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**COMPETING LIBERAL VALUES: THE EFFECTS OF VRA SEC. 2
LITIGATION ON ELECTORAL COMPETITIVENESS**

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INTRODUCTION

The United States recently celebrated the fiftieth anniversary of the Voting Rights Act of 1965. This legislation was one of the most important victories of the Civil Rights Movement, and has been rightly credited as an important milestone on the path to racial equality in the American political system. That said, certain elements of the Voting Rights Act, notably Section 2, may clash with other values we hold in high esteem: specifically, political competition. Although the Court has not traditionally held political competition to be a paramount concern, it is nonetheless important. In this paper we consider whether the break-up of multimember municipal voting districts in the interest of avoiding vote dilution for underrepresented minorities had the unanticipated consequence of reducing political competition.

I. THE VOTING RIGHTS ACT

Fifty years after its enactment, the Voting Rights Act of 1965 (“VRA”) is widely heralded as landmark legislation that symbolizes a watershed moment in the nation’s history.¹ Assuring African Americans the right to

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vote, the VRA also set into motion a process of political sorting whereby political parties undertook a policy realignment, offering voters a choice between parties with sharply differentiated rhetoric at the same time that many voters came to have relatively fixed partisan preferences.² A consequence of the VRA, and the civil rights movement more generally, was a fundamental realignment in American politics; Southern whites, once some of the most reliably Democratic voters in the nation, began moving toward the Republican Party. Furthermore, although African Americans were predominantly Democratic in their voting behavior prior to the VRA, since that time this demographic category has voted overwhelmingly for Democrats, especially in presidential elections. Scholars point to the VRA's enactment as a major cause of today's hyperpolarized partisan politics.³

One of the most important enforcement provisions of the VRA is its ability to protect against the unique injury of "vote dilution."⁴ "In most states, politically self-interested state legislatures draw election district boundaries after each census."⁵ Vote dilution occurs when states take advantage of racially polarized political preferences to undermine the ability of minorities to meaningfully participate in the political process, usually by submerging them within districts where they are technically allowed to vote but consistently outvoted by a white majority.⁶ Questions of vote dilution have heavily focused on single-member districts, particularly those for state legislatures and the U.S. Congress. However, vote dilution doctrine also developed as a reaction to states' use of at-large elections in county and municipal elections, where multiple representatives are elected from a single district, because these systems allow even sizeable minority groups to be consistently outvoted, where voting is racially

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¹ See Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 176 (2007). Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CAL. L. REV. 273, 287-94 (2011); The Voting Rights Act of 1965 was enacted on August 6, 1965 and is codified at 52 U.S.C. § 10301 (2007). See Pub. L. 89-110, tit. 1, § 2, Aug. 6, 1965; *History of Federal Voting Rights Laws: The Voting Rights Act of 1965*, U.S. DEPT. OF JUSTICE, <http://www.justice.gov/crt/history-federal-voting-rights-laws> (Aug. 8, 2015).

² Pildes, *supra* note 1, at 287-88.

³ *Id.*

⁴ Heather Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1666 (2001).

⁵ Pildes, *supra* note 1, at 311.

⁶ Gerken, *supra* note 4, at 1672; Dale Ho, *Minority Vote Dilution in the Age of Obama*, 47 U. RICH. L. REV. 1041, 1046 (2013).

polarized.⁷ The Court's eventual solution was to invalidate at-large districts as "diluting" the minority vote share, replacing them with single-member districts that give minority voters a majority in one or more districts.⁸

Section 2 of the VRA creates a private right of action to protect plaintiffs from "vote dilution" by requiring states to draw voting district lines in ways that offer racial minorities the ability to elect their preferred candidates.⁹ To establish a vote dilution claim, a plaintiff must prove that (1) the state could have drawn an additional, compact majority-minority district but failed to do so; (2) the minority group is politically "cohesive," or votes in a similar fashion; and (3) the majority group – the white electorate – votes as a bloc, enabling them to consistently outvote minority candidates.¹⁰ Importantly, a plaintiff alleging vote dilution need not prove discriminatory intent under Section 2; however, the Supreme Court considers factors bearing a strong resemblance to those required to prove unconstitutional discriminatory intent.¹¹ Dilution cases often hinge on expert testimony, as population and election data are usually required.¹²

The typical remedy for vote dilution claims is the creation of a single-member district in which minorities constitute a majority of the electorate, known as majority-minority districts, allowing them to elect their preferred candidate.¹³ The rise of single-member voting districts has created substantial diversification among elected officials in the South.¹⁴

In the case of single-member districting schemes, it is still possible to undermine minority voting strength by fracturing the minority vote, placing a few minority voters in each district, or packing the minority vote, placing all minority voters in a single district.¹⁵ In the 1994 case *Johnson v. De*

⁷ Gerken, *supra* note 4, at 1672-73.

⁸ *Id.* at 1671-73 (noting that vote dilution doctrine has "largely been developed by the courts over time").

⁹ Section 2 provides that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or any political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . ." 52 U.S.C. § 10301. See Gerken, *supra* note 4, at 1666 (2001); John M. Powers, *Statistical Evidence of Racially Polarized Voting in the Obama Elections, and Implications for Section 2 of the Voting Rights Act*, 102 GEO. L. J. 881, 885 (2014); Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 IND. L. REV. 113, 138 (2010).

¹⁰ *Thornburg v. Gingles*, 478 U.S. 30 (1986); see Gerken, *supra* note 4, at 1674.

¹¹ Ho, *supra* note 6, at 1047, 1059-60; see *Gingles*, 478 U.S. at 36-37 (citing S. REP. NO. 97-417, AT 28-29 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 206-07).

¹² Gerken, *supra* note 4, at 1674.

¹³ Ho, *supra* note 6, at 47.

¹⁴ *Id.* at 1058.

¹⁵ Gerken, *supra* note 4, 114 Harv. L. Rev. at 1672-75.

Grandy, the Supreme Court clarified that proportional representation within a voting district is not a complete defense to a vote dilution suit, but proportionality receives “extraordinarily heavy weight in evaluating such claims and has become the preeminent measure of fairness in redistricting.”¹⁶

Vote dilution is part of the “second generation” of voting rights claims, as its central premise is broader than the mere ability to cast one’s vote, claims which make up the “first generation” of voting rights cases.¹⁷ Vote dilution doctrine encompasses the notion that like-minded voters must be given the chance to aggregate their votes to achieve a representative democracy.¹⁸ It is an individual injury proved by reference to the aggregate treatment of a larger group, and as such, undercurrents of fairness and the nature of democratic representation animate policy choices in this area – what it means to have one’s vote “count” for purposes of participating in the political process.¹⁹

Redistricting is meant to facilitate vote aggregation by grouping individuals on the basis of shared interests, thereby making elected representatives more responsive to the group’s interests.²⁰ Redistricting practices are also intended to ensure that groups cannot gain electoral power that far exceeds their share of the population by manipulating voting district lines.²¹ But, as the nation’s demography continues to evolve, some scholars have questioned whether this emphasis on diversity remains necessary.²²

As the country grows more diverse, and minority voters participate in the electoral process in ever-increasing numbers,²³ it may no longer be necessary to draw majority minority voting districts, either because minorities form a plurality of the voters in a multiracial district or because white voters may cross over to support minority-preferred candidates.²⁴ Moreover, an unintended consequence of vote dilution doctrine may be that its emphasis on racial identification contributes to political and racial

¹⁶ 512 U.S. 997, 1018-19, 1023-24 (1994); Gerken, *supra* note 4, at 1675-76; *see also* *Barnett v. City of Chicago*, 141 F.3d 699, 705 (7th Cir. 1998).

¹⁷ Gerken, *supra* note 4, at 1671, 1677. First generation voting rights claims focused on direct, formal limitations on the ability to register and vote (e.g. poll taxes, literacy tests, identification requirements).

¹⁸ *Id.* at 1677.

¹⁹ Gerken, *supra* note 4, at 1666-67, 1675-77; *see* Ho, *supra* note 6, at 1049.

²⁰ Gerken, *supra* note 4, at 1679.

²¹ *Id.* at 1680.

²² *See* Ho, *supra* note 6, at 1043-44, 1050-51.

²³ *Id.* at 1042-44.

²⁴ *Id.* at 1050-51.

polarization.²⁵ Additionally, Section 2 claims may also make minority-preferred candidates the token representative within a broader representative institution; that is, because majority minority districts tend to be more liberal than the average Democrat district, concentrating these voters into a single district amplifies their political power within that district but deprives surrounding districts of their influence.²⁶ Justice Thomas once declared, “[i]n construing the [VRA] to cover claims of vote dilution, we have converted the Act into a device for regulating, rationing, and apportioning political power among racial and ethnic groups.”²⁷

Preliminary evidence from the 2008 and 2012 elections suggests that the electorate is moving towards greater political polarization, particularly based upon racial characteristics.²⁸ Scholars have concluded that despite substantial progress in softening racial attitudes since the VRA’s enactment, white and minority voters still differ in their political preferences, and these differences are stark in certain parts of the country.²⁹ In these districts, the use of majority-minority districts may still be a welcome safeguard for minorities’ meaningful political participation.³⁰

A less examined element of vote dilution claims and subsequent redistricting is how redistricting impacts electoral competition. Political competition theoretically results in greater accountability, responsiveness, and participation.³¹ Electoral-institutional design necessarily involves tradeoffs, and the benefits of creating majority-minority districts are powerful.³² But it is also important to note that the VRA, and vote dilution doctrine in particular, may have contributed to the decline of competitive elections and the increasingly polarized electorate.³³

It stands to reason that, in our current hyperpolarized political milieu, current redistricting practices have created “safe” electoral districts, which elect officials who themselves are more polarized than members elected from competitive election districts.³⁴ To create more competitive election

²⁵ *Id.*; Pildes, *supra*, at 288.

²⁶ Ho, *supra*, at 1051.

²⁷ *Holder v. Hall*, 512 U.S. 874, 893 (1994) (Thomas, J., concurring).

²⁸ Ho, *supra*, at 1066-69; *see generally* Pildes, *supra*, at 276-81, 310 (noting that “[T]he 2002 and 2004 elections were the least competitive in post-war history.”).

²⁹ Ho, *supra*, at 1069.

³⁰ *Id.* at 1069-70.

³¹ Nathaniel Persily, *The Place of Competition in American Election Law*, in *THE MARKETPLACE OF DEMOCRACY: ELECTORAL COMPETITION AND AMERICAN POLITICS* (Michael McDonald & John Curtis Samples, eds. 2006).

³² Pildes, *supra*, at 318.

³³ *Id.*

³⁴ *Id.* at 308.

districts would mean electing more centrist officials, resulting in less polarized institutions.³⁵ But, current evidence shows that there is not a strong linkage between competitive elections and centrist policy platforms; rather the evidence indicates that candidates count on voters' increasing partisan loyalty, regardless of whether they were elected in a landslide or competitive district.³⁶

Running alongside this polarization narrative is empirical evidence suggesting that elections have become less competitive as a result of voters' geographic self-sorting into communities of like-minded individuals.³⁷ Over the last generation, there has been a dramatic increase in the percentage of geographic units that are dominated overwhelmingly by voters who support one party's candidate in election after election, making these elections non-competitive.³⁸ Majority-minority election districts tend to be some of the least competitive districts in the country.³⁹ And vote dilution doctrine exacerbates the phenomenon of non-competitive elections by concentrating a portion of the state's Democratic voters into majority-minority districts, which can make it more difficult to create competitive districts in the rest of the state.⁴⁰

Our quantitative analysis aims to resolve the question of whether the increasing number of majority-minority single-member districts has affected electoral competition in local elections. If elections in majority-minority districts are more or as competitive as they would be in the absence of vote dilution claims, then the VRA has not only ensured meaningful minority participation in the political process, but a slate of well-qualified candidates responsive to their community's needs. If, however, Section 2's impact has decreased competition in single-member district elections, those communities may themselves become home to the very type of entrenched political power they were founded to avoid. The ramifications of this analysis and decisions about whether to privilege electoral competition over representational guarantees, viewed in light of the nation's changing demography, could illuminate the future of our democratic system.⁴¹

³⁵ *Id.*

³⁶ Persily, *supra* note ??? at 313-14 (showing that Members of Congress who were elected from competitive districts vote in "only slightly less polarized patterns than members from safe seats.").

³⁷ *Id.* at 311-13.

³⁸ *Id.* at 309; 312-13.

³⁹ *Id.* at 316-17.

⁴⁰ *Id.*; see Michael S. Kang, *Race and Democratic Contestation*, 117 YALE L.J. 734, 736 (2008) (stating that safe majority-minority districts reduce electoral competition and run counter to the VRA's intended purpose).

⁴¹ See Kang, *supra*, at 736, 738 ("Electoral competition has become popular as the

II. THE ISSUE OF COMPETITIVENESS

Descriptive representation for historically underrepresented minorities was a key justification for legislation such as the VRA. After generations of disenfranchisement, it was especially important to ensure that African Americans would not only have the right to vote, but also have a reasonable chance to elect a candidate who would serve their interests. Descriptive representation requires more than an elected official who shares the minority group's preferred party, but this group's physical characteristics, as well.⁴² Descriptive representation is justified on the argument that African American legislators are best equipped to effectively fight for the interests of African American constituents.⁴³ However, the right to vote and descriptive representation are not the only hallmarks of effective democracy. Electoral competition, which theoretically ensures democratic accountability, is also an important concern.

Compared to questions of voter disenfranchisement and vote dilution, questions of electoral competition have received less attention from lawyers and judges, but this question has long been considered by political scientists. This is understandable, as the Constitution is silent on the question of electoral competition per se, whereas the Equal Protection Clause clearly demands the right of all demographic groups to be treated equally when it comes to casting a ballot. A constitutional right to competitive elections can only be inferred indirectly from Article 4, section 4 of the Constitution, which states that every state is guaranteed a "Republican form of Government." If we can plausibly claim that completely uncompetitive elections are at odds with republican principles, we can similarly argue that there is a constitutional guarantee of political competition.⁴⁴ That said, this has not been the argument traditionally advanced by the Supreme Court.⁴⁵

structural priority for election law, in place of representational guarantees like the VRA."); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 712-16 (1998) (discussing the absence of Constitutional provisions informing our electoral process and narrating the history of political thought surrounding democratic institutional design).

⁴² Hanna F. Pitken, *THE CONCEPT OF REPRESENTATION* (University of California Press, 1972).

⁴³ See Carol Swain, *Black Faces, Black Interests: THE REPRESENTATION OF AFRICAN AMERICANS IN CONGRESS* (Harvard University Press, 1993).

⁴⁴ See N. Persily, *The Place of Competition in American Election Law*

⁴⁵ *Id.* at 145.

However, Professor Pildes has argued that a more explicit right to competitive elections can be inferred from the Constitution.⁴⁶ The Constitution's Elections Clause grants state legislatures the power to establish the "Times, Places, and Manner" of congressional elections.⁴⁷ However, Pildes argued that "Just as Article 1's grant of enumerated powers to the reasons for which granted, the specific and limited delegation of power in the Elections Clause does not license state legislatures to eviscerate competitive congressional elections and undermine electoral accountability."⁴⁸ Similarly, the Constitution also guarantees that "the People" are to choose their members of congress – not self-interested state legislators.⁴⁹

There is a strong theoretical argument for the value of electoral competition. It is generally accepted that reelection is the paramount concern of all elected officials, and all other goals are subordinate to that ambition.⁵⁰ The fear of electoral defeat presumably keeps legislators honest and encourages them to support legislation aligned with the electorate's wishes and provide valuable constituent services. In the absence of a credible electoral threat, elected officials may engage in self-serving behaviors or otherwise neglect the needs of their constituents. The absence of a credible challenge from the opposing party may further lead to more ideologically extreme elected officials; a Republican (Democrat) in an overwhelmingly Republican (Democratic) district has little reason to moderate his more conservative (liberal) positions in order to maintain electability. In fact, the greater threat may be a primary challenge that forces the representative to move further to the right (left). Although theoretically the case against uncompetitive districts is strong, the empirical evidence that uncompetitive elections leads to greater levels of extremism and ideological polarization is rather weak, at least when the U.S. Congress is the unit of analysis. Professors McCarty, Poole, and Rosenthal failed to uncover evidence that uncompetitive elections were a primary cause of polarization;⁵¹ Carson et al. found some evidence that gerrymandering leads to more polarization in the House, but the effects were modest.⁵² Professor

⁴⁶ Richard H. Pildes, *The Constitution and Political Competition*, 30 NOVA L. REV. 253, 253-78 (2005).

⁴⁷ U.S. CONST. art. I, § 4, cl. 1.

⁴⁸ Pildes, *supra* note 46, at 28.

⁴⁹ *Id.* at 279.

⁵⁰ See DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (Yale University Press, 2nd ed. 2004).

⁵¹ Nolan McCarty et al. *Does Gerrymandering Cause Polarization?*, 55 AM. J. POL. SCI. 666, 666-80 (2009).

⁵² Jamie L. Carson et al., *Redistricting and Party Polarization in the U.S. House of*

Brunell showed that members of congress who win by wide margins are not generally more ideologically extreme than members from competitive districts.⁵³

There are other reasons to value electoral competition, even if the evidence that competitiveness leads to improved behavior by representatives is mixed. It is well known that the United States has a low voter turnout rate compared to other economically advanced nations. There is evidence suggesting that uncompetitive races are one source of low turnout.⁵⁴ Voting is a crucial element of responsible democratic citizenship, and for this reason alone we may wish to pursue policies that boost turnout rates. Low-turnout also has practical implications, as lower levels of turnout tend to reduce the level of representation for minority groups, especially in municipal elections.⁵⁵

The median voter theorem argues that, in a majority rule situation, the outcome of the election will be congruent with the wishes of the median voter – that voter who is the very center of the one-dimensional ideological spectrum.⁵⁶ However, even if this is true, the median voter may not be a good representative of the public's wishes, if voters are systematically different in important ways from non-voters. In a low-turnout environment, the odds that voters will differ from non-voters increase. Low-turnout elections are particularly likely to have an electorate that is whiter, older, and wealthier than high turnout elections.⁵⁷

Further, there may be a non-recursive relationship between voter turnout and electoral competition.⁵⁸ That is, lower levels of electoral competition may decrease voter turnout, but lower turnout may also decrease the level of political competition. Low-probability voters, those who are especially

Representatives, 35 AM. POLITICS RES. 878, 879-904 (2007).

⁵³ Thomas Brunell, *Rethinking Redistricting: How Drawing Uncompetitive Districts Eliminates Gerrymanders, Enhances Representation, and Improves Attitudes toward Congress*, 39 PS: POLITICAL SCIENCE AND POLITICS 77, 77-85 (2006).

⁵⁴ Michael P. McDonald, *Rocking the House: Competition and Turnout in the 2006 Midterm Election*, 4 THE FORUM, (2006).

⁵⁵ Zoltan Hajnal & Jessica Trounstin, *Where Turnout Matters: The Consequences of Uneven Turnout in City Politics*, 67 THE JOURNAL OF POLITICS 515, 515-35 (2005).

⁵⁶ ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (Addison Wesley, 1957).

⁵⁷ ZOLTAN HAJNAL, *AMERICA'S UNEVEN DEMOCRACY* (Cambridge University Press, 2010).

⁵⁸ By non-recursive, we mean that the causal arrow does not point in just one direction. In recursive models, we assume that the causal relationship points in just one direction: a change in X leads to a change in Y. In many instances, however, this assumption is mistaken; X may lead to a change in Y, but Y may also lead to a change in X. DAMODAR N. GUJARATI, *BASIC ECONOMETRICS* 717 (McGraw-Hill, 4th ed 2002).

unlikely to vote in a low-turnout scenario, tend to have weaker attachments to established candidates.⁵⁹ Scholars have shown, for example, that higher turnout tends to decrease the share earned by incumbent parties and candidates in presidential elections.⁶⁰

In the United States, there is a troubling dearth of genuinely competitive elections. The overwhelming majority of all members of congress are reelected every cycle. This is even true in so-called wave elections, in which one party performs extraordinarily well, often shifting the balance of power in congress. In 2006, for example, when Democrats regained control of the House of Representatives, the overall incumbency reelection rate was 94 percent; in 2010, when Republicans took the House back, the incumbency rate was slightly lower, but still very high, at 85 percent.⁶¹

Gerrymandering, a subject that will be discussed in greater detail in the next section, is often treated as a primary explanation for uncompetitive elections. However, gerrymandering is not the only reason for low levels of political competition. If redistricting was the primary cause of uncompetitive political contests, we should compare legislative districts with electoral units that are not affected by redistricting. In the case of U.S. Senate elections, presidential elections, and state executive branch elections, states themselves are the geographic boundaries, and these boundaries are fixed. When we examine these elections, we see that they are similarly uncompetitive. Although U.S. Senate elections are traditionally slightly more competitive than House elections, incumbency rates are nonetheless remarkably high, and have dropped below 80 percent only three times in the past 30 years. In 2012, the incumbent reelection rate for the U.S. Senate was actually higher than the reelection rate for incumbents in the House (91 percent versus 90 percent). We see a similar trend in presidential elections. In the run-up to the 2012 presidential election, only eight states were considered even remotely in play (Colorado, Florida, Iowa, Nevada, New Hampshire, Ohio, Virginia and Wisconsin). Following the election, it turned out that even in these states the end result was not particularly close; the margin of victory was five percentage points or less in only four states.⁶²

⁵⁹ Walter Dean Burnham, *The Changing Shape of the American Political Universe*, 59 THE AMERICAN POLITICAL SCIENCE REVIEW 7, 7-28 (1965).

⁶⁰ Thomas Hansford & Brad Gomez, *Estimating the Electoral Effects of Voter Turnout*, 104 THE AMERICAN POLITICAL SCIENCE REVIEW 268, 268-88 (2010).

⁶¹ OPEN SECRETS, <https://www.opensecrets.org/bigpicture/reelect.php>.

⁶² GEORGE HAWLEY, *VOTING AND MIGRATION PATTERNS IN THE U.S.* (Routledge Press, 2013).

Some scholars and journalists have speculated that the current increasing lack of political competition can be blamed on an ongoing partisan sorting of the American electorate.⁶³ That is, those drawing the lines of legislative districts do not have to rely on a complex gerrymandering scheme. Partisan voters are increasingly clustering together geographically. This issue was largely brought to public attention by Bill Bishop in his book *The Big Sort*. This book noted that the number of counties won by a “landslide” margin – defined as a margin of victory of greater than 20 percent – had increased dramatically in presidential elections since the 1970s.⁶⁴ The use of counties as the unit of analysis is important, given that counties, unlike congressional districts, have fixed boundaries and are therefore not changed after redistricting. In a scenario in which large communities vote overwhelmingly and consistently for one party, drawing district boundaries that favor one of the two parties does not require any special effort on the part of map makers. Bishop’s theory was that people are deliberately making decisions about where to live based on the partisan makeup of a neighborhood or community.

Bishop’s thesis was not immediately and universally accepted by political scientists, however. Abrams and Fiorina wrote one of the first major rejoinders to Bishop. They argued that Bishop overstated his case, and in any event, even if geographic sorting does occur, it is not particularly problematic, given that neighborhoods are no longer particularly relevant when it comes to things like political participation or even discussion.⁶⁵ Other scholars have expressed similar skepticism.⁶⁶ That said, other political scientists have considered the issue of geographic sorting, and concluded that Bishop’s thesis is largely correct.⁶⁷

Incumbents also possess additional benefits that may be leading to less competitive elections. Incumbents benefit from higher levels of name recognition, incumbents enjoy the franking privilege, and incumbents with a long history in the legislature enjoy a seniority status that may benefit the

⁶³ BILL BISHOP, *THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART* (Mariner Books, 2009).

⁶⁴ *Id.*

⁶⁵ Samuel J. Abrams & Morris Fiorina, “*The Big Sort*” *That Wasn’t: A Skeptical Reexamination*, 45 *PS: POLITICAL SCIENCE AND POLITICS* 203, 203-10 (2012).

⁶⁶ See Ryan Strickler, *A “Sorted” America? Geographic Polarization and Value Overlap in the American Electorate*, 97 *SOCIAL SCIENCE QUARTERLY* 439 (2016).

⁶⁷ Torben Lütjenl and Robert Matschoß, “Ideological Migration in Partisan Strongholds: Evidence from a Quantitative Case Study,” *The Forum* 13, 311-346 (2015); Wendy K. Tam Cho, James G. Gimpel & Iris S. Hui, “Voter Migration and the Geographic Sorting of the American Electorate,” *ANNALS OF THE ASSOCIATION OF AMERICAN GEOGRAPHERS* 103, 856-870 (2013).

incumbent's district, which would be lost if the incumbent is defeated. Political competition can also be hindered by certain electoral rules that tend to drive down turnout, which tends to also boost incumbency rates.⁶⁸ Early voter registration requirements, the failure to mail polling locations to voters, and holding local elections non-concurrently with higher levels of government tends to decrease voter turnout and boost the incumbency advantage.⁶⁹

We mention all of these sources of politically uncompetitive elections as a way to note that, while we do value competitive elections, there is a limit to what the courts can accomplish when it comes to boosting electoral competition. That said, there are certain laws and institutional arrangements that can affect electoral competition, and in these instances courts can and do play an important role.

III. POLITICAL COMPETITION AND THE LAW

Many of the complaints about political competition in the United States focus less on the monopoly of one party in a particular district than the duopoly that exists nationwide. Compared to most developed democracies, the United States is unusual in that, in the overwhelming majority of political units with partisan elections, voters are presented with only two viable parties: the Republicans and the Democrats. This is primarily a result of our electoral systems, rather than any deliberate collusion designed to lock out other potential political rivals. Unlike systems that rely on proportional representation, in which parties are awarded seats in a legislature based on their total number of votes, the United States and the state legislatures rely on single-member, plurality rules system for awarding seats. In such a system, any situation in which there are more than two major parties will be unstable and eventually break down. To take an example, if you have a district or state in which one right-wing party faces off against two-left wing parties, and the right-wing party wins the election by winning 40 percent of the vote and both left-wing parties win 30 percent of the vote, in the subsequent election, the two left-wing parties will likely merge in order to ensure a left-wing victory in the subsequent election. Even if the two parties fail to merge, one of the two left-wing parties will likely be eliminated from the electoral competition by the left-wing voters themselves, who ultimately coalesce around one of the two options.⁷⁰ Our

⁶⁸ Jessica Trounstine, "Turnout and Incumbency in Local Elections," *URBAN AFFAIRS REVIEW* 49, 167-189 (2013).

⁶⁹ *Id.* at 170.

⁷⁰ Maurice Duverger, *Party Politics and Pressure Groups*, 23-32 (1972).

election system therefore makes a proliferation of successful third parties very unlikely, even in the absence of any additional efforts from the other parties to hamstringing their efforts.

Beyond the inherent challenges faced by new parties in the American electoral system, states have often placed additional hurdles in front of new parties, and in these cases the courts have intervened – though the Supreme Court has not consistently held that states have an obligation to remove barriers to new parties and other candidates outside the two-party system.⁷¹ Intuitively, from a the standpoint of democratic theory, there is a strong case to be made that voters should have the option to choose between a wide multitude of options, and any laws that restrict ballot access are a hindrance to the democratic process. Restrictions on ballot access may additionally raise First Amendment issues; as Professor Persily argued, “Restrictions on ballot access endanger First Amendment freedoms of speech and association when they curtail a voter’s ability to express his preferences on the ballot and associate with the candidate of his choosing.”⁷² Laws that restrict certain parties from gaining access to the ballot have also raised questions of equal protection.⁷³ The issue is somewhat more complicated than that, however.

There have been cases where the Supreme Court struck down certain barriers to ballot access using this logic. In the case of *William v. Rhodes*, the Court considered the constitutionality of an Ohio law that required new parties to gain enough signatures to equal fifteen percent of the vote cast in the most recent gubernatorial election. This hurdle effectively barred both the American Independence Party and the Socialist Labor Party from the ballot in 1968. The Court ultimately determined that Ohio had failed to show a compelling state interest to justify this particular signature requirement, and that it instead served only to provide the two leading parties with a monopoly over the electoral process.

There are other examples of ballot access requirements being deemed unconstitutional. In *Bullock v. Carter*, the Court struck down a Texas statute that required filing fees as high as \$8,900.⁷⁴ The Court reached a similar conclusion in the case of *Lubin v. Panish*, even though the filing fee in the latter case was much more modest.⁷⁵ The Court later struck down another Ohio law in *Anderson v. Celebrezze*.⁷⁶ In this case, the Court considered the

⁷¹ Persily, *supra* note 44 at 177-181.

⁷² *Ibid.*, 78.

⁷³ *Williams v. Rhodes*, 393 U.S. 23, 32 (1968).

⁷⁴ *Bullock v. Carter*, 405 U.S. 134 (1972).

⁷⁵ *Lubin v. Panish*, 415 U.S. 709 (1974).

⁷⁶ *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

issue of an early filing deadline that would have kept John Anderson, an independent presidential candidate in 1980, off of the ballot. The Court found that was also unconstitutional, as the unreasonably early “filing deadline not only burdens the associational rights of independent voters and candidates, it also places a significant state-imposed restriction on a nationwide electoral process.”⁷⁷

That said, it is not the Court’s position that anyone can gain easy access to any ballot. There is sound justification for placing reasonable restrictions on ballot access. States may place reasonable burdens on new parties and independent candidates in the interest of avoiding a proliferation of frivolous candidates, and they may do so even if these regulations tend to favor the existing two major parties. The Court recognizes that states also have an interest in well-regulated elections.⁷⁸ As the Court noted in *Storer v. Brown*: “[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process.”⁷⁹

In *Anderson*, the Court developed a three-part test to determine the degree to which these competing interests were properly balanced. The Court must first determine the degree to which the law injures a plaintiff’s First and Fourteenth Amendment Rights; it must then identify the interests the state claims are protected by the law in question; finally, the Court must consider both of those interests, and determine whether the state’s interests are sufficiently important to “burden the plaintiff’s rights.”⁸⁰

In *Timmons v. Twin Cities Area New Party*, the Court considered the issue of fusion candidacies.⁸¹ A law in Minnesota banned candidates from appearing on the ballot as the nominee for more than one political party. This law barred the Twin Cities Area New Party from nominating a candidate who was already on the ballot as a candidate for a different party. The Court determined that the anti-fusion requirement did not represent an unconstitutional violation of the plaintiff’s rights to association, as Minnesota’s interest in this case outweighed the plaintiff’s interest.

The Court has furthermore not struck down all legislation requiring that minor parties and candidates demonstrate some minimal demonstration of support before appearing on a general election ballot. In *Munro v. Socialist*

⁷⁷ *Id.* at 781.

⁷⁸ Joshua A. Douglas, *A Vote for Clarity: Updating the Supreme Court’s Severe Burden Test for State Election Regulations that Adversely Impact an Individual’s Right to Vote*, 75 GEO. WASH. L. REV. 373 (2007).

⁷⁹ *Storer v. Brown*, 415 U.S. 724, 730 (1974).

⁸⁰ *Anderson*, 460 U.S. at 789.

⁸¹ *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 382 (1997).

Workers, the Court considered a Washington State statute that required a minor party to receive a minimum of one percent of all the votes cast in the state's primary election for that office, otherwise the party will not appear on the general election ballot.⁸² The nominee for the Socialist Workers Party candidate for U.S. Senate failed to reach that benchmark, and thus did not appear on the ballot for the general election. In his majority opinion, Justice White noted, "While there is no 'litmus-paper test' for deciding a case like this, it is now clear that States may condition access to the general election ballot by a minor-party or independent candidate upon a showing of a modicum of support among the potential voters for the office."⁸³ To avoid a confusing and overcrowded ballot, states have the right to require that candidates and parties have at least some minimal level of support among potential voters.⁸⁴

We may take it for granted that the electoral system in the United States all-but guarantees a two-party system, and Courts can do little to change this. However, there are other important determinants of electoral competition, and in these other areas Courts can clearly play a role. The drawing of district lines is another important determinant of electoral competition. Aside from U.S. Senate elections, which are based on states' boundaries, all U.S. Congress and state legislative districts are required to be redrawn following each decennial Census to ensure equal representation.

District boundaries are required to be drawn in such a way to ensure that all districts have roughly equal population, ensuring the principle of "one man, one vote." This has been the standard since the *Baker v. Carr* decision in 1962, which both declared that issues surrounding redistricting are justiciable and that congressional districts must be periodically redrawn according to population shifts.⁸⁵ This principle was extended to state legislative districts in *Reynolds v. Sims*.⁸⁶ Prior to these decisions, many legislative boundaries in multiple states had been fixed for several decades, in spite of massive population shifts and different rates of natural growth, leading to many cases in which there were massive disparities in terms of the total population within legislative districts. *Karcher v. Daggett* later affirmed that even slight population disparities can be unconstitutional. In this case, although there was only a very small difference in the total population of each district, the lines had clearly been drawn to benefit the

⁸² *Munro v. Socialist Workers*, 479 U.S. 189 (1986) (In that election, Washington State held a "blanket primary" in which voters could vote for any candidate, regardless of party).

⁸³ *Id.* at 193.

⁸⁴ *Jeness v. Fortson*, 403 U.S. 431 (1971).

⁸⁵ *Baker v. Carr*, 369 U.S. 186 (1962).

⁸⁶ *Reynolds v. Sims*, 377 U.S. 533 (1964).

Democratic Party, thus the Court found that the redistricting plan was in violation of Article 1, Section 2 of the Constitution.⁸⁷

Although these decisions ensured that legislative districts would contain an equal number of people, those entrusted with drawing these boundaries nonetheless continued to possess considerable freedom to use redistricting for political ends. The practice of gerrymandering, the manipulation of district boundaries to serve the interest of a particular person, party, or other group, has a long history in the United States. It has both partisan and non-partisan manifestations.

A partisan gerrymander is designed to favor the interests of the party drawing the district boundaries. There are two primary ways this can be carried out. A political party's electoral fortunes can be improved if district lines disperse the opposing party's supporters across multiple districts, where they are a sizable minority in many districts, but a majority nowhere. Cleverly drawn lines can ensure that a political party elects zero representatives to the congress or state legislature, even if, in the state overall, that party enjoys sizable support. Parties can also redraw lines in such a manner that their opponents are packed tightly into a small number of districts, in which the opposing party can be assured to win by an overwhelming margin, but leaving the neighboring districts safely in the hands of the party that drew the boundaries.

Non-partisan gerrymandering is also a common occurrence in the redistricting process. In this case, the new district lines do not necessarily benefit one party over the other, and the ultimate distribution of seats may fairly reflect the overall partisan balance in the state. In the case of a non-partisan gerrymander, the primary beneficiaries are incumbents of both parties. In this scenario, most districts are considered "safe" for the incumbent party. Although the two parties may enjoy fairly equal levels of support at the state level, within each individual district, one party or the other enjoys an overwhelming numerical superiority.

The Supreme Court has considered both kinds of gerrymanders, finding that non-partisan gerrymanders are not problematic from a constitutional standpoint. *Gaffney v. Cummings* set an important precedent in this regard.⁸⁸ In *Gaffney*, the Court considered a redistricting plan in the state of Connecticut that very deliberately took the partisan balance of each potential district into account. In this case, the lines were drawn in such a way that partisan makeup of the legislature was similar to the overall partisan distribution of voters across the state, although it did lead to minor

⁸⁷ *Karcher v. Daggett*, 462 U. S. 725 (1983).

⁸⁸ *Gaffney v. Cummings*, 412 U.S. 735 (1973).

disparities when it comes to the total population of each district.⁸⁹ The Court ultimately found that these minor disparities could be discounted, given that the maps were fair to both major parties: But neither we nor the district courts have a constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State.”⁹⁰ In other words, if a gerrymander has broad bipartisan support, “judicial interest should be at its lowest ebb.”⁹¹

The Court was even more explicit in its deference to bipartisan gerrymandering that protects incumbents in *Bush v. Vera*.⁹² The primary issue was the racial gerrymandering. The Court considered three new congressional districts in Texas that were minority-minority. The Court noted that the nature of this racial gerrymander required strict scrutiny, and declared these new lines unconstitutional as the “districts’ shapes [were] bizarre, and their utter disregard of city limits, local election precincts, and voter tabulation district lines has caused a severe disruption of traditional forms of political activity and created administrative headaches for local election officials.”⁹³ That said, although the Court forced Texas to redraw the lines, it also explicitly stated that it “recognized incumbency protection, at least in the limited form of “avoiding contests between incumbent[s],” as a legitimate state goal.”⁹⁴ The Court’s willingness to accept politically motivated gerrymanders as constitutional was further reiterated in *Easley v. Cromartie*.⁹⁵

On the issue of explicitly partisan gerrymanders that directly disadvantage one of the two major parties, the Court has been similarly unwilling to declare district lines unconstitutional. Although those arguing that partisan gerrymanders violate the Equal Protection Clause may appear on firmer ground when it comes to district lines that clearly disadvantage the minority party, it is not necessarily easy to distinguish partisan from bipartisan gerrymanders. As Professor Persily noted: “Some partisan gerrymanders do not look characteristically different from bipartisan gerrymanders, since shoring up the partisan balance of the status quo may

⁸⁹ *Id.*

⁹⁰ *Ibid.*, 412.

⁹¹ *Id.*

⁹² *Bush v. Vera*, 517 U.S. 952 (1996).

⁹³ *Id.* at 953.

⁹⁴ *Id.* at 964.

⁹⁵ *Easley v. Cromartie*, 532 U.S. 234 (2001).

be the most efficient strategy for insulating the dominant party from challenge.”⁹⁶

Three important cases demonstrate the legally ambiguous nature of partisan gerrymanders. *Davis v. Bandemer* set an important precedent for the Court.⁹⁷ A clearly partisan gerrymander was considered in this case. In the state of Indiana in 1982, Democrats actually won a majority of all votes cast for the state House of Representatives (51.9 percent); yet because of district lines that benefitted the Republican Party, Democrats only won 43 percent of the seats.⁹⁸ The Court concluded that cases of this kind were justiciable, but ultimately concluded that the plaintiff’s had failed to demonstrate an unconstitutional violation of equal protection. Justice White argued in his majority opinion: “The mere fact that an apportionment scheme makes it more difficult for a particular group in a particular district to elect representatives of its choice does not render that scheme unconstitutional. A group’s electoral power is not unconstitutionally diminished by the fact that an apportionment scheme makes winning elections more difficult, and a failure of proportional representation alone does not constitute impermissible discrimination under the Equal Protection Clause.”⁹⁹ A key problem with this decision, however, was that although the Court clearly determined that such cases were justiciable, it did not provide a clear test for determining when a partisan gerrymander violated the Equal Protection Clause. Justice White declared that “unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter’s or a group of voters’ influence on the political process as a whole.” However, he did not explain how this could be proven.

There was hope that two more recent decisions might further clarify this issue. In *Vieth v. Jubelirer*¹⁰⁰ and *LULAC v. Perry*,¹⁰¹ the Court again considered questions of partisan gerrymanders. In *Vieth*, the Court once again declared that the partisan gerrymander was not a violation of rights, but did not overturn *Bandemer*; it concluded that such claims remained justiciable, even if it did not yet have a standard for determining when rights had been violated.¹⁰² The Court again failed to create a standard for

⁹⁶ Persily, *supra* note 44 at 183.

⁹⁷ *Davis v. Bandemer*, 478 U.S. 109 (1986).

⁹⁸ *Id.* at 478.

⁹⁹ *Id.*

¹⁰⁰ *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

¹⁰¹ *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006).

¹⁰² *Vieth*, *supra* note 100 at 313.

resolving claims of partisan gerrymanders in *LULAC*.¹⁰³ We thus remain in a situation where the Court acknowledges that a partisan gerrymander could represent an unconstitutional violation of equal protection, but we do not know what exactly such a violation would look like.

Campaign spending is another issue that speaks to the issue of political competition, albeit indirectly, and this controversial subject has received considerable attention from the courts. However, traditionally the courts have approached the issue of campaign funding as an issue of free speech, rather than an issue of electoral competition.¹⁰⁴ The connection between campaign finance law and political competition is somewhat tenuous, but real. A priori, it may not be entirely obvious whether campaign funding and spending limitations benefit incumbents or challengers. On the one hand, incumbents typically possess an advantage in fundraising, thus limits on raising and spending money should weaken the incumbency advantage. On the other hand, incumbents already possess a large number of advantages not shared by challengers (such as name recognition and easier access to the media).¹⁰⁵

Some political science literature suggested that campaign contribution limits do have a salutary effect on competition, leading to narrower margins of victory and less of an advantage for incumbents.¹⁰⁶ However, other work suggests precisely the opposite, suggesting that strict limits on campaign spending actually leads to fewer candidates and less competition.¹⁰⁷ Although measuring the precise effect of campaign expenditure limits has many methodological difficulties, the general consensus is that these effects on competition are probably quite small.¹⁰⁸

In sum, when we examine how the Court has considered issues of political competition, the Court has rarely held that political competition *per se* is a constitutional guarantee. States may place reasonable limits on ballot access, bipartisan gerrymanders are considered acceptable, and many limitations on campaign spending are viewed as unconstitutional even if large sums of money in politics disproportionately benefit certain voices in the political process. But even if concerns about political competition traditionally take a back seat to other concerns, such as the principle of one

¹⁰³ League of United Latin American Citizens, *supra* note 101 at 548.

¹⁰⁴ Persily, *supra* note 44 at 186.

¹⁰⁵ *Ibid.*, 187.

¹⁰⁶ Thomas Stratmann & Francisco J. Aparicio-Castillo, *Competition Policy for Elections: Do Campaign Contribution Limits Matter?* Public Choice 127, 177-206 (2006).

¹⁰⁷ John R. Lott, Jr. *Campaign Finance Reform and Electoral Competition*, Public Choice 129, 263-300 (2006).

¹⁰⁸ Jeffrey Milyo, *Money in Politics*, Emerging Trends in the Social and Behavioral Sciences: An Interdisciplinary, Searchable, and Linkable Resource (2015).

person one vote, electoral competition has not been disregarded as a concern. Furthermore, some legal scholars have argued that questions about political competition deserve greater attention than they have received.

Some scholars have argued that the issue of political competition can and should be approached from the same perspective as economic competition, particularly anti-trust law. Although there is a qualitative difference between the economic and the political marketplace, there are strong reasons to value competition in both. As Nathaniel Persily noted:

The analogy to antitrust is straightforward: just as a firm can strategize to become an economic monopolist or a set of firms can behave like a cartel, so can one or two parties behave in ways to diminish political competition. Whereas in the economic sphere competition keeps firms honest by forcing them to strive toward lower prices and better quality in order to win over consumers, in the political realm competition could force parties and officeholders to be honest – that is, not to stray too far from the median voter or not to deliver a low-quality “product” (for example, unresponsive legislators or poor constituent service). Political monopolies or duopolies, under this view, lead to unrepresentative government as reflected in politicians who are “out of touch” and legislatures that ignore shifts in voter preferences.”¹⁰⁹

Professors Issacharoff and Pildes wrote an important article making the case for treating the political arena as a market.¹¹⁰ They argued that it is time to deemphasize questions of individual rights and pay greater attention to “the preservation of the robustly competitive partisan market.”¹¹¹ Drawing on public choice theory, which speculates about the behavior of rational actors given different institutional constraints, they argued that protecting competition in the political marketplace will also protect the interests of minority groups. When the Democratic Party possessed a political monopoly in the South, white Democrats could freely disenfranchise blacks with little fear of electoral loss. However, with the rise of political competition in the South, the Democrats were forced to treat black voters as just another element within their political coalition.¹¹² Although the

¹⁰⁹ Persily, *supra* note 44 at 175.

¹¹⁰ Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, STAN. L. REV., 643-717 (1998).

¹¹¹ *Ibid.*, 717.

¹¹² *Ibid.*, 702.

Republican Party in the South now has an incentive to pack black voters into a small number of districts, “competitive pressures in a well-functioning political market would, if partisan motivations dominate, force Republicans to treat black Democratic voters not differently than the other predictable Democratic voters whose aggregate power Republicans were seeking to minimize.”¹¹³

IV. VRA, SECTION 2 AND POLITICAL COMPETITION

We can reasonably anticipate that the transition from multi-member districts to single-member districts as a result of Section 2 of the VRA will ultimately lead to fewer competitive elections, at least in general elections. A county or municipality that relies on multimember districts will likely benefit a particular racial group and that group’s preferred candidates. However, if the minority group is sufficiently large, and the majority group fails to vote as a unified bloc, it remains possible (if not necessarily likely) for the minority group to elect its preferred candidates. The possibility of electing candidates representing various interests encourages the presence of multiple candidates with a realistic chance of winning for each position.

When these multimember districts are invalidated and replaced by single-member districts drawn around racial boundaries, minority communities are assured of their ability to elect their preferred candidates and parties. However, when most minority communities are packed into homogenous districts, we can similarly anticipate that electoral competition will be reduced for both the minority and the majority districts. We can reasonably fear that this lack of competition will discourage otherwise qualified candidates from entering the political arena, as politicians elected in the first round of elections following the district changes will have safe seats for life. This will be especially true in partisan elections, given the extraordinary loyalty of African Americans and (to a somewhat lesser extent) other minorities to the Democratic Party. In places where non-Hispanic whites are overwhelmingly loyal to the Republican Party (especially in the Deep South), we can expect a similar lack of competition in majority-majority districts.

There is evidence from state and federal elections that the creation of majority minority districts leads to very low levels of competition in those districts in general elections. Edward Blum wrote on the case of Arizona, which sought to create a new redistricting process that would increase

¹¹³ Ibid, 705.

electoral competition.¹¹⁴ In 2000, voters in that state passed Proposition 106, which removed the redistricting process from the legislature and gave it to a bipartisan commission. Prior to this, the Republican controlled legislature had created districts that gave the party an overwhelming advantage in congressional elections.¹¹⁵ The commission presented a proposal that would have established a greater number of competitive seats. However, as Latinos are a crucial voting bloc for the Democratic Party in Arizona, creating these more competitive districts necessarily meant dispersing Latino communities over a greater number of districts; prior to this, the Republican redistricting plan “packed” as many Latinos as possible into particular districts, which kept the surrounding districts more non-Hispanic white and thus more reliably Republican.¹¹⁶

The creation of these new, more competitive districts created a new problem: by “cracking” these Latino communities, and dispersing them into multiple districts, there were fewer districts in which Latinos formed a comfortable majority of voters. This decreased the probability that Latinos would be able to elect the candidate of their choice. As a result of the dilution of Latino electoral strength in these districts, the Justice Department denied preclearance to the commission’s plan.¹¹⁷ A new district map needed to be created, maintaining Latino-dominated districts. To quote Blum: “And so, after spending \$6 million of the taxpayer’s money to create a legislative and congressional redistricting plan that would bring real competition to the election process, nothing much had changed from the old days when legislators huddled together in the capitol basement to swap precincts with one another in order to protect their jobs.”¹¹⁸

As indicated by the Justice Department’s response to Arizona’s redistricting plan, assuring political competition is a lower priority in American election law than assuring the creation and maintenance of majority-minority districts in which protected groups have a chance to elect their most preferred candidate. Paradoxically, this may ultimately result in public policy outcomes that most minorities oppose. In a racially polarized political environment, a state that packs its minority voters into a small number of legislative districts will also lead to establishment of more reliably Republican districts. As minorities have, on average, more

¹¹⁴ Edward Blum, *The Unintended Consequences of Section 5 of the Voting Rights Act* (2007).

¹¹⁵ *Ibid.*, 22-23.

¹¹⁶ *Ibid.*, 23.

¹¹⁷ *Ibid.*, at 26.

¹¹⁸ *Ibid.*

progressive policy preferences than non-Hispanic whites,¹¹⁹ and provide a much greater amount of support to the Democratic Party, a state congressional delegation or state legislature that is dominated by Republicans will be less likely to support the policies that minorities prefer. In other words, an unintended consequence of the VRA may often be the implementation of public policies that are less progressive.

Although the hypothesis that the transition from multimember to single-member districts will lead to lower levels of competition is plausible, we cannot discount the possibility that the opposite will be the case. If the multimember districts place minority communities at such a disadvantage that they can never realistically expect to elect their preferred candidate, that may also discourage candidates from diverse communities from entering the political arena. Following the change from multimember to single-member districts may lead to a surge in political interest from people who may have previously remained on the sidelines. If that is the case, then redistricting as a result of Section 2 of the VRA may have an additional salutary benefit beyond guaranteeing protected groups the ability to elect their preferred candidate: it may also increase political competition as measured by the number of candidates. If this is case, then there is not actually a trade-off

Scholars have long studied the impact of redistricting efforts resulting from the VRA for congressional and state legislative elections. To our knowledge, there has been no systematic examination of this question for smaller units of government, such as county and municipal elections. The results of this study will indicate whether there really is a trade-off between political competition and protecting the ability of minority voters to elect their preferred candidates, at least in local elections.

V. DATA

Our goal is to measure the effect of moving local election systems (city councils and county commissions) from an at-large system to a by-district system. We hypothesize that such a move will limit that number of people who run because geographic restrictions to ballot access will decrease opportunities to run for office. Therefore, we are arguing that the VRA, as applied to local elections, creates an opportunity cost where an increase in minority representation leads to a decrease in electoral competition, as measured by the number of candidates for a position.

¹¹⁹ Hawley, *supra* note 62 at 10.

To identify a “universal set” we looked to the Katz Database out of the University of Michigan.¹²⁰ In 2005, Prof. Katz worked on a project to examine whether or not the VRA was still needed. She examined every VRA case initiated between 1982 (*Gingles* was in 1986) and 2005.

There were 331 VRA cases litigated in that timeframe. From that dataset we limited our research focus to only those cases that forced a city or county to move its electoral system from an at-large system to a by-district system. There were 53 cases that met our initial criteria. Unfortunately, not all 53 cases were usable.

In many cities and counties, the municipality used an “at-large system with district filing” system. This means that the municipality carves the city or county into several districts, requires a candidate to live in and run for a specific geographic seat, but then allowed everyone in the city or county to vote. These elections do not test our hypothesis. We are examining the effect of limiting ballot access for candidates to smaller geographic regions. These types of elections, although at-large in nature, already do that. The remedy offered by the courts in almost every case was to simply require the voting to be limited to the districts already drawn. After removing these cases from the dataset, we were left with 32 usable cases.

Our dataset was further limited by the inability to access all the data. Unfortunately, in the United States, accessing historical election data for county and municipal elections is an enormous challenge. There is no central data base where these results are stored. Many states do not have a robust public records act and simply refused to release the data. Others noted that the data was so old that it was no longer held or had been lost. After removing these cases from the dataset, we were left with 22 cases in our study.

As previously noted, we measure competition on the number of candidates pursuing each available seat. However, we needed to think carefully about how to generate this variable. We could not just look at the total number of candidates running in a particular county or municipality, as the transition from at-large to single-member districts sometimes leads to a change in the total number of seats. For example, in many cases, a county would have three at-large seats. After litigation, the court would order the county to have seven by-district seats. Thus, simply counting the number of candidates is not an accurate measurement of electoral

¹²⁰ Ellen D. Katz et al., DOCUMENTING DISCRIMINATION IN VOTING: JUDICIAL FINDINGS UNDER SECTION 2 OF THE VOTING RIGHTS ACT SINCE 1982 (2005), <http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1083&context=other> (last visited Mar. 24, 2017).

competitiveness. If six candidates ran for the three at-large seats prior to litigation and eight candidates ran for the seven seats post litigation, the pre litigation environment is more competitive but has fewer candidates. Therefore, we used “candidates per seat” to measure electoral competitiveness. In my example above the pre-litigation score would be $6/3=2$ and the post-litigation score would be $8/7=1.14$.

All of the cities and counties which met our criteria and had accessible data can be found in Table 1.

TABLE 1: CITIES AND COUNTIES

County/Municipality	Year	State	Circuit	Government Type
Kershaw County	1993	SC	4 th	County
Watsonville City Council	1988	CA	9 th	City
Metro Dade County	1993	FL	11 th	County
Bulloch Co	1992	GA	SD GA	County
City of Pittsburg	1988	NA	3 rd	City
City of Norfolk	1989	VA	4 th	City
City of Texarkana	1992	AR	W.D. AK	City
Escambia County	1984	FL	11 th Cir.	County
Washington County	1988	FL	N.D. FL	County
Beaufort County	2004	NC	4 th	County
City of Gretna	1987	LA	5 th	City
City of Sarasota	1985	FL	MD Fl	City
City of Springfield	1987	IL	CD III	City
City of Chicago Heights	1997	IL	N.D. Ill.	City
Worcester County	1994	MD	4 th	County
Chattanooga	1989	TN	E.D. Tenn.	County
City of Jackson	1988	TN	W.D. Tenn.	City
Jefferson Parish I	1991	LA	5 th	City
City of Thomasville	2005	NC	M.D.N.C.	City
Lubbock	1984	TX	5 th	City
Westwego	1991	LA	5 th	Alderman
City of Dallas	1990	TX	N.D. TX	City

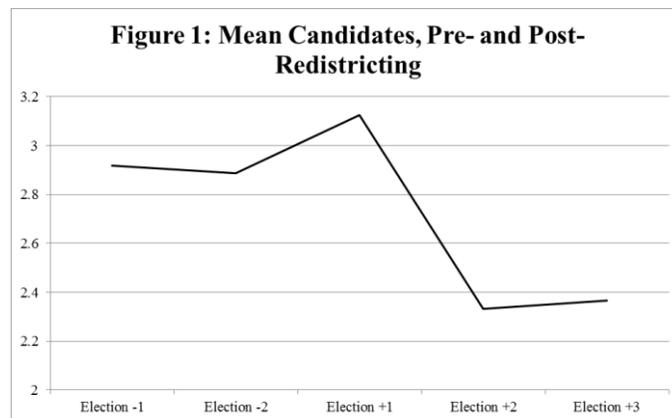
In Table 1 we see that there was great diversity in both this data set. It includes both large cities (such as Dallas, TX) as well as smaller cities (such as Gretna, LA). We also see a mix of both municipal and county governments.

In order to measure the impact of VRA litigation on competition, we generated our competition measure using elections both before and after the change. Specifically, where possible, we created our competition measure

using the two elections preceding the change, and three elections following the change.

VI. RESULTS

Our results show that there is an interesting relationship between the transition to at-large to single-member districts. Before the transition, each available seat averaged a little more than 2.8 competitors. This was true whether we were examining the election that immediately preceded the change, or the election before that. However, following the change, there is typically an immediate spike in the number of contestants for each seat – a mean number of candidates above 3.1. From this finding alone, we might infer that district changes in local elections due to VRA litigation actually leads to an *increase* in political competition. Such a finding is particularly welcome, as it indicates that, at least in these types of cases, there is not actually a trade-off between assuring minorities an opportunity to elect their preferred candidate and political competition. We see the trend in the number of candidates by election cycle in Figure 1.



It is not immediately clear why we would see such a significant surge and decline in the number of candidates, but we can make some reasonable hypotheses. Immediately following the creation of these new districts, we can expect a surge in interest among potential candidates, especially among those that previously faced an inhospitable electoral climate. With new district boundaries that open avenues for new candidates with little chance of success before, it is not surprising that we see a surge in the average number of candidates. So from this perspective, it appears that VRA litigation at the local level is a boon to both minority representation and

competition, suggesting that this is a salutary example of a policy that does not involve any significant trade-offs.

Given our relatively small sample size, we are precluded from engaging in highly sophisticated statistical models, controlling for various district attributes.¹²¹ However, we can use a simple two-sample *t*-test to test whether the mean number of candidates during one period is significantly higher than the mean number of candidates during another period. Our first such test was whether or not there was a statistically-significant difference between the election that occurred two cycles before the change and the election that occurred three cycles after the change – as we can plausibly expect that elections during both periods would represent the norm under both electoral systems (that is, that any short-term interest and enthusiasm that either immediately precedes or follows a major change should not be present in either cycle). Our results showed that the difference between these two means was just outside the standard bounds of statistical significance. Our *t*-test showed that the two-tailed *p*-value was 0.08. In the social sciences, the standard *p*-value that allows an analyst to confidently reject the null hypothesis (in this case, that there is not a statistically-significant difference between the two values) is 0.05. In this case, however, since a simple evaluation of the data indicates that there is a real and important difference, we can plausibly conclude that our major problem was the small sample size, not the lack of a real-world relationship. A *p*-value of 0.08 would furthermore allow us to reject the null hypothesis if we used a less demanding rule for rejecting the null hypothesis, such a $p < 0.1$. Incidentally, we did find a statistically-significant difference between the period immediately following the change, and those that followed ($p = 0.02$), which further indicates that there is a real difference between the period immediately following the change (when we see the surge in candidate interest) and the periods that follow.

We must add a caveat to the conclusion that this surge in support is the result of the transition to single-member districts per se. It is well known that incumbents have an advantage of non-incumbents, even in local

¹²¹ When conducting statistical studies of empirical data, sample size is an important issue. Of particular concern is the concept of “degrees of freedom.” In regression, a model’s degrees of freedom is simply the number of parameters you can estimate, given the number of observations. Sarah Boslaugh and Paul Andrew Watters, *Statistics in a Nutshell* (Sebastopol, CA: O’Reilly Media, 2008), 176. Even aside from the issue of degrees of freedom, a small sample size decreases the odds of finding statistically-significant results, even if the expected relationship exists in the real world; this is because larger sample sizes necessarily lead to smaller standard errors and thus more precision. A model with fewer than two dozen observations would be quite likely to cause the analyst to fail to reject the null hypothesis, even though it should be rejected. *Ibid.*, 359.

elections.¹²² However, immediately after the transition from at-large to single-member districts, the normal rules of incumbency may no longer apply. Some incumbents may not seek reelection if they live in a district that is not favorable to them. Even if they do stand for election, it may not be immediately clear whether they will be successful in the new district boundaries.

Furthermore, the subsequent elections suggest that this short burst in interest among potential candidates does not last. Beginning with the second election following the transition, the districts, on average, reached a new equilibrium that was somewhat below the norm before the change. In both the second and third elections that followed the change, the mean number of candidates was below 2.4. That is, under the new system, there was a smaller average number of candidates after the transition than before.

That being said, we should not overstate the deleterious effects that the change from at-large to by-district elections has on competition. Even at the second and third election, each seat continued to average at least two competitors, indicating that challengers did not believe that the new system led to an environment in which competitors were locked out. Given the importance of assuring protected groups the ability to elect their most preferred candidates, this slightly lower level of electoral competition may be a small price to pay.

However, although the lower amount of competition (as measured by the number of candidates) is not sufficiently concerning to warrant a reconsideration of VRA Section 2 when it comes to local elections, it does not mean that arrangements cannot be made to better facilitate both minority electoral representation and political competition. To consider this issue, we should examine some of these municipal electoral changes in greater detail.

VII. INDIVIDUAL CASES AND POLICY IMPLICATIONS

Avoiding the opportunity cost between diversity and electoral competitiveness might be possible if municipalities and counties consider less traditional methods of elections and districting. The most common type of election in the United States is a “single-member, simple majority” (SMSP) district.¹²³ Under this system, citizens elect a single member to represent a geographic region and the candidate with the plurality of votes

¹²² Jessica Trounstein, *Evidence of a Local Incumbency Advantage*, 36 LEG. STUDIES QUARTERLY 255, 255-280 (2011).

¹²³ In 1967 Congress passed PL 90-196 which prohibited at-large and other multi-member elections by states with more than one House seat.

wins. All congressional and legislative elections in the US are conducted under this method.

In municipal and county elections, it is more common to find non-traditional election systems such as ranked-choice voting, at-large/by-district hybrids, single non-transferable vote and multiple-member districts.¹²⁴ In fact, judges in VRA cases have discretion to accept remedies that offer non-traditional election systems as means to comply with orders to revamp electoral systems.¹²⁵ We offer a few case studies to highlight how non-traditional election systems might provide an escape from the diversity versus electoral competitiveness dilemma that VRA litigation creates.

A. A Hybrid System—The City of Norfolk, Virginia

The City of Norfolk, Virginia was sued by the Norfolk Branch of the National Association for the Advancement of Colored People for violating the Voting Rights Act in 1988. The NAACP argued that Norfolk's at-large system for city council elections diluted the votes of African-Americans.¹²⁶ The District Court ruled in their favor and a new election system was adopted in 1993. Under the new system, the City of Norfolk was divided into seven Wards. In each Ward, candidates had to live within the district boundaries, each citizen cast one vote, and the winner was the candidate with the most votes. Such a remedy is typical in VRA cases—one simply moves from an at-large system to a by-district system. In the case of Norfolk however, the municipality created five Wards and two Superwards. The five Wards were compact districts that ensured the creation of majority-minority districts and the election of African-Americans to the city council. Concurrently, the city created two Superwards that cut the city in half. This move essentially created two, smaller at-large districts. Finally, the system staggered the elections of Wards and Superwards between even numbered years. For example, in 1994, the city elected members to the five Wards. In 1996, the city elected members to the two Superwards.

The results are interesting. In the three elections prior to the VRA litigation (1986, 1988, and 1990) in which the city used an at-large election system, there were 2.5, 3 and 3.5 candidates per seat per election. That averages out to 3 candidates per seat, per election over a six-year period.

¹²⁴ SHAUN BOWLER et. al., *ELECTORAL REFORM AND MINORITY REPRESENTATION: LOCAL EXPERIMENTS WITH ALTERNATIVE ELECTIONS*, Ohio State University Press (2003).

¹²⁵ *Holder v. Hall*, 512 U.S. 874 (1994).

¹²⁶ Anita Earls, Kara Millonzi, Oni Seliski and Torry Dixon, *Voting Rights in Virginia: 1986-2006*, 17 REV. OF LAW AND SOCIAL JUSTICE 761 (2006).

This is slightly higher than the average of 2.8 candidates per seat, per election found in our overall results. Upon adoption of the new Ward system, the competitiveness in the Wards falls as our hypothesis predicted and our data supports. In the three elections after 1990, there were only 2.5, 3.2 and 2.2 candidates per seat respectively, for an overall average of 2.6 candidates per seat, per election. This is noticeable drop—about one-half fewer candidates per seat. When we look at the Superwards, however, the results are noticeably in the opposite direction. In the three elections post-VRA litigation, the Superwards attracted 4.5, 4.5 and 3 candidates per seat, respectively for an overall average of 4 candidates per seat, per election. This is an additional one and a half candidates per seat higher than the new Ward system and more than the invalidated at-large system.

The Norfolk system suggests a possible compromise that does not eliminate the opportunity cost between diversity and electoral competitiveness, but mitigates it. Under such a system, voters get diversity in one election and competitiveness in the next. The Ward elections ensure the presence of minorities on the Council and the Superward elections provide multicandidate competitive elections. This solution is somewhat analogous to the Great Compromise at the Constitutional Convention. In 1787, there was simply no way to craft a compromise that created a proportional system of representation that also gave each state an equal vote. Eventually rather than crafting one representative body, the Framers simply created two—a House for proportional representation and a Senate for equal representation. The City of Norfolk has traveled a similar path.

B. Single Non-Transferable Vote--Beaufort County, North Carolina

Beaufort County's adoption of a single non-transferable vote system may offer a more effective method for escaping the diversity and competitiveness dilemma. In 1991, faced with an ongoing VRA lawsuit filed on behalf of African-American voters, Beaufort County stipulated to an agreed upon Order changing its election system to a single non-transferable vote.¹²⁷

Under its old system, Beaufort County elected five, concurrently serving Commissioners in an at-large system. Each citizen was allowed to cast one vote in each of the five separate elections. Under this system, the same white majority could prevail in all five races. Despite making up 32

¹²⁷ Moore v. Beaufort County, 936 F.2d 159 (1991).

percent of the population, there were no African-Americans serving on the County Commission. In 1992, the County adopted a system that expanded the Commission to seven members, lengthened the terms to four years and staggered the elections so that not all seven members were elected in the same year. They also adopted a single non-transferable vote mechanism that was described in the Order as:

Each voter in the primary and general election shall be entitled to cast *one vote only* (our emphasis) on each ballot. In each party's primary, the four candidates on the ballot who receive the most votes shall be nominated without a runoff. In the general election the four candidates on the ballot who receive the most votes shall be elected for terms of four years each.¹²⁸

In this system, African-Americans can concentrate their vote on an African-American candidate and ensure that they will at least come in the top four, and thus be elected. Single non-transferable vote allows populations with far less than 50% of the populace to still win if they coordinate their vote on a single candidate.¹²⁹ As the data on polarized voting shows, race and ethnicity already serve as that coordinating force. Equally important, the election of minority candidates does not require the creation of geographically limited majority-minority districts that are responsible for the drop in electoral competitiveness.

Beaufort County devised a system that allowed them to “have their cake and eat it too.” They increased the diversity on their Board of Commissioners and increased electoral competitiveness. In the two elections prior to 1992, the commissioner races averaged 1.6 and 1.4 candidates per seat for an overall average of 1.5 candidates per seat, per election. This is far below the average of 2.8 candidates per seat in our overall dataset. In the three elections after 1992, Beaufort County averaged 2.25, 2.0 and 1.33 candidates per seat respectively. Their post-VRA litigation average was 1.9 candidates per seat, per election—higher than before the litigation.

¹²⁸ *Id.* at 4.

¹²⁹ AREND LIJPHART et. al., *The Limited Vote and the Single Nontransferable Vote: Lessons form the Japanese and Spanish Examples*, ELECTORAL LAWS AND THEIR POLITICAL CONSEQUENCES, 154-169 (Bernard Grofman et al. eds., Agathon Press 2003).