

RETURN TO GRAND FENWICK:

The Interview with Chief Justice Rehnquist, cont'd

Alert readers will remember from my article in the November-December issue that the British had come to America for do's and don't's in setting up a British Supreme Court. From the tight little islands, the British had found in our Supreme Court a continental Fenwick, a Grand Duchy of self-sufficiency, a Pimlico into which a passport was demanded at the frontier. So the British asked their *how to* questions, with *whys* left begging an audience. The historic practice of the appellate committee of the Law Lords isn't all there is to the cat's meow if you've got to redo things so that not every issue goes on to Strasbourg. Americans assume that their national dignity is immune from such insult; so we can revel in *whys and wherefores*. And when the nation's Chief Justice says, we reconsider no decision at the behest of partisans, and losers to boot, the luxury is ours to enjoy.

In the interview of September, Chief Justice Rehnquist told me and my two British colleagues that, if there was a significant disagreement with a court decision across the board -- truly across the board in society -- that the justices would listen and consider rethinking their decision, but he also told us that this hardly ever happened. "It's not the royal prerogative," remarked one of our transAtlantic visitors, in the bright sunlit plaza after our tea with the Chief.

That's the nice thing about history; they're making it fresh every day. By December the Supreme Court had an opportunity to do what the Chief Justice told us that they try to do, which is to persuade. The events of December also tested the condition subsequent that the Chief Justice added. Any "significant disagreement against an opinion" would have to be "nonpartisan" before the justices would have "cause to rethink their position." *Bush v. Gore*, or *Bush II*, put the negative side of the equation into play. If a majority of the court decides an issue in favor of one party, such as an election, the losers are partisans because that's who's in elections in the first place; these partisans are losers, because the court makes them so.

Bush's case enlightened Americans on these points: there is no federal constitutional right to vote for presidential electors; there is only such right as may be granted by a state legislature. If the state legislature messes up votarian mechanics so that a loser asks for too few or too many recounts,

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then whoever has the most votes wins without judicial review. And since the loser is a partisan, the loser would have no standing to ask the court to rethink its position.

Jefferson announced “this sacred principle, that ... the will of the majority is in all cases to prevail.” He was speaking of the election of 1800 and the follow-on election contest that extended for weeks into the next year. The occasion was his First Inaugural Address and it is commonly supposed that his remarks were directed to votarianism yielding power in the legislative and executive branches to the majority. But then Jefferson didn't live through the contested election of 1876 in which the judicial branch added its weight to the electoral scales for Tilden to lose and Hayes to win.

The British academics have yet to weigh in on this one; but, to hazard a guess, it is doubtful that their Supreme Court will decide closely run elections, since the British have wisely kept a monarch and functioning monarchy in the wings for close ones with murky results. The Queen asks a party leader to *try to* form a government. Americans were hell-bent on getting rid of their monarch in '76, without thinking through an obvious fact of votarian life. There will be many close ones. Votarianism -- purified of a head of state -- has not achieved its promise if it only works in landslides.

Americans have never explained to the world how we lose so many leaders to gunfire. But the denial extends also to the mechanics of voting. If properly credited, Richard Nixon refused to ask for a recount on the grounds that the Illinois machinery was not up to the task, or that the votes from Cairo would smell as bad as those from the River Wards. Nobody seems to have taken that lesson to heart, as if Watergate excused us all from getting voting done right. And when the creaky and mostly bypassed machinery of constitutional amendment was cranked up to guarantee the right to vote in federal elections in 1964 (“The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any state by reason of failure to pay any poll tax or other tax”) *Bush II* tells us that only a state right to vote in federal elections was protected via the Twenty Fourth Amendment.

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Isn't a constitution to make the "motion of the machinery" work? The phrase is Jefferson's. He was consoling Adams on a November evening in 1800, when Adams' loss (not Jefferson's win) became clear. But there is no codewriting that dedicates machinery to straightening out an election mess, much less, as the majority in *Bush II* noted for "orderly judicial review of any disputed matters that might arise."

The United Kingdom had no written constitution; the European Convention on Human Rights is now carried into effect by the Human Rights Act of 1998 and it does include constitutionally familiar phrases, like "Everyone's right to life shall be protected by law." While the United Kingdom now has a codewriting that looks constitutional to us, the British lack a top court in our mold to make the words work in their national legal system. Panels of law lords are the last arbiters as to these words before appeals go to the continent and the courts of the European Union. Sorting out the design of a top court for the United Kingdom is driven, in part, by the worthy goal of summoning as much prestige and power into the last British court before continental judges resolve human rights issues for those isles and their peoples.

The United States offers, at first glance, a dazzling vision of a top court at the top of its form, into the third century of operations. But the United States enjoys its own strange amalgam of codelaw and caselaw with such venerable doctrines as judicial review and separation of powers asserted by judges asserting that they have the power to declare doctrine because they also declare the power to declare.

And then there is the matter of those darn elections. We decide them in the House of Representatives; we decide them with *ad hoc* electoral commissions (1800, 1824, 1876.) Elections can be decided by the House and the Senate in joint session under the current regime, enacted in 1948 in Title 3. Elections have been decided by state and county election officials as well as undecided, as the elections of 1960 and 2000 instruct us. Presidential elections have been appealed to state legislatures in 1860 and to the Supreme Court in 2000, which decided that the state legislatures did, indeed, have the last word, although presumably not to the point of secession. The electoral machinery is so befuddled that Americans almost elected a vice presidential candidate to the presidency in 1800, and 200 years later the Supreme Court

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had to explain that the Twelfth Amendment, designed as corrective, still didn't confer a federal right to vote on voters.

In general Americans don't know where they stand in relation to the machinery. The selection of popular losers as electoral winners is excused because "that's the way it works." But the machine also explicitly secures to rotten boroughs multiplied voting power, based on equality of senatorial representation. This guarantee of Article V is so quintessentially American that this guarantee is explicitly unamendable. These transMississippi superelectors have been well aware of their power throughout American history. The unpleasantness of '76 launched a tradition of power ceded westward to secure the allegiance of these empty regions, sea to sea. Alaskans extract as much leverage as anyone from their senatorial electors. Until America secedes from us, we're safe up here in our three-vote borough, which was December's winning margin, by the way.

Perhaps the problem is exactly what the majority of the court in *Bush II* say it is. Americans have to sort out their attitudes towards votarianism, express and implied, including "adequate statewide standards for determining what is a legal vote" as a matter of federal or state constitution or statute. Americans could then assign duties to the Supreme Court that complement or support the votarian machinery. Americans could also, however, in our own strange amalgam, leave the Supreme Court to declare its power to declare its power, which may be, as history favors, where we got into our present fix. The Supreme Court understands its relation to us even if we don't know whether we want to be persuaded by the Supreme Court.

It could be an interesting century. The British would get a brand new Supreme Court and a place to put their statues and portraits of judges from a glorious past; Americans could get modern electoral machinery that, like the trains in Italy, "runs on time." And if we mess up the next election, we can always ask the Queen to sort it all out with an invitation to the Palace. It's a solution that's always there, in case we tire of sorting out the winning from the losing partisans on this side of the pond.

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Apparatus

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