Tennessee Law Review

Volume 87
Issue 4 *Summer 2020*

Article 4

2020

THE ORIGINATION CLAUSE'S MISSING PIECE

Chris Land

THE ORIGINATION CLAUSE'S MISSING PIECE

CHRIS LAND*

The Origination Clause is nearly constitutional surplusage today. The scope of the Clause has been limited by the U.S. Supreme Court to a very narrow class of revenue legislation that emerges from the U.S. House of Representatives.

This Article, for the first time, analyzes historical evidence that the U.S. Supreme Court has defined the constitutional scope of "Bills for raising Revenue"—and the concomitant reach of the Clause—in a manner that fails to account for Revolutionary-era British revenue legislation. Four of the five bills passed by the British Parliament which contributed to the outbreak of the Revolutionary War, i.e., the Sugar Act 1764, Stamp Act 1765, American Colonies Act/Declaratory Act 1766, Revenue Act 1767, and the Tea Act 1773, were considered

---

* Research Fellow, Northwestern University, Pritzker School of Law (2018–19). This Article is dedicated to my friends, colleagues, and mentors throughout the years that have encouraged me to be intellectually curious. The author extends gratitude to former colleagues at the U.S. House Committee on Ways and Means who planted the seeds of this Article and Professors Myron Orfield (Minnesota), Seth Barrett Tillman (Maynooth), and John McGinnis (Northwestern) for their comments. The author is also grateful to Cati Shadakofsky and Matt Silverstein for allowing me to posit ideas on the direction of this Article. All errors and omissions are, of course, my own.

by the Revolutionary-era generation to be "Bills for raising Revenue." These measures were largely the genesis of the slogan "taxation without representation."

Under U.S. Supreme Court precedent today, none of these Revolutionary-era measures would likely be subject to the Origination Clause because each bill raised revenue for a specific governmental purpose, e.g., the defense of the American colonies, the enforcement of anti-smuggling laws, and other specific, directed purposes. Though Origination Clause precedent has supposedly been rooted by the Court in "the history of the origin of the power," Origination Clause cases make it clear that only those bills that raise "revenue to support government generally," i.e., undesignated revenue-raisers, are subject to the Origination Clause's requirements.

This Article contends that this approach is largely unsupported by the historical record and that our modern application of the Origination Clause is missing an important piece—the Revolutionary-era generation's view of the legislation which truly constitutes "Bills for raising Revenue."

I. INTRODUCTION: BOSTON TEA

> *"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."*[1]

On April 27, 1773, Lord North[2] rose from the Treasury Bench of the British House of Commons to move that the assembly consider a resolution reported from its Committee on Ways and Means.[3] With the East India Company in declining financial straits, and its warehouses brimming over with surplus imports of tea, the House approved a resolution authored by the Committee which declared a special tax break for the Company. The resolution provided that:

---

1. U.S. CONST. art. I, § 7, cl. 1 (the Origination Clause).

2. In his role as Prime Minister and First Lord of the Treasury. *See generally* PETER DAVID GARNER THOMAS, LORD NORTH (Chris Cook ed., 1976) (recounting Lord North's Actions as Prime Minister and First Lord of the Treasury). Lord North also made the decision to cease hostilities against the American colonies in 1781. *Id.* at 108.

3. *See The Chairman of Ways and Means/Deputy Speakers*, U.K. PARLIAMENT, https://www.parliament.uk/about/living-heritage/evolutionofparliament/parliamentwork/offices-and-ceremonies/overview/chairman-waysmeans/ (last visited Sept. 24, 2020).

> [U]pon all teas, which shall be sold at any of the East India Company's public sales, or be imported under license, after the 10th day of May, 1773 and shall be exported to any of the British plantations in America, a drawback [shall be granted] of all the duties and customs paid upon the importation of such teas.[4]

The East India Company had lobbied the Commons for this language, believing that a tax break would allow the Company to obtain a monopoly over tea exports to the American colonies,[5] achieving two regulatory goals: (1) near-universal enforcement of the tea duties imposed by the Townshend Acts; and (2) undercutting the price of smuggled Dutch tea preferred by many American colonists instead of the British version.[6] However, less than five months later, much of the tea imported to the colonies and favored by the resolution's tax provisions ended up floating in Boston Harbor.[7]

The Boston Tea Party was one of the seminal moments in the Revolutionary era.[8] Indeed, no other incident is a better exemplar of the rallying cry of "taxation without representation" in the American colonies.[9] The root cause of the Boston Tea Party was the ways and means resolution adopted by the House of Commons and the passage of the Tea Act in 1773.[10] This legislative episode was another in a series of revenue bills passed by Parliament in the 1760s–1770s.[11]

---

4. 17 WILLIAM COBBETT, THE PARLIAMENTARY HISTORY OF ENGLAND, FROM THE EARLIEST PERIOD TO THE YEAR 1803, at 841 (1813) (citation omitted).

5. *See id.* at 840–41.

6. *See* BERNHARD KNOLLENBERG, GROWTH OF THE AMERICAN REVOLUTION: 1766–1775, at 90, 93 (1975).

7. *See, e.g.*, JOHN ADAMS, JOHN ADAMS: REVOLUTIONARY WRITINGS: 1755–1775, at 286 (Gordon Wood ed., 2011) ("This Destruction of the Tea is so bold, so daring, so firm, intrepid and inflexible, and it must have so important Consequences, and so lasting, that I cant [sic] but consider it as an Epocha [sic] in History."); *see also* 7 THE HISTORY, DEBATES, AND PROCEEDINGS OF BOTH HOUSES OF PARLIAMENT OF GREAT BRITAIN, 1743–1774, at 103 (1792) (quoting presciently Governor Johnstone: "I much advised the Directors [of the East India Company] to desist from exporting tea to America. . . . I am very certain, that a sort of rebellion will take place upon this measure being known in America.").

8. *See* KNOLLENBERG, *supra* note 6, at 90 ("Passage of the Tea Act of 1773, the East India Company's action authorized by it, and the ensuing Boston Tea Party led directly to the American Revolution.").

9. *See* ADAMS, *supra* note 7, at 286.

10. *See* KNOLLENBERG, *supra* note 6, at 95–102 (detailing colonial opposition to the Tea Act and the events leading to the Boston Tea Party).

11. *See* Tea Act 1773, 13 Geo. 3 c. 44; Revenue Act 1767, 7 Geo. 3 c. 46; American Colonies Act 1766, 6 Geo. 3 c. 12 (commonly known as the Declaratory Act); Stamp Act 1765, 5 Geo. 3 c. 12; Sugar Act 1764, 4 Geo. 3 c. 15.

The Tea Act and other British revenue legislation, including the Sugar Act 1764, Stamp Act 1765, American Colonies Act/Declaratory Act 1766, and Revenue Act 1767, offer important historical evidence relating to the scope of the U.S. Constitution's mandate that revenue bills are required to originate in the U.S. House of Representatives (the Origination Clause) today. Four of the five revenue bills this Article will discuss[12] specifically earmarked tax revenue to offset the costs of defending the American colonies, funding the American judicial system, law enforcement, and other specific colonial administrative expenses.[13] Also, the Tea Act sought to restrain the smuggling of Dutch tea into the American colonies and to prop up the struggling East India Company.[14] This is an example of a revenue bill primarily being used for a regulatory purpose.[15]

This split in purposes between revenue bills which levy impositions (1) for the support of government (whether designated or undesignated) and (2) for regulatory purposes is reflected today in the U.S. Supreme Court's Origination Clause jurisprudence as well as the original meaning of "Bills for raising Revenue."[16] Broadly, legislative measures determined by the Court to be subject to the Clause only levy impositions for the support of the federal budget in the broadest sense—without being designated for a particular program or purpose. Conversely, bills exempt from the Origination Clause under contemporary jurisprudence raise revenue for a particular governmental program or are used to achieve a regulatory objective—i.e., raising revenue 'incidentally.'[17]

Consequently, the U.S. Supreme Court's interpretation of "Bills for raising Revenue" has, since at least the late nineteenth century, been limited to measures "that levy taxes in the strict sense of the

---

12. *See infra* Part IV.C and D. Ironically, the bill most associated with the phrase "taxation without representation"—the Tea Act 1773—is likely the only bill of this quintet that may not have been understood by the Revolutionary-era generation to be a "Bill[] for raising Revenue" and that would also be outside the Origination Clause today. *See infra* Part IV.C and D.

13. *See infra* Part IV.C and D.

14. KNOLLENBERG, *supra* note 6, at 93 ("[T]he Ministry expected that the Tea Act would afford relief to the [East India] Company and at the same time increase the revenue from the Townshend Act duty by increasing colonial consumption of legally imported, duty-paid tea."); *see also* COBBETT, *supra* note 4, at 840–41 ("[I]t was to allow the Company to export such part of the tea at present in their warehouses to British America, as they should think proper, duty free. This would be prodigiously to the advantage of the Company . . . .").

15. *See* discussion *infra* Part III.C and D.

16. *See* discussion *infra* Part III.C and D.

17. *See* discussion *infra* Part III.C and D.

word."[18] The Court has repeatedly affirmed "that a statute that creates a particular governmental program and that raises revenue to support that program, as opposed to a statute that raises revenue to support Government generally," is not subject to the Clause.[19] This doctrine is based on an interpretation of Justice Joseph Story's *Commentaries on the Constitution of the United States,* which declared that "the history of the origin of the power, [the Origination Clause], 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."[20]

The British House of Commons' exclusive control of the public *fisc* has been exhaustively detailed in scholarship.[21] Similarly, the U.S. Constitution's Origination Clause has received increasing study over the last decade,[22] especially in light of the Patient Protection and Affordable Care Act and the manifold procedural eccentricities accompanying its passage.[23] These works, however, have mostly

---

18. United States v. Munoz-Flores, 495 U.S. 385, 397 (1990) (quoting Twin City Bank v. Nebeker, 167 U.S. 196, 202 (1897).

19. *Id.* at 398.

20. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 880 (3d ed. 1858).

21. *See* 3 JOHN HATSELL, PRECEDENTS OF PROCEEDINGS IN THE HOUSE OF COMMONS, WITH OBSERVATIONS 94, 112 (3d ed. 1818); THOMAS ERSKINE MAY, TREATISE ON THE LAW, PRIVILEGES, PROCEEDINGS, AND USAGES OF PARLIAMENT 537 (6th ed. 1868) (citing 1671 resolution); Priscilla H.M. Zotti & Nicholas M. Schmitz, *The Origination Clause: Meaning, Precedent, and Theory from the 12th to the 21st Century*, 3 BRIT. J. AM. LEGAL STUD. 71, 76–78 (2014); FINANCIAL PRIVILEGE: A NOTE BY THE CLERK OF THE HOUSE AND CLERK OF LEGISLATION 1–2 (2012).

22. *See generally* Marie T. Farrelly, *Special Assessments and the Origination Clause: A Tax on Crooks?*, 58 FORDHAM L. REV. 447 (1989) (examining the constitutionality of the Victims Assistance Act, which arguably arose in the Senate); Thomas L. Jipping, *TEFRA and the Origination Clause: Taking the Oath Seriously*, 35 BUFF. L. REV. 633 (1986) (criticizing courts for failing to question the constitutionality of TEFRA and the Senate for creating TEFRA); Rebecca M. Kysar, *The 'Shell Bill' Game: Avoidance and the Origination Clause*, 91 WASH. U. L. REV. 659 (2014) (analyzing the U.S. Senate's increasing practice of using 'strike-all' amendments to effectively avoid the strictures of the Origination Clause); Jonathan Rosenberg, Comment, *The Origination Clause, the Tax Equity and Fiscal Responsibility Act of 1982, and the Role of the Judiciary*, 78 NW. U. L. REV. 419 (1983) (arguing that the Judicial Branch should hear constitutional claims regarding violations of the Origination Clause).

23. *See generally* 42 U.S.C. § 300gg et seq. (2018) (reforming health care of the United States); Tessa L. Dysart, *The Origination Clause, the Affordable Care Act, and Indirect Constitutional Violations*, 24 CORNELL J.L. & PUB. POL'Y 451 (2015) (arguing that the Court's failure to see the Affordable Care Act as an indirect violation of the Origination Clause was contrary to established constitutional

centered on the Clause's modern place in the legislative process, including prudential effects and justiciability within our federal courts,[24] with little focus on the meaning of the phrase "Bills for raising Revenue" and the actual scope of the Origination Clause.[25] This is arguably the most important facet of Clause doctrine, because the scope of the phrase "Bills for raising Revenue" determines which legislative measures are subject to the Clause and also which are not.

This Article will analyze powerful historical evidence relating to the scope of the Origination Clause. Through the lens of "taxation without representation" and the British revenue legislation directed at the American colonies, this Article will consider the durability of the U.S. Supreme Court's modern Origination Clause doctrine—an approach which excludes from the remit of the Clause revenue measures designated for a particular governmental program and revenue measures that have a primary regulatory purpose.[26]

None *(none!)* of the British revenue bills which led to the Boston Tea Party and the theme of "taxation without representation," i.e., the Sugar Act 1764, Stamp Act 1765, American Colonies Act/Declaratory Act 1766, and Revenue Act 1767, would have actually been subject to the Origination Clause today under U.S. Supreme Court precedent.[27] The Revolutionary-era generation would likely have also not viewed the Tea Act 1773 as a "Bill[] for raising Revenue" either, though this is not as clear cut.[28]

The U.S. Supreme Court has adopted a historical approach to Origination Clause doctrine, citing to Story's *Commentaries on the Constitution* and his assertion relating to the "history of the origin of the power" in nearly every case relating to the Origination Clause.[29] This Article will similarly proceed with a historical focus.

If the Founding-era generation understood most—if not all—of the British bills to be "taxation without representation," (each of

---

precedent); Robert G. Natelson, *The Founders' Origination Clause and Implications for the Affordable Care Act*, 38 HARV. J.L. & PUB. POL'Y 629 (2015) (building upon the shell bill argument and asserting that the Founders would not have understood the term 'amend' to include non-germane or strike-all amendments).

24. *See, e.g.*, Natelson, *supra* note 23, at 705–09. Natelson's work analyzed the Founders' understanding of the word 'amend.' *Id.*

25. *See generally* Kysar, *supra* note 22 (discussing the scope of the Origination Clause and the meaning of raising revenue).

26. *See* discussion *infra* Part III.C and D.

27. *See* discussion *infra* Part IV.A–C.

28. *See* discussion *infra* Part IV.A–C.

29. *See* United States v. Munoz-Flores, 495 U.S. 385, 397–98 (1990); Twin City Bank v. Nebeker, 167 U.S. 196, 202–03 (1897).

which was subject to the House of Commons' 'ancient' privilege to originate revenue legislation), then how is it possible that U.S. Supreme Court Origination Clause doctrine has evolved in a manner that would exclude the core principles of the Clause? This Article will proceed to analyze this core question.

Part II of this Article offers brief historical context on the evolution of the House of Commons' financial privilege and the adoption of the Origination Clause in the U.S. Constitution. Part III provides a detailed outline of the U.S. Supreme Court's modern Origination Clause doctrine.

Part IV of the Article describes British revenue legislation and applies modern Origination Clause precedent to each measure, analyzing whether the legislation would fall within the scope of the Clause today and asserting that the Revolutionary-era generation understood all bills that raised revenue to fund government, whether designated for a specific purpose or "government generally," were revenue-raising bills. Part V traces the importance of this analysis to the scope of the Origination Clause and offers conclusory remarks. This Article contends that our contemporary understanding of the U.S. Constitution's Origination Clause is missing a vital piece—the Revolutionary-era generation's view of the nature of legislation constituting "Bills for raising Revenue," since the British revenue bills which gave rise to the Revolutionary War largely would not have been subject to the Clause under modern U.S. Supreme Court precedent.

II. THE ROOTS OF REVENUE ORIGINATION

A. The Financial Privilege of the House of Commons

The authority to raise revenue is the cornerstone of legislative power. Every government action requires an accompanying apportionment of funds for staffing costs, capital expenditures, acquisition of goods and services, and other expenses.[30] In turn, these funds must be derived from taxes, fees, tariffs, assessments, and other revenues.[31] The rise of

30. *See, e.g.*, Alan L. Feld, *The Shrunken Power of the Purse*, 89 B.U. L. REV. 487, 488 (2009).

31. *See The Tax Policy Center's Briefing Book*, URB. INST. & BROOKINGS INST., TAX POL'Y CTR., https://www.taxpolicycenter.org/briefing-book/what-are-sources-revenue-federal-government (last updated May 2020).

democratic/republican/parliamentary government is therefore heavily tied to legislative management of public money.[32]

The roots of popular control of taxation stem from the British medieval period. The 1100 "Charter of Liberties of King Henry I"[33] included provisions that emphasized the "common counsel" of his subjects on various policy issues that King Henry I faced—in some ways a primordial legislature or council of advisors.[34] A century later, King John's sealing of the Magna Carta at Runnymede in 1215 recognized that "[n]o scutage or aid is to be levied in our kingdom without its general consent . . . ."[35] This provision codified, for the first time in England, that taxation should be imposed through fixed legal procedure.[36]

By the turn of the fifteenth century, the British House of Commons, composed of shire and borough representatives, had emerged into a separate legislative assembly apart from the House of Lords.[37] At this time, Richard II recognized that taxation and appropriations were granted by the "Commons . . . with the assent of the Lords,"[38] enshrining the principle of bicameralism in financial matters for the first time.[39] The House of Commons was able to obtain this concession from Richard II and the Lords by withholding

---

32. *See* Louis Fisher, *Presidential Independence and the Power of the Purse*, 3 U.C. DAVIS J. INT'L L. & POL'Y 107, 107 (1997) ("The rise of democratic government is rooted in this legislative control over expenditures.").

33. *Medieval Sourcebook: Charter of Liberties of Henry I, 1100*, FORDHAM UNIV., https://sourcebooks.fordham.edu/source/hcoronation.asp (Jan. 2, 2020).

34 *See id.* (alluding to the common counsel of the barons in several provisions).

35. *Magna Carta (1215)*, U. MINN. L. LIBR., http://moses.law.umn.edu/magnacarta/mc_english.php; *see also* J.C. HOLT, MAGNA CARTA 455 app. 6 (2d ed. 1992) (providing a differently worded version of the above quoted language).

36. It is uncertain whether this right was first granted with Magna Carta, or whether it was merely a codification of existing practices. *See* Zotti & Schmitz, *supra* note 21, at 77 ("One explanation offered by historians for [the omission of this provision in subsequent copies of Magna Carta] is that most of *Magna Carta* was actually a reaffirmation of ancient customs and privileges afforded to the Barons and clergy by the Crown.").

37. HOUSE OF LORDS, BRIEFING: THE HISTORY OF THE HOUSE OF LORDS 2 (2008).

38. ROBERT LUCE, LEGISLATIVE PROBLEMS: DEVELOPMENT, STATUS, AND TRENDS OF THE TREATMENT AND EXERCISE OF LAWMAKING POWERS 390 (1935); *see also* THE ENGLISH PARLIAMENT IN THE MIDDLE AGES 41–42 (R.G. Davies & J.H. Denton, eds. 1981) ("The business most commonly brought to parliament by the king and which most directly involved the commons was taxation."). *See generally* ALBERT BEEBE WHITE, THE MAKING OF THE ENGLISH CONSTITUTION: 449–1485 (1925) (recounting the process through which the English constitution evolved).

39. LUCE, *supra* note 38, at 390.

revenue and appropriations (known jointly as "supply" or "money bills") in order to have the Commons' policy grievances redressed.[40]

By the late-seventeenth century, the House of Commons began to assert an exclusive power to propose revenue legislation as well, based on its popularly-elected—or representative—nature.[41] Hatsell records that a "Mr. Hyde" noted in a 1609 Commons debate that "[s]ubsidies always begin in this House," and that it was "against 'Privilege to entertain subsidies from the Lords.'"[42]

By the 1670s, and perhaps as a figment of the parliaments of the Cromwell years, the Lords and Crown had acknowledged that all taxes had to first be proposed by the Commons and that rates of taxation could not be increased by a House of Lords amendment.[43] For example, a 1671 tax on sugar that was added to a Commons revenue bill by the Lords was stricken on its return to the Commons by a resolution of that House,[44] stating "[t]hat in all aids given to the King by the Commons, the rate or tax ought not to be altered"[45] by the Lords. The House of Lords continued to assert that it could amend revenue measures but acquiesced to the Commons in so far that it agreed not to propose new items or increase levels of taxation.[46]

In 1678, the Lords again attempted to reduce a Commons-imposed tax, and the House passed another resolution emphasizing that "it is the undoubted and sole right of the Commons to direct, limit, and appoint in such bills the ends, purposes, considerations, conditions, limitations, and qualifications of such grants: which ought not to be changed or altered by the House of Lords."[47] The

---

40. U.K. HOUSE OF COMMONS INFO. OFF., FACTSHEET G3: A BRIEF CHRONOLOGY OF THE HOUSE OF COMMONS 2 (2010).

41. LUCE, *supra* note 38, at 390.

42. 3 HATSELL, *supra* note 21, at 112. 'Subsidy' or 'aid' were the historical terms used in the British Parliament referring to two forms of taxation levied by the Crown. *See* Zotti & Schmitz, *supra* note 21, at 76.

43. *See* Zotti & Schmitz, *supra* note 21, at 78.

44. *Id.* This is the origin of modern 'blue-slip' resolutions used by the U.S. House of Representatives for the same reason. *See* JAMES V. SATURNO, CONG. RSCH. SERV., RL31399, THE ORIGINATION CLAUSE OF THE U.S. CONSTITUTION: INTERPRETATION AND ENFORCEMENT 3 (2011).

45. MAY, *supra* note 21, at 537 (citing 1671 resolution).

46. *See* Zotti & Schmitz, *supra* note 21, at 78.

47. MAY, *supra* note 21, at 537 (citing 1678 resolution); *see also* Noel Sargent, *Bills for Raising Revenue Under the Federal and State Constitutions*, 4 MINN. L. REV. 330, 334 (1920) (discussing whether the Origination Clause is merely a directory statement rather than a mandate).

Lords relented, and the Commons' generally absolute[48] privilege to propose and amend revenue legislation was largely enshrined in unwritten parliamentary convention before the Glorious Revolution and the turn of the eighteenth century.[49]

B. American Colonial Legislation and the Constitutional Convention

The early American colonial charters granted by the British Crown in the first part of the seventeenth century granted broad taxation authority to royal governors.[50] As the century passed, the lower houses of the colonial assemblies were granted or asserted, *sua sponte,* privileges similar to the House of Commons' right to originate revenue legislation free of amendment by the House of Lords.[51]

The Carolina Charter of 1663 authorized taxation after the "advice, assent[,] and approbation of the freemen of the said province, or of the greater part of them, or of their delegates or deputies."[52] The Charter of Massachusetts Bay provided that the "advice and Consent of the Councill [sic]" was required before the imposition and "leavy [sic] [of] proportionable and reasonable Assessments[,] Rates[,] and Taxes."[53] Similarly, Maryland's origination requirement echoed these principles:

> FORASMUCH as the Strength of the Lord Proprietary of this Province, doth consist in the Love and Affection of his People . . . no Subsidies, Aids,

---

48. Like any doctrine, disputes continue to arise from time to time about its precise contours. *See* MAY, *supra* note 21, at 537–46 (noting later disputes between the House of Commons and House of Lords over revenue legislation).

49. *See id.* at 537 (citing 1678 resolution). The Bill of Rights (1689) further codified the principles of the Petition of Right, namely, that "levying money for and to the use of the crown, by pretence of prerogative, for other time and in other manner than the same was granted by parliament" shall be illegal. Bill of Rights (Act) 1689, 1 W. & M. 2 c. 2 (Eng. & Wales). For a perspective of the House of Commons' rise from the view of the British Treasury, see generally HENRY ROSEVEARE, THE TREASURY: THE EVOLUTION OF A BRITISH INSTITUTION (1969).

50. *See, e.g.*, CHARTER OF MARYLAND para. XVII (1632) ("Moreover, We will appoint, and ordain, and by these Presents, for Us, our Heirs and Successors, do grant unto the aforesaid now Baron of Baltimore, his Heirs and Assigns, that the same Baron of Baltimore, his Heirs and Assigns, from Time to Time, forever, shall have . . . Power by these Presents, for Us, our Heirs and Successors, to assess and impose the said Taxes and Subsidies there, upon just Cause and in due Proportion.").

51. *See* Zotti & Schmitz, *supra* note 21, at 80.

52. CHARTER OF CAROLINA para. 5th (1663).

53. CHARTER OF MASSACHUSETTS BAY (1691).

> Customs, Taxes[,] or Impositions, shall hereafter be laid, assessed, levied[,] or imposed, upon the Freemen of this Province, or on their Merchandize, Goods[,] or Chattels, without the Consent and Approbation of the Freemen of this Province, their Deputies, or the major Part of them, *first had and declared in a General Assembly* of this Province.[54]

New Jersey also enacted a statutory origination mandate in 1681, providing "[t]hat it shall not be lawful . . . to levy or raise any sum or sums of money . . . without the act, consent and concurrence of the General Free Assembly."[55] At the time colonial independence was declared in 1776, seven out of the nine colonial legislatures that had bicameral assemblies[56] concurrently also maintained some form of origination requirement.[57]

Eleven years later, after the Revolutionary War, the former American colonists turned to the business of constitution-making.[58] The Origination Clause played a notable role in the 1787 "Great Compromise" between the heavily populated states and their sparsely populated neighbors that determined the method of representation in the new Congress.[59]

Congressional representation split the Constitutional Convention deeply, with the small states feeling inherently threatened by the ability of the larger states to use population-based voting to pursue policies that placed them at a disadvantage.[60] After James Madison's Virginia Plan for population-based representation

---

54. 75 FRANCIS BACON, THE LAWS OF MARYLAND 37–38 (1765) (emphasis added).

55. *See* Zotti & Schmitz, *supra* note 21, at 81.

56. Georgia and Vermont were unicameral. *See id.* at 91 tbl.1.

57. *Id.* New York and North Carolina did not have origination provisions in their early state constitutions. *Id.*

58. Editors of the Encyc. Britannica, *Constitutional Convention*, https://www.britannica.com/event/Constitutional-Convention (last visited Sept. 25, 2020).

59. For details on the Great Compromise, see Bradford R. Clark, *Constitutional Compromise and the Supremacy Clause*, 83 NOTRE DAME L. REV. 1417, 1425–31 (2008); Dan T. Coenen, *The Originalist Case Against Congressional Supermajority Voting Rules*, 106 NW. U. L. REV. 1091, 1145–51 (2012); *see also* 1 MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 91–112, 138–39 (1913) (explaining the partisan interests and history that resulted in the Great Compromise).

60. *See* Farrelly, *supra* note 22, at 449–50.

was taken up by the Convention on May 29, 1787,[61] the issue was quickly tabled after passions flared and to prevent "so early a proof of discord in the Convention as [the] secession of a State."[62] The original Virginia Plan did not contain an origination requirement.[63]

After attending to other matters in the draft constitution for two weeks, the Convention returned to Article I on June 11.[64] Roger Sherman (Connecticut) proposed a new compromise that provided for population-based representation in the House of Representatives,[65] and equality among the states in the Senate.[66] Citing the revenue powers of Parliament, Sherman then opened debate on the Origination Clause by noting that the "The House of Lords in England . . . had certain particular rights under the [customary British] Constitution."[67] Pennsylvania delegate James Wilson, considering future Congresses' ability to impose disproportionately higher taxes on the smaller states, said that "[t]he greater States Sir are naturally as unwilling to have their property left in the disposition of the smaller, as the smaller are to have theirs in the disposition of the greater."[68]

Two days later, on June 13, seeking a way to accommodate the larger states,[69] Elbridge Gerry of Massachusetts proposed to "restrain the Senatorial branch from originating money bills."[70] Ironically, Gerry's proposal was met with significant opposition from

---

61. *See* DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 167 (2d ed. 2005) ("[M]ost large state delegates arrived at the Convention determined that states would be proportionally represented in both houses of the new Congress.").

62. JAMES MADISON, NOTES ON DEBATES IN THE FEDERAL CONVENTION OF 1787, at 35–38 (Ohio Univ. Press 1969) (1787).

63. John L. Hoffer, *The Origination Clause and Tax Legislation*, 2 B.U. J. TAX. L. 1, 3 (1984).

64. 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 196 (Max Farrand ed., 1911).

65. MADISON, *supra* note 62, at 98.

66. 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 64, at 468–69 ("The power of self-defence was essential to the small States.") (statement of Oliver Ellsworth (Connecticut)); *see also* Coenen, *supra* note 59, at 1146 (explaining Ellsworth's desire to preserve equivalent state sovereignty by providing an equal number of senators per state, regardless of population size).

67. MADISON, *supra* note 62, at 98.

68. *Id.* at 101.

69. *See* Natelson, *supra* note 23, at 637.

70. MADISON, *supra* note 62, at 113 ("The other branch [the House] 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 sett [sic] of representatives in the other branch who will fall into their snares.").

the supporters of the Virginia Plan, who felt that the restriction would hamper the new government's taxing power (one of the problems of the Articles of Confederation) and that senators should be representatives of the people,[71] unlike the hereditary peers of the House of Lords. Gerry's proposal was defeated seven votes to three.[72]

With some delegates threatening to leave the Convention without the inclusion of an origination requirement,[73] Benjamin Franklin attempted to broker a compromise, proposing that the Senate would be restricted "generally in all appropriations [and] dispositions of money to be drawn out of the General Treasury; and in all laws for supplying that Treasury, the Delegates of the several States shall have suffrage in proportion to the Sums which their respective States do actually contribute to the Treasury."[74] This proposal was referred to an *ad hoc* committee on July 2, 1787, to consider alongside other details of the Great Compromise.[75] Two weeks later, the committee reported out the substance of Franklin's proposal to the Convention.[76] The committee report tracked the conventions of the British House of Commons' regarding revenue legislation.[77]

It is important to note the level of impact that British parliamentary practice had on the delegates to the 1787 Constitutional Convention, which would have likely shaped their understanding of many of the provisions they were drafting in the summer of 1787.[78] Many of the delegates to the Convention had lived

---

71. *See* Natelson, *supra* note 23, at 637.

72. *Id.*

73. *See* Rosenberg, *supra* note 22, at 423.

74. MADISON, *supra* note 62, at 227.

75. *See* Zotti & Schmitz, *supra* note 21, at 93.

76. 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 64, at 526. The report language stated that:

> all bills for raising or appropriating money, and for fixing the Salaries of the Officers of the Govern. [sic] of the U. States [sic] shall originate in the 1st branch of the Legislature, and shall not be altered or amended by the 2d branch: and that no money shall be drawn from the public Treasury, but in pursuance of appropriations to be originated in the 1st branch.

Id.

77. Natelson, *supra* note 23, at 638 ("The committee language largely mirrored common depictions of British parliamentary practice.").

78. *See, e.g.*, Boston Port Act 1774, 14 Geo. 3 c. 19; Indemnity Act 1767, 7 Geo. 3 c. 56; Revenue Act 1767, 7 Geo. 3 c. 46; Stamp Act 1765, 5 Geo. 3 c. 46; *see also* American Colonies (Declaratory) Act 1766, 6 Geo. 3 c. 12 (declaring Parliament's "Power and Authority to make Laws and Statutes of sufficient Force and Validity to

in or studied law in England prior to 1787, with Benjamin Franklin acting as the colonies' representative to the British Parliament in the 1770s,[79] and John Dickinson[80] and six other delegates having studied law at the bar of the Inns of Court in London, where part of the curriculum included British constitutional law and parliamentary custom and usage.[81]

It is also likely that many of the other Convention delegates were familiar with the procedures used by the British Parliament because many served in their respective colonial assemblies[82] and these bodies largely transplanted their practices from those used by the Commons and Lords.[83] British parliamentary practice continues to have an effect on the custom and usage of American legislatures today as many cite British practice in their individual rules of procedure.[84] The Convention delegates also had detailed discussions of the Commons' conventions—especially the 'ancient' financial privilege—during debates on the nascent U.S. Constitution.[85]

---

bind the Colonies and People of America . . . in all Cases whatsoever"); COBBETT, *supra* note 4, at 841 (quoting the Ways and Means resolution of the Tea Act).

79. J. A. Leo Lemay, *Benjamin Franklin*, *in* OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (2015), https://doi.org/10.1093/ref:odnb/52466 (noting that Franklin served as agent for Georgia, Massachusetts, Pennsylvania, and New Jersey).

80 *See* H. Trevor Colbourn, *A Pennsylvania Farmer at the Court of King George: John Dickinson's London Letters, 1754–1756*, 86 PA. MAG. HIST. & BIOGRAPHY 417, 419 (1962).

81. *See* Natelson, *supra* note 23, at 647 n.63 (citations omitted).

82. *Id.* at 647 n.68; *see also* LEONARD WOODS LARABEE, ROYAL GOVERNMENT IN AMERICA: A STUDY OF THE BRITISH COLONIAL SYSTEM BEFORE 1783, at 303 (1930) (discussing Massachusetts General Court's procedure for revenue legislation that was based on the British House of Commons); 3 HERBERT L. OSGOOD, THE AMERICAN COLONIES IN THE EIGHTEENTH CENTURY 164–65 (Peter Smith ed., 1958) (same). *See generally* JEAN LOUIS DE LOLME, THE CONSTITUTION OF ENGLAND (David Lieberman ed., 2007) (1771) (discussing British parliamentary procedure).

83. *See* Natelson, *supra* note 23, at 648 n.73 (citing legislative materials from Virginia and Pennsylvania that stated, *inter alia*, that "the historic procedure of the house of commons . . . was copied in nearly every important detail by the [Virginia] house of burgesses," and that the Pennsylvania Assembly's procedures were "agreeable to the practice of the House of Commons" (citations omitted)).

84. PAUL MASON, MASON'S MANUAL OF LEGISLATIVE PROCEDURE 50 (1953) ("Parliamentary law consists of the recognized rules, precedents and usages of legislative . . . bodies by which their procedure is regulated. It is that system of rules and precedents which originated in the British Parliament and which has been developed by legislative or deliberative bodies in this and other countries."); Natelson, *supra* note 23, at 648 (citing THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE FOR THE USE OF THE SENATE OF THE UNITED STATES (1801) (still in use today)). Mason's Manual is used by Florida and many other state legislatures today.

85. 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 64, at 48, 196, 198; 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 64, at 275,

On July 26th, the Convention adjourned to allow the Committee of Detail[86] to produce a first draft of the Constitution based on the principles agreed to by the delegates.[87] The Committee maintained the Franklin proposal that restricted the Senate from originating or amending revenue legislation.[88] Shortly after its presentation to the Convention, Charles Pinckney and Gouverneur Morris moved that the draft Origination Clause be stricken, stating that the provision might become responsible "for clogging the Goverenment [sic]."[89] Morris's argument was based on events that had occurred in the Virginia and South Carolina legislatures under the Articles of Confederation.[90] Persuaded by Morris, the motion to strike passed seven to four on August 8.[91]

The remainder of the Convention would develop the principles that stood as the final Origination Clause. With many delegates reportedly regretting their earlier vote to strip the Origination Clause from the draft constitution, recognizing that the Clause "was an important counterpoise to the equal representation of the states in the Senate,"[92] and that the Clause's removal was "endangering the success of the plan [the Great Compromise], and extremely objectionable in itself,"[93] Edmund Randolph moved to reconsider the prior vote, which was accepted nine to one.[94]

On August 13th, Randolph then proposed that the Committee's original draft Origination Clause be amended to read:

279; 3 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 64, at 266, 318; *see also* 1 STORY, *supra* note 20, § 874 ("This provision, so far as it regards the right to originate what are technically called 'money bills,' is, beyond all question, borrowed from the British house of commons, of which it is the ancient and indisputable privilege and right . . . ."); Rosenberg, *supra* note 22, at 424 (contrasting the elected nature of the American Senate with the unelected House of Lords).

86. For further information on the Committee of Detail, see William Ewald, *The Committee of Detail*, 28 CONST. COMMENT. 197 (2012).

87. Zotti & Schmitz, *supra* note 21, at 95.

88. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 64, at 154 ("All Bills for raising or appropriating Money, and for fixing the Salaries of the Officers of the Government shall originate in the House of Representatives, and shall not be altered or amended by the Senate.").

89. Zotti & Schmitz, *supra* note 21, at 95.

90. Natelson, *supra* note 23, at 675, 695 n.301 (citations omitted).

91. *Id.* at 638.

92. Jipping, *supra* note 22, at 657.

93. MADISON, *supra* note 62, at 414.

94. Zotti & Schmitz, *supra* note 21, at 95; *see also* Jipping, *supra* note 22, at 658 (recounting the statement of Hugh Williamson (North Carolina): "some think this restriction on the Senate essential to liberty, others think it of no importance. Why not the former be indulged[?]").

> 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 so amended or altered by the Senate as to increase or diminish the sum to be raised, or change the mode of levying it, or the objects of its appropriation.[95]

The purpose of this new provision was to allow bills that incidentally raised revenue to be proposed in the Senate.[96] Randolph, like-minded delegates, and even origination opponents like Madison believed[97] that the "purpose of revenue" phrase was critical because the vast majority of legislation that would be considered by the new Congress would have some relationship to money, and the Origination Clause, if construed broadly, could largely neuter the Senate's powers of amendment.[98] Many were also worried that the House might use the Origination Clause to force compromise on the Senate by, e.g., tacking foreign, non-germane matter to revenue legislation and forcing the Senate to accept it for fear of depriving the federal government of the revenue to function,[99] much like the Articles of Confederation government.

On August 15th, sensing the mood of the Convention change[100] and working with like-minded Convention delegates, Strong proposed an amendment to his August 13th proposal that stated:

> Each House shall possess the right of originating all bills, except bills for raising money for the purposes of revenue, or for appropriating the same and for fixing the salaries of the officers of the Govt. which shall originate in the House of Representatives; but

---

95. MADISON, *supra* note 62, at 442.

96. *Id.* at 442–43.

97. *See id.* at 445–46.

98. Zotti & Schmitz, *supra* note 21, at 95. This concern has largely been incorporated into the Supreme Court's Origination Clause jurisprudence as the Court has been careful to distinguish between bills that solely deal with revenue and ones in which the greater purpose of the legislation is regulatory.

99 MADISON, *supra* note 62, at 444 ("The House . . . will insert other things in money bills, and by making them conditions of each other, destroy the deliberative liberty of the Senate.").

100. For example, George Washington (Virginia) changed his vote to support the Origination Clause after he realized this was an "essential point for other delegates who [he] feared would be intransigent on other points if this concession were not made." Jipping, *supra* note 22, at 658.

> the Senate may propose or concur with amendments as in other cases.[101]

Debate on the Origination Clause was then postponed for two weeks while the Convention debated the other powers of the Senate.[102] August 31st saw all issues that had been postponed by the Convention be referred to the "Committee of Eleven" for a final recommendation.[103] The Committee returned with a counterproposal relating to the Clause that was similar in substance and proposed that the Strong amendment be modified to read: "All bills for raising revenue shall originate in the House of Representatives, and shall be subject to alterations and amendments by the Senate . . . ."[104]

On the last day of the Convention's deliberations, the delegates took up this proposal and agreed to keep the first phrase of the Clause as drafted ("*[a]ll bills for raising revenue shall originate in the [H]ouse of Representatives* . . . ."[105] The Convention also amended the second part with language from the 1780 Massachusetts Constitution ("*but the Senate may propose or concur with amendments as in other bills* . . . ."[106] The final version of the Origination Clause then passed nine states to two, with only Maryland and Delaware voting against.[107] An Origination Clause has governed our federal legislative process since.

III. ORIGINATION CLAUSE DOCTRINE

Other scholars have examined the plain meaning of the Origination Clause and their analyses will not be repeated here. The author commends many of these works to the reader.[108] Instead, this Article will provide a summary of the pieces of the Origination Clause and related federal judicial precedent necessary to: (1) understand where key inflexion points in the Clause are located; and (2) analyze the component parts of the British revenue legislation from the Revolutionary era.

---

101. MADISON, *supra* note 62, at 460.
102. *See* 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 64, at 297.
103. *See* Jipping, *supra* note 22, at 658.
104. MADISON, *supra* note 62, at 580.
105. *Id.* at 607.
106. *Id.*
107. *Id.*
108. *See* sources cited *supra* note 22.

A. Plain Meaning: House Portion of the Clause

The Origination Clause can be broken down into two component parts—in much the same way that our bicameral federal legislature is divided. First: "*All Bills for raising Revenue shall originate in the House of Representatives.*"[109] This clause has a number of noteworthy components:

- The implication that revenue can only be raised by means of a bill, and likely not another legislative vehicle like a resolution or order;[110]
- The meaning of the term 'revenue'; and
- The requirement for a bill to 'originate' (begin)[111] in the House of Representatives

The first point is relatively self-explanatory—as every School House Rock fan[112] is doubtless aware—that the legislative vehicle selected by Congress to raise revenue must be in the form of a 'bill,' which contains the magic words of enactment.[113] It is important to also note that the Constitution may contemplate other methods of enacting legislative vehicles with legal effect, however.[114]

Saving the meaning of the term 'revenue' for further discussion, the third point described above focuses on the action/actions that constitute 'origination' in the House. Perhaps the most basic function

---

109. U.S. CONST. art. I, § 7, cl. 1 (the Origination Clause).

110. *See, e.g.*, U.S. CONST. art. I, § 7, cl. 3 (the Orders, Resolutions and Votes Clause).

111. Of course, the precise meaning of 'origination'/'originate' can have multiple meanings, specifically: (1) does the underlying legislative vehicle merely have to begin its lifecycle (bill number) in the House; or (2) does that requirement have to be accompanied by the more stringent requirement that a particular substantive provision/idea begin in the House (limiting a meaningful senatorial power of amendment)?

112. *Schoolhouse Rock: America - I'm Just a Bill Music Video*, YOUTUBE (Dec. 8, 2011), https://www.youtube.com/watch?v=FFroMQlKiag. For a more modern take on congressional operations, see the skit *How a Bill Does Not Become a Law*, (Nov. 23, 2014), https://www.youtube.com/watch?v=JUDSeb2zHQ0 (Saturday Night Live: Season 40 Episode 7).

113. 1 U.S.C. § 101 (2018) ("Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled."). Most state constitutions contain the enacting clauses for their various state legislatures.

114. *See* U.S. CONST. art. I, § 7, cl. 3 (the Orders, Resolutions and Votes Clause); *see also* Seth B. Tillman, *A Textualist Defense of Article I, Section 7, Clause 3*, 83 TEX. L. REV. 1265, 1320 (2005) (explaining that inaction by the President may constitute approval of a congressional resolution).

of any (American)[115] legislator is the right to introduce legislation for consideration to become a legally binding text. Consequently, when a bill is introduced for consideration at the federal level, it is assigned the prefix "H.R." (House of Representatives) or "S." (Senate).[116]

The U.S. Supreme Court has established that the presence of one or the other prefix is conclusive evidence that a bill began in the legislative house corresponding to its prefix.[117] The doctrine is called the "enrolled bill rule."[118] The enrolled bill rule makes the contents of a legislative vehicle, after being duly enrolled with all amendments and signed by the Speaker of the House and the President of the Senate (or their designee), the strongest form of proof available regarding the contents of a law.[119] Since the bill prefix is contained in an enrolled bill, the prefix denoting the house of origination is conclusive evidence in the same way.[120]

B. Plain Meaning: Senate Portion of the Clause

The Senate's portion of the Origination Clause reads as follows: "*[B]ut the Senate may propose or concur with Amendments as on*

---

115. *See* Chris Land, *That's Not What I Bargained For: Legislative Materials, Comparative Intent and the Nature of Statutory Bargains*, 17 EUR. J.L. REFORM 424, 438 (2016) (focusing on the point that the vast majority of British legislation is proposed by the executive); *see also Ordinary Legislative Procedure,* EUR. PARLIAMENT, http://www.europarl.europa.eu/external/html/legislativeprocedure/default_en.htm (last visited Sept. 26, 2020) (demonstrating the legislative process in the European Union Parliament).

116. *See generally About Legislation of the U.S. Congress*, LIBR. OF CONG., https://www.congress.gov/legislation/about (last visited Sept. 26, 2020) (providing a tool to search all legislation introduced in the U.S. Congress since 1973).

117. *See* Field v. Clark, 143 U.S. 649, 672 (1894) ("It is admitted that an enrolled act, thus authenticated, is sufficient evidence of itself—nothing to the contrary appearing upon its face—that it passed.").

118. *See id.*

119. *See id.* In contrast, the U.S. Code serves as *prima facie* evidence of the law. *See* 1 U.S.C. § 204(a) (2018).

120. *See* United States v. Munoz-Flores, 495 U.S. 385, 409 (1990) (Scalia, J., concurring) ("The enrolled bill which, when signed by the President, became the Victims of Crime Act of 1984, 98 Stat. 2170, bore the indication 'H. J. Res. 648.' The designation 'H. J. Res.' (a standard abbreviation for 'House Joint Resolution') attests that the legislation originated in the House. . . . The enrolled bill's indication of its House of origin establishes that fact as officially and authoritatively as it establishes the fact that its recited text was adopted by both Houses."); Rainey v. United States, 232 U.S. 310, 317 (1914).

other Bills."[121] This phrase can be broken down into three component pieces:

- The Senate may propose or concur, meaning that the second chamber may initiate a proposal *sua sponte* or agree to a counterproposal by the House of Representatives after the Senate has already amended a House revenue bill;
- Senate authority to offer 'amendments' to revenue bills; and
- The qualifier that the Senate has the authority to amend revenue bills in the same manner as it may amend other bills.

The first concept is straightforward and elucidates that the Senate's power to amend revenue legislation extends to all stages of the legislative process, not merely when a revenue bill is presented to the Senate, but also to counterproposals.

The second point is a core substantive component alongside the meaning of the term 'revenue' under the Origination Clause—the grant of power for the Senate to offer 'amendments.' An 'amendment,' in its simplest form, is a proposal to alter a legislative text, ranging from a sweeping strike-all amendment that can delete the entire text and replace the 'gutted' bill with an alternative,[122] or merely altering one punctuation mark. In the context of a revenue bill, it could refer to potentially adding a new kind of revenue measure, reducing the amount of the imposition, or the class of persons/objects to which an imposition is directed.[123]

The third and final point residing in the Senate's portion of the Clause is the textual authorization for the Senate to amend in the same manner "as on other Bills." This is a sticky issue. The plain meaning of this provision purports to tie the Senate's revenue amendment power to its power to amend other legislation. However, the problem is that the Senate has changed its view of germaneness requirements through the years and today *de facto* has no real

---

121. U.S. CONST. art. I, § 7, cl. 1 (the Origination Clause).

122. *See generally* Kysar, *supra* note 22 (positing that the Senate sometimes attempts to avoid the implications of the Origination Clause by amending legislation, using the 'shell' of the original legislation to craft an entirely different piece of legislation).

123. *See* Natelson, *supra* note 23, at 706–09. *See generally* Daniel J. Smyth, *The Original Public Meaning of Amendment in the Origination Clause Versus the Patient Protection and Affordable Care Act*, 6 BRIT. J. AM. LEGAL STUD. 303 (2017) (arguing that complete revisions to bills in the Senate violate the original meaning of amendment as it was understood by the Framers).

germaneness requirement.[124] This is how the Affordable Care Act was amended into H.R. 3590 by the Senate, which was previously the Servicemembers Homeownership Tax Act of 2009.[125]

The Supreme Court's decision in *Rainey v. U.S.*,[126] followed by the D.C. Circuit's *Sissel* opinion,[127] has found that no germaneness requirement exists under the Origination Clause and that the Senate indeed has a very broad power of amendment.[128] This is evidenced by the U.S. Senate's amendment to strip out the provisions of the Servicemembers' Homeownership Tax Act of 2009 and replacement with the Affordable Care Act.[129] Many scholars have said that the core purpose of the Origination Clause is for the House of Representatives to control the revenue-raising agenda in Congress, but without a meaningful germaneness requirement, agenda control is a vaguely-defined fiction.[130] However, another U.S. Supreme Court case (three years before *Rainey*), *Flint v. Stone Tracy Co.*, recognized the presence of a germaneness requirement under the Origination Clause.[131] Interestingly, in *Armstrong v. U.S.*, the Ninth Circuit seemingly ignored *Rainey* and also held that a germaneness requirement exists under the Clause.[132] Additionally, scholars including Natelson and Smyth have demonstrated powerful historical evidence that the meaning of an 'amendment' in the Founding era contained a germaneness requirement.[133]

---

124. *See* STANDING RULES OF THE SENATE, S. Res. 285, 113th Cong. (2013).

125. *See* Sissel v. U.S. Dep't of Health & Hum. Servs., 760 F.3d 1, 7 (D.C. Cir. 2014).

126. 232 U.S. 310, 317 (1914).

127. Sissel v. U.S. Dep't of Health & Hum. Servs., 799 F.3d 1035, 1062 (D.C. Cir. 2015) (Kavanaugh, J., dissenting) ("In *Rainey v. United States*, the Supreme Court concluded that there was no germaneness requirement on Senate amendments to revenue bills." (citation omitted)).

128. *Id.*

129. *Id.* at 1050.

130. *See* Aziz Z. Huq, *The Constitutional Law of Agenda Control*, 104 CALIF. L. REV. 1401, 1448 (2016) ("For several reasons, however, it is not clear that the federal Origination Clause has had, or even could have, the biasing effect in favor of the House that the Framers anticipated."); Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 424 (2004) ("[I]t is unclear in what respect the House's exclusive power to originate revenue bills makes any difference.").

131. 220 U.S. 107, 143 (1911).

132. 759 F.2d 1378, 1382 (9th Cir. 1985) ("The bill that ultimately became TEFRA [the Tax Equity and Financial Responsibility Act] 'originated' in the House as revenue legislation, and the Senate's amendments, while far-reaching and extensive, were 'germane to the subject-matter of the bill [reform of the income tax system], and not beyond the power of the Senate to propose.'").

133. *See* Natelson, *supra* note 23, at 705–09; Smyth, *supra* note 123, at 311.

In the Founding era, as Natelson has shown, the term 'amend' was a restricted term and contained a clear germaneness requirement in the British Parliament, the colonial legislatures, and in the new U.S. Congress.[134] Natelson, and a related article by Smyth,[135] each found that Revolutionary-era legislatures defined their germaneness power as being limited to the same subject, or class of revenue measure, for contemporary constitutional purposes.[136] In this way, a bill that only levied an excise tax on wheat could not be constitutionally amended under this doctrine to include a regulatory exaction on cars with high levels of emissions which was designed to encourage vehicles to be removed from the highway.[137] Or similarly, the bill containing the regulatory exaction on cars could not be amended to include a monetary penalty associated with the commission of a criminal offense.[138]

Germaneness is important because it is the centerpiece of the House of Representatives' ability to control the legislative process surrounding revenue legislation. This agenda control authority is largely meaningless without a germaneness requirement.[139]

C. Scope of Bills for Raising Revenue

The U.S. Supreme Court, as a core principle of its Origination Clause doctrine, dutifully cites Justice Story's *Commentaries on the Constitution* as follows:

> "[R]evenue bills are those that levy taxes in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue." *Twin City Bank v. Nebeker,* 167 U.S. 196, 167 U.S. 202 (1897) (citing 1 J. Story, Commentaries on the Constitution § 880, pp. 610–611 (3d ed. 1858)). The Court has interpreted this general rule to mean that a statute that creates a particular governmental program and

---

134. *See* Natelson, *supra* note 23, at 657, 665, 680–91.

135. *See generally* Smyth, *supra* note 123, at 350–51 ("This meaning of amendment is a change or alteration to something that must 1) be germane to that something, 2) preserve at least the essence of a significant part of the substance of that something[,] . . . and 3) make that something transform from bad to better.").

136. *Id.*; *see also* Natelson, *supra* note 23, at 657, 665, 680–91 (discussing and examining the scope of amendments at the time of the Founders).

137. *See* Natelson, *supra* note 23, at 665.

138. *See id.*

139. *See, e.g.*, Kysar, *supra* note 22, at 711; *see also* Huq, *supra* note 130, at 1448.

> that raises revenue to support that program, as opposed to a statute that raises revenue to support government generally, is not a 'Bil[l] for raising Revenue' within the meaning of the Origination Clause."[140]

In *Twin City Bank*, the Court directly opined on Story's doctrinal claims:

> Mr. Justice Story has well said that the practical construction of the Constitution and the *history of the origin of the constitutional provision in question* proves that revenue bills are those that levy taxes in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue. 1 Story on Const. § 880. . . . 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.[141]

Interestingly, Story's analysis contained specific qualification that revenue bills did not include measures that raised money incidentally for a specific governmental purpose.[142] The D.C. Circuit also cited to Story's *Commentaries* as being the governing principle in its consideration of the Affordable Care Act and whether the Senate's amendments to the Servicemembers' Homeownership Tax Act of 2009 crossed the boundaries of the Origination Clause.[143]

Consequently, the historical record underlying Story's core claims that "*history of the origin of the constitutional provision in question*"[144] should, in theory, support the U.S. Supreme Court's conclusion that "Bills for raising Revenue" were limited to impositions levied for the general revenue of the government, and not impositions to raise funding for a specific purpose or as a regulatory device.[145]

---

140. United States v. Munoz-Flores, 495 U.S. 385, 397–98 (1990).
141. Twin City Bank v. Nebeker, 167 U.S. 196, 202–03 (1896) (emphasis added).
142. 1 STORY, *supra* note 20, § 880.
143. Sissel v. U.S. Dep't of Health & Hum. Servs., 760 F.3d 1, 7 (D.C. Cir. 2014).
144. *Twin City Bank*, 167 U.S. at 202.
145. *Munoz-Flores*, 495 U.S. at 397–98 (quoting *Twin City Bank*, 167 U.S. at 202).

D. Key Origination Clause Precedents

As discussed in the previous section, the U.S. Supreme Court has said that "Bills for raising Revenue" are bills that "levy taxes in the strict sense of the word, and are not bills for other purposes, which may incidentally create revenue."[146] The Court has interpreted this clause "to mean that a statute that creates a particular governmental program and that raises revenue to support that program, as opposed to a statute that raises revenue to support Government generally, is not a 'Bil[l] for raising Revenue.'"[147] The Supreme Court and the Courts of Appeals have said the impositions in the following cases were 'revenue' or "Bills for raising Revenue" under the Clause:

- Corporate Income Tax: Court found that this imposition was a tax for constitutional purposes,[148] even though the tax was amended into the House bill by the Senate.[149]
- 'Frivolous' Tax Return Penalty: Civil penalty on the filing of a 'frivolous' tax return.[150] Tax penalty originated in the Senate.[151] The Eighth Circuit strongly implied this penalty was a revenue measure[152] even though this directly conflicts with the Supreme Court's holdings in *Twin City Bank* and *Millard* that an imposition that raises money for a specific purpose is not a revenue measure for the purposes of the Origination Clause.[153]
- Airline Ticket Excise Tax: Provision originated as a Senate amendment to a House revenue bill.[154] The Ninth Circuit found this imposition to be a tax for constitutional purposes.[155]

---

146. *Id.* at 397.
147. *Id.* at 398.
148. Corporate Excise Tax Act of 1909, ch. 6, § 38, 36 Stat. 11, 112.
149. Flint v. Stone Tracy Co., 220 U.S. 107, 143 (1911).
150. Tax Equity and Fiscal Responsibility Act, Pub. L. No. 97-248, § 326, 96 Stat. 324, 329 (1982).
151. Wardell v. United States, 757 F.2d 203, 205 (8th Cir. 1985).
152. *Id.*
153. *See* Millard v. Roberts, 202 U.S. 429, 436 (1906); Twin City Bank v. Nebeker, 167 U.S. 196, 203 (1896).
154. *See* Tax Equity and Fiscal Responsibility Act, Pub. L. No. 97-248, § 280, 96 Stat. 324, 328 (1982); Armstrong v. United States, 759 F.2d 1378, 1381 (9th Cir. 1985).
155. *Armstrong*, 759 F.2d at 1381.

Conversely, the U.S. Supreme Court and the Courts of Appeals found the following impositions not to constitute 'revenue' or "Bills for raising Revenue" under the Origination Clause:

- Imposition on the Average Amount of National Bank Notes: Provision originated in the Senate.[156] Finding that the imposition did not qualify for the Origination Clause, the Court stated that:

> The tax was a means for effectually accomplishing the great object of giving to the people a currency that would rest, primarily, upon the honor of the United States, and be available in every part of the country. 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.[157]

- Assessment on Real Property: Congress enacted an imposition on real property in the District of Columbia,[158] which was used to fund the construction of railroad infrastructure in the District. The U.S. Supreme Court found that "[w]hatever taxes [were] imposed [were] but means to the purposes provided by the act" and this provision was consequently not subject to the Clause.[159]
- Special Assessment on Offenders: Congress imposed a special assessment on criminal offenders to fund victim support programs.[160] The Court noted that "[t]his case falls squarely within the holdings in *Nebeker* and *Millard*. The Victims of Crime Act of 1984 established a Crime Victims Fund as a federal source of funds for programs that compensate and assist crime victims."[161] The Court concluded "Section 3013 is not a 'Bil[l] for raising Revenue.'"[162]
- Minimum Essential Coverage Provision/Affordable Care Act: An imposition levied for failure to maintain a basic level of health

---

156. *See* Act of June 30, 1866, ch. 184, sec. 6, § 9, 14 Stat. 98, 146.
157. *Twin City Bank*, 167 U.S. at 203.
158. Act of Feb. 28, 1903, ch. 856, § 6, 32 Stat. 909, 914; Act of Feb. 12, 1901, ch. 354, § 9, 31 Stat. 774, 779.
159. Millard v. Roberts, 202 U.S. 429, 437 (1906).
160. Victims of Crime Act of 1984, Pub. L. No. 98-473, 98 Stat. 2170 (codified as amended at 34 U.S.C. § 20101 et seq.).
161. United States v. Munoz-Flores, 495 U.S. 385, 398 (1990) (citation omitted).
162. *Id.* at 401.

> insurance under the Patient Protection and Affordable Care Act.[163] The D.C. Circuit found that "'the paramount aim of the Affordable Care Act is 'to increase the number of Americans covered by health insurance and decrease the cost of health care,' not to raise revenue by means of the shared responsibility payment. The Supreme Court explained: 'Although the . . . payment will raise considerable revenue, it is plainly designed to expand health insurance coverage.'"[164] The court noted that since "the revenue raised was merely incidental to the main object or aim of the challenged measure," the Origination Clause did not apply.[165]

These cases generally affirm the basic principle established by Story in his *Commentaries* and repeatedly adopted by the Supreme Court. Along with the *Wardell* case,[166] these precedents classify impositions that act as revenue for a specified governmental program as outside of the Origination Clause.

As Part IV will demonstrate, however, the Revolutionary-era generation considered bills that raised revenue for specific governmental programs to be 'taxes' and "Bills for raising Revenue."

---

163. Sissel v. U.S. Dep't of Health & Hum. Servs., 760 F.3d 1, 8 (D.C. Cir. 2014).

164. *Id.*

165. *Id.*; *see also* Sissel v. U.S. Dep't of Health & Hum. Servs., 799 F.3d 1035, 1049 (D.C. Cir. 2015) (Rogers, J., concurring) ("[S]ection 5000A of the Affordable Care Act does not come within the scope of the Origination Clause."). Somewhat confusingly, the D.C. Circuit noted that even though the Supreme Court clearly classified the minimum coverage provision as a tax for constitutional purposes, because it is a regulatory penalty and directed to a specific purpose—expanding health insurance coverage—the Origination Clause did not apply. *Id.*

166. The civil penalty imposed for filing a frivolous tax return in this case is clearly not an imposition to support the general operations of government; it is merely a regulatory penalty much like the minimum coverage provision contained in the Patient Protection and Affordable Care Act. *See* Wardell v. United States, 757 F.2d 203, 204–05 (8th Cir. 1985).

IV. "TAXATION WITHOUT REPRESENTATION": THE SCOPE OF THE ORIGINATION CLAUSE

A. British Revenue Legislation of the Revolutionary Era

The following are legislative measures adopted by the British House of Commons and concurred in[167] by the Lords and King George III during the 1760–1770s:

- Sugar Act 1764: Placed excise duties on sugar, molasses, coffee, wine, indigo, cloth, and other consumer goods.[168] Parliament enacted the excise for "the better securing and encouraging the Trade of his Majesty's Sugar Colonies in America; *for applying the Produce of such Duties; and of the Duties to arise by virtue of the said Act, towards defraying the Expences* [sic] *of defending, protecting, and securing the said Colonies and Plantations*."[169]
- Stamp Act 1765: Placed excise duties on parchment, paper, pamphlets, newspapers, and legal instruments.[170] It was enacted by Parliament "*towards further defraying the Expences* [sic] *of defending, protecting, and securing, the* [American Colonies]."[171]
- American Colonies Act 1766/Declaratory Act 1766: Repealed the Stamp Act and declared that the colonies were "subordinate unto, and dependent upon the imperial crown and Parliament of Great Britain."[172] It was enacted by Parliament for "*defraying the expenses of defending, protecting, and securing* the [British colonies and plantations in America]."[173]
- Revenue Act 1767: Placed excise duties on tea, glass, lead, paint, and paper.[174] It was enacted by Parliament "*for making a more*

---

167. The House of Lords and King George III had little power under British constitutional convention to veto or amend revenue legislation, though the House of Lords disputed the settled nature of this convention in the eighteenth century. 1 WILLIAM BLACKSTONE, COMMENTARIES *169. (stating "[the Commons] will not permit the least alteration or amendment to be made by the lords to the mode of taxing the people by a money bill"). These bills influenced the outbreak of the Revolutionary War, and consequently, American constitutional thought in the late-eighteenth century.

168. Sugar Act 1764, 4 Geo. 3 c. 15.

169. *Id.* (emphasis added).

170. Stamp Act 1765, 5 Geo. 3 c. 12.

171. *Id.* (emphasis added).

172. American Colonies Act 1766, 6 Geo. 3 c. 12 (commonly known as the Declaratory Act).

173. *Id.* (emphasis added).

174. Revenue Act 1767, 7 Geo. 3 c. 46.

certain and adequate provision for defraying the Charge of the Administration of Justice . . . and towards further defraying the Expences [sic] of defending, protecting, and securing, the said [American colonies]."[175]

- Tea Act 1773: Exempted tea imported into the American colonies by the British East India Company from taxes under the Revenue Act 1767.[176] It was enacted by Parliament for "*the Benefit and Advantage of the Trade of the said United Company of Merchants of England, trading to the East Indies*, [as an] Allowance of the Drawback of the Duties of Customs upon all Teas sold at the publick [sic] Sales of the said United Company . . . to any of the British Colonies or Plantations in America . . . ."[177]

B. Application of Modern Origination Clause Precedents

Now this Article proceeds to an analysis of whether the British legislation would be subject to the Origination Clause today, under the precedents discussed in Part III:

- Sugar Act 1764: Parliament provided that the "Produce of such Duties; and of the Duties to arise by virtue of the said Act, [were to be applied] towards defraying the Expences [sic] of defending, protecting, and securing the said Colonies and Plantations . . . ."[178]
  - **Analysis:** The U.S. Supreme Court would likely find that *Munoz-Flores* and *Twin City Bank* apply, because the Origination Clause "has not been understood to extend to bills for other purposes,"[179] and that, because the excise tax revenues from the Sugar Act were to be used for defense of the American colonies, the Sugar Act is a tax bill that deals with a "particular governmental program" as the bill "raises revenue to support that program, as opposed to a statute that raises revenue to support Government generally."[180]

---

175. *Id.* (emphasis added).
176. Tea Act 1773, 13 Geo. 3 c. 44.
177. *Id.* (emphasis added); *see* Part I.
178. Sugar Act 1764, 4 Geo. 3 c. 15.
179. *See* Sissel v. U.S. Dep't of Health & Hum. Servs., 799 F.3d 1035, 1048 (D.C. Cir. 2015) (Rogers, J., concurring) (quoting 2 STORY, *supra* note 20, § 877).
180. *See* United States v. Munoz-Flores, 495 U.S. 385, 397–98 (1990) (citing Twin City Bank v. Nebeker, 167 U.S. 196, 202 (1897)).

- **Conclusion:** For those reasons, the Court would likely find that the Sugar Act was therefore not a "Bil[l] for raising Revenue."[181]

- Stamp Act 1765: Parliament provided that the new Stamp Act duties were to be used "towards further defraying the Expences [sic] of defending, protecting, and securing the [American colonies]."[182]
  - **Analysis:** Same as under the Sugar Act 1764.[183]
  - **Conclusion:** The Court would likely find that the Stamp Act was not a "Bil[l] for raising Revenue" because it imposed taxes only to support "a particular governmental program [defending the colonies]."[184]
- American Colonies Act 1766/Declaratory Act 1766[185]: Emphasized that the Sugar Act and Stamp Act were taxation measures used to fund a "particular governmental program"—"defraying the Expences [sic] of defending, protecting, and securing the [British colonies in America]."[186]
  - **Analysis:** Same as under the Sugar Act 1764.[187]
  - **Conclusion:** Further textual evidence that the Sugar Act and Stamp Act "are but means to the purposes provided by the act," (like *Millard*)[188] and for that reason, these bills are not bills "[that] levy taxes in the strict sense of the words" and merely "incidentally create revenue" for the purposes of defense of the American colonies.[189] The Court could also use the *in pari materia*[190] canon of statutory interpretation to ensure that the purposes of these three statutes are read as a complete whole.[191]

---

181. *See id.* at 398.
182. Stamp Act 1765, 5 Geo. 3 c. 12.
183. *See Munoz-Flores*, 495 U.S. at 397–98 (citing *Twin City Bank*, 167 U.S. at 202).
184. *See id.* at 398.
185. American Colonies Act 1766, 6 Geo. 3 c. 12 (commonly known as the Declaratory Act).
186. *Id.*
187. *See Munoz-Flores*, 495 U.S. at 397–98 (citing *Twin City Bank*, 167 U.S. at 202).
188. *See* Millard v. Roberts, 202 U.S. 429, 437 (1906).
189. *See* 1 STORY, *supra* note 20, § 880; *see also Munoz-Flores*, 495 U.S. at 397–98 (citing *Twin City Bank*, 167 U.S. at 202) (explaining that a bill that only creates revenue to support a governmental program is not a revenue bill).
190. *See, e.g.*, Erlenbaugh v. U.S., 409 U.S. 239, 243 (1972) (discussing the *in pari materia* canon).
191. *See id.*

- Revenue Act 1767: Parliament provided that the new excise taxes were enacted "for making a more certain and adequate Provision for defraying the Charge of the Administration of Justice" and for defending the colonies.[192]
  - **Analysis:** The Revenue Act's new taxes were to be used for "particular governmental program[s]"[193]—the judicial system (possibly law enforcement) and colonial defense.[194] The bill "raises revenue to support that program, as opposed to a statute that raises revenue to support Government generally."[195] The D.C. Circuit, in considering the Patient Protection and Affordable Care Act's minimum coverage provision, noted that "[t]he Supreme Court's repeated focus on the statutory provision's 'object,' and 'primary purpose,' makes clear . . . that the purpose of a bill is critical to the Origination Clause inquiry."[196]
  - **Conclusion:** Since the Court "adhere[s] to [a] 'strict' interpretation"[197] of the Origination Clause, the Revenue Act would not be considered a bill "that raises revenue to support Government generally"[198] and would fall outside of a "Bill[] for raising Revenue" under the Origination Clause.[199]
- Tea Act 1773: Parliament provided for a tax exemption to financially support the British East India Company by eliminating duties under the Revenue Act 1767 on tea imported into the American colonies by the East India Company.[200] The

---

192. *See* Revenue Act 1767, 7 Geo. 3 c. 46.

193. *See Munoz-Flores*, 495 U.S. at 397–98 (citing *Twin City Bank*, 167 U.S. at 202).

194. *See* Revenue Act 1767, 7 Geo. 3 c. 46.

195. *See Munoz-Flores*, 495 U.S. at 397–98 (citing *Twin City Bank*, 167 U.S. at 202).

196. Sissel v. U.S. Dep't of Health & Hum. Servs., 760 F.3d 1, 8 (D.C. Cir. 2014) (citations omitted) (first quoting *Twin City Bank*, 167 U.S. at 203; and then quoting *Munoz-Flores*, 495 U.S. at 399). The court also stated that "in *Munoz–Flores*, the Court noted that '[a]ny revenue for the general Treasury that [the provision imposing a special assessment on defendants] creates is . . . "incidental" to that provision's primary purpose,' which was to provide money for a crime victims' fund." *Id.* (alterations in original) (emphasis omitted).

197. *Id.* at 7.

198. *See Munoz-Flores*, 495 U.S. at 397–98 (citing *Twin City Bank*, 167 U.S. at 202).

199. *See id.*

200. The Tea Act expressly states that the legislation was for "the Benefit and Advantage of the Trade of the said United Company of Merchants of England trading to the East Indies." Tea Act 1773, 13 Geo. 3 c. 44.

Act also was enacted to disincentivize the smuggling of Dutch tea into the American colonies.[201]

- **Analysis:** This legislation was a revenue measure that was designed to have a regulatory effect—i.e., adjusting market forces to make it cheaper for the British East India Company to do business, and to discourage smuggling of tea into America by Dutch merchants without the payment of legally-required duties.[202]
- **Conclusion:** In this way, the Court would likely find that, much like *Twin City Bank* and *Sissel*, the reduction of the monetary rate of an imposition for regulatory purposes (e.g., benefitting the British East India Company and discouraging smuggling) does not implicate the Origination Clause because it "*was merely incidental to the main object or aim of the challenged measure.*"[203]

C. The Historical Flaw in Origination Clause Jurisprudence

The American colonists made no distinction between impositions raised to fund a "particular governmental program" or bills for raising revenue "to support Government generally" as the U.S. Supreme Court has done. Each of the bills discussed above either: (1) raised revenue to support particular government programs; or (2) was a regulatory imposition.

The Court in *Munoz-Flores, Twin City Bank*, and *Millard* stated that an imposition that funds "a particular governmental program[,] . . . as opposed to a statute that raises revenue to support government generally, is not a 'Bil[l] for raising Revenue.'"[204] The

---

201. *See generally* Benjamin L. Carp, *Did Dutch Smugglers Provoke the Boston Tea Party?*, 10 EARLY AM. STUD. 335 (2012) (arguing that Atlantic tea smuggling led to the passing of the Tea Act and, consequently, the Boston Tea Party).

202. *Id.*

203. Sissel v. U.S. Dep't of Health & Hum. Servs., 760 F.3d 1, 8 (D.C. Cir. 2014). The court noted that "the taxing power is often, very often, applied for other purposes[ ] than revenue." *Id.* at 9 (alteration in original) (quoting 2 STORY, *supra* note 20, § 962). Further, "[i]t is beyond serious question that a tax does not cease to be valid [under the taxing power] merely because it regulates, discourages, or even definitely deters the activities taxed." *Id.* (second alteration in original) (quoting United States v. Sanchez, 340 U.S. 42, 71 (1950)).

204. *Munoz-Flores*, 495 U.S. at 398; *see* Millard v. Roberts, 202 U.S. 429, 437 (1906) ("Whatever taxes are imposed are but means to the purposes provided by the act."); Twin City Bank v. Nebeker, 167 U.S. 196, 203 (1897) ("The tax was a means for effectually accomplishing the *great object* of giving to the people a currency . . . . There was no purpose by the act or by any of its provisions to raise revenue to be

Courts of Appeals have also echoed this standard.[205] As discussed earlier, the U.S. Supreme Court has adopted the contents of Justice Story's *Commentaries* as follows:

> *Both parties agree that "revenue bills are those that levy taxes in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue."* Twin City Bank v. Nebeker, 167 U.S. 196, 202 (1897) *(citing 1 J. Story, Commentaries on the Constitution § 880, pp. 610–611 (3d ed. 1858))*. The Court has interpreted this *general rule* to mean that a statute that creates a particular governmental program and that raises revenue to support that program, as opposed to a statute that raises revenue to support Government generally, is not a "Bil[l] for raising Revenue" within the meaning of the Origination Clause.[206]

Munoz-Flores was the progeny of *Twin City Bank v. Nebeker*.[207] *Twin City Bank* likewise adopted the 'general rule' relating to the meaning of 'revenue' under the Origination Clause from Story's *Commentaries on the Constitution*:

> Mr. Justice Story has well said that the practical construction of the Constitution and the *history of the origin of the constitutional provision in question* proves that revenue bills are those that levy taxes in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue. 1 Story on Const. § 880.[208]

However, the Supreme Court in *Munoz-Flores, Twin City Bank*, and *Millard* have seemingly oversimplified Justice Story's contentions. The Court has apparently interpreted Story's contention that revenue bills that "incidentally create revenue"

---

applied in meeting the expenses or obligations of the Government.") (emphasis added).

205. *See Sissel*, 760 F.3d at 8.

206. *Munoz-Flores*, 495 U.S. at 397–98 (emphasis added).

207. *See id.* (relying extensively on the rationale of *Twin City Bank*).

208. *Twin City Bank*, 167 U.S. at 202–03 (emphasis added).

include bills containing impositions to fund a "particular governmental program."[209]

Returning to the British revenue legislation, these bills levied impositions on various goods in the colonial market for the express statutory purpose of:

- "[D]efraying the Expences [sic] of defending, protecting, and securing the said Colonies and Plantations;" (Sugar Act 1764);[210]
- "[T]owards defraying the Expences [sic] of defending, protecting, and securing the [American colonies];" (Stamp Act 1765);[211]
- "[D]efraying the Expences [sic] of defending, protecting, and securing the [British colonies and plantations in America];" (American Colonies Act 1766/Declaratory Act 1766);[212]
- "[F]or making a more certain and adequate Provision for defraying the Charge of the Administration of Justice" and for the defense of the colonies; (Revenue Act 1767).[213]

These exemplars raise doubts about Story's contention that bills which "incidentally create revenue" includes "a statute that creates a particular governmental program and that raises revenue to support that program."[214] Story's original contention in his *Commentaries* stated that this 'incidental' qualifier was rooted in "history of the origin of the constitutional provision in question."[215] Without the legislation above being viewed as taxation (without representation) by the American colonists, one of the central themes of the Revolutionary-era would have not existed. Somehow, modern Origination Clause precedent brushes past this point.

"Taxation without representation" was one of the foremost themes of the Revolutionary War.[216] America's revolutionaries did not think themselves to be 'revolutionary' in any sense—they believed that their actions in defying the British Government in the 1760–1770s were rooted in the principles of the Bill of Rights 1689[217]

---

209. *See Munoz-Flores*, 495 U.S. at 397–98.

210. Sugar Act 1764, 4 Geo. 3 c. 15.

211. Stamp Act 1765, 5 Geo. 3 c. 12.

212. American Colonies Act 1766, 6 Geo. 3 c. 12 (commonly known as the Declaratory Act).

213. Revenue Act 1767, 7 Geo. 3 c. 46.

214. 1 STORY, *supra* note 20, at § 880.

215. *Id.*

216. *See, e.g.*, *On This Day: "No Taxation Without Representation!"*, CONST. CTR. (Oct. 7, 2019), https://constitutioncenter.org/blog/250-years-ago-today-no-taxation-without-representation.

217. Bill of Rights (Act) 1689, 1 W. & M. 2 c. 2 (Eng. & Wales).

and that the British Government no longer held faithful to this important cornerstone of the British constitutional settlement.[218] John Adams noted in 1775 that "[t]he patriots of this province desire nothing new; they wish only to keep their old privileges."[219]

One of the key complaints of the Bill of Rights 1689 vis-à-vis King James II was that he levied money for and to the use of the Crown by pretense of prerogative for other time and in other manner than the same was granted by Parliament.[220] Consequently, the Bill of Rights later made "levying money for or to the use of the Crown by pretence of prerogative, without grant of Parliament, for longer time, or in other manner than the same is or shall be granted, . . . illegal."[221] Great parallels exist from the grievances contained in the Bill of Rights 1689 and the disputes aired by the American colonists in the Revolutionary era.[222]

As the British Parliament began passing revenue measures directed specifically at the American colonies in 1764, the colonists began to assert that they were not properly represented in the House of Commons.[223] James Otis, in his 1764 essay *The Rights of the British Colonies Asserted and Proved* noted that "[t]axes are not to be laid on the people, but by their consent in person, or by deputation."[224] Otis also declared that "[w]hen the parliament shall think fit to allow the colonists a representation in the house of commons, the equity of their taxing the colonies, will be as clear as their power is at present of doing it without, if they please."[225] Otis also declared in a number of speeches that "taxation without representation is tyranny."[226]

---

218. *See* BERNARD BAILYN, IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 95 (2d ed. 1992); JAMES OTIS, THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED (1764), *reprinted in* COLONIES TO NATION 1763–1789: A DOCUMENTARY HISTORY OF THE AMERICAN REVOLUTION 28–33 (Jack P. Greene ed., 1975).

219. JOHN ADAMS, *Novanglus; or, a History of the Dispute with America*, *in* THE REVOLUTIONARY WRITINGS OF JOHN ADAMS 149, 245 (C. Bradley Thompson ed., 2000).

220. *See* Bill of Rights (Act) 1689, 1 W. & M. 2 c. 2.

221. *Id.*

222. *Compare id.* (listing and outlawing acts of the former king) *with* THE DECLARATION OF INDEPENDENCE (U.S. 1776) (listing unjust acts taken by the king that led to the colonies' succession).

223. OTIS, *supra* note 218, at 29.

224. *Id.* at 30.

225. JAMES OTIS, A VINDICATION OF THE BRITISH COLONIES, AGAINST THE ASPIRATIONS OF THE HALIFAX GENTLEMAN, IN HIS LETTER TO A RHODE-ISLAND FRIEND 27 (1765).

226. *See On This Day: "No Taxation Without Representation!"*, *supra* note 216.

The Stamp Act Congress/Massachusetts Assembly adopted a resolution in 1765 in response to the Stamp Act which asserted:

> [T]he just rights of his majesty's subjects of this province, derived to them from the British constitution as well as the royal charter, have been lately drawn into question: In order to ascertain the same, this house do unanimously come into the following resolves. . . . [t]hat no man can justly take the property of another without his consent; and that upon this original principle the right of representation in the same body, which exercises the power of making laws for levying taxes, which is one of the main pillars of the British constitution, is evidently founded.[227]

The colonists were not the only ones to recognize the principle of representation as a condition precedent to taxation. Prime Minister William Pitt declared in the House of Lords in 1768 that:

> Parliaments were ashamed of taxing a people without their consent, and allowed them representatives. . . . Our [Parliament's] legislative power over the colonies is sovereign and supreme. . . . let the sovereign authority of this country over the colonies be asserted in as strong terms as can be devised, and be made to extend to every point of legislation whatsoever; that we may bind their trade, confine their manufactures, and exercise every power whatsoever, *except that of taking their money out of their pockets without their consent.*[228]

In a separate debate on the American colonies in the House of Lords in 1768, Lord Camden also observed that the colonists were being unjustly taxed.[229] Camden's speech is entirely consistent with

---

227. *Resolutions on the Stamp Act, Massachusetts Assembly, 1765*, FOUNDING.COM, http://founding.com/founders-library/government-documents/american-state-and-local-government-documents/resolutions-on-the-stamp-act-massachusetts-assembly-1765/ (last visited Jan. 2, 2021).

228. William Pitt, On the Right to Tax America (1766), *in* 3 THE WORLD'S FAMOUS ORATIONS 197, 204–06, 211 (William Jennings Bryan ed., 1906).

229. THOMAS HANSARD, 16 THE PARLIAMENTARY HISTORY OF ENGLAND FROM THE EARLIEST PERIOD TO THE YEAR 1803, at 177–81 (1813) (stating that "[T]he

the grievances aired by the American colonists and may, in some ways, be stronger.[230] Later the same year, the Virginia House of Burgesses adopted a "Petition, Memorial, and Remonstrance" to the British House of Commons decrying "taxation without representation." The Petition declared that:

> As Members of the British Empire, they [the colonists] presume not to claim any other than the common, unquestionable Rights of British subjects, who, by a fundamental and vital Principle of their Constitution, cannot be subjected to any Kind of Taxation, or have the smallest Portion of their Property taken from them by any Power on Earth, without their Consent given by their Representatives in Parliament; this Pillar of their Constitution, the very Palladium of their Liberties, hath been so zealously preserved by the House of Commons of Great-Britain, that they have never suffered any other Branch of their Legislature to make the smallest Amendment or Alteration in any of their Supply [Revenue] Bills . . . .[231]

John Hancock and a group of Boston selectmen published a letter in 1768 which stated that Parliament had passed "[t]axes equally detrimental to the Commercial Interests of the Parent Country and her Colonies, are imposed upon the People, without their Consent;– Taxes designed for the Support of the Civil

---

British Parliament have no right to tax the Americans. I shall not therefore consider the Declaratory Bill now lying on your table; for to what purpose, but loss of time, to consider the particulars of a Bill, the very existence of which is illegal, absolutely illegal, contrary to the fundamental laws of nature, contrary to the fundamental laws of this constitution? . . . [T]axation and representation are inseparably united; God hath joined them, no British parliament can separate them; to endeavour to do it, is to stab our very vitals. . . . My position is this—I repeat it— . . . taxation and representation are inseparable . . . .").

230. *See id.*

231. VA. HOUSE OF BURGESSES, PETITION, MEMORIAL, AND REMONSTRANCE FROM THE HOUSE OF BURGESSES 8 (1769), https://research.colonialwilliamsburg.org/library/materials/manuscripts/view/index.cfm?id=MiscPMR (emphasis omitted). This petition to the House of Commons was one of three directed at each 'branch' of the British 'Constitution'—the House of Commons, the House of Lords, and King George III. These three elements, rooted in Montesquieu's notion of a system of separated powers, was one of the core tenets of the U.S. Constitution's separation of powers.

Government in the Colonies, in a Manner clearly unconstitutional . . . ."[232]

The First Continental Congress' *Declaration and Resolves* was a precursor to the Declaration of Independence and listed the grievances of the American colonies against the King and Parliament.[233] Among these was the declaration "[t]hat the foundation of English liberty, and of all free government, is a right in the people to participate in their legislative council[,]" and that "raising a revenue on the subjects, in America, without their consent" was a violation of the basic rights of Englishmen.[234] Adams noted in his *Resolves* that:

> [S]ince 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 pretences [sic], but in fact for the purpose of raising revenue*, hath imposed rates and duties payable in these colonies . . . with unconstitutional powers . . . .[235]

Here, the First Continental Congress states that even though a tax is enacted "under various pretenses" *it is still in fact a revenue-raising measure.*[236] The *Resolves* even use the phrase "raising revenue," identical to the Origination Clause.[237] Further, the *Resolves* makes no distinction (unlike the U.S. Supreme Court) between taxes generally and taxes for a specific purpose ("under various pretences").[238] It may also encompass regulatory impositions; though, for the reasons discussed below, this is less clear. In fact, the term "under various pretences" is itself clear

---

232. Letter from John Hancock, et al., Calling for a Meeting at Faneuil Hall (Sept. 14, 1768).

233. *See* DECLARATION AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS (1774).

234. *Id.*; *see also* 2 JOHN ADAMS, *The Bill of Rights; a List of Grievances*, *in* THE ADAMS PAPERS: THE PAPERS OF JOHN ADAMS DECEMBER 1773–APRIL 1775, at 159, 160–61 (Robert J. Taylor ed., Belknap Press of Harvard Univ. Press 1977) (arguing that "English liberty" required the governed consent on revenue raising measures).

235. ADAMS, *supra* note 234, at 159 (emphasis added).

236. *See id.*

237. *Id.*; *see also* U.S. CONST. art. I, § 7, cl. 1 (stating *"[a]ll Bills for raising Revenue shall originate in the House of Representatives"*) (emphasis added).

238. *See* 2 ADAMS, *supra* note 234, at 159.

evidence that most bills containing a monetary imposition (except regulatory impositions, as discussed below) are "Bill[s] for raising revenue."[239] Again, the U.S. Supreme Court's jurisprudence does not focus enough on this point.

The phrase "taxation without representation" evolved within the legal backdrop of the American colonists "semantically reducing Parliamentary taxation measures passed under 'various [legislative] pretenses' to 'revenue raising bills.'"[240] Based on the *Resolves*, it is likely that American leaders understood the Sugar Act, Stamp Act, Declaratory Act, and Revenue Act to be taxation, triggering the need for representation in the British Parliament.[241]

Adams also declared that the colonies "for [150] years, allowed to tax themselves, and govern their internal concerns as they thought best. Parliament governed their trade as they thought fit. This plan they wish may continue forever. But it is honestly confessed, rather than become subject to the absolute authority of parliament in all cases of taxation and internal polity, they will be driven to throw off that of regulating trade."[242]

Most importantly to this question, the Declaration of Independence asserted that King and Parliament were liable "[f]or imposing Taxes on us without our Consent."[243] Benjamin Rush, one of the signers of the Declaration of Independence, also noted in debate on the Articles of Confederation in August 1776 that: "By one article, [seven] Colonies are to assess proport[ion] of taxes [for] each colony. Is there no danger from this to the large colonies? Is [it] not Subjecting them to the very evil We fled from G.B. to avoid--taxation without representation?"[244]

---

239. *See id.*

240. Zotti & Schmitz, *supra* note 21, at 83 (alteration in original).

241. *See* OTIS, *supra* note 225, at 27.

242. Zotti & Schmitz, *supra* note 21, at 84–85 (quoting ADAMS, *supra* note 219, at 245–46).

243. THE DECLARATION OF INDEPENDENCE para. 19 (U.S. 1776).

244. Benjamin Rush, *Notes For A Speech in Congress*, *in* 1 CLASSICS OF AMERICAN POLITICAL AND CONSTITUTIONAL THOUGHT: ORIGINS THROUGH THE CIVIL WAR 316 (Scott J. Hammond, et al. eds., 2007). Of course, many on both sides of the Atlantic argued that the "taxation without representation" rallying cry was inapposite because of virtual representation—the doctrine principally advocated by senior ministers in the British Government, including George Grenville and Thomas Whatley, which espoused that service in a legislature was a trusteeship and that all elected representatives represented the entire 'body politic' of a country and not just individual constituencies. JACK P. GREENE, THE CONSTITUTIONAL ORIGINS OF THE AMERICAN REVOLUTION 71 (2010). William Pitt and others in Parliament famously remarked that virtual representation was "the most contemptible idea that ever

It is important to analyze what the colonists meant by a 'tax' because it is inherently connected with the meaning of a "Bill[] for raising Revenue" under the Origination Clause. Some historical sources[245] in the eighteenth century made a distinction between: (1) an imposition that was designed to fund a particular government program or raise revenue for government generally; and (2) an imposition that was designed to regulate behavior or commerce. A tax was an imposition designed to fund a particular government program or raise revenue for government generally.[246]

In particular, John Dickinson noted that "[t]o the word *'tax,'* I annex that meaning which the constitution and history of *England* require to be annexed to it; that is—that it is *an imposition on the subject, for the sole purpose of levying money*."[247] Dickinson also noted that "[t]he parliament unquestionably possesses a legal authority to *regulate* the trade of *Great Britain,* and all her colonies. Such an authority is essential to the relation between a mother country and her colonies; and necessary for the common good of all."[248] Furthermore, John Adams remarked in 1775 that:

> That there are any who pant after "independence," (meaning by this word a new plan of government over all America, unconnected with the crown of England, or *meaning by it an exemption from the power of parliament to regulate trade*.) is as great a slander upon the province as ever was committed to writing. The patriots of this province desire nothing new; they wish only to keep their old privileges. They were, for [150] years, *allowed to tax themselves, and govern their internal concerns as they thought best. Parliament governed their trade as they thought fit.*[249]

Adams made a distinction in his words between the regulation and governing of trade and taxation, declaring that those who desired to merge the two into an argument for independence were

---

entered into the head of a man. It does not deserve serious refutation." *See* Pitt, *supra* note 228, at 200–01.

245. *See, e.g.*, Pitt, *supra* note 228, at 206 (discussing the powers of the British Parliament to tax to raise revenue and to tax to regulate).

246. John Dickinson, *Letters from a Farmer in Pennsylvania*, *in* EMPIRE AND NATION 1, 21 (Forrest McDonald ed., 2d ed. 1999).

247. *Id.*

248. *Id.* at 7.

249. ADAMS, *supra* note 219, at 245 (emphasis added).

committing "slander."[250] James Wilson, one of the signers of the Declaration of Independence and the Constitution, also recognized the authority of Parliament to regulate trade, including through taxation, while making a basic distinction between taxes and regulation.[251] Natelson states that this distinction was the motivating factor behind several word choices at the Constitutional Convention, most notably the intentional uses of the words "[t]ax" and "[d]uty" in several places through the Constitution.[252]

Admittedly, Founding-era dictionary sources make no distinction between taxes designed to raise revenue for a governmental program or government generally and regulatory impositions. Here are definitions of 'tax' from period dictionaries:

- "An impost; a tribute imposed; an excise; a tallage.";[253]
- "An impost, a tribute, a tallage; a charge, a censure."[254]

Furthermore, the eighteenth-century definition of 'revenue' confirms that this term likely encompassed *all* revenue, no matter the source of purpose, as follows:

- "Income; annual profits received from lands or other funds.";[255]
- "An income, profits arising yearly, the amount of an impost or tax laid on the public for the purposes of government.";[256]
- "income; or the annual profits of lands or funds."[257]

Two of the definitions above trace the English version of this word to the French word 'rivenu' or 'revenu' which means 'income.'[258] Each of the definitions contains an essential element—income.[259]

---

250. *Id.*

251. JAMES WILSON, CONSIDERATIONS ON THE NATURE AND EXTENT OF THE LEGISLATIVE AUTHORITY OF THE BRITISH PARLIAMENT 33–34 (1774); *see also* RICHARD BLAND, AN INQUIRY INTO THE RIGHTS OF THE BRITISH COLONIES (Earl Gregg Swem ed., 1922) (1766) (contrasting the power to tax with the right of Parliament to tax the colonies).

252. Natelson, *supra* note 23, at 668.

253. *Tax*, SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785).

254. *Tax*, 1 JOHN ASH, THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1775).

255. JOHNSON, *supra* note 253, *Revenue.*

256. 1 ASH, *supra* note 254, *Revenue.*

257. *Revenue*, 2 FREDRICK BARLOW, THE COMPLETE ENGLISH DICTIONARY: OR GENERAL REPOSITORY OF THE ENGLISH LANGUAGE (1772–1773).

Substantial evidence exists that Dickinson's and Adams' contentions were correct and that taxes *only* included measures that raised revenue to fund a particular program or to support government generally and not regulatory impositions.[260] The definitions of 'revenue' above, as well as the contemporary understanding of the Tea Act 1773 as a 'tax' by the American colonists (even though it was a regulatory imposition), suggest a different conclusion.

Consequently, it is not entirely clear from the historical record the extent to which the American colonial statesmen may have viewed the provisions of the Tea Act 1773 as primarily regulatory in nature, not as a "Bill[] for raising revenue," while the average colonist may have understood it to be "taxation without representation." It is clear, however, that the other four parliamentary measures—the Sugar Act 1764, Stamp Act 1765, American Colonies Act/Declaratory Act 1766, Revenue Act 1767—were completely within the contemporary understanding of a "Bill[] for raising revenue" even though they all raised money for specific governmental purposes, and "not the support of government generally."

D. British and Early State Legislative Comparisons

This view of the meaning of 'tax' and 'revenue' is also found in British parliamentary custom and the practice of the early state legislatures in the Founding era. Blackstone's *Commentaries on the Laws of England* defines a revenue measure as a:

> [B]ill[], 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.[261]

---

258. *Revenu*, COLLINS FRENCH DICTIONARY, https://www.collinsdictionary.com/dictionary/french-english/revenu (last visited Oct. 10, 2020); *see* 2 BARLOW, *supra* note 257, *Revenue*; JOHNSON *supra* note 253, *Revenue*.

259. 1 ASH, *supra* note 254, *Revenue*; 2 BARLOW, *supra* note 257, *Revenue*; JOHNSON, *supra* note 253, *Revenue*.

260. *See* Natelson, *supra* note 23, at 667–69.

261. 1 WILLIAM BLACKSTONE, COMMENTARIES *278 (emphasis added). *But see* ROGER ACHERLEY, THE BRITTANIC CONSTITUTION 45–46 (1727) ("[T]he sole Right

Blackstone's analysis found that a revenue measure was a bill "for any purpose" which raised money from citizens for the "exigencies of government."[262] Notably, this would likely exclude a regulatory imposition.

Standing Order 71, adopted by the House of Commons on February 18, 1667, authorized special 'ways and means resolutions' which were used to set taxation levels—and allowed the British Government to begin collecting revenue at the amended rates—before a formal Act of Parliament completed the process of bicameralism and presentment.[263] This order of the House stated that revenue measures were to begin in the Commons and that "any motion be made in the House for any charge upon the people the consideration and debate thereof should not then be entered upon, but . . . to a Committee . . . before any resolution or vote of the House passed therein."[264] The term 'charge,' based on a 1708 dictionary meant a "Burden or Load; Office or Employ; Expence [sic] or Cost."[265] In this way, the use of "any charge" in this standing order (rule of procedure) of the Commons implies that certainly any impositions raised for the support of specific government programs

---

and Power over the Monies and Treasures of the People, and of Giving and Granting, or Denying Aids or Monies for Publick [sic] Service, and . . . not only of all Laws for Imposing Taxes, and Levying and Raising Aids or Money upon the People, for the Defence [sic] and Support of the State and Government; But also of all Laws, touching the Taking from any Man his Property; and should have Power to Inquire into, and Judge of the Uses and Occasions for which Monies are to be Demanded and Given; and to Appropriate the same to those Uses . . . .").

262. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *278.

263. 3 HATSELL, *supra* note 21, at 207 ("It had been usual for the Treasury, whilst the session of Parliament continued, to direct the application of any of the grants to the services voted by the House of Commons in that session [by resolution] . . . . an Act of Parliament would [finally] pass, which . . . would thereby confirm and authorize that proceeding."); *see also* 1 ALPHEUS TODD, PARLIAMENTARY GOVERNMENT IN ENGLAND: ITS ORIGIN, DEVELOPMENT, AND PRACTICAL OPERATION 513–14 (1867) (discussing parliamentary procedures and caveats); THE LIVERPOOL TRACTATE: AN EIGHTEENTH CENTURY MANUAL ON THE PROCEDURE OF THE HOUSE OF COMMONS 59–66 (Catherine Strateman ed., 1937) (discussing the order adopted on February 18, 1667 and the process by which supplies are processed through Parliament at that time).

264. Bowles v. Bank of Eng. [1913] 1 AC 57 (Chancery) 68 (appeal taken from High Ct. Chancery Div.) (Eng. & Wales) (citing STANDING ORDERS OF THE HOUSE OF COMMONS 34 (1911)).

265. *Charge*, JOHN KERSEY, DICTIONARIUM ANGLO-BRITANNICUM (1708); *see also Charge*, NATHAN BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (10th ed. 1742) (providing a similar definition of the word 'charge').

or government generally was within the meaning of 'charge' (and likely regulatory impositions too), though this is unclear.

In 1696, King William III requested funds to strengthen the military in light of foreign threats.[266] The House of Commons adopted a ways and means resolution specifying taxation levels to fund increase military expenditures as follows:

> The ways and means of raising this supply were first, a general capitation or poll-tax: Secondly, a tax of three shillings in the pound upon land: And thirdly, a duty upon all paper, paste-board, vellum[,] and parchment, imported or made in this kingdom.[267]

This is another example of a revenue bill that raised money for a specific government purpose, but was still subject to the requirement that revenue bills begin in the first chamber.[268] The annals of Parliament record another tax levied in 1697 for a specific governmental purpose which began in the Commons:

> To raise the sums which the Parliament had voted necessary for disbanding the army, paying off of quarters, and paying of seamen, and towards making good of loans, and the deficiencies of former funds; *they resolved*, February 9th, to lay an aid of three shillings in the pound upon land, by way of assessment upon every county . . . .[269]

Two decades later, with the "South Sea Bubble" about to burst[270] and set to ruin British governmental finances for a generation, the House of Commons acted to try to shore up the South Sea Company's finances with the following resolution:

---

266 3 A COLLECTION OF THE PARLIAMENTARY DEBATES IN ENGLAND 69–70 (John Torbuck ed., 1739).

267. *Id.* at 70 (emphasis omitted).

268. *See id.* at 69; *see also* 3 HATSELL, *supra* note 21, at 68–69.

269. 3 A COLLECTION OF THE PARLIAMENTARY DEBATES IN ENGLAND, *supra* note 266, at 99 (first emphasis added; second emphasis omitted).

270. This financial bubble was one of the first publicly owned joint stock companies and was charged by the British Government with the management of the country's national debt that was being used to finance the War of the Spanish Succession. *See* HELEN PAUL, THE SOUTH SEA BUBBLE: AN ECONOMIC HISTORY OF ITS ORIGINS AND CONSEQUENCES 24–35, 43–53 (2010).

> In a grand Committee on ways and means[271] for raising the supply, *it was resolved*, that such of the duties and revenues for answering the respective annuities or payments which shall become payable to the South-Sea company, pursuant to their proposals accepted by this house, as are now temporary, be made perpetual, subject nevertheless to redemption by Parliament, according to the tenor of the said proposals . . . .[272]

Additionally, Parliament generally operated on the premise that regulatory impositions were not 'revenue' subject to an origination requirement.[273] The Lords refused to accept the House of Commons' objections that the Lords' amendments to the Militia Bill 1779 violated the Commons' origination privileges on the basis that they were regulatory impositions outside of the privilege.[274] The Commons ultimately accepted the amendments.[275] Other British revenue legislation also reinforces this concept.[276]

Early American state legislatures also recognized the distinction between revenue and regulatory impositions. The Delaware House of Assembly stated that revenue legislation was only those bills "for the support of Government."[277] Maryland's 1776 Constitution made a similar distinction:

> [T]hat 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

---

271. *See* THE LIVERPOOL TRACTATE, *supra* note 263, at 60–66.

272. 6 A COLLECTION OF THE PARLIAMENTARY DEBATES IN ENGLAND, *supra* note 266, at 267.

273. *See, e.g.*, 23 COBBETT, *supra* note 4, at 141, 143; 8 THE PARLIAMENTARY REGISTER: OR, HISTORY OF THE PROCEEDINGS AND DEBATES OF THE HOUSE OF COMMONS 347 (1802).

274. *See* 20 COBBETT, *supra* note 4, at 1008–18.

275. *Id.*

276. *See, e.g.*, Corn Act 1773, 13 Geo. 3 c. 43; South Sea Company Acts 1720, 7 Geo. c. 1, 2, 28; Taxation Acts 1696, 8 & 9 Will. 3 c. 6, 7, 12, 21, 22, 24, 25.

277. *See* MINUTES OF THE COUNCIL OF THE DELAWARE STATE FROM 1776–1792, at 617 (1886). The council had sent the assembly an appropriation bill, whereupon the assembly: "Resolved, That the same, being a money bill for the support of Government, ought to have originated in the House of Assembly agreeable to the sixth section of the Constitution of this State, and that House cannot proceed upon the bill aforesaid." *Id.* at 616–17.

> arise, shall be accounted a money bill: but every bill, assessing . . . 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.[278]

South Carolina's 1776 and 1778 Constitutions were similar.[279] The Virginia House of Burgesses cited Blackstone's *Commentaries* in debate on the scope of the House origination power in 1777.[280]

As discussed earlier, the eighteenth-century dictionary definition of 'tax' and 'revenue' implied a broad application to all forms of income received by government, whether earmarked for a particular purpose or not, except regulatory impositions. Furthermore, the practical use of this term by the Founders, the British parliament, and early American state legislatures makes it relatively clear that 'taxes' and 'revenues' applied to: (1) bills which levied impositions for the general support of government (undesignated); and (2) bills which levied an imposition for a specific program (designated).[281]

The U.S. Supreme Court's Origination Clause jurisprudence expressly removes impositions which are levied for the support of a particular program—and not the support of government generally—from the scope of the Origination Clause. This doctrine stems from the Court's repeated adoption of Story's *Commentaries*.[282]

---

278. MD. CONST. of 1776, art. XI.

279. S.C. CONST. of 1778, art. XVI ("[A]ll money bills for the support of government shall originate in the house of representatives . . . ."); S.C. CONST. of 1776, art. VII ("All Money Bills for the support of government shall originate in the general assembly. . . .").

280. JOURNAL OF THE HOUSE OF DELEGATES AND SENATE OF THE COMMONWEALTH OF VIRGINIA 71 (1827) ("They, therefore, with great propriety, selected from the language of parliament the term 'money bill,' under which appellation are included, according to the celebrated Judge Blackstone, in his Commentaries of the laws of England, all bills by which money is directed to be raised upon the subject. These being considered, we hope the House of Delegates will approve of the amendment of the Senate to their resolution for allowing to Thomas Johnson the sum. . . ."). The term "money bill" was synonymous with a "Bill[] for raising Revenue" until the eighteenth century, as a "money bill" contained both revenue raising measures and appropriations. *See* Natelson, *supra* note 23, at 651.

281. *But see* Sissel v. U.S. Dep't of Health & Hum. Servs., 799 F.3d 1035, 1049 (Kavanaugh, J., dissenting) (finding that the Patient Protection and Affordable Care Act's Minimum Coverage provision was contained in a "Bill[] for raising Revenue," even though it was a regulatory exaction).

282. *See* United States v. Munoz-Flores, 495 U.S. 385, 397–98 (1990); Twin City Bank v. Nebeker, 167 U.S. 196, 202–03 (1897).

It appears that serious questions regarding the veracity of Story's contention exist since the British Parliament and Revolutionary-era generation likely understood that 'taxes' and 'revenue' levied for the support of a particular program were still "Bills for raising Revenue," whether they were designated for a specific purpose or not. Raising money from the governed for the purpose of funding a government expense was the core tenet. Otherwise, the four British revenue bills, Stamp Act 1765, the Sugar Act 1764, the Declaratory Act 1766, and the Revenue Act 1767, would not have been considered revenue bills, and the cry of "taxation without representation" would have fallen flat among the American colonists. The First Continental Congress made this point clear when it decried the British practice of imposing taxes "*under various presences*, but in fact for the purpose of *raising revenue*."[283] This statement alone makes it clear that the object of the measure it largely irrelevant (unlike contemporary U.S. Supreme Court jurisprudence) and that the act of raising revenue to fund the government is likely the only material issue. Regulatory impositions like the Tea Act (and the Affordable Care Act's minimum coverage provision) are a harder issue, but the best evidence available suggests they were not viewed as revenue provisions in the eighteenth century. However, these bills do provide powerful evidence that our modern understanding of the Origination Clause, should, at a minimum, extend to all bills that raise revenue to fund government, whether programmatically designated or not.

Blackstone's *Commentaries* and British parliamentary custom also makes it clear that the House of Commons made a distinction between bills that: (1) raised revenue to support specific governmental programs or to support government generally (within the origination requirement); and (2) regulatory impositions (outside of the origination requirement).

Additionally, evidence from early American state legislatures, notably Maryland, Delaware, and South Carolina evidences that those bodies followed the same distinction of revenue raising measures for specific or general governmental purposes, as compared to regulatory exactions.

---

283. *See* DECLARATION AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS (1774) (emphasis added).

V. THE IMPORTANCE OF THE SCOPE OF THE ORIGINATION CLAUSE

"[I]t is not clear that the federal Origination Clause has had . . . the biasing effect in favor of the House that the Framers anticipated."[284]

This Article's finding that the Origination Clause is broader than previously assumed by the U.S. Supreme Court is important for numerous reasons, not the least of which because the Clause is an understudied component of our constitutional framework and virtual surplusage today because of the broad amendatory power exercised by the Senate.[285]

The Origination Clause is constitutionally important because it is a threshold question for lawmaking purposes. The Origination Clause is only triggered in cases where a "Bill[] for raising Revenue" is implicated. Clarifying the scope of the Origination Clause will allow the House of Representatives to protect its prerogatives more closely. The House has not always interpreted its authority under the Origination Clause consistently because of political expediency, the vagaries of the presiding officers, and other factors.[286] However, the House is an independent constitutional actor, and as a result, has an absolute veto over the passage of all legislation, including "Bills for raising Revenue."[287] In this way, it is entitled to deference in interpreting the Constitution, especially because of its primary textual role in revenue legislation.[288]

---

284. Huq, *supra* note 130, at 1448.

285. *See* United States v. Lopez, 514 U.S. 549, 589 (1995) (Thomas, J., concurring); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803) ("The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. . . . It cannot be presumed that any clause in the constitution is intended to be without effect . . . ."); *see also* District of Columbia v. Heller, 554 U.S. 570, 643 (Stevens, J., dissenting) (quoting *Marbury*, 5 U.S. (1 Cranch) at 174) ("The preamble thus both sets forth the object of the Amendment and informs the meaning of the remainder of its text. Such text should not be treated as mere surplusage, for '[i]t cannot be presumed that any clause in the constitution is intended to be without effect.'").

286. SATURNO, *supra* note 44, at 3–5. *See generally* 6 CLARENCE CANNON, CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE U.S. (2d ed. 1935) (presenting the prerogatives of the House as to revenue legislation); 3 LEWIS DESCHLER, DESCHLER'S PRECEDENTS OF THE U.S. HOUSE OF REPRESENTATIVES (1977) (outlining the powers and prerogatives of the House); 2 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE U.S. (1907) (presenting the prerogatives of the House as to revenue legislation also).

287. *See* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 440 (2012).

288. *See, e.g.*, *id.* at 414.

This Article has shown, for the first time, that the concept of "taxation without representation" is memorialized in the U.S. Constitution as the Origination Clause. Four of the bills enacted by the British Parliament in the 1760s imposed taxes for specific purposes—repaying the British Treasury for defense of the American colonies during the French and Indian War and paying for the colonial justice system (to prosecute American and Dutch smugglers seeking to evade British taxation no less).[289] The Sugar Act 1764, Stamp Act 1765, Declaratory Act 1766, and Revenue Act 1767 provide specific evidence that the Founding-era generation understood "taxes", "revenue", and "Bills for raising Revenue" to include both impositions for a specific purpose or governmental program and bills that raise funds for the government generally without designation.

Even though the American colonists believed that the British revenue legislation was "taxation without representation," modern U.S. Supreme Court precedent would likely find that these four bills were not "Bills for raising Revenue" within the meaning of the Origination Clause. *Munoz-Flores*, *Millard*, and *Twin City Bank* make it clear that the scope of the Origination Clause is limited to legislation that "'lev[ies] taxes in the strict sense of the word' . . . . to support government generally."[290] This conclusion was drawn from Justice Story's *Commentaries on the Constitution*, which noted that "the history of the origin of the power, [the Origination Clause], 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."[291] This Article has also evidenced that the eighteenth-

---

289. Revenue Act 1767, 7 Geo. 3 c. 46; American Colonies Act 1766, 6 Geo. 3 c. 12 (commonly known as the Declaratory Act); Stamp Act 1765, 5 Geo. 3 c. 12; Sugar Act 1764, 4 Geo. 3 c. 15.; *cf.* Administration of Justice Act 1774, 14 Geo. 3 c. 39 (establishing an act to assist loyalists in quelling riots in Massachusetts); Vice Admiralty Court Act 1768, 8 Geo. 3 c. 22 (establishing vice-admiralty courts to combat smuggling and customs duty evasion); Commissioners of Customs Act 1767, 7 Geo. 3 c. 41 (creating a colonial customs board to increase enforcement of shipping regulations and customs duty collection). *See generally* Carp, *supra* note 201 (arguing that Atlantic tea smuggling led to the passing of the Tea Act and, consequently, the Boston Tea Party).

290. United States v. Munoz-Flores, 495 U.S. 385, 397–98 (1990) (quoting Twin City Bank v. Nebeker, 167 U.S. 196, 202 (1897)); *see* Millard v. Roberts, 202 U.S. 429, 436–37 (1906); *Twin City Bank*, 167 U.S. at 203.

291. 1 STORY, *supra* note 20, § 880; *see Munoz-Flores*, 495 U.S. at 397 (quoting *Twin City Bank*, 167 U.S. at 202 (citing 1 STORY, *supra* note 20, § 880)); *Millard*, 202 U.S. at 436 (first citing *Twin City Bank*, 167 U.S. at 202–03; and then quoting 1

century meaning of "incidentally creat[ing] revenue" was likely limited to regulatory impositions, outside of any origination requirement.

The Supreme Court's Origination Clause jurisprudence has likely interpreted Story's conclusions on 'incidental revenue' to include revenue bills for a specific governmental purpose, whilst the Founding-era meaning of this term was merely limited to regulatory impositions. Otherwise, if modern Court precedent had been applied to the 1760s British revenue legislation, the Founders would have simply accepted the legislation as incidental taxation measures that were funding services designed to benefit the American colonies—likely not worthy of generalized political and military insurrection. In this way, through *Munoz-Flores*, *Millard*, *Twin City Bank*, and lower court progeny like *Sissel v. U.S. Department of Health and Human Services*,[292] the Supreme Court has artificially limited the scope of the Origination Clause to only large tax reform bills that raise money for the Treasury in an unearmarked, general fashion.[293]

In the same way that many Supreme Court doctrines struggled for years to find their genesis, the Origination Clause has not yet become ripe. Many of the delegates to the Constitutional Convention were legislators.[294] Even though we live in an "age of statutes,"[295] many of our distinguished judges today have no experience in statute making or the legislative process. Consequently, some of the more nuanced provisions of Article I that do not rely on Congress to

---

STORY, *supra* note 20, § 880); *Twin City Bank*, 167 U.S. at 202–03 (citing 1 STORY, *supra* note 20, § 880).

292. 799 F.3d 1035, 1036 (D.C. Cir. 2015) (Rogers, J., concurring) ("The panel opinion rests, as it must, on binding Supreme Court precedent. The Supreme Court has never found an Origination Clause violation. And, in three separate cases spanning more than a century, it held that the variable controlling whether a statutory provision falls within the ambit of the Origination Clause is whether raising revenue for the general Treasury is that provision's primary purpose.").

293. *See, e.g.*, Tax Cuts and Jobs Act, Pub. L. No. 115–97, 131 Stat. 2054 (2017); Revenue Act of 1964, Pub. L. No. 88–272, 78 Stat. 19. This is likely because only large taxation bills are enacted for the general support of government—smaller bills tend to be more limited on one or a select number of subjects, making it more likely that revenue measures contained in these pieces of legislation are enacted to fund a specific purpose. *But see Sissel*, 799 F.3d at 1049 (Kavanaugh, J., dissenting) ("[T]he Act imposed numerous taxes to raise revenue. Lots of revenue. $473 *billion* in revenue over 10 years. It is difficult to say with a straight face that a bill raising $473 billion in revenue is not a 'Bill for raising Revenue.'").

294. *See* Tillman, *supra* note 114, at 1355.

295. *See generally* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1985) (noting that modern legislators create a vast amount of law when compared to their common-law-era counterparts).

fill in their meaning—like the Orders, Resolutions and Votes Clause and the Origination Clause—have fallen by the wayside in constitutional elucidation.

Until judges with a keen knowledge of Congress have an opportunity to lend their wisdom and enthusiasm to their colleagues, the perfection of our federal legislative process—specifically the legacy of "taxation without representation" and the Origination Clause—will remain vitally incomplete.