

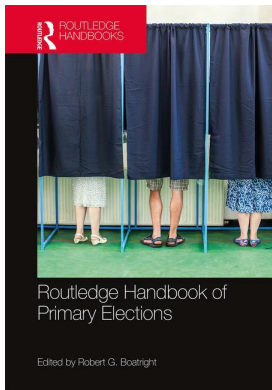
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SORE LOSER LAWS IN PRESIDENTIAL AND CONGRESSIONAL ELECTIONS

Michael S. Kang and Barry C. Burden¹

Sore loser laws – which restrict candidates who lose primaries from running in general elections – are a virtually ubiquitous feature of American politics, but are almost never studied seriously by political scientists or election law scholars. In this chapter, we build on our earlier studies of sore loser laws (Burden, Jones, and Kang 2014; Kang 2011) in two new ways. First, we expand on our findings on the polarizing influence of sore loser laws as applied to congressional and state legislative candidates by looking at the actual incidence of sore loser candidates where they were permitted by law. Second, we survey the state-by-state application of sore loser laws to presidential candidates.

By comparison with general elections, primary elections display greater variety in the rules and processes that govern them across the states. Primaries differ in whether voters must be registered with a party to participate, whether the winning candidate must surpass a threshold to avoid a runoff, and even the date on which the elections take place. Scholars have rightly sought to understand the consequences of these permutations but have largely neglected one aspect of primaries that also affects general elections: the sore loser law.

Sore loser laws make the primary outcome even more important because they restrict candidates who fail to win party primaries from getting ballot access in the general election. The term “sore loser” implies a candidate who is angry at losing a primary and seeks to get back in the game by appearing on the general election ballot as an independent or under a different party’s label. Once a relative rarity, sore loser laws have been steadily adopted over the decades until a version is now in place in almost every state.² These laws are important because they raise the stakes of candidates’ decisions about whether and how to run for office. When a sore loser ban is in place, insurgent and nontraditional candidates face more pressure to run for a major party nomination than as an independent or third-party candidate in the general election. This incentive might help to shore up the two-party system, but it also has the potential to reduce competition and foster party polarization.

Consequences of Variation in State Sore Loser Laws

All sore loser laws restrict candidates who lose party primaries from running in the general election against the party whose nomination they previously sought. However, states impose their restrictions in different ways, some of which are quite circuitous.

When it comes to congressional and most state offices, we have previously reported that nearly every state restricts a primary loser from subsequently filing to run as another party's nominee simultaneously, or as an independent candidate on the general election ballot for the same office in the same election cycle. We reported in 2010 that 15 states specifically disqualified any candidate who has lost a party primary from running in the general election for the same office. Twenty-five other states achieved the same result by effectively prohibiting any primary candidate from running in more than one party primary or running as an independent candidate at all. That is, 40 of 50 states made winning their party's primary election the exclusive route to the general election ballot for primary candidates. Five states opened this door only slightly wider by allowing candidates to cross-file as an independent candidate in addition to a party primary, or to file for more than one primary, but their deadlines required candidates to cross-file well before the elections such that their dual affiliations would be known to the primary electorate. In two other states with nonpartisan primaries only the top two vote-getters proceed to the general election, effectively eliminating sore loser opportunities. In sum, only three states allowed primary losers subsequently to file to appear on the general election ballot as another party's nominee or as an independent.

We have argued that sore loser laws contribute to polarization of the political parties. When combined with ballot access laws that encourage candidates to seek a party's nomination as a means to office, sore loser laws effectively discourage moderate candidates who would have difficulty winning primaries decided by conservative Republicans or liberal Democrats. As a result, theory suggests that nominees who emerge in a system where sore losers are banned will be more ideologically polarized than those who run in a system where sore losers are permitted (Kang 2011).

We found that restrictions on sore loser candidacies contributed to party polarization in Congress and state legislatures (Burden, Jones, and Kang 2014). Taking advantage of the fact that nearly half the states adopted their sore loser laws between 1976 and 1994, we compared the ideological positions of congressional candidates, measured by two different survey sources, in states with and without sore loser laws. We demonstrated that candidates under sore loser restrictions were more ideologically extreme, particularly so for Republicans, such that the gap between Republican and Democratic candidates was about 10 percent greater in states with sore loser laws. We yielded similar results when we compared congressional roll call voting, using NOMINATE data on ideological positions, for legislators in states with and without sore loser laws. We again found that sore loser laws widened polarization between Republicans and Democrats, and that this result survived robustness checks for endogeneity. Whatever benefits sore loser laws might provide, theory and evidence suggest that they contribute to party polarization.

Sore Loser Candidates in Congressional Elections

One question unaddressed in our earlier research is how prevalent sore loser candidates actually are. Although our theory did not require sore losers to actually materialize, the bite of sore loser bans would seem sharper if we see evidence they actually screen out candidates.

We now investigate several years of congressional elections to see if sore loser candidates actually emerge in states that permitted them or somehow sneak through in states that did not permit them. To put this inquiry more starkly, we intend to measure the frequency of two kinds of cases. First are "positive" cases where a candidate who lost a primary in a state that prohibits sore losers nonetheless appears on the general election ballot. Second are "negative" cases where primary losers in states without limitations on sore losers appear on the general election ballot.

If we are interpreting statutes correctly and they are being enforced properly, there should be no "positive" cases. Any candidates who do sneak through a ban would indicate that the statute

does not have the meaning we have ascribed to it or that executives and courts have not noticed or cared about end-runs around the sore loser restrictions.

Expectations about the frequency of “negative” cases are far less clear. On the one hand, we have argued that sore loser bans discourage entry by some candidates who would otherwise run in a party primary if they had assurance in law that they could run in the general election despite failing to win the nomination. The number of such candidates should not be zero because that would suggest that sore loser laws have no impact on who runs, a reality that would be contrary to our theory and the intentions of many state legislators who enacted them. But given the low levels of overall competition in congressional primaries (Ansolabehere et al. 2010; Boatright 2014), we would not expect many sore loser candidates to run in the general election due to the small candidate pool that exists in the primary and the physical, financial, and reputational costs of running again after losing a party nomination.

Because sore loser bans are nearly ubiquitous today, we went back in time to investigate whether sore losers appeared when they were allowed to do so. We chose to analyze several election cycles in the 1970s, the last time that half of the states still permitted sore losers. To avoid the peculiarities caused by redistricting, we analyzed U.S. Senate elections. Due to the staggering of Senate classes, we covered the three consecutive election cycles of 1974, 1976, and 1978 meaning that we have data on every state and all 100 Senate seats.

Tracking down sore loser candidates in elections that took place decades ago is not an easy task, so we adopted a systematic but multifaceted approach to data collection. We began with official election returns from the Clerk of the House of Representatives for a complete record of non-major party candidates who won votes in the general election. We then worked backwards to discern if any of those candidates had run in a Democratic or Republican primary that same year. This information was often available through resources such as the *CQ Guide to U.S. Elections* and the website ourcampaigns.com. These resources were verified and augmented using mostly local newspaper coverage of primary elections.

We acknowledge that party politics in the 1970s were different than the contemporary era because the major parties were more ideologically diverse. The Democrats in particular still contained a large conservative wing based largely in the South (Poole and Rosenthal 2007; Rohde 1991). One might expect more intraparty competition due to the heterogeneity of the party, but there is little evidence that “getting primaried” was more common in the 1970s (Boatright 2013). We nonetheless cannot guarantee that a roll back of sore loser laws in the twenty-first century would have precisely the same impact as it did several decades ago.

As Table 26.1 indicates, of the 100 seats we studied, 52 were up for election in states with sore loser bans while 48 took place in states where sore losers were permitted.³ The average number of major party primary candidates was slightly higher in the sore loser law states (5.9 per seat versus 5.5 per seat), which might suggest that the laws did not deter candidates from running in primaries even though they lacked the opportunity to run in the general election if they

Table 26.1 Sore Loser Candidates in U.S. Senate Elections 1974–1978

Seats Up	Major Party Primary Candidates	Major Party General Election Candidates	Non-Major Party General Election Candidates	Sore Loser Candidates on Ballot	Sore Loser Candidates among Counted Write-In Votes
52 (sore loser laws)	305	98	79	0	1
48 (no sore loser laws)	264	92	75	3	5

failed to win party nominations. The total number of candidates on the general election ballot was indistinguishable between the two kinds of states: 3.4 per state in states banning sore losers versus 3.5 in states that permitted them.

The key finding is that no “positive” sore losers appeared in states where they were banned (as we expected) and a small number of “negative” cases appeared in states where they were permitted. We identified zero such cases in one year, one in another year, and two in another year, for a total of three out of about 48 Senate races, or 6 percent of the time. Thus, when they were permitted, sore losers appeared in about one out of 20 elections.

Sore loser candidates also sometimes received write-in votes in the general election in states where they are officially tallied. Write-in candidates are unique because they may earn votes despite not being listed on the ballot.⁴ In the three election cycles we examined, we found five cases of this in the states without sore loser bans and one case in states with such bans. Although this case does not violate our coding of state laws because we only counted states as having sore loser laws if they prevented primary candidates from appearing on the general election ballot, this seemingly “positive” case deserves some discussion.

The write-in case involved a candidate named Jason Boe, Oregon State Senate President, who ran for the Democratic nomination for U.S. Senate in Oregon in 1974. He lost that primary to former Senator Wayne Morse by just under 10 percentage points. In an extra complication, Morse died two months after winning the nomination. The party’s central committee chose a different candidate (i.e., not Boe) to replace him on the ballot. Boe nonetheless earned 5,072 write-in votes in the general election (totally about .66 percent of the total vote cast). This was not a typical congressional primary.

To ensure that the results were not limited to the Senate, we also explored House elections in two large states. Focusing on two of the same three election cycles – 1974 and 1978 – we collected data on New York (which banned sore losers) and California (which allowed them). We used a similar methodology as above to track down all non-major party candidates who earned general election votes in these two states.

Table 26.2 reports the results. We identified eight “negative” cases out of 78 seats up for election. That is a rate of 10 percent, slightly below the 6 percent rate we calculated in U.S. Senate races during the same era. This higher rate translates to a sore loser candidate in about one out of every ten elections where they were permitted. In the eight New York cases where sore loser candidates ran, five sought the Democratic nomination and then appeared as Liberal Party candidates in the general election while two sought the Republican nomination and then appeared as Conservative Party candidates in the general election, while one ran for both Conservative and Republican nominations and then ran as a Conservative in the general. These particular combinations reflect the uniqueness of political parties in New York that have been shaped in part by the availability of usage of “fusion” tickets, in which multiple parties endorse the same candidate (Scarrow 1986).

Although sore loser candidates are somewhat infrequent, this does not necessarily mean that sore loser laws are unimportant. They might affect candidate behaviors, such as whether/when

Table 26.2 Sore Loser Candidates in California and New York U.S. House Elections in 1974 and 1978

<i>States</i>	<i>Seats Up</i>	<i>Sore Loser Candidates on Ballot</i>	<i>Sore Loser Candidates among Counted Write-In Votes</i>
California (sore loser law)	86	0	0
New York (no sore loser law)	78	8	0

to run and what positions to take, that we cannot easily observe. But there are also some real cases of sore loser candidates running in general elections where they are permitted to do so. Based on our examination of elections from an era when many states lacked sore loser restrictions, about between one in 10 and one in 20 elections with a ban would have seen additional candidates on the general election ballot had the prohibition on sore loser candidates not been in place. Courts and lawmakers need to decide whether the benefits of sore loser bans in congressional elections outweigh the downsides of screening out these additional candidates for office and contributing to partisan polarization.

Application to Presidential Candidates

Although the application and effects of sore loser bans are clear in congressional elections, how they apply to presidential elections is much less clear. Consider one example from the 2016 presidential campaign. Soon after Donald Trump began his campaign for the Republican presidential nomination in the summer of 2015, he suggested he might run as an independent or a minor party candidate if he was not “treated fairly” by the party in the primary process. Even before Trump had participated in the Ohio presidential primary election, Ohio Secretary of State Jon Husted fired back that Trump could not legally make the suggested sore loser run under Ohio law and that Husted would block Trump from making one in his state.⁵ There was a great deal of public argument and uncertainty about whether Ohio’s sore loser law even applied to presidential candidates, but because Trump ultimately won the Republican nomination for president, Husted’s claims and Ohio law were never put to the test.

In fact, it is difficult to determine whether a state’s sore loser law applies to presidential candidates. Why is the legal picture less clear at the presidential level? First, unlike congressional representatives, the party nominee is chosen at the national, rather than state level. Most states hold their own presidential primary elections that decide only the allocation of a state’s respective party delegates in this larger national process. As a result, the eventual party nominee may win the national nomination without winning every single state’s primary election or other selection process. For example, Hillary Clinton and Donald Trump were the 2016 winners of their party primary process despite finishing behind other candidates in a number of states. Clinton won the Democratic presidential nomination by receiving 55.2 percent of the national primary vote and a plurality of party delegates in 34 states, but runner-up Bernie Sanders won primary elections in 11 states and a plurality of party delegates by caucus in another 12 states. Similarly, Republican presidential nominee Donald Trump won a plurality of delegates in 37 states but finished behind another primary candidate in 13 states. Even when Clinton and Trump failed to win a plurality of delegates in a state, they typically were able to win some proportional minority of delegates in the state despite “losing” the state to a rival. The primary is for allocating delegates rather than for selecting candidates directly.

The mismatch between the national scale of the presidential election and the state-limited scope of any state sore loser law complicates the application. State sore loser laws typically restrict primary losers from running in the subsequent general election. But if the intent of sore loser prohibition is to keep a “sore loser” in the primary from getting a second chance at the general election, then it makes little sense to bar a presidential candidate who happens to have lost a state’s primary election but nonetheless went on to win the national party’s nomination from running in the general election. As an example, both Clinton and Trump lost the Oklahoma primary election in 2016 but still won their respective national primary processes and earned their parties’ nomination for the general election. It would be nonsensical for Oklahoma to bar either from the presidential general election as sore losers because they failed to win Oklahoma’s

primary election.⁶ They were losers of the Oklahoma primary, but more importantly, winners of the national nomination process. Express sore loser prohibitions that apply, if at all, against presidential candidates therefore should be limited to those who have failed to win their parties' national nomination, rather than applied generally to losing candidates of any specific state primary. To construe sore loser prohibitions otherwise, a federal district court once explained, "might preclude the ultimate nominee at the [national party] convention from appearing on the general election, if he lost the [state's] primary election" (*Greaves v. Mills*).

Second, while the vast majority of states have sore loser restrictions for most elective offices, those statutes often carve out a special set of different rules for presidential candidates. The result is fewer sore loser restrictions for presidential elections. For one thing, many states do not even hold a primary election at the presidential level. As of 2016, 15 states used caucuses rather than primaries to allocate presidential delegates for at least one of the major parties, even if primary elections are nonetheless used to decide party nominations for other offices.⁷ None of these states attempted to apply sore loser restrictions to caucus losers. In addition, there were two states (Connecticut and New York) that hold presidential primaries but do not have sore loser laws. And five more states held presidential primaries and had sore loser restrictions applicable to congressional candidates that do not apply to presidential candidates, made clear either by statute or court decision.⁸ In sum, there were 22 states (depending on the party) where presidential candidates clearly do not face a sore loser prohibition.

In our judgment, there are 11 other states where the state sore loser restrictions for congressional candidates also appear to apply to presidential candidates. We are not necessarily claiming this as our preferred policy but instead that the sore loser provisions for congressional candidates in these 11 states likely apply to presidential candidates as a matter of statutory interpretation and other applicable law. In seven of these 11 states, either specific statutory language or a court decision makes explicitly clear that the state sore loser restrictions for congressional candidates apply equally to presidential candidates.⁹ In the other four states, the sore loser restrictions appear to apply generally to all elections, even if not expressly specified for presidential elections, and there are no exceptions carved out for presidential elections in the statute.¹⁰ In short, it is reasonably clear that at least 22 states do not have a sore loser prohibition for presidential candidates and at least 11 states do.

Determining sore loser restrictions for presidential candidates in the remaining 17 states is more challenging. In most of these states, the question is whether general sore loser restrictions for congressional candidates apply to presidential candidates despite the fact that the regulation of presidential elections is separated into a distinct statutory chapter, or otherwise differentiated in the code from other elections.

To be specific, 15 of these 17 states break out regulation of presidential elections but in doing so do not specify a sore loser prohibition for presidential candidates. However, these 15 states prohibit sore loser candidacies by candidates for other offices. The question is therefore whether this general sore loser prohibition applies to presidential candidates in the absence of any clarifying language. As an example, Arkansas specifies its conduct of "Elections" under Title 7 of its annotated state statutory code and then "Nominations and Primary Elections" under Title 7, Chapter 7. Within Chapter 7, Arkansas Code § 7-7-204, titled "Candidacy for multiple nominations prohibited," contains Arkansas's sore loser prohibition. It makes clear that a candidate in a party primary shall not be eligible to be the nominee of any other party nor run as an independent or write-in candidate for the same office during the following general election. But Arkansas's process for presidential elections is separated into a different Chapter 8, titled "Federal Elections." Chapter 8 contains no separate sore loser provision that it applies to the presidential election. Careful interpretation of the state's specific statutory language and structure is required to determine whether

Arkansas's sore loser provision under Chapter 7 applies to the presidential elections regulated separately under Chapter 8.¹¹

In our view, four of these 15 states – Delaware, New Jersey, Vermont, and Virginia – have general sore loser restrictions on congressional candidates that do *not* apply to presidential candidates. Although these four states separately regulate presidential candidates, they do not impose specific sore loser restrictions on presidential candidates within that separate regulation, nor is there any statutory indication that the general sore loser restrictions are intended to reach presidential candidates.¹² As one court explained, the sore loser restrictions in these states do not extend to presidential candidates because the separate regulation of presidential elections neither “contains its own ‘sore loser’ provision nor incorporates the provisions found elsewhere in the Election Code.”¹³

By contrast, we think it is fair to infer that the general sore loser restrictions apply to presidential candidates in the remaining 11 states, notwithstanding the fact that regulation of presidential elections is separately codified. In eight of these 11 states, the regulation of presidential elections is separately codified, but the statutory language nonetheless incorporates general restrictions and requirements from the rest of the election code and expressly clarifies that general rules applicable to primary elections apply to the presidential candidates unless otherwise stated.¹⁴ These states thus incorporate their sore loser restrictions into their regulation of presidential elections in some explicit manner. As a result, it appears that these eight states extend their sore loser restrictions to presidential candidates despite the fact that regulation of presidential candidates is separately provided, at least in the absence of an express exception from the sore loser provisions.

In three states – Arizona, Missouri, and Tennessee – there is no explicit incorporation of the sore loser restrictions to presidential candidates, but we believe the state sore loser restrictions are implicitly incorporated to apply to presidential candidates based on the canon *expressio unius est exclusio alterius*. This canon of statutory interpretation provides that the expression of one thing implies the exclusion of all others not expressed. In these three states, the separate regulation of presidential candidates provides expressly for exceptions from general election rules when applied to presidential candidates and elections. For instance, Missouri does not allow a candidate to file as a party candidate for more than one office per election cycle but specifically exempts presidential candidates from this requirement.¹⁵ Missouri, however, makes no such explicit exception for presidential candidates from its sore loser restrictions. Because Missouri makes explicit exception from general election rules for presidential candidates in certain instances, but does not do so for its sore loser restrictions, the implication under *expressio unius* is that Missouri law does not exempt presidential candidates from its sore loser restrictions.

Finally, there are two remaining states where it seems unclear whether state sore loser restrictions apply to presidential candidates: Montana and Rhode Island. Statutory interpretation of the relevant law in these states is especially murky because they do not clarify the applicability of the sore loser restrictions and the statutory language is otherwise ambiguous enough to make imputation one way or the other difficult. Reference to defined terms such as “presidential preference primary” or “independent presidential candidates,” distinct from “primary elections” or “independent candidates” subject to sore loser provisions, makes it hard to tell whether the legislative design includes the former within the sore loser restrictions covering the latter.

The underlying problem, of course, is that the legislative design for sore losers likely did not specifically consider the question of presidential candidates. The applicability of sore loser restrictions even to congressional candidates seems somewhat incidental to the timing of filing deadlines in several states. So it is no surprise that many states do not address the still more esoteric question whether they apply to presidential candidates every four years.

Based on our statutory review, Table 26.3 summarizes sore loser laws across the states as we interpret them. To recap, we estimate that sore loser restrictions apply to presidential candidates in 22 states (marked as CF or SL), do not apply in 26 states (marked as None or Caucus), and may or may not apply in two states (marked as uncertain). We offer no view about these laws' constitutionality and set aside for purposes of this analysis the possibility of a successful constitutional challenge in court. Our final assessment differs considerably from Richard Winger's (2015) conclusion that only two states, South Dakota and Texas, had sore loser laws that apply to presidential primaries. We diverge from Winger's estimate for two principal reasons. The first is that we identify sore loser laws more expansively than Winger. While Winger focuses on express sore loser prohibitions, we include as a sore loser law not only the express prohibitions on sore loser candidacies, but also any combination of cross-filing prohibitions, disaffiliation requirements, and filing deadlines that make it effectively impossible for a candidate to lose a party primary and then subsequently file as an independent candidate or nominee of another party for the general election. For reasons explained in Kang (2011), we believe that such less direct restrictions on sore loser candidacies nonetheless prevent effective sore loser candidacies almost as well as express prohibitions.

Table 26.3 Sore Loser Laws for Presidential Candidates 2016

<i>State</i>	<i>Type of Sore Loser Restriction</i>	<i>State</i>	<i>Type of Sore Loser Restriction</i>
Alabama	CF	Montana	Uncertain
Alaska	Caucus	Nebraska	Caucus
Arizona	CF	Nevada	Caucus
Arkansas	SL	New Hampshire	CF
California	None	New Jersey	None
Colorado	Caucus	New Mexico	None
Connecticut	None	New York	None
Delaware	None	North Carolina	SL
Florida	None	North Dakota	Caucus
Georgia	CF	Ohio	CF
Hawaii	Caucus	Oklahoma	CF
Idaho	Caucus	Oregon	SL
Illinois	CF	Pennsylvania	CF
Indiana	None	Rhode Island	Uncertain
Iowa	Caucus	South Carolina	SL
Kansas	Caucus	South Dakota	CF
Kentucky	Caucus	Tennessee	CF
Louisiana	CF	Texas	SL
Maine	Caucus	Utah	Caucus
Maryland	None	Vermont	None
Massachusetts	CF	Virginia	None
Michigan	CF	Washington	Caucus
Minnesota	Caucus	West Virginia	CF
Mississippi	CF	Wisconsin	CF
Missouri	CF	Wyoming	Caucus

Notes:

CF = cross-filing prohibition

SL = express ban on sore loser candidates

Caucus = caucus state

None = no limitation on sore loser candidates

Second, Winger categorizes a state as not having a sore loser restriction on presidential candidates – even if the law is clearly in the affirmative – when the state has not enforced the restriction against at least one presidential candidate in the past. Winger’s notion of administrative precedent in the application of sore loser laws sensibly acknowledges past administrative practice, but we stick to the statutory text and judicial interpretation of the text in our classifications. It is not clear that a state is legally bound by its previous *administrative* applications of its sore loser restrictions, particularly when many years have passed since the last test of the statute, whatever the normative case for binding the state to its previous practice. A state’s past practice may be probative of the statutory purpose and proper interpretation, but new election administrators have their own interpretations of their state’s regulations that do not necessarily agree with their predecessors’. Indeed, interpretation of these state laws is hardly straightforward, as we would readily admit of our own analysis. As a result, subsequent judicial and administrative interpretations of these laws will not always coincide, even when made in good faith.

A state’s past administration of its sore loser restrictions is therefore not a reliable guide to its future enforcement under what may be quite different circumstances. Not only do new decision makers take office with potentially very different views of state law, but the political circumstances of presidential sore loser candidacies that would trigger the sore loser restrictions are likely to be highly idiosyncratic and salient to enforcement. During the 2016 Republican presidential primaries, primary candidates were pressured to sign a party loyalty pledge that would putatively have required them to support the eventual party nominee. In this context, Donald Trump was repeatedly asked about the possibility that he would run as an independent candidate if he did not win the party nomination, as was widely expected at the time. A Trump sore loser candidacy as then contemplated, splitting the ballot with a mainstream Republican nominee, would have raised the political stakes dramatically for the Republican Party compared to the more typical sore loser candidacy by Lyndon LaRouche in 1992 or Gary Johnson in 2012. The typical sore loser run by LaRouche or Johnson, even Ron Paul in 2008, presents little threat of siphoning off decisive numbers of votes in any state. But Trump’s much greater popularity as a sore loser candidate, had he not won the nomination himself, would have presented a serious threat to the Republican nominee in the 2016 election such that pressure would have been intense on Republican state officials to wield sore loser restrictions to bar Trump. As a consequence, the fact that a state earlier permitted a sore loser candidacy by a fringe candidate, with no chance of disrupting the general election, is no guarantee that the state would similarly permit a sore loser run by a more viable candidate under different political circumstances.¹⁶

Conclusion

Our analysis has provided new insights into the operation of sore loser laws in both congressional and presidential elections in the United States. At the congressional level, we have shown that sore loser bans are now ubiquitous but that they were in place in only half of the states as recently as the 1970s. Examining Senate and House primaries from that earlier period, we found that sore loser candidates did in fact run in general elections between 6 percent and 10 percent of the time when they were permitted. Sore loser laws are thus consequential because they inhibit electoral activity that would otherwise have taken place. At the presidential level, we assessed the applicability of sore loser laws in the states. We discovered substantial ambiguity in statutory language and determined that sore loser bans apply in only about half of the states. The general election activity of primary losers that is generally impossible in congressional elections is thus widely permitted in presidential elections.

Although sore loser provisions are seldom studied by scholars, they are potentially important restrictions that draw tighter connections between primary and general elections. In particular, we contend that they make both types of elections more consequential. A sore loser ban limits the general election to candidates who have won party primaries or who opt to run outside the party apparatus. Because of the endorsement of a party and the ballot line that the party offers in the general election, sore loser laws effectively encourage insurgent and nontraditional candidates to pursue office through a major party in the primary rather than against it in the general. This inconsistency between the two levels of federal elections – not to mention variation that might exist at the state and local level – suggests that lawmakers and scholars ought to give more consideration to the operation of sore loser provisions across the states.

The normative desirability of sore loser laws reflects tradeoffs among a variety of goals and will depend on which of these values gets priority. We have shown here that sore loser laws do squelch electoral competition in general elections to some degree and our previous research showed that they contributed to party polarization. We regard these as real liabilities. But sore loser restrictions might be attractive to those who wish to maintain the dominance of the two-party system, believing that the major parties are the right vehicles for channeling most policy disagreements. There might also be benefits for those who prioritize order and stability in the political system.

Notes

- 1 We thank Evan Crawford and Brian Saling for indispensable research assistance.
- 2 A smaller number of states have laws that require candidates who previously ran under a party label to disaffiliate before running as independents or minor party candidates in subsequent elections (Chamberlain and Klarner 2016).
- 3 We excluded Connecticut and Delaware in 1976 because they did not have conventional primary systems at the time, thus reducing the sample size to 98. However, due to death or retirement, Alabama and Minnesota had both of their Senate seats up for election in 1978, bringing the total back up to 100.
- 4 Some states require write-in candidates to register with the state to earn votes while others will count votes for any candidate whose name is written in. The most notable recent case of a sore loser candidate winning on write-in votes is Lisa Murkowski's 2010 Senate re-election victory in Alaska.
- 5 Paul Singer, "A Trump Independent Run Got Harder Thursday Night, *USA Today*, August 7, 2015; Jeremy Pelzer, "Donald Trump Can't Run as an Independent in Ohio, Secretary of State's Office Says," *Cleveland Plain Dealer*, December 14, 2015.
- 6 The U.S. Supreme Court explained that the state's interest in political stability thus makes less sense in support of a sore loser law applied to presidential candidates. See *Anderson v. Celebrezze*, 460 U.S. 780, 804 (1983) ("The State's interest in regulating a nationwide Presidential election is not nearly as strong; no State could singlehandedly assure 'political stability' in the Presidential context.").
- 7 The caucus states were Alaska, Colorado, Hawaii, Idaho (Democrats only), Iowa, Kansas, Kentucky (Republicans only), Maine, Minnesota, Nebraska (Democrats only), Nevada, North Dakota, Utah, Washington (Democrats only), and Wyoming. Several territories also used caucuses to select delegates.
- 8 The five states are California, Florida, Indiana, Maryland, and New Mexico. Kentucky also would fall into this category when it holds primary elections.
- 9 The seven states are Illinois, Louisiana, Michigan, North Carolina, Ohio, Oklahoma, and Texas.
- 10 The four states are Oregon, Pennsylvania, South Dakota, and Wisconsin.
- 11 We ultimately classify Arkansas as applying its sore loser law to presidential candidates. See below.
- 12 For one complicated example, New Jersey prohibits a general election candidacy by "a candidate who unsuccessfully sought nomination of a political party to that office in the primary election held in the same calendar year." N.J. Stat Ann. § 19:13-8.1. However, New Jersey law refers to presidential candidates for the general election not as nominated by "primary election" but instead as "nominated by the political parties at state convention," N.J. Stat Ann. § 19:13-1, which arguably exempts presidential candidates from the aforementioned sore loser prohibition.
- 13 *Anderson v. Hooper*, 498 F.Supp. 898, 903 (D.N.M. 1980) (interpreting New Mexico's similar statutory language and structure).

- 14 The eight states are Alabama, Arkansas, Georgia, Massachusetts, Mississippi, New Hampshire, South Carolina, and West Virginia.
- 15 Mo. Ann. Stat § 115.351.
- 16 A good example of just such a state change in position is Tennessee Secretary of State Tre Hargett's insistence in 2016 that his state's sore loser law would prevent a general election candidacy by Trump. See Mary Troyan, "Some Question Whether Tenn. 'Sore Loser' Law Would Affect Trump Independent Bid," *USA Today*, Feb. 18, 2016. The state of Tennessee actually had permitted Gary Johnson's sore loser candidacy just four years earlier in 2012, but Hargett's office dismissed that previous position as an anomalous result from "minor party litigation."

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