CONCURRING OPINIONS

(First Amendment News) — Justice Stevens' Proposal to Amend the 1st Amendment

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While the Justices busily prepared their respective opinions in theMcCutcheon campaign finance case, one of their Brethren was preparing to release a book that calls on Americans to reverse some of his former colleagues' constitutional handiwork. The forthcoming book is Six Amendments: How and Why We Should Change the Constitution (Little, Brown & Co., pp. 170). The author is Justice John Paul Stevens.

This short book is offered up against the backdrop of Justice Stevens' co-authored opinion in McConnell v. FEC (2003), his dissents in Colorado Republican Federal Campaign Committee v. FEC (1996), Randall v. Sorrell(2006), Davis v. Federal Election Commission (2008), and Citizens United v. FEC (2010), his criticism of that case in his Five Chiefs: A Supreme Court Memoir (2011), and in his various criticisms of the Court's campaign finance jurisprudence in his print and TV interviews along with his public addresses. Moreover, it is highly likely that Justice Stevens is just as critical of the Court's recent 5-4 decision in McCutcheon v. FEC. In short, John Paul Stevens is a man on a constitutional mission.

Quite apart from Citizens United, Justice Stevens has long had serious reservations about vindicating First Amendment claims in most campaign finance cases. Coming onto the Court shortly after Buckley v. Valeo(1976), he witnessed firsthand what Justice William Brennan and his colleagues had wrought in sustaining several of the First Amendment claims urged by Senator James L. Buckley, presidential candidate Eugene McCarthy, and the ACLU. It left him, he recalled in Five Chiefs, with an "extreme distaste" for that precedent. That distaste, he added, "never abated, and I have felt ever since that the Court would have been best served by inserting itself into campaign finance debates with less frequency."

Given that, he thinks it is time to resort to Article V for a constitutional remedy. Admittedly, it is (and should be) difficult to amend the Constitution. From 1789 to April 2014, some 11,539 amendments have been proposed, but only twenty-six have been ratified. But that fact has not deterred the retired Justice from Hyde Park, Chicago. Here, then, is the text of the 43 words Justice Stevens would add to the Constitution in order to amend the First Amendment.

Neither the First Amendment nor any other provision of this Constitution shall be construed to prohibit the Congress or any state from imposing reasonable limits on the amount of money that candidates for public office, or their supporters, may spend in election campaigns.

(Though the publication date is not until April 22, the text of the above language, which has been confirmed to be the final text, has heretofore appeared here and here and here.)

Reactions from Select 1st Amendment Scholars & Lawyers

Professor Martin Redish, a noted First Amendment scholar who teaches at Justice Stevens' alma mater, takes exception to this proposed constitutional amendment: "As much as I respect Justice Stevens, I believe that his proposed amendment is sorely misguided."

“Its inescapable impact would be to reduce dramatically the flow of information and opinion to the voters about political campaigns, thereby substantially undermining core goals of the First Amendment and its role as a facilitator of democracy. The simple fact is that speech costs money, and by limiting the amount of money that candidates and supporters can spend the provision would necessarily limit the flow of often valuable expression which could help the voters perform their governing function in the voting booth.”

”Moreover, Justice Stevens’ proposal would have the inescapable effect of locking in non-monetary inequalities—for example, incumbency, political connections or fame— perversely, in the name of equality. These are inequalities that have traditionally been diluted by opponents’ use of money to equalize the voters’ awareness of the candidates.”

”Finally, the provision would create an interpretive nightmare. How much money is “reasonable”? Would it differ from state to state? From campaign to campaign? And who gets to decide? Would courts invoke strict scrutiny or rational basis review of the legislature’s judgment? To give the authority of determining how much is “reasonable” to a state legislature invites the fox to watch the hen house: legislators who will stand for reelection will naturally attempt to shape the limits in a way that facilitates their continued victory. Also on an interpretive level, enormous uncertainty would be created by the task of determining who is a “supporter” of a candidate. And even if courts were somehow able to establish coherent interpretive standards for that word, is it appropriate for the Constitution to engage in what amounts to viewpoint-based discrimination by giving preferences to those who are neutral over those who have chosen to support a particular candidate?”

“In sum, Justice Stevens’ proposal would bring about all of these nightmares—political, social, and interpretive. We would be left with a doctrinal morass and a substantial disruption of the flow of information and opinion fundamental to the operation of the democratic process. To be sure, there are problems with our current campaign system, but as Madison warned in Federalist No. 10, sometimes the cure is worse than the disease.”

Professor Steven Shiffrin, another noted First Amendment scholar, takes a different view: “The proposal of Justice Stevens directly speaks to the major evil confronting our elections and our democracy. Nonetheless, I worry that conservatives on the Court, as they have in the past, will make a distinction between commentary on issues and election commentary allowing the former, but not the latter. They have previously ruled that commentary was about issues rather than candidates even when the purpose and effect of the commentary was to influence the outcome of an election. This loophole could seriously undermine the purpose of the proposed amendment.”

Such comments notwithstanding, Justice Stevens is “confident that the soundness” of his proposal “will become more and more evident, and that ultimately [it] will be adopted.” The purpose of his forthcoming book, he tells us, “is to expedite that process and to avoid future crises before they occur.”

Not surprisingly, Robert Corn-Revere, a noted First Amendment lawyer, was also skeptical of the Justice’s amendment idea: “The idea of proposing an amendment to reverse Supreme Court decisions one doesn’t like is not new – witness the myriad amendments that purported to ‘fix’ the First Amendment in the wake of the flag burning cases Texas v. Johnson and U.S. v. Eichmann. But such a thing is rare when it comes from a retired Supreme Court justice, and even more surprising is the degree of latitude the proposed language would give government to restrict our most basic rights. I would have hoped Justice Stevens’ long experience with Fourth Amendment jurisprudence would have suggested the danger of giving the courts power to decide which abridgements are ‘reasonable.’”

Two Opposing Views

– John Nichols & Robert McChesney, Dollarocracy (2013): "Every major reform period in American history…has been accompanied by numerous amendments to the Constitution, amendments that were deemed unthinkable until almost the moment they were passed. If the problems faced at this point in the American journey are going to be solved, history suggests constitutional amendments will be a significant part of the process"

– Laura W. Murphy, director, ACLU Washington Legislative Office (June 2012): "If there is one thing we absolutely should not be doing, it's tinkering with our founding document to prevent groups like the ACLU (or even billionaires like Sheldon Adelson) from speaking freely about the central issues in our democracy. Doing so will fatally undermine the First Amendment, diminish the deterrent factor of a durable Constitution and give comfort to those who would use the amendment process to limit basic civil liberties and rights. It will literally 'break' the Constitution."

Other Proposed Amendments to the First Amendment re Campaign Finance Issues

Following the McCutcheon ruling, there have been renewed calls for a constitutional amendment. For earlier ones, see below:

Proposed Constitutional Amendment by Tom Udall (NM), Michael Bennett (CO), Tom Harkin (IA),Dick Durbin (IL), Chuck Schumer (NY), Sheldon Whitehouse (RI), & Jeff Merkely (OR) – ("[Sect. 1] Congress shall have power to regulate the raising and spending of money and in kind equivalents with respect to Federal elections, including through setting limits on—''(1) the amount of contributions to candidates for nomination for election to, or for election to, Federal office; and ''(2) the amount of expenditures that may be made by, in support of, or in opposition to such candidates. [Sect. 2.] A State shall have power to regulate the raising and spending of money and in kind equivalents with respect to State elections, including through setting limits on—''(1) the amount of contributions to candidates for nomination for election to, or for election to, State office; and ''(2) the amount of expenditures that may be made by, in support of, or in opposition to such candidates. [Sect. 3] Congress shall have power to implement and enforce this article by appropriate legislation.")

Proposed constitutional amendment by Donna F. Edwards (D-MD) and John Conyers (D-MI) [Sect. 1] "Nothing in this Constitution shall prohibit Congress and the States from imposing content-neutral regulations and restrictions on the expenditure of funds for political activity by any corporation, limited liability company, or other corporate entity, including but not limited to contributions in support of, or in opposition to, a candidate for public office. [Sect. 2] Nothing contained in this Article shall be construed to abridge the freedom of the press."

Rep. Ted Deutch, D-Fla (House) and Sen. Bernie Sanders, Vt. (Senate) introduced the followingproposed constitutional amendment: ''[Sect. 1] The rights protected by the Constitution of the United States are the rights of natural persons and do not extend to for-profit corporations, limited liability companies, or other private entities established for business purposes or to promote business interests under the laws of any state, the United States, or any foreign state. [Sect. 2] Such corporate and other private entities established under law are subject to regulation by the people through the legislative process so long as such regulations are consistent with the powers of Congress and the States and do not limit the freedom of the press. [Sect. 3] Such corporate and other private entities shall be prohibited from making contributions or expenditures in any election of any candidate for public office or the vote upon any ballot measure submitted to the people. [Sect. 4] Congress and the States shall have the power to regulate and set limits on all election contributions and expenditures, including a candidate's

own spending, and to authorize the establishment of political committees to receive, spend, and publicly disclose the sources of those contributions and expenditures.''

Geoffrey Stone, "Fixing Citizens United," Huffington Post, June 12, 2012 ("In order to ensure a fair and well-functioning electoral process, Congress and the States shall have the authority reasonably to regulate political expenditures and contributions.")

Laurence Tribe, "The Once-and-for-All Solution to Our Campaign Finance Problems," Slate, June 13, 2012 ("Nothing in this Constitution shall be construed to forbid Congress or the states from imposing content-neutral limitations on private campaign contributions or independent political campaign expenditures. Nor shall this Constitution prevent Congress or the states from enacting systems of public campaign financing, including those designed to restrict the influence of private wealth by offsetting campaign spending or independent expenditures with increased public funding.") (See also here: Larry Tribe: "[A]lthough at one point I thought some such amendment would be wise to consider seriously, I haven't joined forces with those who currently urge vigorous pursuit of the amendment path, which I think probably represents a political dead end.")

Move to Amend ("[Sect. 1] The rights protected by the Constitution of the United States are the rights of natural persons only. Artificial entities established by the laws of any State, the United States, or any foreign state shall have no rights under this Constitution and are subject to regulation by the People, through Federal, State, or local law. The privileges of artificial entities shall be determined by the People, through Federal, State, or local law, and shall not be construed to be inherent or inalienable. [Sect. 2] Federal, State, and local government shall regulate, limit, or prohibit contributions and expenditures, including a candidate's own contributions and expenditures, to ensure that all citizens, regardless of their economic status, have access to the political process, and that no person gains, as a result of their money, substantially more access or ability to influence in any way the election of any candidate for public office or any ballot measure. Federal, State, and local government shall require that any permissible contributions and expenditures be publicly disclosed. The judiciary shall not construe the spending of money to influence elections to be speech under the First Amendment.")

State Resolutions and Ballot Initiatives – Passed (see here re commentary)

Professor Lawrence Lessig has called for a constitutional convention. ("We should begin the long discussion about how best to reform our democracy, to restore its commitment to liberty and a Republic, by beginning a process to amend the Constitution through the one path the Framers gave us that has not yet been taken — a Convention.")

For a contrary view, see John Samples, "Move to Defend: The Case against the Constitutional Amendments Seeking to Overturn Citizens United," Cato Institute, April 23, 2013.

For yet another such view, see Ilya Shapiro, "To Fix Our Campaign Finance System, Liberalize Political Speech Rather than Restricting It," July 24, 2012 (testimony before Subcommittee on the Constitution, Civil Rights, and Human RightsCommittee on the Judiciary, U.S. Senate).

For a related perspective, see Bradley A. Smith, "Separation of Campaign and State," Volokh Conspiracy, April 7, 2014 ("What is needed to protect free speech and our basic democratic institutions, and what I believe the Constitution was intended to provide, is a robust doctrine that prevents state interference with the process by which the government is selected — a doctrine of separation of campaign and state . . . . ").

See generally Ronald Collins & David Skover, When Money Speaks: The McCutcheon Decision, Campaign Finance Laws & the First Amendment (April 2014) (Chapter 8, re proposed reforms, etc.)