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Recommended Citation

Smith, Jackson C. J.D., LL.M. () "THORNTON & THE PURSUIT OF THE AMERICAN PRESIDENCY," *Ohio Northern University Law Review*: Vol. 43 : Iss. 1 , Article 2.

Available at: https://digitalcommons.onu.edu/onu_law_review/vol43/iss1/2

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THORNTON & The Pursuit of The American Presidency

JACKSON C. SMITH*

I. INTRODUCTION

The idea that states can impose restrictions on one's qualifications to serve as President of the United States "is contrary to the 'fundamental principle of our representative democracy' embodied in the Constitution"¹ On May 22, 1995, in *U.S. Term Limits, Inc. v. Thornton*,² the United States Supreme Court held that the State of Arkansas's attempt to place term limits on its U.S. Representatives and U.S. Senators was unconstitutional.³ *Thornton* emphasized that, although Arkansas's members of Congress are elected by Arkansans, "when elected, [those members become] servants of the people of the United States."⁴

Thornton noted that members of Congress "occupy offices that are integral and essential components of a single National Government."⁵ That "single National Government" includes the President of the United States.⁶ Absent a constitutional amendment, the qualifications laid out in the Constitution for service in the national government are fixed and cannot be altered by the states.⁷ However, more than twenty years after *Thornton*, American politics continue to be weighed down by the ambivalence of some states to expand *Thornton* to the American Presidency.⁸

II. THE 2016 RACE FOR THE WHITE HOUSE: A SPECTACLE IN THORNTON NONCOMPLIANCE

The pursuit of the American presidency is one of the most captivating facets of American politics. Pursuant to Article II, Section 1, Clause 4 of the U.S. Constitution, in order to serve as President of the United States, one

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1. *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 783 (1995) (quoting Powell v. McCormack, 395 U.S. 486, 547 (1969)).

2. 514 U.S. at 779.

3. *Id.* at 783, 837-38.

4. *Id.* at 837-38.

5. *Id.* at 838.

6. *See id.*

7. *Thornton*, 514 U.S. at 783, 838.

8. *See infra* Part II.A.

must be: (1) a natural born U.S. citizen; (2) thirty-five years old; and (3) a resident of the United States for fourteen years.⁹ As long as these three constitutionally explicit qualifications are met, any man or woman is deemed fit to pursue the office of President of the United States.¹⁰

However, as is evident amidst the enduring 2016 race for the White House, some states have not heeded *Thornton* in terms of the American presidency.¹¹ Rather, these states have read *Thornton* narrowly as only prohibiting the indirect addition of qualifications to the offices of U.S. Representatives and U.S. Senators instead of applying its holding to the office of President of the United States.¹² These maverick states have attempted and have succeeded in indirectly creating additional qualifications that must be met to serve as President of the United States outside of the age, citizenship, and residency requirements explicitly enumerated in the U.S. Constitution.¹³ For example, these states have prohibited dual elections on the same state ballot, so that one cannot simultaneously run for both the presidency and for another federal or state constitutional office.¹⁴ These additional qualifications are handicapping and disqualifying candidates who would otherwise be constitutionally qualified to pursue the White House.¹⁵

With respect to the 2016 U.S. presidential election (both in terms of the primaries and the general election), the states' disregard for applying *Thornton* to the presidency appears to have had a greater effect on the candidates pursuing the 2016 Republican presidential nomination than on the candidates pursuing the 2016 Democratic presidential nomination.¹⁶ This is largely because the major contenders for the 2016 Democratic nomination,

9. U.S. CONST. art. II, § 1, cl. 5.

10. *See id.*

11. *See infra* Parts II, III.

12. *See infra* Parts II, III.

13. *See infra* Parts II, III.

14. *See e.g.*, KY. REV. STAT. ANN. § 118.405 (LEXIS through 2016 Legis. Sess.); FLA. STAT. ANN. § 99.012 (LEXIS through 2016 Sess.).

15. *Compare* KY. REV. STAT. ANN. § 118.405 (LEXIS), *and* FLA. STAT. ANN. § 99.012 (LEXIS), *with* U.S. CONST. art. II, § 1, cl. 5.

16. *See, e.g.*, Adam Beam, *Kentucky GOP Clears Path for Paul's Dual Campaigns*, REAL CLEAR POL. (Mar. 8, 2015), http://www.realclearpolitics.com/articles/2015/03/08/kentucky_gop_clears_path_for_pauls_dual_campaigns_125866.html; Tom LoBianco, *Lawmakers Ice Bill to Let Pence Run for 2 Offices*, INDIANAPOLIS STAR (Jan. 7, 2015, 10:40 AM), <http://www.indystar.com/story/news/politics/2015/01/06/pence-calls-white-house-bill-well-intentioned/21333571/> [hereinafter LoBianco, *Lawmakers Ice Bill*]; Nick Gass, *Arkansas Lawmaker Unveils Bill Allowing Tom Cotton to Run for White House and Senate*, POLITICO (Mar. 11, 2015, 8:35 AM), <http://www.politico.com/story/2015/03/arkansas-white-house-senate-run-tom-cotton-115972.html>; Janet Hook, *Rubio Faces Tough 2016 Choice: To Run for President He Must Quit the Senate*, WALL ST. J. (Dec. 25, 2014, 6:09 PM), <http://www.wsj.com/articles/marco-rubio-must-choose-between-presidential-bid-and-re-election-to-senate-1419542366>.

with the exception of Vermont Senator Bernie Sanders,¹⁷ were former federal or state government office holders.¹⁸ On the other side, a plethora of the top-tier contenders for the 2016 Republican nomination were *current* federal or state office holders.¹⁹ This is not to suggest that in post-2016 U.S. presidential elections some Democrats will not experience hindrances with similar laws in their own pursuit of the American presidency. Nonetheless, within this article I will examine the actions of Kentucky, Florida, Indiana, and South Dakota in their noncompliance with *Thornton* during the 2016 U.S. presidential election.²⁰ Specifically, I will examine the presidential candidacies of U.S. Senators Rand Paul (R-Kentucky) and Marco Rubio (R-Florida), and the hypothetical candidacies of incumbent Indiana Governor Mike Pence (R-Indiana)²¹ and U.S. Senator John Thune (R-South Dakota) as illustrations of how disregarding *Thornton* is unconstitutionally hindering the pursuit of the American presidency.²²

A. Two Categories of Thornton Noncompliance

Two categories characterize the states' noncompliant *Thornton* measures regarding the presidency. First, there are laws that have a blanket prohibition on simultaneously pursuing the presidency and any other office, state or federal, on the same state ballot.²³ Second, there are laws that allow for dual campaigns of a presidential candidacy and another federal office on the same state ballot, but are silent on whether a state officeholder can simultaneously run for president and reelection to his or her respective state office on the same state ballot.²⁴ Either way, these two categories perfectly illustrate noncompliance with *Thornton* by showcasing a few states' failure

17. See generally Dan Merica, *Bernie Sanders is Running for President*, CNN (Apr. 30, 2015, 5:15 PM), <http://www.cnn.com/2015/04/29/politics/bernie-sanders-announces-presidential-run/>.

18. See, e.g., Annie Karni, *Hillary Clinton Formally Announces 2016 Run*, POLITICO (Apr. 12, 2015, 11:21 AM), <http://www.politico.com/story/2015/04/hillary-clinton-2016-election-presidential-launch-116888>; John Wagner, *O'Malley Aiming for Late May Announcement on 'Colossal Undertaking'*, WASH. POST (Apr. 10, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/04/10/omalley-aiming-for-late-may-announcement-on-colossal-undertaking/>.

19. See, e.g., Jeremy W. Peters & Alan Rappeport, *Rand Paul Announces Presidential Run*, N.Y. TIMES (Apr. 7, 2015), http://www.nytimes.com/2015/04/08/us/politics/rand-paul-republican-presidential-nomination.html?_r=0; Ashley Parker & Alan Rappeport, *Marco Rubio Announces 2016 Presidential Bid*, N.Y. TIMES (Apr. 13, 2015), <http://www.nytimes.com/2015/04/14/us/politics/marco-rubio-2016-presidential-campaign.html>.

20. See *infra* Part V.

21. See Jonathan Topaz, *Indiana Gov. Mike Pence Won't Run for President*, POLITICO (May 19, 2015, 5:13 PM), <http://www.politico.com/story/2015/05/indiana-gov-mike-pence-wont-run-for-president-in-2016-118110>. A hypothetical presidential candidacy by Governor Pence, or any future Indiana Governor with White House ambitions, is still a vivid and relevant illustration of how some states' apathy of *Thornton* is unconstitutionally hindering the pursuit of the American Presidency.

22. See *infra* Part V.

23. See *infra* Part II.A.1.

24. See *infra* Part II.A.

to embrace the Framers' intent on uniformed qualifications for one to serve as President of the United States.²⁵

*1. Blanket Prohibition on Pursuing a Dual Campaign for
President and Another Federal or State Office on Same State
Ballot*

Kentucky and Florida are representative of states that only allow candidates to appear on their respective state ballot once, regardless of whether it is for a primary or general election.²⁶ Therefore, both Kentucky and Florida caused Senator Rand Paul and Senator Marco Rubio, respectively, to consider the allure of either seeking another term in the U.S. Senate or taking a chance to become the next President of the United States.²⁷ They could not pursue both positions in hopes of hedging their bets to reign victorious in one of the races.²⁸

Kentucky and Florida's blanket prohibitions required Paul and Rubio to contemplate forgoing another term in the U.S. Senate as sacrifice for a presidential candidacy, even though both Paul and Rubio were otherwise qualified to continue serving as U.S. Senators pursuant to the fixed qualifications listed in the Constitution.²⁹ However, at least for the primaries, the Kentucky GOP gave Paul a temporary reprieve from the restrictions by way of a state caucus that enabled him to continue to test the boundaries of Kentucky's prohibitive dual campaign law.³⁰ Of course, it would have been a different story had Paul become the 2016 GOP presidential nominee.³¹ As for Rubio, he at first decided to forego a reelection bid to the U.S. Senate in favor of pursuing the 2016 GOP presidential nomination, but he subsequently reversed course after he suspended his 2016 campaign for president.³² Nonetheless, not every state that remains ambivalent to extending *Thornton* to the presidency endorses a

25. See *infra* Part II.A.1., A.3; see also *Thornton*, 514 U.S. at 800-01.

26. See KY. REV. STAT. ANN. § 118.405 (LEXIS); FLA. STAT. ANN. § 99.012 (LEXIS).

27. See KY. REV. STAT. ANN. § 118.405 (LEXIS); FLA. STAT. ANN. § 99.012 (LEXIS).

28. See KY. REV. STAT. ANN. § 118.405 (LEXIS); FLA. STAT. ANN. § 99.012 (LEXIS).

29. See KY. REV. STAT. ANN. § 118.405 (LEXIS); FLA. STAT. ANN. § 99.012 (LEXIS); U.S. CONST. art. I, § 3, cl. 3.

30. See Beam, *supra* note 16.

31. See *id.*

32. Matt Berman, *Marco Rubio Won't Run for Senate in 2016 if He Runs for President*, NAT'L J. (Apr. 2, 2015), <http://www.nationaljournal.com/politics/marco-rubio-won-t-run-for-senate-in-2016-if-he-runs-for-president-20140402>; Jeremy W. Peters & Michael Barbaro, *A Distant Second at Home, Marco Rubio Ends a Disappointing Campaign*, N.Y. TIMES (Mar. 15, 2016), http://www.nytimes.com/2016/03/16/us/politics/marco-rubio.html?_r=1; Susan Davis, *Marco Rubio May Decide to Run for Senate Re-Election After All*, NPR (June 16, 2016, 2:43 PM), <http://www.npr.org/2016/06/16/482340933/marco-rubio-may-decide-to-run-for-senate-re-election-after-all>; Marc Caputo & Burgess Everett, *Rubio Blasts Opponents, Trump as He Announces Reelection*, POLITICO (June 22, 2016, 4:09 PM), <http://www.politico.com/story/2016/06/rubio-to-run-for-reelection-in-big-boost-for-gop-224648>.

complete blanket ban on pursuing a dual run for president and another state or federal office.³³

2. Allowance for Dual Campaigns for President and Another Federal Office, But Silent as to State Officeholders

Unlike Kentucky and Florida, South Dakota³⁴ has adopted election laws that endorse a native son or daughter pursuing dual campaigns for president and another federal office, but only for another *federal* office.³⁵ These laws help the likes of U.S. Senator John Thune (R-South Dakota) in pursuing a Senate reelection bid while concurrently exploring a run for the presidency.³⁶ In addition, Indiana also allows for simultaneous ballot appearances by a Hoosier who is both a presidential candidate and a candidate for another federal office, but with a few caveats.³⁷

i. The Hoosier Caveats

Although Indiana permits a dual run for federal office on the same state ballot, if one of those office offices is the presidency, the matter then turns on whether the ballot is for a political party's primary or the general election.³⁸ In the matter of a *primary*, Indiana would allow for a dual campaign for president and another federal office.³⁹ However, seeking the presidency as a respective party's nominee in a *general election* on an Indiana ballot becomes an interesting scenario.

Pursuant to Indiana Code section 3-8-7-19(b), an Indiana state ballot will list the name of the person "who is nominated as a candidate of a political party: (1) for a federal office in a primary election; and (2) for Vice President of the United States during the same year"⁴⁰ In essence, Indiana will condone dual ballot appearances when one is pursuing his or

33. See e.g., ARK. CODE ANN. § 7-8-303 (LEXIS through the 2016 2d Extraordinary Sess., 2016 Fiscal Sess., and 2016 3d Extraordinary Sess. of the 90th Gen. Assembly); IND. CODE ANN. § 3-8-7-19 (Burns', LEXIS through the 2016 2d Sess. of the 119th Gen. Assembly, P.L. 1 215 (end.)); S.D. CODIFIED LAWS § 12-6-3 (LEXIS through all legis. from 2016 Sess. of 91st Legis. Assembly and Supreme Court Rule 16-67).

34. Apparently not learning its lesson from *Thornton* the first time, the Arkansas legislature would also allow dual campaigns for president and another federal office, but remains silent as to a dual campaign for president and another state office. ARK. CODE ANN. § 7-8-303(b) (LEXIS). However, I refrain from mentioning it in this section because Arkansas will receive honorable mention later on with respect to its junior U.S. Senator, Tom Cotton (R), and the 2020 U.S. presidential election.

35. S.D. CODIFIED LAWS § 12-6-3 (LEXIS).

36. See generally Burgess Everett, *Thune: No 'Opening' for a White House Run*, POLITICO (Jan. 14, 2015, 7:28 AM), <http://www.politico.com/story/2015/01/john-thune-114244>; Gass, *supra* note 16.

37. See IND. CODE ANN. § 3-8-7-19 (LEXIS).

38. *Id.*; IND. CODE ANN. § 3-8-7-15 (Burns', LexisNexis through the 2016 2d Sess. of the 119th Gen. Assembly, P.L. 1 215 (end.)).

39. IND. CODE ANN. § 3-8-7-15 (LEXIS).

40. IND. CODE ANN. § 3-8-7-19(b) (LEXIS).

her party's presidential nomination in the primaries.⁴¹ However, should he or she become a party's presidential nominee, the candidate would be out of luck because he or she was named to the top spot on the national ticket instead of being named to the second spot as nominee for vice president.⁴² In this situation, a court order would likely be needed to place the nominee on the ballot.⁴³ Nonetheless, at their core, Indiana's, Arkansas's, and South Dakota's dual campaign laws concern the pursuit of the presidency and another federal office while staying silent on whether state office holders can pursue a dual campaign for president and a reelection bid or separate bid for a different state office on the same state ballot.⁴⁴ However, there were attempts to change Indiana law to allow its current governor and future governors to engage in dual campaigns for president and a possible gubernatorial reelection bid.⁴⁵

The states' aforementioned laws of both categories are restrictions imposed by the states that impede one's path to becoming a candidate for (and possibly serving as) the next President of the United States.⁴⁶ Further, the age, citizenship, and residency qualifications to serve as president are fixed in the Constitution, which has not been amended since the Supreme Court's decision in *Thornton*.⁴⁷ Thus, the only way that qualifications, outside of those listed in the Constitution, can be levied against a potential presidential candidate is by way of constitutional amendment.⁴⁸ Accordingly, the aforementioned states' laws unconstitutionally and indirectly add qualifications to the office of President of the United States that are nonexistent in the Constitution.⁴⁹

III. IMPERMISSIBLE ADDITION OF QUALIFICATIONS FOR THE AMERICAN PRESIDENCY

State laws that are either modeled after or resemble those of Kentucky, Florida, South Dakota, and Indiana simply do not "level the playing field . . .

41. *See id.*

42. *See id.*

43. *See* Beam, *supra* note 16.

44. ARK. CODE ANN. § 7-8-303 (LEXIS); S.D. CODIFIED LAWS § 12-6-3 (LEXIS); IND. CODE ANN. § 3-8-7-15 (LEXIS); IND. CODE ANN. § 3-8-7-19 (LEXIS).

45. *See* LoBianco, *Lawmakers Ice Bill*, *supra* note 16.

46. *See* ARK. CODE ANN. § 7-8-303 (LEXIS); FLA. STAT. ANN. § 99.012 (LEXIS); IND. CODE ANN. § 3-8-7-19 (LEXIS), KY. REV. STAT. ANN. § 118.405 (LEXIS), S.D. CODIFIED LAWS § 12-6-3 (LEXIS).

47. U.S. CONST. art. II, § 1, cl. 5.

48. U.S. CONST. art. V.

49. *Compare* ARK. CODE ANN. § 7-8-303 (LEXIS), *and* FLA. STAT. ANN. § 99.012 (LEXIS), *and* IND. CODE ANN. § 3-8-7-19 (LEXIS), *and* KY. REV. STAT. ANN. § 118.405 (LEXIS), *and* S.D. CODIFIED LAWS § 12-6-3 (LEXIS), *with* U.S. CONST. art. II, § 1, cl. 5.

...⁵⁰ Instead, these laws require qualifications beyond those stipulated by the Constitution, and thus a state law may prevent a person from running for the presidency by restricting simultaneous campaigns for federal offices when the Constitution has placed no such limitation.⁵¹ At the core of the matter, a few states are utilizing these laws to impermissibly and indirectly add qualifications that one must meet to serve as president.⁵² The President does not serve at the will of an individual state legislature, but rather at the will of the United States as a whole.⁵³

The Kentucky, Florida, South Dakota, and Indiana election laws concerning presidential candidacies are vivid examples of states unconstitutionally adding qualifications for service as president, which are nonexistent within the confines of Article II, Section 1, Clause 5 of the U. S. Constitution.⁵⁴ Kentucky and Florida are telling their native sons and daughters, who are potential presidential candidates, that in addition to the requirements stated in the U.S. Constitution, they cannot simultaneously pursue the presidency and another state or federal office.⁵⁵

On the other hand, South Dakota allows dual candidacies for the presidency and another federal office, but remains silent with respect to dual candidacies of a state officer seeking to become president while pursuing another state office on the same state ballot.⁵⁶ Then there is Indiana, who permits a candidate in pursuit of the presidency and another federal office to appear on the ballot twice, but only if it is for a primary (although one may run in the general election for vice president and another federal office).⁵⁷ All of these requirements are additional qualifications indirectly added to those fixed in the Constitution, namely: age, residency, and citizenship.⁵⁸ This clearly contradicts *Thornton* and, again, disavows “the ‘fundamental principle of our representative democracy,’ embodied in the Constitution, that ‘the people should choose whom they please to govern them.’”⁵⁹

50. *Thornton*, 514 U.S. at 921-22 (Thomas, J., dissenting).

51. Compare FLA. STAT. ANN. § 99.012 (LEXIS), and IND. CODE ANN. § 3-8-7-19 (LEXIS), and KY. REV. STAT. ANN. § 118.405 (LEXIS), and S.D. CODIFIED LAWS § 12-6-3 (LEXIS), with U.S. CONST. art. II, § 1, cl. 5.

52. See FLA. STAT. ANN. § 99.012 (LEXIS); IND. CODE ANN. § 3-8-7-19 (LEXIS); KY. REV. STAT. ANN. § 118.405 (LEXIS); S.D. CODIFIED LAWS § 12-6-3 (LEXIS).

53. See *Thornton*, 514 U.S. 779 at 803 (quoting 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 627 (3d ed. 1858)).

54. Compare FLA. STAT. ANN. § 99.012 (LEXIS), and IND. CODE ANN. § 3-8-7-19 (LEXIS), and KY. REV. STAT. ANN. § 118.405 (LEXIS), and S.D. CODIFIED LAWS § 12-6-3 (LEXIS), with U.S. CONST. art. II, § 1, cl. 5.

55. KY. REV. STAT. ANN. § 118.405 (LEXIS); FLA. STAT. ANN. § 99.012(2) (LEXIS).

56. See S.D. CODIFIED LAWS § 12-6-3 (LEXIS).

57. IND. CODE ANN. § 3-8-7-15 (LEXIS); §3-8-7-19 (LEXIS).

58. U.S. CONST. art. II, § 1, cl. 5.

59. *Thornton*, 514 U.S. at 783 (quoting *Powell*, 395 U.S. at 547).

Thornton noted that “the Framers, in perhaps their most important contribution, conceived of a Federal Government directly responsible to the people, possessed of direct power over the people, and chosen directly, not by States, but by the people.”⁶⁰ As Chief Justice Marshall wrote in *McCulloch v. Maryland*,⁶¹ “[t]he government of the Union . . . is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.”⁶² *Thornton* “recognized the critical postulate that sovereignty is vested in the people, and that sovereignty confers on the people the right to choose freely their representatives to the National Government.”⁶³ The American President is included in that national government.⁶⁴

Like the federal representatives and senators, the President of the United States “owe[s] primary allegiance not to the people of a State, but to the people of the Nation.”⁶⁵ The qualifications to serve as President of the United States were understood by the Framers “to be fixed and unalterable . . .”⁶⁶ They are immutable absent a constitutional amendment.⁶⁷

Seemingly, those who desire to engage in dual candidacies while running for president would likely need the help of the courts in ensuring ballot access to the same state ballot.⁶⁸ Specifically, he or she would likely have to seek a court order to be placed on the same state ballot both as a candidate for President of the United States and as a candidate for the other respective office he or she seeks.⁶⁹ Fortunately, the respective court would likely grant the order, because the state preventing an otherwise constitutionally-qualified presidential candidate from appearing on its ballot twice has defied the U.S. Constitution’s plain text on presidential service by indirectly and unconstitutionally adding the qualification that he or she must not be a candidate for another office.⁷⁰ Again, the office of President of the

60. *Id.* at 821.

61. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

62. *Thornton*, 514 U.S. at 821 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 404-05).

63. *Id.* at 794.

64. *See id.* at 803 (quoting *STORY*, *supra* note 53, at § 627) (“Representatives and Senators are as much officers of the entire union as is the President. States thus ‘have just as much right, and no more, to prescribe new qualifications for a representative, as they have for a president . . . It is no original prerogative of state power to appoint a representative, a senator, or president for the union.”).

65. *Id.* at 803.

66. *Id.* at 791, 806.

67. U.S. CONST. art. II, § 1, cl. 5; *Thornton*, 514 U.S. at 792 (quoting *Powell*, 395 U.S. at 540).

68. *See, e.g.*, *Beam*, *supra* note 16 (“If Paul were to win the Republican nomination for president, he would likely need a court order to appear on the ballot twice in November.”).

69. *See id.*

70. *See State ex rel. Johnson v. Crane*, 197 P.2d 864, 867-68 (Wyo. 1948) (quoting *STORY*, *supra* note 53, at § 627).

United States is an office under the Constitution of the United States—not a state constitutional office.⁷¹

Thornton underscored the notion that “[s]tates have no authority ‘to change, add to, or diminish’” those qualifications for president that are already established within the Constitution.⁷² Numerous “courts have determined that States lack the authority to add qualifications” to those already stated in the Constitution.⁷³ The idea of various states enacting a patchwork of restrictions upon the office of President of the United States runs contrary to the Framers’ efforts to establish a uniform national government.⁷⁴ The allowance of these states’ piecemeal approach in adding qualifications to serve as president is parallel to states’ efforts to place extra-constitutional requirements on members of Congress, which the Supreme Court has condemned as “sever[ing] the direct link that the Framers found so critical between the National Government and the people of the United States.”⁷⁵ As long as one is a natural born United States citizen, has reached the age of thirty-five, and has resided in the United States for at least fourteen years, he or she has met the constitutional standing to pursue the office of President of the United States.⁷⁶

When pursuing the American presidency, whether one’s status as a presidential candidate has changed between the primaries and general election, or whether one is also a candidate for another state or federal office is irrelevant.⁷⁷ These indirectly added qualifications to running for the presidency are inconsistent with those exclusively fixed in the Constitution.⁷⁸ As *Thornton* proclaimed, “[i]t is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.”⁷⁹ The presidency is a federal constitutional office that was not intended to be conformed to the desired qualifications of an individual state government.⁸⁰ The only way states can alter the

71. See *Thornton*, 514 U.S. at 803-04 (quoting *STORY*, *supra* note 53, at § 627).

72. *Id.* at 785 (quoting *United States Term Limits, Inc. v. Hill*, 872 S.W.2d 349, 356 (Ark. 1994)).

73. *Id.* at 798 (citing *State ex rel. Chandler v. Howell*, 175 P. 569 (Wash. 1918); *Ekwall v. Stadelman*, 30 P.2d 1037, 1040 (Or. 1934); *Stockton v. McFarland*, 106 P.2d 328, 330 (Ariz. 1940); *State ex rel. Johnson v. Crane*, 197 P.2d 864, 874 (Wyo. 1948); *Dillon v. Fiorina*, 340 F. Supp. 729, 731 (N.M. 1972); *Stack v. Adams*, 315 F. Supp. 1295, 1297-98 (N.D. Fla. 1970); *Buckingham v. State*, 35 A.2d 903, 905 (Del. 1944); *Stumpf v. Lau*, 839 P.2d 120, 123 (Nev. 1992); *Danielson v. Fitzsimmons*, 44 N.W.2d 484, 486 (Minn. 1950); *In re Opinion of Judges*, 116 N.W.2d 233, 234 (S.D. 1962)).

74. See generally *Thornton*, 514 U.S. at 783.

75. See *id.* at 822.

76. U.S. CONST. art. II, § 1, cl. 5.

77. See *Crane*, 197 P.2d at 867-68 (quoting *STORY*, *supra* note 53, at § 627).

78. See *id.* at 867 (quoting *THE FEDERALIST NO. 60* (Alexander Hamilton)).

79. See *Thornton*, 514 U.S. at 831 (internal quotation omitted) (quoting *Gomillion v. Lightfoot*, 364 U.S. 339, 345 (1960)).

80. See *id.* at 785 (quoting *Hill*, 872 S.W.2d at 356).

qualifications to serve as President of the United States is by way of constitutional amendment, which makes their reliance on the Tenth Amendment to the U.S. Constitution futile.⁸¹

IV. THE ILLUSIVE TENTH AMENDMENT

The idea that any given state could indirectly add qualifications for one to serve as President under the auspice of the Tenth Amendment of the U.S. Constitution is unsubstantiated.⁸² Pursuant to the Tenth Amendment of the U.S. Constitution, “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”⁸³ In *Thornton*, the petitioners argued that since there was no explicit prohibition within the Constitution forbidding states from imposing additional qualifications, like term limits, on their U.S. congressional delegation, “the Tenth Amendment and the principle of reserved powers require that States be allowed to add such qualifications.”⁸⁴ However, their argument was rejected by the Court on the grounds that the power to add qualifications was not an original power reserved to the states through the Tenth Amendment.⁸⁵ *Thornton* articulated that “even if States possessed some original power in this area . . . the Framers intended the Constitution to be the exclusive source of qualifications for Members of Congress, and the Framers thereby ‘divested’ States of any power to add qualifications.”⁸⁶ As with members of Congress, the Constitution is the exclusive source of the qualifications to serve as President of the United States, and states are divested of power to add qualifications to those already fixed within the Constitution.⁸⁷

The election of “representatives to the National [Government] was” viewed by the Framers as “a new right, arising from the Constitution itself. The Tenth Amendment thus provides no basis for concluding that the States possess reserved power to add qualifications to those that are fixed in the Constitution.”⁸⁸ This would include the presidency.⁸⁹ The Tenth Amendment only reserves the power that existed before it was enacted, which does not include the states having the power or authority to indirectly add qualifications for service as President of the United States.⁹⁰ As the

81. *See id.* at 838.

82. *See id.* at 802.

83. U.S. CONST. amend. X.

84. *Thornton*, 514 U.S. at 798.

85. *Id.* at 800.

86. *Id.* at 800-01.

87. *Id.* at 790.

88. *Id.* at 805.

89. *See Thornton*, 514 U.S. at 802 (quoting STORY, *supra* note 53, at § 627).

90. *Id.*

revered Justice Story stated, “the states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them. . . . No state can say, that it has reserved, what it never possessed.”⁹¹

Thornton tells how “the Framers envisioned a uniform national system, rejecting the notion that the Nation was a collection of States, and instead creating a direct link between the National Government and the people of the United States.”⁹² One may reasonably conclude that, with respect to the presidency, any power for the states to add qualifications for president would derive “from the delegated powers of national sovereignty.”⁹³ The role of the American President parallels that of a member of Congress, whom the Court has described as “an officer of the union, deriving his powers and qualifications from the constitution, and neither created by, dependent upon, nor controllable by, the states. . . . Those officers owe their existence and functions to the united voice of the whole, not of a portion, of the people.”⁹⁴

Regarding the scope of state power reserved under the Tenth Amendment, Chief Justice Marshall reiterated that “[t]hese powers proceed, not from the people of America, but from the people of the several States; and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument.”⁹⁵ Contrary to what some states believe, they “have no power, reserved or otherwise, over the exercise of federal authority within its proper sphere.”⁹⁶

Thornton did not allow states to impermissibly add qualifications to those fixed in the Constitution with respect to the federal offices of U.S. Representative and U.S. Senator, and it would likely not permit states to indirectly add qualifications to the federal office of President of the United States.⁹⁷ The only way for the states to effect change in the qualifications for President of the United States is to seek a constitutional amendment.⁹⁸ After all, “[c]onstitutional rights would be of little value if they could be . . . indirectly denied.”⁹⁹ Hence, the Tenth Amendment does not provide an avenue for states to impose additional qualifications for the presidency,

91. *Id.* (quoting STORY, *supra* note 53, at § 627).

92. *Id.* at 803 (citing *FERC v. Mississippi*, 456 U.S. 742, 791 (1982) (O’Connor, J., concurring)).

93. *See id.* at 805.

94. *See Thornton*, 514 U.S. at 803 (quoting STORY, *supra* note 53, at § 627).

95. *Id.* at 801 (quoting *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 193 (1819)).

96. *Id.* at 841 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 430).

97. *See id.* at 803-04 (quoting STORY, *supra* note 53, at § 627).

98. *See, e.g., id.* at 838 (“In the absence of a properly passed constitutional amendment, allowing individual States to craft their own qualifications for Congress would thus erode the structure envisioned by the Framers[.]”).

99. *Thornton*, 514 U.S. at 829 (internal quotation omitted) (quoting *Harman v. Forssenius*, 380 U.S. 528, 540 (1965)).

which handicaps those who otherwise would be constitutionally eligible to seek the presidency.¹⁰⁰

V. THE *THORNTON* HANDICAP

Thornton definitively pronounced Section 3 of Arkansas's Amendment 73 as unconstitutional because "it ha[d] the likely effect of handicapping a class of candidate and ha[d] the sole purpose of creating additional qualifications indirectly."¹⁰¹ At its core, the United States federal government is a "government of the people, by the people, for the people . . ."¹⁰² It is not solely a government of the people of Arkansas, by the people of Arkansas, for the people of Arkansas, or for the people of any other respective state for the matter, but is rather a government for the people of the United States as a whole.¹⁰³

Thornton emphasized that "it is inconceivable that the Framers would provide a specific constitutional provision to ensure that federal elections would be held while at the same time allowing States to render those elections meaningless by simply ensuring that no candidate could be qualified for office."¹⁰⁴ The aforementioned laws of Kentucky, Florida, South Dakota, and Indiana have the "avowed purpose and obvious effect of evading" the qualifications listed in the Constitution that are required to serve as President.¹⁰⁵ The obstacles faced by U.S. Senators Paul, Rubio, and Thune and by Governor Pence in their candidacies for the presidency, or hypothetical candidacy in Thune and Pence's case, are prime examples of how these laws are unfairly handicapping our nation's potential, current, and future presidential candidates.¹⁰⁶

A. Kentucky

From day one, Senator Paul was determined to remove all obstacles in his path to securing the 2016 GOP presidential nomination by trying to dispense with Kentucky's arcane election law preventing him from simultaneously running for the presidency and re-election to U.S. Senate on

100. *Id.* at 837.

101. *Id.* at 836.

102. Abraham Lincoln, President of the United States, Gettysburg Address (Nov. 19, 1863).

103. *See Thornton*, 514 U.S. at 837-38.

104. *Id.* at 811.

105. KY. REV. STAT. ANN. § 118.405 (LEXIS); FLA. STAT. ANN. § 99.012 (LEXIS); S.D. CODIFIED LAWS § 12-6-3 (LEXIS); IND. CODE ANN. § 3-8-7-19 (LEXIS); *see Thornton*, 514 U.S. at 837.

106. *See infra* Part V.A-D.

the same Kentucky ballot.¹⁰⁷ Under the auspice of Kentucky Secretary of State Grimes's threat to sue, Paul looked to the Kentucky legislature to pass legislation to repeal the prohibition.¹⁰⁸ Although Paul and his allies found success with the GOP-controlled Kentucky Senate, he and his team lobbied the Democrat-controlled Kentucky House to no avail.¹⁰⁹ Some believed that Paul himself should challenge Kentucky's dual campaign prohibition in court, but a legal challenge was untimely in the age of the permanent campaign, even though Paul and his team thought the law conflicted with federal law.¹¹⁰ In consequence, Paul looked to the Kentucky GOP for a reprieve.¹¹¹

Paul petitioned the Kentucky GOP to hold a caucus instead of a primary.¹¹² Fortunately for him, Paul was awarded his caucus, which enabled him to circumvent state law by appearing only once on the ballot for his reelection bid to the U.S. Senate.¹¹³ Paul's aim was that he "just want[ed] to be treated like many other candidates around the country who ha[d] not been restricted."¹¹⁴ However, had Paul become the 2016 GOP presidential nominee, Kentucky's prohibition against dual ballot appearances would have needed to be resolved.¹¹⁵

The 2016 Kentucky GOP Caucus does not provide a solution to Kentucky's dual campaign situation.¹¹⁶ After all, the caucus was only meant to be a one-time event.¹¹⁷ U.S. Senate Majority Leader Mitch McConnell, Paul's Senate GOP colleague and Kentucky's senior U.S. Senator, affirmed the position that the caucus option was not meant to be granted in perpetuity by stating that he "support[ed] the caucus only if it was a one-time event that Paul would pay for from his campaign account."¹¹⁸

107. Dylan Matthews, *Rand Paul Can't Run for Senate AND President. Here's His Weird Trick for Doing it Anyway.*, VOX (Mar. 9, 2015, 1:30 PM), <http://www.vox.com/2015/3/9/8176043/rand-paul-kentucky-law>; see KY. REV. STAT. ANN. § 118.405 (LEXIS).

108. Jose A. DelReal, *In 2016, it's Rand Paul vs. Alison Lundergan Grimes*, WASH. POST (Dec. 18, 2014, 3:03 PM), <https://www.washingtonpost.com/news/post-politics/wp/2014/12/18/in-2016-its-rand-paul-vs-alison-lundergan-grimes/>; Matthews, *supra* note 107; Beam, *supra* note 16.

109. Matthews, *supra* note 107; Beam, *supra* note 16.

110. Matthews, *supra* note 107; Shushannah Walshe, *Rand Paul Pushes Kentucky Rule Change to Pursue Presidency and Senate*, ABC NEWS (Feb. 16, 2015, 5:47 AM), <http://abcnews.go.com/Politics/rand-paul-pushes-kentucky-rule-change-pursue-presidency/story?id=28955871>.

111. Ashley Killough, *Can Rand Paul Run for Senate and President at the Same Time?*, CNN (Dec. 2, 2014, 12:58PM), <http://www.cnn.com/2014/12/01/politics/rand-paul-dual-runs/>.

112. Walshe, *supra* note 110.

113. Killough, *supra* note 111; Beam, *supra* note 16.

114. Beam, *supra* note 16.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

Kentucky had no solution in the event that Senator Paul became the GOP's presidential nominee.¹¹⁹ If Paul had become the 2016 nominee, "he . . . [would have] likely need[ed] a court order to appear on the ballot twice in November."¹²⁰ Since Paul did not secure the GOP nomination, the conversation has moved to the 2020 presidential election, regardless of which party wins the White House in November 2016.¹²¹

Paul's failure to bring a legal challenge and Kentucky's failure to acknowledge the possibility of future Kentuckians pursuing the presidency leaves those Kentuckians who want to engage in future dual campaigning in political limbo.¹²² No one has a constitutional right to be a candidate for office; however, absent a constitutional amendment, if one satisfies the qualifications for the presidency enumerated in the Constitution, he or she would have standing to run for and serve as president.¹²³ With Kentucky's refusal to extend *Thornton* to a candidacy for president and Paul's hesitation in bringing a court challenge, the state has avoided resolving the issue that will arise when future Kentuckians attempt to pursue the presidency simultaneously with another federal or state office.¹²⁴ A Kentuckian's qualification to serve as President of the United States unconstitutionally remains at the will of Kentucky, instead of the people of the United States.¹²⁵

B. Florida

In his effort to secure the 2016 GOP presidential nomination, U.S. Senator Marco Rubio said that he would not simultaneously seek a reelection bid to the U.S. Senate because pursuant to Florida law, one cannot be on the ballot while simultaneously pursuing two federal offices.¹²⁶ Apparently, the Florida handicap did not personally bother Senator Rubio.¹²⁷ He wholeheartedly agreed with the law's current construct.¹²⁸

119. Beam, *supra* note 16.

120. *Id.*

121. Robert Costa & David Weigel, *Rand Paul Suspends Presidential Campaign*, WASH. POST (Feb. 3, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/02/03/rand-paul-suspends-presidential-campaign/>.

122. Killough, *supra* note 111.

123. *Id.*

124. *See* Matthews, *supra* note 107.

125. *See id.*

126. *See generally* Patricia Mazzei & Amy Sherman, *Marco Rubio, Calling on New Conservative Generation, Launches Presidential Run*, MIAMI HERALD (Apr. 13, 2015, 11:19 AM), <http://www.miamiherald.com/news/politics-government/election/marco-rubio/article18397748.html>; Berman, *supra* note 32; Hook, *supra* note 16.

127. *See generally* Jose A. DelReal, *Marco Rubio Has Some Advice for Rand Paul: Go Big or Go Home.*, WASH. POST (Apr. 13, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/04/13/marco-rubio-has-some-advice-for-rand-paul-go-big-or-go-home/> [hereinafter DelReal, *Advice*].

128. Berman, *supra* note 32.

After announcing his presidential candidacy, Rubio “stressed that he [would] not simultaneously seek re-election to the U.S. Senate while running for president . . . [because it] would ‘diminish [his] ability to succeed’”¹²⁹ Furthermore, he also lamented, “[i]f you’ve decided that you want to serve this country as its president, that’s what you should be running for.”¹³⁰

It appears that Rubio made the decision about a Senate reelection bid on his own accord, which is admirable.¹³¹ The criticisms lodged against those pursuing the presidency while also seeking another federal office are understandable; some critics believe candidates taking this route may appear “selfish” and are “signaling to donors, supporters, and staffers that [the candidate is] hedging [his or her] bets, and (maybe) they should, too.”¹³² However, Rubio’s decision and the stated criticisms do not defeat the fact that Rubio, or any other U.S. Senator who may be facing reelection, was constitutionally able to simultaneously run for president.¹³³ After all, the U.S. Constitution has not been amended to include the qualification that one cannot pursue election or reelection to another federal office while seeking the presidency of the United States.¹³⁴

After suspending his quest for the GOP presidential nomination, Senator Rubio had until May 2016 to file for reelection to the U.S. Senate.¹³⁵ Though Rubio vowed that “he would not try to preserve his options for re-election if [he] chose to seek the White House,” he later reversed course and ran for reelection to the U.S. Senate after suspending his quest for the American Presidency.¹³⁶ Regardless, Senator Rubio should not have been faced with the decision of either pursuing re-election to the U.S. Senate or pursuing the White House.¹³⁷ Florida deprived Senator Rubio of his right to seek reelection as one of Florida’s U.S. Senators, as

129. DelReal, *Advice*, *supra* note 127.

130. *Id.*

131. *Id.*

132. Berman, *supra* note 32.

133. *Id.*

134. Matthews, *supra* note 107.

135. Peters & Barbaro, *supra* note 32; *see also* Sean Sullivan & Katie Zezima, *Presidential Bids by Rubio, Paul Deal 2016 Blow to Senate GOP*, WASH. POST (Apr. 21, 2015), https://www.washingtonpost.com/politics/presidential-bids-by-rubio-paul-deal-2016-blow-to-senate-gop/2015/04/20/7fc7fda6-e44e-11e4-b510-962fcfab310_story.html.

136. Catalina Camia, *Reports: Marco Rubio Jumps into 2016 Presidential Race*, USA TODAY (Apr. 13, 2015, 2:53 PM), <http://www.usatoday.com/story/news/politics/elections/2015/04/13/marco-rubio-president-2016-announcement/21752401/>; *see* Eli Stokols, *Rubio Suspends Presidential Campaign*, POLITICO (Mar. 15, 2016, 10:52 PM), <http://www.politico.com/story/2016/03/rubio-suspends-presidential-campaign-220827>; Caputo & Everett, *supra* note 32.

137. *See* Berman, *supra* note 32.

well as any other Floridian who seeks a future presidential candidacy, while simultaneously running for another office.¹³⁸

Since *Thornton*, there has not been a constitutional amendment passed that alters Rubio's qualifications to seek re-election and continue serving as a U.S. Senator from Florida.¹³⁹ Not everyone who seeks the presidency is successful, as only one person receives the honor to serve as president.¹⁴⁰ Let the people decide on the merits whether Senator Rubio deserves another term in office. It is not Florida's place to outline qualifications for service as the American President.¹⁴¹

C. Indiana

Before the debacle surrounding Indiana's Religious Freedom Restoration Act, many considered Indiana's Republican Governor, Mike Pence, a credible contender for the 2016 GOP presidential nomination.¹⁴² Currently, Indiana law would not have allowed Governor Pence to pursue a gubernatorial reelection bid while at the same time running for president.¹⁴³ Hence, Indiana Republican State Senator Mike Delph introduced legislation to help make it a reality for Governor Pence, or any future governor, to pursue both the Indiana governor's mansion and the presidency.¹⁴⁴ It is important to note that Indiana does allow a candidate to appear on the ballot if he or she is simultaneously pursuing federal offices.¹⁴⁵ Delph's legislation would enable the state-level politicians to hedge their bets with their presidential ambitions.¹⁴⁶

138. *Id.*

139. Matthews, *supra* note 107.

140. See generally Romney Prepared Victory Speech for Election, but Delivered Concession Speech Instead, WASH. POST (Nov. 7, 2012), https://www.washingtonpost.com/politics/decision2012/romney-prepared-victory-speech-for-election-but-delivered-concession-speech-instead/2012/11/07/74dd5b96-28a0-11e2-b4e0-346287b7e56c_story.html.

141. See Killough, *supra* note 111.

142. See generally Adam Wren, *The Week Mike Pence's 2016 Dreams Crumbled*, POLITICO (Apr. 1, 2015), http://www.politico.com/magazine/story/2015/04/mike-pence-indiana-2016-116569.html#_VTmZPCFVikq; Philip Rucker, *Mike Pence Lays Out Vision for a Presidential Campaign. But Will He Be a Candidate?*, WASH. POST (Dec. 12, 2014), https://www.washingtonpost.com/politics/mike-pence-lays-out-a-vision-for-presidential-campaign-but-will-he-be-a-candidate/2014/12/11/0988c650-7cbd-11e4-84d4-7c896b90abdc_story.html.

143. David Sherfinski, *Bill Could Let Mike Pence Run for Indiana Governor and President*, WASH. TIMES (Jan. 2, 2015), <http://www.washingtontimes.com/news/2015/jan/2/mike-pence-run-indiana-governor-president/>.

144. Tom LoBianco, *Bill Would Let Pence Run for Gov, White House in 2016*, INDIANAPOLIS STAR (Dec. 31, 2014, 5:13 PM), <http://www.indystar.com/story/news/politics/2014/12/31/bill-would-let-pence-run-for-gov-white-house-in-2016/21095873/> [hereinafter LoBianco, *Bill Would Let Pence*].

145. *Id.*

146. *Id.*

Indiana is a complete reversal of what Senator Paul faced in Kentucky.¹⁴⁷ Unlike Paul, Governor Pence is a Republican governor with a GOP-controlled legislature.¹⁴⁸ He would be able to sign legislation to help him pursue the 2016 GOP nomination, and potentially pave the way to help future Hoosiers in their candidacies for the American presidency.¹⁴⁹ The same would be true if the roles were reversed and Democrats were in charge of Indiana's government.¹⁵⁰

However, Delph's legislation was ultimately unsuccessful.¹⁵¹ Ironically, this did not seem to be a major priority for Pence.¹⁵² Referring to Delph's bill, Indiana House Speaker Brian Bosma said, "It does not seem to me to be good public policy to give elected officials the opportunity to run for a federal and a state office at the same time, whether it's a legislator running for Congress or a secretary of state running for president."¹⁵³ Governor Pence characterized the bill as "well-intentioned."¹⁵⁴ However, Pence's ambivalence towards the bill and his Republican brethren's outright rejection of the Delph legislation in the GOP-controlled Indiana legislature has caused the handicap of seeking a reelection bid to state office, like the governorship, as an impermissible and unconstitutional additional qualification to serve as President of the United States.¹⁵⁵

Pence had no ambition or political will to ensure the passage of a bill that would not only help him indirectly further down the road in GOP presidential politics, but would also benefit both Democrats and Republicans who would pursue possible presidential runs.¹⁵⁶ Unfortunately, further ambitious Indiana governors looking to hedge their bets in both a presidential campaign and gubernatorial reelection bid remain in political limbo, as the current ban is still in effect.¹⁵⁷ Indiana appears open to the idea that a member of its congressional delegation could simultaneously appear on ballot for both reelection and vice president if he or she is the national party's vice presidential candidate, but not if that person is his or her national party's presidential candidate.¹⁵⁸ There is also the matter of

147. *Id.*

148. Amber Phillips, *In Picking Mike Pence, Donald Trump May Have Just Given Democrats a Boost*, WASH. POST (July 15, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/07/14/donald-trump-just-left-the-indiana-gop-in-limbo/>; Killough, *supra* note 111.

149. LoBianco, *Bill Would Let Pence*, *supra* note 144.

150. Phillips, *supra* note 148.

151. LoBianco, *Lawmakers Ice Bill*, *supra* note 16.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. LoBianco, *Bill Would Let Pence*, *supra* note 144.

157. LoBianco, *Lawmakers Ice Bill*, *supra* note 16.

158. LoBianco, *Bill Would Let Pence*, *supra* note 144.

disregarding the position of Indiana's respective governor and future governors who may want to pursue the presidency while pursuing re-election as governor.¹⁵⁹

Another handicap resulting from these laws is the prevention of a state office holder, like a current state governor, from pursuing the Presidency.¹⁶⁰ On July 15, 2016, Republican presidential nominee Donald Trump named Governor Pence as his running mate on the GOP ticket.¹⁶¹ Consequently, Governor Pence had to forego his gubernatorial re-election bid.¹⁶² It is one thing for Indiana, or any other respective state, to indirectly put standing qualifications on any of its constitutional state offices.¹⁶³ However, it is a completely different story when states try to place additional qualifications on the federal office of President of the United States.¹⁶⁴

D. South Dakota

In early 2014, both South Dakota and national GOP circles began discussing the idea of Senator John Thune making a run for the 2016 GOP presidential nomination.¹⁶⁵ Although he ultimately chose not to run for president, Senator Thune appeared to keep an open mind about possibly pursuing the 2016 GOP presidential nomination.¹⁶⁶ At the time, South Dakota's election law prohibited "a presidential candidate from seeking another office on the same South Dakota ballot."¹⁶⁷ This prohibition was a 2002 GOP-backed law called the "Daschle law," which Democrats claimed was targeting U.S. Senate Majority Leader Tom Daschle (who was considered a potential contender for the Democratic presidential nomination in 2004).¹⁶⁸

159. *Id.*

160. *Id.*

161. Patrick O'Connor, *Donald Trump Chooses Mike Pence as Running Mate*, WALL ST. J. (July 15, 2016, 6:42 PM), <http://www.wsj.com/articles/donald-trump-chooses-mike-pence-as-running-mate-1468594591>.

162. Phillips, *supra* note 148; Joseph Weber & Christopher Snyder, *Gov or VP? Indiana's Pence Has Friday Ballot Deadline*, FOX NEWS (July 11, 2016), <http://www.foxnews.com/politics/2016/07/11/gov-or-vp-indiana-s-pence-has-friday-ballot-deadline.html>; Cristina Marcos, *Indiana Lawmakers Drop Reelection Bids, Will Run to Replace Pence*, THE HILL (July 15, 2016, 12:10 PM), <http://thehill.com/blogs/ballot-box/governor-races/287914-indiana-lawmakers-drop-reelection-to-replace-pence-as>.

163. Killough, *supra* note 111.

164. *Id.*

165. Emily Cahn, *South Dakota Republicans Await Thune's 2016 Decision*, ROLL CALL (Feb. 26, 2014, 11:11 AM), http://www.rollcall.com/news/south_dakota_republicans_await_thunes_2016_decision-231100-1.html.

166. Everett, *supra* note 36.

167. James Nord, *Democrats Criticize Measure to Repeal 'Daschle Law'*, WASH. TIMES (Feb. 6, 2015), <http://www.washingtontimes.com/news/2015/feb/6/democrats-criticize-measure-to-repeal-daschle-law/>.

168. *Id.*

However, despite Senator Thune's hesitation to join the 2016 race for the White House, in 2015 the Republican-controlled legislature moved to ensure that his obstacles to pursuing the presidency, while possibly seeking re-election to the Senate, would be minimized.¹⁶⁹ Essentially, the Republican-controlled South Dakota Legislature wanted to repeal the "Daschle Law" and replace it with the "Thune Law."¹⁷⁰ South Dakota "House Majority Leader Brian Gosch said the 2002 law is 'bad policy.'"¹⁷¹ Furthermore, South Dakota's state Senate Majority Leader Tim Rave argued that the Thune bill "would increase the state's potential political influence."¹⁷² In fact, current South Dakota Governor Dennis Daugaard argued that South Dakota "should seize the opportunity to increase its political influence for candidates from both parties."¹⁷³ In the end, the Thune bill received Democratic support because "both sides had played political games from the beginning."¹⁷⁴ In March 2015, Governor Daugaard signed the Thune bill into law.¹⁷⁵

Whether South Dakota's recent epiphany on ballot access for a simultaneous run for the presidency and another office will maintain any political stability deserves scrutiny.¹⁷⁶ One of the criticisms leveled at the Thune bill was from South Dakota House Minority Leader Spencer Hawley, who observed that the Republican Party was choosing to change the rules now that it controlled all of South Dakota's federal offices.¹⁷⁷ Unfortunately, it was hypocritical for the 2015 GOP-controlled South Dakota state legislature to move on the Thune bill.¹⁷⁸ South Dakota's Republican-dominated legislature seemingly wanted to have its cake and eat it too.¹⁷⁹ As former South Dakota Democratic Party leader Steve Jarding stated, "[t]he arrogance of a party whose electoral success makes them fear

169. *Id.*

170. *Id.*

171. *Id.*

172. *Legislature Passes Repeal of State's So-Called 'Daschle Law'*, KELOLAND TELEVISION (Mar. 5, 2015, 12:10 PM), <http://www.keloland.com/newsdetail.cfm/legislature-passes-repeal-of-states-so-called-daschle-law/?id=176920> [hereinafter *Passes Repeal*].

173. *Governor to Sign Repeal of State's So-Called 'Daschle Law'*, KELOLAND TELEVISION (Mar. 6, 2015, 6:54 AM), <http://www.keloland.com/newsdetail.cfm/governor-to-sign-repeal-of-states-so-called-daschle-law/?id=176949>.

174. *Passes Repeal*, *supra* note 172.

175. *Daugaard Signs Proposal to Repeal So-Called 'Daschle Law'*, KELOLAND TELEVISION (Mar. 12, 2015, 4:37 PM), <http://www.keloland.com/newsdetail.cfm/daugaard-signs-proposal-to-repeal-so-called-daschle-law/?id=177219>.

176. See Nord, *supra* note 167.

177. *Democrats Criticize Measure to Repeal 'Daschle Law'*, KELOLAND TELEVISION (Feb. 6, 2015, 4:22 AM), <http://www.keloland.com/newsdetail.cfm/democrats-criticize-measure-to-repeal-daschle-law/?id=175689>.

178. Nord, *supra* note 167.

179. *Id.*

nothing has brought South Dakota to this point”¹⁸⁰ In talking about his legislative proposal that would eventually lead to the “Thune Law,” South Dakota’s House Majority Leader Brian Gosch reiterated that his legislation was not about Thune “so much as what might happen down the road.”¹⁸¹

Although South Dakota would appear to be the exception for having “evolved” on ballot access measures by allowing one to run for president while simultaneously running for a different office, there is no political stability.¹⁸² As for the Thune bill, yes, a Republican legislature and governor passed the bill to make the presidential path easier for one of its beloved senators, but it is important to remember that a Republican legislature and governor also passed the Daschle bill.¹⁸³ Therefore, it is not that farfetched to think that South Dakota might one day repeal the Thune bill should a Democrat want to pursue the presidency.¹⁸⁴ It is wherever the political pendulum may sway.¹⁸⁵

These laws prohibiting dual appearances on the same state ballot when one is contemporaneously pursuing the presidency and another federal or state office cannot stand.¹⁸⁶ Indirectly, Kentucky, Florida, Indiana, South Dakota, and Arkansas are impermissibly handicapping candidates for President of the United States.¹⁸⁷ Accordingly, as long as presidential candidates, irrespective of running in a primary or general election, comply with the age, residency, and citizenship requirements pursuant to the Constitution, he or she has the ability to seek the highest office in the land.¹⁸⁸

VI. THORNTON BEYOND 2016: LOOK TO ARKANSAS & INDIANA

The 2016 U.S. presidential election will likely not settle the issue surrounding *Thornton*’s application to the office of President of the United States.¹⁸⁹ Therefore, those states that are hesitant about extending *Thornton* to the standing qualifications to serve as president would be wise to look to Arkansas and Indiana for answers on making their dual campaign laws

180. *Id.*

181. *Id.*

182. *See Passes Repeal, supra* note 172.

183. *See Nord, supra* note 167.

184. *See id.*

185. *See id.*

186. *Thornton*, 514 U.S. at 831.

187. *Id.* at 830-31; *see* KY. REV. STAT. ANN. § 118.405 (LEXIS); FLA. STAT. ANN. § 99.012 (LEXIS); Nord, *supra* note 167; LoBianco, *Bill Would Let Pence, supra* note 144.

188. U.S. CONST. art. II, § 1, cl. 5.

189. *See Topaz, supra* note 21; Nancy Cook, *Tom Cotton for President: Chapter One*, NAT’L J. (Mar. 28, 2015), <https://www.nationaljournal.com/s/29335/tom-cotton-president-chapter-one>.

compliant with *Thornton*.¹⁹⁰ Arkansas would be illustrative of how to address those candidates who want to run for more than one federal office simultaneously.¹⁹¹ Indiana would be representative of how to address dual campaigns for those holding state office and looking for a promotion to the White House.¹⁹² The recent conversations and actions taken in Arkansas and Indiana concerning a candidate's appearance on the same ballot would begin to ensure uniformity among the states in extending *Thornton* to the qualifications of the American President.¹⁹³

Looking towards 2020, Arkansas State Senator Bart Hester introduced legislation that would enable Arkansas's U.S. House and Senate candidates to appear simultaneously on the ballot as presidential or vice-presidential candidates.¹⁹⁴ Hester's legislation was termed the "Tom Cotton bill" because it would lend a clearer nominating path to GOP rising star and Arkansas's current junior U.S. Senator Tom Cotton by enabling him to pursue the presidency on the national GOP ticket while simultaneously pursuing a reelection bid to the U.S. Senate.¹⁹⁵ In testimony regarding his legislation before the Arkansas Senate's State Agencies and Governmental Affairs Committee, Hester pointed out that Texas and Wisconsin had both allowed federal officeholders to run for two federal positions and therefore Arkansas "[should] just afford the people of Arkansas the same opportunity some other states [allow]."¹⁹⁶ All states not adhering to *Thornton* should embrace this mindset with respect to their election laws related to the American Presidency.¹⁹⁷

The Tom Cotton bill amended Arkansas's election law to provide that "[a] person may be a candidate for President or Vice President of the United States and United States Senate or United States House of Representatives in the same primary and general election."¹⁹⁸ The successful Arkansas legislation would bring uniformity among the *Thornton* holdout states with respect to addressing simultaneous runs for federal office, including the pursuit of the presidency.¹⁹⁹ Once again, however, this legislation fails to

190. See ARK. CODE ANN. § 7-8-303(b) (LEXIS); LoBianco, *Bill Would Let Pence*, *supra* note 144.

191. ARK. CODE ANN. § 7-8-303(b) (LEXIS); Gass, *supra* note 16.

192. LoBianco, *Bill Would Let Pence*, *supra* note 144.

193. See *id.*; Gass, *supra* note 16.

194. Gass, *supra* note 16.

195. Cook, *supra* note 189.

196. Beth Ethier, *Arkansas Legislators Paving Way for Sen. Tom Cotton to Run for President in 2020*, SLATE (Mar. 11, 2015, 6:05 PM), http://www.slate.com/blogs/the_slatest/2015/03/11/tom_cotton_2020_new_law_would_let_arkansas_senator_run_for_both_senate_and.html.

197. See *id.*

198. ARK. CODE ANN. § 7-8-303(b) (LEXIS); see *Bill Signed Clearing Path for Cotton Presidential Bid*, KTHV (Mar. 27, 2015, 11:04 PM), <http://www.thv11.com/news/bill-signed-clearing-path-for-cotton-presidential-bid/189293992>.

199. Gass, *supra* note 16.

address the idea that one of Arkansas's constitutional state office holders could one day vie for the presidency.²⁰⁰

When Hester's legislation passed the Arkansas state senate in bipartisan spirit, Democratic State Senator David Johnson commented that "[w]hether we are talking about a Democrat or Republican candidate, I think any Arkansan member of Congress should be afforded that opportunity"²⁰¹ "[A]ny Arkansan member of Congress"²⁰² What about an Arkansan who holds state office, like the Governor of Arkansas?²⁰³ According to Hester, after passage in the state senate, Cotton told him that the bill "is good for every Arkansan in the political world to have the same opportunities."²⁰⁴ "Every Arkansan" would arguably include those state constitutional officers who may want to take a jump at the presidency.²⁰⁵ Accordingly, something similar to Indiana's Pence proposal would not only ensure that Arkansas's state constitutional officers, but also other states' constitutional officers, would be able to pursue the presidency along with another election or reelection bid on the same ballot.²⁰⁶

As previously stated, the recent Indiana proposal would have enabled its current Republican Governor Mike Pence to run for president and reelection as governor simultaneously.²⁰⁷ Again, with some minor exceptions, Indiana does allow for simultaneous runs for president and another federal office, but pursuing the American Presidency from the perch of a state office was a different matter.²⁰⁸ Unfortunately, the Pence proposal was introduced and pursued to no avail in the Indiana legislature.²⁰⁹ It would have made Indiana compliant with the U.S. Constitution because, after all, serving as a state constitutional officer (like Governor), being a candidate for a state office, or running for reelection for a state office currently do not appear with the fixed qualifications listed for presidential service and therefore would not serve to disqualify one from pursuing the presidency.²¹⁰

The marriage of Arkansas's Tom Cotton law and the Indiana proposal would ensure that the Framers' intent to have nationally uniform qualifications to serve as president becomes a reality.²¹¹ Regarding the

200. *See id.*

201. Cook, *supra* note 189.

202. *Id.*

203. *See id.*

204. *Id.*

205. *See id.*

206. *See* LoBianco, *Bill Would Let Pence*, *supra* note 144.

207. *Id.*

208. *See* IND. CODE ANN. § 3-8-7-19 (LEXIS).

209. Topaz, *supra* note 21.

210. U.S. CONST. art. II, § 1, cl. 5.

211. THE FEDERALIST NO. 59 (Alexander Hamilton); *see* IND. CODE ANN. § 3-8-7-19 (LEXIS); *see also* ARK. CODE ANN. § 7-8-303(b) (LEXIS).

thought of states deciphering what qualifications suffice to serve as President of the United States, Alexander Hamilton wrote, “[n]othing can be more evident, than that an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy.”²¹² *Thornton* believed that “[p]ermitt[ing] individual States to formulate diverse qualifications for their representatives [in the National government] would result in a patchwork of state qualifications, undermining the uniformity and the national character that the Framers envisioned and sought to ensure.”²¹³ The qualifications to serve as President of the United States are also constitutionally fixed, but, unfortunately, continue to lack national uniformity.²¹⁴

VII. CONCLUSION

In his *Thornton* concurrence, Justice Kennedy stated, “the National Government is, and must be, controlled by the people without collateral interference by the States.”²¹⁵ The idea of states being able to indirectly add qualifications to the office of President of the United States “effect[s] a fundamental change in the [United States’] constitutional framework.”²¹⁶ *Thornton* articulated that “[i]n the absence of a properly passed constitutional amendment, allowing individual States to craft their own qualifications for Congress would thus erode the structure envisioned by the Framers, a structure that was designed, in the words of the Preamble to our Constitution, to form a ‘more perfect Union.’”²¹⁷

The American President serves at the will of the people of the United States at-large—not at the will of individual state legislatures in Kentucky, Indiana, Florida, South Dakota, Arkansas, and so forth.²¹⁸ Unfortunately, in 2016, qualifying to serve as President of the United States remains at the will of a few individual states.²¹⁹ The will of a few state legislatures should not trump the will of the people of the nation as a whole in their right to elect their next president.²²⁰ These states are denying a potential citizen, who would otherwise be qualified under the Constitution, from pursuing the

212. THE FEDERALIST NO. 59 (Alexander Hamilton).

213. *Thornton*, 514 U.S. at 822.

214. See U.S. CONST. art. II, § 1, cl. 5; ARK. CODE ANN. § 7-8-303(b) (LEXIS); FLA. STAT. ANN. § 99.012(2) (LEXIS); KY. REV. STAT. ANN. § 118.405 (LEXIS); IND. CODE ANN. § 3-8-7-19 (LEXIS); S.D. CODIFIED LAWS § 12-6-3 (LEXIS).

215. *Thornton*, 514 U.S. at 841 (Kennedy, J., concurring).

216. *Id.* at 837.

217. *Id.* at 838.

218. See ARK. CODE ANN. § 7-8-303(b) (LEXIS); FLA. STAT. ANN. § 99.012 (LEXIS); KY. REV. STAT. ANN. § 118.405 (LEXIS); IND. CODE ANN. § 3-8-7-19 (LEXIS); S.D. CODIFIED LAWS § 12-6-3 (LEXIS).

219. See Ethier, *supra* note 196.

220. See *Thornton*, 514 U.S. at 837-38.

presidency while also denying the nation as a whole from properly casting their votes for the office of President of the United States.²²¹ Unequivocally, any man or woman who fulfills the presidential qualifications of age, residency, and citizenship should be able to throw his or her hat into the ring.²²² If the states truly desire to see additional qualifications placed on the office of President of the United States, it is their prerogative under *Thornton* to seek a constitutional amendment.²²³

221. See U.S. CONST. art. II, § 1, cl. 5; ARK. CODE ANN. § 7-8-303(b) (LEXIS); FLA. STAT. ANN. § 99.012 (LEXIS); KY. REV. STAT. ANN. § 118.405 (LEXIS); IND. CODE ANN. § 3-8-7-19 (LEXIS); S.D. CODIFIED LAWS § 12-6-3 (LEXIS).

222. U.S. CONST. art II, § 1, cl. 5.

223. See *Thornton*, 514 U.S. at 837-38.