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Carving up California: been there, tried that

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Last week, the proponents of the "Six Californias" initiative measure submitted a claimed 1.3 million signatures to the secretary of state. Because the signature submission deadline for the November 2014 election has already passed, if enough signatures are validated to qualify it the measure likely will be placed on the November 2016 general election ballot. Unfortunately for all Californians, this conceit of dividing the state is neither novel nor good.

As a state, we've been here before many times. Versions of this idea have been proposed in California's history over 200 times. Once, the state government actually voted (in 1859) to divide the state in two and requested congressional approval - which didn't happen because the Civil War started. And in 1941, four northern California counties voted to secede and form the new state of Jefferson - which lasted until

Japan attacked Pearl Harbor three days later. There is even some precedent in the nation's history: Vermont was formed from New York; Kentucky and West Virginia from Virginia; and Maine from Massachusetts.

Regardless of the history of secessionist urges, the bottom line is this: Dividing California is a procedural nightmare, and the proposal is virtually certain to be rejected by both the California and federal governments, as evidenced by the past record of failure for similar plans. Legal scholars such as Vikram Amar and John Yoo have analyzed the serious state and federal constitutional defects of Six Californias. The persistent notion of dividing California is quixotic and ultimately more a harmful distraction than a beneficial proposal.

Even if voters were to approve the Six Californias measure (which a December 2013 Field Poll suggests is highly unlikely), actually splitting the state is even less likely to occur. Article 4, Section 3 of the U.S. Constitution gives Congress the power to admit new states. The other states, through their congressional representatives, have no incentive to approve a subdivided California; indeed, they have a huge disincentive to do so. This is because American politics is structurally biased in two important ways to advantage sparsely populated states.

SPECIAL REPORT Labor & Employment



Monday, July 21, 2014

Litigation
FedEx indictment part of long crusade against online pharmacies over drug sales
Last week's indictment by San Francisco federal prosecutors against one of the country's biggest package delivery services is the latest, and most ambitious, chapter in their nearly decade-long crusade against online pharmacies.

Criminal
More than 2,500 federal drug offenders in California could be eligible for reduced sentences
The Central District is poised to face the highest number of reviews from current inmates who could get lower sentences for their nonviolent drug offenses, after a federal panel voted Friday to retroactively apply a recent amendment.

Administrative/Regulatory
Carving up California: been there, tried that
Last week, proponents of the "Six Californias" initiative submitted signatures to the secretary of state, which may get it on the 2016 ballot. This idea is neither novel nor good. By **David A. Carrillo, Jack Citrin and Ethan Rarick**

Ethics/Professional Responsibility
State Bar gears up to protect child migrants
Some lawyers and those posing as lawyers appear to be preparing to take advantage of immigrant children arriving here from Central America, members of the State Bar Board of Trustees were told last week.

Law Practice
On The Move
A weekly roundup of lateral attorney moves, law firm office openings and partner promotions from around California.

Quinn Emanuel hired by GM amid recall investigations
Quinn Emanuel Urquhart & Sullivan LLP has been hired to conduct a review of the way General Motors Co. lawyers handle litigation involving the decade-long delay in recalling cars with ignition defects, a coup for the L.A.-based firm.

One, obviously, is the makeup of the U.S. Senate, where each state is equally represented, meaning that currently the 580,000 people in Wyoming have just as much voting power in the upper chamber as the 38 million Californians. If California is allowed to split into six states, those Wyoming residents have only one-sixth as much voting power as the same 38 million ex-Californians. And, of course, each of the new mini-Californias will have a smaller delegation in the House of Representatives, proportional to their newly reduced population.

The second important structural disincentive to acceptance is the Electoral College. Because Senate seats are included in the allotment of Electoral College votes, smaller states have more power in choosing the president. Again, take Wyoming: California has about 65 times as many people, but only 18 times as many votes in the Electoral College. This has had real consequences. If you recalculate the Electoral College vote for 2000 using only House seats (so that the Electoral College more closely reflects population), Al Gore wins easily, even if George W. Bush still takes Florida. Without the small-state bias of the Electoral College, in other words, the hanging chads would have been moot.

For the same reasons, small states have disproportionate power both in enacting federal legislation (and in doing everything else the Senate does, such as confirming federal judges), and in choosing the president. Voters in Wyoming (and Rhode Island and Vermont and Montana and so on) are far, far more powerful than voters in California. There is no reason for them to give away part of this advantage by allowing the biggest state to subdivide, an inevitable dilution of their power regardless of how the new statelets choose to vote. Even large states have no incentive to increase the power of Californians. The nation's largest state is more disadvantaged by the current system than any other. For example, Florida has slightly more than half as many people as California, but the same power in the Senate and 53 percent as much power in the Electoral College.

And then of course there is the partisan impact of the proposal. Most (though not all) small states lean Republican, so the current system weakens the power of California's Democratic majority. What would the new California statelets look like politically? Based on current voter registration, three of them would be overwhelmingly Democratic - Silicon Valley (most of the Bay Area), West California (Los Angeles) and North California (a swath running from Marin County up through Sacramento and on to the Nevada border). The Democratic registration edge in these new states would be large, ranging from 13 to 33 points. The other three new states would have a Republican edge, but it would be slight, in all three cases either one or two percentage points.

Voting results bear out the registration figures. We examined how each of the six new states would have voted in high-profile statewide races (president, governor or U.S. senator) in the past 10 years. Silicon Valley would have voted Democratic every time, and West California and North California would have voted for Democrats all but once. Central California (essentially Fresno, Bakersfield and Stockton) and Jefferson (the far north of the state) would have voted mostly, but not always, Republican. President Barack Obama, for example, would have narrowly carried Jefferson in 2008, and both states would have sent Dianne Feinstein to the Senate in 2006. South California (Orange County, the Inland Empire and San Diego) would have been the most competitive of the new states - voting for Democrats five times and Republicans four.

Based on this recent voting history, the proposed initiative would create three new states where Democrats are almost sure to win, one that would be highly competitive, and two others where Democrats might win from time to time. Demographic changes - particularly the steady increase of Democratic-leaning Latinos - might even move the Republican-leaning new states into the Democratic column within a few years. In short, at least half, and possibly more, of the new senators would be Democrats, and Democratic presidential candidates would easily carry at least half of the new states, including the populous ones with the most Electoral College votes. In good years, Democrats could be competitive in all six new states. There is no reason for Republicans in Congress to agree to such a change.

Even leaving partisan incentives aside, all members of Congress - Democrats and Republicans - are protective of their own power, and that of the voters in their states. They will not cede relative political power from the voters of their own states to the 38 million people who now live in California. Thus, it ultimately is irrelevant how California votes on the measure; the rest of the country will ever allow six new Californias to exist.

Litigation

Bellflower hit with Voting Rights Act lawsuit

Another Southern California city accused of not holding elections fair to minority voters and scheduling regular elections in the spring.

Constitutional Law

Lame duck challenge to foie gras ban

At its Sept. 29 conference, the U.S. Supreme Court will consider a petition for certiorari in "the foie gras case." By **Calvin Massey**

Insurance

Footnote 5: Will it have an impact on insurance cases?

A footnote in a recent opinion raises questions about the role of deposition testimony in insurance cases. By **Rex Heese**

Government

Impact of public records initiative uncertain

With 62 percent of voters supporting Proposition 42 last month, Californians added two new open government provisions to the state constitution. By **Ruthann G. Ziegler and Nicholas W. Norvell**

Constitutional Law

Appellate split on whether breach of lease can be SLAPPed

How do you know what the gravamen of a complaint is for purposes of the anti-SLAPP statute? And are a notice of termination and an unlawful detainer action protected activities under the First Amendment? By **Timothy D. Reuben**

Judicial Profile

Dorothy B. Reyes

Superior Court Judge Los Angeles County (Clara Shortridge Foltz Criminal Justice Center)

Corporate Counsel

Sharon Zezima

General Counsel of GoPro Inc. San Mateo

Corporate

Attorneys oversee resurgence of secondary markets for employee options

Instead of a free-for-all, as occurred when some Facebook Inc. employees sold their shares before the company went public, workers now can sell through structured programs authorized by their employers.

In 1977, when asked about dividing the state, Gov. Jerry Brown replied, "Who wants to be the governor of a little-bitty state?" Who, indeed? And who would want to live in the new, tiny states? Perhaps the measure's primary backer, multimillionaire investor Tim Draper - conveniently for him, his Atherton residence would be in the new state of "Silicon Valley," which according to the Legislative Analyst's Office would become the nation's richest state, with the highest per capita income in the country. It would be ironic if electoral support for this measure were to come from the conservative Central Valley, which would become America's poorest state. And if it approved Six Californias, the electorate of the new rural state of Central California would be voting against its own interests and in favor of a scheme that disproportionately benefits the far wealthier new state in the Bay Area.

There is strength in numbers. If this measure passes, California will lose economic power (eighth-largest economy in the world), and its cultural dominance (home to both Hollywood and Silicon Valley), and its cachet as the Golden State. Draper has promised that this measure will "reboot" California. But even if somehow the measure passes and is implemented, our problems will not disappear, and in fact the poorer new states will have fewer resources with which to address them. If you see this measure on a ballot, consider this: who stands to benefit from its passage? Unless your name is Tim Draper, surely not you.

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