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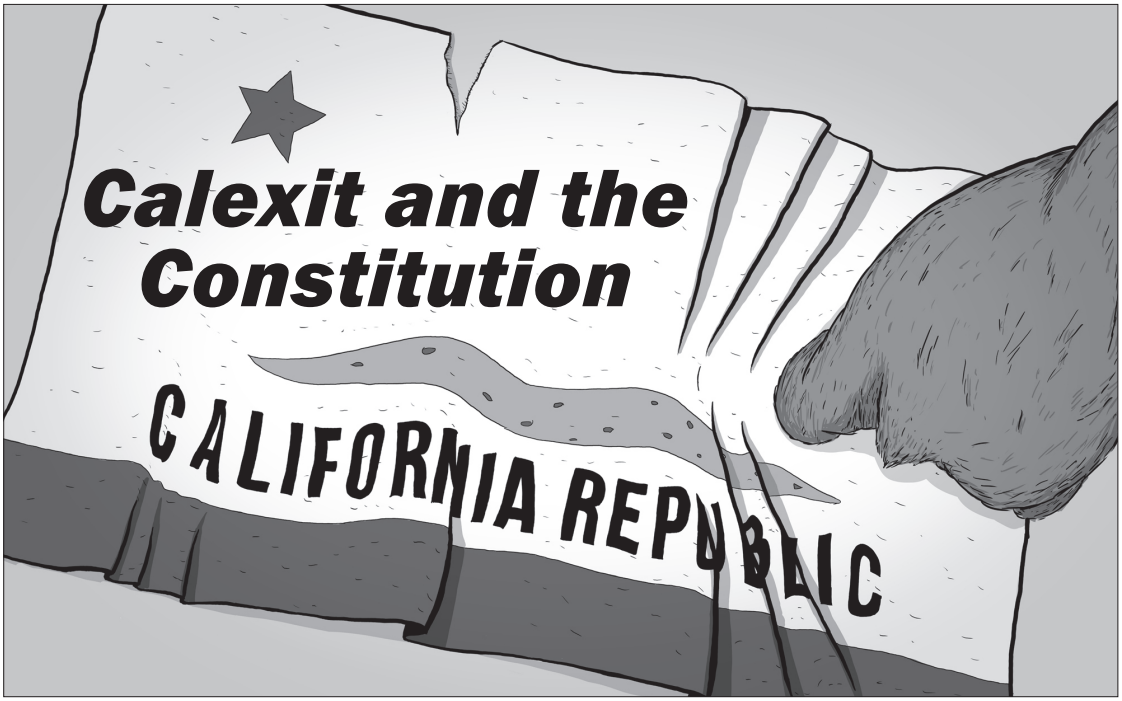
Calexit and the Constitution



The Daily Journal

By Stephen J. Kaufman and George M. Yin

Donald Trump's election as president has many Californians asking whether the state can "go its own way." Indeed, several state elected officials have issued defiant manifestos pledging to defend "California values." And, there has even been talk on social media and elsewhere about whether California should become a sovereign nation. One such group, the Yes California Independence Campaign, has put forth an initiative effort, "Calexit: The California Independence Plebiscite of 2019."

This initiative, if adopted by a majority of California voters, would strike language from Article III, Section 1 of the California Constitution, which states: "The State of California is an inseparable part of the United States of America, and the United States Constitution is the supreme law of the land."

The initiative, if adopted, would also require a "plebiscite" to occur on March 5, 2019, whereupon the electorate would be asked to vote on this question: "Should California become a free, sovereign, and independent country?" If 55 percent vote yes at the 2019 plebiscite, the result "shall constitute a Declaration of Independence from the United States" and the governor would be directed to apply for the "Republic of California to join the United Nations."

The Calexit proponents appear to pin their legal hopes on one line in the *Texas v. White* opinion, which states: 'There was no place for reconsideration, *except through revolution or through the consent of the states.*

Seriously? Well, the group has set up a website, established a political committee, and taken the initial steps to start their initiative drive. They submitted their initiative draft in December to the California attorney general, which has issued a circulating title and summary as required by law for placement on the group's initiative petition. The way is therefore clear for proponents to start collecting signatures to qualify their initiative for an upcoming ballot.

That said, the proponents have a huge challenge. They only have until July 25 to collect 585,407 signatures needed for their self-proclaimed "constitutional amendment," a daunting task even for well-funded efforts. However, after the "surprise" victories of Brexit in the U.K. and Trump in the U.S., we have learned that anything is possible. Nonetheless, the question remains, is Calexit legal? And, if the answer is "no," how can it be stopped?

Under federal constitutional law, the secession of any state is illegal. Indeed, in 1869, the U.S. Supreme Court, in a case called *Texas v. White*, 74 U.S. 700, broached this question when it addressed the issue of whether actions taken by the Texas secessionist state government were legal and enforceable. The court said no, "the ordinance of secession, adopted by the [secessionist] convention and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance were absolutely null." The court ruled that this was because "[t]he union between Texas and the other states was as complete, as perpetual, and as indissoluble as the union between the original states." In short, acts in furtherance of succession are null because a state cannot secede.

However, the Calexit proponents appear to pin their legal hopes on one line in the *Texas v. White* opinion, which states: "There was no place for reconsideration, *except through revolution or through the consent of the states*." (Emphasis added.) Bear in mind, the "revolution" part of that statement was already unsuccessfully attempted by the South at calamitous cost during the Civil War.

However, the second part of the statement, "consent of the states," suggests that secession might be accomplished by an amendment to the U.S. Constitution pursuant to Article V, whereby amendments may be proposed either by Congress with a two-thirds vote in both the House and the Senate or by a convention of states called for by two-thirds of the state legislatures. To then become part of the Constitution, however, an amendment must be ratified by either — as determined by Congress — the legislatures of three quarters of the states or state ratifying conventions in three quarters of the states. In short, this is no easy task.

Yet, even if the Calexit plebiscite occurs and passes, there is no mechanism set forth in the initiative to compel state officials to go along with this plan, and it is not clear why the other states would consent to Calexit.

Since California has no system of mandatory precertification review for initiatives by state agencies that could possibly stop the process in its tracks (as exists in some states), the state and/or private citizens would have to challenge the Calexit initiative in court to prevent it from going to the ballot.

Generally, California courts disfavor "substantive" challenges to initiatives before an election. However, when the validity of an initiative is in serious question, courts will occasionally allow preelection suits. Opponents of an initiative usually initiate those suits. In one noteworthy exception, then-Attorney General Kamala Harris filed a lawsuit in 2015 to relieve her office from the legal obligation to prepare a circulating title and summary for the so-called "Sodomite Suppression Act" initiative that would have authorized the killing of gay and lesbian people by "bullets to the head." Finding that the proposed initiative was "patently unconstitutional on its face," a superior court judge put a halt to the initiative process.

While the circumstances behind that highly offensive initiative are not present here, it is unclear whether the state or some other party will file a preelection challenge to the Calexit initiative. Indeed, state officials and opponents of the measure may be resting on the hope that proponents will not be able to gather enough signatures to qualify the initiative for the ballot, or they may simply wait until after the election to file a challenge should the initiative be adopted by the voters.

One important indicator of whether this movement has "legs" will occur if the proponents obtain 25 percent of the signatures they need to qualify. At that time, Elections Code Section 9034 requires them to notify the state that they reached that benchmark. Should they reach this point, there may be no choice but to take their effort seriously.

From there, Calexit could be challenged as an illegal "revision" of the California Constitution. Courts have held that while voters may amend the California Constitution through an initiative, a constitutional "revision" "may be accomplished only by convening a constitutional convention and obtaining popular ratification, or by legislative submission of the measure to the voters. See Cal. Const. art. XVIII, Sections 1-3; e.g., *Raven v. Deukmejian*, 52 Cal. 3d 336, 349-50 (1990).

In such challenges, courts determine whether an enactment's provisions constitute an impermissible "revision" or a permissible "amendment" by weighing both "quantitative" and "qualitative" factors. For example, an enactment may be so "quantitatively" extensive as to change the California Constitution substantially enough (through the deletion or alteration of numerous existing provisions) to constitute a constitutional "revision." Courts have also held that initiative provisions may result in a "qualitative" revision because they fundamentally change the basic plan of California's government. Whichever is the case, if the enactment is deemed a constitutional revision, it cannot be the subject of an initiative. And, an enactment that will cause the secession of the state from the U.S. must surely be viewed as a constitutional "revision."

Thus, if Calexit gains steam and progresses forward, it will likely be challenged under state or federal law and ultimately held unconstitutional, although when that occurs and at what cost remains to be seen.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