2 CHAUNCEY DEPEW AND THE SEVENTEENTH AMENDMENT

Most people conventionally assume that social decisions are made by straightforwardly amalgamating the opinions of some relevant people—in an oligarchy, those of oligarchs; in a democracy, those of citizen-voters. Of course, if amalgamation really were that simple, then most heresthetical devices (like splitting the majority) would not work. Actually, of course, amalgamation is not at all simple, as is easy to see in the paradox of voting, a neat puzzle that reveals a bit of the astonishing complexity of amalgamation. To illustrate the paradox, assume three people (1, 2, 3) who choose among three alternatives (*a, b, c*) by majority rule in pairwise contests. Assume also that those people order their preferences transitively, which means that:

> if *a* is preferred to *b* and *b* to *c* then *a* is preferred to *c*—or, in short form, *abc*.

Finally, let the people order their preferences thus

1. *abc*
2. *bca*
3. *cab*

Then, *a* beats *b* (by the votes of 1 and 3), *b* beats *c* (by the votes of 1 and 2), and *c* beats *a* (by the votes of 2 and 3). So the amalgamated preferences are circular (intransitive): *abca,* even though each individual's preferences are transitive. Rational man and irrational society.

When tastes are circular (and if there are three or more alternatives and two or more voters, then almost always tastes

are at least potentially circular), then the outcome depends as much on the procedure of amalgamation as on the tastes of participants. Hence, it is always possible to manipulate the outcome by manipulating the agenda. For example, assume in the foregoing illustration that people use the amendment procedure (as in legislatures) so that, say, *a* is put against *b* and the winner against *c*. With that agenda, *c* wins. But if *a* is put against *c* initially, then *b* wins. Or if *b* is put against *c* initially, *a* wins. Thus, each alternative can win under some agenda. Naturally members of legislatures expend considerable energy trying to get control of the agenda.

The obvious way to control the agenda is to be the presiding officer or a member of the committee on the agenda (for example, the Rules Committee in the House of Representatives). A large proportion of the dispute between political parties consists of efforts to get and keep these positions. But it is also possible for ordinary members to control the agenda by exploitation of the rules of the body.

Heresthetic concerns both kinds of control, by leaders and by ordinary members, and I will offer some examples of each. But control by ordinary members is the most spectacular, so I begin with the amazing story of Chauncey DePew, who, simply by offering a cleverly formed amendment, delayed for about ten years the adoption of the Seventeenth Amendment to the U.S. Constitution (on the direct election of senators).

Before he was senator from New York, DePew spent over thirty years working for the Vanderbilts. Initially, he was their man in politics, a lobbyist and lawyer, but eventually he became president of the New York Central Railroad and thus their chief public relations man. After that he served two terms (1899–1911) in the Senate. In the era of trust-building and trust-busting, he was, of course, a controversial figure. For those who admired trust-builders he was a great man—and deservedly so, because he was one of the old Commodore's chief agents in his greatest accomplishment, namely, combining enough small railroads to run, as early as 1873, a scheduled

train from New York to Chicago in twenty-four hours! To trust-busters, on the other hand, DePew epitomized all that was supposedly wrong in the politics of commercial expansionism. Whatever the ultimate judgment on his whole career, however, it must be granted, I think, that he was an enormously talented heresthetician, which is a useful skill for both P.R. men and senators.

The framers of the Constitution provided that, since the Senate was intended to represent the states, state legislatures would elect senators. But, as it soon turned out, the Senate never did represent state governments as intended, mainly because the framers failed to provide a way by which state legislatures could discipline senators if they voted contrary to legislatures' instructions. Hence, from the very beginning, there was no real justification for indirect election because the Constitutional system would not be significantly changed if election were made direct. Whether elections were direct or indirect was thus no more than a matter of taste. By the latter part of the nineteenth century popular tastes were opposed to indirect election because corruption in senatorial elections had become a national scandal. (In the mining states of the West, the price of a legislator's vote for a senator was said to be $2,000, occasionally rising, as tight contests approached decision, to $5,000.) In the 1890s therefore, direct or popular election of senators became a conventional progressive proposal, and resolutions to amend the Constitution to provide for it regularly passed the House of Representatives—and never got out of committee in the Senate.

Senators prized their political freedom. It was easy and dignified to run for the Senate—mainly because one did not have to run at all. Unlike the Illinois campaign of 1858 with its candidates' debates, almost all nineteenth-century senatorial campaigns did not even begin until after state legislators were elected, and then the campaigns consisted almost entirely of soliciting the votes of one or two hundred state legislators. Naturally, senators were not eager to subject themselves to the discomforts of a public campaign, certainly not in response to jealous and malicious resolutions from

the House.* But the senators had no real defense since indirect election had never served its original purpose of providing representation for state governments.

Gradually even senators themselves joined the agitation for popular election. Beginning in the 1890s the system of primary elections spread rapidly through the states, in the South because the so-called white primary was a device to disfranchise blacks and in the North because the primary was a "progressive" reform. Hence many senators came to be elected directly, for all practical purposes, after arduous primary campaigns; and they became ardent advocates of direct election. Most northeastern states resisted primaries, but still, indirect election was doomed. Chauncey DePew, from a northeastern state, did, however, prolong the indirect system for another ten years.

In 1902 a proposed Constitutional amendment passed the House in a form substantially equivalent to the first clause of the present Seventeenth Amendment, which reads, in relevant part:

> The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

For the first time such an amendment was actually considered by a Senate committee. Chauncey DePew then introduced his amendment, which the committee accepted and reported. The report was never brought to a vote, however, because De-

*Chauncey DePew, writing twenty years later and after the Seventeenth Amendment had deprived senators of their freedom from campaigning, still thought the six-year term made the Senate a better place than the House: "My twelve years in the Senate were among the happiest in my life. The Senate has long enjoyed the reputation of being the best club in the world, but it is more than that. . . . there is an independence in a term of six years, which is of enormous value to the legislative work of the Senator. The member of the House, who is compelled to go before his district every two years, must spend most of his time looking after re-election" (*My Memories of Eighty Years* [New York: Charles Scribners' Sons, 1922], p. 175). Perhaps the Senate was such an exclusive club at the turn of the century because the dollar price of membership was so high.

Pew's amendment effectively killed the Constitutional amendment. As an addition to the Constitutional amendment, the DePew amendment read:

> The qualifications of citizens entitled to vote for United States Senators and Representatives in Congress shall be uniform in all states, and Congress shall have the power to enforce this article by appropriate legislation and to provide for the registration of citizens entitled to vote, the conduct of such elections, and the certification of the result.

Today this sentence seems innocuous enough, but in the political context of 1902 it was a killer. It was, in the language of the era, a "force bill." The only elections that might turn out differently if federally regulated were, of course, in the South, where regulation would reenfranchise blacks. But the threat to Democrats was even more pointed. The words *to enforce* and *to provide for . . . the conduct of elections* recalled the era of Reconstruction, then only twenty-five years before. DePew in effect proposed to give Constitutional authority for the revival of Reconstruction, for putting the army in the South to supervise elections, and for guaranteeing the election of some black (and even white) Republicans. What the DePew amendment said to Southern senators, and indeed to Democratic senators generally, was: "You can have your direct election if you really want it, but the price is the reimposition of Reconstruction and honest elections and hence a lot more Republicans." No Southern senator was willing to pay a price that high.

It is conceivable—unlikely but conceivable—that the proposed Constitutional amendment could, even in 1902, have been passed by a two-thirds majority composed of Southern and Northern Democrats and midwestern and western Republicans. But surely, without the Southern Democrats the Constitutional amendment would fail. That was the first thing the DePew amendment did: It alienated the Southern Democrats from the Constitutional amendment.

Why, you may ask, would it not be possible for this putative two-thirds majority to remove the DePew amendment so as to render the Constitutional amendment palatable to the white South? But this, too, was impossible and that was the sneaky power of the DePew amendment.

If there was any issue upon which the Republican party was united in that era it was the desirability of fair treatment for blacks. No Republican would wish or dare to vote for a motion unfriendly to blacks—and a motion to delete the DePew amendment would, of course, be regarded as unfriendly. Even those western Republicans who favored the Constitutional amendment and were fully aware that they were being manipulated by DePew would fear to vote against the amendment. Thus the Republican majority in the Senate was a clear majority for the DePew amendment. Hence there was, possibly, a cycle: The DePew amendment beat the Constitutional amendment, which—perhaps—beat the status quo, which in turn beat the DePew amendment. So the constitutional amendment was doomed.

It may seem to some readers that this is a rather fanciful tale to tell about a motion that never even got to the floor of the Senate. But we can be pretty sure it is just about true because the Constitutional amendment did get to the floor nine years later, along with a reverse version of the DePew amendment. In February 1911, the Constitutional amendment was reported with what might be called a "protective clause" for Southern racism: "The times, places, and manner of holding elections for Senators shall be prescribed by the legislatures thereof [i.e., of the States]." But the opponents of direct election could not be foreclosed so easily. Senator Sutherland of Utah introduced an amendment to delete the protective clause—the reverse of the DePew amendment but with the equivalent parliamentary effect. There were thus three alternatives before the Senate:

(*a*) The resolution to amend the Constitution as amended by the Sutherland amendment (i.e., the resolution without the protective clause);
(*b*) the resolution to amend the Constitution as originally reported (i.e., with the protective clause);
(*c*) no action.

At the time of the roll calls the Senate had 88 members present, so a simple majority was 45 and a two-thirds majority was 57. The vote on the Sutherland amendment pitted *a* against *b*. The Sutherland amendment won, 50 to 36, so the survivor was *a*. The second vote, on the now amended resolution, pitted *a* against *c*. The resolution failed by 54 yea to 34 nay—57 votes yea were Constitutionally required to pass the resolution—so *c* was the social choice. To estimate the relation of *b* to *c* (i.e., to estimate the chance that the *un*amended resolution might have passed if it had ever come to vote), we can assume that all 54 (or at least 53 of them) who voted yea on the amended resolution—*a* over *c*—also favored the unamended resolution, *b* over *c*.* We also know that eight Southern Democrats, led by John Sharp Williams of Mississippi, had insisted on the protective clause and, when it was deleted, voted against the Constitutional amendment, that is, for *c* over *a*. Clearly they favored *b* over *c*, making a total of at least 61 or well over the two-thirds required. Thus *b* would have been the social choice had the original resolution been voted on directly. This gives us a clear cycle:

a beats *b* (as voted on)
b beats *c* (as estimated)
c beats *a* (as voted on)

So the Sutherland amendment had exactly the effect I imputed to the DePew amendment.

There is a footnote to this story. The cycle occurred in a lame duck session. A few months later Democrats, now with an absolute majority, could prevent the DePew-Sutherland maneuver. Since over half the Republicans were also in favor of direct election, it was then easy to pass the Seventeenth Amendment, even without a protective clause.* But the amendment had been delayed for about ten years because DePew was able to use the ordinary member's power to offer amendments in such a way as to exploit divisions of opinion in the Senate.

The complicated moral of this story is that, while in the long run a widely held opinion is likely to be crystallized into a social decision, the crystallization can often be delayed, probably sometimes indefinitely, by a clever heresthetician.

*Those who voted nay on the Sutherland amendment and yea on the Constitutional amendment as amended must have ordered *bac*. They included 20 Northern and Border Democrats and eight western Republicans. Those who voted yea on both roll calls might have had either *abc* or *acb*. They were 25 Republicans and one Southern Democrat, who seems to have been confused. These 25 Republicans were exactly those who were being manipulated by the maneuver. They favored the Constitutional amendment, but they were constrained, by their identification as Republicans, to vote to attach the Sutherland amendment. Hence they must have had the preference order *abc* and the order *acb* must have been held by no one (or possibly by the lone Southern Democrat). Thus it seems reasonable to say that either 53 or 54 persons who voted yea on the amended Constitutional amendment favored *b* over *c*.

Sources: Detail on the occasion for the Seventeenth Amendment is set forth in William H. Riker, "The Senate and American Federalism," *American Political Science Review* 49 (June 1955): 452–67. I have told the story of the DePew amendment twice before, once in "Arrow's Theorem and Some Examples of the Paradox of Voting," in John Claunch, ed., *Mathematical Applications in Political Science I* (Dallas: The Arnold Foundation, Southern Methodist University Press, 1965), pp. 41–60, and the second time in *Liberalism against Populism: A Confrontation between the Theory of Democracy and the Theory of Social Choice* (San Francisco: W. H. Freeman, 1982), pp. 192–95.

*That is, the majority in favor of the amendment was now so large it was no longer necessary to bribe the eight Southerners.