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# Proposition 140: The Constitutionality of Term Limits

Reed Schreiter

*University of the Pacific; McGeorge School of Law*

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California Constitution art. IV, §§ 1.5, 4.5, 7.5, art. VII § 11, art. XX, § 7 (new); art. IV, § 2, art. V, §§ 2, 11, art. IX, § 2, art. XIII, § 17 (amended).
1990 CAL. CONST. Prop. 140.*

Proposition 140, also known as the Political Reform Act of 1990,[1] or the Schabarum Initiative,[2] amends California constitutional provisions regarding specified elected constitutional offices.[3] The measure limits the number of terms that certain elected state officials may serve in the same office, restricts legislative retirement benefits, and reduces the total aggregate expenditures of the legislature.[4]

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* The California Constitution provides that an amendment approved by the voters takes effect the day after the election unless otherwise provided. CAL. CONST. art. XVIII, § 4. Proposition 140 became effective Nov. 7, 1990.

1. 1990 Cal. Const. Prop. 140, sec. 1, at ___.

2. CALIFORNIA SENATE OFFICE OF RESEARCH, PROPOSITION 140: THE SCHABARUM INITIATIVE, September 1990 (initiative co-sponsored by Peter Schabarum) [hereinafter SCHABARUM INITIATIVE].

3. LEGISLATIVE ANALYST OF CALIFORNIA, BALLOT PAMPHLET, PROPOSED STATUTES AND AMENDMENTS TO CALIFORNIA CONSTITUTION WITH ARGUMENTS TO VOTERS, GENERAL ELECTION at 69 (Nov. 6, 1990) [hereinafter BALLOT PAMPHLET]. *See In re* Lance W., 37 Cal. 3d 873, 888 n.8, 694 P.2d 744, 753 n.8, 210 Cal. Rptr. 631, 640 n.8 (1975) (accepting ballot pamphlet summaries and arguments as source of voters' intent and understanding of the initiative). The office of insurance commissioner, created in 1988 by Proposition 103, is not affected by Proposition 140. SCHABARUM INITIATIVE, *supra* note 2, at 19. *See* CAL. INS. CODE §§ 12900-12901 (West 1988 & Supp. 1990) (election and qualifications for office of insurance commissioner).

4. *See* BALLOT PAMPHLET, *supra* note 3, at 69. Proposition 140 also contains a severability provision in the event that any part of the initiative is declared invalid. CAL. CONST. art. VII, § 11 (enacted by Proposition 140).

The California Constitution creates a number of elected state offices, specifies the term for each office, and prescribes required qualifications for each office.[5] Until the passage of Proposition 140, the constitution did not limit the number of terms that an elected official could serve in a particular office.[6]

The offices of governor, lieutenant governor, attorney general, secretary of state, superintendent of public instruction, treasurer, Board of Equalization member, and state senator presently have constitutionally mandated four-year terms.[7] Proposition 140 limits office-holders in these positions to a maximum of two four-year terms.[8] Membership in the state assembly has a constitutionally specified term of two years.[9] Proposition 140 restricts state assembly members to a maximum of three two-year terms.[10]

Rather than limiting the number of consecutive terms that an official may serve, Proposition 140 imposes a lifetime ban on any office-holder who has served the maximum allotted number of terms in a particular office.[11] The term limits apply only to those

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5. CAL. CONST. art. IV, § 1 (creating the California legislature); *id.* art. IV, § 2 (specifying the length of terms and listing the qualifications for membership in the Legislature); *id.* art. V, § 1 (creating office of governor); *id.* art. V, § 2 (specifying length of term and qualifications for office of governor); *id.* art. V, § 9 (office of lieutenant governor); *id.* art. V, § 11 (offices of secretary of state, treasurer, and controller); *id.* art. V, § 13 (creating office of and specifying duties of attorney general); *id.* art. IX, § 2 (office of superintendent of public instruction); *id.* art. XIII, § 17 (membership of Board of Equalization).

6. SCHABARUM INITIATIVE, *supra* note 2, at 5.

7. CAL. CONST. art. IV, § 2(a) (senator); *id.* art. V, § 2 (governor); *id.* art. V, § 11 (lieutenant governor, attorney general, controller, secretary of state, and treasurer); *id.* art. IX, § 2 (superintendent of public instruction); *id.* art. XIII, § 17 (Board of Equalization).

8. *Id.* art. IV, § 2(a) (amended by Proposition 140) (senate); *id.* art. V, § 2 (amended by Proposition 140) (governor); *id.* art. V, § 11 (amended by Proposition 140) (lieutenant governor, attorney general, controller, secretary of state, and treasurer); *id.* art. IX, § 2 (amended by Proposition 140) (superintendent of public instruction); *id.* art. XIII, § 17 (amended by Proposition 140) (Board of Equalization).

9. *Id.* art. IV, § 2(a).

10. *Id.* (amended by Proposition 140).

11. SCHABARUM INITIATIVE, *supra* note 2, at 2. *Compare* 1990 California Proposition 140 (lifetime term limits) *and* 1990 Oklahoma State Question No. 632 (enacting OKLA. CONST. art. V, § 17A) (imposing 12 year term limits on the state legislature) *with* 1990 Colorado Constitutional Amendment No. 5 (amending COLO. CONST. art. IV, § 1, art. V, § 3; enacting COLO. CONST. art. XVIII, § 9) (imposing consecutive term limits on the offices of governor, lieutenant governor, secretary of state, treasurer, attorney general, state senators, and state representatives to United States Congress) *and* 1990 Kansas City (Missouri) Charter Amendment (enacting Kansas City Charter art. II, § 6.4) (imposing retroactive consecutive term limits on the offices of Mayor and City Council).

officials elected on or after November 6, 1990.[12] However, any state senator not on the November 1990 ballot may serve only one additional term.[13]

## LEGISLATIVE RETIREMENT BENEFITS

Proposition 140 requires a person elected to or serving in the legislature on or after November 1, 1990 to participate in the federal Social Security program.[14] The state will pay only the employer's share of the contribution necessary for a legislator to participate in Social Security.[15] No other pension or retirement benefits may accrue from service in the legislature.[16]

## LEGISLATIVE EXPENDITURES

Pursuant to Proposition 140, the total aggregate expenditures of the legislature in the fiscal year immediately following the adoption of the initiative[17] may not exceed the lesser of $950,000 per member or eighty percent of the legislative budget for the

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*See* Lowe v. Kansas City Bd. of Election Comm'rs, No. 90-1041-CV-W-6 (W.D. Mo. Dec. 19, 1990) (1990 W.L. 209974) (upholding Kansas City Charter article II, section 6.4 against challenges based on Voting Rights Act, equal protection under the fourteenth amendment, and the fifteenth amendment). *But see Term Limits Likely to Face Challenge in Courts*, San Francisco Chron., Nov. 8, 1990, at A14 (quoting Chip Nielsen, constitutional lawyer and former GOP Capitol staff member, as suggesting that because of the language of the term limit provisions, the courts may interpret the term limit provisions of Proposition 140 to allow officeholders who have sat out for a term to run again because that person is no longer an officeholder but rather a private citizen); Barnett, *Prop. 140 Could Survive the State Supreme Court*, Sacramento Bee, Jan. 24, 1991, at B9, col. 2 (Proposition 140 may be interpreted as imposing only a ban on more than two *consecutive* terms, not a lifetime ban).

12. CAL. CONST. art. XX, § 7 (enacted by Proposition 140).

13. *Id.* Additionally, the term limits do not apply to an unexpired term to which a person is elected or appointed if the term is more than half completed. *Id.*

14. *Id.* art. IV, § 4.5 (enacted by Proposition 140).

15. *Id.*

16. *Id.* Proposition 140 precludes legislators from earning state retirement benefits through legislative service. BALLOT PAMPHLET, *supra* note 3, at 69.

17. The fiscal year immediately following the adoption of Proposition 140 begins July 1, 1991. SCHABARUM INITIATIVE, *supra* note 2, at 20.

preceding fiscal year.[18] The aggregate expenditures in future fiscal years will be limited to the amount of the previous year's expenditures plus an amount equal to the percentage increase in the state appropriation limit allowed by the California Constitution.[19]

## COMMENT

Being a highly controversial initiative that raises a number of constitutional issues, Proposition 140 will face state and federal constitutional challenges of its validity.[20]

### *A. Single Subject Rule*

One procedural challenge often posited against an initiative is based upon the "single subject rule" of the California Constitution.[21] Under the constitution, "[a]n initiative measure

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18. CAL. CONST. art. IV, § 7.5 (enacted by Proposition 140). Calculations reveal that the total aggregate expenditures of the legislature will be limited to $950,000 per member for the fiscal year 1991-92. SCHABARUM INITIATIVE, *supra* note 2, at 21. The first option under Proposition 140 multiplies $950,000 by 120 legislative members, resulting in a legislative expenditure limit of $114 million. *Id.* Under the second option, the 1990-91 expenditures totaling approximately $180.9 million are multiplied by 80%, producing a limit of $144.7 million. *Id.* Assuming that legislative expenditures would continue to grow at an average annual rate of 7.5%, as they have for the past decade, the provisions of Proposition 140 will reduce the 1991-92 expenditures by approximately 40% or $80 million. *Id.*

19. CAL. CONST. art. IV, § 7.5 (enacted by Proposition 140). For the fiscal years following 1991-92, the total aggregate expenditures of the legislature will be limited to the amount expended in the previous fiscal year adjusted by an amount equal to the percentage increase in the appropriations limit pursuant to the California Constitution article XIII(B). *Id.*

20. On Feb. 21, 1991, a lawsuit (case number SO19660) challenging Proposition 140 was filed with the California Supreme Court.

21. In recent years, a number of initiatives, challenged on the basis of a single subject rule violation, have been reviewed by the California Supreme Court. *See* Raven v. Deukmejian, ___ Cal. 3d ___, 801 P.2d 1077, 276 Cal. Rptr. 326 (Dec. 24, 1990) (Proposition 115--Crime Victims Justice Reform Act); Brosnahan v. Brown, 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982) (Proposition 8--Victims' Bill of Rights); Fair Political Practices Comm'n v. Superior Ct., 25 Cal. 3d 33, 599 P.2d 46, 157 Cal. Rptr. 855 (1979) (Political Reform Act of 1974); Amador Valley Joint Union High School Dist. v. State Bd. of Equalization, 22 Cal. 3d 208, 583 P.2d 1281, 149 Cal. Rptr. 239 (1978) (Proposition 13--tax reform). *See generally* Comment, *The California Initiative Process: The Demise of the Single Subject Rule*, 14 PAC. L.J. 1095 (1983) (permissive "reasonably germane" test adopted by the California Supreme Court destroys all constitutional limits on multiple subjects in initiatives). *But see* Lowenstein, *California Initiatives and the Single Subject Rule*, 30 U.C.L.A. L. REV. 936, 937-38 (1983) (court might choose to abandon permissive test in future review).

embracing more than one subject may not be submitted to the electors or have any effect."[22] According to the California Supreme Court, the rule was enacted primarily to minimize the risks of voter confusion and to avoid "logrolling" by special interests.[23] As such, the court, when resolving a challenge based upon the single subject rule, considers the amount of public scrutiny and debate over the initiative as well as the explanation of the provisions of the initiative provided in the voter ballot pamphlet.[24]

In *Raven v. Deukmejian*,[25] the most recent application of the single subject rule to an initiative, the California Supreme Court stated that "an initiative measure does not violate the single subject rule 'if, despite its varied collateral effects, all of its parts are "reasonably germane" to each other,' and to the general purpose or object of the initiative."[26] When applying this "reasonably germane" standard, the court has recognized that the rule should be liberally construed and that, in accord with a policy favoring the initiative process, the voters will not be limited to brief general statements, and the initiative may deal comprehensively and in

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22. CAL. CONST. art. II, § 8(d). Approved in 1948, the rule is thought to have been adopted in response to a multifaceted initiative invalidated by the court in McFadden v. Jordan, 32 Cal. 2d 330, 196 P.2d 787 (1948) (holding that the initiative consisting of 12 sections, 208 subsections, 21,000 words, and dealing with such varied subjects as pensions, oleomargarine, gambling, elections, and mining should not be placed on the ballot because the initiative amounted to a revision of the constitution rather than an amendment), *cert. denied*, 336 U.S. 918 (1949). *Amador*, 22 Cal. 3d at 229, 583 P.2d at 1290, 149 Cal. Rptr. at 248.

23. *Amador*, 22 Cal. 3d at 231-32, 583 P.2d at 1291, 149 Cal. Rptr. at 249. *See* BLACK'S LAW DICTIONARY 849 (5th ed. 1979) ("logrolling" defined as a practice of including in one statute or constitutional amendment more than one proposition, inducing voters to vote for all, notwithstanding they might not have voted for all if amendments or statutes had been submitted separately).

24. *Amador*, 22 Cal. 3d at 231-32, 583 P.2d at 1291, 149 Cal. Rptr. at 249.

25. ___ Cal. 3d ___, 801 P.2d 1077, 276 Cal. Rptr. 326 (Dec. 24, 1990). At the time of the publication deadline for this edition of the *Pacific Law Journal*, page number cites for the *Raven* case were available only for West's California Reporter. Consequently, subsequent references to this case will cite only to the California Reporter.

26. *Id.*, 276 Cal. Rptr. at 332 (quoting Brosnahan v. Brown, 32 Cal. 3d 236, 245, 651 P.2d 274, 279, 186 Cal. Rptr. 30, 35 (1982)). In addition to the "reasonably germane" test, a second more restrictive test was suggested in a dissenting opinion by Justice Manuel in *Schmitz v. Younger*. *See* Schmitz v. Younger, 21 Cal. 3d 90, 100, 577 P.2d 652, 656, 145 Cal. Rptr. 517, 522-23 (1978) (Manuel J., dissenting). This test would require the initiative's provisions to be functionally related in furtherance of a common underlying purpose. *Id.*

detail with an area of law.[27] In *Brosnahan v. Brown*,[28] the court held that while it might disagree with the wisdom of an initiative, it was not the court's function to pass judgment on the propriety or soundness of the measure, and that in the absence of a compelling and overriding constitutional imperative the court would not prohibit the people from expressing their will.[29]

The stated intent of Proposition 140 is to limit the powers of incumbent representatives, thereby restoring a free and democratic system of fair elections and encouraging qualified citizen representatives to seek public office.[30] In order to limit the powers of incumbency, the measure declares that term limits must be imposed, retirement benefits restricted, and staff and support services limited.[31] The drafters of Proposition 140 believe that the interaction of these three major reforms will preclude politicians from a career in political office.[32]

In order for Proposition 140 to survive the scrutiny of the single subject rule, the measure's provisions--specifically limits on terms, retirement benefits, and legislative expenditures--must be found to be reasonably germane[33] to each other and to the object of political reform, and not an attempt at logrolling unpopular

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27. Fair Political Practices Comm'n v. Superior Ct., 25 Cal. 3d 33, 41, 599 P.2d 46, 50, 157 Cal. Rptr. 855, 859 (1979). The court has held that the provisions of some initiatives have been interdependent and interlocking but that this relationship was not essential to a measure's validity. *Brosnahan*, 32 Cal. 3d at 249, 651 P.2d at 281, 186 Cal. Rptr. at 37. The court has also rejected an argument that the single subject rule requires a showing that each of the provisions of the initiative was capable of gaining voter approval independently. *Raven*, 276 Cal. Rptr. at 334.

28. 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982).

29. *Id.* at 248, 651 P.2d at 281, 186 Cal. Rptr. at 37. "We [the court] avoid an overly strict judicial application of the single-subject requirement, for to do so could well frustrate legitimate efforts by the people to accomplish integrated reform measures. As we have previously observed, the initiative procedure itself was specifically intended to accomplish such kinds of reforms through its function as a 'legislative battering ram.' We should dull or blunt its force only for reasons that are constitutionally mandated . . . ." Amador Valley Joint Union High School Dist. v. State Bd. of Equalization, 22 Cal. 3d 208, 232, 583 P.2d 1281, 1291-92, 149 Cal. Rptr. 239, 249-50 (1978).

30. CAL. CONST. art. IV, § 1.5 (enacted by Proposition 140).

31. *Id.*

32. SCHABARUM INITIATIVE, *supra* note 2, at 6.

33. *See* Raven v. Deukmejian, ___Cal. 3d ___, ___, 801 P.2d 1077, ___, 276 Cal. Rptr. 326, 332 (1990) (quoting *Brosnahan*, 32 Cal. 3d at 245, 651 P.2d at 279, 186 Cal. Rptr. at 35) (subjects must be reasonably germane). "Numerous provisions, having one general object, . . . may be united in one act." Fair Political Practices Comm'n v. Superior Ct., 25 Cal. 3d 33, 38, 599 P.2d 46, 48, 157 Cal. Rptr. 855, 857 (1979).

reforms.[34] In making these determinations, the court must consider whether the reforms proposed by the measure received considerable public scrutiny and debate in the media and the ballot pamphlet.[35]

The clearest argument under the single subject rule in opposition to Proposition 140 is that the initiative deals with three distinct subjects rather than a single subject. If the court concluded that the three categories of reforms--limits on terms, retirement benefits, and legislative expenditures--were not reasonably germane to each other or to the object of political reform through the reduction in the power of incumbency, then Proposition 140 would fail the single subject requirement. An argument may be made that the express purpose of the measure--political reform through the limitation of the powers of incumbency--is adequately served by the term limit provision alone, and that the provisions limiting retirement benefits and legislative expenditures are not reasonably germane to the term limit provision or to the general object of reducing the powers of incumbency.[36]

Opponents may also contend that voter confusion and frustration was at a premium during the November election due to the number of highly-publicized propositions on the ballot, the volume of material contained in the ballot pamphlet, and the existence of a similar competing term limit initiative, Proposition 131.[37] However, due to the California Supreme Court's liberal

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34. Amador Valley Joint Union High School Dist. v. State Bd. of Equalization, 22 Cal. 3d 208, 231-32, 583 P.2d 1281, 1291, 149 Cal. Rptr. 239, 249.

35. *Id.* A preliminary search revealed over 250 pre-election newspaper and magazine articles mentioning Proposition 140.

36. The need for reform in the area of legislative expenditures, as a method of limiting an incumbent's power is questionable. For the past 20 years, legislative expenditures have consistently represented between 0.32% and 0.58% of the state's general fund expenditures. SCHABARUM INITIATIVE, *supra* note 2, at 23. Among the 10 largest states, California ranked fifth in legislative expenditures as a percentage of total state expenditures. *Id.* at 25. Proposition 140 is estimated to reduce state expenditures by $67 million or approximately 0.12% of total budget expenditures. *Id.* at 22.

37. CALIFORNIA SENATE OFFICE OF RESEARCH, AFTER THE ELECTION: ANALYSIS OF SUCCESSFUL PROPOSITIONS ON THE NOVEMBER 1990 BALLOT at i (1990) (28 ballot propositions including 13 "complicated" initiatives). Proposition 131, a wide-ranging government ethics initiative including a consecutive term limit provision, received considerable publicity during the gubernatorial primaries due to the sponsorship of then California Attorney General John VandeKamp. *See* HASTINGS PUBLIC LAW RESEARCH INSTITUTE, POLITICAL REFORM ACT OF 1990: APPRAISAL OF

construction of the single subject rule and the court's precedents validating complex initiatives, it seems likely that Proposition 140 will survive the single subject challenge.[38]

### *B. Constitutional Revision or Amendment*

A second procedural challenge commonly made against California ballot initiatives is that the measure represents a constitutional revision rather than a constitutional amendment. The California Constitution provides that either an amendment or a revision may be made to the constitution, however, the procedures vary for each type of modification.[39] The voters may *amend* the constitution through the initiative process, but a constitutional *revision* may be adopted only after convening a constitutional convention and obtaining popular ratification, or after submission of the measure to the voters by the legislature.[40]

The constitution does not define the terms "revision" or "amendment," but the courts have developed guidelines to assist in the analysis.[41] When considering whether an initiative is a

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PROPOSITION 140, at 1 (1990).

38. For example, the court in Fair Political Practices Comm'n v. Superior Ct. upheld the Political Reform Act of 1974 against a single subject challenge. Fair Political Practices Comm'n v. Superior Ct., 25 Cal. 3d 33, 43, 599 P.2d 46, 51, 157 Cal. Rptr. 855, 860 (1979). This measure contained more than 20,000 words, numerous interrelated sections, and involved four separate substantive subjects: (1) Regulation of election to public office, (2) regulation of ballot measure petitions and elections, (3) regulation of public official conflicts of interest, and (4) regulation of lobbyists. *Id.* at 40, 599 P.2d at 49, 157 Cal. Rptr. at 858. *See* Raven v. Deukmejian, 276 Cal. Rptr. 326 (1990) (upholding Proposition 115 against single subject challenge); Brosnahan v. Brown, 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982) (upholding Proposition 8 against single subject challenge); *Amador*, 22 Cal. 3d 208, 583 P.2d 1281, 149 Cal. Rptr. 239 (upholding Proposition 13 against single subject challenge).

39. CAL. CONST. art. XVIII, §§ 1-4.

40. *Amador*, 22 Cal. 3d at 221, 583 P.2d at 1284, 149 Cal. Rptr. at 242. *See Raven*, 276 Cal. Rptr. at 334. "The Legislature . . . may submit at a general election the question whether to call a convention to *revise* the Constitution." CAL. CONST. art. XVIII, § 2 (emphasis added). "The electors may *amend* the Constitution by initiative." *Id.* art. XVIII, § 3 (emphasis added). "The Legislature . . . may propose an *amendment or revision* of the Constitution . . . ." *Id.* art. XVIII, § 1 (emphasis added).

41. *Raven*, 276 Cal. Rptr. at 334.

revision or an amendment, the courts examine both the quantitative[42] and the qualitative[43] effects of the measure on the constitutional scheme.[44] A substantial change presented in either respect may amount to a revision rather than an amendment.[45]

Quantitatively, Proposition 140 affects six articles of the constitution through the amendment of five sections and the addition of five sections.[46] The actual amount of text added to the constitution is relatively minimal.[47] Proposition 140, particularly in comparison to other initiatives upheld by the court as amendments rather than revisions, may not be so quantitatively extensive as to change the substantial entirety of the constitution.[48]

From a qualitative perspective, while Proposition 140 may substantially change the power of incumbents, the proponents of the initiative will maintain that these changes fall well short of constituting the far-reaching changes in California's basic

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42. A quantitative effect is one that is "so extensive . . . as to change directly the 'substantial entirety' of the Constitution by the deletion or alteration of numerous existing provisions . . . ." *Id.* at 335 (quoting *Amador*, 22 Cal. 3d at 223, 583 P.2d at 1286, 149 Cal. Rptr. at 244).

43. Qualitatively, "even a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision . . . ." *Id.* at 336 (quoting *Amador*, 22 Cal. 3d at 223, 583 P.2d at 1286, 149 Cal. Rptr. at 244). For example, an initiative that purported to vest all judicial power in the legislature would be in effect a revision regardless of the length or complexity of the measure or the number of articles and sections the measure effected. *Amador*, 22 Cal. 3d at 223, 583 P.2d at 1286, 149 Cal. Rptr. at 244.

44. *Raven*, 276 Cal. Rptr. at 334.

45. *Id.* The court in *Raven* held that Proposition 115's quantitative effect on the California Constitution was minimal as the measure affected only one article through the addition of three new sections and the amendment of a fourth section. *Id.* at 335-36. The court further held that, from a qualitative standpoint, a section of Proposition 115 unduly restricted judicial power and severely limited the independent force and effect of the California Constitution. *Id.* at 336-37.

46. *See* BALLOT PAMPHLET, *supra* note 3, at 137-38.

47. *Id.* The text added to the constitution contains approximately 600 words. *See id. Cf.* McFadden v. Jordan, 32 Cal. 2d 330, 349-50, 196 P.2d 787, 799 (1948) (invalidating a measure adding 21,000 words to the constitution and affecting 15 of the constitution's 25 articles), *cert. denied*, 336 U.S. 918 (1949).

48. *See Raven*, 276 Cal. Rptr. at 335-36 (upholding Proposition 115's quantitative component); Brosnahan v. Brown, 32 Cal. 3d 236, 260, 651 P.2d 274, 308, 186 Cal. Rptr. 30, 44-45 (1982) (upholding Proposition 8's quantitative component); Amador Valley Joint Union High School Dist. v. State Bd. of Equalization, 22 Cal. 3d 208, 224, 583 P.2d 1281, 1286, 149 Cal. Rptr. 239, 244 (1978) (upholding Proposition 13's quantitative component).

governmental plan necessary to invalidate the measure.[49] In fact, the stated objective of Proposition 140 is to reduce the power of incumbency and to *re-establish* the system of representative government envisioned by the Founding Fathers.[50] Additionally, it may be argued that any reduction in the power of the legislature accompanying Proposition 140 will be offset by an equal reduction in the power of the executive branch caused by the term limits imposed on the office of the governor.[51]

On the other hand, Proposition 140 imposes a strict spending limit on the legislative branch, but not on the executive or judicial branches.[52] If the effect of the spending limit is to reduce legislative power in relation to the other branches, the qualitative effect of the initiative may be to disturb the proper checks and balances among the three branches of government.[53] This balance of power is an integral component of our democratic government[54] and, if altered, may have such far reaching effects on the basic governmental plan as to amount to a revision.[55]

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49. *Cf. Raven*, 276 Cal. Rptr. at 336 (holding that a provision of Proposition 115 that, in practicality, placed all judicial interpretive power regarding fundamental criminal defense rights in the hands of the Supreme Court of the United States, constituted far-reaching changes in the basic governmental plan).

50. BALLOT PAMPHLET, *supra* note 3, at 137 (emphasis added).

51. *See* CAL. CONST. art. V, § 2 (amended by Proposition 140) (governor).

52. SCHABARUM INITIATIVE, *supra* note 2, at 25.

53. *See* CAL. CONST. art. III, § 3; THE FEDERALIST No. 51, at 355-56 (J. Madison) (B. Wright ed. 1961) (discussing the need for checks and balances). Madison describes how the "partition of power" would be maintained by "so contriving the interior structure of government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper place." *Id.* Madison continues:

> [b]ut the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . It may be a reflection on human nature that such devices should be necessary to control the abuses of government.

*Id.* at 356.

54. *See id.* at 355.

55. *See* Amador Valley Joint Union High School Dist. v. State Bd. of Equalization, 22 Cal. 3d 208, 222-23, 583 P.2d 1281, 1285, 149 Cal. Rptr. 239, 243 (1978) (reiterating that the measure in McFadden v. Jordan was invalidated because of its effects on the government's checks and balances and offering as an example of a revision an initiative vesting all judicial power in the legislature); Brosnahan v. Brown, 32 Cal. 3d 236, 260-61, 651 P.2d 274, 289, 186 Cal. Rptr. 30, 45

Further, opponents of Proposition 140 may look to the Founding Fathers for support. The writings of Alexander Hamilton reveal that the Founding Fathers debated and rejected term limits as ill-founded.[56]

Unless the court finds that the initiative's effect will be to weaken the checks and balances of the legislature in favor of the executive and judicial branches of government, Proposition 140 will probably survive the revision/amendment review.

### C. *Equal Protection*

Proposition 140 also faces potential challenges based upon the equal protection clause of the fourteenth amendment.[57] The measure's stated intent is to limit the power of incumbent candidates only, thereby distinguishing incumbents from other potential candidates.[58] A state has the right to set qualifications for public office so long as it is done in accord with the state

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(1982) (challenge of Proposition 8, alleging it would interfere with the judiciary's ability to perform its constitutional duty). In *Brosnahan*, however, the court determined that the claim that Proposition 8 would interfere with the judiciary was "wholly conjectural" and that "nothing on the face of the article . . . confirms that the article necessarily and inevitably will produce" the feared results. *Brosnahan*, 32 Cal. 3d at 261, 651 P.2d at 289, 186 Cal. Rptr. at 45. The court in Raven v. Deukmejian invalidated a section of Proposition 115 because the court determined that the practical effect of the section would be to unduly restrict judicial power by vesting all interpretive power in the Supreme Court of the United States and, thus, have a devastating qualitative effect on the California Constitution. Raven v. Deukmejian, ___Cal. 3d ___, ___, 801 P.2d 1077, ___, 276 Cal. Rptr. 326, 336 (1990).

56. THE FEDERALIST NO. 72, at 462 (A. Hamilton) (B. Wright ed. 1961).

> [T]he circumstance of reeligibility . . . is necessary to enable the people, when they see reason to approve of his [elected official] conduct, to continue him in his station, in order to prolong his talents and virtues, and to secure to the government the advantage of permanency in a wise system of administration. [E]xclusion, whether temporary or perpetual, . . . would be for the most part rather pernicious than salutary. One ill effect of the exclusion would be a diminution of the inducements to good behavior.

*Id.*

57. *See* U.S. CONST. amend. XIV, § 1. The California Constitution article I, section 7 (former sections 11 and 21 of article I, as renumbered Nov. 5, 1974) makes guarantees similar to the equal protection clause of the federal Constitution. De Bottari v. Melendez, 44 Cal. App. 3d 910, 914, 119 Cal. Rptr. 256, 258 (1975).

58. *See* CAL. CONST. art. IV, § 1.5 (enacted by Proposition 140) (intent of Proposition 140).

constitution and the equal protection and due process clauses of the fourteenth amendment.[59] Although a state may prescribe regulations for a public office, the state may not enact arbitrary requirements for public office.[60]

If a claim is made under the equal protection clause, the courts must first determine the appropriate level of review to utilize when examining the issue.[61] There has been uncertainty among the courts as to whether the right to hold public office constitutes a fundamental right.[62] In *Zeilenga v. Nelson*,[63] the California Supreme Court recognized the right to hold public office as a fundamental right.[64] Subsequent to the California Supreme Court's decision, the Supreme Court of the United States, in *Bullock v. Carter*,[65] declined to decide whether the right to candidacy,

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59. Spencer v. Board of Education, 69 Misc. 2d 1091, 333 N.Y.S.2d 308 (1972). A state's right to impose restrictions on one seeking public office is a power reserved to the states by the Tenth Amendment of the United States Constitution. Chimento v. Stark, 353 F. Supp. 1211, 1215 (D.N.H. 1973).

60. Zeilenga v. Nelson, 4 Cal. 3d 716, 721, 484 P.2d 578, 581, 94 Cal. Rptr. 602, 605 (1971) (holding that durational residency requirements for candidacy were excessive, arbitrary, and denied equal protection).

61. Bullock v. Carter, 405 U.S. 134, 144 (1972) (applying strict scrutiny to and invalidating a statute requiring candidates to pay a substantial filing fee before becoming a candidate for public office).

62. *Compare Zeilenga*, 4 Cal. 3d at 721, 484 P.2d at 581, 94 Cal. Rptr. at 605 (holding that the right to hold public office is a fundamental right) *with Bullock*, 405 U.S. at 142-43 (stating that the Court had not attached fundamental status to candidacy). The courts use the phrases "the right to hold public office" and "the right to candidacy" interchangeably. *See Zeilenga*, 4 Cal. 3d at 721-723, 484 P.2d at 581-582, 94 Cal. Rptr. at 605-606; De Bottari v. Melendez, 44 Cal. App. 3d 910, 915, 119 Cal. Rptr. 256, 259 (1975); Thompson v. Mellon, 9 Cal. 3d 96, 99, 507 P.2d 628, 630, 107 Cal. Rptr. 20, 22 (1973). However, it is a well settled principle that there exists "a federal constitutional right to be *considered* for public service without the burden of invidiously discriminatory disqualifications." Turner v. Fouche, 396 U.S. 346, 362-63 (1970) (emphasis added).

63. 4 Cal. 3d 716, 484 P.2d 578, 94 Cal. Rptr. 602 (1971).

64. *Id.* at 721, 484 P.2d at 581, 94 Cal. Rptr. at 605. The court also held that a restraint on eligibility for elective office imposed a restraint on the right to vote as well. *Id.* As a result, the court concluded that the right to run for public office is as fundamental as the right to vote. *Id.* at 723, 484 P.2d at 582, 94 Cal. Rptr. at 606. Further, the court held that the right to vote would be an empty right if it did not include the right of choice for whom to vote. *Id.* at 721, 484 P.2d at 581, 94 Cal. Rptr. at 605. Therefore, the right to hold public office is also subject to first amendment protection. *Id. See also* Cummings v. Godin, 119 R.I. 325, 335-36, 377 A.2d 1071, 1075-76 (1977) (holding public office, like candidacy for public office, is a significant form of political expression and activity; holding public office is a right included within the ambit of the first amendment).

65. 405 U.S. 134 (1972).

standing alone, is fundamental.[66] Rather, the Court discussed the interrelation between the laws affecting the right to candidacy and the right to vote.[67] Following the decision in *Bullock*, the California Supreme Court, without abandoning its position in *Zeilenga*, adopted the posture of the federal courts in determining what level of review to apply by examining the impact of restrictions on holding public office on other fundamental rights, such as the right to vote.[68]

If, in the term limitation context, the right to hold public office is not deemed fundamental, Proposition 140 will be valid if it bears a "rational relationship to a legitimate state purpose."[69] If, however, the court considers this a fundamental right, the court will apply strict scrutiny, and the state will bear the burden of proving that the initiative furthers a compelling state objective and that the provisions of Proposition 140 are necessary to further that objective.[70] The strict scrutiny analysis is also designed to determine whether the least restrictive method of achieving the state interest has been utilized.[71] If strict scrutiny is applied to Proposition 140,[72] the state might assert as a compelling state interest the need to maintain a responsive and responsible government through the democratic process.[73] The state might

66. *Id.* at 142-43.

67. *Id.* at 143.

68. De Bottari v. Melendez, 44 Cal. App. 3d 910, 915, 119 Cal. Rptr. 256, 259 (1975). Three California Supreme Court cases, *Zeilenga*, Thompson v. Mellon, and Johnson v. Hamilton, held that the right to vote and the right to hold public office were equally fundamental and required strict scrutiny review when classifications implicated these rights. *Zeilenga*, 4 Cal. 3d at 723, 484 P.2d at 582, 94 Cal. Rptr. at 606; Thompson v. Mellon, 9 Cal. 3d 96, 102, 507 P.2d 628, 630, 107 Cal. Rptr. 20, 22 (1973); Johnson v. Hamilton, 15 Cal. 3d 461, 468, 541 P.2d 881, 884, 125 Cal. Rptr. 129, 132 (1975). These cases dealt with statutory durational residence requirements placed on candidates in order to qualify for replacement on the ballot.

69. *Johnson*, 15 Cal. 3d at 466, 541 P.2d at 883, 125 Cal. Rptr. at 131.

70. *Id.*

71. *Zeilenga*, 4 Cal. 3d at 723, 484 P.2d at 582, 94 Cal. Rptr. at 606.

72. "To justify any impairment of [fundamental] rights, there must be present a compelling governmental interest." *Id.* at 721, 484 P.2d at 580, 94 Cal. Rptr. at 604.

73. Chimento v. Stark, 353 F. Supp. 1211, 1215 (D. N.H. 1973) (holding that the state had a compelling interest in maintaining a responsive and responsible government through the democratic process sufficient to support a durational residency requirement for office of governor). However, *Chimento* may be distinguishable from the present case because the court noted that the residency requirement was not a complete barrier to the office but only caused a delay in seeking office. *Id.*

then argue that the political system has become less representative and less competitive due to the increased power of incumbency, and that Proposition 140 was passed to remedy this problem by restricting the power of incumbency.[74] The argument would follow that each provision of the initiative is necessary in order to achieve the proposition's stated purpose: the term limits prohibit an incumbent from re-election after a second term (a third term for members of the assembly); the limits on legislative expenditures reduce the legislative staff available to assist an incumbent during a campaign;[75] and the restrictions on retirement benefits remove an incentive for re-election.[76] Finally, the state may argue that limited terms will result in legislators being more responsive to the citizens of the state by discouraging long-standing relationships between legislators and special interest groups.[77]

The court, however, may find that certain provisions of Proposition 140 are not the least restrictive methods of limiting the power of incumbency.[78] For example, the court might question how restrictions on retirement benefits will actually reduce the power of an incumbent, and query whether this restriction may even discourage well-qualified potential candidates who desire the security of an employer-sponsored retirement program. The court may also consider whether the goal of restricting the power of incumbency is equally served by *consecutive* term limits, as opposed to a lifetime ban. If a legislator's source of power emanates from holding the office, then the court may find that once

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at 1216. The *Chimento* court appeared to give more deference to the state's assertion that its interest was compelling because the residency requirement was contained in the constitution, as opposed to a statute. *Id.*

74. *See* BALLOT PAMPHLET, *supra* note 3, at 137.

75. *See Gray Davis Staff Allegedly Mixed Politics With Job*, L.A. Times, Aug. 31, 1987, part 1, at 3, col. 5 (former Davis aides told investigators that Davis campaign used legislative staff to help win state controller's office); *Legislative Aides' Campaign Role Growing Critics Say; Political Troops Often on State Payrolls*, L.A. Times, May 18, 1987, part 1, at 1, col. 4 (legislative employees used when workers needed in state Senate elections).

76. *See* BALLOT PAMPHLET, *supra* note 3, at 70.

77. *Id.*

78. *See* Zeilenga v. Nelson, 4 Cal. 3d 716, 723, 484 P.2d 578, 582, 94 Cal. Rptr. 602, 606 (1971) (holding that a durational residency requirement was not the least restrictive method of achieving state's objective).

the legislator is no longer in office, the power of incumbency is disrupted. Because this disruption can be achieved through either consecutive term limits or a lifetime ban, the court may find consecutive term limits less onerous, and invalidate Proposition 140's permanent ban.[79]

Although Proposition 140 may be subjected to strict scrutiny under the equal protection clause, the measure will likely survive this challenge. The court will probably find that the state has a compelling interest in restricting the power of incumbents in order to maintain a responsive and responsible government, and that the provisions of Proposition 140 are narrowly tailored to this purpose.

### *D. Due Process*

A challenge to Proposition 140 based upon the due process clause of the fourteenth amendment would most likely be unsuccessful. In order to find a violation of due process, the court must find a deprivation of life, liberty, or property.[80] In *Taylor v. Beckham*,[81] the Supreme Court of the United States concluded that public offices are agencies or trusts, rather than property.[82] In a clear statement of its view, the California Supreme Court has said, "it is well settled that there is no vested right in an incumbent to an office, nor any property right therein paramount to the public interest."[83] In a later case, the same court also held "that public employees have no vested right in any particular measure of compensation or benefits and that these may be modified or

79. *Cf.* SCHABARUM INITIATIVE, *supra* note 2, at 15 (questioning the need for lifelong term limits). Several other questions pertaining to equal protection challenges arising from the application of Proposition 140 include: (1) Will reducing legislative expenditures really reduce the power of the incumbents, or the power of the legislature as a whole? (2) Will the cuts in legislative expenditures cause staff lay-offs and thereby reduce the efficiency and effectiveness of the legislature? (3) Will restrictions on the legislative retirement system discourage from participation any lower-income candidates who cannot afford to provide economic security for themselves and their families?

80. U.S. CONST. amend. XIV, § 1; CAL. CONST. art. I, § 7.

81. 178 U.S. 548 (1900).

82. *Id.* at 576-77.

83. Deupree v. Payne, 197 Cal. 529, 538, 241 P. 869, 873 (1925).

reduced . . . ."[84] From these precedents, it appears that the court will find that there is no property right in holding public office.

### *E. Voting Rights Act*

Proposition 140 may also face a challenge based on a violation of the Voting Rights Act.[85] According to the Supreme Court of the United States, the Voting Rights Act is "aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race."[86] Under the Voting Rights Act, a court will attempt to determine if minority groups are given less opportunity to vote than other members of the electorate and if the denial of the right to vote occurs on account of race or color.[87]

A potential Voting Rights Act argument against Proposition 140 is that the voters at the statewide level have deprived the voters in minority-dominated legislative districts of the right to be represented by experienced legislators of the district's choice.[88] Additionally, it may be argued that the special needs of the minority districts for experienced legislators will cause these districts to bear a disproportionate impact of the term limits.[89]

In opposition to this challenge, proponents of Proposition 140 can argue that all members of the electorate, regardless of race, are equally affected in their choice of candidates because all California legislators are subject to the term limits.[90] Further, proponents of

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84. Butterworth v. Boyd, 12 Cal. 2d 140, 150, 82 P.2d 434, 439 (1938).

85. 42 U.S.C. § 1973 (1988). *See* Lowe v. Kansas City Bd. of Election Comm'rs, No. 90-1041-CV-W-6 (W.D. Mo. Dec. 19, 1990) (1990 W.L. 209974). In December 1990, a consecutive term limit amendment to the city charter of Kansas City, Missouri survived a challenge asserting that the voters at large, through the amendment, deprived voters in minority-dominated districts of the right to be represented by experienced council members of their own choice. *Id.* This challenge was based on the Voting Rights Act, the equal protection clause, and the fifteenth amendment. *Id.*

86. Allen v. State Bd. of Elections, 393 U.S. 544, 565 (1969). The Court held that "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot." *Id.* at 569.

87. *Lowe*, No. 90-1041-CV-W-6 (W.D. Mo. Dec. 19, 1990) (1990 W.L. 209974).

88. *See id.*

89. *See id.*

90. *See id.*

Proposition 140 may posit that the measure does not dilute minority voting strength as the composition of the districts remains unchanged, and that any abridgement of the right to vote is not on account of race or color.[91] Perhaps the most effective rejoinder to the Voting Rights Act challenge is a federal district court's holding in *Lowe v. Kansas City Bd. of Election Comm'rs*,[92] that disproportionate impact within reasonable limits does not violate the Voting Rights Act.[93] The impact of Proposition 140 on minority voters appears benign enough to be reasonable.

## CONCLUSION

Proposition 140 is likely to survive review under the California Supreme Court's current liberal construction of the single subject rule. Although there may be qualitative consequences of Proposition 140, such as a change in the balance of power among the branches of the government, the initiative will survive this review unless certain predicted consequences come to fruition.

As against an equal protection claim, Proposition 140 will probably be subjected to strict scrutiny review because the court will determine that the fundamental right to vote is implicated by the initiative. Proposition 140 might withstand this review because the court will probably conclude that maintaining a responsive and responsible government is a compelling state interest, and that the provisions of Proposition 140 are necessary and narrowly tailored to achieve the objective.

A due process claim will probably fail because the court will follow its precedents and conclude that there is no property right established in holding public office. Finally, Proposition 140 will

91. *See id.*
92. No. 90-1041-CV-W-6 (W.D. Mo. Dec. 19, 1990) (1990 W.L. 209974).
93. *Id.*

likely survive a challenge based on the Voting Rights Act because the impact of Proposition 140 will probably be found to be within reasonable limits of the Voting Rights Act.

*Reed Schreiter*