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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 the 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:

- * 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

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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.

PART II

THE PRESENT, ALTERNATIVE CONCON FUTURES, AND FUTURE EVENTS, TRENDS, AND ISSUES

THE PRESENT: The Balanced Budget Proposal

Much of the present interest and debate on the pros and cons of a ConCon (constitutional convention) are of relevance because 30 states have already applied for a ConCon, and five states have passed resolutions calling for a ConCon in one of their two houses.⁴¹ Much of this movement is being spearheaded by the National Taxpayers Union.

Some argue that the Constitution should not be a forum for conservative economic policy, and that legislative action should deal with budget balancing. Unfortunately, congressional members have a tendency to spend for political reasons (that is to say, well organized special interest groups make strong demands for programs and policies that benefit the interest group directly, not the general public), and it is argued that only an amendment in the Constitution can stop this spending trend. The public seems quite in favor of a balanced budget amendment.⁴² (Although, if a recession sets in, public approval may dramatically decline.)

However, with Reagonomics still the official national policy, it is conceivable that four more states will pass resolutions calling for a ConCon. But those trying to have a ConCon seem dead-set against having an unlimited ConCon. However, I hope as this paper has shown, just because they are dead-set against an unlimited convention does not mean that a general convention won't occur. There are a range of alternative ConCon futures that could result. Some are more probable than others; nonetheless, the alternatives are there.

ALTERNATIVE CONCON FUTURES

To make the preceding pages clearer, it may be of some help to present some alternative scenarios of what might happen if 34 states do indeed apply for a Constitutional Convention (to date 32 have!). These scenarios will be presented in simplified outline form.

1. EVENT: 34 STATES APPLY FOR A LIMITED CONVENTION, AND CONGRESS NULLIFIES CALL

- A. CONGRESS NULLIFIES CALL because states call for less than general convention, i.e., applications are deemed invalid.

- B. STATES PROTEST, proceeding on either one of these alternative courses of action:

- (1) States take controversy to the Supreme Court; or
- (2) States apply for a general convention.

- C. IF STATES TAKE CONTROVERSY TO THE SUPREME COURT, the Court may:

- (1) Refuse to rule (political question);
- (2) Decide in favor of states; that is, convention held and loss of power for Congress; or
- (3) Decide in favor of Congress; convention is not held and Article V in favor of general convention.

2. EVENT: 34 STATES APPLY FOR A LIMITED CONVENTION, AND CONGRESS DOES NOT ACT

- A. CONGRESS DOES NOT ACT, citing procedural problems (e.g., wording of applications, timing, and/or other reasons).

- B. STATES PROTEST:

- (1) States take controversy to the Courts (Supreme Court eventually); or
- (2) They, then, reapply.

- C. SUPREME COURT may:

- (1) Refuse to rule;
- (2) Decide in favor of Congress;
- (3) Decide in favor of states, and convention is held; or
- (4) Other?

3. EVENT: 34 STATES APPLY FOR A LIMITED CONVENTION, AND CONGRESS DETERMINES PROCEDURES

- A. CONGRESS ACCEPTS APPLICATIONS and determines procedures for the convention.

- B. STATES ACCEPT THIS.

- C. EXPERTS, SCHOLARS, RADICALS PROTEST. No one else cares.

- D. LIMITED CONVENTION IS HELD.

4. EVENT: 34 STATES APPLY FOR A LIMITED CONVENTION, AND CONGRESS ALLOWS FOR LIMITED CONVENTION, BUT DELEGATES HOLD GENERAL CONVENTION

- A. CONGRESS ACCEPTS APPLICATIONS and allows for limited convention.

- B. CONVENTION DELEGATES USURP POWER OF CONGRESS and hold general convention.

- C. STATES AND CONGRESS PROTEST:

- (1) They may take controversy to Court; or
- (2) States may attempt to withdraw applications but too late.

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D. SUPREME COURT may:

- (1) Refuse to rule;
- (2) Rule convention illegal and declare amendments void; or
- (3) Rule that amendments are valid.

E. CONCLUSION:

- (1) If Supreme Court rules that amendments are valid, then ratification process begins. Most likely, state legislatures will not ratify amendments.
- (2) Convention creates new constitution, and it does not matter what Supreme Court says. Convention calls on public referendum for ratification.

5. EVENT: 34 STATES APPLY FOR A LIMITED CONVENTION, BUT CONGRESS CALLS FOR GENERAL CONVENTION

A. CONGRESS ACCEPTS APPLICATIONS but calls for general convention.

B. STATES PROTEST:

- (1) They take controversy to Court; or
- (2) They try to withdraw applications.

C. SUPREME COURT may:

- (1) Refuse to rule;
- (2) Favor states and rule that convention is invalid; or
- (3) Allow convention to continue.

D. CONVENTION BEGINS and:

- (1) It is ruled invalid but continues anyway; or
- (2) It is ruled valid and ratification process is surrounded by states' protest.

THE FUTURE: Events, Trends, and Images that would Increase the Probability of a Constitutional Convention

At this point it may be useful to speculate what types of events, trends, and images of the future might increase the probability of a Constitutional Convention occurring.

Of course, it may be argued that such speculation is useless. A ConCon will never happen. It is too dangerous to the present political-power structure. Americans really don't want such an exercise in democracy; they really only want to be left alone so that they can enjoy their middle-class existence. Also, other things may change, and even the Constitution may be changed on occasion by amendment but the idea of a general convention is preposterous. However, this is the status quo position. Are there not any events that could change this perspective?

The probability of there being a convention would dramatically increase if, for some reason, the balanced budget amendment (S.J. Resolution 58, or some version thereof) does not pass Congress. The states' campaign would then continue with only four more states needed for a ConCon on the balanced budget issue. Then, as it were, all hell would break loose--maybe.

One event that is approaching and that could have some impact is the 200-year anniversary of the Philadelphia convention. Americans will be looking over their (dusty) versions of the Constitution and wondering what it means and what it stands for.

It would be a time for re-evaluation. Legislatures would call it the year of the Constitution. The media no doubt will be involved in this process. Critical questions might be: Why is there a Constitution? Are we, as a nation, following the ideals of the Constitution? Is the Constitution outdated? Should it be replaced? Amended? Surely someone will come up with the idea of having and publicly supporting a ConCon--if not a real one, then at least a mock ConCon. This mock convention would either simply try and relive the Philadelphia convention, or it could attempt to design a whole new constitution. And, of course, a mock constitutional convention would create the conditions for legitimizing a real ConCon.

Joseph Coates, a futurist, is quite enthusiastic about this idea. He stresses, however, that a mock convention should be process-oriented and democratic--the general public (not just the managers and owners of large capital and government leaders) should be involved. The broader the base, the better--that is to say, truck drivers, high school students, school teachers, clerks, mothers, and so on. Those with little experience or understanding of government could be easily educated to understand the various issues involved. Surely, it is argued, everyone knows what type of world they want to live in; the trick is to tie this vision of their preferred individual futures with the Constitution. That is to say, there needs to be a link between an individual's socio-political and economic as well as personal reality with the structure of government and with the structure of the Constitution.

A mock convention would probably rest some of the fears that most people have about changing something with as much symbolic reality as the Constitution. On this symbolic level it would be important that a mock convention show itself as representing (1) America, (2) Democracy, and (3) patriotism, the good, the true and the beautiful (and maybe even the efficient as well). Here the impact of the media cannot be stressed enough! Newspapers, and especially television, could make or break a mock constitutional convention. Finally, it is important that the convention be not too long so as to lose national attention, but long enough so that the convention can be a living exercise in participatory democracy.

In terms of political trends, there would be an increased probability of a convention if the power and support of the New Right continues to increase (conventions for issues such as abortion, prayer in schools and so on). A New Right trend would, in addition, favor increased states' rights.

A Democratic party trend would drastically decrease the chance of a convention. Democrats, in general, do not favor the balanced budget amendment, nor the concerns of the New Right. They believe that changes in government should come about in slow, incremental steps, not dramatic leaps as a general convention may bring about.

A Republican party trend would also decrease the probability of a ConCon. They favor the balanced budget amendment but prefer that Congress initiates it.

Another event or set of events that could increase the probability of a ConCon revolve around a basic crisis of structure or faith in American government. The possible event could be a domestic or global crisis that would

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ll in to question the basic structures that the institution provides for (separation of powers, federalism, bill or rights). A collapse of the world economy or a global call--demand--for a world federal government (this would involve rethinking of the institution; for example, could the USA once having entered the world federal government simply leave it by congressional amendment?⁴³ Obviously this raises serious fundamental issues) would also increase the probability of a ConCon.

The development of radical new technologies also increases the chances of a convention occurring. What if in the future there were mass marketing of a drug that could reverse aging or could provide humans with lifespans of 100-200 years?⁴⁴ How would this affect government? Would government then be of the very few, the very rich, and the very old. Also, it seems that two or three-year terms for presidents would be ridiculously short. Might not life-time sentences be considered cruel and unusual punishment? Or what if a new drug came out that could increase intelligence (or the ability to learn); would that not also increase the desire for many to want a more participatory democracy? In addition, how would a communications system that involved each household having computer-telecommunications terminals (for instant recording of opinions on social issues, political candidates, and so on) affect the present political system? Most likely there would be a call for an electronic ConCon with everyone directly participating in the design of the new Constitution. These and other new technologies would lead the public to increasingly demand that the Constitution and the system of government authorized is dysfunctional for the late Twentieth century.

The technological developments above may seem strange; but at one time the television, the airplane, the telephone, and even the social technological development of representative government seemed equally absurd.

PART III

ALTERNATIVE FUTURES, CONSTITUTIONAL CONVENTIONS, AND NEW CONSTITUTIONS

This section will look at the Constitutional Convention from an alternative futures perspective. An alternative futures perspective attempts to look at the future from a range of probable, preferable, and possible futures.

Our alternative futures will be explored, and within each future--each image of the future--reasons why proponents of this future want or do not want a ConCon and a new constitution will be presented. Specific suggestions as to how proponents of each future would attempt to change the present Constitution will also be presented.

However, before we proceed with the above, it is necessary to take a brief look at the U.S. Constitution.

THE U.S. CONSTITUTION

From a conventional point of view the Constitution can be seen as having three basic parts.

The first part established the Constitution as a restraint on governmental power. This part divides and balances the powers of the three branches: the executive, the legislative, and the judiciary. The purpose of this, following the ideas of Montesquieu, was to avoid centralization of power. Thus the principle of separating powers and having checks and balances was designed not for efficiency (as might be the need for

today) but to avoid tyranny (America had just broken away from the centralized British system of government).

Another aspect of this first part is a series of statements which attempts to restrain the powers of the states. States cannot coin money, enter into treaties, nor impose tariffs. Also, the laws and the treaties of the U.S. are deemed superior to state laws (supremacy clause). The Constitution thus creates the system of federalism, that is to say, a division of power between national and state governments.

The second aspect of the Constitution creates the framework for national government. It creates a bicameral national legislature, creates qualifications for this legislature, and places restraints on state legislatures. It also creates a national executive, defines the role, powers, and qualifications of the presidency. In addition, this aspect of the Constitution provides for the creation of the Supreme Court and authorizes Congress to establish inferior courts. Jurisdiction of the national courts is also established. And, of course, this framework provides for the amendment of the Constitution--Article V.

The third aspect of the Constitution defines the basic freedoms and rights of individuals. Freedom of speech, freedom of the press, due process, speedy trials, equal protection under the law, jury trials in civil cases, procedural rights of the accused, the protection of personal and property rights, are some of these fundamental rights.

ALTERNATIVE FUTURES

An alternative futures approach attempts to look at the future from a range of societal images of the future. Implicit in this approach is that the future is difficult to predict and that the future holds many surprises. In addition, an alternative futures approach is helpful in overcoming one's own "single future" bias.

This paper will examine the ConCon in four alternative futures. These are images of the future and ideal types. These four futures are Continued Growth,⁴⁵ Transformational, Ecological-Socialist, and Collapse.

Continued Growth

The first image of the future that I will examine is the status quo, Continued Growth image. This image of the future assumes that the dominant institutions and political philosophies of the past will continue into the future. That is to say, the U.S. will continue to be growth-oriented, technologically dominant, globally politically dominant, liberal, upwardly mobile, materialistic, and individualistic.

While there are some substantial differences with some of the basic ideologies that support this position (for example, the conservative tradition versus the liberal tradition), in general they all support the same type of future for the U.S.

To better understand the probabilities of a ConCon occurring within this future and to better understand how the various proponents of this view feel about the ConCon and the type of Constitution they feel the U.S. should have, I will examine some theories of the state in this image.

First, the conservative theory. This theory is derived from 19th Century laissez faire political economy:

...most Americans tended to hold to the position that the state 'governs best that

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governs least'. Government was distrusted by a people that had recently thrown off the shackles of the English monarchy and its centrally directed mercantilist economic system. Government was, to most Americans, a necessary evil, good only for insurance against external threats to nationhood and internal threats to property and, as a necessary evil, its duties were perceived to be extremely narrow and circumscribed.⁴⁶

It is from this perspective that the Constitution with its emphasis on restraining government power, and on guaranteeing fundamental individual rights was written. A related aspect of this theory was natural law theory as derived from John Locke. The Declaration of Independence ("All men are endowed by their Creator with certain unalienable Rights", and "Governments are instituted among Men, deriving their just powers from the governed...that whenever any Form of Government becomes destructive to these ends, it is the Right of the People to alter or to abolish it...") is an excellent example of this. This idea that there are natural laws was extended to the economic market as well--government should not interfere--the market can take care of itself.

Much of the call for a balanced budget stems out of this conservative policy (albeit in its Twentieth Century version). From this perspective, government is too big. It spends too much. It gives money to the lazy. It bails out large, inefficient corporations. And it steals the savings of the people through taxes.

James Buchanan believes much of this has become possible by:

...the active dereliction of constitutional duty by the federal judiciary. Rather than being the main protectors and guarantors of the basic structure of inviolable individual rights as they are charged to be by the constitutional tradition, federal judges have become not only a rubber stamp for Congressional and Executive program initiatives, but also active participants in the alteration of the structure of rights and the rewriting, without consent, of the American constitutional contract.⁴⁷

Of course, Buchanan and other similar conservatives do not then go on to call for a new government or constitution (as might be implied from the Declaration of Independence); rather, he calls for:

...a reaffirmation of duty by members of the judiciary and a resurrection of their practice, long ignored, of placing limits on government activity.⁴⁸

This perspective on American socio-political reality would be against an unlimited ConCon in that such a convention might lead to a change (loss) of some of the Bill of Rights, and because the conservatives believe that the structure of American government is fine--it is just that the wrong people usually occupy key policy-making positions.

The next perspective that is within the Continued Growth and status quo image is reform liberalism. Here it is believed that due to imperfections or distortions with the market (abuse of property rights, externalities like pollution, job dislocation, public health problems due to industrialization), the concentration of capital, the commodization of labor (and the resultant outcome that those workers who are no longer useful are discarded),

the state must step into the economy and provide basic health services, welfare, education, old-age insurance, and wage and price controls.

...the positive state...is the means by which the community deals with the harsh by-products of the industrial system, controls unchecked privilege, guarantees full employment, cares for the aged and disabled, supports the disadvantaged, and guarantees opportunity for minority groups.⁴⁹

Thus, from this perspective the state acts to soften some of the harsh effects of capitalist development. In terms of political theory, this perspective is diametrically opposed to free-market conservatism. In the words of Henry Carter Adams:

We do not need a new world for a new man...but we do need a new society and a state whose power will be superior to that of any combination of selfish individuals, and whose duties will be commensurate with human wants. That not the best government which governs least, but governs the most wisely.⁵⁰

This in general is the Democratic Party perspective on social and political-economic life in the U.S.A. The Warren Court with its numerous civil rights and individual rights decisions is an example of this perspective. As it was said: "Ask not what your country can do for you, ask what you can do for your country".

A similar, yet more refined perspective, is that of pluralism. Here the state is not monolithic; rather, society is characterized by numerous opposed factions. Each faction attempts to maximize its own interest. In this way power is dispersed. As Robert Dahl says:

Because one center of power is set against another, power itself will be tamed, civilized, and limited to decent human purposes, while coercion, the most evil form of power, will be reduced to a minimum.⁵¹

Here, politics can be characterized by the struggle of various groups (representing the public) all with different levels of organization and popular support (and wealth), competing for a part of the economic pie.

...the state has no inherent interests of its own. The state is nothing more than a neutral sounding board for the total society; it does not favor inherently any particular group or class. Its activities are simply the bargained outcomes of the political struggle. This does not mean that the state is at all times neutral--at any particular moment it favors the dominant coalition--but it will be so in the long run, since the political process and access to bargaining resources are open to all.⁵²

From this perspective, it is obvious that a successful ConCon must be one that is open to as many interests as possible. The role, then, of Congress is neutral. Rather, let the various interest groups bargain and organize for the various changes that they want in the Constitution. In this way the new constitution would represent the dominant and majority interests of the American public.

In addition, part and parcel of the Continued Growth image--whether free-market conservatism, reform liberalism, or pluralism--is a belief in incrementalism.

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itical scientist, Ted Becker, asked Tom Wicker of the New York Times what he thought of the idea of a constitutional revolution debate (a ConCon):

You see flaws in the current system, and I do too, and you set out to eliminate them. But what you can't know--and this is the great failure of institutional reform--is what result that change will cause. If there is any one thing that political life has taught me over the years, it is that almost every time you set out to make a major change because a change is needed, you get a helluva lot of consequences that you never foresaw...and some of them aren't good.⁵³

Change then should come about through conventional safe means--through letting the outs in and the ins out. There are too many problems associated with designing a whole new Constitution. Representative McCloskey, Jr. says:

Who's to say that if you started completely over tomorrow, and you held a constitutional convention, and you set up a new structure, and you tried to cure all the problems of the old structure, that you wouldn't set up just as many new problems because of the difficulty of interpreting the new document or foreseeing new challenges.⁵⁴

Is, given all the problems associated with a ConCon, an attempt to change the present Constitution? True, one would argue, the Supreme Court has distorted its original intentions and meaning through the Court's decisions, but all in all the Constitution stands alone. "the most wonderful work ever struck off at a given time by the brain and purpose of man".⁵⁵

Are there not then any proponents of the Continued Growth image who believe that the structure of government needs to be changed? There are! However, most structural changes are quite conventional. They relate (1) the power relationship between Congress and the Presidency, (2) the balance of power between the states and the federal government, and (3) the power of the Judiciary vis-a-vis the Congress and the Presidency.

James Dator believes that in general there are basically three essential positions in the literature that relate to conventional governmental reform:

One seeks to strengthen the Presidency and weaken--or 'discipline'--Congress. The other seeks to 'revitalize' Congress and reduce the power of the executive and especially the bureaucracy.⁵⁶

As to about the Supreme Court, one may ask.

Without major exception...the Courts are viewed by political scientists and most political activists to be all right structurally. There may be bitter disputes over the decisions, of course. But most people seem to feel that good decisions can be gotten by changing the personnel, not the structure, of the Court.⁵⁷

The view that the presidency needs to be strengthened is argued by numerous conservatives. Samuel Huntington has argued that the "Constitution was a 'late medieval' or ' Tudor' document that made strong, efficient government possible."⁵⁸

...the U.S. (is) plagued by an 'excess of

democracy', manifested most clearly in the subordination of the presidency to Congress, special interest groups and the media...(this) decline in presidential power (has) to be reversed.⁵⁹

Obviously, from this perspective the 22nd amendment (which limits the president to two terms) should be reversed. With respect to the separation of powers doctrine, the conservatives argue that the president does not have enough power, especially in terms of foreign policy, where the treaties he signs are subject to congressional approval. Which other country has an executive leader with so many restraints? Others, however, would argue that government is better slow and safe than quick and tyrannical. But in the words of Lloyd Cutler:

The separation of powers, between the legislative and executive branches, whatever its merits in 1793, has become a structure that almost guarantees stalemate today.⁶⁰

From the reform liberal perspective, the people, through the institution of Congress, need more power. The president should basically be concerned with executing the laws of Congress. One suggestion calls for Congress to have the power to call for a new president through a no-confidence vote (as in the Parliamentary system).

Congress is the central institution of the American Democratic Republic. Unless it functions well and powerfully, much more so than it has in the past, the road to a bureaucratic state and a kind of a monarchic government will be opened up.⁶¹

The pluralist perspective which emphasizes the fluidity and adaptability of the system "stresses the ability of specific presidents or members of Congress to influence policy outcomes".⁶²

The conservative perspective, as mentioned earlier in the ideas of Buchanan, would like to see the power and the role of the Judiciary more strictly defined by the Constitution. Sam Yorty in an interview with Ted Becker said:

Well, I think we badly need a new Constitution because the Supreme Court says what the present Constitution is. And they have distorted it quite a bit by their interpretations.⁶³

The Judiciary is also the "problem" from the perspective of the conservative New Right. The Court reaches too many liberal and "ungodly" decisions.

The arguments go back and forth as to the relative degrees of change needed. More presidency? More congress? Less judiciary? No one seems quite sure. However, they do, in general, concur that only piecemeal reforms are needed. (Even Rexford Tugwell's famous United Republic of America Constitution, however holistic, is still very much from the Continued Growth perspective.)

Thus, if there really was a ConCon today, it is doubtful, given the dominance of Continued Growth policies and politics, that any new substantial changes would come about. State Constitutional Conventions seem to have substantiated this point. There may be some minor changes here and there; the states may gain some power, the Judiciary may lose some--but anything radical, revolutionary, or new, forget it!

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But the Continued Growth image of the future, however dominant, is not shared by all peoples. There are other views of the state, of political-economy, of the future. Within these images, these futures, a ConCon may be something else.

Transformational Society

The transformational image of the future is primarily technologically-oriented and directed. It is argued that the rate of social change has made old institutions obsolete. To survive this century and move onwards towards the next, new and political questions and issues of today (and the future) need to be designed (consciously chosen, that is).

Proponents of this image argue that we are in the midst of a gigantic transformation of humankind. We are undergoing fundamental changes so quickly that within 20 or so years, we will all be as aborigines, strangers, in a new world. Micro-electronics, space travel, artificial intelligence, recombinant DNA, life extension technologies, robotics, global telecommunications, miniature computers, the development of the service and knowledge industry, the fragmentation and individualization of society, the rise of the welfare "abundant" state, increasing individual and cultural diversity, make the present interesting and revolutionary times. The key question, then, is, "Can the socio-political system (which is evolutionary in nature) keep up with these revolutionary developments?" We are, argue the transformational proponents, at the brink of a new age, but we are reminded that the human species may be an experiment that will fail, unless humans consciously begin to design and anticipate the future to be.

The election of Reagan, then, is an attempt to return to an era gone. We are trying to use old solutions, old ways of thinking (materialism, incrementalism, conservatism, liberalism, and socialism) to deal with new problems.

James Dator argues that:

The socio-environmental situation that evoked the American Constitution has changed very drastically since 1789. Whereas then the American states were on the verge of the Industrial Revolution, now we are moving swiftly into some type of Post-Industrial Society.⁶⁴

America then was rural, mercantile, pre-industrial, semi-literate, and sparsely populated. Thus to deal with the lack of communications, the difficulty in travel, and the disparity of literacy among the people, representative government was instituted. The emphasis then was on the sacred word--print--and thus the Constitution was written and codified. Today, however, with electronic telecommunications, all can in some way--directly or semi-directly--participate in government. Today, also, there is holography, video, and more. Why should a constitution be necessarily written? Why should it be static?

In addition, decisions used to be made on precedence. But today, with the rapid rate of change, anticipatory democracy and anticipatory law make much more sense. Dator writes:

Thus, it seems to me imperative both that we seek rapid and radical modifications of our current political values and institutions so that we can bring our social structure into

congruence with our environmental imperatives...⁶⁵

Alvin Toffler, author of The Third Wave, adds that what we need today are inventors not politicians.

...we and our children can take part in the exciting reconstitution not merely of our obsolete political structures, but of civilization itself.

Like the generation of the revolutionary dead (the founding parents), we have a destiny to create.⁶⁶

How should we begin this task of political design?

We must, as a first step, launch the widest public debate over the need for a new political system attuned to the needs of a Third Wave civilization (Transformational Society). We need conferences, television programs, contests, simulation exercises, mock constitutional conventions to generate the broadest array of imaginative proposals for political restructuring, to unleash an outpouring of fresh ideas. We should be prepared to use the most advanced tools available to us, from satellites and computers to video-disc and interactive television.⁶⁷

Although most proponents of this image of the future stress at present the design aspect of reconstituting the present, still they do have some preferences as to the type of institutions they desire. In general, most of them call for structures that are fluid and that increase the amount of public input into the political process. The public needs to be empowered, politicized, and futurized.

For example, the Cascot system (one alternative):

...calls for the implementation of the world's first genuine participatng democracy. It is proposed to use the computer...to make it possible for every citizen to vote-- directly, frequently, and conveniently--for issues as well as for candidataes--from the privacy of his own home.⁶⁸

Ted Becker argues that the government of America has broken its political contract with the people, and the citizens have the right to a constitutional revolution. He suggests the following institutions:

- 1) Public initiative and referendum (towards a direct democracy);
- 2) A national town meeting (through the use of electronic communications technology) (work in this area has already started in Hawaii);
- 3) Half a random house (Congress would have half of its elected representatives elected by lot so as to ensure public participation);
- 4) The presidential election tournament (a more democratic way to elect the president--without parties, primaries, and private contributions;
- 5) The people's cabinet;
- 6) Counter-government (an Ombudsman

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program).⁶⁹

Toffler has similar suggestions using random polling methods.

...the elected representatives would cast only 50 percent of the votes, while the current random sample--who are not in the capital but geographically dispersed in their own homes or offices--would electronically cast the remaining 50 percent. Such a system would not merely provide a more representative process than 'representative' government ever did but would strike a devastating blow at the special interest groups and lobbies who infest the corridors of most parliaments. Such groups would have to lobby the people--not just a few elected officials.⁷⁰

What about the Judiciary? Becker suggests the increased use of tribunals, the use of neighborhood justice centers, the development of a Judiciary that reflects, not only the values of lawyers, but values of the general public. Perhaps there should be a random selection of citizens to help judges in their tasks. Or even: who needs judges! Why not program computers to do this task? Computers could probably perform most of the functions present judges do. Special courts assigned to Constitutional issues or issues involving basic public values could still be occupied by human beings. The alternatives, once the task of designing new political institutions and structures are approached from a creative futures-oriented mind, are endless.

What about a ConCon in this image? Most important would be a mock ConCon. Also, delegates to a ConCon should be randomly selected, or a ConCon should be electronically conducted.

What, then, of the new Constitution? Besides the suggestion that the Constitution be video-taped, it is important to note that the unit of analysis in a transformational scenario would change. In the Continued Growth future, the unit of analysis was the nation-state. For a transformational scenario it would be the individual. The Constitution would then probably be very simple but explicit in the rights of individuals. There might be special rules against acts of violence against the telecommunications network. There also might be special rights on information. Information would be deemed to be free. Everyone would have the right to communicate, the right to the communications network.

The state could almost be termed non-state. It would be seen as more fluid and open to the public than the pluralist model. The underlying philosophical notion would be that the people do know what they want (people here are defined not as a set of interest groups, but as diverse individuals). In addition, the transformational scenario is globally-oriented, and proponents favor some type of global governance system (but not a monolithic world government structure).

Thus it is argued that because of various new technologies and the numerous impacts they are having on society, we are in the midst of a social transformation. What is needed are exciting and compelling visions of the future (not blueprints) based on present status quo oriented thinking).

A Constitutional Convention could begin the needed process of radical change. Of course, present trends continuing, it is doubtful that a ConCon, if held within the next ten to fifteen years, would come up with such suggestions. Still, it is not inconceivable.

The Ecological-Socialist Image

A third image of the future is a newly emerging one that combines aspects of socialism, spiritual/individual change strategies, and ecological awareness. Perhaps it is more accurate to say that this image is a collection of loosely associated images. Nonetheless, proponents of these images do agree on quite a large number of basic issues.

In a previous section it was stated that the U.S. Constitution had three parts to it. The first part dealt with governmental restraints; the second part dealt with the national governmental framework; and the third part dealt with individual rights. This, of course, is the conventional Continued Growth perspective. The Transformational society image saw the Constitution as an attempt to come to terms with the various technological concerns and issues of the 18th Century. This scenario, image, attempts to go beyond conventional categories and theories of governance (separation of powers, federalism, for example). The ecological-socialist image sees the Constitution as:

...a key element in the protection and nurturance of property and the social class system based on property. Despite its occasional use for the protection of racial minorities, political dissidents, the weak, and the poor, we must see the Constitution, finally, as an instrument of class inequality.⁷¹

It was in the fear of populist-democracy that a strong central government was created (Shays' Rebellion, for example, caused a great deal of concern among the elitist property owners as to the viability of the system without strong central control). The men of property tended to believe that "those who own America should govern it".⁷² Also, it is argued, a strong and stable federal government was needed so as to provide the legal-rational basis for the development of American capitalism:

Above all else, the purpose of the convention (1787 ConCon) was to provide a framework for the acquisition, use, and transfer of property, free from the fears of both populist-style intrusions and an unreliable financial and economic environment.⁷³

While the pluralist may argue that different factions (interest groups) compete for government power, and that the government is neutral, the Ecological-Socialist perspective argues that the corporate class actually runs the government (that is to say, there is a harmony of interest between Big Government and Big Business). The state and the Constitution, then, are not neutral; rather, they arose out of a particular ideological context.

From this perspective the system no longer works. Government policies reflect the needs and desires of the corporate section (Reaganomics being the latest example). There is government lawlessness. The FBI, the CIA, the police have abused their powers. The military budget is too high. All is not going well in the land of opportunity.

...we have two governments in America, then, one under the Constitution and a much greater one not under the Constitution. Consider a right such as freedom of speech. "Government": is forbidden to interfere with free speech, but corporations can fire employees for free

speech... newspapers, television, and magazines can refuse to carry "radical" opinion. In short, the inapplicability of our Bill of Rights is one of the crucial facts of American life today.⁷⁴

Citizens do not have equal access to the good life or to the political-government machinery. Government has become a vehicle for the few, and by the very few. In addition, bureaucracies run uncontrolled, and key decisions are made by unaccountable elites.

But that is not all. The ecology conscious proponents point out that the world itself may be doomed. The nation-state with its short-sighted policies may lead humanity to a nuclear war. National policies, following the capitalist-industrial profit-imperative have already begun to destroy the seas, the air, the water, and in fact the whole eco-system.

There now exists a world economy. Multi-national corporations run rampant throughout the globe making private decisions with large-scale public consequences. And while political imperialism may be on the decline, economic and cultural and communications imperialism from the North continues unabated throughout the South. The forecast, then, for the year 2000, if present trends continue, is gloomy, at best.

Thus, this perspective criticizes the Continued Growth ideology of global capitalism (and present socialism); it calls attention to the potential ecological (and thus food) crisis ahead of us; and it warns us of the high probability of nuclear war in the present system.

Like the transformational view, it sees the world today as fundamentally different from the 17th Century. However, this difference is not only because of technological reasons, but also for social reasons (the rise of the welfare state, the development of a world economic system, the homogenization of world values, and so on). In addition, it is less hopeful as to the liberating effects of the science and technology revolution. For technology developed under the present system will only favor the rich over the poor, the powerful over the weak. New technological developments will only lead to a more advantageous position for government and capital over labor. Governments will be able to monitor dissidence more closely and the bargaining power of labor will decrease with automation. Thus instead of electronic democracy, there will be technocratic authoritarianism.

Obviously from this perspective, if there were a ConCon today, corporations through their lobbying efforts would manage to influence the convention. Any constitutional changes that would be made (limited or unlimited) would tend to decrease individual rights, decrease the power of the worker, and increase the ability of capitalism to get out of its present slump.

Obviously a world crisis which conceivably could lead to a new constitutional convention would crystalize many of the social forces that reinforce the status quo. Such a convention would shore up, in a legalistic manner, the structure that is weakening under rapidly changing social conditions.⁷⁵

The balanced budget amendment is an attempt to save capitalism. However, the critical question that the balanced budget proponents do not properly address is: Why does the state spend? That is to say, argue the ecologist-socialists, that if the state did not provide social welfare, if it did not prop up Big Business, if it did not interfere with the economy, then capitalism

would collapse.

That is the critique. Now we will look at the preferred future from this perspective. A new Constitution would have an article that called for long-range planning as well as technology assessment and environmental monitoring. The unit of analysis would be the community as well as the globe--not the nation-state (Continued Growth) or the individual (Transformational Society). There would be articles that collectivized property and wealth. There would be articles that guaranteed individual access to media, to communications, and basic minimum needs. There might be a call for the U.S. to join some type of world federal system or some type of super-ordinate authority. There would also be articles that established a maximum as well as a minimum wage, where changes in the maximum wage would lead to changes in the minimum wage. There would be an article that guaranteed equal rights to all sexes, races, and cultures. Possibly, the U.S. could be divided into ethno-geographical zones.

Thus, in general, the new Constitution would be 1) against private property, 2) against the unlimited accumulation of personal economic wealth, 3) against the irrational destruction of nature, 4) and against government and corporate abuse.

What about new political institutions? In general, this perspective would favor decentralized power (regionalism, community organizations) but still under a strong policy-making state. Wise leaders, as opposed to new structures, would be preferred in this image of the future. The purpose of the state would be to guarantee basic necessities, promote community and regional economic development, and provide public order. The Constitution would then be based on ecological-socialist values--a new document for the new human in the new society.

Societal Collapse

This fourth image of the future is based on the belief that the present global problematique cannot be solved. Due to a host of problems, mainly the following: population explosion; food shortages; water shortages; changing weather patterns; nuclear proliferation; increasing imbalances between nations and between the rich and poor over economic and technological inter-dependence; and so on--the world is destined to collapse.

The days of the industrial society are over. The pertinent question is how to prepare for the coming collapse. In the case of a global nuclear war, well, it doesn't really matter, does it? However, an economic collapse, or local nuclear wars, might leave some survivors around.

If these survivors got together, what type of constitution would they try to build or design?⁷⁶ The obvious initial position is that they, the survivors, would care little for constitution designing. It obviously didn't help the billions who are dead; what use could it be?

However, if we assume that there will be some type of social organization, economy and policy, then there will probably need to be some laws, some rules of conduct.

Most likely there will be an authoritarian type of system, with those who have some power (information or means of production or destruction from pre-collapse days) will constitute a Constitution that gives all power to a sole executive (there goes the balance of powers and federalism). If resources were scarce (as

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ight rationally be presumed), there would be rules governing the allocation of these resources, and methods to resolve conflicts that arise in the allocation process. Instead of a Bill of Rights, there would probably be a code of ethics, similar to the Ten Commandments. For survival reasons, the social rules would be strict and popular participation in government part of the question.

Another type of system would be equally authoritarian, but feudal, in terms of social organization. Inter-region wars in this future (over scarce resources) would be common place, as would inter-personal conflict.

A third possible system would be one based on cooperative principles. Decisions basic to the survival of the community would be made on a collective basis. The Constitution would be spoken, rather than written. In addition to collective decision-making, there would probably be a council of elders (a tribal type of system). Here again, key issues would revolve around the allocation of scarce resources.

In general then, a societal collapse would lead to social and political organizations reminiscent of primitive tribal and feudal societies. It is doubtful that the idea of a ConCon would arise in the minds of humans numbed from the shock of nuclear holocaust or global starvation.

The final section of this paper, Part IV, will look at the impact of a ConCon on Hawaii. It will examine the ConCon in alternative Hawaii futures and attempt to assess the effects of a ConCon on the Hawaii Judiciary's five dimensions. In addition, suggestions for an appropriate strategy for the Hawaii Judiciary with respect to a ConCon will be presented.

PART IV

ALTERNATIVE FUTURES, THE CONCON, HAWAII, AND THE HAWAII JUDICIARY

THE FUTURE, THE CONCON, AND HAWAII: A sketch

If there were a Constitutional Convention (either limited or unlimited) then changes in the National Constitution would no doubt have to be followed by the states (the supremacy clause). Thus, Hawaii would no doubt be affected by any national change. The type of change would depend on which alternative future is under discussion.

The Continued Growth image would lead to few changes in Hawaii. The State of Hawaii has had its own ConCons, and nothing very radical or novel has come out of them. Still, the mere fact that a ConCon (if the public votes for it--it can be put on the ballot after a nine-year period) is part of Article XVII is a progressive sign.

If there were changes in the Hawaii Constitution (with respect to the Continued Growth image), they would probably deal with (1) questions of controlled growth immigration quotas and developmental plans), (2) the structure and role of the Judiciary (direct election of judges, or some other method to make the Judiciary more accountable to the public), (3) questions with respect to the duties and powers of the state government vis-a-vis the federal government.

Hawaii's Constitution would take on a different look under a transformational scenario. Many of the changes discussed at the national level (electronic democracy, and so) would be adopted by Hawaii on the state level. A new branch of government (or special division thereof) could be instituted to deal with issues of long-range

planning, futures research, and public participation in political design.

The Ecological-Socialist future would lead to Hawaii having increased rights and powers. Hawaii might even gain control of its economy by (1) forming financial barriers (to keep the money made through tourism in the state of Hawaii), (2) land use barriers (in terms of fixed quotas) as to who can use land in Hawaii--the state, of course, has final ownership, and (3) by reducing its economic dependency on the mainland.

The Collapse future would probably lead Hawaii to some type of feudal structure--although it is highly doubtful that Hawaii could survive a global collapse. The different islands would be different sovereign states, and property that could produce food would be far more important than beach-front property. Hawaii would be a society based on agriculture and fishing.

The above are just sketches, the actual details for each future would follow the global version of the future--with some local, cultural, geographic, economic and political variations (that is to say, Hawaii's unique culture heritage, its economic dependency on the outside, its island status, and so on).

THE HAWAII JUDICIARY'S DIMENSIONS AND THE FUTURE: A SKETCH

The Hawaii Judiciary, as part of its comprehensive planning, has determined that it has five dimensions with five distinct missions. They are:

- 1) Government Branch - to uphold the constitution--the government it creates, the rights and liberties it guarantees, and the policies and principles that it embodies.
- 2) Dispute Resolution Forum - to ensure to the people of the state the highest standards of justice attainable under our system of government by assuring an equitable and expeditious resolution of all cases and controversies properly brought to the state courts.
- 3) Public Agency - to provide for, promote, and ensure the effective, economical, and efficient utilization of public resources in the administration of the judicial system.
- 4) Subsystem of the Legal System - to promote the effective and expeditious administration of justice by and among the various subsystems of the legal system.
- 5) Institution of a Changing Society - to anticipate and respond to the changing judicial needs of society.

We can easily see how different futures will lead to different changes in the Hawaii Judiciary.

The Continued Growth scenario ConCon might lead to decreased powers for the Judiciary. This would directly impact the first dimension in terms of the ability of the Supreme Court to interpret the Constitution.

The Transformational Society scenario would greatly impact the Judiciary's dimensions. The first dimension might be impacted in that there may not be a written constitution to interpret. The second dimension would be impacted in that although conflict would be high (due to increased diversity), this conflict would be handled on an informal basis. In addition, much of what would be

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called crime today might not be considered crime in a transformational future. Cases also would be resolved more equitably and at a quicker rate through the use of computer judges and other automated systems. A whole new range of litigation could result from conflicts involving the new technologies and their social uses (electronic voting, intelligence drugs, and so on). Hopefully, some of these issues will be anticipated and dealt with in the Constitution.

Similarly, the new technologies (automation, especially) will greatly impact the Judiciary as a public agency. Finally, the fifth dimension in a transformational scenario would gain much more recognition and importance (that is to say, futures research and other methods of anticipating judicial needs would be institutionalized as well as implemented).

The Ecological-Socialist scenario would be concerned mostly with the sixth dimension of the Judiciary (still unofficial but called "the Judiciary as a Political Institution"). This dimension is concerned with the actual policies made by judges and with the structure of the courts. It would attempt to make judicial policies more in line with the Ecological-Socialist world view. The Judiciary would reach decisions that would favor labor over business, individuals over government, and so on. The judicial system would be redesigned so that the poor and other minorities could have equal access to the system. Also, law related to the environment might be dealt with by special courts.

This future would increase the emphasis of the Judiciary as a public agency (in terms of increased administration and increased services), it would increase the emphasis of the Judiciary as a subsystem of the legal system (in terms of an integrated legal system), and it would increase the emphasis of the Judiciary as an institution in a changing society (in terms of increased importance and use of long-range planning, social engineering, and futures research).

In the Collapse scenario there probably would not be a formal Judiciary. Disputes would be resolved by the executive, or by informal community mediation. The laws would be stricter, and the idea of appealing a decision to a higher court would be unheard of.

THE FEDERAL CONSTITUTIONAL CONVENTION: Towards an Appropriate Strategy for the State of Hawaii Judiciary

The only thing that is certain with respect to a ConCon is total uncertainty. There is little clarity on the road to the ConCon. If it were called today, there most likely would be very few changes affecting the Judiciary directly. If the present conservative trend continues, then the Judiciary may lose some of its power vis a vis the other two branches. Judicial review and judicial independence, for example, might be decreased.

Of course, if a ConCon were held in the future under different social and political-economic conditions, the result may be quite different. This would depend on the mood of the country, the image of the future more prevalent then, and the types of issues, problems and concerns that are in the mind of the people.

It does seem, nonetheless, that a ConCon has high democratic value (if not real, then at least on the symbolic level). It would politicize and futurize (in terms of political design and empowerment) the people. A ConCon would force citizens to re-evaluate the Constitution, government, and the future of America.

Thus there are positive and negative aspects of a ConCon. The actual calling of a ConCon and convention

process would cast the Judiciary in the limelight (at least the Supreme Court)--in terms of decisions that would have to be reached with respect to constitutional conflicts that could (and probably will) arise.

It seems then that although the ConCon is a worthwhile and exciting event, it could cause too much change and too much conflict. To avoid some of the negative affects of a ConCon, a mock ConCon would seem to be an excellent tool. It would give the Judiciary (and others) an idea of the possible changes that could occur. And, most importantly, it could democratize, politicize, and futurize the public.

The Judiciary, thus, should definitely become involved in any discussion, debates, programs, and questions of law with respect to the Federal Constitutional Convention. It should not be in the background, simply letting the ConCon happen; rather, the Judiciary should take leadership and attempt to use the ConCon to realize its own preferred future.

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THE POSSIBLE PROBLEM OF RACE IN AMERICAN AND OTHER
WESTERN EXTRATERRESTRIAL SETTLEMENTSJohn H. Stanfield¹, Yale University

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See FUTURICS Vol. 7, No. 4 for part 1.

For the past 400 years, labeling various racial populations as "superior" and "inferior" has been a convenient way to justify group privilege and subordination in the Western World (Van den Berghe, 1967; Mason, 1970). The question is: Will Americans, and other Westerners carry the germ of racism with them if and when they establish permanent settlements on other planets? This question is more significant than it may appear, for it involves the selection of the people who will emigrate to such settlements and the social norms, values, and beliefs which extraterrestrial colonists will transplant and develop. Will African descent and Asian descent populations as well as European descent populations be allowed to emigrate? If so, will they be given equal access to social rewards such as occupational mobility or will they be relegated to low caste positions? This question should be pondered since someone must do the dirty work in the space settlement (Hughes, 1958). How will dirty workers be systematically chosen and defined? Decisions must be made if physically and culturally distinct populations will be included within the intimate social milieu of whites or thrown back to the "Old Earth norms of interracial marriage taboos, segregated communities and schools." To put all of this more candidly, will the history of racism on earth be repeated in the permanent space settlements established by Americans and other Westerners?

The problem of racial inequality has been greatly ignored by science fiction writers. Most assume that racism is nonexistent among their human space travelers. Television shows, such as "Star Trek," give the impression that, in the future, human beings will be able to work together in extraterrestrial ventures irrespective of their racial heritage. Certainly, we should strive for a future world in which people are evaluated by their individual qualities, not by their race. But, how do we get there? For instance, what must Americans do to socialize future generations to identify and evaluate human beings on the basis of their abilities rather than on their racial traits or on behaviors assumed to be correlates of racial traits (see Ehrlich and Feldman, 1977).

It is virtually impossible for emigrants to develop a new world without using the perceptions, values, and beliefs derived from their old world life experiences. Even though Puritans came to New England to establish a new world, their institutions and social norms were largely based upon modified English world views. Indeed, the entire history of European exploration and colonization in the Western Hemisphere, Africa, and Asia involved Europeans who were determined to base their new homes and their relationships with natives upon the cultural baggage brought from "the old country" (Spicer, 1962; Jordan, 1972).

Using old cultural elements to establish new worlds will pose a dilemma in permanent space settlements. If careful long range planning is not done, it will be easy, through previous socialization, to justify excluding, say, Afro-Americans or Hispanics from American extraterrestrial settlements or to adhere to Western norms of attaching negative social meanings to the non-white features of physically distinctive members of space expeditions. In order to ensure equal access

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