

Testimony of
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**SP0173 - JOINT RESOLUTION MAKING AN
APPLICATION TO THE CONGRESS OF THE
UNITED STATES CALLING AN ARTICLE V
CONVENTION TO PROPOSE AN AMENDMENT
ADDRESSING CAMPAIGN FINANCE REFORM**

I am honored to have the opportunity to offer my views about SP0173, a resolution calling for an Article V convention to propose an amendment addressing campaign finance reform.

I have been a law professor for more than 30 years. I have written extensively about the Article V convention process. I have testified in legislatures across the nation supporting calls for an Article V convention. I am eager to support a call from Maine to address the core challenge that our democracy now faces.

Maine has long battled the corrupting influence of money in politics. You were one of the first states to adopt citizen funded elections. You have been a leader in democratic reform, including most recently ranked-choice voting. In 2023, you passed by 86% an initiative to bar entities owned or influenced by foreign governments from spending to influence state elections. And just last year, with 74.9% of the vote, you passed an initiative to limit contributions to committees making independent expenditures (so-called “SuperPACs”).

All of these reforms address a persistent problem in American democracy — that those who can't win at the ballot box seek other ways to achieve their goals. Their best strategy is money: If they can create a dependence upon them, the funders, they can amplify the importance of their own views. As anyone in American politics recognizes, very few succeed without significant financial support; those who offer that support are therefore enormously influential. Boss Tweed, the 19th century Boss of New York's Tammany Hall used to say, "I don't care who does the electing, as long as I do the nominating." The funders of campaigns are our 21st century Boss Tweeds.

Though there has been important work to rally Congress to propose an amendment addressing the corrupting influence of money in American politics, history teaches that Congress is unlikely to act *unless* there is pressure from the states demanding it. The most effective way to create that pressure is the Article V movement. It was the threat of an Article V convention that triggered Congress to propose the Bill of Rights. It was the threat of an Article V convention that got Congress to propose the direct election of Senators. And it will be the threat of an Article V convention that will get Congress to propose an amendment to end the corrupting influence of money in American politics.

I know that many in this legislature are familiar with the arguments in favor of a convention. Senator Bennett has been a longstanding and powerful advocate.

My aim in this testimony is to describe a change in the legal landscape surrounding a convention that radically reduces its risks. Though many have argued for many years that a convention is too dangerous because it could "run away," the United States Supreme Court has now signaled a clear and legally enforceable way to assure that no convention would reach beyond its authorizing mandate.

I outline the argument behind this authority below. In addition, I offer one innovative way that Maine might determine how their delegates are bound. Finally, I include arguments that I have previously made to this committee in 2023 supporting an earlier initiative — SP0705.

States have the power to bind their delegates at an Article V convention

Though the Constitution does not specify how a convention would be constituted, America's long experience with state conventions demonstrates that this is not uncharted territory. There are many proposals for how delegates from each state would be selected to participate in a convention. For my purposes, how they are selected and who they are doesn't matter. The critical point I would add to this debate is this: Whoever they are, and however they are selected, Maine law could constrain how they vote at the convention.

The precedent that supports this critical power is the Supreme Court's *Electors Cases*, 140 S.Ct. 1261 (2020). In those cases, the Court upheld the power of a state legislature to direct how presidential electors vote on Electors Day. More importantly, the Court upheld a procedure for automatically removing and replacing any elector who did not cast their ballot as directed.

These two holding have obvious relevance to an Article V convention. Indeed, their conclusions are even clearer with a convention than with presidential electors. Presidential electors are a constitutionally specified office. The original expectation and early tradition was that they would have discretion in their vote. Yet, modern understandings about democracy drove the Court to recognize a power in state legislatures to direct electors to vote as the people had. That directive could be enforced either through fines, or through

an automatic mechanism that removed an elector voting improperly immediately, and replaced them with another.

This authority could likewise be relied upon to constrain electors at an Article V convention. In the legislation selecting delegates to send to a convention, the legislature could direct the rule by which delegates must vote. That rule could specify how the delegate must vote on certain substantive issues. It could direct as well that the delegate not vote to change the focus of the convention, or to change its rules. Importantly, the legislation could establish an automatic mechanism for replacing a delegate who fails to vote properly, nullifying the vote and replacing it with an alternate's vote. Those provisions could be made enforceable through expedited procedures in a local court.

This fact removes one of the most persistent objections to an Article V convention — that it could “run away,” or act beyond its mandate. As I describe below, I don't believe that argument was ever historically sound. But whatever its soundness before, the legal landscape has changed. Legislatures now have the power to assure that a convention does not act beyond its mandate. That power can be enforced judicially.

Maine should explore tying the binding obligations of delegates to a Maine Citizen Assembly

Across America and the world, the most important democratic innovation changing the relationship of the people to their government is the citizen assembly. Maine should authorize a citizens assembly to review the amendments being proposed by advocates for an Article V convention. If those assemblies prove trustworthy, the legislature could then decide to link the vote of delegates to an Article V convention to the determination of a Maine citizen assembly.

A citizen assembly is a random, representative selection of citizens, brought together to deliberate on matters of public import. The citizens are given preparatory material about the topic in advance. That material is developed in a cross-partisan manner to assure all sides are fairly represented. The citizens then deliberate together, in small groups and then in a single body. They have given their views in advanced. After deliberation, they give their views again.

This process has been used internationally to address critical issues that government has failed to address. In Ireland, citizen assemblies addressed abortion regulation and same-sex marriage. The recommendations from those assemblies were then ratified in referendum at a higher rate than the assembly itself had recommended them. France has used citizen assemblies to address climate change and end of life decisions. Parts of Belgium are using citizen assemblies to determine important local issues regularly.

Maine was the first state to adopt clean elections in America. It was the first to embrace ranked-choice voting. It is the first to pass an anti-SuperPAC initiative. I would urge you to consider becoming the first to authorize the establishment of a citizens assembly to address constitutional change in America.

This process need not be costly. There is a broad range of philanthropic resources now being invested in citizen assemblies across America, as well as non-profits expert in developing and executing them. I am certain that there would be many eager to help Maine take the lead on this innovation for constitutional reform. All it would require from this legislature is legislation authorizing the process, and requiring that the results be presented to the legislature.

An Article V Convention Would Not “Run Away”

There have been two “run away” arguments advanced against an Article V convention. The first fears the convention might change the rules for an amendment’s adoption. The second fears a convention might consider matters not within the scope of the convention call. Even without legislation directing how delegates must vote, neither of these concerns is substantial.

1. *A convention cannot change the rules for an amendment’s adoption*

Citing the 1787 convention that drafted our own constitution, some argue that an Article V convention could change the requirements for an amendment’s adoption. There is no basis in fact for this argument.

First, while our constitution was adopted outside the rules for amending the previous constitution, the Articles of Confederation, it was not the convention that specified the rules. The convention was called by the Continental Congress; in its report back to Congress, it suggested a different method for adopting a new Constitution; Congress accepted the convention’s recommendation, and called upon the states to consider the new constitution under its revised rules. That decision was controversial, but, critically, *it was not a decision of the convention*. Congress chose the method by which the work of the convention was ratified. The proper modern analog for this precedent is therefore this: Does anyone believe that Congress has the power to change the constitution’s rules for adopting an amendment simply by announcing such new rules?

Second, unlike an Article V convention, the 1787 convention was not convened according to any power in the then

existing Articles of Confederation. It was therefore not bound by any constitutional rules. By contrast, an Article V convention is limited by the express terms of the Constitution. As the text directs, the convention is a “convention for Proposing Amendments,” which “shall be valid” only if “ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof,” as Congress shall direct. Again, no convention could operate beyond these plain constraints.

2. *Rules adopted by the Assembly of State Legislatures limit the topics a convention might consider to those with the support of 34 states. That rule is not amendable.*

The most ambitious effort by state legislatures to craft rules for an Article V convention expressly limits the topics that the convention might consider. As Rule 5.6.1 specifies,

The Convention is limited to proposing only an amendment or amendments to the Constitution of the United States whose subject(s) were specifically included in the resolutions of at least two-thirds of the several States. This Convention has no authority to consider any other subject or entertain any motion to consider any other subjects. Any motion not within the scope authorized by each and every one of the resolutions passed by at least two-thirds of the Legislatures of the several States shall be ruled out of order.

The rules further specify that Rule 5.6.1 cannot be amended. Rule 1.3.3 governs amendments to the rules. That rule states explicitly that Rule 5.6 cannot be amended (“The provision

of this section shall not apply to Section 5.6., which shall not be amended or suspended.”).

As any American celebrates, revolutions are possible. But as every member of this Committee knows, a large collective body governed by clear rules specifying the terms of their own amendment is not a likely location of revolution. Advocates who seek to drive the convention to consider matters not supported by 34 states will find their efforts immediately ruled improper. And any convention that ignores its clear limiting rules risks being declared ultra vires.

Indeed, it is these rules that makes convention calls to address campaign finance so critical. Unless 34 states make a similar call, this topic will not be presented at the convention. We will therefore lose this enormously important opportunity to address this critical flaw within our own democracy.

Congress is unlikely to fix itself

When in 1787, Virginia delegate George Mason first insisted on the convention as a mode for amending, he argued the power of the states to call a convention was necessary because if “the Government should become oppressive,” then “no amendments of the proper kind would ever be obtained by the people.”

Whether or not our federal government is “oppressive,” it is perfectly obvious that it is unlikely to propose amendments that could address the deeply unrepresentative system that has evolved in America. Both parties depend upon big and dark money to get elected (Democrats raised and spent more dark money in 2020 than did Republicans); both parties depend upon gerrymandered districts to protect their

incumbents (84% of congressional elections were decided by 10+ point margins); both parties are filled with representatives seeking lifetime tenure (the average tenure of members of the Senate is now greater than members of the former Soviet Politburo; the House is just about equal); and both parties are committed to entrenching their own parties, despite the majority in America being independents (49% consider themselves “independent,” almost 2x the size of either the Republican or Democratic party).

For Congress to propose any amendment requires two-thirds of Congress to agree. In an era of highly partisan politics, that majority is simply not obtainable. Even when members agree, the dynamics of partisan politics in Washington block cross-party votes. No one could argue in good faith that the fundamental problems of representation that our nation now faces are likely to be addressed by Congress.

An Article V convention could be different. Delegates to a convention need not raise money for campaigns. They need not worry about reelection. If well selected, they would see themselves as serving a higher purpose than the game of ordinary politics. That purpose could drive an extraordinary outcome.

Of course, none of this is guaranteed. A convention could fail to propose effective reform—just as every Congress has failed over the last 50 years. But the chance of failure is not a reason not to try.