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Bates v, Jones--Imposing Lifetime Term Limits on California Legislators: For Better or Worse, a Constitutional Exercise of Direct Democracy and Political Will

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Bates v. Jones—Imposing Lifetime Term Limits on California Legislators: For Better or Worse, A Constitutional Exercise of Direct Democracy and Political Will

Alisa R. Fong*

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* B.A., University of California, Irvine, 1990; J.D., University of the Pacific, McGeorge School of Law, to be conferred 1999. I would like to extend my sincere gratitude to Professor J. Clark Kelso for his commitment to the Government Affairs certificate program at McGeorge and his guidance and assistance with this Casenote. Special thanks to my fiancé and lifetime co-counsel, Edmund Gee, Esq., for his unconditional love, support and understanding during these challenging years.

I. INTRODUCTION

The ability to freely vote for the candidate of one's choice is the touchstone of a free and open democratic system of government.¹ The right to vote is a fundamental political right, which preserves all other rights.² To avoid the compromise of other rights, citizens must vigorously guard their voting rights.³ Voting rights are closely associated with the rights of candidates to seek political office.⁴ Thus, in the spirit of ensuring that there is equal access to the political process, the requirements of candidates seeking election to federal and state office are minimal.⁵

The United States Constitution's Qualifications Clause⁶ merely requires that a member of Congress must have attained the age of twenty-five years old, and must have been a United States citizen for seven years.⁷ The California Constitution likewise requires minimal qualifications.⁸ An individual is eligible to be a member of the California Legislature if he or she is a registered voter,⁹ has been a resident of the legislative district for one year,¹⁰ is a citizen of the United States,¹¹ and has been a resident of California for three years immediately preceding the election.¹² In light of the minimal requirements for seeking elective office, both the United States and the California Constitution provide expansive opportunities for individuals to pursue political office as candidates. Correspondingly, voters are presented with potentially a broad spectrum of candidates to choose from when

1. See *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (characterizing the right of an individual to vote freely for the candidate of one's choice as the essence of a democratic society).

2. See *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (recognizing the political franchise of voting not as a natural right, but one generally conceded by society as a fundamental political right).

3. See *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (opining that the right of citizens to vote for the individuals who make the laws under which they must live is a most precious right).

4. See *Burdick v. Takushi*, 504 U.S. 428, 438 (1992) (indicating that voters' rights and candidates' rights do not lend themselves to easy separation).

5. See *infra* notes 6-12 and accompanying text (setting forth the qualifications an individual must meet to serve in Congress or as a California legislator); see also *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 820 (1995) (generalizing that every man who enjoys the confidence of his fellow citizens may qualify as a candidate for Congress); *Thornton*, 514 U.S. at 819 (stating that "[n]o qualification of wealth, of birth, of religious faith or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people").

6. U.S. CONST. art. I, § 2, cl. 2.

7. See *id.* ("No person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States and who shall not, when elected be an inhabitant of that State in which he shall be chosen.").

8. CAL. CONST. art. IV, § 2(c).

9. See *id.* ("A person is ineligible to be a member of the Legislature unless the person is an elector. . .").

10. See *id.* ("A person is ineligible to be a member of the Legislature unless the person . . . [has been] a resident of the legislative district for one year. . .").

11. See *id.* ("A person is ineligible to be a member of the Legislature unless the person is . . . a citizen of the United States. . .").

12. See *id.* ("A person is ineligible to be a member of the Legislature unless the person . . . [has been] a resident of California for three years, immediately preceding the election.").

exercising their right to choose their representatives.¹³ However, the United States Constitution provides that states are granted the power to regulate elections.¹⁴ Thus, the right to vote in any manner and the right to associate for political purposes through the ballot are not absolute.¹⁵

On November 6, 1990, the voters of California joined twenty other states¹⁶ in enacting some form of legislative term limits.¹⁷ Generally, state term limits restrict the number of *consecutive* terms which legislators may serve or limit the number of years that a legislator can hold office within a specified time frame.¹⁸ California joined only six other states to impose *lifetime bans* on legislative service after holding office a specific number of terms in either the lower or upper house.¹⁹

During the period leading up to Proposition 140, disenchantment with the political process grew based on the perception that the California Legislature was dominated by unchallenged career politicians more interested in advancing their individual political careers and agendas than the public interest. Based on this sentiment, an amendment to the California Constitution, Proposition 140,²⁰ was

13. See *Canaan v. Abdelnour*, 40 Cal. 3d 703, 727, 710 P.2d 268, 283, 221 Cal. Rptr. 468, 483 (1985) (invalidating a municipal provision which prohibited write-in voting because of its effect of preventing voters from casting their ballots for the candidates of their choice). *But cf.* *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 14 (1982) (upholding a Puerto Rican statute allowing a political party the power to fill an interim vacancy in the Legislature without holding an election); see *id.* at 5-6 n.4 (indicating that 22 states have adopted similar statutes which allow legislative vacancies to be filled by appointment).

14. See U.S. CONST. art. I, § 4, cl. 1 (providing that, "The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed by each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of [choosing] Senators.").

15. See *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (recognizing that while voting is a fundamental right under the Constitution, limitations and regulatory control, such as allowing the States to regulate their own elections, are also provided in the Constitution).

16. See *Bates v. Jones*, 958 F. Supp. 1446, 1454 n.5 (N.D. Cal. 1997) (providing a list of six states in addition to California that have enacted lifetime limits on legislative service, and fourteen states which have enacted some other form of legislative term limits); see also *infra* notes 18-19 and accompanying text (setting forth states that enacted consecutive and lifetime term limits).

17. See *Bates*, 958 F. Supp. at 1454 (asserting that term limits encourage greater constituent response by moving away from a legislature dominated by career politicians).

18. See *id.* at 1454 n.5; see, e.g., ARIZ. CONST. art. IV, pt. 2, § 21 (limiting legislative service to four consecutive terms in office); COLO. CONST. art. V, § 3 (confining legislative service to four consecutive terms in the lower house, two consecutive terms in the upper house); FLA. CONST. art. VI, § 4 (restricting legislative service to eight consecutive years in office); LA. CONST. art. III, § 4(E) (restraining legislative service to three consecutive terms); MONT. CONST. art. IV, § 8 (limiting legislative service to eight years within the preceding sixteen years); NEB. CONST. art. III, § 8 (confining legislative service to two consecutive terms).

19. See ARK. CONST. amend. 73, § 2 (reducing legislative service to three terms in the lower house and two terms in the upper house); MICH. CONST. art. IV, § 54 (restraining legislative service to three terms in lower house and two terms in upper house); MO. CONST. art. III, § 8 (limiting legislative service to eight years in one house and sixteen years in both houses); NEV. CONST. art. IV, §§ 3-4 (confining legislative service to twelve years service in both houses); OKLA. CONST. art. V, § 17A (curbing legislative service to twelve years service in both houses); OR. CONST. art. II, § 19 (restricting legislative service to six years in lower house and eight years in upper house).

20. See CAL. CONST. art. IV, §§ 1.5-2 (amending the California Constitution through *Proposition 140: Limits on Terms of Office, Legislators' Retirement, Legislative Operating Costs. Initiative Constitutional Amendment*).

placed on the November 1990 ballot through the initiative process.²¹ Proposition 140 provides, “[T]he Senate has a membership of 40 Senators elected for 4-year terms. . . . No Senator may serve more than 2 terms. The Assembly has a membership of 80 members elected for 2-year terms. No member of the Assembly may serve more than 3 terms.”²² The initiative sought to reduce the advantages of incumbency generated by unlimited terms in office by limiting the number of terms legislators could serve.²³ The purpose of Proposition 140 was to shift the concentration of political power away from the entrenched “career politicians” toward the “citizen representatives” envisioned by the Founding Fathers.²⁴

In *Bates v. Jones*,²⁵ the Ninth Circuit Court of Appeals sitting *en banc* held that Proposition 140 requires a lifetime ban on state legislators after serving three terms in the Assembly and two terms in the Senate,²⁶ provided sufficient notice of a lifetime ban to voters,²⁷ and did not violate plaintiffs’²⁸ First and Fourteenth Amendment rights.²⁹ The Ninth Circuit further held that imposing lifetime term limits on state legislators is a neutral candidacy qualification, which a state has a right to impose.³⁰ Finally, while the Ninth Circuit concedes that Proposition 140 has a minimal impact on the plaintiffs’ rights, it is justified by the state’s interest in limiting “unfair incumbent advantages” in order to promote competitive elections.³¹

Part II of this Casenote begins by examining the case law addressing term limits leading up to *Bates v. Jones*.³² Part III of this Casenote traces the unusual path

21. See *id.* § 2(a) (limiting the number of terms legislators may serve); see also *Bates*, 958 F. Supp. at 1455 (explaining that Proposition 140 also imposed term limits on a variety of other state offices which were not challenged in the lawsuit); CAL. CONST. art. IV, § 1 (reserving the powers of the initiative and referendum to the people). See generally CAL. ELEC. CODE §§ 9000-9015 (West 1996) (setting forth the process for qualifying an initiative for the ballot).

22. CAL. CONST. art. IV, § 2(a).

23. See CAL. CONST. art. IV, § 1.5 (declaring that “[t]he increased concentration of political power in the hands of incumbent representatives has made our electoral system less free, less competitive, and less representative”); *id.* (stating that the “powers of incumbency must be limited” in order “to restore a free and democratic system of fair elections”); see also *Bates*, 958 F. Supp. at 1454-55 (criticizing that the ability of legislators to serve unlimited terms in office presents incumbents with an unfair advantage over other candidates).

24. See *Bates*, 958 F. Supp. at 1455 (referencing the preamble of Proposition 140 providing the purpose and intent of the amendment).

25. 131 F.3d 843 (9th Cir. 1997) (*en banc*).

26. See *id.* at 846 (agreeing with the California Supreme Court that Proposition 140 required lifetime bans).

27. See *id.* (stating that the ballot materials and the surrounding context of the measure provided sufficient notice that Proposition 140 required lifetime bans).

28. The plaintiffs included former Assemblyman Bates and other state legislators.

29. See *Bates*, 958 F. Supp. at 847 (providing that the lifetime term limits, imposed by Proposition 140, are a neutral candidacy requirement, not a discriminatory restriction, and are justified by the state’s legitimate interest in incumbency reform).

30. See *id.* (providing that the state has the right to impose neutral candidacy qualifications).

31. See *id.* (asserting that Proposition 140’s impact on the right to vote for a candidate of one’s choice and the right of an incumbent to continue to run for his or her office is not severe, and is justified by the state’s interest in restoring competitive elections).

32. See *infra* Part II.A-B (discussing state and federal term limit cases prior to the decision in *Bates*).

California's term limits initiative traveled to reach judicial adjudication.³³ Finally, this Casenote analyzes the legal and social ramifications of the *Bates* decision.³⁴ Specifically, this Casenote develops and explores the impact of the *Bates* decision in light of the constitutional, federalism, and public policy issues raised by implementing term limits on state legislators through the initiative process.³⁵ This Casenote concludes that *Bates* was correctly decided.³⁶

II. TERM LIMITS CASES PRIOR TO AND LEADING TO *BATES*

A. State Term Limits Cases

1. Legislature v. Eu

Prior to the Ninth Circuit decision in *Bates v. Jones*,³⁷ a similar case was heard in 1991 by the California Supreme Court. In *Legislature v. Eu*,³⁸ several legislators were joined by select constituents and the body of the California Legislature to contest the validity of Proposition 140 by jointly filing a petition for writ of mandate to the California Supreme Court.³⁹ The language of Proposition 140 was ambiguous⁴⁰ in that it was difficult to decipher whether the measure imposed a lifetime ban, or a limit on consecutive terms.⁴¹ This raised interpretive and constitutional questions regarding the measure's validity.⁴² Adopting a deferential approach in analyzing initiatives, the court noted that, "[A]ll presumptions favor the validity of initiative measures. . . . Such measures must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears."⁴³

33. See *infra* Part III (analyzing the opinions of the district court, the court of appeals' three judge panel, and the court of appeals sitting en banc).

34. See *infra* Part IV.A-B (addressing the issues of jurisdiction, voting as a fundamental right, due process and notice requirements, and commenting on the societal impacts of the *Bates* decision).

35. See *infra* Part IV.B (setting forth the social impact of the *Bates* decision).

36. See *infra* Part V (summarizing that Proposition 140's lifetime ban on state legislators is a constitutional exercise of direct democracy).

37. 131 F.3d 843 (9th Cir. 1997).

38. 54 Cal. 3d 492, 816 P.2d 1309, 286 Cal. Rptr. 283 (1991).

39. See *Bates*, 958 F. Supp. at 1455 (discussing the legal history of Proposition 140).

40. See CAL. CONST. art. IV, § 2(a) (providing that "[n]o Senator may serve more than 2 terms").

41. See *Legislature v. Eu*, 54 Cal. 3d 493, 503, 816 P.2d 1309, 1314, 286 Cal. Rptr. 283, 288 (1991) (presenting the California Supreme Court with the interpretive question of determining whether Proposition 140 imposes a lifetime ban or consecutive term limits on legislators).

42. *Id.*

43. *Id.* at 501, 816 P.2d at 1313, 286 Cal. Rptr. at 287. But see J. Clark Kelso, *California's Constitutional Right to Privacy*, 19 PEPP. L. REV. 327, 344-47 (1992) (emphasizing that instead of adhering to a presumption of constitutionality, the courts should have followed the "Rule of Caution," wherein legislation pursued and enacted by the will of the electorate is strictly construed); *id.* at 367-68 (stating that despite the presumption of constitutionality, the California Supreme Court has struck down all or significant portions of half of the voter initiatives between 1964 and 1990); see also Michael Higgins, *Defending Risky Propositions: Judges Have Never Been Reluctant to Overturn Referenda, to Critics' Dismay*, A.B.A.J., July 1997, at 34-35 (indicating that from 1990

The California Supreme Court customarily declines to exercise original jurisdiction on most cases, preferring initial disposition by the lower courts.⁴⁴ However, because the case involved issues of sufficient public importance, the court reasoned that it was both appropriate and justified to exercise original jurisdiction.⁴⁵

In *Eu*, the issue of whether Proposition 140 enacted lifetime term limits or consecutive term limits was settled in favor of lifetime term limits.⁴⁶ Petitioners, the individual legislators and some of their constituents, argued that Proposition 140 imposed a lifetime ban,⁴⁷ while the Secretary of State, the respondent, argued that only consecutive term limits are imposed.⁴⁸ The California Supreme Court held that Proposition 140 imposes a “lifetime ban” on legislators who have served the specified number of terms pursuant to the initiative.⁴⁹ Thus, the court rejected the Secretary of State’s argument that Proposition 140 merely imposes a limit on the number of *consecutive* terms legislators could serve.⁵⁰ Noting that the language of the measure was ambiguous, the court concluded that the “indicia of the voters’ intent”⁵¹ strongly supported the position that a lifetime ban was intended by both

to 1997, California judges struck down three of eighteen initiatives, while litigation on others is pending).

44. See *Eu*, 54 Cal. 3d at 500, 816 P.2d at 1312, 286 Cal. Rptr. at 286 (emphasizing that issues of great public importance should be resolved promptly, supporting the appropriateness of the California Supreme Court’s assertion of original jurisdiction).

45. See *id.* (justifying departure from the court’s usual course because the petition involved the validity of a statewide initiative).

46. See *id.* at 506, 816 P.2d at 1316, 286 Cal. Rptr. at 290 (holding that Proposition 140 imposed lifetime term limits).

47. It appears likely that individual legislators strategically asserted that Proposition 140 imposed a lifetime ban, instead of a limit on consecutive terms, in order to present the measure as a ballot access case which traditionally triggered a strict scrutiny analysis instead of a less demanding rational basis analysis. See *Williams v. Rhodes*, 393 U.S. 23, 39 (1968) (Douglas, J., concurring) (invalidating a state statute using a strict scrutiny analysis which made it virtually impossible for a new party to obtain a place on the ballot, thus impairing individuals’ right to associate and voters’ rights to cast their votes effectively). But see *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (providing that states may impose burdens on candidates’ eligibility for the ballot without presenting constitutionally suspect burdens on voters).

48. See *Eu*, 54 Cal. 3d at 504, 816 P.2d at 1315, 286 Cal. Rptr. at 289 (providing that the petitioners refer to language in the initiative which stresses a broad intent to eliminate “career politicians,” while respondents focus on a narrower interpretation of the measure’s language wherein an incumbent “Senator” or a “member of the Assembly,” rather than a “person,” is limited to continue consecutive terms in office).

49. See *id.* at 506, 816 P.2d at 1316, 286 Cal. Rptr. at 290 (holding that Proposition 140 imposes a lifetime ban on officeholders after serving the prescribed maximum number of terms).

50. See *id.* at 504-06, 816 P.2d at 1315-16, 286 Cal. Rptr. at 289-90 (rejecting a literal interpretation of Proposition 140 which would only prohibit a “Senator” or “Assemblymember” from seeking reelection after the prescribed number of terms, because such a reading would circumvent the intent of the measure by allowing Senators and Assemblymembers to resign from their respective office and seek reelection without the status of Senator or Assemblymember).

51. *Id.* at 504, 816 P.2d at 1315, 286 Cal. Rptr. at 289 (quoting *Kennedy Wholesale, Inc. v. State Bd. of Equalization*, 53 Cal. 3d 245, 250, 806 P.2d 1360, 1363, 279 Cal. Rptr. 325, 328 (1991)); *id.* (providing that examples of such indicia include the analysis and arguments contained in the official ballot pamphlet); *id.* (recognizing that to help resolve ambiguities in a measure enacted through the initiative process, a court may consider indicia of the voters’ intent in addition to the language of the provision itself).

the proponents and voters who supported Proposition 140.⁵² Despite the absence of express language in the initiative or the analysis by the independent Legislative Analyst⁵³ indicating that Proposition 140 contemplated a lifetime ban, the court drew support from the opponents' ballot arguments which repeatedly stressed that the measure imposes a lifetime ban and highlighted the proponents' deceptive failure to disclose this aspect of the measure in their arguments.⁵⁴ Because opponents frequently overstate adverse impacts of a measure, they are not highly authoritative in interpreting a measure.⁵⁵ However, the California Supreme Court found it significant that the proponents failed to contradict or rebut the opponents' lifetime ban argument.⁵⁶ Based on the totality of the circumstances, the court held that it was likely the average voter understood that the measure imposed a lifetime ban against incumbents seeking reelection once the prescribed maximum number of terms had been served.⁵⁷

Although Proposition 140 was enacted as an amendment to the California Constitution, its provisions must also comport with the Federal Constitution.⁵⁸ In *Eu*, the California Supreme Court relied upon the analysis of the United States Supreme Court in analyzing constitutional challenges to election laws.⁵⁹ The court

52. See *id.* (indicating that the independent Legislative Analyst analysis in the ballot pamphlet described the term limitations as limiting "the number of terms that an elected state official can serve in the same office"); see also MARCH FONG EU, BALLOT PAMPHLET, PROPOSED STATUTES AND AMENDMENTS TO CALIFORNIA CONSTITUTION WITH ARGUMENT TO VOTERS, GENERAL ELECTION 69 (Nov. 6, 1990) [hereinafter BALLOT PAMPHLET] (indicating that the Legislative Analyst's analysis did not suggest that only a consecutive term limitation is contemplated).

53. See BALLOT PAMPHLET, *supra* note 52, at 69 (stating that the initiative "limits the number of terms that an elected state official can serve in the same office" without specifically stating that a lifetime ban or consecutive terms are contemplated). But see CAL. ELEC. CODE § 9085(b) (West 1996) (providing that summary statements prepared by the Legislative Analyst are not intended to provide comprehensive information on each measure); cf. Kelso, *supra* note 43, at 345 (pointing out that a legislative analysis is not constitutionally required nor does it have any constitutional significance in the passage of voter initiatives).

54. See *Eu*, 54 Cal. 3d at 505, 816 P.2d at 1315, 286 Cal. Rptr. at 289 (indicating the speculative nature of opponents' "fears and doubts" regarding a measure's adverse effects); see also *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 495 U.S. 568, 585 (1988) (dismissing the authoritative value of the fears and doubts expressed by the opponents in the construction of legislation).

55. See *Eu*, 54 Cal. 3d at 505, 816 P.2d at 1315, 286 Cal. Rptr. at 289 (recognizing that the "fears and doubts" expressed by ballot measure opponents should not be granted great weight in construing a measure).

56. See *id.* (emphasizing that proponents reinforced the intent of a lifetime ban by stressing that Proposition 140 sought to eliminate "career legislators" without foreclosing the opportunity of "good legislators" from seeking other political offices by "mov[ing] up the ladder"); see also BALLOT PAMPHLET, *supra* note 52, at 70 (asserting that "[l]imiting terms, [sic] will create more competitive elections, so good legislators will always have the opportunity to move up the ladder").

57. See *Eu*, 54 Cal. 3d at 505, 816 P.2d at 1316, 286 Cal. Rptr. at 290 (taking into account the measure's language and other relevant material).

58. See *id.* at 515, 816 P.2d at 1322, 286 Cal. Rptr. at 296 (indicating that in determining the validity of an amendment to a state constitution it is appropriate to look to U.S. Supreme Court decisions for guidance); see also *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (holding that "an act of the legislature, repugnant to the constitution, is void").

59. See *Eu*, 54 Cal. 3d at 515, 816 P.2d at 1322, 286 Cal. Rptr. at 296 (noting that the Supreme Court traditionally analyzes the constitutionality of election laws under the Equal Protection Clause).

prefaced its analysis by noting the difficulty presented by constitutional challenges to specific provisions of state election laws because of the absence of any "litmus-paper test"⁶⁰ to provide a distinction between valid and invalid restrictions.⁶¹ While the United States Supreme Court has generally addressed the validity of election regulations under the Fourteenth Amendment's Equal Protection Clause,⁶² "the standard of review utilized in voting and election cases has been in a state of flux."⁶³ Petitioners claimed that Proposition 140's lifetime ban burdened their fundamental rights to vote and to be candidates for public office.⁶⁴

The U.S. Supreme Court has traditionally provided the states broad discretion in the adoption of laws governing the election process, even if such laws limit the electorate's selection of their representatives, provided that the laws are applied in a non-discriminatory and even-handed manner.⁶⁵ In *Eu*, the court addressed petitioners' First and Fourteenth Amendment challenges to the Federal Constitution by applying the standard of review adopted from *Anderson v. Celebrezze*.⁶⁶ In *Anderson*, the Court required the consideration of three separate elements in resolving constitutional challenges to specific provisions of a state's election laws.⁶⁷ First, the court must consider "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff

60. See *Anderson v. Celebrezze*, 460 U.S. 780, 789-90 (1983) (setting forth the test which requires the Court: (1) to consider the type and extent of the harm to the plaintiff, against the impact to the protected rights under the First and Fourteenth Amendments; (2) to identify and assess the interests presented by the state that outweigh the burden resulting from the implementation of its regulation; (3) to weigh and balance the compelling nature of the state interests presented; and (4) to weigh the extent which the state interests justify the burden placed on the plaintiff's rights).

61. See *Eu*, 54 Cal. 3d at 516, 816 P.2d at 1323, 286 Cal. Rptr. at 286 (recognizing that courts must engage in considerable evaluation and balancing which does not yield automatic results).

62. See U.S. CONST. amend. XIV, § 1

(No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.).

63. *Eu*, 54 Cal. 3d at 515, 816 P.2d at 1322, 286 Cal. Rptr. at 296.

64. See *id.* at 514, 816 P.2d at 1322, 286 Cal. Rptr. at 296 (implicating petitioners' First and Fourteenth Amendment rights).

65. See *id.* at 516, 816 P.2d at 1323, 286 Cal. Rptr. at 297 (granting broad authority to the states in enacting election laws); see also *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982) (stating that the Federal Constitution fails to require procedures for states to follow when filling legislative vacancies).

66. 460 U.S. 780 (1983). The petitioners urged the use of a strict-scrutiny standard in analyzing Proposition 140 relying on *Eu v. San Francisco Democratic Committee*, 489 U.S. 214, 222-25 (1989) (invalidating a ban on political party endorsements because it burdened appellees' rights to free speech and free association, without serving a compelling government interest). However, Proposition 140, unlike *San Francisco Democratic Committee*, does not seriously impact the First Amendment freedoms of speech and associations because it equally impacts all political parties. *Eu*, 54 Cal. 3d at 515, 816 P.2d at 1322, 286 Cal. Rptr. at 296. Moreover, the *Eu* court noted that applying strict scrutiny to Proposition 140 would not have yielded a different result. *Id.* at 515, 816 P.2d at 1323, 286 Cal. Rptr. at 297.

67. See *Anderson*, 460 U.S. at 789-90 (setting forth the factors a court must weigh in determining whether a challenged election law provision is unconstitutional); see also *Eu*, 54 Cal. 3d at 517, 816 P.2d at 1323, 286 Cal. Rptr. at 297 (articulating the test to be met to justify the "necessity" of the burden imposed by the State).

seeks to vindicate."⁶⁸ Second, the court must characterize and weigh the interest presented by the State and determine if the interest outweighs the burden imposed by the regulation.⁶⁹ Third, as the court contemplates the legitimacy of the rule, in addition to considering the State's necessity for imposing the particular burden affecting the plaintiff's rights, "it must also consider the extent to which those interests make it necessary to burden the plaintiff's rights," rather than some less drastic alternative.⁷⁰ Finally, the State's interest must be both legitimate and necessary to outweigh any burden on the plaintiff's First and Fourteenth Amendment rights.⁷¹

Applying these factors, the California Supreme Court held that while Proposition 140 impacts the rights of voters and candidates, the impact is sufficiently mitigated by the fact that voters may continue to vote for any qualified candidates, office-seekers are able to serve a significant time in office, and candidates may also seek other public offices.⁷² Additionally, the court held that the State's interests in limiting incumbency are compelling and well recognized.⁷³ The relevant State interests that the California Supreme Court cited included: the power of incumbent officeholders to develop unfair incumbent advantages with various groups and networks,⁷⁴ a desire to prevent the development of "entrenched political machines,"⁷⁵ returning widespread access to the political process,⁷⁶ and reinvigorating electorate participation.⁷⁷ The court concluded that the lifetime ban

68. *Anderson*, 460 U.S. at 789-90.

69. *See id.* (indicating that the State's interest must outweigh the burden imposed on the plaintiff).

70. *See id.* at 806 (asserting that less drastic alternatives must be considered to achieve the State's necessary interests).

71. *See Eu*, 54 Cal.3d at 520, 816 P.2d at 1326, 286 Cal. Rptr. at 300 (stating that incumbency reform is a legitimate state interest, and preventing incumbents from perpetuating their incumbency serves a rational public policy).

72. *See id.* at 519, 816 P.2d at 1325, 286 Cal. Rptr. at 299 (indicating an uncertainty of the legal impact of Proposition 140 on voters because federal law was unclear whether voters retain a constitutional right to vote for particular candidates).

73. *See id.* at 520, 816 P.2d at 1326, 286 Cal. Rptr. at 300 (relying on *State ex rel. Maloney v. McCartney*, 223 S.E.2d 607 (W. Va. 1976), which provided that twenty state constitutions have restricted the ability of incumbents to succeed themselves, and the Twenty-Second Amendment to the Constitution of the United States also limits the number of terms an individual may serve as President); *see also* U.S. CONST. amend. XXII, § 1 (stating that an individual may not be elected President more than twice).

74. *Eu*, 54 Cal. 3d at 521, 816 P.2d at 1326, 286 Cal. Rptr. at 300.

75. *Id.*; *see id.* (illustrating that the presence of an entrenched political machine might discourage and intimidate other candidates from challenging incumbents, which could effectively foreclose access to the political process).

76. *See id.* (predicting that a regular disruption of the political machinery would stimulate discussion within political parties and facilitate electorate participation).

77. *Id.*; *see id.* (asserting that limiting incumbents' ability to succeed themselves would foster an environment which encourages political participation instead of ambivalence because policies that are unfavorable to various minorities are more likely to thrive in an environment where those in power "can rely upon electorate inertia fostered by the hopelessness of encountering a seemingly invincible political machine"). While "*Maloney* involved a limitation on consecutive terms for a Governor, rather than a lifetime ban on incumbent legislators," the court in *Eu* noted that the state interests expressed in *Maloney* "would apply with equal force to the legislative

on candidacy was necessary to accomplish the spirit of Proposition 140, which sought to eliminate a class of career politicians⁷⁸ created and fostered by the unfair incumbent advantages⁷⁹ outlined in the constitutional amendment.⁸⁰ In imposing lifetime bans on state legislators, the court dismissed various, less drastic alternatives, including a limitation on consecutive terms that which require a legislator to take one term off before being eligible to run for the same office.⁸¹ The court concluded that a consecutive term limit would not effectively eliminate the significant incumbent advantages developed while in office, and that incumbent advantages could be substantially “reinvoke[d]”⁸² by individuals even after leaving office for a period of time in their efforts to seek reelection.⁸³

One of the many substantial advantages an incumbent possesses over challenging candidates is name recognition among the voters in his or her district.⁸⁴ An incumbent is in a better position to facilitate increased name recognition through natural media opportunities involving the formulation of public policy and issues of public interest generated by virtue of his or her incumbent status.⁸⁵ Accordingly, the court held that “only a lifetime ban could protect against various kinds of continued exploitation of the ‘advantages of incumbency’ captured through past terms in office.”⁸⁶ In balancing the three elements, the court concluded that “the interests of the state in incumbency reform outweigh any injury to incumbent office holders and those who would vote for them.”⁸⁷ Additionally, the court buttressed its conclusion by stating that voters do not possess a fundamental right to vote for

branch.” *Id.* at 521, 816 P.2d at 1326, 286 Cal. Rptr. at 300.

78. See CAL. CONST. art. IV, § 1.5 (incorporating Proposition 140’s preamble to state the initiative’s purpose).

79. See *Eu*, 54 Cal. 3d at 523, 816 P.2d at 1327, 286 Cal. Rptr. at 301 (referring to “incumbent advantages” which compromise California’s electoral system such as “superior fund raising ability, greater media coverage . . . and greater name recognition among the voters”).

80. *Id.*

81. *Id.*; see *id.* (indicating that less drastic alternatives to a lifetime ban would have been inadequate to eliminate unfair incumbent advantages); see also CAL. CONST. art. IV, § 1.5 (expressing the purpose of Proposition 140).

82. *Eu*, 54 Cal. 3d at 523, 816 P.2d at 1328, 286 Cal. Rptr. at 302; see *id.* (emphasizing that a lifetime ban was necessary to disable incumbents from capitalizing on the advantages which they developed while in office).

83. See *id.* at 523, 816 P.2d at 1327, 286 Cal. Rptr. at 301 (listing greater name recognition as an incumbent advantage over other candidates).

84. *Id.*; see *id.* (stating other incumbent advantages including superior fundraising ability, larger and more experienced staffs, and favorably drawn voting districts); see also Einer Elhauge et al., *How Term Limits Enhance the Expression of Democratic Preferences*, S. SUP. CT. ECON. REV. 59, 67 (1977) (hypothesizing that an incumbent’s “brand name” makes him or her more marketable than a challenger).

85. See Einer Elhauge et al., *supra* note 84, at 67 (illustrating greater media coverage as an incumbent advantage over other candidates).

86. *Eu*, 54 Cal. 3d at 524, 816 P.2d at 1328, 286 Cal. Rptr. at 302; see Elhauge et al., *supra* note 84, at 69 (asserting that “to the extent that term limits reduce the average tenure of incumbents, the average amount of name recognition held by incumbents will be smaller and the disadvantage that must be overcome in a race against an incumbent is reduced”).

87. *Eu*, 54 Cal. 3d at 524, 816 P.2d at 1328, 286 Cal. Rptr. at 302.

particular candidates.⁸⁸ Thus, Proposition 140's lifetime ban does not impose any serious impact on First or Fourteenth Amendment rights; rather, it "impacts all political parties on an equal basis."⁸⁹ Summarizing the state's legitimate and compelling interests in enacting the lifetime ban prescribed by the measure, the court held that the state's interests outweighed "the narrower interests of the petitioner legislators and the constituents who wish to perpetuate their incumbency."⁹⁰

2. League of Women Voters v. Diamond

Subsequent to the decision reached in *Eu*, the United States District Court in Maine decided *League of Women Voters v. Diamond*,⁹¹ which also addressed the issue of state imposed term limits through the initiative process.⁹² In *Diamond*, the court analyzed whether a 1993 state ballot initiative,⁹³ which imposed term limits on various state officials, violated, *inter alia*, plaintiffs' state and federal constitutional rights.⁹⁴ State legislators, voters, and others ("plaintiffs") sought preliminary injunctive relief to prevent the Secretary of State and the Attorney General ("defendants") from enforcing the provisions of the Term Limitations Act of 1993⁹⁵ ("the Act").⁹⁶ The Act limited state senators and representatives to four

88. See *id.* at 524, 816 P.2d at 1328, 286 Cal. Rptr. at 302 (indicating that Supreme Court decisions have held that voters do not have the right to vote for particular candidates); see, e.g., *Burdick v. Takushi*, 504 U.S. 428, 439 (1992) (holding that a state's ban on write-in voting was a limited burden).

89. *Eu*, 54 Cal. 3d at 515, 816 P.2d at 1323, 286 Cal. Rptr. at 296.

90. *Id.* at 525, 816 P.2d at 1329, 286 Cal. Rptr. at 303; see also *Nevada Judges Ass'n v. Lau*, 910 P.2d 898, 902 (Nev. 1996) (upholding a voter initiative which approved a lifetime ban on members of the judiciary after serving two terms as necessary to address the initiative's aims of changing the composition of the judiciary).

91. 923 F. Supp. 266 (D. Me. 1996).

92. Unlike *Eu*, which imposed state term limits through a constitutional amendment, *Diamond* sought to impose term limits through an initiative bill. See *Diamond*, 923 F. Supp. at 267 (indicating the legislative channel term limits were pursued by the state); see also ME. REV. STAT. ANN. tit. 21-A, § 553(1)-(2) (West Supp. 1997) (providing the measure that was adopted through initiative bill I.B.1, rather than through the legislature).

93. ME. REV. STAT. ANN. tit. 21-A, § 553(1)-(2) (West Supp. 1997).

94. See *Diamond*, 923 F. Supp. at 268 (asserting that the Term Limitations Act of 1993 unconstitutionally violates plaintiffs' First and Fourteenth Amendment rights to free speech and association).

95. See *id.* (describing the nature of the relief sought by plaintiffs); see also ME. REV. STAT. ANN. tit. 21-A, § 553(1)-(2) (West Supp. 1997) (appearing as the "Term Limitations Act of 1993" on the November 2, 1993 Maine ballot).

96. See *Diamond*, 923 F. Supp. at 268 (presenting two theories to present enforcement: (1) the Act violates plaintiffs' First and Fourteenth Amendment rights to free speech and association under the United States Constitution; and (2) the Act's legislative attempt to impose additional qualifications on state officeholders without seeking a constitutional amendment violates the Maine Constitution).

consecutive terms.⁹⁷ In December 1993, the Act became law and applied to nominations and ballots printed after January 1, 1996.⁹⁸

Placing *Diamond*'s consecutive term limits measure in context, the court noted that "all state election laws in some capacity burden candidates' and voters' First and Fourteenth Amendment rights."⁹⁹ The court must balance the state's legitimate regulatory interests against First Amendment rights, such as freedom of expression and association, and Fourteenth Amendment rights to participate on an equal basis with other voters in the election of their representatives.¹⁰⁰ The court will strictly scrutinize election laws which impose a "severe burden" on these rights, such as those that are "content-based or overly ballot preclusive," presenting unreasonable barriers for individuals seeking access to the ballot as candidates.¹⁰¹

Alternatively, the court relied on the test set forth by the Supreme Court in *Anderson v. Celebrezze*.¹⁰² The test in *Anderson* requires courts to balance the magnitude of the asserted injury to a plaintiff's First and Fourteenth Amendment rights against the precise interests asserted by the state to justify the burden imposed by its rule.¹⁰³

The standard in *Anderson* was further developed by the Supreme Court in *Burdick v. Takushi*.¹⁰⁴ In *Burdick*, the Supreme Court established that a severe restriction to plaintiff's First and Fourteenth Amendment rights subjects the election law to strict scrutiny,¹⁰⁵ while a reasonable, nondiscriminatory restriction subjects

97. See *id.* (indicating that the bill was passed by the initiative process to impose limits on the number of consecutive terms various state officials could serve); see also ME. REV. STAT. ANN. tit. 21-A, § 553(1)-(2) (West Supp. 1997) ("A person may not serve more than 4 consecutive terms as a state Senator. A person may not serve more than 4 consecutive terms as a member of the state House of Representatives.").

98. See *Diamond*, 923 F. Supp. at 268 (providing a background and phase-in date of the Act); see also ME. REV. STAT. ANN. tit. 21-A, § 554 (West Supp. 1997) ("Notwithstanding any other provision of law, a person who is prohibited from service in an office as set forth in section 553 may not be nominated to that office. . . . This section applies to nominations occurring and ballots printed after January 1, 1996.").

99. *Diamond*, 923 F. Supp. at 271.

100. See *Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (holding that restricting access of political parties to the ballot impinges upon individuals' rights to associate for political purposes, and "the right of qualified voters . . . to cast their votes effectively"); see also *Storer v. Brown*, 415 U.S. 724, 729-30 (1974) (explaining that associational rights are not absolute and are subject to qualification if necessary to fairly and effectively run elections); *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) (emphasizing that the right of suffrage is fundamental in a democratic society).

101. See *Diamond*, 923 F. Supp. at 271 (providing that the Act merely limits the consecutive number of terms a candidate may serve without foreclosing running for their prior office after a one term waiting period, and without permanently limiting the field of candidates from which voters may choose).

102. 460 U.S. 780 (1983); see *Anderson*, 460 U.S. at 789-90 (outlining the factors of the Court's balancing test).

103. See *id.* at 789 (indicating the analytical nature of the test).

104. 504 U.S. 428 (1992).

105. *Burdick*, 504 U.S. at 434; see *Norman v. Reed*, 502 U.S. 279, 288-89 (1992) (setting forth the strict scrutiny standard which must be overcome when a state action severely burdens individuals' First and Fourteenth Amendment rights by limiting access to the ballot: the State must set forth a compelling interest to justify the limitation, and the limitation must be narrowly drawn to advance the state interest). But see *Burdick*, 504 U.S. at 434 (providing only a rational basis standard that must be overcome, and that is generally met when a state election

the law to a less rigorous analysis under *Anderson*.¹⁰⁶ A careful reading of *Burdick* provides guidance as to when a state election restriction moves from legitimate to severe.¹⁰⁷ The two key factors to consider include: "(1) whether the restriction is content-based¹⁰⁸ or content-neutral;¹⁰⁹ and (2) the extent to which alternative routes to ballot access minimize the restriction on the plaintiffs' rights."¹¹⁰ A state's election system that creates barriers limiting the field of candidates does not by itself compel strict scrutiny.¹¹¹ In *Burdick*, the Court held that "when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions."¹¹²

This finding was made in light of the test set forth by *Anderson-Burdick*, and after determining that consecutive terms limits on a state legislator were neither content-based nor overly ballot preclusive,¹¹³ but rather content-neutral.¹¹⁴ The district court then concluded that plaintiffs failed to demonstrate a likelihood of success on the merits that the Act imposes a severe burden on their First and Fourteenth Amendment rights.¹¹⁵ With respect to state constitutional claims, the court similarly concluded that the plaintiffs failed to establish a likelihood of success on the merits.¹¹⁶ Accordingly, defendants were relieved from the obligation

law imposes reasonable, nondiscriminatory restrictions which serve an important regulatory interest, but which nevertheless impact voters' First and Fourteenth Amendment rights).

106. *Burdick*, 504 U.S. at 434; *see Diamond*, 923 F. Supp. at 269 (emphasizing that any election measure that limits the field of candidates by creating barriers, by itself does not subject the measure to strict scrutiny).

107. *See Burdick*, 504 U.S. at 434 (providing that while the Court did not expressly provide when an election law restriction moves from reasonable to severe, two key indicators were isolated).

108. *See Anderson v. Celebrezze*, 460 U.S. 780, 793-94 (1983) (providing that a state election law which unequally burdens new or small political parties or independent candidates would be characterized as content-based); *see also Bullock v. Carter*, 405 U.S. 134, 144 (1974) (striking down a state election law imposing high candidate filing fees as unconstitutional because the economic burden would disproportionately effect the less affluent members of the community, whose candidates would be less likely to afford the cost to become a candidate).

109. *Burdick*, 504 U.S. at 428; *see id.* (including reasonable nondiscriminatory restrictions as content-neutral); *Anderson*, 460 U.S. at 782 (affirming a state election law which imposed a filing period deadline on candidates seeking to appear on the ballot); *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 10 (1982) (upholding a state statute allowing interim vacancies of elected offices to be filled without a special election, and in some cases by appointment, until the next regularly scheduled election, as applicable to all legislative vacancies).

110. *See Burdick*, 504 U.S. at 428 (providing that ample access to the primary ballot is available until the cutoff date for the filing of nominating petitions).

111. *See id.* at 433 (cautioning that a more flexible standard applies).

112. *Id.* at 434.

113. *See Diamond*, 923 F. Supp. at 271 (referring to the minimal impact the measure would have on plaintiffs' First and Fourteenth Amendment rights).

114. *See id.* at 270 (indicating that no distinction among candidates is made on the basis of wealth, race, party affiliation or ideology).

115. *See id.* at 268-70 (stating that the plaintiffs' claims that their First and Fourteenth Amendment rights to free speech and association are violated by the Act do not constitute a severe burden, nor do they rise to the level of strict scrutiny which would establish a likelihood of success on the merits).

116. *See id.* at 272 (disallowing plaintiffs' allegation that the Act impermissibly adds qualifications for office to those set forth in the Maine Constitution).

of justifying the Act with a compelling state interest.¹¹⁷ Instead, the defendants needed only to present an important regulatory interest to overcome the burden of the restriction on the plaintiffs' rights.¹¹⁸ Defendants offered several important regulatory interests which outweighed the plaintiffs' asserted injury to their First and Fourteenth Amendment rights.¹¹⁹ The court was satisfied that many of the interests that defendants presented were both legitimate and strong, including defendants' intent to reduce unfair advantages enjoyed by incumbents at the polls and to promote fairer and more competitive elections.¹²⁰

The *Diamond* court concluded that because the Act results in a flat ban on every incumbent in the Maine legislature, and the number of consecutive terms he or she may serve,¹²¹ the Act could not be accurately described as content-based.¹²² Additionally it established that the Act did not establish a lifetime ban on termed-out incumbents, but rather a ban against *consecutive* limits.¹²³ Seeking to distinguish its holding in *Diamond*, which imposed consecutive term limits on state legislators, with *Bates v. Jones*,¹²⁴ which imposed a lifetime ban on state legislators, the Maine District Court highlighted that the burden the Act imposes is not severe.¹²⁵ "The Act, however, merely limits the consecutive number of terms a candidate may

117. *See id.* (stating that when state election laws impose only "reasonable, nondiscriminatory restrictions" upon voters' First and Fourteenth Amendment rights, "the state's important regulatory interests are generally sufficient to justify the restrictions"); *see also Anderson*, 460 U.S. at 788 (providing that the regulatory interests of a state generally justify reasonable, nondiscriminatory restrictions which affect an individual's right to vote and associate).

118. *See Diamond*, 923 F. Supp. at 272 (indicating that when a severe burden is not established by the plaintiffs, the state's threshold is lowered from presenting a compelling state interest to merely advancing the need of an important regulatory restriction).

119. *Id.* The court noted that the defendants identified six interests which were served by term limits: (1) reducing unfair advantages enjoyed by incumbents at the polls; (2) promoting fairer and more competitive elections; (3) encouraging qualified new candidates to run for public office; (4) dislodging entrenched political leadership; (5) curbing the power of political machines; and (6) encouraging the election of citizen representatives instead of career politicians intent on their own reelection.

Id.

120. *See id.* (listing the first two regulatory interests advanced by the states).

121. *See Diamond*, 923 F. Supp. at 270 (establishing that the Act fails to characterize or advocate a preference among the ideologies presented to the electors); *see also Burdick*, 504 U.S. at 438 (upholding a flat ban on write-in ballots as content-neutral).

122. *See Diamond*, 923 F. Supp. at 270 (noting that the Act results in a flat ban and does not differentiate or limit the range of political ideas from which voters may select their representatives); *see also ME. REV. STAT. ANN.* tit. 21-A, § 553(1)-(2) (West Supp. 1997) (codifying an initiative bill, I.B.1, passed in 1993 by Maine voters, which imposed limits on the number of *consecutive* terms various state officials could serve including state senators and representatives).

123. *See Diamond*, 923 F. Supp. at 270 (stating that incumbents must sit out for one term, after which they may seek their prior office); *see also ME. REV. STAT. ANN.* tit. 21-A, § 553 (West Supp. 1997) (setting forth the limitations on consecutive terms in office).

124. 958 F. Supp. 1446 (N.D. Cal. 1997). *Bates* states that California's Proposition 140 imposed lifetime term limits on state legislators of two terms for state senators and three terms for state representatives. *Id.* at 1085.

125. *See Diamond*, 923 F. Supp. at 271 (asserting that limiting consecutive terms of legislators is less severe than lifetime term limits on legislators).

serve,"¹²⁶ without foreclosing any opportunity to seek both other offices and even to return to his or her prior office after waiting one term.¹²⁷ The court's decision was influenced by an advisory opinion¹²⁸ of the Supreme Judicial Court of Maine,¹²⁹ which concluded that the limitations imposed by the Act fell within the legislative power, and if enacted would be constitutionally valid.¹³⁰

While the Maine District Court was deciding *Diamond*, and following the Opinion of the Justices, the United States Supreme Court decided its first term limits case, *U.S. Term Limits, Inc. v. Thornton*.¹³¹ *Thornton* involved a challenge to a state law which imposed term limits on members of Congress.¹³² Hopeful for some guidance on the issue, but ultimately unpersuaded by the applicability of *Thornton*, the court in *Diamond* held that, "[i]n the absence of any direct authority from the Supreme Judicial Court of Maine on the issue, . . . the advisory opinion of the Justices provides the best forecast of how the Supreme Judicial Court of Maine would evaluate [the] state constitutional issue Plaintiffs raise."¹³³ Accordingly, the court relied on the advisory opinion of the Justices, which *directly* addressed the issue of state imposed consecutive term limits on state legislators in weighing the plaintiffs' likelihood of success on the merits of their claim.¹³⁴

126. *Id.*

127. *See id.* (stating that a termed out incumbent must wait one term before he or she may again run for his or her prior office).

128. *See* Opinion of the Justices, 673 A.2d 693, 695 (Me. 1996) (providing that advisory opinions are issued pursuant to Maine Constitution article VI, section 3, and such opinions are not binding upon the state supreme court); *id.* at 1261 (articulating that advisory opinions will be issued only when important questions of law which pertain to "instant" matters are involved).

129. *See Diamond*, 923 F. Supp. at 271 (preceding the submission of the Act to the voters, the Justices of the Supreme Judicial Court of Maine, in response to the Maine House of Representatives, issued an advisory opinion on the constitutionality of the Act under the Maine Constitution).

130. *See Opinion of the Justices*, 673 A.2d at 695 (reasoning that the qualifications enumerated in the Maine Constitution allow the legislature to prescribe additional conditions for representatives or senators, provided the added qualifications are reasonable, do not conflict with the Constitution, and do not violate any guaranteed rights).

131. 514 U.S. 779 (1995) (5-4 decision); *see infra* Part II.B (providing a more extensive discussion of *Thornton*); *see also Diamond*, 923 F. Supp. at 273 (indicating that, in *Thornton*, the Court struck down a portion of an Arkansas law which imposed term limits on members of the United States House of Representatives and Senate, while clearly stating its decisions did not extend to state law issues).

132. *See Thornton*, 514 U.S. at 783 (describing a challenge to an amendment to the Arkansas State Constitution prohibiting the name of a candidate for Congress from appearing on the ballot if the candidate has already served three terms in the House of Representatives or two terms in the U.S. Senate).

133. *Diamond*, 923 F. Supp. at 273.

134. *See id.* (stating that the court relied less on *Thornton* and more on the Advisory Opinion of the Supreme Judicial Court of Maine in interpreting the Maine Constitution because the Advisory Opinion dealt directly with the state constitutional question raised by the plaintiffs).

3. Summary of State Term Limits Cases

States may impose term limit restrictions on state legislators without violating the Federal Constitution.¹³⁵ The California Supreme Court in *Legislature v. Eu* upheld Proposition 140 which imposed a lifetime ban on state legislators.¹³⁶ In *Diamond*, the United States District Court upheld a Maine ballot initiative, which imposed limits on the number of consecutive terms state officials could serve.¹³⁷ Thus, whether a measure imposes a lifetime ban, consecutive term limits, or other forms of term limits and whether the case is heard in state or federal court, courts reach the same conclusion: imposing term limits on state legislators is within a state's authority.

B. Federal Term Limits Cases

In 1995, the Supreme Court for the first time decided a case involving term limits, *U.S. Term Limits, Inc. v. Thornton*.¹³⁸ In *Thornton*, an action was brought challenging Amendment 73¹³⁹ to the Arkansas Constitution, which precluded persons who had served a certain number of terms in the United States Congress from having their names placed on the ballot for election to Congress.¹⁴⁰ In a divided opinion,¹⁴¹ the Supreme Court affirmed the decisions of the Circuit Court and the Arkansas Supreme Court, which both held that the amendment violated the

135. See *Bates v. Jones*, 958 F. Supp. 1446, 1454 n.5 (N.D. Cal. 1997) (listing fourteen states that have adopted consecutive or other forms of term limits); *infra* notes 18-19 and accompanying text (providing examples of state imposed term limits which have been upheld); see, e.g., ARIZ. CONST. art. IV, pt. 2, § 21 (four consecutive terms); COLO. CONST. art. V, § 3 (four consecutive terms in lower house, two consecutive terms in upper house); MONT. CONST. art. IV, § 8 (eight years within preceding sixteen years); see also *supra* note 19 and accompanying text (listing six states in addition to California that have enacted lifetime term limits on legislative service).

136. See *Legislature v. Eu*, 54 Cal. 3d 492, 501, 816 P.2d 1309, 1313, 286 Cal. Rptr. 283, 287 (1991) (holding that Proposition 140 is constitutionally valid, with the exception of the pension restrictions pertaining to incumbent legislators).

137. See *Diamond*, 923 F. Supp. at 267 (denying a motion for preliminary injunction to prevent enforcement of a consecutive term limits initiative affecting state officials approved by Maine voters).

138. 514 U.S. 779 (1995).

139. Proposed as a "Term Limit Amendment," its preamble states:

The people of Arkansas find and declare that elected officials who remain in office too long become preoccupied with reelection and ignore their duties as representatives of the people. Entrenched incumbency has reduced voter participation and has led to an electoral system that is less free, less competitive, and less representative than the system established by the Founding Fathers. Therefore, the people of Arkansas, exercising their reserved powers, herein limit the terms of elected officials.

ARK. CONST. amend. 73, preamble.

140. See *Thornton*, 514 U.S. at 784 (clarifying that section 3 of amendment 73 applies to Arkansas' Congressional Delegation, which denies individuals that have been elected to three or more terms in Congress the opportunity to seek reelection).

141. The opinion was delivered by Justice Stevens, in which Justices Kennedy, Souter, Ginsburg and Breyer joined. Justice Kennedy filed a concurring opinion. Justice Thomas filed a dissenting opinion, in which Chief Justice Rehnquist, and Justices O'Connor and Scalia joined.

United States Constitution.¹⁴² The Court held that the amendment was an indirect attempt to evade the Qualifications Clauses'¹⁴³ requirements,¹⁴⁴ and undermined the basic democratic principles underlying those clauses.¹⁴⁵

Relying on *Powell v. McCormack*,¹⁴⁶ the *Thornton* Court specifically held that: (1) States may not impose qualifications for the office of the United States representative in addition to those set forth by the Constitution; (2) the Tenth Amendment does not reserve to the states the power to set additional qualifications; and (3) a state provision which has the likely effect of handicapping a class of candidates with the sole purpose of indirectly creating additional qualifications is unconstitutional.¹⁴⁷ The Court concluded that state imposed restrictions on qualifications for Congress violated the idea "that the right to choose representatives belongs not to the States, but to the people."¹⁴⁸ Thus, expressing a concern that if individual states were permitted to independently determine qualifications for their representatives, a "patchwork" of qualifications would result among the states, "undermining the uniformity and the national character that the Framers envisioned and sought to ensure."¹⁴⁹

The holding in *Thornton* is consistent with state and lower federal courts that have held that *Powell* conclusively established that Congress does not have the power to impose additional qualifications on Representatives.¹⁵⁰ The Supreme Court

142. See *Thornton*, 514 U.S. at 783-85 (explaining that the Arkansas Supreme Court issued a 5-2 decision concluding that states may not alter the requirements for congressional service enumerated in the Qualifications Clauses).

143. See U.S. CONST. art. I, § 2, cl. 2 (providing the qualifications for members of the House of Representatives, which require reaching the age of twenty-five and United States citizenship for seven years); *id.* art. I, § 3, cl. 3 (specifying the qualifications for Senate members).

144. See *Thornton*, 514 U.S. at 831 (indicating that amendments which erect barriers for a class of candidates with the purpose or effect of circumventing the requirements of the Qualifications Clauses will not be upheld).

145. See *id.* (emphasizing that "allowing States to evade the Qualifications Clauses by 'dressing eligibility to stand for Congress in ballot access clothing' trivializes the basic principles of our democracy that underlie those Clauses"); see also *id.* at 792 (mentioning that the Supreme Court reviewed the debates at the state conventions and found that they confirmed "the Framers' understanding that the qualifications for members of Congress had been fixed in the Constitution") (quoting *Powell v. McCormack*, 395 U.S. 486, 540 (1969)).

146. 395 U.S. 486 (1969); see *id.* at 522 (holding that the Constitution does not grant Congress the authority to exclude any person who is elected by his or her constituents and meets all the constitutionally prescribed requirements for membership); see also U.S. CONST. art. I, § 2, cl. 2, 3 (listing the qualifications requirements for a member of Congress). See generally U.S. CONST. art. I, § 5 (providing that each House shall judge the qualifications of its members).

147. *Thornton*, 514 U.S. at 779.

148. *Id.* at 820-21.

149. *Id.* at 822.

150. See *id.* at 798 (asserting that based on historical analysis, the qualifications for service in Congress set forth in the Constitution are "fixed" and are not subject to additional qualifications by Congress); see, e.g., *Stumpf v. Lau*, 839 P.2d 120, 122 (Nev. 1992) (citing *Powell* for the proposition that even Congress did not have the power to alter qualifications for constitutional federal officers); *State ex rel. Johnson v. Crane*, 197 P.2d 864, 869 (Wyo. 1948) (following a detailed historical analysis, the Wyoming Supreme Court concluded that the State and Federal Constitutional Qualifications Clauses are exclusive); see also Stanley H. Friedelbaum, *Term Limits, The State Courts, and National Dominion: The Vicissitudes of American Federalism*, 60 ALB. L. REV. 1567, 1578 (1997).

concluded in *Thornton* that changes or additions to the Qualifications Clause must be pursued through a constitutional amendment.¹⁵¹ The Court also rejected the claim that Amendment 73 is a valid exercise of state power under the Elections Clause,¹⁵² which delegates authority to the states to regulate elections of members of Representatives and Senators.¹⁵³ The Elections Clause should be construed to grant states the authority to regulate the *procedural* aspects of the election process, such as promoting efficiency and protecting the integrity of the election process, rather than to allow states to impose *substantive* qualifications, which may exclude classes of candidates from seeking federal office.¹⁵⁴

The decision in *Thornton* involved federal, not state, law issues.¹⁵⁵ Thus, the Supreme Court did not directly address the issue of whether a state could impose term limits on state legislators. Instead, the Court left the issue open leaving lower courts to wrestle with the issue presented in *Bates*.

III. *BATES V. JONES*¹⁵⁶

A. *The Facts*

California proposed and adopted its term limits through the state's initiative process.¹⁵⁷ On November 6, 1990, California voters approved Proposition 140 by a margin of 52.17% to 47.83%.¹⁵⁸ However, five years after California voters passed Proposition 140 and four years following the California Supreme Court's decision

(affirming Justice Stevens' support for the proposition that states may not make additions to the Qualifications Clauses requirements for Representatives and Senators).

151. See *Thornton*, 514 U.S. at 783 (declaring that any changes in the qualifications expressed in the Constitution must be enacted through the amendment process).

152. See U.S. CONST. art. I, § 4, cl. 1 (providing that states may regulate the times, places and manner of holding elections).

153. See *Thornton*, 514 U.S. at 796 (concluding that the Supreme Court in *Powell* held that Congress may not alter the qualifications of its members as expressed in the Constitution).

154. See *id.* at 832-33 (stating that a broad construction of the Elections Clause allowing states to make or alter the qualifications of members of Congress is inconsistent with the Framers' intent).

155. See *Jones v. Bates*, 127 F.3d 839, 868 (9th Cir. 1997) (Sneed, J., dissenting) (declaring that *Thornton* does not provide support for the argument that Proposition 140's term limits on state legislators are unconstitutional, because *Thornton* addresses state imposed term limits on federal officeholders).

156. For the purpose of clarification, the remainder of this Comment will refer to the Northern District Court of California decision of *Bates v. Jones*, 958 F. Supp. 1446 (N.D. Cal. 1997), as *Bates I*. The Ninth Circuit Court of Appeals first review of *Jones v. Bates*, 127 F.3d 839 (9th Cir. 1997), will be referred to as *Bates II*. The Ninth Circuit's en banc review of *Bates v. Jones*, 131 F.3d 843 (9th Cir. 1997), will be called *Bates III*.

157. See BALLOT PAMPHLET, *supra* note 52, at 137 (providing the text of Proposition 140).

158. *Bates I*, 958 F. Supp. 1446, 1455 (N.D. Cal. 1997).

in *Eu*, which held that Proposition 140's lifetime ban on state legislators was valid,¹⁵⁹ the constitutional validity of Proposition 140 was challenged again.¹⁶⁰

In *Eu*, the California Supreme Court evaluated the challenge to Proposition 140 solely on the briefs and papers submitted by the parties, lacking a lower court's examination of the merits of the parties' legal or factual contentions.¹⁶¹

Proposition 140, in relevant part, proposed to amend the California constitutional provision governing legislators by adding language providing that Senators would be limited to two four-year terms in office, and Assemblymembers would be limited to three two-year terms in office.¹⁶² Additionally, the Proposition included a preamble providing that the purpose of the measure was to eliminate incumbent advantages and promote more competitive elections.¹⁶³

Between 1977 and 1996, Plaintiff Tom Bates represented the area comprising the current 14th Assembly District.¹⁶⁴ After nearly two decades of public service in the California Legislature, Bates was unable to seek reelection in 1996 because Proposition 140 limited the number of terms an Assemblymember could serve.¹⁶⁵

159. See *Legislature v. Eu*, 54 Cal. 3d 492, 525, 816 P.2d 1309, 1329, 286 Cal. Rptr. 283, 303 (1991) (upholding the constitutionality of Proposition 140).

160. CAL. ELEC. CODE §§ 9000-9125 (West 1995 & Supp. 1998) (setting forth the general procedures and framework involved in pursuing legislation through the initiative process).

161. See *Bates I*, 958 F. Supp. at 1455 (indicating that no trial was held). In contrast to *Eu*, the District Court in *Bates I* conducted a full trial from October 15 to October 24, 1996. The findings of fact and conclusions of law were made pursuant to Rule 52(a) of the Federal Rules of Civil Procedure. See FED. R. CIV. P. 52(a) (providing that in actions tried upon the facts without a jury the court shall find the facts and state separately its conclusions of law).

162. See CAL. CONST. art. IV, § 2(a) (setting forth the term limits for Senators and Assemblymembers).

163. See CAL. CONST. art. IV, § 1.5 (setting forth the preamble to the initiative).

The people find and declare that the Founding Fathers established a system of representative government based upon free, fair, and competitive elections. The increased concentration of political power in the hands of incumbent representatives has made our electoral system less free, less competitive, and less representative.

The ability of legislators to serve unlimited number of terms, to establish their own retirement system, and to pay for staff and support services at state expense contribute heavily to the extremely high number of incumbents who are reelected. These unfair incumbent advantages discourage qualified candidates from seeking public office and create a class of career politicians, instead of the citizen representatives envisioned by the Founding Fathers. These career politicians become representatives of the bureaucracy, rather than of the people whom they are elected to represent.

To restore a free and democratic system of fair elections, and to encourage qualified candidates to seek public office, the people find and declare that the powers of incumbency must be limited. Retirement benefits must be restricted, state-financed incumbent staff and support services limited, and limitations placed upon the number of terms which may be served.

Id.

164. See *Bates I*, 958 F. Supp. at 1456 (stating that due to reapportionment, the boundaries of the 14th Assembly District have changed, but have generally included the city of Berkeley and adjoining neighborhoods).

165. See CAL. CONST. art. IV, § 2(a) (providing that Assemblymembers were limited to three terms); *Bates I*, 958 F. Supp. at 1456 (acknowledging that Proposition 140 effectively barred Bates from seeking reelection to the State Assembly).

Several voters in the 14th Assembly District were also named as plaintiffs.¹⁶⁶ The voter plaintiffs expressed that their support for Assemblyman Bates was derived from the Assemblyman's exceptional representation, his unique qualifications, and his valuable legislative experience.¹⁶⁷ Former Assemblyman Bates and some of his supporters in the 14th Assembly District sought to enjoin enforcement of California's term limits so Bates could seek re-election to the Assembly in 1996.¹⁶⁸ Several other plaintiff legislators, and voters in their respective districts, were also parties to the suit.¹⁶⁹ Together the parties challenged the constitutionality of Proposition 140's lifetime term limits.¹⁷⁰

B. The District Court

The United States District Court in California, similar to the California Supreme Court in *Eu*, also applied the test set forth in *Anderson*,¹⁷¹ as modified by *Burdick*.¹⁷² Traditionally, the *Anderson-Burdick* test has been applied to "ballot access" cases, which generally involve challenges to laws that govern the procedures and eligibility requirements for political parties or candidates appearing on the ballot.¹⁷³ However, in an effort to distinguish *Bates*, the district court concluded that the term limits imposed by Proposition 140 did not merely limit access to the ballot, but

166. See *Bates I*, 958 F. Supp. at 1456 (naming Jonathan Browning, Lawrence Buchalter, Ardis Graham, Richard Lewis, Edward Lyman, Rachel Sherman, and Richard Sterling as voter plaintiffs from the 14th Assembly District).

167. See *id.* (observing that Bates was unusually concerned with and effective at representing the interests of the voter plaintiffs, including: the needs of low-income and disabled citizens and environmental protection).

168. See *id.* at 1452 (providing that if Bates was successful in enjoining enforcement of Proposition 140, he would seek an eleventh term in the Assembly).

169. See *id.* at 1456-57 (indicating that plaintiff legislators included: Assemblywoman Martha Escutia, Assemblywoman Barbara Friedman; plaintiff voters included: Sylvia Hernandez, Ana Rosa Pena, Claudia Navar, Susan Zarakov, Harriet Brown Sculley).

170. See *id.* at 1451 (stating in the introduction that the court must address the question of whether lifetime legislative term limits provisions of the California Constitution, as enacted by Proposition 140 in 1990, violate the First and Fourteenth Amendments of the United States Constitution).

171. 460 U.S. 780 (1983); see *supra* notes 66-71 and accompanying text (setting forth the constitutional analysis for ballot access cases).

172. 504 U.S. 428 (1992); see *Bates I*, 958 F. Supp. at 1457 (stating that the *Anderson-Burdick* test evolved as the Supreme Court addressed "ballot access cases," which considered the significance of assigning to the First and Fourteenth Amendments rights that are implicated when laws governing the procedures and eligibility requirements for political parties or candidates to appear on ballots are challenged).

173. See *Bates I*, 958 F. Supp. at 1457 (defining ballot access cases); see, e.g., *Burdick v. Takushi*, 504 U.S. 428, 430 (1992) (upholding a state's refusal to allow write-in votes); *Norman v. Reed*, 502 U.S. 279, 293 (1992) (striking down a requirement that small political parties gather a large number of signatures in every state district in which they run candidates); *Storer v. Brown*, 415 U.S. 724, 730 (1974) (holding that California has a compelling interest in protecting the integrity of its political process by requiring disaffiliation by an independent candidate). A state may deny ballot access to an independent candidate if the candidate has been affiliated with any political party within one year prior to the immediately preceding primary election. See *Munro v. Socialist Workers Party*, 479 U.S. 189, 190-91 (1986) (reversing the Ninth Circuit and upholding a requirement that third party candidates receive one percent of the primary vote in order to appear on the general election ballot).

rather defined a qualification for holding legislative office.¹⁷⁴ The district court acknowledged the similar questions presented in *Eu*—decided by the California Supreme Court and *Bates I*—and explained the effect the *Eu* decision had on the district court's decision in *Bates I*.¹⁷⁵ A constitutional interpretation of an issue by the California Supreme Court, such as Proposition 140's lifetime legislative term limits provisions, does not violate the United States Constitution, and is not binding on federal courts.¹⁷⁶ While a state supreme court decision construing the United States Constitution should be granted great respect, the federal courts are not obligated to follow such decisions.¹⁷⁷ However, the California Supreme Court's *construction* of the term limits provisions of Proposition 140 does bind federal courts.¹⁷⁸

The district court held that California's lifetime term limits, expressed in Proposition 140, violated the rights of voters under the First and Fourteenth Amendments.¹⁷⁹ In reaching its conclusion, the court held that: (1) term limits were not content-neutral, but rather a "content based restriction on the ability of voters to vote for candidates of their choice;"¹⁸⁰ (2) the sovereignty interests asserted by

174. See *Bates I*, 958 F. Supp. at 1455 n.7 (explaining that Proposition 140 effectively requires that candidates may not seek reelection to an office which they have held for two terms if they are a Senator and three terms if they are an Assemblymember. This prevents a class of individuals from running for office and denies voters the opportunity to vote for such candidates).

175. *Id.* at 1456.

176. See *id.* (drawing support from *Watson v. Estelle*, 886 F.2d 1093, 1095 (9th Cir. 1989), and holding that state supreme court decisions construing the Federal Constitution do not bind federal courts).

177. See *Watson*, 886 F.2d at 1095 (affirming that this proposition is a well established principle of constitutional adjudication in the federal courts); see, e.g., *Pigee v. Israel*, 670 F.2d 690, 694 (7th Cir. 1982) (indicating that a federal court is not bound by a state court's interpretation of a federal question); *Bryant v. Civiletti*, 663 F.2d 286, 292 n.15 (D.C. Cir. 1981) (providing that a federal court is not bound by the decision of a state supreme court that a statute violated the U.S. Constitution); *Hawkman v. Parratt*, 661 F.2d 1161, 1166 (8th Cir. 1981) (stating that if a state's standard differs from federal standards, federal courts will not be bound by state court decisions); *Industrial Consultants, Inc. v. H.S. Equities, Inc.*, 646 F.2d 746, 749 (2d Cir. 1981) (providing that federal courts will not give effect to a state statute that violates the U.S. Constitution); *Southwest Offset, Inc. v. Hudco Pub., Inc.*, 622 F.2d 149, 152 (5th Cir. 1980) (concluding that a federal court is not bound by a state court's holding based on the Due Process Clause of the U.S. Constitution); *Woods v. Holy Cross Hosp.*, 591 F.2d 1164, 1171 (5th Cir. 1979) (holding that federal courts are not bound by state court determinations of federal constitutional issues); *Bittaker v. Enomoto*, 587 F.2d 400, 402 n.1 (9th Cir. 1978) (acknowledging the persuasive authority of a state court's interpretation of the federal constitution).

178. See *Bates I*, 958 F. Supp. at 1456 (indicating that a state supreme court's construction of an initiative controls over a federal court); see also *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055, 1074-75 (1997) (advocating the certification of novel state law questions and reiterating that the state supreme courts provide the definitive construction of state law).

179. See *Bates I*, 958 F. Supp. at 1460 (stating that term limits burden plaintiffs' First Amendment right of freedom of expression by imposing a content-based restriction upon which candidates voters may choose from; and term limits burden plaintiffs' Fourteenth Amendment right to participate on an equal basis with other voters in the election of their representatives).

180. See *id.* at 1463 (declaring that term limits impose a content-based restriction on the eligibility of candidates for legislative office). But cf. *League of Women Voters v. Diamond*, 923 F. Supp. 266, 270 (D. Me. 1996) (holding that consecutive term limits are content-neutral).

the state were insufficient to constitute a compelling state interest;¹⁸¹ (3) lifetime term limits were not narrowly tailored to achieve the State's interest of incumbency reform;¹⁸² and (4) the State did not establish that its interest in preventing career politicians in the state legislature was important enough to justify the burden that term limits imposed on voting rights.¹⁸³ Moreover, the court opined that even if term limits were required to counter the unfair advantages of incumbency, the State failed to establish that a lifetime ban must be enacted.¹⁸⁴

In concluding that Proposition 140's lifetime term limits violated the United States Constitution, the district court enjoined defendants¹⁸⁵ from enforcing the lifetime term limits against plaintiffs¹⁸⁶ and ordered the defendants to accept the plaintiffs' declarations of intention to be a candidate and their nomination papers.¹⁸⁷ However, the court stayed the injunction pending the filing of an appeal¹⁸⁸ by the State within thirty days, and during the pendency of the appeal to the Ninth Circuit Court of Appeals.¹⁸⁹ Balancing its concerns for confusing the State's electoral process against denying plaintiffs the opportunity to seek reelection in 1998, the court ultimately determined that a stay was appropriate because the State's interests were compelling, and the plaintiffs would not be permanently denied the opportunity to seek reelection if the judgment of the court is affirmed on appeal.¹⁹⁰

181. See *Bates I*, 958 F. Supp. at 1466 (stating that voting rights cases interpret the Fourteenth Amendment to provide limited leeway to states in determining the structure of political representation). The Supreme Court has stressed the importance of providing all voters with the opportunity to participate equally in the political process. *Id.* at 1466. A decision by a State to enact term limits does not shield the state from constitutional review, nor entitle it to a deferential standard of review. *Id.* The court concluded that only two of the State's interests were compelling, "its sovereignty interest in defining its own political institutions and its interest in reducing the unfair electoral advantages incumbents enjoy." *Id.* at 1471.

182. See *id.* at 1468 (asserting that term limits would facilitate the elimination of incumbency advantages; however, the State failed to establish that alternative constitutional reforms which were less intrusive would not accomplish the same goal).

183. See *id.* at 1467 (stating that the State failed to demonstrate that solely preventing the pursuit of legislative careers obstructs competitive elections or electoral representation).

184. See *id.* at 1468 (concluding that the State did not establish that a permanent ban on incumbents seeking reelection was necessary to overcome the unfair advantages of incumbency Proposition 140 sought to eliminate, and implying that other narrowly tailored alternatives, such as consecutive term limits, could accomplish the same goal while mitigating the burden on incumbents' and voters' constitutional rights).

185. Defendant Jones, California's Secretary of State, and co-defendants Clark and McCormack, respective County Registrars for Alameda and Los Angeles County were enjoined. *Id.* at 1471.

186. See *Bates I*, 958 F. Supp. at 1471 (specifying only plaintiffs Bates, Escutia and Friedman).

187. See *id.* (acknowledging that all other eligibility requirements must be met).

188. See *id.* (invoking Federal Rule of Civil Procedure 62(c), which addresses the issue of injunction pending appeal). The court noted that due to the serious constitutional questions raised, the balance of hardships favored the State, the party subject to the injunction). *Id.*

189. *Id.* at 1472.

190. See *id.* (stating that the State presented compelling arguments concerning the constitutionality of term limits, which outweighed the plaintiffs' opportunity to seek reelection).

C. The Court of Appeals

1. Three Judge Panel

A three judge panel¹⁹¹ for the Ninth Circuit Court of Appeals affirmed the judgment of the district court, but based its conclusion on a different rationale.¹⁹² In its decision, the court of appeals did not decide whether a state may adopt lifetime term limits for its legislators without violating the Constitution.¹⁹³ Instead, the court struck down the initiative because voters were not afforded adequate notice of the permanency of the limitation which Proposition 140 imposed.¹⁹⁴ The court concluded that the initiative imposed a severe limitation on the peoples' fundamental rights, and the lifetime ban Proposition 140 imposed on state legislators was conveyed ambiguously to the voters.¹⁹⁵ Reasoning that neither the text of the initiative, the proponents' ballot arguments, nor the state's official description explaining the measure¹⁹⁶ mentioned that a lifetime ban would be imposed, the court held Proposition 140 invalid.¹⁹⁷ Also, in comparing Proposition 140 with initiatives from other states which have passed lifetime term limits,¹⁹⁸ the court was troubled by the conspicuous absence of text explicitly mentioning a lifetime ban, which easily could have been incorporated in the initiative.¹⁹⁹

191. *Bates II*, 127 F.3d 839 (9th Cir. 1997). Circuit Judges Sneed, Fletcher and Reinhardt comprised the panel with Judge Reinhardt writing the opinion, joined by Judge Fletcher, and a dissent filed by Judge Sneed.

192. *See id.* at 844 (invalidating the initiative because the measure failed to mention the severe limitation—a lifetime ban—imposed in either the initiative proponents' arguments, or the State's official description of the measure which constituted inadequate notice).

193. *See id.* (recognizing that a state has a compelling interest in determining the qualifications of its officials, which may constitutionally justify having lifetime term limits, however the court ultimately did not decide this question).

194. *See id.* (indicating the absence of the express mention of the lifetime term limits imposed by Proposition 140 in surrounding ballot materials).

195. *See id.* (acknowledging the measure was ambiguous on its face). *But see* *Legislature v. Eu*, 54 Cal. 3d 492, 504, 816 P.2d 1309, 1315, 286 Cal. Rptr. 283, 289 (1991) (upholding Proposition 140, by concluding that the average voter likely understood that Proposition 140 imposes a lifetime ban).

196. *See Bates II*, 127 F.3d at 844 (basing its holding on a lack of notice of the severe limitation Proposition 140 imposed on voters by imposing a lifetime ban). *But see supra* note 51 and accompanying text (stating that the Legislative Analyst's summary statement of a measure is not intended to provide comprehensive information on the measure).

197. *See Bates II*, 127 F.3d at 844 (asserting that voters were not afforded adequate notice of the severe limitation which the initiative would impose).

198. *See supra* note 19 and accompanying text (listing states other than California which have enacted lifetime bans); *see, e.g.*, OR. CONST. art. II, § 19, cl. 1 (providing that Oregon's constitutional provision imposed the following lifetime ban: "No person shall serve more than six years in the Oregon House of Representatives, eight years in the Oregon Senate, and twelve years in the Oregon Legislative Assembly in his or her lifetime.") (emphasis added).

199. *See Bates II*, 127 F.3d at 844 (emphasizing that no mention of a lifetime limit could be found in the text of the initiative, the legislative analysts's analysis, or the proponents' ballot argument). However, the opponents' ballot argument repeatedly referenced a lifetime ban. *BALLOT PAMPHLET*, *supra* note 52, at 71.

2. *En Banc* Review

Shortly following the three judge panel's decision, a majority of the justices in the Ninth Circuit Court of Appeals subsequently agreed to hear the case.²⁰⁰ On appeal, the State argued that the plaintiffs' right to pursue this action in federal court was barred by the res judicata effect of the California Supreme Court's decision in *Eu*.²⁰¹ However, the eleven judge panel,²⁰² in an opinion written by Circuit Judge Thompson, concluded that California's "public interest exception"²⁰³ justified reexamination of the previously litigated constitutional issue in *Eu*, which subsequently was raised in *Bates III*.²⁰⁴

The en banc court disagreed with the three judge panel decision that invalidated Proposition 140 based on insufficient notice to California voters that a lifetime ban would be imposed.²⁰⁵ Instead, the en banc court adopted a view consistent with the California Supreme Court in *Eu*, holding that Proposition 140's lifetime ban should be upheld.²⁰⁶

The court analogized the language of Proposition 140 affecting legislators²⁰⁷ to the language of the Twenty-Second Amendment to the Constitution affecting the office of the President.²⁰⁸ While neither Proposition 140 nor the Twenty-Second Amendment to the Constitution contain express language of a lifetime ban on the respective offices, the en banc court emphatically noted that despite the absence of the term "lifetime" in the Twenty-Second Amendment, there is no confusion that

200. See *Bates III*, 131 F.3d 843, 844 (9th Cir. 1997) (indicating that a majority of the active judges of the full court voted to rehear the case en banc).

201. See *id.* at 845-46 (rejecting the State's argument that res judicata served as a bar).

202. The panel was comprised of Chief Judge Hug and Circuit Judges: Browning, Schroeder, Fletcher, Pregerson, Thompson, O'Scannlain, Trott, Rymer, Kleinfeld and Hawkins.

203. See *Bates III*, 131 F.3d at 845-46 (stating that California provides a "public interest exception" to the doctrine of res judicata which allows a court to reexamine the merits of a previously litigated issue of public importance); see also *Kopp v. Fair Political Practices Comm'n*, 11 Cal. 4th 607, 622, 905 P.2d 1248, 1256, 47 Cal. Rptr. 2d 108, 116 (1995) (holding that an exception to the doctrine of res judicata applies when the issue previously litigated involves an issue of public importance and there are unusual circumstances favoring reexamination of the issue).

204. See *Bates III*, 131 F.3d at 845-46 (justifying the exercise of the public interest exception in *Bates III* after *Eu* previously addressed the same issues by noting that the California Supreme Court decided *Eu* without the benefit of a lower court record, there was a paucity of case law addressing the issue of term limits at the time *Eu* was decided, and subsequently two significant U.S. Supreme Court decisions had been decided).

205. See *id.* at 846 (stating that sufficient notice was provided to California voters that Proposition 140 required a lifetime ban).

206. See *id.* (agreeing with the California Supreme Court that the relevant ballot materials and the surrounding context of the measure made it clear that Proposition 140 required a lifetime ban).

207. See *id.* (providing that Proposition 140 does not express that the term limits applicable to legislators are less than absolute); see also U.S. CONST. amend. XXII, § 1 (providing that a person may not be elected President more than twice, but failing to contain express language of a lifetime ban).

208. See U.S. CONST. amend. XXII, § 1 (stating that "No person shall be elected to the office of the President more than twice. . .").

the language imposes a lifetime ban on the office of the President after two terms of service.²⁰⁹

The en banc court relied on "the relevant ballot material and the surrounding context,"²¹⁰ including media attention, to support its conclusion that sufficient notice was provided to the voters.²¹¹ This information on Proposition 140 was not only circulated to California voters in the official ballot pamphlet,²¹² but extensive media coverage also emphasized the result of a lifetime ban if Proposition 140 was approved, including a competing measure on the ballot that provided for consecutive term limits.²¹³

In assessing the constitutionality of Proposition 140's lifetime term limits, the en banc court, similar to the district court in *Diamond*,²¹⁴ set forth the analysis of *Burdick*, wherein the court must weigh the asserted injury to plaintiffs' First and Fourteenth Amendment rights against the interests presented by the State as justification for burdening the plaintiffs' rights.²¹⁵

The plaintiffs' asserted rights were framed by the *Bates III* court as: (1) voters have a right to vote for the candidate of their choice; and (2) an incumbent has a right to continue to run for his or her office.²¹⁶ The court emphasized that the

209. See *Bates III*, 131 F.3d at 846 (asserting that it is well-settled that an individual may not serve more than two terms as President pursuant to the Twenty-Second Amendment of the Constitution).

210. *Id.*

211. See *id.* (claiming that sufficient notice that Proposition 140 required a lifetime ban was provided to the voters).

212. See *Bates III*, 131 F.3d at 846 (holding that the relevant ballot materials and the surrounding context clearly conveyed that Proposition 140 required a lifetime ban); *Bates II*, 127 F.3d 839, 864 (9th Cir. 1997) (Sneed, J., dissenting) (drawing support from the unambiguous phrases used in the arguments against Proposition 140 which include "banned for life"); *Legislature v. Eu*, 54 Cal. 3d 492, 505, 816 P.2d 1309, 1315, 286 Cal. Rptr. 283, 289 (1991) (providing that the opponent's ballot language contained in Proposition 140 vigorously reiterated and emphasized the requirement of a lifetime ban); *BALLOT PAMPHLET*, *supra* note 52, at 71 (noting that phrases such as "banned for life" and "lifetime ban" appear in the arguments against Proposition 140 eleven times).

213. See *Bates II*, 127 F.3d at 865 (Sneed, J., dissenting) (asserting that the awareness of the lifetime ban embodied in Proposition 140 was heightened due to a competing initiative on the ballot, Proposition 131, which provided for consecutive term limits, as opposed to the lifetime limits in Proposition 140); Steven A. Capps, *Lawmakers Lying Low in Capitol Quietly Fighting Props. 131, 140*, S.F. EXAMINER, Sept. 16, 1990, at B1 (explaining that when legislators compared Proposition 140 and Proposition 131, most legislators looked less favorably on Proposition 140 because it imposed lifetime term limits); see also Paul Jacobs, *Term Limits Would Oust Lawmakers and a System*, L.A. TIMES, Oct. 13, 1990, at A1 (distinguishing Proposition 140, which "would limit lifetime service" in the Legislature, from Proposition 131, which would "force members of each house to move on after 12 consecutive years," but would allow them to seek office again after "sitting out a term"); Charles Price & Ed Bacciocco, *Term Limits: Is This a Far, Far Better Thing Than We Have Ever Done Before?*, CAL. J., Oct. 1990, at 498 (commenting that Proposition 140 is more restrictive than Proposition 131, which allows officials to run again for their respective offices after sitting out a term).

214. See *supra* notes 104-12 and accompanying text (setting forth the method for determining the standard to apply to state election restrictions).

215. See *Bates III*, 131 F.3d at 846 (providing that the court would apply strict scrutiny review if Proposition 140 severely burdened plaintiffs' rights; but if Proposition 140 imposes only reasonable, non-discriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions).

216. See *id.* at 847 (stating the rights the plaintiffs sought to vindicate).

lifetime ban imposed by Proposition 140 cannot be characterized as content-based or discriminatory on the basis of political party or under the constitutionally protected classes of race, religion or gender.²¹⁷ Accordingly, Proposition 140's term limits on state officeholders were classified as a neutral candidacy requirement,²¹⁸ which a State may impose through its regulatory power.²¹⁹

The burden imposed on plaintiffs' rights by Proposition 140's lifetime ban were slight and overcome by the legitimate interests presented by the State.²²⁰ Proposition 140's term limits undeniably impact the absolute ability and choices of the electors to select their representatives, however, this is true for any qualification for office.²²¹ Moreover, "California voters apparently perceived lifetime term limits for elected state officials as a means to promote democracy by opening up the political process and restoring competitive elections. This was their choice to make."²²² Finally, the court of appeals, sitting en banc, concluded that Proposition 140's lifetime term limits did not violate the plaintiffs' First and Fourteenth Amendment rights.²²³ The en banc panel reversed the district court and vacated the district court's injunction enjoining enforcement of the Proposition.²²⁴

IV. LEGAL AND SOCIAL RAMIFICATIONS

A. *Legal Impact*

1. *Jurisdiction*

Despite the en banc court's conclusion that the "public interest exception"²²⁵ provides an exception to res judicata, there is a compelling argument that a state's adoption of term limits on state legislators fails to raise a federal question.²²⁶ The

217. *See id.* (determining Proposition 140 does not impose a discriminatory restriction).

218. *See id.* (providing examples of other neutral candidacy qualifications, such as age and residency, while reiterating that lifetime term limits do not constitute a discriminatory restriction).

219. *See id.* (clarifying that once an incumbent has served in a single office for a number of years, he or she is not barred from seeking other state offices); *see also* *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (noting that states may create barriers limiting the field of candidates from which voters may choose).

220. *See Bates III*, 131 F.3d at 847 (asserting that the slight burden Proposition 140 imposes on plaintiffs' rights is overcome by legitimate state interests).

221. *See id.* (conceding that imposing qualifications or limitations on running for office impacts a voter's right to vote for whom they wish).

222. *Id.*

223. *See id.* (characterizing term limits on state officeholders as a neutral candidacy requirement).

224. *See id.* (discussing the vacation of the district court's stay pending appeal).

225. *See supra* notes 203-04 and accompanying text (outlining the "public interest exception" to res judicata).

226. *See Bates III*, 131 F.3d at 847-48 (O'Scannlain, J., concurring) (indicating that an appeal from a state supreme court concerning state term limits was dismissed by the U.S. Supreme Court due to the absence of a federal question); *see also* 28 U.S.C.A. §§ 1331, 1332 (West 1993 & Supp. 1998) (providing that a federal question is raised in any civil action arising under the Constitution, laws, or treaties of the United States and that district courts generally have original jurisdiction in civil actions involving citizens of different states and where the matter in

district court, the court of appeals' three judge panel, and the majority opinion in the en banc hearing largely ignored the precedential authority of *Moore v. McCartney*.²²⁷ In contrast, Judge O'Scannlain's concurrence in the en banc hearing relied heavily on the precedential authority of *Moore*.²²⁸ Judge O'Scannlain boldly highlights and challenges whether a federal court had jurisdiction to hear the *Bates* case at all.²²⁹

In *Moore*, which was decided in 1976, the Supreme Court was presented with the opportunity to rule on term limits for state officials in an appeal from the West Virginia Supreme Court, *State ex rel. Maloney v. McCartney*,²³⁰ which upheld term limits on state executive officials.²³¹ The Supreme Court responded by summarily dismissing the case for want of a federal question.²³² Similar to the reasoning in *Moore*, Judge O'Scannlain's concurrence in *Bates III* explained that "[s]ummary dismissals for want of a substantial federal question are decisions on the merits that bind the lower courts until subsequent decisions of the Supreme Court suggest otherwise."²³³

In 1995, two decades after *Moore*, a divided Supreme Court decided *Thornton*, which held that States may not impose additional qualifications for the offices of Representative or Senator.²³⁴ Judge O'Scannlain, sitting en banc in *Bates III*, incorporated Justice Thomas' dissenting opinion in *Thornton*,²³⁵ which cites *Moore*, and explained that the Supreme Court dismissed the appeal from *Maloney v. McCartney*,²³⁶ "on the ground that limits on the terms of state officeholders do not

controversy exceeds the sum or value of \$75,000).

227. 425 U.S. 946 (1976). See generally *Bates III*, 131 F.3d 843 (providing no reference to or mention of *Moore* in the majority opinion).

228. See *Bates III*, 131 F.3d at 847-48 (O'Scannlain, J., concurring) (arguing that the decision in *Moore* that a state's action to limit the terms of its own elected officials failed to raise a federal question was a decision on the merits, and consequently binding lower courts).

229. See *Bates III*, 131 F.3d at 847 (O'Scannlain, J., concurring) (suggesting the utter absence of a federal question precluded jurisdiction to hear the case).

230. 223 S.E.2d 607 (W. Va. 1976).

231. See *Moore v. McCartney*, 425 U.S. 946 (1976) (dismissing an appeal from *State ex rel. Maloney v. McCartney*, 223 S.E.2d 607 (W. Va. 1976)) (involving a state imposed term limit of two consecutive terms for the state governor, and concluding that limits on state officeholders do not even raise a substantial federal question under the Fourteenth Amendment).

232. See *Bates III*, 131 F.3d at 848 (O'Scannlain, J., concurring) (acknowledging the Supreme Court dismissal of an appeal from the West Virginia Supreme Court which upheld term limits for state executive officials).

233. *Id.* (quoting *Wright v. Lane County Dist. Ct.*, 647 F.2d 940, 941 (9th Cir. 1981)).

234. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 837 (1995) (concluding that neither the states nor Congress may impose additional qualifications on Representatives or Senators).

235. See *Bates III*, 131 F.3d at 848 (O'Scannlain, J., concurring) (emphasizing that *Thornton* addressed the issue of whether states could limit the terms of members of Congress, not state elected officials); see also *Thornton*, 514 U.S. at 845 ("Nothing in the Constitution deprives the people of each State of the power to prescribe eligibility requirements for the candidates who seek to represent them in Congress. The Constitution is simply silent on this question.").

236. 223 S.E.2d 607 (W. Va. 1976).

even raise a substantial federal question under the First and Fourteenth Amendments.”²³⁷ The precedential value of *Moore* can be distinguished in its application to *Thornton*, due to the arguably material distinction that *Thornton* sought to limit the terms of *federal* officials, while *Moore* focused on limiting the terms of *state* executives.²³⁸ However, *Moore* appears to be almost directly on point in deciding *Bates*.²³⁹ Indeed, *Bates* presents “the same question the Supreme Court dismissed in *Moore* for want of a substantial federal question: the constitutionality of term limits on *state* officeholders.”²⁴⁰

Thus, in order to dismiss the precedential value of *Moore*, a court must find a constitutionally significant difference between executive and legislative term limits, or between lifetime and consecutive term limits.²⁴¹ Case law provides compelling support for the proposition that term limits on state officeholders are constitutional.²⁴² Indeed, over twenty states have adopted constitutional restrictions limiting the ability of incumbents to succeed themselves.²⁴³ In *Maloney-Moore* involved a limitation on consecutive terms of a Governor was considered, rather than the lifetime ban on state legislators presented in *Bates*. The *Eu* court, which upheld the lifetime ban on state legislators as constitutional, asserted that “many if not all of the considerations mentioned in *Maloney*”²⁴⁴ . . . would apply with equal force to the legislative branch.”²⁴⁵

The Ninth Circuit in *Bates* summarily dismissed the precedential value of *Moore* in a footnote citing intervening doctrinal developments which “strongly

237. *Bates III*, 131 F.3d at 848 (O’Scannlain, J., concurring).

238. *See id.* (inferring that *Moore v. McCartney*, 425 U.S. 946 (1976), may not have been compelling as precedent in *Thornton*).

239. *See id.* (mentioning that *Moore’s* relevance is compelling when applied to state term limits).

240. *Id.* (emphasis added); *see id.* (implying that *Moore’s* application to *Bates*, which involves term limits on state officials, is more compelling than its application to *Thornton*, which involved term limits on federal officials).

241. *See id.* (asserting that *Bates* must be distinguished from *Moore* in order to ignore *Moore’s* precedential value).

242. *See id.* at 849 n.1 (providing numerous examples of state term limit measures which have been upheld); *see, e.g.*, *Dutmer v. City of San Antonio*, 937 F. Supp. 587, 595 (W.D. Tex. 1996) (upholding lifetime term limits for city officials); *League of Women Voters v. Diamond*, 923 F. Supp. 266, 272 (D. Me. 1996) (sustaining consecutive legislative term limits), *aff’d*, 82 F.3d 546 (1st Cir. 1996); *Miyazawa v. City of Cincinnati*, 825 F. Supp. 816, 822 (S.D. Ohio 1993) (approving consecutive legislative term limits), *aff’d*, 45 F.3d 126 (6th Cir. 1995); *U.S. Term Limits, Inc. v. Hill*, 872 S.W.2d 349, 359-60 (Ark. 1994) (sustaining lifetime legislative term limits), *aff’d on other grounds*, 514 U.S. 779 (1995); *Legislature v. Eu*, 54 Cal.3d 492, 524, 816 P.2d 1309, 1328, 286 Cal. Rptr. 283, 302 (1991) (allowing lifetime legislative term limits); *Cawdrey v. Redondo Beach*, 15 Cal. App. 4th 1212, 1231, 19 Cal. Rptr. 2d 179, 189 (1993) (approving lifetime legislative term limits); *Maddox v. Fortson*, 172 S.E.2d 595, 596-97 (Ga. 1970) (upholding consecutive executive term limits); *Nevada Judges Assn. v. Lau*, 910 P.2d 898, 902-03 (Nev. 1996) (upholding lifetime judicial term limits).

243. *See Legislature v. Eu*, 54 Cal. 3d 492, 520, 816 P.2d 1309, 1326, 286 Cal. Rptr. 283, 300 (1991) (providing that such limitations serve a rational public policy of enhancing the political process).

244. *See id.* at 521, 816 P.2d at 1326, 286 Cal. Rptr. at 300 (listing (1) eliminating unfair incumbent advantages, (2) dislodging entrenched political machines, (3) restoring open access to the political process, and (4) stimulating electorate participation as state interests advanced by voters in *Maloney*).

245. *Id.*

suggest that continued reliance on *Moore* is unwarranted.”²⁴⁶ While several noteworthy ballot access cases, including *Thornton*²⁴⁷ and *Burdick*,²⁴⁸ have been decided by the Supreme Court between *Moore* and *Bates*, such cases fail to detract from *Moore*’s precedential value.²⁴⁹ While the cases subsequent to *Moore* have involved peripheral ballot access issues to the court, *Moore* directly addresses the issue before the court in *Bates*, the constitutionality of state-imposed term limits on state officeholders.²⁵⁰

Recent courts which have looked to *Thornton* for guidance on the issue of state imposed term limits on non-federal officials, have found the guidance to be illusory. The Supreme Court’s holding in *Thornton* was narrowly based on the Qualifications Clauses of the Constitution, rather than First and Fourteenth Amendment grounds traditionally presented in state term limits challenges, including *Bates*.²⁵¹ Additionally, the Supreme Court has only found the presence of a federal question involving First and Fourteenth Amendment challenges in two lines of ballot access cases,²⁵² wealth-based restrictions,²⁵³ and restrictions which impose burdens on new or small political parties, or independent candidates.²⁵⁴ A failure to provide ballot access in the aforementioned cases might effectively result in the exclusion of unique ideas and viewpoints from the political process.²⁵⁵ In contrast, the imposition of state term limits raises no similar concerns because they equally affect every politician regardless of party affiliation or ideology.²⁵⁶

246. See *Bates II*, 127 F.3d 839, 851 n.13 (9th Cir. 1997) (asserting that determining the constitutionality of Proposition 140 is not controlled by *Moore*).

247. See Part II.B (providing a discussion of *Thornton*).

248. See *Burdick v. Takushi*, 504 U.S. 428, 441 (1992) (holding that sufficient ballot access is maintained despite the prohibition on write-in voting).

249. See *Bates III*, 131 F.3d at 850 (stating that intervening decisions by the Supreme Court have not weakened the precedential value of *Moore v. McCartney*, 425 U.S. 946 (1976), which squarely addresses the issue of state imposed term limits on state legislators).

250. See *id.* (expressing concern that the court failed to adequately consider the precedential authority of *Moore* in deciding *Bates*).

251. See *id.* at 850 (indicating that *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), may be entirely inapposite); see also *Bates II*, 127 F.3d at 868 (explaining that *Thornton* does not stand for the proposition that term limits categorically violate the Constitution, and therefore is not controlling).

252. See *supra* note 173 and accompanying text (providing a definition and discussion of ballot access cases).

253. See, e.g., *Bullock v. Carter*, 405 U.S. 134, 149 (1972) (invalidating a candidate filing fee provision which disproportionately burdened those of lower economic status).

254. See *Bates III*, 131 F.3d at 850 (remarking that the term limits on state officials do not neatly fit into either of these categories); see, e.g., *Burdick v. Takushi*, 504 U.S. 428, 441-42 (1992) (approving Hawaii’s ban against write-in candidates); *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983) (striking down state-imposed filing requirements on presidential candidates).

255. See, e.g., *Clements v. Fashing*, 457 U.S. 957, 965 (1982) (holding that burdensome requirements on small and independent parties may infringe on their First Amendment interest of ensuring freedom of association); *Bates III*, 131 F.3d at 850 (explaining that a federal question is raised in cases imposing restrictions on wealth or burdens on new or small political parties or candidates due to the significant potential to infringe upon First and Fourteenth Amendment rights).

256. See *Bates III*, 131 F.3d at 850 (stating that term limits on state legislators do not have a disparate impact of any identifiable group).

Thus, if *Moore* is followed and continues to stand for the proposition that term limits on state legislative and executive offices do not present a federal question, absent a subsequent contrary decision by the U.S. Supreme Court,²⁵⁷ the California Supreme Court's decision in *Eu* should provide the final word on the interpretation and validity of Proposition 140's lifetime term limits on state legislators. Conveniently, the court in *Eu* reached the same decision that the court of appeals reached in *Bates III*: lifetime term limits on state legislators are constitutional.²⁵⁸

2. *Due Process and Notice*

The question of whether California voters received notice of the lifetime ban in Proposition 140 received considerable attention in *Bates* and in *Eu*.²⁵⁹ In *Eu*, the court conceded that Proposition 140's language is ambiguous,²⁶⁰ but ultimately held that a lifetime ban was intended.²⁶¹ The district court in *Bates I*, apparently relying on the California Supreme Court's construction of Proposition 140 in *Eu*, did not substantively address the issue of notice.²⁶² In contrast, the court of appeals' three judge panel invalidated the district court's opinion in *Bates I* based on the failure of the initiative's language to provide the voters with adequate notice of the severity of the limitation involved.²⁶³ Finally, the court of appeals held there was sufficient notice that Proposition 140 required a lifetime ban.²⁶⁴ However, the en banc court softened its holding by stating that, "[a]ssuming, *without deciding*, that a federal court may determine whether a state has given adequate notice to its voters in connection with a statewide initiative ballot measure dealing with term limits on state officeholders, we hold that California's notice with regard to Proposition 140 was sufficient."²⁶⁵ Judge O'Scannlain, concurring in *Bates III*, found that

257. The Supreme Court denied certiorari in *Californians for a Citizen Government v. Legislature of the State of California*, 503 U.S. 919 (1992) (mem.).

258. See *Bates III*, 131 F.3d at 847 (holding that Proposition 140's lifetime term limits do not violate voters' or candidates' First and Fourteenth Amendment rights); see also *Legislature v. Eu*, 54 Cal. 3d 492, 525, 816 P.2d 1309, 1329, 286 Cal. Rptr. 283, 303 (1991) (holding that the interests served by Proposition 140's lifetime term limits outweigh the right of voters to vote for incumbent officeholders and the right of incumbents to seek reelection).

259. See *Bates III*, 131 F.3d at 846 (citing that California voters received notice of the lifetime ban imposed by Proposition 140 through ballot arguments and extensive media coverage); *Eu*, 54 Cal. 3d at 505, 816 P.2d at 1315, 286 Cal. Rptr. at 289 (stressing that ballot arguments forcefully and repeatedly emphasized the measure's lifetime ban, and the average voter understood that Proposition 140 imposed a lifetime ban); see also *supra* notes 210-13 and accompanying text (providing examples of media coverage surrounding Proposition 140).

260. See *Eu*, 54 Cal. 3d at 504, 816 P.2d at 1315, 286 Cal. Rptr. at 289 (indicating that the measure's intent to impose a lifetime ban was not clearly expressed).

261. See *id.* (asserting that the framers of and the voters for Proposition 140 contemplated a lifetime ban).

262. See *Bates I*, 958 F. Supp. at 1446 (recognizing the California Supreme Court's construction of the term limits provisions of Proposition 140's application).

263. See *Bates II*, 127 F.3d at 844 (stating the measure was ambiguous on its face and failed to mention the severity of the limitation it sought to impose in the measure's text).

264. See *Bates III*, 131 F.3d at 846 (acknowledging that voters received adequate notice of the lifetime ban).

265. *Id.* (emphasis added).

Proposition 140 provided sufficient notice of lifetime term limits.²⁶⁶ However, Judge O'Scannlain cautioned that a court should not presume that notice is required or even within the province of a federal court to determine.²⁶⁷ Judge O'Scannlain suggested that a notice requirement has no basis in case law or the Constitution, but is instead drawn from "antipathy for and distrust of the initiative process."²⁶⁸ While legislation by initiative may be perceived to carry a greater sense of political force because it is the direct will of the people, the Supreme Court reviews both popular and representative legislation by the same standard.²⁶⁹ It is of no constitutional significance that legislation was enacted by initiative.²⁷⁰

While the Supreme Court has invalidated voter initiatives,²⁷¹ such action should not be misconstrued to indicate that legislation pursued through the initiative process is subject to a higher scrutiny than traditional legislation.²⁷² Indeed, *Bates III* reaffirms the proposition that *any* legislation which impacts an individual's constitutional rights will be carefully reviewed, *however enacted*.²⁷³

Judge O'Scannlain cautioned that to impose a due process "notice" requirement on legislation by initiative would require the federal courts to look behind initiatives to determine that voters were capable of understanding the potential consequences

266. See *id.* at 853 (O'Scannlain, J., concurring) (agreeing with the majority that Proposition 140 provided adequate notice to the voters that a lifetime ban would be imposed).

267. See *id.* (stating that the notion that voters must be provided with notice when a measure would infringe upon their fundamental rights has little legal support); see also *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 822 n.32 (1995) (providing that the method by which Proposition 73 was adopted, by a vote of the people rather than through the state legislative process, is moot because the petitioners failed to assert that the constitutional analysis was contingent upon or affected by the method in which laws were adopted).

268. *Bates III*, 131 F.3d at 854 (O'Scannlain, J., concurring); see *Kelso*, *supra* note 43, at 374 (asserting that initiatives are often poorly-drafted and thought out).

269. *Bates III*, 131 F.3d at 846; see *Fair Political Practices Comm'n v. Superior Court (Institute of Governmental Advocates)*, 25 Cal. 3d 33, 42, 599 P.2d 46, 51, 157 Cal. Rptr. 855, 860 (1979) (providing that it is unreasonable to presume initiative measures receive less scrutiny than proposed legislation in light of the media coverage, ballot information, and public debate which the measures receive). But see *Kelso*, *supra* note 43, at 374 (arguing that in practice courts strictly construe voter initiatives); see also *Higgins*, *supra* note 43, at 35 (arguing that referenda, particularly those implicating minority rights, receive tougher scrutiny than laws passed through the legislature since less compromise is involved in the drafting of initiatives).

270. See *Bates III*, 131 F.3d at 854 n.6 (providing that the Supreme Court has invalidated several voter initiatives because they were often facially neutral measures which involved discriminatory intent, not because the court raised the level of scrutiny for popular legislation). But see *Kelso*, *supra* note 43, at 367 (stating that voter initiatives should not be afforded the presumption of constitutionality, but rather should be subject to a careful review).

271. See *Bates III*, 131 F.3d at 854 n.6 (O'Scannlain, J., concurring) (providing examples of voter initiatives which the Supreme Court has invalidated); see, e.g., *Romer v. Evans*, 517 U.S. 620, 632 (1996) (striking down an amendment to the Colorado Constitution which prohibited all legislative, executive, or judicial action designed to protect homosexual persons from discrimination, and indicating that the motivation for the amendment was "animus" toward a specific class of persons); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 487 (1982) (holding that while the initiative was facially neutral, it was motivated by racial purposes).

272. See *Bates III*, 131 F.3d at 854 (O'Scannlain, J., concurring) (emphasizing that both representative and popular legislation are subject to the same standard of review).

273. See *id.* at 854 n.6 (O'Scannlain, J., concurring) (asserting that when important constitutional rights are implicated, representative and popular legislation are both subject to careful review).

of their actions and that they acted accordingly.²⁷⁴ In addition to the seemingly unworkable task of a court discerning whether voters understood what they were voting for, there is no due process right to notice in the enactment of legislation.²⁷⁵ When legislation is pursued by initiative, the electorate is presented with the actual text of the measure,²⁷⁶ an impartial state analysis,²⁷⁷ arguments for and against the measure,²⁷⁸ and often receives the benefit of extensive public discourse through the media and the political process.²⁷⁹ In contrast, representative legislation is largely advanced outside the stream of public conscience, in committee rooms and white-domed buildings, without consultation with the general electorate.²⁸⁰ Thus, recognizing that the Supreme Court reviews both popular and representative legislation by the same standard, it would be incongruous to impose a due process right to notice in the initiative process when a similar right to notice is not required for representative legislation.²⁸¹ In light of the respective legislative processes and practical access to relevant information, it would be difficult to assert that initiative legislation should be held to a higher standard than representative legislation in providing notice. Indeed, support for the opposite proposition would appear more plausible since the initiative process provides the electorate with the essence of direct democracy and a reflection of the people's will.²⁸² However, history and Supreme Court precedent weigh against this interpretation.²⁸³ Courts have been

274. See *id.* at 854 (O'Scannlain, J., concurring) (acknowledging that such a task would be beyond the scope of the judiciary); see also Kelso, *supra* note 43, at 342-43 (asserting that it is doubtful that a substantial number of voters read, and even fewer understand, all the materials presented in the ballot pamphlet).

275. See *Bates III*, 131 F.3d at 855 (O'Scannlain, J., concurring) (rejecting the temptation to establish a due process right to notice in the initiative process).

276. See CAL. ELEC. CODE § 9084(a) (West 1995) (requiring that the ballot pamphlet include a copy of the text of each state measure).

277. See *id.* § 9085(b) (providing that summary statements shall be prepared by the Legislative Analyst).

278. See *id.* § 9084(c) (stating that the ballot pamphlet distributed to voters must include a copy of the arguments and rebuttals for and against each state measure).

279. See Kelso, *supra* note 43, at 341 (indicating that voters derive most of their information relating to initiatives from the mass media newspapers, television and radio).

280. See *id.* at 353 (stating that deliberative procedural steps are required in proposing legislative initiatives which are similar to proposed statutes); *id.* at 344 (acknowledging that the process is generally controlled by our elected representatives and by implication not by the general public).

281. See *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) (providing that there is no due process right to notice before the government acts in a legislative capacity).

282. See Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 148 (1995) (advocating that popular legislation reflects the voter's perspective and thus inherently protects the electorate's prerogatives); see also *Are Term Limits Constitutional? The Voters Have Spoken, Now the Courts Must Decide*, CAL. LAW., Feb. 1993, at 37 [hereinafter *Are Term Limits Constitutional?*] (arguing that approaching term limits through the initiative process challenges a state's commitment to direct democracy).

283. See *Bates III*, 131 F.3d at 854 (O'Scannlain, J., concurring) (indicating that the Supreme Court extends a presumption that legislators recognize and anticipate the impact of their laws, and that the Supreme Court is reluctant to invalidate legislation on the ground that a legislative body was ignorant of the consequences of its action).

reluctant to invalidate legislation on the basis that a legislative body or the voters were unaware of the effect of their actions.²⁸⁴

The conclusion in *Bates III* dangerously holds that information included in the ballot and the surrounding context provided voters with sufficient notice that Proposition 140 required lifetime bans.²⁸⁵ This was an unnecessary step for the court to take. Instead, the court could have exclusively relied on the finding that Proposition 140's impact on plaintiffs' rights was a neutral candidacy requirement which was neither severe, nor beyond the authority of the State to impose.²⁸⁶

B. Social Ramifications

The initiative process in California is closely guarded by the electorate as a vehicle for direct democracy.²⁸⁷ Arguably, the imposition of term limits through the initiative process challenges the prospect of governance by direct democracy.²⁸⁸ Some commentators argue that voter initiatives are often "an attempt to 'circumvent the legitimate legislative process.'"²⁸⁹ Yet, the initiative process *is* recognized as a legitimate legislative process.²⁹⁰

Initiatives often focus on controversial issues which the legislature has failed to address or that private interest groups seek to advance.²⁹¹ The issue of term limits

284. See *id.* (articulating the judicial presumption that legislators are aware of the consequences of the laws which they enact); see, e.g., *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (holding that the statutory language was clear and courts must presume that Congress intended what it enacted); see also *Taxpayers to Limit Campaign Spending v. Fair Political Practices Comm'n*, 51 Cal. 3d 744, 768, 799 P.2d 1220, 1235, 274 Cal. Rptr. 787, 802 (1990) (indicating that the court must presume that the voters thoroughly study and understand the content of initiative measures presented to them to facilitate the right of the electorate to enact legislation through the initiative process).

285. See *Bates III*, 131 F.3d at 846 (affirming the holding of the California Supreme Court that voters were afforded notice of Proposition 140's lifetime ban). Empirical research indicates that electors do not significantly rely upon the ballot arguments contained in ballot pamphlets. See Kelso, *supra* note 43, at 342 (indicating that limited empirical research supports the conclusion that voters place minimal reliance upon ballot arguments in the ballot pamphlet). There is also little regulation concerning the content of the ballot arguments, which should lead the judiciary to view them with caution. See *id.* at 343 (noting that proponents and opponents of measures are constrained by virtually no controls when drafting their ballot arguments). Moreover, it is "pure fiction" that a significant percentage of voters have educated themselves about the details of most initiatives. See *id.* at 342-43 (presenting empirical research to support the common sense conclusion that electors are not significantly influenced by the ballot arguments contained in the ballot pamphlet).

286. See *Bates III*, 131 F.3d at 847 (implying that the restrictions imposed by Proposition 140 are not discriminatory or content-based).

287. See Friedelbaum, *supra* note 150, at 1570 (asserting that the initiative process provides a direct opportunity for voters to convert popular discontent into political action).

288. See *Are Term Limits Constitutional?*, *supra* note 282, at 37 (acknowledging that pursuing term limits through the "initiative system really test[s] our commitment to direct democracy").

289. Higgins, *supra* note 43, at 34.

290. See CAL. CONST. art. IV, § 1 (providing that the people reserve to themselves the powers of initiative and referendum).

291. See Higgins, *supra* note 43, at 35 (highlighting the controversial and sensitive nature of initiatives and the advocacy groups which seek to advance them).

can be traced to voter discontent and frustration with the electoral process which was perceived to unduly favor incumbents, undermining a competitive election process.²⁹² Unsurprisingly, the initial plaintiff challenging the implementation of the initiative was the target of the initiative's sweeping change, the California Legislature.²⁹³ This challenge reinforced a belief that incumbents were more concerned with protecting their offices than following the will of the electorate.

Despite receiving the support of a majority of the voting electorate, the fate of Proposition 140 ultimately rested on a decision by the judiciary to determine whether the measure was constitutional.²⁹⁴ Unlike ordinary legislation in which legislators have taken an oath to consider the constitutionality of laws they enact, initiative proponents have no corresponding responsibility.²⁹⁵ Moreover, ordinary legislation involves control by our elected representatives who consider the impact of legislation in numerous hearings and committee meetings, and with the aid and benefit of experts.²⁹⁶ In contrast, legislation adopted through the initiative process is often drafted by private interest groups, without adequate consideration of the opposing and legitimate interests,²⁹⁷ and who are willing to stretch the limits of constitutionality.²⁹⁸ The debate over the virtues and drawbacks of direct democracy through the initiative process continues, fueled by several recent high profile initiative measures which have come under judicial scrutiny.²⁹⁹ Both traditional legislation and initiatives are subject to judicial scrutiny, and judges who declare measures approved through either process unconstitutional "risk being labeled

292. See CAL. CONST. art. IV, § 1.5 (setting forth a preamble to Proposition 140 outlining the initiative's purpose).

293. *Legislature v. Eu*, 54 Cal. 3d 492, 816 P.2d 1309, 286 Cal. Rptr. 283 (1991).

294. See generally *Bates III*, 131 F.3d 843 (9th Cir. 1997) (en banc) (indicating challenges to the constitutionality of Proposition 140); *Bates II*, 127 F.3d 839 (9th Cir. 1997) (providing appellate court review of the constitutionality of Proposition 140); *Bates I*, 958 F. Supp. 1446 (N.D. Cal. 1997); *Legislature v. Eu*, 54 Cal. 3d 492, 816 P.2d 1309, 286 Cal. Rptr. 283 (1991) (involving a constitutional challenge to Proposition 140).

295. See *Kelso*, *supra* note 43, at 339-40 (emphasizing that legislators must assess the constitutionality of every statute, while private interest groups are under no similar obligation).

296. See *id.* at 344 (providing that hearing and speeches comprise a legislative history of a measure which are controlled by legislators).

297. See *id.* at 339 (outlining some of the risks associated with legislating through the initiative process).

298. See *Higgins*, *supra* note 43, at 35 (indicating that advocacy groups are willing to test the boundaries of constitutionality in order to further their agenda).

299. See *Romer v. Evans*, 517 U.S. 620, 632 (1996) (invalidating Amendment 2 to the Colorado Constitution that withdrew legal protection exclusively from homosexuals from the injuries caused by discrimination as violative of the Equal Protection Clause); *Lee v. Oregon*, 891 F. Supp. 1429, 1437 (D. Or. 1995) (concluding that Measure 16, a ballot initiative approved by the voters on the Oregon ballot in November 1996 which would have allowed terminally-ill adults the ability to obtain a doctor's prescription for a fatal drug dosage for the express purpose of ending their life, was overinclusive and violated the Equal Protection Clause), *vacated by Lee v. Oregon*, 107 F.3d 1382 (9th Cir. 1997). In California, several initiatives which received strong support from the electorate were also struck down as unconstitutional. See, e.g., *Gregorio T. v. Wilson*, 59 F.3d 1002 (9th Cir. 1995) (enjoining Proposition 187, which sought to regulate undocumented immigration in California); *California ProLife Political Action Comm. v. Scully*, 989 F. Supp. 1282, 1299 (E.D. Cal. 1998) (concluding that the political campaign contribution limits imposed by Proposition 208 were too low, violating candidates' First Amendment rights of freedom of expression).

'activists' and 'antidemocratic.'"³⁰⁰ These labels are unfairly placed.³⁰¹ In fact, judges who invalidate measures which violate the Constitution, are simply fulfilling their roles and responsibilities as judges.³⁰²

The decision in *Bates* stands for the proposition that the judiciary adopts a "procedurally-blind" approach when determining the constitutionality of legislation. In contrast, the California Supreme Court has not gone this far. Rather, possibly recognizing that the electorate ultimately has the power to recall the justices who frustrate the will of the voters, the court has adopted a policy presuming the validity of initiative measures "unless their unconstitutionality clearly, positively, and unmistakably appears."³⁰³ Because federal judges are not subject to voter recall, one could argue that they do not risk offending the electorate by striking down measures approved through the initiative process. Alternatively, state judges, who must face the voters and seek the continued confidence to serve in the judiciary, have adopted a glowing policy of deference to "jealously guard the precious initiative power."³⁰⁴ One hopes that politics and cynicism do not drive this distinction, yet the distinction remains nonetheless.

V. CONCLUSION

The emotional issues of the right to vote, the political process, and the constitutional framework of our nation collided in a modern test of democracy embodied by *Bates v. Jones*.³⁰⁵ Under *Bates*, following a healthy brush with the Constitution, the will of the voters prevailed.³⁰⁶ The passage of Proposition 140 captured the powerful sentiment of a state, and possibly a nation, empowered to bring about change in the way states are governed.³⁰⁷

300. See Higgins, *supra* note 43, at 34 (emphasizing that judges are often harshly criticized for declaring laws unconstitutional).

301. See *California ProLife Council Political Action Comm.*, 989 F. Supp. at 1302 (providing that the assertion that judges place more reliance on their view of the social good in resolving constitutional issues, rather than the law, is unfounded).

302. See Higgins, *supra* note 43, at 34 (indicating that a judge who strikes down a law that is violative of the Constitution is not an activist, but is just doing his or her job).

303. *Legislature v. Eu*, 54 Cal.3d 492, 501, 816 P.2d 1309, 1313, 286 Cal. Rptr. 283, 287 (1991).

304. See *id.* (providing that the initiative power should be broadly construed to facilitate the democratic process).

305. 131 F.3d 843 (9th Cir. 1997) (en banc).

306. See *supra* Parts II.A.1, III (discussing respectively the following cases which address the constitutionality of Proposition 140: *Legislature v. Eu*, 54 Cal. 3d 492, 816 P.2d 1309, 286 Cal. Rptr. 283 (1991) and *Bates v. Jones*, 958 F. Supp. 1446 (N.D. Cal. 1997), *rev'd*, 127 F.3d 839 (9th Cir. 1997), and *aff'g*, 131 F.3d 843 (9th Cir. 1997) (en banc)).

307. See CAL. CONST. art. IV, § 1.5 and *supra* note 163 and accompanying text (referencing Proposition 140's preamble which sets forth the motivation of the initiative).

To date, the Supreme Court has not considered a term limits case that specifically involves state legislators.³⁰⁸ Despite several state supreme and appellate court decisions which have upheld challenges to state imposed term limits, (and some which have applied for a writ of certiorari and been denied),³⁰⁹ the rulings of lower federal district courts and state supreme courts will continue to control.³¹⁰ Indeed, commentators have predicted that it is unlikely that the Supreme Court will consider any further cases concerning term limits in *any* form.³¹¹ Consistent with such predictions, the Supreme Court declined to hear *Bates*.³¹² Thus, state and lower district courts must continue to uphold their concurrent obligation to preserve the "values and structural integrity of the constitutional system,"³¹³ while states may elect to explore and experiment with new ways of governance to advance their constitutional interests of structuring their legislature,³¹⁴ promoting competitive elections,³¹⁵ and reinvigorating the democratic system of governance.³¹⁶

Finally, despite the populist approach used in enacting Proposition 140, it is important to emphasize that it is not the role of the judiciary to judge the *wisdom* of Proposition 140's lifetime ban on state legislators, but rather its constitutionality.³¹⁷ The decision in *Bates* affirmatively illustrates that states, and by extension voters, continue to wield significant control and self-determination in their structure of state governance, and are empowered to shape their political process by imposing content-neutral restrictions on their legislators.

308. See *Moore v. McCartney*, 425 U.S. 946, 946 (1976) (holding that state executive term limits failed to raise a substantial federal question).

309. See, e.g., *Arkansas Term Limits v. Donovan*, 117 S. Ct. 1081, 1081 (1997) (upholding the Supreme Court of Arkansas' refusal to place a constitutional amendment initiative on the state ballot, that directed state legislators and Arkansas members of Congress to propose and secure an amendment to the United States Constitution which would limit the number of terms that members of Congress may serve); *Bates III*, 131 F.3d at 847 (upholding the same voter initiative imposing a lifetime ban on state legislators challenged in *Eu*); *Eu*, 54 Cal. 3d at 524, 816 P.2d at 1328, 286 Cal. Rptr. at 302 (upholding a lifetime ban on state legislators imposed by voter initiative).

310. See Friedelbaum, *supra* note 150, at 1580 (preferring that state appellate courts serve as the "fora of last resort" to determine the constitutionality of implementing state imposed term limits).

311. See *id.* (implying the absence of need to hear a term limits case because the issue of the constitutionality of both state and federal term limits have already been addressed and decided upon by the United States Supreme Court).

312. See *Bates v. Jones*, 118 S. Ct. 1302 (1998) (denying certiorari).

313. Friedelbaum, *supra* note 150, at 1580.

314. See *Bates III*, 131 F.3d at 859 (Rymer, J., concurring) (providing that the structure of a state's legislature is among the state's strongest interests).

315. See *id.* at 847 (speculating that California voters viewed lifetime term limits as a vehicle to achieve a more competitive political process).

316. See *id.* (indicating that California voters anticipated that the goals of democracy and an increase in the participation of the political process would be furthered by lifetime term limits).

317. See *id.* at 860 (Hawkins, J., concurring) (remarking that the judiciary's role is to determine the constitutionality of legislation, not its merits).