Origination and Original Meaning: Reviving the Origination Clause to Restrain the Administrative State

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Abstract. There is a disturbing trend of federal agencies assessing fees to be paid by taxpayers via administrative rulemaking. This unconstitutional arrangement leaves Americans in danger of taxation without representation—the very peril the Origination Clause was designed to prevent. This oft-forgotten constitutional provision requires all revenue-raising bills to originate in the House of Representatives.

The Origination Clause was the glue that bonded the Constitutional Convention's warring factions together to produce the Great Compromise. Since the Declaration of Independence, fear of taxation without representation was front-and-center of the Framer's concerns. The Origination Clause's original meaning and purpose was to create a procedural safeguard preventing excessive taxation by connecting the politically sensitive job of assessing tax burdens to the branch of the government most accountable to the people. By ensuring the enactors of a tax were never more than two years away from an election, the Origination Clause provides a strong incentive for legislators to only tax when necessary for the common good.

Shockingly, what the Framers thought was an integral part of our constitutional constellation quickly faded into irrelevance, disfavor, and disrepute. The Supreme Court's purposive jurisprudence has eroded the Origination Clause into nothing more than a parchment barrier. It has even permitted taxes written by industry lobbyists and enacted via rulemaking to withstand Origination Clause scrutiny.

To restore this key safeguard for liberty, the Supreme Court should discard its purposive jurisprudence and analyze the Clause again from an originalist perspective. At a bare minimum, this analysis

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would strike down the growing trend of taxation by agency regulation. With at least three Justices on the Supreme Court showing interest in reconsidering the Origination Clause, the time is ripe to consider what results an originalist interpretation could yield.

Introduction

> All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.[1]
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> [T]he power to tax involves the power to destroy . . . .[2]
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> The power to tax is not the power to destroy while this Court sits.[3]

At the end of 2021, just before Christmas, thousands of rural communities got a surprise gift from the U.S. Forest Service: a proposed new fee being levied upon their emergency services departments.[4] Like many rural communities, Montezuma County, Colorado, has been forced into a symbiotic relationship with the federal bureaucracy.[5] Approximately 72% of the land within the county is owned, managed, and exclusively controlled by federal administrative agencies.[6] To have meaningful public services, utility access, and other key infrastructure, Montezuma County must cooperate with federal agencies.[7] For instance, to cover its whole jurisdiction with radio connectivity, Montezuma County's Emergency Management Office required a permit to build two emergency communications towers on U.S. Forest Service land to be used by first responders in the region.[8] These communications towers are necessary to support the county's police radio, disaster response, 911 dispatch operations, and other critical emergency services.[9] Additionally, Montezuma County even allows federal agencies like the U.S. Forest Service to use these communications towers free of charge to dispatch forest rangers and wildland firefighters.[10]

According to Montezuma County Emergency Manager Jim Spratlin, this arrangement with the U.S. Forest Service was working out well, with

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1 U.S. CONST. art. I, § 7, cl. 1.

2 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819).

3 Panhandle Oil Co. v. Mississippi *ex rel.* Knox, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting).

4 Land Uses; Special Uses; Annual Programmatic Administrative Fee for Communications Use Authorizations, 86 Fed. Reg. 72540 (proposed Dec. 22, 2021) (to be codified at 36 C.F.R. pt. 251) [hereinafter Proposed Communications Use Fee].

5 BD. OF CNTY. COMM'RS, CNTY. OF MONTEZUMA, COLO., RES. 13-2021: OPPOSING THE FEDERAL GOVERNMENT'S "30 X 30" LAND PRESERVATION GOAL 1 (2021).

6 *Id.*

7 *See* Letter from the Montezuma Cnty. Bd. of Comm'rs to Joey Perry, Program Manager, U.S. Forest Serv. (Feb. 8, 2022), https://perma.cc/37J8-KH3F.

8 Jim Mimiaga, *Montezuma County, Boebert Challenge Proposed Fee for Towers on Forest Service Land*, JOURNAL, (Feb. 15, 2022, 4:27 PM), https://perma.cc/YZM9-9CTE.

9 *Id.*

10 Letter from the Montezuma Cnty. Bd. of Comm'rs, *supra* note 7, at 2.

both sides being "good neighbors" until December 2021.[11] Just after Christmas, Spratlin read a notice in the *Federal Register* that the U.S. Forest Service was planning to impose new fees on the county's emergency communications towers.[12] In addition to the land use fees and permitting fees that Montezuma County already paid,[13] the Forest Service proposed adding another fee to go directly into the agency's coffers.[14] In the Agriculture Improvement Act of 2018 ("2018 Farm Bill"), Congress granted the Forest Service the power to impose a tax to gather revenue from communications permit holders to fund the costs of administering the bureaucracy overseeing rural communication regulations.[15] The vague statutory provision in the 2018 Farm Bill gave Montezuma County no notice as to how much the newly established fees would be.[16] The only guideline that the bill established was that the fee amount should be "based on the cost to the Forest Service of any maintenance or other activities required to be performed by the Forest Service as a result of the location . . . of the communications facility."[17] For years, Montezuma County did not know what their new financial obligation would be until the Forest Service finally moved to collect this new revenue source at the end of 2021.[18]

The Forest Service's proposed new fee structure would collect revenue from operators of radio or fiber optic communication equipment on U.S. Forest Service land.[19] In sum, the total revenue collected would be enough to cover 100% of the operating budget of the bureaucrats managing the permitting process.[20] The agency determined that it wanted to collect $5.4 million per year to fund staff salaries, training, and administrative overhead.[21] Starting with that bottom line in mind, the agency then divided the cost of its budget among all communications permit holders—with no distinction between small local governments and massive commercial telecommunications providers—and determined that

11 Mimiaga, *supra* note 8.

12 *See id.*; Proposed Communications Use Fee, *supra* note 4.

13 36 C.F.R. § 251.57(a) (2022) (imposing a land use fee on communications site users). The fees, however, were deposited directly into the Treasury and did not directly fund the U.S. Forest Service's regulatory activities. *See* Proposed Communications Use Fee, *supra* note 4, at 72541.

14 Proposed Communications Use Fee, *supra* note 4, at 72541.

15 Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 8705(e)–(f), 132 Stat. 4490, 4879–80 (codified as amended at 43 U.S.C. § 1761a(e)–(f)).

16 *See id.*; Mimiaga, *supra* note 8.

17 *Id.* § 8705(c)(3)(B), 132 Stat. at 4879 (codified as amended at 43 U.S.C. § 1761a(c)(3)(B)).

18 Mimiaga, *supra* note 8.

19 Proposed Communications Use Fee, *supra* note 4, at 72541.

20 *See id.*

21 *Id.*

Montezuma County would owe $1,400 for each radio operating on national forest lands.[22]

Without any opportunity for their elected representatives to debate the issue, thousands of communication permit holders suddenly found themselves in debt to a government agency.[23] Only after the regulation was promulgated did eleven members of Congress have the opportunity to advocate for Montezuma County and criticize the U.S. Forest Service for crafting "a one-size-fits-all administrative fee structure" that failed to exempt local government entities.[24]

Assessing fees via executive rulemaking deprives Americans of the vigorous debate that the Framers intended to be injected into revenue decisions.[25] In rulemaking, instead of having elected representatives debate the merits of a policy before it is enacted, legislative "debate" happens retroactively, with elected members of Congress writing desperate letters asking federal agencies to reconsider their regulations ad hoc.[26] By straying from the Constitution's narrow procedure for raising government revenue, the growth of the administrative state has created a system that leaves American communities, like Montezuma County, in the dust.

To prevent revenue raising by executive rulemaking, a rediscovery and revitalization of the Origination Clause's procedural safeguards is necessary. Agency rules assessing fees violate the Origination Clause's purpose of linking the politically sensitive job of allocating tax burdens to the most accountable elected officials. Out of respect for the Origination Clause's carefully delineated congressional procedure for raising revenue, courts should strike down agency rulemaking provisions that raise revenue.

First, this Comment reviews the history of the Origination Clause and how purposive jurisprudence sapped it of its original strength. Next, it argues that the time is ripe for reconsideration of the Origination Clause by departing from purposive jurisprudence and, instead, applying an originalist analysis of the Origination Clause. Finally, it concludes that courts should strike down agency regulations that raise revenue since the Origination Clause must at least mean that revenue decisions cannot be isolated from the people's elected representatives.

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22 *See id*. at 72540.

23 *See id*. at 72540–42 (observing the annual programmatic administrative fee applied to "3,715 authorizations for wireless uses").

24 Letter from Lauren Boebert, U.S. Rep., et al. to Meryl Harrell, Deputy Under Sec'y, Nat. Res. & Env't, Dep't of Agric. (Feb. 11, 2022), https://perma.cc/Z2CF-URR2.

25 THE FEDERALIST NO. 58 (Alexander Hamilton).

26 Letter from Lauren Boebert et al., *supra* note 24.

I. The History of the Origination Clause

One of the deepest fears that early Americans had of government was the potential for taxation without representation.[27] The Origination Clause addressed this concern by requiring that the branch most accountable to the people—and the body of that branch most accountable via elections every two years[28]—would have to introduce all bills passing a tax on the people.[29] Elbridge Gerry, one of the main advocates for the Origination Clause, argued that the House of Representatives should introduce all revenue bills since it was comprised of the most "immediate[ ] . . . representatives of the people . . . [and] the people ought to hold the purse-strings."[30] At the Virginia Convention, John Marshall relied on the procedural protections offered by the House of Representatives to argue for the ratification of the Constitution.[31] He noted that the electoral interests of House members provided a procedural guard against tyranny and frivolous taxation since the people could hold members accountable for all taxes.[32] Under this carefully constructed constitutional framework, Marshall argued that elected legislators would only pass taxes if they could convince the general public that the specific "taxes laid [were] for their good."[33]

Chief Justice Marshall reiterated this view formally in *McCulloch v. Maryland*,[34] where he ruled that the carefully prescribed rules of congressional procedure provide "[t]he only security against the abuse of [the taxing] power."[35] Under the Constitution, the taxing power is checked only by political forces affecting "the interest of the legislator" and reflecting "the influence of the constituents over their representative."[36]

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27 *See* THE DECLARATION OF INDEPENDENCE para. 19 (U.S. 1776) (expressing frustration with the King of Great Britain "[f]or imposing Taxes on us without our Consent").

28 Before the ratification of the Seventeenth Amendment in 1913, only the House of Representatives was directly elected by and accountable to the people. *See* U.S. CONST. amend. XVII (providing for the direct election of senators).

29 U.S. CONST. art. I, § 7, cl. 1.

30 5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION IN THE CONVENTION HELD AT PHILADELPHIA 188 (Jonathan Elliot ed., 1845).

31 *See* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 230–31 (Jonathan Elliot ed., 2d ed. 1836).

32 *Id.*

33 *Id.* at 231.

34 17 U.S. (4 Wheat.) 316 (1819).

35 *Id*. at 428.

36 *Id.*

Therefore, linking taxation with direct representation was a key structural protection for individual liberty.[37]

The Origination Clause was discussed extensively during the Constitutional Convention and the following ratification debates at state capitols across the country.[38] After days of deliberation at the Constitutional Convention, the Framers settled on the Origination Clause as the compromise in the fierce debate about representational apportionment between the House and the Senate.[39] After going through several versions, they ultimately settled on the text of Article I, Section 7, Clause 1 of the Constitution: "All Bills for raising Revenue shall originate in the House of Representatives . . . ."[40] This clause was so important to the Constitutional Convention's Great Compromise that George Mason argued that "[t]o strike out the section, was to unhinge the compromise."[41] Additionally, Elbridge Gerry stated that the Origination Clause was so integral to the Great Compromise that "acceptance of the [constitutional] plan will inevitably fail, if the Senate be not restrained from originating Money bills."[42]

Rather than viewing the Origination Clause as an obscure procedural requirement, the Framers identified it as a key provision protecting liberty by requiring accountability to the people:

> The house of representatives . . . alone can propose the supplies requisite for the support of government. They in a word hold the purse; that powerful instrument by which we behold . . . representation of the people, gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government. This power over the purse may, in fact be regarded as the most comple[te] and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.[43]

Although the Framers held the Origination Clause in great esteem, its power and prestige would only wane as time passed on.

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37 *See* THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 31, at 230–31.

38 *See* Robert G. Natelson, *The Founders' Origination Clause and Implications for the Affordable Care Act*, 38 HARV. J.L. & PUB. POL'Y 629, 636–46 (2015) (providing a historical account and legal analysis of how the Framers drafted the Origination Clause).

39 *Id.*

40 U.S. CONST. art. I, § 7, cl. 1.

41 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 224 (Max Farrand ed., 1911).

42 *Id.* at 275.

43 THE FEDERALIST NO. 58, *supra* note 25.

A. *Purposive Analysis Weakens the Origination Clause*

The Framer's high view of the Origination Clause has not held up in litigation. Since ratification, the Supreme Court has sporadically weighed in on the Origination Clause,[44] but it has never struck down a government action based on an Origination Clause claim.[45]

The Supreme Court first considered a challenge to a statute based on the Origination Clause in *Twin City Bank v. Nebeker*.[46] In *Nebeker*, the Supreme Court considered a challenge to a statute establishing U.S. bonds.[47] While the bill creating the bonds originated in the House of Representatives, the Senate proposed an amendment that imposed a tax to fund the program.[48] The amended bill ultimately passed the House and Senate and was signed into law.[49] When considering the case, the Supreme Court decided that the bill did not implicate the requirements of the Origination Clause because the tax in the legislation did not qualify as a bill for raising revenue.[50] The Court held that "revenue bills are those that levy taxes in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue."[51] Since the bill did not aim "to raise revenue to . . . [meet] the expenses or obligations of the government," it did not implicate the Origination Clause.[52] In the end, the Court held that a tax that funded a program designed to establish a national currency did not implicate the Origination Clause since the primary purpose of the tax was not to raise revenue for the general operation of the government.[53] Since the tax had a specific purpose attached to it, it cleared the hurdle of the Origination Clause.[54] Under *Nebeker*'s reasoning, the primary inquiry is purposive in nature.[55] If the statute in question raises revenue to fund the general operation of the

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44 *See, e.g.*, Twin City Bank v. Nebeker, 167 U.S. 196, 202 (1897); Millard v. Roberts, 202 U.S. 429 436–37 (1906); Flint v. Stone Tracy Co, 220 U.S. 107, 142 (1911); Rainey v. United States, 232 U.S. 310, 317 (1914); Nat'l Cable Television Ass'n, Inc. v. United States, 415 U.S. 336, 341 (1974); Skinner v. Mid-Am. Pipeline Co., 490 U.S. 212, 221 (1989); United States v. Munoz-Flores, 495 U.S. 385, 387–88 (1990); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 668–69 (2012) (Scalia, J., dissenting).

45 Sissel v. U.S. Dep't. of Health & Hum. Servs., 799 F.3d 1035, 1036 (D.C. Cir., 2015).

46 167 U.S. 196 (1897).

47 *Id.* at 202.

48 *Id.*

49 *Id.*

50 *Id.*

51 *Id.*

52 *Nebeker*, 167 U.S. at 203.

53 *Id.*

54 *Id.*

55 *Id.*

government, the Origination Clause applies.[56] If there is a purpose attached to the statute, however, the Origination Clause does not apply.[57] *Nebeker*'s purposive reasoning ultimately set the stage for how the Court would handle future Origination Clause cases.[58]

The Supreme Court expounded upon its purposive view of the Origination Clause in *Millard v. Roberts*.[59] In *Millard*, the Supreme Court considered whether a bill that originated in the Senate that imposed property taxes on D.C. residents for the purpose of giving a large grant to two private railroad companies implicated the Origination Clause.[60] Unlike in *Nebeker,* where the bill originated in the House and was amended by the Senate,[61] here, the Origination Clause question was even more direct because the statute originated in the Senate.[62] To resolve the case, the Court held that *Nebeker* "need only be cited" since "[w]hatever taxes are imposed are but means to the purposes provided by the act."[63] Since the property tax was attached to the specific purpose of giving a grant to two private railroad companies, the Court held that it was not a revenue bill and did not implicate the Origination Clause.[64] Therefore, whether the statute originated in the House or the Senate was immaterial.[65]

While *Nebeker* and *Millard* provided the foundation for cases regarding the Origination Clause's requirement that "[a]ll Bills for raising Revenue shall originate in the House of Representatives," the next two cases the Supreme Court heard involved questions about the exception to the rule: "the Senate may propose or concur with Amendments as on other Bills."[66] In *Flint v. Stone Tracy Co.*[67] and *Rainey v. United States*, [68] the Supreme Court dealt with two bills that originated in the House but were amended extensively by the Senate.[69] In *Flint*, the Court offered dicta,

56 *Id.*

57 *Id.*

58 *See, e.g.*, Millard v. Roberts, 202 U.S. 429, 436 (1906); Flint v. Stone Tracy Co, 220 U.S. 107, 143 (1911); Rainey v. United States, 232 U.S. 310, 317 (1914); Skinner v. Mid-Am. Pipeline Co., 490 U.S. 212, 221 (1989); United States v. Munoz-Flores, 495 U.S. 385, 397–98 (1990).

59 202 U.S. 429 (1906).

60 *Id.* at 435.

61 *Nebeker*, 167 U.S. at 202.

62 *Millard*, 202 U.S. at 436.

63 *Id.* at 436–37.

64 *Id.* at 437.

65 *Id.*

66 U.S. CONST. art. I, § 7, cl. 1.

67 220 U.S. 107 (1911).

68 232 U.S. 310 (1914).

69 *Flint*, 220 U.S. at 143; *Rainey*, 232 U.S. at 317.

noting that the Senate amendment was permissible since it "was germane to the subject-matter of the bill."[70] Just three years later, however, the Supreme Court rejected that dicta, holding "it is not for this Court to determine whether the amendment was or was not outside the purposes of the original bill."[71] *Rainey* concluded that there is no requirement for Senate amendments to be germane to the topic of the bill.[72]

While not implicating the Origination Clause explicitly, in *National Cable Television Ass'n v. United States*,[73] the Supreme Court considered a challenge to a congressional delegation of taxation authority to an independent agency.[74] Later, the precedent established in *National Cable* would be part of the foundation of modern Origination Clause challenges.[75] In *National Cable*, the Court heard a trade association's challenge to a Federal Communication Commission ("FCC") program that used fees paid by television broadcasters to fund its regulatory activity.[76] The Court considered the constitutionality of the Independent Offices Appropriations Act provision:

> [A]ny work, service . . . benefit . . . license . . . or similar thing of value or utility performed, furnished, provided, granted . . . by any Federal agency . . . to or for any person (including . . . corporations . . .) . . . shall be self-sustaining to the full extent possible, and the head of each Federal agency is authorized by regulation . . . to prescribe therefor . . . such fee, charge, or price, if any, as he shall determine . . . to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts . . . .[77]

Under the provisions of this Act, the FCC established a fee schedule sufficient to cover 100% of the operating budget of its television broadcast regulatory program.[78] In analyzing this practice, the Supreme Court distinguished between a taxation regime and a fee regime.[79] Taxation is "a legislative function," and Congress "is the sole organ for levying taxes."[80] As a legislative body, Congress may tax "arbitrarily and disregard benefits bestowed by the Government on a taxpayer and go solely on ability to pay,

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

71 *Rainey*, 232 U.S. at 317.

72 *Id.*; *see* Rebecca M. Kysar, *The 'Shell Bill' Game: Avoidance and the Origination Clause*, 91 WASH. U. L. REV. 659, 683 (2014).

73 415 U.S. 336 (1974).

74 *Id*. at 337–40.

75 *See, e.g.*, Skinner v. Mid-Am. Pipeline Co., 490 U.S. 212, 218 (1989).

76 *Nat'l Cable Television Ass'n*, 415 U.S. at 337–40.

77 *Id.* at 337 (quoting Independent Offices Appropriation Act of 1952, Pub. L. No. 82-137, tit. V, 65 Stat. 268, 290 (codified as amended at 31 U.S.C. § 9701(a)–(b))).

78 *Id.* at 340.

79 *Id.* at 340–41.

80 *Id*. at 340.

based on property or income."[81] In contrast, a fee "is incident to a voluntary act," so a federal agency can only charge a fee for a service which "bestows a benefit on the applicant" provided that the benefit is "not shared by other members of society."[82]

The Court rejected the Independent Offices Appropriations Act's assertion that agencies can make "public policy" determinations when setting fee schedules since this would "carr[y] an agency far from its customary orbit and put[ ] it in search of revenue in the manner of an Appropriations Committee of the House."[83] After distinguishing between taxes and fees and narrowing the FCC's ability to make public policy determinations in its fee-making practices, the Court expressed doubt about the FCC's assertion that fees collected from television broadcasters should pay for the entire regulatory scheme, holding that a fee system that forces private parties to pay for benefits rendered to the public becomes a tax.[84] Ultimately, the Court held that a fee must match the "value to the recipient" of government services.[85]

Notably, in *National Cable*, the Supreme Court, when considering *A.L.A. Schecter Poultry Corp. v. United States*[86] and *J. W. Hampton, Jr., & Co. v. United States*,[87] also expressed doubt that the delegation of power for an agency to set fees clears the nondelegation doctrine.[88] In the end, the Court decided to "read the Act narrowly to avoid constitutional problems" and remanded the case to the FCC even though it remained unsure "that the Commission used the correct standard in setting the fee."[89]

In 1989, the Supreme Court applied *National Cable*'s standards to the Origination Clause.[90] In *Skinner v. Mid-America Pipeline Co.*,[91] the Supreme Court considered another Origination Clause challenge to a statute that directed the Secretary of Transportation to levy fees on pipeline users so that regulatory efforts would be self-funded.[92] The Court took notice of Congress' growing trend of delegating to agencies the authority to self-finance their regulatory programs and listed examples from the Federal Energy Regulatory Commission and the Nuclear Regulatory

81 *Id.*

82 *Nat'l Cable Television Ass'n*, 415 U.S. at 340–41.

83 *Id.* at 341.

84 *Id.* at 343.

85 *Id.* at 344 (internal quotations omitted).

86 295 U.S. 495 (1935).

87 276 U.S. 394 (1928)

88 *See Nat'l Cable Television Ass'n*, 415 U.S. at 342.

89 *Id.* at 342–43.

90 Skinner v. Mid-Am. Pipeline Co., 490 U.S. 212, 223–24 (1989).

91 490 U.S. 212 (1989).

92 *Id.* at 214–15.

Commission.[93] In this case, while Congress delegated the Secretary of Transportation wide discretion in administering and assessing the fees, it retained the proviso that the amount of fees assessed could never exceed 105% of the program's appropriations in a fiscal year.[94]

When setting its fee schedule, the Department of Transportation took the advice of industry lobbyists and decided to establish a system that assessed fees based on the length of the pipeline.[95] This lobbyist-supported system exempted 23% of the nation's gas pipeline operators and 17% of the nation's hazardous liquid pipeline operators because their pipelines were under an arbitrary length threshold.[96] The Supreme Court upheld this delegation, finding that while the Origination Clause requires that a bill delegating taxation authority be introduced first in the House of Representatives, it does not imply anything about the scope of Congress' power to delegate taxation power once a bill is enacted.[97] In reaching this conclusion, the Court relied on precedent holding that administrative agencies have prosecutorial discretion to waive enforcement of certain provisions and discretion to interpret statutes as they apply them in their day-to-day administrative function.[98]

During the next term, the Supreme Court reaffirmed the purposive analysis from *Nebeker* and *Millard* when evaluating Origination Clause cases.[99] In *United States v. Munoz-Flores*,[100] the Supreme Court considered whether a statute imposing special assessments on people convicted of a federal misdemeanor violated the Origination Clause.[101] Relying on a purposive view of the Origination Clause, the Supreme Court held that "a statute that creates a particular governmental program and that raises revenue to support that program, as opposed to a statute that raises revenue to support Government generally, is not a 'Bil[l] for raising Revenue' within the meaning of the Origination Clause."[102] Therefore, if a

93 *Id.* at 215–16.

94 *Id.* at 215.

95 *Id.* at 216.

96 *Id.* at 217.

97 *Skinner*, 490 U.S. at 221.

98 *Id.* at 221–22. The Court noted that the First Congress gave the Secretary of the Treasury the power to waive penalties for failure to pay the required liquor tax. Additionally, it noted that the Internal Revenue Service has the primary responsibility for interpreting how the Internal Revenue Code applies to a specific taxpayer. *Id.* at 222 (quoting Bob Jones Univ. v. United States, 461 U.S. 574, 596–97 (1983)).

99 United States v. Munoz-Flores, 495 U.S. 385, 397–98 (1990).

100 495 U.S. 385 (1990).

101 *Id.* at 387.

102 *Id.* at 398.

statute raises revenue for a specific purpose, it will not implicate the Origination Clause under the *Nebeker* and *Millard* precedent.[103]

B. *The Rediscovery of the Origination Clause*

There is growing frustration with the Origination Clause's purposive test, and at least one former justice has called for a departure from past precedent.[104] While most of the aforementioned Origination Clause cases were quick affirmations of a statute or of an agency interpretation based on a purposive analysis,[105] the dissent in *National Federation of Independent Business v. Sebelius*[106] took a different and stronger view of the Origination Clause.[107] In Justice Antonin Scalia's dissent, joined by Justices Anthony Kennedy, Clarence Thomas, and Samuel Alito, he noted that the Origination Clause requires tax measures to have a greater degree of accountability to the people.[108] In Justice Scalia's view, the majority opinion rewrote the Affordable Care Act as a form of "[j]udicial tax-writing."[109] He argued that delegating tax-writing authority to other branches of government is a special threat to the separation of powers:

> Taxes have never been popular, see, e.g., Stamp Act of 1765, and in part for that reason, the Constitution requires tax increases to originate in the House of Representatives. . . . That is to say, they must originate in the legislative body most accountable to the people, where legislators must weigh the need for the tax against the terrible price they might pay at their next election, which is never more than two years off. The Federalist No. 58 "defend[ed] the decision to give the origination power to the House on the ground that the Chamber that is more accountable to the people should have the primary role in raising revenue." . . . Imposing a tax through judicial legislation inverts the constitutional scheme, and places the power to tax in the branch of government least accountable to the citizenry.[110]

While the majority and concurrence did not address this argument, *NFIB v. Sebelius* ignited a wave of scholarly interest in how the Origination

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103 *Id.* at 397–401.

104 Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 668–69 (2012) (Scalia, J., dissenting).

105 *See* Millard v. Roberts, 202 U.S. 429, 437–38 (1906); Flint v. Stone Tracy Co, 220 U.S. 107, 177 (1911); Rainey v. United States, 232 U.S. 310, 317 (1914); Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 224 (1989); *Munoz-Flores*, 495 U.S. at 401. *But see* Nat'l Cable Television Ass'n, Inc. v. United States, 415 U.S. 352, 357–60 (1974) (Marshall, J. dissenting) (asserting the annual fee was "not authorized by the statute" and the agency's delegated authority).

106 567 U.S. 519 (2012).

107 *Id.* at 668–69 (Scalia, J., dissenting).

108 *Id.*

109 *Id.* at 668

110 *Id.* at 668–69.

Clause affected the Affordable Care Act.[111] While Justice Scalia primarily focused on how the Origination Clause suggests that taxation raises a special constitutional question,[112] the ensuing scholarship regarding the Origination Clause had a different focus.[113] Primarily, most of the scholars wrote on whether the Senate's extensive amendments to the House-originated bill violated the Origination Clause.[114]

Amidst this new wave of interest in the Origination Clause, then-Judge Brett Kavanaugh proposed a new way of looking at the Origination Clause in his dissent from denial of rehearing en banc in *Sissel v. U.S. Department of Health and Human Services*.[115] *Sissel* involved a challenge to the Affordable Care Act primarily on Origination Clause grounds, backed by the wave of scholarly research into the issue.[116] The U.S. Court of Appeals for the D.C. Circuit's panel decision held that the Affordable Care Act does not implicate the Origination Clause because the Affordable Care Act only raises revenue for the purpose of providing healthcare to more Americans.[117] The majority of the D.C. Circuit denied a rehearing en banc, and Judge Judith Rogers wrote a concurrence affirming the purposive test handed down in *Nebeker* and *Millard* and re-affirmed in *Munoz-Flores*.[118] Judge Rogers argued that since the Affordable Care Act only raised revenue (albeit a large sum of revenue) for a specified purpose, it is not a revenue bill for the purposes of the Origination Clause.[119]

In his dissent from a denial of rehearing en banc, then-Judge Kavanaugh agreed that the Affordable Care Act did not violate the Origination Clause because its statutory vehicle was properly introduced in the House (albeit through dramatic, yet permissible, Senate amendments).[120] He objected, however, to the panel's holding that the

111 *See* Kysar, *supra* note 72, at 714–17; Tessa L. Dysart, *The Origination Clause, the Affordable Care Act, and Indirect Constitutional Violations*, 24 CORNELL J.L. & PUB. POL'Y. 451, 460 (2015); Timothy Sandefur, *So It's a Tax, Now What?: Some of the Problems Remaining After* NFIB v. Sebelius, 17 TEX. REV. L. & POL. 203, 204–05 (2013); Jeff Overly, *ACA Foes' Favorite New Weapon Lacks Legal Firepower*, LAW360 (May 20, 2013, 7:19 PM), https://www.law360.com/articles/440145; Natelson, *supra* note 38, at 633–34; Prescilla H.M. Zotti & Nicholas M. Schmitz, *The Origination Clause: Meaning, Precedent, and Theory from the 12th to 21st Century*, 3 BRIT. J. AM. LEGAL STUD. 71, 130–31 (2014); Steven J. Willis & Hans G. Tanzler IV, *The Wrong House: Why "Obamacare" Violates the U.S. Constitution's Origination Clause*, 1 (Wash. Legal Found., Working Paper No. 189, 2015).

112 *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 668–69 (Scalia, J., dissenting).

113 *See supra* note 111.

114 *See supra* note 111.

115 760 F.3d 1 (D.C. Cir. 2014), *reh'g denied*, 799 F.3d 1035 (D.C. Cir. 2015).

116 *Id.* at 8–10.

117 *Id.*

118 *Sissel*, 799 F.3d at 1036 (Rogers, J., concurring in denial of rehearing en banc).

119 *Id.* at 1040.

120 *Id.* at 1049 (Kavanaugh, J., dissenting from denial of rehearing en banc).

Affordable Care Act did not constitute a bill for raising revenue.[121] First, he argued that the purposive analysis of the Origination Clause amounts to judicial minimization of "an integral part of the Framers' blueprint for protecting the people from excessive federal taxation" that "has been important historically and remains vital in the modern legislative process."[122] Next, he noted that the purposive view is hardly workable and "all but guts the Origination Clause by effectively enabling the Senate to originate tax bills that might have some broader social purpose."[123] Additionally, he noted that courts are not equipped to perform effective purposive analyses of statutes:

> [I]t is extremely difficult for a Court to identify *one* predominant purpose. Courts cannot realistically determine the predominant purpose of a regulatory tax, or of a large piece of legislation with numerous provisions and multiple objectives. Indeed, the Supreme Court has cautioned against trying to divine a legislature's "primary" purpose. The "search for legislative purpose is often elusive enough, without a requirement that primacy be ascertained."[124]

Finally, he worked within the Supreme Court precedent available and argued that *Nebeker*, *Millard*, and *Munoz-Flores* only represent "narrow exception[s] to the Origination Clause."[125] Synthesizing his view, then-Judge Kavanaugh argued that

> The Nebeker–Millard–Munoz–Flores principle applies only if the law in question designates that the revenues be used for a specific program. Importantly, the fact that a law raises revenue to be paid into the treasury to help generally offset the costs of a new program on the overall federal balance sheet has never been held to exempt the law from the Origination Clause. Otherwise, to take one example, a massive income tax increase imposed for the avowed purpose of offsetting the costs of new wartime efforts against al Qaeda and ISIS would be exempt from the Origination Clause. . . . But those laws remain subject to the Origination Clause.[126]

Even though then-Judge Kavanaugh still would have upheld the Affordable Care Act on Origination Clause grounds because the bill was introduced in the House, his dissent highlighted the unworkability of the purposive analysis of the Origination Clause.[127]

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121 *Id.*

122 *Id.* at 1050.

123 *Id.* at 1060 (internal quotations omitted).

124 *Sissel*, 799 F.3d at 1054–55 (quoting McGinnis v. Royster, 410 U.S. 263, 276 (1973)).

125 *Id.* at 1057.

126 *Id.* at 1058–59.

127 *Id.* at 1049–50.

II. Replacing the Purposive Analysis of the Origination Clause with Originalist Jurisprudence

Then-Judge Kavanaugh's dissent in *Sissel* demonstrates how the purposive interpretation of the Origination Clause is unworkable.[128] Even though he agreed that the panel reached the right conclusion, he argued that reaffirming the purposive view is so dangerous to the Origination Clause that the panel opinion "set[ ] a constitutional precedent that is too important to let linger and metastasize."[129] Unfortunately, the purposive view of the Origination Clause has been metastasizing for 126 years since *Nebeker*,[130] but it is not too late to revive this "integral part of the Framers' blueprint for protecting the people from excessive federal taxation."[131] An original meaning analysis considering the text and the historical background of the Origination Clause can resurrect it from being a relatively obscure constitutional provision to being an integral part of the constitutional framework designed to protect liberty.

A. *The Broad Textual Original Meaning of the Origination Clause*

As with any constitutional provision, discerning the meaning of the Origination Clause "must begin with 'the language of the instrument.'"[132] The text of Article I, Section 7, Clause 1 of the Constitution states: "All Bills for raising Revenue shall originate in the House of Representatives."[133] Notably, the text refers not just to taxes, tariffs, or particular categories of revenue-raising devices—concepts the Framers were familiar with from the British Parliament.[134] Rather, it states that all legislation that raises revenue "shall originate in the House of Representatives."[135] In determining what constitutes a revenue-raising bill, the Framers were intentionally broad.[136] Edmund Randolph suggested a more limited drafting of the Origination Clause using the language, "[b]ills for raising

128 *See id.* at 1054–55.

129 *Id.* at 1050.

130 *See* Twin City Bank v. Nebeker, 167 U.S. 196, 196 (1897).

131 *Sissel*, 799 F.3d at 1050.

132 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2243 (2022) (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 186–89 (1824)).

133 U.S. CONST. art. I, § 7, cl. 1.

134 *See generally* Natelson, *supra* note 38 (reviewing how British parliamentary practice influenced American political leaders during the colonial era).

135 U.S. CONST. art. I, § 7, cl. 1.

136 *See Sissel*, 799 F.3d at 1055.

money for the purpose of revenue."[137] James Madison opposed this motion, noting that it would be impossible to determine what the primary purpose of a revenue bill is.[138] Randolph's narrow version ultimately failed, and the broader text of the Origination Clause prevailed.[139] In the end, the simple text of the Origination Clause concerned all "bills for raising revenue" and did not include any implicit test about the purpose of the bill.[140]

Given the expansive textual scope of the Origination Clause, if a bill raises revenue—irrespective of any other purposes that the bill may or may not have—it must comply with the demands of the Origination Clause.[141] The textual analysis that then-Judge Kavanaugh undertook in *Sissel* represents one of the few thorough analyses of the original textual meaning of the Origination Clause.[142] In contrast with then-Judge Kavanaugh's textual reasoning, the foundational Supreme Court case on the Origination Clause, *Nebeker*, dispensed with any textual reasoning.[143] Instead, the Court decided it would not engage in "an extended examination of precedents, or a full discussion as to the meaning of the . . . Constitution."[144] Had the Court done so, a purposive interpretation of the Origination Clause would have never been established because the Framers explicitly rejected any mention of the purpose of a bill while drafting the Origination Clause at the Constitutional Convention.[145]

In the end, then-Judge Kavanaugh squares the *Nebeker* line of cases with his careful textual analysis by contending that the purposive tests employed in those cases represent only a "narrow exception" to the Origination Clause.[146] Even if these cases represent only a narrow exception to the Origination Clause, they have already done major damage to its strength.[147] As then-Judge Kavanaugh noted, a "purposive approach all but guts the Origination Clause."[148] As noted above, the whole *Nebeker* line of cases established the purposive approach.[149] Rather than trying to square a textual analysis with mangled purposive precedent by classifying the precedent as a narrow exception, it would be better to

137 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 41, at 273 (emphasis omitted).

138 *Id*. at 276.

139 *See* U.S. CONST. art. I, § 7, cl. 1.

140 *Sissel*, 799 F.3d at 1055–56.

141 *Id.* at 1056.

142 *See id.* at 1055–56.

143 Twin City Bank v. Nebeker, 167 U.S. 196, 202 (1897).

144 *Id.*

145 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 41, at 273, 276.

146 *Sissel*, 799 F.3d at 1060.

147 *See id.*

148 *Id.* (internal quotations omitted).

149 *See supra* Part I.

forever abandon the flawed purposive approach. A purposive analysis creates bad law because ascertaining a legislative purpose is, at best, an "elusive" endeavor.[150] The next time the Supreme Court addresses the Origination Clause, it should adopt a textualist interpretation of the Origination Clause and abandon the ahistorical purposive analysis.

B. *The Broad Original Meaning of the Origination Clause Informed by British Parliamentary Practice*

The Framers' debate took place in the context of an established meaning of the origination requirements in British parliamentary practice.[151] In British parliamentary practice at the time of the Constitutional Convention, "[o]nly the House of Commons could originate money bills."[152] Blackstone, in his *Commentaries*, defined a money bill:

> [any] bill[ ], by which money is directed to be raised upon the subject [meaning citizen], for any purpose or in any shape whatsoever; either for the exigencies of government, and collected from the kingdom in general, as the land tax; or for private benefit, and collected in any particular district, as by turnpikes, parish rates, and the like.[153]

Roger Archerley defined a money bill similarly and argued the House of Commons maintained those associated powers over money bills:

> [t]he sole Right and power over the Monies and Treasures of the People, and of Giving and Granting, or Denying Aids or Monies for Publick Service, and . . . not only of all Laws for Imposing Taxes, and Levying and Raising Aids or Money upon the People, for the Defence and Support of the State and Government; But also of all Laws, touching the Taking from any Man his Property; and should have power to Inquire into, and Judge of the Uses and Occasions for which Monies are to be Demanded and Given; and to Appropriate the same to those Uses.[154]

While the two definitions of a money bill vary slightly, they both agree that bills that raise money—whether tethered to a purpose or whether they are merely to raise money for the government in general—must originate in the Lower House.[155]

Blackstone's and Archerley's consensus—that purposive analysis is irrelevant when determining whether a bill qualifies as a money bill—is evident in parliamentary precedent vis-à-vis "supply bills," which are

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150 McGinnis v. Royster, 410 U.S. 263, 276 (1973).

151 Natelson, *supra* note 38, at 646–47 (noting that many of the Framers had first-hand professional experience with British parliamentary procedure).

152 *Id*. at 649.

153 *Id*. at 650 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *169).

154 *Id*. (emphasis omitted) (quoting ROGER ACHERLEY, THE BRITTANIC CONSTITUTION 45–46 (1759)).

155 *See id*. at 650–52.

revenue-raising bills that impose taxation and appropriate the raised funds for earmarked purposes.[156] Supply bills could raise revenue in a variety of ways, including by land taxes.[157] Funds gathered by supply bills could be earmarked for a variety of purposes, including funding the salaries of civil service employees, fighting wars, building ships, and more.[158] Whatever their method of revenue raising and whatever their purpose, supply bills "always began in the Lower House" due to the origination requirement.[159] The historical precedent of supply bills with delineated earmarks originating in the House of Commons demonstrates that the purpose of a revenue bill did not alleviate it of the requirement of being introduced in the Lower House.[160]

The parliamentary practice of the origination requirement is incompatible with the purposive analyses adopted in *Nebeker* and *Millard*.[161] The British Parliament's experience with the Origination Clause is instructive because the federal legislature and most state legislatures based their procedures on Parliament's.[162] *Nebeker* held that a bill creating a bond was not a bill for raising revenue because it aimed to accomplish "the great object of giving to the people a currency."[163] Regardless of the noble purpose attached to the bill, it would still qualify as a money bill under either Blackstone or Archerley's definitions. Under Blackstone's definition, even a bill to establish a toll on a turnpike qualifies as a money bill despite its noble purpose of providing infrastructure.[164] Likewise, under Archerley's definition, a law that takes property from a citizen (by having them pay any sort of fee, tax, levy, or other provision) and gives it to the government qualifies as a money bill.[165]

Under British parliamentary precedent, the tax in *Millard* is also a money bill.[166] In *Millard*, the Supreme Court held that a property tax on the residents of the District of Columbia did not implicate the Origination Clause because the tax had a specific earmark attached to it.[167] Under

156 *Id*. at 651.

157 Natelson, *supra* note 38, at 651.

158 *Id*. at 651–52.

159 David W. Hayton, *The Business of the House*, *in* THE HISTORY OF PARLIAMENT: THE HOUSE OF COMMONS 1690–1715 (D. Hayton, E. Cruickshanks, & S. Handley eds., 2002).

160 *Id.*

161 Twin City Bank v. Nebeker, 167 U.S. 196, 202–03 (1897); Millard v. Roberts, 202 U.S. 429, 436–37 (1906).

162 Natelson, *supra* note 38, at 646–48.

163 *Nebeker*, 167 U.S. at 203.

164 1 WILLIAM BLACKSTONE, COMMENTARIES *169.

165 ROGER ACHERLEY, THE BRITTANIC CONSTITUTION 45–46 (1759).

166 *See Millard*, 202 U.S. at 436–37.

167 *Id.*

British parliamentary procedure, however, a supply bill funded by property taxes used to construct ships was considered a money bill and was required to originate in the Lower House.[168] It is hard to see how a bill funded by property taxes used to construct a railroad would be any different.[169] In conclusion, a purposive analysis of the Origination Clause is incompatible with the textual meaning and with the original meaning informed by British parliamentary precedent.

III. Applying the Textual and Original Meaning of the Origination Clause to the Administrative State

The textual and original meaning of the Origination Clause was broad, covering many ways of raising government revenue including by property taxes and even turnpike tolls.[170] But the purposive view of the Origination Clause eroded the procedural protections it was supposed to give.[171] The purposive view of the Origination Clause has also allowed agencies to accumulate unchecked legislative power to determine tax burdens, threatening individual liberty.[172] To fix this problem, the Supreme Court should strike down agency revenue-raising regulations under the Origination Clause.

A. *The Purposive View of the Origination Clause Has Allowed Agencies to Amass Unchecked Legislative Power to Determine Tax Burdens*

In *National Cable*, the Supreme Court considered the constitutionality of an FCC regulation that charged cable providers to fund the FCC's regulatory activity.[173] In its holding, the Supreme Court adopted a purposive test to distinguish between optional fees paid to the government and involuntary taxes.[174] The Court ruled that taxation is "a legislative function," and Congress "is the sole organ for levying taxes."[175] As a legislative body, Congress may tax "arbitrarily and disregard benefits bestowed by the Government on a taxpayer and go solely on ability to pay,

168 Natelson, *supra* note 38, at 651 n.90.

169 *See Millard*, 202 U.S. at 436–37.

170 Natelson, *supra* note 38, at 650 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *169).

171 Sissel v. U.S. Dep't. of Health & Hum. Servs., 799 F.3d 1035, 1060 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from denial of rehearing en banc).

172 *See* Skinner v. Mid-Am. Pipeline Co., 490 U.S. 212, 214–17 (1989).

173 Nat'l Cable Television Ass'n, Inc. v. United States, 415 U.S. 336, 337–38 (1974).

174 *See id.* at 340–41.

175 *Id.* at 340.

based on property or income."[176] In contrast, a fee "is incident to a voluntary act" so a federal agency can charge a fee for a service which "bestows a benefit on the applicant" as long as the benefit is "not shared by other members of society."[177] By using a purposive analysis instead of a textualist analysis, the Supreme Court ultimately allowed agencies to exercise the power to allocate fee—or "tax"—burdens.[178]

Later, in *Skinner*, the Supreme Court considered an Origination Clause challenge to a statute that directed the Secretary of Transportation to levy fees on pipeline operators so that regulatory efforts would be self-funded.[179] The Secretary of Transportation engaged in the politically sensitive job of determining which pipeline operators would have to pay a fee and which ones would be exempt.[180] The Supreme Court upheld this delegation, finding that while the Origination Clause requires that a bill delegating taxation authority be introduced first in the House of Representatives, it does not imply anything about the scope of Congress' power to delegate taxation power once this bill is enacted.[181]

National Cable and *Skinner* both explicitly allowed agencies broad discretion when determining how much an individual taxpayer (or "feepayer") would owe to the government.[182] Leaving feepayers at the mercy of unelected bureaucrats to assess individual tax burdens deprives individuals of the procedural rights they are due under the Constitution. Indeed, the only constitutional protections against excessive fees and taxes are "found in the structure of the government itself."[183] Only the structure envisioned by the Framers protects against excessive taxation because "[i]n imposing a tax[,] the legislature acts upon its constituents" and the people can "influence . . . their representative, to guard them against . . . abuse."[184] Short-circuiting this system by delegating the politically-sensitive job of allocating tax burdens to unelected bureaucrats, however, leaves feepayers with no recourse. Indeed, in *Skinner*, the Supreme Court upheld a fee-assessment system that was developed by the Department of Transportation (in close consultation with industry lobbyists) that arbitrarily exempted certain pipeline operators and made others pick up the slack.[185] This type of ad hoc

176 *Id.*

177 *Id.* at 340–41.

178 *See id.* at 341–44.

179 Skinner v. Mid-Am. Pipeline Co., 490 U.S. 212, 214–15 (1989).

180 *Id.* at 216–17.

181 *Id.* at 221.

182 *See Nat'l Cable Television Ass'n*, 415 U.S. at 343–44; *Skinner*, 490 U.S at 214.

183 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 428 (1819).

184 *Id.*

185 *Skinner*, 490 U.S. at 216–217, 224.

decision-making about which pipeline operators must pay a fee and which ones are exempt is the exact kind of "arbitrar[y]" decision-making that is quintessentially legislative in nature.[186]

In *Skinner*, the feepayers hired good lobbyists and were able to perform effective regulatory capture and protect their interests.[187] But a taxpayer without extensive resources may not be so fortunate. Allowing the executive branch to subsume the legislative task of assessing tax burdens puts individual liberty at risk[188] because the only constitutional protection against excessive taxation is structural. When that structure is not followed, the government is able to arbitrarily assess individual tax burdens.[189]

B. *Administrative Agencies Should be Reined in by Striking Down Revenue-Raising Regulations Under the Origination Clause*

The Supreme Court's precedent that the Origination Clause does not limit the "scope of Congress' power to delegate discretionary authority under its taxing power" is not within the original meaning of the Origination Clause and should be overturned.[190] Justice Scalia seemed to suggest that delegating the carefully guarded power of raising revenue to any unaccountable government body should be subject to careful scrutiny.[191] In his dissent in *NFIB v. Sebelius*, he argued that "invert[ing] the constitutional scheme" by placing "the power to tax in [a] branch of government least accountable to the citizenry" violates the Origination Clause.[192] While Justice Scalia was speaking of what he believed to be "[j]udicial tax-writing," the principle remains the same when applied to the executive branch rather than the judiciary.[193] Placing the politically-sensitive task of allocating individual tax burdens in any institution other than a body directly elected by and accountable to the people removes any

186 *Nat'l Cable Television Ass'n*, 415 U.S. at 340.

187 *Skinner*, 490 U.S. at 215–17.

188 Clinton v. City of New York, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) ("Liberty is always at stake when one or more of the branches seek to transgress the separation of powers."); Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 272 (1991) ("The ultimate purpose of this separation of powers is to protect the liberty and security of the governed."); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 537 F.3d 667, 714 (Kavanaugh, J., dissenting) ("[T]he separation of powers protects . . . individual rights.").

189 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 216, 428 (1819).

190 *See Skinner*, 490 U.S. at 221.

191 Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 668–69 (2012) (Scalia, J., dissenting).

192 *See id.* at 669.

193 *Id.* at 668.

protection against arbitrary taxes and fees.[194] Indeed, taxation by rulemaking incentivizes the creation of more arbitrary taxes and fees.[195]

The Constitution rarely speaks to the specific rules by which Congress must operate, but where it does speak, its obligations are ironclad.[196] No bills or policy considerations can change the obligations that the Constitution places on the legislative power of revenue raising.[197] Policies that circumvent "the carefully crafted restraints spelled out in the Constitution," and thwart "the Framers' decision that the legislative power of the Federal Government be exercised in accord with a . . . finely wrought and exhaustively considered, procedure" are unconstitutional.[198] Congress cannot upset the constitutional procedure for revenue bills by delegating revenue-raising authority to the executive branch, just like it could not pass a bill granting the Senate the power to introduce revenue-raising legislation.[199] Any efforts to side-step this process short-circuit the very foundations of the constitutional order and leave individuals with no protections from excessive taxation.[200]

C. *Methods of Evaluating Origination Clause Claims Other than an Originalist Analysis Remain Judicially Unworkable*

Some defenders of the purposive view of the Origination Clause argue that it provides a clear rule of decision for complex cases and should be adhered to under stare decisis.[201] The stare decisis factors, however, point to the need for a reexamination of Origination Clause precedent. When considering an argument based on stare decisis, the Court has considered several factors:

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194 *McCulloch*, 17 U.S. (4 Wheat.) at 428.

195 *See* Ronald J. Krotoszynski, Jr., *Reconsidering the Nondelegation Doctrine: Universal Service, the Power to Tax, and the Ratification Doctrine,* 80 IND. L.J. 239, 240 (2005) ("An incumbent politician's dream would be to create new and improved government services (thereby generating good will, credit, and votes) without having to take responsibility for paying for these services through new or increased taxation (which leads, with some regularity, to electoral difficulties). . . . Sufficiently devious legislators could attempt to delegate to an administrative agency responsibility for designing a new social program and, in addition, also delegate to the agency responsibility for selecting the precise funding mechanism that will pay for it.") (footnotes omitted).

196 Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 951, 959 (1983).

197 *Id.*

198 *Id.*

199 United States v. Munoz-Flores, 495 U.S. 385, 394 (1990) (holding that the separation of powers within the legislative branch have similar requirements to the separation of powers between the branches).

200 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 216, 428 (1819).

201 Sissel v. U.S. Dep't of Health & Hum. Servs., 799 F.3d 1035, 1035–36 (D.C. Cir. 2015) (Rogers, J. concurring in the denial of rehearing en banc).

> the quality of the precedent's reasoning; the precedent's consistency and coherence with previous or subsequent decisions; changed law since the prior decision; changed facts since the prior decision; the workability of the precedent; the reliance interests of those who have relied on the precedent; and the age of the precedent.202

Many of these factors favor a reevaluation of the Origination Clause. First, the purposive precedent's reasoning is poor because the foundational Supreme Court case on the Origination Clause, *Nebeker*, dispensed with serious textual reasoning and instead opted not to perform "an extended examination of precedents, or a full discussion as to the meaning of the . . . Constitution."[203] In contrast, the textualist interpretation of the Origination Clause is more fleshed out and offers more extensive reasoning.[204]

Second, the facts have changed since prior Origination Clause decisions. Prior Origination Clause decisions were decided based on whether a statute was properly enacted by Congress.[205] With the exponential growth of the administrative state, however, revenue-raising decisions are more isolated than ever from the people's elected representatives.[206] The growth of policies placing "the power to tax in [a] branch of government least accountable to the citizenry" warrants a fresh look at the Origination Clause.[207]

Third, the purposive analysis is unworkable. As then-Judge Kavanaugh noted in *Sissel*, "it is extremely difficult for a Court to identify" the primary purpose of a statute, especially when dealing with a large and complicated statute.[208] As a result, the Supreme Court has effectively abandoned the Origination Clause: it has never invalidated even one statute based on an Origination Clause challenge.[209] The unworkable purposive analysis should be replaced by the more fleshed out originalist analysis.[210]

Additionally, the unworkability of Origination Clause jurisprudence has created a scenario where hardly any safeguards against administrative fees remain in place. The limitation established in *National Cable* that fee

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202 Ramos v. Louisiana, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring).

203 Twin City Bank v. Nebeker, 167 U.S. 196, 202 (1897).

204 *See Sissel*, 799 F.3d at 1051–57 (Kavanaugh, J., dissenting from denial of rehearing en banc).

205 *Nebeker*, 167 U.S. at 196; *see also* Millard v. Roberts, 202 U.S. 429, 436–37 (1906); Flint v. Stone Tracy Co., 220 U.S. 107, 142 (1911); Rainey v. United States, 232 U.S. 310, 317 (1914); Skinner v. Mid-Am. Pipeline Co., 490 U.S. 212, 221 (1989); United States v. Munoz-Flores, 495 U.S. 385, 387–88 (1990).

206 *See generally* Peter L. Strauss, *How the Administrative State Got to This Challenging Place,* 150(3) DAEDALUS 17 (2021) (reviewing the evolution of executive agencies and their delegated authority).

207 Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 669 (2012) (Scalia, J., dissenting).

208 *Sissel*, 799 F.3d at 1054 (Kavanaugh, J., dissenting from denial of rehearing en banc).

209 *Id.* at 1036 (Rogers, J., concurring in denial of rehearing en banc).

210 *See id.* at 1051–57 (Kavanaugh, J., dissenting from denial of rehearing en banc).

revenue cannot encompass 100% of a program's budget is not applied in most of the fee-revenue rules promulgated today.[211] For instance, the U.S. Forest Service's proposed regulation establishing fees for communications equipment is designed to cover 100% of the costs associated with the program, including administrative overhead, staff salaries, training, and even the costs associated with collecting the fees.[212] And, despite *National Cable*'s explicit prohibition of agencies setting their fees via the practice of coming up with their own enforcement budget and then dividing it up amongst the regulated parties, the U.S. Forest Service used that exact cost calculation framework to establish its fees.[213]

Without constitutional guardrails on agency fees, statutory provisions are the only real check on the power of the executive branch to levy taxes. In *Skinner*, the Court found that the statutory limitation that an agency could only collect up to 105% of its appropriated funds via fee revenue was a sufficient check on the danger of agencies funding themselves without congressional oversight.[214] But that safeguard was specific to the statute in question in *Skinner*.[215] Absent such language in the statutory framework, it is hard to see how a federal agency would need Congress to receive its funding.

Reducing agencies' dependency on Congress poses grave constitutional concerns. The Framers made the executive branch dependent on Congress for appropriations as a way to check "the overgrown prerogatives" of the executive branch.[216] If the executive branch can raise funds independent of Congress, the Origination Clause is nothing more than a "parchment barrier[ ]."[217] As it currently stands, almost nothing other than their own will and self-restraint prevents agencies from raising their own revenue.

Some argue that delegating agencies the power to raise their own revenue is good policy.[218] Indeed, the concept of a federal program paying for itself (by choosing a small, unfortunate group to bear the cost) is often popular with voters.[219] Additionally, this novel way of raising revenue for

211 Nat'l Cable Television Ass'n, Inc. v. United States, 415 U.S. 336, 341–43 (1974).

212 Proposed Communications Use Fee, *supra* note 4, at 72540–42.

213 *Nat'l Cable Television Ass'n*, 415 U.S. at 343 (holding that agencies cannot assess fees by figuring "the total cost . . . to the [agency] for operating . . . and then to contrive a formula that reimburses the [agency] for that amount"); Proposed Communications Use Fee, *supra* note 4, at 72540–42.

214 Skinner v. Mid-Am. Pipeline Co., 490 U.S. 212, 219–20 (1989).

215 *Id.*

216 THE FEDERALIST NO. 58, *supra* note 25.

217 THE FEDERALIST NO. 48 (James Madison).

218 *See* Kaijie Wu, *Taxing Power Delegation for Better Environmental Regulation: A Proposal on Federal Carbon Tax Policymaking*, 61 NAT. RES. J. 61, 100 (2021).

219 *See* Krotoszynski, *supra* note 195, at 239–47.

the federal government allows for the creation of new programs without having to increase debt, cut spending for other programs, or raise taxes.[220] Although this policy of self-financing regulatory activity may be useful, "even useful 'political inventions' are subject to the demands of the Constitution which defines powers and . . . sets out just how those powers are to be exercised."[221] In this case, the Constitution is clear: only the House of Representatives has the authority to introduce a bill raising revenue.[222] If bills introduced in the Senate are no substitute to this provision, certainly a notice in the *Federal Register* cannot clear this constitutional hurdle.

There are also countervailing policy reasons why delegating revenue-raising authority to agencies is a poor decision. Taxation is an inherently political activity, and political influences keep policymakers in check as they make revenue decisions.[223] For example, politicians sensitive to "the influence of . . . constituents" would be unlikely to pass a bill charging county governments and massive telecommunications providers the same fee for using Forest Service land since policies transferring money from county governments to the federal bureaucracy are disfavored.[224] No politician would want to take up the cause of transferring money from local search-and-rescue providers to paper-sifting bureaucrats at the U.S. Forest Service headquarters in Washington, D.C.[225] Many politicians would probably agree with Montezuma County and find a regulation that distracted from providing essential emergency services for the sake of moving "money from one government pocket to another . . . inefficient and unconscionable."[226] Indeed, after the new fee structure was enacted, some members of Congress questioned the wisdom of delegating their legislative authority to unaccountable agencies and advocated for giving first-responders an exemption from this onerous tax.[227] If this fee were

220 *See id*. at 240.

221 Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 945 (1983).

222 *See* U.S. CONST. art. I, § 7, cl. 1.

223 THE FEDERALIST NO. 58, *supra* note 25; McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 428 (1819); THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 31, at 230–31.

224 *McCulloch*, 17 U.S. (4 Wheat.) at 428; *see* Letter from Lauren Boebert et al., *supra* note 24; *see also* 31 U.S.C. §§ 6901–07 (directing federal agencies provide funding to rural counties to help offset the costs of having tax-exempt federal land in their jurisdictions).

225 *See* Mimiaga, *supra* note 8; Letter from Lauren Boebert et al., *supra* note 24.

226 Letter from the Montezuma Cnty. Bd. of Comm'rs, *supra* note 7, at 2.

227 Mimiaga, *supra* note 8 ("The Forest Service's proposal to significantly increase fees for communications towers utilized by counties appears to be a top-down, one-size-fits-all mandate drafted by some bureaucrat in Washington that doesn't understand the West or rural communities." (quoting U.S. Rep. Lauren Boebert)).

challenged in court and the court applied the original meaning of the Origination Clause, it would be invalidated because Congress—much less the House of Representatives—never voted on this specific method of allocating fee burdens.

Conclusion

The U.S. Forest Service's proposed rule imposing new fees on communications users provides an opportunity to revisit the Origination Clause as applied to the administrative state.[228] In applying this authorizing statute via regulations, the Forest Service has been very clear about what it is doing: raising revenue for itself.[229] It did not hide behind any sort of purposive fee versus tax distinction.[230] Rather, it used the word "revenue" twelve times in its announcement in the *Federal Register*.[231] Taking the agency's words at face value, it is promulgating a rule to raise revenue[232]—a power that is exclusively reserved for bills originating in the House of Representatives.[233] If the nondelegation doctrine applies anywhere, it must certainly apply when Congress delegates the legislative authority to set tax rates and assess tax burdens on individuals.

How to fund regulatory activity in National Forests is a complex policy question, but fortunately, the judicial solution is simple: restore the Origination Clause and force the representatives of the people to figure it out. It is doubtful that the people of Montezuma County (or their representatives) would be in favor of cutting the wildfire prevention budget in favor of investing in training programs for bureaucrats at the U.S. Forest Service's Washington, D.C. headquarters.[234] To resolve the doubt and determine the correct solution for this policy question, the issue should be returned to the legislative branch for the House of Representatives to introduce a revenue bill. Anything less than restoring this clear constitutional requirement leaves Americans unrepresented in the business of the government of a presumptively free people.

228 Proposed Communications Use Fee, *supra* note 4, at 72540–46.

229 *See id.*

230 *Id.*

231 *See id.*

232 *Id.*

233 U.S. CONST. art. I, § 7, cl. 1.

234 *See* Mimiaga, *supra* note 8; Letter from the Montezuma Cnty. Bd. of Comm'rs, *supra* note 7; Letter from Lauren Boebert et al., *supra* note 24.