FEDERALISM AND POLITICAL COMPETITION IN EMERGING DEMOCRACIES

JONATHAN L. MARSHFIELD[*]

ABSTRACT

Political competition is essential to the development and maintenance of a healthy and stable democracy. Current scholarship has largely ignored the role that federalism can play in fostering meaningful political competition in emerging democracies. This Article aims to fill this void by developing a theory of political competition within federal systems based on a formal game theory model created by economist and Nobel Laureate Roger B. Myerson. The Article argues that constructive political competition is especially difficult in emerging democracies because social and economic exigencies create strong incentives for new leadership to quash opposition and because first-time voters do not have a point of comparison by which to judge their first set of democratic leaders. Unitary regimes exacerbate these problems because they create an all-or-nothing political scenario and provide voters with only one point of political comparison. Federal systems, on the other hand, create multiple political arenas. This means that political opposition can be contained without being quashed, and that voters will have multiple points of political comparison. After exploring the necessary parameters of this model, the Article then applies the model to post-apartheid South Africa, which has been controlled by a single political party since the country's first democratic election in 1994. The Article concludes that South Africa's federal structure is gradually fostering constructive political competition as the model suggests and that opposition parties in South Africa are well situated to take further advantage of these opportunities in the future.

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* LL.M New York University School of Law; J.D. Rutgers University School of Law; B.A. Cedarville University.

INTRODUCTION

By all accounts, South Africa's negotiated transition from apartheid to democracy was one of the great accomplishments of the twentieth century.[1] There are, however, reasons to be concerned about the stability and maturity of South Africa's democracy. A primary concern is the African National Congress's (ANC) stronghold on political life.[2] The ANC is the only political party to have held national power since South Africa's first democratic election in 1994.[3] In the three elections that have been held since then, the ANC has never won less than sixty-six percent of the national vote.[4]

South Africa's experience is illustrative of a larger trend of one-party dominance in emerging democracies.[5] Many societies that transition from authoritarianism to democracy[6] struggle to develop political cultures that

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1. *See* Peter N. Bouckaert, Note, *The Negotiated Revolution: South Africa's Transition to a Multiracial Democracy*, 33 STAN. J. INT'L L. 375, 375 (1997) (characterizing South Africa's transition to democracy as "one of the greatest political achievements of this century"); *see also* Marianne Geula, Note, *South Africa's Truth and Reconciliation Commission as an Alternate Means of Addressing Transitional Government Conflicts in a Divided Society*, 18 B.U. INT'L L.J. 57, 59–63 (2000) (providing concise description of transition to democracy).

2. *See* Roger Southall, *The 'Dominant Party Debate' in South Africa*, 2005 AFR. SPECTRUM 61, 64–65 (summarizing concerns associated with ANC's dominance of post-apartheid democracy); Adam Habib & Rupert Taylor, *Parliamentary Opposition & Democratic Consolidation in South Africa*, 26 REV. AFR. POL. ECON. 261, (1999) (discussing relationship between democratic stability and ANC political dominance).

3. Independent Electoral Commission of South Africa, *Results*, http://www.elections.org.za (click "Elections"; then "Results") (last visited Feb. 28, 2011) [hereinafter *IEC Results*] (providing official election results for all of South Africa's post-apartheid elections); *see also* Norbert Kersting, *Voting Behaviour in the 2009 South African Election*, 2009 AFR. SPECTRUM 125 (summarizing ANC's dominance since 1994).

4. *IEC Results*, *supra* note 3. The ANC won 63% of the national vote in 1994, 66% in 1999, 70% in 2004, and 66% in 2009. *Id.*

5. *See* Hermann Giliomee & Charles Simkins, *The Dominant Party Regimes of South Africa, Mexico, Taiwan and Malaysia: A Comparative Assessment*, *in* THE AWKWARD EMBRACE: ONE-PARTY DOMINATION AND DEMOCRACY 1 (Hermann Giliomee & Charles Simkins eds., 1999) (discussing general trend of one-party dominance in emerging democracies and specifically discussing Mexico, Malaysia, Taiwan, and South Africa); *see also* ADAM PRZEWORSKI ET AL., DEMOCRACY AND DEVELOPMENT 59–69 (2000) (listing countries that have experienced one-party dominance notwithstanding democratic elections including, among others, Botswana, Burkina Faso, Egypt, Gambia, Ivory Coast, Madagascar, Senegal, South Africa, Honduras, Nicaragua, Bolivia, Mongolia, Pakistan, and Turkey).

6. Following Samuel P. Huntington, this Article uses the term "authoritarianism" to refer to any form of government that is non-democratic. *See* SAMUEL P. HUNTINGTON, THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY 11–13 (1991). Following Joseph A. Schumpeter, democracy refers to "that institutional arrangement for arriving at political decisions in which individuals acquire power to decide by means of a competitive struggle for the people's vote." JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 269 (2d ed. 1947); *see also* HUNTINGTON, *supra*, at 6–10 (explaining why Schumpeter's procedural definition of democracy is

support loyal opposition and constructive political competition.[7] This trend is troubling because political competition is inextricably linked with democratic stability. Mature, stable democracies almost universally exhibit vibrant two-party or multi-party political systems.[8] Indeed, democratic theorists generally agree that "a functioning political opposition is essential to democracy."[9]

Yet, emerging democracies face significant obstacles to loyal political opposition.[10] Social, economic, and political exigencies associated with dramatic political transition can create strong incentives for the first-elected party to consolidate power and quash opposition.[11] An additional,

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best for purposes of classification and comparative analysis). As used in this Article, "emerging democracy" refers to a country that is transitioning or has recently transitioned from authoritarianism to democracy. *See* Stathis N. Kalyvas, *Commitment Problems in Emerging Democracies: The Case of Religious Parties*, 32 COMP. POL., 379 (2000) (using the term similarly).

7. *See* Giliomee & Simkins, *supra* note 5, at 2–3 (arguing that many dominant-party systems occur "on the heels" of revolution or political transition of some kind). This trend was widely observed during the democratization of the former Soviet Union. *See* Peter C. Ordeshook, *Constitutions, Elections, and Election Law*, 87 TEX. L. REV. 1595, 1603–06 (2009).

8. *See* AREND LIJPHART, PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES 76–77 (1999) [hereinafter LIJPHART, GOVERNMENT FORMS AND PERFORMANCE] (listing party ratios for thirty-six democracies between 1945 and 1996); AREND LIJPHART, DEMOCRACIES: PATTERNS OF MAJORITARIAN AND CONSENSUS GOVERNMENT IN TWENTY-ONE COUNTRIES 106–26 (1984) [hereinafter LIJPHART, MAJORITARIAN AND CONSENSUS GOVERNMENT] (listing party ratios for twenty-two democracies between 1945 and 1980). Political parties are not a necessary condition for democracy. PRZEWORSKI ET AL., *supra* note 5, at 20 n.8. However, modern democratic competition is generally structured around political parties. *Id* at 20. More important, in systems where at least one party exists, political competition depends on the existence of a viable opposition party. *Id.* Thus, one-party states are generally indicative of a lack of meaningful political competition. *Id.*

9. Courtney Jung & Ian Shapiro, *South Africa's Negotiated Transition: Democracy, Opposition, and the New Constitutional Order*, 23 POL. & SOC'Y 269, 272 (1995). Many theorists go further and claim that a democracy is not fully consolidated until there has been at least one peaceful transfer of power to an opposition party following the initial transition to democracy. *See, e.g.*, HUNTINGTON, *supra* note 6, at 266–67 (articulating now famous "two-turnover" test for democratic consolidation); ADAM PRZEWORSKI, DEMOCRACY AND THE MARKET: POLITICAL AND ECONOMIC REFORMS IN EASTERN EUROPE AND LATIN AMERICA 10 (1991) ("Democracy is a system in which parties lose elections . . . .").

10. "Loyal opposition" refers to political opposition that recognizes a distinction between opposition to extant leadership and opposition to the underlying political order. *See* HUNTINGTON, *supra* note 6, at 261–62. Within a democracy, loyal opposition may oppose a particular party or leader, but it must nevertheless recognize democratic processes as the legitimate means for resolving political conflict. *See* Barrington Moore, Jr., *Liberal Prospects under Soviet Socialism: A Comparative Historical Perspective*, *in* MORAL ASPECTS OF ECONOMIC GROWTH, AND OTHER ESSAYS 82, 84–91 (1998) (defining "loyal opposition" and tracing its roots to monarchal regimes).

11. Government performance is critically important for young democracies to survive. Emerging democracies have a small window of opportunity to demonstrate their efficacy. Democracies that fail to deliver basic public services and economic growth tend to fail. *See* HUNTINGTON, *supra* note 6, at 258–61. These circumstances create strong incentives for quashing political opposition. *See* Giliomee & Simkins, *supra* note 5, at xii; *infra* Part II.A (discussing this problem in more detail). Emerging democracies also face a crisis of regime loyalty. They are faced with residual supporters of

and perhaps more universal, obstacle to political competition in emerging democracies concerns the peculiar circumstances facing first-time voters. Within mature democracies there are typically many political leaders that have established reputations for using political power within constitutional constraints and for the public good.[12] Voters therefore have the ability to make real comparisons between democratic leaders and their policy platforms.[13] Political track records provide voters with a means of evaluating a candidate's propensity to adopt efficacious policies and a credible basis to believe a candidate's promises.[14] These circumstances create a competitive market for votes in which political track records are the most valuable currency.[15] Voters in emerging democracies are situated in a fundamentally different political game. There are no established leaders with credible reputations for democratic governance.[16] Thus, voters have no real reference point against which to compare the performance or policies of the first-elected government or any challengers. Additionally, even if voters become dissatisfied with the first-elected government, they have no reason to believe that an incumbent will perform any better because incumbents cannot demonstrate their credibility or competence by reference to an established track record. As a result, many emerging democratic societies stifle political competition by repeatedly re-electing bad leadership.[17]

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authoritarianism. This creates incentives for new leaders to quash all opposition out of fear that any opposition will undermine the new democratic order. *See infra* Part II.A (discussing this problem in more detail).

12. Roger B. Myerson, *Federalism and Incentives for Success of Democracy*, 1 Q. J. POL. SCI. 1, 3–4 (2006).

13. *Id.*

14. This model of voter choice is not undisputed. *See* John Ferejohn, *Incumbent Performance and Electoral Control*, 30 PUB. CHOICE 5 (1986) (arguing that a better model of voter choice is based on voters as primarily forward looking). *But see* V.O. KEY, JR., THE RESPONSIBLE ELECTORATE: RATIONALITY IN PRESIDENTIAL VOTING 1936–1960 (1966) (offering support for voter choice model based on reputations); Jeffrey S. Banks & Rangarajan K. Sundaram, *Optimal Retention in Agency Problems*, 82 J. ECON. THEORY 293 (1998) (same). More important than these disputes regarding modeling, there is significant empirical evidence that voters do in fact rely on a candidate's past reputation in making electoral choices. *See generally* MORRIS P. FIORINA, RETROSPECTIVE VOTING IN AMERICAN NATIONAL ELECTIONS (1981); Gerald H. Kramer, *Short-Term Fluctuations in U.S. Voting Behavior, 1896–1964*, 65 AM. POL. SCI. REV. 131 (1971).

15. For classic economic models of voter activity along these lines see Gerald H. Kramer, *A Dynamic Model of Political Equilibrium*, 16 J. ECON. THEORY 310 (1977) and Richard D. McKelvey, *Policy Related Voting and Electoral Equilibrium*, 43 ECONOMETRICA 815 (1975).

16. *See* H. Kwasi Prempeh, *Presidential Power in Comparative Perspective: The Puzzling Persistence of Imperial Presidency in Post-Authoritarian Africa*, 35 HASTINGS CONST. L.Q. 761 (2008) (discussing the problems facing emerging democracies caused by inexperienced democratic leadership).

17. *See* PRZEWORSKI ET AL., *supra* note 5, at 25–27 (listing countries that have been caught in this cycle at various times). The dynamics of this process are complex and multi-variant. *See* Myerson,

Notwithstanding these serious problems facing emerging democracies, there has been very little theoretical research exploring the ways in which institutional design can foster constructive political competition.[18] Most theoretical discussions simply assert that democracy is incompatible with formal legal restraints on political opposition.[19] While these negative assertions are no doubt true, they do not address the more constructive issue of how to design institutions that can counteract one-party dominance by creating positive incentives for constructive political competition in emerging democracies.[20] This Article takes up that important but neglected question. It argues that well-designed federal arrangements are one way to effectively counteract some of the obstacles to political competition facing emerging democracies.

Federalism can facilitate political competition in at least two ways. First, in a unitary system there is only one political arena. This means that only one political party has the opportunity to develop a positive track record at any given time, and, consequently, the first-elected party in an emerging democracy has a monopoly on voters' expectations. In a federal regime, however, there are multiple constitutionally protected political arenas.[21] Federalism creates the possibility that several different political parties can develop political track records at the same time. This, in turn, provides voters with points of comparison, and, consequently, creates a competitive market for votes based on positive political track records. In this way, the decentralization of political power by federal arrangement is better suited to facilitate political competition than a unitary system.[22] In economic terms, it can reduce opportunity costs associated with political choice.

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supra note 12, at 5–7. The claim here is only that a lack of political track records is one real problem facing emerging democracies. *Id.*

18. *See* Jung & Shapiro, *supra* note 9, at 271 (noting absence of research in this area).

19. *See, e.g.*, HUNTINGTON, *supra* note 6, at 7–9. These can include legal restraints on political association or the press, or direct and indirect manipulation of votes and voting districts. *Id.*

20. *See* Jung & Shapiro, *supra* note 9, at 273–75; Myerson, *supra* note 12, at 6 (noting that literature on federalism considers effects of devolving policy-making authority to subnational units and ignores role that federalism can play in providing incentives for democratic stability). Nobel Laureate and economist Roger B. Myerson has developed a formal game theory model dealing with federalism and incentives for non-corrupt governance. *Id.* Myerson's model relies on political competition as a means of creating incentives for leaders to withstand corruption. *Id.* at 4–7. This appears to be the only literature addressing the relationship between federalism and political competition. The model developed here draws on Myerson's formal game theory model, but develops a series of additional parameters that expand Myerson's model beyond his original application. *See infra* Part III (discussing Myerson's model).

21. *See* DANIEL J. ELAZAR, EXPLORING FEDERALISM 107–09 (1987) (defining federalism as legal arrangement that divides power between various spheres of government).

22. *See infra* Part III (developing and supporting this claim).

Second, federalism is well suited to dealing with the incentives to quash political opposition that appear in many emerging democracies. First-elected leaders are under extreme pressure to address momentous social problems quickly and effectively.[23] This creates incentives for the ruling party to remove impediments to swift government action, including political opposition. Unitary regimes exacerbate this problem because they create an all-or-nothing political scenario. By creating multiple spheres of political authority, federalism creates new possibilities for compromise and consensus between political groups.[24] For example, certain contested issues can be left undecided at the national level but delegated to subnational government. This can make it easier for first-elected governments to avoid political deadlocks and direct political confrontation at the national level, thus mitigating the incentives to quash all opposition.[25]

This is not to suggest that federalism can solve all exigencies facing new democratic regimes. The more modest but nevertheless important point is that unitary regimes create an all-or-nothing political scenario, which creates incentives for the first-elected party to quash all opposition and provides voters with only one point of political comparison. Federal arrangements, on the other hand, create multiple political arenas. This means that competition can be contained without being destroyed, and that voters will, from time zero, have multiple points of political comparison. In short, federalism can foster constructive political opposition because it creates legally independent spheres of competition that operate simultaneously.

After further extrapolating the necessary parameters of the above model, this Article analyzes South Africa's federal structure to determine

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23. *See infra* Part II.A.

24. *See* Jonathan L. Marshfield, *Authorizing Subnational Constitutions in Transitional Federal States: South Africa, Democracy, and the KwaZulu-Natal Constitution*, 41 VAND. J. TRANSNAT'L L. 585, 621–29 (2008) (explaining how South Africa's federal structure played this role during transition from apartheid to democracy). Federalism can operate in this way by formally memorializing negotiated compromises that divide issues between central and subnational government. Federalism may also alleviate the zero-sum game in a less formal way. By simply creating legally independent political arenas, political parties will gravitate towards those arenas where they are most likely to be successful. Multiple arenas create more chances that more parties will at least find one arena where they can gain significant support. This obviously increases the chances that meaningful political opposition will develop. It also reduces the need for national consensus on all issues, and, consequently, mitigates the incentives to quash opposition. Unitary regimes do not afford this alternative.

25. *See infra* Part III.C (defending this claim); Marshfield, *supra* note 24, at 625–28 (explaining how this actually occurred in South Africa during the transition to democracy).

its prospects for fostering political competition.[26] It then examines the role that South Africa's federal structure has played in the various recent successes of parties opposing the ANC. The Article concludes that South Africa's federal structure is conducive to fostering political opposition and that, notwithstanding the ANC's prevailing dominance, evidence suggests that South Africa's federal structure is gradually fostering healthy political competition. The Article then looks forward to South Africa's 2014 general elections and analyzes which opposition parties are best situated to take advantage of South Africa's federal structure and challenge the ANC.

This Article has eight major parts. Part I explores the theoretical connection between political competition and democratic stability and proposes three reasons why democratic stability is inextricably linked to political competition. Part II explains some of the major obstacles to constructive political competition facing emerging democracies. Part III develops and defends the argument that federal systems are better situated than unitary regimes to remove impediments to political competition facing emerging democracies. It also describes the particular kind of federal regime that is necessary for the model to work effectively. Parts IV through VII analyze South Africa's federal structure in light of the model and determine that the South African system both satisfies necessary legal parameters and is in fact fostering political competition. Part VIII concludes by examining the current nature and status of the most notable opposition parties in South Africa and explores their prospects for challenging the ANC in the country's next general election in 2014.

I. POLITICAL COMPETITION AND DEMOCRATIC STABILITY

Theorists have long struggled to identify background conditions necessary for maintaining stable democracies.[27] Studies have revealed compelling correlations between democratic stability and certain economic, cultural, and political conditions.[28] In this vein, there is general

26. South Africa presents an ideal test case for this thesis for several reasons. First, South Africa underwent a dramatic transition from apartheid to democracy that culminated with the country's first all-inclusive election in 1994. Second, the politics of post-apartheid South Africa have been dominated by a single party, the ANC. Third, since the fall of apartheid, South Africa has operated under a constitutionally protected federal structure. Fourth, notwithstanding the ANC's political dominance, post-apartheid South Africa has always had several organized and active opposition parties.

27. The study that is most frequently credited with first attempting to identify correlations between democratic stability and economic, cultural, and social background conditions is SEYMOUR MARTIN LIPSET, POLITICAL MAN: THE SOCIAL BASES OF POLITICS (1981).

28. Prominent studies include: PRZEWORSKI ET AL., *supra* note 5; Carles Boix & Susan C. Stokes, *Endogenous Democratization*, 55 WORLD POL. 517 (2003); Daron Acemoglu & James A.

consensus among democratic theorists that there is a strong empirical correlation between political competition and democratic stability.[29] Stable, long-lasting democracies almost universally correlate with alternation in political power between at least two political parties.[30]

Although this empirical correlation has strong intuitive appeal, it is largely unhelpful on its own because it fails to provide a sound theoretical explanation for the nexus between political competition and democracy.[31] Why does meaningful political competition tend to correlate with democratic stability? This question is particularly important from an institutional design perspective. If constitution-makers are to intelligently tailor legal arrangements to the problems facing emerging democracies, it is essential that they have a working theory regarding the nexus between

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Robinson, *A Theory of Political Transitions*, 91 AM. ECON. REV. 938 (2001); Julian Wucherpfennig & Franziska Deutsch, *Modernization and Democracy: Theories and Evidence Revisited*, 2009 LIVING REVS. DEMOCRACY, at 1 (providing comprehensive summary of state of economic development theory).

29. Jung & Shapiro, *supra* note 9, at 272 ("it is doubtful that any regime could long survive as minimally democratic without" genuine political opposition); Moore, *supra* note 10, at 83 ("[t]he key characteristic of liberal democracy . . . is the existence of a legitimate and, to some extent, effective opposition."); *see also* Robert A. Dahl, *Preface to* POLITICAL OPPOSITIONS IN WESTERN DEMOCRACIES xi (Robert A. Dahl ed. 1966) ("the right of an organized opposition to appeal for votes against the government in elections . . ." is one of the "great milestones in the development of democratic institutions."); Stephanie Lawson, *Conceptual Issues in the Comparative Study of Regime Change and Democratization*, 25 COMP. POL. 183, 192–93 (1993) ("[P]olitical opposition is the *sine qua non* of contemporary democracy in mass polities and . . . its institutionalization in some form or another is required before a regime can be called 'democratic' with any real meaning.").

30. *See* PRZEWORSKI ET AL., *supra* note 5, 23–30, 51–55 (providing summary of all regime years in all countries between 1950 and 1990 and conducting statistical analysis of relationship between "stability and change of political leadership"); *see also* LIJPHART, GOVERNMENT FORMS AND PERFORMANCE, *supra* note 8, at 76 (cataloguing alternations in political power within thirty-six democracies between 1945–1996). This empirical correlation led Samuel P. Huntington to articulate his now famous "two-turnover" test for democratic consolidation. *See* HUNTINGTON, *supra* note 6, at 266–69. Huntington determined the surest test for democratic consolidation was whether "the party or group that takes power in the initial election at the time of transition loses a subsequent election and turns over power to those election winners, and if those election winners then peacefully turn over power to the winners of a later election." *Id.* at 266–67. This is a demanding test, however, and many, including Huntington, recognize that it is probably under-inclusive of consolidated democracies. *Id.* at 267 (noting that the U.S. did not pass two-turnover test until 1840); *see also* Omar G. Encarnación, *Beyond Transitions: The Politics of Democratic Consolidation*, 32 COMP. POL. 479, 486–87 (2000) (discussing problems with the two-turnover test).

31. Truisms regarding the relationship between political competition and democracy are plentiful. *See, e.g.*, Williams v. Rhodes, 393 U.S. 23, 32 (1968) ("Competition in ideas and governmental policies is at the core of our electoral process . . . ."). Informed theories regarding the precise connection between democracy and competition are more difficult to find. *See* Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1365 (1987) (noting that Supreme Court precedent dealing with party competition "beg[s] questions that lie at the heart of political competition in a democracy").

political competition and democratic stability; particularly any causal relationship that may exist between the two.[32]

This section argues that there are at least three reasons that political competition may be linked with democratic stability: (1) political competition is indicative of the fact that social conflicts have been brought within democratic processes; (2) political competition creates incentives for leaders to govern well; and (3) political competition can reduce agency costs associated with representative government.[33]

A. Political Competition as Indicative of Democratic Consolidation

Benjamin Franklin could have added social disagreement to his famous list of life's certainties.[34] Western political theory is based on the assumption that a sovereign authority is necessary to mediate inevitable social conflict and disagreement.[35] Liberal democracy is part of this tradition.[36] Although it vests ultimate sovereignty in the people, it recognizes that people will inevitably disagree and that there must be a fair means of resolving these disagreements.[37] Democratic processes are

32. There is a healthy body of literature struggling with a definition of political competition in democracies. *See* Charles Simpkins, *Stability and Competitiveness in the Political Configurations of Semi-Developed Countries*, *in* THE AWKWARD EMBRACE, *supra* note 5, 47, 49–51 (discussing literature). This Article adopts the standard description offered by Giovanni Santori, which holds that political competition exist if the political system contains more than one contestant and "circumstances must be imaginable in which challenger parties can defeat the predominant party." *Id.* at 49 (citing GIOVANNI SANTORI, PARTIES AND PARTY SYSTEMS: A FRAMEWORK FOR ANALYSIS (1976)); *see supra* notes 34–49 and accompanying text (discussing how this definition is intrinsic to democratic assumptions).

33. The first reason is descriptive. It attempts to explain why an observable correlation between democratic stability and political competition occurs. It does not, however, offer a theory of causation regarding the relationship between political competition and democratic stability; political competition is symptomatic of democratic stability and is not necessarily the cause of stability. The remaining two reasons, however, do offer causal theories. They suggest ways that political competition can contribute to democratic stability.

34. *See* Letter from Benjamin Franklin to Jean Baptiste Le Roy (Nov. 13, 1789), *in* 10 THE WRITINGS OF BENJAMIN FRANKLIN, 1789–1790 69 (Albert H. Smyth ed., 1907) ("[I]n this world nothing can be said to be certain, except death and taxes.").

35. Hobbes presents perhaps the most well-known example of this theme within western political theory. *See* THOMAS HOBBES, LEVIATHAN: WITH SELECTED VARIANTS FROM THE LATIN EDITION OF 1668 ch. XXIX (Edwin Curley ed., 1994) (discussing the need for sovereign to cure ills of state of nature); *see also* Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 339 (discussing Hobbes's contribution).

36. John Locke's theory of democracy is illustrative. *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 42–56 (C.B. Mcpherson ed., 1980).

37. *See, e.g.*, LOCKE, *supra* note 36, at 48 ("And this puts men out of a state of nature into that of a common-wealth, by -setting up a judge on earth, with authority to determine all controversies, and redress the injuries that may happen to any member of the of the common-wealth; which judge is the legislative, or magistrates appointed by it. And where-ever there are any number of men, however

considered fair because they respect individual preferences and retain a commitment to the people as the ultimate authority rather than the people's leaders.[38]

Thus, if we assume that social disagreement is inevitable, the stability and longevity of a democratic regime ultimately depends not on conditions such as social homogeneity or tranquility, but on whether all the necessary power groups within a society have endorsed democratic processes as the only legitimate means of resolving political conflicts.[39] For democracy to be consolidated, groups and individual citizens must respect democratic outputs even if those outputs conflict with their own preferences or interests.[40]

It is notoriously difficult to determine whether a society has achieved democratic consolidation.[41] However, an absence of political competition within democratic processes is highly indicative of non-consolidation.[42] Samuel P. Huntington has noted: "In any society, the sustained failure of the major opposition political party to win office necessarily raises questions concerning the degree of competition permitted by the system."[43] Implicit in Huntington's hypothesis is the assumption that

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associated, that have not such decisive power to appeal to, there they are still in the state of nature."); PRZEWORSKI, *supra* note 9, at 95 ("Conflicts of values and of interests are inherent in all societies. . . . Democracy is only a system for processing conflicts without killing one another; it is a system in which there are differences, conflicts, winners and losers.").

38. *See* John Ferejohn, *Must Preferences be Respected in a Democracy?*, *in* THE IDEA OF DEMOCRACY 231 (David Copp et al. eds., 1993) (discussing democracy's role in respecting preferences).

39. *See* HUNTINGTON, *supra* note 6, at 266–69. Obviously, homogeneity and other social conditions make this level of agreement more or less probable and more or less easier to obtain. *See* Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 Am. J. Int'l L. 489, 526 (2001) (noting possible role of homogeneity in democratic stability but noting that democracy does not require a common *demos*).

40. *See* HUNTINGTON, *supra* note 6, at 266–69; *see also* JEREMY WALDRON, LAW AND DISAGREEMENT 147–63 (1999) (explaining how democratic processes respect all citizens' preferences even though the minority is ultimately subject to will of the majority).

41. *See supra* note 30 (discussing Huntington's two-turnover test for consolidation and critiques of this test); PRZEWORSKI, *supra* note 5, at 13–36 (discussing problems with determining consolidation and expounding a four-part test); *see generally* THE DEMOCRACY SOURCEBOOK 1–55 (Robert A. Dahl et al. eds., 2003) (providing a helpful sampling of excerpts from various democratic theorists debating competing conceptions of democracy and democratic consolidation).

42. *See* PRZEWORSKI ET AL., *supra* note 5, at 23–28 (crafting an "alternation rule" in order to ensure that non-democratic societies are not misclassified).

43. HUNTINGTON, *supra* note 6, at 8. Huntington's test assumes that within a free society, politics will always be characterized by some degree of political competition. Thus, if there is no observable political competition as evidenced by electoral victories, the system must have erected restrains to political competition. *Id.* Huntington's definition must be moderated by the realization that different political systems reflect political competition in different ways. *See* Jung & Shapiro, *supra* note 9, at 274. First-past-the-post electoral systems, for example, usually result in two-party systems and highly visible alternation in political power. *Id.* Multi-party systems usually result in coalition

democracy involves the resolution of conflict between competing groups. If there is a systematic absence of any meaningful political opposition, this is most likely because the system is curbing opposition, not because the society is void of any political disagreement. Another alternative that Huntington overlooks is that political opposition exists, but it refuses to recognize democratic processes as legitimate.[44] In either case, there is a lack of consolidation because major social conflicts have not been brought within democratic processes.[45]

Disagreement in emerging democracies is all the more certain. Societies that transition from authoritarianism to democracy inevitably consist of many individuals, groups, and institutions with conflicting loyalties.[46] These societies are inevitably fractured and characterized by various political, cultural, and social cleavages. The challenge for emerging democracies is how to institutionalize these conflicts.[47] That is, emerging democracies must convince all major social groups to endorse democratic procedures and institutions as the proper means of resolving conflict. Until they do so, they remain a threat to the democratic order itself.[48]

The corollary of this is that a lack of political opposition within democratic processes indicates a lack of consolidation.[49] Political competition is inextricably linked with political stability because it reflects the fact that all major groups have endorsed democratic processes as legitimate.

B. Political Competition and the Public Good

Political competition is also linked to democratic stability for a more practical reason: it provides an incentive for leaders to govern well.[50]

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governments where alternation is less visible. *Id.*; *see also* LIJPHART, GOVERNMENT FORMS AND PERFORMANCE, *supra* note 8, at 10–47 (discussing how these kinds of electoral systems manifest political competition in various countries).

44. *See* Jung & Shapiro, *supra* note 9, at 272.

45. *Id.*

46. *See* GIUSEPPE DI PALMA, TO CRAFT DEMOCRACIES: AN ESSAY ON DEMOCRATIC TRANSITIONS 55 (1990).

47. DI PALMA, *supra* note 46, at 55.

48. PRZEWORSKI, *supra* note 9, at 19; DI PALMA, *supra* note 46, at 55; Jung & Shapiro, *supra* note 9, at 272.

49. Dahl, *supra* note 29, at xvi ("[O]ne is inclined to regard the existence of an opposition party as very nearly the most distinctive characteristic of democracy itself; and we take the absence of an opposition party as evidence, if not always conclusive proof, for the absence of democracy.").

50. *See* Jung & Shapiro, *supra* note 9, at 272–73 (alluding to the idea that competition may create incentives for refined government outputs); Habib & Taylor, *supra* note 2, at 261–62

Meaningful political competition creates the realistic possibility that current leadership will be replaced if it does not perform.[51] An organized political opposition presents the public with alternative government policies, which can incite public debate and criticism regarding the incumbent's ineffective practices and policies. This creates an incentive for the majority party to deliberate, prospectively, regarding the best course of action, which, in turn, creates incentives to avoid making rash decisions. All of these dynamics can work together to prevent government from adopting minimally vetted policies.[52]

The existence of an organized political opposition creates a market for public policy. It puts pressure on the ruling party to critically evaluate its own policies and ensure that it governs prudently and well. In this way, political competition can raise the substantive quality of government outputs, which, in turn, promotes democratic stability by ensuring that the people are satisfied with their government's performance.[53] This is a causal theory. Political competition contributes to democratic stability by refining government outputs and therefore reinforcing the legitimacy of democratic processes.

C. Political Competition and Agency Costs

Political competition is further linked to democratic stability because it reduces agency costs inherent in representative government. A major problem facing any representative democracy is the incongruence of interests between the people and their representatives.[54] Democracy presumes that elected representatives will be accountable to the people. Elected representatives are, however, human. They have their own

(discussing the purification value of political competition in South Africa as a means of dealing with economic crisis).

51. *See* Frederick M. Barnard, *Between Opposition and Political Opposition: The Search for Competitive Politics in Czechoslovakia*, 5 CAN. J. POL. SCI. 533 (1972) (discussing genuine political competition as a means of reforming communist Czechoslovakia from within).

52. *See* Jung & Shapiro, *supra* note 9, at 272–73; *see also* Hermann Giliomee et al., *Dominant Party Rule, Opposition Parties and Minorities in South Africa*, *in* OPPOSITION AND DEMOCRACY IN SOUTH AFRICA 161 (R. Southall ed., 2001) (discussing how political opposition in South Africa could perform these functions).

53. *See generally* Christian List & Robert E. Goodin, *Epistemic Democracy: Generalizing the Condorcet Jury Theorem*, 9 J. POL. PHIL. 277 (2001) (discussing how multiple sources of input, especially competing sources, in the democratic process can refine democratic outputs); Jeremy Waldron, *The Wisdom of the Multitudes: Some Reflections on Book 3, Chapter 11 of Aristotle's* Politics, 23 POL. THEORY 563 (1995) (same).

54. *See* David B. Spence, *Administrative Law and Agency Policy-Making: Rethinking the Positive Theory of Political Control*, 14 YALE J. ON REG. 407, 440 (1997) (discussing incongruence of interests in representative government).

independent interests that may diverge from those of their constituents, and, more problematically, representatives are not always able or willing to advocate for all of their constituents' preferences.[55]

Competitive elections provide one means of holding representatives accountable.[56] Challengers have strong incentives to expose political corruption and emphasize an incumbent's broken promises.[57] These incentives create, in turn, counter-incentives for incumbents to govern honestly and follow through on promises so that they will not be vulnerable to defeat come election time. Competitive elections, therefore, can reduce agency costs and thereby promote democratic legitimacy.

However, elections occur relatively infrequently and allow candidates to group popular actions with unpopular actions and thereby avoid, to a degree, strict political accountability.[58] One way to recover these residual agency costs is to ensure that representatives are required to interact with counter-representatives.[59] Political competition between representatives can also play a key role in reducing agency costs. Opposition representatives have real continuing incentives to "ask[] awkward questions, shin[e] light in dark places, and expos[e] abuses of power."[60] This forces officials to give reasons for and justify their policies, which further reduces their ability to pursue their own interests at the people's expense.[61] Political competition between representatives can help to ensure that ruling elites are kept in check, that they follow through on promises

55. *See generally* ANNE PHILLIPS, ENGENDERING DEMOCRACY (1991) (discussing the agency costs associated with representative democracy); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 245–47 (1986) (outlining agency costs associated with representative government).

56. *See generally* Bernard Manin, et al., *Elections and Representation*, *in* DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 29 (Przeworski et al. eds., 1999) (outlining the basic logic underlying electoral systems as a basis of accountability); Brandice Canes-Wrone et al., *Out of Step, Out of Office: Electoral Accountability and House Members' Voting*, 96 AM. POL. SCI. REV. 127 (2002) (concluding that elections are effective means of holding representatives accountable); Jose Antonia Cheibub & Adam Przeworski, *Democracy, Elections, and Accountability for Economic Outcomes*, *in* DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 222 (Przeworski et al. eds., 1999) (discussing elections as means of holding leaders responsible for economic outcomes).

57. *See* Jung & Shapiro, *supra* note 9, at 272–73.

58. John Ferejohn, *Accountability and Authority: Toward a Theory of Political Accountability*, *in* DEMOCRACY, *supra* note 55, 132 [hereinafter Ferejohn, *Accountability*] (discussing other reasons why elections are not a complete solution to problem of accountability); *see* John Dunn, *Situating Democratic Political Accountability*, *in* DEMOCRACY, *supra* note 55, at 329 (discussing problems associated with relying exclusively on elections as means of holding representatives accountable); Ferejohn, *supra* note 14 (discussing the problem of agency costs in-between election cycles).

59. *See* Ferejohn, *Accountability*, *supra* note 58, at 132 (discussing this alternative).

60. *See* Jung & Shapiro, *supra* note 9, at 272.

61. *Id.* at 272–73.

made to the public, and that they are attentive to their constituents' demands and preferences.[62]

In these ways, political competition minimizes disconnects between the people and their government, which reduces the likelihood that the people will become dissatisfied with democratic processes, thus promoting political stability.[63] The absence of vibrant political competition represents a vulnerability to democracy because elected representatives have few incentives to pursue the people's interests and preferences over their own interests.[64]

II. THE DIFFICULTY OF FOSTERING POLITICAL COMPETITION IN EMERGING DEMOCRACIES

Notwithstanding the tight nexus between political competition and democratic stability, emerging democracies face unique circumstances that make meaningful political competition difficult. This section focuses on two particularly challenging problems faced by emerging democracies.[65] The remainder of this Article explores how federalism can help facilitate political competition in emerging democracies by overcoming these two problems.

A. Political Opposition and the Exigencies of Political Transition

Societies that transition from authoritarianism to democracy face many challenges. One of those challenges is to prove to the people and competing elites that democracy is a more effective form of government

62. *Id.*

63. *See generally* LIPSET, *supra* note 27, at 64 (discussing citizen and elites' perception of effective government as a key variable in democratic stability).

64. These benefits of political competition are not democratic luxuries. The absence of political competition generally corresponds with political pathologies such as bad government outputs, increased dissatisfaction with democratic processes, and government corruption. For a general discussion of the pathologies associated with an absence of political competition, see Lawrence Schlemmer, *Deformations of Political Culture by One-Party Dominance*, *in* CHALLENGES TO DEMOCRACY BY ONE-PARTY DOMINANCE: A COMPARATIVE ASSESSMENT 117 (Andrea E. Ostheimer ed., 2006).

65. For a helpful summary of the research regarding the unique problems facing emerging democracies, see Michael Bratton, *Deciphering Africa's Divergent Transitions*, 112 POL. SCI. Q. 67, 77–80 (1997) (discussing specific problems facing development of opposition and democratic consolidation more generally in emerging democracies). Democratic consolidation in emerging democracies is incredibly complicated. *Id.* The purpose here is not to provide a complete theory of the problems facing emerging democracies. Rather, the focus is on those recognized problems that federalism is uniquely suited to addressing.

than authoritarianism.[66] This is particularly true regarding economic development.[67] Emerging democracies must demonstrate that they can promote economic growth and deliver necessary government services.[68] However, this sort of government efficiency and production requires cooperation and consensus between powerful elites.[69] Emerging democracies can scarcely afford to be locked in political stalemates and power struggles.[70] They typically have a small window of opportunity to demonstrate that democracy, rather than authoritarianism, is the preferred form of government.[71] Thus, the stability of new democratic regimes "depends, first, on the ability of the principal political elites—party leaders, military leaders, and business leaders—to work together to deal with the problems confronting their society."[72] These pressures create incentives for the dominant party to quash opposition groups that fail to "get on board."

Another familiar challenge for emerging democracies is the problem of "loyal opposition."[73] By definition, emerging democracies are transitioning to democracy from some form of authoritarianism.[74] This means that portions of the society inevitably supported the prior, non-democratic regime.[75] This dynamic can blur the all-important line between opposition to democratic processes and opposition to the policies and

66. *See* LIPSET, *supra* note 27, at 61–72 (discussing connection between government's actual performance and democratic stability); Larry Diamond et al., *Democracy in Developing Countries: Facilitating and Obstructing Factors*, *in* FREEDOM IN THE WORLD: POLITICAL RIGHTS AND CIVIL LIBERTIES 229, 231 (Raymond D. Gastil ed., 1988) (discussing relationship between effectiveness and legitimacy). The precise relationship between government effectiveness and stability is not uncontested. *See* HUNTINGTON, *supra* note 6, at 258. However, the basic logic that effectiveness undermines legitimacy and contributes to instability remains sound. *Id.*

67. Lipset famously posited this correlation. Seymour Martin Lipset, *Some Social Requisites of Democracy: Economic Development and Political Legitimacy*, 53 AM. POL. SCI. REV. 69 (1959); *see also* LIPSET, *supra* note 27, at 27–58.

68. HUNTINGTON, *supra* note 6, at 258.

69. *Id.*; s*ee* Juan Linz & Alfred Stepon, *Political Crafting of Democratic Consolidation or Destruction: European and South American Comparisons*, *in* DEMOCRACY IN THE AMERICAS: STOPPING THE PENDULUM 41, 58–59 (Robert A. Pastor ed., 1989) (discussing the difficult economic conditions facing Colombia and Venezuela and how coordination between elites sustained democratic stability in the 1960s).

70. HUNTINGTON, *supra* note 6, at 257–59.

71. *Id.* at 256–57 (discussing phenomenon of "authoritarian nostalgia" that often follows ineffective democratic regimes).

72. *Id.* at 259; *see also* Habib & Taylor, *supra* note 2, at 262 (discussing how economic effectiveness is fast becoming a primary concern for South Africa's democratic consolidation).

73. *See supra* note 10.

74. *See supra* note 6 (discussing definitions of "authoritarianism," "democracy," and "emerging democracies").

75. *See* HUNTINGTON, *supra* note 6, at 266–70.

actions of the first-elected government.[76] Consequently, opposition in emerging democracies can be a precarious endeavor for political leaders.[77] First-elected governments often succumb to the temptation to decry all opposition as anti-democratic and pro-authoritarianism.[78] These political circumstances make it difficult for political opposition to be taken seriously on the merits and easy for the first-elected government to obtain popular support for formal restraints on political opposition.

However, as discussed above, political competition plays a key role in democratic stability because it puts government policies to the test and fosters constructive deliberation rather than rash, knee-jerk reactions.[79] Emerging democracies desperately need constructive political deliberation so that they can bring dangerous social conflicts within democratic processes and secure substantively desirable government outputs.[80] The legitimacy of the new democratic order depends, to some extent, on both of these things.

Emerging democracies therefore face polarizing forces. On the one hand, they have a genuine need for consensus, compromise, and unity in order to meet basic social needs and move their societies away from all-too-immediate authoritarian pasts. On the other hand, the pathologies associated with a lack of political competition may undermine the very purpose for which consensus is necessary.[81] Thus, there is a need for institutional arrangements that address these exigencies and provide ways for these societies to foster constructive political opposition that does not fatally undermine government efficacy and legitimacy.

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76. *See* Michael Bratton & Nicolas Van de Walle, *Neopatrimonial Regimes and Political Transitions in Africa*, 46 WORLD POL. 453 (1994) (discussing how antecedent political culture dramatically affects success and potency of successive democratic elections).

77. Zimbabwe provides a horrifying example of this phenomenon. *See* Christine Sylvester, *Whither Opposition in Zimbabwe?*, 33 J. MOD. AFR. STUD. 403, 407–10 (1995) (discussing overt oppression of political opposition and dangers of engaging in political competition within Zimbabwe).

78. *Id.* at 403–04; *see also* Moore, *supra* note 10, at 83–87 (discussing this phenomenon in context of former Soviet states).

79. *See supra* Part I.B–C.

80. *Id.*; *see also* Habib & Taylor, *supra* note 2, at 261–64 (discussing the need for these processes in post-apartheid South Africa); Giliomee, et al., *supra* note 52, at 161 (same); *cf.* Southall, *supra* note 2, at 65–66 (suggesting mitigating factors that may reduce urgency of need for political competition in post-apartheid South Africa).

81. *See* N. Ganesan, *Appraising Democratic Developments in Postauthoritarian States: Thailand and Indonesia*, 28 ASIAN AFF.3, 14 (2001) (discussing tension between economic development and political competition in Indonesia and Thailand). *See generally* Andrew C. Gould, *Conflicting Imperatives and Concept Formation*, 61 REV. POL. 439, 448–49 (1999) (discussing conflict between consensus and competitive mobilization as deep problem in theory of state-society relations); Schlemmer, *supra* note 64, at 118–20 (discussing pathologies associated with an absence of political competition).

B. The Problem of Political Track Records and Voter Behavior in Emerging Democracies

If one looks at a sampling of emerging democracies, a troubling trend is visible: voters frequently reelect bad leadership.[82] This trend has been attributed to two challenges facing voters in emerging democracies.

First, emerging democracies do not have a pool of democratically proven leaders or policies from which to draw.[83] Established democracies typically have an entire guild of political professionals who have been trained to exercise political power within the confines of constitutional constraints and for the public good.[84] Established democracies also tend to have at least some collective experience with a variety of different substantive policies.[85] This diversity of candidates and experiences provides voters with multiple points of comparison that they can use to legitimately distinguish between candidates and policies within a democratic system.[86] In emerging democracies, on the other hand, political candidates will typically have no government experience or will have experience operating only within the preexisting authoritarian system.[87] Voters and leaders also have no experience with democratically generated substantive policies. This means that the first-elected leaders will set the bar for the society's democratic expectations, and, consequently, voters will have no basis by which to judge the performance of their first-elected leadership.[88] A real impediment to democratic competition in emerging

82. Zimbabwe again provides another example, especially during the period while formal legal restraints on opposition and overt strong-arm tactics by President Mugabe were relatively underdeveloped. *See* Sylvester, *supra* note 77, at 407–10; *see also* GILIOMEE & SIMKINS, *supra* note 5, at 59–69 (discussing this phenomenon in other countries).

83. *See* Bratton & Van de Walle, *supra* note 76, at 453 (discussing how antecedent political culture dramatically affects success and potency of successive democratic elections); Myerson, *supra* note 12, at 4.

84. The degree to which leaders live up to these expectations is somewhat irrelevant. The point is that the political culture operates on the basis of these ideals. Voters, leaders, and political parties build their platforms and form their choices based on reputation and promises that use the language of constitutional constraint and the public good.

85. This refers to various different economic or social ideologies that are nevertheless compatible with democratic process. One can easily think of competing economic ideologies within the U.S. as helpful examples.

86. This is not to suggest an idealized view of politics in established democracies. The point is one of comparison. Within established democracies, comparisons are made based on policy platforms that are framed in terms of a theory of public good and a theory of constitutional fidelity. Voters discriminate on the basis of these arguments. Within emerging democracies, these arguments are usually impossible because of the lack of democratic leaders and because of the voter's inability to properly respond to democratic political arguments.

87. Myerson, *supra* note 12, at 4.

88. *See* John D. Holm et al., *The Development of Civil Society in a Democratic State: The*

democracies is that voters have no point of reference to use in distinguishing between competing candidates and those candidates' respective substantive policy platforms.[89]

Second, because emerging democracies do not have a pool of proven leaders or tested substantive policies, voters have no reason to expect that opposition leaders will behave any differently than incumbents, or that opposition policies will be any more effective.[90] Even if the first-elected leadership performs poorly, voters have no credible reason to believe that opposition leaders or policies will perform any better. If we accept that there are inherent costs associated with replacing incumbent leaders[91]—such as popular loyalty to the first-elected leader because of that leader's role in overthrowing the authoritarian regime—voters are unlikely to replace incumbent leaders with unproven challengers.[92]

These dynamics can prevent emerging democracies from developing vibrant political competition.[93] They essentially eradicate any competitive market for the people's vote because the people have no reason to believe that replacing the incumbent with an opposition leader will result in meaningful political change. Thus, as one theorist has noted, "the central problem for a new democracy may be to create good democratic reputations where they have not previously existed."[94] Once a society begins to produce a pool of democratically proven leaders and policies, voters have better reason to believe that one leader or policy will be better than another. This fosters a competitive market for votes, which sets the stage for meaningful political competition and all of its attendant virtues.

Botswana Model, 39 AFR. STUD. REV.43 (1996) (discussing how underdeveloped civil society affects citizens ability to form political expectations after democratization); *see also* Bratton & Van de Walle, *supra* note 76, at 453 (discussing how antecedent political regimes impede development of necessary democratic skills).

89. *See* PIPPA NORRIS, DEMOCRATIC PHOENIX: REINVENTING POLITICAL ACTIVISM 35–82 (2002) (conducting an empirical analysis of voter behavior in dominant-party states); Robert Mattes, *Voter Behaviour and Party Dominance in South Africa: Another View*, *in* CHALLENGES, *supra* note 64, at 105.

90. *See* Sylvester, *supra* note 77, at 407–10 (discussing this defect in terms of a "weak civil society" in Zimbabwe). *See generally* Jean-François Bayart, *Civil Society in Africa*, *in* POLITICAL DOMINATION IN AFRICA: REFLECTIONS ON THE LIMITS OF POWER 109, 112 (Patrick Chabal ed., 1986) (discussing general problems with under-developed democratic civil societies that result in one-party dominance).

91. *See* Myerson, *supra* note 12, at 4–6.

92. *Id.* at 4–5.

93. *See* Julias E. Nyang'oro, *Reform Politics and the Democratization Process in Africa*, 37 AFR. STUD. REV. 133 (1994) (discussing information defects in civil society in emerging democracies); Peter M. Lewis, *Political Transition and the Dilemma of Civil Society in Africa*, 46 J. INT'L AFF. 31, 50–54 (1992) (same).

94. Myerson, *supra* note 12, at 4.

As discussed below, federalism is uniquely suited to proliferating political track records and creating incentives for good governance.

III. A THEORY OF POLITICAL COMPETITION WITHIN FEDERAL SYSTEMS

Notwithstanding the real problems facing emerging democracies, there has been almost no theoretical research exploring institutional design and incentives for constructive political competition.[95] Some theorists have considered the ways in which different electoral systems can affect political competition.[96] Douglas Rae, for example, has concluded that first-past-the-post electoral systems are likely to produce two-party societies, which, in turn, can facilitate strong political opposition in established democracies.[97] There has also been some discussion regarding the implications for political competition of consociational electoral systems.[98] With the exception of Roger B. Myerson's model regarding political corruption discussed below, there has been essentially no theoretical discussion of the ways that federal arrangements may facilitate or impede political competition. This section fills that gap in the literature.

A. Myerson's Theory of Character-Based Track Records in Federal Regimes

Myerson crafted a formal game theory model that was addressed to the specific problem of political corruption. Myerson's formal proof demonstrated that federal regimes can promote honest government better than unitary regimes because they allow opposition politicians to develop independent track records for honesty.[99] Myerson's model is very narrow in scope—his express assumptions limit the model's applicability solely to

95. Robert Dahl's 1966 work remains the seminal authority on political competition and democracy. Dahl, *supra* note 29. Dahl made various conceptual recommendations regarding institutional design and political competition. *Id.* at 351–52. Yet, with the exception of his suggestions regarding electoral systems, these suggestions have not been revisited or empirically tested.

96. *See, e.g.*, Joel D. Barkan et al., *Space Matters: Designing Better Electoral Systems for Emerging Democracies*, 50 AM. J. POL. SCI. 926 (2006).

97. DOUGLAS W. RAE, THE POLITICAL CONSEQUENCES OF ELECTORAL LAWS (1967); *see* Jung & Shapiro, *supra* note 9, at 274 (discussing Rae in the context of emerging democracies).

98. *See* Jung & Shapiro, *supra* note 9, at 273 (concluding that consociational systems work against political competition). Consociationalism is often associated with Arend Lijphart's articulation of a non-territorial based system of decentralized power. *See* Arend Lijphart, *Consociational Democracy*, 21 WORLD POL. 213, 222 (1969); *see also* ELAZAR, *supra* note 21, at 18–26 (discussing consociationalism).

99. Myerson, *supra* note 12, at 4–5.

the issue of corruption in unitary regimes.[100] However, as discussed more fully below, his basic logic can be extrapolated to provide a more general theory of political competition in federal regimes if certain key parameters are observed. This Article first summarizes Myerson's model and assumptions and then argues for a different set of parameters that allow for an expanded model of political competition in federal regimes.

1. Myerson's Basic Logic

Myerson's model addresses the "chances of success for a new democracy" where the first set of democratically elected leaders have no democratic credentials.[101] Myerson presents the problem in terms of a game theory equilibrium where voters rationally assume that the first elected leaders will behave as previous leaders did under the non-democratic regime.[102] That is, political leaders will use power and resources to benefit elites rather than the voting public.[103] In a unitary state, voters may also rationally assume that other challengers would behave the same way because they do not have a proven reputation under the new democratic regime.[104] Thus, when rational voters consider transition costs associated with replacing a corrupt national incumbent, they have no incentive to replace him and no reason to oppose his suppression of political opposition. This results in the first-elected leader being repeatedly re-elected, but without any incentive for serving the public.[105]

Myerson concludes that federalism can help to alleviate this problem. Federalism can promote political competition by providing opposition politicians with opportunities to develop democratic reputations and, consequently, enhance the credibility of their opposition platforms.[106] Once opposition leaders have developed credible subnational track records, voters are more willing to pay the transition costs associated with removing an incumbent leader because the challenger's track record gives voters confidence that his commitment to honesty is credible.[107] This credible threat to corrupt national politicians gives those politicians a

100. *Id.*
101. *Id.* at 3–4.
102. *Id.* at 4.
103. *Id.*
104. *Id.*
105. Myerson, *supra* note 12, at 4, 19.
106. *Id.* at 5.
107. *Id.* at 13–14.

reciprocal incentive to reform and govern honestly thus fostering constructive political competition in the regime as a whole.[108]

2. Myerson's Parameters and Assumptions

Myerson makes various assumptions regarding voter behavior, political leadership, and the structure of the federal system. Regarding voters, he assumes that they always prefer responsible over corrupt government, but they "perceive some costs or risks of changing the leaders . . . ."[109] Thus, if voters suspect that a future leader "would govern corruptly, then voters would rationally re-elect corrupt leaders . . . ."[110] Myerson also assumes that voters "have no disagreements regarding public policy decisions" that would cause them to rationally vote for corrupt leaders.[111] Implicit in Myerson's theory is the further assumption that voters find politicians' bald promises incredible, but find past performance to be a good indicator of future performance.

Thus, in Myerson's model, voters decide whom to vote for based entirely on the candidate's proven reputation and transition costs of installing a new leader. Myerson's theory is therefore less likely to apply in a system where people vote primarily based on group identities or solidarities. The model also does not address the reality of conflicting and cross-cutting voter preferences. Myerson assumes that voters will choose honest leaders over corrupt leaders regardless of the leader's stance on any other policy.[112] This assumption is important when attempting to extrapolate Myerson's logic beyond its application to government corruption.

Regarding political leadership, Myerson assumes that political leaders tend to govern corruptly unless they have an incentive to govern responsibly.[113] He also assumes that, within a federal system, leaders always prefer national over subnational office.[114] When these assumptions are combined with Myerson's assumptions about voters, subnational

108. *Id.* at 19–20.
109. *Id.* at 6.
110. *Id.*
111. Myerson, *supra* note 12, at 6.
112. *Id.*
113. *Id.* at 6–7 ("[P]olitical leaders would generally prefer to govern corruptly."). He accounts for the fact that some leaders may be "intrinsically virtuous." *Id.* at 8–9. However, he assumes that the probability of any challenger being intrinsically virtuous is too small for voters to risk the costs of installing a new leader on the hope that the new leader would be intrinsically virtuous. *Id.* at 9–10. Thus, the possibility of a virtuous leader has no real affect on his model.
114. *Id.* at 12.

leaders are incentivized to govern responsibly because a positive track record could help them ascend to national office.[115] Responsible governance at the subnational level provides a reciprocal incentive for national leaders to govern responsibly so as to avoid being replaced by subnational leaders.[116]

Myerson's assumptions regarding the nature of the federal system are most important for present purposes. He assumes that both national and subnational leaders are elected for a fixed term and must run for "re-election again in each period until rejected by the voters."[117] National and subnational leaders are assumed to be elected separately.[118] Myerson further assumes that subnational leaders "exercise independent political powers which can be used to demonstrate their qualifications for national leadership."[119]

With these assumptions in place, Myerson's logic is clear. Voters prefer honest leaders over corrupt leaders. Voters tend to disbelieve politicians' promises and use past performance to predict future behavior. Thus, because of replacement costs, voters will not remove a corrupt incumbent leader unless the challenger has a history of honest governance. Independent subnational governance provides aspiring national leaders with an opportunity to develop track records of honesty that correlate to qualities necessary for national leadership. This correlation allows subnational leaders to translate their subnational reputation into a credible opposition platform at the national level, which, in turn, results in the national leadership either reforming itself or being replaced.

B. Toward a Broader Theory of Political Competition in Federal Regimes

Political track records can be divided into at least two different types: (1) character-based track records, and (2) policy-based track records. As used here, a character-based track record refers to a general reputation for honest rather than corrupt governance. Policy-based track records refer to a party's reputation for enacting prudent (and presumably popular) substantive policies as well as administrative policies that affect the efficient delivery of government services. Policy-based track records also

115. *Id.* at 19–20.
116. *Id.*
117. Myerson, *supra* note 12, at 7.
118. *Id.* at 21.
119. *Id.* Myerson describes this assumption as the "key" to the model. *Id.* at 5 ("The key is that provincial leaders exercise real governmental power, and their hopes of rising to national leadership can increase their incentive to use this power responsibly.").

include a party's qualifications for and proven competence in policy-making and administrative responsibilities. Myerson applies his theory only to character-based track records.[120] This section argues that Myerson's basic logic can be applied to policy-based track records if we account for three new variables: (1) institutional independence; (2) voter priorities; and (3) qualitatively comparable responsibilities.

1. Institutional Independence

When examined closely, Myerson's model depends on the degree of institutional separation between national and subnational government.[121] Without sufficient independence, it becomes difficult for subnational leaders to develop marketable reputations. If subnational leaders do not have some degree of visible independence from the center, they will not be able to take credit for good subnational governance because national leadership will be able to make an equal claim to their good performance. Additionally, as subnational leaders develop good reputations, national leaders will have incentives to exercise control over them so as to limit political competition and take credit for their performances.[122]

Because Myerson's model is concerned only with character-based track records, these issues are resolved by his stated assumption that subnational leaders are separately elected by voters rather than appointed by national leadership.[123] Separate elections provide the minimum amount of independence necessary for subnational leaders to develop independent *character-based* track records. All government officials within a federal democracy presumably have the volitional capacity and a legal obligation to reject bribes. If subnational leaders are appointed by the center, national leadership can put pressure on subnational leaders to act corruptly.[124] Even if appointed subnational leaders act honestly, national leadership could take some credit for this because it made the appointment.[125] If subnational leaders are separately elected, however, they have no reason to fear removal by national leadership and they can take sole credit for their honesty. Thus, even if subnational leaders have little or no policy independence from the center, they may still be able to build a marketable

120. *Id.* at 6. Although he does not define corruption, he expressly excludes policy-based voter preferences and eliminates the significance of intrinsically virtuous leaders from his model. *Id.*

121. *Id.* at 20.

122. *Id.* at 21.

123. Myerson, *supra* note 12, at 21.

124. *Id.*

125. *Id.*

reputation by simply being honest—*as long as they are separately elected*.[126] Myerson's model turns on this assumption.

If Myerson's model is to be applied to positive track records on issues other than corruption, subnational leaders must have a degree of independence from the center regarding those issues. If the rules of a federal regime are such that the center has the power to effectively preempt or control subnational policy, Myerson's track-record model will not work because as soon as subnational leaders begin to develop positive policy reputations, national leadership will preempt or undermine those policies.[127] To extrapolate Myerson's theory, therefore, we must assume that the federal regime provides some formal policy independence for subnational leaders, as well as mechanisms for subnational leaders to enforce their independence.

2. Voter Priorities

Institutional independence must also overlap with voter priorities. Myerson assumes that voters have only one priority: replacing corrupt leaders with leaders that have a reputation for honesty.[128] This assumption drives his logic. Subnational leaders become a credible threat to national leaders only if voters intend to promote honest subnational leaders to national office, which, under Myerson's assumptions, they will always do. If we extrapolate Myerson's model to apply to multiple issues, it will work only if we assume that voters are willing to replace any national leader that does not deliver on analogous issues or competencies. This may be a dubious assumption when multiple issues are involved because those issues can cut in different directions and voters are likely to prioritize issues in a variety of ways.

Thus, in broadening Myerson's model to apply to policy-based track records, we must be aware of the fact that different track records represent different amounts of political capital depending on voter priorities. Furthermore, the rules of a federal regime determine what kinds of independent track records a subnational leader can develop. Many federal regimes entrust subnational leaders with independent authority for a

126. *Id.*

127. As a practical matter, national leadership could simply preempt subnational substantive policies that deviate from policies set at the center before they could be implemented.

128. *Id.* at 6.

variety of administrative and policy-making responsibilities.[129] If performance in these areas is important to voters, and the rules of the federal system protect subnational leaders' independence in these areas, subnational leaders may be able to develop policy-based track records that they can use to challenge national leadership.

In sum, the effectiveness of Myerson's model as applied to policy-based track records depends on a degree of overlap between subnational independence (as secured by the specific regime's rules) and voter priorities.[130] The model can be extended to other kinds of track-records if the federal regime protects subnational leaders' independence in areas that are important to national voters (or at least analogous to issues that are important to national voters).

3. Qualitatively Comparable Responsibilities

Implicit in Myerson's model is the idea that subnational governance is sufficiently analogous to national governance such that if subnational leaders are qualified for their positions, they will also be qualified for national positions.[131] However, this is not necessarily the case in many federal regimes.[132] Responsibilities of subnational governors can range from extensive to menial. The degree to which subnational track records can aid in fostering political competition depends, in part, on whether subnational governance is qualitatively comparable to national governance.[133] The more that a track record demonstrates relevant qualifications for national leadership, the more effective that track record will be in fostering political competition.[134] It seems obvious that the more

129. The basic structure of the American system federal system is illustrative. The Tenth Amendment reserves to the states all substantive policy responsibilities that are not expressly delegated to the federal government. *See* U.S. CONST. amend. X.

130. Subnational independence can no doubt help in shaping voter preferences. An honest subnational leader, for example, may raise voter awareness regarding the extent of corruption at the center. But this does not change the fact that underlying socioeconomic conditions usually dictate election issues and the rules of a federal regime determine what sort of track record a subnational leader is able to develop.

131. Myerson makes this assumption explicit when he discusses the possibility that local government track records could have the same effect as provincial government track records. Myerson, *supra* note 12, at 21. However, he seems to assume that provincial government responsibilities will always be "qualitatively comparable" to national responsibilities. *Id.*

132. *See* John Dinan, *Patterns of Subnational Constitutionalism in Federal Countries*, 39 RUTGERS L.J. 837 (2008) (exploring substantive competencies of subnational leadership in a variety of different federal systems); Ronald L. Watts, *Forward: States, Provinces, Länder, and Cantons: International Variety Among Subnational Constitutions*, 31 RUTGERS L.J. 941 (2000) (same).

133. Myerson, *supra* note 12, at 21.

134. *Id.*

power subnational leaders have, the more valuable their track records will be. Thus, the real-world applicability of Myerson's logic may depend on its applicability to policy-based track records, which presumably reflect a leader's positive ability to govern well rather than his ability to avoid corruption.

C. Federalism as a Means of Moderating the Exigencies of Political Transition

The model developed above is directed to the impediments to political competition created by the information problems facing first-time voters in an emerging democracy. Federalism can also promote political competition by addressing other exigent circumstances such as the problem of "loyal opposition" and the need to avoid political stalemates that will undermine government efficiency.[135]

Regarding the problem of loyal opposition, federalism, by definition, creates separate legal spheres of governance. This creates the possibility that opposition leaders can develop their own independent policies and track records without coming into direct conflict with the majority leadership. This creates a comfortable scenario for both opposition and majority leadership because they are able to exert influence and develop independent records without the appearance of direct confrontation, thus diffusing any concerns regarding loyalty to democratic processes.[136]

Regarding the urgent need for consensus and cooperation between elites, federalism eliminates the zero-sum game created by a unitary regime. In a unitary system, disputing groups are faced with an all-or-nothing scenario: one party or coalition gets to decide all substantive policy issues via the central government. By creating separate spheres of governance, federalism diffuses this dangerous power dichotomy and creates the possibility that some issues and policies can be devolved to subnational governance where opposition parties may have more consolidated support. Providing opposition parties with an independent

135. *See supra* Part II.A discussing these issues.

136. Dahl seems to have recognized federalism's potential in this regard back in 1965. Dahl observed that "constitutional separation of powers and federalism both create a variety of alternative sites and reduce the possibility of an all-or-nothing victory through elections; hence both tend to decrease the relative importance of electoral encounters . . . ." Dahl, *supra* note 29, at 350. Dahl concluded, however, that federalism impeded political competition by reducing electoral stakes. *Id.* at 351. The application here is that federalism can facilitate competition in emerging democracies because reducing electoral stakes creates a counter-incentive for the dominant party to quash all opposition. It is also worth nothing that Dahl's idea has gone largely unnoticed and undeveloped since 1965.

sphere of governance can actually facilitate consolidation by channeling them into subnational democratic institutions rather than alienating them from the new political order entirely. However, this solution also promotes competition because it gives opposition parties a simultaneous opportunity to demonstrate to the public that their policies and leadership are efficient and trustworthy.

These possibilities reduce incentives for the dominant party to quash all political opposition because they create an alternative: decentralization. Obviously, this model works effectively only if opposition parties are able to obtain control of at least one subnational unit. The crucial theoretical point, however, is that federalism creates a possible compromise *that is impossible in a unitary regime*.[137]

IV. SOUTH AFRICA'S FEDERAL STRUCTURE AND CHARACTER-BASED TRACK RECORDS

The remaining sections explore whether South Africa's federal structure is conducive to promoting political competition pursuant to the above model and, if so, whether South Africa's experience provides empirical support for the model's theoretical claims. This section considers whether the rules governing South Africa's federal system allow for subnational politicians to develop character-based track records that could facilitate political competition pursuant to Myerson's model. The section first analyzes the formal election rules and the rules governing the relationship between national and subnational leadership. It then considers some open empirical issues and strategic alternatives regarding those rules that may impact the effectiveness of Myerson's model.

A. South Africa's Electoral System

South Africa's electoral system can likely accommodate subnational character-based track records. South Africa's federal structure consists of three basic levels of government: national, provincial, and local.[138] Political powers at all levels derive from and are circumscribed by the

137. I have previously examined South Africa as a test case for a variant of this theory and explored the precise circumstances under with it is most likely to be effective in promoting democratic consolidation. *See* Marshfield, *supra* note 24, at 625–29. Thus, I do not revisit this empirical research here. Rather, the remainder of this Article explores whether South Africa's experience presents evidence of the voter-based model of political competition developed above.

138. *See generally* I.M. RAUTENBACH & E.F.J. MALHERBE, CONSTITUTIONAL LAW 268–70 (4th ed. 2004) (providing overview of South Africa's federal structure).

National Constitution (NC).[139] The NC creates nine provinces and establishes legislative and parliamentary-executive branches in each province.[140] Local government consists of 300 municipalities that are governed by Municipal Councils.[141] The national legislature (Parliament) is bicameral and composed of the National Assembly and the National Council of the Provinces (NCOP).[142] The NCOP consists of delegates from the provinces and exists exclusively to represent provincial interests in the national legislative process.[143] The national government further consists of a parliamentary-executive and an independent judiciary.[144]

South Africa has a parliamentary, party-based electoral system. National and provincial elections are held concurrently every five years.[145] Municipal elections are held separately every five years.[146] Registered political parties may contest the national election; any or all of the

139. Rassie Malherbe & Dirk Brand, *South Africa: Sub-National Constitutional Law*, *in* INTERNATIONAL ENCYCLOPEDIA OF LAWS, CONSTITUTIONAL LAW, SUB-NATIONAL CONSTITUTIONAL LAW 1, 48–65 (Andre Alen, et al. eds., 2001) (describing South Africa as a devolutionary federal system where residual powers belong to national government); *see also In re* Certification of the Constitution of the Province of KwaZulu-Natal 1996 (11) BCLR 1419 (CC) para. 14 (S. Afr.) (holding that provinces are "recipients and not the source of power.").

140. S. AFR. CONST., 1996 § 103(1) (establishing nine provinces); *id.* § 104 (establishing provincial legislative branches); *id.* § 125 (establishing provincial executive branches). The provinces are not permitted to have their own judicial branches. *In re* Certification of the Constitution of the Province of KwaZulu-Natal 1996 (11) BCLR 1419 (CC) para. 33 (S. Afr.). Provinces are permitted to adopt constitutions, but this is largely a formality because the National Constitution establishes all the "particulars" necessary for provincial government to function and does not permit Provincial Constitutions to deviate from the NC's design in any significant way. RAUTENBACH & MALHERBE, *supra* note 138, at 244 n.22; *see In re* Certification of the Constitution of the Western Cape 1997 (9) BCLR 1167 (CC) para. 15 (S. Afr.) ("[The NC] provides a complete blueprint for the regulation of government within provinces which proves adequately for the establishment and functioning of provincial legislatures and executives.").

141. The NC requires Parliament to provide for a national system of local governance. S. AFR. CONST., 1996 § 151(1). The boundaries and particulars of local government are laid out in the Local Government: Municipal Structures Act and the Local Government: Municipal Demarcation Act. *See* RAUTENBACH & MALHERBE, *supra* note 138, at 280–81.

142. S. AFR. CONST., 1996 § 42.

143. *Id.* §§ 60–72.

144. *Id.* §§ 83–102 (executive); *id.* §§ 165–80 (judiciary).

145. S. AFR. CONST., 1996, § 49 (election of Parliament to five-year terms); *id*. § 108 (election of provincial legislatures for five-year terms). The NC allows for Parliament and provincial legislatures to be dissolved separately by a majority vote of the respective bodies if the dissolving body has been in service for at least three years. *Id.* § 109 (dissolution of provincial legislatures); *id.* § 50 (dissolution of Parliament). An election must be held within ninety (90) days of dissolution. *Id.* § 108 (election after dissolution of provincial legislatures); *id.* § 49 (election after dissolution of Parliament). Thus, it is possible that provincial and national elections could be held separately. However, because dissolution is only likely to occur as a result of coalition governments, which in turn implies meaningful political competition, the Article treats this possibility as too remote while the ANC retains a stronghold on Parliament.

146. The NC provides that municipal government may be elected to five-year terms but allows Parliament to shorten the term. S. AFR. CONST., 1996 § 159.

provincial or municipal elections; or any combination of municipal, provincial, or national elections. Before an election, registered political parties must submit official candidate lists for each election that the party will contest.[147] Each candidate list must identify candidates in the order of the party's preference.[148] The NC prohibits candidates from holding positions in both the National Assembly and a provincial legislature.[149]

On election day for national and provincial governments, voters receive separate national and provincial ballots.[150] The ballots display a list of registered political parties with a corresponding picture of the parties' first-choice candidate.[151] Voters cast a single vote for a political party at the national level and a separate vote for a single party at the provincial level.[152] The 400 seats in the National Assembly are assigned based on a constituency system.[153] There are ten constituencies: one for each of the nine provinces and one assigned to the national vote at large.[154] The provincial constituencies receive 200 seats, which are divided proportionally among the provinces based on population.[155] The remaining 200 seats are assigned to parties based on their proportional share of the national vote at large.[156]

Seats in the provincial legislatures are assigned based solely on the number of provincial-ballot votes each party received.[157] Municipal council seats are similarly assigned based on the number of municipal-ballot votes each party received.[158] Seats at all levels of government are filled by the individuals identified on the parties' candidate lists in the order listed by the parties.[159]

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147. The "list system" is established by national legislation (the Electoral Act). The NC requires only that election rules be based on a "national common voters roll[]," "provide[] for a minimum voting age of 18 years," and "result[], in general, in proportional representation." S. AFR. CONST., 1996 § 46; *see* RAUTENBACH & MALHERBE, *supra* note 138, at 120–21 (describing the particulars of the electoral rules).

148. RAUTENBACH & MALHERBE, *supra* note 138, at 120.

149. S. AFR. CONST., 1996 § 158.

150. *See* Murray Faure, *Elections for Parliament and the Provinces in the New South Africa: 1994–2004*, 2 AFR. ASS'N POL. SCI. 70, 72–75 (1997).

151. *Id.*

152. *Id.*

153. RAUTENBACH & MALHERBE, *supra* note 138, at 120.

154. *Id.* at 120–21.

155. *Id.*

156. *Id.*

157. This is prescribed by national legislation. *Id.* at 246.

158. *Id.* at 280–81. Local government may also include "participation" by certain non-elected traditional leaders. *See id.* at 270–71. However, a local government body may not consist of more than 20% traditional leadership. *Id.* at 271, 281.

159. RAUTENBACH & MALHERBE, *supra* note 138, at 120–21. Municipalities may choose to operate under a "ward system" rather than the "list system." *Id.* at 281.

The National Assembly elects one of its members to serve as the President and may remove the President by a vote of no-confidence.[160] Provincial legislatures similarly elect one of their members to be Premier and may remove the Premier by a vote of no-confidence.[161] The National Assembly and provincial legislatures serve for concurrent five-year terms, unless dissolved by a vote of no-confidence.[162] The President and provincial Premiers must be reelected at the beginning of every legislative term and no individual may serve more than two consecutive terms as Premier or President.[163]

The Constitution does not provide for either the President or Parliament to directly remove provincial officials from office.[164] However, the national executive may intervene in provincial administration if a provincial executive fails to "fulfill an executive obligation in terms of the Constitution or legislation."[165] The national executive may issue a directive ordering compliance or may assume responsibility for the obligation directly if necessary to protect national interests.[166] This mechanism could conceivably allow a corrupt national executive to exercise authority over an honest provincial executive.[167] Provincial government exercises considerably more control over municipal government, but municipal council members are nevertheless separately elected and not subject to removal by provincial or national leadership.[168]

Viewed in total, South Africa's federal system would seem to allow for independent subnational character-based track records as envisioned by Myerson. National and subnational leaders are separately elected for fixed terms, may not be removed by national leadership, and are not directly responsible to national leadership. Additionally, the National Assembly's constituency-based electoral system means that opposition parties can gain more seats in the National Assembly if their support is consolidated within particular provinces rather than spread evenly over the country at large.

160. S. AFR. CONST., 1996, §§ 86, 102.

161. *Id.* § 128.

162. *See supra* note 145.

163. S. AFR. CONST., 1996, § 88 (president); *id.* § 130 (premier).

164. *See* S. AFR. CONST., 1996, §§ 105, 108, 128 (providing that provincial officials are separately elected to five-year terms unless they are dissolved by a vote of no-confidence); RAUTENBACH & MALHERBE, *supra* note 138, at 267 (discussing national government's limited powers of intervention regarding provincial government).

165. S. AFR. CONST., 1996, § 100(1); *see* RAUTENBACH & MALHERBE, *supra* note 138, at 267.

166. S. AFR. CONST., 1996 § 100(1).

167. Myerson, *supra* note 12, at 21 (discussing how mechanisms for imposing pressure on subnational leaders can affect their independence and dull incentives for building independent track records).

168. RAUTENBACH & MALHERBE, *supra* note 138, at 276–77.

This would seem to provide an additional incentive for opposition parties to develop strong provincial and municipal track records. In light of growing suspicion regarding the integrity of the ANC and that of its top leaders, this may prove to be a valuable feature of South Africa's federal structure.[169] In fact, as discussed in Part VIII below, opposition parties capitalized on this structural feature during the 2009 election.

B. Strategic Alternatives Affecting Myerson's Model

South Africa's electoral rules nevertheless present opposition parties with several strategic alternatives that may affect their ability to foster independent character-based track records. For example, opposition parties must decide whether to list their most prominent leader as a candidate for the National Assembly or as a candidate for a particular provincial legislature.[170] In light of the ANC's majority in the National Assembly, opposition leaders will have little or no real power in the National Assembly. Under Myerson's model, a more prudent strategy for opposition parties is to focus on obtaining a majority in a provincial legislature. This would enable them to exercise power independent of the ANC and develop an independent provincial track record.[171] This requires opposition party leadership to resist the prestige of the National Assembly and concentrate on a long-term reputation-building strategy within a low-profile provincial legislature.

This is a choice that most regional opposition parties have been unable to make. For example, in 1994, the Inkatha Freedom Party (IFP) sent Mangosuthu Buthelezi, its internationally known leader, to the National Assembly even though it anticipated winning a majority in the KwaZulu-Natal legislature and the ANC was sure to win a majority in the National Assembly.[172] That same year, President de Kerk's National Party (NP)

169. *See* Jonathan Hyslop, *Political Corruption: Before and After Apartheid*, 31 J. S. AFR. STUD. 773, 789 (2005) (examining extent and nature of corruption in post-apartheid South Africa).

170. Only ninety percent (90%) of a party's listed candidates for a provincial legislature need to reside within that province. RAUTENBACH & MALHERBE, *supra* note 138, at 246 n.1.

171. This strategy is viable only if the opposition party has consolidated support within specific provinces such that it can obtain a majority in those provincial legislatures. The Congress of the People (COPE), for example, which finished third in the 2009 national election, did not win control of any provincial legislatures. *See IEC Results*, *supra* note 3; *see also infra* Part VIII.B–C (discussing the geographic distribution of COPE's constituency).

172. This was particularly ironic because the IFP was the dominant proponent for decentralization during the constitutional negotiations and the KwaZulu-Natal legislature became the venue for a regime-threatening conflict between the IFP and ANC between 1994 and 1996. Marshfield, *supra* note 24, at 632–38 (discussing the role of the KwaZulu-Natal provincial legislature in the negotiated transition to democracy).

faced similar prospects regarding its success in the Western Cape provincial legislature. The NP nevertheless sent de Klerk to the National Assembly.[173] However, in 2009, the Democratic Alliance (DA) became the first party to list its president as a candidate for a provincial legislature (Western Cape) rather than the National Assembly.[174] Indeed, it appears that the DA has adopted a deliberate strategy to build a strong provincial track record upon which to challenge the ANC in the 2014 election.[175] These examples illustrate that South Africa's electoral system provides opposition parties with an important strategic decision, which represents an added variable affecting whether Myerson's model is likely to play out constructively in South Africa.

C. Open Empirical Questions Affecting Myerson's Model

South Africa's electoral rules also raise various empirical questions that bring into question whether Myerson's model is likely to materialize in South Africa.

First, Myerson's model would seem to work most effectively in a presidential rather than parliamentary system. The model works best when voters are keenly dialed in to the character of the leader for whom they are voting. Although party reputations surely play a role in voter choice in presidential systems, a candidate's individual reputation would seem to be more at issue in a presidential system than in a parliamentary system. In a parliamentary system, the primary focus is the party's *collective* reputation, which, because of its corporate nature, is more difficult for voters to track and is more malleable by the party.[176] Additionally, in a

173. De Klerk and Buthelezi's involvement in the first national government was incredibly symbolic. In an effort to set the tone for reconciliation and cooperation, the ANC agreed to a provision in the Interim Constitution that extended executive cabinet posts to any opposition party that obtained twenty or more seats in the National Assembly. S. AFR. (INTERIM) CONST., 1993 § 88. De Klerk and Buthelezi both assumed posts in Nelson Mandela's cabinet. This cooperation between three previously bitter rivals was extraordinary. These circumstances perhaps explain and justify the NP and IFP's decisions to send their prominent leaders to the national government rather than focus on provincial track records.

174. *See infra* Part VIII.B–C (discussing DA's opposition strategies in the 2009 election).

175. *See* Democratic Alliance, *A Strong Track Record in Government*, http://www.da.org.za/campaigns.htm?action=view-page&category=6592 (last visited Feb. 28, 2011). This was also the stated strategy of the DA's predecessor, the Democratic Party. *See* Adam Habib & Lubna Nadvi, *Party Disintegrations & Re-Alignments in Post-Apartheid South Africa*, 29 REV. OF AFR. POL. ECON. 331 (2002).

176. Myerson discusses a variation on his model that accounts for voters' inability to observe corruption in leaders. *See* Myerson, *supra* note 12, at 18. This variation is somewhat analogous to the point here. Myerson's variation deals primarily with the idea that corruption can be hidden by leaders, but the decrease in voter welfare will serve as a proxy for leader corruption. *Id.* The point is that

presidential system, voters are the primary means of holding individual executives accountable. Executives receive their mandate from the voters and, consequently, structure their campaigns around voter preferences. Thus, if voters demand integrity, executive candidates will have to proffer evidence of personal integrity. In a parliamentary system, however, the executive is accountable primarily to the majority party or coalition that controls the legislature, and party support is often driven by patronage, not personal integrity.

This disconnect between the voters and the executive could dull the incentives that are so crucial to Myerson's model. Executives in a parliamentary system may have less of an incentive to develop a strong character-based track record, because their success is tied directly to party rather than voter support. Thus, they may actually tend toward corruption in order to curry political favor within the party. Likewise, voters in a parliamentary system may find it more difficult to isolate culpability for corruption since campaigns are structured around the collective reputation of the party rather than individual candidates.

Perhaps anticipating this criticism of his model, Myerson notes in a parenthetical that his model will nevertheless work in a parliamentary system "provided that . . . leadership selection is understood as the primary function of parliamentary elections."[177] This caveat is not unrealistic. Even in a parliamentary system, if voters demand virtue from their leaders, political parties will have an incentive to elect individuals that have reputations for honesty and to expel corrupt leaders from the party.

South Africa's electoral rules are configured to promote this because they require parties to list all candidates in order of preference before any election.[178] Party reputations are therefore publicly linked to the individual reputations of the listed candidates—particularly the reputation of the first-choice candidate, who is presumably the party's selection for President or Premier. Nevertheless, the legislature's ultimate selection for Premier or President is never certain and the majority party can remove the President or Premier at any time by a no-confidence vote.

Thus, the parliamentary nature of South Africa's electoral system raises the empirical question of how tight the nexuses are between candidates'

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parliamentary systems create an added layer between voters and corruption that could make it more difficult for voters to track culpability and easier for parties to mask corruption. It is a variation on the agency problem flagged by Myerson.

177. *Id.* at 11.

178. This requirement is strictly enforced by the Independent Electoral Commission. *See ANC, DA and COPE make candidate list cut-off*, MAIL & GUARDIAN, Mar. 2, 2009, *available at* http://www.mg.co.za/article/2009-03-02-anc-and-da-make-candidate-list-cutoff.

personal track records, collective reputations of political parties, and public choice regarding parliamentary elections. If these connections are weak and voters do not see executive "leadership selection as the primary function of parliamentary elections,"[179] Myerson's character-based model may break down, or, at the very least, the incentives will be less pronounced.

A second empirical issue that affects Myerson's model in South Africa is whether holding concurrent national and provincial elections affects voters' tendency to cast their subnational vote independent of their national vote.[180] As described below, the provinces' substantive policy-making authority is nominal, and most high-profile issues are decided at the national level.[181] This means that national elections can easily dominate provincial elections. An important empirical question is whether voters can critically evaluate provincial candidates in their own right or whether voter preferences regarding the national election tend to dictate how voters cast their provincial vote. The party-based parliamentary system may also play a role here, because it is easy to imagine that voters will have difficulty identifying a credible basis for splitting their provincial and national ballots between different political parties.[182] Myerson's model only works if voters cast their national and subnational votes independently. South Africa's concurrent electoral system may result in a de facto blending of national and provincial votes notwithstanding the formality of separate ballots.

A third empirical question is whether national prosecution of provincial leadership could effectively squelch any independent provincial track records.[183] Neither the President nor the National Assembly has authority to directly remove a provincial representative or Premier from office. However, the President's cabinet is vested with significant discretion and

179. Myerson, *supra* note 12, at 11.

180. It is interesting that during the negotiated transition from apartheid to democracy, the ANC advocated for a single-ballot electoral system. Andrew Reynolds, *South Africa: Electoral System Design and Conflict Management*, INTERNATIONAL INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE, http://www.idea.int/esd/upload/south_africa.pdf (last visited Feb. 28, 2011). Under the ANC's proposal, provincial and national representation would have been determined by a single vote for a single political party. This proposal was a transparent strategic move by the ANC to take advantage of its national dominance. *Id*. at 69–70. The ANC's position was ultimately rejected in favor of the split-ballot system described above. *Id.* at 70. Significantly, results from the 1994 election showed that many voters did in fact split their national and provincial votes between parties. *Id.*

181. *See infra* Parts V–VI.

182. There is some empirical evidence that voters split their votes. *See* Reynolds, *supra* note 180, at 69–70 (analyzing results from the 1994 election).

183. Myerson raises this as a possible empirical issue affecting his model. Myerson, *supra* note 12, at 21.

ultimate authority regarding criminal prosecution of government corruption.[184] Provincial leadership is not immune from investigation and prosecution by national law-enforcement and intelligence agencies.[185] Findings from a recent report regarding government corruption and prosecution in South Africa do not suggest that the national government has systematically used this power as a means of eliminating political competition.[186] Nevertheless, the possibility of strategic prosecutions by national leadership of subnational competition exists under South Africa's structure. This sort of behavior could affect the real-world independence of subnational leaders to challenge national leadership through the development of subnational track records.

V. THE PROVINCES' LAW-MAKING AUTHORITY AND POLICY-BASED TRACK RECORDS

South Africa's federal structure may also allow subnational leaders to develop policy-based track records. As noted above, the key to expanding the model to policy-based track records is that the subnational units retain a degree of independence from the national government on issues that can be used to mount a meaningful campaign against national leadership.[187] This section explores the degree to which South Africa's federal structure may be able to accommodate this broader theory of political competition within federal systems.

A. The Provinces' Formal Law-Making Authority

The ability of provincial leaders to develop policy-based track records is significantly limited by the fact that the provinces have almost no independent policy-making or taxing authority. Provincial legislatures may only make laws concerning specific issues listed in the NC.[188] The NC lists only twelve rather insignificant substantive areas where the

184. S. AFR. CONST., 1996, § 179(6).

185. *See* U.N. OFFICE ON DRUGS AND CRIME: REGIONAL OFFICE FOR SOUTH AFRICA & SOUTH AFRICAN DEPARTMENT OF PUBLIC SERVICE AND ADMINISTRATION, COUNTRY CORRUPTION REPORT: SOUTH AFRICA (April 2003) (describing the prosecutorial structure in South Africa).

186. *Id.* at 52–54 (presenting statistics regarding corruption prosecutions without any suspicious regional patterns or marked increase in prosecutions).

187. *See supra* Part III.B (discussing this in terms of three variables: institutional independence, voter priorities, and qualitatively comparable responsibilities).

188. S. AFR. CONST., 1996, § 104; *In re* Certification of the Constitution of the Province of KwaZulu-Natal 1996 (11) BCLR 1419 at (CC) para. 14 (S. Afr.); *see* Marshfield, *supra* note 24, at 590–95 (providing detailed legal analysis of provinces' law-making authority).

provinces have exclusive law-making authority.[189] The three most notable powers are the regulation of liquor licenses, roads, and land use planning.[190] However, Parliament may override provincial legislation in any of these areas if "necessary" to "maintain economic unity," "maintain essential national standards," or "to prevent unreasonable action taken by a province which is prejudicial to another province or to the country as a whole."[191] The Constitutional Court has interpreted these requirements liberally and universally upheld preemptive national legislation.[192]

The NC provides a more generous list of issues over which provincial legislatures and Parliament have concurrent law-making authority.[193] Some of the more significant issues on the list include education, the environment, health services, and welfare services.[194] Provinces may enact laws in these areas, but Parliament has complete discretion to preempt any provincial law with national legislation.[195] Provinces therefore have absolutely no formal independence on these issues. They are only permitted to make law if the national leadership, by acquiescence, permits them to do so.

A further practical limitation on the law-making authority of the provinces is their inability to collect meaningful taxes. The provinces may not assess any sales, property, income, or value-added tax.[196] Provinces are therefore dependent on distributions from the national government in order to implement any laws that they make.[197] Parliament is constitutionally required to provide provinces with funds sufficient to perform "basic services" and implement any national legislation that Parliament delegates to provincial executives, which Parliament can do without limitation.[198] Thus, because the provinces are not entitled to any funding for

189. S. AFR. CONST., 1996, § 104, sched. 5, pt. A.

190. *Id.* Less notable powers include provincial sport, "abattoirs," "provincial cultural matters," and provincial archives. *Id.*

191. S. AFR. CONST., 1996, § 44(2).

192. Cape Metro. Council v. Minister of Prov. Affairs and Constitutional Dev. 1999 (11) BCLR 1229 (CC); Weare v. Ndebele NO 2009 (4) BCLR 370 (CC); Nhlabathi v. Fick 2003 (9) ZALCC (LCC).

193. S. AFR. CONST., 1996 § 104, sched. 4, pt. A.

194. *Id.*

195. *Id.* §§ 104, 146–50.

196. *Id.* § 228.

197. *Id.* § 227(1)(a); *see* Tom Lodge, *Provincial Government and State Authority in South Africa*, 31 J. S. AFR. STUD. 738, 740–41 (2005) (discussing the provinces' dependence on national funds).

198. S. AFR. CONST., 1996, § 227(1)(a).

independent provincial programs, they are very limited in their ability to enact and implement meaningful provincial legislation.[199]

This lack of substantive law-making independence suggests that South Africa's structure cannot support a strict application of the model developed here. Although the provinces certainly make substantive laws, the provinces have no effective means of fending off national preemption. Indeed, the system is purposefully set up to favor national legislation and permit provinces to make law only as Parliament sees fit.[200] Parliament is well within its constitutional authority to enact preemptive legislation, impose burdensome national legislation that consumes provincial resources, or simply withhold necessary funds so that provinces are unable to enact meaningful legislation. All of these devices enable national leadership to control whether a province can deviate from national policy choices. Without independent authority to enact deviant policies, subnational leaders cannot develop policy-based track records that challenge the national leaders' incompetence.[201]

B. The Provinces' De Facto Policy-Making Independence as Illustrated by the HIV/AIDS Controversy

The previous discussion assumes that national leadership is consolidated and able to act unanimously in imposing national policy. Under those circumstances, and if we assume that national leadership will always preempt "undesirable" subnational law, provincial leadership lacks the ability to develop independent policy-based track records. However, if the ANC were to be divided on a particular issue that would also be within the province's law-making authority, then provinces could enjoy de facto independence from national preemption and craft their own policy

199. *See* Lodge, *supra* note 197, at 740–41 (discussing financial limitations on independent provincial policy).

200. In the words of the Constitutional Court, South Africa's "constitutional structure . . . makes provision for framework provisions to be set by the national sphere of government." *Cape Metro. Council* 1999 (11) BCLR 1229 (CC) para. 50.

201. It should be noted that this analysis focuses on the formal logic of the proposed model. The point is that provinces have no means of fending off national preemption. According to the model, this means that the national leaders will be able to squelch opposition track records, thus short-circuiting the incentives necessary for the model to work. In reality, it is possible that the ANC could, for any number of reasons, not want to preempt provincial authority even though provincial parties were developing good track records. If the ANC were to exercise this sort of restraint because of some other incentive, the model may still work. The point here, however, is that the formal rules of South Africa's federal system do not guarantee the necessary level of independence for provinces to develop independent policy-based track records. Part VIII below discusses the way that political opposition has in fact developed in South Africa within the confines of this legal structure.

solutions. This could have positive effects for political competition because opposition parties would have the opportunity to demonstrate their abilities to adopt and implement sound provincial policies on issues of obvious public importance.[202] If these provincial policies were successful, opposition parties would have a marketable policy-based track record regarding a high-profile issue.

President Thabo Mbeki's controversial position on HIV/AIDS provides a powerful illustration.[203] Beginning in 2002, President Mbeki took the rather bizarre position that HIV was not proven to cause AIDS.[204] President Mbeki therefore opposed government provisioning of antiretroviral therapy to prevent mother-to-child transmission of HIV.[205] In 2002, under President Mbeki's leadership, the National Department of Health adopted regulations that prohibited doctors from prescribing antiretroviral drugs except to patients in designated research programs.[206] An advocacy group challenged the regulations in court, and, in 2002, the Constitutional Court declared the restrictions to be unconstitutional and required that the government make antiretroviral treatment generally available.[207] Still divided over the issue, the ANC did not take adequate national measures to fulfill this mandate.[208] However, because the Court's ruling had freed the provinces from compliance with the now invalid national regulations, various provinces, including the opposition-controlled Western Cape, instituted their own programs to ensure that antiretroviral treatments were administered.[209]

The ANC's policies have now been largely discredited, and during the 2009 election, the DA relied on its positive leadership and track record in the Western Cape regarding the antiretroviral issue.[210] This strategy seems to have been effective. Commenting on the run-up to the 2009 election, a

202. The argument assumes that the issues are of public importance because they were able to gridlock the ruling party. Obviously, some issues could conceivably divide the party but not be of public importance.

203. *See* Lodge, *supra* note 197, at 743–44 (discussing how the ANC's gridlock over HIV/AIDS policy allowed provinces to exercise independence on the issue).

204. Mandisa Mbali, *HIV/AIDS Policy-Making in Post-Apartheid South Africa*, *in* STATE OF THE NATION: SOUTH AFRICA 2003–2004, at 318 (John Daniel et al. eds., 2001).

205. *Id.* at 321–22. Mbeki cited unnecessary government expense and possible poisonous effects of antiretroviral drugs as justifications for opposing government provision of antiviral treatment. *Id.*

206. *Id.* at 324; *see* DEPARTMENT OF HEALTH, HIV/AIDS & STD STRATEGIC PLAN FOR SOUTH AFRICA 2000–2005 (Feb. 2000), *available at* http://www.doh.gov.za/aids/index.html.

207. *Minister of Health v. Treatment Action Campaign* 2002 (10) BCLR 1075 (CC) (S. Afr.).

208. Lodge, *supra* note 197, at 743–44; *see also* AVERT, *History of HIV & AIDS in South Africa*, http://www.avert.org/history-aids-south-africa.htm (last visited Feb. 28, 2011).

209. Lodge, *supra* note 197, at 743–44.

210. *See* DEMOCRATIC ALLIANCE, DA MANIFESTO: ELECTION 2009 18 (2009).

columnist wrote the following in a national newspaper: "[T]he DA has a good track record. Compare ANC with DA rule in the Western Cape and Cape Town. Under the DA, the Western Cape rolled out antiretroviral drugs when all the ANC-ruled provinces were denying that HIV causes AIDS."[211]

The ANC's HIV/AIDS debacle demonstrates that South Africa's federal structure can accommodate subnational policy track records that can be used effectively to promote political competition. The key is that the provinces have some form of independence from national policy. If provincial policy is preempted, the model is short-circuited. Thus far, ANC gridlock seems to be the only way that provinces gain any real policy independence. Even then, provinces are free to enact deviant policy only if no national policy exists—either because none was ever enacted or existing policy was declared invalid by the Court.

VI. THE PROVINCES' ADMINISTRATIVE AUTHORITY AND POLICY-BASED TRACK RECORDS

Another way for the model to operate is for opposition parties to develop sound track records for government administration even if they are not able to develop independent substantive policy. This section considers that application of the model under South Africa's federal structure.

The provinces have significant administrative responsibility. Provincial executives are exclusively responsible for implementing provincial law.[212] More importantly however, the NC provides that Parliament may require provincial executives to administer national legislation irrespective of whether the legislation falls within one of the province's enumerated powers.[213] Thus, Parliament may enlist provincial executives to administer any national law. In practice, Parliament relies heavily on provincial government to administer national law. In 1999, more than seventy-five percent of all public servants were provincial officials.[214] Furthermore, in

211. Andrew Kenny, *It's Got To Be The DA For Me*, CITIZEN, Apr. 20, 2009 (on file with author).

212. S. AFR. CONST., 1996 § 125.

213. *Id.* Provincial executives have a standing obligation to implement national legislation that falls within one of the provinces' enumerated powers. *Id.* at § 125(3). For a full discussion of some further eccentricities regarding the relationship between national legislation and provincial executives, see RAUTENBACH & MALHERBE, *supra* note 138, at 259–60. The only restriction on Parliament's assignment of administrative responsibilities to the provinces is that it must provide provinces with the means necessary to perform assigned obligations. S. AFR. CONST., 1996, § 125(3).

214. Lodge, *supra* note 197, at 738.

1999, more than forty-three percent of the country's overall revenue was assigned to the provinces so that they could meet their administrative responsibilities.[215] This means that provincial administration involves significant responsibility and, consequently, the possibility of developing meaningful independent track records depending on the degree of independence from national control.

Premiers have a fair degree of independence regarding the structure and appointment of their cabinets (Executive Councils).[216] The Premier must appoint between five and ten provincial legislatures to serve on his or her Executive Council.[217] The Premier defines the responsibilities of each member of the Council and may remove members unilaterally.[218] The only exception to this is the position of Secretary which is established and defined by national legislation.[219] The Premier may still appoint and remove the Secretary unilaterally. A Premier may also unilaterally reassign responsibilities among council members.[220] The provincial legislature may remove the Premier, the Executive Council, or both by a vote of no-confidence.[221] The national government does not have any analogous authority to remove provincial executives.[222]

Administrative departments at both the national and provincial levels are established and structured by national legislation.[223] Provinces have no independent authority to restructure or alter provincial departments.[224] Provinces similarly have no authority regarding the staffing of provincial departments.[225] Instead, national legislation determines how provincial departments are structured, what their respective mandates are, and how

215. *Id.* at 740 (percentage calculated based on revenue figures provided by Lodge).

216. *See generally* RAUTENBACH & MALHERBE, *supra* note 138, at 261.

217. S. AFR. CONST., 1996, § 132(1). The Western Cape constitution provides for a larger cabinet. *See* Dirk Brand, *The Western Cape Provincial Constitution*, 31 RUTGERS L.J. 961, 961 (2000). This is significant because the Constitutional Court held that this change to provincial executive authority was an exclusive executive power that could not be changed by national legislation unless it implicated a pressing national interest. *See In re* Certification of the Constitution of the Western Cape 1997 (12) BCLR 1653 (CC) para. 15 (S. Afr.). This confirms that provincial executives have significant independence when it comes to the appointment and structure of their cabinets.

218. S. AFR. CONST., 1996, § 132(2).

219. *See* Premier of the Province of the Western Cape v. Pres. of the RSA 1999 (4) BCLR 383 (CC) paras. 71–72 (S. Afr.) (discussing the various national statutes that govern the role of the provincial Secretary).

220. *See* RAUTENBACH & MALHERBE, *supra* note 138, at 261 (*citing Montshioa v. Motshegare* 2001 (8) BCLR 833 (B) at 930 (S. Afr.).

221. S. AFR. CONST., 1996 §§ 109, 141.

222. *Id.* § 141; RAUTENBACH & MALHERBE, *supra* note 138, at 216–62.

223. *See Premier of the Province of the Western Cape* 1999 (4) BCLR 383 (CC) paras. 1, 5 (S. Afr.) (describing the structure of administrative departments).

224. RAUTENBACH & MALHERBE, *supra* note 138, at 262 n.167.

225. *Id.*

they are staffed. Salaries for public servants employed in the provincial departments are also set by national legislation but must be paid by the provinces.[226]

Nevertheless, despite the provinces' inability to restructure and staff administrative departments, provincial departments are ultimately managed by the Premier and his or her Executive Council.[227] National government does not have authority to interfere with this responsibility unless the province is so derelict in its duties that national interests and basic services are threatened.[228] Thus, provinces maintain a degree of management oversight that could form the basis for an independent administrative track record.

Although Premiers cannot formally restructure administrative departments, they can establish a variety of management policies and protocols that affect the delivery of government services. They can also tackle the pervasive skills deficit that plagues provincial public servants and disrupts delivery of government services.[229] Thus, Premiers have the independent authority to develop well-trained and efficient provincial departments. And because national law vests provincial government with substantial administrative responsibilities and provides them with large amounts of money to fulfill these responsibilities, provinces have a genuine opportunity to develop sound administrative track records regarding incredibly important and high-profile issues such as healthcare, education, and welfare.[230] There is no reason why independent administrative track records of this sort could not trigger constructive political competition at the national level pursuant to the model.[231]

VII. MUNICIPAL GOVERNMENT AND INDEPENDENT TRACK RECORDS

South Africa's federal structure allows for municipal track records to promote political competition at the national level. South Africa has over

226. Lodge, *supra* note 197, at 741.

227. *Premier of the Province of the Western Cape* 1999 (4) BCLR 383 (CC) paras. 71–72 (S. Afr.). National Legislation provides that the Executive Council Secretary (also known as the Director General) is the head of provincial administrative departments. *Id.*

228. S. AFR. CONST., 1996 § 100(1).

229. *See* Lodge, *supra* note 197, at 739–40 (discussing skills deficit in provincial administration).

230. *See id.* at 741 (discussing the responsibilities that provinces have to administer service delivery in those areas).

231. *See, e.g.*, Michael Trapido, *W Cape: Zille's Chance to Show the Other Provinces How It's Done?*, MAIL & GUARDIAN, Apr. 28, 2009, http://www.thoughtleader.co.za/traps/2009/04/28/western-cape-zille's-chance-to-show-8-other-provinces-a-prototype-for-success/ (stating hope that the opposition's new administration in the Western Cape will implement administrative polices that will improve delivery of government services and spur political competition).

300 local government institutions.[232] The substantive powers of local government are a strict subset of the powers assigned to provincial government and subject to the same national preemption principles that apply to provincial government.[233] By and large, therefore, most local government activities are dominated by provincial and national government policies and practices.[234]

National legislation establishes unique municipal governments for the country's six major metropolitan areas.[235] These municipalities enjoy exclusive executive authority within their jurisdictions and the subset of provincial powers assigned to them.[236] Because of the size and economic significance of these metropolitan areas, their municipal governments have significant administrative responsibilities regarding delivery of crucial government services. Furthermore, because their municipal council members are separately elected, political parties may be able to use municipal government positions to develop positive administrative and character-based track records as in the provincial context. As noted above, a key issue in the municipal context is whether the responsibilities of local government are "qualitatively comparable" to provincial and national responsibilities.[237] On this point, South Africa's federal rules seem to provide sufficient independence for municipal governments, at least in the six major metropolitan areas, such that the model could apply.[238]

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232. RAUTENBACH & MALHERBE, *supra* note 138, at 286.

233. S. AFR. CONST., 1996 § 151-64; RAUTENBACH & MALHERBE, *supra* note 138, at 276–79.

234. S. AFR. CONST., 1996 § 139 (providing for provincial intervention in local government); RAUTENBACH & MALHERBE, *supra* note 138, at 276 ("Parliament and the provinces exercise extensive control over local government.").

235. RAUTENBACH & MALHERBE, *supra* note 138, at 286–87 (describing provisions of the Local Government: Municipal Structures Act). The six metropolitan municipalities are the City of Cape Town, Ekurhuleni Metropolitan (East Rand), eThekwini Metropolitan (Durban), the City of Johannesburg, Nelson Mandela Bay (Port Elizabeth), and the City of Tshwane (Pretoria).

236. *See id.* at 297.

237. *See supra* Part III.B.3; Myerson, *supra* note 12, at 21.

238. Indeed, as discussed further below, the DA has relied heavily on their president's, Helen Zille's, record as the mayor of Cape Town where she won the 2008 World Mayor Award. *See Cape Town Mayor Helen Zille*, WORLD MAYOR, http://www.worldmayor.com/contest_2008/world-mayor-2008-zille.html (last visited Feb. 28, 2011). Interestingly, the ANC majority in the National Assembly moved without notice to block a motion by the DA to recognize Zille's award. *Id.* The then-ANC-controlled Western Cape legislature also sought to "downgrade the city mayor's post to a ceremonial role and distribute the executive powers among the city council itself." *Id.*

VIII. REAL POLITICAL COMPETITION AND SUBNATIONAL TRACK RECORDS IN SOUTH AFRICA

Having examined the rules of South Africa's federal regime, this Article now turns to the reality of post-apartheid politics in South Africa to determine whether South Africa's federal structure is actually fostering political competition, as the model would suggest. South Africa's 2009 general election presents promising signs for political competition in South Africa and provides compelling support for the real-world applicability of the policy-based model of political competition herein.

A. The ANC's Dominance from 1994 to 2004

The first decade of post-apartheid politics was clearly dominated by the ANC. In 1994, during the country's first democratic election, the ANC won 63% of the national vote and 252 of the 400 seats in the National Assembly.[239] Two opposition parties, the NP and the IFP won significant representation in the National Assembly. The NP won 82 seats and the IFP won 43 seats.[240] The ANC won control of all but two of the provincial legislatures.[241] The NP won control of the Western Cape by a slim margin, winning 23 of the possible 42 seats.[242] The IFP won control of the KwaZulu-Natal legislature, winning 41 of the possible 81 seats.[243] In the provincial legislatures of both the Western Cape and KwaZulu-Natal, the ANC was the second place vote-getter.[244]

In 1999, the ANC increased its majority in the National Assembly by winning 66% of the national vote and taking 266 of the 400 seats.[245] Three major opposition parties competed in the 1999 election. The newly formed Democratic Party (DP) took 38 National Assembly seats, the IFP took 34 seats, and the New National Party took 28 seats.[246] Most significantly, the ANC defeated the New National Party in the Western Cape legislature and closed to within two seats of the IFP in the KwaZulu-Natal legislature.[247]

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239. *See IEC Results*, *supra* note 3.
240. *Id.*
241. *Id.*
242. The ANC won 14 of the 42 seats. *Id.*
243. *Id.*
244. *Id.*
245. *IEC Results*, *supra* note 3.
246. *Id.*
247. *Id.*

In 2004, the ANC obtained its largest majority in the National Assembly by winning 279 of the 400 seats, representing 70% of the national vote.[248] The ANC also defeated the IFP in the KwaZulu-Natal legislature.[249] However, the ANC did not win a majority in the Western Cape legislature, and it was forced to form a coalition with an opposition party, the DP.[250] The DP's strength in the Western Cape legislature set the stage for it to gain enough support to successfully oppose the ANC's ill-fated HIV/AIDS policies,[251] and this prudent policy ultimately gave the DP a tremendous amount of political capital leading into the 2009 election.

B. Evidence of Opposition Success in 2009

In 2009, the ANC won 264 of the 400 seats in the National Assembly.[252] The DA won 67 seats, the Congress of the People (COPE) won 30 seats, and the IFP claimed 18 seats.[253] This means that the ANC can afford to lose as many as 63 seats without losing control of the national government or being forced to form a majority coalition. Table 1 below shows the four major parties' respective shares of the 400 seats in the National Assembly by provincial and national constituencies. The provincial constituency distributions show that the only party with consolidated provincial support is the DA. It won the majority of the Western Cape's National Assembly seats and was close behind the ANC's majority in both Gauteng and the Eastern Cape. No other opposition party challenged the ANC significantly in any other provincial constituency.

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248. *Id.*
249. *Id.*
250. *Id.*
251. *See supra* Part VI.B (discussing the HIV/AIDS controversy).
252. *See IEC Results*, *supra* note 3.
253. *See id*. This gave the ANC an unsurprising 65.9% majority. *Id.*

TABLE 1: NATIONAL ASSEMBLY SEATS BY CONSTITUENCY[254]

PARTY	NATIONAL CONSTITUENCY SEATS	PROVINCIAL CONSTITUENCY SEATS									
		EC	FS	Ga	KZN	Li	Mp	NW	NC	WC	TOTAL
ANC	126	19	9	31	36	17	14	11	3	8	264
DA	--[255]	6	4	19	7	2	2	2	2	23	67
COPE	16	3	1	4	1	1	1	1	1	2	30
IFP	9			1	8						18

At the provincial level, the ANC won control of all provincial legislatures except for the Western Cape, where the DA narrowly defeated the ANC.[256] Table 2 shows the party distribution of all provincial legislative seats won in the 2009 election. This distribution again shows that the Western Cape was the only province vulnerable to opposition control. The IFP retains consolidated but weakening support within KwaZulu-Natal. COPE appears to have more support in the Eastern Cape and Gauteng, but it is not yet a legitimate threat to the ANC's majority in either of those provinces.

254. Data taken from Independent Electoral Commission of South Africa, *Seat Assignment National Assembly*, http://www.elections.org.za/(click "Elections"; then "Results") (last visited Feb. 28, 2011).

255. The DA did not submit a national constituency list of candidates. It nevertheless received its proportional share of candidates based on the national vote at large, but its national constituency seats were filled by candidates from its provincial candidate lists. *See* RAUTENBACH & MALHERBE, *supra* note 138, at 121–29 (explaining relevant electoral rules in this scenario).

256. *See IEC Results*, *supra* note 3.

TABLE 2: PROVINCIAL LEGISLATIVE SEATS BY PARTY[257]

PARTY	PROVINCIAL LEGISLATIVE SEATS								
	EC	FS	Ga	KZN	Li	Mp	NW	NC	WC
ANC	44	22	47	51	43	27	25	19	14
DP	6	3	16	7	2	2	3	4	22
COPE	9	4	6	1	4	1	3	5	3
IFP			1	18					
Independent Democrats			1					2	2
United Democratic Movement	3								
African Christian Democratic Party			1	1					1
Minority Front				2					
Freedom Front Plus		1	1						
United Christian Democratic Party							2		
African Independent Congress	1								
TOTAL	63	30	73	80	49	30	33	30	42

Regarding municipal government, there are 300 local governments. In 2006, the last local government election, the ANC won control of 203 municipalities.[258] The IFP won twenty-six municipalities, almost exclusivity within scarcely populated rural areas of KwaZulu-Natal.[259] The DA won seven municipalities.[260] Most importantly, however, the ANC won five of the six major metropolitan municipalities.[261] The DA's victory in Cape Town was the only significant opposition victory in local

257. Data taken from Independent Electoral Commission of South Africa, *Seat Assignment Provincial Legislatures*, http://www.elections.org.za/(click "Elections"; then "Results") (last visited Feb. 28, 2011).

258. Independent Electoral Commission of South Africa, *2006 Local Government Elections*, http://www.elections.org.za/ (click "Elections"; then "Results") (last visited Feb. 28, 2011).

259. *Id.*

260. *Id.*

261. *Id.*; *see supra* note 235 (listing the six metropolitan municipalities).

government. COPE was not formed until 2008 and therefore did not compete in the 2006 municipal elections.

C. Analysis and Opposition Strategies for 2014

The Article now explores whether the model could benefit any of the three major opposition parties as they are situated following the recent 2009 election. This section is not intended to be a complete sociopolitical analysis. Instead, it explores some of the real-world possibilities of the model for purposes of illustrating its practical value and limitations. The inquiry is therefore limited to this question: do opposition parties have any real opportunities to develop subnational track records that they could use against the ANC in the 2014 general election?

Of the three major opposition parties, COPE appears to be least likely to develop a subnational track record. COPE does not have control of any provincial or municipal governments. Although local government elections will take place in 2011, it is unlikely that COPE will win control of any of the six major metropolitan municipalities. Thus, COPE is unlikely to have any opportunity to develop a subnational track record of any kind that it could use against the ANC in the 2014 national elections.

The IFP, on the other hand, seems to be operating in reverse under the model. The IFP's support base has traditionally been contained within KwaZulu-Natal.[262] It won control of the province after the first democratic election in 1994.[263] However, its support within the province has steadily dropped since then. In 1999, after five years of IFP control, the ANC came within less than two percentage points of beating the IFP.[264] The ANC ultimately took control of the province in 2004 and retained control in 2009.[265] Since taking power, the ANC has been relentless in exposing the

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262. *See* ANTHEA JEFFERY, THE NATAL STORY: 16 YEARS OF CONFLICT (1997).

263. *See IEC Results*, *supra* note 3 (the IFP won 41 of the 81 seats but formed a coalition with minority parties to gain control independent of the ANC); KWAZULU-NATAL MONITORING PROJECT, *KwaZulu-Natal's New Constitution: No Losers . . . Any Winners?*, 1996 KWAZULU-NATAL BRIEFING 1, 2 (explaining how the IFP won more votes than any other party and obtained control over the legislature by forming a coalition with minority parties).

264. Independent Electoral Commission of South Africa, *Provincial Elections '99, KwaZulu-Natal Results*, http://www.elections.org.za/ (click "Elections"; then "Results") (last visited Feb. 28, 2011).

265. Independent Electoral Commission of South Africa, *Provincial Elections '04, KwaZulu-Natal Results*, http://www.elections.org.za/ (click "Elections"; then "Results") (last visited Feb. 28, 2011); Independent Electoral Commission of South Africa, *Provincial Elections '09, KwaZulu-Natal Results*, http://www.elections.org.za/content/uploadedFiles/2009%20National%20and%20Provincial%20Election%20candidate%20lists.pdf?n=9151 (last visited Feb. 28, 2011).

IFP's apparent incompetence and corruption while in office.[266] Thus, the IFP seems to have squandered an opportunity to develop a sound subnational track record that it could have used to challenge the ANC at the national level. Its poor track record and 2009 defeat nevertheless lend support to the notion that conditions within South Africa can support the model.[267]

In contrast to COPE and the IFP, the DA is currently well positioned to take advantage of the model. It won control of the Western Cape provincial government from the ANC in 2009. Thus, unlike any of the other opposition parties, it can use the next five years to develop a positive provincial track record. Since 2006, the DA has also controlled the City of Cape Town. The DA's president, Helen Zille, has received international recognition for her governance of the City of Cape Town, particularly her track record of dealing with corruption.[268] Since the 2009 election, Zille has served as the Premier of the Western Cape.

The DA appears to be convinced that it can mount a successful campaign against the ANC based on its subnational track records. The DA's 2009 election campaign and its ongoing campaigns regarding the upcoming 2010 local government election have relied heavily on Zille's positive track record as the mayor of the City of Cape Town. The party's current website has as one of its main taglines: "DA: A Strong Track Record in Government."[269] The website provides a report card of DA activities and policies in the City of Cape Town and other notable municipalities.[270] Perhaps most revealing of the DA's commitment to a bottom-up opposition strategy is the fact that Zille did not go to the National Assembly, but chose to remain in the Western Cape as Premier following the 2009 election. As noted above, she is the first party president to pass up a seat in the National Assembly for a position in provincial government.

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266. *We rescued KZN, says Ndebele*, IOL NEWS, Feb. 18, 2009, http://www.iol.co.za/news/politics/we-rescued-kzn-says-ndebele-1.435007 ("When the ANC took over the reins from the IFP the provincial government was in a near state of collapse. Sixty percent of schools had no power. Fifty percent of schools used pit latrines while most had no toilets at all.").

267. This point is particularly important because ethnic loyalties in voting undermine Myerson's model. The IFP drew its support from the Zulu people. However, it seems that these loyalties may be softening since the IFP was removed from office. An alternative theory, however, is that Zulu loyalties are not gone but divided. The ANC's president, Jacob Zuma, is Zulu.

268. *See supra* note 238.

269. *See* Democratic Alliance, http://www.da.org.za/ (last visited Feb. 28, 2011).

270. *See A Strong Track Record In Government*, Democratic Alliance, http://www.da.org.za/campaigns.htm?action=view-page&category=6592.

It is obviously difficult to determine empirically whether the DA's track record in the City of Cape Town caused its success in the 2009 Western Cape election. However, the DA has clearly adopted an opposition strategy built around strong subnational track records. The party seems to be staking its future on the viability of the model.

CONCLUSION

Federalism is not a panacea. It cannot cure all difficulties facing emerging democracies. It can, however, play a significant role in fostering political competition if certain legal parameters and political circumstances are met. The ANC has dominated South African politics since the country's first democratic election in 1994. Many citizens, onlookers, and commentators sense that legitimate political competition is necessary for South Africa's democracy to take the next step towards consolidation. South Africa's federal regime presents opposition parties with real opportunities to develop policy- and character-based track records, and the DA has already taken advantage of these opportunities to gain significant victories over the ANC in the Western Cape. What remains to be seen is whether the model's formal logic will translate to real and meaningful political competition between the DA and the ANC in the 2014 national election.