A TREE GROWS IN WASHINGTON:

THE CRYSTALLIZATION AND INTERPRETATION OF AMENDMENT RULES IN THE HOUSE OF REPRESENTATIVES

Being a Disquisition on Episodes from the Natural History of the National Legislative Process in America

Stanley Bach and Elizabeth Rybicki
Congressional Research Service
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Prepared for presentation at the 1996 Annual Meeting of the American Political Science Association; San Francisco, California.

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INTRODUCTION

In 1874, Frederick Law Olmsted described the grounds of the United States Capitol building as being in a state of "sylvan juvenility." Thanks to his efforts, plus a combination of "oyster-shell lime and swamp muck" and "a compost of manure and more swamp muck," the grounds now comprise "a remarkable green oasis" and "contain more than one hundred species of plants, shrubs, and trees, including the symbolic gifts of State trees from thirty-three States of the Union."[2]

Millions of visitors observe and admire these trees each year. What they are far less likely to observe and admire are the trees, also uniquely American, that grow sporadically within the confines of the Capitol building itself. These extraordinary Senate- and House-plants are unusual in several respects. First, they are not perennials, though they could be called recurrents. Second, they can grow at unpredictable intervals and in any season, though rarely in mid-August or late December. Sometimes two or more trees appear on the same day; at other times, months intervene between one spurt of growth and the next. Third, unlike their namesakes on the "green oasis," these indoor trees do not depend on compost and swamp muck for nourishment; their growth is stimulated directly by the unique qualities of the warm breezes that waft through their contained environments.

Fourth, they grow nowhere else in Washington, though their off-shoots and genetic cousins can be found scattered in other similarly-shaped buildings around the United States. Fifth, these trees can grow to maturity within a matter of minutes or

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[1]The authors are listed in order of height. The taller author wishes to thank the shorter author who did all of the hard work and most the analysis on which this paper is based.

[2]U.S. Congress. House of Representatives. *The Capitol.* (Eighth Edition) House Document No. 96-374. 96th Congress, 2nd Session; 1981. pp. 24-26.

hours; however, they also are short-lived. They rarely survive for much more than an hour on the south side of the building, but may persist for days, or on rare occasions, even for a week or more, on the north side. And finally, even after they are cut down, these trees leave behind the strong roots from which they grew, roots that reach down into the history of the House and Senate as legislative institutions.

The science of government, if science it be, is not often mistaken for botany, but understanding trees is important to understanding our political world as well as our natural world. The "amendment trees" that can develop on the House (or Senate) floor are central to the amending process, and so to the legislative process as a whole. These trees affect the numbers and kinds of alternatives from which Representatives may choose, and thereby shape the strategies that Members can adopt to influence policy decisions and legislative outcomes.

As we shall demonstrate, the rules governing these aspects of amendment procedure, like so many of Congress' legislative rules, have changed over the course of two centuries. In the preface to his *Precedents*, Deschler asserted that the House's system of procedure is "perhaps the most carefully adjusted and scientifically balanced of any parliamentary body in the world."[3] Surely the legislative rules of both houses are more conclusive and better elaborated today than a century or more ago, or even before 1946, for example, when committee jurisdictions were first incorporated into standing rules. What is less certain is the degree to which they are, as Deschler implies, the product of deliberate design and conscious choice. That is one of the questions on which the research reported here will shed some light.

THE CONTEMPORARY TREE

This study explores one aspect of the history of Congress' legislative rules by seeking out the origins and the stages of development of the amendment tree as it can grow today on the floor of the House of Representatives. This "tree" derives its name from the graphic depiction of the maximum number and kinds of amendments that Representatives may offer under specified parliamentary conditions. Readers unfamiliar with this subject but wanting to delve further into this paper first must endure definitions of the various kinds of amendments and summaries of the current procedures under which Members can propose them on the House floor.[4] The initiated

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[3]U.S. Congress. House of Representatives. *Deschler's Precedents of the United States House of Representatives*. House Document No. 94-661; 94th Congress, 2nd Session; 1976. v. 1, p. iii.

[4]For a more detailed discussion of House amendment procedures, see Stanley Bach, *The Amending Process in the House of Representatives*. CRS Report for Congress 91-605. Congressional Research Service; August 9, 1991. See also Bach, Parliamentary Strategy and the Amendment Process: Rules and Case Studies of Congressional Action,"

are invited to turn directly to the next section.

A first-degree amendment proposes to change the text of a measure (bill or resolution); by contrast, a *second-degree* amendment proposes to change the text of a first-degree amendment that is pending (i.e., one that a Member has offered but on which the House has not yet voted). In general, a third degree amendment--an amendment to an amendment to an amendment--is not in order. In addition to these distinctions, we also will have occasion to refer to the three different forms that amendments can take. An amendment, whether in the first or second degree, may propose to *insert* additional language in the text it proposes to amend, *strike out* some language from the text, or replace some language in that text (in other words, both *strike out and insert).*

The House also distinguishes between perfecting and substitute amendments. A perfecting amendment proposes to change some part, but not all, of the text of a measure or amendment; on the other hand, a *substitute* amendment proposes to replace the entire text. A substitute for the text of a measure, proposing to strike out and replace everything after its enacting or resolving clause, is known as an *amendment in the nature of a substitute* (less formally but more conveniently, a *complete substitute),* as opposed to a substitute for a pending amendment. A perfecting amendment may insert, strike out, or strike out and insert; by definition, any substitute amendment proposes to strike out and insert. Any first-degree amendment to replace less than the entire text of a measure is, again by definition, a perfecting amendment. However, it will be useful here to speak of a *partial substitute* as a first-degree amendment that proposes to replace a section or title of a measure when only that section or title is subject to amendment. (We introduce this concept only for explanatory purposes; the House recognizes no such thing as a partial substitute.)

There are different opportunities for offering amendments on the House floor depending on whether the House is meeting "in the House" or whether it has resolved itself into a "Committee of the Whole." When the House considers a measure "in the House", the entire text of the measure is open to amendment; therefore, an amendment in the nature of a substitute is in order at any time that another first-degree amendment is not pending. On the other hand, when the House resolves into Committee of the Whole to consider a measure, that measure usually is amendable one section at a time; a Member may offer an amendment in the nature of a substitute only when the Committee of the Whole is considering amendments to the first section or only after it has acted on any amendments to the last section. At all other times, Members can propose only to amend whatever section then is open to amendment; they can offer amendments to perfect the section or they can propose to replace its entire

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Polity, v. XV, n. 4, Summer 1983; and Barry R. Weingast, "Fighting Fire with Fire: Amending Activity and Institutional Change in the Postreform Congress," in Roger H. Davidson (ed.), *The Postreform Congress* (New York: St. Martin's Press, 1992), pp. 142-168.

text with what we are calling here a partial substitute.[5]

The core rule of the House that governs the amendment process is Rule XIX:[6]

> *When a motion or proposition is under consideration a motion to amend and a motion to amend that amendment shall be in order, and it shall also be in order to offer a further amendment by way of substitute, to which one amendment may be offered, but which shall not be voted on until the original matter is perfected*, but either may be withdrawn before amendment or decision is had thereon. Amendments to the title of a bill or resolution shall not be in order until after its passage, and shall be decided without debate. (Emphasis added.)

It is from this rule that amendment trees grow. When a first-degree amendment is pending, one Member may offer a second-degree perfecting amendment to it and another may offer a second-degree substitute amendment for it;[7] these amendments to the first-degree amendment may be offered in either order. In addition, an amendment to the second-degree substitute is in order, notwithstanding the general prohibition against third-degree amendments. The result is a four-branch "tree" depicted in Figure 1. Members can offer all of these four amendments before the House has to vote on any one of them. And as Members adopt or defeat each amendment, it may be replaced on its branch of the tree by another amendment of the same kind so long as the new amendment meets certain conditions--for example, it may not propose only to re-amend some text that already has been amended.[8]

What follows is devoted to understanding the origins and interpretations of Rule XIX and the four amendments it authorizes. First, however, it should be noted how

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[5]The same principles apply when a Committee of the Whole considers a measure for amendment title by title, instead of section by section.

[6]U.S. Congress. House of Representatives. *Constitution, Jefferson's Manual, and Rules of the House of Representatives of the United States, One Hundred Fourth Congress.* (Hereafter cited as *House Rules and Manual.*) House Document No. 103-342; 103d Congress, 2d Session; 1995; p. 615.

[7]The House does not characterize a substitute for a first-degree amendment as a second-degree amendment. It is an alternative to the first-degree amendment, and both alternatives are subject to second-degree perfecting amendments. We use the term "second-degree substitute" here only because it is more compact than "substitute for the first-degree amendment."

[8]Once a first-degree amendment has been amended by adoption of a second-degree substitute, therefore, no further amendments to the first-degree amendment are in order because all of it has been amended.

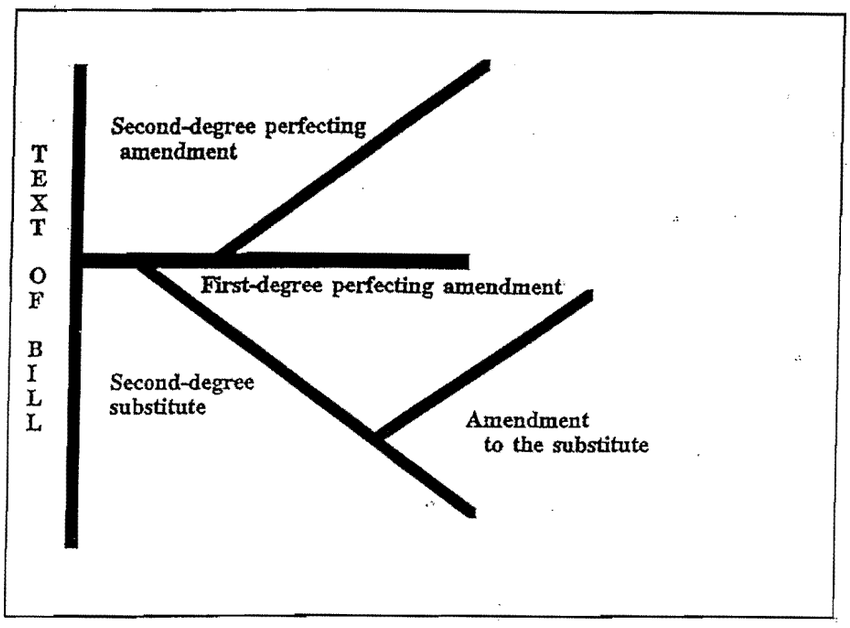

Figure 1: The Contemporary "Cannon" Tree

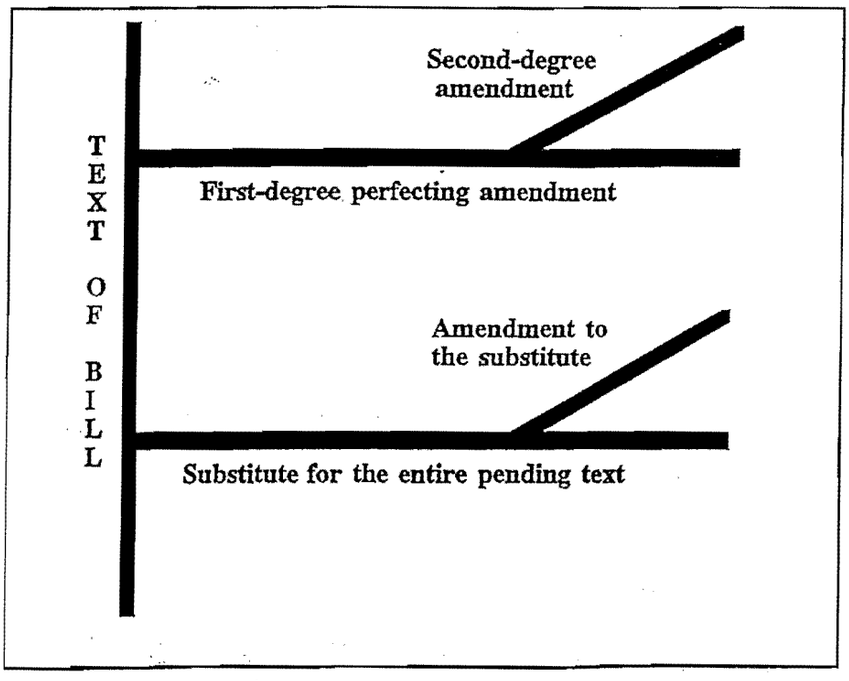

Figure 2: The 19th Century "Hinds" Tree

much this rule does not encompass. For instance, it does not speak in terms of first- and second-degree amendments or perfecting amendments, nor does it make any mention of an amendment in the nature of a substitute or when it may be offered. Also, House precedents establish that, notwithstanding the apparently clear meaning of Rule XIX, a first-degree amendment cannot be amended at all if it takes the form of a motion to strike out language from the text of a measure. However, Members may amend the portion of the measure that is proposed to be stricken, and the other three branches of the tree can grow on that first-degree amendment.[9] This is one of only two circumstances under which two first-degree amendments can be pending at the same time. The other, which we eventually will discuss in excruciating detail, will prove critical to the argument we shall make.

The four-branch amendment tree of Rule XIX describes a procedure that is reasonable enough for the House to follow.[10] When the House is considering a proposal to change a bill, it is reasonable for the House to be able to improve (perfect) that proposal before accepting or rejecting it.[11] If there is an alternative proposal on the same subject, it is equally reasonable for the House to consider the second as a substitute for the first, and to choose between them by voting on the substitute. And if the first alternative is subject to perfecting amendments, why should not Members have the same opportunity to perfect the second before making their choice between them? The result can become complicated and confusing--for example, when the Chair states that a vote is about to take place on the amendment of the gentleman from California to the amendment of the gentlewoman from New York offered as a substitute for the amendment of the gentleman from Texas--but not impossibly or unreasonably so. In fact, the amendment opportunities on the House floor generally are more restricted and conceptually less complicated than those available in the Senate.[12]

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[9]In other words, there can be a five-branch tree with two first-degree amendments pending: an amendment to strike out and an amendment to perfect the text proposed to be stricken. The former is not amendable; the latter is subject to a second-degree perfecting amendment and to a second-degree substitute that also is amendable.

[10]Other American legislative bodies have chosen to be governed by much the same rule. See Paul Mason, *Mason's Manual of Legislative Procedure* (St. Paul, MN: West Publishing Co., for the National Conference of State Legislatures, 1989) (first edition, 1935), Sec. 409, pp. 268-269.

[11]By the same token, if someone proposes to strike some language from a measure, it is reasonable to give Members a chance to perfect that language before the House votes on whether to strike it out altogether.

[12]See Stanley Bach, *The Amending Process in the Senate.* CRS Report for Congress 93-113. Congressional Research Service; January 19, 1993.

What may be reasonable, however, is not inevitable. When and why did the House adopt Rule XIX, and what were its antecedents? How was the amendment process regulated, if it was, before this rule was adopted? In other words, what are the roots of the House amendment tree? It was curiosity about the answers to these questions that provoked the research on which this paper reports.[13]

THE ORIGINS OF RULE XIX

The natural place to begin such a quest is in the work of Asher Hinds. In his magisterial *Precedents,* Hinds reports that the House adopted the first, pivotal sentence of Rule XIX as part of the general rules revision of 1880.[14] He also quotes the report of the Rules Committee on the proposed revision to the effect that "Rule XIX merely embraces, in the form of a rule, that which has long been the practice of the House without rule."[15] To our frustration but not our surprise, the Committee's report says little more on this subject except to mention several earlier rulings to which we shall return momentarily. Furthermore, there was no substantive discussion of Rule XIX, its antecedents or its intended meaning, while the House debated the rules package in Committee of the Whole. We are encouraged to conclude, therefore, that, in adopting Rule XIX, the House intended to codify without change its amendment practices, and that these practices no longer were contentious, if they ever had been.

Hinds observes that the Rules Committee report "does not give the entire history of this rule, which goes back to the Continental Congress":[16]

> In that body a habit had grown up of displacing a pending proposition

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[13]We are concerned here with only some of the principles of the amendment process: those governing the initial growth of amendment trees. These principles involve the relationships among first and second-degree amendments, perfecting amendments, substitutes, and amendments in the nature of substitutes, and motions to insert, to strike out, and to strike out and insert. There are other, closely related, principles governing the order for voting on amendments which are of secondary interest, and still others which are not considered at all, such as the principles embodying prohibitions against re-amending matter, against re-offering a rejected amendment, and against amending an amendment to which the House already has agreed.

[14]U.S. Congress. House of Representatives. *Hinds' Precedents of the House of Representatives.* (Washington: U.S. Government Printing Office, 1907), v. 5, sec. 5753. The second sentence of the rule, which does not concern us here, was added in 1893.

[15]*Ibid.*

[16]*Ibid.* We examined portions of the journals of the Continental Congress for evidence of this "habit", but without success.

in order to take up another and entirely different matter. Thus, instead of a decision on the merits of a question, there was often a postponement forced by the merits of some other proposition. The Continental Congress abolished this practice by a rule:

> 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 postponed or disagreed to.

When the House of Representatives was organized under the Constitution, this rule, on April 7, 1789, was made part of the rules; but the last clause, "until it is postponed or disagreed to" was dropped.

Hinds asserts that early Speakers construed this rule broadly--"as preventing what is now known as a substitute; that is, a proposition to strike out all after the enacting or resolving words and insert a new text."[17] (Note for future reference that Hinds defines "substitute" here as what we now would call an "amendment in the nature of a substitute".) The Rules Committee report had stated that:[18]

> Speaker Macon decided, in the Ninth Congress [1805-1807], that if a motion to amend the original matter was first submitted, it was not then in order to submit an amendment in the nature of a substitute. This decision was reversed by Speaker Polk in the Twenty-fourth Congress [1835-1837], who was sustained on appeal by a decisive vote; and the practice has since been in accordance with the latter decision.

Hinds was unable to find any evidence of the decision attributed to Macon (for a reason we shall explain eventually), but he did find two instances in 1808 in which Speaker Varnum, Macon's successor, held that "amendments in the nature of substitutes" were not in order. Speaker Barbour ruled to the same effect in early 1822, even though the amendment in the nature of a substitute in question was germane. Hinds concludes that the House "seems to have seen the undesirability of a rule that produced such a result," because it amended the rule two months later to remove any reference to a substitute, leaving the rule to read:[19]

> No motion or proposition on a subject different from that under consideration shall be admitted under color of amendment.

According to Hinds, the rule of 1789, as bequeathed by the Continental

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[17]*Ibid.*

[18]*Ibid.*

[19]*Ibid.*

Congress, concerned both the form and substance of amendments. It prohibited an amendment on a different subject--that is, a "new motion or proposition"--if offered in the form of a "substitute." But the way in which the rule was interpreted broke the link between form and substance; any "substitute" was prohibited, whether or not it addressed the same subject as "the motion or proposition under debate." The amendment of 1822 repealed the bar against substitutes; what remained in the rule has come down to us intact as the House's germaneness rule (now in clause 7 of Rule XVI).

Another effect of the 1822 rules change was to strike from the House's rules the only reference to the forms of amendments that Representatives could offer. Until the rules revision of 1880, the standing rules were entirely silent on the subject that Rule XIX was added to address. Nonetheless, Hinds concurs with the Rules Committee that, by the mid-1830s, it had again become established that germane substitutes were in order: "In the time of Mr. Speaker Polk substitute amendments seem to have been admitted as a matter of course, and on January 6, 1836, he ruled that an amendment might be made to the substitute."[20]

Thus, the amendment precedents and practices that were codified in the 1880 rule had roots in the 1822 rules change--which, by inference, made a substitute in order once again--and certainly in precedents that were in place by 1836--when a substitute was held to be amendable. We would expect to find that, during the intervening decades leading up to 1880, these procedures were becoming even better established, including the rights of Members to offer second-degree perfecting amendments as well as substitutes and amendments to them. We also would expect that by 1880, therefore, the House's amending procedures had become so firmly entrenched in precedent and practice that the Rules Committee's recommendation to codify them in Rule XIX was hardly worthy of comment.

SUBSTITUTING ONE MEANING FOR ANOTHER

In large part, our research bears out these expectations. At the same time, it points to an intriguing problem: the House's amending practices during the decades before 1880 (and sometimes thereafter) cannot be explained satisfactorily by Rule XIX as we now understand it.

We believe that the authors of Rule XIX were, in fact, simply codifying a set of amendment practices and procedures that had become well-established and well-accepted. However, we also believe that the way in which the rule is interpreted today, and has been for many years, is not the way in which it was intended to be understood. Before 1880, the House's amending procedures are much more easily explained by an alternative reading of Rule XIX.

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[20] *Ibid. Congressional Globe*, 24th Congress, 1st Session (January 6, 1836), p. 75.

We offer this study as a *tentative* history of the House's amendment rule because our research necessarily is incomplete. It would be a mammoth research task to identify, much less examine, every instance of amending activity in the House and in Committee of the Whole. To date, we have concentrated on the published precedents of the House and on the other cases that we located in the *Congressional Record* during the first sessions of selected Congresses, especially during the 1870s.[21] This approach has allowed us to study, more or less systematically, how the House conducted its floor amending activity during the years leading up to the adoption of Rule XIX. (Our research also extends into the Congresses that met between 1880 and 1920, but what that reveals about the interpretation and implementation of the rule is something we shall reserve for the sequel to this paper.)

Rarely did we find Members engaged in cogent discussions on the floor about the procedures they were following. Of the discussions we did encounter, some were informative, more were tantalizing, but most were confused, confusing, or inconclusive. We found no "smoking guns," though we did smell whiffs of gunpowder from time to time. We began by assuming that we would be able to use our current understanding of the House's amendment procedures to explain the cases recorded in the *Precedents* and the others that we located. As that assumption became less and less defensible, we turned from deduction to induction. Instead of deducing what must have happened on the floor from known principles, we began to ask what principles--what general amendment "rules"--could account for what we observed, through the *Record*, actually happening on the House floor.

Our most satisfactory explanation--our working hypothesis, if you will--the one that best accounts for what happened--is that the interpretation though not the wording of Rule XIX has changed. What it was intended to mean in 1880 is not what it means today nor what it has meant throughout most of the 20th Century.

The two possible interpretations of the rule turn on different notions of what constitutes a "substitute" amendment. The rule states that a first-degree amendment is subject to a second-degree perfecting amendment and "it shall also be in order to offer

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[21]Another goal of this research was to discover how difficult it is to study the origins and development of elements of the House's legislative process by relying on original sources when the published precedents are incomplete or inconclusive. It is difficult and time-consuming indeed. Events shedding light on our subject occurred only infrequently, and not necessarily on matters of obvious policy or political significance. Had we looked at House floor action only on the most important bills of the session, we would have missed episodes such as the 1878 "Case of the One-Armed Lawyer" to which we shall refer. To locate cases of interest, our primary research strategy was to search the *Congressional Record* index for bills that, for whatever reason, consumed a disproportionate amount of time and attention on the House floor, and then to review the actual floor debates on those bills. This approach was time-consuming and almost certainly not comprehensive, but better than any alternative we could devise.

a *further amendment by way of substitute,* to which one amendment may be offered...." What is an "amendment by way of substitute"? Today we know that it is a substitute for a first-degree amendment--what we are calling for ease of reference a "second-degree substitute." We believe, however, that when the House adopted Rule XIX in 1880, it understood the same phrase to mean a first-degree substitute: either for the entire text of the measure--what we now call an "amendment in the nature of a substitute" (or "complete substitute")--or for the entire text of whatever part (section or title) of the measure was open to amendment--what we are calling here a "partial substitute."

If so, the "tree" in the minds of 19th Century Representatives is depicted in Figure 2, not Figure 1. Under this interpretation, any bill or resolution being considered on the floor was subject to first-degree perfecting amendments, considered one at a time, and each of them was amendable by second-degree amendments, also considered one at a time. Each second-degree amendment could be either a perfecting or a substitute amendment, but both forms of amendment could not be pending at the same time, as they can today. On the other hand, while a first-degree amendment and an amendment to it were pending, another first-degree amendment was in order if it proposed to replace the entire pending text, and that "amendment by way of substitute" also was amendable.

We shall refer to the modern interpretation of the rule as "the Cannon tree" because that unquestionably is the tree depicted (see Figure 3) in the first edition of Clarence Cannon's *Procedure in the House of Representatives,* dated 1920, where Cannon states that:[22]

> While only one amendment may be offered at a time, and amendments in the third degree are not admitted, four motions in the first and second degrees may be pending simultaneously, as follows: (a) Amendment, (b) amendment to the amendment, (c) substitute for the amendment, and (d) amendment to the substitute.

Also, in Cannon's *Precedents of the House of Representatives,* published in 1936 as a three-volume supplement to *Hinds' Precedents,* Cannon presents a 1921 precedent under a headnote asserting that, *"[u]nder the recent practice of the House* the substitute provided for in Rule XIX has been construed as a substitute for the amendment and not a substitute for the text."[23] (Emphasis added).

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[22]Washington, Government Printing Office, 1920; p. 7. We thank Cynthia Miller, Assistant Historian of the House of Representatives, for helping us discover the existence of this first edition.

[23]U.S. Congress. House of Representatives. Cannon's *Precedents of the House of Representatives.* (Washington: U.S. Government Printing Office, 1936), v. 8, sec. 2883.

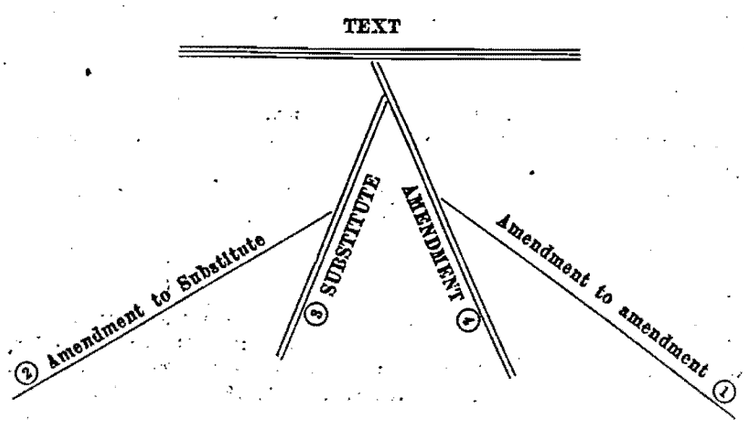

Figure 3: From Cannon's *Procedure in the House of Representatives*, 1920

Correspondingly, we shall refer to the alternative, earlier, interpretation of the procedure codified in Rule XIX as "the Hinds tree." Although nowhere in his *Precedents*, published in 1907, is Hinds as explicit about what a substitute is and is not, the cases he cites all are consistent with that tree and none are consistent only with the modern, "Cannon", tree (though some are consistent with both, for reasons explained in the next section.) Furthermore, we believe that Hinds was too careful to have missed, and too responsible to have failed to report, a significant change in the accepted interpretation of the rule.[24]

Thus, we are led to believe that the *authoritative* change in the interpretation of Rule XIX occurred sometime after 1907 but by no later than 1920, even if the practice of the House had begun to change before the turn of the century. However, that story--about the implementation and later interpretations of the rule--we shall leave for another day. In the remainder of this paper, we shall concentrate on the development of the rule: the House's amendment practices before 1880 and the adoption of Rule XIX in that year. Before we present any of the evidence we have

[24]We would not be surprised, however, if Hinds decided not to include in his *Precedents* incidents and rulings that were inconsistent with his understanding of the House's amendment practices before 1880 and his interpretation of Rule XIX thereafter. His purpose was not to compile a catalogue of everything that had happened. Instead, in his introduction to the *Precedents*, he argued that "[i]t is manifestly desirable, on a floor where high interests and great passions strive daily, that the rules of action should be known definitely, not only by the older members, but by all. Not only will the Speaker be enabled to make his decisions with more confidence and less fear that he may be swayed by the interests of the moment, but the Members, understanding the rules of his action, will sustain with commendation what they might have criticised with asperity." *Hinds' Precedents*, v. 1, p. iii.

assembled, we first must ask readers who have accompanied us this far to endure another exposition of procedural "technicalities."

A NECESSARY THOUGH PAINFUL DIGRESSION

We contend that, according to the Hinds tree, Members could offer two first-degree amendments before either was voted on. One Member could offer a first-degree perfecting amendment, and another could offer a first-degree substitute for the entire text that was open to amendment--i.e., either an amendment in the nature of a substitute for the entire text of the measure, or a partial substitute for the pending section or title. Furthermore, these two first-degree amendments could be offered in either order, and each was subject to second-degree amendments offered one at a time.

Something like this remains possible. Although it is unlikely to arise in the House today, the possibility must be understood in order to evaluate the implications of what was happening on the House floor 100 to 125 years ago.

The four-branch tree of Figure 1 actually can be an eight-branch tree, depicted in Figure 4, when a Representative offers an amendment in the nature of a substitute (complete substitute) to replace the entire text of the pending bill or resolution. A complete substitute is a first-degree amendment, so it is subject to the other amendments shown in Figure 1: a second-degree perfecting amendment, a second-degree substitute, and an amendment to the second-degree substitute.

By precedent, however, the underlying text of the measure--the text the complete substitute proposes to replace--also is subject to perfecting amendments, offered one at a time. The logic is the same as that underlying the four-branch tree: if the House is presented with two alternatives (in this case, two versions of the bill) and can perfect one of them, it should be able to perfect the other as well before choosing between them. So the House votes on any such perfecting amendments before voting on the complete substitute (as it may have been amended). Furthermore, each perfecting amendment, as a first-degree amendment, also is subject to the other amendments shown in Figure 1.

The result is the possibility of a dual amendment tree, with three amendments offered to the amendment in the nature of a substitute, and the same three kinds of amendments offered to an amendment proposing to perfect the underlying text of the measure. In such a situation, there can be two first-degree amendments offered and under consideration at the same time, a complete substitute and a perfecting amendment, just as the Hinds tree permitted. However, this situation can arise today only if a Member decides to offer a perfecting amendment while a complete substitute already is pending. In the modern House, *an amendment in the nature of a substitute never is in order while any other amendment to the measure is pending.* The order in which Members seek to offer the amendments is critical; and in turn, that fact will be critical to our analysis of 19th Century amending practices.

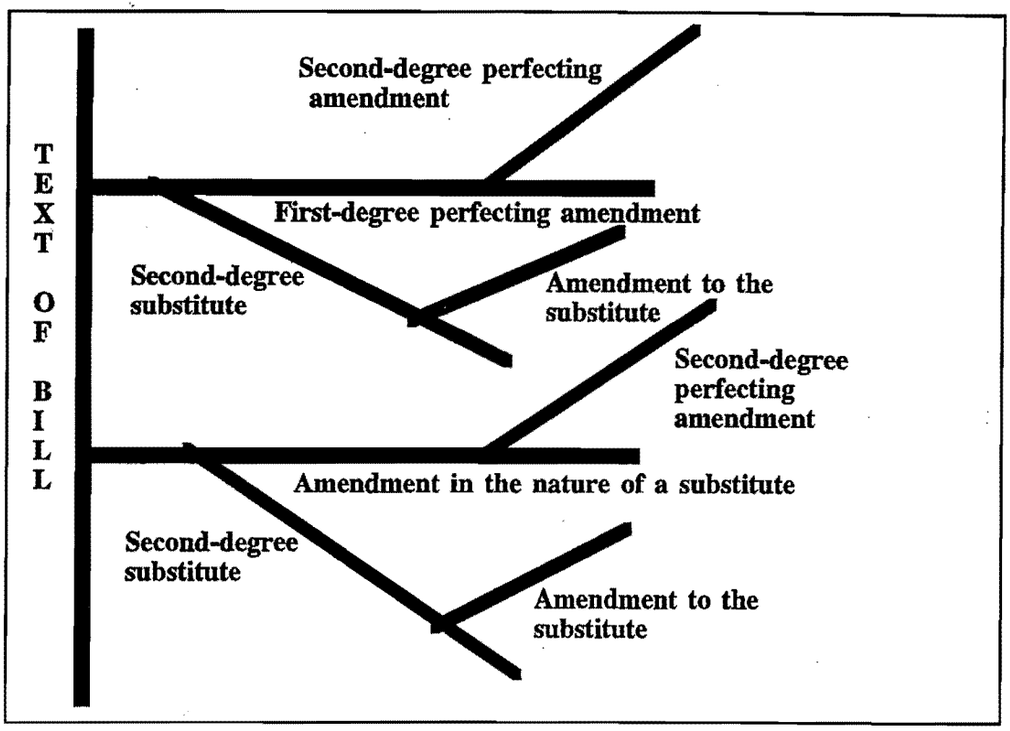

Figure 4: The Contemporary Dual Amendment Tree

Fortunately, the dual amendment tree is very unlikely to arise in the contemporary House. When a measure is considered "in the House," Members usually vote on it without considering any amendments at all. After no more than an hour of debate, the majority floor manager invariably moves the previous question, a motion to which the House usually agrees. One effect of ordering the previous question is to preclude all floor amendments to the measure. On the rare occasions on which the House defeats the motion to order the previous question, one amendment is offered and then the previous question is moved on the measure and the amendment to it. Thus, by ordering the previous question, the House can and, in practice, almost always does bring the measure to a final vote before there is any opportunity for an amendment tree to develop.

When a measure is considered in Committee of the Whole, a Representative can offer an amendment in the nature of a substitute at the beginning of the amendment process. While that amendment is pending, other Members can offer first-degree perfecting amendments to the underlying measure, but they usually have little incentive to do so. The reason lies in the fact that, in Committee of the Whole, measures

typically are considered for amendment one section or title at a time. When a complete substitute is offered during consideration of the first section, the only first-degree perfecting amendments in order are to that section; the rest of the measure is not yet open to amendment. And more often than not, the first section is merely the short title of the bill--stating something to the effect that "This Act may be cited as the 'Truth and Beauty Act of 1996.'" No substantive amendment would be germane to this section. Furthermore, the later, substantive sections of the measure become open to amendment only if and when the complete substitute is rejected, which is unlikely to happen because such substitutes usually are committee amendments that, however amended, almost invariably are adopted.[25]

As this discussion indicates, the Hinds tree of Figure 2 could arise today as an incomplete growth of the dual amendment tree of Figure 4. However, the dual tree provides for amendments that could not grow as branches of the Hinds tree. It also will be important to remember the importance of sequence: that a stunted version of the Hinds tree can develop today only if the first-degree perfecting amendment is offered after the first-degree complete substitute is offered and while it remains pending. Furthermore, it will become significant that, in Committee of the Whole, a dual tree cannot develop during the consideration of any subsequent section or title. In other words, while a section or title is open to amendment, a first-degree perfecting amendment and a first-degree partial substitute (proposing to replace the entire section or title) cannot be pending at the same time, regardless of the order in which Members might try to offer those two amendments.

With all of this having been explained so clearly, we now can return to the 19th Century to review the available evidence about what amendment procedures the House had been following before Rule XIX was adopted in 1880, and what the House thought it was doing when it adopted that rule.

FROM 1789 TO 1879

A moment's review of page 7 will remind readers that, from 1789 until 1822, the House's rules prohibited any "new motion or proposition" offered "as a substitute for the motion or proposition under debate," a prohibition that had been adopted eight years earlier by the Continental Congress. The *Journals of the Continental Congress* reveal that, before 1781, the term "substitute" had been used to refer to an alternative to the pending proposition, whether that proposition was the pending measure or an

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[25]The same situation arises when a measure is considered for amendment in Committee of the Whole by titles instead of by sections, because Title I usually is preceded by Section 101, which is the short title. A complete substitute also can be offered after the last section or title has been amended. In that case, perfecting amendments are in order only if they propose to add new sections or titles at the end of the measure.

amendment to it. For example a delegate could offer a "substitute" that proposed to replace one resolution with another.[26] However, the same term also was applied to motions to strike the text of a pending amendment and insert something else in its place. Delegates sometimes referred to such a second-degree amendment as a "substitute in lieu of the amendment."[27]

The authors of the 1781 rule and those who retained it in 1789 did not specify what they meant by "substitute"--i.e., whether they intended to ban non-germane complete substitutes or second-degree substitutes or both. However, Luther Cushing, who was perhaps the pre-eminent student of American legislative procedure between Jefferson and Reed, implies that the 1781 rule was provoked by new motions or propositions in the form of complete substitutes. He wrote in 1856 that, before adoption of the rule, "the consideration of important and interesting measures was sometimes postponed, and others brought forward without due notice or preparation.[28]

Although Cushing's statement is far from conclusive, the inference we draw from it finds support in Hinds' discussion of how Speakers interpreted the same language after 1789. Recall his assertion that early Speakers construed the rule to prohibit "what is now known as a substitute; that is, a proposition to strike out all after the enacting or resolving words and insert a new text."[29] (Note that Hinds not only defines what "substitute" meant in the years after 1789, he also defines what it meant when he was writing for publication in 1907.) In two of the cases he cites, the amendments in question were amendments in the nature of substitutes. In one of the 1808 rulings, Speaker Varnum ruled that an amendment, "being a substitute for the original resolution, could not be admitted conformably with the rules of the House."[30] And in 1822, shortly before the rule was amended, Speaker Barbour ruled à germane amendment to strike "all after the word *resolved* and in lieu thereof insert the following...." to be inadmissible.[31]

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[26]*The Journal of the Continental Congress,* 1779, pp. 225, 244, 249.

[27]*Ibid.,* p. 261.

[28]Luther Stearns Cushing, *Elements of the Law and Practice of Legislative Assemblies in the United States of America* (Boston: Little, Brown and Company, 1856), p. 534. See also Jack Rakove, *The Beginnings of National Politics: An Interpretive History of the Continental Congress* (Baltimore: Johns Hopkins University Press, 1979), p. 201.

[29]*Hinds' Precedents*, v. 5, sec. 5753.

[30]*The Journal of the House of Representatives*, 10th Congress, 1st Session, p. 122; *Annals of Congress*, 10th Congress, 1st Session, p. 1391.

[31]*The Journal of the House of Representatives*, 17th Congress, 1st Session, p. 135.

However, an incomplete perusal of the *Journal of the House* and the *Annals of Congress* for this period reveals a practice that was less consistent than Hinds might lead us to expect. In at least two instances, the House did entertain complete substitutes, notwithstanding the rule.[32] And in several others, Speakers' rulings imply that substitutes were to be identified by their content, not their form. In 1808, Rep. Lewis of Virginia proposed an amendment that today could not be construed as a substitute of any kind; it proposed to add a section to the pending bill. The *Journal* notes that the Speaker ruled the amendment out of order because it was "a substitute," and proceeds to quote the rule that "no new motion or proposition shall be admitted under color of amendment" as a substitute.[33] Similarly, in 1822, Rep. Baldwin of Pennsylvania moved to strike several lines from a measure and insert only three words in their place. Speaker Barbour "decided this motion to be out of order, on the ground that it was essentially a substitute for the original proposition, within the meaning of the rule--inasmuch as it was incompatible with the original proposition, and went to change its principle and effect."[34]

These rulings suggest a definition of "substitute" that depended on what an amendment said, not what it did (i.e., whether it was drafted to replace some, all, or none of the "motion or proposition under debate"). After Barbour made the ruling just cited, he defended it against an appeal by remarking that "any amendment which would have the effect to make the friends of a proposition its foes, must be in its nature intrinsically a substitute"[35]--clearly a criterion of content, not form.[36] The most we can conclude with confidence is that the definition of "substitute," and, therefore, the meaning of the rule, was not well-settled. We can add, however, that all the available rulings that turned on the form of amendments involved complete substitutes. We have encountered no instance in which a second-degree substitute was ruled out of order under the rule of 1789.

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[32]See, for example, *Annals of Congress*, 9th Congress, 1st Session, p. 298; and *Annals of Congress*, 10th Congress, 1st Session, p. 2199.

[33]*The Journal of the House of Representatives*, 10th Congress, 1st Session, p. 283; *Annals of Congress*, 10th Congress, 1st Session, p. 2244.

[34]*Annals of Congress*, 17th Congress, 1st Session, p. 715.

[35]*Ibid.*

[36]More generally, this analysis has been hampered by the imprecise way in which amendments often were drafted, even during the later decades of the 19th Century. Today, we can determine what an amendment is--e.g., a first-degree perfecting amendment or a second-degree substitute--by examining what it does, regardless of what Members may call it. In the 19th Century, on the other hand, before the House had an Office of Legislative Counsel, how Members drafted amendments often was as imprecise as how they described them in debate.

By amending the rule in 1822 to remove any reference to substitutes, the House restricted the effect of that rule to prohibiting what we now characterize as non-germane amendments. By implication, the House also removed the prohibition against substitutes, but it added nothing to its rules concerning how and when Members could propose them. In 1837, the House did adopt *Jefferson's Manual* as part of its rules, but however valuable it might have been, it was selective and incomplete in its coverage.[37] Furthermore, until 1860, the House had nothing like a published collection of authoritative precedents on which to rely. Cushing's imposing study and its briefer 1845 predecessor,[38] as well as Joel Sutherland's earlier *Manual*,[39] all published privately, were useful documents to which Members sometimes referred but by which they were not bound.

To understand the effect of the 1822 rules change and the House's amending practices during the decades that followed, we must rely on what we can infer from what the House did. Unfortunately, our research to date on the amendment process before the Civil War is limited largely to the small number of published precedents. However, Hinds does cite an important case that is inconsistent with the Cannon tree but fully consistent with the Hinds tree.

While the Senate was trying to construct a legislative compromise in 1850 that would hold the Union together, the House took time to debate a claim originating during the American Revolution. Just before the outbreak of the Revolutionary War, Great Britain had promised to pay George Galphin of Georgia for land he had acquired from Indians. After the war, Georgia claimed the land but did not pay Galphin. Many years later, when his descendants petitioned the Federal Government, the U.S. Treasury paid the principal, plus 75 years worth of interest. Controversy arose over the interest payment and over allegations that Secretary of War George Crawford had benefitted personally from payment of the claim.

In July 1850, the House considered a resolution, reported by a select committee, concluding that while the payment of the principal was warranted, the payment of interest was not.[40] Rep. Toombs of Georgia proposed to amend the resolution by

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[37]*Jefferson's Manual* remains part of House rules, but only to the extent that it is applicable and "not inconsistent with the standing rules and orders of the House..." *House Rules and Manual*, Rule XLII.

[38]Luther Stearns Cushing, *Manual of Parliamentary Practice* (Boston: Samuel Dickinson, 1845).

[39]Joel B. Sutherland, *A Congressional Manual* (Philadelphia: Peter Hay and Co., 1839).

[40]*Hinds's Precedents*, v. 5, sec. 5785. *The Congressional Globe*, 31st Congress, 1st Session, pp. 1322, 1328.

inserting an additional statement to the effect that there was no evidence of impropriety on Crawford's part. Rep. Schenck of Ohio responded with a second-degree perfecting amendment to insert still another statement that, in adopting Toombs' amendment, "this House is not to be understood as approving his [Crawford's] relation to that claim." This much--first- and second-degree perfecting amendments to insert--is consistent with both trees. However, with the Toombs' amendment pending, Schenck also offered a complete substitute for the committee resolution which incorporated the findings of both Toombs'perfecting amendment and his amendment to it. And Rep. Thompson of Mississippi then amended the Schenck complete substitute to add an explicit denunciation of the interest payment. We depict the relationships among these amendments in Figure 5.[41]

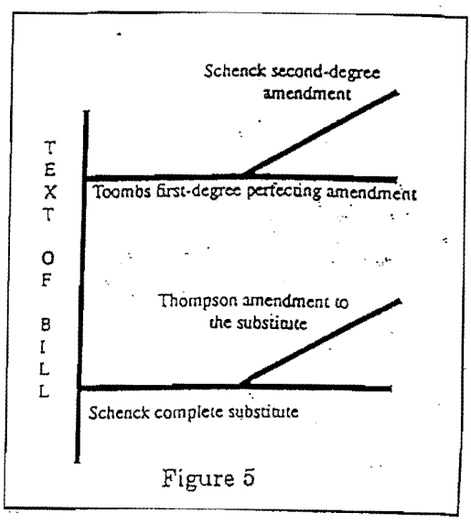

Figure 5

What we find significant is that Schenck was able to offer a complete substitute while another first-degree amendment, Toombs' perfecting amendment, already was pending. Under today's procedures "in the House", a first-degree perfecting amendment can be offered while a complete substitute already is pending, but the reverse never is permitted. Recall the importance of sequence. And the Toombs and Schenck first-degree amendments each was amendable in the second degree (by Schenck and Thompson respectively).

It is equally important that, after the four amendments had been offered, Speaker Cobb explained that "every amendment that could be made had been moved...." When Rep. Featherston, also of Mississippi, sought to offer his own substitute for the committee resolution, the Speaker "stated the facts," according to the *Globe:*[42]

> The committee had reported certain resolutions; the gentleman from Georgia [Toombs] had moved to amend those resolutions by an additional resolution; the gentleman from Ohio [Schenck] had moved to amend the amendment. The gentleman from Ohio had also offered an amendment, in the nature of a substitute, *for the entire resolutions of the committee*; and the gentleman from Mississippi [Thompson] had moved an amendment to that substitute. The substitute of the gentleman from Mississippi [Featherston], therefore, could not be entertained in the

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[41]The form and effect of the amendments is not clear from their texts in the *Globe* nor from the statements of their sponsors. However, at p. 1344, the *Globe* does characterize them in the same way that Hinds does, and as we do here.

[42]*Ibid.*, p. 1345.

> present state of the question. The gentleman would see that every amendment which could be made had been moved when the previous question was seconded. (Emphasis added.)

In addition to clarifying that the Schenck substitute was proposed as an alternative to the committee resolution, not to the Toombs first-degree perfecting amendment, this statement also implied, first, that all four of the amendments were in order, and, second, that only those four amendments were in order. In other words, only one second-degree amendment could be offered to each first-degree amendment; neither the Toombs nor the Schenck first-degree amendment was subject to both a second-degree perfecting amendment and a second-degree substitute, as it would be today.

Ten years later, in 1860, the House adopted a revision of its rules that "corrected the contradictory provisions, combined several rules into one, and made others conform to the established practice."[43] Consistent with this purpose, the following year witnessed the first publication of *Barclay's Digest of Rules*, prepared by the Clerk of the House, John Barclay. *Barclay's Digest* was printed in the same volume as the rules of the House, a practice that continued throughout the rest of the century. In the 1861 edition, Barclay stated the well-established principle that amendments could be offered only in two degrees. Then, referring to the 1850 episode just discussed, he added in brackets:[44]

> But it is the well settled practice of the House that there may be pending at the same time with such amendment to the amendment, an amendment in the nature of a substitute *for part or the whole of the original text,* and an amendment to that amendment.... (Emphasis added.)

Barclay goes on to comment on the origins of this practice:[45]

> It was decided many years ago that if the motion to amend the original matter was *first* submitted, it was not then in order to submit an amendment in the nature of a substitute; but it was subsequently decided otherwise and the practice ever since has been in accordance with the latter decision. So now, notwithstanding the pendency of a motion to amend an amendment to the original matter, a motion to amend, in the nature of a substitute, and a motion to amend that amendment may be received, but cannot be voted upon until the original matter is perfected. (Emphasis in original; references omitted.)

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[43]DeAlva Stanwood Alexander, *History and Procedure of the House of Representatives* (Boston and New York: Houghton Mifflin Company, 1916), p. 192.

[44]John M. Barclay, *Barclay's Digest of Rules* (Washington: Government Printing Office, 1861), p. 8.

[45]*Ibid.*

Taken as a whole, Barclay's statement of House procedure provides for a first-degree perfecting amendment and a first-degree complete or partial substitute to be pending at the same time, and amendable, even if the perfecting amendment is offered first.

The *Journal* and *Debates* support his first assertion, regarding the decision made "many years ago"--in 1826, to be precise.[46] On the other hand, his second contention--that the 1826 decision was "subsequently decided otherwise"--may be based on an error in the *Journal* for 1844.[47] The account in the *Congressional Globe*[48] for the same day is incomplete and open to several interpretations, one of which is that the ruling Barclay cites did not concern an amendment in the nature of a substitute at all. We have no way of knowing what really happened, but we do know that a questionable ruling of the Chair that may have been recorded incorrectly became established as precedent, not only in *Barclay's Digest* of 1861, but in subsequent editions, compiled by Barclay's successors, until the 1880 edition. For the subsequent practice of the House, what actually happened in 1844 was far less important than what Barclay, and later Hinds, thought happened.

In the 1880 edition of the *Digest*, the Journal Clerk, Henry H. Smith, repeated the same statement from earlier editions, but then added that "[t]his practice has been crystallized into the present Rule XIX....[49] With minor stylistic changes, Barclay's statement with Smith's addendum was carried over in later editions until 1895, well after adoption of Rule XIX in 1880. Still later, Hinds presented the same case under a headnote asserting that "[i]t was settled by the practice of the House, before the adoption of the rule, that there might be pending with the amendment, and the amendment to it, another amendment in the nature of a substitute and an amendment to the substitute."[50] Hinds goes on to state unequivocally that one of Schenck's amendments was offered in 1850 "as a substitute for the original resolutions." So

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[46]Gales & Seaton's *Register of Debates in Congress*, 19th Congress, 1st Session, pp. 1251-1253; *Journal of the House of Representatives*, 19th Congress, 1st Session, pp. 794-795. Recall that the prohibition against substitutes was repealed by implication in 1822, but Hinds does not assert that that change was interpreted immediately to permit substitutes at any or all times. The 1880 Rules Committee report attributes this interpretation to Speaker Polk in 1836-1837, but we have been unable to find any such ruling.

[47]*Journal of the House of Representatives*, 28th Congress, 1st Session, pp. 806-811.

[48]*Congressional Globe*, 28th Congress, 1st Session, pp. 529-530, 534.

[49]*Digest of the Rules and Practice of the House of Representatives*, 46th Congress, 2d Session, 1880, pp. 201-202.

[50]*Hinds Precedents*, v. 5, sec. 5785.

unless we are to think that Hinds understood an "amendment in the nature of a substitute" to be something other than an "amendment by way of substitute" (the language of Rule XIX), we are drawn irresistibly to the conclusion that it was the Hinds tree of Figure 2 that Speaker Cobb had in mind in 1850 and that Hinds meant to describe more than fifty years later.

Even if Barclay's 1861 statement of precedent is not as explicit and clear as we might like, other incidents from the 1870s are consistent with our inference that it was the Hinds tree, not Cannon's tree, that grew during this period. In 1876, for example, the House considered a bill to build a new market-house in the District of Columbia. Before the House could vote on the two committee amendments to the bill, Sam Randall of Pennsylvania offered an amendment in the nature of a substitute that would have authorized sale of the property instead.[51] Randall delivered an eloquent speech against "the promotion of a private enterprise at the public expense,"[52] but the House first adopted the committee amendments and then rejected his substitute.

Also in 1876, the House took up a bill on election contributions that the Judiciary Committee had reported with an amendment to insert two words in the first section. With the Judiciary Committee amendment still pending, Rep. Brown of Kentucky, acting on behalf of the Committee on Reform in the Civil Service, offered what he characterized as (and what certainly was) "an amendment in the nature of a substitute for the bill just reported."[53] Members then proceeded to offer second-degree amendments to the Brown substitute. In both cases, a complete substitute was offered while a first-degree perfecting amendment remained pending.

In the following year, Randall, now the Speaker, repeated approvingly Barclay's formulation that the amendment in the nature of a substitute which is in order is "to the original text in whole or in part."[54] Absent any evidence to the contrary, we interpret "original text" to refer to the text of a measure (which is what the phrase means today). *McPherson's Hand-Book of Politics* for 1879 also reported a complete substitute for a bill being offered while a perfecting amendment to the bill was pending.[55] All of these cases are offered as cumulative evidence that, during the

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[51]*Congressional Record*, 44th Congress, 1st Session, pp. 1821-1825. See also *Congressional Record,* 43rd Congress, lst Session (April 21 and June 6, 1874), pp. 3245, 4650.

[52]*Ibid.*, p. 1823.

[53]*Congressional Record*, 44th Congress, 1st Session, pp. 1844-1845.

[54]*Congressional Record*, 45th Congress, 1st Session, p. 627.

[55]Edward McPherson, *McPherson's Hand-Book of Politics* (Washington: Solomons & Chapman, 1879), p. 47.

1870s, the House repeatedly engaged in amending practices that cannot be explained by current amendment procedures, but that do fit an alternative explanation--what we have called the Hinds tree--an explanation that also is consistent with the terms of Rule XIX.[56]

Pointing to the same conclusion from a different direction are other instances before 1880 in which Members were not allowed to offer both second-degree amendments that are in order under Cannon's tree and the contemporary interpretation of Rule XIX. In those cases, with a second-degree substitute pending, the Chair indicated--sometimes more clearly and conclusively than in others--that a Member could not offer a second-degree perfecting amendment as well.[57] In April 1878, for instance, Rep. Fort of Illinois offered what he and the Chair characterized as a substitute for the pending first-degree amendment. If the Fort amendment were the second-degree substitute of the Cannon tree, then a second-degree perfecting amendment also would have been in order. The Chair, however, stated that "[i]t is not in order to offer further amendments until the substitute of the gentleman from Illinois shall have been voted on."[58] Such cases support the contention that, consistent with the Hinds tree, only one second-degree amendment (either a perfecting amendment or a substitute) was in order at a time to each of the first-degree amendments that could be pending at the same time.

There is one remaining question that Barclay raised but did not answer. What

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[56]Some pre-1880 episodes were consistent with both trees. In those cases, a first-degree perfecting amendment was offered with a complete substitute pending and, in some of them, a second-degree perfecting amendment was proposed to either or both of the first-degree amendments. (For example, *Congressional Record*, 43rd Congress, lst Session (December 9, 1873), pp. 105-108.) Under the modern interpretation of Rule XIX, such a development would be in order although it is unlikely to occur for reasons discussed in the text. And under what we believe to be the House's pre-1880 amendment procedure, the two first-degree amendments were in order, regardless of the sequence in which Members proposed them. In other words, these cases cannot help us distinguish which tree, if either, was in Members' minds at the time.

[57]See for example, *Congressional Record:* 43rd Congress, lst Session (December 16, 1873), pp. 239-243; 43rd Congress, 1st Session (January 15, 1874), pp. 683-692.

[58]*Congressional Record,* 45th Congress, lst Session (April 11, 1878), pp. 2472-2476. That Fort's amendment and others like it were called substitutes during the late 1870s does not convince us that they were the substitutes "for original text" that Barclay had in mind or that the Rules Committee intended to codify. But it is evidence that the same word was coming to be used to refer both to second-degree substitutes and to partial or complete first-degree substitutes, a confusion in terminology that probably gave rise after 1880 to some uncertainty and inconsistency about what the new rule actually meant.

did he mean when he stated that an amendment in the nature of a substitute "for part or the whole of the original text" was in order? What is "part" of the original text? A review of the House's consideration of a naval appropriations bill suggests the answer.[59]

The bill was being read for amendment by paragraphs in Committee of the Whole, so that at any moment a single paragraph was all of the text that was open to amendment. To the pending paragraph, Rep. Lewis of Alabama offered a perfecting amendment, to which Piper of California offered a second-degree amendment that was a substitute although he did not characterize it as such. Rep. Hale then offered another first-degree perfecting amendment that Rep. Reagan proposed to amend. (See Figure 6.) The discussion that followed on the floor indicates that the Chairman had permitted the Hale and Reagan amendments to be offered on the mistaken assumption that Lewis had proposed a substitute for the entire paragraph. Randall stated that he would have had no objection to the four amendments being pending if the Lewis amendment was a first-degree partial substitute. Because it was not, however, the Chair held that the Committee would dispose of the Lewis and Piper amendments before entertaining the Hale and Reagan amendments.

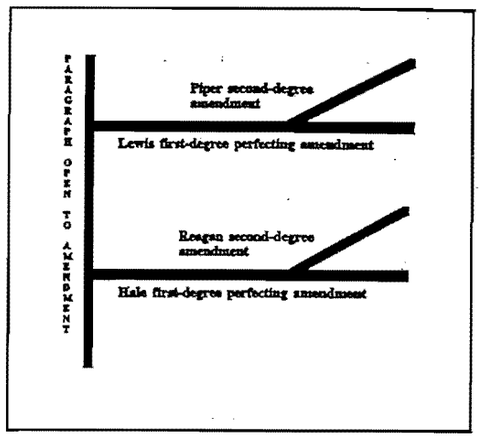

Figure 6

When Hale sought to offer his amendment as a second-degree perfecting amendment to the Lewis amendment, the Chair advised him that he could not do so unless Piper first withdrew his second-degree substitute. The implication--though only an implication--is that only one second-degree amendment was in order at a time, that Members could not have pending a second-degree perfecting amendment and a second-degree substitute amendment to the same first-degree amendment, as the contemporary interpretation of Rule XIX permits. However, with the Lewis and Piper amendments still pending, the Chair did proceed to recognize

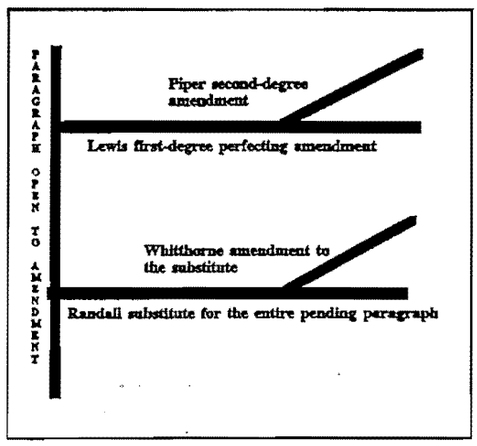

Figure 7

[59]The following two paragraphs are based on *Congressional Record*, 44th Congress, 1st Session, pp. 3262-3272.

Randall to offer a substitute for the entire paragraph, and Rep. Whitthorne to offer a second-degree amendment to the Randall substitute. (See Figure 7.)

What these amendments suggest is that the House was following procedures in Committee of the Whole that were equivalent to those followed in the House. In the House, where a bill was--and is--open to amendment at any point, a complete substitute for its text could be offered even if a first-degree perfecting amendment already was pending. Similarly, in Committee of the Whole, where a bill typically was--and is--open to amendment one section (or paragraph, in the case of appropriations bills) at a time, a substitute for that entire part of the bill (what we are calling a partial substitute) and a first-degree perfecting amendment could be pending at the same time, even if the perfecting amendment was offered first. The Chair was prepared to entertain the Hale first-degree perfecting amendment so long as he thought that the Lewis amendment was a substitute for the paragraph. When the Chair discovered that Lewis actually had offered a first-degree perfecting amendment, he then was prepared to entertain Randall's substitute for the paragraph, and an amendment to it.[60]

We encountered several other cases that are difficult to explain except by concluding that a first-degree partial substitute and a first-degree perfecting amendment could be pending at the same time. In 1876, for example, the Speaker agreed with Rep. Conger of Michigan when he said that "I offered a substitute [for the pending section] and it is now pending, but I understand that under the rules it is first

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[60]The same case points to another apparent difference between amendment procedures then and now. When an amendment to strike out and insert was offered, the House evidently then could entertain amendments to perfect both the matter proposed to be stricken and the matter proposed to be inserted. Today, only the matter to be inserted is amendable. In 1876, when Hale of Maine inquired if, with a motion pending to strike out and insert, he could amend the text to be stricken, the Chair responded that he could, "for the reason that if it is proposed to amend the bill by striking out the paragraph the friends of the paragraph are entitled to make it in the first place as perfect as they can." (*Congressional Record*, 44th Congress, 1st Session, p. 3267.) This ruling was not appealed, and indeed it seems to have been fairly common practice at the time. The ruling and reasoning followed Cushing's 1845 *Manual (op. cit.*, p. 72). Although Jefferson used much the same language in his *Manual (op. cit.*, p. 397), it was to support different propositions. Jefferson contended that when an amendment is offered to insert language, that language may be perfected; so too, with a motion to strike out pending, the language proposed to be stricken may be perfected. However, Jefferson did not take the next step, as Cushing did, and apply the same principle to both parts of a motion to strike out and insert. It is worth noting that what the House permitted in 1876 the Senate permits today. In this respect, 19th Century House procedures bear a greater similarity to 20th Century Senate procedures. The more general question--one that is both obvious and obviously important--about the relationship between the historical development of House amendment procedures and those of the Senate, we leave for other, more intrepid researchers.

in order to perfect the part proposed to be stricken out."[61] A month later, during consideration in Committee of the Whole of a post office appropriations bill, Cannon of Illinois offered a partial substitute for the pending section and with that amendment pending, the Chair also entertained first and second-degree perfecting amendments to the section Cannon proposed to replace.[62] Similarly, with a partial substitute pending for a section of an 1878 appropriations bill, the Chairman entertained an amendment to perfect the section, stating that "[t]his is an amendment to perfect the original text, while the amendment offered by the gentleman from Ohio is to strike out the original text and insert a substitute. The amendment of the gentleman from Indiana [the first-degree perfecting amendment] properly comes first."[63]

That amendment procedures in Committee of the Whole mirrored those of the House may have reflected the fact that, during the 19th Century, bills were more likely to be considered "in the House" than at present. The suspension procedure had not developed into its current form, and the absence of annual or periodic reauthorizations limited the number of bills that required consideration in Committee of the Whole. Under these circumstances, the way in which bills were considered "in the House" was somewhat more open and generous to Members than it is today when the previous question is always moved and usually ordered so as to cut off all possibility of floor amendments.

During the late 19th Century, by contrast, the majority floor manager sometimes would yield for Representatives to offer amendments before moving the previous question on the bill and the amendments pending to it. Because a bill considered "in the House" is open to amendment at any point, there were more opportunities then than now for Members to offer complete substitutes. Also, there appears to have been an informal practice by which a floor manager sometimes would yield to several Members to offer a series of first-degree perfecting amendments before he moved the previous question. In this way, the floor manager could control which first-degree amendments would be considered without losing control of the bill and the floor. As a result, sometimes several first-degree perfecting amendments were pending at the same time, but this seems to have been allowed by unanimous consent (implicit or explicit), without regard to the restrictions on amendments that otherwise would have

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[61]*Congressional Record,* 44th Congress, lst Session (April 11, 1876), pp. 2386. The bill was being considered in the House as in Committee of the Whole. At the time, this meant that the bill was read for amendment by sections, whereas today a bill considered in this way is open to amendment at any point.

[62]*Congressional Record,* 44th Congress, 1st Session (May 17, 1876), pp. 3129-3130.

[63]*Congressional Record,* 45th Congress, lst Session (March 6, 1878), pp. 1535-1537. See also the post office appropriations bill for the same year: *Congressional Record,* 45th Congress, lst Session (April 20, 1878), pp. 2678.

been enforceable.[64]

In this section, we have focused on evidence that helps us determine whether it was the Hinds or the Cannon tree that governed the House's amendment procedures when the Rules Committee began its work on what became the rules revision of 1880. The evidence available admittedly is incomplete and sometimes ambiguous; still, it points clearly to the Hinds tree. In one 1878 case we encountered, concerning a one-armed prospective law professor at West Point, there were pending at the same time in Committee of the Whole a second-degree perfecting amendment and a second-degree substitute for the same first-degree amendment, which of course is consistent with the modern, Cannon tree.[65] Nonetheless, most of the evidence points in the other direction. Absent a formal rule and comprehensive published precedents, complete consistency would be too much to expect.

We also would not like to leave the impression that the amending process as it actually took place on the floor (or at least as it was recorded in the *Record* and its predecessors) always was clear and consistent. To the contrary, confusion and inconsistency often prevailed. On three separate occasions during consideration of the same bill in 1874, for example, Speaker Blaine seems to have been guided by the conviction that two first-degree perfecting amendments and a complete substitute (and an amendment thereto) all could be pending at the same time.[66] In one of these instances, a Member who had offered one of the first-degree perfecting amendments inquired: "I have offered an amendment to the text of the original bill. Is any amendment in order except to the amendment I have offered?" Blaine replied: "The amendment of the gentleman's colleague is in the nature of an amendment to an amendment. It is admitted on that ground, although it applies to a different portion of the bill. But two amendments can be entertained and be pending at the same time."[67] So Blaine may have been treating the two first-degree perfecting amendments as if one were an amendment to the other, making his rulings consistent with the Hinds tree even if the reason for his treatment of the perfecting amendments is unclear.

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[64]See, for example, the proceedings on amendments to a coinage bill in 1879: *Congressional Record,* 46th Congress, lst Session (May 22, 1879), pp. 1525-1526.

[65]*Congressional Record*, 45th Congress, 2nd Session, pp. 964-967. The Chairman also entertained pro forma amendments to strike the last word from the second-degree substitute, thereby completely filling the Cannon tree.

[66]*Congressional Record,* 43rd Congress, 1st Session, April 9, 1874, pp. 2979-2980; April 11, 1874, pp. 3015-3016; and April 14, 1874, p. 3072.

[67]*Congressional Record*, April 11, 1874, p. 3016.

For some other episodes we have no plausible explanation.[68] However, we decline to impose on ourselves the burden of having to explain every case that we found on the ground that a hypothesis falls when even a single case inconsistent with it appears. Our research satisfies us that it would be foolish to assume that nothing in the *Record* and its predecessors is simply wrong, either in what happened on the House floor or in how it was recorded.[69]

Some reasons for confusion, uncertainty, and inconsistency come readily to mind. Membership turnover in the House was high so most Representatives were inexperienced, and probably had little time or reason to become experts in House rules. Rep. James Brooks of New York complained that:[70]

> under our...miserable system of representation, every two or four years, after a man has been educated to a place in this body, after he has come to know its rules, and understand his duties, after he has been trained and educated as a statesman, then at that hour the political wheel rolls him out, and a green man comes in.

Because committee chairmen did not secure and retain their positions by virtue of seniority, they were not necessarily experienced floor managers of legislation. According to Thompson, "some 1300 chairmanships prior to 1895 lasted for fewer than six years, and only 70 exceeded that length."[71] There were no published authoritative

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[68]See, for example, *Congressional Record,* 44th Congress, lst Session (June 23, 1876), pp. 4100-4104.

[69]Our analysis has been complicated by uncertainty about what Members understood it meant to have an amendment "pending." Today, we would say that an amendment is pending only when it has been offered and is actually under consideration. Thus, we would say that all four amendments on the Cannon tree are pending at the same time, even though the "pending question" is the one on which the first vote will take place. In the late 19th Century, however, Members sometimes seem to have had amendments read and described as "pending," even if it was premature for the amendment to be considered at that time. If so, then "pending' encompassed "awaiting consideration" as well as "being considered." Unfortunately, we have not found any explicit definition, which obviously complicates our effort to discover what kinds of amendments Members actually could offer while the House already was considering one or more other amendments.

[70]Quoted in Margaret Susan Thompson, *The "Spider Web:" Congress and Lobbying in the Age of Grant* (Ithaca, NY: Cornell University Press, 1985), p. 87.

[71]*Ibid.* See also Charles Stewart, "Committee Hierarchies in the Modernizing House, 1875-1947," *American Journal of Political Science,* v. 36, n. 4, November 1992, pp. 835-836; and Garrison Nelson, "Partisan Patterns of House Leadership Change," *American*

precedents for the House to follow, except for Barclay's selective *Digest* which first appeared in 1860, and no professional Parliamentarian such as Hinds or Cannon to promote accuracy and consistency in procedure. The Representatives who presided over the House as Speaker or as Chairman in Committee of the Whole had to rely largely on their own experience and judgment, and they can hardly be presumed to have been experts. In the 19th Century, the mean years of prior House service for Speakers at the time of first election to that office was six.[72]

Consider, for example, the 1876 election bill mentioned above. The Speaker entertained at least five first-degree perfecting amendments to the bill and the same number of second-degree perfecting amendments to the complete substitute before the House voted on any of them. When Rep. Page of California asked "how many amendments can be offered to this bill and be pending at the same time," and made a point of order that "there are already pending more amendments than the rule allows," Speaker Kerr responded that all the amendments had been in order:[73]

> because the treatment and discussion of this bill thus far has been upon the assumption that the House is acting on the bill by sections [which it was not]; hence it is that to the original text of the bill four amendments have been already permitted to be offered, not one of which was offered as an amendment to an amendment, but each one as an amendment to a separate and distinct part of the original bill.

Blaine dissented from what he called Kerr's "new and extraordinary ruling"; he would be right today and, as best we can tell, he was right then. 1876 was the only year in which Kerr was Speaker; perhaps his handling of this bill reflected his inexperience. In any event, this may have been just the kind of situation that convinced the Rules Committee several years later that it should propose codifying the House's basic amendment rule.

EMBRACING THE PRACTICE OF THE HOUSE

During the twenty years between the rules revisions of 1860 and 1880, the number of bills introduced quadrupled, and 44 clauses were added to the rules. In 1879, Rep. Blackburn of Kentucky spoke of "this bunglesome and overgrown system under which we now suffer," of rules that "are so voluminous, so conflicting, even so crude, as to render it almost impossible for any one to arrive at a clear comprehension of their

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Political Science Review, v. 71, n. 3, September 1977, pp. 918-934.

[72]Nelson Polsby, "The Institutionalization of the U.S. House of Representatives," *American Political Science Review*, v. 62, n. 1, March 1968, p. 149.

[73]*Congressional Record*, 44th Congress, 1st Session, pp. 1891, 1893-1894.

purpose and scope."[74]

The pressures on the House were growing, minority obstruction was becoming an increasing problem, but the Rules Committee, which was charged with preparing the 1880 revision, committed itself from the outset to avoiding innovation and contentious change. At its first meeting on the subject, according to Rep. William Frye, the Committee agreed that no change to the rules should be made "except by unanimous consent, and wherever we disagreed the old rules should be reported."[75] The Committee was neither revolutionary nor partisan. It "simply sought," in Alexander's words, "to foster order, accuracy, uniformity, and economy of time."[76] It is not surprising, then, that the Committee did not address opportunities for delay and minority obstruction; the Reed Rules would come in the following decade.

In recommending a new rule on amendment procedures, there is absolutely no evidence that the Committee thought it was breaking new ground. As we noted much earlier in this paper, the Committee's report simply states that "Rule XIX merely embraces, in the form of a rule, that which has long been the practice of the House without rule."[77] And its members could claim to know something about what the practice of the House long had been. In 1880, the average length of service for Representatives was four years. The newest member of Rules, Blackburn of Kentucky, was a five-year veteran. The others had served far longer: Frye of Maine for nine years, Speaker Randall for 17, Garfield of Ohio for 18, and Alexander Stephens of Georgia for 24 (not consecutively, of course). They were an experienced and knowledgeable group who were unlikely to act by accident or mistake.

The silence of the Committee and the House is the best evidence that the Committee intended no change in House amendment procedures. During floor debate on the entire package, Rule XIX was passed over quickly along with Rules XVIII and XX. Representatives did debate other rules, but there evidently was no need to explain or defend Rule XIX. The House must have believed that it knew what procedures were being codified, and these procedures were illustrated during the debate itself as the proposed new rules were read for amendment, clause by clause.

It will come as no surprise to students of the 19th Century House that one of the most controversial issues was the authority of the Appropriations Committee. Rep.

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[74]*Congressional Record*, 46th Congress, 1st Session (June 25, 1879), p. 2328.

[75]Quoted by William A. Robinson, *Thomas B. Reed, Parliamentarian* (New York: Dodd, Mead & Company, 1930), p. 66.

[76]DeAlva Stanwood Alexander, *History and Procedure of the House of Representatives* (Boston: Houghton Mifflin Company, 1916), p. 195.

[77]*Congressional Record*, 46th Congress, 2nd Session, p. 203.

Shallenberger of Pennsylvania proposed to insert a provision in clause 3 of Rule XI that appropriations bills reported by other House committees were to be referred sequentially to the Appropriations Committee.[78] Muldrow of Mississippi then offered a substitute for all of clause 3. At that time, pro forma amendments--motions to strike out the last word--were treated as true amendments and, if not withdrawn by unanimous consent, were disposed of by vote. So Rep. Money moved "to amend by striking out the last word of the substitute of my colleague," and Garfield then offered a comparable amendment to the Shallenberger amendment. (See Figure 8.) When another Member sought to offer an amendment, the Chairman explained that:[79]

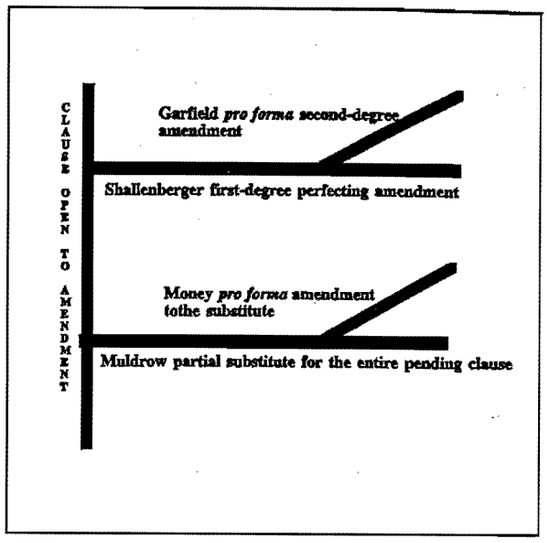

Figure 8

> The gentleman from Pennsylvania has offered an amendment to *the original clause,* and the gentleman from Mississippi has offered a substitute for *the original clause,* and there is now pending an amendment to each one of those amendments. That is as far as can be gone under the rules of the House. Until these amendments to the amendments are disposed of in some way no other amendment is in order. (Emphasis added.)

The situation the Chairman described, depicted in Figure 6, illustrates the Hinds tree, and tracks the 1876 case discussed above as it shed light on what Barclay evidently had in mind when he referred to an amendment in the nature of a substitute for part of the original text.

There can be no question that the Rules Committee relied on the *Digest* of Barclay and his successors. The unusually attentive reader will have noted the similarity between Barclay's formulation and the Rules Committee report, especially the Committee's reference to a ruling by Speaker Macon in the 9th Congress, 1805-1807, to the effect that "if a motion to amend the original matter was first submitted, it was not then in order to submit an amendment in the nature of a substitute." (The

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[78]This case is taken from *Congressional Record*, 46th Congress, 2nd Session, pp. 610-614.

[79]*Ibid.*, p. 614.

Committee then went on to explain that Speaker Polk had reversed this ruling and, again following Barclay, "the practice has since been in accordance with the latter decision."[80]) However, Macon made no such ruling. Instead, it was made in the 19th Congress, under Speaker Taylor. The Rules Committee was deceived by a clerical error in the most recent editions of the *Digest.* The versions published from 1860 to 1878 carried the correct citation to the 19th Congress. To our bemusement, however, we discovered that in the printing of the 1879 *Digest,* "19" was misprinted as "9", and this error was carried over in all subsequent versions of the *Digest.* The Rules Committee faithfully copied the same error in its report; after all, the Committee only intended to codify what the *Digest* said.

PRELUDE TO THE SEQUEL

Such is the evidence we can offer in support of the conclusion we prefigured many pages ago. Rule XIX as adopted in 1880 did indeed codify more or less well-established practice. But the meaning of the rule then was not the meaning we give it today. The evidence we have been able to adduce is fragmentary and sometimes inferential, but we find its combined weight to be compelling.

In this paper, we have concentrated on the origins of the rule, not its subsequent interpretation. We agree with Henry Smith's assessment in 1880 that the House's amendment procedures were "crystallized" into the new Rule XIX. In fact, we suspect that "crystallization" is likely to prove an apt metaphor for other developments in the history of congressional procedure.

Practices can accumulate gradually into custom, perhaps supported by rulings that rest on the authority of experience and recollection. If such a practice proves sufficiently durable, useful, and commonplace, there eventually comes a moment of crystallization, when conventional practice thenceforth becomes enforceable as precedent or codified as rule. From a concentration of practice there finally crystallizes some principle, standard, or criterion of procedure which, from then on, is to be qualitatively more binding and controlling than before.

Examples that come to mind of practice crystallizing into precedent are the right of the Senate's Majority Leader to priority in recognition, and, in the House, the priorities that guide Chairmen in Committee of the Whole in deciding the order in which Representatives are to be recognized to offer amendments. Even when some practice is crystallized in a formal rule, the Members may not view the adoption of that rule as a particularly consequential act; they simply are making the rules more complete by codifying something that already is well-established and perhaps even enforceable practice. This was obviously true of the adoption of Rule XIX in 1880. By then, the House's amendment procedure had crystallized; all that remained was to give

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[80]*Hinds' Precedents*, v. 5, sec. 5753.

that fact formal recognition in the rules.

When change is the product of a gradual process, not a single identifiable event, it becomes much more difficult, if not impossible, to identify and attribute motives to those responsible for it. In fact, we are justified in questioning whether anyone was responsible at all, at least knowingly. Surely how change occurs must inform our thinking about why it occurs.

So we offer this paper as a cautionary tale to those who assume or assert that legislative rules and rules changes necessarily are the products of rational calculation. Legislators are understood to be rational actors who act in ways calculated to promote certain outcomes. They recognize that legislative procedures can help or hinder them in trying to attain those outcomes, so they seek to create or change procedures in ways that they think will work to their advantage. To this end, they may favor procedures that, for example, enhance the discretion of individual members, the rights of the minority or majority party or coalition, or the powers of legislative committees or party leaders. In one way or another, legislative rules are presumed to be products of such calculations.

But what are we to make of cases such as the one chronicled here? During the middle decades of the 19th Century, leading up to 1880, the interests and incentives of individual Congressmen changed--for example, as the notion of rotation in office began to give way to thoughts of congressional careers. The importance and cohesion of congressional parties also changed, from the fragmentation that preceded the Civil War to the impressive cohesion in party voting that peaked in the years following the 1880 recodification. So too did the role of the House's standing committees change, as the committee system stabilized (notwithstanding disputes over appropriations power), congressional workload increased, and committees assumed an increasingly influential role in the legislative process. How are we to assume or discover rational calculation in a gradual process when the characteristics and interests of the most likely proponents and beneficiaries of change also changed significantly while the process was taking place?

Although this is mere speculation, we are intrigued by the possibility that development and change in the House's amending rules were related to changes in the committee system. Throughout most of the 19th Century, it will be remembered, the House's committees did not enjoy the deference they often received a hundred years later. As we already have noted, the turnover in House membership was high; so too was the rate of change in committee rosters. Committee chairmanships were not assigned on the basis of seniority, and there were few subcommittees to chair. So Members remaining in the House lacked powerful incentives to remain on the same committee and develop the expertise that would convince their other colleagues to defer to their specialized knowledge and judgment.

Under these circumstances, it was fitting for the House's amendment procedures to permit Members to offer their own versions of legislation as alternatives--complete

or partial substitutes--for committee bills. If a committee brought its own bill to the floor, why should that have dissuaded a Member from offering his own alternative, and would not the House have welcomed having the same opportunities to perfect each of them? Alternatively, if a committee reported one Member's bill with some committee amendments, why should another Member have had to wait until the House acted on those committee amendments before offering his own version as an amendment in the nature of a substitute?

This line of argument also suggests two related reasons why Representatives may have seen an advantage in how Rule XIX came to be reinterpreted sometime before 1920. First, as House committees became more influential, it became less plausible for individual Members to expect the House to reject a committee bill in favor of their own alternative, embodied in a complete substitute. Second, if the committees themselves more frequently reported bills referred to them with their own committee amendments in the nature of substitutes (as they often do today), there would be fewer opportunities for Representatives to offer their own complete substitutes, even if they were inclined to do so.

If so, Members would have had less reason to value the opportunity to offer complete substitutes, and would have been more interested in expanding their opportunities to amend the bills and complete substitutes that House committees approved and brought to the floor. By this reasoning, increasing committee influence may have made Representatives receptive to re-interpreting Rule XIX and transforming the first-degree complete substitute of the Hinds tree into the second-degree substitute of the Cannon tree.

To determine whether such speculations have any merit would require systematic information we now lack on when and how committees brought their legislative recommendations to the House floor during the 19th and early 20th Centuries, and how often committee proposals were accepted, amended, or rejected. For us, the prior and obvious task is to ask exactly how, when, and why the change in the meaning of Rule XIX took place. Having attempted in this paper to document how the amendment tree developed and how that procedure crystallized and ultimately was codified into a rule, we shall turn in the sequel to explore how the same rule took on a different meaning through what we anticipate to have been an equally gradual process of interpretation and re-interpretation.