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# The Origination Clause Awakens

*Author's Note: This article summarizes my paper titled "The Original Public Meaning of Amendment in the Origination Clause Versus the Patient Protection and Affordable Care Act [PPACA]," published in the British Journal of American Legal Studies in 2017. Challenging the whole of PPACA in the courts may be a lost cause, but this article argues that my paper could help future courts adjudicate any similar cases involving the Origination Clause.*

"The late [Philadelphia] Convention were not [even] empowered totally to alter the present [Articles of] Confederation. The idea was to *amend*. If they lay before us a thing [i.e., the new constitution] quite different, we are not bound to accept it."
― William Grayson, Virginia Convention, June 24, 1788

## Introduction

In 2012, the Supreme Court declared the individual mandate in the Patient Protection and Affordable Care Act (PPACA) is constitutional under Congress' power to tax. The mandate fines people for not purchasing health insurance and has raised billions of dollars since going into effect.

In response to this decision, several lawsuits, particularly *Sissel v. U.S. Department of Health & Human Services* and *Hotze v. Burwell*, challenged the constitutionality of the individual mandate and the rest of PPACA according to the Constitution's Origination Clause. This clause provides the congressional procedure for originating bills for raising revenue and reads as follows (emphasis added):

> All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with *Amendments* [on House bills for raising revenue] as on other Bills.

As I've discussed previously, the Senate proposed PPACA as an "amendment" to the House bill titled the Service Members Home Ownership Tax Act of 2009. While PPACA regulated health care, the Service Members bill would have, most notably, granted tax credits to service members seeking their first homes and temporarily increased estimated tax payments for certain companies. The Senate's "amendment" replaced the Service Members bill with PPACA except for the bill's number of "H.R. [House Resolution] 3590." Congress calls such an amendment a "complete substitute."

Between 2013 and 2015, *Sissel* and *Hotze* experienced a series of losses in the federal court system. In early 2016, the Supreme Court declined to review *Sissel* or *Hotze*, and thus both lawsuits have, in effect, failed. Challenging the whole of PPACA or the individual mandate appears to be a lost cause.

### *A. Arguments of Sissel and Hotze*

*Sissel* and *Hotze* argued primarily that the individual mandate was a bill for raising revenue that originated in the Senate, not the House, and that PPACA therefore violates the Origination Clause. *Hotze* additionally argued PPACA contained other bills for raising revenue besides the

individual mandate, such as the medical device tax, and so even without the individual mandate the Origination Clause would apply to PPACA.

In support of their arguments, the lawsuits claimed the Service Members bill was not a bill for raising revenue and therefore PPACA cannot be defended as having been an amendment to—and thus a continuation of—a House bill for raising revenue. According to *Sissel*, the Service Members bill was not a bill for raising revenue because, between the tax credits for service members and temporary increase in estimated tax payments for certain companies, the Service Members bill was actually "revenue-neutral."

The lawsuits further claimed that, even if the Service Members bill was a bill for raising revenue, the Senate cannot amend House bills for raising revenue with such complete substitutes as PPACA. According to the lawsuits, such complete substitutes amount to originations of new bills for raising revenue and make the Origination Clause meaningless. *Sissel* additionally claimed PPACA was non-germane (i.e., not of the same subject) to the Service Members bill and thus doubly an invalid amendment.

*B. Article by Priscilla Zotti and Nicholas Schmitz: The Original Public Meaning of the Origination Clause*

*Sissel's* and *Hotze's* argument that Senate amendments to House bills for raising revenue cannot be complete substitutes that are new bills for raising revenue was supported by the original public meaning of the Origination Clause as documented in an article by Priscilla Zotti and Nicholas Schmitz in the *British Journal of American Legal Studies* in 2014. The original public meaning of a constitutional word or provision, as defined in my paper, is the "meaning that a 'reasonable speaker of English' during the … [era of the founding of the Constitution] would have ascribed to the word or provision." Many legal scholars believe the Constitution should be interpreted according to the original public meaning of its words and provisions.

Zotti and Schmitz found many examples of writings from the ratification period suggesting a "reasonable speaker of English" would have thought the Origination Clause disallowed amendments to be complete substitutes. One of Zotti's and Schmitz's examples was an article by an American Citizen in the *Philadelphia Independent Gazetteer* on September 28, 1787. An American Citizen argued the Origination Clause allows the Senate to "restrain the profusion of errors of the [H]ouse of [R]epresentatives [regarding a bill for raising revenue], but they [the Senate] cannot take the necessary measures to raise a national revenue."

*C. Arguments of the Department of Justice*

The Department of Justice (DOJ) responded to the above arguments by *Sissel* and *Hotze* by arguing the individual mandate was not even a bill for raising revenue. The DOJ claimed that, according to precedent of the Supreme Court, a tax bill such as the individual mandate qualifies as a bill for raising revenue only if the primary purpose of the bill is to raise revenue. The DOJ said the primary purpose of the individual mandate is to increase access to health insurance coverage and not to raise revenue. The DOJ concluded the Origination Clause is therefore not applicable to PPACA.

The DOJ also argued that, even if the individual mandate was a bill for raising revenue, PPACA comports with the Origination Clause. The DOJ said the Service Members bill was a bill for raising revenue and therefore PPACA was an amendment to—and thus a continuation of—a House bill for raising revenue. According to the DOJ, the Service Members bill was a bill for raising revenue primarily because the Service Members bill dealt entirely with amending the revenue code and had revenue-raising provisions, such as the temporary increase in estimated tax payments for certain companies.

The DOJ said PPACA was a valid amendment to the Service Members bill because, among other reasons, the meaning of amendment at the time of the founding permitted complete substitutes, even if the complete substitutes were non-germane to the things being amended.[1] As evidence, the DOJ noted that, on June 14, 1788, in the Virginia Convention to ratify the Constitution, Delegate William Grayson said a Senate amendment to a House bill for raising revenue "could strike out every word of the bill, except the word whereas, or any other introductory word, and might substitute new words [and a new bill for raising revenue] of their own." The DOJ also noted Thomas Jefferson's *A Manual of Parliamentary Practice: For the Use of the Senate of the United States* (1801) said that "[a]mendments [to bills in general in the Senate] may be made so as totally to alter the nature of the proposition[.] … A new bill may be ingrafted, by way of amendment[.]"

*D. Robert Natelson's Article: The Original Understanding of Amendment*

The DOJ's argument that Senate amendments to House bills for raising revenue can be complete substitutes that are new bills for raising revenue received support, in large part, from Robert Natelson's recent article on the Origination Clause in the *Harvard Journal of Law & Public Policy*. Natelson considers the original understanding—not the original public meaning—of a constitutional word or provision to be the controlling meaning of that word or provision. The original understanding of a constitutional word or provision, as defined in my paper, is "what the ratifiers of the Constitution[, who were the delegates to the 13 state conventions held between 1787 and 1790,] thought was the meaning of the word or provision."

Natelson argued the original understanding of amendment permits complete substitutes. His evidence amounted to William Grayson's comment in the Virginia Convention—described above—that bill amendments could be complete substitutes, an example of a complete substitute to a resolution in the North Carolina Convention in 1788, and two examples of complete substitutes to resolutions in the Virginia legislature in 1780.[2] Natelson examined records from the Virginia legislature and other state legislatures in the founding era because such records can help illuminate the ratifiers' understanding of constitutional words and provisions. Examination

[1] The DOJ did not specify if the meaning of amendment that the DOJ claimed to have discovered was the original public meaning, original understanding, original intent, or another meaning of amendment.

[2] Natelson presented additional evidence from various American legislatures in the decades leading up to the founding and from the Philadelphia Convention of 1787 that he claimed shows the original understanding of amendment permits complete substitutes. However, as my paper documents in detail on p. 328 and pp. 335-337, Natelson's additional evidence was evidence only that American legislators and the delegates to the Philadelphia Convention approved of extensive amendments—not complete substitutes—to bills and resolutions.

of records from other governmental settings in the founding era, such as the British parliament and the Philadelphia Convention of 1787, can likewise be helpful.

Natelson further argued complete substitutes must be germane (i.e., of the same subject) to what is being amended. Natelson said the ratifiers considered taxes of any kind to be of the same subject of taxation. Thus, according to Natelson, a bill amendment can be germane if it replaces one tax with another tax(es).

Natelson thereby concluded, in near agreement with the DOJ, that the Senate can amend House bills for raising revenue with complete but germane substitutes that are new bills for raising revenue.

*E. Gap in the Evidence of Sissel and Hotze*

*Sissel* and *Hotze* provided no evidence that the original public meaning or original understanding of amendment expressly disallow complete substitutes. This gap in evidence was significant because it prevented the lawsuits from having significantly stronger arguments.

**My Paper: The Original Public Meaning and Original Understanding of Amendment**

My paper titled "The Original Public Meaning of Amendment in the Origination Clause Versus the Patient Protection and Affordable Care Act," cited in my Author's Note, provides the evidence that was lacking in *Sissel* and *Hotze*. My paper argues it is evident the original public meaning and original understanding of amendment expressly disallow complete substitutes, even if the complete substitutes are germane to the things being amended.

*A. Original Public Meaning of Amendment*

To discover the original public meaning of amendment, my paper examined 15 dictionaries from the founding era, such as Samuel Johnson's *A Dictionary of the English Language* (1755), for their definitions of amend and amendment. My paper also analyzed every occurrence of amend and amendment in writings from the most prominent compilations of records from the ratification period, such as *The Documentary History of the Ratification of the Constitution, The Federalist Papers,* and *The Complete Anti-Federalist.*

*1. Dictionary Definitions of Amendment*

The 15 dictionaries I examined indicate an amendment was "a change or alteration to something that transformed the thing from bad to better."

This definition suggests an amendment must be germane to the thing being amended and not be a complete substitute because otherwise the amendment would not actually correct the given thing.

*2. Writings from the Compilations of Ratification Records*

My paper found over 60 examples of writings from the compilations of ratification records that suggest amendments could not be complete substitutes. Most of these examples involve the Articles of Confederation, which was the legal compact between states enacted in 1781. The Philadelphia Convention began with what was generally understood to be the mission of amending the Articles by adding powers to the Confederation Congress. However, many of the delegates to the Convention came to believe the Articles outlined a system of government that was ineffective overall. The Convention replaced the Articles with the Constitution.

One of the over 60 examples involves a pamphlet by the Federal Farmer published in 1787. He suggested the new constitution amounted to a complete substitute to the Articles and thus was not an amendment as follows (emphasis added):

> [Leading up to the Philadelphia Convention,] not a word was said about destroying the old constitution, and making a new one–The states still unsuspecting, and not aware that they were passing the Rubicon [river] [i.e., the point of no return], appointed members to the new convention, for the sole and express purpose of revising and *amending* the confederation–and, probably, not one man in ten thousand in the United States, till within these ten or twelve days, had an idea that the old ship [Articles] was to be destroyed, and he put to the alternative of embarking in the new ship [new constitution] presented, or of being left in danger of sinking[.]

A second example involves a letter by Silas Lee, a prominent opponent of the new constitution, to George Thatcher, who represented Massachusetts in the Continental Congress, on February 14, 1788. Lee said the following (emphasis added):

> But I hope the precedent of the late federal [Philadelphia] Convention will not be followed by the next [convention to *amend* the new constitution] that may be appointed; viz instead of revising or *amending* this [new constitution] in certain parts … they will not with one Stroke wipe the whole away … & propose a new one[.]

A third example is Denatus' article in the *Virginia Independent Chronicle* on June 11, 1788. He said the following (emphasis added): "[T]he express purpose of the [Philadelphia] [C]onvention was, to revise and *amend*, the [A]rticles [of Confederation]…. Instead of this…. they built a stately palace [new constitution] after their own fancies…. Had they preserved only one article of the union [the Articles], and built the present [new] constitution to it, the objection of innovation would be unreasonable[.]"

Four records in the compilations claimed that, according to legislators or other select individuals, amendments could actually be complete substitutes. For instance, in an article in the *Maryland Gazette* on January 31, 1788, Aristides said amendments by legislators could involve "striking out the whole" of a document and "substituting something in its room." In another example, a Citizen, in his article in the *Lansingburgh Northern Centinel* of New York on January 29, 1788, appeared to suggest it was his unique opinion that the Philadelphia Convention's amendment power permitted the replacement of "the whole" of the Articles. However, none of these four records suggest such a view was common among "reasonable speakers of English."

*3. Conclusion: The Original Public Meaning of Amendment*

The totality of evidence from the founding-era dictionaries and the compilations of ratification records shows the original public meaning of amendment is a change or alteration to something that must 1) not be a complete substitute to that something, 2) be germane to that something, and 3) make that something transform from bad to better.

*B. Original Understanding of Amendment*

As mentioned earlier, my paper also argues it is evident the original understanding of amendment disallows complete substitutes, even if the complete substitutes are germane to the things being amended.

*1. James Madison Contradicted William Grayson*

For one, as Zotti and Schmitz observed in their article on the Origination Clause, Delegate James Madison immediately contradicted William Grayson in the Virginia Convention when Grayson said bill amendments could be complete substitutes. Madison said the following:

> I suppose the first part of the [Origination] [C]lause [i.e., the requirement that all revenue bills must originate in the House of Representatives] is sufficiently expressed to exclude all [of Grayson's] doubts [that the Senate is unable to originate its own revenue bills as complete substitutes to House revenue bills].

Madison thereby declared Senate amendments to House bills for raising revenue could never be complete substitutes that are new bills for raising revenue.

*2. British Parliament*

Also, according to the practice of the British parliament during the founding era, bill amendments could not be complete substitutes. This practice is revealed in a debate about a bill "for the more easy recovery of the Tythes … and other Ecclesiastical Dues, from … Quakers" in the House of Lords in 1736. A lord said the following in response to proposed amendments to the bill:

> I think it impossible to make a proper Bill of that we have now before us, without altering the whole, which, according to our methods of proceeding, cannot be done in the committee; for … the Bill would then be a new Bill[.]

*3. The Proposal and Ratification Process of the Constitution*

Furthermore, much evidence from the proposal of the Constitution at the Philadelphia Convention and from the Constitution's ratification process suggests the founders thought an amendment to the Articles of Confederation could not be a complete substitute. The founders included the ratifiers, the delegates to the Philadelphia Convention, and the others who affected the proposal and ratification process of the Constitution.

After the Constitution was proposed by the Philadelphia Convention, the Constitution was considered by the Confederation Congress, state legislatures, and, finally, state conventions. Below, I highlight several findings from these settings.

*a. Philadelphia Convention*

On May 30, 1787, at the beginning of the Philadelphia Convention, Delegate Charles Pinckney of South Carolina objected to proposed resolutions that essentially stated the Articles was unamendable and should be replaced with a new system of government. Pinckney said the following (emphasis added):

> [I]t appeared to him [Pinckney] that their [the Philadelphia Convention's] business was at an end; for as the powers of the house in general were to revise the present confederation, and to alter or *amend* it as the case might require; to determine its … incapability of *amendment* or improvement, must end in the dissolution of the [Convention's] powers.

*b. Confederation Congress*

On September 27, 1787, the Confederation Congress was in the middle of debating the new constitution. Congressman Richard Henry Lee proposed a resolution stating, in part (emphasis added), "the … Constitution [i.e., Articles of Confederation] … limits the power of [the Confederation] Congress [and Philadelphia Convention] to the *amendment* of the present Confederacy … but does not extend it to the creation of a new confederacy[.]"

*c. State Legislatures*

A day later on September 28, the House of Representatives of Pennsylvania discussed the new constitution. Assemblyman William Robinson, who supported the new constitution, emphasized it was "new ground" and "a different organization [than the Articles]" and therefore "no alteration of any particular article of the Confederation, which is the only thing provided for." He noted the Philadelphia Convention (emphasis added) "did not think of *amending* and altering the present [Articles of] Confederation, for they saw the impropriety of vesting one body of men [i.e., the Confederation Congress] with the necessary powers [that are now shared by the congress, presidency, and judiciary in the new constitution]."

*d. State Conventions*

On June 24, 1788, toward the end of the Virginia Convention, William Grayson actually contradicted his comment earlier in the convention that amendments to bills could be complete substitutes. While arguing for some amendments to the new constitution, Grayson said (emphasis added), "[t]he late [Philadelphia] Convention were not [even] empowered totally to alter the present [Articles of] Confederation. The idea was to *amend*. If they lay before us a thing [i.e., the new constitution] quite different, we are not bound to accept it." The significance of this contradiction cannot be overstated, as this contradiction nullifies the importance of Grayson's comment earlier in the Virginia Convention that bill amendments could be complete substitutes

and upends a cornerstone of the originalist argument that amendments can be complete substitutes.

*4. Conclusion: The Original Understanding of Amendment*

The preponderance of evidence from the British parliament during the founding era and from the proposal and ratification process of the Constitution suggests the original understanding of amendment disallows any complete substitutes.

*C. The Critical Question*

If "reasonable speakers of English" and the founders thought amendments could not be complete substitutes, how did "reasonable speakers of English" and founders who supported the new constitution justify its replacement of the Articles of Confederation?

Some "reasonable speakers of English" argued the new constitution actually qualified as an amendment to the Articles because the new constitution preserved some parts of the Articles. One example involves the State Soldier's article in the *Virginia Independent Chronicle* on January 16, 1788. He said the new constitution amended the Articles and emphasized that some preserved parts of the Articles were the union among states and a stipulation for appropriating "monies under pretence [sic] of providing for our national defence [sic]."

Several founders suggested the Philadelphia Convention and Confederation Congress had inherent powers in addition to their delegated power to amend the Articles. For example, Henry Lee (who should be confused with Richard Henry Lee) of the Confederation Congress, said that "we have a right to decide [the new constitution's fate] from the great principle of necessity [of having an effective system of government] or the [principle of] salus populi." The founders knew the legal principal of necessity in Latin as Necessitas est lex temporis, and the principle of salus populi meant the welfare of the people is the supreme law.

**Conclusion**

It is evident the original public meaning and original understanding of amendment in the Origination Clause disallow complete substitutes. PPACA was a complete substitute to the Service Members bill and thus a violation of the original public meaning and original understanding of amendment. Certainly, the current Supreme Court will not adopt this originalist argument and declare PPACA unconstitutional. However, a future Supreme Court should consider this originalist argument for any similar cases involving the Origination Clause.

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