

# Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law

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## I. INTRODUCTION: WHY IS THERE NO PARTISAN COMPETITION IN LOCAL LEGISLATIVE ELECTIONS?

In the debates over the Supreme Court's partisan gerrymandering cases *Vieth v. Jubelirer*<sup>1</sup> and *LULAC v. Perry*,<sup>2</sup> there has been extensive discussion among legal scholars and political scientists about the lack of competition in national and state legislative races.<sup>3</sup> When compared with city council elections in big cities around the country, however, the races in those legislatures appear intensively competitive. Although gerrymandering and incumbency advantage have rendered many individual congressional and state legislative seats uncompetitive, there is substantial competition for control of both houses of Congress and most state legislatures.<sup>4</sup> By comparison, there are almost no competitive legislative seats at the local level and there is usually no competition for control of the local legislature overall.<sup>5</sup> Further, in most local elections that feature parties, there is no evidence that the major political parties or individual candidates offer voters different policy choices or platforms.<sup>6</sup>

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<sup>1</sup> *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

<sup>2</sup> *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006).

<sup>3</sup> See, e.g., Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002); Nathaniel Persily, *Reply: In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649 (2002); Richard Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 63-64 (2004).

<sup>4</sup> See Persily, *supra* note 3, at 656-58. In 2006, control over both houses of Congress changed hands, as did control over 10 legislative chambers. See John Hood, *GOP Car Wreck: A Tune-up Won't Fix It*, NAT'L REV., Dec. 4, 2006.

<sup>5</sup> SUSAN WELCH & TIMOTHY BLEDSOE, *URBAN REFORM AND ITS CONSEQUENCES: A STUDY IN REPRESENTATION* 29 (1988); PAUL PETERSON, *CITY LIMITS* 115 (1981); Charles Gilbert, *National Political Alignments and the Politics of Large Cities*, 79 POL. SCI. Q. 25, 28 (1964).

<sup>6</sup> Only about a third of city councils feature "substantial party cleavage." WELCH & BLEDSOE, *supra* note 5, at 29. Only twelve percent of city council members thought that there was a "very important" rivalry between Democrats and Republicans. *Id.*

The lack of competition in local legislative elections is particularly striking when compared with mayoral elections in the same cities. For instance, New York City has had a series of close mayoral elections. Since 1989, Republican Party candidates have won four out of five mayoral elections, with three elections decided by 3 percent or less.<sup>7</sup> In that same period, the partisan composition of the city council has barely changed: Democrats have controlled the City Council with between 44 and 48 of the 51 seats.<sup>8</sup> The elections have not been close either—in the closest council election in 2005, the winner received over 62 percent of the vote.<sup>9</sup>

New York's experience is not unique. Other large cities where the mayoral races receive substantial media attention and campaign money, such as Philadelphia and Los Angeles, have had similar patterns.<sup>10</sup> Each has had some competitive mayoral elections, although without the type of sustained partisan or other group competition that marks other executive races like Presidential and gubernatorial campaigns, and non-competitive elections for city council and other offices.<sup>11</sup>

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<sup>7</sup> See KAREN KAUFMAN, *THE URBAN VOTER: GROUP VOTING & MAYORAL VOTING BEHAVIOR IN AMERICAN CITIES* 130, 190 (2004); Dan Janison, *City Voter Turnout Slumps*, *NEWSDAY*, Nov. 30, 2005, at A16.

<sup>8</sup> This result cannot be explained as the result of the power of incumbency, because term limits forced every Council seat to turn over. In 1989, the New York City Council only had thirty-five members, and there were thirty-four Democrats and one Republican. Since the council expanded to fifty-one members in 1991, Democrats have controlled no fewer than forty-four seats and now control forty-eight. Because of term limits, there are no council members who served for this whole period. See Dan Janison, *Unanimous Vote of Confidence: City Council's First Gay and Female Speaker Quinn Says She's "Incredibly Proud" to Be Elected*, *NEWSDAY*, Jan. 5, 2006, at A18; Bob Liff, *Growing Pains for GOP: Maverick Irks Council's 7-member Bloc*, *NEWSDAY*, Jan. 10, 1994, at 21; Nicky Robertshaw, *S.I. Race: Big Stakes, Few Differences*, *CRAINS N.Y. BUS.*, Jan. 22, 1990, at 1; Curtis L. Taylor, *GOP Won't Be Left out; Republicans Want Say in Council Rule Changes*, *NEWSDAY*, Jan. 5, 2002, at A4; Vivian Toy, *The Council; Democratic Majority Retains Wide Margin*, *N.Y. TIMES*, Nov. 5, 1997, at B5; Sam Howe Verhovek, *Political Talk*, *N.Y. TIMES*, Nov. 10, 1991, at A42.

<sup>9</sup> Tony Avella received 17,819 out of 28,531 votes cast, or 62.4 percent, in winning his council seat in Queens. New York City Board of Elections, *available at* <http://vote.nyc.ny.us/results.html> (last visited Aug. 23, 2006).

<sup>10</sup> Notably, Philadelphia has partisan elections and Los Angeles has nonpartisan elections. See Section IV.A *infra* for a discussion of the effect of nonpartisan elections on voting patterns.

<sup>11</sup> In Philadelphia, John Street, a Democrat, has been elected as Mayor twice, defeating Republican Sam Katz each time, first by a slim one-percent margin in 1999 and then by a more substantial sixteen percent in 2003. Tom Barnes, *FBI's Bug Turns into Big Win for Street*, *PITT. POST-GAZETTE*, Nov. 5, 2003, at A1; *Blacks Win in Mayoral Contests Across U.S.*, *JET MAG.*, Nov. 22, 1999, at 4. During these elections, no city council seats changed partisan hands, and the elections were notably non-competitive. Mark McDonald & Jim Nolan, *'Happy Jack' Kelly Makes Comeback: Republican Wins Council Seat*, *PHILA. DAILY NEWS*, Nov. 5, 2003, at 13. In nonpartisan Los Angeles, no mayoral candidate has avoided a run-off (which occurs if no candidate receives more than 50 percent of the vote in the first round of voting) in the last four elections, and the winning mayoral candidate received 54 percent of the vote in the run-off in 1993, 61 percent in 1997, 54 percent in 2001 and 58 percent in 2005. By contrast, only one of thirteen city council races went to a run-off in the 2005 election. See KAUFMAN,

The lack of competition in local elections was once a national issue. Early twentieth-century Progressives pushed for nonpartisan elections, where party names do not appear on the ballot, among other reforms as a solution to the problem of one-party rule in the cities.<sup>12</sup> They were successful in instituting nonpartisan elections in a majority of American cities, but the reforms have not solved the problem of a lack of competition. In fact, a substantial literature has shown that these elections feature even less competition, that voter turnout is substantially lower, that incumbents are safer and that there is no indication that candidates engage in any substantial policy competition.<sup>13</sup> However, little work has been done examining the underlying question of why is there no partisan competition in big city local elections.<sup>14</sup>

This is odd: the lack of development of partisan rivalries in local elections is in direct conflict with the predictions of those economists, political scientists and election law scholars who study partisan competition more generally. The dominant model of partisan competition—most commonly associated with Anthony Downs—predicts that political parties participating in elections will attempt to maximize their vote, just as profit seeking firms seeking to maximize their sales.<sup>15</sup> If one party is dominant, the other party positions itself along the ideological spectrum so it will receive the support of all the voters to one side of the dominant party. Just as in markets, Downs predicts that competition in politics is inevitable and desirable.

To the extent solutions have been offered to explain the lack of competition in local legislatures, they have followed Fiorella LaGuardia's famous maxim: "There is no Democratic or Republican way to pick up garbage."<sup>16</sup> That is, political scientists have argued that the lack of competition is natural, an outgrowth of what city government is and what it

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*supra* note 7, at 181; League of Women Voters, available at <http://www.smartvoter.org/2005/05/17/ca/la/city.html> (last visited Aug. 23, 2006).

<sup>12</sup> See notes 155-66 and accompanying text.

<sup>13</sup> PETERSON, *supra* note 5, at 115; Brian Schaffner, Matthew Streb & Gerald Wright, *Teams Without Uniforms: The Nonpartisan Ballot in State and Local Elections*, 54 POL. RES. Q., 7, 19-22 (2001); Melinda Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 95 AMER. POL. SCI. REV. 315, 329 (2001) (issues have little impact in nonpartisan elections).

<sup>14</sup> This paper only addresses partisan competition in large American cities. For a discussion of how small cities may be different, see note 49 and accompanying text.

<sup>15</sup> See ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 114-17 (1957).

<sup>16</sup> Where, or whether, LaGuardia actually said this has been lost to history. However, he is frequently quoted as having said it. See, e.g., Schulyer Kropf, *Sanders Announces Bid for Thurmond's Seat*, THE POST AND COURIER (SOUTH CAROLINA), Sep. 6, 2001, at 1; Alexandra Marks, *Again, New York Voters Are Poised to Reject 'Blue,'* CHRISTIAN SCI. MONITOR, Nov. 4, 2005, at 3; William Jefferson Clinton, Remarks at the U.S. Conference of Mayors Event (Jan. 16, 2001).

does. There is a problem with these “natural” explanations—there is no reason to believe that they are true.

The most prominent of these explanations was advanced by Paul Peterson in his seminal book, *City Limits*.<sup>17</sup> He claims that the issues faced by local governments are by their nature non-ideological and hence do not give rise to party politics. The mobility of capital and labor makes economic redistribution impossible to accomplish on a local level because factors of production will flee locations that tax them to provide for others.<sup>18</sup> Instead, local politics only deals with the provision of widely-agreed upon public goods and their allocation, e.g., the creation of city parks and the decision of where to locate them. These issues, Peterson argues, do not give rise to political disputes because, by their very nature, no one is against public goods.<sup>19</sup> The only type of political conflict in cities, according to Peterson, is about where and to whom to allocate public goods. This, however, does not create partisan competition over platforms and ideas, but instead only creates group and neighborhood-based competition. In the language of Downs’s model, Peterson effectively argues that there is no partisan competition in local electoral markets because there *are* no local electoral markets—there is no range of beliefs and hence no space for partisan competition.

Despite their prominence, Peterson’s claims are unconvincing. Even if the provision of certain public goods is agreed upon by a wide swath of the population, political parties can debate whether one policy or another is effective in providing the public good. For instance, although crime is widely considered bad and the efficient removal of garbage good, there is no broad agreement about whether to engage in “broken windows” or community policing. Similarly, the universal desire to not have refuse lying on the street does not translate into clear agreement about whether to privatize the provision of waste removal services.<sup>20</sup> Peterson does not establish why this type of debate could not be the subject of party politics. Further, local politics constantly feature debates about what local public

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<sup>17</sup> PETERSON, *supra* note 5. There has been substantial criticism of Peterson’s theory about the role mobile capital and labor plays in limiting the issue space of local government. See David J. Barron & Gerald E. Frug, *Defensive Localism: A View of the Field from the Field*, 21 J.L. & POL. 261, 267-69 (2005) (summarizing criticism of Peterson). However, there has been none focusing on his explanation for the lack of local party politics.

<sup>18</sup> PETERSON, *supra* note 5, at 41-61.

<sup>19</sup> “Plans to attract industry to a community, to extend its transportation system, or to renew depressed areas within the city are characteristic types of developmental policies. . . . Conflict within the city tends to be minimal, decision-making processes . . . support is broad and continuous and, if any group objects, that group is unlikely to gain much support.” *Id.* at 132.

<sup>20</sup> See notes 56-64 and accompanying text.

goods are good. Localities dispute how schools should be organized and what they should teach. They dispute whether gentrification is good or bad. There are constant arguments over whether a city should build mass transit and impose growth limitations to encourage dense land use or build roads and use zoning to encourage suburban-style developments. These issues define a city, and are as ideological as the issues that face national government. But, unlike national issues, there are no political parties taking sides in these debates on the local level.

There are other potential “natural” explanations. Perhaps a large majority of most city residents are members of one party and, hence, they do not disagree enough about policies to create competition. This hypothesis, however, fails to explain basic empirical facts about urban elections, like the existence of uncompetitive council elections in cities with competitive mayoral elections, or the inconsistent endorsement behavior in local elections by newspapers that consistently favor one party in national elections. Alternatively, perhaps partisan rivalries do not develop because there can be independent competition for mayor and councils are too weak to generate much concern among existing parties or potential new parties. This hypothesis, too, is insufficient. Parties do run candidates in these elections; they just lose. Further, such a theory would be hard to square with the reality of the statutory power of city councils, which can be quite extensive, often including the power to approve or reject enormous budgets.

What these explanations miss is that the lack of local party competition is likely not a “natural” result of political forces, but is more likely the result of the legal regime and internal political party rules governing party competition. *The problem is legal, and not purely political.*

To explain the effect of voting rules on local partisan competition, this paper employs Downs’s metaphor for electoral competition—that parties behave like competitive firms and that market rules can be used to understand the behavior and efficiency of “political markets” in translating voter preferences into government policy.<sup>21</sup> However, as noted, the basic Downsian model fails to explain why competition does not arise in local elections. As such, this paper develops a modified version of the Downsian model that explains the lack of partisan competition in local legislative

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<sup>21</sup> See David Schleicher, “Politics as Markets” Reconsidered: *Natural Monopolies, Competitive Democratic Philosophy and Primary Ballot Access in American Elections*, 14 SUP. CT. ECON. REV. 163 (2006).

elections in medium and large cities as the result of laws, and not merely natural political forces.<sup>22</sup>

A crucial point here is that beliefs about local politics do not strongly track beliefs about national politics. There is substantial evidence that Democratic or Republican voters (and politicians) in any locality, who form relatively coherent ideological blocs on national issues, do not form coherent ideological blocs about local politics. Put another way, the information that a candidate is a Democrat or a Republican in a local election does not reveal much information about her beliefs about local issues. As noted by political scientists Edward Banfield and James Q. Wilson, "What the party stands for in local elections often has little relation to what it stands for in state and national ones, and moreover in local elections (even more than in state and national ones) the party as such seldom has any concrete program or platform."<sup>23</sup> In Downsian terms, this means that local and national elections comprise separate markets.

Conceiving of local and national elections as separate markets highlights how unnatural the lack of competition in local elections is. Absent anti-competitive behavior or synergies, separate product markets will usually feature different competitors (or at least the same competitors with different market shares). However, local and national elections feature the same competitors with the same market share—Democrats and Republicans receive a share of the vote in local elections that is directly commensurable with their share of the national vote.<sup>24</sup>

For a Downsian model to explain this phenomenon, two crucial assumptions must be made. First, voters must choose party membership and affiliation as a result of preferences about national issues (and not local issues). Second, interest in, and information about, candidates for city council must be sufficiently low such that a significant portion of the electorate is only armed with the information available on the ballot when

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<sup>22</sup> See Section III.A, *supra*.

<sup>23</sup> EDWARD C. BANFIELD & JAMES Q. WILSON, CITY POLITICS 227 (1963).

<sup>24</sup> The extent to which local voting directly tracks national voting is remarkable. From 1967, when Indianapolis and the surrounding Marion County were combined into the unified "Unigov" that exists today to the mid-1990s, Republicans dominated both national and local elections. Democrats started gaining ground in 1996, gaining forty-six percent of the vote, and then forty-eight percent in 2000. Just as this was occurring, in 1999, Democrat Bart Peterson won the mayoralty. In 2003, Democrats took control of the city-county council and, in 2004, John Kerry carried Marion County. See William Blomquist & Roger B. Parks, *Fiscal, Service, and Political Impacts of Indianapolis-Marion County's Unigov*, PUBLIUS, Fall 1995, at 50-53; Matthew Tully, Council Control Shifts to Dems, INDIANAPOLIS STAR, Dec. 17, 2003, at A1; See also Marion County Clerk's Election Result Board, [http://www.indygov.org/eGov/County/Clerk/Election/Election\\_Info/Past\\_Results/home.htm](http://www.indygov.org/eGov/County/Clerk/Election/Election_Info/Past_Results/home.htm) (last visited Oct. 25, 2006); Dave Leip, Atlas of U.S. Presidential Elections, <http://uselectionatlas.org/RESULTS/index.html> (last visited Oct. 25, 2006).

deciding whom to vote for in these elections. There is ample evidence for each of these assumptions.

Once these assumptions are made, the effect of local laws can be seen. Three specific laws—by my definition, “unitary party rules”—cause local and national elections to have similar results even though preferences about local and national issues are widely disparate. First, parties that win a certain number of votes state-wide or have a certain number of members, either statewide or in a locality, almost always automatically receive a spot on local ballots.<sup>25</sup> Second, by law and by party rule, an individual who is a member of a national political party is necessarily a member of the same party when it comes to local elections.<sup>26</sup> Finally, national party organizations have a First Amendment right to organize campaigns in local elections even if the election is nonpartisan.<sup>27</sup>

Under the assumptions made above and, crucially, with the unitary party rules, the vote in local elections will track, at some level of remove, the vote in national elections of the locality. Because there is not enough media attention or campaign spending to provide real information about candidates in most local elections, voters use the heuristic provided by the national party’s endorsement of a candidate (*i.e.*, that the candidate appears on the ballot with “Democratic” or “Republican” before her name) even if it tells them little about a candidate’s stances. This is not irrational behavior. If a candidate’s national party membership expresses little but not zero information about him and there is scant other information, voters will rationally rely on the available national party heuristic. Further, the national party that is in the minority in the city will not be able to rebrand itself at the local level because the cues provided about the party at the national level dominate voter beliefs about party candidates. If it uses primary elections, there is a further limitation on the ability to rebrand—the voters deciding on candidates will have made their decisions on the basis of national, not local politics, and therefore will not select candidates that are differentiated along local policy lines. In cities dominated by one party, there will be no competition. (Notably, those cities with party competition for national office, like Indianapolis, also feature local party competition).

This begs the question: if the national parties do not compete effectively at the local level, why there are not other entrants, such as local third

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<sup>25</sup> See note 108 and accompanying text.

<sup>26</sup> See note 109 and accompanying text.

<sup>27</sup> See note 110 and accompanying text.



parties? The answer is that the forced bundling of the national parties' products—their brand name—renders entry for third parties difficult. The reason is that the support of their partisans and “leaners,” independents who act like partisans, give the national parties an initial base of voters in local elections unrelated to their issue stances in local elections. When combined with “Duverger’s Law,” the robust social scientific finding that elections featuring first-past-the-post/single-member district elections tend to have only two competitive parties, the barrier to entry for parties seeking to enter local elections is very high.<sup>28</sup> The only real option available to potential local party entrants is entering national and local elections simultaneously, because entering national elections would, under the assumptions in the model, give the new entrant a chance to earn adherents that would then vote for it in a local election. However, Duverger’s Law also applies in national elections and these elections, unlike local elections, are quite competitive. As such, entry is difficult if not impossible.

If the model is correct, there are dramatic implications. First, and most importantly, it shows local elections are very inefficient means of translating voter preferences into government policy. That is, local government does not meet the most basic definitions of democracy—it does not provide voters with the ability to replace incumbents with opponents with different views and to have their views represented in local policies.<sup>29</sup> Further, a system that retards party competition also removes from local politics the forces that create new political coalitions, investments in the development of political ideas, and new leaders. The lack of parties makes city government both unrepresentative and uncreative. The model has important implications in the academy as well—determining that local governments are not particularly democratic problematizes much recent work in local government law aimed at enhancing local power and reforming local government structures.

Moreover, the model explains why nonpartisan elections are not a solution. The major harm caused by the unitary party rules and the shape of local political competition is that the partisan affiliation of candidates is only a weak heuristic for their policy preferences. The use of nonpartisan elections takes the little information that the heuristic of party provides and removes it entirely.

If all of this is right, reform seems attractive. One start would be abandoning the local elections reforms of the Progressive Era. One easy

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<sup>28</sup> For a discussion of Duverger’s Law, see Schleicher, *supra* note 21, at 190-91.

<sup>29</sup> See *id.* at 173-80.



reform would be abandoning nonpartisan elections. This, however, will not solve the problem of the lack of partisan competition in councils where it is allowed. Another possibility would be to give more power to Mayors relative to city councils and other city-wide elected officials. This would be good, too, as mayoral elections feature far more competition than council elections do. But it would not solve the problem, as although there is usually more competition for mayor than for council, mayoral elections in most cities do not feature regular partisan competition either.

To attack the problem head on, a state could repeal the unitary party rules that are not constitutionally mandated, refusing to guarantee local ballot places for parties based on statewide votes and passing a law opening local primaries to all voters.<sup>30</sup> This may result in a local party that is in the minority reconstituting itself for the purposes of local elections as a broader coalition. If this did not work, a state could also take a more dramatic step: it could bar any party that chooses to register for national and state elections from getting a place on the ballot for local elections.<sup>31</sup> Only purely local parties could compete. These policies would spur the rejiggering of local voters among existing parties or the creation of new parties without reference to their membership in national parties. Such movement would require parties seeking to be competitive in local elections to express policy preferences on local issues, which would permit all voters to use the party identification of candidates as a good heuristic for their policy views on local issues. Because of the use of single member districts and first-past-the-post voting, local elections would likely result in a two party system at the local level, too, but with parties that provide relevant heuristics for the policy beliefs of the candidates.

The paper will proceed as follows. Section II explains why competition should be expected in local elections and explores and rejects three different explanations for why the lack of competition is a natural byproduct of the nature of city politics. Section III sketches a model explaining the lack of competition as a result of election laws and discusses the evidence supporting the assumptions in the model. Section IV will explore the implications of the model and will discuss the ways my proposed policy changes would effect local elections.

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<sup>30</sup> As is discussed in Section IV.B *infra*, the second of these proposals would generate a substantial constitutional challenge. Whether it would be successful is unclear.

<sup>31</sup> This too could be subject to a constitutional challenge, as discussed in Section IV *infra*, but it would be far more likely to pass constitutional muster than the other proposal.

## II. WHY IS THERE NO PARTISAN COMPETITION IN LOCAL LEGISLATIVE ELECTIONS: "NATURAL" EXPLANATIONS CANNOT EXPLAIN THE LACK OF COMPETITION

In order to properly discuss the failure of "natural" accounts for the lack of partisan competition in local legislative elections, it is necessary to first explain why one would expect competition in local elections. In order to do so, it is necessary to establish the basic model that serves as the work-engine of most analyses of partisan competition—Anthony Downs's spatial political markets model—and why one-party domination is not a stable equilibrium in the model.<sup>32</sup> After doing so, this section considers three alternative "natural" explanations for the lack of competition in local elections: (i) Peterson's theory that the lack of partisan competition is a result of the issues facing local governments; (ii) an argument that, because of residential political segregation (*i.e.*, Democrats living in the same cities as other Democrats), people in cities agree about local politics; and (iii) an argument that the stakes for local legislative elections are low enough and the transactions cost of forming new parties is high enough that there is no entry despite current partisan groupings being unresponsive to local political beliefs.

### *A. The Lack of Competition is a Political Market Failure*

Downs's model of party behavior in elections is the simplest and most widely used in political science and the study of elections in the law.<sup>33</sup> He made two basic assumptions: (1) parties are groups of politicians allied with the sole goal of being elected and appeal to voters through the promotion of policies designed strategically to garner the most votes possible; and (2) voters' beliefs about policy are arrayed through ideological space along a single continuum, and voters will vote for the politician who ideologically comes closest to their ideal position.<sup>34</sup> The parties thus behave just like firms in an ordinary market, maximizing vote share instead of profits, selling their "good," or policy position, to "consumers," or voters. Borrowing from an economic model about the location of firms in physical space developed by Harold Hotelling, Downs's model determined that, in a two-party system, parties will

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<sup>32</sup> DOWNS, *supra* note 15, at 114-149. For a discussion of Downs's influence, see Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 649-50 (1998).

<sup>33</sup> DOWNS, *supra* note 15, at 116-17.

<sup>34</sup> *Id.* at 139; Issacharoff & Pildes, *supra* note 32, at 649.

compete for the median voter, as earning her vote will mean earning the votes of all voters to one side of electoral spectrum and hence winning the election (this is widely referred to as the median voter hypothesis).<sup>35</sup> Although electoral rules—like the first-past-the-post/single member district system used in the United States—can create a situation in which it is a likely result that only two parties compete for votes,<sup>36</sup> a one-party system is always an unstable equilibrium. Under the model, if one party is dominant, another will spring to life and take an ideological position nearly identical to that of the dominant party such that it receives half or nearly half of the votes.<sup>37</sup>

The assumptions made by Downs are extreme, and political scientists and lawyers alike have noted that politics does not work like a Downsian model.<sup>38</sup> However, relaxing either of his assumptions without abandoning the model—*i.e.*, understanding that parties and politicians have interests other than maximizing their vote share or acknowledging that voters have views that are not reducible to two dimensions—makes the existence of a one-party system even less likely. If parties are not dogmatic in the pursuit of the median voter but rather serve a number of masters (primary voters, the politicians' own policy interests, respect from opinion leaders), there emerges more policy space in which a competitor party could seize votes.<sup>39</sup> Other elements can complicate the median voter hypothesis but not the instability of one-party systems under the model.<sup>40</sup>

<sup>35</sup> DOWNS, *supra* note 15, at 141; DENNIS C. MUELLER, PUBLIC CHOICE II: A REVISED EDITION OF PUBLIC CHOICE 65-79 (1989) (providing a more mathematically complex version of the median voter hypothesis).

<sup>36</sup> See Schleicher, *supra* note 21, at 168-69 (summarizing "Duverger's Law," the principle developed by Maurice Duverger that elections with single member districts and a first-past-the-post voting system, like that used in the United States, will tend to have only two parties).

<sup>37</sup> See DOWNS, *supra* note 15, at 127-32.

<sup>38</sup> "The assumptions underlying [Downs's model] are so unrealistic (one-issue dimension; a unimodal symmetric preference distribution; all individuals vote; two candidates) that many researchers were naturally led to examine the consequences of relaxing them." MUELLER, *supra* note 35, at 180. For a summary of this work, see MUELLER, *supra* note 35, at 180-93; Richard Hasen, *The "Political Market" Metaphor and Election Law: A Comment on Issacharoff and Pildes*, 50 STAN. L. REV. 719, 722 n.13 (1998). Downs himself noted the effect of some variation on his assumptions. For example, he noted that complete convergence in party platforms meant the possibility that voters at the ends of the distribution would not see any difference between the parties and not vote. DOWNS, *supra* note 15, at 140.

The robustness of the general predictions of the model, however, is strong in the face of the relaxation of assumptions. Joseph Schlesinger has shown that, even if members of parties—office seekers, organizers, and primary voters—have some ideological or personal goals as well as winning office, when looked at through the lens of American political experience, these influences will not much weaken the argument that the primary behavior of parties is to develop strategies in order to win office. JOSEPH SCHLESINGER, POLITICAL PARTIES AND THE WINNING OF OFFICE 22-28, 140-48 (1991).

<sup>39</sup> JOHN H. ALDRICH, WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA 180-93 (1995); SCHLESINGER, *supra* note 38, at 144-45 (noting that parties occasionally

This very simple discussion of the enormous literature surrounding partisan competition is only meant to establish a simple proposition: in political markets, as in economic ones, monopoly is not a natural state of affairs. It must be explained.

*B. Mobile Factors of Production Cannot Explain the Lack of Competition*

As noted above, political scientists and legal scholars have not entirely failed to broach the subject of the lack of partisan competition in local elections. Easily the most prominent explanation offered is Paul Peterson's thesis that the lack of partisan competition is a result of the type of issues at stake in local politics. He argues that the mobility of capital and labor across localities means that localities cannot engage in policies that give rise to ideological conflict, and hence, local issues do not engender partisan wrangling. This argument is quite flawed. He does make a somewhat persuasive case that local governments face different types of issues from those facing the national government. However, he cannot explain why this difference means that partisanship thrives at one level and does not at another.

Before exploring the flaws of Peterson's argument, it is important to locate it in terms of the discussion that preceded this one—the explanation of Downs's political markets model. Put in terms of the Downsian model, Peterson's argument is, in effect, that the reason there is no local partisan competition is that there is no local political market. In order for Downs's model to work, there must be “ideological space.” That is, for parties to have a reason to locate themselves ideologically and to compete over policies, there must be disputed beliefs among voters about politics. Ordinarily, this is simply assumed. Downs assumed not only the existence of ideological space but the distribution of voters inside that space. The shape and number of axes extant in ideological space is often disputed by political scientists criticizing Downs's assumptions, but the basic idea that people disagree about public policies is ordinarily not the subject of much discussion. Peterson's argument challenges this basic idea.

He begins by noting that both labor and capital are highly mobile between localities.<sup>41</sup> As mobile factors of production, they can abandon a locality if the mix of public policies pursued by a city government makes it

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adopt strategies that do not maximize their vote, like the nominations of Barry Goldwater and George McGovern); Samuel Issacharoff, *Collateral Damage: The Endangered Center in American Politics*, 46 WM. & MARY L. REV. 415, 424-25 (2004) [hereinafter *The Endangered Center*].

<sup>40</sup> See MUELLER, *supra* note 35, at 180-93.

<sup>41</sup> See PETERSON, *supra* note 5, at 22-30.

advantageous to locate elsewhere, *i.e.*, if taxes become too high or if public services are not optimally provided.<sup>42</sup> The mobility of residents and capital limits the policy mix pursued by local governments. According to Peterson, in order to avoid residential and capital flight, cities are basically barred from engaging in “redistributive” politics.<sup>43</sup> Local governments cannot engage in tax and benefits policies that take resources from one social group and systematically give them to another because the taxed—be they residents or investors—will simply leave. As such, city policies are limited to two areas. The first are “developmental” or those policies meant to attract investment or immigration. In Peterson’s taxonomy, developmental issues are those public goods cities provide, like good schools, parks and roads to attract development. The second are “allocational,” or the division of governmental resources among the population. These issues are inevitable; localities have to hire some people and not others and have to place schools and parks in some neighborhoods and not others.

The issues at the national level are different, he claims, because residents and capital are imperfectly mobile internationally. Hence, the national government can redistribute wealth, while local governments cannot.<sup>44</sup> Redistribution gives rise to ideological, and hence party, division

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<sup>42</sup> *Id.* at 31-39.

<sup>43</sup> *Id.* at 40-65.

<sup>44</sup> *Id.* at 67-92. The veracity of this claim is somewhat tenuous. First, capital (if not labor) is quite mobile internationally and constrains national policies as well. Thomas Friedman has popularly described the effect of global capital flows as creating a “golden straight-jacket” for national policy makers. THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* 83-92 (1999). (It also should be noted that mobility of capital has not constrained partisan politics in small open economies like Taiwan and New Zealand. Second, cities have some control over local businesses and workers because they provide “agglomeration economies,” or the market size and knowledge-based advantages that come from being near other people and companies. See MASAHISA FUJITA, PAUL KRUGMAN & ANTHONY J. VENABLES, *THE SPATIAL ECONOMY* 4-6 (1999). This is based on three factors, first identified by Alfred Marshall, specifically, the desire of employers and employees (1) to reduce transport costs; (2) to locate near large labor market pools to reduce risk; and (3) to be near others to learn from their “knowledge spillovers.” Glenn Ellison, Edward L. Glaeser & William Kerr, *What Causes Industry Agglomeration? Evidence From Coagglomeration Patterns* (HIER Discussion Paper Number 2133, Apr. 2007, available at <http://post.economics.harvard.edu/hier/2007papers/2007list.html> (finding evidence that all three factors play a significant role in urban agglomeration). Thus cities have some ground for engaging redistributionary policies, as firms and labor will not just flee cities because of an increase in cost, because they are getting real benefits from being located near other producers or workers. However, capital is somewhat constrained by national boundaries and, although agglomeration does provide cities with some capacity to engage in redistributive policies, substantial local redistribution can cause negative economic effect. See Edward Glaeser, *Are Cities Dying?*, 12 J. ECON. PERSP. 139, 156 (1998). For a survey of the criticism of Peterson’s arguments about the way mobile factors limit the range of political choice in cities, see Barron & Frug, *supra* note 17, at 265-66. Most scholars have agreed on a position that is somewhat in from Peterson—that cities have some “relative autonomy.” *Id.*

about the size and object of government.<sup>45</sup> Peterson argues that the difference in the types of possible governmental policies results in a difference in the type of electoral politics. When combined with the national government's need to solve "great issues," like war and economic depression, the difference in the policies available to the national government creates partisan politics—the issues are important enough and there is range enough in the possible policy choices for relevant cleavages in public opinion to form and be exploited by political parties.<sup>46</sup> Local politics is different, Peterson argued. Developmental policies do not provoke much disagreement and allocational policies do not lead to partisan politics. Instead, they lead to a geographic and group-politics based solely on which group is receiving benefits and which group is not.<sup>47</sup> But the lack of local partisan politics is a function of the lack of importance of local issues and the limited range of policy choices available at the local level. "Because cities have so few policy options open to them, partisan political life becomes one dimensional, a pale reflection of national political debates, a thin veneer that has none of the solidity of partisanship as it is usually understood. . . . In short, local politics is limited politics. Its issues are not great enough to generate its own partisan political life."<sup>48</sup>

This logic fails. Even if mobile residents and capital limits the range of policy choices available to cities,<sup>49</sup> Peterson does not give an explanation

<sup>45</sup> PETERSON, *supra* note 5, at 150-66.

<sup>46</sup> *Id.* at 80-90, 110-12. "Parties are made and unmade by great issues involving war and peace, depression and recovery, race and religion, economic growth and social equality." *Id.* at 111. This argument is peculiar in the extreme. Localities suffer from economic depression, face problems of social inequity and, particularly, generate and need to solve racial conflict.

<sup>47</sup> *Id.* at 150-66; KAUFMAN, *supra* note 7, at 19 ("The essential questions that dominate many, if not most, local elections focus on the priorities and allocation of local government services: who will receive how much and at the expense of whom. The 'who' and 'whom' within the realm of local politics do not, of course, refer to individuals but rather to subgroups within the larger municipality that represent, at times, opposing priorities and interests.")

<sup>48</sup> PETERSON, *supra* note 5, at 112, 115-16.

<sup>49</sup> Following on the pioneering work of Charles Tiebout, William Fischel has argued that urban politics is more representative, at least in small cities, than any other form of government because of the power of mobile residents. WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* 87-90 (2001). He argues that city politics has developed better majoritarian systems, because voters feel free to exit, and further that the threat of that exit disciplines political actors to avoid rent-seeking. Fischel argues that cities with more than 100,000 residents have politics that looks like state politics, complete with powerful interest groups. *Id.* at 93-95. He is surely right that big cities resemble states in their size and, to a lesser degree, in the complexity of their politics. However, states usually have well-functioning party systems through which voters can express meaningful preferences about political issues, whereas big cities do not.

However, Fischel's analysis brings up a larger issue: how the threat of exit impacts cities differentially. It is likely that exit becomes less of a constraint on city governments the denser a city becomes. For citizens choosing where to live among smaller cities and towns, of which there are many

for why the debates that do occur, about how to provide public goods like education or public safety, could not cause partisan divides.<sup>50</sup> Further, he does not explain why he assumes that people agree about what public goods should be provided. Neither of these propositions can withstand scrutiny. There are frequent debates about what public goods cities should provide and what policies work best at achieving these goods. They are just not the subject of partisan debates.

It can be said without much question that political parties constantly debate the means by which the national government provides public goods. For instance, the national parties agree that the nation should be kept safe from foreign attack but disagree about what combination of security and military policies will accomplish this. At the local level, there are debates about similar issues but these debates are not conducted between political parties. The most basic of all local developmental public policies is how to spur local economic growth and it is the subject of one of the hottest debates in urban policy. Cities around the country have taken sides between Richard Florida's idea that cities grow when they attract members of the "creative class" through expanding cultural offerings and downtown housing options and Joel Kotkin's theory that urban growth is mostly a

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in any given metropolitan area, public policy—particularly property taxes and schools systems—make up a large part of the decision-making process. However, when choosing between the urban core (or the few urban cores, for metropolitan areas with large edge cities) and the smaller surrounding municipalities, other factors are likely to play a role. Cities are not only providers of public policy; they allow residents to receive gains from living near one another and markets, or agglomeration. Residents of cities also suffer from the costs of congestion, including higher housing prices for similar property and a lack of open space. The gains in agglomeration from living in a big city are likely to be large, although the congestion costs are likely to be high, too. Whereas the main differentiating factor between two smaller cities may be public policies, like which one has the best schools or lowest property tax, there are a whole host of gains and costs independent of public policies implicated in the choice between a dense urban area—be it a central city or an edge city—and a small town. This is not to say that public policies do not play a large role in the decision citizens make between living in a large, dense municipality and living in a smaller, less dense one, but they just play less of a role than they do in making the decision between living in one of two smaller cities. The denser the city, the more likely agglomeration forces (being close to work, other workers, markets, and entertainment) and congestion costs (real estate prices, the absence of open space) are likely to play a role in moving decisions, leaving public policy as less of the deciding factor. Thus, a resident of a big, dense city is less likely to move in response to the passage of a public policy that a voter does not like than is the resident of a smaller city. To make this concrete, a resident of Chicago is less likely to respond to a public policy that she does not like by moving out of the city to the suburbs than a resident of Hinsdale is to respond to a public policy she does not like by moving to Oak Brook (both of which are rich suburbs in the Chicagoland region). The result is that, as cities get denser, the threat of exit (of residents or capital) has less of a handcuffing effect on city policy.

<sup>50</sup> It should be noted that other critics of Peterson, in particular John Mollenkopf, have argued that the provision of public goods is marked by political conflict. See JOHN MOLLENKOPF, *A PHOENIX IN THE ASHES* 37 (1992) (discussing and citing literature on political conflict in local economic development). Neither Mollenkopf nor anyone else, however, has devoted much energy to explaining why this conflict is not partisan.



function of low local taxes and space for cheap housing.<sup>51</sup> Although they certainly have an implicit debate about ends, Florida and Kotkin are both focused on the question of what means produce economic growth. Between cities, this issue is debated back and forth. Why this could not be the subject of intra-city partisan debate, as well as inter-city dispute, is not clear. Previous debates about the causes of local economic growth, like the disputes about whether cities with one type of industry or many types of industry grow faster, exist in a similar universe.<sup>52</sup> In each case, supporters of one position argued that a certain set of policies would produce the end of economic growth, and their rivals, armed with different assumptions about investment behavior, human nature, and government capability, advanced different policies.

Other policy debates take exactly the same form.<sup>53</sup> A number of large police departments, most notably New York City's, have adopted a "broken windows" theory of policing, vigorously pursuing and punishing minor disorder—crimes like vandalism and loitering—on the ground that this will create an atmosphere of social order that will result in a lower overall crime rate.<sup>54</sup> Other cities have not adopted this tactic, on the ground that it constitutes a misallocation of resources and there is no truth to the proposition that punishing small property crimes creates an atmosphere of order.<sup>55</sup> Scholars and journalists have argued back and forth

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<sup>51</sup> Compare RICHARD FLORIDA, *THE RISE OF THE CREATIVE CLASS: AND HOW IT'S TRANSFORMING WORK, LEISURE, COMMUNITY AND EVERYDAY LIFE* (2004) with Joel Kotkin, *For Thriving Cities, It's not Enough to Be Cool*, THE AUSTRALIAN, Feb. 20, 2006, at 8, with Joel Kotkin, *Paths to Prosperity: Many Journalists Believe Yuppies, Bohemians, and Rock Bands Are the Key to Local Economic Growth. They Ought to be Looking at Families*, THE AMER. ENTERPRISE, July 1, 2003, at 32. For a discussion of the debate between Florida and Kotkin, see, e.g., William Helton, *The Panacea Patrol: A Fresh Idea About How to Stimulate Local Economies Is Fueling a Debate About Whether It Can Solve All Problems*, GOVERNING MAG., Oct., 2004, at 62; Patrick Holmes, *Creatives Take to the Suburbs*, DENVER POST, July 24, 2005, at E6; Christopher Shea, *The Road to Riches?*, BOSTON GLOBE, Feb., 29, 2004, at D1.

<sup>52</sup> See Edward Glaeser, H. Kallal, J. Scheinkman & A. Shleifer, *Growth in Cities*, 100 J. POL. ECON. 1126, 1152 (1992).

<sup>53</sup> A perfect example of a debate over the means by which public services could be provided is garbage pick-up. Nearly every city in the nation has debated the merits of privatizing trash disposal services. See, e.g., Paul Glastris, *Reinventing Government: Book Reviews*, WASH. MONTHLY, Apr. 1992, at 39; John Tierney, *Bringing His Gospel Home; City Hall Lends Ear to Captain of Privatization*, N.Y. TIMES, May 25, 1995, at B1.

<sup>54</sup> The policy was first described and given its name in a famous article by James Q. Wilson and George Kelling. James Q. Wilson & George Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29. For a critical description and discussion of the theory, see BERNARD HARCOURT, *THE ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* 23-37 (2001).

<sup>55</sup> HARCOURT, *supra* note 54, at 9, 59-89 (noting that other cities have not adopted broken windows policing and conducting studies showing that the decrease in crime in these cities during the 1990s was comparable to cities using broken windows policing).

whether the broken windows approach results in a lower crime rate.<sup>56</sup> What is notable about this debate for the purposes of this paper is that both sides of the debate believe that crime is bad and should be prevented, but disagree about whether a certain policy promotes that end. Political parties could line up on either side of this issue and debate it. But they do not.<sup>57</sup>

Further, local citizens do not agree about what city policy should attempt to maximize. That there is some agreement that certain public goods like schools should be provided does not mean there is agreement about the form they should take. Perhaps the most notable is whether localities should give children vouchers to attend private school. Although there is an empirical question that is often debated—whether a voucher system would produce better results than a purely public school system in terms of reading and arithmetic tests—there is also a purely normative one, namely, whether schools be used to create civic unity or should they be seen as purely providing education and judged on that metric.<sup>58</sup> The national parties actually have taken sides on this debate—with Republicans in favor and Democrats against—but the debate over vouchers is no different in kind from any number of issues faced by urban governments.<sup>59</sup> Take the fight in the 1960s over “urban renewal.” Those in favor of slum

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<sup>56</sup> Papers in favor of broken windows include George L. Kelling & William H. Sousa, Jr., *Do Police Matter? An Analysis of the Impact of New York City's Police Reforms*, MANHATTAN INST. CENTER FOR CIVIC INNOVATION CIVIC REP. No. 22 (2001); and WESLEY SKOGAN & KATHLEEN FRYDL, *FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE* (2004). Papers by those opposed to broken windows policing include Anthony A. Braga et al., *Problem-Oriented Policing in Violent Crime Places: A Randomized Controlled Experiment*, 37 *CRIMINOLOGY* 541 (1999); Jeffrey Fagan & Garth Davies, *Policing Guns: Order Maintenance and Crime Control in New York*, in *GUNS, CRIME, AND PUNISHMENT IN AMERICA* (Bernard E. Harcourt ed., 2003); and Bernard Harcourt & Jens Ludvig, *Broken Windows: New Evidence from New York City and a Five City Social Experiment*, 73 *U. CHI. L. REV.* 271 (2006).

<sup>57</sup> See Bernard Harcourt, *The Broken Windows Myth*, *N.Y. TIMES*, Sept. 11, 2001, at A21 (discussing the lack of debate about broken windows in New York politics).

<sup>58</sup> For a discussion of vouchers along these lines, see Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 *U. CHI. L. REV.* 937, 938 (1996); Martha Minow, *Choice and Commonality: Welfare and Schooling After the End of Welfare as We Knew It*, 49 *DUKE L. J.* 493, 495-97 (1999).

<sup>59</sup> See Jamie Steven Kilberg, *Neutral and Indirect Aid: Designing a Constitutional School Voucher Program Under the Supreme Court's Accommodationist Jurisprudence*, 88 *GEO. L.J.* 739, 770 n.214 (2000) (noting that the major parties have taken sides on the issue of school vouchers); Andrew Weisenberger, *Cleveland Program Could Lead to Definitive Supreme Court Precedent on School Vouchers*, 30 *J. L. & EDUC.* 564, 564 (2001) (same). Notably, local members of the national parties have been far more catholic, with prominent local Democrats, like Mayors Anthony Williams of Washington D.C., Cory Booker of Newark and John Norquist of Milwaukee in favor, and Republican Mayors Michael Bloomberg and Richard Riordan opposed. Peter Beinart, *Wedded*, *NEW REPUBLIC*, Apr. 5, 2004, at 8; Ronald Brownstein, *Voters Seem Dissatisfied, Uncertain on Election Eve*, *L.A. TIMES*, Nov. 1, 1993, at A1; Meghan Clyne, *School Vouchers Taking Hold in Washington*, *N.Y. SUN*, Nov. 14, 2005, at A1; Myron Magnet, *In Prospect*, 13 *CITY JOURNAL* 5 (2003); Katherine Skiba, *Justices Appear Sympathetic to Vouchers*, *MILWAUKEE JOURNAL-SENTINEL*, Feb. 21, 2002, at A1.

clearance had a very different view of what a good city would look like than Jane Jacobs and her acolytes.<sup>60</sup> A modern version of the debate takes place over the benefits and costs of gentrification.<sup>61</sup> Whether slums should have been cleared, or whether it is good for property values to rise in poor neighborhoods was never the subject of a clear partisan divide, but it could have been. Peterson does not provide an explanation why it was not.

Finally, there is substantial evidence that local issues take on partisan characteristics when the federal government becomes involved. As the federal government grew through the course of the twentieth century, many issues that had been purely local in scope became national issues. When these issues became national, they also became partisan. The easiest example of this is crime. Over the past thirty years, many issues related to policing and crime that were traditionally within the jurisdiction of local and state governments have become subject to federal law.<sup>62</sup> Traditionally, and with some notable exceptions, policing strategies have not been the focus of much local partisan debate; partisan politics often ends at the detective's door.<sup>63</sup> When the 1994 Crime Act brought similar issues to the national scene—increasing the number of officers on the street, crime prevention programs—they became intensely partisan.<sup>64</sup> The explanation for the lack of partisan debate at the local level, then, cannot turn on the type of issue in play.

There is another theoretically possible argument for why local issues do not give rise to party politics (although Peterson does not make it). Even if local issues are not inherently nonpartisan, beliefs about groups of local issues could be widely diffuse. That is, the coalition of people that agree that evolution should (or should not) be taught in the schools may have nothing to do with the coalition of people that favor (or disfavor) increased development downtown. If all issues form their own unrelated coalitions, political parties cannot coalesce beliefs.

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<sup>60</sup> See JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 141-51 (1961); Jay Wickersham, *Jane Jacobs's Critique of Zoning: From Euclid to Portland and Beyond*, 28 B.C. ENVTL. AFF. L. REV. 547 (2001) (discussing Jacobs's critique of urban renewal).

<sup>61</sup> Compare J. Peter Byrne, *Two Cheers for Gentrification*, 46 HOW. L.J. 405 (2003) with Richard T. LeGates & Chester Hartman, *The Anatomy of Displacement in the United States*, in *GENTRIFICATION OF THE CITY* 178, 182-85 (Neil Smith & Peter Williams eds., 1986).

<sup>62</sup> See John S. Baker, *State Police Powers and the Federalization of Local Crime*, 72 TEMP. L. REV. 673 (1999); Nancy Marion, *Rethinking Federal Criminal Law: Symbolic Policies in Clinton's Crime Control Agenda*, 1 BUFF. CRIM. L. R. 67 (1997).

<sup>63</sup> See Gregory Howard Williams, *Police Discretion: The Institutional Dilemma—Who Is in Charge?*, 68 IOWA L. REV. 431, 460-65 (1983).

<sup>64</sup> See, e.g., Harry A. Chernoff, Christopher M. Kelly & John R. Kroger, *The Politics of Crime*, 33 HARV. J. ON LEGIS. 527 (1996).

Such a distribution of beliefs about local issues is theoretically possible, but it is extremely unlikely. For this argument to be correct, it would have to be the case, at the very least, that beliefs about local issues are more randomly dispersed in the population than national issues. After all, the national parties are able to shape political conflict despite the fact that many issues—immigration, international trade—cut across our national party lines without any damage to the party system. National political parties continued to function even when issues as fundamental as civil rights and the Vietnam War split the major parties internally. That local beliefs would be so much more disparate than national beliefs that parties could play no role would be extremely counter-intuitive because there are fewer issues at play in local politics. Given the smaller dimensions of debate, it is more likely that there are coherent coalitions at the local level than there are at the national level.

Thus, Peterson's explanation for why local politics does not feature political party competition does not match the reality of local debates. The basic assumption in Downsian models—that people disagree about politics and that parties can take ideological positions that attract voters—should apply to local as well as national political markets. Thus, the explanation for the lack of partisan competition in local elections must be rooted in some idea of market failure and not simply by positing that there are no local political markets. The next section will argue that the first step to figuring out why there is no partisan competition in local election is recognizing that local and national politics comprise separate markets.

### *C. Residential Segregation By National Party Membership Cannot Explain the Lack of Competition*

If Peterson's claim that there is effectively no such thing as a local political market is rejected, another explanation is needed for the lack of partisan competition in big city legislative elections. One alternative explanation is that there is no competition because people who live in major American cities agree about local political issues. If voters who agree with the Democratic Party (or the Republican Party) on national issues agree with it on local issues, then it stands to reason that the Democrats would dominate in those areas where their voters are the predominant local party (and Republicans dominate where they are the dominant party). Further, under this theory, the lack of partisan competition in local legislative elections is good—it expresses the honest desire of voters to receive public policies on which they all largely agree.

For residential segregation by national party affiliation to explain the lack of partisan competition in local elections, two things must be true. First, citizens in a city must be predominantly members of one party. In most major American cities, this condition is met.<sup>65</sup> Second, voter beliefs about local issues must be heavily correlated with their beliefs about national issues.<sup>66</sup> Otherwise, there is no reason to believe that dominance by a national party in a locality should translate in dominance in local elections.

This theory must be contrasted against a contrary hypothesis; that national political beliefs do not predict local political beliefs. If the opinions of voters in national politics do little to predict their opinions in local politics, then residential segregation by national party cannot explain the lack of competition. Further, the lack of competition is a bad result, as the dominant local party is unlikely to be representative of the policy beliefs of voters.<sup>67</sup> Under this alternative hypothesis, local voters must have political beliefs that could be the basis of political party formation (contrary to Peterson's theory), but those beliefs must only be weakly correlated with their national party preference. That is, voters' but membership in these two groups would bear little resemblance to the breakdown between Democrats and Republicans. In Downsian terms, this alternative argument is a claim that there are local and national political markets are separate.

Before any comparison of these two theories can be undertaken, it must be noted that the theory that residential partisan segregation can explain the lack of competition in local elections only if it can clear two major hurdles. The first is that, even if people largely agree about policies, there is still likely some range of belief about local issues. Because of this, the minority party locally should be able to adopt a set of policy stances that will appeal

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<sup>65</sup> After the political change prompted by the Great Depression, virtually all major cities entered a period of one-party domination. See Gilbert, *supra* note 5, at 28. Only two major cities were not exclusively dominated by Democrats at the national level—Cincinnati and Indianapolis—and notably these two cities also featured, and continue to feature, substantial competition at the local level. (Cincinnati also has the nation's most active local-only third party.) See Charles Gilbert & Christopher Clague, *Electoral Competition and Electoral Systems in Large Cities*, 24 J. POL. 323, 326, 329 (1962). Further, the nation's political residential segregation has increased by forty-seven percent between 1976 and 2000, measured at the county level, geographic segregation by major-party affiliation. Bill Bishop, *The Schism in U.S. Politics Begins at Home: Growing Gaps Found from County to County in Presidential Races*, AUSTIN AMERICAN-STATESMAN, Apr. 4, 2004, at A1 (surveying county-level data on political segregation by party).

<sup>66</sup> This presumes that voters base their party membership decisions on national and not local issues. This is explored in depth in Section III.B.1.

<sup>67</sup> This assumes, of course, that responsiveness to voters' policy concerns is a primary reason for valuing political competition. See Schleicher, *supra* note 21, at 176-78.

to the local median voter and thereby be competitive in local elections. There has to be a reason this does not happen. The best explanation would be that national political parties serve to constrain their local branches from too much deviation in cities where they constitute the minority. If national parties did serve to constrain their local parties (either formally or through informal norms) then a residential partisan segregation could explain the lack of partisan competition at the local level. But there must be substantial evidence of this.

The second hurdle is even more difficult. For residential partisan segregation to explain the lack of competition, beliefs about national and local political issues have to be *extremely* unified. If a faction of the majority party agreed with the minority party on some local issues, it would likely defect sometimes. Unless the residential segregation by national party is extreme, this would create at least occasional competition.<sup>68</sup>

Given these hurdles, the evidence weighs heavily against the theory that residential political segregation can, on its own, explain the lack of partisan competition in local legislatures. It is certainly against the weight of expert opinion. That voters behave differently in local elections than they do in national elections is central to Peterson's theory and is assumed by most political scientists of all stripes.<sup>69</sup> Moreover, there is empirical evidence that residential segregation by national party cannot provide an explanation for the lack of partisan competition. This evidence comes in three types: direct information about voting and endorsements in local elections, studies of local voter turnout, and evidence from different types of elections within cities. Given this evidence, and because any explanation rooted entirely in residential partisan segregation would require evidence that beliefs about national and local elections are highly correlated, this theory can be rejected as the reason for the lack of competition in local legislative elections.

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<sup>68</sup> A thought experiment proves this point. Imagine a city with a majority party and a minority party, in which the majority party makes up a large percentage of voters but not all (say 70 percent). Further imagine that the minority party is unified in local and national elections. Finally, assume that the majority party is split, in which a majority of its members agree on local issues but a substantially minority agree with the minority party on local issues. At some point in time, the combined minority party plus majority party dissenters (if they rise to as many as 20 percent of the populace, which is roughly 30 percent of the majority party) could form a majority of local voters in opinions about local issues. Domination by the majority party over time would be unlikely, then, unless national party members agree on local issues almost all of the time.

<sup>69</sup> See, e.g., BANFIELD & WILSON, *supra* note 23, at 227; PETERSON, *supra* note 5, at 131-34; CLARENCE N. STONE, *REGIME POLITICS: GOVERNING ATLANTA, 1964-1988* (1989) (defining governing structures in localities as "regimes," without reference to national political trends).

### 1. Polling Data and Newspaper Endorsements

The clearest empirical evidence that voters' partisan beliefs do not closely track their beliefs at the local level comes from a study of New York City mayoral elections.<sup>70</sup> The race for Mayor of New York is unique. Located in the media capital of the nation, New York's Mayor attracts more attention than any other municipal officer in the country. Further, more campaign money is spent in the New York mayoral race than in any other race for municipal office by a wide margin.<sup>71</sup> Thus, more information is available for (and is forced upon) voters for Mayor of New York than in any other municipal race and, possibly, than any other non-Presidential race for electoral office in the United States. Because of the sheer amount of information available to voters about the candidates, voters are able to compare a candidate's stances without necessarily relying on a party heuristic.

Karen Kaufman has engaged in one of the most comprehensive studies of local voting behavior. In her book, *The Urban Voter*, she studied three successive New York mayoral elections—1989, 1993, 1997.<sup>72</sup> The first two of these featured races between David Dinkins, an African-American Democrat and Rudy Giuliani, the famed white Republican former prosecutor.<sup>73</sup> Despite the Democrats having an overwhelming advantage in vote registration, both elections were very close: in 1989, Dinkins won with 50 percent of the vote, but in 1993, Giuliani bested him with 51 percent.<sup>74</sup> Kaufman found that party status and ideology were a

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<sup>70</sup> See KAUFMAN, *supra* note 7, at 85-114, 160-90. It should be noted that I am not focusing on Kaufman's work on the mayoral race in Los Angeles. The reason for this is that the mayoral race in Los Angeles is nonpartisan, which makes impossible a direct comparison of the effect of party on voting in local elections and national ones.

<sup>71</sup> In the 2005 election, Mayor Michael Bloomberg spent close to \$70 million and his opponent, Fernando Ferrer, spent \$8 million. Joyce Purnick, *It's My Money and I'll Run if I Want To*, N.Y. TIMES, Nov. 10, 2005, at B1. In 2001, Bloomberg spent nearly \$50 million and Mark Green, the Democratic nominee, spent \$15 million. Michael Cooper, *Record Spending by Bloomberg Raises Questions About City's Acclaimed Law*, N.Y. TIMES, Nov. 8, 2001, at D4. Tens of million more was spent by Green's challengers in the Democratic Primary. See Paul Ryan, Center for Gov't Studies, *A Statute of Liberty: How New York City's Campaign Finance Law is Changing the Face of Local Elections 2* (2003), <http://www.cgs.org/publications/docs/nycreport.pdf> (last visited Sept. 20, 2006). In comparison, spending in the next biggest local governmental race, for Mayor of Los Angeles, has never exceeded \$21 million in total campaign spending. See Tom Baxter, *Costly Campaigns: Local Elections Run up Big-League Tabs*, ATLANTA J. & CONST., Dec. 7, 1997, at P3 (comparing spending in local elections around the country and showing that more was spent in New York election than in others); Patrick McGreevy, *Mayoral Rivals Got Illegal Contributions*, L.A. TIMES, Nov. 4, 2005, at B6; Rick Orlov, *Change Defines L.A.'s Year*, DAILY NEWS OF L.A., Dec. 31, 2001, at N20.

<sup>72</sup> KAUFMAN, *supra* note 7, at 136-66.

<sup>73</sup> *Id.* at 134-35.

<sup>74</sup> *Id.* at 144. Nearly 70 percent of New York voters are registered Democrats. *Id.* at 125 n.1.



statistically significant independent variable in determining whether voters would support a candidate. However, the effect of party was swamped by other variables. In 1989, variables related to race and beliefs about the state of race relations in New York explained more about whether a white voter voted for Giuliani.<sup>75</sup> In 1993, when Dinkins was up for reelection, beliefs about whether the city overall and race relations, crime, and the economy in New York were going in the right direction, were more influential in determining votes than party status. That is to say, voters' retrospective analysis of whether the city government was performing well was far more important than their partisan status.

In 1997, Giuliani defeated Ruth Messinger, a white Democrat borough president of Manhattan, by a 57-41 percent margin.<sup>76</sup> Notably, Giuliani received 43 percent of the Democratic vote and 45 percent of the "Liberal" vote (voters who self-identified as liberal). Again, among all voters, party identification and ideology were statistically significant determinants of individual vote, but each had less effect on voting patterns than any of the following variables: the voter's race, beliefs about the likelihood of police brutality under Giuliani, and beliefs about the health of the city economy. Each variable had a similar effect to a variable about Giuliani's handling of the school system.<sup>77</sup> Again, beliefs about local policies were more important than party in determining local voting patterns.<sup>78</sup>

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<sup>75</sup> *Id.* at 212.

<sup>76</sup> *Id.* at 154.

<sup>77</sup> *Id.* It should be noted that most national election studies use a better variable for "partisan leaning" than partisan registration—party registration can include people who do not identify with the party and does not include those who are effectively party members although they are registered independent. See Larry Bartels, *Partisanship and Voting Behavior 1952-1996*, 44 AM. J. POL. SCI. 35, 46 n.13 (2000). The inclusion of the "ideology" variable catches some of this second problem. Even if the "Democratic" variable is substantially lower than it would be on a properly identified "Democrat" variable, it should not matter. Retrospective issue voting and racial voting swamp party voting in Kaufman's study by a large amount. Further, the utility of Kaufman's data for this purpose is to show that local elections are at least partially independent of national ones, a finding that is not imperiled by the lack of close fit between Kaufman's data specification and my purposes.

<sup>78</sup> Kaufman's study is in accord with the curious phenomenon of the 1997 election: the absence of any presidential effect. In most sub-presidential elections, the president's popularity has an effect on vote for candidates of the president's party, but New York City did not exhibit this trend. See James D. King, *Incumbent Popularity and Vote Choice in Gubernatorial Elections*, 63 J.POL. 585, 587 (2001); James E. Piereson, *Presidential Popularity and Midterm Voting at Different Electoral Levels*, 19 AM. J. POL. SCI. 683, 684 (1975). Bill Clinton was an extremely popular figure in New York City in 1997, with approval ratings of nearly 70 percent, but Giuliani dramatically increased his vote share from 1993 to 1997, racking up a 16 percent advantage on Messinger after only defeating Dinkins by 2 percent. KAUFMAN, *supra* note 7, at 154; EVAN J. MANDERY, *THE CAMPAIGN: RUDY GIULIANI, RUTH MESSINGER, AL SHARPTON AND THE RACE TO BE MAYOR OF NEW YORK CITY* 173 (2000) (Clinton's approval rating at 69 percent during 1997 election).

Kaufman uses this data to argue that, in local elections, when voters see an election as a choice between their racial or economic group and another, they are likely to vote for the candidate representing their group.<sup>79</sup> The data certainly supports this view. Race played a larger role in voting decisions in the Dinkins-Giuliani races than it did in the Messinger-Giuliani race.<sup>80</sup> The data, however, also tells another story. In 1993 and 1997, two elections featuring incumbents, voters based their decisions not on national party label but on their disparate beliefs about how the incumbent performed on a series of issues. Evaluations of the performance of Dinkins and Giuliani as mayor had a more substantial effect than national party. This is in contrast with national elections, in which party identification is the strongest determinant of individual vote.<sup>81</sup> Given the overwhelmingly Democratic nature of the New York City electorate—both in terms of registration and voting patterns in national races—Kaufman's finding that party is not a strong determinant of voting in mayoral races is a strong indication that beliefs about local and national politics are not strongly correlated.

Kaufman's data that beliefs in New York about local and national politics are substantially distinct is confirmed by examining newspaper endorsement rates. Where individual institutions make endorsements on both the local and national level, consistency in party preferences would be evidence that beliefs about local and national politics are likely to be similar. New York area newspapers provide the perfect means for studying this question: unlike other regions, virtually all local elections in New York and the counties in New York State in the region have partisan, rather than nonpartisan, elections, which makes it easy to compare endorsement rates.

The major newspapers in the New York region show substantial inconsistency in their endorsement rates in local and national elections. Since 1997, the *New York Times* has exclusively endorsed Democrats in every race for national public office (President, Senator, House of

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<sup>79</sup> KAUFMAN, *supra* note 7, at 20, 59.

<sup>80</sup> *Id.* at 154.

<sup>81</sup> See, e.g., Owen G. Abbe et al., *Agenda Setting in Congressional Elections: The Impact of Issues and Campaigns on Voting Behavior*, 56 POL. RES. Q. 419 (2002) (issues important in Congressional election but effect smaller than partisan effect); Tititilli Hibbin, *Public Disapproval and Majority Party Candidates*, in CONTINUITY AND CHANGE IN HOUSE ELECTIONS 126-27 (David W. Brady, John F. Cogan & Morris P. Fiorina eds., 2000) (party identification more important than retrospective evaluations of Congressional behavior in predicting vote); Herbert Weisberg, *Partisan and Incumbency in Presidential Elections*, 24 POL. BEHAV. 339, 351 (2002) (although retrospective economic evaluation of presidential performance is significant, partisanship effect is far larger).

Representatives) in races covering New York City and its New York state suburbs.<sup>82</sup> Over the same period, it endorsed Republicans nearly a quarter of the time in local elections, including endorsements of Michael Bloomberg and Rudy Giuliani for Mayor of New York City.<sup>83</sup> *Newsday*, Long Island's biggest newspaper, had similar results. Since 1997, *Newsday* endorsed Democrats 81 percent of the time in national races covering New York City and Long Island.<sup>84</sup> In comparison, in local elections over the same period, its Democratic endorsement rate was only 57 percent of the time.<sup>85</sup> The *Daily News*, a New York City paper, shows the other side of the same coin. Over the last ten years, it has been reliably Republican in local elections—endorsing Republican candidates for Mayor and City Council over the last ten years 75 percent of the time—but has favored Democrats in national elections, endorsing their candidates 63 percent of the time.<sup>86</sup> Because it seems safe to assume that the *New York Times*,

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<sup>82</sup> See *Al Gore for President*, N.Y. TIMES, Oct. 29, 2000, § 4, at 16; *Charles Schumer for the Senate*, N.Y. TIMES, Oct. 17, 2004, § 14, at 13; *Election Day Choices*, N.Y. TIMES, Nov. 7, 2006, at A20; *Election Day Choices*, N.Y. TIMES, Nov. 3, 1998, at A26; *For Congress from New York*, N.Y. TIMES, Oct. 27, 2000, at A30; *For Congress in New York*, N.Y. TIMES, Oct. 25, 2002, at A34; *For Congress in Staten Island*, N.Y. TIMES, Nov. 2, 1997, § 4, at 14; *For Congress on Long Island*, N.Y. TIMES, Oct. 24, 2004, § 14LI, at 13; *Hillary Clinton for the Senate*, N.Y. TIMES, Oct. 22, 2000, § 4, at 14; *John Kerry for President*, N.Y. TIMES, Oct. 17, 2004, § 4, at 10.

<sup>83</sup> The New York Times endorsed 23 Democrats and 7 Republicans for local office during this period, or 23.3 percent Republicans. See *Election Choices*, N.Y. TIMES, Nov. 3, 2001, at A22 (endorsing four Democrats and one Republican for local office); *Election Day Choices*, N.Y. TIMES, Nov. 7, 2006, at A20; *Election Day Choices*, N.Y. TIMES, Nov. 6, 2001, at A20 (endorsing six Democrats for local office); *Election Day Choices*, N.Y. TIMES, Nov. 4, 1997, at A26 (endorsing three Republicans, including Mayor Rudy Giuliani, and nine Democrats for local office); *An Endorsement for Mayor*, N.Y. TIMES, Oct. 23, 2005, § 4, at 11 (endorsing Republican Michael Bloomberg for Mayor of New York); *For City Council in Manhattan*, N.Y. TIMES, Oct. 23, 2005, § 14, at 13 (endorsing a Republican and a Democrat for local office); *For County Executive*, N.Y. TIMES, Oct. 30, 2005, § 14WC, at 27 (endorsing a Democrat for local office); *For Westchester District Attorney*, N.Y. TIMES, Oct. 23, 2005, § 14WC, at 15 (endorsing a Republican for local office); *Nassau Comptroller*, N.Y. TIMES, Oct. 23, 2005, § 14LI, at 15 (endorsing a Democrat for local office).

<sup>84</sup> *Newsday* has endorsed 26 Democratic candidacies and 6 Republicans for national office. See *It's Election Day*, NEWSDAY, Nov. 2, 2004, at A36 (6-1); *It's Election Day*, NEWSDAY, Nov. 7, 2000, at A32 (4-3); *It's Election Day*, NEWSDAY, Nov. 3, 1998, at A28 (5-1); *Make a Difference*, NEWSDAY, Nov. 4, 2002, at A26 (4-1); *Today is Election Day*, NEWSDAY, Nov. 7, 2006, at A36 (6-0 Democrats to Republicans).

<sup>85</sup> *Newsday* has endorsed 87 Democrats and 64 Republicans for local office over this period. See *It's Election Day*, NEWSDAY, Nov. 8, 2005, at A34 (33-19); *It's Election Day*, NEWSDAY, Nov. 2, 2004, at A36 (0-1); *It's Election Day*, NEWSDAY, Nov. 7, 2000, at A32 (6-1); *It's Election Day*, NEWSDAY, Nov. 3, 1998, at A28 (0-3); *Newsday's Endorsements in Today's Nassau Elections*, NEWSDAY, Nov. 6, 2001, at A32 (18-8); *Newsday's Endorsements in Today's Suffolk Elections*, NEWSDAY, Nov. 6, 2001, at A32 (endorsing 14-15); *Newsday's NYC Election Day Endorsements*, NEWSDAY, Nov. 4, 1997, at A32 (4-2); *These Are The Candidates Who Most Deserve Your Votes*, NEWSDAY, Nov. 3, 1997, at A32 (11-14); *Today is Election Day*, NEWSDAY, Nov. 7, 2006, at A36 (1-1 Democrats to Republicans in local races).

<sup>86</sup> See *Chuck Schumer for Senate*, DAILY NEWS, Oct. 29, 2004, at 56 (endorsing a Democrat for Senate); *Day of Decision—Get Out and Vote*, DAILY NEWS, Nov. 5, 2002, at 30 (endorsing a Democrat

*Newsday* and the *Daily News* editorial boards had constant preferences over this period, it seems likely that, in this region at least, local and national political beliefs are not highly correlated.<sup>87</sup>

## 2. Turnout in Local Elections

Studies of voting turnout also support the argument that voter beliefs about local and national policies are different. In his magisterial study of local civic engagement, *Democracy in Suburbia*, Eric Oliver examined every local governmental unit in the country (e.g., city, village) and ran various regression analyses to determine whether factors that were specific to the locality—the population of the city or town, the median household income, economic diversity, racial composition of the city, the percentage of residents who commute to work, city age, and whether the city had a mayor or used a different form of government—affected the extent to which any resident was civically engaged in a number of different ways, including turnout in local elections.<sup>88</sup>

The results were striking. Voting in local elections is directly effected to a statistically significant degree by virtually all the factors included in Oliver's study. For instance, small localities feature higher local voting rates, although residents in large cities vote more than those in mid-sized localities.<sup>89</sup> Voting was lower in poor and rich localities and higher in

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for Congress); *Do Your Duty: Vote Today*, DAILY NEWS, Nov. 7, 2000, at 40 (endorsing Democrats Al Gore for President and Hilary Clinton for Senate); *Get Out and Vote, Starting With Mike*, DAILY NEWS, Nov. 8, 2005, at 38 (endorsing Republican Mayor Bloomberg, three Republicans for city council and one Democrat for city council); *New York's Elephant Graveyard*, DAILY NEWS, Nov. 7, 2006, at 40 (endorsing Hilary Clinton for Senate); *The Race for Senate*, DAILY NEWS, Nov. 1, 1998, at 58 (endorsing Republican Alphonse D'Amato for Senate); *Right War, Right Time, Right Man*, DAILY NEWS, Oct. 31, 2004, at 50 (endorsing Republican President Bush); *Vote Today—And Vote Smart*, DAILY NEWS, Nov. 4, 1997 (endorsing Republican Mayor Rudy Giuliani, a Democrat for local office and a Republican for Congress); *Vote Today For City's Future*, DAILY NEWS, Nov. 6, 2001, at 40 (endorsing Bloomberg for Mayor).

<sup>87</sup> One issue that requires attention is that the data discussed above comes from the New York region. This is simply because New York City receives the predominant amount of attention in the local election literature. This is partially because it is the nation's biggest city and has one of its most vibrant political cultures, but also because it has partisan local elections. The absence of partisan elections in most of the nation's other very large cities—Los Angeles, Chicago, Houston, Dallas, Boston—makes the study of comparative party behavior impossible. There is nothing that can be done about this, but it does open the findings up to the criticism that New York politics are more removed from national politics than they are in other cities. It should be noted, however, that this argument goes against the grain of most thought on the subject. In *City Limits*, Peterson includes a chapter asking if New York is atypical in the ways in which its political life is more multifaceted than other cities, making its politics more like national politics. He concludes that New York is not a deviant case. PETERSON, *supra* note 5, at 187-209. There is little reason to worry that the problem lies in the opposite direction.

<sup>88</sup> ERIC OLIVER, *DEMOCRACY IN SUBURBIA* 29-32 (2001).

<sup>89</sup> *Id.* at 47-52.

middle income areas and was also increasing along with economic heterogeneity.<sup>90</sup> Cities that have mayors, rather than non-political city managers, also have higher local voting percentages.<sup>91</sup> Importantly, Oliver tested to see whether these city-specific factors had any effect on the extent to which city residents were interested in national elections but found that they did not—these factors only affected interest in local politics.<sup>92</sup> Thus, the question of whether citizens vote in local elections is very much determined by where they live and how their locality is governed. Which city people live in, however, has no effect on whether they are interested in national elections.

Oliver's study does not provide direct evidence that voters have different beliefs about local and national political issues. However, if city characteristics affect local political interest but not national political interest, it is extremely likely that city characteristics also affect opinions about local politics—if only because the amount of turnout affects the make-up of the electorate.<sup>93</sup> Thus, Oliver's study, and the studies on nonpartisan elections, can be taken to mean that there are a number of factors that effect local beliefs that do not affect national political beliefs.

### 3. *The Contrast Between Mayoral and City Council Elections*

One final reason to suspect that residential partisan segregation does not explain the lack of competition in local legislative elections is that big cities regularly feature competitive campaigns for mayor and uncompetitive campaigns for city council, both by district and for control of the council.<sup>94</sup> This is true in cities with partisan elections, like New York and Philadelphia, and in cities without partisan elections, like Los Angeles. This result is not a recent phenomenon. As early as 1962, political scientists Charles Gilbert and Christopher Clague found that incumbent city councilmen were more likely to be reelected than incumbent mayors.<sup>95</sup> This is simply inconsistent with the theory that residential partisan segregation explains the lack of partisan competition in local legislative elections.

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<sup>90</sup> *Id.* at 78-89.

<sup>91</sup> *Id.* at 183.

<sup>92</sup> *Id.* at 221, 225, 232 (finding city size, city median income, city economic diversity and percentage residential affect interest in local politics but not in national politics).

<sup>93</sup> See Zoltan Hajnal & Jessica Trounstein, *Where Turnout Matters: The Consequences of Uneven Turnout in City Politics*, 67 J. POL. 515, 531-32 (2005) (differential turnout by ethnic groups in local elections has a significant effect on mayoral election results).

<sup>94</sup> See notes 7-11 and accompanying text.

<sup>95</sup> Gilbert & Clague, *supra* note 65, at 340.

*D. The Stakes of Local Elections Cannot Explain the Lack of Competition in Local Legislative Elections*

Another possible “natural” explanation for the lack of competition in local legislative election is that the benefit of developing a party to contest legislative elections (both to voters and to politicians) is not worth the substantial transaction costs associated with developing a new party.<sup>96</sup> The result is that there is no threat of entry at the local level and hence the parties are unresponsive.

This theory relies on the assumptions that local legislatures and other non-mayoral offices are of little import, that developing a new purely local entrant is quite costly to the organizers and, finally, that the lack of a threat of entry causes one-party dominance. Although it is surely true that dominant parties use certain levers to create additional barriers to entry in legislative elections (e.g., gerrymandering),<sup>97</sup> these factors cannot explain the lack of partisan competition on their own.

It is true that many large cities have “strong mayor” systems, in which the mayor dominates local politics and the city council is left with less strength.<sup>98</sup> However, city councils are still quite powerful.<sup>99</sup> As noted above, this paper only seeks to explain the lack of competition in city councils in large American cities and America’s largest cities are huge governmental entities.<sup>100</sup> The biggest city with partisan elections, New

<sup>96</sup> Thanks go to Rick Pildes for suggesting this line of inquiry.

<sup>97</sup> Jessica Trounstein, *Dominant Regimes and the Demise of Urban Democracy*, 68 J. POL. 879, 880-82 (2006).

<sup>98</sup> Richard C. Schragger, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System*, 115 YALE L.J. 2542, 2546, 2549-52 (2006).

<sup>99</sup> An effort to explain the lack of competition as a result of the weakness of councils also cannot explain the lack of competition in other city elections. For instance, during the period between 1989 and 2005 when New York has had 3 close elections and four Republican victories, Democrats have not only managed to hold the City Council without any competition but have also won every non-mayoral city-wide race for Public Advocate and Controller. Democrats have won every race for these offices since 1989, with no winner receiving less than 56 percent of the vote. Clifford Levy, *Hevesi and Green Are Re-elected; Fields Gets Borough Post*, N.Y. TIMES, Nov. 5, 1997, at B4; Manuel Perez-Rivas & Joseph W. Queen, *Election Yields Few Surprises*, NEWSDAY, Nov. 4, 1993, at 130; *The Races in New York City*, N.Y. TIMES, Nov. 10, 2005, at B6; *The 2001 Elections: Results*, N.Y. TIMES, Nov. 8, 2001, at D5; *Vote Totals for the Elections Held on Tuesday in New York and New Jersey*, N.Y. TIMES, Nov. 9, 1989, at B12.

<sup>100</sup> That small cities have different dynamics than big cities is an old idea in political theory. Joseph Schumpeter notably divided governments into small groupings “in which there is not much to disagree on,” and larger ones. The difference between small governments and large ones, he claimed, was the difference between “government by the people,” in which “the people . . . actually participate in all the duties of legislation and administration,” and “government approved by the people,” in which representatives cannot be closely watched by voters. JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 245-46 (1943). For a discussion of why a simply rational protection of assets (or any

York, has a budget larger than that of all but four state governments.<sup>101</sup> Philadelphia and Baltimore both have budgets over a billion dollars.<sup>102</sup> In each city, the city council serves as the general legislative body, with all the power to approve spending and pass local laws.<sup>103</sup> Given these huge resources, the idea that the stakes are not high enough for party development seems unlikely.

Further, there is evidence that partisan development can occur in cities if the situations are right. Cincinnati has adopted several electoral systems, but notably had a single transferable voting system from 1935 to 1955.<sup>104</sup> The result of changing the legal system was the development of a third party, the Charter Party, which displaced the Democrats as the second strongest political force in the city. The Charter Party survives to this day, making formally-nonpartisan Cincinnati America's only large city with a competitive non-national party.<sup>105</sup> Cincinnati was not a particularly large city, but the incentives were such that partisan development occurred.

Finally, and most pressingly, a theory built on the difficulty of party development would have to account for the lack of competition between extant parties. Even if the creation of new parties is difficult given the stakes of local elections, there needs to be an explanation for why there is no substantial competition between Republicans and Democrats in most city councils. The next section develops a model that attempts to explain this phenomenon.

### III. WHY IS THERE NO PARTISAN COMPETITION IN LOCAL ELECTIONS: A MODIFIED POLITICAL MARKETS MODEL THAT TAKES INTO ACCOUNT ELECTION LAW CAN EXPLAIN THE LACK OF COMPETITION

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individual interest) will not justify voting in a large polity, see Richard Hasen, *Law, Economics & Norms: Voting Without Law*, 144 U. PA. L. REV. 2135, 2136-38 (1996).

<sup>101</sup> *New York City Rolling in \$2 Billion Surplus; Talk Turns to BMWs and Lots of Hot Dogs*, CHI. TRIB., Apr. 25, 1998, at 3.

<sup>102</sup> John Fritze, *With Levies, Trims, City Finances Are on More Stable Footing: The Bottom Line on Fiscal Claims*, BALTIMORE SUN, Oct. 13, 2006, at A1; Michael Currie Schaffer, *Street, Council Closer on Budget*, PHILADELPHIA INQUIRER, May 18, 2006, at B01.

<sup>103</sup> See N.Y. CITY, N.Y. CHARTER §§ 21, 22, 225, 227 (1989); PHILADELPHIA, PA CHARTER, §§ 1-101, 2-300 (2003); BALTIMORE, MD CHARTER ART. III § 11 (2006). Baltimore has a Board of Estimate, composed of city-wide elected and appointed officials that determines city fiscal policy. BALTIMORE, MD CHARTER ART. VI § 1 (2006).

<sup>104</sup> KATHLEEN BARBER, A RIGHT TO REPRESENTATION 101-07 (2000). Cincinnati also had a Council-appointed nonpartisan city manager instead of a mayor, meaning the Council was the most powerful political entity. Thus, Cincinnati's development of a third-party is not a complete refutation of this argument. Still, it provides potent evidence that the lack of partisan competition is not a function of the lack of incentive for party development.

<sup>105</sup> See Gilbert, *supra* note 5, at 28; Gregory Korte, *Charter Party Counts on Comeback*, CINCINNATI ENQUIRER, Oct. 24, 2003, at 1B.



None of the “natural” explanations can explain why there is no partisan competition in local legislative elections. This is because they all ignore a crucial factor—the laws by which local legislative elections are organized. This section creates a model that explains the lack of partisan competition in local elections as a function of election laws and the way voter behavior interacts with those laws. This model is somewhat stylized, but it does provide explanations for a number of important facts about city elections, ranging from the greater competitiveness of mayoral elections than legislative ones to the behavior of endorsers. The section also explores whether the assumptions necessary to make the model work are realistic. Finally, it examines what the implications are if the model is correct.

#### *A. The Model*

Downs’s model of partisan competition, described in Section II.A, provides the starting point for this section. The basic assumptions he makes about voter beliefs and party behavior are adopted here. Political parties adopt ideological positions in order to attract voters, who will vote for whichever party is closest to them on the issues. Further, both the positions of voters and of parties can be pictured in two-dimensional “ideological” space. However, as noted above, in Downs’s model, one-party control is not a stable equilibrium. The goal of this section is to add several complications to Downs’s model such that it can explain the lack of partisan competition in local legislative elections.

First, the parameters of the model must be set. The residents of a city, call it City A, must vote in both national and local elections, *i.e.*, vote in elections for President and Congress and in elections for the Mayor and City Council. Further, in City A, national and local governments hold elections in which political parties are free to compete. Also, both types of elections must use first-past-the-post voting and single-member districts, as all federal and almost all local races do in the United States.

The combination of letting parties compete in elections and using this voting system is that there will usually only be two parties contesting any given election. This tendency, known as Duverger’s Law, is a function of voters not wanting to waste their vote, forcing them to choose among the top two candidates, and candidates and donors avoiding parties that do not have a chance of winning. Although third parties can and do develop in some countries featuring single-member districts and first-past-the-post voting, the general finding that this voting system results in a two party

system is quite robust.<sup>106</sup> As such, for the purposes of the model, it is assumed that only two parties will contest the national election in City A and only two parties will contest the local election. Any new party seeking to contest either type of election must displace one of the two extant parties.

The assumption of a two-party system in each election effectively sets the ground rules. Next, an assumption about voter beliefs at the local and national level must be added. It must be assumed that national and local political markets are separate. Ordinarily, the question of “separate” markets comes up in antitrust analysis, either during a merger or when monopolists are accused of tying.<sup>107</sup> What is meant by separate markets here is that there are separate ranges of voter policy preferences at the local and national levels and that voter beliefs about national issues and local issues are only weakly correlated. This is just a formalization of what was discussed in Section II.B. National party preferences, of voters and of politicians, only explain a small bit about their beliefs about local issues. To translate that into a Downsian model, the ideological space on which parties compete—usually drawn as a left-to-right axis—is different at the national and local level. Thus, the range of issues that tie voters in stable partisan blocks at the national level in City A, ranging from abortion to taxes to war, are only weakly correlated with any similar grouping of beliefs of voters in City A about local issues. Roughly speaking, this means that a national party’s local branch could not agree on a local platform. Further, the assumption means that a candidate’s national party membership reveals some small information about a candidate’s positions on local issues, but does not give anything close to a full accounting.

Given these basic assumptions, one would expect the development of robustly competitive two-party systems at both the national and local level with different parties in each. For instance, if the markets are truly separate, Republicans and Democrats could contest national elections taking place in City A, while another set of parties would contest local elections. The question the model seeks to solve is why this does not happen.

Three more assumptions are needed to explain this phenomenon. First, if forced to choose, voters will decide to identify with a party based on its stance on issues at stake in the national legislature (and with the President)

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<sup>106</sup> See Schleicher, *supra* note 21, at 190.

<sup>107</sup> See Gregory J. Werden, *The History of Antitrust Market Delineation*, 76 MARQ. L. REV. 123 (1992); Raymond A. Atkins, *An Economic Model of Tying: Obtaining a Firstmover Advantage*, 5 GEO. MASON L. REV. 525 (1997).

and not based on its positions on local issues. This is an assumption about the weighting of preferences—voters in the model have beliefs about local issues but care more about national ones. Next, city legislative elections are of sufficiently low salience that most voters only know about the candidates the information that appears on the ballot, *i.e.*, party status. This is an assumption about available information. The combination of media attention and campaign dollars spent on legislative elections is not sufficient to provide much information to voters about city council campaigns. Finally, some degree of political residential segregation must be assumed. That is, in City A, one of the two major national parties is dominant in national elections.

That was the set-up. The crucial question is what causal factor makes the political parties dominant in national elections in City A dominant in local elections in City A. This model contends that there are a set of election laws and party rules—“unitary party rules,” as they are described above—that are the causal mechanism that permit the national parties to dominate local elections. There are three such rules. First, national parties automatically receive ballot places in local elections.<sup>108</sup> That is to say, regardless of what else occurs, some candidate will appear on a local ballot as a “Democrat” and some candidate will appear as a “Republican.” Second, states have laws (and parties have internal rules) that make membership in national parties contingent on not being a member of another party, particularly for the purposes here, a different purely local party.<sup>109</sup> This means that local voters, political activists, and politicians

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<sup>108</sup> For instance, in New York State, political parties are defined as political organizations with candidates for Governor receiving 50,000 votes in the last gubernatorial election. N.Y. ELEC. § 1-104 (CLS 2007). Political parties so defined are guaranteed a place on the general election ballot. N.Y. ELEC. § 7-116 (CLS 2006). Under the Home Rule Law, municipalities can modify state election laws in so far as they affect the election of local officers. *Bareham v. Rochester*, 158 N.E. 51 (N.Y. 1927). This power has never been used to change the eligibility of parties for local ballots aside from making local elections nonpartisan. Pennsylvania’s laws are similar. Major political parties are those parties that received 2 percent of the vote in a statewide election, that received 2 percent of the vote in ten countywide elections and have as registered members at least 15 percent of the voters registered by party in the state. 25 PA. CONS. STAT. § 2831(a) (2007); 25 PA. CONS. STAT. § 2872.2 (2007). See *Rogers v. Corbett*, 460 F.3d 455 (3d. Cir. 2006). Major parties place their candidates on the ballot by way of primary for all offices in the state. 25 PA. CONS. STAT. § 2862 (2007).

<sup>109</sup> This “rule” exists in all states, in one form or another, with the exception of Louisiana. See, *e.g.*, N.Y. ELEC. § 5-302 (CLS 2006) (enrolling in one party annuls membership in another party); 10 ILL. COMP. STAT. 5/7-10, 43 (2007) (signing a petition to put an independent candidate on the ballot bars voting in a party primary; voters may not participate in two party primary processes). Most often, it is expressed in the state’s primary voting rules. Forty-eight states use either a “closed,” “semi-closed,” or “open” primary, in which voters either have to indicate a preference for the party in advance to vote in the primary or must choose the party on the day of the election in order to vote in the primary. See Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms and Partisan Competition*, 101 COLUM. L. REV. 274, 282-83, 313 n.23 (2001) [hereinafter *Private*

cannot organize uniquely local parties without harm to their position in national parties. Finally, as a matter of constitutional law, national political organizations have the right to participate in local elections even if the election is formally nonpartisan.<sup>110</sup> Thus, national parties competing in local elections are guaranteed to have substantial organizational muscle.

Under the assumptions made above and the unitary party rules, the two major parties in national elections will, in the first instance, earn in local legislative elections in City A a share of the vote equivalent to their share of the voters who identify with them in national elections. Automatic ballot access for major parties will ensure that they are on the ballot. Other parties—non-national parties—will not initially receive a ballot place. A lack of other information about the candidates means that a rational, but uninformed voter will have only the partisan affiliation of the candidate for local legislative office with which to make her decision. Because partisan affiliation provides little but not zero information about candidates, the rational voter will vote for her preferred national party. The minority local party will not compete. First, its primary electorate is made up of voters that care more about national politics than local politics, and hence there is no reason for local voters to treat local party heuristic as expressing anything other than national policy preferences.<sup>111</sup> Further, even if it did choose to adopt popular local stances, it would not matter much for city council elections. There is simply not enough information for the content of those policy stances to matter to a sufficient number of voters. As such, absent entry, there is no competition—the dominant party in national elections will win all low salience local elections.<sup>112</sup>

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*Parties*]. The two states, aside from Louisiana, that had other types of primary elections had their primary laws overturned in the courts. See *O'Callaghan v. State*, 6 P.3d 728, 730-31 (Alaska 2000) (Alaska's "blanket primary" unconstitutional); *Wash. State Republican Party v. Washington*, 2006 U.S. App. LEXIS 21421 (9th Cir. 2006) (Washington's modified "blanket primary" law unconstitutional). Louisiana uses a nonpartisan primary system. *Private Parties*, *supra* note 109, at 282.

<sup>110</sup> See *Cal. Democratic Party v. Lungren*, 919 F.Supp. 1397, 1399 (N.D. Cal. 1996) (California constitutional amendment barring parties from endorsing candidates in nonpartisan elections violates the First Amendment). Open primary rules—which do not require registration in advance or any lasting connection to the party—are the least binding version of this type of rule. Notably, there is little overlap between states with open primaries and big cities with partisan elections. Only two major cities with partisan elections are in states that have open primaries and one of them is Indianapolis, which has competitive local elections. See note 65.

<sup>111</sup> The introduction of primary elections permits the model to work even with only a weak form of the assumption about voter knowledge. Even if voters are able to keep in their heads separate ideas about parties at the national and local level, the parties themselves will not be able to distinguish themselves at each level if voters select their party status with reference to national and not local issues. I am indebted to Chris Elmendorf for suggesting this argument.

<sup>112</sup> Here, the reason it is necessary to assume that voters supporting one national party make up a large majority of the electorate in City A becomes clear. Absent such domination, the model would

Despite this lack of competition, there is no reason to expect entry by a third party because a set of political markets operating under these assumptions has serious barriers to entry for new parties seeking to contest local elections. One barrier is that even voters who are disaffected with the local party will not leave the party at the primary stage because of the law that a person can only be a member of one party and the assumption that people care more about national politics than local politics.<sup>113</sup> As such, new parties will face difficulties presenting candidates that are representative of the preferences of the disaffected swath of the electorate. Further, by assumption, party activists also care more about national than local issues and, to the extent they care about the strength of their party in national disputes, they are unlikely to either abandon their careers with the national party or do anything to weaken their favored national party. This means that the class of organizers and candidates from which a new local entrant can draw is substantially limited.

Potential local third party entrants also face the problem of the lack of information in these elections. Local legislative elections are low salience and, by assumption, it is nearly impossible to convince anyone to pay attention to a purely local party and even more impossible to convince voters to abandon their pre-set party identification. Absent the attention of a major political race, entrants face the difficulty of getting anyone to pay enough attention to change their mind.

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result in competitive local elections rather than uncompetitive local elections. As discussed above, that is exactly what happens in cities like Indianapolis that are split between the national parties. *See supra* note 65. If cities were evenly divided among the major parties, unaffiliated voters would tip the balance between the parties for control of the local legislature. They may do so on the basis of national preferences, but, given their relative small number, it might be possible for the parties to appeal to them with local as well as national appeals. If the lack of dominance is expressed not in an even distribution of partisans, but rather as a high number of independent voters who switch their allegiance election to election, the barriers to entry for new, purely local parties would be even lower—there would be more voters who would be open to appeals based on something other than party affiliation.

<sup>113</sup> In localities with open primaries—where the decision to affiliate with a party is made on the day of the election—and in local elections in years with no national elections, this effect should be less dramatic. Voters do not have to leave a party to vote in the primary of another party, or rather, doing so has no costs. However, affiliation has more than formal, legal attributes. Voters likely will not vote in another party's primary in a local election because they must face the cost of acquiring enough information to determine the party primary in which they would like to vote.

Notably, there is little opportunity to see how open primaries and partisan big city elections interact. The nine biggest cities with partisan elections are New York, N.Y.; Phila., Pa.; Indianapolis, Ind.; Baltimore, Md.; Washington, D.C.; Charlotte, N.C.; Tucson, Ariz.; Tulsa, Okla.; and St. Louis, Mo. Karen I. Chang, *The Party's Over: Establishing Nonpartisan Municipal Elections in New York City*, 11 J. L. & POL'Y 579, 579 n.2 (2003). The twelve states with some sort of open primaries are Alabama, Arkansas, Georgia, Illinois, Indiana, Massachusetts, Mississippi, Missouri, Ohio, South Carolina, Tennessee, and Texas. *See Miss. State Democratic Party v. Barbour*, 2007 U.S. Dist. LEXIS 41908 at \*28 (S.D. Miss., June 7, 2007). The only overlap is Indianapolis and St. Louis, MO and, as noted above, Indianapolis is the only major city with major party competition in local elections.

A local party entrant must be very successful very quickly. This is because of Duverger's Law: a party seeking entry must begin as one of the top two parties or voters, candidates and donors will abandon it as a waste of votes and resources. Finally, the national parties can draw on the institutional resources—members, volunteers, money—that it has from its role in national elections and apply them to local elections.

The only way around these barriers for new entrants is to compete at both the national and local level. This would permit the local party to overcome the informational problem of convincing voters to vote for it in low-salience elections. By participating in high-salience national elections, the party could attract voters to it who would then recognize it at the local level.

This strategy, though, is made nearly impossible because national political markets are competitive and, as such, there is not a great deal of issue space in which a new party could enter. Duverger's Law applies to national races, creating a further barrier to entry. Further, entering in campaigns at the national level is extremely costly.

The problem facing local party entrants is formally identical to a problem that sometimes occurs in product markets when monopolists engage in illegal tying.<sup>114</sup> Although tying is often not inefficient, it can create inefficiencies if a monopolist ties the sale of a good in which it has a monopoly to the sale of a complementary good. (e.g. if Apple had a monopoly on MP3 players and required all iPod purchasers to only buy Apple headphones and ensured that only those headphones worked with the iPod). This can force any potential entrant in the tied product to also compete in the monopoly product or engage in "two-stage entry." This is an added barrier to entry and can result in increased monopolist profits and added deadweight loss.

Thus, as in the hypothetical headphone market, there is no entry into local political markets because it is too costly. As such, the dominant national party in a locality wins all local elections. It does so despite not necessarily having issue stances that are favored by a majority of the population on local issues. Instead, it wins because, by law, it automatically competes in both high-salience national elections and low-salience local ones. When combined with the lack of information in local elections and the extremely high barriers to entry created by the unitary

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<sup>114</sup> Both the idea and the example of headphones and a music player are drawn from the excellent discussion of two-state entry tying models in W. KIP VISCUSI, JOHN M. VERNON & JOSEPH E. HARRINGTON, JR., *THE ECONOMICS OF REGULATIONS AND ANTITRUST* 275-78 (MIT Press 3d ed. 2000) (1992).

party rules and Duverger's Law, it forces a purely local entrant to have to do the impossible: compete in elections at all levels. Because this is nearly impossible, there is no partisan competition in local elections even though it is inefficient.

### *B. The Assumptions*

It should be clear that the assumptions about voting behavior do a great deal of the work of the model. This leads to the obvious question of whether the assumptions are good. The five assumptions in the model are that (1) only two parties contest each type election; (2) policy preferences about local and national issues are only weakly correlated; (3) there is substantial residential segregation by political party; (4) voters and activists put substantially greater weight on national than on local issues when deciding party affiliation; and (5) party status, as revealed on ballots, is the crucial determinant of voting in low-salience local legislative elections. The first three have previously been discussed—the empirical support that Duverger's Law is robust is solid and the evidence for assumptions 2 and 3 was discussed in Section II.B. This section discusses the evidence for the other two assumptions.

#### *1. National Concerns Dominate Local Concerns in Party Identification Decisions*

The first assumption that must be discussed is that voters choose to identify with a political party based on national rather than local concerns. Before going further, however, it is necessary to explain what "identification" means in this context. The common political science definition of identification that is employed here is broader than merely joining a party, although most voters who identify also join. What is meant instead is that a voter will choose a party to favor and, after having made this choice, the voter will rely on the party's endorsement as a relevant factor when making voting decisions. The decision to identify is a cost-saving measure for a voter; rather than evaluate each candidate independently, which takes time and effort, he can use the party label as heuristic device, providing him with information about the candidate's views.<sup>115</sup>

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<sup>115</sup> "In partisan elections, the most powerful cue provided by the political environment is the candidates's membership in a particular political party. Even if voters know nothing else about a candidate, the ballot provides them with one important piece of information. The cue provided by party label is simple, direct and . . . consequential in shaping individuals' perceptions and evaluations of



That party identification is the major influence on voting patterns has been known for decades and, further, it has become a stronger influence on voters over the past 20 years.<sup>116</sup> Morris Fiorina, along with a few others, developed in the 1980s the dominant model of voter party affiliation used in modern political science.<sup>117</sup> Drawing on the work of Downs and V.O. Key, he claimed that party identification is actually the result of a constantly updating Bayesian calculation by voters based on party performance. That is, voters look at which party has served them and their interests well over time and keep a “running tally” of party preference.<sup>118</sup> This preference then informs their vote decision. This view has been challenged by those who note the effect partisan belief has on assessment of information—*i.e.*, Democrats view new information differently from Republicans—and argue that partisan belief is self-reinforcing.<sup>119</sup> Whether Fiorina or others are right is not particularly important to this paper. As long as party identification is a real at any given time and the behavior of national parties has some effect on it, such that national politics is a relatively competitive market, as predicted by Downs, the model is not harmed.

For the purposes here, what is important is that neither of these models spends much time considering the differences between government at different levels. The assumption is that voters choose parties based on how they stand on national issues and, despite having some beliefs about local issues, these do not much affect their identification decision. Such an assumption is absolutely crucial to the model. If voters base on their identification decision on local issues, there is no reason to think that having the same parties compete in local and national elections would result in uncompetitive local elections—instead, it would likely result in uncompetitive national elections.

There is clear direct evidence that beliefs about local issues do not have much of an impact on party identification. This can be proven by looking

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political candidates.” Wendy M. Rahn, *The Role of Stereotypes in Information Processing about Political Candidates*, 37 AM. J. POL. SCI. 472, 472 (1993).

<sup>116</sup> See Larry M. Bartels, *Partisanship and Voting Behavior, 1952-1996*, 44 AM. J. POL. SCI. 35 (2000) (partisan voting stronger in 1996 than ever in terms of its effect on presidential elections and high in congressional races, although not as high as in the 1950s and 1960s.).

<sup>117</sup> Fiorina’s model largely displaced the dominant view preceding it, the “Michigan model” of voting behavior, which treated partisan identification as something unchanging and chosen socially, usually by one’s parents. ANGUS CAMPBELL, PHILLIP CONVERSE, WARREN E. MILLER & DONALD STOKES, *THE AMERICAN VOTER* (1960).

<sup>118</sup> MORRIS FIORINA, *RETROSPECTIVE VOTING IN AMERICAN ELECTIONS* 83 (1981).

<sup>119</sup> Larry M. Bartels, *Beyond the Running Tally: Partisan Bias in Political Perceptions*, 24 POL. BEHAV. 117, 117-120 (2002).

at structural changes that dramatically affect the local branches of the major parties and testing whether they affect party membership. The strongest proof comes from looking at what happens when a city adopts nonpartisan local elections. It is very clear that the use of nonpartisan local election systems substantially weakens (though does not eliminate) the role of local parties in local politics.<sup>120</sup> Where nonpartisan elections are used, voters are less able to identify parties with local issues. To the extent that voters use local issues in their party identification decisions, one would expect to see nonpartisan elections correlated with a decrease in total party identification.

However, the evidence goes in the opposite direction. The use of nonpartisan elections in a locality has no effect on the percentage of voters affiliating with the national parties.<sup>121</sup> A scholar studying the issue summed up her findings thusly: "Perhaps most importantly, it is national and not local politics which affects public support for political parties."<sup>122</sup> Notably, this is very different from studies that look at differences in state election laws—which govern voting in state and national elections. Different state election laws have a clear and significant effect on party identification.<sup>123</sup>

It should be remembered that, for the purposes of the model, this assumption applies not only to voters, but also to activists and candidates. That said, there is no reason to think that the assumption would be any less valid for these groups. Activists may have beliefs that are more radical than other party members,<sup>124</sup> but this should not effect the belief that national issues are more important than local ones in making a party identification. Further, for candidates and activists alike with ambitions for more power, it is essential to join one of the two national parties. Finally, candidates have enormous incentives to ally with the major parties—they provide a brand name effective with voters and an institutional apparatus that is a function of its national status.<sup>125</sup>

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<sup>120</sup> Timothy Bledsoe & Susan Welch, *Patterns of Political Activity Among U.S. Cities*, 23 URB. AFF. Q. 249, 261 (1987) ("Thus, although there is a range of party strength in cities with nonpartisan elections . . . this variation should not prevent us from noting that the relationship between nonpartisan systems and limited party activity is very strong.").

<sup>121</sup> Carol A. Cassel, *The Nonpartisan Ballot and The Decline of American Parties: A Contextual Effect*, 9 POL. BEHAV. 246, 253 (1987).

<sup>122</sup> *Id.*

<sup>123</sup> Barry C. Burden & Steven Greene, *Party Attachments and State Election Laws*, 53 POL. RES. Q. 63, 64 (2000) (finding that the type of primary used had a significant effect on party identification).

<sup>124</sup> See *Private Parties*, *supra* note 109, at 298-304.

<sup>125</sup> ALDRICH, *supra* note 39, at 49.

As such, the assumption that voters, activists and candidates care more about national issues (and national status) when making affiliation decision seems reasonable.

## 2. Local Legislative Elections and Salience

The other assumption necessary to the model is that city council races are sufficiently low-salience that most voters only know about the candidates the information that appears on the ballot: party status. This actually comprises two related assumptions, that (1) voters rely on their party identification absent reason to abandon it; and (2) there is not enough media coverage of, money spent on, or inherent interest among voters in city council races to convince voters to do something other than vote for the candidate of the party with which they identify.

There is substantial evidence for this proposition. American voters commonly engage in ticket-splitting at the top of tickets—*i.e.*, people vote for one party for Presidential and another for Congress—although they have done so less in recent years.<sup>126</sup> However, less is known about the candidates further down the ballot, and the amount of ticket-splitting decreases substantially.<sup>127</sup> This finding has been consistent across different types of elections—the less the prominent the race the more likely that party identification will predict a voter's selection.<sup>128</sup>

Information on a ballot is particularly important. One study of voting in judicial elections—which are like city council races in their lack of salience—found that party information on the ballot was the major determinant of voting patterns. “[Ballot information] had an enormous impact on their willingness to choose a candidate and on the choice of one candidate over another. Not only do a great many voters come to the polls uncertain about what they will do in particular contests, but are willing to choose a course of action at the last possible moment on the basis of one

<sup>126</sup> See Marc J. Hetherington, *Resurgent Mass Partisanship: The Role of Elite Polarization*, 95 AM. POL. SCI. REV. 619, 621 (2001).

<sup>127</sup> See Paul Allen Beck, Lawrence Baum, Aage R. Clausen & Charles E. Smith, Jr., *Patterns and Sources of Ticket Splitting in Subpresidential Voting*, 86 AM. POL. SCI. REV. 916 (1992) (hypothesizing that “[i]n the relatively low information context of subpresidential races, then, partisanship should be a particularly valuable guide to voting” and confirming that hypothesis with a study of voting patterns in subpresidential races in Ohio).

<sup>128</sup> Philip Dubois, *The Significance of Voting Cues in State Supreme Court Elections*, 13 L. & SOC. 757, 761 (1979) (collecting studies on the role of partisanship in low salience elections); Jeffrey J. Mondak, *Public Opinion and Heuristic Processing of Source Cues*, 15 POL. BEHAV. 167, 173 (1993) (heuristics more important when individual has high need for cognitive efficiency); Marcus Pohlmann, *The Electoral Impact of Partisanship and Incumbency Reconsidered: An Extension to Low Salience Elections*, 13 URB. AFF. Q. 495, 499 (1977) (straight ticket voting more prevalent in low salience elections than in high salience elections).

piece of information.”<sup>129</sup> Further, even when not on the ballot, candidate partisan affiliation dominates all other information in terms of its influence on voting decisions. A study of down-ballot, nonpartisan statewide elections in California showed that voters had difficulty choosing whom to support in the absence of partisan identification.<sup>130</sup> More importantly, their choices were highly unstable. A large percentage of voters changed their stated preferences once they discovered the party status of candidates in nonpartisan elections.<sup>131</sup>

Of the assumptions, this is the most important. The effect of the low salience of city council elections is that local parties can choose platforms designed to represent voter preferences or not with no effect on voting patterns.<sup>132</sup> This proposition may seem extreme but it is important to remember that city council campaigns happen at the same time as mayoral campaigns which are almost necessarily higher profile. Further, media markets in cities are extremely expensive, rendering access to mass media other than direct mail extremely expensive. Although the difficulty of creating enough information about city council races could be overcome—theoretically at least—by city council candidates spending enormous sums in support of their candidates, the odds of enough of this occurring to create true competition in the city council is unlikely at best.

The dramatic effect of the lack of information on local city council elections can be seen if one considers the case of New York City’s Councilmanic District Five on the Upper East Side of Manhattan. In the 2001 local election, Gifford Miller, a powerful and well-known Democratic incumbent who directly after the election would become Speaker of the City Council, faced a relatively unknown candidate named Robert Strougo. Not surprisingly, Miller won 68 percent of the vote to Strougo’s 31 percent, neatly tracking the 2-1 dominance of Democrats in

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<sup>129</sup> Daniel Klein & Lawrence Baum, *Ballot Information and Voting Decisions in Judicial Elections*, 54 POL. RES. Q. 709, 725 (2001).

<sup>130</sup> Brian F. Schaffner & Matthew J. Streb, *The Partisan Heuristic in Low-Information Elections*, 66 POL. OPINION Q. 559, 569 (2002).

<sup>131</sup> *Id.* at 570.

<sup>132</sup> This differentiates what local parties go through and what faces state-wide parties in eras when national parties are not particularly ideological coherent. In the period between the Great Depression and the Civil Rights movement, Southern Democrats and Northern Democrats essentially ran on different platforms (except with respect to some economic policies). Voters in the South were not deluded into thinking that they were voting for integrationists even though the northern wing of the party was controlled by people committed to racial integration. The reason is that they had enough information. By contrast, voters for City Council do not have enough information, and therefore minority local parties cannot appeal to voters through crafting better policy platforms.

the district.<sup>133</sup> In 2005, a perfect storm of factors lined up to reverse this result. First, Miller could not run for reelection because of term limits. His aide, Jessica Lappin, who had never run for public office before, was the Democratic candidate.<sup>134</sup> Second, Republican Mayor Michael Bloomberg reached new heights of popularity, particularly on the Upper East Side (he would end up winning 59 percent of the citywide vote and more than 80 percent of the vote on the Upper East Side).<sup>135</sup> In District Five, the Republicans nominated Joel Zinberg, a former Democrat, cancer surgeon and Yale-educated lawyer, who built his candidacy around Bloomberg's popularity, declaring his goal as furthering the Mayor's agenda.<sup>136</sup> The *New York Times* and the *New York Post* endorsed Zinberg, as did Bloomberg.<sup>137</sup> In the face of this, Lappin's campaign simply sounded a single theme. When asked by a local paper what differentiated the candidates, she responded, "I'm a Democrat. I mean, that's sort of the most obvious difference between us. . . He's a Republican, and I'm proud to be a Democrat, and I think that certainly distinguishes us."<sup>138</sup> The result of the election was a near carbon copy of the 2001 race: Lappin received 65 percent of the vote to Zinberg's 35 percent.<sup>139</sup> Thus, in a district which a Republican mayor won 80 percent of the vote, the Republican city council candidate devoted to exactly the same platform as the Mayor only won 35 percent, despite being endorsed by the mayor and the major newspaper and facing a political neophyte. The only factor that mattered was the 2-1 advantage Democrats had in registration.

The story of Joel Zinberg is the story of all city council candidates: what they say and who they are matter very little to those who will vote for them. It is their party status and the popularity of that party at the national level that defines them.

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<sup>133</sup> Gotham Gazette, Gotham Gazette's Searchlight on Campaign 2001, District 5, <http://www.gothamgazette.com/searchlight2001/dist5.html> (last visited Dec. 11, 2006).

<sup>134</sup> Jessica Bruder, 'Partisan Paradox' Dogs Upper East Side Races, N.Y. OBSERVER, Nov. 7, 2005, at 11.

<sup>135</sup> See note 7. In the two Assembly Districts that compose the Fifth Councilmanic District, the 65th and 73rd, Bloomberg received 81 percent and 85 percent of the vote, respectively. See New York City Board of Elections, New York County Mayoral Results, <http://vote.nyc.ny.us/pdf/results/2005/general/Manhattan/New%20York%20Mayor%20NY%20Recap.pdf> (last visited Dec. 11, 2006).

<sup>136</sup> Jonathan Hicks, *In Council Race, Surgeon Takes on Former Miller Aide*, N.Y. TIMES, Nov. 5, 2005, at B5.

<sup>137</sup> *For City Council in Manhattan*, N.Y. TIMES, Oct. 23, 2005, § 14, at 13; *The Post's Endorsements*, N.Y. POST, Nov. 7, 2005, at 26.

<sup>138</sup> Bruder, *supra* note 134, at 11.

<sup>139</sup> Jonathan Hicks, *Except for Mayor, Democrats Come Out Ahead*, N.Y. TIMES, Nov. 9, 2005, at B9.

## IV. IMPLICATIONS AND PATHS TO POSSIBLE SOLUTIONS

If the model accurately describes city politics, the implications are dramatic. If the assumptions are accurate, then the model described above provides an explanation for why local legislative elections do not feature party competition and, further, explains why there is not sustained party competition for even mayoral races. The result is that big city urban governments are unrepresentative and uncreative, failing to meet even the narrowest definitions of democratic legitimacy. This should cause us to revise the way we look at the decisions of urban governments and at the way we think about local government law. This section will first discuss the implications of the model. It will then propose several possible policy changes cities could undertake to spur partisan competition. These proposals range from the prosaic to the utopian, and are certainly not without their own problems, but are an effort to think about what could create urban partisan competition and what it might look like if there was such competition.

*A. Implications*

The most obvious problem created by a lack of partisan competition in local legislative elections is that elected officials are less responsive to voter beliefs and less subject to being removed for bad performance. This needs little explanation—a political party in a one-party system can pursue ends less closely related to the desires of voters, just as a monopolist can engage in supra-competitive pricing.<sup>140</sup> There is substantial evidence that a lack of competition at the local level directly influences the policy decisions of cities.<sup>141</sup> Voters have more difficulty removing incumbents they do not like in one-party cities because they cannot be sure that their replacement—be it an independent or a primary challenger—actually represents a different set of policy choices.<sup>142</sup>

The problems created by a lack of partisan competition are not only felt statically, but also dynamically. That is, each set of elected officials is less

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<sup>140</sup> See RICHARD POSNER, ANTITRUST LAW 9-15 (2001). Theoretically, the threat of entry by a third party can serve to keep prices at the competitive rate; however, where entry is costless, we are unlikely to see a monopoly in the first place.

<sup>141</sup> Trounstein, *supra* note 97, at 880.

<sup>142</sup> In previous work, I have explored different normative reasons for favoring competition in elections. See Schleicher, *supra* note 21, at 175-87. Regardless of whether one supports competition because of its role in electing officials representative of the desires of the electorate or because it gives voters an easy means to remove officials they do not like, but provides legitimate results in the interim between elections, one-party governance does not provide any competitive benefits.

representative than it should be *and* there is an inefficiently low amount of policy development, candidate incubation and interest group mobilization opposed to the dominant party over time. Political parties do more than put candidates up for office—they serve as the fulcrum for the creation of ideas about governance and for the development of future political leaders.<sup>143</sup> They also organize groups into politically effective coalitions.<sup>144</sup> In a one-party city, there is too little of each of these. Occasional challenges by outsiders in top-of-the-ticket races do not fundamentally alter this aspect of a city's politics. An independent or opposition party candidate may win a mayoral campaign, but that does not create the type of institutional development of ideas, leaders and groups that is the natural result of party competition. Thus, inefficient political machines often flourish in cities over time, even when outside groups win an occasional election. George Washington Plunkitt, a member of New York City's Tammany Hall Democratic Party machine, put this point pithily when he compared the occasional "reform" campaigns made up of elite citizens that won New York mayoralty but did not sustain a challenge to machine's control of the city: "Reform committees . . . were morning glories. Looked lovely in the morning and withered up in a short time, while the regular machines went on flourishing forever, like fine old oaks."<sup>145</sup>

Of course, there is competition at the primary level in one-party systems. There is even proof that these primaries are substantially more competitive than primaries where there is partisan competition.<sup>146</sup> However, primary competition is not an adequate replacement for partisan competition. Most importantly, with very few exceptions, there are no formal groups in primary competition and these groups do not have access to the ballot. As such, they are unlikely to create ideological competition for the same reasons that non-partisan elections do not create competition (as is discussed in the next section). City council primary elections turn on

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<sup>143</sup> "All types of private actors, who may or may not possess legally cognizable connections to the official party apparatus, are important members of the party coalition, including unions, interest groups, think tanks, and other politically active groups." Michael S. Kang, *The Hydraulics and Politics of Party Regulation*, 91 IOWA L. REV. 131, 133-34 (2005). See also Nancy Rosenblum, *Political Parties as Membership Groups*, 100 COLUM. L. REV. 813, 838-39 (2000).

<sup>144</sup> Rosenblum, *supra* note 143, at 824-26.

<sup>145</sup> W. RIORDAN, PLUNKITT OF TAMMANY HALL: A SERIES OF VERY PLAIN TALKS ON VERY PRACTICAL POLITICS 57 (1994). Plunkitt makes clear that the failure of reformers to form parties that engage in politics is the reason they could not dent Tammany Hall's power over the long term. "The fact is that a reformer can't last in politics." *Id.* at 58.

<sup>146</sup> See Malcolm Jewell & Lee Sigelman, *Voting in Primaries: The Impact of Intra- and Inter-Party Competition*, 39 W. POL. Q. 446, 452 (1986).

the same factors that non-partisan city council elections turn on—ethnicity and, to a lesser extent, money, with ideology not playing much of a role. Further, party primaries are, by their nature, exclusive of non-members, thus limiting the extent to which the competition serves to make politicians representative of the views of the entire populace. This exclusivity also limits the extent to which party factions can play the role of idea and future leader development and group mobilization: by their very nature, they cannot include groups and people outside of the party. Also, primary voters are not even representative of party members as a whole; they are more ideological and more likely to play an activist role in politics.<sup>147</sup> Thus, although primaries create some competitive pressure, they do not serve the same function as true partisan competition.

Also, the lack of partisan competition in local legislatures creates problems in organizing these legislatures because coherent parties solve collective action and vote cycling problems for legislators as well as for voters. Parties help legislators solve prisoner's dilemma-like problems that arise in legislative decision-making (e.g. when all legislators acknowledge the necessity of a tax increase, but each legislator sees political benefits in being a sole vote against an agreement).<sup>148</sup> By creating formal bonds of trust and penalties for disloyal behavior, parties enable legislators to make mutually beneficial agreements without fear of defection.<sup>149</sup> When there is only one party, party whips cannot play this role. Further, party can solve the problem of cyclical voting described famously by Kenneth Arrow. Arrow proved that majority rule (or any other voting rule) will not result in stable outcomes for certain sets of individual legislator preferences—that a legislature may, by majority rule, prefer an option A to another option, B, B to a third option C and C to A.<sup>150</sup> Party formation can solve this, by giving a certain limited set in the legislature the power to make rules and hence break the circle of voting preference.<sup>151</sup>

As such, a lack of partisan competition in local elections results in government that is not representative, does not feature the proper development of new political leaders, coalitions and policy ideas and has

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<sup>147</sup> See *Private Parties*, *supra* note 109, at 298-308.

<sup>148</sup> ALDRICH, *supra* note 39, at 32-37.

<sup>149</sup> *Id.*

<sup>150</sup> See KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 46-60 (2d ed. 1963).

<sup>151</sup> *Id.* at 37-41. There is evidence that cycling occurs more frequently in nonpartisan legislatures. See Gerald Wright & Brian Schaffner, *The Influence of Party: Evidence from the State Legislatures*, 96 AM. POL. SCI. REV. 367, 374 (2002) (demonstrating that the nonpartisan Nebraska legislature does not feature stable coalitions).



disorganized local legislatures that cannot easily translate even their weakly representative ideas into policy.<sup>152</sup>

These flaws—endemic to local democracies in the United States—put serious pressure on the understandings of those local government law scholars that argue for increased devolution of power to cities because of their supposedly superior democratic purchase. Most of these efforts put a great deal of attention on the ability of citizens to actively participate in local decision-making and that surely is a value. However, the other side of the coin is that, if this paper is right, the elected officials in cities have little claim to be representative of voter beliefs and, even where participation is extensive and influential, elected officials are still the final decision-makers about policy. Further, those who take an active role in city governance are unlikely to be representative of their fellow citizens either—their participation is almost certainly either caused by or creates views that are not shared by the rest of the community—leaving cities without much representation for its non-active and non-politically influential citizenry.

The lack of competition in local legislatures also puts pressure on those who look at cities through the lens of pluralism. Pluralist scholars de-emphasize elections and instead claim that city government is, because of the lack of declarative outcomes created by competitive elections, open to all groups.<sup>153</sup> These groups, be they neighborhoods, ethnic groups, or organized interests, are able to battle each other inside government. The lack of competition, under this view, is not a problem because it promotes

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<sup>152</sup> There is one exception to this claim. Local councils that are comprised of members based on voters' national party preferences may be more representative of local voters' national issue preferences than locally competitive councils. This has important implications for dissenting groups at the national level. Aside from stating disagreement, a minority can dissent from a national consensus "by deciding," forming a majority of some sub-group and exercising power over the issue in that sub-group. See Heather Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745 (2006) (defining dissenting by deciding). One example of such a dissent is a decision by a local government controlled by dissenters at the national level—on some national issue, a local government can dissent from national policy by putting its opposition view into effect in this city. *Id.* at 1748. However, if local governments are simply contests to prove competence at the local level, or are contests about local issues (and not national ones), there is no reason to believe that these "dissents" are anything more than the decisions of local officeholders with little purchase on the beliefs of their constituencies about national issues. If the model explored above is correct, there is no content to this objection—local elections are nothing more than referenda on national issues and party commitment and therefore the decisions by local governments on issues of national import should very much be considered instances of "dissenting by deciding."

<sup>153</sup> The most well-known proponent of pluralism in studying the politics of cities is Robert Dahl. See ROBERT DAHL, *WHO GOVERNS?* (1961). For a nice discussion of the evolution of Dahl's pluralism, see Richard W. Krouse, *Polyarchy & Participation: The Changing Democratic Theory of Robert Dahl*, 14 POLITY 441 (1982).

a form of proportional representation—each group can have access to government because no group has lost in an election and policy outcomes are a result of the negotiation of all groups in a city. However, this fails to take into account how the lack of competition shapes interest group negotiation. When decisions must be made between competing policies, in representative democracies we turn to the views of the mass public. Ultimately, the pluralist vision—if not supplemented by electoral competition—forgoes notions of representation of the views of the mass of the citizenry. That is, pluralism may celebrate a system of representation of something but, unless one believes that all social groups are equal in their ability to organize, there is no guarantee or even likelihood of even the roughest degree of proportionality. The legitimacy of a pluralist system rests on a less than sturdy foundation unless there is some resort to popular opinion.

The problems of local democracy also create pressure on those scholars and activists who want to create complicated schemes for reforming local government into complicated regional governance structures. Local elections suffer from the existence of too little information; adding more complication to the structure of governance without providing any help to voters through improved heuristic devices for choosing candidates is only likely to make local democracy weaker. Increasing the power of institutions is unlikely to create better democracy, or those cities with a great deal of power—New York, Chicago etc.—would have more competitive elections. Although a few regionalists—most notably Gerald Frug – have clear-sightedly argued *that* any effort to create regional or other alternative local government structures must rest on an expansion of partisan politics, none have addressed *how* this can be achieved.<sup>154</sup> Nor has much scholarship been devoted to the ways in which regionalism and alternative governing structures would worsen local democracy by increasing information costs to voters and exacerbating the problems discussed in this paper. There is not space in this article to address the ways in which the realities of local democracy conflict with (or improve) the extremely large number of ideas for enhancing local power and reforming the structures of local government. That will have to wait for another day. However, the remainder of the paper can sketch four policy proposals that might help generate more electoral competition in cities. None is without its attendant problems, but they should serve to spur thought on the subject. Such new ideas are drastically needed, because, if

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<sup>154</sup> See Gerald Frug, *Beyond Regional Government*, 115 HARV. L. REV. 1763, 1807-09 (2002).

the paper is right, much of the existing thought about cities needs dramatic revision.

### *B. Policy proposals*

This subsection consists of four policy proposals, ranging from the previously discussed to the entirely new. These are sketches of proposals, and because of the novelty of the second and third approaches, it is difficult to say how they would work in practice. However, new thinking about city politics is needed and these proposals are of the sort that could generate much needed political competition.

#### *1. Repeal Nonpartisan Elections Laws*

One ironic implication of the model is that the policy once seen as the solution for the problems of one-party city government actually causes harm. Nonpartisan elections were part of the package of reforms pushed by Progressive reformers around the turn of the last century to limit the power of political machines and to promote more business-like city administration.<sup>155</sup> In cities with nonpartisan elections, political parties do not play a formal role—they do not have any ability to limit who will appear on the general election ballot (by selecting a standard bearer) and candidates do not appear on the ballot with a party label.<sup>156</sup> Progressive reforms swept the nation during the period between the turn of the century and the Great Depression, particularly in the South and West.<sup>157</sup> Cities have continued to adopt nonpartisan election systems even after the end of the Progressive Era, and now most of the nation's local governments use nonpartisan elections.<sup>158</sup> Even the nation's strongest bastion of traditional urban party politics, New York City, considered but ultimately rejected a charter revision to institute them in 2003.<sup>159</sup>

However, at the same time, scholars studying urban elections have largely turned against nonpartisan systems.<sup>160</sup> Political historians have castigated the Progressive reformers as an upper class movement meant to

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<sup>155</sup> See DENNIS R. JUDD & TODD SWANSTROM, *CITY POLITICS: PRIVATE POWER AND PUBLIC POLICY* 81-92 (2d ed. 1998).

<sup>156</sup> See *id.*

<sup>157</sup> *Id.* at 81-92; WELCH & BLEDSE, *supra* note 5, at 8-9.

<sup>158</sup> See Chang, *supra* note 113, at 579-80.

<sup>159</sup> See *id.* at 584-85; Jonathan P. Hicks & Michael Cooper, *City Votes Down Effort to End Party Primaries*, N.Y. TIMES, Nov. 5, 2003, at A6.

<sup>160</sup> Schaffner, Streb & Wright, *supra* note 13, at 8-9.

disenfranchise ethnic whites and later racial minorities.<sup>161</sup> Further, political scientists studying voting patterns have found that voting turnout is lower,<sup>162</sup> incumbents are safer,<sup>163</sup> and variables about a candidate's status—particularly his employment and his race—matter more in cities with nonpartisan election than in cities with partisan elections.<sup>164</sup>

The reason the use of nonpartisan elections affects turnout, incumbent safety and voting decisions is that it decreases the amount of information available to voters. As Brian Schaffner, Matthew Streb, and Gerald Wright have noted:

Informed by rational actor theories of behavior, political science now generally accepts the view that many citizens are going to be poorly informed about, and only moderately interested in politics. Nevertheless, more recent research has demonstrated that, in spite of these shortcomings at the individual level, we can and do achieve an electorate that is collectively rational and highly responsive to what government does. This collective rationality is attained, in large part, by the use of information short cuts. Party labels, in this perspective, provide important cognitive information. They convey generally accurate policy information about candidates and their low cost and accessibility help voters to reach reasonable decisions. It follows, then, that taking party labels away in nonpartisan elections and thereby raising the cost of information about candidates for voters, nonpartisan elections would make voting more difficult and thereby undermine the potential for popular control.<sup>165</sup>

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<sup>161</sup> See, e.g., WELCH & BLEDSOE, *supra* note 5, at 4-8; JUDD & SWANSTROM, *supra* note 155, at 84-92.

<sup>162</sup> See Schaffner, Streb & Wright, *supra* note 13, at 25.

<sup>163</sup> See *id.* at 26; Kurt E. Scheuerman, Comment, *Rethinking Judicial Elections*, 72 OR. L. REV. 459, 461-62 (1993) ("[N]on-partisan incumbents are more likely to be unopposed."); Peter D. Webster, *Selection and Retention of Judges: Is There One 'Best' Method?*, 23 FLA. ST. U. L. REV. 1, 25 (1995) (less competition in nonpartisan elections).

<sup>164</sup> See Phillip L. Dubois, *Voting Cues in Nonpartisan Trial Court Elections: A Multivariate Assessment*, 18 LAW & SOC'Y REV. 395, 430 (1984) (finding that information about employment status has greater effect in nonpartisan judicial elections than newspaper or bar association endorsements); Gerald Pomper, *Ethnic and Group Voting in Nonpartisan Municipal Elections*, 30 PUB. OPINION Q. 79, 81 (1966) (race has greatest effect in nonpartisan elections).

<sup>165</sup> Schaffner, Streb & Wright, *supra* note 13, at 8-9 (citations omitted).

Schaffner, Streb, and Wright then confirmed, through studies of different types of elections, that voters in nonpartisan elections simply behave like they have less information than voters in partisan elections. That is, voters in nonpartisan system do not replace the heuristic provided by party label with other, better indicators of policy stances taken by candidates—they do not learn their policy position or rely on newspaper or civic group endorsements. Instead, for the most part, voters simply remain entirely uninformed.<sup>166</sup>

The model used here comports with, and generalizes, the findings of Schaffner, Streb, and Wright. The harm caused by having the same parties on the ballot for local and national elections under the model used here is that they provide little information to candidates. Nonpartisan elections just exacerbate this problem—they take the little information provided by the ballot and remove it, leaving voters adrift. Thus, the major policy directed at solving the problem of a lack of partisan competition in local elections actually makes what is bad about the lack of competition and makes it worse.

Nonpartisan elections were once considered the solution to the problem of unrepresentative local politics, but most observers have moved away from this understanding. The model provides a coherent explanation for why nonpartisan elections have not solved, and have made worse, the problem of non-representative local governments.

## 2. Stronger Mayors, Weaker Councils

As noted above, one of the major Progressive reforms of city governance, adopted mostly in medium-sized cities, was the introduction of so-called “council-manager” systems, in which an elected city council selects a city manager to serve as a city’s executive.<sup>167</sup> However, unlike non-partisan elections, which continue to have some popularity, there has been a move away from weak mayor systems: a number of cities have abandoned “council-manager” systems and others have given mayors new, important powers.<sup>168</sup>

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<sup>166</sup> *Id.* at 13-27.

<sup>167</sup> A majority of cities with between 10,000 and 250,000 residents have a council manager system of government. OLIVER, *supra* note 88, at 177.

<sup>168</sup> See Schragger, *supra* note 98, at 2547-51. Schragger provides a fascinating account of how the structure of federalism reduces the power of mayors and limits their power to serve as figureheads of local democracy. In this way it is of a type with this paper: Schragger shows the structural constitutional and federal constraints on the realization of local democracy, just as this paper shows the structural political constraints on local democracy.

To the extent this paper is correct, these are good ideas. Mayoral elections, especially those in big cities, produce the type of electoral froth—news media coverage, campaign spending—that can help voters overcome the informational problems they face as a result of not having an accurate party heuristic. City councils do not. As such, to the extent that cities are making decisions about the allocation of political power between a local legislature and a local executive, and care about the extent to which officials are representative of the views of locals, they should grant more power to mayors, and less to councils.

### *3. Repeal the Unitary Party Rules*

Repealing the use of nonpartisan election systems obviously will not have any effect on cities that use partisan systems. Granting more power to Mayors would help with issues of democratic representation, but mayoral elections are not bastions of healthy partisan competition either and, of course, there are other reasons for favoring legislative input. To directly confront the problem of the lack of competition in local elections, cities could repeal the “unitary party rules,” or those laws and party rules that bind local parties to national ones. Doing so, however, would face substantial constitutional challenges and repeal of two of the three such rules may be unconstitutional.

As discussed above, the three unitary party rules are: (1) national parties are given an automatic place on the local ballot as a result of their performance in state elections; (2) an individual who joins a national party is automatically a member of the local branch of that party; and (3) national party organizations cannot be stopped from being able to mobilize resources to contest local elections.<sup>169</sup> The third rule is constitutionally mandated—courts have read the First Amendment to invalidate state laws limiting party participation in local elections—and could not be repealed.<sup>170</sup> However, the other two could be (arguably) repealed and this would have the effect of changing the structure of competition in local elections.

Repealing the laws that give successful statewide parties an automatic place on local ballots would force the major national parties to canvas for petitioners to get on the ballot like other parties. There is little doubt that they would be successful in doing so—petitioning is mostly a function of campaign money and the local branches of national parties are likely to

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<sup>169</sup> See notes 108-110 and accompanying text.

<sup>170</sup> See note 110 and accompanying text.

have sufficient funding.<sup>171</sup> The relevance of requiring re-qualification for the ballot would be that it would give the national party that forms the minority in local elections a chance to re-brand itself. Because the national party that forms the minority in local elections rarely wins office, it would have an incentive to label itself something different in local elections and thereby establish a new local party that is affiliated with the national party but is also different. That national parties that are local minorities can achieve electoral success when rebranded is not an entirely untested idea. In New York City, Republicans have joined with other parties in endorsing a single candidate under a “fusion” platform. This has proved successful in the past—Mayors Seth Low, Fiorella LaGuardia, Rudy Giuliani, and Michael Bloomberg all ran under one version or another of a fusion platform—but is impossible in all states other than New York because fusion is illegal.<sup>172</sup> Further, even in New York State, where fusion is legal, it has not resulted in any systematic local party competition in any city.<sup>173</sup> A change that required the national parties to petition to get on local ballots might be able to do just that.

A repeal of the law that provides automatic ballot status for major parties would be unlikely, however, to create to create local party competition on its own. However, if it was combined with a repeal of the law that said that people can only be members of one party at a time it might be effective. Such a change would permit members of the national party that is dominant in national elections in a locality to join the minority party only for local elections. This would give the newly-formed local version of the minority party the proper competitive atmosphere in primaries such that it could produce competitive local candidates.

This proposal would face a substantial constitutional challenge. In *California Democratic Party v. Jones*, the Supreme Court invalidated a “blanket primary” system, in which any voter could vote in any primary.<sup>174</sup> It did so because parties had the right, under the First Amendment, to decide on their membership and thus internal party rules that limited voting

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<sup>171</sup> Cf. Dmitri Evseev, *A Second Look at Third Parties: Correcting the Supreme Court's Understanding of Elections*, 85 B.U.L. REV. 1277, 1284-86 (2005) (noting that extreme cost of ballot access can be overcome but only at substantial expense).

<sup>172</sup> See OLIVER E. ALLEN, *THE TIGER: THE RISE AND FALL OF TAMMANY HALL* 204 (1993); Pildes, *supra* note 3, at 121; Dan Janison, *Bloomberg Strategy: Liberal Political Energy*, NEWSDAY, June 21, 2004, at A8.

<sup>173</sup> See Elissa Berger, Note, *A Party That Won't Spoil: Minor Parties, State Constitutions and Fusion Voting*, 70 BROOK. L. REV. 1381, 1391 (2005) (describing the greatest accomplishments of third parties in New York as tipping elections to one major party candidate or another).

<sup>174</sup> *Cal. Democratic Party v. Jones*, 530 U.S. 567, 586 (2000).

in primaries to individuals who were members of the party were unconstitutionally impinged by the blanket primary system. The compelling state interest advanced by the state—that blanket primaries would produce moderate candidates—was not found to be legitimate.<sup>175</sup> If a state repealed the unitary party rules, the major parties would have substantial ground to challenge any effort to force them to permit members of other parties to vote in their local primaries. A district court in Mississippi has found that a state law that did not require primary voters to register in the Democratic Party was unconstitutional because the party had the right to exclude non-members.<sup>176</sup> It did so because the reasons offered—increasing voter participation and preserving the overall integrity of the electoral process—did not justify the imposition on state party association rights. Under this proposal, the state, however, could offer a different type of justification, the promotion of differentiated local parties, and it is unclear what the Supreme Court would make of it.

There is also a half-step a state could take along these lines. States could allow day-of party registration, which would allow voters to register in the party the day of the election. The use of day-of primaries in local elections would permit nationally partisan voters to affiliate with the party that best represents them at the local level and thereby capture some of the gains from repealing the unitary party rules. Combining day-of registration with a repeal of the automatic ballot status for major parties might cause a rejiggering of local parties and thereby create local party competition. This option would option, however, would also face a constitutional challenge.<sup>177</sup>

#### *4. Bar National Parties from Participating in Local Elections*

Even repealing two of the three unitary party rules would not necessarily have the effect of creating partisan competition in local elections. Because the national parties still have the ability to use their superior resources to campaign in local races, they probably would continue to dominate local elections, usually resulting in one-party domination because of residential partisan segregation. A more radical proposal to create competition would be necessary.

One such radical proposal would be for a state to pass a law barring parties registered with the state—the national parties and all current third

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<sup>175</sup> *Id.* at 582.

<sup>176</sup> *See* *Miss. State Democratic Party v. Barbour*, 491 F.Supp.2d 641, 661 (2007).

<sup>177</sup> *Id.*



parties seeking to receive automatic ballot lines in state and national races—from competing in local elections. Local elections would be open to parties but all parties would have to choose between competing in state and national races and competing in local races. The parties that chose to be registered with the state could be barred from participating in the campaigns of purely local parties by a campaign regulator. This would be similar to the rules surrounding political action committees and so-called 527 organizations, which the Federal Elections Commission regulates in order to ensure that they do not coordinate their political activities with parties.<sup>178</sup>

Such a rule would permit the flourishing of competition at the local level. Because first-past-the-post/single member districts would still be used, this competition would not become a free-for-all as are regularly seen in nonpartisan campaigns.<sup>179</sup> Instead, one would expect to see a two-party system develop at the local level, but that these two parties would be take stances on local issues and compete for votes using local appeals. Voters would have more information about local candidates, as they would come with a party label, a brand which voters could use as a heuristic for their beliefs about local issues. At first, these new party names might not have much meaning to voters, and local elections might be dominated by copy cat versions of national party groups (for instance, the “Donkey” or “Elephant” parties).<sup>180</sup> But, as Morris Fiorina has shown, meaning accrues to political parties based on their performance over time and, as local officials (including more prominent Mayors) were assessed for their performance, voters would be able to give these entities local meaning.<sup>181</sup> Once they have developed reputations based on the performance of local member officials, voters would be able to use the names of these local-only parties as heuristics for making their voting decisions.

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<sup>178</sup> For a discussion of how this is done currently and how campaign finance laws could be improved to stop further coordination, see Meredith A. Johnston, Note, *Stopping “Winks and Nods”: Limits on Coordination as a Means of Regulating 527 Organizations*, 81 N.Y.U. L. REV. 1166, 1201-06 (2006).

<sup>179</sup> See Schleicher, *supra* note 21, at 190-92. For instance, in the nonpartisan California Governor’s race accompanying the Gray Davis recall vote, 135 candidates appeared on the ballot. Elizabeth Garrett, *New Issues in the Law of Democracy: Democracy in the Wake of the California Recall*, 153 U. PA. L. REV. 239, 254 (2004).

<sup>180</sup> They would certainly be more successful if they were regional local-election only parties, or even national-local-election-only parties. Because media is mostly regional and national, parties that were able to brand themselves across a region or the country would be able to use the mass media to create associations in a number of places at once, adding to the ability of voters to associate them with policies and successes (or failures).

<sup>181</sup> See note 118 and accompanying text.

The constitutionality of a law barring national parties from competing in local elections would obviously face a substantial challenge from the national parties and such a challenge might succeed for the same reasons that the constitutionality of the proposals in the previous section is in doubt. There are, however, some reasons to think that, despite being more radical, this type of law might be better suited to survive such a challenge. The law would be neutral on its face, creating no bias against any group. Nor would it penalize any group—any party could choose to compete in local elections or in state and national ones. States establish limits on which parties can appear on the ballot with regularity—they usually condition it on receipt of a certain number of votes at the state level or on presenting a certain number of signatures.<sup>182</sup> Such requirements, unless overly burdensome when taken as a whole, are constitutional.<sup>183</sup> Finally, courts have regularly held that barring parties entirely from local elections is constitutional by sanctioning nonpartisan local elections, and that is less of a restriction on political parties than barring parties that compete in national state elections from competing in local elections.

However, it is ultimately impossible to say how a court would treat such a rule. Certainly it is unlike any regulation considered by courts and given the confusing nature of the Supreme Court's election law jurisprudence, it is difficult to determine how they would rule on such a novel question.<sup>184</sup>

Even if it the reaction of the Court to this issue is not clear, the majority of the scholarship on election law would likely argue that such a proposal should be considered constitutional. Many scholars in the field have moved away from an individual-rights based conception of election law claims, because constitutional claims about elections are almost always claims about the invidious effect of laws on groups and their political power. "The salience of political structures and groups to voting claims makes it difficult to fit them into a conventional individual rights framework."<sup>185</sup> Instead, most, although not all, scholars in the field argue that constitutional claims about elections should be made with reference to an

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<sup>182</sup> For a discussion of the ways courts have treated ballot access laws, see Judge Richard Posner's opinion in *Nader v. Keith*, 385 F.3d 729 (7th Cir. 2004) (holding that district court did not abuse its discretion in denying Ralph Nader's petition to be added to the general election ballot for President).

<sup>183</sup> *Id.* at 735.

<sup>184</sup> Pildes, *supra* note 3, at 66 (Supreme Court jurisprudence about election issues is confused and confusing).

<sup>185</sup> Heather Gerken, *One Person, One Vote: A Theoretical and Practical Examination of the Costs and Causes of Minimalism in Voting Cases: Baker v. Carr and Its Progeny*, 80 N.C. L. REV. 1411, 1434 (2002). See also Pildes, *supra* note 3, at 40-48.

underlying theory of democracy.<sup>186</sup> Most prominent among these structuralist claims is that the Supreme Court should interpret constitutional protections dealing with elections to ensure that incumbent law-makers and incumbent parties do not distort competition to protect themselves from competitive pressures. Laws limiting competition—like partisan gerrymandering or excessively strong campaign finance restrictions—should be treated with the type of analysis used in antitrust.<sup>187</sup>

However, comparing politics to markets does not end the analysis. If politics are like markets, they are not like the market for corn or some other commodity. Instead, they are complex, heavily regulated markets.<sup>188</sup> Understanding the effect of election laws on political markets takes the modern economic analysis of antitrust and industrial organization and likely other tools as well.<sup>189</sup> More effort must go into understanding the effect of election laws on the various and different political markets that comprise modern American (and international) government.

This paper is one such study of one type of political market. For the reasons laid out throughout this paper, barring parties that compete at the state and national level from competing at the local level would help create a competitive environment in local elections. And the introduction of such competition is dearly needed. Otherwise, our localities will continue to be governed by local officials with little democratic legitimacy, that do not represent the beliefs of local voters on local issues and that are extremely well-protected against challenges.

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<sup>186</sup> See, e.g., Issacharoff, *supra* note 3, at 599; Pildes, *supra* note 3, at 40-49; Schleicher, *supra* note 21, at 169. But see Hasen, *supra* note 38.

<sup>187</sup> “In the marketplace of ideas, the idea of the marketplace of ideas enjoys a dominant market share. . . . [Scholars] write about ‘lockups,’ ‘rent seeking,’ ‘agency problems,’ and ‘externalities’; they propose antitrust as a model for judicial oversight.” Pamela Karlan, *Politics by Other Means*, 85 VA. L. REV. 1697 (1999). See also Pildes, *supra* note 3, at 40-49; Schleicher, *supra* note 21, at 166-167.

<sup>188</sup> “Democracy is a heavily regulated industry.” Pildes, *supra* note 3, at 52.

<sup>189</sup> See Schleicher, *supra* note 21, at 188-219 (analyzing the Supreme Court’s primary ballot access law jurisprudence through the lens of natural monopoly regulation).

