

BILLS FOR RAISING REVENUE UNDER THE
FEDERAL AND STATE CONSTITUTIONS

INTRODUCTION

SOME time ago the author's attention was attracted to this statement of Senator Pomerene, made in debate June 3, 1918:

"The provision in the constitution that 'all bills for raising revenue shall originate in the House of Representatives,' even if comprehensive enough to cover the change of time of payment of revenue, is purely directory and not mandatory."

This study is the result of an attempt to discover if the statement that the provision is directory, rather than mandatory, has any foundation either in law, as a matter of principle, or in fact, as a matter of practice. A study of similar provisions in the constitutions of the American states was necessitated, in addition to some analysis of such provisions as they exist in foreign countries.

Article I, section 7, clause 1, of the federal constitution provides that:

"All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills."

The constitution of the Confederate States of America duplicated the federal provision.

It is said that such a provision exists in twenty-two state constitutions.¹ Many states say that money bills can originate in either house. Thus, the New York constitution provides: "Any bill may originate in either house of the legislature." But where the constitution so provides or is silent on the question the senate, as a general practice, concedes to the lower house the right of initiating measures for raising revenues and often general appropriation bills as well.²

¹ Dealey, *American State Constitutions*, 190.

² Agger, *Budget in the American Commonwealth*, 25 *Columbia University Studies*, 22.

1. HISTORY OF THE FEDERAL CONVENTION

In 1776, eight of the states adopted new constitutions, five of these providing that all money bills must originate in the lower house. Two of these, Maryland and Delaware, provided against the abuse of this privilege by the lower house putting riders on money bills. In 1780 Massachusetts adopted a provision almost identical with that of the federal constitution. So that prior to 1787 six states had such provisions. Many of the delegates from these states opposed the placing of such a provision in the federal constitution.³

On June 13, 1787, a proposal that money bills should only originate in the first branch and that the Senate should have no power to alter or amend was defeated eight to three, New York, Delaware, and Virginia voting for it. July 5 Franklin made a report providing all money bills should originate in the House, the Senate being unable to alter or amend. This was coupled with provisions that representation in the House should be based on population and in the Senate should be by states. It was, in fact, an inducement offered by the small to the large states. This passed with five ayes; three noes; three divided. August 6 we find the following in the report of the committee of detail of the draft constitution:

"All bills for raising or appropriating money . . . shall originate in the House of Representatives, and shall not be altered or amended by the Senate."

But by this time it had practically been settled that there would be equal representation in the Senate, and the small states were not so anxious to pass such a provision, depriving them of all power over money measures. So we find that August 8 this provision was defeated seven to four, Connecticut, New Hampshire, Massachusetts, and North Carolina favoring. This action stirred up a great deal of opposition and on August 11 it was moved and seconded to reconsider the former action, by a vote of eight ayes; two noes; and one divided.⁴ August 13 a measure "That all bills for raising or appropriating money" belong to the House was defeated. When amended to read "bills for the

³ E. D. Adams, *Control of the Purse*, Kansas University Quarterly, April, 1894, reviews the debates on this point in the Federal Convention, and the subsequent disputes between the House and Senate over its interpretation.

⁴ According to the *Journal of the Convention*, South Carolina was divided; New Jersey and Maryland voting, no. Madison's records show New Jersey voting, yes.

purpose of revenue" this was also defeated, by four ayes and seven noes. A proposal designed to win the favor of the small states was made August 15, by giving the Senate power to "propose or concur with amendments as in other cases." September 8 the question came up for final consideration and was adopted in its present form. To the first clause providing that bills for raising revenue shall originate in the House there were two dissenting votes, Maryland and Delaware; there was no vote on the second clause, and presumably no opposition.

"By a majority of the members of the convention the matter was not looked upon as a question of much constitutional importance but simply as a convenient subject upon which to base a compromise."⁵

McHenry before the Maryland House of Delegates on Nov. 29 declared:

"The controversy ended in a compromise by which the lesser states obtain a power of amendment in the Senate . . . The larger states hoped for an advantage by confining this privilege to that branch where their numbers predominated."

Luther Martin before the Maryland House on November 29, 1787, also referred to the final solution as a compromise. The question was so connected with other constitutional provisions that it is difficult to ascertain the principles by which it was settled. Despite the absence of any great regard for it among the members of the convention the people did regard the restriction to the House as a great constitutional principle.⁶

"Gerry was right when he said that the presence or absence of such a provision would have much to do with the acceptance or rejection of the constitution by the people."

The report of Elbridge Gerry to the vice president of the Massachusetts Convention, in 1788, summarizes most of the arguments in favor of the adopted measure. (1) "It was conceived to be highly unreasonable and unjust that a small State, which would contribute but one sixty-fifth part of any tax, should, nevertheless, have an equal right with a large state which would contribute eight or ten sixty-fifths of the same tax, to take money from the pockets of the latter." (2) The right of expending should be in proportion to the ability of raising money, and the larger states would have no security as to this if without due command of their own purses. (3) The power to *amend* practically is the power to *propose*. (4) The senators are further

⁵ Adams, 177.

⁶ *Ibid*, 181.

removed from the people, and more extravagant. (5) With the power of amendment the Senate would never be satisfied with the bills of the House. (6) As proposed the constitution gives the lesser states an "undue command of the property of the larger states." The latter two points, it will be observed, are opposed to the last clause, giving the Senate power to amend. Said Franklin on July 6, 1787, in the Convention:

"It was always of importance that the people should know who had disposal of their money, and how it had been disposed of. It was a maxim that those who feel, can best judge. This end would be best attained if money affairs were to be confined to the immediate representatives of the people."

There was, too, a great deal of mistrust of the Senate. Thus, said Gerry on June 13, if the Senate were given power to initiate money bills they would repeat the experiment "till chance should furnish a set of representatives in the other branch who would fall into their snares."

And Mason on July 6 said:

"Should the latter have the power of giving away the people's money they might soon forget the source from which they received it. We might soon have an aristocracy."

What were the objections to the adopted provision? (1) There is not sufficient analogy between the House of Lords and the Senate to justify its adoption. The Senate is elected by the people, through their deputies, while the House of Lords is neither directly nor indirectly representative of the people. (2) Madison, among others, declared that the senators would be a more capable set of men than the representatives, and should have a say in the "preparation of the business, especially of that which was most important, and in our republics, worse prepared than any other." (3) It was also argued that such a discrimination would lead the best men to decline to serve in the Senate, preferring to go into the House. (4) If there was no restriction of any kind the people could compare the bills prepared by both branches. (5) There was no advantage of the system in England. (6) As long as both branches had to approve such bills, what difference did it make as to which branch initiated them? (7) In practice the House would tack other clauses onto money bills. (8) Luther Martin, in his "Genuine Information" said that one argument against the provision was that it would be the source of future disputes as to what *are* or *are not* revenue bills. (9) Williamson on July 6 declared that if the privilege were confined to either branch it

should be to the second "as the bills in that case would be more narrowly watched, than if they originated with the branch having most of the popular confidence." This seems to have been the real idea of many, though most of those who favored property interests did not bring it out so clearly.

2. HISTORY AND ARGUMENTS IN ENGLAND

In the British Parliament, in 1678, it was settled that: (1) "all bills for purpose of taxation, or containing clauses imposing a tax, must originate in the House of Commons and not in the House of Lords." (2) The Lords cannot amend taxing bills, but may reject them. This latter right has rarely been exercised. A valuable precedent for the right of the Commons had been established in 1407, under Henry IV.⁷ A money bill, in that case, came from the Lords to the Commons. The lower body remonstrated, claiming the sole right to originate such bills; the king yielded to their claim. But he did so more because of the weakness of the Commons than because of their strength, as that body always did the bidding of the king or the dominant Lords. The theory was that as the Commons were the financially poorest branch, they should be allowed to state the maximum of taxation.

The most interesting debate occurring in Parliament on the subject was in 1860, when the Commons presented a bill repealing the Paper-Duty Bill to the Lords.⁸ May 21 Lord Lyndhurst admitted that the Lords could neither alter, originate, or amend money bills, but claimed for them the right to reject such bills. He cited cases where this right was admitted by the Commons and declared by the Lords.⁹ He stated that this right included the power of negating a proposed repeal of an existing bill, supporting his position with precedents.¹⁰ In this position he was supported by Lord Chelmsford; and by Lord Montague, the latter also citing precedents. The latter denied

⁷ 3 Stubbs, *Constitutional History of England*, 62, 63.

⁸ For history of the dispute see 1860 *Annual Register*, 76-96.

⁹ Rejection by Lords of Money Bills; 1789; 1790; two rejections of bill imposing duty on cocoanuts; 1809, bill granting duties on malt.

Admission by Commons of right of Lords to pass or reject as a whole in 1671 and 1689.

In 1853 Lord Aberdeen, speaking before the Lords, said that body might reject money bills on the second reading.

¹⁰ Rejection by Lords of temporary or permanent repeal of taxes or duties:

1758, bill discontinuing for a limited time duties on tallow imported from Ireland; 1790, bill abolishing stamp duties affecting coasting trade; 1805-1807, bills abolishing fees paid to custom-house; 1808, bill to repeal duties on coal carried coastwise; 1811, bill to suspend temporarily duties on corn; 1816, bill to repeal excise duties on stone bottles.

that this action of the Lords would amount to the imposition of a tax, "for the tax did not exist by virtue of a vote of the House of Commons, but by the law of the land, on the assent of the Queen, Lords, and Commons." Lord Dufferin and the Marquis of Clanricarde admitted the technical force of the claim that a money bill in force could only be repealed by joint action, but urged the impolicy of rejection. Lord Cranworth denied the validity of the precedents cited. The bill for repeal was then rejected, one hundred ninety-three to one hundred four. The country was divided in feeling on the question, leading authorities supporting both sides. The majority of the people from prudential reasons justified the Lords' action as a financial necessity. The opposition was by those interested financially in the repeal.¹¹ "The cheap newspapers, which felt severely the burthen of the paper-duty on their enterprise, vehemently impugned the conduct of the Lords." This might be compared to the present justifiable opposition to the zone postage law so vigorously opposed by our periodicals. Opinion in the House was likewise divided, the conservatives upholding the constitutionality of the Lords' action. Lord Palmerston on May 25 moved the appointment of a committee to examine the precedents. The motion was passed and a committee of twenty-one appointed, which later reported to the House. On July 6 Lord Palmerston said that as a result of the report he was convinced of the constitutionality of the Lords' action. This view was taken by Whiteside, Disraeli, and Horsmann. Mr. Collier denied the validity of the precedents, as in none of them had bills been rejected on purely financial grounds. Mr. Osborne likewise denied the right of the Lords to reject money bills, but said their action was financially justified. A resolution saying the Lords' attitude was "justly regarded . . . with peculiar jealousy" was passed; though this was generally held to admit the *right* of the Lords to reject. A resolution was then passed that in the future the House should have the sole power to impose or remit taxes. This did not satisfy the opponents of the Lords, who thought that the precedent was likely to prove of dangerous application later. So on July 17 a resolution censuring the Lords was moved, the resolution also saying

¹¹ 1860 Annual Register, 82. The legislation of 1910 removed from the Lords all of their remaining power over money bills. The present discussion is therefore valuable chiefly as throwing light upon the development historically of the doctrine, and as English experience has been adopted as a precedent in many countries.

the Lords had encroached on the rights and privileges of the Commons. This was rejected, one hundred seventy-seven to one hundred thirty-eight, and when contrasted with the resolution passed July 6 leaves the question of the exact position of the Commons doubtful.

3. SURVEY OF THE PRINCIPLE INVOLVED.

The statement by Hamilton in the *Federalist*¹² that the sole power to originate money bills was the most effectual weapon of the House seems to summarize most of the arguments favoring the grant. The people "can obtain a redress of every grievance." The most direct and responsible representatives of the people were to be in the House; give them, therefore, the exclusive power to originate bills to raise revenue. Says Cooley:¹³

"As one body is more numerous than the other, and more directly represents the people, and in many of the states is renewed by more frequent elections, the power to originate all money bills, or bills for the raising of revenue, is left exclusively, by the constitutions of some of the states, with this body, in accordance with the custom in England."

4. THE LEGAL PROBLEM.

It will be recalled that Luther Martin, in his "Genuine Information," said that one argument against the constitutional provision was that it would be the source of future disputes as to *what are or are not revenue bills*. Says Miller:¹⁴

"'Bills for raising revenue' would have reference to laws for the purpose of obtaining money by some form of taxation or other means of raising the necessary funds to be used in supplying the wants of the government, paying its expenses, and discharging its debts."

Despite the seeming clearness of this definition many disputes have arisen.¹⁵ Do all bills which result in the raising of revenue, directly or indirectly, come within the classification of "revenue bills?" Have bills raising revenue originated in the federal or state Senates and become laws?¹⁶ If so, what principles

¹² No. 58.

¹³ *Constitutional Limitations*, 156.

¹⁴ *Lectures on the Constitution*, 204. See also *United States v. Hill*, (1887) 123 U. S. 681, 31 L. Ed. 275. 8 S. C. R. 308.

¹⁵ The following statement by Hon. L. R. Sheldon, ex-member of Congress, in the *American Economist*, June 19, 1903, is rather too optimistic and implies the absence of controversies, some of them serious, which have arisen. "The clause has had a definite and uniform interpretation from the very beginning of the government."

¹⁶ The United States Senate in 1859 insisted that each House was equally competent to pass on the question as to what constituted a revenue bill.

are involved? We must examine the cases coming before the courts, disputes between the two branches of the legislature, and the opinions of other authorities; bearing in mind, of course, that some courts do not apply as strictly as others the rule of stare decisis, and that the results of legislative disputes or opinions by others would have no binding influence, but could only be admitted as evidence of a tendency or in support of particular views.

5. NON-REVENUE BILLS.

We shall here consider the cases arising in federal and state courts in which bills in dispute have been declared not to come within the constitutional prohibition; also similar statements arising during the disputes between the House and Senate.

A. *In the Federal Courts.* "If these courts had not assumed that a revenue bill of Senate origin was a nullity, why spend so much time in proving that the act under consideration was not such a bill?"¹⁷ It was held by Justice Story¹⁸ that the phrase "revenue laws" as used in an act of 1804, meant such laws "as are made for the direct and avowed purpose of creating revenue or public funds for the service of the government." That is, if revenue is not the "direct and avowed" aim of a bill then it is not a revenue bill, even though it may result in the securing of money for the Treasury.

A statute requiring the clerk of the United States circuit court to pay into the treasury any surplus of fees and emoluments which his semi-annual return to the attorney general shows to exist over and above the compensation and allowances authorized by law to be retained by him, is not a "revenue law."¹⁹ The clerk's obligation was held to grow from a statute governing an officer of a court of the United States, and not from a "revenue law."

An act imposing taxes on the notes of a national bank is not a revenue bill, since the tax was to aid in providing a "national currency based upon United States bonds."²⁰ An act originating in the Senate which established a postal money-order system was upheld.²¹ A bill which increased the rates of postage

¹⁷ Hubbard v. Lowe, (1915) 226 Fed. 135.

¹⁸ United States v. Mayo, (1813) 1 Gall. (U.S.C.C.) 397, Fed. Cas. 15755. See also United States v. Norton, (1875) 91 U. S. 566; 23 L. Ed. 454; State v. Bernheim, (1897) 19 Mont. 517, 49 Pac. 443.

¹⁹ United States v. Hill, (1887) 123 U. S. 681, 31 L. Ed. 275, 8 S. C. R. 308.

²⁰ Twin City National Bank v. Nebeker, (1897) 167 U. S. 196, 42 L. Ed. 134, 17 S. C. R. 766.

²¹ United States v. Norton, (1875) 91 U. S. 566, 23 L. Ed. 454.

on third class matter was upheld since it "provides for an equivalent for the money which the citizen may choose voluntarily to pay."²² The decision might be criticized on two grounds; (1) all taxes should provide to the citizen an equivalent for the money he is forced to pay. This is just as true whether the benefit be direct and immediate or indirectly through the general functioning of government. (2) Strictly speaking, the citizen in the instant case does *not have* to pay; but in the present state of our civilization and advancement is it not in fact almost incumbent upon us to transmit newspapers and communications from one part of the country to another to maintain and improve our economic, social, and political conditions? Then on the assumption that any but an extraordinary increase in the postage rates will have no appreciable effect on the amount of mail sent through the post-office, is not an increase in postage rates in reality a "revenue law"?

The case of *Millard v. Roberts*²³ involved a bill to eliminate grade crossings and for a union station in Washington, D. C., providing for the payment of a sum of money to the railway companies, this money to be raised by a tax on the District property. This was held to be only a means to the purpose provided by the act. McKenna, Justice, said that bills for other than tax purposes that may incidentally create revenue are not revenue bills. This is rather a pretty bit of reasoning. The purpose of the bill could not have been accomplished except by the raising of revenue. Provide for the raising of revenue but specify the purpose for which the money raised is to be used and your bill is not a revenue measure at all.

In fact one cannot but be impressed after a review of the decisions, federal and state, with the truth of this statement:

"It has sometimes required a good deal of mental strain to demonstrate that some piece of legislation originating in a Senate was not a 'bill for raising revenue.'"²⁴

B. *In the State Courts.* An Oklahoma law prescribed a fee to the public for services rendered by the clerk of the supreme court. It was held that it was not exacted for revenue, but as compensation, and, therefore, was not a revenue measure, within

²² *United States v. James*, (1875) 13 Blatch (U.S.C.C.) 207, Fed. Cas. No. 15464.

²³ (1906) 202 U. S. 429, 50 L. Ed. 1090, 26 S. C. R. 674.

²⁴ The court in *Hubbard v. Lowe*, (1915) 226 Fed. 135, citing as instances, 167 U. S. 196; 13 Blatch, 207; 124 Fed. 197; 97 Fed. 435.

the meaning of the constitution.²⁵ If this be regarded as a measure to aid the government in "paying its expenses," according to Justice Miller's definition of revenue bills, previously quoted, there might be some grounds for justifiable criticism of this decision. A law restricting to \$3000 the sum certain recipients of fees might hold is not a revenue law; it neither increases nor diminishes the burdens of the people or litigants.²⁶

Laws taxing mortgages have been upheld.²⁷ An act providing for the discovery of property not already listed for taxation and providing for the assessment and collection of taxes is not a revenue law.²⁸

In Georgia a law originating in the Senate chartered the town of Elberton; and included the power to tax the townspeople. It was held that the taxing is a mere incident, and not the end of the act.²⁹ It might in addition have been said that (1) it was optional with the town authorities as to whether any tax at all should be levied; (2) the date of levying was optional; (3) the amount or rate of the tax was not specified (except as it might be limited by the debt limit of the town). A Montana law of 1907 authorized the establishment of country free high schools and provided for a tax to supply the funds for expenses, the money to be used only for the particular school in the district in which the money is raised. This was held not to be a revenue bill, as no money was raised for the state.³⁰

A Colorado act of 1889, which came up to the federal courts,³¹ authorized counties to refund their judgment and bonded debts. This was held, by Sanborn, circuit judge, not to be a rev-

²⁵ *Re Lee*, (Okla. 1917) 169 Pac. 53. See also *Northern Counties Investment Trust v. Sears*, (1895) 30 Ore. 388, 41 Pac. 931.

²⁶ *Commonwealth v. Bailey*, (1882) 81 Ky. 395, 4 Ky. L. Rep. 384. Cf. *United States v. Hill*, (1887) 123 U. S. 681, 31 L. Ed. 275, 8 S. C. R. 308.

²⁷ *Cornelius v. State*, (1914) 40 Okla. 733, 140 Pac. 1187; reaffirmed in *Trustees v. Hooton*, (1916) 53 Okla. 530, 157 Pac. 293. *Dundee Mortgage Trust Inv. Co. v. Parrish*, (1885) 24 Fed. 197. The question here was whether the act conformed to the Oregon constitution. The court held that the act levied no tax and does not raise revenue, but only provides that when a tax is levied or a revenue raised that mortgages shall contribute thereto as land. In other words, the definition of "land" for the purpose of taxation was made clearer by the act. The federal court professed to follow *Mumford v. Sewell*, (1883) 11 Ore. 67, 4 Pac. 585, 50 Am. Rep. 462, where the court held that such an act only incidentally created revenue.

²⁸ *Anderson v. Ritterbusch*, (1908) 22 Okla. 761, 98 Pac. 1002.

²⁹ *Harper v. Commissioners of Elberton*, (1857) 23 Ga. 566.

³⁰ *Evers v. Hudson*, (1907) 36 Mont. 135, 92 Pac. 462.

³¹ *Geer v. Commissioners*, (1899) 97 Fed. 435, 38 C. C. A. 250.

enue law, as bills for raising revenue provide for the levy and collection of taxes to defray the expenses of government.

"This act was not of that character. Its main purpose was to authorize certain quasi-municipal corporations to refund their debts. The provisions for the levy and collection of taxes which it contained were mere incidents to the general refunding legislation which it carried."

A bill providing for an increase in the license fees to be paid by saloons was held to be a police regulation, and not a revenue law.³² Of somewhat similar character was a Colorado law requiring insurance companies to pay to the commissioner of insurance two per cent of the premiums received; it was declared that the primary object of the bill was to regulate the companies.³³

C. *Miscellaneous.* The following bills raising money originated in the Senate: establishing the post-office, establishing the mint, regulating the sale of public lands.³⁴

"It makes no difference whether the bill or measure increases or reduces or repeals taxes, the right of origination is with the House of Representatives."³⁵

In 1883, however, the House, under stress of circumstances, permitted the Senate to add to a little bill affecting the tobacco revenue a whole plan of tariff revision.

6. CONSIDERED AS REVENUE BILLS.

A. *In the Federal Courts.* Customs duties can be imposed only in revenue bills arising in the House of Representatives.³⁶ Internal revenue laws are likewise revenue laws.³⁷ An interesting case arose in connection with the so-called "Cotton Futures Act." This was originally passed by the Senate. The House struck out all of the clauses after the enacting clause and substituted a different act, seeking to prohibit such contracts by imposition of a prohibitive tax. The court held that this was a

³² *State v. Wright*, (1887) 14 Ore. 365, 12 Pac. 708; contra *Thierman v. Commonwealth* (1906) 123 Ky. 740, 97 S. W. 366.

³³ *Colorado National Life Assurance Co. v. Clayton*, (1913) 54 Col. 256, 130 Pac. 330.

³⁴ 1 Tucker, *Constitution* 451; 1 Story, *Constitution* s. 880. "For such bills do not impose a burden on tax payers." The constitutional clause, according to these authorities, was designed to protect the tax payers, and only relates to revenues raised by taxation.

³⁵ Hon. Lionel R. Sheldon, ex-member of Congress, in *American Economist*, June 19, 1903.

³⁶ *Rainey v. United States*, (1914) 232 U. S. 310, 58 L. Ed. 617, 34 S. C. R. 429; 24 A. & E. Enc. 887.

³⁷ *Pettigrew v. United States*, (1878) 97 U. S. 385, 24 L. Ed. 1029; *Prather v. United States*, (1896) 9 App. Cas. (D.C.) 82.

revenue bill originating in the Senate.³⁸ "It has not heretofore been found necessary to condemn an act of Congress for this kind of careless journey work."

B. *In the State Courts.* Bills for taxation can only be originated in the House of Representatives.³⁹

C. *In the House and Senate.* In the first Congress this question arose, during discussion in the House of a bill for the establishment of the Treasury Department. In June, 1789, a motion was made and carried to strike out a clause making it the duty of the secretary of the treasury "to digest and report a plan for the improvement and management of the revenue and the support of the public credit." This motion was carried by a large majority. It was argued "that the power of reporting plans for the improvement of the revenue is the power of originating money bills." Would such an argument now be advanced by anyone in opposing plans for the establishment of a national budget system?

In the twenty-second Congress (1833) Clay offered a bill in the Senate to reduce tariff duties, to appease the people of South Carolina. It was objected that the Senate had no power to originate bills to raise revenue. Clay insisted that it was a bill to reduce duties and, therefore, did not come within reach of an equitable objection. Webster said that "the subject belonged expressly to the House of Representatives. It was of no consequence whether the duty was increased or decreased; if it is a money bill, it belonged to the House of Representatives to originate it." The same bill was introduced and passed in the House, and the Senate concurred. On his own motion Clay's bill was laid on the table. This debate was confined to the Senate, the House not participating in the discussion. During a debate in the Senate in the twenty-eighth Congress on McDuffie's Tariff Bill, to revive the compromise tariff of 1833, which would have been a reduction of the then existing duties (imposed in the tariff of 1842), by a vote of thirty-three to four the Senate decided that a tariff bill was a revenue measure.

July 26, 1919, there was a debate in the House on Bill H. R. 414, to provide for the establishment and maintenance of free zones in the ports of the United States, and for other purposes.

³⁸ Hubbard v. Lowe, (1915) 226 Fed. 135.

³⁹ Stockton, etc., R. Co. v. Common Council of City of Stockton. (1871) 41 Cal. 147, 165.

This bill had been previously referred to the committee on interstate and foreign commerce. Representative Fordney, the chairman of the ways and means committee, said that body believed the bill to be a revenue measure, and moved the bill's reference to the latter committee. Representatives Garner and Moore supported the view that this was a revenue measure, while Representatives Esch and Sanders argued this was a bill dealing principally with interstate commerce. Mr. Kitchin, a Democrat, said that in the past all such bills had been referred to the ways and means committee. On a division Mr. Fordney's motion won, fifty-four to thirty-three.

In 1837 the Senate passed a bill for the issue of treasury notes. When this was sent to the House Mr. Bell of Tennessee objected to its consideration, as it was a money bill and should have originated in the House. Mr. John Quincy Adams agreed. The bill was laid aside and one for the same purpose introduced and passed by the House, and then sent to the Senate, which concurred. This was the first objection by the House to the consideration of Senate bills indirectly bearing on the revenue.⁴⁰ In 1859 the House passed a post-office appropriation bill. This was amended by the Senate changing and in some cases increasing postage rates. By a vote of one hundred seventeen to seventy-six the House returned to the Senate, as a revenue measure, the amended bill. In the third session of the forty-first Congress the Senate passed a bill to repeal the law imposing the income tax. The House of Representatives passed a resolution calling the attention of the Senate to the constitutional clause, and insisted that the House had the sole power to impose, reduce, or repeal taxes. Said Mr. Butler: "Cutting off one tax is in fact always equivalent in contemplation of law, to raising another."⁴¹

7. THE QUESTION OF TREATIES.

On August 2, 1919, in the House, Congressman George M. Young declared the Canadian Reciprocity Act illegal since: (a) The president's power to negotiate with foreign governments does not extend outside the treaty-making power; this power does not extend to revenue measures, whose origination belongs solely to the House; (b) Taft's action was, therefore, an invasion of the House's constitutional prerogatives. That is, the approval of the House was of no effect since the president and Senate had, in the

⁴⁰ Adams, *Control of the Purse*, 192.

⁴¹ Quære, Was this a valid objection?

first place, no right to negotiate such a treaty. It is well known that in the past the president has been obliged to keep in touch with the House Committee on Foreign Relations; and where an appropriation has been necessary it has been customary to ask the concurrence of the House.

What restrictions, in general, are there on the power of the president and Senate to make treaties?⁴² The treaty-making power in practice and authority has been held, says Senator Kellogg, "to embrace all those subjects which it has been the practice and custom of nations to exercise." This includes the questions of customs duties, settlement and payment of damages, etc. Any of the specific grants made to Congress may be made the subject of treaties. Said Chief Justice Ellsworth in a letter of March 13, 1796: "The power goes to all kinds of treaties." Yet this power is limited, and limited only, by the express provisions of our constitution; for instance, no power of Congress given it under the constitution can be annulled or amended.⁴³ Treaties and laws of Congress are of equal supremacy, and it is well settled that the latest treaty or act relating to a given subject is supreme.

The objections that are made to the League of Nations on the ground of constitutional infringement and that are made to the Reciprocity Act are not new. The same objections were made to the Jay Treaty of 1794—that it restricted the power of Congress to lay taxes or exact higher duties upon commodities, and that it provided for the payment of money. In the bitter discussion that arose over that treaty one of its leading supporters was Hamilton, who said that treaties may include the consideration of pecuniary indemnifications, involving appropriations of money. President Washington, taking the advice of Hamilton and others, refused to submit the treaty to the House.⁴⁴ Although the power to raise revenues is vested exclusively in the House many treaties involving modification of the existing revenue laws have been negotiated, and Congress asked to pass the necessary legislation to carry them into operation. Senator Kellogg asserts that the

⁴² For the most part these observations will, aside from the author's own comments, be drawn from recent utterances of two of the best known authorities on constitutional law. H. St. George Tucker, 89 *Central Law Journal*, 79. F. B. Kellogg in the Senate, August 7, 1919.

⁴³ The Supreme Court has decided that a treaty can not alter the constitution. *Thomas v. Gay*, (1897) 169 U. S. 264, 42 L. Ed. 740, 18 S. C. R. 340.

⁴⁴ A list of treaties involving the payment of money and not submitted to the Congress may be found in Crandall, *Treaties* 179 (1796-1903).

power to negotiate such treaties is beyond question, though the wisdom is doubtful. In the case of *De Lima v. Bidwell*,⁴⁵ the decision of the court asserted that, in effect, the treaty of April 11, 1899, amounted to a repeal of the tariff laws, so far as concerned the Island of Porto Rico. The court held that the question of propriety was for the Senate and president to determine when they made the treaty. This would seem to be but a logical application of the principle formerly advanced in *Luther v. Borden*.⁴⁶ The *De Lima* case has since been cited and approved.⁴⁷

To what extent can the House be obligated by the adoption of treaties involving the exercise of some of its constitutional powers? John Forsyth, representative, later secretary of state, instituted in the House, during the discussion of the Jay Treaty, the contention that legislation to administer the treaty was necessary, but made no claim that the treaty was invalid. It was a valid treaty, "but not having the force of law in its operation upon the municipal concerns of this people without legislative enactment."⁴⁸ In the *De Lima* case the court said that the Congress clearly reserves the right to refuse to carry out such a treaty.

Is Congress morally, though not legally, bound to carry out the provisions of such a treaty? Many of the great lawyers who oppose the League of Nations assert, for instance, that we might be under moral obligation to declare war in certain cases. Or there might be such an obligation on Congress to reduce tariff duties in certain cases. This is vigorously denied by Tucker.

"If the power given to Congress to declare war means anything, it means that the power must be exercised by the free, independent and untrammelled judgment of the representatives of the people, or it means nothing. To be morally bound is as effective as is being legally bound. . . . In other words, if under this theory, Congress must declare war, it is clear that it has no independent action. . . . The treaty power may make a treaty (a contract) agreeing to declare war, but it is valueless without the act of Congress to execute it—and immorality cannot be imputed to Congress for declining to do what their best judgment does not approve."

To the author this view seems eminently sound.

⁴⁵ (1901) 182 U. S. 1, 45 L. Ed. 1041, 21 S. C. R. 743.

⁴⁶ (1845) 7 How. (U.S.) 1, 12 L. Ed. 581. The court declared it could not consider the propriety of a decision of the President.

⁴⁷ *Dorr v. United States*, (1903) 195 U. S. 138, 49 L. Ed. 128, 24 S. C. R. 808.

⁴⁸ Having the power of independent action, Congress can in no wise be obligated by the action of President and Senate. Story, *Constitution* s. 1508; Tucker, *Limitations on the Treaty Making Power*, Ch. I, p. 4.

Congress alone has the power, we have seen, to carry out the specific grants given it under the constitution. Nations dealing with the treaty-making power are presumed to have knowledge of the constitutional limitations.⁴⁹ In the case of *Turner v. American Baptist Missionary Union*,⁵⁰ Mr. Justice McLean on the circuit, said:

“A treaty under the federal constitution is declared to be the supreme law of the land. This, unquestionably, applies to all treaties where the treaty-making power, without the aid of Congress, can carry it into effect. It is not, however, and can not be the supreme law of the land where the concurrence of Congress is necessary to give it effect. Until this power is exercised, as where the appropriation of money is required, the treaty is not perfect. It is not operative in the sense of the constitution, as money can not be appropriated by the treaty-making power. This results from the limitations of our government. The action of no department of the government can be regarded as a law until it shall have all the sanctions required by the constitution to make it such.”

8. APPROPRIATION BILLS.

Conceding that the House of Representatives has the sole right to originate revenue bills, and bearing in mind the measures coming within this classification, the question arises whether the House alone has the right to originate measures appropriating money. Or is the right to raise revenue to be distinguished from the right to appropriate money, and can the Senate initiate appropriation bills? Before considering the court decisions on this question we shall examine the principle and practice.

A. *The Principle.* Elbridge Gerry in his address to the vice-president of the Massachusetts Convention, Jan. 21, 1788, seemed to imply that the power to raise money was accompanied by the power to expend, since in support of the constitutional provision he said: “The right of expending should be in proportion to the ability of raising money.” And many subsequent authorities and writers have claimed that the right to expend, to appropriate, belongs solely to the House.

⁴⁹ 2 Butler, *Treaty-making Power*, s. 372, and cases cited. 2 Burgess, *Political Science and Constitutional Law* 294.

⁵⁰ (1852) 5 McLean (U.S.C.C.) 344, Fed. Cas. No. 14251. The author cannot but agree with the principle stated by Senator Kellogg: “There ought not be a promise which should require us to send an army to foreign shores which would be violated if the Congress, in the exercise of a constitutional right, should refuse to act.” The author’s views on the relations of Congress to the treaty power are more fully expressed in 89 *Central Law Journal* 370.

Justice Miller, however, says:⁵¹

"The appropriation of that money, which is always necessarily done by virtue of an act of Congress, would seem to be quite a different thing from the laws prescribing how the money shall be raised."

Gilfrey's *Precedents* asserts:⁵² "A plain and literal interpretation . . . gives the power to originate to the Senate, as well as to the House." The following statement of Mr. Carpenter, in the Senate, April 24, 1872, is cited and approved:

"The fact that the constitution so carefully provides that 'bills for raising revenue' shall originate in the House of Representatives, and makes no such provision in regard to bills appropriating money, is conclusive that it was intended to restrict the Senate in the one case and not in the other."

Tucker even claims⁵³ that the exclusive power of appropriation which belongs to the Commons of England was specifically refused to the House by the framers of the constitution. In support he quotes from Madison's papers as to the intent of the framers, and cites the defeat on August 13, 1787, of a measure providing that "all bills for raising or appropriating money" shall originate in the House. When we recall, however, that when amended to read "bills for the purpose of revenue" this was also defeated, and that the provision was a source of dispute and the subject of compromise, we cannot but be skeptical of any attempt to prove what the real intent of the framers was on the question whether the Senate should be able to initiate appropriation bills.

Justice Miller goes on to say that:

"There is no apparent connection between a bill for raising money and an appropriation bill to spend that money."

Observe that he refers here only to money that has been already raised.

"It is difficult," he says, "to see, under this clause of the constitution, how it is, when no new law is necessary to raise revenue, that the act appropriating or directing how the revenue already raised . . . shall be appropriated, can be properly called a bill for raising revenue."

Most of our revenue is derived from a system of permanent taxation, and there is no necessity for a yearly law or series of laws for the raising of revenue. Justice Miller then attempts to

⁵¹ Lectures on the Constitution p. 204.

⁵² P. 59.

⁵³ Constitution of the United States, 448, 450.

explain why it is that the House has insisted that it has the sole right to originate appropriation bills.⁵⁴

"In England a familiar term also is 'the budget,' and this budget, while voting the money necessary for the support of the Government, almost always contains some modification of the system of taxation; they are united together, and they are in fact bills which appropriate the money, and establish the sources at the same time from which it shall be raised."

In analogy our constitutional phrase "bills for raising revenue" has "come to be construed to include both bills of appropriation and bills for establishing or raising revenue; although they may be very different in character, and the bill for an appropriation may contain no element incident to the raising of revenue." But it may have been originally "that appropriation bills were accompanied by more or less legislation on the subject of the means of raising revenue."

In 1872 the principle involved was discussed by committees of the House and Senate, the former contending that it had the exclusive power of originating bills, but was defeated in the controversy. The House Judiciary Committee, majority report, on Feb. 2, 1881, said that the Senate could originate general appropriation bills. No action was ever taken by the House on the report.

B. *The Practice.* The Senate, as we have seen, has the same *legal* right to initiate appropriation bills that the House possesses. Nevertheless, all is not smooth sailing, for, obviously, if the House should refuse to accept Senate prepared bills legislation would be at a standstill. Senator Jones of Washington said on July 10, 1918:

"There is quite a controversy as to whether or not appropriation bills must originate in the House of Representatives or in the Senate, and, as I understand, the Senate has always contended that appropriation bills may originate in the Senate."

The House, however, though wrongly, we believe, has claimed the sole right to originate such bills, "and it has, therefore, a standing 'committee on appropriation.' This has been the practice now for so long a time that it may be doubted whether it will be seriously questioned."⁵⁵ But the Senate, denying the House claim, has frequently originated bills appropriating money for

⁵⁴ Miller, 207, 208.

⁵⁵ *Ibid.* p. 204. McClain, *Constitutional Law in the United States*, s. 69, also asserts that the power of the House to pass appropriation bills is the result of custom.

specific purposes that have become law, but while asserting its own rights in the matter refrains from the preparation of general appropriation measures.

The first debate on the right of the Senate to originate general appropriation bills took place in that body in 1853. Senator Seward asserted that none had been prepared or reported or submitted to the Senate since 1789.⁵⁶ He said that the *letter* of the constitutional provision gave the right to the Senate, but that the practice was against it. A resolution that the Senate could pass appropriation bills was carried; two bills were prepared, but the House laid them on the table.

Senator Penrose, whose wide experience renders his opinion valuable, in replying to Senator Jones on July 10, 1918, said that *special* appropriation bills can originate in the Senate.

"But we would not undertake to get through the Senate a general appropriation bill for a fiscal year for a government department; because the House of Representatives would not receive such a bill."⁵⁷

C. *In the Courts.* So far as the author has been able to discover the question has never arisen in the federal courts, and but few times in the state courts, where the decisions are conflicting. Chief Justice Gray of Massachusetts said that both Houses could originate appropriation bills, while in Indiana, where only the lower branch can originate revenue bills, it was held that money could not be appropriated by joint resolution, which would certainly imply that the Senate alone could not originate an appropriation measure.⁵⁸ In a Kentucky case, Chief Justice Hayes held:⁵⁹

"A bill may originate in the Senate for the appropriation of money or from the treasury, unless it necessitates the levy of taxes or duties to meet its requirements."

In this point he agrees with Justice Miller, who, it will be recalled, refers to an appropriation bill as one to spend money that has already been raised. A Minnesota case,⁶⁰ on the other

⁵⁶ Congressional Globe, 1855-56, pt. I, 3756.

⁵⁷ Hon. Lionel R. Sheldon, *American Economist*, June 19, 1903. "Never in the whole history of Congress has a revenue or general appropriation bill that originated in the Senate been enacted into law."

⁵⁸ (1878) 126 Mass. Rep. supplement 557-602; *May v. Rice*, (1883) 91 Ind. 546. The former contains a very valuable historical study.

⁵⁹ *Commonwealth v. Bailey*, (1182) 81 Ky. 395, 4 Ky. L. Rep. 384.

⁶⁰ *Curryer v. Merrill*, (1878) 25 Minn. 1, 33 Am. Rep. 450. The act in question provided for uniform text books, to be provided from public moneys.

hand, brought forth the view that an act making an appropriation of public money is not a bill for raising a revenue, even though it may lead to the necessity of taxation.

Q. METHODS OF EVASION.

A. *General.* There are two chief ways in which the spirit of the constitutional provision is often neglected. First, as Elbridge Gerry in the address previously referred to remarked, the power given to the Senate to "propose or concur with amendments" practically gives the power to propose. Madison also recognized this when on June 13, 1787, he said, when opposing the grant of sole power to originate to the House, that to be logical the Senate should not be given power to make amendments, since "an addition of a given sum would be equivalent to a distinct proposition of it." In South Carolina the Senate, until the constitution of 1790 was adopted, had no right to amend money bills. During the debates in the federal constitutional convention John Rutledge, speaking of the experiences of South Carolina with this provision, said that the Senate, despite the constitutional clause, frequently did make amendments.

"Sometimes, indeed, if the matter of the amendment of the Senate is pleasant to the other House they wink at the enactment; if it be displeasing, then the constitution is appealed to."

The second method of evasion was clearly brought forth in the debate of June 13 by Butler, opposing the grant of sole power to the House.

"If the Senate should be degraded by any such discrimination, the best men would be apt to decline serving it in favor of the other branch. And it will lead the latter into the practice of tacking other clauses to money bills."

Nor was this mere speculation. Some of the early state constitutions, in existence in 1787, as Maryland and Delaware, provided against the lower house abusing its privilege by putting riders on money bills.

B. *The Senate's Amending Power Considered.* In accordance with the Commons resolution of July 3, 1678, the House of Lords is without power to amend revenue measures.⁶¹ To protect themselves, however, the Lords prior to 1910 rejected on sight riders that were tacked to money bills.⁶²

⁶¹ See also Hallam, *Constitutional History*, ss. 508-511.

⁶² De Lolme on the Constitution, Ch. 17, pp. 381, 382.

Some of the British colonies have nominative and some have elective upper chambers. So far as the author is aware in none of the former does the upper body have the power of amendment. In the latter the practice is not uniform. In the Cape of Good Hope no alteration by the legislative council is permitted by the House, and the power to amend is also denied in Victoria.⁶³ In South Australia and Tasmania the claim of power to amend as in the United States and various states, is partially allowed by the lower House.⁶⁴ As a result of disputes in 1854 and 1872, and the preparation by mutual consent of a test case for the opinion of the law officers of the Crown in England, it was settled that the upper legislative branch in New Zealand has no power to amend.⁶⁵

In the forty-second Congress (1871-2) the House passed a bill abolishing the duties on tea and coffee. The Senate prepared a bill in the nature of a substitute with a different title, which was a general revision of the revenue laws, customs and internal taxes. Mr. Dawes offered a resolution of protest, alleging the unconstitutionality of the methods of the Senate, and moved that the bill be laid on the table. His motion was adopted. During the debate Mr. Garfield said:

"To admit that the Senate can take a House bill, consisting of two lines relating specifically and solely to a single item, and can graft upon that bill in the name of an amendment a whole system of tariff and internal taxation, is to say that they may exploit all the meaning out of the clause of the constitution which we are considering, and may rob the House of the last vestige of its rights under that clause."

In 1883, however, the House, under stress of circumstances, permitted the Senate to add to a little bill affecting the tobacco revenue a whole plan of tariff revision. The Senate has the constitutional power to amend; but this power may be used so widely and often as to constitute grave abuse, and to avoid this the only remedy of the House is steadfastly to refuse to concur in Senate amendments which seem to go too far.

It is interesting to observe at least one meaning given to the provision by the accepted parliamentary use of pre-constitution times. The Continental Congress had a rule:

⁶³ Todd, *Parliamentary Government in the Colonies*, 709.

⁶⁴ *Ibid.*

⁶⁵ Rasden, *History of New Zealand*, I, 553, II, 157, III, 8.

"No new motion or proposition shall be admitted, under color of amendment, as a substitute for the motion or proposition under debate until it is concurred in or disagreed to."

The courts recognize the principle that a revenue bill of Senate origin is a nullity.⁶⁶ But they also recognize the power of the Senate practically to destroy the meaning of the constitutional clause. In *Hubbard v. Lowe*, discussing the "Cotton Futures Act," the court declared:

"The Senate of the United States, having full power to amend a revenue bill, has from the beginning originated taxes by inserting them in House legislation."

A whole new bill not even dealing with the same topic may be offered in the guise of a substitute. It would seem entirely just for the House to refuse to assent to such a clear evasion.⁶⁷

What is the attitude of the courts? In the Tariff Act of 1909 a Senate amendment imposed an excise tax based on gross tonnage on the use of foreign-built pleasure yachts. This proposal was solely of Senate origin. But this excise tax was not invalid, since the bill itself originated in the House.⁶⁸ White, Chief Justice, quoted with approval the lower court: "It is not for this court to determine whether the amendment was or was not outside the purpose of the original bill." Here, then, is a possible test for the courts to apply in such cases. *Is the amendment outside the purpose of the original bill?* But Justice White said the court could not pass on the question. In other words, if the House will not protect its rights from impairment, why should the Supreme Court pass on the constitutionality of the Senate action? As in a great many other cases the Supreme Court avoids taking responsibility when a loophole appears. This is not, as was the case in *Luther v. Borden*, a purely political matter, but one which may affect, through the imposition of taxes, the personal and business interests of every individual. Should individuals and firms be protected against taxes adopted

⁶⁶ The court in *Hubbard v. Lowe*, (1915) 226 Fed. 135, says: "It has sometimes required a good deal of mental strain to demonstrate that some piece of legislation originating in a Senate is not a 'bill for raising revenue.'"

⁶⁷ Mr. Hinds of Maine in the House, Aug. 21, 1911, denounced as unconstitutional the action of the Senate in adding complicated and formidable amendments raising revenue from manufactures of steel, from chemicals, etc., to a bill of the House sent to the Senate, "raising revenue from manufactures of cotton, and for nothing else." Mr. Hinds was an authority on parliamentary and constitutional law.

⁶⁸ *Rainey v. United States*, (1914) 232 U. S. 310, 58 L. Ed. 617, 34 S. C. R. 429.

in an unconstitutional manner? It is not sufficient for the Court to declare that it is powerless to interfere, since the House has, perhaps under the stress of circumstances or unwittingly, assented to the Senate's abuse of its privilege. Neglect can not fairly be considered as an admission that trespass is justified.

10. THE MERIT OF THE RESTRICTION

"It can hardly be said . . . that it constitutes any safeguard against careless and corrupt finance in legislatures; and it must be admitted also that it has slowly been declining in public esteem."⁶⁹

This is probably due to the abuses just considered. If they will stand on their rights both the House and Senate can prevent these; the Senate by rejecting all riders or refusing to consider bills with riders attached, and the House by refusing to agree to amendments which do more than amend and go so far as to initiate. With the popular election of United States Senators and more democratic methods of choosing state senators much of the advantage of the grant of sole power of originating revenue bills to the House has, of course, disappeared. Perhaps the greatest present-day advantage of the system is that by it each House is able to concentrate on the preparation of certain kinds of bills, thus assuring more expert knowledge and less duplication than would otherwise exist. It is certain that in the preparation of new organic laws there are more important restrictions which should be adopted and used.

NOEL SARGENT.

MINNEAPOLIS.

⁶⁹ Beard, *American Government and Politics* 707.