

APPEAL NO. 14-20039

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**STEPHEN F. HOTZE, M.D., AND
BRAIDWOOD MANAGEMENT, INC.,**
PLAINTIFFS-APPELLANTS

v.

**KATHLEEN SEBELIUS, SECRETARY OF HEALTH & HUMAN
SERVICES, AND JACOB J. LEW, SECRETARY OF THE TREASURY, IN
THEIR OFFICIAL CAPACITIES,**
DEFENDANTS-APPELLEES.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS**

**BRIEF *AMICUS CURIAE* OF FOUNDATION FOR MORAL LAW, IN
SUPPORT OF PLAINTIFFS-APPELLANTS URGING REVERSAL**

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**STATEMENT OF IDENTITY AND INTERESTS
OF *AMICUS CURIAE*, FOUNDATION FOR MORAL LAW**

Amicus Curiae Foundation for Moral Law (the Foundation), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the liberties guaranteed under the Constitution of the United States. The Foundation promotes a return in the judiciary and other branches of government to the historic and original interpretation of the United States Constitution, and promotes education about the Constitution and the moral foundation of this country's laws and justice system.

The Foundation has an interest in this case because it believes that this nation's laws should reflect the moral basis upon which the nation was founded, the ancient roots of the common law, the pronouncements of the legal philosophers from whom this nation's Founders derived their view of law, and the views of the Framers. The Foundation also believes that the Framers, because of their skeptical view of human nature, feared the concentration of government power in any one individual, branch, or level of government, and that they especially fear the power to tax. Like the Framers, the Foundation believes the power to propose new taxes should rest with that branch of Congress that most directly represents the people.

SOURCE OF AUTHORITY TO FILE

This brief is submitted pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure with the consent of all parties. No party or party's counsel authored any portion of this brief. No one other than the *Amici Curiae* or their counsel contributed any money to fund this brief.

SUMMARY OF ARGUMENT

The Origination Clause of Article I, Section 7 of the Constitution is not a mere formality. It reflects the Framers' fear of government power and their concern that one of the foremost government powers, that of taxation, should be carefully limited. The slogan, "no taxation without representation," was a rallying cry of the defenders of English common law and a major grievance of the American colonists. They enshrined this principle in the Constitution with the requirement that all bills for raising revenue had to originate in the House of Congress that most directly represented the people -- the House of Representatives, as the Senate was composed of people chosen by their state legislators, not by the people.

After the ratification of the Seventeenth Amendment in 1913, Senators were elected rather than appointed, but they still represented the states

and served six-year rather than two-year terms. The Seventeenth Amendment left the Origination Clause intact and did not change its meaning or importance.

In *National Federation of Independent Business [NFIB] v. Sebelius*, 567 U.S. ___, 132 S.Ct. 2566 (2012), the Supreme Court ruled that exaction imposed by the Affordable Care Act upon persons who choose not to purchase health insurance is a tax, because it has the basic characteristics of a tax rather than of a penalty: it raises substantial revenue, it does not punish illegal activity, it does not involve a *scienter* requirement. *Amicus* also notes that the tax is paid into the general fund of the Treasury and it is not paid in exchange for government services.

The Senate cannot use a "shell bill" to circumvent the Origination Clause. Although the Senate has the authority to amend a House revenue bill, the amendment must be germane to the subject matter of the House bill. In this case, Senate Majority Harry Reid took H.R. 3590, a six-page double-spaced bill granting tax credits to military personnel seeking to purchase their first homes and increasing estimated taxes for certain corporations, deleted its language entirely, and substituted a 906-page single-spaced health care bill that was totally unrelated to anything in the original H.R. 3590. In no realistic sense did the Affordable Care Act originate in the House.

Because the individual mandate of the Affordable Care Act is a tax, and because it did not originate in the House, this Court should uphold the Constitution and strike down the statute.

ARGUMENT

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.

Article I, Section 7, Clause 1

The Origination Clause is not a mere technicality to be circumvented whenever convenient. Rather, it is based upon a cherished principle of the common law that Americans argued for in the Declaration of Independence, fought for in the War for Independence, and enshrined in the Constitution: **no taxation without representation.**

Let us look to this history:

I. The Practice in England

Parliament developed in medieval times from the Great Council (Magnum Concilium, also called the Curia Regis) which consisted of clergy, nobles, and "knights of the shire" who represented the various counties. Their duty was to

approve taxes proposed by the Crown.¹ But often the Council demanded the redress of the people's grievances before they would vote on taxation, and thus legislative powers developed.

The House of Commons developed into an legislative body distinct from the House of Lords in the late 1200s or early 1300s, when the "knights of the shire" who represented the counties and the burgesses chosen to represent the towns began sitting in a separate chamber (later called the House of Commons) from that used by the nobles and high clergy (later called the House of Lords). During the "Good Parliament" of 1376, the Commons appointed Sir Peter de la Mare to convey to the House of Lords their complaints about excessive taxation, lack of accounting for royal expenditures, and mismanagement of the armed forces. This led to the creation of the office of Speaker of the House.

According to the *Oxford Dictionary of Politics*, "House of Commons," "The 1689 Bill of Rights established for the Commons the sole right to authorize taxation and the level of financial supply to the Crown." Although the text of the English Bill of Rights of 1689 uses the term "Parliament" rather than "Commons," the term as used here seems in practice to mean the House of Commons, which had

¹ Thomas Pitt Taswell-Langmead, *English Constitutional History from the Teutonic Conquest to the Present Time* (Houghton Mifflin 1946) 47, 143-49. The Magnum Concilium may have been an outgrowth of the earlier Anglo-Saxon witanagemot.

taken the lead in the struggles with the Stuart Kings and had in 1649 temporarily abolished both the Monarchy and the House of Lords. Actually, the Commons had this authority as early as the reign of King Edward III (1327-1377)²; in 1348 the Commons gave a conditional grant of money to the King, but one of the conditions was that the king should thenceforth levy no "imposition, tallage, or charge by way of loan or in any other manner, without the grant and assent of the commons in parliament," and that this condition was to be entered on the roll "as a matter of record, whereby they may have remedy if anything should be attempted to the contrary in time to come."³ King Charles I (1625-1649) tried to circumvent the Commons' authority by exacting "loans" from commoners with the threat of arrest if they refused;⁴ this was one of the Commons' grievances against King Charles as expressed in the Petition of Right and on other occasions.⁵ The basic principle that underlay this concern was that the people who pay the taxes should have a voice in the adoption of those taxes.

II. The Concerns of the American Colonies

The American colonists shared the view of the Commons that there should be no taxation without representation and argued that because they had no

² Brent Winters, *The Excellence of the Common Law* (Mountain Press 2006) 180.

³ Taswell-Langmead 179.

⁴ Winters 190.

⁵ Taswell-Langmead 406-40.

representatives in Parliament, Parliament had no authority to tax them. As early as 1640-41 members of Parliament urged the Massachusetts Bay Colony to send delegates to Parliament, but the colonists refused, saying "if we should put ourselves under the protection of the Parliament, we must be then subject to such laws as they should make...[which] might prove very prejudicial to us."⁶

In the 1760s the taxation issue was fanned into flame with the Stamp Act of 1765, the Townshend Acts of 1767, the Tea Act of 1773, and the Intolerable Acts. Their opposition was based not on the amount of the taxes, but on the principle that Parliament had no authority to tax the colonists because the colonists had no representatives in Parliament. In 1765 the Virginia House of Burgesses adopted a resolution introduced by Patrick Henry which asserted that taxation without representation is tyranny:

“Resolved, that the taxation of the people by themselves, or by persons chosen by themselves to represent them, who can only know what taxes the people are able to bear, or the easiest method of raising them, and must themselves be affected by every tax laid on the people, is the only security against a burdensome taxation, and the distinguishing characteristic of British freedom, without which the ancient constitution cannot exist.”⁷

⁶ John Winthrop, *the Journal of John Winthrop 1630-1649* ed. Richard S. Dunn and Laetitia Yeandle (Harvard University Press 1996) 182-83.

⁷ Patrick Henry, Virginia Resolves on the Stamp Act, 1765.

These taxes comprised one of the major grievances raised by the colonists in the Declaration of Independence ("For imposing Taxes on us without our Consent"). And the colonists took up arms to defend this principle.

III. The Decisions of the Constitutional Convention of 1787

Taxes were a major concern of the delegates to the Constitutional Convention. When the delegates adopted the Sherman Compromise by which they established a two-house legislature, many wanted to be sure that only the house that represented the people who would pay taxes be allowed to initiate taxes. Elbridge Gerry of Massachusetts declared,

Taxes and representation are strongly associated in the minds of the people, and they will not agree that any but their immediate representatives shall meddle with their purses.⁸

Madison cited Ben Franklin of Pennsylvania as saying,

...[I]t was always of importance that the people should know who had disposed of their money, and how it had been disposed of. It was a maxim that those who feel, can best judge. This end would, he

⁸ Elbridge Gerry, quoted in Max Farrand, ed., *The Records of the Federal Convention of 1787* (Yale University Press 1937) II:278. James Madison, *The Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America*, ed. Gaillard Hunt and James Brown Scott (Oxford University Press, 1920) 391.

thought, be best attained, if money affairs were to be confined to the immediate representatives of the people.⁹

Not everyone agreed. Roger Sherman of Connecticut noted,

As both branches must concur, there can be no danger whichever way the Senate be formed. We establish two branches in order to get more wisdom, which is particularly needed in the finance business -- The Senate bear their share of the taxes, and are also the representatives of the people.¹⁰

But the report of the Compromise Committee on Representation chaired by

Elbridge Gerry recommended this language:

[A]ll Bills for raising or appropriating money and for fixing the salaries of the Officers of the Government of the United States, shall originate in the first Branch of the Legislature, and shall not be altered or amended by the second branch -- and that no money shall be drawn from the public Treasury but in pursuance of appropriations to be originated by the first Branch.¹¹

In support of this proposal George Mason of Virginia stated,

The consideration which weighed with the committee was that the first branch would be the immediate representatives of the people; the second would not. Should the latter have the power of giving away the people's money, they might soon forget the source from whence they received it.¹²

This language was adopted in July but stricken August 8. Subsequently, Edmund

Randolph of Virginia offered similar language, adding that "the Senate will be

⁹ Benjamin Franklin, quoted in James Madison, *Notes of Debates in the Federal Convention of 1787 Reported by James Madison* (Ohio University Press 1984) 251.

¹⁰ Roger Sherman, quoted in Madison, *Notes* 114.

¹¹ Report of Compromise Committee on representation, quoted in Farrand I:524.

¹² George Mason, quoted in Madison, *Notes* 250.

more likely to be corrupt than the H. of Reps and should therefore have less to do with money matters."¹³ He also declared that

The arguments in favor of the proposed restraint on the Senate ought to have the full force. First, the Senate did not represent the *people*, but the *states*, in their political character. It was improper therefore that it should tax the people. ...Again the Senate is not, like the House of Representatives, chosen frequently and obliged to return frequently among the people. They are to be chosen by the states for six years.... In all events, he would contend that the purse strings should be in the hands of the representatives of the people.¹⁴

But this language was rejected on August 13, partially because his language restricted the Senate's authority to amend a tax proposal. On August 15 Caleb Strong of Massachusetts proposed that only the House of Representatives could initiate revenue bills but that the Senate could "propose or concur with amendments as in other cases."¹⁵ On September 8 Strong's proposal was accepted with revised language, and the Origination Clause in its present form was adopted 9-2.¹⁶

The Origination Clause, then, was a compromise between those who wanted the House of Representatives alone to have the power to originate taxes with no

¹³ Edmund Randolph, quoted in Madison, *Notes* 448.

¹⁴ George Mason, quoted in Madison, *Notes* 443.

¹⁵ Caleb Strong, quoted in Farrand II:298.

¹⁶ Farrand II:552.

power of the Senate to alter or amend, and those who wanted both Houses to have the power to originate taxes. It was also a concession to the delegates from larger states who didn't like the idea that the smaller states had equal representation in the Senate. With the Origination Clause in this form the Constitution was signed by the delegates, approved by the Congress, and was sent to the States for ratification.

As James Madison explained in *Federalist No. 58*,

...[A] constitutional and infallible resource still remains with the larger States, by which they will be able at all times to accomplish their just purposes. The House of Representatives cannot only refuse, but they alone can propose, the supplies requisite for the support of government. They, in a word, hold the purse -- that powerful instrument by which we behold, in the history of the British Constitution an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government.¹⁷

And James Iredell, who would later serve as a U.S. Supreme Court Justice 1790-1799, argued in the first North Carolina ratifying convention that

The House of Representatives...will represent the immediate interests of the people. They will originate all money bills, which is one of the greatest securities in any republican government. ... The authority over money will do everything. A government cannot be supported without money. Our representatives may at any time compel the

¹⁷ James Madison, *Federalist No. 58*, *The Federalist* ed. Michael Loyd Chadwick (Global Affairs 1987) 317 (original spelling retained).

Senate to agree to a reasonable measure, by withholding supplies till the measure is consented to.¹⁸

Amicus has explored the adoption of the Origination Clause to demonstrate that the Framers placed it in the Constitution for very important reasons: because the maxim "no taxation without representation" means the legislative body which originates taxes should be the body that most directly represents the people, because they wanted to preserve the balance of power between larger and smaller states, and because they believed the House would be less susceptible to corruption and abuse.

IV. The Effect of the Seventeenth Amendment

The ratification of the Seventeenth Amendment in 1913 did not change the meaning of the Origination Clause. It provides that the States shall choose their U.S. Senators by popular elections rather than by the state legislators. But the Senators still represent the States, and they still serve six-year rather than two-year terms. The House of Representatives remains the body that most directly represents the people and that can be most quickly turned out of office by the people.

¹⁸ James Iredell, quoted in Jonathan Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Lippincott Co. 1901) IV:39,129.

If the Framers of the Seventeenth Amendment had intended to repeal or modify the Origination Clause, they could have done so. But they left it intact. From this we must infer that they intended that its meaning and effect remain unchanged.

V. The Court's Interpretation of the Origination Clause

Court cases involving the Origination Clause are few, but from them several principles can be drawn.

First, although the House of Representatives can enforce the Origination Clause by "blue-slipping" a bill and sending it back to the Senate, or simply by refusing to pass it, the House's failure to do so does not mean the Court should refuse to exercise judicial review:

Although the House certainly can refuse to pass a bill because it violates the Origination Clause, that ability does not absolve this Court of its responsibility to consider constitutional challenges to congressional enactments Nor do the House's incentives to safeguard its origination prerogative obviate the need for judicial review.

United States v. Munoz-Flores, 495 U.S. 385, 392 (1990).

Of all Origination Clause issues, the Courts have wrestled most with the question of what constitutes a "Bill for raising Revenue." *Amicus* urges a "plain meaning" construction and suggests that, to the reasonable man-on-the-

street, a bill that takes money out of his pocket and places it in the government's coffers and/or redistributes it to other persons, is a bill for raising revenue. This is the way a reasonable person would have understood the Clause in 1787; this is the way a reasonable person would understand it today.

And in fact, the U.S. Supreme Court ruled in *National Federation of Independent Business [NFIB] v. Sebelius*, 567 U.S. ___, 132 S.Ct. 2566 (2012), that the exaction imposed on persons who decline to purchase health insurance is a tax. *Id.* 2601. Distinguishing the Affordable Care Act (ACA) tax from the penalty imposed by the Child Labor Tax Law and invalidated by the Court in *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922), the Court noted that:

(1) Unlike the "extremely heavy burden" imposed by the Child Labor Tax Law, the ACA tax will for most Americans be "far less than the price of insurance, and by statute, it can never be more. It may often be a reasonable financial decision to make the payment rather than purchase insurance, unlike the 'prohibitory' financial punishment in [*Drexel*]." *NFIB* 2595-96. The Court noted that the Congressional Budget Office has estimated that four million people each year will elect to pay the tax rather than purchase health insurance. *NFIB* 2597.

(2) Unlike the *scienter* requirement of the Child Labor Tax Law which applied the penalty only to those who "knowingly employed underage laborers,"

there is no scienter requirement in the Affordable Care Act. As the Court said, "Such scienter requirements are typical of punitive statutes, because Congress often wishes to punish only those who intentionally break the law." *Id.* 2595. As the Court stated,

In distinguishing penalties from taxes, this Court has explained that "if the concept of penalty means anything, it means punishment for an unlawful act or omission." *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 224, 116 S.Ct. 2106, 135 L.Ed. 506 (1996); see also *United States v. La Franca*, 282 U.S. 568, 572, 51 S.Ct. 278, 75 L.Ed. 551 (1931) ("[A] penalty, as the word is here used, is an exaction imposed by statute as a punishment for an unlawful act"). While the individual mandate clearly aims to induce the purchase of health insurance, it need not be read to declare that failing to do so is unlawful. Neither the Act nor any other law attaches negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS. The Government agrees with that reading, confirming that if someone chose to pay rather than obtain health insurance, they have fully complied with the law.

Id. 2596-97. The Court said further, "We do not make light of the severe burden that taxation -- especially taxation motivated by a regulatory purpose -- can impose. But imposition of a tax nonetheless leaves an individual with a lawful choice to do or not do a certain act, so long as he is willing to pay a tax levied on that choice." *Id.* 2600.

(3) The penalties under the Child Labor Tax Law were enforced in part by the Department of Labor, "an agency responsible for punishing violations of labor laws, not collecting revenue." The tax on those who elect not to purchase

insurance is "collected solely by the IRS through the normal means of taxation -- except that the Service is *not* allowed to use those means suggestive of a punitive sanction, such as a criminal prosecution." *Id.* 2596 (emphasis original).¹⁹

The Court in *NFIB* also noted that "Congress's choice of label" does not "control whether an exaction is within Congress's constitutional power to tax." *Id.* 2594. In *Drexel*, what Congress called a tax the Court determined was a penalty. In *United States v. Sotelo*, 436 U.S. 268, 275 (1978), what Congress called a penalty the Court determined was a tax.

The Court also noted that the ACA tax was expected to raise substantial revenue for the U.S. Treasury. The tax would amount to about \$60 per month (\$720 per year) for individuals earning \$35,000 per year and about \$200 per month (\$2,400 per year) for individuals earning \$100,000 per year. *NFIB* 2596 fn 8. If the CBO estimate that four million people each year will pay the tax rather than

¹⁹ The Administrations gyrations over whether to call the ACA a tax suggest that the title given to the exaction in the Act bears little credibility. In late 2010, as the Administration arm-twisted and steamrolled to pressure Congress into passing the legislation, the Administration insisted it was not a tax, presumably because an additional tax would not be popular with congressmen and their constituents. During the *NFIB* litigation, the Administration asked the Court "to interpret the mandate as imposing a tax, if it would otherwise violate the Constitution." *Id.* 2594. Now, facing the possibility that a tax might violate the Origination Clause, the Administration again argues that it is not a tax. As the Court determines whether or not this is a tax that the American people must pay, the American people deserve better than this.

buying insurance is correct, that comes to \$2,880,000,000 per year if they all earned \$35,000 per year or \$9,600,000,000 per year if they all earned \$100,000 per year. In either event, this is substantial revenue. Furthermore, the Affordable Care Act involves multiple other taxes that will also raise revenue.²⁰

Amicus notes, further, that the Court in *NFIB* upheld the ACA as a tax while also concluding that it could not be justified under the Commerce Clause or other portions of the Constitution. The Court's reasoning that led it to conclude that the ACA exaction is a tax is therefore central to its conclusion and therefore must be considered holding rather than dicta.

Other Supreme Court cases are distinguishable. *United States v. Munoz-Flores*, 495 U.S. 385 (1990), involved an assessment on persons convicted of federal misdemeanors which went to the Crime Victims Fund established by the Victims of Crime Act. The Court ruled that the assessment did not violate the Origination Clause because the assessments were not placed in the general treasury but rather were used to compensate crime victims. By contrast, taxes collected under the Affordable Care Act go directly to the general treasury.

²⁰ Letter from congressional budget Office to Sen. Harry Reed, Nov. 18, 2009, available at http://cbo.gov/sites/default/files/cbofiles/ftpdocs/107xx/doc10731/reid_letter_11_18_09.pdf.

Twin City National Bank of New Brighton v. Nebecker, 167 U.S. 196 (1897), involved a banking tax of \$73.08. The bank argued that this tax was not in the bill as it was originally passed by the House but was added in an amendment by the Senate, with which the House later concurred. The Court upheld the tax, noting that the bill had originated in the House, and the Origination Clause specifically says "but the Senate may propose or concur with Amendments as on other bills." Unlike this banking bill, the Affordable Care Act originated in the Senate.

Millard v. Roberts, 202 U.S. 429 (1906), involved a law for the elimination of grade crossings and for a railway station in the District of Columbia. To finance this, the bill instituted a property tax in the District of Columbia. The primary issue was whether the law appropriated public funds for private purposes, but the Court dismissed an Origination Clause challenge on the ground that the funds raised were not for the general fund but for a specific project and were incidental to that project.

VI. Congress's Interpretation of the Origination Clause

To some extent, Congress has policed itself concerning Origination Clause violations, although as noted earlier, Congress's failure to do so does not absolve the Court of its duty to exercise judicial review. *Munoz-Flores* 392.

The Senate has considered some of the finer points of what constitutes raising revenue:

* A bill is not for the purpose of raising revenue under the Origination Clause if it sets fees for services. The Senate has determined that a bill which included postal rates was not subject to the Origination Clause, reasoning that postal charges are not revenue because they are made in exchange for specific services.²¹ The tax imposed by the Affordable Care Act is not in exchange for any government services.

* A bill is more likely to be subject to the Origination Clause if the revenues are paid into the general fund of the Treasury rather than set aside for a specific purpose. The Senate has sustained a point of order against such a bill.²² Revenues from the tax imposed by the ACA are paid into the general fund of the Treasury.

²¹ Clarence Cannon, *Cannon's Precedents of the House of Representatives of the United States Including References to Provisions of the Constitution and Laws, the Laws, and Decisions of the United States Senate*, Vol. VI. Ch. CLXXXX (Washington: Government Printing Office 1977), § 317.

²² Cannon § 316.

* The Senate has declined to consider a bill dealing with international oil commerce because import restrictions directly affect tariff revenues.²³ The ACA tax doesn't just affect tax revenues; it provides tax revenues.

The House has also protected its prerogatives under the Origination Clause by adopting resolutions "blue-slipping" legislative proposals, that is, returning them to the Senate without action. James v. Saturno, Specialist on the Congress Government and Finance Division, has written,

Overall, House precedents indicate a wide spectrum of tax and tariff actions that have been excluded on the basis of the origination clause. ... [Examples of measures that the House has returned to the Senate include the following: a concurrent resolution reinterpreting a definition in the tariff act of 1922; bills providing for a bond issue; amending the Silver Purchase Act; exempting receipts from the operation of the Olympic games from taxation; and redetermining a sugar quota involving a combination of tariff duties and incentive payments.²⁴

Saturno observes that the House has sometimes exhibited a fairly restrictive view of the Senate's authority to amend a revenue bill, and regarded the origination clause as limiting the Senate only to germane amendments.²⁵ He writes,

Overall, House precedents indicate a wide spectrum of tax and tariff actions that have been excluded on the basis of the Origination

²³ Cannon § 320.

²⁴ James V. Saturno, "The Origination Clause of the U.S. Constitution: Interpretation and Enforcement," (Congressional Research Service, The Library of Congress, 2002) CRS-6.

²⁵ Saturno, *op. cit.* 3-6.

Clause. ... [E]xamples of measures that the House has returned to the Senate include the following: a concurrent resolution reinterpreting a definition in the tariff act of 1922; bills providing for a bond issue; amending the Silver Purchase Act; exempting receipts from the operation of the Olympic Games from taxation; and redetermining a sugar quota involving a combination of tariff duties and incentive payments.²⁶

Saturno notes that in 1872 the House passed H.R. 1537 which repealed duties on coffee and tea. The Senate "amended" it by a general revision of various laws imposing duties and taxes. As the House tabled the Senate's amended bill, Rep. (later President) James A. Garfield (R-OH) stated,

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.²⁷

The House and Senate themselves have invoked the Origination Clause in circumstances similar to the case at hand. But the fact that the leadership of a Congress controlled by the same political party as the President, in a high-pressure and highly-partisan vote, failed to do so, does not absolve the courts of their duty to enforce the Constitution. *Munoz-Flores* 392.

VII. The Use of a "Shell Bill"

²⁶ Saturno, *op. cit.* 6.

²⁷ James A. Garfield, quoted by James V. Saturno, *op. cit.* 6. The Senate objected that the House's position reduced their role to merely formal amendments but agreed that the Senate's power to amend was not without limits.

The Administration is expected to justify its violation of the Origination Clause by claiming that, in fact, the Affordable Care Act did originate in the House. They will note that Senate Majority Leader Harry Reid (D-NV) took a bill that had been passed by the House, struck out all of its language, and inserted what became the Affordable Care Act in its place.

Amicus contends that the "shell game" of using a "shell bill" does not satisfy the Origination Clause, for the following reasons:

(1) The Affordable Care Act is completely unrelated to the original House bill. The House bill was House Resolution 3590, titled the Service Members Home Ownership Tax Act of 2009. The purpose of the bill was to grant tax credits to military personnel seeking to purchase their first homes and to increase corporate estimated taxes for certain corporations by 0.5%. It had nothing whatsoever to do with anything related to health care. The Senate's "amendment" deleted the House Resolution in its entirety and substituted the Affordable Care Act in its place. H.R. 3590 was a six-page, double-spaced bill. Senator Reid's "amendment" was a 906-page, single-spaced bill that bore no relationship to the original House Bill whatsoever.

(2) A basic principle of parliamentary law is that an amendment must be germane to the main measure. According to *Robert's Rules of Order, Newly Revised*, "An amendment must always be *germane* -- that is, closely related to or

having bearing on the subject of the motion to be amended. this means that no new subject can be introduced under pretext of being an amendment (see pp. 129-31)."²⁸ *Robert's* further states on pp. 129-31:

DETERMINING THE GERMANENESS OF AN AMENDMENT. As already stated, an amendment must be *germane* to be in order. To be *germane*, an amendment must *in some way involve* the same question that is raised by the motion to which it is applied. A secondary amendment must relate to the primary amendment in the same way. An amendment cannot introduce an independent question; but an amendment can be hostile to, or even defeat, the spirit of the original motion and still be germane. ...

As an example of a germane amendment, assume that a motion is pending "that the Society authorize the purchase of a new desk for the Secretary." It would be germane and in order to amend by inserting after "desk" the words "and matching chair," since both relate to providing the secretary with the necessary furniture. On the other hand, an amendment to add to the motion the words "and the payment of the President's expenses to the State Convention" is not germane.²⁹

Amicus cites *Robert's*, not necessarily because the Senate is strictly bound thereby, but because *Robert's* sets forth universal principles of fairness and orderliness by which deliberative bodies conduct their business. "Amending" a bill by striking its language entirely and inserting instead a totally new bill that bears no relationship whatsoever to the former, is simply not what people commonly understand the

²⁸ General Henry M. Robert, 1876; rev. Sarah Corbin Robert, Henry M. Robert III, William J. Evans, Daniel H. Honemann, and Thoms J. Balch, *Robert's Rules of Order, Newly Revised* (Perseus Publishing 2000) Art. VI, § 12, p. 125.

²⁹ *Robert's*, VI:§12, pp. 129-31.

term "amend" or
 "amendment" to mean.

Let us also examine definitions from dictionaries published close to the founding era. Samuel Johnson's *A Dictionary of the English Language* (1768) defines "amendment" as "in law, a correction of an error committed in a process."³⁰ Deleting a 6-page bill about tax credits for military personnel purchasing homes and inserting in its place a 906-page bill about health care hardly constitutes "correcting an error committed in a process." Noah Webster's *An American Dictionary of the English Language* (1828) uses a definition similar to Samuel Johnson's but adds an additional definition, "A word, clause or paragraph, added or proposed to be added to a bill before a legislature."³¹ Clearly, the common understanding of the term "amendment" did not include substitution of a totally unrelated bill. The original House bill had absolutely nothing to do with health care. The amended Affordable Care Act had absolutely nothing to do with veterans' housing exemptions. They are not in the slightest way germane to one another.

³⁰ Samuel Johnson, *A Dictionary of the English Language 3rd. Ed.* (Dublin: W.G. Jones, 1768), "Amendment."
books.google.com/.../A_Dictionary_of_the_English_Language.html.

³¹ Noah Webster, *1828 An American Dictionary of the English Language* (1828; reprinted Foundation for American Christian Education 1995), "Amendment." Webster was younger than most of the Framers of the Constitution, but he knew many of them personally, sometimes dined with them during the Convention of 1787, and was commissioned by them to write a defense of the Constitution.

The District Court's astounding assertion that "The Origination Clause itself does not require 'germaneness'"³² would reduce the Clause to a nullity. If the Senate is empowered to take a House bill, strip it entirely of its content, and substitute a revenue bill in its place, then the Framers were wasting time, paper, and ink by placing the Origination Clause in Article I Section 7. Clearly, they adopted the Origination Clause for a very important reason: to ensure that taxes originate with the House that represents the people who pay the taxes. This Court should give effect to the Framers' purpose.

The District Court argues that the Origination Clause applies only when a bill's "primary purpose" is to raise revenue, and that we are to look at the "overarching purpose" of a bill in making this determination.³³ We are reminded of Justice Frankfurter's dictum, "the ultimate touchstone of constitutionality is the Constitution itself, and not what we have said about it." *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 491-92 (1939)(concurring). Article I Sec. 7 does not say "Bills the primary purpose of which is raising revenue shall originate in the House of Representatives," or "Bills the overarching purpose of which is to raise revenue shall originate...." Rather, its language is explicit and clear: "All Bills for raising Revenue shall originate in the House of Representatives."

³² *Hotze v. Sebelius*, Civil Action No. 4-13-CV-01318.

³³ *Id.*

One could just as easily argue that a law is not a tax for purposes of the Taxing and Spending Clause of Article I Sec. 8, unless raising revenue was its "primary" or "overarching" purpose. Had the Chief Justice employed this reasoning in *NFIB*, he could not have justified the Affordable Care Act as a tax. But again: Because of the importance the Framers placed on the principle of no taxation without representation, to the extent a bill can be authorized as a tax under the Taxing and Spending Clause, to the same extent that bill must be subject to the limitations of the Origination Clause. The Administration cannot "have its cake and eat it too."

The cases cited by the District Court concerning germaneness are not on point. The Court noted that in *Texas Ass'n of Concerned Taxpayers, Inc. v. United States*, 772 F.2d 163, 164 (5th Cir. 1985), *cert. denied*, 476 U.S. 1151 (1986), this Circuit dismissed an Origination Clause challenge where a House bill was referred to the Senate Finance Committee, which "struck the entire text of the bill after the enacting clause and replaced it with a massive tax-increasing proposal." Note, however, that the House bill was entitled the Miscellaneous Revenue Act of 1981 which was intended to have the aggregate effect of reducing taxes. True, the Senate amended it by replacing it with a bill for massive tax increases. But the amendment was germane. An amendment is germane even if its effect is the opposite of the original bill. But it must be relevant to the subject matter of the

original bill, i.e., taxes. As the Court said at ____, "The Senate's amendment, adding new taxes, was germane to the subject matter and thus within the range of amendments permitted by the origination clause."³⁴

Similarly, the District Court noted, in *Flint v. Stone Tracy Co.*, 220 U.S. 107, 143 (1911), the Senate substituted a corporation tax in place of an inheritance tax. But as the Supreme Court said at 143, the House bill was "a general bill for the collection of revenue." The Senate sought to achieve the same objective as the House, the collection of revenue, but chose to do so by a corporation tax instead of an inheritance tax. In sharp contrast, in the case at hand, when the Senate substituted the Affordable Care Act for an entirely unrelated bill for veterans' credits, this is not substituting one tax for another but rather a complete change of the subject matter of the bill.

³⁴ *Texas Assn.* did not hold that the issue of germaneness is a nonjusticiable political question. Rather the court held that if Congress has given a word or phrase "an interpretation consistent with the limitations on authority contained in the provisions [of the Constitution]," the courts should not intrude. But there has been no suggestion that Congress has given a clear or consistent interpretation of germaneness, and in any event, the Supreme Court said in *Munoz-Flores* at 392 that "[a]lthough the House certainly can refuse to pass a bill because it violates the Origination Clause, that ability does not absolve this Court of its responsibility to consider constitutional challenges to congressional enactments." The Ninth Circuit reached a similar conclusion in *Armstrong v. United States*, 759 F.2d 1378 (9th Cir. 1985). As the passage of the Affordable Care Act clearly demonstrates, the House's refusal to invoke the Origination Clause may often depend more upon which political party controls the House than upon any constitutional considerations.

And in *Armstrong v. United States*, 759 F.2d 1378, 1380-81 (9th Cir. 1985), the House passed a bill that would have reduced taxes by about one billion dollars between 1982 and 1986. The Senate amended all but the enacting clause and passed a bill that increased total revenues by about one hundred billion dollars between 1983 and 1985. The Court noted, first, that the phrase "Bills for raising Revenue" includes not only bills that increase taxes but all bills relating to taxes. Quoting from *Flint*, the Ninth Circuit concluded at ___ that a bill that raised taxes was "germane to the subject matter of the bill [reform of the income tax system], and not beyond the power of the Senate to propose." The Sixth Circuit reached the same conclusion in *Heitman v. United States*, 753 F.2d 33, ___ (6th Cir. 1984): "The Senate may amend bills originating in the House as long as the bill remains germane to the subject matter of the bill." Likewise the Eighth Circuit: "We cannot agree that 'revenue-raising' means only bills that increase taxes." *Wardell v. United States*, 757 F.2d 203, 205 (8th Cir. 1985). All of these courts gave a broad interpretation of germaneness. But all agreed that a Senate amendment to a House revenue bill must be germane.

The Framers were deeply concerned that the power to tax must be carefully limited to the legislative body that represents the people who pay the taxes. They would not have been impressed by the argument that a "shell bill" fulfills the requirements of the Origination Clause. They would have recognized

that allowing Senate to initiate a tax by gutting a House "shell bill" and substituting its own tax bill would eviscerate the Origination Clause and render it utterly ineffective. An Origination Clause without a "germaneness" requirement is the same as no Origination Clause at all.

CONCLUSION

Speaking for a unanimous Court in 1819, Chief Justice John Marshall declared that "the power to tax is the power to destroy." *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819). Like their predecessors in England and in the colonies, the Framers of our Constitution were wary about taxing powers and strove to limit those powers to the House of Congress that most directly represents the people who pay the taxes.

Despite the Administration's gyrations, the Supreme Court has spoken clearly and unmistakably: the individual mandate of the Affordable Care Act constitutes a tax. It is therefore subject to the Origination Clause, and this Court should not allow a "shell game" subterfuge to defeat the intent and purpose of those who drafted and ratified that clause.

Amicus urges the Court to rule that the Affordable Care Act is unconstitutional, both in the individual mandate and in its entirety.

Respectfully submitted,

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May 14, 2014

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) as it contains 6,367 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) as it has been prepared in a proportionally space typeface using Microsoft Word 2010 in 14-point, Time New Roman type style.

Respectfully submitted, this the 14th day of May, 2014.

s/ John A. Eidsmoe

CERTIFICATE OF SERVICE

I, John A. Eidsmoe, as counsel for *Amicus Curiae* Foundation for Moral Law, hereby certify that on May 14, 2014, I electronically filed a true and accurate copy of the foregoing “Brief *Amicus Curiae* of Foundation for Moral Law, In Support of Plaintiffs – Appellees Urging Affirmance” with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit through the appellate CM/ECF system.

I further certify pursuant to Fed. r. app. P. 25(d) that, on May 14, 2014, the foregoing Amicus Brief was served electronically on the individuals listed below:

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I certify that all participants of this case which are registered with the CM/ECF system, will be electronically served by said system.

I make these representations voluntarily and declare them to be true and accurate to the best of my knowledge.

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