

THE CASE FOR CALLING AN ARTICLE V CONVENTION

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I lend conditional support to a call by our state legislatures for a national convention to be conducted pursuant to Article V of the Constitution of the United States. My support is qualified because I perceive such a convention to be a risky venture. Some of the aims expressed by others favoring such a convention strike me as ineffective, unwise, or even reckless. I share the widely held view that our government is broken, but I strongly hope that we can solve our problems without a constitutional convention. I believe that Congress could and would enact laws restoring its ability to represent the public good if, but only if, we amend the Constitution to overrule the Supreme Court's fantasy that corporate campaign expenditures are an exercise of free speech protected by the First Amendment.

I. THE CAUTIONARY TALE OF PHILADELPHIA

I remind this assembly of the elegant image of the Founding Fathers when they gathered in Philadelphia. The images we have of them portray wisdom and mutual respect. But it is important to recognize that there were many compromises being negotiated among their conflicting aspirations, ambitions, and values. Some of their exchanges were bitter. It was not easy for them to come up with anything resembling a constitution. Indeed, they were not proud of their handiwork. Some walked out of the meeting. Even James Madison and George Washington, who summoned the meeting in Philadelphia, were reluctant to sign and were slow to advocate its ratification by the states. And the presidential election of 1800 was a nightmare of confusion that resulted from bad draftsmanship in Article II as written at Philadelphia.

Those who remained in Philadelphia to sign the draft at least agreed that the government led by the Continental Congress was intolerably incompetent. There was no prospect that that body could maintain stability among the thirteen former colonies or conduct foreign relations on behalf of all. There was but modest hope that the government they devised might perhaps do a better job. Our situation today in the twenty-first century is not all that different. Our present Congress is widely recognized as not very competent. In its incompetence, our Congress even resembles the Continental Congress.

Should we, therefore, summon another meeting in Philadelphia to fix our broken government? Who would we want to invite to address the problems of its incompetence? Do we really require another Philadelphia

meeting of citizens, free to design our new government? I pray not. If you thought about picking up an equal number of our fellow citizens in 2012 and asking them to do what those Founders did in Philadelphia in 1787, I would not expect to be happy with their results. Some of the suggestions made at this 2010 Cooley Symposium are proposals with which I would strongly disagree. And, incidentally, as a student of Justice Thomas Cooley, I think he would share most of my misgivings.

I think Justice Cooley might point to California as an example of why an Article V conference, empowered to rewrite the Constitution, is frightening. We do not have an image of those who wrote the present California Constitution. A reason is that it was the people of California who wrote it, mostly by referenda and initiatives. California once had a pretty good constitution and an excellent state government for a century or so, until The People started rewriting it. As a result, the government of California simply does not work anymore. Voters initiate and ratify laws that they are not willing to pay to enforce. For a simple, current example, they vote to maximize sentences for the criminal conduct they disapprove of, but then they do not vote to raise the funds needed to build prisons to house those convicted and sentenced.

The root problem of popular government is that We the People are not very well informed. California voters can agree on the need to punish crime but cannot at the same time reflect together on the secondary consequences of their decisions. As a wise veteran of politics declared, democracy is the worst form of government except for all the others.

Local governments in stable communities may be different. Many issues of the sort that our local governments confront are pretty fully understood by the neighbors who are affected and who share many of the interests to be served. But as we encounter larger issues presented by an unstable economy of continental and now global dimensions, operating through many diverse and complex technologies, serving a population of cultural diversity divided by class, and facing numerous complex environmental issues, it is not reasonable for the people to suppose that their popular answers to our cosmic problems can be made to work. The California example provides a strong caution against opening the constitutional scheme up to popular choice and doing Philadelphia all over again. We require a government that is at once aware both of popular values and of the realities of the global marketplace, its natural environment, and the prevailing human condition.

II. THE IMPERATIVE NEED FOR AMENDMENT: CORRUPTION

Our governments have become seriously dysfunctional. A major cause is the corruption resulting from costly political campaigns funded by private sources seeking enactments and enforcements of laws beneficial to

themselves. Eighty percent of American citizens perceive that Washington is broken. And few would perceive their state governments to be much better. The reality is that even the most honest representatives whom we elect to pursue the public good are forced by reality to negotiate their decisions with other officials whose elections were bought. And even the best public servants are likely to depend on campaign funding, requiring large investments of their time and energy. Negotiating the enactment of laws drafted to serve the public good was never easy because of our disagreements over the identity of the public good. But it is almost impossible when the public good must be compromised with the private benefits purchased by generous campaign contributions.

Congress has repeatedly addressed this problem with bipartisan support, most recently by the Bipartisan Campaign Reform Act of 2002 (McCain–Feingold) regulating campaign finance. State legislatures have also enacted many laws regulating the finance of campaigns. The problem became acute in the 1960s as political campaigns became dependent on the use and misuse of expensive media. But state and federal laws addressing the problem have all been thrown in the ditch by the United States Supreme Court.

It bears special notice that the Court has not even distinguished the contributions made by lawyers and litigants to secure the election of their preferred judicial candidates. The purpose served by judicial elections is fundamentally different from elections of other officials; the aim was and is to secure greater independence and integrity in the judicial institutions that adhere to that practice. It may not be a very good idea, but that assessment depends on the circumstances and the alternatives. But making large contributions to a judicial campaign is much less an expression of political aims than are contributions to Congressional campaigns. The United States Supreme Court has no business rewriting state constitutions to make state judges more like themselves. And a big contribution to a judicial candidate is almost surely intended to influence the outcomes of disputed cases. State laws have, for this reason, distinguished judicial elections from others with respect to the law governing campaigns and funding. But Supreme Court Justices demonstrated their lack of common sense in applying their misguided conception of the First Amendment to make the election of state judges auctions to be won by the higher bidders.

In North Carolina, we have tried to deter the corruption of our courts by campaign contributions by means of public funding. This scheme was replicated in New Mexico, Wisconsin, and West Virginia. But it is a system that remains vulnerable to big spenders such as the United States Chamber of Commerce. An important feature of those state laws is a provision for “matching funds” awarded to candidates who accept limited public funding and are then challenged by candidates outspending the state fund. In 2011, the Supreme Court held that even this scheme violates the First

Amendment because it deters the exercise of the right, the Court has declared, to spend money to influence elections and, thus, government. North Carolina and three other states are forbidden to protect the integrity of their judicial elections.

The 2010 decision of the Supreme Court declaring the right of corporations to fund election campaigns was merely a break in the last straw of integrity in our political processes at both state and federal levels. Its rotten 2010 decision invalidating the bipartisan McCain–Feingold law has now been followed in 2011 by its ludicrous declaration that corporations are people entitled to the rights of citizens. Never mind that the only legitimate function of corporate executives is to maximize profits at whatever cost or consequence to fellow citizens. The job of corporate executives is to concentrate on the bottom lines appearing in their next annual reports. Indeed, Adam Smith, the great theorist of market economics, warned us in the eighteenth century that moral constraint depends on human contact. Corporations are fundamentally and congenitally amoral.

III. CONCLUSION

My qualified support for states calling for an Article V convention is, therefore, dependent on the accompaniment of their calls with a statement that the correction of campaign-finance law would be the aim and that the convention will be cancelled if the Constitution is meanwhile amended to correct the misdeeds of the Supreme Court in constitutionalizing the right of wealthy citizens and even, for heaven's sake, business firms to pay politicians' campaign expenses in exchange for preferential conduct of government.

But we have to do what we have to do. The Supreme Court's decisions to treat campaign money as speech simply must be reversed if our broken government is ever to be repaired.