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Joshua A. Douglas

University of Kentucky College of Law, joshuadouglas@uky.edu

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The Procedure of Election Law in Federal Courts

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THE PROCEDURE OF ELECTION LAW IN FEDERAL COURTS

Joshua A. Douglas*

I. INTRODUCTION

Most federal court cases take a typical path: a district judge initially decides the dispute, and the losing party can appeal to the circuit court, which sits in three-judge panels.¹ The losing party at the court of appeals can either ask the full en banc circuit court to rehear the case or seek certiorari review at the United States Supreme Court.²

Election law cases are different. Although some cases take the traditional three-tiered path described above,³ Congress has enacted special procedures for many other types of cases. In litigation involving the Voting Rights Act, certain aspects of campaign finance, and redistricting, a three-judge district court comprised of both appellate and district judges initially hears the dispute, and the Supreme Court is required to review any appeal.⁴ For other campaign finance cases, Congress has enacted a particularly unique procedure in which a single district judge certifies constitutional challenges to the full en banc circuit court, thereby skipping the three-judge appellate stage altogether.⁵

In the past few years, the Supreme Court has considered several election law cases arising under these different congressionally-mandated procedures. For example, the process by which the Court rejected a constitutional attack to the Voting Rights Act⁶ was quite different from the procedure that gave rise to the Court's decision upholding Indiana's voter identification law.⁷ Similarly, although the substantive holding of the Court's recent campaign finance decision in *Citizens United v. FEC*⁸ has generated widespread commentary,⁹ there has been little examination of the procedural posture of that case. These varying processes have a

* © 2011 Joshua A. Douglas, Assistant Professor of Law, University of Kentucky College of Law. Special thanks to Rick Hasen, Doug Keller, and Michael Solimine for reading an early draft of this Article and providing invaluable comments. This Article also benefitted greatly from comments I received at the University of Illinois Junior Faculty Federal Courts Workshop. Kyle Hermanson provided excellent research assistance. Finally, thanks to the members of the *Utah Law Review* for superb editing.

¹ See 28 U.S.C. §§ 46(c), 132(c), 1291, 1294, 1331 (2006).

² See *id.* §§ 46(c), 1254(1).

³ See, e.g., *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 187–88 (2008).

⁴ 42 U.S.C. §§ 1973aa-2, 1973c (2006); 28 U.S.C. § 2284(a); Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 403, 116 Stat. 81, 113–14.

⁵ 2 U.S.C. § 437h (2006).

⁶ *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2509–10 (2009).

⁷ *Crawford*, 553 U.S. at 187–88.

⁸ *Citizens United v. FEC*, 130 S. Ct. 876, 917 (2010).

⁹ See, e.g., Adam Liptak, *Justices, 5–4, Reject Corporate Campaign Spending Limit*, N.Y. TIMES, Jan. 22, 2010, at A1.

dramatic effect on the scope of election law litigation because they influence the manner in which courts dissect the issues, thus contributing to the substantive analysis.¹⁰

The Supreme Court famously declared that the right to vote is “preservative of other basic civil and political rights,”¹¹ which may explain why Congress has created special procedures for election law cases. Courts are often asked to decide the winner of an election,¹² and these winners enact laws under which we are governed. Election law cases therefore play a fundamental role in shaping our democracy. Courts also have a profound impact on election administration. Whether it is through construing the Voting Rights Act,¹³ deciding the proper scope of campaign finance regulations,¹⁴ or analyzing the constitutionality of an election law,¹⁵ federal courts are at the forefront of shaping our political process.

Additionally, even though courts play a significant role in protecting fundamental rights, including the right to vote,¹⁶ there is heightened concern when courts enter the political fray because the judiciary is the least democratic branch of government.¹⁷ Thus, there is an inherent tension between the desire to leave the judiciary out of the political process and the courts’ obligation to protect voting rights. Any election law decision implicitly calls into question the legitimacy of the courts’ power to render a judgment in this area. This tension requires a greater need to scrutinize the way in which courts are involved in election law disputes.

Election law scholars, however, have paid scant attention to the different procedures by which courts decide election law cases. Further, there has been little exploration of the reasons why certain processes exist, and there is even less discussion of which procedures are best for election law cases. One commentator has advocated for state legislatures to define clearly certain procedural matters for election contests, including: “(1) who can be a contestant; (2) what standard of evidence to require; and (3) how to expedite contests.”¹⁸ But there are more

¹⁰ See *infra* Part III.

¹¹ Reynolds v. Sims, 377 U.S. 533, 562 (1964).

¹² See, e.g., Miller v. Treadwell, 245 P.3d 867 (Alaska 2010) (deciding the 2010 Alaska U.S. Senate election); Sheehan v. Franken, 767 N.W.2d 453 (Minn. 2009) (per curiam) (deciding the 2008 Minnesota U.S. Senate election).

¹³ See, e.g., Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504, 2510 (2009).

¹⁴ See, e.g., Citizens United v. FEC, 130 S. Ct. 876, 917 (2010).

¹⁵ See, e.g., Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 187–88 (2008).

¹⁶ See, e.g., Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69, 96–100 (2009).

¹⁷ See, e.g., Roy L. Brooks, *The Use of Policy in Judicial Reasoning: A Reconceptualization Before and After Bush v. Gore*, 13 STAN. L. & POL’Y REV. 33, 46 (2002) (“By stopping the electoral process, the Supreme Court, our least democratic branch of government, made a major inroad into a political matter that Congress and the people had jointly reserved for themselves (Congress through federal statutes and the people through the federal Constitution).” (citation omitted)).

¹⁸ Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. ON LEGIS. 265, 311 (2007).

fundamental and foundational questions: What goals are we trying to achieve in enacting special procedures for election law? Do the current processes meet these goals? If not, what modifications are necessary?

This Article answers those questions, proceeding in four Parts. Part II identifies the values and features we should strive to promote in creating a special procedure for election law cases: timeliness, accuracy, legitimacy, minimization of ideology, preservation of proper judicial roles (judicial economy), and signaling. If we are going to have specific processes unique to election law cases, these processes should be based on sound principles. Part III examines federal court procedures for election law cases, describes the way in which federal courts hear election law disputes, and evaluates these processes in light of the goals discussed in Part II. Part IV advocates “merits-based direct en banc review” as a uniform judicial procedure for election law cases in federal courts.¹⁹ Briefly stated, in this system, a single trial judge must expedite discovery, resolve factual disputes, and make a timely decision on the merits. The losing party then has a right to an expedited appeal directly to the full en banc court for any nonfrivolous election law questions. The en banc court reviews the district court’s findings of fact for clear and convincing evidence (or a similar standard) and analyzes the legal conclusions de novo.

Enacting merits-based direct en banc review will provide uniformity and clarity to the judiciary’s role in affecting elections and their outcomes. It will also meet many of the goals we should strive to achieve in creating a special procedure for election law cases. Perhaps most important, if the federal judiciary is to remain intimately involved in the election business, then merits-based direct en banc review is the best procedure to sustain a robust democracy in which voters can freely and fairly elect their leaders.

II. GOALS FOR A JUDICIAL SYSTEM FOR ELECTION LAW CASES

Before evaluating how courts currently review election law cases, or determining how courts *should* resolve election law disputes, it is important to discern the values we should seek to promote in any judicial procedure for election law. Congress has enacted special mechanisms for election law cases²⁰ and obviously believes that certain types of election law disputes are different from other court cases. Thus, there would seem to be a reason to enact unique procedures in this area of law; however, it is not clear how the various systems Congress has promulgated actually relate to the goals we should strive to achieve in resolving election law cases. That is, there is a disconnect between why election

¹⁹ State courts have a myriad of procedures for handling election law cases, and in particular, election contests. *See, e.g.*, BARRY H. WEINBERG, *THE RESOLUTION OF ELECTION DISPUTES: LEGAL PRINCIPLES THAT CONTROL ELECTION CHALLENGES* 1–2 (2d ed. 2008) (discussing election contest procedures). An examination of these state court procedures is beyond the scope of this article.

²⁰ *See infra* Part III.

law cases are so important and the structures under which courts render their decisions.

This Part identifies six goals we should seek to promote in any special judicial system for election law disputes: timeliness, accuracy, legitimacy, minimization of ideology, preservation of proper judicial roles (judicial economy), and signaling. Several of these ideals may conflict at times. For example, we may have to sacrifice timeliness for accuracy, or vice versa. Others are interrelated; by rendering an accurate decision, courts are likely to enjoy greater legitimacy in their decision-making powers. After understanding why these ideals are important for election law and determining if current procedures achieve these values, we can then discern what type of process would best promote as many of these goals as possible.²¹

Ultimately, promoting these goals will lead to the realization of an overarching value inherent in a representative democracy: prompt, fair decisions that structure elections in the most just manner possible and ensure the winner of an election is the person who received the majority of votes through an equal and fair process.²² At the same time, judicial procedures should ensure that litigants feel they had a fair shot, and judicial rules must level the playing field for all participants.²³ Our democracy is founded upon the belief that everyone has an equal chance to affect our government;²⁴ any judicial process for election law cases must also promote this value.

A. *Timeliness*

Elections require prompt certainty and finality in the result. That is, election law disputes should not be drawn out affairs.²⁵ Quick resolution helps to ensure legitimacy for the outcome and promotes political accountability—particularly if the case arises in the context of an upcoming election. Lack of timely certainty and finality, by contrast, leads to an inability of candidates to campaign properly or elected leaders to govern effectively.

It is particularly important to ensure timely resolution of election administration disputes before an election so that the parties and the electorate

²¹ This list could serve to inform a discussion about the proper judicial resolution of cases in other areas of law that may also deserve special attention. Thus, although this Article focuses on election law, these principles have wide applicability.

²² See generally LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* 1–6 (1994) (discussing how the imposition of “fair rules” can lead to just electoral outcomes).

²³ See *id.* at 1 (“To me, fair play means that the rules encourage everyone to play.”).

²⁴ See *id.* at 6.

²⁵ See Mark Klock, *Is it “The Will of the People” or a Broken Arrow? Collective Preferences, Out-of-the-Money Options, Bush v. Gore, and Arguments for Quashing Post-Balloting Litigation Absent Specific Allegations of Fraud*, 57 U. MIAMI L. REV. 1, 53 (2002) (noting that the main objective and social policy behind voting is to achieve the “quick resolution of disagreement over who should have political power”).

know how they may act within the political process.²⁶ For example, candidates, political parties, and advocacy groups must understand the proper scope of campaign finance restrictions before a campaign season is in full swing. Similarly, courts should resolve challenges to a state's election regulations before the state implements those laws in an election. As Justice Scalia has explained, election law is an area in which "the dos and don'ts need to be known in advance of the election."²⁷ Prompt adjudication serves the goal of providing clarity to the election process.

With respect to election contests, the electorate more readily accepts the result when there is quick resolution of a close election, instead of having the candidates and their supporters dig in their heels in a drawn-out post-election dispute.²⁸ As one commentator explains,

Were temporal proximity not a priority, elections could be held well ahead of time (much as in a monarchy the heir apparent may be selected well in advance), which would provide ample opportunity for recounts, contests, revotes, and the careful resolution of any issues that arise in an election. Yet because the issues facing politicians are constantly evolving, and because politicians may frequently change their stripes, holding elections roughly contemporaneously with when the victors will take office increases political accountability.²⁹

Long judicial battles also require the courts (rather than "the people," in the view of many,³⁰) to decide the outcome far removed from when the voters actually made their choice. That is, courts need time to decide a post-election dispute, so involving the judiciary necessarily increases the time between when a person votes and when there is a definitive winner, which could call into question the sanctity of

²⁶ This goal also counsels against applying the political question doctrine to disputes involving election administration or voting rights, as it is more important for courts to render timely decisions in this area. See JoAnn D. Kamuf, Note, "Should I Stay or Should I Go?": *The Current State of Partisan Gerrymandering Adjudication and a Proposal for the Future*, 74 *FORDHAM L. REV.* 163, 202 (2005) ("The political question doctrine should not control in the arena of election law, which is already highly regulated by the courts." (citation omitted)).

²⁷ *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 208 (2008) (Scalia, J., concurring in the judgment); see also 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).

²⁸ See Huefner, *supra* note 18, at 292–93.

²⁹ *Id.* at 292.

³⁰ See, e.g., Krysta R. Edwards, Note, *The Vote from beyond the Grave*, 51 *WM. & MARY L. REV.* 1583, 1605 (2010) (noting that some citizens "simply do[] not see the point in voting when an election is decided by the courts rather than the people" (citation omitted)).

election administration.³¹ In other words, “[i]n an important sense, a speedy determination of an election protects the integrity of the process.”³²

Moreover, given that some offices have short terms (such as two years for members of Congress),³³ it makes sense to resolve any disputes quickly so that the person elected can begin the job of governing. Even if the person is a low-level official or merely one member of a larger body, his or her constituents will suffer a lack of representation every day that an election contest drags on. For example, the court battle between Norm Coleman and Al Franken for the 2008 Minnesota Senate seat lasted several months after the winner was supposed to take office, meaning that the citizens of Minnesota had only one U.S. Senator during the time it took the Minnesota courts to resolve the election dispute.³⁴ The process could have dragged on even longer if Coleman had continued his battle in federal court.³⁵ Similarly, Hamilton County, Ohio, was required to use a former judge to temporarily fill a vacancy on the juvenile court while the federal and state courts sorted out an election contest between the candidates for that position.³⁶

It follows that post-election legal battles deserve quick adjudication. Surely, anyone involved in a legal dispute will argue that their area of law deserves efficiency and finality. But from a societal and normative perspective, election law presents special reasons to elevate the goal of timeliness.³⁷ Quick adjudication helps to promote integrity in the electoral process and legitimacy of elected officials.³⁸ It also allows elected officials to govern, as opposed to being mired in legal challenges. Thus, any special procedure for resolving election law cases should include a goal of quick decision making in reaching a final resolution. Simply directing judges to decide cases promptly or put election contests at the

³¹ See Huefner, *supra* note 18, at 293.

³² *Id.* (citation omitted).

³³ U.S. CONST. art. I, § 2 (“The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . .”).

³⁴ See Mike Kaszuba & Pat Doyle, *How Long Will Minnesota Be a Senator Short?*, STARTRIBUNE, <http://www.startribune.com/politics/state/36785544.html> (last updated Dec. 28, 2008); see also Edward B. Foley, *The Lake Wobegone Recount: Minnesota’s Disputed 2008 U.S. Senate Election*, 10 ELECTION L.J. 129 (2011).

³⁵ See Richard L. Hasen, *Franken’s Monster: Will Bush v. Gore Bite Democrats in Coleman v. Franken?*, SLATE (Mar. 18, 2009, 2:07 PM ET), <http://www.slate.com/id/2214074/pagnum/all/#p2>.

³⁶ *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 245 (6th Cir. 2011).

³⁷ See Huefner, *supra* note 18, at 314–15 (“Election contests need to be both commenced and concluded as expeditiously as possible.”). Timeliness is particularly important for new or struggling democracies to ensure a peaceful end to an election dispute. See Oren Ipp & Terence F. Hoverter, *Identifying International Principles for Resolving Election Disputes*, 57 ADMIN. L. REV. 829, 835 (2005). The key principles for resolution of international post-election disputes are: (1) the right to file a complaint, (2) an impartial arbiter, (3) timely resolution of disputes, (4) effective, appropriate, and enforceable remedies, and (5) transparent and accessible procedures. *Id.* at 833–37.

³⁸ See Huefner, *supra* note 18, at 293 (“[I]t is important that representatives serve with full authority and respect, rather than with unresolved questions about their legitimacy.”).

front of the docket is one way to achieve timeliness; however, as discussed below, there are also structural mechanisms that can foster prompt adjudication. That is, so long as Congress wishes to enact special procedures for election law cases, it can include both structural means and aspirational directives to promote timeliness.

B. Accuracy

No one would dispute that court decisions involving election law should be accurate. Elections are fair only if the rules governing them promote fairness and accuracy, giving each side an equal opportunity for victory. A common understanding of popular sovereignty recognizes election law “as a guarantor of electoral accuracy and governmental legitimacy.”³⁹ Certainly, a court case that ultimately decides the election must be as accurate as possible in discerning the will of the majority because the elected leader will likely not enjoy legitimacy if the court proceeding that led to the victory was tainted.⁴⁰ But election administration cases also require accuracy to ensure that the electoral process remains fair.

If a court is incorrect in a private contract dispute or a tort case, the parties themselves will be aggrieved and the public may have a poor view of the courts. But, as a whole, society will not necessarily suffer unless the rule somehow negatively affects business transactions or has other widespread consequences beyond that case. Moreover, the courts can eventually reverse their position on an incorrect legal rule with little long-term implications. If, however, the courts are wrong on a matter of election law, there are resulting widespread societal concerns: e.g., the wrong person could be elected, citizens could be incorrectly denied their right to vote, or improper influences could taint the election process.

Our democracy functions because we elect leaders to govern us.⁴¹ If those leaders are elected using improper means or unfair rules, then they may not be able to govern as effectively because they will not enjoy legitimacy among the electorate.⁴² Moreover, the stakes in any election law case are necessarily high

³⁹ James A. Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty under the Lockean Constitution*, 52 U. PITT. L. REV. 189, 245 (1990) (discussing this “Lockean-based” view of popular sovereignty).

⁴⁰ See Joaquin G. Avila, *The Washington 2004 Gubernatorial Election Crisis: The Necessity of Restoring Public Confidence in the Electoral Process*, 29 SEATTLE U. L. REV. 313, 315 (2005) (“[T]he vibrancy of our body politic and the continued legitimacy of our form of government rest upon the understanding that the electoral process will accurately reflect the will of the people.”); see also Kevin J. Hickey, Note, *Accuracy Counts: Illegal Votes in Contested Elections and the Case for Complete Proportionate Deduction*, 83 N.Y.U. L. REV. 167, 172 (2008) (“In short, the value of accuracy counsels that the final tally should reflect the will of the electorate.”).

⁴¹ See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 7 (1980) (defining democracy as “rule in accord with the consent of a majority of those governed”).

⁴² See Gardner, *supra* note 39, at 192 (“[E]lection laws and procedures necessarily affect the legitimacy of an elected government by determining the extent to which election

given that they impact political power and thus the authority to make laws that affect all aspects of our society. Elections must enjoy the appearance of fairness and equality, as these values infuse the theoretical backbone of our democracy and provide legitimacy to those elected under judicial rules. Accuracy in election law cases is thus paramount to achieve that notion of fairness.⁴³ “When a court or other tribunal acts to remedy an election irregularity, the public must be able both to understand why the election failed and to accept how it will be fixed. The public must also have confidence that it will be fixed fairly and not arbitrarily.”⁴⁴

Courts place a premium on accuracy in all of their decisions. Election law cases, however, have an even greater need for accuracy, meaning that legislatures should enact structural mechanisms and create specific procedures to increase the likelihood of accurate decision making.

C. Legitimacy

As a corollary to accuracy, courts must enjoy the public’s support in rendering election law decisions. Elected leaders themselves will not enjoy legitimacy if the courts that set out the rules under which politicians are elected are not perceived as fair, unbiased, and competent to make decisions in this area.⁴⁵ If courts are to remain in the business of deciding election law disputes—and there is no indication that they will remove themselves from the “political thicket”⁴⁶—then society must view the decisions as legitimate.⁴⁷ Of course, there is an inherent tension present, as any time a court decides a hotly contested election law case it will open itself up to criticism of partisanship and overreaching simply based on the subject matter involved.⁴⁸ But if Congress decides that the federal courts must

results accurately reflect the consent of the governed.”). Thus, the goals of accuracy and legitimacy of elected officials go hand in hand; without an accurate vote tally, the winner will not enjoy legitimacy.

⁴³ Jocelyn Friedrichs Benson, *Democracy and the Secretary: The Crucial Role of State Election Administrators in Promoting Accuracy and Access to Democracy*, 27 ST. LOUIS U. PUB. L. REV. 343, 344–45 (2008) (noting that, along with access, accuracy is one of the key values “at the heart of a healthy democratic process”).

⁴⁴ Huefner, *supra* note 18, at 291–92.

⁴⁵ See Christopher S. Elmendorf, *Refining the Democracy Canon*, 95 CORNELL L. REV. 1051, 1060 n.33 (2010) (noting that a court that employs an “even-handed application of the law . . . accordingly confers legitimacy on the declared winner of the election”).

⁴⁶ See generally Pamela S. Karlan, *Exit Strategies in Constitutional Law: Lessons for Getting the Least Dangerous Branch Out of the Political Thicket*, 82 B.U. L. REV. 667, 673–74, 698 (2002) (exploring various “exit strategies” for the Supreme Court to remove itself from the political thicket but concluding that the Court is unlikely to stop deciding election law cases anytime soon).

⁴⁷ See, e.g., Elmendorf, *supra* note 45, at 1060 (“Courts that lack the public’s confidence [regarding perceived partisanship] may not be able to resolve election disputes authoritatively.”).

⁴⁸ As Professor Rick Hasen notes, using the courts as part of a political strategy can inherently undermine the legitimacy of both the court rendering the decision and the

be involved in election law litigation, then it should also set up a structure that can best preserve the courts' legitimacy.

Legitimacy has two strands: legitimacy of the court in deciding election law cases and legitimacy of elected officials.⁴⁹ Further, one flows from the other: a court's legitimacy in analyzing election law rules can help lead to greater legitimacy for candidates operating under those rules. That is, if the public views courts that construe election law rules as legitimate, then the representatives elected under those rules are also likely to enjoy legitimacy because the public will perceive the process by which they are elected as fair. With respect to procedures for election law court cases, then, courts must enjoy legitimacy for them to render competent decisions that the public will accept.

As Professor Steven Huefner explains, a court decision that resolves a close election must "be both fair and perceived as fair."⁵⁰ Part of ensuring this perception of fundamental fairness is rooting out any bias of the decision makers and crafting a system that encourages "[g]reater uniformity in recount and contest procedures."⁵¹ Litigants must feel that they have had a fair chance to make their argument before an unbiased court and that the court will render its decision solely based on the substantive merits of the case.⁵²

elected official that the decision involves. *See* Hasen, *supra* note 27, at 993 ("Putting 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. Moreover, when judges second-guess decisions made by legislators and votes cast by the people, the legitimacy of the election process itself can suffer."). Justice Breyer expressed a similar sentiment in his dissent in *Bush v. Gore*, 531 U.S. 98, 157 (2000) (Breyer, J., dissenting), noting that a close election can "embroil[]" judges in partisan conflict and "undermin[e] respect for the judicial process."

⁴⁹ *See* Hasen, *supra* note 27, at 993; *cf.* Michael L. Wells, "Sociological Legitimacy" in *Supreme Court Opinions*, 64 WASH. & LEE L. REV. 1011, 1032-33 (2007) (explaining that the Supreme Court is often concerned with the public's perception of its decisions both in terms of "legal" and "sociological" legitimacy).

⁵⁰ Huefner, *supra* note 18, at 289.

⁵¹ *Id.* at 290.

⁵² *Id.* Professor Huefner continues:

Ensuring that the public perceives and accepts a remedy as fair is equally important to the legitimacy of an election remedy. Public acceptance of the process through which the system resolves election failures ultimately involves a complex mix of overlapping factors that sometimes are in tension with each other. For instance, the public not only must believe that the remedial system treats both candidates and voters equally, but also must be confident that the system will protect anonymous voting while allowing an accurate accounting of the outcome.

Id.; *see also* Benjamin Handler, *Abandoning the Cause: An Interstate Comparison of Candidate Withdrawal and Replacement Laws*, 37 COLUM. J.L. & SOC. PROBS. 413, 436 (2004) ("[B]oth historical and modern experience have demonstrated that courts are at their lowest level of legitimacy when applying loose principles to contentious issues of election

Even decisions that do not resolve a disputed election, but instead construe laws regarding election administration, require legitimacy for the political process to work. Many people disagreed with the Supreme Court's campaign finance decision in *Citizens United v. FEC*, which held that corporations and unions can spend an unlimited amount of money from their general treasuries on political campaigns.⁵³ But the debate focused on whether the Court was incorrect in its legal and constitutional analysis, not on whether the Court lacked the power to rule the way it did—that is, on whether the Court's decision was illegitimate.⁵⁴

Courts require legitimacy in all of their decisions if they expect people to follow their mandates.⁵⁵ The unique position of election law cases, however, requires heightened legitimacy for the courts. Election law is different because of the role elections play in our democracy.⁵⁶ Nothing happens—no laws are passed, no governing takes place—until someone is elected to an office. Therefore, when courts become involved in the foundational step of promulgating rules for elections, their decisions must be seen as a proper exercise of their power. It follows that any special election law procedure must keep the preservation of the judiciary's legitimacy in mind.

D. *Minimization of Ideology*

Bias in judicial decisions might taint the accuracy and legitimacy of the result. Because election law cases are fraught with ideological underpinnings, it is imperative to highlight this reality in any judicial procedure for election law cases. Simply stated, many election law court battles involve ideological issues, in which there is a Republican/conservative position and a Democratic/liberal position.⁵⁷

law. Such cases worry legal observers in the federal system and in states where the judiciary is relatively independent; in states where judges are elected or otherwise remain accountable to political leaders, they may be disastrous. Thus, to preserve the appearance of judicial impartiality, lawmakers should favor rules and objective standards over looser principles.”).

⁵³ *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010); see Robert Barnes, *In the Court of Public Opinion, No Clear Ruling*, WASH. POST, Jan. 29, 2010, at A1 (explaining how President Obama criticized the Supreme Court's decision during his State of the Union address).

⁵⁴ See, e.g., Richard L. Hasen, *The Supreme Court Kills Campaign Finance Reform*, SLATE (Jan. 21, 2010, 12:58PM), <http://www.slate.com/id/2242209> (discussing the Roberts Court's legal and constitutional analysis in *Citizens United v. FEC*).

⁵⁵ See Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1450–51 (2001) (discussing the aftermath of the *Bush v. Gore* decision and the importance of the Supreme Court's legitimacy).

⁵⁶ See, e.g., Akhil Reed Amar, *Applications and Implications of the Twenty-Fifth Amendment*, 47 HOUS. L. REV. 1, 13 (2010) (noting that elections are the “very foundations of our democracy”).

⁵⁷ For example, “liberal” judges tend to reject a claim of race-based gerrymandering (thereby allowing legislatures to consider race in redistricting to counter historical racial discrimination), while “conservative” judges tend to reject any consideration of race in

Even issues that do not seem partisan on their face—e.g., whether to require voters to show photo identification to vote—present ideological questions beneath the surface.⁵⁸ The judiciary, however, is supposed to be unbiased.⁵⁹ This tension requires that any court structure for election law cases minimize the ideological backgrounds judges will bring to a decision, so as to ensure accuracy, fairness, and legitimacy.

Instinctively, many people believe that judges will vote with their political brethren in an election law case.⁶⁰ Thus, from the outset there is a perceived ideological bias that a judicial procedure must overcome. Research confirms this instinct. For example, in a comprehensive study of decisions under the Voting Rights Act, Professors Adam Cox and Thomas Miles found that the ideology of the judge rendering a decision (based on the political party of the president appointing the judge) was a strong predictor of that judge's vote.⁶¹ But judges—

redistricting. *See, e.g.*, *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993). Similarly, as a generalization, liberals—whether they are candidates, voters, or even judges—tend to oppose felon disenfranchisement laws while conservatives tend to support them. *See, e.g.*, Heather K. Gerken, *Shortcuts to Reform*, 93 MINN. L. REV. 1582, 1594 (2009) (“A party label can tell a voter whether a candidate is liberal or conservative and thus indicate to a voter how a candidate is likely to approach issues like campaign finance or felon disenfranchisement.”).

⁵⁸ *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 186–87 (2008). Generally, Republicans favor a photo identification requirement and Democrats oppose such a requirement. *See Democrats Hold Double-Digit Lead in Competitive Districts*, PEW RES. CENTER FOR THE PEOPLE & THE PRESS (Oct. 26, 2006), <http://people-press.org/report/293/democrats-hold-double-digit-lead-in-competitive-districts>. This might be because Republicans generally are more concerned about the integrity of the electoral process, while Democrats are more concerned about access to the ballot. A cynical observer would note, however, that those without photo identification tend to be the poor and minorities, and these voters tend to vote for Democratic candidates. Thus, the stated policies toward voter identification may be based on partisanship: Republicans want to place more obstacles to voting for Democratic-leaning voters, and Democrats want to ensure their supporters have easy access to the ballot.

⁵⁹ *See* Adrian Vermeule, *Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 43 (2009) (“The first-best system would be one in which the judiciary is itself unbiased.”).

⁶⁰ *See* Lawrence B. Solum, *Judicial Selection: Ideology versus Character*, 26 CARDOZO L. REV. 659, 679 (2005) (“Judging aimed at advancing political ideology naturally conceives of these disputes about the rules of the game as part of the game itself. An ideological judge will use election law to rig elections for her own faction.”).

⁶¹ Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 19–25 (2008) (finding that judicial ideology significantly influences judicial decision making in Voting Rights Act cases); *see also* Joshua A. Douglas, *The Voting Rights Act through the Justices' Eyes: NAMUDNO and Beyond*, 88 TEX. L. REV. *See also* 1, 8 (2009) (finding that conservative Supreme Court justices tend to construe the Voting Rights Act narrowly while liberal justices interpret the Act more broadly). State courts also exhibit partisanship in election law cases. *See* Scott Graves, *Competing Interests in State Supreme Courts: Justices' Votes and Voting Rights*, 24 AM. REV. POL. 267, 276–280

even partisan elected state judges—are not supposed to be ideological.⁶² Instead, the paramount goal of the judiciary is fairness and accuracy.⁶³ Resolving this tension involves creating a structure that tempers, as best as possible, partisan decision making. Given that rooting out ideological predilections is nearly impossible,⁶⁴ the best procedure for election law cases will minimize ideology by allowing the viewpoints of many perspectives to infiltrate the process.

E. Proper Judicial Roles

Several of the goals discussed above—as well as current judicial procedures for election law cases⁶⁵—give rise to a specific concern about creating a special procedure for election law. Judges should be asked to perform their traditional judicial functions, instead of reaching outside of their expertise. The underlying value is judicial economy,⁶⁶ so that judges are not learning new skills in the context of deciding a difficult election law case. This means that judges who typically focus on fact finding should undertake fact finding in an election law case, while judges who normally conduct in-depth legal analysis should continue to perform this role in election law disputes.⁶⁷ In an area in which we are seeking to achieve

(2003). *But see* Michael E. Solimine, *Institutional Process, Agenda Setting, and the Development of Election Law on the Supreme Court*, 68 OHIO ST. L.J. 767, 790–92 (2007) (positing that the evidence is mixed regarding whether federal judges rule in partisan ways in election law cases).

⁶² See Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 969 (1999) (“Even if it is not descriptively accurate, the principle that judges should avoid impinging their personal ideology into constitutional interpretation remains a normative ideal.”).

⁶³ See Huefner, *supra* note 18, at 291–92 (“When a court or other tribunal acts to remedy an election irregularity, the public must . . . have confidence that it will be fixed fairly and not arbitrarily.”); *see also* Benson, *supra* note 43, at 344–45 (explaining that, along with access, accuracy is one of the key values “at the heart of a healthy democratic process”).

⁶⁴ See Eugene Volokh, *Pragmatism vs. Ideology in Free Speech Cases*, 99 NW. U. L. REV. 33, 34 (2005) (noting, in the First Amendment context, that “one cannot avoid making ideological judgments”).

⁶⁵ See *infra* Part III.

⁶⁶ See generally BLACK’S LAW DICTIONARY 863 (8th ed. 2004) (defining “judicial economy” as “[e]fficiency in the operation of the courts and the judicial system; esp., the efficient management of litigation so as to minimize duplication of effort and to avoid wasting the judiciary’s time and resources”).

⁶⁷ In a discussion of the proper roles for district and appellate judges in specialized courts for administrative law questions, Professor Harold Bruff explains that “[t]he experience of circuit judges may make them better suited than district judges to exercise administrative review, because appellate judges always serve as restrained reviewers of decisions by others, not initial triers of fact.” Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 344 (1991). By contrast, district judges are “possessed of tools for original fact-finding and accustomed to their use.” *Id.*

quick adjudication, accuracy in the decision, and legitimacy for the decision maker, courts should focus on what they do best. A system that places a judge not only in the middle of a hotly contested election law dispute but also asks that judge to learn a new or less familiar judicial role is unlikely to achieve these goals effectively. Thus, when structuring a procedural mechanism for election law, trial judges should be asked to take on their normal judicial role—discovery management, evidence gathering, and fact finding, with an initial pass at resolving questions of law⁶⁸—while appellate judges should be asked to perform their typical function—in-depth legal analysis.⁶⁹

Inherently, this value suggests that a multilayered review process is most appropriate. However, including appellate judges at the first stage or trial judges at the second stage mixes these judges' normal areas of expertise, requiring them to conduct a form of analysis with which they may be less familiar.⁷⁰ Moreover, a single panel of both trial and appellate judges that makes final determinations of both fact and law will not work because it again asks certain members of the panel to undertake a function that they do not normally engage in for their other cases. Given the goals of timeliness, accuracy, and legitimacy, judges should focus their election law efforts on those tasks they do most often on a regular basis in their other cases.

In sum, preserving each judge's normal role will help to achieve the other principles discussed above. Of course, it is not concerning if a particular mechanism advances these ideals in a manner that requires certain judges to perform tasks that they do not normally do; maintaining proper judicial roles is a secondary consideration that is a means to an end, not an end itself. Exploiting each type of judge's normal expertise seems likely to help courts reach fast, accurate decisions that enjoy widespread legitimacy because judges can focus on what they are good at in considering the case. Any special procedure for election law should keep this concept of judicial economy in mind.

F. Signaling

A final, although minor, consideration for an election law judicial procedure is the signal Congress sends in creating a special system for these cases. Congress implicitly signals to courts, litigants, and the public that election law cases are important—indeed, more significant than other cases the courts handle because of the foundational principles embodied in the decisions.⁷¹ In other words, if these

⁶⁸ *See id.*

⁶⁹ *See id.* (“The courts of appeals follow procedures designed for resolution of issues of law.”).

⁷⁰ *See* Michael E. Solimine, *The Three-Judge District Court in Voting Rights Litigation*, 30 U. MICH. J.L. REFORM 79, 132 (1996).

⁷¹ *See* Edward B. Foley, *Election Law and the Roberts Court: An Introduction*, 68 Ohio St. L.J. 733, 735 (2007) (“Both election law and constitutional law are foundational, then, in the sense of creating frameworks for and setting in motion the

decisions were not somehow different, then why would the legislature create specific processes for them in the first place? There is something unique about election law judicial decisions, as they define the rules under which we elect our leaders and therefore have a tremendous impact on how we are governed. Moreover, elections are fundamentally important to the foundation of our democracy.⁷² If Congress is going to place election law cases in a separate bucket—and the analysis below demonstrates that it already has⁷³—then it should actively consider the reasons for doing so and the inherent signal this sends.⁷⁴

* * *

This Part has identified six goals to consider when evaluating current mechanisms for election law cases. These goals are not meant to be an exhaustive list, but should provide a starting place for an examination of current court procedures for election law disputes and the framework for a new uniform judicial procedure for this area. Of course, there are certainly other values we could contemplate, including creating specific standards of review or evidentiary rules for election law cases;⁷⁵ however, the aforementioned six goals are of vital importance. Part III builds upon these goals and analyzes current federal court practices with respect to election law. Part IV proposes a uniform procedure for election law cases that best achieves these goals.

III. FEDERAL COURT ELECTION LAW PROCEDURE

Federal court election law cases follow one of three trajectories. In the standard situation, a case originates in the district court, with direct review to a three-judge panel of the court of appeals, and then discretionary certiorari review to the Supreme Court.⁷⁶ In some scenarios, however, the case is first argued to a three-judge panel of the district court, with direct review to the Supreme Court.⁷⁷ In still other cases, a single district judge certifies any nonfrivolous constitutional challenges directly to the en banc court of appeals, with typical certiorari review to the Supreme Court.⁷⁸ This Part explores these different mechanisms of hearing election law cases in federal court. It concludes with a discussion of the

exercise of conventional legislative power by democratically chosen and accountable officials.”).

⁷² See Amar, *supra* note 56, at 13.

⁷³ See *infra* Part III.

⁷⁴ Of course, Congress must also keep in mind the concern that creating a special procedure could actually signal federal court openness to election litigation. Thus, any procedure should not actively invite election law challenges, and it must include a mechanism to easily weed out and dismiss frivolous cases. See *infra* Part IV.

⁷⁵ See Huefner, *supra* note 18, at 311.

⁷⁶ See *infra* Part III.A.

⁷⁷ See *infra* Part III.B.

⁷⁸ See *infra* Part III.C.

DISCLOSE Act, a bill introduced in 2010, which illustrates both Congress's interest in court procedure for election law cases and Congress's partisan approach to these issues.⁷⁹

A. Typical Three-Tiered Federal Court Review

The normal path of a federal court case is quite familiar. First, a district court initially decides the dispute, making findings of fact and conclusions of law.⁸⁰ The losing party then has a right to direct review before a three-judge panel of the court of appeals for that circuit.⁸¹ A losing party at the court of appeals has two recourses: seek en banc review, in which every judge from that circuit hears the case,⁸² or seek review from the Supreme Court through the certiorari process.⁸³ Importantly, review at the Supreme Court is discretionary and requires the vote of four justices.⁸⁴

Between 2000 and 2009, the Supreme Court heard fifteen election law cases that came through the typical process: district court, court of appeals, then certiorari.⁸⁵ These cases generally involved constitutional challenges to a state's

⁷⁹ See *infra* Part III.D.

⁸⁰ See 28 U.S.C. §§ 132(c), 1331, 1332 (2006).

⁸¹ See *id.* §§ 46, 1291, 1294.

⁸² *Id.* § 46(c). Because of its size (twenty-nine active judges), the Ninth Circuit allows for only a "limited en banc" review, in which the en banc court consists of the chief judge and ten additional active judges selected at random. See 9TH CIR. R. 35-3.

⁸³ 28 U.S.C. § 1254(1). Note that the court of appeals can also certify a question of law to the Supreme Court. *Id.* § 1254(2). The Supreme Court, however, has not accepted a certified question from the courts of appeals since 1981. *United States v. Seale*, 130 S. Ct. 12, 13 (2009) (Stevens, J., dissenting from the dismissal of the certified question).

⁸⁴ See 28 U.S.C. § 1254(1); ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 296–300 (8th ed. 2002) (describing the "Rule of Four").

⁸⁵ *Brunner v. Ohio Republican Party*, 555 U.S. 5 (2008) (considering a challenge to state's compliance with HAVA); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008) (considering the constitutionality of Indiana's voter identification law); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008) (examining the constitutionality of Washington's "top two" primary system); *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196 (2008) (considering New York state's judicial appointment system); *Purcell v. Gonzelez*, 549 U.S. 1 (2006) (vacating an order of the Ninth Circuit enjoining operation of Arizona's voter identification laws); *Randall v. Sorrell*, 548 U.S. 230 (2006) (reviewing the constitutionality of the Vermont Campaign Finance Reform Act); *Clingman v. Beaver*, 544 U.S. 581 (2005) (considering the constitutionality of Oklahoma's semiclosed primary system); *FEC v. Beaumont*, 539 U.S. 146 (2003) (analyzing the constitutionality of a provision of the Federal Election Campaign Act); *Republican Party of Minn. v. White*, 536 U.S. 765 (2002) (considering the constitutionality of the Minnesota judicial canon prohibiting judicial candidates from announcing views on legal or political issues); *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) (rejecting a constitutional challenge to the Federal Election Campaign Act coordinated expenditure limits); *Cook v. Gralike*, 531 U.S. 510 (2001) (considering a constitutional challenge to an initiative amending the Missouri Constitution to require any

election law practice.⁸⁶ Importantly, the Court *chose* to hear these cases, thus determining that the issues were ready for Supreme Court resolution.

In this three-tiered process, decision making occurs in the following way: the district court issues findings of fact and also takes a first pass at the constitutionality of the provision.⁸⁷ District judges have significant power over the scope of the litigation through their evidentiary rulings and factual findings. If appealed, a three-judge panel of the court of appeals reviews the district court's decision, giving great deference to the district court's factual findings, but making its own assessment on the constitutional question.⁸⁸ Thus, there are at least three appellate judges who take a fresh look at legal issues, with additional judges analyzing the dispute if it goes en banc. If the Supreme Court accepts the case for review, it too generally defers to the district court for factual disputes (unless the lower court's findings are clearly erroneous) but provides its own view on the legal constitutional issue.⁸⁹

For example, consider the recent challenge in *Crawford v. Marion County Election Board* to Indiana's voter identification law, a particularly hot-button election issue.⁹⁰ The district judge issued a seventy-page decision, laying out in detail the factual underpinnings of the case and analyzing the legal questions regarding the plaintiffs' standing and the constitutionality of the voter identification statute.⁹¹ A large part of the court's decision involved describing the purportedly undisputed facts of the case, detailing the evidence the plaintiffs presented regarding the way in which the statute allegedly impacted various voters.⁹² The court considered the reliability of an expert report and reviewed the evidence of the statute's alleged infringement on voters' rights.⁹³

On direct review, a three-judge panel of the Court of Appeals for the Seventh Circuit affirmed the district judge's conclusion that the law was constitutional, spending the bulk of its decision on the legal questions of standing and alleged

candidate for Congress that did not support term limits to have that listed on ballot); *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000) (analyzing a constitutional challenge to California's blanket primary system); *Rice v. Cayetano*, 528 U.S. 495 (2000) (reviewing the constitutionality of Hawaii's voter eligibility requirement for trustees for Office of Hawaiian Affairs); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000) (considering a challenge to provisions of Missouri's campaign finance law); *Gutierrez v. Ada*, 528 U.S. 250 (2000) (determining whether the Organic Act of Guam required a runoff election for the governor and lieutenant governor of Guam).

⁸⁶ See cases cited *supra* note 85. Two of the cases were constitutional challenges to provisions of the Federal Election Campaign Act. See *Beaumont*, 539 U.S. at 149; *Colo. Republican Fed. Campaign Comm.*, 533 U.S. at 437.

⁸⁷ See FED. R. CIV. P. 52(a)(1).

⁸⁸ See FED. R. CIV. P. 52(a)(6).

⁸⁹ See, e.g., *Clingman*, 544 U.S. at 618 (Stevens, J., dissenting) (noting that a district court's factual findings are "entitled to substantial deference").

⁹⁰ *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 185 (2008).

⁹¹ *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775 (S.D. Ind. 2006).

⁹² *Id.* at 785–97.

⁹³ *Id.* at 783, 803–09.

infringement on voters' rights.⁹⁴ There was little discussion of the district court's factual findings per se; those facts merely informed the court's legal conclusions.⁹⁵ The plaintiffs sought en banc review, but the majority of judges on the Seventh Circuit declined to rehear the case, with four judges dissenting.⁹⁶

The plaintiffs then filed a writ of certiorari to the Supreme Court, and the Court agreed to hear the case.⁹⁷ At the merits stage, the Supreme Court affirmed the Seventh Circuit and upheld the voter identification law, focusing its decision on the legal intricacies of a law requiring photo identification.⁹⁸ Notably, the Court dismissed the standing issue briefly in its opinion, instead winnowing the case to the key legal issue of the alleged constitutional burden Indiana's voter identification law imposed.⁹⁹ The Court's majority relied heavily on the district court's factual findings, refusing to question the court's view that the plaintiffs had failed to provide sufficient evidence of voter infringement under the photo identification law.¹⁰⁰ The Court stressed that it was focusing on the evidence in the record, leaving the factual findings to the district court and simply using those findings to make its legal conclusions.¹⁰¹

The three-tiered process in *Crawford* displays several attributes emblematic of the standard federal court approach to election law (and most other) cases. First, a single district judge is given great latitude to render factual findings. That judge is closest to the facts and is best equipped to make evidentiary findings "on the ground" of the litigation.¹⁰² The district judge also takes a first pass at the legal issues. Second, a randomly selected three-judge panel focuses on the legal questions, informed by the district court's factual findings. En banc review is

⁹⁴ *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 954 (7th Cir. 2007). One judge dissented. *See id.* at 954 (Evans, Circuit Judge, dissenting).

⁹⁵ *Id.* at 950–52.

⁹⁶ *Crawford v. Marion Cnty. Election Bd.*, 484 F.3d 436, 437 (7th Cir. 2007) (Wood, J., dissenting from the denial of rehearing en banc).

⁹⁷ *Crawford v. Marion Cnty. Election Bd.*, 551 U.S. 1192, 1192 (2007).

⁹⁸ *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189–204 (2008).

⁹⁹ *See id.* at 189 n.7 ("We also agree with the unanimous view of those judges that the Democrats have standing to challenge the validity of SEA 483 and that there is no need to decide whether the other petitioners also have standing.").

¹⁰⁰ *Id.* at 187, 201.

¹⁰¹ *See, e.g., id.* at 202 ("In sum, on the basis of the record that has been made in this litigation, we cannot conclude that the statute imposes 'excessively burdensome requirements' on any class of voters.").

¹⁰² *See, e.g., United States v. Aguwa*, 123 F.3d 418, 423 (6th Cir. 1997) (noting that "appellate courts are not equipped to resolve factual issues"); *see also* Frank O. Bowman, III, *Coping With "Loss": A Re-Examination of Sentencing Federal Economic Crimes under the Guidelines*, 51 VAND. L. REV. 461, 536 (1998) ("District courts are very well equipped to make findings of fact. That is, after all, their job."); Jeremy M. Taylor, Comment, *The Ghost of Harlan: The Unfulfilled Search for Judicially Manageable Standards in Voting Rights Litigation*, 65 MISS. L.J. 431, 454–55 (1995) (explaining that the Fifth Circuit routinely remanded voting rights cases to the district court for specific findings of fact and conclusions of law).

discretionary, so the three-judge panel has a great deal of power in rendering a final decision on the disputed legal issues, which a subsequent panel must follow.¹⁰³ The appellate panel's decision is often definitive; the Supreme Court agrees to hear only a small percentage of cases on discretionary certiorari review.¹⁰⁴ If the Court chooses to decide the case, it too will give great deference to the district judge's factual findings and will focus on the legal or constitutional issues. Additionally, the certiorari process allows the parties and the Court to narrow the scope of the legal issues under review, as the Court decides only those questions it wishes to hear.

As with any system, there are both advantages and disadvantages to proceeding in this manner. Because it is the standard appellate process for most cases in all areas of law,¹⁰⁵ perhaps its most obvious virtue is that the three-tiered process *best preserves each judge's proper role*, engaging each judge's expertise.¹⁰⁶ It ensures that multiple judges are not bogged down with the minutiae of evidentiary disputes, instead leaving factual findings to a single judge who is, in theory, experienced with sorting out the facts of a case. Additionally, federal courts are used to this process, and they know how to operate within this system. The typical review pattern works well for the vast majority of cases; it requires litigants to present their best evidence at the start, yet provides several chances to make legal arguments using that evidence. Given that election law cases involve highly-charged issues that require careful adjudication, the three-tiered approach provides a systematic mechanism to ensure that each judge best uses his or her particular skills in this environment.

There is also an institutionalized correction mechanism, helping to foster *accuracy*.¹⁰⁷ The legal issues are well thought-out and briefed through multiple tiers of review; many judges have a chance to pass upon the questions; and the review process narrows down the important or difficult ones so that the higher level courts can focus in on the tough issues. Thus, the multilayered review process

¹⁰³ See Michael Abramowicz, *En Banc Revisited*, 100 COLUM. L. REV. 1600, 1604–06, 1627–28 (2000) (noting that three-judge panels decide the vast majority of appeals and highlighting the criticism that these panels wield too much power); Jonathan Remy Nash, *The Majority that Wasn't: Stare Decisis, Majority Rule, and the Mischief of Quorum Requirements*, 58 EMORY L.J. 831, 857–58 (2009) (“The power of the three-judge panel in some ways exceeds what one normally understands as stare decisis weight: No subsequent three-judge panel of the court is empowered to overrule an earlier holding of a three-judge panel.”).

¹⁰⁴ See, e.g., John R. Quinn, “Attitudinal” Decision Making in the Federal Courts: A Study of Constitutional Self-Representation Claims, 33 SAN DIEGO L. REV. 701, 712 (1996) (“The extremely small percentage of certiorari petitions the Supreme Court grants, among other things, makes a circuit court decision much less likely to be reviewed than a district court decision, many of which are appealable as of right.”).

¹⁰⁵ See Bruff, *supra* note 67, at 344.

¹⁰⁶ See *supra* Part II.E.

¹⁰⁷ See generally Chad M. Oldfather, *Error Correction*, 85 IND. L.J. 49, 55–69 (2010) (describing an appellate court's institutional error-correction function).

perhaps can best lead to the “correct” legal result.¹⁰⁸ Indeed, by having the opportunity to test out arguments at the district court, litigants can see what arguments work as they prepare for the (possible) multiple levels of review. Having subsequently higher courts consider an issue also ensures a great amount of deliberation, and the courts are likely to consider carefully the application of a rule to future scenarios and how the rule should shape the democratic process.¹⁰⁹ Thus, in an area in which certainty and accuracy in legal principles are paramount, a multiple-level system seems well suited to achieve these goals.

Of course, many cases will not benefit from three tiers of review, tempering the likelihood of full error correction in every instance. Although legal issues are well vetted through multiple layers of review, most cases—which will not reach either the en banc circuit court or the Supreme Court given that those bodies decline to review most cases—benefit from the analysis of *only four judges* (one district judge and three circuit court judges). If more judges equal “better” decision making,¹¹⁰ then this system does not easily foster a multiplicity of viewpoints. Only the most contentious or “important” cases (according to the en banc court or Supreme Court) receive scrutiny from the greatest number of possible judges.¹¹¹ Then again, the traditional federal court system at least has a mechanism for multiple layers of review for those cases that are hardest or most significant.

There are, of course, several downsides to the standard federal court judicial process. For one, multilayered federal court review is arduous and lengthy, often taking several years before a final resolution. With multiple judicial layers, parties must sometimes wait years before learning the ultimate result. For example, the plaintiffs in *Crawford* filed their complaint on May 2, 2005,¹¹² the district court rendered its decision on April 14, 2006,¹¹³ and the Supreme Court did not issue its decision until April 28, 2008.¹¹⁴ This is especially troubling in election law cases, in which timely finality is important. Governments must attempt to operate their elections as fairly as possible within the confines of the rules that courts dictate, and elected leaders must have prompt legitimacy for effective governing. Thus, regarding *timeliness*, the traditional system leaves much to be desired for election

¹⁰⁸ However, this procedure does not give the courts a similar ability for robust error correction of factual findings, as the appellate courts usually defer to the district court’s findings of fact. *See, e.g., Walls v. Konteh*, 490 F.3d 432, 440 (6th Cir. 2007) (“[R]eviewing courts typically defer to the judgment of the initial arbiter on largely fact-based matters”).

¹⁰⁹ *See, e.g.,* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 847 (1994).

¹¹⁰ *See* Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635, 1695 (1998).

¹¹¹ 28 U.S.C. § 46(c) (2006) (en banc review); *id.* § 1254 (certiorari review).

¹¹² Complaint for Declaratory and Injunctive Relief, *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775 (S.D. Ind. 2006) (No. 1:05-cv-0634-SEB-VSS), 2005 WL 3708052.

¹¹³ *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775 (S.D. Ind. 2006).

¹¹⁴ *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

law cases, particularly when the parties need to know how to conduct themselves for upcoming elections.

In addition, given the method through which judges are selected to hear a case, it can appear that the ultimate outcome is largely dependent on the *ideology* of the judges—particularly with respect to the appellate judges. In a random drawing of a three-judge panel for direct review of a district court’s decision, the panel might differ significantly in its political and ideological viewpoint as compared to another randomly selected three-judge panel.¹¹⁵ This is significant with respect to the way in which judges construe a constitutional rule or analyze a statute: broadly, narrowly, textually, etc. Assuming ideology influences decisions, the ideology of the panel can have an extremely poignant impact on the ultimate resolution and thus the scope of the rule of law handed down.¹¹⁶ Elections are about the allocation of power; judicial partisanship should not play a role in the process, especially given that the federal judiciary is supposed to be a neutral arbiter. Ideological decision making calls into question the fairness of the electoral process.

The concern of ideological decisions is also present with respect to district judges, who are normally randomly assigned a case when it is filed,¹¹⁷ but the importance of ideology at the district court stage is tempered for two main reasons. First, district judges know that the court of appeals almost certainly will review their decisions, and there is some evidence that district courts keep a keen eye on the circuit’s opinions and try to align their decisions so as to avoid reversal.¹¹⁸ Second, although district judges might make certain factual findings with an

¹¹⁵ See Emerson H. Tiller & Frank B. Cross, *A Modest Proposal for Improving American Justice*, 99 COLUM. L. REV. 215, 226 (1999) (using empirical analysis to show that “one-party dominance on panels occurs at a surprisingly high rate”); J. Robert Brown, Jr. & Allison Herren Lee, *Neutral Assignment of Judges at the Court of Appeals*, 78 TEX. L. REV. 1037, 1041–43 (2000) (explaining that even though “[a]ppellate panels are not intended to reflect a mosaic of society,” it is a concern that “systems of assignment are susceptible to at least some degree of manipulation”).

¹¹⁶ Tiller & Cross, *supra* note 115, at 226.

¹¹⁷ See Ahmed E. Taha, *Judge Shopping: Testing Whether Judges’ Political Orientations Affect Case Filings*, 78 U. CIN. L. REV. 1007, 1010 (2010) (“Judicial assignment is conducted randomly in federal district courts.”).

¹¹⁸ See, e.g., C.K. ROWLAND & ROBERT A. CARP, POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS 34, 40, 48–50 (1996) (finding relatively little difference between district judges appointed by Democratic and Republican presidents over all cases, but larger differences in cases involving controversial issues such as race relations, religion, and privacy); Paul M. Collins, Jr. et al., *International Conflicts and Decision Making on the Federal District Courts*, 29 JUST. SYS. J. 121, 134 (2008) (finding that district judges are “marginally constrained” by the perceived preferences of the circuit court in which they sit and that district judges consider the likelihood of reversal in their decisions). Of course, predicting what the circuit court will do is not an exact science given that the case will go to a randomly-assigned three-judge panel.

ideological bent, evidentiary rulings typically have little political tenor.¹¹⁹ Given that the appellate court ultimately will decide questions of law, and will do so de novo,¹²⁰ the district court's ideology comes through only in the way that its factual findings influence the appellate court's decision. Thus, although district judges' ideology may matter to the ultimate outcome of the issue, it likely matters less than appellate judges' ideological predilections. If anything, district judges' greatest ideological influence is indirect through their factual findings, to which the appellate courts will usually defer.

The problem of ideology, however, is prevalent with respect to another one of the goals previously discussed: *legitimacy* for the court's decisions.¹²¹ Consistently ideological decisions will derogate courts' standing in the public's eye,¹²² particularly for election law cases, which often present either obvious or latent partisan issues.¹²³ This is particularly true if successive courts reverse each other. Imagine a case in which the district court rules in favor of the "Republican" position, only to suffer reversal from a three-judge court of appeals that sides with the "Democratic" argument, to then have the Supreme Court reverse that decision and ultimately rule in favor of the "Republican" position.¹²⁴ The public will likely

¹¹⁹ Richard L. Sippel, *Analysis of Evidence by Terence Anderson and William Twining*, FED. LAW., Aug. 1999, at 52, 56 n.7 (Aug. 1999) (book review) ("In general, trial judges are much more interested in getting it right the first time and avoiding reversal or a remand on appeal than they are in moving a legislative-type agenda through evidentiary rulings."). *But see* J. Alexander Tanford, *A Political-Choice Approach to Limiting Prejudicial Evidence*, 64 IND. L.J. 831, 866 (1989) ("[T]he decision to admit or exclude evidence necessarily entails making a political choice to favor some values over others.").

¹²⁰ *See, e.g.*, *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 233 (6th Cir. 2011) (explaining, in an election law case, that "we review the district court's legal conclusions de novo and its factual findings for clear error").

¹²¹ *See supra* Part II.C.

¹²² *See* Christopher S. Elmendorf, *Undue Burdens on Voter Participation: New Pressures for a Structural Theory of the Right to Vote?*, 35 HASTINGS CONST. L.Q. 643, 650 (2008) ("Sometimes labeled 'diffuse support,' [the] willingness to accept judicial judgments with which one disagrees and to defend the institution of judicial review seems connected to citizens' perception of the Court as a distinctly legal, as opposed to political, institution."); Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 993 (2005) ("Putting 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. Moreover, when judges second-guess decisions made by legislators and votes cast by the people, the legitimacy of the election process itself can suffer." (citation omitted)).

¹²³ Of course, not every election law case will involve a partisan issue. Moreover, it may not be obvious which position each political persuasion will favor. *See Solimine, supra* note 70, at 123–25. Nevertheless, there are many cases in which the ideological issues are obvious or at least beneath the surface.

¹²⁴ The case of *Clingman v. Beaver*, 544 U.S. 581 (2005), presents this exact scenario, although not in the context of a pure Democratic/Republican split. In *Clingman*, the district court rejected a third party's constitutional challenge to Oklahoma's semiclosed primary election system, in which a political party could invite only its own party members and

think that the judiciary is just as political as the other branches, especially if the courts' decisions adhere to each judge's ideological leanings.¹²⁵

Finally, the three-tiered system presents a mixed bag when it comes to *signaling*. On the one hand, this process does a great job of telling the litigants and the public which cases are highly salient or important because only those cases receive greater scrutiny through en banc or Supreme Court review. On the other hand, the judiciary treats all election law cases just like any other case without distinguishing them from other run-of-the-mill disputes. From a normative and institutional perspective, there is no signal that all election law cases present especially important issues, even when a particular case does or does not deserve the scrutiny of higher courts. For example, a case could have significant implications for how to run elections or campaigns, but for whatever reason, the Supreme Court chooses not to take it (perhaps because the Court is waiting to see if there will be a circuit split on the issue).¹²⁶ The message to the public at large is

voters registered as Independents to vote in the party's primary. *Beaver v. Clingman*, No. CIV-00-1071, 2003 WL 745562, at *23 (W.D. Okla. Jan. 24, 2003). The Tenth Circuit reversed, concluding that the statute violated the associational rights of minor political parties. *Beaver v. Clingman*, 363 F.3d 1048, 1051 (10th Cir. 2004). The Supreme Court reversed, over the dissent of three of the more "liberal" justices (Stevens, Souter, and Ginsburg), and upheld the statute. 544 U.S. at 598; *see also* *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 383–84, 397–98 (2000) (explaining that the district court upheld a provision of Missouri's campaign finance law; the Eighth Circuit reversed the district court; the Supreme Court reversed the court of appeals and upheld the provision).

¹²⁵ *See* Elmendorf, *supra* note 122, at 650 ("[I]t seems fair to expect that the mass public's perception of courts as above politics will gradually erode if highly partisan election-law issues become a recurring part of the judicial docket and judges consistently take 'their' respective party's side in answering the question presented.").

¹²⁶ For example, the Supreme Court denied certiorari on a seemingly important challenge to North Carolina's campaign finance regulations that provide public funding for appellate judicial elections, including a complete ban on campaign contributions during the last twenty-one days of the election. *N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427, 432, 440 (4th Cir. 2008), *cert denied sub nom.* *Duke v. Leake*, 129 S. Ct. 490 (2008). Commentators who study both the Supreme Court and election law had predicted that the Court would take the case, as it presented significant issues regarding public financing of judicial elections. *See, e.g.,* Troy D. Cahill, *Conference Call: Judge Election Case Heads to High Court*, SCOTUSBLOG (Oct. 27, 2008, 5:01 PM), <http://www.scotusblog.com/2008/10/conference-call-judge-election-case-heads-to-high-court/#more-8153>; Rick Hasen, *Fourth Circuit Decides Two Important Campaign Finance Cases, Raising Issues that Could Get En Banc or Supreme Court Attention*, ELECTION LAW BLOG (May 1, 2008, 12:32 PM), <http://electionlawblog.org/archives/010719.html>. Although the certiorari petition itself generated some minor commentary, this pales in comparison to the information the public would have received about the case had the Court decided to hear it. Thus, the simple district judge and three-judge panel decision did not signal the importance of this issue to anyone besides those who already study this field. It certainly did not send the message that these types of questions are vitally important to understanding the role of money in politics. Although, arguably, the Court's decisions in other similar cases already give the public this knowledge, the issue is not

that the case is just as insignificant as any other case the Court declines to hear. The typical procedure thus does a poor job of highlighting that election law cases are different and meaningful based on the foundational nature of the right to vote to the running of our democracy.

In sum, the standard federal court procedure, typically used for constitutional challenges to state election laws, presents a mixed bag. On the plus side, this approach is good at separating each judge's role. District judges generally focus on factual findings, and appellate judges spend most of their time analyzing the legal constitutional questions, which is what these judges do for most of their other cases as well. The multiple levels of review also promote accuracy through error correction, although the fact that most cases do not enjoy three levels of review tempers this virtue. On the negative side, the three-tiered approach is slow, and it does not include any structural mechanisms to minimize ideology—a concern by itself and also a problem through the negative impact this has on the legitimacy of the court system in deciding election law cases. It also does not signal, for election law as a whole, that this area is any more important, significant, or at least in need of special attention than any other area.

B. Three-Judge District Court with Direct Review to the Supreme Court

The second method of federal court procedure for election law cases involves a three-judge district court, with direct review to the Supreme Court. Congress has authorized three-judge district courts in three situations: challenges under the Voting Rights Act (VRA),¹²⁷ constitutional challenges under the Bipartisan Campaign Reform Act of 2002 (BCRA),¹²⁸ and constitutional challenges to the apportionment of statewide or federal legislative districts.¹²⁹

In these cases, the chief of the circuit court appoints the three-judge panel, which must include at least one circuit court judge.¹³⁰ The court sits as a district court, conducting a trial on the merits of the case.¹³¹ Although a single judge from the panel can make pretrial evidentiary rulings, the full panel must render any

whether a single case tells the public about an issue, but instead, whether the judiciary is set up institutionally to elevate the public's understanding of the issues that form the basis of our democracy.

¹²⁷ 42 U.S.C. §§ 1973c, 1973aa-2 (2006).

¹²⁸ Act of Mar. 27, 2002, Pub. L. No. 107-155, § 403, 116 Stat. 82, 114 (“The action shall be filed in the United States District Court for the District of Columbia and shall be heard by a 3-judge court convened pursuant to section 2284 of title 28, United States Code.”); 2 U.S.C. § 437h note (2006).

¹²⁹ 28 U.S.C. § 2284(a) (2006) (“A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.”).

¹³⁰ *Id.* § 2284(b)(1).

¹³¹ *Id.* § 2284(b)(3).

factual findings.¹³² Similarly, the panel must resolve any questions of law.¹³³ The parties appeal directly to the Supreme Court, and the Court does not have discretion to decline the appeal.¹³⁴ The Court can “note probable jurisdiction,”¹³⁵ which means that it will conduct a full merits hearing on the case, or it can summarily affirm or summarily reverse, but either way the Supreme Court must decide the dispute.¹³⁶

As noted above, Congress has seen fit to implement three-judge district courts in three main settings. First, a three-judge court must hear a challenge that a state’s action violates the VRA.¹³⁷ Thus, if a plaintiff seeks invalidation of a state’s law because the state seeks to use a test or device as a prerequisite to voting, or if a litigant alleges that a covered jurisdiction failed to obtain preapproval (called “preclearance”) for a change in a voting practice, that dispute must go to a three-judge district court, with direct appeal to the Supreme Court.¹³⁸ Second, the BCRA provides that if any action is brought to challenge the constitutionality of any provision of the Act, it “shall be filed in the United States District Court for the District of Columbia and shall be heard by a 3-judge court” pursuant to title 28, section 2284 of the United States Code.¹³⁹ That is, constitutional challenges to the BCRA require a three-judge district court with direct Supreme Court review. Finally, title 28, section 2284 of the United States Code is the general statute authorizing three-judge district courts when “otherwise required by Act of Congress,” and additionally “when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.”¹⁴⁰

Prior to the enactment of title 28, section 2284 of the United States Code, Congress created three-judge district courts in certain situations initially as a response to the Supreme Court’s decision in *Ex Parte Young*.¹⁴¹ In that case, the Supreme Court recognized federal courts’ power to enjoin the action of state officials when those actions violated the U.S. Constitution.¹⁴² States’ rights

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* § 1253.

¹³⁵ *See* SUP. CT. R. 18(12).

¹³⁶ *See The Supreme Court, 2003 Term Leading Cases*, 118 HARV. L. REV. 343, 346 n.26 (2004) (“When Congress has provided by statute for direct Supreme Court review of a district court decision, the Court may summarily affirm, summarily reverse, or . . . note probable jurisdiction and review the case with the benefit of briefing and oral argument.”).

¹³⁷ 42 U.S.C. §§ 1973aa-2, 1973c (2006).

¹³⁸ *Id.*; *see, e.g.,* *Lulac of Tex. v. Texas*, 318 F. App’x 261, 262 (5th Cir. 2009) (“Section 5 preclearance actions generally must be resolved by a three-judge court, whose decision is appealable only to the Supreme Court.”).

¹³⁹ Act of Mar. 27, 2002, Pub. L. No. 107-155, § 403(a)(1), 116 Stat. 82, 114 (2002).

¹⁴⁰ 28 U.S.C. § 2284(a) (2006). For an overview of the subject-matter of cases heard before three-judge district courts from 1964 to 1994, *see* Solimine, *supra* note 70, at 91–92.

¹⁴¹ *Ex Parte Young*, 209 U.S. 123 (1908). *See generally* Solimine, *supra* note 70, at 83–93 (discussing the history of three-judge district courts).

¹⁴² *Ex Parte Young*, 209 U.S. at 159.

advocates were distraught at what they saw as the Supreme Court's usurpation of state power.¹⁴³ In response, Congress enacted the first iteration of the three-judge district court statute, which required suits seeking relief against state officials to go initially before a three-judge panel, with direct review to the Supreme Court.¹⁴⁴ As one commentator explains, this "format was designed to encourage greater deliberation among three minds before a grant of injunctive relief, to lend greater dignity to the proceedings, and to provide expedited Supreme Court correction, if necessary."¹⁴⁵

In subsequent years, Congress expanded, and then contracted, the use of three-judge district courts.¹⁴⁶ Ultimately, Congress enacted what is now title 28, section 2284 of the United States Code, which authorizes three-judge district courts for reapportionment cases and in other situations Congress may deem necessary.¹⁴⁷ In that legislation, Congress curtailed the broad use of three-judge district courts for any suit seeking injunctive relief against a state official, but still explicitly included reapportionment cases within the three-judge district court ambit because, in the words of Judge J. Skelly Wright, those cases were of "great public concern" that required tremendous "public acceptance" to ensure their legitimacy.¹⁴⁸ The legislative history explains, albeit briefly, Congress's rationale for retaining three-judge district courts for reapportionment cases:

The bill preserves three-judge courts for cases involving congressional reapportionment or the reapportionment of a statewide legislative body because it is the judgment of the committee that these issues are of such importance that they ought to be heard by a three-judge court and, in any event, they have never constituted a large number of cases.¹⁴⁹

[The bill] . . . is supported by the Judicial Conference, the Department of Justice, and the American Bar Association. Although the NAACP has spoken in opposition to restriction of three-judge court jurisdiction, the Committee is satisfied that the civil rights of citizens will continue to be well protected by this bill.¹⁵⁰

¹⁴³ See David P. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1, 1-8 (1964); Solimine, *supra* note 70, at 83-84.

¹⁴⁴ See Act of June 18, 1910, ch. 309, § 17, 36 Stat. 539, 557.

¹⁴⁵ Solimine, *supra* note 70, at 84.

¹⁴⁶ *Id.* at 83-89.

¹⁴⁷ See Act of Aug. 12, 1976, Pub. L. No. 94-381, § 3, 90 Stat. 1119, 1119.

¹⁴⁸ See Sidney B. Jacoby, *Recent Proposals and Legislative Efforts to Limit Three-Judge Court Jurisdiction*, 26 CASE W. RES. L. REV. 32, 39 (1975).

¹⁴⁹ S. REP. NO. 94-204, at 4, 9 (1975), *reprinted in* 1976 U.S.C.C.A.N. 1988, 1991.

¹⁵⁰ H.R. REP. NO. 94-1379, at 4 (1976).

From 2000–2009, half of the Supreme Court’s thirty election law cases derived from decisions of three-judge district courts.¹⁵¹ Five of these cases arose out of VRA challenges, four arose under the BCRA, and the remaining six were reapportionment or redistricting cases.¹⁵² Thus, all three sources of three-judge panels for election law cases regularly fill the Court’s election law docket.¹⁵³

As would be expected, there are both virtues and pitfalls to using three-judge district courts with direct review to the Supreme Court for election law cases, particularly in light of the goals set out in Part II. The first major benefit is the *timeliness* with which this system can produce a final result. Indeed, quick adjudication was one of the main purposes behind the creation of three-judge district courts.¹⁵⁴ Take, for example, the recent major VRA case, *Northwest Austin Municipal Utility District No. One v. Holder*.¹⁵⁵ The three-judge district court

¹⁵¹ *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504 (2009) (reviewing challenge to the preclearance requirement and bail out provisions of Section 5 of the Voting Rights Act (VRA)); *Davis v. FEC*, 554 U.S. 724 (2008) (reviewing challenge to the “Millionaires’ Amendment” of the Bipartisan Campaign Reform Act of 2002 (BCRA)); *Riley v. Kennedy*, 553 U.S. 406 (2008) (reviewing whether a state must obtain preclearance under the VRA to reinstate an election practice that had been in effect before the enactment of a law that the state supreme court subsequently struck down); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007) (reviewing challenge to “electioneering communications” provisions of the BCRA); *Lance v. Coffman*, 549 U.S. 437 (2007) (per curiam) (reviewing whether plaintiffs had standing to assert a violation of the Elections Clause of the U.S. Constitution); *League of United Latin Am. Citizens v. Perry (LULAC)*, 548 U.S. 399 (2006) (reviewing challenges to a mid-decade redistricting plan as violating equal protection and the VRA); *Wis. Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006) (reviewing constitutional challenge to the BCRA as applied to broadcast advertisements the plaintiffs planned to air during an upcoming election); *Cox v. Larios*, 542 U.S. 947 (2004) (reviewing constitutionality of a Georgia legislative reapportionment plan for the State House of Representatives and Senate); *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (reviewing claims of partisan gerrymandering in a redistricting plan for U.S. House seats in Pennsylvania); *McConnell v. FEC*, 540 U.S. 93 (2003) (reviewing consolidated challenges to the constitutionality of the BCRA); *Georgia v. Ashcroft*, 539 U.S. 461 (2003) (reviewing a three-judge panel’s refusal to grant preclearance to Georgia’s state legislature’s redistricting plan under the VRA); *Branch v. Smith*, 538 U.S. 254 (2003) (reviewing challenge to a district court’s redistricting plan in Mississippi); *Utah v. Evans*, 536 U.S. 452 (2002) (reviewing constitutional challenge to the use of the “hot deck imputation” method of supplementing census data); *Easley v. Cromartie*, 532 U.S. 234 (2001) (reviewing constitutionality of a North Carolina redistricting plan); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000) (reviewing a decision to grant preclearance to Louisiana parish school board redistricting). In addition, during 2010, the Court decided one case arising from a three-judge district court. *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (reviewing challenge to provisions of the BCRA).

¹⁵² See cases cited *supra* note 151.

¹⁵³ For a compilation of the number of orally argued three-judge court cases on the Supreme Court’s docket from 1953 to 1993, see Solimine, *supra* note 70, at 107.

¹⁵⁴ See *supra* note 141–145 and accompanying text.

¹⁵⁵ *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504 (2009).

rendered its final decision in that case on September 4, 2008.¹⁵⁶ The Supreme Court received jurisdictional statements and noted probable jurisdiction only a few months later, on January 9, 2009.¹⁵⁷ The Court issued its final decision in the case on June 22, 2009.¹⁵⁸ Thus, appellate resolution took less than a year.

This is consistent with the other three-judge district court cases in which the Supreme Court heard oral argument between 2000–2009. As table 1 demonstrates, the Supreme Court disposes of most cases within about a year or less of the district court's final decision. This is in contrast to the time it usually takes the district court to render a decision once a plaintiff files a complaint,¹⁵⁹ because—unless the court dismisses the case at the pleadings stage—a district court must expend significant time and energy gathering evidence and making findings of fact.¹⁶⁰ Skipping the regular court of appeals stage quickens the pace at which the parties can obtain final resolution in the Supreme Court, as it shortens the period between the district court's final decision and the Supreme Court's review.

¹⁵⁶ *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221 (D.D.C. 2008).

¹⁵⁷ *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 129 S. Ct. 894 (2009) (Mem.).

¹⁵⁸ *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504 (2009).

¹⁵⁹ Although there are outliers, the district courts in these cases most often needed between nine months and three years to render a decision. *See infra* Table 1. Of course, during much of this time the parties were likely engaged in discovery.

¹⁶⁰ It is possible that a three-judge district court takes longer to cull through the evidence and render a decision than would be the case for a single district judge, somewhat mitigating the increased speed of direct Supreme Court review. *See infra* text accompanying notes 227–228. Nevertheless, election law cases are likely to be inherently complex, meaning that it would take a district court a considerable amount of time to render a decision regardless of whether it does so through a single judge or a three-judge panel.

Table 1: Time to Decide Cases Before Three-Judge District Court Panels with Direct Review to the Supreme Court, 2000–2009

Case	Date Case Filed	Date of District Court Decision	Time Between Date Case Filed and District Court's Decision	Date of Supreme Court Decision	Time Between District Court and Supreme Court Decisions
<i>Nw. Austin Mun. Util. Dist. No. One v. Holder</i>	Aug. 4, 2006 ¹⁶¹	Sept. 4, 2008 ¹⁶²	2 years, 1 month	June 22, 2009 ¹⁶³	9 months, 18 days
<i>Davis v. FEC</i>	June 28, 2006 ¹⁶⁴	Aug. 9, 2007 ¹⁶⁵	1 year, 1 month, 12 days	June 26, 2008 ¹⁶⁶	10 months, 17 days
<i>Riley v. Kennedy</i>	Nov. 16, 2005 ¹⁶⁷	May 1, 2007 ¹⁶⁸	1 year, 5 months, 15 days	May 27, 2008 ¹⁶⁹	1 year, 26 days
<i>FEC v. Wis. Right to Life, Inc.</i>	July 28, 2004 ¹⁷⁰	Dec. 21, 2006 ¹⁷¹	2 years, 4 months, 23 days	June 25, 2007 ¹⁷²	6 months, 4 days
<i>Lance v. Coffman</i>	Dec. 3, 2003 ¹⁷³	Aug. 11, 2006 ¹⁷⁴	2 years, 8 months, 8 days	Mar. 5, 2007 ¹⁷⁵	6 months, 22 days

¹⁶¹ Complaint, *Nw. Austin Mun. Util. Dist. No. One v. Gonzales*, 573 F. Supp. 2d 221 (D.D.C. 2008) (Civ. No. 06-01384).

¹⁶² *Nw. Austin Mun. Util. Dist. No. One v. Gonzales*, 573 F. Supp. 2d 221 (D.D.C. 2008).

¹⁶³ *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504 (2009).

¹⁶⁴ Complaint for Declaratory and Injunctive Relief, *Davis v. FEC*, 501 F. Supp. 2d 22 (D.D.C. 2007) (Civ. No. 06-01185).

¹⁶⁵ *Davis v. FEC*, 501 F. Supp. 2d 22 (D.D.C. 2007).

¹⁶⁶ *Davis v. FEC*, 554 U.S. 724 (2008).

¹⁶⁷ Complaint, *Kennedy v. Riley*, Civ. No. 2:05cv1100-MHT (M.D. Ala. May 1, 2007), 2007 WL 1284912.

¹⁶⁸ *Kennedy v. Riley*, Civ. No. 2:05cv1100-MHT (M.D. Ala. May 1, 2007), 2007 WL 1284912.

¹⁶⁹ *Riley v. Kennedy*, 553 U.S. 406 (2008).

¹⁷⁰ Docket, *Wis. Right to Life, Inc. v. FEC*, 466 F. Supp. 2d 195 (D.D.C. 2006) (Civ. No. 04-1260).

¹⁷¹ *Wis. Right to Life, Inc. v. FEC*, 466 F. Supp. 2d 195 (D.D.C. 2006).

¹⁷² *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007).

¹⁷³ Docket, *Lance v. Coffman*, 444 F. Supp. 2d 1149 (D. Colo. 2006) (Civ. No. 03-02453).

¹⁷⁴ *Lance v. Coffman*, 444 F. Supp. 2d 1149 (D. Colo. 2006).

¹⁷⁵ *Lance v. Coffman*, 549 U.S. 437 (2007).

<i>Wis. Right to Life v. FEC</i>	July 26, 2004 ¹⁷⁶	May 10, 2005 ¹⁷⁷	9 months, 14 days	Jan. 23, 2006 ¹⁷⁸	8 months, 13 days
<i>LULAC v. Perry</i>	Oct. 12, 2003 ¹⁷⁹	June 9, 2005 ¹⁸⁰	1 year, 7 months, 28 days	June 28, 2006 ¹⁸¹	1 year, 19 days
<i>Cox v. Larios</i>	Mar. 13, 2003 ¹⁸²	Feb. 10, 2004 ¹⁸³	10 months, 28 days	June 30, 2004 ¹⁸⁴	4 months, 20 days
<i>Vieth v. Jubelirer</i>	Dec. 21, 2001 ¹⁸⁵	Jan. 24, 2003 ¹⁸⁶	1 year, 1 month, 3 days	Apr. 28, 2004 ¹⁸⁷	1 year, 3 months, 4 days
<i>McConnell v. FEC</i>	Mar. 27, 2002 ¹⁸⁸	May 1, 2003 ¹⁸⁹	1 year, 1 month, 4 days	Dec. 10, 2003 ¹⁹⁰	7 months, 9 days
<i>Georgia v. Ashcroft</i>	Oct. 10, 2001 ¹⁹¹	Apr. 5, 2002 ¹⁹²	5 months, 26 days	June 26, 2003 ¹⁹³	1 year, 2 months, 21 days
<i>Branch v. Smith</i>	Nov. 1, 2001 ¹⁹⁴	Feb. 26, 2002 ¹⁹⁵	3 months, 25 days	Mar. 31, 2003 ¹⁹⁶	1 year, 1 month, 5 days

¹⁷⁶ Verified Complaint for Declaratory and Injunctive Relief, *Wis. Right to Life, Inc. v. FEC*, No. Civ.04-1260DBS (D.D.C. May 10, 2005), 2005 WL 3470512.

¹⁷⁷ *Wis. Right to Life, Inc. v. FEC*, No. Civ.04-1260DBS (D.D.C. May 10, 2005), 2005 WL 3470512.

¹⁷⁸ *Wis. Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006).

¹⁷⁹ Docket, *Henderson v. Perry*, 399 F. Supp. 2d 756 (E.D. Tex. 2005) (Civ. No. 03-0354).

¹⁸⁰ *Henderson v. Perry*, 399 F. Supp. 2d 756 (E.D. Tex. 2005).

¹⁸¹ *League of United Latin Am. Citizens v. Perry (LULAC)*, 548 U.S. 399 (2006).

¹⁸² Docket, *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004) (No. CIV.A. 1:03-CV-693-CAP).

¹⁸³ *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004).

¹⁸⁴ *Cox v. Larios*, 542 U.S. 947 (2004).

¹⁸⁵ Complaint for Declaratory and Injunctive Relief, *Vieth v. Pennsylvania*, 241 F. Supp. 2d 478 (M.D. Pa. 2003) (Civ. No. 01-2439).

¹⁸⁶ *Vieth v. Pennsylvania*, 241 F. Supp. 2d 478 (M.D. Pa. 2003).

¹⁸⁷ *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

¹⁸⁸ Docket, *McConnell v. FEC*, 251 F. Supp. 2d 948 (D.D.C. 2003) (Civ. No. 02-0581).

¹⁸⁹ *McConnell v. FEC*, 251 F. Supp. 2d 948 (D.D.C. 2003).

¹⁹⁰ *McConnell v. FEC*, 540 U.S. 93 (2003).

¹⁹¹ Complaint for Declaratory Judgment, *Georgia v. Ashcroft*, 195 F. Supp. 2d 25 (D.D.C. 2002) (Civ. No. 01-2111).

¹⁹² *Georgia v. Ashcroft*, 195 F. Supp. 2d 25 (D.D.C. 2002).

¹⁹³ *Georgia v. Ashcroft*, 539 U.S. 461 (2003).

¹⁹⁴ Docket, *Smith v. Clark*, 189 F. Supp. 2d 548 (S.D. Miss. 2002) (Civ. No. 01-0855).

¹⁹⁵ *Smith v. Clark*, 189 F. Supp. 2d 548 (S.D. Miss. 2002).

¹⁹⁶ *Branch v. Smith*, 538 U.S. 254 (2003).

<i>Utah v. Evans</i>	Apr. 25, 2001 ¹⁹⁷	Nov. 1, 2001 ¹⁹⁸	6 months, 7 days	June 20, 2002 ¹⁹⁹	7 months, 19 days
<i>Easley v. Cromartie</i>	July 3, 1996 ²⁰⁰	Mar. 7, 2000 ²⁰¹	3 years, 8 months, 4 days	Apr. 18, 2001 ²⁰²	1 year, 1 month, 11 days
<i>Reno v. Bossier Parish Sch. Bd.</i>	July 8, 1994 ²⁰³	May 1, 1998 ²⁰⁴	3 years, 9 months, 23 days	Jan. 24, 2000 ²⁰⁵	1 year, 8 months, 23 days

This is quite different from the typical three-tiered approach, which often requires several years before the Supreme Court reaches a final resolution.²⁰⁶ Hence, cutting out one level of appeal seems to assist in the timely resolution of important election law disputes.²⁰⁷

Additionally, having three judges take an initial look at the case increases the possibility that the district court will make an *accurate* decision and potentially reduces the importance of *ideology*. The conventional wisdom behind appellate courts is that judges collectively can make better decisions, increasing the potential for the “correct” answer from the outset.²⁰⁸ Further, using multiple judges decreases the possibility that ideology will drive the decision because multiple judges temper the ideological bent a single judge may bring to a case, assuming the

¹⁹⁷ Complaint for Declaratory and Injunctive Relief, *Utah v. Evans*, 182 F. Supp. 2d 1165 (D. Utah 2001) (Civ. No. 01-0292).

¹⁹⁸ *Utah v. Evans*, 182 F. Supp. 2d 1165 (D. Utah 2001).

¹⁹⁹ *Utah v. Evans*, 536 U.S. 452 (2002).

²⁰⁰ Complaint, *Cromartie v. Hunt*, 133 F. Supp. 2d 407 (E.D.N.C. 2000) (No. 4.96-CV-104).

²⁰¹ *Cromartie v. Hunt*, 133 F. Supp. 2d 407 (E.D.N.C. 2000).

²⁰² *Easley v. Cromartie*, 532 U.S. 234 (2001).

²⁰³ Complaint, *Bossier Parish Sch. Bd. v. Reno*, 7 F. Supp. 2d 29 (D.D.C. 1994) (No. 1:94cv01495).

²⁰⁴ *Bossier Parish Sch. Bd. v. Reno*, 7 F. Supp. 2d 29 (D.D.C. 1998).

²⁰⁵ *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000).

²⁰⁶ See *supra* text accompanying notes 87–104, 112–114. In *Crawford*, the Supreme Court issued its decision two years and fourteen days after the district court’s decision. See *supra* text accompanying notes 112–114. Of course, cases that do not use all levels of review are resolved sooner.

²⁰⁷ But see Solimine, *supra* note 70, at 126 (suggesting that a single-judge model with expedited review could achieve the same virtues as a three-judge court).

²⁰⁸ See Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 42 (1994) (postulating that “numerical superiority of higher level courts by itself ensures better decisionmaking”). Professor Caminker explains that if every judge has merely a 50% chance at reaching the “correct” answer, then the larger the panel, the more likely the panel collectively will reach the right result. *Id.* at 42 n.155.; see also Dan T. Coenen, *To Defer or Not to Defer: A Study of Federal Circuit Court Deference to District Court Rulings on State Law*, 73 MINN. L. REV. 899, 924 (1989) (“Assigning several judges to a problem reduces the risk that important lines of analysis will escape attention.”).

panel includes judges of varied viewpoints.²⁰⁹ Indeed, the whole purpose behind the creation of the three-judge court was to “encourage greater deliberation among three minds.”²¹⁰

A multiple-judge panel also enhances the *legitimacy* of the court’s decision in an area in which perceived accuracy is paramount.²¹¹ There is a symbolic virtue in having three judges initially decide an election law case; the litigants and the public likely perceive the decision to be more reasoned and accurate because multiple judges have considered the issue.²¹² It further *signals* to the litigants and the public that the issue is, indeed, important enough for three judges at the start.

With these benefits, however, come negative aspects to three-judge panels with direct Supreme Court review. First, this set-up does not allow the appellate process to winnow legal questions for the Supreme Court’s consideration, and thus there is no narrowing of the legal issues as the case moves up the chain.²¹³ Instead, the Court must consider all cases originating from a three-judge court, even if it does so in a summary fashion.²¹⁴ The Court must actually consider the merits of each case as opposed to just allowing the lower court decision to stand without any binding decision from the Supreme Court, as is the scenario when the Court denies certiorari.²¹⁵ Professor Michael Solimine describes the pitfalls of this approach as follows:

²⁰⁹ See Joy Milligan, Note, *Pluralism in America: Why Judicial Diversity Improves Legal Decisions about Political Morality*, 81 N.Y.U. L. REV. 1206, 1234 (2006) (discussing research demonstrating that “judges within panels may learn from one another’s ideas and worldviews”).

²¹⁰ Solimine, *supra* note 70, at 84.

²¹¹ See, e.g., Henry J. Friendly, *Indiscretion about Discretion*, 31 EMORY L.J. 747, 757 (1982) (“Assuming that all panel members take seriously their responsibility for independent exercise of judgment, the give and take of discussion may produce a result better than any single mind could reach.”); see also Caminker, *supra* note 208, at 40 (“Federal courts depend on the perceived legitimacy of their enterprise for their authority to ensure others follow their decision.”).

²¹² See Solimine, *supra* note 70, at 127 (“To the extent that anyone, inside or outside the legal community, really pays attention, there is perhaps some added value to having three judges, including at least one appellate jurist, hear the case at the outset.”).

²¹³ See Douglas Y.S. Park & Zachary J. Kelton, *Fairly Presenting Federal Claims to the State Courts: Recent Developments in Preserving Federal Claims for Subsequent Federal Court Review*, 41 WILLAMETTE L. REV. 485, 502–03 (2005) (“[T]he U.S. Supreme Court [has] specifically noted that the ‘process of “winnowing out weaker claims on appeal and focusing on” those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy.’” (citing *Smith v. Murray*, 477 U.S. 527 (1986))).

²¹⁴ See SUP. CT. R. 18(12).

²¹⁵ SUP. CT. R. 20(4)(b) (“Neither the denial of the petition, without more, nor an order of transfer to a district court under the authority of 28 U. S. C. § 2241(b), is an adjudication on the merits, and therefore does not preclude further application to another court for the relief sought.”).

[T]hese 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.²¹⁶

As Professor Solimine further explains, the Court actually reviews appeals from three-judge district courts much in the same way it handles certiorari petitions, with a summary decision.²¹⁷ But these decisions create binding law on the issue.²¹⁸ Thus, the Supreme Court is often asked to decide important election law issues prematurely and render binding precedent on a question that it may not be ready to resolve.²¹⁹

Moreover, because the Court must decide every case, it might do so without a full analysis, instead issuing a summary opinion that provides little guidance on the Court's holding and no rationale for restricting voting rights. This nearly occurred in *Harper v. Virginia State Board of Elections*,²²⁰ a case that has come to stand for the importance of the right to vote as a fundamental right.²²¹ But that was almost not to be. When the justices first tallied their votes regarding Virginia's poll tax, they came out 6–3 to uphold the Virginia law using a summary affirmance, without any published analysis.²²² Justice Goldberg, however, circulated a dissenting opinion—which led several justices to change their votes—highlighting that “[t]his affirmance, although summary, constitutes a holding by this Court that such poll taxes imposed upon citizens too poor to pay them are constitutional.”²²³ He further lamented that because the case arose as an appeal from a three-judge court, the Supreme Court was required to render a decision on the merits, prompting him to issue an opinion explaining his opposition.²²⁴ “Whatever may have been my decision as to whether or not certiorari should be granted on this issue, since this case is on appeal, I am compelled to face up to the substantial constitutional issue presented.”²²⁵ Ultimately, Justice Goldberg's view prevailed.²²⁶ The three-judge district court process, however, forced the Supreme Court's hand. This demonstrates that the Court can do more harm than good if it issues a summary

²¹⁶ Michael E. Solimine, *Institutional Process, Agenda Setting, and the Development of Election Law on the Supreme Court*, 68 OHIO ST. L.J. 767, 797 (2007).

²¹⁷ See Solimine, *supra* note 70, at 107–08.

²¹⁸ See *supra* notes 134–136 and accompanying text.

²¹⁹ See Solimine, *supra* note 70, at 107–08.

²²⁰ 383 U.S. 663 (1966).

²²¹ *Id.* at 670.

²²² RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW* 37 (2003).

²²³ *Id.* at 177.

²²⁴ *Id.* at 177–78 n.1.

²²⁵ *Id.*

²²⁶ *Id.*

opinion without explanation regarding a constitutional question that it must resolve.

Another negative consequence stemming from three-judge district courts is that they *mismatch judicial roles*: three-judge courts must make evidentiary rulings and initial factual findings, which are normally within the province of a single district judge.²²⁷ Indeed, appellate judges are generally inexperienced in this sort of judging, normally deferring to the district court unless the fact finding is clearly erroneous.²²⁸ Thus, the process of fact finding is inherently more difficult for a three-judge district court that includes a circuit judge. It also may be laborious for trial judges to share the fact finding process with other judges when they are used to undertaking fact finding alone, which can make the process arduous and acrimonious. For example, in *McConnell v. FEC*,²²⁹ the three judges on the district court panel took shots at each other in their separate opinions regarding the length of time it took the court to dispose of the case, disputing whether the delay was the result of the enormous discovery and voluminous record or instead was the fault of the panel majority that simply failed to decide the case expeditiously.²³⁰ The

²²⁷ See Caminker, *supra* note 208, at 41 (“The structure of and tasks assigned to trial courts encourage their relative proficiency at factfinding.”). The three-judge district court statute allows a single judge to enter any order permitted by the Federal Rules of Civil Procedure, but that decision is still reviewable by the full three-judge court. 28 U.S.C. § 2284(b)(3) (2006). The full three-judge panel also must make the ultimate factual findings. *Id.*

²²⁸ See Caminker, *supra* note 208, at 41–42 (noting that the functional differences between appellate and district court judges mean that appellate judges are “likely to be more proficient at the declaration of law than are district courts”). Similarly, district judges are likely more proficient at fact finding, and asking a three-judge panel of district and circuit judges to complete this task is not necessarily the easiest or best way of reaching accurate and quick decisions. See Solimine, *supra* note 70, at 116 (“Given the factfinding that typically occurs at the trial level, it is difficult to believe that increasing the number of decisionmakers, in itself, leads to easier, quicker, or more accurate findings.”).

²²⁹ 251 F. Supp. 2d 176 (D.D.C. 2003) (per curiam) (three-judge court).

²³⁰ See *id.* at 266–67 n.1 (Henderson, J., concurring in part and dissenting in part); *id.* at 207 n.36, 209 n.41 (per curiam). As Professor Solimine explains,

The controversial nature of the lower court proceedings in *McConnell* is not that unusual for three-judge district court litigation. . . . 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 quarters, it does not

Supreme Court also typically defers to the district court's initial fact finding (with the benefit of the intermediate appellate court's review of that fact finding),²³¹ but in this system, the Court must take on the initial appellate review. As the Supreme Court has explained, "[w]here an intermediate court reviews, and affirms, a trial court's factual findings, this Court will not 'lightly overturn' the concurrent findings of the two lower courts. But in this instance there is no intermediate court, and we are the only court of review."²³² The Court concluded, therefore, that it had no choice but to analyze the district court's factual findings in greater detail.²³³

Thus, the three-judge district court with direct Supreme Court review places judges outside of their comfort zones: a circuit court judge must make initial factual findings, district judges must collaborate in their factual findings, and the Supreme Court is not able to benefit from an intermediate appellate court's review of the district court's decision.

Finally, three-judge district courts do not necessarily eliminate the main concern that led to their creation: eradicating the appearance that partisan judges have too much power in shaping the political structure of our democracy through their decisions, i.e., *ideologically-driven decision making*.²³⁴ Although multiple judges can limit the power of one partisan judge, there is nothing inherent in the structure of three-judge panels that necessarily helps to eliminate partisanship.²³⁵ Indeed, given that the chief of the circuit picks the judges for every three-judge panel, it is possible that the chief's ideology might shine through the selections.²³⁶ This may or may not actually occur. Professor Solimine examined eighty-nine three-judge courts from 1976–1994 and found little evidence of partisan court-packing, suggesting that partisanship may not affect three-judge courts as much as it could.²³⁷ But this does not eliminate the potential of ideologically-driven

necessarily follow that they are comfortable in engaging in joint decision making.

Solimine, *supra* note 216, at 777–78.

²³¹ See Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 425 (2007) (explaining the Supreme Court's view that "[t]rial judges are not only in a better position to assess the credibility of live witnesses, but they also have superior expertise and greater experience determining facts."); see also *Anderson v. Bessemer City*, 470 U.S. 564, 574–75 (1985) ("The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources.").

²³² *Easley v. Cromartie*, 532 U.S. 234, 242–43 (2001) (internal citations omitted).

²³³ *Id.* at 243.

²³⁴ Solimine, *supra* note 70, at 134–35.

²³⁵ Indeed, Professors Cox and Miles found that partisanship is a very strong predictor of how a judge on a three-judge district court will vote in a Voting Rights Act case. See Cox & Miles, *supra* note 61, at 18–29.

²³⁶ See Solimine, *supra* note 70 at 110–115; see also Pamela S. Karlan, *The Right to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1729 (1993).

²³⁷ Solimine, *supra* note 70, at 114.

decision making or the perception that it happens. Nor does it provide an institutionalized mechanism for limiting the chief judge's ability to affect case outcomes.²³⁸ Moreover, any system that uses a subset of judges will suffer the possibility that the decision will be based on the luck of the draw.²³⁹ Of course, even an entire court—such as the Supreme Court or a full en banc court—can exhibit ideological decision making. But there is nothing about the structure of using a full court, besides the selection process of federal judges itself,²⁴⁰ that contributes to the appearance that partisanship is highly relevant to the decision. By contrast, the structure of three-judge courts invites the perception that ideology plays a large role in the process because the ideology of the particular panel members is often a key predictor of the decision.²⁴¹

Three-judge district courts, with direct review to the Supreme Court, ultimately have some virtues that are important in election law cases: quick resolution, an air of greater accuracy and legitimacy, and the symbolism of increased scrutiny for particularly important cases, to name a few. But they also have less desirable features, such as forcing the Supreme Court to decide an issue earlier than it may wish, a misallocation of tasks in the judicial decision-making process, and the possible perpetuation of the view that ideology drives the decisions. This process, despite being a staple of the VRA and certain campaign finance litigation, is thus not the most ideal system, although it certainly has aspects we should retain in any court regime for election law cases.

C. Single District Judge with Direct Review to the En Banc Circuit Court

The Federal Election Campaign Act (FECA) of 1971 provides the third process by which election law cases move through the federal courts. Under section 437h of the statute, eligible plaintiffs can assert constitutional challenges to the Act to a district court (single district judge), with direct certification of the dispute to the court of appeals sitting en banc:

[T]he [Federal Election] Commission, the national committee of any political party, or any individual eligible to vote in any election for the

²³⁸ See Tracy E. George & Albert H. Yoon, *Chief Judges: The Limits of Attitudinal Theory and Possible Paradox of Managerial Judging*, 61 VAND. L. REV. 1, 32 (2008) (describing a chief judge's formal and informal powers and suggesting that "[i]n the end, chief judges who are so inclined can find ways to affect assignments").

²³⁹ See, e.g., Cox & Miles, *supra* note 235, at 18–29.

²⁴⁰ See Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1067 (2001) ("When a party wins the White House, it can stock the federal judiciary with members of its own party, assuming a relatively acquiescent Senate."); see also FRANK B. CROSS, DECISION MAKING IN THE U.S. COURTS OF APPEALS 19 (2007) ("[R]esearchers have presumed that judges appointed by Democrats are ideologically liberal whereas those appointed by Republicans are ideologically conservative.").

²⁴¹ See, e.g., Cox & Miles, *supra* note 235, at 18–29.

office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.²⁴²

Although the legislative history of section 437h is sparse, it appears that the drafters of the FECA included this provision to ensure quick adjudication of constitutional questions given the importance of resolving disputes surrounding an election. Senator James Buckley, who planned to raise constitutional objections to the FECA, explained the inclusion of the timeliness provision as follows:

[I]t is a modification that I am sure will prove acceptable to the managers of the bill. It merely provides for the expeditious review of the constitutional questions I have raised. I am sure we will all agree that if, in fact, there is a serious question as to the constitutionality of this legislation, it is in the interest of everyone to have the question determined by the Supreme Court at the earliest possible time.²⁴³

Similarly, in the House, Representative William Frenzel responded to a colleague's question regarding the constitutionality of the FECA by noting,

Any time we pass legislation in this field we are causing constitutional doubts to be raised. I have many myself. I think the gentleman has pointed out a good one. We have done the best we could to bring out a bill which we hope may pass the constitutional test. But, we do not doubt that some questions will be raised quickly.

I do call the attention of the gentleman to the fact that any individual under this bill has a direct method to raise these questions and to have those considered as quickly as possible by the Supreme Court.²⁴⁴

Justice O'Connor, writing for a unanimous Supreme Court in explaining that section 437h was to be strictly construed, observed that "[t]hese brief remarks by

²⁴² 2 U.S.C. § 437h (2006). The only other federal law with a similar procedure—direct review to the en banc circuit court—is the Emergency Energy Conservation Program. *See* 42 U.S.C. § 8514(a)(2) (2006). This procedure was also part of the House report accompanying the Federal Insecticide, Fungicide, and Rodenticide Act Amendments of 1988, but it did not make it into the final bill. *See* H.R. REP. NO. 100-939, at 64 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3474, 3513. *But see* 7 U.S.C. § 136n (2006) (outlining a judicial review procedure that does not include automatic en banc consideration). Louisiana law provides for direct en banc appeal of a trial court's decision in a post-election contest regarding the winner of the election. LA. REV. STAT. ANN. § 18:1409(H).

²⁴³ 120 CONG. REC. 10,562 (1974).

²⁴⁴ 120 CONG. REC. 35,140 (1974).

two Members of Congress nearly exhaust the legislative history of the section.”²⁴⁵ Thus, it appears that the driving force behind mandating direct en banc review was to ensure timeliness and comprehensive decision making on a question as important as the constitutionality of a law affecting elections.²⁴⁶

The timeliness factor inherent in section 437h was actually a lot stronger in the original formulation of the statute. Initially, section 437h provided for direct nondiscretionary review to the Supreme Court,²⁴⁷ and it included a provision requiring the en banc court of appeals and the Supreme Court “to advance on the docket and to expedite to the greatest possible extent the disposition of any matter” the district court had certified under this section.²⁴⁸ Congress eliminated these portions of section 437h as part of its overall goal of limiting the Supreme Court’s mandatory docket²⁴⁹ and giving the courts greater control over the order in which it hears cases.²⁵⁰ Thus, although the mechanism itself allows for faster adjudication by skipping the three-judge panel stage of appellate review, the statute in its current form propounds watered-down timeliness.

The Supreme Court has heard only two cases deriving from section 437h’s direct en banc procedure—and both occurred when the statute included mandatory Supreme Court review.²⁵¹ The most famous case arising under section 437h is *Buckley v. Valeo*.²⁵² *Buckley* presented the initial broad-based constitutional challenge to the FECA.²⁵³ In fact, Senator Buckley invoked the very procedures on timeliness he had included in the bill to challenge the constitutionality of much of

²⁴⁵ *Bread Political Action Comm. v. FEC*, 455 U.S. 577, 583 (1982) (holding that only the three types of plaintiffs explicitly listed in the statute may invoke the section’s expedited procedures).

²⁴⁶ *See Cal. Med. Ass’n v. FEC*, 453 U.S. 182, 188 (1981) (“Congress was concerned that its extensive amendments to the Act in 1974 might raise important constitutional questions requiring quick resolution . . .”); *id.* at 190 (“It is undisputed that this provision was included in the 1974 Amendments to the Act to provide a mechanism for the rapid resolution of constitutional challenges to the Act.”); *see also Bread Political Action Comm. v. FEC*, 591 F.2d 29, 33 (7th Cir. 1979) (“Thus three Congressional purposes are clear: comprehensive review, speedy review, and ultimate review by our highest court of constitutional challenges to the Act.”), *overruled by Bread*, 455 U.S. at 585.

²⁴⁷ 2 U.S.C. § 437h(b) (1982) (“Notwithstanding any other provision of law, any decision on a matter certified under subsection (a) of this section shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought no later than 20 days after the decision of the court of appeals.”), *repealed by* Pub. L. No. 100-352, § 6(a), 102 Stat. 662, 663 (1988).

²⁴⁸ 2 U.S.C. § 437h(c) (1982), *repealed by* Pub. L. No. 98-620, § 402(1)(B), 98 Stat. 3335, 3357 (1984).

²⁴⁹ H.R. REP. NO. 100-660, at 11 (1988) (explaining that the “Supreme Court should be granted greater authority to determine its docket”).

²⁵⁰ Pub. L. No. 98-620, § 401(a), 98 Stat. at 3356–57.

²⁵¹ *Cal. Med. Ass’n v. FEC*, 453 U.S. 182, 188 (1981); *Buckley v. Valeo*, 424 U.S. 1, 8 (1976); *see also id.* at 8 n.4

²⁵² 424 U.S. 1.

²⁵³ *Id.* at 6.

the Act soon after it became law.²⁵⁴ Reviewing a robust decision from the en banc D.C. Circuit Court²⁵⁵ (consolidated with a related three-judge court decision²⁵⁶), the Supreme Court upheld portions of the law and struck down others, ruling that limits on campaign contributions, as well as disclosure and reporting requirements, are constitutional, but that limits on campaign expenditures are not.²⁵⁷ The second case stemming from section 437h is *California Medical Ass'n v. FEC*, in which the Court upheld FECA's annual limit for individuals and unincorporated associations to contribute to multicandidate political committees.²⁵⁸ The Supreme Court has not granted certiorari on any case that was certified to the en banc circuit court under section 437h after Congress removed the direct review provision.²⁵⁹

A few years after the tumultuous *Buckley* litigation, Judge Harold Leventhal of the D.C. Circuit Court wrote a law review article lambasting section 437h's "most unusual procedure."²⁶⁰ He highlighted his many objections to certification of questions to the en banc court, direct Supreme Court review, and the duty to expedite the decision:

The benefit of expedition is one thing. But the straitjacket of the particular procedure, more like a headlong gallop than a brisk canter, was not debated by Congress. There is wisdom in removing that unusual procedure from the law. The system bypasses the benefit of a record-making procedure, and while this could be recaptured in part by the kind of remand used by the District of Columbia Circuit [in *Buckley*], even this was trial by rapid-fire combat, under the gun of a legislative call for haste. The use of certified questions on an expedited basis encourages an abstract approach to constitutional decision-making—the kind of approach which proved unworkable in the reapportionment context.

²⁵⁴ *See id.* at 7–8.

²⁵⁵ *Buckley v. Valeo*, 519 F.2d 821, 898 (D.C. Cir. 1975) (en banc).

²⁵⁶ Although the bulk of the case went before the D.C. district court, which certified questions to the en banc D.C. Circuit, a separate three-judge panel considered and rejected a challenge to related Internal Revenue Code provisions. *See Buckley v. Valeo*, 401 F. Supp. 1235 (D.D.C. 1975) (three-judge court). For a jurisprudential history of *Buckley v. Valeo*, see generally Richard L. Hasen, *The Nine Lives of Buckley v. Valeo*, in *FIRST AMENDMENT STORIES* (Richard W. Garnett & Andrew Koppelman eds., Foundation Press) (forthcoming 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1593253.

²⁵⁷ *Buckley*, 424 U.S. at 143.

²⁵⁸ *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 201 (1981).

²⁵⁹ The three-judge district court/direct Supreme Court review mechanism from the Bipartisan Campaign Reform Act is actually in the note following 2 U.S.C. § 437h, and the Court has heard several cases in recent years under this provision. *See supra* Part III.B.

²⁶⁰ Harold Leventhal, *Courts and Political Thickets*, 77 COLUM. L. REV. 345, 384 (1977).

As for en banc hearings, these, if anything, tend to be counter-productive in terms of expedition. Appellate courts like the United States courts of appeals, which are accustomed to working in small panels, have difficulty in expediting their en banc determinations. The ingenuity of counsel in articulating constitutional questions lends itself to minor, perhaps frivolous issues, and the instruction for compulsory appellate jurisdiction of the Supreme Court is contrary to all recent studies and thinking concerning that Court.²⁶¹

Despite Judge Leventhal's apprehension, however, certification of questions to the en banc court has endured, albeit infrequently invoked. Since 2000, there are only three reported en banc decisions stemming from a district court's section 437h certification: one in 2000 and two in 2010.²⁶² But this does not necessarily mean that the provision is meaningless. Instead, given that the FECA is over thirty years old,²⁶³ it simply might signal that the constitutionality of the Act is well settled. Indeed, *Buckley* itself resolved many of the original constitutional objections to FECA.²⁶⁴ It may be, then, that there is simply a diminished need for plaintiffs to challenge the FECA because there are few nonfrivolous challenges they might be able to raise. It remains to be seen, however, whether the Supreme Court's recent invitation of as-applied challenges in election law will lead to a corresponding increase in as-applied constitutional challenges to the Act.²⁶⁵ In fact, after a decade of almost no en banc decisions under section 437h, very recently two en banc courts have considered as-applied challenges to the FECA.²⁶⁶ Thus, the section 437h procedure may see a renewed vitality.

One problem that can arise under section 437h occurs when the district court certifies only some issues to the en banc court and dismisses others as frivolous, and the plaintiff wishes to appeal that adverse decision. In that circumstance, there is the possibility of parallel proceedings at the court of appeals. A three-judge

²⁶¹ *Id.* at 385.

²⁶² *Cao v. FEC (In re Cao)*, 619 F.3d 410 (5th Cir. 2010) (en banc) (rejecting a challenge to various applications of the FECA), *cert denied*, 131 S. Ct. 1718 (2011); *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc) (holding that, in light of the Supreme Court's decision in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), the FECA's contribution limits were unconstitutional as applied to an unincorporated nonprofit association, but upholding the disclosure and reporting requirements); *Mariani v. United States*, 212 F.3d 761 (3d Cir. 2000) (en banc) (rejecting a constitutional challenge to FECA's ban of hard money contributions from corporate treasuries).

²⁶³ Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified at 2 U.S.C. § 437h (2006)).

²⁶⁴ *Buckley v. Valeo*, 424 U.S. 1 (1976) (upholding individual campaign contribution limits and reporting requirements, but striking down self-funding limits for candidates and total expenditure limits for campaigns).

²⁶⁵ See Joshua A. Douglas, *The Significance of the Shift Toward As-Applied Challenges in Election Law*, 37 HOFSTRA L. REV. 635, 635 (2009).

²⁶⁶ *Cao*, 619 F.3d at 414; *SpeechNow.org*, 599 F.3d at 689.

panel will hear the appeal of the district court's decision rejecting certain claims as frivolous, while the en banc court will consider the certified questions. The standards of review—and even the questions presented—will be different: the three-judge panel will determine whether the district court correctly held that the challenge was frivolous and therefore not worthy of certification under an abuse of discretion standard, while the en banc court will review the constitutional challenge de novo.²⁶⁷ The Fifth Circuit recently faced this conundrum, but instead of having parallel proceedings, it decided to hear all issues at its en banc session.²⁶⁸ This process was arguably inconsistent with the statute, which does not empower the en banc court to consider the noncertified questions, but none of the parties objected to this process.²⁶⁹ As Part IV discusses, eliminating the possibility of split proceedings is one fix required of this procedure.

Besides the parallel proceedings concern, however, section 437h does not seem to impose any other major structural deficiencies such as those inherent in the traditional three-tiered approach²⁷⁰ or the three-judge district court.²⁷¹ Judge Leventhal's concerns thus are overstated. He is correct that the procedure does not invite *detailed* fact finding at the district court.²⁷² But the process of going from a single district judge, who weeds out frivolous cases and makes preliminary findings of facts, to the en banc circuit court for the resolution of legal questions, has much to commend it.

For one, although previously the statute included a specific instruction to the courts to decide cases expeditiously,²⁷³ even without that mandate, it still inherently promotes *timeliness*. Not only does this process limit the scope of the district court's decision and skip the three-judge panel, it also signals to the full circuit court that the case is particularly important and should be handled at the next en banc session.²⁷⁴ Indeed, recent en banc courts have heeded this message. In *SpeechNow.org v. FEC*, the D.C. Circuit heard oral argument on January 27, 2010,

²⁶⁷ *Cao*, 619 F.3d at 415.

²⁶⁸ Order Consolidating Appeals, *Cao*, 619 F.3d 410 (No. 10-30080) (“The court has sua sponte consolidated the above appeals for briefing and oral argument purposes. The parties’ briefs on all issues should be consolidated, but you are warned to clarify the differing standards of review that will apply to the separate facets of these cases.”).

²⁶⁹ *Cao*, 619 F.3d at 415 (“For purposes of judicial economy and efficiency, we consolidated the Plaintiffs’ appeal of the dismissal of the non-certified questions with the court’s en banc consideration of the certified questions.”).

²⁷⁰ *See supra* Part III.A.

²⁷¹ *See supra* Part III.B.

²⁷² *Cal. Med. Ass’n v. FEC*, 453 U.S. 182, 193 n.14 (1981) (“[A]s a practical matter, immediate adjudication of constitutional claims through a § 437h proceeding would be improper in cases where the resolution of such questions required a fully developed factual record.”).

²⁷³ 2 U.S.C. § 437h(b), (c) (1976).

²⁷⁴ *See George, supra* note 110, at 1667–68 (“[The en banc] procedure creates the presumption that the cases are likely to involve difficult, complex, highly political, or at least significant questions.”).

and rendered its decision on March 26, 2010.²⁷⁵ In *Cao v. FEC*, the Fifth Circuit heard oral argument on May 25, 2010, and issued its opinion on September 10, 2010, reviewing a decision the district court had issued just over eight months earlier.²⁷⁶

The use of multiple judges also enhances the likelihood that litigants and the public will perceive the decision as *accurate* and *legitimate*. Instinctively, it makes sense that the more judges on a panel, the greater chance for tempering of extreme views, compromise, and reasoned analysis.²⁷⁷ The whole point of multimember panels is to ensure that judges with different viewpoints and experiences have the ability to make their voices heard.²⁷⁸ Even if the decision of a multimember panel is not actually more “accurate” than a single judge’s decision, it is likely to be perceived as better reasoned because of the nature of give-and-take on an appellate court. Ideologues or those most invested in the outcome who may not like the decision are still unlikely to view the court’s authority as illegitimate, especially if a dissent airs the opposing side’s position.²⁷⁹ Section 437h promotes the goals of accuracy and legitimacy by having the full en banc court undertake the

²⁷⁵ *SpeechNow.org v. FEC*, 599 F.3d 686, 687 (D.C. Cir. 2010).

²⁷⁶ *Cao v. FEC (In re Cao)*, 619 F.3d 410, 410 (5th Cir. 2010), *cert denied*, 131 S. Ct. 1718 (2011); *Cao v. FEC*, 688 F. Supp. 2d 498, 498 (E.D. La. 2010) (decided Jan. 27, 2010).

²⁷⁷ *See George, supra note 110*, at 1695.

²⁷⁸ *See, e.g., Stephen J. Choi & G. Mitu Gulati, Trading Votes for Reasoning: Covering in Judicial Opinions*, 81 S. CAL. L. REV. 735, 739 (2008) (“The multimember panel studies indicate that the votes of judges are influenced by the ideologies of other judges on the same panel. Either to maintain collegiality, to avoid a judge’s breaking away to author a dissenting opinion, or simply because of group dynamics, judges appear to moderate their voting in settings where there is potential diversity in political views.”); Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1664 (2010) (noting that in the immigration context, “[m]ultimember panels . . . reduce the probability that a single individual with a strong ideology (in either direction) will reach an extreme result They do this by diffusing subjective biases, permitting deliberation, and promoting consensus.”); Jonathan Remy Nash & Rafael I. Pardo, *An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review*, 61 VAND. L. REV. 1745, 1747 (2008) (using empirical analysis of bankruptcy cases to demonstrate that, with respect to achieving accuracy, or at least a perception of accuracy, “multimember tribunals that adhere to traditional notions of appellate hierarchy and that have subject-matter expertise in the area of the appeal appear to be desirable”).

²⁷⁹ For example, the vigorous opinions in *Bush v. Gore* on both sides might have actually helped the Court weather the storm from an inherently political and (for a large segment of the population) unpopular decision. *See Herbert M. Kritzer, The Impact of Bush v. Gore on Public Perceptions and Knowledge of the Supreme Court*, 85 JUDICATURE 32, 33 (2001) (“The Court’s action in *Bush v. Gore* was dramatic, subject to intense media coverage, and controversial, but the effects on public perceptions and knowledge of the Court were modest.”); *cf. Deborah Hellman, Judging by Appearances: Professional Ethics, Expressive Government, and the Moral Significance of How Things Seem*, 60 MD. L. REV. 653, 671 (2001) (arguing that in analyzing the issues in *Bush v. Gore*, the justices should have taken into consideration whether that decision would appear principled to the public).

constitutional analysis in the first instance.²⁸⁰ It places the difficult questions about the constitutional legitimacy of creating rules for democratically electing our leaders directly in the hands of the largest already-constituted group of judges in our federal court system, thereby minimizing the influence of a single district judge or a random selection of three appellate judges. This tempers a concern that the *ideology* of a randomly selected judge will unduly influence the outcome. It also leads to a greater perception of accuracy and legitimacy for the court's decisions.

Further, unlike for the three-judge district court, section 437h generally promotes each type of judge's expertise and *proper judicial role*: district judges decide preliminary matters and factual issues, and appellate judges decide constitutional questions.²⁸¹ True, district judges are not supposed to make detailed factual findings under section 437h.²⁸² Appellate judges also are not reviewing a lower court decision, as the district court simply certifies constitutional questions to the en banc court without rendering an initial decision on their merit.²⁸³ Section 437h is thus not perfect in best using each judge's skills. But it at least cogently separates a district judge's factual findings from an appellate court's legal analysis on the constitutional questions.

Section 437h also demonstrates Congress's commitment to recognizing the significance of election law litigation. When a case goes en banc, the lawyers hone their arguments, the judges refocus their energies, and the public is told, "This is an important one." En banc cases have greater weight than decisions of a three-judge panel because the decision speaks for the entire court.²⁸⁴ The nature of en banc review thus *signals* the importance of the issues to all involved. Section 437h does this for constitutional challenges to the FECA, highlighting the importance of the proper functioning of that law to our electoral practices.

Thus, a process such as section 437h that leads to quick en banc adjudication fosters many of the goals identified in Part II: timeliness, accuracy, legitimacy, minimization of ideology, use of each judge's expertise, and signaling. As Part IV explores, section 437h provides a strong launching point for creating a uniform procedure for election law cases in federal courts. It simply needs refinement and broader application.

²⁸⁰ See 2 U.S.C. § 437h (2006).

²⁸¹ See *supra* Part II.E.

²⁸² Cal. Med. Ass'n v. FEC, 453 U.S. 182, 193–94 n.14 (1981).

²⁸³ See 2 U.S.C. § 437h.

²⁸⁴ See, e.g., *Brown v. First Nat'l Bank in Lenox*, 844 F.2d 580, 582 (8th Cir. 1988) (“[O]ne panel of this Court is not at liberty to overrule an opinion filed by another panel. Only the Court en banc may take such a step.”).

D. DISCLOSE Act

In response to the Supreme Court's highly controversial decision in *Citizens United v. FEC*, Democrats in Congress introduced the DISCLOSE Act.²⁸⁵ The law was intended to strengthen disclosure requirements for corporate campaign contributions and place limits on political contributions from foreign corporations.²⁸⁶ The bill, which passed the House but not the Senate,²⁸⁷ provided that any constitutional challenges to the law must be filed in the D.C. District Court, with appeal to a regular three-judge panel of the D.C. Circuit.²⁸⁸ The judicial review procedures in the law were thus different from any of the currently used processes for election law cases.²⁸⁹ In essence, Congress provided for the regular three-tiered review procedure, but designated the venue as the D.C. federal courts. The bill also stated that a member of Congress could intervene in any constitutional challenge or bring his or her own challenge to the law.²⁹⁰

Notably, the House rejected an alternative bill sponsored by Representative Dan Lungren of California that provided for expedited judicial review through a three-judge district court, much like in the Voting Rights Act and Bipartisan Campaign Reform Act cases.²⁹¹ Representative Lungren and Representative Lamar Smith of Texas, both Republicans, took to the House floor to denounce the omission of an expedited review procedure in the Democrats' bill.²⁹² Representative Lungren accused the Democrats supporting the bill of intentionally

²⁸⁵ Democracy is Strengthened by Casting Light on Spending in Elections Act, H.R. 5175, 111th Cong. (2010).

²⁸⁶ H.R. 5175, 111th Cong. § 102.

²⁸⁷ See Michael A. Memoli, 'Disclose Act' Fails to Advance in Senate; The Bill Would Require Greater Transparency on Political Donations by Corporations, L.A. TIMES, Sept. 24, 2010, at 2.

²⁸⁸ See H.R. 5175, 111th Cong. § 401(a)(1).

²⁸⁹ *Id.* The judicial review provision of the bill reads, in pertinent part:

(a) SPECIAL RULES FOR ACTIONS BROUGHT ON CONSTITUTIONAL GROUNDS.— If any action is brought for declaratory or injunctive relief to challenge the constitutionality of any provision of this Act or any amendment made by this Act, the following rules shall apply:

(1) The action shall be filed in the United States District Court for the District of Columbia, and an appeal from a decision of the District Court may be taken to the Court of Appeals for the District of Columbia Circuit.

(2) A copy of the complaint shall be delivered promptly to the Clerk of the House of Representatives and the Secretary of the Senate.

Id.

²⁹⁰ *Id.* § 401(b).

²⁹¹ See 156 CONG. REC. H4826 (daily ed. June 24, 2010) (statement of Rep. Smith) (DISCLOSE Act debate).

²⁹² *Id.*

failing to include expedited review in an effort to ensure that the Supreme Court would not interpret the law before the 2010 elections.²⁹³ That is, Representative Lungren suggested that Democrats were afraid the Court would strike down the bill but still wanted to create uncertainty on the lawfulness of—and a corresponding chill on—corporate campaign expenditures for the upcoming midterm election.²⁹⁴

The debate on the judicial review provision of the DISCLOSE Act tells us some important things about the procedure of election law cases. For one, Congress is well aware that it needs to consider how election law cases proceed through the courts, and it actively debates these issues when drafting new election laws. But Congress's focus is misplaced. Members of Congress seek to employ judicial review for their own partisan purposes, instead of contemplating the institutional and structural aspects of the judicial review procedure they select.²⁹⁵ Representative Lungren accused Democrats of stalling any review of the DISCLOSE Act in an effort to affect the upcoming elections while himself seeking faster review to ensure court consideration before the elections, likely because he believed implementation of the law would help Democrats and hurt Republicans. This is largely the same debate Senator Buckley had with respect to section 437h in the FECA.²⁹⁶ Members of Congress use the insertion of a particular judicial review process to slow down or speed up court interpretation of a new election law depending on their support of or opposition to the law, which can affect whether that law applies in an upcoming election.

²⁹³ *Id.* Representative Lungren admonished:

This bill does not have the expedited appellate procedure that we've had in every other campaign finance law. And what this motion to recommit does is says that same process that we've had which allows an expedited review of the underlying constitutionality of this bill will be in this bill as it has been in the past. Why? Because we are dealing with the First Amendment to the Constitution, and people ought to know sooner rather than later whether the law we passed is constitutional.

If in fact your intent is to ensure there is vagueness for this election period so that those who are protected in this bill—that is, the exemptions given to the unions applies, but there is uncertainty on the part of other corporate entities, either for-profit or not-for-profit, that will have a chilling effect on the latter group, and that will create an uneven playing field for the balance of this election period. The only way in which you might not have that uneven playing field is to have an expedited consideration all the way to the Supreme Court of the underlying constitutionality.

Id.

²⁹⁴ *Id.*

²⁹⁵ See Solimine, *supra* note 216, at 773 (“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.”).

²⁹⁶ See *supra* Part III.C.

But, as discussed above, unique judicial processes for election law cases produce unintended consequences.²⁹⁷ Moreover, Congress's criteria for implementing a judicial review procedure are misguided. On an issue as highly charged as campaign finance, it is difficult, if not impossible, for members of Congress to separate their partisan motivations from best practices for judicial review. This underscores the need for Congress to create, outside the context of a substantive election law, a uniform procedure for these cases. Instead of attempting to manipulate the judicial review process based on whether a representative supports or opposes a particular law, Congress should enact a uniform procedure for all election law cases that is tied to the goals identified in Part II. Part IV proposes a solution.

IV. CREATING A UNIFORM PROCEDURAL MECHANISM FOR ELECTION LAW CASES IN FEDERAL COURTS

As the foregoing discussion demonstrates, there are several procedures federal courts use for election law cases. But many of these processes do not promote the goals we seek to achieve in adjudicating election law disputes, which are often the most highly salient and partisan decisions judges make.²⁹⁸ Among the problems with the current approaches are that the three-tiered system is slow and laborious, the three-judge district court misplaces judicial expertise and requires premature Supreme Court decision making, and there is a perception that ideology drives election law outcomes.²⁹⁹

To avoid these concerns, we need not reinvent the wheel. Rather, it is possible to promulgate a single process that can best achieve quick, accurate, and fair judicial review of election laws. In fact, although it needs tweaking, one procedure already stands above the others in balancing the requirements of the judicial system with the importance of election law disputes: the direct en banc review process of title 2, section 437h of the United States Code. This Part proposes a modification to the procedure outlined in section 437h, which Congress should adopt for election law cases heard in federal courts. This Article terms this system *merits-based direct en banc review*.

To begin, judicial processes for election law cases should be uniform, as a single procedure for all election law cases in federal courts can enhance clarity, predictability, and the perception of fairness.³⁰⁰ Although many people are

²⁹⁷ See *supra* Part III.A, III.B.

²⁹⁸ See Heather K. Gerken, *The Texas and Pennsylvania Partisan Gerrymandering Cases—Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503, 520 (2004) (“The Court does not avoid making political judgments in election law cases. It simply cloaks those judgments in the ill-fitting garb of individual rights.”); Hasen, *supra* note 16, at 102 (explaining that election law cases are “highly salient” and often viewed as turning on “partisan consideration[s]”).

²⁹⁹ See *supra* Part III.A, III.B.

³⁰⁰ Uniformity is a common virtue for election administration. For example, Congress premised the Help America Vote Act, its latest major attempt to overhaul the country's

skeptical of using the courts to decide election disputes, a judicial role for elections is not going away.³⁰¹ A consistent approach will help litigants know what to expect, ensure that elected leaders do not promulgate procedures solely to entrench themselves or their party in positions of leadership,³⁰² and harmonize the judiciary's role in affecting and deciding elections. There is no discernable reason for having multiple processes unless they are related to specific goals inherent in the cases falling within their scope.³⁰³ Creating a uniform procedure for all election law cases, outside the context of a specific substantive election provision, also will eliminate the possibility that members of Congress will attempt to insert a review mechanism in a particular law to speed up or slow down judicial interpretation of that law, which is exactly what occurred in the DISCLOSE Act debate.³⁰⁴

Other features of the new process that this Article proposes include involving the highest number of judges practicable (thus promoting greater accuracy), providing for timely adjudication, and protecting the judiciary's legitimacy in deciding election law cases. Further, although no system can completely eliminate the role of ideology, merits-based direct en banc review can best minimize judges' ideological predilections. Finally, adopting this procedure will signal to the court, litigants, and society that election law cases are vitally important, both in terms of the accuracy required and in the implications the decisions will have for the foundation of our political system. In short, an expedited three-tiered process with direct en banc review best promotes the goals identified in Part II and provides a clear mechanism that defines when and how courts should become involved in election law disputes.³⁰⁵

voting processes, on the virtues of "Uniform and Nondiscriminatory Election Technology and Administration Requirements." See 42 U.S.C. § 15481 (2006).

³⁰¹ Cf., e.g., Luis Fuentes-Rohwer & Laura Jane Durfee, *Leaving the Thicket at Last?*, 2009 MICH. ST. L. REV. 417, 421 (suggesting that the Supreme Court should remove itself from deciding election law cases because the Court's incoherent intervention in the political system may not be worth the cost); Karlan, *supra* note 46, at 695–98 (arguing that the Court should minimize its intervention in the democratic process).

³⁰² HEATHER K. GERKEN, *THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT* 15 (2009); see also Michael S. Kang, *To Here from Theory in Election Law*, 87 TEX. L. REV. 787, 789 (2009) (book review) ("First, the heart of *The Democracy Index* establishes that the central problem for legal reform in election administration—and a central concern of election law—is the political self-interest of lawmakers locking themselves into office. Election law structures the incentives and restrictions on the process by which lawmakers, who make the election law that governs them, gain and maintain public office. The risk of incumbent entrenchment is not unique to election law, but it is the defining concern of this area of law, just as Gerken suggests.").

³⁰³ For example, post-election contests regarding the winner of an election might benefit from a unique procedure.

³⁰⁴ See *supra* Part III.D.

³⁰⁵ See Huefner, *supra* note 18, at 306 ("It . . . is fundamentally important, both for courts and for the strength of our elections, that our political communities establish clearer and more objective standards for when and how courts should void or adjust a flawed election.").

Here is how merits-based direct en banc review would work: A litigant files an election law case, either challenging an election practice or questioning the constitutionality of an election statute. The case is first assigned to a district judge. That judge is directed to move the case to the top of the docket, thus fostering timeliness of decision making.³⁰⁶ The judge expedites discovery,³⁰⁷ briefing, and hearings, and then renders a decision in the case in a timely fashion. As with most cases, judges should pay particular attention to resolving any disputed facts. That is, judges will fulfill their typical role in handling the case, with the exception that—because it is an election law case—the judge is charged to act expediently. Judges also must decide if any of the challenges are frivolous, throwing out those aspects of the case in which no reasonable mind could differ (much like a judge might dismiss certain aspects of a case through Rule 12(b)(6)).³⁰⁸ The findings of fact and dismissal of frivolous claims will provide litigants with an initial timely assessment of the merits of the case, giving the losing side an indication of whether it is worth pursuing particular issues at the appellate level.

The losing party can then appeal any merits-based decision directly to the en banc court. For any issues that the district court dismissed based on frivolity, the chief judge of the circuit shall have the power to refer those issues to the full en

³⁰⁶ Of course, the most expeditious process would be to have only one level of judges, with no possibility of review. Indeed, some states use this procedure for election contests. See, e.g., HAW. REV. STAT. § 11-172 (1991). As Professor Huefner explains, “Especially if some election contests receive *de novo* review in appellate courts anyway, it might be both more efficient and most expeditious to combine the trial and the appeal into a single event.” Huefner, *supra* note 18, at 315. However, eliminating multiple levels of review would deprive the process of other important virtues, such as fostering legitimacy and accuracy, providing all parties with the sense that the judiciary gave them a fair shot during the litigation, and ensuring that judges take on roles consistent with their particular expertise (fact finding or legal decision making). Achieving all of the goals requires a balance; elevating timeliness over all other goals would minimize the others.

Moreover, the mere presence of the possibility of an appeal incentivizes judges to try to make the “correct” (nonreversible) decision and lends legitimacy to the process because society knows that there is an inherent error-correction mechanism within the procedure. See Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379, 379 (1995) (“[T]he appeals process allows society to harness information that litigants have about erroneous decisions and thereby to reduce the incidence of mistake at low cost (because the appeals tribunal convenes only in a subset of cases).”). Furthermore, “if one reconsiders the possibility of multiple levels of appeal, then allowing appeals at any level would have the advantage of improving judges’ incentives for accuracy at all earlier levels of appeal (not just at trial).” *Id.* at 410–11.

³⁰⁷ See Huefner, *supra* note 18, at 315 (“A prolonged period of discovery, while obviously conducive to a more accurate determination of election outcomes, is antithetical to the need for a prompt and final determination.”).

³⁰⁸ FED. R. CIV. P. 12(b)(6).

banc court if reasonable minds could differ on their proper resolution.³⁰⁹ This ensures that the dismissal of frivolous issues still receives appellate review (through the chief judge) but does not bog down the full en banc court or require parallel proceedings.³¹⁰ It protects merits-based direct en banc review from dilution, focusing the courts, litigants, and society on the important and salient election-related questions.

The en banc stage will operate much as it does now for section 437h,³¹¹ with one minor exception: the appellate court should give the district court's findings of fact slightly less deference than in a regular case. A heightened standard, such as a requirement that the district court's findings of fact be "clear and convincing," provides the en banc court with a better ability to root out incorrect or ideological decisions.³¹² Providing too much deference to a district court's fact finding raises the concern that ideology or the whims of a single judge infused the decision; requiring en banc courts to review the facts de novo usurps the district judge's normal powers and would be too burdensome. A modified standard (such as "clear and convincing") retains the overall benefits discussed earlier of using an en banc court but still gives the district court a significant role in uncovering the facts of the dispute. It thus combines the goals of preserving each judge's typical role, minimizing ideology, and ensuring accuracy.³¹³ As for conclusions of law, much like in all other cases the en banc court will review the decision de novo.³¹⁴ That is, the en banc court can benefit from the district court's initial first pass on factual

³⁰⁹ This is similar to the Supreme Court's rule allowing the circuit justice for a particular circuit to dispose of an application for an emergency stay him or herself or refer the question to the full Court for consideration. SUP. CT. R. 22, 23.

³¹⁰ This contrasts with the Fifth Circuit's approach in *Cao*. See *Cao v. FEC (In re Cao)*, 619 F.3d 410 (5th Cir. 2010) (en banc), *cert denied*, 131 S. Ct. 1718 (2011). See *supra* notes 268–269 and accompanying text. The Fifth Circuit's action in hearing the frivolous claim en banc with the certified questions skirted the district court's determination that one of the challenges was frivolous, instead consolidating the appeal of the dismissal based on frivolity and the certified questions "[f]or purposes of judicial economy and efficiency." *Cao*, 619 F.3d at 415. Allowing an appeal of frivolous issues to circumvent the regular appeals process and go directly en banc with merits-based decisions minimizes the benefits of direct en banc review and could overburden en banc courts. If one judge has already determined that the challenge is frivolous, then the chief judge can serve as a gatekeeper for the full court.

³¹¹ See *supra* Part III.C.

³¹² Cf. 28 U.S.C. § 2254(e) (2006) (providing that in habeas cases a federal court reviews a state court's factual findings for "clear and convincing" evidence).

³¹³ Of course, requiring the en banc court to scrutinize the facts, even under a "clear and convincing" standard, somewhat sacrifices the goal of timeliness at this stage of the proceedings.

³¹⁴ See, e.g., *Churchill v. Fjord (In re McLinn)*, 739 F.2d 1395, 1401 (9th Cir. 1984) (en banc) (explaining the virtues of de novo review by noting that "de novo review of questions of law is dictated in part because of the precedential effect of those questions on future litigants. While the trial courts' factual determinations bind only the parties, the determination of legal issues affects the rights of future litigants.").

questions while still engaging in robust deliberation on the legal issues. This ensures that each level of court focuses on what it does best, and for the en banc court, it allows it to decide both the difficult legal and factual disputes with the benefit of the lower court's analysis.

The court must decide the case at its next regularly scheduled en banc sitting, or if there is no sitting scheduled within a certain time period (such as the next three months), the court must convene specially to hear the case.³¹⁵ Nevertheless, the court must decide the case as expeditiously as possible.

Finally, the losing party at the en banc stage can seek certiorari review at the Supreme Court.³¹⁶ As the evidence above demonstrates, the Court operates best when it is not forced to answer questions prematurely.³¹⁷ The Court can allow en banc courts to sort out most election law questions, reserving its resources for the truly salient or difficult disputes. It can also rely on the en banc court's review of the district court's findings of fact.

Merits-based direct en banc review is flexible enough to respond to the needs of particular cases. For example, not every election law dispute is extremely significant or important, requiring the full resources of an en banc sitting. Convening en banc courts is not cheap—either institutionally or financially.³¹⁸ But

³¹⁵ The Ninth Circuit presents somewhat of an anomaly, as it does not include all of its twenty-nine active judges in its en banc sittings but instead sits in “limited en banc” panels of eleven judges. *See* 9TH CIR. R. 35-3. To maintain uniformity across the circuits and to adhere to the goals discussed above, that court also should sit as a full en banc panel to ensure that the decision benefits from the full court's review. *See* Hon. John M. Roll, *The 115 Year-Old Ninth Circuit—Why a Split is Necessary and Inevitable*, 7 WYO. L. REV. 109, 132–36 (2007) (explaining criticisms of the Ninth Circuit's limited en banc procedure); Hon. Pamela Ann Rymer, *The “Limited” En Banc: Half Full, or Half Empty?*, 48 ARIZ. L. REV. 317, 322–23 (2006) (describing perceived flaws in the Ninth Circuit's limited en banc review).

³¹⁶ Empirical evidence suggests that the Supreme Court is more likely to grant certiorari on a case that a circuit court has heard en banc. *See* Tracey E. George & Michael E. Solimine, *Supreme Court Monitoring of the United States Courts of Appeals En Banc*, 9 SUP. CT. ECON. REV. 171, 195–96. Using direct en banc review for election law cases, however, is unlikely to cause a marked increase in the Supreme Court's election law docket. Professors George and Solimine hypothesize that “the Supreme Court's certiorari decision is affected by the en banc nature of the lower court ruling in two ways: en banc serves as a signal, and en banc cases are inherently more significant.” *Id.* at 196–97. Congress has already signaled, however, that election law cases are more significant by creating special procedures for their resolution. Increasing the use of en banc courts for election law cases thus would further recognize, not amplify, the importance of these cases, which is unlikely to affect the Supreme Court's decision as to whether to hear these disputes.

³¹⁷ Solimine, *supra* note 216, at 797.

³¹⁸ *See generally* Douglas H. Ginsburg & Donald Falk, *The Court En Banc: 1981–1990*, 59 GEO. WASH. L. REV. 1008, 1018–37 (1991) (discussing the costs of rehearing cases en banc); *see also* 5TH CIR. R. APP. P. 35.1 (explaining that “each request for en banc consideration must be studied by every active judge of the court and is a serious call on limited judicial resources”).

not every en banc case requires oral argument or drawn out deliberations. Just like in any other case, if the majority of judges believe the election case before the en banc court is low stakes and unlikely to generate controversy among the judges, then it can dispose of the case on the briefs or through a summary opinion.³¹⁹ Further, judges need not convene in the same place for an easy case but can work through electronic communication. Thus, while all active judges on the circuit court still must review the case, the en banc court can preserve its resources for the difficult or high-impact election law disputes.

Another feature of many election law judicial review provisions is that they vest jurisdiction exclusively in the D.C. federal courts.³²⁰ But the D.C. federal courts do not necessarily have any specialized expertise in election law.³²¹ Limiting all election law cases to one court cuts against the ideals discussed above (increasing the number of judges hearing a case to foster timeliness, accuracy, legitimacy, and minimization of ideology). By contrast, having en banc courts across the country decide election law cases allows issues to percolate and opens the litigation process. Further, some issues may be unique to local elections and would benefit from local judges.

There are many advantages, and few disadvantages, to merits-based direct en banc review. First, it best promotes opportunities for “correct” decision making. As discussed above, as a general matter, the greater number of judges involved in a decision, the more likely it is to be correct.³²² “[G]iven a reasonable understanding of what the job of judging is and under reasonable assumptions about how well

³¹⁹ In some circuits, the judges vote on whether to hold oral argument when voting on whether to take a case en banc. *See* 11TH CIR. R. 35-10, INTERNAL OPERATING PROCEDURES § 7; 5TH CIR. INTERNAL OPERATING PROCEDURES *following* R. APP. P. 35-6; *see also* *Of Course, Inc. v. Comm’r of Internal Revenue*, 499 F.2d 754, 756 (4th Cir. 1974) (“Since the issue presented by the appeal was legal and not factual and the record of the oral argument of the parties before the panel was available to the *en banc* court, it was concluded that oral argument might be dispensed with and the cause disposed of on the record, written briefs of the parties and the tape of the oral argument before the original panel.”); *United States v. Gori*, 282 F.2d 43, 53 (2d Cir. 1960) (explaining that the court can dispose of a case en banc on the briefs only and that litigants do not have an “absolute right to oral argument”); *cf.* Theodore Eisenberg & Geoffrey P. Miller, *Reversal, Dissent, and Variability in State Supreme Courts: The Centrality of Jurisdictional Source*, 89 B.U. L. REV. 1451, 1459 (2009) (noting that some state Supreme Courts decide cases without oral argument and through summary affirmances to manage the case load).

³²⁰ *See, e.g.*, Bipartisan Campaign Reform Act, Pub. L. No. 107-155, § 403, 116 Stat. 81, 113–14 (2002) (“The action shall be filed in the United States District Court for the District of Columbia and shall be heard by a 3-judge court convened pursuant to section 2284 of title 28, United States Code.”), 2 U.S.C. § 437h note (2006); Voting Rights Act, 42 U.S.C. § 1973c (2006) (vesting preclearance decisions with the D.C. district court).

³²¹ *Cf.* Solimine, *supra* note 216, at 773 (“Perhaps the supporters [of the BCRA] 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.”).

³²² *See* George, *supra* note 110 and accompanying text.

individual judges are likely to do it, enlarging the number of judges who sit on a court can be expected to improve the court's performance."³²³ In fact, the whole point of multimember panels is to increase the possibility of reaching the "correct" result; en banc courts employ more judges to review the decision of a three-judge panel, and three-judge panels review the decision of a single judge because of the notion that the greater the number of judges, the better the decision will be as it moves through the appellate process.³²⁴ Given that both accuracy and timeliness are highly important in election law cases based on the foundational issues involved, it makes sense to include as many judges as possible early in the process.

Stated differently, section 437h already assures comprehensiveness in decision making. Assuming that there is actually a "correct" result that a court can reach, the en banc system is the best mechanism to achieve that goal as quickly as possible—particularly given that, under a certiorari system, the courts of appeals are the last rung on the judicial ladder for most litigants.³²⁵ En banc courts benefit from multiple viewpoints, and more extreme judges tend to moderate their opinions to capture the votes of more mainstream judges.³²⁶ Intuitively, more legal minds will be better at reaching the "correct" result than fewer legal minds; moving directly to the en banc court ensures that the largest already-constituted judicial panel will hear a case as early as practicable. Moreover, as compared to randomly selected three-judge panels in a circuit, en banc courts promote uniformity in decision making, as they eliminate the possibility of conflicting decisions within a circuit or a result tainted by the panel draw.

Second, even if more judges does not mean greater accuracy as an empirical matter, a decision from an en banc court would seem to enjoy greater legitimacy; the more judges that sign on to an opinion, the more likely court-watchers and the public will view it as the correct result.³²⁷ Of course, the general public may not be able to differentiate meaningfully between a three-judge panel and the en banc court. But to the extent that there is a choice in judicial structure, including more judges early in the decision-making process can contribute to the perception of the decision as stemming from reasoned and considered analysis. This in turn might

³²³ Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 83 (1986); see also Michael Ashley Stein, *Uniformity in the Federal Courts: A Proposal for Increasing the Use of En Banc Appellate Review*, 54 U. PITT. L. REV. 805, 834 (1993) ("[T]he aggregation of judgments of a judicially consistent group of judges will create a greater 'consistency' in their decisions.").

³²⁴ See Caminker, *supra* note 208, at 42 & n.155.

³²⁵ See *Quinn*, *supra* note 104, at 712; see also *Textile Mills Sec. Corp. v. Comm'r of Internal Revenue*, 314 U.S. 326, 334–35 (1941) (explaining that courts of appeals decisions "are the courts of last resort in the run of ordinary cases").

³²⁶ See George, *supra* note 110, at 1695.

³²⁷ Cf. VIRGINIA A. HETTINGER, STEFANIE A. LINDQUIST & WENDY L. MARTINEK, *JUDGING ON A COLLEGIAL COURT* 19 (2006) (stating that unanimous decisions "may promote institutional legitimacy and effective implementation of individual decisions"); Jeffrey S. Sutton, *A Review of Richard A. Posner, How Judges Think* (2008), 108 MICH. L. REV. 859, 870 n.37 (2010) ("[U]nanimous decisions have more legitimacy.").

enhance the public's view of the judiciary's overall role in deciding election disputes. Further, direct en banc review minimizes the potential back-and-forth within a court system by eliminating the three-judge panel, which en banc courts often reverse.³²⁸

Third, involving many judges in the decision-making process promotes uniformity, which in turn leads to clarity, consistency, and judicial integrity.³²⁹ By contrast, having appeals to three-judge panels invites the possibility that panel decisions may be in tension with each other, undermining the public's perception of the court's adherence to the rule of law.³³⁰ A direct appeal to the en banc court focuses all of the court's active judges on the case, thereby eliminating the possibility of an intra-circuit conflict and removing the constraints of a prior panel's decision, particularly where the judges on the three-judge panel might become entrenched in their positions or feel perturbed that their colleagues are questioning their work at the en banc sitting.³³¹ It also invites the full court to decide whether it wishes to follow or reject another circuit's decision on the same or similar matter. Ultimately, because the stakes are higher in election law cases, a majority decision after review by the entire court is more likely to enjoy support as stemming from considered reasoning and analysis.³³² As Justice Douglas once explained, allowing courts to sit en banc "makes for more effective judicial administration. Conflicts within a circuit will be avoided. Finality of decision in the circuit courts of appeal will be promoted."³³³

Fourth, the en banc process likely leads to the greatest possibility of minimizing ideology—to the extent that is even feasible in the federal courts. As

³²⁸ See Brown, Jr. & Lee, *supra* note 115, at 1111 (observing that many circuit courts take a case en banc to reverse a three-judge panel decision that the majority of judges find too conservative).

³²⁹ See Stein, *supra* note 323, at 819–22 (advocating for greater use of en banc courts to promote uniformity, avoid minority judges wielding too much power within the circuit, and reduce cases that must go to the Supreme Court for resolution of circuit conflicts).

³³⁰ *Id.*; see also Mary Garvey Algero, *A Step in the Right Direction: Reducing Intercircuit Conflicts by Strengthening the Value of Federal Appellate Court Decisions*, 70 TENN. L. REV. 605, 605, 613 (2003) (criticizing the federal court system for allowing circuit splits to remain unanswered, as a lack of coherence and uniformity is unfair to all litigants and undermines the federal court system's legitimacy).

³³¹ See Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213, 217–18 (1999) (explaining that "[t]he en banc case is of greater consequence than the more common panel case" because "it expends greater judicial and litigant resources, exposes the parties and circuit to the possibility of a splintered ruling, and removes some of the standard constraints on judicial decisionmaking at the court of appeals level").

³³² See *id.* at 218 (observing that "[a] circuit court's ability to sit en banc may work to protect the integrity of circuit law and to reinforce institutional legitimacy by ensuring consistency and conformity in decisionmaking," but noting that frequent en banc sessions also have negative consequences).

³³³ *Textile Mills Sec. Corp. v. Comm'r of Internal Revenue*, 314 U.S. 326, 334–35 (1941).

one scholar found, en banc courts at the macro-level are balanced: “Thus, the institutional structure of the federal courts (collegiality and hierarchy) is successful at achieving the goal of limiting or moderating the behavior of judges at the intermediate appellate level.”³³⁴ This is particularly true because “strategic judges restrain[] the power of ideology-driven judges.”³³⁵

No system in which judges obtain their seats through executive appointment or election can eliminate all vestiges of ideology.³³⁶ But finding a structure that minimizes the role of ideology as much as possible is vitally important for election law decisions, which can be intrinsically partisan given that they shape the rules of the game. Having all of a court’s appellate judges decide the case at least brings all of the ideological viewpoints together in one court, which, one hopes, will balance partisan motivations.³³⁷ As Professor Adrian Vermuele posits:

[A]t the level of multimember judicial panels such as the Supreme Court, the court as a whole can constitute a system whose behavior differs from the behavior of the individual judges who sit on the court. If the biases of individual judges cut in different directions, the court as a whole can behave as though all the judges are principled law-followers.³³⁸

By contrast, decisions by only a few judges might emanate from partisan motives of those judges, especially if all of the judges on the panel share the same political persuasion.³³⁹ Decisions of three-judge courts, for example, could be chalked up to the partisan make-up of that particular panel, which may be different from the partisan leanings of the judiciary as a whole. Direct en banc review, by contrast, provides predictability to the litigants and society, as it ensures that the decision (or, at least, society’s perception of the decision) is not dependent simply on the random draw of the panel.³⁴⁰ If election law decisions remain partisan even

³³⁴ George, *supra* note 110, at 1695.

³³⁵ *Id.*

³³⁶ See generally Joanna M. Shepherd, *The Influence of Retention Politics on Judges’ Voting*, 38 J. LEGAL STUD. 169, 171–72 (2009) (finding that judges facing retention elections respond in their decisions to political pressure from both their constituency and their opponents).

³³⁷ See, e.g., Stein, *supra* note 323, at 823 (“The diversity of [judges’] backgrounds . . . add[s] to the general formula.”). But see Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1, 14 (2008) (describing the barriers plaintiffs in punch-card ballot litigation face at the en banc level and positing, “[t]o the extent that federal appellate courts now contain more conservative judges than liberal judges, the chances of litigants using *Bush v. Gore* for successful election reform appear bleak”).

³³⁸ Vermuele, *supra* note 59, at 39–40.

³³⁹ See Abramowicz, *supra* note 103, at 1604 (noting criticism of courts of appeals and highlighting studies showing that “decisions of the courts of appeals are excessively ideological”).

³⁴⁰ See Michael Hasday, *Ending the Reign of Slot Machine Justice*, 57 N.Y.U. ANN. SURV. AM. L. 291, 299 (2000) (“Under the random assignment system, parties can only make reasonably accurate predictions after the three judges are assigned to their case.”). Of

after direct en banc review, then that is a function of the overall partisanship of that circuit, not the whims of the panel-selection process. To correct this systemic partisanship, the electorate can elect a president of the opposite party in the hope that that president will nominate judges of a different ideological persuasion.³⁴¹ This is dissimilar from a randomly selected three-judge panel, which has nothing inherent in its structure that deemphasizes the importance of that panel's ideological makeup. Ultimately, in a system in which ideology will always play a part, involving more judges can at least temper the role of partisanship in the decision-making process. En banc courts also have greater visibility than three-judge panels, so using full appellate courts can expose latent partisanship.³⁴²

The fifth laudable effect of merits-based direct en banc review is that, unlike in the three-judge district court model of federal court decision making, this procedure assigns judges their traditional roles: trial judges ensure that the proper parties are before the court, make findings of fact, and determine if any legal challenges are frivolous,³⁴³ and the en banc circuit court reviews the district court's factual findings (with the gloss of a "clear and convincing" or similar standard) and resolves questions of law.³⁴⁴ This process preserves each type of judge's normal expertise. Assigning judges tasks with which they are already familiar

course, judges themselves would generally not admit that partisanship plays any role in their decisions. But the public certainly believes that ideology is a vital factor in judicial decision making. *See Supreme Court Update*, RASMUSSEN REP. (Jan. 7, 2011), http://www.rasmussenreports.com/public_content/archive/mood_of_america_archive/supreme_court_ratings/positives_hold_steady_for_supreme_court_negatives_are_down (showing that only 41% of voters believe the Supreme Court bases its decisions on the Constitution and legal precedents and 56% believe that Justices have their own political agenda, while only 24% say that Supreme Court justices are impartial).

³⁴¹ *See, e.g.*, Jeffrey Toobin, *Are Obama's Judges Really Liberals?*, NEW YORKER, Sept. 21, 2009, http://www.newyorker.com/reporting/2009/09/21/090921fa_fact_toobin ("Obama's choice of judges reflects ferment in the world of legal liberalism, which is tied ever more closely to the fate of Democrats in the executive and legislative branches of government. Liberals who once saw judges as the lone protectors of constitutional rights are now placing their hopes on elected politicians like Obama.").

³⁴² *Cf.* Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2159, 2173–74 (1998) (explaining that a dissenting opinion can often serve to expose a panel majority's partisan biases).

³⁴³ *Bread Political Action Comm. v. FEC*, 455 U.S. 577, 580 (1982) ("[T]he District Court, as required by § 437h(a), first made findings of fact and then certified the case"); *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 193 n.14 (1981) ("A party seeking to invoke § 437h must have standing to raise the constitutional claim. . . . [W]e do not construe § 437h to require certification of constitutional claims that are frivolous."); *Albanese v. FEC*, 78 F.3d 66, 69 (2d Cir. 1996) (holding that the district court properly refused to certify questions to the en banc court because the plaintiff lacked standing to assert a challenge under § 437h).

³⁴⁴ *Bread*, 455 U.S. at 580 (noting that the district court certified the case to the en banc panel to resolve the constitutional questions).

promotes accuracy and legitimacy and assists in generating timely decisions. It thus preserves judicial economy. One problem with the three-judge district court is that it mangles judicial decision making in an effort to create something special and unique. Placing judges in uncomfortable settings, however, is not the proper way to specialize election law cases.

Finally, direct en banc review provides a symbolic signaling role, telling litigants, the court, and even the public that these cases are especially important. Indeed, circuit courts vote to hear cases en banc only to maintain uniformity of decisions or if “the proceeding involves a question of exceptional importance.”³⁴⁵ By requiring en banc review at the outset for election law cases, Congress can signal the importance of election law decisions to the functioning of our democracy. A court plays a greater institutional role when it involves all of its judges in a case. Barring a requirement that the United States Supreme Court decide every election law dispute (which itself would have its own problems separate from any signaling effect), using en banc courts more often for election law cases is the best way to recognize the importance of the judiciary’s role in shaping this country’s elections.³⁴⁶

V. CONCLUSION

The public is immensely interested in elections, never more so than when the race is close. Campaigns routinely ask the courts to construe the rules to each candidate’s advantage. Even outside the context of an actual election, federal courts decide numerous election law cases that have a profound influence on how elections are run, thus impacting the scope of our representative democracy. Whenever judges decide the constitutionality of an election provision or the reach of campaign finance limitations, the courts are shaping the meaning of political participation. But there has been little thought given to the processes by which

³⁴⁵ FED. R. APP. P. 35(a); *see also* *W. Pac. R.R. Corp. v. W. Pac. R.R. Co.*, 345 U.S. 247, 270–71 (1953) (Frankfurter, J., concurring) (approving en banc decisions for cases that are “extraordinary in scale—either because the amount involved is stupendous or because the issues are intricate enough to invoke the pooled wisdom of the circuit”).

³⁴⁶ Professor Ned Foley has proposed the creation of a specialized election court to resolve election disputes, which can eliminate partisan decision making. *See* Edward B. Foley, *The Analysis and Mitigation of Electoral Errors: Theory, Practice, Policy*, 18 *STAN. L. & POL’Y REV.* 350, 378–79 (2007). A specialized election court might serve a strong signaling role, telling litigants and the public that election cases are so important and unique that they deserve their own court. It also could help to eliminate partisanship, depending on the method of selecting judges. But such an election court would likely eliminate one virtue of using general-jurisdiction judges in election law cases: general-jurisdiction judges are very familiar with evidence gathering and litigation tactics and can bring their overall expertise in judicial decision making to election law cases. It thus might make more sense for a specialized election court to hear only particular election cases, such as post-election contests over the winner of an election. Moreover, expanding the use of en banc courts is a more practicable and passable solution than creating a new court from whole cloth for all election law disputes.

courts decide these cases, even though these procedures have a significant impact on the litigation. By tying the particulars of a special election law process to the goals we should strive to seek in enacting a procedure—such as through merits-based direct en banc review—we can better arm the courts with the tools for fairly and efficiently deciding election law cases.