PROPOSITION 6 AND REDISTRICTING:

A LEGAL PERSPECTIVE

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Proposition 6 was approved by the voters of California in June of 1980. Although its language is fairly straightforward, this simplicity belies a long history of reapportionment law on the state and federal levels. Further, it is the product of fifteen years' struggle in the courts of California and the country. Because Proposition 6 still leaves some terms undefined, more struggle may follow. This paper attempts to put Proposition 6 in the context of reapportionment history and to anticipate some of the conflicts to come.

Case Law[1]

Laws about representation in this country are as old as the Constitution itself. In Article 1, section 2 of that document, the Founding Fathers provided that, "Representatives and direct taxes shall be apportioned among the several states." While the courts were not hesitant to consider cases on taxes, cases on representation were subject to a "hands off" policy for the first 175 years of our constitutional history. As late as 1946 the U.S. Supreme Court denied jurisdiction in a reapportionment case, saying it did not wish to enter this "political thicket."[2]

By the early 1960s, however, both the composition and the attitude of the Court had changed. Starting with Baker v. Carr[3] in 1962, the Court quickly moved from a position of finding that it had jurisdiction to one of sweeping reform. Since that time the Court has not hesitated to consider and often to invalidate reapportionment plans. It will be interesting to see whether the Court will be as active in the 1980s as it was in the 1960s and '70s.

Baker v. Carr was a modest but sure entry into the political thicket. In that case the Tennessee legislature had not been reapportioned for sixty years. During

that time, the state had experienced substantial growth and shift of population. Although the legislature was to be apportioned by population, the disparity between the largest and smallest districts had increased to 23 to 1. The U.S. Supreme Court decreed that the apportionment issue was justiciable and that federal courts had jurisdiction. Rather than name the remedy itself, the Court then remanded the case to the district court for resolution.

Georgia was the next state whose system became subject to scrutiny. In 1963 the Court invalidated the state's county unit system of voting in Congressional and statewide primaries. Relying on the Equal Protection Clause of the 14th Amendment, the Court held that city residents had been deprived of equal protection of the law. According to the Court: "within a given constituency, there can be room but for a single constitutional rule--one voter, one vote."[4]

The same theme was reiterated the following year when the Court invalidated Georgia's Congressional districting plan, stating: "as nearly as is practicable one man's vote in a Congressional election is worth as much as another's."[5] Rather than citing the Equal Protection Clause, however, in the Congressional redistricting case the Court used Article 1, section 2 of the Constitution as its authority. The article requires that Representatives be elected "by the People."

In 1964 the Court decided six major state legislative redistricting cases on the same day. Often cited collectively by the name of the lead case, Reynolds v. Sims,[6] the Court again turned to the Equal Protection Clause for support. Not only did the 14th Amendment require the plans be invalidated, but also that both houses of a state legislature be apportioned on a population basis. This was a radical departure from the practice in many states of apportioning at least the upper house on land or some other historical criteria. The Chief Justice wrote: "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or economic interests."[7] The Court recognized that "mathematical exactness or precision" may

be impossible. Instead, the legislative districts were to be "substantially" equal.

It is on the definition of "equality" that the Court has separated the Congressional districting cases from the legislative ones. Article 1, section 2 has been applied in Congressional cases to require the states to make a good faith effort to achieve precise mathematical equality.[8] The case currently authoritative in this area allows a maximum total deviation between the population of the largest and smallest districts of only 0.149 percent.[9] In contrast, the Equal Protection Clause has been applied more liberally to state legislative districting. The Court has accepted a deviation of 9.9 percent without much questioning in this area[10] and allowed a deviation of 16.4 percent when justified by rational state policy.[11] However, the Court has also said that these norms are not readily transferable from one state to another.[12]

Many other cases of a similar nature have been decided, but this brief history indicates the trend. After years of neglect, the Court took on the apportionment issue with a vengeance. It went quickly from the "one voter, one vote" standard to requiring almost exact equality in Congressional apportionment. A major blow was struck in legislative apportionment when it declared that both houses of a state legislature must be population-based. While the standard has not been as strict as for Congressional apportionment, deviation in legislative apportionment can only be minor or must be justified. Even with justification, there are limits.

California History

When California entered the Union in 1850, its new Constitution called for a decennial census and provided that apportionment in both houses of the legislature be based on population. The Constitution also prohibited the division of a county in districting. If a district were formed of two or more counties, they could not be separated by a county belonging to another district.[13] The more populous counties

elected their legislators at-large and consequently controlled the legislature. According to historians this multi-member districting created a chaotic situation leading to the Constitutional Convention of 1878.[14]

The Constitution of 1879 was more explicit than its predecessor. The state was divided into forty Senatorial and eighty Assembly districts, "as nearly equal in population as may be." Each district was to choose one representative. Numbering of the districts was to begin at the northern boundary of the state. No county or city and county could be divided unless it contained sufficient population in itself to form two or more districts. Nor could any county or city and county be united with another in forming a district.[15] An exception was made for Congressional districts. Every Congressional district was to be composed of compact, contiguous Assembly districts.[16] There, however, a county or city and county containing sufficient population could be split, with the residue being attached by "compact adjoining Assembly districts to a contiguous county or counties."

A major change in the Constitution of 1879 occurred in 1926 with the adoption of Proposition 28, commonly known as the "Federal Plan." Voters that year rejected a proposal to retain a population-based formula and opted instead for a population-based Assembly and a county-unit-based Senate. Assembly districts were to be "as nearly as equal in population as may be." However, no county was to be divided in the creation of Assembly districts unless it contained sufficient population in itself to form two or more such districts. Congressional districts were to be composed of "compact, contiguous" Assembly districts. In the formulation of Senatorial districts no county or city and county could be divided, no more than three whole counties could be combined and no part of a county or city and county could be united with any other. Districts were to be numbered consecutively beginning at the northern end of the state and were to be single-member.[17]

Under the "Federal Plan" population variances between districts of the same

type steadily grew. Although Assembly and Congressional districts were to be "population-based," by 1960 the population ratio between the smallest and largest Assembly districts was 4.25 to 1. Between Congressional districts, it was 2 to 1. The state Senate, of course, was not population-based. By 1960 the variance between Senatorial districts was a whopping 433.3 to 1.[18]

It was at this point that the U.S. Supreme Court startled the country with its ruling in Reynolds v. Sims. Not only did equality become "one voter, one vote," but both houses of a state legislature now had to be apportioned by population. The federal District Court wasted little time in applying Reynolds to California. Within six months, the California Senate reapportionment formula was declared unconstitutional.[19]

The legislature then tried, but failed, to reapportion the Senate. In July of 1965 the California Supreme Court assumed jurisdiction and ordered a redistricting of the Assembly as well.[20] This forced the two houses to compromise, and a plan was agreed upon in October of 1965. Two years later the same Court invalidated California's Congressional districting.[21] This, too, was then remedied by the legislature. However, the Court had also asked that a policy on redistricting be developed.[22] Neither the legislature nor the people themselves were successful in providing the latter.

Almost as soon as the 1960s redistricting was done, a new census required that the process be begun again. Yet, what the legislature proposed, the Governor twice vetoed. When these two branches of government could still not agree in 1973, the California Supreme Court assumed jurisdiction. The Court appointed three retired jurists to draw the districting plans. These "Court Masters," as they were called, adopted seven guidelines for their efforts. Of the guidelines, the first five were widely accepted by groups which testified before the Masters. The other two were less popular. The guidelines were:[23]

1) Districts of a particular type were to be numerically equal in population "as nearly as practicable," with strict equality as the standard in Congressional districts and reasonable equality in legislative districts.

2) The territory included within a district was to be contiguous and compact, taking into account the availability of transportation and communication between the people in the district themselves and between the people and their representatives.

3) Insofar as practicable, counties and cities within a district were to be maintained intact.

4) Insofar as practicable, the integrity of the state's basic geographical regions (coastal, mountain, desert, central valley and intermediate valley) were to be preserved.

5) The community of social and economic interests of an area was to be considered in determining whether the area should be included or excluded from the district.

6) State Senatorial districts were to be formed by combining adjacent Assembly districts and, to the degree practicable, Assembly district boundaries were to be used as Congressional district boundaries.

7) The basis for the reapportionment was to be the 1970 census, with census tracts--where available--as the basic unit of formation.

The Court Masters stated that "to the extent required by the federal Constitution, population equality controls."[24] As far as population equality was concerned, the Masters set as a goal for themselves no more than a 1 percent deviation from the ideal in Senate and Assembly districts, with 2 percent as the absolute maximum in unusual circumstances. Although reapportionment plans in other states allowed greater deviation, the Masters noted that the districts in those states had much smaller populations. Thus, a deviation of even 1-2 percent in California would affect far more people than it would elsewhere. Indeed, California's state Senate districts contained more people than its Congressional ones. The Masters believed that one reason the U.S. Supreme Court had required stricter population equality in Congressional districts was because of their large population. Thus, California Senate districts might be judged by the same standard.[25]

Applying the above guidelines, the Masters drew districts with the following

variations from the ideal:[26]

	Largest	Smallest	Ideal Population
Assembly	+1.94%	-1.90%	249,661
Senate	+1.92%	-1.02%	499,322
Congressional	+0.24%	-0.21%	464,486

As can be seen, for Senate and Assembly districts the deviation above or below the ideal was less than the 2 percent ceiling the Masters had set for themselves. In fact, only two Senate and four Assembly districts fell into the deviation range between 1 percent and 2 percent. The rest deviated less than 1 percent. The deviation for Congressional districts was even smaller. Of the 400 California cities with a population of less than 250,000, sixteen were divided in forming Assembly districts. Of the forty-three California counties with a population of less than 250,000, six were divided in forming Assembly districts. The number of divisions was fewer for Senate and Congressional districts.[27] Thus, the Masters were fairly successful in following the guidelines they had established.

The Masters' guidelines, however, were just that: the Masters', not the legislature's or the people's. Finally, with the 1980s reapportionment in sight, the legislature and the people started formulating their own policy. What emerged from the legislature was ACA 53. It then was adopted by the people as Proposition 6 and became the law of the state in the form of Constitutional Amendment XXI. The Amendment formally repealed the reapportionment provisions of the California Constitution which had been invalidated by the courts fifteen years before. In their place it provided:

> SECTION 1. In the year following the year in which the national census is taken under the direction of Congress at the beginning of each decade, the Legislature shall adjust the boundary lines of the Senatorial, Assembly, Congressional, and Board of Equalization districts in conformance with the following standards:

(a) Each member of the Senate, Assembly, Congress, and the Board of Equalization shall be elected from a single-member district.

(b) The population of all districts of a particular type shall be reasonably equal.

(c) Every district shall be contiguous.

(d) Districts of each type shall be numbered consecutively commencing at the northern boundary of the state and ending at the southern boundary.

(e) The geographical integrity of any city, county, or city and county, or of any geographical region shall be respected to the extent possible without violating the requirements of any other subdivision of this section.

Proposition 6 Analyzed

On even a quick reading of Proposition 6 it is clear that many of the concepts of the case law, former California Constitutional provisions, and the Court Masters' guidelines are present. On careful reading, there is really nothing new in Proposition 6.

A. Single-Member Districts.

As noted in the California History section, supra, California has not always had single-member districts. The state's first Constitution did not provide for them and multi-member districts in populous areas resulted. This is suggested as an impetus for the state's second Constitution. Both the Constitution of 1879 and the "Federal Plan" Amendment of 1926 then established single-member districts. However, that was not the end of the multi-member alternative.

In the period between 1965 when the "Federal Plan" was declared unconstitutional and 1980 when Proposition 6 was adopted, multi-member districts were not only possible, but in fact existed. When the California Supreme Court invalidated the "Federal Plan," it made no distinction between apportionment laws which might still be constitutional and those which were not. The distinction was left to the legislature.[28] The legislature, for the most part, finally agreed on the new districting lines. However, in two parts of the state no agreement could be reached. Instead, the counties of San Francisco and Alameda were left intact with two

Senators to be elected at-large from each county. The State Supreme Court upheld this plan.[29]

Although the Court Masters used seven specific guidelines for their apportionment in 1973, single-member districts was not one. When the Supreme Court responded to the Masters' request for instructions, it left the door open to multi-member plans. According to the Court, if the Masters concluded there were compelling reasons for multi-member districts, they could recommend such plans as an alternative.[30] No multi-member districts were in fact recommended.

In their ballot arguments, the proponents of Proposition 6 used several cogent reasons for single-member districts. One reason was that multi-member districts tend to be so large that they reduce the influence of individual voters. Voters who believe they have little influence tend to stay home from the polls.[31] A second argument against multi-member districts was their cost: both to candidates running in larger districts and to taxpayers who must foot the bills for oversized legislatures. The voters of Illinois recently abolished their multi-member lower house districts partially because of the cost issue.

Not only the taxpayers and voters, but the courts as well have not looked with favor on multi-member districts. In one case a federal district court had written a reapportionment plan for North Dakota creating multi-member districts where single-member districts had existed in the past. The U.S. Supreme Court invalidated the plan, limiting the flexibility of lower courts to make such substantive changes absent strong justification to the contrary.[32]

On several occasions challenges have been made to multi-member districts on the ground that they discriminate against Black and Hispanic voters. In early cases the Court held that multi-member districts were not unconstitutional per se but might be invalidated if used to minimize the voting strength of a racial or political minority.[33] Then, in 1973, the Court upheld a lower court opinion where it had been

found that multi-member districts, in that particular case, invidiously discriminated against racial and ethnic groups. There, single-member districts were the mandated solution.[34]

Thus, while it is highly unlikely that the provision for single-member districts would be subject to court challenge, Proposition 6 is in the mainstream of most former practice in California. It is also in harmony with the practice in other states and the current trends. Single-member districts are certainly not a new idea, but perhaps they are an idea whose time is truly come.

B. Equally Populous Districts.

The concept of equally populous districts of the same type is also not a new idea. It is not new on the federal level or the state.

When the U.S. Supreme Court announced its "one man, one vote" standard for Congressional districts, it cited language which had been in the Constitution all along. As noted earlier, the Court relied on Article 1, section 2 which provides that Representatives are to be apportioned among the several states and elected "by the People."[35] While not a new idea, the Court gave this language a new interpretation.

The interpretation was that states were to strive for the closest equality possible in Congressional apportionment. Any deviation from equality had to be justified by a showing of "good faith effort."[36] Other justifications, including "rational state policy" and the preservation of subdivision integrity or compactness, were not accepted.[37] In summarizing the Court's position on Congressional districting, Justice Blackmun wrote: "Population equality appears to be the preeminent, if not the sole, criterion, on which to adjudge constitutionality."[38] In light of this the Court struck down a Congressional plan with a deviation of 4.13 percent and replaced it with one which deviated only 0.149 percent.[39]

Like the federal Constitution, early California Constitutions used population as the basis for their apportionment. As noted earlier, the Constitution of 1879

mandated that districts be "as nearly equal in population as may be." The Amendment of 1926 preserved this equality standard for Assembly and Congressional districts. In 1973 the Court Masters sought for the districts in each plan to be "numerically equal in population as nearly as practicable," with strict equality in the case of Congressional districts and reasonable equality in legislative ones. Proposition 6 adopted the "reasonably equal" standard for all the types of districts it covered.

As with the Congressional analogy, the idea of equally populous districts is not new in California, but the interpretation is. At the time that California's reapportionment was invalidated in light of "one man, one vote," the deviations for the "population-based" Congressional and Assembly districts were as follows:

	Largest	Smallest
Congressional[40]	+42.9%	-27.3%
Assembly[41]	+56.1%	-63.2%

For the non-population-based state Senate, deviation figures are not available. However, the ratio of population between the smallest and largest districts was 450 to 1.[42]

The most recently accepted deviations in California were those used by the Court Masters and affirmed by the state Supreme Court. As discussed earlier, the deviations for Congressional districts were less than 1 percent, and for Senate and Assembly districts, less than 2 percent. Like the rest of the country, in the last fifteen years California has come a long way in its definition of "equal population."

The cases regarding equality in legislative apportionment allow for more deviation than do those for Congressional. To begin with, the U.S. Supreme Court based legislative "one man, one vote" on the Equal Protection Clause of the 14th Amendment rather than on Article 1, section 2. From Reynolds v. Sims forward, the

Court has been more flexible in legislative apportionment. In Reynolds the Chief Justice wrote:

> We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement.[43]

Since Reynolds the cases on legislative apportionment have fallen into two categories: those which consider a deviation alone and those which consider it in light of some rational state policy. In the former category, a deviation of 7.83 percent in the Connecticut legislature[44] and of 9.9 percent in Texas[45] have been allowed. In those cases the Court held that the deviations were not of the magnitude to create a prima facie case of invidious discrimination. The burden was on the plaintiff to prove his case.

In the other category--that where a rational state policy exists--more deviation has been allowed. Reynolds opened the door for that, too, when the Chief Justice wrote:

> So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature.[46]

He then outlined some of the considerations which might be made:

> A state may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme.[47]

In subsequent cases the preservation of political subdivisions has been sanctioned as a rational state policy justifying deviation. The most prominent of these cases dealt with an apportionment of the Virginia legislature which resulted in a total deviation of 16.4 percent. The district court invalidated the plan, but the U.S. Supreme Court reinstated it. The Court deferred to a state policy of following political subdivision lines. Uncontradicted evidence demonstrated that the plan

produced the minimum deviation possible while keeping political subdivisions intact. However, the Court also said the 16.4 percent deviation "may well approach tolerable limits."[48] Rejecting the almost absolute equality required of Congressional districting, the Court found that applying such a strict standard to state legislatures might well impair the functioning of state and local governments.

Other state policies which might justify deviation remain to be approved by the Court. Generally, there are at least two limitations on the use of a "rational state policy" as justification. On the one hand, the factors composing the policy must be "free from any taint of arbitrariness or discrimination."[49] On the other hand, they must be uniformly applied to all parts of the plan.[50] Obviously, the objectives of the policy must be served by the deviation. If the deviation does not help meet the objectives, then the deviation is not justified.[51]

Proposition 6 is an attempt to create a "rational state policy" for California. Thus, a court might be more lenient in the deviation allowed California if Proposition 6 is followed than if not. Clearly, the preservation of political subdivisions, the concept found in (e) of Proposition 6, would be an acceptable state policy. The desire for contiguity found in (c) may also be an acceptable policy. The latter remains to be tested by the courts.

Assuming that both guidelines would be approved and fairly applied, the amount of tolerable deviation must still be determined. Several points are relative to this determination. First, the deviations accepted in other states might well be rejected in California. The U.S. Supreme Court has generally held that each state is different and a deviation allowed in one state is not transferable to another.[52] Second, as discussed earlier, California's legislative districts are exceptionally large. For instance, they are far larger than the House of Delegates districts in the Virginia case, where a 16.4 percent total deviation was allowed.[53] The following, using the Court Masters' 1973 data cited earlier, illustrates the magnitude of such a

deviation in California.

	Ideal Size	16.4%
Virginia House of Delegates	46,485	7,624
California Assembly	249,322	40,944
California Senate	499,322	81,889
California Congressional	464,486	76,175

In California a 16.4 percent deviation would involve five or ten times as many people as in Virginia. Indeed, if the Court required less than a 1 percent deviation in Congressional districts partially because the districts were so numerous, then less than a 1 percent deviation might be required of California Senate districts as well.

On the other hand, deviations as small as those set by the Court Masters may be lower than what would be accepted when apportionment is done by the legislature. The U.S. Supreme Court has imposed stricter deviation standards on court-drawn plans than on legislature-drawn ones.[54] The Court Masters, of course, represented the California Supreme Court in their activites. Their guidelines of 1 percent deviation in Congressional districts and 2 percent in legislative ones were affirmed by the California Supreme Court, but the Court also noted that "many objectors contend the Masters adopted too rigorous standards of population equality in the case of legislative districts."[55]

Another interesting notation occurred in the California Supreme Court's consideration of the Masters' plan. While the Governor and legislature could not reach agreement on Assembly or Congressional districts, the Governor would have been willing to accept the legislature's plan for the state Senate. The plan, however, was part of the overall apportionment package and could not be approved separately. The Senate plan, supposedly drawn with consideration given to the

rational state policy of preservation of county and city lines, had a deviation of 16.5 percent.

The plan was rejected by the Masters and the Court on two grounds. Without considering rational state policy, it was 6.6 percent above the tolerated deviation of 9.9 percent in Texas.[56] If rational state policy were considered, it was only 0.1 percent above the deviation of 16.4 percent allowed in Virginia. However, the Masters and Court found that the rational state policy had not been followed: "The districts in the plan unnecessarily split cities and counties, often combine whole or partial counties across mountain ranges or bodies of water and disregard travel patterns, geography, common economic activities and other 'community of interest' indicators."[57] Thus, the Masters and Court at least considered application of the deviations upheld in other states to the California legislature proposal. What the Masters and Court would have done had the proposal properly fallen within the other states' accepted deviations is unclear.

The preceding discussion has focused on what factors may be considered in determining a tolerable population deviation for California districts. While the variables of following or not following rational state policy are important to this consideration, another variable may be just as significant: the court itself which makes the decision.

If a case should go to the U.S. Supreme Court, it would likely be viewed in light of the U.S. Supreme Court precedents already discussed in this paper. If a case should go to the California Supreme Court, however, a whole new door is opened. The California Supreme Court currently favors deciding cases on "independent state grounds." Since Proposition 6 is part of the California Constitution, it would be a "state ground" for an apportionment decision. Thus, the California Supreme Court could decide for itself what "reasonable" population equality might be. It could also define "contiguity" and the "geographical regions" of the state. The Court could

decide to what extent these criteria other than population may infringe on the population standard. All this could be done in a relative vacuum. The only possible exception might be in Congressional apportionment, since the U.S. Supreme Court has found Article 1, section 2 of the U.S. Constitution the authority there. Even there, however, unless further challenged, the California Supreme Court has some freedom under Proposition 6 to act on its own.

Thus, there are many factors which may influence the application of the equal population standard in California. The "safest" path for the legislature to take would probably be to limit deviation as much as possible. The less deviation, the less likely a challenge and the less likely that a court--rather than the legislature--will draw the districts.

C. Contiguous Districts.

Under part (c) of Proposition 6, "every district shall be contiguous." Like "equal population," the word "contiguous" has appeared in federal law and the California Constitution for many years. Unlike "equal population," which has been given a new interpretation, it could be said that "contiguous" has never been interpretted.

As early as 1842 Congress mandated that Congressional districts be contiguous. This requirement was dropped in 1850 but reinstated in 1862. In 1929 Congress changed its mind again and eliminated from the then law the requirements of contiguity, compactness and equal population for Congressional districts. The attitude in Congress was that districting should be the bailiwick of the states.[58]

"Contiguous" first appeared in California in the Constitution of 1879. In Article IV, section 6, Senate and Assembly districts were to be composed of "contiguous territory." In section 27, Congressional districts were to be composed of "compact contiguous Assembly districts." The same phrases were repeated in the "Federal Plan" Amendment of 1926. In 1973 the Court Masters chose as one of their

guidelines: "The territory included within a district should be contiguous and compact, taking into account the availability and facility of transportation and communication between the people in a proposed district, between the people and candidates in the district, and between the people and their elected representatives."[59]

While "contiguous" has often been used as a standard, it has never substantively been defined by the courts. In Reynolds v. Sims, as discussed earlier, the U.S. Supreme Court acknowledged that a state may have an interest in providing for "compact districts of contiguous territory." No further definition was given. The next year the California Supreme Court had an opportunity to define "contiguous" but declined. In that case, however, it attempted to apply the "contiguous territory" guideline in order to correct technical errors in the legislature's reapportionment plan. These errors had resulted in several districts being composed of separate parts. The correction united the parts as the Court believed the legislature had intended.[60]

The Court Masters were the next group to have the opportunity to define "contiguous" but did not. The Masters used compactness and contiguity together as a standard and then referred to them in terms of ease of transportation and communication between people in the district. While ease of transportation and communication are worthy standards on their own, they do not provide a very precise definition.

Further, there is no distinction between the separate concepts of "compactness" and "contiguity" in the reference to transportation and communication. The Court Masters rejected some of the legislature's plans containing elongated and oddly-shaped districts cutting many city and county lines. However, the Masters only noted these districts were not "compact," making no mention of whether they were contiguous.

Two definitions of "contiguous" have been suggested by non-court sources. One is from a Texas Attorney General's opinion in 1961 regarding a state requirement that Congressional districts be composed of "contiguous counties." It was his view that to be contiguous, boundaries of the counties must "touch one another so that all may be included in a common boundary line." This definition would suggest that two or more pieces of land joined only by water would not be contiguous. Nor, perhaps, would two triangles joined only at their vertices.

Another author has proposed a definition of "contiguous" which involves the ease of transportation aspect suggested by the Court Masters. Under his definition, "Every part of every district shall be accessible from every other part of the same district without passing through any other district of like purpose, but the term 'accessible' shall not include access solely by air or water, except to an island."[62] The author noted that a situation occurring in the 1966 redistricting of California influenced his wording. He referred to the Fourth Senate District which consisted of "Marin, Napa, and a portion of Solano Counties; their boundaries touch in a geometrical point in San Pablo Bay."[63]

Perhaps the best definition of "contiguous" would be a combination of the two basic concepts suggested: an inclusive boundary line and an ease of accessibility. However, for a court to be forced to define "contiguous" will probably require that some blatant anomaly occur similar to that which inspired the above author. It is unfortunate the sponsors of Proposition 6 did not include a standard of "compactness" with "contiguous." The two go well together and are perhaps easier to define and apply in that context.

D. Numbering Districts.

Proposition 6 states that districts of each type shall be numbered consecutively beginning at the northern boundary of the state. Similar provision was made in the California Constitution of 1879--Article IV, section 6--and the Amendment of

1926.

While numbering is a fairly straightforward concept, one additional point is worthy of mention. Members of Congress and the state Assembly stand for election every two years. Members of the state Senate, on the other hand, are elected for four-year terms. The odd-numbered districts elect Senators in one general election; the even-numbered districts elect Senators in the next general election two years later. The Court Masters were sensitive to this system when assigning numbers to Senate districts: "The assignment of an odd or even number to a particular district generally was premised on the concept that incumbents should not be unnecessarily deprived of the opportunity to run for re-election and that large segments of the population who last voted for a Senator in 1970 should not be deprived of the opportunity to vote for a Senator in 1974."[64]

While courts have recognized that there are always political considerations in apportionment, they have been very hesitant to involve themselves in that part of the "political thicket." Should it be shown, however, that numbering was used to deprive incumbents of their seats, a court might base its involvement in the case and its decision partially on this provision of Proposition 6.

E. Geographical Integrity.

Section (e) of Proposition 6 provides: "The geographical integrity of any city, county, or city and county, or of any geographical region shall be respected to the extent possible without violating the requirements of any other subdivision of this section."

As with the other sections of Proposition 6, this section reiterates much of the former law. The State Constitution of 1849--Article IV, section 30--provided that in forming districts, "no county shall be divided." The Constitution of 1879--Article IV, section 6--recognized that some cities and counties may be too populous to form one district and allowed for their division if they contained sufficient population in

themselves to form two or more districts. However, no part of a city or county could be united with another city or county to form a district. An exception was made for Congressional districts, since Assembly districts were used as building blocks. Parts of two different counties could be united in that case. The Amendment of 1926 was similar, except that no county could be divided to form more than one Senate district.

The Court Masters simplified and added to the former criteria. Because the equality of population standard was much stricter than before, it was recognized that some cities and counties would have to be split and combined with parts of others. The Court Masters used as their guides, insofar as practicable:

* counties and cities be maintained intact
* the integrity of California's basic geographical regions be preserved
* the "community of interest" of an area be considered
* Assembly districts be the building blocks for other districts.

Proposition 6 dropped "community of interest" as a guideline. It could be argued that this deletion was warranted. "Community of interest" is a term which would be difficult for a court to define and then apply. It is far more nebulous than the geographical boundaries of cities and counties. Also, it is assumed that, at least in smaller cities, a community of interest exists within the boundaries and that concept is fulfilled when geographical integrity is followed.

Proposition 6 also dropped the use of Assembly districts as building blocks. The Court Masters used Assembly districts in this manner because it was convenient to draw Assembly districts and then group them by pairs into Senate districts. The legislature, however, would likely take a different approach. There, each house would desire to district itself. The Senate, for instance, would want to draw its own lines rather than accept those drawn by the Assembly for it. Proposition 6 therefore reflects practical politics by leaving out the building block criterion.

A term which Proposition 6 retained and which may have to be defined by a court is the state's "geographic regions." The Court Masters designated these as coastal, mountain, desert, central valley and intermediate valley. Counties were then assigned to each region with the assignment for the most part being respected. The legislature, of course, is free to recognize different regions or to use the same basic regions but change the counties assigned to them. If the legislature is "reasonable" in its designation, it would be difficult to challenge that designation in court. To bring a successful challenge it would have to be argued that the designation was unreasonable or that the designation was reasonable but not followed.

Section (e) concludes that geographical integrity "shall be respected to the extent possible without violating the requirements of any other subdivision of this section." This statement implies that the other sections are to take precedence when there is a conflict between one of them and geographical integrity. Certainly the U.S. Supreme Court rulings have held that equality of population must be the preeminent consideration. Both contiguity and geographical integrity would have to be subordinate to the equal population requirement. But in California, section (e) seems to indicate that between the standards of contiguity and geographical integrity, contiguity would be given preference if they conflicted.

Conclusion

Proposition 6 has strong roots in both federal and state constitutional history. It is also a product of numerous court decisions over the last fifteen years. Proposition 6 is a "rational state policy"--a policy requested by the California Supreme Court and a possible justification for population deviations in the eyes of the U.S. Supreme Court. While Proposition 6 should do much to end the confusion of recent California reapportionments, because it contains terms which have yet to be

defined by the legislature or courts, conflict is still possible.

FOOTNOTES

[1]More thorough studies are available in many publications. For a short summary of reapportionment law see one of the following Rose Institute publications: Redistricting: Shaping Government for a Decade, 3-9 (1980); California Redistricting, 5-44 (1980).

[2]Colgrove v. Green, 328 U.S. 549 (1946).

[3]369 U.S. 186 (1962).

[4]Gray v. Sanders, 372 U.S. 268, 381 (1963).

[5]Wesberry v. Sanders, 376 U.S. 1, 7-8 (1964).

[6]377 U.S. 533 (1964).

[7]Ibid. at 562.

[8]Kirkpatrick v. Preisler, 394 U.S. 526 (1969).

[9]White v. Weiser, 412 U.S. 783 (1973).

[10]White v. Regester, 412 U.S. 755 (1973).

[11]Mahan v. Howell, 410 U.S. 315 (1973).

[12]Swann v. Adams, 385 U.S. 440, 445 (1967).

[13]California Constitution of 1849, Article IV, sections 28, 30.

[14]24 The Works of Hubert Howe Bancroft, 371, as cited in Adickes, "California Reapportionment: A New Amendment," 40 So. Cal. L. Rev. 646, 656 at n. 39 (1967).

[15]California Constitution of 1879, Article IV, section 6.

[16]Ibid., section 27.

[17]Ibid., as amended, Article IV, sections 6, 27.

[18]California Redistricting, supra n. 1, at 112-113.

[19]Silver v. Jordan, 241 F. Supp. 576 (S.D. Cal. 1964), aff'd, 85 S. Ct. 1572 (1965).

[20]Silver v. Brown, 46 Cal. Rptr. 308 (1965).

[21]Silver v. Reagan, 62 Cal. Rptr. 424 (1967).

[22]Silver v. Brown, 46 Cal. Rptr. 308, 318 (1965).

[23]Legislature of the State of California v. Reinecke, 110 Cal. Rptr. 718, 727-

728 (1973).

[24]Ibid., 729.

[25]Ibid., 727-728, citing White v. Weiser, 93 S. Ct. 2348, 2352 (1973).

[26]Ibid., 753.

[27]Ibid.

[28]Silver v. Brown, 63 Cal. 2d 270, 280 (1965).

[29]Silver v. Brown, 63 Cal. 2d 841 (1966). For an interesting discussion of this decision see Adickes, supra n. 14, at 648-650.

[30]Legislature v. Reinecke, 107 Cal. Rptr. 18, 20 (1973).

[31]See Joseph F. Zimmerman, "A 'Fair' Voting System for Local Governments," 68 Nat'l Civic Rev. 481 (1979).

[32]Chapman v. Meier, 420 U.S. 1 (1975).

[33]Burns v. Richardson, 384 U.S. 73 (1966); Whitcomb v. Chavis, 403 U.S. 124 (1971).

[34]White v. Regester, 412 U.S. 755 (1973).

[35]Wesberry v. Sanders, 376 U.S. 1 (1964).

[36]Kirkpatrick v. Preisler, 394 U.S. 526 (1969).

[37]Ibid. at 533-534. See also, Wells v. Rockefeller, 394 U.S. 542 (1969).

[38]Chapman v. Meier, 420 U.S. 1, 23 (1975).

[39]White v. Weiser, 412 U.S. 783 (1973).

[40]Silver v. Reagan, 62 Cal. Rptr. 424 (1967).

[41]Silver v. Brown, 46 Cal. Rptr. 308 (1965).

[42]Silver v. Jordan, 241 F. Supp. 576 (1965).

[43]Reynolds v. Sims, 377 U.S. 533, 577 (1964).

[44]Gaffney v. Cummings, 412 U.S. 735 (1973).

[45]White v. Regester, 412 U.S. 755 (1973).

[46]Reynolds v. Sims, 377 U.S. 533, 579 (1964).

[47]Ibid.

[48]Mahan v. Howell, 410 U.S. 315, 329 (1963). In Summers v. Cenarussa, 413

U.S. 906 (1973) the Court vacated a district court decision, 342 F. Supp. 288 (1972), which had allowed a 19.41% maximum deviation in the Idaho legislature. This result had been produced by Idaho's policies of maintaining political subdivisions and anticipating population shifts.

[49]Roman v. Sincock, 377 U.S. 695, 710 (1964).

[50]Swann v. Adams, 385 U.S. 440 (1967).

[51]Mahan v. Howell, 410 U.S. 315 (1963); Chapman v. Meier, 407 F. Supp. 649 (D.N.D. 1975).

[52]Swann v. Adams, 385 U.S. 440 (1967).

[53]Mahan v. Howell, 410 U.S. 315 (1963).

[54]Connor v. Finch, 431 U.S. 407 (1977).

[55]Legislature of the State of California v. Reinecke, 110 Cal. Rptr. 718, 722 (1973).

[56]White v. Regester, 412 U.S. 755 (1973).

[57]Legislature of California v. Reinecke, 110 Cal. Rptr. 718, 731 (1973).

[58]Acts as cited in Bickerstaff, "Reapportionment by State Legislatures: A Guide for the 1980s," 34 So. West. L. J. 608, 610-611 (1980).

[59]Legislature of the State of California v. Reinecke, 110 Cal. Rptr. 718, 728 (1973).

[60]Silver v. Brown, 48 Cal. Rptr. 609, 611 (1965).

[61]Texas Attorney General's Opinion No. WW-1041 (1961).

[62]Adickes, supra n. 14, at 657.

[63]Ibid.

[64]Legislature of the State of California v. Reinecke, 110 Cal. Rptr. 718, 746 (1973).

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