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
Executive Director of the DC Center
Senior Fellow in Constitutional Law
Pacific Legal Foundation[*]

29 April 2014

Pacific Legal Foundation
National Litigation Center
930 G Street
Sacramento, CA 95814
(916) 419-7111
www.pacificlegal.org

Pacific Legal Foundation
Washington, DC Center
(Office Address and
Phone Number Pending)
Gaziano: (703) 673-8352
TGaziano@pacificlegal.org

---

[*]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. Instead, PLF is supported primarily by thousands of small, individual donors. It also receives support from small family foundations, several 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 2013, PLF had approximately 8,800 individual, foundation, and corporate supporters from every part of the country. In 2013, a majority of PLF's funding came from individuals, with 88.2% of its donors giving less than $1000. PLF's income from corporate donors, including many small, mom-and-pop companies, was 15.7% of its total contributions.

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

Good morning Mr. Chairman and other distinguished Members of the Subcommittee. Thank you for inviting me to testify today on a structural limitation on Congress's taxing power that was absolutely essential to the signing and ratification of the U.S. Constitution, but which is sometimes treated as a trifling annoyance to be dispensed with by empty artifices by some today.

I am privileged to be a part of Pacific Legal Foundation (PLF). PLF represents Matt Sissel in his constitutional challenge to the individual mandate tax in the Obamacare law, which will be orally argued in the U.S. Court of Appeals for the DC Circuit on May 8, 2014.[2] As this Subcommittee knows, the case turns on the meaning of the Constitution's requirement that all "Bills for raising of Revenue" originate in this House.[3] Although today's hearing focuses on the Constitution's Origination Clause more broadly, I frequently reference the facts and the government's strained arguments in *Sissel* as a paradigm example of what the Clause rejects. The *Sissel* case also has the potential to establish a landmark ruling, further defining the requirements of that Clause, especially given the case's stark facts, the unprecedented legislation that seemingly required unconstitutional tactics to pass, and the able counsel and amici involved, including many members of this Subcommittee and House.

Although I am new to PLF (and not on the *Sissel* litigation team), I have been a legal scholar or public servant for more than 25 years, with much experience in separation of powers law. I have worked in all three branches of the federal government, including in the U.S. Department of Justice, Office of Legal Counsel, during three administrations, where I provided legal advice to the White House and four Attorneys General, especially on separation of powers and other structural constitutional matters. I also was honored to work as a chief subcommittee counsel in this House, primarily engaged in investigations and oversight of the executive branch, which was an exercise in separation of powers law and practice. In addition, I have published on separation of powers issues as a think tank scholar and testified previously before this Constitution Subcommittee and other congressional committees on this subject.

PLF's opening and reply briefs for Sissel in the D.C. Circuit, as well as three amicus briefs, including the one for Chairman Franks and 39 other Members of the House, provide an excellent explication of the original public meaning of the Origination Clause. Instead of trying to duplicate all that scholarship here, the cover pages and links to each of them are attached to this testimony in an appendix.[4] Below I summarize the most important points in those briefs,

---

[1] I wish to thank Inez Feltscher for her research assistance as well as Eileen Dutra and Pamela Spring for their careful review and editorial work. PLF's litigation counsel for Matt Sissel (see note 2), Timothy Sandefur, Paul J. Beard II, and Daniel A. Himebaugh, not only provided substantive input into this testimony, but they also provided an enormous amount more through their years of research, court filings, and the production of the appellate briefs that were my primary introduction to the important arguments and source material for this testimony.

[2] *Sissel v. U.S. Dept. Health & Human Services, et al.*, No. 13-5202 (D.C. Cir. 2013) (*Sissel*).

[3] U.S. Const. art. I § 7, cl 1 (the Origination Clause).

[4] *See* Appellant's Opening Brief, *Sissel* (D.C. Cir. Oct. 23, 2013); Appellant's Reply Brief, *Sissel* (D.C. Cir. Dec. 20, 2013); Amicus Brief of Rep. Trent Franks, *et al.*, *Sissel* (D.C. Cir. Nov. 12, 2013); Amicus Brief of Center for Constitutional Jurisprudence, *Sissel* (D.C. Cir. Nov. 8, 2013); Amicus Brief of Association of American Physicians

and elaborate on some key interpretive issues with additional textual observations, hypotheticals, and constitutional arguments of my own.

To better appreciate the textual arguments, however, at least a basic understanding of the political philosophy of the founding generation and the particular constitutional history of the Origination Clause is important. Thus, my testimony begins with a short statement regarding the democratic theory that animated restraints on Congress's power generally and its taxing power in particular. I then address the original public meaning of the Origination Clause in general terms. Finally, the *Sissel* case debate provides the best vehicle to explain what the Origination Clause does, and does not, mean.

Democratic Theory and the Separation of Powers

There was likely no issue with more universal agreement among the Framers than the need to separate powers between the levels of government and the branches of the national government to prevent tyranny. The Framers all accepted Montesquieu's admonition that there could be no liberty where the legislative and executive powers are united in the same person. As Chairman Franks's amicus brief rightly notes, English constitutional history from the imposition of Magna Carta, through the tumultuous revolutions of 1649 and 1688, to the late colonial era had firmly established not only the necessity of some separation of powers, but also the essential principle of Anglo-American ordered liberty that the taxing power must be controlled by the people's house in the legislature.[5] Based on Enlightenment ideas, the practice of separating government power had begun to be implemented more systematically in the colonial governments and especially in the early state governments at the time of the framing of the United States Constitution.[6]

The separation of powers is expressed in various ways in the Constitution, including the structure of the Constitution and in several explicit provisions of it. Nevertheless, James Madison acknowledged a common fear regarding the plan for the national government when he noted in *Federalist 47* that: "The accumulation of all powers, legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced as the very definition of tyranny."[7] This formulation is an improvement on Montesquieu's, for it acknowledges the need for an independent judiciary. In several other *Federalist* Papers, Madison explained that citizens need not fear that the separation of powers was neglected in the new Constitution. In fact, he argued that the United States Constitution separated the powers much more effectively than the early state governments, and pitted "ambition against ambition" to keep the national government in check.

Madison's and Alexander Hamilton's writings in the *Federalist*, as well as the anti-Federalist writings, are also strong evidence that all sides emphatically agreed that a failure to properly separate and effectively cabin the national government's most dangerous powers would

---

& Surgeons, *Sissel* (D.C. Cir. Nov. 8, 2013) These briefs may be found at http://www.pacificlegal.org/cases/Sissel-3-1374.

[5] Amicus Brief of Rep. Franks, *et al*., at 6.

[6] *See* Benjamin W. Labaree, *America's Nation-Time 1607-1789*, at 228-32 (Norton Library, 1976).

[7] THE FEDERALIST NO. 47, at 244 (James Madison) (Bantam Classic ed., 1982).

have doomed the endeavor to ratify the Constitution. And as this Subcommittee knows, the purpose of the separation of powers was not to protect government officials' power for *their* sake, but to better protect individual liberty. Power was understood to be corrupting, and the Framers believed that powerful officials would seek to aggrandize ever greater power for themselves. Thus, the more power concentrated in one person or entity the correspondingly greater threat to liberty. It was for this reason that the Framers struggled to more effectively divide and separate the necessary powers of the government.

Yet the Framers of the U.S. Constitution did not simply adopt a model of complete separation that existed in several state constitutions. Based on his careful study of foreign and state governments, Madison explained that experience had shown that such "parchment barriers" were particularly ineffective in keeping government actors from aggrandizing power.[8] Thus, the precise form of separation, checks, and balances needed for the national government consumed the greatest amount of time and discussion during the Constitutional Convention and the state ratifying debates. Those careful, precise choices and compromises cannot be abandoned by any government actor or group of government actors, absent Article V amendment.

The Framers were especially concerned with tyranny by democracy's "most dangerous branch," the legislature.[9] This fear was heightened with regard to the proposed Congress for 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 of a national leviathan, though arguably necessary to correct a major weakness of the Articles government, would never have been agreed to without further checks and controls.

With regard to all congressional legislation (though notably not with certain issues of foreign and diplomatic policy left to the President and/or Senate), the Founders further divided the proposed Congress into two branches and required near-simultaneous agreement by both branches and the President in the Bicameralism and Presentment provisions of Article I. This was decidedly to make legislation particularly inefficient, and to increase the chance of friction that would kill many imprudent bills. They imposed other checks on legislation as well. This hearing and the *Sissel* litigation focus on whether one of those controls will endure.

The "One-House Veto" and Other Unconstitutional Ideas

The Progressive thinkers of the late Nineteenth and early Twentieth Centuries understood this anti-efficiency purpose of a limited enumeration and separation of powers very well, and resented it all the more. Although they succeed in enlisting the Supreme Court to unreasonably expand the scope of and undermine the limits on Congress's enumerated powers, they did not succeed in seriously weakening the Bicameralism and Presentment requirements, at least not yet.

Nevertheless, the congressional acceptance of the one-House veto and the High Court's eventual invalidation of it in *I.N.S. v. Chadha*, 462 U.S. 919 (1983) exposes a major fallacy propagated by modern progressives regarding what the constitutional separation of powers

---

[8] THE FEDERALIST NO. 48 at 250 (JAMES MADISON).
[9] *See id*. at 251.

allows and what modern government requires. It also provides a helpful analogy regarding how Congress and the courts should respect the original meaning and text of the Origination Clause.

There is both a simple and somewhat more sophisticated form of the progressive fallacy. The simple form posits that: New arrangements between the branches or between the Houses of Congress satisfy the separation of powers as long as all the governmental parties agree. In other words, ordinary Americans should have no ground to object if the officials whose powers are at stake are all in agreement. The seemingly more sophisticated version of the fallacy is this: Modern arrangements agreed to by the branches or Houses of Congress satisfy the constitutional separation of powers so long as each entity's power endowment is roughly equivalent to the original distribution. Thus, if the President has supposedly grown too powerful, it's appropriate for Congress to augment its powers or dispense with some of the restraints on them. Some muddled thinkers, or perhaps just wishful ones, also suggest that any new accommodation that aids government efficiency satisfies separation of powers principles, which includes the efficiency that comes with specialization of government units.

The fundamental problem with either version is that it describes a "power sharing arrangement," not the actual separation of powers in our Constitution. Other power sharing arrangements may be a *kind* of separation but that's not the same as THE *constitutional* separation of powers in our fundamental charter of government. There are two reasons why.

The first is that the Framers and the Enlightenment thinkers they relied on were as concerned about the particular nature of each branch's power as they were about balancing them. They endowed each branch (or House) with particular powers that history had shown were necessary to protect our liberties. In short, they weren't concerned with "balance" for its own sake; they didn't care if three oligarchs in a frightful leviathan were equally powerful. Instead, they chose a particular arrangement, consistent with human nature to align the interest of the official with the liberties of the people, which would best protect our individual liberty. The second problem with the muddled thinkers is that government, particularly the legislative process, is not supposed to be efficient. As every school child learns, it is difficult to transform a bill into a law; this is by design.

Despite efforts to undermine the separation of powers, the courts have generally held firm in enforcing the Bicameralism and Presentment requirements against creative "modern" schemes to dispense with its strict requirements. Although there were over 163 purported laws enacted between 1970-75 that allowed one House or a particular committee of Congress to effectively reverse or "veto" an executive action,[10] the *Chadha* Court held that such "modern," supposedly necessary legislative devices were invalid under the Bicameralism and Presentment Clauses of the Constitution.[11] Instead, 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."[12]

[10] *I.N.S. v. Chadha*, 462 U.S. 919, 944 (1983).
[11] *Id*. at 989.
[12] *Id*. at 957.

While the current congressional practice with regard to the Origination Clause is not perfect or without some debatable precedents, it has been generally respectful of the Origination Clause requirements and would not take much policing to reverse the practice established in PPACA and some other questionable precedents. In contrast, if the PPACA precedent were erroneously upheld, or for some reason the courts wrongly chose not to reach the merits of the challenge, it would be left to the House of Representatives to properly enforce the original public meaning of the Origination Clause until the courts returned to their senses.[13]

Origination Clause Background and Drafting History

With regard to the taxing power of the national government, the Framers were not content with the general plan to divide Congress into two parts, with the Houses having different constituencies and different electoral sequences, and still requiring bicameral agreement on all potential laws within a given Congressional cycle. The original Constitution imposes other limitations and prohibitions on this most destructive of domestic powers.[14] The authorization of an income tax with the adoption of the Sixteenth Amendment did not change these rules for the type of taxes previously regulated. Moreover, they remain textual evidence of the distrust the framing generation had for granting too free a hand to those who wielded the power to tax.

More importantly for today's hearing and the *Sissel* case, no one seriously argues that the Sixteenth Amendment affected the requirement that all "Bills for raising Revenue shall originate in the House," including income taxes authorized by it. As referenced above, the requirement that revenue bills originate in the People's House has a venerable parliamentary history, and the Americans were not shy about imposing that control even during the colonial period in their respective colonies.

Moreover, the American Revolution was triggered by a series of offensive taxes and the corollary to the rule that the People's House exercise control over taxation. That corollary was that the people being taxed must be directly represented in that House to make those taxes morally and constitutionally legitimate. It was also clear that, at least by 1776, a token amount of direct representation, as was being debated in England and existed for some of the British Caribbean colonies, would not do for the American rebels. The Continentals rejected the theory of "virtual representation" in all its forms; they wanted a direct, proportional representation—albeit for a certain class of free men thought to be responsible enough to exercise the franchise.[15]

The origination principle in the lower house was almost universally adopted in early state constitutions (seven of eight states with bicameral legislatures in 1790)[16] because the lower house remained more immediately accountable to the electorate. The greater electoral

---

[13] One would not expect the U.S. Senate to exercise restraint. The Framers' genius included a healthy skepticism about public officials' exercise of self-restraint. They understood the tendency of every public official and every branch to aggrandize power whenever possible. Our generation would be foolish to think human nature was different.

[14] 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).

[15] It is easy today to criticize the imperfection in the revolutionary-era ideal of voter equality, but that is not particularly relevant to understanding the original public meaning and requirements of the Origination Clause.

[16] *See* Amicus Brief of Center for Constitutional Jurisprudence at 9 and n.2.

responsiveness of delegates in the lower house to the people was the same rationale for requiring tax bills to originate in the "People's House" in Congress at the national level. Though U.S. Senators are no longer appointed by state legislatures, the frequency of House elections and smaller electoral districts was the very ground for expecting that U.S. Representatives would be more responsive to the liberties of the people.[17] (The negligible impact of the Seventeenth Amendment is discussed further in this testimony.)

As the amicus brief for Chairman Franks and other House Members notes, the state constitutional clauses in 1787 expressly rejected a "primary purpose" element (i.e., that the primary purpose of the revenue bill must be to raise revenue) in the great number of states with such a clause,[18] and Virginia prohibited any Senate amendments to House revenue bills whatsoever.[19] The drafting history of the Origination Clause provides strong evidence that a "primary purpose" element also was considered and rejected at the Constitutional Convention.

The original text of the 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 by the Clause. The final language is closest to the language of the Massachusetts Constitution of 1780, with the use of "all money-bills" instead of "Bills for raising Revenue" in the U.S. Constitution. The debates over this Clause in the Constitutional Convention and state ratification conventions show that the terms "money bills" and "revenue bills" were synonymous.

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."[20]

As telling as the drafting history and debates during the Convention are in rejecting a primary purpose element and an open-ended construction of what a permissible Senate "Amendment" to a House revenue bill would be, the state ratification debates 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 whether those statements were challenged by those who were opposed to ratification. George Mason, a major opponent of ratification in Virginia, is reported to have conceded previously that the Origination Clause only allowed minor changes to correct errors that would prevent Senate passage,[21] and as such, he

---

[17] Amicus Brief of Rep. Franks, *et al.,* at 10-11 and n.20 (quoting Madison, Notes on the Debates in the Federal Convention of 1787, at 443 (New York, Norton & Co., Inc., 1969)).
[18] Amicus Brief of Rep. Franks, *et al*., at 16.
[19] *See* Amicus Brief of Center for Constitutional Jurisprudence at 10 and n.3.
[20] Amicus Brief of Rep. Franks, *et al*., at 8 and n.16 (quoting Madison, Notes on the Debates in the Federal Convention of 1787, at 445 (New York, Norton & Co., Inc., 1969)).
[21] Amicus Brief of Center for Constitutional Jurisprudence at 20 (citing Farland, 2 Records of Federal Convention 273 (Aug. 13, 1787)).

never raised the Senate's role in amending tax 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.

Justice Joseph Story's Commentaries have also been accorded special deference by the courts in describing the original understanding of the Constitution by the founding generation. Among the more definitive statements on the scope of the Senate's amendment power to House revenue bills, was the following by Story: Such amendments would allow "slight[] modifications" as might be "required … to make [the House bill] either palatable or just."[22] He also suggested that "an amendment of a single line might make it entirely acceptable to both Houses." *Id.* Thus, we have the founding era's most famous expositor of the Constitution explaining 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 2074 pages of text.

Allowing the Senate any role in amending revenue bills was somewhat of an anomaly, relating to the Great Compromise over representation generally, but the text and drafting history impose necessary, meaningful limits on the scope of a permissible Senate "Amendment" under the Origination Clause. As explained further below, a rule of construction that reads the exception narrowly is required by the original history and understanding of the Clause. A rule of construction that reads the exception expansively is illogical because it is destructive of the entire enterprise of adding it to the Constitution and the reliance delegates and ratifiers paid to its existence. But a rule of construction urged by the current administration removes any limitation on permissible Senate amendments and renders the Clause a dead letter for all practical purposes.

The Original Public Meaning of the Origination Clause and PPACA's Contrary Example

The preceding history and political philosophy of the framing era helps to highlight the violation of the Origination Clause with the purported enactment of the Obamacare law. A better name for it prior to signing would be the "Senate Health Care Bill" because that is how Senate Majority Leader Harry Reid proudly, and at least accurately, labeled it.[23] As this Subcommittee knows, 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 and a few other places because it reduced taxes for certain people. It provided for no tax increases whatsoever. It had nothing remotely to do with health care; it provided for tax relief to certain military veterans and others who frequently have to move, making it difficult for them to take full advantage of existing tax credits.

2. The Senate gutted the entirety of H.R. 3590, except for the designation "H.R. 3590," and poured a completely new, 2074-page bill into the empty shell with 17 major tax increases, amounting to hundreds of billions of dollars in new taxes. One of those

[22] 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.
[23] Amicus Brief of Rep. Franks, *et al.*, at 2 and n.3.

revenue provisions was the individual mandate penalty, or the Shared Responsibility Payment (SRP), 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.[24] 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 purported act on March 23, 2010, which received the erroneous designation "Pub. L. 111-148."

Boiled down to one sentence, the only part of the Senate Health Care Bill and its 17 or so historically-large tax increases that originated in the House is the House bill designation and number. There are two compelling reasons why even a somewhat closer case would be invalid under the Origination Clause, but Representatives and citizens alike should ponder one fact alone and conclude that such an artifice is invalid. The use of such House designations and bill numbers did not exist at the time of the Framing or for 30 years thereafter.[25]

As such, it should be apparent that something is seriously wrong with the government's theory of the case and the district court's ruling that both maintain 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. As any faithful textualist understands, words must be given their ordinary meaning. 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 on the same street address was an "amendment" to the house. They would not think that a later novel with the same library code as an unrelated earlier novel on a different subject was an "amendment" to the earlier novel. And they would not think that a racehorse in the Kentucky Derby which was given the same racing number as a horse that withdrew was an "amendment" to the earlier horse because of that number. Complete and unrelated substitutes are not "amendments" in any reasonable meaning of that term.

This simple fact should end the matter for the *Sissel* case, but this Subcommittee is interested in the subject more broadly, so it should also consider how the Origination Clause should operate in other contexts. The full text of the Clause provides:

---

[24] *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://blog.heritage.org/2010/03/10/video-of-the-week-we-have-to-pass-the-bill-so-you-can-find-out-what-is-in-it/. Contrast the Senate Health Care Bill with the six-page SMHOTA that anyone could have read and no Member objected to.

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

> 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.[26]

The PLF briefs in *Sissel* and the amicus briefs ably explain the following principles regarding the original public meaning of this Clause. Additional analysis of several of these principles is contained in the remaining sections of this testimony.

- "Bills for raising Revenue" was understood broadly to include all "money bills" or other legislation to raise money for the general treasury, regardless of whether it has other purposes as well. That phrase should be read coextensively with the government's power to tax, except to exclude legislation that lowers taxes and two other narrow categories under existing court precedents.

- Under existing court precedents, 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 is not a real 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.

- Under existing court precedents, bills that impose a special assessment, user fee, or similar monetary exaction that are used 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. The existing cases that fall under this exception probably reach the right result, but there is a better constitutional rationale than that in some of the older cases—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.[27]

- The applicable rationale for the two seeming "exceptions" will not affect Sissel's challenge of the individual mandate tax, since it can satisfy neither exception 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's majority in *NFIB* clearly established, and the government seems now to accept, 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.

---

[26] U.S. Const. art. I § 7, cl. 1.

[27] 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.

- "Bills for raising Revenue" include *all* bills that raise revenue, regardless of whether doing so is their "primary purpose" or whether the bills are also regulatory in some sense, since almost all tax laws have regulatory purposes. Although the government misreads a passage from one case to reach a contrary conclusion, a "primary purpose" test was rejected by the delegates to the Constitutional Convention and expressly rejected by most states that ratified the Constitution in their state constitutions. It is inconceivable that the original public meaning of the Origination Clause could have included a "primary purpose" element. That 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 and contemporary commentary establish that the founding generation did not think they had erected an optional limitation so easily defeated with the right incantation.[28]

- 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.

- 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. I think even more is required than mere germaneness, including that it be limited to a correction or change that does not alter the tax scheme it amends in significant ways, but that is a debatable point that is not yet established in the legal precedents.

- The issue of whether a Senate amendment is germane to an actual House bill that raises revenue is justiciable in the courts.

- Whether an amendment is germane to another bill or provision will sometimes involve close and difficult questions. There are various plausible presumptions or ways for the House or the courts to deal with close cases, ranging from those that create a presumption for liberty to those that are more deferential to Congress, 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.

[28] The Amicus Brief for Rep. Franks, *et al.*, at 19-20, does an excellent job explaining how the government misreads the reasoning of the Court in *Munoz-Flores* to reach its "primary purpose" conclusion. The Court had held that the special assessment at issue was primarily for a dedicated fund, taking it out of the scope of the Origination Clause, and that any incidental payment to the general treasury was not the primary purpose of the act. That is very different from a bill that only generates revenue for the general treasury. No inquiry into that bill's purpose is required or appropriate, especially since almost every tax law will have some regulatory purpose in addition to raising revenue.

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

Before there can be a constitutional Senate amendment to a revenue bill, there must be an engrossed bill sent from the House that would "raise[] Revenue" within the meaning of the Origination Clause. The SMHOTA bill does not qualify. PLF has always raised this problem as one of two main arguments in Matt Sissel's challenge to the individual mandate tax.

In PLF's opening brief for Matt Sissel in the D.C. Circuit, however, my colleagues seemed to accept, perhaps for the sake of argument, that two sections of SMHOTA increased taxes to make the tax reductions in the main part of the bill budget neutral. Yet provisions that help with "budget neutrality" under congressional budget rules are not the same as whether the provisions at issue are taxes within the meaning of the Constitution. Upon closer reflection, and the suggestion from amici from this Subcommittee, we conclude that the assumption that some taxes were raised to offset tax reductions in PLF's opening brief was entirely unnecessary. This is because there is no provision of the SMHOTA bill that increases taxes.

The first four sections of SMHOTA include the title and tax reduction provisions. They would not raise revenue in any manner. 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.[29] Penalties for not filing tax returns are no different than 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, offsetting tax cuts in other portions of the bill under congressional budget laws, but it is not an increase in the tax rate or total revenue. A helpful analogy in the House amicus brief is a bill changing the tax filing date from April 15 to April 1 for income tax earned in the previous calendar year.[30] That may have a positive budgetary impact for a particular accounting cycle, but it would not be a tax increase for taxpayer for the period in which taxes were due.

Thus, there is no reasonable ground to argue that SMHOTA was a bill to raise revenue, even if dedicated government lawyers are paid to advance unreasonable arguments. The unreasonable argument conflates positive budget impacts with what constitutes a tax. Such clever lawyering sometimes helps with judges who are understandably reluctant to overturn the central provision of the President's signature legislative achievement. But if that were correct, then there would be no distinction between most bills that emerge from the House Budget Committee and those that emerge from the Ways and Means Committee for Origination Clause purposes. The elaborate jurisdictional distinctions that have developed between those

[29] Appellant's Opening Brief, at 15 (and cases cited therein); *see also Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2599 (2012) (*NFIB*).
[30] *See* Amicus Brief of Rep. Franks, *et al.*, at 24.

committees over the decades would be without a constitutional significance. This Subcommittee knows otherwise. Budget bills can affect all sorts of accounting formulas, but tax bills have a more direct impact on citizens outside the Beltway. And those tax bills that *increase* taxes raise special concerns. It is only those that originate in the House that the Senate can conceivably amend without running afoul of the Origination Clause.

Because SMHOTA was not a bill for raising revenue, the Senate could not constitutionally "amend" it, even with a germane amendment, to institute a single new tax. This fact independently renders the individual mandate tax unconstitutional.

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 *NFIB*. The Court in *Morrison* and *NFIB* properly dismissed an interpretation of the Commerce Clause that would render the enterprise of enumerated powers meaningless.[31]

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 government and the district court in the *Sissel* case seem to concede that a Senate "Amendment" creating new taxes must be germane to a House revenue bill, but their concept of germaneness renders it an empty semantic game. According to their reasoning, all that might be required is that both bills be about taxes, or perhaps both have the word "tax" in them. But that effectively is no different than eliminating the germaneness requirement altogether. There might be some House revenue bill that does not have the word "tax," but then the government would argue that both bills were about money or payments. 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 complete gut-and-substitute procedure employed by the Senate to pass the Senate Health Care Bill is not a constitutional "Amendment" within the meaning of the Origination Clause, even if any such gut-and-substitute device could be on other bills, because the complete

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

substitute was not remotely germane to the House SMHOTA bill. Returning to the hypotheticals in the previous section, how would any English speaker of the late Eighteenth Century to the present answer the ultimate question at issue in *Sissel* as applied to the following facts?

- If someone asked who "originated" the plan for the skyscraper on 222 Main Street, and especially the design of its innovative central support columns, no one would plausibly respond that it was the homeowner who transferred his property to the skyscraper developer if the original homeowner had no idea that his home was going to be gutted and replaced. Even if he knew it was a possibility his home would be destroyed, no one would say he originated the new plan of construction just because he somehow made it possible. But now imagine the homeowner knew that there was a restrictive covenant that ran with the property pursuant to which only modest modifications could be made to his existing (perhaps historic) structure. The former homeowner would rightly refute the notion that he originated the skyscraper construction in any sense just because he used to own 222 Main Street.

- If someone asked who "originated" the idea for the central plot developments 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 based on the content of the text, not its binding or numeric designation. In sum, the inquiry is over who originated the basic elements of the text (or tax scheme) at issue. 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. That could present an interesting discussion, but it would be irrelevant to answer the content-based question by the semantic game of searching for books whose titles have "West Side Story" in them.

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

The government's last, desperate line of defense for the unconstitutional individual mandate tax is to argue that the "germaneness" of a Senate Amendment to a House revenue raising bill (assuming SMHOTA was one, which it is not) is a political question that is committed to the political branches and would be improper for the courts to second-guess.

There are three problems with this last line of 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, perhaps for prudential reasons, as a constitutional barrier to judicial action. Lower courts after *Rainey* did not read that concern as a holding, prohibiting their consideration of the question. Indeed, many federal appellate courts have not only continued to examine the germaneness question but have expressly held it to be justiciable.[32]

[32] *See* Appellant's Opening Brief, at 23 (citing applicable cases).

Second, the government could advance an analogous "political question" 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. In short, the text of the Origination Clause logically requires an examination as to whether the tax at issue truly "originated" in the House and whether the Senate's purported "Amendment" is in a form that was permissible "on other Bills" at the time of the Framing. Fortunately, the Supreme Court appears mindful of the Clause's nature in its later Origination Clause decisions—and in protecting analogous individual rights.

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.[33] The "non-justiciability" argument was forcefully advanced by the government in *Munoz-Florez*, particularly with regard to the germaneness of the Senate amendment. The High Court itself 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, and the rest of its opinion left little doubt that all issues relating to a violation of the Origination Clause were justiciable: "We conclude initially that this case does not present a political question and therefore reject the Government's argument that the case is not justiciable." *Id.* at 387.

As for the concern expressed in *Rainey*, most House and Senate rules are not proscribed by the Constitution and most don't directly affect the individual rights of the people, and thus, the House and Senate are free to amend those types of rules almost any way they choose, so long as they don't violate due process or some other constitutional guarantee. The content or operation of these types of rules is not justiciable in the courts, pursuant to the power of each House to determine their own internal rules of procedure[34] and political question doctrine.

Thus, the House and Senate are free to create committees to consider legislation, assign the proportion of members from each party to such committees, and decide the jurisdiction thereof, as well as other parliamentary matters concerning floor debate and privileged motions. 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 bicameral passage and presentment to the President proscribed in Article I § 7, cls. 2-3.[35] A violation of those constitutional procedures for the passage of legislation is certainly justiciable.

[33] *United States v. Munoz-Flores*, 495 U.S. 385, 391, 393 (1990).
[34] U.S. Const. art. I § 5, cl. 2.
[35] *Chadha*, 462 U.S. at 951.

Nor can the House or Senate engage in artifices to avoid those constitutional requirements, especially when they are related to the enactment of legislation. The House may be able to pass a rule that dispenses with the third reading of a bill before floor debate or that "deems" it to have been so read, since that does not implicate any constitutional provision. It could even change the rules regarding germane amendments to non-revenue bills, departing from the long-standing precedents since the early republic. 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. Neither could the House pass a rule that allows only those members to vote on sustaining or overriding such a veto on their being in the majority of a "preliminary" voice vote. All kinds of evasions are possible, but the 2/3 requirement is a substantive one with a fixed constitutional 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, including an Origination Clause violation, if brought by a proper party.

Nevertheless, this House has a right and obligation to do so 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 notes, the result of the 2010 congressional elections is a perfect example of how the voters will react if the Origination Clause is not followed. 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 overwhelming number of 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, and primarily, 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 by the purported enactment of the bill by constitutional violation 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 from the President and both Houses of Congress that the suit was "meddling" in their business.

In the *Sissel* case, the government is arguing that whether the 2074-page Senate Health Care Bill was germane to the six-page House bill that had nothing to do with healthcare is not a question that the courts could answer, lest irreparable damage to our constitutional order result. 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 and independent court review. If the courts cannot pass on the germaneness of the Senate's substitution of the PPACA for the six-page veterans' preference home tax credit bill, then the Origination Clause is a dead letter.

Under the Obama administration's and district court's view, all that is necessary is that the House bill have the word "tax" in it in order for the Senate to originate any tax imaginable. Under a broad application of this harmful "leave it to us to decide what our powers are" argument, the courts also could not determine if a House bill that exclusively lowers taxes was indeed a bill to "raise Revenue" under the Origination Clause or not. But even assuming the

courts would be allowed to make the determination of whether the House bill raised revenue, the House Ways and Means Committee acts on several bills to raise taxes each session.

The reported statement from Senate Majority Leader Harry Reid's counsel[36] 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."[37] She seemed to think it would be easier to gut and strip a non-controversial tax bill. Hijacking a non-controversial bill, however, 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.

Should the Courts Defer to Congress In Close Cases?

The gut-and-complete-substitute process used to strip everything from a six-page bill *lowering* taxes for service members and substituting a 2074-page bill that transforms American healthcare and creates 17 new taxes is not a close case under the Origination Clause. Yet 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 suggests they should maintain a presumption in favor of individual liberty requiring the government to prove the constitutionality of the enactment that reasonably has been placed in doubt.
- The courts could show no deference or presumption either way.
- The courts could fashion a rule of 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, I believe the first or second alternative would have a firmer constitutional foundation.

The Seventeenth Amendment Does Not Affect the Origination Clause

Even the government that is employing other meritless arguments and defenses for the unconstitutional taxes originated in the Senate, including the individual mandate tax, does not argue that Seventeenth Amendment affects the Origination Clause. There are several reasons why that is so. The main one is that there is no textual support for such a reading. Second, direct election of Senators every six years for much larger electoral districts (except in a few states

[36] Amicus Brief of Rep. Franks, *et al.*, at 28-29 (quoting e-mail from Kate Leone, Senior Health Counsel, Office of Sen. Harry Reid).

where they are the same electoral size as a congressional district) does not alter the political reality that House members are more responsive to the people.

Finally, the Framers' assumption that the Senate would be made up of more "aristocratic" members appointed by state legislatures influenced other tasks and powers given to the Senate. No one would argue that the Seventeenth Amendment silently changed those provisions related to ratifying treaties or confirming judges, ambassadors, and other officers of the United States. But an analogy to the process of House impeachment and Senate trial is especially apt.

No one would seriously argue the passage of the Seventeenth Amendment altered the carefully proscribed procedures for House impeachment and Senate trial of appointed officials, even though the U.S. Senate assumed the role of the British House of Lords, a portion of which sometimes sat as England's highest court. Although U.S. Senators are now less "lordly," that does not change the carefully calibrated constitutional procedures for House impeachment and Senate trial.

Indeed, the Senate must await the articles of impeachment and House managers who will prosecute the impeachment, because the Senate is confined to the articles passed by the House. By analogy to a germane amendment to a House revenue bill, they may consider new evidence the House did not review, and they may vote down certain of the articles of impeachment, but they cannot introduce or consider new articles of impeachment for trial.

To take the analogy one step further, however, what the Senate did with the PPACA would be the equivalent of waiting for the House to introduce a single article of impeachment on an executive branch official (or perhaps even voting to impeach such official) for a petty crime and then take up the article, and through "amendment," try Judge Z on multiple articles of bribery, misappropriation of court funds, and other high crimes. No one would think that the House could "ratify" such a trial verdict by later enacting conforming articles of impeachment for Judge Z. The impeachment must originate in the House, and the trial on impeachment must be limited to those matters that originated in the House.

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.[38]

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 type of constitutional government it guarantees is far more important. We at PLF are grateful to Matt Sissel and our Foundation's private donors who make it possible to vindicate his fundamental rights. And we thank the Subcommittee for doing what it can to preserve, protect, and defend them as well.

---

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