THE 'SHELL BILL' GAME: AVOIDANCE AND THE ORIGINATION CLAUSE

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ABSTRACT

With increasing frequency, many important revenue laws, such as the Affordable Care Act and the American Taxpayer Relief Act of 2012, begin as "shell bills." The Origination Clause of the Constitution aims to place decisions over tax policy closer to the people by requiring that bills raising revenue begin in the House of Representatives, but the Clause also allows the Senate to amend such bills. The Senate has interpreted its amendment power broadly, striking the language of a bill passed by the House (the shell bill), and replacing it entirely with its own unrelated revenue proposal. According to a new challenge against the Affordable Care Act, this shell bill game is an unconstitutional sleight of hand because it obfuscates the bill's true origins in the Senate.

The constitutional fate of the Affordable Care Act and myriad other revenue laws, as well as the intra-congressional balance of power over revenue policy, turns on the interpretation of the Senate's power to amend revenue legislation, an analysis heretofore unexplored in the academic literature. This Article draws upon constitutional text, history, and congressional and judicial precedent to conclude that such amendment power is broad and, accordingly, that revenue laws that began as shell bills do not violate the Origination Clause. This Article also proposes a conceptual framework for analyzing existing jurisprudence interpreting the Origination Clause—a "legislative process avoidance" doctrine, whereby the Court deflects searching review of lawmaking procedures. Grounded in constitutional text and history, theories of judicial review, and longstanding principles guarding congressional purview over internal rules, this legislative process avoidance doctrine further supports deference to the Senate's expansive interpretation of its amendment power

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without rendering the Clause a nullity. Separation of powers concerns also show the doctrine's promise in other constitutional contexts, such as the interpretation of gaps in the lawmaking process left open by Article 1, Section 7.

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INTRODUCTION

To bring decisions over revenue policy closer to the people, the Origination Clause of the Constitution requires that "[a]ll Bills for raising Revenue" begin in the House of Representatives.[1] Congressional practice and judicial decisions interpret the scope of the Clause broadly.[2] The Origination Clause, however, also allows the Senate to "propose or concur with Amendments as on other Bills."[3] The Senate has construed its power to amend revenue legislation liberally, thus reducing the Clause's impact.[4] With increasing frequency, the Senate takes a revenue bill passed by the House (the "shell bill"[5]), strikes the language of the bill entirely, and replaces it with its own revenue bill unrelated to the one that began in the House. Under a narrow view of the Senate's amendment power, this shell bill game is an unconstitutional sleight of hand, obfuscating the bill's true origins in the Senate. Yet it is the path many important pieces of revenue legislation, such as the Affordable Care Act, the American Taxpayer Relief Act of 2012, the Emergency Economic Stabilization Act of 2008, and even the Tax Reform Act of 1986, have followed.[6]

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1. U.S. CONST. art. I, § 7, cl. 1. I have discussed the origins and meaning of the Origination Clause in another context. *See* Rebecca M. Kysar, *On the Constitutionality of Tax Treaties*, 38 YALE J. INT'L L. 1 (2013) (arguing that tax treaties violate the Origination Clause because the House is not involved in the treaty-making process).

2. Mary L. Heen, *Congress, Public Values, and the Financing of Private Choice*, 65 OHIO ST. L.J. 853, 874 n.94 (2004) ("[T]he term 'raising revenue' has been interpreted by lower federal courts as broadly encompassing provisions 'relating to' revenue."); *see also infra* text accompanying notes 185–195.

3. U.S. CONST. art. I, § 7, cl. 1.

4. *See* Sean R. Gard, *Revival of the Origination Clause in Patent Law: Old Clause Trumps New Practice*, 16 U. BALT. INTELL. PROP. L.J. 61, 66 (2008) ("Despite the broad interpretation of courts concerning what constitutes bills that 'raise revenue' in the context of taxation, in practice, the Senate still retains considerable authority to amend House bills.") (quoting from Michael W. Evans, '*A Source of Frequent and Obstinate Altercations': The History and Application of the Origination Clause*, 105 TAX NOTES 1215, 1232 (Nov. 29, 2004)).

5. I use the term "shell bill" as it is used in Capitol Hill parlance—to refer to the House-originated revenue bills whose text the Senate completely replaces in order to comply with the Origination Clause. *See, e.g.*, John Dickerson, *The Invasion of the Bill Snatchers*, SLATE (Oct. 6, 2009, 7:35 PM), http://www.slate.com/articles/news_and_politics/politics/2009/10/the_invasion_of_the_bill_snatchers.single.html. The term is also used at the state level to refer to bills with no substantive provisions that are introduced to comply with timeliness requirements. This tactic is used either as a political strategy or because there is not sufficient time to draft the bill's contents. *See* Martha J. Dragich, *State Constitutional Restrictions on Legislative Procedure: Rethinking the Analysis of Original Purpose, Single Subject, and Clear Title Challenges*, 38 HARV. J. ON LEGIS. 103, 112 n.72 (2001) (discussing Illinois' use of such shell bills).

6. American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313 (2013); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010); Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 112 Stat. 3765 (2008); Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986) (current version at 26 U.S.C § 1 (2006)).

The constitutional fate of these statutes turns on whether the Senate's broad interpretation of its amendment power is correct. On the heels of *National Federation of Independent Business v. Sebelius* ("*NFIB*"),[7] a conservative public interest law firm launched another attack against the Affordable Care Act arguing that, in using the shell bill tactic in enacting the Act, Congress unconstitutionally circumvented the Origination Clause.[8] Specifically, the complaint alleged that because the individual mandate raises revenue, which the Court implicitly confirmed in its opinion upholding the mandate under Congress's taxing power,[9] the Act should have originated in the House of Representatives. The D.C. District Court, citing an earlier draft of this Article and largely adopting the interpretive theory of the Senate's amendment power set forth herein, disagreed with this argument and granted the government's motion to dismiss.[10] At the time of this writing, an appeal to the D.C. Circuit Court of Appeals is pending.[11]

In informal writings, some scholars have readily dismissed the Origination Clause challenge against the Affordable Care Act.[12] Ambiguity surrounding the Clause's components, however, exposes the seriousness of the challenge and indeed implicates profound questions concerning the scope of judicial review. No sustained scholarly treatment of the Senate's power to amend revenue legislation exists,[13] and the Court's case law leaves many open questions.

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7. 132 S. Ct. 2566 (2012).

8. [Proposed] Amended Complaint for Declaratory Judgment and Injunctive Relief, Sissel v. U.S. Dep't of Health & Human Servs, No. 1:10-cv-01263 (D.D.C. Sept. 11, 2012).

9. The *NFIB* Court did not address the Origination Clause issue, presumably since the parties did not raise it. Justice Scalia, in his dissent, briefly touched upon the Origination Clause but did not invoke its direct application. He remarked that the majority's decision to label the mandate a tax stood contrary to Congress's decision and therefore "invert[ed] the constitutional scheme" by "plac[ing] the power to tax in the branch of government least accountable to the citizenry," in tension with the Origination Clause. NFIB, 132 S. Ct. at 2655 (Scalia, J., dissenting).

10. Sissel v. U.S. Dep't of Health & Human Servs., No. 1:10-cv-01263 (D.D.C. June 28, 2013). As this Article was going to print, another federal district court dismissed a similar Origination Clause challenge, also citing an earlier draft of this Article. Hotze v. Sebelius, No. 4:13-cv-01318, 2014 WL 109407 (S.D. Tex. Jan. 10, 2014). The Texas district court reasoned that the Act was not a revenue bill and that, even if it was, the Senate's amendment power was broad.

11. Civil Notice of Appeal, Sissel v. U.S. Dep't of Health & Human Services, No. 1:10-cv-01263 (D.D.C. July 5, 2013).

12. *See, e.g.*, Jack M. Balkin, *The Right Strikes Back: A New Legal Challenge for Obamacare*, THE ATLANTIC (Sept. 17, 2012 12:49 PM), http://www.theatlantic.com/national/archive/2012/09/the-right-strikes-back-a-new-legal-challenge-for-obamacare/262443/ (implying that the Origination Clause challenge to the Affordable Care Act is "off the wall" and "frivolous").

13. One possible exception is a brief essay by a practitioner. John L. Hoffer, Jr., *The Origination Clause and Tax Legislation*, 2 B.U. J. TAX L. 1 (1984). Another is a practitioner's comparative survey of origination clauses at the federal and state levels, which discusses the issue in passing. J. Michael

In its most recent interpretation of the Origination Clause, the Court pronounced the general enforceability of the Clause, meaning that it is not simply up to the House to police the Clause.[14] This is a departure from the Court's typical unwillingness to entertain challenges involving internal congressional procedure,[15] yet it is less dramatic than previously understood. In this Article, I demonstrate that the Supreme Court case law under the Origination Clause reveals a pattern: the Court's interpretation of the Clause consistently allows it to avoid intrusion into the legislative process, in recognition of separation of powers concerns and its own institutional limitations.

By identifying as the Court's guide star its reluctance to conduct a searching review of the legislative process, this Article thus proposes a coherent doctrinal framework for analyzing possible challenges under the Origination Clause—a "legislative process avoidance" doctrine. Such an approach is grounded in constitutional text and history, as well as theories of judicial review and longstanding principles that guard congressional purview over the legislative process.[16] Given its intertwinement with congressional procedure and its textual commitment of interpretive authority to Congress, the Origination Clause is a particularly appropriate setting for a legislative process avoidance doctrine.[17] General separation of powers concerns as embodied in the Rulemaking Clause and the political question doctrine, however, also show the doctrine's promise in other constitutional contexts. For instance, the judiciary could invoke the

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Medina, *The Origination Clause in the American Constitution: A Comparative Survey*, 23 TULSA L.J. 165 (1987). Both authors conclude somewhat cursorily that Senate amendments must be germane to the original house bill in order to give proper effect to the Origination Clause, a conclusion with which I disagree. *See also* Michael W. Evans, '*A Source of Frequent and Obstinate Altercations': The History and Application of the Origination Clause*, TAX HIST. PROJECT (Nov. 29, 2004), *available at* www.taxhistory.org/thp/readings.nsf/ArtWeb/8149692C128846EF85256F5F000F3D67?OpenDocument (providing an account of existing congressional and judicial precedent interpreting the Senate's amendment power).

14. United States v. Munoz-Flores, 495 U.S. 385 (1990).

15. *See* Rebecca M. Kysar, *Lasting Legislation*, 159 U. PA. L. REV. 1007, 1021–25 (2011) (discussing endogeneity, i.e. the interpretation and enforcement of legislative rules by the adopting body); Rebecca M. Kysar, *Listening to Congress: Earmark Rules and Statutory Interpretation*, 94 CORNELL L. REV. 519, 553–62 (2009) (providing an overview of legislative rules in the context of a special interest disclosure regime).

16. U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings . . . .").

17. This phrase, I coin, is a play upon the constitutional avoidance doctrine, which counsels that the Supreme Court should avoid resolving cases on constitutional grounds (instead resolving them on other grounds). *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Although the doctrines differ in obvious regards, they are both premised on the proper scope of judicial review.

doctrine to defer to Congress in interpreting gaps left open by Article 1, Section 7.[18]

The legislative process avoidance doctrine prescribes that the Court defer to the Senate's interpretation of its amendment power under the Origination Clause, a conclusion that is supported by the Clause's text. The Origination Clause's grant of such power to the Senate "*as on other Bills*"[19] represents submission to Senate procedure. Moreover, the Senate's broad interpretation of its amendment power is wholly supported by the text and history of the Clause, as well as by congressional and judicial precedent. Thus, even an amendment in the form of a wholesale substitute should and will most likely survive constitutional scrutiny. This would be the case even where the amendment converted the measure from revenue-decreasing or revenue-neutrality to revenue-increasing (as occurred in the Affordable Care Act context).

It is important to clarify that the institutional argument for a legislative process avoidance doctrine in the Origination Clause context is necessarily intertwined with the substantive constitutional analysis of how broadly to construe the amendment power since the textual grant of permission to the Senate to amend "as on other Bills" constitutes deference to that body. In this Article, however, I also canvass additional textual, historical, and precedential arguments to justify the Senate's interpretation. Additionally, I offer theoretical arguments for a legislative process avoidance doctrine that may support its application to situations where the constitutional grant of deference is not so clear.

The approach outlined herein avoids judicial inquiries into the acceptable degree of an amendment's germaneness to the original bill and the revenue effects of a bill amidst a changing macroeconomic environment—all nettlesome endeavors fraught with impracticalities and separation of powers concerns. This broad interpretation of the Senate's power to amend revenue legislation thus continues a trend identified in other constitutional contexts—Congress, not the courts, is the proper avenue for recourse against unfair taxation.[20] Judicial deference to the

18. For instance, the judiciary, under the legislative process avoidance doctrine, should defer to Congress in formulating the precise requirements of whether a bill "passes" a house or whether the House or Senate could assign to a committee the power to present a passed bill to the President.

19. U.S. CONST. art. I, § 7, cl. 1 (emphasis added).

20. Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533, 548 (1869) ("The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation, or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution."); McCray v. United States, 195 U.S. 27, 55 (1904) (stating that recourse for abuses of the taxing power

elected branch in the Origination Clause context is especially appropriate given the Clause's origins in protecting democracy over tax policy.

This Article proceeds as follows. In Part I, I discuss the history of the Origination Clause, as well as its purpose of creating democratically sound revenue legislation. In Part II, I propose a framework for understanding the doctrine under the Origination Clause; generally, the Court, motivated by concerns for institutional competency and separation of powers, avoids judicial reconstruction of the legislative process. This legislative process avoidance doctrine predicts an expansive interpretation of the Senate's amendment power, a reading that is also supported by constitutional text, history, and precedent. In Part III, I draw upon theories of judicial review and traditional separation of powers principles to justify using the legislative process avoidance doctrine in interpreting the Origination Clause and to suggest the doctrine's possible application to other constitutional contexts. In this Part, I also discuss why the Senate's broad amendment power mutes the Clause's effect but by no means vitiates it since the House still retains agenda control.[21] Finally, in Part IV, I apply the legislative process avoidance doctrine to the context of healthcare reform, predicting that the Origination Clause challenge to the Affordable Care Act will fail.

I. THE ORIGINS OF THE ORIGINATION CLAUSE

The Origination Clause has roots in fourteenth-century England where the elected House of Commons originated revenue bills with subsequent

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lies "in the people, upon whom, after all, under our institutions, reliance must be placed for the correction of abuses committed in the exercise of a lawful power"); Edward D. Kleinbard, *Constitutional Kreplach*, TAX NOTES, Aug. 16, 2010, at 757 ("[T]he Constitution can best be understood as contemplating that the principal remedy for harsh, oppressive, or stupid tax legislation is to vote the rascals out."); 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, 451 n.165 (1983) ("Traditionally, it has been the policy of the courts to defer to Congress in constitutional claims involving tax legislation, especially in the area of equal protection.").

21. Indeed, in prior work, I have taken the position that the democratic benefits of the House's participation in revenue policy, among other considerations, mandate a role for the House in the tax treaty process as a constitutional matter. *See* Kysar, *supra* note 1. In the tax treaty context, the House's complete omission from the process is particularly egregious. In contrast, a broad amendment power does not pose the same affront to the democratic rationales motivating the Origination Clause since the House still retains agenda-setting ability. *See* Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 424–25 (2004) (describing the advantage bestowed upon the House by the Origination Clause even in the face of a broad amendment power); *see also infra* notes 262–66 and accompanying text.

action by the House of Lords, which was appointed by the crown.[22] The justification for this practice abroad was the lower house's accountability to the people, which would minimize arbitrary, unfair, and overly burdensome taxes.[23] One notable feature of the English practice was the House of Lords' inability to substantively amend revenue bills originating in the House of Commons.[24] The American colonies largely adhered to the custom of giving the lower chambers the power to originate money bills, eight of which codified the power in their charters by the time of the Constitutional Convention.[25] Several of those clauses, however, deviated from the English practice and allowed Senate amendments.[26]

At the federal level, one of the principal defects of the Articles of Confederation was the inability of the federal government to raise revenue, which had subsequently resulted in economic turmoil and "national humiliation" according to Alexander Hamilton.[27] The Constitutional Convention was, in part, convened to expand the federal government's power to tax.[28] The expansion of the taxing power, in and of itself, proved noncontroversial; however, the procedural mechanism through which taxes would be imposed sparked debate.[29]

Delegates from large states invoked the power to originate revenue bills in the lower house as a counterweight to the powers of the Senate.[30] Delegates also used democratic principles to justify the Origination Clause, which gave control over initiating revenue matters to the directly elected House of Representatives, rather than the Senate whose members were elected by state legislatures. After the origination power was placed

22. 1 DAVID K. WATSON, THE CONSTITUTION OF THE UNITED STATES: ITS HISTORY, APPLICATION, AND CONSTRUCTION 342 (1910); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 315 (abr. photo. reprint 1987) (1833).

23. STORY, *supra* note 22, at 315.

24. *Id.* at 639–43.

25. Michael B. Rappaport, *The President's Veto and the Constitution*, 87 Nw. U. L. Rev. 735, 765 n.118 (1993).

26. Of the eleven states adopting new constitutions after the revolution, four forbade the upper house from originating or amending revenue bills (New Jersey, South Carolina, Virginia, and Maryland), and three allowed the upper house to amend, although not originate, such bills (Delaware, Massachusetts, and New Hampshire). Two states had no version of the origination privilege (North Carolina and New York), and two others did not have bicameral legislatures (Pennsylvania and Georgia). *Id.*

27. THE FEDERALIST NO. 15 (Alexander Hamilton).

28. Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM L. REV. 1, 6–7 (1999).

29. Rosenberg, *supra* note 20, at 423.

30. After one instance of the Clause's removal during debate, Edmund Randolph argued that the House required its inclusion as "compensation at least for giving up the point of proportional representation in the Senate." WILLIAM M. MEIGS, THE GROWTH OF THE CONSTITUTION IN THE FEDERAL CONVENTION OF 1787 111 (1987).

in the House, the Framers enhanced the democratic functions of the Clause by requiring a larger number of members, proportionate representation, and shorter terms in the House.[31] The Framers hoped these characteristics would further ensure that the House would design revenue policy in a manner that was closest to the people's wishes.[32] Although the Seventeenth Amendment would later result in direct election of the Senate, thereby reducing somewhat the Senate's insularity from public opinion,[33] the House, and the House alone, retains these other attributes.[34]

Edmund Randolph of Virginia first proposed the basic, bicameral structure of the legislature as part of the "Virginia Plan." In its original incarnation, the Virginia Plan did not discuss any restriction on either house's role in originating revenue bills.[35] Charles Pinckney of South Carolina proposed as a modification to the plan that "[a]ll money bills of every kind shall originate in the House of Delegates, and shall not be altered by the Senate."[36] The convention body defeated Pinckney's proposal, arguing that both houses should have the power to originate revenue legislation.[37]

The Virginia Plan proved divisive. Nationalists preferred its replacement of state-based representation with a proportionate system and were joined by delegates from the large states. The anti-federalists feared the plan's concentration of national power, and delegates from small states objected to their dilution of power under the plan. To break this deadlock, a special committee was formed to produce the "Great Compromise." In

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31. James Madison, in a speech to the newly formed House of Representatives on May 15, 1789, made this point:

> The constitution . . . places the power in the House of originating money bills. The principal reason . . . was, because [its members] were chosen by the People, and supposed to be best acquainted with their interests, and ability. In order to make them more particularly acquainted with these objects, the democratic branch of the Legislature consisted of a greater number, and were chosen for a shorter period, so that they might revert more frequently to the mass of the People.

3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 356 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS].

32. *Id.*

33. U.S. CONST. amend. XVII.

34. Although the members of the House have shorter terms and thus are theoretically more responsive to their constituents, gerrymandering has muted this benefit by creating "safe" seats in the House. *See, e.g.*, Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1334 (1994) (positing that gerrymandering results in longer tenure of representatives).

35. Hoffer, *supra* note 13, at 3.

36. 5 THE DEBATES IN THE SEVERAL STATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 129 (Jonathan Elliot ed., 1861) [hereinafter ELLIOT'S DEBATES].

37. ARTHUR TAYLOR PRESCOTT, DRAFTING THE FEDERAL CONSTITUTION 86 (1941).

exchange for the grant of equal representation in the Senate to the small states, the Great Compromise provided that "all bills for raising or appropriating money . . . shall originate in the first branch of the legislature, and shall not be altered or amended by the second branch . . . ."[38]

Although the Origination Clause thus became linked to the Great Compromise,[39] with several delegates from large states threatening to thwart the Convention rather than forgo the origination privilege,[40] the Clause remained the subject of heated debate. Subsequent to the Great Compromise, Elbridge Gerry of Massachusetts argued "that the people ought to hold the purse-strings,"[41] proposing very similar language to the first draft of the Clause, including its prohibition on amendments by the Senate. Several delegates agreed with Gerry's proposal, including George Mason and Benjamin Franklin, who concluded that the power over revenue affairs should be given to the immediate representatives of the populace so that the nation would not be in danger of becoming an aristocracy.[42]

Other delegates, however, opposed the Clause over the course of the Convention. Pinckney, although the drafter of the first incarnation of the Clause, invoked his own state's undesirable experience with a similar provision, which was routinely evaded and caused strife between the two houses.[43] James Madison echoed these opinions, also arguing that the Senate would prove more capable than the House.[44] Still others cautioned against following the English model since, unlike England's House of Lords, both houses in the new nation would be elected bodies.[45] Some delegates from small states also thought relinquishing the power to originate money bills too great a sacrifice for equal representation in the Senate.[46]

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38. 1 ELLIOT'S DEBATES, *supra* note 36, at 194.

39. 2 FARRAND'S RECORDS, *supra* note 31, at 514 ("[M]embers from large States set great value on this privilege of originating money bills. Of this the members from the small States, with some from the large States who wished a high mounted Govt, endeavored to avail themselves, by making that privilege, the price of arrangements in the constitution favorable to the small States, and to the elevation of the Government.").

40. Rosenberg, *supra* note 20, at 423.

41. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 113 (Adrienne Koch ed., 1966) [hereinafter "MADISON'S NOTES"].

42. *Id.* at 304–06.

43. *Id.* at 114.

44. *Id.* at 113, 238.

45. 5 ELLIOT'S DEBATES, *supra* note 36, at 188–89 (noting views of Butler, Madison, Pinckney, and Sherman).

46. *See, e.g.*, 5 ELLIOT'S DEBATES, *supra* note 36, at 394 (recounting the position of John Francis

Nonetheless, the Clause's ability to mollify delegates from the large states would ensure its later survival. Gerry's proposal eventually passed nine to one.[47] To cure perceived shortcomings, however, Edmund Randolph submitted a version that clarified that the Clause only applied to "bills for raising money for the *purpose of revenue*."[48] This change was made in order to exclude from the Clause's scope bills under which money incidentally arose.[49] This proposed language also responded to the concern that the House would "tack" on to revenue bills other unrelated matters.[50]

Randolph's proposal gave the power to amend revenue bills to the Senate, but not in such a way as to "increase or diminish the sum to be raised, or change the mode of levying it."[51] The grant of an amendment power to the Senate would ultimately secure the Clause's place in the Constitution. George Mason, for instance, supported Randolph's proposal because the failure to give amendment powers to the Senate would problematically prevent the Senate from correcting errors or from defending its purview over foreign affairs.[52] He thought the latter concern to be acute given the danger that the House of Representatives would "tack[] foreign matter to money bills."[53]

Although Randolph's version seemed to resolve some of the shortcomings in the prior bill, James Madison argued that it would create new ambiguities. Under Madison's view, doubt and altercation would arise as to whether revenue had merely incidental effects, as well as over the precise meaning of the Senate's amendment power.[54] As to the latter point, Madison worried that the Senate might use its amendment powers to include extraneous material, thus requiring inquiry into the degree of connection between the subject matter of the bill and the amendment.[55] He also was of the view that Randolph's version should be altered to at least allow the Senate "to *diminish* the sums to be raised."[56]

Mercer). This view was not universally shared. Madison would argue that the origination privilege was of little consequence since "[a]mendments could be handed privately by the Senate to members in the other House." *Id.* at 274.

47. MADISON'S NOTES, *supra* note 41, at 441.
48. *Id.* at 442.
49. *Id.* at 441–42.
50. 2 FARRAND'S RECORDS, *supra* note 31, at 273.
51. *Id.* at 273.
52. 5 ELLIOT'S DEBATES, *supra* note 36, at 415 (statement of George Mason).
53. *Id.*
54. MADISON'S NOTES, *supra* note 41, at 446.
55. *Id.*
56. PRESCOTT, *supra* note 37, at 444 (emphasis in original).

On September 5, 1787, the delegates offered a near final form of the Origination Clause. Instead of limiting the Clause to bills "for the purpose of revenue," the new draft applied to "bills for raising revenue." The Clause gave the power to the Senate to "alter[]" or "amend[]" such bills,[57] thus broadening the amendment power envisioned by Randolph. At this point, the delegates from the large states became amenable to the view of the small states that equal representation in the Senate did not serve as a sufficient counterweight to the origination privilege. They thus agreed to postpone consideration of the Clause until the remainder of the Senate's powers were delineated—specifically, its powers in the realm of appointments, treaty-making, presidential selection, and impeachments.[58] The small states, pleased with the strengthening of the Senate's powers, finally acquiesced to the Origination Clause. Three days later, the language of the Origination Clause was finalized, [59] which applied to "bills for raising revenue." It also tracked the language of the Massachusetts Constitution in granting the Senate the ability to "propose or concur with Amendments as on other Bills."[60]

Madison, originally an opponent of the Clause, would later attempt to assuage residents of New York who were grieved by the weakening of the Clause through the Senate's amendment power, arguing that the diluted Clause would still prove powerful:

> The House of Representatives can not only refuse, but they alone can propose, the supplies requisite for the support of government. They, in a word, hold the purse . . . . This power over the purse, may in fact be regarded as the most compleat [sic] and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.[61]

Years later, however, the concession of the Senate's amendment power would still sting for some. Gerry, in a letter dated eleven years after the Convention, would argue that the Senate's amendment power violated the compromise and rendered the Origination Clause ineffective. For these reasons, Gerry stated he would never have consented to equal

57. 5 ELLIOT'S DEBATES, *supra* note 36, at 510.
58. Rosenberg, *supra* note 20, at 428; 5 ELLIOT'S DEBATES, *supra* note 36, at 511.
59. PRESCOTT, *supra* note 37, at 450–51.
60. U.S. CONST. art. I, § 7, cl. 1; *see* MADISON'S NOTES, *supra* note 41, at 607.
61. THE FEDERALIST NO. 58 (James Madison).

representation in the Senate in light of the final version of the Clause.[62] The scope of the Senate's amendment power, and hence the gravity of the large states' concession, is the subject of the remainder of this Article.

II. THE JURISPRUDENCE OF THE ORIGINATION CLAUSE

As Part I summarizes, the Framers included the Origination Clause to further democratic principles and to mollify the large states. Although James Madison warned of the difficulty in enforcing and interpreting the Clause,[63] the Convention presumably adopted it because its benefits outweighed these concerns. Nonetheless, Madison's warnings would prove prescient. This Part discusses the jurisprudence interpreting the Clause, synthesizing the Court's decisions as animated by its unwillingness to breach legislative prerogative, an approach that I label the "legislative process avoidance" doctrine. This Part concludes by applying the "legislative process avoidance" doctrine to predict judicial deference to the Senate's broad reading of its amendment power, a reading that I defend as a substantive matter through examination of history, text, and precedent.

A. Judicial Enforceability of the Origination Clause

The primary method by which the Origination Clause is enforced is by a House resolution returning a bill to the Senate (this practice is known as "blue-slipping" because the resolution is printed on blue paper).[64] Typically, challenges against Congress's failure to adhere to rules governing its lawmaking process are unenforceable by the Court.[65] Such a result is premised on separation of powers concerns and each house's authority over its own rules under the Rulemaking Clause of the Constitution.[66]

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62. 3 FARRAND'S RECORDS, *supra* note 31, at 265–67.

63. 2 FARRAND'S RECORDS, *supra* note 31, at 276.

64. House Rule IX, clause 2(a)(1) provides for this process. Other informal means of enforcing the Clause are as follows: (1) ignoring a Senate-passed revenue bill; (2) using a conference committee to decide Origination Clause questions; and (3) omitting the revenue portions of the offending bill. JAMES V. SATURNO, CONG. RESEARCH SERV., RL31399, THE ORIGINATION CLAUSE OF THE U.S. CONSTITUTION: INTERPRETATION AND ENFORCEMENT 9, 12 (2011).

65. *See, e.g.*, Vander Jagt v. O'Neill, 699 F.2d 1166, 1173 (D.C. Cir. 1983) (denying review of the House's allocation of committee seats except in cases of "constitutional infirmity"); *see also* Kysar, *Lasting Legislation*, *supra* note 15, at 1021–25 (discussing the non-reviewability of legislative rules); Kysar, *Listening to Congress*, *supra* note 15, at 553–62 (same).

66. U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings . . . ."). Courts generally interpret this Clause to stand for the proposition that legislative rules are

Indeed, early on, the Court refused to review requirements for passing legislation, even if set forth in the Constitution. In *Field v. Clark*, the Court held that it could not second-guess the legislative practice whereby the presiding congressional officer attests that the bill presented to the President is the one signed by Congress (the "enrolled bill" doctrine).[67] Accordingly, the *Field* Court declined to examine evidence presented by the plaintiffs that the congressional journals indicated that the statute signed by the President in fact differed from the one passed by the House and the Senate.[68]

In so doing, the *Field* Court concluded that Congress was free to designate the process by which the passage of a bill is authenticated.[69] According to the Court, because the signing of the bill by the presiding officers of each house was official attestation as to the bill's contents in accordance with internal rules, "[t]he respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed Congress, all bills authenticated in the manner stated."[70] The Court discounted any risk that the presiding officers would conspire to attest to a bill that was never passed by Congress. Instead, the Court expressed concern that an opposite conclusion would result in uncertain laws whose validity is dependent upon subordinate officers in charge of keeping the journals of each house.[71]

Nearly one hundred years later and in apparent tension with this precedent,[72] the *United States v. Munoz-Flores* Court held justiciable the issue of whether legislation complied with the Origination Clause and ultimately concluded that the law at issue (a statute that imposed monetary penalties on persons convicted of federal misdemeanors) fell outside the scope of the Clause.[73] In a concurring opinion, Justice Scalia critiqued the majority by arguing that the enrolled bill doctrine requires that the Court not consider where, in fact, the revenue bill had originated and instead defer to Congress's designation of the bill's origination in the House

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beyond the scrutiny of the judicial branch.

67. Field v. Clark, 143 U.S. 649, 670–71 (1982). *See also* United States v. Munoz-Flores, 495 U.S. 385, 408–10 (1990) (Scalia, J., concurring) (citing from *Field*).

68. *Field*, 143 U.S. at 650.

69. *Id.* at 671.

70. *Id.* at 672.

71. *Id.* at 673.

72. This tension is further explored below. *See infra* notes 235–40 and accompanying text.

73. United States v. Munoz-Flores, 495 U.S. 385, 401 (1990).

(albeit factually incorrect).[74] Such an approach would not, according to Scalia, make Origination Clause challenges categorically non-justiciable—instead, the judiciary could intervene when Congress had designated the legislation as originating in the Senate.[75]

The *Munoz-Flores* majority, in a somewhat cryptic footnote, rejected Scalia's argument by distinguishing *Field* because it did not implicate a constitutional requirement binding upon Congress, such as the Origination Clause.[76] The Court also rejected the argument that the case presented a non-justiciable political question. In analyzing the factors enumerated in *Baker v. Carr* that raise such questions,[77] the Court dismissed the argument that invalidating a law on Origination Clause grounds entailed a "lack of respect" for Congress's judgment sufficient to create a political question.[78] The Court also discredited the Government's contention that the House's incentives to protect its "institutional prerogatives" or the Origination Clause's failure to implicate individual rights obviated the need for judicial intervention.[79]

Even in light of *Munoz-Flores*, separation of powers principles, in fact, permeate the case law under the Origination Clause. Although the Court does not defer to Congress's certification as to a bill's origins, its understanding of "bills for raising revenue" and other interpretations of the Clause avoid judicial ensnarement in the legislative process. Thus, although the holding in *Munoz-Flores* is somewhat incongruous with the holding in *Field*, examination of Origination Clause jurisprudence reveals that *Munoz-Flores*'s departure from prior case law is perhaps not as stark as previously understood.

B. The Scope of the Origination Clause

1. Funds for the General Treasury as a Proxy for "Revenue Raising"

The Supreme Court has spoken on the meaning of the Origination Clause only a handful of times, but commentators have ascertained two rules that the Court has invoked to narrow its scope: (1) raising revenue must be the primary purpose, rather than an incidental consequence, of the

74. *Id.* at 409–10 (Scalia, J., concurring).
75. *Id.* at 410.
76. *Id.* at 391 n.4 (majority opinion).
77. Baker v. Carr, 369 U.S. 186, 217 (1962). These factors are discussed in more detail below. *See infra* text accompanying notes 250–53.
78. *Munoz-Flores*, 495 U.S. at 390–91.
79. *Id.* at 392–95.

legislation; and (2) such revenues must be for general government coffers.[80] The Court, however, has never denied an Origination Clause challenge solely on the basis of the first condition. Instead, the Court invokes the second as a proxy for the first; if a statute funds the general treasury instead of a specific program or service, it has a primary purpose of raising revenue. Alternatively, if the statute funds a specific activity or segment, it falls outside the scope of the Clause. The Court's use of these objective facts as proxies for predominant purpose likely emanates from its reluctance to review the legislative process to unearth legislative intent.

United States v. Norton is a case often cited for the Court's concern that revenue-raising must be the primary purpose of the legislation in order to fall under the Origination Clause.[81] Notably, however, the *Norton* case did not even involve the Origination Clause.[82] The misunderstanding arises from the Court's analogy to the Origination Clause, which it reasoned must have been in the minds of Congress in drafting a statute of limitations that applied to violations of "revenue laws." In so doing, the *Norton* Court cited to Story's *Commentaries on the Constitution* for the proposition that the Origination Clause was "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."[83] The Court then reasoned that the purpose of the act under which the defendant embezzler was charged was to promote greater security and convenience in the transmission of money through the mail system, rather than to create revenues. Thus, the defendant did not benefit from the shorter statute of limitations that applied to violations of revenue laws.

In exploring the meaning of revenue bills for purposes of the Origination Clause, however, the Court does not reconstruct congressional purpose. The Court's failure to do so in the constitutional context is appropriate since attribution of congressional purpose might mean invalidation of the statute. By contrast, in the statutory context, the Court is merely trying to effectuate congressional intent. *Twin City Bank of New*

80. SATURNO, *supra* note 64, at 8.

81. United States v. Norton, 91 U.S. 566 (1875).

82. *See, e.g.*, United States v. Simpson, 885 F.2d 36, 40–41 (3d Cir. 1989) (misconstruing *Norton* as an Origination Clause case); United States v. Herrada, 887 F.2d 524, 525–26 (5th Cir. 1989) (same); United States v. Tholl, 895 F.2d 1178, 1182 (7th Cir. 1990) (same); United States v. Greene, 709 F. Supp. 636, 637 (E.D. Pa. 1989) (same, citing *Norton* as among "[n]umerous Supreme Court decisions [holding] that origination clause restraints do not extend to bills that incidentally create revenue if those bills were enacted for purposes other than revenue raising").

83. *Norton*, 91 U.S. at 569 (citing 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES ch. XIII, § 877 (1833)).

Brighton v. Nebeker, an Origination Clause case, involved the National Banking Act, which imposed a tax on a banking association's average amount of circulating notes in order to establish a currency backed by United States bonds.[84] Significantly, the taxes were not deposited to the general Treasury but instead were earmarked specifically to fund the expenses in printing and circulating the bonds.[85] Because the tax functioned as a means for the currency, the Court was convinced that Congress had no purpose to raise revenue "in meeting the expenses or obligations of the Government."[86] Thus, although the Court was interested in whether a revenue-raising purpose existed, it looked to the direct funding of the currency through the tax, rather than searching the legislative record, to make its determination.

Less than a decade later, in *Millard v. Roberts*, the Court held that a bill taxing property in the District of Columbia so that it could fund railroad terminals and the elimination of railroad crossings in the District was not a bill to raise revenue.[87] The funds raised by the taxes were distributed to the railroad corporations to effectuate these changes. The Court cited *Nebeker* to conclude that the taxes "are but means to the purposes provided by the act" rather than a means to fund the general expenses of the federal government.[88]

More recently, in *Munoz-Flores*, discussed above, the Court held that a law imposing a monetary "special assessment" on persons convicted of a misdemeanor did not constitute a tax.[89] The Court reasoned that revenue bills are not bills "for other purposes which may incidentally create revenue."[90] Importantly, the Court characterized its case law interpreting this phrase "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."[91] Rather than reconstructing congressional intent to determine whether the bill was enacted for non-revenue purposes, the Court concluded that the

84. Twin City Bank v. Nebeker, 167 U.S. 196 (1897).
85. *Id.* at 198–99.
86. *Id.* at 203.
87. Millard v. Roberts, 202 U.S. 429, 436–37 (1906).
88. *Id.* at 437.
89. United States v. Munoz-Flores, 495 U.S. 385, 398 (1990). The Court stated in dicta that a different result might occur where the program funded is "entirely unrelated to the persons paying for the program," thus indicating that it was also concerned about the close connection between the payor-criminals and the program, which benefitted victims of criminals. *Id.* at 400 n.7.
90. *Id.* at 397 (citing *Twin City Bank*, 167 U.S. at 196).
91. *Id.* at 398.

special assessments were used to assist crime victims rather than deposited into the general Treasury and thus the bill was not a revenue bill.[92]

A review of the Supreme Court case law construing the scope of the Origination Clause thus fails to support judicial inquiry into Congress's purpose in enacting a statute. Rather, the Court takes as a proxy that such purpose is non-revenue-raising when the structure of the statute earmarks revenues to fund a program it creates.

Indeed, in light of the purposes of the Origination Clause, it seems justifiable to exclude from the Clause's ambit those funds that are solicited as fees or to fund a specific government program. In such cases, the need for accountability is lessened since taxpayers can judge for themselves whether the taxes are worth what is essentially a voluntary payment in a quid pro quo transaction. Revenues that are for the general treasury, *including* regulatory taxes, however, will be used for general government services. The loose nexus between the taxes and their benefits, in the latter case, may result in insufficient monitoring by the public and hence unfair taxation, against which the Origination Clause was meant to protect.

2. The Murky Line Between Regulatory and Revenue-Raising Taxes

a. Analogy to the Taxing Power Cases

Rather than conducting a searching review of congressional purpose in the Origination Clause context, the Court has chosen to instead carve out from the Clause's application statutes that generate revenues for a specific purpose or program. In other contexts, the Court has taken a similar approach to explicitly discard "distinctions between regulatory and revenue-raising taxes."[93]

It is worthwhile to briefly explore one such context, the Court's taxing power jurisprudence, since the Court's failure to police the boundary between regulatory and revenue-raising taxes in cases involving the taxing power supports the above reading of the case law under the Origination Clause; the prudential considerations underlying the Court's approach in the taxing power context apply equally in the Origination Clause context. Additionally, this discussion will later inform the inquiry, discussed in Part IV, of whether the Court's determination that the individual mandate

92. *Id.* at 399–401.

93. Bob Jones Univ. v. Simon, 416 U.S. 725, 741 n.12 (1974) (discussing the meaning of "tax" for purposes of the Anti-Injunction Act).

constitutes a tax for purposes of the taxing power necessarily means the mandate falls within the scope of the Origination Clause.

In the context of the taxing power, the Court has reasoned that "[e]very tax is in some measure regulatory"[94] and an opposite conclusion would require examination of hidden legislative motivations.[95] In its recent health care decision, *National Federation of Independent Business v. Sebelius* ("*NFIB*"), the Court reaffirmed its hesitation to distinguish between regulatory measures and taxes.[96]

At issue in *NFIB* was the constitutionality of the individual mandate, which requires that most Americans maintain a "minimum essential" amount of health insurance coverage.[97] Those that do not comply must make a "shared responsibility payment" to the Internal Revenue Service when filing income taxes.[98] Referring to this payment as a "penalty," the Act provides that it "shall be assessed and collected in the same manner" as other tax penalties.[99] The amount of the payment is determined by taxable income, number of dependents, and joint filing status, and does not apply at all to those individuals that do not pay federal income tax.[100]

In *NFIB*, the Supreme Court reasoned that these features, along with the significant revenue-raising function of the mandate (estimated at $4 billion per year), meant that the individual mandate constituted a tax, thus falling under Congress's taxing power.[101] In so doing, the Court did not allow Congress's decision to label the mandate a "penalty" rather than a "tax" to govern.[102] The *NFIB* Court further pointed out that the mandate was akin to a tax, rather than a penalty, because (1) the amount due for most Americans would be much less than the price of insurance, and indeed cannot exceed such price, (2) the provision lacked a scienter requirement, and (3) the IRS enforced it through "normal means of taxation" (rather than criminal prosecution).[103]

Importantly for our purposes, the Court also concluded that, although the mandate was designed to influence conduct, it could still be considered

94. Sonzinsky v. United States, 300 U.S. 506, 513 (1937) (upholding as within the scope of the taxing power an annual license tax upon sellers of firearms).
95. *Id.*
96. Nat'l Fed'n of Ind. Bus. v. Sebelius, 132 S. Ct. 2566, 2596–97, 2599–2600 (2012).
97. 26 U.S.C. § 5000A (Supp. V 2012).
98. 26 U.S.C. § 5000A(b)(1).
99. 26 U.S.C. § 5000A(c), (g)(1).
100. 26 U.S.C. § 5000A(b)(3), (c)(2), (c)(4), (e)(2).
101. *NFIB*, 132 S. Ct. at 2595–96.
102. *Id.* at 2597–98.
103. *Id.* at 2595–96.

a valid exercise of the taxing power.[104] The Court cited to case law upholding taxes that were obviously regulatory, such as taxes on marijuana,[105] concluding that taxes necessarily shape behavior by serving as an "economic impediment to the activity taxed."[106] Although the Court has thus rejected a bright line distinction between taxes and regulation, recognizing that they are on a spectrum, it also suggested that some regulatory taxes may fall so far on the regulation side that they risk recharacterization as penalties, such as when the tax is so burdensome that individuals have no choice but to pay it.[107] If a provision raises revenue and does not constitute a penalty, however, it will generally receive the protection of the taxing power, which in light of *NFIB* and prior case law, appears to be quite broad.[108]

b. Factors Motivating the Court's Non-Distinction Between Regulatory and Revenue-Raising Taxes

As discussed above, in the taxing power context, the Court explicitly rejects a distinction between revenues and exactions that regulate behavior.[109] I have argued that, in the Origination Clause context, the

104. *Id*. at 2596.

105. *Id.* (citing United States v. Sanchez, 340 U.S. 42, 44–45 (1950) and Sonzinsky v. United States, 300 U.S. 506, 513 (1937)).

106. *Id.* (quoting *Sonzinsky*, 300 U.S. at 513).

107. *See id.* at 2595. Roberts cited to a Lochner-era case, *Bailey v. Drexel Furniture Co.*, which recharacterized a ten percent tax upon the income of businesses that hired children as a penalty falling outside of Congress' taxing power. 259 U.S. 20, 38 (1922). Some commentators had considered *Drexel Furniture* and its progeny to no longer be good law. *See* Brian Galle, *Conditional Taxation and the Constitutionality of Health Care Reform*, 120 YALE L.J. ONLINE 27, 28 (2010), *available at* http://yalelawjournal.org/images/pdfs/889.pdf ("[T]he best reading [of existing doctrine] is that courts will not impose any substantive limits on the uses to which Congress may put its taxing authority. Any confusion results from the Court's failure to formally overrule outdated precedents that once suggested otherwise."). The *NFIB* opinion, however, seems to have revived the distinction between taxes and penalties.

108. Even the dissenting Justices agreed that Congress had the power to constitutionally impose a tax to achieve the mandate's purpose. The question was only whether it had done so. *NFIB*, 132 S. Ct. at 2651; *see* Linda Sugin, *The Great and Mighty Tax Law: How the Roberts Court Has Reduced Constitutional Scrutiny of Taxes and Tax Expenditures*, 78 BROOK. L. REV. 777 (2013). Indeed, "[t]he *NFIB* decision emphasizes Congress's power to tax where it cannot constitutionally regulate." *Id.* at 796. For cases construing the taxing power broadly, see License Tax Cases, 72 U.S. (5 Wall.) 462, 471 (1866) ("[T]he power of Congress to tax is a very extensive power. . . . [I]t reaches every subject, and may be exercised at discretion."); United States v. Kahriger, 345 U.S. 22, 28 (1953) ("It is axiomatic that the power of Congress to tax is extensive and sometimes falls with crushing effect . . . . As is well known, the constitutional restraints on taxing are few.").

109. In the taxing power context, the Court draws a distinction between taxes and penalties. In that context, federalism concerns arising from penalties warrant such a distinction. *See* Ruth Mason, *Federalism and the Taxing Power*, 99 CALIF. L. REV. 975, 1030 (2011) (discussing how tax penalties may crowd out state regulation of the same area). This may explain the Court's failure to focus on a

Court implicitly takes this position. Some lower courts even conflate the questions of what constitutes a tax for purposes of the taxing power and what falls within the scope of the Origination Clause.[110] Others analyze the scope of the two clauses differently.[111]

There is an argument to be made that the text of the Origination Clause requires examination of the purpose of the legislation since it applies only to "Bills *for* raising Revenue,"[112] as opposed to the taxing power, which contains no such preposition.[113] Although the Clause as written is more limited than earlier incarnations that addressed "bills for raising money," notably, the delegates rejected language in a proposal that would have limited the Clause to "bills for raising money for the *purpose of revenue*."[114] The Framers may have dropped this phrase in response to Madison's warning that whether the collection of revenue was the primary purpose of a bill would prove a vexing question:

> The proposed substitute, which in some respects lessened the objection [against] the section, had a contrary effect with respect to this particular. It laid a foundation for new difficulties and disputes between the two houses. The word *revenue* was ambiguous. In many acts, particularly in the regulations of trade, the object would be twofold. The raising of revenue would be one of them. How could it be determined which was the primary or predominant one; or whether it was necessary that revenue [should] be the sole object, in exclusion even of other incidental effects.[115]

Additionally, it is difficult to see why revenue policy would not fall within the Framers' desire to prevent unfair taxation simply because such policy was employed to achieve regulatory ends.[116] After all, immediately

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provision's penalty-like features in the Origination Clause context. *See* United States v. Munoz-Flores, 495 U.S. 385 (1990) (focusing on the use of revenues rather than the penalty-like features of the special assessment at issue).

110. *See, e.g.*, South Carolina *ex rel* Tindal v. Block, 717 F.2d 874, 887 (4th Cir. 1983) (holding that price controls on milk were not revenue-raising for purposes of the Origination Clause, citing to case law interpreting the taxing power).

111. *See* Tex. Office of Pub. Util. Counsel v. FCC, 183 F.3d 393, 427 (5th Cir. 1999) ("[T]axing Clause and Origination Clause challenges . . . represent separate lines of analysis.").

112. U.S. CONST. art. I, § 7, cl. 1 (emphasis added).

113. U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power to lay and collect Taxes . . . to pay the Debts and provide for the common Defence and general Welfare of the United States . . . .").

114. PRESCOTT, *supra* note 37, at 441 (emphasis in original).

115. MADISON'S NOTES, *supra* note 41, at 445–46.

116. The aim of the taxing power is similarly broad. The Constitution allows it to be invoked to "provide for the common Defence and general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1. The breadth of the taxing power reflected profound dissatisfaction with the inability of the

subsequent to the signing of the Constitution, tariffs constituted the primary source of federal revenue,[117] and as Madison's quotation demonstrates, it was not lost upon the Framers that the import duties would have had a regulatory effect by stimulating domestic productions.[118]

As Madison warned, drawing a line between revenue-raising and other legislative activity proves very difficult since taxes perform many functions.[119] The government's ability to shape taxpayer behavior through the tax system rather than through other means has been widely recognized as a powerful tool in its policy repertoire.[120] Congress "spends" through the tax law by offering tax breaks to reward certain behavior. To highlight the equivalency between tax benefits and government spending, Stanley Surrey famously labeled tax provisions that deviate from the goal of measuring the tax base as "tax expenditures."[121] Congress may also penalize certain behaviors by overtaxing them relative to the tax base, provisions which Ruth Mason categorizes as "tax penalties."[122]

As a general matter, unearthing legislative purpose is a notoriously controversial task.[123] The hybrid nature of taxes makes the Court's search

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national government to finance itself under the Articles of Confederation by taxing individuals directly. Although the Taxing Clause solved the immediate problem of repayment of national war debt, it was drafted to apply much more extensively. The Supreme Court defers to Congress on whether tax provisions promote general welfare. *See*, *e.g.*, Helvering v. Davis, 301 U.S. 619, 640 (1937) ("The line must still be drawn between one welfare and another, between particular and general. . . . The discretion, however, is not confided to the courts. The discretion belongs to Congress . . . . ").

117. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 180 (1996) ("[T]he [F]ramers believed that [the government's] revenue needs would be met through a program of indirect taxation centering on import duties . . . .").

118. *See* Robert D. Cooter & Neil S. Siegel, *Not the Power to Destroy: An Effects Theory of the Tax Power*, 98 VA. L. REV. 1195, 1205 (2012) ("The Founders understood that import duties would not only raise revenues, but would also change the behavior of those subject to them. Like raising revenues, stimulating domestic production of manufactured goods by reducing their importation was an important legislative purpose.").

119. For numerous examples of tax provisions that reward and penalize behavior, see Mason, *supra* note 109, at 984–92.

120. *Id.* at 984 ("[All tax scholars] concede that the government uses the tax law not only to raise revenue, but also to influence taxpayer behavior.").

121. *See* STANLEY S. SURREY, PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES 136 (1973). The Office of Management and Budget defines tax expenditures as "alternatives to other policy instruments, such as spending." OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, ANALYTICAL PERSPECTIVES, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2013 247 (2012).

122. Mason, *supra* note 109, at 978.

123. *See* William N. Eskridge, Jr., *Legislative History Values*, 66 CHI.-KENT L. REV. 365, 391–417 (1990) (discussing the shortcomings of the purposive approach to statutory interpretation). Judge Posner, for instance, has argued against such an approach on the grounds that statutes are the result of political compromise among competing interest groups, rather than implementations of public-regarding purposes. RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 288–90 (1985).

for a primary purpose particularly difficult. Although scholars widely agree on the existence of tax expenditures and tax penalties, deciding which provisions go in which category, or neither, has long proved vexing. This is because there is no scholarly consensus on the definition of the ideal base from which tax expenditures and penalties are said to deviate.[124] For instance, if one views the proper tax base as excluding income from savings (as would be the case under a cash-flow consumption tax), then the lower rates on capital gains would appear as tax penalties. If instead, one adopted the Schanz-Haig-Simons definition of income,[125] income from savings would indeed be taxed and thus the preferential capital gains rates would appear as tax expenditures.[126] If one's baseline is the Schanz-Haig-Simons definition of income with the omission of the classical corporate tax, then perhaps the capital gains rates simply offset our current system's double taxation of corporate income and thus constitute neither tax penalties nor tax expenditures but are simply provisions that raise revenue.[127]

In the taxing power context, Justice Cardozo expressed the view that policing the line between taxes and fines impermissibly required "psychoanalysis" of Congress by the judiciary,[128] and the Court has subsequently reasoned that prudential considerations place "[i]nquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it" outside of the judiciary's competency.[129] Congressional members may not state the purpose of the tax provisions, they may all have mixed motives in pursuing them, or

124. Mason, *supra* note 109, at 984 ("Th[e] baseline problem is well understood, and so far, no satisfying solution has been advanced to solve it."). The problem that defining the baseline poses for tax expenditure analysis was first and famously identified by Boris Bittker several decades ago, shortly after Stanley Surrey's introduction of the concept. Boris I. Bittker, *Accounting for Federal "Tax Subsidies" in the National Budget,* 22 NAT'L TAX J. 244, 247, 260 (1969).

125. This classical definition of income includes "consumption plus (or minus) the net increase (or decrease) in value of an individual's assets during the taxable period." Boris I. Bittker, *A "Comprehensive Tax Base" as a Goal of Income Tax Reform*, 80 HARV. L. REV. 925, 929 (1967).

126. Until 2004, the Treasury Department listed the preferential rate on capital gains as a tax expenditure every year since its budget was first prepared in 1972. Linda Sugin, *Tax Expenditures, Reform, and Distributive Justice*, 3 COLUM. J. TAX. L. 1, 19 n.123 (2011). The Joint Committee on Taxation, however, continues to classify the preference as a tax expenditure. JOINT COMMITTEE ON TAXATION, JCS-1-13, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2012–2017 5, 34 (2013).

127. *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, ANALYTICAL PERSPECTIVES, BUDGET OF THE UNITED STATES, FISCAL YEAR 2004 138–39 (2003) (justifying the omission of capital gains from the list of tax expenditures on essentially these grounds).

128. United States v. Constantine, 296 U.S. 287, 299 (1935) (Cardozo, J., dissenting).

129. Sonzinsky v. United States, 300 U.S. 506, 513–14 (1937).

different members may have different motives.[130] As this discussion points out, however, the very characterization of a member's motive lacks solid theoretical grounding since it depends on an ideal tax base, a concept that tax scholars have yet to come to an agreement upon despite four decades of effort.[131] Asking the Court to resolve a debate that implicates the proper distribution of societal benefits and burdens is not only impractical but outside its competence.[132]

Rather than searching for congressional purpose, the Court seems to have chosen an objective inquiry in defining the scope of the Origination Clause. The remainder of this Part discusses the Court's interpretations of the Senate's amendment power under the Clause and synthesizes them as further expressions of its reluctance to delve too deeply into the legislative process. I then continue this pattern to predict other expansive interpretations of the Senate's power to amend revenue legislation.

C. The Senate's Power to Amend Revenue Legislation

1. The Lack of a Germaneness Requirement

As stated above, the text of the Origination Clause provides that "the Senate may propose or concur with Amendments [on bills for raising revenue] as on other Bills,"[133] which raises several questions. Why does the text specify two paths to amend? What is meant by the language "as on other Bills"? Does the Senate's amendment have to be germane to the House bill? Even if the Court generally does not enforce a germaneness requirement, does the shell bill tactic cross the line into unconstitutionality? Does the Senate have the freedom to turn a revenue-neutral or revenue-decreasing bill into a revenue-increasing one? Vice versa? The Court has only answered a minority of these questions, but its answers again shed light on its general approach to challenges

130. Mason, *supra* note 109, at 1026.

131. Caleb Nelson has traced the evolution of judicial review of legislative purpose over time, discussing how many traditional rationales for restriction of such review have fallen away in modern times. Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784 (2008). As discussed in the text, however, the tax context presents special and ongoing concerns regarding the judicial review of legislative purpose.

132. Ruth Mason has made a similar argument in the taxing power context, calling such a task "quintessentially legislative." Mason, *supra* note 109, at 1026; *see also* Edward A. Zelinsky, Winn *and the Inadvisability of Constitutionalizing Tax Expenditure Analysis*, 121 YALE L.J. ONLINE 25 (2011) (warning of the indeterminacy of the tax expenditure concept in importing it to the Establishment Clause context).

133. U.S. CONST. art. I, § 7, cl. 1.

under the Origination Clause. As before, apprehension of its institutional limitations drives much of its analysis.

The Court first attempted to construe the Senate's amendment power in *Flint v. Stone Tracy Company*.[134] In that case, the taxpayer challenged a tax enacted as part of the Tariff Act of 1909 as improperly originating in the Senate. The Senate had removed a section of the tariff bill adopting an inheritance tax and replaced it with a corporate tax.[135] The *Flint* Court held that this fell within the Senate's amendment power under the Clause.[136] It examined the text of the Clause and concluded the following:

> The bill having properly originated in the House, we perceive no reason in the constitutional provision relied upon why it may not be amended in the Senate in the manner which it was in this case. The amendment was germane to the subject-matter of the bill, and not beyond the power of the Senate to propose.[137]

Although the Court's rationale makes mention of a germaneness requirement, the Court did not explain how a corporate tax could, in fact, be germane to an inheritance tax. Indeed, other than both producing revenue it is difficult to see a connection between the two.[138] The Court has since expressed a reluctance to examine the relationship between the Senate's amendment and the original House bill whose text it replaces. In *Rainey v. United States*, the Court upheld as constitutional the Senate's addition of an excise tax on foreign-manufactured yachts to a tariff bill.[139] The Court adopted the lower court's reasoning that it is outside the power of the judiciary "to determine whether the amendment was or was not outside the purposes of the original bill."[140] The *Rainey* holding, along with the absence of any relationship between the two taxes at issue in *Flint*, casts doubt upon the existence of a germaneness requirement.

The Court's mindfulness of its institutional limitations in *Rainey*, however, seems to stand in contrast to the *Munoz-Flores* holding, in which the Court was willing to put justiciability concerns aside in determining whether a bill had in fact originated in the house designated by Congress.

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134. 220 U.S. 107 (1911).
135. *Id.* at 143.
136. *Id.*
137. *Id.*
138. Of course if revenues are sufficient to establish germaneness, the requirement is superfluous. Moreover, under House precedent, even if an amendment has the same fundamental purpose as the bill, it will be non-germane if it prescribes a sufficiently different method to achieve that purpose.
139. Rainey v. United States, 232 U.S. 310, 317 (1914).
140. *Id.*

The two inquiries, however, are quite different. For one, it is rather straightforward for the Court to actually unearth where a bill began. Inquiry into whether an amendment is related to a bill, however, is a much more nettlesome endeavor.

For instance, suppose the House passed a bill that eliminated the double taxation on corporate income (a reform referred to by tax experts as "corporate tax integration") by excluding dividend income in the hands of shareholders. The Senate, however, amends this bill to instead *raise* rates on dividends, say from the current top rate of 20% so that they are taxed like ordinary income at a top rate of 39.6%. Effectively, the Senate has enacted a tax that lies contrary to the purpose motivating the House bill. Yet since it involves the taxation of dividends, is it germane to that bill? Or does germaneness require a relationship to corporate tax integration? The answer would depend upon the degree of germaneness required, which would necessarily entail policy judgments regarding the underlying legislation. The Court could use the legislature's rich precedents regarding interpretation of germaneness requirements as a guide in such an inquiry,[141] but to apply and interpret legislative rules is in tension with separation of powers concerns, as well as the Rulemaking Clause and the case law thereunder.[142]

Additionally, if the Court enforced a germaneness requirement, Congress would be incentivized to legislate in an inefficient fashion. For instance, the House might separate omnibus bills into various single-subject bills such that the Senate would be less likely to meet the germaneness test.[143] A germaneness requirement might also prevent the

141. Under the House germaneness requirement, it could be argued that even though the hypothetical Senate amendment relates to the general subject matter of the House bill, it is still not germane. *See* WILLIAM MCKAY & CHARLES W. JOHNSON, PARLIAMENT AND CONGRESS: REPRESENTATION AND SCRUTINY IN THE TWENTY-FIRST CENTURY 181 (2012) (stating that House germaneness procedure requires that an amendment not broaden the scope of the bill and that it must share the purpose, as well as the means to that purpose, of the underlying bill).

142. *See supr*a text accompanying notes 65–66; *see also infra* notes 213; 215–19 and accompanying text.

143. There are benefits to the reduction of omnibus legislation, such as considered deliberation and the reduction of logrolling. *See* Brannon P. Denning & Brooks R. Smith, *Uneasy Riders: The Case for a Truth-in-Legislation Amendment*, 1999 UTAH L. REV. 957 (advocating a constitutional amendment that would limit bills to a single subject). That being said, the complexity of the federal lawmaking apparatus makes at least some packaging of legislation necessary from an efficiency standpoint.

passing of a bill, even though all that was required for the Senate's approval was the addition of one unrelated, uncontroversial provision.[144]

Additionally, the history of the Clause seems to militate against a germaneness requirement since the Framers specifically rejected a form of the Clause that would have prevented the Senate from amending a revenue bill in a manner that would "change the mode of levying [the tax]."[145]

On the other hand, Madison's warning that the Senate's amendment power would become a "source of doubt and altercation" could be read to support the existence of a germaneness requirement:

> When an obnoxious paragraph shall be sent down from the Senate to the House of Representatives, it will be called an origination under the name of an amendment. The Senate may actually couch extraneous matter under that name. In these cases, the question will turn on the *degree* of connection between the matter and object of the bill, and the alteration or amendment offered to it. Can there be a more fruitful source of dispute, or a kind of dispute more difficult to be settled?[146]

It is unclear, however, whether Madison was merely speculating as to the intra-congressional disputes that may arise, or instead saw the Senate's amendment power as indeed cabined by germaneness. Since Madison was commenting on an earlier version of the Origination Clause, it is also uncertain whether the final version of the Clause obviated Madison's concerns by clarifying that the Senate may amend revenue bills "as on other Bills."

What then does this phrase, "as on other Bills," mean?[147] One possibility is that the phrase is dynamic and ambulatory, evolving with Senate practice as to its general amendment power. This view would

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144. In fact, Madison invoked an analogous hypothetical to support the Senate's power to amend revenue legislation generally. 3 FARRAND'S RECORDS, *supra* note 31, at 317; 3 ELLIOT'S DEBATES, *supra* note 36, at 376. Justice Story later made a similar point:

> There would also be no small inconvenience in excluding the senate from the exercise of this power of amendment and alteration; since if any, the slightest modification were required in such a bill to make it either palatable or just, the senate would be compelled to reject it, although an amendment of a single line might make it entirely acceptable to both houses. STORY, *supra* note 22, at 317.

145. 2 FARRAND'S RECORDS, *supra* note 31, at 273.

146. 5 ELLIOT'S DEBATES, *supra* note 36, at 417.

147. This phrase was borrowed from the Massachusetts constitution. CHARLES WARREN, THE MAKING OF THE CONSTITUTION 669 (1928). However, there is no state case law interpreting it. *See* Medina, *supra* note 13, at 206–07 (detailing case law and stating that "[g]iven its long history, Massachusetts' origination clause has received little construction") (footnote omitted).

comport with the traditional understanding of each house of Congress having domain over its legislative rules.[148] Jefferson's Manual of Parliamentary Practice for the Use of the Senate of the United States suggests that the Senate's general power to amend has traditionally been quite broad, long encompassing the shell bill tactic:

> Amendments may be made so as totally to alter the nature of the proposition; and it is a way of getting rid of a proposition, by making it bear a sense different from what was intended by the movers, so that they vote against it themselves. A new bill may be ingrafted by way of amendment on the words, "Be it enacted . . . ."[149]

According to Jefferson, the lack of a germaneness requirement followed the practice of Parliament.[150] Since its first meeting, the House affirmatively required amendments to be germane to the pending bill, yet House precedent also admits of the inherent ability of the legislature to propose a non-germane amendment, absent an express rule.[151] Historically, the Senate has lacked a formal written rule against non-germane amendments on general legislation,[152] and thus early congressional

148. *See* U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings . . . .").

149. THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE FOR THE USE OF THE SENATE OF THE UNITED STATES § 35.3 (1801) (citation omitted); *see also* P.H. MELL, A MANUAL OF PARLIAMENTARY PRACTICE: RULES FOR CONDUCTING BUSINESS IN DELIBERATIVE ASSEMBLIES 60 (1893) (characterizing substitute bills as amendments).

150. JEFFERSON, *supra* note 149, at § 35.3; *see also* MCKAY & JOHNSON, *supra* note 141, at 177 (citing precedent that suggests the germaneness requirement did not exist in the House of Commons prior to 1883).

151. 5 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 5825 (1907) [hereinafter HINDS' PRECEDENTS] ("In the absence of an express rule, the amendment would not be liable to a point of order upon the ground that it was inconsistent with or not germane to the subject under consideration, for, according to the common parliamentary law of this country and of England, a legislative assembly might by an amendment, in the ordinary form or in the form of a substitute, change the entire character of any bill or other proposition pending. It might entirely displace the original subject under consideration, and in its stead adopt one wholly foreign to it, both in form and in substance.").

152. *See* FLOYD M. RIDDICK & ALAN S. FRUMIN, RIDDICK'S SENATE PROCEDURE: PRECEDENTS AND PRACTICES, S. DOC NO. 101-28, at 854 (1992) ("The Senate does not have a general rule requiring that amendments be germane to the measure to which they are proposed."). Important exceptions to the lack of germaneness requirement in the Senate are upon invocation of cloture, during consideration of an appropriations or a budget reconciliation bill, and when proceeding under a unanimous consent agreement. *See* Pub. L. No. 93-944, 313, 88 Stat. 297 (1974) (codifying the reconciliation process); Rebecca M. Kysar, *Reconciling Congress to Tax Reform*, 88 NOTRE DAME L. REV. 2121, 2128 (2013) (discussing certain of these germaneness requirements); RIDDICK'S SENATE PROCEDURE, S. DOC. NO 101-28, at 1311 (detailing unanimous consent agreements); STANDING RULES OF THE SENATE: REVISED TO JAN. 24, 2013, S. DOC. NO 113-18, at 11–12 (Rule XVI: Appropriations and Amendments

practice and American understanding of parliamentary practice leaves room for omission of such a requirement.

Since the Senate possesses the power to attach non-germane amendments to non-revenue bills, the Constitution thus appears to prescribe its power to do so in the context of revenue bills. Nonetheless, early congressional precedents on the issue are mixed. Shortly after ratification of the Constitution, the House passed a bill to establish a national tariff system, with the Senate making thirty-three amendments, many of which were non-germane.[153] Several years later, however, the Senate's ability to meaningfully alter revenue bills was called into question. In 1807, the House passed a bill protecting maritime commerce from pirates and also repealing duties on salt. The Senate responded with an amendment that would reduce the duty on salt rather than repeal it. Representative John Randolph objected to the amendment as falling outside its powers under the Origination Clause:

> [A] fair construction of [the Senate's amendment power] will confine it to the details of the bill, and restrain them from affecting the leading principles; the quantum of tax or its objects. For if they possess the power of varying the objects or altering the quantum, the power reserved to this House is illusory.[154]

Randolph thus argued for limiting the Senate's amendment power to accepting the bill, rejecting the bill, or making minor changes as to its "details." Although several other congressional members objected to this understanding, the House ultimately sustained the motion in support of Randolph's view.[155]

Throughout the nineteenth century, the debate over germaneness continued. The House generally took the position that such a requirement existed.[156] At times, the Senate would appear to concede to the House's view,[157] but for the most part it disputed the existence of a germaneness

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to General Appropriations Bills (prescribing procedures for appropriations bills)); STANDING RULES OF THE SENATE, S. DOC. NO 113-18, at 15–17 (Rule XXII: Precedence of Motions (prescribing procedures upon invocation of cloture)).

153. Michael Evans, *The Foundations of the Tax Legislation Process: The Confederation, Constitutional Convention, and First Revenue Law*, TAX NOTES, Jan. 21, 1991, at 291–93.

154. 9 ANNALS OF CONG. 630 (1807).

155. *Id.* at 635–36.

156. 2 HINDS' PRECEDENTS, *supra* note 151, §§ 1481, 1489 (1907).

157. In arguing for the Senate's ability to amend a House bill repealing duties on tea and coffee to one which imposed import duties, Senator Ritchie contended the following:

> [T]here is no limitation of this power of propositions and concurrence, an amendment carries with it all the rights and privileges of parliamentary construction. It is those

requirement, arguing that the requirement would deny to the Senate the power to make "anything more than mere formal amendments."[158]

After the Civil War, the dispute over the Senate's amendment power came to a head. In 1872, the House passed a thirty-two-word bill repealing duties on tea and coffee, which the Senate replaced with a twenty-page amendment repealing the entire income tax (which had been enacted to finance the war) and modifying the tariff system.[159] The House protested this move, with one representative arguing that the Framers intended a germaneness requirement such that only "amendments touching the subject upon which revenue was to be raised as in their judgment should be deemed wise and proper; either to raise or lower the rate, to modify the time or mode of collection, or anything pertaining immediately to that subject-matter."[160] Another member disputed whether the substitution of a "great thick bill" actually constituted an amendment,[161] and a House majority agreed, passing a resolution informing the Senate of its constitutional violation.[162]

In response to the House resolution, the Senate Committee on Privileges and Elections filed a report forcefully discussing the Senate's power to amend. The report reasoned that the power to amend was broad since the Framers consciously deviated from the practice in British Parliament, in which the House of Lords had no such power at all.[163] The report also emphasized the phrase "as on other Bills" as an express and plain directive that the amendment power is unlimited.[164] Under the Senate's view, the only limitation upon its power was that it could not

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> amendments that parliamentary usages and law permit only that can be added. The question, to my apprehension, is whether the Senate has proposed an amendment which in parliamentary law would be germane to the subject.

CONG. GLOBE, 42nd Cong., 2d Sess. 2111 (1873).

158. S. REP. NO. 42–146, at 4 (1872), *discussed in* 2 HINDS' PRECEDENTS *supra* note 151, § 1489 (1907).

159. Evans, *supra* note 13.

160. CONG. GLOBE 42nd Cong., 2d Sess. 2106 (1872).

161. *Id.*; *see also id.* at 2107 (Representative James A. Garfield stating, "I do not deny [the Senate's] right to send back a bill of a thousand pages as an amendment to our two lines. But I do insist that their thousand pages must be on the subject-matter of our bill.").

162. *Id.* at 2111–12.

163. S. REPT. NO. 42–146, at 3, *discussed in* 2 HINDS' PRECEDENTS *supra* note 151, § 1489.

164. *Id.* ("Your committee[s] are at a loss to know how this matter can be made plainer than the express words of the Constitution make it. The provision in relation to such bills that 'the Senate may propose or concur with amendments as on other bills,' declares this power of the Senate as clearly as language can declare it. The Constitution does not prescribe what amendments, or limit the extent of the amendments which the Senate may propose; and the House of Representatives cannot regulate or limit a power which the Constitution has, in express words, so broadly conferred upon the Senate.").

propose a revenue-related amendment on a House bill that was not itself revenue-related.[165]

The issue was ultimately left unresolved since the expiration of the income tax at issue rendered moot the Senate's expedited repeal of it. Ultimately, however, both Houses came to recognize a broad Senate power to amend revenue bills. For instance, in 1879, the House passed a bill modifying domestic taxation that the Senate attempted to amend to raise import duties. In response to a Senate point of order against its ability to do so, a Senator argued that the right to amend was "limited only by [the Senate's] own rules."[166] The Senate rejected the point of order, thus also rejecting any germaneness requirement on its amendment power.[167]

Over the next several decades, the House gradually abandoned its restrictive view of the Senate's amendment power.[168] In fact, in 1909, no member of the House challenged the Senate's conversion of the House tariff bill into a new tax on corporate income, at issue in *Flint*. In 1968, the House voted to table a resolution to blue-slip a significant Senate amendment enacting an emergency wartime surtax to a minor House revenue bill extending excise taxes,[169] and in 1982, the House again confirmed a broad reading of the amendment power in tabling a blue-slip resolution on a Senate amendment that replaced a minor tax cut initiated in the House with a bill increasing taxes by nearly $100 billion.[170]

To summarize, evidence on the original meaning of the amendment power disfavors the existence of a germaneness requirement, as does the text of the Clause. Although the matter remained unsettled between the two Houses for some time, the Court has decided not to enforce any such requirement. Its refusal to do so further assembles the Origination Clause jurisprudence within a larger legislative process avoidance doctrine. As discussed below, the power given to Congress over the legislative process

165. *Id.*

166. 8 CONG. REC. 1478 (1879).

167. *Id.* at 1482.

168. *See* Evans, *supra* note 13 (discussing an 1883 precedent in which the House left the germaneness question to be resolved in conference and an 1888 precedent in which the House rejected a resolution blue-slipping a Senate amendment).

169. 114 CONG. REC. 17977 (1968).

170. 128 CONG. REC. 18375–76 (1982). The precedential value of the House's act may not bind it in the future since it did not formally concede the point. *See* Evans, *supra* note 13. A report by the Congressional Research Service, however, concludes that recent congressional precedents "exhibit no general restriction on the Senate's amendment authority." SATURNO, *supra* note 64, at 6. Since the Senate has no internal rule requiring amendments to be germane, it may essentially "'originate' specific tax provisions, even though it may not originate tax measures." *Id.*

through the Rulemaking Clause, as well as theories of judicial review, may mandate such an approach.[171]

2. The Constitutionality of Shell Bills

Judicial enforcement of a general germaneness requirement for Senate amendments implicates institutional concerns; however, a rule that recognizes the Senate's complete substitution of a House bill as prima facie evidence of non-germaneness appears straightforward. Under this view, the Court would strike down only wholesale amendments to shell bills for failing the germaneness test and would thus be relieved of having to make a searching inquiry into the legislative record or otherwise exceeding its judicial function. This more modest approach, however, would also prove unworkable in practice and would violate the legislative process avoidance doctrine.

Although the Court has never confronted the issue, several state and lower federal courts have condoned the shell bill game and none have prohibited it.[172] Pursuers of original meaning, however, might consult dictionaries contemporary with the Founding era to justify departure from existing case law. *Johnson's Dictionary*, for instance, defines "amend" to mean "to correct; to change any thing that is wrong."[173] It defines "amendment" as "a change from bad for the better," specifically "[i]n law, the correction of an errour committed in a process."[174] These definitions seem to require something narrower than a wholesale substitution. One

171. *See infra* Part III.A.I–B.

172. Walthall v. United States, 131 F.3d 1289, 1295 (9th Cir. 1997) (upholding the Tax Equity and Fiscal Responsibility Act, which began as a shell bill, against an Origination Clause challenge); Armstrong v. United States, 759 F.2d 1378 (9th Cir. 1985) (same); Tex. Assoc. of Concerned Taxpayers, Inc. v. United States, 772 F.2d 163, 168 (5th Cir. 1985) (same); Wardell v. United States, 757 F.2d 203, 205 (8th Cir. 1985) (per curiam) (same); Rowe v. United States, 583 F. Supp. 1516, 1519 (D. Del. 1984), *aff'd*, 749 F.2d 27 (3d Cir. 1984) (same); Heitman v. United States, 753 F.2d 33, 35 (6th Cir. 1984) (per curiam) (same); Tibbetts v. Sec'y of the Treasury, 577 F. Supp. 911, 914 (W.D.N.C. 1984) (same); Frent v. United States, 571 F. Supp. 739, 742 (E.D. Mich. 1983) (same, noting that "[n]othing in the [Origination] clause indicates that the Senate may not amend a revenue raising bill by a wholesale substitution of the text of that bill"); Stamp v. Comm'r, 579 F. Supp. 168, 171 (N.D. Ill. 1984) (same, reasoning that "hoary doctrine permits . . . wholesale amendment so long as the Senate version is relevant to the subject matter of the original House version," presumably interpreting relevancy broadly); Milazzo v. United States, 578 F. Supp. 248, 252–53 (S.D. Cal. 1984) (same, reasoning that the bill "remained a revenue bill" although it was "dramatically altered"); Bearden v. Comm'r, 575 F. Supp. 1459, 1460–61 (D. Utah 1983) (same); *see also* Shadrick v. Bledsoe, 186 Ga. 345 (1938) (interpreting similar language under the Georgia constitution in holding that a substitute bill is a recognized method of amendment under parliamentary procedure).

173. 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1768).

174. *Id.*

could further argue that the phrase "as on other Bills" forecloses substitute amendments since it was not expected that the Senate would employ such a technique. Moreover, the preposition "on," which Johnson's Dictionary defines as "noting addition or accumulation" and "noting dependence or reliance," would suggest that an amendment must be attached to a bill.[175] Since there is essentially nothing left of the original bill in the shell bill tactic, aside from its number, one could argue that the substitute amendment is not attached *on* a bill, within the meaning of the Clause's text.[176]

The "as on other Bills" phrasing in the Clause, however, invites Congress to supply its own interpretation of the amendment power that changes over time.[177] Even if the Framers did not expect the Senate's amendment power to include substitute amendments, the Framers would not have chosen to foreclose the Senate's ability to employ them. This understanding also comports with the Rulemaking Clause of the Constitution, which gives each house authority over its own proceedings.[178]

In fact, it seems not lost upon the drafters that the Senate's amendment power would lead to the shell bill tactic, thus reducing the protection afforded the large states by the Origination Clause. In 1788, William Grayson (a delegate to the Convention but eventual opponent of the Constitution) stated at the Virginia State Convention that "the power of proposing amendments [is] the same, in effect, as that of originating" since "[t]he Senate could strike out every word of the bill, except the word *whereas*, or any other introductory word, and might substitute new words of their own."[179]

One might still argue, however, that the Senate's ability "to propose or concur with Amendments" forecloses shell bills since such bills cannot be construed as "concurrence" with the House. Granted, the Senate could "propose" amendments as an alternative to "concurrence," however, this is a separate path. Accordingly, the text could be read as requiring that any

175. *Id.*

176. *See* Daniel Smyth, *The Origination Clause: Die Harder, Obamacare!*, AM. THINKER (Oct. 19, 2012), http://www.americanthinker.com/2012/10/the_origination_clause_die_harder_obamacare.html.

177. This is analogous to Jack Balkin's distinction between original meaning and original expected application. Balkin embraces the former since constitutional text often is intentionally vague, allowing future generations to discern its applications. *See* Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007). Here, I argue that the Framers left the text ambiguous for both present and future Congresses to interpret.

178. This point is elaborated below. *See infra* Part III.A.

179. 3 ELLIOT'S DEBATES, *supra* note 38, at 377.

such amendments proposed by the Senate must then be returned to it after a House vote approving the amendments (at which point the Senate finally "concurs"). Otherwise, why would it be necessary for the two routes—propose or concur—to be set forth in the text when the latter renders the former superfluous?

There is, however, an additional explanation of why the two paths exist. Mike Rappaport suggests that the language was drafted to reflect the fact that the Senate has either the right to make suggestions to the House falling short of a formal vote *or* to pass the bill with amendments. Under this understanding, the meaning of the word "concur" may simply refer to the Senate "*passing* an amended bill as opposed to *proposing* one without passing it."[180] Indeed, there was some question in the colonies as to the proper amount of policymaking the Senate could engage in before the House revenue bill was presented to it.[181] Rappaport's explanation is thus plausible given the necessity to clarify an informal role for the Senate in formulating revenue policy.

The constitutional text thus seems to leave the delineation of the Senate's amendment power to Congress, and from a constitutional perspective, its blessing of shell bills seems reasonable. The Court's own institutional limitations should lead it to uphold shell bills since an opposite conclusion would prove unworkable. The Senate, for example, might replace a revenue bill with an amendment whose aim is identical, but whose technical approach is entirely different. To take the above example, suppose the House again attempts to integrate the corporate tax through dividend exclusion. The Senate also supports integration of the corporate tax, but completely replaces the text of the House bill with a form of integration that repeals the income tax at the corporate level while maintaining taxation of dividends at the shareholder level.[182] Since the Senate's approach achieves the House's goal of corporate tax integration,

180. Mike Rappaport, *Obamacare and the Origination Clause III: Propose or Concur with Amendments*, LIBERTY LAW BLOG (OCT. 1, 2012) (emphasis in original), http://www.libertylawsite.org/2012/10/01/obamacare-and-the-origination-clause-iii-propose-or-concur-with-amendments bout-the-original-language/.

181. *See* Evans, *supra* note 13 (discussing the extent to which the Senate could informally consider revenue bills as an open question even as of the 1800s). The doctrinal approach prescribed in this Article would support the constitutionality of the current practice whereby Senators can first introduce revenue measures and consider them informally so long as they are not formally passed and sent to the House. A contrary interpretation would cause the judiciary to conduct a searching inquiry into the legislative process.

182. *See* DEP'T OF THE TREASURY, REPORT ON INTEGRATION OF THE INDIVIDUAL AND CORPORATE TAX SYSTEMS: TAXING BUSINESS INCOME ONCE (1992) [hereinafter TREASURY DEP'T] (detailing several methods of achieving corporate tax integration).

albeit through a different route, it could be argued that the substitute bill is germane to the shell bill. At the same time, the two approaches to integration result in very different consequences, and thus there is also an argument in favor of non-germaneness.[183] Yet any non-germaneness between the two proposals has little to do with the fact that the Senate employed a shell bill tactic.

To take an even starker example, suppose the House exempts dividends by passing the following bill:

> "H.R. 1. A Bill to Integrate the Corporate Tax.
>
> *All distributions out of the earnings and profits of a corporation shall not be included in the gross income of equity holders*."[184]

Further assume that the Senate strikes the text of the above bill and amends it to the following:

> "H.R. 1. A Bill to Integrate the Corporate Tax.
>
> *All dividends shall be excluded from the gross income of shareholders*."

Although the Senate's amendment has completely replaced the text of the House bill, as any tax expert would know, the difference is merely in semantics rather than substance. The Court's rejection of a Senate amendment that merely simplifies the House's language would be overly formalistic. As a result, our quest to narrow the germaneness requirement to a bright line rule prohibiting shell bills has failed as too broad.

A constitutional ban on shell bills may also be under-inclusive from the perspective of an advocate for a narrow amendment power. Suppose that the House passes a revenue bill with one hundred provisions—a provision increasing the penalty for failure to file partnership tax returns by .0001%, as well as ninety-nine provisions implementing the integration of the corporate tax. Suppose further that the Senate retains the penalty increase provision, strikes out those ninety-nine provisions relating to corporate tax

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183. *See, e.g.*, Michael L. Schler, *Taxing Corporate Income Once (Or Hopefully Not at All): A Practitioner's Comparison of the Treasury and ALI Integration Models*, 47 TAX L. REV. 509, 512 (1992) (discussing the similarity in the end result of the two approaches as well as the divergence in their "collateral consequences"). Under House precedent, an amendment that prescribes a sufficiently different method to achieve the same fundamental purpose as the underlying bill will be considered non-germane. MCKAY & JOHNSON, *supra* note 141, at 181.

184. As any tax expert will realize, this example is an over-simplification of how the dividend exclusion proposal would actually work. A more realistic example, for instance, would provide that dividends be excluded only to the extent the corporation has paid corporate-level income taxes, among other complex features. *See* TREASURY DEP'T, *supra* note 182, at 17.

integration, and replaces them with ninety-nine provisions creating an inheritance tax. The Senate's retention of that one, very insignificant revenue provision absolves it from a shell bill violation. To reach a different result would require inquiry into the germaneness of the amendment, the very analysis we were trying to avoid with the blanket prohibition on shell bills.

Taken together, these examples illustrate that a prohibition on shell bills is problematic. Just like in our discussion of a general germaneness requirement, judicial analysis of the legislative process produces deep impracticalities.

3. Amendments Can Alter a Bill's Revenue Effects

Even if the Senate's amendment power does not prohibit non-germane amendments or shell bills, other possible limitations exist that reduce the effectiveness of the shell bill game. For instance, can the Senate amend a House bill reducing revenues in such a way that the bill now increases revenues? In this section, I discuss why the jurisprudential pattern under the Origination Clause means that the Court would likely interpret "bills for raising revenue" as encompassing not only House bills that increase revenue, but also those that merely relate to revenues. Similarly, the Senate's amendment power should not be construed as limited by the amendment's revenue effects.

This issue arose in the courts in the early 1980s when taxpayers challenged the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA").[185] TEFRA originated in the House of Representatives as a bill that would *reduce* revenues by $976 million over five years.[186] Using a shell bill tactic, the Senate struck nearly all of the bill's text and substituted provisions that *increased* revenues in the amount of $99 billion over three years.[187] In the leading TEFRA case, *Armstrong v. United States*,[188] a taxpayer sought a refund of taxes assessed under TEFRA, arguing that the Origination Clause only applied to bills that increase revenues. Accordingly, under the taxpayer's view, TEFRA did not raise

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

186. *See* Moore v. U.S. House of Representatives, 553 F. Supp. 267, 269 (D.D.C. 1982), *aff'd*, 733 F.2d 946 (D.C. Cir. 1984) (recounting the legislative history of TEFRA).

187. *Id.* After TEFRA passed the Senate, a constitutional debate ensued over the Senate's actions. Ultimately, the House voted down resolutions that asserted the House's prerogative to originate revenue legislation. *Id.*

188. 759 F.2d 1378 (9th Cir. 1985).

revenues until the Senate transformed it into a tax increase, in violation of the Clause.

The Ninth Circuit rejected the taxpayer's interpretation of the Origination Clause, holding instead that it applied to all bills "*relating to* taxes."[189] The *Armstrong* court cited Black's Law Dictionary, the Framers' intent, and congressional practice for this interpretation, noting that the Senate has never attempted to initiate tax decreases, a practice that the taxpayer's interpretation would condone.[190]

The court also reasoned that the taxpayer's approach presented practical difficulties since a revenue bill may, in some years, increase revenues, and, in others decrease them. According to the court, Congressional members might also disagree as to the bill's revenue effects.[191] The court further concluded that the taxpayer's interpretation would impermissibly narrow the amendment power since that power should not be read as constraining the Senate from altering revenues.[192] Finally, the *Armstong* court stated that its decision "is strongly influenced, if not controlled by the Supreme Court's decision in *Flint v. Stone Tracy Co.*,"[193] since the Supreme Court in that case was not troubled by the fact that the Senate amendment at issue increased taxes for corporations or raised revenues to a greater extent proposed in the original House bill.[194] In holding that the Origination Clause encompasses *all* revenue-related bills and that the TEFRA amendment was within the Senate's power, the *Armstrong* court joined the view held by four other circuit courts and numerous district courts.[195]

The TEFRA decisions conform to congressional precedent. For instance, in the post-Civil War example discussed above,[196] the House initially argued that a Senate bill repealing the income tax was a bill for "raising revenue." Later, the Senate would concede the point in arguing that a House bill repealing duties on tea and coffee was also a bill for "raising revenue," therefore it was free to amend that bill by substituting a repeal of the income tax.[197] At the time of the debates surrounding

189. *Id.* at 1381 (emphasis in original).
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.* at 1382.
194. *Id.*
195. *See supra* text accompanying note 172 (footnote 172 lists cases involving TEFRA).
196. *See supra* notes 159–62 and accompanying text; *see also supra* text accompanying notes 163–65.
197. *See* Evans, *supra* note 13; 2 HINDS' PRECEDENTS, *supra* note 151, § 1489 (1907) ("Suppose the existing law lays a duty of 50 per cent upon iron. A bill repealing such law, and providing that after

TEFRA, some House members expressed the view that the House-originated, revenue-reducing bill did not fall within the ambit of the Origination Clause.[198] Nonetheless, the House eventually acquiesced.[199] In more recent precedent, the House has actively protected its constitutional prerogative in originating revenue-decreasing bills.[200]

It could also be argued that even if a revenue-neutral or revenue- decreasing shell bill is a revenue bill for purposes of the Origination Clause, the Senate could be forbidden from tacking on additional revenues. The textual basis for such an argument would be that the Clause's phrase "as on other Bills" limits the Senate from increasing revenues since they cannot do so upon non-revenue bills.[201] However, the history of the Clause, in which the Framers rejected a version that would have prevented the Senate amending a revenue bill in a manner that would "increase or diminish the sum to be raised," does not support such a limitation of the Senate's amendment power.[202] Additionally, the Senate likely cannot amend a non-revenue bill to decrease revenues, as discussed above, so to interpret the phrase "as on other Bills" in this manner would prevent the Senate from amending a revenue bill to lower taxes. This would stand in tension with the Clause's enactment history since Madison explicitly rejected the aforementioned version of the Clause since it would prevent the Senate from diminishing revenues.[203] Instead, as I argue throughout this Article, the phrase "as on other Bills" is best read as a delegation to the Senate for outlining the rules and procedures in which it is to amend revenue bills.

Given the institutional limitations facing the Court in ascertaining the level of revenues anticipated to be produced by a bill, it is likely the Court would follow *Armstrong* in interpreting "revenue-raising" to mean

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a certain day the duty upon iron shall be only 40 per cent, is still a bill for raising revenue, because that is the end in contemplation. Less revenue will be raised than under the former law, still it is intended to raise revenue, and such a bill could not constitutionally originate in the Senate, nor could such provisions be ingrafted, by way of amendment, in the Senate upon any House bill which did not provide for raising—*that is, collecting*—revenue.") (emphasis added) (quoting S. REP. NO. 146 (1872)).

198. 128 CONG. REC. H6357, H6366 (daily ed. Aug. 18, 1982) (statement of Rep. Moore) ("The bill, H.R. 4961, when it left the House did not raise revenue. As a matter of fact, all six of its minor provisions lost revenue. The other body in violation of the Constitution struck all of these provisions and replaced them with a massive revenue-raising bill.").

199. *See supra* notes 159–62 and accompanying text; see also text accompanying notes 163–65.

200. *See* 144 CONG. REC. H878-79 (daily ed. Mar. 5, 1998) (returning to the Senate a bill repealing a fee that was determined by the House to have a direct, negative impact on revenues).

201. Thanks to Andrew Hyman for raising this argument.

202. 2 FARRAND'S RECORDS, *supra* note 31, at 273.

203. *See* PRESCOTT, *supra* note 37, at 444.

"revenue-*relating*," in keeping with the legislative process avoidance doctrine. It is also likely that the Court would reject a prohibition on the Senate increasing revenues through amendment for the same reasons. Although the Court could defer to the revenue estimates of the Joint Committee on Taxation (JCT) prepared at the time of the bill's consideration, sometimes the JCT does not prepare such estimates if the bill lacks momentum in Congress, as was the case for the shell bill used to enact the Affordable Care Act. Moreover, although the JCT has maintained its reputation as a non-partisan body, congressional members do not always agree with its analysis. For instance, the JCT chooses to ignore certain macroeconomic effects for budget reporting purposes, an omission which at times has proven controversial.[204] To address this omission, a House rule has required the JCT to provide a separate "macroeconomic impact analysis" of bills reported by the Ways and Means Committee.[205] An issue could thus arise as to which estimate the Court should rely upon. Adding to the complexity, the revenue estimates are sometimes updated in connection with constructing the new CBO baseline, and the Court may have to decide between the estimate upon which Congress relied and the more recent one.

More troublingly, in a world of expiring tax legislation, there is considerable disagreement as to the appropriate baseline to be used in revenue estimates. For instance, the recent extension of the Bush tax cuts for the middle class would have been scored as a revenue-raiser if the baseline incorporated purported "current policy" (i.e., extension of *all* Bush tax cuts), but would have been scored as a revenue-loser if the baseline incorporated current law (i.e., expiration of the tax cuts as scheduled). Finally, revenue estimates provided by the JCT cover only up to a ten-year budget window period.[206] Legislation producing a short-term revenue decrease may actually increase revenues on a long-term horizon, and vice versa. Deciding among the various possible revenue estimates would thus force the Court into the position of budgetary scorekeeper.

Construing the Origination Clause to apply to measures affecting, rather than only increasing, revenues also seems to comport with the purpose of the Clause. A tax bill that decreases revenues may be

204. *See* JOINT COMM. ON TAXATION, SUMMARY OF ECONOMIC MODELS AND ESTIMATING PRACTICES OF THE STAFF OF THE JOINT COMM. ON TAXATION, JCX-46-11, at 2–3 (2011), *available at* https://www.jct.gov/publications.html?func=startdown&id=4359.

205. JOINT COMM. ON TAXATION, TESTIMONY OF THE STAFF OF THE JOINT COMM. ON TAXATION BEFORE THE HOUSE COMM. ON WAYS AND MEANS REGARDING ECONOMIC MODELING, JCX-48-11, at 3–4 (2011), *available at* https://www.jct.gov/publications.html ?func=startdown&id=4362.

206. *See* Kysar, *Lasting Legislation*, *supra* note 15, at 1012 n.13 and accompanying text.

burdensome or unfair since it may be alleviating, to an insufficient degree, an already burdensome or unfair law. Additionally, the tendency of the legislature to deliver special interest legislation in the form of tax decreases implicates the interest of the people since those tax breaks may lead to higher general taxes to make up for the foregone revenue.[207]

The likely conclusion that the Origination Clause encompasses all bills relating to revenue means that the Senate may alter a revenue-decreasing bill to one that increases revenues without violating the Origination Clause. This is a corollary to my conclusion above that no germaneness requirement cabins Senate amendments on revenue bills and is further supported by the same prudential considerations that weigh against limiting the Clause to revenue-increasing bills in the first place.

III. THE THEORETICAL CASE FOR A LEGISLATIVE PROCESS AVOIDANCE DOCTRINE UNDER THE ORIGINATION CLAUSE

I have argued above that the Court's jurisprudence under the Origination Clause can largely be explained as an expression of its reluctance to conduct a searching review of the legislative process, thus predicting an expansive reading of the Senate's amendment power. I have also defended this reading from the standpoint of constitutional history, text, and precedent, both judicial and congressional. Separation of powers principles support the Court's approach to interpreting the Origination Clause and can be articulated as a legislative process avoidance doctrine, with possible application to other areas of constitutional law.

The legislative process avoidance doctrine counsels that courts should construe ambiguous constitutional provisions in a manner that avoids searching review of the legislative process. For instance, where the Constitution does not clearly prescribe conditions for legislative enactment, the judiciary should be hesitant to interpret additional ones. The case for doing so appears especially strong in the matter at hand since the Origination Clause is closely associated with congressional procedure and gives the amendment power to the Senate "as on other Bills," thus leaving the interpretative task to Congress.[208] Whether the case for the legislative process avoidance doctrine is as strong in other areas of

207. *See* Kysar, *supra* note 1 (describing our tax system as a zero-sum game).

208. The question may arise as to *which* house gets to determine the scope of its amendment power. Logically, this should flow to the Senate since, in other contexts, it is the sole determiner of its power to amend. In modern times, both houses agree on an expansive interpretation of the Senate's amendment power and therefore little turns on the answer to this question.

constitutional law is a subject for future inquiry. As a preliminary matter, questions left open by Article I, Section 7, such as the precise requirements of whether a bill "passes" a house or whether a house could delegate to a committee the power to present a passed bill to the President, are likely candidates for the doctrine's application.[209] As explained in this Part, separation of powers concerns, as embodied in the Rulemaking Clause and the political question doctrine, can be marshaled to support a legislative process avoidance doctrine, at least where the text indicates interpretive delegation to Congress. In areas of traditional legislative concern, ambiguity may even imply such delegation.

A. The Rulemaking Clause and its Underpinnings

Madison rightly predicted that the Origination Clause would be "a source of frequent [and] obstinate altercations,"[210] yet the Framers did little to resolve its ambiguities. Did they wish Congress or the judiciary to settle disputes under the Clause? In warning that the Clause would become "a source of perpetual contentions" between the houses, James Wilson in fact assumed that there would be "no mediator to decide [such contentions]."[211] After all, at the time of the Federal Constitutional Convention, the legitimacy of judicial review, as a general matter, was unsettled.[212] It is likely that the judicial review of the internal workings of the legislature would have proven even more controversial, given the legislative prerogative over its internal proceedings.

1. An Expansive Interpretation of the Rulemaking Clause

The principle that the legislature has unfettered discretion over the lawmaking process has its textual roots in the Rulemaking Clause of the Constitution, and its historical roots in British and American law dating back centuries.[213] Under the Rulemaking Clause, which provides that "[e]ach House may determine the Rules of its Proceedings,"[214] the houses are free to make, amend, repeal, suspend, ignore, or waive their internal

209. The latter question was decided in favor of congressional deference in Mester Mfg. Co. v. INS, 879 F.2d 561, 570–71 (9th Cir. 1989).

210. MADISON'S NOTES, *supra* note 41, at 238.

211. *Id.* at 444.

212. William E. Nelson, Commentary, *Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790–1860*, 120 U. PA. L. REV. 1166, 1168 (1972).

213. John C. Roberts, *Are Congressional Committees Constitutional: Radical Textualism, Separation of Powers, and the Enactment Process*, 52 CASE W. RES. L. REV. 489, 528 (2001).

214. U.S. CONST. art. I, § 5, cl. 2.

rules.[215] The Clause was adopted without discussion, reflecting the view, expressed by Justice Story, that the power over legislative rules is inherent in Congress's lawmaking authority:

> No person can doubt the propriety of the provision authorizing each house to determine the rules of its own proceedings. If the power did not exist, it would be utterly impracticable to transact the business of the nation, either at all, or at least with decency, deliberation, and order. The humblest assembly of men is understood to possess this power; and it would be absurd to deprive the councils of the nation of a like authority.[216]

So fundamental is this legislative power that it could be argued that the Rulemaking Clause is superfluous; it merely confirms generally accepted separation of powers principles.[217] It is often noted that procedure determines outcomes in the legislative process. If the judiciary could meddle with legislative procedure, it would essentially alter the statutory law, a troublesome result.

Some trace the legislature's unfettered discretion over its internal processes to the British theory of legislative sovereignty, which attempted to counter the long history of monarchical interference.[218] It makes sense to question, then, whether this legislative prerogative should endure given the American break from the British theory in favor of sovereignty of the people.[219] In other words, as a matter of constitutional design, were the Framers justified in giving to Congress the power over its internal proceedings?

In many respects, the Constitution imposes limitations on the formulation of Congress's internal rules. For instance, Sections 4 and 5 of Article I include rules for legislative assembly, selection of officers,

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215. Roberts, *supra* note 213, at 525; *see also* Kysar, *Lasting Legislation*, *supra* note 15, at 1021–25 (discussing endogeneity of legislative rules in the budgetary context).

216. 2 STORY, *supra* note 22, at 298.

217. *See* Roberts, *supra* note 213, at 528 (discussing the lack of such a clause in the Articles of Confederation and the legislative body's creation of legislative rules nonetheless).

218. Stephen Raher, Judicial Review of Legislative Procedure: Determining Who Determines the Rules of Proceedings 36 (Aug. 2008) (unpublished manuscript) (presented at the Midwest Political Science Association Spring Conference, 2009), *available at* http://works.bepress.com/stephen_raher/1.

219. *See* Nelson, *supra* note 212, at 1170–71 ("Americans rejected the traditional British view that the legislature possessed complete sovereignty and argued instead that sovereignty lay with the people, who by a constitution delegated limited power to the legislature. Legislators were mere 'servants of the people,' and a constitution, 'the commission from whence [they] . . . derive[d] their power.'") (footnotes omitted).

discipline of members, and voting and quorum rules, among others.[220] These limitations thus represent the American rejection of the British tradition of legislative sovereignty. Accordingly, under the principles of judicial review established by *Marbury v. Madison*,[221] the judiciary may properly enforce them.[222] Nonetheless, where the people have not adopted constitutional provisions concerning legislative procedure, the judiciary's involvement in the workings of legislative process is problematic.

Indeed, the Constitution leaves ample room for Congress to supply certain details of the lawmaking process. Article 1, Section 7 says little about the actual process of creating legislation, focusing instead on the Presidential veto and override process. For instance, there is no requirement that an identical bill be passed by the two houses; instead the houses are left to their own devices in designing a method of agreeing upon the bill that is to be sent to the President.[223] The manner of passage is also left vague. Accordingly, under current legislative rules, only one member of the majority need be present for a bill to pass, and there is no constitutional requirement that legislators read the text of a bill or have a factual basis for its contents.[224] To be sure, the Court has emphasized that the "finely wrought and exhaustively considered" enactment process of Article I, Section 7 cannot be circumvented,[225] but that apparatus leaves many gaps to be filled in by Congress under its rulemaking authority.

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220. *See* Vermeule, *supra* note 21, at 361 (cataloguing the constitutional provisions that govern congressional procedure).

221. 5 U.S. (1 Cranch) 137 (1803).

222. *Id.* at 176–78 (reasoning that the judiciary's enforcement of unconstitutional laws "would subvert the very foundation of all written constitutions").

223. Roberts, *supra* note 213, at 523–24.

224. *Id.* at 524. There are limited contexts in which the legislature must build a record when it passes a law. For instance, in assessing Congress's power under the Commerce Clause, the Court has reviewed the legislative record to determine if the empirical findings were sufficient to justify the contested legislation. *See* United States v. Lopez, 514 U.S. 549 (1995) (striking down the Gun-Free School Zones Act of 1990 and referring to Congress's failure to make sufficient findings that would justify the regulation of guns); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (invalidating Title I of the Americans with Disabilities Act as exceeding Congress's powers under the Equal Protection Clause since the legislative record failed to show a pattern of irrational state discrimination against the disabled); United States v. Morrison, 529 U.S. 598 (2000) (striking down federal legislation punishing violence against women in spite of congressional findings regarding the impact of gender-motivated violence on victims and families). These decisions have been heavily criticized. *See, e.g.*, Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707 (2002) (contending that the Court has placed unrealistic obligations upon Congress and has failed to understand that majority vote, rather than deliberation, often dictate political outcomes); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 83 (2001) (arguing that the Court's approach constitutes encroachment upon Congress's lawmaking powers). There is, however, no general rationality requirement for lawmaking. Roberts, *supra* note 213, at 524 n.88.

225. INS v. Chadha, 462 U.S. 919, 951 (1983) (invalidating one-house legislative veto); Clinton v.

Additionally, the Court has interpreted the Rulemaking Clause broadly, affording Congress great flexibility over the legislative process. For instance, in *United States v. Ballin*, the Court deferred to the House's interpretation of the constitutional "Quorum to do Business" requirement to include both voting and non-voting members, reasoning that the Rulemaking Clause of the Constitution empowers each house to create its legislative rules. According to the *Ballin* Court, the Rulemaking Clause preempts judicial review of such rules.[226] The *Ballin* Court reasoned: "The power to make rules . . . is a continuous power, always subject to be exercised by the house, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal."[227]

Other Supreme Court and lower federal cases adopt an expansive view of the Clause, seldom reviewing rules and capitulating to Congress unless the rule infringes upon constitutional limitations[228] or the fundamental rights of individuals (especially when Congress functions in a semi-judicial capacity).[229] A more recent case indicates the Court's hesitance to review legislative rules even when they implicate individual rights. In *Nixon v. United States*, the Court held non-justiciable a Senate rule that delegated fact-finding in an impeachment proceeding to a committee, invoking the political question doctrine and reading the text of the Impeachment Trial Clause to prevent judicial review.[230]

City of New York, 524 U.S. 417, 439–40 (1998) (striking down presidential line-item veto).

226. United States v. Ballin, 144 U.S. 1 (1892). In dicta, the *Ballin* Court provided that legislative rules may not "ignore constitutional restraints or violate fundamental rights." *Id.* at 5. A third enumerated limitation, that there exists a reasonable relation between a rule and the desired end, has never been applied by the Court and conflicts with the language quoted in the above text. As a result, some commentators doubt its force, concluding that, in spite of these limitations, "*Ballin* supports a very expansive interpretation of the Rulemaking Clause," which the Court has continually confirmed. Roberts, *supra* note 213, at 532.

227. *Ballin*, 144 U.S. at 5.

228. *See* Kysar, *Lasting Legislation*, *supra* note 15, at 1021–23.

229. *See* Kysar, *Listening to Congress*, *supra* note 15, at 556. For instance, in *United States v. Smith*, when the Senate, pursuant to its own rules, recalled the resolution confirming the appointment of George Smith to the Federal Power Commission, the Court interpreted such rules to conclude that the Senate did not have power to reconsider the nomination. 286 U.S. 6 (1932). *Christoffel v. United States* held in favor of a witness who argued that he could not be convicted of perjury because the House Committee to which he gave testimony lacked a quorum as defined in the legislative rules. The dissent argued that the Court must presume that Congress follows its rules. 338 U.S. 84 (1949). Finally, in *Yellin v. United States*, the petitioner, who had been convicted of contempt of Congress for refusing to answer a question from a House committee, argued that the committee did not follow its own rules in failing to consider the petitioner's request for a closed session. The Court reversed the petitioner's conviction, reasoning that the committee rule bestowed a right upon the witness. 374 U.S. 109, 114–15 (1963). *Smith*, *Christoffel*, and *Yellin* all involved congressional violations of legislative rules in the context of the abridgment of fundamental rights bestowed by such rules and do not support general review of the legislative process.

230. Nixon v. United States, 506 U.S. 224, 228–38 (1993). The *Nixon* decision is often contrasted

The judicial reluctance to review legislative rules is in accordance with its unwillingness to review the legislative process as a general matter. The Court has held, for instance, that the due process clause does not apply to legislatures[231] and has failed to adopt a "due process of lawmaking" in spite of academic calls for such judicial inquiry.[232] *Field v. Clark*, which was decided the same year as *Ballin* and pronounced the enrolled bill doctrine discussed above,[233] did not involve a direct interpretation of the Rulemaking Clause but can be viewed as the Clause's analogue, protecting even egregious errors from judicial review so long as the bill is certified as enrolled by the appropriate officer.[234]

2. Munoz-Flores *and the Rulemaking Power*

These precedents display the Court's unwillingness to review legislative process, though it could be argued that the Court has specifically opted out of this principle in the Origination Clause context. *Munoz-Flores*, for instance, recognizes the general justiciability of the Clause and specifically lies in tension with the *Field* holding.[235] As one scholar has argued, the two cases "cannot peacefully coexist" since it is illogical for the judiciary "to police Article I's 'Origination Clause' requirement (which focuses on where a bill started, not whether it was ever passed), but not to police Article I's requirement of bicameral

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with the Court's approach in *Powell v. McCormack*, which held justiciable the question of whether Congress had the authority to exclude a member who had been elected to office amidst scandal. Powell v. McCormack, 395 U.S. 486 (1969). In *Powell*, the Court declined to apply the political question doctrine; instead, the Court held that it was simply interpreting the House's power to be the judge of the qualifications of its own members under Article I, Section 5, Clause 1, as expressly limited by Clause 2 of the same section's criteria for membership (age, residency, and citizenship). *Id.* Although *Powell* affirms that judicial review of the internal workings of Congress is not entirely off-limits, it differs from *Nixon*, and the interpretation of the Senate's power to amend revenue legislation, since *Powell* involved an express provision of the Constitution that limited the rulemaking power. *See Nixon*, 506 U.S. at 237. The express limitations on Congress's membership requirements at issue in *Powell* thus stand in contrast with the Senate's duty to "try" impeachments at issue in *Nixon* or the Senate's amendment power under the Origination Clause, the details of which are textually committed to the Senate by the Constitution.

231. Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915).

232. *See* Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976).

233. *See supra* text accompanying notes 67–71.

234. *See* Field v. Clark, 143 U.S. 649 (1892); John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CALIF. L. REV. 1773, 1790 n.63 (2003) (describing the enrolled bill doctrine "as an analytical corollary to the Rulemaking Clause").

235. *See supra* text accompanying notes 67–76. For illustration of the tension between *Munoz-Flores* and *Field*, see Vikram David Amar, *Why the 'Political Question Doctrine' Shouldn't Necessarily Prevent Courts from Asking Whether a Spending Bill Actually Passed Congress: Part Two in a Series*, FINDLAW (Apr. 13, 2006), http://writ.news.findlaw.com/amar/20060413.html.

approval as a precondition for lawmaking."[236] Although the *Munoz-Flores* Court attempted to distinguish *Field* because it did not implicate a constitutional provision, it is difficult to see how *Field* did not involve the Presentment Clause's bicameral requirements for bill passage.[237]

Perhaps the two cases can be resolved because the enrolled bill doctrine rests on prudential considerations that are not as serious in the origination context. Certainly at the time *Field* was decided, verifying the text of a bill might present practical difficulties. For instance, looking to the legislative journals to determine what texts were enacted would create significant uncertainty as to the status of the law since the journals were considered unreliable. By contrast, ascertaining where, in fact, a bill originated is straightforward in today's world. The technological advancements that make such an inquiry possible, however, have also resulted in the improvement of legislative record-keeping, thus calling into question the traditional justifications for the enrolled bill doctrine.[238]

All of this does not mean that because the Court can easily determine the location of a bill's origination, regardless of its label, it can also readily answer whether the purpose of a tax provision is revenue-raising or regulatory, or whether an amendment is germane to the original house bill, or whether a bill increases or decreases revenues. If modern-day realities warrant overturning the enrolled bill doctrine, which the *Munoz-Flores* Court seems to have partially accomplished, they do not also warrant general review of the legislative process. Instead, prudential considerations continue to justify the judiciary's aversion to such review in the Origination Clause context generally.

Nonetheless, as a textual matter, one could contend that the Origination Clause simply trumps the separation of powers principles underlying the *Field* decision. Reading the Presentment Clause in conjunction with the Rulemaking Clause, Congress's authority over its rules may mandate that it determines the means by which a bill is certified as "passed." Thus, because the Presentment Clause does not set forth detailed requirements as to what constitutes a passed bill, the Constitution leaves the interpretation to Congress, which has chosen to bestow authority on the presiding legislative officers as to the verification of a bill's contents.[239]

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236. Amar, *supra* note 235.

237. U.S. CONST. art. I, § 7, cl. 2–3.

238. Ittai Bar-Siman-Tov, *Legislative Supremacy in the United States?: Rethinking the "Enrolled Bill" Doctrine*, 97 GEO. L.J. 323, 334–35 (2009) (discussing technological developments that call into question the historical basis for the enrolled bill doctrine).

239. Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105, 1178–79 (2003). Admittedly, the Presentment Clause does not reference

Specific constitutional provisions, on the other hand, limit congressional authority. For instance, Congress may not pass a one-house legislative veto because it falls outside the general framework of the Presentment Clause.[240] Thus, although each house may decide the question of *whether* a bill has passed, Congress may not circumvent the requirement that a bill pass *both* the House and the Senate before the bill becomes law. Similarly, the Origination Clause's clear directive forecloses Congress from having the freedom to certify where the bill originates. The ambiguity of the Senate's amendment power, however, establishes no such clear directive, and accordingly the legislative process avoidance doctrine should govern to interpret the power broadly.

3. Theories of Judicial Review of the Legislative Process

Of course, a legislative process avoidance doctrine is premised on the view that judicial review of the legislative process is undesirable. Ittai Bar-Siman-Tov has recently argued the contrary—that constitutional theories can be marshaled in *favor* of such review.[241] Bar-Siman-Tov first relies upon H.L.A. Hart, who posits that a legal system must have "rules of recognition" or criteria for identifying the legal rules of the system.[242] According to Hart, courts decide whether a law has been violated and thus cannot help but determine the content of the laws.[243] In so doing, they must only enforce those laws that meet the rules of recognition, and thus, according to Bar-Siman-Tov, the courts must necessarily have the authority to determine whether laws were validly enacted.[244] Importantly, Bar-Siman-Tov argues that this justifies judicial review of both constitutional *and* extraconstitutional rules of procedure.

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the authoritativeness of each House and indeed differs from other sections that seem to bestow such authority. *Id.* at 1179 (discussing Article I, Section 5's provision that "Each House shall be the Judge of the . . . Qualifications of its own Members" and Article I, Section 3's language that "The Senate shall have the sole Power to try all Impeachments" as standing in contrast to the text of the Origination and Presentment Clauses). The vagueness left open by the Presentment Clause when read in conjunction with each house's authority over the legislative process, however, supports an implicit delegation to Congress. The same is true for the Origination Clause, and in the case of the amendment power the text implicitly delegates to the Senate "as on other Bills."

240. *See, e.g.*, INS v. Chadha, 462 U.S. 919, 956–59 (1983) (holding that a one-house legislative veto violated the Presentment Clause).

241. Ittai Bar-Siman-Tov, *The Puzzling Resistance to Judicial Review of the Legislative Process*, 91 B.U. L. REV. 1915 (2011); *see also* H. L. A. HART, THE CONCEPT OF LAW 94–95, 100–10 (2d ed. 1994).

242. Bar-Siman-Tov, *supra* note 241, at 1944–51.

243. HART, *supra* note 241, at 97.

244. Bar-Siman-Tov, *supra* note 241, at 1946.

I have acknowledged that judicial review of certain constitutional procedural rules, like the bicameralism requirement or the place of origination, is justified and follows from the principle of sovereignty of the people, rather than the legislature. I disagree, however, that judicial review of extraconstitutional procedural rules is desirable or even supported by Hart's rules of recognition. First, as Bar-Siman-Tov himself recognizes, some of Hart's statements appear to be antithetical to judicial review of the legislative process. For instance, Hart writes that "the rules of recognition . . . need not refer to all the details of procedure involved in legislation."[245] Thus, because some legislative rules do not speak to the legitimacy of a law but perhaps reflect mere housekeeping, they need not be enforced by the judiciary.

More problematically, if judicial review ultimately derives from a directive of the people, either through their constitution or extraconstitutional norms, then one must confront the possibility that the people have chosen judicial enforcement of some constitutional provisions or extraconstitutional norms and not others. Our current system embraces the endogeneity of legislative rules, and this appears to have been the case since the founding. If there is space for Bar-Siman-Tov's argument as a theoretical matter, American tradition has explicitly rejected such an option. Moreover, in the matter at hand, the text of the amendment power can be read to place its interpretation squarely within Congress, a reading that is reinforced by this longstanding norm against reviewability of legislative rules.[246]

To be sure, a different result may be justified when a violation of legislative rules results from a defect or failure in the political process, such as vote dilution or even dominance by interest groups.[247] Process

245. HART, *supra* note 241, at 96.

246. *See* WILLIAM D. POPKIN, MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS 1074 (5th ed. 2009) ("There is no doubt that Congress can disregard its own procedural rules concerning how it adopts statutes, assuming these rules are not constitutionally required. This is true even if the rules are contained in a prior statute, rather than in a House or Senate resolution."). This reading also places the Senate's power to amend revenue legislation largely outside of Adler and Dorf's "constitutional existence conditions" theory, which posits that many Constitutional provisions operate as rules of recognition and are thus enforceable. Adler & Dorf, *supra* note 239, at 1107.

247. Indeed, I have previously argued that courts, in interpreting ambiguous statutes, can correct certain defects in the political process and incentivize Congress to follow its legislative rules by assuming each house follows such rules. Kysar, *Listening to Congress*, *supra* note 15; *see also* Rebecca M. Kysar, *Penalty Default Interpretative Canons*, 76 BROOK. L. REV. 953, 965 (2011) (proposing an interpretative methodology whereby courts "refus[e] to question Congress's internal rules of procedure in accordance with [Congress's] rulemaking authority granted by the Constitution"). Although this interpretive methodology impacts the legislative process, it does so in accordance with

theories, best represented by John Hart Ely's representation-reinforcing theory, charge courts with correcting such defects or failures.[248] Ely sought to overcome the countermajoritarian tendencies of substantive judicial review by prescribing court intervention only upon the malfunctioning of the political process, thus justifying judicial review of those substantive areas that the political process is unlikely to protect.

Although the process theorists' approach seems closely connected to the judicial review of the legislative process, they differ in important ways. First, the purported malfunction of the legislative process, for instance the Senate's failure to follow its own hypothetical germaneness requirement, need not represent a failure of the political process.[249] Indeed, the lack of such a requirement may be said to enhance deliberation. A rule violation may also be the result of an implicit waiver of the rule by Congress, thereby reflecting a valid expression of congressional will or interpretation. Second, even if one were to invoke the theory to justify judicial review of the legislative process, it does not lead to the conclusion that judges should prescribe the details of such process. For instance, if the judiciary enforces legislative rules upon the legislature, it still could defer to the legislature's interpretations of such rules. This might be especially true where the rules, such as those governing germaneness, are particularly difficult to apply.

Applying these insights to the matter at hand, concerns advanced by the process theorists do not justify the Court's intervention in interpreting the Senate's power to amend revenue legislation. Even if one accepts a violation of legislative rules as prima facie evidence of a failure of the political process, no such violation occurs here. In fact, the interpretive method I prescribe defers to Congress's own rules in interpreting the amendment power, and Congress's expansive interpretation of this power does not result from such a failure.

B. The Scope of the Senate's Amendment Power as a Quasi-Political Question

In addition to the Rulemaking Clause and Congress's inherent authority over the legislative process, the political question doctrine is

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Congress's own governing principles.

248. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 73–104 (1980).

249. *See* POPKIN, *supra* note 246, at 1075 ("It is hard to know whether the rules were purposely violated and whether violation undermines a desirable deliberative process.").

another articulation of separation of powers concerns that warrant a legislative process avoidance doctrine in the Origination Clause context. The Supreme Court enumerated the factors that are indicative of a non-justiciable political question in *Baker v. Carr*:

> [A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[250]

Scholars have formulated two strands of the political question doctrine, and the *Baker* factors recognize both. The classical strand of the doctrine rests on the fact that the Constitution excludes certain issues from judicial review, whereas the prudential strand is derived from notions of expediency and legitimacy.[251] The first *Baker* factor (and perhaps the second if used to prove the existence of the first) represents the classical theory, and the remaining factors derive from the prudential theory.[252] Since *Baker* was decided, however, the Court has seemed to embrace the classical approach, finding only two issues that presented political questions and, in so doing, emphasizing the constitutional text committing such issues to Congress.[253]

Both strands of the doctrine support reading the amendment power in a way that averts judicial review of the legislative process—that is, broadly. The phrase "as on other Bills" commits the decision of the issue to Congress by allowing it to determine the scope of the power. This textual

250. Baker v. Carr, 369 U.S. 186, 217 (1962).

251. *See* Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966).

252. *See* Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 265 (2002).

253. *See* Gilligan v. Morgan, 413 U.S. 1, 6–7 (1973); Nixon v. United States, 506 U.S. 224, 228–38 (1993). In a third case possibly fitting within this category, Vieth v. Jubelirer, 541 U.S. 267 (2004), four justices, in a plurality opinion, concluded that claims of partisan gerrymandering were non-justiciable on political question grounds due to the lack of judicially manageable standards for adjudicating such claims. Four justices believed such claims were indeed justiciable, and one justice concurred with the ruling of the Court but argued that judicially manageable standards for such claims could be developed in the future. *Id.*

anchor is in keeping with the classical strand of the political question doctrine and avoids the accusation that the doctrine is fundamentally arbitrary. Additionally, prudential considerations have been discussed throughout this Article as supporting a broad amendment power. Under the Origination Clause, the Senate's power to "propose or concur with Amendments as on other Bills," fails to provide the Court with any workable standards as to determining germaneness of an amendment or whether the amendment increases or diminishes revenues.[254] Furthermore, resolution of these issues would involve policy determinations of a nonjudicial sort or otherwise manifest a lack of respect due Congress by requiring the Court to delve deeply into the Senate's internal deliberations and proceedings.

The *Munoz-Flores* Court's rejection of the political question doctrine as to the determination of the origin of a revenue bill can be distinguished. Such a determination does not implicate the institutional limitations of the Court, nor does it involve judicial interpretation of the vagaries of the legislative process since the inquiry is straightforward. Additionally, although the Origination Clause may "textually commit" to Congress the determination of the amendment power through the "as on other Bills" phrase, no such text commits to Congress the judging of the origin of the bill.

To be sure, the political question doctrine faces serious challenges,[255] and, given its rare invocation, its stability as a doctrinal matter is in

254. For instance, the fixed meaning of qualifications of congressional members as set forth in Article I, Section 2 provided the Court with judicially manageable standards to judge the House's exclusion of Representative Powell on a ground other than those qualifications. Powell v. McCormack, 395 U.S. 486 (1969). In contrast, the Senate's power to "try" impeachments under Article I, Section 3, Clause 6, lacked such specificity, thereby failing to supply judicially manageable standards for review. *Nixon*, 506 U.S. at 228–38. The amendment power is akin to the latter since it also lacks specificity. *See supra* text accompanying note 230.

255. Jonathan R. Siegel, *Political Questions and Political Remedies*, *in* THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES 243, 243 (Nada Mourtada-Sabbah & Bruce E. Cain eds., 2007) ("The puzzling and troubling feature of the political question doctrine is the potential it seems to have to render constitutional provisions meaningless."). The initial debate over the political question doctrine rested on whether judicial review is discretionary. Judge Hand argued that courts should strike down government acts only rarely and that the political question doctrine allowed the judiciary to avoid non-pressing issues. LEARNED HAND, THE BILL OF RIGHTS (1958). In a direct response to Hand's argument, Wechsler countered that the classic defense of judicial review demands review of nearly all constitutional questions. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 1–10 (1959). Later Bickel argued that nothing prevented the judiciary from deciding only certain constitutional issues, but that the judiciary should only invoke the political question doctrine to dismiss cases that are governed by "circumstantial and varying" principles. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 187 (1962) (advancing the prudential strand of the doctrine). Modern scholars critique the doctrine on other grounds. Louis Henkin has argued that the Court either reaches the

question. Nonetheless, its underpinnings may still inform an interpretive approach regarding the Origination Clause. Although the political question doctrine may not bar judicial review of all challenges under the Origination Clause, as the *Munoz-Flores* Court held, the Court's general interpretation of the Origination Clause in a manner avoiding review of the legislative process follows many of the considerations expressed in the political question doctrine.[256] Accordingly, the legislative process avoidance doctrine I have proposed herein may be categorized as a variation on the political question doctrine.

The political question doctrine has long been a favorite among those embracing constitutional review by the coordinate branches.[257] Chemerinsky, for instance, invokes the doctrine to support his view that "for each part of the Constitution one branch of government is assigned the role of final arbiter of disputes."[258] The case for deferring to Congress is especially convincing in the context of congressional procedure both because of the judiciary's limitations in judging its content, as well as Congress's strengths in so doing. Congress actively interprets and enforces the Origination Clause, and through its intimate experience with its own intricate rules of procedure is best left to judge germaneness and other limitations on the Senate's amendment power.[259] In contrast, the judiciary, it is sometimes said, is best left to protect individual liberties and

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merits of a claim or disposes of a claim on other grounds, never actually applying the political question doctrine to avoid judicial review. Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 600 (1976). Redish responded to Henkin's article, arguing that, in fact, the doctrine does exist, but that the role of judicial review in a constitutional democracy is cause for abandonment of it. Martin H. Redish, *Judicial Review and the "Political Question*," 79 NW. U. L. REV. 1031, 1059–60 (1985). McCormack argues that the political question doctrine cannot exist as a logical matter since dismissing a challenge to governmental action is equivalent to upholding the action. Wayne McCormack, *The Justiciability Myth and the Concept of Law*, 14 HASTINGS CONST. L.Q. 595, 614 (1987). Others have contended that the political question doctrine is justified because political branches may enforce upon themselves judicially unenforceable constitutional provisions. *See* J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97, 156–62 (1988); *see also* Barkow, *supra* note 252, at 329 (positing that the political branches are better than the judiciary at enforcing certain constitutional provisions). Jonathan Siegel disputes this view, arguing that the mandatory nature of judicial review, its resolution of precise issues, its deliberative character, and the use of precedent deem it a superior mechanism for resolving constitutional disputes. Siegel, *supra*, at 244.

256. Redish, *supra* note 255 at 1032–33 (arguing that courts often implicitly invoke the principles underlying the political question doctrine).

257. Rachel E. Barkow, *The Rise and Fall of the Political Question Doctrine*, *in* THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES, *supra* note 255, at 23, 41.

258. ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION 84 (1987).

259. To analogize, the political question doctrine remains vibrant in the area of foreign relations, which involves equally "delicate" and "complex" questions "of a kind for which the Judiciary has neither aptitude, facilities nor responsibility." *See* Barkow, *supra* note 252, at 329 (quoting Chi. & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948)).

minorities from the oppression of the majority.[260] Although the Origination Clause, at some level, implicates individual rights to fair revenue policy, it is closer to the spectrum of those questions concerning the structure of government that are properly left to the popular branches.[261]

C. The Continued Effect of the Origination Clause

One could argue that a broad understanding of the amendment power renders the Origination Clause a nullity. For instance, a germaneness requirement allows the House to serve as gatekeeper for any legislative changes, as well as to define the boundaries of such change. Absent a germaneness requirement, the House may only do the former, a result it can reach by simply refusing to pass revenue bills. As I have argued elsewhere, however, although a broad amendment power dilutes the Clause, the House still enjoys an agenda-setting advantage.[262] The House gains this advantage from its ability to frame the political debate.[263]

Political scientists have explored the importance of agenda setting, most often as between the executive branch and Congress,[264] but empirical work also suggests that the first-mover advantage accrues in the intra-congressional context as well.[265] For instance, if the House proposes a tax cut, the public will likely look unfavorably upon a Senate's

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260. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 896 (1983).

261. It could thus be said that aspects of the Origination Clause fall within that category of constitutional questions that lend themselves to final decision by Congress. For enumeration of such questions, see MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

262. *See* Kysar, *supra* note 1, at 40–41 (illustrating this phenomenon through the Condorcet voting paradox). For a general discussion of the importance of agenda setting, see FRANK R. BAUMGARTNER & BRYAN D. JONES, AGENDAS AND INSTABILITY IN AMERICAN POLITICS (1993); ROGER W. COBB & CHARLES D. ELDER, PARTICIPATION IN AMERICAN POLITICS: THE DYNAMICS OF AGENDA-BUILDING (1972); JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES (2d ed. 1995); WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE (1982).

263. *See* Kysar, *supra* note 1.

264. *See, e.g.*, STEPHEN J. WAYNE, THE LEGISLATIVE PRESIDENCY 16 (1978); Lars Willnat, *Agenda Setting and Priming: Conceptual Links and Differences*, *in* COMMUNICATION AND DEMOCRACY: EXPLORING THE INTELLECTUAL FRONTIERS IN AGENDA-SETTING THEORY 51, 58 (Maxwell McCombs et al. eds., 1997).

265. *See, e.g.*, Gerald S. Strom and Barry S. Rundquist, *A Revised Theory of Winning in House-Senate Conferences*, 71 AM. POL. SCI. REV. 448, 450 (1977) ("[T]he chamber that acts first on a bill tends to have the greatest impact on the content of a bill . . . ."); *see also* Donald A. Gross, *House-Senate Conference Committees: A Comparative-State Perspective*, 24 AM. J. POL. SCI. 769 (1980); Dennis S. Ippolito, *House-Senate Budget Conferences: Institutional and Strategic Advantages*, 11 AM. POL. Q. 71 (1983).

counter-proposal of a tax increase. This is not simply because people do not like paying taxes but because the House, through its agenda-setting, has shaped voters' preferences. Once the House proposes the tax cut, voters then feel entitled to its benefits, causing them to greatly value the tax cut (thereby increasing the House bill's chance of passage in the Senate).

Even though the House can only prevent the Senate from proposing revenue policy by not originating *any* revenue bills, the House's ability to set the political conversation and negotiating stage on the revenue front is valuable. Indeed, the Origination Clause appears to informally affect the path of revenue legislation by establishing a norm that, even where the Senate uses the shell bill game, it does so only where the House has previously acted on an issue.[266] The House's special role in originating revenue policy is confirmed by the large number of members, staff, and resources devoted to the House Ways and Means Committee and the prestige associated with a seat on the committee, as compared with other committees in the House.[267] The Senate Finance Committee does not share such glory in the Senate. As a practical matter, the House remains closer to tax issues than the Senate even after decades of acquiescing to the shell bill game and a broad Senate amendment power.

It could further be argued that, from a functionalist perspective, the original justifications for the Origination Clause are no longer relevant and thus strict enforcement of it should be abandoned. It is true that because of the Seventeenth Amendment, which mandated direct election of the Senate, the differences between the two houses are less stark. Moreover, gerrymandering has cast into doubt the proposition that the House is more responsive to the populace because it is more frequently elected. Gerrymandering not only distorts the "one person, one vote" principle, but also appears to insulate incumbents.[268]

Still, although the Clause was intended to bring revenue policy closer to the people, it also was drafted to protect the interests of the large states.

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266. In the case of the Affordable Care Act, the House had already drafted a health care reform bill, but the Senate chose the shell bill route for political reasons. *See infra* text accompanying notes 276–77. In that context, it could be argued that the shell bill tactic was particularly appropriate given that the House had already acted on the issue. The 1986 Tax Reform Act followed a similar path. Although that legislation was the result of the shell bill tactic, the original House bill also addressed tax reform.

267. Charles Stewart III, *Congress and the Constitutional System*, *in* THE LEGISLATIVE BRANCH 3, 21 (Paul J. Quirk & Sarah A. Binder eds., 2005).

268. Easterbrook, *supra* note 34, at 1334–35 (hypothesizing that gerrymandering is responsible for the longer tenure of House Representatives).

Because the House is the only body that is proportionately representative, it still serves this role. To the extent the interests of small states differ from large states, the Clause thus continues to serve a meaningful function. For instance, the alternative minimum tax disproportionally harms high tax states, such as California, New York, and Illinois, by denying the deduction for state and local taxes. Because they are often more populated, high tax states are less represented in the Senate. The Senate's filibuster exacerbates the extent to which small states can dominate national policy by giving the power to block legislation to forty Senators.[269] Other examples of current policies that may harm more heavily populated states are limitations on mortgage interest and the failure to geographically index the Code.[270] Giving less control over revenue policy to the House might cause such policies to be even more punishing to the large states.

The Clause may also influence the deliberative model of revenue policy through ancillary effects. First, the Clause establishes a classical model through which revenue legislation is often shaped. Following this norm, revenue legislation often begins with the House Ways and Means Committee and ends with a conference to resolve differences between the two houses.[271] Although not all revenue legislation follows this path, the model endures and indeed is often used for tax bills of particular importance, such as the Tax Reform Act of 1986.[272] Second, the Origination Clause gives more power to the tax committees, thus arguably encouraging deliberation.[273] Because the Clause creates a "classical" path of tax legislation, the Ways and Means Committee benefits from being the typical starting point. Additionally, under the Origination Clause, the Senate cannot pursue revenue amendments on non-revenue bills, which would otherwise remove authority from the Senate Finance Committee.

The Clause thus establishes norms that may benefit the democratic process in unexpected ways. Additionally, although modern developments, such as gerrymandering and the Seventeenth Amendment,

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269. STANDING RULES OF THE SENATE: REVISED TO JANUARY 24, 2013, S. DOC. NO 113-18, at 15–17 (Rule XXII: Precedence of Motions).

270. *See, e.g.*, Louis Kaplow, *Regional Cost-of-Living Adjustments in Tax/Transfer Schemes*, 51 TAX L. REV. 175 (1996) (discussing the tax system's failure to address cost-of-living differences among regions).

271. One might further contend that because the Senate and Executive branch can informally influence the shape of revenue policy before any legislation is drafted, this negates any first-mover advantage that the House might enjoy. Although such informal input cabins the discretion later exercised by the House, its first-mover advantage is still valuable since it "holds the pen" in first articulating the policy details.

272. *See* Evans, *supra* note 13.

273. *Id.*

have muted the democratic benefits that the Founders originally envisioned for the Clause, the Clause remains one of the only tools in which the large states can combat the influence of the small States—an influence which has been strengthened by the filibuster. Enforcement of the Clause thus continues to preserve the bargain struck by the Great Compromise. Nonetheless, the bargain also granted to the Senate the power to amend revenue bills, a power which I have explained herein should be read broadly as a constitutional matter. In fact, solely from a policy perspective, an expansive reading of the Senate's amendment power may best allocate influence between the two houses. Because it preserves the House's powerful agenda-setting ability while also giving flexibility to the Senate to act upon revenue policy, this interpretation recognizes that modern developments between the two houses have obscured some of their differences while also acknowledging that the Clause still serves important functions.

IV. CONSTITUTIONAL ANALYSIS OF THE AFFORDABLE CARE ACT UNDER THE ORIGINATION CLAUSE

In this Article, I have constructed a conceptual framework for analyzing the Court's jurisprudence under the Origination Clause and advanced it from a theoretical perspective. This proposed legislative process avoidance doctrine, which deflects searching review of the legislative process, predicts and justifies an expansive reading of the Senate's power to amend revenue legislation. In this Part, I apply this framework to analyze a recent challenge to the Affordable Care Act under the Origination Clause, *Sissel v. United States Department of Health and Human Services*.[274]

A. The Enactment of Health Care Reform

The procedural history of health care reform is complex, but a short summary will suffice for the discussion at hand.[275] On November 7, 2009, the House passed a health care reform bill, H.R. 3962, by a narrow margin.[276] Reluctant to engage directly Senate debate on some of the

274. Amended Complaint for Declaratory Judgment and Injunctive Relief, Sissel v. U.S. Dep't. of Health & Human Servs., No. 1:10-cv-01263 (D.D.C. Sept. 11, 2012).

275. For a detailed account of the passage of health care reform, see BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS (4th ed. 2012).

276. Affordable Health Care for America Act, H.R. 3962, 111th Cong. (1st Sess. 2009) was passed by a vote of 220 to 215.

House bill's controversial provisions, Senate Majority Leader Reid did not wish to use it as the basis for the Senate's competing plan.[277] Instead, the Senate drafted its own health care bill, which replaced the text of a "shell" bill, H.R. 3590, in order to comply with the Origination Clause. The House had earlier originated the shell bill, passing it on October, 8, 2009.[278] At a modest eight pages long, the shell bill expanded and extended a homebuyers' tax credit for members of the armed forces, the costs of which were offset by an eleven dollar increase in the monthly penalty for failure to file a partnership or S corporation return, and a half-percentage point increase in the amount of corporate estimated taxes for large corporations.[279] In its over two thousand pages, the Senate text that replaced the House text contained the majority of the health care law, including the individual mandate.[280] The Senate passed H.R. 3590 on December 24, 2009 by a sixty vote supermajority, just enough to stave off a filibuster. The amended bill, which was now called the Affordable Care Act, was sent to the House, where it would face an uphill battle.

There were key differences between the House and Senate plans, which were yet to be ironed out by the time the Democrats lost their sixtieth vote in the Senate upon the election of Scott Brown on January 19, 2010.[281] Because the changes necessary to ensure House passage of the Senate plan would almost certainly invoke threat of a filibuster in the Senate, Democrats developed a different strategy. On March 21, 2010, the House passed the Senate plan but also originated and passed a separate reconciliation bill, H.R. 4872, which contained changes essential to the House's cooperation.[282] The reconciliation bill, under the protections of the reconciliation process, required only a bare majority in the Senate, and was passed by the Senate on March 25, 2010. After being signed by the President on March 30, 2010, the reconciliation bill became law and is referred to as the Health Care and Education Reconciliation Act of 2010.[283] Together with the Affordable Care Act, which was signed into law on March 23, 2010, these two laws comprise federal health care reform.

277. Joseph Arminio, *Congressman Gohmert says Obamacare, new security force, 'appeared out of nowhere'*, WND (Dec. 29, 2011, 12:20 AM), http://www.wnd.com/2011/12/381801/.
278. Serv. Members Home Ownership Tax Act of 2009, H.R. 3590, 111th Cong. (1st Sess. 2009).
279. *Id.*
280. Patient Prot. & Affordable Care Act, H.R. 3590, 111th Cong. (1st Sess. 2009).
281. Michael Cooper, *GOP Senate Victory Stuns Democrats*, N.Y. TIMES, Jan. 20, 2010, at A1.
282. Health Care and Educ. Reconciliation Act of 2010, H.R. 4872, 111th Cong. (2d Sess. 2010).
283. Pub. L. No. 111-152 (Mar. 30, 2010).

B. The Individual Mandate and the Scope of the Origination Clause

Under the jurisprudence of the Origination Clause as described and theorized in this Article, the individual mandate should and likely will fall within the Clause's scope. Although Congress designed the individual mandate to induce individuals to purchase health insurance, this should not negate its revenue-raising function. Revenues collected from the mandate indirectly assist the government in administering other aspects of healthcare reform. Nonetheless, because the revenues are not earmarked and instead fund the general "expenses or obligations of the government,"[284] the Court will likely not view them as funding a specific program or purpose. Neither do they resemble quid pro quo arrangements that lower courts have ruled fall outside the scope of the Origination Clause.[285]

The *NFIB* Court's characterization of the mandate as a tax for purposes of the taxing power does not necessarily mean it will fall within the scope of the Origination Clause. As explored above, the two inquiries are not the same.[286] They do, however, overlap. The *NFIB* Court reasoned that the regulatory purposes of the mandate did not turn the mandate into a penalty. Similarly, the Court should and will likely conclude that the mandate's regulatory purposes do not erase its revenue-raising function.[287]

That being said, the D.C. District Court came to an opposite conclusion in recent litigation involving an Origination Clause challenge to the Affordable Care Act.[288] The *Sissel* court reasoned that, under Supreme

284. Twin City Bank v. Nebeker, 167 U.S. 196, 203 (1897).

285. *See, e.g.*, United States *ex rel.* Michels v. James, 26 F. Cas. 577, 578 (C.C.N.Y. 1875) (holding that a bill to increase postage rates did not fall within the Origination Clause's definition of a revenue bill because citizens received postal service in return).

286. For one, the Court, in conducting an Origination Clause analysis, focuses on whether a provision raises general revenue rather than probes the tax/penalty distinction as in the taxing power context. *See* Mason, *supra* note 109, at 1030; United States v. Munoz-Flores, 495 U.S. 385 (1990) (focusing on the use of revenues rather than the penalty-like features of the special assessment at issue). *See also* text accompanying note 109 (hypothesizing that federalism concerns in the taxing power context drive this distinction).

287. The *NFIB* Court did express a view that the mandate could be a tax for one purpose and not another, holding that the mandate was not a tax under the Anti-Injunction Act but still within Congress's taxing power. The Court reasoned that Congress's failure to describe the mandate as a tax was only fatal to inclusion under the former because it is within Congress's discretion to decide whether to apply the Anti-Injunction Act, but it is not within Congress's discretion to determine the limits of its powers. Nat'l Fed'n of Ind. Bus. v. Sebelius, 132 S. Ct. 2566, 2594 (2012); *see also* Ellen P. Aprill, *The Impact of Agency Procedures and Judicial Review on Tax Reform*, 65 NAT'L TAX. J. 4, 918–920 (2012) (discussing Congress's motivation in enacting the Anti-Injunction Act). Congress's label should likewise be irrelevant for purposes of the Origination Clause. So long as a provision functions like a tax, Congress has the freedom to label it in the manner most politically expedient.

288. Sissel v. U.S. Dep't of Health & Human Servs, No. 1:10-cv-01263 (D.D.C. June 28, 2013).

Court case law, a bill must "levy taxes, *in the strict sense of the word*" and cannot be "*for other purposes* which may incidentally create revenue."[289] Because Congress enacted the Affordable Care Act to expand health insurance coverage, according to the court, it fell outside the scope of the Clause. I discussed above in Part II why institutional limitations will likely make the Supreme Court hesitant to delve into the purposes of legislation in making a determination as to the Clause's scope. I also concluded that, as a substantive constitutional law matter, there is a strong case for including regulatory taxes within the Clause's scope. Although I think the D.C. District Court's conclusion is incorrect in this regard, its reasoning on the scope of the amendment power follows my own, as discussed below.

C. The Constitutionality of The Affordable Care Act's Shell Bill Game

If the mandate falls within the scope of the Origination Clause, the next issue is whether the Senate's shell bill game violates the Clause. As discussed above, institutional limitations should and will likely prevent the Court from holding the shell bill tactic unconstitutional.[290] The Court does not venture into assessing the germaneness of a Senate amendment to the original revenue bill. Although it could be argued that the shell bill approach is prima facie evidence of germaneness, thereby saving the Court from wading into the legislative process, in reality such a rule would be both over- and under-inclusive.[291] Additionally, Congress's position that no germaneness requirement exists is well-supported by constitutional text, history, and precedent.

Indeed, citing an earlier draft of this Article, the *Sissel* court reasoned that a germaneness requirement would impermissibly limit the Senate's amendment power and that, even if such a requirement existed, it was a non-justiciable question.[292] The court argued that although *Munoz-Flores* allows review of whether a provision is a "Bill[] for raising revenue," the lack of a textually explicit germaneness requirement makes such an inquiry beyond the scope of the judiciary.[293] The court then concluded that the text of the Clause commits to Congress the ability to define the scope of the Senate's amendment power, which under the political question

289. *Id.* at 12 (citing Twin City Nat. Bank of New Brighton v. Nebecker, 167 U.S. 196, 202 (1987)) (emphasis in original).
290. *See supra* text accompanying note 172; *see also supra* notes 173–83 and accompanying text.
291. *See supra* notes 182–84 and accompanying text.
292. *Sissel*, No. 1:10-cv-01263 at 17.
293. *Id.* at 20.

doctrine and along with the Rulemaking Clause, makes the question non-justiciable, thus adopting much of my reasoning herein.

Although the *Sissel* plaintiff did not set forth the argument in his complaint (and thus the *Sissel* court did not reach it),[294] perhaps a more convincing path to unconstitutionality would be the contention that the Origination Clause applies only to revenue-*increasing* measures. Specifically, the *Sissel* plaintiff could have argued that the original House bill, H.R. 3590, did not raise revenues within the meaning of the Origination Clause, but the Senate amendment in fact did, in violation of the Origination Clause.

Although the Congressional Budget Office did not make a formal revenue estimate of the shell bill, the bill was almost certainly revenue-neutral. This is because statutory and internal pay-as-you-go rules require that tax cuts be offset by tax increases or spending cuts.[295] The House bill gave tax breaks to members of the military. According to the bill's executive summary, it offset those costs with an increase in filing penalties as well as the amount of required corporate estimated tax payments.[296] Although it is possible that those provisions would have brought in more revenue than the military tax breaks, it is very unlikely given their express designation as revenue offsets. Even if the plaintiffs cannot prove revenue neutrality, Congress intended the bill to be revenue neutral. During the debates of the bill, several members expressed that their support, in part, was based on its revenue-neutrality.[297]

In contrast to the shell bill, the Senate's amendment *increases* revenues. The Congressional Budget Office estimated that the amended bill would reduce federal deficits by $118 million over the 2010–2019 period,[298] and the Joint Committee on Taxation estimated that its

294. Amended Complaint for Declaratory Judgment and Injunctive Relief, Sissel v. U.S. Dep't of Health & Human Servs., No. 1:10-cv-01263 (D.D.C. Sept. 10, 2012).

295. Kysar, *supra* note 152.

296. H.R. 3590: SERVICE MEMBERS HOME OWNERSHIP TAX ACT OF 2009, LEGISLATIVE DIGEST, *available at* http://www.gop.gov/bill/111/1/hr3590 (describing the increase in penalties and estimated tax payments as offsets to the cost of the tax credit extension).

297. 155 CONG. REC. H10551 (daily ed. Oct. 7, 2009) (statement of Rep. John Tanner characterizing the bill as "completely bipartisan and, more importantly, or as importantly, fully paid for"); 155 CONG. REC. H10552 (daily ed. Oct, 7, 2009) (statement of Rep. Ron Kind that the bill "will not add a nickel to our national deficit"); 155 CONG. REC. H10552 (daily ed. Oct. 7, 2009) (statement of Rep. Bob Etheridge indicating that the bill is fully paid for); 155 CONG. REC. E2459 (daily ed. Oct. 6, 2009) (statement of Rep. Al Green discussing revenue neutrality of bill).

298. CONGRESSIONAL BUDGET OFFICE, LETTER TO SENATOR HARRY REID PROVIDING REPORT OF COST ESTIMATE OF H.R. 3590, PATIENT PROTECTION AND AFFORDABLE CARE ACT (Mar. 11, 2010), *available at* http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/113xx/doc11307/reid_letter_hr3590.pdf.

revenue-related provisions would increase revenues by nearly $400 billion in that period.[299] As discussed above, however, this argument is also unpersuasive, and the Court would likely refrain from interpreting revenue-*raising* to mean solely revenue-*increasing* or to prevent the Senate from altering the revenue impacts of House bills through its amendment power. As a substantive constitutional matter and discussed in this Article, text, history, and precedent support Congress's interpretation that the Origination Clause encompasses revenue-*related* bills. They also support an amendment power unlimited by the revenue impact of the amendment. These interpretations of the Senate's amendment power are also grounded in theories of judicial review and institutional considerations, as discussed throughout this Article. Accordingly, the argument under the Origination Clause asserting the unconstitutionality of the Senate's shell bill strategy, which it used to enact the individual mandate, should fail.[300]

CONCLUSION

The Court has long deferred to Congress in matters of taxation. Its willingness to police the Origination Clause seems contrary to this general deference. In actuality, the Court interprets the Clause in a manner that avoids intrusion into the legislative process, thus continuing the view that Congress, rather than the judiciary, is the proper audience to address unfair taxation. These decisions also confirm that the general legislative purview over procedure is very much alive, and for good reason. Theories of judicial review and longstanding conceptions of the lawmaking power necessitate such a result. Indeed, separation of powers concerns may justify a general interpretive method whereby courts construe ambiguous

299. JOINT COMM. ON TAXATION, ESTIMATED REVENUE EFFECTS OF THE MANAGER'S AMENDMENT TO THE REVENUE PROVISIONS CONTAINED IN THE "PATIENT PROTECTION AND AFFORDABLE CARE ACT" (Dec. 19, 2009).

300. Although I predict the failure of the Origination Clause challenge against the Affordable Care Act, the legislative avoidance doctrine proposed herein would readily dismiss two arguments advanced by the Government in the challenge. First, the Government argues that because language similar to the individual mandate originated and was passed in the House in another bill that never became law, this somehow cures the constitutional defect. Defendant's Motion to Dismiss Plaintiff's Amended Complaint, Sissel v. U.S. Dep't of Health & Human Servs., 1:10-cv-01263 at 7 n.2 (D.D.C. Nov. 8, 2012). Such an argument would require the Court to decide the similarity of the substance of the two bills, a task outside its judicial competence. Second, the Government argues that the second piece of health care reform, the Health Care and Education Reconciliation Act of 2010, began in the House and represented the House's implicit acceptance of the already passed Affordable Care Act. *Id.* This argument would also necessitate the performance of a non-judicial task by requiring it to assess the germaneness between the later enacted statute and the earlier one.

constitutional provisions in a manner that avoids searching review of the legislative process. Given its entanglement with congressional procedure and its textual deference to Congress, the Origination Clause is a convincing context for this legislative process avoidance doctrine.

As a practical matter, this understanding of the Court's jurisprudence under the Origination Clause predicts and prescribes deference to the Senate's expansive interpretation of its power to amend revenue legislation, which in turn is supported by constitutional text, history, and precedent. Perhaps fittingly given the democratic origins of the Clause, the most viable recourse left in challenges to shell bills is a repeal by the most accountable branches, rather than an appeal to the least accountable one.