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The Sore Loser Law

One of the least discussed but most powerful contributors to the polarization in U.S. politics is what is called The Sore Loser Law. In this law, a candidate who runs in a primary and loses cannot run in the general election either as an independent or as a nominee of another party.

Sore Loser Laws Polarize Elections

In an abstract entitled, “Nominations and the Supply of Candidates: The Connection between Sore Loser laws and Congressional Polarization,” Barry C. Burden and Bradley Jones from the University of Wisconsin, and Michael Kang from Emory University School of Law argue that Sore Loser Laws create more polarization than any other form of voting or electoral restrictions.

According to Burden, Jones, & Kang (BJ&K), “By preventing candidates who lose partisan primaries from subsequently running in the general election as independents or as nominees of other parties, these laws require insurgents to channel their activities inside the party system, thus producing more extreme major party nominees.”

BJ&K’s argument is quite simple. In a world with relatively few competitive districts, nominations are organized by parties who desire to control uncertainties, ward off competitors, and select ideologically appealing nominees. With Sore Loser laws, candidates tend to shift to the more extreme positions of their parties, because they know if they lose the primary, their political career may be over. In addition, if they do get elected, they will tend to vote in ways that appease the political extremes of their parties, because they are scared of being “primaried” by a candidate that appeals more strongly to the base of their party.

As BJ&K stated, “Democratic candidates running in states with such laws are nearly six points more liberal. Republicans are roughly 9.5 points more conservative in those same states. Given the many other institutional, electoral, personal, and historical factors that might shape candidates’ ideological positions, an effect of this magnitude is substantial.”

Under Sore Loser Laws The Real Losers Are The Voters

Mickey Edwards, a former Republican Congressman from Oklahoma and now vice president at the Aspen Institute and the author of “The Parties Versus the People: How to Turn Republicans and Democrats Into Americans,” argued much the same points in an op-ed in the New York Times.

Edwards contends that Sore Loser laws are primary contributors to the current polarization in American politics. In his words, Sore Loser laws deprive voters of a full array of choices. They are arguably even more insidious than partisan redistricting, which affects House races but not Senate ones.”

In the 2012 Republican Senate primary in Texas, David Dewhurst, the moderate lieutenant governor, won 45% percent of the vote, while Ted Cruz won 34%. In the run-off, with only 8% of Republicans voting, Cruz was victorious. If Dewhurst had run as an independent, he would have had an excellent chance of winning the final election. However, with the Sore Loser laws, he was blocked from the ballot.

The situation in 2010 in Utah was more bizarre. There, Republicans begin the nominating process with a convention of 3500 party activists. In the second round of voting for a 2010 Senate nominee, the incumbent, Robert Bennett, finished third, 320 votes behind conservative Mike Lee, and was eliminated. Had Bennett been able to run in a primary, he probably would have won. Had he been able to run as an independent, he might also have won. However, the party convention coupled with the Sore Loser law, ended Bennett's political career. In Edward's words, "the state's sore-loser law meant that 320 party activists effectively made a decision on behalf of the three million people of Utah."

Another example of the impact of the Sore Loser laws occurred in the 2010 Senate election in Delaware to fill the seat that had once been held by Joe Biden. Mike Castle, a former Governor and Congressman, was expected to win, but he was defeated in the Republican Primary by Christine O'Donnell, a Tea Party candidate. The Democrats nominated Chris Coons. Polls showed that Castle would have easily beaten Coons. Polls also indicated that Castle would have won a three-way race, but because of the Sore Loser laws, he was forbidden from running as an independent. In the final election, Coons defeated O'Donnell 57% to 40%.

Compare the experience in Utah and Texas with that in Connecticut, one of the states without a Sore Loser law.

In 2006, liberal Democrats were determined to end the career of Senator Joseph I. Lieberman (their party's vice-presidential nominee in 2000) over his support for the Iraq war. He lost to Ned Lamont, in a primary. But Connecticut is one of three states that have partisan primaries or caucuses, but no Sore Loser law (Iowa and New York are the others). Mr. Lieberman was thus able to run — and win — in the general election, as an independent.

Because of the strength of the parties and the Sore Loser laws, it is almost impossible for a candidate defeated in a primary to win an election. Since the candidate cannot run on another party or as an independent, the only alternative is for a write-in vote. Since 1955, only one candidate has been elected by write-in after losing a primary, Lisa Murkowski in Alaska in 2010.

Enacting of Sore Loser Laws Directly Correlates with Increased Polarization.

As can be seen from the table below, all but three states, New York, Connecticut, and Iowa have Sore Loser laws, while California, Washington, and Louisiana have non-partisan primaries. The other 44 states, however, have Sore Loser laws.

As can be further seen, 36 of the 47 states with Sore Loser laws have enacted them since 1950 and 26 have enacted them since 1970. This time coincides with the increased polarization of American politics.

State - Type - Year Enacted*

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

* Information taken from Kang (2011). “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.

Years Enacted

1920 & Prior	5	1921-1950	6
1951-1970	10	1970-1990	21
1990-Present	5	None	3

Conclusion

Most people focusing on reforming elections look at open primaries, ranked choice voting, ending Gerrymandering, and increasing voter access. However, they tend to ignore the Sore Loser laws. Evidence suggests that the Sore Loser laws have a critical impact on increasing the polarization of American politics.