



1-1-1996

# Book Review - Politics and the Constitution: A Review of Judge Malcolm Wilkey's Call for a Second Constitutional Convention

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## Recommended Citation

Charles D. Kelso & R. R. Kelso, *Book Review - Politics and the Constitution: A Review of Judge Malcolm Wilkey's Call for a Second Constitutional Convention*, 27 PAC. L. J. 1213 (1996).

Available at: <https://scholarlycommons.pacific.edu/mlr/vol27/iss3/6>

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## **Politics and the Constitution: A Review of Judge Malcolm Wilkey's Call for a Second Constitutional Convention**

IS IT TIME FOR A SECOND CONSTITUTIONAL CONVENTION? BY JUDGE MALCOLM R. WILKEY. The National Legal Center for the Public Interest, Washington, D.C. 1995. Pp. viii, 214.

Reviewed by Charles D. Kelso\* and R. Randall Kelso\*\*

This book, an expanded version of lectures given by Judge Wilkey in 1993 at Brigham Young University, calls for a second Constitutional Convention.<sup>1</sup> The book also includes comments by seven accomplished persons and a reply to each comment by Judge Wilkey.<sup>2</sup>

### **I. JUDGE WILKEY'S THESIS**

Judge Wilkey opens with his conclusion that our current constitutional system has failed because of three fundamental problems of modern American politics: gridlock, near perpetual incumbency, and unaccountability of our representatives to the electorate.<sup>3</sup> Gridlock, says Judge Wilkey, is "the inability to pass constructive legislation because of conflicting, neutralizing forces built into the system."<sup>4</sup> He says that gridlock results primarily from three things: (1) Perceived reelection needs, *i.e.*, money and reliance on special interests which, in turn, disables representatives from making principled policy choices; (2) interbranch conflict, flowing from the decline of party loyalty and discipline, because of reliance on PAC money and from ticket-splitting and an anti-Presidential bias in Congress; and (3) interparty conflict, which aggravates interbranch tensions.<sup>5</sup>

Perpetual incumbency, says Wilkey, results from the cost of political campaigns, which makes it difficult to fund successful challengers to incumbents. It

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1. MALCOLM R. WILKEY, *IS IT TIME FOR A SECOND CONSTITUTIONAL CONVENTION?* 11 (1995) [hereinafter WILKEY].

2. See *infra* notes 28-42 and accompanying text (discussing these responses). There is also a Preface by Ernest Hueter, President of the National Legal Center for the Public Interest, at the inside front cover, and an Introduction by Roger Clegg, Vice President and general counsel of the National Legal Center, who served as editor. WILKEY, *supra* note 1, at 1-8. The National Legal Center is a tax-exempt, nonprofit public interest law firm, duly incorporated under the laws of the District of Columbia, to provide nonpartisan legal information and services to the public at large. *Id.* at ii.

3. WILKEY, *supra* note 1, at 11.

4. *Id.* at 19.

5. *Id.* at 19-30.

also results from incumbent name recognition and from the continually increasing size and power of the federal government.<sup>6</sup>

Unaccountability leads to various maneuvers, such as pretending to balance the budget and then enacting supplementary appropriations.<sup>7</sup> Also, gridlock leads to extra-legal actions by the President in foreign affairs and, thus, to executive unaccountability.<sup>8</sup>

According to Judge Wilkey, the above three aspects of the operation of our present constitutional system have led to unfortunate consequences in both the judicial and political arenas. Because of gridlock, the federal courts have been led to engage in judicial activism in order to "do good" in areas such as school segregation and legislative appointment where Congress had failed to act.<sup>9</sup> Such activism, viewed by Wilkey as the fourth fundamental problem of modern American politics, saps the willingness of the people to critique elected officials and is an anti-majoritarian element in what should be a democratic process.<sup>10</sup> In the political arena, unaccountability leads to unchecked growth in congressional staffs and federal programs and the temptation to avoid making hard choices while blaming the other party; the President is led to engage in extra-legal action in foreign affairs because gridlock prevents timely and proper congressional oversight; and the nation's election system, as a way of transforming the will of the people into law, is losing its vitality.<sup>11</sup>

Wilkey says it is not possible to eliminate gridlock, perpetual incumbency, unaccountability, or judicial activism, and their attendant negative consequences, without a realignment of power through constitutional change. The reason is that the needed reforms would threaten groups who do not want to give up their power and who fear change in the relative position of the federal versus the state governments, the President versus the Congress, and the Senate versus the House.<sup>12</sup>

Design of the needed constitutional changes, says Judge Wilkey, depends substantially on whether the new system will be run by office-holders, who are a professional political class with consecutive terms in office (career politicians), or "persons of demonstrated talent drawn from different walks of life, for specific terms, who will return relatively quickly to private life."<sup>13</sup> Judge Wilkey prefers

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6. *Id.* at 30-34.

7. *Id.* at 34-36.

8. *Id.* at 37.

9. *Id.* at 39-43.

10. *Id.* at 11, 43-46.

11. *Id.* at 20-22, 27-29, 31-34.

12. *Id.* at 21-22. As Wilkey notes,

"No one has claimed that the officeholders today are less honest, intelligent, or hardworking than fifty years ago. . . . So, if the undeniable deficiencies are not in the individuals involved, where and what is the problem? It must be systemic . . . . The principal cause of paralysis is the incumbents' perceived need for reelection."

*Id.* at 21.

13. *Id.* at 49.

the second model, which he calls the "Cincinnatus" model, because he thinks the present system of career politicians has failed dismally and that such a system will inevitably result in a federal government of elephantine or even dinosaurian proportions.<sup>14</sup>

The first and most basic change, says Judge Wilkey, a change needed to deal with perpetual incumbency, would be to provide for congressional and presidential term limits, or no consecutive reelection to the same office.<sup>15</sup> Also, Wilkey would have Supreme Court Justices serve fifteen-year staggered terms.<sup>16</sup>

A number of other reforms would make sense, he says, in aiding the effective functioning of government, under either the career politician or the Cincinnatus model. To deal with gridlock, Judge Wilkey would have a new Constitution provide as follows:

1. For the President: a line-item veto; a balanced-budget amendment or a requirement that additions to the President's budget be passed by extraordinary majorities; a requirement that Congress would have to vote the President's budget up or down in designated categories before it could consider budgetary proposals of its own; no Senate confirmation for most presidential appointments; fewer obstacles to treaty ratification and clarification of the extent to which Congress shares the President's power in foreign affairs, particularly the war power; a power to propose specific categories of legislation by referendum; changes in the character and timing of presidential elections and conventions to make them shorter and less costly; and, if elections for the House and Senate are changed to six-year terms, a term of six years for the President, with no immediate reelection,<sup>17</sup>
2. For both the President and Congress: reciprocal powers to dissolve Congress or vote no confidence in the President (with either to result in a special election for all offices); the ability of members of Congress to serve in the cabinet; the ability of the President and cabinet members to address one or both houses of Congress; a

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14. *Id.* at 50-53.

15. *Id.* at 53-57.

16. *Id.* at 105-06.

17. *Id.* at 75-84, 96-104. Because of his strong preference to coordinate presidential, House, and Senate elections in order to increase governmental accountability, Wilkey notes that if the Constitution were amended to provide for an eight-year term for Senators and a four-year term for members of the House, the presidential term should remain at four years. *Id.* at 78. Judge Wilkey also raises the possibility of electing the president first, and then holding congressional elections a few weeks after that, so the "voters would know at the time they selected Members of Congress which party was going to control the presidency" and "the successful presidential candidate [could] take to the airwaves to explain his immediate priorities . . . in a forum a bit different from the presidential campaign, which so often is totally divorced from the local campaigns for the Senate and the House." *Id.* at 92.

nonpartisan commission to lay out House districts every 10 years; and the elimination of staggered terms with Senate and House members elected only in Presidential election years.<sup>18</sup>

To eliminate unaccountability, Judge Wilkey supports these provisions in a new Constitution:

1. For Congress: longer terms, fewer Members, and larger districts for the House, with higher salaries fixed by an outside commission.<sup>19</sup>
2. For the States: To reinvigorate the role of the states, the Constitution should provide that specific powers are for the states alone, and not the federal government.<sup>20</sup>
3. For the People: "None of the above" should appear as a choice on ballots; a nonpartisan commission should lay out the House districts every ten years; and a Constitutional Convention should be held every 20 years.<sup>21</sup>

With regard to the mechanics for bringing these constitutional changes into reality, Judge Wilkey turns to Article V of the Constitution. That Article provides that, on the application of the legislatures of two-thirds of the states, Congress shall call a convention for proposing Amendments. Amendments proposed by such a convention will be valid as part of the Constitution when ratified by the legislatures of three fourths of the states, or by conventions in three fourths of the states, whichever mode of ratification Congress chooses.<sup>22</sup>

Wilkey says that Congress could use its power under the Necessary and Proper Clause to flesh out procedural questions such as how delegates would be chosen and who is eligible to be a delegate. Congress could also appoint a commission to study and propose substantive reforms. But Congress should not impose a straightjacket on the Convention. Indeed, Wilkey thinks that Congress probably would exceed its powers if it sought to prescribe the Convention's method of voting, or required an oath not to vote for any amendment on a subject not listed in the resolution calling for a Convention, or imposed a bar on considering any topic other than those specified by Congress, or refused to submit any proposed amendment to the states which violated a listed agenda, or banned judicial review of all disputes about the Convention's actions.<sup>23</sup>

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18. *Id.* at 84-96.

19. *Id.* at 70-74.

20. *Id.* at 106-08.

21. *Id.* at 108-10.

22. *Id.* at 126-29.

23. *Id.* at 133-35.

With respect to the danger of a “runaway” convention, Judge Wilkey says that the usual list of “horribles” conjured up by opponents to a convention<sup>24</sup> are highly controversial and no consensus could be formed to pass them. He admits that perhaps there is a valid fear about what the press would do with the Convention. The best we can hope for, he says, is for the Convention to work in committees and keep committee deliberations secret until a well-thought-out product is brought to the floor of the Convention. “Rumors and leaks will abound, but we cannot put off the Constitutional Convention any more than we can put off day-by-day legislation just because of the distortions which may appear in the press.”<sup>25</sup>

Wilkey says that a second Constitutional Convention should produce reforms that would make Congress and the President accountable, responsive, and effective. “Instead of permitting the Congress and the President to abdicate so much of policymaking to the courts, we ought to be devising—or revising—a framework to compel them to perform their constitutional duties.”<sup>26</sup>

Judge Wilkey devotes a chapter of his book to picturing how the government would function after his suggested reforms are adopted. He foresees a considerable increase in the effectiveness by which programs of the party that won the national election become transformed into law. The main reason is that all members of Congress and the President would be elected during the same year, and thus, it is likely that a majority of both houses would be members of the same party as the President. The members of Congress, being new and much more frequently political amateurs, would tend to leave foreign affairs in the hands of the President. Further, the President’s budget would be approved rather readily because of the new constitutional requirement that Congress vote the President’s budget “up or down in designated categories” before it can consider budgetary proposals on its own, and the President would have a line-item veto to veto specific provisions in the congressional budget the President did not like. Though the President’s power is enhanced, there would be plenty of interaction between the President and Congress, says Wilkey, especially because members of Congress would be serving in the cabinet.<sup>27</sup>

Because Judge Wilkey’s book is advocacy for a Convention, it is not surprising that he does not provide an estimate of how likely he thinks it is that such a Convention will be held. Instead, he concentrates on supporting his conclusions: (1) that there is an imperative need to modify the structure and mechanisms of our federal government in order to restore its character as a limited government; and

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24. The judge supplies such a list: “[A]bolish the Bill of Rights or portions thereof; reverse several Supreme Court decisions; forbid all abortion, or legalize all abortion; allow prayer in the schools; forbid all guns or legalize all guns for self-defense; require an ironclad balanced budget, or one with loopholes; and compel revenue sharing with the states.” *Id.* at 131.

25. *Id.* at 132.

26. *Id.* at 137.

27. *Id.* at 111-21.

(2) that his recommended reforms would help bring that about, along with other desirable results.

## II. COMMENTATORS' REMARKS

Of the seven commentators to Judge Wilkey's remarks, only one, Terry Eastland,<sup>28</sup> gives an almost unqualified endorsement to Judge Wilkey's call for a Convention. Eastland agrees that a Convention should articulate new limits on the federal government by providing for term limits, a balanced budget, and a line-item veto. Eastland would require a supermajority (perhaps two-thirds) of both houses to raise taxes, impose new ones, or raise the debt ceiling. He notes that the election of 1994 brought to Washington a number of persons who believe that relimitation of the federal government is essential and overdue. However, not being confident that the GOP will succeed in that daunting task, he concludes that he is not willing to discount the possibility of movement for a Constitutional Convention.<sup>29</sup>

Former Attorney General Edwin Meese<sup>30</sup> agrees that the federal government is too big, costs too much, and is doing some wrong things. However, he does not see the federal government failing to do a good job because of gridlock. Instead, it exercises too much power and is engaged in issues with which it should not be dealing. Meese wants more power and authority returned to state and local government to deal with problems affecting the everyday lives of Americans. For him, the three most important items for reform are eliminating perpetual incumbency, reforming the budget process, and restoring the balance between the federal and state governments. However, he sees political and legal events—such as the Supreme Court's decision in *U.S. v. Lopez*,<sup>31</sup> and the election of 1994 and its aftermath—as events starting to move public policy in a desirable direction. Rather than having a Constitutional Convention, he believes that several events provide a desirable alternative and that alternative should be given an opportunity to succeed, namely, the new climate and membership of Congress, the public clamor for change, and the renewed vitality of the states, combined with the strategy of holding a conference of the states and the development of a state petition to the federal government.<sup>32</sup>

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28. Terry Eastland is a fellow at the Ethics and Public Policy Center in Washington, D.C., and the editor of *Forbes MediaCritic*. He has been a resident scholar at the National Legal Center for the Public Interest (1988-90) and the Director of the Office of Public Affairs at the Department of Justice (1985-88). *Id.* at 214.

29. *Id.* at 145.

30. Edwin Meese III is currently a Distinguished Fellow at the Heritage Foundation, where he holds the Ronald Reagan Chair in Public Policy. He is also a Distinguished Visiting Fellow at the Hoover Institution at Stanford University. *Id.* at 214.

31. 115 S. Ct. 1624 (1995); see *id.* (holding that Congress exceeded its power under the Commerce Clause when it enacted criminal penalties for possessing a gun within 1000 feet of a school).

32. WILKEY, *supra* note 1, at 169-83.

Other commentators on the merits of Judge Wilkey's proposal give various reasons for their negative appraisals. Walter Berns<sup>33</sup> cites Madison in support of his concern about the lack of stability that will result from a second Constitutional Convention, and Berns thinks it unlikely that such a convention would be in the hands of properly qualified people.<sup>34</sup>

Phyllis Schlafly<sup>35</sup> does not agree with Wilkey that all of the conditions he identifies as problems are in fact negative features of our present system. For example, she thinks it a tragedy that gridlock was not effective to stop the federal government from the colossal fiscal and social failure of its many welfare programs. Also, she is pleased that the Clinton health plan was stopped by gridlock. The whole process of holding a new Constitutional Convention, she says, would be a disaster.<sup>36</sup>

Michael E. DeBow and Dwight R. Lee<sup>37</sup> believe that gridlock is not one of today's major problems; the main problem, as they see it, is the growth of governmental power in this century. This leads toward private interests capturing the government and massive mistakes and miscalculations even in the absence of private interest manipulation or any corruption at all. DeBow and Lee foresee that any Constitutional Convention would be a political event largely in the hands of current office-holders dominated by short-term political considerations. For this reason, the Convention could not be relied upon to bring about effective campaign reform. They call, instead, for a simple political reform: Members of Congress should be asked to pledge not to vote for any new governmental program or activity that cannot be squared with the enumerated powers of Congress set out in Article I, Section 8 read as of the time of the Founding.<sup>38</sup>

Instead of focusing on Wilkey's critique of the present system or his proposals for change, Michael Stokes Paulsen<sup>39</sup> argues that Congress presently has a duty to call a Constitutional Convention. The reason, he says, is that 45 states have called for a Convention to consider various amendments, without conditioning their application on every other state seeking a Convention for the

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33. Walter Berns is John M. Olin Professor Emeritus at Georgetown University and a resident scholar at the American Enterprise Institute. *Id.* at 213.

34. *Id.* at 141-43.

35. Phyllis Schlafly is president of Eagle Forum, a conservative organization. She is also the author of 16 books, and is a syndicated columnist and radio commentator. *Id.* at 214.

36. *Id.* at 151-62. Specifically, Ms. Schlafly notes, "The whole process [of a Constitutional Convention] would be a prescription for constitutional chaos, controversy, and confrontation, along a road our nation has never traveled before, without any map or guidelines, and with no clear vision of our destination." *Id.* at 157.

37. Michael E. DeBow is Professor of Law, Cumberland School of Law, Samford University. Dwight R. Lee is Ramsey Professor of Economics, Terry College of Business, University of Georgia; and Adjunct Fellow of the Center for the Study of American Business, Washington University and the Center for the Study of Public Choice, George Mason University. *Id.* at 214.

38. *Id.* at 187-99.

39. Michael Stokes Paulsen is Associate Professor of Law at the University of Minnesota Law School. He served as attorney-advisor in the Justice Department's Office of Legal Counsel in the Bush administration. *Id.* at 214.



same reasons.<sup>40</sup> All the Constitution requires, says Paulsen, is that “thirty-four states want a Convention; they do not all have to have the same agenda.”<sup>41</sup> Judge Wilkey applauds Paulsen’s analysis, noting that the current Congress’ failure to pass critical amendments on term limits and the balanced budget proves once more that Congress, “no matter what its composition and no matter which party is in the leadership, is a hopeless proposition so far as producing any meaningful structural constitutional reform.”<sup>42</sup>

### III. OUR CRITIQUE

Judge Wilkey is a forceful advocate and his book is well organized and well written. However, like the majority of his commentators, we remain unpersuaded. Specifically, we think that his reforms, even if adopted by a Convention and the States, will not work as he foresees. Further, it is unclear what reforms might emerge from a second Convention if one were to be held, and we strongly suspect that this view is so widely shared that it is very unlikely such a Convention will ever be held. Finally, we doubt that a Convention is needed to consider the problems and reforms suggested by Judge Wilkey.

#### A. *Judge Wilkey’s Flawed Critique of the Current Democratic Process and His Proposal for a Constitutional Convention*

##### 1. *Why Judge Wilkey’s Reforms Are Not Likely to be Successful*

Judge Wilkey’s reforms will address the main procedural problems he has identified. Taken together, they will end perpetual incumbency; will reduce the likelihood of gridlock; and may result in greater accountability, since one party is more likely to control the entire federal government. The President’s budget would more likely be enacted, and the President would probably gain greater control over foreign affairs with less need to take extra-legal action. The Constitution’s provisions would restrain federal growth in relation to the States, and growth of the federal government would be restrained by a balanced-budget provision. With single-party control of the federal government, candidate campaign promises might more promptly find their way into the law. However, apart from the effect of specific constitutional limits on congressional power, gone from the system would be a number of the checks and balances that diffuse power between the President and Congress and which tend to promote deliberation on new legislative proposals. Under Wilkey’s proposed reforms, there would be little to hold back from enactment any proposal that attracts current

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40. *Id.* at 207-09.

41. *Id.* at 208.

42. *Id.* at 211.

approval of the party in power. Such proposals might call for vastly increased expenditures by the federal government. If the President's budget supported those ideas, it is likely that they would be enacted into law. And gone are effective political restraints on adventurous actions by the President in foreign affairs.

Suppose Wilkey's system had been in place in 1992. With six-year terms for the President and members of Congress, the Clinton presidency, with the Clinton Congress, would have had until 1998 to pass legislation without going to the voters again. Budgets reflecting the priorities in the 1993 budget could have been passed by close votes in each of the next few years. The 1993 budget did bring the country closer to a balanced budget, one of Wilkey's main priorities. Succeeding budgets, with similar priorities, could have done the same thing, all consistent with Wilkey's proposed budget reforms. With increased parliamentary discipline, bills like the Clinton health care plan might well have been enacted in 1994. Fewer constraints would be in place regarding Presidential foreign policy in places like Bosnia.

In terms of public accountability, it is perhaps better to have the House of Representatives elected every two years. The public can express its approval or disapproval at the way the country is being run, and can express, if wanted, its desire for a mid-course correction. While the public sorts out its sense of where the country should be going, perhaps a little gridlock is not so bad.

In addition, term limits may have some unintended consequences that are undesirable. First, they may enhance public officials' search while in office for post-term-limit employment. This creates potential conflicts of interest, the appearance of impropriety or corruption, and increased power for special interest lobbyists to promise office holders post-term-limit employment in exchange for favorable treatment today. Second, term limits may reduce the number of competitive elections, with credible potential challengers deciding to save their money and wait until the incumbent's term limit has expired and then run for the open seat. This is particularly true for short term limits of 6-8 years. Furthermore, with rapid turnover of office-holders, persons of great wealth may all too easily be able to generate politically significant name recognition and win election on that basis alone.

## *2. Why the Outcome of a Convention is Not Likely to be What Wilkey Foresees*

It is highly unlikely that a Constitutional Convention would produce a scheme that represents the kind of systematic thinking that Judge Wilkey desires. As a result of interest group lobbying and extraneous political considerations, the Convention is likely to be diverted to other topics than a unified plan. The drafters of 1787 were not too influenced by political currents of the day because they met in secret. That would be impossible today, with a crowd of radio, television, and newspaper journalists sure to be on hand. Further, there is no general agreement

on what needs to be done with respect to governmental restructuring except, possibly, to require budget-balancing within some reasonable length of time.

3. *Why a Constitutional Convention Should Not Be Held, Absent Extreme Circumstances*

It is widely appreciated that there is a need to preserve social cohesion created by the legitimacy associated with a long-standing constitutional system. The nation would risk losing that cohesion with a new Constitutional Convention. Major changes in constitutional structure should be taken only in extreme circumstances, for compelling reasons, like those which existed at the time of the original Constitutional Convention because of the deeply flawed nature of federal governmental power under the Articles of Confederation.

4. *Why Such Extreme Circumstances Do Not Exist Today*

Today, the nation does not face the kind of crises that brought the States together for a Convention in 1787. It is true, of course, that several important social programs, e.g., Medicaid, Medicare, and Social Security, need to be reformed because the resources dedicated to meeting currently promised future obligations are not sufficient. But these are areas subject to congressional control and a Constitutional Convention is not a legal necessity nor even a direct path toward controlling the growth of these programs. When public concerns are great enough, Congress is moved to act. For example, even without a Constitutional Convention both the Republicans and Democrats in Congress have been pushed by public opinion, and prodded by election results, to propose balanced budget plans.

B. *What May Be Behind Wilkey's Proposals: Substance, Not Process*

The results of the 1994 congressional elections belie most of the procedural problems that Wilkey says exist. When the people want more Republican rather than Democratic members of Congress, they vote for them, as they did in 1994. Those members of Congress who ignored their constituents' desires were held accountable at the polls; incumbency did not save them. At the present time, a balanced budget is an issue atop the agenda of both Congress and the President. Negotiations may break off, but balancing the budget will be a large theme in the 1996 campaigns of both parties, and both the President and congressional leaders have pledged a balanced budget in seven years, using Congressional Budget Office economic data. Federalism concerns, such as the elimination of unfunded mandates, are being addressed. These and other serious national problems are being dealt with by the regular political process, and change can come about in traditional political ways. The one aspect of trusting the political process to work

out these issues that is the most problematic, and the one aspect not yet being dealt with seriously by Congress, is campaign finance reform. However, campaign finance reform needs to be carefully considered to maximize democratic participation. It is not clear that the Constitution needs to be amended to do this, or that a Constitutional Convention would be the best way to bring about proper reform. Even Judge Wilkey does not have a clear, comprehensive proposal in mind with respect to this problem.<sup>43</sup>

In truth, most of Wilkey's litany of concerns—ideas which have been floating around for at least the last 10 years—derive mostly from the frustration of Republicans with Democrats controlling the House for the past 40 years; the Senate for 34 of the past 40 years; and Supreme Court majorities rendering opinions, until quite recently, viewed more favorably by Democrats than by Republicans. Because people in democratic elections have decided over the past 40 years to vote Democratic more than Republican for members of Congress, Wilkey, like many Republicans, appears to have decided that something must be wrong with the system. His real concern, however, is substance, not process.

Not surprisingly, because Republicans have had greater success in Presidential elections in recent years, Wilkey wants to increase the powers of the President. He wants to do this explicitly in a number of ways discussed above: (1) Line-item veto for the President, (2) additions to the President's budget must be passed by extraordinary majorities, (3) no Senate confirmation for most presidential appointments, and (4) fewer obstacles to treaty ratification.<sup>44</sup> His desire to move our system more to a Parliamentary system with coordinated voting, increased party discipline, and members of Congress serving in the President's cabinet, would also increase the power of the President as head of his party, and thus is also consistent with Wilkey's Republican leanings.<sup>45</sup>

Since the real problem motivating Wilkey is not process, but substance, to respond fully to Wilkey's argument one has to address the underlying substantive concerns Wilkey has on topics like a balanced budget, less power in Washington and more power to the states, and a less liberally activist Supreme Court. These matters are best understood in the context of a general examination of the nature of American politics. That, in turn, can help shed light on the extent to which there is a need for a new Constitutional Convention.

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43. See generally *id.* at 102-04.

44. See *supra* note 17 and accompanying text.

45. Though recent greater Republican success in presidential elections rather than election to Congress may account for Wilkey's preference for greater presidential power, it must be noted that as far back as the founding, conservatives like Alexander Hamilton wanted a stronger presidency, while progressives like James Madison and Thomas Jefferson put more faith in the legislature, properly checked. In general, it may be that conservatives prefer the greater structure and bureaucratic regularity of the executive branch, while progressives favor that branch of government typically thought to be closer to the people, the Congress, and particularly the House of Representatives.

C. *The Nature of the American Political Process*

1. *Four Basic Approaches to Political Issues*

The main issues in American politics can be classified under two headings: fiscal policy and social policy. One can have a conservative or progressive approach towards each. In general, a conservative fiscal approach gives high priority to the balance sheet, matching governmental costs with revenues to achieve a balanced budget. A progressive fiscal approach puts greater weight on using the government's fiscal resources to provide correctives to the business cycle to promote economic growth and lower unemployment. A progressive fiscal approach is thus willing to run deficits in order to stimulate the economy. Conservative social policy emphasizes the traditional moral values of the majority of the community and is reluctant to have government take over functions that might better be handled by private individuals, community organizations, or religious organizations. Progressive social policy focuses more on protecting the rights of individuals, particularly the rights of individuals in the minority or dissent, and responds to identified needs by looking for answers partly in government programs which protect individuals' health and safety concerns and provide a safety net for those in need.

Combining conservative and progressive approaches to fiscal and social policy yields four possible combinations of political perspectives. At one extreme are *traditional conservatives* who are conservative on both fiscal and social policy. In his heart, and in his rhetoric, President Reagan epitomized this kind of approach; Newt Gingrich and the House Republicans carry on this tradition today.

At the other extreme are *modern liberals* who are progressive on both fiscal and social policy. President Johnson epitomized this kind of approach in the 1960s. It is often associated today with the phrase "liberal Democrats in Congress."

Third, there is the *traditional liberal* approach of the 18th and 19th centuries, which was conservative on fiscal policy, but progressive on social policy. This was the position of Presidents Jefferson and Madison in the early 19th century. It is the position today of various groups in the center of American political debate who are looking for a third way between the House Republicans and the liberal Democrats in Congress. The "Big Tent" strategy of the Republicans, the "New Democrat" strategy of the Democrats, and various independent movements, such as those represented by Paul Tsongas or Bill Bradley, all are seeking to capture the essence of this approach.

Finally, there is a *modern conservative* position, progressive on fiscal policy, but conservative on social policy. President Nixon epitomized this approach with his fiscally progressive comment that "we are all Keynesians now," coupled with his socially conservative "law and order" approach. The modern conservative

position is also reflected in the socially conservative populism of Democrats like George Wallace.

## 2. *The Four Main Eras of American Politics*

As we have discussed elsewhere more fully, between 1789 and 1986, four main eras existed in American constitutional law. These eras reflect four different judicial decision-making styles: a natural law era, 1789-1872; a formalist era, 1872-1937; a Holmesian era, 1937-1954; and an instrumentalist era, 1954-1986.<sup>46</sup> Each one of the four approaches to political issues discussed in the previous section formed the backdrop for one of these four eras of constitutional law. Indeed, at its most elementary level, each of the eras of constitutional law was the product of the society which elected the Presidents and members of the Senate who, in turn, nominated and confirmed the Justices. Identifying these political currents and their connections to the judicial decisionmaking styles can help put contemporary politics into perspective.

The first age was the traditional natural law era, which existed from 1789-1872. The dominant judicial vision of this time was very protective of the individual on economic rights, and thus took a conservative approach to the takings clause, the contract clause, and other economic matters.<sup>47</sup> The judicial vision also favored protection of civil rights, and thus was progressive on civil liberty matters where the text of the Constitution so permitted.<sup>48</sup> Similarly, the dominant political vision of this age was fiscally conservative and socially progressive, reflecting the traditional liberal approach of the Enlightenment. This

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46. A full discussion of these eras and the judicial decision-making styles associated with them appears in R. Randall Kelso, *Separation of Powers Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Decision-Making*, 20 PEPP. L. REV. 531 (1993); and also in R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 VAL. U.L. REV. 121 (1994) [hereinafter *Styles*]; Charles D. Kelso & R. Randall Kelso, *Our Nine Tribunes: A Review of Professor Lusky's Call for Judicial Restraint*, 1995 SETON HALL CONST. L.J. 1289 (1995) (book review) [hereinafter *Nine Tribunes*]. See generally R. RANDALL KELSO & CHARLES D. KELSO, *STUDYING LAW: AN INTRODUCTION* 101-23, 261-310, 388-423 (1984).

47. See ROBERT K. FAULKER, *THE JURISPRUDENCE OF JOHN MARSHALL* 17 (1968) ("[Chief Justice Marshall] called the property right 'sacred.' Marshall considered it to be unequivocally a natural right, thus following such liberal republicans as Locke and Adam Smith"); see also KELSO & KELSO, *supra* note 46, at 512-13 (discussing the traditional natural law approach to cases involving economic rights), citing, *inter alia*, *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810)).

48. See generally KELSO & KELSO, *supra* note 46, at 512-13 ("With respect to personal rights, this was reflected in Jefferson's opening paragraph of the Declaration of Independence (the unalienable rights to 'Life, Liberty and the pursuit of Happiness'), the Constitution's Bill of Rights, and works such as Thomas Paine's *The Rights of Man* (1792)"). Of course, with regard to the issue of slavery, the plain text of the Constitution did not permit the Justices to do the progressive thing from the perspective of natural law. Instead, though the natural law judges themselves abhorred slavery, the plain text of the Constitution required them to uphold its constitutionality. See generally Donald N. Roper, *In Quest of Judicial Objectivity: The Marshall Court and the Legitimation of Slavery*, 21 STAN. L. REV. 532 (1969).

vision was represented during the early part of this era by the Jeffersonian and Jacksonian Democratic Party.<sup>49</sup> The cancer in the Democratic party represented by the institution of slavery, meant that the mantel for carrying out the Enlightenment vision of liberty and equality of opportunity represented in the Declaration of Independence passed during the last part of this era to the abolitionists and the Republican Party, which led the fight to pass the Enlightenment-inspired 13th, 14th, and 15th Amendments.<sup>50</sup>

The second age, the formalist era, lasted from 1872-1937. The judicial policy of this age was traditionally conservative on both fiscal and social policy. The courts placed a high priority on protecting business from economic regulation,<sup>51</sup> while the courts permitted the traditional moral values of communities to trample on individual civil rights.<sup>52</sup> Similarly, the politics of this age was dominated by Republican administrations catering to business interests and the traditional moral values of the community.<sup>53</sup>

The third age of judicial decision-making—the Holmesian age from 1937-1954—was brought about by President Roosevelt packing the Supreme Court with judges who would permit the government to enforce legislation reflecting Roosevelt's progressive view of fiscal policy, while continuing to allow traditional moral values of the community to trump individual rights in most

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49. Both Jefferson and Jackson were strong believers in a balanced budget and fiscally conservative policies, while being socially progressive in expanding the right to vote and protecting individual civil liberties, like freedom of speech, freedom of religion, and frontiersmen's individual freedom from governmental control. See generally ALF J. MAPP, JR., THOMAS JEFFERSON: A STRANGE CASE OF MISTAKEN IDENTITY 397-402 (1987) (discussing Jefferson's views as represented in his first inaugural address to the Nation); ARTHUR M. SCHLESINGER, JR., THE AGE OF JACKSON 306-21 (1945) (discussing Jacksonian democracy).

50. On the Civil War amendments reflecting Enlightenment-based thinking, see R. Randall Kelso, *The Natural Law Tradition on the Modern Supreme Court: Not Burke, but the Enlightenment Tradition Represented by Locke, Madison, and Marshall*, 26 ST. MARY'S L.J. 1051, 1078-79 (1995) [hereinafter *Natural Law Tradition*] (listing sources).

51. See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (federal government cannot regulate child labor); *Lochner v. New York*, 198 U.S. 45 (1905) (New York statute regulating the maximum working hours for bakers violates "liberty of contract," which is part of the 14th amendment due process clause). See generally KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 231-46 (1989).

52. See, e.g., *Schenck v. United States*, 249 U.S. 47 (1919) (protestors of World War I thrown into jail for protest activities); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (de jure segregation does not violate the equal protection clause as long as the separate facilities are equal). See generally HALL, *supra* note 51, at 247-66; KELSO & KELSO, *supra* note 46, at 513 ("Civil rights were left for more than a half century to whatever the legislatures of the respective states decided to pass").

53. See generally HALL, *supra* note 51, at 189-210. Note that during this period the Democratic party elected only two Presidents, and both times the Republican party was split, first when reform Republicans of the 1880s "Mugwumps" backed Democrat Grover Cleveland for President, and second when Teddy Roosevelt's "Bull Moose" party split the Republicans in 1912 ensuring the election of Woodrow Wilson.

cases.<sup>54</sup> In politics as well, this was a period of progressive fiscal policy, but conservative social policy.<sup>55</sup>

With the coming of the Warren Court, the Supreme Court moved into an age of progressivism on both economic and social policy. While the Supreme Court continued to allow federal and state governments to enforce economic regulation reflecting a progressive view of fiscal policy, individual rights began to trump majoritarian consensus in many cases.<sup>56</sup> Similarly, the politics of the Kennedy and Johnson administrations moved to modern liberalism.<sup>57</sup> Even President Richard Nixon, who was personally more conservative on fiscal and social policy than Johnson, proved no challenge to the welfare state modern liberalism of the Democratic majorities in Congress.<sup>58</sup>

### 3. *The Modern Natural Law Era Today*

Since 1986, the Supreme Court has clearly moved away from the liberal activist vision of the Warren Court, and has begun to carve out a majority seemingly committed to returning constitutional law to the natural law judicial decision-making philosophy of the framing and ratifying period.<sup>59</sup> If the connections we have suggested above between politics and judicial decision-making styles have resonance, one should also see in contemporary politics a reflection of the tone and debates of the founding period.

During the founding period, the two parties which competed for political control were the Federalist party of John Adams and Alexander Hamilton and the Democratic-Republican party of Thomas Jefferson and James Madison. In broad

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54. HALL, *supra* note 51, at 271-84; see KELSO & KELSO, *supra* note 46, at 513-14 ("Holmesian jurisprudence . . . leaves [the] protection of both economic and personal rights up to the political process."); Styles, *supra* note 46, at 203-13 (discussing the Holmesian style of deference to government in economic and civil liberties cases).

55. See HALL, *supra* note 51, at 265 ("Between 1917 and 1945, . . . [r]acism, nativism, and national-security hysteria shaped the legal culture in ways that mocked the rule of law."); *id.* at 314 (discussing the Cold War and the Red Scare of the early 1950s). Note that only at the margins, like President Truman integrating the armed forces, was politics progressive on civil liberties during this era. The witch-hunts of the House Un-American Activities Committee and the McCarthyism of the early 1950s are more typical of the political discourse of this era than robust protection for freedom of speech or freedom for dissent.

56. See KELSO & KELSO, *supra* note 46, at 514 ("The instrumentalist era of our law . . . has witnessed growing protection for personal and civil rights [while permitting] government regulation of economic enterprise."); William J. Brennan, *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 441-43 (1986) (summarizing the increased protection for civil liberties represented by Supreme Court precedents since 1954); Styles, *supra* note 46, at 221-25. See also HALL, *supra* note 51, at 290-300.

57. See generally HALL, *supra* note 51, at 286-87, 300-08.

58. Thus many of initiatives that we take for granted today as part of the modern liberal state were begun under the Nixon Administration, including the Environmental Protection Agency, the Occupational Health and Safety Administration, the Consumer Product Safety Commission, and the Food Stamp program. See generally *id.* at 304-08.

59. See *Natural Law Tradition*, *supra* note 50, at 1057-73, 1080-85; *Nine Tribunes*, *supra* note 46, at 1306-23; see also Styles, *supra* note 46, at 150-84.



terms, the Federalist party was the party of big business and the active fundamentalists of the New England Puritan tradition. They drew much of their political philosophy from the classic and Christian natural law tradition, which in its English version was represented by Hooker, Blackstone, and Burke.<sup>60</sup> In contrast, Jefferson's party was billed more as the party of the working man, and had its political philosophical roots in the Enlightenment natural law tradition, with religious beliefs a matter for personal conscience, and not for governmental imposition.<sup>61</sup> In terms of politics, the Federalist campaigns against Jefferson stressed that he was too liberal and radical in domestic policy and that he could not be trusted with foreign policy.<sup>62</sup> In response, Jefferson charged the Federalist Party with being the party of big business and a threat to individual freedom through enactments such as the Alien and Sedition Acts.<sup>63</sup>

Jefferson was able to triumph over Adams in 1800, and thereafter his Democratic-Republican party continually triumphed over the Federalists by being able to command the allegiance of a majority of the middle and working classes, laborers and farmers alike, through a policy of fiscal conservatism, small government, and a balance of powers between the States and the federal government in Washington, while continuing to protect, within the framework of early 19th century notions of civil liberties, a progressive policy regarding freedom of speech, freedom of religion, and other personal civil liberties.<sup>64</sup> This approach prevented sufficient numbers of the middle class from joining the business interests and fundamentalist Christians of the Federalist Party, or the Federalist Party's later incarnation as the Whig Party, so that the Democratic party dominated politics during the first half of the 19th century. Only when the issue of slavery split the Northern and Southern Democratic parties, was the Republican party, the heir of the Federalists and Whigs, able to build its own majority coalition.

The connections between the modern Republican party and the Federalist Party, with their bases in big business (and their supporters among the professional elite) and Christian fundamentalists, is obvious. So, too, the connections are obvious between the modern Democratic Party and Jefferson's Democratic Party in terms of their base with the working and middle class with a progressive tradition on civil rights matters.

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60. See *Natural Law Tradition*, *supra* note 50, at 1053-55 (listing other sources).

61. See *id.* at 1065-66, 1074-75; see also MAPP, *supra* note 49, at 399-400.

62. See MAPP, *supra* note 49, at 385-86 ("Many [Federalists] attacked Jefferson as a betrayer of Washington and a traitor to his country. . . . A letter . . . printed in the *Connecticut Courant* . . . summarized the questions hurled from many New England pulpits: 'Do you believe in the strangest of all paradoxes—that a spendthrift, a libertine, or an atheist is qualified to make your laws and govern you and your posterity?'").

63. *Id.* at 370-74, 377-80.

64. See *id.* at 399-400 (discussing Jefferson's position in favor of a balanced budget, states' rights, freedom of religion, freedom of speech, and protecting small business and farmers from big business oppression).

We have also entered an age, like Jefferson's age, where the swing voters are fiscally conservative and socially progressive. This differs from most politics since 1932, where the Democratic Party could rely on electing a majority to Congress based on promoting a progressive fiscal policy. For most of this period, progressive fiscal policy was viewed as successful in dealing with the Great Depression and as being responsible for the post-War economic boom of the 1950s and 1960s. The last twenty years of stagnant real wages and sky-rocketing budget deficits, however, have undermined a majority of voters' faith in progressive fiscal policy, and has pushed a number of voters who used to be fiscally and socially progressive modern liberals to adopt a fiscally conservative posture. Thus, not enough fiscally progressive voters remain for the Democratic Party to remain a majority party based upon fiscal progressivism alone.

This new age of politics also differs from the period between the Civil War and the Great Depression. During that period, the Republican party dominated federal politics because of the loyalty of fiscally conservative, socially progressive voters who viewed the Republican Party as the party that ended slavery and passed the socially progressive Civil War amendments. Though fiscally conservative, these traditional liberal voters of the Enlightenment tradition are not wedded to the Republican Party today, as they were after the Civil War, because they view too many elements in the Republican Party today as too socially conservative. Though socially progressive, these fiscally conservative voters are not wedded to the Democratic Party either because of the Democratic Party's legacy since 1932 of being fiscally progressive.

This analysis suggests that for the Democratic Party to return to being the majority party in Congress and to win the Presidency on a regular basis, Democrats today will have to abandon an agenda based solely on the modern liberal coalition of the 1960s which was based on purely fiscally progressive policies. In the modern era of politics, the Democrats will be able to win only by putting together the same coalition that Jefferson did in 1800. This would involve winning back fiscally conservative, socially progressive voters by promoting a smaller, more decentralized government,<sup>65</sup> combined with a focus on middle class interests,<sup>66</sup> while painting the Republicans as the party of big business and a threat to individual liberties of freedom of speech, freedom of religion, and cultural diversity.<sup>67</sup>

In response, the modern Republican party has two main ways to try to defeat this coalition, remain the majority party in Congress, and win back the

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65. "The age of big government is over," as President Clinton said in his 1996 State of the Union Address. President's Address Before a Joint Session of Congress on The State of The Union, 32 Weekly Comp. Pres. Doc. 90 (January 23, 1996).

66. Note the recent focus by the Democratic leadership in Congress on middle class wages, middle class tax relief, and providing responsible protection for Medicare, Medicaid, and Social Security.

67. This would be the modern equivalent of Jefferson's charges against the oppressive and xenophobic character of the Alien and Sedition Acts of 1798.

presidency. One way would be to keep together its base in the business community and fundamentalist Christian voters, while convincing a sufficient number of fiscally conservative, but socially progressive voters to vote Republican on a consistent basis. This would be done by persuading them that the Democratic party is likely to remain too liberal on fiscal matters, and thus Democrats can be predicted to continue wasting their tax dollars on big government programs not directly related to their interests. If the Democratic party does not move to the Jeffersonian vision described above, this Republican argument that the Democrats are "tax and spend liberals" should consistently work, as it did in the congressional elections in 1994, and the presidential elections in the 1980s of Presidents Reagan and Bush against Walter Mondale and Michael Dukakis. Unless the Democratic Party changes and becomes more fiscally conservative, it will continue to be perceived as too liberal, in the modern sense of fiscally and socially progressive, to command majority support today.

A second way for the Republican party to become the dominant party would be to find an effective wedge issue to split the Democratic party, as slavery split Northern and Southern Democrats before the Civil War. Similar to race being the major wedge issue before the Civil War, the debate over affirmative action may be such a wedge issue today. Instead of splitting Northern and Southern Democrats, affirmative action may split white and minority Democrats. Enough Northern Democrats joined the Republican Party to make them the majority party after 1860. Perhaps enough white middle and working class Democrats can be persuaded to join the Republican party today. Of course, President Clinton is trying to mitigate the effects of that wedge issue with his comments to "mend, and perhaps eventually end" affirmative action (which is targeted to white middle and working class Democrats), while continuing a socially progressive commitment to remedying the continuing effects of prior racial discrimination (which is targeted to minority middle and working class Democrats).

A third possible way for the Republican Party to become a majority party would be to convince enough fiscally conservative, but socially progressive voters to become conservative on social issues also, and thereby build a majority party based upon socially conservative values alone. In the earlier natural law era, that attempt failed, as the socially progressive Enlightenment natural law approach to social issues prevailed over the classic and Christian socially conservative tradition of the Federalist party.<sup>68</sup> Similarly, it is unlikely that the Christian Coalition wing of the Republican Party can sufficiently expand its base to make the Republican Party a majority party without resorting to including in the Republican "Big Tent" fiscally conservative, but socially progressive voters.<sup>69</sup>

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68. See generally *Natural Law Tradition*, *supra* note 50, at 1074-79.

69. This was tested by Pat Buchanan's run for the Presidency. Pat Buchanan clearly tried to build a majority coalition based upon: (1) The traditional conservatism of Christian Coalition voters; (2) the modern conservatism of Richard Nixon and the George Wallace tradition of socially conservative populism; and (3)

Campaigning in 1992 as a New Democrat, President Clinton appealed to the Jeffersonian tradition of fiscal conservatism and balanced budget rhetoric, combined with being progressive on social issues. Just as Jefferson was successful against President Adams in 1800, Clinton was successful in 1992 in painting President Bush as being too closely associated with the business elite, and as not caring enough about the middle class. Just as Jefferson was able to tarnish President Adams as being a threat to individual liberties because of the Alien and Sedition Acts, coming out of the Houston Convention, Clinton was able to tarnish Bush as being too obsequious to the Christian Coalition-inspired and Pat Buchanan-led wing of the Republican party.

During his first two years in office, however, Clinton ignored the lessons of Jefferson, and appealed back to the modern liberal wing of the Democratic party, associated with President Johnson's "Great Society" programs, which still controlled the Democratic leadership positions in Congress. Thus, in 1994, the Republicans were able successfully to paint President Clinton as a modern liberal whose campaign as a New Democrat (really an old Jeffersonian Democrat) was just talk. Thus, in 1994, a significant number of the new fiscally conservative, but still socially progressive, voters who had supported Presidents Reagan and Bush in the 1980s supported Republican candidates for Congress for the first time.

Since 1994, the Republicans, led by Speaker Newt Gingrich in the House, have paid too much attention to their base of the big business elite and socially conservative voters, and insufficient attention to how the impact of their policies are being perceived by these fiscally conservative, but socially progressive voters who made the difference in the 1994 congressional elections. Thus, the Republicans have left themselves open to the charge of continuing to cater too much to the big business elite in terms of issues like tax policy (e.g., the charge that their tax breaks are for the wealthy), or as not being socially progressive enough on middle and working classes issues like Medicare and Medicaid (e.g., the charge that they are slowing the growth in these programs to the point that services will need to be cut, thus undermining the necessary social safety net in which socially progressive voters believe).

In 1996, the swing votes will be the same group of voters who were the swing votes in 1992 and 1994: the fiscally conservative, socially progressive voters of the Enlightenment tradition. A message to grab such voters must combine, as it did for Jefferson, fiscal conservatism on the budget; a balanced role for the States and the federal government; protection of individual rights, but a recognition, consistent with Enlightenment philosophy, that individuals not only have rights, but responsibilities; and a vision of equal protection which is informed by the Enlightenment perspective that individuals should be given an equal opportunity

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embracing the wedge issue of affirmative action, combined with xenophobic rhetoric over immigration. Whether this combination would be successful in gaining more than 40% of the electorate in a general election is in some doubt.

to compete, but there is no guarantee of equal outcomes for any individual, or for any group, in society.<sup>70</sup> In addition, there is a need to appear to be on the side of the middle and working class, and thus to be concerned about their medical care, their education, and the environment in which they live, while protecting them from exploitation by big business. In such a climate, politically popular tax cuts would need to be clearly linked to providing more money in the pockets of the middle and working class, rather than merely relieving the tax burden for the relatively wealthy. The real question for 1996 is which candidate for the presidency will appeal best to this tradition. Will it be Bob "Jefferson" Dole or William Jefferson Clinton?<sup>71</sup>

#### IV. CONCLUSION

Our analysis suggests that there is not an adequate basis for Judge Wilkey's concerns about the need for a Constitutional Convention. Judge Wilkey's concerns with the perpetual incumbency of politicians and their political unaccountability seem overblown in light of the elections in 1992 and 1994. The regular democratic processes are responding on issues critical to Judge Wilkey, like a balanced budget and an appropriate regard for federalism. To win elections, politicians will have to, and are, listening to the public's concern on these issues. While Judge Wilkey's third concern regarding gridlock is still occasionally present, gridlock is not necessarily bad while the public sorts out new priorities. Where gridlock becomes a major problem, the regular democratic process is capable of responding, as it did in forcing the politicians to reopen the government after the government shutdown in December 1995 and January 1996. Finally, Judge Wilkey's fourth concern with judicial activism is misplaced. The Supreme Court has already retreated a long way from the liberal judicial activism of the 1960s, and its current membership is not likely to repeat the past. In short,

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70. On viewing the Enlightenment's concept of equality as equality of opportunity, not equality of result, see *Natural Law Tradition*, *supra* note 50, at 1071-72; *Styles*, *supra* note 46, at 182-83.

71. It could not be Pat "Jefferson" Buchanan. As indicated above, Buchanan's campaign was based on trying to put together a different kind of coalition to achieve majority party status. See *supra* note 69 and accompanying text.

the contemporary political climate is not sufficiently ill that there is any necessity for the strong medicine of a second Constitutional Convention. The major substantive problems that Wilkey identifies with current political outcomes, such as the lack of a balanced budget or an appropriate regard for federalism, are being, and likely will continue to be, addressed by the regular political process.<sup>72</sup>

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72. It must be noted that, in one respect, Judge Wilkey's proposal for a second Constitutional Convention resonates with the ideas of Thomas Jefferson. Jefferson is famous for proposing the doctrine that since "the earth belongs in usufruct to the living," each new generation has the right to make for itself a new Constitution. See WILLARD STERNE RANDALL, *THOMAS JEFFERSON: A LIFE* 486 (1993). On this point, James Madison's reply to Jefferson, counselling against such a doctrine, is instructive. See DAVID N. MAYER, *THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON* 300-01 (1994) ("Among the objections cited by Madison was that too frequent appeals to the people to 'new-model' government would 'in great measure deprive the government of that veneration, which time bestows on every thing, and without which perhaps the wisest and freest governments would not possess the requisite stability'. . . . Another objection put forward by Madison was that a frequent reference of constitutional questions to the decision of the whole society raised 'the danger of disturbing the public tranquility by interesting too strongly the public passions'").

