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PERSPECTIVE

Six problems with 'Six Californias' initiative

By David A. Carrillo and Stephen M. Duvernay

California Secretary of State Debra Bowen recently qualified the "Six Californias" initiative for signature gathering, the first step in qualifying for the fall 2014 state election. Launched by venture capitalist Tim Draper in December 2013, this initiative would institute a process for dividing California into six new territories that could request admission to the union as new states.

Experts on the U.S. Constitution have expressed reservations about this measure, pointing out that Congress holds ultimate power over the formation of new states. We will not revisit those concerns. Instead, we examine this proposal under state law, assuming that, if enacted, the measure will be reviewed by the state high court. (Professor Vikram Amar has identified some of these issues.)

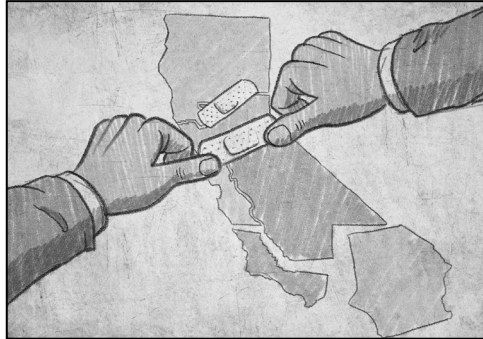


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provisional because Virginia's legislature did not consent to the division. See Vasan Kesavan and Michael Stokes Paulsen, "Is West Virginia Unconstitutional?," 90 Cal. L. Rev. 291 (2002). But it is difficult to argue that the electorate "consenting" by plebiscite is equivalent to the California Legislature consenting. Although the electorate exercises some legislative power through the initiative process, Prof. Eng'rs in *Cal. Gov. v. Kempton*, 40 Cal. 4th 1016, 1038 (2007), the electorate and the Legislature are constitutionally distinct entities, and the admissions clause specifically refers to the "legislature" of a state. Those things should preclude consent by plebiscite.

The Guarantee Clause

There is another problem with the measure's "legislative consent" provision, which states that "the legislative consent required by Section 3 of Article IV of the United States Constitution ... is given by the people." This may violate the U.S. Constitution's guarantee clause (Art. 4, Section 4) because it commandeers constitutional authority expressly delegated to state legislatures in the admissions clause. Cf. *Morrissey v. State*, 951 P.2d 911, 916-17 (Colo. 1998) (initiative directing the Colorado state legislature to propose federal constitutional amendment violated guarantee clause because it "usurp[ed] the exercise of representative legislative power").

Boundary Determination

Even if the voters can, as a general matter, provide legislative consent, the measure's provision for counties to decide which new state to join may be an impermissible delegation of legislative authority. The "unlawful delegation" issue usually arises in the administrative context, where courts have long required delegation to be accompanied by an ascertainable standard to guide the exercise of delegated authority. See, e.g., *State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners Inc.*, 40 Cal. 2d 436, 448 (1953).

Under this line of authority, legislative delegations are invalid when there is a total cession of power, and the courts will intervene to "preserve the representative character of the process of reaching legislative decision." *Hess Collection Winery v. Cal. Agr. Labor Relations Bd.*, 140 Cal. App. 4th 1584, 1605 (2006). Here, not only is there an absence of any articulable standard for later decision-making, the ultimate policymaking power to decide the boundaries of the new states is removed

from the existing state Legislature and the legislatures of the nascent states, and instead given to the counties.

Designation of Proponent

The measure provides that in "recognition of his personal and financial stake" in the measure, the official proponent (who is not identified) is appointed "agent of the State of California" for purposes of defending the measure. This includes the power to "supervise" the state's attorney general, gives the agent sole discretionary power to retain independent counsel at state expense to defend the measure, and includes the power to order the attorney general to appoint such counsel as a special deputy.

This is troublesome. Among other things, this provision may violate Article 2, Section 12 of the state Constitution, which prohibits initiatives "that name[] any individual to hold any office"; it may invade the law enforcement authority of the governor and attorney general under Article 5, Sections 1 and 13; and it may violate the requirement of Article 4, Section 16(a) that all laws of a general nature have uniform operation.

Local Independence

The measure would retain the language in current Article 11, Section 5(a) of the state Constitution that local laws "with respect to municipal affairs shall supersede all laws inconsistent therewith." This may result in exporting California's existing muddled doctrine of state-local relations to the new states. Several state high court decisions have struggled to interpret the phrase "municipal affairs," most notably *Ex Parte Braun*, 141 Cal. 204, 214 (1903), where one concurring justice described the phrase as "the loose, indefinable, wild words ... [that] impose[] upon the courts the almost impossible duty of saying what they mean." See also *Cal. Fed. Savings & Loan Ass'n v. City of Los Angeles*, 54 Cal. 3d 1, 6 (1991) ("those 'wild words' have defeated efforts at a defining formulation of the content of 'municipal affairs'").

As it stands, the municipal affairs doctrine generally prefers the state over local governments. See, e.g., *State Bldg. and Constr. Trades Council v. City of Vista*, 54 Cal. 4th 547, 556 (2012) (when the subject of the state statute is one of statewide concern, the statute is reasonably related to its resolution and is not unduly broad, then the conflicting local law ceases to be a "municipal affair"). The measure's use of this problematic phrase could result in maintaining that rule, which appears to be the opposite of the measure's stated intent "to empower local governments."

Maybe California would benefit from some structural changes. But the electorate's initiative power plainly does not extend to dismantling California's government and partitioning its territory. This measure may have been intended to spark debate on important issues, and in that respect it has already succeeded. Its fate at the ballot box, and in the courts, is another matter.

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Amendment or Revision?

The principal question is whether the measure is beyond the electorate's initiative power because it constitutes a revision of, rather than an amendment to, the state Constitution. While the state Constitution vests ultimate power in the people, including the "right to alter or reform" the government, Cal. Const., Art. 2, Section 1, the scope of the electorate's initiative power is limited. Specifically, while an initiative measure can amend the state Constitution, constitutional revisions can only originate from a legislative proposal. Cal. Const., Art. 18, Sections 1, 2. As the state Supreme Court explained in *Strauss v. Horton*, 46 Cal. 4th 364, 441 (2009), revisions are measures that effect "far reaching changes in the nature of our basic governmental plan" or "substantially alter the basic governmental framework set forth in our Constitution."

It is difficult to imagine a more fundamental change in the basic governmental plan or framework of the state than breaking the state into six new sovereign entities. Cf. Cal. Const., Art. 3, Section 1 (the "State of California is an inseparable part of the United States"). Presumably, each of the new states would require its own new constitution to submit to Congress when applying for admission to the union. The end result is to void the state Constitution, which surely is beyond the initiative power.

Finally, there is an argument that the measure is beyond even the revision power: It contemplates the organic act of forming six new states with their own charters, not a set of changes to a document expected to continue in force. This can only be accomplished by the people exercising their full sovereignty in a state constitutional convention.

The Admissions Clause

Article 4, Section 3, Clause 1 of the U.S. Constitution (the admissions clause) requires a state's legislature to consent to formation of a new state from its territory. The Six Californias measure attempts to sidestep this requirement by providing that the electorate is "acting as the legislative body of the State pursuant to their reserved legislative power."

Does this satisfy the admissions clause? There is little law on this subject. As an example, there is an argument that West Virginia's admission was uncon-