Welcome to What Happens Next – 1.10.2021

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

My name is Larry Bernstein.

What Happens Next offers listeners an in-depth analysis of the most pressing issues of the day. Our experts are given only SIX minutes to present. This is followed by a Q&A period for deeper engagement.

I think you will find this discussion to be informative and provocative.

This program is moderated to be politically neutral. Our speakers will give their opinions and then we encourage you to make up your own mind.

This week’s topics include Presidential Power under the Constitution, Islamism in France, the Electoral College, and the Myth of the Entrepreneurial State.

Our leadoff speaker today is Michael McConnell who is the Richard and Frances Mallery Professor at Stanford Law School and a Senior Fellow at the Hoover Institution. Michael is a former Federal Judge with the US Court of Appeals in the Tenth Circuit.

Michael will be discussing his new book entitled The President who Would Not be King: Executive Power under the Constitution. The book is provocative because it looks back to the original constitutional debates to figure out which branch of government has designated responsibilities. Based on this framework, Michael disagrees with some of the most important 20th century Supreme Court cases on Presidential Power.

Our second speaker is Ayaan Hirsi Ali who is a research fellow at the Hoover Institution and the author of several books including Infidel and Heretic. In fact, we did a book club with Ayaan years ago on Infidel, and I am thrilled to have her back for What Happens Next. Ayaan will speak today about Islamism in France and about the murder by a Muslim Terrorist of a French Schoolteacher who discussed the Charlie Hebdo shootings in class.

What Happens Next then shifts to a debate about the electoral college. Jack Rakove who is the William Robertson Coe Professor of History and American Studies at Stanford will argue for abolishing the electoral college. To be followed by Robert Hardaway who is a Professor of Law at University of Denver Sturm College of Law who will discuss his book The Electoral College and the Constitution: The Case for Preserving Federalism.

Our final speaker today is Deirdre McCloskey who is Distinguished Professor of Economics, History, English, and Communication at the University of Illinois at Chicago. Deirdre will be discussing her new book The Myth of the Entrepreneurial State.

All right that is today’s session.
Since the beginning of What Happens Next, I have spent a few minutes each month to discuss the Bureau of Labor Statistics Employment Report because the data are the most important real time estimate for what is happening in the economy and because the data has been the most volatile in our lifetime.

I think the top story this month is that employment growth has stalled likely due to the spike in COVID cases. The establishment survey has jobs for the month down by 140,000 jobs. This was led by a job loss of 370,000 in restaurants that was caused by state restrictions closing restaurants and bars. This means away from restaurants; the economy grew by 230,000 jobs which is trend growth.

Some good news from the report was that 750,000 employees moved from part-time work to full-time employment last month.

Now, let’s look at the big picture. How has employment changed since the beginning of COVID? There have been 9 million job losses in 2020, so we have a long way to go. Currently, 57.4% of the working age population works which is 3.5% less than pre-COVID levels, which is pretty good considering.

The biggest challenge facing the American economy is how do we reemploy these 9 million workers if many of those workers previously worked for firms that have closed permanently. There are always transitional problems for businesses to hire new employees because they do not know them.

Our first speaker today is Stanford Law Professor Michael McConnell, please go ahead.

Michael McConnell:

So, we've been riveted this week with the terrible events in Washington, and that has led many members of the press and public to be deluging me and others who study the presidency with questions about the 25th amendment, which I think has never been in the headlines before, and also impeachment again. And I'd be happy to talk about those things during Q&A.

But what I really want to do is look forward to issues that are going to arise in the new Biden administration. And I have to say that I am not looking forward to the case of whiplash that I expect to get, because every time the presidency changes party hands, many people's opinions about the nature of the presidency and the powers that pertain to the presidency shift overnight. So those who were very critical of President Obama's unilateral policies, for the most part became quite pleased with President Trump's aggressive use of executive orders. And those who've been criticizing President Trump's executive unilateralism, I suspect many of them will be praising the same kinds of assertions of power by new President Biden.

And yet the Constitution gives the same set of powers to presidents that we like and presidents that we don't like. It is a prescription for both an empowerment of the president and also constraint of that power, and it stays the same. And it's my conviction that if we paid more close attention to what the Constitution has to say for presidents on both sides, that we would have a more stable republic and maybe a calmer attitude toward presidents and presidential power.
My book is actually a good deal of history, but it's, I hope, more than just history because what I've tried to do is use that history to provide explanations and interpretations of presidential power using the close examination of the text itself, but also in light of the British constitutional experience that the framers looked back to, and to early disputes over presidential powers that helped frame and develop and construe the Constitution. What I do is I show that there are actually three different kinds of executive power that need to be distinguished.

There are prerogative powers. These are powers that are vested in the president by virtue of his office, or previously in the King by virtue of the King's office. They are not given to the executive by the legislative branch, and the legislative branch cannot regulate them, override them, or diminish them. Among these, most obvious are such powers as the veto power, the pardon power, whether we like it or not, Commander in Chief and others. The president's prerogative powers are specifically laid out in the Constitution. They're not implied. And in most cases, they're actually matched the corresponding prerogative power as it existed for the King under the British constitution.

The second category of powers are delegated powers. These are things that the president cannot do without advance authorization from Congress. So, for example, the president cannot spend a dime of public money without an appropriation passed by Congress. He can't tax. He can't borrow. He cannot enforce the law, that is restrict people's life, liberty, or property, without there being a law which he is enforcing.

And then the third type of power, which I think has generally gone unrecognized but is quite important, I call residual executive powers. These are powers that the president exercises under the rubric of the executive power. The first sentence of Article II being that the president is vested with the executive power. And I try to show in the book what the character of those powers are, and especially their limitations, that they are limited to powers of an executive nature and may not entrench upon either legislative or judicial powers. And perhaps more importantly, they are subject to being overwritten or regulated or diminished by Congress, so long as Congress is operating within the scope of its enumerated powers. It basically can trump the president. But the president doesn't have to wait for Congress. Until Congress is active, the president has this kind of authority.

Well, I think when you look at the presidential powers in light of these three different categories, that many of the separation of powers controversies that have gone to the United States Supreme Court in the last century are much clearer. The court has actually thrown a lot of smoke in the air and has not provided a very clear way of distinguishing between what powers a president can exercise and what powers he cannot. This comes up especially often these days in connection with executive orders.

A lot of people don't even know what executive orders are. They're not mentioned in the Constitution, but there seems to be this belief. There was by supporters of Mr. Trump and I think already we can see that supporters of Mr. Biden are taking the same position. They think that executive orders are a way the president can do almost anything, that he really doesn't have to go to Congress, he can just exercise... He could just issue an executive order and make the world conform to what policies he wants. And this is a misunderstanding. An executive order does not gain any additional authority merely by virtue of being called an executive order. Executive orders are authoritative only in so far as they are putting into effect powers that the president has either directly under the Constitution or from the statutes. And that leads us then back to the various categories of power and where the president gets that.
Michael McConnell:

Thanks very much. I look forward to the questions.

Larry Bernstein:

In reading your book, Michael, I was a little bit in shock when you started discussing the Steel Seizure Cases. In particular, I had been taught when I was in school that the Steel Seizure Case, and particularly Jackson's opinion where he stated that the president's powers are strongest when the President also gets approval from the Congress and when the two branches work together, yet you suggest that Jackson's opinion was wrongly decided. Could you just spend a second and give the background for the Steel Seizure Case and what you think Jackson got right and maybe what the other justices, who were in dissent in that case, probably were right about? And maybe finally, why it's important.

Michael McConnell:

Jackson gets the answer right. So, this is a case where President Harry Truman during the Korean War issued an executive order seizing the steel mills at a time of a labor dispute in order to keep the steel mills open to produce armaments to keep the war effort going. And the court held, and I think correctly... And Justice Jackson, I think, correctly held that President Truman did not have authority to issue that executive order.

My problem with Justice Jackson's opinion is its analysis, its reasoning, not where it comes out. And so basically what Jackson says is that you look to whether Congress and the president are in agreement. And if Congress has agreed with the president, he exercises essentially the entire power of the national government. If Congress and the president are in disagreement, that is if Congress has indicated its disagreement with the president, the president has very little power. And then in cases where Congress has been silent or ambiguous, which is a very large number of cases. In fact, most of the separation of powers cases in modern history fall into this category. Jackson calls it a "zone of twilight" and he says it can only be decided by the courts in light of what he calls "contemporary imponderables".

Well, I think that all three of those ideas are wrong. The first one's almost right. It is true that when Congress and the president are in agreement, that the president's action is usually going to be upheld, if we mean by agreement that Congress has actually passed a law authorizing the president to do what he did. I do think that Jackson is wrong when he talks about congressional implied agreement or implied powers. Congress actually has to pass laws through bicameralism and presentment if it's going to empower the president.

And then in the next category, he just ignores the entire existence of prerogative powers. And when the president is exercising one of those, the president is going to prevail.

And then in this middle category, which is so important and so large, his analysis is completely useless. "Contemporary imponderables." Well, if they're imponderable, how are the judges supposed to ponder them? And I think "contemporary imponderables" just invites the judges to second-guess the decisions and decide them on the basis of how they judge the policy implications of the moment. I do not think that any cases fall into this intermediate category. I think that every single separation of powers case
involves one of the three kinds of power that the president has and congressional silence doesn't change the result in any of them.

Jack Rakove:

What was the dynamic of President Roosevelt's executive order putting a hundred thousand Americans in sort of detention or concentration camps? I don't think, as I recall, that was not approved by Congress. Do you know what the dynamic of that was?

Michael McConnell:

Yes. this is an action taken under military authority, and it's not... I mean, that decision, which was upheld by the Supreme Court at the time, and recently has been... The Supreme Court recently specifically overruled the decision upholding that. Is not really a matter of separation of powers so much as it was that the decision both violated the due process rights of the Japanese internees and also because of its being based upon their racial and ethnic categories, rather than any specific actions undertaken by the individuals involved, violated the equal protection clause.

Larry Bernstein:

Just to follow up on that a second. We had another speaker on one of the calls, Peter Irons, he spoke about it, and he mentioned... In one of his books, he defended an appeal of that case recently. And I guess some information had not been given to the defense and that case, it was then thrown out. One of the famous cases was thrown out for prosecutorial malfeasance under... How did this happen to reappear in front of the Supreme Court for them to make this decision? So, was one of the parties still involved? Or is it a practice of the Supreme Court to look at cases back in history and say that they may have made a mistake?

Michael McConnell:

There are things going on at three different levels. In the US Supreme Court, the issue simply came up as a matter of precedent in a case that had nothing to do with internment camps but in which the same sort of issue appeared. The court said that it wasn't going to follow the logic of the Korematsu case because it was wrongly decided. But the other two forums in which this is occurring are that there are some people still around who were the victims of this internment policy, and they've been able to go to trial court and get their actual cases reversed. And then finally Congress has acted, recognized the injustice of the situation and has voted compensation for these individuals.

Larry Bernstein:

Just following up on Jack's question. If I recall as the facts, Earl Warren was Governor of California and Earl Warren was the one that went to the West Coast military authority and made a request to intern the Japanese. So, what role did the state authorities play? If you know the history why did the military to go ahead and pursue that decision?
Michael McConnell:

I teach this case and I'm interested in it. Earl Warren did do this. He was in large part responsible for this terrible event, but only in an advisory and requesting capacity. It was actually a federal order by President Roosevelt. And in the Supreme Court, the Supreme Court was told and actually given affidavits that there were serious national security interests that were being achieved. And what we now know is that the Supreme Court was actually misled and that there was a substantial countervailing evidence that was not presented to the Court on that point.

Jack Rakove:

Michael, I wonder how do you read, if I remember correctly, Jackson's dissenting opinion in Korematsu? And again, his concurring opinion in Youngstown. Do you see Jackson growing? I guess, off the top of my head I wonder whether Jackson in the Youngstown case was attempting to kind of formulate some of the misgivings and some of the reservations he's expressed earlier about having the judicial power sign on to a bold executive move.

Michael McConnell:

Well, Jack, I think that's very plausible. I don't know enough about Jackson's psychology to be sure, but it certainly does seem logical that he may have regretted some of the excesses of the earlier time and that the Youngstown decision may be cutting back from that. Jackson also, in his opinion, in the Youngstown, in the Steel Seizure Case, there's a very amusing little aside in which he quotes an opinion of the attorney general approving an earlier order that's very similar to that Jackson wrote. And Jackson, now in his capacity as Supreme Court Justice, says that the Court needs to be skeptical of executive branch legal opinions, even when the author is himself.

Larry Bernstein:

I want to go to a different case that you discuss in your book and that's, I may pronounce the names wrong here, Zivotofsky v. Kerry. And this was a case where Congress had passed a law saying that if you were born in Jerusalem that the US passport would say Jerusalem, Israel. And this was something that, for example, the Obama administration refused to comply with because they did not recognize Jerusalem as the capital of Israel. And I think the question is what are the president's powers as it relates to foreign affairs and who gets to make that decision? Does Congress have that authority or not? Michael, how do you think about foreign affairs being a classification of powers for the president?

Michael McConnell:

Yeah, so the Zivotofsky case may seem trivial in a way, because it's just about one word on a passport, but it was probably the most important foreign affairs-related separation of powers case we've had in the last several decades. And, again, the result of the case may or may not have been correct, but the analysis of the majority opinion, which was written by Anthony Kennedy, seems extremely dubious because the Court... And it's related really to the way you put the question. I hope you don't mind a little critique of the question itself.
Larry Bernstein:

Go right ahead.

Michael McConnell:

There is a foreign affairs clause to the Constitution, and there are a number of foreign affairs powers and they are not all given to the president. There's this, I think, a sense that the president has nearly prerogative power over the whole field of foreign affairs but when you look carefully at the Constitution, in fact, Congress is given very significant, maybe not as much power as the president, but very significant power in the foreign affairs arena.

And the Supreme Court held that this decision as to whether to put the word Jerusalem on the passports was part of the recognition power, that is the power of the president to recognize what foreign government there is and what the extent of their territory is. And the Court held that that is a, they didn't use the word prerogative, but they effectively held that that is a prerogative power of the president. It's something that the president gets to decide absolutely and Congress doesn't have the right to speak to it. I think that that's quite wrong. The recognition power is an important power, but it was not given to the president as a prerogative. I think that this falls... And there's a lot of history of this in the book because there were some important recognition disputes even in the George Washington administration, and the Supreme Court did not care to look at those in any real detail.

But I believe that this is a power which is one of those residual powers under the executive vesting clause and therefore is subject to the Congress's override. And Congress had passed a statute that allowed people to choose to put the word Israel on their passport when they were born in Jerusalem. And the real question in the case, I think, wasn't, "Is this a power of the president?" The real question is, "Did Congress have an enumerated power to pass that statute?" I think the answer to that is yes, but it's interesting that only one Justice seemed to think that that was even an important part of the case.

I think that points to a larger point here which is that the powers of the president and of the Congress are reciprocal. And in most of these separation of powers conflicts, it isn't good enough just to look at what Article II says about the powers of the president. You also have to look at Article I and see what are the powers of Congress over the matter. This is a particularly important point.

Another example I talk about in the book is the so-called torture memos under George W. Bush, where, completely putting aside all the moral and international law questions having to do with the particular interrogation techniques involved, Congress had passed a statute, in fact, two statutes that governed this matter. And Bush's lawyers said that his powers, which are prerogative powers under the Commander in Chief clause, were superior to anything Congress might have said. And I think the problem with that is that Congress is actually given an explicit Article I Section 8 power to regulate the conduct of American armed forces. And I think those statutes fall absolutely clearly within the core of the historical meaning of that power. And to say that the Commander in Chief clause trumps the explicitly enumerated power of Congress to pass rules for the regulation of the conduct of the armed forces, I think was a real mistake.
Larry Bernstein:

I wanted to follow up with one of your points listed under the prerogative powers. And that was the right to pardon. I just received a question from one of our listeners, Irwin Warren. He has a couple of questions. One is what are any limitations on the president’s right to pardon? You usually, see pardons in the last week of presidential administrations so we’re probably going to see a bunch. And for example, are the limitations... Does someone have to be charged with a crime before there’s a pardon or can the president just issue some sort of a blanket pardon for any crime committed? Can you do it for anyone in the administration, anyone outside the administration? Are there any limitations, including himself, on the right to pardon?

Michael McConnell:

That's a great question. There are some limitations. The pardon cannot extend to impeachment. And most importantly, it only extends to federal crimes. Cyrus Vance looking into the affairs of the Trump operation under New York law is completely unaffected by the pardon power.

So that's explicit, but it also historically can be seen, it's limited to acts that took place prior to the pardon, but it can extend to acts that have not yet been prosecuted. And that actually has to be so for the pardon power to serve its most important purpose and its most important purpose was actually in case of insurrection as a really means of reconciliation after the insurrection has been put down. So, the whiskey rebellion under the Washington administration is the best example of this, Washington marches an army, an army larger than ever was put into the field during the entire revolutionary war against the rebels, against the whiskey tax, mostly in Western Pennsylvania. And after putting down the insurrection, a couple of people were tried and then Washington issued a pardon of all the other participants for what they did.

And this was a gracious gesture, but also a very shrewd gesture because it basically put an end to the rebellion and enabled people to come together. If he had been prosecuting all those hundreds, maybe even thousands of participants, he would have been creating martyrs, it would have festered for a long time. A similar example is Jimmy Carter’s-

How about in the civil war, didn't Lincoln say, "You can take your gun and head home?"

Michael McConnell:

Yes, Lincoln pardoned the participants, the Confederate soldiers in the Confederate army. The only people who weren't fully pardoned after the civil war, were people who had previously sworn an oath of allegiance to the United States and then took up arms against the country. And ultimately there was only one person, Jefferson Davis, who never received any kind of pardon. And Jimmy Carter did it for draft resistors in the Vietnam war.

So yes, people can be pardoned, even though they haven't yet been charged with a crime. Now, there is an open question about sort of open-ended pardons, where the crimes were not referring to specific acts, but for example, your pardon for anything you may have done over the preceding number of years, that's an open question, but there is a precedent, modern precedent, which is Gerald Ford pardoned
Richard Nixon for any acts that he might have done when he was president. So, if that precedent holds, then the pardon does not have to be for any one specific crime.

Larry Bernstein:

We're going to move ahead and Michael stick around because I want to ask a bunch of questions during the electoral college section. Our next speaker is Ayaan Hirsi Ali, she'll be discussing Islamism in France. She's the author of Infidel and Heretic. Ayaan, if you're on the line, please go ahead.

Ayaan Hirsi Ali:

Larry, thank you very much for that. And I just have to thank Michael McConnell for a fascinating conversation. I completely forgot what I was supposed to do, that's how fascinating it was. I'm going to start the six minutes and try my best to adhere. I want to start with the timeline, Larry, when Samuel Paty, a school teacher in France was beheaded on October 2, 2020, because he had been teaching a class on free speech. And he had shown caricatures that the magazine, Charlie Hebdo, had shown in 2015. This was back in 2015, January, 2015, a number of journalists were beheaded because of those caricatures. But the school teacher, Samuel Paty was killed, accused of blasphemy, not because he had drawn the caricatures, but because he had shown them. And then Larry reached out to me and said, "Could you please speak to us about the dangers of Muslim radicals in France?"

Well, what I'd like to do this afternoon, is to say the problem is really much bigger than France and that we have to see it in a European context. And in order to do that, we have to understand it in a way that ... you can come at this from different perspectives, but my perspective is it's really a failure of leadership, a failure of modern European leadership from pretty much after the second world war. And the leadership in Europe has failed on this particular issue, and the issue is, look at it like a branch with three intertwined twigs and it's a confounding problem. The first part of that is the failure of the leadership in anticipating the problems from Muslim majority countries. And when I say that, I mean immigration from Muslim majority countries. I think they should have been able to anticipate that, given that they had colonized a number of these countries and were familiar with the way things work, in those contexts, they should have seen that once Muslim immigrants in large numbers would settle or resettle in Europe, that some of these problems would present themselves.

And so they failed to see that. The second is the inability to integrate or develop a coherent set of policies to integrate those immigrants. And in that sense, they failed not only their own societies, but they also failed the immigrants. And finally, and this is later in the 1980s, they failed to understand the nature of political Islam, and in particular, the difference between jihad, which is the acts of terrorism that have now been carried out, like the beheading of Samuel Paty, the attacks in Bataclan, there's been several attacks in France. France has been in the news more than in any other European country that has hosted Muslim majority populations. But radical Islam was like a background music, they were setting up mosques, Islamic centers. They were persuading young, confused, in some ways, disenfranchised and victims of discrimination, young populations in Europe, from Muslim majority countries who are either born there or who were first generation, into projecting the values of the country that they had come to.

So, if you combine these three failures, you have to ask yourself, why did they do it? Why did these European leaders fail to do this? And you are going to get different explanations, but one that I find
fascinating is that a lot of these European leaders on the center right or on the center left, tried to squeeze the issues of Muslim immigration, the problems with integration and radical Islam into the left vs. right wing spectrum or cleavage, that they were used to addressing their own issues, their own economic issues, political issues, et cetera. So, in some ways, that does actually make sense because every time you bring about the issue of, well, what should we do about immigration? Why, more or less in what manner, what is the morality of rescuing people that are coming from failed states and civil wars? They were absolutely incapable of agreeing on that and the crisis continued and continues and gets bigger.

On the issue of integration, even more interesting. Some, especially those on the center left and beyond, would argue, well, these people should keep their values and their customs. If that's the case, then how do you integrate them? And then the center right would respond in almost a caricature manner, that the people on the left were either too dumb, too relativist, too cosmopolitan. And a legitimate discussion on what it is and how should we integrate immigrants in general and Muslims in particular, how should we talk about such issues as blasphemy and if you come from an area where you have blasphemy laws.

The integration part is very, very important. It seems as if the leadership on the center left and the center right, could not possibly agree on what it is that represented the core values of their own countries. And what makes Muslim immigrants different from say, other immigrants, is when such issues come about as blasphemy, if you take freedom of speech for granted, beheading someone because they blasphemed against your religion is just something you can't ignore, you have to have a rational conversation about that. But what about women's rights? What about gay rights? What about antisemitism that's now promoted in the name of Islam, in the name of radical Islam? And then finally, and this is the point where I think probably the failure is at its worst, is European leadership ignored the studies, the reports, and the facts on the ground, where dour is the proselytization, it is the process of converting non-Muslims into Islam and radicalizing moderate Muslims, and turning them into jihadis.

Once you ignore that process, you will forever be surprised and shocked every single time a Jihadi terrorist attack takes place. But then you do nothing about the foreign money that's flowing into the country, the foreign institutions that are established to, and to use Macron's words, that's the president of France, create and establish an Islamist separatist parallel society. And so I'm going to just leave the test of this for my Q & A, but to end, it is the failure in these three areas, the squeezing of these problems into the left right framework that I think has brought us to the place where we are in Europe.

Larry Bernstein:

Okay. Thank you. I want to go on two different paths. One is, I'll call it the Napoleonic creed, and then the second topic will be, I'll call it the Algerian crisis. Now, after the French Revolution, Napoleon took over, he defined what being French was. And he tried to, I guess, separate being a good Catholic from being French and that to be French, you had to follow certain things and freedom of religion or classifying you in a religious type, was something that the French state wasn't going to do. And that's followed to today where they don't seem to, in a census, for example, ask which your religion is. How do you think about in the original creation of the French state, starting with Napoleon, where they believed in what was French and that being a good Muslim or being a good Jew, was sort of irrelevant, is my first question?
Ayaan Hirsi Ali:

And that is really specific to France, and you would almost make an argument that every European country found its path to the particular constitution of the day that they have now. Now, what is unique about the French is that they have this doctrine of citizenship and that is a very radical separation of religion and politics. And I mean, I don't know if we have enough time to get into why France came down that path, but the French revolution, particularly, I would say, egregious experience in the French past with religion of the Catholic past, that all led to the desire for this almost clinical separation of politics and religion. Now you fast forward to the 20th century and the 21st century and in comes the religion, Islam that is, where the conversation about separating the two has barely begun.

And if you are a Muslim and you're very serious about your religion, it's incredibly difficult to separate religious rules from political rules. And that is why it's easy for political Islamists when they organize, to persuade large numbers of Muslims, regardless of whether they live in France or in Egypt, but if they are to be true to their religion, then they have to be political. And in France, it's the exact opposite. And according to French statistics, the number of people that they are recording right now as being Muslim in France is six million. Now not all six million of them are political and many of them have in fact embraced the principles of French society. But yeah, France does have that, I would say in terms of speaking on the level of integration, they have the presence of a large swathe of Muslims who have a political approach to their religion, who now live in France and are being asked to observe the norms and values of French Society. It's very interesting to see what this particular president makes of it.

Larry Bernstein:

In terms of a history of integration, Algeria used to be part of France and they had a plebiscite to separate into its own country and something on the order of seven or eight million French Catholics returned from Algeria to France. But during that civil war, a number of the Algerian Muslims fought on France's behalf during that civil war and France had an obligation to allow the Algerian Muslims to move to France. I think it was around a million at the time, and this was in the early 1960s. And it's that population, which I would say France failed to integrate, failed to think it through. But can you imagine if Algeria was still part of France, as an alternative, how that would've worked in the context of an integrated Europe. But in any case, this has been going on since the early 1960s, when those million Algerians showed up, why haven't they been able to it figure out, why is it coming to a head now, and what is the solution for this six million?

Ayaan Hirsi Ali:

I think Algeria and the history between France and Algeria is a very interesting one. The Algerians who fought on the side of France have been, in many ways, betrayed on so many different levels. So, when you read that history, it's a very complex history. But right now, I would say the issue of integration and integrating Muslims is and has gone beyond that particular relationship, say between ... and very complicated and very bloody and full of betrayals. I mean, it's fascinating in its own right. But right now, the problem is not just an Algerian French relationship, it's gone beyond that.

I don't want the American audience to think the history of the descendants of Black slaves and those whose civil rights were compromised, but the relationship with Algeria and France is like that, it is not, it's much more complicated than that. And if you look at the presence of those six million Muslims in
France, many of them come from Turkey, many of them come from other parts of North Africa, Tunisia, but they also come from West Africa, places like Senegal and Guinea. So, it would be, I think, simplistic to reduce it to a colonial relationship.

Larry Bernstein:

I was just using Algeria as example of, this was the initial large wave to properly integrate, and it didn't work, it hasn't worked.

Ayaan Hirsi Ali:

It did work through, most of the people from say a Muslim majority country, will actually fully integrate. Most of them will be French, not Algerians. In Holland, most of them are from a former colony Indonesia. In Britain, I think you will find a number of former colonies that actually are very well-integrated and that's where contemporary political Islam comes into play. From 1979 onwards, we see an uptick in Islamic activism and it's these Arab countries, Arab Muslim countries, are in fact evicting these radical Muslims, their Imam's and their organizations, and those who are evicted, using the framework of asylum, freedom of religion principles, were able to establish themselves in Paris and in London and in Stockholm and everywhere else. And so that is a separate problem. Yes, it does affect some Algerians, but it affects really most immigrants from Muslim minority countries who came as guest workers, who came through that relationship of after decolonization being former colony, mother country is what they call in the UK, the Commonwealth.

But I think a lot of what we've seen, especially in the Islamic separatist space, that also leads to a manifestation of terrorism, that is Muslims in general. And some of them have nothing to do with colonization, they've been exposed to radicalization in some of these Western countries, European countries, and it's the failure of the European leadership to see it because they were busy trying to squeeze that problem into the left right issue, demonizing each other. I mean, it's really hard in Europe right now to have a conversation about immigration, about integration, about radical Islam, because the two sets of leaders on either side of the spectrum, start accusing one another, in a very childish way, of being evil.

Larry Bernstein:

And just to bring it back to the decapitated school teacher for a second, what we have is, I guess, two different liberal themes. On one hand, we want to allow for the freedom of religion and the freedom of speech, to proselytize your grew. And on the other hand, we have other rights, societal rights, like being able to teach about radical Muslims acts of terror previously, as in this case with the caricatures. But also, as you mentioned before, gay rights or women's rights, which will be inconsistent with some of the other religious views. How is a liberal democratic open society supposed to deal with this radical Muslim population?

Ayaan Hirsi Ali:

So there's a lot that's been written on this. Any society, especially France, Germany, the Netherlands, Sweden, we have these conversations all the time. You have to answer the question, what is it? What are our core values? What is it that makes us distinct from everyone else? Now here's one thing that
cannot be blamed on immigration or on Muslims or any other external factors, and that is the conversation that is going on within the west on the level of ideas, the modernist versus the postmodernist. The postmodernist in any of these countries, it’s, I think, quite potent in America, who are arguing that there is no such a thing as universal values, there's no such a thing as core values. And they started to get into a relativist, moral relativist mode, that reduces everything into it's all just a matter of perspective, everything is subjective.

Ayaan Hirsi Ali:

That narrative, you cannot blame on Islamists, Muslims, other external factors. But if you then apply that philosophy, in Europe it’s called the philosophy of multiculturalism, you apply it to the issue of trying to integrate large numbers of people from Muslim countries, then they are going to say, if all values are equal, if all religions are equal, if everything is subjective, why would you condemn the way I treat women, that my religion tells me to treat women or gay people or to think about blasphemy and democracy? Why would you condemn that as negative? Isn’t it’s just unto you, your principles, unto mine, can I not just have them here? That is a conversation they've been having for a long time in Europe. It looks to me like President Macron wants to break away from it, but within his own country, he can't because there is an intelligentsia that will not let him do that.

Aside from that, there are some very compelling geopolitical reasons he has. You saw once he said he was going to take this on, he was confronted by the President of Turkey. Now, Spain, Italy, Germany, they're not willing to have that confrontation with the President of Turkey that Macron wants to have. It becomes very, very complex and the issues of immigration integration and Islam, even though they may appear okay, they're old enough, we should have been mature, we can now, after a lot of analysis, we think we see what is objective and what’s not, maybe we could agree on some issues, but it's just not going to happen yet. And we're lurching from crisis to crisis when it comes to immigration, lurching from crisis to crisis when it comes to integration and on the issue of Islam, it looks like each member nation of the European countries seems to be developing its own private relationship. Macron with the UAE, Germany with Turkey and so on. I think this is a problem that's going to go on for a long time.

Larry Bernstein:

Ayaan, thank you. All right. We're going to move on to our next two speakers to discuss whether we should abolish or preserve our electoral college, which I thought was a good topic given that they just met a couple of days ago. 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.

Jack Rakove:

Of all the issues that the framers faced, the election of the president was, I think, actually the most difficult and perplexing. There was after all, no precedent available in 18th century political science, to create a national republican lowercase R, national republican election. The 18th century, the dominant model of executive power available were either monarchical or ministerial in nature. And back in 1776, the American revolutionaries had rejected both of those models. Dealing with the presidency was, I think, the single most vexing problem the framers faced, they were still wrestling with it literally 10 days before they adjourned. And even then, they defaulted key decisions about how electors would be appointed to the state legislatures. And I think it’s a big mistake to ascribe too much wisdom to their intentions, to assume that they had a well-conceived understanding about how the system of election would actually 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 to 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.

Larry Bernstein:
Sweet. Okay. Robert Hardaway from the University of Denver Law School, take it away.

Robert Hardaway:
Well, thanks. I can think of no better six-minute defense of our Federalist institutions than that set forth by Senator John F. Kennedy in 1956. At that time, Republicans were convinced that the electoral college favored Democrats, so they were trying to, quote, 'abolish it'. And it was JFK, a very famous and valiant defense in the US Senate. And he said, quote, "Abolishing the electoral college would greatly increase the likelihood of a president elected by a minority of the people." I'll explain more of what he meant by that in a moment. "It would break down the federal system under which the States enter the union," I will make some comments on that, "which provides a system of checks and balances which ensures that no area or group shall obtain too much power."

There's an old saying to the effect that one should not take down a fence until one knows why it was put up. So, let me address each of those three important points. The first was why do we have it in the first place? And in order to understand that you have to understand the context of what the state of the colonies was back in 1787. The largest colonies, New York and Pennsylvania were in the process of forming their own separate nation state, imposing tariffs, custom barriers on their hapless neighbors. And the smaller colonies were considering their own amalgamation of a separate nation and defense of that. George Washington very reluctantly even participated in the constitutional convention because he said, "There's no way you can have one nation when there's just... you have on the one hand the large
States that insist on a legislature that's based purely on population, and the small States that insist on equal suffrage in the Senate," a right they had under the articles of Confederation. So, he was not inclined to think that there'll be any favorable outcome.

And the smaller state, Rhode Island even refused to send a delegate. They were so outraged and were intent on forming their own separate nation with the other smaller states. So, it didn't look like there was much prospects for success of creating a united nation, a united country. And they did the easy stuff first in the first months, the first weeks of the constitutional convention. But then they got to what I think was the most critical question, which is related, as Jack pointed out, is related to the presidential election. But it was really, the bedrock question was how would a legislature be constructed? Would it be based on population or would each state have equal representation?

And the convention was on the verge of being dissolved and everyone's going to go their own way, form their own separate nations, at least three, possibly as many as five. When in the hours, it was Benjamin Franklin who... I think this was his most important contribution to the body politic and the creation of the United States. He said, "Let me give you this compromise. Let me propose it. We'll do both. We'll have a House that's based purely on population, and a Senate. Well, neither party really liked that, And the smaller states said, "No, we want a guarantee. How do we know that as soon as we adopt this constitution, the big states won't get a constitutional convention or propose a constitutional amendment and take away our equal suffrage in the Senate, and will take away the weight that the small states have in the election of a president?"

And the only way that the compromise was eventually adopted... by one vote, I should say, we came within one vote of not having a United States of America, was to say, "Okay, we'll give you a guarantee." And that's in the last sentence of Article V, says you can't aggregate or take away the right of each state's representation in the Senate, upon which, by the way, every state's weight in the presidential election is based unless every state agrees. And it was only but adding this Article V guarantee against future demagogues trying to take away the equal suffrage in the Senate, upon which every state's weight in the electoral college was going to be based in presidential elections, that it passed by a single vote. That's how close we came to not having a United States of America.

Now the grand compromise, which JFK referred to, was first the compromise based on the House and the Senate. Second, that each state would also be able to have a weight in presidential elections based on in significant part that equal representation of each state in the Senate. And most important of all, I think, was the last sentence of Article V, which guaranteed that no future demagogues could take away their equal suffrage in the Senate, upon which their weight in presidential elections was based. And that's pretty much why President Kennedy noted that, look, this is a whole solar system of government power we're talking about. If you're going to mess with one like the electoral college, then you really have to consider the others. They're all inextricably intertwined. And he said, "You can't do that unless you reexamine the Senate. They're both so closely related."

Now his second point, which may be counterintuitive, but he was right on the numbers, he says, "If we adopt the Russians type system or French system, a so-called popular vote system, you're not going to get a president elected who is supported by the majority of the people." That's why he said that abolishing the electoral college would greatly increase the likelihood of a president elected by a minority
of the people. And he gave him a number of examples. I'll just give you one more recent one that really vindicates JFK's concerns.

In the latest French election, there were two major parties, just like our country has two major parties. But the electorate can be a little fickle sometimes, and in the summer of 2017, in the first round of a so-called popular vote, a right-wing extremist got 23%, a renegade candidate, Macron got 21%, thereby presenting the hapless voters in France with the runoff between the two, these two unpalatable, non-popular candidates. So, a candidate opposed by almost two thirds of the voters was elected. And they're so disgusted, the French voters, with what passed as democracy that they actually cast several million ballots with a blank ballot. Said, "This is not democracy."

Now, many of the criticisms of the electoral college is that it creates so-called battleground states due to the unit vote rule, but this is the choice of each individual state, the drafters of the constitution, one in every state to determine how it was going to throw its presidential weight around. And every state has adopted it with the exception of Maine and Nebraska. However, it's up to the states that created the unit vote, and any state is free to abolish it. California and Colorado, the voters there were asked in a referendum would you like to get rid of it? Because it creates battleground states, isn't that terrible? But the voters resoundingly rejected that in both California. And in California, they don't want to share their electoral votes with the Republicans. They don't like the idea.

And if you had a Russian style popular vote system, candidates would doubtless spend most of their time campaigning in the big cities such as New York and Los Angeles. And one of the purposes of the creation of the electoral college was that support for a candidate should be broad, as well as deep. They didn't want a particular region, say in the South in the 1950s, segregationist candidates that get 90% of the popular votes and thereby get a president elected against the will of the rest of the country. They wanted a system which would ensure broad support, and not just concentrated support in a particular region, like the South or in the coasts or anything of that nature. And I think in that way, they very much succeeded.

Larry Bernstein:

Jack, one of the things that Robert was saying was what happens if there are three or four candidates and someone wins the popular vote with maybe, I don't know, 31%. In your mind, would you like to see something where if you don't get a majority 50.1% of the total vote, it ends up in the House where each state gets one vote? Or would you just say whoever's the top of the hill? Or do you want runoffs like France or Israel?

Jack Rakove:

Okay. No, we don't want it going to the House. There are ways to solve this. You could, for example, go to a system of rank choice voting, which would solve the problem. You could have a runoff election the way the French, and I believe that Brazilians do. I mean, they are feasible. I think if we went to a national popular vote, I think there'd still be strong incentives, strong advantages working on behalf of the two major political parties, assuming the Republican party as such survives, which I think is becoming an open question. Survives as something other than a Trump cult. I think those problems are solvable.
Larry Bernstein:

Well they're solvable in any sense, but what makes you think that the current French system that Robert was just attacking where the two runoffs were a small minority of the total population and something on the order of 4 million people decided to put a blank vote. Why is-

Jack Rakove:

There are lots of reasons.

Larry Bernstein:

Why is splintering power with multiple parties a good idea? We see it in France, we see in Italy, we see it in Israel. Why does it make it a stronger political system?

Jack Rakove:

Well, but Israel is a parliamentary system.

Larry Bernstein:

Fair enough.

Jack Rakove:

Which is completely different from ours. France is a combined model. Macron wound up with a pretty strong mandate, coming out of the last presidential election.

Larry Bernstein:

Because he did so well in the House as well. He did very well in parliament.

Robert Hardaway:

I might just point out here that our electoral college is very much the same as the British electoral college. Of course, they don't call it electoral college, they call it a parliament where they elect members of parliament who then in turn go to their electoral college, they call it a parliament, and elect the leader. So, it works almost exactly the same way as the parliamentary democracies. And in 1974, for example, the Labor party managed to elect more MPs and formed the government. But if you looked at the total number of votes for MPs, that did not match. But I don't remember anyone saying this is undemocratic, we should abolish parliamentary democracies and so forth. The only difference was in our electoral college-

Larry Bernstein:

Actually, we got a question from one of our listeners on a very similar topic. Victor Mikheev wrote in and Victor lives in London. He asked the question, "Why don't we just have each of the 435 congressional districts vote separately in order to achieve something like what England does?"
Robert Hardaway:
Well, the answer is the States have the option of doing that, and two states have already done that. That that's actually the system in Maine and Nebraska. And so each state is free to do that. But-

Jack Rakove:
But the problem with doing that is you have the whole problem with gerrymandering.

Robert Hardaway:
Yes, exactly.

Jack Rakove:
You can use I call crack and pack principles to distort how districts would be constituted. So, if in fact you wanted to move more towards... retain some kind of electoral college system but move to a vote, the best way to the best way to do that would be to do a kind of proportional allocation, which that would be closer to the Israeli model, right? There are no districts in Israel. If you actually went to the district system, which was in fact the preferred form when for electoral college for reform discussed in the 19th century, the problem today is the parties have invested so much work in learning how to gerrymander that you could wind up with vastly distorted results.

Robert Hardaway:
And states have the option of doing that. If you think that's a good reform, go to the states and have them agree on something like that, which would make a lot more sense than this NPVIC which is based on the illusion that there's a popular vote for candidates. You vote for electors who may or may not vote for the actual candidate that they've pledged to vote for. And also, how do you count popular votes-

Jack Rakove:
That's ridiculous. No one votes for electors. We have the whole elector case. We don't want electors exercising their independent judgment. They've never had any value or function. As soon as we have contested elections, electors became the simple tools of party. Electors, they sure have no function whatsoever, except that their presence distorts the one person, one vote principle, which to my way of thinking is fundamental to any modern democracy. There's no reason why a vote in Wyoming-

Larry Bernstein:
Does that mean, to understand your point Jack-

Jack Rakove:
... should count for more than a vote in California.

Larry Bernstein:
Jack, should we have a Senate or not?
Jack Rakove:

I mean, Robert is right to say that that's locked into the constitution. It's not subject to Article V amendments for exactly the reasons he gave. But I have to say, Robert, I thought your historical account of what happened in 1787 was badly distorted. It seems to me, you don't really know the history very well. And until you come up with a coherent explanation of how the whole electrical system was designed, you can't really maintain the argument you're making. It's fine JFK said what he did back in 1956, but it seems to me that's largely irrelevant to the problems we have to deal with today.

Robert Hardaway:

Well, I've written several books, which I go into lot of detail. It's hard to go into that detail in the six minutes. I was just hitting some of the high points that JFK-

Jack Rakove:

The details you made struck me as being wrong. New York was not one of the largest states. By the way, they were states, not colonies. The role you ascribed to Franklin, that's wrong in terms of this. The idea the electoral college system is essential to preserving the equal state vote is erroneous. I mean, so-

Robert Hardaway:

JFK might have been off the mark, but I think that when we came to understanding the origins of electoral college, I think he was right on the numbers. And that's why I've looked into every one of his assertions historically and said that he was absolutely right. And he's also absolutely right in predicting the disasters that occur in elections, like in France. He had it right on the numbers.

Jack Rakove:

Our elections and elections in France, we have a different political culture. I think you have to reason from American history.

Robert Hardaway:

Yes, you do, because we have two parties. And that's because, as I explained in my book, that that flows from the electoral college. It's not a coincidence that we're the only country in the world with a two-party system. It's because we are the only one that has a real electoral college. And all the problems with multi parties and so forth are all based in countries which don't have an electoral college. But I think JFK was right on the numbers. And I think history was-

Larry Bernstein:

Jack, if you believe that today, that the constitution is flawed both for the electoral college and for the Senate, does it also mean that... are you also opposed to small states or federalism in general?

Let's just say, pick a state, Vermont. Here is a very small state with 3 electoral votes. Like your Wyoming's example, it has too much power. Should the federal government get rid of some of these smaller states and merge it with some of the bigger states? Or, Rhode Island?
Jack Rakove:

I’d be willing to discuss in the abstract, but there’s a bigger issue here, which is hard to explain in this short period of time. But ask yourself the question, when you go to the polls, do you ever vote on the basis of the interest of the state in which you live? When we vote presidentially, and I’ve lived in five or so different, I’ve cast my votes in I think five different states over the course of my lifetime. I mean, I’m 73 years old now. And I carry my preferences with me wherever I live. When I move from one state to another, I don’t ask, what is in the interest of the state that should affect or influence the way I vote presidentially? I ask, what are my political values?

So, I think in that sense, as opposed to what I think Robert believes, it seems to me the values of federalism are adequately protected in Congress. That's to say we have a geographically based system of appointing both members of the House of Representatives and members of the Senate. But I think it's kind of crazy for the one truly national office, the presidency to have a state-based system when in fact the preferences on which we act when we vote presidentially do not really depend upon those kinds of local issues.

Robert Hardaway:

I've heard many proposals along Jack's proposal, his thinking that it's just not fair that Wyoming has more power in the Senate, for example, than California. And I've heard proposals along the green party and left wing people to say we should try to abolish the Senate and get every state to agree to abolish the Senate. I ever also heard proposals, well, let's just make it one person one vote so that Wyoming, that California would get 58 senators and Wyoming would be lucky to get one Senator. I've heard all these proposals. But it's as Madison said originally, is that we don't elect a president based on the masses. We have 13 separate sovereignties, he said, and those 13 sovereignties elect the president. And that's the fundamental cornerstone of federalism that creates a united republic.

So that's why I say when people, as JFK said, if people want to mess with one part of it, that they want to mess with the electoral college, abolish it or whatever, then they really have to consider abolishing the US Senate because they're inextricably intertwined. The weight of each state in the electoral college is based on the Article V guarantee of equal suffrage in the Senate. And if we're going to destroy that-

Larry Bernstein:

Jack, just to follow up with you for a second. You mentioned that you don't think of you being a resident or a person of California. You've lived all over the US, and many of listeners on our call have lived in multiple states over their life. It's ironic that at this point of US history, it used to be people even used to be citizens of more states over their lifetime. There was a lot more moving between states across the country. But are you suggesting that maybe this concept of having 50 individual states itself is undemocratic and kind of anachronistic?

Should we abandon the states as well?
Jack Rakove:

Not really. I mean, I think it does have a distorting impact on the presidential vote. I do think the principle of one person, one vote-

Larry Bernstein:

But just beyond the president, are you suggesting that we're all Americans and we should move towards a national government and reject federalism?

Jack Rakove:

We carry our preferences with us. For example, if you believe in the second amendment, if you believe in abortion or the right to life, if you believe in this that or the other thing, those are the commitments that really determine how we vote individually. The idea that when we vote, we're doing it in some sense to preserve the federal system, that the federal system somehow depends upon our system of presidential elections, to be honest, that just strikes me as being nuts.

Robert Hardaway:

I might point out that actually Jack's proposal is similar to one that Alexander Hamilton made. He proposed let's get rid of the states, let's just have state lines, sort of like you have in Russia and divided up into regions and so forth. But federalism would never have worked. We would never have a united country because these small states and the big states would never have agreed to form one country. And if we hadn't been for our federalist structure that the founding fathers created, we wouldn't have had one nation. We'd have at least three-

Larry Bernstein:

Robert, what I think Jack is saying is let the past be the past. We're in 2021, if we were going to create our new country right now, how would we do it and why? Would we have states, would we have a Senate, or would we adopt some sort of parliamentary or maybe a combination of a single house and an executive? And I ask you Jack, do you like the states? Should we have these individual states?

Jack Rakove:

I'm much more of a Madisonian than a Hamiltonian. I mean, I spent almost half a century working on Madison, and I just do Hamilton on the side. But I have to think, if we were starting from scratch, abolishing or relegating the states to a lesser position would be an acceptable option, it would be an acceptable option to me. But the issue today is the same as it was in 1787, you'd have a lot of transaction costs. Hamilton wasn't the only one to talk about eliminating or redrawing state lines. The problem is you already have all these separate legal systems, going back to the formation of the colonies and the different legal histories they have. So, the transaction cost of getting rid of the states would run awfully high.

But that's one reason why I think Robert is wrong to think that federalism somehow depends upon the existence of the presidency. Federalism, the very existence of the states and the fact that we have these separate bodies of law that are state and local, as well as national. We've made such a deep investment
in this that the federal system is destined to persist for a long time anyhow. And the presidency doesn't really have anything to do with it.

Robert Hardaway:

Well Jack, I appreciate that you're a Madisonian. And as I now have the exact quote that when he was asked, what constitution have you created? And he says, "This government's not completely consolidated, nor is it entirely federal. Who are the parties to it? The people not as the people comprising one great mass, but the people comprising 13 sovereignties." And that was the basis. I mean, federalism is extremely complex. I teach federal jurisdiction and the checks and balances are so sensitive, so complicated, really. But I think federalism works because you have a separation between local interests and also national interests. And making those two combine in one nation is extremely difficult, particularly in a country with such geographic extension as the United States.

But the drafters realized that you can't have a country controlled by just particular regions or areas of the United States, as JFK said. They asked the bank robber, Willie Sutton I think it was, "Why do you rob banks?" And he said, "Because that's where the money is." And if we have this Russian system, national popular vote, where would they people campaign? They go where the votes are.

Jack Rakove:

I think that's false. I think if you have a national popular vote, and the parties are competitive so they have to actually campaign, it seems to me the strongest incentive is they want to mobilize their votes wherever they are. The idea that everybody will spend all their time campaigning in what, New York, LA, the Bay area, Chicago, Houston, arithmetically, that's bunk. If you do the arithmetic, it's a vast electorate. They don't all live in the big city. We know big cities are highly Democratic, we know the rural countryside is highly Republican, and we know the real battlegrounds are suburban and ex-urban areas throughout the country. And that kind of sociology, which by the way, this is also a very Madisonian approach, has nothing to do actually with the existence of state lines. It's really a way of asking how are the real interests and preferences of the citizens, not the states, of the citizens distributed across the landscape?

Larry Bernstein:

That's a kind of a recent phenomena, this concept of battleground states in this sense. If you go back to a very close election like a 1960, which was almost a popular vote tie, in that election, there were only 14 States in which any of the two candidates got more than 55% of the vote. But here in 2020, 34 states had more than 55%. So, the concept of battleground states is not something that is always been an American phenomenon, but has just more recently played itself out where this rural versus urban thing is also modern.

Robert Hardaway:

And of course, it changes over time.
Jack Rakove:

I want to mention if we still have a little time here, think about what's happened to Georgia. Which is for a long time, South Carolina, Georgia was really the heart of segregation, Mississippi, Alabama, the cotton belts, slave belt, really the racist parameters of Southern politics. Why has Georgia now become a battleground state? There are really two reasons. One is Stacey Abrams, because she realized there was a big black electorate out there, you could do a better job of mobilizing. The second factor is the Georgia economy has changed. The Georgia society has changed. People, for a whole variety of reasons, economic and social changes, have changed the very nature of the state of Georgia. So, its history as a state, its culture as a state, the whole process of population movement, which is really based on the preferences of individuals-

Social choices of individuals is what changes the composition of the states. Again, that's the reason for saying that there's some kind of important correlation between having a state-based system of presidential elections and maintaining federalism. That just strikes me as a false equation.

Larry Bernstein:

That's so funny, because I think of that as the exact opposite, Jack. Why is the fact that Georgia, which has I'll call it a new population because of wild swings in immigration, given a chance to reconstitute itself into a purple state?

In 1960, JFK won Georgia by like 30%. Nixon got like 25. And then it became a Republican state probably beginning of 1980, after Carter had won the state. He probably won it in '80 as well. So it moves around. It has a massive African-American immigration from my home state of Illinois, has moved to Atlanta which is a new modern black metropolis, not Chicago anymore. Why is that problematic at all or run counter to states reconstituting them-

Jack Rakove:

No no, I'm not saying it's all bad, it's just a way of illustrating what are the real dynamics of how the president... of how our electoral system works. Again, I'm trying to get at this idea... I mean, it seems, I think if I understand Robert's arguments correctly, that he really is trying to emphasize the federalism values that the presidential election system has. And I think he's exaggerating and even really distorting what those values actually are.

But the other thing I'm trying to say is that... and this, again, I think this is a Madisonian position as well, is that there's no way to say what the interest of the state is until you actually aggregate the preferences of its citizens. And the problem with battleground states is what makes them battleground states is precisely because they're closely divided, meaning the citizens of the states themselves don't really agree as to what their core interests are. That's what makes them battleground states, it's their disagreement, not their sense of cohesion is a state.

Robert Hardaway:

If I can add two points about the battleground States, just two quick points. One is that it changes over time. What becomes a battleground state changes based on demographics. And that's one reason that like in 1979, Vernon Jordan on behalf of the African-Americans in his constituency was opposed to
abolishing the electoral college. He agreed with JFK. And he made the point which basically swayed the whole Congress against this whole idea of adopting the Russian system. Quote, "Take away the electoral college and the importance of being black melts away, instead of being crucial for victory in major states, such as battleground states, instead become 10% of the electorate with reduced impact." So they realized that this push to abolish the electoral college, which comes every 10 years or so, when a particular party thinks that somehow they’ve gotten a raw end of the stick, even though there’s really only been a divergence between a hypothetical popular vote and an electoral vote, an average of once a century, like it does in all the parliamentary democracies in the world, for example, in 1974 in England.

Because I think Jack and I agree on my main problem with the NPVIC, of course the compact clause is a huge... according to the multi-state tax commission Supreme Court decision, those kinds of compacts are okay when they’re very benign, sort of sharing water rights and so on. But when you affect the national structure, it’s not permissible. You would have to get the permission of Congress. And it’s also based on the illusion that when you go into the voting booth, you vote for candidates. How do you account, like in the 1960 election, several states had unpledged electors? How do you translate popular votes for unpledged electors to votes for a particular candidate? Or how do you do it like in 2016 when three Colorado electors who were pledged to Hillary Clinton decided to vote for a Republican instead? How do you account the popular votes for those electors who violated their pledges? And then a third of the states, electors are not even required to vote for the person they’re pledged to. There’s just simply no way to do that.

And also, how can you have a recount when every state has a different trigger for having to recount? How can you have a national recount when only half the states participate in it? It just doesn’t make any sense. And since any kind of scheme or cabal that’s formed by the states can be... that any participant in it can withdraw at any time, that means that states could, once the legislature pass the control from Republicans or Democrats, the other party could withdraw from the cabal. And that means you’d have changing the goalposts on reelection. You have a different standard in every election. So I think Jack, do we agree that the NPVIC is not the way to go?

Jack Rakove:

Yeah, I definitely agree. The only way to accomplish the national popular vote is by article five amendment. And the problem is, as I think about it, what is the best way to strategize that very difficult goal?

Robert Hardaway:

Glad that we agree on that one.

Larry Bernstein:

We’re going to invite our next speaker, Deirdre McCloskey, who is a distinguished professor of economics, history, English, communications at the University of Illinois at Chicago. And she will be discussing her book, The Myth of the Entrepreneurial State. Deirdre, please go ahead.
Deirdre McCloskey:
Okay. I have a speech defect, so you'll have to grow accustomed to it, but it's only for a few minutes. The argument of the book that I wrote with Alberto Mingardi, which came out in October, is that the idea of industrial policy, which is becoming popular again on both the Democratic and Republican side, is very strange and is very weak. The argument for industrial policy is that the government should be making decisions about innovation in this industry or that, or investment in aircraft or investment in farming. And the counter argument is the very simple one that the government is unlikely to get that kind of choice right. I mean, obviously if the Canadians are in invading us, which of course is a tremendous rational fear, then we need the government to act and it's fairly obvious how it should act. But in these very tricky decisions about what products we're going to have favor, or what industry should expand or contract, it seems to me, and to lots of other observers, that it's going to be smarter to leave that decision to the profit and loss in a market economy.

Here's an illustration. How many products, new products do you suppose are introduced every year? Tried it out, one might say, in American grocery stores? Now this is every year. How many? Is it a hundred or a thousand? No, it's 20,000 products. That means in order to decide which one of these to pursue, a central planner in Washington or Springfield, Illinois, or somewhere would have to herself decide whether this kind of beans or that kind of oatmeal is the one that should be put forward. That what an industrial policy means. And the actual way that this massive number of products is sorted out is the ones that sell, the ones that the grocery stores find they can make money on and pay their employers with are the ones that go forward.

Now, in other words, industrial policy, to use a hot term that often gets people over excited, is a version of socialism. I'm not claiming that my friends who are in favor of such policies are communists or something like that, but I am saying that under socialism, one puts political decisions ahead of economic decisions. And there are lots of cases where one should. If you're facing a plague, early in the plague, it's very desirable that the government take charge and stop the plague, if there's an invasion, as I said, or if there's a forest fire. There's no easy way of taking care of a large forest fire with market mechanisms.

But for most of the things that we buy and sell, and including our own labor, it makes a lot more sense to use the information that we all have about what we like, what we're prepared to accept in the way of pay, what sort of careers we think we can do. That information is not in the heads of someone in Washington or in London, it's in the heads of ordinary people spread out over the economy. And it's been said, and I think it's exactly correct that for most issues, the best way of marshaling this information is through supply and demand through the marketplace. So that's the argument.

Larry Bernstein:
Okay. So President Biden is 10 days out. He has mentioned that he wants to do some industrial policy, particularly as it relates to the environment and various green projects. Let’s start with that industry specifically, because that's the one industry that Biden has talked about. He's also mentioned some anti-fracking stuff as well. How do you think Biden will want to implement his industrial policy to achieve the objectives, environmental objectives that he wants? What would you say is the wrong way to do it? What's the right way to do it? Is there a right way to do it? And how do you think he will do it?
Deirdre McCloskey:

Well, I voted for him, which is for first time I haven't voted for the Libertarian party candidate for a long, long time. But I think he's going to do it the way it's usually done. For example, under the Obama administration, there were massive subsidies to wind power, and for that matter to solar power. And I don't think subsidies make any sense. I mean, yeah, you can say, well, I know, I'm a very smart person and I know that wind power is going to be the power of the future. But as a matter of fact, in England where it's been extensively tried, the problem is that the wind doesn't blow all the time. And so there are great ups and downs in the amount of electricity that's being generated by these mills.

So the right way to encourage alternative power is for the government to invest in research. In particular, we ought to be doing, I think, if you want my opinion, more nuclear power. Something on the order of 80 or 90% of French electricity is generated with very safe atomic power. So I think they're going to go the usual way. And it's a clumsy, it's not evil, it's not because... although sometimes it is because people are evil. Particular interest groups will seize influence in the government and they'll get subsidies for them. Spectacular example of this of course is the subsidy for corn led by my former home state of Iowa for fuel. That is an absurd policy. It's an industrial policy. It's been in effect for a very long time. And Charles Grassley is not about to allow it to lapse. That, by the way, is another problem with industrial policy, that it tends to be permanent. It's very hard to change it. Whereas if one of the 20,000 grocery items introduced annually in the United States doesn't work out, it passes away and we find another kind of oatmeal.

Larry Bernstein:

Let me try a new line of questioning. In the next couple of weeks, we're going to have a discussion about changes in antitrust policy. One of the ideas being contemplated by the Biden administration is to break up some of the large tech firms, think Amazon, Google, Facebook et cetera. How do you think about that form of industrial policy where tech firms are broken up?

Deirdre McCloskey:

I think it's a terrible mistake. I think it's very foolish. The reason that these large firms are large is that they're very competent. It's not because of their alleged malfeasance of various kinds. Maybe there has been malfeasance, but that's not why Google and Facebook are so successful. Yes, as you said, you're absolutely right, and this is often forgotten. Antitrust policy is another form of industrial policy. It's another form of politics taking over the economy. There's of course a longstanding attitude in the United States that anything large is dangerous.

They don't have quite the same attitude about this in France or Germany, or even in Britain, but we do, and it's a longstanding feature of our politics. But it is politics. And it has the problem, as the classic case of the interstate commerce commission shows, that the antitrust gets exercised in the interest of what interests can take over the antitrust policy. It's happened over and over again. So no, I don't think antitrust is a good idea. I don't think tariffs are a good idea. They're another form of industrial policy, which shows you by the way that it does real policy is ancient. It's as old as Joseph in Egypt. It's what governments do. And they shouldn't.
Larry Bernstein:

Is there any hope that the Biden administration will not pursue industrial policy? Or is it too much in that incoming administration's DNA?

Deirdre McCloskey:

Well, as I just finished saying, it's in every administration's DNA. After all, the Trump administration is notorious for imposing arbitrary and insane and sometimes highly corrupt tariffs, which have a long history in the United States. So, I don't think the Biden administration is going to be any worse than the Trump administration, or indeed the Obama administration or the... just go back through all the administrations. Because what politicians and governments like to do is to have what they call these programs. That's what any politician who can get her name on a policy, the Helen Jones act is thrilled and that's what they like to do. And it's not to our interest. It's in the interest of some of us, but then that's against the interest of all the others.

So, we argue in the book that they're just terribly deep fallacies, problems, factual absurdities in the case for intervening in particular in innovation policy. But it applies as I've been saying to all kinds of other interventions in the economy. Now look, it doesn't mean I'm against all interventions in the economy. I think there should be a safety net for the poor and disabled. And I think that there are certain functions of government that I guess you could call interventions in the economy. But so many of them, in particular this one we talked mainly about, innovation policy, turn out to be con games or tragedies or absurdities.

Larry Bernstein:

Okay. This is the point of the show where I asked each of the speakers to end on a note of optimism. I'm going to start with Michael McConnell. Michael, I'd like you to do two things for me. One is I was hoping that you would say something during the electoral college discussion. So if you could give me your observations of that discussion and then end on a note of optimism as it relates to presidential power, that'd be terrific.

Michael McConnell:

Well yes, the oddity of the electoral college issues is that the modern reasons given for why the electoral college might make sense have almost no relation to the historical reasons for which it was adopted at the time, which is just an oddity. I don't get very excited about the electoral college debate because it would require a constitutional amendment. And it just seems to me so farfetched to think that two thirds of the states are going to... or Congress and three quarters of the states are going to adopt an amendment which diminishes the power of half of them. It's just not going to happen so I don't worry about it. I do actually agree, I should say, with Jack Rakove that if we were starting afresh today, we would never adopt the electoral college. It was designed for the problems of an earlier time.

Now as for a note of optimism, I think every time we have a new president it's worth optimism. And I'd like to just say that it does seem to me that our new president, we don't know what his character is really going to look like, but he seems rather more modest in his proclamations and maybe in his sense
of self than the last two occupants of the office. And I think that it may very well be that he shows some self-restraint, which is the most important aspect of an executive.

Larry Bernstein:

Robert, do you want to give us a note of optimism?

Robert Hardaway:

Well, thank you. Yes. I'm optimistic about the defeat, ultimate defeat of this NPVIC. I think Jack and I both agree that that's kind of a travesty, the whole idea of it. Back in 2007 when they first proposed this in the Colorado legislature, I went down with two other professors. They were 10 to one in the senate committee. And I said, "Give me 20 minutes and I can persuade you that it's not viable." And 20 minutes later they agreed to change their vote from 10 to one in favor to 10 to one against. And I think that as the word gets out about this cabal, I am very optimistic.

And I also agree that it's very unlikely that a constitutional amendment... of course, I take the position as JFK did that you can't abolish the electoral college unless you abolish the US Senate, but that may or may not be the case. But in any case, I have a great optimism that the federalist foundations of our country will be preserved and will serve as well in the future, as it has in the past 200 years.

Larry Bernstein:

Thank you, Robert. Deirdre, do you want to end on a note of optimism?

Deirdre McCloskey:

Sure. And in fact, one basis where my optimism is Biden is that like me, he stutters. And that fact is important in the formation of a personality, because you have a handicap. And if you don't think you have a handicap, and that's Trump's problem, your arrogance comes to the floor. And it's the arrogance of industrial policy and these kind of random interventions in the economy that annoy me and they're costly. But the United States and Sweden and France and lots of other countries are basically market economies. And yes, random absurdities like a tariff on French wine and so forth can disturb things. But I think on the whole, they're in the nature of an error term. A smallish error term. These economies, and particularly our own, are engines of innovation that operate mainly through private enterprise. And I am, I'm in general an optimist, but I am even in these times optimistic about the future of the American economy.

Larry Bernstein:

Thank you very much. That ends today's session. I want to thank our speakers and our audience for their participation. Just a plug for next week, we're going to have Martin Gurri and Bill Easterly talking about the arrogance of experts. I guess a follow-up to Dierdre's points. We're also going to go back to our roots and have some COVID speakers, including Dr. Ari Ciment, who will discuss the latest treatments in respiratory issues associated with COVID. With that, that ends today's session. Thanks again, and you may disconnect. Have a great day. Go Bears.