

THE ORIGINAL MEANING OF THE ORINATION CLAUSE

HEARING BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE OF THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES ONE HUNDRED FOURTEENTH CONGRESS SECOND SESSION

JANUARY 13, 2016

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Supplemental Material submitted by Paul D. Kamenar, Esq., Constitutional and Public Policy Lawyer. This material is available at the Subcommittee and can also be accessed at:

<http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=104322>.

THE ORIGINAL MEANING OF THE ORIGINATION CLAUSE

WEDNESDAY, JANUARY 13, 2016

HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON THE CONSTITUTION
AND CIVIL JUSTICE
COMMITTEE ON THE JUDICIARY
Washington, DC.

The Subcommittee met, pursuant to call, at 9:05 a.m., in room 2141, Rayburn House Office Building, the Honorable Trent Franks (Chairman of the Subcommittee) presiding.

Present: Representatives Franks, DeSantis, Goodlatte, King, Gohmert, and Cohen.

Staff Present: (Majority) John Coleman, Counsel; Tricia White, Clerk; (Minority) James J. Park, Chief Counsel; and Veronica Eli-gan, Professional Staff Member.

Mr. FRANKS. The Subcommittee on the Constitution and Civil Justice will come to order. Without objection, the Chair is author-ized to declare a recess of the Committee at any time.

Thank you all for being here. The first clause of Article I, Section VII of the Constitution 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.” This clause, commonly referred to as the Origination Clause, was de-signed by the Constitution’s Framers to bring the power to tax closer to the people by giving control over initiating revenue legislation to their immediate Representatives, Members of the House of Rep-resentatives, who are elected every 2 years. The Framers’ viewed the Origination Clause as a critical protection against government abuses and the creation of an aristocracy in America.

The power to tax is one of the most fundamental operations of a sovereign and one of the most dangerous to liberty. As Chief Jus-tice John Marshall famously observed, the power to tax involves the power to destroy.

Simply put, the Origination Clause, the origination of revenue bills is not a small matter or marginal issue. Indeed, the need for a just tax system was the moral justification for our entire War of Independence. Its importance was expressed through the Virginia House of Burgesses, the Stamp Act Congress, and the First Conti-nental Congress, all of whom petitioned the Crown and the Par-liament in England for redress of their tax grievances.

It was with these realities in mind that the Origination Clause of our Constitution was written. The clause was, according to Massachusetts convention delegate Elbridge Gerry, “the cornerstone of the accommodation” of the Great Compromise of 1787. Thus, without the Origination Clause at the core of the Great Compromise, the Constitution as we know it today would not have come into being.

When the Framers wrote the Constitution, they knew it was vital that the power to raise and levy taxes originate in the people’s House whose Members are closest to the electorate with 2-year terms rather than in the Senate whose Members sit unchallenged for 6-year terms. The Senate also does not proportionally represent the American population, and they already enjoy their own and unique and separate Senate powers granted to them in the Constitution.

As George Mason observed during the debate in the Constitutional Convention, “Should the Senate 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.”

I have called today’s hearing to examine the roots of the Origination Clause, its original meaning and purpose, and to see where the Origination Clause stands today after 225 years after the Great Compromise. I am concerned that over time the original meaning of the clause has been set aside, and the protections the clause affords to American taxpayers have been severely eroded. Instead of a robust check on the Federal Government over the people, I am troubled that the clause has become a mere formality in practice, a formality that may be dispensed with as easily as the Senate taking any bill that originated in the House and striking the entire text of the bill and replacing it with a “bill for raising revenue no matter how nongermane the Senate’s amendment is to the House original passed measure.” A glaring example would be when the Senate struck everything but the bill number in the ACA legislation, which was a completely nongermane bill, and inserted the entire Affordable Care Act, which the Supreme Court later specifically designated as a tax since it raised 17 different taxes and was, in fact, the largest tax increase in the history of the Republic.

This sort of procedure blatantly ignores the Framers’ intent, and if allowed to stand, it renders the Origination Clause of our Constitution a dead letter. We await with great concern the Supreme Court’s decision as to whether they will allow that to happen as they ponder the review of the case on this topic, *Sissel v. HHS*.

Enforcing the Origination Clause is of critical concern to this House and especially this Constitution Subcommittee. If we as Members of the House who took a solemn oath to support and defend the Constitution, including its Origination Clause, fail to defend this right and responsibility as the immediate Representatives of the people and those most accountable to them, we dishonor and fundamentally abrogate our sworn oath to support and defend the Constitution of the United States from all enemies, foreign and domestic.

I thank the witnesses for their testimony and yield to the Ranking Member, Mr. Cohen, for his opening statement.

Mr. COHEN. Thank you, Mr. Chair.

Last night was a great opportunity to hear the President's last State of the Union speech. Unfortunately, it will be his last, but it was probably his greatest, inspiring us as to what we as Americans should be doing to move our country forward, inspire our citizens, and protect them against fears being generated and concerns. And he reiterated the importance of the Affordable Care Act and how much good it has done and how well-received it has been. But, once again, in this Committee, I have to play the Bill Murray role. It's Groundhog's Day early.

This hearing on The Original Meaning of the Origination Clause is a repeat of a hearing we had 2 years ago, almost 2 years ago. And we have the same majority witnesses before us, so they're getting their act down. That's good. They've got a second act. But even though they have a second act, in court, they're 0 for 3. In the NBA you'd be sent down to the developmental league, but, no, you're still here in the major leagues, even though you're 0 for 3.

It appears no Federal judge has so far considered the merits of this latest attack on the Patient Protection and Affordable Care Act. The Origination Clause, attorneys can argue about anything and everything. I'm an attorney, and you can hire me for either side, and I can charge. It's a great deal. But the reality is the Origination Clause ensures that the House—important—people's House, has the first say when it comes to bills raising revenue, and it's the Chamber most closest to the people. But at the same time, it's the same Chamber that it was when the Origination Clause was drafted because at that time, of course, the Senate was made up of folks that could get the votes of the State legislatures. And they were the States' guys, and they got picked by—sometimes it was the Governor; sometimes it might have been the Speaker of the House—but basically they weren't elected by the people, and they were chosen by just general assembly. Now they're elected. So it's kind of a different game.

We have an evolving Constitution, and we change and we don't go back to what somebody necessarily said because things change, but the Constitution reflects political compromises made by the Framers to ensure competing interests of various States and regions were addressed, even though they changed when we elected the Senate. Foremost among these was the compromise of Congress itself, and it gave the House a little more emphasis because it was the people's House, and the Senators were the boss' House, so to speak.

The Origination Clause reflects that balance, and it gave the House "exclusive authority to originate bills" for raising revenue. That clause gave the Senate broad leeway to, "propose or concur with amendments as on other bills." That balance has worked for two centuries, and the House prerogative to originate all bills relating to revenue is established and respected. At the same time, the Senate's authority to amend is established and respected.

The majority witnesses, however, believe the Origination Clause is in peril, and particularly, they allege that Congress did an end run around the Origination Clause when it passed the Affordable Care Act and, in particular, its individual mandate and the related shared responsibility payment.

As will be made more evident during our discussion today, neither the facts nor the law support that assertion. Sometimes you argue the facts. Sometimes you argue the law. Now you just kind of argue politics. While the Affordable Care Act is arguably not even a bill for raising revenue within the Origination Clause's meaning, even if the clause applied to the act, it is clear the act met the clause's requirements.

The vehicle for enacting what ultimately became the Affordable Care Act was a tax bill that originated in the House which the Senate then amended by substituting language of the Affordable Care Act. In so doing, the Senate clearly acted within its authority within the Origination Clause to propose or concur with amendments to a House revenue bill as on other bills.

I question the need for today's hearing when lower courts have already spoken and when the Supreme Court may be about to speak on this issue. This hearing serves little purpose other than to once again attack the Affordable Care Act, which the majority party has tried to repeal on 62 occasions and constantly failed, and I do enjoy the little engine that could, but that's kind of what we're experiencing here in Congress.

The ACA has allowed almost 18 million Americans to get health insurance, including more than 236,000 Tennesseans who have received health insurance through ACA's changes, establishing the lowest rate of uninsured in 50 years. It ended discrimination by insurers against those with preexisting conditions, including women, allowed young adults under 26 to remain covered by their parents' insurance, benefitting 2.3 million Americans, encouraged better, more efficient delivery of quality health care, and ensured that most premium dollars are spent on health care, not profits.

I was proud to have voted for the Affordable Care Act and proud to vote 62 times not to go into the political demagoguery of trying to repeal what is one of our Nation's best efforts at joining the rest of the industrialized and civilized Nations in having health care for its people, saying that you have a right to exist and a right to live, and we should let every citizen have that opportunity.

President Obama's signature achievement is one I am proud to have voted for and will strongly defend against all attacks, including those today in a Committee which I wish we were hearing voting rights; I wish we were hearing civil rights; I wish we were hearing opportunities to extend rights to people rather than taking health care away from them. I yield back the balance of my time.

Mr. FRANKS. And I thank the gentleman.

And I now yield to the Chairman of the Committee, Mr. Goodlatte from Virginia.

Mr. GOODLATTE. Thank you, Mr. Chairman.

I appreciate your holding this hearing. You know, listening to the remarks of the gentleman from Tennessee, I've been reading the 17th Amendment to the United States Constitution, in fact, re-reading the 17th Amendment to the United States Constitution, which provided for the direct election of United States Senators, and I can't see anything in this amendment whatsoever that says that the interpretation of the Origination Clause, which is provided for with direct, clear language in the United States Constitution, is in any way changed by the 17th Amendment. So our Constitu-

tion doesn't evolve. It gets amended by specific black-letter language, and that language doesn't provide for any such change. And I would hope that regardless of what position people take on the substantive issues that come before the Congress, including health care and the Affordable Care Act, that people would not attempt to change the meaning of the Constitution in order to accomplish their current policy goals. The ends should not justify the means of surrendering power from the House to the United States Senate. This document has not evolved that power from the House to the Senate, and this Committee and this Congress, this House of Representatives, should do everything in its power to make sure that it does not evolve away from the people's House so that in the future, when we address issues that are important to Members of the House representing their constituents on either side of the aisle, that we do not find ourselves saying: Well, it's okay now. Let things start off in the United States Senate instead of in the House, even though the Constitution clearly provides for that.

The Origination Clause was the result of a contentious dispute at the Constitutional Convention between big States and small States over the structure and powers of the Federal Government. The less populated small States feared that the Senate, where each State would have equal representation—still does—would have little control over raising revenue. Indeed, all versions of the Origination Clause that prohibited the Senate from amending revenue-raising bills were vigorously opposed by small State delegates. On the other hand, the Framers understood the importance of keeping the power to tax close to the people. This dispute was ultimately resolved by providing the Senate with the power to propose or concur with amendments as on other bills.

Unfortunately, the exact scope of the Senate's power to amend House bills under this clause remains ambiguous today. I hope this hearing will help clarify the extent of the Senate's authority to propose or concur with amendments on revenue bills in addition to examining the original meaning of the term bills for raising revenue.

Nevertheless, it's clear that Members of the House of Representatives have a duty to safeguard its constitutional prerogative in order to protect individual liberty from the dangers of concentrated power, and that duty is distinct from the Senate. In Federalist 58, Madison stated: The House of Representatives can not only refuse, but they alone can propose the supplies requisite for the support of 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 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.

It's clear from Madison that the Origination Clause was designed to be one of the many important constitutional tools that the House uses against the overgrown prerogatives of other branches of government or even the Senate. Therefore, it is important that we do

not disregard this duty, and I thank our witnesses for coming, and I look forward to their testimony.

I yield back. Thank you, Mr. Chairman.

Mr. FRANKS. And I thank the Chairman.

Mr. COHEN. Mr. Chair, Mr. Conyers won't be here today. I would like to introduce his remarks for the record.

Mr. FRANKS. Without objection.

[The prepared statement of Mr. Conyers follows:]

**Statement of the Honorable John Conyers, Jr. for the Hearing on
“The Original Meaning of the Origination Clause” Before the
Subcommittee on the Constitution and Civil Justice**

**Wednesday, January 13, 2016, at 9:00 a.m.
2141 Rayburn House Office Building**

Although the official title of today’s hearing is “The Original Meaning of the Origination Clause,” the real objective of this hearing is to provide yet another opportunity for opponents of the Patient Protection and Affordable Care Act to attack this duly enacted law.

In fact, there already have been 62 attempts in the House to repeal this measure since its enactment. And, this is *in addition* to the numerous hearings that various committees in this body have held on the same subject matter.

Today's hearing -- which attacks the Act's individual mandate and related "shared responsibility payment" provisions on the basis that they violate the Constitution's Origination Clause -- is a particularly fruitless undertaking for several reasons.

To begin with, the Constitution's Origination Clause does *not even apply* to the Act.

The Clause requires that "Bills for raising Revenue shall be originated in the House of Representatives; but the Senate may propose or concur with amendments as on other Bills."

Based on more than a century of judicial and Congressional precedents, it is absolutely clear that the Act's individual mandate requirement presents no Origination Clause problem.

This is because measures with primarily non-revenue purposes – even if they contain provisions that would raise revenue – simply are not “Bills for raising Revenue” within the meaning of the Clause, as the Supreme Court has made abundantly clear.

As recently as its 2012 decision upholding the constitutionality of the Act in *National Federation of Independent Business v. Sebelius*, the Court quoted Justice Joseph Story's observation from nearly 200 years ago that Congress's taxing power "is often, very often, applied for other purposes, than revenue."

The Court found that that the primary purpose of the Act's individual mandate and of the Act generally was, among other things, to expand health insurance coverage.

And, even if we were to assume that the Origination Clause somehow applies to the Affordable Care Act, the measure does not violate the Clause's requirements.

Even a cursory review of the legislative history of the Act establishes this fact.

The House measure, which the Senate amended to add the text of its version of the Affordable Care Act, *was a revenue bill*. And, as explicitly authorized by the Origination Clause, the Senate then had broad authority to replace the underlying House-originated revenue bill with its measure.

Not surprisingly, federal courts have rejected an attack on the Act for purportedly violating the Origination Clause for these very same reasons.

Finally, rather than wasting time on yet another futile attack against the Affordable Care Act, this Committee should be focusing on the real, not imagined, problems that Americans desperately want addressed.

These include:

- addressing the epidemic of gun violence;
- restoring the Voting Rights Act to full effectiveness; and
- creating more job opportunities by strengthening the competitiveness of our Nation's businesses.

Instead, we will spend this morning addressing phantom issues created by the Act's opponents in an effort to derail the law, this time under the guise of constitutional analysis.

I again urge my colleagues on the other side of the aisle to spend the remaining time left in this Congress to focus on real issues.

Mr. FRANKS. And, without objection, other Members' opening statements will be made part of the record as well.

So now I will introduce our witnesses. Our first witness is Todd Gaziano. Mr. Gaziano is executive director of the D.C. Center and senior fellow in constitutional law at the Pacific Legal Foundation. Prior to joining Pacific Legal Foundation, he served in the Justice Department's Office of Legal Counsel, was chief Subcommittee counsel in the U.S. House of Representatives, and was the founding director of Heritage Foundation's Center for Legal and Judicial Studies. From early 2008 to December 2013, he served as an appointee of the House of Representatives on the U.S. Commission on Civil Rights.

Our second witness is Elizabeth Wydra. Ms. Wydra is Chief Counsel of the Constitutional Accountability Center. She frequently participates in Supreme Court litigation and has argued several important cases in the Federal courts of appeals. She was previously a supervising attorney and teaching fellow at the Georgetown University Law Center Appellate Litigation Clinic. After graduating from law school, she clerked for Judge James R. Browning of the U.S. Court of Appeals for the Ninth Circuit.

Our final witness is Paul Kamenar. Mr. Kamenar is a Washington, D.C., attorney who provides legal counsel on legal, regulatory, and public policy matters, and guest lectures at the U.S. Naval Academy on constitutional and national security law. He is also a senior fellow of the Administrative Conference of the United States and a member of its Committee on Judicial Review. Mr. Kamenar was formerly a clinical professor of Law at George Mason University Law School, an adjunct professor at Georgetown University Law Center, and senior executive counsel at the Washington Legal Foundation.

Now each of the witnesses' written statements will be entered into the record in its entirety, and I would ask each witness to summarize his or her testimony in 5 minutes or less. To help you stay within that time, there's a timing light in front of you. The light switch will switch from green to yellow, indicating that you have 1 minute to conclude your testimony. When the light turns red, it indicates that the witness' 5 minutes have expired.

Before I recognize the witness, it is the tradition of the Subcommittee that they be sworn. So if you'll stand to be sworn, please.

Will you raise your right hand?

Do you solemnly swear that the testimony you are about to give will be the truth, the whole truth and nothing but the truth, so help you God?

You may be seated. Let the record reflect that the witnesses answered in the affirmative. I want to welcome all of you here, and I now recognize our first witness, Mr. Gaziano, and please turn on that microphone before you start here.

TESTIMONY OF TODD F. GAZIANO, EXECUTIVE DIRECTOR OF THE D.C. CENTER, SENIOR FELLOW IN CONSTITUTIONAL LAW, PACIFIC LEGAL FOUNDATION

Mr. GAZIANO. Chairman Franks, Chairman Goodlatte, and other distinguished Members of the Subcommittee, thank you for inviting

me to testify again on this topic. I'm proud to be part of the Pacific Legal Foundation, which is representing Matt Sissel in his constitutional challenge to ObamaCare. This hearing and the *Sissel* case focus on the Framers' most important check on Congress' power to tax, which some today regard as an annoyance to be circumvented with clever tricks. There was similar disdain for the constitutional rules for legislation in the 1970's that led to over 161 House and Committee veto bills. Luckily, the Supreme Court understood that the legislative rules that were set forth in the Constitution protected individual rights and not just congressional prerogatives.

The Supreme Court in *INS v. Chadha* held that such finely wrought and exhaustively considered procedures for legislation could not be modified by modern designs and modern practices. The Court stressed that certain prescribed steps were still necessary to "provide enduring checks on each branch and to protect the people from the improvident exercise of power." The Court then struck down all those 160 laws or provisions thereof to protect our individual liberty.

Well, I am delighted to be here today to testify on a similar protection of our individual liberty and to do so with Paul Kamenar, who I've worked with before, and with Elizabeth Wydra, who I believe has written about the best opposing view of anyone I've ever written. But as gifted a scholar as she is, even she can't defend the indefensible.

My friend does seem to concede in a written testimony that the D.C. Circuit's newly minted primary purpose test is invalid. The four-judge dissent in the D.C. Circuit warned that this new test would allow the Senate to originate taxes by simply characterizing them as having weightier nonrevenue purposes. For example, the Senate could enact and originate a gas tax in a bill that promotes the environment. The founding generation did not think they had erected an optional limitation so easily defeated with the right incantation.

Now turning to the text of the Origination Clause itself for its original meaning, it fails to satisfy the clause for two independent reasons. First, the Service Members Home Ownership Tax Act was not a bill for raising revenue within the meaning of the clause because it only cut taxes. Other provisions which increased penalties and accelerated filing fees to make it budget neutral were not taxes within the meaning. I will be glad to elaborate on that, but the result of that is that the Senate could not amend that bill at all with any additional taxes.

Second, and I think this goes more to Chairman Goodlatte's question, even if the House bill was a bill for raising revenue within the clause, the Senate healthcare bill was not a germane amendment and thus not constitutional. In *Flint v. Stone Hill*, the Supreme Court said that a Senate amendment must be germane to the revenue bill that originated in the House. It is irrelevant whether the Senate's practice allows any amendments on nonrevenue bills. There was a germaneness requirement in the Articles of Confederation Congress, and that helped form the original understanding of the Senate's limited role to amend a House revenue bill.

Second, the Senate's hotly disputed practice with regard to revenue bills in the late 19th century is almost completely worthless in determining the original public meaning of the clause, and it's especially ironic to rely on the Senate's views. It's like deferring to the foxes for the rules for raiding the henhouse.

And, finally, the Supreme Court's germaneness requirements, which have been followed by numerous courts, is absolutely required to properly give the Origination Clause any meaning whatsoever. If the Senate merely had to wait for a House revenue bill of some type and then could substitute a completely different omnibus tax code, which could happen several times a year, that would render the clause empty. Interpretations of clauses that render them meaningless are an insult to the framing generation and any rational basis of law.

I want to, since my time is limited, skip to one interpretation that Madison supposedly was quoted as saying that the Senate under the Origination Clause could gut and substitute a bill. That's kind of a minority view. It's very contrary to George Mason, most of the other Framers, and especially Story's interpretation that said that the Senate's amendment power would only be limited to a single line of text or a trifle to fix error. But even if Madison was right, that doesn't save ObamaCare because it might be constitutional in some cases to have a complete substitute language, but the bill still has to be—the Senate amendment still has to be germane to the House bill. And Madison didn't say otherwise, and no Framers said otherwise. If they had said otherwise, the Constitution would not have been ratified. There is simply no argument that the Senate's healthcare bill with its 20 historically large taxes is germane to the 6-page servicemembers housing bill. There is no constitutional precedent whatsoever for that position. Thank you, Mr. Chairman.

[The prepared statement of Mr. Gaziano follows:]



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

By Todd F. Gaziano
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13 January 2016

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* Pacific Legal Foundation (PLF) is a nonprofit, public-interest watchdog organization that litigates for properly limited government, and in defense of property rights, individual rights, free enterprise, and a balanced approach to environmental regulations in courts nationwide. PLF attorneys represent clients free of charge. PLF is privately supported, and receives no funds from government at any level, including government grants or contracts. PLF is supported primarily by thousands of small, individual donors. It also receives support from small family foundations, public charitable foundations, private bequests, and modest corporate support, all of which are motivated by a desire to further PLF's pro-freedom mission. During 2014, the last year complete data is available, PLF had 9,881 individual, foundation, and corporate supporters from every part of the country. In 2013, the vast majority of PLF's funding came from individuals, with 89.7% of its donors giving less than \$1000. Corporate donations, including small mom-and-pop companies, ranches, and other incorporated entities constituted about 13.7% of income, coming from about 300 gifts. PLF welcomes gifts from large corporations, but such companies have provided less than 1/100th of PLF's funding for many years, if not its entire history.

**The Meaning and Requirements of
the Constitution's Origination Clause¹**

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.

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).

Sisse/ 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 *Sisse/* 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 *Sisse/* 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/2RRRlz>. 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/weO0ss>.

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.pacificfiled.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://goon.gl/ObH1E0>.

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. . . .

¹⁸Sissel, Reply Brief in Support of Petition for Writ of Certiorari, available at <http://goo.gl/ObH1ED>.

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 (1907), 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 *NFTB*. The Court in *Morrison* and *NFTB* 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); *NFTB*, 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/lwlibsb.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 procedure²⁵ 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-Florez*, 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.

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).

Mr. FRANKS. And thank you, sir.

I now recognize our second witness, Ms. Wydra, and make sure that microphone is on.

**TESTIMONY OF ELIZABETH B. WYDRA, CHIEF COUNSEL,
CONSTITUTIONAL ACCOUNTABILITY CENTER**

Ms. WYDRA. Good morning. Thank you, Chairman Franks, Ranking Member Cohen, and Members of the Subcommittee, for inviting me to testify today. It's a pleasure and an honor.

As the Chairman noted, the Origination Clause 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. As the tax and history of the Constitution make clear, this provision was intended to strike a careful balance between the two Houses of Congress, giving the House the exclusive authority to propose legislation affecting the Nation's purse strings while ensuring that the Senate retained the right to amend such legislation, just as it could amend all other bills. This includes the strike-and-replace method of amendment used by the Senate in the ACA, as has been discussed, and more generally, since the founding. As Thomas Jefferson explained in his Manual of Parliamentary Procedure he wrote for the Senate in 1801, "Amendments may be made so as to totally alter the nature of the proposition. A new bill may be engrafted by way of amendment on the words, be it enacted." Does the existence of the strike-and-replace amendment method of Senate amendment contemplated in the second half of the Origination Clause mean that the power given to the House in the first half of the Origination Clause to originate revenue bills has no meaning? Absolutely not. But don't take my word for it, even though I appreciate Mr. Gaziano's kind words.

Let's listen to James Madison. At Virginia's ratifying convention, he noted that even though critics said that the Senate could strike out every word of the bill except the word "whereas" or any other introductory word and might substitute words of their own, the clause nonetheless kept the Nation's purse strings in the hands of the House because the House was free to reject the Senate's amendments to revenue bills. And in the Federalist Papers, Madison emphasized the importance of the Origination Clause by noting that the House had the power to propose as well as refuse when it came to the power of the purse. The Origination Clause thus makes the House the first and the last word on all revenue bills.

Throughout history, the House has defended its constitutional prerogatives with vigor, mostly through the blue-slip process through which violations of the Origination Clause are raised and remedied.

My written testimony goes through in greater detail the original meaning of the Origination Clause, so for now, I will turn to the legal challenges claiming that the Affordable Care Act violates this clause. Every judge to have considered the merits of this claim on the merits has rejected it. As stated plainly by conservative superstar Judge Brett Kavanaugh of the D.C. Circuit Court of Appeals, the Affordable Care Act complied with the Origination Clause. As he went on to write: The act, in fact, originated in the House, as required by the clause in H.R. 3590, which was itself a bill to raise

revenue, and although the original House bill was amended and its language replaced in the Senate, such Senate amendments are permissible under the clause's text and precedent.

Reinforcing the wisdom of these judges who have found that the ACA complied with the Origination Clause, it is important to note that at the time the ACA was making its way through Congress, no blue-slip objection was made on Origination Clause grounds in the House, despite vocal and vigorous opposition by many critics of the bill, some of whom are here today, on numerous other grounds.

The fact that no Member of the House filed a blue slip on the Origination Clause ground is not constitutionally dispositive of the issue, but it does confirm what the application of constitutional text and history and court precedent show, that the ACA was enacted consistent with the requirements of the Origination Clause.

As both a citizen and a constitutional lawyer, I applaud the Committee's interest in the vitality of the Origination Clause. I also would applaud a hearing on voting rights. The right to vote is a foundational right in our constitutional democracy, and I am grateful for the opportunity today to talk about the original meaning of this important provision of our Constitution. But the clause remains strong. Today the House remains as it has since the founding, the first and last word on all revenue bills, and it continues to defend its constitutional prerogatives through the blue-slip process when any Senate bills that might arise infringe on its Origination Clause authority.

The fact that no one filed a blue slip to try to stop the ACA on Origination Clause grounds is not because the clause has lost its constitutional teeth. It's because there's no constitutional defect in the act in the first place.

Thank you again, Mr. Chairman, and Members of the Subcommittee. I look forward to your questions and a great discussion today.

[The prepared statement of Ms. Wydra follows:]



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THE ORIGINAL MEANING OF THE ORIGINATION CLAUSE

Testimony of Elizabeth B. Wydra
 Chief Counsel, Constitutional Accountability Center
 Before the Subcommittee on the Constitution & Civil Justice
 Committee on the Judiciary
 United States House of Representatives

Wednesday, January 13, 2016, 9:00 AM
 2141 Rayburn House Office Building

I would like to thank the Subcommittee for inviting me to assist its members and their colleagues in considering the original meaning of the Origination Clause. While the Clause is, of course, always relevant to the daily practices of Congress, the Supreme Court will soon consider the Clause as well, when it decides whether to grant a petition for a writ of *certiorari* raising an Origination Clause challenge to the Patient Protection and Affordable Care Act (ACA) (*Sissel v. Department of Health & Human Services et al.* (15-543)).

I served as counsel in a similar Origination Clause challenge to the ACA, *Hotze v. Burwell*, representing Congressman Sandy Levin, Ranking Member of the House Ways and Means Committee, and Senator Ron Wyden, then-Chair of the Senate Finance Committee.¹ I have also spoken extensively about the Affordable Care Act since its passage in public debates, on academic panels, and in the media. I served as counsel in *King v. Burwell* to members of Congress who were current and former leaders of the committees that crafted the ACA, and the House and Senate leaders who melded the respective committee versions into the bill that was ultimately enacted, as well as members of state legislatures who served during the period when their governments were deciding whether to create their own Exchanges under the ACA.² I

¹ Brief *Amici Curiae* of Congressman Sandy Levin, Ranking Member, House Ways & Means Committee, and Senator Ron Wyden, Chair, Senate Finance Committee, in Support of Appellees & Affirmance, *Hotze v. Burwell*, No. 14-20039 (5th Cir.), available at http://theconstitution.org/sites/default/files/briefs/CAC_Amicus_Hotze_v_Burwell.pdf

² Brief *Amici Curiae* of Members of Congress & State Legislatures in Support of Respondents, *King v. Burwell*, 135 S. Ct. 2480 (2015), available at http://theconstitution.org/sites/default/files/briefs/King_Amicus_Brief.pdf

also served as counsel to state legislators in *NFIB v. Sebelius*.³ And I testified on the legality of the of the tax credits at issue in *King v. Burwell* before the Senate Judiciary Committee, Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts, on June 4, 2015.

I am currently Chief Counsel of the Constitutional Accountability Center, a public interest law firm, think tank, and action center, dedicated to realizing the progressive promise of our Constitution.

Introduction and Summary

The Origination Clause of the Constitution provides that “[a]ll Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other bills.” U.S. Const. art. I, § 7, cl. 1. When the Framers gathered in Philadelphia in 1787 to draft the new national charter, they debated at length the precise balance of power that should exist between the House of Representatives and the Senate. The Origination Clause was critical to the balance that was struck, giving the important prerogative to propose bills that would affect the national treasury to the House of Representatives, but ensuring that the Senate would retain broad power to amend such legislation. Throughout our nation’s history, the Senate has exercised this power, at times striking in whole the text of bills that originated in the House and replacing the stricken language with new text, and the Supreme Court has recognized that the Senate has a broad power to amend bills consistent with the requirements of the Origination Clause.

The *Sissel* and *Hotze* plaintiffs claim that two crucial provisions of the ACA violate the Origination Clause: 1) the ACA’s requirement that individuals who are not otherwise exempted from the law’s coverage maintain “minimum essential coverage” or, in the alternative, pay “a penalty with respect to such failures”;⁴ and 2) the requirement that, if a large employer has at least one employee who would qualify for a tax credit or cost-sharing reduction through purchase of an insurance plan on the individual market, the employer “offer its full-time employees . . . the opportunity to enroll in minimum

³ Brief *Amici Curiae* of State Legislators from All Fifty States et al. Supporting Petitioners, *U.S. Dep’t of Health & Human Servs. v. Florida*, 132 S. Ct. 2566 (2012), available at <http://theconstitution.org/cases/briefs/us-department-health-human-services-v-florida-florida-v-hhs/supreme-court-amici-brief>; Brief of *Amici Curiae* of State Legislators from All Fifty States et al. in Support of Defendants-Appellants, *U.S. Dep’t of Health & Human Servs. v. Florida*, 648 F.3d 1235 (11th Cir. 2011), available at <http://theconstitution.org/cases/briefs/us-department-health-human-services-v-florida-florida-v-hhs/11th-circuit-amici-brief>; Brief of *Amici Curiae* State Legislators in Support of Defendants, *Florida v. U.S. Dep’t of Health & Human Servs.*, 780 F. Supp. 2d 1256 (N.D. Fla. 2011), available at <http://theconstitution.org/cases/briefs/us-department-health-human-services-v-florida-florida-v-hhs/florida-district-court>.

⁴ 26 U.S.C. § 5000A (2010).

essential coverage under an eligible employer-sponsored plan" or be assessed a payment.⁵ This claim is wrong. The enactment of the challenged provisions of the ACA was consistent with the Origination Clause's requirements because the ACA originated in the House as H.R. 3590, the Service Members Home Ownership Tax Act of 2009, and was subsequently amended by the Senate to become the ACA. H.R. 3590 was plainly a revenue-raising bill within the meaning of the Origination Clause because it was a tax bill that would have raised revenue for the government. Although the Senate struck all of the text of H.R. 3590 except its enacting clause and replaced that language with the text of the ACA, that amendment was consistent with the careful balance the Framers struck in the Origination Clause when they provided that the Senate could "propose or concur with Amendments as on other Bills."

The House has historically guarded its prerogatives under the Origination Clause through the "blue slip" resolution process, which allows any Member to object to a bill that the member views as inconsistent with the requirements of the Origination Clause. Yet no member raised a blue-slip objection to the ACA. Similarly, no member of the Senate used that chamber's procedure for formally enforcing the Origination Clause, which would have entailed raising a point of order on the Senate floor. While the absence of any formal contemporaneous objection by members of Congress may not be dispositive of the constitutional question, it does further support the argument that the ACA satisfies the requirements of the Origination Clause.

**Pursuant to the Origination Clause, the Constitution Vests the House with
Sole Authority To Propose Bills for Raising Revenue, While Retaining
the Senate's Authority to Amend As With All Other Bills**

As noted above, the Origination Clause provides that "[a]ll 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 As the text and history of the Constitution make clear, this provision was intended to strike a delicate balance between the two houses of Congress, giving the House of Representatives, the body that would most directly represent the people, the exclusive authority to propose legislation affecting the nation's purse strings, while also ensuring that the Senate retained the right to amend such legislation just as it could amend other bills.

The notion that the responsibility for raising revenue should rest with the organ of government most directly accountable to the people, so as to prevent arbitrary and

⁵ *Id.* § 4980H.

⁶ U.S. Const. art. I, § 7, cl. 1.

oppressive taxation, has roots dating back to fourteenth-century England.⁷ Following this tradition, when the colonies declared their independence from England (in large part because of the unjustness of the taxes imposed under British rule), many of the colonies incorporated into their constitutions origination clauses that codified the English rule.⁸

By the time the Framers convened in Philadelphia to draft our national charter, the belief that the authority to propose revenue bills should rest exclusively with the body most directly accountable to the people was deeply held. As Elbridge Gerry of Massachusetts explained, “it was a maxim, that the people ought to hold the purse-strings.”⁹ Benjamin Franklin agreed that “money affairs” should “be confined to the immediate representatives of the people.”¹⁰ Indeed, the desire to codify this principle in the new national charter was so important to some delegates that “they were willing to jeopardize the entire Convention rather than surrender on the issue.”¹¹

Despite the importance many attached to the Origination Clause principle, the need for the provision—and its specific parameters—were nonetheless the subject of considerable dispute at the Convention, in large part because it was a key provision in the contentious debate between large and small states about the respective powers of the House of Representatives and the Senate.¹² As originally proposed, the Origination Clause would have provided that “[a]ll money bills of every kind shall originate in the House of Delegates, and shall not be altered by the Senate.”¹³ But withdrawing power from the Senate so completely drew strong opposition, notably from James Madison.¹⁴

⁷ 1 William Blackstone, *Commentaries* 168-69 (explaining why revenue bills were required to originate in the elected House of Commons); see Rebecca M. Kysar, *The ‘Shell Bill’ Game: Avoidance and the Origination Clause*, 91 Wash. U. L. Rev. 659, 665-66 (2014) (same).

⁸ Jonathan Rosenberg, *The Origination Clause, the Tax Equity and Fiscal Responsibility Act of 1982, and the Role of the Judiciary*, 78 Nw. U.L. Rev. 419, 422 (1983); see J. Michael Medina, *The Origination Clause in the American Constitution: A Comparative Survey*, 23 Tulsa L.J. 165, 168 n.13 (1987).

⁹ James Madison, *Notes of Debates in the Federal Convention of 1787*, at 113, 441 (Adrienne Koch ed., 1966).

¹⁰ *Id.* at 306; see 3 The Records of the Federal Convention of 1787, at 356 (Max Farrand ed., 1911) (“The principal reason [for the Origination Clause] was, because [the House’s members] were chosen by the People, and supposed to be acquainted with their interests, and ability.”); 2 The Records of the Federal Convention of 1787, at 275 (“Taxation & representation are strongly associated in the minds of people, and they will not agree that any but their immediate representatives shall meddle with their purses.”).

¹¹ Rosenberg, 78 Nw. U.L. Rev. at 423.

¹² Rosenberg, 78 Nw. U.L. Rev. at 419.

¹³ 5 The Debates in the Several States of the Adoption of the Federal Constitution 129 (Jonathan Elliot ed., 1861) (“Elliot’s Debates”).

¹⁴ See, e.g., Madison, *Notes of Debates in the Federal Convention of 1787*, at 113.

Ultimately, the delegates appointed a committee to attempt to forge a compromise, and the version of the Origination Clause that would be written into our enduring Constitution then began to take shape. In its final form, the Origination Clause departed from earlier proposals in two critical respects. First, it applied to all “bills for raising revenue,” regardless of whether the bill was “for the purpose of revenue.”¹⁵ Second, it gave the Senate the broad power to amend revenue-raising bills that originated in the House just as it could amend other bills. Indeed, the version of the Clause that was adopted “broaden[ed] the [Senate’s] amendment power” beyond that of some earlier proposals that would have given the Senate a more modest amendment power.¹⁶

In short, the Origination Clause, in its final form, provided for an expansive category of bills that would need to originate in the House—that is, all “bills for raising revenue,” even those that did not have as their purpose the raising of revenue—but it also granted to the Senate an expansive power to amend such bills, just as the Senate could amend other legislation. After the Constitution was sent to the States for ratification, James Madison explained the importance of the Origination Clause in the *Federalist Papers*:

The house of representatives can not only refuse, but they alone can propose the supplies requisite for the support of 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.¹⁷

Madison also discussed the importance of the Clause at the Virginia ratifying convention, explaining that, even though critics noted that the “Senate could strike out every word of the bill, except the word *Whereas*, or any other introductory word, and might substitute words of their own,”¹⁸ the Clause nonetheless kept the nation’s purse strings in the hands of the people’s most direct representatives because the House was free to reject the Senate’s amendments to revenue bills. As Madison explained it, “When a bill is sent with proposed amendments to the House of Representatives, if they

¹⁵ 5 Elliot’s Debates, at 510.

¹⁶ Kysar, 91 Wash. U.L. Rev. at 670; 5 Elliot’s Debates at 510.

¹⁷ The *Federalist* No. 58.

¹⁸ 3 Elliot’s Debates at 377 (William Grayson).

find the alterations defective, they are not conclusive. The House of Representatives are the judges of their propriety”¹⁹

Thus, both halves of the Origination Clause were critical to the careful balance the Framers struck, and the Framers expected that the House and Senate would both act to preserve the institutional prerogatives they were granted under the Clause. As the next Section demonstrates, that is exactly what they have done.

Since the Founding, the House and the Senate Have Fulfilled Their Constitutionally Prescribed Roles Under the Origination Clause

In the more than 200 years since the Constitution was adopted, both houses of Congress have recognized and respected this delicate balance struck by our nation’s founders. The Senate has properly exercised its constitutional authority to amend revenue-raising bills, but when it has contravened the House’s prerogative by attempting to originate such bills itself, the House has zealously defended its constitutionally-granted authority, most often by using a “blue slip” resolution—a resolution, printed on blue paper, informing the Senate that the House believes the Senate’s bill or the Senate’s amendment to a House non-revenue bill infringes upon the House’s constitutional prerogative to originate bills for raising revenue and that, accordingly, the House refuses to consider the Senate bill.

“All Bills for raising Revenue shall originate in the House”

As Madison’s words make clear, the Framers expected the House to zealously defend its constitutionally granted authority as the holders of the nation’s purse. Throughout history, the House has done just that, principally by using the blue slip process to inform the Senate that the House believes the Senate’s bill infringes upon the House’s constitutional prerogative to originate bills for revenue.²⁰

If a Member believes that the Senate has sent the House a bill that violates the Origination Clause, he or she may offer a resolution that states that “in the opinion of the House, [the bill] contravenes the first clause of the seventh section of the first article of the Constitution of the United States.”²¹ Once the resolution is proposed, the Ways

¹⁹ *Id.*

²⁰ See James V. Satumo, Cong. Research Serv., *The Origination Clause of the U.S. Constitution: Interpretation and Enforcement* 9 (2011). The House can, of course, use other means to dispose of an unwanted bill from the Senate. The Committee of the Whole House can pass a similar bill instead, as it did in the 91st Congress. H.R. Rep. No. 112-556 at 102 (2012). Or the Committee on Ways and Means can report a bill to the House, which upon approval will then be sent to the Senate, as it did in the 93rd Congress. *Id.*

²¹ Although blue slip resolutions are almost always proposed by a member of the House Ways and Means Committee (often the chair of the committee), any member can propose such a resolution. For example, on July 16, 1999, the House passed H. Res. 249, a blue slip proposed

and Means Committee will determine whether to move it to the entire House floor. If it does move the resolution to the floor, it is considered privileged and thus will be addressed immediately, before all other motions except those to adjourn.²² The entire House then votes, usually by voice, and if the House passes the resolution, it is sent to the Senate, and the House takes no further action on the legislation. Over a 14-year period from 1987 to 2001, the House of Representatives successfully passed 28 blue slip resolutions, an average of two per year.²³ In some years it has passed as many seven such resolutions.²⁴ Indeed, the House of Representatives passed six blue slip resolutions during the 111th Congress alone. In sum, members of the House have not hesitated to zealously protect the House's Origination Power.²⁵

"[T]he Senate may propose or concur with Amendments"

As detailed above, the Origination Clause confers on the House of Representatives the important power to propose all revenue-raising bills, but it allows the Senate the broad power to amend such bills. From the Founding onward, this broad power has been understood to include the power to replace the bulk of the text of a House-originated bill with new text. As Thomas Jefferson explained in the manual of parliamentary practice he wrote for the Senate in 1801, "Amendments may be made so as totally to alter the nature of the proposition[.] . . . A new bill may be ingrafted, by way of Amendment, on the words 'Be it enacted,' &c."²⁶ The "strike and replace with a substitute" form of amendment is common in both the House and the Senate. Further, in the Senate, unlike in the House, amendments need not be germane or even relevant to

by Representative Rob Portman, to return S. 254 to the Senate on the ground that it would affect customs revenues. And on October 24, 2000, the House passed H. Res. 645, proposed by Representative Phil Crane, to return the Bear Protection Act of 1999 to the Senate, again on the ground that it would affect customs revenues. Though both Representative Portman and Representative Crane served on the Ways and Means Committee, neither was its Chair. Indeed, from 1989-2000, 60% (12 of 20) blue slip resolutions that passed the House were proposed by someone other than the Chair of the Ways and Means Committee. *Id.* at 93-100.

²² House Rule IX, cl. 2(a)(1).

²³ H.R. No. 111-708, at 99-100 (2011).

²⁴ *Id.*

²⁵ Although the policing role played by the Senate generally focuses on the right to amend conferred by the second half of the Clause, it, too, has the power to object to bills that it believes have not been properly proposed in accordance with the Origination Clause. This is typically done in the form of a point of order made against a bill or amendment during debate on the Senate floor. See, e.g., 147 Cong. Rec. S6582 (daily ed. June 21, 2001) (point of order made by Senator Max Baucus against a tax amendment to an original Senate bill on the ground that "the amendment would affect revenues on a bill that is not a House-originated revenue bill"); *id.* (sustaining point of order by vote of the Senate).

²⁶ Thomas Jefferson, *A Manual of Parliamentary Practice, for the Use of the Senate of the United States* § 35, at 97 (1813).

the subject of the bill being amended (with some important exceptions, such as when cloture has been invoked or the Senate is considering a budget reconciliation bill).²⁷

The Senate has continued to follow Jefferson's practice guide, repeatedly using the procedure of striking out the text of a House bill for raising revenue and substituting new text. For example, in the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA),²⁸ a tax increase signed into law by President Reagan, the Senate replaced the entire text of the House bill except for its enacting clause, H.R. Rep. No. 97-760 (1982). As the U.S. Court of Appeals for the Fifth Circuit recognized in *Texas Association of Concerned Taxpayers, Inc. v. United States*,²⁹ that amendment was "within the range of amendments permitted by the origination clause."³⁰ As the Fifth Circuit explained, the Supreme Court's decision in *Flint v. Stone Tracy Co.*,³¹ recognized that the Senate has broad power to amend revenue-raising bills consistent with the requirements of the Origination Clause.³² Thus, the only possible limitation on the Senate's power is an exceedingly modest one, that is, that "both the amendment and the amended portion address revenue collection."³³

Thus, precedent affirms what the text of the Origination Clause and settled practice make clear: the Senate has broad authority to amend revenue-raising bills that originate in the House consistent with the requirements of the Origination Clause.

The Provisions of the ACA Challenged in *Sissel* and *Hotze* Satisfy the Requirements of the Origination Clause

Against the backdrop of the clearly delineated roles of the House and Senate established by our Nation's Founders in the Constitution, it is clear that the challenged provisions of the ACA were enacted in accordance with the requirements of the

²⁷ Compare Floyd M. Riddick & Alan S. Fruman, *Riddick's Senate Procedure* 854 (1992) ("[t]he Senate does not have a general rule requiring that amendments be germane to the measure to which they are proposed"), with House Rule XVI:7 ("[n]o motion or proposition on a subject different from that under consideration shall be admitted under color of amendment").

²⁸ Pub. L. No. 97-248, 96 Stat. 324 (1982).

²⁹ 772 F.2d 163 (5th Cir. 1985).

³⁰ *Id.* at 168; see *Armstrong v. United States*, 759 F.2d 1378, 1381 (9th Cir. 1985) (upholding the Tax Equity and Fiscal Responsibility Act of 1982 despite the fact that the Senate amendment replaced the "entire text of the House bill except for its enacting clause").

³¹ 220 U.S. 107 (1911).

³² *Texas Ass'n*, 772 F.2d at 168 (*Flint* upheld "the Senate's substitution of a corporation tax for a House-drafted inheritance tax"); see *Flint*, 220 U.S. at 143 ("perceiv[ing] no reason" why such an amendment would not be constitutional).

³³ *Texas Ass'n*, 772 F.2d at 168. Even this modest requirement, however, has not been universally adopted; because the Senate is not limited by a germaneness requirement in amending House-originated legislation, there is a strong argument that the Origination Clause does not impose a "germaneness" requirement either.

Origination Clause. The Affordable Care Act originated in the House of Representatives as H.R. 3590, the Service Members Home Ownership Tax Act of 2009. The House-passed version of H.R. 3590 was plainly a revenue-raising bill within the meaning of the Origination Clause, and the Senate's amendment of that bill was within its constitutionally delegated authority, as understood from the time of the Founding to the present.

First, the bill that eventually became the Affordable Care Act originated as H.R. 3590, and H.R. 3590 was plainly a bill for "raising Revenue" within the meaning of the Origination Clause. In the Origination Clause, the "term 'Bills for raising Revenue' does not refer only to laws *increasing* taxes, but instead refers in general to all laws *relating* to taxes."³⁴ As the Fifth Circuit recognized in *Texas Association*, "all contemporary courts have adopted the construction apparently given it by Congress, i.e., 'relating to revenue.'"³⁵ And as that Court noted, this understanding is consistent with historical practice: the House and the Senate have long agreed that "a bill for raising revenue may be a bill to increase or diminish existing rates."³⁶

There can be no question that H.R. 3590 "relate[d] to taxes."³⁷ Its enacting clause provided that it would amend the Internal Revenue Code of 1986 to modify the first-time homebuyers credit in the case of members of the Armed Forces and certain other Federal employees.³⁸ Sections 2 and 3 pertained to tax credits, section 4 addressed the calculation of gross income, section 5 dealt with tax returns, and section 6 addressed estimated tax payments.

Moreover, even under a more narrow understanding of the Origination Clause, H.R. 3590 was a revenue raising bill. Although some provisions of the bill would have extended tax credits, section 5 of the bill would have increased the penalty for failing to file a partnership or S corporation return, and section 6 would have increased corporate estimated tax payments for the third quarter of 2014.³⁹ In fact, the Joint Committee on

³⁴ *Armstrong v. United States*, 759 F.2d at 1381; see Satumo, CRS, *The Origination Clause of the U.S. Constitution*, at 4.

³⁵ 772 F.2d at 166; see *id.* (citing cases).

³⁶ S. Rep. No. 42-146, at 5 (1872). This is, in part, because tax reductions are sometimes enacted with the hope that they will increase revenues. Indeed, as the Fifth Circuit has recognized, "[t]he same bill may have an effect of increasing revenue under certain economic conditions and decreasing revenue under others." *Texas Ass'n*, 772 F.2d at 166. Further, there is no simple test for distinguishing between revenue bills based on whether they raise or lose revenue. The methodology for measuring the revenue effect of legislation is complex and sometimes controversial.

³⁷ *Armstrong*, 759 F.2d at 1378.

³⁸ See H.R. 3590 IH (Sept. 17, 2009).

³⁹ H.R. 3590 IH §§ 5-6.

Taxation estimated that H.R. 3590 would increase revenue by \$86 million over a five-year period.⁴⁰

Thus, there is simply no question that H.R. 3590 was a revenue raising bill. The assertions by the plaintiffs in *Sissel* and *Hotze* to the contrary blink at reality.

After H.R. 3590 passed the House, the Senate amended it by striking the text, save for the enacting clause, and replacing it with the text of the ACA. As discussed above, it is well established by constitutional text, history, and precedent that the Senate may strike nearly all of a House bill, save the enacting clause, and substitute new text.

Some critics have argued further that the Senate's amendment of H.R. 3590 was impermissible because it was not "germane." This argument too is incorrect, based on constitutional text, historical practice, and precedent. In the Senate, again, there is no general requirement that amendments be germane to the matter being amended. Indeed, the Senate itself has considered whether there is a special germaneness requirement that somehow implicitly applies to amendments to House-originated revenue measures and concluded that there is not.

In 1879, the House passed a bill modifying various laws regarding internal taxation, and the Senate Finance Committee, to which the House-passed bill was referred, reported a version of the bill that made further amendments along the same lines. When the bill came to the Senate floor, Senator Stanley Matthews offered an amendment imposing new duties on tea and coffee. Another Senator made a constitutional point of order, arguing that "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."⁴¹ Senator Matthews disagreed. He said,

This is a revenue bill; it is a bill to raise money by taxation. That I understand to be the definition of a revenue bill; and such bills by the Constitution . . . must originate in the House of Representatives. This bill originated in that House, and is here for consideration and for amendment. We are not obliged either by the Constitution or by any rules of order to adopt or reject that bill as it is sent to us. We have a right to discuss it; we have a right to amend it; and we have a right to amend it in any particular in which we see fit to amend it, limited only by our own rules.⁴²

⁴⁰ U.S. House, Joint Committee on Taxation, *Estimated Revenue Effects of HR 3590, the "Service Members Home Ownership Tax Act of 2009," Scheduled for Consideration by the House of Representatives on October 7, 2009* (JCX-40-09), October 6, 2009.

⁴¹ 8 Cong. Rec. 1478 (1879).

⁴² *Id.*

A short time later in the debate, Senator Matthews turned to those rules. He asked, “Where is the rule . . . which prohibits me from moving an amendment to a bill when the amendment is not germane? Is there any such rule? I have not heard of any; the Senator does not quote any; there is not any; and the senior members of the Senate all unite in the declaration that there is not any.”⁴³

The point of order was put to a vote and rejected.⁴⁴ The Senate thus expressly rejected the argument that a Senate amendment to a House revenue bill must be germane to the House bill.

Further, as discussed above, even assuming there is some germaneness requirement, both *Flint* and *Texas Association of Concerned Taxpayers* adopted a very loose conception of germaneness, and the ACA plainly satisfies that test because both versions of the bill concerned revenue. The entirety of H.R. 3590 concerned revenue, and the ACA also addressed revenue by imposing a tax when certain requirements were not met. Tellingly, no Member of the Senate raised a point of order objecting to the amendment of H.R. 3590.

Thus, just as there was found to be no merit to the Origination Clause challenge in *Texas Association*—even though the Senate “struck the entire text of the bill after the enacting clause and replaced it with a massive tax-increasing proposal,” thereby replacing the House bill’s tax *cut* with a tax *increase*⁴⁵—there is no merit to any Origination Clause challenge to the ACA. Appropriately, every court to have considered such a challenge has rejected it.

**The Fact That the House Did Not Use the Blue Slip Process To Object Further
Confirms that the Challenged Provisions of the ACA Do Not Violate the
Origination Clause**

As discussed above, the House has vigorously defended its prerogatives under the Origination Clause through well-established practices and procedures, chiefly the use of the “blue slip” resolution. During the 111th Congress alone, the House of Representatives passed six blue slip resolutions, including one objecting to a provision that would have established that health care provided by the Secretary of Veterans Affairs constituted minimum essential coverage.⁴⁶

Despite the well-established practice of using blue slips to object to bills that violate the Origination Clause, none of the legal challenges to the ACA have pointed to a single member of the House having filed a blue slip resolution in reference to the ACA

⁴³ *Id.* at 1480.

⁴⁴ *Id.* at 1482.

⁴⁵ 772 F.2d at 164.

⁴⁶ H.R. Rep. No. 111-708, at 93-94 (2011).

at the time it was considered by Congress.⁴⁷ Indeed, the best they can do is point to a resolution introduced three years *after* the bill was passed.⁴⁸ As noted above, *any* member of the House could have filed a blue slip resolution at the time the ACA was considered.⁴⁹ The reason that none did is simple: no one at the time—not even those who vigorously opposed the ACA—understood the House's prerogatives under the Origination Clause to be threatened by the Senate-amended bill.

In short, the failure of any member of the House to file a blue slip resolution confirms what the application of constitutional text, history, and precedent show: Sections 5000A and 4980H were enacted consistent with the requirements of the Origination Clause.

⁴⁷ Jack M. Balkin, *The Right Strikes Back: A New Legal Challenge for Obamacare*, *The Atlantic* (Sept. 17, 2012), available at <http://www.theatlantic.com/national/archive/2012/09/the-right-strikes-back-a-new-legal-challenge-for-obamacare/262443/> (last accessed May 30, 2014).

⁴⁸ H.R. Res. 153, 113th Cong., introduced on April 12, 2013.

⁴⁹ Because any member could have filed a blue slip resolution, it is irrelevant that Congressman Levin, a Democrat and supporter of the ACA, was Chairman of the Ways and Means Committee at the time the ACA was enacted. It is also irrelevant that the resolution might not have passed. In 1982, for example, after Congress passed TEFRA, a bill that massively overhauled the Internal Revenue Code, a representative in the House filed a blue slip resolution that was voted down by the full House. Medina, 23 Tulsa L.J. at 179. After this failure, the House attempted another resolution to send the bill back to the Senate, but this one failed as well. *Id.*

Mr. FRANKS. And I thank the gentlelady.
And we will now recognize our third and final witness, Mr. Kamenar, and please turn on that microphone.

**TESTIMONY OF PAUL D. KAMENAR, ESQ.,
CONSTITUTIONAL AND PUBLIC POLICY LAWYER**

Mr. KAMENAR. Thank you, Chairman Franks, Chairman Goodlatte, Ranking Member Cohen, and Members of the Subcommittee. Thank you for inviting me here again this morning to testify on Origination Clause as I did in April 2014 along with Mr. Gaziano.

I want to particularly thank you, Mr. Chairman, for your continued leadership on this issue and your fidelity to your oath of office to support and defend the Constitution by reintroducing House Resolution 392 with many of your colleagues, expressing the sense of the House that the Affordable Care Act violates the Origination Clause, and by filing a friend-of-the-court brief with 45 of your colleagues in the court of appeals and the Supreme Court in the pending *Sissel* case. And I am very honored to have represented you along with my co-counsel, Joseph Schmitz, in that case, and we have submitted the brief and the dispositive law review article for the record.

And I, finally, applaud you for holding these important hearings to remind the Congress, the executive, the judiciary, and the American people, of the critical importance of the Origination Clause to the founding of this country and how it is in jeopardy to being reduced to nullity.

Now, the history of the clause, as we say in our brief and my statement, few clauses have such a rich and historical significance as the Origination Clause. With its origins in the Magna Carta of 1215 A.D., the principle of taxation only by the immediate Representatives of the people was so firmly entrenched in English tradition, and its implementation on the American side of the Atlantic was nearly universal in colonial and early State legislatures.

As the Chairman noted, without its guarantee, the 1787 convention and ensuing ratification debates, our Constitution would simply not exist, at least not in its present form, that the restriction of the Senate from originating taxes was the cornerstone of the accommodation of the Great Compromise, which satisfied the necessary number of States to ratify our Constitution.

Let me quickly address the first part of the clause, which says all bills for raising revenue must originate in the House. Does the Affordable Care Act raise revenue? That's an easy answer. Of course, it does. Yet in a remarkable decision, the majority panel the D.C. Circuit said that the bill which raises \$500 billion in new taxes is not a revenue-raising bill because its primary purpose is to promote health care and not raise revenue. There is simply no logical or historical basis for this novel interpretation. As the four dissenting judges in *Sissel* noted, the act imposes numerous taxes to raise revenue, \$473 billion in revenue over 10 years. It's difficult to say with a straight face that a bill raising \$473 billion in revenue is not a bill for raising revenue.

Now, if the purpose test is correct, the Senate could easily circumvent, as Mr. Gaziano said, by attaching any kind of purpose to raising taxes, to protect the military, the environment, health care,

and I note that even Mrs. Wydra and her clients in the Hotze case agree that this is a bill for raising revenue. So we all agree on the first clause. There's consensus here.

It's the second clause in terms of the Senate amendment power that we have some dispute. Now the history of that provision demonstrates that the scope of that amendment power is very limited and narrow, not the broad, sweeping power that allows the Senate here to take a 6-page bill that gives tax credits, go to the House where the Senate figuratively tears off the House bill number and pasted it on top of a 2,071-page ObamaCare bill, and said that this bill originated in the House.

To summarize our main points in our brief quickly, that the words "originate" and "amendment" and "as on other bills" must be interpreted how the amendment process was understood at the time of the ratification, not subsequent 19th- and 20th-century practice.

If you'll look at the history of this amendment, the Senate power was actually a compromise to prevent the House from tacking on or smuggling in nonrevenue, nongermane measures to a revenue bill which would preclude the Senate from amending that, not being able to strip out those nonrevenue measures. So they said: Okay, you could amend a revenue bill with respect to the provisions there.

Two, no one at the time thought the Senate could amend a House bill with a nongermane bill, let alone one that guts and replaces the House bill in its entirety.

Three, indeed the unicameral Continental Congress in 1781 made such amendments not in order. "No new motion or proposition shall be admitted under color of amendment as a substitute for a proposition under debate until it is postponed or disagreed to." Note the phrase "under color of amendment." And what's happened here is that under a color of amendment, the Senate in this case actually originated the revenue-raising bills.

Finally, James Madison, which Ms. Wydra talked—mentioned, the father of the Constitution, called the Senate's power "a paltry right of the Senate to propose alterations to money bills." And the fact that no one issued a blue slip is constitutionally irrelevant and would not make any sense anyway since Chairman Pelosi at the time—Speaker Pelosi would not have brought that to the House floor.

Unfortunately, the dissenters in the *Sissel* case said that this gut-and-replace amendment was constitutional. Yet the three-judge panel, which said that this is not a bill for raising revenue said: No, that's not correct; that would render the power under the Origination Clause "an empty formalism."

In conclusion, I'd like to quote Justice Thurgood Marshall's citing Federalist 58. He said it best in the *Munoz-Flores* case, "Provisions for the separation of powers within the legislative branch are thus no different in kind from provisions concerning relations between the branches of our government." Both sets of provisions safeguard liberty.

And if the Supreme Court on Friday does not review and later reverse the lower courts in *Sissel*, the original meaning of the cornerstone of the Great Compromise that allow the Constitution to

be ratified would erode and unfortunately turn the Great Compromise into a great hoax. Thank you.

[The prepared statement of Mr. Kamenar follows:]*

***Note:** Supplemental material submitted with this statement is not reprinted in this record but is on file with the Subcommittee, and can also be accessed at:

<http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=104322>.

**BEFORE THE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE
OF THE U.S. HOUSE OF REPRESENTATIVES**

**HEARING ON
“THE ORIGINAL MEANING OF THE ORIGINATION CLAUSE”
JANUARY 13, 2016**

ROOM 2141, RAYBURN HOUSE OFFICE BUILDING

TESTIMONY OF PAUL D. KAMENAR, ESQ.

Mr. Chairman, Mr. Ranking Member, and Members of the Subcommittee:

My name is Paul Kamenar, a Washington, D.C., lawyer and legal public policy advisor with over 35 years of experience litigating federal cases in the U.S. Supreme Court and lower federal courts raising important constitutional, statutory, and public interest issues. I am also a Senior Fellow of the Administrative Conference of the United States, and a member of its Judicial Review Committee. I am a frequent guest lecturer at the U.S. Naval Academy on Constitutional and National Security Law. I was also a Clinical Professor of Law at George Mason University Law School and Adjunct Professor at Georgetown University Law Center where I taught a separation of powers seminar. As the former Senior Executive Counsel of the Washington Legal Foundation, I represented over 250 Members of Congress in original and *amicus curiae* litigation in dozens of cases, testified before Congress numerous times, and participated in legal symposia and conferences on a variety of legal topics.

Of particular relevance to this hearing, I am co-counsel with Joseph E. Schmitz representing Chairman Trent Franks and some 45 other House Members in a brief *amici curiae* in the Origination Clause case supporting a petition for writ of certiorari pending before the United States Supreme Court in *Sissel v. HHS*, No.15-543. We also filed a similar brief when the case was before the U.S. Court of Appeals for the D.C. Circuit. I also testified before this Committee on April 29, 2014 on this same topic. Today’s hearing is all the more timely because the Supreme Court is scheduled to decide this Friday, January 15, 2016, whether or not they will hear this important constitutional case. That case raises the issue of whether the Affordable Care Act – which has over 17 revenue raising provisions designed to raise approximately \$500 *billion* in revenue – violates the Origination Clause inasmuch as it originated in the Senate as the “Senate Health Care Bill” instead of in the House. For the record, I am submitting a copy of our *amici* brief in *Sissel* to accompany my written statement. I am testifying today in my personal capacity and not on behalf of any other person or organization.

Origination Clause: History and Interpretation¹

The Origination Clause of the U.S. Constitution, Article I, section 7, clause 1, 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.*” 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” of the Great Compromise of 1787 which satisfied the necessary number of States to ratify the Constitution.²

Few clauses in our Constitution have such a rich and clear historical significance as the Origination Clause. With its origins in the *Magna Carta* of 1215 AD, 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: the principle of taxation only by the immediate representatives of the people. This principle 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.

Our Founders were justifiably concerned that the power to raise and levy taxes should originate in the House of Representatives, also known as the “People’s House,” whose Members are closest to the electorate, with two-year terms. The Senators, by contrast, sit unchallenged for the better part of a decade, do not proportionally represent the American population, and already enjoy their own unique and separate Senate powers intentionally divided by the Founders between the two chambers. The “power of the purse” was unquestionably reposed by our Founders in the People’s House, and it has remained in that chamber throughout our history.

At the 1787 Constitutional Convention, George Mason stated the reasons for the impropriety of Senate tax originations:

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 Govt. will pursue schemes for their aggrandizement – will be able by weary[ing] out the

¹ Our brief in *Sissel v. HHS* relies heavily upon the excellent historical research by Nicholas Schmitz and Professor Priscilla Zotti in their article, “The Origination Clause: Meaning, Precedent, and Theory from the 12th to 21st Century,” 3 Br. J. Am. Leg. Studies 71 (2014). A copy of that article is submitted for the record.

² Delegate Elbridge Gerry, quoted in James Madison, Notes on the Debates in the Federal Convention of 1787, at 290 (New York, Norton & Company Inc., 1969) [hereinafter Madison].

H. of Reps. and taking advantage of their impatience at the close of a long Session, to extort measures for that purpose.³

The Origination Clause thus embodies a foundational principle of American jurisprudence that offers a structural constitutional protection against abuses of power by the national government. The separation of powers “check” provided by the Origination Clause lets the American people know exactly who is responsible for proposing taxes and assures that these individuals are those subject to removal from office most frequently. Just as the vertical separation of powers between our federal and state governments is designed to preserve freedom as embodied in the Tenth Amendment, the horizontal separation of powers between the three branches of government is designed to preserve liberty and freedom. The intrabranch separation of powers between the House and Senate on revenue raising bills further ensures our liberty as the Supreme Court has reminded us.

Original Meaning of “Bill for Raising Revenue”

The Origination Clause has two parts. The first or dominant one reposes only in the House the power to originate “Bills for raising Revenue.” The second part of the clause grants the Senate a very limited right “to propose or concur with Amendments as on other Bills.” In short, the Senate is forbidden from originating taxes or other “Bills for raising Revenue.”

As for the scope of what constitutes a “Bill for raising Revenue,” the Colonists thought that anything that taxed them for any reason was a “money bill” and thus subject to the restrictions of the Origination Clause. All but one of the first 13 States included an Origination Clause provision in their respective constitutions, and 11 of those did not have a “purposive” test as to the underlying purpose of the tax or revenue. The Massachusetts Constitution of 1780 was quite explicit and formed the basis of the imported final language of the Federal clause:

[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.⁴

Early judicial opinions further demonstrate the Founders’ broad meaning of “bills for raising revenue.” For example, in *United States v. James*, 26 F. Cas. 577, 578 (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. . . . In respect to such bills it was

³ Madison at 443 (James Madison arguing for the necessity of the clause at the Constitutional Convention on August 13, 1787). Madison at 445 (Delegate Elbridge Gerry arguing that the Convention delegates would not sign, and the states would not ratify any new federal Constitution that did not restrict the Senate from originating taxes).

⁴ Massachusetts Const. (1780) (emphasis added).

reasonable that the immediate representatives of the taxpayers should alone have the power to originate them.

Power of Senate to Amend Revenue Raising Bills

The House of Representatives has always recognized the principle that the Senate may not design new tax bills. Indeed, when the Framers wrote the Origination Clause, it was clear that the scope of permissible amendments “as on other Bills” provided in the second part of that clause – regardless of whether or not the bill was for raising revenue -- did *not* include amendments that were not germane to the subject matter of the bill.⁵ 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.” In short, no non-germane substitute amendments at all were permitted in 1787 by the unicameral Continental Congress.

After the Constitution was ratified, under our newly established bicameral legislature, designed as it was to prevent creative usurpations of the House’s right to “first ha[ve] and declare” 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.⁶

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. To be sure, the Senate and the House each have the constitutional power to “determine the Rules of its Proceedings” (Art. I, sec. 5, cl. 2), but that does not mean the Senate can alter the original meaning “as on other Bills.” In other words, while the Senate may adopt procedures on the scope of their amendment power regarding germaneness or amendments in the nature of a substitute with respect to non-revenue raising legislation passed by the House, the Senate can only “amend” revenue raising bills from the House in the same manner that they could amend “other Bills” as was the practice *at the time of the ratification*.⁷

⁵ 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.”).

⁶ Asher Crosby Hinds, *Parliamentary Precedents of the House of Representatives of the United States*, §5825 (1907) (emphasis added).

⁷ To be sure, the House possesses the ability to “blue slip” a Senate bill that it believes violates the Origination Clause. See James V. Saturno, *The Origination Clause of the U.S. Constitution: Interpretation and Enforcement*,

Otherwise, if the Senate's rules of procedure allowed for the Senate to "amend" a House bill proposing a modest revenue measure by replacing it altogether with major tax provisions, the purpose of the Origination Clause would have been rendered a nullity. Worse still, the clause would be rendered a nullity if the Senate could propose legislation raising all manner of taxes and ascribe a legislative purpose for doing so, such as improving health care, and claim that the bill is not a bill *for* raising revenue, but a bill *for* improving health care. Remarkably, this specious "purposiveness" test was adopted by the D.C. Circuit in the *Sissel* case that is pending review in the Supreme Court. It would indeed come as a surprise to our Founders that what they regarded as this "paltry right of the Senate to propose alterations in money bills"⁸ has been elevated to major power that usurps the sole power of the House. A Senate thus unrestricted from the confines of the Origination Clause would blur the fundamental separation of powers within the legislative branch. The power of the purse was unquestionably reposed in the People's House, and it has remained in that chamber throughout our history.

Judicial Interpretations of the Origination Clause

The Supreme Court jurisprudence on the Origination Clause is rather sparse, consisting of only a handful of cases, the most recent being *United States v. Munoz-Flores*, 495 U.S. 385 (1990).⁹ As an initial matter, the question first arises as to whether the judiciary ought to adjudicate disputes involving the interpretation of the Origination Clause, or whether they should defer to the decisions of the Legislative Branch as to the scope of the House's revenue raising power and the Senate's amending power. Indeed, the Justice Department invokes the "political question doctrine," arguing that the courts lack jurisdiction under Article II to adjudicate Origination Clause disputes.

Congressional Research Service 9-10 (March 15, 2011). But the success of any blue slip effort depends upon the Speaker of the House and the majority of its Members to vote and agree on the resolution. Moreover, the rush to enact the ACA precluded meaningful review. See Remarks of Speaker Nancy Pelosi to 2010 Legislative Conference for the National Association of Counties, "We have to pass the bill so you can find out what is in it." (March 10, 2010). In any event, the House cannot "waive" its rights that it possesses under the Origination Clause. Moreover, in July 2015, Chairman Trent Franks introduced, and Representative Louie Gohmert along with 15 other Members of Congress have co-sponsored, H. Res. 392 in July 2015, that expresses the Sense of the House of Representatives that the ACA "violates article I, section 7, clause 1 of the U.S. Constitution because it was a 'Bill for raising Revenue' that did not originate in the House of Representatives." This resolution is a functional equivalent of a blue slip.

⁸ 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).

⁹ 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).

Associate Justice Thurgood Marshall, citing Federalist 58, soundly rejected this argument in *Munoz-Flores*:

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. 495 U.S. at 395, 397 (1990).

To quote the judicial opinion of the last federal judge to strike down an Act of Congress under the Origination Clause, any Bill for raising Revenue that originates in the Senate “is not a law at all. . . . It is one of those legislative projects which, to be a law, must originate in the lower house.”¹⁰ Justice Marshall dismissed the political question claims following the logic of *Baker v. Carr*. Courts are capable of crafting 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. *Id.*¹¹

Thus, *Munoz* departed quite dramatically from the old Court standard regarding Origination Clause challenges expressed in *Field v. Clark Boyd* (1892) that the judiciary is bound to respect Congress’s indications of a Bill’s origination source via its formally enrolled status.

In *Munoz-Flores*, the Court was considering a challenge to the \$25 assessment levied on defendant convicted of federal immigration violation and whether that provision imposing the small assessment was a “Bill for raising revenue” under the Origination Clause. 495 U.S. at 385. The amounts so collected were to be deposited in a special Victims Fund that was capped, with residual funds, if any, to be deposited in the General Treasury.

In reaching the merits of the case, the Court concluded that the assessment provision was not a Bill for raising revenue for the General Treasury:

As in *Nebeker* and *Millard*, then, the special assessment provision was passed as part of a particular program *to provide money for that program* -- the Crime Victims Fund.

¹⁰ *Hubbard v. Lowe*, 226 F. 135, 137, 141 (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 under the Origination Clause 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).

¹¹ 495 U.S. at 396. Professor Randy Barnett of Georgetown University Law Center has forcefully argued that the judiciary should not “defer” to the Congress in determining whether the ACA violated the Origination Clause. <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/03/12/the-origination-clause-and-the-problem-of-double-deference/>

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 "incidenta[l]" to that provision's primary purpose.

495 U.S. at 399 (emphasis added)

While one can take issue with the Supreme Court's conclusion that funds raised and deposited in an earmarked fund do not constitute "a bill for raising revenue," what is abundantly clear is that *Munoz-Flores* does not support arguments that revenue raising bills do not come within the purview of the Origination Clause if there is also a "purpose" for the revenue other than just a plain tax increase. Rather, this case fell squarely within the holdings of earlier cases of the Court, namely *Twin City Bank v. Nebecker*¹² and *Millard v. Roberts*¹³, 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.'

The last time Supreme Court also addressed the Origination Clause before *Munoz-Flores* was 76 years earlier in *Flint v. Stone Tracy*, 220 U.S. 107 (1911). In that case, the Court concluded that the Senate's amendment to a House revenue raising bill that merely replaced just one clause (the inheritance tax) of the House bill 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." *Id.* at 110.

The Senate's modest and germane amendment in *Flint* stands in sharp contrast, both qualitatively and quantitatively, from any situation where the Senate proposes to "gut and replace" a modest House bill with the Senate Bill loaded up billions of dollars in revenue raising provisions. Unfortunately, that is what happened in the case of the Affordable Care Act which is the subject of the pending appeal in *Sissel v. HHS*.

Sissel v. HHS

In *Sissel*, the plaintiffs challenged the constitutionality of the Affordable Care Act under the Origination Clause, arguing that the law and its revenue raising measures, including the individual mandate penalty that the Supreme Court ruled was a tax, originated in the Senate rather than the House. The legislative history of the ACA is rather simple. On October 8, 2009, the House of Representatives unanimously passed the six-page "Service Member's Home Ownership Tax Act" (SMHOTA), H.R. 3590, 111th Cong. (2009), which was intended to *reduce* taxes by providing a tax credit to certain veterans who purchased homes. The Senate "amended" H.R. 3590 by deleting the entire text and substituting the 2,074 page bill which Senate Majority Leader Harry Reid referred to as the "Senate Health Care Bill," which included 17 specifically denominated revenue provisions, including the penalty imposed on those non-exempt persons who fail to buy a government approved health insurance policy. 26 U.S.C. 5000A. The Congressional Budget Office estimated that this "gut and replace" bill would

¹² 167 U.S. 196 (1897).

¹³ 292 U.S. 429 (1906).

increase revenue by \$486 *billion* between 2010 and 2019, one of the largest tax increases in American history.

The Senate returned the “Senate Health Care Bill” with only the original H.R. 3590 number affixed to it back to the House, whereupon it was rushed into passage by the Democratic controlled House without a single Republican vote. On March 23, 2010, the President signed “The Patient Protection and Affordable Care Act,” Pub. L. 111-148 (hereinafter “ACA”), otherwise known as “Obamacare.”

Congressional *amici* argued in the D.C. Circuit that the ACA was a bill for raising revenue that did not originate in the House despite the H.R. 3590 designator affixed to the Bill. Indeed, bill designators did not even exist in the early Congresses. Moreover, Senate rules and procedures provide that such “gut and replace” amendments are “in the nature of a substitute” whereas the Senate text constitutes “original text.”¹⁴

But even if the ACA had originated in the House, the Senate’s legerdemain of substituting the House tax credit bill for veterans with the massive Senate Health Care Bill was not constitutional for two reasons: (1) SMHOTA was not a revenue raising measure to which the Senate might amend under the second prong of the Origination Clause since it provided for tax credits, and (2) even if it were a revenue raising measure, the total “gut and replace” Senate amendment was not germane to the subject matter of the House bill. Significantly, unlike the scenario in *Munoz-Flores* and similar cases where the revenue generated was earmarked for a specific fund or was in the nature of a user fee, the billions of dollars raised under the ACA go directly into the general treasury to fund all government operations.

When the Supreme Court upheld the individual mandate penalty as a constitutional “tax,” Chief Justice Roberts 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 requirements in the Constitution.*” *NFIB v. Sebelius*, 132 S. Ct. 2566, 2598 (emphasis added). In other words, while the Constitution gives Congress as a whole the power to “lay and collect taxes,” any bill laying such taxes must originate in the House of Representatives under the Origination Clause. The Supreme Court has thus yet to address the Origination Clause issue presented in *Sissel*.

In a remarkable decision by the three-judge panel of the D.C. Circuit in *Sissel*, that court held that the ACA, despite the \$500 billion in taxes, was not even a bill for raising revenue because the *purpose* of the ACA was to improve health care, not to raise taxes. 760 F.3d 1 (D.C. Cir. 2014). The panel’s concoction of its hitherto unknown ‘primary purpose’ test is not embodied in Supreme Court precedent as the panel mistakenly concluded. If 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.

¹⁴ See Senate Rule XV; Christopher M. Davis, *The Amending Process in the Senate*, Congressional Research Service (March 15, 2013).

As Circuit Judges Kavanaugh, Henderson, Brown, and Griffith noted in their dissent from the denial of *en banc* review of that decision, “[t]he panel opinion sets a constitutional precedent that is too important to let linger and metastasize.” 799 F.3d 1035 (D.C. Cir. 2015). These four 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.*

Having rightly 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,” the dissenting judges nonetheless wrongly concluded that “the relevant Supreme Court case law forecloses the germaneness requirement advanced by Sissel,” and, notwithstanding the Senate’s “gut and replace” amendment, the “Affordable Care Act originated in the House.” In short, the dissent would render the Origination Clause a nullity by allowing the Senate to use its “paltry right” to “amend” any House measure dealing with revenue by replacing it altogether with a massive tax bill having nothing to do with the original House bill.

In a rejoinder, the original panel, which ruled that the ACA was not even a bill for raising revenue, vigorously countered that the dissent’s position on the scope of the Senate’s amendment power would render the Origination Clause an “empty formalism.” In short, both the original panel and dissenters were both right and both wrong. The original panel was wrong to conclude that the ACA was not a bill for raising revenue but right to conclude that if it were, it could not “gut and replace” a House revenue bill. The dissenters were right to conclude that the ACA was indeed a bill for raising revenue, but wrong to conclude that the Senate could use its “paltry right” to amend House revenue raising bills to “gut and replace” the House bill with a non-germane substitute revenue bill raising \$500 billion in new taxes.

Conclusion

It is abundantly clear that the conflicting opinions by the circuit judges in *Sissel* on the meaning of both parts of the Origination Clause cry out for Supreme Court review. Unfortunately, many Court observers believe that the Court, having upheld the individual mandate penalty as a tax in *NFIB* and the subsidies for federally-run insurance exchanges in *King v. Burwell*, 135 S.Ct. 2180 (2015), will shirk its responsibility and deny review when it is scheduled to meet in conference this Friday. Regardless of one’s opinion of the merits of the case, it would be a tragic mistake for the Court to let the D.C. Circuit’s decision “linger and metastasize” as the dissenters put it.

The argument that the Senate’s amendments to House revenue 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 at the time that the Framers granted the Senate the power to amend “as on other bills.” This practice may be admissible in the context of non-revenue raising bills, but the Constitution expressly prohibits this mischief whenever the Senate endeavors effectively to originate taxes.

Thank you for the opportunity to testify on this important issue. I will be glad to answer any questions that the Committee may have.

Mr. FRANKS. I want to thank all of the witnesses for very invigorating testimony.

And we'll now proceed under the 5-minute rule with questions, and I'll begin by recognizing myself for 5 minutes.

I think one of the real issues before us today is the meaning of the Origination Clause. And not to be the blooming obvious award here, but, indeed, if Ms. Wydra is correct that any misapplication could be corrected by a followup vote by the House when the legislation returns, that's true of a bill that originated in the Senate in the first place. So, once again, if the Senate can take a House bill, nongermane, and strike everything and make the largest revenue-raising bill in the history of the Republic into it, I have no ability in terms of engineering to ascertain how the Origination Clause retains any meaning whatsoever.

And I appreciate the Ranking Member's reference to the "Little Engine That Could." If my grasp of that classic literature in which he took his reference is correct, I think it turned into the little engine that did. We can hope.

Mr. Gaziano, in your written testimony, you state that, "like the guarantee of free speech, the Origination Clause guarantees a deeply ingrained individual right." I find this point very compelling given that one of the "repeated injuries and usurpations" penned by Thomas Jefferson against the King of Great Britain in the Declaration of Independence was "imposing taxes on us without our consent."

With this in mind, who is the Origination Clause intended to protect? How is it intended to protect them, and who is responsible for ensuring that protection?

Mr. GAZIANO. Thank you very much for the question. The Origination Clause certainly isn't designed to protect just the prerogatives of government actors. It protects immediately current taxpayers, but it also protects any future taxpayers and those who may be affected by taxes. If the economy is tanked because of high taxes, then we are all deeply affected. But as the Supreme Court noted, that the legislative procedures that are set forth in the Constitution and aren't the optional variety which you all can make under the rules provision, those finely wrought provisions must be justiciable in the courts when anyone is adversely affected by a law.

Getting back to the blue slip issue, House Members did object to the procedures, the abbreviated procedures in the House bill. This is, as Mr. Kamenar alluded to, we must pass—the then Speaker's statement: We must pass the bill before—to find out what's in it.

But moreover, Members didn't understand that the penalty provision of the individual mandate, which is at the heart of our challenge in the *Sissel* case, was a tax until the Supreme Court majority said it was a tax, and that's why the courts must remain open to protect our individual rights. One of the greatest expositors of the Constitution did analogize the Origination Clause's protection to the protections of the First Amendment. That was Joseph Story.

And just as Congress may believe that it isn't abridging free speech, and it may debate a point of order, and both Houses may rule that it doesn't abridge free speech, that doesn't mean that in-

dividuals whose rights are infringed by Congress' views can't and shouldn't go to court.

Mr. FRANKS. Well, thank you. I know it's been suggested that our Constitution is evolving. It is my perspective that if this is really a living document, then perhaps it's also a dead letter. My hope and I hope that the responsibility of this Committee is to keep the Constitution from evolving into vapor, and the Origination Clause I think is at stake in this case.

Mr. Kamenar, if allowed to stand, what effect would the D.C. Circuit's decision in *Sissel v. HHS* have on Federal courts' understanding of the Origination Clause, and what effect could it have on Congress?

Mr. KAMENAR. Well, the D.C. Circuit opinion right now says that ObamaCare was not a bill for raising revenue. That, as I said in my testimony, is totally ridiculous, and Ms. Wydra would agree with that. So it doesn't have any impact upon this body. This body judges what is constitutional and what its prerogatives are. Until the Supreme Court rules on this, the decisions of courts of appeals have really no effect on what is the ultimate and final word on the matter. And, again, you have the dissenters ruling that this could be amended by the Affordable Care Act. Again, they were the dissenters, and they had no authority, judicial precedent with respect to the decision.

So the short answer is that that Court's ruling did not have any impact on this. It may have impact on other courts that look at this, and there are several pending in other courts, but each circuit court can judge on its own what the interpretation means.

Mr. FRANKS. Thank you, sir.

I'll now recognize the Ranking Member for 5 minutes.

Mr. COHEN. Thank you, Mr. Chair.

Firstly, I'd like to comment that President Obama asked us all to kind of be more civil and work together, and I would like to suggest that our Chairman is one of the most civil and decent fellows in the Congress, although there are many of them, and I thank you for that.

You're always a gentleman, and while we disagree on things, and sometimes I'm a bit broad-shouldered, I guess, in the way I approach things, you are always very, very nice in how you respond. And you taught me a lesson today. You're right. I brought up the "Little Engine That Could," kind of like Ted Cruz brought up "Green Eggs and Ham," and in the end, of course, they sort of like "Green Eggs and Ham." So both of us brought up books that we didn't really think about the actual story. But in the same object as Ted Cruz, it made me think about this Committee and what we do, and we discuss these issues about the Constitution, and it's important that we do. And we probably, I would suggest, Mr. Chairman, maybe take up consideration of natural-born citizen. That might be really germane and relevant today to have a hearing on whether or not Senator Cruz is a natural-born citizen, as the Constitution says you must be to be President of the United States, because we could have a real terrible situation if the Republicans nominated somebody who couldn't actually take the oath of office. And I would just submit that for your consideration.

I think that's certainly a hearing that would be relevant, timely, and appropriate because his mother—he was born in Canada, and I understand his mother even voted in Canada. And while Canada is a great country, and I think Mr. Trudeau is a great guy, he shouldn't be President of the United States, and he can't be President of the United States because he is not a natural-born citizen.

This issue is going to be decided by the Supreme Court, and I guess on Friday they're going to decide whether they're going to hear it or not. I think we got maybe an idea of whether it was going to be heard or not last night. Six Supreme Court Justices did what Supreme Court Justices have done for a long time, and that is show respect for the President and attend the State of the Union address. Justice Scalia and his two votes and Justice Alito failed to appear, and I suspect since you need four folks to get a hearing, that you'll be one short, and this will be mooted. But we'll find out on Friday, but I think there was maybe a little groundhog show yesterday in the fact that six Justices did come and respect the President.

I also note—and it's something that's bothered me since we passed this bill, which is great—but people can call a bill whatever they want, and I appreciate the lady and gentleman who refer to it and Mr. Frank as he does in an always an appropriate manner, the Affordable Care Act, or ACA. ObamaCare we know is not really praising Obama. That's a pejorative really in politics, and we can't get around the fact that people want to attach it. And there's a whole bunch of problems. President Obama is a great man and a great human being who has tried to bring the parties together and tried to bring this country forward, and his election was a great testament to breaking ceilings and showing that all people, regardless of their race, their religion, other factors other than where they're born naturally, have the opportunity to be President in this country. It's a great country for that reason. And he scorned people who use the politics of race and/or religion.

But when we talk about ObamaCare, a lot of people are conjuring up the fact that maybe this man with this unusual name has some birther problem himself, which of course he doesn't. It's Senator Cruz that might, ironically enough, but Mr. Trump is right on that. But it's just unfortunate that people continue to do that because that's disrespect for the President and disrespect for the whole concept and the celebration that this country should have and did have in many quarters that somebody who is of African American parentage could become President of the United States and could be a great leader and a great moral force for this great Nation.

So it's been an interesting hearing. And I'd ask Ms. Wydra, is there anything you've heard today in the comments of either of your two compadres here that you'd like to comment on?

Ms. WYDRA. Sure.

First, thank you, Ranking Member Cohen for giving me the opportunity because I want to respond first to a mischaracterization of the brief that we filed in the Hotze case in the Fifth Circuit. That brief actually did not take a position on whether the ACA is a bill for raising revenue. We said however the Court decided that issue basically did not matter because it was unquestionably clear

that the Affordable Care Act did comply with the requirements of the Origination Clause. And, in fact, while there have been some disputes among the judges who heard the merits of this case about how those claims lose, there is universal agreement among the judges who have heard these cases, both conservative and liberal judges, that the case is a loser.

And so I think that, you know, the Supreme Court as you mentioned, will be considering in conference this Friday. Generally, they don't take up cases for review if there isn't—this is just a general rule—if there isn't a circuit split. There is no circuit split on this issue. So I think that's important to note that, just as throughout history, the Supreme Court has not ever struck down an act of Congress as a violation of the Origination Clause, I don't think they will do so in this case because it clearly complied with the Origination Clause, both halves, under the original meaning of the Origination Clause, under Supreme Court precedent, which was cited repeatedly to say that the Origination Clause does not apply to bills for other purposes which may incidentally create revenue. And I think there's a really interesting debate which we can have about whether or not that test is supported by the original meaning. It really comes down to, from a textual standpoint, whether the Constitution's substitution of the words "for raising revenue" for the prior language referencing bills "for raising money for the purposes of revenue" is a stylistic change or a substantive change. And as a Con-law nerd, I'm delighted to get into that. But the real point here today is that however you slice it, whichever way the courts rule on the actual test, the Affordable Care Act did comply with the requirements of the Origination Clause.

Mr. COHEN. Thank you. So, in essence, we're just whistling Dixie, and if I'm wrong in saying whistling Dixie because there was some other way, the Chairman will correct me as he did earlier.

Mr. FRANKS. If you listen to the "Little Train That Could," he was whistling Dixie too.

I now recognize the gentleman from Iowa, Mr. King, for 5 minutes.

Mr. KING. Thank you, Mr. Chairman.

I thank the witnesses for your testimony. I point out that my good friend from Tennessee can sometimes be a bit of an ornery agitator and slide off topic from time to time. He'll be very interested in knowing that as I walked into my office on Monday, the first time I had set foot in there in 2016, I walked back to what I call our leg shop, and there I see there are two new faces. And they were two interns that I had not met before and actually wasn't aware that they were coming on board. So as I introduced myself to them, the first one—her name is Sydnee—and right away, I say, "Where are you from?"

And she said, "I was born in Canada."

"Born in Canada. Well, why are you here?"

"Well, because I'm a born in Canada with an American citizen mother and a Canadian father, and I'm a dual citizen."

The second I heard that, I picked up my iPhone, and I interviewed her. This is 2 minutes long, and I'd like to play it for you all so you can hear how simple this argument actually is.

[Audio recording played.]

Mr. KING. "Maybe because of politics" was the last answer that we heard from her. And for me——

Mr. COHEN. Would the gentleman yield for just a minute?

Mr. KING. I would yield to the gentleman from Tennessee since he brought up the topic.

Mr. COHEN. Thank you, sir. Thank you. I think that there's a proper response, and I'd like to play it right now.

Mr. KING. Let me reclaim my time on that, and since I'm going to claim the last word in this particular hearing and utilize my time then to examine the witnesses, but I'm always opened to dialogue in the elevator or anyplace else, Mr. Cohen.

Mr. COHEN. Chris Christie would like this one.

Mr. KING. I thought that it was quite interesting and ironic and coincidental that I would walk into my office——

Mr. GOHMERT. Mr. Chairman, the gentleman from Tennessee is out of order.

Mr. KING. I thought it was coincidental with excellent timing that I would walk into my office and find a young lady who hasn't been in this arena, never been to law school, and who happened to find herself in a very, very similar, if not identical, birth circumstances of Senator Ted Cruz, who understood this with such utter clarity. And the default is this: If you're born to an American citizen, say on some other soil, say the son or daughter of a missionary or missionary couple, then they're automatically American citizen by virtue of the citizenship of their parents. And no one doubts that, or we wouldn't have missionaries traveling around the world. They would stay here, I would think. And she understood with such clarity. She said if you're not a naturalized citizen, then you are a natural-born citizen by default. And that's what the 1790 statute says. That's what all the scholarship says with except to people that I suspect have that politics in the way of their rationale.

So I'd like to pose a quick question to each of the panelists if I could, and it's going to be a general one. This: I'm troubled. It looks to me like I'm seeing Supreme Court decisions, circuit court decisions that are calculating the policy instead of the text in the Constitution. And it looks to me like the text of the Constitution with the Origination Clause—if the courts—if the courts do not honor the text of the Constitution and the original understanding, they realize that it blows the whole ACA up, and we have to start all over. I'd be very happy with that.

But it seems to me that they're not reading the text of the Constitution and applying it any longer. And I used to be able to make the call on what I expected the Court would rule, and I was right so often that I had a sense of confidence. Now I no longer have that confidence.

So my question is, if we have a rogue court, especially a rogue court, are we wedded then to Marbury to the extent that we have no recourse to a rogue Supreme Court? Or is there another alternative——

Mr. FRANKS. Would the gentleman direct that to one of the witnesses?

Mr. KING. I would go to Mr. Gaziano.

Mr. GAZIANO. I'll just give two very brief answers. First of all, I don't—although we all disagree with every court sometimes, I think the Supreme Court will easily get this right. And as my precedent for this Origination Clause question, if they take it, and as I stated in my written testimony, if they don't take the case we bring for Matt Sissel, there are other cases pending. Others will be brought. They have to take it. So it's really important for the Supreme Court to provide guidance. And in the *Sackett* case we won 9-0, 3 years ago, every single judge, nine district courts, five circuit courts, had ruled the other way. There were many, many more judges who got that question wrong. But when it went up to the Supreme Court, the Pacific Legal Foundation won 9-0. Even Obama's own appointees voted against the EPA.

So the fact that the circuit courts are strongly divided and four dissenting judges in the D.C. Circuit thought that the panel decision was dangerous is an additional reason for the Supreme Court to correct the error, but I have every confidence that when they take this case—they've really got to take this case; they ought to take it now—they will do the right thing.

Secondly, if you don't mind, three other times in my testimony, I stressed, as I did the last time, the importance of you all having this hearing and getting it right regardless of whether the Court gets it right and regardless of when they get it right. So if the Supreme Court doesn't take this, it's absolutely important that the House enforce the original meaning of the Origination Clause because you have a responsibility to interpret and apply the original meaning of the Constitution, and you can do so. And guess what? You get punished by the voters when you don't, as Chairman Frank's amicus brief in the D.C. Circuit so ably pointed out and that you joined.

Mr. KING. I accept your statement. I'm far more cynical on the result out of the Supreme Court on this particular case. I appreciate your testimony.

I yield back the balance of my time.

Mr. FRANKS. I now recognize the gentleman from Texas, Mr. Gohmert.

Mr. GOHMERT. Thank you, Mr. Chair.

And just so people get the historical perspective on the Supreme Court attending the State of the Union, since I've been in Congress, the Supreme Court has never had all nine Justices attend a State of the Union address. And since 9/11, my understanding is neither the House Republicans, House Democrats, Senate Republicans, Senate Democrats, ever have all of their Members come to a State of the Union since 9/11. And it goes back to concern about what happened in Clancy's book back in the early 1990's where someone crashed a plane into the Capitol and took out everybody because everybody, including the Supreme Court, were all there. We just want to make sure that doesn't happen.

In Alito's defense, if I were on the Supreme Court, which I'll never be because I wouldn't take the guff they do at the Senate hearings, but if I were on the Supreme Court and knew what was involved in a decision I'd made, such as *Citizens United*, had the President of the United States reflect his ignorance of what the case actually said, what it meant, what it represented and what

the Court said, I would never come back to another State of the Union he gave again and be lectured by somebody that misrepresented what I said, what I knew, when my knowledge and my intellect and my writings were far greater than anything he had to say at the State of the Union address.

Now, Ms. Wydra, you said this case is a loser. But Mr. Kamenar, has there ever been a Supreme Court case that's been taken up that dealt as directly as the cases we're considering here on the issue of the Origination Clause?

Mr. KAMENAR. Thank you, Mr. Gohmert. No. The Supreme Court has never ruled on a case where the Senate took a House bill, gut and replaced the entire thing and added revenue-raising measures. And I just want to correct the record here from Ms. Wydra. I'm quoting from her brief that she filed: "The Origination Clause, in its final form, provided for an expansive category of bills that would need to originate in the House—that is, all 'bills for raising revenue,' even those that did not have as their purpose the raising of revenue." The D.C. Circuit said that the ACA had its purpose for improving health care. So she obviously disagrees with that. You read her beginning of her first four or five pages of opinion. She can't say she agrees with the majority of the D.C. Circuit, so I'm quoting her brief there. But to get to your point, no—

Ms. WYDRA. That's about the original meaning of the Origination Clause. That wasn't about the D.C. Circuit's opinion in particular.

Mr. KAMENAR. What do you think of the D.C. Circuit? Do you think that the—

Mr. GOHMERT. Well, if we could keep the format where I get to ask the questions. Thank you.

Well, let me ask, Mr. Gaziano, if the Supreme Court does not take this case or takes it and rules, in fact, that either this was not a case that raised revenue when clearly it does, or they rule that it did originate in the House, can there ever again be any meaning applied to the Origination Clause without which we would have no Constitution like this today?

Mr. GAZIANO. There would probably be no effective meaning to the Origination Clause in the court, but that would increase the importance of this body doing the right thing. As I mentioned in my written testimony—or until the Supreme Court changed its opinion and correctly interpreted the Constitution, which of course has also happened throughout our history when the Supreme Court gets something wrong. But it would be even more important for this body to establish firewalls and apply the original meaning. I would submit that if you believe the Supreme Court was wrong, and you have the independent power to interpret and apply the Constitution, you could not follow the Supreme Court's opinion. You would have to vote to stop a Senate bill that violated the Origination Clause. You would also suffer political damage with the voters if you didn't, but I would submit it would be your constitutional duty.

Mr. GOHMERT. Having been here in Congress now for 11 years, I can tell you that if the Supreme Court rules that the Constitution says or doesn't say something, that often is enough to be a winning argument among Members of Congress who don't pay as much attention to the Constitution but seem to think, well, if the Supreme

Court says it, then it must be the law, when, in fact, as we know they get things wrong and have to be corrected later by another court. Thank you, Mr. Chairman, for the time.

Mr. FRANKS. I thank the gentleman.

I thank all of the witnesses. I almost wish this hearing wouldn't end, but not that bad. So this, indeed, concludes today's hearing.

And, without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

And, again, I thank the witnesses and the Members and even the audience, and this hearing is adjourned.

[Whereupon, at 10:08 a.m., the Subcommittee was adjourned.]

