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THE AFTERMATH OF THORNTON

Ronald D. Rotunda*

I. INTRODUCTION

While term limits on state officials are quite common,¹ and raise no serious federal constitutional problems,² term limits on federal legislators are a different matter. In *U.S. Term Limits v. Thornton*³ the Supreme Court, by a narrow 5 to 4 majority, declared unconstitutional an Arkansas law limiting ballot access for incumbent U.S. Senators and Representatives after they had served two terms (in the case of Senators) or three terms (in the case of Representatives).

What next? In considering the aftermath of *Thornton*, a primary question is whether it should be narrowly interpreted. It is interesting to note that the Arkansas law was written as a ballot access law, not as a permanent disqualification from office. It did not incapacitate or prohibit an incumbent from serving in the U.S. Senate for a third term after having served two terms; he or she was only disqualified from being listed on the ballot. During oral argument, counsel for the respondents agreed that the Arkansas law was not a "qualification," an admission that caused Justice Stevens to remark: "That's a major concession."⁴ Conse-

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1. Over 20 state governors now live with them. *Miyazawa v. City of Cincinnati*, 825 F. Supp. 816, 821 (S.D. Ohio 1993). Municipal term limits, which date back as far as 1851, are in effect in approximately 3,000 American cities, including such major metropolises as New York City, Los Angeles, Houston, New Orleans, and Denver. Danielle Farge, *Microcosm of the Movement: Local Term Limits in the United States*, 4 U.S. Term Limits Outlook Series 1 & appendix, 1-16 (No. 2, Aug. 1995). Term limits on state legislators are becoming more common. As of 1994, 16 states imposed term limits on state legislators. Mark P. Petracca, *Restoring "The University in Rotation": An Essay in Defense of Term Limitation*, in Edward H. Crane and Roger Pilon, eds., *The Politics and Law of Term Limits* 57, 57 (Cato Institute, 1994).

2. See, e.g., *Legislature of the State of California v. Eu*, 54 Cal. 3d 492, 286 Cal. Rptr. 283, 816 P.2d 1309 (1991) (rejecting free speech and equal protection claims to term limits imposed on state legislative officials).

3. 115 S. Ct. 1842 (1995), *aff'g sub nom. U.S. Term Limits, Inc. v. Hill*, 872 S.W.2d 349 (Ark. 1994). See Ronald D. Rotunda, *Rethinking Term Limits for Federal Legislators in Light of the Structure of the Constitution*, 73 Or. L. Rev. 561 (1994) (discussing the constitutional issues).

4. *U.S. Term Limits v. Thornton*, 63 U.S.L.W. 3451, 3453 (U.S. Dec. 13, 1994).

quently, Justice Stevens, who wrote the majority opinion, could not simply invalidate the Arkansas law: he had to show that it was really a “qualification.” He concluded that it was a qualification because that was the “true intent” of the people of Arkansas; the law “has the sole purpose of creating additional qualifications indirectly.”⁵

This intent argument raises interesting questions, particularly if the state has several purposes in mind. For example, if another state enacts a ballot access restriction, could a lower court (or the Supreme Court) uphold the law as consistent with *Thornton* if the “true intent” is not solely to impose absolute and permanent term limits but only to level the playing field between incumbents and challengers?

Justice Stevens’ opinion explicitly approved of *Storer v. Brown*,⁶ which upheld a California law that denied ballot access to any Congressional candidate running as an independent if the candidate had voted in the most recent party primary or had registered with a political party during the previous year. Suppose a state law, following *Storer*, provided that a candidate can be listed on the ballot for Senator no more than two elections out of every three. Or assume that a state law provides that if a two-term Senate incumbent remains on the ballot for a third consecutive time, then the incumbent’s party must also nominate a second candidate to run for the same office. The state may be expected to argue that its “true purpose” is to level the playing field between incumbents and challengers, to give voters more choices in candidates, or to compensate for the incumbents’ greater ability to raise campaign funds and their greater name recognition. The state will argue that it did not have the “sole purpose of creating additional qualifications.” Moreover, both of these hypothetical laws affecting ballot access are, like the ballot access restriction in *Storer* (and unlike the law in *Thornton*), a temporary restriction, not a lifetime ban. While Justice Stevens did not explain how the Court would rule on this question, the way he wrote his opinion, with its reference to “true intent,” suggests that *Thornton* will not end the term limit debate.

However, I would like to leave to one side the question whether *Thornton* will be narrowly interpreted by later courts. Instead, let us focus on probable responses to *Thornton* even if the Court eventually decides to invalidate all ballot access laws

5. *Thornton*, 115 S. Ct. at 1871.

6. 415 U.S. 724 (1974).

that may serve to limit congressional terms, even if the law's "sole purpose" is not to create "additional qualifications."

The *Thornton* majority announced that state efforts to impose term limits on federal legislators are unconstitutional because—

allowing the several States to adopt term limits for congressional service would effect a fundamental change in the constitutional framework. Any such change must come not by legislation adopted either by Congress or by an individual State, but rather—as have other important changes in the electoral process—through the Amendment procedures set forth in Article V.⁷

Is it historically correct that "fundamental change in the constitutional framework" must be effected only through the Amendment process? Certainly, one obvious response to the Supreme Court's decision in *Thornton* is to lobby for a constitutional amendment, but that alternative, which is always cumbersome, may not appear to be especially promising in this instance because Congress has already considered and rejected that option.

However, history indicates that some amendments are eventually accepted even though initially rejected. Let us briefly turn to that history and look at two significant ways that the Constitution has been effectively amended, one dealing with the role of the Presidential electors (where there has never been a formal amendment) and the other dealing with the direct election of U.S. Senators (where a *de facto* change in the Constitution preceded what was later formalized as the Seventeenth Amendment). Both examples offer historical insight as to what might happen as the term limit debate moves into second gear.

II. PRESIDENTIAL ELECTORS

Technically, we do not vote for the President or Vice President. We vote for electors, who in turn cast ballots for President and Vice President. I say "technically" because the modern election ballot does not even indicate that one does not really vote for Clinton-Gore, or Bush-Quayle. The names of the candidates for Presidential electors do not appear on the ballot, they con-

7. *Thornton*, 115 S. Ct. at 1871 (citation omitted).

duct no campaigns, and they are really unknown to the electorate.⁸

The framers believed that members of the Electoral College, unencumbered by the voters' preferences, would exercise their judgment to decide who was the best person for the Presidency.⁹ The framers foresaw many things, but they did not clearly foresee how the Electoral College would operate in practice. Political parties quickly developed, and by 1800 the electors began to evolve into agents of the political party. The electors were faceless scribes whose only real job was to ratify what the voters had already decided.¹⁰ In 1826, Senator Thomas Hart Benton acknowledged that the electoral college "has failed" its objective, and that this "is a fact of such universal notoriety, that no one can dispute it." Moreover, he added: "That it ought to have failed, is equally uncontested; for such independence in the electors was wholly incompatible with the safety of the people."¹¹

There have been rare exceptions over the years, but it has long been clear that people expect the electors to act as their agents, not as independent decision-makers. For example, electors pledged for Horace Greeley, the Democratic candidate in 1872, felt obligated to vote for him even though, by the time of the Electoral College vote, Greeley was dead and in his coffin.¹² In *Thomas v. Cohen*,¹³ a New York court held that an elector

8. U.S. Const., Art. II, § 1, cl. 2 provides: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . ." When our country was young, the selection of electors was even more indirect. Some state legislatures directly chose that state's Presidential electors. In other states the voters chose electors by district, rather than the winner-take-all method that is common today. The practice that the people voted for the electors did not become a universal practice until 1860. See *McPherson v. Blacker*, 146 U.S. 1, 28-29 (1892); Stanley Elkins and Eric McKittrick, *The Age of Federalism* 692 (Oxford U. Press, 1993); Alfred H. Kelly and Winfred A. Harbison, *The American Constitution: Its Origins and Development* 168 (W.W. Norton & Co., 4th ed. 1970).

9. See, e.g., Federalist 68 (Hamilton) in Jacob E. Cooke, ed., *The Federalist* 457, 459 (Wesleyan U. Press, 1961); Joseph Story, *Commentaries on the Constitution of the United States* § 745 (Ronald D. Rotunda and John E. Nowak, eds. 1987) (originally published in 1833); *Gray v. Sanders*, 372 U.S. 368, 376 n.8 (1963) ("The electoral college was designed by men who did not want the election of the President to be left to the people.").

10. See *McPherson v. Blacker*, 146 U.S. 1, 36 (1892); Kelly and Harbison, *American Constitution* at 135 n.5 (cited in note 8); Albert J. Rosenthal, *The Constitution, Congress, and Presidential Elections*, 67 Mich. L. Rev. 1, 4 (1968).

11. S. Rep. No. 22, 19th Cong., 1st Sess. 4 (1826).

12. Edward S. Corwin, *The President: Office and Powers 1787-1984* at 385-86 (Randall W. Bland, Theodore T. Hindson, and Jack W. Peltason, eds., New York U. Press, 1984).

13. 146 Misc. 836, 262 N.Y.S. 320 (1933). See also *State ex rel. Nebraska Republican State Central Committee v. Wait*, 92 Neb. 313, 325, 138 N.W. 159, 163 (1912); *Johnson v. Coyne*, 47 S.D. 138, 139, 196 N.W. 492, 493 (1923). In *Thomas*, e.g., the court said: "The services performed by the presidential electors to-day are purely ministerial, notwith-

who pledged to vote for a certain candidate had a *legal* duty to vote for the candidate, and that the court could issue mandamus to force the elector to vote as pledged.¹⁴

Oddly enough, there are some people who are shocked to learn that politicians (such as candidates for Presidential electors) could be forced to keep their promise to the voter, so we can find language in other state court decisions arguing that any attempt to limit an elector's discretion would violate the U.S. Constitution. In 1948, an advisory opinion of the Alabama Supreme Court so argued.¹⁵ It was no accident that the Alabama Court issued its advisory ruling in 1948. It was in that year that one of the most important examples of the faithless elector occurred, when all of the duly elected Democratic electors from Alabama refused to vote for President Truman, the nominee of the Democratic Convention, and instead voted for the Dixiecrat candidate.

Some states, in an effort to prevent a reoccurrence of that situation, and to enact common understanding into law, authorized the party to require its candidates for electors to pledge to vote for the party's nominee. The Alabama Democratic Party, after 1948, exercised state delegated authority and required its electors to sign a pledge to support the Democratic Party nominee. In *Ray v. Blair*,¹⁶ the U.S. Supreme Court held that Alabama could constitutionally permit the party to require Democratic electors to pledge to vote for the Democratic nominee. While upholding the pledge, the majority did not reach the question of how it could be enforced, although the dissent explicitly assumed that the pledge was legally binding.¹⁷

Blair, in upholding the pledge, acknowledged that the electors "are not the independent body and superior characters which they were intended to be," and they "are not left to the exercise of their own judgment."¹⁸ The Court thus relied on the "long-continued practical interpretation of the constitutional

standing the language of the Constitution written over 100 years ago. To read that document with an eye to the language only . . . would mean to hold that our primaries, nominating, campaigning, and voting, are empty gestures." 146 Misc. at 842, 262 N.Y.S. at 326.

14. 146 Misc. at 841-42, 262 N.Y.S. at 326.

15. *Opinion of the Justices, No. 87*, 250 Ala. 399, 400-01, 34 So. 2d 598, 600 (1948).

16. 343 U.S. 214 (1952).

17. *Id.* at 233 (Jackson, J., dissenting) ("It may be admitted that this law does no more than to make a legal obligation of what has been a voluntary general practice.").

18. *Id.* at 228 n.15 (quoting S. Rep. No. 22, 19th Cong., 1st Sess. 4 (1826)).

propriety of an implied or oral pledge of his ballot by a candidate for elector”¹⁹

Blair is interesting because it illustrates how the Constitution can, in effect, be amended without enacting a formal amendment that requires electors to be faithful to their pledge. The states and the state political parties reached that result without ever proposing a constitutional amendment. In the context of term limits, states should be able to authorize candidates running for federal office to volunteer to take a pledge that they will vote for term limits, or serve no more than a set number of terms. A state, by analogy to *Ray v. Blair*, may also be able to authorize a political party to require its candidates to pledge to support enacting term limits by statute, if elected, and to pledge to personally abide by term limits.

III. THE ENACTMENT OF THE SEVENTEENTH AMENDMENT

The process leading to the direct election of U.S. Senators offers a particularly interesting example of how the Constitution was amended *de facto* prior to the actual ratification of the Seventeenth Amendment. Originally the Constitution provided: “The Senate of the United States shall be composed of two Senators from each State, *chosen by the Legislature thereof*, for six Years; and each Senator shall have one Vote.”²⁰ In 1913, the Seventeenth Amendment was ratified; it provided that the voters would elect the Senators directly.

At first blush it might appear to be amazing that the Senate joined the House in 1912 in proposing this Amendment. As early as 1828, the House of Representatives considered a constitutional amendment to provide for direct election of the Senators. The House actually voted in favor of such an amendment in 1893, 1894, 1898, 1900, and 1902.²¹ Each time, the Senate refused, but in 1912 it finally joined the House. Why would the Senators, who had been chosen by their state legislatures, and who had previously never supported direct elections, suddenly change their minds?

19. *Id.* at 229-30.

20. U.S. Const., Art. 1, § 3, cl. 1 (emphasis added).

21. Kelly and Harbison, *American Constitution* at 629, 631 (cited in note 8). While a majority voted in favor of the amendment on each of these dates, the House (prior to 1912) passed the proposed amendment by the requisite two-thirds majority only in 1893 and 1902. See George H. Haynes, 1 *The Senate of the United States: Its History and Practice* 97 n.1 (Houghton Mifflin Co., 1938).

The answer is that by 1912, Senators were already picked by direct election in 29 of the 48 states, notwithstanding the language of Article I. As Senator William E. Borah said in 1911, in support of the Seventeenth Amendment: "I should not have been here [in the U.S. Senate] if it [direct election] had not been practiced, and I have great affection [for this system]."22

The story of how U.S. Senators were selected by direct vote of people at a time when Article I clearly mandated that the state legislatures choose the Senators starts with strong public rejection of the procedure that provided for selection by the state legislature. When choosing the U.S. Senator, members of the state legislatures often were divided. Until this deadlock could be broken, no Senator was chosen. The State was then deprived of representation for a period of time that ranged up to a year or more.²³

Election by the state legislatures also made it easier for candidates to buy elections, since the number of votes needed to be bought were few, and the state legislators voted by open ballot. Major corporations paid Senators stipends, and corrupt political bosses, who could not win an election by the public at large, could more easily win an election by the state legislators.²⁴

It should be no surprise that the U.S. Senate, the product of this corrupt system, would not allow any constitutional amendment to change it. As early as 1874 California and Iowa requested Congress to propose such an amendment, but Congress was unmoved.²⁵ In 1893 and in 1902, two-thirds of the House of Representatives voted for an amendment providing for direct election, but the measure was never even allowed to come to the Senate for a vote.²⁶

The people then turned to primary elections. This "primary" was not binding in a Constitutional sense, because Article I still provided that the state legislature would choose the Senator. But voters in a party primary could register their choice for U.S. Senator, and then urge members of the state legislature of that party to vote for the person who won that election.²⁷ It was

22. 46 Cong. Rec. 2647 (Feb. 16, 1911).

23. See, e.g., Haynes, 1 *The Senate* at 91-95 (cited in note 21).

24. See, e.g., Kelly and Harbison, *American Constitution* at 630-31 (cited in note 8).

25. Haynes, 1 *The Senate* at 97-98 (cited in note 21). For earlier examples of states urging Congress to provide for direct elections of U.S. Senators, see, e.g., Election of United States Senators, H.R. Rep. No. 88, 56th Cong., 1st Sess. 1-2 (1900); Wilkinson Call, S. Doc. No. 236, 55th Cong., 2d Sess. 1, 5 (1898) (requesting Congress to pass legislation ensuring that Senate elections not be left to political forces bribing state legislators).

26. Haynes, 1 *The Senate* at 96-97 (cited in note 21).

27. *Id.* at 99.

in the one-party southern states, with strong party discipline, that voters, in effect, were actually choosing a Senatorial candidate in the special primary election. The state legislators of the dominant Democratic Party would then vote for the candidate who had won the primary.²⁸

States that were not one-party states were, initially, less effective in circumventing the requirements of Article I. More effective reform began in the western states. In 1904 the people of Oregon, by use of the Initiative, created a remedy that would allow the virtual direct election of Oregon's Senators. First, the voters would pick their party's Senatorial candidates in a primary. The people would then vote for their Senator by choosing among the primary winners at a general election. To make the new system work, the voters relied on state legislators taking official, state-sanctioned pledges.

The new state law authorized candidates for the state legislature to sign one of two pledges. In Pledge Number 1, the candidate solemnly pledged to vote—

“for that candidate for United States Senator in Congress who has received the highest number of the people's votes for that position at the general election next preceding the election of a Senator in Congress, *without regard to my individual preference.*”²⁹

In Pledge Number 2, the state legislative candidate promised that, if elected to the state legislature, to—

“consider the vote of the people for United States Senator . . . as nothing more than a recommendation, *which I shall be at liberty to wholly disregard* if the reason for so doing seems to me to be sufficient.”³⁰

The Oregon legislature had to choose a U.S. Senator shortly following the time when the pledge system went into effect. A majority of the state legislators had signed Pledge Number 1, and on the first ballot they picked the candidates that the people had earlier chosen in the general election. In previous instances, the state legislature had often deadlocked for weeks or more. This

28. *Id.* at 99-100. This procedure was not limited to the one party states, but it was less effective in the other states. For example, in 1890 in Illinois, the people in the Democratic party voted for John M. Palmer, and then the state legislature, controlled by the Democrats, selected Palmer. However, the party discipline was not that great, and the legislature was still deadlocked for several weeks before accepting the people's choice. *Id.* at 99.

29. *Id.* at 101 (emphasis added).

30. *Id.*

time, the politicians kept their promise and Oregon, in effect, avoided and bypassed the Article I requirement that the state legislature, not the people should choose Oregon's U.S. Senators.

Two years later, the Oregon legislature again had to choose a U.S. Senator. This time, the people had picked a Democratic candidate, but the legislature was Republican. However, nearly 58% of the legislators had signed Pledge Number 1. The politicians kept their promise: the Republican state legislators promptly voted for the Democratic candidate, because they had promised to vote for the winner of the election.

Other states followed Oregon's example, but went even farther. Nebraska required that *on the official election ballot, next to the names of the candidates for the state legislature, would be printed either—*

“Promises to vote for people's choice for United States Senator”

Or,—

“Will not promise to vote for people's choice for United States Senator.”³¹

Additional states copied the Nebraska system. The promise (or refusal to promise) was printed right on the ballot, just like the candidate's party affiliation is printed on the ballot. Thus, it was easy for the voters to know which candidates would promise to follow the people's desire for direct election to the U.S. Senate.³²

As early as December 1910, so many states followed the Oregon/Nebraska example that 14 of the 30 U.S. Senators whom state legislatures were to select at the next election were already known, although the state legislatures had not even yet begun to convene. In all 14 cases, the people had chosen the Senators by direct election, and the state legislators had bound themselves to respect that choice.³³ By 1912, when the Senate finally approved the Seventeenth Amendment, about 60% of the Senators were already chosen by virtual elections.

31. *Id.* at 103 (quoting 1909 Neb. Laws § 253).

32. Eventually, the Oregon state constitution *required* that the state legislature choose as U.S. Senator the person whom the people had chosen in the direct election. Comment, Garcia, *the Seventeenth Amendment, and the Role of the Supreme Court in Defending Federalism*, 10 Harv. J. L. & Pub. Pol. 189, 208 (1987).

33. Haynes, 1 *The Senate* at 104 (cited in note 21) (citing *Boston Herald* (Dec. 26, 1910)).

IV. CONCLUSION

The experience with Presidential electors and the Seventeenth Amendment is useful in analyzing what might happen to the term limit movement. First, the fact that Congress has not yet proposed a constitutional amendment to mandate term limits does not mean that the dispute is over. Recall that the first effort to propose a constitutional amendment providing for the direct election of U.S. Senators was in 1828. Even though the people supported direct election of Senators by very high margins (rivaling the large margins favoring term limits), it took many years to persuade Congress to propose such an amendment. The effort to amend the Constitution is not a race for the short-winded.

Moreover, failure to amend the Constitution does not mean that reform is impossible. The Electoral College still exists, even though it is almost an historical curiosity. The names of the Presidential candidates, not the electors, are now on the ballots. Some states now require electors to promise to vote for the candidate to whom they are pledged. The faithless elector is a rare, if not extinct, phenomenon, held in disregard. "Faithless," after all, is a pejorative word.

Years before there was a Seventeenth Amendment providing for direct election of U.S. Senators, many states provided for an election, and then required that a statement be placed directly on the ballot indicating whether the state legislative candidate would automatically follow the choice that the voters had made in a direct election for Senator. We should expect term limit proponents to lobby for similar statements on the ballot for U.S. Representative and Senator. Does the candidate pledge to vote for a federal statute and Constitutional Amendment favoring term limits? Does the candidate pledge to abide by term limits?

There is nothing unconstitutional or even unusual about placing such information on the ballot.³⁴ Ballots have listed party membership for years and the experience of the Progressives and their push for the Seventeenth Amendment during the early part of this century demonstrates that pledges are also appropriately placed on the ballot. Like the requirement that the ballot list the name of the Presidential candidate (rather than the

34. The only case where the Supreme Court has prevented the state from placing information about a candidate on the ballot is when the state violates the equal protection clause and places the race of the candidate on the ballot in order "to require or encourage its voters to discriminate upon the grounds of race." *Anderson v. Martin*, 375 U.S. 399, 402 (1964) (state may not require that nomination papers and ballots designate the race of the candidate for elective office).

name of the anonymous electors pledged to him), the requirement that the pledge be on the ballot simply makes easier the voter's job of determining where the candidate stands. Voters then can always cast their ballots against (or for) the candidate who supports term limits.