

The Founders' Origination Clause (and Implications for the Affordable Care Act)

by

Robert G. Natelson*

Abstract

This Article is the first comprehensive examination of the original legal force of the Constitution's Origination Clause, drawing not merely on the records of the 1787-90 constitutional debates, but on founding-era British and American legislative practice and other sources. This Article defines the bills governed by the Origination Clause, the precise meaning of the House origination requirement, and the extent of the Senate's amendment power.

For illustrative purposes, the Article tests against its findings the currently-litigated claim that the financial penalty for failure to acquire individual health insurance under the Patient Protection and Affordable Care Act is invalid as a Senate-originated "tax." The Article concludes that this "tax" was a valid Senate amendment to a House-adopted revenue bill. The Article also concludes, however, that the amendments that added PPACA's regulatory provisions and appropriations were outside the Senate's amendment power.

*Robert G. Natelson was a law professor for 25 years at three different universities and is currently is Senior Fellow in Constitutional Jurisprudence at the Independence Institute in Denver. His works and biography are listed at <http://constitution.i2i.org/about>.

The author wishes to thank the following for invaluable assistance: The Independence Institute, Denver, Colorado, and its research director, Dave Kopel; Virginia Dunn, Archives & Library Reference Services Manager, Library of Virginia; Joanna Innes, Fellow and Tutor in Modern History Somerville College, University of Oxford, England; Seth Barrett Tillman, Lecturer in Law, National University of Ireland Maynooth; Jane Thompson, Associate Director of Faculty Services and Research, William A. Wise Library, University of Colorado; and Daniel Smyth, Editor, LibertyBlog.org.

All interpretations and any mistakes are the author's own.

TABLE OF CONTENTS

INTRODUCTION

- A. *The Origination Clause and the Patient Protection and Affordable Care Act*
 - B. *Prior Scholarship and Treatment of Evidence*
 - C. *The Structure of this Article*
- I. THE UNLOVED CLAUSE: SURVEY OF THE CONSTITUTIONAL CONVENTION AND RATIFICATION DEBATES
- A. *The Constitutional Convention*
 - B. *The Ratification Debates*
 - C. *Non-Conclusions*
- II. FOUNDING-ERA LEGISLATIVE PRACTICE: THE BRITISH PARLIAMENT
- A. *How Parliamentary Practice Influenced the Founders*
 - B. *Parliament and the Power of the Purse*
 - 1. *The Scope of the Term “Money Bill”*
 - 2. *Tacking and Hotch-Potch Bills*
 - 3. *The Dispute over Amendments by the Lords*
 - 4. *What Was An “Amendment?”*
 - C. *Summary of British Practice*
- III. FOUNDING-ERA LEGISLATIVE PRACTICE: AMERICAN CONSTITUTIONS AND LEGISLATURES
- A. *American Constitution-Drafting: Background Information*
 - B. *How the American States Adopted New Rules*
 - C. *How the American Rules Continued to Evolve*
 - D. *The Scope of “Amendment” in American Practice*
 - E. *Summary of American Practice*
- IV. WHAT THE CONSTITUTIONAL DEBATES TELL US ABOUT THE REASONS FOR HOUSE ORIGINATION AND THEIR SIGNIFICANCE
- A. *The Policies Behind House Origination*
 - B. *Significance of the Policies Behind House Origination*
- V. WHAT THE CONSTITUTIONAL DEBATES TELL US ABOUT THE SCOPE OF AN “AMENDMENT”
- A. *The Policies Served By the Amendment Qualifier*
 - B. *How Broad Was the Amendment Qualifier?*

CONCLUSION: THE ORIGINATION CLAUSE AND SOME IMPLICATIONS FOR THE PPACA

* * * *1

¹*Bibliographical Note:* This footnote collects those sources cited *more than once*, including prior published research by the author.

Convention Proceedings

THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Jonathan Elliot ed., Washington, 2d ed. 1836) [hereinafter ELLIOT'S DEBATES]; THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1937) [hereinafter FARRAND'S RECORDS]

Dictionaries (all unpaginated)

JOHN ASH, THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (London 1775) [hereinafter ASH]; N. BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (25th ed., London 1783) [hereinafter BAILEY]; FREDERICK BARLOW, THE COMPLETE ENGLISH DICTIONARY (1772-73) [hereinafter BARLOW]; ALEXANDER DONALDSON, AN UNIVERSAL DICTIONARY OF THE ENGLISH LANGUAGE (Edinburgh 1763) [hereinafter DONALDSON]; THOMAS DYCHE & WILLIAM PARDON, A NEW GENERAL ENGLISH DICTIONARY (16th ed., London 1777) [hereinafter DYCHE & PARDON]; SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (8th ed., London 1786) [hereinafter JOHNSON]; WILLIAM KENRICK, A NEW DICTIONARY OF THE ENGLISH LANGUAGE (London, 1773) [hereinafter KENRICK]; WILLIAM PERRY, THE ROYAL STANDARD ENGLISH DICTIONARY (1st American ed., Worcester, Mass. 1788) [hereinafter PERRY]; THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (3d ed., London 1789) [hereinafter SHERIDAN]

Legislative and other Governmental Publications

British: WILLIAM COBBETT, THE PARLIAMENTARY HISTORY OF ENGLAND (vols. 13-28, 1803-16) [hereinafter COBBETT]; JOURNALS OF THE HOUSE OF COMMONS [hereinafter H.C. JOUR.]; JOURNALS OF THE HOUSE OF LORDS [hereinafter H.L. JOUR.]; THE PARLIAMENTARY REGISTER; OR HISTORY OF THE PROCEEDINGS AND DEBATES OF THE HOUSE OF COMMONS [hereinafter PARLIAMENTARY REGISTER] (mult. vols.)

Federal: JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789 (Government Printing Office, 1904-37) [hereinafter J. CONT'L CONG]

Connecticut: 1-5 THE PUBLIC RECORDS OF THE STATE OF CONNECTICUT (Charles J. Hooley & Leonard Woods Labaree eds. 1894-1943) [hereinafter CONNECTICUT RECORDS]

Massachusetts: A JOURNAL OF THE HONORABLE HOUSE OF REPRESENTATIVES OF THE COMMONWEALTH OF MASSACHUSETTS. BEGUN AND HELD AT BOSTON IN THE

COUNTY OF *SUFFOLK*, ON WEDNESDAY THE TWENTY-SIXTH DAY OF MAY, *ANNO DOMINI*, 1784 [hereinafter MASS. H.R. JOUR.]

Maryland: The Senate and House of Delegates Journals are cited MD. H.D. JOUR. and MD. SEN. JOUR. Each session is free standing with its own pagination.

New Hampshire: EARLY STATE PAPERS OF NEW HAMPSHIRE (Albert Stillman Batchellor ed., 1891–92) [hereinafter N.H. PAPERS]

New Jersey: VOTES AND PROCEEDINGS OF THE GENERAL ASSEMBLY OF THE STATE OF NEW-JERSEY [hereinafter N.J. PROCEEDINGS]

New York: VOTES AND PROCEEDINGS OF THE ASSEMBLY OF THE STATE OF NEW-YORK, from 1780 through 1790 [hereinafter N.Y. ASSEM. JOUR.] & JOURNAL OF THE SENATE OF THE STATE OF NEW YORK [hereinafter N.Y. SEN. JOUR.], both available at the Gale Database, *Eighteenth Century Collections Online*.

North Carolina: THE STATE RECORDS OF NORTH CAROLINA (Walker Clark ed., 1895–1905) [hereinafter N.C. RECORDS]

Rhode Island: 8-10 RECORDS OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS IN NEW ENGLAND (John Russell Bartlett ed., 1863–65) [hereinafter R.I. RECORDS]

South Carolina: JOURNALS OF THE GENERAL ASSEMBLY AND HOUSE OF REPRESENTATIVES 1776-1780 (William Edwin Hemphill, Wylma Anne Wates & R. Nicholas Olsberg eds, 1970) [hereinafter S.C. H.R. JOUR (1776-80); JOURNAL OF THE HOUSE OF REPRESENTATIVES OF SOUTH CAROLINA, JAN. 8, 1782-FEB. 26, 1782 (A.S. Salley, Jr., ed. 1916) [hereinafter S.C. H.R. JOUR. (1782)]

Pennsylvania: MINUTES OF THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA (1784-89) [hereinafter PA. GEN. ASSEM. MIN.]

Virginia: JOURNAL OF THE HOUSE OF DELEGATES OF THE COMMONWEALTH OF VIRGINIA (Richmond, 1827) [hereinafter VA. H.D. JOUR.]; JOURNAL OF THE SENATE OF THE COMMONWEALTH OF VIRGINIA (1785–90) (Richmond, Thomas W. White 1827–28) [hereinafter VA. SEN. JOUR.]

Other Works

ROGER ACHERLEY, THE BRITTANIC CONSTITUTION (1759) [hereinafter ACHERLEY]

JEAN-LOUIS DE LOLME, THE CONSTITUTION OF ENGLAND (David Lieberman, ed. 2007) (first published, 1771) [hereinafter DE LOLME]

John Dickinson, *Letters from a Farmer in Pennsylvania*, reprinted in EMPIRE AND NATION 1 (Forrest McDonald ed., 2d ed. 1999) [hereinafter DICKINSON]

THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (Merrill Jensen, John P. Kaminski, & Gaspare J. Saladino eds., 1976–2012) [hereinafter DOCUMENTARY HISTORY]

PAUL EINZIG, THE CONTROL OF THE PURSE: PROGRESS AND DECLINE OF PARLIAMENT'S FINANCIAL CONTROL (1959) [hereinafter EINZIG]

SYDNEY GEORGE FISHER, THE EVOLUTION OF THE CONSTITUTION OF THE UNITED STATES (1897) [hereinafter FISHER]

ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, THE FEDERALIST (George W. Cary & James McClellan eds., 2001) [hereinafter THE FEDERALIST]

JOHN HATSELL, PRECEDENTS OF PROCEEDINGS IN THE HOUSE OF COMMONS (2d ed, 1785) (3 vols.) [hereinafter HATSELL]

DAVID W. HAYTON, INTRODUCTION, THE HISTORY OF PARLIAMENT: THE HOUSE OF COMMONS 1690-1715 (D. Hayton, E. Cruickshanks & S. Handley, 2002), available at <http://www.histparl.ac.uk/volume/1690-1715/survey/business-house> [hereinafter HAYTON]

THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE FOR THE USE OF THE SENATE OF THE UNITED STATES (1801) [hereinafter JEFFERSON'S MANUAL]

Ronald J. Krotoszynski, Jr., *Reconsidering the Nondelegation Doctrine: Universal Service, The Power to Tax, and the Ratification Doctrine*, 80 IND. L.J. 239 (2005) [hereinafter Krotoszynski, Reconsidering]

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

PAUL MASON, MASON'S MANUAL OF LEGISLATIVE PROCEDURE (2010 ed.) [hereinafter MASON'S MANUAL]

Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077 (2004) [hereinafter Natelson, Trust]

Robert G. Natelson, *The Constitutional Contributions of John Dickinson*, 108 PENN. ST. L. REV. 115 (2003) [hereinafter Natelson, Dickinson]

Robert G. Natelson, *The Founders' Hermeneutic: The Real Original Understanding of Original Intent*, 68 OHIO ST. L.J. 1239 (2007) [hereinafter Natelson, Founders' Hermeneutic]

ROBERT G. NATELSON, THE ORIGINAL CONSTITUTION: WHAT IT ACTUALLY SAID AND MEANT (2d ed., 2011) [hereinafter NATELSON, ORIGINAL CONSTITUTION]

Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1 (2003) [hereinafter Natelson, General Welfare]

INTRODUCTION

A. *The Origination Clause and the Patient Protection and Affordable Care Act*

This Article reconstructs the original legal force of the Origination Clause. The *original legal force* of a document or of a provision in a document is how the courts would have applied it immediately following its adoption. This Article relies on founding-era interpretive methods to recover the original legal force.²

The Origination Clause is one of several conditions for valid enactment appearing in the same section of the Constitution.³ Besides House origination of revenue bills, the conditions include passage by both the Senate and the House of Representatives, presentment to the President, and *either* the President's signature *or* a subsequent two thirds approval, on roll call votes, by each chamber of Congress.⁴ It is clear from the text that a bill not complying with these procedures is not a valid law. In considering the Origination Clause, the Supreme Court has said as much.⁵

The Origination Clause is immediately relevant because of litigation ensuing on the Supreme Court's decision to sustain as a revenue-raising "tax"⁶ the financial penalty for failing to comply with the individual

SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (James H. Hutson, ed. 1987) [hereinafter HUTSON, SUPPLEMENT]

Priscilla H.M. Zotti & Nicholas M. Schmitz, *The Origination Clause: Meaning, Precedent, and Theory from the 12th to the 21st Century*, 3 BR. J. AM. LEG. STUDIES 71 (2014) [hereinafter Zotti & Schmitz]

² See generally Natelson, *Founders' Hermeneutic*, *supra* note 1.

³U.S. CONST. art. I, §7.

⁴U.S. CONST. art. I, §7.

⁵United States v. Munoz-Flores, 495 U.S. 385 (1990).

⁶Nat'l Fed. of Independent Business v. Sebelius, 132 S.Ct. 2566 (2012).

insurance mandate of the Patient Protection and Affordable Care Act (PPACA).⁷ Several challengers to the penalty contend that the PPACA effectively arose in the Senate by reason of a substitute bill,⁸ rather than in the House, thereby rendering the penalty/tax void for non-compliance with the Origination Clause.⁹ In defending the law, the government has responded that substitution of this kind is common within the legislative process, and within the Senate's power to "amend."¹⁰

This Article is not designed primarily to address the validity of the PPACA, but to define the rules the founders' Origination Clause imposed on

⁷Pub. L. 111–148 (Mar. 23, 2010).

⁸Thomas L. Jipping, *Comment: TEFRA and the Origination Clause: Taking the Oath Seriously*, 35 BUFF. L. REV. 633 (1986) criticized a similar substitution procedure in the passage of the Tax Equity and Fiscal Responsibility Act of 1982, arguing that the Origination Clause was violated because the Senate substituted a 400+ page tax increase for the text of a 25 page house-passed bill that made only minor, technical changes in the tax code. *Id.* at 686–87.

As pointed out below, however, even small tax bills—including those that cut taxes—qualify as "Bills for the raising of Revenue" as the Constitution uses the term. *Infra* notes ____ and accompanying text (defining money bills to include denial of revenue and reporting Common rejection as a breach of privilege).

The controversial substitution of TEFRA (400 pages for 25) was dwarfed by the substitution of the PPACA (2076 pages for six).

⁹There are several cases based on this theory making their way through the federal courts, none of which has been successful thus far. *Sissel v. U.S. Dept. of Health and Human Services*, 951 F.Supp. 2d 159 (D.D.C. 2013) (dismissing claim on the merits), *affirmed*, 2014 WL 3714701 (D.C. Cir. 2014); *Hotze v. Sebelius*, — F.Supp.2d—, 2014 WL 109407 (S.D.Tex. 2014) (same); *Association of American Physicians and Surgeons v. Sebelius*, 746 F.3d 468 (D.C. Cir. 2014) (holding that claim was waived).

¹⁰ Defendants' Reply Memorandum in Support of Motion to Dismiss, *Sissel, supra*, Case No. 1:10-cv-01263 (BAH) (D. D.C. Jan. 11, 2013), at 8.

Natelson—Origination Clause 2014-0924 Draft; Do Not Cite Page 8 of 105 congressional procedures. After the rules are defined, the Article briefly examines their implications for the PPACA controversy.¹¹

B. Prior Scholarship and Treatment of Evidence

There has been no comprehensive treatment of the founders' Origination Clause. Indeed, only a handful of scholars have examined the original meaning,¹² usually as an introduction to later jurisprudence or to current issues. Most of their discussion of original meaning has been limited to summary examinations of the views of the framers and a few other founders.¹³ This approach to originalist research is always problematic, but particularly so in the case of the Origination Clause, which has very deep roots in prior history and in legislative practice. As shown by Part I of this Article, the constitutional debates divorced from the larger context tell us very little.

¹¹See the Conclusion *infra*.

¹²The most thorough treatment of the original meaning is probably *Zotti & Schmitz*, *supra* note 1. Other treatments are, in inverse chronological order, as follows: *Kysar, Shell Bill*, *supra* note 1; Rebecca M. Kysar, *On the Constitutionality of Tax Treaties*, 38 YALE J. INT'L L. 1 (2013); Sean R. Gard, *The Revival of the Origination Clause in Patent Law: Old Clause Trumps New Practice*, 16 U. BALT. INTELL. PROP. L.J. 61 (2008); *Krotoszynski, Reconsidering*, *supra* note 1; Erik M. Jensen, *Origination Clause*, in THE HERITAGE GUIDE TO THE CONSTITUTION 85-86 (2005); Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361 (2004). *Marie T. Farrelly, Special Assessments and the Origination Clause: A Tax on Crooks?* 58 FORDHAM L. REV. 447 (1989); Thomas L. Jipping, *Comment: TEFRA and the Origination Clause: Taking the Oath Seriously*, 35 BUFF. L. REV. 633 (1986).

¹³ *Kysar, Shell Bill*, *supra* note 1, at 665-70 & 691, the latest contribution to the literature, is representative in this regard. Professor Kysar notes the ancient roots of the origination rule, *id.* at 665-66, but does not explore them. Most of her discussion is on jurisprudence subsequent to the founding.

Most prior treatments also suffer from methodological problems common among legal writers untrained in historical method.¹⁴ Perhaps the most serious of these is a form of *anachronism*: using as evidence of the constitutional bargain sources dating from well after the founding era.¹⁵ To avoid anachronism, this Article generally avoids sources arising after May 29, 1790, the day Rhode Island became the thirteenth state to approve the Constitution.

C. *The Structure of this Article*

Part I recounts the constitutional debates of 1787-90. This Part covers some of the same ground covered by prior writers, but in richer detail. Part I renders it obvious that even a detailed examination of the constitutional debates, when performed in isolation, leaves key questions unanswered. This is because our record of those debates leaves many of the founders' assumptions unstated. We can clarify those assumptions only by exploring history known to the founders and their own experiences.

Part II explains that the founding generation was influenced heavily by British parliamentary practice, and it investigates how Parliament dealt with issues of origination and amendment. Part III then examines relevant history in America: the pre-Revolutionary constitutional controversies that defined for Americans "Bills for raising Revenue," and the American legislative practice that confirmed the parliamentary meaning of "originate" and of "Amendments." Equipped with this context, Part IV turns once again to the constitutional debates. It identifies the policies behind House origination, and the precise meaning and scope of the requirement that "Bills

¹⁴NATELSON, ORIGINAL CONSTITUTION, *supra* note 1, at 37-41 (discussing common faults of constitutional interpretation).

¹⁵E.g., Kysar, *Shell Bill*, *supra* note 1, at 687 (citing nineteenth century events, apparently as evidence of original meaning).

Natelson—Origination Clause 2014-0924 Draft; Do Not Cite Page **10** of **105** for raising Revenue . . . originate in the House of Representatives.” Part V does the same for the amendment qualifier: “but the Senate may propose or concur with Amendments as on other Bills.”

In addition to defining the meaning of the Origination Clause, Parts I – V show that it was designed as a fixed rule of balance between the chambers of Congress, imposed to promote good government and to protect individual liberty. The power of each house to adopt its own *internal* rules¹⁶ did not include authority to alter the balance between the houses.¹⁷ Finally, the Article’s Conclusion summarizes those lessons and their implications for the constitutionality of the PPACA.

I. THE UNLOVED CLAUSE? SURVEY OF THE CONSTITUTIONAL CONVENTION AND RATIFICATION DEBATES

A. *The Constitutional Convention*

The Origination Clause almost didn’t make it into the Constitution. Neither the Virginia Plan nor the New Jersey Plan contained origination language. This is understandable, since the former envisioned both legislative chambers being apportioned by population and the latter envisioned a unicameral legislature. Yet resistance to House origination continued throughout most of the Constitutional Convention.

¹⁶U.S. CONST. art. I, §5, cl. 2 (“Each House may determine the Rules of its Proceedings. . . .”)

¹⁷Cf. *New York v. United States*, 505 U.S. 144 (1992) (holding that an attempt by state and federal politicians to alter the federal-state balance of power was invalid). *But see Dames & Moore v. Regan*, 453 U.S. 654 (1981) (upholding cancellation of debts though executive agreements with foreign powers because of long usage and congressional acquiescence).

Professor Rebecca Kysar has argued, in *Kysar, Shell Bill*, *supra* note 1, that the boundaries of the Clause were designed to fluctuate according to the legislative rules, but I could find no reliable evidence to support that view.

On June 13, 1787, after the delegates had been in full session for over two weeks,¹⁸ Elbridge Gerry of Massachusetts moved to “restrain the Senatorial branch from originating money bills.”¹⁹ His apparent goal was to encourage larger states to recede from their demand that representation in both legislative chambers be based on population or on property.

Gerry’s proposal ran into a buzz-saw of opposition from the convention’s “nationalists.” These were delegates supporting a very strong national government and, by extension, proportionate representation in both chambers. Pierce Butler and Charles Cotesworth Pinckney of South Carolina, James Madison of Virginia, Rufus King of Massachusetts, and even the moderate Roger Sherman of Connecticut all spoke against the proposal.²⁰ Not only did they reject House origination as compensation, but some claimed it was useless or even harmful.²¹ Gerry’s motion was trounced, seven states to three.

Nevertheless, proposals for an exclusive House privilege to initiate money bills recurred several times, usually as appendages to the issue of legislative representation. On July 5, 1787, an ad hoc committee appointed to resolve the issue of legislative representation offered its report. The committee had reached a compromise whereby the lower chamber—or, as it was commonly called early in the proceedings, the “first branch”—was to be based primarily on population while the upper chamber (“second branch”) was to be based on equal representation of states. As compensation to the larger states for agreeing to equal state representation in the Senate, the

¹⁸The convention had obtained a quorum for business on May 25. 2 FARRAND’S RECORDS, *supra* note 1, at 1 (Official Journal, May 25, 1787).

¹⁹1 FARRAND’S RECORDS, *supra* note 1, at 233 (Madison, June 13, 1787). The various definitions of “money bill” are discussed *infra* Part II.

²⁰1 FARRAND’S RECORDS, *supra* note 1, at 233-34 (Madison, June 13, 1787)

²¹E.g., 1 FARRAND’S RECORDS, *supra* note 1, at 233 (Madison, June 13, 1787) (reporting own remarks).

Natelson—Origination Clause 2014-0924 Draft; Do Not Cite Page **12** of **105**
committee report provided for exclusive House origination of money bills.²²
The report proposed that

all bills for raising or appropriating money, and for fixing the Salaries of the Officers of the Governt. of the U. States shall originate in the 1st branch of the Legislature, and shall not be altered or amended by the 2d branch: and that no money shall be drawn from the public Treasury, but in pursuance of appropriations to be originated in the 1st branch.”²³

The committee language largely mirrored common depictions of British parliamentary practice.²⁴

Because the advocates of proportionate representation were holding out for proportionate representation, they were not interested in compensation. Arguing against the committee report were several of the previous opponents, now joined by Gouverneur Morris and James Wilson, both of Pennsylvania. Supporters, such as Virginia’s George Mason and Delaware’s Gunning Bedford, Jr., had little to say on the merits, preferring to appeal primarily to the need for compromise. The convention opted to retain the House-origination part of the committee report, but the vote was equivocal: five states in favor, three opposed, with three delegations evenly divided.²⁵

In late July the convention sent its list of formal resolutions to the Committee of Detail so that committee could prepare the first draft of a constitution. The committee presented its draft on August 6. In accordance with the convention’s vote for the July 5 compromise, the committee draft

²²The idea of including it in the report apparently was Benjamin Franklin’s. 1 FARRAND’S RECORDS, *supra* note 1, at 526 (editor’s note).

²³1 FARRAND’S RECORDS, *supra* note 1, at 526 (Madison, July 5, 1787).

²⁴Part II.B.

²⁵1 FARRAND’S RECORDS, *supra* note 1, at 542 (Madison, July 6, 1787).

provided that “All bills for raising or appropriating money, and for fixing the salaries of the officers of the Government, shall originate in the House of Representatives, and shall not be altered or amended by the Senate.”²⁶ On August 8, however, by a tally of seven states to four the convention approved a motion from South Carolina’s Charles Pinckey to strike this provision.²⁷

The following day, Virginia Governor Edmund Randolph²⁸ “expressed his dissatisfaction” with the prior day’s vote “concerning money bills, as endangering the success of the plan [i.e., the Constitution], and extremely objectionable in itself; and gave notice that he should move for a reconsideration of the vote.”²⁹ On August 11, Randolph formally added an amendment to the House origination proposal limiting it to revenue bills only, and qualifying it with a senatorial power to amend.³⁰

The debate over the Randolph proposal displayed a far more able defense of House origination than mounted heretofore. It included thoughtful speeches by Randolph, Virginia’s George Mason, and Delaware’s John Dickinson.³¹ Still, Randolph lost, seven states to four.³²

²⁶2 FARRAND’S RECORDS, *supra* note 1, at 178 (Madison, Aug. 6, 1787).

²⁷2 FARRAND’S RECORDS, *supra* note 1, at 224 (Madison, Aug. 8, 1787).

²⁸Randolph’s pivotal role in the Constitution’s adoption has been unfairly neglected. He presented the Virginia Plan and helped bridge gaps between small-state delegates and nationalists. To retain his political flexibility, he refused to sign the Constitution; but that flexibility enabled him to demand a bill of rights while simultaneously acting as the Constitution’s lead spokesman during the Virginia ratifying convention.

²⁹2 FARRAND’S RECORDS, *supra* note 1, at 230 (Madison, Aug. 9, 1787).

³⁰2 FARRAND’S RECORDS, *supra* note 1, at 273 (Madison, Aug. 13, 1787).

³¹2 FARRAND’S RECORDS, *supra* note 1, at 273-280 (reproducing Madison’s account of the debate). Dickinson has been even more underappreciated than Randolph. See generally Natelson, *Dickinson*, *supra* note 1. This debate is discussed further *infra* Part IV.A

³²2 FARRAND’S RECORDS, *supra* note 1, at 280 (Madison, Aug. 11, 1787).

On August 15, Caleb Strong of Massachusetts proposed origination language during a discussion of the Treaty Clause, only to see the issue postponed.³³ On September 5, another ad hoc committee appointed to mediate differences recommended origination language incorporating Randolph's proposal: "All bills for raising revenue shall originate in the House of Representatives, and shall be subject to alterations and amendments by the Senate."³⁴ After another postponement,³⁵ the convention returned to the topic on September 8. The delegates replaced "and shall be subject to alterations and amendments by the Senate" with language from the 1780 Massachusetts constitution.³⁶ The convention voted for the final Origination Clause by a count of nine states to two.³⁷

B. The Ratification Debates

More determinative of the original legal force than the framers' debates is the understanding of the Constitution's 1,648 *ratifiers*.³⁸ The Origination Clause was the topic of considerable discussion both among the ratifiers and among the orators, pamphleteers, and essayists who sought to influence them. At first appearance, however, the extant material seems less helpful than such material often is.³⁹

³³2 FARRAND'S RECORDS, *supra* note 1, at 297-98 (Madison, Aug. 15, 1787).

³⁴2 FARRAND'S RECORDS, *supra* note 1, at 509 (Madison, Sept. 5, 1787).

³⁵2 FARRAND'S RECORDS, *supra* note 1, at 509 (Madison, Sept. 5, 1787).

³⁶2 FARRAND'S RECORDS, *supra* note 1, at 552 (Madison, Sept. 8, 1787). Mass. Const. (1780), ch. 1, §3, art. 7 (providing "All money bills shall originate in the house of representatives; *but the senate may propose or concur with amendments, as on other bills.*"). (Italics added).

³⁷2 FARRAND'S RECORDS, *supra* note 1, at 552 (Madison, Sept. 8, 1787).

³⁸Natelson, *Founders' Hermeneutic*, *supra* note 1, at 1288-89.

³⁹Compare Robert G. Natelson, *Proposing Constitutional Amendments by Convention: Rules Governing the Process*, 78 TENN. L. REV. 693, 723-32 (2011)

One reason the extant material initially seems unhelpful is that participants in the ratification process—even those on the same side—exhibited markedly different views about the importance of the Origination Clause. Federalists and Anti-Federalists not only differed from each other, but they differed among themselves. The differences seem to have been rooted largely in political expediency. In general, the debate on the Origination Clause displayed the following pattern:

First: Federalists trying to sell the Constitution to the ratifying public in more populous states (e.g., Virginia,⁴⁰ Pennsylvania,⁴¹ Massachusetts)⁴²

(showing a unified founding-era understanding as to the limitability of an Article V “Convention for proposing Amendments”) and Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 CASE W. RES. L. REV. 243, 296-312 (2004) (discussing almost complete consistency among the representations from proponents of the Necessary and Proper Clause).

⁴⁰An American, *To Richard Henry Lee II*, Jan. 3, 1788, reprinted in 15 DOCUMENTARY HISTORY, *supra* note 1, at 173:

You tell us the president & Senate have all the executive & two thirds of the legislative powers in their hands. Surely, Sir, this is very wrong in the degree for as the Senate cannot originate bills to raise a revenue (a most important matter) they do not hold so great a share of legislative power as the house of representatives. . . .

Id. at 175.

See also THE FEDERALIST NO. 58, *supra* note 1, at 300, 303 (Madison):

. . .[A] constitutional and infallible resource still remains with the larger States, by which they will be able at all times to accomplish their just purposes.

The House of Representatives cannot only refuse, but they alone can propose, the supplies requisite for the support of government. They, in a word, hold the purse—that powerful instrument by which we behold, in the history of the British Constitution, an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government. . . .Those who represent the dignity of their country in the eyes

of other nations, will be particularly sensible to every prospect of public danger, or of dishonorable stagnation in public affairs. To those causes we are to ascribe the continual triumph of the British House of Commons over the other branches of the government, whenever the engine of a money bill has been employed.

In that passage Madison, a Virginian, was addressing an audience in New York, a medium-sized state with large-state aspirations. Hamilton, a New Yorker, took the same tack:

[T]he most *popular* branch of every government, partaking of the republican genius, by being generally the favorite of the people, will be as generally a full match, if not an overmatch, for every other member of the Government. But independent of this most active and operative principle, to secure the equilibrium of the national House of Representatives, the plan of the convention has provided in its favor several important counterpoises to the additional authorities to be conferred upon the Senate. The exclusive privilege of originating money bills will belong to the House of Representatives.

THE FEDERALIST NO. 66 (Hamilton), *supra* note 1, at 342, 344.

⁴¹E.g., *One of the People*, PA. GAZETTE, Oct. 17, 1787, reprinted in 2 DOCUMENTARY HISTORY, *supra* note 1, at 186, 191 (stating, “The government which is offered to you is truly republican, and unites complete vigor and the most perfect freedom; for the people have the election of the Representatives in Congress . . . and in the House of Representatives must all money bills originate.”). See also *An American Citizen II, On the Federal Government*, PHILA. INDEPENDENT GAZETTEER, Sept. 28, 1787, reprinted in 13 *id.* at 264, 265 (stating that the Senate “may restrain the profusion or errors of the House of Representatives, but they cannot take the necessary measures to raise a national revenue”) (italics in original); cf. *An American Citizen III*, reprinted in 2 *id.* at 144, 145 (emphasizing importance of the House, although not dealing directly with the Origination Clause). “An American Citizen” was Tench Coxe, a Pennsylvania Federalist and highly influential essayist.

⁴²E.g., *Cassius VI*, MASS. GAZETTE, Dec. 18, 1787, reprinted in 5 DOCUMENTARY HISTORY, *supra* note 1, at 479, 480:

Sect. 7 provides, that all bills for raising revenues shall originate in the house of representatives. Here again must the anti-federalists appear weak and contemptible in their assertions, that the senate will have it in their power to establish themselves a complete aristocratick body; for this clause fully evinces, that if their inclinations were ever so great to effect

represented House origination as a valuable addition to the authority of the House of Representatives, the legislative chamber in which populous states would enjoy more influence.⁴³ Illustrative is the comment of “Valerius,” a Virginia supporter of the Constitution:

The senate has the power of originating all bills, except *revenue bills*, in common with the house of representatives, and *no bill* can pass into a law without the approbation of *two thirds* of both houses. From this exclusion of the *senate* with respect to *money bills*, it is plain that this *body* does not possess such extensive legislative power, as the house of representatives.”⁴⁴

In addition to touting House origination, large state Federalists deprecated the significance of the amendment qualifier. Virginia Federalist James Madison labeled it “paltry.”⁴⁵

such an establishment, it would answer no end, for being unable to levy taxes, or collect a revenue, is a sufficient check upon every attempt of such a nature.

⁴³E.g., *Americanus II*, VA. INDEPENDENT CHRONICLE, Dec. 19, 1787, reprinted in 8 DOCUMENTARY HISTORY, *supra* note 1, at 244, 248:

That *taxation and representation are inseparable, and that each should bear an exact ratio to the other are self-evident truths.* . . . The *house of representatives*, which has the exclusive right of *originating Bills of taxation*, is composed of members elected *directly by the people in the most exact proportion*.

(Italics in original.)

⁴⁴Valerius, *To the Honorable RICHARD HENRY LEE, member of Congress for the state of Virginia*, VA. INDEPENDENT CHRONICLE, Jan. 23, 1788, reprinted in 8 DOCUMENTARY HISTORY, *supra* note 1, at 313, 316 (italics in original).

⁴⁵James Madison to George Washington, Oct. 18, 1787, reprinted in 8 DOCUMENTARY HISTORY, *supra* note 1, at 76, also reprinted in 13 DOCUMENTARY HISTORY, *supra* note 1, at 408 (referring to “the paltry right of the Senate to propose alterations in money bills”). See also Brutus, VA. J., Dec. 6, 1787, reprinted in 8 DOCUMENTARY HISTORY, *supra* note 1, at 212.

Second: Large state Anti-Federalists minimized the value of House origination or criticized the allegedly-wide scope of the amendment qualification.⁴⁶ Thus, one group of Virginia Anti-Federalists argued that the

This was a Virginia Federalist, not to be confused with the more famous New York Anti-Federalist “Brutus.” He wrote of the Senate’s amendment power:

[I]t is giving them the power of doing good, almost without the possibility of doing harm. . . . the House of Representatives will discuss, form and send it up—the Senate will have it in their power to deliberate, debate upon it, and propose amendments, if necessary; but they can go no further, the House of Representatives must concur with their amendments or they have no effect

Id. at 214.

See also Theophilus Parsons, *Speech at the Mass. Ratifying Convention* (Jan. 23, 1788), 2 ELLIOT’S DEBATES, *supra* note 1, at 92-93 (arguing that the Senate’s amendment power did not add much to what the Senate could do privately in any case).

⁴⁶*George Mason’s Objections to the Constitution of Government formed by the Convention*, Oct. 7, 1787, reprinted in 8 DOCUMENTARY HISTORY, *supra* note 1, at 43, also reprinted in 14 DOCUMENTARY HISTORY, *supra* note 1, at 147 (stating, “The Senate have the Power of altering all Money-Bills, and of originating Appropriations of Money, & the Sallerys of the Officers of their own Appointment in Conjunction with the President of the United States; altho’ they are not the Representatives of the People, or amenable to them.”); *James Bowdoin to James de Caledonia*, PHILA. INDEPENDENT GAZETTEER, Feb. 27, 1788, reprinted in 16 DOCUMENTARY HISTORY, *supra* note 1, at 237, 240 (fictional letter about how Federalists are creating an aristocracy, assisted by the power of the Senate to alter money bills); *Cincinnatus IV, To James Wilson, Esquire*, N.Y.J. Nov. 22, 1787, reprinted in 19 *id.* at 281, 282:

And lastly, the right of altering or amending money bills, is a high additional power given them as a branch of the legislature, which their analogous branch, in the English parliament, could never obtain, because it has been guarded by the representatives of the people there, with the most strenuous solicitude as one of the vital principles of democratic liberty

In point of number therefore and the weight derived from it, the representative proposed by the constitution is remarkably feeble. It is farther weakened by the senate being allowed not only to reject, but to alter and amend money bills.”

Id. at 283-84.

Senate should have no power to amend at all.⁴⁷ Other large state Anti-Federalists contended that the amendment qualifier left any benefits from House origination uncertain. For example, a Massachusetts Anti-Federalist wrote:

The Senate have the power of altering all money bills, and of originating appropriations of money, and the salaries of the officers of their own appointment . . . although they are not the Representatives of the people, or amenable to them.—These, with their other great powers (viz. their powers in the appointment of Ambassadors, and all publick officers, in making treaties, and in trying all impeachments) their influence upon and connection with the Supreme Executive from these causes, their duration of office, and their being a constant existing body almost continually setting, joined with their being one compleat branch of the Legislature, will destroy any balance in the government, and enable them to accomplish what

See also A Federal Republican, A Review of the Constitution, Nov. 28, 1787, reprinted in 14 DOCUMENTARY HISTORY, *supra* note 1, at 255, 272: (a Pennsylvania Anti-Federalist) (stating, “That our boasted republic will ere long wear the face of an aristocracy may easily be seen . . . There is another idea to be suggested, that in just policy no money bill should be altered or amended in any way by the senate.”); William Grayson, *Speeches at the Va. Ratifying Convention*, Jun. 14, 1788, 3 ELLIOT’S DEBATES, *supra* note 1, at 375-76 & 377-78 (arguing that Senate should not have the power to amend, which was tantamount to the power to originate).

⁴⁷*The Society of Western Gentlemen Revise the Constitution*, VA. INDEPENDENT CHRONICLE, April 30, 1788, reprinted in 9 DOCUMENTARY HISTORY, *supra* note 1, at 769, 775 (suggesting an amendment to the Constitution to require that all bills begin in the house, with the Senate being able to amend other bills but not bills for raising revenue).

usurpations they please upon the rights and liberties of the people.⁴⁸

Third: In small states (Maryland, Delaware, New Jersey) the roles were reversed. Small-state Federalists wished to demonstrate that the Senate, where their states would enjoy equal representation, would be an important part of the government, so they de-emphasized House origination while emphasizing the Senate's amendment authority. Maryland's James McHenry, who had attended the Constitutional Convention, told his state's house of delegates that, "The Larger States hoped for an advantage by confirming this [origination] privilege [sic] to that Branch where their numbers predominated, and it ended in a compromise by which the Lesser States obtained a power of amendment in the Senate."⁴⁹

Fourth: Small-state Anti-Federalists denigrated House origination. They argued that the Senate contribution to revenue bills should not have been limited to amendments—i.e., that the Senate should have been given full power to originate. Luther Martin, the bibulous but durable⁵⁰ attorney general of Maryland, had been a disgruntled delegate at the framing

⁴⁸MASS. CENTINEL, Nov. 21, 1787, reprinted in 4 DOCUMENTARY HISTORY, *supra* note 1, at 288. See also James Monroe, *Some Observations on the Constitution*, 9 *id.* at 884, 889:

This is a check of great importance in the English constitution, and indeed the preservation of the democracy, but the construction and principles of the two governments are so radically different, that . . . the same effects are not to be expected from it, at least not to the same extent in this, that are experienced in that.

Monroe, the future President, was then a Virginia Anti-Federalist.

⁴⁹James McHenry's *Speech to Maryland House of Delegates*, Nov. 29, 1787, reprinted in 14 DOCUMENTARY HISTORY, *supra* note 1, at 279, 282-84.

⁵⁰He was still attorney general in 1819 and argued *McCulloch v. Maryland*, 17 U.S. 316 (1819) on behalf of his state before the Supreme Court. *McCulloch*, 17 U.S. at 372-77 (reporting Martin's argument).

convention. During the ratification debates he attacked the alleged insignificance of the Senate:

[T]he senate, the members of whom will it may be presumed, be the most select in their choice, and consist of men the most enlightened, and of the greatest abilities, who from the duration of their appointment and the permanency of their body, will probably be best acquainted with the common concerns of the States, and with the means of providing for them, will be rendered almost useless as a part of the legislature; and that they will have but little to do in that capacity, except patiently to wait the proceedings of the house of representatives, and afterwards examine and approve, or propose amendments.⁵¹

To the foregoing patterns, there were a few exceptions. John Dickinson was a Federalist living in Delaware, but in his *Fabius* essays he praised the House's origination power.⁵² Perhaps this was because he was addressing a national audience. Madison uncharacteristically wandered. In Philadelphia, he had opposed House origination as either harmful or useless.⁵³ During the ratification fight, he acted more like a typical large-state Federalist—praising

⁵¹Luther Martin, *Genuine Information I*, BALTIMORE MD. GAZETTE, Dec. 28, 1787, reprinted in 15 DOCUMENTARY HISTORY, *supra* note 1, at 146, 151. See also Luther Martin's *Speech Before the Maryland House of Delegates*, Nov. 29, 1787, reprinted in 14 *id.* at 285, 289-90 (“It was contended that the Senate derived their powers from the People and therefore ought to have equal priviledges [sic] to the Representation. . . ”).

⁵²*Fabius II*, PA. MERCURY, Apr. 15, 1788, reprinted in 17 DOCUMENTARY HISTORY, *supra* note 1, at 120, 124-25 (stating, “These representatives will also command the public purse, as all bills for raising revenue, must originate in their house.”) (italics in original). Moreover, Dickinson had close ties with Pennsylvania as well as Delaware.

⁵³1 FARRAND'S RECORDS, *supra* note 1, at 527 (Madison, Jul. 5, 1787) (arguing that it was useless); 2 FARRAND'S RECORDS, *supra* note 1, at 224 (Madison, Aug. 8, 1787) (arguing that it could be harmful).

House origination⁵⁴ and belittling the amendment qualifier.⁵⁵ During the Virginia ratifying convention, he conceded that the Senate's power to amend was very broad: narrower than a power to originate, but not "considerab[ly]" so.⁵⁶

B. Non-Conclusions

The foregoing account of the framing and ratification may be interesting, but tells us little about the meaning, scope, and purpose of the Origination Clause. From that account, the Clause appears merely as sop from small states to large states. Discussion on the merits of the Clause seems contradictory and driven solely by political expediency. Key portions of the Clause—Bills for raising Revenue, originate, Amendments—all remain undefined.

⁵⁴See also THE FEDERALIST NO. 58, *supra* note 1, at 300, 303.

⁵⁵James Madison to George Washington, Oct. 18, 1787, *reprinted in* 8 DOCUMENTARY HISTORY, *supra* note 1, at 76; *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 1, at 408 (referring to "the paltry right of the Senate to propose alterations in money bills").

⁵⁶James Madison, *Speech to the Va. Ratifying Convention*, 3 ELLIOT'S DEBATES, *supra* note 1, at 377 ("The honorable member [William Grayson] says that there is no difference between the right of originating bills and proposing amendments. There is some difference, though not considerable"). Another exception was the Federalist who signed his survey of the Constitution, "A Native of Virginia:"

In this the Constitution is an improvement upon that of England: There all money bills must not only originate but must be perfected in the House of Commons: Here though the Senate cannot originate such bills, yet they have the power of amending them, and by that means have an opportunity of communicating their ideas to the House of Representatives upon the important subject of taxation.

"A Native of Virginia," *Observations Upon The Proposed Plan of Federal Government*, Apr. 2, 1788, *reprinted in* 9 DOCUMENTARY HISTORY, *supra* note 1, at 655, 668.

That is why the larger context is so important. Only after exploring that context⁵⁷ can we return fruitfully to the constitutional debates.⁵⁸

II. FOUNDING-ERA LEGISLATIVE PRACTICE: THE BRITISH PARLIAMENT⁵⁹

A. How Parliamentary Practice Influenced the Founders

All American political leaders knew something of the British Parliament. During the colonial era, Parliament produced much of the law affecting British America, and Parliament's overreach had provoked the Revolution. Many American leaders had learned about Parliament from direct experience. Benjamin Franklin came to London in 1757 and served there for many years as a colonial agent.⁶⁰ John Dickinson studied in the

⁵⁷Parts II & III.

⁵⁸Parts IV & V.

⁵⁹This Part reports the results of searches, largely but not exclusively digitized, into modern scholarship and eighteenth century materials. The eighteenth century materials include (1) leading treatises, as cited in the footnotes; (2) the official journals for both the House of Commons and the House of Lords; (3) William Cobbett's *Parliamentary History*, a collection of floor debates, with some commentary; and (4) the *Parliamentary Register*, another collection of floor debates. This material is available variously from *British History Online*, the *Pro-Quest House of Commons Historical Papers*, and *Eighteenth Century Collections Online*, with some supplementation from *Google Books*.

To avoid anachronism (discussed *supra* in the Introduction, section B), I selected as the time frame the fifty-year stretch ending on May 29, 1790. This period offers the advantage of covering all the years any of the leading founders were in London. A *caveat*: Eighteenth century parliamentary records must be used with caution. They arose in a context with which most American constitutional writers are unfamiliar, they are incomplete, and they are skewed toward the comments of those MPs willing to provide their speeches to reporters.

⁶⁰J. A. Leo Lemay, *Benjamin Franklin* (1706-1790), OXFORD HISTORY OF NATIONAL BIOGRAPHY, available at <http://www.oxforddnb.com.weblib.lib.umt.edu:8080/view/article/52466>

Middle Temple, one of the four Inns of Court for training barristers. His letters from London to his father are filled with reflections on parliamentary politics.⁶¹ Dickinson was a member an elite coterie of American lawyers educated at Inns,⁶² a group that included six other framers⁶³ and several major ratification figures.⁶⁴ Among the latter was Virginia's William Grayson,⁶⁵ whom we shall meet again.⁶⁶ Many founders who had not spent time in London were exposed to parliamentary institutions and procedures from popular writings⁶⁷ and from service in, or observation of, American colonial and state legislatures.

(stating that Franklin served as agent for four colonies: Pennsylvania, Massachusetts, New Jersey, and Georgia).

⁶¹See H. Trevor Colbourn ed., *A Pennsylvania Farmer at the Court of King George: John Dickinson's London Letters, 1754–1756*, PA. MAG. HIST. & BIOGRAPHY, at 417 (1962) (setting forth the content of Dickinson's letters from London to his parents).

⁶²CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 18 (H. Fertig 1966) (1911) (stating that between 1750 and 1775, four colonies, Maryland, Pennsylvania, South Carolina, and Virginia, had nearly 150 lawyers educated at the Inns).

⁶³E. ALFRED JONES, AMERICAN MEMBERS OF THE INNS OF COURT 21–22, 61–63, 102, 104, 134–36, 170–71 (1924) (including, besides Dickinson, John Blair, William Houston, Jared Ingersoll, William Livingston, Charles Pinckney, and Charles Cotesworth Pinckney).

⁶⁴See, e.g., *id.* at 45–47 (citing Henry Lee, a Federalist speaker at the Virginia ratifying convention); *id.* at 412 (listing Alexander White, a leading Federalist spokesman in the same state).

⁶⁵K. R. Constantine Gutzman, *William Grayson*, AMERICAN NATIONAL BIOGRAPHY ONLINE, available at <http://www.anb.org/weblib.lib.umt.edu:8080/articles/01/01-00342.html?a=1&f=Grayson%2C%20William&ia=-at&ib=bib&d=10&ss=0&q=2>.

⁶⁶*Infra* Part V.C.

⁶⁷E.g., DE LOLME, *supra* note 1. Popular in America were the books by the Whig historian Catherine Macaulay. See, e.g., Letter from Benjamin Rush to Catherine Macaulay, Jan. 18, 1769, reprinted in 2 THE FOUNDERS

During the eighteenth century, Parliament consisted of the Crown and two legislative chambers: the House of Commons and the House of Lords. The House of Commons was elected every seven years, unless sooner dissolved by the Crown,⁶⁸ while the Lords were mostly hereditary.⁶⁹ Before Independence, the governments of Britain's American colonies mimicked that structure: they featured colonial governors, usually appointed by the Crown; popularly-elected lower chambers; and less democratic upper chambers. After Independence, the bicameral structure remained intact⁷⁰ in all states except Georgia, Pennsylvania, and the independent state of Vermont.⁷¹

Just as the structure of colonial and state legislatures mimicked that of Parliament, so did their procedures.”⁷² Although it is not strictly relevant

CONSTITUTION 375-76 (Philip B. Kurland & Ralph Lerner, eds. 1987). Rush was a signer of the Declaration of Independence, a member of Congress, America's leading physician, and a delegate to the Pennsylvania ratifying convention.

⁶⁸1 WILLIAM BLACKSTONE, COMMENTARIES, *182.

⁶⁹Certain peers from the northern part of the country were elected by other Lords. 1 WILLIAM BLACKSTONE, COMMENTARIES, *163.

⁷⁰The least democratic chamber probably was the Maryland senate. MD. CONST. (1776) arts. XIV & XV (providing for indirect election of senators every fifth year).

⁷¹GA. CONST. (1777), art. II; PA. CONST. (1776), § II; VT. CONST. (1777), ch. II, § ii.

⁷²S. M. Pargellis, *The Procedure of the Virginia House of Burgesses* (pt. 1), 7 WM. & MARY C. Q. HIST. MAG. 73, 74 (1927) (observing that “the historic procedure of the house of commons . . . was copied in nearly every important detail by the house of burgesses”); S.M. Pargellis, *The Procedure of the Virginia House of Burgesses* (pt. 2), 7 WM. & MARY C. Q. HIST. MAG. 143, 156 (1927) (noting the House of Burgesses’ “remarkable adherence to English forms and practices”); Joan de Lourdes Leonard, *The Organization and Procedure of the Pennsylvania Assembly 1682–1776*, 72 PA. MAG. HIST. & BIOGRAPHY 215, 239 (1948) (noting similarity between rules of the Pennsylvania Assembly and the House of Commons); Jack P. Greene, *The Role of the Lower Houses of Assembly in Eighteenth-Century Politics*, 27 J. S. HIST. 451, 466 (1961) (pointing out that lower houses of colonial legislatures

to our investigation, we might note that those procedures later became pervasive in the federal Congress and remain so in American legislative bodies even today.⁷³

B. Parliament and the Power of the Purse

1. The Scope of the Term “Money Bill”

One of the more celebrated aspects of parliamentary practice pertained to “money bills”—a term whose contours are discussed below.⁷⁴ As commonly stated, parliamentary practice was as follows:

- * Only the House of Commons could originate money bills. This meant that each money bill had to be introduced in the Commons by a member of that chamber, considered by a committee of that chamber (which might include the committee of the whole), perhaps suffer amendments in the same body, and then win a majority vote therein—all before being sent to the Lords.⁷⁵

often justified their actions by claiming that they were “agreeable to the practice of the House of Commons”).

⁷³See generally JEFFERSON’S MANUAL *supra* note 1 (discussing Senate procedures and relying heavily on parliamentary citations); MASON, *supra* note 1, by far the most frequently-used procedural manual among American state legislative chambers, explains:

Parliamentary law consists of the recognized rules, precedents and usages of legislative bodies by which their procedure is regulated. It is that system of rules and precedents that originated in the British Parliament and that has been developed by legislative or deliberative bodies in this and other countries.

MASON’S MANUAL, *supra* note 1, at 29.

⁷⁴Infra notes ____ and accompanying text.

⁷⁵DE LOLME, *supra* note 1, at 58 (outlining the procedure).

- * The House of Lords could approve or reject any money bill.⁷⁶
- * The Lords could not offer amendments to money bills; the Lords were required to accept or reject each as an entirety.⁷⁷
- * Once the Lords had approved a money bill, it was presented it to the King or Queen for royal approval.⁷⁸

These rules were the basis of the saying that the House of Commons held the “power of the purse.”

Reality was more complicated. Parliamentary historian David W. Hayton, writing of the late seventeenth and early eighteenth century, observed that, “The Commons’ exclusive control over fiscal legislation was a perennial source of friction.”⁷⁹ One area of friction was the scope of the phrase “money bill.” Most everyone agreed that the term included all alterations in the tax laws,⁸⁰ whether they raised or reduced⁸¹ taxes. Beyond

⁷⁶DE LOLME, *supra* note 1, at 58.

⁷⁷DE LOLME, *supra* note 1, at 71 (“any alteration that may be made in it, in the other House, is sure to be rejected”); 1 WILLIAM BLACKSTONE, COMMENTARIES *164 (same).

⁷⁸DE LOLME, *supra* note 1, at 59; 1 WILLIAM BLACKSTONE, COMMENTARIES *177

⁷⁹HAYTON, *supra* note 1.

⁸⁰GILES JACOB, LEX CONSTITUTIONIS: OR, THE GENTLEMAN’S LAW 145 (1737) (stating, “The Commons in Making and Repealing of Laws have equal Power with the Lords; and for laying of Taxes on the Subject, the Bill is to begin in the House of Commons . . . [which] will not permit any Alterations to be made by the Lords in a Bill concerning Money.”)

⁸¹1 WILLIAM BLACKSTONE, COMMENTARIES, *164 (stating “[the Commons] . . . will not permit the least alteration or amendment to be made by the lords to the mode of taxing the people by a money bill”); ACHERLEY, *supra* note 1, at 45-46 (explaining the scope of the Commons’ privilege as “The 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”) (bolding in original; italics added).

that, the definitions varied somewhat. William Blackstone defined a money bill as

[any] bill[], by which money is directed to be raised upon the subject [i.e., 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.⁸²

Roger Acherley's 1759 work, *The Brittanic Constitution*,⁸³ so described a "money bill" as to reserve to the Commons

[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 . . .⁸⁴

⁸²1 WILLIAM BLACKSTONE, COMMENTARIES at *164.

⁸³ACHERLEY, *supra* note 1.

⁸⁴ACHERLEY, *supra* note 1, at 45-46. Of the origination privilege, Acherley wrote:

. . . That the sole Right and Power over the Peoples Monies and Treasures, and of *Giving*, and *Granting*, or *Denying* Monies, and *Imposing Taxes* for the Publick Service should be Vested in [the Commons] and that all Motions and Laws Relating thereto, should be *First Propounded*, and have their **Rise**, Commencement and Progress in their House. . . ."

Id. at 49 (all italics and boldings in original).

One distinction between Blackstone's and Acherley's definitions is that Acherley seemed to include exactions for purposes of regulation ("all Laws, touching the Taking from any Man his Property") while Blackstone did not. Controversy was quite heated over this topic. Some in the Lords contended that purely regulatory exactions *never* qualified as money bills.⁸⁵ Some members of the Commons argued that any measure imposing duties, even if imposed purely to regulate commerce, was a money bill.⁸⁶ Each House, however, contained a spectrum of opinion on the matter. Illustrative is a 1779 Commons debate on the Lords' amendments to a militia bill, a debate that centered on whether the Commons should reject the amendments as impermissible alterations in a money bill. Ultimately, the Commons decided to accept the amendments.⁸⁷

Another difference between the Acherley and Blackstone definitions is that Acherley, unlike Blackstone, included appropriations within the scope of "money bill." To modern eyes, this would seem a major difference, but in the eighteenth century it was not. During the years before the drafting of the U.S. Constitution, Parliament generally handled revenue and appropriations together. The Commons would initiate a "supply bill"⁸⁸ creating or re-

⁸⁵E.g. 23 COBBETT, *supra* note 1, at 144 (reproducing remarks by the Earl of Shelburne in the Lords, May 20, 1782); PARLIAMENTARY REGISTER, *supra* note 1, Fifteenth Parliament, Second Session 347 (Jul. 3, 1782) (reproducing remarks by the Duke of Richmond) & 349 (reporting remarks by Lord Stormont).

⁸⁶PARLIAMENTARY REGISTER, *supra* note 1, Fifteenth Parliament, Third Session 1-2 (May 9, 1783) (reporting remarks by the Speaker).

⁸⁷20 COBBETT, *supra* note 1, at 1008-18 (Jul. 2, 1779) (reproducing the Commons debate on the Lords' amendment to the militia bill, illustrating disagreement about what was and was not a money bill and complaints about the Lords having gutted the militia bill, which ultimately passed).

⁸⁸HAYTON, *supra* note 1 (stating, "Supply bills always began in the Lower House, while most private estate bills originated in the Upper."); cf. DE

authorizing one or more levies and earmarking the levy or levies for a particular purpose.⁸⁹ For example, the bill funding the “civil list” for a new monarch’s reign—that is, support for the sovereign’s household and for most of the civil service—earmarked for that purpose hereditary Crown review supplemented by new or renewed excise taxes and customs duties.⁹⁰ Other supply bills imposed named taxes (such as land taxes), often time-limited, for funding a designated activity, such as fighting a war.⁹¹ Except for bills for the support of the army, supply bills seldom appropriated funds in detail as modern legislatures do. Allocation within the permitted purpose was the task of the executive branch.⁹² Not until adoption of Edmund Burke’s⁹³ 1782 reform legislation did Parliament begin to appropriate non-military expenses in detail.⁹⁴ Not until 1787 did Parliament create the Consolidated Fund, an

LOLME, *supra* note 1, at 58: (“All Bills for granting Money must have their beginning in the House of Commons . . .”).

⁸⁹EINZIG, *supra* note 1, at 137-38. See also 3 HATSELL, *supra* note 1, at 62 (referring to “granting and appropriating” as components of supply). *Id.* at 63 (providing an example of earmarking levied funds for shipbuilding).

⁹⁰EINZIG, *supra* note 1, at 118-19, 132, 142. Until the latter part of the eighteenth century, the king generally had a free hand in administering civil list funds. *Id.* at 151. A shift did not begin until 1777. *Id.* at 153 & 163. As the century progressed, moreover, Parliament funded increasing shares of the civil service with supply bills other than the civil list bill. *Id.* at 153.

⁹¹EINZIG, *supra* note 1, at 164 (noting the prevalence of earmarked taxes in 1785).

⁹²EINZIG, *supra* note 1, at 120, 160 & 164-65.

⁹³Burke, of course, was one of the most dazzling characters in an age of dazzling characters: a moderate Whig, leading parliamentarian, friend of the American colonies, enemy of the French Revolution, noted philosopher, and widely accounted as the founder of modern conservatism. See generally RUSSELL KIRK, EDMUND BURKE: A GENIUS RECONSIDERED (1967).

⁹⁴EINZIG, *supra* note 1, at 164-65 (describing the Civil Establishment Act of 1782).

account analogous to a modern state general fund, fed by many revenue bills and appropriated for many purposes.⁹⁵

In the Parliament known to the founders, therefore, “supply”—consisting of both revenue and spending—was an accepted legislative category. To employ the modern legislative term, supply was a *single subject*.⁹⁶ This was true even of omnibus financial bills containing multiple sources of revenue for multiple purposes, including but not limited to the civil list bill.⁹⁷

2. *Hotch-Potch Bills and Tacking*

Although a chamber of Parliament originating a bill was not bound by a single subject rule, the usual bill was limited to some accepted legislative category. The relatively rare exception was the “hotch-potch bill.”⁹⁸ A hotch-

⁹⁵EINZIG, *supra* note 1, at 138 & 163.

⁹⁶MASON’S MANUAL, *supra* note 1, at 225 & 592.

⁹⁷38 LORDS JOUR. , available at <http://www.british-history.ac.uk/report.aspx?compid=116866> (Aug. 30, 1789) (placing into a committee a single bill granting and applying money for various purposes); 3 HATSELL, *supra* note 1, at 96 (reporting an incident of a single bill altering various financial duties). Cf. 28 COBBETT, *supra* note 1, at 270 (Jul. 10, 1789) (reporting the comment by MP Richard Brinsley Sheridan that “all the ministers [sic] revenue bills were hotch-potch bills,” meaning omnibus revenue bills); 30 LORDS JOUR. at 381 (Mar. 28, 1763) (reporting the Lords’ rejection of dissenters’ argument that a bill was improper because it contained several different kinds of revenue-raisers).

⁹⁸Both Johnson’s and Sheridan’s dictionaries defined “hotchpotch,” as one unhyphenated word: “a mingled hash, a mixture.” JOHNSON, *supra* note 1; SHERIDAN, *supra* note 1 (both unpaginated). The word did not appear in most other dictionaries.

potch bill was one, often introduced late in the session, encompassing matters in disparate categories.⁹⁹

During the seventeenth century and very early eighteenth century, the Commons sometimes created a hotch-potch by combining non-financial matter into a money bill. This was done when opposition in the Lords to the non-financial matter was expected, but the Commons hoped the Peers would be sufficiently desperate for revenue to approve the measure. This practice of throwing non-financial provisions into hotch-potch with financial provisions was called *tacking*.¹⁰⁰

Unsurprisingly, the Peers objected to tacking. In 1702 they adopted a House of Lords standing order (rule) by which they automatically rejected any money bill onto which the Commons had tacked non-financial provisions.¹⁰¹ The Peers were sufficiently firm about this¹⁰² that by the time of the American founding efforts to tack were rare.

3. *The Dispute over Amendments by the Lords*

I have found no instances in which even the staunchest member of the House of Lords disputed the exclusive privilege of the Commons to *originate*

⁹⁹E.g., PARLIAMENTARY REGISTER, *supra* note 1, Fifteenth Parliament, Second Session 275-76 & 230 (Jun. 27, 1782) (reporting discussion in the Commons on a hotch-potch bill); *id.*, Sixteenth Parliament, Sixth Session at 377 (Jul. 10, 1789) (reporting remarks of William Pitt).

¹⁰⁰HATSELL, *supra* note 1, at 162-64 (describing and criticizing tacking); EINZIG, *supra* note 1, at 196-98 (relating the history of tacking).

¹⁰¹The Lords' standing order is mentioned at 23 COBBETT, *supra* note 1, at 144-45 (speech by Lord Loughborough, Jul. 3, 1782). See also DE LOLME, *supra* note 1, at 261.

¹⁰²PARLIAMENTARY REGISTER, *supra* note 1, Fifteenth Parliament, Second Session 346 (Jul. 3, 1782) (reporting remarks by the Lord Chancellor); *id.* at

money bills.¹⁰³ But there was great controversy over whether the Peers could *amend* them.¹⁰⁴ In a 1778 floor speech, Lord Shelburn argued that they could:

I shall never submit to the doctrines I have heard this day from the woolsack [i.e., the Chancellor], that the other House are the only representatives and guardians of the people's rights. I boldly maintain the contrary. I say this House are equally the representatives of the people. They hold the balance; and if they should perceive two of the branches of the legislature unite in oppressing and enslaving the people, it is their duty to interpose to prevent it.

* * * *

The noble and learned lord on the woolsack, in the debate which opened the business of the day, asserted, that your lordships were incompetent to make any alteration in a Money Bill, or a Bill of Supply. I should be glad to see the matter fairly and fully discussed, and the subject brought forward and argued upon precedent, as well as all its collateral relations. I should be pleased to see the question fairly committed, were it for no other reason but to hear the sleek, smooth contractors from the other House of Parliament, come to that bar and declare, that they, and they only, could frame a Money Bill; and they, and they only, could dispose of the property of the peers of Great Britain. . . [U]ntil the claim, after a solemn discussion of this House, is openly and directly relinquished, I shall continue to be of

348 (Jul. 3, 1782) (reporting remarks by Lord Stormont); *id.* at 351 (reproducing remarks by Lord Loughborough).

¹⁰³For the origins and evolution of the Commons privilege, see EINZIG, *supra* note 1, at 111-14.

opinion, that your lordships have a right to alter, amend, or reject a money Bill¹⁰⁵

The House of Lords made recurrent efforts to amend money bills. Most of the time the Commons' response was hostile. Thus, in 1772 the Lords offered an amendment to a Corn Bill—not to impose, but to *remove* a charge. Several indignant speakers rose in the Commons to denounce the perceived insult, including former Massachusetts colonial governor Thomas Pownall (the bill's sponsor) and a particularly outraged Edmund Burke. The Speaker of the Commons added that "he would do his part in the business, and toss the Bill over the table." He proceeded to do so, and other members of the House kicked it on their way out.¹⁰⁶

¹⁰⁴EINZIG, *supra* note 1, at 195.

¹⁰⁵19 COBBETT, *supra* note 1, at 1032, 1048-49 (April 8, 1778). As an admonition to his fellow members of the Commons, Edmund Burke cited this speech in his own oration of June 14, 1784. 24 COBBETT, *supra* note 1, at 955.

See also PARLIAMENTARY REGISTER, *supra* note 1, Fourteenth Parliament, Fourth Session 375 (Apr. 7, 1778) (containing similar assertions by the Duke of Richmond and the Earl of Effingham on the Lords' privilege to fully consider and amend); *id.* at 430-31 (Jun. 2, 1778) (reproducing further statements by the Duke of Richmond); 19 COBBETT, *supra* note 1, at 1239 (June 2, 1778) (paraphrasing the Lord Chancellor in the House of Lords, who in contrast to his statement on April 7, said, "He said he never could agree, that the Lords, by either amending or rejecting a money Bill, thereby invaded the province of the other House"); 23 COBBETT, *supra* note 1, at 1028 (June 18, 1783), paraphrasing Earl Ferrers:

How it ever should have been understood, that their lordships were not empowered to make alterations in money bills, he could not conceive, or from what principle the other House had assumed to themselves the right of framing taxes which they were to give their consent to as a matter of course, without being at liberty to judge whether they were proper and equitable, or partial and unjust, or to make an alteration, which might be of the greatest advantage to the nation at large.

¹⁰⁶17 COBBETT, *supra* note 1, at 512-15 (Jun. 3, 1772). Einzig relates this incident and another like it. EINZIG, *supra* note 1, at 196.

The incident illustrates that the Commons generally defined a “money bill” to include not only rate increases, but all changes in levies, including reductions.¹⁰⁷ The incident does *not* illustrate, however, the consistent response of the Commons to amendments from the Lords. The second edition of John Hatsell’s authoritative study of Parliamentary practice, published in 1785, listed 85 incidents in which the Peers had attempted to send money bills back to the Commons with amendments.¹⁰⁸ Hatsell’s list shows that the Commons acquiesced to the Lords’ amendments in 22 of these cases, and agreed to conferences or otherwise deliberated over the amendments in three others. In many, but not all, of the instances in which the Commons approved the amendments, they added provisos asserting their privilege and/or noting that the amendments were “small” or remedied prior mistakes. There seems to have been a gradual reduction over time in Commons acquiescence to Lords amendments. But Hatsell listed amendments accepted by the Commons as late as 1750 and taken into honest consideration as late as 1772.

This willingness to bend reflects the reality that Peers’ opinion on financial legislation was often valuable. Even Charles James Fox, a leader of the liberal forces in the Commons,¹⁰⁹ said he thought the right of the Lords to participate in money bills “was often too strictly construed.”¹¹⁰

¹⁰⁷See also *supra* notes ____ accompanying text (defining money bills to include denial of revenue).

¹⁰⁸3 HATSELL, *supra* note 1, at 78-104.

¹⁰⁹ On Charles James Fox, see *FOX, Hon. Charles James (1749-1806), of Wimbledon, Surr., THE HISTORY OF PARLIAMENT TRUST*, <http://www.historyofparliamentonline.org/volume/1754-1790/member/fox-hon-charles-james-1749-1806>.

¹¹⁰PARLIAMENTARY REGISTER, *supra* note 1, Fifteenth Parliament, Third Session 2 (May 8, 1783) (reporting remarks by Charles James Fox).

To his list of Lords amendments, Hatsell appended two comments that cannot be reconciled. In the first, he wrote that “the Commons have vigorously and uniformly opposed the attempt”¹¹¹ of the Lords to interfere in matters of supply. In the second, just few pages later, he backed away from that characterization and attempted to synthesize the cases. He concluded that (1) the Lords could correct mistakes in revenue bills and (2) they could offer any kind of amendment in bills imposing exactions for regulatory purposes if they did not “make any alteration in the quantum of the toll or rate, in the disposition or duration of it, or in the persons, commissioners, or collectors appointed to manage it.”¹¹² Whether Hatsell’s synthesis was entirely accurate is less important than the fact that the state of the record induced him to believe it was tenable. That record shows that, whatever the correct theory was, in practice much depended on tug-of-war between the chambers, inter-house conference committees,¹¹³ and the efficacy of

¹¹¹3 HATSELL, *supra* note 1, at 105.

¹¹²3 HATSELL, *supra* note 1, at 110-12. Cf. PARLIAMENTARY REGISTER, *supra* note 1, Fourteenth Parliament, Fifth Session 540 (Jul. 2, 1779) (reporting a similar attempt to synthesize the cases by Sir Grey Cooper).

¹¹³HAYTON, *supra* note 1 (“If the two Houses did not agree, the differences between them would have to be settled by a conference or conferences.”).

conciliation.¹¹⁴ There is every reason to believe that leading founders were aware that the rules were not entirely settled in Britain.¹¹⁵

4. *What Was An “Amendment?”*

The Origination Clause states that “the Senate may propose or concur with Amendments *as on other Bills.*” In other words, the Constitution’s definition of an “Amendment” of a revenue bill is the same as the general definition of a legislative amendment.¹¹⁶ Thus, in seeking the founding-era definition of “Amendment,” one may consult how that term was used in both revenue and non-revenue bills.

“Amendment” is, of course, a noun that corresponds to the verb “amend.” Etymologically, the verb is closely related to “mend”—that is, to

¹¹⁴See, e.g., 14 COBBETT, *supra* note 1, at 1234-35 (Feb. 25, 1752) (reporting that the Commons rejected an amendment from the Lords because the amendment added a tax, and the Lords were denying any inability to amend money bills, so to assuage the Lords, the Commons advanced other reasons for rejection, and the Lords receded from their amendments) (Editor’s discussion.) See also 27 COBBETT, *supra* note 1, at 652 (“The Bill being returned to the Commons, and some of the amendments being thought to trench on the privileges of that House, the consideration of the said amendments was postponed for three months. A new bill was immediately brought in, which passed both Houses.”) (Editor’s summary of debate of Jun. 30, 1788).

¹¹⁵As James Wilson put it, “The point is still sub judice in England.” 1 FARRAND’S RECORDS, *supra* note 1, at 546 (Madison, Jul. 6, 1787) (reporting remarks by Wilson).

¹¹⁶Kysar, *Shell Bill*, *supra* note 1, at 685 & 690-92, argues that the phrase “as on other Bills” implies that Congress may change the Constitution’s amendment rule for revenue bills as it may alter rules on other subjects. One difficulty with this interpretation is that it would enable Congress to eliminate a constitutional check inserted for reasons exogenous to its internal operations, *infra* Part IV & V. This would be comparable to enforcing an agreement between Congress and a weak President to abolish the presidential veto.

correct or repair. Eighteenth century dictionaries reflect this etymology by defining “amend” in the sense of to “correct” or “make better.”¹¹⁷ For example, Francis Allen’s dictionary defined “amendment” as “an alteration which makes it better, a correction.”¹¹⁸ In modern speech we preserve this connection between amending and mending through the idiom, “to make amends.”

Within Parliament, members frequently used the words “amend” and “amendment” so as to render explicit the connection to “mend.”¹¹⁹ To repair roads, for example, was to “amend” them.¹²⁰ MPs sometimes distinguished

¹¹⁷ASH, *supra* note 1 (“To correct, to reform, to restore”); BAILEY, *supra* note 1 (“to reform, to correct, to repair, to make or grow better”); ALLEN, *supra* note 1 (“to alter something for the better; to correct”); BARLOW, *supra* note 1 (“to alter for the better. To correct. To reform.”); DONALDSON, *supra* note 1 (“to alter something faulty for the better”); JOHNSON, *supra* note 1 (“To correct; to change anything that is wrong”); PERRY, *supra* note 1 (“to correct; to grow better”); SHERIDAN, *supra* note 1 (“to grow better”) (all dictionaries unpaginated).

¹¹⁸ALLEN, *supra* note 1. Cf. JOHNSON, *supra* note 1 (“1. A change from bad for the better. 2. Reformation of life. 3. Recovery of health. 4. [In law] Correction of an error committed in process.”); PERRY, *supra* note 1 (“a change for the better”) (All dictionaries unpaginated).

¹¹⁹17 COBBETT, *supra* note 1, at 389 (Mar. 2, 1772):

The *Lord Chancellor* said, that he confessed he had had a share in drawing this Bill, and should be unworthy of the situation he was in if he could not defend every clause, every sentence, every syllable, every word, and every letter in it; that he would defend every part of it, and was free to confess that he would not consent to any amendment whatsoever; that if the Bill was to be altered, it were better to throw it out ; that it could not be mended . . .). (Italics in original).

See also 19 COBBETT, *supra* note 1, at 50 (Feb. 17, 1777) (reporting speech by Solicitor General Alexander Wedderburn in Commons using the phrase “mended or unamended”).

¹²⁰37 H.C. JOUR. 30 (Dec. 7, 1778) (stating, “Nor the Roads effectually widened, amended, and kept in Repair”).

between an “amendment,” which made things better, and an “alteration,” which could make them worse.¹²¹ On other occasions they might use “amend” merely as a synonym for “alter.”¹²² However, they seem not to have varied their usage according to the nature of the item amended—that is, whether that item was a bill from the same house, a bill from the other house, a resolution, a report, or a prior law.¹²³

MPs sometimes did draw a line between amending a bill and changing its essence. In 1742, the Earl of Elay argued that a particular bill was

one as cannot be amended, without first erasing it to its very foundation . . . If it appears to be such a Bill as cannot be fully amended in the committee, without altering its nature, and making it in a great measure a new Bill; we ought not to send it to a committee, because every Bill, by our forms of proceeding, ought to be twice read and considered in the House before its being committed, which, I am sure, can never be said of a Bill so moulded in the committee as to make it quite a new Bill.”¹²⁴

¹²¹14 COBBETT, *supra* note 1, at 409 (Mar. 3, 1749) (presenting editor’s summary of debate: “[T]hey have made a most dangerous encroachment upon the civil power in all his majesty’s plantations; therefore this may be called an alteration, but it cannot be called an amendment.”).

¹²²13 COBBETT, *supra* note 1, at 793 (Apr. 27, 1744) (reporting Chancellor Hardwick as contending, “for every alteration, though it be for the same purpose with those offered by the Commons, must be called an amendment.”). See also PHILIPS, LEX PARLIAMENTARIA: OR A TREATISE OF THE LAW AND CUSTOM OF PARLIAMENTS 328 (3d ed. 1748) (apparently using the words “Amendment” and “Alteration” interchangeably).

¹²³One reviewer suggested I distinguish between amendments to bills and amendments to resolutions, or between amendments to bills arising in the same house and amendments to bills reported from the other house. I could find insufficient evidentiary justification for such distinctions.

¹²⁴13 COBBETT, *supra* note 1, at 91-92 (March 11, 1742). See also 13 COBBETT, *supra* note 1, at 699 (April 3, 1744) (quoting the *Parliamentary Journal of the*

The parliamentary journals and debate collections do not reproduce the text of most amendments, but judging by those that are reproduced, the overwhelming majority worked only modest changes in the underlying bills.¹²⁵ However, the cumulative effect of a series of amendments could alter a proposal greatly.¹²⁶ In 1789, MP Richard Brinsley Sheridan¹²⁷ observed

Hon. Philip York as stating, “Moves an Amendment or rather total alteration of the question. . .”); 16 COBBETT, *supra* note 1, at 1052 (Nov. 13, 1770) (quoting William Dowdeswell as stating in Commons, “As no proposal has been made to amend the Address, I conclude that it cannot be amended; that it is not faulty in particular part, but is uniformly and totally wrong: this is my reason for proposing no amendment”); 16 COBBETT, *supra* note 1, at 266 (Dec. 10, 1766) (reporting editor’s composite of speeches in Lords: “[N]or do I see that such an alteration would be an amendment of the constitution; I think it would destroy it, to the very foundation.”); 28 COBBETT, *supra* note 1, at 714 (April 26, 1790) (“Mr Curwen observed, that being perfectly convinced that the bill was so defective that it could not by any amendment which it might receive in the committee be rendered unobjectionable, he should oppose the motion.”).

¹²⁵In the interest of space, a sample of several kinds of amendments must suffice. 25 H.C. JOUR. 138-39 (April 28, 1746) (reproducing Commons committee amendments to a Commons bill); 31 H.C. JOUR. 168 (Feb. 19, 1767) (reproducing Commons committee’s amendments to Lords bill); 33 H.C. JOUR. (May 11, 1770) (reproducing Lords amendments to Commons bill); 34 H.C. JOUR. 349 (May, 29, 1773) (reproducing an approved amendment from the floor); 37 H.C. JOUR. 697 (Mar. 7, 1780) (reporting a successful amendment that expunged five of eight lines in a motion for an accounting in favor of a longer, more precise description of how the accounting was to be conducted).

¹²⁶13 COBBETT, *supra* note 1, at 806 (Apr. 27, 1744) (reporting remarks of Lord Talbot):

It is well known, my lords, that the Bill now before us was sent up from the Commons in another form, and that it has received so many alterations in this House, that its original intention is almost forgotten, and the first plan almost hidden by the additions which one proposition after another has produced. The Bill thus amended must now pass under the inspection of the Commons, and our alterations must be confirmed by their suffrages.

that “all the ministers [sic] revenue bills were hotch-potch bills; for, if they were not so when first brought in, they had so many things altered, amended, and added, before they went through, that the original bill was hardly to be traced.”¹²⁸

On relatively rare occasions even a single amendment could work great alteration.¹²⁹ One MP spoke of “radical amendments”¹³⁰—that is, changes that went to the root (*radix*) of a proposal. Members in an originating

See also 15 COBBETT, *supra* note 1, at 32 (May 14, 1753, editor’s comments) (“[T]he [Clandestine Marriage] Bill was almost entirely altered by the addition of new clauses and alteration of every one of the old.”). Yet, the editor also reported that “The House proceeded to take into consideration the Amendments made by the Commons to the said Bill: and the said Amendments being read twice by the clerk, were agreed to.” *Id.* at 86 (June 6, 1753). *See also* 26 COBBETT, *supra* note 1, at 80 (June 2, 1786) (reporting Charles James Fox as stating in the Commons, “The Bill which they have framed, has been renewed and amended, until it scarcely bears the resemblance of the original form.”).

¹²⁷On Sheridan, a brilliant literary figure, see *Sheridan, Richard Brinsley, (1751-1816), of Harrow, Mdx.*, THE HISTORY OF PARLIAMENT TRUST, <http://www.historyofparliamentonline.org/volume/1754-1790/member/sheridan-richard-brinsley-1751-1816>.

¹²⁸28 COBBETT, *supra* note 1, at 270 (Jul. 10, 1789).

¹²⁹19 COBBETT, *supra* note 1, at 640 (Feb. 4, 1778):

Lord Camden spoke in reply to lord Mansfield, and began with observing, that had the noble earl early in the debate given his sentiments on the irregularity of quashing the motion, by moving an amendment totally foreign to the purport of it, he should have been exceedingly happy, as it might have assisted their lordships materially, by bringing on a debate on the question really before the House, and which was of too important a nature to be taken up hastily, or by the bye, as the noble earl had done.

¹³⁰28 COBBETT, *supra* note 1, at 368 (Feb. 9, 1790) (quoting Richard Sheridan as stating in the Commons, “For such an evil, when proved, what remedy could be resorted to, but a radical amendment of the frame and fabric of the constitution itself?”). The same day, he repeated the expression, *id.* at 369 (“In hoping, however, that that government might be radically amended . . .”).

chamber sometimes grumbled about how the amending chamber had gutted a bill under the guise of amendment, but the originating chamber might adopt the changes nevertheless.¹³¹ Members also advanced amendments designed to discredit the underlying bill.¹³² There was more license for this sort of foolery when an originating chamber was amending its own bill than when it was amending a bill from the other chamber. If one House lacerated the other's bills, the other likely would call a joint conference.¹³³

To illustrate the great latitude of amendments permitted, John Hatsell's treatise cited a handful of incidents.¹³⁴ In one notorious episode, a resolution criticizing the ministry for spending money on a military action by the Duke of Aremberg was successfully amended to one that praised the ministry for the same action.¹³⁵ Yet incidents of this kind were rare and some were old. Hatsell dug back over a century (to 1678) to report a dispute between the Houses over Lords' amendments to a money bill for disbanding

¹³¹20 COBBETT, *supra* note 1, at 1008-18 (Jul. 2, 1779) (reporting proceedings in Commons on a Militia Bill).

¹³²25 COBBETT, *supra* note 1, at 89 (Feb. 21, 1785) (quoting Edward Bearcroft in the Commons, describing an amendment by Richard Sheridan of a Lords bill).

¹³³HAYTON, *supra* note 1 (stating, "In the case of legislation a conference would usually be called if one House amended to an unacceptable extent a bill produced by the other.").

¹³⁴2 HATSELL, *supra* note 1, at 79 (citing examples on Feb. 24, 1728 and on Mar. 12, 1728 in which the sense and meaning of questions were totally altered by amendments). See *id.* at 84-85 (discussing the Duke of Aremberg incident mentioned in the text); *id.* at 82 ("But as it frequently happens that questions are moved, upon which the House do not wish to give any opinion, they avoid it . . . by making such amendments to the question as change the nature of it, and make it inadmissible even by those who proposed it.").

¹³⁵13 COBBETT, *supra* note 1, at 701 (Apr. 3, 1744). The amendment changed the words describing the action from "a dangerous misapplication of public money, and destructive of the rights of parliament" to "necessary for putting the said troops in motion, and of great consequence to the common cause."

the army. Rather than agree to the amendments, the Commons inserted the substance of the original bill into another bill, to which the Lords felt constrained to assent.¹³⁶

Much more recent (1779) was the complaint of Lord Stormont that a particular “[a]mendment was not a correction of a few words of the Address [of Thanks to the Crown], which he had ever considered to be the sort of amendment warranted by parliamentary usage; but the substituting of entire new matter, totally foreign to the address, and equally foreign to the whole business of the day.”¹³⁷

As these incidents demonstrate, amendments occasionally replaced key language in a bill or resolution. On the other hand, *complete* substitutes—the gutting of a bill and replacement with new language—may have been unknown. My review of parliamentary records, both journals and debates, did not uncover a single example of a complete substitute offered as an amendment, either within or between chambers. Daniel Smyth, an independent researcher, reviewed all editions of Cobbett’s *Parliamentary History* for the period 1688 through 1789 and found none.¹³⁸

Moreover, I found no amendments that altered the subject matter of an original motion. Even the amendment that reversed the sentiment expressed on the Duke of Arenberg’s military action did not change the resolution’s subject matter. Similarly, the amendment of which Lord Stormont

¹³⁶2 HATSELL, *supra* note 1, at 93.

¹³⁷20 COBBETT, *supra* note 1, at 1037 (Nov. 25, 1779) (reporting speech in Lords by Lord Stormont).

¹³⁸Daniel Smyth, *The Origination Clause III: ObamaCare's a Good Amendment to Die Hard*, http://www.americanthinker.com/2013/11/the_origination_clause_iii_obamacare_a_good_amendment_to_die_hard.html.

complained did not change the topic of the underlying motion: It was an address to the Crown before amendment, and it remained one after.

Most American legislative bodies today require that an amendment be “germane” to the underlying measure.¹³⁹ *Mason’s Manual*, the most popular book of legislative procedure, states, however, that “[t]o be germane, the amendment is required only to relate to the same subject. It may entirely change the effect of or be in conflict with the spirit of the original motion or measure and still be germane to the subject.”¹⁴⁰ Eighteenth century parliamentary records do not use the term “germane” to describe the necessary connection between the subject of a bill and its amendment,¹⁴¹ but they support the conclusion that the germaneness rule of *Mason’s Manual* was already in place. Use of the term “amend” may have strayed from the word’s connection to “mend,” but in parliamentary practice it still bore a sense different from complete erasure or repeal.¹⁴² There was merit to the distinction that Burke drew in 1790 when he spoke of foolish public policies

¹³⁹Cf. *Flint v. Stone Tracy Co.* 220 U.S. 107, 143 (1911) (upholding a Senate amendment against an Origination Clause challenge in part because the amendment was germane to the subject of the original bill).

¹⁴⁰MASON’S MANUAL, *supra* note 1, at 272.

¹⁴¹Compare *Flint v. Stone Tracy Co.* 220 U.S. 107, 143 (1911) (upholding a Senate amendment against an Origination Clause challenge in part because the amendment was germane to the subject of the original bill).

The use of the word “germane” to mean “relevant” or “pertinent” dates to the early seventeenth century, OXFORD ENGLISH DICTIONARY ONLINE, <http://www.oed.com.weblib.lib.umt.edu:8080/view/Entry/77863?redirectedFrom=germane#eid>, but its use to indicate a necessary connection between an original bill and a proposed amendment seems not to have arisen until the nineteenth century. MASON’S MANUAL, *supra* note 1, at 272 (discussing the germaneness requirement, and citing sources dating no earlier than the nineteenth century).

¹⁴²18 COBBETT, *supra* note 1, at 656-57 (reporting Lord Camden as stating that “no amendment, nor any thing [sic] short of a total repeal of it, would be sufficient.”). (May 17, 1775).

undertaken in “a spirit well calculated to overturn states, but perfectly unfit to amend them.”¹⁴³

At least one commentator, relying principally on a passage in Jefferson’s *Manual of Parliamentary Practice*,¹⁴⁴ has maintained that completely unrelated substitutes-as-amendments were permitted in Parliament. In the passage relied on, Jefferson cited Hatsell’s treatise for the proposition that an “amendment” could include a complete substitute that might “totally alter the nature of the proposition.”¹⁴⁵ In fact, however, Hatsell does not go so far: He reports no incidents in which an amendment worked a complete replacement and no amendments that altered the subject of the original bill. Hatsell reports only rare incidents in which the wording of a resolution was altered to change its political thrust.¹⁴⁶

Jefferson also cited Antichell Grey’s *Debates* to conclude that in Parliament, “A new bill may be ingrafted by way of amendment, on the words ‘Be it enacted, &c.’¹⁴⁷ Grey is, however, not much of a source for founding-era practice, since he covered only the period from 1667 through 1694, a 17-year

¹⁴³28 COBBETT, *supra* note 1, at 357 (Feb. 9, 1790).

¹⁴⁴Kysar, *Shell Bill*, *supra* note 1, at 686.

¹⁴⁵JEFFERSON’S MANUAL, *supra* note 1, at 61. Jefferson’s Rule 35.3 provides as follows:

Amendments may be made so as totally to alter the nature of the proposition; and it is a way of getting rid of a proposition, by making it bear a sense different from what was intended by the movers, so that they vote against it themselves. 2 *Hats.* 79, 4, 82, 84. A new bill may be ingrafted by way of amendment, on the words “Be it enacted, &c.” 1 *Grey* 190, 192.

¹⁴⁶The only examples he provides appear at 2 HATSELL, *supra* note 1, at 79 & 85, although he does state that evasive amendments are an option for the House of Commons when it wishes to avoid giving an opinion on a question. *Id.* at 82.

¹⁴⁷JEFFERSON’S MANUAL, *supra* note 1, at 61 (citing 1 Grey 190, 192).

stretch ending nearly a century before the Constitution was ratified. Further, the cited pages of Grey do not support Jefferson's conclusion. To the extent they are coherent, they appear only to report (1) dissatisfaction in the Commons with amendments to a bill added by the Lords and (2) vague suggestions that the Commons respond aggressively. I have reproduced the relevant passages in the footnote, so one may judge for oneself.¹⁴⁸

¹⁴⁸ The text is in two fragments, as follows:

Sir Nicholas Carew. Would have a new Bill sent up to the Lords, but not retain this Viper to destroy us all.

Sir Robert Howard. One line only to be grafted upon in this Bill, viz. "Be it enacted by the Lords and Commons." Suppose their Privilege and ours taken away by this Bill, yet they retain them by the Proviso.

Id. at 190.

Mr Sollicitor Finch. Not safe, nor useful, to throw out, or keep, this Bill—Unless to have one neither like this, nor what we sent up—Since they have taken this way not to amend ours, he would have this sent up by way of amendment, and upon conference we may show them how shameful it is we should have this sent us; and at a conference may be informed, whether the Privilege they mention in their Bill be such as is known by Law, or any new unknown one. By this Bill any man may settle a trust in a Peer, and the party avoid justice. If a man have a decree, how can it be executed?

Sir Thomas Meres. Neither fears to be dissolved, nor desires it—Would have it read a second time, the 10th of February, that the House may be full.

Sir Thomas Littleton. To send up a second Bill, would be to have a second foil—Would have us rest upon our votes—Would have it laid aside, with this consideration entered in the Journal, "That this shall not tend to the hindrance of any intercourse between the two Houses."

Mr Swynfin. Proper reason for not reading a Bill a second time, is, when no part of it can be mended. In the enacting Clause, viz. that no cause of original complaint shall be tryed, &c. it is a

D. Summary of British Practice

An American founder reasonably familiar with British parliamentary practice would have noted the following: All money bills were introduced first in the House of Commons, and had to be passed by that chamber before being sent to the Lords.¹⁴⁹ That was the meaning of the term “originate.” The typical money bill created or extended one or more taxes or other revenue sources and earmarked them to fund designated spending. The “money bill” category also included fees-for-service such as tolls and, in the view of many, exactions for regulatory purposes.

An originating chamber enjoyed the prerogative of initiating “hotch-potch bills.” But the Lords resisted “tacking,” the addition of non-financial terms to money bills. The effect of the Lords’ resistance was to limit money bills to the subject of money.

The Commons took the constitutional position that the Lords could not proffer amendments to money bills, but could only accept or reject them entirely. Some Peers disagreed, and claimed for their chamber full power to propose amendments. Sometimes the Lords did offer amendments, only to see

plain owning, assuming, and now enacting, that nothing shall be taken from the Lords, but what is in express words taken by this Act; we are content not to be troubled with civil Causes, tryable in any other Court, but reserve still a power— That word "lower House" was never used but in Henry VIIIth's time, when the House of Commons was much imposed upon—This breaks off our intercourse only as to this business, but nothing else; you may send up any vote, or reasons, why you lay it aside.

Id. at 192.

¹⁴⁹ACHERLEY, *supra* note 1, at 45-46 (asserting that the power of origination grants to the Commons, “the *First Commencement and Consideration, and the sole Modeling in their House*”); DE LOLME, *supra* note 1, at 67 (stating, “All Bills for granting Money must have their beginning in the House of Commons: the Lords cannot take this object into their consideration but in consequence of a bill presented to them by the latter”).

the Commons contemptuously discard them as a breach of privilege. On rarer occasions, the Commons acceded to the Lords' amendments or negotiated over them.

The amendment power was broad and an amendment could even reverse the political thrust of the underlying bill. But amendment was limited to the subject-matter of the original. In other words, it had to address matters within the same accepted categories. Only an originating chamber could designate the general subject(s) of a bill or create a hodge-podge. The amending chamber could not add a new subject, change the subject, or create a hodge-podge. Amendment practice in Parliament probably did not extend to complete substitutes, even if germane.

III. FOUNDING-ERA LEGISLATIVE PRACTICE: AMERICAN CONSTITUTIONS AND LEGISLATURES

A. *American Constitution-Drafting: Background Information*

Political leaders in Britain's North American colonies generally were familiar with parliamentary procedures, including the practices prevailing (and the practices contested) pertaining to money bills.¹⁵⁰ In fact, colonial legislatures imitated Parliament by adopting "supply bills" comprised of taxes earmarked for designated spending.¹⁵¹ Many Americans had long wished for an origination rule in the colonies:¹⁵²

¹⁵⁰Supra Part II.A; FISHER, *supra* note 1, at 133. Fisher's book is a classic exposition of the Constitution's roots in earlier documentary history.

¹⁵¹E.g., *An Act for the Supply of the Treasury* (Mass., May 13, 1753), available at *Eighteenth Century Collections Online* (imposing various kinds of levies and appropriating funds). For discussion of a Maryland colonial supply bill, see "A FRIEND TO MARYLAND," AN ANSWER TO THE QUERIES ON THE PROPRIETARY GOVERNMENT OF MARYLAND INSERTED IN THE PUBLIC LEDGER (1764). See especially *id.* at 61-63 (containing a letter from the upper house to

[T]he colonists always insisted that [the power of origination of money bills] belonged to them in all their [lower house] legislative bodies as a matter of course because they were free-born Englishmen. In Pennsylvania, especially, they contended for it against their proprietors and deputy-governors with the greatest persistency, and insisted on the right in its fullest extent,—namely, that money-bills should not only originate in the lower house of assembly, but should also be either accepted or rejected by the council or upper house without any attempt to amend them.¹⁵³

In the years immediately before the Revolution, however, the origination issue was overshadowed by Parliament's imposition of financial exactions on America. Some of these took the form of restrictive tariffs as part of a scheme for regulating commerce among units of the British Empire. Other exactions were imposed to raise revenue. Most American opinion-molders conceded that Parliament (or, in the argument of James Wilson, the Crown)¹⁵⁴ had authority to impose the former. They agreed that the colonists had consented to central regulation for the general welfare of the Empire.¹⁵⁵

the lower discussing the bill and alluding to the colonial-era power of the upper house to amend).

¹⁵²FISHER, *supra* note 1, at 133. Zotti & Schmitz, *supra* note 1, at 70-82 cite and quote language requiring popular consent in the colonies for taxation and they see therein precedents for lower house origination, but I do not read any of that language as *requiring* lower house origination.

¹⁵³FISHER, *supra* note 1, at 133.

¹⁵⁴JAMES WILSON, CONSIDERATIONS ON THE NATURE AND THE EXTENT OF THE AUTHORITY OF THE BRITISH PARLIAMENT 33 & 34 (1774).

¹⁵⁵E.g., DICKINSON, *supra* note 1, at 7 (stating, “The parliament unquestionably possesses a legal authority to regulate the trade of Great Britain, and all her colonies. Such an authority is essential to the relation

However, they maintained that they had never consented to exactions for raising revenue.

In phrasing their objections, the colonists argued that they had never consented be *taxed* by anyone but themselves, and that it was the right of Englishmen not to be taxed without their consent. Contemporaneous dictionaries defined “tax” to include regulatory exactions,¹⁵⁶ but Americans developed a more specific usage: A tax was a levy adopted to raise money rather than to regulate.

This usage was refined by John Dickinson, author of the explosive series of *Letters from a Farmer in Pennsylvania* (1767-68).¹⁵⁷ “To the word ‘tax,’ ” Dickinson wrote, “I annex that meaning which the constitution and history of *England* require to be annexed to it; that is—that it is *an imposition on the subject, for the sole purpose of levying money.*”¹⁵⁸ He noted that a resolve of the 1765 Stamp Act Congress had stated, “*ALL supplies to the crown, being free gifts of the people, it is unreasonable, and inconsistent with the principles and spirit of the British constitution, for the people of Great Britain to grant to his Majesty the property of the colonies.*”¹⁵⁹ He then added, “Here is no distinction made between *internal* and *external* taxes. . . . This language is clear and important. A ‘TAX’ means an imposition to raise money.”¹⁶⁰

between a mother country and her colonies; and necessary for the common good of all”) (italics in original).

¹⁵⁶See, e.g., JOHNSON, *supra* note 1 (unpaginated) (defining “tax” as “an impost; a tribute imposed; an excise; a tallage,” without distinguishing the purpose as regulatory, revenue-raising, or both).

¹⁵⁷DICKINSON, *supra* note 1.

¹⁵⁸DICKINSON, *supra* note 1, at 21 (Italics in original).

¹⁵⁹DICKINSON, *supra* note 1, at 23.

¹⁶⁰DICKINSON, *supra* note 1, at 23.

Dickinson's identification of taxes with revenue had been foreshadowed in the work of Richard Bland,¹⁶¹ and later colonial pamphleteers adopted it, including John Adams and James Wilson.¹⁶² Six years after Dickinson published the *Farmer* essays, the First Continental Congress (1774) adopted the same distinction when it complained of taxes imposed, "for the express purpose of raising a Revenue."

The identity between taxes and pure revenue-raising was fundamental to the American cause during the Revolution, exemplified by the famous slogan: "No taxation without representation." Note that the slogan said nothing of regulatory exactions or appropriations. This identity also survived the Revolution to influence the Constitution and the constitutional debates: It was the assumption behind a motion by Pennsylvania's George Clymer at the Constitutional Convention,¹⁶³ and it surfaced again during the ratification debates.¹⁶⁴ Within the text of the Constitution, it is reflected in the framers'

¹⁶¹RICHARD BLAND, AN INQUIRY INTO THE RIGHTS OF THE BRITISH COLONIES (1766).

¹⁶²JOHN ADAMS, NOVANGLUS, OR A HISTORY OF THE DISPUTE WITH AMERICA (1774); JAMES WILSON, CONSIDERATIONS ON THE NATURE AND THE EXTENT OF THE AUTHORITY OF THE BRITISH PARLIAMENT (1774).

¹⁶³2 FARRAND'S RECORDS, *supra* note 1, at 363 (Madison, Aug. 21, 1787) (reporting that Clymer "moved as a qualification of the power of taxing Exports that it should be restrained to regulations of trade, <by inserting after the word "duty" Sect 4 art VII the words> 'for the purpose of revenue.'").

¹⁶⁴E.g., *Americanus II*, VA. INDEPENDENT CHRONICLE, Dec. 19, 1787, reprinted in 8 DOCUMENTARY HISTORY, *supra* note 1, at 244, 248 (stating, "The house of representatives, which has the exclusive right of originating Bills of taxation, is composed of members elected directly by the people in the most exact proportion.") Note how the word "taxation" is used as a proxy for "Bills for the raising of Revenue". See also *The State Soldier I*, VA. INDEPENDENT CHRONICLE, Jan. 16, 1788, 8 DOCUMENTARY HISTORY 303, 305 (same).

Accord: Zotti & Schmitz, supra note 1, at 100-01.

decision to itemize separate a “Tax” and a “Duty.”¹⁶⁵ This was because a duty might be imposed either for revenue or for regulation; if it was a regulatory exaction, it did qualify as a tax.¹⁶⁶ This usage influenced state constitutions as well.¹⁶⁷

In sum: Three background facts necessary for understanding early post-Independence legislative practice in the early American states are as follows:

- * Leading founders were generally familiar with parliamentary procedure;
- * many wished to extend money-bill origination rules to America; and
- * among “money bills,” they considered revenue raisers (taxes) as a distinct, particularly important, subcategory.

B. How the American States Adopted New Rules

Twelve of the fourteen states (including Vermont) adopted constitutions between Independence and the composition of the federal Constitution. (Connecticut and Rhode Island, whose royal charters were uncommonly democratic, were satisfied to modify them.) This Part III.B reviews those state constitutions ratified between 1776 and 1778. In the aggregate, they reflect two trends: (1) increasing popular control over money bills and (2) the division of the “money bill” concept into components.

¹⁶⁵U.S. CONST. art. I, §9, cl. 1 (“a Tax or duty may be imposed on such Importation”) & cl. 5 (“No Tax or Duty shall be laid on Articles exported from any State.”).

¹⁶⁶However, the duties, imposts and excises authorized by U.S. CONST. art. I, §8, cl. 1 apparently were those designed to raise revenue. *See* NATELSON, ORIGINAL CONSTITUTION, *supra* note 1, at 88-89.

¹⁶⁷*See* Part III.B (particularly the material on the Maryland constitution of

The only state constitutions adopted between 1776 and 1778 that did not augment lower-house control over money bills were those of New York and North Carolina. In North Carolina it seems to have been hardly necessary, since the new state senate was but a smaller image of its house of commons.¹⁶⁸ Of the remaining ten constitutions from that era, those of Georgia, Pennsylvania, and Vermont chose the most radical course: They abolished their upper houses altogether.¹⁶⁹ This helps explain why at the Constitutional Convention, Pennsylvania president Benjamin Franklin openly suggested unicameralism as an answer to origination issues.¹⁷⁰

Virginia's 1776 constitution created a state senate, but prescribed that *all* bills, financial or not, originate in the house of delegates. The senate could amend most bills—but not “money-bills.”¹⁷¹ New Jersey adopted the putative British rule by banning upper house amendment of any “money bills.”¹⁷² The

1776).

¹⁶⁸Both were elected to annual terms. N.C. CONST. (1776), arts. II & III. The New York senate was a more remote body, elected for staggered four year terms in large districts. N.Y. CONST. (1777), art. XI.

¹⁶⁹GA. CONST. (1777), art. II; PA. CONST.(1776), § II; VT. CONST. (1777), ch. II, § ii.

¹⁷⁰1 FARRAND'S RECORDS, *supra* note 1, at 546 (Madison, Jul. 6, 1787) (quoting Franklin as saying, “As to the danger or difficulty that might arise from a negative in the 2d. [house] where the people wd. not be proportionally represented, it might easily be got over by declaring that there should be no such Negative: or if that will not do, by declaring that there shall be no such branch at all.”).

¹⁷¹VA. CONST. (1776) (unnumbered) (“All laws shall originate in the House of Delegates, to be approved of or rejected by the Senate, or to be amended, with consent of the House of Delegates; except money-bills, which in no instance shall be altered by the Senate, but wholly approved or rejected.”).

¹⁷²N.J. CONST. (1776), art. VI:

That the Council shall also have power to prepare bills to pass into laws, and have other like powers as the Assembly, and in all respects be a free and independent branch of the Legislature

Massachusetts legislature's proposed 1778 constitution, disapproved by the voters, would have fit the same pattern.¹⁷³

Four states limited upper house control over financial measures, but split the “money bill” concept into component parts. Those states were Delaware, Maryland, South Carolina, and New Hampshire.

Delaware was the home of John Dickinson when he was not working in Philadelphia. Its constitution was drafted and adopted in September, 1776 by a convention chaired by Dickinson’s friend (and, subsequently, Constitutional Convention colleague) George Read. The document provided:

All money-bills *for the support of government* shall originate in the house of assembly, and may be altered, amended, or rejected by the legislative council. All other bills and ordinances may take rise in the house of assembly or legislative council, and may be altered, amended, or rejected by either.¹⁷⁴

As we have seen, “money-bills for the support of government” encompassed both taxes and spending, and that is how the Delaware legislature construed it.¹⁷⁵ The term did not encompass regulatory measures. It is unclear whether it encompassed fees-for-service such as tolls.

of this Colony; save only, that they shall not prepare or alter any money bill—which shall be the privilege of the Assembly

¹⁷³FISHER, *supra* note 1, at 135 (“Excepting bills and resolves levying and granting money or other property of the State, which shall originate in the house of representatives only, and be concurred or non-concurred in whole by the senate.”).

¹⁷⁴DEL. CONST. (1776), art. 6 (italics added).

¹⁷⁵MINUTES OF THE COUNCIL OF THE DELAWARE STATE, FROM 1776 TO 1792, 616-17 (Dover, James Kirk & Son, Printers 1886) (Feb. 12, 1781). The council had sent the assembly an appropriation bill, whereupon the assembly:

“Resolved, That the same, being a money bill for the support of Government, ought to have originated in the House of Assembly,

Two months later, Maryland (perhaps coincidentally, Dickinson's birthplace and early family home) adopted a refined origination clause worth reproducing at length:

Art. X. That the House of Delegates may originate all money bills. . . .

XI. That the Senate may be at full and perfect liberty to exercise their judgment in passing laws—and that they may not be compelled by the House of Delegates, either to reject a money bill, which the emergency of affairs may require, or to assent to some other act of legislation, in their conscience and judgment injurious to the public welfare—the House of Delegates shall not on any occasion, or under any presence annex to, or blend with a money bill, any matter, clause, or thing, not immediately relating to, and necessary for the imposing, assessing, levying, or applying the taxes or supplies, to be raised for the support of government, or the current expenses of the State: and to prevent altercation about such bills, it is declared, that no bill, imposing duties or customs for the mere regulation of commerce, or inflicting fines for the reformation of morals, or to enforce the execution of the laws, by which an incidental revenue may arise, shall be accounted a money bill: but every bill, assessing, levying, or applying taxes or supplies, for the support of government, or the current expenses of the State, or appropriating money in the treasury, shall be deemed a money bill.

agreeable to the sixth section of the Constitution of this State, and that House cannot proceed upon the bill aforesaid.

XXII. That the Senate may originate any other, except money bills, to which their assent or dissent only shall be given; and may receive any other bills from the House of Delegates, and assent, dissent, or propose amendments.¹⁷⁶

Like the Delaware instrument, therefore, the Maryland constitution included taxes and spending in the origination rule, but excluded regulatory levies and was unclear on the subject of local fees-for-service. The Maryland constitution also responded to a history of fierce parliamentary disputes by outlawing the practice of “tacking.”

South Carolina’s 1776 and 1778 constitutions likewise forbade upper house amendment of “money bills for the support of government” (taxes and spending) but excluded from the ban regulatory impositions and, at least by prevailing interpretation, fees-for-services such as tolls.¹⁷⁷ On the other hand, the 1776 New Hampshire Constitution split the “money bill” concept another way: It provided that “all bills, resolves, or votes for raising, levying and collecting money originate in the house of Representatives”—language that

The council acquiesced in this determination after the assembly initiated a duplicate bill. *Id.*

¹⁷⁶MD. CONST. (1776), arts. X, XI & XXII.

¹⁷⁷S.C. CONST. (1776), ART. 7 (All money-bills for the support of government shall originate in the general assembly, and shall not be altered or amended by the legislative council, but may be rejected by them.”); S.C. CONST. (1778), art. XVI (“all money bills for the support of government shall originate in the house of representatives, and shall not be altered or amended by the senate, but may be rejected by them.”).

See also S.C. H.R. JOUR. (1782), *supra* note 1, at 117, 119 & 120 (Feb. 24-25, 1782) (negotiating with senate over that body’s amendment of amercement bill); S.C. H.R. JOUR (1776-80), *supra* note 1, at 185 (Aug. 31, 1779) (reporting senate initiation of bill raising ferry rates); *id.* at 205 (Sept. 7, 1779) (reporting house passage); *id.* at 209 (Sept. 8, 1779 (reporting senate passage). The 1782 measure occurred after the house had successfully asserted the privilege

included taxes, fees-for-services such as tolls, and perhaps regulatory levies, but excluded spending.¹⁷⁸

C. How the American Rules Continued to Evolve

As we have seen, reforms in the British Parliament during the 1780s began to sever the “money bill” concept into appropriations (which became much more detailed) and revenue.¹⁷⁹ Similarly, we have seen that in America, revolutionary rhetoric and state constitution writers began to divide the “money bill” concept into its component parts.¹⁸⁰

State legislative journals reveal the same trend.¹⁸¹ Before Independence, American lawmakers, like their British counterparts, adopted “supply bills” consisting of mixed taxes and appropriations.¹⁸² After Independence, mixed bills were rare: There were tax bills, appropriation bills (which might be called “supply bills”),¹⁸³ regulatory measures, and (less frequently) borrowing and local-fee-for service bills.¹⁸⁴ Each category was

against senate amendment of other money bills, and the 1779 measure at the time it was doing so. See *infra* notes ____ and accompanying text.

¹⁷⁸N.H. CONST. (1776) (no article numbers).

¹⁷⁹*Supra* notes ____ and accompanying text.

¹⁸⁰*Supra* Parts III.A & III.B.

¹⁸¹Zotti & Schmitz, *supra* note 1, at 85-91, summarize state constitutional origination requirements before 1790, but do not reflect the differences in the content of those requirements nor their evolution in subsequent legislative practice.

¹⁸²*Supra* note ____ and accompanying text.

¹⁸³E.g., N.Y. ASSEM. JOUR. 60 (Feb. 28, 1786) (so calling an appropriation bill).

¹⁸⁴For examples from one state, see e.g., S.C. H.R. JOUR (1776-80), *supra* note 1, at 211 (Sept. 8, 1779) (tax bill); 160 (Oct. 17, 1776) (appropriation for “watch companies” [teams for night duty]); 198 (Sept. 5, 1779 (borrowing bill); 205 (Sept. 7, 1779) (ferriage bill). On local fee-for-service as a money bill, see 1 WILLIAM BLACKSTONE, COMMENTARIES at *164 (“money for private benefit, and

becoming the “single subject” it represents in most state legislatures today. But I have found no evidence of further subdivision: sweeping tax measures¹⁸⁵ and omnibus appropriation bills¹⁸⁶ continued to be passed.

A concomitant development was the refinement of state origination rules. As we shall see, this development was reflected in state constitutions adopted after 1778, but it began earlier. It took two forms: (1) constricting the scope of the term “money bill” to fewer than all of its traditional components and (2) granting the upper chamber power to amend.

Refinement of state origination rules was encouraged by a series of inter-chamber disputes in states with such rules. In Britain the Crown could resolve such disputes by dissolving or proroguing Parliament, but American chief executives had no comparable power.¹⁸⁷ Inter-chamber contention could, therefore, continue for some time.

The 1776 and 1778 South Carolina constitutions both confined the house origination requirement to taxes and appropriations, and prescribed that the upper house could not amend such measures. The legislative council, as the 1776 constitution called the upper chamber, proved prickly about its

collected in a particular district; as by turnpikes, parish rates [local taxes], and the like”).

¹⁸⁵E.g., N.Y. ASSEM. JOUR., *supra* note 1, at 91-92 (Mar. 25, 1778) (referencing a bill containing different kinds of taxes); N.Y. SEN. JOUR., *supra* note 1, at 99-100 (Mar. 28, 1778) (same). Thus, a broad New York revenue measure considered by the 1786 legislature was entitled merely “an Act for Raising Monies by Tax.” N.Y. ASSEM. JOUR., *supra* note 1, at 31 (Feb. 4, 1786) (reporting house order “That a bill be prepared and brought in, for the raising the sum of [blank] by tax, within this State); *id.* at 80 (Mar. 13, 1786) (referring to the measure as “An act for raising monies by tax”).

¹⁸⁶E.g. 1780 N.J. PROCEEDINGS, *supra* note 1, at 55 (Dec. 12, 1780).

¹⁸⁷E.g. 1 FARRAND’S RECORDS, *supra* note 1, at 546 (Madison, Jul. 6, 1787) & 2 FARRAND’S RECORDS, *supra* note 1, at 275 (Aug. 13, 1787) (reporting remarks by James Wilson).

dignity,¹⁸⁸ and notwithstanding the constitutional ban insisted on amending money bills.¹⁸⁹ The general assembly initially acquiesced,¹⁹⁰ but it soon began to reject all the legislative council's amendments—even those agreed with. The general assembly then restored each amendment it favored by amending the bill itself.¹⁹¹

Under the 1778 constitution, the senate, instead of amending directly, transmitted “schedules” (lists) of money-bill amendments to the house of representatives, expecting the house to consider them on third reading.¹⁹² On September 2, 1779, the house of representatives issued a letter to the senate labeling the senate’s procedure “unparliamentary” (improper).¹⁹³ There was a further exchange of tart notes over the next few days.¹⁹⁴ Meanwhile, the house struck all senate amendments to a borrowing ordinance on the ground

¹⁸⁸S.C. H.R. JOUR (1776-80), *supra* note 1, at 21 (Apr. 2, 1776) (sending back house message for insufficiently dignified address).

¹⁸⁹S.C. H.R. JOUR (1776-80), *supra* note 1, at 25 (Apr. 3, 1776) (reproducing a legislative council note stating it was not a mistake for it to have amended an appropriation bill).

¹⁹⁰S.C. H.R. JOUR (1776-80), *supra* note 1, at 29-30 (Apr. 3, 1776) (adopting appropriations measure the senate had amended).

¹⁹¹S.C. H.R. JOUR (1776-80), *supra* note 1, at 160 (Oct. 17, 1776). It is unclear whether the amendments then immediately added had been those inserted by the legislative council. The council did, however, accede to the lower house bill. *Id.* at 162.

¹⁹²E.g., S.C. H.R. JOUR (1776-80), *supra* note 1, at 189 (reproducing senate president’s note of Sept. 1, 1779). For another use of “schedule” to describe a list of proposed amendments, *see, e.g.*, S.C. H.R. JOUR. (1782), *supra* note 1, at 82 (Feb. 14, 1782).

¹⁹³E.g., S.C. H.R. JOUR (1776-80), *supra* note 1, at 189 (Sept. 2, 1779).

¹⁹⁴S.C. H.R. JOUR (1776-80), *supra* note 1, at 191 (Sept. 2, 1779) (reproducing note of senate president Charles Pinckney); *id.* at 192 (Sept. 3, 1779) (reproducing note of house speaker Thomas Farr).

that the measure was an “Ordinance . . . for a supply for the support of Government,” which the senate had no power to amend.¹⁹⁵

The struggle continued in this vein for about week,¹⁹⁶ with the senate continuing to act on tax bills simultaneously with the house rather than waiting for the house to complete its own procedures first.¹⁹⁷ On September 9, the house adopted a formal resolution that, while acknowledging that it previously had acquiesced to some senate amendments, stated that it no longer would do so.¹⁹⁸ That appeared to have sealed a victory for the house.

In February, 1780, the house adopted, without senate amendment, a large tax increase. The bill was then sent to the senate.¹⁹⁹ Before the upper chamber could take action, however, British troops rescued South Carolina’s taxpayers by invading the state and scattering the legislature.²⁰⁰

Although one might censure the conduct of the South Carolina legislative council and senate for trying to amend bills without authority to do so, those chambers were responding to a serious practical inconvenience. One advantage of bicameralism is that one chamber may identify technical problems in a bill that the other chamber has not noticed. The South

¹⁹⁵S.C. H.R. JOUR (1776-80), *supra* note 1, at 199 (Sept. 5, 1779). This session was held on a Sunday, a phenomenon I had not seen before within the founding era records. It may reflect the seriousness of the military situation.

¹⁹⁶S.C. H.R. JOUR (1776-80), *supra* note 1, at 202-03 (Sept. 6, 1779) (reproducing letter of senate president Charles Pinckney).

¹⁹⁷S.C. H.R. JOUR (1776-80), *supra* note 1, at 211 (Sept. 8, 1779) (reporting senate action on tax bill).

¹⁹⁸S.C. H.R. JOUR (1776-80), *supra* note 1, at 214 (Sept. 9, 1779) (reporting house resolution).

¹⁹⁹S.C. H.R. JOUR (1776-80), *supra* note 1, at 279 (Feb. 5, 1780) (reporting origin of a “tax for the publick service,” by Rep. David Ramsey, the famous physician and historian). *See also id.* at 283, 287-90, 292 & 292-93 (various dates) (reporting later proceedings in the bill).

²⁰⁰S.C. H.R. JOUR (1776-80), *supra* note 1, at xvi (editors’ introduction).

Carolina origination rule prevented the upper house from offering even amendments of that nature through normal legislative channels.

It is understandable, therefore, why three of the four delegates representing South Carolina at the Constitutional Convention vocally opposed any federal origination rule. Charles C. Pinckney,²⁰¹ Pierce Butler²⁰² and John Rutledge²⁰³ all pointed out that their state's proscription of senate amendment had provoked severe legislative disputes.²⁰⁴ These were disputes the South Carolina delegation had witnessed personally: Pinckney and Butler were each members of the legislature at the time, their younger colleague Charles Pinckney was serving as senate president, and Rutledge had been state president (governor).

In Virginia, similar conflict led to erosion of the 1776 constitution's ban on senate amendment of money bills.²⁰⁵ During 1777 and 1778, a battle raged between the senate and house of delegates over whether an appropriation was a kind of money bill.²⁰⁶ The appropriation in question was small: The

²⁰¹ FARRAND'S RECORDS, *supra* note 1, at 234 (Madison, Jun. 13, 1787) (reporting claim by Charles C. Pinckney that in South Carolina the rule "has been a source of pernicious disputes" and that as a practical matter, the state senate gives "informal schedules of amendments" to the house).

²⁰² FARRAND'S RECORDS, *supra* note 1, at 233 (Madison, Jun. 13, 1787) (complaining of tacking in South Carolina).

²⁰³ FARRAND'S RECORDS, *supra* note 1, at 279-80 (Madison, Aug. 13, 1787) (reporting remarks by John Rutledge).

²⁰⁴ FARRAND'S RECORDS, *supra* note 1, at 279-80 (Madison, Aug. 13, 1787)

²⁰⁵ VA. CONST. (1776) (unnumbered) ("All laws shall originate in the House of Delegates, to be approved of or rejected by the Senate, or to be amended, with consent of the House of Delegates; except money-bills, which in no instance shall be altered by the Senate, but wholly approved or rejected.").

²⁰⁶ The proceedings are reported in VA. H.D. JOUR. at 10 (Nov. 3, 1777) (reproducing petition by Johnson to the house); 20 (Nov. 11, 1777) (reproducing the house committee report recommending payment to Johnson), 32 (Nov. 18, 1777) (announcing that the senate has agreed to the

house of delegates had passed a bill authorizing reimbursement for the expenses of one Thomas Johnson. The senate sought to amend it. The house claimed it was a money bill, and the senate claimed it was not. The senate argued that money bills were limited to taxation/revenue measures.

Thomas Jefferson, then a member of the house of delegates, supported the position of his own chamber in a highly learned paper surveying British parliamentary precedent. (That document is instructive reading for anyone who thinks Jefferson was merely a revolutionary firebrand rather than a careful lawyer.) The senate then responded with a paper of its own.

One reading both papers can see that Jefferson won the intellectual debate, but that did not prevent him from losing the political debate. Immediately after a joint conference, the house of delegates responded with a device that had been used by the South Carolina house of representatives: Rather than adopt senate amendments, it drafted its own bill incorporating their substance.²⁰⁷ Thereafter, however, the house waived its objections to

Johnson bill with an amendment), 52 (Dec. 1, 1777) (mentioning the senate amendments to the Johnson bill), 54-55 (Dec. 4, 1777) (reproducing Jefferson's reasons against senate amendment power and his willingness to go to conference), 56 (Dec. 4, 1777) (stating that the senate agrees to go to conference with the house on the Johnson amendments), 70-71 (Dec. 9, 1777) (reproducing the senate argument that money bills do not include appropriations), 108-11 (Jan. 9, 1778) (reproducing Jefferson's detailed reasons against a senate power to amend) & 131 (Jan. 23, 1778) (reproducing Jefferson's report that the house had delivered its reasons against senate amendment to the senate).

See also VA. H.D. JOUR. at 15 (May 21, 1778) (reproducing the house committee report recommending payment to Johnson), 29 (May 30, 1778) (reporting house tabling of the senate amendment to Johnson bill) & 34-35 (June 1, 1778) (stating that the house rejected the effort by the senate to amend, and that the house adjourns after agreeing to a conference).

²⁰⁷VA. SEN. JOUR., *supra* note 1, at 12 (May 30, 1778) & 18 (May 30 & June 1, 1778) (apparently signifying that the house and senate reached a deal on the

senate amendment of appropriations, and the post-July, 1778 legislative journals disclose senators frequently amending appropriations with the acquiescence of the delegates.²⁰⁸ Only on revenue bills did the delegates remain firm.²⁰⁹ Just as the troubles in South Carolina induced its Constitutional Convention delegates to oppose an origination rule, so did the disputes in Virginia induce James Madison to do likewise.²¹⁰

The New Jersey constitution prescribed the black-letter version of the British rule: “[T]e Council [upper house] . . . shall not prepare or alter any money bill—which shall be the privilege of the Assembly.”²¹¹ Accordingly, tax bills and appropriations (“bills for the support of government”) were prepared

Johnson bill whereby the house passed a new bill incorporating the senate amendments, and the senate objected but accepted).

There had been two conferences, and apparently the parties agreed for the future to avoid this procedure by allowing the senate to amend appropriation bills.

²⁰⁸E.g., VA. SEN. JOUR. at 30 (Nov. 18, 1778) (reporting house approval of senate appropriation amendments).

²⁰⁹E.g., VA. H.D. JOUR. at 86 (Nov. 26, 1783):

The House proceeded to consider the amendments of the Senate, to the bill “declaring tobacco, hemp, flour or deer skins, a payment of certain taxes;” and the same were read.

The first amendment being read a second time;

A motion was made, and the question being put, that it is the opinion of this House, that the said bill being a money bill, the Senate hath no power to amend or alter, but must wholly approve or reject the same,

It was resolved in the affirmative.

On a motion made,

Resolved, That this House doth disagree to the amendments of the Senate to the said bill.

²¹⁰2 FARRAND’S RECORDS, *supra* note 1, at 276-77 (Madison, Aug. 13, 1787) (reporting remarks by James Madison).

²¹¹N.J. CONST. (1776), art. VI.

and passed first by the assembly.²¹² When approving such a bill the council announced that it was doing so without amendments;²¹³ when rejecting one, it rejected it as a whole.²¹⁴

Yet New Jersey also failed to adhere firmly to the British origination rule. Almost from the time the state constitution was ratified, the council amended bills that proposed regulatory levies and single-purpose appropriations.²¹⁵ Furthermore, in 1778 the assembly itself conceded that an

²¹²1777 N.J. PROCEEDINGS, *supra* note 1, at 198 (Oct. 9, 1777) (referencing “an Act to raise a Fund by general Taxation for defraying the necessary Expences [sic] of the State”); 1780 *id.* at 55 (Dec. 11, 1780) (appropriations bill).

²¹³1777 N.J. PROCEEDINGS, *supra* note 1, at 32 (Nov. 28, 1777) (reporting “A Message from the Council” by a Mr. Cooper). *Id.* at 32 (Nov. 27, 1777) (stating that council had passed tax bill “without any Amendment”).

²¹⁴1776 N.J. PROCEEDINGS, *supra* note 1, at 29 (Oct. 8, 1776) (reporting Council rejection of “support of government” bill as a whole); 1782 *id.* at 17 (Dec. 21, 1782) (reporting a sample tax bill for 1783); *id.* at 85 (Dec. 24, 1782) (reporting council rejection of tax bill); *id.* at 88 (Dec. 26, 1782) (reporting another council rejection just before end of session).

²¹⁵E.g. 1776 N.J. PROCEEDINGS, *supra* note 1, at 44 (Nov. 21, 1776) (reporting that assembly passed amendments made by council to bill setting fees to be collected for commissions); *id.* at 46 (Nov. 22, 1776) (reporting that assembly agreed to 8 of 9 council amendments); *id.* at 48 (Nov. 25, 1776) (reporting that assembly agreed to conference report on last amendment); *id.* at 110 (Mar. 15, 1777) (reporting that council amended bill to give salary to secretary in lieu of fees on commissions).

See also 1778 N.J. PROCEEDINGS, *supra* note 1, at 58 (Dec. 11, 1778) (setting forth an example of council amendment of money bill, although amendments were rejected by assembly):

The Bill, intitled, *An Act for the Relief and Support of maimed and disabled Officers and Soldiers, and of the Widows and Children of such as fall in Battle, or otherwise lose their Lives in the military Service*, was read, with the Amendments made thereto by the Council; and the said Amendments being again read in their Places, on the Question, Whether the House agrees to the said Amendments? It passed in the Negative.

Ordered,

appropriation for supervising prisoners was not a money bill of the kind that foreclosed council amendment.²¹⁶ When the assembly finally (in 1780) objected to the council amending appropriations, the upper house responded with a long list of precedents in which its power over such measures had gone unchallenged.²¹⁷ Apparently, its amendment prerogative was not questioned again.

The Maryland constitution explicitly excluded regulatory measures from its definition of “money bills,” and it specifically banned tacking.²¹⁸ This did not prevent conflict between the legislative chambers on financial issues. Although both chambers sometimes restrained themselves from provoking each other,²¹⁹ on other occasions the temptation to fight prevailed. The house of delegates apparently engaged in tacking despite the state constitutional

That Mr. Cripps and Mr. Ford do carry back to the Council the said Bill, with their Amendments, and acquaint them that this House doth not agree to the said Amendments, but do adhere to their Bill.

²¹⁶1778 N.J. PROCEEDINGS, *supra* note 1, at 52 (Dec. 9, 1778) (reporting that “The Bill, intitled, An Act for appointing a Commissary of Prisoners for the State of New-Jersey, and vesting him with certain Powers, was read the second Time; On the Question, Whether the said Bill is a Money-Bill, and therefore improper to be originated in Council ? It was carried in the Negative. . .”).

²¹⁷1780 N.J. PROCEEDINGS, *supra* note 1, at 57-58 (Dec. 13, 1780) (reproducing “A Message from the Council”). The houses went to conference on the issue, *id.* at 58 (Dec. 14, 1780), but it appears that the council prevailed.

²¹⁸MD. CONST. (1776), art. XI.

²¹⁹MD. H.D. JOUR., *supra* note 1, at 99 (Jan. 26, 1781) (reporting that the house resolved not to consider whether a measure is a money bill so as to avoid disputes among the chambers); *id.* at 49 (Dec. 11, 1782) (reporting message from the senate stating that an appropriation bill may be considered by house as a money bill that it cannot amend, so it merely refuses assent and sends its reasons in a separate letter); *id.* at 87 (Jan. 12, 1784) (reproducing letter from house to senate saying that funding the civil list was

ban, provoking angry protests from the senate.²²⁰ The senate further responded by amending money bills to delete tacked language. Sometimes the house of delegates simply denied that challenged material was a tack,²²¹ or reaffirmed its privilege against senate amendments²²² and refused to consider those amendments.²²³ When the house objected to senate alterations, the senate retorted that the house’s decision to tack was a waiver of its privilege.²²⁴ The senate also interpreted its own privileges expansively.²²⁵ At the Constitutional Convention, two Maryland delegates cited their state’s experience as part of their arguments against House origination.²²⁶

The history in South Carolina, Virginia, New Jersey, and Maryland helps explain why several post-1778 state constitutions explicitly permitted

a money bill, but that the house agreed to a senate amendment and would send a separate bill for that purpose).

²²⁰MD. H.D. JOUR., *supra* note 1, at 69 (Apr. 3, 1777) (reporting senate refusal to approve a bill because of an alleged tack); *id.* at 176-77 (May 16, 1780) (reproducing a senate remonstrance against adding tender law onto a money bill, and claiming it was an “unconstitutional tack”).

²²¹E.g., MD. H.D. JOUR., *supra* note 1, at 151 (May 6, 1780).

²²²E.g., MD. H.D. JOUR., *supra* note 1, at 154 (May 8, 1780).

²²³E.g., MD. H.D. JOUR., *supra* note 1, at 80 (Jan. 9, 1783) (reporting house refusing to consider senate amendments on the ground that a defense funding bill was a money bill).

²²⁴MD. H.D. JOUR., *supra* note 1, at 84 (Jan. 10, 1784).

²²⁵MD. H.D. JOUR., *supra* note 1, at 187 (March 9, 1786) (reproducing message from the state senate referring to the inconvenience of the ban on amendments, and that a bill for regulation of poor is not a money bill); *id.* at 188 (adding in the letter that only bills that assess taxes and provide for “the general support of government” were money bills, excluding regulation of commerce and morals, and concluding that bills for raising money on the inhabitants of a particular county for that county or local purpose were not money bills).

the upper house to amend money bills. The 1780 Massachusetts charter provided that money bills were to originate in the state house of representatives, but that “the senate may propose or concur with amendments, as on other bills.”²²⁷ When New Hampshire replaced its earlier constitution in 1784, it adopted the Massachusetts formula.²²⁸ In 1790, Pennsylvania scrapped its unicameral system and adopted language tracking the new federal Constitution.²²⁹

D. The Scope of “Amendment” in American Practice

In America, as in Britain, the words “amend” and “amendment” ordinarily communicated a sense closely akin to “mend.” Thus, the 1788 American edition of William Perry’s *Royal Standard English Dictionary* defined “amend” as “to correct, to grow better;” and it defined an amendment as “a change for the better.”²³⁰ In America as in Britain one could refer to faulty roads being “amended.”²³¹

To see whether American legislative practice tracked the dictionary definition of “amend,” I examined legislative journals and similar records from the Continental and Confederation Congresses and from Vermont and

²²⁶2 FARRAND’S RECORDS, *supra* note 1, at 280 (Madison, Aug. 13, 1787) (reporting remarks by Charles Carroll and James McHenry).

²²⁷MASS. CONST. (1780), ch. I, §3, art. VII.

²²⁸N.H. CONST. (1784), Part II, The “Form of government” (“ALL money bills shall originate in the House of Representatives, but the Senate may propose or concur with amendments as on other bills.”).

²²⁹PA. CONST. (1790), art. I, § 20 (“All bills for raising revenue shall originate in the house of representatives; but the senate may propose amendments, as in other bills.”).

²³⁰PERRY, *supra* note 1 (unpaginated) (defining “amend” and “amendment”).

²³¹E.g., 1 CONNECTICUT RECORDS, *supra* note 1, at 76; 8 R.I. RECORDS, *supra* note 1, at 460; 9 *id.* at 277.

the other thirteen states.²³² The records show that in American, as in British, practice, the word was used in a sense broader than that reflected by the dictionaries: “Amend” frequently meant merely to “alter.”²³³ In America, as in Britain,²³⁴ how the word was used did not hinge on the nature of the item being amended. Most amendments were small,²³⁵ even if cumulatively the

²³²A caveat: The legislative journals for most of the states are incomplete. The problem is especially acute in the South, due in part to the ravages of the 1779-81 British invasion. *See supra* note 1 for sources surveyed for Connecticut, Massachusetts, Maryland, New Hampshire, New Jersey, New York, North Carolina, Rhode Island, South Carolina, and Virginia. Other resources used were as follows:

Delaware: MINUTES OF THE COUNCIL OF THE DELAWARE STATE, FROM 1776 TO 1792 (Dover, James Kirk & Son, Printers 1886)

Georgia: 1 & 2 THE REVOLUTIONARY RECORDS OF THE STATE OF GEORGIA (1908).

Pennsylvania: PA. GEN. ASSEM. MIN., *supra* note 1; 10-11 PA. ARCHIVES (1854-55) and 14-15 MINUTES OF THE SUPREME EXECUTIVE COUNCIL OF PENNSYLVANIA (1853).

Vermont: 3 STATE PAPERS OF VERMONT (1924) (covering the period 1778-81). and for Pennsylvania, PA. GEN. ASSEM. MIN., *supra* note 1; 10-11 PA. ARCHIVES (1854-55) and 14-15 MINUTES OF THE SUPREME EXECUTIVE COUNCIL OF PENNSYLVANIA (1853).

²³³E.g., 8 R. I. RECORDS, *supra* note 1 at 193-94 (General Assembly Proceedings, April 17, 1777) (“It is voted and resolved, that Jonathan Arnold, Henry Ward and Daniel Mowry, Esqs., be, and they are hereby, appointed a committee to revise, alter and amend an act for the relief of tender consciences. . . ”).

²³⁴*Supra* note ____ and accompanying text.

²³⁵E.g., 2 THE REVOLUTIONARY RECORDS OF THE STATE OF GEORGIA 297 (1908) (reporting a small insertion by way of amendment); 1 CONN. RECORDS, *supra* note 1, at 532-33 (Feb. 12, 1778) (reproducing general assembly’s recommendation of amendments to the proposed Articles of Confederation) E.g., 21 N.H. PAPERS, *supra* note 1, at 368 (Dec. 30, 1788) (reproducing a senate amendment changing the period of a tax from four to three years).

changes they wrought could become great.²³⁶ A few individual amendments were very significant, as when the Virginia senate sought to replace the entire house preamble to the famous bill “for establishing religious freedom.”²³⁷ I found no amendments irrelevant to the subject matter of their original bills, assuming that revenue is considered a single subject.²³⁸

On the other hand, the American records, unlike those in Britain, do report complete substitutes being offered as amendments. Outside of Massachusetts, these appear in the records only rarely, but that might reflect the fact that legislative journals did not report the content of most amendments.

In a complete substitute, all the language in a bill or resolution after the enacting clause (or after some other clause very early in the text) was removed and replaced with new language. In the Virginia legislature, an amendment was offered on June 8, 1780 that would strike everything after the phrase “resolved that” and insert new material.²³⁹ The amendment failed,

²³⁶See, e.g., VA. H.D. JOUR., *supra* note 1, at 106 (Jan. 5, 1785) (listing extensive amendments to a bill “for enabling British merchants to recover their debts from the citizens of this Commonwealth”); *id.* at 96-97 (Dec. 17, 1785) (listing extensive amendment to an election bill).

²³⁷VA. H.D. JOUR., *supra* note 1, at 117 (Dec. 29, 1785). VA. SEN. JOUR., *supra* note 1, at 61 (Dec. 23, 1785) (reporting an amendment that read, “Strike out the whole of the first page, and to the end of the 22d line of the second page,” and then inserting new matter).

²³⁸However, an amendment to a revenue measure might have a regulatory effect. See, e.g., 3 STATE PAPERS OF VERMONT 118-19 (1924) (recording a Vermont measure amending a statute [rather than a pending bill] to exempt those who supported “some sort of religious worship” from paying taxes for the support of town-designated denominations).

²³⁹VA. H.D. JOUR., *supra* note 1, at 36 (Jun. 6, 1780) (reporting first a small amendment being made, and then a substitute.):

Mr. Page reported, according to order, the resolutions agreed to yesterday by the committee of the whole House on the state of the Commonwealth; and he read the same in his place, and

but was not held to be out of order. On December 19 of the same year, a Virginia house committee offered a resolution addressing the alleged

afterwards delivered them in at the clerk's table, where the same were again read, and are as followeth:

Resolved, that it is the opinion of this committee, That ample and certain funds ought to be established, for sinking the quota of the continental debt due from this State in ten years.

Resolved, that it is the opinion of this committee, That certain funds ought to be established for furnishing to the continent the quota of this State, for the support of the war for the current year.

Resolved, that it is the opinion of this committee, That a specific tax ought to be laid for the use of the continent, in full proportion to the abilities of the people,

And the first resolution being read a second time, the amendment following was proposed to be made thereunto:

To strike out the word “ten,” and insert “fifteen.”

And the question being put, that the House do agree to the said amendment,

It was resolved in the affirmative.

The amendment following, was also proposed to be made to the said resolution:

To strike out from the word “that,” to the end of the resolution, and to insert “the act of Congress of the 18th of March last, ought to be adopted, that this Commonwealth will take upon itself its due proportion of the one hundred and eighty millions of dollars, issued by Congress, and recommended to be speedily called in by taxes or otherwise; and that the General Assembly will redeem or call in the same, and also establish certain funds for the redemption of this Commonwealth's due proportion of the new money to be issued in lieu thereof, in the manner and time proposed by Congress, as far as the circumstances of this Commonwealth will admit.”

And the question being put, that the House do agree to the said amendment,

It passed in the negative.

Ayes 25. Noes 59.

financial peccadillos of one of Virginia's congressional delegates, Meriwether Smith. The resolution stated: "*Resolved, that it is the opinion of this committee, That the said Meriwether Smith, is guilty of a misapplication of the public money, and that he ought to be forthwith recalled from Congress to answer for such misapplication.*" An amendment was offered as follows:

. . . to strike out from the word "resolved," to the end of the resolution; and to insert "that the accounts, of Meriwether Smith, Esq. appear to be unsatisfactory, inasmuch as the sum of 8,000*l.* and upwards remains thereby unaccounted for. And the Speaker of this House is desired to write to the said Meriwether Smith, Esq. and to require of him a full and explicit settlement of his accounts with the Commonwealth, as a delegate of this State in Congress; and that the same be laid before the next session of Assembly."²⁴⁰

This amendment was approved.

In New Jersey, a substitute was offered during proceedings on whether the state would participate in the 1780 Philadelphia Price Convention, an interstate gathering targeted at the problem of wartime inflation.²⁴¹ One of the resolutions offered by the relevant committee was:

That it is the Opinion of this Committee, that the Act for the Limitation of Prices, and to prevent the with-holding the Necessaries of Life from Sale, already agreed to be gone into at this Sitting, will be sufficient to enable the Purchasers for the

²⁴⁰VA. H.D. JOUR., *supra* note 1, at 58 (Dec. 19, 1780).

²⁴¹On this and other Founding Era conventions, see Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments,"* 65 FLA. L. REV. 615 (2013).

Army to procure all the Flour which this State will be able to furnish.²⁴²

The journal tells us that

[o]n considering the second Paragraph, an Amendment was moved in these Words, “That it is the Opinion of this Committee, that the Laws now in Force in this State, and those now under Consideration of the Legislature, will be sufficient to enable the Purchasers for the Army to procure all the Flour which this State will be able to furnish. . . ”²⁴³

and that “the Question being put, Whether the House agree to the said Amendment? It passed in the Affirmative.”²⁴⁴

In October, 1781, the New Jersey assembly heavily amended a bill to supplement “trading with the enemy” rules by replacing its title and one of its sections.²⁴⁵

The North Carolina records also disclose occasional use of complete substitutes as amendments. In May, 1777, the state house of commons sent to the senate a compensation proposal for the state treasurers, as follows:

This House have resolved that the Treasurers of this State be allowed after the rate of five hundred pounds each per annum during their continuance in office for the ensuing year in lieu and satisfaction of all services as Treasurers.²⁴⁶

The senate responded with complete substitute:

²⁴²1779 N.J. PROCEEDINGS, *supra* note 1, at 48 (Nov. 26, 1779).

²⁴³1779 N.J. PROCEEDINGS, *supra* note 1, at 48 (Nov. 26, 1779).

²⁴⁴1779 N.J. PROCEEDINGS, *supra* note 1, at 48 (Nov. 26, 1779).

²⁴⁵1781 N.J. PROCEEDINGS, *supra* note 1, at 28-29 (October 5, 1781).

²⁴⁶12 N.C RECORDS, *supra* note 1, at 62 (May 2, 1777).

This House have rec'd your message and resolve respecting the allowance to the Treasurers, and would propose the following resolve instead of that adopted by you.

Resolved that the two Treasurers of this State hereafter chosen be allowed the sum of five hundred pounds each per annum for the ensuing year, in lieu and satisfaction of all services as Treasurers.”²⁴⁷

Later the same year, the house offered amendments so extensive to a bill regulating state tobacco inspection that the changes bordered on qualifying as a complete substitute.²⁴⁸

The same practice of employing substitutes was followed at the North Carolina ratifying convention. In that state, ratification of the Constitution proceeded in two stages. The convention met initially in July and August of 1788, but adjourned without approving the instrument. In November of the following year it reconvened.²⁴⁹ The committee of the whole recommended this resolution:

Whereas the General Convention which met in Philadelphia, in pursuance of a recommendation of Congress, did recommend to the citizens of the United States a constitution or form of government, in the following words, viz: [setting forth the Constitution in its entirety]

²⁴⁷12 N.C RECORDS, *supra* note 1, at 63 (May 2, 1777).

²⁴⁸12 N.C. STATE RECORDS, *supra* note 1, at 189-90 (Dec. 9, 1777).

²⁴⁹22 N.C. STATE RECORDS, *supra* note 1, at 36-53 (reproducing proceedings of second session).

Resolved, That this Convention, in behalf of the freemen, citizens and inhabitants of the State of North Carolina, do adopt and ratify, the said Constitution and form of government.²⁵⁰

In response, opponents moved to amend so that the “whole of the report from the word ‘whereas’ be struck out, and that the following amendments to the Constitution or plan of government for the United States, previous to the adoption, be inserted in place thereof [setting forth certain constitutional amendments].”²⁵¹ The convention addressed this motion, but defeated it by a vote of 187-82. The convention then proceeded to ratify the Constitution, subsequently recommending amendments as well.²⁵²

I have been able to find one substitute amendment in Pennsylvania. The original was a proposed resolution for the appointment of a committee “to bring in a bill directing the commissioners of the city and several counties in this state” to make out an assessment roll. The substitute directed the assessment roll to be prepared “by each county with this state,” included a few other technical changes.²⁵³

The amendment qualifier in the Origination Clause derived from the Massachusetts constitution, so practice in that commonwealth may be of particular interest. Only one volume of the Massachusetts legislative journals has been published for the period between the adoption of the state constitution in 1780 and the ratification of the U.S. Constitution.²⁵⁴ It does

²⁵⁰22 N.C. STATE RECORDS, *supra* note 1, at 47-48 (reproducing proceedings of second session).

²⁵¹22 N.C. STATE RECORDS, *supra* note 1, at 45-46 (reproducing proceedings of second session).

²⁵²22 N.C. STATE RECORDS, *supra* note 1, at 46-53 (reproducing proceedings of second session).

²⁵³PA. GEN. ASSEM. MIN., *supra* note 1, at 74 (Dec. 2, 1785).

²⁵⁴MASS. H.R. JOUR., *supra* note 1.

reveal scrupulous adherence to the rule that money bills “originate” in the lower chamber:²⁵⁵ Inter-house committees could cooperate in drafting,²⁵⁶ but a money bill was introduced first in the lower house. Only if approved by that body, was the bill “sent up” to the senate.²⁵⁷ The Massachusetts senate might amend it and “send it down” to the house.²⁵⁸ Heavily amended bills apparently were routinely replaced with substitutes. In the house journal the phrase repeatedly recurs, “Read and concurred, as taken into a new draft.”²⁵⁹

I have not been able to identify substitute amendments in the records of the Continental and Confederation Congresses, but the power to amend seems to have been very broad. When discussing proposed instructions to diplomats, for example, one member (Meriwether Smith, in fact) moved to “to

²⁵⁵MASS. H.R. JOUR., *supra* note 1, at 22 (May 31, 1784) (referencing a committee report making real estate liable for payment of taxes when tenants leave a town); *id.* at 23 (same date) (first reading of act for assessing and collecting taxes in plantations) & 75 (June 19, 1784) (reporting a house resolve directing the Treasurer to pay to Jabez Hatch certain money out of continental tax, to be paid to creditors was sent by the House to the Senate).

²⁵⁶MASS. H.R. JOUR., *supra* note 1, at 41 (Jun. 5, 1784) (reporting that committee of both houses had drafted an impost bill, which was read for the first time, but does not previously appear in the records).

²⁵⁷MASS. H.R. JOUR., *supra* note 1, at 59 (Jun. 12, 1784) (reporting passage of impost law and that it was “Sent up for concurrence”).

²⁵⁸MASS. H.R. JOUR., *supra* note, at 76 (Jun. 19, 1784) (reporting that senate amended and passed a house lottery bill).

²⁵⁹E.g., MASS. H.R. JOUR., *supra* note 1, at 73 (Jun. 18, 1784) (reporting that house prepared a schedule “for the articles to be returned in order to take a new valuation of the several towns in the Commonwealth,” then sent it to the senate, which “Read and concurred, as taken into a new draft.”); *id.* at 87 (Jun. 23, 1784) (reporting that senate approved land cession bill, “as taken into a new draft”); 93 (Jun. 26, 1784) (reporting, “Read and concurred as taken into a new draft. Sent down for concurrence”) & 197 (Nov. 9, 1784) (reporting, “Read and concurred as taken into a new draft.”) This was a staple part of Massachusetts legislative practice over the years, see, e.g., MASS H.R. JOUR. 134 (Apr. 6, 1770), and it meant that the bill was re-written entirely.

strike out all that follows the words, ‘expectations of Congress,’” thereby gutting the instructions.²⁶⁰ The amendment was defeated, but apparently deemed in order.

On the other hand, every complete substitute I found addressed the same topic addressed by the original bill—and, indeed, addressed it quite closely. The practice regarding substitutes also reflected the American tendency to treat the components of the traditional “money bill” concept as separate subjects. Thus, I found no substitutes that attempted to add regulatory or appropriations measures onto revenue bills, or otherwise mixed any of the accepted categories.

As is true of the British records, the early American documents are incomplete, so it is theoretically possible that hand searches of hard-copy legislative folders in state archives would uncover evidence that some legislatures more closely limited the scope of permissible amendments, or applied different definitions of “amendment” to different categories of measures, or permitted substitutes unrelated to their originals. The evidence adduced so far, however, certainly places on those who believe such variations existed the burden of producing samples of them.

There is further evidence that the word “amendment” was assumed to encompass only alterations germane to the subject of the underlying original bill. This evidence consists of rules adopted by several legislative bodies. For example, in 1781 the New Hampshire house of representatives adopted a rule that limited motions to those to amend, postpone, or commit the matter before the house.²⁶¹ A necessary assumption behind the rule was that was

²⁶⁰Compare 20 J. CONT'L CONG 606-07 (Jun. 6, 1781) with the proffered amendment. *Id.* at 613 (Jun. 8, 1781).

²⁶¹8 N.H. PAPERS, *supra* note 1, at 8 (Jan. 9, 1776) (showing that the first set of rules for house of representatives had no provision regarding amendment); 740 (Dec. 20, 1777) (adding four rules, but none on amendments); & 919-21

that an “amendment” had to be relevant to its underlying motion; otherwise the provision would have been nugatory. The New Hampshire rule was reaffirmed in 1784,²⁶² 1785,²⁶³ and in slightly modified form, in 1786, 1787, and 1788.²⁶⁴ In 1789, it was tightened to provide that “when a motion is regularly before the House, no new one shall be received unless to postpone commit or amend it—And no new motion shall be admitted under colour of amendment as a Substitute of the motion under debate.”²⁶⁵

The use of the phrase “under colour of” is revealing. Although in modern usage the phrase can be used in a manner consistent with good faith,²⁶⁶ this was not true during the founding era. In the eighteenth century, the phrase carried strong associations of pretext, concealment, and falsehood.²⁶⁷ A “new motion . . . under colour of amendment as a Substitute”

(Dec. 20 1781) (showing the rules revised, included [at 920] the following: “9. While a question is before the House no motion shall be received, unless to amend or commit the same, or to postpone the consideration of the main question, or for having the yeas and nays entered on the Journal.”).

²⁶²20 N.H. PAPERS, *supra* note 1, at 70-71 (including among the rules of house adopted June 8, 1784 the following: “SEVENTH. While a question is before the House, no motion shall be received, unless to amend or commit the same, or to postpone the consideration of the main question, or for having the yeas and nays entered on the journal.”).

²⁶³20 N.H. PAPERS, *supra* note 1, at 339-340 (Jun. 2, 1785) (same).

²⁶⁴20 N.H. PAPERS, *supra* note 1, at 620 (June 10, 1786) (stating, “7th. When a motion is before the House, no other motion shall be received, unless to amend, divide, commit, postpone, reduce the same to writing, or to have the yeas and nays entered on the journals.” See also 21 *id.* at 43 (Jun. 8, 1787) (same rule); *id.* at 298 (Jun. 8, 1788) (same rule)

²⁶⁵21 N.H. PAPERS, *supra* note 1, at 591 (June 5, 1789).

²⁶⁶E.g. Colo. Rev. Stat. §38-41-108 (granting a short adverse possession period to persons who possess land “under claim and color of title, made in good faith”).

²⁶⁷BAILEY, *supra* note 1 (defining the noun “colour,” in addition to other meanings, as “pretence or show”); DYCHE & PARDON, *supra* note 1 (defining the verb “colour” as “to set a good face upon a bad matter; to conceal or hide

necessarily communicated the view that an substitute-by-way-of-amendment unrelated to the original bill was not a true amendment: It was a pretext—a lie.

The same year the New Hampshire house of representatives adopted its initial limit on the scope of motions, Confederation Congress provided that “No new motion or proposition shall be admitted under colour of amendment as a substitute for the question or proposition under debate until it is postponed or disagreed to.”²⁶⁸ Similarly, in 1784 the unicameral Pennsylvania legislature adopted the following rule:

When any motion is regularly before the House, the debate and decision thereon, shall not be interrupted by the admission of any other motion, except it be for the previous question, or for amending, postponing, or committing the original motion or subject in debate; nor shall any new proposition or motion be admitted by way of amendment, or substitute for such original motion while the same is depending.²⁶⁹

The following year, however, the rule was altered to read only:

the truth; to act contrary to justice”); JOHNSON, *supra* note 1 (including among the definitions of the verb, “To palliate; to excuse. To make plausible.”); KENRICK, *supra* note 1 (including among other definitions of the noun, “The representation of any thing [sic] superficially examined.—Concealment; palliation; excuse; superficial cover.—Appearance; pretence; false shew”); PERRY, *supra* note 1 (including among other definitions of the noun, “concealment; excuse”); SHERIDAN, *supra* note 1, at (including among other definitions of the noun, “the representation of any thing [sic] superficially examined; palliation; appearance; false shew”); BARLOW, *supra* note 1 (including among other definitions of the noun, “In Law, the probable pleas of a defendant to an action brought, which in fact, is false).

²⁶⁸20 J. CONT'L CONG 479 (May 4, 1781).

²⁶⁹PA. GEN. ASSEM. MIN., *supra* note 1, at 26 (Nov. 19, 1784).

No business, regularly before the House, shall be interrupted, but by motion for the previous question, postponement, commitment, or amendment.²⁷⁰

The reason for the change is not clear. Although the records divulge a substitute amendment that year, it was germane to the original motion.²⁷¹ Perhaps the limitation of interruptions to “previous question, postponement, commitment, or amendment” was deemed sufficient, since the word “amendment” implied no alteration in the business before the house.²⁷²

In 1789, the second session of the North Carolina ratifying convention adopted a standard similar to the initial New Hampshire rule,²⁷³ and the North Carolina senate adhered to it the following year.²⁷⁴ Also, in 1789, when the new federal House of Representatives met, it installed the Confederation Congress rule to govern its own proceedings.²⁷⁵

These regulations may have been a reaction to attempted abuse of the amendment process, although I have not been able to find such abuse in the

²⁷⁰PA. GEN. ASSEM. MIN., *supra* note 1, at 62 (Nov. 26, 1785). The next appearance in the official minutes of legislative rules was during the 1787 session, and the change was retained. *Id.* at 38 (Nov. 10, 1787).

²⁷¹*Supra* note ____ and accompanying text.

²⁷²*Cf. supra* note ____ and accompanying text (discussing similar New Hampshire rule).

²⁷³22 N.C. RECORDS, *supra* note 1, at 41 (Nov. 17, 1789) (“XX. When any question is in debate, it shall be determined before any new motion shall be admitted, unless to amend it, to adjourn from day to day, or for the previous question.”).

²⁷⁴21 N.C. RECORDS, *supra* note 1, at 735-36 (Nov. 1, 1790) (“13th. Whenever any question is in debate before the house, it shall be determined or postponed before any new motion shall be introduced, unless to amend it, to adjourn, or for the previous question.”).

²⁷⁵1 ANNALS OF CONG. 103 (Apr. 7, 1789) (“No new motion or proposition shall be admitted, under color of amendment, as a substitute for the motion or proposition under debate.”).

records. Perhaps lost or unavailable records show efforts to introduce new legislation under the guise of amendment. The rules demonstrate, at least, that founding-era lawmakers did not consider unrelated substitutes to be genuine amendments. The Americans, like the British, drew a line between an amendment and an unrelated motion.²⁷⁶

E. *Summary of American Practice*

The drafters of most of the initial state constitutions believed that “democratic” lower houses should enjoy more power over financial matters than “aristocratic” upper houses. Those drafters experimented with ways of putting this belief into action. Three states—Georgia, Pennsylvania, and Vermont—adopted constitutions that provided for no upper chambers at all. The Virginia and New Jersey constitutions required that “money bills” originate in the lower house and be accepted or rejected by the upper with no power of amendment. South Carolina applied the same rule to “money bills for the support of government.” New Hampshire, Delaware, and Maryland adopted less rigorous origination rules.

Experience led to modifications. The Virginia legislature informally excluded appropriations from the definition of “money bills,” thereby permitting senate amendment. The 1780 Massachusetts constitution permitted senate amendment of all money bills, as did the second New Hampshire and Pennsylvania constitutions ratified in 1784 and 1790, respectively.

In post-Independence America, the traditional components of “money bills”—revenue/taxes, appropriations, regulatory exactions, and local fee-for-

²⁷⁶E.g., N.J. PROCEEDINGS 8 (Sept 23, 1782) (offering an amendment “striking out the Word ‘amend,’ and inferring in its Stead the Word ‘repeal’ . . . to which the House agreed”); 10 R.I. RECORDS, *supra* note 1, at 268 (Feb. 1788) (reproducing words of a petition seeking “repeal or amendment” of a law).

service such as tolls—generally were treated as different subjects addressed by separate bills. The category of revenue/taxes was placed under the most direct popular control: Even states that abandoned House origination for some money bills retained it for revenue bills. In most states, therefore, tax measures had to be first introduced in, and adopted by, in the lower house before being transmitted to the state senate.

An amendment apparently had to be germane to its underlying bill. Although American lawmakers, unlike their British counterparts, occasionally amended by complete substitute, amendments by substitute also addressed the same subject matter as the underlying bill.²⁷⁷ Several legislative bodies adopted rules that implicitly reflected the germaneness principle.

IV. WHAT THE CONSTITUTIONAL DEBATES TELL US ABOUT THE REASONS FOR HOUSE ORIGINATION AND THEIR SIGNIFICANCE

A. *The Policies Behind House Origination*

Part I explained that debate over the Origination Clause was largely ancillary to the issue of representation in Congress, and that during the ratification debates, whether a participant characterized House origination and the amendment qualifier as important usually was dictated by whether he was a Federalist or Anti-Federalist, and whether he was addressing a large-state audience or a small-state audience. This is the sort of disagreement that critics of originalist methods cite when they argue that it

²⁷⁷Supra notes 260-276 and accompanying text. *Zotti & Schmitz, supra* note 1, at 104-05 are generally in accord, but they assume that substitute bills are always non-germane.

is impractical to recover the founders' understanding of constitutional phrases.²⁷⁸

Very often, however, the records of such disagreements actually clarify a provision's meaning and purpose. One reason is that the debate may have been based on shared assumptions.²⁷⁹ A good illustration is the debate over the Origination Clause, for it proceeded from a common understanding of its meaning. Participants knew what it meant for a bill to "originate" in the House of Representatives. They knew that "Bills for raising Revenue" were tax bills. They knew that there had been good and bad experiences from different origination rules, and that any particular version would operate differently in America than in Britain. Even the fact that the opposing sides could creditably characterize the amendment power as both broad and limited²⁸⁰ suggests that the public understood that there was truth in both characterizations.

There also was general agreement about the policies underlying House origination. The principal dispute was over the weight of those policies and the extent to which the Clause furthered them. Because advocates of House origination ultimately prevailed, however, we can legitimately infer that the ratifiers found the advocates' case more persuasive than opponents'. In other

²⁷⁸BARACK OBAMA, THE AUDACITY OF HOPE 132 (2006) (stating that because of differences among founders, "It is unrealistic to believe that a judge, two hundred years later, can somehow discern the original intent of the Founders or ratifiers.").

²⁷⁹See, e.g., Natelson, *Trust*, *supra* note 1 (discussing the nearly unanimous view of the founders that government was a fiduciary trust). In many instances, moreover, disagreement induced the Constitution's advocates to issue authoritative representations of meaning that, because the ratifiers relied on them, we may rely on as well. E.g., Natelson, *General Welfare*, *supra* note 1 (concluding that the ratifying public accepted the Federalists' explanations of the General Welfare Clause).

²⁸⁰Supra Parts II & III.

words, the ratifiers agreed with the policies behind the Clause, believed they were important, and believed the Clause promoted them.

We next turn to the issues of (1) just what the policies underlying the Clause were and (2) how central they were to the constitutional scheme.

We begin again at the Constitutional Convention. The two delegates most responsible for assuring that the Clause became part of the Constitution were Edmund Randolph of Virginia and John Dickinson of Delaware.

Although less known today than they should be, both of these men were central actors in the constitutional drama. While still in his early 30s, Randolph had been elected governor of the nation's largest state. He was the first substantive speaker at the convention, when on May 29, 1787 he introduced the Virginia Plan.²⁸¹ In July, he was elected to the Committee of Detail, a stellar group chosen to prepare the first draft of the Constitution. The committee assigned Randolph the task of making an initial outline for that draft. The outline provided that "powers belonging peculiarly to the representatives are those concerning money-bills," and assigned other powers to "the senate peculiarly."²⁸² After the convention had defeated House origination several times, it was Randolph who raised the subject yet again,²⁸³ and it was he who suggested limiting it to revenue bills.²⁸⁴

²⁸¹1 FARRAND'S RECORDS, *supra* note 1, at 20-22 (reproducing Virginia Plan).

²⁸²HUTSON, SUPPLEMENT, *supra* note 1, at 189. The powers he assigned to the Senate were treaties, appointment of the judiciary, and the sending of ambassadors. *Id.*

²⁸³2 FARRAND'S RECORDS 230 (Madison, Aug. 9, 1787) (reporting remarks by Edmund Randolph).

²⁸⁴2 FARRAND'S RECORDS 262 (Madison, Aug. 11, 1787); 2 FARRAND'S RECORDS, *supra* note 1, at 273 (Aug. 13, 1787).

Dickinson was a gifted statesman whom some have compared, at least politically, to Edmund Burke.²⁸⁵ He was about 20 years older than Randolph, and had served as chief executive of *two* states—Pennsylvania and Delaware.²⁸⁶ Like Randolph, he believed in a strong upper house. He argued for tying Senators to territorial units (the states) because this might offer some of the advantages provided by the British House of Lords.²⁸⁷ His initial sketch of the upper house provided for senators at least 30 years old, apportioned equally by states, elected by state legislatures, and serving staggered seven year terms.²⁸⁸ In other words, Dickinson's initial vision was strikingly similar to the plan that the convention eventually adopted. He also believed that this upper chamber should be checked by granting the lower house the exclusive prerogative of originating money bills.

On August 13, Madison took the floor to deliver technical and closely-reasoned arguments against lower house origination and against the Randolph compromise.²⁸⁹ During his discourse Madison made the tactical error of belittling in Dickinson's presence the latter's celebrated pre-Revolutionary distinction between revenue/tax bills and other financial measures.²⁹⁰ This triggered the response that was Dickinson's most memorable speech at the Convention. Just as Dickinson had preceded Burke

²⁸⁵E.g., Gregory S. Ahern, *The Spirit of American Constitutionalism: John Dickinson's Fabius Letters*, 11 HUMANITAS 57 (1998), available at <http://www.nhinet.org/humsub/11-2.htm> (“Perhaps closest of all to Dickinson's view of man and society, however, is that of Edmund Burke.”).

²⁸⁶For a brief time he served simultaneously as president of both states. Natelson, *Dickinson*, *supra* note 1, at 425.

²⁸⁷Natelson, *Dickinson*, *supra* note 1, at 457-58.

²⁸⁸HUTSON, SUPPLEMENT, *supra* note 1, at 88. An earlier version of the scheme for an upper house appears *id.* at 85.

²⁸⁹2 FARRAND'S RECORDS, *supra* note 1, at 276 (Aug. 13, 1787) (reporting remarks by James Madison).

²⁹⁰2 FARRAND'S RECORDS, *supra* note 1, at 276 (Madison, Aug. 13, 1787).

in defending the American cause, now Dickinson anticipated Burke by underscoring the wisdom often embedded in tradition:

Experience must be our only guide. Reason may mislead us. It was not Reason that discovered the singular & admirable mechanism of the English Constitution. It was not Reason that discovered or ever could have discovered the odd & in the eye of those who are governed by reason, the absurd mode of trial by Jury. Accidents probably produced these discoveries, and experience has given a sanction to them. This is then our guide. And has not experience verified the utility of restraining money bills to the immediate representatives of the people[?] Whence the effect may have proceeded he could not say; whether from the respect with which this privilege inspired the other branches of Govt. to the H. of Commons, or from the turn of thinking it gave to the people at large with regard to their rights, but the effect was visible & could not be doubted[.] Shall we oppose to this long experience, the short experience of 11 years which we had ourselves, on this subject[?].—As to disputes, they could not be avoided any way. . . . [A]ll the prejudices of the people would be offended by refusing this exclusive privilege to the H. of Repress. and these prejudices shd. never be disregarded by us when no essential purpose was to be served. When this plan goes forth, it will be attacked by the popular leaders. Aristocracy will be the watchword; the Shibboleth among its adversaries. Eight States have inserted in their Constitutions the exclusive right of originating money bills in favor of the popular branch of

the Legislature. Most of them however allowed the other branch to amend. This he thought would be proper for us to do.²⁹¹

When Dickinson had finished, Randolph rose again to reinforce his colleague's arguments.²⁹²

Dickinson and Randolph lost the vote immediately ensuing, but they won the war. One key to their success lay in the amendment qualifier. It mollified fears of legislative disputes²⁹³ of the kind that had flared in Britain, Virginia, Maryland, and South Carolina.²⁹⁴

²⁹¹2 FARRAND'S RECORDS, *supra* note 1, at 278 (Aug. 13, 1787) (reporting remarks by John Dickinson).

²⁹²2 FARRAND'S RECORDS, *supra* note 1, at 278-79 (Madison, Aug. 13, 1787):

Mr Randolph regarded this point as of such consequence, that as he valued the peace of this Country, he would press the adoption of it. We had numerous & monstrous difficulties to combat. Surely we ought not to increase them. When the people behold in the Senate, the countenance of an aristocracy; and in the president, the form at least of a little monarch, will not their alarms be sufficiently raised without taking from their immediate representatives, a right which has been so long appropriated to them.—The Executive will have more influence over the Senate, than over the H. of Reps—Allow the Senate to originate in this case, & that influence will be sure to mix itself in their deliberations & plans. The Declaration of War he conceived ought not to be in the Senate composed of 26 men only, but rather in the other House. In the other House ought to be placed the origination of the means of war. As to Commercial regulations which may involve revenue, the difficulty may be avoided by restraining the definition to bills for the mere or sole, purpose of raising revenue. The Senate will be more likely to be corrupt than the H. of Reps and should therefore have less to do with money matters. His principal object however was to prevent popular objections against the plan, and to secure its adoption.

²⁹³1 FARRAND'S RECORDS, *supra* note 1, at 234 (Madison, Jun. 13, 1787) (reporting remarks by Charles C. Pinkney); 1 *id.* at 527 (Madison, July 5, 1787) (reporting remarks by James Madison).

Another key to their success was restricting the Clause to “Bills for raising Revenue.” Despite Madison’s doubts, this categorization was well defined and easily defended. Recent history, both in Britain and America, had formed in the public mind a distinction between revenue, regulation, and appropriation²⁹⁵—a distinction also reflected in other parts of the Constitution.²⁹⁶ Recent history in America, moreover, had created a perceived identity between taxes and revenue and a perception that this was a more dangerous power than the others and should be subject to greater check and popular control. The latter perception was very much in evidence during the ratification debates: The Constitution’s grant to Congress of authority to tax was far more controversial than any of its regulatory grants.²⁹⁷

Opponents of a lower-house origination rule observed that in Britain, the King could resolve inter-chamber conflict by dissolving or proroguing Parliament, but that American executives generally had no such prerogative. 1 FARRAND’S RECORDS, *supra* note 1, at 545 (Madison, Jul. 6, 1787) (reporting remarks by Gouverneur Morris); 1 FARRAND’S RECORDS, *supra* note 1, at 546 (Madison, Jul. 6, 1787) (reporting remarks by James Wilson); Luther Martin, *Genuine Information VI*, BALTIMORE MD. GAZETTE, Jan. 15, 1788, 15 DOCUMENTARY HISTORY, *supra* note 1, at 374-375.

²⁹⁴Part III. For further discussion of the amendment qualifier, see Part V.

²⁹⁵*Supra* Part III.A.

²⁹⁶U.S. CONST. art. I, § 8, cl. 3 (“To regulate Commerce”); art. I, §8, c. 12 (“To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years.”); art. I, §9, cl. 6 (“No Preference shall be given by any Regulation of Commerce or Revenue”); art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law”).

²⁹⁷Hence the memorable warning by “Brutus,” possibly Robert Yates of New York, who had been a constitutional convention delegate, and was perhaps the best of the Anti-Federalist writers:

The general legislature will be empowered to lay any tax they chuse [sic], to annex any penalties they please to the breach of their revenue laws; and to appoint as many officers as they may think proper to collect the taxes.

Several other factors contributed to Dickinson's and Randolph's success. Randolph pointed out that lower-house initiation of revenue bills would check the appetite for war.²⁹⁸ Dickinson, as noted earlier, had observed that adding lower-house origination to the Constitution would render the

* * * *

This power, exercised without limitation, will introduce itself into every corner of the city, and country – It will wait upon the ladies at their toilett [sic], and will not leave them in any of their domestic concerns; it will accompany them to the ball, the play, and the assembly; it will go with them when they visit, and will, on all occasions, sit beside them in their carriages nor will it desert them even at church; it will enter the house of every gentleman, watch over his cellar, wait upon his cook in the kitchen, follow the servants into the parlour, preside over the table, and note down all he eats or drinks; it will attend him to his bedchamber, and watch him while he sleeps; it will take cognizance of the professional man in his office, or his study; it will watch the merchant in the counting-house, or in his store; it will follow the mechanic to his shop, and in his work and will haunt him in his family, and in his bed; it will be a constant companion of the industrious farmer in all his labour, it will be with him in the house, and in the field, observe the toil of his hands, and the sweat of his brow; it will penetrate into the most obscure cottage; and finally, it will light upon the head of every person in the United States. To all these different classes of people, and in all these circumstances, in which it will attend them, the language in which it will address them, will be GIVE! GIVE!

Brutus VI, N.Y. J., Dec. 27, 1787, reprinted in 15 DOCUMENTARY HISTORY, *supra* note 1, at 110, 112-114.

²⁹⁸2 FARRAND'S RECORDS, *supra* note 1, at 278-79 (Madison, Aug. 13, 1787) (reporting Edmund Randolph as stating, "In the other House ought to be placed the origination of the means of war."); cf. *An American Citizen IV*, 13 DOCUMENTARY HISTORY, *supra* note 1, at 431, 435, Oct. 21, 1787 (citing the military appropriations clause and stating that "the original grant of the supplies must be made by the House of Representatives, the *immediate delegates of the people*). (Italics in original).

instrument more consistent with Anglo-American custom and therefore more acceptable and saleable to the American people.²⁹⁹ Some of their success also derived from their reminders about British experience: Lower-house origination had enabled the British people to check the Crown and the Lords and to fashion the freest and most successful major nation in the world.

Dickinson and Randolph predicted that claims of “aristocracy” would be launched against the Constitution. Perhaps their colleagues recognized that they were correct. In any event, their prophecy was fully borne out. Warnings of aristocracy turned out to be central to the Anti-Federalist attack.³⁰⁰ The Origination Clause proved a powerful defensive weapon.³⁰¹

As a matter of substance, these concerns about aristocracy were entirely legitimate. Anyone reading the Constitution could see that the Senate would be a very different and far more “aristocratic” branch than the House.³⁰² Senators would be selected from a group required to meet stiffer

²⁹⁹ 2 FARRAND’S RECORDS, *supra* note 1, at 263 (Madison, Aug. 13, 1787) (reporting remarks of Edmund Randolph); 2 *id.* at 278 (Aug. 13, 1787) (reporting remarks by John Dickinson).

³⁰⁰ See, e.g., Cincinnatus IV, *To James Wilson, Esquire*, N.Y.J., Nov. 22, 1787, 19 DOCUMENTARY HISTORY, *supra* note 1, at 281, 282 (warning of potential aristocracy); Arthur Lee to Edward Rutledge, Oct. 29, 1787, 8 DOCUMENTARY HISTORY, *supra* note 1, at 131 (stating of the Constitution, “All this is calculated to enure a feeble Representative & a powerful Senate—that is to sacrifice [sic] the Democracy to the Aristocracy.”).

³⁰¹ See, e.g., *Marcus I* (James Iredell), NORFOLK AND PORTSMOUTH J., Feb. 20, 1788, 16 DOCUMENTARY HISTORY, *supra* note 1, at 161, 164-67 (using the Origination Clause to counter Anti-Federalist charges of “aristocracy”).

³⁰² The distinction between the federal legislative chambers would be far greater than that prevailing in any state. For example, only three states provided for upper-house terms longer than a year, and all were shorter than the six-year term for U.S. Senators: Virginia (three years), New York (four), and Maryland (five).

age and citizenship qualifications than Representatives.³⁰³ At a time of heavy immigration and shorter life expectancy, the pool of potential Senators was significantly smaller than the pool of potential Representatives. The allocation of Senators would be less reflective of population than the House.³⁰⁴ Although Representatives would be directly elected for two year terms, Senators would be indirectly elected for terms three times as long.³⁰⁵ In all but the smallest states, Senate districts would be much larger than House districts, thereby making it difficult for local or minority interests to be heard in the Senate. The Senate's more intimate size would render it more susceptible to “corruption”—both in the sense of illegal conduct and in the sense of placing special interest over the general interest.³⁰⁶

Higher qualifications, indirect election, longer terms, and larger districts would generate Senators with higher social status, better education, and greater wealth than Representatives. They would be more tied to the

³⁰³Compare U.S. CONST. art. I, § 2, cl. 2 (setting forth qualifications of Representatives) with *id.* art. I, § 3, cl. 3 (setting forth qualifications of Senators).

³⁰⁴1 FARRAND'S RECORDS, *supra* note 1, at 233 (Madison, Jun. 13, 1787) (reporting remarks by Elbridge Gerry); 1 *id.* at 544 (Madison, Jul. 6, 1787) (reporting remarks by George Mason); 2 *id.* at 274 (Madison, Aug. 13, 1787) (reporting remarks of George Mason). See also *Americanus II*, VA. INDEPENDENT CHRONICLE, Dec. 19, 1787, reprinted in 8 DOCUMENTARY HISTORY, *supra* note 1, at 244, 248 (stating, “*That taxation and representation are inseparable, and that each should bear an exact ratio to the other are self-evident truths. . . . The house of representatives, which has the exclusive right of originating Bills of taxation, is composed of members elected directly by the people in the most exact proportion.*”).

³⁰⁵U.S. CONST. art. I, § 3, cl. 1 (“The Senate of the United States shall be composed of two Senators, from each State, chosen by the Legislature thereof”).

³⁰⁶2 FARRAND'S RECORDS, *supra* note 1, at 279 (Madison, Aug. 13, 1787) (reporting remarks by Edmund Randolph). On the founders' concept of “corruption” see *Natelson, Trust*, *supra* note 1, at 1116 & 1120.

national capital. They might well have less knowledge of the people's needs and abilities,³⁰⁷ and would share less "sympathy" (identity of interest and feelings) with them.³⁰⁸

The Senate would thereby be much less "representative" of the people than the House. But had not the Revolution been fought under the slogan, "No taxation without representation?"

There was more. The Constitution granted this unrepresentative and exclusive body crucial prerogatives denied to the House—most importantly a share in the executive power though participation in executive and judicial appointments and treaties.³⁰⁹

Now consider the practical implications of all this: Senators' long terms and other prerogatives would enable them to advance their preferred financial policies over and over again, patiently suffering rejection until, by chance or otherwise, they obtained a compliant House.³¹⁰ Even if sentiment in the House remained unaltered, Senators' greater experience, political acumen, and personal connections might enable them to overwhelm the simpler people in the other chamber. As George Mason observed, "An aristocratic body, like the screw in mechanics, working its way by slow degrees, and holding fast whatever it gains, should ever be suspected of an

³⁰⁷*Fabius II* (John Dickinson), PA. MERCURY, Apr. 15, 1788, 17 DOCUMENTARY HISTORY, *supra* note 1, at 120, 124 (stating that Representatives "by holding *their* offices for two years, as thereby they will acquire better information, respecting national affairs"). (Italics in original.)

³⁰⁸As Benjamin Franklin phrased it, "those who feel, can best judge." 1 FARRAND'S RECORDS, *supra* note 1, at 546 (Madison, Jul. 6, 1787 (reporting remarks by Franklin)).

³⁰⁹U.S. CONST. art. II, §2, cl. 2 (granting the Senate power to advise and consent to the appointment of federal officers and the making of treaties).

³¹⁰1 FARRAND'S RECORDS, *supra* note 1, at 233 (Madison, Jun. 13, 1787) & 545 (Jul. 6, 1787) (reporting remarks by Elbridge Gerry).

encroaching tendency—The purse strings should never be put into its hands.”³¹¹

Once the balance was tipped in favor of the Senate, it was likely to tip further, especially if, as many believed, the Senate secured the President as an ally. Eventually, the Senate might assume the leading role in government, with the House reduced to the insignificance of the Parliament of Paris, a mere registry for laws really created elsewhere.³¹² Nor would this be a benign preeminence: Because the Senate would be malapportioned and relatively remote from the people, it would have little “sympathy” with them or knowledge about them. Over time, its measures would become more ill-tuned to the real world and more oppressive, and its spending more extravagant.³¹³

For such reasons, men like Mason, Dickinson, and Randolph believed that the Senate, while a necessary check on the excesses of democracy, really did pose a risk of aristocracy or oligarchy. House origination was a needed corrective, a necessary check.³¹⁴ House origination was a structural

³¹¹2 FARRAND’S RECORDS, *supra* note 1, at 224 (Madison, Aug. 8, 1787) (reporting remarks by George Mason).

³¹²Thus, at the Constitutional Convention George Mason argued that a bare negative was a very different thing from that of originating bills; and that if the Senate had the power of initiating it could reduce the House to insignificance. He compared the potential situation to the Parliament of Paris and to Poyning’s Law. By the latter statute, no Irish Parliament could be held until the proposed legislation had been sent to England and returned under the English great seal. 2 FARRAND’S RECORDS, *supra* note 1, at 274 (Madison, Aug. 13, 1787) (reporting remarks of George Mason).

See also 2 FARRAND’S RECORDS, *supra* note 1, at 297 (Madison, Aug. 15, 1787) (reporting remarks by Nathaniel Gorham).

³¹³Elbridge Gerry to William Cushing, Jan. 21, 1788, 6 DOCUMENTARY HISTORY, *supra* note 1, at 1265, 1270.

³¹⁴2 FARRAND’S RECORDS, *supra* note 1, at 297 (Madison, Aug. 15, 1787) (reporting remarks by George Mason); THE FEDERALIST NO. 66 (Hamilton), *supra* note 1, at 342, 344 (stating, that “to secure the equilibrium of the national House of Representatives, the plan of the convention has provided in

device designed to protect freedom, promote democratic values, and ensure more knowledgeable government.

C. *Significance of the Policies Behind House Origination*

It is clear, therefore, that the policies behind lower-house origination were not of marginal concern. They served some of the core purposes recited in the Preamble. House origination would “promote the general Welfare” through a more informed and less warlike government. It would “secure the Blessings of Liberty” by promoting democracy and checking aristocracy. It also would increase the chances that the public would ratify the Constitution and continue to find it congenial thereafter. For a Constitution must suit the spirit of a people, and, as Dickinson observed, “all the prejudices”³¹⁵ of Americans would be offended by the lack of House origination.

V. WHAT THE CONSTITUTIONAL DEBATES TELL US ABOUT THE SCOPE OF AN “AMENDMENT”

A. *The Policies Served By the Amendment Qualifier*

its favor several important counterpoises to the additional authorities to be conferred upon the Senate. The exclusive privilege of originating money bills will belong to the House of Representatives.”).

Several founders pointed to Britain for corroboration. 2 FARRAND’S RECORDS, *supra* note 1, at 278 (Aug. 13, 1787) (reporting remarks by John Dickinson); THE FEDERALIST NO. 58, *supra* note 1, at 300, 303 (Madison) (comparing the Constitution’s origination rule to the privilege of the House of Commons, by which it had greater prerogatives than other branches of government).

³¹⁵2 FARRAND’S RECORDS 278 (Madison, Aug. 13, 1787).

Opponents raised several arguments against the Origination Clause—and thus for greater power in the Senate—that did not prove strong enough to omit or alter the Clause. Among these arguments were:

- The Senate would be less remote than the House of Lords.³¹⁶
- The greater skills of Senators would be appropriate for the exacting task of drafting financial bills.³¹⁷
- The Senate might be less “extravagant” (wandering, immoderate)³¹⁸ than the House.³¹⁹
- Smaller chambers are better for deliberation and larger ones better for deciding on pre-set proposals.³²⁰

³¹⁶1 FARRAND’S RECORDS, *supra* note 1, at 233 (Madison, Jun. 13, 1787) (reporting remarks by Pierce Butler); Luther Martin, *Genuine Information VI*, BALTIMORE MD. GAZETTE, Jan. 15, 1788, *reprinted in* 15 DOCUMENTARY HISTORY 374-375.

³¹⁷1 FARRAND’S RECORDS, *supra* note 1, at 233 (Madison, Jun. 13, 1787) (reporting remarks by James Madison); Luther Martin, *Genuine Information VI*, BALTIMORE MD. GAZETTE, Jan. 15, 1788, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 1, at 374-375. Cf. 2 FARRAND’S RECORDS, *supra* note 1, at 544 (Madison, Jul. 6) (reporting observation of Hugh Williamson that if bills originate in Senate, they will be “more narrowly watched”); 1 *id.* at 234 (Madison, June 13, 1787) (reporting remarks by Hugh Williamson).

³¹⁸E.g., BAILEY, *supra* note 1 (unpaginated) (defining “extravagant” as “Wandering out of due bounds, roving beyond due limits; irregular; wild; wasteful, prodigal”).

³¹⁹2 FARRAND’S RECORDS, *supra* note 1, at 276 (Madison, Aug. 13, 1787) (reporting James Madison as so arguing).

³²⁰1 FARRAND’S RECORDS, *supra* note 1, at 544 (Madison, Jul. 6, 1787) (reporting James Wilson as saying, “the least numerous body was the fittest for deliberation; the most numerous for decision.”); 2 *id.* at 224 (Madison, Aug. 8, 1787) (reporting remarks by James Wilson); 2 *id.* at 279 (Madison, Aug. 13, 1787) (reporting remarks by John Rutledge).

The concept is presented in JAMES HARRINGTON: THE COMMONWEALTH OF OCEANA (1656), available at <http://www.constitution.org/jh/oceana.htm>, a book of political theory popular with the Founders. The idea was that the

- Experience “proved that [House origination] had no effect,”³²¹ and therefore the House’s veto power on Senate legislation would be sufficient to preserve popular liberty.³²²
- If both chambers could initiate, they would offer competing plans and the people could choose between them.³²³
- Good men would not run for the Senate unless they enjoyed substantial power.³²⁴
- Possibly the least appealing argument of all—advanced by Gouverneur Morris: “[T]here never was, nor ever will be a civilized Society without an Aristocracy. [My] endeavor was to keep it as much as possible from doing mischief. . . ”³²⁵

Senate would deliberate and pose the final decision, aye or nay, to the executive branch:

Dividing and choosing, in the language of a commonwealth, is debating and resolving; and whatsoever, upon debate of the senate, is proposed to the people, and resolved by them, is enacted by the authority of the fathers [i.e., the senate], and by the power of the people, which concurring, make a law.

³²¹ 1 FARRAND’S RECORDS, *supra* note 1, at 527 (Madison, Jul. 5, 1787) (reporting remarks by James Madison); 1 *id.* at 545 (Madison, Jul. 6, 1787) (reporting remarks by Charles Pinckney).

³²² 1 FARRAND’S RECORDS, *supra* note 1, at 544 & 544-45 (Madison, Jul. 6, 1787) (reporting remarks by James Wilson); 2 *id.* 279 (Madison, Aug. 13, 1787) (reporting remarks by John Rutledge).

³²³ 1 FARRAND’S RECORDS, *supra* note 1, at 543-44 (Madison, Jul. 6, 1787) (reporting remarks by Gouverneur Morris).

³²⁴ 1 FARRAND’S RECORDS, *supra* note 1, at 233 (Madison, Jun. 13, 1787) (reporting remarks by Pierce Butler and James Madison).

³²⁵ 1 FARRAND’S RECORDS, *supra* note 1, at 545 (Madison, Jul. 6, 1787) (reporting remarks by Gouverneur Morris).

There were two anti-origination arguments that proved more compelling because they backed by recent experience. The amendment qualifier responded to each them.

The first was that the origination power would encourage the House to resort to “tacking” and other forms of extortion to overpower the Senate.³²⁶ This contention was supported by pre-1702 British history and by more recent history in Maryland and other states. Events in Maryland had demonstrated that a mere constitutional ban on tacking was not sufficient.³²⁷ The amendment qualifier provided a more dynamic way to prevent tacking.³²⁸ It did so by enabling the Senate to cut non-financial terms from revenue bills—that is, to limit bills to the single broad subject of revenue.³²⁹ Of course, the same result could have been achieved by granting the Senate plenary power over revenue bills. But limiting the Senate’s power to *amending* also prevented the Senate from adding extraneous matter and

³²⁶2 FARRAND’S RECORDS, *supra* note 1, at 277 (Madison, Aug. 13, 1787) (reporting remarks of James Wilson); 1 *id.* at 545-46 (Madison, Jul. 6, 1787) & 2 *id.* at 276 (Aug. 13, 1787) (reporting remarks by Gouverneur Morris); 2 *id.* at 224 (Madison, Aug. 8, 1787) (reporting remarks by John Mercer).

³²⁷Apparently, there had been no such problems in states, such as New York and Connecticut, that allowed Senate origination, 1 FARRAND’S RECORDS 234 (Madison, June 13, 1787) (reporting remarks by Roger Sherman about the Connecticut experience), and I have found none those states (Massachusetts, New Hampshire, and Delaware) that permitted upper-house amendment.

³²⁸The delegates at the drafting convention understood that an origination clause should include a remedy for tacking. See 1 FARRAND’S RECORDS, *supra* note 1, at 546 (Madison, Jul. 6, 1787) (“Mr. Martin said that it was understood in the Committee that the difficulties and disputes which had been apprehended, should be guarded agst. in the detailing of the plan”); 2 *id.* at 263 (Madison, Aug. 13, 1787) (reporting remarks of Edmund Randolph).

³²⁹On revenue as a single broad subject in America, see *supra* notes ____ and accompanying text. Cf. *supra* note ____ and accompanying text (reproducing remarks in Parliament by Richard Brinsley Sheridan on the latitude of revenue amendments).

attempting to force it on the House. In other words, it prevented “reverse tacking.”

The second compelling argument against origination was that the traditional origination rules created a practical inconvenience. Members of the upper house had to employ extra-parliamentary channels to suggest even uncontroversial, technical amendments.³³⁰ This argument was supported by history in Britain, Maryland, Virginia, and South Carolina.³³¹ The amendment qualifier responded to the inconvenience by allowing the Senate to offer its proposals through normal legislative channels.

C. How Broad Was the Amendment Qualifier?

As noted in Part I.B, during the ratification debates the Federalists, especially in large states, emphasized the importance of House origination and depicted the amendment qualifier as consistent with it. These representations certainly implied that “Amendment” was a limited concept; otherwise House origination would not have been important.

Large-state Anti-Federalists argued that the amendment qualifier was nearly tantamount to permitting the Senate to originate, but the way they phrased their arguments also implied that “Amendment” was a limited concept. Even their most extravagant claims about the breadth of possible amendments cited only amendments that dealt with the same subject as their underlying bills. Illustrative is the assertion by Elbridge Gerry of Massachusetts that “[I]f the Senate should have the power of proposing amendments, they may propose that a bill originated by the house to raise

³³⁰1 FARRAND’S RECORDS, *supra* note 1, at 234 (Madison, June 13, 1787) (reporting remarks by Charles C. Pinkney).

³³¹*Supra* Parts II & III.

one thousand should be increased to one hundred thousand pounds.”³³² In Gerry’s example, the underlying bill addressed only revenue, and Gerry’s hypothetical amendment did so as well.

Similarly, at the Virginia ratifying convention, Anti-Federalist William Grayson, who had served both in his state legislature and as acting president of Congress,³³³ contended that “The Senate could strike out every word of the bill, except the word whereas, or any other introductory word, and might substitute new words of their own.”³³⁴ Grayson was no doubt thinking of amendments-by-way-of-substitution in the Virginia legislature.³³⁵ In both recorded cases, however, the substitute had addressed the same subject matter as the initial motion.³³⁶

³³²Letter from Elbridge Gerry to William Cushing, Jan. 21, 1788, *reprinted in* 6 DOCUMENTARY HISTORY, *supra* note 1, at 1265, 1270 (subjoined “statement of facts”). This echoed one of Madison’s convention arguments against the Origination Clause. 1 FARRAND’S RECORDS, *supra* note 1, at 233-34 (Madison, June 13, 1787) (reporting himself as saying “The Gentleman in pursuance of his principle ought to carry the restraint to the amendment; as well as the originating of money bills. Since, an addition of a given sum wd. be equivalent to a distinct proposition of it.”)

³³³K. R. Constantine Gutzman, *William Grayson*, AMERICAN NATIONAL BIOGRAPHY ONLINE, available at <http://www.anb.org/weblib.lib.umt.edu:8080/articles/01/01-00342.html?a=1&f=Grayson%2C%20William&ia=-at&ib=-bib&d=10&ss=0&q=2>.

Grayson had been given the honor of carrying from the house of delegates to the senate the resolution appointment commissioners to the famous Potomac River conference with Maryland. 1781-86 MD. H.D. JOUR. 540 (Dec. 13 & 14, 1784)

³³⁴3 ELLIOT’S DEBATES, *supra* note 1, at 377.

³³⁵*Supra* notes ____ and accompanying text.

³³⁶*Id.*

Treating the amendment power as broad but limited to accepted subject matter categories may be the only way to reconcile, at least partially, three of Madison's contemporaneous comments about the amendment qualification. In a letter to George Washington written about a month after the federal convention, Madison described the Senate's amendment power as "paltry."³³⁷ This suggests a narrow scope for amendment. Yet at the Virginia ratifying convention the following year he defended the amendment qualification against Grayson by asserting that, "The honorable member says that there is no difference between the right of originating bills and proposing amendments. There is some difference, though not considerable."³³⁸ This suggests a broad scope for amendment.

Yet these two statements may be ascribed merely to Madison's peering through opposite ends of the same telescope. One of his comments at the federal convention clarifies his thinking:

The words amend or alter, form an equal source of doubt & altercation. When an obnoxious paragraph shall be sent down from the Senate to the House of Reps it will be called an origination under the name of an amendment.³³⁹ The Senate may actually couch extraneous matter under that name. In these cases, *the question will turn on the degree of connection*

³³⁷James Madison to George Washington, Oct. 18, 1787, 8 DOCUMENTARY HISTORY, *supra* note 1, at 76, 13 DOCUMENTARY HISTORY, *supra* note 1, at 408 (referring to "the paltry right of the Senate to propose alterations in money bills").

³³⁸3 ELLIOT'S DEBATES, *supra* note 1, at 377. Cf. 1 FARRAND'S RECORDS, *supra* note 1, at 544 (Madison, Jul. 6, 1787) (stating "Mr. Gerry would not say that the concession was a sufficient one on the part of the small States. But he could not but regard it in the light of a concession. ").

³³⁹*Supra* notes ____ and accompanying text (discussing substitute bills "under colour of amendment").

between the matter & object of the bill and the alteration or amendment offered to it. Can there be a more fruitful source of dispute, or a kind of dispute more difficult to be settled?³⁴⁰

In other words, an amending chamber, like an originating chamber, could propose very broad alterations in the status quo, but an amending chamber's freedom was confined by the "matter & object" of the underlying bill. A valid (as opposed to pretextual) amendment could not be "extraneous" because a "degree of connection" was necessary. The Senate's prerogative to amend included broad authority over revenue bills, but that authority was still narrower in scope than that enjoyed by the House.

CONCLUSION: THE ORIGINATION CLAUSE AND SOME IMPLICATIONS FOR THE PPACA

Although some framers were skeptical about the Origination Clause, they eventually decided to include it the Constitution. They did so because the Clause assisted the case for ratification and because, as pointed out in Part IV.C, it genuinely served core constitutional goals. The Clause promoted liberty and good government by ensuring that taxation was connected to representation and to popular desires. It promoted democratic values by checking an unrepresentative, exclusive, and powerful Senate. Any provision serving policies as central as these certainly deserves protection from efforts to weaken or gut it. That is one reason we must understand exactly what the Clause does, and does not, mean.

A "Bill[] for raising Revenue" as the Constitution employs the phrase is a tax. A "tax" is an exaction with no legitimate basis other than raising revenue—that is, with no enumerated power to support it other than the

³⁴⁰2 FARRAND'S RECORDS, *supra* note 1, at 276 (Madison, Aug. 13, 1787)

Taxation Clause.³⁴¹ The rule that a tax bill must “originate in the House of Representatives” means that it must be passed by the House before the Senate may act on it. Levies that can be justified independently under Congress’s Commerce Power,³⁴² for example, are not “taxes” as the founders understood the term, and therefore not subject to the Origination Clause. The historical record tells us that the origination principle applies to all changes in tax laws, whether revenue-positive, revenue-negative, or revenue-neutral.³⁴³

Once a revenue measure passes the House, it is transmitted to the Senate. The Senate may pass it unaltered, defeat it, ignore it, or offer “Amendments.” Such an “Amendment[]” may take the form of a partial change or of a complete substitute, but to qualify as an “Amendment” it must address the same subject as the original bill. For constitutional purposes all taxes are within the same subject. Thus, if the House passes a pure tax bill the Senate may replace its content entirely with taxes of its own. Regulations and appropriations are subjects different from taxes, however. If the Senate alters a pure tax bill by adding regulations or appropriations, that alteration is not germane to the underlying bill. It thereby exceeds the scope of “Amendment” as the Origination Clause uses the word.

Founding-era history shows why these rules make sense. Experience in both Britain and America had discredited the practice of “tacking”—that is, the practice by which one legislative chamber attempted to coerce the other

(Italics added.)

³⁴¹U.S. CONST. art. I, § 8, cl. 1.

³⁴²U.S. CONST. art. I, §8, cl. 3 (the Commerce Clause) together with *id.* at cl. 18 (the Necessary and Proper Clause). See *Gonzales v. Raich*, 545 U.S. 1 (2005).

chamber by adding non-revenue measures to revenue bills. One reason the Constitution granted the Senate the power to alter tax bills was to enable it protect itself against House tacking. Similarly, the Constitution's limitation on the Senate's alteration power to germane "Amendments" enabled the House to protect itself against tacking by the Senate.

Application of these rules to the legislative history of the PPACA demonstrates their effect. H.R. 3590 initially was introduced in the House of Representatives. It was a six-page measure designed, according to its title, "To amend the Internal Revenue Code of 1986 to modify the first-time homebuyers credit in the case of members of the Armed Forces and certain other Federal employees, and for other purposes."³⁴⁴ The "other purpose[]]" was to accelerate temporarily estimated tax payments by certain corporations, apparently to generate revenue to offset the money lost due to the expanded credit.³⁴⁵

H.R. 3590 was a "Bill for raising Revenue" as the Constitution uses that term. It reduced taxes for certain taxpayers and effectively raised them for others. Even if it had done only one or the other, it still would have been a "Bill for raising Revenue." As such, it was properly introduced first in the House.

³⁴³*Supra* notes __ & __ and accompanying text (defining money bill as, in part, one denying revenue and reporting Commons rejection as breach of privilege of bill reducing charges).

³⁴⁴H.R. 3590, 111th Cong. (2009); Sissel, *supra*, 951 F.Supp. 2d at 161.

³⁴⁵The Congressional Budget Office did not score H.R. 3590 in its original form. I was unable to find the purpose of the corporate tax acceleration on the website of the House Democratic Caucus, but the website of the House Republican Caucus confirms that it served as a revenue offset. See <http://www.gop.gov/bill/h-r-3590-service-members-home-ownership-tax-act-of-2009/>.

The House passed H.R. 3590 and sent it to the Senate. That chamber altered the bill completely. The Senate (1) struck all matter after the enacting clause, (2) inserted the 2076-page PPACA, and (3) replaced the bill's title. This substitute included the penalty (tax) challenged in federal court as exceeding the Senate's amendment power.³⁴⁶ The substitute also contained various revenue-generating taxes, explicitly denominated as such.³⁴⁷

Adding these taxes was within the Senate's power to amend, because all taxes comprise a single subject. Founding-era courts almost certainly would have upheld an amendment replacing some taxes with others.

To be sure, the PPACA's penalty for failing to purchase qualifying insurance was not really a "tax" as the Constitution uses that term.³⁴⁸ But for

³⁴⁶See Sissel, *supra*, Plaintiff Matt Sissel's Opposition to Motion to Dismiss (Dec. 3, 2012) (stating, "insofar as Section 5000A(b) imposes a tax on persons who fail to obtain 'minimum essential coverage,' it is invalid because it did not originate in the House as required by the Origination Clause").

³⁴⁷See, e.g., Pub. L. 111-148, §9001 (imposing excise tax on high cost employer-sponsored health coverage), § 9004 (increasing tax on distributions from certain health savings accounts and medical savings accounts), § 9007(b) (imposing taxes on hospitals that fail to meet certain requirements), § 9015 (imposing hospital insurance tax on high-income taxpayers), § 9017 (imposing excise tax on elective cosmetic medical procedures).

The law also alters the tax code in other ways, e.g., *id.* § 1401 (granting certain tax credits) & § 9013 (modifying itemized deduction for medical expenses).

³⁴⁸The penalty's regulatory purpose should have disqualified it as a tax, but the Supreme Court's short discussion of the tax issue evinces no awareness of the founders' tax/regulatory distinction. *NFIB v. Sebelius*, *supra*, 132 U.S. at 2594-99 (opinion for the Court); *see also id.* at 2651-55 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting). The Court relied instead on its own tax-versus-regulation precedents. Some of that jurisprudence accords with the founders' distinction. *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922) (holding that a "tax" not designed to raise revenue is not a tax for constitutional purposes); *Millard v. Roberts*, 202 U.S. 429 (1906) (holding that a regulatory measure that produces only incidental revenue is not a "tax"); *Twin City Nat'l Bank v. Nebecker* 167 U.S. 196 (1897) (holding that

our purposes it is a tax because the Supreme Court has so ruled.³⁴⁹ Only because the Supreme Court held the penalty to be a tax was it a valid Senate “Amendment” to a “Bill for raising Revenue.”³⁵⁰

The Senate’s substitute H.R. 3590 also added *non-revenue* provisions. These included regulations on insurance companies, employers, and health care providers,³⁵¹ as well as various appropriations.³⁵² These, however, are

incidental generation of revenue did not prevent the measure from being regulatory when adopted pursuant to a valid regulatory purpose). *See also* Rodgers v. United States, 138 U.S. 992 (6th Cir. 1943) (same).

However, the precedent closest in concept to NFIB v. Sebelius fails to apply the founders’ distinction. United States v. Kahriger, 345 U.S. 22 (1953) (holding a gambling tax valid because it produced revenue, despite a dominant regulatory purpose, and adding in dicta, 354 U.S. at 28, that even a measure raising only “negligible” revenue qualified as a tax).

³⁴⁹NFIB v. Sebelius, *supra*, 132 U.S. at 2593.

³⁵⁰ The United States Court of Appeals for the D.C. Circuit recently held, seemingly in defiance of the Supreme Court, that the penalty for purchasing insurance was not a revenue bill. *Sissel, supra*, ___ F. 3d at ___ (D.C. Cir. 2014). If the court of appeals is correct, however, then adding the penalty was not a valid amendment.

The court of appeals stated that because the PPACA’s penalty was not a revenue measure because it was designed as a regulation. Yet the Supreme Court had *specifically* ruled the regulatory function to be *ultra vires*, thereby distinguishing the case from those in which the Supreme Court upheld measures enacted for *valid* regulatory purposes. United States v. Munoz-Flores, *supra* (assessments levied as part of constitutionally-enacted criminal measure); Millard v. Roberts, 202 U.S. 429 (1906) (upholding levy as incident to creation of national currency); Twin City Nat’l Bank v. Nebecker 167 U.S. 196 (1897) (same). The court of appeals did not explain how a measure can be legitimated by serving an illegitimate purpose.

The result of the appeals court’s reasoning is that (1) Congress is permitted to advance an impermissible regulatory function via a tax that (2) is exempt from the rules applying to taxes precisely because it advances an impermissible regulatory function!

Surely that is not what the Constitution means.

³⁵¹E.g., Pub. L. 111-148, §§ 1001 & 1003 (imposing extensive additional

subjects distinct from revenue. Adding them exceeded the Senate's power to amend.

The challengers in the PPACA Origination Clause litigation, therefore, have been attacking the wrong part of the law. Under modern Commerce Power and Spending Clause jurisprudence,³⁵³ the regulatory and appropriation portions of the PPACA would have been within the power of the Senate to *originate*. But they were not germane to H.R. 3590 as it emerged from the House, and thus not within the scope of the Senate's power to *amend*.

Whether the PPACA's valid taxes (including the penalty for not purchasing insurance) can be severed from the invalid portions of the PPACA is another issue entirely.

regulations on insurance companies and policies); *id.*, §§1511-1515 (imposing additional regulations on employers).

³⁵² *E.g.*, *id.* at § 3511 (purportedly authorizing certain appropriations).

³⁵³Today, health and insurance regulations are justified under the Commerce Power, but such regulations are not within the scope of the Commerce Power as originally understood. Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001); Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847 (2003); Robert G. Natelson, *The Legal Meaning of “Commerce” In the Commerce Clause*, 80 ST. JOHN’S L. REV. 789 (2006). Indeed, the Supreme Court did not treat most forms of insurance as “Commerce” until 1944. David B. Kopel and Robert G. Natelson, *Health Insurance is not “Commerce,”* NAT’L L. J., March 28, 2011.