

# THE ORIGINATION CLAUSE, THE AFFORDABLE CARE ACT, AND INDIRECT CONSTITUTIONAL VIOLATIONS

*Tessa L. Dysart\**

*“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.”*

*U.S. Const. art. I, § 7, cl. 1 (Origination Clause).*

*“As we have often noted, ‘[c]onstitutional rights would be of little value if they could be . . . indirectly denied.’ ”*

*United States Term Limits, Inc. v. Thornton,*  
514 U.S. 779, 829 (1995)

*The Supreme Court’s opinion in National Federation of Independent Business v. Sebelius, upholding the constitutionality of the Patient Protection and Affordable Care Act (ACA) as a permissible exercise of Congress’s taxing power rekindled an old question about the constitutionality of the Act: Was the Act unconstitutional under the Origination Clause? The bill that became the ACA, H.R. 3590, originated in the House as the Service Members Home Ownership Tax Act of 2009. It was gutted by the Senate and replaced with the ACA before being passed and sent back to the House for final passage.*

*The Supreme Court has heard very few cases on the Origination Clause, and Origination Clause challenges have met with little success. Most of these cases have developed over the questions of whether the bill is actually a revenue-raising bill that is constitutionally required to be originate in the House, and, if so, whether the Senate amendments were appropriate. But United States Term Limits v. Thornton provides another angle under which to examine the constitutionality of the ACA: an indirect violation of a constitutional prohibition. In this Article, I will provide an overview of the ACA’s passage and analyze it through the*

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\* Assistant Professor of Law, Regent University School of Law. J.D. Harvard Law School. This Article was presented at the 2013 SEALS conference as part of the New Scholars Workshop. The author thanks those involved with SEALS and her panel for the experience, including her mentor Brannon Denning. She also thanks Andrew Dysart, Andrew Karchner, John Tuskey, and James Duane for their helpful comments and suggestions and Leah Achor, Kathleen Knudsen, and Nicholas Lee for their research assistance and helpful feedback.

*lenses of traditional Origination Clause arguments and the Term Limits approach.*

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## INTRODUCTION

On March 23, 2010, President Barack Obama signed into law the Patient Protection and Affordable Care Act (ACA).<sup>1</sup> Several states quickly filed lawsuits after the signing, claiming that the Act, and particularly the individual mandate provision, was, among other things, beyond Congress's Commerce Clause power.<sup>2</sup> On June 28, 2012, the Court upheld the individual mandate's "financial penalty" on those who do not have health insurance as a permissible exercise of Congress's taxing power.<sup>3</sup> That decision raised a different question about the Act's

<sup>1</sup> Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 (codified as amended in scattered sections of 26 and 42 U.S.C.).

<sup>2</sup> Complaint at 16, *Florida v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256 (N.D. Fla. 2011) (No. 3:10-cv-00091-RV-EMT) [hereinafter *Florida Complaint*]; Complaint for Declaratory and Injunctive Relief at 5–6, *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010) (No. 3:10-CV- 00188-HEH).

<sup>3</sup> *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2608 (2012). In reaching his decision, Chief Justice John Roberts, in a portion of the opinion that the other Justices in the majority did not join, also determined that the Act was beyond Congress's Commerce Clause power. *Id.* at 2585–93. The four dissenting Justices, although they did not join any part of Chief Justice Roberts's decision, agreed that the Act was beyond Congress's commerce power. *Id.* at 2648. Since the Court's decision, there has been uncertainty over the precedential value of the portion of the Chief Justice's opinion discussing the Commerce Clause. See Timothy

passage: Was the Act unconstitutional under the Origination Clause?<sup>4</sup> H.R. 3590, the bill that became the ACA, originated in the House as the Service Members Home Ownership Tax Act of 2009.<sup>5</sup> The House passed the Service Members Home Ownership Tax Act of 2009 on October 8, 2009, sending it to the Senate.<sup>6</sup> The Senate deleted the entire text of the Service Members Home Ownership Tax Act of 2009, replaced it with the ACA, passed the bill, and sent it back to the House for final passage.<sup>7</sup> On October 11, 2012, Pacific Legal Foundation, one of the many organizations with active court challenges to the ACA on behalf of Matt Sissel, amended its complaint to allege that the ACA was unconstitutional under the Origination Clause,<sup>8</sup> which states, “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.”<sup>9</sup>

The Supreme Court has heard very few Origination Clause cases.<sup>10</sup> Its decisions have focused primarily on whether the challenged bill was,

Sandefur, *Ninth Circuit Asks: What Parts of the Obamacare Decision Are Binding?*, PLF LIBERTY BLOG (Aug. 10, 2012), <http://blog.pacificlegal.org/2012/ninth-circuit-asks-what-parts-of-the-obamacare-decision-are-binding/>; William A. Jacobson, *What If that Huge Conservative Doctrinal Achievement Was Mere Dicta?*, LEGAL INSURRECTION (June 29, 2012, 4:36 PM), <http://legalinsurrection.com/2012/06/what-if-that-huge-conservative-doctrinal-achievement-was-mere-dicta/>.

<sup>4</sup> Michael Patrick Leahy, *Justice Roberts Turns Obamacare into Origination Clause Shell Game*, BREITBART (July 1, 2012), <http://www.breitbart.com/big-government/2012/07/01/justice-roberts/>; Joseph E. Schmitz, *Challenge Obamacare Under “Origination Clause,”* NEWSMAX (July 10, 2012, 11:58 AM), <http://www.newsmax.com/TheWire/obamacare-healthcare-origination-clause/2012/07/10/id/444912>.

<sup>5</sup> 155 CONG. REC. H9729 (daily ed. Sept. 17, 2009); *Actions - H.R.3590 - 111th Congress (2009–2010): Patient Protection and Affordable Care Act*, CONGRESS.GOV, <http://beta.congress.gov/bill/111th-congress/house-bill/3590/actions?q=hr3590> (last visited Feb. 28, 2015) [hereinafter *ACA Legislative History*] (“Passed/agreed to in House . . . Passed/agreed to in Senate: Passed Senate with an amendment and an amendment to the Title by Yea-Nay Vote. 60–39.”).

<sup>6</sup> 155 CONG. REC. H10,554 (daily ed. Oct. 7, 2009); *ACA Legislative History*, *supra* note 5.

<sup>7</sup> 156 CONG. REC. H2153 (daily ed. Mar. 21, 2010); 155 CONG. REC. S13,891 (daily ed. Dec. 24, 2009); *ACA Legislative History*, *supra* note 5 (“Passed/agreed to in Senate: Passed Senate with an amendment and an amendment to the Title by Yea-Nay Vote. 60–39 . . . [T]he House agree to the Senate amendments . . . 219–212.”).

<sup>8</sup> Proposed Amended Complaint for Declaratory Judgment and Injunctive Relief at 10–12, *Sissel v. U.S. Dep’t of Health & Human Servs.*, 951 F. Supp. 2d 159 (D.D.C. 2013) (No. 1:10-CV-01263-BAH) [hereinafter *Sissel Amended Complaint*], *aff’d*, 760 F.3d 1 (D.C. Cir. 2014). Two plaintiffs in Texas filed another Origination Clause challenge in May 2013. Complaint for Declaratory and Injunctive Relief at 7–10, *Hotze v. Sebelius*, 991 F. Supp. 2d 864 (S.D. Tex. 2014) (No. 4:13-cv-01318). Other litigants have raised the origination issue in their cases as well. *See, e.g.*, *Ass’n of Am. Physicians & Surgeons v. Sebelius*, 746 F.3d 468 (D.C. Cir. 2014); *Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 87 n.3 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 683 (2013) (holding that the origination claim was waived because it was not initially raised in the district court or in plaintiff’s original briefing on appeal).

<sup>9</sup> U.S. CONST. art. I, § 7, cl. 1.

<sup>10</sup> Rebecca Kysar, *The “Shell Bill” Game: Avoidance and the Origination Clause*, 91 WASH. U. L. REV. 659, 673 (2014) (“The Supreme Court has spoken on the meaning of the

in fact, a bill for raising revenue under the Origination Clause.<sup>11</sup> Other cases have looked at the permissibility of Senate amendments to House revenue bills.<sup>12</sup> These two questions form the heart of Pacific Legal Foundation’s challenge to the ACA in *Sissel v. United States Department of Health and Human Services*.<sup>13</sup> There is, however, a third question to consider—a question that finds its foundation in a different line of cases. Even if Congress’s actions in passing the ACA met the technical requirements of the Origination Clause, is this process of passing bills—particularly the delete and replace<sup>14</sup> process used by the Senate—“an indirect attempt to accomplish what the Constitution prohibits [Congress] from accomplishing directly”?<sup>15</sup> This reasoning was important to the Court’s decision in *United States Term Limits v. Thornton*, which struck down the part of Arkansas’s Amendment 73 that, according to the majority, instituted term limits for members of Congress.<sup>16</sup> This reasoning has also appeared in other Supreme Court cases.<sup>17</sup> In this Article, I will explore whether the Court should hold the ACA unconstitutional under the same reasoning. Is the ACA an attempt to circumvent the Constitution and accomplish indirectly what the Constitution forbids the Senate from doing directly?

In Part I, I will provide a brief history of the ACA’s passage. In Part II, I will explore whether the ACA directly violates the Origination Clause by looking at the traditional questions raised by Origination Clause cases: (1) Is the ACA a bill for raising revenue? And (2) is the Senate permitted to completely substitute the text of a bill under the

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Origination Clause only a handful of times . . .”). For examples of the few cases regarding the Origination Clause that the Court has considered, see *United States v. Munoz-Flores*, 495 U.S. 385 (1990); *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 Nat’l Bank v. Nebeker*, 167 U.S. 196 (1897); *Lumberman’s Bank v. Huston*, 167 U.S. 203 (1897); *United States v. Norton*, 91 U.S. 566 (1875). As Professor Rebecca Kysar has pointed out, *United States v. Norton* is not technically an Origination Clause case, although it is often treated as one. Kysar, *supra*, at 674. Nonetheless, the Court in *Norton* did interpret the Clause, thus making the case useful. *Norton*, 91 U.S. at 568–69.

<sup>11</sup> See *Munoz-Flores*, 495 U.S. at 397–401; *Millard*, 202 U.S. at 436–37; *Twin City Nat’l Bank*, 167 U.S. at 202–03; *Lumberman’s Bank*, 167 U.S. at 203; *Norton*, 91 U.S. at 568–69.

<sup>12</sup> See *Rainey*, 232 U.S. at 317; *Flint*, 220 U.S. at 142–43.

<sup>13</sup> *Sissel Amended Complaint*, *supra* note 8, at 10–12.

<sup>14</sup> Traditionally, the process of using an amendment to completely replace the text of a bill is called “gut and amend.” California State Legislature, *Glossary of Legislative Terms*, CALIFORNIA STATE LEGISLATURE, <http://www.legislature.ca.gov/quicklinks/glossary.html> (last visited Feb. 28, 2015). The terms “delete and replace,” however, are more accurate in terms of what the legislative body is actually doing. Therefore, I will use the terms “delete and replace” rather than “gut and amend” throughout this Article.

<sup>15</sup> *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829 (1995).

<sup>16</sup> *Id.* at 829, 837.

<sup>17</sup> See, e.g., *Clinton v. City of New York*, 524 U.S. 417, 448–49 (1998); *Powell v. McCormack*, 395 U.S. 486, 547–48 (1969).

Origination Clause? Finally, in Part III, I will examine the Supreme Court's decisions addressing indirect constitutional violations and analyze why the passage of the ACA—even if it meets the requirements of the Court's existing Origination Clause jurisprudence—should not be permitted under the Origination Clause's history and purpose.

### I. THE ACA'S PASSAGE

Barack Obama was not the first president to promote national health care reform. In fact, although the proposed plans differ, prior Republican and Democratic presidents have proposed reforming health care at a national level.<sup>18</sup> Barack Obama, like Bill Clinton before him, made national health care reform an important part of his campaign.<sup>19</sup> On February 24, 2009, in his first remarks to a joint session of Congress, President Obama specifically discussed the need for national health care reform, stating that “the cost of our health care has weighed down our economy and the conscience of our nation long enough” and that the issue “cannot wait, it must not wait, and it will not wait another year.”<sup>20</sup> Just five months later, on July 14, 2009, America's Affordable Health Choices Act of 2009, H.R. 3200, was introduced in the House of Representatives.<sup>21</sup> The bill was considered in three House committees, but never voted on by the House.<sup>22</sup> Less than four months later, another bill, the Affordable Health Care for America Act, H.R. 3962, was introduced in the House on October 29, 2009.<sup>23</sup> The House passed this bill less than a week and a half later on November 7, 2009, by a vote of 220–215.<sup>24</sup>

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<sup>18</sup> Farah Stockman, Op-Ed, *Recalling the Nixon-Kennedy Health Plan*, BOSTON GLOBE, June 23, 2012, <http://www.bostonglobe.com/opinion/2012/06/22/stockman/bvg57mguQxOVpZMmB1Mg2N/story.html> (discussing Richard Nixon's efforts to reform health care); James P. Pfiffner, *President Clinton's Health Care Reform Proposals of 1994*, in TRIUMPHS AND TRAGEDIES OF THE MODERN PRESIDENCY: SEVENTY-SIX CASE STUDIES IN PRESIDENTIAL LEADERSHIP 69–71 (David M. Abshire ed., 2001).

<sup>19</sup> Barack Obama, Candidate for President of the United States, Acceptance Speech at the Democratic National Convention (Aug. 28, 2008), available at <http://millercenter.org/president/speeches/detail/4427>; Barack Obama, Candidate for President of the United States, Speech at Families USA Conference: The Time Has Come for Universal Health Care (Jan. 25, 2007), available at <http://obamaspeeches.com/097-The-Time-Has-Come-for-Universal-Health-Care-Obama-Speech.htm>; William Jefferson Clinton, President of the United States, Address on Health Care Reform (Sept. 22, 1993), available at <http://millercenter.org/president/speeches/detail/3926>.

<sup>20</sup> Barack Obama, President of the United States, Address to Joint Session of Congress (Feb. 24, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/Remarks-of-President-Barack-Obama-Address-to-Joint-Session-of-Congress](http://www.whitehouse.gov/the_press_office/Remarks-of-President-Barack-Obama-Address-to-Joint-Session-of-Congress).

<sup>21</sup> 155 CONG. REC. H8099 (daily ed. July 14, 2009). The bills discussed in this Article may not represent the totality of the health care reform bills considered by Congress, but they do represent some of the major proposals that were considered.

<sup>22</sup> 155 CONG. REC. H11,383 (daily ed. Oct. 14, 2009).

<sup>23</sup> 155 CONG. REC. H12,140 (daily ed. Oct. 29, 2009).

<sup>24</sup> 155 CONG. REC. H12,967–68 (daily ed. Nov. 7, 2009).

On the Senate side, two committees took the lead on health care reform. On July 15, 2009, the Senate Health, Education, Labor, and Pensions Committee approved along party lines a health care bill that had been released in draft form in June.<sup>25</sup> In the Senate Finance Committee, Senator Max Baucus released a draft version of his health care reform bill on September 16, 2009.<sup>26</sup> The draft bill was considered in Committee and formally introduced on October 19, 2009, as Senate Bill 1796.<sup>27</sup>

H.R. 3590, the bill that ultimately became the Patient Protection and Affordable Care Act, was introduced in the House on September 17, 2009, as the Service Members Home Ownership Tax Act of 2009.<sup>28</sup> The House unanimously approved H.R. 3590 on October 8, 2009.<sup>29</sup> As passed by the House, the six-page long bill permitted members of the military, the intelligence community, and the Foreign Service who had taken advantage of the first-time homeowners tax credit to sell their home within three years of purchase without a penalty.<sup>30</sup> It also extended by one year the availability of the first-time homeowners tax credit for persons who served at least ninety days outside of the United States on “qualified official extended duty” in the year 2009.<sup>31</sup> The remaining sections of the bill excluded from taxable income money received by certain individuals under the American Recovery and Reinvestment Act of 2009 “to offset the adverse effects on housing values that result[ed] from a military base realignment or closure”;<sup>32</sup> raised the penalty for not filing a partnership or S corporation return;<sup>33</sup> and increased for a few months corporate estimated tax payments.<sup>34</sup> Nothing in H.R. 3590, as originally passed by the House, mentioned anything relevant to health care or health insurance.

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<sup>25</sup> David M. Herszenhorn, *Senate Committee Approves Health Care Bill*, N.Y. TIMES, July 15, 2009, [http://thecaucus.blogs.nytimes.com/2009/07/15/senate-committee-approves-health-care-bill/?\\_r=0](http://thecaucus.blogs.nytimes.com/2009/07/15/senate-committee-approves-health-care-bill/?_r=0); Ezra Klein, *The Senate HELP Committee Releases (Most of) Its Health Reform Bill*, WASH. POST, June 9, 2009, [http://voices.washingtonpost.com/ezra-klein/2009/06/the\\_senate\\_help\\_committee\\_rele.html](http://voices.washingtonpost.com/ezra-klein/2009/06/the_senate_help_committee_rele.html).

<sup>26</sup> Press Release, Senate Finance Committee, Baucus Introduces Landmark Plan to Lower Health Care Costs, Provide Quality, Affordable Coverage (Sept. 16, 2009), available at <http://www.finance.senate.gov/newsroom/chairman/release/?id=4bed55c7-a06e-4a21-a798-2f830a31e0d0>.

<sup>27</sup> 155 CONG. REC. S10,520 (daily ed. Oct. 19, 2009).

<sup>28</sup> 155 CONG. REC. H9729 (daily ed. Sept. 17, 2009).

<sup>29</sup> 155 CONG. REC. H11,126 (daily ed. Oct. 8, 2009).

<sup>30</sup> Service Members Home Ownership Tax Act of 2009, H.R. 3590, 111th Cong. § 2(a) (2009); JOINT COMM. ON TAXATION, JCX-39-09, TECHNICAL EXPLANATION OF H.R. 3590, THE “SERVICE MEMBERS HOME OWNERSHIP TAX ACT OF 2009” SCHEDULED FOR CONSIDERATION BY THE HOUSE OF REPRESENTATIVES ON OCTOBER 7, 2009 (2009).

<sup>31</sup> H.R. 3590; JOINT COMM. ON TAXATION, *supra* note 30, at 4.

<sup>32</sup> H.R. 3590; JOINT COMM. ON TAXATION, *supra* note 30, at 5–6.

<sup>33</sup> H.R. 3590; JOINT COMM. ON TAXATION, *supra* note 30, at 7.

<sup>34</sup> H.R. 3590; JOINT COMM. ON TAXATION, *supra* note 30, at 9.

H.R. 3590 was received by the Senate on October 8, 2009.<sup>35</sup> On November 19, 2009, Senate Majority Leader Harry Reid announced the Senate's health care reform legislation, which had been crafted from the above mentioned Senate committee bills,<sup>36</sup> as a substitute to H.R. 3590, completely deleting the original bill's text and adding the ACA's text in its place.<sup>37</sup> By a party-line vote, the Senate first invoked cloture on the bill on November 21, 2009.<sup>38</sup> After considering amendments for over three weeks,<sup>39</sup> the Senate invoked cloture the final time on December 23, 2009,<sup>40</sup> and H.R. 3590 passed the Senate as amended on December 24, 2009, on a party-line vote.<sup>41</sup>

Although the health care bill that the House had passed in November 2009 differed from the Senate's version—most noticeably in the Senate bill's lack of a public health insurance option<sup>42</sup>—the House voted on March 21, 2010, to agree to the Senate amendments to H.R. 3590.<sup>43</sup> President Obama signed the bill into law two days later.<sup>44</sup> One of the factors prompting the House's vote was, undoubtedly, the Democrats' loss of a filibuster-proof majority in the Senate.<sup>45</sup> Following the 2008 election, the filling of vacancies caused by senators joining the administration, the April 2009 party switch of Pennsylvania Senator Arlen Specter, and Al Franken's official win of the contested Minnesota Senate race, the Senate Democrats had sixty votes in their caucus—a filibuster-proof majority.<sup>46</sup> On August 26, 2009, Massachusetts Senator Ted Ken-

<sup>35</sup> 155 CONG. REC. S10,327 (daily ed. Oct. 8, 2009).

<sup>36</sup> Ted Barrett et al., *Senate Leader Unveils \$849 Billion Health Care Bill*, CNN.COM (Nov. 19, 2009), <http://www.cnn.com/2009/POLITICS/11/18/health.care/>.

<sup>37</sup> U.S. SENATE REPUBLICAN POLICY COMM., LEGISLATIVE NOTICE: H.R. 3590: THE QUALITY, AFFORDABLE HEALTH CARE FOR ALL AMERICANS ACT 1–2 (Dec. 2, 2009).

<sup>38</sup> See 155 CONG. REC. S11,967 (daily ed. Nov. 21, 2009); see also *U.S. Senate Roll Call Votes 111th Congress—1st Session, On the Cloture Motion, H.R. 3590*, U.S. SENATE.GOV, [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=111&session=1&vote=00353#state](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=1&vote=00353#state) (last visited Feb. 28, 2015).

<sup>39</sup> 155 CONG. REC. S13,834 (daily ed. Dec. 23, 2009).

<sup>40</sup> *Id.*

<sup>41</sup> 155 CONG. REC. S13,891 (daily ed. Dec. 24, 2009); see also *U.S. Senate Roll Call Votes 111th Congress—1st Session, On the Passage of the Bill, H.R. 3590*, SENATE.GOV, [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=111&session=1&vote=00396#position](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=1&vote=00396#position) (last visited Mar. 7, 2015).

<sup>42</sup> *Public Option May Be Dropped from Final Health Care Bill*, CNN.COM (Dec. 28, 2009), <http://www.cnn.com/2009/POLITICS/12/28/health.care/index.html>.

<sup>43</sup> 156 CONG. REC. H1891 (daily ed. Mar. 21, 2010).

<sup>44</sup> See *Key Features of the Affordable Care Act*, HEALTHCARE.GOV, <http://www.healthcare.gov/law/timeline/index.html> (last visited Feb. 28, 2015).

<sup>45</sup> Robert Pear & David M. Herszenhorn, *Obama Hails Vote on Health Care as Answering "the Call of History,"* N.Y. TIMES, Mar. 21, 2010, <http://www.nytimes.com/2010/03/22/health/policy/22health.html?pagewanted=2>.

<sup>46</sup> Manu Raju & Josh Kraushaar, *Norm Coleman Concedes Minnesota Senate Race to Al Franken*, POLITICO (July 1, 2009), <http://www.politico.com/news/stories/0609/24383.html>. The two independent senators in the 111th Congress caucused with the Democrats. JENNIFER

nedy, a staunch proponent of health care reform, passed away.<sup>47</sup> Paul Kirk Jr., who had been selected to temporarily fill Senator Kennedy's seat,<sup>48</sup> voted for H.R. 3590, which allowed the Democrats to retain their filibuster-proof majority and invoke cloture as needed.<sup>49</sup> However, Republican Scott Brown won the January 19, 2010, Massachusetts special election to serve the remainder of Senator Kennedy's term.<sup>50</sup> Senator Brown's election, which deprived Democrats of their sixty-vote majority, was seen in political circles as a vote against health care, because the Democrats no longer had a filibuster-proof majority.<sup>51</sup> Senator Brown was sworn into office on February 4, 2010.<sup>52</sup> Thus, by March 2010, the House could not return an amended health care bill to the Senate for easy approval. Nor could it negotiate with the Senate over the differences between the House and Senate proposals, as any bill would not pass a cloture vote in the Senate.<sup>53</sup> As Representative Diana DeGette noted in 2013, "We had to take the Senate version of the health care bill."<sup>54</sup>

After its passage, the Act was challenged in court almost immediately by several states, individuals, and organizations.<sup>55</sup> The lawsuits, among other things, challenged Congress's constitutional power to enact

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E. MANNING, CONG. RESEARCH SERV., R40086, MEMBERSHIP OF THE 111TH CONGRESS: A PROFILE 1 (2010).

<sup>47</sup> Emily Smith, *Timeline of the Health Care Law*, CNN.COM (June 28, 2012), <http://www.cnn.com/2012/06/28/politics/supreme-court-health-timeline>.

<sup>48</sup> Dan Fletcher, *Paul Kirk Jr., Kennedy's Replacement*, TIME.COM (Sept. 24, 2009), <http://www.time.com/time/nation/article/0,8599,1925686,00.html>.

<sup>49</sup> 155 CONG. REC. S13,891(daily ed. Dec. 24, 2009).

<sup>50</sup> Matt Viser & Andrea Estes, *Big Win for Brown*, BOSTON.COM (Jan. 20, 2010), [http://www.boston.com/news/local/massachusetts/articles/2010/01/20/republican\\_trounces\\_coakley\\_for\\_senate\\_imperils\\_obama\\_health\\_plan/](http://www.boston.com/news/local/massachusetts/articles/2010/01/20/republican_trounces_coakley_for_senate_imperils_obama_health_plan/).

<sup>51</sup> *Id.*

<sup>52</sup> Z. Byron Wolf et al., *Scott Brown Sworn in as 41st GOP Senator, Says Stimulus "Did Not Create One New Job"*, ABC NEWS.COM (Feb. 4, 2010), <http://abcnews.go.com/Politics/scott-brown-sworn-washington-welcomes-newest-republican-senator/story?id=9748675&singlePage=true#Ubi6Mflkxvk>.

<sup>53</sup> See *Public Option May Be Dropped from Final Health Care Bill*, CNN.COM (Dec. 28, 2009), <http://www.cnn.com/2009/POLITICS/12/28/health.care/index.html> (discussing the plans for a House-Senate conference committee to "begin negotiations . . . on merging health care bills passed by the Democratic majorities in each chamber").

<sup>54</sup> Robert Pear, *Wrinkle in Health Law Vexes Lawmakers' Aides*, N.Y. TIMES, July 29, 2013, [http://www.nytimes.com/2013/07/30/us/politics/wrinkle-in-health-law-vexes-lawmakers-aides.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/07/30/us/politics/wrinkle-in-health-law-vexes-lawmakers-aides.html?pagewanted=all&_r=0).

<sup>55</sup> Starting March 23, 2010, twenty-six states joined to sue the federal government and challenge the ACA's constitutionality. See Florida Complaint, *supra* note 2, at 1-4. On July 26, 2010, Matt Sissel and the Pacific Legal Foundation challenged the ACA's constitutionality. See Sissel Amended Complaint, *supra* note 8, at 10. On March 26, 2010, the Association of American Physicians and Surgeons challenged the ACA's constitutionality. See Complaint at 1, Ass'n of Am. Physicians & Surgeons, Inc. v. Sebelius, 901 F. Supp. 2d 19 (D.D.C. 2012) (No. 1:10-CV-00499-RMC) [hereinafter Ass'n of Am. Physicians Complaint].

the ACA.<sup>56</sup> This was not a new challenge; during congressional deliberations on the bill, questions had been raised about its constitutionality.<sup>57</sup> Congress, in its legislative findings, attempted to justify the bill as a valid exercise of its Commerce Clause power.<sup>58</sup> Despite President Obama “absolutely reject[ing] [the] notion” that the individual mandate was a tax increase,<sup>59</sup> the government defended the individual mandate before the Supreme Court as being authorized independently by both the commerce and taxing powers.<sup>60</sup> In a decision that surprised many,<sup>61</sup> the Supreme Court upheld the individual mandate under Congress’s taxing power, with a majority of Justices making it clear that the mandate was not constitutional under Congress’s Commerce Power.<sup>62</sup> The Court’s decision, however, left undecided other questions about the ACA’s constitutionality—including whether the Act, with its individual mandate penalty now considered a tax, properly originated in the House of Representatives,<sup>63</sup> as required by Article I, Section 7 of the Constitution.<sup>64</sup>

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<sup>56</sup> See Florida Complaint, *supra* note 2, at 3–4; Ass’n of Am. Physicians Complaint, *supra* note 55, at 8–9, 13–14.

<sup>57</sup> 156 CONG. REC. H1901, H1903 (daily ed. Mar. 21, 2010) (statements of Rep. Young, and Rep. McClintock, respectively); see also 156 CONG. REC. H1829 (daily ed. Mar. 21, 2010) (statement of Rep. Poe); Walter Williams, *A Minority View: Constitutional Contempt*, TOWNHALL.COM (Nov. 11, 2009), [http://townhall.com/columnists/walterwilliams/2009/11/11/a\\_minority\\_view\\_constitutional\\_contempt/page/full](http://townhall.com/columnists/walterwilliams/2009/11/11/a_minority_view_constitutional_contempt/page/full).

<sup>58</sup> See 42 U.S.C. § 18091 (2012) (“(A) The requirement regulates activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased. . . . (B) Health insurance and health care services are a significant part of the national economy. . . . (E) The economy loses up to \$207,000,000,000 a year because of the poorer health and shorter lifespan of the uninsured. By significantly reducing the number of the uninsured, the requirement, together with the other provisions of this Act, will significantly reduce this economic cost. (F) The cost of providing uncompensated care to the uninsured was \$43,000,000,000 in 2008. . . . (G) 62 percent of all personal bankruptcies are caused in part by medical expenses. . . . (H) Under the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 et seq.), the Public Health Service Act (42 U.S.C. 201 et seq.), and this Act, the Federal Government has a significant role in regulating health insurance. The requirement is an essential part of this larger regulation of economic activity, and the absence of the requirement would undercut Federal regulation of the health insurance market.”).

<sup>59</sup> Jacqueline Klingebiel, *Obama: Mandate Is Not a Tax*, ABC NEWS.COM (Sept. 20, 2009), <http://abcnews.go.com/blogs/politics/2009/09/obama-mandate-is-not-a-tax/>.

<sup>60</sup> Brief for Petitioners at 21, 52, *Dep’t of Health & Human Servs. v. Florida*, 132 S. Ct. 604 (2012) (No. 11-398), available at [http://sblog.s3.amazonaws.com/wp-content/uploads/2012/01/11-398tsUnitedStates.filed\\_.pdf](http://sblog.s3.amazonaws.com/wp-content/uploads/2012/01/11-398tsUnitedStates.filed_.pdf).

<sup>61</sup> Anastasia Killian, *NFIB v. Sebelius: When Is a Tax Not a Tax, and When Is It?*, FORBES.COM (June 28, 2012), <http://www.forbes.com/sites/wlf/2012/06/28/nfib-v-sebelius-when-is-a-tax-not-a-tax-and-when-is-it/>.

<sup>62</sup> *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2587–91, 2594, 2600, 2608 (2012); *id.* at 2644–50 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

<sup>63</sup> See generally *id.*; Sissel Amended Complaint, *supra* note 8, at 6.

<sup>64</sup> U.S. CONST. art. 1, § 7.

## II. IS THE ACA A DIRECT ORIGINATION CLAUSE VIOLATION: TRADITIONAL ORIGINATION CLAUSE INQUIRIES

Only a handful of Origination Clause challenges have made it to the Supreme Court.<sup>65</sup> The disposition of those cases has rested on two key questions: (1) is the challenged act actually a “bill[ ] for raising [r]evenue”<sup>66</sup> that triggers the Origination Clause’s requirements;<sup>67</sup> and (2) were the Senate amendments, adding revenue-raising provisions to a House bill, permissible under the Origination Clause?<sup>68</sup> This Part will look at each of these questions with respect to the ACA.<sup>69</sup>

### A. *Is the ACA a Bill for Raising Revenue?*

While the Constitution requires “bills for raising [r]evenue” to originate in the House of Representatives, it gives no guidance as to what constitutes a bill for raising revenue.<sup>70</sup> The Supreme Court first interpreted the Origination Clause by analogy in the 1875 case *United States v. Norton*.<sup>71</sup> The Court noted that the Clause’s construction was “practically well settled by the uniform action of Congress,”<sup>72</sup> and “that construction” had defined the Clause as applying “to bills to levy taxes in the strict sense of the words, and has not been understood to extend to

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<sup>65</sup> See Kysar, *supra* note 10, at 673; *United States v. Munoz-Flores*, 495 U.S. 385 (1990); *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 Nat’l Bank v. Nebeker*, 167 U.S. 196 (1897); *Lumberman’s Bank v. Huston*, 167 U.S. 203 (1897); *United States v. Norton*, 91 U.S. 566 (1875) (however, see note 10 explaining that *Norton* is not technically an Origination Clause case).

<sup>66</sup> U.S. CONST. art. I, § 7.

<sup>67</sup> See *Munoz-Flores*, 495 U.S. 385; *Millard*, 202 U.S. 429; *Twin City Nat’l Bank*, 167 U.S. 196; *Lumberman’s Bank*, 167 U.S. 203; see also *Norton*, 91 U.S. 566.

<sup>68</sup> See *Rainey*, 232 U.S. 310; *Flint*, 220 U.S. 107.

<sup>69</sup> Pacific Legal Foundation, in its brief to the United States Court of Appeals for the District of Columbia Circuit, specifically states the disputed issue as whether the individual mandate violates the Origination Clause. Brief of Appellant at 1, *Sissel v. U.S. Dep’t of Health & Human Servs.*, 951 F. Supp. 2d 159 (D.D.C. 2013) (No. 1:10-CV-01263-BAH), *aff’d*, 760 F.3d 1 (D.C. Cir. 2014). However, as one of the amici pointed out, the Origination Clause applies to “discrete sections and amendments.” Amicus Curiae Brief of Ass’n of Am. Physicians & Surgeons in Support of Appellant and Reversal at 7, *Sissel v. U.S. Dep’t of Health & Human Servs.* No. 13-5202 (D.C. Cir. 2013) (citing *Twin City Nat’l Bank*, 167 U.S. at 203 (“There was no purpose by the act or by any of its provisions to raise revenue to be applied in meeting the expenses or obligations of the Government.”)). Although there were undoubtedly parts of the ACA that were not bills for raising revenue under the Origination Clause, and thus would not have needed to originate in the House, there are several provisions in addition to the individual mandate that could raise Origination Clause concerns. Therefore, I will use the broader term ACA in this article.

<sup>70</sup> JAMES V. SATURNO, CONG. RESEARCH SERV., RL31399, THE ORIGINATION CLAUSE OF THE U.S. CONSTITUTION: INTERPRETATION AND ENFORCEMENT 3 (2011).

<sup>71</sup> *Norton*, 91 U.S. 566; see also Kysar, *supra* note 10, at 674.

<sup>72</sup> *Norton*, 91 U.S. at 569.

bills for other purposes which incidentally create revenue.’”<sup>73</sup> This understanding was affirmed, according to the Court, by an 1813 circuit decision by Justice Story in which he interpreted the term “revenue laws” in an act to mean “such laws as are made for the direct and avowed purpose for creating and securing revenue or public funds for the service of the government,” but excluded laws “whose collateral and indirect operation . . . within the scope of the provision” may “possibly conduce to the public or fiscal wealth.”<sup>74</sup>

Applying these principles in later cases, the Court held in *Twin City National Bank v. Nebeker*<sup>75</sup> that an act creating a national currency secured by U.S. bonds, while at the same time imposing a tax on certain bank notes, was not a bill for raising revenue because tax went to “effectually accomplishing the great object of giving to the people a currency,” rather than to “raise revenue to be applied in meeting the expenses or obligations of the Government.”<sup>76</sup> The money was designed to support the currency program and did not go into the general treasury.<sup>77</sup>

Likewise, in *Millard v. Roberts*,<sup>78</sup> the Court upheld against an Origination Clause challenge taxes an act imposed for improving railroads and building a railroad station in the District of Columbia because the taxes imposed by the act were “but means to the purposes provided by the act,” with the money going to the railroad companies, not to the general treasury.<sup>79</sup> Combined, these decisions appear to define a bill for raising revenue as one that raises funds for the general expenses of government, not for specific projects. A decision of the U.S. Circuit Court for the Southern District of New York, in holding that a raise in postal rates was not a bill for raising revenue, also demonstrated this principle:

Certain legislative measures are unmistakably bills for raising revenue. These impose taxes upon the people, either directly or indirectly, or lay duties, imposts or excises, for the use of the government, and give to the persons from whom the money is exacted no equivalent in return, unless in the enjoyment, in common with the rest of the citizens of the benefit of good government. It is this feature which characterizes bills for raising revenue.

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<sup>73</sup> *Id.* (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 877, 880 (1833)).

<sup>74</sup> *United States v. Mayo*, 26 F. Cas. 1230, 1231 (C.C.D. Mass. 1813) (No. 15,755); *see also Norton*, 91 U.S. at 569.

<sup>75</sup> *Twin City Nat’l Bank v. Nebeker*, 167 U.S. 196 (1897).

<sup>76</sup> *Id.* at 203.

<sup>77</sup> *Id.* at 198–99, 203; *see also Kysar*, *supra* note 10, at 675.

<sup>78</sup> *Millard v. Roberts*, 202 U.S. 429 (1906).

<sup>79</sup> *Id.* at 437.

They draw money from the citizen; they give no direct equivalent in return.<sup>80</sup>

The reason for treating bills for raising revenue differently and requiring them to originate in the House, said the court, was because members of the House were “immediate[ly] responsib[le] to their constituents” and “their jealous regard for the pecuniary interests of the people, it was supposed, would render them especially watchful in the protection of those whom they represented.”<sup>81</sup>

More recently, in *United States v. Munoz-Flores*,<sup>82</sup> the Court affirmed its past precedents, noting that statutes that create governmental programs and raise revenue to support those programs are not bills for raising revenue.<sup>83</sup> Rather, that definition is reserved for bills that “raise[ ] revenue to support Government generally.”<sup>84</sup> In analyzing the program at question in that case—a requirement that courts impose a special assessment on persons convicted of federal misdemeanors, to be deposited into the Crime Victims Fund<sup>85</sup>—the Court said that Congress “anticipated that ‘substantial amounts [would] not result’ from that source of funds.”<sup>86</sup> While any excess from the Crime Victims Fund would go into the general treasury, the revenues from the special assessment made up only four percent of the Crime Victims Fund, and Congress did not anticipate, nor did there actually materialize, any sort of substantial excess from the Fund.<sup>87</sup>

Given the Supreme Court’s precedents, would the ACA fall under the definition of a “bill for raising revenue”? In *National Federation of Independent Business v. Sebelius (NFIB)*, both the Government’s brief and the Court’s opinion recognized that the individual mandate provision of the ACA would raise significant revenues—approximately \$4 billion a year starting in 2017,<sup>88</sup> and the money would go into the general treasury.<sup>89</sup> Additionally, the Treasury Inspector General for Tax Adminis-

<sup>80</sup> *United States ex rel. Michels v. James*, 26 F. Cas. 577, 578 (C.C.S.D.N.Y. 1875) (No. 15,464).

<sup>81</sup> *Id.*

<sup>82</sup> *United States v. Munoz-Flores*, 495 U.S. 385 (1990).

<sup>83</sup> *Id.* at 398.

<sup>84</sup> *Id.* In *United States v. Munoz-Flores*, the Court indicated, in response to an argument raised by Munoz-Flores, that too much attenuation between a payor and a program may factor into whether a particular bill is a revenue-raising bill. *Id.* at 408 n.7.

<sup>85</sup> *Id.* at 387, 398.

<sup>86</sup> *Id.* at 399 (alteration in original) (quoting S. REP. NO. 98-497, at 13–14 (1984)).

<sup>87</sup> *Id.*

<sup>88</sup> *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2608 (2012); see also Brief for Petitioners at 54, *Dep’t of Health and Human Servs. v. Florida*, 132 S. Ct. 604 (2012) (No. 11-398).

<sup>89</sup> *Sebelius*, 132 S. Ct. at 2594 (“The ‘[s]hared responsibility payment,’ as the statute entitles it, is paid into the Treasury by ‘taxpayer[s]’ when they file their tax returns.” (alteration in original) (citing 26 U.S.C. § 5000A(b))).

tration stated that the ACA<sup>90</sup> includes “\$438 billion worth of revenue provisions in the form of new taxes and fees”<sup>91</sup> and amounts to “the largest set of tax law changes in 20 years.”<sup>92</sup> A 2012 letter from the Congressional Budget Office to Speaker of the House John Boehner on how proposed legislation to repeal the ACA<sup>93</sup> would affect government spending and revenue noted that the following revenue losses over the ten year period of 2013 to 2022 if the ACA were repealed: \$55 billion for the individual mandate penalty; \$117 billion for the employer mandate penalty; \$111 billion for the “excise tax on high-premium insurance plans”; \$223 billion in other changes on tax revenues mostly associated with “shifts in the mix of taxable and nontaxable compensation”; \$318 billion from the Hospital Insurance payroll tax rate hike; \$102 billion from the fee on health insurance providers; \$34 billion for a fee on certain drug manufacturers and importers; \$29 billion for a fee on certain medical device manufacturers and importers; and \$24 billion for repealing the limit on pre-tax contributions to flexible spending accounts.<sup>94</sup>

Despite recognizing the revenue aspects of the individual mandate in its briefing before the Supreme Court,<sup>95</sup> in its motion to dismiss in the Pacific Legal Foundation case, and in its appellate briefing, the Government asserted that the ACA was not a bill for raising revenue because “the Origination Clause applies only if generating revenue is the legislation’s key purpose.”<sup>96</sup> The key to this argument was the Government’s attempt to draw a clear distinction between the taxing power, which permits Congress to “lay and collect Taxes, Duties, Imposts and Excises,”<sup>97</sup>

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<sup>90</sup> In writing its report and for purposes of the numbers provided in the report, the Treasury Inspector General for Tax Administration looked at both H.R. 3590 and the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, referring to the two acts collectively as the “ACA.” TREASURY INSPECTOR GENERAL FOR TAX ADMIN., 2011-20-105, THE MODERNIZATION AND INFORMATION TECHNOLOGY SERVICES ORGANIZATION IS EFFECTIVELY PLANNING FOR THE IMPLEMENTATION OF THE AFFORDABLE CARE ACT 1 (2011).

<sup>91</sup> TREASURY INSPECTOR GENERAL FOR TAX ADMIN., *supra* note 90, at 1.

<sup>92</sup> *Id.*

<sup>93</sup> For purposes of the letter and the numbers provided in the letter, the Congressional Budget Office looked at both H.R. 3590 and the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, referring to the two acts collectively as the “ACA.” Letter from Douglas W. Elmendorf, Director, Congressional Budget Office, to John Boehner, Speaker of the House of Representatives, 1 n.1 (July 24, 2012), available at <http://cbo.gov/sites/default/files/cbofiles/attachments/43471-hr6079.pdf>.

<sup>94</sup> Letter from Douglas W. Elmendorf, *supra* note 93, at 9–10, 17.

<sup>95</sup> Brief for Petitioners, *supra* note 88, at 52–56.

<sup>96</sup> Defendants’ Motion to Dismiss Plaintiff’s Amended Complaint at 7, *Sissel v. U.S. Dep’t of Health & Human Servs.*, 951 F. Supp. 2d 159 (D.D.C. 2013) (No. 1:10-CV-01263-BAH) [hereinafter *Sissel Defendant Motion to Dismiss*], *aff’d*, 760 F.3d 1 (D.C. Cir. 2014). The Government raised a similar argument before the District of Columbia Circuit in its appellate brief. Brief of Appellees at 9–14, *Sissel v. U.S. Dep’t of Health & Human Servs.*, 760 F.3d 1 (D.C. Cir. 2014) (No. 13-5202).

<sup>97</sup> U.S. CONST. art. I, § 8.

and the Origination Clause, which applies to “[b]ills for raising [r]evenue.”<sup>98</sup> Therefore, even bills enacted pursuant to Congress’s power to tax under the Spending Clause need not originate in the House if raising revenue was “incidental to the overall purpose of the statute.”<sup>99</sup> According to the Government, the purpose of the ACA was to “improve the nation’s health care system by reforming insurance markets, reducing the number of Americans without health coverage, and controlling costs.”<sup>100</sup> Thus, Congress did not design the revenue generating provisions in an attempt to meet governmental expenses; rather, the provisions were designed to accomplish the ACA’s purposes.<sup>101</sup> Furthermore, the Government pointed to the Supreme Court’s decision in *NFIB*, in which the Court stated, “[a]lthough the payment will raise considerable revenue, it is plainly designed to expand health insurance coverage.”<sup>102</sup>

The Government’s argument, however, rests on an overly broad reading of the Supreme Court’s Origination Clause decisions. The Supreme Court never stated that generating revenue must be the “key purpose” of the challenged act; rather, it pointed out that the Origination Clause does not apply to bills that “incidentally” raise revenue.<sup>103</sup> The Court has further clarified, as shown by *Twin City National Bank v. Nebeker*, *Millard v. Roberts*, and *United States v. Munoz-Flores*, that the fact that a tax goes into the general treasury signifies that it does not “incidentally” raise revenue.<sup>104</sup> The individual mandate and other revenue-raising provisions of the ACA are not incidental or insubstantial; rather, the provisions raise significant revenue for the Government, amount to significant changes to the tax code, and fund the general treasury.<sup>105</sup>

Additionally, if a particular act is only deemed to be within Congress’s power to pass because it was passed under the taxing power, then the argument could be made that the purpose of the act was to create revenue and that the revenue-raising provisions are not “incidental” to the bill.<sup>106</sup> Because the Supreme Court held that the individual mandate

<sup>98</sup> *Id.* § 7; Sissel Defendant Motion to Dismiss, *supra* note 96, at 8.

<sup>99</sup> Sissel Defendant Motion to Dismiss, *supra* note 96, at 8.

<sup>100</sup> *Id.* at 9–10.

<sup>101</sup> *Id.* at 9.

<sup>102</sup> *Id.* (alteration in original).

<sup>103</sup> *United States v. Norton*, 91 U.S. 566, 569 (1875).

<sup>104</sup> See *supra* notes 71–87 and accompanying text; see also Kysar, *supra* note 10, at 674. However, there was the possibility in *Munoz-Flores* of a small amount of money going into the General Treasury, and that program was still considered “incidental.” See *United States v. Munoz-Flores*, 495 U.S. 385, 399 (1990).

<sup>105</sup> See *supra* notes 88–94 and accompanying text.

<sup>106</sup> Plaintiff Matt Sissel’s Opposition to Motion to Dismiss at 14–19, *Sissel v. U.S. Dep’t of Health & Human Servs.*, 951 F. Supp. 2d 159 (D.D.C. 2013) (No. 1:10-CV-01263-BAH) [hereinafter *Sissel Opposition to Motion to Dismiss*], *aff’d*, 760 F.3d 1 (D.C. Cir. 2014);

may only be justified as a valid use of Congress's taxing power as opposed to any other congressional power under Article I, Section 8 of the Constitution, the purpose of at least part of the ACA must be to create revenue.<sup>107</sup>

This appears to be the argument that Pacific Legal Foundation made in its opposition to the motion to dismiss in *Sissel v. United States Department of Health and Human Services*.<sup>108</sup> According to Pacific Legal Foundation, “[W]here a tax is imposed only as an exercise of the tax[ing power], and not as an adjunct to a regulation of commerce, or the exercise of some other enumerated power, then it is a tax for raising revenue . . . .”<sup>109</sup> Thus, there are two classes of tax laws under the Origination Clause—those that raise revenue and must originate in the House, and “those that are ‘bills for other purposes which may incidentally create revenue.’”<sup>110</sup> This second group of laws includes those in which Congress passes a tax, penalty, or fee as a means to “enforce a statute passed under *some other enumerated power*.”<sup>111</sup> Pacific Legal Foundation cited several cases as examples of this second type of law, including *Twin City National Bank v. Nebeker* (passed pursuant to Congress's interstate commerce power),<sup>112</sup> *United States v. Norton* (also passed pursuant to Congress's commerce power),<sup>113</sup> *Millard v. Roberts* (passed pursuant to Congress's power over the District of Columbia),<sup>114</sup> and *Munoz-Flores v. United States* (part of Congress's power to control practice and procedure in federal courts, which is incidental to its power to create lower federal courts under Article III).<sup>115</sup>

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Timothy Sandefur, *So It's a Tax, Now What?: Some of the Problems Remaining After NFIB v. Sebelius*, 17 TEX. REV. L. & POL. 203, 232–34 (2013).

<sup>107</sup> Sandefur, *supra* note 106, at 232–34.

<sup>108</sup> Sissel Opposition to Motion to Dismiss, *supra* note 106, at 14–19; *see also* Sandefur, *supra* note 106, at 232–34.

<sup>109</sup> Sissel Opposition to Motion to Dismiss, *supra* note 106, at 15.

<sup>110</sup> *Id.* at 14 (quoting *Twin City Nat'l Bank v. Nebeker*, 167 U.S. 196, 202 (1897)).

<sup>111</sup> *Id.*

<sup>112</sup> *Twin City Nat'l Bank*, 167 U.S. 196; Sissel Opposition to Motion to Dismiss, *supra* note 106, at 15.

<sup>113</sup> *United States v. Norton*, 91 U.S. 566 (1875); Sissel Opposition to Motion to Dismiss, *supra* note 106, at 15.

<sup>114</sup> *Millard v. Roberts*, 202 U.S. 429 (1906); Sissel Opposition to Motion to Dismiss, *supra* note 106, at 15.

<sup>115</sup> *United States v. Munoz-Flores*, 495 U.S. 385, 398 (1990). Pacific Legal Foundation claims that the provision in *Munoz-Flores* was enacted pursuant to Congress's “law-enforcement powers.” Sissel Opposition to Motion to Dismiss, *supra* note 106, at 15. However, I do not agree that the Constitution gives to Congress a general “law-enforcement power.” In their corrected reply brief before the Court of Appeals for the District of Columbia Circuit, Pacific Legal Foundation states that the program authorized in *Munoz-Flores* was enacted pursuant to Congress's Commerce Clause power. Corrected Reply Brief of Appellant at 7, *Sissel v. U.S. Dep't of Health & Human Servs.*, 951 F. Supp. 2d 159 (D.D.C. 2013) (No. 1:10-CV-01263-BAH), *aff'd*, 760 F.3d 1 (D.C. Cir. 2014).

Lower federal court opinions also confirm this point. A federal district court, in upholding federal milk price support systems, noted that the Origination Clause “does not invalidate those revenue raising ‘impositions made incidentally under the commerce clause . . . , as a means of constraining and regulating.’”<sup>116</sup> Similarly, the Fourth Circuit also upheld the milk price support system, explaining that assessments are a permissible way to regulate commerce.<sup>117</sup> Because the “clear language and structure” of the amendment authorizing the collection had the primary purpose of regulating commerce, the program was constitutionally permitted under the commerce power, not the taxing power.<sup>118</sup> The Sixth Circuit held penalty provisions under the Agriculture Adjustment Act of 1938 to be a valid exercise of Congress’s commerce power, noting that a test for determining when Congress was using its commerce or taxing power was

to view the objects and purposes of the statute as a whole and if from such examination it is concluded that revenue is the primary purpose and regulation merely incidental, the imposition is a tax and is controlled by the taxing provisions of the Constitution. Conversely, if regulation is the primary purpose of the statute, the mere fact that incidentally revenue is also obtained does not make the imposition a tax, but a sanction imposed for the purpose of making effective the congressional enactment.<sup>119</sup>

All of these cases draw a distinction between acts passed for a certain regulatory purpose and supported by Congress’s Commerce Power, and acts passed pursuant to Congress’s taxing power.<sup>120</sup>

The fact that the ACA has some sort of regulatory effect—encouraging individuals to maintain qualifying health insurance—does not prevent it from being a tax passed pursuant to Congress’s taxing power.<sup>121</sup> The Supreme Court has made clear that all taxes are, to some degree, regulatory in that they “interpose[ ] an economic impediment to the activity taxed as compared with others not taxed.”<sup>122</sup> However,

[A] tax is not any the less a tax because it has a regulatory effect . . . and it has long been established that an

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<sup>116</sup> *Mulroy v. Block*, 569 F. Supp. 256, 265 (N.D.N.Y. 1983) (quoting *United States v. Stangland*, 242 F.2d 843, 848 (7th Cir. 1957)).

<sup>117</sup> *South Carolina ex rel. Tindal v. Block*, 717 F.2d 874, 887 (4th Cir. 1983).

<sup>118</sup> *Id.* at 887–88.

<sup>119</sup> *Rodgers v. United States*, 138 F.2d 992, 994 (6th Cir. 1943).

<sup>120</sup> See Sandefur, *supra* note 106, at 232–34.

<sup>121</sup> See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2596 (2012).

<sup>122</sup> *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937).

Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed.<sup>123</sup>

Congress's designation of the challenged provision as a tax is not even necessary for a particular act to be deemed a valid exercise of Congress's taxing power.<sup>124</sup> Furthermore, as Chief Justice Roberts noted in *NFIB*, the individual mandate provision in the ACA "looks like a tax in many respects"—it is codified in the Internal Revenue Code and collected by the IRS; it is paid by taxpayers when they file their income tax returns; it does not apply to people whose household income is too low to meet the IRS's filing threshold; and the payment amount is determined by tax-related factors like "taxable income, number of dependents, and joint filing status."<sup>125</sup>

The Government's attempt to distinguish between acts passed pursuant to Congress's taxing power and bills for raising revenue under the Origination Clause does not change this analysis.<sup>126</sup> When one examines the meaning of the words "revenue" and "tax," this supposed distinction between the scope of the taxing power and the Origination Clause seems a bit forced. Although James Madison was not a proponent of the Origination Clause,<sup>127</sup> he made clear in Federalist 58 that taxes must originate in the House of Representatives, explaining that it was the House of Representatives that

alone can propose, the supplies requisite for the support of the government. They, in a word, hold the purse . . . . 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.<sup>128</sup>

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<sup>123</sup> *Id.*; see also *Sebelius*, 132 S. Ct. at 2596 ("Although the payment will raise considerable revenue, it is plainly designed to expand health insurance coverage. But taxes that seek to influence conduct are nothing new. Some of our earliest federal taxes sought to deter the purchase of imported manufactured goods in order to foster the growth of domestic industry.").

<sup>124</sup> *Sebelius*, 132 S. Ct. at 2594–95.

<sup>125</sup> *Id.* at 2594.

<sup>126</sup> Defendants' Reply Memorandum in Support of Motion to Dismiss Plaintiff's Amended Complaint at 7–8, *Sissel v. U.S. Dep't of Health & Human Servs.*, 951 F. Supp. 2d 159 (D.D.C. 2013) (No. 1:10-CV-01263-BAH) [hereinafter *Sissel Defendant Reply Memorandum*], *aff'd*, 760 F.3d 1 (D.C. Cir. 2014).

<sup>127</sup> See *infra* note 266 and accompanying text.

<sup>128</sup> THE FEDERALIST NO. 58 (James Madison), available at [http://thomas.loc.gov/home/histdox/fed\\_58.html](http://thomas.loc.gov/home/histdox/fed_58.html).

Additionally, although not contemporaneous with the founding, Webster's 1828 dictionary defined "revenue" as including "[t]he annual produce of taxes, excise, customs, duties, rents, [etc.] which a nation or state collects and receives into the treasury for public use."<sup>129</sup> "Tax" was defined in part as a noun meaning

[a] rate or sum of money assessed on the person or property of a citizen by government, for the use of the nation or state. . . . *Tax* is a term of general import, including almost every species of imposition on persons or property for supplying the public treasury, as tolls, tribute, subsidy, excise, impost, or customs. But more generally, *tax* is limited to the sum laid upon polls, lands, houses, horses, cattle, professions and occupations.<sup>130</sup>

As a verb, "tax" was defined as "[t]o lay, impose or assess upon citizens a certain sum of money or amount of property, to be paid to the public treasury, or to the treasury of a corporation or company, to defray the expenses of the government or corporation, [etc.]."<sup>131</sup> An even later source, the first edition of Black's Law Dictionary, defined "revenue" this way: "As applied to the income of a government, . . . [as] a broad and general term, including all public moneys which the state collects and receives, from whatever source and in whatever manner."<sup>132</sup> Black's defined "taxation" as "[t]he imposition of a tax; the act or process of imposing and levying a pecuniary charge or enforced contribution, . . . for the purpose of providing revenue for the maintenance and expenses of government."<sup>133</sup> These definitions seem to comport with the argument that bills passed under Congress's taxing power are bills for raising revenue.

Finally, this view that bills passed under Congress's taxing power are bills for raising revenue was also expressed in a 1905 debate over a Senate bill imposing a tax on certain bonds to be paid by banking associations, apparently to help pay to build the Panama Canal.<sup>134</sup> In the House, the provision was challenged as violating the Origination Clause.<sup>135</sup> The House passed its own bill, and a conference committee

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<sup>129</sup> 2 WEBSTER'S DICTIONARY 58 (1st ed. 1828), available at <http://archive.org/stream/americanfictiona02websrich#page/n476/mode/1up>.

<sup>130</sup> *Id.* at 90.

<sup>131</sup> *Id.*

<sup>132</sup> BLACK'S LAW DICTIONARY 1040 (1st ed. 1891), available at <http://blacks.worldfree mansociety.org/1/R/r-1040.jpg>.

<sup>133</sup> *Id.* at 1154.

<sup>134</sup> 2 ASHER C. HINDS, HIND'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 1494 (Government Printing Office 1907).

<sup>135</sup> *Id.*

was formed.<sup>136</sup> In arguing that the Senate bill was not a bill for raising revenue, Wisconsin Senator James C. Spooner,<sup>137</sup> an attorney who had turned down the position of Attorney General in President McKinley's administration,<sup>138</sup> stated that the term "revenue laws" "embraces clearly all bills passed in the exercise of the taxing power . . . for the purpose of raising money for the support of the Government."<sup>139</sup> However, he said, the definition did not include, nor was it intended to include, "bills passed in the exercise of constitutional powers other than the taxing power, even if they operated to raise revenue, or even if they imposed incidentally a tax or taxes to secure the more efficient and successful exercise of the power."<sup>140</sup>

The district court in *Pacific Legal Foundation's* challenge rejected the argument that the ACA was a revenue-raising bill, finding the individual mandate to be designed for the purpose of expanding health care coverage; thus, any revenue raised was "merely incidental."<sup>141</sup> Although the court recognized that the individual mandate revenues "do not support a 'particular governmental program,'" the court said that the revenues were not raised to generally support the government, as the government would have preferred to raise zero revenues under the individual mandate and instead obtain universal health insurance coverage.<sup>142</sup> The United States Court of Appeals for the District of Columbia Circuit agreed, finding that the purpose of the statute was to increase health care coverage and not to raise revenue, and that any revenue raised is incidental to the ACA's primary purpose.<sup>143</sup> Whether the Supreme Court will formally adopt this argument, however, is another matter. Its opinions seem to focus on the destination of the funds in ascertaining the purpose of the particular tax.<sup>144</sup> Additionally, its opinions and those of lower courts seem to recognize a dichotomy between regulatory penalties and fees enacted pursuant to some other congressional power (often the Commerce Clause), and the power to enact a tax under Congress's taxing power.<sup>145</sup> If the Court follows this reasoning, then the ACA would be a bill for raising revenue. However, the Court's track record in Origination Clause cases has been to narrowly interpret

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<sup>136</sup> *Id.* §§ 1489, 1494.

<sup>137</sup> *Id.*

<sup>138</sup> *Spooner, John Coit*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=S000741> (last visited Feb. 28, 2015).

<sup>139</sup> 2 HINDS, *supra* note 134, §§ 1489, 1494.

<sup>140</sup> *Id.* §§ 1489, 1494.

<sup>141</sup> *Sissel v. U.S. Dep't of Health & Human Servs.*, 951 F. Supp. 2d 159, 167–170 (D.D.C. 2013), *aff'd*, 760 F.3d 1 (D.C. Cir. 2014).

<sup>142</sup> *Id.* at 168.

<sup>143</sup> *Sissel v. U.S. Dep't of Health & Human Servs.*, 760 F.3d 1, 8–9 (D.C. Cir. 2014).

<sup>144</sup> *See infra* notes 75–94 and accompanying text.

<sup>145</sup> *See infra* notes 107–116 and accompanying text.

the Origination Clause, so it seems unlikely that the Court would change its approach now. Furthermore, even if the Court did recognize the ACA as a bill for raising revenue under this or another theory, the Government's argument is that the ACA originated in the House.<sup>146</sup> This argument raises the second important question for direct Origination Clause inquiries—what is the scope of the Senate's power to add revenue-raising provisions by amendment?

*B. Can the Senate Add Revenue Provisions to a House Bill Under the Origination Clause?*

A second often-litigated Origination Clause question is the scope of the Senate's power to amend House revenue bills or even to add revenue provisions to properly-passed House bills. Although early drafts of the Origination Clause prohibited the Senate from amending revenue-raising bills,<sup>147</sup> the final version of the Clause that was ratified in the Constitution permits the Senate to "propose or concur with Amendments as on other Bills."<sup>148</sup> While this may seem to be a very broad power that would permit any type of amendment, the Supreme Court has read a few restrictions into the Senate's amendment power under the Origination Clause.

In *Flint v. Stone*,<sup>149</sup> the Supreme Court held that a Senate amendment replacing an inheritance tax in a House bill with a corporation tax did not violate the Origination Clause.<sup>150</sup> The Court simply noted that the bill "properly originated in the House" and that "[t]he amendment was germane to the subject-matter of the bill, and not beyond the power of the Senate to propose."<sup>151</sup> A few years later in *Rainey v. United States*,<sup>152</sup> the Court upheld a tax added by the Senate to a House bill because the provision was added "as an amendment to a bill for raising revenue which originated in the House."<sup>153</sup> Despite the *Flint* Court's

<sup>146</sup> Sissel Defendant Motion to Dismiss, *supra* note 96, at 5–6.

<sup>147</sup> See *infra* notes 244–71 and accompanying text.

<sup>148</sup> U.S. CONST. art. I, § 7.

<sup>149</sup> 220 U.S. 107 (1911).

<sup>150</sup> *Id.* at 143.

<sup>151</sup> *Id.*

<sup>152</sup> 232 U.S. 310 (1914).

<sup>153</sup> *Id.* at 317. The dispute in *Rainey* was over an excise tax on foreign-built pleasure yachts that was added by the Senate to the House tariff bill which became the Tariff Act of 1909. *Id.* at 315. Introduced on March 17, 1909, by Congressman Serano Payne, chairman of the House Ways and Means Committee, this bill originated in a special session of Congress called by President Taft for the explicit purpose of passing new tariff legislation. *Tariff Measure Is Finally Passed, Corrected and Signed—Congress Ends Its Session*, N.Y. TIMES, August 6, 1909, <http://query.nytimes.com/mem/archive-free/pdf?res=9805E3D6143DE733A25755C0A96E9C946897D6CF>. The bill was introduced in the House as "[a] bill . . . to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes." 44 CONG. REC. 65 (1909).

consideration of germaneness, because the bill had “become an enrolled and duly authenticated Act of Congress,” the *Rainey* Court refused to consider whether the amendment was outside the original bill’s purpose.<sup>154</sup> Furthermore, although the Court in both *Flint* and *Rainey* indicated that it would not look past an enrolled bill to determine if the bill was properly enacted,<sup>155</sup> in *Munoz-Flores*, the Court rejected the Government’s argument that “the House’s passage of a bill conclusively establishes that the House has determined either that the bill is not a revenue bill or that it originated in the House.”<sup>156</sup> Contrary to the Government’s argument, the Court did not believe that its review of the constitutionality of an act under the Origination Clause showed a “‘lack of respect’ for Congress’[s] judgment” under the political question doctrine.<sup>157</sup>

The Senate’s ability to amend House revenue bills has also been a source of controversy between the House and Senate.<sup>158</sup> For example, in 1871, the House agreed to a resolution directing the Committee on Rules to examine the constitutionality of the Senate’s practice of adding non-germane amendments to bills for raising revenue and to consider “whether any further rules or proceedings are needed to preserve the privileges of the House.”<sup>159</sup> Although it does not appear that the Committee reported on its findings, a year later the House Ways and Means Committee reported a resolution that was ultimately approved directing the clerk to send back to the Senate, pursuant to the Origination Clause, a bill that originally addressed repealing coffee and tea duties but was amended to reduce taxes on other things.<sup>160</sup> During the lengthy House debates on the resolution, then-Representative James A. Garfield argued for a germaneness rule, stating that the Senate’s power to amend House revenue bills should be “limited to the subject-matter of the bill.”<sup>161</sup> When the Senate received the resolution, the Senate referred the issue to its Committee on Privileges and Elections, which issued a report outlining a much broader right of the Senate to amend, but acknowledging that the Senate could not add revenue-raising amendments to any House bill, “but only to a bill raising revenue.”<sup>162</sup>

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<sup>154</sup> *Rainey*, 232 U.S. at 317.

<sup>155</sup> *Rainey*, 232 U.S. at 316; *Flint*, 220 U.S. at 143.

<sup>156</sup> *United States v. Munoz-Flores*, 495 U.S. 385, 390 (1990).

<sup>157</sup> *Id.* at 390–94.

<sup>158</sup> See SATURNO, *supra* note 70, at, 5–7 (2011).

<sup>159</sup> 2 HINDS, *supra* note 134, § 1489.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

Pacific Legal Foundation advanced this argument in its lawsuit,<sup>163</sup> claiming first in its opposition to the motion to dismiss that the individual mandate originated in the Senate because the Senate deleted and completely replaced the language in the Service Members Home Ownership Tax Act of 2009 with the language of the ACA.<sup>164</sup> While there have been several instances in which courts have permitted the Senate to delete and replace a bill with its own revenue-raising bill, those were instances in which the original House bill was a bill for raising revenue.<sup>165</sup> According to Pacific Legal Foundation, “it is undisputed that H.R. 3590 was *not* originally a bill for raising revenue.”<sup>166</sup> Pacific Legal Foundation also argued that the Senate amendment was improper because it was not germane to the original bill.<sup>167</sup> At the district court level, the germaneness argument seemed to circle back to the first argument, that the original House bill was not a bill for raising revenue,<sup>168</sup> while at the appellate level Pacific Legal Foundation also contended that the amendment was not germane because the original House bill had nothing to do with reforming health insurance.<sup>169</sup>

The Government did, however, dispute the claim that the Service Members Home Ownership Tax Act was not a bill for raising revenue, noting that “every provision” of the bill concerned collecting revenue.<sup>170</sup> Not only did the original bill contain tax provisions related to home purchases by certain members of the military, it also increased estimated tax payments for certain corporations.<sup>171</sup> The district court agreed with the Government’s analysis, and the circuit court did not address it.<sup>172</sup> With respect to the germaneness question, the Government cited to *Rainey* for the proposition that it is the prerogative of the House and Senate to determine the appropriateness of an amendment, not the courts.<sup>173</sup> The circuit court did not address this issue in its opinion.<sup>174</sup>

The original H.R. 3590 does initially appear to be a bill for raising revenue. Although the bill’s second, third, and fourth provisions would

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<sup>163</sup> Sissel Amended Complaint, *supra* note 8, at 11–12.

<sup>164</sup> Sissel Opposition to Motion to Dismiss, *supra* note 106, at 9–10.

<sup>165</sup> *Id.* at 10.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 10–12.

<sup>168</sup> *Id.*

<sup>169</sup> See Appellant’s Opening Brief at 21, *Sissel v. U.S. Dep’t of Health & Human Servs.*, 760 F.3d 1 (D.C. Cir. 2014) (No. 13-5202).

<sup>170</sup> Sissel Defendant Reply Memorandum, *supra* note 126, at 9.

<sup>171</sup> *Id.* at 9–10.

<sup>172</sup> *Sissel v. U.S. Dep’t of Health & Human Servs.*, 951 F. Supp. 2d 159, 167–69 (D.D.C. 2013); *Sissel v. U.S. Dep’t of Health & Human Servs.*, 760 F.3d 1 (D.C. Cir. 2014).

<sup>173</sup> Brief for the Appellees at 17, *Sissel*, 760 F.3d 1 (No. 13-5202). The Government also noted that Pacific Legal Foundation’s reliance on *Munoz-Flores* was inapposite, since that case did not overrule *Rainey*, rather it noted that Origination Clause cases are justiciable. *Id.* at 18.

<sup>174</sup> *Sissel*, 760 F.3d 1.

decrease revenue through tax credits, excluding certain funds from income, and waiving recapture of the tax credit for certain persons who sell their homes,<sup>175</sup> the bill's fifth and sixth sections, which concern corporate taxes and penalties, appear to raise government revenue.<sup>176</sup> According to members of Congress, however, those provisions were added to pay for the other provisions of the bill that cost the government money.<sup>177</sup> A Republican summary of the bill noted,

To offset the cost of the legislation, the bill increases the penalties for failure to file a partnership or S-corporation return from \$89 to \$110, beginning in taxable years following December 31, 2009. H.R. 3590 also increases by half percentage point—to 100.75 percent—the amount of any required installment of corporate estimated tax which is otherwise due in July, August, or September 2014.<sup>178</sup>

Additionally, during the House debates on the bill, several representatives noted that the bill would not cost the government money.<sup>179</sup> Thus, the corporate tax provisions are merely a way of meeting, on paper, the

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<sup>175</sup> Service Members Home Ownership Tax Act of 2009, H.R. 3590, 111th Cong. §§ 2–4 (as introduced in the House, Sept. 17, 2009). In its motion to dismiss at the district court, the Government claimed that it did not matter that parts of the bill sought to decrease taxes. Sissel Defendant Motion to Dismiss, *supra* note 96, at 10 (“[O]nce a revenue bill has been initiated in the House, the Senate is fully empowered to propose amendments, even if their effect will be to transform a proposal lowering taxes [ ] into one raising taxes.” (quoting *Armstrong v. United States*, 759 F.2d 1378, 1381–82 (9th Cir. 1985))). However, that does not answer the question of whether a tax credit amounts to a bill for raising revenue. Professor Kysar argues that Pacific Legal Foundation would have had a more convincing argument that the ACA violates the Origination Clause had it argued that the Clause only applied to “revenue-increasing measure.” Kysar, *supra* note 10, at 718.

<sup>176</sup> H.R. 3590 §§ 5–6.

<sup>177</sup> See Luke Mullins, *House Votes to Extend First-Time Home Buyer Tax Credit for Service Members*, US NEWS.COM (Oct. 8, 2009), <http://money.usnews.com/money/blogs/the-home-front/2009/10/08/house-votes-to-extend-first-time-home-buyer-tax-credit-for-service-members>; *Legislative Digest: H.R. 3590, Service Members Home Ownership Tax Act of 2009*, GOP.GOV (Oct. 9, 2009), <http://www.gop.gov/bill/h-r-3590-service-members-home-ownership-tax-act-of-2009/> [hereinafter *Legislative Digest: H.R. 3590*]. Several members of the House of Representatives filed an amicus brief at the District of Columbia Circuit in the *Sissel* case. Brief of Rep. Trent Franks et al. as Amici Curiae in Support of Appellant’s Petition for Rehearing *En Banc*, *Sissel*, 760 F.3d 1 (No. 13-5202). In the brief, the House members point out that the corporate tax provision was a “withholding modification that [did not] raise revenue or tax rates, but merely collect[ed] a small amount more than may otherwise be due, which amount may be refunded or adjusted once the corporation files its annual return.” *Id.* at 24 n.29 (citing *Baral v. United States*, 528 U.S. 431, 436 (2000) for the proposition that “Withholding and estimated tax remittances are not taxes in their own right, but methods for collecting the income tax.”)

<sup>178</sup> *Legislative Digest: H.R. 3590, supra* note 177.

<sup>179</sup> 155 CONG. REC. H10,553 (Oct. 7, 2009) (statement of Rep. Etheridge, noting that the bill is paid for); 155 CONG. REC. H10,552 (Oct. 7, 2009) (statement of Rep. Kind, noting that the bill is paid for and “will not add a nickel to our national deficit”); 155 CONG. REC. H10,551

PAYGO requirement to achieve “revenue neutrality.”<sup>180</sup> Companies subject to the tax increase in 2014 “would receive an offsetting tax reduction in 2015.”<sup>181</sup>

Thus, it would appear that under the Supreme Court’s interpretation of the Origination Clause, the revenue-raising provisions of the original H.R. 3590 were designed to, on paper, make the Service Members Home Ownership Tax Act of 2009 revenue neutral—not to raise money for the operation of the government in general, or really raise any revenue at all. This understanding of the Service Members Home Ownership Tax Act raises doubts as to whether it would be considered a revenue-raising bill for purposes of the Origination Clause, calling into question the constitutionality of the Senate’s amendments to that bill if the ACA is deemed a revenue-raising bill under the Court’s jurisprudence.

Although the Supreme Court’s Origination Clause precedents could reasonably be read broadly to hold that the ACA directly violates the Origination Clause, such an outcome seems unlikely for several reasons. First, the Court has never held a law unconstitutional under the Origination Clause.<sup>182</sup> The Court has been wary of strictly enforcing the Origination Clause and appears implicitly to defer to Congress. There is no reason to think that the current Court would take a more robust approach to enforcing the Clause than previous Courts have taken. In fact, Justice Scalia, one of the four dissenters in *NFIB*, argued in *Munoz-Flores* that Congress should have the final word on where a bill originated, noting that the designation of a bill as a House bill “attests that the legislation originated in the House.”<sup>183</sup> Second, the Court has already gone out of its way to uphold the ACA in *NFIB*—adopting a reading of the statute that many found surprising.<sup>184</sup> It seems unlikely that a majority of the Court (especially given Justice Scalia’s views) would now hold that the ACA violates a constitutional provision that the Court has routinely been reluctant to enforce vigorously. Under the traditional approach the Court takes to the Origination Clause, the Clause has been rendered meaningless if it permits the Senate to delete and replace a House bill and fails to

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(Oct. 7, 2009) (statement of Rep. Tanner, noting that the bill is “fully paid for”); 155 CONG. REC. E2459 (Oct. 6, 2009) (statement of Rep. Green noting that the act is “deficit neutral”).

<sup>180</sup> *Legislative Digest: H.R. 3590*, *supra* note 177.

<sup>181</sup> *Id.*

<sup>182</sup> *See supra* note 10.

<sup>183</sup> *United States v. Munoz-Flores*, 495 U.S. 385, 409 (1990) (Scalia, J., concurring).

<sup>184</sup> *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012); Randy E. Barnett, *No Small Feat: Who Won the Obamacare Case (and Why Did So Many Law Professors Miss the Boat)?* 65 FLA. L. REV. 1331 (2013). Barnett noted that 85% of experts polled by the American Bar Association believed that the individual mandate would be upheld, and even those who thought it could be upheld under the tax power still believe it to be constitutional under the Commerce Clause. He believes that so many professors were wrong because they “never properly understood the New Federalism of the Rehnquist Court.”

treat a bill enacted solely under Congress's taxing power that raises considerable revenue as a bill for raising revenue.

### III. A DIFFERENT APPROACH: INDIRECT CONSTITUTIONAL VIOLATIONS

Assuming the ACA is a bill for raising revenue subject to the Origination Clause, there is another approach that the Court could take that would give meaning and purpose to the Origination Clause. This approach is based on the Court's reasoning in cases in which it has protected compromises embodied in the Constitution that were the source of great debate at the constitutional convention from being easily displaced or ignored by Congress or the states.<sup>185</sup> This includes protecting such provisions from indirect violations—from attempts to circumvent the constitutional guarantee.<sup>186</sup> In Part A, I will outline the Court's approach to indirect constitutional violations in *Term Limits* and *Clinton v. City of New York*. I will then look at whether the Origination Clause is the type of constitutional provision that should fall under the Court's indirect constitutional violation analysis. Finally, I will consider what indirect constitutional violations occurred in the passage of the ACA.

#### A. Indirect Constitutional Violations Cases

##### 1. *United States Term Limits v. Thornton*

In *United States Term Limits v. Thornton*, the Court held that section 3 of Arkansas's Amendment 73, which prohibited members of Congress who had served a certain number of terms from appearing on the ballot, was unconstitutional under the Qualification Clauses.<sup>187</sup> The Court started its analysis with a thorough review of its previous decision in *Powell v. McCormack*,<sup>188</sup> in which it held that Congress lacked the power to add qualifications for serving in Congress, other than those set out in the Qualifications Clauses.<sup>189</sup> *Powell*, much like *Term Limits*, could be characterized as an indirect constitutional violation case. Although Adam Clayton Powell had been properly elected to Congress and met the qualifications set out in the Qualifications Clause, the House decided, with the key vote needing only a majority to pass, to exclude Powell from that body due to alleged misconduct.<sup>190</sup> After reviewing the pre-convention precedents, the constitutional convention debates and

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<sup>185</sup> See *Clinton v. City of New York*, 524 U.S. 417 (1998); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829 (1995); see also Tara Ross, *Federalism & Separation of Powers*, ENGAGE, Sept. 2010, at 37 (2010).

<sup>186</sup> See *U.S. Term Limits, Inc.*, 514 U.S. at 829.

<sup>187</sup> *Id.* at 836.

<sup>188</sup> *Powell v. McCormack*, 395 U.S. 486 (1969).

<sup>189</sup> *U.S. Term Limits, Inc.*, 514 U.S. at 787; see also *Powell*, 395 U.S. 486.

<sup>190</sup> *Powell*, 395 U.S. at 553–54. The Constitution permits the House or Senate to “expel a Member” by a vote of two-thirds of its members. U.S. CONST. art. I, § 5, cl. 2.

post-convention ratifying debates, the post-ratification history, and “the basic principles of our democratic system,” the Court concluded that Powell was improperly excluded and that Congress, in judging its members qualifications, was limited to the qualifications set forth in the Constitution.<sup>191</sup> In essence, the power given to the House in Article I, Section 5 of the Constitution to judge the qualifications of its members did not allow the House to violate the Qualifications Clause of Article I, Section 2 by adding qualifications.<sup>192</sup>

The *Term Limits* Court, after reaffirming its previous decision in *Powell*, addressed whether the states had power to add to the qualifications for members of Congress.<sup>193</sup> Although the Court found that the states had no reserved power under the Tenth Amendment to add to congressional qualifications, the Court went further and looked at whether, if such a power existed, the framers, in intending the qualifications in the Constitution to be exclusive, “divested” the states of any such power.<sup>194</sup> Following the pattern set out in *Powell*, the Court looked at “the text and structure of the Constitution, the relevant historical materials, and, most importantly, the ‘basic principles of our democratic system’” to find that states were precluded from adding qualifications.<sup>195</sup> As part of its inquiry, the Court examined the constitutional convention and ratifying debates; congressional experience, which it viewed as “‘erratic’” and of limited precedential value;<sup>196</sup> the views of learned commentators;<sup>197</sup> and state practice, which it also deemed to be of limited value.<sup>198</sup>

After determining that the states could not add to congressional qualifications, the Court got to the heart of its indirect constitutional violation reasoning. Amendment 73’s supporters had argued that the Amendment was not a qualification—rather, it was simply a ballot access restriction that prohibited candidates who had served too many terms from appearing on the ballot, but did not prevent them from serving in Congress if they won a write-in election.<sup>199</sup> The Court stated that it need not decide if Amendment 73 was in fact a qualification, because even if it was simply a ballot access provision it would be unconstitutional.<sup>200</sup> The Court explained that “Amendment 73 [wa]s an indirect

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<sup>191</sup> *Powell*, 395 U.S. at 548, 550.

<sup>192</sup> The Court did not address any limits the Constitution placed on Congress’s power to *expel* by a two-thirds vote any of its members in accordance with the Expulsion Clause. *Powell*, 395 U.S. at 558 n.27; U.S. CONST. art. I, § 5, cl. 2.

<sup>193</sup> *U.S. Term Limits, Inc.*, 514 U.S. at 798–801.

<sup>194</sup> *Id.* at 800–01.

<sup>195</sup> *Id.* at 806.

<sup>196</sup> *Id.* at 819 (quoting *Powell*, 395 U.S. at 545–46).

<sup>197</sup> *Id.* at 799–800.

<sup>198</sup> *Id.* at 823–26.

<sup>199</sup> *Id.* at 787, 828.

<sup>200</sup> *Id.* at 829.

attempt to accomplish what the Constitution prohibits Arkansas from accomplishing directly,”<sup>201</sup> and as such it could not stand.<sup>202</sup> In rejecting this argument, the Court used lofty language to highlight the importance of the Qualifications Clauses in our constitutional structure. For example, the Court exclaimed that allowing the Amendment to survive as a ballot access provision would “trivialize[ ] the basic principles of our democracy that underlie” the Qualification Clause and treat it “not as the embodiment of a grand principle, but rather as empty formalism.”<sup>203</sup> Additionally, the Court found it “inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.”<sup>204</sup> While responding to an argument by the Amendment’s supporters that would allow term limits under the Elections Clause of Article I, Section 4,<sup>205</sup> the Court pointed back to its decision in *Powell* and the Framers’s concern about congressional aggrandizement, and then “refuse[d] to adopt an interpretation of the Elections Clause that would so cavalierly disregard what the Framers intended to be a fundamental constitutional safeguard.”<sup>206</sup> Finally, the Court declared that protecting the constitutional “structure envisioned by the Framers” by prohibiting the states from creating congressional qualifications results in “a ‘more perfect Union.’”<sup>207</sup> This grand language makes it appear that our entire constitutional structure rests on protecting this safeguard from direct and indirect challenges alike.

## 2. *Clinton v. City of New York*

The Court’s analysis of indirect constitutional violations in *Clinton v. City of New York* is not as straightforward as in *Term Limits*, but it is still present. At issue in *Clinton v. City of New York* was President Clinton’s decision to cancel certain provisions in the Balanced Budget Act of 1997 and Taxpayer Relief Act of 1997 pursuant to authority granted to him under the Line Item Veto Act.<sup>208</sup> The Line Item Veto Act permitted the President to cancel, within five days, certain provisions related to spending, discretionary budget authority, or limited tax benefits that had been enacted into law.<sup>209</sup> The President was required to follow specific

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<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 830.

<sup>203</sup> *Id.* at 831.

<sup>204</sup> *Id.* (quoting *Gomillion v. Lightfoot*, 364 U.S. 339, 345 (1960)).

<sup>205</sup> U.S. CONST. art. V, § 4 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.”).

<sup>206</sup> *U.S. Term Limits, Inc.*, 514 U.S. at 832.

<sup>207</sup> *Id.* at 838.

<sup>208</sup> *Clinton v. City of New York*, 524 U.S. 417, 422–25 (1998).

<sup>209</sup> *Id.* at 436.

procedures in cancelling items, including ensuring that the cancellation would “‘reduce the Federal budget deficit; . . . not impair any essential Government functions; and . . . not harm the national interest.’”<sup>210</sup> The President was further required to notify Congress of the cancellation within five days of the enactment of the canceled provision.<sup>211</sup> Congress could pass, by a majority vote of each body, a disapproval bill, which the President could veto but not cancel.<sup>212</sup> New York City, among others, challenged the constitutionality of Clinton’s cancellations.

In holding the Line Item Veto Act unconstitutional, the Court characterized the President’s actions as “[i]n both legal and practical effect, . . . amend[ing] two Acts of Congress by repealing a portion of each.”<sup>213</sup> The Court noted that no provision of the Constitution permits the President to amend, enact, or repeal a statute.<sup>214</sup> While the President is permitted to veto legislation, the Court found there to be profound differences between the President’s exercise of the veto and his exercise of the line item veto.<sup>215</sup> The Court then explained that it was proper to construe constitutional silence on the line item veto “as equivalent to an express prohibition” because the Article I process for enacting legislation was “the product of the great debates and compromises that produced the Constitution itself.”<sup>216</sup> In fact, founding era historical sources support the notion “that the power to enact statutes may only ‘be exercised in accord with a single, finely wrought and exhaustively considered, procedure,’”<sup>217</sup> and the President’s use of the line item veto resulted in shortened bills that were “not the product of the ‘finely wrought’ procedure that the Framers designed.”<sup>218</sup> Although the Court did not delve into the history of the Article I process in its opinion, it did cite to its opinion in *INS v. Chadha*, in which the Court looked at the early historical materials on the Presentment Clause, including the constitutional convention debates, the Federalist Papers, and early commentators.<sup>219</sup>

The Government argued that the cancellations were not a repeal because the “lockbox” provision of the Line Item Veto Act caused the cancelled provisions to have a real budgetary effect since the President and Congress were prohibited from spending the savings from the cancella-

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<sup>210</sup> *Id.* (quoting Line Item Veto Act, 2 U.S.C. § 691(a)(A) (1995), *invalidated* by Clinton v. City of New York, 524 U.S. 417 (1998)).

<sup>211</sup> *Id.* at 435.

<sup>212</sup> *Id.* at 436–37.

<sup>213</sup> *Id.* at 438.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 438–39.

<sup>216</sup> *Id.* at 439.

<sup>217</sup> *Id.* at 439–40 (citing *INS v. Chadha*, 462 U.S. 919, 951 (1983)).

<sup>218</sup> *Id.* at 440.

<sup>219</sup> *Id.* (citing *Chadha*, 462 U.S. at 951); *Chadha*, 462 U.S. at 946–48.

tions.<sup>220</sup> The Court explained that the cancellations still amounted to a repeal because the President's action rendered the provisions "entirely inoperative as to the appellees," making that action the "functional equivalent of a partial repeal."<sup>221</sup> The Court also rejected the Government's arguments that the President's actions were exercises of his discretionary authority pursuant to the relevant acts or some form of discretionary spending authority.<sup>222</sup> The Court found the first argument—an analogy to *Field v. Clark*—inapposite,<sup>223</sup> and the second argument unpersuasive since the line item veto was different from discretionary spending authority because it allowed the President unilaterally to "change the text of duly enacted statutes."<sup>224</sup> Thus, the fatal flaw in the Line Item Veto Act was that it permitted the President, contrary to the procedures set out in Article I, Section 7 of the Constitution for enacting legislation, "to create a different law—one whose text was not voted on by either House of Congress or presented to the President for signature."<sup>225</sup> However, as one professor has noted, the Constitution is silent on many aspects of the legislative process, including bicameralism.<sup>226</sup> Thus, the Line Item Veto Act, although not expressly prohibited in the Constitution, indirectly violated the Constitution by circumventing the procedures set forth in the Constitution for passing laws.

Dissenting on this point, Justices Breyer and Scalia made this indirect constitutional violation argument more clear. Justice Breyer pointed out that in cancelling the provisions, the President did not repeal or amend the law; rather, he "simply *followed* the law, leaving the statutes, as they are literally written, intact"<sup>227</sup> by preventing the certain provisions from "*having legal force or effect*," a power explicitly given to him under the law by Congress in the Line Item Veto Act.<sup>228</sup> In fact, according to Justice Breyer, the "lockbox" feature of the Act did not allow the President to cancel an item.<sup>229</sup> Instead, it allowed him to "decide *how* to spend the money . . . either for the specific purpose mentioned . . . or for general deficit reduction."<sup>230</sup> Justice Scalia agreed that the cancellations did not raise a Presentment Clause concern, because Congress passed and the President signed the bills before the cancellations occurred.<sup>231</sup>

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<sup>220</sup> *Clinton*, 524 U.S. at 440–41.

<sup>221</sup> *Id.* at 441.

<sup>222</sup> *Id.* at 442.

<sup>223</sup> *Id.* at 443–44.

<sup>224</sup> *Id.* at 447.

<sup>225</sup> *Id.* at 449.

<sup>226</sup> Kysar, *supra* note 10, at 701.

<sup>227</sup> *Clinton*, 524 U.S. at 474 (Breyer, J., dissenting).

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 479.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 463 (Scalia, J., dissenting).

Thus, the Court's real concern was that the Line Item Veto Act permitted the President to allow certain portions of duly passed statutes to not have "legal force or effect."<sup>232</sup> While the Constitution would prohibit such an action absent congressional authority, Congress had long authorized the President to suspend certain parts of statutes.<sup>233</sup>

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The Court's opinions in *Term Limits*, *Powell*, and *Clinton v. City of New York* seem to create a test by which the Court will protect certain constitutional provisions from being easily disregarded by the states or Congress. As the above descriptions of the cases show, the Court is most concerned about protecting constitutional provisions that serve as "fundamental constitutional safeguards." Furthermore, these provisions must be the product of "finely wrought debate" at the constitutional convention. Therefore, the Court seems most concerned about provisions that were central to the tenuously reached agreements and compromises that resulted from the debates at the constitutional convention, such as the provision on representation and the process for passing legislation. To protect these compromises, the Court will step in and prevent states and Congress from indirectly violating these provisions—from taking actions that the text of the Constitution may permit, but that would render the particular constitutional guarantee nugatory. The test that the Court applies is largely historical—looking at the history surrounding a particular provision's adoption at the constitutional convention. It also looks to some degree at the provision's purpose, to the extent the purpose is relevant to understanding the clause, as it was in *Term Limits* and *Powell*. While this test may go beyond the actual text of the Constitution, at least as we may now understand it, it seeks to implement the original compromises or meanings ascribed to the text by the Founding generation by preventing their compromises from being easily evaded.

### B. *The Origination Clause*

Is the Origination Clause the type of constitutional provision that should be subject to the historical test set out in *Term Limits* and *Clinton v. City of New York*? To answer this question, I will first look at the history of the Origination Clause and its inclusion in the Constitution, including the debates from the constitutional convention and the ratifying debates, to determine if it is the type of constitutional provision that should be protected from indirect violations.

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<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 464.

## 1. Constitutional Convention

The Court in *Term Limits* and *Clinton v. City of New York* placed great emphasis on the history surrounding the adoption of the Qualifications Clauses and the Article I process for passing legislation; the fact that these provisions were the source of great debate and compromise at the constitutional convention; and the need to protect the carefully crafted compromises inferred in the language of these provisions. The Origination Clause has a similar history. In fact, noted legal historian Charles Warren called the compromise surrounding the adoption of the Origination Clause “a question which had seriously threatened to break up the Convention.”<sup>234</sup>

Under the British Constitution, all bills for raising taxes were required to originate in the House of Commons, and the House of Lords lacked the power to amend such bills.<sup>235</sup> This privilege extended to

all bills, by which money is directed to be raised upon the subject, for any purpose or in any shape whatsoever; either for the exigencies of government, and collected from the kingdom in general, as the land tax; or for private benefit, and collected in any particular district; as by turnpikes, parish rates, and the like.<sup>236</sup>

The reason for the provision is unclear. According to Blackstone, the reason given for the privilege was that because it is the people that are taxed, “it is proper that they alone should have the right of taxing themselves.”<sup>237</sup> But Blackstone disregarded that reason, since the lords owned “a very large share of property” that was subject to equal taxation.<sup>238</sup> He believed the real reason was that the lords were a “permanent hereditary body” owing their creation to the king and, “supposed[ly] more liable to be influenced by the crown”<sup>239</sup>; thus, “[i]t would . . . be extremely dangerous, to give them any power of framing new taxes for the subject.”<sup>240</sup> On the other hand, the House of Commons was a temporary elected body.<sup>241</sup>

The Founders, likewise, were not in agreement as to the purpose of the origination provision. At the Constitutional Convention, James Madison claimed that commentators “had not yet agreed on the reason”

<sup>234</sup> CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 670 (Fred B. Rothman & Co. 1993) (1928).

<sup>235</sup> 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*163–64.

<sup>236</sup> *Id.* at \*164.

<sup>237</sup> *Id.* at \*163–64.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

for restricting the House of Lords when it came to money bills.<sup>242</sup> But, whatever the reason, the British practice carried over to the colonies. Seven state constitutions required the lower legislative house to originate money bills, with only three permitting the upper body to amend such bills.<sup>243</sup>

Elbridge Gerry, the Massachusetts delegate who, on June 13, 1787, proposed the idea at the Constitutional Convention that money bills should originate in the House, seemed to agree with Blackstone's reasoning.<sup>244</sup> He noted that the House was "more immediately the representatives of the people, and it was a maxim that the people ought to hold the purse-strings."<sup>245</sup> Pierce Butler of South Carolina disagreed, citing "no analogy" between the House of Lords and the Senate and fearing it would prevent "the best men" from serving in the Senate.<sup>246</sup> Gerry's proposal was met with debate and, initially, disapproval by a vote of three to seven.<sup>247</sup> It was brought up again on July 5 as part of the report of the committee appointed to determine the issue of representation in Congress—the Great Compromise.<sup>248</sup> The committee recommended that there be proportional representation of states in the House, equal representation of states in the Senate, and that "bills for raising or appropriating money, and for fixing salaries [of government officials]" originate in the House and that the Senate be prohibited from amending such bills.<sup>249</sup> The origination language was considered a concession by the small states,<sup>250</sup> although James Madison questioned this characterization, noting that members of the Senate could easily suggest amendments or bills to members of the House.<sup>251</sup>

When the delegates debated the origination provision in more detail on July 6, the convention was again divided.<sup>252</sup> According to Charles Warren, the states were split into five different factions on the origination

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<sup>242</sup> 1 MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 233 (Yale Univ. Press 1911).

<sup>243</sup> WARREN, *supra* note 234, at 275. The seven state constitutions were Delaware, Maryland, Massachusetts, New Hampshire, New Jersey, South Carolina, and Virginia. *Id.* The three states that allowed the upper body to amend money bills were Delaware, Massachusetts, and New Hampshire. *Id.*

<sup>244</sup> 1 FARRAND, *supra* note 242, at 233. On May 29, 1787, Charles Pinckney introduced a draft constitution that included an Origination Clause. 5 JONATHAN ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 128–29 (2d. ed. 1836 & Supp. 1845). However, the first serious discussion of the Origination Clause came with Gerry's proposal.

<sup>245</sup> 1 FARRAND, *supra* note 242, at 233.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 233–34.

<sup>248</sup> *Id.* at 526.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* at 531.

<sup>251</sup> *Id.* at 527.

<sup>252</sup> *Id.* at 544–46.

issue: (1) the small state delegates who opposed taking the origination power from the Senate; (2) the small state delegates who were opposed to the proposal but were willing to vote for it as part of a compromise; (3) the large state delegates who “regarded it as an essential right to be possessed by the House since that body as the immediate representatives of the people ought to have control of the people’s money, and since the large States would probably have a majority in the House”; (4) the large state delegates who viewed the origination issue “as of no consequence and hence as constituting no concession whatever on the part of the smaller States;” and (5) the large state delegates who viewed taking the origination power from the Senate as wrong and as a likely “dangerous source of dispute between the two branches.”<sup>253</sup> The convention voted five to three, with three states divided, to keep the origination provision in the committee’s report.<sup>254</sup>

On August 8, the convention reconsidered the origination language and voted seven to four to strike it.<sup>255</sup> Those arguing to strike the provision claimed, among other things, that it gave “no particular advantage to the House”; that the Senate was already trusted with great powers, so it could certainly be trusted with originating money bills; that the Senate, because it would sit constantly, was better suited to originate money bills; and that the clause would be a source of “injurious altercations between the two Houses.”<sup>256</sup> Those opposed to striking out the provision argued that eliminating it would upset the Great Compromise that had been made.<sup>257</sup> The next day, while discussing the article addressing representation and voting in the Senate, Edmund Randolph of Virginia called for reconsideration of the vote, noting that the convention’s actions in taking out the origination provision “endanger[ed] the success of the plan.”<sup>258</sup> During the discussion, Hugh Williamson from North Carolina explained that his state “had agreed to an equality [of votes] in the Senate, merely in consideration that money bills should be confined to the other House.”<sup>259</sup> On August 11, the convention voted nine to one, with one state divided, to reconsider the origination provision.<sup>260</sup>

The convention took up the reconsideration on August 13, at which time there was a “violent debate” over the provision.<sup>261</sup> Randolph of-

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<sup>253</sup> WARREN, *supra* note 234, at 276–77; *see also id.* at 277 n.1 (Warren’s breakdown of positions of the delegates on the issue).

<sup>254</sup> 1 FARRAND, *supra* note 242, at 547.

<sup>255</sup> 2 FARRAND, *supra* note 242, at 224–25.

<sup>256</sup> *Id.* at 224.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* at 230.

<sup>259</sup> *Id.* at 233.

<sup>260</sup> *Id.* at 262–63.

<sup>261</sup> WARREN, *supra* note 234, at 435.

ferred amendments to the provision to make it less offensive to those opposed to it, including making it clear that the provision only applied to bills that raised money “for the *purpose of revenue*.”<sup>262</sup> The motion failed by a vote of four to seven, as did a vote on whether to allow the Senate to amend revenue bills.<sup>263</sup> Notably, General George Washington, who previously had voted against the origination provision, changed his vote to “aye” because of the importance of the provision to other members of the convention.<sup>264</sup> Two days later, Caleb Strong of Massachusetts proposed adding an origination provision that permitted the Senate to amend “bills for raising money for the purposes of revenue.”<sup>265</sup> The decision on Strong’s proposal was postponed on that day and again on August 21.<sup>266</sup>

On September 5, the Special Committee of September 4, which had been constituted to provide solutions to questions surrounding the election of the President, the appointment and treaty powers, and the impeachment power, offered a solution to the origination issue.<sup>267</sup> The proposed language read: “All bills for raising revenue shall originate in the House of Representatives, and shall be subject to alterations and amendments by the Senate: No money shall be drawn from the Treasury, but in consequence of appropriations made by law.”<sup>268</sup> The vote on the clause, however, was postponed again.<sup>269</sup> On September 8, the proposal was amended by voice vote to replace the language “and shall be subject to alterations and amendments by the Senate,” with language from the Massachusetts Constitution that read “but the Senate may propose or concur with amendments as in other bills.”<sup>270</sup> The provision finally passed by a vote of nine to two.<sup>271</sup>

The records of the constitutional convention show that the Origination Clause, like the Qualifications Clauses and the issues of bicameralism and presentment, was to refer back to the language in *Clinton v. City of New York*, “the product of the great debates and compromises that produced the Constitution itself.”<sup>272</sup> While the delegates held diverse views on the Clause, it was ultimately included first as part of the Great

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<sup>262</sup> 2 FARRAND, *supra* note 242, at 273.

<sup>263</sup> *Id.* at 280.

<sup>264</sup> *Id.* at 280 n.\*.

<sup>265</sup> *Id.* at 297.

<sup>266</sup> *Id.* at 298, 357–58.

<sup>267</sup> WARREN, *supra* note 234, at 664.

<sup>268</sup> 2 FARRAND, *supra* note 242, at 508–09.

<sup>269</sup> *Id.* at 510.

<sup>270</sup> *Id.* at 552. It was changed to “as on other bills” in the referral to the Committee on Style. *Id.* at 568.

<sup>271</sup> *Id.* at 552.

<sup>272</sup> See *Clinton v. City of New York*, 524 U.S. 417, 439 (1998); see also *supra* notes 244–71 and accompanying text.

Compromise, and second, as part of agreements regarding the scope of the Senate's power—two of the most contentious issues at the Constitutional Convention. Thus, the agreement reached on the Clause can be said to be “finely wrought,” meeting the standard set out in *Clinton v. City of New York*<sup>273</sup> in that its text was the source of debate, revision, and compromise. The Origination Clause can also be seen as a provision the framers “intended to be a fundamental constitutional safeguard.”<sup>274</sup> Some of the delegates at the convention clearly saw the provision as ensuring that the taxing power remained in the hands of the representatives closest to the people.<sup>275</sup> This view was also put forth by Madison, an opponent of the Clause, in Federalist 58.<sup>276</sup> Therefore, the first part of the test is met.

## 2. State Ratifying Conventions

In addition to being a source of debate at the Constitutional Convention, the Origination Clause was a source of debate at the state ratifying conventions. In general, it was viewed as a clause to curb power abuses.

At the Massachusetts ratifying convention, in response to an argument that “*the power to raise money may be abused*,” Judge Sumner cited the Origination Clause and asked,

can we suppose the representatives of Georgia, or any other state, more disposed to burden their constituents with taxes, than the representatives of Massachusetts? It is not to be supposed; for, whatever is for the interest of one state, in this particular, will be the interest of all the states, and no doubt attended to by the House of Representatives.<sup>277</sup>

Delegate Parsons also cited the Origination Clause as a means for the House “to control the Senate.”<sup>278</sup> Parsons recognized that some objected to the Senate's power to amend money bills, which may allow the Senate to “increase the supplies, and establish profuse salaries,” but he was not concerned with that power since the Senate could, without such power, informally suggest amendments to the House.<sup>279</sup>

<sup>273</sup> *Clinton*, 524 U.S. at 439–40.

<sup>274</sup> *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833 (1995).

<sup>275</sup> *See, e.g.*, 2 FARRAND, *supra* note 242, at 274–75, 278.

<sup>276</sup> THE FEDERALIST NO. 58 (James Madison), available at [http://thomas.loc.gov/home/histdox/fed\\_58.html](http://thomas.loc.gov/home/histdox/fed_58.html) (“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.”).

<sup>277</sup> 2 ELLIOT, *supra* note 244, at 163.

<sup>278</sup> *Id.* at 92.

<sup>279</sup> *Id.* at 383.

At the North Carolina ratifying convention, Delegate Iredell, in discussing the power of the House of Representatives as compared to the Senate, explained that the House, which would represent the people, “will originate all money bills, which is one of the greatest securities in any republican government.”<sup>280</sup> Later in the ratifying convention, Iredell responded to an argument that the Senate was too powerful by comparing the Senate to its British equivalent and noting how important the origination power is to the ability of government to function.<sup>281</sup> Iredell explained that the constitutional convention debated giving the Senate the power to originate money bills, but he praised the delegates for refraining from that action.<sup>282</sup>

At the Pennsylvania ratifying convention, Delegate M’Kean, in response to the argument that the powers of Congress were too “large,” especially with respect to taxation, noted that tax laws “must originate with the immediate representatives of the people.”<sup>283</sup> The ability of the House to control the public money was also cited by Delegate Wilson as a check on the Senate’s power.<sup>284</sup> In Virginia, Delegate Randolph cited the Origination Clause in response to a concern about standing armies, arguing that the “consent of the democratic branch” was needed for every bill, and that “money bills can originate with them only.”<sup>285</sup> At the South Carolina convention, Charles Pinckney described the House as having the ability, partially through the Origination Clause, to curb the power abuses of other departments.<sup>286</sup>

At least one delegate at the ratifying convention, however, understood the Origination Clause to permit the Senate to delete and replace bills. At the Virginia convention, Delegate Grayson complained that the Senate’s power to amend money bills was “equal, in principle, to that of originating.”<sup>287</sup> Madison responded that he never viewed the Origination Clause as that important and that “[t]here [wa]s some difference, though

<sup>280</sup> 4 ELLIOT, *supra* note 244, at 39.

<sup>281</sup> *Id.* at 129.

<sup>282</sup> *Id.*

<sup>283</sup> 2 ELLIOT, *supra* note 244, at 536.

<sup>284</sup> *Id.* at 508.

<sup>285</sup> 3 ELLIOT, *supra* note 244, at 600.

<sup>286</sup> 4 ELLIOT, *supra* note 244, at 329–30 (“The House of Representatives, in which the people of the Union are proportionably represented, are to be biennially elected by them. Those appointments are sufficiently short to render the member as dependent as he ought to be upon his constituents. They are the moving-spring of the system. With them all grants of money are to originate: on them depend the wars we shall be engaged in, the fleets and armies we shall raise and support, the salaries we shall pay; in short, on them depend the appropriations of money, and consequently all the arrangements of government. With this powerful influence of the purse, they will be always able to restrain the usurpations of the other departments, while their own licentiousness will, in its turn, be checked and corrected by them.”).

<sup>287</sup> 3 ELLIOT, *supra* note 244, at 375.

not considerable” between originating and amending bills.<sup>288</sup> Grayson objected that he still considered the powers to be the same, noting that “[t]he Senate could strike out every word of the bill, except the word *whereas*, or any other introductory word, and might substitute new words of their own.”<sup>289</sup> While Grayson’s understanding of the Clause was prophetic, it is not clear if others concurred in his understanding of it.

The arguments at the state ratifying conventions demonstrate that the Origination Clause was viewed as an important constitutional safeguard in that it checked, at a minimum, the power of the Senate, and it could also serve as a check on the other governmental departments.

### 3. Constitutional Commentaries

In *Term Limits* and *Powell*, part of the Court’s analysis of the relevant constitutional provisions included exploring how those provisions were interpreted in leading constitutional commentaries of that time.<sup>290</sup> These same commentaries also provide some insight into the Origination Clause’s purpose. In general, the reasons given in the commentaries are consistent with the discussion at the Constitutional Convention and in the state ratifying conventions. For example, two constitutional commentaries cited the provision as important in maintaining the balance of power between the small and large states.<sup>291</sup> These commentators also pointed to purpose of the provision as being to protect the people from oppression.<sup>292</sup> Charles Warren, in his commentary on the constitutional convention, noted that convention delegates Mason, Dickinson, and Gerry all agreed that “[t]axation and representation are strongly associated in the minds of the people, and they will not agree that any but their immediate representatives shall meddle with their purse. In short, the acceptance of the plan will inevitably fail, if the Senate be not restrained from originating money bills.”<sup>293</sup> Taxation without representation or consent was certainly a concern of the founding generation.<sup>294</sup>

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<sup>288</sup> *Id.* at 377.

<sup>289</sup> *Id.*

<sup>290</sup> U.S. *Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829 (1995); *Powell v. McCormack*, 395 U.S. 486, 521, 526, 537–38 (1969).

<sup>291</sup> 1 ST. GEORGE TUCKER, *BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE*, app. note D, pt. 2 (1803) (noting that the Origination Clause provided protection against “undue weight of the smaller states . . . in the imposition of [tax] burdens” as one of the reasons for the Origination Clause. Story also noted that the Origination Clause “was indispensable to preserve the equality of the small states, and to reconcile them to a surrender of their sovereignty.” 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES*, bk. III, ch. IX, § 671 (1833).

<sup>292</sup> 1 TUCKER, *supra* note 291, at app. note D, pt. 5; 2 STORY, *supra* note 291, at bk. III, ch. IX, § 572 (1833).

<sup>293</sup> Warren, *supra* note 234, at 275.

<sup>294</sup> See THE DECLARATION OF INDEPENDENCE para. 2, fact 17 (U.S. 1776) (including in the list of British tyrannies, “imposing Taxes on us without our Consent.”); Patrick Henry, *Vir-*

Several commentators, however, noted that the Senate had the power to amend revenue bills.<sup>295</sup> In fact, one commentator made the point that the Origination Clause “[a]s it appears in the Constitution it is not really a substantial limitation upon the Senate because of that body’s right to amend.”<sup>296</sup> St. George Tucker, in his edition of Blackstone’s Commentaries, also noted that if one looked at the early journals of the Senate, one would find that “several acts for establishing the post-office; for regulating the value of foreign coins, and for establishing a mint, all originated in the senate.”<sup>297</sup> The reason, he believed, that the House acquiesced to this action was that “no revenue was intended to be drawn to the government by these laws.”<sup>298</sup>

Thus, while the commentators provide no support for narrowly interpreting the Senate’s power to amend revenue bills, they do affirm the important purposes behind including the Clause in the Constitution.

#### 4. Legislative Practice

As discussed in *Term Limits* and *Powell*, early congressional practice provides insight into how the Clause was interpreted by those the Clause’s language most immediately affected, although congressional practice can be “erratic” and of limited precedential value.<sup>299</sup> Just as the Qualifications Clauses restricted Congress and the states from adding qualifications, and early congressional experience with the Clauses showed how Congress monitored that restriction, reviewing how early Congresses addressed potential Origination Clause violations can show how that Clause was interpreted.

The early legislative practice shows that the House, at times, took a narrow view of the Origination Clause, especially with respect to the Senate’s ability to amend revenue bills. For example, in 1807, after the Senate amended a bill dealing with salt duties and protecting commerce from pirates, the House returned the bill with a message refusing to agree to the amendments.<sup>300</sup> During the debate on the amendments, Representative John Randolph, stepson to St. George Tucker, criticized the Senate amendments as going “beyond amendment of the details of the bill,”

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*ginia Stamp Act Resolutions (May 30, 1765)*, in JOURNALS OF THE HOUSE OF BURGESSSES OF VIRGINIA, 1761–1765 (John Pendleton Kennedy ed., 1907).

<sup>295</sup> See CHARLES KELLOGG BURDICK & FRANCIS MARION BURDICK, THE LAW OF THE AMERICAN CONSTITUTION: ITS ORIGIN AND DEVELOPMENT 155 (G.P. Putnam’s Sons ed., 1922); THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 132 (Little et al. eds., 2d ed. 1871); WARREN, *supra* note 234, at 275–77.

<sup>296</sup> BURDICK & BURDICK, *supra* note 295, at 155.

<sup>297</sup> 1 TUCKER, *supra* note 291, at app. note D, pt. 5.

<sup>298</sup> *Id.* at app. note D, pt. 5 n.188.

<sup>299</sup> See U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 819 (1995).

<sup>300</sup> 2 HINDS, *supra* note 134, § 1481.

noting that “under the Constitution he believed the Senate had no power to amend a money bill by varying the objects or altering the quantum.”<sup>301</sup> In 1859, the House approved a resolution declaring that Senate amendment to a post office appropriations bill, which raised the rate of postage, was a revenue-raising bill for purposes of the Origination Clause,<sup>302</sup> although at least one court had disagreed with that determination.<sup>303</sup> During discussions on the House resolution, however, one House member argued that the Origination Clause only applied to bills that fell under Congress’s taxing power.<sup>304</sup> On the other hand, the House did not consider a bill “to fix the amount of United States notes and the circulation of national banks, and for other purposes” to be a bill that needed to originate in the House, despite Representative Garfield’s objection.<sup>305</sup>

Additionally, the House has interpreted the Origination Clause to also apply to Senate bills repealing taxes, noting that under the Constitution, it is the House’s right to originate “all bills relating directly to taxation, including all bills imposing or remitting taxes.”<sup>306</sup> In 1872, the Senate used what sounds like a delete and replace process to replace a House bill that cut duties on coffee and tea with a bill more generally reducing taxes.<sup>307</sup> The House objected, passing a resolution that said that the Senate’s actions “‘conflict[ed] with the true intent and purpose of [the Origination] clause.’”<sup>308</sup> The Senate disagreed with the House’s contentions, arguing for a broad right to amend revenue bills.<sup>309</sup>

Congressional practice also provides insight into what was considered a revenue-raising amendment. In 1864, the House objected to, and the Senate agreed to pull, Senate amendments to a bill “enrolling and calling out the national forces” that set forth a “5 per cent duty on all incomes.”<sup>310</sup> The Senate acted in a similar manner in 1905 when the House complained about revenue provisions the Senate added to an appropriations bill.<sup>311</sup> Early congressional practice also shows instances in which the Senate decided not to originate a bill when a question was raised about the Origination Clause.<sup>312</sup>

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<sup>301</sup> *Id.*

<sup>302</sup> *Id.* § 1485.

<sup>303</sup> *See id.* § 1494 (discussing a court decision, *United States ex rel. Michels v. James*, 26 F. Cas. 577 (C.C.S.D.N.Y. 1875), in which a raise in postal rates was not deemed a revenue-raising bill).

<sup>304</sup> *Id.* § 1485.

<sup>305</sup> *Id.* § 1490.

<sup>306</sup> *Id.* § 1488.

<sup>307</sup> *Id.* § 1489.

<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> *Id.* § 1486.

<sup>311</sup> *Id.* § 1493.

<sup>312</sup> *See id.* § 1482 (bill “raise[d] the duty on certain articles”); *see id.* § 1483 (bill abolished salt duties).

Later congressional precedents also provide examples in which the House and Senate have struggled with the scope of the Origination Clause and the House's prerogative to originate revenue-raising bills.<sup>313</sup> While the congressional precedent is somewhat mixed, it does demonstrate an early effort by the House to protect its prerogative.

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Although there was a diversity of views on the Origination Clause at both the Constitutional Convention and at the state ratifying conventions, overall the clause was seen as curbing or balancing the Senate's power (and maintaining a balance among the states). It was also seen as a protection against tyranny by keeping the power to tax closest to the most immediate representatives of the people. The Clause was heavily debated and a part of the most important and controversial decisions and compromises at the Constitutional Convention—those involving representation and the Senate's power. It seems to clearly fall under the description of a "finely wrought provision" and appears to be exactly the type of provision that the Court should protect from indirect constitutional violations under the standard set forth in *Term Limits* and *Clinton v. City of New York*.

#### CONCLUSION—ACA AND INDIRECT CONSTITUTIONAL VIOLATIONS

Since the Origination Clause is the type of constitutional provision that the Court normally seeks to protect from indirect constitutional violations, did the ACA's passage amount to an indirect violation? Given the Origination Clause's history, the Senate could indirectly violate the Clause in two primary ways. First, assuming the Court agrees that any bill justified only under Congress's taxing power qualifies as a revenue-raising bill for purposes of the Clause, the Senate could attempt to add a provision to a House bill that raises significant revenue but is justified under another congressional power, such as the Commerce Clause. In the case of the ACA, however, the Supreme Court, in deciding that the individual mandate was only constitutional under Congress's taxing power, protected against this indirect violation.<sup>314</sup>

The second way that the Senate could indirectly violate the Origination Clause would be by "amending" a bill in such a way as to so radically change it so that the new amended legislation is, in essence, a new piece of legislation that "originated" in the Senate. This is what happened with the ACA. The Senate's use of delete and replace to com-

<sup>313</sup> See 6 Cannon's Precedents §§ 314–22 (1935); 7 DESCHLER'S PRECEDENTS Ch. 25 §§ 13–20 (1994).

<sup>314</sup> See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2608 (2012).

pletely remove the original text of H.R. 3590 and replace it with the Senate-generated health care plan went beyond the act of simple amendment and amounted to originating a new revenue-raising bill in the Senate, something the Origination Clause was enacted to guard against. While the Origination Clause's text permits the Senate to amend revenue-raising bills, to completely delete the House's text and substitute entirely new (and unrelated) language, while it may technically be an "amendment" in the modern sense of the word,<sup>315</sup> goes beyond the purpose of the Clause and what it was designed to protect against—just like allowing a ballot access restriction to act as a Qualification creates an indirect constitutional violation.

Furthermore, given the history behind the Origination Clause in the Constitution and the important role that the Clause played in constitutional compromises over representation and separation of powers, allowing the spirit of the Clause to be ignored by permitting the Senate to delete and replace the ACA would upset the "finely wrought" system of checks and balances and separation of powers set up by our constitutional system. This is especially true given the political situation following Senator Scott Brown's election. Because the Senate Democrats lost their filibuster-proof majority with Senator Brown's election, it would have been very difficult for the House to amend the ACA and return it to the Senate or push for a conference committee to work out the differences between the two plans. Any national health care reform legislation that met the President's broad goals would have struggled to garner sixty votes in the Senate after Senator Brown's election. Thus, the House Democrats were faced with two options—pass, without amendment, a bill that they did not prefer, or be the reason that the President's key policy initiative failed. Recall that in the discussion over the Origination Clause, one of the reasons for supporting the Clause was that the House would be the immediate representative of the people and hold tightly to

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<sup>315</sup> The Senate's action of completely replacing the text may have gone beyond the historical understanding of amendment. For example, Webster's 1828 dictionary defined amendment as "[a] word, clause or paragraph, added or proposed to be added to a bill before a legislature." 1 WEBSTER'S DICTIONARY 148 (1st ed. 1828), available at <http://www.archive.org/stream/americandictionary1websrich#page/148/mode/2up>. (This was the second definition for the term. The first definition was "[a]n alteration or change for the better; correction of a fault or faults; reformation of life, by quitting vices." *Id.*). Black's Law Dictionary defined the term, with respect to legislation, as "[a] modification or alteration proposed to be made in a bill on its passage, or an enacted law; also such modification or change when made." BLACK'S LAW DICTIONARY 67 (1st ed. 1891), available at <http://www.blacks.worldfreemansociety.org/1/A/a-0067.jpg>. Black's defined "modification" as "[a] change; an alteration which introduces new elements into the details, or cancels some of them, but leaves the general purpose and effect of the subject-matter intact." BLACK'S LAW DICTIONARY 783 (1st ed. 1891), available at <http://www.blacks.worldfreemansociety.org/1/M/m-0783.jpg>. Neither of these definitions envisions a complete substitution.

the power of the purse.<sup>316</sup> As the court recognized in *United States ex rel. Michels v. James*, the House would have “immediate responsibility to their constituents, and their jealous regard for the pecuniary interests of the people, it was supposed, would render them especially watchful in the protection of those whom they represented.”<sup>317</sup> The Senate’s use of delete and replace, especially in this instance, took away the House’s important structural role.

Finally, as discussed above, the history of the Origination Clause’s adoption shows that, just like the Qualifications Clauses and the Article I legislative process, it is the type of structural constitutional guarantee—born from the compromises at the Constitutional Convention—that the Court has protected from indirect violations. Just like the Court prevented Arkansas from circumventing the Qualifications Clause by limiting congressional terms through a ballot access provisions and the President from circumventing the Article I process through the use of the line item veto, the Court should prevent the Senate from circumventing the Origination Clause by using its amendment power under the Origination Clause to delete and replace the ACA into law. Permitting the Senate to use delete and replace renders the Origination Clause a meaningless constitutional provision.

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<sup>316</sup> See *supra* notes 235–45 and accompanying text.

<sup>317</sup> *United States ex. rel. Michels v. James*, 26 F. Cas. 577, 578 (C.C.S.D.N.Y. 1875).