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

HEARING ON "THE ORIGINAL MEANING OF THE ORIGINATION CLAUSE"
APRIL 29, 2014

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TESTIMONY OF NICHOLAS M. SCHMITZ
COAUTHOR OF:
"THE ORIGINATION CLAUSE: MEANING, PRECEDENT, AND THEORY FROM THE 12TH TO 21ST CENTURY,"
3 *BRITISH JOURNAL OF AMERICAN LEGAL STUDIES*, 71-139 (2014)

TESTIMONY OF NICHOLAS M. SCHMITZ

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

My name is Nicholas M. Schmitz. I am a graduate of the United States Naval Academy, and am currently pursuing my second graduate degree at Stanford University. My first graduate degree was in British Social Contract Theory and Political Philosophy at Oxford University as a Rhodes Scholar. I subsequently served as a Marine Infantry Officer in Helmand Province, Afghanistan, before spending the last several years on the teaching faculty with the U.S. Naval Academy's Political Science Department. Among other courses, I taught the undergraduate Midshipmen a required course titled, "U.S. Government and Constitutional Development" as they prepared to take their respective statutory oaths of office to "support and defend the Constitution of the United States against all enemies, foreign and domestic." Although I have since resigned my commission to pursue other career goals, I still feel bound by my oath to support and defend the Constitution. More relevant to the topic of this hearing, I am coauthor of the recently published scholarly article in the peer reviewed British Journal of American Legal Studies, titled "The Origination Clause: Meaning, Precedent, and Theory from the 12th to the 21st Century."[1] My research partner, Professor Priscilla H.M. Zotti, is chairman of the Political Science Department of the U.S. Naval Academy. I am grateful for the opportunity to present the results of our publication to this committee as our own personal and academic findings. The entire journal article is submitted for the record.[2]

The theme of my testimony today is that the history of the Origination Clause, which mandates that "All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills,"[3] reveals a deliberate constitutional "check and

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[1] Priscilla H.M. Zotti and Nicholas M. Schmitz, *The Origination Clause: Meaning, Precedent, and Theory from the 12th to 21st Century*, 3 BR. J. AM. LEG. STUDIES, 71-139 (2014) (hereinafter Zotti-Schmitz).
[2] As indicated in the journal article itself, the views expressed in that article as well as in this testimony are my own and do not reflect the official policy or position of the Department of Defense or the U.S. Government.
[3] U.S. Const., Art. I, Sec. 7.

balance" under which nobody in the federal government except the direct representatives of the people in the House of Representatives, who are elected every two years and who are most familiar with the circumstances of the people, can constitutionally propose federal laws under the taxing power of Congress.[4]

Professor Zotti and I are aware of only a handful of scholarly publications on the Origination Clause since Justice Joseph Story wrote his often cited six-page reflection on it in his 1833 Commentaries. Only two other scholarly articles have been published since the Supreme Court last ruled on the issue 24 years ago. All of the other publications focus almost exclusively on the handful of cases comprising 20th Century Court precedent. As a result of our decidedly historical focus, our research's conclusions departed somewhat from the convention legal wisdom surrounding the purpose, role, and standing of the clause in our governmental system. I will largely contain my remarks to the pre-20th century period from Magna Carta to the Colonial tradition, through the Revolution, the 1787 Convention, the Ratification debates, and the early American understanding of the Clause.

The 1215AD Magna Carta forced upon King John at Runnymede by his Barons following their open insurrection, contained among its 63 clauses that, "*No scutage or aid is to be levied in our realm except by the common counsel of our realm. . . .*"[5] This "Great Charter" of 1215 then went into extensive details as to who composed the "common counsel of the realm," procedural restrictions on when and how they were to be convened, and what constituted their consent. The Crown repealed the

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[4] *See* U.S. Const., Art I, Sec. 8 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States"); *see also United States v. Butler*, 297 U.S. 1, 68-69 (1936) ("The power of taxation, which is expressly granted, may, of course, be adopted as a means to carry into operation another power also expressly granted. But *resort to the taxing power to effectuate an end which is not legitimate, not within the scope of the Constitution, is obviously inadmissible*.").

[5] "And to obtain the common counsel of the realm for the assessment of an aid (except in the cases aforesaid) or scutage, we will have archbishops, bishops, abbots, earls, and greater barons summoned individually by our letters, and we shall have summoned generally through our sheriffs and bailiffs all those who hold of us in chief, for a fixed date, with at least forty days' notice, and at a fixed place; and in all letters of summons we will state the reason for the summons. And when the summons has thus been made, the business shall go forward on the day arranged according to the counsel of those present, even if not all those summoned have come." *See* J.C. HOLT, MAGNA CARTA 17 appendix 6, at 455 (2nd ed. 1992.)

origination clauses in the subsequent reissues of the Great Charter in 1216, 1217, and 1225, however, the early unicameral counsel refused to assent to various revenue measures in 1242 and 1255AD, insisting that despite its neglect and royal nullification, the restrictions of the original constitutional charter were still binding.[6] By 1295 representative of the several boroughs were allowed into the early parliament, and in 1341, the common representatives of the boroughs began meeting in a newly formed lower House of Commons separately from the more aristocratic parliamentary members. In this earliest British example of bicameral legislature, the Commons held little legislative power except that which they could obtain through their vigorously asserted prerogative to design and approve taxation and to impeach royal ministers. By Richard II's reign (1377-1399) it was customary that the "Commons granted with the assent of the Lords."[7] The principle remained for several hundred years, but was not firmly solidified against the claims of the Lords until the late 17th century. In 1671 a battle between the Commons and the Lords erupted when the Lords attempted to reduce a tax on sugar that the Commons had originated. The Lord's recognized the principle that the Commons exclusively originate new taxes, but the Lords reasoned in this case that they were reducing revenue vice raising it. On July 3rd, 1678, the Commons passed a resolution that the Lords had no power to amend revenue measures and that "all bills for the purpose of taxation, or containing clauses imposing a tax, must originate in the House of Commons and not in the House of Lords."[8] The Lords fought the Commons on this minor prerogative of

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[6] WILLIAM SHARP MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN, Ch. 14 (1914).

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

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

[8] Noel Sargent, *Bills for Raising Revenue under the Federal and State Constitutions*, 4 MINN. L.REV. 330 at 334 (1919-1920).

at least reducing revenue until the 1690s when the Commons effectively won the exclusive right to manage all revenues.[9]

During the 17th and 18th Centuries on the American side of the Atlantic, the colonies were experimenting with their own forms of representative government under the allowance of their Royal charters. Colonial charter's granted during the first half of the 17th century under King James I and Charles I, generally afforded colonial governors broader and less popularly constrained methods of taxation. After the decapitation of Charles I at the end of the 30 Years War, and after the restoration of the House of Stuart between the 1660s and 1690s, new or reissued Royal charters generally mandated some form of local, popular consent for taxation. For example, Carolina's (1663), Pennsylvania's (1681), New England's (1688), and Massachusetts's (1691) charters all required some variation of the "advice, assent and approbation of the freemen of the said province, or the greater part of them, or their delegates or deputies"[10] to legally impose taxes. However, even when origination requirements were not mandated in the Royal charters, many colonies simply wrote popular assembly origination requirements into their own governing laws. For example, after an open insurrection in the late 1640s in Maryland, the newly established bicameral legislature in Annapolis passed a law binding its upper council and governor in 1650 entitled "An ACT against raising of Money within this Province, without Consent of the Assembly." Under it, tax laws had to be "first had and declared in [the] General Assembly."[11] New Jersey likewise codified in 1681 that it was illegal "to levy or raise any sum or sums of money, or any other tax whatsoever, without the act, consent and concurrence of the General Free

[9] LUCE, *supra* note 7, at 390.
[10] The Charter of Carolina – 1663, *reprinted in* THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES PART II (Washington, GPO, 2d ed. 1878) (hereinafter GPO)
[11] FRANCIS BACON, THE LAWS OF MARYLAND VOL. 75, 37-38 (1765) (available at *Archives of Maryland Online*, http://aomol.net/megafile/msa/speccol/sc2900/sc2908/000001/000075/html/index.html).

Assembly."[12] By the 1760s, most colonies had a lower-house with some advantage over the upper-house on monetary and taxing matters either by constitutional mandate, statute, or common practice.

Prior to the 1760s the colonists had enjoyed not only the privilege of local ratification of any proposed taxing measures by the Crown and Parliament but more often than not the original design of the taxing measures themselves. The British Parliament attempted to levy the Sugar Act of 1764 for the purpose of "defraying the expenses of defending, protecting, and securing" the colonies. The Stamp Act of 1765 was subsequently passed for the purpose of reimbursing the British government for its expenses in the Seven Years War. Many colonists, and some Brits, disagreed with the constitutionality of such taxes. William Pitt ("the elder") protested in Parliament in 1765 on behalf of the colonists against the Stamp Act by arguing that:

> "[The] distinction between legislation and taxation is essentially necessary to liberty. . . . The Commons of America, represented in their several assemblies, have ever been in possession of the exercise of this their constitutional right of giving and granting their own money. They would have been slaves if they had not enjoyed it."[13]

In 1764, the Virginia House of Burgesses (along with separate petitions from ten other colonies) sent its famous petition to the House of Commons citing the colonial logic of opposition to the internal tax:

> "[T]he Council and Burgesses . . . in a respectful manner but with decent firmness, to remonstrate against such a measure . . . conceive it is essential to British liberty that laws imposing taxes on the people ought not to be made without the consent of representatives chosen by themselves; who, at the same time that they are acquainted with the circumstances of their constituents, sustain a proportion of the burden laid on them."[14]

The logic was echoed in the fundamental objection of the first act of coordinated American government in the Stamp Act Congress. It was reiterated again by the First Continental Congress in October of 1774. The opening line of that body's declaration of rights and grievances reads:

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

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

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

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

Following independence, the new states formed their own constitutions. Of the eleven available state constitutions immediately following the American Revolution, eight established bicameral legislatures (nine by 1790 with PA, and 10 by 1863 with VT). Of those nine with bicameral legislatures by 1790, seven had lower house Origination Clauses (NY and NC had no Origination Clause; however, North Carolina had annual senatorial elections). Of the seven with Origination Clauses by 1790, six allowed upper-house amendments to revenue raising bills (VA prohibited senate amendments).[15] None of the state constitutions prior to 1787 made any mention of the concept of "incidental revenue" except for Maryland's:

> "no bill, imposing duties or customs for the mere regulation of commerce, or inflicting fines for the reformation of morals, or to enforce the execution of the laws, by which an incidental revenue may arise, shall be accounted a money bill: but every bill, assessing, levying, or applying taxes or supplies, for the support of government, or the current expenses of the State, or appropriating money in the treasury, shall be deemed a money bill."[16]

However, that same constitution required that the Legislature cannot "on any occasion, or under any presence annex to, or blend with a money bill, any matter, clause, or thing, not immediately relating to, and necessary for the imposing, assessing, levying, or applying the taxes or supplies, to be raised by the government, or the current expenses of the State."[17] This standard of the day of single purpose legislation removed many of the complexities of modern day Origination Clause jurisprudence. Finally, in Maryland's case, it is not even clear that the Senate could amend a money bill in the first place if it were classed as such.

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[15] Zotti-Schmitz, *supra* note 1, at 85-91.
[16] Maryland Constitution of 1776, *reprinted in* GPO, supra note 10, at 822.
[17] *Id.*

When the Constitutional Convention opened on May 25th 1787, the fundamental topic of disagreement between the delegates that threatened progress towards amending the Articles of Confederation was over the nature of representation in the legislative branch. The small states insisted on retaining the equal representation they had enjoyed under the Articles of Confederation, while the large states wanted to shift the national legislature to be proportionally representative of their populations. Delegates from the small states threatened retire from the convention and even to confederate with foreign nations rather than consent to a form of government that would give their state less than equal representation in the new legislature. Contrary to popular narrative, Roger Sherman's June 11th proposal of the now famous Great Compromise did not by itself convince the smaller states' delegates to consent to our modern bicameral legislature's method of representation. Sherman's proposal initially failed in Convention. What it took, was Benjamin Franklin's recognition that the fundamental disagreement was over property and taxation, and Elbridge Gerry's subsequent proposal to:

> "restrain the Senatorial branch from originating money bills. The other branch was more immediately the representatives of the people, and it was a maxim that the people ought to hold the purse-strings. If the Senate should be allowed to originate such bills, they would repeat the experiment, till chance should furnish a set of representatives in the other branch who will fall into their snares."[18]

On July 5th a committee assigned to the issue produced the first draft language of the clause which required "that all bills for raising or appropriating money, . . . shall originate in the 1st. branch of the Legislature, and shall not be altered or amended by the 2d. branch".[19] With this measure added, the larger states' representative on the committee had "assented conditionally" to an equality of votes in

[18] JAMES MADISON, NOTES ON DEBATES IN THE FEDERAL CONVENTION OF 1787, at 113 (New York, Norton & Co. Inc., 1969) (hereinafter MADISON).
[19] *Id.* at 237.

the Senate, given that the "smaller States have conceded as to the constitution of the first branch, and as to money bills."[20]

While there was significant debate about the wisdom of the clause, according to Madison, the view that "generally prevail[ed]" was George Mason's argument that:

> "The consideration which weighted with the Committee was that the 1st branch would be the immediate representatives of the people, the 2nd would not. Should the latter have the power of giving away the people's money, they might soon forget the source from whence they received it. We might soon have an Aristocracy."[21]

At the end of the debate on July 6th, the first draft of the Origination Clause without Senate amending power was voted for in the affirmative (6-3 with Georgia, New York, and Massachusetts divided). The following day, on July 7th the vote to allow equality of representation in the Senate for the small states was finally passed (6-3 with Georgia and Massachusetts divided). It had taken a month of heated debate that threatened to dissolve the Convention and the Union between the time of the proposal of the Virginia Plan and the actual compromise mechanism proposed by Benjamin Franklin including the Origination Clause that made progress possible. Specifically, it took the adoption of a strict Origination Clause against the Senate to convince enough of the larger States to allow equal representation in the Senate. The Origination Clause was the "cornerstone of the accommodation."[22]

However, the vote to insert the strict form of the Origination Clause and allow for equal representation of states in the Senate and proportional representation in the House did not end the issue. The Clause was subsequently repealed and then reintroduced in the Convention with a limited Senate amending power requiring that "Bills for raising money for the *purpose of revenue* or for appropriating the same shall originate in the House of Representatives and shall not be amended or altered in the Senate as to increase or diminish the sum to be raised, or change the mode of levying it,

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[20] *Id.* at 242.
[21] *Id.* at 250.
[22] *Id.* at 290 (Delegate Elbridge Gerry in Convention indicating the centrality of the Clause to the Great Compromise).

or the objects of its appropriation."[23] George Mason explained that the logic for adding the emphasized phrase "for the purpose of revenue" was to remove the objection that all federal powers might have "some relation to money." However, this language was ultimately not adopted by the Convention,[24] and in the very same paragraph, Mason observed that:

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

The debate on the wisdom of the Clause continued. The imperative for adding the Senate amending power was primarily to prevent the House from abusing the absence of that privilege by disingenuously tacking foreign matters to money bills and claiming that the Senate could not amend them out. By adding the amending power, the Framers thought the Senate would be able to strip out non-germane clauses the House had smuggled into a revenue raising bill. Some of the delegates did seek to expand the Senate's involvement "perfecting" House originated revenue measures. Madison, himself, was early in the Convention one of these exceptions as he believed that the Senate should at least be allowed "to diminish the sum to be raised. Why should they [the Senate] be restrained from checking the extravagance of the other House."[25] However, the primary problem the Framers sought to address with the amending power was to prevent abuses witnessed by lower Houses under the British system, not to expand the Senate's influence on tax law, and certainly not to allow the Senate to effectively originate tax law. The amending power's was primarily a defensive measure for the Senate to guard its legitimate

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[23] *Id.* at 461 (August 15th in Convention).
[24] For a more detailed review of the Framer's debate over the phraseology "Bills for raising Revenue" as opposed to "bills for raising money for the purpose of revenue," see Zotti-Schmitz, *supra* note 1, at 122, note 181.
[25] MADISON, *supra* note 18, at 444.

prerogative over non-tax legislation in the face of an offensive House abusing a strict Origination Clause prerogative. Ultimately, the argument that seemed to prevail in the Convention was the more pragmatic issue and admission by the Framers that: "Taxation & representation are strongly associated in the minds of the people, and they will not agree that any but their immediate representatives shall meddle with their purses. In short the acceptance of the plan will inevitably fail, if the Senate be not restrained from originating Money bills."[26]

On September 8th, the last substantive working days of the Convention, the final language of the Clause was voted on: "On the question of the first part of the clause – 'All bills for raising revenue shall originate in the House of Representatives'." The measure on the first half of the Clause was passed (9-2), the second half of the Clause granting the Senate amending power was never officially voted on, but was signed to in the final draft by the Convention, and forwarded for ratification.

While there was significant theoretical debate about the wisdom of the Clause in the closed-door Convention, the public ratification debates were less divided on their understanding of its meanings. We find only one instance in the Documentary History of the Ratification of the Constitution in which an antifederalist speculated about the possibility of the Clause permitting a Senate substitute amendment. Madison himself was present during that debate in the Virginia legislature, and responded to the criticism of the Senate amending power by stating:

> "The criticism made by the Honorable Member, is, that there is an ambiguity in the words, and that it is not clearly ascertained where the origination of money bills may take place. I suppose the first part of the clause is sufficiently expressed to exclude all doubts…"[27]

There is some interpretive leeway in the historical evidence regarding the question of whether the Origination Clause was understood to apply to appropriations as well as taxation. However, the vast majority of the historical evidence from the ratification debates is heavily weighted to one side on the

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[26] *Id.* at 445.

[27] Virginia Convention Debates, 14 June 1788 *reprinted in* THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Vol. 10, 1268 (hereinafter DHRC).

issue of the extent of the Senate's amending power. For example in Philadelphia it was argued that under the new Clause "They [the Senate] may restrain the profusion of errors of the house of representatives, but they cannot take the necessary measures to raise a national revenue."[28] In Pennsylvania, it was argued that "The two branches will serve as checks upon the other; they have the same legislative authorities, except in one instance. Money bills must originate in the House of Representatives."[29] And finally, in Virginia, it was interpreted as follows: "A revenue bill will now have a double chance of attaining to perfection. The House of Representatives will discuss, form and send it up – the Senate will have it in their power to deliberate, debate upon it, and propose amendments, if necessary; but they can go no further."[30] It may not be that surprising that no one apprehended a fear that the Senate would use the amending power to introduce non-germane (or even worse, substitute-) amendments containing their own taxing measures. At the time, the Continental Congress under the Articles of Confederation made such amendments illegal.[31] This may have been what the public had in mind for the limits on customary amendments when they ratified the words "but the Senate may propose or concur with Amendments as on other Bills." Legislative procedure at the time, and in most all American legislative bodies did not permit that sort of amendment.[32] Furthermore, in the extreme example of a substitute amendment, retaining the vestigial structure of the House Bill number would

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[28] An American Citizen II: On the Federal Government *Philadelphia Independent Gazetteer*, 28 Sept. 1787 *reprinted in* DHRC, supra note 27, V.13 at 265: Reprinted 21 Oct. 1787 under title: "On the safety of the people, from the restraints imposed on the Senate." V.2. at 143.

[29] The Pennsylvania Convention Debates, 1 Dec. 1787 *reprinted in* DHRC, *supra* note 27, V.2 at 451.

[30] Brutus *Virginia Journal*, 6 Dec. 1787 *reprinted in* DHRC, *supra* note 27, V.8 at 214-15.

[31] See ASHER CROSBY HINDS, PARLIAMENTARY PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, §1072 (U.S. Gov't Printing Office, 1899): In 1781, the Continental Congress passed this measure "No new motion or proposition shall be admitted under color of amendment as a substitute for a question or proposition under debate until it is postponed or disagreed to."

[32] *See* LUCE, *supra* note 7, at 429: After the early 1800s, the Senate became "almost if not quite the only parliamentary body in this country adhering in any degree to the English belief that an amendment need not be germane." Also *see* the Senate's own historical parliamentary rulings when judging the issue *reprinted in* U.S. Senate Proceedings, in Blair & Rives, 66 *The Congressional Globe*, May 8 1872, Part 4 at 3181-83: "Now the Chair desires to add to this that by the parliamentary law as practiced in the House of Representatives, which is the parliamentary law as generally understood by Legislatures and parliamentary bodies in the United States, this [non-germane] amendment would be totally out of order."

likely not satisfy the contemplated amendment procedures at the time as the bill numbering system was not even adopted until the early 19th century.[33]

The early courts and Senate largely abided by the original understanding of the Clause. However, at the end of the 19th century, the Supreme Court imported the concept of "incidentally create[d] revenue" to exempt certain bills from Origination Clause scrutiny. The authority the Court relied on in its 1875 decision in *United States v. Norton*[34] and again in its 1897 decision in *Twin City Bank v. Nebeker*,[35] was Judge Joseph Story's 1833 Commentaries on the Constitution. In those Commentaries, Story argued (in opposition to another scholar of his time) that a bill for establishing the Post Office need not have originated in the House of Representatives,

> "And, indeed, the history of the origin of the power, already suggested, abundantly proves, that it has been confined to bills to levy taxes in the strict sense of the words, and has not been understood to extend to bills for other purposes, which may incidentally create revenue. No one supposes that a bill to sell any of the public lands, or to sell public stock, is a bill to raise revenue, in the sense of the constitution. Much less would a bill be so deemed, which merely regulated the value of foreign or domestic coins…"[36]

While the concept of "incidentally create[d] revenue" is mentioned nowhere in the Constitution, to the early Court's credit, their application of Story's opinion in the 1875 *Norton* and 1897 *Nebeker* cases concerning "incidentally create[d] revenue" was at least consistent with the *context* of that authority's words. *Norton* concerned an act to "establish a postal money order system," and *Nebeker* concerned an act to regulate the value of currency (the National Banking Act of 1864). These were exactly the illustrative examples Story listed to give the concept context. I refer the Committee to my article discussing subsequent court cases interpreting the Origination Clause, but it is important to note

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[33] The number referencing system did not even exist until 1817 in the House and 1847 in the Senate. The House adopted a sequential numbering system in which bills were numbered consecutively for an entire Congress in the 15th Congress (1817), and the Senate began using the same numbering system in the 30th Congress (1847). Prior to that time, the Senate numbering system provided that sequential numbering started anew at the beginning of each congressional session. LexisNexis, "About Bills" (www.lexisnexis.com/help/cu/Serial_Set/About_Bills.htm).
[34] *United States v. Norton*, 91 U.S. 566 (1875).
[35] *Twin City Bank v. Nebeker*, 167 U.S. 196 (1897).
[36] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §877 at 343 (Boston, Hillard, Gray, and Co. 1833).

the context of Story's concept of "incidentally create[d] revenue." That context was in relation to bills which do not "levy taxes in the strict sense of the words," and where the generation of revenue is nearly accidental and unintended – a complete byproduct of the Senate legislation. If the various branches of the Federal Government were to extend Story's concept of "incidentally create[d] revenue" to bills where taxes are levied for the general expenses of government, without reference to Constitutionally enumerated Senate powers, then not only would they be in contravention of the original meaning of the Clause, but they would also be in contravention to the very authority most often cited to endorse the concept. Further, such an extension of the concept would render the origination clause wholly impotent.

The danger of the inevitable blurring of legislation and taxation was considered at length by the Framers in the Convention. One early draft of the Clause even proposed specifying "bills for raising money for the purpose of revenue." However, after much debate on the complexity of discerning congressional purpose,[37] the Framers instead imported the identical language used in most of the States' origination clauses, "Bills for raising Revenue." The connotation of that common phrase employed by many of the states at the time of Ratification was quite broad in that it encompassed nearly all legislation that levied strict taxes regardless of the purpose. Madison's explanation of the

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[37] *See* MADISON, *supra* note 18, at 445-46. When the draft version of the Origination Clause was introduced in Convention stating "Bills for raising money for the *purpose of revenue*", Madison foresaw the extraordinary ambiguity present in such language:

> "The word revenue was ambiguous. In many acts, particularly in the regulations of trade, the object would be twofold. The raising of revenue would be one of them. How could it be determined which was the primary or predominant one; or whether it was necessary that revenue should be the sole object, in exclusion even of other incidental effects. . . . Can there be a more fruitful source of dispute, or a kind of dispute more difficult to be settled?"

See also STORY, *supra* note 37, § 1086:

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

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

Clause to the ratifying public likewise comported with the public understanding of both the scope of legislation encompassed by the phrase "Bills for raising Revenue", and the extent of the Senate's amending power: "The House of Representatives cannot only refuse, but they alone can propose the supplies requisite for the support of the government."[38]

In *Millard v. Roberts*, the Supreme Court in 1906 upheld the constitutionality of property taxes imposed to fund a railroad terminal in the District of Columbia.[39] The taxes, imposed to improve the rail system, were not levied to raise revenue but for the program put in place. Using the same logic as *Nebeker*, the Court ruled that the taxes were not for raising revenue but only for the stated purpose in the Act, hence those taxes did not raise questions under the Origination Clause. *Millard*, also a unanimous decision, relied heavily on the logic of *Nebeker*, as the Court quoted it extensively. *Millard* thus reaffirmed the understanding of the Origination Clause from *Norton* and *Nebeker*.[40]

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

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[38] THE FEDERALIST NO. 58 (James Madison).
[39] 202 U.S. 429 (1906).
[40] *Millard v. Roberts*, 202 U.S. 429 (1906). During the next decade, the Court acknowledged in two separate cases that the challenged tariff bills were revenue bills, but upheld the power of the Senate to amend them. *See Flint v. Stone Tracy Co*., 220 U.S. 107 (1911); *Rainey v. United States*, 232 U.S. 310 (1914). Following *Millard* in 1906, the Court did not have occasion to follow the logic of *Nebeker* regarding incidental revenue until 1990, but that 1990 case did not involve any tax as had *Nebeker* and *Millard*. *See United States v. Munoz-Flores*, 495 U.S. 385 (1990) (monetary "special assessment" on persons convicted of a federal misdemeanor).

accounting" gimmick, because the Senate can always pair up taxing and spending provisions so as to avoid the Clause.[41]

As explained in the journal article I am submitting for the record, throughout the 20th century the Supreme Court has developed a historically narrow standard for what bills are considered "Bills for raising Revenue" within the context of the Origination Clause, and, if classed as a revenue raising bill, a standard that any Senate amendments must be germane to the subject matter of the House originated bill. While the somewhat passive evolution of this standard over the 20th century has survived as relatively uncontroversial given the small scale and the nature of the cases presented, the Supreme Court sooner or later will have to revisit this standard if broader challenges are presented in order to preserve any substantive meaning and effect in the Origination Clause and our theory of mixed legislatures. Otherwise, the Senate may continue to institutionalize creative legislative maneuvers for originating broader and more burdensome taxing measures in contravention of the Framer's fear that, "If the Senate can originate, they will in the recess of the Legislative Sessions, hatch their mischievous projects, for their own purposes, and have their money bills ready cut & dried, (to use a common phrase) for the meeting of the H. of Representatives."[42]

In conclusion, the history of the Origination Clause reveals a deliberate constitutional "check and balance" under which nobody in the federal government except the direct representatives of the people in this House of Representatives, who are elected every two years and who are most familiar with the circumstances of "We the People,"[43] can constitutionally propose federal laws under the taxing power of Congress.

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[41] *Munoz-Flores* at 407-408 (Stevens, J., concurring).
[42] MADISON, *supra* note 18, at 443.
[43] U.S. Const., Preamble.