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CONTENTS

HISTORICAL DEVELOPMENT OF THE SENATE'S AMENDMENT PROCESS

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INTRODUCTION

Senate majorities have used a complex assortment of rules and practices in recent years to exert greater control over the institution's decision-making process than at any other point in its history. The principal means by which they establish such control is their ability to block amendments on the Senate floor. A broad selection of recent scholarship captures this dynamic.[1]

The present study, however, considers the ability of the majority leader to use his priority of recognition to block floor amendments in the context of the historical development of the Senate's amendment trees. When coupled with cloture and employed early in the process, filling the tree may be successful in passing the majority's preferred bill through the Senate unchanged. At a minimum, the tactic protects members of the majority from having to cast tough votes that could be used against them in their effort to secure re-election.

Yet despite the increased importance of the amendment process to Senate majorities' efforts to control the agenda, we have, at best, only a limited understanding of how that process developed. Put differently, existing treatments do not account for the role that the amendment process was originally intended to play, the mechanics of how that role was performed and the extent to which it has changed over time. And given the increased controversy surrounding the practice of filling the amendment tree in the Senate today, this represents a significant limitation of the scholarship thus far.

This void can be filled with an analysis of the timing and sequence of the changes in how amendments have been considered on the Senate floor over time and the impact of such changes on the number of amendments simultaneously permitted on legislation. Such an examination of the development of the Senate's amendment process helps account for the significant institutional change observed in that chamber, as represented by the rapid rise of the practice of filling the amendment tree. Contrary to current practice, the amendment process evolved to facilitate consideration of the Senate's business in an orderly manner.

1. Richard S. Beth, Valerie Heitshusen, et al., "Leadership Tools for Managing the U.S. Senate," Paper Presented at the *Annual Meeting of the American Political Science Association*, Sept. 3-6, 2009; Chris Den Hartog and Nathan W. Monroe, *Agenda Setting in the U.S. Senate: Costly Consideration and Majority Party Advantage* (New York: Cambridge University Press, 2011); Gregory Koger, *Filibustering: A Political History of Obstruction in the House and Senate* (Chicago: The University of Chicago Press, 2010); Barbara Sinclair, *Unorthodox Lawmaking: New Legislative Processes in the U.S. Congress*, 3rd ed. (Washington, D.C.: Congressional Quarterly Press, 2007); Steven S. Smith, *The Senate Syndrome: The Evolution of Procedural Warfare in the Modern U.S. Senate* (Norman, Oklahoma: The University of Oklahoma Press, 2014).

AMENDMENTS IN THE EARLY SENATE

The amendment process is governed by general principles that provide the foundation for Senate rules XV, XVI and XXII, as well as the numerous precedents that help clarify procedural ambiguities that may arise under these rules in specific parliamentary situations. These principles are derived from English parliamentary law and were first compiled for the Senate in *A Manual of Parliamentary Practice for the use of the Senate*, which was written by Thomas Jefferson during his tenure as vice president and president of the Senate (1797-1801). Jefferson's intention was to give members additional procedural guidance in situations for which the institution's first 24 Standing Rules did not provide explicit direction. In the absence of such guidance, Jefferson feared that the Senate's deliberations would fluctuate between chaos and heavy-handed majority rule.

During the first decade of that chamber's history, its Standing Rules offered considerably less guidance for how the amendment process should be conducted than they do today. Adopted in April 1789 during the 1st Congress, the first set of rules merely stipulated that amendments would be considered before other motions (e.g., to adjourn) and that no bill could be amended until it had been read twice. Rule X, which would eventually become today's Rule XV, simply stated that: "If a question in debate contains several points, any member may have the same divided."[2] Then, as now, precedents were needed to fill in the gaps created by the ambiguities inherent in the Senate's Standing Rules. In the absence of additional authorities, senators were left to turn to general parliamentary law, as documented in the *Manual* for procedural guidance when establishing these precedents.

Jefferson discerned "general parliamentary law" by consulting the Constitution, the Senate's rules "and where those are silent [...] the rules of Parliament."[3] According to the *Manual*, committee amendments are considered before floor amendments and legislative text cannot be amended more than once.[4] Given this, legislators should have an opportunity to amend any text proposed to be stricken and/or inserted before the actual vote to strike/insert said text.[5] Additionally, motions to commit have precedence over motions to amend.[6] Finally, amendments may be amended in the second degree but third-degree amendments are not in order.[7]

These principles were invoked to facilitate the orderly consideration of the Senate's business without compromise to legislative deliberation. Reducing confusion in the amendment process was particularly important in the early Senate because it chose not to adopt the practice followed at the time in the House of Commons and the new House of Representatives of amending bills by paragraph.[8] Jefferson acknowledged that even though the consideration of amendments in this manner presented some challenges, it also produced "advantages overweighing their inconveniences."[9]

Consequently, the practices by which the early Senate governed the amendment process sought to balance the need for order with the imperative of deliberation. That is, the latter was only subsumed to the former when it was absolutely necessary. This is reflected in Jefferson's discussion of the prohibition on third-degree amendments:

> If an amendment be moved to an amendment, it is admitted. But it would not be admitted in another degree: to wit, to amend an amendment to an amendment, of a M.[*ain*] Q.[*uestion*]. This would lead to too much embarrassment. The line must be drawn somewhere, and usage has drawn it after the amendment to the amendment.[10]

Put simply, the prohibition was designed to impose order on the process of offering amendments. It was meant to avoid unnecessary confusion. The prohibition was not intended to provide certain senators with a means by which they could block others from offering amendments to legislation. This last point is affirmed by the next two sentences immediately following Jefferson's definition of a third-degree amendment:

> The same result must be sought by deciding against the amendment to the amendment, and then moving it again as it was wished to be amended. In this form, it becomes only an amendment to an amendment.[11]

The expectation was that while an amendment in the third degree would be out of order, an identical amendment in the second degree would be allowed, once that spot opened on the tree.

The prohibition on third-degree amendments was tolerated because the benefits derived from a more manageable process outweighed the costs imposed by temporarily limiting legislative deliberation. However, members had little need to resort to Jefferson's prohibition—on offering an amendment

2. April 16, 1789, 1-1, *Journal*, p. 13.

3. Thomas Jefferson, *A Manual of Parliamentary Practice. For the Use of the Senate of the United States*, (Washington: Government Printing Office, 1993), p. xxviii.

4. Ibid., p. 44.

5. Ibid., pp. 57, 61.

6. Ibid., p. 54.

7. Ibid., p. 56.

8. Ibid., pp. 40-42.

9. Ibid., p. 41.

10. Ibid., p. 56.

11. Ibid.

to an amendment to an amendment of a main question—for much of the Senate's early history.

Nevertheless, maintaining order in the Senate became more important as the size of its membership increased and the institution considered more controversial legislation. As a consequence, some of the first challenges against third-degree amendments did not arise until the 1840s and 1850s.[12] Third-degree amendments were not routinely offered (and subsequently ruled out of order) until the 1870s.[13] A cursory review of these debates conveys the general sense of confusion and disorder that commonly characterized the consideration of legislation on the Senate floor before the advent of televised proceedings, computers and staff to help members keep track of everything.

This prohibition was thus not imposed to protect a bill from poison-pill amendments. To do so would have been inconsistent with the general parliamentary practice followed at the time. In offering his rationale, Jefferson quotes 18th century practice in the House of Commons:

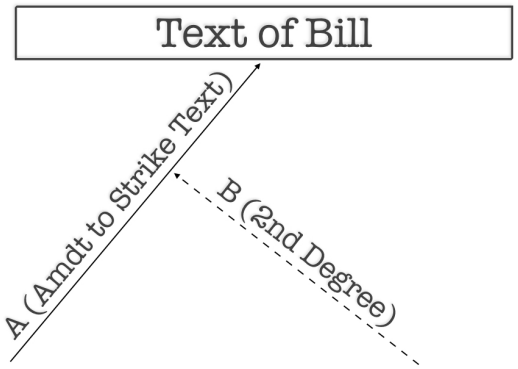
> Amendments may be made so as totally to alter the nature of the proposition; and it is a way of getting rid of a proposition, by making it bear a sense different from what was intended by the movers, so that they vote against it themselves.[14]

Commenting upon that same practice, a clerk serving in the House of Commons during the period in question observed: "This, perhaps, is not quite fair, but has been often done."[15] Such amendments were tolerated because they were perceived to be instrumental to discern the true sense of the institution on any given question.

The early amendment trees to which the principles of general parliamentary law gave rise could be rather limiting, particularly when measured against the contemporary practice. For example, the requirement that legislators have an opportunity to amend text proposed to be stricken and/or inserted before the actual vote to strike and/or insert said text, coupled with the stipulation that a main question could only be amended in the second degree, suggests that no more than two amendments could be pending before the Senate at the same time. In addition, the prohibition on third-degree amendments precluded members from perfecting second-degree ones before they received a final vote.

A volume of 18th century precedents from the House of Commons provides examples of the relatively straightforward amendment process depicted in Jefferson's *Manual*.

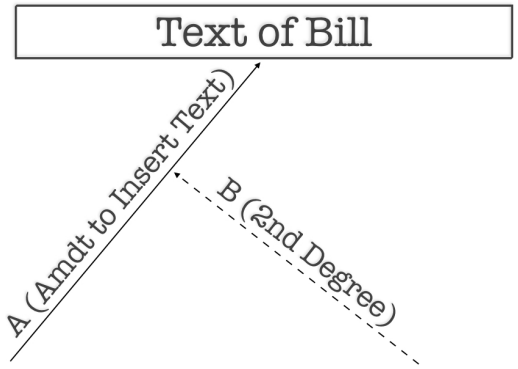
FIGURE I: EARLY AMENDMENT TREE BASED ON MOTION TO STRIKE



In Figure 1, a member offered an amendment (branch *A*) to strike text from the underlying bill. Another member subsequently moved an amendment (branch *B*) to strike part of the text that was to be stricken by the first, the effect of which would be to retain a part of the original text proposed to be stricken by the first amendment.[16] In this instance, the general principles of parliamentary law permitted the second member to perfect the underlying text proposed to be stricken before a vote on the original motion to strike.

Figure 2 depicts another early amendment tree from the House of Commons. However, this tree is based on a motion to insert.[17]

FIGURE 2: EARLY AMENDMENT TREE BASED ON MOTION TO INSERT



12. For example, see: March 3, 1849, 30-2, *Congressional Globe*, pp. 682-83; March 31, 1858, 35-1, Congressional Globe, pp. 1417-18.

13. For example, see: June 7, 1870, 41-2, *Congressional Globe*, p. 4166; July 14, 1870, 41-2, Congressional Globe, p. 5574; Jan. 6, 1874, 43-1, Record, pp. 392-94; March 30, 1874, 43-1, Journal, p. 395; March 31, 1874, 43-1, Journal, p. 398.

14. Ibid., p. 61.

15. John Hatsell, *Precedents of Proceedings in the House of Commons: Under Separate Titles*, With Observations (London: Hansard and Sons, 1818), II, p. 117.

16. Ibid., p. 110. This precedent occurred Nov. 13, 1755.

17. Ibid., p. 193, This precedent is based on events occurring March 24, 1709 and Jan. 21, 1728.

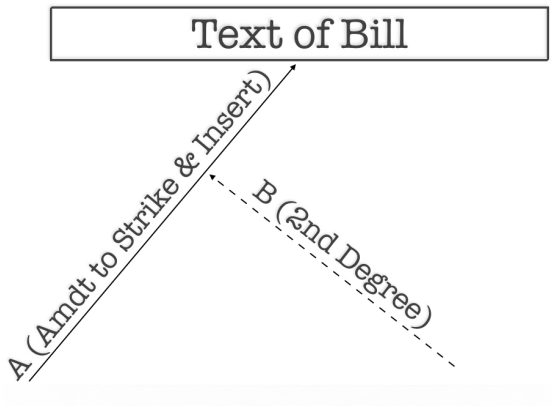
Here, a member proposed an amendment (branch *A*) to insert text in the underlying bill.

Pursuant to the requirement that the text proposed to be inserted shall be open to amendment prior to a final vote on that text, another member was afforded the opportunity to move to perfect the words proposed to be inserted by the first (branch *B*).

However, the early practice that governed compound motions to strike *and* insert is less clear. Jefferson covers all three forms of amendment in the *Manual* and explicitly acknowledges that an amendment to the text proposed to be stricken or inserted is in order before a vote on the amendment to strike or insert. Yet he does not make a similar observation regarding the compound motion to strike *and* insert, which he considers immediately following the discussion on the former. Instead, Jefferson implies that such motions are not open to further amendment and that alternatives to them must wait until the first motion is rejected before being offered.

However, the early Senate appears not to have followed Jefferson's parliamentary guidance here. Instead, motions to strike and insert were considered in the same way as other amendments. For example, Figure 3 depicts a motion to strike and insert from the early 19th century.[18] Here, Sen. Samuel A. Foote, a Connecticut Whig, moved to strike out certain words in a proposition and to insert others in lieu thereof (branch *A*). Sen. John Macpherson Berrien, a Whig from Georgia, then moved to strike certain words in the Foote amendment and to insert others (branch *B*).

FIGURE 3: EARLY AMENDMENT TREE BASED ON MOTION TO STRIKE AND INSERT



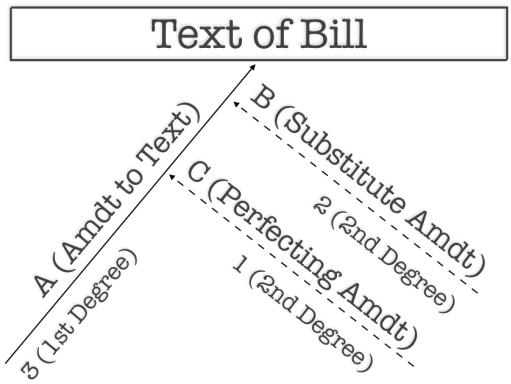
Each of these examples illustrates a relatively straightforward approach to the amendment process. That is, senators would offer amendments to the main question *ad seriatim* until no other amendments were permitted or until the members were satisfied with the underlying bill. Similarly, members would offer second-degree amendments *ad seriatim* to the pending first-degree amendment until further amendments were precluded or until the members were satisfied with its text and thus ready to move on.

Furthermore, in either example, no more than two amendments were pending before the chamber at the same time. From this point on, this paper will refer to this as a prohibition against "horizontal third degrees." According to Sen. Henry Cabot Lodge, R-Mass., a former president pro tempore and Senate majority leader: "The number of amendments pending is the test of the degree of the amendment."[19] Horizontal third-degree amendments thus represent competing first- and second-degree amendments that are not in order under the Senate's precedents, because the amendment tree has been filled. In addition, no amendment is pending beyond the second degree in any of the examples. This reflects the prohibition on offering an amendment to an amendment to an amendment. From this point on, this will be referred to as a prohibition on "vertical third degrees."

AMENDMENTS IN THE CONTEMPORARY SENATE

With respect to the amendment trees followed in the Senate today, Figure 4 depicts the procedural options if a motion to insert text is the first amendment offered on the floor.

FIGURE 4: CHART I - MOTION TO INSERT TEXT



The modern procedural options differ from the amendment tree depicted in Figure 2 in that two second-degree amendments are pending to the first-degree amendment at the same time (branches *B* and *C*).

Chart 2 in Figure 5 depicts the amending opportunities available to senators if a motion to strike text from the underlying bill is the first amendment offered on the Senate floor.

18. See Feb. 12, 1828, 20-2, Journal, p. 151.

19. June 10, 1914, 63-2, *Record*, p. 10128.

FIGURE 5: CHART 2-MOTION TO STRIKE TEXT

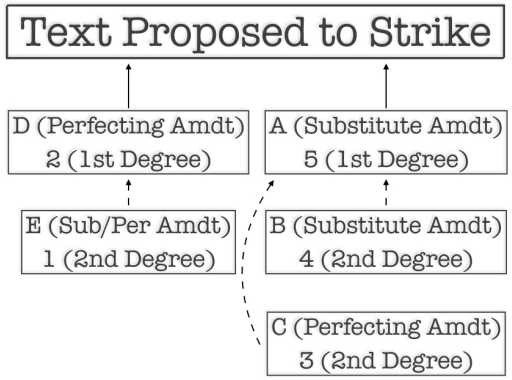
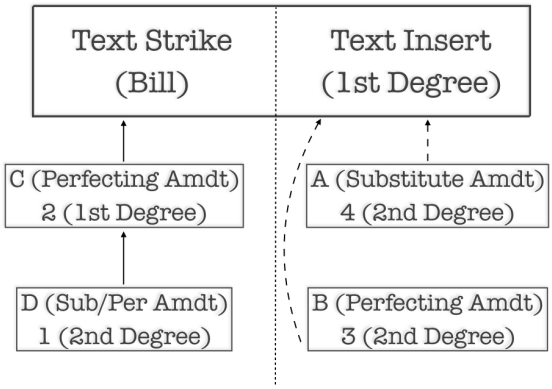


Chart 2 differs from the early amendment tree depicted in Figure 1 because it does not count the amendment to strike against the limit on the number of proposed amendments allowed at the same time. In addition, it allows for two first-degree and three simultaneous second-degree amendments to be pending to the underlying bill (branches *A* and *D*, and *B*, *C* and *E*, respectively). In contrast, there are only two amendments pending to the underlying bill in Figure 1: the motion to strike (first degree) and an amendment to the motion to strike (second degree).

Chart 3 depicts the amending opportunities that arise when a substitute for a section of the underlying bill (i.e., motion to strike and insert) is the first amendment offered on the Senate floor (see Figure 6).

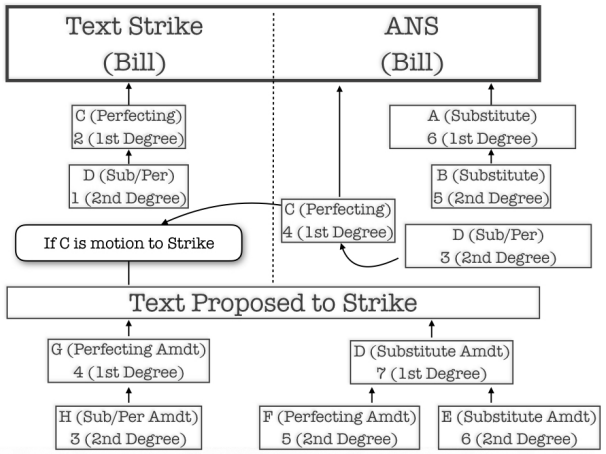
FIGURE 6: CHART 3 - MOTION TO STRIKE AND INSERT (SUBSTITUTE FOR SECTION OF BILL)



Unlike the earlier model in Figure 3, the modern process depicted above permits four amendments to be pending alongside the original motion to substitute text for a section of the underlying bill (two first- and three second-degree amendments versus one first-degree amendment and one second-degree amendment).

Finally, Chart 4 in Figure 7 depicts the parliamentary situation that arises when the first amendment offered on the Senate floor is a full-text substitute for the underlying bill (ANS).[20]

FIGURE 7: CHART 4 - MOTION TO STRIKE AND INSERT (ANS)



Here, up to five first-degree and six second-degree amendments can be pending to the underlying bill (or ANS) at the same time.

Contemporary trees such as these are obviously more complex than the practice followed in the 18th century House of Commons and in the early Senate. Yet despite this complexity, each branch remains based, in part, on the general principles of English parliamentary law identified above. The modern trees simply reflect the Senate's conscious resolution of the instances in which these principles conflict.

Despite the complexity of the modern trees, order is still maintained by adherence to the principles of precedence. According to the *Manual*: "it is a general rule that the question first moved and seconded shall be first put. But this rule gives way to what may be called Privileged questions; and the Privileged questions are of different grades among themselves."[21] In this context, privilege is assigned to amendments based on one of the principles of parliamentary law. For example: "When it is proposed to amend by inserting [striking] a paragraph or part of one, the friends of the paragraph may make it as perfect as they can by amendments, before the question is put for inserting [striking] it."[22] This is because the legislative text cannot be amended more than once. With this language, the Senate gradually decided to

20. An amendment in the nature of a substitute (ANS) is the same form as the amendment in Chart 3, but instead of striking only a section of the bill, an ANS strikes everything in the bill after the enacting clause and substitutes a new bill in its place.

21. *A Manual of Parliamentary Practice*, p. 50.

22. Ibid., p. 61.

circumvent the other prohibitions on horizontal and vertical third-degree amendments reflected in the general parliamentary law and observed in Senate practice over the course of the 18th and early 19th centuries. In this sense, the amendment trees followed in the contemporary Senate all violate at least one of the principles articulated in the *Manual*, in that they all permit either horizontal and/or vertical third-degree amendments.

That the Senate modified its practice over time to expand the number of amendments that could be pending at the same time was consistent with the nature of precedent and helped the institution maintain balance between the twin imperatives inherent in its amendment process: to maintain order and to facilitate deliberation. A brief survey of the key developments in the evolution of the amendment trees suggests the primary factor in each instance was the desire to make the process more responsive to the needs of rank-and-file senators, thereby to facilitate legislative deliberation and to preserve order in what would otherwise be the chaotic environment of the Senate floor.

KEY DEVELOPMENTS IN THE AMENDMENT PROCESS

Most of the modifications to the procedures that govern the amendment process were established by the creation of new precedents. However, one of the most important changes was established by the adoption of a new Standing Rule in 1874. The principles articulated in the debate that preceded the adoption of this rule, as well as the rule itself, underpin Charts 3 and 4 and thus are explained in detail below. In subsequent years, these principles were gradually applied to Charts 1 and 2. It thus makes sense to begin our historical survey with Chart 4 and the adoption of the 1874 rule.[23]

Chart 4

The amendment tree depicted in "Chart 4" is the most complex process permitted in the Senate today (absent unanimous consent). It is also the one most commonly followed. Given this complexity and ubiquity, it makes sense that parliamentary situations that arise under it would conflict with the limited nature of the amendment process as it existed in the early Senate.

While there is some indication that the Senate periodically set aside its restrictive procedures by unanimous consent to accommodate a process analogous to that depicted in Chart 4, the fact remains that the institution's rules and practices at the time prohibited most of the branches observed on the tree today.[24] For example, the prohibition on vertical third-degree amendments would preclude *B*, *D*, *E* (lower half), *F* (lower half) and *H* (lower half). Additionally, the prohibition on horizontal third-degree amendments would preclude more than two amendments from being proposed at the same time. That is, only one other amendment could be pending before the Senate in addition to the ANS (the right side of the tree). This would preclude *A*, *C*, *E*, *G* (lower half) and/or *D* (lower half) from pending at the same time. It would also preclude all second-degree amendments listed on the chart (*B*, *D* and *F* in the upper half and *E*, *F* and *H* in the lower half) because only the ANS and one first-degree amendment could be pending at the same time under the prohibition on both horizontal and vertical third degrees.

What would eventually become the process outlined in Chart 4 was made possible by the Senate's adoption of a new Standing Rule in 1874. Specifically, it modified the procedures by which it considered amendments in the nature of a substitute (ANS). During consideration of legislation that related to currency and the banking system (S. 617; left side of the tree in Chart 4), Sen. Augustus Summerfield Merrimon, D-N.C., offered an amendment in the nature of a substitute (Merrimon ANS) to the bill. Sen. Oliver H.P.T. Morton, R-Ind., offered an amendment to strike a section of the underlying bill (branch *E* on Chart 4; left side of the tree).

At this point, two amendments were pending before the Senate (Merrimon ANS and Morton) and under the institution's precedents, no further amendments were permitted until after one (or both) of them were disposed of in some way. To offer an amendment to either the Morton amendment (in what would be branch *F* on left side) or to the Merrimon ANS (branches *A* or *C* on right side) would be a violation of the prohibition on horizontal third degrees, because more than two amendments would then be pending before the Senate at the same time.

Up until that point, the chair had consistently applied this rule to other amendments during the consideration of S. 617.[25] For example, the chair ruled that an earlier amendment offered by Morton was not in order because the Merrimon ANS and an amendment offered by Sen. John A. Logan, R-Ill.,

23. This is not meant to represent a definitive analysis of the precedents governing the Senate's amendment process. Such an examination is beyond the scope of this brief study. The precedents cited here do not necessarily represent the first instance in which the Senate altered its procedures for considering amendments. In fact, the process was highly variable for much of the Senate's history, a fact that remained the case until the institutionalization of the office of the parliamentarian in the mid-20th century and the rise of Senate party leadership. Nevertheless, the precedents cited here do signal important shifts in how the Senate structured its amendment process from that point on and feature substantive debates between members that help shed light on how they understood the process to work at a specific point in the institution's history.

24. In that sense, it is like how the Senate routinely considers amendments today—by setting aside the rules via unanimous consent to make an amendment pending.

25. The chair ruled out-of-order three first-degree amendments and one second-degree amendment on the same grounds. These were the Simon Cameron, R-Pa., second-degree amendment to the Logan amendment to the Merrimon ANS, a Morton amendment to the underlying bill, a Hamlin amendment to the Merrimon ANS and a Logan amendment to the underlying bill.

(branch *C* on right side) were then pending. Additionally, the chair sustained a point of order (p/o) against an amendment offered by Sen. Hannibal Hamlin, R-Maine, to one offered by Morton to the underlying bill (branch *F* on left side) because it was a horizontal third-degree amendment. Unable to process multiple amendments at one time, senators were left with no choice but to alternate back and forth between amending the left and right sides of the tree (S. 617 and the Merrimon ANS, respectively). Amendments offered to either side would have to be disposed of prior to another being offered.

At this point, Sen. John Sherman, R-Ohio, offered an amendment to Morton's (branch *F* on the left side) for the express purpose of adjudicating the chair's application of the Senate's precedents: "I simply wish to raise the question formally as to the right to perfect the section proposed to be stricken out."[26] Sen. Thomas W. Ferry, R-Mich., subsequently raised a p/o against the Sherman amendment on the grounds that it was an amendment in the third degree (horizontal) and therefore not in order. The chair initially advised that the Sherman amendment was not in order, prior to submitting the p/o to the decision of the Senate.

Two sides emerged during the subsequent debate. On one side were those senators who agreed with the chair that a motion to strike out and insert constituted one question under the rules and precedents of the Senate. Consequently, the Merrimon ANS was one of the propositions allowed to be pending. The Morton amendment was the second. No further amendment was in order. According to the chair:

> The rule regarding amendments is one of convenience merely, and designed to prevent the confusion which would result from piling proposition upon proposition without end. The rule of parliamentary law is that amendments can only be moved in the second degree; that is, there can never be more than three undetermined propositions before the Senate at any one time: first, the bill; second, an amendment; third, an amendment to an amendment...The object intended to be secured by the rule must be kept in view, which is, not to multiply beyond three undetermined questions before the Senate.[27]

On the opposite side were several senators who disagreed with the chair's narrow construction of the Senate's precedents. Specifically, they contended that the amendment process to which such an interpretation gave rise was insufficiently flexible to foster adequate legislative deliberation. For example, Sen. Roscoe Conkling, R-N.Y., highlighted that one of the effects of the chair's interpretation of the rule was "to cut off all amendments, to preclude every other Senator from offering any amendment whatever, because an amendment, if offered would be in the third degree, and therefore would be out of order."[28]

Sherman argued that the Senate's prior practice had been to treat ANS by consent "as separate text open to amendment in the second degree" and that failure to do so moving forward "would be exceedingly inconvenient in the ordinary management of the business of the Senate."[29] He further argued that the chair's ruling to strictly enforce (what was then) Rule XII was too restrictive to allow the Senate "to conduct the ordinary business of the country" because it impeded legislative deliberation.[30] The Senate was, in effect, presented with a *fait accompli*. If it wanted to amend the section proposed to be stricken by the Morton amendment, no matter how small a change, it first would have to vote down the Morton amendment. According to Sherman:

> In other words, if there is the slightest variation, to the dotting of an *i* or the crossing of a *t*, or a misrecital of fact or a misrecital of a section, you cannot amend; and the only way you can correct that formal error is by a motion to strike out the whole section and substitute a new section in correct form.[31]

Here, of course, in support of his position, Sherman is citing the general parliamentary law documented in Jefferson's *Manual*. Sherman goes on to articulate the logic identified therein:

> If there is no way to amend it, if we have got either to vote to strike it out or take it as a whole, almost any affirmative proposition would be stricken out. That, it seems to me, reverses the whole logic of parliamentary law which is intended by simple and plain rules to enable the majority to perfect the proposition before it, to reach a vote on the substantial points, and settle the matter in that way.[32]

The effect of the chair's ruling, according to Sen. Allen G. Thurman, D-Ohio, was essentially to block members from offering further amendments: "You utterly deprive the friends of the measure an opportunity to perfect it before the motion is made to strike it out."[33]

Members instead contended that an ANS constituted two

26. March 31, 1874, 43-1, *Record*, p. 2613.

27. March 31, 1874, 43-1, Record, p. 2604.

28. Ibid., p. 2518.

29. Mar. 31, 1874, 43-1, *Record*, p. 2604.

30. Ibid., p. 2613.

31. Ibid.

32. Ibid., p. 2614.

33. Ibid.

separate questions: the text of the underlying bill proposed to be stricken and the text proposed to be inserted. According to the principles of general parliamentary law, amendments should be allowed to both. Consequently, the text of the substitute proposed to be inserted should be treated as an original question for purposes of amendment. In this case, the consequence would be to allow three amendments to be pending at the same time (i.e., horizontal third degrees). Hamlin argued in support of a broad construction of the rule: "You divide your proposition and you have virtually two substantial propositions pending before the Senate, or a proposition with two branches, either of which admits an amendment."[34]

In short, Sherman and his allies argued that the practice at the time, if rigidly applied, preserved order at the expense of the Senate's ability to deliberate: "You move to strike out a section; the section is open to double amendment, in the first degree and in the second degree. That has been the practice, and it is only in that way that you can get at the wish of the Senate."[35] Sherman argued that absent a deliberative process on the floor, it would be difficult, if not impossible, to truly understand the body's will. In contrast, advocates for a narrower construction of Rule XII observed that failure to adhere to the practice would undermine order. They instead emphasized the difficulties that would confront the Senate if the number of amendments that could be pending at the same time were not limited.

The Senate eventually adopted the following change to Rule XII by unanimous consent at the end of the debate:

> That the twelfth rule be so amended that, pending a motion to strike out and insert, the part to be stricken out and the part to be inserted shall each be regarded for purposes of amendment as a question, and motions to amend the part to be stricken out shall have precedence.[36]

While the new Rule XII laid the foundation for what would eventually become the amendment tree depicted in Chart 4, it is important to note that the 1874 precedent did not speak to every branch featured on it. Instead, it simply codified the occasional practice that an ANS would not count as an amendment for the purposes of enforcing the prohibition on horizontal and vertical third-degree amendments. As the chair would eloquently put it in 1977: "Under the precedents of the Senate, the first full substitute for the bill does not kill a degree. It is a freebie."[37] The effect was to allow two other amendments to be pending at the same time, in addition to the ANS. In this case, *E* and *F* on the left side of the tree could be pending along with the ANS. The logical implication is that *A* and *B*, or *A* and *C*, or *C* and *D*, could each be pending at the same time. Additionally, *A* and *E* could also be pending simultaneously. In the case of *B* and *D*, the 1874 rule finally permitted what had previously been considered vertical third-degree amendments.

The 1874 rule did not adjudicate those situations depicted in Chart 4 where more than two amendments could be pending simultaneously (in addition to the ANS). Additionally, it did not resolve the ambiguity with respect to an application of the rule to amendments other than an ANS. As written, the new rule technically applied to any motion to strike and insert that was pending before the Senate. However, the debate at the time focused only on application of the rule to those situations when an ANS was the first amendment offered on the Senate floor.

This ambiguity was not resolved until the 1890s. Specifically, the Senate expanded the amendment tree depicted in Chart 4 in September 1890 explicitly to permit horizontal and vertical third-degree amendments in certain instances. In September 1890, the Senate was considering an ANS to a bill that related to the federal judiciary. It was original text for purposes of amendment under the 1874 rule and the precedent established addresses the question of horizontal third degrees.

During debate, Sen. George G. Vest, D-Mo., offered a first-degree substitute amendment to the ANS reported by Committee of the Whole (*A* on right side). Sen. Joseph N. Dolph, R-Ore., then offered a first-degree perfecting amendment to the ANS (*C* on right side). Sen. John J. Ingalls, R-Kan., proposed a second-degree substitute amendment to the Dolph amendment (*D* on right side) to which Dolph responded with a p/o against the Ingalls amendment, arguing that it was in the third degree and therefore not in order. The chair ruled that, under Rule XVIII, the Ingalls amendment was in the second degree and thus in order. Dolph appealed the ruling and Sen. Eugene Hale, R-Maine, successfully moved to table the appeal on a 28 to 17 vote.[38] After disposition of Dolph's appeal, Sen. John C. Spooner, R-Wis., inquired of the chair if the Ingalls second-degree substitute was amendable, given that it was a motion to strike and insert. The chair ruled that it was not, because any amendment thereto would be an amendment in the third degree. Notably, the chair did advise that further amendments to Dolph would be in order after disposition of the Ingalls amendment.[39]

34. March 31, 1874, 43-1, *Record*, p. 2604.

35. Ibid., p. 2615.

36. March 31, 1874, 43-1, *Record*, p. 2643.

37. Sept. 23, 1977, 95-1, *Record*, p. 30646.

38. 39 senators were absent.

39. See Sept. 22, 1890, 51-1, *Record*, pp. 10311-14.

In this instance, the Senate established precedent that applied the 1874 rule (renumbered from XII to XVIII) to an ANS *and* a first-degree substitute amendment pending to an ANS (branch *A*). In the case of *A*, the amendment pending there could be amended in one further degree. Additionally, the language of the ANS proposed to be stricken by *A* could be amended in two degrees (branches *C* and *D*). By applying the 1874 rule to *A*, the Senate effectively permitted more than two amendments to be pending at the same time. In fact, after this ruling, up to four amendments could be pending simultaneously to an ANS.

The 1890 ruling also clarified that the left and right sides of the amendment tree in Chart 4 constituted separate trunks that could each support amendments in the second degree. This implied that *E* and *F* could be pending at the same time as *A*, *B*, *C* and *D*. However, the number of amendments permitted on the left side of the tree was limited to two (a first-degree perfecting amendment and a second-degree substitute or perfecting amendment). The chair advised in 1932 that a first-degree substitute amendment was not in order on the left side of the tree, because the ANS was pending and only one substitute could be pending to a measure at the same time.[40] Thus, while the ANS was treated as original text for the purposes of amendment on the right side of the tree, it continued to be treated as an amendment on the left side.[41]

Chart I

As noted, the principles to which the 1874 rule change gave rise were technically only in effect when a motion to strike and insert was pending as an ANS or a first-degree substitute. The rule and subsequent precedents did not speak to those parliamentary situations in which another, separate motion was pending. In these instances, the Senate's original prohibition on horizontal and vertical third-degree amendments appeared to remain in effect.

For example, the Senate defeated an attempt in 1914 to apply the 1874 rule and the 1890 precedent to parliamentary situations in which the first amendment offered was a motion to insert, rather than an ANS (Chart 1 instead of Chart 4). In this case, the Senate was considering a committee amendment to insert language (branch *A*) into legislation that dealt with tolling on the Panama Canal (H.R. 14385).[42] Sen. Furnifold M. Simmons, D-N.C., offered a second-degree substitute (branch *B*) to the committee amendment. Sen. George Sutherland, R-Utah, then offered a competing second-degree to perfect the text proposed to be stricken by the Simmons amendment (branch *C*). Sen. Frank B. Brandegee, R-Conn., subsequently raised a p/o against the Sutherland amendment on grounds that it violated the prohibition on horizontal third-degree amendments. The chair ultimately sustained the Brandegee p/o.

The debate over this question highlights the tension that arises from the amendment process' twin roles to facilitate deliberation and preserve order. Sutherland argued that Rule XVIII was not limited to those situations in which an ANS was the first amendment offered. Rather, the rule should be applied indiscriminately to any motion to strike and insert pending before the Senate: "The rule is that pending a motion to strike out and insert – not to strike out and insert in the original bill, but to strike out and insert as to any proposition which is pending before the Senate."[43] Under Sutherland's interpretation of the rule, the Simmons second-degree substitute amendment (branch *B*) did not preclude senators from offering an additional second-degree amendment to perfect the text proposed to be stricken.

In contrast, Sen. Henry Cabot Lodge, R-Mass., claimed that Rule XVIII did not apply in this case and that the original prohibition on horizontal third-degree amendments precluded more than two amendments from pending before the Senate at the same time because the first amendment was a motion to insert:

> The main question is the bill. The committee amendment is amendment No. 1. Any amendment to that amendment is in order and is No. 2, but any further amendment, whether substitute or perfecting, is amendment No. 3, and must be excluded at that stage.[44]

Lodge's allies feared that taking a broad construction of Rule XVIII (as Sutherland did) would effectively eliminate the limits on the number of amendments that could be pending before the Senate at any one time. The result would be chaos. The amendment process would become unintelligible, unwieldy and confusing. Brandegee contended that the consequence of permitting Sutherland's amendment would be that every member would have:

> ...a right to offer an amendment to the amendment proposed by the Senator from Utah, and the Senator

40. Feb. 15, 1932, 72-1, *Record*, p. 3938.

41. It should be noted that the lower half of Chart 4 was not visually depicted in the Senate's precedents until 1992. However, the chair advised the Senate in 1967 that *G* or *D* in the lower half would be in order when a simple motion to strike was pending in branch *C*. See, April 25, 1967, 90-1, *Record*, pp. 10692-94. Additionally, the Senate considered an amendment offered in branch *G* in 1982. See, May 13, 1982, 97-2, *Record*, p. 10032. No precedents have yet been identified for *G* and *D* pending at the same time or for *E*, *H* and *F*, although these branches would be consistent with Chart 2. Finally, the precedent established in 1890 that a first-degree motion to strike and insert would be treated in the same way as an ANS under the 1874 rule also provides the basis for Chart 3. See, Jan. 7, 1915, 63-3, *Record*, p. 1096.

42. June 10, 1914, 63-2, *Record*, pp. 10128-32.

43. Ibid., p. 10130.

44. June 10, 1914, 63-2, *Record*, p. 10129.

> from New Hampshire can offer an amendment to my amendment to the amendment of the Senator from Utah, and we would spend the rest of the year here offering amendments down the line to the other amendments.[45]

For these members, such a precedent could jeopardize the Senate's ability to complete consideration of legislation in a timely process.

In sustaining Brandegee's p/o, the chair advised: "Only one motion to amend the main question and one motion to amend that amendment can be pending at the same time."[46] This applied when the first amendment offered on the Senate floor was a motion to insert. The chair acknowledged that a different parliamentary situation prevailed under the rule adopted in 1874 when the first amendment offered was an ANS. The chair cited this as the "only exception" to his ruling.[47] Regardless, the Senate would eventually align its treatment of *B* in Chart 1 with *A* in Chart 4. By the 1930s, the chair was advising across all charts that: "The philosophy of the rule seems to be to perfect whatever the Senate has to vote on before the Senate votes on it."[48]

Chart 2

During the debate in the 1914 case reviewed above, proponents of the Sutherland amendment argued that the Senate had, in fact, permitted horizontal third degrees in similar parliamentary situations in the past. Sen. Joseph L. Bristow, R-Kan., provided the chair with a specific citation to one such case in the *Congressional Record* from that very year.[49] Yet Lodge correctly pointed out that the precedent in question concerned a motion to strike out text instead of a motion to insert new text, and thus represented a different amendment tree altogether (Chart 2 instead of Chart 1).

The amendment tree that arises when the first amendment offered on the Senate floor is a simple motion to strike is depicted in Chart 2. In the case cited by Bristow, the Senate was considering a committee amendment to strike text from an underlying naval appropriations bill.[50] Sen. James A. O'Gorman, D-N.Y., moved to strike additional language in the underlying bill (branch *D* in Chart 2). Sen. John Sharp Williams, D-Miss., then offered a second-degree amendment (branch *E*) to O'Gorman's. In response to a parliamentary inquiry, the chair advised that the last clause of Rule XVIII, which stated that, "motions to amend the part to be stricken out shall have precedence" allowed for the Williams amendment to be pending, even though there were already two such amendments.[51] The chair reasoned: "The Senator from Mississippi is seeking to amend the part to be stricken out before the motion is put on striking it out."[52]

However, Rule XVIII was adopted to address a procedural situation that concerned a pending motion to strike out and insert and not a simple motion to strike. Additionally, it was clear during the 1874 debate that the Senate counted a motion to strike against the two-amendment cap established by the prohibition on horizontal third degrees (otherwise the Morton motion to strike in branch *E* would not have precluded an additional amendment under the prohibition on horizontal third degrees). Yet the Senate stopped counting such motions as amendments for the purposes of enforcing the prohibition at some point in the late 19th or early 20th centuries. What is clear is that, by 1912, the motion to strike was no longer counted as an amendment for this purpose.[53]

CONCLUSION

The precedents that stipulate the number of amendments that may be pending to legislation at a given time evolved to facilitate the consideration of the Senate's business in an orderly manner. However, juxtaposing the historical development of the amendment process with the general state of amending activity in the Senate today points to the ways in which the precedents underpinning it are being used for a different purpose. That is, they are now being used by majority leaders from both political parties to block the consideration of amendments on the Senate floor.

Yet, as in the past, the amendment trees can be altered to facilitate the ability of members to offer amendments while maintaining order in the institution. Individual senators, and the minority party more generally, can challenge the majority leader's ability to use precedent to block their amendments by offering either horizontal or vertical third-degree amendments when the tree has been filled.

Arguments against efforts to do so are inconsistent with the development of the amendment process in the Senate over time, the overarching goal of which was to facilitate the consideration of legislation in an orderly manner. Although this

45. Ibid., 10130.

46. June 10, 1914, 63-2, *Record*, p. 10131.

47. Ibid., p. 10132. This advice appears to conflict with the precedent established in 1890 in which A in Chart 4 was given the same treatment as an ANS. However, it should be noted that the Senate was considering an ANS at the time and not, as in this instance, a motion to insert.

48. Feb. 18, 1935, 74-1, *Record*, p. 2098. See also, March 3, 1936, 74-2, Record, p. 3133; May 19, 1942, 77-2, *Record*, p. 4346.

49. June 10, 1914, 63-2, *Record*, p. 10131.

50. See: May 29, 1914, 63-2, *Record*, pp. 9454-58.

51. Ibid., p. 9455-56.

52. Ibid., p. 9456.

53. See: April 19, 1912, 62-2, *Record*, pp. 5018-21. See also, Jan. 8, 1915, 63-3, *Record*, p. 1161; Dec. 17, 1919, 66-2, *Record*, pp. 755-57; May 2, 1924, 68-1, *Record*, p. 3672; March 24, 1938, 75-5, *Record*, p. 4005.

goal was periodically weighed against the need to facilitate the participation of individual senators in the legislative process, the result was to increase the number of amendments that could be pending to legislation on the Senate floor at the same time.

The routine practice of filling the amendment tree in the Senate today, coupled with the cloture process to end debate, effectively prevents members from being able to perfect the underlying legislation before it receives an up-or-down vote on final passage. Instead of a deliberative process designed to discern the true sense of the institution's membership, senators are confronted with a *fait accompli*. This practice is inconsistent with the principles of general parliamentary law on which the amendment process is based.

It also reflects a more fundamental shift in the role played by the amendment process. In short, the process is no longer used to discern the true position of Senate. Instead, it is viewed from the perspective of party leadership and bill managers as a means to protect legislation developed elsewhere, off the floor, from being changed on it. Consequently, the Senate floor no longer represents a deliberative arena where consequential decisions are made.

The concept of "path dependence" refers to a process that is resistant to change because the costs of doing so are high compared to maintaining the status quo. In addition, the costs of changing course increase over time.[54] Institutional rules are path dependent[55] and this may help explain why senators have not consistently used the tactic of offering third-degree amendments. Yet the preceding analysis suggests that path dependence may impact the Senate in a way that differs from how we typically think about the path dependent nature of the institution's rules. That is, they affect the legislative process by constraining the majority party in pursuit of its goals and enhance the ability of the minority to obstruct. Instead, the contemporary utilization of the precedents underpinning the amendment process provides an example of one way in which the path dependent nature of the Senate's rules may help increase the ability of the majority to exercise negative agenda control.

From this perspective, we can posit that members altered the amendment trees in the past when the costs they imposed exceeded the costs of change. By extension, the costs of the status quo today simply are not perceived as sufficiently high, relative to the perceived costs associated with the adjudication of amendment trees by offering third-degree amendments to create new branches, as in the past when they were considered too limiting.

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54. Paul Pierson, "Increasing Returns, Path Dependence, and the Study of Politics," *The American Political Science Review* 94:2. (June 2000), 252.

55. John Aldrich, "Rational Choice Theory and the Study of American Politics," in *Dynamics of American Politics: Approaches and Interpretations*, ed. Lawrence C. Dodd and Calvin Jilson (Boulder, CO: Westview Press, 1994), pp. 208-33.