Welcome to What Happens Next – 1.10.2021

Islamic Fanaticism, Presidential Power, the Electoral College, and the Myth of the Entrepreneurial State – Jack Rakove

Larry Bernstein:

Our first speaker is Jack Rakove, He is a professor at Stanford in the history of political science and law departments. Jack, why don't you start out with your case for abolishing the electoral college? Good luck.

Jack Rakove:

Great. Well, happy to be here. As we all know, the electoral college has been much in the news this week. And I want to use the opening part of my remarks to say three propositions about its history and its future. First proposition concerns its origins, the second deals with its early evolution, and the third, although it's important to argue, at least suggest that we should replace the electoral college with a national popular vote. And that the only way to do this requires an article five constitutional amendment, which most people see as the infallible stumbling block. I want to start by going back to 1787, the year the constitution was written. It's a big mistake, I think, to assign too much consistency or foresight to the way in which the framers of the constitution imagined how this wholly novel mechanism would work.

I think today we are perfectly entitled to think critically, indeed, even disparagingly about how our system of presidential election was originally conceived and to ask whether a better model might not work better. So that's the first item, that's kind of the deepest article part. Then the second part follows, I think, pretty quickly from the first. The early contested license for the presidency reveal how quickly the system evolved once Americans began inventing political parties. Now at the beginning, so long as George Washington wanted to be president, it did not matter how the presidency would be chosen. You'd always get the same result if Washington's on the ballot. Back in 1787, the framers believed that the election of a president by a popular vote
would never work, mostly because it would be too difficult to fashion strong pluralities, much less a popular majority, of the geographically extended nation of the United States. But in fact, as soon as John Adams and Thomas Jefferson effectively opposed each other in the first contested election of 1796, a popular election would have produced a decisive choice.

So, the framers’ expectations of the process were wrong. Certainly, where the framers had somehow imagined, at least loosely conceived the electorates as a qualified group of informed, and then the family minded citizens. Once the elections were contested, the elections became, as they have ever since remained, the loyal tools, the lackeys, if you will, of their political parties. And third, the framers of the constitution did not determine exactly how the electorates would be appointed. The first contested elections of 1796 and 1800 produced numerous examples of how the state legislatures would manipulate the rules for appointing electors for partisan purposes. When we think about 1800, we think mostly about the tied vote between Jefferson and Aaron Burr, but to my way of thinking, the interesting thing about 1800 is the ingenious way in which the states altered their rules for appointing electors out of those virtually partisan concerns. And we were worried coming out of this past week's event and really coming out of the past election whether Republican legislators would be tempted to do the same thing, looking ahead at 2024. So, my first two are historic points, but third point is essentially looking forward. I'm a big believer that we should replace the electoral college with a national popular vote because the only way to do that is to have an Article V Amendment.

I'll stress this point, as I'm sure Robert will soon agree, because as many listeners know, there is an alternative proposal out there to form a compact among states casting 270 electoral votes to give the electoral college majority to whichever national candidate turns out to be the popular vote winner. The problem with this proposal, which we know is the quote, the NPVIC, the National Popular Vote Interstate Compact, is that no one has ever actually explained how it survives Article I, Section 10 of the Constitution, which requires the interstate compacts to secure Congressional approval. Proposal of this nature would inevitably meet that objection. Once it does, it'll prove impossible to rebut the claim that a proposal so fundamental to nature must be done by Constitutional Amendment.

So finally, just my last thoughts, let me just advance to the fairly obvious reasons. Well, some obvious, some less so as to why I support the idea of a national popular vote. First, it is absurd to think that the candidate receiving fewer votes than his opponent should be the winner of a presidential election. Even in this last election with Biden enjoying a popular vote margin of 7 million, a swing of some tens of thousands of votes could still have given Trump the victory. It just produces an extraordinarily discordant result. Second, following the principle we call one person, one vote, I believe a vote in California should have the same weight as a vote in Wyoming.

Second, big point. In a popular election of a single national constituency, the parties would discover strong incentives to mobilize their voters wherever they were and the problem of focusing political attention on a shifting number of battleground states would disappear. Third, for the past 30 years, the presidency has suffered a genuine legitimacy crisis, which our dominant image of red and blue states is only reinforcing. Having a national popular vote would
restore a much-needed legitimacy to the entire office of the presidency. Four, the idea that a state-based system of presidential election is somehow essential to the vitality of our federal system is salacious. We would do just as well without it as with it. And that's a wrap.