Buffalo Law Review

Volume 35 | Number 2 Article 6

4-1-1986

TEFRA and the Origination Clause: Taking the Oath Seriously

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COMMENTS

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I. INTRODUCTION

Significant constitutional developments take different forms and occur under different circumstances. Most are noticed and taken seriously because they directly involve the constitutional rights of individuals.[1] A few, on the other hand, involve issues

1. Significant Supreme Court cases involving the rights of individuals under the Bill of Rights or the fourteenth amendment abound. *See, e.g.*, Bowers v. Hardwick, 106 S. Ct. 2841 (no right to homosexual sodomy), *reh'g denied*, 107 S. Ct. 29 (1986); Miller v. California, 413 U.S. 15 (1973) (free speech); Roe v. Wade, 410 U.S. 113 (1973) (right to abortion); Goldberg v. Kelly, 397 U.S. 254 (1970) (procedural due process rights); Miranda v. Arizona, 384 U.S. 436 (1966) (right of criminal suspects to be informed of rights); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (libel/free speech); Brown v. Board of

seemingly less relevant to individuals. These developments, which are usually less politically charged, involve the broad, structural issues of federalism and the separation of powers.[2] Such was the case with the passage of the Tax Equity and Fiscal Responsibility Act of 1982,[3] signed into law by President Ronald Reagan on September 3, 1982.

Widely regarded as the largest tax increase in United States history,[4] TEFRA will increase the federal government's net budget receipts by $205.3 billion during fiscal years 1983 through 1987.[5] The day after the measure was finally passed by Congress, however, its constitutionality was challenged by a group of eighteen members of the House of Representatives.[6] They claimed

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Educ., 347 U.S. 483 (1954) (equal protection rights).

2. The recent invalidation of a portion of the so-called Gramm-Rudman balanced budget law shows that separation of powers issues can still attract substantial political attention. *See* Synar v. United States, 626 F. Supp. 1374 (D.D.C.) (three-judge court), *aff'd sub nom.* Bowsher v. Synar, 106 S. Ct. 3181 (1986).

3. Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 (1982) [hereinafter TEFRA] (codified as amended in scattered sections of 26 U.S.C.).

4. *See, e.g.*, 128 CONG. REC. E3888 (daily ed. Aug. 13, 1982) (statement of Rep. Porter: "the largest tax increase in U.S. history"); 128 CONG. REC. S8650 (daily ed. July 19, 1982) (statement of Sen. Long: "the largest tax increase ever recommended in a single piece of legislation"); Buckley, *Exit Reaganomics?*, NAT'L REV., Aug. 20, 1982, at 1042 ("the highest single peacetime tax increase in U.S. history"); McGrath, *A No-Fingerprints Tax Bill*, NEWSWEEK, Aug. 9, 1982, at 16 ("a record $99 billion tax increase"); *A Taxing Week on the Hill*, NEWSWEEK, Aug. 2, 1982, at 19 ("a bill that . . . would raise a record $99 billion in new tax revenue"); Wiener, *ABC's of the Big Boosts Ahead for Taxpayers*, U.S. NEWS & WORLD REP., Aug. 2, 1982, at 44 ("the biggest tax boost in history"); Rowen, *$100-Billion Tax Bill Agonizing to House Republicans*, Wash. Post, Aug. 8, 1982, at G1, col. 2 ("the biggest tax increase on record"); Tyrrell, *The Great GOP Tax Increase*, Wash. Post, Aug. 2, 1982, at A15, col. 1 ("the largest peacetime tax measure in history").

The use of this label itself became newsworthy. *See Measuring the Size of the Tax Bill*, N.Y. Times, Aug. 17, 1982, at D16, col. 3.

5. STAFF OF THE JOINT COMM. ON TAXATION, 97TH CONG., 2D SESS., GENERAL EXPLANATION OF THE REVENUE PROVISIONS OF THE TAX EQUITY AND FISCAL RESPONSIBILITY ACT OF 1982, at 454 (Jt. Comm. Print 1982).

6. Moore v. United States House of Representatives, 553 F. Supp. 267 (D.D.C. 1982), *aff'd*, 733 F.2d 946 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985). This first origination clause challenge to TEFRA differed from those by individual taxpayers that followed because it raised the special issue of the standing of members of Congress to challenge the constitutionality of a federal statute. Indeed, it was on this ground that the district court dismissed the plaintiffs' action. *Moore*, 553 F. Supp. at 268. The court of appeals, over a vigorous opinion by Judge Antonin Scalia concurring in the result but disagreeing on the standing issue, found that the Congressmen had standing and yet affirmed the district court's dismissal as "a proper exercise of the court's remedial discretion to withhold declaratory relief." *Moore*, 733 F.2d at 948.

The *Moore* plaintiffs included nine republicans and nine democrats: W. Henson Moore

that TEFRA was passed in violation of the origination clause of the United States Constitution, which states: "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."[7] Individual taxpayers have raised similar claims in more than fifty cases since 1982.[8]

(R-La.), Philip M. Crane, (R-Ill.), Elliott H. Levitas (D-Ga.), Stephen L. Neal (D-N.C.), James G. Martin (R-N.C.), James D. Santini (D-Nev.), Carroll Hubbard, Jr. (D-Ky.), John H. Rousselot (R-Cal.), Lawrence P. McDonald (D-Ga.), Richard T. Schulze (R-Pa.), Billy Lee Evans (D-Ga.), Ed Bethune (R-Ark.), Richard C. Shelby (D-Ala.), Bob Stump (R-Ariz.), Daniel B. Crane (R-Ill.), James E. Jeffries (R-Kan.), J. Patrick Williams (D-Mont.), and Larry E. Craig (R-Idaho). Moore v. United States House of Representatives, Complaint of Aug. 18, 1982, at 1-3.

This Comment does not address the standing of Members of Congress to bring such claims under the origination clause. For an argument supporting Congressmen's standing, see Comment, *The Origination Clause, the Tax Equity and Fiscal Responsibility Act of 1982, and the Role of the Judiciary*, 78 NW. U.L. REV. 419 (1983); for an argument against Congressmen's standing, see Case Comment, Moore v. U.S. House of Representatives: *A Possible Expansion of Congressmen's Standing to Sue*, 60 NOTRE DAME L. REV. 417 (1985). For recent treatment of the general issue of Congressmen's standing, see Synar v. United States, 626 F. Supp. 1374 (D.D.C.) (three-judge court), *aff'd sub nom.* Bowsher v. Synar, 106 S. Ct. 3181 (1986).

7. U.S. CONST. art. I, § 7, cl. 1.

8. Of the more than 50 reported and unreported origination clause challenges to TEFRA researched for this Comment, most found their way to court under the following similar circumstances. Sections 6702 and 6703 of the Internal Revenue Code, 26 U.S.C. §§ 6702, 6703 (1982), added by TEFRA, allow the IRS to label as "frivolous" tax returns meeting certain statutory criteria and to assess a $500 civil penalty against a taxpayer filing such a return. The plaintiffs in each of these cases paid 15% of the fine assessed them, asked for a refund from the IRS, and, upon denial of the refund, filed suit. Of these cases, the following have been reported: Texas Ass'n of Concerned Taxpayers, Inc. v. United States, 772 F.2d 163 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 2265 (1986); Hudson v. United States, 766 F.2d 1288 (9th Cir. 1985); Jolly v. United States, 764 F.2d 642 (9th Cir. 1985); Boday v. United States, 759 F.2d 1472 (9th Cir. 1985); Armstrong v. United States, 759 F.2d 1378 (9th Cir. 1985); Wardell v. United States, 757 F.2d 203 (8th Cir. 1985); Heitman v. United States, 753 F.2d 33 (6th Cir. 1984); Schoffner v. United States, 627 F. Supp. 167 (S.D. Ohio 1985); Phelps v. United States, 56 A.F.T.R.2d (P-H) 85-5853 (E.D. Wash. 1985); House v. United States, 593 F. Supp. 139 (W.D. Mich. 1984), *aff'd mem.*, 787 F.2d 590 (6th Cir. 1986); Vaughn v. United States, 589 F. Supp. 1528 (W.D. La. 1984); Liljenfeldt v. United States, 588 F. Supp. 966 (E.D. Wis.), *aff'd*, 753 F.2d 1077 (7th Cir. 1984); Karpowycz v. United States, 586 F. Supp. 48 (N.D. Ill. 1984); Scull v. United States, 585 F. Supp. 956 (E.D. Va. 1984); Rowe v. United States, 583 F. Supp. 1516 (D. Del.), *aff'd*, 749 F.2d 27 (3d Cir. 1984); Aune v. United States, 582 F. Supp. 1132 (D. Ariz. 1984), *aff'd sub nom.* Brasseur v. United States, 765 F.2d 148 (9th Cir. 1985); Ueckert v. United States, 581 F. Supp. 1262 (D.N.D. 1984); Reed v. United States, 581 F. Supp. 718 (D. Colo. 1984); Stamp v. Commissioner, 579 F. Supp. 168 (N.D. Ill. 1984); Kloes v. United States, 578 F. Supp. 270 (W.D. Wis. 1984); Milazzo v. United States, 578 F. Supp. 248 (S.D. Cal. 1984); Tibbetts v. Secretary of the Treasury, 577 F. Supp. 911 (W.D.N.C. 1984); Bliss v. United States, 54 A.F.T.R.2d (P-H) 84-5968 (E.D. Wash. 1984); McCauley v.

This Comment focuses on the constitutional controversy surrounding the passage of TEFRA. Specifically, this Comment argues that TEFRA's passage did indeed violate the origination clause of the Constitution because TEFRA, a bill designed to raise revenue, was originated by the Senate as an "amendment" substituting TEFRA[9] for the text of a House bill that was not a "bill for raising revenue" within the meaning of the origination clause.

While the origination clause is perhaps a more obscure constitutional provision than those in the Bill of Rights,[10] it nonetheless

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United States, 53 A.F.T.R.2d (P-H) 84-1386 (E.D. Wash. 1984); Hamrick v. Commissioner, 53 A.F.T.R.2d (P-H) 84-1384 (W.D. La. 1984); Howard v. United States, 53 A.F.T.R.2d (P-H) 84-1381 (E.D. Wash. 1984); Gimelli v. United States, 53 A.F.T.R.2d (P-H) 84-1032 (E.D. La. 1984); McDowell v. Secretary of the Treasury, 84-1 U.S. Tax Cas. (CCH) P9459 (D.N.J. 1984); Sivertsen v. United States, 84-1 U.S. Tax Cas. (CCH) P9409 (D. Conn. 1984); Whitman v. Commissioner, 84-1 U.S. Tax Cas. (CCH) P9393 (W.D. La. 1984); Lopez v. United States, 84-1 U.S. Tax Cas. (CCH) P9356 (D.N.M. 1984); Kane v. United States, 84-1 U.S. Tax Cas. (CCH) P9229 (D. Ariz. 1984); Bearden v. Commissioner, 575 F. Supp. 1459 (D. Utah 1983).

Nine cases challenging TEFRA were brought to court on motions to quash an IRS summons under 26 U.S.C. § 7602. Of these, the six reported cases are: Harris v. United States, 758 F.2d 456 (9th Cir. 1985); Morris v. United States, 616 F. Supp. 246 (E.D. Mich. 1985); Burdette v. United States, 57 A.F.T.R.2d (P-H) 86-1222 (M.D. Ala. 1985); Schlick v. United States, 586 F. Supp. 433 (N.D. Ill. 1984); Tucker v. United States, 54 A.F.T.R.2d (P-H) 84-6406 (N.D. Ind. 1984); Frent v. United States, 571 F. Supp. 739 (E.D. Mich. 1983), *appeal dismissed mem.*, 734 F.2d 14 (6th Cir. 1984).

Two cases challenging TEFRA were brought by citizens on origination clause grounds alone. *See* Graham v. United States, 573 F. Supp. 848 (E.D. Pa. 1983); Klingler v. Executive Branch, 572 F. Supp. 589 (M.D. Ala. 1983). These cases were dismissed under the Anti-Injunction Act, 26 U.S.C. § 7421(a) (1982), which bars suits by taxpayers that restrain collection of tax revenue.

9. Many of the courts confronting origination clause challenges to TEFRA have confused the issue of TEFRA's constitutionality under the origination clause with the issue of whether the Senate can amend a bill by substitution. *See, e.g.*, Harris v. United States, 758 F.2d 456, 458 (9th Cir. 1985); Heitman v. United States, 753 F.2d 33, 35 (6th Cir. 1984); Karpowycz v. United States, 586 F. Supp. 48, 52 (N.D. Ill. 1984); Scull v. United States, 585 F. Supp. 956, 960 (E.D. Va. 1984); Stamp v. Commissioner, 579 F. Supp. 168, 171 (N.D. Ill. 1984); Kloes v. United States, 578 F. Supp. 270, 272 (W.D. Wis. 1984); Frent v. United States, 571 F. Supp. 739, 742 (E.D. Mich. 1983), *appeal dismissed mem.*, 734 F.2d 14 (6th Cir. 1984). The discussion of this issue on the House floor showed similar confusion. 128 CONG. REC. H4777-78 (daily ed. July 28, 1982) (statement of Rep. Rostenkowski). These issues, however, are fundamentally different, and maintaining this distinction is necessary for proper resolution of the origination clause issue. *See infra* notes 285-91 and accompanying text.

10. The first, fourth, fifth, sixth, and fourteenth amendments to the United States Constitution, for example, are rich sources of litigation and the subject of an enormous amount of scholarship. A perusal of constitutional law casebooks and treatises commonly used in law schools today, however, reveals no mention of the origination clause. *See, e.g.*, C. ANTIEAU, MODERN CONSTITUTIONAL LAW (1969); E. BARRETT & W. COHEN, CONSTITU-

remains an important part of our constitutional scheme of government by checks and balances and separation of powers.[11] The vitality of this constitutional system is called into question when an unambiguous procedural constitutional provision directed expressly at the two houses of Congress can be so easily sidestepped for reasons of political expediency.[12] Constitutional violations, whether of article I or the Bill of Rights, ultimately affect individuals. As Justice Lamar noted in *Lake County v. Rollins*: "The liberty of the citizen, and his security in all his rights, in a large degree depend upon the rigid adherence to the provisions of the constitution and the laws, and their faithful performance."[13]

This constitutional crisis is threefold. First, Congress passed TEFRA in violation of the origination clause.[14] Second, the fed-

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TIONAL LAW (7th ed. 1985); P. BREST & S. LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING (2d ed. 1983); D. CURRIE, THE CONSTITUTION IN THE SUPREME COURT 1789-1888 (1985); P. FREUND, A. SUTHERLAND, M. HOWE & E. BROWN, CONSTITUTIONAL LAW (4th ed. 1977); G. GUNTHER, CONSTITUTIONAL LAW (11th ed. 1985); P. KAUPER & F. BEYTAGH, CONSTITUTIONAL LAW (5th ed. 1980 & Supp. 1982); W. LOCKHART, Y. KAMISAR, J. CHOPER & S. SHIFFRIN, CONSTITUTIONAL LAW (6th ed. 1986); J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW (2d ed. 1983); S. WEAVER, CONSTITUTIONAL LAW AND ITS ADMINISTRATION (1946). In contrast, constitutional law treatises published during the 19th and early 20th centuries regularly discussed the origination clause. *See infra* notes 148, 151, 154. Before the recent challenges to TEFRA, the last Supreme Court case involving the origination clause was Flint v. Stone Tracy Co., 220 U.S. 107 (1911) (Senate amendment substituting a corporation tax for an inheritance tax not violative of the origination clause). The last origination clause case in any federal court was Bertelsen v. White, 65 F.2d 719 (1st Cir. 1933) (section 23 of the Merchant Marine Act of 1920 not a "bill to raise revenue" because its "primary object" was not to raise revenue).

11. The Constitution delegates certain governmental powers to the federal government and reserves the rest to the states or to the people. U.S. CONST. amend. X. This division is often called federalism. The Constitution also divides federal power among three branches: the legislative (article I), executive (article II), and judicial (article III). This division is often called the separation of powers. Article I, section 7, which contains the origination clause, "is one of several in the Constitution which implement the 'separation of powers' doctrine." Kennedy v. Sampson, 511 F.2d 430, 434 (D.C. Cir. 1974).

As Section IV of this Comment demonstrates, the standing of litigants to bring a particular action is of central importance to the proper resolution of constitutional challenges based on the origination clause. Therefore, the standing of individual litigants can logically be seen as an integral part of the separation of powers doctrine. *See* Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881 (1983).

12. Simply put, the democrats in the House of Representatives did not want to take responsibility for an election-year tax increase and thus forced the republicans in the Senate to originate such an increase in the form of TEFRA. *See infra* notes 264-82 and accompanying text.

13. 130 U.S. 662, 673 (1889). This applies in no smaller degree to Congress than it does to the courts.

14. *See infra* notes 25-63, 264-84 and accompanying text.

eral courts have decided cases involving origination clause challenges to TEFRA by individual taxpayers even though they cannot properly exercise judicial review over this issue. This is because individual taxpayers lack standing[15] to satisfy the constitutional requirement that a "case" or "controversy" be present for the proper invocation of judicial power.[16] In addition, this issue is a nonjusticiable "political question" which the Constitution leaves for resolution by the political branches.[17] These branches take the same oath that judges do to uphold the Constitution and are bound by that oath to enact statutes in accordance with the dictates of the Constitution.[18] The political branches have not taken this oath seriously in the passage of TEFRA and have instead let political expediency take precedence over the requirements of the Constitution. Third, even after erroneously assuming they could properly exercise judicial review, the courts have failed to properly analyze the origination clause issue.[19] Among the more than fifty challenges to TEFRA under the origination clause to date, only five courts have made any attempt to interpret the clause itself in deciding the case before them.[20] These attempts have been cursory and lacking in adequate authority. Because "it is . . . the province and duty of the judicial department to say what the law is"[21] when interpreting constitutional provisions such as the origi-

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15. *See infra* notes 186-231 and accompanying text.

16. U.S. CONST. art. III, § 2, cl. 1. In Moore v. United States House of Representatives, 733 F.2d 946 (D.C. Cir. 1984), the court stated: "Furthermore, we note that private taxpayers have been found to have standing to challenge the constitutionality of TEFRA under the origination clause, so the issue will not go unresolved." *Id.* at 956. The court cited Armstrong v. United States No. 83-0598 (S.D. Cal. September 2, 1983) (mem.) and Frent v. United States, 571 F. Supp. 739 (E.D. Mich. 1983), *appeal dismissed mem.*, 734 F.2d 14 (6th Cir. 1984). Neither of those cases, however, addressed the issue of taxpayer standing. Those courts, like all the others addressing the issue, simply assumed that the taxpayers before them had the requisite standing to raise an origination clause claim.

17. *See infra* notes 232-63 and accompanying text.

18. The issue of whether the courts have the final say in the interpretation of the constitutionality of statutes in cases properly before them has functionally been settled since Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). *But see infra* note 191 and accompanying text.

19. *See infra* notes 285-308 and accompanying text.

20. Armstrong v. United States, 759 F.2d 1378, 1381-82 (9th Cir. 1985); Wardell v. United States, 757 F.2d 203, 205 (8th Cir. 1985); Kloes v. United States, 578 F. Supp. 270, 272 (W.D. Wis. 1984); Milazzo v. United States, 578 F. Supp. 248, 252 (S.D. Cal. 1984); Frent v. United States, 571 F. Supp. 739, 742 (E.D. Mich. 1983), *appeal dismissed mem.*, 734 F.2d 14 (6th Cir. 1984).

21. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). Likewise, Alexander

nation clause in light of the intention or meaning of their framers,[22] the failure of these courts to properly treat this issue adds

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Hamilton wrote that courts should declare the sense of the law and exercise judgment rather than will. Otherwise, the delicate system of separation of powers and checks and balances would break down and the rights of individuals be imperiled. THE FEDERALIST No. 78, at 469 (A. Hamilton) (Mentor ed. 1961).

22. *See generally* R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977) (leading work representing interpretivist approach to constitutional interpretation); Eastland, *The Burger Court and the Founding Fathers: Are We All Activists Now?*, 28 POL'Y REV. 14, 15 (1984) (judicial review should be constrained by "the language of the Constitution and the intent of the framers"); Graglia, *How the Constitution Disappeared*, COMMENTARY, Feb. 1986, at 19 (argument for limited, text-bound approach to judicial review); Meese, *Toward a Jurisprudence of Original Intention*, 2 BENCHMARK 1 (1986); Graglia, *Constitutional Mysticism: The Aspirational Defense of Judicial Review* (Book Review), 98 HARV. L. REV. 1331 (1985) (advocating a literalist position to restrict judicial review).

The Supreme Court has often made reference to the intention of the framers when interpreting constitutional provisions. As Justice Lamar once wrote for the Court: " 'Nor are we justified in resorting to strained construction or astute interpretation, to avoid the intention of the framers of the constitution . . . .' " Lake County v. Rollins, 130 U.S. 662, 673 (1889) (quoting Law v. People, 87 Ill. 385, 395 (1877)); *see also* Bowsher v. Synar, 106 S. Ct. 3181, 3187 (1986) (conclusion that "[t]he Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts" based on analysis of debates in First Congress of 1789, 20 members of which had been delegates to the constitutional convention); United States v. Leon, 468 U.S. 897, 906 (1984) (analysis including "an examination of [the fourth amendment's] origins and purposes"); Marsh v. Chambers, 463 U.S. 783, 790-91 (1983) (historical evidence "not only sheds light on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress—their actions reveal their intent. . . . This unique history leads us to accept the interpretation of the First Amendment draftsmen"); Ingraham v. Wright, 430 U.S. 651 (1977) (framers intended eighth amendment prohibition on cruel and unusual punishment to apply only to criminal law context); Flast v. Cohen, 392 U.S. 83, 103 (1968) (analysis including inquiry into "the specific evils feared by those who drafted the Establishment Clause and fought for its adoption"); Everson v. Board of Educ., 330 U.S. 1, 8-15 (1947) (extensive discussion of framers' conception of religious freedom and emphasis on "[t]he meaning and scope of the First Amendment . . . in the light of its history and the evils it was designed forever to suppress"); Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 297 (1888) (interpretation of Supreme Court jurisdiction including analysis of debates in First Congress of 1789, "many of whose members had taken part in framing [the Constitution]," which "is contemporaneous and weighty evidence of its true meaning"); Ames v. Kansas, 111 U.S. 449, 464 (1884) ("It thus appears that the first Congress, in which were many who had been leading and influential members of the convention, and who were familiar with the discussions that preceded the adoption of the Constitution by the States and with the objections urged against it, did not understand that the original jurisdiction vested in the Supreme Court was necessarily exclusive"); Slaughter-House Cases, 83 U.S. 36, 72 (1872) ("in any fair and just construction of any section or phrase of these amendments, it is necessary to look to [their purpose] . . . , the evil with they were designed to remedy"). *But see* Thornburgh v American College of Obstetricians and Gynecologists, 106 S. Ct. 2169, 2193 (1986) (White, J., dissenting) ("As its prior cases clearly show, however, this Court does not subscribe to the simplistic view that constitutional interpretation can possi-

insult to constitutional injury. Left uncorrected, these constitutional violations precipitate a constitutional crisis and set a danger-

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bly be limited to the 'plain meaning' of the Constitution's text or to the subjective intention of the Framers"). Justice White's statement is consistent with his dissenting argument in *Ingraham, supra,* that the intent of the framers should not be used to restrict the scope of the eighth amendment.

A debate currently exists over the merits—and even the possibility—of an approach to constitutional interpretation based primarily on the intent or meaning of the framers of the provision in question. *See e.g.,* T. SOWELL, A CONFLICT OF VISIONS: IDEOLOGICAL ORIGINS OF POLITICAL STRUGGLES 51-55 (1987); Kommers, *The Supreme Court and the Constitution: The Continuing Debate on Judicial Review,* 47 REV. POL. 113 (1985); Kurland, *Of Meese and (the Nine Old) Men,* 32 LAW SCH. REC. 2 (Spring 1986); Kaufman, *What Did the Founding Fathers Intend?,* N.Y. Times, Feb. 23, 1986, Magazine at 42; Commanger, *Meese Ignores History in Debate With Court,* N.Y. Times, Nov. 20, 1985, at A31, col. 2; Berger, *Justice Brennan Is Wrong,* Wash. Post, Oct. 28, 1985, at A15, col. 1; Berns, *The Words According to Brennan,* Wall St. J., Oct. 23, 1985, at 32, col. 4; Taylor, *Brennan Opposes Legal View Urged By Administration,* N.Y. Times, Oct. 13, 1985, at 1, col. 2.

On one level, one cannot claim to be "interpreting" something written by others unless one takes account of their intentions or meaning. The emphasis of the founding fathers was on judicial restraint, and they institutionalized this by rejecting for the Supreme Court a role as a reviser of legislation and by separating judges from the policy making process. *See generally* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 98, 105, 108, 109 (M. Farrand ed. 1911) [hereinafter CONVENTION RECORDS] (comments of Massachusetts delegate Rufus King); at 120 (comments of Virginia delegate James Madison); at 97-98, 105, 139 (comments of Massachusetts delegate Elbridge Gerry); at 139 (comments of South Carolina delegate Charles Pinckney).

Likewise, for decades after the ratification of the Constitution, reference was regularly made to the intent of the framers when the need arose to interpret the document. *See generally* 3 CONVENTION RECORDS, *supra,* at 419-20 (comments of Pennsylvania delegate Gouveneur Morris), 268 (comments of Massachusetts delegate Rufus King), 473-74 (comments of Virginia delegate James Madison); 1 CONVENTION RECORDS, *supra,* at xxiv (comments of editor M. Farrand: "in later years when the interpretation of the Constitution was discussed, many of the delegates referred to and explained the action or the intention of the Convention upon particular subjects"); THE FEDERALIST No. 78, at 466 (A. Hamilton) (Mentor ed. 1961) (it is the duty of the judiciary "to declare all acts contrary to the *manifest* tenor of the Constitution void") (emphasis added); 9 WRITINGS OF JAMES MADISON 191 (G. Hunt ed. 1910). Justice Iredell wrote for the Supreme Court in Ware v. Hylton, 3 U.S. (3 Dall.) 199, 267 (1796), that it was "too apt, in estimating a law passed at a remote period, to combine in our consideration, all the subsequent events which have had an influence upon it, instead of confining ourselves (which we ought to do) to the existing circumstances at the time of its passing." Resort to the intention or meaning of the framers is particularly appropriate when interpreting a procedural constitutional provision directed at the two houses of Congress rather than substantive provisions directed at individual citizens.

Even under a more restrictive view of the role of history in constitutional interpretation, resort to the intent or meaning of the framers with respect to the origination clause would still be appropriate. *See generally* Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation,* 31 U. CHI. L. REV. 502 (1964) (history is reliable guide to understanding evils an enactment was designed to counteract). The passage of TEFRA raises exactly the sort of issue and problems that concerned the framers of the origination clause. *See infra* notes 98, 141, 160, 269-71 and accompanying text.

ous precedent.

In addition to describing the provisions and passage of TEFRA,[23] a thorough understanding of this issue requires an examination of the origination clause from two important perspectives. The first is an original perspective—that of the framers of the Constitution. The debates and proceedings of the convention that produced the Constitution in 1787, along with the work of some early constitutional commentators, will provide an understanding of the purposes behind the inclusion of the origination clause in the Constitution and the important part it continues to play in our constitutional framework. This will also help answer the question whether the clause is still a useful part of the Constitution or simply "a quaint—perhaps unenforceable—relic of American revolutionary folklore."[24] The second perspective is a functional one—that of the legislative and judicial branches in practice since 1787. This perspective further helps answer the specific question at the heart of TEFRA's constitutionality under the origination clause—the meaning of the phrase "bills for raising revenue." The constitutionality of TEFRA's passage can only be understood against this backdrop.

This Comment will first describe TEFRA and the events surrounding its passage. Second, it will examine the origination clause through the development of the original and functional perspectives. Third, it will assess whether the courts have authority to adjudicate this issue. Fourth, it will assess the specific question of TEFRA's constitutionality under the origination clause.

II. Tax Equity and Fiscal Responsibility Act of 1982

A description of TEFRA and the events surrounding its passage is necessary before turning to an analysis of its constitutionality under the origination clause. TEFRA, in the most technical

23. *See infra* notes 25-63 and accompanying text.

24. Taylor, *Thorny Questions In Tax Challenge*, N.Y. Times, Aug. 18, 1982, at D20, col. 1. This begs the question whether Congress is free to simply ignore constitutional provisions it might consider outdated or a legislative nuisance. It would seem self-evident that Congress is bound to follow the dictates of the Constitution until such time as it exercises its power to initiate the constitutional amendment process. *See* The Federalist No. 78, at 470 (A. Hamilton) (Mentor ed. 1961) ("Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it prior to such an act.").

sense, did not originally appear for the first time in the Senate. Rather, the course of legislative activity that eventually produced TEFRA began in the House of Representatives with the passage of a small, obscure measure.[25] The Senate turned that bill into TEFRA by an amendment in the nature of a substitute. Therefore, the constitutionality of the Senate's amendment must be measured first by whether the original bill was one for raising revenue. If it was, TEFRA is constitutional under the origination clause because the Senate was merely exercising its express power of amending revenue-raising bills. If, on the other hand, H.R. 4961 was not a bill for raising revenue, the question is whether TEFRA is itself a revenue-raising measure. If not, then the origination clause is not implicated. If, however, H.R. 4961 was not a revenue-raising measure and the Senate amendment was, then TEFRA is unconstitutional because the origination clause requires that it have originated in the House.[26]

A. *H.R. 4961*

Thirteen members of the House of Representatives introduced H.R. 4961, "The Miscellaneous Revenue Act of 1981,"[27] on November 13, 1981. This measure was labeled a "bill to make miscellaneous changes in the tax laws."[28] H.R. 4961 combined

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25. H.R. 4961, 97th Cong., 1st Sess. (1981).

26. An argument might be made concerning the distinction between a bill initiated by the Senate and an amendment by the Senate to a bill received from the House. The origination clause specifically states, however, that where revenue-raising legislation is concerned, the Senate may propose or concur on amendments only after a revenue-raising measure has originated in the House. As will be developed, the proper test of whether a measure is a "bill for raising revenue" within the meaning of the origination clause is whether its purpose is to raise revenue. *See infra* notes 153-57, 169-85 and accompanying text. This test can be applied to Senate amendments as well as to Senate bills. Indeed, evaluating Senate amendments and bills in the same way under the clause is necessary to avoid emasculating its effect.

27. H.R. 4961, 97th Cong., 1st Sess. (1981). The bill's sponsors were: Fortney H. Stark (D-Cal.), John J. Duncan (R-Tenn.), Ken Holland (D-S.C.), Wyche Fowler, Jr. (D-Ga.), Marty Russo (D-Ill.), Robert T. Matsui (D-Cal.), Cecil Heftel (D-Haw.), Frank J. Guarini (D-N.J.), Richard T. Schulze (R-Pa.), Guy Vander Jagt (R-Mich.), Harold E. Ford (D-Tenn.), Don Bailey (D-Pa.), and L.A. Bafalis (R-Fla.). 127 CONG. REC. 27,461 (1981).

28. *Id.* The discussion of H.R. 4961 and TEFRA will focus on each measure's revenue provisions. Both bills have some spending provisions as well, but appropriations bills are not covered by the origination clause, and these provisions do not affect these measures' central purposes.

five other bills relating to different subjects.[29] Each section of H.R. 4961, if enacted, would have reduced revenue.[30] The reports of both the Subcommittee on Select Revenue Measures[31] and the full Committee on Ways and Means,[32] as well as discussion of the measure on the floor of the House of Representatives,[33] reflect that this bill was one predicted to reduce revenue.[34] H.R. 4961, as passed by the House on December 15, 1981, would have reduced net budget receipts each year from 1982 to 1986 for a total revenue reduction of $976 million.[35]

Thus, H.R. 4961, as passed by the House, would have made

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29. H.R. 4908 (rental of residences to family members and other business uses of residences; 2-year delay in effective date of 1976 Tax Reform Act net operating loss rules) became sections 2 and 6 of H.R. 4961; H.R. 3262 (treatment of attorneys' fees in civil tax cases when position of the United States is unreasonable) became section 3 of H.R. 4961; H.R. 2860 (limitation on acceleration of accrual of taxes) became section 4 of H.R. 4961; H.R. 2397 (treatment of lending or finance businesses for purposes of the tax on personal holding companies) became section 5 of H.R. 4961; H.R. 4408 (refunds of excise tax on buses) became section 7 of H.R. 4961. STAFF OF THE HOUSE COMM. ON WAYS AND MEANS, 97TH CONG., 1ST SESS., MISCELLANEOUS REVENUE ACT OF 1981 (1981).

30. H.R. 4908 (sections 2 and 6 of H.R. 4961) would have reduced net budget receipts by approximately $375 million during 1982-86; H.R. 3262 (section 3 of H.R. 4961) would have increased budget outlays by less than $5 million annually; H.R. 2860 (section 4 of H.R. 4961) would have reduced net budget receipts by approximately $575 million during 1982-86; H.R. 2397 (section 5 of H.R. 4961) would have reduced net budget receipts by less than $5 million annually; H.R. 4408 (section 7 of H.R. 4961) would have reduced net budget receipts by less than $1 million annually in 1982 and 1983. *Id.* at 9, 16, 19, 22, 24, 26.

31. STAFF OF THE HOUSE COMM. ON WAYS AND MEANS, 97TH CONG., 1ST SESS., SUBCOMM. ON SELECT REVENUE MEASURES, SECTION-BY-SECTION SUMMARY, ANALYSIS, AND JUSTIFICATION OF H.R. 4961, at 6, 12, 15, 18, 20 (Comm. Print 1981).

32. H.R. REP. No. 404, 97th Cong., 1st Sess, at 9, 16, 19, 22, 24, 26 (1981).

33. 127 CONG. REC. 31,518-25 (1981).

34. Some courts have acknowledged this as well. *See, e.g.*, Texas Ass'n of Concerned Taxpayers, Inc. v. United States, 772 F.2d 163, 164 (5th Cir. 1985) ("In the form passed by the House, H.R. 4961 was intended to reduce taxes. The total revenue effect of the tax provisions were [sic] projected to be a reduction of revenues . . . ."); Armstrong v. United States, 759 F.2d 1378, 1381 (9th Cir. 1985) ("The bill that eventually became TEFRA was introduced in the House of Representatives, and in its original version, it would have reduced total tax revenues by a billion dollars between 1982 and 1986"); Schlick v. United States, 586 F. Supp. 433 (N.D. Ill. 1984) ("The net effect of H.R. 4961 would have been to reduce the amount of tax revenue collected . . . . The effect of the Senate amendments was an increase in the amount of revenue to be collected rather than a reduction as contemplated by the House"); Moore v. United States House of Representatives, 553 F. Supp. 267, 269 (D.D.C. 1982), *aff'd*, 733 F.2d 946 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985) ("The House Report estimated that the net effect of the tax provisions of the bill would reduce revenues by 976 million dollars over five years.").

35. H.R. REP. No. 404, *supra* note 32, at 38. Both the Treasury Department and the Congressional Budget Office concurred with these revenue estimates. *Id.* at 38, 41.

several minor changes in existing tax laws with the effect, both separately and in combination, of reducing revenue to the government by nearly $1 billion. It was a measure designed to provide relief for selected groups of taxpayers by correcting perceived negative effects of past legislation; it was not so much a piece of new legislation as it was a bill to remedy the effects of past legislation. For example, it provided for the extension of certain deductions,[36] the allowance of awards of attorney's fees in certain tax cases,[37] and the adjustment of accrual dates.[38] H.R. 4961 would not have levied a tax, imposed a duty, or taken money from the people for the purposes of government. If anything, H.R. 4961 would have taken money from the government and given it back to the people. Nowhere in the bill, its legislative history, nor discussion of it by members of Congress is there any statement or suggestion that the purpose of H.R. 4961 was to raise revenue. Rather, in both purpose and potential effect, H.R. 4961 was a bill for other purposes that would have reduced revenue.

B. *TEFRA*

After the House sent H.R. 4961 to the Senate, the first amendment by the Senate Committee on Finance was the following: "On page 2, strike line 1, through and including page 31, line 2, and insert the following."[39] In so doing, the Senate, by an amendment in the nature of a substitute, turned a "bill to make certain miscellaneous changes in the tax laws"[40] into an act "to provide for tax equity and fiscal responsibility."[41] The bill's title, its statement of purpose, and its text were changed. In the form reported by the Senate Committee on Finance, TEFRA's text alone spanned more than seventy pages of the Congressional Record.[42] Its more than 270 sections covered everything from Medicare and Medicaid, unemployment compensation, and pensions to mergers and acquisitions, airports, cigarettes, recreational equip-

36. *Id.* at 10.
37. *Id.* at 7. This provision of H.R. 4961 involved appropriations, which are not covered by the origination clause.
38. *Id.* at 17.
39. 128 CONG. REC. S8577 (daily ed. July 19, 1982).
40. 127 CONG. REC. 27,641 (1981).
41. 96 Stat. 324 (1982).
42. 128 CONG. REC. S8577-8644 (daily ed. July 19, 1982).

ment, ministers and church employees, Puerto Rico, and the tuna industry.[43]

The Senate passed TEFRA on July 23, 1982, by a narrow vote of fifty to forty-seven.[44] It asked for a conference with the House five days later.[45] On July 28, Representative John Rousselot of California introduced a resolution declaring that, in the opinion of the House, the Senate action of turning H.R. 4961 into TEFRA contravened the origination clause.[46] Congressman Rousselot noted the striking difference between the bill sent to the Senate as H.R. 4961 and the bill that returned as TEFRA: "We have not touched this bill, very few know what is contained therein. We have not looked at it . . . . It is a foot and a half thick. Now the original bill [H.R. 4961] went over—look at it here in my hand—31 pages."[47] The House tabled the Rousselot resolution and immediately sent the bill to a conference committee.[48]

This procedure of moving directly to a conference without having debated, considered, marked up, or otherwise addressed the measure passed by the alternate house of Congress was acknowledged as unusual.[49] Conference committees are formed to work out differences between alternate versions of the same legislation passed by the two houses. In this case, the House had not even begun to write an alternate bill. When Committee on Ways and Means Chairman Dan Rostenkowski proposed that his committee begin writing a tax bill similar to that passed as TEFRA by the Senate Committee on Finance, "he encountered such a barrage of anxiety from Democratic members who didn't want to participate in election-year tax raising that he abruptly postponed a scheduled bill-writing session."[50] Another news article noted this unusual procedure: "Moreover, the conferees generally ignored

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43. *Id.*

44. 128 CONG. REC. S9046 (daily ed. July 22, 1982).

45. 128 CONG. REC. S9307 (daily ed. July 28, 1982).

46. *Id.* at H4776. This was the method used during the 19th century when the House felt a measure passed by the Senate violated the origination clause. *See infra* notes 166-73 and accompanying text.

47. 128 CONG. REC. H4781 (daily ed. July 28, 1982).

48. *Id.*

49. *Id.* at H4777 (statement of Rep. Rostenkowski), H4780 (statements of Rep. Conable and Pickle). *See infra* notes 275-79 and accompanying text.

50. Merry, *Senate Tax-Boost Bill Poses Hard Political Problems for House Democrats and Candidates in November*, Wall St. J., July 26, 1982, at 3, col. 5.

the legislative rules that normally restrict conference committee actions. Such panels theoretically are required to operate within the scope of provisions cleared by both chambers . . . . But the tax conferees took a freewheeling legislative tack, sometimes even adding provisions that had cleared neither house."[51] Wrote another journalist: "The seven Senators and eight Representatives on the conference committees are in the unusual position of working entirely with a bill written by the Senate . . . since the House decided it did not want to write its own tax-increase package in this election year."[52] This understanding of the political context of TEFRA's passage suggests that the members of Congress themselves did not consider H.R. 4961 and TEFRA to be alternate versions of the same bill, notwithstanding the parliamentary technique of "amendment" by substitution.

The Senate and House conference reports each show that the text of TEFRA, in its final form, runs more than four hundred pages,[53] compared to just seventy-five pages for the entire report on H.R. 4961 by the House Committee on Ways and Means (which includes the full text of the bill).[54] The projected revenue effects of H.R. 4961 and TEFRA could not have differed more. While H.R. 4961 would have reduced revenue and slightly raised spending, TEFRA will dramatically increase revenue and lower spending. H.R. 4961 would have reduced revenue by nearly one billion dollars;[55] TEFRA will increase revenue by nearly $100 billion over the same period.[56]

TEFRA was the product of a complete substitution-by-amendment that left little more than the number and enacting clause of the original bill intact.[57] What is more important for origination

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51. Merry, *Conferees Clear a $98.3 Billion Tax-Increase Measure, But Battle on Direction of Fiscal Policy, GOP Looms*, Wall St. J., Aug. 16, 1982, at 3, col. 2.

52. Arenson, *Tax Bill Moves Into Conference*, N.Y. Times, Aug. 4, 1982, at D1, col. 2.

53. H.R. REP. No. 760, 97th Cong., 2d Sess., 691 (1982); S. REP. No. 530, 97th Cong., 2d Sess., 691 (1982). In contrast, H.R. 4961 was less than 25 pages long. *See supra* note 31.

54. H.R. REP. No. 404, *supra* note 32.

55. *Id.* at 38.

56. STAFF OF THE HOUSE COMM. ON WAYS AND MEANS, 97TH CONG., 2D SESS., COMPILATION OF CONFEREES' DECISIONS ON H.R. 4961 at 38 (Comm. Print 1982); H.R. REP. No. 760, *supra* note 53; S. REP. No. 530, *supra* note 53.

57. Three sections of H.R. 4961 remain part of TEFRA: section 3 (treatment of attorneys' fees); section 5 (personal holding companies), and section 7 (refund of excise taxes on buses). STAFF OF THE JOINT COMM. ON TAXATION, 97TH CONG., 2D SESS., SUMMARY OF THE REVENUE PROVISIONS OF H.R. 4961 at 85-86 (Jt. Comm. Print 1982).

clause concerns, however, is that the purpose of TEFRA was to raise revenue, while the purpose of H.R. 4961 was not. Every report and discussion of TEFRA makes plain that it was intended to raise revenue through increased taxation to reduce the growing budget deficit. During the Senate debate on TEFRA, Senator Robert Dole of Kansas, then chairman of the Committee on Finance, alternatively called TEFRA "a revenue raising bill" and "our proposals to raise revenue."[58] That committee's report stated that one of TEFRA's four principal objectives was "to raise revenue as part of an effort to narrow the . . . budget deficits."[59] This objective remained specifically stated in the conference reports of the House[60] and Senate,[61] as well as in TEFRA's official legislative history.[62] It met this objective through a combination of income and excise tax increases, deduction and preference cutbacks, repeal of tax exclusions, and extension of Medicare and Medicaid tax coverage to groups of employees not previously covered.[63]

This review of the facts surrounding TEFRA's passage, as well as of the purposes and revenue effects of both TEFRA and H.R. 4961, is critical to the constitutional analysis here. Ordinarily, even such a dramatic substitution-by-amendment would not have raised constitutional problems. As the examination of the origination clause that follows reveals, however, the purpose of a bill is the important inquiry in determining its constitutionality under this provision of the Constitution.

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58. 128 CONG. REC. S8648 (daily ed. July 19, 1982).

59. S. REP. NO. 494, 97th Cong., 2d Sess. 96 (1982).

60. H.R. REP. NO. 760, *supra* note 53.

61. S. REP. NO. 530, *supra* note 53.

62. 1982 U.S. CODE CONG. & ADM. NEWS 1486.

63. *See generally* STAFF OF SENATE COMM. ON FINANCE, 97TH CONG., 2D SESS., TAX EQUITY AND FISCAL RESPONSIBILITY ACT OF 1982 (Comm. Print 1982). It might be argued that H.R. 4961 and TEFRA were no different in that one merely extended deductions and the other cut them back. The important inquiry for purposes of constitutionality under the origination clause, however, is the purpose of the measure, not its general subject matter. *See infra* Section III. Under the purpose test, the fact that a bill merely relates to revenue is not enough.

This is the only substantive argument based on actual interpretation of the origination clause offered by courts confronting challenges to TEFRA. *See, e.g.*, Armstrong v. United States, 759 F.2d 1378, 1381 (9th Cir. 1985); Wardell v. United States, 757 F.2d 203, 205 (8th Cir. 1985); Milazzo v. United States, 578 F. Supp. 248 (S.D. Cal. 1984). *See infra* notes 64, 175-79, 297 and accompanying text.

III. The Origination Clause

A. *The Constitutional Convention*

A review of the proceedings and debates during the constitutional convention of 1787 makes clear that the origination clause and the issues it represented were integral parts of the convention. As the convention successively confronted the issues of bicameralism, representation, and legislative powers, the origination clause played an increasingly important role in the compromises that made completion of the Constitution possible. This review also reveals that, as the process of compromise continued, the definition of the class of legislative measures that must originate in the House of Representatives narrowed.[64]

The delegates first confronted the clause when Charles Pinckney of South Carolina introduced his May 29 proposals to the convention and continued to debate it until its final adoption on September 8, just one week before the final approval of the full Constitution.[65] The clause was at the heart of the major conflict over the mode of representation the federal legislature would adopt[66] and was an ingredient in the compromise over the powers of the respective branches of the legislature.[67]

The origination clause served two major purposes at the convention. First, it was one of "several important counterpoises to

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64. The clause covered "all money bills of every kind" on May 29, "all Bills for raising or appropriating money" on July 5, and "all Bills for raising revenue" on September 5. *See infra* note 146. This fact is important in considering the recent origination clause challenges to TEFRA because some of those courts interpreted the clause as covering "all revenue bills" or "all bills having to do with revenue." *See, e.g.*, Harris v. United States, 758 F.2d 456, 458 (9th Cir. 1985) (origination clause not violated because H.R. 4961 a "revenue bill"); Heitman v. United States, 753 F.2d 33, 35 (6th Cir. 1984) (TEFRA a "revenue bill"); Milazzo v. United States, 578 F. Supp. 248, 252 (S.D. Cal. 1984) (TEFRA constitutional because H.R. 4961 a "bill dealing with the collection of taxes"). However, the plain words of the clause state that it applies not to bills "having to do with revenue" but to bills "for raising revenue." The narrowing of the clause's focus during the convention and the shift in its wording from subject matter to purpose suggest that these courts' interpretations are too broad.

65. *See infra* notes 71-74, 129-35 and accompanying text.

66. *See* 2 G. Curtis, History of the Origin, Formation, and Adoption of the Constitution of the United States 216-17 (1863).

67. *See generally* McDonald & Mendle, *The Historical Roots of the Originating Clause of the U.S. Constitution: Article I, Section 7*, 27 Modern Age 274 (1983) (analysis of role of origination clause in constitutional convention).

the additional authorities to be conferred upon the Senate,"[68] such as the trying of impeachments, confirmation of executive appointments, and ratification of treaties. Second, it ensured that the branch of the national legislature most representative of the people—the House of Representatives—would have to take the political initiative of taking more money from the people through taxation.[69] The clause thus played a part in the distribution of governmental power in general and in the exercise of the fiscal power in particular.

At first, the proponents of the origination clause jealously guarded its dual elements of origination and amendment of appropriation and revenue bills as powers reserved to the House. They only gave ground when a concession was necessary to prevent failure of the convention.[70] The central role the origination clause played and the narrowing of definition it underwent both suggest that today it should be enforced in accordance with the particularized meaning it was given by the framers.

The convention proceeded to address the issues concerning the legislative branch of the federal government in three stages. First, the delegates considered whether to establish a unicameral or bicameral legislature. Second, they confronted the question of what mode of representation would determine the membership of the legislature. Third, they debated the appropriate powers the legislature was to exercise.

The issue of originating bills to raise revenue was on the convention's agenda from the start. Indeed, this was a major difference between the initial proposals that Edmund Randolph of Vir-

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68. THE FEDERALIST No. 66, at 404 (A. Hamilton) (Mentor ed. 1961).

69. An argument might be made that the passage of the seventeenth amendment to the Constitution, establishing direct election of Senators, has changed this perspective entirely. However, the basic policy reasons for passage of the origination clause remain fully intact. All members of the House of Representatives face their constituents at the polls every two years; Senators spend three times as long in office. Congressmen represent fewer people than Senators and remain in closer contact with the "grass roots." The need for the House to retain the originating power to balance the powers of the Senate remains in full force as well.

For further discussion of this point, see 128 CONG. REC. E3888 (daily ed. Aug. 13, 1982) (statement of Rep. Porter); McDonald & Mendle, *supra* note 67, at 274, 280-81; Schulze, *The Tax Law's Bad. It's Unconstitutional*, N. Y. Times, Aug. 23, 1982, at A17, col. 2; *Taxation Without Representation*, Wall St. J., Apr. 19, 1982, at 26, col. 1.

70. *See infra* notes 122 (amendment power given to Senate) and 127 (power to originate appropriation bills given to Senate) and accompanying text.

ginia and Charles Pinckney of South Carolina submitted to the convention on May 29.[71] Both plans called for a bicameral legislature with a popularly elected lower house which would, in turn, elect the upper house.[72] Randolph's proposal gave equal authority to originate legislation by stating that "each branch ought to possess the right of originating Acts."[73] Under his plan, both the lower and upper houses could initiate money bills. Pinckney's plan, on the other hand, stated: "All money bills, of every kind, shall originate in the House of Delegates, and shall not be altered by the Senate."[74] These two aspects of Pinckney's proposal—originating and amending—would play a crucial role in the development of our constitutional structure of government. As will be developed in this Section, both elements of legislative power with respect to money bills became parts of compromises that allowed the process of constitution making to continue.[75]

When the Committee of the Whole House reported Randolph's proposals for the consideration of the full House on June 13, Elbridge Gerry of Massachusetts, an early supporter of the origination clause, moved to add to the general clause concerning origination of bills these words: "excepting money bills, which shall originate in the first branch of the national Legislature."[76] This motion, seconded by Pinckney, was defeated by a vote of

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71. 1 CONVENTION RECORDS, *supra* note 22, at 20, 23.

72. *Id.* at 21; 1 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 144 (J. Elliot ed. 1888) [hereinafter CONSTITUTION DEBATES]; 1 JOURNAL OF THE FEDERAL CONVENTION 61, 65 (E.H. Scott ed. 1894) [hereinafter CONVENTION JOURNAL]. Multiple sources of material from the constitutional convention are used because each provides different types of information. Farrand provides both the journal entries and passages from the notes of various delegates; Scott provides passages from Madison's notes; Elliot provides agenda items (motions, votes, etc.).

73. 1 CONSTITUTION DEBATES, *supra* note 72, at 143-46; 1 CONVENTION JOURNAL, *supra* note 72, at 62; 1 CONVENTION RECORDS, *supra* note 22, at 20.

74. 1 CONSTITUTION DEBATES, *supra* note 72, at 146; 1 CONVENTION JOURNAL, *supra* note 72, at 65.

75. *See infra* notes 100-28 and accompanying text.

76. 1 CONSTITUTION DEBATES, *supra* note 72, at 174; 1 CONVENTION JOURNAL, *supra* note 72, at 158; 1 CONVENTION RECORDS, *supra* note 22, at 224. Even though Pinckney's proposals containing the first version of the origination clause were defeated, this early effort to add it to Randolph's proposals suggests the importance placed on it by the convention. This Section will establish that the origination clause was valuable as a balancing tool to gain compromises necessary for the success of the convention. This early effort to include the clause, before the controversies necessitating compromise arose, shows that the clause was important in its own right as well.

eight to three.[77] The notes of James Madison of Virginia[78] provide the rationale for this early move to keep the origination clause alive: "The other branch was more immediately the representatives of the people, and it was a maxim, that the people ought to hold the purse-strings."[79] Madison opposed the motion, as he consistently opposed the origination clause throughout the convention, arguing that the Senate would represent the people as well as the House.[80] He also said that, to be consistent, the measure's proponents should also prohibit the Senate from amending revenue bills, since "an addition of a given sum would be equivalent to a distinct proposition of it."[81] Hugh Williamson of North Carolina countered that "[t]he restriction will have one advantage, it will oblige some member in the lower branch to move, and people can then mark him."[82]

In opposition to the Randolph and Pinckney proposals for a bicameral legislature, William Paterson of New Jersey introduced the so-called "small state" plan on June 15. It has been given this label because its terms benefited the less populous states[83] by putting them on par with the larger states with respect to political representation in the federal government.[84] The Committee of

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77. 1 CONSTITUTION DEBATES, *supra* note 72, at 174; 1 CONVENTION JOURNAL, *supra* note 72, at 159; 1 CONVENTION RECORDS, *supra* note 22, at 224.

78. Madison's notes are widely considered the most accurate and complete of any made by a delegate to the convention. *See, e.g.*, J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at xxiii (Norton Library ed. 1969) (comments on the accuracy and completeness of Madison's notes).

79. 1 CONVENTION JOURNAL, *supra* note 72, at 158; 1 CONVENTION RECORDS, *supra* note 22, at 233; *see also* C. WARREN, THE MAKING OF THE CONSTITUTION 275 (1937) (citing rationle for Gerry's June 13 motion as the lower house would be immediate representatives of the people).

80. This is similar to the contemporary argument that the seventeenth amendment, allowing for direct election of Senators, obviated the need for the origination clause. *See supra* note 69, *infra* notes 82, 103 and accompanying text.

81. 1 CONVENTION JOURNAL, *supra* note 72, at 159; 1 CONVENTION RECORDS, *supra* note 22, at 234. Later versions of the origination clause submitted to the convention, with the exception of the final compromise version, included this prohibition on Senate amendments. *See infra* note 146 and accompanying text.

82. 1 CONVENTION JOURNAL, *supra* note 72, at 159; 1 CONVENTION RECORDS, *supra* note 22, at 234. This concern is valid today as well, since every member of the House of Representatives must face constituents at the polls every two years. *See* 128 CONG. REC. E3888 (daily ed. Aug. 13, 1982) (statement of Rep. Porter); Schulze, *supra* note 69.

83. Generally, the small states included Connecticut, Delaware, Maryland, and New Jersey. The large states included Georgia, Massachusetts, New York, North Carolina, Pennsylvania, South Carolina, and Virginia.

84. 1 CONSTITUTION DEBATES, *supra* note 72, at 175-77; 1 CONVENTION JOURNAL, *supra*

the Whole House, however, did not agree and reported Randolph's proposal instead.[85] In so doing, the delegates decided the first question—they chose a bicameral over a unicameral model for the new national legislature. By thus settling on a bicameral model, however, the convention lengthened its own agenda by necessitating consideration of the questions of representation and powers of the two houses. This also set the stage for the power struggles between the large and small states that followed.[86] The remainder of the convention would be fraught with disputes over the basis for representation in the two branches and the powers to be held by each. The power of originating money bills, therefore, took on added significance as a balancing force in these debates.[87]

The debate between the large and small states over representation in the Senate[88] continued on June 30 when Oliver Ellsworth of Connecticut moved that each state be allowed an equal vote in the second branch.[89] Ellsworth made it clear that no formulation of a general government would be approved without equal representation in the Senate.[90] After protracted debate, Dr. Benjamin Franklin of Pennsylvania helped clarify the issues and proposed a compromise. He capsuled the core of the debate: "The diversity of opinions turns on two points. If a proportional representation takes place, the small States contend that their liberties will be in danger. If an equality of votes is to be put in its place, the large States say their money will be in danger."[91]

Ellsworth's motion was technically defeated on July 2, but the

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note 72, at 163-67; 1 CONVENTION RECORDS, *supra* note 22, at 242-45.

85. 1 CONSTITUTION DEBATES, *supra* note 72, at 181-83; 1 CONVENTION JOURNAL, *supra* note 72, at 196; 1 CONVENTION RECORDS, *supra* note 22, at 313. It is important to note that these resolutions allowed both houses to originate all bills.

86. Madison remarked that "[t]he great difficulty lies in the affair of Representation; and if this could be adjusted, all others would be surmountable." 1 CONVENTION RECORDS, *supra* note 22, at 321.

87. *See infra* notes 94-128 and accompanying text.

88. The issue with respect to representation in the lower house was whether it would be on the basis of population, property, or taxes paid. *See* McDonald & Mendle, *supra* note 67, at 278.

89. 1 CONSTITUTION DEBATES, *supra* note 72, at 192; 1 CONVENTION JOURNAL, *supra* note 72, at 271; 1 CONVENTION RECORDS, *supra* note 22, at 482-88.

90. 1 CONVENTION JOURNAL, *supra* note 72, at 271; 1 CONVENTION RECORDS, *supra* note 22, at 482.

91. 1 CONVENTION JOURNAL, *supra* note 72, at 278; 1 CONVENTION RECORDS, *supra* note 22, at 488. Dr. Franklin's proposal is detailed in 1 CONVENTION JOURNAL, *supra* note 72, at 278-79; 1 CONVENTION RECORDS, *supra* note 22, at 507-08.

vote was even at five to five.[92] This reflected the deadlock in the convention over the representation issue. As a result, the convention appointed a committee to seek a compromise. As one delegate put it: "Some compromise seemed to be necessary, the States being exactly divided on the question for an equality of votes in the second branch."[93]

The committee reported back three days later and proposed, in what has been labeled the "Great Compromise," that the House be proportioned according to population and that each state have an equal vote in the Senate. To make such a formulation possible, however, it was necessary to revive the origination clause, which had been absent from consideration since Randolph's original proposals had been reported. The committee now recommended that "all Bills for raising or appropriating money . . . shall originate in the first Branch of the Legislature, and shall not be altered or amended by the second branch."[94]

During debate on the committee report, Nathaniel Gorham of Massachusetts noted that the proposal contained provisions "mutually conditioned" on each other. One aspect of the compromise struck between the smaller and larger states was that the former would gain equal representation in the Senate and that the latter would gain for the House, which it controlled, the exclusive privilege of originating and amending all bills to raise revenue. When Gorham questioned how the committee had viewed the compromise, committee member Gerry responded that the report was agreed to "merely in order that some ground of accommodation might be proposed. Those opposed to the equality of votes have only assented conditionally . . . ."[95] Ellsworth accepted the

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92. 1 CONSTITUTION DEBATES, *supra* note 72, at 193; 1 CONVENTION JOURNAL, *supra* note 72, at 284; 1 CONVENTION RECORDS, *supra* note 22, at 509. States voting in favor of equal representation included the small states of Connecticut, Delaware, Maryland, and New Jersey, joined by New York; states voting against equal representation included the large states of Massachusetts, North Carolina, Pennsylvania, South Carolina, and Virginia.

93. 1 CONVENTION JOURNAL, *supra* note 72, at 284; 1 CONVENTION RECORDS, *supra* note 22, at 511. Roger Sherman of Connecticut said that the convention was now at "full stop." Madison, on the other hand, preferred to battle the issue in the full House rather than send it to a committee for resolution. 1 CONVENTION JOURNAL, *supra* note 72, at 289; 1 CONVENTION RECORDS, *supra* note 22, at 515.

94. 1 CONSTITUTION DEBATES, *supra* note 72, at 194; 1 CONVENTION JOURNAL, *supra* note 72, at 290; 1 CONVENTION RECORDS, *supra* note 22, at 524.

95. 1 CONVENTION JOURNAL, *supra* note 72, at 291; 1 CONVENTION RECORDS, *supra* note 22, at 527.

compromise because one was needed and this one was convenient and reasonable.[96]

Madison again opposed the exclusive "privilege of originating money bills,"[97] judging the matter as no concession by the small states at all. He argued that collusion between members of both houses could produce a revenue bill that originated in the House in form only,[98] thus frustrating the purpose of the origination clause. He also voiced his oft-repeated concern that the privilege resting with the House would be a source of "frequent and obstinate altercations"[99] between the two houses over the procedure and content of bills raising or appropriating money.

The debates of the succeeding ten days are evidence that the equality of votes in the Senate and the privilege of originating

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96. 1 CONVENTION JOURNAL, *supra* note 72, at 296; 1 CONVENTION RECORDS, *supra* note 22, at 532.

97. 1 CONVENTION JOURNAL, *supra* note 72, at 291; 1 CONVENTION RECORDS, *supra* note 22, at 527; *see also* F. MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 206-07 (1985) (Madison's preference would be that Congress "would have a general power to legislate on all matters of national concern" which meant that "[e]ither house could originate all types of bills").

98. This observation is very significant because it shows that the framers were concerned that there be no political tricks between the House and the Senate that would appear in form to comply with the origination clause but that would violate it in substance. William Grayson made a similar prediction before the Virginia ratifying convention. *See infra* notes 140-41 and accompanying text.

This is, in fact, precisely what happened with the passage of TEFRA. The tenor of the economic and political times in 1982 signaled the need for a large tax increase to cut the budget deficit. Such an increase was not forthcoming from the House of Representatives, whose members all faced reelection that year. As a result, the Senate fashioned TEFRA in July 1982 and amended by substitution a House-sponsored bill that would cut taxes to create a bill that would increase taxes by more than $200 billion over five years. It was this kind of form-over-substance action based on political expediency that the framers foresaw and wanted to avoid. *See infra* notes 268-82 and accompanying text. Because such a result is possible, it suggests the need for rigorous application of the origination clause where a controversy arises. It has been proposed that this likelihood of fiscal political pressures suggests the framers intended that the courts be the body to enforce the origination clause. Comment, *supra* note 6, at 438-39. However, the remedy Madison recommended was elimination of the clause altogether, and the solution Grayson advocated was restriction of the amendment power to the House. The proceedings of the constitutional convention contain no mention of a role for the courts in enforcing the origination clause. Viewed in the broader context of the standing and political question doctrines, both of which implicate the separation of powers that the framers vigorously sought to further, this conclusion is even less likely.

99. 1 CONVENTION JOURNAL, *supra* note 72, at 291; 1 CONVENTION RECORDS, *supra* note 22, at 527; *see also* THE FEDERALIST No. 10, at 77 (J. Madison) (Mentor ed. 1961) ("Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction.").

bills to raise revenue in the House were conditional on each other.[100] Franklin, a prime architect of the compromise, emphasized that the committee had reported "several propositions as mutual conditions of each other."[101] On July 6, committee member George Mason of Virginia explained the rationale behind the committee's inclusion of the origination privilege in the report: "The consideration which weighed with the Committee was that the first branch would be the immediate representatives of the people, the second would not."[102] Gerry emphasized that the members of the House would return more often to the people and thus would have more of the people's confidence in money matters.[103] Franklin echoed this when he said that "it was always of importance that the people should know who had disposed of their money, and how it had been disposed of . . . . This end would . . . be best attained, if money affairs were to be confined to the immediate representatives of the people."[104] The comments of John Rutledge of South Carolina, Luther Martin of Maryland, and Roger Sherman of Connecticut repeated the notion that the dual issues of originating revenue bills in the House and equal votes in the Senate were tied, both integral parts of the compromise.[105]

Charles Warren identifies five factions within the convention with different concerns about the origination clause.[106] Some of the small state delegates, eager to maintain as much power in the Senate as possible, were opposed to vesting the originating power in the House. They were joined in their opposition by two groups of large state delegates: those who thought the clause of little consequence and not a significant concession by the small states, and those who thought depriving the Senate of the originating power was wrong in theory and likely to be a source of intracongres-

100. *See* C. WARREN, *supra* note 79, at 276-77, 666-67.

101. 1 CONVENTION JOURNAL, *supra* note 72, at 302; 1 CONVENTION RECORDS, *supra* note 22, at 543. The committee report was based on a proposal by Franklin.

102. 1 CONVENTION JOURNAL, *supra* note 72, at 304; 1 CONVENTION RECORDS, *supra* note 22, at 544.

103. 1 CONVENTION JOURNAL, *supra* note 72, at 304-05; 1 CONVENTION RECORDS, *supra* note 22, at 545. *See supra* notes 69, 82.

104. 1 CONVENTION JOURNAL, *supra* note 72, at 306; 1 CONVENTION RECORDS, *supra* note 22, at 546.

105. 1 CONVENTION JOURNAL, *supra* note 72, at 346-48; 2 CONVENTION RECORDS, *supra* note 22, at 3-4.

106. C. WARREN, *supra* note 79, at 276-77.

sional disputes. Two groups favored the origination clause: the small state delegates willing to agree to it as a part of the needed compromise and the large state delegates who insisted on retention of this power in the House, where the large states were more powerful.

On August 6, the Committee of Detail was appointed to put the work completed to date into a draft constitution.[107] Article 4, section 5 of the draft stated: "All bills for raising or appropriating money . . . shall originate in the House of Representatives, and shall not be altered or amended by the Senate."[108] By this time, the compromise was beginning to unravel and the factions were dividing. John McHenry of Maryland began meeting fellow delegates to organize an effort to eliminate the origination clause.[109] That effort succeeded two days later when article 4, section 5 was struck from the draft.[110]

Forrest McDonald has also noted that convention delegates with similar preferences banded together in factions. He describes the effort to strike the origination clause as spearheaded by a coalition of three groups: small state delegates who had won equal representation in the Senate by agreeing to vest the origination power in the House but who now were reneging on that concession, ardent nationalists who thought the power would cause disputes between the houses and weaken national authority, and those who objected to the origination clause because slaves were to be counted in the census on which representation in the House would be based.[111]

Delegates differed over the value of the clause to the Constitution. Mason argued that to "strike out the section, was to un-

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107. 1 CONSTITUTION DEBATES, *supra* note 72, at 223; 2 CONVENTION RECORDS, *supra* note 22, at 175.

108. 1 CONSTITUTION DEBATES, *supra* note 72, at 224; 2 CONVENTION JOURNAL, *supra* note 72, at 450; 2 CONVENTION RECORDS, *supra* note 22, at 178. Even at this date, just one month before the adoption of the final Constitution, neither the power of originating appropriation bills nor of amending money bills had been granted to the Senate.

109. 2 CONVENTION RECORDS, *supra* note 22, at 210-11.

110. 1 CONSTITUTION DEBATES, *supra* note 72, at 234; 2 CONVENTION RECORDS, *supra* note 22, at 214. The states voting to strike the origination clause were Delaware, Georgia, Maryland, New Jersey, Pennsylvania, South Carolina, and Virginia; those voting against striking the clause were Connecticut, Massachusetts, New Hampshire, and North Carolina. *See also* C. WARREN, *supra* note 79, at 665 (discussing effort ot strike origination clause).

111. McDonald & Mendle, *supra* note 67, at 279.

hinge the compromise of which it [was] made a part."[112] John Mercer of Maryland thought the origination clause such an advantage to the House that the equality of votes for small states in the Senate would be rendered meaningless, while Madison thought the clause provided no advantage at all, being only "a source of injurious altercations."[113] Ellsworth was willing to stick by the agreement.[114]

The clause continued to be the subject of debate. The effort to include it in the Constitution now proceeded on three principle rationales,[115] exemplified by the proceedings of August 9. First, such delegates as Randolph,[116] Franklin,[117] and Caleb Strong of Massachusetts,[118] continued to argue that the origination privilege was an important counterpoise to the equal representation of the states in the Senate. Second, Mason argued that "it was of essential importance to restrain the right to the House of Representatives the immediate choice of the people."[119] Third, George Read of Delaware argued that if the privilege was indeed viewed as a condition of the compromise announced on July 5, then he would support it.[120] Williamson, Franklin, and Mason emphasized this fact and urged the delegates to stick with the terms of the compromise.[121]

On August 15, Strong moved and Mason seconded to amend article 6, section 12 of the draft constitution to read: "Each House

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112. 2 CONVENTION JOURNAL, *supra* note 72, at 481; 2 CONVENTION RECORDS, *supra* note 22, at 224.

113. 2 CONVENTION JOURNAL, *supra* note 72, at 481; 2 CONVENTION RECORDS, *supra* note 22, at 224.

114. 2 CONVENTION JOURNAL, *supra* note 72, at 481; 2 CONVENTION RECORDS, *supra* note 22, at 224.

115. The effort to include the clause in the Constitution was initially founded on the first two of the three rationales mentioned here. *See supra* notes 68-69 and accompanying text.

116. 2 CONVENTION JOURNAL, *supra* note 72, at 483-86; 2 CONVENTION RECORDS, *supra* note 22, at 232, 234.

117. 2 CONVENTION JOURNAL, *supra* note 72, at 484; 2 CONVENTION RECORDS, *supra* note 22, at 233.

118. 2 CONVENTION JOURNAL, *supra* note 72, at 484; 2 CONVENTION RECORDS, *supra* note 22, at 232.

119. 2 CONVENTION JOURNAL, *supra* note 72, at 485; 2 CONVENTION RECORDS, *supra* note 22, at 233.

120. 2 CONVENTION JOURNAL, *supra* note 72, at 484; 2 CONVENTION RECORDS, *supra* note 22, at 233.

121. 2 CONVENTION JOURNAL, *supra* note 72, at 484; 2 CONVENTION RECORDS, *supra* note 22, at 233.

shall possess the right of originating all Bills except Bills for raising money for the purpose of revenue or for appropriating the same . . . which shall originate in the House of representatives; but the Senate may propose or concur with amendments as in other cases."[122] It is important to note two aspects of this amendment. First, it still reserved the power of originating appropriation bills (as well as bills for raising revenue) to the House. Second, and more significantly, the power of amending money bills was offered the Senate as a concession.

This concession again made majority support for the origination clause possible; delegates began to agree that this formulation was acceptable. For example, Williamson said that "some think this restriction on the Senate essential to liberty, others think it of no importance. Why not the former be indulged."[123] Nevertheless, consideration of this amendment was postponed, by a vote of six to six, until the issue of the Senate's powers was finally settled. The question of the origination clause was called on August 21 but not taken up.[124]

Another event that improved chances for a compromise was the change of George Washington's vote to support the origination clause. He did so primarily because it was an essential point for other delegates who Washington feared would be intransigent on other points if this concession were not made.[125]

On August 31, those parts of the draft constitution and committee reports that had been postponed or not acted upon were referred to a Committee of Eleven.[126] This committee reported a

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122. 2 CONVENTION RECORDS, *supra* note 22, at 294. This is the first time the amending power was granted to the Senate.

123. THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 404 (G. Hunt & J. Scott eds. 1920) [hereinafter CONVENTION DEBATES]; 2 CONVENTION JOURNAL, *supra* note 72, at 532; 2 CONVENTION RECORDS, *supra* note 22, at 297. Delegates such as Wilson, Ellsworth, and Madison still argued that it was really no concession at all. 2 CONVENTION JOURNAL, *supra* note 72, at 484; 2 CONVENTION RECORDS, *supra* note 22, at 233.

124. 1 CONSTITUTION DEBATES, *supra* note 72, at 255; CONVENTION DEBATES, *supra* note 123, at 438; 2 CONVENTION JOURNAL, *supra* note 72, at 570, 572; 2 CONVENTION RECORDS, *supra* note 22, at 357-58.

125. *See* C. WARREN, *supra* note 79, at 668.

126. 1 CONSTITUTION DEBATES, *supra* note 72, at 280; 2 CONVENTION RECORDS, *supra* note 22, at 473. The committee members were: Roger Sherman (Conn.), John Dickinson (Del.), Abraham Baldwin (Ga.), Daniel Carrol (Md.), Rufus King (Mass.), Nicholas Gilman (N.H.), David Brearley (N.J.), H. Williamson (N.C.), Gouveneur Morris (Pa.), Pierce Butler (S.C.), and James Madison (Va.).

new version of article 6, section 12 on September 5: "all Bills for raising revenue shall originate in the House of representatives and shall be subject to alterations and amendments by the Senate."[127] Significantly, not only was the power of amendment still granted to the Senate, but origination of appropriation bills was no longer specifically reserved to the House—another major concession that made final approval of the origination clause possible.[128]

Finally, on September 8, the origination clause was amended to its final form: "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."[129] This form was approved by a vote of nine to two.[130] The proceedings of the convention were referred to a Committee of Style and Arrangement,[131] which reported on September 12. The origination clause now constituted the article 1, section 7 of the Constitution we see today.[132] When the section of this draft containing the origination clause was finally considered by the convention, Madison's notes indicate that there was no debate about the provision.[133] The Constitution was agreed to unanimously on September 15,[134] and two days later the convention closed after the signing of the document.[135]

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127. 1 CONSTITUTION DEBATES, *supra* note 72, at 285; CONVENTION DEBATES, *supra* note 123, at 512; 2 CONVENTION JOURNAL, *supra* note 72, at 661; 2 CONVENTION RECORDS, *supra* note 22, at 505. This is the first time the power of originating appropriation bills was granted to the Senate.

128. This concession was also a source of objection to the Constitution by the proponents of the origination clause. *See infra* notes 136-39 and accompanying text.

129. 1 CONSTITUTION DEBATES, *supra* note 72, at 295; 2 CONVENTION RECORDS, *supra* note 22, at 545.

130. 1 CONSTITUTION DEBATES, *supra* note 72, at 295; 2 CONVENTION JOURNAL, *supra* note 72, at 690; 2 CONVENTION RECORDS, *supra* note 22, at 552. The states voting in favor were Connecticut, Georgia, Massachusetts, New Hampshire, New Jersey, North Carolina, Pennsylvania, South Carolina, and Virginia; those voting against were Delaware and Maryland.

131. 1 CONSTITUTION DEBATES, *supra* note 72, at 295; 2 CONVENTION JOURNAL, *supra* note 72, at 691; 2 CONVENTION RECORDS, *supra* note 22, at 547. The members of the committee were William Johnson (Conn.), Rufus King (Mass.), Alexander Hamilton (N.Y.), Gouveneur Morris (Pa.), and James Madison (Va.).

132. 1 CONSTITUTION DEBATES, *supra* note 72, at 300; 2 CONVENTION JOURNAL, *supra* note 72, at 703; 2 CONVENTION RECORDS, *supra* note 22, at 593.

133. 2 CONVENTION JOURNAL, *supra* note 72, at 723-24; 2 CONVENTION RECORDS, *supra* note 22, at 613-14.

134. 1 CONSTITUTION DEBATES, *supra* note 72, at 317; 2 CONVENTION JOURNAL, *supra* note 72, at 741; 2 CONVENTION RECORDS, *supra* note 22, at 633.

135. 1 CONSTITUTION DEBATES, *supra* note 72, at 317-18; 2 CONVENTION RECORDS, *supra* note 22, at 648.

Three supporters of the origination clause—Mason, Gerry, and Randolph—refused to sign the Constitution.[136] Listed among Mason's objections was the fact that the Senate now had "the power of altering all money bills, and of originating appropriations of money."[137] Gerry stated that even if the Senate had been constituted on the same basis of representation as the House, "money bills should not be originated or altered by that branch . . . ."[138] He thought that too much power had been given to the Senate in the compromise that had separated the originating and amending powers with regard to revenue-raising bills. Randolph would later continue to argue, as a member of Congress, that the Senate should not have the amendment power.[139]

Objections to the final form of the clause also surfaced in the debates in the state ratifying conventions. In the Virginia convention, for example, Grayson argued that the power of amendment was the power to originate and, therefore, violated the original principle of the clause.[140] He said that the "Senate could strike out every word of the bill except *whereas*, or any other introductory word, and might substitute new words of their own."[141] In contrast to Grayson, Madison argued that it was necessary for the Senate to have the power of amendment to avoid contentions and to facilitate compromise.[142]

Speaking before the Maryland House in November 1787, McHenry described the final nature of the compromise: "The Larger States hoped for an advantage by confirming this privilege to that Branch where their numbers predominated, and it ended in a compromise by which the Lesser States obtained a power of

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136. McDonald & Mendle, *supra* note 67, at 279.

137. 1 CONSTITUTION DEBATES, *supra* note 72, at 494; 2 CONVENTION RECORDS, *supra* note 22, at 638.

138. 3 CONVENTION RECORDS, *supra* note 22, at 266.

139. 2 A. HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES 942 (1907).

140. 3 CONVENTION RECORDS, *supra* note 22, at 317-18.

141. C. WARREN, *supra* note 79, at 670-71. This is exactly what the Senate did in turning H.R. 4961 into TEFRA nearly two centuries after Grayson's warning. *See supra* note 39, *infra* notes 270-71 and accompanying text. Warren wrote in 1937 that "Grayson's prophecy constitutes exactly what has taken place, in practice, in the Senate." C. WARREN, *supra* note 79, at 671.

142. 3 CONVENTION RECORDS, *supra* note 22, at 317-18. This reflects Madison's overriding concern with the dangers of factions and contentions. *See also* THE FEDERALIST No. 10 (J. Madison) (Mentor ed. 1961).

amendment in the Senate."[143]

Madison provided perhaps the most succinct statement of the basis of the origination clause. Speaking before the Virginia ratifying convention, he stated that the principle reason for restricting the originating power to the House was that its members

> were chosen by the People, and supposed to be best acquainted with their interests . . . . In order to make them more particularly acquainted with these objects, the democratic branch of the Legislature consisted of a greater number, and were chosen for a shorter period, so that they might revert more frequently to the mass of the People.[144]

Although Senators are now chosen by direct election, the major factors cited by Madison remain as true today as they were in 1787: representation in the House is by population, the House contains more members, and its members return more frequently to the people for approval at the polls. In addition, the powers of the Senate (trying impeachments, treaty and appointment confirmation, etc.) are the same, as is the need to counterbalance them with the origination power.[145] Thus, the original reasoning supporting the origination clause remains valid and argues for its continued enforcement.

This rather extensive review of the proceedings of 1787 reveals several things. Successive versions of the clause show that the specific powers contained in its original version were given up only when it was clear that success of the convention required it.[146] Warren cites the adoption of the September 5 committee re-

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143. 3 CONVENTION RECORDS, *supra* note 22, at 148.

144. *Id.* at 356.

145. *See supra* note 68 and accompanying text.

146. May 29, 1787—Pinckney proposal: "all money bills of every kind shall originate in the House of Delegates & shall not be altered by the Senate." 3 CONVENTION RECORDS, *supra* note 22, at 596 (House originates revenue and appropriation bills; no Senate amendment power); July 5, 1787—committee report: "all Bills for raising or appropriating money . . . shall originate in the first Branch of the Legislature, and shall not be altered or amended by the second Branch." 1 CONVENTION RECORDS, *supra* note 22, at 524 (House originates revenue and appropriation bills; no Senate amendment power); August 6, 1787—committee report: "All Bills for raising or appropriating money . . . shall originate in the House of Representatives, and shall not be altered or amended by the Senate." 2 CONVENTION RECORDS, *supra* note 22, at 178 (House originates revenue and appropriation bills; no Senate amendment power); August 8, 1787—origination clause struck from draft; August 15, 1787—amendment to article 6, section 12: "Each House shall possess the right of originating all Bills except [for] Bills for the purposes of [raising] revenue or for appropriating the same . . . which shall originate in the House of representatives; but the Senate may propose or concur with amendments as in other cases." 2 CONVENTION RECORDS, *supra*

port as the end of "this long and hard fight over a question which had seriously threatened to break up the Convention."[147] The Senate power to amend was not conceded until mid-August, and Senate origination of appropriation bills was not added until early September. The framers of the Constitution in general, and the proponents of the origination clause in particular, were cautious about granting too much power over revenue bills to the Senate and intended that the power they did grant be carefully circumscribed so that the purposes of the origination clause would not be frustrated.

The origination clause underwent a narrowing of focus from concerning "all money bills" to "bills for raising revenue" through the course of the convention. This change reflects a significant shift in terms of how the clause should be applied. It shifted the focus of the clause from the subject matter of bills (money) to the purpose of bills (raising revenue). This more specific wording of the clause defines it proper application today.

B. *Commentators*

Early constitutional commentators provide additional insight into the nature and definition of the origination clause. They agree that it was based on a similar division of revenue authority between the two houses of the British Parliament and note that there had been debate in the constitutional convention over the applicability of this procedure to the American republic.[148]

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note 22, at 294 (House originates revenue and appropriation bills; Senate may amend); September 5, 1787—committee report: "all Bills for raising revenue shall originate in the House of representatives and shall be subject to alterations and amendments by the Senate." 2 CONVENTION RECORDS, *supra* note 22, at 505 (House originates bill for raising revenue; Senate may amend); September 8, 1787—amendment to article 6, section 12: "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." 2 CONVENTION RECORDS, *supra* note 22, at 545 (House originates bills for raising revenue; Senate may amend); September 14, 1787—final form of article I, section 7: "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." 2 CONVENTION RECORDS, *supra* note 22, at 593.

147. C. WARREN, *supra* note 79, at 670.

148. *See, e.g.*, 1 T. COOLEY, CONSTITUTIONAL LIMITATIONS 268 (8th ed. 1927); S. MILLER, LECTURES ON THE CONSTITUTION 205-08 (1893); 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 338-40 (1833); 1 F. THORPE, THE CONSTITUTIONAL HISTORY OF THE UNITED STATES 505 (1970 ed.). *But see* 1 G. CURTIS, CONSTITUTIONAL HISTORY OF THE UNITED STATES 452-53 (1889). The House of Lords lost the power to amend revenue bills in 1911. *See* T. COOLEY, *supra*, at 268 n.1; McDonald & Mendle, *supra* note 67, at 275.

Commentators also provide insight into the situations where a potential problem of constitutionality under the origination clause might arise. In so doing, they note the fact that the focus of the clause and the class of legislation to which it refers narrowed during the course of the convention. For example, the origination clause does not refer to appropriation or spending bills but only to revenue bills.[149] The power of originating appropriation bills was forfeited late in the convention to save the existence of the origination clause as a viable part of the Constitution.[150] One commentator emphasizes that the more specific "bills for raising revenue" wording has "a distinct meaning as used in this clause."[151] The August 15 rewording by the convention to include the phrase "for the purpose of revenue" was a significant development. Watson has noted: "Prior to that the clause had related to 'money bills,' which would include bills for any purpose, but now a limitation to a specific purpose had been made by the report."[152]

This shift in definition from the subject matter to the purpose of bills helps distinguish between the different types of legislation that come under the ambit of the origination clause. These commentators have argued that a "purpose test" is appropriate[153] and have found that some of the early origination clause cases set forth a purpose test as well.[154] "[T]he expression 'bills for raising revenue' would have reference to laws for the purpose of obtaining money by some form of taxation . . . to be used in supplying the wants of the government . . . ."[155] The clause does not refer to bills that have the effect of raising money for other purposes or through a vehicle other than taxation such as the sale of

149. *See* 2 G. CURTIS, *supra* note 66, at 222 n.3; S. MILLER, *supra* note 148, at 204-05.

150. This power was granted the Senate in the proposal of September 5. *See supra* note 127 and accompanying text.

151. 1 D. WATSON, WATSON ON THE CONSTITUTION 344 (1910).

152. *Id.* at 345; *see also supra* note 122 and accompanying text (discussing wording of August 15 amendment); 2 G. CURTIS (discussing August 15 amendment as attempt to "avoid an alleged ambiguity").

153. *See, e.g.*, S. MILLER, *supra* note 148, at 204.

154. Watson, for example, cites United States v. Norton, 91 U.S. 566, 567 (1875) (act establishing a postal money-order system not a revenue law because it had no "purpose of revenue in view.") 1 D. WATSON, *supra* note 151, at 351. Willoughby cites Twin City Bank v. Nebeker, 167 U.S. 196 (1897) (holding that "a bill, the primary purpose of which is not the raising of revenue, is not a measure that must originate in the House . . . ."). 2 WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 656 (2d ed. 1929).

155. S. MILLER, *supra* note 148, at 204.

public land or securities.[156] In short, "the history of the origin of the power . . . 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."[157]

Finally, these commentators have acknowledged that the clause is susceptible to legislative abuse,[158] echoing Madison's warnings in the constitutional convention and Grayson's objections in the Virginia ratifying convention. Watson noted that granting the power to "amend" or "alter" to the Senate may mean that disputes can easily arise as to whether a particular Senate measure is a proper amendment or an improper origination.[159] Corwin's treatise went so far as to state that "the provision is otherwise negligible, inasmuch as the Senate may 'amend' any bill from the House by substituting an entirely new measure under the enacting clause."[160] Because, however, the clause was so important to the formation of the Constitution,[161] and because the purpose test provides a means of dealing with questionable Senate amendments, the origination clause should be not be abandoned simply because it is susceptible to legislative abuse. Rather, it should be rigorously enforced; indeed, the possibility of legislative abuse, today as in 1787, itself demands rigorous enforcement.

C. *The Functional Understanding*

The original understanding of the origination clause was that it required bills raising revenue through "the imposition of taxes"[162] to originate in the House of Representatives. This restriction did not apply to measures raising revenue only inciden-

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156. 2 J. STORY, *supra* note 148, at 342-43.

157. *Id.* at 343; *see also* 1 T. COOLEY, *supra* note 148, at 268 n.1 (also confining scope of clause to levying taxes in the strict sense of the word).

158. *See* 2 J. STORY, *supra* note 148, at 340.

159. 1 D. WATSON, *supra* note 151, at 346.

160. E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 34 (H. Chase & C. Ducat rev. 14th ed. 1978). This, like Grayson's prediction before the Virginia ratifying convention, describes what the Senate did to create TEFRA. *See supra* note 141 and accompanying text.

161. Curtis highlights the important role of the clause in the compromises of the convention. *See* 2 G. CURTIS, *supra* note 66, at 216-17. Watson likewise notes the very difficult questions the convention confronted with respect to the origination clause. *See* 1 D. WATSON, *supra* note 151, at 349-50.

162. 2 J. STORY, *supra* note 148, at 341.

tally or through means other than taxation.[163] It did not apply to appropriation bills because, by the end of the constitutional convention, the power to originate appropriation bills had been given to the Senate.[164] Through this narrowing of meaning, then, the origination clause became a rather specifically defined procedural requirement that the framers of the Constitution expected to be followed within the range of application it retained.

The focus of this inquiry must be to further develop the definition of that class of legislation the origination clause requires be initiated by the House of Representatives. Evaluating the constitutionality of a measure under the clause requires isolating and applying this definition because the clause does not consider all bills concerned with revenue or money. It applies only to "bills for raising revenue," not to "money bills" in general.[165] The operation of the clause in the affairs of the House and Senate, as well as what little case law exists on the subject, will provide added insight into this essential inquiry. What emerges from this review is that, consistent with the view of early commentators noted above, analysis under the origination clause must look to the purpose of the bill to determine whether it is intended to raise revenue for government operations through the vehicle of taxation.

Although exhibiting some of the rancor predicted by the founding fathers,[166] the House of Representatives and the Senate have generally followed the dictates of the origination clause since 1787. Measures originated by the Senate have occasionally been

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163. The raising of revenue through increased postage rates or the sale of land, for example, does not come within the meaning of the origination clause. *See* United States v. Norton, 91 U.S. 566, 569 (1875) ("The precise question before us came under the consideration of Mr. Justice Story, in the *United States v. Mayo*, 1 Gall. 396. He held that the phrase *revenue laws*, as used in the act of 1804, meant such laws 'as are made for the direct and avowed purpose of creating revenue or public funds for the service of the government.' "(emphasis in original)); 2 J. STORY, *supra* note 148, at 343 ("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.").

164. *See supra* note 127 and accompanying text.

165. The very first version of the origination clause, offered by Charles Pinckney on May 29, 1787, referred to "all money bills of every kind." By the end of the convention the clause covered only "bills for raising revenue." *See supra* note 146.

166. For example, the House has argued that the origination clause covers all tax bills relating to revenue, whether they impose or remit taxes, while the Senate has argued that the clause refers only to tax bills that impose taxes. *See, e.g.*, 2 A. HINDS, *supra* note 139, at 947.

rejected by the House[167] or withdrawn by the Senate[168] because of questions over their constitutionality under the clause. In 1872, the House passed a bill repealing existing duties on tea and coffee. The Senate, by amendment, substituted a bill reducing a variety of other taxes. The House passed a resolution claiming that this action violated the origination clause by not relating to the specific subject matter of the original bill.[169] This resolution was referred to the Senate Committee on Privileges and Elections. Its report conceded that "the Senate can not propose an amendment raising revenue to any bill coming from the House, but only to a bill raising revenue."[170] The issue was the definition of "bills for raising revenue" within the meaning of the origination clause. The report drew from both early commentators[171] and Supreme Court decisions[172] and made clear that one must look at the purpose of a measure to determine if it is a bill for raising revenue. The origination clause "embraces clearly all bills passed in the exercise of the taxing power . . . for the purpose of raising money for the support of the Government."[173]

The case law concerning "bills for raising revenue," or "revenue laws,"[174] also supports the relevance of the purpose test and emphasizes an important element of this definition. "Raising revenue," in the context of the origination clause, implies that the purpose of a measure must be to *increase* revenue for the support of government through the operation of the taxing power. The cases make clear that "bills to raise revenue" relates to money coming into the treasury,[175] the levying[176] or imposing of taxes,[177]

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167. *See id.* at 957-61 (1905 incident).

168. *See id.* at 945-46 (1864 incident).

169. *Id.* at 950-51.

170. *Id.* at 952. The origination clause restricts both Senate amendments and Senate bills. *See supra* note 26.

171. *Id.* at 964 (citing 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 880 (3rd ed. 1858)).

172. The report cited: Twin City Bank v. Nebeker, 167 U.S. 196 (1897); United States v. Norton, 91 U.S. 566 (1875); United States *ex rel.* Michels v. James, 26 F. Cas. 577 (C.C.S.D.N.Y. 1875) (No. 15,464).

173. 2 A. HINDS, *supra* note 139, at 964.

174. Bills for raising revenue become revenue laws. United States v. Norton, 91 U.S. 566, 569 (1875).

175. The Nashville, 17 F. Cas. 1176, 1178 (C.C.D. Ind. 1868) (No. 10,023).

176. Millard v. Roberts, 202 U.S. 429, 436 (1906); The Nashville, 17 F. Cas. 1176, 1178 (C.C.D. Ind. 1868) (No. 10,023); Northern Counties Inv. Trust v. Sears, 30 Or. 388, 402, 41 P. 931, 935 (1895) (quoting STORY ON THE CONSTITUTION, § 880).

177. United States v. Hill, 123 U.S. 681, 686 (1887); United States *ex rel.* Michels v. James, 26 F. Cas. 577, 578 (C.C.S.D.N.Y. 1875) (No. 15,464).

the exacting of money for the use of the government,[178] or public purposes.[179] To determine whether a particular legislative measure meets these criteria, courts have looked at its purpose. In so doing, courts have found certain acts not to be bills for raising revenue under the origination clause.[180] Courts interpreting state constitutional provisions identical to the federal origination clause have reached similar results.[181] Other decisions, using the same purpose test, have found that the act in question was indeed a bill for raising revenue that properly originated in the House, making

178. Twin City Bank v. Nebeker, 167 U.S. 196, 203 (1897); United States *ex rel.* Michels v. James, 26 F. Cas. 577, 578 (C.C.S.D.N.Y. 1875) (No. 15,464).

179. Dundee Mortgage Trust Inv. Co. v. Parrish, 24 F. 197, 201 (D. Or. 1885).

180. *See, e.g.*, Millard v. Roberts, 202 U.S. 429 (1906) (holding an act to make public improvements in the District of Columbia not a bill for raising revenue); Twin City Bank v. Nebeker, 167 U.S. 196, 203 (1897) (holding that section 41 of the National Banking Act was not a bill for raising revenue because "[t]here was no purpose by the act or by any of its provisions to raise revenue to be applied in meeting the expenses or obligations of the Government"); United States v. Hill, 123 U.S. 681, 685-86 (1887) (holding statute not a revenue law because not for the purpose of exercising the taxing power); United States v. Norton, 91 U.S. 566, 567 (1875) (holding an act establishing a postal money-order system not a revenue law because it does not appear "that Congress, in enacting it, had any purpose of revenue in view"); Bertelson v. White, 65 F.2d 719, 722 (1st Cir. 1933) (holding that section 23 of the Merchant Marine Act "is not a bill to raise revenue . . . . On the contrary, it diminishes the revenue of the government"); United States *ex rel.* Michels v. James, 26 F. Cas. 577, 578 (C.C.S.D.N.Y. 1875) (No. 15,464) (holding that "bills for raising revenue" are those that "impose taxes upon the people . . . for the use of the government"); The Nashville, 17 F. Cas. 1176, 1178 (C.C.D. Ind. 1868) (No. 10,023) (holding statute not a revenue law because not among "bills the direct and principal object of which has been to raise revenue").

181. *See, e.g.*, Geer v. Board of Comm'rs, 97 F. 435, 440 (8th Cir. 1899) (holding statute not a bill for raising revenue because its "provisions raise no revenue for the government"); Dundee Mortgage Trust Inv. Co. v. Parrish, 24 F. 197, 201 (D. Or. 1885) (holding statute not a bill to raise revenue because it "does not authorize or provide for levying any tax or raising a cent of revenue"); Dalton v. State Property and Bldgs. Comm'n, 304 S.W.2d 342, 350 (Ky. 1957) (holding statute not a bill to raise revenue because it did not "purport to raise revenue or to increase taxes. To 'raise revenue' means to levy a tax as a means of collecting revenue"); State v. Lasky, 156 Me. 419, 423, 165 A.2d 579, 581 (1960) (holding a statute repealing and repromulgating a shellfish tax in a correcting act not a bill to raise revenue because "[n]o new revenue was provided in the correcting act"); *In re* Paton's Estate, 114 N.J. Eq. 324, 327, 168 A. 422, 424 (1933) (holding a statute exempting certain bequests to educational institutions from taxation not a bill to raise revenue because "its purpose and effect is rather somewhat to decrease revenue than to increase it"); Northern Counties Inv. Trust v. Sears, 30 Or. 388, 402, 41 P. 931, 935 (1895) (holding a statute not a bill to raise revenue because " 'the direct and principal object of [it]' " was not to raise revenue) (quoting The Nashville, 17 F. Cas. 1176, 1178 (C.C.D. Ind. 1868) (No. 10,023)).

the Senate amendments permissible.[182] Still others, also using the purpose test, have found measures to be bills for raising revenue that unconstitutionally originated in the Senate.[183] There are virtually no exceptions to this pattern of emphasis on the purpose test.[184] What emerges is that a "bill for raising revenue" within the meaning of the origination clause is one designed to increase revenue for the support of the government through the vehicle of taxation.[185]

In sum, with an understanding obtained by combining an original perspective based on the formation of the clause and a functional perspective based on the activity of legislatures and courts since 1787, basic conclusions regarding the origination clause can be drawn. The origination clause does not apply to appropriation bills but only to revenue bills. It does not apply to bills decreasing revenue but only to bills increasing revenue. It does not apply to bills for other purposes that raise revenue only incidentally but only to measures whose purpose is to raise revenue for the support of government. It does not apply to bills raising revenue through sale of land or securities or through increasing postage rates but only to bills raising revenue through taxation.

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182. *See, e.g.*, Rainey v. United States, 232 U.S. 310 (1914); Flint v. Stone Tracy Co., 220 U.S. 107 (1911); United States v. Billings, 190 F. 359 (C.C.S.D.N.Y. 1911), *modified*, 232 U.S. 261 (1914).

183. *See, e.g.*, Wofford Oil Co. v. Smith, 263 F. 396 (M.D. Ala. 1920).

184. A few courts have made the same mistake as some of those confronting origination clause challenges to TEFRA and said that bills that decrease revenue are, nevertheless, bills to raise revenue and, therefore, must originate in the House of Representatives. *See, e.g.*, Weissinger v. Boswell, 330 F. Supp. 615 (M.D. Ala. 1971) (interpreting state constitution). These courts did not analyze the origination clause in arriving at this conclusion, however, and their results are inconsistent with the plain meaning, the history, and other interpretations of the clause as outlined in Section III of this Comment. Other courts have, in fact, expressly reached the opposite conclusion. *See infra* note 185. Significantly, the court in *Weissinger* did endorse the purpose test in determining whether a particular legislative measure meets the requirements of the origination clause. 330 F. Supp. at 624.

185. Some courts have specifically held that a bill that diminishes revenue cannot be a "bill for raising revenue." *See, e.g.*, Bertelson v. White, 65 F.2d 719, 722 (1st Cir. 1933) (section 23 of the Merchant Marine Act "is not a bill to raise revenue . . . . On the contrary, it diminishes the revenue of the government"); Dalton v. State Property and Bldgs. Comm'n, 304 S.W.2d 342, 350 (Ky. 1957) (statute not a bill to raise revenue because it did not "purport to raise revenue or to increase taxes"); State v. Lasky, 156 Me. 419, 423, 165 A.2d 579, 581 (1960) (statute not a bill to raise revenue because "[n]o new revenue was provided" by the statute); *In re* Paton's Estate, 114 N.J. Eq. 324, 327, 168 A. 422, 424 (1933) (statute exempting bequests to educational institutions from taxation not a bill to raise revenue because "its purpose and effect is rather somewhat to decrease revenue than to increase it").

The meaning and purpose of the origination clause, and the range of legislative measures to which it applies, is rather narrow and, hence, easily applied.

This is the backdrop against which TEFRA's constitutionality under the origination clause must be measured. The most important question in this regard is whether the bill originally passed by the House of Representatives, H.R. 4961, was a bill for raising revenue within the meaning of the origination clause. If it was, then TEFRA is constitutional as long as the amendment was considered germane to the subject matter of the original bill. If it was not, however, the inquiry becomes whether TEFRA itself was a measure for raising revenue. If so, it is unconstitutional under the origination clause. Answering these questions requires applying the purpose test.

IV. Judicial Review

It is of little value to complain about constitutional violations in the abstract. Rather, the better course is to isolate the nature of the problem and to establish a means by which it should be resolved. From the very beginning of this republic, the focus has been on the courts—especially the Supreme Court—for the resolution of matters involving alleged constitutional violations. From Chief Justice Marshall's dicta in *Marbury v. Madison* that it is "the very essence of judicial duty" to interpret the Constitution[186] to the incorporation of the Bill of Rights into the fourteenth amendment and subsequent Supreme Court review of state legislation[187] to the employment of substantive due process in creating new rights[188] to the judicially created exclusionary rule,[189] the courts

186. 5 U.S. (1 Cranch) 137, 178 (1803).

187. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968) (sixth amendment right to jury trial); Klopfer v. North Carolina, 386 U.S. 213 (1967) (sixth amendment right to speedy trial); Malloy v. Hogan, 378 U.S. 1 (1964) (fifth amendment right against self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (sixth amendment right to counsel); Wolf v. Colorado, 338 U.S. 25 (1949) (fourth amendment prohibition against unreasonable searches and seizures); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947) (eighth amendment prohibition against cruel and unusual punishment); Everson v. Board of Educ., 330 U.S. 1 (1947) (first amendment prohibition of establishment of religion); Cantwell v. Connecticut, 310 U.S. 296 (1940) (first amendment right of religious exercise); Near v. Minnesota, 283 U.S. 697 (1931) (first amendment freedom of press); Gitlow v. New York, 268 U.S. 652 (1925) (first amendment freedom of speech and press).

188. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (right to abortion within fourteenth amendment liberty); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to use contracep-

have edged into the position of "first among equals" in matters involving the Constitution and the enforcement of constitutional rights.

Still, the Constitution established three coequal branches of government. Indeed, the framers probably envisioned the legislative branch as relatively stronger than the judicial.[190] There has been strong sentiment throughout our history that because members of the legislative and executive branches take the same oath that judges do to support and defend the Constitution, they have an obligation to make judgments during the execution of their duties to ensure that their actions are in conformity with the Constitution.[191]

One of the oldest and most established principles in federal court jurisprudence is that judicial power may only be exercised when there is a case properly before the court. That is, there must be an actual "case" or "controversy" before a court has authority to act.[192] Courts, in our constitutional system, do not have the authority to render advisory opinions.[193] This principle im-

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tives within Bill of Rights penumbra); Lochner v. New York, 198 U.S. 45 (1905) (right to contract for labor within fourteenth amendment liberty).

189. *See* United States v. Leon, 468 U.S. 897, 906 (1984) (exclusionary rule not a " 'personal constitutional right' " but "operates as 'a judicially created remedy' " (quoting United States v. Calandra, 414 U.S. 338, 348 (1974))).

190. *See* THE FEDERALIST No. 51, at 322 (J. Madison) (Mentor ed. 1961) ("But it is not possible to give to each department an equal power of self-defense. In republican government, the legislative authority necessarily predominates."); *see also* F. MCDONALD, *supra* note 97, at 228-29, 240. *Cf.* THE FEDERALIST No. 78 (A. Hamilton) (Mentor ed. 1961).

191. *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448, 476-77 (1980) (opinion of Burger, C.J.) (1965 Voting Rights Act prohibition of literacy test based on congressional interpretation of fourteenth amendment equal protection clause (citing Katzenbach v. McClung, 348 U.S. 641 (1966))); Glidden v. Zdanok, 370 U.S. 530 (1962) (opinion of Harlan, J.) (congressional interpretation of article III "courts"); Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946) (congressional interpretation of commerce clause); Eakin v. Raub, 12 Serg. & Rawle 330 (Pa. 1825) (Gibson, J., dissenting) (responsibility for constitutional passage of legislation rests with legislature); W. LOCKHART, Y. KAMISAR, J. CHOPER & S. SHIFFRIN, CONSTITUTIONAL LAW 13-15 (6th ed. 1986) (views of Presidents Jefferson, Jackson, and Lincoln); McCleskey, *Judicial Review in a Democracy: A Dissenting Opinion*, 3 HOUS. L. REV. 354 (1966). For a recent development of the view that "constitutional interpretation is not and was never intended to be solely within the province of the Court" but that the Court is "a partner in the shaping of constitutional law rather than its final arbiter," see J. AGRESTO, THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY 10 (1984).

192. U.S. CONST. art. III, § 2, cl. 1. *See* U.S. v. Richardson, 418 U.S. 166, 171 (1974).

193. *See* Poe v. Ullman, 367 U.S. 497, 504 (1961) (opinion of Frankfurter, J.) (" 'This court can have no right to pronounce an abstract opinion upon the constitutionality of a State law.' " (quoting Georgia v. Stanton, 6 Wall. 50, 75)); Rescue Army v. Municipal

poses separate requirements on both the parties and the issues involved which must be met before judicial review is authorized.

Courts lack authority to review origination clause challenges to TEFRA brought by taxpayers for two reasons. First, the parties (taxpayers) lack the necessary standing to be appropriate parties to raise this particular claim. Second, the issue is an inherently political question which the Constitution leaves for resolution by the political branches.

A. *Standing*

The first prerequisite for the proper invocation of judicial power focuses on the party before the court. It is most commonly phrased in terms of a party's "standing" to assert the particular claim being made. The party before the court must have "a personal stake in the outcome of the controversy,"[194] meaning that the party must have suffered an "injury to a legally protected right."[195] It is not enough that a statute may be unconstitutional in the abstract; this does not alone suffice to justify invocation of judicial authority. The Supreme Court has stated that it has "no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act."[196] More recently, the Court has stated that it cannot

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Court, 331 U.S. 549, 568 (1947) ("the Court's refusal to render advisory opinions"); Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (the Court has "no power to give advisory opinions"); Muskrat v. United States, 219 U.S. 346, 357 (1911) (constitutional requirement of "case" or "controversy" means there is "no general veto power in the court upon the legislation of Congress"); Note, *Advisory Opinions on the Constitutionality of Statutes*, 69 HARV. L. REV. 1302, 1303 (1956) ("it was determined early in the history of the federal system that the Justices of the Supreme Court would not give advisory opinions").

194. Baker v. Carr, 369 U.S. 186, 204 (1962).

195. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 140-41 (1951). In the present context, this means an individual taxpayer must allege "a concrete and specific injury within the zone of interests protected by the origination clause." Case Comment, *supra* note 6, at 427.

196. Frothingham v. Mellon, 262 U.S. 447, 488 (1923). One commentator, examining different facets of the TEFRA/origination clause controversy, stated: "If TEFRA was enacted in violation of the origination clause, it should be struck down." Comment, *supra* note 6, at 459. This Section on judicial review shows, however, that the matter is not so simple, however appealing this sentiment might seem. The issues of TEFRA's constitutionality under the origination clause and federal court authority to adjudicate the question are

" 'pronounce any statute . . . void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.' "[197] Likewise, the Court has stated that "[t]he Constitution has many commands that are not enforceable by the courts because they clearly fall outside the conditions and purposes that circumscribe judicial action."[198] In short, to have standing, an individual must demonstrate a direct injury, actual or threatened, to a legally protected interest or right that can be traced to the action the party challenges.[199]

Although the Supreme Court has provided varied expressions of the contours of the standing requirement,[200] it has articulated specific principles governing the standing of taxpayers.[201] These cases have dealt with taxpayer challenges to allegedly unconstitutional expenditures of tax collections. They involve alleged violations of taxpayers' constitutional rights stemming from the *operation* of the statute in question rather than the circumstances surrounding its *enactment.*[202] None of the courts confronting origination clause challenges to TEFRA have addressed the issue of individual taxpayer standing.[203] Therefore, past cases on standing

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separate. Maintaining this distinction is essential to the vitality of the separation of powers.

197. Baker v. Carr, 369 U.S. 186, 204 (1962) (quoting Liverpool S.S. Co. v. Commissioners of Emigration, 113 U.S. 33, 39 (1885)); *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803) ("The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officials, perform duties in which they have a discretion."). Thus, it may be said that the standing requirement confines the Court to reviewing alleged violations of individual constitutional rights, not violations of constitutional provisions.

198. Colegrove v. Green, 328 U.S. 549, 556 (1946). Likewise, Professor Henkin notes that "[n]ot all constitutional limitations or prohibitions imply rights and standing to object in favor of private parties." Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 622-23 (1976).

199. *See* Warth v. Seldin, 422 U.S. 490, 500 (1975) ("standing question . . . is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief").

200. *See* Kennedy v. Sampson, 511 F.2d 430, 433 (D.C. Cir. 1974) (different approaches include the logical nexus test of Flast v. Cohen, 392 U.S. 83 (1968), the injury-in-fact requirement, and the "zone of interests" test).

201. *See, e.g.*, Flast v. Cohen, 392 U.S. 83 (1968); Frothingham v. Mellon, 262 U.S. 447 (1923).

202. This difference in the nature of the plaintiff's claims in origination clause challenges to TEFRA is crucial when discussing both the standing and political question doctrines, both analyzed in this Section.

203. Only one court confronting an origination clause challenge to TEFRA addressed the standing issue, but it focused solely on the particular issue of the standing of members of Congress. Moore v. United States House of Representatives, 553 F. Supp. 267 (D.D.C.

are of limited assistance, relevant only in their articulation of general principles which may be applied to the cases challenging TEFRA under the origination clause.

In *Frothingham v. Mellon*,[204] the plaintiff taxpayer sought to enjoin enforcement of the Federal Maternity Act of 1921,[205] which provided for federal financial grants to states maintaining programs for reducing maternal and infant mortality. The injury the plaintiff alleged was twofold: an invasion by the federal government of legislative areas traditionally left to the states and, more specifically, an increased tax burden resulting from the expenditures amounting to a taking of property without due process of law.[206] The Court denied standing, noting that the plaintiffs' alleged injury was indirect, not quantifiable, and shared with millions of other citizens.[207]

Frothingham involved an alleged injury produced by the "administration" and "enforcement" of a statute rather than the nature of its enactment.[208] Nonetheless, the case is instructive because it emphasizes that a "direct injury suffered or threatened" is an essential prerequisite for standing to challenge a federal statute. In denying standing, the Court asked the crucial question: "What, then, is the nature of the right . . . here asserted and how is it affected by this statute?"[209]

These principles were carried forward and expanded upon in *Flast v. Cohen*.[210] The plaintiff in this case sought to enjoin an allegedly unconstitutional expenditure of federal funds for religious instruction by asserting a violation of her first amendment rights. While again involving the operation of a statute rather than its mode of enactment, *Flast* provides important general principles applicable to taxpayer standing. The Court held in *Flast* that standing rules "have been fashioned with specific reference to the status asserted by the party whose standing is challenged and to

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1982), *aff'd*, 733 F.2d 946 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985). *See supra* note 16.

204. 262 U.S. 447 (1923).

205. Federal Maternity Act of 1921, ch. 133, 42 Stat. 224 (1921) (repealed 1927).

206. *Frothingham*, 262 U.S. at 479-80.

207. *Id.* at 487.

208. *Id.* at 487, 488. *See supra* note 202 and accompanying text.

209. *Id.* at 482.

210. 392 U.S. 83 (1968).

the type of question he wishes to have adjudicated."[211] The Court fashioned a requirement that there be "a logical nexus between the status and the claim sought to be adjudicated."[212]

The *Flast* Court backed slightly away from the absolute bar to taxpayer challenges of federal statutes established in *Frothingham*. Nevertheless, subsequent decisions[213] have established "the continuing validity of the *Frothingham* barrier to taxpayer actions and the limited breach affected by *Flast*, by declining to recognize taxpayer standing in cases not satisfying the literal terms of the *Flast* 'nexus' test."[214] Thus, as a general rule, taxpayers rarely have standing to challenge a federal statute under any circumstances, least of all under a constitutional provision like the origination clause.

The Supreme Court has stressed one additional facet of the standing doctrine that is relevant to taxpayer challenges to TEFRA under the origination clause. The Court has contrasted the kind of judicially protected individual right necessary to confer standing with the more general interests shared by the public at large.[215] A plaintiff will not have standing if he "has only the

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211. *Id.* at 101.

212. *Id.* at 102. An extensive discussion is unnecessary here of whether taxpayers have standing to make an origination clause challenge to TEFRA under this "nexus" test alone. No taxpayers since *Flast* have been found to have standing under this limited exception to the bar to taxpayer challenges established in Frothingham v. Mellon, 262 U.S. 447 (1923). *See infra* notes 213-14 and accompanying text. Subsequent Supreme Court decisions have strictly limited the holding in *Flast* to its facts. *See, e.g.*, Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982); United States v. Richardson, 418 U.S. 166 (1974).

Flast held only that a taxpayer may have standing to challenge an actual exercise of Congress' taxing or spending power under article I, section 8 which violates a specific substantive limitation on that power. The only such limitation the Court has recognized is the establishment clause of the first amendment. *Flast*, 392 U.S. at 105. In origination clause challenges, taxpayers attack not an exercise of the taxing or spending power itself but the internal procedural workings of Congress. They challenge TEFRA under article I, section 7, not article 1, section 8. "Thus, the Court [in *Flast*] reaffirmed that the 'case or controversy' aspect of standing is unsatisfied 'where a taxpayer seeks to employ a federal court as a forum in which to air his generalized grievances about the conduct of government . . . .' " *Valley Forge*, 454 U.S. at 464 (quoting *Flast*, 392 U.S. at 106). In addition, the origination clause is entirely inapplicable to appropriation measures, the object of the appellant's attack in *Flast*.

213. *See, e.g.*, Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); United States v. Richardson, 418 U.S. 166 (1974).

214. Public Citizen, Inc. v. Simon, 539 F.2d 211, 215 (D.C. Cir. 1976).

215. *See, e.g.*, Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); O'Shea v. Littleton, 414 U.S. 488 (1974); *Ex Parte* Levitt, 302 U.S. 633 (1937) (per

right, possessed by every citizen, to require that the Government be administered according to law."[216] Consistent with this requirement, the Court has repeatedly rejected challenges to the constitutionality of statutes brought under the claim that they deprived the states of the republican form of government guaranteed them by article IV of the Constitution.[217]

Applying these principles to taxpayer challenges to TEFRA under the origination clause demonstrates that taxpayers are not entitled to standing to bring such actions. The only provision upon which taxpayers can rely in making such a challenge is the origination clause itself. They cannot identify an individual constitutional right that is infringed by TEFRA's origination in the Senate rather than in the House. They can only generally assert that, because TEFRA was passed in a manner inconsistent with the origination clause, it is unconstitutional and should be struck down. This is exactly the general sort of right, possessed by all citizens (or at least by all taxpayers), that the courts in the wake of *Frothingham* have held does not grant standing to the individual.

The origination clause is found in article I of the Constitution, which describes the powers and structure of the legislative branch of government. Some clauses in that article make reference to individuals, such as those describing qualifications for serving as Representatives or Senators.[218] Section 7, however, is directed solely at the two houses of Congress and is a procedural directive for the enactment of certain kinds of legislation.[219] As Judge Scalia has put it: "When a suit by a private citizen is involved, the specificity with which the Constitution or a statute confers a right upon that particular individual as opposed to the

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curiam); Newman v. United States *ex rel.* Frizzell, 238 U.S. 537 (1915); Tyler v. Judges of the Court of Registration, 179 U.S. 405 (1900).

216. Fairchild v. Hughes, 258 U.S. 126, 129 (1922).

217. U.S. CONST. art. IV § 4. For lists of cases in which the Court has rejected claims under this clause, see Baker v. Carr, 369 U.S. 186, 223-24 (1962); Colegrove v. Green, 328 U.S. 549, 556 (1946).

218. *See* U.S. CONST. art. 1, § 2, cl. 2; *Id.* art. 1, § 3, cl. 3.

219. Article I, section 7, of the Constitution contains three clauses dealing with the passage of legislation by Congress. Clause 1 requires that all bills for raising revenue must originate in the House of Representatives. *Id.* art. I, § 7, cl. 1. Clause 2 requires passage by both the Senate and House and provides for overriding a presidential veto. *Id.* art. I, § 7, cl. 2. Clause 3 applies the general procedural rules for passage of bills to all other orders, resolutions, or votes requiring concurrence of both houses of Congress. *Id.* art. I, § 7, cl. 3.

citizenry at large does control the standing inquiry."[220] Article I, section 7 confers no such right.

Closely related to this analysis is an alternative formulation of the standing requirement in terms of whether a litigant's interest allegedly at stake in a particular case is within the "zone of interests" protected by the statutory or constitutional provision at issue.[221] Under this approach individual taxpayers also lack standing to challenge TEFRA under the origination clause. This is because article I, section 7, which is "one of several in the Constitution which implement the 'separation of powers' doctrine,"[222] contemplates and protects interests of the legislative and executive branches of government, not those of private individuals. The D.C. Circuit has summarized the zone of interests protected by article I, section 7 as follows:

> Taken together, these provisions define the prerogatives of each governmental branch in a manner which prevents overreaching by any one of them. The provision under discussion [clause 2 on the veto power] allocates to the executive and legislative branches their respective roles in the lawmaking process. When either branch perceives an intrusion upon its legislative power by the other, this clause is appropriately invoked.[223]

The same is true of clause 1 of section 7—the origination clause—concerning the two houses of the legislative branch.

It is apparent, then, how the doctrines of standing and separation of powers meet. If the courts do not adhere to traditional notions of standing by requiring that the litigants articulate direct and specific injuries traceable to the statutory provision at issue, there will result "an overjudicialization of the processes of self-governance."[224] Nothing makes this danger more apparent than

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220. Moore v. United States House of Representatives, 733 F.2d 946, 958 (D.C. Cir. 1984) (Scalia, J., concurring in result), *cert. denied*, 469 U.S. 1106 (1985).

221. Kennedy v. Sampson, 511 F.2d 430, 433 (D.C. Cir. 1974). Another commentator has stated: "One of the interests that the origination clause protects is the right of citizens to have taxing authority restricted by the powers of popular vote. Neither the district court nor the court of appeals [in *Moore*] denied that private plaintiffs would have standing to challenge TEFRA." Case Comment, *supra* note 6, at 423. As *Kennedy* held, however, article I, section 7 contemplates interests of the houses of Congress, not of individuals. Neither the district court nor the court of appeals in *Moore* addressed the standing of private plaintiffs but only inferred its existence because courts had in fact confronted origination clause claims brought by private plaintiffs in the past. *See infra* note 241.

222. *Kennedy*, 511 F.2d at 434.

223. *Id.*

224. Scalia, *supra* note 11, at 881.

the challenges to TEFRA under the origination clause where taxpayer standing was improperly presumed.

It might be argued that, although taxpayers in general have no standing to challenge TEFRA under the origination clause because their grievance is only a general one shared by all taxpayers,[225] individual taxpayers who paid a partial penalty under the provisions added to the Internal Revenue Code by TEFRA have the requisite personal stake in the outcome to confer standing. While this situation may meet the standing requirement as a basis for certain challenges to TEFRA—and many of this nature have indeed been made by tax protesters—it still does not confer the requisite standing for an origination clause claim. These taxpayers have standing to challenge TEFRA's constitutionality because its operation violates certain individual rights. For example, nearly all of the taxpayer challenges to TEFRA have included vagueness,[226] due process,[227] or self-incrimination[228] arguments. These meet standing requirements since the injury alleged is to an identifiable individual right and is traceable to the constitutional defect claimed. No such connection exists between the alleged injury and the unconstitutional mode of enactment, however. In fact, one would search in vain through the dozens of reported and unreported opinions on origination clause challenges to find even a suggestion of the individual right that was infringed when TEFRA

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225. *See supra* note 216 and accompanying text.

226. Most taxpayers challenging TEFRA have contended that the term "frivolous" in section 6702 of the Internal Revenue Code, 26 U.S.C. § 6702, is unconstitutionally vague. *See, e.g.*, House v. United States, 593 F. Supp. 139, 142-43 (W.D. Mich. 1984), *aff'd mem.*, 787 F.2d 590 (6th Cir. 1986); Scull v. United States, 585 F. Supp. 956 (E.D. Va. 1984); Kloes v. United States, 578 F. Supp. 270 (W.D. Wis. 1984).

227. Taxpayers have alleged that the statute requiring payment of 15% of the assessed civil penalty before seeking judicial review violates due process by not giving them a predeprivation hearing. *See, e.g.*, Jolly v. United States, 764 F.2d 642 (9th Cir. 1985); Stamp v. Commissioner, 579 F. Supp. 168 (N.D. Ill. 1984); Tibbetts v. Secretary of the Treasury, 577 F. Supp. 911 (W.D.N.C. 1984). For an extensive analysis of this due process argument, see Kahn v. United States, 753 F.2d 1208 (3d Cir. 1985).

228. Many taxpayers challenging TEFRA have asserted that the Internal Revenue Service's requiring them to divulge the information requested on their tax forms violates their right against self-incrimination under the fifth amendment. *See, e.g.*, Aune v. United States, 582 F. Supp. 1132 (D. Ariz. 1984), *aff'd mem. sub nom.* Brasseur v. United States, 765 F.2d 148 (9th Cir. 1985); Ueckert v. United States, 581 F. Supp. 1262 (D.N.D. 1984); Bearden v. Commissioner, 575 F. Supp. 1459 (D. Utah 1983). This argument as to tax returns had been made long before TEFRA's passage, and the ability of taxpayers to make fifth amendment claims has, as a result, been strictly limited. *See* Comment, *The Tax Protest Cases: A Policy Approach to Individual Constitutional Rights*, 19 CAL. W.L. REV. 351 (1983).

originated in the Senate rather than in the House. Arguably, members of both houses of Congress may themselves, in their official capacity, have standing to make such a claim.[229] The D.C. Circuit has so held in *Moore v. United States House of Representatives*.[230] However, as Judge Scalia cautioned in his concurrence in that case: "Unless and until those internal workings [of Congress], or the resolution of those inter-branch disputes through the system of checks and balances . . . brings forth a result that harms private rights, it is no part of our constitutional province, which is 'solely, to decide on the rights of individuals.' "[231]

B. *Political Question*

Just as the Constitution's "case" or "controversy" requirement includes the prerequisite of standing for the party before the court,[232] so it also includes prerequisites for the issues the party wishes to raise. The Supreme Court in *Flast* discussed this dual limitation placed upon federal courts by the case-and-controversy doctrine,[233] noting that "no justiciable controversy is presented when the parties seek adjudication of only a political question."[234] The Court has also held that the standing and political question doctrines are separate and that "either the absence of standing or the presence of a political question suffices to prevent the power of the federal judiciary from being invoked by the complaining party."[235] Two circuit courts have produced conflicting rulings on the question of whether a taxpayer challenge to TEFRA under the origination clause constituted a nonjusticiable political question. The Fifth Circuit ruled in *Texas Association of Concerned Taxpayers, Inc. v. United States*[236] that the issue was nonjusticiable while the Ninth Circuit ruled in *Armstrong v. United States*[237] that it was justiciable. Despite the conflict, the Supreme Court has denied a petition for a writ of certiorari on this issue in

229. For further discussion of the standing of Congressmen to challenge statutes under the origination clause, see Comment, *supra* note 6.

230. 733 F.2d 946 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 779 (1985).

231. *Id.* at 959 (Scalia, J., concurring in result).

232. *See supra* notes 194-99 and accompanying text.

233. Flast v. Cohen, 392 U.S. 83, 95 (1968).

234. *Id.*

235. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 215 (1974).

236. 772 F.2d 163 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 2265 (1986).

237. 759 F.2d 1378 (9th Cir. 1985).

Texas Association.[238]

The D.C. Circuit noted in *Moore* that the Supreme Court "has implicitly held that issues under the origination clause are *not* nonjusticiable questions, by the Court's adjudication of several challenges to revenue acts brought under the origination clause."[239] None of the cases cited by the circuit court,[240] however, addressed this issue specifically. Interestingly, in the space of a few sentences, the court found this conclusion of justiciability to be first an "implicit" and then an actual holding of the Supreme Court.[241] Examination of the political question doctrine, however, shows that this origination clause issue is nonjusticiable. The substantial questions presented by the doctrines of standing and political question cannot be so easily answered by inferring implicit holdings from cases that are actually silent as to the answer.

The Supreme Court has long held that when a case raises a political issue, such that the Constitution leaves its resolution to the political branches rather than to the courts, courts do not have the authority to act.[242] The central question is, of course, determining when a particular issue raises such a political question. Until 1962, the Court had treated each case individually, noting which cases raised political questions and which cases did

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238. Texas Ass'n of Concerned Taxpayers, Inc. v. United States, 106 S. Ct. 2265 (1986). Justice White, joined by Justice Brennan, argued in dissent that this issue should be addressed by the Court since the Ninth and Fifth Circuits had delivered directly contradictory rulings on the political question issue.

239. Moore v. United States House of Representatives, 733 F.2d 946, 953 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985).

240. The court cited Flint v. Stone Tracy Co., 220 U.S. 107 (1911) and Millard v. Roberts, 202 U.S. 429 (1906).

241. In the opinion, "[t]he Supreme Court has implicitly held that issues under the Origination Clause are *not* nonjusticiable political questions" became "prior Supreme Court cases which found such issues justiciable" by the very next paragraph. *Moore*, 733 F.2d at 953. The court claimed that other courts had found standing of taxpayers in origination clause challenges to TEFRA. *Id.* at 956; *see also* Schlick v. United States, 54 A.F.T.R.2d (P-H) 84-6287, 6288 (N.D.Ill. 1984) ("The many courts which have ruled on the constitutionality of TEFRA have recognized private taxpayers' standing . . . ."). However, just as previous courts had simply assumed origination clause issues justiciable, so these courts simply assumed taxpayer standing to make origination clause claims. *See supra* notes 203, 221 and accompanying text.

242. *See, e.g.*, Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919 (1983); Baker v. Carr, 369 U.S. 186 (1962); Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912); Field v. Clark, 143 U.S. 649 (1892); Luther v. Borden, 48 U.S. (7 How.) 1 (1849). This is consistent with the emphasis the founding fathers placed upon separating the judiciary from the policy making process. *See supra* note 22.

not, but had never articulated the features these cases had in common.[243] In the 1962 landmark case of *Baker v. Carr*,[244] however, the Court observed that "several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers."[245] Beyond a general connection with the separation of powers, the Court listed the following as elements common to issues presenting a political question:

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[246]

The Court went on to say that the presence of one of these formulations would be enough for the claim to be deemed a political question; indeed, in those cases where the courts have not found political questions, they have expressly found that none of these elements existed.[247]

Certain characteristics of article I of the Constitution are relevant in applying the *Baker* test to the origination clause. Article I outlines the structure and powers of the legislative branch. While some of the sections and clauses of article I mention duties or prerogatives of individuals within the legislature, section 7, containing the origination clause, specifically addresses legislation, not legislators. It is a purely procedural section, requiring a certain process for the enactment of legislation. Section 7 concerns the business of legislating—an activity left only to the political branches. The first element in the *Baker* test—the constitutional commitment on an issue to a political department—which the Su-

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243. *See* Baker v. Carr, 369 U.S. 186, 211 (1962).

244. 369 U.S. 186 (1962).

245. *Id.* at 217.

246. *Id.*

247. *See, e.g.*, Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919 (1983); Baker v. Carr, 369 U.S. 186 (1962); Armstrong v. United States, 759 F.2d 1378 (9th Cir. 1985).

preme Court identified as being "[p]rominent on the surface of any case held to involve a political question,"[248] can thus be found in the context of a challenge to TEFRA under the origination clause by reference to the clause itself and its placement within the Constitution.

Two other elements in the Court's list can also be found in this context. The "respect due coordinate branches of government" and "an unusual need for unquestioning adherence to a political decision already made"[249] have been found to be important reasons for judicial deference to legislative determinations as to the validity of enactments. In *Field v. Clark*,[250] importers challenged the constitutionality of the 1890 Tariff Act[251] on the grounds that the bill as signed by the President and deposited in the archives was missing a provision it contained when it passed the two houses of Congress. They argued that a bill, even though signed and approved by the President, cannot become law if it was not passed by Congress. Although the Court noted that "[i]n view of the express requirements of the Constitution the correctness of this general principle cannot be doubted,"[252] it proceeded to state that this was not the only question:

> it remains to inquire as to the nature of the evidence upon which a court may act when the issue is made as to whether a bill, originating in the House of Representatives or the Senate, and asserted to have become a law, was or was not passed by Congress.[253]

The Court held that when a bill is passed, attested to by the Speaker of the House and the President of the Senate, signed by the President of the United States, and deposited in the archives, "its authentication as a bill that has passed Congress should be deemed complete and unimpeachable."[254] As part of its rationale, the Court noted that the respect due "coequal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed Congress, all bills authen-

248. Baker v. Carr, 369 U.S. 186, 217 (1962).
249. *Id.*
250. 143 U.S. 649 (1892).
251. 1890 Tariff Act, ch. 1244, 26 Stat. 567 (1890).
252. *Field*, 143 U.S. at 669.
253. *Id.* at 670.
254. *Id.* at 672.

ticated in the manner stated."[255]

Significantly, the claim in *Field* was founded upon the clause immediately following the origination clause in the Constitution.[256] It takes no stretch of the interpretive imagination to see that directly adjacent clauses within a single section can and should be read together. This is especially true when they relate to the same subject—here, procedural rules for the passage of legislation. In light of the Supreme Court's interpretation in *Field*, it seems clear that, if a bill that has passed Congress and received the President's signature cannot be challenged by the courts under article I, section 8, then, its mode of passage by Congress cannot be questioned by the courts under article I, section 7. The Supreme Court has emphasized the importance of "attributing finality to the action of the political departments"[257] and noted the resulting reluctance of the courts to delve into the question "whether, as passed, [a statute] complied with all requisite formalities."[258]

Thus, several of the elements cited in *Baker* as indicating the existence of a political question are present in the taxpayer challenges to TEFRA under the origination clause. A final element indicating its existence can also be found. In *Pacific States Telephone & Telegraph Co. v. Oregon*,[259] a corporation challenged a tax initiated by public referendum under article IV, section 4 of the Constitution, which guarantees a republican form of government to the states.[260] The Supreme Court, in deeming this a political question and thus dismissing the action, noted that the corporation was not making arguments relating to the operation of the tax. Nor was the corporation arguing "that there was anything inhering in the tax or involved intrinsically in the law which vio-

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255. *Id.* Professor Scharpf's functional formulation of the doctrine would include decisions concerning legislative enactments as nonjusticiable political questions. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 568-69 (1966).

256. U.S. CONST. art. I, § 7, cl. 2 (requiring that all bills passing the House and Senate be presented to the President and providing for the overriding of a presidential veto).

257. Coleman v. Miller, 307 U.S. 433, 454 (1939).

258. Baker v. Carr, 369 U.S. 186, 214 (1962). For present purposes, no material difference exists between asking a court to analyze a bill's mode of passage by the conjuctive efforts of the legislative and executive branches and asking it to analyze its passage by the two houses of congress.

259. 223 U.S. 118 (1912).

260. Article IV, section 4 reads in part: "The United States shall guarantee to every State in this Union a Republican Form of Government . . . ."

lated any of its constitutional rights. If such questions had been raised they would have been justiciable, and therefore would have required the calling into question of judicial power."[261] Rather, the plaintiff corporation was calling the political entity itself before the court "not for the purpose of testing judicially some exercise of power assailed, on the ground that its exertion has injuriously affected the rights of an individual because of repugnancy to some constitutional limitation"[262] but presumably for the purpose of overturning undesirable legislation. The taxpayer challenges to TEFRA under the origination clause are analogous to *Pacific States Telephone* on the issue of political question. No intrinsic violation of individual constitutional rights by TEFRA has been identified in any of the challenges to date. The plaintiffs have, instead, attempted to bring Congress itself into court to challenge how it did what the Constitution explicitly permits it alone to do—pass legislation. These attempts should not have been permitted under the doctrine of political question.

In sum, in addition to the fact that taxpayers lack the standing necessary to challenge TEFRA under the origination clause, these challenges also raise nonjusticiable political questions that are not appropriate for the courts to address. As the Court noted in *Field v. Clark*, however, even though a certain constitutional challenge is impermissible, it may still be true that the enactment of the statute in question was unconstitutional.[263] Because this matter is not appropriate for judicial resolution or supervision, it is only Congress' own diligence and commitment to constitutional principle which will protect against this type of constitutional violation. Examination of the constitutionality of TEFRA is still important, then, because the political branches are ultimately accountable to the people for their actions.

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261. *Baker*, 223 U.S. at 150. This resembles the distinction between claims based on the *operation* as opposed to the *enactment* of a statute in the origination clause context. *See supra* note 202 and accompanying text.

262. *Id.* at 150-51.

263. 143 U.S. 649, 669 (1892).

V. TEFRA's CONSTITUTIONALITY

A. *Applying the Principles*

The preceding discussion reveals that the purpose test is the appropriate guide for evaluating a legislative measure's constitutionality under the origination clause. Applying this test to the facts surrounding TEFRA's passage[264] leads to several conclusions. The first is that the bill originally passed by the House of Representatives, H.R. 4961, was not a bill for raising revenue within the meaning of the origination clause. It was not a bill "to levy taxes in the strict sense of the words."[265] It would take no money from the people; rather, it would give money back to the people. It would not raise money for the support of the government; rather, it would decrease the money coming into the treasury. Most importantly, the bill was not intended to raise revenue. In both purpose and revenue effect, H.R. 4961 was not a bill for raising revenue.

The second conclusion that can be drawn is that TEFRA was in fact a bill for raising revenue within the meaning of the origination clause. In stated purpose and projected effect, it would dramatically raise revenue through taxation. The fact that it came into being by amendment is irrelevant to its constitutionality under the origination clause[266] for, as the Senate Committee on Privileges and Elections stated in 1872, "the Senate can not propose an amendment raising revenue to any bill coming from the House, but only to a bill raising revenue."[267]

The third conclusion that can be drawn is that the leaders of the House and Senate acted in producing TEFRA in a way the framers of the origination clause had predicted and sought to avoid.[268] As noted earlier, some of the opponents of the origination clause in the convention, most notably James Madison, predicted that members of the House and Senate might collude in order to produce a tax bill that met the constitutional require-

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264. *See supra* notes 25-63 and accompanying text.

265. 2 J. STORY, *supra* note 148, at 343.

266. *See supra* note 26 and accompanying text.

267. 2 A. HINDS, *supra* note 139, at 952.

268. This makes interpreting the origination clause in light of the intention of its framers most appropriate. *See supra* note 22.

ments of the origination clause in form but not in substance.[269] In the Virginia ratifying convention, William Grayson also spoke against allowing the Senate the power to amend bills for raising revenue for the same reasons, warning that the Senate might "strike out every word of the bill except the word *whereas*, or any other introductory word, and might substitute new words of their own."[270] This is, in fact, what the Senate did with TEFRA. As if Grayson's speech was their script, the Senate Committee on Finance proposed the first amendment to H.R. 4961: "On page 2, strike line 1, through and including page 31, line 2, and insert the following"[271] The Senate struck everything but the enacting clause and substituted their own bill.

In the challenge to the 1890 Tariff Act[272] under the origination clause's companion provision in *Field v. Clark*,[273] the Court noted that the plaintiffs' argument suggested something of a conspiracy by Congressmen "to defeat an expression of the popular will in the mode prescribed by the Constitution."[274] As events unfolded in the TEFRA scenario, it became apparent that such a conspiracy existed to produce a tax bill in a fashion that would hopefully pass constitutional muster. The popular media at the time of TEFRA's passage said it loud and clear. The President and Senate republicans had, one year before, succeeded in passing a large income tax cut, "[b]ut now the GOP has cause to curse the anniversary. The prospect of sky-high federal deficits . . . has forced the Republicans in the Senate to mark the anniversary of their record tax reduction with a record $99 billion tax increase."[275] A tax increase was not forthcoming from the House even though congressional opinion was that one was needed.[276] The Senate had one ready but the House democrats did not want the responsibility for it. They sat back as the Senate amended H.R. 4961 into TEFRA and as the bill proceeded directly to a conference committee without debate, markup, or consideration.

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269. *See supra* note 98 and accompanying text.
270. C. WARREN, *supra* note 79, at 670-71.
271. 128 CONG. REC. S8577 (daily ed. July 19, 1982).
272. 1890 Tariff Act, ch. 1244, 26 Stat. 567 (1890).
273. 143 U.S. 649 (1892).
274. *Id.* at 673.
275. McGrath, *A No-Fingerprints Tax Bill*, NEWSWEEK, Aug. 9, 1982, at 16.
276. 128 CONG. REC. H4780 (daily ed. July 28, 1982) (statements of Reps. Conable and Pickle); 128 CONG. REC. S8645 (daily ed. July 19, 1982) (statement of Sen. Dole).

The media appropriately identified this bill: "The tax bill, born of necessity in the GOP-controlled Senate";[277] "the Senate tax bill";[278] and "the Senate Republicans' tax bill."[279]

The conspiracy the Supreme Court declined to acknowledge in *Field* in 1892 was obvious enough for all to see in 1982. Democrats in the House made it plain that they intended "to make Republicans take the lead in any effort to reduce deficits by raising taxes."[280] The plan was for a small "revenue-enhancement" bill to begin in the House and then to let the Senate "do all the big stuff."[281] This original design would likely have satisfied the technical requirements of the origination clause by originating a revenue-raising bill in the House and having it amended to raise more revenue by the Senate. It might, at the same time, have lent some credence to Madison's arguments against the origination clause in the 1787 constitutional convention. What the House actually did, however, as the popular media noted at the time, was to originate a bill "which included six minor, technical modifications of the tax code, each reducing revenues slightly."[282]

TEFRA was the product of election-year politics. The democrats wanted to label the republicans as the tax-increasers and so fashioned a plan that would force the Senate—controlled by republicans—to originate a tax bill. The House and the Senate knew it, and the media knew it.[283] Everyone knew it, it seemed,

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277. Beck, *The Tax Battle Heats Up*, NEWSWEEK, Aug. 23, 1982, at 26.

278. Wiener, *ABC's of the Big Boosts Ahead for Taxpayers*, U.S. NEWS & WORLD REP., Aug. 2, 1982, at 44.

279. Karmin, *Back to Basics in Economic Policy*, U.S. NEWS & WORLD REP., Aug. 23, 1982, at 28.

280. Edsall, *Democrats on Tax Increase: Let's Let the Republicans Do It*, Wash. Post, Feb. 9, 1982, at A4, col. 1.

281. *Id.*

282. Smith, *Congressmen Plan A Court Challenge*, N.Y. Times, Aug. 17, 1982, at D17, col. 5.

283. *See generally* Editorial, *The Moral Equivalent of Taxes*, Wall St. J., Aug. 17, 1982, at 28, col. 1 (Editorial) ("Democrats in the House have cast off constitutional responsibility for revenue raising, handing it gratefully to the Republicans."); Arenson, *Strong Reagan Support Expressed for Tax Bill*, N.Y. Times, Aug. 5, 1982, at D1, col. 1 ("Because of the House's reluctance to vote for any tax increases, it took the unusual step of deciding not to pass its own version of a tax package, instead going directly to conference with the Senate over a version drawn up by the Senate Finance Committee."); Edsall, *House Votes to Accept Senate's $98.5 Billion Tax Bill*, Wash. Post, July 29, 1982, at A14, col. 1 ("Democrats averted direct House consideration of the measure as part of a strategy designed to ensure that in no way would the legislation be described as a 'Democratic' tax bill."); Cowan, *Senate Committee Reaches Accord on 1983 Tax Rises*, N.Y. Times, July 2, 1982, at A1, col. 6

except the courts. Even though the courts could not appropriately exercise judicial review over these origination clause challenges to TEFRA brought by individual taxpayers,[284] those that did failed in their analysis of the merits.

B. *Challenges to TEFRA*

Eighteen Congressmen joined on August 18, 1982, in a suit against the House of Representatives, claiming that TEFRA contravened the origination clause.[285] Although that suit was dismissed for lack of standing,[286] more than fifty similar suits have been brought by individual taxpayers since then.[287] Most of the courts confronting these claims have confused the issue of TEFRA's constitutionality under the origination clause with the issue of the Senate's power to amend any bill by substitution. In addressing only the latter issue, they have commonly cited *Flint v. Stone Tracy Co.*,[288] a 1911 Supreme Court case in which a House bill establishing an inheritance tax was amended by a Senate substitute of a corporation tax.[289] The Court distinguished between

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("Although the House . . . traditionally initiates tax bills, the House Democratic leadership insisted that in this election year the Republican Senate and the Republican White House take the lead, and possible election-day risks, in raising revenue."); Merry, *Senate Unit Today Begins Effort to Raise Taxes by About $21 Billion in Fiscal 1983*, Wall St. J., June 29, 1982, at 2, col. 3 ("Although tax bills constitutionally must originate in the House, Sen. Dole has obtained the blessing of House Ways and Means Committee Chairman Dan Rostenkowski (D. Ill.) to proceed first.").

284. *See supra* Section IV.

285. Moore v. United States House of Representatives, 553 F. Supp. 267 (D.D.C. 1983), *aff'd*, 733 F.2d 946 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985).

286. *Id.* at 271.

287. *See supra* note 8.

288. 220 U.S. 107 (1911).

289. The following are among the cases that have relied on *Flint*: Jolly v. United States, 764 F.2d 642, 645 (9th Cir. 1985); Boday v. United States, 759 F.2d 1472, 1476 (9th Cir. 1985); Armstrong v. United States, 759 F.2d 1378, 1382 (9th Cir. 1985); Wardell v. United States, 757 F.2d 203, 204 (8th Cir. 1985) (per curiam); Burdette v. United States, 57 A.F.T.R.2d (P-H) 86-1222 (M.D. Ala. 1985); Liljenfeldt v. United States, 588 F. Supp. 966, 972 (E.D. Wis.), *aff'd mem.*, 753 F.2d 1077 (7th Cir. 1984); Karpowycz v. United States, 586 F. Supp. 48, 52 (N.D. Ill. 1984); Scull v. United States, 585 F. Supp. 956, 960 (E.D. Va. 1984); Rowe v. United States, 583 F. Supp. 1516, 1519 (D. Del.), *aff'd mem.*, 749 F.2d 27 (3d Cir. 1984); Aune v. United States, 582 F. Supp. 1132, 1135 (D. Ariz. 1984), *aff'd sub nom.* Brasseur v. United States, 765 F.2d 148 (9th Cir. 1985); Ueckert v. United States, 581 F. Supp. 1262, 1264 (D.N.D. 1984); Stamp v. Commissioner, 579 F. Supp. 168, 171 (N.D. Ill. 1984); Kloes v. United States, 578 F. Supp. 270, 272 (W.D. Wis. 1984); Milazzo v. United States, 578 F. Supp. 248, 253 (S.D. Cal. 1984); Tibbetts v. Secretary of the Treasury, 577 F. Supp. 911, 914 (W.D.N.C. 1984); Gimelli v. United States, 53

origination and substitution when it stated:

> [T]he tariff bill . . . originated in the House of Representatives and was there a general bill for the collection of revenue . . . . The bill having properly originated in the House, we perceive no reason in the [origination clause] why it may not be amended in the Senate in the manner which it was in this case. The amendment was germane to the subject-matter of the bill and not beyond the power of the Senate to propose.[290]

The fact that the original House bill in this case was in fact a bill for raising revenue was what made its origination in the House necessary. The fact that the Senate amendment was germane was what made its form as a substitute valid. The background of TEFRA is not analogous to the situation in *Flint*. The question that determines TEFRA's constitutionality under the origination clause is whether H.R. 4961 was a bill for raising revenue, not whether the Senate may amend by substitution. Whatever the Senate's power to amend may be, it may not do so at all if its amendment turns a bill for some purpose other than raising revenue into a bill that raises revenue.[291] This is what the Senate did with TEFRA, and it is for this reason that TEFRA is unconstitutional under the origination clause.

Most of the courts faced with challenges to TEFRA have, rather than conduct their own investigation into the origination clause issue, simply cited the first district court case to rule on the issue, *Frent v. United States*,[292] as precedent for their holding that TEFRA is constitutional.[293] That case, however, made two erro-

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A.F.T.R.2d (P-H) 84-1032 (E.D. La. 1984); Bearden v. Commissioner, 575 F. Supp. 1459, 1460-61 (D. Utah 1983). The late Justice Thomas Cooley stated in his analysis that *Flint* involved "the substitution by the Senate of a tax on incomes of corporations for a tax on inheritance." T. COOLEY, *supra* note 148, at 268 n.2.

290. *Flint*, 220 U.S. at 143.

291. *See supra* note 170 and accompanying text.

292. Frent v. United States, 571 F. Supp. 739 (E.D. Mich. 1983), *appeal dismissed mem.*, 734 F.2d 14 (6th Cir. 1984). The *Frent* holding was based exclusively on *Flint*. *See supra* notes 287-89 and accompanying text.

293. *See* Boday v. United States, 759 F.2d 1472 (9th Cir. 1985); House v. United States, 593 F. Supp. 139 (W.D. Mich. 1984), *aff'd mem.*, 787 F.2d 590 (6th Cir. 1986); Liljenfeldt v. United States, 588 F. Supp. 966 (W.D. Wis.), *aff'd mem.* 753 F.2d 1077 (7th Cir. 1984); Karpowycz v. United States, 586 F. Supp. 48 (N.D. Ill. 1984); Rowe v. United States, 583 F. Supp. 1516 (D. Del.), *aff'd mem.* 749 F.2d 27 (3d Cir. 1984); Aune v. United States, 582 F. Supp. 1132 (D. Ariz. 1984), *aff'd sub nom.* Brasseur v. United States, 765 F.2d 148 (9th Cir. 1985); Ueckert v. United States, 581 F. Supp. 1262 (D.N.D. 1984); Stamp v. Commissioner, 579 F. Supp. 168 (N.D. Ill. 1984); Milazzo v. United States, 578 F. Supp. 248 (S.D. Cal. 1984); Bearden v. Commissioner, 575 F. Supp. 1459 (D. Utah 1983).

neous findings which led it to make the wrong conclusion on the origination clause issue. First, it incorrectly characterized the plaintiff's argument: "Because of this substitution of the Senate text, plaintiff contends that the Act was enacted in violation of [the origination clause]."[294] Plaintiffs in this and other challenges to TEFRA have argued that the statute is unconstitutional not because the Senate amended by substitution but because that substitution created a bill for raising revenue for the first time.[295] The issue is the respective natures of H.R. 4961 and TEFRA, not the parliamentary maneuver known as amendment by substitution. Second, the court in *Frent* incorrectly characterized H.R. 4961: "Nothing in the [origination clause] indicates that the Senate may not amend a revenue-raising bill by a wholesale substitution of the text of that bill."[296] The court made no attempt to examine H.R. 4961 to determine whether it was a revenue-raising bill in terms relevant to the origination clause. The discussion in this Comment reflects that H.R. 4961 was, in fact, not a revenue-raising bill.

Other courts have held that H.R. 4961 was a bill for raising revenue by asserting that the origination clause concerns any bill even relating to revenue.[297] A careful analysis reveals that this interpretation of the clause is too broad. This interpretation would incorrectly apply the clause to bills for other than revenue purposes that nonetheless brought in revenue incidentally. However, these categories of bills are excluded from the clause's coverage.[298] This broad interpretation, in contrast, comports better with the original wording of the origination clause that the constitutional convention specifically rejected by its end.[299]

Only five courts dealing with TEFRA challenges have made any attempt to interpret the origination clause.[300] One cited no authority,[301] three made extremely brief passes at the clause,[302]

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294. Frent v. United States, 571 F. Supp. 739, 742 (E.D. Mich. 1983), *appeal dismissed mem.*, 734 F.2d 14 (6th Cir. 1984).

295. *See* cases cited *supra* note 8.

296. *Frent*, 571 F. Supp. at 742.

297. *See, e.g.*, Texas Ass'n of Concerned Taxpayers, Inc. v. United States, 772 F.2d 163 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 2265 (1986); Armstrong v. United States, 759 F.2d 1378 (9th Cir. 1985); Wardell v. United States, 757 F.2d 203 (8th Cir. 1985) (per curiam); Milazzo v. United States, 578 F. Supp. 248 (S.D. Cal. 1984).

298. *See supra* notes 153-57 and accompanying text.

299. *See supra* note 146 and accompanying text.

300. *See supra* note 20.

301. *See* Milazzo v. United States, 578 F. Supp. 248 (S.D. Cal. 1984).

and one correctly characterized the issue but, for no stated reason, concluded it was not implicated in the case before the court.[303]

These cases were brought by tax protesters, and their complaints often included unorthodox claims.[304] Indeed, the reason they were in court in the first place was that their income tax returns had been declared frivolous under a provision TEFRA added to the Internal Revenue Code.[305] The legislative history of that provision reveals that it was intended to deal with specious claims made by tax protesters.[306] Such claims have routinely been found meritless.[307] In such a context, the use of seemingly applicable precedent might seem most expeditious. Of all the claims against TEFRA brought by individual taxpayers, however, the charge that TEFRA was unconstitutional under the origination clause was the one that had real merit.[308]

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302. *See* Armstrong v. United States, 759 F.2d 1378 (9th Cir. 1985); Wardell v. United States, 757 F.2d 203 (8th Cir. 1985) (per curiam); Kloes v. United States, 578 F. Supp. 270 (W.D. Wis. 1984).

303. *See* Frent v. United States, 571 F. Supp. 739, 742 (E.D. Mich. 1983), *appeal dismissed mem.*, 734 F.2d 14 (6th Cir. 1984). Most courts facing origination clause challenges to TEFRA have relied on *Frent*. *See supra* note 293.

304. For example, some plaintiffs have asserted a claim based on the eighth amendment's prohibition against cruel and unusual punishment. *See, e.g.*, Vaughn v. United States, 589 F. Supp. 1528, 1533 (W.D. La. 1984); Milazzo v. United States, 578 F. Supp. 248, 253 (S.D. Cal. 1984). Some unreported cases also raise interesting claims. One plaintiff claimed wages were an even exchange for labor and, therefore, could not constitute income. Ganz v. United States, No. 85-C-14819 (N.D. Ill. Oct. 31, 1985). Another made a claim under the first amendment guarantee of religious expression. Smith v. United States, No. 83-1673 (M.D. Pa. April 14, 1984).

305. 26 U.S.C. §§ 6702, 6703 (1982).

306. Interestingly, at least one example of a contemporary origination clause analysis consistent with that presented in this Comment exists outside the TEFRA context. In United States v. Ramos, 624 F. Supp. 970 (S.D.N.Y. 1985), the defendant had been convicted of violating section 841(a)(1) of the Comprehensive Drug Abuse Protection and Control Act of 1970, 21 U.S.C. § 841(a)(1), and was assessed $50 pursuant to a criminal penalty provision, 18 U.S.C. § 3013 (a)(2)(A) (Supp. II 1984). He asserted that section 3013 was a revenue-raising measure that originated in the Senate in violation of the origination clause. The court held that, although the provision raised revenue, this was incident to its purpose "as a punishment on a convicted person." *Id.* at 973. Stated the court: "The assessment is not a tax on the public, but only a consequence of being convicted of a crime. Its purpose was to punish convicted criminals." *Id.*

307. S. REP. No. 494, 97th Cong., 2d Sess., pt. 2, at 277, *reprinted in* 1982 U.S. CODE CONG. & ADM. NEWS 781, 1024.

308. *See, e.g.*, Lonsdale v. Commissioner, 661 F.2d 71 (5th Cir. 1981) (per curiam); United States v. Daly, 481 F.2d 28 (8th Cir.) (per curiam), *cert. denied*, 414 U.S. 1064 (1973); United States v. Porth, 426 F.2d 519 (10th Cir.), *cert. denied*, 400 U.S. 824 (1970);

VI. CONCLUSION

The origination clause of the United States Constitution requires that all bills for the purpose of raising revenue through the vehicle of taxation to support government must originate in the House of Representatives. The dual purposes of the clause—to balance the powers exercised by the Senate and to keep the power of extracting money from the people in the branch most responsive to them—remain as important today as ever. Indeed, the circumstances surrounding the passage of TEFRA demonstrate that the kind of political maneuvering that the framers sought to avoid by drafting the origination clause remains a problem today.

The courts are at fault in contributing to this constitutional crisis by failing to adhere to traditional notions of standing and assuming that these origination clause challenges were properly before them. Not only do individual taxpayers lack standing to bring these claims, but these claims represent nonjusticiable political questions which the Constitution leaves for the political branches to resolve. Because courts lack the authority to confront origination clause challenges to TEFRA brought by individual taxpayers, it is the duty of Congress to remain committed to constitutional principles, even in the world of crafty day-to-day politics. In the case of TEFRA, however, Congress "brush[ed] aside constitutional issues in favor of political calculations. . . ."[309]

H.R. 4961 was not a bill for raising revenue. The Senate substituted TEFRA, a bill for raising revenue, for H.R. 4961 in violation of the origination clause. The courts handling origination clause challenges to TEFRA not only lacked authority to rule on the statute's constitutionality but also failed to give the kind of careful analysis that such an important issue demands. Rather, in the context of tax protest cases, they either summarily followed an incorrect precedent or made brief, erroneous analyses of their own. In doing so, an important part of the constitutional system of separation of powers may have been damaged beyond repair.

It is of little value to complain about constitutional violations in the abstract. This analysis shows that individual taxpayers lack

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Porth v. Brodrick, 214 F.2d 925 (10th Cir. 1954) (per curiam); Cupp v. Commissioner, 65 T.C. 68 (1975), *aff'd mem.*, 559 F.2d 1207 (3d Cir. 1977).

309. Edsall, *House Votes to Accept Senate's $98.5 Billion Tax Bill*, Wash. Post, July 29, 1982, at A14, col. 1.

standing to bring origination clause claims and that this issue is a nonjusticiable political question. What, then, should be done?

The better question might be "what should have been done?" Simply put, the members of Congress should have taken their oath to uphold the Constitution seriously and dealt with the constitutional issues implicated by TEFRA's passage. As the Congress acted when origination clause questions arose in the nineteenth century, the issue should have been presented to the appropriate congressional committee for evaluation.[310] In the present context, this would have been the House Judiciary Committee. Rather than give in to election-year politics, the members of Congress should have stuck with constitutional principle. This might have changed the outcome of Congress' policy, but a constitution is supposed to set parameters within which the public policy process is to function; a constitution is not to be ignored in order to make desired policy outcomes attainable.

To give such short shrift to an unambiguous constitutional provision in favor of end-running this mandated procedure for passing tax legislation is to undermine the rule of law in our society. The consequences for the American people are enormous, not only because their representatives have violated the Constitution, nor only because they cannot directly challenge it in court, but also because the result is taxation without representation—a major theme of the American Revolution and an essential reason for the existence of the origination clause.

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310. 2 A. HINDS, *supra* note 139, at 944-45 (1859 incident), 946 (1871 incident), 953-54 (1883 incident), 967 (1878 incident).