

Institutional Process, Agenda Setting, and the Development of Election Law on the Supreme Court

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The burgeoning commentary on the two important election law cases, Randall v. Sorrell and LULAC v. Perry, decided by the Roberts Court at the end of the 2005 Term, has paid relatively little attention to the procedural posture of the cases and the institutional processes by which they were reviewed by the Court. This Article explores such elements by focusing on the role of the unique procedural aspects of some election law cases, such as the use of three-judge district courts with direct appeals to the Supreme Court. These factors shed light on the Court's decision to decide the cases in the first instance, as well as on the eventual content of the decisions. The Article considers several examples of these institutional processes, including the impact of the direct review provisions established by Congress in some election law cases, the use of three-judge district courts, and the effect of these institutional factors on agenda setting in the Supreme Court and the impact on decision making in the lower courts. The Article concludes by situating these institutional processes in the ongoing debate over the propriety and level of the legalization of the law of democracy.

I. INTRODUCTION

The Supreme Court has not been reticent about deciding cases that address issues concerning the administration of democracy and elections in this country. By one measure the Court has decided an average of almost sixty cases dealing with election law each decade from 1961 to 2000.¹ This pattern has continued, at a perhaps slightly reduced pace, since 2001.² The burgeoning literature on these cases will be augmented by that addressing the

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¹ RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* 1–3 (2003).

² Richard L. Hasen, *No Exit? The Roberts Court and the Future of Election Law*, 57 S.C. L. REV. 669, 672 n.26 (2006) (listing twelve such cases decided by the Court from January 2001 to January 2006).

*Randall v. Sorrell*³ and *League of United Latin American Citizens (LULAC) v. Perry*⁴ cases decided by the Roberts Court at the close of the 2005 Term. Much of this commentary, however, pays relatively little attention to the effect of the procedural posture of the cases or to the institutional processes by which they were reviewed by the Court. This Article focuses on those factors, using *Randall* and *LULAC* as case studies. It explores the presumed reasons for the Court to exercise its discretion to hear these cases in the first place, as well as the possible impact of the institutional settings of the cases on the eventual content of the decisions.

The Article proceeds as follows: Part I considers the impact of the special provisions, occasionally created by Congress, to govern litigation of election law cases. In the two federal laws regulating campaign financing, at issue in *Buckley v. Valeo*⁵ and *McConnell v. Federal Election Commission*,⁶ Congress provided for special procedures for the cases to be litigated at the trial and appellate levels.⁷ Some of those procedures might account for elements of the substantive criticism leveled at the cases. No such procedures were at issue in *Randall*, which involved a state statute regulating campaign financing. But *Randall* is not free from its own procedural complications, and it is instructive to compare the three decisions with the procedural histories in mind. *Randall* also involved arguably counter-intuitive examples of litigant and amicus behavior.

Part II of the Article focuses on the role of three-judge district courts in election law cases, particularly those involving reapportionment and certain Voting Rights Act (VRA) cases. *LULAC* is one of many such cases that have come before the Supreme Court. Since 1981, for example, the Supreme Court has decided on the merits no less than thirty-eight cases involving election law that came on direct appeals from three-judge district courts.⁸

³ 126 S. Ct. 2479 (2006).

⁴ 126 S. Ct. 2594 (2006).

⁵ 424 U.S. 1 (1976) (per curiam).

⁶ 540 U.S. 93 (2003).

⁷ Supreme Court cases other than *Buckley* and *McConnell* illustrate the operation of special review procedures for election law-related legislation. See, e.g., *Cal. Med. Ass'n v. Fed. Election Comm'n*, 453 U.S. 182, 187–89 (1981); *Bread Political Action Comm. v. Fed. Election Comm'n*, 455 U.S. 577, 581–84 (1982); *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 486–89 (1985).

⁸ Rick Hasen has helpfully compiled lists of election law cases decided by the Supreme Court. See *HASEN*, *supra* note 1, at 172–74 (listing forty-four such cases from 1981 to 1990); *id.* at 174–75 (listing fifty-four such cases from 1991 to 2000); *Hasen*, *supra* note 2, at 672 n.26 (listing fourteen cases decided, or to be decided, from 2001 through the end of the 2005 Term). In those time periods, eight, twenty-one, and eight cases, respectively, were initially decided by three-judge district courts. To Hasen's list I add *Lance v. Dennis*, 126 S. Ct. 1198 (2006) (per curiam). See *infra* note 129. A list of

Part II addresses a number of issues peculiar to this type of litigation, focusing on *LULAC*. These include the staffing of the three-judge court; the frequent adjudication of VRA claims by these courts, despite a jurisdictional statute that only refers to reapportionment claims; the impact of a direct appeal to the Supreme Court being available from trial court decisions, bypassing the usual ladder of appeals that applies to other cases; and doctrinal problems raised by the frequent practice of the Court summarily affirming such cases, as opposed to setting them for briefing and oral argument and resolving them on the merits.

Part III of the Article addresses the complementary issues of how the Supreme Court sets its own agenda, and how election law decisions of the Court affect lower court adjudication. The Court was not forced to decide *Randall* and *LULAC* on the merits. It could have denied certiorari and summarily affirmed (or reversed) those cases, respectively. This Part draws on the literature addressing the Court's discretionary ability to set its own agenda to speculate on why the Court decided to decide these cases in particular, and election law cases in general. In a similar fashion, it considers how the widespread complaint that much election law jurisprudence is beset by a lack of doctrinal clarity affects lower court adjudication.

The Conclusion of the Article situates a focus on procedures and institutional processes in the larger debate over whether the law of democracy ought to be legalized, that is, whether and to what extent election law and administration ought to be subject to review by the courts. It suggests that wherever one comes out on this debate, greater attention should be paid to the *processes* of legalization in this area, that is, how election law cases are litigated in trial courts and are filtered up to and decided by the Supreme Court. The Article concludes in an evaluative mode by offering suggestions for reform.

II. CONGRESSIONAL DESIGN OF COURT REVIEW AND LITIGANT BEHAVIOR IN ELECTION LAW CASES

A. *The Buckley and McConnell Litigations*

The federal government has regulated the financing, and related aspects, of electoral campaigns for federal offices for much of the twentieth century.⁹

these cases can be found in the Appendix to this Article. The number would be even larger if one counted cases that were not decided after full briefing to and arguments before the Court, but rather were summarily affirmed. *See, e.g., Cox v. Larios*, 542 U.S. 947 (2004). Such cases can nevertheless play important roles in election law jurisprudence. *See infra* notes 107–17.

⁹ For a historical overview, see *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 115–19 (2003).

Of the several congressional statutes passed over that period, apparently none until 1974 provided any special procedures that litigants, and federal judges, must follow in adjudicating legal challenges to those laws. The normal course of events would be a suit filed before and a decision by a single U.S. district judge, followed by an appeal to the relevant U.S. court of appeals, followed by the filing of a writ of certiorari in the Supreme Court, which possesses the discretion to grant or deny the writ.

To be sure, prior to 1974 Congress had established a special scheme to govern adjudication of constitutional challenges to any federal statute. Early in the century, Congress passed legislation providing that constitutional challenges to state statutes, seeking injunctive relief, must be brought before a three-judge district court. The membership of the court consisted of the district judge before whom the case was originally assigned, and at least one appellate judge of the circuit in which suit was filed. The remaining member of the court was either a circuit or district judge. An appeal of a decision of that court would be filed directly with the Supreme Court, which ostensibly had to decide the case on the merits. It was thought that enjoining state statutes was an important decision that would be given greater authoritative weight by the public were there three deciding judges, rather than one. Likewise, it was thought that there was a public interest in promptly resolving such challenges, and one way to do that would be to provide a direct appeal to the Court, bypassing the courts of appeals.¹⁰ For similar reasons, Congress extended these procedures in 1937 to cover constitutional challenges to *federal* statutes.¹¹ Eventually, justices and judges came to conclude that the three-judge district court was unnecessary and unwieldy in these circumstances, and largely for those reasons this part of the legislation was repealed in 1976.¹² So prior to 1976, it was not unknown for constitutional challenges to federal election statutes to be heard before a three-judge district court.¹³

¹⁰ For a lengthier discussion of the historical genesis of the three-judge district court, see Michael E. Solimine, *The Three-Judge District Court in Voting Rights Litigation*, 30 U. MICH. J.L. REFORM 79, 83–85 (1996).

¹¹ This legislation was one of the “few remnants” of President Roosevelt’s Court-packing plan that actually made it into law. 17 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 4234, at 600 (2d ed. 1988). It was codified at 28 U.S.C. § 2284 (2000).

¹² WRIGHT ET AL., *supra* note 11, at 600–03. The jurisdiction of the three-judge district court was restricted after 1976 to reapportionment cases, as further addressed in Part II.

¹³ See, e.g., *Am. Civil Liberties Union v. Jennings*, 366 F. Supp. 1041, 1048–57 (D.D.C. 1973) (three-judge court) (adjudicating constitutional challenge to Titles I and III of the Federal Election Campaign Act of 1972, Pub. L. No. 92-255, 86 Stat. 3), *vacated as moot*, 422 U.S. 1030 (1975).

Congress in 1974 apparently provided for the first time a special review procedure for a challenge to a federal election statute. In the amendments that year to the Federal Election Campaign Act, Congress first required that a certain class of plaintiffs (namely, the Federal Election Commission (FEC), “the national committee of any political party,” or “any individual eligible to vote in any election for the office of the President”) could utilize these procedures to launch a constitutional challenge, or a request for a declaratory judgment or other relief, in a federal district court.¹⁴ The district court was to “immediately” certify all questions of constitutionality to the court of appeals for that circuit, which was directed to hear the matter en banc. The circuit court decision was to be reviewed by direct appeal to the Supreme Court, and the legislation admonished the courts of appeals and the Supreme Court to “advance on the docket and to expedite to the greatest possible extent the disposition” of the case.¹⁵ These procedures were followed in the litigation that culminated in *Buckley v. Valeo*,¹⁶ which (among other things) upheld contribution limits but struck down restrictions on expenditures.

A similar pattern is found in the *McConnell* litigation. That decision considered a constitutional challenge to the Bipartisan Campaign Reform Act (BCRA) of 2002,¹⁷ also known as the McCain-Feingold law. Section 403 of the BCRA provided that any constitutional challenge should be heard expeditiously before a three-judge district court in the District of Columbia, with a direct appeal available to the Supreme Court.¹⁸ Unlike the 1974 Amendments, the BCRA did not limit the types of plaintiffs who could utilize these provisions. However, it did state that members of Congress

¹⁴ Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 315(a), 88 Stat. 1285 (codified at 2 U.S.C. § 437h(a) (1976)). Potential plaintiffs who did not fall into these categories were “remitted to the usual remedies,” *Bread Political Action Comm. v. Fed. Election Comm’n*, 455 U.S. 577, 584 (1982), which presumably at the time would have been a three-judge district court, though recall that option in these circumstances was repealed in 1976.

¹⁵ Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 315(a), 88 Stat. 1285 (codified at 2 U.S.C. §§ 315(a)–(c) (1976)).

¹⁶ 424 U.S. 1, 1 (1976) (per curiam). For a description of the procedural course of the litigation, see *id.* at 7–11. The litigants in *Buckley* did not find these provisions to be entirely straightforward. Because it was not clear that section 315 governed *all* constitutional challenges to the 1974 Amendments, a three-judge district court was constituted to hear certain challenges, and that court heard the case simultaneously as the case was heard before the D.C. Circuit Court of Appeals. The three-judge court adopted the opinion of the D.C. Circuit, and a direct appeal from that decision was filed in the Supreme Court. *Id.* at 9 n.6.

¹⁷ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002).

¹⁸ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155 § 403(a), 116 Stat. 113 (2002) (codified at 2 U.S.C. § 437h(a) (Supp. 2004)).

could intervene in extant litigation or bring a challenge on their own.¹⁹ These provisions were followed in the litigation that culminated in *McConnell*,²⁰ in which a majority upheld most of the important provisions of the BCRA, which placed restrictions on soft money contributions and certain electioneering communications.

Why were special review provisions set out in these laws? The legislative history on these provisions is sparse,²¹ but the primary intent seems clear enough. Given their regulation of campaign finance for presidential and other federal office elections, the drafters thought that a prompt resolution of any legal challenge to these important statutes was desirable. This is apparent from the face of the statutes, both of which direct the federal judiciary to dispose of the case in a prompt manner, as well as from what little legislative history there is.²² Yet if promptness were the sole consideration, then *forbidding* any constitutional challenge in any court would have worked even better. The laws would not have undergone any constitutional challenge in court and could have gone into effect immediately. A less drastic alternative would have been to provide that *one* court, say, the district court with no appeal, or the Supreme Court in an original action, could hear a challenge. Apparently not willing to take such unusual and controversial steps, the drafters fell back on more modest changes to the normal process of litigation in federal court.

Perhaps there were other motivations as well. With the BCRA, for example, the drafters followed the extant provisions of the three-judge district court (and previously used, with respect to challenges to federal statutes). The use of three judges rather than one suggests that the BCRA drafters thought that three jurists were better than one when it came to the coherence and acceptance of what was apt to be a controversial holding. The controversy was generated by the lengthy discussion of First Amendment issues during the legislative process of the BCRA, a controversy mirrored in the drafting of the 1974 Amendments. It is not unknown for special court

¹⁹ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155 § 403(b)-(c), 116 Stat. 114 (2002) (codified at 2 U.S.C. § 437h(b)-(c) (Supp. 2004)).

²⁰ *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 132–33 (2003) (describing the litigation).

²¹ *Bread Political Action Comm. v. Fed. Election Comm'n*, 455 U.S. 577, 581–83 (1982) (making this point with respect to the 1974 Amendments).

²² *Id.* at 583 (discussing the intent of 1974 Amendments); Joshua Panas, Note, *Out of Control?: Congressional Power to Shape Judicial Review of New Legislation*, 1 GEO. J.L. & PUB. POL'Y 151, 163–66 (2002) (discussing legislative history of these provisions in the 1974 Amendments and the BCRA). Most of the history is taken from statements made on the floor of Congress. *Id.* For a critical discussion of similar provisions in other federal statutes, see William F. Ryan, *Rush to Judgment: A Constitutional Analysis of Time Limits on Judicial Decisions*, 77 B.U. L. REV. 761 (1997).

provisions in federal legislation to be shaped by anticipated litigation challenging or involving the legislation. Supporters, or critics, of legislation can in various ways use particularized judicial review provisions to attempt to shape preferred policy outcomes with respect to application of the statute.²³ Both supporters and critics of the BCRA in Congress, for example, anticipated (some more eagerly than others) the inevitable constitutional challenge.²⁴ Perhaps the supporters thought a federal district court in the District of Columbia would, all things being equal, possess more legal acumen and political sophistication than federal judges elsewhere, and be more likely to uphold the law.²⁵ Critics of the law might have anticipated that a majority of the Court would strike it down, and so they would have wished for a process for the Court to quickly achieve that result. Indeed, some public supporters of the BCRA may have secretly wished for a successful court challenge, and perhaps the reverse was true as well. Then, too, perhaps some members of Congress were genuinely conflicted by the serious and difficult constitutional problems raised, and the special review provisions accentuated the passing off of this problem to the judicial branch. So for various reasons

²³ For general discussions of this phenomenon in Congress, see CHARLES R. SHIPAN, *DESIGNING JUDICIAL REVIEW: INTEREST GROUPS, CONGRESS, AND COMMUNICATIONS POLICY* (1997); Charles R. Shipan, *The Legislative Design of Judicial Review: A Formal Analysis*, 12 J. THEORETICAL POL. 269 (2000); Joseph L. Smith, *Judicial Procedures as Instruments of Political Control: Congress's Strategic Use of Citizen Suits*, 31 LEGIS. STUD. Q. 283 (2006); Pablo T. Spiller & Emerson H. Tiller, *Decision Costs and the Strategic Design of Administrative Process and Judicial Review*, 26 J. LEGAL STUD. 347 (1997); Keith E. Whittington, "Interpose Your Friendly Hand": *Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583 (2005). For examples of legislation in which Congress provided for special review provisions for expected constitutional challenges, see Neal Devins, *Is Judicial Policymaking Countermajoritarian?*, in *MAKING POLICY, MAKING LAW: AN INTERBRANCH PERSPECTIVE* 189, 197 (Mark C. Miller & Jeb Barnes eds., 2004). All members of Congress are, of course, not of one mind on this issue. At any given time, various members will have different views on how much or little they should exercise independent judgments on constitutional issues on proposed legislation, as opposed to deferring such issues to the courts. For a good overview, see Bruce G. Peabody, *Congressional Attitudes Toward Constitutional Interpretation*, in *CONGRESS AND THE CONSTITUTION* 39 (Neal Devins & Keith E. Whittington eds., 2005).

²⁴ Panas, *supra* note 22, at 164–66.

²⁵ Consider that the D.C. Circuit in *Buckley* had upheld most of the law, a holding reversed, in part, by the Supreme Court. *Buckley v. Valeo*, 424 U.S. 1, 10–11 n.7 (1976) (per curiam) (describing holdings of the D.C. Circuit). Judicial challenges to various federal administrative actions often are filed in the D.C. Circuit, either because Congress vests exclusive jurisdiction there, e.g., Jacob E. Gersen & Adrian Vermeule, *Chevron as a Voting Rule*, 116 YALE L.J. 676, 712 n.69 (2007) (giving examples) or due to venue rules. Cass R. Sunstein, *Participation, Public Law, and Venue Reform*, 49 U. CHI. L. REV. 976, 979 (1982).

the existence of special review provisions may have been an implicit part of the legislative deal that culminated in passage of the BCRA.²⁶

Additional evidence for the strategic drafting of judicial review provisions can be found in the persons who were designated as being eligible to use those provisions. Recall that the 1974 Amendments permitted the FEC, the national committee of a political party, and anyone eligible to vote for President, to bring suit under the special procedures. Those are broad categories, but not of unlimited breadth.²⁷ Perhaps the drafters of the Amendments wished to remove any doubt regarding the standing of individuals or entities to challenge the law.²⁸ Yet, the very existence of the

²⁶ For further discussion of the possible strategic behavior of the drafters of the BCRA, see Richard L. Hasen, *Bad Legislative Intent*, 2006 WIS. L. REV. 843, 866–69. To be sure, there are counterexamples of Congress in similar circumstances not creating special review provisions. In the discussions in Congress and elsewhere that accompanied the reauthorization of the expiring provisions of the 1982 Voting Rights Act (VRA), there was considerable controversy over whether, in light of recent Supreme Court decisions, Congress had the constitutional authority to reenact the preclearance provisions which applied to only certain parts of the country. See, e.g., Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane*, 66 OHIO ST. L.J. 177 (2005). The legislative history recognizes and discusses the potential constitutional issues. See H.R. REP. NO. 109-478, at 54–65, 92–94 (2006), as reprinted in 2006 U.S.C.C.A.N. 618, 654–66, 677–79. The renewal legislation that passed, Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006), contained no special review provisions for an expected constitutional challenge. In the absence of any such special provision, it would appear under existing provisions of the VRA that such a challenge, by a political subdivision subject to the preclearance process, would need to be brought before a three-judge district court in the District of Columbia. See 42 U.S.C. § 1973b (2000). Such a challenge was filed not long after passage of the Act, and a three-judge district court was convened. Complaint, *Nw. Austin Mun. Util. Dist. No. One v. Gonzales*, No. 1:06-cv-1384 (D.D.C. Aug. 4, 2006) (on file with author). Given these existing provisions, perhaps the drafters of the VRA renewal in 2006 felt no additional attention to that issue was necessary. Cf. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (permitting original action to be filed in the Supreme Court to challenge the constitutionality of various provisions of the 1965 Voting Rights Act).

²⁷ The categories did not include the trade associations that brought suit in the *Bread* litigation. *Bread*, 455 U.S. at 578 (describing those parties).

²⁸ *Id.* at 583–84 (discussing but finding it unnecessary to resolve whether this was the intent). Congress is thought to have statutory authority, within limits, to provide that persons can have standing to bring suit in an Article III court, where there might be doubts that those persons would have standing to sue in the absence of the statute. For discussion, see RICHARD H. FALLON, JR., ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 143–56 (5th ed. 2003). Whether members of Congress, and other lawmakers, had standing, by virtue of their office alone, to challenge official action has been particularly unclear. *Id.* at 165–67.

provision suggests that (some of) the drafters and their supporters wished to facilitate a court challenge. A wide range of plaintiffs who fell under the second and third categories brought suit in *Buckley*, including Senator James Buckley, who had opposed the law.²⁹ A similar story is told by the history of the BCRA. Initial drafts of that legislation addressed who might bring suit,³⁰ but the final version did not expressly address the issue, with the exception of stating that members of Congress could initiate a suit or intervene in an extant suit. The exception might be driven by the uncertainty of whether members of Congress would have standing, in the absence of an enabling statute, to bring such a suit.³¹ But again, it facilitated the anticipated court challenge to the legislation. Eleven separate suits were brought and later consolidated, including those led by Senator Mitch McConnell and Representative Ron Paul, both of whom had opposed the BCRA.³²

How effective were these provisions in expediting and otherwise facilitating the litigation process? First, consider the *Buckley* litigation. There plaintiffs filed suit in U.S. District Court on January 2, 1975, the first day after the 1974 Amendments went into effect.³³ Moving promptly as requested by Congress, discovery and briefing took place, the case was argued before the D.C. Circuit on June 13, and that court handed down a decision on August 29, taking up over 100 pages in the official reports.³⁴ Also moving promptly after appeals were filed, the Supreme Court held oral argument on November 10, and rendered 294 pages worth of opinions in the U.S. Reports on January 10, 1976.³⁵ Because the federal judiciary took only a little over a year to litigate this complex case, it would seem easy to conclude that, if nothing else, the case was expeditiously resolved.

²⁹ *Buckley*, 424 U.S. at 7–8 (describing plaintiffs). Perhaps these provisions had the intended legal effect, for the Supreme Court appeared to have some skepticism regarding the justiciability of the case. The Court stated that the complaint “demonstrate[d] that at least some of the” plaintiffs had standing. *Id.* at 12.

³⁰ *Panas*, *supra* note 22, at 153–54, 157–58.

³¹ *Id.* at 159–61; *supra* note 28 and accompanying text.

³² The joint opinion in *McConnell* by Justices Stevens and O’Connor did not discuss standing. The separate opinion by Chief Justice Rehnquist for the Court found that McConnell, Paul, and certain other plaintiffs lacked standing to challenge certain provisions of the BCRA. 540 U.S. at 225–26. In a separate opinion, Justice Stevens, joined by Justices Ginsburg and Breyer, dissented on this point. *Id.* at 363–64.

³³ This and other aspects of the litigation history of the lower court litigation are found in *Buckley v. Valeo*, 519 F.2d 821, 901–04 (D.C. Cir. 1975) (en banc).

³⁴ *Id.* at 821–934.

³⁵ That number includes a ninety-page appendix to the per curiam opinion, reprinting the contested provisions of the 1974 Amendments. *Buckley*, 424 U.S. at 144–235.

Perhaps, though, the speedy resolution came at a high cost. As persuasively demonstrated by Professor Rick Hasen, “*Buckley*’s drafting history tells a story of the pitfalls of rushed drafting by committee, particularly in a case raising complex issues of constitutional law and statutory interpretation where the Justices did not all have well-formed ideas in advance about how to resolve these complex issues.”³⁶ The Justices self-consciously took seriously the mandate to expedite their resolution of the case,³⁷ and while it would be unfair to characterize *Buckley* as a rushed job (and Hasen does not), certain aspects of the opinion were not well thought out,³⁸ and some of that might be attributable to the unusual procedural posture of the case.³⁹

Next, consider the effect of the special review provisions in *McConnell*. Like *Buckley*, that case started rapidly. Suit was filed on March 27, 2002, by Senator McConnell and others, only hours after the President had signed the legislation. But proceedings moved slower after that, due in large part to the desire of counsel to engage in discovery, and that of the three-judge panel to develop an adequate factual record. Oral argument was heard on December 4 and 5, and the court issued a lengthy opinion on May 1, 2003.⁴⁰ Appeals were promptly lodged in the Supreme Court, which established an expedited schedule for briefing. Oral argument was heard on September 8, before the normal start of the Court’s October Term, and a lengthy opinion, taking up over 270 pages in the U.S. Reports,⁴¹ was issued on December 10, 2003.

³⁶ Richard L. Hasen, *The Untold Drafting History of Buckley v. Valeo*, 2 ELECTION L.J. 241, 242 (2003). Professor Hasen draws on an extensive analysis of Justice Lewis Powell’s papers on the case.

³⁷ *Id.* at 248.

³⁸ The most prominent example was the brief statement by the majority in *Buckley* that the statutory restriction on third parties making soft-money expenditures against or on behalf of a candidate only applied when the ad used certain express language in that regard, the much-discussed “magic words.” *Buckley*, 424 U.S. at 44, 44 n.52. That statement came late in the drafting process and arguably the Justices did not appreciate the difficulties the language would cause. Hasen, *supra* note 36, at 242, 250–51. The Court would eventually revisit the issue in *McConnell v. Federal Election Commission*, 540 U.S. 93, 189–94 (2003).

³⁹ It has been frequently argued that *Buckley* was decided in an abstract context, without the full benefit of a record on the likely or actual effects of the 1974 Amendments. To the extent that charge is true, some of it can be attributed to the expedited nature of the review provisions. Panas, *supra* note 22, at 167–68.

⁴⁰ A summary of the procedural history of the litigation before the three-judge district court is found at *McConnell v. Federal Election Commission*, 251 F. Supp. 2d 176, 206–09 (D.D.C. 2003) (per curiam) (three-judge court). The per curiam opinion and the separate opinions of each of the three judges together fill over 800 published pages. *Id.* at 176–919.

⁴¹ *McConnell*, 540 U.S. at 93–365.

The *McConnell* litigation thus took over twenty months to conclude, as opposed to the thirteen months of *Buckley*. In each case, the Supreme Court took about the same amount of time to hear the case and render a decision. The longer time for *McConnell* can be attributed to proceedings in the district court. On that score, there was acrimony, unusually expressed in a public way, among the three judges. It begins with a *per curiam* opinion, signed by U.S. District Judges Colleen Kollar-Kotelly and Richard J. Leon, but not by Circuit Judge Karen LeCraft Henderson. That opinion included extensive findings of fact and legal analysis. Separate opinions by each judge, concurring in part and dissenting in part, followed. Judge Henderson was highly critical of the time it took to produce an opinion, compared the delay unfavorably to what she considered the far more expeditious treatment by the lower courts in *Buckley*, and appeared to lay most of the blame on the other judges.⁴² The judges on the *per curiam* opinion took issue with the criticisms, arguing the extra time was taken up in needed discovery and court review of a voluminous record, both of which, they asserted, were not characteristic of the *Buckley* litigation.⁴³ Given the length, complexity, and fractured nature of the opinions, it is no shock that “not any one opinion is fully dispositive,”⁴⁴ and among other things each opinion has its own lengthy findings of fact.⁴⁵

The controversial nature of the lower court proceedings in *McConnell* is not that unusual for three-judge district court litigation. The usual model of litigation in American jurisprudence has a single trial judge making findings of fact in the absence of a jury, with one or two layers of appellate review by multimember courts afterwards. Requiring three jurists to make and agree upon such findings, especially in a very complex case, can produce the sort of disagreement and awkwardness found in *McConnell*. Nor can the sniping of the judges go unnoticed. Perhaps it is due in part to the fact that this amalgam of judges normally does not sit together. District judges rarely decide cases together, and trial judges and appellate judges usually act separately. Moreover, trial judges presumably have considerable experience managing discovery, making findings of fact, and engaging in a myriad of tasks relevant to litigation at the trial court level, and rarely act in an appellate capacity at that level. The reverse would be true for appellate judges. While all of the federal judges in the District of Columbia share close

⁴² *McConnell*, 251 F. Supp. 2d at 266–67 n.1 (Henderson, J., concurring in part and dissenting in part).

⁴³ *Id.* at 207 n.36, 209 n.41 (*per curiam*).

⁴⁴ *Id.* at 266 (*per curiam*).

⁴⁵ *Id.* at 220–33 (*per curiam*); *id.* at 296–356 (Henderson, J., concurring & dissenting); *id.* at 438–588 (Kollar-Kotelly, J., concurring & dissenting); *id.* at 813–918 (opinion of Leon, J.).

quarters, it does not necessarily follow that they are comfortable in engaging in joint decision making. It may not be entirely coincidental that the D.C. Circuit, unlike most of the other circuits, does not regularly have district judges sit by designation on the circuit.⁴⁶

Perhaps all of this controversy would have been worth it had the end result been celebrated. But it was not. The Supreme Court moved things along, though in the end it produced fractured opinions as well.⁴⁷ The end result has not received glowing reviews.⁴⁸ In the lower court, Judge Henderson complained that the case had moved along too slowly. Perhaps *McConnell* and *Buckley* moved too quickly, and the laudable desire of Congress to expedite these cases, and the admirable following of that mandate by a coordinate branch of government, contributed to the perceived doctrinal deficiencies of those cases.⁴⁹ In a larger sense, perhaps expedited

⁴⁶ For further discussion of the points in this paragraph, see Solimine, *supra* note 10, at 116–18. For documentation of the D.C. Circuit not having its district judges sit by designation on appellate panels, see Richard B. Saphire & Michael E. Solimine, *Diluting Justice on Appeal? An Examination of the Use of District Judges Sitting by Designation on the United States Courts of Appeals*, 28 U. MICH. J.L. REFORM 351, 366–67 (1995).

Another reason that might account for the lack of harmony in *McConnell* was suggested by Judge Tamm in the lower court opinion in *Buckley*. He mentioned, albeit in passing, that under the special review provisions the D.C. Circuit served “primarily as the jurisdictional prerequisite to ultimate Supreme Court disposition.” *Buckley*, 519 F.2d at 921 (Tamm, J., concurring in part and dissenting in part). This might be read to suggest that the efforts of the lower court judges were somewhat irrelevant, since the Justices were definitely going to review the case. Knowing this *ex ante*, lower court judges might be motivated not to take their collegial responsibilities seriously. This probably reads too much into Judge Tamm’s comments, and I find it difficult to believe that any federal judge, when faced with an important case like this one, would shirk her responsibilities, even when Supreme Court review was a certainty. That said, I cannot entirely dismiss the possibility that the fear of near-irrelevancy is found in the minds of able lower court judges in direct review cases, when it is obvious that the Supreme Court will review the case on the merits.

⁴⁷ Though the opinions were not as fractured, or as long, as the opinion in the district court. A joint opinion by Justices Stevens and O’Connor, and separate opinions authored by Chief Justice Rehnquist and Justice Breyer, on different challenges to the BCRA, spoke for majorities of the Court. There were also five additional opinions, concurring and dissenting in part.

⁴⁸ See, e.g., Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503, 515 (2004) (The joint opinion by Stevens and O’Connor “was mechanical and unreflective. Even ardent supporters of reform were taken aback by its sloppiness. Many commentators simply dismiss *McConnell* as an example of poor judicial craftsmanship.”) (footnotes omitted).

⁴⁹ See Allison R. Hayward, *The Per Curiam Opinion of Steel: Buckley v. Valeo as Superprecedent? Clues from Wisconsin and Vermont*, 2005–2006 CATO SUP. CT. REV. 195, 206–08 (2006) (discussing whether additional time would have aided the Court in announcing a better received doctrine in *McConnell* and other cases).

review provisions rush election law cases up to the Court at a faster pace than is optimal. In this regard, consider the less publicized sequel to *McConnell* in *Wisconsin Right to Life v. Federal Election Commission*.⁵⁰ There, litigants used the special review provisions to challenge another aspect of the BCRA. The primarily legal issue was whether a footnote⁵¹ in the Supreme Court's decision in *McConnell* had left open the possibility of an as-applied, as opposed to a facial, constitutional challenge to a certain part of the BCRA. A three-judge district court answered in the negative. The Supreme Court heard oral arguments and decided the case a mere six days later, holding in a brief opinion that an as-applied challenge was permissible, and remanded for further proceedings.⁵² Knowing that other challenges to various BCRA cases, under the special review procedures, were likely in the pipeline,⁵³ perhaps the Court had BCRA-fatigue, and was happy to swiftly dispose of the case. Or perhaps the Court preferred to grapple with the potentially difficult issues on the merits via as-applied challenges, with a more robust record from the lower court, as opposed to a facial challenge. In the end, we cannot conclude that the expedited decision making demanded by the special review provisions led to suboptimal results, but we should not rule out the reverse either.

B. *The Randall v. Sorrell Litigation*

At first blush, the procedural posture of *Randall v. Sorrell*⁵⁴ may seem to have little in common with *Buckley* or *McConnell*. *Randall* was a constitutional challenge to a Vermont statute that placed limits on both campaign contributions and expenditures to elections to state office there. A constitutional challenge was brought through the normal process: first in federal district court in Vermont,⁵⁵ then on appeal to the Second Circuit,⁵⁶

⁵⁰ 126 S. Ct. 1016 (2006) (per curiam).

⁵¹ *McConnell v. Fed'l Election Comm'n*, 540 U.S. 93, 190 n.73 (2003) (joint opinion of Stevens & O'Connor, JJ.).

⁵² *Wis. Right to Life*, 126 S. Ct. at 1018. The litigation returned to the Supreme Court's docket in the 2006 Term. On remand the district court held for the plaintiff, *see Wis. Right to Life v. Fed. Election Comm'n*, 466 F. Supp. 2d 195 (D.D.C. 2006) (three-judge court), and upon appeal the Court granted review. 127 S. Ct. 1145 (2007).

⁵³ *E.g.*, *Christian Civic League of Maine v. Fed. Election Comm'n*, 433 F. Supp. 2d 81 (D.D.C. 2006) (three-judge court) (facial challenge, denying motion for preliminary injunction), *appeal docketed*, No. 05-1447 (U.S. May 11, 2006), *motion to expedite appeal denied*, 126 S. Ct. 2062, *dismissed as moot*, 127 S. Ct. 336 (2006); *Davis v. Fed. Election Comm'n*, Case No. 06-1185 (D.D.C. 2006) (three-judge court) (complaint filed on June 28, 2006) (facial challenge) (on file with author).

⁵⁴ 126 S. Ct. 2479 (2006).

⁵⁵ *Landell v. Sorrell*, 118 F. Supp. 2d 459, 462 (D. Vt. 2000).

and then on a writ of certiorari in the U.S. Supreme Court. Rapidity was not an issue. Indeed, the opposite was true. Suits challenging the law, later consolidated, were initiated in 1999, not long after the law went into effect, and the district judge issued a decision upholding some challenges, and denying others, in August of 2000.⁵⁷ The normal appellate process ensued, and in 2004, a split Second Circuit panel upheld the entirety of the statute, though it remanded for further proceedings on the issue of whether the expenditure limits were narrowly tailored to serve the interests of preventing corruption or the appearance of corruption.⁵⁸ Petitions for rehearing en banc were filed and were denied the following year, accompanied by unusually lengthy opinions concurring in or dissenting from that denial.⁵⁹ The Supreme Court granted a writ of certiorari later that year and issued its decision in June of 2006.

While outwardly this process was different from the special and direct review procedures that governed in *Buckley* and *McConnell*, there are similarities as well. For one, there was a sense that the Supreme Court was highly likely to agree to review the case. The drafters and supporters of the Vermont statute unapologetically viewed it as a direct challenge to the regime of *Buckley* and its progeny, which put limits on the regulation of campaign expenditures.⁶⁰ When the Second Circuit denied the challenge and upheld the law, it seemed very likely that the Court would exercise its discretion to review the case on certiorari. The issues involved were high profile and did not lack for publicity. A split panel decision and the publication of opinions concurring in or dissenting from denials for rehearing en banc have been associated with a higher likelihood of a certiorari petition being granted. The controversy generated by such opinions might encourage lawyers to seek Supreme Court review, and such opinions may serve as a signal to the Supreme Court that the case is an important one.⁶¹ So, this particular case had the flavor of one governed by a direct review statute.

⁵⁶ Landell v. Sorrell, 382 F.3d 91, 105 (2d Cir. 2002).

⁵⁷ Landell v. Sorrell, 118 F. Supp. 2d 459 (D.Vt. 2000).

⁵⁸ Landell v. Sorrell, 382 F.3d 91 (2d Cir. 2004). Judge Ralph Winter filed a lengthy dissent. *Id.* at 149–210 (Winter, J., dissenting). The same panel had rendered a decision in 2002, but it was withdrawn when a motion for rehearing en banc was filed. *Id.* at 96–97. The decision two years later took into account the intervening decision of *McConnell*.

⁵⁹ See generally Landell v. Sorrell, 382 F.3d 91 (2d Cir. 2005).

⁶⁰ Hayward, *supra* note 49, at 201 n.31 (discussing intent of drafters of Vermont law).

⁶¹ Michael E. Solimine, *Due Process and En Banc Decisionmaking*, 48 ARIZ. L. REV. 326, 335, 335 n.60 (2006). The opinions in the Second Circuit were particularly noteworthy, because that Circuit has a long tradition of rarely sitting en banc, and rarely generates opinions accompanying a denial of rehearing en banc. *Id.* at 332; see also Michael E. Solimine, *Ideology and En Banc Review*, 67 N.C. L. REV. 29, 57 (1988).

Indeed, both the losers *and* winners before the Second Circuit supported certiorari in the Supreme Court.⁶² Moreover, thirteen state attorneys general and others who supported the Vermont law filed briefs recommending that the Court take the case.⁶³ These are curious moves by the supporters, in light of the probability of reversal of the lower courts, and of the fact that the Second Circuit had ordered a remand on an issue, which, if followed at that point, would have postponed resolution of the entire case to a later—and perhaps better situated—day.⁶⁴ The point was not lost on the three dissenting Justices, who argued, among other things, that the Court's disposition was "premature," and that the Second Circuit's remand order should have been allowed to proceed to produce a more robust record in which to consider the constitutional issues.⁶⁵

This survey leads to several conclusions. Providing for direct review of a lower court decision to the Supreme Court is no panacea. Cases litigated under such statutes do not always lead to swift results, as intended by the drafters. Whether they do or not, there remain problems of developing an adequate record and affording careful consideration by lower court judges and Supreme Court Justices to what are often complex and politically

⁶² *Randall v. Sorrell*, 126 S. Ct. 2479, 2487 (2006).

⁶³ National Voting Rights Institute, *Broad Coalition Urges U.S. Supreme Court to Review Campaign Spending Limits Case* (news release, June 15, 2005), available at http://www.nvri.org/press/spending_limits_release_061505.html. The filing of amicus briefs in the Supreme Court by state attorneys general (SAG), alone or in combination, is now common. For an overview of this phenomenon, see Michael E. Solimine, *Formalism, Pragmatism, and the Conservative Critique of the Eleventh Amendment*, 101 MICH. L. REV. 1463, 1475–79 (2003) (essay review). Twenty-five SAG filed various briefs in *McConnell* in the Supreme Court. *McConnell*, 540 U.S. at 113 n.†. In contrast, only three amicus briefs were filed in the Supreme Court in *Buckley*, none by SAG. 424 U.S. at 6 n.†. Part of the explanation for the difference is the greater number of amicus briefs filed in recent years in the Supreme Court in all cases, see Ryan J. Owens & Lee Epstein, *Amici Curiae During the Rehnquist Court*, 89 JUDICATURE 134 (2005), and the recent increased activism of SAG, see Solimine, *supra* note 62. Whether such briefs have any effect on the Supreme Court, at the certiorari stage or the merits stage, is another matter. For discussion of that point, see Paul M. Collins, Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 LAW & SOC'Y REV. 807 (2004); see also Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743 (2000). In *Randall*, the briefs filed by SAG did not appear to carry great weight, as they were only mentioned in a dissenting opinion. 126 S. Ct. at 2509–10 (Stevens, J., dissenting).

⁶⁴ Richard H. Hasen, *The Newer Incoherence: Competition, Social Science, and Balancing in Campaign Finance Law after Randall v. Sorrell*, 68 OHIO ST. L.J. 849, 862 n.62 (2007).

⁶⁵ *Randall*, 126 S. Ct. at 2512 (Souter, J., joined by Ginsburg, J., and in part by Stevens, J., dissenting).

charged cases. The absence of a direct review statute, on the other hand, does not automatically mean that rapid litigation is impossible,⁶⁶ or that an adequate record will be developed.

II. THE PROMISE AND PERILS OF THE THREE-JUDGE DISTRICT COURT IN ELECTION LAW CASES

A. *The Structure and Functions of the Three-Judge District Court*

In contrast to the recent special review provisions at issue in the *Buckley* and *McConnell* litigation, the three-judge district court has a long history in adjudicating relatively large numbers of election law cases. The court was statutorily created in 1910, largely in reaction to the well-known Supreme Court case of *Ex parte Young*,⁶⁷ which declared unconstitutional Progressive Era legislation regulating railroads, and affirmed the issuance of an injunction against the enforcement of the legislation by state officials. The intent of Congress was that it was better to obtain the input of three federal judges, rather than just one, when considering whether to issue injunctions regarding the presumptively important issue of the constitutionality of statewide legislation. To enable the case to be promptly resolved, the legislation provided that a direct appeal should lie to the Supreme Court. The

⁶⁶ Consider examples of how swiftly recent high profile election law litigation was concluded in the absence of direct review statutes. *See, e.g.*, *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam) (litigated challenge to counting of votes in Florida for 2000 Presidential election); *Tex. Democratic Party v. Benkiser*, No. A-06-CA-459-SS, 2006 U.S. Dist. LEXIS 47115 (W.D. Tex. July 6, 2006) (held improper for Tom DeLay to be declared ineligible for reelection to seat in Congress, after he had resigned), *aff'd*, 459 F.3d 582 (5th Cir. 2006). Indeed, much election law litigation, in federal and state courts, must take place rapidly to be resolved before an upcoming election. *See* Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 991-99 (2005) (discussing such litigation). Such rapidity can be regarded as preferable to post-election litigation, since it can be the only way for an aggrieved plaintiff to obtain an effective remedy, *id.* at 991-92, while “[p]utting judges in the position of deciding election law questions when the winner and loser of its decision will be obvious can undermine the legitimacy of the courts.” *Id.* at 993 (footnote omitted). On the other hand, the “absence of a complete record . . . and the press of time,” *id.* at 999, can lead to suboptimal judicial consideration of pre-election cases. Perhaps *Buckley* is an example of those costs. *See Purcell v. Gonzalez*, 127 S. Ct. 5, 8 (2006) (per curiam) (reversing circuit court reversal of district court denial of injunction in pre-election suit, in part “[g]iven the imminence of the election and the inadequate time to resolve . . . factual dispute[s]”).

⁶⁷ 209 U.S. 123 (1908). The case was and still is significant, since it in effect creates an exception to the Eleventh Amendment, which, as interpreted by the Supreme Court in *Hans v. Louisiana*, 134 U.S. 1 (1890), and its progeny, prevents States from being sued in federal court for constitutional violations. Solimine, *supra* note 10, at 83-84.

coverage of the court was eventually expanded to include challenges to federal legislation.⁶⁸ By the modern civil rights era, three-judge district courts came to hear over three hundred cases a year.⁶⁹ In the wake of *Baker v. Carr*⁷⁰ in 1962, many such courts were convened to consider suits involving the reapportionment of state legislatures or of congressional districts from that state.⁷¹ By the 1970s, up to one-fourth of the cases decided on the merits by the Supreme Court consisted of direct appeals from such courts, involving both reapportionment and many other types of constitutional cases.⁷²

Opposition to the three-judge court eventually arose in the federal judiciary itself, in part based on the inconvenience of convening such courts at the trial level, and in part due to the burden direct appeals placed on the Supreme Court's docket. These concerns were brought to the attention of Congress, which responded in 1976 by passing legislation⁷³ that limited the jurisdiction of the court to constitutional challenges to the apportionment of state legislatures or Congressional districts.⁷⁴ Even limited in that way, such courts still decide significant numbers of reapportionment cases each decade, some of which find their way to the Supreme Court, with *League of United Latin American Citizens (LULAC) v. Perry*⁷⁵ being an example. Both before

⁶⁸ Solimine, *supra* note 10, at 83–84.

⁶⁹ *Id.* at 137 (tbl.1) (listing hearings before three-judge district courts in the years from 1964 to 1994).

⁷⁰ 369 U.S. 186 (1962) (holding claim of malapportionment is cognizable under the Equal Protection Clause and is not a nonjusticiable political question).

⁷¹ Solimine, *supra* note 10, at 91–93 (discussing reapportionment litigation from the 1960s to the 1990s); see also Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 646 (2002) (noting the “huge amount of the redistricting in the United States [that] finds its way into the courts”).

⁷² Solimine, *supra* note 10, at 85, 138.

⁷³ Pub. L. No. 94-381, 90 Stat. 1119 (1976), codified in pertinent part at 28 U.S.C. § 2284 (2000). Congress still occasionally enacts legislation, outside of the election law context, that requires that any constitutional challenge to the legislation take place before a three-judge district court. For examples, see Solimine, *supra* note 10, at 89–90 n.69.

⁷⁴ Solimine, *supra* note 10, at 85–89. The Judicial Conference of the United States, and the American Law Institute, came to support either the elimination of the three-judge district court, or significant curtailment of the jurisdiction of the court. The legislative record indicates that Congress left the court intact to handle reapportionment cases, because of their “importance,” and because “they have never constituted a large number of cases.” *Id.* at 88 (quoting S. REP. NO. 94-204, at 9 (1975)). The only significant opposition to the limit came from the NAACP, which argued that three federal judges were sometimes necessary in civil rights cases to overcome the hostility of a single district judge. *Id.* at 88–89. See also WRIGHT, *supra* note 11, § 4235 at 604–05 (discussing the 1976 amendment).

⁷⁵ 126 S. Ct. 2594 (2006).

and after the 1976 legislation, the 1965 Voting Rights Act (VRA) permitted political subdivisions covered by the preclearance requirements to bring an action before a three-judge district court in the District of Columbia, authorizing that court to issue a declaratory judgment regarding whether a change in election procedure is consistent with the VRA.⁷⁶ Preclearance

⁷⁶ 42 U.S.C. § 1973b-c (2000). For discussion of preclearance litigation, see Peyton McCrary, et al., *The End of Preclearance As We Know It: How the Supreme Court Transformed Section 5 of the Voting Rights Act*, 11 MICH. J. RACE & L. 275, 280-83 (2006); Solimine, *supra* note 10, at 90-91. It is not entirely clear why a three-judge district court in the District of Columbia was designated to hear these declaratory judgment actions. The Supreme Court observed that the federalism concerns raised by local governments needing the permission of the national government to change election procedures suggested that a special court should be convened to resolve such an action, *see* Allen v. State Bd. of Elections, 393 U.S. 544, 562-63 (1969), a rationale similar to that which motivated Congress in responding to *Ex parte Young*. The Court acknowledged the possible burdens on local governments in litigating such actions in the District of Columbia, *id.* at 559, but the Court, in earlier upholding the constitutionality of certain provisions of the 1965 VRA, found the restriction of district court litigation to the District of Columbia to be within Congress' power to regulate the jurisdiction of federal courts. *South Carolina v. Katzenbach*, 383 U.S. 301, 331 (1966). Some opponents of the 1965 VRA criticized the restriction, e.g., H.R. Rep. No. 89-439 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2488 (individual views of Rep. Willis) (restriction to the District of Columbia "seems a gratuitous affront to some very fine Federal judges" outside of the District); *Katzenbach*, 383 U.S. at 359 (Black, J., dissenting) (Restriction forces "[s]tates to entreat federal authorities in far-away places for approval of local laws."). The limit to the District was apparently driven, in part, by traditional requirements that the proper venue for actions against certain federal officials would be in the District, *Katzenbach*, 383 U.S. at 331-32, and perhaps by the presumed expertise and non-parochialism of federal judges in the District. *See* ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 16-21 (1987) (discussing reasons for and opposition to the exclusive jurisdiction provisions of § 5 when passed in 1965); 15 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE §§ 3815-3816 (2d ed. 1986) (discussing changes in venue requirements in suits against federal officers). Efforts made during the 1970 renewal of § 5 of the VRA to extend venue of these actions to local U.S. district courts were rejected, *see* DAVID J. GARROW, PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965 194-96 (1978), and the issue appears not to have been expressly revisited since then. *See* THERNSTROM, *supra*, at 83-95 (discussing possible changes to venue provisions of Section 5 in lead up to the 1982 amendment); Laughlin McDonald, *The 1982 Extension of Section 5 of the Voting Rights Act of 1965: The Continued Need for Preclearance*, 51 TENN. L. REV. 1, 38 (1983) (observing that while amending the VRA in 1970, 1980, and 1982, Congress continued to vest exclusive jurisdiction of preclearance actions in the District of Columbia Court, "on the grounds that it was necessary to provide uniform interpretation and application of the Act's standards and to continue to insure decision-making free from local pressure") (footnote omitted).

cases can be appealed to the Supreme Court but if they are, they are often, though not always, summarily affirmed.⁷⁷

A cluster of procedural issues are unique to litigation before three-judge district courts. According to the statute, the court consists of the district judge to whom the case was originally assigned, and two other judges assigned by the chief judge of the circuit, at least one of whom must be a circuit judge.⁷⁸ Experience shows that in most instances federal judges from that state are assigned, and usually only one, rather than the possible two, circuit judges are assigned by the chief judge to constitute the panel. The vast majority of three-judge district courts thus consist of two district judges and one circuit judge.⁷⁹ Nonetheless, discretion in this regard lies entirely with the chief judge, and controversy in some instances has attended the formation of these panels.⁸⁰ The coverage of the statute has also been problematic. As noted, the

⁷⁷ McCrary, *supra* note 76, at 281; see also Mark A. Posner, *The Real Story Behind the Justice Department's Implementation of Section 5 of the VRA: Vigorous Enforcement, as Intended by Congress*, 1 DUKE J. CON. LAW & PUB. POL'Y 120, 155–56 (2006); Solimine, *supra* note 10, at 91 n.75. Historically, most appeals from three-judge district courts have been summarily disposed of by the Court. *Gonzalez v. Automatic Emps. Credit Union*, 419 U.S. 90, 99 n.17 (1974).

⁷⁸ 28 U.S.C. § 2284(b)(1) (2000).

⁷⁹ Solimine, *supra* note 10, at 114 (noting that of the 89 published three-judge court cases from 1976 to 1994, only five had two rather than one circuit judge assigned). The difference may not be inconsequential. Given the difference in status in the judicial hierarchy, a district judge may feel excessively deferential to two circuit judges on a panel, as opposed to just one. *Id.* at 117–18. Even two district judges may feel deferential to the one circuit judge on the panel. A study of such panels from the 1960s suggested that there was such deference, since it found that over 60% of the signed opinions were authored by the Circuit Judge, more than one would expect if the opinions were assigned randomly over the range of cases to all of the judges on the panel. Thomas G. Walker, *Behavioral Tendencies in the Three-Judge District Court*, 17 AM. J. POL. SCI. 407, 411 (1973). My study of 89 such cases from 1976 to 1994 revealed less evidence of such deference, as a third of the cases were per curiam, and the balance of signed opinions was split between those authored by a circuit judge and a district judge. Solimine, *supra* note 10, at 119–20.

⁸⁰ Commentators have suggested that chief judges may have the motive and opportunity to “stack” three judge panels in reapportionment cases. *E.g.*, Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1726–29 (1993). For an assessment of the historical evidence that can be brought to bear on this issue, see Solimine, *supra* note 10, at 110–12. In 1995, I surveyed the chief judges of all of the circuits to determine what criteria they employed to pick the judges. The responses indicated that no formal criteria were used, but informally the chief judges stated that judges from the forum state were almost always used, since they were presumably more familiar with the facts of that case, and other factors, such as workload and administrative issues, were also considered. A few responses even allowed that, far from stacking panels, some chief judges took pains to “balance” some panels, presumably taking into account the political affiliation or ideological outlook of the designees. *Id.* at

statute only refers to constitutional challenges to reapportionment claims. Nonetheless, courts frequently litigate related VRA claims, even though they go unmentioned in the statute. Courts rarely speak to this issue, but apparently this is thought to be uncontroversial because the VRA claim is almost always factually related to the constitutional claims, and thus can be said to fall within pendent jurisdiction.⁸¹

Another set of problems is associated with the direct review process. Legislation dating from the origins of the three-judge district court permits these cases, in theory, to be rapidly disposed of by the Supreme Court, if appeal of the decision of the three-judge panel is sought in that Court.⁸² The statute is separate from the legislation establishing the discretionary certiorari jurisdiction of the Court, and it appears that, if the plain language of the statute is followed, the Court has an obligation to resolve the appeal on the merits. Yet in practice the Court has largely equated such appeals with those reaching it by writs of certiorari, by summarily affirming (or, sometimes, reversing) the appeals that it does not consider worthy of full consideration. For the cases that are worthy, probable jurisdiction is noted, the case is set for full briefing and oral argument, and an opinion is rendered.⁸³

113. Still, one must take such statements with a grain of salt, and more rigorous examination of the assignment process is appropriate. For some steps in that regard, see *id.* at 114–15.

⁸¹ See *Page v. Bartels*, 248 F.3d 175, 187–91 (3d Cir. 2001). For further discussion, see Solimine, *supra* note 10, at 95–97. This is not to be confused with a handful of provisions of the VRA, and of the Civil Rights Act of 1964, which require or permit a three-judge district court to be convened to hear certain specialized matters. 17 WRIGHT, *supra* note 11, § 4235, at 604–05. Nor should it be confused with the preclearance provisions of the VRA, which permit declaratory judgment actions in certain instances to be filed before a three-judge district court in the District of Columbia. See *supra* notes 76–77 and accompanying text.

⁸² 28 U.S.C. § 1253 (2000). This provision does not have language directing the Supreme Court to expedite its review of the matter, like the statutes in *Buckley* and *McConnell*.

⁸³ Solimine, *supra* note 10, at 107–09. There is evidence that the Justices treat certiorari and appeal in a similar but not identical fashion. In his interviews with some Justices and their clerks, H.W. Perry found that they took a more careful look at cases that came to them by direct appeal, as opposed to the much larger number of cases that came on writs of certiorari. H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* 104–05 (1991). For discussion of the statements of the Court as a whole, and of individual Justices, on this issue, see ROBERT L. STERN, ET AL., *SUPREME COURT PRACTICE* 276–79 (8th ed. 2002). Another piece of evidence in this regard is suggested by Rick Hasen, who discusses the drafting history of an important election law case, *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966) (holding poll taxes for state and local elections unconstitutional). That case was an appeal from a three-judge district court, and in an early draft of an opinion dissenting from an anticipated summary affirmance, Justice Arthur Goldberg suggested that he treated the

Finally, direct review implicates the scope of appellate scrutiny by the Court. In direct review cases, the Court may be forced or influenced to engage in a time-consuming and extensive review of the facts, more so than it would otherwise. Two factors seem to account for this. The absence of intermediate appellate courts to consider and filter the legal and factual issues in these cases might compel the Court to engage in unusually careful review of the facts found by the trial court, and in a weighing of the evidence in the record.⁸⁴ The other reason is doctrinal. Recent Court decisions reviewing decisions from three-judge district courts have held that while the familiar deferential standard of not overturning a finding of fact by the trial court, unless it is clearly erroneous,⁸⁵ will ostensibly apply, rigorous review of

two differently, and that a case where certiorari would ordinarily be denied might be a candidate for full resolution on appeal. In his view, a summary affirmance is technically a resolution of the case on the merits, and he felt “compelled to face up to the substantial constitutional issues presented.” HASEN, *supra* note 1, at 177–78 n.1 (reprinting draft dissent). After this draft was circulated, the case was set for a full hearing, and the Court eventually reversed. *Id.* at 36–38. *Cf.* Sara C. Benesh, et al., *Aggressive Grants by Affirm-Minded Justices*, 30 AM. POL. RES. 219, 223 (2002) (Empirical study did not distinguish between certiorari and appeals, “notwithstanding the technical differences between them . . . because both decisions . . . are largely discretionary today.”) (footnote omitted).

⁸⁴ *Easley v. Cromartie*, 532 U.S. 234, 243 (2001) (suggesting that usual deference to trial court fact finding is not present on direct appeals, since “there is no intermediate court, and we are the only court of review”) *Cf.* Solimine, *supra* note 10, at 117 (suggesting that both three-judge district court cases, and other cases, can raise complex issues of fact). A related issue is similar to one I explored earlier (*see supra* note 46): Do judges on three-judge district courts take their jobs seriously, given the possibility of direct review by the Supreme Court? *Cf.* Edward B. Foley, “*Narrow Tailoring*” Is Not the Opposite of “*Overbreadth*”: Defending BCRA’s Definition of “*Electioneering Communications*,” 2 ELECTION L.J. 457, 457–58 (2003) (arguing that the *McConnell* decision was “irrelevant,” in light of fractured nature of the opinion, *de novo* review by the Supreme Court of legal issues, and the Court’s independent examination of evidence in the record) *with* Karlan, *supra* note 80, at 1729 (noting that three-judge district court decisions are practically unreviewable, since so few are subject to full review by the Court). I think these judges on the whole do take their jobs seriously, in part since most decisions of three-judge district courts are not appealed and, of those that are, most are summarily affirmed. STERN, *supra* note 83, at 92; Solimine, *supra* note 10, at 109. On the other hand, consider the situation if the normal adjudicative process applied; a single district judge would know that her decision would be subject to at least one appeal as of right. That said, the lower court judges in these situations are not oblivious to the possibility of Supreme Court review and sometimes actively encourage it. *E.g.*, *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1353 (S.D. Fla. 2002) (*per curiam*) (three-judge court) (Jordan, J., concurring) (urging the Court “to note probable jurisdiction in this case or one of the other political gerrymandering cases arising from this electoral cycle”).

⁸⁵ FED. R. CIV. P. 52(a).

factual findings will nonetheless take place.⁸⁶ The Court has stated that close review of the record and the factual findings made by the lower court may be appropriate if the record is largely documentary.⁸⁷

B. *The LULAC Litigation*

Consider how several of these unique procedural and institutional processes played out in *LULAC v. Perry*, which considered challenges under the Constitution and the VRA to a mid-decade redistricting of the districts for the members of the Texas delegation to the U.S. House of Representatives. A majority of the Court held that the redistricting was not an invalid political gerrymander, but that the redrawing of one district diluted the voting power of Hispanics and amounted to a violation of section 2 of the VRA.⁸⁸ The lengthy and complicated litigation does not lend itself to easy summary, and only a brief review is necessary here.⁸⁹ Litigation took place in a three-judge district court early in this decade during an initial redrawing of such districts, after the decennial census, and that court instituted a redistricting plan.⁹⁰ Not long after, Texas Representative Tom DeLay, the then-Republican Majority Leader of the House, led efforts that convinced the Texas legislature to redraw the districts again to make it more likely that the GOP share of the Texas delegation would increase. Litigation again took place before a three-judge district court, which in 2004 rejected all constitutional and VRA claims by the plaintiffs.⁹¹ The Supreme Court in that year vacated and remanded⁹² the decision in light of its intervening decision of *Vieth v. Jubelirer*,⁹³ a reapportionment case that held that political gerrymandering claims might be

⁸⁶ *E.g.*, *Easley*, 532 U.S. at 243. For an especially helpful and careful analysis of this rigorous standard of factual review, see Melissa L. Saunders, *A Cautionary Tale: Hunt v. Cromartie and the Next Generation of Shaw Litigation*, 1 ELECTION L.J. 173 (2002).

⁸⁷ *Easley*, 532 U.S. at 243. Prior to *Easley*, “the Court has sometimes set aside trial court findings of fact as clearly erroneous, even in voting rights cases coming to it on direct appeal from three-judge courts.” Saunders, *supra* note 86, at 186 (footnotes omitted).

⁸⁸ 42 U.S.C. § 1973 (2000).

⁸⁹ For a full review of the litigation, see *LULAC v. Perry*, 126 S. Ct. 2594, 2605–07 (2006) (discussing events from 1990 to 2005).

⁹⁰ *Balderas v. Texas*, No. 6:01CV158, 2001 U.S. Dist. LEXIS 25740 (E.D. Tex. Nov. 14, 2001) (per curiam) (three-judge court), *aff’d summarily*, 536 U.S. 919 (2002).

⁹¹ *Session v. Perry*, 298 F. Supp. 2d 451 (E.D. Tex. 2004) (per curiam) (three-judge court).

⁹² *Jackson v. Perry*, 125 S. Ct. 351 (2004).

⁹³ 541 U.S. 267 (2004).

justiciable under certain circumstances.⁹⁴ Upon remand, the three-judge district court in 2005 reached the same conclusion.⁹⁵ The Supreme Court noted probable jurisdiction of the appeal, and the Court rendered a decision in 2006.

In a superficial way, the composition of the three-judge panel might be characterized as an example of stacking (or, alternatively, as being finely balanced). Judge Patrick Higginbotham of the Fifth Circuit is an appointee of a Republican President, while Texas District Judges T. John Ward and Lee H. Rosenthal are appointees of Democratic and Republican Presidents, respectively.⁹⁶ The DeLay-inspired redistricting plan helped the GOP, so if the judges were thinking in partisan terms, a majority might be expected to uphold the plan. As noted, that is what occurred, and in the 2004 decision Judge Ward dissented in part on the VRA claim.⁹⁷ In the 2005 decision Judge Ward specially concurred, emphasizing that he did not accept all aspects of Judge Higginbotham's majority opinion.⁹⁸

This chain of events might be characterized as partisan decision making by these judges, but this is a crude manner of evaluating the case. To be sure, given the important, partisan consequences of many reapportionment and VRA cases, one might reasonably expect even life-tenured federal judges to be sensitive to the political consequences of the decision.⁹⁹ But it is difficult

⁹⁴ *Vieth* produced a 4-1-4 split. Justice Scalia, in a plurality opinion, did not dispute that "severe partisan gerrymanders violate the Constitution," *id.* at 292, but concluded that an absence of judicially manageable standards made claims challenging such gerrymanders to be nonjusticiable political questions. Justices Stevens, Souter (joined by Ginsburg), and Breyer dissented in separate opinions, all contending that there were such standards. The pivotal opinion was by Justice Kennedy, who concurred in the judgment ordering dismissal, but on the basis that judicially manageable standards, while not presented in *Vieth*, might emerge in future litigation. *Id.* at 309-11 (Kennedy, J., concurring).

⁹⁵ *Henderson v. Perry*, 399 F. Supp. 2d 756, 758 (E.D. Tex. 2005) (three-judge court).

⁹⁶ Higginbotham was appointed to the Fifth Circuit in 1982 (by Reagan), while Ward and Rosenthal were appointed in 1999 (by Clinton) and 1992 (by Bush), respectively. For a contrast of the composition of the earlier stage of the litigation, see *supra* note 88. It consisted of Judges Higginbotham, Ward, and District Judge John Hannah, Jr., an appointee of President Clinton. *Balderas*, 2001 U.S. Dist. LEXIS 25740, at *6 (listing judges).

⁹⁷ *Session*, 298 F. Supp. 2d at 515-31 (Ward, J., concurring in part and dissenting in part).

⁹⁸ *Henderson*, 399 F. Supp. 2d at 779-85 (Ward, J., concurring). He also stated that he was adhering to the views in his concurring and dissenting opinion in the 2004 decision. *Id.* at 784 n.1.

⁹⁹ Solimine, *supra* note 10, at 120-25; Note, *Federal Court Involvement in Redistricting Litigation*, 114 HARV. L. REV. 878, 883-86 (2001). The popular press often reports the presumed political affiliation of federal judges in election law cases. See, e.g.,

to gauge such partisanship. Using the partisan affiliation of the appointing President as a proxy for the ideology or attitudes of the appointed federal judge is problematic. The appointment of a lower federal court judge may be due in large part to the patronage of the senators from the state and other factors less related to ideology.¹⁰⁰ It may also be difficult to characterize a particular reapportionment plan as helping only one party or the other.¹⁰¹ The conventional wisdom is that in recent years many such plans have been gerrymandered to help incumbents stay in office, not to aid one party or the other as such (though the goals are not necessarily incompatible).¹⁰² Even if the majority of three-judge district court decisions on redistricting claims are not examples of stark partisan decision making,¹⁰³ one must ask whether the

Ralph Blumenthal, *DeLay Stays on the Ballot, Judges Rule*, N.Y. TIMES, Aug. 4, 2006, at A11 (reporting appointing Presidents of federal judges who ruled in *Tex. Democratic Party v. Benkiser*, No. A-06-CA-459-SS, 2006 U.S. Dist. LEXIS 47115 (W.D. Tex. July 6, 2006)). For additional examples from the election law context, see Solimine, *supra* note 10, at 127–28. For criticism of this practice, on the basis that it “wrongly assumes that federal judges cannot put aside their personal political beliefs and are motivated by overt partisanship,” see *id.* at 127; see also Linda Greenhouse, *Telling the Court’s Story: Justice and Journalism at the Supreme Court*, 105 YALE L.J. 1537, 1557 (1996) (describing policy of the *New York Times* to only provide such information “if such identification makes sense as a news judgment in the context of a specific story,” as routinely providing this information would be “insinuating that all federal judges are simply carrying out the agendas of their political sponsors”).

¹⁰⁰ Political scientists have long used the appointing President’s political party as a proxy for the presumed ideology of the appointed judge. Dissatisfied with this measure for the reasons stated in the text, more recent studies have used more complicated measures that are sensitive to the ideology of the senators from the state. For a review of the controversy, see VIRGINIA A. HETTINGER, STEFANIE A. LINDQUIST & WENDY L. MARTINEK, *JUDGING ON A COLLEGIATE COURT: INFLUENCES ON FEDERAL APPELLATE DECISION MAKING* 50–51 (2006). Rather than use the political party of the appointing President, some studies have measured the ideology of Supreme Court Justices by analyzing perceptions of nominees in editorials in prominent newspapers. JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 320–22 (2002).

¹⁰¹ Solimine, *supra* note 10, at 122–23.

¹⁰² For discussions of the considerable literature on this point, see Alan I. Abramowitz, et al., *Incumbency, Redistricting, and the Decline of Competition in U.S. House Elections*, 68 J. POL. 75 (2006); Richard Forgette & John W. Winkle III, *Partisan Gerrymandering and the Voting Rights Act*, 87 SOC. SCI. Q. 155, 155–56 (2006); David Lublin & Michael P. McDonald, *Is It Time to Draw the Line?: The Impact of Redistricting on Competition in State House Elections*, 5 ELECTION L.J. 144 (2006).

¹⁰³ Solimine, *supra* note 10, at 123 (discussing such cases and literature up to 1996 and concluding that there is not “compelling evidence of systematic partisan voting behavior”) (footnote omitted). A recent study, focusing on these cases decided from 1981 to 2006, lends support to this conclusion. Mark J. McKenzie, *Beyond Partisanship?: Federal Courts, State Commissions, and Redistricting* ch.3 (2006) (unpublished Ph.D.

LULAC litigation is the exception to the rule. The mid-decade redistricting plan in Texas was unabashedly one to aid the GOP delegation,¹⁰⁴ the Republican appointees on the lower court in *LULAC* upheld the plan, while the Democratic appointee had reservations.¹⁰⁵ One's judgment on whether to label this as partisan decision-making will depend, of course, on how convincing one finds the opinions filed by these judges, and whether they

dissertation, University of Texas at Austin) (on file with author). The study examined all decisions of three-judge district courts in redistricting cases, published in the Federal Supplement or online, a total of 138 cases. *Id.* at 20–21 (describing dataset). Comparing the partisan affiliation of the judges (using the party of the appointing President as a proxy, *id.* at 2), the study concluded, among other things, that judges in these cases acted as “constrained partisans.” *Id.* at 14, 29. That is, while judges were more likely to strike down (on either constitutional or VRA grounds) redistricting plans crafted by and presumably favoring the opposite party, they were no more likely to strike down plans produced in a bipartisan process as compared to those crafted by their own party. *Id.* at 29–30 (describing results).

It may also be useful to compare the judicial decision making in *McConnell*. That panel consisted of two Republican appointees (Circuit Judge Henderson, appointed in 1990, and District Judge Leon, appointed in 2002) and one Democratic appointee (District Judge Kollar-Kotelly, appointed in 1997). As discussed in Part I *supra*, Judges Leon and Kollar-Kotelly crossed party lines, as it were, to uphold most of the BCRA, against Judge Henderson's dissent. Moreover, it is difficult to characterize the BCRA as automatically helping or hurting Democratic or Republican candidates. *Cf.* CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 32 (2006) (Because campaign finance laws “are often challenged on First Amendment grounds,” as governmental abridgment of freedom of speech, authors hypothesize that “Republican appointees would be more sympathetic than Democratic appointees to this constitutional objection.”).

¹⁰⁴ *LULAC v. Perry*, 126 S. Ct. 2594, 2606 (2006); *id.* at 2629 (Stevens, J., concurring in part and dissenting in part).

¹⁰⁵ *Cf.* McKenzie, *supra* note 103, at 16 (observing that the argument that Judge Higginbotham engaged in partisan decision making in *LULAC* is weakened by the fact that he was a member of the unanimous three-judge panel that had earlier left a Democratic gerrymander in place, before the mid-decade redistricting, referring to *Balderas v. Texas*, No. 6:01CV158, 2001 U.S. Dist. LEXIS 25740 (E.D. Tex. Nov. 14, 2001)). Perhaps recognizing the politically charged nature of the case, several of the Justices in *LULAC* seemed to go out of their way to praise the lower court judges, collectively or individually. *See, e.g.*, 126 S. Ct. at 2605 (majority opinion by Kennedy, J.) (stating that the three-judge panel “brought considerable experience and expertise to the instant case”); *id.* at 2631 (Stevens, J., concurring in part and dissenting in part) (referring to the “characteristically thoughtful opinion written by Judge Higginbotham” in 2005); *id.* at 2653 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part) (referring to the “careful factfinding” by the “experienced judges” on the district court).

were applying the law and the facts in a principled fashion, irrespective of their presumed personal views.¹⁰⁶

Another aspect of three-judge district court litigation revealed by *LULAC* concerns the impact of summary dispositions of appeals from three-judge district courts. The legal effect of the frequent summary affirmances is unclear. The Supreme Court has stated that a summary affirmance is on the merits and has precedential value, but only to the precise issues presented and decided by the lower court. Beyond that, the Court as a whole, and individual Justices, have not spoken clearly or consistently with respect to how much precedential weight the Court itself should give to summary affirmances.¹⁰⁷ Not surprisingly, the Court has also been unclear on how much precedential weight lower federal courts should give to these dispositions.¹⁰⁸

A good example of this lack of clarity is the *Cox v. Larios* litigation. There, a three-judge district court heard a challenge to the reapportionment of the state legislature that was consistent with one-person, one-vote principles, but based in part on political gerrymandering that aided Democrats. The court found the reapportionment to be unconstitutional,¹⁰⁹ and the Supreme Court summarily affirmed.¹¹⁰ Justice Stevens concurred in that disposition, in part on the basis that, in his view, the facts in *Cox* would justify a finding of improper political gerrymandering after the *Vieth* case, decided shortly before *Cox*.¹¹¹ In contrast, Justice Scalia, in dissent from the summary disposition, would have set the case for argument, for in his view precedent was not clear on the questions addressed by the district court. He added that “[t]his is not a petition for certiorari, however, but an appeal, and we should not summarily affirm unless it is clear that the disposition of this case is correct.”¹¹² *Cox* was a source of great confusion, since it “seemed to

¹⁰⁶ Put another way, this inquiry should weigh whether and to what extent the decisions of the lower court judges (or the Supreme Court Justices, upon review) can be characterized as examples of the legal model (i.e., applying legal analysis in a principled manner), the attitudinal model (i.e., applying one’s policy views), or the rational choice or strategic model (i.e., considering the likely reaction to a decision, by Congress and other actors), or some combination of the above. For a useful review and summary of the considerable literature discussing and attempting to apply these models, see LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* 5–21 (2006); Barry Friedman, *The Politics of Judicial Review*, 84 *TEX. L. REV.* 257 (2005).

¹⁰⁷ For an excellent discussion of the cases, see STERN, *supra* note 83, at 279–81.

¹⁰⁸ *Id.* at 281–85.

¹⁰⁹ *Larios v. Cox*, 300 F. Supp. 2d 1320, 1356 (N.D. Ga. 2004) (per curiam) (three-judge court).

¹¹⁰ *Cox v. Larios*, 542 U.S. 947 (2004).

¹¹¹ *Id.* at 949–50 (Stevens, J., joined by Breyer, J., concurring).

¹¹² *Id.* at 951 (Scalia, J., dissenting).

contradict the logic, if not the holding, of *Vieth*,¹¹³ which had left very little doctrinal space open to pursue a political gerrymandering claim.

The confusion was evidenced in the Court's resolution of *LULAC*. The Justices sparred over the meaning of the summary disposition in *Cox*. Justice Kennedy for the majority asserted that the reasoning of the lower court in *Cox* was not conclusive on whether and how political gerrymanders were actionable.¹¹⁴ In contrast, Justice Stevens contended (not surprisingly, in light of his concurring opinion in that case) that *Cox* demonstrated there could be judicially manageable standards to assess the legality of political gerrymanders.¹¹⁵ If there were no such standards, he added, "we would not have summarily affirmed the decision in *Cox* over the dissent of only one Justice."¹¹⁶ The debate over the meaning of the lower court opinion in *Cox*, and over the significance of the Court's summary disposition, illustrates the mischief caused by such dispositions of direct appeals. The Court places itself in the awkward position of subsequently explaining the precedential value of a summary disposition by discussing the opinion of the *lower* court which was affirmed. Such dispositions are neither fish nor fowl; a certiorari denial leaves the lower court holding intact but does not imply any approval by the Court, while a full resolution of a case on the merits is binding on the Court and lower courts. Summary dispositions do not enjoy the clarity of either of those positions.¹¹⁷

¹¹³ Hasen, *supra* note 2, at 683. For similar expressions of the confusion left by *Cox*, see Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line? Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 564–69 (2004); Richard H. Pildes, *The Supreme Court, 2003 Term-Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 76–78 (2004).

¹¹⁴ *LULAC v. Perry*, 126 S. Ct. 2594, 2612 (2006).

¹¹⁵ *Id.* at 2635 (Stevens, J., concurring in part and dissenting in part).

¹¹⁶ *Id.* at 2635 n.5 (citation omitted).

¹¹⁷ There are other examples of election law jurisprudence muddled by summary dispositions of appeals from three-judge district courts. For example, the Court in *Wells v. Edwards*, 409 U.S. 1095 (1973) summarily affirmed a decision which held that the election of state judges was not governed by the one-person, one-vote principles, because those principles only apply to representative branches of government which, it was asserted, the judiciary was not. *Wells v. Edwards*, 347 F. Supp. 453, 455 (M.D. La. 1972) (three-judge court). Nearly two decades later, the Court was faced with the issue of whether elected state judges were "representatives" coverable by Section 2(b) of the VRA, 42 U.S.C. § 1973(b) (2000). The majority in *Chisom v. Roemer* found that *Wells* was a reapportionment, not a VRA, case, and was not controlling. 501 U.S. 380, 402–03 (1991). Justice Scalia, in his dissent, found *Wells* to be relevant, as he argued that the intent of the drafters of the 1982 Amendments of the VRA, at issue in *Chisom*, would have been the same as that suggested by the disposition of *Wells*. *Id.* at 411, 415 (Scalia, J., dissenting). Another example is suggested by the summary affirmance in *Parker v. Ohio*, 540 U.S. 1013 (2003). The lower court in that case had held in part that the alleged failure to create multi-racial legislative "influence districts" was not cognizable under

Finally, *LULAC* illustrates the uncertainties resulting from the review of factual findings by lower courts. The Justices sparred over the deference to be given fact finding by the lower court. The majority dutifully invoked the deference appellate courts usually give to such findings by lower courts,¹¹⁸ and did so in most instances, save for the holding of the lower court that the creation of a certain district did not violate the VRA.¹¹⁹ It is not entirely clear whether the latter decision of the Court should be regarded as a holding that a finding of fact was clearly erroneous, as opposed to a *de novo* review of a question of law, or a review of a mixed question of law or fact. The dissenters on that point appeared to assume that it was a finding of fact, and accordingly chided the majority for not giving sufficient deference to the lower court.¹²⁰ The lengthy discussion of the facts in all of the opinions is dizzying, no matter what level of deference was purportedly at use. In my view, the majority's disagreement with the lower court is best viewed as a review of a mixed question of law or fact, and in that instance less appellate deference is appropriate.¹²¹

Section 2 of the VRA. *Parker v. Ohio*, 263 F. Supp. 2d 1100, 1104–05 (S.D. Ohio 2003) (three-judge court). Lower courts have taken divergent approaches to this issue, see SAMUEL ISSACHAROFF, ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 777–79 (rev. 2d ed. 2002) (discussing cases); DANIEL HAYS LOWENSTEIN & RICHARD L. HASEN, *ELECTION LAW* 211–12 (3d ed. 2004) (same), and the Court arguably sent an ambiguous signal by resolving *Parker* in the way it did.

¹¹⁸ *LULAC*, 126 S. Ct. at 2614.

¹¹⁹ *Id.* at 2615–19 (holding, *inter alia*, that lower court did not sufficiently consider the “compactness” prong of the three-part test established by *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986) to determine whether a plaintiff has stated a claim under Section 2 of the VRA).

¹²⁰ *Id.* at 2655–57 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part); *id.* at 2665 (Scalia, J., concurring in the judgment in part and dissenting in part).

¹²¹ Saunders, *supra* note 86, at 183–84 (reviewing cases and noting that the Court has not clearly stated the standard of review for mixed questions, and arguing that *de novo* review is appropriate in these circumstances). It is instructive to compare the level of appellate review of facts in other cases discussed in this Article. For *McConnell*, see LOWENSTEIN & HASEN, *supra* note 117, at 935–36 (questioning which opinion in the lower court the majority of the Court gave factual deference). For *Randall*, see *Randall v. Sorrell*, 126 S. Ct. 2479, 2492 (2006) (noting that First Amendment interests require Court to review record carefully and independently).

III. SUPREME COURT AGENDA-SETTING AND SUPERVISION OF LOWER COURTS IN ELECTION LAW CASES

A. *The Mysteries of the Supreme Court's Docket*

There are at least two mysteries regarding the Supreme Court's docket: why have the Court's decisions rendered on the merits shrunk from the low hundreds in the early years of the Rehnquist Court to the seventy-five or eighty decided each Term since the mid-1990s; and why does the Court select the cases to decide that it does? Neither the Court collectively nor its individual members frequently speak to these issues. The shrunken docket is the easier to explain. It is likely due to a combination of factors, including the statutory repeal, in the 1970s and 1980s, of most mandatory appellate jurisdiction,¹²² the change in the Court's personnel and the turnover of lower court judges, the apparent desire of at least some of the Justices to lessen the role of the Court in American life, and less frequent appeals by the federal government.¹²³

The reasons for the Court's discretionary exercise of review over particular cases have always been unclear. The Court's own rules only blandly state that it will be more likely to review cases which can resolve a split of authority among lower courts, or which present an opportunity to resolve an "important question of federal law."¹²⁴ Sometimes the Court, in the opinion on the merits, will explain why it granted review in a case; it did not do so in *Randall* or *LULAC*. A wide variety of factors have been suggested to explain why the Court agrees, or does not agree, to hear cases.

¹²² This would include the restriction of the jurisdiction of the three-judge district court in 1976, which led to far fewer such cases and fewer direct appeals. See *supra* notes 73–74 and accompanying text.

¹²³ For a full discussion of these and other possible reasons, see Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737 (2001); Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403; Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 640–44 (2003); David M. O'Brien, *A Diminished Plenary Docket: A Legacy of the Rehnquist Court*, 89 JUDICATURE 134 (2005); Kevin M. Scott, *Shaping the Supreme Court's Federal Certiorari Docket*, 27 JUST. SYS. J. 191 (2006). Cf. Frederick Schauer, *Foreword: The Court's Agenda—And the Nation's*, 120 HARV. L. REV. 4, 8–9 (2006) (discussing issues of importance to the public that are not addressed in Supreme Court decisions).

¹²⁴ SUP. CT. R. 10 (considerations governing review on certiorari). While the parallel rule dealing with direct appeals, Supreme Court Rule 18, does not expressly state the criteria the Court employs to decide whether to grant an appeal a full review, it is understood by litigators before the Court that the jurisdictional statement required by that rule should explain (not unlike a certiorari petition) why the Court should give plenary review to the appeal, rather than a summary disposition. STERN, *supra* note 83, at 481–82.

The suggestions start with largely subjective considerations of what is an important issue of federal law, perhaps informed by the characteristics of the lower court decision litigants, or of signals by the parties or by amici. In addition to or in lieu of such factors, it has also been suggested that Justices take their own policy preferences into account; for example, whether they wish to affirm or reverse the decision below. In addition, Justices might act strategically, taking into account the likely voting behavior on the merits of their fellow Justices.¹²⁵

B. *Supreme Court Agenda Setting and Lower Court Adjudication*

What light do these factors shed on the Court's decisions to review, or not to review, election law cases? A complete answer to this question would require intensive case studies of cases selected, or not selected, for review, and is beyond the scope of the present Article. Speaking more generally, as observed at the outset of the Article, the Court, over the past several decades, has not evaded plenary consideration of many election law cases. Perhaps the Justices see legal questions raised by the operation of the processes of democracy to be inherently important, in the sense that they are first order issues of self-governance that are antecedent to the development of substantive policy by all of the branches of government.¹²⁶ Among election law cases, Justices are no doubt influenced by, among other things, the general interest of elites in the legal and policy-making communities for particular subjects. For example, Professor Richard Pildes has noted that

¹²⁵ There is a rich literature exploring all of these factors. In addition to the sources cited *supra* note 123, see VANESSA A. BAIRD, ANSWERING THE CALL OF THE COURT: HOW JUSTICES AND LITIGANTS SET THE SUPREME COURT AGENDA (2006); PERRY, *supra* note 83; Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389 (2004); Friedman, *supra* note 106, at 292–95; Tracey E. George & Michael E. Solimine, *Supreme Court Monitoring of the United States Courts of Appeals En Banc*, 9 SUP. CT. ECON. REV. 171, 174–75 (2001). Scholars have come to different conclusions on the explanatory strength of these factors. Compare PERRY, *supra* note 83, at 146–66, 198–251 (concluding, based on interviews of the Justices and their clerks, that while strategic considerations are not totally absent, legal factors largely drive decisions to review), and Cordray & Cordray, *supra*, at 391 (reaching similar conclusion based on review of certiorari votes), with Gregory A. Caldeira et al., *Sophisticated Voting and Gate-Keeping in the Supreme Court*, 15 J.L. ECON. & ORG. 549, 570 (1999) (concluding, based on a review of votes on certiorari in the 1982 Term, that there was considerable strategic voting).

¹²⁶ For discussions of the importance of these first order questions, see ISSACHAROFF, *supra* note 117, at 1–2 (discussing democratic processes in general); LOWENSTEIN & HASEN, *supra* note 117, at 29–30 (discussing right to vote); Schauer, *supra* note 123, at 46–47, 47 n.168.

“[c]ommentators, judges, and editorialists across the domestic political spectrum had urged the Court to address the problem”¹²⁷ of political gerrymanders, which it did in *Vieth*, and again in *LULAC*. The same could be said of campaign finance regulation, especially after Congress revisited the issue with the passage of the BCRA.

Congress, for its own reasons, has facilitated this process by passing special direct review statutes or leaving litigation of reapportionment and related VRA cases before three-judge district courts. But these statutes might be characterized as forcing the hand of the Court, by prompting it to decide cases that it might not otherwise, without the benefit of an initial appellate review in that case. Moreover, being, in effect, compelled to decide a case might deprive the Court of the presumed benefits of permitting a legal issue to percolate in the lower courts before certiorari of a particular case is granted.¹²⁸ There is some evidence that the Court considers this a problem. The Court frequently summarily affirms direct appeals from three-judge district courts in election law cases,¹²⁹ even though such dispositions are, arguably, less justified in the past three decades, after the 1976 legislation restricting the jurisdiction of those courts. Similarly, the Court remanded the first direct appeal in the *LULAC* litigation for reconsideration in light of *Vieth*,¹³⁰ an odd disposition to some,¹³¹ since the Court could have summarily affirmed the lower court’s decision that there was no improper gerrymander (the same result the majority reached in 2006). Perhaps the Court felt uncomfortable deciding *Vieth* and *LULAC* in such rapid-fire succession.¹³² The spacing out of resolution of direct appeals in this way may, in effect, restore the benefits of percolation.¹³³

¹²⁷ Pildes, *supra* note 113, at 56 (footnote omitted).

¹²⁸ For further discussion, see Solimine, *supra* note 10, at 105–07.

¹²⁹ See *supra* notes 109–17 and accompanying text (discussing the *Cox* litigation and additional election law cases); see, e.g., *O’Lear v. Miller*, 537 U.S. 997 (2002) (summarily affirming political gerrymandering case, *O’Lear v. Miller*, 222 F. Supp. 2d 862 (E.D. Mich. 2002) (per curiam)). Occasionally the Court will note probable jurisdiction to a direct appeal from a three-judge district court and rule on the merits at the same time, without full briefing and oral argument. E.g., *Lance v. Dennis*, 126 S. Ct. 1198, 1200 (2006) (per curiam).

¹³⁰ See *supra* notes 93–94 and accompanying text.

¹³¹ E.g., Hasen, *supra* note 2, at 683.

¹³² Had *LULAC* come up by way of certiorari, rather than by appeal, perhaps the Court would have denied certiorari, waiting for further percolation in the lower courts on gerrymandering and related issues. By the same token, once the Court decides to decide an election law case on the merits, it will not necessarily attempt to evade difficult issues presented. While not involving a direct appeal, the Court, in *Randall v. Sorrell*, 126 S. Ct. 2479, 2487 (2006), declined a suggestion in an amicus brief to dismiss the writ of certiorari as improvidently granted, insofar as it permitted review of the issue of Vermont’s expenditure limits, the issue to be remanded under the Second Circuit

This description oversimplifies Supreme Court review of election law cases, because there is undoubtedly a sort of complex and continuous feedback mechanism between lower courts and the Court. The number of cases the Court does decide to review, and the content of those decisions, affects subsequent lower court decisions, which in turn impacts the production of cases the Court will be asked to review.¹³⁴ Conventional wisdom, for example, holds that if the Court develops and applies legal principles characterized by indeterminate standards, as opposed to bright line rules, then lower court rulings will suffer by the confusion and uncertainty.¹³⁵ Election law cases are not immune from this critique. Some commentators were scornful of the lack of doctrinal clarity or coherence in *McConnell* and *Vieth*,¹³⁶ and such criticism is unlikely to abate in the wake of *Randall* and *LULAC*.¹³⁷

decision. See Brief for Senator John McCain, Senator Russell Feingold, Representative Christopher Shays, and Representative Martin Meehan as Amici Curiae in Support of Respondents at 17–18 n.16, *Randall v. Sorrell*, 126 S. Ct. 2479 (2006) (nos. 04-1528, 04-1530 & 04-1697). The Court made no mention of this request, though Justice Souter stated that he would not “disturb the Court of Appeals’s stated intention to remand.” *Randall*, 126 S. Ct. at 2512 (Souter, J., dissenting). In a similar fashion, Justice Souter, in *LULAC*, stated that he would not have reached the partisan gerrymander issue, given that there was no majority of the Court, in his view, that was ready to apply a “single criterion,” so he treated “the broad issue of gerrymander much as the subject of an improvident grant of certiorari.” *LULAC v. Perry*, 126 S. Ct. 2594, 2647 (2006) (Souter, J., concurring in part and dissenting in part). The majority of his colleagues did not agree with him on that point. Cf. Schauer, *supra* note 123, at 34 (observing that both *Randall* and *LULAC* avoided being “momentous” decisions by, respectively, not overruling *Buckley v. Valeo*, and not placing restrictions on partisan gerrymandering).

¹³³ Consider that between *David v. Bandamer*, 478 U.S. 109, 113 (1986), in which a plurality of the Court held that political gerrymanders could be justiciable under some circumstances, and the decision to note probable jurisdiction to revisit the issue in *Vieth*, cases raising that issue were decided by various three-judge district courts, some of which were appealed and summarily affirmed. See *Vieth v. Jubelirer*, 541 U.S. 267, 279–80, 280 n.6 (plurality opinion) (citing and discussing these cases, and noting that all had held against the plaintiffs).

¹³⁴ For further discussions of this feedback mechanism, see BAIRD, *supra* note 125; Vanessa A. Baird, *The Effect of Politically Salient Decisions on the U.S. Supreme Court’s Agenda*, 66 J. POL. 755, 758 (2004); Mark S. Hurwitz, *Institutional Arrangements and the Dynamics of Agenda Formation in the U.S. Supreme Court and Courts of Appeals*, 28 LAW & POL’Y 321 (2006).

¹³⁵ For a review and critique of the considerable literature on this issue, see Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court*, 63 WASH. & LEE L. REV. 271 (2006).

¹³⁶ See Hasen, *supra* note 2, at 669–70 (summarizing criticism of both of those cases). Cf. HASEN, *supra* note 1, at 8, 47–49 (arguing that in some election law cases, the Supreme Court *should* issue vague standards, so that it does not adopt a single vision of

This line of criticism can be overstated. The Supreme Court, of course, reviews very few cases from all areas of the law, and yet in the minds of most people, lower court decision making does not collapse in incoherence. A useful model for understanding the hierarchical relationship between the Supreme Court and lower courts is that of principal and agent.¹³⁸ The Court is the principal, monitoring the actions of its agents, the lower courts, in applying the law. Simply because each case is not reviewed does not mean lower court judges feel free to, or do, run amuck applying federal law. Federal district judges, in non-three-judge district court cases at least, know that there can be an appeal as of right to the circuit court. Circuit judges in such cases will know most of their decisions will not be appealed or, if they are, will be denied certiorari. But they can never be sure which cases might end up before the Supreme Court. The aversion to reversal and, more importantly, the internalization of the application of precedent are surely robust checks on the independence of lower court decision making.¹³⁹

Perhaps the alleged incoherence of Supreme Court doctrine can be overstated as well. Consider the Supreme Court's controversial decision in 1993 in *Shaw v. Reno*,¹⁴⁰ which placed vague restraints on the ability of state legislatures to create so-called racially gerrymandered legislative districts. The vagueness no doubt led the Supreme Court to revisit the issue in several subsequent cases.¹⁴¹ As Pildes observes, many commentators (himself

political equality, and to give space to lower courts to fashion different approaches to these questions, which could aid the Court when it eventually reviews such cases).

¹³⁷ For example, Justice Thomas, in *Randall*, argued that the five factors the plurality opinion of Justice Breyer used to evaluate the constitutionality of Vermont's contribution limits, 126 S. Ct. at 2495–99, were a “newly minted, multifactor test” which requires the Court to evaluate the “propriety of regulations of political speech based upon little more than its *impression* of the appropriate limits.” *Id.* at 2503 (Thomas, J., concurring in the judgment) (emphasis in original).

¹³⁸ For an overview of the literature developing and applying this model, see Tracey E. George & Albert H. Yoon, *The Federal Court System: A Principal-Agent Perspective*, 47 ST. LOUIS U. L.J. 819 (2003) (applying model to federal courts); Michael E. Solimine, *The Future of Parity*, 46 WM. & MARY L. REV. 1457, 1476–77 (2005) (applying model to Supreme Court review of state courts).

¹³⁹ See Frank Cross, *Appellate Court Adherence to Precedent*, 2 J. EMPIRICAL LEGAL STUD. 369, 371 (2005); Friedman, *supra* note 106, at 295–305; Kevin M. Scott, *Understanding Judicial Hierarchy: Reversals and the Behavior of Intermediate Appellate Judges*, 40 LAW & SOC'Y REV. 163, 182–83 (2006).

¹⁴⁰ 509 U.S. 630, 658 (1993).

¹⁴¹ See *Shaw v. Hunt*, 517 U.S. 899, 901 (1996); *Bush v. Vera*, 517 U.S. 952, 956 (1996); *Abrams v. Johnson*, 521 U.S. 74, 77 (1997); *Hunt v. Cromartie*, 526 U.S. 541, 543 (1999); *Easley v. Cromartie*, 532 U.S. 234, 237 (2001); see also *United States v. Hays*, 515 U.S. 737, 739 (1995) (holding that the plaintiffs lacked standing to bring a *Shaw v. Reno*-type claim); *Sinkfield v. Kelley*, 531 U.S. 28, 29 (2000) (per curiam).

included) predicted the “amorphous doctrine would lead to frequent *Shaw* litigation after the 2000 redistricting.”¹⁴² “Yet,” Pildes continues, “the predicted disorder did not occur,” and “rather than a deluge of *Shaw* litigation, there has been almost no such litigation at all.”¹⁴³ Pildes attributes the trickle of litigation to state legislators having “internalized the vague legal constraints of *Shaw* in ways that generated a stable equilibrium,”¹⁴⁴ and “vague law was transformed into settled practice.”¹⁴⁵ It is too soon to tell if *Randall* or *LULAC* will similarly generate less litigation than might be expected. Much will depend, of course, on whether, and to what extent, the Supreme Court decides to hear cases that raise the same or similar issues. The direct review statutes that govern much *Shaw* and now *LULAC*-type litigation have not prevented the Court from being flexible in this regard.

Direct review statutes aside, it is often difficult to predict when the Court will choose to decide election law cases. Consider two recent examples. In *Republican Party of Minnesota v. White*,¹⁴⁶ the Court held that an ethical code that prohibited candidates for state judicial office from announcing their views on disputed legal or political issues violated the First Amendment. Several issues of judicial campaign speech were left open by *White*, two of which are whether partisan or solicitation activities of judicial candidates can be restricted. Those issues were addressed upon remand in *White*, and the Eighth Circuit, sitting en banc, eventually held those restrictions in Minnesota to be unconstitutional.¹⁴⁷ Despite the urgings of the American Bar Association, ten state attorneys general, and others to review the decision,¹⁴⁸ along with the considerable publicity the case had generated, the Court denied certiorari early in 2006.¹⁴⁹ Perhaps the Court was waiting for more

¹⁴² Pildes, *supra* note 113, at 67 (footnote omitted); *see also* Solimine, *supra* note 10, at 81 n.12 (similarly predicting that *Shaw* would generate litigation that would return to the Supreme Court).

¹⁴³ Pildes, *supra* note 113, at 67 (footnote omitted).

¹⁴⁴ *Id.* at 68.

¹⁴⁵ *Id.* at 69 (footnote omitted). Pildes also explores a variety of other factors which account for the paucity of *Shaw* litigation. *Id.* at 69 n.178.

¹⁴⁶ 536 U.S. 765 (2002). The vote was 5-4. Justice Scalia wrote the majority opinion, and Justices Breyer, Ginsburg, Stevens, and Souter dissented.

¹⁴⁷ *Republican Party of Minn. v. White* (“White II”), 416 F.3d 738 (8th Cir. 2005) (en banc).

¹⁴⁸ Press Release, Justice at Stake, High Court Decision Could Open Floodgates of Money into America’s Courtrooms (Jan. 23, 2006), *available at* <http://www.justiceatstake.org/contentViewer.asp?breadcrumb=7,55,744>.

¹⁴⁹ *Dimick v. Republican Party of Minn.*, 126 S. Ct. 1165, 1166 (2006).

developments in the lower courts on this issue, a wish that no doubt will be granted.¹⁵⁰

In a like fashion, the application of the Equal Protection Clause to the counting of ballots in *Bush v. Gore*¹⁵¹ seemed destined to generate more litigation, as indeed it has.¹⁵² Some of those cases were trial court decisions, or appeals from requests for preliminary injunctive relief. However, the appellate court in *Stewart v. Blackwell*¹⁵³ reviewed a district court decision based on a full trial record, and the split Sixth Circuit held that the selective use of punch ballots in Ohio elections violated the principles of *Bush v. Gore*. The state's petition for rehearing en banc was granted.¹⁵⁴ The case was later vacated as moot.¹⁵⁵ Given the controversy still surrounding *Bush v. Gore*,¹⁵⁶ it is not at all clear that the Court would be inclined to grant review. Yet there will be more such litigation,¹⁵⁷ and it is difficult to believe that the Court will be able or inclined to evade review of such cases indefinitely.

V. CONCLUSION: THE LEGALIZATION OF DEMOCRACY AND THE PROCESSES OF JUDICIAL REVIEW

Election law scholarship has recently been dominated by two overlapping debates.¹⁵⁸ Some scholars argue that courts in general, and the Supreme Court in particular, should play a reduced role in the supervision of

¹⁵⁰ See *Developments in the Law: Voting and Democracy*, 119 HARV. L. REV. 1127, 1133–44 (2006) (discussing post-*White* litigation in the lower courts).

¹⁵¹ 531 U.S. 98 (2000) (per curiam).

¹⁵² For a discussion of that litigation, see Edward B. Foley, *The Future of Bush v. Gore*, 68 OHIO ST. L.J. (forthcoming 2007); Richard B. Saphire & Paul Moke, *Litigating Bush v. Gore in the States: Dual Voting Systems and the Fourteenth Amendment*, 51 VILL. L. REV. 229, 278–94 (2006).

¹⁵³ 444 F.3d 843 (6th Cir. 2006).

¹⁵⁴ *Stewart v. Blackwell*, No. 05-3044 (6th Cir. July 21, 2006) (order vacating panel decision and ordering rehearing en banc).

¹⁵⁵ *Stewart v. Blackwell*, 473 F.3d 692, 694 (6th Cir. 2007) (vacating and remanding as moot).

¹⁵⁶ See Pildes, *supra* note 113, at 83 n.226 (arguing that *Bush v. Gore* “remains so explosive” that parties before the Supreme Court, and the Justices themselves, refrain from addressing the implications of the case). *Bush v. Gore* was not mentioned in any of the opinions in *Randall* and *LULAC*.

¹⁵⁷ E.g., *Wexler v. Anderson*, 452 F.3d 1226, 1231–33 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 934 (2007). For the prospects and impact of the likelihood (or lack thereof) of Supreme Court review of cases raising *Bush v. Gore*-like issues, see Foley, *supra* note 152.

¹⁵⁸ For a useful overview of these debates, by a contributor to them, see Guy-Uriel Charles, *Judging the Law of Politics*, 103 MICH. L. REV. 1099, 1100–01 (2005) (reviewing HASEN, *supra* note 1).

electoral law issues, and that in general such issues should be left for resolution to the democratic process itself.¹⁵⁹ Other scholars have argued that judicial intervention is necessary to police the potential self-interested manipulation of electoral processes by officials and political parties.¹⁶⁰ Within the latter field, there is robust debate over the scope of judicial review. One school would limit judicial review to the protection of individual rights.¹⁶¹ Others see the purpose of judicial review in this context as primarily protecting the structure of democratic institutions to achieve competition or other goals.¹⁶² The outcome of these debates, which will no doubt be continued with vigor in the wake of *Randall* and *LULAC*, has consequences for the scope of election law doctrine.¹⁶³

What have not been given sufficient attention in these debates are the processes and institutions of court review. To be sure, the relevant scholarship acknowledges and discusses the direct review provisions and other unique aspects of some election law cases, but rarely does it systematically evaluate what type of court processes and institutions are optimal to litigate such cases.¹⁶⁴ This lack of attention is problematic on two levels. First, as I have endeavored to demonstrate in this Article, the peculiar procedures established to govern litigation of some election law cases are, for good or ill, not necessarily outcome-neutral, and can have important consequences for the development of election law doctrine. Second, it seems to be common ground that judicial decision making in election law cases is particularly ripe for the accusation of partisan or result-oriented outcomes.¹⁶⁵

¹⁵⁹ E.g., Daniel Hays Lowenstein, *You Don't Have to be Liberal to Hate the Racial Gerrymandering Cases*, 50 STAN. L. REV. 779 (1998); Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649 (2002).

¹⁶⁰ E.g., Issacharoff, *supra* note 71; Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998).

¹⁶¹ E.g., HASEN, *supra* note 1.

¹⁶² E.g., Pildes, *supra* note 113.

¹⁶³ See Charles, *supra* note 158.

¹⁶⁴ Some exceptions to these generalizations would include Karlan, *supra* note 80; Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 STAN. L. REV. 731, 753–62 (1998); see Note, *supra* note 99.

¹⁶⁵ E.g., *Bush v. Vera*, 517 U.S. 952, 1038 (1996) (Stevens, J., dissenting) (“Given the uniquely political nature of the redistricting process, I fear the impact [that the application of *Shaw v. Reno* and its progeny] will have on the public’s perception of the impartiality of the Federal Judiciary.”); *Landell v. Sorrell*, 406 F.3d 159, 166 (2d Cir. 2005) (Sack & Katzmann, JJ., concurring in denial of rehearing en banc) (noting that “highly partisan and political caste” of campaign finance cases is “bound to have, or at least to be seen as to have, an impact favoring one political side or another depending on

In this environment, it is particularly important that the processes of judicial review are, and be perceived as, non-partisan in nature,¹⁶⁶ as has been persuasively argued for non-judicial personnel and institutions administering electoral processes.¹⁶⁷

A decade ago I advocated several reforms to the judicial process in election law cases. Among other things, I suggested that the purported advantages of three-judge district courts, such as “greater deliberation, better ‘systematic’ results, more rapid Supreme Court review [were] modest indeed,”¹⁶⁸ and that Congress should consider abolishing those courts, and permit reapportionment cases to be litigated like any other case in federal court. Short of that, I argued that three-judge district courts should be constituted in as non-partisan and random a process as possible, to avoid charges that chief judges of circuits have stacked such panels to achieve a certain result.¹⁶⁹ Ten years of litigation before such courts have not convinced me otherwise. Also, the Court should reconsider its frequent but problematic practice of summarily disposing of (and particularly by affirming) appeals from such courts. At the very least, if summary affirmances are still used, they should have no precedential value for other cases, and should be treated like the unpublished dispositions that they resemble. Finally, I am not convinced that the direct review regime exemplified by the *McConnell* litigation has been an optimal one, and Congress should not enact direct-review statutes in the future. In short, and in general, election law cases are not unique enough to justify a separate litigation process.

the result”); see also Note, *supra* note 99, at 885–90 (discussing possible partisan influences on federal and state judges in redistricting litigation).

¹⁶⁶ See Frederick Schauer, *Judicial Review of the Devices of Democracy*, 94 COLUM. L. REV. 1326, 1336–37 (1994); Solimine, *supra* note 10, at 127–28.

¹⁶⁷ See, e.g., Hasen, *supra* note 66, at 973–91 (arguing that appointed, non-partisan officials should administer elections rather than elected officials); Issacharoff, *supra* note 71, at 644 (discussing blue-ribbon commissions and other approaches to attain non-partisan redistricting).

¹⁶⁸ Solimine, *supra* note 10, at 126.

¹⁶⁹ *Id.* at 134–35. I am in favor of chief judges having no more than one circuit judge sit on the panels, and drawing on judges who sit in the state in question. On the other hand, I am opposed to chief judges deliberately seeking an ideological balance on such panels to give them a more bipartisan flavor. *Id.* at 135.

APPENDIX
UNITED STATES SUPREME COURT ELECTION LAW CASES ON APPEAL
FROM THREE-JUDGE DISTRICT COURTS¹⁷⁰

1981-1990

- Upham v. Seamon, 456 U.S. 37 (1982).
City of Port Arthur v. United States, 459 U.S. 159 (1982).
City of Lockhart v. United States, 460 U.S. 125 (1983).
NAACP v. Hampton County Election Comm'n, 470 U.S. 166 (1985).
Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.,
470 U.S. 480 (1985).
Thornburg v. Gingles, 478 U.S. 30 (1986).
Davis v. Bandemer, 478 U.S. 109 (1986).
City of Pleasant Grove v. United States, 479 U.S. 462 (1987).

1991-2000

- Clark v. Roemer, 500 U.S. 646 (1991).
Presley v. Etowah County Comm'n, 502 U.S. 491 (1992).
U.S. Dep't of Commerce v. Montana, 503 U.S. 442 (1992).
Grove v. Emison, 507 U.S. 25 (1993).
Voinovich v. Quilter, 507 U.S. 146 (1993).
Shaw v. Reno, 509 U.S. 630 (1993).
United States v. Hays, 515 U.S. 737 (1995).
Miller v. Johnson, 515 U.S. 900 (1995).
Morse v. Republican Party of Va., 517 U.S. 186 (1996).
Shaw v. Hunt, 517 U.S. 899 (1996).
Bush v. Vera, 517 U.S. 952 (1996).
Lopez v. Monterey County, 519 U.S. 9 (1996).
Reno v. Bossier Parish Sch. Bd., 520 U.S. 471 (1997).
Abrams v. Johnson, 521 U.S. 74 (1997).
Lawyer v. Dep't of Justice, 521 U.S. 567 (1997).
City of Monroe v. United States, 522 U.S. 34 (1997).
Lopez v. Monterey County, 525 U.S. 266 (1999).
Dep't of Commerce v. House of Representatives, 525 U.S. 316 (1999).
Hunt v. Cromartie, 526 U.S. 541 (1999).
Reno v. Bossier Parish Sch. Bd., 528 U.S. 320 (2000).
Sinkfield v. Kelley, 531 U.S. 28 (2000).

¹⁷⁰ See *supra* note 8 for the source of these cases.

2000-2006

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

Utah v. Evans, 536 U.S. 452 (2002).

Branch v. Smith, 538 U.S. 254 (2003).

Georgia v. Ashcroft, 539 U.S. 461 (2003).

McConnell v. FEC 540 U.S. 93 (2003).

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

Wis. Right to Life, Inc. v. FEC, 126 S. Ct. 1016 (2006).

Lance v. Dennis, 126 S. Ct. 1198 (2006).

LULAC v. Perry, 126 S. Ct. 2594 (2006).

