

Sore Loser Laws and Democratic Contestation

MICHAEL S. KANG*

TABLE OF CONTENTS

INTRODUCTION	1014
I. THE MAJOR POLITICAL PARTIES AND IDEOLOGICAL POLARIZATION: CONSTITUTIONAL LIMITATIONS ON PARTY REFORM FROM THE DEMAND SIDE	1019
A. IDEOLOGICAL POLARIZATION BETWEEN THE MAJOR PARTIES	1019
B. A DEMAND-SIDE APPROACH TO MAJOR PARTY POLARIZATION	1025
II. INTRAPARTY POLITICS AND DEMOCRATIC CONTESTATION: THE OPPORTUNITY FOR PARTY REFORM FROM THE SUPPLY SIDE	1030
A. DEMOCRATIC CONTESTATION INSIDE THE MAJOR PARTIES	1030
B. THE OPPORTUNITY FOR PARTY REFORM FROM THE SUPPLY SIDE	1037
III. SORE LOSER LAWS	1042
A. SORE LOSER LAWS: AN INTRODUCTION	1042
B. SORE LOSER LAWS V. DUVERGER’S LAW	1048
C. SORE LOSER LAWS AS A STATE LAW TRUMP OVER POLITICAL COMPROMISE	1053
IV. A SUPPLY-SIDE APPROACH TO PARTY REFORM	1058
A. REPEAL OF SORE LOSER LAWS AS PARTY REFORM	1058
B. SORE LOSER CANDIDACIES: WHAT THEY MEAN AND WHY THEY ARE DIFFERENT	1063
C. RETHINKING BALLOT ACCESS IN INTRAPARTY TERMS	1071
CONCLUSION	1074

* Associate Professor, Emory University School of Law. © 2011, Michael S. Kang. Many thanks for comments on earlier drafts to Barry Burden, Julie Cho, Chris Elmendorf, Deepthy Kishore, Hillel Levin, Lori Ringhand, and Richard Winger. Thanks also to Amy Flick, Zack Crawford, Stephanie Grace, Madeline Gwyn, Mark Johanson, and Carl Marchioli for excellent research assistance.

INTRODUCTION

In all but three states today, sore loser laws of different permutations prevent a losing candidate in a party primary election from subsequently filing to run as a listed candidate in the general election as the nominee of another party or as an independent candidate. The near omnipresence of sore loser laws is typically assumed to be a stable feature of twentieth-century politics, but their spread across the United States is surprisingly recent. As late as 1985, about half the states had a sore loser law or a functional equivalent that prohibited losing candidates in a party primary from appearing on the ballot in the general election.¹ By 2007, however, almost every state had enacted one.² Although sore loser laws now have become a nearly ubiquitous feature of election law, they have thus far received almost no attention, even from practicing lawyers and scholars who specialize in the field.

Sore loser laws reveal the possibilities for a different approach to a problem that party reformers have attacked unsuccessfully for more than a decade: major party polarization. Over the last couple decades, the major political parties have become increasingly polarized from an ideological standpoint. To put it simply, Democrats have become more uniformly liberal, while Republicans have become more uniformly conservative, to degrees that many commentators and political activists find troubling. Politically moderate candidates who challenge the party base and defy party orthodoxy are for better or worse filtered out of the system by the major parties, even if and when they are the candidates who appeal most to the median voter in the general electorate. Moderate candidates have difficulty surviving the party primary election, which is usually controlled by activists and voters representing the ideologically extreme demands of the party base.³

Accordingly, the main reform response to party polarization has approached the problem from the demand side of the major parties. That is, reformers in several states have successfully expanded voter eligibility in party primaries to include not only party members, but also independent voters and even members of other parties. The shift from closed primaries that allow only party members to vote in those states' primary elections to open or semi-open primaries dilutes the voting power of the party base in the primary, and it allows more moderate candidates to compete against more ideological party favorites. The fatal problem with this approach, however, has been constitutional. Courts have struck down these state law manipulations of the primary franchise as intrusions on the parties' associational rights of self-determination and expression in the "basic

1. See DAVID E. PRICE, BRINGING BACK THE PARTIES 128–29 (1984); Kay Lawson, *How State Laws Undermine Parties*, in ELECTIONS AMERICAN STYLE 240, 249 (A. James Reichley ed., 1987).

2. See *infra* Table 1; see also Troy K. Schneider, Op-Ed., *Can't Win for Losing*, N.Y. TIMES, July 16, 2006, at O13.

3. See SETH E. MASKET, NO MIDDLE GROUND: HOW INFORMAL PARTY ORGANIZATIONS CONTROL NOMINATIONS AND POLARIZE LEGISLATURES 9 (2009) (asserting that party activists "seek the most ideologically extreme candidate they feel they can get elected").

function of a political party,'—by opening it up to persons wholly unaffiliated with the party."⁴

What is missed in the alarm about party polarization and associated reform efforts from the demand side is that there may be an alternative approach to addressing party polarization from the *supply* side.⁵ A supply-side approach looks to the regulation of the supply of candidates to the general election, rather than the demand side of which citizens are eligible to vote. Loosening ballot access restrictions that regulate the supply of candidates in the general election might give greater leverage and exit options to more moderate party candidates who tend to be vetoed by the party base in primary elections. What is more, a supply-side approach is unlikely to encounter the constitutional difficulties that doomed attempts to open up the party primaries from the demand side. Instead, a supply-side approach, at least the intervention suggested here, would reduce party polarization by *repealing* election regulation, rather than imposing more.

I argue that sore loser laws can and should be repealed as a supply-side response to party polarization. To explain why sore loser laws contribute to party polarization, my argument here proceeds in four parts. First, sore loser laws interact with a larger background of election law regulation that advantages the major parties over minor parties and independent candidates. The basic structure of winner-take-all elections for virtually every federal and state office produces a natural tendency toward two major parties and discourages the development of a third party in American politics. What is more, ballot access laws grant virtually automatic ballot access to the major parties while conditioning ballot access for other candidates on showing of public support. The result is that virtually all serious candidates for high public office seek the nomination of a major party in the primary election as a first course. Doing otherwise not only forgoes the possibility of the major instrumental advantages that come with a major party nomination, but also signals in almost every case a disloyalty to the party or lack of seriousness that can be fatal for a candidacy.

Second, the irresistible political incentive to seek a major party nomination works in concert with sore loser laws to ensure that the party primary is the only real gateway to the general election ballot. Although all serious candidates may seek the major party nomination, only one candidate wins the party primary. The losing candidates, in turn, are effectively barred by a sore loser law from running in the ensuing general election. This is true even though the candidate

4. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 581 (2000) (citation omitted).

5. I borrow the term "supply side" from DAVID T. CANON, *RACE, REDISTRICTING, AND REPRESENTATION: THE UNINTENDED CONSEQUENCES OF BLACK MAJORITY DISTRICTS* (1999). In the context of redistricting, Canon describes his supply-side examination of majority-minority districts as focused on "the supply of candidates—how individual politicians respond to the changing electoral context imposed by new district lines and how, in turn, their decisions shape the electoral choices and outcomes in a given district." *Id.* at 3. Similarly here, I consider the regulation of party politics from the supply side by focusing on sore loser laws that restrict the supply of candidates from the primary elections into the general election.

by then may have built up a realistic chance of winning if permitted to run a sore loser candidacy against the major party nominees in the general election. The result is that the sore loser law obstructs the exit from the party of even candidates who have been rejected by the party.

Third, the channeling of all serious competition through the major parties locks intraparty dissent into the parties. Parties contain a diversity of viewpoints, interests, and conflicting visions for the parties' proper direction. Although parties represent a commitment among the roughly likeminded to work together, they are merely strategic alliances that work only when political leaders and citizens who disagree on many issues nonetheless find sufficient agreement on a sufficient number of important issues that they find it advantageous to coordinate. The emergence, and more importantly, the maintenance of a healthy political alliance that claims the allegiance of many leaders and citizens requires a great deal of negotiation and compromise among strong-willed, ambitious people with divergent views about politics and government.

A primary election is a critical moment when the different elements of a party vie for control, but winners and losers emerge who must be brought back together if the party is to cohere and succeed going forward. Winners must compromise sufficiently with losers essential to the party's efforts or risk losing their support. However, the sore loser law ensures, through strength of state law, that the primary election is a winner-take-all affair in every sense by disabling the losing candidates. The sore loser law removes the most potent threat from losing primary candidates—the option of splitting the party coalition by challenging the winner in the general election.

Fourth, as a consequence, repealing sore loser laws would give centrist candidates new leverage within their parties and induce ideological compromise toward the political center as a result. Party polarization occurs because the party voters with more extreme ideological preferences control their party primaries and elect more extreme candidates as the major party nominees. Party voters screen out more moderate candidates, who have no recourse under sore loser laws other than to become more ideologically extreme in pursuit of primary success. In the absence of a sore loser law, however, party dissenters can threaten a sore loser run that should worry the party's nominees about splitting the base during the general election. As a result, a repeal of sore loser laws should encourage party leaders and party nominees to reach effective compromises with important dissenting elements within the party to stave off these threats. If they do not, then moderate candidates who cannot survive the primary are free to challenge the major party nominees from the political center in the general election.

Of course, sore loser laws are duopolistic as well. They preclude the best prospects for a challenge to the major party nominees by credible candidates with loyal constituencies of their own. Intraparty factions frustrated by their parties carry with them the best chances for the birth of a successful third party. Talented officials and activists, particularly those with past successes to their

credit, almost always have worked first within one of the major parties. If they broke away to form a third party, they would bring name recognition, experience, credibility, and resources to their new enterprise. However, sore loser laws prevent major party dissidents from breaking off to join a new party, even for the short term, and ensure that a third-party challenge can come only from entirely outside the major parties. Regulation can thus guarantee that minor parties are composed primarily of politicians and activists from the fringe, without the experience and talent of the major parties, and often without serious ambitions of challenging the major parties electorally.

What has gone almost unnoticed is the effect of ballot access restrictions, such as sore loser laws, on the internal politics of the major parties themselves. Any scholarly attention to ballot access has been focused on minor parties and the interparty competition they might offer the major parties. This focus follows from the faith among election law scholars that partisan competition can serve as a structural means of addressing far-reaching and diverse problems in election law. Provided the background rules of politics are set appropriately, political parties seeking to win elections possess the proper motivation to meet public preferences and compete to the benefit of the median voter to satisfy demand-side incentives. The focus on interparty competition, though a paradigmatic advance in election law, gives short shrift to the necessary conditions of competition *within* important political groups, most prominently the major parties themselves. By underemphasizing heterogeneity and conflict within the major parties, the election law scholarship correspondingly underemphasizes the importance of intraparty competition in promoting genuine deliberation—problems traditionally seen as matters of interparty competition might be better reframed as intraparty affairs.

Along these lines, the broader significance of sore loser laws is ultimately their threat to healthy, dynamic intraparty politics within the Democratic and Republican parties. The ideological tradeoffs made by a major party are the sum of complex intraparty politics among a diverse set of interdependent political actors, each striving for a slightly different vision and agenda. Parties serve a critical functional role in democracy by aggregating preferences and providing means of representation and accountability. But it is a mistake to think parties serve this mediating role for large numbers of citizens by emerging naturally from political agreement among so many. For parties to fulfill the democratic function of coordinating a large swath of leaders and citizens with a wide range of preferences, intraparty competition must be a dynamic political process in which one faction's leverage over the power of state law ought not trump the rest of the party coalition by fiat. To the extent that the ideological position of the major parties is internally resistant to change, by operation of a sore loser law or otherwise, the parties lose a capacity to adapt and respond to voter preferences in keeping with the aspiration of robust partisan competition. Protecting robust democratic contestation within the parties from suppressed dissent and party uniformity through force of state law should be the overarch-

ing concern and is more important than whether the parties are too moderate or too extreme at the particular moment.

This Article thus connects sore loser laws to a theory of democratic contestation that I have introduced in earlier work. A theory of democratic contestation takes as its core democratic value the basic competitive process among leaders to present the mass public with meaningful choices about what they want from government and the way they think about politics.⁶ This competitive process can be undercut by sore loser laws that allow the major parties to control candidates' ability to reach the wider public through restriction of the general election ballot. Sore loser laws not only allow the parties to deny attractive candidates and choices access to the general election, but just as importantly, they also give critical leverage to entrenched party leaders and voters who can enforce party orthodoxy on dissenters in what should otherwise be competitive, active democratic contestation within the major parties. This Article therefore applies a theory of democratic contestation to the fundamental institutions of American democracy—its major political parties.

In Part I, I explain the perceived problem of major party polarization and how party reform has tried to remedy it from the demand side. I describe attempts to open up the franchise in party primary elections to nonmembers and the constitutional challenges that have crippled those attempts. The U.S. Supreme Court has made clear that state attempts to moderate the major parties, against their objection, by forcing more moderate voters into their primaries are unconstitutional infringements on the parties' associational rights under the First Amendment.

In Part II, I begin to sketch out a supply-side approach to the problem of major party polarization. The major parties are diverse, heterogeneous coalitions that feature intense internal disagreement about the best directions for their collective efforts. I explain how this intraparty disagreement and conflict should serve as healthy democratic contestation that ensures the responsiveness and adaptability of the major parties. I then suggest that party polarization may be symptomatic of a breakdown in intraparty democratic contestation that results in the internal dominance of more ideologically extreme elements in the party. I argue that ballot access laws play an important role in structuring intraparty politics by regulating the supply of candidates to the electorate. Ballot access laws therefore might be partially to blame for major party polarization, and party reform might be more successful by looking to adjust appropriately these ballot access restrictions on the supply of candidates.

In Part III, I introduce sore loser laws and explain the role that these overlooked regulations of ballot access play in encouraging party polarization. Sore loser laws are a reasonably new feature of state election law and now deny party dissenters the ability to exit the party following the primary in almost every state. By frustrating the ability of serious politicians to reach the ballot

6. See Michael S. Kang, *Race and Democratic Contestation*, 117 YALE L.J. 734, 738 (2008).

outside the major parties, sore loser laws stifle intraparty dissent. Moderate dissenters must toe the party line and win the support of the ideological base of voters and leaders in closed primaries if they hope to reach the general election ballot as candidates.

In Part IV, I propose the repeal of sore loser laws as a supply-side approach to reform. I argue that the repeal of sore loser laws would force important elements of each major party, whether victorious or not in primary elections, to compromise if their parties are to continue as effective political coalitions going forward. In the absence of sore loser laws to bind together different elements of each party by force of law, each party would need to maintain its coalition by striking ideological and other political compromises sufficient to dissuade dissenters in the party from exiting.⁷

I. THE MAJOR POLITICAL PARTIES AND IDEOLOGICAL POLARIZATION: CONSTITUTIONAL LIMITATIONS ON PARTY REFORM FROM THE DEMAND SIDE

The two major parties, the Republicans and Democrats, are pervasively involved in nearly every aspect of American politics and government, and they have become more ideologically polarized over the last fifty years. The Republicans are more uniformly conservative, and the Democrats more uniformly liberal. Although the major parties have electoral incentives to produce centrist candidates, they have increasingly chosen more ideologically extreme candidates and forced voters to choose between polarized alternatives.

The reform response has approached the problem of major party polarization from the demand side. States have required the parties to permit independents and sometimes members of other parties to vote in their party primary elections. These reforms would have changed the ideological demands of the party from its candidates by diluting the voice of voters from the party base. However, for this very reason, courts have struck down such laws that inject nonmembers of the party into this “basic function of a political party.”⁸

A. IDEOLOGICAL POLARIZATION BETWEEN THE MAJOR PARTIES

The major parties have become ideologically polarized because party leaders and voters have very effectively enforced ideological discipline on candidates through party primary elections. Many political scientists have documented the increasing polarization of the major parties over the last fifty years—Republican candidates have become more uniformly conservative, while Democratic candi-

7. See generally Terry Smith, *A Black Party?* Timmons, *Black Backlash and the Endangered Two-Party Paradigm*, 48 DUKE L.J. 1 (1998) (discussing the political value of partisan exit as a means of influencing a party coalition).

8. *E.g.*, *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973) (“A prime objective of most voters in associating themselves with a particular party must surely be to gain a voice in that selection process.”).

dates have become more uniformly liberal since the 1960s,⁹ despite evidence that the electorate has not undergone a similar shift in ideological predisposition.¹⁰ Samuel Issacharoff explains that Republican positions in Congress are now twice as distant from Democratic positions as they were forty years ago.¹¹ The major parties have gravitated toward the ideological extremes as a result of many factors in American politics, but the question for legal scholars and reformers concerned about polarization has been the role of election law in contributing to it and as a key part of a reform strategy to reverse it.

Party leaders typically want primary elections to be closed, or limited to voters who register publicly with the party.¹² This exclusivity produces a nominee who shares in the general principles that the party leaders have developed publicly as the party's foundation. In the Supreme Court's words, nomination of candidates is when the party "select[s] a 'standard bearer who best represents the party's ideologies and preferences.'"¹³ Those who truly share the party's general orientation want to participate in this basic function of a political party because it helps determine how the Republican or Democratic Party defines itself and what types of candidates emerge. Nonmembers are those who either did not care enough to participate in past primaries or chose instead to participate in another party's primary.

Party primaries therefore produce ideological bias relative to the general electorate.¹⁴ The primary election is decided by party members who tend to be

9. See ALAN ABRAMOWITZ, *THE DISAPPEARING CENTER: ENGAGED CITIZENS, POLARIZATION, AND AMERICAN DEMOCRACY* 34–61 (2010); NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* 1 (2006); BARBARA SINCLAIR, *PARTY WARS: POLARIZATION AND THE POLITICS OF NATIONAL POLICY MAKING* 3–13 (2006); Richard Fleisher & John R. Bond, *The Shrinking Middle in the U.S. Congress*, 34 BRIT. J. POL. SCI. 429, 431–36 (2004); Jason M. Roberts & Steven S. Smith, *Procedural Contexts, Party Strategy, and Conditional Party Voting in the U.S. House of Representatives, 1971–2000*, 47 AM. J. POL. SCI. 305, 305 (2003).

10. See, e.g., MORRIS P. FIORINA WITH SAMUEL J. ABRAMS & JEREMY C. POPE, *CULTURE WAR?: THE MYTH OF A POLARIZED AMERICA* 77 (1st ed. 2005); John H. Evans, *Have Americans' Attitudes Become More Polarized?—An Update*, 84 SOC. SCI. Q. 71, 76–78 (2003); cf. Roberts & Smith, *supra* note 9, at 306 (“[T]he largest expansion of party polarization of the electorate’s policy attitudes, which occurred in the 1990s, follows congressional polarization.” (citing Gary C. Jacobson, *Party Polarization in National Politics: The Electoral Connection*, in *POLARIZED POLITICS: THE PRESIDENT AND THE CONGRESS IN A PARTISAN ERA* 9 (Jon Bond & Richard Fleischer eds., 2000)). *But see* MATTHEW LEVENDUSKY, *THE PARTISAN SORT: HOW LIBERALS BECAME DEMOCRATS AND CONSERVATIVES BECAME REPUBLICANS* 126–28, 133 (2009) (describing Republican and Democratic voters as having become more ideologically uniform as a function of partisan sorting); Alan I. Abramowitz & Kyle L. Saunders, *Is Polarization a Myth?*, 70 J. POL. 542, 553–54 (2008) (finding deepening ideological polarization among party supporters, particularly among the most interested, most informed, and most politically active).

11. Samuel Issacharoff, *Collateral Damage: The Endangered Center in American Politics*, 46 WM. & MARY L. REV. 415, 424 (2004).

12. See ALAN WARE, *THE AMERICAN DIRECT PRIMARY: PARTY INSTITUTIONALIZATION AND TRANSFORMATION IN THE NORTH* 255–64 (2002).

13. *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989) (quoting *Ripon Soc’y, Inc. v. Nat’l Republican Party*, 525 F.2d 567, 601 (1975) (Tamm, J., concurring)).

14. See, e.g., Stephen Ansolabehere, James M. Snyder, Jr. & Charles Stewart, III, *Candidate Positioning in U.S. House Elections*, 45 AM. J. POL. SCI. 136, 152–54 (2001); Barry C. Burden, *The Polarizing Effects of Congressional Primaries*, in *CONGRESSIONAL PRIMARIES AND THE POLITICS OF*

more ideologically extreme than the median voter in the general election. Democratic primary voters, for instance, are on average more liberal, while Republican primary voters are on average more conservative.¹⁵ Indeed, these voters are motivated at least in part by these ideological commitments to participate in primary elections, which tend to be characterized by lower turnout and media attention than general elections. As a result, the winning candidates in closed primary elections tend to be more ideologically extreme. For party leaders who share their voters' ideological predispositions, this bias toward the ideological extreme is a valuable result. The party primary filters out candidates who might be seen as too moderate or independent from the standpoint of party leaders and the party's base of voters. The party primary provides a form of veto right to the party leaders and voters and helps advance more ideological candidates to the general election.

Commentators and reformers thus far have approached ideological polarization of the major parties as a problem of demand-side politics. Political parties, as institutions of democratic politics, must be responsive to the demands of voters, both inside and outside the party membership. Affecting the mix of voters whom the parties need to attract in the primary and general elections should change the strategies of the political parties, their positions, and the candidates they offer for elected office. As a result, commentators and reformers have largely viewed the ideological polarization of the parties as a result of changes in election law that push candidates and parties to respond to decidedly noncentrist sets of voters.¹⁶ To the degree that the primary electorate is limited to party voters with ideologically extreme demands, primary elections are likely to produce winning nominees who are responsive to those ideologically extreme demands. And the problem of party polarization thus can be remedied by altering the mix of voters eligible to vote in the party primary and moderating the ideological skew in incentives that party candidates confront.¹⁷

In theory, American elections should already induce a strong incentive for parties and candidates to adopt the centrist position of the median voter in the general election. Duverger's Law predicts that the usual American practice of first-past-the-post, winner-take-all elections, in which the plurality winner wins

REPRESENTATION 95, 95–97 (Peter F. Galderisi, Marni Ezra & Michael Lyons eds., 2001); Elisabeth R. Gerber & Rebecca B. Morton, *Primary Election Systems and Representation*, 14 J.L. ECON. & ORG. 304, 321 (1998).

15. Cf. FIORINA WITH ABRAMS & POPE, *supra* note 10, at 78 (“For as long as we have had data, political scientists have known that political elites are more polarized than the mass of ordinary Americans.”); Herbert McClosky, Paul J. Hoffman & Rosemary O’Hara, *Issue Conflict and Consensus Among Party Leaders and Followers*, 54 AM. POL. SCI. REV. 406, 426 (1960) (“Whereas the leaders of the [Democratic and Republican] parties diverge strongly, their followers differ only moderately in their attitudes toward issues.”).

16. See, e.g., Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 625–28 (2002) (arguing that partisan gerrymandering has contributed to partisan polarization).

17. See Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274, 307 (2001).

the entire district, would encourage the development of two broadly based parties with ideologically centrist candidates.¹⁸ Under Duverger's Law, there is incentive only to finish first with a winner-take-all plurality because there is no payoff at all for second-place or third-place finishers as there is in systems of proportional representation.¹⁹ Any small faction unlikely by itself to win a plurality, as a result, is likely to be better off coalescing with a major party as part of a broader coalition in an effort to win a plurality.²⁰

Anthony Downs posited that these two major parties will converge on the ideological center, where the median voter is positioned, in two-party duopoly.²¹ Because a party receives no payoff unless it wins the election, a party's only motivation must be winning the election, and therefore, satisfying the median voter who casts the deciding vote. The competition for the median voter, with centrist policy preferences relative to the party bases on either side, constrains the degree to which the party can nominate an ideologically extreme candidate.²² Both parties realize that an ideologically extreme candidate, though perhaps closer to their personal policy preferences as party activists, is less likely to win the median voter's approval, and therefore, more likely to be defeated in the general election.²³ Downs predicts that both parties will seek to win over the median voter by moving closer and closer to her position until both converge in Downsian competition.²⁴ The two major parties must subordinate their ideological interests to the absolute need to satisfy the median voter during the general election.

However, the major parties have nominated and elected more ideologically extreme candidates despite this countervailing Downsian competition toward the center. The reasons for this ideological polarization are complex and multifaceted. At least part of the phenomenon is simply the product of partisan realignment following the Civil Rights Movement, which shifted the South toward the Republicans and the Northeast more consistently toward the Democrats.²⁵ Realignment has made both major parties more ideologically homoge-

18. See MAURICE DUVERGER, *POLITICAL PARTIES: THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE* 216–28 (Barbara North & Robert North trans., Methuen & Co. 2d ed. 1961) (1951).

19. *Id.* at 248–49; see also Gary W. Cox, *Centripetal and Centrifugal Incentives in Electoral Systems*, 34 AM. J. POL. SCI. 903, 919–22 (1990) (presenting the different electoral incentives for minor parties under proportional representation).

20. DUVERGER, *supra* note 18, at 226–27. A nontrivial number of minor parties nonetheless regularly field candidates, even though “most minor parties never expect their candidates to win,” in part because minor parties believe that “[f]ielding candidates is merely one way to advance their agendas and to communicate with the public.” See Elizabeth Garrett, *Is the Party Over? Courts and the Political Process*, 2002 SUP. CT. REV. 95, 110.

21. ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 115 (1957).

22. See *id.* at 116–17.

23. See *id.*

24. See *id.*

25. See generally EDWARD G. CARMINES & JAMES A. STIMSON, *ISSUE EVOLUTION: RACE AND THE TRANSFORMATION OF AMERICAN POLITICS* 27–58 (1989) (describing the permanent transition of partisan loyalties in the South during the 1960s); Alan I. Abramowitz & Kyle L. Saunders, *Ideological*

neous and more clearly identifiable by their ideological positions. Another contributing trend is the increasing need over several decades for campaign financing to fund expensive television advertising, which has given greater leverage to the national party organizations over individual candidates.²⁶ Other commentators cite partisan gerrymandering as another influence on ideological polarization.²⁷ However, an important aspect of understanding party polarization is that Downsian competition assures less centrism than commonly thought.

As a practical matter, the parties are never sure about the precise preferences of the median voter in any given election. In theory, both parties might move immediately to the median voter's position if they knew exactly what a candidate needed to avow to win the election, but in fact, the electorate's preferences are constantly changing, always uncertain, and susceptible to persuasion.²⁸ The parties not only respond to existing median-voter preferences to the inexact degree that they are discernible, but they also seek to influence voter preferences in their preferred direction through campaigning and rhetoric.²⁹ Neither party therefore knows for certain exactly where the median voter will ultimately sit on election day. Given both this level of uncertainty and the intrinsic ideological motivations of party leaders, each party cheats in the direction of its ideological base by nominating competing candidates who are ideologically more extreme than the median voter, moving in opposite directions from one another.³⁰

What is more, Downsian competition dictates that a party not be further from the political center than its competitor,³¹ but Downsian competition is indeterminate regarding how close to the political center the two parties actually end up. Although the parties possess incentives toward the center, each party cares

Realignment in the U.S. Electorate, 60 J. POL. 634, 640 (1998) (finding a reversal in the "traditional regional gap in party identification").

26. See Paul Frymer & Albert Yoon, *Political Parties, Representation, and Federal Safeguards*, 96 NW. U. L. REV. 977, 998–1016 (2002) (describing the parties' use of campaign finance money); Gerald M. Pomper, *The Fate of Political Parties*, 2 ELECTION L.J. 69, 72 (2003).

27. See, e.g., Issacharoff, *supra* note 11, at 428.

28. See Randall L. Calvert, *Robustness of the Multidimensional Voting Model: Candidate Motivations, Uncertainty, and Convergence*, 29 AM. J. POL. SCI. 69, 86 (1985) (predicting convergence is likely with perfect information but less likely when voter preferences are uncertain).

29. See R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 60–118 (1990) (describing uncertainty about voter preferences and candidate strategies in light of that uncertainty); LAWRENCE R. JACOBS & ROBERT Y. SHAPIRO, *POLITICIANS DON'T PANDER: POLITICAL MANIPULATION AND THE LOSS OF DEMOCRATIC RESPONSIVENESS* 22 (2000) (explaining how party actors seek to shift public opinion toward their policy preferences).

30. See Adam Meirowitz, *Keeping the Other Candidate Guessing: Electoral Competition When Preferences Are Private Information*, 122 PUB. CHOICE 299, 299–302 (2005) (finding formally that uncertainty about candidate and voter preferences is more likely to produce platform divergence); Rebecca B. Morton, *Incomplete Information and Ideological Explanations of Platform Divergence*, 87 AM. POL. SCI. REV. 382, 389 (1993) (finding candidate divergence as a function of ideological motivation and uncertainty about voter preferences).

31. See DOWNS, *supra* note 21, at 117.

sufficiently about ideological principle to cheat toward its ideological base to the degree that it can without becoming noncompetitive vis-à-vis its counterpart.³² A party becomes noncompetitive only to the degree that the other party moves significantly closer to the center such that the median voter would clearly prefer the other party. The parties must always strike a strategic tradeoff between electability and their ideological base. However, parties may sufficiently value ideology such that they strike this tradeoff in favor of ideology at the margin. What is more, if *both* parties move away from the political center and choose to be more loyal to their ideological bases, then *neither* party necessarily becomes noncompetitive, despite the fact that neither party satisfies the median voter's ideal preferences. The parties may then settle on an equilibrium in which each nominates a candidate ideologically distant from the political center, which presents the median voter with a difficult binary choice between extreme nominees.

Indeed, the major parties have strong reasons for favoring ideology over electability at the margin. Although the major parties exist in large part to win elections, they emerge as political coalitions because they coordinate large groups of political actors who share overlapping political aims, among which ideological motivations hold an important place. Political science demonstrates that many party actors, leaders, and activists are motivated by more ideologically extreme views and hope that the party tacks in ideological directions toward their positions.³³ The party as a political coalition depends significantly on their contributions and must satisfy their ideological demands to stand any chance of continuing success.³⁴ What is more, for most public offices, the party actors are better informed and more motivated to monitor officeholders and other candidates on ideological grounds than what is usually an apathetic public.³⁵ As a result, each major party must counterbalance its need to nominate candidates with sufficiently centrist positions to remain electable against the equally important need to nominate candidates with sufficiently ideological

32. See John H. Aldrich & Michael D. McGinnis, *A Model of Party Constraints on Optimal Candidate Positions*, 12 MATHEMATICAL & COMPUTER MODELLING 437, 449 (1989).

33. See Kaare Strom, *A Behavioral Theory of Competitive Political Parties*, 34 AM. J. POL. SCI. 565, 574 (1990); Aaron Wildavsky, *The Goldwater Phenomenon: Purists, Politicians, and the Two-Party System*, 27 REV. POL. 386, 388, 393–94 (1965); cf. Walter J. Stone & Alan I. Abramowitz, *Winning May Not Be Everything, But It's More Than We Thought: Presidential Party Activists in 1980*, 77 AM. POL. SCI. REV. 945, 945–46 (1983) (describing the works of political scientists finding there has been a rise in “purists” among American political activists, although arguing that even these “purists” favor electability over ideology).

34. See JOHN H. ALDRICH, *WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA* 22–23 (1995); see also MARTY COHEN, DAVID KAROL, HANS NOEL & JOHN ZALLER, *THE PARTY DECIDES: PRESIDENTIAL NOMINATIONS BEFORE AND AFTER REFORM* 31 (2008) (defining party activists as “intense policy demanders” whose purpose is “to place reliable agents in government offices”); DAVID KAROL, *PARTY POSITION CHANGE IN AMERICAN POLITICS: COALITION MANAGEMENT* 18 (2009) (noting that party politicians are “constrained to maintain a sufficient differential between themselves and the opposition on . . . issue[s] to motivate [party activists] to remain loyal”).

35. See MASKET, *supra* note 3 (“A vast, poorly informed general electorate that leans toward the incumbent’s own party does not instill as much fear among incumbents as a smaller, tightly controlled primary electorate.”).

positions to excite the party base and motivate the party as an ongoing coalition.³⁶

In short, there is a simple explanation for major party polarization in recent decades—as the Democratic Party became more left-leaning as an ideological matter, the Republican Party had more slack available to become more right-leaning itself, and vice-versa. Each party becomes more loyal to its ideological base without losing competitive ground to the other. At least in theory, either party could have tacked back toward the ideological center and gained a competitive advantage, but both parties may have valued ideological principle sufficiently to continue the trend and forgo a significant move back toward the middle. Downsian competition does not necessarily dictate that the parties gravitate toward the center, provided that both parties value ideological principle highly and maintain a roughly similar ideological distance from the median voter.³⁷ In other words, the Republicans and Democrats may have acted as do many duopolies—they settled into a competitive equilibrium in which each side catered to its ideological base at the margin.³⁸

B. A DEMAND-SIDE APPROACH TO MAJOR PARTY POLARIZATION

The most common reform effort at mitigating ideological polarization of the two major parties has been directed at the demand side of politics. In a number of states, state laws governing eligibility to vote in a party primary were broadened from a closed format, which permitted only party-registered voters to vote in the primary, to a more open format that included voters who were not registered party members. The simple premise was that broadening a party's primary electorate to include independents, or even members of other parties, would bring less ideological voters into the primary process and dilute the ideological pull of the party's base.³⁹ A more moderate primary electorate would draw candidates who were no longer absolutely compelled to satisfy the undiluted ideological demands of the party base, and therefore, more toward the political center.⁴⁰

36. See generally NELSON W. POLSBY & AARON WILDAVSKY WITH DAVID A. HOPKINS, *PRESIDENTIAL ELECTIONS: STRATEGIES AND STRUCTURES OF AMERICAN POLITICS* 41–47 (12th ed. 2008) (discussing the intraparty debates over the tradeoff between electability and ideological principle in party candidates).

37. DOWNS, *supra* note 21, at 118.

38. Cf. MASKET, *supra* note 3 (concluding that partisan politics currently produce “a highly polarized government whose elected officials are often ideologically steadfast and unwilling to compromise, even in cases in which they might win a few more general election votes by doing so”). See generally Leonard Shapiro, *Decentralized Dynamics in Duopoly with Pareto Optimal Outcomes*, 11 *BELL J. ECON.* 730, 737 (1980) (describing a model of duopolies in which a Pareto optimum may be reached without interaction amongst the duopolists); George J. Stigler, *A Theory of Oligopoly*, 72 *J. POL. ECON.* 44, 45–46 (1964) (explaining that oligopolists can seek to maintain their profit share by assigning each buyer to a single seller or by fixing the market share of each oligopolist).

39. See generally Michael S. Kang, *The Hydraulics and Politics of Party Regulation*, 91 *IOWA L. REV.* 131, 140–41 (2005) (describing the democratizing impulses behind opening party primaries).

40. See Richard H. Pildes, *The Supreme Court 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 *HARV. L. REV.* 29, 103 (2004) (explaining that proponents of open and blanket

The simplest reform was opening the primary only slightly to include independent voters in addition to party-registered voters, but not voters who had registered with other parties. A similar adoption of a semi-closed format was the subject of *Tashjian v. Republican Party*⁴¹ in 1986. Connecticut Republicans, who had suffered a series of electoral losses during the 1980s, decided to open their primary franchise to independent voters, but were blocked by state law from doing so.⁴² They successfully challenged the state restriction before the Supreme Court, which held that the state could not so limit “[t]he Party’s attempt to broaden the base of public participation in and support for its activities.”⁴³ The converse proposition—whether the state could *require* a political party to open its primary franchise to nonmembers—was not decided by the Court. The Court only touched upon this question in *Democratic Party of the United States v. Wisconsin ex rel. La Follette*,⁴⁴ a case involving conflict between Wisconsin state law and the national Democratic Party, but the resolution of the case might have been complicated by overarching concerns about an individual state interfering with the operation of national party activity.⁴⁵ By contrast, the California blanket primary in *California Democratic Party v. Jones*⁴⁶ squarely presented the basic substantive issue when it was adopted by ballot initiative as part of the larger trend toward liberalizing party primary participation.⁴⁷

California’s blanket primary struck down in *Jones* went beyond the semi-closed format from *Tashjian* and allowed *any* voter, regardless of party registration, to participate in any party primary election on an office-by-office basis. In other words, the blanket primary not only allowed independent voters to cast a ballot in a party primary but also authorized members of another party to cross party lines and participate. Both major parties in California, as well as several minor parties, were plaintiffs in *Jones* and challenged the blanket primary in federal court.⁴⁸ They and other opponents of the blanket primary argued that allowing members of one party to participate in another party’s choice of nominees was “like letting UCLA’s football team choose USC’s head coach.”⁴⁹

primaries hoped that they would “generate more centrist candidates (and thus elected officials) who better reflected median voter preferences”).

41. 479 U.S. 208 (1986).

42. *Id.* at 212.

43. *Id.* at 214.

44. 450 U.S. 107 (1981).

45. See Richard H. Pildes, *Judging “New Law” in Election Disputes*, 29 FLA. ST. U. L. REV. 691, 693 n.4 (2001) (interpreting *La Follette* as judicial hostility toward attempts by states “to extend [their] powers into direct control of national political party conventions”).

46. 530 U.S. 567 (2000).

47. See Kang, *supra* note 39, at 141. See generally Nathaniel Persily, *Toward a Functional Defense of Political Party Autonomy*, 76 N.Y.U. L. REV. 750, 773–84 (2001) (describing the “[p]olitics and [e]mpirics” of Proposition 198, which proposed the blanket primary, and the Court’s decision in *Jones*).

48. *Jones*, 530 U.S. at 571.

49. *Cal. Democratic Party v. Jones*, 984 F. Supp. 1288, 1290 (E.D. Cal. 1997), *aff’d*, 169 F.3d 646 (1999), *rev’d*, 530 U.S. 567 (2000).

Supporters of the blanket primary presented the blanket primary as a measure to encourage party candidates to become more centrist and more moderate.⁵⁰ They argued that California's closed primaries excluded independent voters from the primary election and left voters of the minority party with "no real voice in the selection of their representative."⁵¹ The closed primary favored "party hard-liners" and "stack[ed] the deck against more moderate problem-solvers."⁵² One state senator who supported the blanket primary claimed that the "[closed primary] system has created a Legislature that is disproportionately left, and disproportionately right."⁵³ In short, the blanket primary was directed squarely against the perceived problem of ideological polarization and offered a demand-side remedy.

However, such efforts at demand-side reform through expanding the primary franchise ran headlong into constitutional protections of political parties as central ideological associations in American politics. In a series of cases since the 1980s, including *Tashjian* and *La Follette*, courts have considered party challenges to laws that limit the primary franchise to party members and laws that expand the primary franchise to independents and members of other parties. In virtually all these cases, the Supreme Court has decided in favor of plaintiffs nominally representing the party's First Amendment interests and, in defining the primary franchise, has carved out what has been called a doctrine of party autonomy from state regulation.⁵⁴ I have described these cases involving party regulation as instances of judicial management of political conflict and endorsed the Court's general skepticism toward state attempts to regulate the internal affairs of political parties.⁵⁵ Other commentators disagree,⁵⁶ but the Court's position on party associational rights and freedom from state regulation with respect to parties' internal affairs has become reasonably clear.

The constitutional challenges for demand-side regulation of party politics inhere from the parties' basic associational rights under the First Amendment to define themselves through their choice of candidates. Political parties coordi-

50. *Jones*, 530 U.S. at 580.

51. Shaun Bowler & Todd Donovan, *Political Reform via the Initiative Process: What Voters Think About When They Change the Rules*, in *VOTING AT THE POLITICAL FAULT LINE: CALIFORNIA'S EXPERIMENT WITH THE BLANKET PRIMARY* 44 (Bruce E. Cain & Elisabeth R. Gerber eds., 2002) (quoting CAL. SEC'Y OF STATE, OFFICIAL BALLOT PAMPHLET: PRIMARY ELECTION (1996)).

52. *Id.* at 43 (quoting CAL. SEC'Y OF STATE, *supra* note 51). At least some opponents of Proposition 198 agreed that a blanket primary would help centrist candidates. Republican Party chairman John Herrington complained that a blanket primary would "drive candidates of both parties to the meaningless middle." Carl Irving, Editorial, *Open Primaries Would Help Moderates*, S.F. EXAMINER, Feb. 13, 1996, <http://www.sfgate.com/cgi-bin/article.cgi?f=/e/a/1996/02/13/EDITORIAL461.dtl>.

53. Steven A. Capps & Carla Marinucci, *State Voters To Decide on Cross-Party Ballots*, S.F. EXAMINER, Mar. 18, 1996, at A-2 (quoting San Diego Democratic Senator Steve Peace).

54. See Persily, *supra* note 47, at 785–86.

55. Kang, *supra* note 39, at 135.

56. See, e.g., Garrett, *supra* note 20, at 130–48; Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741, 1777–88 (1993); Gregory P. Magarian, *Regulating Political Parties Under a "Public Rights" First Amendment*, 44 WM. & MARY L. REV. 1939, 2010–43 (2003).

nate large political coalitions bound by the common purpose of electing roughly like-minded candidates. Although parties conduct a wide array of political activity, it is this common, overriding purpose of electing candidates that cements the coalition and differentiates parties from the many other interest groups active in the political process.⁵⁷ As a result, there is a functional justification for constitutional protections for the independence of these internal party processes from state regulation. Political parties, if they are to function properly as venues for political organization and dissent, must stand independently from overweening attempts by states to regulate their programmatic content and direction. Parties are what Samuel Issacharoff calls “intermediary institutions of civil society,” such that “an excess of regulation deprives them of their reason for being.”⁵⁸ Just as the party must balance its ideological principles against the demands of the decisive median voter in the general election, courts assessing state regulation of political parties must balance the constitutional interests in the rights of parties to determine their ideological agendas against the interests of the state to ensure wider public participation and ideological inclusiveness.

Indeed, the selection of candidates is a critical self-defining function of any party. First, the party’s viability depends on its nominated candidates to unify the party internally as an effective coalition going forward. The party’s effectiveness and sustainability hinge upon the ideological attractiveness of its candidates as motivation for the party’s leaders and activists to continue working together. To the degree that a large percentage of party constituents no longer finds the election of the party’s candidates to be an attractive aim, political coordination within the party loses its value.⁵⁹ Second, a party’s candidates publicly represent the party’s political agenda and philosophy. Candidates are the party’s visible product and spokespeople. They define the political substance of the party label and articulate the party’s programmatic goals in both words and deeds.⁶⁰ Finally, the party’s candidates are its basic instrument for realization of the party’s fundamental aim of electing candidates to office. A party must select its candidates carefully to balance the ideological aims of the party constituents and any practical need for centrist electability. As the Court has put it, the party nomination process “often determines the party’s positions on the

57. See Bruce E. Cain, *Party Autonomy and Two-Party Electoral Competition*, 149 U. PA. L. REV. 793, 802 (2001) (“What distinguishes political parties from interest groups is that the former officially nominate candidates under their name (i.e., party label) while the latter do not.”).

58. Samuel Issacharoff, *supra* note 17, at 281, 294.

59. See MASKET, *supra* note 3, at 49 (explaining that the aim of activists within the party coalition is to “ensure that only the sorts of people they like—people who will vote in a certain ideological fashion or will provide particular benefits to their backers—will be able to serve in government”).

60. See Marc J. Hetherington, *Resurgent Mass Partisanship: The Role of Elite Polarization*, 95 AM. POL. SCI. REV. 619, 628–29 (2001) (finding that public perceptions of the major parties tracks patterns of partisan voting in Congress); Jonathan Woon & Jeremy Pope, *Made in Congress? Testing the Electoral Implications of Party Ideological Brand Names*, 70 J. POL. 823, 833–34 (2008) (explaining how the parties’ legislative positions in Congress define their reputations among voters).

most significant public policy issues of the day, and even when those positions are predetermined it is the nominee who becomes the party's ambassador to the general electorate in winning it over to the party's views."⁶¹

For all these reasons, the Court has jealously defended the major parties' nomination processes from state-imposed intrusion by nonmembers, including California's blanket primary. In striking it down as unconstitutional in *Jones*, the Court explained that the blanket primary interfered with the rights of party members to define the direction and character of their ideological association. The blanket primary "forces [the parties] to adulterate their candidate-selection process—the 'basic function of a political party,'—by opening it up to persons wholly unaffiliated with the party."⁶² It therefore threatened to saddle the party with "an unwanted, and possibly antithetical" candidate who could severely transform, or even destroy, the party's message and mission.⁶³ The Court concluded that it "can think of no heavier burden on a political party's associational freedom."⁶⁴ *Jones* faithfully represents the Court's consistent assertion of party independence from state regulation in how to choose party candidates for office.⁶⁵

The end result of the Court's doctrine of party autonomy regarding primary elections is that it is exceedingly difficult to influence political parties through demand-side reforms to the party primary process. The parties' associational rights to self-definition foreclose to a large degree attempts to moderate the major parties by diluting the ideological makeup of their primary electorate. Of course, the major parties face Downsian pressure to moderate their selection of candidates toward the political center and weigh the electability of their nominees with the median voter. Indeed, candidates of the major parties regularly engage in the familiar dynamic of appealing to the party base during the primary before tacking toward the center once nominated and competing during the general election for the median voter's favor.⁶⁶ However, state attempts to

61. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 575 (2000).

62. *Id.* at 581 (citation omitted) (quoting *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973)).

63. *Id.* at 579 (explaining that a single election in which the party nominee is selected by outsiders could destroy a party).

64. *Id.* at 582.

65. The most recent attempt to be reviewed by the Court occurred in *Washington State Grange v. Washington State Republican Party*, where the state of Washington enacted a "top two" primary. 552 U.S. 442, 444 (2008). The new Washington format provided for a two-stage election process: an open primary election, during which any voter could vote for any candidate regardless of partisan affiliation, followed by a general election between only two candidates with the highest vote totals during the primary election. *Id.* at 447–48. This top two primary by its terms did not choose the parties' nominees, nor did it refer to the top two primary finishers as nominees of their respective parties. *See id.* at 453 & n.7. Indeed, the primary finishers with the top two vote totals advanced to the general election regardless of their party affiliation, such that two candidates who listed the same party preference could be pitted against each other in the general election. *Id.* at 448. Although the Court rejected a facial challenge as premature, the Court even here left open the possibility for an applied challenge that parties' associational rights might be implicated if voters misinterpreted candidates' listed party preferences as reflecting endorsement by those parties. *Id.* at 455–56.

66. *See Burden*, *supra* note 14.

moderate nominees by forcibly injecting party nonmembers into the party's decision making have been effectively discouraged by the Court's decisions. Although the major parties may decide for themselves to nominate more moderate, less polarized candidates, it is apparently their choice whether to dilute their ideological prerogative. Regulation of political parties from the demand side has hit a constitutional wall erected by the Court.

II. INTRAPARTY POLITICS AND DEMOCRATIC CONTESTATION: THE OPPORTUNITY FOR PARTY REFORM FROM THE SUPPLY SIDE

A different approach to the perceived problem of party polarization would be to harness the diversity within the major parties, rather than trying to change the parties from the demand side. In this Part, I first explain how the major parties are diverse coalitions that each house a great deal of political disagreement and debate. Although the major parties represent general agreement among many roughly like-minded leaders and voters, they choose candidates only through a complex process of intraparty competition, conflict, and accommodation among many party actors that serves as healthy democratic contestation. Different competing elements press for different visions for their party, and in the process, produce dynamic intraparty politics that give the major parties their responsiveness, creativity, and adaptivity. However, a breakdown in this process of democratic contestation may be responsible for major party polarization and therefore critical to party reform that might address it. Democratic contestation deteriorates when state law grants excessive legal leverage to leading elements of the parties, mainly through control of ballot access, such that they can force moderate dissenters in the party to toe the party line.

By loosening restrictions on ballot access, and thereby altering the institutional leverage within the party, it may be possible to change party politics from the supply side and tip party politics in the direction of centrism. Less restrictive ballot access might limit the ability of dominant elements within the party to dictate to more moderate dissenters and therefore restore the natural incentives within party politics to reach accommodation among party rivals, including those who advocate more centrist, ideologically moderate agendas. As a result, party reform from the supply side can tilt party politics in centrist directions by taking advantage of intraparty diversity and empowering more centrist leaders over more extreme ones.

A. DEMOCRATIC CONTESTATION INSIDE THE MAJOR PARTIES

The scholarly focus on competition between the major parties tends to reify the parties too much as cohesive ideological associations, whose perpetually changing compositions cannot be considered simply as a natural confluence of shared interests and ideas. In a colloquial sense, it is common to think Republicans identify as Republicans, or Democrats as Democrats, because they individually believe in some critical core of predetermined principles. However, it is a

mistake to think that the major parties result organically from convergence of political preferences among like-minded partisans without recognizing that what comes to be understood as Republican or Democratic principles is itself conditional and endogenous.⁶⁷

Parties represent general agreement among roughly like-minded individuals on many issues, but they also house a great deal of intraparty disagreement about a wealth of issues among many political leaders who at times agree and at other times conflict.⁶⁸ As David Karol explains, parties are best understood as “coalitions of groups with intense preferences on issues who come together to win elections and further their individual policy agendas.”⁶⁹ Parties emerge as successful coalitions when the political leaders of these groups who disagree about many things nonetheless share just enough common cause on a sufficient number of important issues that they find mutual advantage in affiliation and collaboration along many directions.⁷⁰ Each major party therefore embodies a provisional agreement to set aside certain disagreements and conflicts, within limited bounds, in the interest of sharing the mutual benefits of cooperation through the party against other common political opponents.

Among themselves, however, party leaders compete fiercely for relative control over the party’s direction and articulated agenda. The major parties are merely strategic, adaptable tools within which party leaders of varying influence and standing compete to advance their own, sometimes overlapping and sometimes conflicting, interests.⁷¹ Party actors clash with one another to advance their competing views of the party’s best interests and course of action. “In contemporary terms, ‘issues,’ ‘problems,’ ‘reforms’—the stuff of party identity—do not arise spontaneously, fully articulated, and electoral victories are not self-interpreting.”⁷² It is within the party that political leaders and informed activists decide the most nuanced and difficult value choices in politics, as opposed to the choices between the broader, more distinct alternatives usually presented in interparty competition. And it is within the party that ideological conflicts among provisional allies must reach resolution or compromise

67. See Morris P. Fiorina, *Parties and Partisanship: A 40-Year Retrospective*, 24 *POL. BEHAV.* 93, 103 (2002) (describing parties as malleable entities that party leaders “invent and reinvent to solve problems that face them at particular times in history”); Frymer & Yoon, *supra* note 26, at 981 (declaring that parties “lack any fundamental, enduring, and essential nature”).

68. See COHEN, KAROL, NOEL & ZALLER, *supra* note 34, at 85–86 (“Given that a party is a coalition of intense policy demanders, policy conflicts are bound to arise . . .”).

69. KAROL, *supra* note 34, at 183.

70. See COHEN, KAROL, NOEL & ZALLER, *supra* note 34, at 34 (explaining that party coalitions “need to include enough groups to attract a majority of voters in the election, but not so many that it dilutes too much the benefits that any one group can get from being in the coalition”).

71. See Fiorina, *supra* note 67; Frymer & Yoon, *supra* note 26, at 981 (“Parties, like most political institutions, are highly malleable organizations filled with goal-oriented actors who respond to historically specific political contexts.”).

72. NANCY L. ROSENBLUM, *ON THE SIDE OF THE ANGELS: AN APPRECIATION OF PARTIES AND PARTISANSHIP* 105 (2008).

for the party to thrive.⁷³ This sensitive intraparty conflict both balances the teeming heterogeneity of the party constituents and assembles a workable compromise among them that might still appeal to the median voter in the general election.

The Democratic Party, for instance, has quite publicly evolved over the last couple decades as a result of ongoing intraparty debate about its ideological direction. During the 1980s, many party leaders became convinced that the party had drifted too far to the left to win national elections.⁷⁴ A number of prominent Southern Democrats, including Bill Clinton and Al Gore, founded the Democratic Leadership Council to restore the party to what they believed were its core concerns: the working middle class.⁷⁵ These efforts developed signal issues, such as health care, free trade, and welfare reform, that shifted the Democrats at the national level toward the political middle and contributed to Clinton's presidential election in 1992 and reelection in 1996. These ideological shifts toward the middle produced policy innovation and electoral success but were also highly contested within the party. Rival leaders within the party competed politically to advance their visions of the party's priorities, negotiating the basic tension between serving the party's ideological base and catering to the median voter in the general election.⁷⁶

Parties therefore play an important function in the process I call "democratic contestation"—the basic competitive process among leaders to present the mass public with meaningful, attractive choices about what it wants from government.⁷⁷ The internal process of identifying a few key issues and candidates for the party, out of many possible options, involves a critical number of pivotal conflicts, value choices, and ultimate compromises. Marrying the disparate literatures of public choice and political theory, I argue in other work that political leaders, who work heavily through the major parties, engage in a deliberative competition to "offer to the public a full set of choices, to be effectuated through elections and democratic politics, about what they care about, what they are willing to dedicate government toward, and what lines they are willing to draw across society in fighting for them."⁷⁸ The ultimate aim is not simply to increase the sheer number or diversity of choices presented to the public, but to generate an increasingly attractive set of choices that require citizens to consider and refine their preferences about government and

73. See Kang, *supra* note 39, at 179 & n.171.

74. See STANLEY B. GREENBERG, *MIDDLE CLASS DREAMS: THE POLITICS AND POWER OF THE NEW AMERICAN MAJORITY* 303 (1996); William A. Galston, *The Future of the Democratic Party*, BROOKINGS REV. (SPECIAL ELECTION ISSUE), Winter 1985, at 16, 17–20.

75. See generally Jon F. Hale, *The Making of the New Democrats*, 110 POL. SCI. Q. 207, 208–28 (1995) (describing the rise of the Democratic Leadership Council during the 1980s and early 1990s).

76. See MARK D. BREWER & JEFFREY M. STONECASH, *DYNAMICS OF AMERICAN POLITICAL PARTIES* 147–65 (2009) (detailing the intraparty conflict among Democrats about the ideological direction of the national party over the last two decades).

77. Kang, *supra* note 6.

78. *Id.* at 753.

society.

The product of democratic contestation within the major party coalitions—consolidation of the parties behind a few designated candidates with overlapping agendas—goes a long way toward making democratic politics accessible to the average voter. Mass democratic politics requires the sensible coordination of millions of citizens who usually have insufficient time, interest, or resources to become fully informed about politics, across what can be a vast, disorganized political landscape.⁷⁹ These typical citizens thus become “rationally ignorant” about politics and need assistance to identify their political interests and develop their political preferences. What is more, the familiar challenges of collective action severely complicate the political coordination even of well-informed and like-minded citizens.⁸⁰ Many thousands of citizens, as a diffuse collective, will have difficulty communicating and determining the most promising lines of affiliation and agreement among themselves. As a result, in the absence of leadership, most citizens struggle to find ideological and political direction. Parties provide the necessary leadership, through a process of democratic contestation, to organize mass politics for average voters.⁸¹

The major parties negotiate the welter of value choices and organize politics into useful, accessible agendas that appeal both to ideological principle and pragmatic electability. Although the average voter may not know where she stands on most specific policy questions, the parties boil down the larger complexity into accessible value choices that she can understand and engage imperfectly. In doing so, parties are guided by their electoral incentives to understand the average voter’s concerns and respond to those concerns in offering agendas that will resonate with a broad set of voters. Over time, parties develop ideological credibility, and just as parties guard against issue cycling and coalition instability among legislators,⁸² parties provide an institutional home for average voters to moor themselves ideologically and politically. For many voters, as a result, “party identification forms the key ‘structuring principle’ or ‘lens’ for viewing and understanding politics.”⁸³ The major parties thus bundle choices for the average voter into familiar brands that mitigate

79. See Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and “Disclosure Plus,”* 50 UCLA L. REV. 1141, 1153–54 (2003) (explaining the rational ignorance of most voters); cf. Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 903 (1998) (describing a view of average voters as “civic slackers”).

80. See Kang, *supra* note 6, at 755–56 (describing the collective action problem for a mass public); see also E.E. SCHATTSCHEIDER, *PARTY GOVERNMENT* 52 (1942) (“The immobility and inertia of large masses are to politics what the law of gravity is to physics. This characteristic compels people to submit to a great channelization of the expression of their will, and is due to *numbers*, not to want of intelligence.”).

81. See JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 283 (3d ed. 1950) (“Party and machine politicians are simply the response to the fact that the electoral mass is incapable of action other than a stampede . . .”).

82. ALDRICH, *supra* note 34.

83. *Id.* at 166; see also ANGUS CAMPBELL, PHILIP E. CONVERSE, WARREN E. MILLER & DONALD E. STOKES, *THE AMERICAN VOTER* 128 (Midway Reprint 1980) (1960) (concluding party affiliation “seems

the informational demands, as well as offer guidance and attractive choices to the average voter who may know little more than her broadest ideological preferences.⁸⁴ Average voters can rely on their basic understandings about the major political parties as a heuristic for accurately assessing party candidates, the issues that matter most, and their own positions on those candidates and issues.

The product of democratic contestation within the major parties—the selection of party candidates and their agendas—becomes the substantive menu of alternatives presented to the general electorate. The major social contribution that the parties provide is this intense democratic contestation that produces coherent choices for citizen voters in the form of candidates and party platforms. Although most voters are not actively engaged in party politics or even the primary elections, the ideas debated and positions ultimately taken by the parties out of this contestation refine the substance of what the major parties hope will appeal to the average voters in more distilled form during the general election and beyond into everyday politics. This process of intraparty debate, deliberation, and strategy must be successful for the parties to draw average citizens, who are not normally focused on politics, into developing partisan affiliations. In this sense, the democratic contestation *within* the parties sets the stage for democratic contestation between more defined choices for voters *between* the parties later on. The meaningful participation of many voters, who would otherwise struggle to make sense of a complicated political landscape, becomes accessible as a result of democratic contestation within the major parties.

But democratic contestation must first occur within the major parties and is critical in its own right. Intraparty politics may offer the only real venue for democratic contestation available to the most politically sophisticated groups of citizens—committed Democrats and Republicans. For them, the general election provides little opportunity for real deliberation or choice. Instead, intraparty politics, and ultimately the party primary, provides the main opportunity for Democrats and Republicans to assess their ideological priorities and refine their preferences on an ever-changing array of important political issues. Only intraparty conflict offers these citizens a meaningful opportunity to participate in democratic contestation through engagement with meaningful choices about their politics. In particular, certain constituencies that are overwhelmingly bound to one major party, such as African-Americans, depend almost entirely

to be . . . strong on those who absorb little of politics and whose image of the candidates is extremely diffuse”).

84. See David Schleicher, “Politics as Markets” Reconsidered: *Natural Monopolies, Competitive Democratic Philosophy and Primary Ballot Access in American Elections*, 14 SUP. CT. ECON. REV. 163, 173 (2006) (noting that competition among parties “gives myopic voters clear, simple choices”).

on intraparty politics for serious consideration of public policy.⁸⁵ By the time of the general election, committed partisans usually must put aside any ideological differences with their partisan brethren and rally behind their candidates in the name of party solidarity.⁸⁶ More sophisticated choices about politics and public policy that might occur even among copartisans give way to a much broader, cruder choice between the broadly distinct philosophies embodied by the two major parties that speak mainly to uncommitted independents with very different political perspectives. Indeed, the most serious, complicated discussions about public policy often occur within the confines of the party, with the participation of the more sophisticated party bases helping to shape the party's positions.

Honest internal debate among party leaders within each party gives credibility to disagreement with the party orthodoxy by regular members of the party. For instance, John Zaller demonstrates in his study of public opinion during the 1960s how critical disagreement by prominent Democratic Party leaders gave important credibility to criticism of the Vietnam War among Democrats.⁸⁷ Opposition to the war evolved as an issue on the left and subsequently developed only through intense intraparty conflict among Democrats before the Party largely adopted opposition as a defining partisan position, shattering elite interparty consensus in favor of the Vietnam War. As Zaller details, average voters were not initially sensitive to the nascent disagreement among Democrats, but as the debate blossomed into a full-blown partisan conflict between Republicans and Democrats, the war became a central issue on which even the least politically aware Americans adopted some opinion.⁸⁸

Democratic contestation benefits when parties allow competing factions within them to challenge each other and contest the usual party orthodoxy on important issues. Indeed, the opportunity to press a faction's particular vision for the party and express internal voice within the party is essential for the party's continuing vitality and the motivation of ambitious party constituents. This process of intraparty competition provides a space for new ideas and new approaches to familiar issues and problems by those striving for influence within the party coalition.⁸⁹ When sufficiently robust, this intraparty competitive process constantly tests the party's direction and offers critical alternative choices to the

85. See generally PAUL FRYMER, *UNEASY ALLIANCES: RACE AND PARTY COMPETITION IN AMERICA* (1999) (arguing that currently African-Americans generally have no realistic electoral alternatives outside the Democratic Party).

86. See LEVENDUSKY, *supra* note 10, at 118–19 (finding that partisans sort themselves by tending to adopt the issue positions dominant within their parties); JOHN R. ZALLER, *THE NATURE AND ORIGINS OF MASS OPINION* 216–58 (1992) (explaining that committed partisans who filter campaign information through partisan identification are strongly predisposed to resist opposing appeals).

87. ZALLER, *supra* note 86, at 185–211.

88. *Id.* at 203–05.

89. See, e.g., WILLIAM H. RIKER, *LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE* 215 (1982) (“[A] new issue that generates disequilibrium allows old losers to become new winners.”).

party base about what the party stands for, within a context in which these choices are less apt to be seen as questions of bare partisan loyalty than as constitutive matters of ideological principle. The primary is the central event in which much of the process of intraparty negotiation and compromise occurs. Within the dynamics of the party's larger electoral calculations, different party factions might differ in the candidates they most prefer. More ideologically extreme elements of the party argue for greater focus on the party's core principles and ideological commitments.⁹⁰ Other, more centrist elements of the party may press for greater focus on pragmatism and electoral attractiveness to independent swing voters who decide the general elections to come. The primary election, under the auspices of the party, provides a process for resolving what can be intense intraparty disagreement⁹¹ and identifying a single candidate who will receive the benefit of the party's coordinated efforts in the general election.⁹² The nominated candidates, as well as their platforms and priorities moving forward, represent an internal resolution of much intraparty contestation and provisionally suggest the direction of the party's agenda for both the short- and long-term.

What the various party factions ultimately want to avoid in the end is splitting their votes in the general election such that none of their candidates wins against a greater enemy from outside their party.⁹³ The primary election permits the party to settle internal divisions among candidates before the general election and allows the party to proceed on a unified basis in the general election. The Downsian tradeoff between electability and ideology that parties strike in the primary is the product of this intraparty democratic contestation, rather than a deliberate, conscious choice of a monolithic party institution. However, for the party to prosper as an ongoing alliance, the primary process must produce winning nominees and positions that defeated intraparty rivals can accept and support going forward.⁹⁴ The party survives as a successful coalition in support

90. See, e.g., Brent Ainsworth, "Tea Party" in Mill Valley Attracts More Than 600; Obama Backers Demonstrate a Few Blocks Away, *MARIN INDEP. J.* (Novato, Cal.), Mar. 7, 2010, http://www.marinij.com/ci_14630734?IADID (describing mobilization of Tea Party members against Republicans in Name Only); Kathleen Parker, Op-Ed., *The GOP's Misguided Hunt for Heretics*, *WASH. POST*, Feb. 24, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/23/AR2010022303783.html> (describing the hunt for heretics in the Republican Party).

91. See James I. Lingle, Diana Owen & Molly W. Sonner, *Divisive Nominating Mechanisms and Democratic Party Electoral Prospects*, 57 *J. POL.* 370, 372 (1995) ("By their very nature, therefore, primaries invite internal party dissension if not civil war.").

92. See COHEN, KAROL, NOEL & ZALLER, *supra* note 34, at 84 ("What this means in the ordinary language of politics is that nominees must be *acceptable* to all or nearly all members of the coalition rather than the choice of any small part of it.").

93. See DIANA C. MUTZ, *IMPERSONAL INFLUENCE: HOW PERCEPTIONS OF MASS COLLECTIVES AFFECT POLITICAL ATTITUDES* 10 (1998) (describing the situation of a primary voter trying "to assess likely winners and losers by gauging the opinions of others in order to make a vote decision").

94. See Geoffrey C. Layman et al., *Activists and Conflict Extension in American Party Politics*, 104 *AM. POL. SCI. REV.* 324, 327 (2010) (describing party nominations as "decided through negotiations between various kinds of activists in search of a candidate who is satisfactory to all wings of the party").

of the selected nominees only to the degree that the coalition coheres politically following what can be difficult intraparty disputes in the primary elections.

B. THE OPPORTUNITY FOR PARTY REFORM FROM THE SUPPLY SIDE

With an understanding of intraparty politics in place, the polarization of the major parties might be understood as failures of democratic contestation within the major parties. The major parties have become more ideologically extreme in part because more extreme leaders and voters have become dominant in the internal contestations over party control. To the extent that relatively extreme and relatively moderate elements of the major parties disagree over candidates and policy, the extreme elements appear to be successfully requiring candidates to become extreme as a price of the parties' nominations. Dominance by extreme elements of the party is partially political because they have persuaded other party constituents to become more ideological; but, critical to the argument here, part of their dominance may also be a function of state law. By establishing the competitive structures within which party politics play out, state law sets the balance of power among party rivals. If major party polarization is a failure of democratic contestation within the party, we might look to state law regulation of party politics for sources of that failure.

Of course, the risk of political entrenchment through state law is just as great a threat to intraparty competition as interparty competition. Many commentators caution courts to strike down laws that dampen *interparty* competition by advantaging one major party's dominance over the other.⁹⁵ But the important insight here is that individual leaders compete constantly to advance their particular political agendas against other leaders outside and *inside* their own party. The proximity of party leaders to the levers of state law makes it equally tempting to use their control over state law to lock into place legal rules that advantage their political leverage within their party. Because intraparty competition mirrors interparty competition, individual leaders may try to impose regulations and procedures on their own party that favor their interests over their intraparty rivals'.⁹⁶ The "state" as lawmaker in these cases may merely be one party element with political interest in tilting the rules of intraparty politics against other competing elements of the party.⁹⁷

When state law locks in the dominance of one party element over others,

95. See, e.g., Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 551 (1997); Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1610 (1999).

96. See, e.g., Nathaniel Persily, *Candidates v. Parties: The Constitutional Constraints on Primary Ballot Access Laws*, 89 GEO. L.J. 2181, 2200–01 (2001) (describing how the New York Assembly enacted new ballot access laws providing political parties with a choice between a set of procedures preferred and proposed by the Democrats and different procedures preferred and proposed by Republicans).

97. See Lowenstein, *supra* note 56, at 1758 (“[U]nlike any other private groups, political parties routinely, pervasively, and legitimately exercise their influence from within the government.”); Persily,

parties can neither represent the diversity of their constituencies nor respond as faithfully to the market incentives of interparty competition. State law can at times crowd out the need for political compromise directed at reinforcing the informal precommitments inherent in the maintenance of a political party.⁹⁸ Even when dissenters with significant support protest the direction of their party, and even when the party fails to present attractive choices for the median voter, the party's direction may be locked into place by election laws and regulations. In other work, I argue that regulation of party internal affairs, including the party primary election, should be decided by politics rather than state law trumps wielded by one element of a party over others.⁹⁹ Likewise here, the party's direction and agenda should be shaped by a fair debate among party constituents based proportionately on their internal leverage within the party, which in turn is based on the political strengths that they bring to the party coalition. Election laws and regulations that forestall this debate, by locking in intraparty advantages to certain elements of the party, undermine the greater value that parties offer.¹⁰⁰

Indeed, the need for healthy democratic contestation within the major parties is implicit in any normative commitment to electoral competition between the major parties. Samuel Issacharoff and Richard Pildes argue that courts should analogize politics to “a robustly competitive market—a market whose vitality depends on both clear rules of engagement and on the ritual cleansing born of competition.”¹⁰¹ For purposes of constitutional law, courts should therefore intervene in election law “to ensure an appropriately competitive partisan environment.”¹⁰² Issacharoff and Pildes focus principally on interparty competition, but their commitment to competition between the major parties is logically based on a faith that the parties are internally flexible, adaptive coalitions whose direction and agenda are unfixed and contestable. Interparty competition is meaningful only if parties are capable of competitive responsiveness that brings them closer to the median voter's ultimate preferences. Because the parties must

supra note 47, at 752 (“The state’ is rarely, if ever, a neutral, nonpartisan lawgiver that enacts unbiased rules of party membership.”).

98. *See* Kang, *supra* note 39, at 181 (“[W]hen the party is subject to state law commands, party actors will seek to terminate difficult intraparty disputes by using state regulation of the party to force their fraternal rivals to acquiesce.”); Ellen D. Katz, *Barack Obama, Margarita Lopez Torres, and the Path to Nomination*, 8 *ELECTION L.J.* 369, 379 (2009) (warning that allowing “party leaders to enlist and rely on state law as the primary vehicle for party governance, largely reliev[es] these leaders of any need to secure the support or acquiescence of party members to a chosen course”).

99. *See* Kang, *supra* note 39, at 174–80. In fact, centrist leaders were responsible for demand-side reforms, such as the blanket primary in *Jones*, after they were frustrated by ideologues within their party. *See id.* at 164–66.

100. *See* Katz, *supra* note 98, at 380 (“The degree to which a nominating regime is penetrable and contestable offers a means to gauge the health and vibrancy of the associational and participatory interests of the participants within it.”).

101. Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 *STAN. L. REV.* 643, 646 (1998).

102. *Id.* at 648.

be sufficiently open to change and internal contestation to compete for the median voter, state law or other practices that ossify the party's direction and agenda run counter to models of healthy partisan competition.

Courts have guarded against intraparty entrenchment through state law when they have considered the constitutionality of government regulation of party internal affairs. Judicial skepticism toward state impositions on the parties' control over their primaries effectively checks intraparty entrenchment. By withholding the availability of state law trumps to decide party policy about who votes in primary elections, courts force the parties to reach an internal political consensus about the question of which important party elements have a chance to influence.¹⁰³ One element of the party, namely one with access to state authority, cannot dictate the structure of the primary process by legal fiat. Along similar lines, lower courts have guarded against state laws that extensively restrict ballot access in the party primaries. Courts acknowledge that state law, by complicating efforts to run as a primary candidate, can "insulate a party monopoly, particularly against insurgents within the party seeking to carry its banner."¹⁰⁴ In other words, state laws that restrict the party primary process can serve to entrench the dominance of controlling elements in the major parties.

What is less understood is the tight connection between, on the one hand, ballot access in the *general election* for minor parties and independents and, on the other hand, the *intraparty* politics of the major parties. Given the duopolistic position of the major parties,¹⁰⁵ restrictions on ballot access outside the parties further increase the exclusivity of the major parties as doorkeepers to meaningful ballot access and thus further entrench duopoly. But as I have explained, the major parties are not monolithic and instead comprise many rival elements competing within the party for influence.¹⁰⁶ As a result, to the extent state laws grant legal advantages, such advantages mainly benefit certain elements within the party at the expense of those other elements competing for relative influence within the same party.

Until now, commentators have viewed ballot access restrictions primarily in interparty¹⁰⁷ rather than intraparty terms, but every restriction on ballot access outside the major parties has consequences for intraparty politics. Stricter ballot access restrictions for the general election do much more than disadvantage minor parties and independent candidates—they may stall intraparty competition as well as this interparty competition. Ballot access restrictions for the

103. See Kang, *supra* note 39, at 181–86.

104. *Campbell v. Bysiewicz*, 242 F. Supp. 2d 164, 174 (D. Conn. 2003); see also *Molinari v. Powers*, 82 F. Supp. 2d 57, 77 (E.D.N.Y. 2000) (finding that the only purpose of certain restrictions on primary ballot access was "to disadvantage a candidate . . . who does not enjoy the support of the Republican State Committee").

105. See *supra* note 38 and accompanying text.

106. See *supra* notes 68–72 and accompanying text.

107. See sources cited *supra* note 95.

general election can give the dominant groups within the major parties enormous legal leverage over moderate dissenters by making them more dependent on the party for ballot access. The more exclusive the control by the party as an institution over ballot access, the greater the ideological pressure that the controlling elements within the party can exert over minority dissenters and their candidates inside the party.

A great study by Seth Masket illustrates the ideological pressure on candidates and officeholders produced by party control of ballot access.¹⁰⁸ From 1914 to 1959, the state of California adopted cross-filing for public office, which permitted candidates to run in as many party primaries as they desired without revealing their party affiliation on the primary ballot. In other words, a Republican candidate could run in both the Democratic and Republican primaries without any mention of her own party affiliation, and therefore, could win an election at the primary stage by capturing all party nominations.¹⁰⁹ Indeed, it was common for incumbents to win reelection in just such fashion during this time.¹¹⁰ The result was that party voters had little idea from the ballot of any particular candidate's party affiliation and struggled to monitor and discipline legislators of their party. Masket found that consequently state legislators elected during the cross-filing era abruptly ceased voting along party lines in the legislature, even for standard party-line votes such as the election of the assembly speaker.¹¹¹ Legislators moderated ideologically to a striking degree, and party cohesion disappeared almost completely in the legislative voting.¹¹² What is more, when California abolished cross-filing, ideological extremism and partisan cohesion snapped back to historical norms.¹¹³

Masket's study illustrates a couple complementary considerations. First, candidates for public office moderate toward the median voter of the general electorate when they need worry less about the demands of party voters who can discipline them effectively through the primary election process. Candidates in California during this period had little practical concern about ballot access in the general election, and they did not feel great need to satisfy party voters (or leaders) to mount a viable candidacy. Freed from this necessity, candidates

108. See Seth E. Masket, *It Takes an Outsider: Extralegislatve Organization and Partisanship in the California Assembly, 1849–2006*, 51 AM. J. POL. SCI. 482 (2007).

109. *Id.* at 485.

110. See *id.* at 486.

111. *Id.* Masket finds this effect even though at the time a legislator still needed to win her party's nomination to reach the general election under California law. See Dean E. McHenry, *Cross Filing of Political Candidates in California*, 248 ANNALS AM. ACAD. POL. & SOC. SCI. 226, 228 (1946) (discussing this disqualification mechanism). Despite this legal requirement, party voters could not exercise great leverage on their candidates because they did not know which ones belonged to their party and were subject to their legal veto. It was simply too difficult for party voters to monitor and discipline so many candidates under such conditions of partisan ambiguity.

112. See Masket, *supra* note 108, at 487.

113. *Id.*

responded to the most salient electoral demands they still needed to meet—those of the median voter in the general election—and faithfully moved toward the political center for that purpose. This finding underscores the fact that officeholders' ideological polarization is not entirely sincere and is in significant part a necessary response to political pressures from their respective party base.¹¹⁴

Second, the new restriction on ballot access exerted an immediate influence on candidates' ideological positions. Once cross-filing was abolished in 1959 and winning a single party's primary became virtually the only channel for a viable candidacy, serious candidates instantly understood that they needed to satisfy the base's ideological demands to reach the general election.¹¹⁵ As do candidates in most states today,¹¹⁶ candidates in California compromised their interest in satisfying the median voter in the general election later on to first win the party nomination. As a result, internal leverage within the party swings strongly toward more ideological leaders, candidates, and voters in the party primaries. The greater the legal leverage held by these party constituents, as opposed to other elements of the party that urge greater ideological centrism and emphasis on electability, the more polarized the party is likely to become.¹¹⁷

However, this understanding of intraparty conflict and contestation, as well as the potentially disruptive effect of state law to these processes, also suggests hope for the cause of party reform. Until now, attempts at mitigating ideological polarization of the major parties and relaxing their hegemony have been directed toward changing the mix of voters in primary election,¹¹⁸ but these reform efforts could be directed toward the supply side of elections—the ballot access restrictions that structure eligibility of candidates for the general election. Just as cross-filing in California moderated the major parties for forty years by weakening their control over ballot access, appropriate liberalization of ballot access laws could do the same to the major parties

114. See MASKET, *supra* note 3 (arguing that informal party activists, through their control of party nominations, monitor and discipline party politicians to be ideologically extreme).

115. Cf. PRICE, *supra* note 1, at 134 (“Without such laws, candidates may be less inclined to take the primary seriously as an intraparty contest that requires them to come to terms with the organized party and its main constituencies . . .”).

116. See *supra* note 66 and accompanying text.

117. John Zaller and a group of his colleagues advance a theory of parties that explains the recent trend of party polarization in exactly these terms. Kathleen Bawn et al., A Theory of Political Parties (Oct. 6, 2006) (unpublished paper), available at <http://www9.georgetown.edu/faculty/hcn4/Downloads/ToP%20October%205.pdf>. They argue that parties are driven by intense policy demanders, with more extreme policy preferences than average voters, who want to win for the sake of advancing or at least protecting their intense concerns. See *id.* at 9. As a result, parties routinely aspire to nonmajoritarian policies and cater to the average voter only as practically necessary to win elections. See *id.* at 22. The dominant elements within the party hope “for a candidate who will stand up for their intense concerns as faithfully as possible, even if those concerns are not widely popular.” *Id.* They promote faithful candidates “at the nomination stage, either through selection of the candidate in the first place or de-nomination for poor performance.” *Id.* at 37.

118. See *supra* notes 39–43 and accompanying text.

today.

Such supply-side reforms might tilt the major parties toward the political center more effectively than reforms from the demand side. Less restrictive ballot access might moderate politics from the supply side by offering candidates greater opportunities to bypass the ideological veto of the party base. Specifically, regulation from the supply side might loosen up ballot access and allow minority dissenters in the major parties to reach the general election ballot more easily as independent or minor party candidates. But even short of actual exit from the major parties, the credible threat of exit by dissenting moderates would lend those candidates greater political leverage within intraparty politics. Such supply-side reform might give dissenting moderates better opportunities to influence party politics from within and free up more robust democratic contestation, bringing important voices and views to the table in a way that ultimately enriches party politics.

III. SORE LOSER LAWS

Sore loser laws are a powerful form of supply-side regulation. They restrict the supply of candidates in the general election by effectively disqualifying candidates who have lost a party primary election from running in the subsequent general election. Sore loser laws existed in roughly half the states twenty years ago, but now only three states permit a losing primary election candidate subsequently to file to appear on the ballot in the general election as the nominee of another party or as an independent candidate.

Though commentators focus mainly on the duopolistic effect of sore loser laws, I explain in this Part that the most significant effect of sore loser laws is their influence on *intraparty* politics and democratic contestation in the Democratic and Republican Parties. Sore loser laws close off exit opportunities for moderate candidates and thereby remove the strongest threat that rejected candidates possess in intraparty politics—the option of breaking up the party coalition and running against the party’s nominee in the general election. For this reason, sore loser laws give great leverage to the ideologically demanding party base over politically moderate dissenters. They therefore preempt the natural incentives for the controlling elements within the party to compromise with their parties’ more moderate dissenters and move the parties toward the political center.

A. SORE LOSER LAWS: AN INTRODUCTION

Sore loser laws, in various forms, prohibit losing candidates in one party’s primary election from subsequently filing to run as the nominee of another party or as an independent candidate on the general election ballot in the same electoral cycle. Sore loser laws, in other words, block a sore loser candidate from continuing to challenge in the general election a party’s nominee who has

already defeated that sore loser candidate in the preceding party primary. Sore loser laws restrict the supply of candidates in the general election by disqualifying, as a matter of state law, a large number of serious candidates who have lost the party primary election.

Sore loser laws are virtually ubiquitous today, but this was not always the case. As of 2010, sore loser candidacies are effectively barred by law in every state except Connecticut, Iowa, and New York.¹¹⁹ This near uniformity across the states, however, is a somewhat recent development in American politics. As recently as 1984, one source reported that only twenty-seven of fifty states carried sore loser provisions.¹²⁰ My own count for 1984 is higher, at thirty-seven states, but thirteen of those states had just adopted sore loser laws during the previous eight years between 1976 and 1984.¹²¹ And then between 1985 and 1994, eight additional states enacted new laws barring sore loser candidacies,¹²² which helped bring the number of states that barred sore loser candidacies to a total of forty-seven.¹²³ In other words, though almost all states have sore loser laws today, almost half the country—twenty-one states by my count—adopted sore loser laws only recently, between 1976 and 1994. The year of enactment as well as the type of sore loser restriction are listed in Table 1 for each state.¹²⁴

The most common form of sore loser law is an express prohibition on a sore loser candidacy. The majority of states have enacted explicit prohibitions forbidding a candidate that lost a primary election from appearing as a candidate on the general election ballot. Fifteen states disqualify for the general election ballot any candidate who has lost the preceding party primary for the same

119. See *infra* Table 1. See generally Schneider, *supra* note 2 (discussing the possibility of Senator Lieberman running in Connecticut's general election for U.S. Senator, despite losing the primary, and noting that as of 2006 (and thus, not taking into account Vermont's 2010 sore loser law), only four states did not have sore loser laws).

120. See PRICE, *supra* note 1.

121. The thirteen states that adopted sore loser laws or their equivalents between 1976 and 1984 are Alabama, Alaska, Delaware, Georgia, Idaho, Louisiana, Massachusetts, Minnesota, Missouri, New Hampshire, Rhode Island, South Dakota, and Wisconsin. See *infra* Table 1. Louisiana bars sore loser candidacies by virtue of nonpartisan primary elections in which party nominations are not made in the first place. See *infra* note 137 and accompanying text.

122. The eight states that adopted sore loser laws or their equivalents between 1985 and 1994 are Illinois, Kansas, Michigan, Montana, Nebraska, Oklahoma, Texas, and Utah. See *infra* Table 1.

123. The two states that adopted sore loser laws or their equivalents between 1995 and 2010 are Vermont and Washington. See *infra* Table 1. Washington bars sore loser candidacies by virtue of nonpartisan primary elections in which party nominations are not made in the first place. See *infra* note 138 and accompanying text. Connecticut, Iowa, and New York still do not have sore loser laws. See *infra* Table 1.

124. Sore loser laws generally apply to all federal, state, and local elected offices, but only four states apply their sore loser provisions to elections for presidential electors—Mississippi, Ohio, South Dakota, and Texas. See Richard Winger, *Sore Loser Laws Don't Generally Apply to Presidential Candidates*, BALLOT ACCESS NEWS (Jan. 12, 2007), <http://www.ballot-access.org/2007/01/12/sore-loser-laws-dont-generally-apply-to-presidential-candidates/>.

Table 1: Type of Sore Loser Law and Year of Original Enactment State by State¹²⁵

State	Type of Sore Loser Restriction	Year of Enactment	State	Type of Sore Loser Restriction	Year of Enactment
Alabama	CF	1977	Montana	PCF	1991
Alaska	CF	1980	Nebraska	SL	1994
Arizona	PCF	1970	Nevada	CF	1963
Arkansas	SL	1955	New Hampshire	CF	1981
California	CF	1917	New Jersey	SL	1915
Colorado	SL	1963	New Mexico	SL	1939
Connecticut	None		New York	None	
Delaware	PCF	1978	North Carolina	CF	1967
Florida	PCF	1970	North Dakota	SL	1975
Georgia	CF	1983	Ohio	CF	1929
Hawaii	CF	1967	Oklahoma	CF	1987
Idaho	SL	1976	Oregon	SL	1939
Illinois	CF	1989	Pennsylvania	CF	1937
Indiana	SL	1967	Rhode Island	CF	1981
Iowa	None		South Carolina	SL	1950
Kansas	CF	1989	South Dakota	SL	1977
Kentucky	SL	1920	Tennessee	CF	1975
Louisiana	NP	1978	Texas	SL	1985
Maine	CF	1973	Utah	CF	1994
Maryland	SL	1957	Vermont	PCF	2010
Massachusetts	CF	1976	Virginia	SL	1932
Michigan	CF	1988	Washington	NP	2004
Minnesota	CF	1981	West Virginia	CF	1919
Mississippi	CF	1906	Wisconsin	CF	1977
Missouri	CF	1977	Wyoming	CF	1973

125. “SL” denotes an express prohibition on sore loser candidacies. “CF” denotes a cross-filing prohibition or other legal requirement that effectively prohibits a candidate from losing a party primary and thereafter filing to run as an independent candidate for the same office or to run in another party primary at the same time for the same office. “PCF” denotes a partial cross-filing prohibition or other legal requirement under which a candidate (i) may run in a party primary and as an independent candidate at the same time for the same office, or (ii) may not run in a party primary and as an independent candidate at the same time for the same office, but may run in more than one primary at the same time for the same office, provided in either case that the candidate files all his or her candidacies in advance of the primary election. “NP” denotes a nonpartisan primary.

office.¹²⁶ Three other states accomplish the same effect by prohibiting independent candidacies on the general election ballot by anyone who has lost the preceding party primary, and then separately prohibiting candidates from running in more than one primary during a single election cycle.¹²⁷ Fourteen more states prohibit a candidate from running as an independent candidate on the ballot if she participates in a primary at all, while likewise prohibiting cross-filing in more than one party primary as well.¹²⁸ In short, in these states, candidates must choose to run either in a single party primary, or as independents in the general election, but they cannot do both in the same election cycle.

However, even in the absence of such explicit prohibitions, state law may similarly bar sore loser candidacies by indirect means. Eight states both bar candidates from running in more than one party primary at a time and bar candidates from running in a party primary and being listed as an independent candidate on the general election ballot at the same time, even if they do not expressly prohibit each route.¹²⁹ These states require a candidate, as a condition

126. Arkansas, Colorado, Idaho, Indiana, Kentucky, Maryland, Nebraska, New Jersey, New Mexico, North Dakota, Oregon, South Carolina, South Dakota, Texas, and Virginia all use this method. ARK. CODE ANN. 7-7-103(e) (2007); COLO. REV. STAT. § 1-4-105 (2008); IDAHO CODE ANN. § 34-704 (2008); IND. CODE ANN. § 3-8-1-5.5(a) (West 2006); KY. REV. STAT. ANN. § 118.345(1) (West 2006); MD. CODE ANN., ELEC. LAW § 5-706(b) (West 2010); NEB. REV. STAT. § 32-605 (2008); N.J. STAT. ANN. § 19:13-8.1 (West 1999); N.M. STAT. ANN. § 1-8-19 (2003); N.D. CENT. CODE § 16.1-13-06 (2009); OR. REV. STAT. § 249.048 (2009); S.C. CODE ANN. § 7-11-210 (Supp. 2009); S.D. CODIFIED LAWS § 12-7-5 (2004); TEX. ELEC. CODE ANN. § 162.015 (West 2010); VA. CODE ANN. § 24.2-520 (2006). Oregon prevents only “major party” candidates from running with a party’s nomination if they lose another party’s primary election. OR. REV. STAT. § 249.031(g) (2009); *see also id.* § 249.048.

127. California, Illinois, and Kansas fall into this category. CAL. ELEC. CODE §§ 8001, 8003 (West 2003); 10 ILL. COMP. STAT. 5/10-3, -7 (2008); KAN. STAT. ANN. §§ 25-202(c), -306 (2000).

128. Alabama, Alaska, Georgia, Hawaii, Maine, Michigan, Minnesota, Mississippi, Missouri, Nevada, Pennsylvania, Tennessee, Utah, and Wisconsin. ALA. CODE § 17-9-3(b) (LexisNexis 2007); ALASKA STAT. §§ 15.25.030(a)(14), .180(a)(13) (2010); GA. CODE ANN. § 21-2-137 (2008); HAW. REV. STAT. § 12-3(c) (2009); ME. REV. STAT. ANN. tit. 21-A, §§ 144(3), 351(2) (2008); MICH. COMP. LAWS ANN. §§ 168.590g, .692, .692a, .695 (West 2005 & 2008); MINN. STAT. ANN. § 204B.04 (West 2009); MISS. CODE ANN. § 23-15-359 (Supp. 2010); MO. ANN. STAT. § 115.351 (West 2003); NEV. REV. STAT. §§ 293.176(1), .177(2)(a), .200(6) (2009); 25 PA. CONS. STAT. ANN. §§ 2911(e)(5), 2936 (West 2007); TENN. CODE ANN. § 2-5-101(f) (Supp. 2010); UTAH CODE ANN. §§ 20A-9-201(2)(a)(ii), -501(2) (LexisNexis 2010); WIS. STAT. § 8.15(7) (2007–2008). Mississippi’s law is not as explicit as the other states listed in this footnote, but the language of MISS. CODE ANN. § 23-15-359, as it descended from earlier codifications, has long been interpreted by Mississippi courts to prohibit a candidate from running both as an independent and in a primary. *See* Miss. State Bd. of Election Comm’rs v. Meredith, 301 So. 2d 571, 573 (Miss. 1974); *Bowen v. Williams*, 117 So. 2d 710, 711 (Miss. 1960) (confirming this interpretation from *Ruhr v. Cowan*, 112 So. 386 (Miss. 1927)); *Ruhr*, 112 So. at 389.

129. Massachusetts, New Hampshire, North Carolina, Ohio, Oklahoma, Rhode Island, West Virginia, and Wyoming. MASS. GEN. LAWS ANN. ch. 53, §§ 6, 48 (West 2007); N.H. REV. STAT. ANN. §§ 655:14, :43(IV) (LexisNexis 2007 & Supp. 2010); N.C. GEN. STAT. § 163-106(a)–(b) (2009); OHIO REV. CODE ANN. §§ 3513.04, .07 (LexisNexis Supp. 2010); OKLA. STAT. tit. 26, § 5-105 (1991); R.I. GEN. LAWS §§ 17-14-1.1, -2.1 (2003); W. VA. CODE ANN. §§ 3-5-7(d)(6), -23(a) (LexisNexis Supp. 2010); WYO. STAT. ANN. §§ 22-5-204(b), -302 (2009). For instance, the West Virginia law requires independent and third-party candidates to file declaration of candidacy papers at least thirty days before the election and does not allow the nomination of candidates who are already candidates in a primary election. *See* W. VA. CODE ANN. §§ 3-5-7(d)(6), -23(a). Thanks to Bob Bastress for his advice on West Virginia law. Oklahoma’s law, however, is less clear. From 1987 to 2004, the state barred sore loser candidacies by

of ballot eligibility, either to be registered with a party to run as a candidate in that party's primary, for a nontrivial duration before the primary election, or simply bar outright cross-filing in multiple party primaries.¹³⁰ And to run as an independent candidate in the general election, these states also require a candidate to be unregistered with a party for a duration before filing to run as an independent, or simply bar outright cross-filing in a party primary at the same time as filing as independent candidate. As a result, a candidate who has entered and lost one party's primary cannot run in the subsequent general election as the nominee of another party or as an independent candidate. Of course, several states permit exceptions to these sore loser prohibitions in extraordinary circumstances, such as the death, incapacitation, or withdrawal of a primary winner.¹³¹

Five states require greater explanation: Arizona, Delaware, Montana, Florida, and Vermont. Arizona, Delaware, and Montana prohibit candidates from running as independent candidates after running in a party primary, but these states do not prohibit cross-filing in more than one party primary.¹³² In these states, it is conceivable that a candidate might run in the primary of a major party but also decide to run in another party primary at the same time. If she were to lose the primary of the major party, she might still advance to the general election by winning the primary of the other party. In this sense, the candidate would technically be able to run in the general election as a sore loser of the major party primary. However, the candidate must have the foresight to file in more than one party primary in advance of those primary elections because the filing deadlines for primaries are set in advance of all primary elections. As a practical matter, this severely limits the opportunity for sore loser candidacies.¹³³ Florida law is similar in effect, though slightly different in form. Although Florida law

these means for all federal, state, and county candidates. However, in 2004, the Oklahoma Supreme Court held that the disaffiliation requirement did not apply to federal congressional candidates in *Bradshaw v. Oklahoma State Election Board*. See 2004 OK 69, ¶ 1, 98 P.3d 1092, 1092–93. Since 2004, no candidate to my knowledge has tested this exception, which was contrary to the state election board's interpretation of the statute. See *id.* at ¶ 9 & nn.10–11, 98 P.3d at 1096 & nn.10–11 (Kauger, J., dissenting) (citing decisions by the state election board).

130. A candidate satisfies this affiliation requirement in most of these states by being a registered party member for a duration of time or by filing as a candidate in a single party primary.

131. See, e.g., ALASKA STAT. § 15.25.110 (2010). After Lisa Murkowski lost the 2010 Alaskan Republican primary, she considered collaborating with the Libertarian Party to have herself replace the Libertarian nominee through this type of potential loophole in Alaskan law. See Christina Bellantoni, *Lisa Murkowski Flirts with Libertarians, and They Flirt Back*, TALKING POINTS MEMO (Sept. 8, 2010, 5:02 PM), <http://tpmdc.talkingpointsmemo.com/2010/09/lisa-murkowski-flirts-with-libertarians.php>.

132. See ARIZ. REV. STAT. ANN. § 16-312(E) (Supp. 2010); DEL. CODE ANN. tit. 15, § 3002(b) (2007); MONT. CODE ANN. §§ 13-10-303, -507 (2009).

133. For instance, Michael Castle lost the 2010 Republican primary for Senate to Christine O'Donnell, John Whitesides, *Republicans Take Stock After Tea Party Stunner*, REUTERS (Sept. 15, 2010, 4:28 PM), <http://www.reuters.com/article/idUSTRE68E0AK20100915>, and could not make a sore loser challenge by running as the nominee of another party because the filing deadline for entering another party's primary had long passed by the time of his primary defeat, see DEL. CODE ANN. tit. 15, § 3101(2) (2007).

prohibits cross-filing as a candidate in more than one party primary,¹³⁴ Florida law nonetheless permits a candidate to run in a party primary as well as run as a “no-party” candidate for the same office during the same year.¹³⁵ As a result, a candidate who loses a party primary may still advance to the general election as a no-party candidate if the candidate had the foresight before the primary election to both file as a no-party candidate and enter the party primary. Vermont law, for its part, is the most recently enacted sore loser restriction. It allows candidates to run for more than one party nomination, and run as an independent even when running for a party nomination, but the filing deadline for each path to the general election is the same date.¹³⁶ As a result, a candidate may run as a sore loser candidate after losing a primary but only if he or she cross files at the start and declares at least dual allegiance before the primary election takes place.

Finally, two states hold nonpartisan primaries where sore loser candidacies are impossible simply because there are no official party nominees selected at all—only the top two finishers from the nonpartisan primary, irrespective of their partisan affiliation, may advance to a general runoff election. In Louisiana, all partisan candidates and even independent candidates for a given office run together in a single nonpartisan election, and only the top two vote-getters can qualify for and receive votes in the subsequent general election for that office.¹³⁷ Washington’s election process is nearly identical for these purposes, except that voters may cast write-in votes for a candidate on the general election ballot who did not participate at all in the primary election.¹³⁸

For purposes of this Article, I focus on only laws that restrict a losing candidate in the primary from being formally listed on the ballot during the subsequent general election. Even where sore loser laws prohibit a candidate who has lost a party primary from being listed on the general election ballot as the nominee of another party or an independent candidate, some states permit the candidate to campaign and be eligible to win the general election as a write-in candidate. For instance, incumbent Senator Lisa Murkowski lost the

134. See FLA. STAT. ANN. § 99.021(1)(b) (West Supp. 2011) (requiring an oath that the candidate is a registered member of the party in whose primary he seeks nomination and is not a registered member of any other party).

135. See *id.* § 99.021(1) (failing to require any attestation of disaffiliation from any political party to qualify as a no-party candidate).

136. Act of Apr. 7, 2010, No. 73, §§ 1, 4, 2010 Vt. Legis. Serv. (West) (codified as amended at VT. STAT. ANN. tit. 17, §§ 2351, 2356).

137. See LA. REV. STAT. §§ 18:481 to :482 (2004 & Supp. 2010). Louisiana maintained a top two, or “Cajun,” primary from 1978 until 2008, see *Love v. Foster*, 147 F.3d 383, 385–87 (5th Cir. 1998), when the state switched to closed party primaries from the 2008 election cycle through the 2010 election cycle, see Richard A. Clucas, *The Oregon Constitution and the Quest for Party Reform*, 87 OR. L. REV. 1061, 1087 & n.185 (2008), only to re-institute the top two primary effective as of January 1, 2011, see Act of June 25, 2010, No. 570, sec. 1, § 481, 2010 La. Sess. Law Serv., available at <http://www.legis.state.la.us/billdata/streamdocument.asp?did=722314>.

138. See WASH. REV. CODE §§ 29A.52.112, .60.021 (2010).

2010 Republican primary in Alaska during her reelection bid¹³⁹ and was barred by the state's sore loser provisions from filing afterward as an independent candidate or a nominee of another party.¹⁴⁰ Murkowski nonetheless managed to win the subsequent general election, despite not being listed on the ballot, as a write-in candidate.¹⁴¹ Such electoral success as a write-in candidate, however, is exceedingly rare. The inherent disadvantages of being excluded from the list of candidates on the ballot presented to the voters are great, particularly for federal and statewide offices that tend to be contested by major party nominees themselves listed on the ballot and familiar to voters.¹⁴² As a result, even where candidates are permitted to run on a write-in basis, a sore loser restriction that prevents the candidate from being listed on the general election ballot poses a very significant barrier to winning office. Murkowski's victory illustrates how a losing primary candidate may be the most popular and centrist candidate in the general election (primary defeat notwithstanding), and yet, the challenges of a write-in candidacy are likely to deter and undercut such bids in very many cases. Before Murkowski's reelection in 2010, no candidate had won election to the United States Senate on a write-in basis in more than half a century.¹⁴³

B. SORE LOSER LAWS V. DUVERGER'S LAW

Despite the prevalence of sore loser laws across the states, there is almost no literature, empirical or normative, addressing sore loser laws. To the extent that sore loser laws are mentioned in academic commentary, they are criticized only in passing as part of a large category of duopolistic laws that discriminate against minor parties, such as single-member districting, restrictive ballot access rules, prohibitions on fusion candidacies, and campaign finance laws.¹⁴⁴ Sore loser laws receive almost no attention within this literature at least in part because commentators attribute more weight to these other aspects of American election law with respect to the persistence of major party duopoly.

139. See Aaron Blake, *Alaska Sen. Murkowski Concedes Primary*, WASH. POST: THE FIX (Aug. 31, 2010, 10:20 PM), <http://voices.washingtonpost.com/thefix/senate/sen-murkowski-picks-up-208-vot.html>.

140. See *supra* note 128 and accompanying text.

141. See Sandhya Somashekhar, *Murkowski Poised for Second Full Senate Term*, WASH. POST, Dec. 28, 2010, at A5.

142. See, e.g., *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 831 (1995) (“[W]rite-in candidates have only a slight chance of victory.”); James A. Gardner, *Deliberation of Tabulation? The Self-Undermining Constitutional Architecture of Election Campaigns*, 54 BUFF. L. REV. 1413, 1431 n.69 (2007) (“[N]o candidate would deem the possibility of waging a write-in campaign a meaningful substitute for a line of the official ballot form, as the Court has explicitly acknowledged.”).

143. See Sandhya Somashekhar, *Murkowski May Make Write-in History*, WASH. POST, Nov. 4, 2010, at A26 (describing the unusual circumstances underlying Murkowski's rare success as a write-in candidate, the first such Senate election as a write-in candidate since Strom Thurmond's victory in 1954).

144. See, e.g., Mark R. Brown, *Policing Ballot Access: Lessons from Nader's 2004 Run for President*, 35 CAP. U. L. REV. 163, 168, 193–95 (2006); Klarman, *supra* note 95, at 535–36; Howard A. Scarow, *Duverger's Law, Fusion, and the Decline of American “Third” Parties*, 39 W. POL. Q. 634, 638 (1986); Bradley A. Smith, Note, *Judicial Protection of Ballot-Access Rights: Third Parties Need Not Apply*, 28 HARV. J. ON LEGIS. 167, 207 (1991).

Of course, sore loser laws contribute to major party duopoly. They deny minor parties the most crucial element for their potential electoral success—quality candidates.¹⁴⁵ Sore loser laws target a pool of candidates—losing primary candidates—that is likely to be stronger than the usual array of noncontenders run by minor parties. Thus, new parties cannot be created from the fresh defection of dissident members from the major parties.¹⁴⁶ Combined with the other disadvantages faced by minor parties, sore loser laws make it difficult to build up a viable third party as an ongoing enterprise that provides meaningful competition against the major parties over the long term. This absence of a viable third party cuts down any candidate's options for challenging the major parties from the outside.

The effect of sore loser laws in denying outside opportunities for major party actors, through minor party or independent candidacies, is easy to dismiss as inconsequential because of the major disadvantages to outside challenges posed by Duverger's Law. Samuel Issacharoff points out that the use of single-member, first-past-the-post electoral districts "promotes the existence of two and only two serious parties, and provides a strong measure of immunity against displacement by third parties."¹⁴⁷ Bruce Cain claims that "ultimately, the only really important discrimination against minor parties is the single-member simple plurality rule itself."¹⁴⁸

However, this view of minor party and independent candidacies as futile under Duverger's Law fixates on an unduly ambitious sense of what minor party and independent candidacies hope to achieve. The theoretical fixation on third parties as ongoing enterprises modeled after the major parties distracts attention from the more important possibility of third parties as outlets for outside challenges by major party dissidents. In a single election, Duverger's Law tends to favor the leading pair of *candidates*, not necessarily two major parties.¹⁴⁹ A popular, well-known candidate, who for political reasons runs as the nominee of a minor party, is not doomed to failure, and indeed, there are prominent cases of success. There are risks from drawing broad conclusions from a single case, but

145. See, e.g., STEVEN J. ROSENSTONE, ROY L. BEHR & EDWARD H. LAZARUS, *THIRD PARTIES IN AMERICA: CITIZEN RESPONSE TO MAJOR PARTY FAILURE* 139–42 (2d ed. 1996) (explaining the availability of quality candidates as a critical determinant of third-party success at the national level).

146. See *id.* at 194–99 (noting greater third-party success in presidential elections following a divisive party convention from one of the major parties).

147. Issacharoff, *supra* note 17, at 292.

148. Bruce E. Cain, *Garrett's Temptation*, 85 VA. L. REV. 1589, 1602 (1999); see also Daniel H. Lowenstein, *The Supreme Court Has No Theory of Politics—and Be Thankful for Small Favors*, in *THE U.S. SUPREME COURT AND THE ELECTORAL PROCESS* 283, 300 (David K. Ryden ed., 2d ed. 2002) (arguing that Duverger's Law with respect to the "single-member-district system" is one of three "structural features . . . most responsible" in creating a duopoly).

149. Cf. William H. Riker, *The Two-party System and Duverger's Law: An Essay on the History of Political Science*, 76 AM. POL. SCI. REV. 753, 755 (1982) ("Politicians and candidates with some common interests—perhaps only a common desire to win or perhaps also a common ideology or a common identification with a group—appeal to voters under a common banner, and thereby generate political parties.").

Joe Lieberman's victory as a sore loser candidate in Connecticut's 2006 Senate election is one example of how the strongest independent or minor party candidacies are the result of defection by a strong candidate from the major parties.¹⁵⁰

Joe Lieberman is exactly the type of candidate targeted by the bases of the major parties. Democratic loyalists, almost all of whom are to his political left, disdained Lieberman for his frequent defiance of Democratic Party orthodoxy.¹⁵¹ In 2005, Lieberman's voting record ranked second lowest among Democrats on the Americans for Democratic Action scorecard,¹⁵² and most prominently, Lieberman angered Democrats by vocally supporting President George W. Bush's war in Iraq, well after the war had grown quite unpopular among Democrats.¹⁵³ Lieberman made regular practice of siding with Republicans on high-profile concerns, including the failed filibuster of Justice Samuel Alito's nomination, the Terry Schiavo controversy, and Bush's Social Security privatization proposals, among others.¹⁵⁴ Lieberman's fiercest critics cited as symbolic evidence of Lieberman's disloyalty his famous "kiss" with President Bush after the 2005 State of the Union speech, when Bush embraced and seemed to kiss Lieberman.¹⁵⁵ Indeed, Bush would later refuse to endorse the Republican candidate for Lieberman's Senate seat,¹⁵⁶ while Bush's Democratic opponents in the previous two presidential elections, Al Gore and John Kerry, refused to endorse their fellow partisan Lieberman.¹⁵⁷

For all these reasons, the Democratic base mobilized to a surprising degree against a sitting incumbent and supported Ned Lamont's primary challenge. Lamont, who had never run for office, spent roughly \$12 million of his money on his primary challenge.¹⁵⁸ Marshall Wittmann from the Democratic Leader-

150. Although there are many more examples at the congressional, state, and local levels, it is easy to offer historical examples of candidates nominally outside the major parties, running as minor party or independent candidates, providing serious candidacies even at the presidential level. Most famously, Teddy Roosevelt finished second in his 1912 presidential run as the Bull Moose Party's nominee, ahead of incumbent Republican President Howard Taft, in what was "a battle only between Roosevelt and [Democrat Woodrow] Wilson." ROSENSTONE, BEHR & LAZARUS, *supra* note 145, at 86. It was Taft's candidacy as a Republican incumbent that spoiled Roosevelt's election bid. *See id.* at 84–86.

151. *See* MATT BAI, THE ARGUMENT: BILLIONAIRES, BLOGGERS, AND THE BATTLE TO REMAKE DEMOCRATIC POLITICS 260 (2007) (describing the movement against Lieberman as intended to "cleanse the party of Republican appeasers"); Kevin A. Pirch, *Bloggers at the Gate: Ned Lamont, Blogs, and the Rise of Insurgent Candidates*, 26 SOC. SCI. COMPUTER REV. 275, 280–81 (2008) (recounting Lieberman's decline in popularity among Democrats as a result of his support for President George W. Bush and the war in Iraq, among other things); Kate Zernike, *Allied with Democrats, Lieberman Easily Aligns with Republicans*, N.Y. TIMES, Feb. 8, 2007, at A18 (describing Lieberman's cooperation with Republicans).

152. *See* Harold Meyerson, Editorial, *Lieberman's Real Problem*, WASH. POST, July 12, 2006, at A15.

153. *See, e.g.*, William Yardley, *Lieberman's Support for War Leaves Him Embattled on Left: Facing Liberal Wrath in Connecticut*, N.Y. TIMES, May 19, 2006, at B1.

154. *See* Pirch, *supra* note 151 (listing Democratic grievances).

155. *See* BAI, *supra* note 151.

156. *See* David Lightman, *Bush Boosts Lieberman's Bid: Statement Seen as Signal to GOP Voters*, HARTFORD COURANT, Aug. 22, 2006, at A1.

157. *See* John Nichols, *A Fight for the Party's Soul*, NATION, Aug. 14/21, 2006, at 24, 27.

158. Matthew Contineti, *Joementum Returns: Ever Since Ned Lamont's Primary Triumph, Lieberman Has Been Ahead*, WKLY. STANDARD, Nov. 6–Nov. 13, 2006, at 8.

ship Council characterized the race as “a fight for the soul of the Democratic Party.”¹⁵⁹ By that measure, it was no contest. Lamont defeated Lieberman in the primary race 52% to 48% in a “high-turnout” election.¹⁶⁰

In the usual circumstances, Lieberman’s defeat in the party primary would have meant his ouster from the Senate, even for a long-time incumbent with a broad base of support. Lieberman complained on the night of his primary defeat that “[t]he old politics of partisan polarization won today.”¹⁶¹ Indeed, such a message was almost certainly the intention of many Lamont supporters. As filmmaker and Lamont supporter Michael Moore declared: “Let the resounding defeat of Senator Joe Lieberman send a cold shiver down the spine of every Democrat who supported the invasion of Iraq.”¹⁶² The executive director of MoveOn.org, which had strongly supported Lamont,¹⁶³ wrote after the election in the *Washington Post* that “[t]he policy of seizing the political middle ground no longer makes sense.”¹⁶⁴ The party base in the Democratic primary rejected him as its nominee.

Nonetheless, Lieberman was eligible to run as an independent in Connecticut after his primary loss because the state does not have a sore loser law.¹⁶⁵ Sensing the possibility of a primary defeat, Lieberman had already organized a sore loser run and qualified his platform, the Connecticut for Lieberman Party, for the general election ballot.¹⁶⁶ He ran as what liberals considered “the de facto GOP candidate in the race,” with a weak Republican nominee Alan Schlesinger receiving little of his party’s support.¹⁶⁷ Lieberman’s advisers knew that Lieberman needed only about 30% of the Democratic vote in the general election and that he was likely to win roughly two-thirds of the Republican vote in the three-way race with Lamont and Schlesinger.¹⁶⁸ This cross-partisan coalition of centrist Republicans and Democrats returned Lieberman to the Senate on election day by a 50% to 40% margin over Lamont, with Schlesinger

159. Nichols, *supra* note 157, at 25.

160. Matthew Continetti, “Pro-War, You Get the Door”: *The Triumph of the Ned Lamont Democrats*, WKLY. STANDARD, Aug. 21–Aug. 28, 2006, at 20.

161. Continetti, *supra* note 158.

162. Continetti, *supra* note 160, at 22.

163. See Joe Garofoli, *Bloggers Helped Power Lamont Victory, Net Efforts Seen as a Growing Liberal Political Force*, SEATTLE POST-INTELLIGENCER, Aug. 10, 2006, at A11.

164. Continetti, *supra* note 160, at 23 (quoting Eli Pariser).

165. Lieberman could have run as an independent after his primary election defeat because there was no prohibition on him, a registered Democrat, from running as an independent, *see supra* note 119 and accompanying text, and the filing deadline for an independent candidacy in Connecticut in 2006 was August 9, 2006, the day after the primary election, *see* OFFICE OF THE SEC’Y OF THE STATE, NOVEMBER 7, 2006 STATE ELECTION CALENDAR 1 (2005), available at <http://www.ct.gov/sots/LIB/sots/ElectionServices/Calendars/2006Election/2006.pdf>.

166. Although Lieberman could have run as an independent candidate, *see supra* note 165, Lieberman chose to run as a minor party candidate, at least as a technical matter, likely because minor party candidates are listed higher up on the ballot order than independents.

167. Bruce Shapiro, *Ned Lamont vs. Joe Lieberman: Round Two*, NATION, Nov. 6, 2006, at 11, 13.

168. See Continetti, *supra* note 158, at 9.

receiving roughly the remaining 10% of the vote.¹⁶⁹

Thanks to the absence of a sore loser law in Connecticut, Lieberman was able to qualify for the ballot in the general election. He successfully patched together a winning coalition of voters from the political center, despite having defied the Democratic base that had previously elected him to three terms.¹⁷⁰ Duverger's Law, at least by itself, does not doom strong candidates to failure when they run against the major parties as Lieberman did. Indeed, Duverger's Law worked for Lieberman here, not against him. Republican-leaning voters appeared to vote strategically between Lamont and Lieberman instead of wasting their votes on Schlesinger.

In short, Lieberman's reelection helps demonstrate that a critical element to successful outside challenges through minor party or independent routes is the supply of quality candidates.¹⁷¹ The best candidates usually run as nominees of the major parties, but not always. It is precisely those instances that provide the most interesting opportunities for minor parties and a supply-side approach to party reform. For instance, historically at the presidential level, a nationally prestigious candidate who runs as a minor party or independent candidate receives an average of roughly thirty times the vote of a nonprestigious candidate.¹⁷² As the study's authors summarize simply: "When citizens view a minor party candidate as legitimate—that is, when the candidate has attributes that resemble those of most major party nominees—voters are more likely to choose the third party alternative."¹⁷³ But sore loser laws choke off outside options and block out quality candidates from pursuing challenges to the major party candidates when they themselves are denied nomination. As a result, party dissenters must stay inside their party to fight their battles, while minor parties are deprived of quality candidates and forced to run marginal candidates with no hope of competitiveness. Sore loser laws cut off what are realistic, if only sporadic, hopes of serious competition to Democrats and Republicans from minor parties and independents.

However, the focus on the duopolistic effect of sore loser laws tends to obscure what may be their even more harmful consequence—the suppression of *intraparty* competition, rather than *interparty* competition. It is easy to see duopolistic harm that dooms the long-term development of a third-party challenge to Republicans and Democrats. What has gone unnoticed is the role that

169. *America Votes 2006—U.S. Senate/Connecticut*, CNN.COM, <http://edition.cnn.com/ELECTION/2006/pages/results/states/CT/S/01/> (last visited Dec. 17, 2010).

170. See *Biography*, SENATOR JOSEPH LIEBERMAN, <http://lieberman.senate.gov/index.cfm/about-joe/biography> (last visited Dec. 17, 2010).

171. Murkowski's victory illustrates this fact as well. Murkowski's standing and popularity as the incumbent senator was obviously critical to her success as a write-in candidate, which would have been prohibitively difficult to achieve as a political unknown without past electoral achievements.

172. See ROSENSTONE, BEHR & LAZARUS, *supra* note 145, at 140–42 (defining "nationally prestigious" as including a current or former federal officeholder, or state governor, who has previously run as the presidential or vice-presidential nominee for a major party).

173. *Id.* at 139.

sore loser laws may play in suppressing intraparty dissent, moderation, and change. Sore loser laws, by removing opportunities for major party politicians to run as minor party or independent candidates, effectively eliminate the best opportunities to threaten exit from the party. These regulations channel all intraparty dissent through the party.

C. SORE LOSER LAWS AS A STATE LAW TRUMP OVER POLITICAL COMPROMISE

Courts, in the few cases reviewing sore loser laws, have upheld them.¹⁷⁴ Under a widely recognized state interest in stability and prevention of voter confusion, courts have presupposed that the major parties must determine their best representative and advance only a single candidate to the general electorate in what the Supreme Court applauds as a simplified, winnowed field of final contenders. The Court has declared that “[i]t is too plain for argument” that the state “may insist that intraparty competition be settled before the general election by primary election or by party convention.”¹⁷⁵ These benefits appear so uncontroversial that they prompt virtually no judicial controversy or academic commentary on the subject, even as other aspects of party regulation and primaries have garnered a gigantic literature.

In *Storer v. Brown*, the Court upheld a California statute that effectively prohibited sore loser candidacies.¹⁷⁶ The statute required, among other things, that independent candidates be disaffiliated from any political party for at least a year preceding the last primary election, and therefore, barred any losing candidate in the primary election from running as an independent candidate in the general election.¹⁷⁷ The Court reasoned that the logic of the statute was that the primary election was designed “not merely [as] an exercise or warm-up for the general election,” but “to have contending forces within the party employ the primary campaign and primary election to finally settle their differences.”¹⁷⁸ The statute prevented defeated primary candidates from “continuing the struggle” within the party beyond the primary stage (where it must be resolved) into the general election.¹⁷⁹ The Court explained that the statute reasonably prevents the general election from becoming “a forum for continuing intraparty feuds.”¹⁸⁰

The Court assumed in *Storer* that if a voter or candidate is a party member, then she will participate only in the party primary and rightfully be bound by its results. As the Court explained, and as the nomenclature suggests, such sore loser laws thus target only “sore losers” who have lost the primary election fair

174. See, e.g., *Storer v. Brown*, 415 U.S. 724, 736 (1974); *Backus v. Spears*, 677 F.2d 397, 399–400 (4th Cir. 1982); *Nat’l Comm. of the U.S. Taxpayers Party v. Garza*, 924 F. Supp. 71, 75 (W.D. Tex. 1996).

175. *Am. Party of Tex. v. White*, 415 U.S. 767, 781 (1974).

176. 415 U.S. at 736.

177. *Id.* at 726.

178. *Id.* at 735.

179. *Id.*

180. *Id.*

and square and then may be motivated to continue in the general election “prompted by short-range political goals, pique, or personal quarrel.”¹⁸¹ If a candidate wishes later to run as an independent candidate, then she should never have run in the party primary in the first place and should have “ma[d]e early plans to leave a party and take the alternative course to the ballot.”¹⁸² She should have run from the beginning as the nominee of another party or as an independent, without ever pretending to represent the views of the party in whose primary she competed.

What is perverse about this view of political parties and sore loser laws is the premise that voters and candidates for office can be neatly categorized as being either included in or excluded from true party membership. Parties are provisional coalitions whose core principles and shared agenda are constantly contested among many constituents who might comprise the party at any given moment. Political parties bring together candidates with overlapping but nonidentical interests, who agree in certain broad respects, but who also disagree on many issues to varying degrees and wish to push their shared agenda in differing directions. As I have explained, intraparty competition over the direction of the party can therefore be intense, not unlike interparty competition, and constantly threatens a level of party disunity in the push–pull tumult of party politics.¹⁸³

The Court’s view of major party primaries in *Storer v. Brown* therefore contains an internal tension. On the one hand, the Court identifies the party primary election as “the initial stage in a two-stage process by which the people choose their public officers.”¹⁸⁴ The primary is drafted into service as part of the state apparatus for winnowing down the general field of candidates, and as a result, provides a main point of entry for ballot access to interested candidates. Indeed, as the Court itself has acknowledged, the first-past-the-post, winner-take-all election format in the United States reinforces a duopolistic system in which nomination by one of the two major parties usually provides the only serious opportunity at election to significant public office.¹⁸⁵ In this view, party primary election is a state-sponsored, first-stage election, necessary for ballot access.

On the other hand, however, the Court also breezily dismissed challenges to the one-year disaffiliation statute in *Storer v. Brown*, which barred in practice any primary candidate from running subsequently as an independent candidate in the general election. The Court explained that the statute simply guarded against “splintered parties and unrestrained factionalism” among party members who should resolve their political disagreement within the confines of the party

181. *Id.*

182. *Id.*

183. See *supra* notes 68–73 and accompanying text.

184. *Storer*, 415 U.S. at 735.

185. See, e.g., *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 378–81 (1997) (Stevens, J., dissenting).

primary.¹⁸⁶ To the degree that the statute barred a primary loser from running in the general election as an independent, this state interest outweighed the interest the candidate and her supporters may have “in making a late rather than an early decision to seek independent ballot status.”¹⁸⁷

This view of party candidates and primary elections is strikingly simplistic. Parties are, and should be, fluid, informal coalitions only provisionally committed toward a general political agenda defined by the mutual interests of self-identified party actors who find it in their mutual interest to coordinate with one another instead of other political actors. Simply put, there is no such thing intrinsically as a Democrat or Republican. Although we may refer to ourselves and others colloquially as Democrats or Republicans, those allegiances are in no sense permanent or intrinsic.¹⁸⁸ More importantly, the strength of those allegiances constantly waxes and wanes in intensity depending on the circumstances of the two parties. A party gains or fades in support depending on how well it continues to negotiate well-functioning political compromises among a heterogeneous body of potential members and leaders within an ever-changing political landscape.¹⁸⁹

A critical locus for those negotiations occurs in and around elections, and most prominently by design during the primary process.¹⁹⁰ Candidates cannot be categorized neatly as either included in or excluded from true party membership, but instead, should be viewed as various competitors in a larger political game to advance themselves and their political agendas, whether it occurs within or without a major party.¹⁹¹ The primary is itself the process that defines what is a Democrat or Republican, rather than a process that includes Democrats or Republicans as externally defined. The primary is the place where the party actors decide, through the choice of their party nominees, the direction and priorities of their party.

The resolution of this intraparty contestation leading up to and continuing into the primary elections produces relative winners and losers. To be clear, identification of primary winners and losers extends far beyond the specific primary candidates who have won or lost the election. Their respective supporters and other interested party members also win or lose, depending on the party’s direction as embodied by the selection of certain nominees at the

186. *Storer*, 415 U.S. at 736; *see also* Nat’l Comm. of the U.S. Taxpayers Party v. Garza, 924 F. Supp. 71, 74 (W.D. Tex. 1996) (“[Texas’s] ‘sore loser’ statute prohibits, and thus avoids, divisive and internecine intraparty fights after a political party had decided its nominee.”).

187. *Storer*, 415 U.S. at 736.

188. *See supra* notes 67–69 and accompanying text.

189. *See generally* KAROL, *supra* note 34, at 6–11, 16–20 (describing parties as shifting coalitions, managed proactively by politicians in response to political imperatives, of different groups with intense preferences on particular issues).

190. *See generally* COHEN, KAROL, NOEL & ZALLER, *supra* note 68, at 81–85 (describing the intraparty politics of the primary election process).

191. *See id.* at 82–83.

expense of others.¹⁹² Of course, candidates who have failed to win the party's nomination for office are the most prominent set of losers in the primary process. They have articulated a vision for the party, with their leadership a prominent part, that has been rejected, at least in salient measure. For the most divisive primary contests, primary losers may have had their party bona fides and loyalties challenged and even repudiated by other party members in a very public fashion.¹⁹³ Not only may a primary loser question her place and commitment to the party after defeat, depending on the circumstances of her defeat, but she may question her loyalty to the party for the general election and beyond. What is more, a primary defeat often caps a much longer process of disaffection and conflict with party members, and such a defeat may simply finalize a deeper estrangement beyond what one campaign captures. It is precisely here where the precommitted loyalty of the primary loser is tested.

The major risk to the party coalition is that losing candidates from the primary will run against the party's nominee and split the party vote in the general election.¹⁹⁴ In the absence of a sore loser restriction, losing candidates from the primary might undermine the basic premise of the party's efforts to consolidate party support behind a single nominee against the nominees of other parties. Primary losers are in an analogous position to Helen of Troy's suitors from Homer's *Iliad*, who swore to her stepfather, Tyndareus, to support the suitor among them who would eventually win Helen's hand.¹⁹⁵ Like Helen of Troy's eager suitors, every candidate may be willing to pledge her party loyalty

192. See, e.g., JOHN HEILEMANN & MARK HALPERIN, *GAME CHANGE: OBAMA AND THE CLINTONS, MCCAIN AND PALIN, AND THE RACE OF A LIFETIME* 259–60 (2010) (discussing how Hillary Clinton, after her defeat in the 2008 Democratic presidential primaries, knew that “[h]er voters were angry, they felt insulted, [and] they had to be coaxed along” into supporting President Obama’s campaign).

193. See, e.g., Nicole Duran, *How “Red” Is Alaska? Three Shades of Republicanism Exposed by Senate Primary*, ROLL CALL (D.C.), June 9, 2004, http://www.rollcall.com/issues/49_135/-5832-1.html (describing the divisive 2010 Alaska Republican primary election for U.S. Senate); Sean Lenggell, *Murkowski Trails Primary Foe in Alaska: “Tea Party” Candidate in Lead; Senate Race Too Close To Call*, WASH. TIMES, Aug. 26, 2010, at A4 (describing contentious primary fights in which incumbents were challenged as unfaithful to party principles); Matt Viser, *Primary Voters Back the Familiar: Insurgents Falter; McCain Wins*, BOS. GLOBE, Aug. 25, 2010, at 1 (same).

194. Cooperation by party candidates is critical for the party coalition to remain united behind a single nominee in the general election. The party label usually serves well enough to predetermine the votes of party members in the general election against the other major party, but if presented with more than one familiar face from their party, party voters might not have the discipline to vote for only the designated nominee in the general election. Party leaders cannot depend on party voters, only so informed and less individually committed to party victory than the party leaders, to refrain from voting for primary election losers. Party voters are too likely to vote again for their favorite candidates if presented with a second chance in the general election. Although sore loser candidacies might rarely be undertaken in practice, the threat of one would always loom as a dire possibility and potential embarrassment for the party. And at least in certain cases, defection by primary losers to run in the general election would be likely to disrupt the precommitment strategy and split the party vote in the general election.

195. See 2 PAUSANIAS, *DESCRIPTION OF GREECE* bk. III, ch. 20, para. 8–11 (E. Capps, T.E. Page & W.H.S. Rouse eds., W.H.S. Jones & H.A. Ormerod trans., G.P. Putnam’s Sons 1926) (c. 160–80 C.E.). Thanks to Jim Greiner for the suggestion of this analogy.

before the primary and promise to support the winner in the general election, provided the commitment occurs before the primary when every candidate hopes to be the winning nominee who enjoys that consolidated support. However, like Helen's unsuccessful suitors who sought to escape enforcement of their oath after Helen chose Menelaus,¹⁹⁶ primary losers may reconsider their precommitment to support the winner once the primary election has passed unsuccessfully for them. And in the absence of a sore loser law, there is no legally binding effect to their earlier informal commitments. These primary losers might require private inducements to honor their precommitments and to abstain from running in the general election against the party nominee.

The major parties survive and even thrive despite these regular tests of party loyalty because they are flexible coalitions that adapt to political necessity. Primary winners routinely retain the loyalty of primary losers by inviting them to participate to varying degrees in the process of campaigning and governing.¹⁹⁷ Primary winners cut ideological compromises with primary losers, who are themselves important figures within party politics, to attract the losers' help as well as reconnect with party members who supported losing candidates and whose loyalties may also be strained. More importantly, in anticipation of the post-primary reconciliation and the need for party cohesion, primary winners must moderate their positions and rhetoric to avoid irrevocable alienation of other party leaders and voters. Just as the party divides during primary contests, the party, as a coalition, must reconnect and cohere for the general election against its partisan opponent.

The primary process is therefore, by necessity, not only a resolution of party contestation through the designation of party nominees but also an ongoing process of negotiation and accommodation among party leaders upon whose cooperation the party's ongoing success depends.¹⁹⁸ Compromise surrounding primary fights is necessary to ensure that primary losers continue finding worthwhile collaboration within the party and forestall their exit. Primary elections are in a certain sense all-or-nothing outcomes, but looking more broadly, the overall agenda and many party positions can be adjusted to accommodate the interests of a more expansive set of party constituents. This process occurs not simply around elections, but continuously as political leaders strategically position themselves and the party throughout their careers. To the degree that party constituents find mutual advantage in cooperation, they have every incentive to maintain the party coalition and work together even when

196. See MATTHEW R. CHRIST, *THE BAD CITIZEN IN CLASSICAL ATHENS* 68 (2006).

197. Cf. Jo Freeman, *The Political Culture of the Democratic and Republican Parties*, 101 *POL. SCI. Q.* 327, 349 (1986) (suggesting "social homogeneity" as a source of cohesion because although "one [obvious] source of cohesion is the desire to win, . . . this by itself is not sufficient to hold either party together between campaigns or after divisive primaries").

198. See COHEN, KAROL, NOEL & ZALLER, *supra* note 34, at 84 ("A party that tries to force the choice of nominees who lack broad acceptability within the party quickly ceases to be a long coalition at all, becoming instead a collection of warring factions.").

they may individually lose particular intraparty disputes. They have every incentive, particularly following primary fights, to search for a mutually beneficial compromise around which to coalesce. Parties are marked by this internal tension between the reality of intraparty contestation and the need for intraparty cohesion.

Sore loser laws, however, impose an enforceable precommitment among party candidates by power of state law. Under a sore loser law, a primary winner need not worry as much about effective exit by primary losers from the party coalition, particularly in the short term. Primary losers are prohibited by law from challenging the party's nominees in the general election, even if they stand a better chance of winning it in the end than any other candidates. Informal loyalty to the party, reinforced by some perception of mutual self-advantage, is no longer necessary to block them from challenging the party's nominees. Candidates must satisfy the party bases, regardless of their own policy preferences or other electoral considerations, for a viable candidacy. As one political handicapper explains: "[I]n a primary, shrillness matters. It's a race to the fringe."¹⁹⁹ Candidates who are more ideologically extreme are advantaged, while centrist candidates are badly handicapped and forced to adapt to party orthodoxy.

IV. A SUPPLY-SIDE APPROACH TO PARTY REFORM

Reform efforts to moderate party politics from the supply side may succeed where efforts to do so from the demand side have failed—states could repeal their sore loser laws. Although regulation from the demand side of party politics have encountered constitutional barriers, regulation from the *supply* side of party politics, by contrast, would avoid any constitutional complications. The constitutional barriers to state regulation of voter participation in party primaries simply do not apply to, nor do comparable constitutional complications arise from, the abolition of restrictions on sore loser candidacies. The liberalization of candidacy eligibility would loosen the hold of the major party bases that push their candidates toward the ideological extremes and might encourage a healthier process of intraparty compromise.

A. REPEAL OF SORE LOSER LAWS AS PARTY REFORM

Sore loser laws should be removed, not as a constitutional matter by courts, but as a matter of party reform by states seeking to encourage greater centrism from the major parties and their candidates. Primary elections regularly embody and play out intraparty conflicts that are inherent in major party politics.²⁰⁰ However, sore loser laws grant primary winners a nearly absolute legal trump in the form of exclusive ballot access in the general election. The primary winner

199. Robert Draper, *It's Just a Texas-Governor Thing*, N.Y. TIMES MAG., Dec. 6, 2009, at 30, 32 (quoting Charlie Cook).

200. See *supra* notes 69–73 and accompanying text.

not only wins the major party nomination for the general election, but also effectively becomes the only primary candidate even permitted to appear on the general election ballot.²⁰¹ As a result, primary winners have less incentive to compromise with primary losers in their political disagreements, and internal party dissent can become bottled up without sufficient accommodation.²⁰² Sore loser laws, though conceived as a way of strengthening party politics,²⁰³ actually may stall the natural process of conflict and compromise inherent in a process of democratic contestation²⁰⁴ and discourage primary winners from accounting properly for dissent, to the detriment of the party.

In the absence of a sore loser law, intraparty politics will need to accommodate primary losers and bring back together the party coalition after the primary fight. Primary winners must appease primary losers to a greater degree and stave off what can be a very real threat of a continuation of the primary battle directly into the general election.²⁰⁵ Primary losers may have accumulated new support and prominence during the primary campaign, with a fully functioning campaign operation that could be sustained for a short time more to support a sore loser candidacy. Even when the odds cut against a sore loser candidacy, primary winners still need to deter challenges from inside the party and anticipate the need for conciliating other important segments of the party.²⁰⁶ Candidates therefore should appeal to a broader base of support within the party, not just at election time, but throughout their careers. Without the safety of a sore loser law, candidates cannot appeal to a bare majority within their party (particularly not to the most extreme elements), and they have the same assurances of success that they possess under a sore loser law.²⁰⁷

Sore loser laws therefore may be replacing political compromise and cohesion with a state law trump that primary winners can flaunt. Such laws can at

201. See *supra* section III.A.

202. See Kang, *supra* note 39, at 175.

203. See *supra* notes 174–75 and accompanying text.

204. See *supra* section II.A.

205. See Patrick J. Kenney & Tom W. Rice, *The Relationship Between Divisive Primaries and General Election Outcomes*, 31 AM. J. POL. SCI. 31, 31 (1987) (explaining how primary elections create in-group loyalties and out-group hostilities for supporters of different candidates that carry over into the general election).

206. See *id.* at 42 (concluding that intraparty “hostilities are often so intense that even the threat of a victory by the opposition party in November may fail to rally supporters of losing primary candidates behind their party’s nominee”); Priscilla L. Southwell, *The Politics of Disgruntlement: Nonvoting and Defection Among Supporters of Nomination Losers, 1968–1984*, 8 POL. BEHAV. 81, 82 (1986) (“[Disgruntlement over the failure of a preferred candidate to win the party’s nomination] can be seen as . . . a type of ‘sore loser’ response . . . that often makes it difficult for [supporters] to redirect their allegiance from a losing candidate to the party’s nominee.”). See generally ROBERT S. GILMOUR & ROBERT B. LAMB, *POLITICAL ALIENATION IN CONTEMPORARY AMERICA* (1975) (studying the degree to which supporters of primary losing candidates become alienated from the party through the primary process and refuse to support the party’s nominee).

207. See Southwell, *supra* note 206, at 81, 87–89 & tbl.3 (1986) (identifying the availability of a third-party or independent candidate in the general election as a determinant of whether supporters of losing primary candidates will vote for the party’s nominee).

times interfere with the self-regulating internal politics of political parties. But without sore loser laws, the threat of a sore loser candidacy restores the political leverage in intraparty politics of party losers, often more moderate elements of the party.²⁰⁸ A repeal of sore loser laws can force primary winners to compromise with primary losers, make concessions, and adjust the party's direction in ways that account for the greater diversity within the party. To the degree that party politics tend to advantage party elements that are more ideologically extreme, the removal of sore loser laws may force those elements to compromise ideologically with more moderate elements within the party, and therefore, shift the parties back toward the political center. And where political accommodation fails within the party, a repeal of sore loser laws opens opportunities for moderate candidates to reach the general election ballot without the assent of the party base. Joe Lieberman, for instance, is the perfect example of a sore loser candidate from the political center. Lieberman offers a rare instance of how the absence of a sore loser law provides opportunities for centrist candidates who would be rejected as too moderate by the major parties but nevertheless appeal to the median voter of the general electorate.²⁰⁹ Only in the absence of a sore loser law in Connecticut was Lieberman eligible still to run as an independent in the general election and win back his Senate seat.²¹⁰

This approach to party reform operates from the supply side, rather than the demand side. The removal of sore loser laws reconfigures the institutional opportunities for political leaders and adjusts the incentives among them in party politics. The removal of sore loser laws alters the supply of candidates in the general election because primary losers, in the absence of sore loser laws, have greater access to the general election ballot. This access to the general election ballot threatens party cohesion in the general election—one of the central objectives of parties and primaries—and thus forces greater accommodation and coordination among candidates and party leaders. Earlier attempts at party reform focused on affecting the demand side of party politics—the mix of voters eligible to participate in party primaries.²¹¹ But altering the mix of candidates eligible to advance beyond the party primaries may have equal potential to influence party politics and induce ideological moderation within a larger process of democratic contestation. Important elements of the major parties may oppose supply-side reform for precisely this reason. They would value ideological polarization and would prefer to continue their domination of

208. See *supra* section I.A (describing the candidate polarization that results from primary elections).

209. See *supra* notes 150–69 and accompanying text.

210. As a technical matter, Lieberman ran as the only nominee of the Connecticut for Lieberman Party in 2006. Shortly after the 2006 election, the Connecticut for Lieberman Party had no registered members; Lieberman remained a registered Democrat. See Shawn Zeller, *Crashing the Lieberman Party*, 64 CQ WKLY. 3207, 3207 (2006). John Orman, a critic of Lieberman, changed his registration to the Connecticut for Lieberman Party, and as the party's only member, elected himself party chairman. His first act as chairman was a press release attacking Lieberman. *Id.*

211. See *supra* notes 39–40 and accompanying text.

major party affairs. However, the same public and elite support from the political center that successfully enacted demand-side reforms, such as open and blanket primaries later struck down by the Court,²¹² might be redirected toward the supply-side reform of repealing sore loser laws.

What is more, a supply-side approach to party reform through removal of sore loser laws should encounter none of the constitutional challenges inherent in demand-side efforts. Earlier demand-side reforms to require inclusion of party nonmembers in primary elections intruded directly on the ability of parties to conduct their internal affairs and control their ideological agenda. As a result, courts vigorously defended the political parties from this state-imposed inclusion and reinforced the parties' First Amendment "freedom to identify the people who constitute the association, and to limit the association to those people only."²¹³ However, the removal of sore loser laws does nothing to intrude on parties' conduct of their internal affairs and does not impose any nonmembers on their decision-making processes. Instead, sore loser laws deal only with candidates who have already been rejected by the parties as losing contestants for their nominations. A primary defeat can represent the party's institutional rejection of a candidate's platform and agenda for the party, but even then the candidate may not take her supporters with her and exit the party for a sore loser candidacy. The removal of sore loser laws simply permits losing primary candidates, as well as their supporters with them, to move on to new political affiliations in the wake of their rejection by their party.²¹⁴

Of course, sore loser candidacies might come from the ideological extremes as well as the political center. In some cases, primary losers who are more ideologically extreme than the primary winner might threaten to run as a sore loser and force ideological compromises toward the extreme rather than the center. If Lieberman had won the 2006 Democratic primary, for instance, Ned Lamont might have just as well entered the general election from the political left as an independent. In other words, there is nothing about the threat

212. See *supra* note 54 and accompanying text.

213. *Democratic Party of the U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981).

214. The contrast with the Court's decision in another case involving ballot access for minor parties, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), is also helpful. In *Timmons*, the Court considered an appeal from the Eighth Circuit and rejected a claim by minor political parties that Minnesota's state law prohibition on fusion candidacies was unconstitutional. *Id.* at 353–54. Fusion permits a candidate to run as the nominee of more than one party for a particular election, but the Court reasoned that the State was not constitutionally prohibited from barring a party from nominating "those few individuals who both have already agreed to be another party's candidate and also, if forced to choose, themselves prefer that other party." *Id.* at 363. Sore loser laws, by contrast, prohibit a party from nominating a candidate who is not running as another party's nominee in the relevant election and has been rejected by that party in the primary process. However, the harm from the restriction on parties and candidates identified by the Eighth Circuit remains the same for sore loser laws as for fusion prohibitions—they force minor parties "to make a no-win choice" among "cast[ing] their votes for candidates with no realistic chance of winning, defect[ing] from their party and vot[ing] for a major party candidate who does, or declin[ing] to vote at all." *Twin Cities Area New Party v. McKenna*, 73 F.3d 196, 199 (8th Cir. 1996), *rev'd sub nom. Timmons*, 520 U.S. 351.

of a sore loser candidacy, at least in the abstract, that predicts greater political moderation as a result. The only prediction in abstract theory is that primary winners are likely to compromise in the direction of primary losers to a greater degree than they would have with a sore loser law.²¹⁵

However, we need not consider the effect of sore loser laws, or the effect of their removal, completely in the abstract. The problem of party polarization today is that more ideologically extreme candidates are winning outright already and tend disproportionately to be primary winners over more centrist candidates. To the degree that the removal of sore loser laws induces compromise by primary winners toward primary losers, it is likely that the removal of sore loser laws today in American politics would induce compromise by more extreme candidates toward less extreme ones. What is more, in most cases, the greatest incentive and leverage would accrue to losing primary candidates who have centrist appeal and could themselves win the general election.²¹⁶ More centrist candidates, who are rejected by the party base as out of step with the party, cannot survive the primary or reach the general election ballot even when they would be the most attractive candidates for the general electorate. Centrist candidates, therefore, pose the most credible threats to run as sore losers because running from the political center will make them more likely to be serious contenders in the general election, relative to more extreme candidates with less mainstream appeal.²¹⁷

The repeal of sore loser laws, however, still allows parties to continue their important functions in the election process. Other proposals for reforming the primary process tend to remove parties to a significant degree from the process as a means of reducing polarization. For instance, top two primaries and instant runoff voting remove formal party nominations from the election ballot. In top two primaries, the top two vote recipients in a blanket first-stage election, regardless of their party affiliation, advance to the second-stage election such that two candidates from the same party might face off in the general election.²¹⁸ In instant runoff voting, the first-stage and second-stage elections generally are collapsed into a single election in which voters list their ordinal preferences over a range of listed candidates on the ballot.²¹⁹ In both types of elections, the candidates' party affiliations are usually listed on the ballot only as a matter of the candidates' self-identification, without any party itself having

215. See *supra* section III.C.

216. See Michael McDonald & Seth C. McKee, Op-Ed., *The Revenge of the Moderates*, POLITICO (Oct. 20, 2010, 7:02 AM), <http://www.politico.com/news/stories/1010/43872.html> (observing under partisan polarization that “strong candidates holding moderate positions realize they are electorally viable by abandoning their party and appealing to the center in general elections”).

217. See *id.* (reporting that 89% of successful minor party candidates for Congress since the Civil War were ideologically centrist relative to the major parties).

218. See *supra* note 65.

219. See Bernard Grofman & Scott L. Feld, *If You Like the Alternative Vote (A.K.A. the Instant Runoff), Then You Ought To Know About the Coombs Rule*, 23 ELECTORAL STUD. 641, 641 (2004) (describing instant runoff voting).

the right to designate its chosen nominee on the ballot. Nor are parties, as a result, able to prevent candidates inconsistent with their values from listing themselves on the ballot as affiliated with those parties on what amounts to a general election ballot.²²⁰ For these reasons, the informational value of having the parties designate their respective flag bearers is lost to voters, both those variously supportive and opposed to those parties, for whom party identification is an important heuristic cue for voting.²²¹ By contrast, the repeal of sore loser laws continues to permit parties to nominate designated candidates as their flag bearers, keeping the parties and this information in the process. The only change is that the parties cannot also bar candidates whom they have decided to reject from running on a different ticket.

B. SORE LOSER CANDIDACIES: WHAT THEY MEAN AND WHY THEY ARE DIFFERENT

The removal of sore loser laws might not have made a difference had sore loser candidacies been the political equivalent of an independent or a minor party candidacy, without first losing a major party primary. Candidates in some but not all states can already avoid sore loser laws by running as independents or minor party candidates from the outset and bypassing a major party primary. These candidates can disaffiliate from a major party, sit out the Republican and Democratic primaries, and instead run entirely as independents or minor party candidates from the outset, provided the candidates disaffiliate early enough under the applicable state election law.²²²

Nevertheless, many states effectively prohibit major party politicians from running as independent or minor party candidates by requiring disaffiliation from a major party so far in advance of the election that most politicians would be precluded as a practical matter. For instance, the California statutes at issue in *Storer v. Brown* required an independent candidate to “be clear of political party affiliations for a year before the primary.”²²³ For most major party politicians, the political advantage in avoiding the major party primary election will not necessarily be clear a year ahead of the primary election (and what may be a year and a half ahead of the general election). But courts have nonetheless upheld these disaffiliation statutes with such long durational requirements that

220. This concern for parties’ associational interests was the focus in *Washington State Grange v. Washington State Republican Party*, 522 U.S. 442 (2008), but the Court there refrained from deciding the constitutional question in the absence of empirical data on the likelihood that voters would confuse the candidate’s listed party affiliation for an official party endorsement or nomination of the candidate. *Id.* at 454–58.

221. *See supra* note 83 and accompanying text.

222. *See, e.g.*, FLA. SENATE COMM. ON ETHICS AND ELECTIONS, LEGAL IMPLICATIONS OF CANDIDATE PARTY SWITCHING IN FLORIDA ELECTIONS, S. 2011-119, Reg. Sess., at 2–3 (2010) (explaining that Florida law permits a candidate to switch party affiliation and run in a different party’s primary election or run as a “no party affiliation” candidate in the general election), available at <http://www.flsenate.gov/Committees/InterimReports2011/2011-119ee.pdf>; *see also* FLA. STAT. ANN. § 99.021(1)(b) (West Supp. 2011).

223. *See* 415 U.S. 724, 733 (1974).

they effectively prohibit even an independent candidacy, or minor party candidacy, from the outset for major party politicians.²²⁴

What is more, even where such independent and minor party candidacies are permitted from the outset, the value of a major party nomination is so great for most American politicians that only in the rarest instances would a serious candidate forgo the chance at winning the party nomination.²²⁵ Even putting aside the obvious resources that the major parties offer their candidates, the major parties possess market dominance in a duopolistic system in which their party labels are the most familiar and powerful.²²⁶ Candidates deciding whether to run in a major party primary are forced to choose between the chance of ballot access through the party or political irrelevance from working entirely outside one of the major parties. Sore loser candidacies, however, carve out a third way between these two paths to the general election.²²⁷

First, sore loser candidacies build on what can be successful, albeit ultimately defeated, primary campaign operations. Skilled managers and volunteers are often ambivalent about an outside candidacy that entirely forgoes the opportunity to win the party nomination on practical grounds.²²⁸ A decision to run entirely outside the major parties signals a lack of seriousness or subversiveness that could drive away skilled campaign support. Such an outside run politically appears in most instances to be futile, as well as subversive, to a major party that activists may actually believe in and support professionally.²²⁹ By contrast, candidates are able to attract stronger campaign organizations for a major party primary campaign than they are likely to attract for an entirely independent or minor party run. Even losing primary candidates may build up a campaign organization of skilled managers and committed volunteers as a part of their efforts to win the party nominations. Once built up as an initial matter, losing primary candidates can more easily carry over these professional organizations into a sore loser run and simply maintain their operations going forward, rather

224. *See id.*; *see also* *Curry v. Buescher*, 394 F. App'x 438, 446 (10th Cir. 2010) (upholding a similar Colorado statute).

225. *Cf.* ROSENSTONE, BEHR & LAZARUS, *supra* note 145, at 194 (“A politician will not even contemplate a third party run until the major parties force him to.”).

226. *See supra* notes 80–83 and accompanying text.

227. *See, e.g.*, Aaron Blake, *Specter Won't Rule Out Run as an Independent*, HILL (D.C.), Mar. 17, 2009, <http://thehill.com/homenews/18790-specter-/#wont-rule-out-run-as-independent> (reporting Senator Arlen Specter's reservations about running as an independent and regrets that sore loser candidacies are not permitted in his state of Pennsylvania).

228. *See* Jonathan Bernstein, *The New New Presidential Elite*, in *IN PURSUIT OF THE WHITE HOUSE 2000: HOW WE CHOOSE OUR PRESIDENTIAL NOMINEES* 145, 169 (William G. Mayer ed., 2000) (explaining that party professionals' main loyalty is to their party).

229. *See, e.g.*, Michael Luo, *Lacking G.O.P. Largess, Crist Turns to Democrats*, N.Y. TIMES, July 1, 2010, <http://www.nytimes.com/2010/07/02/us/politics/02crist.html> (reporting how former Republican Governor Charlie Crist was shunned by some former supporters in the party after deciding to forgo the Republican primary and run for reelection as an independent).

than build up an independent or minor party organization from scratch.²³⁰

Second, sore loser candidacies can build on a new base of voter support earned through a contested primary election.²³¹ Major party primaries earn free media coverage and public attention that is difficult to obtain outside the major parties. Even losing primary candidates can gain a great deal of public exposure, name recognition, and fundraising ability. What is more, losing primary candidates may have persuaded a substantial number of voters and can build on that new and current base of electoral support for the general election. All these advantages bolster a sore loser candidacy following a primary defeat and may provide critical credibility that cannot be obtained in the absence of a major party primary run.

Third, sore loser candidacies have a different political meaning than independent or minor party candidacies that forgo the major parties entirely. An outside run can be seen as the candidate's rejection of the major parties and decision to go it alone. This decision, given the context of American duopoly, often is understood by political observers as a purely noninstrumental mission that surrenders electoral relevance for ideological purity.²³² In many cases, particularly below the presidential level, outside runs usually are futile runs by candidates who no longer harbor serious prospects of election victory and are pursuing alternate agendas. Although independents and minor party candidates manage a surprising number of electoral triumphs, it is still the case that the major parties and their candidates tend to dominate campaigns and elections.²³³ As a result, it is easy for political professionals and news media to dismiss such outside runs as futile and disregard them.

However, sore loser candidacies are something different. The candidate has first tried to work within the party and present the party with alternate direction. The candidate signals a desire to be politically relevant and loyal to the party. The only way to change the party from within, at least in a fundamental way, is to contest primary elections and force the party to absorb new interests and concerns. In many cases, the candidate may attract a great deal of public and leadership support within the party even in a losing effort. But the candidate has been rejected by the party and rebuffed in an effort to change it from within.

230. See Walter J. Stone, *The Carryover Effect in Presidential Elections*, 80 AM. POL. SCI. REV. 271, 277 (1986) (finding that committed activists are the most likely to have loyalty to their primary candidates and surprisingly likely not to support the party's nominee other than their own favorite).

231. See Denis G. Sullivan, *Party Unity: Appearance and Reality*, 92 POL. SCI. Q. 635, 641–43 (1977) (describing the loyalty of party voters to losing primary candidates and their difficulty in shifting support to the primary-winning nominee).

232. See RICHARD HOFSTADTER, *THE AGE OF REFORM* 97 (1985) (arguing that third parties' "function has not been to win or govern, but to agitate, educate, generate new ideas, and supply the dynamic element in our political life").

233. See, e.g., John F. Bibby & Thomas M. Holbrook, *Parties and Elections*, in *POLITICS IN THE AMERICAN STATES: A COMPARATIVE ANALYSIS* 66, 67 (Virginia Gray, Russell L. Hanson & Herbert Jacob eds., 7th ed. 1999) (reporting that since 1950, all but five elected governors were elected as a Democrat or Republican).

The primary defeat is a message to the candidate about his or her value to the party and what the party stands for. It is only after the candidate has tried and failed to change the party from within, through intraparty democratic contestation, that the candidate and her supporters may feel justified in challenging the party from without.²³⁴ It may be only after decisive defeat in an intraparty conflict that an element of the party can justifiably conclude that it should pursue outside options.

As a result, even candidates with strong disagreements with their major party are overwhelmingly likely to seek a major party nomination as their most preferred strategy over abandoning their major party altogether by forgoing the primary. Major party dominance induces candidates to seek change within the party rather than abandoning it. Indeed, a saving grace of American duopoly can be the ability of the major parties to absorb these dissenters into their coalitions and aggregate a wide swath of leadership and voter preferences.²³⁵ But sore loser laws lock those candidates into the major parties and prevent them from leaving in short order after their parties have rejected them. Political rationality demands that serious candidates run in a major party primary, and then sore loser laws prevent a primary fight from carrying over into a serious party split in the form of a sore loser candidacy by a primary loser.

Sore loser candidacies outside the major parties would be more attractive to quality candidates, particularly well-known incumbents, than scholarly views about Duverger's Law would seem to allow. The notion that Duverger's Law minimizes the likelihood of a successful third party depends in part on the rational calculations of political leaders and candidates. Candidates are disinclined to join a third party, at least at the outset of their candidacies, because "a potential leader buys a career, and as a rational purchaser he has no interest in a party that may lose throughout his lifetime."²³⁶ However, in the short term, a quality candidate who knows his electoral viability with the electorate, particularly as an incumbent, has much less reason to question the feasibility of a sore loser candidacy outside the major parties. Lieberman, for example, had little reason to question whether he had a realistic chance at winning the 2006 Connecticut Senate race. As a three-time incumbent and former Democratic vice-presidential nominee,²³⁷ Lieberman had enormous credibility, name recognition, and voter support, regardless of whether he ran as a Democrat or an

234. See V.O. KEY, JR., *POLITICS, PARTIES & PRESSURE GROUPS* 243 (3d ed. 1952) (observing, for example, that Dixiecrats in 1948 "had no special desire to form a minor party but did so only when it seemed impossible . . . to convert the dominant elements in one of the major parties to their views").

235. See SAMUEL J. ELDERSVELD & HANES WALTER, JR., *POLITICAL PARTIES IN AMERICAN SOCIETY* 22–28 (2d ed. 2000) (characterizing absorption of protest and coalition flexibility as key virtues of the American two-party system).

236. Riker, *supra* note 149, at 765; see also John H. Aldrich & William T. Bianco, *A Game-Theoretic Model of Party Affiliation of Candidates and Office Holders*, 16 *MATHEMATICAL & COMPUTER MODELLING* 103, 116 (1992) ("For politicians, the problem is to assess which party or parties is the most likely to yield a long, successful career.").

237. See *Biography*, *supra* note 170.

independent. Lieberman's calculation to run had less to do with Duverger's Law than weighing his electoral prospects in 2006 against any potential costs to his standing within the Democratic Party in the future.

In other words, a major reason for the lack of electoral success by minor parties is the absence of quality candidates willing to run on their tickets. Quality candidates have enormous incentives to pursue major party nominations and this fact, coupled with sore loser laws, deprives minor parties of almost all quality candidates. However, when quality candidates such as Joe Lieberman have already failed to obtain the major party nomination and are willing to make a sore loser run with a minor party, they are much more likely to win than the typical minor party nominee. The quality of the candidate makes a bigger difference than the absence of a major party label.

None of this is to say that party cohesion would be destroyed, or even that sore loser candidacies would become commonplace, if sore loser laws were repealed. As a practical matter of politics, primary winners will have powerful incentives to compromise with primary losers, who themselves have incentives not to challenge the party's nominee in the general election. Primary losers, to the degree that they share similar political interests as the bulk of their party, will generally prefer that the party succeed and will have interests aligned roughly with the party's interests.

If the primary loser is sufficiently similar ideologically to the primary winner, then the primary loser's entry into the general election usually will not lead to electoral victory in the immediate term. The primary loser, under most circumstances of normal party politics, would calculate that she and her party's nominee would split their overlapping base of electoral support during the general election. For instance, if the Republicans nominate a single strong candidate, the entry of another Democratic candidate (the primary loser) in addition to the Democratic nominee (the primary winner) is likely to split the Democratic vote and may simply hand victory to the Republican nominee in a close race.²³⁸ This is simply to say that Duverger's Law deters entry of a weaker third candidate into the race under normal party politics. As a result, the primary loser will have little incentive to enter into a general election race that she is unlikely to win.

Furthermore, primary losers possess incentives over the longer term not to challenge their own party's nominees in a given election. Most serious candidates in a party primary election have hopes of continuing as party members in good standing even if they lose the party primary. They have longer time horizons than the single election cycle before them. Challenging their party's nominee in the general election, defying the expected precommitment among primary candidates, carries significant costs to their reputations within the party. They are likely to be seen as disloyal to the party and willfully injuring the party's chances at victory if they decide to run as minor party or independent

238. See John Kellett & Kenneth Mott, *Presidential Primaries: Measuring Popular Choice*, 9 POL-ITRY 528, 530 & n.4 (1977) (explaining the problem of vote splitting).

candidates. Party voters and leaders may remember this challenge to the party, question the primary loser's ideological bona fides in the future, and thereby compromise the primary loser's long-term future in the party.²³⁹ Particularly for more junior politicians, the cost of a minor party or independent candidacy will be too high when weighed against what may be a marginal chance of winning a single election.

The problem for the party is that neither the immediate nor longer term incentives against sore loser candidacies hold in every case. In the immediate term, a primary loser may be quite ideologically dissimilar to the primary winner such that a sore loser candidacy as a minor party nominee or independent is politically worthwhile. In the case of Joe Lieberman and Ned Lamont in the 2006 Connecticut Senate race, Lieberman had positioned himself clearly as more conservative than Lamont. Lieberman therefore drew votes from more conservative Republicans and did not rely as heavily on the Democratic base that he and Lamont shared.²⁴⁰ Rather than splitting the vote, as two more similar candidates might have, Lieberman actually constructed his own middle-right coalition among Connecticut voters by virtue of his dissimilarity from Lamont and many other Connecticut Democrats. Lieberman differed sufficiently from his old party that a sore loser candidacy was a viable option.

Over the long term, even candidates who defy the party by running as sore losers are likely to continue to have opportunities within their party, defection notwithstanding. The major parties have tremendous incentives to welcome back sore loser candidates and continue collaborating with them to the degree that their political agendas sufficiently coincide, particularly when partisan competition is intense. When competition between Republicans and Democrats is intense, every vote matters, and every good candidate is likely to be valued. Neither running against nor campaigning against the party, nor other types of ideological or partisan disloyalty, will categorically disqualify a candidate from future collaboration with the party. When Lieberman announced his sore loser candidacy against Lamont, there were questions about whether Democrats would permit him to caucus with them after running as an independent.²⁴¹ But ultimately, Senate Democrats allowed Lieberman to caucus with them and restored him to senior positions on key Senate committees as a de facto Democrat. As Lieberman explained: “‘Caucuses like to keep as many members as they can, not discourage membership.’”²⁴² Particularly at a time when

239. See, e.g., Sean J. Savage, *To Purge or Not To Purge: Hamlet Harry and the Dixiecrats, 1948–1952*, 27 *PRESIDENTIAL STUD. Q.* 773, 784–86 (1997) (recounting the Democratic Party's desire to punish Dixiecrats following their defection from the Party during the 1948 elections).

240. *America Votes 2006—U.S. Senate/Connecticut/Exit Poll*, CNN.COM, <http://www.cnn.com/ELECTION/2006/pages/results/states/CT/S/01/epolls.0.html> (last visited Jan. 25, 2011).

241. See David Lightman, *Would Party Forgive Joe? Lieberman Says Democrats Can Count on Him if He Wins; Vice Versa Is Iffy*, HARTFORD COURANT, Aug. 18, 2006, at A1.

242. Alexander Bolton, *Lieberman Says He Has Been Promised Seniority*, HILL (D.C.), Oct. 2, 2006, <http://www.freerepublic.com/focus/f-news/1712434/posts>.

Lieberman's inclusion gave the Democrats bare control of the Senate, Democratic leader Harry Reid was eager to declare at the first caucus meeting following the 2006 elections that "'[w]e're all family.'"²⁴³

Indeed, even in the absence of legal enforcement of party precommitments, parties are fully capable of developing informal procedures that help bolster political cohesion. The *White Primary Cases* offer an interesting illustration of this principle. White Democrats in Fort Bend County, Texas effectively excluded African-Americans from electoral politics for decades during the early twentieth century by conducting much of the Democratic Party's candidate selection, in a one-party state, outside the formal apparatus of the party.²⁴⁴ White Democrats participated in the primary elections of the whites-only Jaybird Democratic Association, which was nominally separate from the Democratic Party. Nonetheless, the Jaybird primary functioned as the real election of consequence because its winning candidate would then run with the Jaybird endorsement in the Democratic primary and then basically uncontested as the Democratic nominee in the general election.²⁴⁵ Although this system was quite effective in excluding African-Americans from the electoral process, the Jaybird primary was inherently unstable. As Samuel Issacharoff and Richard Pildes point out: "Because the Jaybirds merely endorsed a candidate at the county party primary, every decision could be undone at the party level."²⁴⁶ A major reason that such decisions were not undone at the party level has generally been overlooked, but provides a great illustration of how parties, or in this case party equivalents, bolster precommitments with political deal making.

The Jaybird Association relied on ideological solidarity and institutional rules to reinforce internal cohesion. Of course, the Jaybird Association depended on the unfortunate fact of racial prejudice to maintain loyalty within Fort Bend County. The Jaybird Association also strengthened loyalties from leadership and voters by rooting itself deeply within the social fabric of the community and became a center for social activity beyond electoral politics. What is more, the Jaybird Association employed voting rules and term limits to discourage electoral defection. Under its original formulation, the Jaybird Association constitu-

243. Mark Leibovich, *Enter, Pariah: Now It's Hugs for Lieberman*, N.Y. TIMES, Nov. 15, 2006, <http://www.nytimes.com/2006/11/15/us/politics/15lieberman.html>. In fact, Democrats continued to caucus with Lieberman, and let him retain his committee chairmanship, even after he campaigned for Republican presidential candidate John McCain subsequently in 2008. See Andrew Taylor, *Dems Give Lieberman Wrist Slap over Backing McCain*, BUCKS COUNTY COURIER TIMES (Levittown), Nov. 18, 2008, at A6.

244. See Michael J. Klarman, *The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking*, 29 FLA. ST. U. L. REV. 55, 67–68 (2001).

245. See *Terry v. Adams*, 345 U.S. 461, 483 (1953) (Clark, J., concurring) (explaining that "the winners of the Jaybird Democratic Association balloting, with but a single exception shown by th[e] record, ran unopposed and invariably won in the Democratic July primary and the subsequent general elections for county-wide office" from 1889 to 1953).

246. Issacharoff & Pildes, *supra* note 101, at 665.

tion required that a Jaybird candidate win a two-thirds vote for a first term as an officeholder, and for a second term, a three-fourths vote.²⁴⁷ As a result, even a candidate with clear majority support among Jaybird voters might need to curry favor with many more elements of the party and continue seeking votes in pursuit of a supermajority. Moreover, other leaders in the Jaybird Association would feel pressure to reach an accommodation with such candidates, even if those candidates were far from ideal choices for them, or otherwise risk defaulting the Jaybird primary process. Term limits under the Jaybird internal rules further discouraged defection by candidates. By prohibiting more than two terms for most offices, the Jaybirds minimized the likelihood that a charismatic, long-time incumbent might build up sufficient political strength to defy the Jaybird Association and challenge it with defection. These requirements forced candidates and Jaybird leaders to reach consensus compromises that, once struck, were likely to be politically durable at the level of the Democratic primary and general elections.²⁴⁸ Only one candidate appears to have challenged the Jaybird winner in the Democratic primary over more than fifty years.²⁴⁹ The success of the system in turn reinforced its effectiveness, such that defying it became political suicide for junior candidates, who had every incentive to honor the Jaybird primary.²⁵⁰ These factors did not require legal enforcement through any sore loser law barring losing candidates in the Jaybird primary from running later in the Democratic primary or general election.

In other words, the removal of sore loser laws does not necessarily disrupt the political cohesion of the major parties—it only requires them to earn it. When sore loser laws block primary losers from leaving the party, they do little more than bottle up dissent and thwart intraparty political dynamics. There are claims that sore loser laws are necessary “to ensure that everyone competing for a party’s nomination is truly committed to that party and none other.”²⁵¹ But along these lines, sore loser laws help ensure that the only candidates who receive ballot access are those who hew to the platform preferred by one particular element of the party, usually a more ideologically extreme element, and therefore entrench the party from fundamental changes against that

247. CLARENCE R. WHARTON, *WHARTON’S HISTORY OF FORT BEND COUNTY* 216 (1939).

248. Although the supermajority requirements were later reduced, the Jaybird Association always required majority support for its endorsement and did not permit victory by plurality. See Pauline Yelderman, *The Jaybird Democratic Association of Fort Bend County* 72–76 (Aug. 1938) (unpublished M.A. thesis, University of Texas) (on file with the University of Texas Library).

249. Charles Schultz won two terms as County Judge but ran again in the Democratic primary in defiance of the Jaybird Association prohibition on a third term. Schultz lost to the Jaybird winner in a landslide defeat. See *Terry*, 345 U.S. at 483 n.13 (Clark, J., concurring).

250. See, e.g., Leslie Anne Lovett, *The Jaybird–Woodpecker War: Reconstruction and Redemption in Fort Bend County, Texas, 1869–89*, at 80 (May 1994) (unpublished M.A. thesis, Rice University) (on file with Rice University) (explaining that whites joined the Jaybirds “under the threat of being shunned by the whole white community as ‘social and political outcast[s]’” (alteration in original)).

251. Lawson, *supra* note 1.

element's preference. In terms of Albert Hirschman's voice–exit paradigm, the cost of exit is very high for serious candidates at the outset.²⁵² Exit, in the form of an independent or a minor party candidacy, is not barred by sore loser laws, but in practice is unlikely to result in electoral success. And sore loser laws block exit from the party, at least in its most serious form, for candidates who enter the party primary and lose. As a result, almost all serious dissent within the party is channeled through the party primary.

C. RETHINKING BALLOT ACCESS IN INTRAPARTY TERMS

Although commentators have focused mainly on the duopolistic effects of ballot access laws in the United States,²⁵³ it may be that the most damaging threat of entrenchment from these laws occurs within the major parties, rather than entrenchment of the major parties against minor party challenges. Sore loser laws are only one form of a whole panoply of ballot access laws that not only have consequences for third parties and independent candidates, but also squelch intraparty conflict and cabin dissent within the major parties. An important contribution of the Article is shifting from an exclusive focus on interparty competition to greater attention to intraparty politics that are equally, if not more, consequential.

The major parties benefit from a wide range of preferential treatment in terms of ballot access. Most significantly, every state exempts the major parties from the usual requirements of signature collection for ballot access, by virtue of statutory exemptions for parties that have received a threshold level of the vote in previous elections. For instance, the Fourth Circuit recently upheld a North Carolina election law that required a political party to receive at least 10% of the votes cast in the previous election for governor or president to qualify for automatic ballot placement²⁵⁴—a threshold that only the major parties regularly met.²⁵⁵ Other parties that did not achieve the minimum vote threshold would not technically qualify as “political parties” under North Carolina election law, and therefore, had to collect petitions signed by a number of registered voters equaling at least 2% of the votes cast in the most recent

252. Cf. ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 21 (1970) (describing the exit option available to consumers).

253. See, e.g., Mark R. Brown, *Popularizing Ballot Access: The Front Door to Election Reform*, 58 OHIO ST. L.J. 1281, 1321–22 (1997); Dmitri Evseev, *A Second Look at Third Parties: Correcting the Supreme Court's Understanding of Elections*, 85 B.U. L. REV. 1277, 1278–81 (2005); Oliver Hall, *Death by a Thousand Signatures: The Rise of Restrictive Ballot Access Laws and the Decline of Electoral Competition in the United States*, 29 SEATTLE U. L. REV. 407, 408–09 (2005); Richard H. Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695, 695–97 (2001); Richard Winger, *The Supreme Court and the Burial of Ballot Access: A Critical Review of Jenness v. Fortson*, 1 ELECTION L.J. 235, 235–36 (2002).

254. See *McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215, 1219, 1226 (4th Cir. 1995).

255. See N.C. GEN. STAT. § 163-96(a)(1) (2004) (amended 2006). In 2006, North Carolina lowered the threshold requirement from 10% to 2%. See Act of Aug. 13, 2006, No. 234, sec. 1, § 163-96(a)(1), 2006 N.C. Sess. Laws 1018.

general election for governor, including 200 signatures from each of the four congressional districts. North Carolina's ballot access requirements—and exemption of the major parties from those requirements—are hardly unique and rarely controversial in other states.²⁵⁶ The purpose of such an exemption is to avoid recurring burdens for political parties that have had electoral support in previous elections that justifies automatic ballot placement.²⁵⁷

Of course, such systems of ballot access discriminate against minor parties. Although ballot access seems rationally conditioned on a showing of political support, the common measure of what constitutes a legitimate, bona fide political party is shaped to the organization and operation of the major parties. The regulatory scheme, as a condition for equal access to the ballot, requires minor parties to adopt the same strategies and tactics as the major parties, even though these strategies and tactics may poorly suit minor parties. In North Carolina, for example, the statute requires that a political party demonstrate *statewide* support in the most recent gubernatorial election as a prerequisite for automatic ballot access.²⁵⁸ The underlying assumption for purposes of election law is that political parties are defined by a comprehensive pursuit of electoral office spanning the entire jurisdiction, most especially the highest statewide office. But the statewide elections for governor and president are the races in which a minor party is least likely to succeed or even to be competitive. In many cases, it may be feasible for a minor party to become consistently competitive in a particular locality or region,²⁵⁹ but it is far more difficult for a minor party to muster the organizational strength to win the presidency or governorship. The costs of competition increase and the prospects for third-party success may decrease as the size of the electoral jurisdiction increases.²⁶⁰ North Carolina's law and others like it limit the feasibility of building consistent electoral strength in a particular locality, district, or county by denying automatic ballot access regardless of past electoral showing there. North Carolina's

256. See, e.g., *Schrader v. Blackwell*, 241 F.3d 783, 791 (6th Cir. 2001) (upholding Ohio ballot access laws similar to North Carolina's); *Socialist Workers Party v. Hechler*, 890 F.2d 1303, 1306 (4th Cir. 1989); *Green Party of Ark. v. Daniels*, 735 F. Supp. 2d 1055, 1065 (E.D. Ark. 2010); *Patriot Party of Pa. v. Mitchell*, 826 F. Supp. 926, 942 (E.D. Pa. 1993).

257. But see Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States To Protect the Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331, 362–71 (arguing that the stability of the two-party system does not require legal protection).

258. N.C. GEN. STAT. § 163-96(a)(2) (2009).

259. See DOUGLAS W. RAE, *THE POLITICAL CONSEQUENCES OF ELECTORAL LAWS* 94–96 (1971) (discussing the local success of parties in Canada and Austria that are minor parties nationally); Riker, *supra* note 149, at 762 (“[I]f the third party nationally is one of the two larger parties locally, then sophisticated voting by supporters of the weakest party (i.e., one of the two larger parties nationally) strengthens the third party.”).

260. See, e.g., Gary D. Allison, *Protecting Our Nation's Political Duopoly: The Supremes Spoil the Libertarians' Party*, 41 TULSA L. REV. 291, 292 (2005) (detailing third parties' lack of success in U.S. Senate, presidential, and gubernatorial elections); James Bopp, Jr. & Susan Lee, *So There Are Campaign Contribution Limits That Are Too Low*, 18 STAN. L. & POL'Y REV. 266, 280 n.107 (2007) (noting that an effective campaign generally must communicate with 75% to 80% of potential voters, such that statewide elections require campaigns to reach a larger audience at greater cost).

law conditions ballot access in local contests, where minor parties are most likely to be competitive, on the minor party's showing of strength in statewide contests for executive office, where minor parties are least likely to be competitive. As a consequence, the Libertarian Party is perpetually forced to secure over 40,000 petition signatures to win the right to place its candidates on the ballot for even a single office.²⁶¹

Nevertheless, such ballot access laws are routinely upheld against challenges by minor parties. To its credit, the Fourth Circuit at least recognized the heavy burden placed on minor parties by the North Carolina scheme. In *McLaughlin v. North Carolina Board of Elections*, the court noted that the Libertarian Party, because of its failure to win at least 10% of the statewide gubernatorial or presidential vote, ceased to exist legally as a party after every election.²⁶² As the court acknowledged: "Even had a Libertarian candidate for local or county-wide office won her election, her ability to designate her party affiliation on the ballot for purposes of reelection would be conditioned on the party's ability to register support elsewhere."²⁶³ For this reason, the Libertarian Party is forced to "expend great effort to obtain statewide and local ballot access before each gubernatorial and presidential election only to lose that access *in toto* immediately thereafter."²⁶⁴ Despite expressing such reservations, the *McLaughlin* court upheld North Carolina's regulatory scheme based on the wealth of Supreme Court precedent upholding similar systems as constitutionally legitimate.²⁶⁵ Other courts have upheld, with even less consideration, similar regulatory schemes that tie ballot access in local elections to statewide measures of voter support.²⁶⁶

Just as for sore loser laws, the duopolistic effect of such ballot access laws chills intraparty politics. These regulatory constraints help to preclude the splintering off of a dissatisfied faction of a major party into a new third party. Many commentators have argued against the duopolistic effects of such ballot access restrictions, but again, the more important effect on politics within the major parties is often overlooked.²⁶⁷ Just like sore loser laws, these restrictions limit alternate pathways (through minor parties) to the general election ballot in the event that a candidate dissents sufficiently from her party orthodoxy. Ballot

261. For the 1992 general elections, the Libertarian Party collected 43,620 petition signatures, which was twenty more than the 2% required. See *McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215, 1219 (4th Cir. 1995).

262. *Id.* at 1220.

263. *Id.* at 1223.

264. *Id.* at 1224.

265. See *id.* at 1225 (citing *Am. Party of Tex. v. White*, 415 U.S. 767 (1974)).

266. See, e.g., *Schrader v. Blackwell*, 241 F.3d 783, 791 (6th Cir. 2001); *Council of Alt. Political Parties v. Hooks*, 179 F.3d 64, 80 (3d Cir. 1999); *Socialist Workers Party v. Hechler*, 890 F.2d 1303, 1306 (4th Cir. 1989); *Libertarian Party v. Bond*, 764 F.2d 538, 545 (8th Cir. 1985); *Libertarian Party of Fl. v. Florida*, 710 F.2d 790, 795 (11th Cir. 1983); *Arutunoff v. Okla. State Election Bd.*, 687 F.2d 1375, 1380 (10th Cir. 1982).

267. See sources cited *supra* note 253.

access restrictions can block major party dissidents from exiting to a new party, if only for the short term, and thus ensure that the only opportunity for a third party is a challenge from entirely outside the major parties.

Ironically, none of these effects on intraparty politics is readily visible when the primary politics are understood only as an intraparty affair. Given a sharp distinction between intraparty and interparty competition, the Supreme Court has explained that the primary election is where party actors must “finally settle their differences.”²⁶⁸ However, within either the intraparty or interparty context, political actors coordinate with provisional allies and strategize against perceived opponents to promote their individual ideological, political, and personal agendas. When a particular element of a major party is frustrated within party politics, the best chance for advancing its agendas may rest in a minor party or an independent candidacy, or at least in the threat of such a defection. Indeed, talented officials and activists, particularly those with past successes to their credit, have very often worked first within one of the major parties. If they broke away to form a third party, they would bring name recognition, experience, credibility, and resources to their new enterprise. Ballot access regulation that blocks such defection can guarantee that minor parties are composed primarily of politicians and activists from the fringe, often without either the experience and talent of the major parties or serious ambitions of challenging the major parties electorally.²⁶⁹

CONCLUSION

The repeal of sore loser laws offers a supply-side approach to the problem of major party polarization. Sore loser laws limit the supply of candidates eligible for the general election by disqualifying losing candidates from party primaries. Sore loser laws, therefore, remove routes for candidates to reach the

268. *Storer v. Brown*, 415 U.S. 724, 735 (1974).

269. What is the justification for such restrictive ballot access laws? The putative deal between states and parties is that parties receive regulatory advantages like ballot access in exchange for submitting to other party regulation that conforms the parties to state preferred procedures. See *Libertarian Party of Me. v. Diamond*, 992 F.2d 365, 367 (1st Cir. 1993) (explaining that legally recognized parties receive certain benefits, like ballot access and fundraising advantages, along with certain responsibilities, like obligations to hold caucuses, conventions, and primaries). However, the major parties need few state-conferred incentives to organize themselves into their current forms. The major parties adopt their organizational setup, in addition to all the informal relationships that tie together party leaders, because it makes sense politically for party leaders to organize in such a way. Parties have persisted as a dominant vehicle for political action since the founding because parties are useful devices for solving collective action problems and coordinating large groups of voters, activists, and politicians. As John Aldrich posits, party leaders “have created and maintained, used or abuse[d], reformed or ignored the political party when doing so has furthered their goals and ambitions.” ALDRICH, *supra* note 34, at 4. Aldrich summarizes a wealth of political science when he explains that politicians organize and maintain political parties because they “need to orchestrate large and diverse groups of people to form winning majorities, and because often more can be won through parties.” *Id.* at 26. Although additional benefits from election law for organizing into parties may make parties even more attractive, state-conferred regulatory advantages are not the necessary or proximate reason that political leaders create and maintain parties.

general election outside the auspices of the parties, and they reinforce the major parties' control over ballot access. As a practical matter, this concentration of ballot access in the hands of the major parties entrenches the dominance of more ideological elements in the major parties over more moderate dissenters. Sore loser laws, by removing the leverage of moderate dissenters from exiting the party through sore loser candidacies, disrupt the natural incentives to compromise with more moderate elements within the party. Repealing sore loser laws might reverse this effect and increase the leverage of moderate dissenters to move the major parties toward the political center from within.

However, the ideological polarization of the major parties is only a symptom of a larger, more troubling problem—the deterioration of democratic contestation within the Democratic and Republican Parties. As the major vehicles for political mobilization in American politics, the major parties are the main venue for democratic contestation through which attractive new ideas and different approaches to political problems emerge. Excessive dominance by any party element over its intraparty rivals thwarts the vitality of this process as uniformity replaces creativity and competition. Rival leaders and elements within the party that would otherwise compete to define their party and challenge voters to consider alternative directions are instead induced to comply with party orthodoxy for the necessary chance at the party's nomination.

These important costs of ballot access restrictions in general, and sore loser laws specifically, are overlooked by courts and commentators focused mainly on interparty competition, rather than on intraparty competition. However, serious politicians reside almost exclusively within the major parties, and they compete with each other both across and within party lines. Ballot access restrictions, most importantly sore loser laws, not only preclude the best prospects for minor parties to obtain quality candidates who can import a loyal constituency of their own, but also deprive candidates of leverage of what might be their most effective strategy for advancing their political aims inside their party. Sore loser laws that restrict politicians' ability to jump to another party limit their ability to use the threat of exit as a tool in intraparty politics. Even if minor parties are discouraged by Duverger's Law from ongoing interparty competitiveness, sore loser laws exact an even more consequential toll on intraparty competition within the Democratic and Republican Parties. That is, restrictions on minor parties and independent candidates not only reduce competition from outside competitors for the major parties, they also significantly reduce competition within the major parties in ways that raise concerns separate from whether a competitive third party is viable within the American first-past-the-post system. Indeed, restrictions on minor parties and independent candidates may be driven by attempts by the major parties to entrench dominant factions within them more so than a desire by the major parties to insulate themselves from outside challenges.