

Lazare, D. (2001). *The velvet coup: The Constitution, the Supreme Court, and the decline of American democracy*. New York: Verso, pp. 1 – 13.

"In or about December 1910," wrote Virginia Woolf, "human nature changed." Close to a century later, we can be considerably more precise as to when American politics underwent a similar transformation. It was at 2:30 in the morning, Central Standard Time, on November 8, 2000, as Democratic presidential candidate Al Gore's motorcade was pulling into War Memorial Plaza in downtown Nashville. There, before TV cameras, reporters, and exhausted supporters, the vice president was expected to deliver the usual graceful exit speech conceding that his Republican opponent, Texas governor George W. Bush, had eked out a win in the Electoral College despite trailing in the popular vote. Under time-honored rules governing the election of every U.S. president since George Washington, Bush would soon take over the White House.

But then, farther back in the motorcade, an aide's Skytel pager began to vibrate. It was a message from a top Gore strategist back at campaign headquarters named Michael Whouley, whose job that night was to monitor the Florida results. Not so fast, Whouley advised. Where Bush had previously been ahead by 50,000 votes, the latest returns had cut his lead to just 6,000. With a number of precincts as yet uncounted, Florida's twenty-five electoral votes were back in play. Forty-five minutes earlier, Gore had called Bush in Austin to let him know that a formal concession was imminent. Now he picked up the phone to say the opposite.

"Circumstances have changed dramatically since I first called you," he told his opponent. "The state of Florida is too close to call."

"Are you saying what I think you're saying?" replied a stunned George W. "Let me make sure that I understand. You're calling back to retract that concession?"

"Don't get snippy about it!" Gore shot back according to an account pieced together by the *Washington Post*. If Bush prevailed in the final count, he would offer his full support. "But I don't think we should be going out making statements with the state of Florida still in the balance." When Bush protested that his brother, Florida governor Jeb Bush, had personally assured him that the Sunshine State was all locked up, Gore replied that he didn't believe that Jeb was the controlling legal authority in such matters.

Everyone knows, supposedly, what happened next, If Jeb was not the controlling legal authority, then no one was. Over the next few days, Americans watched in astonishment as a country judge in Tallahassee, the Florida Supreme Court, the Florida state legislature, and then the U.S. Supreme Court wrestled over what to do with some 14,000 votes in three counties that were still in dispute. It was monumental foul-up, all the pundits agreed, the equivalent of a four-car head-on collision at a four-way stop sign. Yet no single person or thing was to blame. With the popular vote a dead heat, the Florida tally was crucial. Yet because of an unusual number of election day glitches having to do with butterfly ballots, hanging chads, and whatnot, the Florida tally was indeterminate. The entire political system seemed frozen as a consequence. Newspapers printed detailed accounts of how a similar deadlock between Rutherford B. Hayes and Samuel J. Tilden had caused the 1876 presidential election to wind up in Congress. Yet doomsday forecasters pointed out that this time things could be even messier since, thanks to a constitutional quirk, the House would be in Republican hands as of January 1 while the Senate would be in Democratic. Who would the next president be as of January 20? No one could say. Perhaps Bill Clinton would agree to stay on in the interim. Perhaps, suggested the wits at *Saturday Night Live*, Bush and Gore would agree to share the Oval Office like Oscar and Felix in *The Odd Couple*. Late-night comics had a field day.

But then came the Supreme Court's infamous December 12 ruling, at which point the laughter stopped. The ruling, an unsigned mass of contradictions and absurdities, left court watchers aghast. After halting the Florida recount several days earlier, "The Supremes" had then decided to terminate it altogether on the grounds that the vote counting process had run out of time thanks to a deadline imposed by the Florida state legislature, which had never wanted a recount in the first place. Such reasoning was transparently partisan. Clearly, Republican justices had awarded

victory to a Republican candidate so as to insure that control of the court would remain in Republican hands. Yet the Democrats were powerless to do anything about it. The Supreme Court was the highest authority in the land; there was no one left to appeal to. The only comfort they could find was in the thought that, after stealing the presidency in 2000, Republicans would no doubt get their comeuppance in the next round of congressional elections and certainly in the presidential election in 2004. Once voters had given the Republicans what they had coming to them, the Democrats would take back what was rightfully theirs, the electoral process would get back on track, and American democracy would resume its normal course of onward and ever upward. Having triumphed once again, the republic would emerge "more perfect" by virtue of having survived another test.

This is the official version, one that sees the events of November-December 2000 as *sui generis* and therefore unreflective of the true state of American democracy. Butterfly ballots, hanging chads, the November 22 "bourgeois riot" aimed at cutting short the Miami recount—the combination was a million-to-one event that was unlikely to ever occur again. Yet the official version is flawed. Narrow as it might have seemed in the wee hours of November 8, Gore's lead in the popular vote was not razor thin. To the contrary, by the time all the absentee ballots had been counted, it had grown to a healthy 540,000 votes, a margin of victory greater than Richard M. Nixon's in 1968 and five times that of John F. Kennedy in 1960. The results in Florida were also not the photo finish that they were portrayed as being. Had all the ballots there been accurately and honestly counted, a statistical analysis by the *Miami Herald* found that Gore would have carried the state by some 23,000 votes. Proportionally, this was a bit less than his lead nationally, 0.38 percent versus 0.5. But it was still hardly microscopic.

Indeed, in international terms, it was hard to know what all the fuss was about. In parliamentary democracies, election officials engage in far finer calibrations in distributing legislative seats according to each party's share of the national vote. When a handful of votes can determine whether a party gains a toehold in the national assembly or is shut out, the allowable margin of error is much less. Yet if Poland and the Czech Republic can accurately tabulate the results for a dozen or more parties at a time, why did the American system have such inordinate trouble tabulating them for just two? If the honesty of election officials in those countries is rarely called into question, why were the results in Florida so dubious that the two parties were immediately at each other's throat?

The answer is that the great unraveling that began on November 7 was not a fluke, but a breakdown of systemic proportions. The problems that the American electoral apparatus faced were ones that any competent system should have been able to handle. Yet, as the pressure mounted, the machinery froze. Thanks to a variety of factors—lackluster candidates, content-less campaigns, a tuned-out electorate, both sides' use of super-sophisticated marketing techniques that were increasingly canceling each other out— election results might reasonably have been expected to be growing narrower rather than broader. This would suggest that the country would need a more finely tuned tallying system. Yet thanks to aging voting machines, ill-trained and ill-paid election workers, and a hyper-fragmented political structure resulting in literally tens of thousands of state and local contests being decided on the same day, the U.S. was winding up with one that was less accurate rather than more. The Electoral College, unchanged since the eighteenth century, added yet another layer of uncertainty. In a pool of 100 million voters, glitches and counting errors could be expected to offset one another to a degree and "wash out" of the final tally. But by dividing the presidential race into fifty smaller state contests, the Electoral College multiplied the chances that an individual mishap could end up having serious reverberations. Rather than reducing the opportunities for failure, it expanded them. As a consequence, the election chaos that erupted in three or four Florida counties was enough to put the state race in doubt and hence the entire national election.

But this was not all. Once the dispute wound up in the hands of the state legislature and the courts, the system froze up again. At the very least, the United States should have had some national election agency capable of taking charge of the process and sorting things out. In India, to cite just one example, an all-powerful election commission sets the dates for elections, arranges

for security at thousands of polling places, distributes the ballots, and then takes responsibility for gathering and counting them up—no small task in a country of more 600 million voters, sixteen major language groups, and a dozen-and-a-half major parties. Yet because the authors of the U.S. Constitution had made no such provision back in 1787, Americans two centuries later were at a loss over what to do. As former White House counsel Lloyd Cutler cracked a bit irreverently: "The boys in the powdered wigs didn't get this one right. They didn't anticipate anything like this ever happening, so we find ourselves in a kind of political wilderness"—a wilderness, one might add, from which Americans were unable to find their way out. Indeed, the more judges, local election commissioners, and state legislators tried to intervene, the more the general level of anger and confusion rose. Ultimately, it was left to a former *New York Times* executive editor named Max Frankel to argue on the *Times* op-ed page that although the outcome was "ugly, unfair, confusing or wrong," things might have been worse: there could have been blood in the streets. But the words rang hollow. Rather than settling the dispute peacefully and democratically, the American political system had compounded the problem in such a way as to bring the nation to the brink of an explosion. The only way the system could re-establish control was through a thinly veiled judicial coup d'etat—which, of course, was no solution at all.

"The U.S. may be the most technologically advanced country, but our electoral system is any day better," observed M.S. Gill, India's chief election commissioner, on the heels of the Florida fiasco. But, then, scores of other electoral systems around the globe are better as well. As a joke making the rounds of the Third World had it, perhaps next time it would be up to Haiti (or Russia, Serbia, Mozambique, etc.) to send observers to the United States to see to it that the governor of Florida did not again steal the election on his brother's behalf. In parts of the world where the natives are used to hanging their heads in shame whenever Jimmy Carter or Madeleine Albright lectures them on their democratic shortcomings, the *schadenfreude* was running at high tide.

But if America's performance was astonishing on one level, it was quite un-astonishing on another. Mechanisms like the Electoral College, which give state and local officials enormous leeway in determining how elections are to be conducted, date from the late eighteenth century when the infant United States consisted of scattered farms, plantations, and homesteads interspersed with a few coastal cities. It was a decentralized electoral system befitting a decentralized, homespun republic. But two centuries later, America is anything but decentralized. Thanks to round-the-clock cable newscasts, instant polling, and the Internet, information no longer takes weeks to travel by coach or schooner. Instead, it takes just nanoseconds to flash from coast to coast. Such a society needs election methods suitable for a new age, yet as of the year 2000 it was still making do with the same old mechanisms. The results were like traveling on a two-century-old stagecoach between Trenton and Philadelphia. The wonder was not that it took so long, but that the contraption made it at all.

The world's greatest democracy as a teetering old stagecoach—surely there is some mistake? Yet while the United States persists in thinking about itself as the newest of the new, it is in fact the oldest of the old, a polity dating from the days of the French monarchy, the Venetian republic, and the Holy Roman Empire. All those entities have long since vanished, yet the U.S. constitutional system staggers on. In other countries, mechanisms of government are viewed in modern terms as no less fallible than the beings who made them. They are machines that must be repaired, updated, and revamped from time to time in order to remain in good working order. Despite its reputation for practicality, though, the attitude in the U.S. is almost defiantly premodern. Rather than people like ourselves, the constitutional system, Americans persist in believing, was made by a race of giants that was infinitely superior. As no less a constitutional authority than Bill Clinton observed in mid-November, "Our Founders may not have foreseen every challenge in the march of democracy, but they crafted a Constitution that would"—this at a time when the constitutional system was verging on a nervous breakdown. Yet because the system was deemed to be superhuman, Americans were no more inclined to tamper with it than to tamper with, say, the *Mona Lisa*. On those rare occasions when they did approach the sacred temple and offer some modestly worded constitutional amendment, they did so only according to rules established by the Constitution itself, thereby underscoring their subservience.

Americans see their Constitution as something akin to "the ark of the covenant, too sacred to be touched," as Jefferson once observed. The flipside of religious veneration, however, is a feeling of passive helplessness whenever the machinery goes awry. Rather than making the necessary repairs, the only thing Americans feel they can do under such circumstances is cross themselves and hope the machinery will somehow fix itself. As Kay Bailey Hutchison, a Republican Senator from Texas, observed following the Supreme Court's velvet coup: "Now is the time to bring our country together and begin the orderly transition of power that has occurred in our nation for more than two hundred years. The Constitution has triumphed once again." But in the United States, the Constitution is always triumphant because it would be sacrilegious to view it any other way. Republican mobs in Miami, incompetent election officials, self-serving Supreme Court justices—such things merely *look* like symptoms of political breakdown. But if one truly *believes* in an omniscient Constitution, then one knows they are not.

Yet rather than triumphing in November-December 2000, the Constitution merely endured. Rather than proving its omniscience, its performance proved the opposite, i.e. that any device created by fallible beings is itself fallible and hence prone to breakdown and decay.

Unfortunately, the Constitution's performance also proved something else. Despite what it says in the high-school civics texts, the United States is not a democracy. What it is, rather, it is an eighteenth-century republic that has come to resemble a democracy in certain respects, but which at its core remains stubbornly pre-democratic. In stating on December 12 that the individual citizen has no constitutional right to vote for president, the Supreme Court's five-member conservative majority was merely stating what was obvious to anyone who had actually read Article II, which is that the power to choose members of the Electoral College lies with the individual state legislatures rather than the people at large. Yet it couldn't help but come as a shock to the millions of Americans who have come to regard voting in presidential elections as a fundamental democratic right. Now the Supreme Court wished to inform them that such a right did not exist. While the United States might look like a democracy and sometimes even act like one, it was fundamentally a holdover from the days when not even the most radical politicians believed that the people should be free to run the government as a whole.

Civil libertarians who define democracy as a series of "thou shall not's"—thou shall not abridge freedom of speech, thou shall not abridge freedom of the press, and so forth—miss the boat. As important as such liberties may be, modern democracy must be understood first and foremost in terms of the *positive* freedom of the people as a whole to exert effective control over the whole of society. A people's freedom to reshape their entire environment is the freedom on which all others rest. Yet a society in which an unelected judiciary lightly tosses aside the results of a popular election because it would take too much time to tally up the vote is one in which the people's impotence is all too apparent.

The Gore-Bush Presidential Election has thus emerged as the great divide. Where Americans were formerly inclined to see the Supreme Court as a neutral body devoted to a concept of the law as a force greater than politics, they now see that it is no less baldly political than any other institution in Washington. Where previously they had looked upon the Electoral College as a harmless relic from another era, they now see that it is not harmless at all, but a serious infringement on the people's right of self-government. But while it is certainly welcome that American eyes have opened at least a crack to the true nature of their ruling institutions, the process would be incomplete if it did not lead to a reexamination of the document from which all these institutions derive, i.e. the U.S. Constitution. The Electoral College is an essential part of a structure assembled more than two centuries ago with utmost rigor and care. The House and Senate, the presidency, the arduous amending process outlined in Article V—these were not items that the Founders lightly tossed onto the table like a deck of playing cards, but elements that they honed and crafted in such a way as to fit together as tightly as pieces in a jigsaw *puzzle*. If institutions like the Electoral College have resisted reform all these years, it is because Americans sense, not incorrectly, that they are integral to the overall design and that removing them would throw the entire machinery out of whack. As one constitutional scholar put it in the early 1990s, changing the Electoral College might be a good idea, "But it would take a constitutional

amendment to change it. And people start to worry that when you tinker with the system, who knows what we'll be left with?" Since tinkering would necessitate rethinking the entire structure, Americans have preferred to leave well enough alone.

But now that the constitutional machinery has been thrown out of whack regardless, Americans may no longer have that option. They increasingly find themselves forced to tackle a problem that previous generations have repeatedly put off. Rethinking the Constitution in the twenty-first century is no easy task. Indeed, it is no less revolutionary than rethinking the solar system was in the sixteenth. Americans do not merely live under the Constitution; they live *in* the Constitution, inhabiting its recesses, shaping their lives according to its needs and dictates, absorbing its logic and making it their own. There is nothing in American society that does not bear the Constitution's stamp in one way or another; if this sounds dogmatic, it is because an entire legal and political system that derives from a single 4,400-word document is itself dogmatic. Rethinking the Constitution as a whole means rethinking the United States as a whole, something Americans have never dared to do.

This means learning to view a great deal else differently as well. Take history, an area in which American attitudes are surprisingly complex. Supposedly, Americans are great believers in progress, the idea that people are capable of learning from experience and improving their condition from one year to the next. As much as Americans may admire the ingenuity of a Benjamin Franklin or a Robert Fulton, they know that science and technology have advanced far beyond what those eighteenth-century pioneers could have imagined. But for all their belief in scientific progress, they believe the opposite in terms of constitutional development. Rather than progress and advancement, Americans consider it an article of faith that it is impossible to advance beyond the wisdom of the Founders. As Clinton put it in 1997 in a televised "town hall" meeting in Akron, Ohio:

We live in a country that is the longest-lasting democracy in human history, founded on the elementary proposition that we are created equal by God. That's what the Constitution says. And we have never lived that way perfectly, but the whole history of America is in large measure the story of our attempt to give more perfect meaning to the thing we started with—the Constitution and the Bill of Rights.

Leaving aside the fact that nowhere does the Constitution state that "we are created equal by God"—the statement is a paraphrase of the Declaration of Independence—this accurately sums up a concept of American history in which "we the people" are constantly circling back to the principles that made them great in the first place. Just as Edmund Burke described a nation as a partnership "between those who are living, those who are dead, and those who are to be born," constitutional development in the United States involves a similar kind of intergenerational partnership between the Framers and those following in their wake. Rather than improving government, Americans see their mission as remaining true to ideas that were present at the creation. Indeed, if Clinton is any authority, the idea is not merely to remain true, but "to give more perfect meaning" to ideas that preceded them by more than two centuries.

But how does one give more perfect meaning to something that was perfect to begin with? Are such efforts superfluous? Or could it be that the Founders' teachings were not perfect after all and that it is the job of subsequent generations to fill in the blanks they left behind? If so, it is a task that Americans feel they must undertake without ever admitting to themselves that is what they are up to. They must deny that the Founders were in any way imperfect and insist that they represented an unsurpassable peak of human wisdom that "we the living" can barely hope to comprehend. Yet they must fix problems that the Founders created. While human knowledge may advance in some areas, any thought of advancing beyond an eighteenth-century level in political science is forbidden.

But if Americans are to come to grips with the Constitution, they must say goodbye to such pre-modern beliefs. They must recognize that progress is not confined to the technological realm, but is something that must take place across the board if it is to take place at all. The lesson of the 2000 presidential election is that the United States is not the most perfect government on earth, but

one of the most antique. Its constitutional machinery is woefully obsolete due to generations of neglect. It must be rethought from top to bottom if it is to be hauled into the world of modern democracy.