

# **FUTURICS**

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## THE FEDERAL CONSTITUTIONAL CONVENTION: POSSIBILITIES, PROBABILITIES, AND ALTERNATIVE FUTURES

By Sohail Inayatullah

### PREFACE: Emerging Issues Analysis

The State of Hawaii Judiciary, in an attempt to become progressive and proactive in its decision-making, has instituted a Futures Research Program as an integral and fundamental aspect of its larger Comprehensive Planning Venture.

Basically, the purpose of the Futures Research Program is to discover various issues (events, trends, and images) that specifically have the potential to impact the adjudicatory, as well as organizational aspects of the Judiciary, and, generally, the potentiality of impacting the legal, socio-political, and philosophical climate of Hawaii (as well as the larger national and global environment, where appropriate).

Why do this? In the past, because of the slow rate of social change, making decisions without large degrees of lead time resulted in few adverse consequences; today, because of the rapidity of social change (new technologies, new values, new social revolutions) a greater degree of lead time is needed for the functional, efficient, and effective management of organizations.

Traditionally, institutions, especially the Judiciary (and law), have reacted to problems and events; it is hoped that, through a futures research planning component, the Judiciary can begin to anticipate problems (and opportunities) before they occur.

To be able to adequately plan the future as well as for the future it is necessary to have information about the future. Thus, the futures research mechanism provides the Judiciary with issues that have the probability of impacting the Judiciary in a significant manner.

This technique of futures research is called "Emerging Issues Analysis". Basically, it involves scanning various journals (especially chosen because of their relevant content); deducing events, trends, and images from various social change theories (models of reality that attempt to explain what is, as well as predict the future); and deducing events and trends from various images of the future (whether these images are in the minds of the general public, key decision-makers, or marginal "crackpots").

In the Judiciary's first run at this venture, 28 issues were discovered. Out of these, four issues, which were deemed most salient (in terms of potential impact, relevance, probability of occurrence, and lack of general awareness of the issues), were selected. They are:<sup>3</sup>

- \* The Federal Constitutional Convention (unlimited)
- \* Automation and Robotization
- \* Brain Drugs
- \* Alternative Dispute Resolution Mechanisms.

This paper will concentrate on the Federal Constitutional Convention. Upon completion of this paper (and the other three emerging issues papers), the Judiciary's Committee on Emerging Issues (represented by key decision-makers, members of the University Law and Political Science Departments, futures researchers, planners, Judiciary employees, and other key members of

the community) will examine these papers; thereafter, they will be studied by students of the University of Hawaii Law School (or an ad-hoc group of law clerks at the State Judiciary) from a legal point of view. That is to say, a point of view that attempts to discern the various legal and jurisprudential impacts of a specific issue.

Armed with this futures and legal information, the Judiciary will then be able to make an appropriate decision (or develop an appropriate strategy or plan) as to what it should do--if anything--with respect to the emerging issue; that is to say, it could choose to educate the public in general, educate professionals involved with the Judiciary, direct the Legislature to take action, start pilot programs to deal with the issue, and so on. The emerging Issues Analysis process will then be an ongoing one, involving the following steps: (1) selection and scanning of journals; (2) evaluation and selection of particular issues; (3) writing of issues papers; (4) legal analysis of issues papers; and (5) appropriate Judiciary action.

Editors question: Can this thrust be a model for other states?

### PART I

## THE FEDERAL CONSTITUTIONAL CONVENTION: INTRODUCTION, HISTORY, AND FUNDAMENTAL ISSUES

### INTRODUCTION: The Federal Constitutional Convention

"Is a Constitutional Convention impending?"  
(Wayne Wheeler, 1926)

"The Constitution is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men at all times and under all circumstances." (Ex Parte Milligan, 1866)<sup>5</sup>

"...the Constitution has become a controversial document. Increasingly, it is seen as an obsolete vehicle, much like the Model T, that cannot possibly convey its riders across the heavily trafficked, fast-moving highways of the contemporary world." (John Judis, 1980)<sup>6</sup>

Although it is now 1982, Wayne Wheeler's question in 1926, "Is a Constitutional Convention impending?" is still valid today. With 30 states (now 31 states--the latest being Alaska--January 1982) having applied for a limited Constitutional Convention (ConCon) to deal with the issue of a balanced budget for the Federal government, and only four more needed for the required two-thirds, it is not unreasonable to assume that a ConCon is indeed impending. In addition to the balanced budget issue, over 15 states have applied for a convention to deal with the abortion issue.

All is not well in the USA. And although many would agree with the Supreme Court's opinion quoted above that, like the Bible and the Flag, the Constitution is forever; still, some would agree with John Judis that the Constitution is not too bad, but a new one, appropriate for the late 20th Century (and 21st Century?), is badly needed.

Those familiar with the question of the Federal Constitutional Convention might wonder why another paper is being written about a subject that in the opinion of some should be consigned to the realm of dead letters.

Indeed numerous essays have been written as to the many

legal questions (as well as historical-philosophical) that a ConCon raises. For example, if 34 states apply for a ConCon, must Congress call one? Can there be a limited ConCon? Who sets the rules of procedure for the ConCon? And so on. And although this paper will touch upon these issues and attempt to present the various perspectives held by authorities and non-authorities alike, it will nonetheless largely focus on alternative structures for the ConCon and alternative political futures and the ConCon. Thus, in general, this paper will attempt to look at the ConCon more from a structures-political approach than from a legal approach.

#### ISTORY: The 1787 Philadelphia Convention

The Constitution is a fundamental symbol of the USA. To disagree with the Constitution is to disagree with the nation of America itself. The Constitution is more than a 200-year-old piece of paper; it embodies the law of the land, the lex supra leges.

It is by the Constitution--Article V to be specific--that the states derive their authority to call for a ConCon. It reads:

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress...<sup>8</sup>

Thus the Constitution allows for two methods of amendment. And although some may argue that the convention method for altering the Constitution is a can of worms,<sup>9</sup> the states nonetheless have applied for Constitutional Convention. Over the years, almost 400 applications have been filed for a ConCon by the states. The subjects of these applications have included: (1) direct election of senators; (2) world federal government; (3) anti-polygamy; (4) limitation of federal taxing power; and numerous others.<sup>10</sup>

In the 1960s, the states fell two states short of the magic two-thirds when 32 states filed petitions for a ConCon to offset the Supreme Court's one-man, one-vote decision.

And even though there has yet to be a Federal Constitutional Convention called under the auspices of Article V, the applications of the states have not been without impact. For example, the states call for the direct election of senators led Congress to propose the same amendment itself--Amendment 17. Also, the present call by the states for a balanced federal budget has led to Senate Joint Resolution 58 which also calls for a balanced budget. And the impact of 15 states calling for an abortion amendment has led to a proposed federalism constitutional amendment that would turn over to the states the power to regulate and control abortions.

Why was this article put into the Constitution? Isn't the method for proposing amendments by Congress enough? Why should there be two methods for changing the Constitution?

Basically the Article V convention method is a compromise between those at the 1787 convention who:

...believed that the states should have unchecked power to amend the Constitution, and those who considered congressional involvement an essential safeguard for groups and interests that might otherwise be sacrificed to the majority's will.<sup>11</sup>

Article V then deals with the allocation of power. What if Congress becomes abusive of states' powers and attempts to decrease the power of the states; should not the states then have a way, a constitutional method to fight back? Conversely, what if the states tried to increase their power at the expense of the federal government?

Walter Dellinger of Duke University writes:

Mason of Virginia objected to congressional control over the proposal of amendments because congressional abuses of power might be the cause of the perceived need of reform. Set against this concern was the threat, perceived by Hamilton, that the states would seek amendment to enhance their power at the expense of the federal government. This debate reflected the tension felt throughout the entire Convention between the need to create an effective national structure, significantly stronger than the one existing under the Articles of Confederation and the desire to guard against delegating excessive power to the central government.<sup>12</sup>

The delegates believed that this tension, this debate, between the states and the Congress, between the people and the government, the majority and the minority, was resolved through the dual method of changing the Constitution as written in Article V. Here it is important to note that Congress is involved in both mechanisms and thus, by inaction, could defeat the desire of the states to have a convention.

Nonetheless, objections and virtues aside, Article V is part and parcel of the U.S. Constitution.

#### ON AMENDMENTS

Before I proceed to outline the various legal issues and questions involved in the calling of a ConCon, it is of some worth to ask: Why indeed should there be an amendment article in the Constitution at all? Isn't the Constitution sacred, unchanging, and valid for all times?

Basically it is argued that a "government which...provides no means of change...will either degenerate into a despotism or, by the pressure of its inequities, bring on a revolution."<sup>13</sup> John Burgess, the political theorist, wrote that amendment clauses form:

...the most important part of a constitution. Upon its existence and truthfulness, i.e., its correspondence with real and natural conditions, depends the question as to whether the state shall develop with peaceable continuity or shall suffer alternations of stagnation, retrogression, and revolution.<sup>14</sup>

John Platt argues that when the founding fathers, or the gang of 55 as Neal S. Manne calls them, created the Constitution they were aware that for its success a key element has to be modifiability.

Modifiability is the second requirement in a successful system for keeping the peace. In a changing world, no system could be perfect for



long. The best system demands, not so much a plan ideal in every detail to begin with, as a plan with provisions for being changed and adapted as imperfections appear or as conditions change. In the long run, any system that is not modifiable by feasible and orderly procedures in a reasonable time, is brittle, for it will force stresses to build up higher and higher until some part of the structure is broken, and broken suddenly and dangerously.<sup>15</sup>

Here it is worth noting that the Constitution can be changed by formal means (Article V) or by informal means (judicial interpretation).

Thus, it is for the success of the system--so that the government does not lose its legitimacy and possibly be overthrown--that the amendment section was included in the Constitution. Of course, amendment by Constitutional Convention, as the 1787 Philadelphia convention showed, can not only lead to minor amendments, but can lead to overall and fundamental change of the Constitution--that is to say to a new Constitution all together, a veritable Constitutional revolution.

It is perhaps this fear of such a drastic change that has resulted in there not being a single Federal Constitutional Convention in U.S. history--even though the Constitution itself was framed during a convention and even though there have been over 200 state conventions.

#### FUNDAMENTAL ISSUES

Most of the scholarship on the Constitutional Convention has largely been concerned with various legal/constitutional issues that a ConCon raises.

Basic legal questions are raised and each author, or in some cases groups of authors, attempt(s) to answer the questions raised by: (1) using deductive reasoning; (2) attempting to understand the real intent of the gang of 55 (that is to say, an historical analysis of Article V); (3) attempting to understand Article V and the issues that it raises through an analysis of the decisions of the court, especially the Supreme Court; (4) analyzing the text of Article V; and (5) through personal political/policy preferences.

There is obviously little consensual agreement among scholars; however there are, as we shall see,<sup>16</sup> basic opposing points of view. The basic issues are:

- 1) Must Congress call a convention if two-thirds of the states apply?
- 2) Can the Convention be limited, or must it be general/unlimited?
- 3) What is the length of time for which an application is valid?
- 4) What is the role of the President and/or state governors in the amending process?
- 5) What is the role of Congress in defining the scope and procedures of the convention?
- 6) Can the states withdraw an application once it has been submitted to Congress, and can states rescind ratification of a proposed amendment?
- 7) Are issues that relate to the convention justiciable?
- 8) Is the convention absolute?

#### Must Congress Call a Convention

The general agreement is that Congress does not have a choice in the matter--it must call a convention if and when two-thirds of the states apply for one. Alexander Hamilton wrote in The Federalist, No. 85:

The words of the article are peremptory. The Congress 'shall call a convention'. Nothing in this particular is left to the discretion (of Congress).<sup>17</sup>

And Charles Mathias, Jr., Republican senator from Maryland adds his personal opinion by writing that: "This provision is as valid and binding as any other in the Constitution. To ignore it or try to frustrate its application would do violence to our oaths."<sup>18</sup>

However, it is not that simple, for Congress must go about the task of determining if the applications received are valid (in terms of the time elapsed, and in terms of the type of convention being applied for). What then constitutes a valid application? And, much more important, what is the role of Congress in a ConCon--ministerial or legislative?<sup>19</sup> All this leads directly into the most important issue of whether or not the convention can be limited to a single issue, or whether the convention must be a general/unlimited one.

#### Limited Versus Unlimited

From the perspective of the states, it is obvious that a limited convention is proper. Only 18 or so of the approximately 400 applications for a convention have been of a general nature--the rest have been calls for a limited, issue-specific convention.

Numerous legal scholars claim that a convention cannot be limited and that, if a state applies for a limited convention, then its application must be considered invalid.<sup>20</sup> In addition, proponents of the unlimited ConCon argue:

- 1) To permit the states to limit the subject matter of the ConCon would be inconsistent with the aims of the structure of the Constitution. If state legislatures have the power to propose amendments as well as limit the convention to a particular subject matter, then effective proposal power would have shifted to the states. This shift would thus override the division of authority between state and national interests.
- 2) The convention is an entity itself; it thus must set its own course. Neither the states nor Congress can limit a convention once it has been called.
- 3) A general convention also simplifies matters. Van Alostne of Duke University writes:

First, it eliminates the plan and arbitrary difficulty of expecting a reasonable Congress to decide whether, given different forms in which these state resolutions are submitted (the current example of the "budget-balancers" is itself a fine example), a sufficient "consensus" has in fact been expressed for given kind of limited convention. It avoids, too, the plan and related problem (supposing Congress agrees that a sufficient, albeit limited-agenda, consensus has been expressed), of what Congress is expected to do in describing the agenda for the

convention thus called. (emphasis added)<sup>21</sup>

For example, what is meant by a limited convention? Does it mean a convention where delegates can only vote yes or no? Do applications for a limited convention have to be identically worded?

- 4) The original Philadelphia convention was unlimited (although it was not intended to be).
- 5) Congress has no limited or limitable agenda. Why should a convention--which is equal in structure--have a limited agenda? A convention must have authority "for an unconditional reappraisal for constitutional foundations."<sup>22</sup>

Proponents of the limited convention proponents argue:

- 1) If the states apply for a limited convention, then Congress must authorize a limited convention. Congress does not have the authority to not call a convention if two-thirds of the states apply for one.
- 2) If states can only call for a limited convention or only call for an unlimited one, then the state method is unequal to the Congressional initiated method.
- 3) If the states can only call for a general convention, it would leave the states unable to mandate action on specific grievances.

#### Contemporaneity of Applications

The general agreement here is that the applications for a convention should have some general contemporaneity.

Dillon v. Gloss<sup>23</sup> is usually cited in support of this position. Also, the usual number of years deemed appropriate are three and seven. Some legal scholars question this position also, however.<sup>24</sup>

#### Role of Executive

Hollingsworth v. Virginia<sup>25</sup> is regularly cited as to why the President has no role in a ConCon; and Hawke v. Smith<sup>26</sup> is regularly cited as to why the governor has no role in a ConCon.

Charles Black, Jr., of Yale School, however, disagrees with these two positions. He argues that any attempt to exclude the President is in contravention of Article 1, Section 7:

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary...shall be presented to the President of the United States...<sup>27</sup>

And:

The exclusion of state governors (from the convention process) has no rational basis.<sup>28</sup>

In addition, the more than obvious political problems with excluding the governor on the state level, and the President on the national level, are important to note.

#### Role of Congress

This, of course, directly relates to the limited vs. unlimited controversy. What is the power of the Congress vis-a-vis the convention and the states? Some argue that

Congress should simply follow the wishes of the states. Others argue that Congress should take a more active role in terms of deciding which applications are valid and which are invalid.

Another fundamental question is: Should Congress set the procedures for the convention? Senate Bill 215 attempted to do this in 1973; however, the bill did not pass the House (it did pass the Senate). Recently a similar bill, S. 817, which is up before the Senate, has attempted to lay down procedures for (1) the application process; (2) the contemporaneity of applications; (3) judicial review; (4) the ratification process; (5) the role of the Executive; and in general the whole ConCon process.

Charles Black presents the most forceful argument against Congress' getting involved in passing a Bill to set up procedures for a convention. In reference to S. 215 he writes:

This is a bad bill in so many ways as to boggle the mind. It rests on radical disregard of the fundamental principle that no Congress can bind its successors to vote against their own consciences on issues of constitutional law or of high policy.<sup>29</sup>

And:

Unexplainedly and inexplicably, it makes Congress into a court of law, and forbids the real courts of law to decide legal questions arising under the Constitution.<sup>30</sup>

#### Withdrawal of Applications and Rescission of Ratification

The text of Article V offers little guidance on this important question. The withdrawal of an application is significant in that a specific number of states are needed for the convention to be honored. Senate 817 gives the state legislature the power to decide questions of withdrawal and allows any state to rescind its ratification (but only prior to the time when three-fourths of the states have ratified any such amendment).

Other writers tend to agree with this position of allowing states to withdraw and rescind. Court decisions reached with respect to the ERA amendment and states rescinding their ratification are of salience here. The states obviously are operating under the assumption that they have the right to withdraw; several states have written into their application that their application be deemed void if the convention is not limited to a specific issue.

#### Are the Issues that Relate to the Convention Justiciable

Another important question, it is perhaps as significant as the limited/unlimited issue. This issue raises fundamental questions of power--constitutional and political.

Senate 817 permits judicial review. The American Bar Association's special report on Article V favors limited judicial review:

...there should be several limits on judicial consideration. First, a Congressional determination should be overturned only if 'clearly erroneous'. This standard recognizes Congress' political role and at the same time insures that Congress cannot arbitrarily void the convention process. Second, by limiting judicial remedies to declaratory relief, the

possibility of actual conflict between the branches of government would be diminished. As Powell illustrated, courts are more willing to adjudicate questions with 'political' overtones when not faced with the institutionally destructive need to enforce the result.<sup>31</sup>

Much of the relevant discussion depends on whether the courts believe that cases or controversies raised by the convention process are political or not. Some argue that questions relating to the amendment process are political and nonjusticiable.<sup>32</sup> Either way, if a Federal Constitution Convention did occur, the probability that the Supreme Court (or lower courts) would be brought into the conflict is very strong. Whether it would choose to get involved is unclear.

### Is the Convention Absolute

The basic question here is whether a Constitutional Convention has the power to totally create a new constitution with new methods of ratification. The present U.S. Constitution obviously did usurp and reconstitute the powers of the Articles of Confederation.

The delegates, then, were part of a constitutional revolution.

They had no authority to draft a new constitution, and they had no authority to declare it should be binding when ratified by conventions in only nine of the original thirteen states. The constitution they framed took away from the states and granted to the federal government powers which they had never yielded under the Articles of Confederation. It abolished the government which had existed theretofore.<sup>33</sup>

Does a convention have any limitations on its powers? It is limited by the government and the Constitution which establishes it. Wayne Wheeler writes:

There are two general theories regarding the power of conventions. One is that the delegates elected to compose such an assembly are to be governed by any limitations placed in the call for the convention and by any constitutional limitations existing in the form of government under which it is called. The other is that the delegates to conventions represent the sovereign or the people and that since all power rests with the people, they may exercise practically unlimited authority in framing constitutions or amendments.<sup>34</sup>

Although this question may seem to be one requiring the legal training of judges to answer, it seems more likely that the meta-issue is legitimacy. Would the people accept this new constitution? What if they throw away the idea of having a Constitution all together. "Eliminate the Executive! Congress! The Judiciary! Or worse", writes Neal S. Manne, "what if the new Constitution eliminated Yale Law School!"<sup>35</sup>

The legal issues then are numerous, and the answers to these issues remain unclear. Most likely these issues will only (can only) be partially resolved through legalistic reasoning, through analyzing the real intentions of the gang of 55, or through a textual analysis of Article V, or even through simple deductive reasoning. Rather, it is more likely that these issues will be resolved on the basis of political/policy preferences.

### CONCON PRO AND CON: The Conventional Socio-Political Analysis

Naturally, one would expect a great deal of resistance to a ConCon (given the sacred nature of the U.S. Constitution), especially a convention that could conceivably be open-ended.

Alpheus Mason of Princeton University believes that a ConCon is "an extraordinary measure". A ConCon is "a mistake, dangerous and unrealistic".<sup>36</sup>

Charles Mathias, Jr., believes, like many others, that a convention may run away even if the states desire it to be limited and controlled.

When a convention meets and considers its agenda, the only restraint on it may well be whatever restraint it imposes on itself. If it does not practice self-restraint and goes beyond its mandate, it is possible that there will be no way to rein in it. It is likely that the courts and Congress will be powerless to intervene.<sup>37</sup>

However, there is the reality of ratification. And even if a convention runs away and the public, through state conventions or through state legislatures, accepts it, then have not the people spoken? That is to say, if the American people like the new amendments (or the new constitution) and the states ratify it (or in the event of a totally new constitution, if whoever is chosen to ratify it, ratifies it--that is to say--any constitution to be legitimate will somehow have to be ratified), then who has the right to complain? We, the People, have spoken.

Lawrence Tribe of Harvard University is totally against the idea of having a Constitutional Convention. Basically, he argues that it is much safer and wiser to change the Constitution through the well-traveled route of congressional initiated change. And even more important:

It is hard to imagine a less opportune moment for the potentially tumultuous step of a constitutional convention--no matter how limited its official purpose. The past decade has been among the most turbulent in the nation's history. The Vietnam War, the near-impeachment of a president, political assassinations, economic upheavals--it is hardly necessary to enumerate the many storms we have weathered. If, as a result of those bitter experiences it is now time for self-healing and consolidation, for a return to basic concerns and turning away from confrontation and division, little could be worse for the country than to risk the possible trauma of our first Constitutional Convention since 1787.<sup>38</sup>

In addition, Canada in its attempt to patriate its Constitution from England is facing numerous serious problems with respect to national solidarity and unity. Wouldn't the U.S. face similar situations?

Thus, in general, those against having a ConCon argue that it is too dangerous an event; it holds too many negative possibilities for the U.S.A. It is unnecessary. There are other, more tested ways of reforming the Constitution and the government.

Others, however, argue that such a negative view is



predicated on a basic mistrust of the people, and of democracy itself. If the states apply for a convention, then let there be one. As Abraham Lincoln said:

I fully recognize the rightful authority of the people over the whole subject (amendment of the Constitution), to be exercised in either of the modes prescribed in the instrument itself, and I should under existing circumstances, favor, rather than oppose, a fair opportunity being afforded the people to act upon it.

I will venture to add that, to me, the convention mode seems preferable, in that it allows amendments to originate with the people themselves, instead of only permitting them to take, or reject, propositions, originated by others, not especially chosen for the purpose, and which might not be precisely<sup>39</sup> such, as they would wish to accept or refuse.

And John Noonan of UC Berkeley Law School adds:

A method (Constitutional Convention) sanctioned by Lincoln, by Hamilton, by Madison, by Washington and Franklin, and by all the markers of the Constitution, and involved from time to time by every state, is indeed a workable, useful, and wise way of keeping our Constitution a living instrument of the people.<sup>40</sup>

Liberals, against the convention method, argue that conventions, specifically limited ones, make it too easy for narrow and parochial state interests. This argument comes directly from the states' attempts to overturn the Supreme Court's reapportionment decision experience. It has its present basis on the states' interests in abortion, prayer, and other similar concerns. This view, however, does not adequately understand the American tradition of interest-group politics. Those who have wealth, and are better organized, will be able to influence public policy. This holds true for a Constitutional Convention as well. Different interest groups will try and have their candidates elected for the convention, so the type of amendments that they want will be written in. The philosophical assumption is that these interest groups represent the will of the people--this, of course, may or may not be true.

Nonetheless, those against the possibility--of having a convention--are correct when they claim that a ConCon is very serious and important business. It will without a doubt bring about serious conflicts.

## BASIC CONFLICTS

The basic structural conflicts would be (1) Congress--States, (2) Congress--Supreme Court, and (3) Supreme Court--States.

### Congress--States

This, of course, is the classic confrontation. It could come about through the following ways. First, Congress may treat certain state applications as invalid. Second, Congress may withhold appropriations for the convention until the delegates at the convention adopted certain internal procedures. Third, Congress could refuse to treat (allow) certain amendments as part of the convention's scope. And fourth, Congress could, even when two-thirds of the states have applied for a convention, do nothing.

This would raise questions as to the power of Congress,

the powers of the states, the power of the convention, and it would also eventually draw the Judiciary, the media, and intellectuals (who would write convincingly for one side or the other) into the battle. And finally, the Executive itself would probably get involved in this confrontation.

### Congress--Supreme Court

If there is a dispute between Congress and the states (or the convention), then the courts would be called to arbitrate. The Supreme Court may claim that the issue is non-justiciable. However, a decision to not rule, would in itself, be a decision favoring one group or another, depending on the nature of the controversy. Most likely, the Supreme Court would have to rule on the limits of Congressional power with respect to the states and a Constitutional Convention.

### Supreme Court--States

If a court decision is reached that favors Congress, then the states would no doubt protest, claiming that the convention method was originally designed to avoid the control of the federal government. If a convention runs wild--becomes unlimited--then again the states would protest. The Supreme Court would again have to rule.

### Conflict as Democracy

Of course, most people, groups, would not want to risk a convention with so many possible dangers. However, might it not also be argued, that in this age of extreme political apathy, maybe a convention--with all its possible controversies, all its legal and political problems--would be just the thing that could lead to a revitalization, a relegitimation of the American political system, of American government, and of the Constitution itself? What could be more fascinating than a Constitutional Convention--especially if it were held during the bicentennial of the 1987-9 convention?

So far this paper has summarized and analyzed emerging issues; it has discussed the historical basis of Article V; it has discussed the importance of the modifiability of the Constitution; and it has brought out the various legal issues raised by a CoCon. In addition, the pros and cons of a ConCon from various socio-political perspectives were presented. Finally some of the basic institutional conflicts that a ConCon may bring about were discussed. It was noted that such conflicts may in fact revitalize the American political system.

Part II of this paper will examine the present call for a balanced budget, alternative futures for the ConCon, and events, trends, and images that could increase the probability of there being a ConCon.

See the next issue of Futurics for Part II and conclusion of this paper.

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<sup>4</sup>Wayne Wheeler, "Is a Constitutional Convention Impending", 21 Ill. L. Rev. (1927), pp. 782-803.

<sup>5</sup>Edward Greenberg, The American Political System, Massachusetts: Winthrop Publishers, 1980, p. 344.

<sup>6</sup>John Judis, "Reconstituting Power in America", in In These Times, Vol. 5, No. 6, (December 17-23, 1980), p. 6.

<sup>7</sup>Dixon, "Article V: The Comatose Article of Our Living Constitution?", 66 Mich. L. Rev. (1968), p. 943.

<sup>8</sup>U.S. Constitution, Article V.

<sup>9</sup>Dixon, "Comatose Article", p. 946.

<sup>10</sup>American Bar Association, Amendment of the Constitution, by the Convention Method Under Article V, Chicago: American Bar Association, 1974, pp. 60-61.

<sup>11</sup>Lawrence Tribe, "Issues Raised by Requesting Congress to Call a Constitutional Convention to Propose a Balanced Budget Amendment", 10 Pac. L. J. (1979), p. 632.

<sup>12</sup>Walter Dellinger, "The Recurring Question of the 'Limited' Constitutional Convention", 88 Yale L.J. (1979), p. 1625.

<sup>13</sup>American Bar Association, "Amendment", p. 1.

<sup>14</sup>John Burgess, Political Science and Constitutional Law, quoted in Neal Manne, "Good Intentions, New Inventions, and Article V Constitutional Conventions", 58 Texas L. Rev. (1979), pp. 131-132.

<sup>15</sup>John Platt, The Step to Man, New York: John Wiley and Sons, Inc., 1966, p. 120.

<sup>16</sup>See American Bar Association, "Amendment", pp. 5-6; also see Neal Manne, "Good Intentions", pp. 136-142.

<sup>17</sup>The Federalist, No. 85 quoted in Charles McC. Mathias, Jr., "What's the Constitution Among Friends", in American Bar Association Journal, Vol. 67 (July 1981), p. 863.

<sup>18</sup>Ibid., p. 863.

<sup>19</sup>Wayne Wheeler, "Impending", p. 789.

<sup>20</sup>Charles Black, Bruce Ackerman of Yale Law School and Walter Dellinger of Duke to name a few.

<sup>21</sup>William Van Alstyne, "Does Article V Restrict the States to Calling Unlimited Conventions Only?--A Letter to a Colleague", 1978 Duke L.J., p. 1299.

<sup>22</sup>Bruce Ackerman, "Unconstitutional Convention", New Republic (March 3, 1979) quoted in William Van Alstyne, "Does Article V", p. 1297.

<sup>23</sup>256 US 368 (1921); see American Bar Association, "Amendment", for discussion.

<sup>24</sup>Neal Manne, "Good Intentions", pp. 137-138.

<sup>25</sup>3 US (3Dall.) 378 (1978).

<sup>26</sup>253 US 221 (1920); see Neal Manne, "Good Intentions", pp. 139-140 for discussion.

<sup>27</sup>Charles Black Jr., "Amending the Constitution: A Letter to a Congressman", 82 Yale L.J. (1972), p. 206.

<sup>28</sup>Ibid., p. 209.

<sup>29</sup>Ibid., p. 214.

<sup>30</sup>Ibid., p. 214-215.

<sup>31</sup>American Bar Association, "Amendment", p. 25.

<sup>32</sup>See Neal Manne, "Good Intentions", pp. 159-162.

<sup>33</sup>Wayne Wheeler, "Impending", p. 797.

<sup>34</sup>Ibid., p. 797.

<sup>35</sup>Neal Manne, "Good Intentions", p. 167.

<sup>36</sup>Alpheus Thomas Mason Quoted in American Bar Association, American Bar Association Journal, Vol. 5, No. 2, (1981), p. 1463.

<sup>37</sup>Charles McC. Mathias, Jr., "What's the Constitution Among Friends?", p. 863.

<sup>38</sup>Lawrence Tribe, "Issues Raised by Requesting Congress to Call a Constitutional Convention to Propose a Balanced Budget Amendment", 10 Pac. L. J. (1979), p. 633.

<sup>39</sup>Abraham Lincoln, The Collected Works of Abraham Lincoln, quoted in John Noonan, Jr., "The Convention Method of Constitutional Amendment--Its Meaning, Usefulness, and Wisdom", 10 Pac. L. J. (1979), p. 666.

<sup>40</sup>Ibid., p. 666.

<sup>41</sup>Charles McC. Mathias, Jr., "What's the Constitution Among Friends?", p. 861.

<sup>42</sup>U.S. Congress, Senate, Committee on the Judiciary, Balanced Budget--Tax Limitation: