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Critical Legal Issues: WORKING PAPER SERIES

THE WRONG HOUSE:
WHY "OBAMACARE" VIOLATES THE U.S. CONSTITUTION'S ORIGINATION CLAUSE

by
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Hans G. Tanzler IV

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Will the United States remain a *constitutional* Republic . . . or will it not? Multiple pending tax challenges to the PATIENT PROTECTION AND AFFORDABLE CARE ACT[1] (ACA) prompt that compelling question. Absent its tax provisions, the ACA fails constitutional muster; but with them, this WLF WORKING PAPER argues, the ACA violates other important constitutional restrictions governing tax legislation—and must be struck down if the U.S. Constitution's Origination Clause is to be upheld.[2]

I. INTRODUCTION

When the United States Supreme Court upheld the Affordable Care Act in *NFIB v. Sebelius* in 2012,[3] finding it consistent with the taxing power,[4] albeit inconsistent with the Commerce Clause,[5] it necessarily brought the constitutional requirements for a revenue bill into play. As explained in a hugely significant passage of the Court's opinion, the taxing power is subject to *multiple* "requirements."[6] The Court did not list them, but they include:

[1] PATIENT PROTECTION AND AFFORDABLE CARE ACT, Pub. L. No. 111-148, § 1501, 124 Stat. 119 (2010).

[2] U.S. CONST. art. 1, § 7, cl. 1 ("All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.").

[3] *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012).

[4] *Id.* at 2594.

[5] *Id.* at 2585.

[6] *Id.* at 2598 (emphasis added).

1. Taxes, *arguably*, must be for the general welfare.[7]
2. Direct taxes must be apportioned.[8]
3. Income taxes must be laid upon "income" "from" a source "derived."[9]
4. Excises, duties, and imposts must be uniform.[10]
5. Bills for the raising of revenue "shall originate" in the House, subject to Senate "Amendments."[11]

The Court dealt with the first three restrictions. The ACA satisfies the general welfare clause[12] and is not "any recognized category" of direct tax.[13] As a result, the tax need not be apportioned and the Sixteenth Amendment cannot justify it because it is not a tax on income.[14] However, that still leaves two other potential challenges: origination and uniformity.[15]

The U.S. Court of Appeals for the D.C. Circuit disregarded the Origination Clause in its 2014 *Sissel v. HHS* ruling.[16] As a result, it failed to enforce the constitutional mandate therein: "All Bills for raising Revenue shall originate in the House of Representatives; but the

[7] U.S. CONST. art. 1, § 8, cl. 1 provides: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."

[8] U.S. Constitution article 1, § 2 requires that capitation and other direct taxes be "apportioned" among the several states. In contrast, article 1, § 9 requires direct taxes be "in Proportion to the Census." The Sixteenth Amendment removed the apportionment requirement for taxes on income derived from any source.

[9] U.S. CONST. amend. XVI.

[10] U.S. CONST. art. 1, § 8, cl. 1.

[11] U.S. CONST. art. 1, § 7, cl. 1.

[12] *Cf. NFIB*, 132 S. Ct. at 2604 (2012) (Roberts, C.J., concurring) (appearing to apply the general welfare requirement only to the Spending Power); *id*. at 2628 (Ginsburg, J., concurring).

[13] *Id*. at 2599.

[14] *NFIB,* 132 S. Ct. at 2598; *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 618 (1895) (explaining that the earlier *Pollock* decision, *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), only applied to income from land but the second decision expanded it to all forms of income earned by individuals).

[15] This paper considers only one of these challenges: the Origination Clause. The other constitutional requirement that the ACA violates is the uniformity requirement.

[16] *Sissel v. HHS*, 760 F.3d 1 (D.C. Cir. 2014).

Senate may propose or concur with Amendments as on other Bills."[17] This WLF WORKING PAPER considers the Origination Clause in detail, concluding the ACA fails to meet that essential constitutional requirement.

A. The Supreme Court's Origination Tests

In addition to the D.C. Circuit's rejecting an origination challenge to the ACA, the U.S. District Court for the Southern District of Texas rejected an ACA origination challenge last year in *Hotze v. Sebelius*.[18] Both courts mistakenly held that the Origination Clause applies only if the "primary purpose" of the act was to raise revenue. Each court incorrectly cited Supreme Court decisions in support of that theory. In fact, the Supreme Court has never used a "primary purpose" test for origination inquiries. Instead, the Supreme Court applies five inter-related origination tests, which are incompatible with the *Sissel*/*Hotze* "primary purpose" test. A review of these tests will lay the groundwork for a proper analysis of the ACA's validity under the Origination Clause.

1. Tax Test: *If the act includes a tax, an origination inquiry is warranted*.

Justice Joseph Story authored COMMENTARIES ON THE CONSTITUTION, an oft-cited and oft-praised book analyzing the Constitution. With regard to origination, Story said and the Court in *United States v. Norton*[19] quoted: "[Revenue bills are those] to levy taxes in the strict sense of the word, and ha[ve] not been understood to extend to bills for other purposes which incidentally create revenue."[20]

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[17] U.S. CONST. art. 1, § 7, cl. 1.

[18] *Hotze v. Sebelius*, 991 F. Supp. 2d 864 (2014).

[19] *United States v. Norton*, 91 U.S. 566 (1876).

[20] 1 J. Story, COMMENTARIES ON THE CONSTITUTION § 880, pp. 610-611 (3d ed. 1858). The complete passage was:

§ 877. What bills are properly 'bills for raising revenue,' in the sense of the constitution, has been

2. Incidental Test: *If the tax raises more than incidental revenue, the origination inquiry is justified*.

Justice Story laid the foundation for the Incidental Test in the passage quoted above, but the Court developed it more fully in *United States v. Munoz-Flores*.[21] In 1990, the Court upheld the Victims of Crime Act of 1984[22] against an origination challenge. The act imposed a $25 "special assessment" on persons convicted of federal misdemeanors. The statute dedicated[23] the monies to the Crime Victims Fund; hence, it did not raise *general* revenues for appropriation. The significance of dedicated funds is discussed below. Indeed, the act required the Treasury to maintain a separate fund to be used to compensate crime victims.

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matter of some discussion. A learned commentator supposes, that every bill, which indirectly or consequentially may raise revenue, is, within the sense of the constitution, a revenue bill. He therefore thinks, that the bills for establishing the post-office, and the mint, and regulating, the value of foreign coin, belong to this class, and ought not to have originated (as in fact they did) in the senate. [2 Elliot's Debates 283-284]. But the practical construction of the constitution has been against his opinion. And, indeed, the history of the origin of the power, already suggested, abundantly proves, that it has been confined to bills to levy taxes in the strict sense of the words, and has not been understood to extend to bills for other purposes, which may incidentally create revenue. [2 Elliot's Debates 283-284]. No one supposes, that a bill to sell any of the public lands, or to sell public stock, is a bill to raise revenue, in the sense of the constitution. Much less would a bill be so deemed, which merely regulated the value of foreign or domestic coins, or authorized a discharge of insolvent debtors upon assignments of their estates to the United States, giving a priority of payment to the United States in cases of insolvency, although all of them might incidentally bring, revenue into the treasury.

[21] *United States v. Munoz-Flores*, 495 U.S. 385 (1990).

[22] 18 U.S.C. § 3013.

[23] 42 U.S.C. § 10601 provides:

(a) Establishment

There is created in the Treasury a separate account to be known as the Crime Victims Fund (hereinafter in this chapter referred to as the "Fund").

(b) Fines deposited in Fund; penalties; forfeited appearance bonds

Except as limited by subsection (c) of this section, there shall be deposited in the Fund—

***

(2) penalty assessments collected under section 3013 of title 18;

With regard to the Incidental and Tax Tests, the Court stated:

> Both parties agree that 'revenue bills are those that levy taxes in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue.' *Twin City Bank v. Nebeker,* 167 U.S. 196, 202 (1897) (citing 1 J. Story, Commentaries on the Constitution § 880, pp. 610-611 (3d ed. 1858)). The Court has interpreted this general rule to mean that a statute that creates a particular governmental program and that raises revenue to support that program, as opposed to a statute that raises revenue to support Government generally, is not a 'Bil[l] for raising Revenue' within the meaning of the origination Clause.[24]

Significantly, the "special assessment" was an excise on the court process, which—as the parties correctly stipulated—was a tax. Two pages later, the Court concluded its Incidental Test and Dedication Test analyses, finding the small amounts of general revenues to be very small—a mere 0.28%. The Court stated, "any revenue for the general Treasury that § 3013 creates is thus 'incidenta[l]' to that provision's primary purpose."[25]

3. Dedication Test: *If a bill raises revenue for general appropriations, rather than for a dedicated account, it is subject to an origination challenge*.

In 1897, the *Nebeker*[26] Court upheld an act creating a national currency and imposing a "duty"[27] on state-chartered banks. *Nebeker* developed the Dedication Test, which was first espoused in *United States v. Norton*.[28] If the statute dedicates funds to a specific account, then they are not available "to be applied in meeting the expenses or obligations of the Government."[29] Because the statute in *Nebeker* dedicated the funds to a redemption account, the funds were unavailable for general appropriations. Although *Norton* seemed to

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[24] *Munoz-Flores*, 495 U.S. at 397-98.

[25] *Id.* at 399.

[26] *Twin City Bank v. Nebeker*, 167 U.S. 196 (1897)

[27] 13 Stat. 99, 111, c. 106. *Nebeker* 167 U.S. at 200.

[28] *United States v. Norton*, 91 U.S. 566 (1876).

[29] *Nebeker*, 167 U.S. at 203.

rely on "functional"[30] dedication as a relevant factor, *Nebeker* held it to be critical. Thus the funds must be available to the general treasury to be subject to an origination inquiry.

Additionally, the 1990 *Munoz-Flores* Court viewed the existence of the dedicated fund as critical for an origination inquiry. The Court minimized the possibility of excess funds being available as general revenues for appropriation, explaining that excesses were intermittent and "incidental."[31] In the eyes of the Court, such dedicated funds are not revenues for purposes of the Origination Clause.[32]

4. Germaneness Test: *If the Senate amendments to the House tax are "germane," the origination challenge fails*.

The Court in *Rainey v. United States*[33] and *Flint v. Stone Tracy Co.*[34] developed this test. In 1911, the *Flint* Court considered the constitutionality of a tax on corporate income. The Court did not discuss the Tax, Dedication, or Incidental Test. All parties agreed that this was a tax of some sort (the Court ultimately upheld it as an excise) and thus clearly a tax that raised more than incidental funds available for the general treasury.

Instead the Court utilized a Germaneness Test. The House originally passed the Tariff Act of 1909 to create an inheritance tax. The Senate amended the Act by stripping out the inheritance tax and replacing it with a tax on corporations. Thus, the Court examined whether the Senate amendment was sufficiently germane to the House version. In analyzing the two versions, the Court asked three questions:

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[30] The *Norton* decision was very early in our tax system. The Court effectively foreshadowed the Dedication Test. The funds in question were not explicitly dedicated but the Court noted that the funds were to be used to pay for the Postmaster General's salary. Twenty-two years later the *Nebeker* Court required formal dedication to trigger the Dedication Test.

[31] *Munoz-Flores*, 495 U.S. at 399.

[32] *Id.*

[33] *Rainey v. United States,* 232 U.S. 310 (1914).

[34] *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911).

1) Was the inheritance tax portion of the bill passed by the House "for raising revenue"?
2) Was the corporate tax passed by the Senate "for raising revenue"?
3) Was the Senate amendment to the House bill "germane" to the purpose of the House bill?

The Court concluded yes to all three questions. It determined that the Senate version was also a tax, which would result in increased revenues, and both versions comprised excises (one on inheritance, the other on corporate income) that require the same taxing power restriction of uniformity.

> **5. Isolation Test:** *The Court, applying the Incidental and Germaneness Tests, isolates the tax from the remainder of the House Bill and Senate amendments*.

The Court in *Rainey* explored both the Germaneness Test above as well as the Incidental Test. *Rainey* involved another tax amendment from the Tariff Act of 1909 that imposed an excise on foreign-built yachts. The Court examined the particularities of the excise through the lens of the four previously created origination tests. It never considered the "over-arching" purpose of the Act. Furthermore the Court did not even cite *Flint*, as it felt that it dealt with an entirely separate part of the Act. The Court analyzed the challenged amendment in *isolation* from the rest of the bill.

B. Introduction to the Analysis

With the five tests now laid out, this paper will next analyze the ACA and explain whether it is subject to the Origination Clause, and if so, whether it meets the precepts of the Origination Clause. First the paper will briefly explain the process underlying the ACA's passage. Then it will break down the House version of the bill to see if that version is a "Bill for raising Revenue" as discussed in *Flint*. The paper will next analyze whether the Senate version was a "Bill for raising Revenue." The analysis concludes that the House Bill was not a

revenue-raising bill but the Senate Bill was, so that the ACA violates the Origination Clause.

The paper will then assess the two ongoing origination challenges against the ACA. The first is the D.C. Circuit's *Sissel v. HHS* case.[35] The second is *Hotze v. Sebelius*, which is on appeal before the Fifth Circuit.[36] Both cases utilized flawed reasoning and misapplied the Supreme Court origination tests—and thus must be reversed on appeal.

II. ANALYSIS OF THE AFFORDABLE CARE ACT

A. Brief Procedural History of the ACA

The ACA passed the House by a procedural method that legal scholars refer to as the "Shell Bill" game.[37] The entire purpose of the game is to subvert the Origination Clause. It is played first by the House, which passes a bill it believes raises revenue. The bill is generally very short and is passed for the sole purpose of being amended by the Senate, or in the ACA's case, entirely replaced. The bill is then sent to the Senate, which treats it as a shell. In theory, the shell bill raises revenue but bears no relationship to the final Act. The Senate can then gut the entire bill and replace it with it its own version. This "amended" version of the bill is then sent back to the House and ultimately to the President for signature.

The game accomplishes two things. First it allows the Senate to functionally originate tax law in its house because the House has satisfied the origination requirement by passing a shell bill to raise revenue. Second, by passing the burden on to the Senate, the game arguably protects the House from having to make difficult political decisions. Congress no

[35] *Sissel v. HHS*, 760 F.3d 1 (D.C. Cir. 2014). On October 9, 2014, the Petitioner filed a request for rehearing *en banc* in the D.C. Circuit (http://blog.pacificlegal.org/wp/wp-content/uploads/2014/10/Petition-for-Rehearing-En-Banc1.pdf).

[36] *Hotze v. Sebelius*, 991 F. Supp. 2d 864 (2014)

[37] Rebecca M. Kysar, *The 'Shell Bill' Game: Avoidance and the Origination Clause*, 91 WASH. U. L. REV. 659 (2014).

doubt thought it had worked the Shell Bill game to perfection when pursuing passage of the ACA. The House passed House Bill 3590, entitled "Service Members Home Ownership Tax Act of 2009." The Senate, for its part, believing the House had created a bill for raising revenue, took the bill and completely gutted it, replacing it with the 2000-plus page ACA.

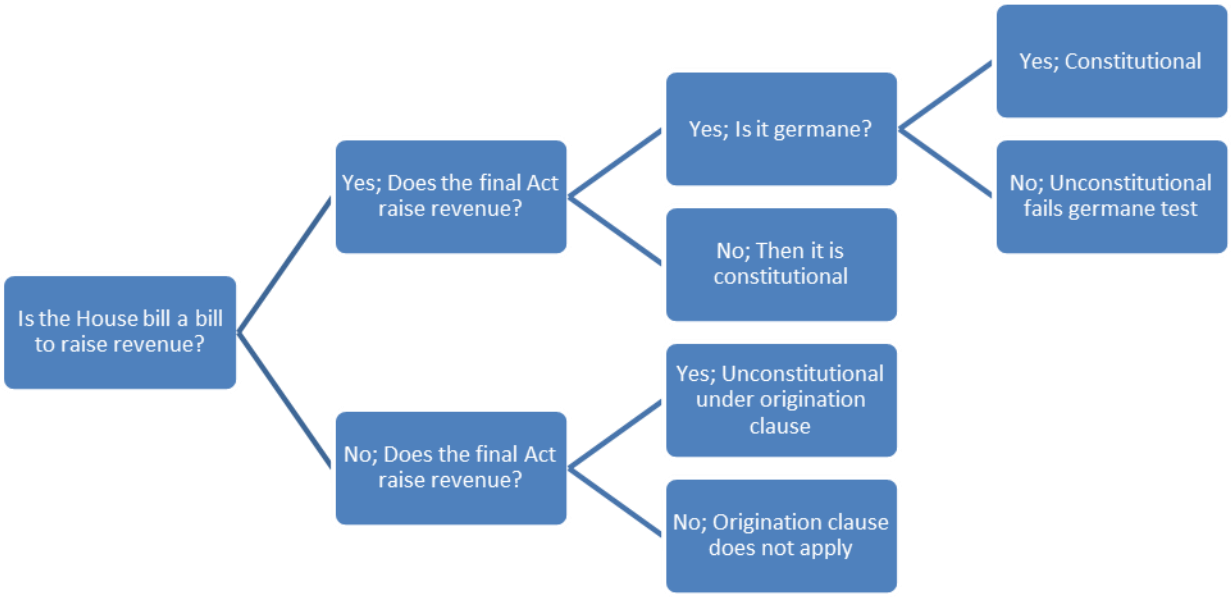
However, one crucial caveat to playing this game is that the shell bill *must* be a bill for raising revenue; otherwise the Senate has no constitutional ground to stand on if it replaces the shell with a tax bill. Unfortunately for the Congress that passed the ACA, HB 3590 was not a bill to raise revenue; therefore the Senate, which according to Chief Justice Roberts' opinion in *NFIB v. Sebelius* imposed a tax with the ACA, improperly originated a bill for raising revenue. And, to uphold the Constitution, the federal courts must strike it down.

B. Applying the Origination Tests to the ACA

To best analyze HB 3590 the Court's three-part origination framework in *Flint* can be applied here:

1. Was House Bill 3590 a "Bill for raising Revenue"?
2. Was the Affordable Care Act a "Bill for raising Revenue"?
3. Were the changes made by the Senate to the original House Bill "germane" "Amendments," or did they so gut the original bill as to constitute a new bill?

The three questions both partially overlap and are interdependent. They create a decision-tree with five possible outcomes:



- The House Bill and ACA raise revenue, albeit differently, and Senate amendments are germane. The law would be constitutional under the Origination Clause.
- The House Bill and ACA raise revenue, albeit differently, but Senate amendments are not germane. The law would be *un*constitutional by violating the Origination Clause.
- The House Bill "raises revenue" but the ultimately-passed ACA does not, so the Origination Clause would not apply.
- The House Bill does not "raise revenue" but the ACA, as amended by the Senate, does raise revenue. The law would be *un*constitutional because Senate amendments would necessarily be non-germane and thereby violate the Origination Clause.
- Neither the House Bill nor the ACA raises revenue, so the Origination Clause would not apply.

C. Was HB 3590 a Bill to Raise Revenue?

The discussion below will reveal that the ACA falls into the fourth category, which means it is unconstitutional. HB 3590 contained no taxes "in the strict sense of the word," as Justice Story put it. Instead, it proposed uses of Congress's spending power, borrowing power, and limited police power. Because HB 3590 was thus not a "Bill for raising Revenue," it was not a proper vehicle for the Senate to use as a shell bill.

HB 3590 was the original six-page bill passed by the House. It contained six sections:

1. The title of the Bill.
2. Waiver of a homebuyer's credit recapture for military personnel.
3. Extension of the homebuyer's credit to military personnel.
4. Exclusion from gross income for military base realignment compensation.
5. Increase in penalties for failure to file S Corporation and partnership returns.
6. Change in the timing of some corporate tax deposits.

1. HB 3590 Section 1

The title section is irrelevant in a substantive origination analysis, as it is a mere title. It is not a tax, and the title itself raises no revenue. The original title, "Service Members Home Ownership Tax Act of 2009," does suggest something about the House's view of the bill though, by using the term "Tax." But that use cannot be conclusive regarding the nature of the bill for two reasons. First, if Congress's denomination were controlling, the Origination Clause would have no teeth: the Senate could evade an origination challenge by either labeling a bill a "tax for raising revenues" or by amending a similarly denominated House Bill. The Court in *Munoz-Flores* considered—and rejected—such strategies. The Court found origination challenges did not implicate political questions and thus held them to be within the judiciary's province. Second, the *NFIB v. Sebelius* Court specifically held that the congressional denomination of the Affordable Care Act as a tax or as a non-tax was not controlling. Chief Justice Roberts found it significant for application of the Anti-Injunction Act, but not determinative for deciding the constitutional significance.[38]

[38] *NFIB*, 132 S. Ct. at 2594-95: "Congress knew that suits to obstruct taxes had to await payment under the Anti–Injunction Act; Congress called the child labor tax a tax; Congress therefore intended the Anti–Injunction Act to apply. In the second case, however, we held that the same exaction, *although labeled a tax, was not in fact authorized by Congress's taxing power*. *Drexel Furniture,* 259 U.S. at 38, 42 S. Ct. 449. *That constitutional question was not controlled by Congress's choice of label*.'" (Emphasis added).

2. HB 3590 Section 2

Section 2 *waived* a credit recapture provision. This provision fails to create a bill for raising revenue for three reasons:

1. It involves a credit, not a tax.
2. It decreases rather than increases revenue.
3. It is an exclusion rather than a tax.

Internal Revenue Code § 36(f) imposes what it refers to as a "tax" on some taxpayer principal-residence dispositions. The "tax" is a function of prior credits. Early disposition triggers recapture of the prior credit and thus an increase in what the taxpayer owes. HB 3590 proposed a recapture *waiver* in some cases involving members of the armed forces. It thus proposed *decreasing* revenues rather than *raising* them. At best, it excluded certain persons from a "tax" instead of applying a tax. That aspect alone creates doubt regarding whether the section was a "Bill for raising Revenue."

Some commentators suggest "all changes to the tax code are within the origination rule."[39] Even following such a broad reading, however, § 2 of HB 3590 was not a *tax* for raising revenue: it was not a *tax* at all in the "strict sense" of the Constitution. Much of the Internal Revenue Code involves penalties, either civil or criminal, which do not constitute taxes in the "strict sense," as required by *Norton*, *Nebeker*, *Millard*,[40] and *Munoz-Flores*. *NFIB v. Sebelius*, for example, found Subchapter 68B penalties to be "taxes" for purposes of the Anti-Injunction Act, but not for purposes of the Constitution.

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[39] Rob Natelson, *Did Obamacare Violate the Constitution's Origination Clause? No…and Yes*, American Thinker (Aug. 5, 2014); http://www.americanthinker.com/2014/08/did_obamacare_violate_the_constitutions_origination_clause_no__and_yes.html.

[40] *Millard v. Roberts*, 202 U.S. 429 (1906).

Also, much of the Code involves credits—in particular § 36 (the subject of HB 3590 § 2)—which are subject to limitations on Congress's spending power, rather than on its taxing power.[41] Many credits, for instance, have limited geographic reach.[42] If they were subject to taxing power constitutional restrictions, they would fail: they are not direct taxes subject to apportionment and cannot satisfy the alternative "indirect tax" uniformity requirement.

I.R.C. § 36 allows the first-time homebuyer credit. Subsection 36(f) (the specific subject of HB 3590) imposes recapture of the credit for early disposition. Though facially denominated a "tax," it is better viewed as a refund paid to the United States—or negative spending. Indeed, the recapture is essentially contractual: Congress grants a benefit, but on the condition that the recipient will repay the benefit in case of a breach.[43]

For example, Congress can appropriate funds to build a road or to fund a research grant at a university. Each case involves spending. Undoubtedly, each would involve a written contract with breach provisions. If construction were delayed, or proved faulty, the United States could seek a refund of appropriated funds. A similar provision would also appear in any research grant. Refunds resulting from contractual provisions would increase funds available to the Treasury and thus for appropriation; however, calling them "revenues" would be a stretch and calling them "taxes" even more so. Subjecting them to an origination challenge would seem frivolous. Significantly, the Supreme Court has often

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[41] Steven J. Willis & Nakku Chung, *Credits vs. Taxes: The Constitutional Effects on the Health Care Reform Debate,* (May 20, 2011). WASHINGTON LEGAL FOUNDATION WORKING PAPER No. 176. Available at SSRN: http://ssrn.com/abstract=1848403 (explaining at pages 6-10 that credits and exclusions are subject to Congress's spending power rather than its taxing power).

[42] *E.g.*, I.R.C. §§ 1396 (empowerment zone employment credit); 1400N(c)(2) (credit limited to persons in Texas and Florida), (h) (rehabilitation credit limited to the "Gulf Opportunity Zone").

[43] *See* Steven J. Willis, *The Tax Benefit Rule: A Different View and Unified Theory of Error Correction*, 42 U. FL. L. REV. 575, 621 (1990) (explaining how an investment tax credit recapture provision is best viewed as a "broken promise" and thus akin to a contractual breach).

referred to the Spending Clause as essentially "contractual." In 2012, Chief Justice Roberts explained: "We have repeatedly characterized . . . Spending Clause legislation as 'much in the nature of a *contract*.'"[44] The Chief Justice was citing to and quoting from two cases that dealt with conditional grants to states. Recapture provisions accompanying credits likewise fulfill a contractual purpose. More importantly, HB 3590 § 2 did not impose a recapture; instead, it *waived* a recapture. It thus was an exclusion, a bill that proposed *not* to tax something and *not* to raise revenue. Calling such a bill one to raise revenue is problematic.

The express language of the Constitution refers to "raising Revenue." None of the six Supreme Court origination decisions dealt with provisions that would decrease rather than increase revenues. Furthermore, all four Supreme Court cases squarely addressing the issue applied the Incidental Test, which requires the act in question to raise more-than-incidental revenue for it to be subject to an origination challenge. Indeed, in *Munoz-Flores*, the Court found the amount of revenue in most years to be zero and in other years to be almost trivial, so that the Court deemed it "incidental" and thus not subject to origination. If zero is too little to satisfy "raising Revenue," one is hard-pressed to view *decreases* in revenue as sufficient. In conclusion, HB 3590 § 2 did not involve a tax and did not form a "Bill for raising Revenue." As such, it could not make HB 3590 a proper vehicle for germane Senate amendments that themselves raise revenue.

3. HB 3590 Section 3

Section 3 proposed extending the § 36 homebuyer's credit to some military personnel. As a credit, it was not a tax; instead, it involved spending. Also, it would have raised no revenue; instead, it would have decreased revenue.

[44] *NFIB*, 132 S. Ct. at 2602 (emphasis in the original).

4. HB 3590 Section 4

Section 4 proposed to exclude from gross income some military fringe benefits related to base closures and realignments. Exclusions from a tax are not themselves taxes; instead, they are *spending*. Congress closed bases and re-assigned military personnel. Some of those persons likely took advantage of an earlier homebuyer's credit; however, because of the base closures and reassignments, they faced recapture of benefits. Congress chose to appropriate funds to assist with the relocations. It wanted neither the relocation funds taxed nor the credits recaptured. Thus, it chose to exclude them, essentially as part of the relocation appropriation. Hence, § 4 did not create a "Bill for raising Revenue" and could not make HB 3590 into a suitable vehicle for Senate amendments that raise revenue.

5. HB 3590 Section 5

Section 5 proposed to increase revenue, but by way of a fine for unlawful behavior: late filing of S corporation and partnership returns. As such it was not a tax.[45] The House did not pass HR 3590 § 5 for the purpose of raising general revenues, but rather to prevent or to punish unlawful behavior. That would be an exercise of Congress's limited police power, rather than its taxing power. The provision increased failure-to-file fines on partnership and S returns from $89 to $110. It was not a tax, as the provision was an amendment to Subchapter 68B of the Internal Revenue Code, which covers non-tax penalties.

In *NFIB*, the Supreme Court considered whether § 5000A constituted a tax under the Constitution and also under the Anti-Injunction Act. Section 5000A appears in Chapter 48 of the Internal Revenue Code, which generally comprises excise taxes. Section 5000A(g)(1)

[45] *See NFIB*, 132 S. Ct. at 2595-96 (Roberts, C. J., discussing the characteristics of a penalty versus a tax and citing *Bailey* v. *Drexel Furniture*, 259 U.S. 20 (1922)).

provides the "penalty" "shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68." As the Supreme Court explained, Subchapter 68B penalties are not taxes in the constitutional sense; however, they are taxes for purposes of the statutory Anti-Injunction Act. But, as the Court also explained, "treating" § 5000A as a Subchapter 68B penalty for purposes of assessment and collection does not make it a penalty. To the contrary, the Court held § 5000A to impose a tax. Because § 5 proposed a Subchapter 68B penalty, it was not a tax "in the strict sense of the word." Thus, it too could not constitute a revenue-raising bill.

6. HB 3590 Section 6

Section 6 proposed to alter federal borrowing—authorized by Article I, § 8 of the Constitution—but it did not affect revenues,[46] let alone "raise" them, and also was not an exercise of the taxing power. The section proposed altering "corporate estimated tax payments." In reality, corporations and individuals make estimated tax "deposits," which are mere loans. The relevant amounts do not become "taxes" until assessment, which occurs upon the filing of the annual return—generally March 15 for corporations and April 15 for individuals.[47] In the meantime, the mere deposits bear no interest and are subject to various procedural rules that do not apply to tax payments.[48] Hence, § 6 involved

[46] For accounting purposes, this provision would best be viewed as affecting cash flows and not income. In accounting parlance, revenues are a type of income, but borrowing is not. Cash-flow Statements and Income Statements are both important, but they serve different accounting and financial purposes.

[47] Steven J. Willis & Nakku Chung, *No Healthcare Penalty? No Problem: No Due Process*, 38 AM. J. LAW & MED. 516, 534-35 (2012) (explaining the consequences of "estimated tax payments" actually being "deposits" rather than payments).

[48] I.R.C. § 6211(b)(1) refers to "estimated tax payments" as "payments on account of" tax, as opposed to payments of tax; however, it disregards estimated "payments," as well as amounts withheld for purposes of determining a deficiency I.R.C. § 6211(b)(1) (2010). Essentially, the amounts are deposits potentially subject to reapplication. Per § 6315, they are "payments on account" of the underlying tax. I.R.C. § 6315 (1986). They become payments of the underlying tax upon the filing of the return, when they are "applied against the tax shown on such return." Treas. Reg. § 301.6315-1 (1954). Interest on refunds runs from the date of "payment"

borrowing, not taxing, and also could not constitute a revenue-raising bill.

7. Conclusion Regarding HB 3590's Status

Under the approach Justice Story advocated in his treatise, and adopted by the Supreme Court in *Norton*, *Nebeker*, *Millard*, and *Munoz-Flores*, a "Bill for raising Revenue" is necessarily a tax. As elaborated above, however, HB 3590 was not a "Bill for raising Revenue," because three of its five substantive sections involved spending, one involved borrowing, and one involved fines to prevent unlawful behavior rather than revenue for general appropriation. None of the five sections involved an exercise of Congress's taxing power. Under Story's view then, quoted by the Court in 1897 and again in 1990, HB 3590 was not a "Bill for raising Revenue" because the various provisions were not taxes in the "strict sense."

D. Was the ACA a Bill to Raise Revenue?

Of course the Supreme Court already answered this question in the affirmative in *NFIB v. Sebelius*. According to the Court, the health insurance mandate was, standing alone, unconstitutional: it violated Congress's power to regulate commerce. But, coupled with the tax as a means of enforcement, the mandate passed constitutional muster: § 5000A was deemed a tax. Application of the various origination tests confirms that the part of the ACA that imposed the § 5000A tax comprised a bill for raising revenue.

1. Applying the Supreme Court's Origination Tests

The Dedication Test need not be applied, as no evidence suggests any of the revenues raised by the various ACA taxes are "dedicated" to a particular account. However,

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until the date of refund. I.R.C. § 6611(b) (1986). Per I.R.C. § 6513, amounts attributable to withholding and to estimated "taxes" are considered paid on the last day for filing the return. In layman's language, they normally become payments on April 15.

the Tax Test, the Incidental Test, and the Isolation Test all do apply.

a) The Tax Test

The 2000-plus page Senate amendment to HB 3590 served three broad purposes. First, it imposed regulations on the medical-care industry. Second, it raised *substantial* taxes relating to health insurance and health-care devices.[49] Third, it contained miscellaneous provisions unrelated to health care, at least some of which raised revenue through the use of Congress's taxing power. As required by *Norton*, *Nebeker*, *Millard*, and *Munoz-Flores*, the Origination Clause applies to taxes in the strict sense. Chief among such taxes which the Affordable Care Act imposed was § 5000A of the Internal Revenue Code.

Much of the *NFIB* Court's opinion dealt with the technical meaning of a tax. Central to that discussion was the importance of the Anti-Injunction Act: a statute that precludes any court from enjoining the imposition of a tax. For purposes of the AIA, the Court followed Congress's designation of § 5000A as a penalty rather than a tax.[50] As a result, the Court found the AIA inapplicable. But, for purposes of the Constitution, the Court rejected Congress's designation, finding it non-controlling.

Under the Constitution, the Court held, § 5000A is a tax.[51] In contrast, the Court explained some other Internal Revenue Code provisions—specifically Subchapter 68B penalties—were indeed taxes for purposes of the ACA but not taxes under the Constitution;

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[49] Actually, according to the Supreme Court, I.R.C. § 5000A (the tax on the failure to carry minimum essential coverage) would raise "*considerable*" revenue. *NFIB*, 132 S. Ct. at 2596 (emphasis added). The D. C. Circuit, in *Sissel*, referred to this as "*substantial*" revenue. *Sissel*, 760 F.3d at 9 (emphasis added). In addition, the ACA included other taxes, *e.g.*, § 4191(a) (2.3% excise or duty on various "medical devices"), § 4980H (tax on employers offering non-conforming health insurance plans and the subject of *Burwell v. Hobby Lobby*, 134 S. Ct. 2751.), § 5000B(a) (excise on tanning booths), § 5051(a) (tax on beer for public consumption).

[50] *NFIB,* 132 S. Ct. at 2583.

[51] *Id.* at 2583-84.

instead, they were mere penalties.[52] Recall, part of HB 3590, which preceded the Senate amendments, involved a change to a Subchapter 68B penalty. To that extent, at least, the House Bill was not a tax, but the Senate amendment clearly was. Significantly, the Court held it was not "any sort" of direct tax and thus not subject to the apportionment requirement. In so holding, the Court implicitly found the tax was not justifiable under the Sixteenth Amendment: that amendment removed the apportionment requirement for an income tax, which otherwise was a direct tax, as held in *Pollack*[53] and cited by *NFIB*.

Ultimately, the Supreme Court did not identify what type of tax § 5000A imposed other than that it was not a direct tax. That leaves excises, duties, imposts, and "other" heretofore undiscovered taxes.[54] Regardless of what type of tax ACA imposed, the Court clearly held the Affordable Care Act imposed a tax and thus passed the Tax Test.

b) The Incidental Test

NFIB also established § 5000A would raise "considerable" revenues, estimated at $4 billion per year by 2017. The Court did not address other ACA taxes, as they had nothing to do with the constitutionality of the ACA. Nevertheless, those taxes were projected to raise significant revenue, as well.[55]

Munoz-Flores showed how the Court examines the Incidental Test in various ways, both absolute and relative. In absolute terms, billions of dollars of revenue hardly seems incidental. More significantly, the ACA—viewed in its entirety rather than in isolation—

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[52] *Id.*

[53] *Pollock,* 158 U.S. at 618 (1895).

[54] *Hylton v. United States*, 3 U.S. 171, 173 (opinion Chase J., 1796); *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 557 (1895).

[55] $210 billion in increased Medicare taxes; $32 billion excise tax on Cadillac health plans; Tax Foundation http://taxfoundation.org/article/how-938-billion-health-care-bill-financed (accessed 10/1/14).

would not have passed constitutional muster but for the § 5000A tax. That alone makes the tax more than incidentally important to the act. Further, as the Court explained, the health insurance mandate was, standing alone, unenforceable absent the tax. That also makes the tax essential to the bill.

Other taxes affected by the ACA were similarly "more than incidental." For example, the § 4980H tax on non-compliant health insurance plans prompted the *Hobby Lobby*/*Conestoga*[56] litigation. The government argued the need for the taxes was so compelling, it overcame First Amendment objections from the litigants. Hobby Lobby, for example, faced the choice between violating its First Amendment religious rights or suffering an annual tax of nearly $500,000,000. From the point of view of the taxpayer, the amount was ruinous. The government lost those cases, but nevertheless has little credibility when it now argues the tax was unimportant: it has litigated at least 48 cases seeking to uphold it. Other litigation continues regarding the imposition of § 4980D[57] taxes as part of the ACA, though in matters involving various religious institutions, such as *Notre Dame University*,[58] *Priests for Life*,[59] and the *Little Sisters of the Poor*.[60] Once again, the stakes are very high—potentially involving hundreds of millions of dollars in tax to be imposed on the litigants. Concluding these taxes are merely incidental is not credible.

c) The Isolation Test

The ACA—viewed as a whole—comprised a tax because the revenues were

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[56] *Hobby Lobby*, 134 S. Ct. 2751).

[57] I.R.C. § 4980D.

[58] *Univ. of Notre Dame v. Sebelius*, 988 F. Supp. 2d. 912 (7th Cir. 2013).

[59] *Priests for Life v. Sebelius*, 2013 U.S. App. Lexis 26035 (D.C. Cir. 2013).

[60] *Little Sisters of the Poor Home for the Aged v. Sebelius,* 134 S. Ct. 893 (2013). This case is pending on remand in the Tenth Circuit as *Little Sisters of the Poor Home for the Aged v. Burwell*.

substantial and the taxes were essential from both a constitutional and enforcement viewpoint. Additionally, they were substantial from the viewpoint of litigants, as well as the government. Nevertheless, that is an incorrect—or at least incomplete—analysis.

Instead, the Isolation Test requires courts to view the various taxes in isolation, as if they were stand-alone bills. Standing alone, § 5000A raised a significant amount of revenue and triggered enormous controversy, resulting in the *NFIB* opinion. Had Congress passed the tax on lacking "minimum essential coverage" as a stand-alone bill, no one would argue it was anything but a tax bill which would have to originate in the House. That is the proper perspective as shown by *Flint* and *Rainey*.

Together, all three tests—the Tax Test, the Incidental Test and the Isolation Test—lead to the inevitable conclusion that § 5000A of the Internal Revenue Code imposed a tax and thus was a "Bill for raising Revenue" under the Constitution.

E. Were the Senate Amendments Germane?

Up to this point, this paper has focused on the argument that the ACA violates the Origination Clause because the House Bill did not raise revenue and the Senate Bill did. However, as noted in the discussion of the decision tree above, there is another possible way in which the ACA could be found unconstitutional. Even if a court were to decide that the House Bill does raise revenue, it could decide that the final bill raised revenue differently and that the Senate amendments were not germane to the House Bill. Such a finding would also violate the Origination Clause and mean that the ACA is unconstitutional.

In *Flint*, the Supreme Court created and explained the germaneness requirement for Senate amendments, which Article I, § 7 allows. The Court considered the Senate action to be an appropriate amendment because it was "germane" to the House Bill. The Court did

not precisely delineate which facts were critical to its germaneness analysis, but the Court examined four important aspects of the original House Bill,[61] which provide a framework to follow:

- It imposed a variety of taxes. The Court focused on the inheritance tax which comprised approximately 2.5 pages of a 508-page bill.[62]
- The inheritance tax it imposed constituted an excise, which would be subject to the uniformity requirement.
- The tax would raise revenues.[63]
- The excise tax applied to inheritances.

The Senate stripped the House Bill of the proposed inheritance tax and replaced it with an eleven-and-a-half page tax on corporate income. The Senate added many other provisions; however, the *Flint* Court did not discuss them. The Court was unconcerned with the Tax Test, the Incidental Test, or the Dedication Test, as both the House Bill and the Senate amendments clearly met those tests; instead, the Court focused on the germaneness of the Senate action. Examining the same four factors it considered in relation to the House Bill, but now with regard to the Senate amendment, the Court found:

- It imposed a tax.
- The tax it imposed constituted an excise, which would be subject to the uniformity requirement.
- The tax would raise revenues.
- The excise tax applied to corporate income.

[61] H.R. 1438 (Tariff Act of 1909).

[62] The ultimate marked-up bill, including Senate additions and Senate strike-outs comprised 508 pages.

[63] The Court did not note this fact; however, the expectation of revenues from the proposed Inheritance Tax seems clear. Looking at the history of the bill, the Taft Administration was looking for new and creative ways to raise revenue. President Taft liked the idea of an inheritance tax as the "burden" fell on those who could afford it, however, it was ultimately struck for a corporate tax. The executive and legislature did not like the idea of the possibility of a double tax since most states had an inheritance tax in place already. *See* Editorial, The Craze for New Taxes, N.Y. TIMES, June 16, 1909; Taft Sees a Hope of Reduced Duties, N.Y. TIMES, June 20, 1909.

Though not stated, the inheritance tax portion of the Tariff Act of 1909 was a complicated inheritance tax. Similarly, the Senate Amendments involved a complicated corporate tax. The Court found the change from an excise on inheritance to an excise on corporate income to be germane. Both houses of Congress sought to impose a tax, which would raise revenue, and both sought to use the vehicle of an excise—they merely disagreed as to the object of the tax.

The passage of the Affordable Care Act presents a significantly different factual situation than the Court addressed in *Flint*. The following facts, when considered in the context of the *Flint* Germane Test, reflect that the Senate amendments were not germane to HB 3590:

- The House Bill did not raise revenue. The Senate Bill, as the Supreme Court held in *NFIB*, raised a "considerable" amount of revenue.

- The House Bill did not involve a tax. The Senate Bill, as the Supreme Court held in *NFIB*, imposed a tax;[64] indeed, constitutionality of the Affordable Care Act hinged on the Court's finding it to be a tax.

- The House Bill involved a credit, an exclusion, a waiver of a credit recapture, a fine, and some borrowing. In contrast, the Senate Bill involved what is likely a newly discovered type of tax—one speculated about in the 1796 *Hylton* decision as well in the 1895 *Pollack* decision (both relied upon by the Supreme Court in *NFIB*).

- The House Bill, though undoubtedly important to its proponents, was brief: Two pages comprised the title or the cover sheet. Over five pages involved benefits for military personnel. Part of one page involved a very small penalty increase for partnerships and S corporation late filings, and part of that same page involved a very short change in the timing of corporate estimated deposits. Nothing remotely concerned health care, regulating health care, raising taxes on medical equipment, tanning booths, or raising a newly discovered type of tax on the lack of health insurance. In contrast, the Senate amendments added more than 2000 pages of very complicated material regulating the health care system and imposing a host of taxes to support the regulation. In *Flint*, both bills were facially similar. Here they are not.

[64] *NFIB,* 132 S. Ct. at 2600.

- Viewed in isolation, the § 5000A tax comprised six pages and looked nothing like any of the House Bill provisions it replaced. It differed in subject matter, length, complexity, its nature of being a tax, its nature of being a newly discovered type of tax, and in its purpose: raising money rather than spending it.

- In short, the Senate amendments were not germane.

III. PENDING AFFORDABLE CARE ACT CASES

A. *Sissel v. HHS*

The *Sissel* Court never reached the germaneness question because it incorrectly concluded that the Act, as amended by the Senate, was not a Bill for raising Revenues."[65] Most significantly, *Sissel* collapsed the Incidental Test into the Tax Test and did so with a never-before-seen "primary purpose" gloss. According to the court, the Origination Clause applies only to bills with the "primary purpose" of raising revenue.[66] Applying that test, the court determined the primary purpose of the ACA was to regulate the U.S. health care system.[67] That analysis is flawed because it ignores the Supreme Court's Isolation Test.

Under the Isolation Test, courts must examine each taxing provision in a Senate Bill separate and apart from every other taxing provision and separate from the bill as a whole. The Supreme Court has never looked at a taxing provision and compared it to the overall act, let alone the "primary" purpose of the Act; instead, it has examined isolated taxing provisions to see if they raise more than incidental revenue and to determine whether they are germane to some portion of the original House Bill.

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[65] *Sissel*, 760 F.3d at 24-25.

[66] *Id.* at 18-19.

[67] *Id.*

As a result, the fundamental premise of *Sissel* is mistaken, as it relies on Supreme Court language taken out of context. For example, in discussing *Nebeker*, the court said:

> [T]he issue was whether 'a tax upon the average amount of the notes of a national banking association in circulation[] was a revenue bill within the [Origination] [C]lause.' The Court observed that '[t]he *main purpose* that Congress had in view was to provide a national currency based upon United States bonds, and to that end it was deemed wise to impose the tax in question.' *Id*. at 203 (emphasis added). … And in *Munoz-Flores*, the Court noted that '[a]ny revenue for the general Treasury that [the provision imposing a special assessment on defendants] creates is … 'incidental' to that provision's *primary purpose*,' which was to provide money for a crime victims' fund.[68]

The bulk of this paragraph is incorrect. The opinion cherry-picks language from cases that focus on the Incidental Test to twist them such that they seem to support a "primary-purpose" test. Further, the Circuit Court fails to cite either *Rainey* or *Flint*, the two cases which examined—in isolation—separate parts of the Tariff Act of 1909. The 1911 *Flint* decision upholding one part of the 1909 Act was not *res judicata* or otherwise binding in a separate origination challenge to another part of the same 1909 Act. Rather, in both cases, the Supreme Court examined isolated parts of the 1909 Act in relation to similar parts of the House Bill. The Court never compared either provision to the overall "purpose" of the 1909 Tariff Act. Thus, *Sissel's* "primary purpose" test was fabricated from whole cloth.

An assessment of the "primary purpose" test the D.C. Circuit used in *Sissel* concludes that: 1) the test has no support in the Constitution or in Supreme Court decisions; 2) it is ill-advised and, if adopted, will result in an expansion of the "Shell Bill" game; and 3) even if the primary purpose test applies, the Senate bill logically comprised multiple "bills" and thus still passes the test, consistent with the Isolation Test.

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[68] *Id.* at 17-19 (citing *Munoz-Flores*, 495 U.S. at 397, 399 and *Nebeker*, 167 U.S. at 202) (emphasis added; alterations omitted).

B. *Hotze v. Sebelius*

In 2014, the U.S. District Court for the Southern District of Texas considered an origination challenge to the ACA.[69] The case is currently on appeal before the Fifth Circuit.[70] The court generally followed the Supreme Court approach and cited most of the relevant Supreme Court origination cases; however, the court mistakenly adopted a "primary purpose" test similar to the one adopted by *Sissel,* even citing *Sissel* as authority. Ultimately, the district court held the House Bill was a bill for raising revenue, the ACA was not a bill for raising revenue, and that the Senate amendments were germane. The court's reasoning was flawed on all three holdings.

1. *Hotze's* House Bill Analysis

The court incorrectly analyzed HB 3590:

> The bill that originated in the House on October 8, 2009, entitled the 'Service Members Home Ownership Tax Act of 2009,' included both revenue-raising and revenue-decreasing provisions. Indeed, the entirety of that bill concerned revenue.[71]

The court properly quoted both *Nebeker* and Justice Story with regard to the meaning of "revenue raising":

> Bills covered by the Origination Clause 'are those that levy taxes in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue.' *Nebeker, 167 U.S. at 202-03* (citing 1 Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 880 (1833)).[72]

But the court then failed to discuss the six sections of HB 3590 (other than to list them). It concluded—with no analysis whatsoever—some of the provisions were "revenue-raising"

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[69] *Hotze*, 991 F. Supp. 2d 864 (2014).

[70] Docket number 14-20039, 5th Cir.

[71] *Id.* at 884-85.

[72] *Id.* at 879.

and some were "revenue-decreasing." None of the six provisions constituted a tax in the "strict sense of the word" as the district court itself required as the essential element for "revenue-raising." The *Hotze* Court merely assumed its conclusion on this issue: that the House Bill concerned "taxes" in the strict sense. It correctly cited *Nebeker*, but then failed to do the close reading those authorities required.

2. *Hotze's* ACA Tax Analysis

Hotze concluded the ACA was not itself a bill for raising revenue and thus was not subject to the Origination Clause. The analysis, however, was flawed in at least eight important ways:

First, the district court correctly quoted the Supreme Court *NFIB* decision in two places: that the § 5000A tax raises "at least some revenue"[73] and that it raises "considerable" revenue.[74] But, it ignored the numerous other taxes found in the ACA: *e.g.,* the taxes on tanning booths, beer, and medical devices. Thus the district court appears to have downplayed the "considerable" revenues that will result from the ACA.

Second, although the district court correctly cited *Nebeker* and Story in relation to the Incidental Test, the court preceded the quotation with an inaccurate statement: "In its Origination Clause jurisprudence, the Supreme Court has paid particular attention to the *overarching purpose* of the challenged bills."[75] None of the Supreme Court origination cases, however, ever used the term "overarching." Indeed, as quoted properly by *Hotze*, *Nebeker* found the bill in question had "no purpose" to raise revenue. Thus, the *Nebeker* Court was less focused on the "primary" or "overarching purpose" of the act, and was instead focused

[73] *NFIB*, 132 S. Ct. at 2594.

[74] *Id.* at 2596.

[75] *Id.* at 879 (emphasis added).

on the utter absence of any revenue-raising purpose whatsoever. It was not a balancing test, or a "primary purpose" test; instead, *Nebeker*—as quoted by *Hotze*—focused on whether the bill raised more than incidental revenue: a far lower standard than "overarching purpose."

Third, the district court correctly quoted the *Millard* decision to the effect that the questioned bill was but "a means to the purposes provided by the act."[76] But, the court then made the same mistake that *Sissel* made: it failed to quote the portion of *Millard* which held the bill had "*no purpose*" for raising general revenue because the funds involved were dedicated. To put it in the best light, the district court focused on the wrong part of *Millard*—the broad discussion of the Act's purpose rather than on the specific holding, which was that the bill was not subject to the Origination Clause because it had "no purpose" to raise general revenue and thus failed the Dedication Test.

Fourth, the district court correctly cited *Munoz-Flores*, but misleadingly concluded the Supreme Court held the act in question was outside an origination challenge "even where the excess money collected was paid into the General Treasury."[77] That quotation did not appear in *Munoz-Flores*, but instead, was the district court's interpretation of the Supreme Court decision. As explained above, *Munoz-Flores* found the general appropriation revenues to be very small: 0.28% of the Crime Victim's Fund in a single year. *Hotze* was technically correct to say *Munoz-Flores* upheld a bill despite excess funds being paid to the general Treasury; however, the district court failed to acknowledge how very small that excess was, in both amount and over time. More significantly, the district court failed to

[76] *Id*. at 880.

[77] *Id.*

acknowledge the Supreme Court's extensive discussion of that issue.

Fifth, the district court concluded its analysis of the Supreme Court cases with two remarkable statements:

> In short, the Supreme Court has consistently interpreted the phrase 'raising revenue' narrowly to apply only to those bills, or provisions of bills, whose *primary purpose* is the collection of revenue.[78]
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> * * *
>
> 'Under the Supreme Court's precedents—sparse as they may be on this subject—so long as the primary purpose of the provision is something other than raising revenue, the provision is not subject to the Origination Clause.'[79]

Those statements, however, are plainly incorrect. The Supreme Court has never adopted a "primary purpose" test for origination cases (which are hardly "sparse"). To the contrary—as cited and quoted by the district court itself—the Supreme Court consistently follows the Incidental Test. To be subject to the Origination Clause, a bill must raise "more than incidental revenues." Requiring more than "incidental" revenues is a far cry from requiring "primary" revenues or a "primary purpose" for raising revenue. As explained in relation to *Sissel*, the "primary purpose" language stems from an out-of-context quotation from *Munoz-Flores*. The full sentence stated: "Any revenue for the general Treasury that § 3013 creates is thus 'incidenta[l]' to that provision's primary purpose."[80]

The district court cited *Munoz-Flores* immediately before concluding the case stood for the "primary purpose" test, but it failed to recognize that *Munoz-Flores* focused on the lack of revenues being more-than-incidental rather than on their being less-than-primary.

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[78] *Id.*

[79] *Id.* (*quoting Sissel v. HHS*, 951 F. Supp. 2d 159, 168 (D.D.C. 2013)).

[80] *Munoz-Flores*, 495 U.S. at 399.

Sixth, the district court relied on a 1989 Fifth Circuit opinion to support its "overarching purpose" test. But, the Fifth Circuit case—*Herrada*[81]—was itself flawed. The case concerned § 3013, which *Munoz-Flores* also involved. The Fifth Circuit wrote:

> The *Munoz-Flores* court analyzed § 3013 in isolation and failed to follow the methodology dictated by *Norton, Twin City*, and *Millard*. Those cases instruct us to consider the overarching purpose of an Act when one of its provisions is subject to an Origination Clause challenge.[82]

The last two sentences are remarkably incorrect. The Fifth Circuit criticized the Ninth Circuit for examining § 3013 in isolation, citing *Norton*, *Twin City* (*Nebeker*), and *Millard*. *Norton*, however, found the questioned act to impose a fine, rather than a tax. The Court never spoke of an "overarching purpose;" to the contrary, *Norton* stressed the lack of "any purpose" for the raising of revenue.[83] Similarly, *Nebeker* and *Millard* each stressed the acts in question had "no purpose" for raising revenue. Neither used the term "overarching purpose," which differs greatly from a "more-than-incidental" standard.

More significantly, the Fifth Circuit criticized the Ninth Circuit for examining § 3013 in isolation; however, that is precisely what the Supreme Court did in both *Flint* and *Rainey.* The other significant Supreme Court cases—*Norton*, *Nebeker*, and *Millard*—were essentially single-subject bills; hence, the isolated examination issue was not relevant. As a result, the Fifth Circuit's *Herrada* decision was flawed and *Hotze's* reliance on it is in turn flawed too.

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[81] *United States v. Herrada*, 887 F.2d 524 (5th Cir. 1989).

[82] *Id.* at 527-28

[83] *Norton,* 91 U.S. at 568.

Seventh, the district court cited *Flint*, but did so in two misleading ways.[84] *Hotze* failed to explain the most significant aspect of the case: how it essentially foreshadowed and rejected the "primary purpose" test. As explained in relation to *Sissel, Flint* considered a very small portion of the Tariff Act of 1909 in its origination challenge. It never compared the revenue effects of the corporate tax to the "primary purpose"—let alone the "overarching purpose"—of the entire act. Most of the Tariff Act affected revenues; but, nevertheless, the Supreme Court carved out a very small portion of the act for its analysis, separate from the effects (revenue or otherwise) of the bulk of the act. The *Hotze* Court should have recognized this aspect of *Flint* and should have at least attempted to reconcile it with the "primary purpose" test. Failure of the court to do so casts substantial doubt on the validity of the district court's opinion.

Eighth, the district court never cited *Rainey*. As explained above, the Supreme Court in *Rainey* drove home the point it made in *Flint*: an origination challenge examines the questioned tax in isolation from other aspects of the act. This is the opposite of a "primary purpose" test as asserted by the district court. *Hotze's* failure to grapple with contrary Supreme Court authority—directly on point—weakens its argument considerably.

3. *Hotze's* Germaneness Analysis

The district court's germaneness analysis also contained several flaws. The *Hotze*

[84] The second misleading reference to *Flint* is technical, but noteworthy. The district court cited: "*Flint v. Stone Tracy Co*., 220 U.S. 107, 31 S. Ct. 342, 55 L. Ed. 389, T.D. 1685 (1911), overruled on other grounds by *Garcia v. San Antonio Metro. Transit Auth*., 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985) (analyzing whether challenged statute originated in the House of Representatives)." *Garcia* indeed overruled a tiny aspect of *Flint* in relation to municipal water supplies. The citation should have noted "overruled *in part* on other grounds," which would have been much clearer. Also, the parenthetical appears to apply to *Garcia*, but it actually applies to *Flint*. Readers of *Hotze* should not be misled to think that either *Flint* was overruled in any significant or relevant manner, or that *Garcia* had anything whatsoever to do with an origination challenge.

Court oddly questioned whether the Supreme Court even adopted the Germaneness Test.[85] It also held, citing to a Fifth Circuit decision,[86] that the Germaneness Test was non-justiciable, though the Supreme Court has employed it at least twice.[87] Overall, the court approved of the "Shell Bill" game. Such an endorsement so minimizes the Origination Clause as to render it almost meaningless.

Specifically, *Hotze* "assumed" the germaneness requirement, but then proceeded to assume its conclusion, finding germaneness with virtually no legal analysis. The Senate amendments departed substantially from the House Bill. The § 5000A tax raised substantial revenue and clearly constituted a tax "in the strict sense" of the Constitution—the standard recognized even by *Hotze*. Nothing in HB 3590, however, constituted a tax; hence, the amendments could not be germane. *Hotze*, however, never analyzed the specific provisions of either the amendment or the House bill; instead, it conclusorily found them "germane."

Hotze also minimized the Germaneness Test, incorrectly asserting *Flint* and *Texas Ass'n of Concerned Taxpayers* (*TACT*) stood for a "very loose conception of germaneness."[88] Arguably *TACT* did, but *Flint* certainly did not. The district court stated:

> There can be no dispute that, generally speaking, the Senate is not limited by a germaneness requirement in amending House-originated legislation.[89]
>
> * * *
>
> The unifying principle in these cases is that a Senate amendment to a bill that 'raises

[85] *Hotze*, 991 F. Supp. 2d. at 883.

[86] *Texas Ass'n of Concerned Taxpayers, Inc. v. United States*, 772 F.2d. 163 (5th Cir. 1985), *cert. denied*, 476 U.S. 1151, 106 S. Ct. 2265, 90 L. Ed. 2d 710 (1986).

[87] *Rainey v. United States*, 232 U.S. 310, 317 (1914); *Flint v. Stone*, 220 U.S. 107, 143 (1911). *Flint* applied the Germaneness Test. *Rainey* chose not to apply the Germaneness Test, but instead to defer to Congress, which it deemed "satisfactory." The facts supported a strong case for germaneness.

[88] *Hotze*, 991 F. Supp. 2d at 884.

[89] *Id.* at 883.

> revenue' is germane so long as the original House bill related to tax or revenue issues.[90]
>
> * * *
>
> That the sources of revenue generated by the ACA mandates differ from those originally proposed under the House bill is of no import in this analysis, as both *Flint* and *Texas Association of Concerned Taxpayers* make clear.[91]

Each statement is inaccurate. First, the Supreme Court has required germaneness for Senate amendments and reputable commentators have agreed. Perhaps some dispute remains, but declaring the dispute settled is flatly incorrect. Second, the statements misstate the factual bases for *Flint* and *TACT* germaneness—and ignore the factual basis for germaneness in *Rainey*. *Flint* involved a House excise that raised substantial revenue and indisputably was a tax. The relevant Senate amendment changed the object of the tax, but remained an excise intended to raise substantial revenue. *Rainey* involved House excises and duties on various luxury goods that raised substantial revenues; the Senate merely added a duty and excise on foreign-produced yachts—which was a textbook example of a germane amendment. *TACT* involved a House-proposed, complicated tax to raise revenues (at least arguably over time as explained by the Ninth Circuit) affecting the income tax. The Senate amendments also involved complicated income-tax provisions. Germaneness in *TACT* was not as obvious as it was in *Flint* and *Rainey*, but it still existed in terms of the existence of a tax, revenues, the type of tax, and the degree of complexity.

IV. CONCLUSION

The United States has a written constitution, unlike most countries. Americans agree to live by it or seek to amend it through a complicated process. Ignoring it has not been a

[90] *Id.* at 884.

[91] *Id.* at 885.

traditional option. Modern Progressives view the Constitution as a tool for social change—a living document whose meaning morphs as society evolves. But even the most radical Progressive should acknowledge words on a sheet of paper—even if that paper happens to be 225-year old parchment. After all, it is one thing to find new meaning in penumbras, vague terms, and lofty goals where clarity is elusive. It is quite another to ignore the plain import of the words "shall originate in the House," as if they have no meaning.

The Origination Clause remains a serious part of our Constitution, as evidenced by the six Supreme Court cases interpreting it. The "Shell Bill" game, if endorsed by the federal courts, drains Article I, § 7 of any substance. Finding origination challenges to be "non-justiciable" would similarly strip the requirement of meaning. It would allow the House and Senate to act without a check from a co-equal branch, which would only encourage more of the kind of shenanigans that accompanied the passage of the ACA.[92]

The Affordable Care Act comprised a "Bill for raising Revenue" and thus had to originate in the House of Representatives, which it did not. Instead, Congress used non-germane Senate amendments to a non-tax House Bill to accomplish what politicians apparently thought they could not accomplish any other way. Hence, the Senate and House leaders chose to bypass the constitutional requirements by using an odious game intended to subvert the strictures of Article I, § 7. The D.C. Circuit through *en banc* review of *Sissel*, and the Fifth Circuit in its review of *Hotze*, should both reverse the previous courts' opinions and hold that Internal Revenue Code § 5000A violates the Constitution's Origination Clause.

Those courts should not embrace the hitherto unknown "primary purpose" test.

[92] Dana Milbank, *Looking Out for Number One (Hundred Million)*, WASH. POST, Dec. 22, 2009; listing numerous "backroom deals" made in order to secure cloture in the Senate, "the Louisiana Purchase," "the Cornhusker Kickback," "Gator Aid," "Iowa Pork," "Omaha Prime Cuts," "Handout Montana," "the U Con," "the Bayh Off," and "Cash for Cloture."

Such a test would subvert a fundamental structural protection in the written constitution. The Origination Clause ensures that revenue measures like the ACA can only originate in the lower house, which is elected every two years and thus must be more responsive to the electorate. If that clause is rendered a dead letter, an important impediment to federal revenue-raising will be lost.

