

# The Partisan Ordering of Candidacies and the Pluralism of the Law of Democracy: The Case of Taiwan

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## ABSTRACT

Political parties are more than key players of democratic politics under the law of democracy. In addition to acting behind the scenes of election lawmaking, political parties regulate themselves in the name of “party autonomy,” and the extra-legal self-regulations they make often have external effects on the democratic political process as a whole. The most important function political parties perform is to select candidates for electoral competition, and how parties regulate candidate selection in general and candidacy in particular exemplifies their role as co-regulators of electoral democracy. Using Taiwan as a case study, this article explores how partisan self-regulation of legislative candidacies has diversified and complicated the qualifications for representatives. It also attempts to grasp the normative significance and implications of partisan rules by theorizing a pluralistic account of democratic authorities and election lawmaking: the pluralism of the law of democracy. By taking pluralism seriously, this article aims at shedding new light on the regulatory roles of the state, the courts, and political parties in advancing electoral integrity.

## INTRODUCTION

**D**EMOCRACY IS OFTEN PERCEIVED as a game, and the law of democracy the rules of the game. Democracy, however, is not the kind of game that is bound by rules imposed by disinterested rule makers. Democracy is about self-governance, so the law of democracy is supposed to be the law by democracy. Political parties are key players of this game, and as such, they have a huge say over the formal rules—i.e., the state law—structuring and regulating the game they play (Lowenstein 1993;

Issacharoff and Pildes 1998). State-imposed political rules surely matter, but they are not the only rules of the game. Whatever monopoly a state has, it is not the only political authority in a democracy (Greene 2012). Political parties, among others, have strong political authorities, too, and they make many of the rules governing what they claim to be their internal affairs. This article uses the terms “partisan ordering” and “partisan self-regulation” synonymously to refer to the rule making done by political parties, and “partisan rules” as the rules that came out of this process. The distinction between state law and the partisan rules is not merely a matter of formal legality, but can be of political significance as well. Whereas a state law may well be authored by those partisans who occupy the government, a partisan rule is usually imposed by those who control the party organization (Key 1964; Garrett 2002; Kang 2005). And whereas the courts have more input over state-imposed political regulation, judicial intervention is much more

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constrained when it comes to partisan self-regulation, if not only because political parties may invoke their constitutional right to free association (Avnon 1995).

In a functional sense, the self-regulations political parties make can be seen as part of the law of democracy, and under certain circumstances, they may be the rules of the game that truly matter. In the United States, for instance, much of the presidential nomination process is structured by partisan rules, and the 2008 Obama-Clinton contest vividly demonstrates what differences the partisan rules can make (Hasen 2008; Citrin and Karol 2009; Smith and Springer 2009; Thompson 2010; Gerken and Rand 2010). To be sure, political parties in modern democracies no longer take charge of such matters as printing ballots for general elections, and much of what they used to do on their own in a previous era has fallen under the purview of state law (El-Haj 2011). Political parties have been and continue to be prominent forces in shaping the democratic political order, even though much of what they do is usually considered as matters of politics, as opposed to matters of law.

Consider political parties' candidate selection. One of the most important things political parties do is select their candidates for general elections. In modern democracies, political parties and/or their candidates have dominated electoral competition to a significant extent. With a few exceptions, political parties around the world of democracies have extensive control of their own candidate selection process. A political party usually decides its own rules on (i) who can be selected (the candidacy rules), (ii) who gets to select its candidates (the selectorate rules), and (iii) by what process/mechanism the selection is to be made (the candidate selection methods) (Norris 2006; Hazan and Rahat 2010; Ashiagbor 2011). Each political party may choose to adopt candidate selection rules or policies as it sees fit. How a political party approaches the task of candidate selection not only defines its very character and identity, affects its electoral fortune, but also may, individually and collectively, create certain external effects on the law and politics of democracy. For instance, by structuring and shaping intra-party competition, partisan ordering of candidate selection may affect (and be affected by) the terms of inter-party competition (Kang 2005). Partisan candidate selection also exerts a strong winnowing effect on the pools of candidates for general elections, and thereby may have sub-

stantively changed the terms of candidacies and ballot accesses as set forth by the state (Persily 2001a).

Of the three types of partisan rules on candidate selection, the candidacy rules are arguably the most direct expression of what a political party wants, or does not want, in its candidates for general elections. What happens when a political party adds a few more first-order qualifications for its nominees for elected offices? What does the interplay between the state law and the partisan candidacy rules tell us about the ordering of democracy in general and the right to stand for elections in particular in our modern time? What role should the state play in dealing with partisan candidate selection? This article seeks to address these understudied issues by analyzing the candidacy rules for legislative elections in Taiwan. Taiwan presents an interesting case study because one may readily observe a myriad of state-imposed and party-instituted candidacy rules in Taiwan. The robust interplay of these rules further invites us to rethink the law and politics of democracy by integrating two separate fields of study—election law and candidate selection. For the sake of manageability, this inquiry is focused on the legislative candidacy rules. Partisan candidacy rules might be more commonly used and more diverse in Taiwan than in other democracies. The tensions between the state ordering and the partisan ordering of democracy, however, are by no means applicable only to the candidacy rules. Nor is Taiwan the only democracy that has to confront such complexities in democratic ordering. This article therefore attempts to draw some general lessons from the case of Taiwan.

Students of the law of democracy in several countries have long wrestled with a myriad of legal issues concerning political parties (see generally Müller and Sieberer 2006; Lowenstein 2006; Karvonen 2007; Geddis 2007; Guaja 2010; Pildes 2011a; van Biezen 2011; Skach 2012; Issacharoff, Karlan, and Pildes 2012; Lowenstein, Hasen, and Tokaji 2012). In addition to studying party law, election law, and constitutional law, some scholars of party regulation have further explored issues concerning the applicability of certain general laws—such as employment law and anti-discrimination law—in intra-party affairs (see, e.g., Orr 2011a; Morris 2012). The recent election law scholarship, moreover, attends to the challenges posed by partisan candidate selection more than ever before (see, e.g., Tully 2003; Gauja 2010; Kang 2011; Morris

2012). Still, disagreement persists as to which side of the public-private divide we should place the various regulatory issues and legal disputes concerning partisan candidate selection. One could even challenge the wisdom of framing the pertinent legal issues as boundary disputes between state regulation and party autonomy, or, between law and politics. As the dominant mode of legal reasoning in the existing literature, this way of framing often runs the risk of neglecting the party politics that shape political regulation by the state (see, e.g., Lowenstein 1993; Garrett 2002; Kang 2005). It also might not fully appreciate the regulatory authority political parties have as intermediaries between the civil society and the state (see, e.g., Issacharoff and Ortiz 1999; Orr 2013). It is arguable that, as a field of study, the law of democracy still awaits a new theoretical paradigm for understanding the role of political parties as co-regulators of electoral democracy.

This article attempts to do two things. The first is to provide a robust account of the functionally defined candidacy rules for legislative elections in Taiwan. By examining the relevant state regulations, the partisan candidacy rules, and how these regulations/rules interact with each other, this article is going to tell a story about how legislative candidacies in Taiwan are governed not only by the state candidacy law, but also in large part by a variety of partisan candidacy rules, some of which trump state regulations in fact, if not in law. The second attempt is to draw insights from legal pluralism and argue for a pluralistic as opposed to a state-centric view of the law of democracy. Re-framing the legal issues concerning the candidacy rules in this way, I argue, better accounts for the potentials as well as challenges posed by partisan ordering of candidacies. Rather than identifying and treating political parties as either autonomous rights-bearers, state actors, or public utilities to be bound by the rule of (public) law, the pluralism of the law of democracy would rather have us think of them as *sui generis* actors that co-regulate democracy with the state. Though doing so does not dissolve the age-old boundary dispute between private/politics and public/law, it may empower us to renegotiate the terms for better state-party collaboration in democratic ordering. In addition to considering how to achieve electoral integrity through uniform state regulation, for instance, it is also worth considering what divergent and competing partisan rules may contribute to this project. Fur-

thermore, this article argues for revamping the “separation of party and state” as a fundamental principle governing the pluralistic ordering of democracy. Just as we should be vigilant against illegitimate state interference with party autonomy, we should not turn a blind eye to potentially problematic state sanction of partisan rules, such as the anti-defection laws in Taiwan and elsewhere (Geddis 2002; Booyesen 2006; Janda 2009; Gauja 2010).

This article is organized as follows. The second section discusses the legislative candidacy law in Taiwan from the conventional state-centered perspective. In addition to outlining the *de jure* qualifications for legislative candidacies as stipulated by the state law, it highlights the political conditions and, specifically, the institutional arrangements that empower political parties to assert their *de facto* authorities on candidate selection. The third section looks into the partisan candidacy rules in Taiwan. It identifies four types of partisan candidacy rules based on the purposes they serve. The textual and functional analyses are further accompanied by observations of how inter-party and intra-party politics shape these rules and what consequences they have on the law and politics of Taiwan democracy. The fourth section reflects on the pluralism of the law of democracy as revealed by the state and partisan ordering of legislative candidacies in Taiwan. It argues that, by reframing the law of democracy as a pluralistic order, we would be better equipped to confront the inevitable tensions between the state and political parties with insights drawn from such fields as federalism and the law of religion. The fifth section is the conclusion.

### THE LEGISLATIVE CANDIDACY LAW IN TAIWAN: A STATE-CENTERED VIEW

The candidacy rules are defined in this article as regulations that prescribe the *qualifications* for standing for election of a given office, whereas *qualifications* are referred specifically to those first-order categorical qualities (whether positively or negatively framed) about candidate eligibility (Gardner and Charles 2012; Maskell 2015; cf. Rehfeld 2009). The candidacy rules promulgated by the state are usually treated as synonymous to the *qualifications for office*, except for the fact that the latter entails an additional qualification: being elected (Lowenstein 1994). In addition to

being qualified under the candidacy rules, a candidate needs to satisfy the second-order, procedural requirements (such as signatures, financial disclosure, and deposit) as set forth by the ballot access rules to stand for election. Whereas the candidacy rules are used to determine a candidate's eligibility to run for (and serve at) an elected office, the ballot access rules are devised mainly to winnow out those frivolous but otherwise qualified candidates. Telling the difference between a candidacy rule and a ballot access rule is tricky, especially since these two types of electoral rules often work in tandem, have similar effects on limiting who may run for office, and are even interchangeable in certain occasions. A result-oriented definition of qualifications for office as proposed by political theorist Andrew Rehfeld (2009: 246) can easily dissolve this classification difficulty, but this article maintains the conceptual distinction between the candidacy rules and the ballot access rules to focus the inquiry on the former for the present purpose.

The candidacy rules—those in the law books in particular—are substantive restrictions of the right to stand for elections as well as the right to vote. As such, their uses and justifications are of great concern for many democratic theorists (see, e.g., The Federalist Papers No. 52; Thompson 2002; Chafetz 2007; Rehfeld 2009; Cassady 2014; Kalt 2014; Tillman 2014). Throughout the history of democratic theory it has been argued that under these rules, the meaningfulness of the democratic process is at stake. Although disagreements still exist as to whether candidacy rules should be constitutionally entrenched and justified on certain grounds, a global consensus has been established that state-imposed candidacy restrictions must be justified with compelling reasons, and be as minimal as possible (see, e.g., Venice Commission 2002; Massicotte, Blais, and Yoshinaka 2004; Merloe 2009). This is a state-centered view about the candidacy rules, and it has profoundly shaped our understanding of and expectations about the candidacy law.

The case of the candidacy law in Taiwan appears to be a cautionary tale for this state-centered view. As a young democracy, Taiwan has a fairly old Constitution that explicitly guarantees the right to stand for elections.<sup>1</sup> The 1947 Constitution only prescribes citizenship and minimum age as general requirements for elected offices,<sup>2</sup> but several other qualifications and disqualifications for office have been imposed by the government since Taiwan

began to hold some limited elections in the 1950s. By the early 1990s, Taiwan transitioned from an authoritarian state into a full-fledged electoral democracy. The turning point in Taiwan's democratization was arguably the ascendance of multi-party competition and the shrinking of the Kuomintang (KMT)'s one-party dominance. It appears that it was the democratization that drove the gradual liberalization of the candidacy law, and not the other way around. While the symbolic significance of the candidacy law is firmly established in democratic theory, the case of Taiwan invites us to rethink the practical significance of the state law.

*The de jure (dis-)qualifications  
for legislative candidacies*

The Legislative Yuan is the unicameral parliament in Taiwan, which is a president-parliamentary type of semi-presidential democracy (Lin 2009). Since 1992 when it was, for the first time, fully elected by the people in Taiwan, the Legislative Yuan has been composed of four types of Legislators (立法委員): (1) the District Legislators, who are elected from geographical districts; (2) the Aboriginal Legislators, who are elected from two aboriginal districts; (3) the At-Large Legislators; and (4) the Overseas Compatriot Legislators, both of whom are elected from party lists. The 2005 constitutional reform fixed the size of the Legislative Yuan by reducing it by half to 113 seats, extended the legislative term from three to four years, and significantly re-engineered the mixed-member majoritarian (MMM) system used for the legislative elections.<sup>3</sup> Since 2008 when the Constitutional Amendment took effect, the 73 District Legislators have been elected from first-past-the-post single-member districts, and the 34 list-tier members (i.e., the At-Large Legislators and the Overseas Compatriot Legislators) have been elected by a separate List-PR (proportional representation) vote (subject to a 5% electoral threshold) held parallel to the district elections. The remaining six Aboriginal Legislators are elected from two three-member districts under the single non-transferrable vote (SNTV) system. One consequence of the electoral reform is the marked change in terms of legislative composition.

<sup>1</sup>Art. 130 of the Republic of China (ROC) Constitution.

<sup>2</sup>Art. 45 and Art. 130 of the ROC Constitution.

<sup>3</sup>Additional Article 4 of the ROC Constitution.

TABLE 1. THE *DE JURE* QUALIFICATIONS FOR LEGISLATIVE CANDIDACIES IN TAIWAN

<i>Qualifications</i>	<i>Source of law</i>	<i>Coverage*</i>				<i>Year adopted ~ Year abolished</i>
		(1)	(2)	(3)	(4)	
Citizenship I	The Constitution, the Election and Recall Act (ERA), and the Nationality Act	•	•	•	•	1947 ~
Age (23 and older)	The Constitution and ERA	•	•	•	•	1947 ~
Aboriginal ID	Additional Articles of the Constitution and ERA		•			1991 ~
Party nominee	Additional Articles of the Constitution and ERA			•	•	1991 ~
Female (quota) I (abolished)	(Ex) Additional Articles of the Constitution	•		•	•	1991 ~ 2005
Female (quota) II	Additional Articles of the Constitution			•	•	2005 ~
Citizenship II (10 years after Naturalization)	ERA	•	•	•	•	1980 ~
Residency** (4 months)	ERA	•	•			1980 ~
Non-residency (for more than 8 years)	ERA				•	1991 ~
Education level (high school or else) ( <i>abolished</i> )	(Ex) ERA	•	•	•	•	1980 ~ 1994

\* (1) candidates for the District Legislators; (2) candidates for the Aboriginal Legislators; (3) candidates for the At-Large Legislators; (4) candidates for the Overseas Compatriot Legislators.

\*\*The residency requirement for both voting and candidacies was reduced from six months to four months in 1991.

Apart from the fact that the ratio of the list-tier members to the nominal-tier members (i.e., the District Legislators and the Aboriginal Legislators) has been raised from 1:3.6 to 1:2.3, the resulting consolidation of the list-tier election has left the Overseas Compatriot Legislator an endangered species in Taiwan's politics.<sup>4</sup>

Against the backdrop of all the talks and walks of constitutional, electoral, and parliamentary reform over the past two decades in Taiwan, democratic reformers and general public alike appeared to have marginal concerns for legislative candidacy law. Table 1 and Table 2 list the 10 qualifications and 16 disqualifications for the legislative candidacies/offices that had or have been legally required by the state since 1992. In addition to the different ways they were framed, the qualifications and disqualifications also differ in terms of their sources of law and coverage. Of the 10 qualifications, six came from the constitutional law and four from the statutory law. In contrast, all 16 disqualifications were made by the statutory law. Whereas the qualifications could be either general rules or rules specific to a certain type(s) of legislative candidacies, all of the disqualifications in Taiwan have been general rules. Most importantly, about two-thirds of these qualifications and disqualifications can be dated back to the time when Taiwan was still under the authoritarian rule. The 1990s and the 2000s saw the abolishment of the education-level requirement (1994) and the ban on students and

police officers from running for elected offices (2005). Three new disqualification rules have since been added, however, to prohibit those who were convicted of organized crimes (1996), who are still obligated to render (non-military) alternative services (2005), and who are sitting judges or prosecutors (2011) from standing for elections.

To the extent that Taiwan's legislative candidacy law can be said to have been liberalized in part in the wake of Taiwan's democratization, the progress was by and large made through the ordinary legislative process. In Judicial Yuan Interpretation No. 290 (1992), Taiwan's Constitutional Court upheld the constitutionality of educational qualifications for all types of national and local legislative candidacies. At that time, the justices' hands were arguably tied by the three-fourths supermajority decision rule that the Court was required to follow in adjudicating constitutional cases,<sup>5</sup> and in that case, the justices

<sup>4</sup>Before 2005, the amended ROC Constitution used to set aside approximately six to eight seats for the Overseas Compatriot Legislators. After 2005, however, the number of Overseas Compatriot seats is no longer constitutionally or statutorily specified, and political parties are not obligated to nominate any Overseas Compatriot candidates. As a result, only one person was elected to the Legislative Yuan as the Overseas Compatriot Legislator in 2008 and 2012 respectively.

<sup>5</sup>After the enactment of the Constitutional Interpretation Procedure Act of 1993, the Constitutional Court adjudicates the constitutionality of statutes by two-thirds supermajority vote, and the constitutionality of regulations and alike by simple majority.

TABLE 2. THE *DE JURE* DISQUALIFICATIONS FOR LEGISLATIVE CANDIDACIES IN TAIWAN

<i>Disqualifications</i>	<i>Source of law</i>	<i>Year adopted ~ Year abolished</i>
Conviction of insurrection or foreign regression	ERA	1980 ~
Conviction of corruption-related crimes	ERA	1980 ~
Conviction of organized crimes	Organized Crime Prevention Act	1996 ~
Felon disenfranchisement (before re-enfranchised)	ERA	1980 ~
Prisoners and detainees (before or during imprisonment)	ERA	1980 ~
Civil servants impeached or dismissed (before punishment expired)	ERA	1980 ~
Legislators recalled (in four years)	ERA	1980 ~
Bankruptcy (before discharged)	ERA	1980 ~
Mental incapacity	ERA	1980 ~
Active military personnel and cadets	ERA	1980 ~
Active alternative service personnel	ERA	2005 ~
Election workers	ERA	1980 ~
Judges and prosecutors (before resigned or retired)	Judges Act	2011 ~
Dual nationality*	Nationality Act (Ex) ERA	2000 ~ 1991 ~ 2007
Police officers ( <i>abolished</i> )	(Ex) ERA	1980 ~ 2005
Students ( <i>abolished</i> )	(Ex) ERA	1980 ~ 2005

\*Strictly speaking, dual nationality is a disqualification for offices as opposed to candidacies. It is nonetheless included in this table because it is not necessary to make such a nuanced distinction for the purpose of this article.

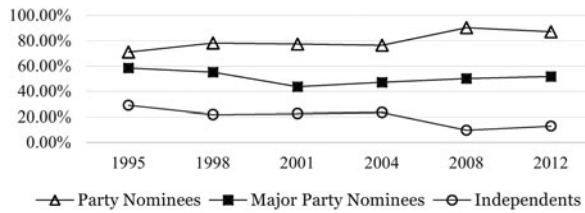
could only agree on issuing a non-binding exhortation that legislators reconsider the necessity of such restrictions and make reasonable accommodations when the society as a whole becomes more educated. The Judicial Yuan Interpretation No. 290 has since been sharply criticized for being too deferential to paternalistic election law-making. The lawmakers managed to strike the educational qualifications for legislative candidates off the books in 1994.<sup>6</sup> By 1996 when the disqualification for convicts of organized crimes was under legislative consideration as a prophylaxis against the mafia's political influence, the Legislative Yuan went with the harshest proposal for life-long disqualification.<sup>7</sup> Liberals objected to this legislation, claiming that such a measure was too restrictive to be constitutionally permissible. However, in the following years no one has ever challenged the constitutionality of any disqualification rules before the Constitutional Court. In view of the subsequent development in the partisan ordering of candidacies in Taiwan, one can only wonder the difference it would make by mounting such a constitutional challenge—even if the Constitutional Court would probably be less deferential and more assertive than it was back in 1992 when the Judicial Yuan Interpretation No. 290 was made.

#### *Party nomination as a key to electoral success*

Independent candidates used to be strong competitors to party-nominated candidates in the limited elections the KMT regime held during its four-decade authoritarian rule. Known in Taiwan as *dangwai* persons (黨外人士), i.e., persons outside of the Party (KMT), these competitive independents were not non-partisans in the usual sense of the word, but were loosely organized opposition elites. They later defied the martial law ban on new political organizations and formed the Democratic Progressive Party (DPP) in 1986 (Jacobs 2012). Since then, multi-party competition has profoundly transformed Taiwan's electoral politics, leaving electoral competition essentially taking place among partisan candidates across the board. As illustrated in Figure 1, the last six cycles of legislative elections held between 1995 and 2012 show that political independents, on average, constituted about one fifth of the candidates. But as Figure 2 shows, political independents only accounted for an average of 2.91% of the legislator-elects during this period. Party nominees clearly dominate the

<sup>6</sup>The educational qualifications for executive candidates were subsequently abolished in 2000.

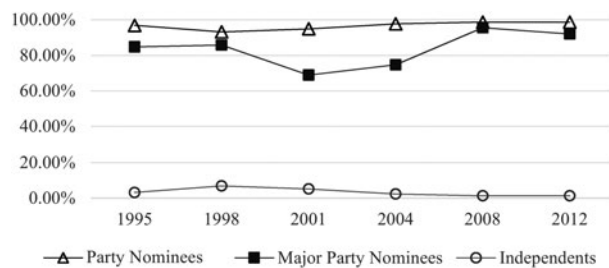
<sup>7</sup>Art. 13 of the Organized Crime Prevention Act.



**FIG. 1.** Party-nominated and independent legislative candidates: 1995–2012. Source: The Electoral Database of the Central Elections Commission, Taiwan.

legislative elections after Taiwan transitioned to democracy, and their dominance has stayed fairly constant since the mid-1990s.

As far as legislative elections are concerned, party nomination has become a key to electoral success in Taiwan. For the last six legislative election cycles, a party nominee was eight times more likely than an independent candidate to be elected to the Legislative Yuan. A candidate nominated by either of the two major parties, the KMT or the DPP, was 11 times more likely to be elected than an independent. The disparities in the election rates of party nominees and of independents have been further widened after the new MMM system was put into effect in 2008. Major party nominees, for instance, were 23 times more likely to win elections than independents in the 2008 and the 2012 election cycles. Following Rehfeld's suggestion to conceptualize qualifications for office in probabilistic terms (Rehfeld 2009: 243), we certainly can view party nomination as a qualification for legislative candidacies/offices, albeit a *de facto* or a virtual one. While such disparities may be attributed to the voters' preferences to a certain extent, the circumstance gives considerable power to political parties in general and major parties in particular for choosing



**FIG. 2.** Party-nominated and independent legislator-elects: 1995–2012. Source: The Electoral Database of the Central Elections Commission, Taiwan.

candidates of their liking. Therefore, the state law is not the sole source of voter-exogenous qualifications. Even if the state-imposed candidacy law is as minimalistic as it can be, the actual access to candidacies and offices may be far more exclusive due to the effects of partisan candidate selection.

### *The legal empowerment of partisan candidate selection*

However powerful and resourceful political parties in Taiwan may be, they do not achieve their dominance in the electoral arena on their own. To a significant extent, the political-regulatory authorities political parties have over matters of candidate selection are conferred or empowered by the state. The state has done so mainly through the construction and implementation of the pro-party or party-friendly law of democracy. To begin with, party endorsement is one among the few information items listed on the ballots for district legislative elections.<sup>8</sup> By designing the ballots in this way, the state guarantees the salience of the candidates' party affiliation and ensures that political parties can serve as voting cues even in candidate-centered district elections. In the Judicial Yuan Interpretation No. 340 (1994), the Constitutional Court invalidated the deposit-discount for party-nominated candidates in district elections as unconstitutional discrimination. Since then, Taiwan's election law has no longer provided preferential legislative ballot access for party nominees. Party nominees in district elections, however, can take advantage of the unlimited contributions their parties can give to them under the existing campaign finance law.<sup>9</sup> This financial advantage can be enormous for candidates backed by the KMT, which has accumulated immense wealth throughout the years of its authoritarian rule and has continued to use the huge proceeds of its business investments for all kinds of political spending (Cheng 2006). Since 1997, political parties that received at least 5% of the vote in the most recent legislative election would be subsidized annually with public money (by a rate of NTD 50 per vote) until the end of the legislative term.<sup>10</sup> The general party funding has since become the

<sup>8</sup>Art. 62 of the Election and Recall Act (ERA).

<sup>9</sup>Art. 18 of the Political Finance Act.

<sup>10</sup>Art. 43 of the ERA.

major source of revenue for all the effective political parties in Taiwan except the KMT.

Only political parties that are legally established and meet either one of the ballot access criteria (as stipulated by the Article 24.4 of the Election and Recall Act [ERA]) may contest the party-based list-PR elections. In this regard, party nomination is a *de jure* qualification for an individual to run as a list-tier legislative candidate in Taiwan. The probability of his or her electoral success is further contingent on his or her ranking in the closed list the party submitted to the Central Elections Commission and ultimately, to the voters. In the Judicial Yuan Interpretation No. 331 (1993), the Constitutional Court held that a list-tier legislator must vacate his/her seat upon losing the membership of the party by which he/she was nominated. Following the ruling of the Court, the ERA promptly set up rules enabling the party to refill such vacancies with the remaining candidates on the party list.<sup>11</sup> In addition to dispensing the carrots (the offices of list-tier legislators) provided by the state, political parties could discipline their list-tier legislators with a big stick provided also by the state: the anti-defection law directed solely at the list-tier legislators.

Political parties may get to keep their list-tier candidates/legislators on a short leash, but from the perspective of the state law, the list-tier legislators remain as representatives of the people, not as party delegates. As part of the 2005 constitutional reform, no less than half of the list-tier seats must be set aside for women.<sup>12</sup> Political parties would have to honor this new gender quota law lest the list-tier seats they won subsequently be rendered vacant.<sup>13</sup> Except for imposing this quasi-obligation to foster women's political participation and gender representation, the state basically gives political parties free hands to do whatever they see fit for candidate selection. A political party, however, is criminally punishable (by fine) if one of its nominees is later convicted of obstruction of election, vote buying, organized crime, or certain serious felonies.<sup>14</sup> The ERA has also criminalized vote buying and obstruction of election in the party nomination process since 2014.<sup>15</sup> Some DPP Legislators previously resisted this new rule for fear of politically motivated prosecution. The criminalization nonetheless may be conceived as the state's effort in helping political parties maintain electoral integrity of their own nominating processes. To the extent

that partisan candidate selection may still be considered matters of politics, that politics is made possible by a myriad of state-imposed political regulations. Even if we take a state-centered view of the law of democracy, we should bear in mind that the narrowly defined candidacy law is not the only law that affects the politics of candidacy.

### THE PARTISAN LEGISLATIVE CANDIDACY RULES IN TAIWAN

Voluntary associations for all sorts of occupational, social, and political purposes are governed by the Civil Associations Act in Taiwan. The Act regulates their organizations, finance, and legal registrations. It also specifies the terms of governmental supervision. Political parties fall squarely within the purview of the Act, which regulates them as a sub-type of political association.<sup>16</sup> Under the Act, political parties are not required to address candidate selection in their party constitutions, nor are they obligated to disclose their candidate selection rules to the public, if they have any. That being said, both of the two major parties in Taiwan, the KMT and the DPP, have compiled and publicized detailed bylaws on candidate selection. Candidate selection in minor parties has been less institutionalized and is usually kept away from the public. But prominent minor parties in Taiwan, such as the New Party (NP), the People First Party (PFP), the Taiwan Solidarity Union (TSU), and the Green Party (GP), do select their legislative candidates on the basis of certain internal rules, be they formal or informal, indefinite or valid for one election cycle only. This article defines a party rule (or a party's self-regulation) in functional terms of publicity and general applicability we associate with rules. Whether or not a given practice may count as a rule is often a matter of dispute, though.

The KMT and the DPP have tried a myriad of methods—including nomination by party leaders/

<sup>11</sup>Art. 71.2 of the ERA.

<sup>12</sup>Additional Article 4.2 of the ROC Constitution.

<sup>13</sup>Art. 67.4 of the ERA.

<sup>14</sup>Art. 112 of the ERA; Art. 14 of the Organized Crime Prevention Act.

<sup>15</sup>Art. 101 of the ERA.

<sup>16</sup>Chapter 9 of the Civil Associations Act.



cadres or nomination committees, closed primaries, opinion polls, and the weighted methods with different combinations of different selectorates—for selecting their candidates (Baum and Robinson 1999; Wu and Fell 2001; Fell 2006; Hazan and Rahat 2010). The minor parties in Taiwan, on the other hand, tend to stick to the tradition of nomination by party leaders. The existing literature on the partisan candidate selection in Taiwan, however, has said little about partisan self-regulation of candidacies. In fact, the two major parties and several minor parties in Taiwan have extensive experiences with using various candidacy rules in limiting who they may nominate, and these partisan candidacy rules are by no means inconsequential or of marginal importance. Both the ex-President Chen Shui-bian (陳水扁) and the current President Ma Ying-jeou (馬英九) of Taiwan would not have been the major parties' presidential nominees in 1999 and 2007 respectively, had the DPP and the KMT not changed their candidacy rules in advance.<sup>17</sup> Given the variations and magnitude of legislative candidacies, the partisan legislative candidacy rules in Taiwan may provide us with a few more clues to explore the rationales and motivations behind the partisan ordering of candidacies.

#### *Four types of partisan legislative candidacy rules*

It surely matters who makes the rules. Political parties strive to win elections and they are much less constitutionally constrained than the state in pursuing their electoral and political victories. Partisanship, for one thing, is antithesis of political neutrality; the very existence of political parties is built on the discrimination on the basis of political beliefs and party identities (Rosenblum 2008). To the extent that political parties are free to choose their own candidates as they see fit and disassociate people they don't like, they are free to express and carry out their electoral preferences in the form of candidacy rules. The partisan candidacy rules thus differ significantly from the state-imposed candidacy rules: either they are designed for purposes wholly foreign to the state, or they are more restrictive than the state rules of similar concerns. This article identifies and discusses four major types of partisan legislative candidacy rules that are drawn from Taiwan's experience. This typological analysis is not meant to be comprehensive. It merely seeks to illustrate what the partisan candidacy rules are capable

of, and how they interact with the state candidacy rules in Taiwan.

The partisan identity rules. Party membership is arguably the most fundamental qualification a political party may impose on the candidates it selects (see Table 3). It is quite common for a political party to require a candidate who is seeking nomination to be a good-standing member of the party for a minimum period of time (Hazan and Rahat 2010). The membership period serves as a proxy for bona-fide partisan identity. To cultivate party loyalty a political party may further impose more restrictive qualifications such as requiring a certain level of the candidates' past participation in party activities. The more restrictive these partisan identity rules are, the more likely that the selectees are faithful to what the party stands for, but this would also create a smaller candidate pool for the party to choose its standard bearers. Different political parties could make different trade-offs between the depth and width of their partisan identity, and a given political party may strike different balances for different types of candidacies, or from time to time. Notably, both the KMT and the DPP waive their membership period requirements for some of their list-tier candidates. While the identity-based candidacy rules are not the only means to assure that party nominees are faithful partisans, such

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<sup>17</sup>In the case of Chen Shui-bian, the DPP adopted a special nomination rule in 1999 to sidestep the then-existing bylaw that precluded any party member from seeking more than one major executive candidacy in a four-year period. Without overriding the so-called "four-year clause," the DPP would not be able to nominate its most promising presidential hopeful at that time—Mr. Chen, who lost his reelection bid in the 1998 Taipei mayoral race as the DPP nominee, and was therefore not eligible for the DPP's presidential nomination under the old rule. The DPP later abandoned this candidacy rule for good in 2000.

The case of Ma Ying-jeou concerns the bending of partisan rules on the part of the KMT. As of 2006, the KMT's party constitution provided that no party member is eligible for nomination if he or she has been found guilty of a crime in the first trial. At the urging of the then KMT Chairman Ma Ying-jeou, the KMT adopted a more restrictive bylaw in 2006 to suspend the party membership of any member the moment when he or she is indicted for a crime. However, Mr. Ma, the presumptive KMT nominee for the 2008 presidential election, was indicted in February 2007 for misusing his mayoral allowance during his two terms as Taipei mayor. To secure Mr. Ma's nomination, the KMT first ditched the "suspension-upon-indictment" bylaw and later changed the party constitution to disqualify only the convicts. The KMT's candidacy rule was later switched back to the "guilty-upon-first-trial" rule in 2009.

TABLE 3. EXAMPLES OF THE PARTY IDENTITY RULES

<i>Qualifications</i>	<i>The KMT rules</i>	<i>The DPP rules</i>
Party membership	•	•
Membership period requirement	• (4 months)	• (2 years*)
Special membership period requirement for list-tier candidates	• (3 years)	
Waiver of the membership period requirement	• (for list-tier candidates)	• (for list-tier candidates and recruited district candidates)
Level of party participation	• ( <i>ad hoc</i> requirement)	• (for certain list-tier candidacies; 2006~2011)**

\*The previous membership period requirements of the DPP varied from none to three years.

\*\*In 2006–2011, certain list-tier candidacies of the DPP were open only to candidates with specified experiences in party leadership or governmental services.

DPP, Democratic Progressive Party; KMT, Kuomintang.

arrangements also cast doubt on the common perception in Taiwan that list-tier legislators are more partisan than district legislators. In fact, a few list-tier legislators in Taiwan were outspoken critics of the parties that nominated them, and this phenomenon can be attributed in part to the relaxed partisan identity check in the parties' candidate selection.

The integrity-image rules. Both the state and political parties have interests in maintaining the integrity and trustworthiness of the elected representatives, but while the state has to justify its restrictions on the right to stand for elections as constitutionally permissible, political parties—when they are viewed as non-state actors—don't. With different focuses of attention, each of the two major parties in Taiwan has maintained a set of integrity-related candidacy rules that are more extensive and/or more restrictive than their counterparts in the state law. For instance, Article 13 of the Organized Crime Prevention Act in Taiwan disqualifies the candidacies of those who were convicted of organized crimes. The DPP and the

KMT, by contrast, disqualify such candidacies upon indictment and finding guilty in the first trial respectively. The two major parties may well have opted for the rules listed in Table 4 for the sake of projecting or managing their public images as parties which hold themselves to a higher moral standard. Although perception and reality are two different things, the partisan integrity-image rules appear to be more effective than the state integrity-rules in helping to solve the infamous problem of “black-gold politics (黑金政治)”—i.e., politics dominated by thugs and plutocrats—in Taiwan.

The representation-reinforcing rules. Some partisan candidacy rules work as affirmative action measures in reinforcing political representation of certain groups in partisan candidate selection and ultimately in the legislature (Krook 2009; Childs 2013). Since the 2008 legislative elections, political parties in Taiwan have worked with the state to reinforce gender equality in political representation by incorporating into the partisan rules the constitutional imperative that women should hold no less

TABLE 4. EXAMPLES OF THE INTEGRITY-IMAGE RULES

<i>Disqualifications</i>	<i>The KMT rules</i>	<i>The DPP rules</i>
Organized crime indictees	• (upon finding guilty in the first trial)	• (upon indictment)
Corruption indictees	• (upon finding guilty in the first trial)	
Additional felon disqualifications (for certain felonies)	• (upon finding guilty in the first trial)	• (upon conviction, but with exceptions)
Dual nationality upon nomination		•
Holding foreign permanent residency upon nomination		•

TABLE 5. EXAMPLES OF THE REPRESENTATION-REINFORCING RULES

<i>Qualifications</i>	<i>The KMT rules</i>	<i>The DPP rules</i>
Female quota for list-tier candidates	• (one in two)	• (one in two)
Female quota for district candidates		• (one in four)
List-tier quota for aboriginals		• (optional; one seat guaranteed in 1995–2006)
List-tier quota for experts/scholars/minorities		• (1992 ~ 2006)

than half of the list-tier seats (see Table 5). Political parties are in a position to do more for women (or any other group) on their own initiatives (Orr 2011a). The DPP, for instance, continues to require that women constitute at least one-fourth of its nominees for district elections after the new MMM system took effect in 2008. Under the old party primaries rules that lasted until mid-2000s, the DPP had also been known for using quota rules to ensure or reinforce representation of certain groups in its list-tier primaries. The DPP abolished its list-tier quota for experts, scholars, and minorities in 2006 and relied instead on the nomination committee mechanism to select list-tier candidates representing those groups. Though not expressed and fixed in the written rules, some of KMT’s list-tier candidacies appear to have been reserved for candidates from groups such as veterans (retired generals, to be specific) and people doing business in China.

The competition/recruitment rules. A political party’s candidate selection can be a great site for power struggle. It is where incumbents face intra-party challengers, and moderates compete with hardliners (Katz 2001; Gauja 2012). The process has profound influence over the substance. It is

not at all surprising that partisan candidacy rules, as first-order regulations of the candidate selection process, can level the playing field or tilt the game in certain directions (Rahat 2009). What is striking, though, is how ingenious the partisan candidacy rules could be in rewriting the basic rules of the electoral game as viewed from a state-law-centered perspective. For instance, there are no state-imposed term limits for Taiwan’s Legislators, but both the KMT and the DPP have their list-tier Legislators subject to party-imposed term limitations (see Table 6). The minor party TSU has even implemented a term-reduction plan for the three list-tier seats it won in 2012. As part of their pre-election pledges, the TSU’s top list-tier candidates had to agree in public that they would serve only half of the term (two years) and let the subsequent candidates on the party list serve their remaining terms. In case that the legislator-elects later have second thoughts, the TSU is even ready to tender their pre-signed resignations on their behalf (interview with the Secretary-General of the TSU, March 25, 2013, on file with author). Such term-changing rules not only have significant influences on intra-party competition and parties’ candidate recruitment, but also have arguably sharpened the mandate

TABLE 6. EXAMPLES OF THE COMPETITION/RECRUITMENT RULES

<i>Party</i>	<i>Rules</i>
KMT	<ul style="list-style-type: none"> <li>■ <i>Term Limits for List-Tier Candidacies</i> (one term is the default; two-term limits for all except for the Speaker, who could be re-nominated twice as list-tier nominee)</li> <li>■ <i>Level of Party Participation</i></li> </ul>
DPP	<ul style="list-style-type: none"> <li>■ <i>Term Limits for List-Tier Candidacies</i> (two-term limits)</li> <li>■ <i>Restriction on Central Party Cadre Candidacies</i> (must resign from party office one year before the sworn-in day of the elected office to be eligible for party nomination)</li> <li>■ <i>Restriction on Incumbents of Other Elected Offices</i> (disqualified if the remaining term is more than half of the term) (1993 ~ 2006)</li> <li>■ <i>No-Contest Agreement</i> (agree not to seek nomination in 5 years if fails to win a certain number of votes) (1994 ~ 2007)</li> </ul>
TSU	<ul style="list-style-type: none"> <li>■ <i>Pledge to Serve Only Half of the List-Tier Term if Elected</i></li> </ul>

TSU, Taiwan Solidarity Union.

divide between the list-tier and the nominal-tier legislators in Taiwan.

*The politics of partisan ordering  
of legislative candidacies*

Unlike the state law on legislative candidacies that usually remains fairly stable after a rule was made or changed, the partisan candidacy rules in Taiwan over the past two decades have often been found in a flux of constant changes. Pressured in part by inter-party competition in the electoral arena, the two major parties in general, DPP in particular, are quite open to experimenting with new rules for candidate selection. They would not hesitate to start over when experiments went wrong. The overriding objective for partisan candidacy rules of all sorts, it seems, is to help political parties maximize their respective electoral success. Effective political parties in Taiwan also compete with one another for moral high ground in the public relations war that prompts them to erect higher and higher fences to keep criminal suspects and ex-felons from entering their candidate selection. Appearance does not necessarily reflect reality, though. The KMT, for instance, has been known for letting some of their controversial allies run as independents and run unopposed by KMT nominees.

Just as the state is “always a constellation of currently existing political and partisan forces” (Issacharoff and Pildes 1999: 653), a political party is always a coalition of people with diverse ideas and interests. Many of the partisan candidacy rules in Taiwan are shaped to a great extent by intra-party politics, which appears to be more visible and more robust in the DPP because its leadership has been much more fragmented than its competitors. Intra-party factional politics aside, the competition between incumbents and challengers may affect and be affected by the partisan candidacy rules. The competition/recruitment rules, in particular, often reflect the relative power incumbents or the party-in-government has vis-à-vis the party organization, which might side with challengers for the sake of party building in the long run. Similarly, the restrictiveness of the partisan identity rules may be understood as a function of the power balance between party members/activists and the party-in-the-electorate. In this regard, the term “partisan *self-regulation*” makes sense only when viewed from an outsider’s perspective. For those who get to make

the party’s internal rules, the rules are meant to bind others rather than bind themselves (Elster 2000).

**BEYOND THE PRIVATE-PUBLIC DIVIDE:  
THE PLURALISM OF THE LAW  
OF DEMOCRACY**

Legal pluralism may be everywhere (Tamanaha 2008: 375), but not everywhere do we take seriously the pluralism of normative ordering. The law of democracy, for one, has long been dominated by legal statism (El-Haj 2011). But if by legal pluralism we mean “the social arena at issue has multiple active sources of normative ordering” (Tamanaha 2008: 397), then even in our time, where much of democratic politics has been legalized and highly regulated by the state, legal pluralism—as a matter of “social state of affairs”—can still be said to be alive and well in the field of the law of democracy. The second and third sections of this article together have sought to establish a descriptive account of how the state and political parties have interacted with each other in ordering the legislative candidacies in Taiwan. While much work remains to be done, it can be argued that what has been uncovered in this article is by far only a tip of an iceberg, and the iceberg can be named as “the pluralism of the law of democracy.”

It is one thing to speak of the pluralism of the law of democracy as a state of affairs. It is quite another thing to explore the normative implications of, and responses to, this state of affairs. Along the great fault line between the public and the private, much has been debated about what the state (and especially the courts) should do with political parties in general and with their candidate selection in particular (see, e.g., Lowenstein 1993; Persily and Cain 2000; Issacharoff 2001; Persily 2001a, 2001b; Cain 2001; Garrett 2002; Kang 2005, 2011; Pildes 2011b; Orr 2001, 2011a, 2011b; Elmendorf and Schleicher 2013; Dawood 2013). Notwithstanding the heated exchanges on questions such as whether a political party resembles more a private club or a public utility, at the heart of this grand debate is not the essentialist dispute over the nature of political parties. After all, most of the participants agree on two things: (i) the private/public boundary disputes could never be settled, for what it means to be public or private changes over time and depends on what is at stake; and (ii) as intermediaries between

the civil society and the state, political parties could never fit in to either of the categories with ease. Rather, the debate is about how to resolve the inevitable conflicts that arise from interactions between political parties and the state. The “public or private” judgment, in turn, is better understood as normative judgment about whose will—the state’s or the political parties’—should prevail when conflict occurs. In this regard, reframing the law of democracy as a pluralistic legal order certainly helps to accentuate the conflicts or tensions between the state and the partisan ordering of democracy. By taking a legal pluralistic perspective, we may even get to see a few risks and opportunities overlooked or obscured by the traditional state-centered view.

#### *Rethinking party autonomy and state regulation*

Consider the case for constitutional protection of political parties’ autonomy in ordering their own candidate selection. Political parties are often in a position to claim and enjoy the right to free association protected under the constitutional law, and partisan self-regulation would trump state regulation if it is considered a legitimate exercise of the party’s associational right. Whether and to what extent candidate selection is within the realm of party autonomy, however, are often matters of dispute and vary from country to country. Assume, for the moment, that we want to base our normative judgment solely on a functional, pragmatic analysis of what works best for democracy. Then what would be the justifications for letting autonomous partisan ordering rule over state law when it comes to the regulation of candidate selection? American law professor Nathaniel Persily advances a two-fold functional argument for near-absolute party autonomy in determining who can vote in their primaries in the context of American democracy (Persily 2001b). First, strong and broad judicial protection for party organizational autonomy serves to “prevent the party-in-government from crafting electoral rules that disadvantage its opponents and further add to the advantages of incumbency” (Persily 2001b: 753) and thereby promotes the value of electoral competitiveness. Second, party autonomy also promotes the democratic interest in minority representation by empowering party organizations to build coalitions among interest groups “who are ideologically or otherwise distant from the median voter” (Persily 2001b: 811).

By generalizing Persily’s argument for autonomous partisan selectorate rules in American democracy, we could build a strong rights-based case for party autonomy (especially when it comes to candidate selection): Partisan ordering should trump state law as a matter of constitutional right, because only then could we minimize such risks to liberal democracy as election law manipulation and “tyranny of the median voter” (Persily 2001b: 805). A robust constitutional protection of political parties’ associational rights certainly serves to secure and cultivate the pluralism in partisan rules, but the framing of party autonomy as a matter of rights does not necessarily place the partisan ordering of democracy in its best light. Persuasive as it is, Persily’s functional analysis appears to put more emphasis on the preventive/defensive functions and less on the proactive or innovative potentials of party autonomy. By reframing party autonomy as a source of democratic ordering that competes and cooperates with the state, we may see that the law of democracy bears a structural resemblance to federalism: Both political parties and the states in a federal system can serve as “laboratories of democracy.” The recent scholarship of federalism has attended to the dynamics of party politics in the making of federalism (Kramer 2000; Gerken 2010; Bulman-Pozen 2012; Gerken 2014). Translating the vocabularies of federalism to the law of democracy, in turn, may help us better articulate the diversity, flexibility, institutional experimentation as well as the accompanying costs and risks partisan ordering may bring to this pluralistic field of law.

In view of the great power political parties—especially the major ones—wield over the electoral arena, it is understandable that many people would look to state/legal regulation to ensure that political parties do not abuse their power or peril electoral integrity (Norris, Frank, and Coma 2014; Post 2014). It is beyond the scope of this article to fully examine various approaches (as suggested by the comparative law of democracy) the state may use to regulate the substantive and/or procedural terms of intra-party politics and partisan candidate selection. But even if the constitutional protection of party autonomy does not foreclose possibilities of state intervention, we do need to take seriously the public interest in pluralistic democracy and the risks of election law manipulation. The case for state regulation appears to become weaker as the state seeks to do more than policing a few agreed-upon

boundary lines of reasonable pluralism in democratic politics. Whereas some partisan rules may strike us as invidious discrimination that should not be tolerated in a liberal democracy, some other partisan rules may serve to pursue a substantive ideal of democracy (such as political equality) beyond what the state law could do. Partisan ordering, therefore, can be part of the problem and part of the solution. Rather than looking solely to the state for reform measures, the ideal of electoral integrity is arguably better served by means of pluralistic democratic ordering.

In any event, the state does have a constitutional responsibility to honor and protect the right to vote as well as the right to stand for elections. Even if there is not much the state could do to regulate partisan candidate selection, it should be required to keep its own candidacy rules and ballot access rules as open as possible for the sake of preventing the electoral arena from being taken over entirely by (major) political parties. In a sense, an exclusive partisan candidacy rule is tolerable if, and only if, “exit” from it is a viable option under the state’s inclusive candidacy law (Hirschman 1970).

### *Reconstructing the separation of party and state*

The law on religion in a liberal, pluralistic society presents yet another point of reference for thinking about the law of democracy from a legal pluralistic perspective. Much of the talk about party autonomy is readily comparable to religious freedom—especially the free exercise of religious belief the state (or the society as a whole) is required to respect (and even accommodate in certain occasions) under the constitutional law. The comparison does not end there. To the extent that a liberal pluralistic order of religion is built upon the separation of church and state, it is at least worth considering whether a pluralistic order of democracy should be structured and maintained in accordance to a similar principle: the separation of party and state. In fact, some of the issues concerning public-private division in the legal regulation of political parties could be reframed as issues regarding the required degree of such separation. The question is about where to draw the normative baseline. Although it is easier for the courts to apply a minimalist approach that condemns only the outright establishment of one-party state, this article argues for a more robust requirement that would demand probing scrutiny of

the justifiability of the entanglement of state and political parties. The main reason for this choice has to do with consistency and reciprocity: If we rightfully distrust the state’s restrictions on party autonomy, we should be equally concerned about the state’s endorsement or assistance to partisan ordering. Just as the state should not interfere with party autonomy, political parties should not be allowed to commandeer the state to work as their subordinates.

The partial anti-defection law that governs the list-tier legislators in Taiwan is particularly problematic when scrutinized under the proposed separation of party and state principle. It is one thing to entrust political parties with the power to nominate the list-tier candidates; it is quite another thing to treat the list-tier legislators as if they were nothing but party appointees who serve at the pleasure or mercy of their parties. The latter arguably violates the separation of party and state principle, because by turning the removal from the legislature into a powerful means of party discipline, it risks to relegate what is supposed to be a public office into a patronage at parties’ disposal.<sup>18</sup> The anti-defection law serves as a fail-safe for the TSU’s list-tier term-reduction rule. This particular rule has its own problem with the separation of party and state principle as well. While the state simply could not prevent political parties from making their own rules about legislative terms, the state should not be required to enforce a partisan rule that is inconsistent with its statutory rules. Therefore, the term-reduction pledge demanded by the TSU is at best a political deal that

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<sup>18</sup>The most controversial attempt to use the anti-defection law in Taiwan came in September 2013, when the KMT sought—at the strong urging of its Chairman, President Ma Ying-jeou—to revoke the party membership of the Legislative Speaker Wang Jin-ping (王金平), who was also an At-Large Legislator elected from the KMT’s party list, on the ground of an alleged ethical violation by Speaker Wang. At the request of Speaker Wang, the Taipei District Court temporarily retained Wang’s KMT membership and later invalidated the KMT’s decision for its failure to follow the procedure as required by the Civil Code and the Civil Associations Act. Upon the KMT’s appeal, the Taipei High Court affirmed the district court’s judgment, concluding that the KMT’s party autonomy could not trump the state law when its disciplinary decision-making was inconsistent with the principle of intra-party democracy. The KMT appealed to the Supreme Court in October 2014, but the appeal was dismissed by the Court in April 2015, because the new leadership of the KMT no longer wished to contest the High Court’s ruling as so insisted by President Ma, who resigned from his party chairmanship in December 2014 after the KMT was defeated in the joint local elections in November of the same year.

should be deemed unenforceable in courts, with or without the anti-defection law.

### CONCLUSION

Political parties are more than key players to be protected and regulated by the law of democracy. In addition to acting behind the scene of election lawmaking, political parties regulate themselves in the name of “party autonomy.” The partisan self-regulations they make often have external effects on the democratic political process as a whole. As a field of study, however, the law of democracy still awaits a new theoretical paradigm for understanding the role of political parties as *sui generis* actors that co-regulate democracy with the state. Using the legislative candidacy rules in Taiwan as a case study, this article explores how at least four types of partisan rules have diversified and complicated the legislative candidacy law in Taiwan. Drawing insights from legal pluralism, this article argues that we should take a pluralistic as opposed to a statist view to take more seriously the pluralism of the law of democracy. While such reframing does not dissolve the age-old boundary disputes between private/politics and public/law, it empowers us to confront the inevitable conflicts or tensions between the state and political parties with insights and lessons drawn from other pluralistic fields such as federalism and the law of religion. In addition to the preventive/defensive functions of the rights-based party autonomy as already argued in the literature, a legal pluralistic view arguably helps us to appreciate the diversity, flexibility, institutional experimentation, as well as the accompanying costs and risks partisan ordering may bring to the law of democracy better. Above all, a pluralistic order of democracy should be organized around a robust principle of separation of party and state which is modeled after the time-honored separation of church and state. Just as we should be vigilant against illegitimate state interference with party autonomy, we should be equally distrustful of unwarranted state sanction of partisan rules.

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### REFERENCES

- Ashiagbor, Sefakor. 2011. *Political Parties and Democracy in Theoretical and Practical Perspectives: Selecting Candidates for Legislative Office*. Washington, DC: National Democratic Institute.
- Avnon, Dan. 1995. “Parties Laws in Democratic Systems of Government.” *Journal of Legislative Studies* 1(2): 283–300.
- Baum, Julian and James Robinson. 1999. “Party Primaries in Taiwan: Trends, Conditions, and Projections in Candidate Selection.” *Occasional Papers/Reprint Series in Contemporary Asian Studies* 155(6): 2–39.
- Booyesen, Susan. 2006. “The Will of the Parties Versus the Will of the People? Defections, Elections and Alliances in South Africa.” *Party Politics* 12(6): 727–46.
- Bulman-Pozen, Jessica. 2013. “Partisan Federalism.” *Harvard Law Review* 127(4): 1077–1146.
- Cain, Bruce E. 2001. “Party Autonomy and Two-Party Electoral Competition.” *University of Pennsylvania Law Review* 149: 793–814.
- . 2010. “Reform, Perhaps: Two Studies on the Presidential Nomination Process.” *Election Law Journal: Rules, Politics, and Policy* 9(2): 153–55.
- Cassady, Benjamin. 2014. “You’ve Got Your Crook, I’ve Got Mine: Why the Disqualification Clause Doesn’t (Always) Disqualify.” *Quinnipiac Law Review* 32: 209–310.
- Chafetz, Josh. 2007. *Democracy’s Privileged Few: Legislative Privilege and Democratic Norms in the British and American Constitutions*. Yale University Press.
- Cheng, Tun-jen. 2006. “Strategizing Party Adaptation: The Case of the Kuomintang.” *Party Politics* 12(3): 367–94.
- Childs, Sarah. 2013. “Intra-Party Democracy: A Gendered Critique and a Feminist Agenda.” In *The Challenges of Intra-Party Democracy*, edited by William P. Cross and Richard S. Katz, first edition, 81–99. Oxford, UK: Oxford University Press.
- Citrin, Jack and David Karol. 2009. *Nominating the President: Evolution and Revolution in 2008 and Beyond*. Lanham, MD: Rowman and Littlefield Publishers.
- Dawood, Yasmin. 2013. “Democracy and the Problem of the Partisan State.” In *Loyalty: NOMOS LIV*, edited by Sanford Levinson, Paul Woodruff, and Joel Parker, 257–91. New York, NY: New York University Press.
- El-Haj, Tabatha Abu. 2011. “Changing the People: Legal Regulation and American Democracy.” *New York University Law Review* 86(1): 1–68.
- Elmendorf, Christopher S. and David Schleicher. 2013. “Informing Consent: Voter Ignorance, Political Parties, and Election Law.” *University of Illinois Law Review* 2013: 363–432.
- Elster, Jon. 2000. *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraint*. New York, NY: Cambridge University Press.
- European Commission for Democracy through Law (Venice Commission). 2002. *Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report*. CDL–EL(2002)5. Venice Commission.
- Fell, Dafydd. 2006. “Democratization of Candidate Selection in Taiwanese Political Parties.” *Journal of Electoral Studies* 13(2): 167–198.

- Gardner, James A. and Guy-Uriel Charles. 2012. *Election Law in the American Political System*. New York, NY: Aspen Publishers.
- Garrett, Elizabeth. 2002. "Is the Party Over? The Court and the Political Process." *2002 Supreme Court Review*: 95–152.
- Gauja, Anika. 2010. *Political Parties and Elections: Legislating for Representative Democracy*. Burlington, VT: Ashgate Pub. Company.
- . 2012. "The 'Push' for Primaries: What Drives Party Organisational Reform in Australia and the United Kingdom?" *Australian Journal of Political Science* 47(4): 641–58.
- Geddis, Andrew. 2002. "Gang Aft A-Gley: New Zealand's Attempt to Combat 'Party Hopping' by Elected Representatives." *Election Law Journal* 1: 557–571.
- . 2007. *Electoral Law in New Zealand: Practice and Policy*. Wellington, New Zealand: LexisNexis New Zealand.
- Gerken, Heather K. 2010. "Foreword: Federalism All the Way Down." *Harvard Law Review* 124: 4–74.
- . 2014. "The Loyal Opposition." *Yale Law Journal* 123: 1958–94.
- Gerken, Heather K., and Douglas B. Rand. 2010. "Creating Better Heuristics for the Presidential Primary: The Citizen Assembly." *Political Science Quarterly* 125(2): 233–53.
- Greene, Abner S. 2012. *Against Obligation: The Multiple Sources of Authority in a Liberal Democracy*. Cambridge, MA: Harvard University Press.
- Hasen, Richard L. 2008. "Too Plain for Argument: The Uncertain Congressional Power to Require Parties to Choose Presidential Nominees through Direct and Equal Primaries." *Northwestern University Law Review* 102: 253–63.
- Hazan, Reuven Y. and Gideon Rahat. 2010. *Democracy within Parties: Candidate Selection Methods and Their Political Consequences*. New York, NY: Oxford University Press.
- Hirschman, Albert O. 1970. *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States*. New Ed edition. Cambridge, MA: Harvard University Press.
- Issacharoff, Samuel. 2001. "Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition." *Columbia Law Review* 101(2): 274–313.
- Issacharoff, Samuel and Daniel R. Ortiz. 1999. "Governing Through Intermediaries." *Virginia Law Review* 85: 1627–1670.
- Issacharoff, Samuel and Richard H. Pildes. 1998. "Politics as Markets: Partisan Lockups of the Democratic Process." *Stanford Law Review* 50: 643–717.
- Issacharoff, Samuel, Pamela S. Karlan, and Richard H. Pildes. 2012. *The Law of Democracy: Legal Structure of the Political Process*. New York, NY: Foundation Press.
- Jacobs, J. Bruce. 2012. *Democratizing Taiwan*. Leiden, The Netherlands: Brill.
- Janda, Kenneth. 2009. "Laws against Party Switching, Defecting, or Floor-Crossing in National Parliaments." *2009 World Congress of the International Political Science Association*.
- Kalt, Brian C. 2014. "The Application of the Disqualification Clause to Congress: A Response to Benjamin Cassady, You've Got the Crook, I've Got Mine: Why the Disqualification Clause Doesn't (Always) Disqualify." *Quinnipiac Law Review* 33(1): 7–31.
- Kang, Michael S. 2005. "The Hydraulics and Politics of Party Regulation." *Iowa Law Review* 91: 131–187.
- . 2011. "Sore Loser Laws and Democratic Contestation." *Georgetown Law Journal* 99: 1013–1075.
- Katz, Richard S. 2001. "The Problem of Candidate Selection and Models of Party Democracy." *Party Politics* 7(3): 277–96.
- Karvonen, Lauri. 2007. "Legislation on Political Parties: A Global Comparison." *Party Politics* 13(4): 437–55.
- Key Jr., V. O. 1964. *Politics, Parties, and Pressure Groups*. New York, NY: Thomas Y. Crowell Company.
- Kramer, Larry D. 2000. "Putting the Politics Back into the Political Safeguards of Federalism." *Columbia Law Review* 100(1): 215–93.
- Krook, Mona Lena. 2009. *Quotas for Women in Politics: Gender and Candidate Selection Reform Worldwide*. Oxford and New York: Oxford University Press.
- Lin, Jih-wen. 2009. "The Evolvement of Taiwan's Constitutional System." In *The Political System of Taiwan*, edited by Markus Porsche-Ludwig and Ching-peng Chu, 31–54. Baden-Baden, Germany: Nomos Publishers.
- Lowenstein, Daniel Hays. 1993. "Associational Rights of Major Political Parties: A Skeptical Inquiry." *Texas Law Review* 71: 1741–1792.
- . 1994. "Are Congressional Term Limits Constitutional?" *Harvard Journal of Law and Public Policy* 18: 1–72.
- . 2006. "Legal Regulation and Protection of American Parties." In *Handbook of Party Politics*, edited by Richard S. Katz and William J. Crotty, illustrated edition, 456–470. CA: Sage Publications Ltd.
- Lowenstein, Daniel Hays, Richard L. Hasen, and Daniel P. Tokaji. 2008. *Election Law: Cases and Materials*. Durham, NC: Carolina Academic Press.
- Madison, James, Alexander Hamilton, and John Jay. 1787 (1788). *The Federalist Papers*. New York, NY: Penguin Books.
- Maskell, Jack. 2015. *Qualifications of Members of Congress*. R41946. Congressional Research Service.
- Massicotte, Louis, André Blais, and Antoine Yoshinaka. 2004. *Establishing the Rules of the Game: Election Laws in Democracies*. Toronto, Canada: University of Toronto Press.
- Merloe, Patrick. 2009. "Human Rights—The Basis for Inclusiveness, Transparency, Accountability, and Public Confidence in Elections." In *International Election Principles: Democracy and the Rule of Law*, edited by John Hardin Young, 3–39. Chicago, IL: ABA Publishing.
- Morris, Caroline. 2012. *Parliamentary Elections, Representation and the Law*. Portland, OR: Hart Publishing.
- Müller, Wolfgang and Ulrich Sieberer. 2006. "Party Law." In *Handbook of Party Politics*, edited by Richard S. Katz and William J. Crotty, illustrated edition, 435–45. CA: Sage Publications Ltd.
- Norris, Pippa. 2006. "Recruitment." In *Handbook of Party Politics*, edited by Richard S. Katz and William J. Crotty, 89–108. London: Sage Publications Ltd.
- Norris, Pippa, Richard W. Frank, and Ferran Martinez i Coma, eds. 2014. *Advancing Electoral Integrity*, first edition. Oxford and New York: Oxford University Press.



- Orr, Graeme. 2001. "Overseeing the Gatekeepers: Should the Preselection of Political Candidates Be Regulated?" *Public Law Review* 12: 89–94.
- . 2011a. "Legal Conceptions of Political Parties through the Lens of Anti-discrimination Law." In *Electoral Democracy: Australian Prospects*, edited by J.C. Tham, B. Costar, and G. Orr, 120–139. Melbourne, Australia: Melbourne University Press.
- . 2011b. "Party Primaries for Candidate Selection—Right Question, Wrong Answer." *University of New South Wales Law Journal* 34: 964–83.
- . 2013. "Private Association and Public Brand: The Dualistic Conception of Political Parties in the Common Law World." *Critical Review of International Social and Political Philosophy* 17(3): 332–49.
- Persily, Nathaniel. 2001a. "Candidates v. Parties: The Constitutional Constraints on Primary Ballot Access Laws." *Georgetown Law Journal* 88: 2181–2225.
- . 2001b. "Toward a Functional Defense of Political Party Autonomy." *New York University Law Review* 76: 750–824.
- Persily, Nathaniel, and Bruce E. Cain. 2000. "The Legal Status of Political Parties: A Reassessment of Competing Paradigms." *Columbia Law Review*, Symposium: Law and Political Parties, 100(3): 775–812.
- Pildes, Richard H. 2011a. "Political Parties and Constitutionalism." In *Comparative Constitutional Law*, edited by Tom Ginsburg and Rosalind Dixon, 254–264. Cheltenham, UK: Edward Elgar.
- . 2011b. "Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America." *California Law Review* 99: 273–334.
- Post, Robert C., Pamela S. Karlan, Lawrence Lessig, Frank I. Michelman, and Nadia Urbinati. 2014. *Citizens Divided: Campaign Finance Reform and the Constitution*. Cambridge, MA: Harvard University Press.
- Rahat, Gideon. 2009. "Which Candidate Selection Method Is the Most Democratic?" *Government and Opposition* 44(1): 68–90.
- Rehfeld, Andrew. 2009. "On Quotas and Qualifications for Office." In *Political Representation*, edited by Ian Shapiro, Susan C. Stokes, Elisabeth Jean Wood, and Alexander S. Kirshner, 236–268. New York, NY: Cambridge University Press.
- Rosenblum, Nancy L. 2010. *On the Side of the Angels: An Appreciation of Parties and Partisanship*. Princeton, NJ: Princeton University Press.
- Skach, Cindy. 2012. "Political Parties and the Constitution." In *The Oxford Handbook of Comparative Constitutional Law*, edited by Michel Rosenfeld and András Sajó, 874–890. Oxford, UK: Oxford University Press.
- Smith, Steven S. and Melanie J. Springer, eds. 2009. *Reforming the Presidential Nomination Process*. Washington, DC: Brookings Institution Press.
- Tamanaha, Brian. 2008. "Understanding Legal Pluralism: Past to Present, Local to Global." *Sydney Law Review* 30: 375–411.
- Thompson, Dennis F. 2002. *Just Elections: Creating a Fair Electoral Process in the United States*. Chicago, IL: University of Chicago Press.
- . 2010. "The Primary Purpose of Presidential Primaries." *Political Science Quarterly* 125(2): 205–32.
- Tillman, Seth Barrett. 2014. "Originalism and the Scope of the Constitution's Disqualification Clause." *Quinnipiac Law Review* 33: 59–126.
- Tully, Steve. 2003. "Party Registration and Preselection: A Minefield for Electoral Administrators?." In *Realising Democracy: Electoral Law in Australia*, edited by Graeme Orr, Bryan Mercurio, and George Williams, 143–156. Sydney, Australia: Federation Press.
- Van Biezen, Ingrid. 2011. "Constitutionalizing Party Democracy: The Constitutive Codification of Political Parties in Post-War Europe." *British Journal of Political Science* 42(1): 187–212.
- Wu, Chung-li and Dafydd Fell. 2001. "Taiwan's Party Primaries in Comparative Perspective." *Japanese Journal of Political Science* 2(1): 23–45.

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