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Race and Democratic Contestation

ABSTRACT. As the Voting Rights Act of 1965 (VRA) passes its fortieth anniversary and faces upcoming constitutional challenges to its recent renewal, a growing number of liberals and conservatives, once united in support, now share deep reservations about it. This Article argues that the growing skepticism about the VRA and majority-minority districting is misguided by a simplistic and impoverished account of electoral competition in American politics. Electoral competition should be judged with reference to the ultimate ends it is intended to produce – more democratic debate, greater civic engagement and participation, and richer political discourse – all of which are generated by a deeper first-order competition among political leaders that this Article describes as "democratic contestation." This Article offers democratic contestation, in place of electoral competition, as a basic value in the law of democracy and as the foundation for a new theory that helps reconcile approaches to race, representation, and political competition. A theory of democratic contestation shifts the normative focus from the pluralist absorption with which groups get what from politics to a new focus on the tenor and quality of political competition among leaders. When viewed through a theory of democratic contestation, the VRA is crucially procompetitive in the broader sense of democratic contestation. By carving out safe majority-minority districts, the VRA may break the discursive stasis of racial polarization in which politics revolve around the single axis of race. A theory of democratic contestation reveals how majority-minority districts may energize the process of democratic contestation and enable an internal discourse of ideas that moves beyond the racially polarized divide, an otherwise inadvisable move in the face of racially polarized opposition. A theory of democratic contestation thus demands a reevaluation of the Supreme Court's recent decision in *LULAC v. Perry* and provides a new understanding of the renewed VRA going forward in the modern world of national partisan competition.

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INTRODUCTION

The Supreme Court once criticized the Voting Rights Act of 1965 (VRA),[1] widely regarded as the most successful intervention for racial minorities during the last century,[2] as representing merely the "politics of second best."[3] Although the VRA was needed long ago to dismantle the Jim Crow South, the Court's recent decisions reflect the view that the VRA today threatens to impose representational guarantees in place of, and often preemptive of, political resolution through electoral competition and interest group pluralism.[4] As the VRA passes its fortieth anniversary and faces upcoming constitutional challenges to its recent renewal,[5] liberals and conservatives once united in their support for the VRA have come to share the Court's concerns.[6] As Richard Pildes aptly put it, "the quiet era of the VRA now appears at an end."[7]

Electoral competition has become popular as the structural priority for election law, in place of representational guarantees like the VRA.[8] The VRA

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1. Voting Rights Act of 1965, 42 U.S.C.A. §§ 1971, 1973 to 1973j (West 2007).

2. *See, e.g.*, Pamela S. Karlan, *Section 5 Squared: Congressional Power To Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1, 2 (2007) ("The [Voting Rights] Act is rightly celebrated as the cornerstone of the 'Second Reconstruction.'").

3. Johnson v. De Grandy, 512 U.S. 997, 1020 (1994) (quoting BERNARD GROFMAN, LISA HANDLEY, & RICHARD G. NIEMI, MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 136 (1992)).

4. *See, e.g.*, League of United Latin Am. Citizens v. Perry (*LULAC*), 126 S. Ct. 2594, 2613-23 (2006); Georgia v. Ashcroft, 539 U.S. 461, 479-91 (2003).

5. *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (codified as amended at 42 U.S.C.A. §§ 1971 to 1973bb-1 (West 2006)).

6. *See, e.g.*, Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1731 (2004); Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 68-70 (2004); Abigail Thernstrom, *Section 5 of the Voting Rights Act: By Now, a Murky Mess*, 5 GEO. J.L. & PUB. POL'Y 41, 72-76 (2007).

7. Richard H. Pildes, *The Politics of Race*, 108 HARV. L. REV. 1359, 1361 (1995) (reviewing QUIET REVOLUTION IN THE SOUTH (Chandler Davidson & Bernard Grofman eds., 1994)).

8. *See, e.g.*, Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 646 (1998) ("Only through an appropriately competitive partisan environment can one of the central goals of democratic politics be realized: that the policy outcomes of the political process be responsive to the interests and views of citizens."); Richard H. Pildes, *Competitive, Deliberative, and Rights-Oriented Democracy*, 3 ELECTION L.J. 685, 686, 691-95 (2004) (reviewing RICHARD A. POSNER, LAW,

carves out, at least when conditions of racial polarization prevail, majority-minority districts[9] that tend to be overwhelmingly Democratic, with little intradistrict electoral competition from Republicans, by virtue of the Democratic partisanship of African American and Latino voters.[10] Particularly since the South has developed two-party competition that resembles what many view as "normal politics,"[11] the establishment of majority-minority districts clashes with the normative sensibilities of an increasing number of commentators and courts. Samuel Issacharoff and Richard Pildes argue that courts instead should self-consciously focus on regulating electoral competition with the dominant structural aim of assuring a "robustly competitive partisan environment."[12] Not surprisingly, they are among the new group of skeptics[13] about the continuing value of the VRA and the "legal requirement of 'safe minority districting.'"[14] Issacharoff and Pildes argue that safe majority-minority districts under the VRA reduce electoral competition and thus may run counter to the VRA's purposes in the context of contemporary politics.

The Supreme Court also seemed to prioritize electoral competition under the VRA in its review of the 2003 Texas congressional redistricting in *LULAC v. Perry*.[15] The Court focused on three districts that were reconfigured in 2003, each of which faced VRA-related challenges. What was striking in the Court's handling of the VRA claims is that the Court decided to restore old District 23, the only challenged VRA district in which the racial minority had no guarantee of electing its candidate of choice. Despite a "politically active" Latino electorate, old District 23 consistently elected a Republican representative over

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PRAGMATISM, AND DEMOCRACY (2003)) (stating that competitive theorists give electoral competition "pride of place" and priority among democratic values).

9. "Majority-minority" districts are districts in which African Americans or Latinos as a bloc constitute a majority of the population.

10. *See* Pamela S. Karlan, *Our Separatism? Voting Rights as an American Nationalities Policy*, 1995 U. CHI. LEGAL F. 83, 88 (noting that courts generally order majority-minority districts as a remedy under the VRA); Michael P. McDonald, *Redistricting and Competitive Districts*, *in* THE MARKETPLACE OF DEMOCRACY: ELECTORAL COMPETITION AND AMERICAN POLITICS 222, 233 (Michael P. McDonald & John Samples eds., 2006) (noting the Democratic partisanship of African American and Latino voters).

11. Pildes, *supra* note 6, at 84.

12. Issacharoff & Pildes, *supra* note 8, at 717.

13. *See* Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 645-46 (2002); Issacharoff & Pildes, *supra* note 8, at 704-07; Pildes, *supra* note 6, at 95-99; Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1607 (1999).

14. Richard H. Pildes, *The Decline of Legally Mandated Minority Representation*, 68 OHIO ST. L.J. 1139, 1140 (2007).

15. 126 S. Ct. 2594 (2006).

the energetic opposition of Latino voters in close, competitive elections. Equally odd, the Court sustained the dismantling of old District 24 and ordered the dismantling of new District 25, two electorally safe districts where the minority communities successfully elected their candidates of choice. However, the Court's handling of the Texas redistricting may be explained by a growing judicial preference for electoral competition under the VRA.[16] In short, the Supreme Court may be joining with the greater skepticism about VRA majority-minority districting and its anticompetitive electoral effects.

This Article argues that this growing skepticism about the VRA is based on an impoverished account of political competition. *Electoral* competition is only one form of *political* competition. Even if the VRA and safe majority-minority districting cut against electoral competition, a structural commitment to competition in politics ought to transcend the simple maintenance of competitive elections between the major parties. Electoral competition should be judged with reference to the ultimate ends it is intended to produce—more democratic debate, greater civic engagement and participation, and richer political discourse—all of which are implicated by a deeper notion of political competition among political leaders that I term "democratic contestation." Electoral competition serves only as a proxy, a means to these greater democratic ends.

This Article offers democratic contestation as a basic value to be pursued in the law of democracy and the foundation for a theory that helps sort through and reconcile approaches to race, representation, and political competition under the VRA. Democratic contestation represents the basic competitive process among leaders to present the mass public with meaningful, attractive choices, not just about two candidates, but about what they want from government and the way they think of politics. Democratic contestation is the deliberative competition among political leaders to shape and frame the public's understandings about elective politics, public policy, and civic affairs. It encompasses the process by which leaders dare, force, and challenge the public to think about politics. Electoral competition is only one prominent element of this larger competition among political leaders for sociopolitical influence—a healthy process of democratic contestation that draws in and engages the public in that process to win the hearts and minds of citizens.[17]

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16. *See* Ellen D. Katz, *Reviving the Right To Vote*, 68 OHIO ST. L.J. 1163, 1164-65 (2007).

17. Throughout this Article, I purposely adopt a functional rather than status-related definition of the term "leader." I distinguish leaders only by what they try to do—coordinate and organize mass politics toward any sociopolitical ends—and not at all by who they are, what they have, or what they represent culturally, politically, or ideologically. In previous work, I have referred to political leaders as "elites," drawing upon political science jargon to identify

Although electoral competition generally coincides with democratic contestation, it also diverges in many instances that inform the way that the law of democracy should develop, particularly under the VRA.

The Article proposes a basic shift in the level of analysis from electoral competition among politically relevant groups, principally the major political parties, to a new, deeper focus on the more fundamental political competition among leaders to create and ultimately determine the character of the alignments that emerge as politically relevant in the first place. Of course, many commentators have debated the merits of different forms of electoral competition in various settings, whether the primary or general election, intradistrict or interdistrict, or within or across institutions like parties and branches of government. These debates, however, so far fail to connect those different forms of electoral competition to the deeper aspiration—represented by democratic contestation—that they all should seek to promote. This Article seeks to reorient the usual preference for electoral competition, in a way that ought to influence debate across all election law, by identifying and articulating the basic value of democratic contestation that underlies electoral competition.

Democratic contestation is both a means and an end of healthy democratic politics. It is a means in the sense that the *process* of democratic contestation should lead to richer, more legitimate and popular political outcomes that better respond to the hopes and needs of the sociopolitical community. But critically, democratic contestation is also an end in itself. The process by which the community entertains and confronts choices about how to define its politics is a crucial function of democracy, justly celebrated by democratic theory. It is a central tenet of a *theory* of democratic contestation that political leaders initiate agenda setting and frame the basic questions and alternatives in the process of democratic contestation. A theory of democratic contestation values the process of democratic contestation as a fundamental aim of the law of democracy and therefore brings a new theoretical perspective to old views and debates.

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political entrepreneurs who seek to lead the public, form groups, and initiate collective action for political ends. *See* Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and "Disclosure Plus,"* 50 UCLA L. REV. 1141, 1162-65 (2003); *see also* JOHN R. ZALLER, THE NATURE AND ORIGINS OF MASS OPINION 6 (1992) (defining elites as "persons who devote themselves full time to some aspect of politics or public affairs"). In referring to political leaders or elites, I do not mean to invoke an explicitly class-based or neo-Marxist definition of elites. *See generally* C. WRIGHT MILLS, THE MARXISTS 117-18 (1962); Kenneth Anderson, *A New Class of Lawyers: The Therapeutic as Rights Talk*, 96 COLUM. L. REV. 1062 (1996) (book review). Instead, I mean in this Article only to indicate self-identified political entrepreneurs, regardless of social, cultural, or economic position, who effectively lead public opinion and help coordinate collective action.

Democratic contestation offers a synthesis of democratic theory, bridging quite disparate elite and participatory perspectives. A theory of democratic contestation is distinctly leader-centered in that it envisions at its heart robust political competition among political leaders as the engine of democratic politics. It takes for granted that mass democracy, given the challenges of collective action, depends critically on the coordinating entrepreneurship of political leaders. The process of democratic contestation helps define the political alignment of the polity and constitutes the substantive politics for the community. However, diverging from traditional elite perspectives, a theory of democratic contestation prizes leadership competition precisely because that competition makes possible the central goal of promoting mass participatory politics. A process of democratic contestation draws in the mass public, makes political debate accessible, presents civic choices to the public, and instigates a broader discourse about the political future of the community. At the individual level, this process enables citizens to constitute political identity by engaging in politics and developing their particular sensibilities about public affairs. The process of democratic contestation thus integrates the personal self-constitution for individual citizens at the micro level and the collective self-constitution for the sociopolitical community at the macro level. The theory of democratic contestation that I introduce here, and plan to develop in future work, does not defy the consensus that electoral competition is valuable as a general matter over the great range of instances. Electoral competition is generally consistent as a goal with a theory of democratic contestation, serving as a regular catalyst for leadership mobilization and mass political participation. Indeed, a theory of democratic contestation helps clarify why electoral competition is valuable, by exploring its normative ends, but it also helps identify those instances when electoral competition is less useful in achieving those ends, as in the case of racial polarization under the VRA.

Once viewed through a theory of democratic contestation, the VRA can be seen as crucially procompetitive in the broader sense of democratic contestation, rather than narrowly as electorally anticompetitive. The VRA applies most forcefully under conditions of racial polarization where white and minority voters are locked into opposed voting blocs along the dominant axis of race. The VRA, by breaking this racial stasis and carving out safe majority-minority districts, may liberate the process of democratic contestation in both the white and minority communities. The majority-minority district releases both groups from the overriding pressure, imposed by racial polarization, to maintain racial in-group cohesion and therefore to avoid exploring concerns that may divide them along nonracial lines. For this reason, the majority-minority district can facilitate fraternal competition within the minority group and encourage engagement in an internal discourse that would be impossible,

or at least inadvisable, in the face of racially polarized opposition. Politics, by virtue of the racial guarantee,[18] moves beyond race and racial polarization. Majority-minority districting basically removes race from intradistrict politics, counterintuitively, by districting with race as the primary consideration.

As a result, if the Supreme Court is interested in promoting political participation and civic engagement consistent with a theory of democratic contestation, its handling of the Texas districts in *LULAC v. Perry* may be entirely wrong. The majority-minority district may be a positive instrument, enabling the leaders and citizens of the racial minority to engage in a broader competition of ideas, through a process of democratic contestation, moving beyond the racially polarized divide that dominates politics in the absence of the majority-minority district.[19] The electoral safety of the majority-minority

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18. The Court has explained that the Voting Rights Act secures for racial minorities an equality of political opportunity to elect, not a guarantee of electoral success. *See, e.g.*, Johnson v. De Grandy, 512 U.S. 997, 1014 n.11 (1994) (distinguishing "equality of opportunity" from "a guarantee of electoral success for minority-preferred candidates"). But the typical majority-minority district as ratified by courts provides a reasonable assurance of electoral success. The government produces the aforementioned racial guarantee, in the form of safe majority-minority districts, through the use of facially neutral classifications drawn by district lines on a geographic map. *See* Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1695-96 (2001) ("[W]e cannot look at a district line and immediately conclude that the government has employed a racial classification . . . ."). Nonetheless, the obvious reference to racial considerations in drawing district lines led the Court to apply strict scrutiny in *Shaw v. Reno*, 509 U.S. 630 (1993), and later cases and strike down as unconstitutional majority-minority districts where race served impermissibly as a "predominant, overriding factor" in the redistricting process. *See* Michael S. Kang, *When Courts Won't Make Law: Partisan Gerrymandering and a Structural Approach to the Law of Democracy*, 68 OHIO ST. L.J. 1097, 1108-10 (2007) (describing *Shaw* and the introduction of the predominant factor standard). The Court, however, effectively made clear that race-consciousness in districting tailored to comply with the Voting Rights Act, as described above, does not violate *Shaw*. *See, e.g.*, Bush v. Vera, 517 U.S. 952, 958 (1996) ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race."); Miller v. Johnson, 515 U.S. 900, 916 (1995) ("Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process."); *see also Bush*, 517 U.S. at 990-95 (O'Connor, J., concurring). Even Justices Scalia and Thomas later noted that they agreed the Voting Rights Act provides a compelling state interest under *Shaw*. *See LULAC*, 126 S. Ct. at 2667 (Scalia, J., concurring in the judgment in part, dissenting in part).

19. A separate debate, only indirectly implicated here, is whether majority-minority districts optimally advance the policy preferences of the racial minority group. *Compare* CAROL M. SWAIN, BLACK FACES, BLACK INTERESTS: THE REPRESENTATION OF AFRICAN AMERICANS IN CONGRESS 200-05 (1993), Charles Cameron, David Epstein & Sharyn O'Halloran, *Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?*, 90 AM. POL. SCI. REV. 794 (1996), *and* Bernard Grofman, Lisa Handley & David Lublin, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L.

district, disdained by the Court in *LULAC*, might empower the racial minority to debate, deliberate, and decide internally about public policy and ideology, about priorities and concerns. For the racial minority, electoral politics transforms from racially polarized outcomes at the polls to the more optimistic question of who the group's candidate of choice will be and what type of politics the community wishes to develop as its own.

Part I describes the debate over the VRA and the basic tension between electoral competition and safe majority-minority districting under the VRA. Part I explains how the Court appeared to resolve the VRA claims in *LULAC v. Perry* by emphasizing and acting on a structural preference for electoral competition over other democratic values. Next, Part II introduces a theory of democratic contestation – a fresh account of democratic politics with particular focus on the role of political leaders in generating political discourse and action. Part II explains that a theory of democratic contestation offers a new understanding of representation, electoral competition, and the normative aims of democratic politics. Finally, Part III applies a theory of democratic contestation to the problems of racial polarization and the VRA. It argues that a theory of democratic contestation provides a powerful rationale for majority-minority districting and challenges the logic of the Court's handling of the VRA claims in *LULAC v. Perry*. Part III contends that the Court's new requirement of "cultural compactness" under the VRA is particularly counterproductive if the Court is serious about the normative aims emphasized in *LULAC*. The Article concludes by arguing, based on a theory of democratic contestation, against the popular movement toward coalition districts as substitutes for majority-minority districts under the VRA.

I. ELECTORAL COMPETITION AND THE NEW ERA OF THE VRA

A. The VRA, Representation, and Electoral Competition

Legal and political communities, once overwhelmingly supportive of the VRA, now divide on the question whether the VRA does more harm than good

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REV. 1383 (2001), *with* David Lublin, *Racial Redistricting and African-American Representation: A Critique of "Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?,"* 93 AM. POL. SCI. REV. 183 (1999), Kenneth W. Shotts, *Does Racial Redistricting Cause Conservative Policy Outcomes? Policy Preferences of Southern Representatives in the 1980s and 1990s*, 65 J. POL. 216 (2003), *and* Kenneth W. Shotts, *Racial Redistricting's Alleged Perverse Effects: Theory, Data, and "Reality,"* 65 J. POL. 238 (2003). Political scientists disagree about whether majority-minority districts undercut the substantive interests of the racial minority at the level of the entire legislature by packing voters of color into a few districts and thereby bleaching the rest of the jurisdiction toward Republican control.

in today's political world.[20] The recent debate over renewal of section 5 of the VRA and the Supreme Court's decision in *LULAC v. Perry* were revealing about the future of the VRA, as the renewed VRA heads toward inevitable challenges in court.[21] The controversy is whether the successes of the decades-old VRA in opening the doors to minority political gains in the South and beyond have undermined the very rationales for its existence.

The VRA was designed to end African American disenfranchisement in what was then a one-party South. The Democratic Party dominated Southern politics completely for nearly a century through the VRA's passage in 1965.[22] In the complete absence of partisan competition, the Democratic Party had no desire to destabilize its one-party hegemony by ending the historical disenfranchisement of African Americans. There were no incentives for Democrats even to consider broadening their constituency or pursuing African American votes. What is more, in the context of the one-party South, the VRA's intervention did little, at least immediately, to shift partisan advantage or otherwise entrench either party any further.[23] The VRA simply opened the door to African American representation within the Democratic Party, rather than offer opportunities for partisan mischief.

To the degree that the VRA's effectiveness was premised on nonpartisan neutrality in a one-party Democratic South, however, the VRA undermined that very premise in impressive fashion after 1965.[24] The VRA's empowerment of African American voters quickly influenced the Democratic agenda and incentivized southern Democrats to address African American political interests.[25] George Wallace, who famously declared his dedication to

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20. *Compare* Issacharoff, *supra* note 6, *and* Pildes, *supra* note 6, *with* Karlan, *supra* note 2, *and* Michael J. Pitts, *Let's Not Call the Whole Thing Off Just Yet: A Response to Samuel Issacharoff's Suggestion To Scuttle Section 5 of the Voting Rights Act*, 84 NEB. L. REV. 605 (2005).

21. *See generally* Issacharoff, *supra* note 6, at 1730-31; Nathaniel Persily, *Options and Strategies for Renewal of Section 5 of the Voting Rights Act*, 49 HOW. L.J. 717 (2006); Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174 (2007) [hereinafter Persily, *Promise and Pitfalls*]; Pitts, *supra* note 20.

22. *See generally* PAUL FRYMER, UNEASY ALLIANCES: RACE AND PARTY COMPETITION IN AMERICA (1999); V.O. KEY, JR., SOUTHERN POLITICS IN STATE AND NATION (1949); J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910 (1974).

23. *See* Issacharoff, *supra* note 6, at 1730-31.

24. *See* Pamela S. Karlan, *Loss and Redemption: Voting Rights at the Turn of a Century*, 50 VAND. L. REV. 291, 313-22 (1997) (describing the collapse of the New Deal coalition in the South after the passage of the VRA).

25. *See* ROBERT J. COTTROL, RAYMOND T. DIAMOND & LELAND B. WARE, *BROWN V. BOARD OF EDUCATION*: CASTE, CULTURE, AND THE CONSTITUTION 235-36 (2003).

"segregation forever" before the VRA's passage, could be found campaigning actively for African American votes a decade later.[26] The VRA was so effective at engaging African American interests, tabled completely in the Jim Crow South, that it triggered a dramatic partisan realignment of the electorate.[27]

During the thirty years following the VRA's enactment, white conservatives fled the Democratic Party in waves, particularly in the South. They increasingly identified as Republicans and voted for Republican candidates, thereby reinvigorating what had been a moribund GOP in the South. Real partisan competition in the South emerged between the Democratic Party, newly remade with African American voters as one of its core constituencies, and the Republican Party, built on the base of erstwhile Democrats and other white conservatives. Partisan competition motivated both parties, though primarily the Democratic Party, to court African American voters aggressively in ways that appear to many commentators as the "normal, pluralist interest group politics to which the VRA aspired."[28] If the VRA provided a command-and-control method for ensuring representation of African American interests, a newly competitive partisan environment now seemed to empower African American voters as had not been seen in a century.[29]

In light of the changed politics of the South, however, critics argue that the VRA now may threaten to compromise, rather than promote, this electoral competition between the major parties.[30] Section 2 of the VRA carves out, at least when conditions of racially polarized voting prevail, majority-minority jurisdictions that assure the election of the minority group's candidates of choice as its representatives.[31] The close association between African American

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26. MARSHALL FRADY, WALLACE 289 (1996).

27. *See* EDWARD G. CARMINES & JAMES A. STIMSON, ISSUE EVOLUTION: RACE AND THE TRANSFORMATION OF AMERICAN POLITICS 74 (1989); FRYMER, *supra* note 22, at 26. *See generally* Alan I. Abramowitz & Kyle L. Saunders, *Ideological Realignment in the U.S. Electorate*, 60 J. POL. 634 (1998); Persily, *Promise and Pitfalls*, *supra* note 21.

28. Pildes, *supra* note 6, at 97.

29. *See, e.g.*, Samuel Issacharoff & Pamela S. Karlan, *Groups, Politics, and the Equal Protection Clause*, 58 U. MIAMI L. REV. 35, 47-49 (2003) (describing the political leverage of minority groups); Pildes, *supra* note 6, at 95-99 (arguing that the VRA embodies a command-and-control regime outdated in the face of two-party competition nationwide).

30. *See* T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After* Shaw v. Reno, 92 MICH. L. REV. 588, 601-03 (1993) (defining "filler people"); John Hart Ely, *Standing To Challenge Pro-Minority Gerrymanders*, 111 HARV. L. REV. 576, 584-85 (1997) (discussing the problem of "filler people"); Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589, 1614-16 (1993) (discussing the problem of "wasted votes").

31. *See generally* Gerken, *supra* note 18.

voters and Democrats means that representational guarantees for African Americans under the VRA inevitably produce safe districts for Democrats that are almost completely insulated from partisan competition.[32] Electoral competition here cuts against representation, and the converse is true as well.[33] A district that is electorally competitive between Republicans and Democrats, for instance, is likely to produce close elections that encourage the parties to compete aggressively, but is also likely to saddle a significant portion of the district's electorate, including the racial minority, with a representative whom it does not want.[34] Conversely, a majority-minority district designed to ensure that a racial minority voter will be represented by the candidate of her choice is likely, as a direct consequence, to be "safe" and not electorally competitive.[35]

Many commentators therefore question whether the VRA is politically necessary to ensure consideration of minority interests that might already be addressed through energetic partisan competition.[36] Indeed, VRA critics suggest that VRA representational guarantees in the form of majority-minority districts may not only be unnecessary, but may actively preempt healthy engagement and bargaining between the racial minority and the rest of the political system. Samuel Issacharoff questions whether the VRA's "narrow focus on securing the electability of minority candidates could compromise the range of political accords available to minority voters."[37] Likeminded critics have joined Issacharoff's skepticism about majority-minority districts under the VRA and now increasingly believe that "[r]ather than impos[ing] a particular view about what kind of representation is 'fair' on blacks or Latinos,

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32. *See* McDonald, *supra* note 10, at 232-33.

33. *See* Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 667-73 (2002).

34. *See id.* at 679 (arguing that competitive districts "leave almost half the political consumers with a bitter taste in their mouths for two or more years"); *see also* Thomas L. Brunell, *Rethinking Redistricting: How Drawing Uncompetitive Districts Eliminates Gerrymanders, Enhances Representation, and Improves Attitudes Toward Congress*, 39 PS: POL. SCI. & POL. 77 (2006) (arguing that minimizing competitive districts promotes voter satisfaction).

35. The degree to which a majority-minority district can be considered electorally safe varies somewhat. It was once the case that the racial minority group within a majority-minority district needed to constitute at least sixty-five percent of the district's total population for the district to be considered "safe" as a minority guarantee under the VRA. *See* United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977) (establishing the sixty-five percent rule). More recently, courts have been willing to recognize districts as safe with bare popular majorities for the racial minority. I refer to majority-minority districts generally as "safe," even though a few individual majority-minority districts may not be electorally safe in a given election.

36. *See supra* note 6.

37. Issacharoff, *supra* note 6, at 1729.

we can simply let members of those groups do what any other political minority does in a healthy democracy: negotiate the best deal possible."[38]

B. LULAC v. Perry

New skepticism about safe districting under the VRA came to a head in *LULAC v. Perry*,[39] the Supreme Court's most recent VRA decision. *LULAC* addressed the infamous Texas congressional "re-redistricting" in which state Republicans broke from custom and engaged in a middecade redistricting, undoing the court-approved apportionment already in place.[40] Although public attention focused on the partisan gerrymandering claims entertained by the Court, the Court also reviewed VRA-related claims with respect to three congressional districts, namely Districts 23, 24, and 25 under the *LULAC* redistricting.[41] The Court's resolution of the VRA issues in the case emerged as the most interesting, provocative, and controversial element of *LULAC*.

Most notably, the Court's solicitude toward the VRA claims of Latinos residing in District 23 stands in sharp juxtaposition to the Court's dismissal of claims by African Americans residing in District 24. Before the *LULAC* redistricting, old District 23 was a majority-minority district, with Latinos constituting 57.5% of the voting-age population, but Latinos were not able to control the district electorally and select their candidate of choice.[42] Since 1996, District 23 had been represented by Republican Congressman Henry Bonilla who, while a Latino himself, was not supported by the Latino community and garnered just eight percent of Latino votes in the 2002 election immediately preceding the *LULAC* redistricting.[43]

What stood out for the Court, however, was that the Latino community of old District 23, by 2003, may have been on the verge of ousting incumbent Bonilla from office. Latino voters "were poised to elect their candidate of choice" and "were becoming more politically active, with a marked and continuous rise in Spanish-surnamed voter registration."[44] The *LULAC*

38. Heather K. Gerken, *A Third Way for the Voting Rights Act: Section 5 and the Opt-In Approach*, 106 COLUM. L. REV. 708, 714 (2006).

39. League of United Latin Am. Citizens v. Perry (*LULAC*), 126 S. Ct. 2594 (2006).

40. *See generally* Michael S. Kang, *The Bright Side of Partisan Gerrymandering*, 14 CORNELL J.L. & PUB. POL'Y 443, 465-68 (2005) (describing the Texas re-redistricting in 2003).

41. *See* 126 S. Ct. at 2612-26.

42. *See id.* at 2613.

43. *Id.*

44. *Id.* at 2621.

redistricting, by dismantling old District 23 and splitting up Latino voting strength, "not only made fruitless the Latinos' mobilization efforts but also acted against those Latinos who were becoming most politically active."[45] The Court objected to the effort to thwart the growing efficacy of Latino voters and insulate an incumbent from dissatisfied constituents. The Court held that the dismantling of old District 23 violated section 2 of the VRA.[46]

By contrast, the Court was openly dismissive of the VRA claims brought by African Americans in old District 24, surrounding Dallas-Fort Worth. In truth, the legal foundation for their claims was shaky at best. The African American community in District 24 comprised only a quarter of the total population,[47] qualifying not as a majority-minority district, but instead only as a coalition district, in which the minority population does not by itself control the selection of the district's representatives.[48] Nonetheless, the plaintiffs contended, and the state did not dispute, that the African American community had managed consistently to elect its candidate of choice in District 24.[49] African Americans constituted a voting majority within the Democratic Party such that they successfully supported Congressman Martin Frost in the Democratic primary and then voted for him as part of a cross-racial Democratic coalition in the general election. The effect of the *LULAC* redistricting of the African American community was to dismantle District 24, but the protection of such coalition districts had never been clearly established under the VRA by lower courts.

The Court, however, rested its rejection of these VRA claims on somewhat surprising alternate grounds. The Court affirmed the dismissal based on a finding that Frost never qualified in the first place as the minority community's candidate of choice.[50] Despite the consistent support for Frost among African Americans, the Court doubted whether Frost, a white centrist, could be considered as their genuine candidate of choice given the lack of electoral competition in District 24. The Court explained that the "fact that African

45. *Id.* at 2622.

46. *Id.* at 2623.

47. *Id.* at 2624.

48. *See* Georgia v. Ashcroft, 539 U.S. 461, 492 (2002) (Souter, J., dissenting) (comparing majority-minority districts "in which minorities can elect their candidates of choice by their own voting power, to coalition districts, in which minorities are in fact shown to have a similar opportunity when joined by predictably supportive nonminority voters"); Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1529-39 (2002) (explaining the politics of "coalitional districts").

49. *LULAC*, 126 S. Ct. at 2624.

50. *Id.* at 2625.

Americans preferred Frost to some others" was not determinative, because Frost simply never faced serious opposition that presented African American voters with real alternatives.[51] The Court speculated that a challenge from a credible African American candidate, perhaps in the primary, might have attracted African American votes away from Frost. The Court also speculated that "Anglos and Latinos would vote in the Democratic primary in greater numbers if an African American candidate of choice were to run."[52] In other words, the absence of electoral competition undercut the meaningfulness of African American support for Frost in an uncontested district that habitually reelected the Democratic incumbent.

The Court's disparate treatment of Districts 23 and 24 is puzzling, because it was the latter, not the former, in which the minority group was actually represented by the candidate it supported. On one hand, the Court found a VRA violation in the dismantling of old District 23, where Latinos were not represented by their candidate of choice. Latinos were instead represented by a Republican, Henry Bonilla, whom they opposed and strove to defeat. On the other hand, the Court did not find a VRA violation in the dismantling of District 24, where the effect was to deprive African American voters of Martin Frost, a representative whom they had supported for two decades.

The disparate results of *LULAC* make more sense, however, if the Court was focused less on representation than on electoral competition. Ellen Katz argues that the Court was not concerned that Latinos had not been represented by their candidate of choice in old District 23, but instead was outraged by the thwarting of the developing electoral competition between Republicans and Democrats in the district.[53] The Court admired the electoral competitiveness of District 23 before the redistricting and what it saw as the corresponding political vibrancy and engagement in the Latino community. Katz contends that the Court believed that "[t]he prospect of defeating Bonilla mobilized Laredo's Latino voters, while the redistricting plan eliminated that prospect and the political engagement it engendered."[54] The Court repeatedly characterized the Latino community before the redistricting as "politically

51. *Id.* The factual record established that Frost's district had been safely Democratic; insulated from challenges; crafted for Frost himself; and at least according to one witness, drawn specifically to elect a white Democrat. *See id.*

52. *Id.* at 2624.

53. *See* Katz, *supra* note 16, at 1171-73.

54. *Id.* at 1177.

active" and averred that the *LULAC* redistricting, by breaking it up, "undermined the progress of a racial group."[55]

Conversely, the noncompetitiveness of Martin Frost's District 24 undercut the value of its preservation, at least to the Court's eyes. If the prospect of victory stimulated vibrancy in the competitive old District 23 in a way that called for VRA protection, the Court appeared repulsed by the electoral security of old District 24. The Court seemed to believe that a "noncompetitive district [like District 24] becomes a forum unlikely to generate the engagement and vibrancy Justice Kennedy thought had been manifest in Laredo."[56] The guarantee of Frost's incumbency, in the Court's view, stripped away the value of preserving old District 24, even if it meant that the African American community would lose the congressman they consistently supported.[57] As a result, *LULAC* represents a decided normative choice in favor of the ideals of electoral competition, as embodied in the Court's mind by old District 23, over the representational guarantee offered by old District 24.

What is more, the Court's treatment of new District 25 only reinforces the Court's prioritization of electoral competition. New District 25 was an offset majority-minority district, stretching geographically from Austin to the Mexican border, designed to compensate for the dismantling of old District 23 in the *LULAC* redistricting. In fact, the district court below found that the new District 25 is "a more effective Latino opportunity district than Congressional District 23 had been."[58] Nonetheless, the Court in *LULAC* held that new District 25 could not serve as an adequate offset for the dismantling of the cherished old District 23. In contrast to the Court's celebration of political cohesiveness among Latinos in District 23, the Court disdained new District 25 as "an entirely new district that combined two groups of Latinos, hundreds of miles apart, that represent different communities of interest."[59]

The Court never fully analyzed the VRA merits of new District 25, but the Court did conclude that new District 25 failed to satisfy the requirement of political compactness under section 2 of the VRA, in a ruling that Daniel Ortiz

55. *LULAC*, 126 S. Ct. at 2621.

56. Katz, *supra* note 16, at 1180.

57. *See* Guy-Uriel E. Charles, *Race, Redistricting, and Representation*, 68 OHIO ST. L.J. 1185 (2007) (arguing that the Court doubted the authenticity of Frost's representation in the absence of genuine electoral competition).

58. Session v. Perry, 298 F. Supp. 2d 451, 503 (E.D. Tex. 2004).

59. *LULAC*, 126 S. Ct. at 2623.

dubs a requirement of "cultural compactness."[60] Part III extensively discusses this cultural compactness requirement introduced in *LULAC*, but it suffices to say for now that the Court rejected the replacement of old District 23 with new District 25 and expressly privileged the "growing Latino political power"[61] in an electorally competitive District 23. The Court again preferred the competitive District 23, even absent representation by the candidate of choice, over the surer guarantee of representation in another district, this time the electorally secure District 25.

The Court's linkage of the VRA claims and electoral competition is deeply intriguing and goes to the heart of VRA jurisprudence. The implication is that the VRA honors minority voters' revealed preferences only when sufficient electoral competition exists to certify their genuineness. Old District 24, an incumbent-friendly haven, stood in contrast to the competitiveness of old District 23, where Latinos appeared on the verge of overthrowing the incumbent. Under this interpretation, Ellen Katz argues that "minority voters might have a protected right to participate in a competitive political environment but not in a noncompetitive one."[62] The modern-day VRA, and the tensions it poses, expose deeper assumptions about how the Court believes democratic politics operate, how they should operate, and the perceived centrality of electoral competition in the Court's reasoning.[63]

Despite the central value placed on electoral competition by both the Court and commentators, there is need to reexamine the precise function of electoral competition in democratic theory, even as the Court begins to incorporate electoral competition more tightly into the law of the VRA. The close focus on electoral competition by both the Court and commentators has been deeply undertheorized and neglectful of other salient democratic values.[64] Electoral

60. *See* Daniel R. Ortiz, *Cultural Compactness*, 105 MICH. L. REV. FIRST IMPRESSIONS 48, 50 (2006), http://www.michiganlawreview.org/firstimpressions/vol105/ortiz.pdf.

61. *LULAC*, 126 S. Ct. at 2623.

62. Katz, *supra* note 16, at 1164.

63. *See id.* at 1166 (arguing that *LULAC* "rests on a nascent conception of political harm experienced by all voters—regardless of race—when a political system is rigged to block competition").

64. *See* Guy-Uriel E. Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretive Approach of* Baker v. Carr, 80 N.C. L. REV. 1103, 1142 (2002) (listing "majority rule, political participation, accountability, responsiveness, substantial equality, and interest representation" in a nonexhaustive list). In fact, Pildes admits that his prioritization of electoral competition purposely sets aside other important values for the sake of parsimony and judicial focus. *See* Pildes, *supra* note 8, at 690 (claiming the need to "reduce the welter of values behind democracy to a structure that will helpfully orient judicial oversight of politics around one set of questions"). As I argue above, however, the question is whether

competition is too narrow, failing to connect with normative commitments such as participation and deliberation. A focus on electoral competition may crowd out and affirmatively cut against fulfillment of these other important normative goals whose subordination may be questionable in particular or general instances. If other democratic values deserve service at all, then advocates of electoral competition must justify the tradeoffs against those values required by the promotion of electoral competition. There may be times when the goals of participation or deliberation should trump the promotion of electoral competition.

In fact, electoral competition itself depends on other important democratic interests, such as political participation and deliberation, to be meaningful. For example, if electoral competition is to safeguard responsiveness, as its proponents hope, electoral competition depends critically on at least a minimally informed and engaged citizenry capable of evaluating the basic contest for leadership. Although Richard Pildes argues that electoral competition is the "one structural aim that the history of American law and democracy suggests should be a particular focal point,"[65] it is difficult to imagine electoral competition succeeding unless the public participates, engages, and deliberates sufficiently to choose among the alternatives competing for votes.[66] Any theory of electoral competition must presume that individual citizens develop sensibilities about their interests, group identifications, and preferences over government policy. Although competition-oriented theorists may claim that democracy should be defined almost exclusively as a "competitive struggle for the people's vote and not discussion and decision among the people themselves,"[67] such a tight focus on electoral competition leaves much missing from its normative account of healthy democracy—namely, how people arrive at their political preferences that drive electoral competition in the first place and make electoral responsiveness meaningful.

Electoral competition instead is best understood as an instrumental means to deeper first-order ends. To assess whether electoral competition serves as an effective, perhaps even superior, substitute for majority-minority districts

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the costs of parsimony outweigh its benefits such that a competition-oriented approach fails to appreciate the interconnectedness of other democratic values with the instrumental goals of electoral competition.

65. Pildes, *supra* note 13, at 1607.

66. *See* Pildes, *supra* note 8, at 691-95 (acknowledging that "how politicians give information to voters and how voters inform one another . . . is critical to well-functioning competitive politics").

67. ALBERT WEALE, DEMOCRACY 98 (1999).

under the VRA, it is necessary to specify as a normative matter the ultimate outcomes sought. Pildes questions the continuing usefulness of safe majority-minority districting, consistent on these grounds with the Court's reasoning in *LULAC*,[68] because he believes that electoral competition may achieve the goal of representational equality for African Americans more effectively.[69] I argue instead that the normative aspiration for electoral competition or the VRA should not be simply to achieve representational equality for a designated racial community as a group. Electoral competition and the VRA, and perhaps the law of democracy as a general matter, should aspire to promote a vibrant process by which all citizens, irrespective of race, are consistently challenged by political choices about their political identity and sensibilities, which need not track racial lines.

The next Part introduces that deeper process of participation and political discourse as the process of "democratic contestation." Political leaders contest one another rhetorically and otherwise within the sociopolitical discourse to shape the political choices of the mass public. Electoral competition is generally desirable as an important catalyst for this process of democratic contestation and consonant with the goals of a theory of democratic contestation. Electoral competition helps generate democratic contestation and typically coincides with it, stirring up competitive debate. But the two overlapping notions of competition in politics—electoral competition on one hand and democratic contestation on the other hand—diverge in important ways. Electoral competition should be recognized as a second-order means of generating first-order democratic contestation that may need to give way when an emphasis on electoral competition actually inhibits democratic contestation, at least under exceptional circumstances.

In these important exceptions, a process of democratic contestation may best be promoted by an effective reduction in electoral competition in ways that have not been considered. By digging past the second-order mechanism of electoral competition to uncover its normative roots, a theory of democratic contestation identifies the core values underlying electoral competition and finds opportunities to foster those values in other ways that may, surprisingly, cut against electoral competition in specific contexts, such as racial polarization under the VRA.[70]

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68. Pildes departs from the *LULAC* decision, however, with respect to other concerns. *See, e.g.*, Pildes, *supra* note 14, at 1153-55 (objecting to the Court's concerns about essentialization).

69. Pildes, *supra* note 6, at 97-98.

70. *See infra* Part III.

II. DEMOCRATIC CONTESTATION

This Part introduces a theory of democratic contestation. It explains that healthy democratic politics flow from the basic process of democratic contestation—the fundamental political competition among leaders to influence the public's basic choices about politics and the ultimate political alignment of the polity. Through a process of democratic contestation, political leaders compete to shape, coordinate, and frame the public's understandings about electoral politics, public policy, and civic affairs. I develop a *theory* of democratic contestation that places central normative focus on the encouragement of a competitive, dynamic *process* of democratic contestation. A theory of democratic contestation presses beyond electoral competition and articulates a more specific account of how democratic politics operate and ultimately connect with normative ends.

A. A Theory of Democratic Contestation

The process of democratic contestation is the ongoing sociopolitical discourse among political leaders to influence how the mass public understands public affairs and develops its political associations and self-identifications. Through the process of democratic contestation,[71] rival leaders aggressively attempt to influence sociopolitical thought and culture, both within and without the electoral context, and direct public sensibilities about what societal cleavages are politically relevant and what concerns are worth contesting in politics. As leaders argue in favor of policy, ideological, and symbolic positions, they offer to the public a full set of choices, to be effectuated through elections and democratic politics, about what they care about, what they are willing to dedicate government toward, and what lines they are willing to draw across society in fighting for them. "American democracy in all its complexity," as Robert Bennett explains, "can be understood as an engine for producing a diverse menu of conversation about

71. Democratic contestation should not be confused with Philip Pettit's "contestatory democratization." Philip Pettit, *Republican Freedom and Contestatory Democratization*, *in* DEMOCRACY'S VALUE 163, 178-88 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999). Rather than referring to a political process of public deliberation, Pettit introduces contestatory democratization as an institutional regime under which government decisions may be challenged by individuals as inconsistent with a shared, nondiscriminating system of democratic government. *Id.* at 179-80.

public affairs, largely carried on in public."[72] The process of democratic contestation enables just such a public conversation.

A theory of democratic contestation identifies as its central goal the promotion of a robust process of democratic contestation. It emphasizes the function and incentives of leaders who challenge the public with important choices and thus drive participatory politics from the top down through a process of democratic contestation. Under a theory of democratic contestation, political divisions and alignment do not emerge automatically or inevitably from the individual preferences of the mass public. There are many potential majorities that may become politically relevant,[73] and the process of democratic contestation mediates which majority becomes politically dominant and which issues or political divisions define the political agenda.[74] Should we associate politically along socioeconomic class divisions, or instead along cultural disagreements? What role should religion and race play, if any? Should the next election be decided strictly along party lines, or is it an audit of the incumbent's performance? Will this election be a referendum on the hot issue of today, or should a new issue take its place?

Every new way of framing and constructing the political landscape, each new issue or alternative, activates a different majority of citizens and may shift the balance of power from one side to another. A loser along one dimension can reframe the debate, switch issues, and alter the political agenda to escape a losing position and activate a new, winning majority alignment.[75] Politics, on this view, can be conceptualized as how a political society decides to divide up. Political divisions may be relatively thin, grouping people according to their views regarding a single issue, or they may be thick, like partisanship, aggregating disagreement along multiple issues at once. All divisions, though, are undergirded by understandings about politics. At a deeper level, the process

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72. ROBERT W. BENNETT, TALKING IT THROUGH: PUZZLES OF AMERICAN DEMOCRACY 34 (2003).

73. *See* WILLIAM H. RIKER, THE STRATEGY OF RHETORIC: CAMPAIGNING FOR THE AMERICAN CONSTITUTION 131 (Randall L. Calvert, John Mueller & Rick K. Wilson eds., 1996) ("The practical consequence of the existence of a cycle of tastes is that there are many potential majorities."); *see also* Kenneth A. Shepsle, *Losers in Politics (and How They Sometimes Become Winners): William Riker's Heresthetic*, 1 PERSP. ON POL. 307 (2003) (discussing Riker's theory that losers may propel fresh or reframed issues into the political debate).

74. *See* E.E. SCHATTSCHNEIDER, THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA 66 (1960) (noting that "each new cleavage produces a new allocation of power").

75. A loser seeks, not necessarily to change the position of individual voters on a particular issue, but instead to change individual voters' minds about what particular issue they should focus on. *See id.* at 68 (arguing that "the definition of the alternatives is the supreme instrument of power" (emphasis omitted)).

of democratic contestation, and politics itself, is a rhetorical competition among various leaders of all stripes fighting to define those public understandings about politics (and thus the prevailing political alignment) in ways that promote their causes.[76] Electoral competition is valuable, not because it presents choices between candidates, but mainly because it motivates this larger, rich process of democratic contestation.

Through the process of democratic contestation, political leaders simplify and organize politics for public understanding in ways that help the mass public overcome the usual collective action problems that beset mass coordination. Individual citizens are consumers of political organization, not its originators, basically responding to the competing appeals of political leaders and choosing how to align. As explained further below,[77] without external leadership individual citizens may struggle to learn about politics, identify their self-interests, and find like-minded others in a diffuse, disconnected society. Lani Guinier and Gerald Torres's evocative thought experiment, in which a crowded amphitheater full of people attempts to self-govern,[78] helps illustrate a central dilemma of collective action. Only so much can be accomplished through individual interactions with nearby peers. A diffuse, disconnected public will struggle to communicate within itself and set a clear agenda, to decide even what to decide, much less determine a collective position on particular issues.[79] Among an amphitheater of people, in the absence of external coordination and agenda setting, how would any individual know what others in the crowd are thinking or how they plan to act? How would she communicate with enough of her like-minded peers to determine relevant lines

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76. *Cf.* Edward L. Rubin, *Public Choice, Phenomenology, and the Meaning of the Modern State: Keep the Bathwater, But Throw Out That Baby*, 87 CORNELL L. REV. 309, 337-40 (2002) (describing political discourse as a process through which people create and respond to competing political meanings).

77. *See infra* Section III.B.

78. LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY 183-88 (2002). To illustrate their views about territorial districting, Guinier and Torres describe a thought experiment in which citizens of "Old Verona" sit inside a large amphitheater watching a rabbi and bishop argue on stage below. Citizens sit too far away to hear the argument and are instead entitled to elect a group representative from their respective seating section who would observe the argument on their behalf, report back his findings, and lead a subsequent group discussion of the topics at issue on stage. Guinier and Torres hope that the thought experiment helps illustrate that territorial proximity is an arbitrary way to determine representation and conclude that allowing citizens to wander the amphitheater in search of their desired group discussion would be preferable. *Id.* at 187.

79. *See generally* AVINASH K. DIXIT & BARRY J. NALEBUFF, THINKING STRATEGICALLY (1991); THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT (1980).

of agreement and disagreement on which even to begin? Disconnected citizens struggle without external coordination, but when political leaders offer them a few simple choices, mass commonality emerges as roughly like-minded individuals answer with similar responses. Politics are driven less by the bottom-up interests of individual citizens than by the strategic, top-down agenda setting by leaders, constrained by competitive demands, to coordinate and channel individual citizens into their preferred directions.[80]

Democratic theory valuing political participation and democratic deliberation has tended to prize bottom-up orientations toward mass politics. As the next Section explains in greater detail, the hope of bottom-up coordination and sophisticated deliberation by average citizens, unequipped for either, has always been unrealistic,[81] leaving such approaches to democratic theory vulnerable to criticism by advocates of electoral competition.[82] A theory of democratic contestation disclaims the highest aspirations that average citizens typically should serve as "first-order deliberators on policy issues"[83] or that "every member of the community . . . takes part, actively and responsibly."[84] A theory of democratic contestation instead fully recognizes the centrality of top-down leadership in the political process. Nor does a theory of democratic contestation insist on a political process that trades exclusively in neutral, public-regarding justification, in place of sociopolitical self-interest or exercise of leadership power.[85] The promotion of civic virtue is not the primary aim. Although a robust process of democratic contestation would incentivize leaders to generate public-regarding appeals that attract broader support, a

80. *See* KEY, *supra* note 22, at 245-95 (emphasizing the centrality of political leadership and organization); SCHATTSCHNEIDER, *supra* note 74, at 35-60 (describing politics as organization and counterorganization of the public by competing leaders); *id.* at 138 ("The emphasis is on the role of leadership and organization in a democracy, not on the spontaneous generation of something at the grass roots.").

81. *See infra* Section III.B.

82. *See, e.g.*, POSNER, *supra* note 8, at 158-64 (castigating participatory and deliberative approaches as unrealistic, elitist, and invariably disappointed by real politics); JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 250-68 (3d ed. 1950) (criticizing the classical doctrine of democracy as hopelessly unrealistic).

83. Pildes, *supra* note 8, at 693 (using the term to criticize theories of deliberative democracy).

84. SCHUMPETER, *supra* note 82, at 250.

85. *See* AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 101 (1996) ("In a deliberative democracy, then, the principle of publicity requires that government adopt only those policies for which officials and citizens give public justifications."); JOHN RAWLS, POLITICAL LIBERALISM 241-54 (expanded ed. 2005) (requiring "public reason" to be the centerpiece of the political process); Henry S. Richardson, *Democratic Intentions*, *in* DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS 349, 376 (James Bohman & William Rehg eds., 1997) (requiring commitment to the public good).

theory of democratic contestation does not exclude or otherwise discredit the normal operation of leadership bargaining and majoritarian politics. A theory of democratic contestation realistically acknowledges the basic necessity of leadership competition as the catalyst for mass politics and the limits of bottom-up mobilization, but it does so without also abandoning all appreciation of participatory and deliberative values.[86]

Indeed, a theory of democratic contestation celebrates and finds significant value in the individual engagement of citizens with politics enabled by the process of democratic contestation.[87] Personal engagement by individual citizens with this process of democratic contestation confers to those individuals significant constitutive value that transcends the simple instrumental worth of voting and participation. Active political participation, as described by Hannah Arendt, Frank Michelman, and others, contributes directly to personal self-realization.[88] Individual participation helps citizens forge their political identity and develop a personal sense of social and moral agency through engagement with politics. Moreover, direct engagement with political discourse over the public good fosters a sense of public virtue and public spiritedness, as well as bonding the individual citizen with the collective welfare of the political community.[89] A robust process of democratic contestation encourages participation and spreads these benefits of political engagement throughout the mass public.

A theory of democratic contestation avoids the mistake of ignoring the value of political engagement when it falls short of the lofty ideal of much democratic theory. Citizens derive constitutive value by considering the admittedly simplified choices regarding the common good offered by the

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86. *See, e.g.*, POSNER, *supra* note 8, at 144 (arguing that theorists of competitive democracy, like himself, "don't believe politics has intrinsic value or that political activity is ennobling").

87. This emphasis on individual participation and engagement distinguishes a theory of democratic contestation from deliberative democracy and civic republicanism, which tend to value elite deliberation as an end in itself rather than as a catalyst for grassroots participation and engagement. *See, e.g.*, Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711, 747-55 (2001) (contrasting a deliberative democratic or civic republican emphasis on the quality of deliberation and a participatory emphasis on citizen involvement).

88. *See generally* HANNAH ARENDT, BETWEEN PAST AND FUTURE (Penguin Books 1968) (1954); BENJAMIN R. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE (1984); JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT (George Routledge & Aons, Ltd. 1928) (1861); Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLA. L. REV. 443 (1989).

89. *See generally* MILL, *supra* note 88; CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 22-34 (1970); ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 336-63 (2000); JEAN-JACQUES ROUSSEAU, OF THE SOCIAL CONTRACT (Donald A. Cress trans., Hackett Publ'g Co. 1987) (1762).

deliberative process of democratic contestation. Even a limited form of political engagement, in response to democratic contestation, promotes the development of individual sensibilities about the public good and government's proper role in achieving it. Political engagement enables citizens to weigh for themselves where they stand on an array of policy, ideological, and symbolic questions, framed by leaders, and in so doing, cultivate their political self-identity—for instance, as a conservative, Democrat, environmentalist, or patriot, among many overlapping possibilities. This process of engagement may attract citizens into deeper political interest and participation, within and without the electoral context, and foster political efficacy, legitimacy, and investment in the healthy operation of American democracy. Familiar forms of engagement, framed and simplified by political leadership, should be valued for what they provide, not regretted for what they are not. A theory of democratic contestation finds nothing inconsistent between this appreciation of the individual self-constitutive value of political participation on one hand and a leader-centered view of how mass politics operate through a process of democratic contestation on the other hand.

Instead, a theory of democratic contestation holds that the process of democratic contestation is itself a necessary element of participatory and deliberative politics as they actually operate. The process of democratic contestation permits individuals, themselves only intermittently interested in public affairs and otherwise occupied by everyday life, to participate meaningfully in just such self-constitutive ways. The competitive pressures of democratic contestation require leaders to reach out to the mass public at an accessible level such that individuals themselves need not engage directly in sophisticated political deliberation for meaningful political engagement.[90] The process of democratic contestation generates a political discourse in which average citizens are presented with manageable choices about the direction, tenor, and substance of politics, simplifying and ordering politics for individuals who otherwise would remain rationally ignorant and hopelessly disconnected. As the process of democratic contestation unfolds, it invites the public into political engagement and deliberation on terms that it appreciates and invites citizens constantly to rethink their personal commitments and understandings.[91] Public deliberation occurs usefully, boiled down to a limited

90. *See* Dennis F. Thompson, *The Role of Theorists and Citizens in* Just Elections: *A Response to Professors Cain, Garrett, and Sabl*, 4 ELECTION L.J. 153, 157 (2005) (disclaiming hopes that "all citizens [will] 'fly to the assembly' to talk all day" and urging "modest aims" in democratic deliberation).

91. *See* ROGER W. COBB & CHARLES D. ELDER, PARTICIPATION IN AMERICAN POLITICS: THE DYNAMICS OF AGENDA-BUILDING 43-62, 101-24 (1972) (describing a dynamic process in

set of core issues, with a limited set of alternatives emerging from leadership competition, for the public to weigh.[92] It is, basically, the method by which American mass democracy operates.[93] A theory of democratic contestation offers a realistic model of participatory politics that admits the obvious limitations inherent in mass politics, but nonetheless embraces the real opportunities for political engagement and deliberation available in spite of them.[94]

Democratic contestation thus connects the constitutive value of individual self-development at the micro level to the aggregative value of electoral competition at the macro level.[95] Through the process of democratic contestation, people decide who they are as political creatures, align under political leadership, and constitute the collective political landscape in response to leadership. Out of that process of individual empowerment, individual

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which parties expand the scope of sociopolitical conflict and draw in the larger public); SCHATTSCHNEIDER, *supra* note 74, at 3-17 (describing politics as a contest over the socialization of conflict in which losers attempt to call in outside help by expanding conflict).

92. *See, e.g.*, R. MICHAEL ALVAREZ & JOHN BREHM, HARD CHOICES, EASY ANSWERS: VALUES, INFORMATION, AND AMERICAN PUBLIC OPINION 216-24 (2002) (describing how people reason sensibly about difficult political questions by drawing upon basic value predispositions); BENJAMIN I. PAGE & ROBERT Y. SHAPIRO, THE RATIONAL PUBLIC: FIFTY YEARS OF TRENDS IN AMERICANS' POLICY PREFERENCES 383-98 (1992) (concluding that people deliberate rationally at a general level and respond sensibly to information on broad questions of public affairs); SAMUEL L. POPKIN, THE REASONING VOTER: COMMUNICATION AND PERSUASION IN PRESIDENTIAL CAMPAIGN (2d ed. 1994) (describing the accurate use of basic information by people to reach sensible conclusions about politicians and policy preferences); JAMES A. STIMSON, TIDES OF CONSENT: HOW PUBLIC OPINION SHAPES AMERICAN POLITICS 31-57 (2004) (describing the responsiveness of the mass public and how the public modulates its preferences to current political events); Edward G. Carmines & James A. Stimson, *The Two Faces of Issue Voting*, 74 AM. POL. SCI. REV. 78 (1980) (distinguishing public reasoning on "easy" and "hard" issues).

93. As E.E. Schattschneider explained succinctly, the people are a sovereign that "can speak only when spoken to," and "whose vocabulary is limited to two words, 'Yes' and 'No.'" E.E. SCHATTSCHNEIDER, PARTY GOVERNMENT 52 (1942); *see also* V.O. KEY, JR., POLITICS, PARTIES, AND PRESSURE GROUPS 247 (1942) ("[A] mass of people cannot act as a unit; a small inner circle has to narrow the choices for public office and to formulate questions of public policy.").

94. *See* SCHATTSCHNEIDER, *supra* note 74, at 135 ("Democracy was made for the people, not the people for democracy."); Kang, *supra* note 17, at 1163 (arguing that models of participatory democracy should "accept how people think about politics, rather than denying and hoping to change how people think about politics").

95. *See* POSNER, *supra* note 8, at 130-57 (contrasting Concept I and Concept II theorists along similar lines); SCHUMPETER, *supra* note 82, at 250-83 (contrasting what he calls the classical doctrine of democracy with his theory of competitive leadership); Gerken, *supra* note 38, at 748-51 (contrasting participatory and elite-centered views of democracy).

choices – in aggregate – form collective understandings about politics, which in turn form the distribution of political preferences across society. Democratic contestation makes possible the political self-constitution of individuals, and in the process makes possible the political self-constitution of the sociopolitical community as a whole. By connecting the mass public with leadership politics in this way, the process of democratic contestation helps construct the backdrop of political understandings against which elections and electoral competition take place. Democratic contestation, therefore, invests elections with their substantive meaning and legitimacy. The process of democratic contestation, of which elections and campaigns are only one part, gives rise to a mass political discourse that enables individuals to identify their sociopolitical interests, develop a political self-identity, and then hold leaders accountable to their sociopolitical interests through elections.

An odd feature of criticism against participatory approaches to democracy is an assumption that modern political rhetoric is "largely content-free"[96] and citizens know their ideological interests almost detached from the context of contemporary political discourse.[97] Under this view, political interests and preferences come first. Political deliberation is nearly unnecessary, because voters, as consumers, instinctively know what they want to buy. However, political tastes are not defined exogenously. Public engagement with the process of democratic contestation is necessary for citizens' determinations of their political interests, which in turn underpin the meaningfulness of electoral competition. To know how to associate ideologically, citizens must engage and understand the alternatives in the political world and the ever-evolving political meaning attached to them. Even though the level of sophistication falls short of the academic ideal, there is always an ongoing, familiar political discourse, both within and outside the context of campaigns and elections, by which citizens daily receive political information, are effectively presented with ideological choices, and respond with determinations about who they are politically and how they feel about politics. Electoral competition is valuable not simply because it helps ensure government responsiveness to these determinations, but more importantly because it generally stirs up the process of democratic contestation that generates these determinations in the first place.

A theory of democratic contestation brings fresh perspective and conceptual clarity needed to advance familiar debates. For instance, commentators have

96. POSNER, *supra* note 8, at 153.

97. *See, e.g.*, *id.* at 168-69 ("People have a pretty good idea of their own interests, or at least a better idea than officials do.").

debated the relative attractiveness of different forms of electoral competition and the tradeoffs among them.[98] However, these debates almost uniformly have failed to dig deeper to the common currency underlying the democratic value of all forms of electoral competition. This failure undermines attempts to compare and contrast different forms of electoral competition because of the resulting inability to measure electoral competition by its ultimate standards for success. Perhaps it is preferable to have more interparty competition in general elections rather than more intraparty competition in primary elections, to the degree that there is a tradeoff. But a close focus on electoral competition as an end in itself falters because it does not capture the more deeply rooted common value in all forms of political competition. Only once the process of democratic contestation is identified as the baseline value underlying political competition does it become possible to compare different forms of electoral competition with respect to this common currency, and only then can we successfully compare the relative merits, for instance, of competitive primary and general elections.

A theory of democratic contestation contemplates political competition on a more fundamental level than electoral competition among candidates for office. *Electoral* competition, in this sense, is but a single form of *political* competition, which democratic contestation encourages in many manifestations. Focused on the goal of generating a lively public discourse, a theory of democratic contestation admits and encourages political competition at multiple levels in dynamic combination. The process of democratic contestation, for instance, may be served not only by intradistrict competition between partisan candidates at election time, but also legislative competition between the major parties (and perhaps minor parties as well) during the rest of the year.[99] As a result, in the context of apportionment, the process of democratic contestation may be advanced by some degree of safe districts on both sides of the aisle, in which the parties have security in office, in place of fierce electoral

98. *See, e.g.*, Elizabeth Garrett, *Hybrid Democracy*, 73 GEO. WASH. L. REV. 1096 (2005) (discussing the competitive interaction between direct and representative democracy); Gerken, *supra* note 18 (discussing the relative merits of competition across and within institutions); Issacharoff & Pildes, *supra* note 8 (arguing in favor of intradistrict partisan competition); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312 (2006) (arguing in favor of partisan competition as a substitute for institutional rivalry between branches of government); Persily, *supra* note 33, at 661-62 (arguing in favor of competitive primary elections and interdistrict competition).

99. *See, e.g.*, Chad Flanders, *Deliberative Dilemmas: A Critique of* Deliberation Day *from the Perspective of Election Law*, 23 J.L. & POL. 147, 164-65 (2007) (discussing potential tradeoffs between deliberation at the legislative level and deliberation at the citizen level).

competition.[100] Incumbent security helps guarantee that both parties have secure bases in the legislature and insulates them from severe swings in partisan balance in the legislature.[101] Incumbent security also encourages the development of party leadership who, when relieved of reelection worries, may foster stronger interparty legislative competition that provides an optimal blend of electoral and legislative contestation in ways that a myopic focus on electoral competition prohibits or obscures.[102]

A theory of democratic contestation therefore extends beyond a narrow focus on elections to a broader consideration of ongoing legislative and pluralistic politics. The process of democratic contestation should occur continually between elections, within and across parties, as the government decides public policy and the public decides how to define itself and the direction of the state. There is a vast political science literature detailing the degree to which leadership and public opinion constantly interact in a process of deliberation that occurs perhaps in the extended shadow of electoral considerations, but often distant from them in ways that complicate a narrow focus on electoral competition.[103] Interest groups jostle for public influence; legislatures, agencies, and other institutions deliberate over public policy; and leaders of various stripes push for substantive legislation and government

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100. *See* Kang, *supra* note 40, at 459-61 (describing the benefits of "defensive gerrymandering" to protect incumbents).

101. *See* Nathaniel Persily, Thad Kousser & Patrick Egan, *The Complicated Impact of One Person, One Vote on Political Competition and Representation*, 80 N.C. L. REV. 1299, 1314-17 (2002).

102. *Cf.* Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1124-26 (2005) (contrasting values of different forms of intra- and interinstitutional diversity). What is more, even safe one-party districts that exhibit almost no interparty competition, like many majority-minority districts protected under the VRA, may be home to deep ideological democratic contestation as valuable as that seen in highly competitive two-party districts.

103. *See generally* R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION (1990) (describing the interaction of coalition leaders, politicians, and the public in legislative lawmaking); FRANK R. BAUMGARTNER & BETH L. LEECH, BASIC INTERESTS: THE IMPORTANCE OF GROUPS IN POLITICS AND IN POLITICAL SCIENCE 37-38 (1998) (explaining that "much of the important work in lobbying is in setting the agenda, in defining the alternatives for decision makers, in gathering evidence, and in convincing others that certain types of evidence are germane to the decision at hand"); R. SHEP MELNICK, BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS (1994) (describing interest group activism in the courts); Julie L. Andsager, *How Interest Groups Attempt To Shape Public Opinion with Competing News Frames*, 77 JOURNALISM & MASS COMM. Q. 577 (2000) (discussing efforts by interest groups to influence news coverage); Elisabeth R. Gerber & Justin H. Phillips, *Development Ballot Measures, Interest Group Endorsements, and the Political Geography of Growth Preferences*, 47 AM. J. POL. SCI. 625 (2003) (examining the role of interest groups in development ballot initiatives); Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339, 351-63 (1988) (discussing interest group activism in the regulatory process).

action across a wide variety of settings, from media outlets, to courts, to administrative agencies, to direct democracy. Elections are a central institution of democratic politics, providing critical incentives for leadership attentiveness to public concerns and mass preferences,[104] but it would be a mistake to concentrate too narrowly on the interparty competitiveness of periodic elections as the sole gauge of democratic health. The process of democratic contestation is punctuated by elections, but not defined completely by them.[105]

A theory of democratic contestation offers a new approach to the basic problems of the law of democracy. I do not intend here to articulate a comprehensive survey of the law of democracy, but instead to introduce the primary value of democratic contestation as a core aspiration and to clarify thought about race and the VRA. The normative ends underlying a theory of democratic contestation are not necessarily to ensure group representation, but instead to ensure a dynamic environment in which leaders vie to present competing proposals about what politics should be about and how groups should be organized. Interest groups themselves, their demands for representation notwithstanding, are endogenous to the political process. Politics is not simply about whether groups get represented and how much representation they get, but about what group alignments emerge and become politically relevant in the first place.

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104. As Dennis Thompson puts it nicely, "[e]lections can occur without democracy, but democracy cannot endure without elections." DENNIS F. THOMPSON, JUST ELECTIONS: CREATING A FAIR ELECTORAL PROCESS IN THE UNITED STATES 1 (2002).

105. To this point, commentators argue that the law of free expression under the First Amendment, even in nonelectoral contexts, should be motivated by normative commitments to competitive discourse that are somewhat akin to democratic contestation. Most obviously, the notion that the First Amendment protects and cultivates a "marketplace of ideas" pervades First Amendment law and commentary. *See, e.g.*, Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . ."); THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 7-8 (1963); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 2-3 ("Scholars and jurists frequently have used the image of a 'marketplace of ideas' to explain and justify the first amendment freedoms of speech and press."). The marketplace model has influenced campaign finance law, but nothing like the theory of democratic contestation has been applied to the VRA as here, or to other areas of election law, such as gerrymandering or direct democracy, where it might be equally appropriate. It is worth noting, however, that Heather Gerken suggests that Justice Kennedy may be linking the First Amendment to race and redistricting along parallel lines, but the theory underlying this jurisprudence still appears strikingly undeveloped. *See* Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104 (2007).

B. Beyond Pluralism: The Challenges of Collective Action and the Origins of Mass Politics

The basic view of mass politics underpinning a theory of democratic contestation disputes the oversimplified assumptions of American pluralist theory and makes better sense of how mass politics operate in practice. A theory of democratic contestation does not assume a political world in which the public divides easily into well-identified groups of interest. Instead, as this Section details, it assumes that the challenges of collective action, in the absence of external coordination, tend to frustrate political alignment and deliberative politics. Individuals know little about politics, have little incentive to learn, and face high costs of information even if they try to learn.[106] Without leadership, it will be difficult to identify the most promising grounds for political agreement and then equally difficult to coordinate, in a vast, disorganized political landscape, with fellow citizens who share one's views. Even well-informed individuals with well-specified political preferences may struggle to coordinate with many others. It requires a process of democratic contestation to offer the necessary leadership and structure to the dynamic chaos of mass politics.

The Court's general approach to the VRA, however, tracks the basic assumptions of pluralist theory and inherits the fundamental pluralist oversimplication that people identify and coordinate along politically salient divisions much more easily than they actually do.[107] While pluralist theory does not simply assume a cohesive majority that agrees on all questions, it posits the construction of democratic majorities on a case-by-case basis, for every question, issue, and election. Robert Dahl depicts a polyarchic world in which "minorities rule," as groups combine to constitute temporary majorities in a fluid process of pluralist competition and negotiation.[108] The proper functioning of pluralist politics where "minorities rule" presumes that the public will be able to divide and coordinate along familiar political divisions into particular minorities. Although individuals can accomplish little by

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106. *See infra* notes 122-124.

107. *See, e.g.*, ARTHUR F. BENTLEY, THE PROCESS OF GOVERNMENT: A STUDY OF SOCIAL PRESSURES 208-64 (1949) (assuming that group interests naturally manifest themselves in pressure-group representation); DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION 57 (1953) (explaining simply that the "proliferation of associations is inescapable" as the need arises); *see also* MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 48-51 (1965) (criticizing pluralist theorists for failing to question why and how groups organize).

108. *See* ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 133 (1956).

themselves, they naturally band together with like-minded others and aggregate into groups along salient axes of political difference.

As such, pluralist theory posits that the basic form of political competition occurs among interest groups, with important interests in society vying against one another in the political system for attention.[109] Pluralist theory presupposes a society divided into identifiable and politically salient groups, each pressing its competing claims in the democratic system.[110] In the same spirit, the VRA extends group-based guarantees of fair treatment in the pluralist competition.[111] Section 2 of the VRA promises racial minorities the equal opportunity to "elect representatives of their choice" and to "participate in the political process."[112] The Court soon reasoned that these guarantees require not merely that the individual have the right to vote and that the vote be equally weighted, but the fair treatment of the group to which the individual belongs.[113] As a consequence, the VRA moved beyond the atomistic act of voting and guaranteed a fair chance of winning a preferred outcome.[114] The Court took on the task, under the VRA, of defining group-based vote

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109. *See generally* ROBERT A. DAHL, DILEMMAS OF PLURALIST DEMOCRACY: AUTONOMY VS. CONTROL (1982); ROBERT A. DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT (1967); KEY, *supra* note 22; TRUMAN, *supra* note 107.

110. *See, e.g.*, MELISSA S. WILLIAMS, VOICE, TRUST, AND MEMORY: MARGINALIZED GROUPS AND THE FAILINGS OF LIBERAL REPRESENTATION 179 (1998) ("Individuals secure the representation of their interests in public policy decisions by organizing pressure groups to influence policy makers."); Cass Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1542 (1988) (describing the pluralist vision of politics as a "struggle among interest groups for scarce social resources").

111. *See, e.g.*, Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1412-13 (1983); Samuel Issacharoff, *Groups and the Right To Vote*, 44 EMORY L.J. 869, 884-86 (1995).

112. 42 U.S.C. § 1973 (2000).

113. *See, e.g.*, Davis v. Bandemer, 478 U.S. 109, 167 (1986) (Powell, J., concurring in part and dissenting in part) ("The concept of 'representation' necessarily applies to groups: groups of voters elect representatives, individual voters do not."); Issacharoff, *supra* note 111, at 883-84 ("[A]ny sophisticated right to genuinely meaningful electoral participation must be evaluated and measured as a group right, that of groups of voters seeking the outcomes promised to them through the electoral system.").

114. *See also* Issacharoff, *supra* note 111, at 883 ("To be effective, a voter's ballot must stand a meaningful chance of effective aggregation with those of like-minded voters to claim a just share of electoral results."). *See generally* Gerken, *supra* note 18 (explaining and defining group entitlements under the VRA).

dilution and weighing competing claims of different groups as a referee of the pluralist process.[115]

For this reason, courts and commentators have shoehorned the VRA into the larger vision of American pluralism and a "remedial theory of fair representation for all groups."[116] Pluralist theory invests the existing set of interest groups with implicit legitimacy in the democratic process, premised on a faith that groups manifest significant interests in society that demand and deserve representation. If relevant interest groups are properly represented in the pluralist system, the government will accurately reflect an amalgam of public interest to which every group contributes a piece.[117] Courts and commentators thus have focused heavily on the normative question of how to maintain a pluralistic competitive forum for political groups to fight for their fair share of political representation.[118]

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115. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 73-104 (1980) (describing the judiciary as a referee within the political process).

116. Lani Guinier, *[E]racing Democracy: The Voting Rights Cases*, 108 HARV. L. REV. 109, 137 (1994). Justice Stevens, for instance, argues for just such a comprehensive legal conception of political representation that encompasses all political groups, from racial minorities to political parties. *See generally* Pamela S. Karlan, Cousins' *Kin: Justice Stevens and Voting Rights*, 27 RUTGERS L.J. 521 (1996). In short, Justice Stevens proposes a uniform doctrinal approach to questions of group-based vote dilution that focuses on the dilutive intent of the government and looks to deviation from usual practice to discern such intent. *See* Vieth v. Jubelirer, 541 U.S. 267, 335-37 (2004) (Stevens, J., dissenting); Karcher v. Daggett, 462 U.S. 725, 753-55 (1983) (Stevens, J., concurring); City of Mobile v. Bolden, 446 U.S. 55, 90-91 (1980) (Stevens, J., concurring); *see also* Presley v. Etowah County Comm'n, 502 U.S. 491, 510-26 (1992) (Stevens, J., dissenting) (applying in practice a similar test); Cousins v. City Council, 466 F.2d 830, 859 (7th Cir. 1972) (Stevens, J., dissenting) (proposing a similar test).

117. *See, e.g.*, ELY, *supra* note 115, at 152 ("[I]t is of the essence of democracy to allow the various persons and groups that make up our society to decide which others they wish to combine with in shaping legislation."); Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CAL. L. REV. 1201, 1218 (1996) ("[U]nless black voters are able to elect candidates of their choice, their particular bundle of interests, for which race serves as a shorthand, may be undersatisfied relative to the number of individuals asserting these interests and the intensities of their preferences.").

118. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 300 (1962) (Frankfurter, J., dissenting) (arguing that election law requires courts "to choose among competing bases of representation—ultimately, really, among competing theories of political philosophy"); HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 167 (1967) (contending that any concept of representation rests on one's "metapolitics—his broad conception of human nature, human society, and political life"); Keith J. Bybee, *Democratic Theory and Race-Conscious Redistricting: The Supreme Court Constructs the American Voter*, *in* THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS 219, 222 (Howard Gillman & Cornell Clayton eds., 1999) ("Since representation can be interpreted in a wide range of ways, the *kind* of political community to be forged by representative government is itself

The fundamental complication with pluralist theory, however, is that the process by which individuals adopt political identification, and by which political groups form, is highly contingent and indeterminate. The pluralist focus on groups and how they are represented, rather than on how they form in the first place, tends to put the cart before the horse. Far more consistent with democratic contestation than pluralist theory, the lessons of public choice theory demonstrate that the political division of the public into orderly groupings is far from a prepolitical or well-defined ideological process.[119] A theory of democratic contestation shifts the focus from the legal treatment of extant groups to how those groups, among the multitude of possibilities, emerge as politically relevant in the first place. This shift in focus calls attention to how a process of democratic contestation solves the inherent challenges to collective action in mass politics.

Bottom-up coordination among likeminded citizens simply does not occur spontaneously within a mass public that is diffuse, disorganized, and heterogeneous. In everyday politics, before individual citizens are able to coordinate effectively in a pluralistic fashion, they need to overcome daunting obstacles to collective action. First, average individual citizens tend to be "rationally ignorant" about politics in the absence of political education through a process of democratic contestation.[120] The unsubsidized costs of acquiring reliable, current political information are high in the face of the many more pressing demands of everyday life. Without leadership help, the average citizen struggles to identify the critical issues of the day, much less develop a position on them and decide where she aligns with fellow citizens.[121]

In the individual calculus of a typical voter, the instrumental benefit reaped from personal investment, as an individual citizen with a single vote, is quite small relative to the costs.[122] Of course, many citizens choose to get involved in

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open to debate. The result is that representational debates are always anchored in disputes over the nature of the political community.").

119. *See* RUSSELL HARDIN, COLLECTIVE ACTION (1982); WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM (1982).

120. *See* ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 207-37 (1957); SCHUMPETER, *supra* note 82, at 262.

121. *See generally* MICHAEL X. DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS 213-15 (1996); PAGE & SHAPIRO, *supra* note 92, at 9-15.

122. *See, e.g.*, BRIAN BARRY, SOCIOLOGISTS, ECONOMISTS AND DEMOCRACY 14-23 (1970) (discussing the "infinitesimal" instrumental value of voting); DONALD P. GREEN & IAN SHAPIRO, PATHOLOGIES OF RATIONAL CHOICE THEORY 47-71 (1994); Andrew Gelman, Gary King & W. John Boscardin, *Estimating the Probability of Events That Have Never Occurred: When Is Your Vote Decisive?*, 93 J. AM. STAT. ASS'N 1, 2 (1998) (noting the tiny direct

politics out of personal interest, ambition, or a sense of civic duty. Most citizens, however, are rationally ignorant of the most basic facts about public affairs. Given the extraordinarily small chances that any single vote will be decisive in an election, the average citizen chooses rationally to address her everyday concerns first and decides that it is simply not worth the necessary time and resources to become politically well-informed.[123] Quite understandably, she remains a "civic slacker," deficient in information, interest, and sophistication about public affairs.[124] While capable of responding sensibly to guidance from trusted political leaders, the average voter needs information and direction from a process of democratic contestation to be brought back within the political debate. As leaders compete for the hearts and minds of citizens in their rhetorical campaigning, they provide political information at low cost to the public on terms the public can understand and afford.

Second, the indeterminacy of pluralist politics can be overwhelming without meaningful simplification by a process of democratic contestation. Pluralist theory presupposes the division of citizens into groups, or factions, "united and actuated by some common impulse of passion, or of interest."[125] However, there is no intuitive prepolitical certainty about the correct lines of political division.[126] The public can potentially divide into a manifold array of politically relevant groups, because the available axes for political agreement and disagreement are virtually unlimited. Larry Alexander explains that "[a]s voters we are Democrats and Republicans, blacks and whites, males and females. But we are also hawks and doves, redistributionists and laissez-faire

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personal value gained from voting given the exceptionally low probability that one's vote will be decisive).

123. *See* Kang, *supra* note 17, at 1153; *cf.* Gary S. Becker, *A Theory of the Allocation of Time*, 75 ECON. J. 493, 495-98 (1965) (discussing a household production function in which individuals allocate time across various needs and demands).

124. Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 903 (1998).

125. THE FEDERALIST NO. 10, at 46 (James Madison) (Clinton Rossiter ed., 1961).

126. *See* MICHAEL C. DAWSON, BEHIND THE MULE: RACE AND CLASS IN AFRICAN-AMERICAN POLITICS 12 (1994) ("In advanced industrial societies, however, citizens have multiple identities, as the pluralists have been pointing out for much of the second half of the twentieth century. Further, many scholars have pointed out that preferences are not exogenous – they do not fall like manna from the sky. Preferences are clearly endogenous."); MARTHA MINOW, NOT ONLY FOR MYSELF 20 (1997) (referring to the "complex interactions among people, historical settings, and events" inherent in group identification). Martha Minow concludes that "[e]ach of us is a unique member of the sets of endless groupings that touch us." *Id.* at 39. In politics, "for strategic purposes we may choose to affiliate along one or a few lines of group membership, but these lines may shift as our strategies and goals change." *Id.*

advocates. We are atheist, agnostic, Catholic, Protestant, Jewish, Muslim, and Buddhist, all of various stripes. We are trade unionists and managers, Main Streeters and cosmopoles."[127] People are similar and different in so many significant ways that it is difficult for a common consensus to coalesce about even which similarities and differences are the most important ones for political identification.[128] This contingency within complex society both gives leaders opportunity and necessitates leaders to order mass politics.

Put simply, political division is endogenous to the political process. How people divide politically is itself a product of politics. Political alignments are not the inevitable bottom-up product of individuals coming together as an organic consequence of shared interests and ideology.[129] Subgroups of people share all types of differences and similarities that could be understood as politically relevant, but the process by which certain differences and similarities emerge as the most important and relevant lines of political differentiation is not obvious. Intuitively important demographic factors, such as gender, religion, and education, have far less impact on people's politics than one might expect.[130] What is more, the potential lines of political differentiation are in constant flux, as the politics that they bear continually changes and redefines the possibilities.[131] Democratic contestation is the process by which leaders help guide the public through the drawing and constant revision of these lines.

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127. Larry Alexander, *Lost in the Political Thicket*, 41 FLA. L. REV. 563, 575 (1989); *see also* Akhil Reed Amar, *Lottery Voting: A Thought Experiment*, 1995 U. CHI. LEGAL F. 193, 203 ("You're never going to be able to cast a vote for someone who looks like you along every dimension – if you are, say, a conservative black Catholic woman, you might have to decide which of those attributes is the most essential part of your *political* identity."); Karlan & Levinson, *supra* note 117, at 1204 (noting that the "list of potential criteria for creating voting groups is exceedingly long"). Political alignment necessitates this sort of choice, disaggregating and weighing the many components of personal identity.

128. *See, e.g.*, Jon Gertner, *The Very, Very Personal Is the Political*, N.Y. TIMES, Feb. 15, 2004, § 6 (Magazine), at 42, 46-47 ("To look at this country the way direct marketers might, through the prism of data, is to see an America of almost uncountable religious and ethnic segmentations, or a country of homeowners, parents, college graduates, high-school dropouts, entrepreneurs, fishermen, regular voters, absentee voters and irregular voters.").

129. *See* Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1074 (1980) ("One cannot speak of 'groups' as though society were objectively subdivided along lines that are just there to be discerned.").

130. *See* DONALD GREEN, BRADLEY PALMQUIST & ERIC SCHICKLER, PARTISAN HEARTS AND MINDS: POLITICAL PARTIES AND THE SOCIAL IDENTITIES OF VOTERS 3 (2002) ("Of the seemingly 'fundamental' social identities, only race is a powerful predictor of electoral choice.").

131. *See, e.g.*, SIDNEY VERBA, KAY LEHMAN SCHLOZMAN & HENRY E. BRADY, VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS 170 (1995) (observing that "what constitutes a politically relevant characteristic changes with new times and new circumstances").

Third, mass politics requires political organization that a process of democratic contestation must provide. Even if everyone agrees about the most important basis for political division, everyone also must know that everyone else shares the same thoughts and then act with them in a coordinated way.[132] Political mobilization, in short, requires large-scale coordination. A particular subset of people must perceive themselves as a group and also know to act upon that shared sense all at once in coordination with their cohort. This shared sense of group commonality comes spontaneously without cost and external direction only on rare occasions.

Instead, for mass coordination to emerge, a leader must bear the costs of organization and focus the attention of a diffuse, disconnected collection of individuals.[133] A leader must work to communicate across the cohort and convince it to act together in coordinated fashion. Otherwise, the presence of many disconnected people with diverse, undeveloped positions along so many dimensions makes spontaneous coordination decidedly improbable.[134] Similarly situated citizens may act in disparate ways that collectively lead to the least preferred outcome, because they do not see, or at least do not prioritize, the commonalities among them. They may fall victim to preference cycling in which even those with similar preferences may struggle to achieve lasting agreement.[135]

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132. *See* JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 77 (Adrienne Koch ed., Ohio Univ. Press 1966) (1840) (remarks of James Madison) (noting that group formation is complicated when there are "so great a number of interests [and] parties, that in the [first] place a majority will not be likely at the same moment to . . . be apt to unite in the pursuit of it"); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 213 (1976) ("It is not enough for the successful group to recognize its interests; it must organize to translate this interest into support for the politician who will implement it.").

133. *See* HARDIN, *supra* note 119, at 16-37 (discussing the difficulty of collective action and central importance of "political entrepreneurs" in group coordination); JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES 129-30, 188-93 (1984) (describing the role of "policy entrepreneurs" in promoting issues throughout the policy-making process); Robert H. Salisbury, *An Exchange Theory of Interest Groups*, 13 MIDWEST J. POL. SCI. 1, 11-15 (1969) (explaining the role of "entrepreneurs/organizers" in investing up-front capital necessary to overcome problems of collective action).

134. Absent external coordination from democratic contestation, they will remain disorganized, as what Mancur Olson describes as a "latent group." OLSON, *supra* note 107, at 48-51.

135. *See generally* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 63-83 (2d ed. 1963); DUNCAN BLACK, THE THEORY OF COMMITTEES AND ELECTIONS 46-51 (1958). Even worse, the difficulties of coordination can preclude collective action even when a desire for collective action is overwhelmingly and desperately shared by a vast majority. A dramatic example is how the lack of information and coordination delayed the fall of communism in Eastern Europe, where Eastern Europeans were unable to coordinate until shared

Fortunately, this very indeterminacy begets democratic potential under a theory of democratic contestation. Precisely because the landscape of political organization is unfixed, perpetually susceptible to change, and desperate for direction, there is opportunity for political leaders to fill the void and attempt to organize their own constituencies. Rather than assuming a pluralistic political world neatly divided into predetermined groups vying for their share of the pie, a theory of democratic contestation recognizes an uncertain political world in flux, full of deliberative potential and disorganization for political leaders to engage.[136] In other words, the indeterminacy of collective action permits and encourages the process of democratic contestation.

Even longstanding institutions like political parties feature constant adaptation, internal rivalry, and immense institutional reorganization over short periods of time as competing party leaders vie for relative influence.[137] Despite the seeming essentiality of political parties, a theory of democratic contestation recognizes parties fundamentally as informal alliances among political leaders with overlapping interests who see mutual benefit in nonbinding collaboration. It is important not to overestimate the institutional cohesion of parties or to invest them with representational interests as a united whole.[138] As I have argued in previous work, party leaders compete constantly to advance their individual agendas against rivals doing the same both within and across party lines.[139] What is more, the form, substance, and membership

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preferences were revealed and suddenly brought forth enormous change in shockingly quick fashion once coordination was facilitated. *See* Timur Kuran, *Now Out of Never: The Element of Surprise in the East European Revolution of 1989*, 44 WORLD POL. 7 (1991); Susanne Lohmann, *The Dynamics of Informational Cascades: The Monday Demonstrations in Leipzig, East Germany, 1989-91*, 47 WORLD POL. 42 (1994).

136. Of course, not all possible lines of political differentiation are equally salient. Many recur with frequency across societies, most prominently race, as discussed further in Part III. However, as many have established, even racial meaning is socially constructed, and race's political salience has varied with attempts by leaders to mobilize voters along racial lines. *See, e.g.*, Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295, 311-17 (2000) (arguing against the mistake of assuming the permanence and inelasticity of race's sociopolitical force even within the historical context of the Jim Crow South).

137. *See* Michael S. Kang, *The Hydraulics and Politics of Party Regulation*, 91 IOWA L. REV. 131, 141-73 (2005) (describing political parties as evolving "supralegal creatures" and identifying intraparty politics as a vital form of political rivalry).

138. *See* Paul Frymer & Albert Yoon, *Political Parties, Representation, and Federal Safeguards*, 96 NW. U. L. REV. 977, 981 (2002) (declaring that parties lack "any fundamental, enduring, and essential nature").

139. Kang, *supra* note 137, at 142-46.

of even the two major parties changes incredibly over time as both inter- and intraparty competition plays out.[140]

In other words, the process of democratic contestation occurs not only through competition between parties, electoral and otherwise, but importantly and valuably within parties. Parties are useful tools that leaders use to coordinate with provisional allies, simplify political information for the public, and organize the indeterminacy of polyarchic politics, but only insofar as leaders continue to find them useful for advancing themselves in the larger process of democratic contestation. Political leaders act critically as entrepreneurs, to survey the public and strategize how best to offer appeals that will attract citizens to them and their leadership. Parties are an important element within the process of democratic contestation, but only one part of it.

The law of democracy, under the VRA and elsewhere, should encourage the natural tendency among political leaders to coordinate the mass public. Democratic contestation is the process by which politics remains timely and responsive, constantly presenting the average citizen with new issues, questions, and understandings about public affairs in advancement of the general welfare. The process of democratic contestation helps coordinate and simplify the political landscape throughout the full range of political discourse. The next Part concentrates on the "thick" divisions of racial polarization and group identification in the pluralist process, but the process of democratic contestation also includes relatively narrow issue-specific divisions of all sorts that crosscut the public into provisional factions defined entirely by agreement or disagreement about isolated concerns. The process of democratic contestation is therefore broad and multilayered, covering particularized debate about individual issues, as well as the broader process by which leaders try to convince people how to aggregate those issue-specific positions into thicker sensibilities about political self-identification and group membership. The dynamism and vibrancy of democratic contestation, rather than electoral competition or the pluralistic fair treatment of groups, should be a touchstone for the VRA and the rest of the law of democracy.

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140. *See* John F. Bibby, *State Party Organizations*, *in* THE PARTIES RESPOND 19, 19-46 (L. Sandy Maisel ed., 4th ed. 2002) (describing major changes to state parties since the 1960s); Morris P. Fiorina, *Parties and Partisanship: A 40-Year Retrospective*, 24 POL. BEHAV. 93, 103 (2002) (describing parties as malleable entities that party leaders "invent and reinvent to solve problems that face them at particular times in history" (citing JOHN H. ALDRICH, WHY PARTIES? THE ORIGINS AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA (1985))); Paul S. Herrnson, *National Party Organizations at the Dawn of the Twenty-First Century*, *in* THE PARTIES RESPOND, *supra*, at 47, 47-78 (describing major changes to national parties since the 1960s); *see also supra* note 27 (describing the realignment of the major parties following passage of the VRA).

The next Part applies a theory of democratic contestation to the special problem of race and the VRA. However, democratic contestation, as both theory and process, should be valuable in many other domains that I do not address directly here, but do not mean to foreclose. The law of democracy must guard against disruption of the process of democratic contestation as a primary normative aim, whether it is in partisan gerrymandering, campaign finance law, or other areas of election law. This Article provides only a first exploration of democratic contestation as a theoretic tool for understanding law and democratic governance.

III. RACE AND DEMOCRATIC CONTESTATION

This Part explains how a theory of democratic contestation informs normative perspectives on race, majority-minority districting under the VRA, and *LULAC v. Perry*. A theory of democratic contestation shifts the normative focus from the usual zero-sum calculus of who gets how much in racial group representation, to a new focus on the quality and character of politics that emerge from the process of democratic contestation. A theory of democratic contestation identifies the paralytic effect of race on political discourse as the real harm under conditions of racial polarization and identifies the need for the VRA as a race-specific remedy.

A theory of democratic contestation enables one to see past the conventional frameworks of electoral competition and pluralistic representation and to appreciate how the VRA can positively affect participatory politics in a procompetitive fashion. The VRA, through majority-minority districting, may generate dynamic new processes of democratic contestation that break free from the stagnant discourse, fixated along the single axis of race, otherwise predominant under conditions of racial polarization for both the white majority and racial minority.

Finally, this Part argues that the Court in *LULAC v. Perry* is misguided in its handling of the Texas redistricting if it hopes to animate and engage the electorate as it aspired to do in that decision. A theory of democratic contestation reveals that *LULAC* was confused in its theory and counterproductive in its result with respect to the most controversial emerging issues of the day under the VRA: electoral competition, cultural compactness, and coalition districting.

A. The Politics of Racial Polarization

Under the Court's methodology for section 2 of the VRA, racially polarized voting occurs when the racial minority group is politically cohesive such that

its members usually vote for the same candidate, and the white majority votes as a bloc to enable it to defeat the minority group's preferred candidate.[141] In other words, racial polarization includes a pattern of bloc voting in which the white majority and racial minority consistently oppose each other along racial lines.[142] Under these conditions, the VRA requires the government to draw district lines that offer racial minorities a fair chance to elect their candidates of choice, traditionally through the use of majority-minority districts.[143] The prevalence of racial polarization, particularly in the South, is undergirded by a remarkable gulf in public opinion and perceived political interest across racial lines well-documented by political scientists.[144]

Political theorists and commentators, though, have struggled with the basic question of why racial minorities should be exempted from the usual rule of majoritarianism. In a pluralist democracy, the majority is supposed to triumph in the political process, and minority groups are generally expected to lose.[145] Nonetheless, Congress specifically intended the VRA to protect and represent African Americans as a historically disempowered group that was

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141. *See* Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986); *see also* Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1845-56 (1992) (discussing the emergence of the racial polarization requirement after the 1982 amendments).

142. *See* GROFMAN ET AL., *supra* note 3, at 82-108; Bernard Grofman, *A Primer on Racial Bloc Voting Analysis*, *in* THE REAL Y2K PROBLEM: CENSUS 2000 DATA AND REDISTRICTING TECHNOLOGY 43-80 (Nathaniel Persily ed., 2000); *see also* Pildes, *supra* note 7, at 1373 (stating that racially polarized voting remains a "pervasive fact of political life in the South" that makes descriptive representation for racial minorities improbable in the face of persistent majority opposition).

143. *See generally* Gerken, *supra* note 18.

144. *See* DAWSON, *supra* note 126; DONALD R. KINDER & LYNN M. SANDERS, DIVIDED BY COLOR: RACIAL POLITICS AND DEMOCRATIC IDEALS (1996); *see also* DAVID T. CANON, RACE, REDISTRICTING, AND REPRESENTATION: THE UNINTENDED CONSEQUENCES OF BLACK MAJORITY DISTRICTS 20-59 (1999); SWAIN, *supra* note 19, at 5-19; Guy-Uriel E. Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 CAL. L. REV. 1209, 1232-39 (2003).

145. *See, e.g.*, Whitcomb v. Chavis, 403 U.S. 124, 153 (1971) (expressing concern that vote dilution becomes "a mere euphemism for political defeat at the polls"); Bruce E. Cain, *Voting Rights and Democratic Theory: Toward a Color-Blind Society?*, *in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 268 (Bernard Grofman & Chandler Davidson eds., 1992) ("[I]f the system has worked for years on the premise that disproportionate outcomes were the price of single-member districts and simple plurality winners, then why should this right be given to blacks and Latinos?"); Issacharoff & Pildes, *supra* note 8, at 701 (observing the task is "to distinguish contexts in which minorities lose elections in the same manner as any other insufficiently powerful interest groups").

systematically stripped of opportunities for political representation.[146] The long history of racial discrimination and political oppression, many argued, justifies special representation for race in the political process that reverses the usual deference to majority rule.[147] In the same vein, John Hart Ely cited the power of racial animus as a justification for race's special treatment. Ely argued that racial minorities' discreteness and insularity render them particularly vulnerable to discriminatory prejudice by the majority and therefore deserving of special representation in the political process.[148] For this reason, Ely argued in favor of race-conscious measures as a necessary remedy for the likelihood of racial disadvantage in the political process.[149]

The problem is that public-choice theory suggests exactly the opposite conclusion.[150] Discrete, insular minorities are better prepared to organize and coordinate group action, all other things being equal. They are smaller in size, with more homogeneous interests, and therefore enjoy advantages in collective action, at least relative to the larger, more diffuse majority.[151] As a result, Bruce Ackerman reasons that racial minorities should be better positioned to compete in the political process by exploiting heterogeneity and disunity in the majority population.[152] Under this account, the internal homogeneity and cohesion of a racial minority, to the degree that they are successfully maintained, are

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146. *See* Issacharoff, *supra* note 111, at 886 (observing that the VRA was designed to redress the "central features of the black experience in the U.S.—in particular, a history of *de jure* discrimination and segregation"); *see also* James F. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 VA. L. REV. 633, 677 (1983) (noting that the VRA was "designed as a remedial device to overcome a history of obstructionist resistance to the enfranchisement of blacks"). *See generally* ERIC FONER, FOREVER FREE: THE STORY OF EMANCIPATION AND RECONSTRUCTION (2005); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION: 1863-1877 (1988); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004); KOUSSER, *supra* note 22.

147. *See, e.g.*, Issacharoff, *supra* note 111, at 885-86 (explaining that the VRA premised its protections on a "history of discrimination-bred disadvantage").

148. ELY, *supra* note 115, at 152-60.

149. *Id.* at 153 (arguing that race-conscious measures are justified when racial groups are known "to be the object of widespread vilification, groups we know others (specifically those who control the legislative process) might wish to injure").

150. *See* Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 724-26 (1985) (replying to Ely that discrete and insular groups actually exercise disproportionate political strength); *see also* OLSON, *supra* note 107, at 22-36; Peltzman, *supra* note 132.

151. *See* HARDIN, *supra* note 119, at 38-49 (describing the advantages of small group size); OLSON, *supra* note 107, at 22-36, 44-65 (explaining the surprising tendency for the exploitation of the great by the small); Ackerman, *supra* note 150, at 724-26.

152. Ackerman, *supra* note 150.

competitive advantages. Far from meriting special dispensation in theory, racial minorities ought to benefit from the dynamics of collective action, as more compact, efficient contestants in the polyarchic commotion of pluralist politics.

A theory of democratic contestation offers a new defense of the special treatment of race in the democratic process – one grounded in these dynamics of collective action. Smaller size and homogeneity of interests do advantage discrete, insular groups, but not when it comes to race. The power of racial animus, which Ely emphasized, helps position race as an exceptionally durable and powerful point of coordination in politics. Under conditions of racial polarization, racial prejudice shores up in-group cohesion within a heterogeneous white majority such that even individual whites who share common interests with a homogeneous racial minority deny that commonality and, contrary to those common interests, refuse to break from the white majority. The usual advantages of internal homogeneity and cohesion among a minority group fail in the case of racial polarization, because white in-group cohesion by definition trumps countervailing lines of commonality that would otherwise matter in the pluralist process. The history of racial discrimination and oppression, which many cite as independent justification for race-conscious remedies, evidences the overwhelming power of race as just such a dominant point of coordination in politics when racial polarization occurs. "Race prejudice," as one commentator put simply, "divides groups that have much in common . . . and unites groups (whites, rich and poor) that have little else in common than their antagonism for the racial minority."[153] Racial minorities, under conditions of racial polarization, thus have been and continue to be "barred from the pluralist's bazaar,"[154] unable to participate fully in the contemplated process of democratic interchange.

Racial polarization therefore represents a rare case where mass coordination appears to occur almost reflexively along the dominant axis of race.[155] I do not claim that race constitutes a prepolitical or otherwise "natural" division, nor is it necessary to argue that race inevitably emerges as the defining political division or take a position on the basic causes of race's centrality under conditions of racial polarization. On one hand, it may be correct that race's salience arises from the "bottom up," deriving from the individual preferences

153. Frank I. Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CAL. L. REV. 275, 315 (1972).

154. ELY, *supra* note 115, at 152.

155. *See* Karlan & Levinson, *supra* note 117, at 1218 (arguing that polarization is generated by the decisions of African American, Latino, and other minority voters "to unite politically and to 'pull, haul, and trade' their way into electoral power" (quoting Johnson v. De Grandy, 512 U.S. 997, 1020 (1994))).

of citizens.[156] On the other hand, race's salience may be a responsive function of leadership mobilization along the most historically well-established line of division.[157] For purposes of this Article, I principally seek to recognize and identify race's centrality in the way that citizens think about politics under conditions of racial polarization. Race, at least under conditions of racial polarization, stands out as an almost unique exception to the usual unpredictability of mass coordination that gives life to the process of democratic contestation.

As a consequence, when racial polarization prevails, race deserves special treatment because it threatens to preempt the healthy competitive process of democratic contestation. The normal dynamics of collective action are inverted such that the usual space and opportunity for democratic contestation in large part disappears. Race predominates as an almost determinative political division.[158] Under a theory of democratic contestation, a critical harm of racial polarization is not necessarily that politics is discussed in explicitly racial terms, but rather that the competitive imperative of racial polarization—that of maintaining racial in-group cohesion above other considerations—demands that racial communities avoid exploration of issues and concerns that carry the risk of dividing them along nonracial lines. Racial polarization thereby constricts the scope of political discourse to a subset of familiar issues unthreatening to the dominant racial alignment and removes other issues from thorough consideration. Racial polarization may silence consideration of important public concerns that otherwise deserve and require attention within racially polarized communities and in the process deprive the larger polity, outside those communities, of important voices in the broader debate.

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156. *See, e.g.*, Issacharoff, *supra* note 111, at 887-88; Karlan & Levinson, *supra* note 117, at 1217-19.

157. *See, e.g.*, Charles, *supra* note 144, at 1225-26 (describing the Court's "top-down understanding of racial identity claims"); *see also* Jeffrey A. Roy, Carolene Products*: A Game-Theoretic Approach*, 2002 BYU L. REV. 53 (arguing from a game-threoretic perspective that race offers a particularly easy focal point for stable coordination).

158. To say that white and African American political views are racially polarized is not to imply that African American (or white) political views are monolithic. *See* CANON, *supra* note 144, at 94-97. That is, the polarized divide between whites and African Americans obscures the fact that there is great intragroup diversity of political views for both whites and African Americans. On nonracial issues, whites and African Americans display the same level of ideological dispersion and diversity. *See id.* at 30. The rest of the Article argues that a majority-minority district, by relieving the pressure of racial polarization, permits white and minority voters to rediscover this commonality on nonracial grounds and develop alternate frameworks for encountering politics. *See* GUINIER & TORRES, *supra* note 78, at 11-31 (describing the essential need in a democracy for citizens to identify cross-racially and choose freely among multiple political identities).

While the power of racial animus and the history of racial discrimination and oppression are clearly central to race's exceptionalism, they provide only part (albeit a critical part) of the normative story. The present debate underappreciates how racial animus, its history, and its ongoing legacy continue to damage the healthy operation of democratic politics. Race requires special treatment, not simply because of the history of discrimination and oppression, but because the same factors that contributed to, and are now bolstered by, that history help make racial polarization acutely disruptive to the political discourse at the heart of democratic contestation. Almost by definition, the special circumstances of racial polarization mean that citizens can regard their political choices, often literally, only in the context of black and white, forgoing opportunities for democratic contestation and overlooking other potential lines of commonality and difference among them.

Racial polarization thus stalls the process of democratic contestation in which the uncertainty of coordination motivates leadership to stir up vibrant, energetic politics. Racial polarization in the electoral context is devastating because it is symptomatic of a deeper problem—a discursive polarization in which the political discourse passively maintains public divisions along racial lines.[159] For profound and deeply rooted sociopolitical reasons, race under circumstances of racial polarization is the conversation stopper. Politics may freeze along the historically dominant axis of race, removing incentives for political leaders to challenge the public with new choices and understandings inconsistent with the entrenched racial alignment.[160] Race, under conditions of racial polarization, therefore thoroughly undermines the mass participatory process of democratic contestation. Although the VRA definition of racial polarization focuses on voting, consistent patterns of racially polarized voting have causes rooted in, as well as pervasive consequences for, the character of

159. Thanks to Jennifer Nou for the term "discursive polarization." It is important to clarify as well that discursive polarization need not be defined by (though it may be characterized as) an exclusive fixation on explicitly racialized issues, such as affirmative action. Instead, discursive polarization is defined by static sets of disagreements that divide the polity consistently along racial lines, whether or not the issues themselves are explicitly racialized, and reinforce racially polarized politics where both whites and the racial minority block themselves into permanent opposition along racial lines.

160. *See also* Lani Guinier, *More Democracy*, 1995 U. CHI. LEGAL F. 1, 4 ("Race, unfortunately, or fortunately, depending on your perspective, still defines the political interests of many Americans, and it should not surprise us that this is true given the fact that we live in such a racially defined world."). *See generally* DAWSON, *supra* note 126 (showing that African Americans overwhelmingly subordinate political identity along class and other lines to racial identity).

the public discourse that implicate all forms of associated political behavior, including political preferences, self-identity, and political participation.

It is important to emphasize that the VRA imposes majority-minority districts only when racial polarization is empirically demonstrable—where the white majority and racial minority take on self-conscious group identity that submerges other aspects of political self-identity for both groups.[161] The VRA's imposition of majority-minority districts simply does not apply as a matter of law where racial polarization is not evident. This Article, using a theory of democratic contestation, articulates a new normative rationale for the VRA's usual methodology as it applies to demonstrated patterns of racial polarization. The traditional practice of maintaining majority-minority districts under the VRA in those instances should be maintained, even where electoral competition may be diminished, because a theory of democratic contestation provides a new explanation of race's exceptionality and the countervailing need for majority-minority districts where racial polarization prevails.

A theory of democratic contestation allows a reunderstanding of why race is excepted from normal pluralistic politics. It provides a reconception of legal carve outs under the VRA not simply as representational guarantees, but as tailored remedies for an exceptional breakdown in the healthy competitive interplay of democratic contestation. A theory of democratic contestation explains why race requires special consideration in the form of the VRA and the design of political institutions as they come before the Court in cases like *LULAC*. Race, when left unchecked, may be the unique sociopolitical characteristic that enables an ever-enduring political alignment across a mass public that solves the usual instability of collective action in democratic politics.[162] Under conditions of racial polarization, the determinative force of race as a source of coordination demands race-conscious intervention to restart democratic contestation. It is less a failure of representation, as John Hart Ely framed it, than a failure of democratic contestation and political discourse. The need to protect the process of democratic contestation from the polarizing effect of race distinguishes race as exceptional in pluralistic politics.[163]

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161. *See* Thornburg v. Gingles, 478 U.S. 30 (1986); Karlan & Levinson, *supra* note 117, at 1216.

162. *See, e.g.*, Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1046-64 (1995) (describing the powerful psychological underpinnings of race discrimination as a means of status production and detailing the accompanying social psychology literature).

163. *See* FRYMER, *supra* note 22, at 10 ("Precisely because racism is so divisive and repelling, African Americans are in the unique position of not being able to join in the give-and-take of normal coalition politics."). Obviously, the race-specific purpose of the VRA also distinguishes the treatment of race from other important, potentially divisive sociopolitical

In fact, the singular power of racial animus, as demonstrated by the long history of extraordinary discrimination and oppression, makes clear the terrible disruption of democratic contestation and its effects. The history of racial politics suggests that the polarized white majority is prone to unify behind racial lines and actively suppress other political disagreements precisely to sustain racial discipline. Racial polarization serves as a self-disciplining nonaggression pact, in which polarized white leaders forgo competitive efforts of democratic contestation and subordinate disagreement in the maintenance of racial hierarchy.[164] An overwhelming harm in the *White Primary Cases*,[165] for instance, was certainly the political exclusion of African American voters. However, commentators neglect the closely associated problem from the standpoint of democratic theory that both white and African American communities lost opportunities to engage in democratic contestation across and within racial lines.[166] White Democrats in the *White Primary Cases* were willing to submerge their ideological and sociopolitical differences, sacrificing the rich opportunities for democratic contestation, in a determined effort to remain racially unified.[167] Racial polarization provided the exceptional

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differences such as religion, ideology, and class. In other societies, alternate bases of political differentiation may dominate in similar fashion analogous to racial polarization in the United States. *See, e.g.*, DONALD L. HOROWITZ, ETHNIC GROUPS IN CONFLICT 573-77 (1985) (describing deep tribal and other forms of ethnic conflict requiring consociational arrangements in Asia and Africa).

164. *See* Robert Cooter, *Market Affirmative Action*, 31 SAN DIEGO L. REV. 133, 153-56 (1994) (describing Jim Crow practices as cartel behavior); Daria Roithmayr, *Racial Cartels* (Univ. of S. Cal. Law Sch. Law and Econ. Working Paper Series, Paper No. 66, 2007), *available at* http://law.bepress.com/cgi/viewcontent.cgi?article=1067&context=usclwps (characterizing racial discrimination in politics along these lines).

165. Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Gravey v. Townsend, 295 U.S. 45 (1935); Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927).

166. *See, e.g.*, Issacharoff & Pildes, *supra* note 8, at 655-68 (describing white cohesion across ideological lines during the *White Primary Cases* but defining the *White Primary Cases* in terms of electoral competition); Pildes, *supra* note 13, at 1621 (suggesting that judicial intervention in the *White Primary Cases* would have been unnecessary under conditions of partisan competition); Roithmayr, *supra* note 164, at 23-31 (describing racial exclusion in the *White Primary Cases* as anticompetitive mutual disarmament).

167. *See* KEY, *supra* note 93, at 533 (concluding that the effect of Reconstruction was "the wiping out of party differences between the whites, formerly divided between the Whig and Democratic parties"); KOUSSER, *supra* note 22, at 16-17, 25 (describing economic divisions among Southern whites in the early Jim Crow South); C. VANN WOODWARD, ORIGINS OF THE NEW SOUTH 1877-1913, at 321-49 (1951) (explaining how shared support for white supremacy unified whites within the Democratic Party and overrode economic and political rifts exposed by Southern populism); C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 60-77 (2d rev. ed. 1966) (same).

circumstance where deep racial divisions help cement into place an entrenched majority and thereby disable the process of democratic contestation for both whites and African Americans.

For precisely this reason, majority-minority districting on the basis of race may be procompetitive—on democratic contestation grounds—rather than anticompetitive, as many suppose.[168] It can end discursive polarization and restart the competitive process of democratic contestation inside the district for both white and minority communities. Martha Minow writes that electoral structures ought "to permit self-identification by individuals as temporary, contingent members of self-formed groups."[169] Majority-minority districting allows citizens to do exactly that. Though based on race, majority-minority districts relieve citizens of the burden of focusing on race. Majority-minority districts liberate them to think politically beyond race by acknowledging and controlling for race. That is, state recognition of race through majority-minority districting does not preempt political self-constitution. Quite the opposite, majority-minority districting may facilitate the community's reengagement with political self-constitution, at least at the district level, through a healthy process of democratic contestation that transcends race.

Within a majority-minority district, minority members who once banded together defensively against the white majority are liberated to explore intragroup differences and disagreements. In this sense, majority-minority districts and the VRA truly grant the racial minority the chance to consider a full range of pluralistic opportunities. Once a majority-minority district obviates the need to cohere against racially polarized opposition, minority citizens can consider more nuanced differences among them than would have otherwise been advisable. Rather than coordinating behind a single minority candidate of choice against the white majority, the minority community is freed to choose the best among several candidates, each with distinct alternatives and platforms. Minority citizens may be forced, whether willing or not, to push past "the simple fact of their racial affiliation to make legislative choices."[170] While some commentators claim that majority-minority districts may retard the development of normal, pluralist politics by making districts safely held by the minority,[171] a theory of democratic contestation reveals how

168. *See, e.g.*, Katz, *supra* note 16, at 1180 ("Majority-minority districts are invariably also noncompetitive districts.").

169. MINOW, *supra* note 126, at 96.

170. Kathryn Abrams, *"Raising Politics Up": Minority Political Participation and Section 2 of the Voting Rights Act*, 63 N.Y.U. L. REV. 449, 497 (1988) (discussing the need for and value of intraminority debate when race is an indeterminate guide for political choice).

171. *See, e.g.*, Pildes, *supra* note 6, at 97-99.

that safety liberates the racial minority to explore nonracial dimensions of political identity and disagreement in a genuinely pluralist fashion.

In short, majority-minority districting can be transformative of process and ultimately of preferences themselves. For the African American community to debate seriously the potentially divisive issue of civil unions, for instance, partisan considerations must be bracketed from the discussion.[172] As long as the debate occurs within the normal context characteristic of racially polarized voting, African Americans may instinctively return to the historically familiar pattern of deciding along racial lines.[173] That is, whatever substantive debate that might occur regarding civil unions is drowned out in the whirlpool of racial politics in the end. It is only in the safe place of a racial guarantee that policy and political discussion unaligned with race may flourish. By generating what Heather Gerken calls "second-order diversity"[174] in the form of racial guarantees, majority-minority districts can foster healthy exploration of the full political diversity and dissent within a racial community. Majority-minority districts destabilize the usual relationships of power and enable both white and minority citizens to experience democracy from fresh perspectives.[175] Majority-minority districts provide a space where "members of the majority are temporarily deprived of the comfort—and power—associated with their majority status" and where "members of the electoral minority are not permanent dissenters, but sometimes participants in the governance process."[176] White voters constitute electoral majorities at state and national levels of government beyond the single legislative district,[177] but minority

172. For discussion of the tension within the African American community regarding the issue of gay marriage, see Esther Kaplan, *The Religious Right's Sense of Siege Is Fueling a Resurgence*, NATION, July 5, 2004, at 33, which discusses the divisiveness of gay marriage within the Democratic Party. *See also* David Mattson, *The Struggle To Redefine Marriage*, INSIGHT, Aug. 5-18, 2003, at 30 (noting African American support for a federal marriage amendment); *State of the Union*, ECONOMIST, Nov. 22, 2003, at 29 (identifying gay marriage as a wedge issue).

173. *See* Quentin Kidd et al., *Black Voters, Black Candidates, and Social Issues: Does Party Identification Matter?*, 88 SOC. SCI. Q. 165 (2007); Quentin Kidd et al., Social Conservatism in the 2004 Election: Assessing the Pull of Values Issues on African American Voters (Sept. 1-4, 2005) (unpublished manuscript, on file with The Yale Law Journal).

174. *See* Gerken, *supra* note 102, at 1106-08; *see also* McAdams, *supra* note 162, at 1049 (explaining how fixing the racial minority group as the relevant voting "majority" within a majority-minority district helps counteract the subordination effort underlying race discrimination).

175. *See* Gerken, *supra* note 102, at 1151 (praising second-order diversity for "help[ing] vary participatory experiences over the course of a civic life").

176. *Id.* at 1150.

177. *See* LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 5-7 (1994) (advocating turn taking); Gerken, *supra* note 102,

voters usually constitute an electoral majority at only the local or district level, if at all.[178] The majority-minority district "turns the tables" and provides both groups with a new vantage point on governance and democracy that is useful, educational, and empowering at least at one level of government.[179] Even better, the fresh perspectives that emerge from the discourse in a majority-minority district may be particularly distinctive and offer innovations that spread, reframe, and advance political discourse outside the majority-minority district.[180]

More empirical research is needed before any definitive claims are possible, but consistent with a theory of democratic contestation, there is growing empirical evidence that majority-minority districting facilitates minority political participation and turnout. Criticizing majority-minority districting, Lani Guinier argues that majority-minority districts may increase voter apathy and decrease participation because "one can certainly argue that safe seats

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at 1142-60 (arguing that allowing the minority to "turn the tables" offers a form of second-order diversity useful in democracy); George Kateb, *The Moral Distinctiveness of Representative Democracy*, 91 ETHICS 357, 360-61 (1981) (praising taking turns standing for the whole).

178. *See, e.g.*, Christopher E. Smith & Linda Fry, *Vigilance or Accommodation: The Changing Supreme Court and Religious Freedom*, 42 SYRACUSE L. REV. 893, 942 (1991) (noting that racial minorities are underrepresented nationally but are achieving greater representational success at the municipal or local level).

179. In a controversial twist during April 2007, the state of Nebraska divided Omaha public schools into three racially identifiable districts in an effort ostensibly intended to give racial minorities control of dedicated school districts. *See* Sam Dillon, *Law To Segregate Omaha Schools Divides Nebraska*, N.Y. TIMES, Apr. 15, 2006, at A9 [hereinafter Dillon, *Law*]; Sam Dillon, *Schools Plan in Nebraska Is Challenged*, N.Y. TIMES, May 17, 2006, at A17; Rick Montgomery, *Omaha Schools: Divide and Conquer?*, SEATTLE TIMES, Apr. 27, 2006, at A7. The only African American state senator in Nebraska, Ernie Chambers, sponsored the plan and argued that it was necessary to "carv[e] our area out of Omaha Public Schools and establish[] a district over which we would have control." Dillon, *Law*, *supra* (quoting Neb. State Sen. Ernie Chambers); *see also* Kathleen A. Bergin, *Mixed Motives: Regarding Race and Racial Fortuity*, 23 CONST. COMMENT. 271, 271-72 (2006) (reviewing DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM (2004)) (discussing the Chambers plan).

180. *Cf.* Richard Briffault, *Home Rule and Local Political Innovation*, 22 J.L. & POL. 1 (2006) (describing how diversity across localities produces political innovation); Heather K. Gerken, *Dissenting By Deciding*, 57 STAN. L. REV. 1745, 1759-74 (2005) (arguing that outlying dissent improves the quality of the marketplace of ideas); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 288-90 (2005) (arguing that the "polyphony" of disaggregated authority supports plurality, dialogue, and redundancy).

discourage political competition and thus further diminish turnout."[181] Guinier's argument is intuitive and has been influential, as reflected in recent skepticism about the VRA, but it also is generally untested as an empirical proposition. Empirical work thus far has focused on the policy effects of majority-minority districts and the consequences for minority interests in the legislature,[182] but with few exceptions, it has neglected the study of process-oriented values and the effects on the democratic experience for residents of majority-minority districts. The empirical focus on outcomes, to the neglect of process, mirrors the theoretical focus on outcomes rather than process—a theoretical focus that the Article attempts to complicate. However, new research in political science suggests that racial minorities represented by racial minorities tend to be more civically engaged and to participate politically at higher rates. The empirical evidence on the issue of minority participation in majority-minority districts appears, if anything, contrary to Guinier's expectations.

With respect to Latino communities in particular, empirical studies find that majority-minority districts do not discourage participation or depress turnout as Guinier fears, and instead help mobilize Latinos and increase Latino turnout.[183] Although Latinos are less likely to vote than Anglo whites in general, Latinos living in a majority-Latino district are significantly more likely to turn out to vote on election day, controlling for other relevant factors.[184]

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181. GUINIER, *supra* note 177, at 85; *see also* Phil Duncan, *Minority Districts Fail To Enhance Turnout*, 51 CONG. Q. WKLY. REP. 798 (1993); Phil Duncan, *New Minority Districts: A Conflict of Goals*, 51 CONG. Q. WKLY. REP. 2010 (1993).

182. *See, e.g.*, *supra* note 19 (citing studies on the ideological impact of majority-minority districts).

183. *See* Matt A. Barreto, Gary M. Segura & Nathan D. Woods, *The Mobilizing Effect of Majority-Minority Districts on Latino Turnout*, 98 AM. POL. SCI. REV. 65, 74 (2004) ("Latinos vote more when in a majority-Latino district, contrary to the expectations of those who expected or feared minority demobilization."); Gary M. Segura & Nathan D. Woods, *Majority-Minority Districts, Co-Ethnic Candidates, and Mobilization Effects*, *in* VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER 133, 141 (Ana Henderson ed., 2007) (concluding that "the effect of living in districts with greater Latino population is mobilizing for Latinos"). *But see* Kimball Brace et al., *Minority Turnout and the Creation of Majority-Minority Districts*, 23 AM. POL. Q. 190, 192-200 (1995) (reporting that over-time comparison suggests that minority turnout increases in majority-minority districts but that cross-sectional analyses yield mixed results).

184. *See* Barreto et al., *supra* note 183, at 70-74; Segura & Woods, *supra* note 183, at 141-43. Of course, there are many important forms of political participation besides voting that deserve consideration for purposes of democratic contestation. *See* VERBA ET AL., *supra* note 131, at 37-48 (surveying the range of political participation); *see also* Michael S. Kang, *Counting on Initiatives?: An Empirical Assessment*, 4 ELECTION L.J. 217 (2005) (reviewing JOHN G. MATSUSAKA, FOR THE MANY OR THE FEW (2004); DANIEL A. SMITH & CAROLINE J. TOLBERT,

What is more, Latinos who live in overlapping majority-Latino districts at multiple levels of government – for instance, majority-Latino districts for both state legislative and congressional elections – are even more likely to vote than Latinos who live in a majority-Latino district at only one level of government.[185] The boost to political participation likely extends beyond voter turnout alone. For instance, Latinos tend to be underrepresented at community policing meetings when they constitute only a minority within a neighborhood, but participate in large numbers when they constitute the majority within a neighborhood.[186]

Although empirical research on majority-minority districts for African Americans is more mixed, the social science literature generally finds higher levels of political participation by African Americans in jurisdictions of minority empowerment.[187] Much of this literature focuses on municipal politics in majority-minority cities, but nonetheless, a recent study finds that majority-minority districts do not discourage political participation by African Americans and exhibit higher African American turnout by a statistically significant margin in four of eight states examined.[188] Moreover, African Americans are significantly more likely to take the additional participatory step of contacting their congressperson if their representative is an African American, controlling for other considerations.[189] More empirical study is needed with regard to the participatory effects of majority-minority districting

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EDUCATED BY INITIATIVE (2004)) (discussing different political science measures for political participation and civil society).

185. *See* Barreto et al., *supra* note 183, at 72; *see also* Brace et al., *supra* note 183, at 197 (finding a similar result for nested African American districts).

186. *See* ARCHON FUNG, EMPOWERED PARTICIPATION: REINVENTING URBAN DEMOCRACY 125-27 (2004).

187. *See* F. Glenn Abney & John D. Hutcheson, Jr., *Race, Representation, and Trust*, 45 PUB. OPINION Q. 91 (1981); Lawrence Bobo & Franklin D. Gilliam, Jr., *Race, Sociopolitical Participation, and Black Empowerment*, 84 AM. POL. SCI. REV. 377 (1990); Susan E. Howell & Deborah Fagan, *Race and Trust in Government*, 52 PUB. OPINION Q. 343 (1988); *see also* David A. Bositis, *The Future of Majority-Minority Districts and Black and Hispanic Legislative Representation*, *in* REDISTRICTING AND MINORITY REPRESENTATION: LEARNING FROM THE PAST, PREPARING FOR THE FUTURE 9 (David A. Bositis ed., 1998); D. Stephen Voss & David Lublin, *Black Incumbents, White Districts: An Appraisal of the 1996 Congressional Elections*, 29 AM. POL. RES. 141 (2001).

188. *See* Claudine Gay, *The Effect of Black Congressional Representation on Political Participation*, 95 AM. POL. SCI. REV. 589, 594-99 (2001); *see also* Brace et al., *supra* note 183, at 196-200 (finding similar turnout increases in the general election for state house districts but not for congressional or state senate districts).

189. *See* Claudine Gay, *Spirals of Trust? The Effect of Descriptive Representation on the Relationship Between Citizens and Their Government*, 46 AM. J. POL. SCI. 717, 728-29 (2002).

for both African Americans and Latinos at the primary election stage, rather than the general election.[190] Past work has examined voter turnout exclusively in the general election, rather than the primary election where electoral competition ought to be greater in majority-minority districts. Still, whatever the speculative loss in democratic contestation from reduced partisan competition in majority-minority districts, the empirical literature suggests that an overall net gain in terms of democratic contestation may result from sheltering minority voters from the politics of racial polarization. The minority community could be liberated from discursive polarization and empowered to enjoy higher levels of political participation and engagement under majority-minority arrangements.

Although majority-minority districts are clearly designed foremost to accommodate the preferences of minority voters, the benefits from breaking free of the static discourse of racial polarization also might accrue to the white community.[191] Of course, white voters under conditions of racial polarization do not benefit in the zero-sum game of political representation and pluralist politics. Racial minority voters ultimately control who is elected from majority-minority districts. However, the basic normative shift offered here is from a pluralistic focus on which groups get what from politics, to a new focus on what type and tenor of politics result from the process of democratic contestation. A focus on democratic contestation helps identify the fact that, even if white voters lose ground from the standpoint of political representation, they may benefit from the changed quality of political discourse resulting from

190. One might expect a basic tradeoff between electoral competition in the primary and general elections with corresponding effects on voter turnout, such that even if turnout decreases for a less competitive general election, it should increase on average for the more competitive primary election in a majority-minority district. *See* Persily, *supra* note 33, at 661-62. However, empirical work in political science thus far focuses exclusively on general elections and likely understates the net increase in participation in majority-minority districts. In addition, for purposes of gauging democratic contestation, it would be useful to consider other measures of political participation and civic engagement besides voting and turnout. *See, e.g.*, VERBA ET AL., *supra* note 131, at 37-48 (describing a diverse range of political participation and arguing against a narrow focus on voting and turnout).

191. A robust line of empirical research on ethnic heterogeneity points in this direction, though a full exploration of its implications extends far beyond this Article. In short, empirical research across a wide range of social contexts and participatory measures finds ethnic heterogeneity negatively associated with civic engagement and political participation. *See generally* Robert D. Putnam, *E Pluribus Unum: Diversity and Community in the Twenty-First Century: The 2006 Johan Skytte Prize Lecture*, 30 SCANDINAVIAN POL. STUD. 137, 149-51 (2007) (surveying studies and concluding that inhabitants of ethnically diverse communities tend to withdraw from collective life).

a healthier process of democratic contestation now freed from the trap of racial polarization that affects all sides.

As a consequence, location in a majority-minority district may have a positive influence on many white citizens. In the usual politics of racial polarization, a wide body of psychology research explains that white voting cohesion under conditions of racial polarization is motivated, at least in significant part, by considerations of group rivalry and primitive drives to subordinate and advance one's social group status.[192] However, in majority-minority districts where the racial minority will invariably attain descriptive representation, white voters no longer need to fixate squarely on group status and are freed to view politics in other ways. White voters, who as a general matter are not as cohesive as minority voters,[193] may freely engage in the politics of majority-minority districts and reimagine politics along new lines. This freedom might help explain why political scientists find that "race-conscious redistricting seems often to *reduce* racial polarization and bloc voting and to make white voters more likely to consider black and Hispanic candidates."[194] Majority-minority districts feature nuanced "supply-side" politics that frequently feature cross-racial alliances between white and minority voters.[195] The politics of racial polarization, in surprising ways, is asymmetrical. Whites are regularly invited to become influential voters in majority-minority districts in ways that minority voters outside of majority-minority districts usually are not.[196]

It is important to note that majority-minority districting, while relieving the pressures inherent in racial polarization, does not squelch discussion of race outside the politics of the district. The use of majority-minority districting is not intended to, and does not, silence extradistrict discussion of race. It actually gives formal recognition to its political salience.[197] In practice, by facilitating

192. *See* McAdams, *supra* note 162, at 1044-62 (reviewing the psychology literature).

193. *See* Karlan & Levinson, *supra* note 117, at 1224. *See generally* Grofman, *supra* note 142, at 43-67.

194. *See* Pamela S. Karlan, *Politics by Other Means*, 85 VA. L. REV. 1697, 1723 (1999) (citing examples). It is important to recognize, however, that other studies find that political participation by whites in majority-minority districts tends to decrease. *See* Barreto et al., *supra* note 183; Gay, *supra* note 189.

195. CANON, *supra* note 144, at 93-142.

196. *See id.* at 137-42.

197. *See* Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 506-07 (1993) (articulating a theory of expressive harm from the creation of majority-minority districts).

the election of minority spokespeople to the legislature and positions of public prominence, majority-minority districting does more to elevate issues of racial importance across the larger statewide and national debate, and in a more nuanced and sophisticated fashion, than would the intradistrict politics of racial polarization.[198] However, majority-minority districting may permit discussion of race, without permitting race wholly to dominate voting, discourse, and political alignment in a way that paralyzes democratic contestation. That is, majority-minority districting serves to mitigate the damaging effects of racial polarization on political discourse and democratic contestation, but it does so—importantly—without denying the importance of race in politics.

To be sure, none of this is to say that electoral competition is not important under a theory of democratic contestation as a general matter. In most cases, the spur of electoral competition is a central means for achieving the primary goal of incentivizing political leaders to engage the public in a process of democratic contestation. However, as I argue and the empirical literature suggests, electoral competition is not always the best means for fostering democratic contestation under the exceptional circumstances of racial polarization. True as well, electoral competition is normally the best means of ensuring policy responsiveness to the median voter in the relevant community, as candidates gravitate toward her median preferences in hope of winning elections.[199] But under the VRA, where the relevant community is the racial minority, the dismantling of majority-minority districts in favor of general electoral competition will hardly enhance policy responsiveness to the minority community's median preferences in the district. Quite the opposite, the majority-minority district guarantees electoral outcomes in the control of the minority community, and remaining concerns about electoral dissatisfaction and responsiveness are likely to be transferred to the party primaries instead of the general election.[200]

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198. *See* Gerken, *supra* note 102, at 1134 (noting that minority legislators can serve as "conversational entrepreneurs" in promoting awareness of their group concerns (quoting BENNETT, *supra* note 72, at 36-37)); Karlan, *supra* note 10, at 98-99 (arguing that legislative fora offer special opportunities for pluralist bargaining and deliberation on minority issues).

199. *See generally* Duncan Black, *On the Rationale of Group Decision-Making*, 56 J. POL. ECON. 23 (1948) (introducing the median voter theorem).

200. *See* Persily, *supra* note 33, at 661-62 (discussing the tradeoff between competition in the primary and general election). A further argument is that dismantling majority-minority districts and replacing them with "coalition districts," *see infra* Section III.C, enhances policy responsiveness to the racial minority by increasing the likelihood that its political party will win the legislature. Even assuming that the correct unit of analysis is the whole legislature instead of the individual district, there is a fierce social scientific debate about whether the

B. LULAC *and Democratic Contestation*

Viewed through a theory of democratic contestation, the politics of the Voting Rights Act as played out in *LULAC* appear in a very different light. Samuel Issacharoff and Ellen Katz are troubled by the anticompetitive effects of the VRA, predetermining electoral competition in favor of Democrats in VRA-protected districts.[201] When the focus shifts, however, from electoral competition to democratic contestation—a broader, more robust conception of political competition—the protections of the VRA appear less threatening and more energizing overall to political discourse.

The deeper goals of democratic politics are better served by shifting normative focus to a theory of democratic contestation, as outlined here. Democratic contestation, more so than electoral competition, connects with a richer notion of political competition in which rivalry among political leaders stimulates debate, offers choices to the public, and gives life to political affairs. The debate over the VRA requires a deeper exposition of politics, representation, and competition that a theory of democratic contestation can help develop.

If Ellen Katz correctly identifies a principal concern in *LULAC* about the VRA's effect on competitive politics, it is clear that *LULAC* was confused. The Court in *LULAC* viewed electoral safety with suspicion, as an obstacle to political participation and engagement. However, the electoral safety of majority-minority districts actually makes them the most promising way to regenerate healthy political participation and advance civic engagement, particularly among the racial minority, as I have shown. If the Court hoped to emphasize "engagement over security,"[202] the Court should have unequivocally endorsed the use of the VRA to break up patterns of racial polarization that freeze into place what amounts to a racial stasis between white and minority communities in terms of democratic contestation. District 23 would be worth protecting as a safe majority-minority district under the VRA, even now after Bonilla's subsequent ouster in 2006 and even if the district fails to continue the partisan dueling praised beforehand in *LULAC*. Safe majority-minority

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coalitional strategy is actually successful in practice as a matter of substantive policy. *See supra* note 19. Moreover, the strategy is inherently risky for the racial minority, which may end up controlling neither the district nor the legislature. Just so, the coalitional strategy backfired in the Georgia redistricting of *Georgia v. Ashcroft*, 539 U.S. 461 (2003), where it was most prominently featured. *See* Pamela S. Karlan, Georgia v. Ashcroft *and the Retrogression of Retrogression*, 3 ELECTION L.J. 21, 29 (2004).

201. *See* Issacharoff, *supra* note 6; Katz, *supra* note 16, at 1165-66.

202. Katz, *supra* note 16, at 1181.

districts, under traditional VRA methodology, already served the Court's participatory goals, consonant with a theory of democratic contestation. The Court's effort to promote those goals in *LULAC*, through a new emphasis on electoral competition, is unnecessary and misguided.

What is more, the implicit requirement in *LULAC* that majority-minority districts be electorally competitive for VRA recognition is actually counterproductive to these goals of democratic contestation. Majority-minority districts, notwithstanding their electoral noncompetitiveness in the general election, are valuable in liberating the process of democratic contestation, but the Court in *LULAC* misunderstands this counterintuitive dynamic. By instituting a new emphasis on electoral competition, the Court may discourage safe majority-minority districts and thus their healthy promotion of the Court's own participatory goals. Ironically, the Court's participatory goals were better served by traditional VRA methodology before *LULAC* than by *LULAC*'s doctrinal modifications apparently designed to serve those goals.

Notwithstanding the rest of the Court's reasoning about the VRA, the Court's handling of new District 25, announcing a new VRA requirement that majority-minority districts be "culturally compact,"[203] may be the most troubling element of *LULAC* under a theory of democratic contestation.[204] Here, the Court echoed the antiessentialism of *Shaw v. Reno*[205] in reviewing the permissibility of new District 25, a majority-Latino district created as an offset to prevent vote dilution under the VRA. The Court concluded that the district contained not a single cohesive political community, but two separate Latino communities for the purposes of the VRA. The Court thus broke unexpectedly from precedent that defined a minority community as politically cohesive under the VRA if the community shared collective voting preferences in favor of the same candidates for office. But again, a theory of democratic contestation helps understand the Court's mistakes about race and the VRA in *LULAC*.

Although the Latino residents of District 25 voted cohesively, the district was, in Daniel Ortiz's words, not "culturally compact."[206] Quoting the district court's findings of fact, the Court noted that the "Latino communities at the opposite ends of District 25 have divergent 'needs and interests,' owing to 'differences in socio-economic status, education, employment, health, and

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203. Ortiz, *supra* note 60, at 50.

204. League of United Latin Am. Citizens v. Perry (*LULAC*), 126 S. Ct. 2594, 2619 (2006).

205. 509 U.S. 630, 642-52 (1993). *See generally* Gerken, *supra* note 31, at 1718-20 (describing the concerns about essentialization in *Shaw*, defined as "the drawing of inferences about an individual's substantive preferences based on her group membership").

206. Ortiz, *supra* note 60, at 50.

other characteristics.'"[207] District 25, as a result, spanned "disparate communities of interest,"[208] rather than a single political community, as a result of "the enormous geographical distance separating the Austin and Mexican-border communities, coupled with the disparate needs and interests of these populations."[209] The heterogeneity of District 25 rendered it impermissibly noncompact under the VRA.

The Court's justification for its cultural compactness requirement appeared to flow from an antiessentialist imperative that cautioned against assuming "from a group of voters' race that they 'think alike, share the same political interests, and will prefer the same candidates at the polls.'"[210] That is, the VRA does not permit political grouping of minority citizens simply because they vote together as a bloc under conditions of racially polarized voting. Political grouping may be warranted, according to *LULAC*'s cultural compactness reasoning, only when a district features cultural homogeneity that justifies bundling together members of the same race on independent grounds. There must be independent indicia, apart from bloc voting, that bind together the community in terms of socioeconomic, education, employment, health, and geographic considerations, among other things.

Under a theory of democratic contestation, *LULAC*'s dubious insistence on cultural compactness is misguided. The baseline requirement of bloc voting characterized by racial polarization is a necessary trigger for VRA intervention and was unchanged by *LULAC*. Both before and after *LULAC*, a VRA remedy applies only when minority voters are frustrated politically along racial lines. But *LULAC* may require, separate from racially polarized voting, a new requirement of cultural homogeneity. *LULAC* may mean that "[s]tates might not then have VRA obligations to create districts that, for example, bring together urban and rural minorities, or suburban and city ones, even when voting is racially polarized."[211] *LULAC* here goes terribly wrong.

With the goal of promoting political vibrancy and engagement, the last thing the Court ought to require is cultural homogeneity. Cultural homogeneity, or cultural compactness, would limit the space for political differentiation within the minority community. It is cultural *heterogeneity*, not

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207. *LULAC*, 126 S. Ct. at 2613 (internal citations omitted) (quoting Session v. Perry, 298 F. Supp. 2d 451, 502, 512 (E.D. Tex. 2004)).

208. *Id.* at 2618 (quoting *Session*, 298 F. Supp. 2d at 512).

209. *Id.* at 2619.

210. *Id.* at 2618 (quoting Miller v. Johnson, 515 U.S. 900, 920 (1995)); *see also Shaw*, 509 U.S. at 647 (criticizing as impermissible stereotyping the purposeful districting together of individuals with "little in common with one another but the color of their skin").

211. Pildes, *supra* note 14, at 1146.

homogeneity, that provides opportunities for democratic contestation. Cultural heterogeneity creates lines of differentiation and divisions of interest that invite political leaders to campaign for strategic realignment of political coalitions within the minority community. If, for example, District 25 contains distinct cultural communities, one in Austin and one along the Rio Grande, the sociopolitical differentiation between those communities offers the promise of democratic contestation and rivalry within the district going forward. District 25 might feature ongoing contestation for hearts and minds among Latino leaders striving to convince residents to divide along socioeconomic, educational, employment, health, and geographic lines—the dimensions the Court recites in *LULAC* as relevant for cultural homogeneity. Every such cleavage offers another line of differentiation along which leaders can appeal, challenging people to consider it as politically central. Every cleavage and difference offers fuel for democratic contestation.

The Court ought not to limit VRA enforcement to instances of cultural homogeneity in the name of political competition. Rather, the Court should ambitiously seek out cultural heterogeneity when enforcing the VRA, and in the process, activate the diversity—and thus potential for robust democratic contestation—within minority communities currently shackled by racial polarization. Connecting back to the Court's interest in political vibrancy and engagement, certainly the worst prescription would be intense homogeneity along socioeconomic, educational, employment, health, and geographic lines, leaving few prospects for political realignment along lines other than race. Recent empirical work helps illustrate this prospect. Rates of civic participation in local affairs are significantly lower in economically homogeneous cities than economically diverse ones.[212] Studies reveal that residents of economically homogeneous cities were significantly less likely to be interested in local politics than residents of economically diverse cities, even after controlling for other factors, and were significantly less likely to vote in local elections or be involved with their community board.[213] The Court's insistence on economic homogeneity, for instance, in minority communities under the VRA therefore may lead to less political engagement and participation than would be likely to blossom in more heterogeneous, culturally noncompact ones.

By self-consciously seeking out a vision of cultural homogeneity, the Court heads down the path of trying to define for the minority community the content of its political identity and constitution. By focusing on, for example,

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212. *See* J. Eric Oliver, *The Effects of Metropolitan Economic Segregation on Local Civic Participation*, 43 AM. J. POL. SCI. 186, 187-88 (1999). *See generally* J. ERIC OLIVER, DEMOCRACY IN SUBURBIA (2001).

213. *See* Oliver, *supra* note 212, at 199-204.

geographic or socioeconomic commonality in a model for required cultural compactness, the Court presumes that those commonalities are salient, perhaps determinative, in the community's political self-definition. But why so? The process of democratic contestation properly allows the community, in a contingent interaction between leaders and the public, to decide how it will constitute itself politically. By acting on a particular theory of cultural homogeneity, the Court itself makes explicit its audacious assumptions about how the Latino communities in Districts 23 and 25 should and will develop politically.

Ironically, the Court's antiessentialism in *LULAC*, and earlier in *Shaw v. Reno*, was expressly motivated by caution about preempting the self-constitution of racial minorities and presuming it along racial lines.[214] *LULAC* cites with approval *Shaw*'s prohibition on "assum[ing] from a group of voters' race that they 'think alike, share the same political interests, and will prefer the same candidates at the polls.'"[215] Just so, the Court in *LULAC* concludes that it would disserve the VRA's purposes to uphold District 25, which combines two far-flung Latino communities, "by failing to account for the differences between people of the same race."[216] That is, the Court worried about affirming essentializing assumptions about how voters, diverse along many dimensions, will decide to constitute their political identities.

However, the Court's spirit of antiessentialism, expressed in *LULAC*, is undermined by *LULAC*'s putatively antiessentialist methods. The Court's direction on cultural compactness threatens to do exactly what it cautioned against in *LULAC* itself and *Shaw v. Reno* before it. *LULAC*, by imposing a requirement of cultural homogeneity, threatens to preempt democratic contestation. Requiring cultural homogeneity under the VRA essentializes the minority community's political identity, not along racial lines, but along whatever dimensions the Court selects as critical to cultural homogeneity. If anything, judicial agnosticism about the right measure of cultural homogeneity or heterogeneity is more consistent with the core of the Court's antiessentialist

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214. *See* Ellen D. Katz, *Race and the Right To Vote After* Rice v. Cayetano, 99 MICH. L. REV. 491, 516-27 (2000) (attributing to the Court the belief that race-based voting classifications preempt political self-constitution).

215. *LULAC*, 126 S. Ct. at 2618 (quoting *Johnson*, 515 U.S. at 920); *see also Shaw*, 509 U.S. at 647. Justice Kennedy and the Court continued along these antiessentialist lines last Term. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2796-97 (2007) (Kennedy, J., concurring); *see also id.* at 2767 (majority opinion) (arguing that race-conscious government action "demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities" (internal quotation marks omitted) (quoting Rice v. Cayetano, 528 U.S. 495, 517 (2000))).

216. *LULAC*, 126 S. Ct. at 2618.

concerns. Broad antiessentialism aspires that political alignments ought to be determined by a robust political process of democratic contestation, not by judicial or other government design. Ironically, *LULAC*'s novel requirement of cultural homogeneity runs headlong into the antiessentialist purposes the Court intends it to serve in the first place.

C. The Mistake of Coalition Districts and Their Misguided Popularity

Given the emphasis on counteracting the effect of racial polarization, it might seem intuitive that a theory of democratic contestation would also generally favor coalition districts. Coalition districts, while not majority-minority districts as a matter of population, allow racial minority voters to control election outcomes by virtue of their cohesive bloc voting in the party primary.[217] Minority voters could defeat racially polarized opposition from whites by unifying behind a single candidate in the party primary, almost always the Democratic primary, where they actually constitute a voting majority. In the right situation, enough white Democrats would be willing to vote for the minority Democrat over the Republican in the general election to provide the winning margin, even if the same candidate did not attract white support in the primary.[218] Coalition districts, by requiring minority voters to attract the support of sympathetic white voters inside their districts, induce the construction of necessary biracial coalitions to elect the minority candidate of choice. This deemphasis of race might seem at first glance consonant with the values underlying a theory of democratic contestation, but in a way that cuts against majority-minority districting.

Before *LULAC*, the Court for these reasons had praised coalition districts and generally emphasized a preference for normal politics in which minority voters would not be "immune from the obligation to pull, haul, and trade to find common political ground."[219] In *Georgia v. Ashcroft*, the Court's most recent VRA decision before *LULAC*, the Court unified in support of VRA recognition of coalition districts.[220] Just as coalition districts seem to encourage, the Court hoped that minority voters would be "able to form

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217. *See* Georgia v. Ashcroft, 539 U.S. 461, 492-93 (2003) (Souter, J., dissenting); Metts v. Murphy, 363 F.3d 8, 11 (1st Cir. 2004) (en banc) (per curiam); *see also* Grofman et al., *supra* note 19, at 1407-09; Pildes, *supra* note 48, at 1534-39.

218. *See* Pildes, *supra* note 48, at 1534-35.

219. Johnson v. De Grandy, 512 U.S. 997, 1020 (1994).

220. 539 U.S. at 482-84, 492-93.

coalitions with voters from other racial and ethnic groups."[221] A scholarly consensus applauded coalition districts and the Court's decision in *Ashcroft* effectively endorsing them.[222] Furthermore, after *Ashcroft* and immediately before *LULAC*, Congress accepted the Court's position on coalition districts by letting stand that aspect of *Ashcroft* in the Voting Rights Act Reauthorization Act of 2006.[223]

An oddity of *LULAC* is that the Court looked askance at the claims of voters in old District 24, which appeared to be a coalition district under the VRA. When the Court was presented its first chance after congressional renewal to express approval of coalition districts, the Court rejected the coalition district claims offered in *LULAC*.[224] Old District 24 seemed to be a classic example of a coalition district as the theory would have it. African American voters constituted only a quarter of the district's total voting-age population but made up almost two-thirds of the Democratic primary electorate, sufficient to control the Democratic primary.[225] African American voters consistently elected their preferred candidate, Martin Frost, in the party primary and then, in a safe Democratic district, managed to elect Frost to office in general election after general election. Although a large majority of white voters voted against the minority community's candidates of choice in District 24, Frost won office with overwhelming African American support in combination with just enough votes from white Democrats.[226] The district thus offered textbook operation of the coalitional logic that the Court earlier praised in *Ashcroft*—one in which "minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice."[227] However,

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221. *Id.* at 481 (quoting *Johnson*, 512 U.S. at 1020).

222. *See, e.g.*, Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503, 531-39 (2004); Pildes, *supra* note 6, at 92-98.

223. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (codified as amended at 42 U.S.C.A. §§ 1973 to 1973bb-1 (West 2006)); *see also* Persily, *Promise and Pitfalls*, *supra* note 21, at 236-37 (noting tension between the House and Senate reports but concluding that coalition districts would be protected under the renewed VRA).

224. League of United Latin Am. Citizens v. Perry (*LULAC*), 126 S. Ct. 2594, 2625-26 (2006).

225. *Id.* at 2624.

226. *See* 1 Joint Appendix at 56, 92-103, *LULAC*, 126 S. Ct. 2594 (Nos. 05-204, 05-254, 05-276, 05-439), 2006 WL 64437 (report of Allan J. Lichtman on Voting-Rights Issues in Texas Congressional Redistricting).

227. Georgia v. Ashcroft, 539 U.S. 461, 481 (2003) (quoting Johnson v. De Grandy, 512 U.S. 997, 1020 (1994)).

presented with a classic case of just such an enduring biracial coalition, the Court in *LULAC* chose not to save old District 24.

Even more oddly, the Court also contradicted its earlier reasoning from *Ashcroft* by questioning whether Martin Frost was a legitimate candidate of choice for District 24 at all.[228] In *Ashcroft*, the Court defended coalition districts under the VRA despite the fact that coalition districts may produce elected candidates who "may not represent perfection to every minority voter."[229] But in *LULAC*, the Court insisted that the absence of primary challenges to the incumbent Martin Frost undercut the genuineness of his undisputed support among African American voters. Suggesting that African Americans might have supported an African American candidate in the primary against Frost,[230] the Court insisted that the African American voters had only "the ability to influence the outcome between some candidates, none of whom is their candidate of choice."[231] This resulting ambivalence by the Court—uniform approval for coalition districts in *Ashcroft* followed by contradictory hostility toward them in *LULAC*—reflects fundamental normative confusion about coalition districts among the Justices.

Unmoored from a theory of democratic contestation, such ambivalence demonstrates the Court's uncertainty about the precise harm under the VRA that coalition districts purportedly resolve. Old District 24 embodied what the Court had earlier idealized about coalition districts: a multiracial alliance that one state senator testified was a "good coalition . . . of African-Americans, Hispanics, and Anglos working together."[232] But the Court in *LULAC* seemed intuitively bothered by something else about the district. As Ellen Katz noted, the Court appeared suspicious of the lack of electoral competition in the district, preferring instead what the Court saw as the vibrancy among Latinos in old District 23. The Court noted that in District 23, Latino voter registration had increased, and it was "Latinos who were becoming most politically

228. *LULAC*, 126 S. Ct. at 2648 (Souter, J., concurring in part and dissenting in part).

229. *Ashcroft*, 539 U.S. at 481 (quoting *De Grandy*, 512 U.S. at 1020).

230. *LULAC*, 126 S. Ct. at 2625. Of course, undisputed testimony in the *LULAC* record explained that Frost may not have faced primary challengers precisely because he was genuinely the African American voters' candidate of choice. *See, e.g.*, 1 Joint Appendix, *supra* note 226, at 241-43 (testimony of Roy Brooks); *id.* at 238-41 (testimony of Ron Kirk); *id.* at 256-57 (testimony of Royce West). Dallas Mayor Ron Kirk testified that he "[did] not believe that you could elect an African-American candidate, including perhaps [him]self, against Martin." *Id.* at 241.

231. *LULAC*, 126 S. Ct. at 2625.

232. 1 Joint Appendix, *supra* note 226, at 260 (testimony of Royce West).

active."[233] By contrast, the Court questioned the lack of competition in old District 24, even though under the Court's precedent, there was no basis for questioning whether Frost, who had consistently received African American support, was genuinely the racial minority's candidate of choice.

New reference to a theory of democratic contestation helps clarify the Court's quandary regarding coalition districts. The critical harm of racial polarization that the VRA targets, as I have argued, is the resulting discursive polarization paralyzing the process of democratic contestation. Viewed in this light, coalition districts are responsive to the VRA's normative aims only if they release the pressures of racial polarization. The question is not simply whether coalition districts permit the racial minority to win the district. Majority-minority districts more safely ensure victory for the racial minority. Instead, coalition districts are preferable to majority-minority districts if they improve opportunities for democratic contestation beyond the single axis of race. The fact by itself that coalition districts seem to encourage biracial coalitions is nondecisive as a normative matter. Coalition districts are preferable only if they encourage a broader diversity of democratic contestation under the challenging conditions of racial polarization, most prominently by enabling minority voters to align nonracially.

Under a theory of democratic contestation, then, the badly overlooked problem with coalition districts is that they do not allow minority voters to realign and divide among themselves in politics and deliberation. Coalition districts depend on racial cohesion for effectiveness in electing minority candidates of choice. The very premise of coalition districts, in fact, is that minority voters remain tightly together on candidates and issues not only at the stage of the general election, but crucially at the stage of the party primary as well. If the minority community divides at the primary stage, then its candidate of choice likely will lose in the party primary, defeated by the candidate supported by their white copartisans in the primary.[234] In other words, coalition districts do not alter the need for the racial minority to remain tightly cohesive and thus shun consideration of issues and policies that might break up its necessary pattern of bloc voting. Even if minority voters are forced to ally with sympathetic white voters, coalition districts do not encourage the minority community to explore intragroup disagreement.

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233. *LULAC*, 126 S. Ct. at 2622.

234. *Cf.* Janai S. Nelson, *White Challengers, Black Majorities: Reconciling Competition in Majority-Minority Districts with the Promise of the Voting Rights Act*, 95 GEO. L.J. 1287, 1300-01 (2007) (discussing the risk that entry of multiple African American candidates who split the African American vote in a majority-minority district allows a white candidate to win office).

In fact, coalitions intensify the need for cohesiveness and racial unity among the minority group. The very logic of coalition districts requires the continuation of strong in-group cohesion among minority voters that does not break up the stasis of polarization and invigorate the process of democratic contestation. Coalition districts thus discourage the type of primary challenge, and concomitant fraternal debate within parties and racial groups, that the Court seemed to desire from old District 24. The electoral insecurity of coalition districts, which forces the coalitional compromises that the Court once favored, also removes the secure margin that allows the racial minority to experiment with ideas and seriously entertain internal debate.

It is important to remember that coalition districts are used to satisfy the VRA only under the predicate conditions of racial polarization. Coalition districts do not counteract the basic fact of racial polarization. To the degree that minority voters can elect their candidate of choice without constituting a voting majority, the basic precondition of racial polarization simply does not exist, and the VRA does not apply in the first place. True, coalition districts can be constructed to contain a number of marginally sympathetic white Democrats who are willing to cross racial lines and support the racial minority's candidate of choice in the general election, even if not the primary election. But the racial minority, the community of interest for purposes of the VRA, must not break from its pattern of racial bloc voting, or it will lose control of the district. Coalition districts might superficially weaken polarization among white voters, but racial minority voters are almost always more racially polarized and cohesive than their white counterparts.[235] Contrary to the goals of democratic contestation, coalition districts do not permit the racial minority to consider anything other than strict in-group cohesion and uniformity.

Just so, the coalition politics of old District 24 likely discouraged internal debate and division within the African American community. Evidence at trial bore out that African American candidates might have been able to win old District 24, perhaps even defeat Frost in the Democratic primary, but that no serious primary challenge had ever been mounted against Frost.[236] Frost had been a solid representative for African American voters in his district, scoring a ninety-four percent rating from the NAACP for his voting record, higher than the average among African American Democrats.[237] Nonetheless, the electoral incentives discouraged any primary challenge to Frost from other serious

235. *See* Karlan & Levinson, *supra* note 117, at 1223-24.

236. *See supra* notes 226-230.

237. *See* 1 Joint Appendix, *supra* note 226, at 107 (report of Allan J. Lichtman).

contenders who might have split the African American vote. Drawing African American votes away from Frost might only have opened the door for a candidate far less preferable to African American voters, and more preferable to white Democrats in the district, than either Frost or whatever African American challenger who entered the primary against him. It may have been this dynamic within the politics of old District 24, as a classic coalition district, that bothered the Court in *LULAC* and drew the Court to focus so closely on the absence of any past primary challenges, particularly from African American candidates, in old District 24. That is, the Court in *LULAC* grasped at the connection between the politics of coalition districts and the need for democratic contestation, but it simply lacked the conceptual theory, which I have attempted to provide here, to articulate the deeper rationale for the surprising holdings that it produced in *LULAC*.

Georgia v. Ashcroft presented an odd circumstance in which the minority community at least arguably supported the use of coalition districts instead of majority-minority districts.[238] In fact, this assertion taken as fact by the *Ashcroft* Court, is highly uncertain, as I have pointed out in earlier work.[239] Although minority elected officials supported the *Ashcroft* redistricting, a fact on which the Court relied heavily, virtually all civil rights and community groups representing African American voters opposed the *Ashcroft* redistricting and filed an amicus curiae brief urging its reversal.[240] Coalition districts, if traded for majority-minority districts for purposes of satisfying the VRA, are typically less attractive to the minority group. As the Court acknowledged, coalition districts require the minority group to compromise with other racial groups and settle for candidates who "may not represent perfection to every minority voter."[241] Of course, Justice O'Connor relished the need for the racial minority group to organize cohesively in coalition districts and attract marginal copartisan support in the general election.[242] Coalition districts demand biracial compromises just to hold the district safely, but the need for the racial minority to remain unified precludes any possibility to think and align beyond race even

238. *See* Gerken, *supra* note 38, at 733 ("[T]here was relative unanimity among African American representatives about the wisdom of the plan."); Pildes, *supra* note 6, at 96 (noting the "nearly unanimous support of a large black political delegation").

239. *See* Michael S. Kang, *De-Rigging Elections: Direct Democracy and the Future of Redistricting Reform*, 84 WASH. U. L. REV. 667, 691-94 (2007); *see also* Karlan, *supra* note 200, at 33 (questioning community support among African Americans).

240. *See* Brief of Georgia Coalition for the Peoples' Agenda as Amicus Curiae in Support of Appellees, Georgia v. Ashcroft, 539 U.S. 461 (2003) (No. 02-182).

241. *Ashcroft*, 539 U.S. at 481 (quoting Johnson v. De Grandy, 512 U.S. 997, 1020 (1994)).

242. *Id.* at 482-84.

within the party. Coalition districts basically rule out the chance for the racial minority to do anything but align tightly together behind a single candidate throughout the entire electoral process. This necessary dictate has limiting, unhealthy consequences on the character and tenor of democratic contestation for the minority community.

The majority-minority district provides a necessary safe venue where intragroup disagreement can be explored. The tight coincidence of race and party in American politics, at least for Latinos and African Americans, requires that this intragroup conflict play itself out within the Democratic Party, rather than between the major parties.[243] The political party is a critical venue for democratic contestation to occur among the ideologically like-minded, and a serious theory of democratic contestation demands intraparty debate in addition to interparty conflict. Although political parties and interparty competition serve as crucial mediating devices for average citizens to understand politics, meaningful intraparty debate is also essential to give political parties their substantive content as expressive associations in the first place and meaningfully declare what they represent.[244]

Intradistrict primary conflicts in majority-minority districts are well positioned to host this type of democratic contestation within minority communities. The party primary is a central venue for debate among copartisans who are strategically bound to vote together and compromise over their differences in the general election.[245] General elections, by their nature, concentrate on appeals aimed strategically at centrist voters, split between more conservative and liberal partisans. In the general election, the cost of intragroup and intraparty division is prohibitive because it would likely lead to electoral defeat. The party primary, in a majority-minority district but not in a coalition district, is where copartisans can explore their differences and redefine their commitments without necessarily costing themselves the ultimate general election.[246] It is only in the majority-minority district where democratic contestation within the minority group can be engaged without compromising the group and its party's ultimate ability to elect their candidate of choice.

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243. *See generally* FRYMER, *supra* note 22, at 87-119 (discussing the problem of electoral capture within the Democratic Party that squelches interparty competition for minority votes).

244. *See* Kang, *supra* note 137, at 141-42; Nathaniel Persily, *Toward a Functional Defense of Political Party Autonomy*, 76 N.Y.U. L. REV. 750, 805-20 (2001).

245. *See* Kang, *supra* note 137, at 141-44.

246. *See id.*

CONCLUSION

A theory of democratic contestation offers a new normative guide for healthy democratic politics and therefore provides a new perspective for assessing the entire range of election law with the value of democratic contestation at its center. A theory of democratic contestation complicates the usual understanding about the value of competition by pushing up the level of analysis from simple electoral competition to the deliberative competition among leaders to challenge the public with important choices about what politics it wants. As a result, a theory of democratic contestation should enrich views about a diverse set of problems across election law. Just as a theory of democratic contestation guides courts regarding the justifiability of majority-minority districts under the VRA, it also may inform courts about the constitutional justifiability (or impermissibility) of partisan gerrymanders or the desirability of campaign finance reform.

Although this Article's focus has been on the judicial application of the VRA, a theory of democratic contestation may provide even greater value to legislatures and other policy-making institutions, particularly redistricting commissions, than it does to courts. As this Article has argued, courts can and should productively apply a theory of democratic contestation under the well-established auspices of the VRA to shelter a space for democratic contestation to flourish, where racial polarization would otherwise threaten to kill it off. Nonetheless, there are fewer opportunities for courts, as nonlegislative bodies, to apply an affirmative vision of democratic contestation in contexts such as redistricting or campaign finance law. Courts generally act to strike down, rather than initiate and affirmatively construct, electoral structures that might be designed to cultivate certain forms of democratic contestation.[247] However, policy-making institutions regularly make such choices and would be richly informed by efforts to construct affirmative accounts of democratic contestation. Just as we expect legislatures, and quasi-legislative institutions like independent commissions, to decide among democratic values to promote in deciding matters of election law, so too might we expect them to decide among different varieties of democratic contestation to promote and, just as importantly, to discourage.

Policy-making institutions vested with appropriate democratic legitimacy, particularly redistricting commissions, could affirmatively design electoral

247. Courts may be institutionally ill-equipped to decide the value-laden and empirical questions that an affirmative account of democratic contestation necessarily requires. *See* Kang, *supra* note 239, at 686-99 (arguing that politically insulated institutions such as courts are poorly suited for questions of democratic theory).

structures to emphasize certain sociopolitical commonalities or differences. Redistricting commissions, as they currently operate or have been proposed, generally lack a substantive vision for healthy democratic politics even though they are specifically intended to design the electoral structures within which democratic politics are to proceed.[248] A theory of democratic contestation offers just such a substantive vision. Redistricting commissions could consider not simply electoral competition, as many advocate, but the particular quality and character of the democratic contestation to be pursued. Commissions could decide, for instance, whether to choose along nonracial qualities such as economic class or religion in the construction of legislative districts. Of course, the same concerns regarding electoral entrenchment might apply as they do with the putative promotion (or discouragement) of electoral competition. But a theory of democratic contestation provides a vocabulary, and more importantly, a sharper, more athletic theory, with greater conceptual clarity about normative commitments, than the blunt tool that electoral competition by itself provides.

248. *See id.* at 675-99 (describing redistricting commissions, actual and proposed, and their challenges).