

1964

# The Three-Judge District Court in Constitutional Litigation

David P. Currie

Follow this and additional works at: [http://chicagounbound.uchicago.edu/journal\\_articles](http://chicagounbound.uchicago.edu/journal_articles)



Part of the [Law Commons](#)

---

## Recommended Citation

David P. Currie, "The Three-Judge District Court in Constitutional Litigation," 32 University of Chicago Law Review 1 (1964).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact [unbound@law.uchicago.edu](mailto:unbound@law.uchicago.edu).

# THE UNIVERSITY OF CHICAGO LAW REVIEW

VOLUME 32

AUTUMN 1964

NUMBER 1

---

---

## THE THREE-JUDGE DISTRICT COURT IN CONSTITUTIONAL LITIGATION

DAVID P. CURRIE†

*When shall we three meet again  
In thunder, lightning, or in rain?*

W. Shakespeare.

THE Second Statute of Westminster, in 1285, provided for trials at assizes before two justices sitting together.<sup>1</sup> County courts in colonial Virginia heard trials in benches of eight;<sup>2</sup> federal trial courts of three judges were established in 1789.<sup>3</sup> Although not the only instances of their kind, these are exceptions; in America and in England, the more common pattern has been trial before a single judge. Judges sat alone at nisi prius by 1340,<sup>4</sup> and today in England one judge may hear almost any original proceeding.<sup>5</sup> The Federal Circuit Court lingered until 1911,<sup>6</sup> but its powers could be exercised by a single judge as early as 1802.<sup>7</sup>

Ever since the turn of the century, however, Congress has found it

† Assistant Professor of Law, The University of Chicago.

<sup>1</sup> 13 Edw. 1, st. 1, c.30. See 1 HOLDSWORTH, A HISTORY OF ENGLISH LAW 278 (6th ed. 1938); POTTER, HISTORICAL INTRODUCTION TO ENGLISH LAW 112-13 (4th ed. 1958).

<sup>2</sup> See John P. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROB. 3, 5 (1948).

<sup>3</sup> Act of Sept. 24, 1789, ch. 20, §§ 4, 11, 1 Stat. 73 74, 78.

<sup>4</sup> 14 Edw. 3, st. 1, c.16. See HOLDSWORTH, *op. cit. supra* note 1, at 279; POTTER, *op. cit. supra* note 1, at 113.

<sup>5</sup> See HOLDSWORTH, *op. cit. supra* note 1, at 641. The present statute provides: "Every Proceeding in the High Court and all business arising thereout shall, so far as is practicable and convenient and subject to the provisions of this Act relating to divisional courts, be heard and disposed of before a single judge . . ." Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c.49), as amended § 60, in 2 THE ANNUAL PRACTICE, 1963, p. 3206 (Diamond, Jacob, Adams, Neave & Redman). Only a very few original matters (*e.g.*, some contempt proceedings, o.59, r.26, and certain petitions to remove disqualified local officials o.59, r.12) are required to be heard by multiple-judge Divisional Courts. See order 59, *Rules of the Supreme Court*, in 1 THE ANNUAL PRACTICE, 1964 pp. 1721-63 (Diamond, Jacob, Adams, Neave & McGuffie).

<sup>6</sup> Act of March 3, 1911, ch. 231, § 289, 36 Stat. 1087, 1167.

<sup>7</sup> Act of April 29, 1802, ch. 31, § 4, 2 Stat. 156, 157-58.

advisable to provide for the convening of extraordinary trial courts composed of three judges in certain kinds of cases. Antitrust and railroad cases which the Attorney General certified to be of general importance were the first in this category.<sup>8</sup> Suits to set aside orders of the Interstate Commerce Commission have long been included.<sup>9</sup> The 1964 Civil Rights Act provides for three-judge trials in several classes of cases.<sup>10</sup> Finally, three judges are required in the type of case that I propose to consider: suits to enjoin the enforcement of state or federal statutes on the ground of their unconstitutionality.<sup>11</sup>

Congress, moreover, has provided an unusual method of appellate review in the same classes of cases. The circuit courts of appeals and the certiorari jurisdiction were created in 1891;<sup>12</sup> most district-court judgments today are appealed to the courts of appeals,<sup>13</sup> with further review in the discretion of the Supreme Court.<sup>14</sup> In three-judge cases, however, there is neither discretion nor an intermediate review—a direct appeal as of right may be taken to the Supreme Court.<sup>15</sup>

I begin with a prejudice against these extraordinary provisions. Consuming the energies of three judges to conduct one trial is *prima facie* an egregious waste of resources. It seems fair to assume that men selected for the bench are capable and impartial enough to do their job without assistance, and cries of overcrowded dockets argue persuasively for

<sup>8</sup> Act of Feb. 11, 1903, ch. 544, 32 Stat. 823, now 15 U.S.C. §§ 28, 29; 49 U.S.C. §§ 44, 45 (1958).

<sup>9</sup> Act of June 29, 1906, ch. 3591, § 5, 34 Stat. 584, 592 (now 28 U.S.C. § 2325 (1958)). Three-judge review of certain other administrative orders was tried and rejected. See HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 48, 1317 n.32 (1953). Numerous later statutes have more appropriately provided for review of administrative orders by courts of appeals, e.g., orders of the CAB, 49 U.S.C. § 1486 (1958); and of the FTC, 15 U.S.C. § 45(c) (1958). The Administrative Conference has recommended that ICC orders be reviewed also in the courts of appeals, S. Doc. No. 24, 88th Cong., 1st Sess. 10-11, 39 (1963).

<sup>10</sup> Act of July 2, 1964, Civil Rights Act, §§ 101(d) (voting discrimination); 206(b) (public accommodations); 707(b) (employment), 78 Stat. 241, in U.S. Code Cong. & Admin. News (1964), pp. 1591, 1594, 1614.

<sup>11</sup> 28 U.S.C. §§ 2281 (state laws), 2282 (federal) (1958).

<sup>12</sup> Act of March 3, 1891, ch. 517, §§ 26, 26 Stat. 826, 828. Obligatory Supreme Court review was further curtailed by the Act of Sept. 6, 1916, ch. 448, § 2, 39 Stat. 726, and the Act of Feb. 13, 1925, ch. 229, § 240, 43 Stat. 936, 938-39.

<sup>13</sup> 28 U.S.C. §§ 1291, 1292 (1958). Direct review by the Supreme Court is provided in certain actions to which the United States is a party, e.g., 15 U.S.C. § 29 (civil antitrust); 18 U.S.C. § 3731 (some government appeals in criminal cases); 28 U.S.C. § 1252 (when an Act of Congress is held unconstitutional).

<sup>14</sup> 28 U.S.C. § 1254 (1958). Appeals as of right are allowed by a party relying on a state statute held to be unconstitutional; such appeals are said to be "of negligible importance." HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 47 (1953).

<sup>15</sup> 28 U.S.C. § 1253 (1958).

economy. Certainly appellate courts customarily sit in panels of three or more. But on appeal the routine, time-consuming facets of trial have been winnowed away. What remain are likely to be issues of relatively substantial import, on which there is much to be said for collective deliberation. Direct appeals deprive the Supreme Court of the benefit of the judgment of the court of appeals. Appeals as of right add to the burdens of a court with plenty to do already. It is not adequate to say that three-judge district courts or direct appeals were necessary a half-century ago when they were first employed for attacks on state statutes, or a quarter-century back, when federal statutes were included; Mr. Justice Frankfurter's admonition that the wisdom of fifty years ago is not necessarily the wisdom of today has itself lost nothing through the passage of time.<sup>16</sup> The special courts must be justified by their ability to solve contemporary problems.

I believe there is a place for the three-judge district court in constitutional litigation. But the present statutes, as they have been interpreted by the Supreme Court, do not accurately reflect the policies that justify the special procedure. More important, the Court's decisions construing these statutes engender considerable and unnecessary uncertainty in determining the applicability of the three-judge procedure, thereby creating traps for the unwary litigant and substantially increasing the burden on the courts. If there are cases where three heads are truly better than one, those cases should be defined with clarity, the more so since expeditious disposal of litigation is one of the ends which the extraordinary court was designed to attain.

### I. A MODICUM OF HISTORY

Whether a trial is conducted by one judge or by three seems a technical matter far removed from the important issues of government and politics. But the three-judge provisions, despite their bland and technical phrasing, are products of battles between competing political forces over four persistent and significant issues: judicial review, national supremacy, sovereign immunity, and the use of the injunction.

Once upon a time people apparently could not sue the states in federal courts. At least, this was evidently the intent of the eleventh amendment, which, in reflex to the shock of *Chisholm v. Georgia*,<sup>17</sup> excluded from the federal judicial power any suit "against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."<sup>18</sup>

<sup>16</sup> *Distribution of Judicial Power Between United States and State Courts*, 13 CORN. L.Q. 499, 503 (1928).

<sup>17</sup> 1 U.S. 16 (1793). See 1 WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 91-102 (rev. ed. 1926).

<sup>18</sup> In their haste to overturn *Chisholm*, the framers of this amendment forgot to

But within three decades the Supreme Court had taken more than a little of the sting out of this immunity by holding that a suit against a state officer was not a suit against a state.<sup>19</sup> Immunity, however, was based not so much on abstract state pride as on the realities of federal and state power and the protection of state treasuries.<sup>20</sup> In the light of the latter policy the Court narrowed its holding: people can't sue the states to collect on contractual obligations even if they name the state treasurer as the only defendant.<sup>21</sup>

On the other hand, in a series of cases topped off by the celebrated *Ex parte Young*<sup>22</sup> in 1908, the Court made clear that a state officer (and effectively the state) can be enjoined by a federal court from enforcing an unconstitutional statute. Behind the outlandish conceptual justification concocted to support this holding lay the not implausible conviction that federal constitutional rights could not be adequately protected without the intervention of federal equity; therefore the philosophy of immunity had to yield.<sup>23</sup>

The basic issue underlying *Ex parte Young*, in other words, was federal review of the constitutionality of state laws. If the national government is to have vitality, it is often said, the states may not be left with the last word in delineating federal and state powers.<sup>24</sup> Quite the same view of human nature supports the argument that if the states are not to be reduced to administrative departments, the federal government may not have final say; as Spencer Roane wrote, "there is a Charybdis to be avoided, as well as a Scylla; . . . a centripetal, as well as a centrifugal principle, exists in the government."<sup>25</sup> But the last word must reside

---

prohibit suits against a state by its own citizens, but the Supreme Court patched that up by holding the judicial power had never extended to suits by individuals against states to begin with. *Hans v. Louisiana*, 134 U.S. 1 (1890).

<sup>19</sup> *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 842-44 (1824).

<sup>20</sup> See 1 WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 99 (rev. ed. 1926); Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 19 (1963).

<sup>21</sup> See *Hagood v. Southern*, 117 U.S. 52, 67-70 (1886); *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 50-51 (1944); Jaffe, *supra* note 20, at 24, 29.

<sup>22</sup> 209 U.S. 123 (1908).

<sup>23</sup> See *Ex parte Young*, 209 U.S. 123, 165 (1908); *Osborn v. United States*, 22 U.S. (9 Wheat.) 738, 844 (1824) (Johnson, J., dissenting); Jaffe, *supra* note 20, at 21; HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 819-20 (1953); WRIGHT, *FEDERAL COURTS* 160-61 (1963). Said Marshall in *Osborn*: "A denial of jurisdiction . . . asserts that the agents of a State, alleging the authority of a law void in itself, because repugnant to the constitution, may arrest the execution of any law in the United States." 22 U.S. (9 Wheat.) at 847.

<sup>24</sup> See, e.g., HOLMES, *COLLECTED LEGAL PAPERS* 295-96 (1920); JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 15, 17 (1941).

<sup>25</sup> *Hunter v. Martin*, 4 Munf. (18 Va.) 1, 26 (1815). See 1 WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 448 (2d ed. 1926).

somewhere; the federal courts, independent of most federal as well as state political pressures, are the most impartial repository of the power to arbitrate between the states and the nation.

The Civil War, if not the decisions of the Supreme Court, resolved the question in favor of a federal power of decision.<sup>26</sup> But the spirit of the Virginia and Kentucky Resolutions will not down. In crisis after crisis, from *McCulloch v. Maryland* to *Baker v. Carr*, every important decision invalidating a state law has brought forth a rash of irresponsible proposals to limit the Court's jurisdiction, to alter its procedures or composition, or to subject its decisions to review by an unwieldy tribunal composed of judges from the courts of each of the fifty states.<sup>27</sup>

And so it was when in *Ex parte Young* the Court upheld the power of a federal trial judge to enjoin a state officer from enforcing a railroad-rate statute found to violate due process. Such injunctions had become common; the states, experimenting with a variety of novel regulatory and tax measures to cope with the needs of the new industrial world, were encountering stubborn obstacles in the persons of federal judges who insisted on reading their own economic theories into the due process and commerce clauses. Rates set by public-utility commissions were disallowed as confiscatory. Statutes regulating working conditions were held to impair "liberty of contract." Taxes were invalidated. A flock of indignant articles appeared charging the Court with "usurpation" of legislative powers; memorials were sent to Congress demanding legislation.<sup>28</sup>

<sup>26</sup> That the federal courts have power to pass upon state laws was decided in *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796); that the Supreme Court could exercise it by reviewing the decisions of the state courts was made clear in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

<sup>27</sup> South Carolina once prescribed criminal penalties for appealing state court decisions to the Supreme Court. Others sought to deprive the Court of its jurisdiction over state judgments, to require the concurrence of five of the then seven Justices to hold a state law invalid, or to give appellate jurisdiction to the Senate whenever the validity of a state law was questioned. See Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States, A History of the Twenty-fifth Section of the Judiciary Act*, 47 AM. L. REV. 1, 4, 26, 30-33, 175 (1913). More recent proposals are discussed in Elliott, *Court-Curbing Proposals in Congress*, 33 NOTRE DAME LAW 597 (1958). The "Court of the Union" absurdity is advocated in Council of State Governments, *Amending the Constitution to Strengthen the States in the Federal System*, 36 STATE GOV'T 10, 13-14 (1963), and torn to shreds by Professor Black, *Proposed Constitutional Amendments*, 49 A.B.A.J. 637, 639 (1963). Among the latest were Senator Dirksen's unconstitutional scheme to forbid enforcement of the equal protection clause in reapportionment cases until 1966, 111 CONG. REC. 18567 (1964) (amendment offered to H.R. 11380, 88th Cong., 2d Sess.) and the Tuck bill, H.R. 11926, 88th Cong., 2d Sess. (1964), which would have taken away federal court jurisdiction entirely in reapportionment suits.

<sup>28</sup> See JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 48-56 (1941); 2 WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 713-17 (2d ed. 1926).

It was bad enough that the Supreme Court forbade the enforcement of state laws; it was far worse that individual district judges should do so, especially since some tended to be overzealous even by the Supreme Court's standards. The annoying potential of trial court decisions became much more evident after 1875, when, for the first time, the circuit courts were given general jurisdiction over cases arising under the Constitution.<sup>29</sup> The last straw was perhaps the most irritating of all: the device employed to test a state law in a federal trial court, sanctioned in *Osborn v. Bank of the United States* in 1824,<sup>30</sup> was a suit to enjoin a state officer from enforcing the law.

Injunctions—especially federal ones—have been a long-standing source of special discomfort and the frequent subject of special legislation.<sup>31</sup> An injunction paralyzes action until final decision of the case, perhaps after two appeals. Reversal of an erroneous injunction is often little solace to the victim; in the interval, irreparable damage may have been done.<sup>32</sup> Finally, and most important in 1910, “temporary” or “interlocutory” injunctions, often awarded without notice or hearing, tied up enforcement for long periods even before the merits had been tested.<sup>33</sup>

Agitation against the federal courts' veto on state laws ran high in 1910. “[I]f I had it in my power,” said North Carolina's Senator Overman, “I would not allow a federal court to enjoin the enforcement of a state

<sup>29</sup> Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470. The Midnight Judge Bill had done the same but was quickly repealed. Act of Feb. 13, 1801, ch. 4, § 11, 2 Stat. 89, 92, repealed by Act of March 8, 1802, ch. 8, § 1, 2 Stat. 132.

<sup>30</sup> 22 U.S. (9 Wheat.) 738, 842-44 (1824).

<sup>31</sup> The Norris-LaGuardia Act forbade the use of the injunction in some labor disputes and limited it severely in others. Act of March 23, 1932, ch. 90, 47 Stat. 70, 29 U.S.C. §§ 101-15 (1958). See the discussion of earlier federal and state legislation in FRANKFURTER & GREENE, *THE LABOR INJUNCTION* 150-98 (1930). Injunctions against the collection of federal taxes have long been prohibited. INT. REV. CODE OF 1954, § 3653. Injunctions against the enforcement of state administrative rate orders and state taxes are not only required to be issued by three judges; they cannot be issued at all unless the state courts fail to provide a satisfactory remedy, 28 U.S.C. §§ 1342 (rates) 1341 (taxes).

<sup>32</sup> See FRANKFURTER & GREEN, *op. cit. supra* note 31, at 78-80, 200-01; Michelman, *State Power to Govern Concerted Employee Activities*, 74 HARV. L. REV. 641, 649-50 (1961). Lockwood, Maw, & Rosenberry, *The Use of the Federal Injunction in Constitutional Litigation*, 43 HARV. L. REV. 426, 433-43 (1929), arguing that this difficulty can be easily overcome by careful bookkeeping in rate cases, but is a serious problem in tax and especially regulation cases.

<sup>33</sup> For an excellent and detailed discussion of the particular vices of temporary or interlocutory injunctions before 1910, see Hutcheson, *A Case for Three Judges*, 47 HARV. L. REV. 795, 800-04 (1934). See also Note, 77 HARV. L. REV. 299 (1963); FRANKFURTER & GREENE, *op. cit. supra* note 31, at 78-80, 200-01: “The preliminary proceedings . . . make the issue of final relief a practical nullity” *Id.* at 200. Senator Burkett in 1908 proposed to abolish all injunctions before final decision in suits to restrain enforcement of state laws. 42 CONG. REC. 4847 (1908).

statute."<sup>34</sup> Congress was not prepared to go this far, but it found one way to make the pill of federal judicial supremacy less bitter. As an appendage to the Mann-Elkins Railroad Act, Congress enacted Senator Overman's bill forbidding the issuance of federal interlocutory injunctions against unconstitutional state statutes, except by a district court composed of three judges.<sup>35</sup> This remedy was not a novel one, for Congress had established three-judge courts as early as 1903<sup>36</sup> and again in 1906<sup>37</sup> "to expedite litigation of great and general importance."<sup>38</sup>

Requiring three judges does not alter the ultimate result, as would a restriction of the Supreme Court's jurisdiction; the Supreme Court still has the last word. Nor does the three-judge provision, like the later statutes limiting federal injunctions against state taxes and rate orders, and the judicially developed abstention doctrine,<sup>39</sup> shift the responsibility for any part of the initial decision, or the vital opportunity to construct the record, to the presumptively more sympathetic (to state statutes) state courts. But there is no means of reviewing state laws which is better calculated to give offense to the states than to entrust the job to "one little federal judge" armed with the injunction.<sup>40</sup> On the other hand, Senator Overman said, "[I]f three judges declare that a state statute is unconstitutional the people would rest easy under it."<sup>41</sup> Three judges lend the dignity required to make such a decision palatable. The very cumbersome and extraordinary nature of the procedure show that the federal courts recognize that important and delicate interests are at stake. More importantly, the presence of three judges also ensures greater deliberation with less chance of error or bias. Ultimate correction of a judge's initial error is not satisfactory; an erroneous suspension of enforcement for even a few months or weeks may be most damaging.<sup>42</sup> While it is possible

<sup>34</sup> 45 CONG. REC. 7256 (1910). In 1908 he had introduced a bill to forbid all federal injunctions against the enforcement of state laws. 42 CONG. REC. 4849 (1908). Such a bill was passed by the House in 1910. 46 CONG. REC. 313, 316 (1910).

<sup>35</sup> Act of June 18, 1910, ch. 309, § 17, 36 Stat. 557. The Senate had passed a very similar bill, also sponsored by Overman, in 1908. S. 3732, 60th Cong. 1st Sess. See 42 CONG. REC. 4846-59 (1908).

<sup>36</sup> Act of Feb. 11, 1903, ch. 544, § 1, 32 Stat. 823.

<sup>37</sup> Act of June 29, 1906, ch. 3591, § 5, 34 Stat. 592.

<sup>38</sup> 36 CONG. REC. 1679 (1903) (Senator Fairbanks).

<sup>39</sup> *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1940).

<sup>40</sup> "There are 150 cases of this kind now where one federal judge has tied the hands of the state officer," said Senator Overman. "I am opposed to allowing one little federal judge to stand up against the governor and the legislature and the attorney general of the State and say, 'This act is unconstitutional.'" 45 CONG. REC. 7256 (1910). See also 24 CONG. REC. 4847, 4853 (1908) (Senators Overman and Bacon), where the same arguments were made to support an earlier and similar bill.

<sup>41</sup> 45 CONG. REC. 7256 (1910).

<sup>42</sup> Senator Crawford of South Dakota, who proposed to oust the regular trial courts



that two judges out of a panel of three may be mistaken or even prejudiced, it is more possible that a single judge may be; and if the mistake is an honest one, even one clear-eyed judge among three may be able to forestall a bad decision. That Congress was particularly concerned with this aspect is reinforced by the fact that the three-judge requirement as enacted applied only to interlocutory and not to permanent injunctions, and also by the inclusion of a provision for direct review of three-judge decisions in the Supreme Court. Indeed, indulging the supposition that claims of insults to state dignity are most likely to be pressed when supported by evidence of practical mistreatment, it is reasonable to conclude that the three-judge provision was designed principally to reduce the number and duration of delays in enforcement resulting from the improvident issuance of interlocutory injunctions against valid state laws.<sup>43</sup>

This policy was again prominent in 1913, when the three-judge statute was amended "to put the order of a State railroad commission upon an equality with a statute of a State":<sup>44</sup> "A few judges have sometimes hastily and improvidently issued interlocutory injunctions . . . and have for an unjustifiably long time held up or prevented the operation of a State statute or an order of a State railroad commission."<sup>45</sup> In 1925, application of the three-judge requirement was extended to final as well as interlocutory injunctions because "It is an anomaly to require the presence of a circuit judge and two district judges to hear an application for a preliminary injunction and then allow a single district judge to pass upon the cause finally."<sup>46</sup> This was held inapplicable unless there was a request for an interlocutory injunction,<sup>47</sup> but in 1948 Congress required three

---

of jurisdiction altogether, complained that in one rate case involving a preliminary injunction, the railroad, "after . . . reaping the benefit of its defiance of the order of the state board for five years," practically conceded the validity of the order. 45 CONG. REC. 7253 (1910).

<sup>43</sup> "Congress was . . . seeking to make interference by interlocutory injunction from a federal court with the enforcement of state legislation . . . a matter of the adequate hearing and the full deliberation which the presence of three judges, one of whom should be a Circuit Justice or Judge, was likely to secure. It was to prevent the improvident granting of such injunctions by a single judge." *Cumberland Tel. & Tel. Co. v. Louisiana Pub. Serv. Comm'n* 260 U.S. 212, 216 (1922). See Note, 77 HARV. L. REV. 299, 300 (1963), suggesting that protecting the state's dignity cannot have been the dominant objective, because the statute originally applied only to interlocutory injunctions, while dignity would be just as offended by final orders.

<sup>44</sup> Act of Mar. 4, 1913, ch. 160, § 266, 37 Stat. 1013. See remarks of Rep. Clayton, 49 CONG. REC. 4773.

<sup>45</sup> H.R. REP. NO. 1584, 62nd Cong. 2d Sess. 1 (1913).

<sup>46</sup> See remarks of Sen. Cummins, 66 CONG. REC. 291, on Act of Feb. 13, 1925, ch. 229, § 238, 43 Stat. 936, 938.

<sup>47</sup> *Smith v. Wilson*, 273 U.S. 388 (1927).

judges to issue permanent injunctions against state laws whether or not interlocutory relief was sought.<sup>48</sup>

The extension of the three-judge requirement to suits attacking acts of Congress was a product of the parallel running battle over judicial review of federal statutes.<sup>49</sup> F.D.R.'s unpropitious exhortation that Congress enact his programs without heed to the Constitution<sup>50</sup> is proof enough of Hamilton's insight that limitations on governments are not worth a fig without courts to enforce them.<sup>51</sup> But proof was hardly necessary;

<sup>48</sup> Act of June 25, 1948, ch. 646, § 2281-84, 62 Stat. 936. See H.R. REP. NO. 308, 80th Cong., 1st Sess. A181 (1947). In 1942, Congress had more specifically defined the powers of a single judge. Act of April 6, 1942, ch. 210, § 3, 56 Stat. 199.

<sup>49</sup> Chief Justice Marshall was prepared to surrender the right of review in the face of a very real threat of mass impeachment. See 3 BEVERIDGE, LIFE OF MARSHALL 177 (1916); JACKSON, *op. cit. supra* note 24, at 27-28; 2 WARREN, *op. cit. supra* note 28, at 273-82, 289-97. Lincoln disobeyed the decision of the Chief Justice denying him power to suspend habeas corpus. *Ex parte Merryman*, 17 Fed. Cas. 144 (9437) (C.C.D. Md. 1861). See JACKSON, *op. cit. supra* note 24, at 324-27; 2 WARREN, *op. cit. supra* note 28, at 368-74; Swisher, *Mr. Chief Justice Taney*, in DUNHAM & KURLAND, MR. JUSTICE 35, 55 (1964). The virulent Reconstruction Congress insulated its doubtful legislation from the possibility of condemnation by depriving the Court of jurisdiction in a pending case. Act of March 27, 1836, ch. 34, 15 Stat. 44. To his everlasting credit, President Johnson courageously vetoed this bill while his own impeachment trial was proceeding in the Senate, but the statute was passed over his veto and sustained by the Court in *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1869). See 2 WARREN, *op. cit. supra* note 28, at 464-88. Franklin Roosevelt attempted to dilute the Court's opposition by flooding it with additional Justices. S. 1392, 75th Cong., 1st Sess. See S. REP. NO. 711, 75th Cong., 1st Sess.; JACKSON, *op. cit. supra* note 24, *passim*. For a discussion of alternative suggestions made for the same purpose, see Elliott, *Court Curbing Proposals in Congress*, 33 NOTRE DAME LAW. 597, 605-06 (1958). The Jenner Bill, S. 2646, 85th Cong., 1st Sess. (1957), nearly enacted during the recent Witch Hunt, would have stripped away much of the Supreme Court's power over the activities of Congress as well as of the states.

<sup>50</sup> "I hope your committee will not permit doubts as to constitutionality, however reasonable, to block the suggested legislation." 4 PUBLIC PAPERS & ADDRESSES OF FRANKLIN D. ROOSEVELT 297-98 (1938), quoted in HART & WECHSLER, *supra* note 23, at 94. Lincoln similarly declared that he would vote to prohibit slavery in the territories in the teeth of the *Dred Scott* decision. See JACKSON, *op. cit. supra* note 24, at 31.

<sup>51</sup> *The Federalist*, No. 78, heavily relied on by Marshall in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

Anti-democratic a judicial barricade assuredly is, in the true and complimentary sense: It is the last known safeguard against mob rule, which John Stuart Mill called "the tyranny of the majority." The short-sighted "liberal" who in the Thirties was eager to sacrifice the Court because he approved of Roosevelt's social goals must by now recognize that only the obduracy of the "Neanderthals" then in the Senate saved the country from political purges, from travel restrictions based on association, and from deprivation of citizenship without hearing, in the Forties, Fifties and Sixties. *Aptheker v. Rusk*, 378 U.S. — (1964); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963); *United States v. Lovett*, 328 U.S. 303 (1946).

Judge Learned Hand, who ultimately accepted a degree of judicial review for Hamilton's reasons, THE BILL OF RIGHTS 14-30 (1958), once rightly protested that judicial review alone was an insufficient safeguard. THE SPIRIT OF LIBERTY 164 (1960). Professor Bickel, on the other hand, objects to Hamilton's argument as proving too much: The Constitution limits courts as well as legislatures, and therefore there must

common sense tells us that if cabbages are to be preserved, it is injudicious to entrust them to rabbits for safe-keeping. *Marbury v. Madison* was correct because judicial review is indispensable to the effectuation of constitutional limitations not designed to be ephemeral.<sup>52</sup>

Nineteen thirty-seven was the year of Roosevelt's attempted rape of the Supreme Court, precipitated by judicial scuttling of the New Deal. Gone were the N.R.A. and the A.A.A.;<sup>53</sup> the TVA was over its turbines in trouble before a district judge in Knoxville.<sup>54</sup> Then Mr. Justice Roberts' famous change of mind eased the pressure; Congress left the Supreme Court alone and was content to enact less extreme measures "for the protection of laws passed by the Congress"<sup>55</sup> from "the evils of conflicting

---

be checks on judicial excesses too. *THE LEAST DANGEROUS BRANCH* 344 (1962). There are checks: impeachment, constitutional amendment, the appointing power, the power to regulate jurisdiction, the power to withhold funds other than judges' salaries; their scope is a matter of debate. In addition, the very weakness pointed out by Judge Hand renders constitutional checks on judicial power less necessary than those on other branches. In a crisis, the practical men in Philadelphia must have known, there is nothing but moral force to prevent the executive from disregarding court decisions. To the extent that the executive can likewise ignore offensive legislation, the argument for judicial review is somewhat weakened. But the retaliatory power of Congress, which controls the money, is greater than that of the Court (if Congress' power be constitutional rather than actual, even the President's control of the military ultimately depends upon the inclinations of his subordinates). More important, the popularly elected President is the product of and subject to many of the same political pressures as the popularly elected Congress; he is therefore less likely to exercise a check upon Congress than upon the Court, whose excesses will seldom be in the direction of contemporaneous public emotion.

<sup>52</sup> Wrong, then, was Roosevelt, and wrong was the Court in *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869), for a restriction that can be destroyed at the whim of Congress is no restriction at all. Neither a congressional power to make "exceptions" to the Court's appellate jurisdiction nor an executive power to "appoint . . . Judges of the Supreme Court" with Senate consent should be construed "to destroy the essential role of the Supreme Court in the constitutional plan." HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 312 (1953); Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960) (both discussing only jurisdiction and not appointments). Whether by construction or by amendment, the power to make exceptions to the appellate jurisdiction should be given to the Court, not to Congress; and the Court's membership should be fixed at nine. See Roberts, *Now Is the Time: Fortifying the Supreme Court's Independence*, 36 A.B.A.J. 1 (1948) (jurisdiction); Elliott, *supra* note 27, at 606-07 (noting proposals to limit membership). If the Court errs, better the deliberately cumbersome process of constitutional amendment; if Congress be tempted to destroy the Court for political reasons, better it be inhibited by the necessity for an accusation of "High Crimes and Misdemeanors."

<sup>53</sup> *United States v. Butler*, 297 U.S. 1 (1936); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

<sup>54</sup> *Tennessee Elec. Power Co. v. TVA*, M.D. Tenn. Dec. 14, 1936, *reversed*, 90 F.2d 885 (6th Cir. 1937). See FREUND, *THE SUPREME COURT OF THE UNITED STATES* 154-59 (1961); Frankfurter & Fisher, *The Business of the Supreme Court at the October Terms, 1935 and 1936*, 51 HARV. L. REV. 577, 618 n.71 (1938).

<sup>55</sup> 81 CONG. REC. 3268 (1937) (Representative Michener).

decisions by inferior courts on constitutional questions and . . . the alleged abuse of the power of injunction by some of the Federal courts"<sup>56</sup> (1600 injunctions had been granted by district judges).<sup>57</sup>

The new statute<sup>58</sup> provided for government intervention in private suits attacking Acts of Congress, in order to ensure adequate representation of the public interest, and for direct appeals to the Supreme Court from district-court decisions holding acts of Congress unconstitutional, in order to expedite decision of important cases,<sup>59</sup> and for a three-judge district court in suits to enjoin enforcement of federal statutes. "Is not a law of Congress of equal dignity with a ruling of the Interstate Commerce Commission?" asked Senator O'Mahoney. Requiring three judges, he said, "would prevent the declaring of laws of Congress unconstitutional except in clear cases."<sup>60</sup> Thus the great battle ended in respectable compromise. Judicial review was preserved, but its most irritating feature was eliminated.

At times the Supreme Court has displayed rather pointed hostility toward the three-judge provisions. The statute, Mr. Justice Frankfurter wrote in *Phillips v. United States*, is not "a measure of broad social policy to be construed with great liberality"; it is "an enactment technical in the strict sense of the term and to be applied as such."<sup>61</sup> Technical it is, in that it deals with the lawyer's preserve of federal court procedure, but it expresses an important institutional policy all the same.<sup>62</sup>

The Court's distaste is predicated upon the conviction that the three-judge procedure is burdensome.<sup>63</sup> Yet of an average total of 10,000 cases annually tried in the district courts, a mere 60 are constitutional three-judge cases.<sup>64</sup> And in a recent five-year period during which nearly 2,000

<sup>56</sup> S. REP. NO. 711, 75th Cong., 1st Sess. 3 (1937).

<sup>57</sup> See S. Doc. No. 42, 75th Cong., 1st Sess. 1 (1937); JACKSON, *op. cit. supra* note 24, at 115-18.

<sup>58</sup> Act of Aug. 24, 1937, ch. 754, 50 Stat. 752.

<sup>59</sup> 81 CONG. REC. 3153, 3254, 3255, 3268, 3273 (1937) (Representatives Michener, Summers and Chandler); H.R. REP. NO. 212, 75th Cong., 1st Sess. 1, 7 (1937).

<sup>60</sup> 81 CONG. REC. 7045 (1937). The Committee made clear that the three-judge provision was based upon the existing statutes respecting state laws and ICC orders. S. REP. NO. 963, 75th Cong., 1st Sess. 4 (1937). There was little discussion. The section's House sponsor agreed with a questioner that it was intended to "expedite the disposition of injunction matters and prevent the delay in Federal litigation on injunction proceedings that has seemed to exist for the past several years." 81 CONG. REC. 8703 (Representatives May and Summers).

<sup>61</sup> 312 U.S. 246, 251 (1941).

<sup>62</sup> See HART & WECHSLER, *op. cit. supra* note 52, at 849.

<sup>63</sup> *Phillips v. United States*, 312 U.S. 246, 250 (1941).

<sup>64</sup> Note, 77 HARV. L. REV. 299, 305 (1963). Note, 50 CALIF. L. REV. 728, 733 n.32 (1962).

cases were filed in the Supreme Court each year, a total of 31 were direct appeals from constitutional three-judge courts.<sup>65</sup> However, such cases continue to arise, and by and large they present questions of some importance. The three-judge procedure is a rather effective means of ameliorating the inevitable frictions and reducing the opportunities for abuse. When the actual extent of the burden on the federal courts is considered, the price for the palliative does not seem too high.<sup>66</sup>

## II. THE STATUTES

The basic three-judge statute is 28 U.S.C. § 2281, which provides:

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefore is heard and determined by a district court of three judges under section 2284 of this title.

This is long-winded, repetitive, and sloppy in draftsmanship. In somewhat simplified form, and with minor differences, it is restated as applicable also to federal statutes in section 2282.<sup>67</sup> Section 2284 prescribes in terrible detail the composition and procedure of the three-judge court and is too long to reproduce.<sup>68</sup> Section 1253 provides that, "except as

---

From 1952 to 1960, the average number of all three-judge cases was 54.4, but the number in 1962 was twice that of 1961. Comment, 72 *YALE L.J.* 1646, 1658 (1963).

<sup>65</sup> Note, 50 *CAL. L. REV.* 728, 733 n.33 (1962); Comment, 27 *U. CHI. L. REV.* 555, 565 n.48 (1960). Comment, 72 *YALE L.J.* 1646, 1655 (1963), notes thirty-six direct appeals from § 2281 courts from 1958 through 1961.

<sup>66</sup> *Accord*, Note, 49 *VA. L. REV.* 538, 569 (1963). *Contra*, Comment, 27 *U. CHI. L. REV.* 555 (1960), which argues that the specific evils sought to be remedied by the three-judge laws—abuses of the preliminary injunctive procedure and massive assaults on state taxes or regulations or on the New Deal—have disappeared. These conclusions are disputed in Note, 77 *HARV. L. REV.* 299, 303 (1963).

<sup>67</sup> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title." The reviser, who failed to combine §§ 2281 and 2282, should be immersed for twelve years in a pot of his own verbiage.

<sup>68</sup> The district judge presented with a complaint requiring three judges is to notify the chief judge of the circuit, who designates two additional judges, at least one of whom must be a circuit judge. Five days notice must be given to interested officials. The single judge may grant a temporary restraining order that expires when the case is heard and determined. Hearing is expedited. Any member of the panel may perform all functions except conduct the trial, appoint a master or referee, hear an application

otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

Such a prolix statute could hardly have escaped serious problems of interpretation. Most have centered around the determination of when three judges are needed: What is an "injunction"? When does a complaint seek to enjoin the "enforcement, operation or execution" of a "State statute," an "Act of Congress," or an "order made by an administrative board or commission acting under State statutes"? If some of these questions look easy, the Court has not made them so. Moreover, what are the powers of a single judge? Who decides whether the case is for three judges? Where should an appeal be filed from the decision not to empanel a special court?

With that, into the cauldron.

### III. WHEN IS A THREE-JUDGE COURT REQUIRED?

#### 1. *The Relief Sought: "An Interlocutory or Permanent Injunction."*

"In 1955 appellee brought this suit for a declaratory judgment," wrote Mr. Justice Douglas for the Supreme Court in *FHA v. The Darlington, Inc.*<sup>69</sup> "On appeal, we remanded the cause for consideration by a three-judge court pursuant to 28 U.S.C. § 2282." This statement had nothing to do with the questions then before the Court, and it was inaccurate as a matter of history, since the Court on the first appeal had held, rightly or wrongly, that "a cause of action for injunctive relief is stated."<sup>70</sup> Nevertheless, the statement is some evidence that the author of the opinion, at least, at that time believed a three-judge court to be required in an action for declaratory judgment; and no other Justice saw fit to refute him.

Subsequently, however, the Court has gone far to reject this suggestion. *Flemming v. Nestor*<sup>71</sup> was a proceeding under section 205(g) of the

---

to grant or vacate an interlocutory injunction, dismiss the action, or enter a summary or final judgment. The section also contains an unrelated and little-used provision for abstention in certain cases.

<sup>69</sup> 358 U.S. 84, 87 (1958).

<sup>70</sup> 352 U.S. 977 (1957). The complaint had sought an injunction, but a three-judge court dissolved itself on finding no basis for equitable relief. A single judge then entered a decree providing that the defendant "shall promptly approve" a schedule of rents to be submitted by the plaintiff and "may not insist" upon a promise not to rent for periods of less than thirty days as a condition of that approval. Appellant's Jurisdictional Statement, pp. 22-25, 53.

<sup>71</sup> 363 U.S. 603 (1960). *Thompson v. Whittier*, 365 U.S. 465 (1961), was similar. See the district court's decision, 185 F. Supp. 306 (D.D.C. 1960).

Social Security Act<sup>72</sup> to review the administrative denial of benefits to an alien who had been deported for membership in the Communist Party. A federal statute was attacked as unconstitutional, but the Court held that three judges were not required because the suit was not for an injunction. And in *Kennedy v. Mendoza-Martinez*,<sup>73</sup> the Court held the three-judge provision inapplicable to an action for declaratory relief against loss of citizenship under an allegedly invalid statute, because the original request for an injunction had in effect been abandoned before trial.<sup>74</sup>

The statutory language furnishes powerful support for these decisions. Neither section 2281 nor section 2282 requires a three-judge court whenever a statute is challenged on constitutional grounds. Both sections provide only that "an interlocutory or permanent injunction . . . shall not be granted" except by three judges; declaratory judgments are not injunctions, and they are not mentioned. It can be argued seriously that Congress, by employing a technical term with an established meaning, deliberately excluded applications for other forms of relief from the operation of the statutes. For when Congress has deemed the form of relief immaterial to the existence of federal jurisdiction, it has found words to make this clear.<sup>75</sup>

But the courts have not brushed aside the question so easily. One district court held that a three-judge court must be convened to pass upon a request for a writ of mandamus and prohibition, because "I fail to see how the employment of a different nomenclature in the denomination of the relief here sought, when in substance it is not different, can avoid the terms of the Act."<sup>76</sup> Another district judge declared that three judges would be required in a declaratory judgment suit because the

<sup>72</sup> 53 Stat. 1370 (1939), 42 U.S.C. § 405(g) (1958).

<sup>73</sup> 372 U.S. 144 (1963).

<sup>74</sup> Three judges were held unnecessary for want of an injunction request in *Hall v. Welch*, 185 F.2d 525, 527 (4th Cir. 1950) (habeas corpus); *Brotherhood of Locomotive Firemen v. Chicago, B. & Q. R.R.*, 225 F. Supp. 11, 21 (D.D.C. 1964) (action to set aside arbitration award); *Coyle v. Pope & Talbot, Inc.*, 207 F. Supp. 685 (E.D. Pa. 1962) (motion to quash summons); *United States v. Eramdjian*, 155 F. Supp. 914, 925 (S.D. Cal. 1957) (criminal defense).

<sup>75</sup> See *International Ladies' Garment Workers Union v. Donnelly Garment Co.*, 304 U.S. 243, 250 (1938). The District Courts have jurisdiction over "civil actions wherein the matter in controversy . . . arises under the Constitution," 28 U.S.C. § 1331 (1958); the Supreme Court has appellate jurisdiction over state-court judgments "where the validity of a treaty or statute . . . is drawn in question," 28 U.S.C. § 1257 (1958), and over district court judgments "holding an Act of Congress unconstitutional" when the United States is a party, 28 U.S.C. § 1252 (1958).

Three judges were held unnecessary in *Donnelly* because the claim of unconstitutionality was made in anticipation of a defense, not as a ground for injunction.

<sup>76</sup> *Rolls-Royce, Inc. v. Stimson*, 56 F. Supp. 22, 23 (D.D.C. 1944).

decision would have "the same force and effect as an injunction."<sup>77</sup> A district court decision that declaratory judgments are forbidden by 28 U.S.C. § 1341, which in certain cases forbids a district court to "enjoin, suspend, or restrain" the collection of state taxes, has been approved by responsible commentators.<sup>78</sup> These decisions recognize that while "injunction" is a term of art, it should be construed to effectuate the statutory purpose; "injunction" can reasonably be interpreted to include all decrees or judgments whose effect is substantially the same, with respect to the purposes of the three-judge statutes, as that of the traditional injunction. Although the decision in *Nestor* was based in part on the language of the statute,<sup>79</sup> in *Mendoza* the Court expressly refrained from holding that no declaratory action required three judges;<sup>80</sup> it held instead that the action before it was not within the purpose of section 2282.

In 1934, when declaratory judgments were first authorized by federal legislation,<sup>81</sup> it could not have been seriously contended that such judgments were within the three-judge requirement,<sup>82</sup> for three judges were then required only in cases in which an interlocutory injunction was requested. Whether or not a declaratory judgment is the equivalent of an injunction, it is certainly not interlocutory. At that time the evil at which the statute aimed was not the invalidation of a state program by a single judge per se, but the suspension of a program in advance of a decision on the merits.<sup>83</sup> However, the 1937 act extending the three-judge provisions to attacks on federal statutes applied to all injunctions, whether or not interlocutory relief was sought;<sup>84</sup> and in revising the Judicial Code in 1948 Congress amended the state-statute provision to the same effect.<sup>85</sup>

Why, then, did Congress single out injunctions for special treatment? There is danger of an affront to the states or to Congress whenever a statute is held unconstitutional, and for such serious confrontations between legislature and judiciary three judges might well have been always required. But the Court in *Nestor* and in *Mendoza* put its finger squarely on the significant distinguishing feature of an injunction. In the absence

77 *United States v. 149 Gift Packages*, 52 F. Supp. 993, 995 (E.D.N.Y. 1943) (dictum).

78 *Collier Advertising Serv., Inc. v. City of New York*, 32 F. Supp. 870 (S.D.N.Y. 1940). *Accord*, *West Pub. Co. v. McColgan*, 138 F.2d 320, 324-25 (9th Cir. 1943). See BORCHARD, *DECLARATORY JUDGMENTS* 828 (2d ed. 1941); Note, 50 *YALE L.J.* 927 (1941).

79 363 U.S. at 607.

80 372 U.S. at 154.

81 48 Stat. 955 (1934), 28 U.S.C. §§ 2201-2202 (1958).

82 See *Developments in the Law—Declaratory Judgments*, 62 *HARV. L. REV.* 787, 869 n.652 (1949).

83 See *Stratton v. St. Louis So. W. Ry.*, 282 U.S. 10, 14-15, 17 (1930).

84 50 Stat. 752 (1937), now 28 U.S.C. § 2282 (1958).

85 62 Stat. 968 (1948), now 28 U.S.C. § 2281 (1958). See Reviser's note to § 2281.



of an injunction, a statute may be enforced even though it has been held unconstitutional, until the Supreme Court finally decides the issue; but enforcement in the face of an injunction is punishable as contempt of court, even if the order is set aside on appeal.<sup>86</sup> The particular vice of the injunction was that it enabled a single district judge, by an erroneous decision, to stop the machinery of enforcement until he could be reversed on appeal. Said Mr. Justice Goldberg in *Mendoza*: "These sections were enacted to prevent a single federal judge from being able to paralyze totally the operation of an entire regulatory scheme."<sup>87</sup>

It was in the light of this policy that the Court held the three-judge statute inapplicable in *Nestor* and in *Mendoza*. A reversal of the Administrator's denial of benefits in the former case, Justice Harlan wrote, "would not put the operation of a federal statute under the restraint of an equity decree; indeed, apart from its effect under the doctrine of stare decisis, it would have no other result than to require the payment of appellee's benefits."<sup>88</sup> In *Mendoza*, "the relief sought and the order entered affected an Act of Congress in a totally noncoercive fashion. . . . Pending review in the Court of Appeals and in this Court, the Government has been free to continue to apply the statute."<sup>89</sup>

Free the Government is, in the sense that enforcement of the statute would not be contempt of court. Yet the fundamental theory of the declaratory judgment is that in a civilized society people will obey court decisions without the threat of force or punishment,<sup>90</sup> and in practice, as Professor Borchard observed, a declaratory decree is rarely ignored.<sup>91</sup> It was on this basis that two courts held declaratory judgments prohibited by the Tax Injunction Act: "A natural presumption expects public officials to respect the Court's declaration."<sup>92</sup> Moreover, the Supreme

<sup>86</sup> *Worden v. Searls*, 121 U.S. 14 (1887); *United States v. United Mine Workers*, 330 U.S. 258, 294 (1947). The Court has recently carved an exception to the *Mine Workers* rule, apparently limited to reversals of state courts for lack of jurisdiction in cases preempted by the Labor Management Relations Act. *Re Green*, 369 U.S. 689 (1962).

<sup>87</sup> 372 U.S. at 154.

<sup>88</sup> 363 U.S. at 607.

<sup>89</sup> 372 U.S. at 155.

<sup>90</sup> See BORCHARD, *DECLARATORY JUDGMENTS* 12-14, 279-80 (2d ed. 1941); Sunderland, *A Modern Evolution in Remedial Rights—The Declaratory Judgment*, 16 MICH. L. REV. 69, 70 (1917).

<sup>91</sup> BORCHARD, *op. cit. supra* note 90, at 439.

<sup>92</sup> *Collier Advertising Serv. v. City of New York*, 32 F. Supp. 870, 872 (S.D.N.Y. 1940) (dictum), followed in *West Pub. Co. v. McColgan*, 138 F.2d 320, 324-25 (9th Cir. 1943), construing what is now 28 U.S.C. § 1341. *Collier* was approved on the same ground in Note, 50 YALE L.J. 927, 931-32 (1941). *Contra*, *Morrison-Knudsen Co. v. State Bd. of Equalization*, 35 F. Supp. 553 (D. Wyo. 1940); *Mississippi Power & Light Co. v. City of Jackson*, 116 F.2d 924 (5th Cir. 1941) (*semble*) (construing comparable prohibition on injunctions against state public utility rate orders, now 28 U.S.C. § 1342). There were contrary decisions also with respect to federal taxes, e.g., *Penn v. Glenn*, 10 F. Supp.

Court has held that, independently of the Tax Injunction Act, the long-standing policy considerations which that statute codified are equally applicable to declaratory judgments: "Interference with state internal economy and administration is inseparable from assaults in the federal courts on the validity of state taxation . . ." <sup>93</sup> This holding seems to reflect the conviction that, because of the high probability of voluntary compliance with an adjudication of invalidity, a declaratory judgment would, in practical fact though not in theory, effectively prevent the states from collecting taxes first and repaying them, if necessary, afterward. <sup>94</sup>

If, as these authorities maintain, the likelihood of voluntary compliance with declaratory judgments is so great that in effect the enforcement of the statute is suspended, so much more is this true of a declaration of unconstitutionality in a case such as *Mendoza*. Compliance in a tax case is truly voluntary, since the federal court is often absolutely forbidden to enter a supplementary injunction. <sup>95</sup> But if the Attorney General attempts to deport *Mendoza* after the statute is declared unconstitutional, the district court can enjoin him. Presumably a three-judge court must now be called, since an injunction is sought on the ground that the statute is unconstitutional; but what remains for the three judges to decide? As the United States argued in *The Darlington*, a declaratory judgment is not a mere advisory opinion. <sup>96</sup> The statute provides that a declaratory judgment "shall have the force and effect of a final judgment or decree," <sup>97</sup> and the courts have held it entitled to res judicata effect. <sup>98</sup> Therefore, the Second Circuit has held, if the defendant threatens to commit acts which have been declared illegal, "the issues are at rest" and the

---

483 (W.D. Ky. 1935), *appeal dismissed*, 84 F.2d 1001 (6th Cir. 1936), but Congress overruled them in 1935. 49 Stat. 1027 (1935), 28 U.S.C. § 2201 (1958).

<sup>93</sup> *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 298 (1943).

<sup>94</sup> See Note, 50 *YALE L.J.* 927, 931-32 (1941). Moreover, the total paralysis envisioned by the Court in *Mendoza* will not always result from an injunction either, except for the aid of voluntary compliance. An injunction must not be broader than the case demands; except in a class action it may be inappropriate to enjoin enforcement against persons other than the plaintiffs, who in many cases will by no means include all those affected by the statute. Should a trial judge enter an injunction that is too broad, however, quite likely it must be obeyed until corrected, unless it can be said that his jurisdiction to enter it was obviously lacking. *United States v. United Mine Workers*, 330 U.S. 258 (1947).

<sup>95</sup> 28 U.S.C. § 1341 (1958).

<sup>96</sup> *FHA v. The Darlington, Inc.*, 352 U.S. 977 (1957), Appellant's Jurisdictional Statement, p. 20.

<sup>97</sup> 28 U.S.C. § 2201 (1958).

<sup>98</sup> *E.g.*, *Ma Chuck Moon v. Dulles*, 237 F.2d 241 (9th Cir. 1956). See 3 *BARRON & HOLTZOFF, FEDERAL PRACTICE & PROCEDURE* 1269 (1958); *BORCHARD, DECLARATORY JUDGMENTS* 438 (2d ed. 1941); *RESTATEMENT, JUDGMENTS* § 77 (1942).

plaintiff is "entitled as of course" to an injunction.<sup>99</sup> There is no reason to doubt that these principles are equally applicable to questions of constitutionality.<sup>100</sup> Indeed, the purpose of a declaratory action is to establish finally the rights of the parties. This policy, as well as the general res judicata policy against relitigation of issues already decided, requires that the issue of constitutionality, once decided, not be reopened. In short, whenever the Government attempts to assert its touted freedom to enforce a challenged statute pending appeal of a declaration of its invalidity, the issuance of an injunction may be "virtually automatic."<sup>101</sup> If the three-judge court is but a rubber stamp, its deliberations are no protection against an improvident suspension of statutory enforcement, and the policy of sections 2281 and 2282 can be frustrated by any plaintiff willing to seek initially only a declaration of invalidity on which to base a subsequent request, if necessary, for an ancillary injunction. Even in the unlikely event that Court should permit reexamination of the constitutional question if an injunction is asked pending appeal,<sup>102</sup> the likelihood of voluntary compliance with a declaratory judgment seems

<sup>99</sup> *Vermont Structural Slate Co. v. Tatko Bros. Slate Co.*, 253 F.2d 29 (2d Cir. 1958).

<sup>100</sup> RESTATEMENT, JUDGMENTS § 77 ex. 4 (1942). Although the question is one of law, see *id.*, § 70, the request for injunction arises out of essentially the same transactions, and perhaps is part of the same cause of action, as the original suit.

<sup>101</sup> *Developments in the Law—Declaratory Judgments*, 62 HARV. L. REV. 787, 869-70 (1949).

<sup>102</sup> If the declaratory judgment has been affirmed on appeal, the single judge's decision is not the basis for the injunction, and three-judge policy is not impaired. There is authority that no judgment is res judicata pending appeal, e.g., *Contra Costa Water Co. v. Oakland*, 165 Fed. 518, 529 (C.C.N.D. Cal. 1904); see 2 FREEMAN, JUDGMENTS § 772 (5th ed. 1925), although recent federal decisions are contrary. *Zannaras v. Bagdad Copper Corp.*, 260 F.2d 575 (9th Cir. 1958) (*semble*); *Refior v. Lansing Drop Forge Co.*, 134 F.2d 894, 896 (6th Cir. 1943); *United States v. Nysco Labs., Inc.*, 215 F. Supp. 87, 89 (E.D.N.Y. 1963). See RESTATEMENT, JUDGMENTS § 41 comment d (1942). Arguably res judicata policy does not require that binding effect be given to a judgment whose correctness is still an open question. In a very real sense a request for supplementary injunction pending appeal from a declaratory judgment forms a part of the original suit, and the doctrine of the law of the case, which admonishes judges to follow prior decisions in the same litigation prior to its final determination, is a weak and flexible one in the federal courts that yields easily to the demands of justice. 1A MOORE, FEDERAL PRACTICE ¶0.404[1] (2d ed. 1961). Moreover, accepting the prevailing federal rule that ordinarily a judgment is res judicata pending appeal, res judicata is a judge-made principle that must be accommodated with the commands of congressional policy. To bind the three-judge court to follow the constitutional decision of a single judge pending appeal would deny the state and federal governments the protection intended to be afforded by §§ 2281 and 2282. Relitigation of subsidiary decisions of single judges in three-judge cases is contemplated by § 2284(5); arguably relaxation of res judicata might also be required as to the constitutional issue should the plaintiff seek an injunction following a declaratory judgment. Though a declaratory judgment suit is a "case or controversy" only because it is binding in later litigation, to suspend the judgment's effect until after appeal is not to make it academic, and I think relitigation on a request for ancillary injunction would be constitutional.

so great as to make the Government's theoretical freedom to enforce the statute chimerical.

Perhaps the arguments of compliance and *res judicata* prove too much, for they are applicable not only to declaratory judgments but whenever a statute is held unconstitutional. In specifying "injunctions," Congress could hardly have thought the remedy sought immaterial. And undeniably, even in a declaratory judgment suit, the latitude exists for the Government, at least for a while, to defy convention without pain of contempt. But the declaratory judgment is a special case. It was unknown in the federal courts when the three-judge statute was adopted in 1910.<sup>103</sup> It is often a substitute for the injunction, and may possibly be available before there is cause for traditional relief. In constitutional litigation its sole purpose and almost invariable effect are the same as those of the injunction: to ensure that the statute is not enforced against the plaintiff.

Three judges should have been required in *Mendoza*, but not in *Nestor*, which was essentially an action to recover money. Nonetheless, *Mendoza* is not a horrible decision. Despite the Court's cautious refusal to hold that no declaratory judgment action requires three judges, the decision probably limits the three-judge statutes to cases in which the judgment sought is enforceable by contempt proceedings.<sup>104</sup> If so, the Court's solution to this problem, in contrast with its solutions to so many others in the three-judge field, has the monumental advantages of simplicity and comprehensibility.

Neither the statutory language nor its purpose requires that there be a request for an injunction in the original complaint; presumably three judges must be called whenever a timely injunction prayer is made. On the other hand, *Mendoza* demonstrates that if the plaintiff withdraws his plea before the court is convened, the evils sought to be remedied by the statute cannot occur, and one judge may hear the case.<sup>105</sup> This principle was carried further by a three-judge court in *The Darlington*, which decided that no case for injunction had been stated and remanded to a single judge for decision of a plea for declaratory judgment.<sup>106</sup> Even if the case has been argued before three judges, this practice may save two

<sup>103</sup> Not, however, when "injunction" was again employed in extending the act to federal laws, but there is no proof that in copying the earlier law Congress meant to exclude declaratory suits.

<sup>104</sup> One district court read *Nestor* as excluding all actions for declaratory judgments. *Cities Service Oil Co. v. McLaughlin*, 189 F. Supp. 227, 229 (D.D.C. 1960).

<sup>105</sup> 372 U.S. at 153-54. *Healy v. Ratta*, 289 U.S. 701 (1933); *Cf. Ex parte Hobbs*, 280 U.S. 168 (1929). In *Mendoza* the injunction plea was not formally abandoned, but there was no mention of it in a pretrial stipulation of issues or in the trial judge's decision. The Court concluded the injunction was no longer contemplated.

<sup>106</sup> *The Darlington, Inc. v. FHA*, 134 F. Supp. 337 (E.D.S.C. 1955). *Cf. Two Guys from Harrison-Allentown v. McGinley*, 266 F.2d 427, 432 (3d Cir. 1959).

of them effort and does not infringe three-judge policy. At some point, however, the cost becomes greater than the saving. As the case progresses it becomes increasingly significant that a decision to remand may necessitate an extra appeal, and a reversal of that decision will nullify any saving of effort. Once the argument begins, the three-judge court ought to forget about remanding and decide the case.

## 2. *The Claim Need not be Meritorious, but There Must be Federal Jurisdiction*

Sections 2281 and 2282 provide only that an injunction shall not be "granted" by a single judge; yet in its first decision construing section 2281 the Supreme Court held that a single judge may not deny one either.<sup>107</sup> The denial of an injunction certainly does not impede the enforcement of a statute, and the affront to state sovereignty is obviously less when a statute is upheld than when it is struck down. Nevertheless, said the Court, the statute provides for direct appeal to the Supreme Court from decisions denying as well as granting injunctions, in plain contemplation that three judges will make both kinds of rulings;<sup>108</sup> moreover, the judge must "immediately" cause an extraordinary court to be convened whenever an application is presented.<sup>109</sup> Therefore the statute requires that "the application for the interlocutory injunction should be heard before the enlarged court, whether the claim of unconstitutionality be or be not meritorious."<sup>110</sup>

Despite the apparent lack of need for three judges when an injunction is denied, arguments can be made for the rule. A contrary rule would enable a single judge to dispose of some cases which now require an extraordinary court, but time and effort would not always be conserved, for the judge would have power to decide only one way. If he decided not to dismiss, he would have to call a three-judge court to do his work over again. On this ground it makes good sense to forbid the single judge to conduct a trial. But the Court made clear in *Ex parte Northern*

<sup>107</sup> *Ex parte Metropolitan Water Co.*, 220 U.S. 539 (1911), followed in *Ex parte Northern Pac. Ry.*, 280 U.S. 142 (1929); *Stratton v. St. Louis S.W. Ry.*, 282 U.S. 10 (1932); *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713 (1962) (dictum).

<sup>108</sup> 28 U.S.C. § 1253 (1958).

<sup>109</sup> 28 U.S.C. § 2284(1) (1958).

<sup>110</sup> 220 U.S. at 545. In 1942 Congress enacted that "such single judge shall not . . . dismiss the action, or enter a summary or final judgment." 56 Stat. 199. Arguably this codifies the rule under discussion. On the other hand, the amendment applies only to "any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges," and thus may not be relevant in determining whether the case before the court is such an action. The context also indicates that the provision is applicable to one member of a convened three-judge court rather than to the judge to whom the complaint was first presented. See text accompanying notes 116-21 *infra*.

*Pac. Ry.* that its rule precludes not only a dismissal after hearing, but also a dismissal before trial for failure to state a meritorious claim,<sup>111</sup> although the possible waste of effort is not formidable in such cases.

However, the ultimate denial of the injunction does not tell the whole story. In *Stratton v. St. Louis S.W. Ry.*<sup>112</sup> the district judge had entered a temporary restraining order; it took him eleven months to decide to dismiss the action, and meanwhile the state could not enforce its statute. There is nothing wrong with the issuance of a restraining order to prevent irreparable harm;<sup>113</sup> abuses can be promptly corrected if a special court is convened, since such orders are reviewable by the full panel at any time.<sup>114</sup> But to postpone deciding whether the case is one for three judges until the single judge decides the merits would transform a temporary order into an interlocutory injunction, the source of the very evil the statute was intended to erase.

But if there is no temporary restraining order, this argument fails. Then, as one court has said almost in the teeth of the Supreme Court's rule, "the determination of the threshold issue dispose(s) of any need for a three-judge court to determine the Constitutionality of the statute."<sup>115</sup> Absent a restraining order, one judge should be allowed to rule on all motions prior to trial.

The Supreme Court firmly disagrees. Yet in *Ex parte Poresky* it held that a single judge may dismiss a complaint seeking to enjoin the enforcement of a state statute if the claim of unconstitutionality is "plainly insubstantial," either because it is "obviously without merit" or because it has been rejected by previous decisions.<sup>116</sup> Although a Bar Association committee recommending passage of the 1942 amendment forbidding a single judge to "dismiss the action, or enter a summary or final judgment"<sup>117</sup> told the Congress this would overrule *Poresky*,<sup>118</sup> the decision

<sup>111</sup> 280 U.S. 142 (1929).

<sup>112</sup> 282 U.S. 10 (1932).

<sup>113</sup> 28 U.S.C. § 2284(3) (1958).

<sup>114</sup> Bowen, *When Are Three Judges Required?* 16 MINN. L. REV. 1, 20 (1931). 28 U.S.C. § 2284(5) expressly makes all rulings of single judges reviewable, but it is probably applicable only to rulings made after the special court has been convened. See text accompanying notes 116-21 *infra*.

<sup>115</sup> *Kelly v. Illinois Bell Tel. Co.*, 325 F.2d 148, 151 (7th Cir. 1963). The court of appeals permitted one judge to hold the challenged statute inapplicable and dismiss on the merits. There was no temporary injunction. The decision is not contrary to the Court's rule, however, because the plaintiff had agreed to postpone the constitutional issue, thus temporarily requesting no injunction on constitutional grounds. See note 158 *infra*.

<sup>116</sup> 290 U.S. 30, 32 (1933). This holding was made applicable to actions attacking federal statutes in *California Water Serv. Co. v. City of Redding*, 304 U.S. 252 (1938).

<sup>117</sup> 28 U.S.C. § 2284(5) (1958).

<sup>118</sup> H.R. REP. NO. 1677, 77th Cong., 2d Sess. 5 (1942). Some writers concluded that it

has proved a hardy weed. The courts have not carried out the designs of the committee, and if Congress meant to do so, it used language rather inapt for the purpose. As has been frequently observed, the amendment only applies to cases "required . . . to be heard and determined by a district court of three judges," and *Poresky* held that unless there is a substantial constitutional question there is no such case.<sup>119</sup> Moreover, although the sentence in question refers simply to "a single judge," it appears in a section that begins: "Any one of the three judges of the court . . ." <sup>120</sup> Thus the prohibition seems to limit only the powers of one member of a panel already assembled.<sup>121</sup> Not only have the lower courts continued to follow *Poresky*;<sup>122</sup> the Supreme Court has twice approved the decision in express dicta<sup>123</sup> and has built upon it as the premise for a further limitation of the three-judge requirement.<sup>124</sup>

Since a single judge may not dismiss a constitutional claim that is "not meritorious," why may he dismiss one that is "obviously without merit?" The difference, said the Court in *Poresky*, is not simply of degree, for the absence of a substantial federal question is often a jurisdictional defect, and "the provision requiring the presence of a court of three judges necessarily assumes that the District Court has jurisdiction."<sup>125</sup> Not necessarily; conceivably Congress might have provided that whenever a three-judge court were requested, three judges should be convened to decide all questions, including "jurisdictional" ones. Indeed, such a requirement could be supported by the same arguments which deny the judge power to dismiss on the merits. Again there may be duplication of effort; the panel may disagree with his decision that there is jurisdiction or that an injunction is sought against enforcing a statute on constitutional grounds. A temporary restraining order entered before decision on these preliminary issues may inflict substantial damage if the decision is

---

had done so. Bereuffy, *The Three Judge Federal Court*, 15 ROCKY MT. L. REV. 64, 71, 73-74 (1942); Note, 28 MINN. L. REV. 131, 132 (1944).

<sup>119</sup> *Bell v. Waterfront Comm.*, 279 F.2d 853, 857 (2d Cir. 1960); *Jacobs v. Tawes*, 250 F.2d 611, 614 (4th Cir. 1957); Note, 77 HARV. L. REV. 299, 307-08 (1963); 62 HARV. L. REV. 1398, 1400 (1949).

<sup>120</sup> 28 U.S.C. § 2284(5) (1958).

<sup>121</sup> See authorities cited note 119 *supra*; Comment, 27 U. CHI. L. REV. 555, 560 n.26 (1960).

<sup>122</sup> *E.g.*, *Brotherhood of Locomotive Firemen v. Certain Carriers*, 331 F.2d 1020, 1022 (D.C. Cir. 1964); *Weir v. United States*, 310 F.2d 149, 151-53 (8th Cir. 1962); *Williams v. Ball*, 294 F.2d 94, 95 (2d Cir. 1961); *Stuart v. Wilson*, 282 F.2d 539, 540-41 (5th Cir. 1960).

<sup>123</sup> *Bailey v. Patterson*, 369 U.S. 31, 33 (1962); *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715 (1962).

<sup>124</sup> *Bailey v. Patterson*, *supra* note 123.

<sup>125</sup> 290 U.S. at 31.

delayed. The problem is even worse should the single judge decide he need not call the statutory tribunal; his injunction may then remain in force until his procedural error is corrected on appeal. However, it seems always to have been taken for granted, and the Supreme Court has lately reaffirmed, that Congress committed the initial decision whether a three-judge court is required to the single judge. Jurisdictional questions have generally been considered a part of that decision.<sup>126</sup>

Why? "It would certainly be absurd," said Judge Parker, "to require that, in a case of which the court manifestly lacks jurisdiction, . . . all the cumbersome machinery of a court of three judges must be set in motion merely to dismiss the case."<sup>127</sup> To be sure it would be absurd, if it were always obvious whether or not there is jurisdiction. But threshold issues are not invariably easy ones. If nothing else appears from this paper, it should be evident that an extraordinary degree of confusion surrounds the determination of whether three judges are required. Nor is it by any means true that in every case there "manifestly" is, or is not, federal jurisdiction. Even such an apparently obvious requirement as the jurisdictional amount raises difficult issues of statutory construction, not the least in suits for injunctions.<sup>128</sup> Nor is it always easy to isolate those constitutional issues which are so frivolous, or so foreclosed by prior decisions, as to be too insubstantial for jurisdiction. Should a single judge have dismissed the suit to reapportion Tennessee's legislature on the basis of *Colegrove v. Green*?<sup>129</sup> After the Court had once upheld the power of a state to compel school children to salute the flag, was it frivolous to argue the contrary?<sup>130</sup>

Any attempt to justify the distinction between dismissals on the merits and for lack of jurisdiction in terms of the nature of the issues fails entirely with respect to the insubstantial federal question. For this is a jurisdictional question only if there is no diversity of citizenship; if there is diversity, presumably, the single judge may not dismiss no matter how frivolous the constitutional question.<sup>131</sup>

<sup>126</sup> *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715 (1962). See Note, 77 HARV. L. REV. 299, 307 (1963).

<sup>127</sup> *Jacobs v. Tawes*, 250 F.2d 611, 615 (4th Cir. 1957). *Accord*, Note, 77 HARV. L. REV. 299, 307 (1963). *Contra*, Bowen, *When Are Three Federal Judges Required?* 16 MINN. L. REV. 1, 23-24 (1931).

<sup>128</sup> 28 U.S.C. §§ 1331, 1332 (1958). See *Healy v. Ratta*, 292 U.S. 263 (1934).

<sup>129</sup> 328 U.S. 549 (1946). Three judges were convened in the Tennessee case. *Baker v. Carr*, 175 F. Supp. 649, 652 (M.D. Tenn. 1959).

<sup>130</sup> *Compare* *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940), *with* *Barnette v. West Virginia State Bd. of Educ.*, 47 F. Supp. 251 (S.D.W. Va. 1942), *aff'd*, 319 U.S. 624 (1943).

<sup>131</sup> See *Ex parte Poresky*, 290 U.S. 30, 31 (1933) (dictum); Note, 77 HARV. L. REV. 299, 308 (1963); 47 HARV. L. REV. 707 (1934). *Contra*, *Wylie v. State Board of Equalization*, 21 F. Supp. 604 (1937).



An attempt to separate the individual issues most likely to cause delay or duplication of effort would have created a great deal of confusion and would probably have been the worst way to delimit the threshold powers of the single judge. And while the simplest answer would have been that all questions must be resolved by three judges, committing jurisdictional issues to the single judge does save some effort in many cases without impairing the statutory purpose. Perhaps there is a rough correspondence between the Court's distinction and three-judge policy; in the mine run of cases, jurisdictional questions are probably easier than the merits. And everyone knows which issues are jurisdictional and which are not.

Aye, there's the rub. It is plain enough that a single judge may dismiss when there is neither diversity nor a substantial federal question,<sup>132</sup> or when the amount in controversy does not exceed \$10,000.<sup>133</sup> But does the district court lack "jurisdiction" to enjoin the collection of federal taxes or to restrain proceedings in state courts? It has been so held; the statutes provide respectively that "no suit . . . shall be maintained"<sup>134</sup> and that a federal court "may not grant an injunction."<sup>135</sup> What of the statutes providing that the district courts "shall not enjoin" the collection of state taxes or the enforcement of state public-utility rate orders if the state provides a plain, speedy, and efficient remedy?<sup>136</sup> What is the significance of the fact that both these statutes originally provided that "no district court shall have jurisdiction" in such cases?<sup>137</sup> Shall we say that, despite their varying language, all these provisions should be

---

It has been argued that, even if jurisdictional questions generally are for the single judge, an exception should be made for the insubstantial question. *Poresky* permits the judge to make a watered-down version of the very constitutional determination Congress particularly wanted him not to make, see 62 HARV. L. REV. 1398, 1400 (1949), and this may tend to prejudice his later consideration of the real question as a member of the panel. Finally, if a single judge errs in dismissing a complaint for want of a substantial question, there must be two appeals before the constitutional question is resolved, both appeals dealing with the same problem but the first deciding only the jurisdictional question. See Bereuffy, *The Three Judge Federal Court*, 15 ROCKY MOUNTAIN L. REV. 64, 72 (1942).

<sup>132</sup> *Ex parte Poresky*, 290 U.S. 30 (1933).

<sup>133</sup> *Jacobs v. Tawes*, 250 F.2d 611 (4th Cir. 1957); *Cooney v. Legg*, 34 F. Supp. 531 (S.D. Cal. 1940). Or when exclusive jurisdiction is in the Customs Court. *Eastern States Petroleum Corp. v. Rogers*, 177 F. Supp. 944 (D.D.C. 1958).

<sup>134</sup> INTERNAL REVENUE CODE of 1954, § 7421(a). Single judges dismissed such suits in *National Council on the Facts of Overpopulation v. Caplin*, 224 F. Supp. 313 (D.D.C. 1963), and in *Harvey v. Early*, 160 F.2d 836, 838 (4th Cir. 1947).

<sup>135</sup> 28 U.S.C. § 2283 (1958). A single judge dismissed such a suit in *Pullen v. Patton*, 19 F. Supp. 340 (N.D. Tex. 1937).

<sup>136</sup> 28 U.S.C. §§ 1341, 1342 (1958).

<sup>137</sup> 50 Stat. 738 (1937); 48 Stat. 775 (1934).

classified as "jurisdictional" because they exclude certain types of cases from the federal courts entirely without decision of the merits?

Perhaps, but that is only the beginning of our difficulties. May a single judge dismiss an action otherwise within the three-judge requirement because in his opinion the plaintiff's legal remedies are adequate? Because he finds no threat of irreparable injury? Because the plaintiff does not have clean hands? The Supreme Court once appeared to say no; it said a district judge had dismissed "for want of equity" and reversed him, saying he lacked authority to dismiss on the merits.<sup>138</sup> But the lower court's opinion makes clear that the judge had held the challenged statute to be constitutional;<sup>139</sup> like *The Darlington*,<sup>140</sup> the case is mighty weak authority.

Traditional jargon has it that questions as to the propriety of an equitable remedy are matters of "equitable jurisdiction."<sup>141</sup> One commentator has said that such determinations "partake of a strongly jurisdictional flavor,"<sup>142</sup> and a few lower courts have upheld the power of a single judge to dismiss for want of equity.<sup>143</sup> One writer roundly condemned these decisions, fiercely contending that such questions really go to the merits.<sup>144</sup> His position has some appeal, since a decision that there is no equity in the bill establishes not that the federal court is an inappropriate forum but that the plaintiff is not entitled to the remedy he seeks.<sup>145</sup> But this is tilting at windmills. It is fruitless to pick nits over what is "really" a matter of jurisdiction. "Jurisdiction" is but a handy name with which to describe a collection of legal consequences. Like the storied reptile, a word takes on color from its surroundings. Sound legal analysis would dictate an assessment of the similarities between rulings on equitable jurisdiction on the one hand and those on "jurisdictional" and "merits" questions on the other, in the light of three-judge policy. Unfortunately for sound legal analysis, the policy distinction be-

<sup>138</sup> *Stratton v. St. Louis S.W. Ry.*, 282 U.S. 10, 13, 18 (1930).

<sup>139</sup> *St. Louis S.W. Ry. v. Emmerson*, 27 F.2d 1005, 1009 (S. D. Ill. 1928).

<sup>140</sup> See text accompanying notes 69-71 *supra*.

<sup>141</sup> *But see* 1 POMEROY, EQUITY JURISPRUDENCE § 131 (3d ed. 1905).

<sup>142</sup> NOTE, 77 HARV. L. REV. 299, 309 (1963).

<sup>143</sup> *Rosso v. Puerto Rico*, 226 F. Supp. 688, 690-92 (D.P.R. 1964) (adequate remedy); *Linehan v. Waterfront Comm.*, 116 F. Supp. 401, 404 (S.D.N.Y. 1953) (no irreparable injury); *Priceman v. Dewey*, 81 F. Supp. 557 (E.D.N.Y. 1949) (both); *Farr v. O'Keefe*, 27 F. Supp. 216 (S.D. Miss. 1939). See 62 HARV. L. REV. 1398, 1399 (1949). *Bereuffy*, *supra* n.118, at 69-70, cites also *Independent Gin & Whse. Co. v. Dunwoody*, 30 F.2d 306 (M.D. Ala. 1928), and *Pullen v. Patton*, 19 F. Supp. 340 (N.D. Tex. 1937). But in *Dunwoody* the court held the statute unconstitutional, despite language referring to equity; *Pullen* was dismissed on the basis of the statutory limitation on enjoining state court proceedings, now 28 U.S.C. § 2283 (1958), not on general equitable principles.

<sup>144</sup> *Bereuffy*, *supra* note 118, at 70.

<sup>145</sup> 62 HARV. L. REV. 1398, 1400 (1949).

tween jurisdictional and merits questions is too vague to be of much aid. Unlike many jurisdictional issues, the determination of "equitable jurisdiction" is likely to require investigation of facts outside the complaint; it may be time-consuming; it may require a hearing of some kind. But it may be identical to the probably "jurisdictional" question, based on equitable considerations, whether a state remedy for unlawful taxes or rates is "plain, speedy, and efficient."

With the question of equitable jurisdiction, as with all preliminary questions, the power of the single judge should be largely dependent upon the absence of a temporary restraining order. Under present law, however, his power is on an all-or-nothing basis. Some would err on the side of the single judge to unburden the courts;<sup>146</sup> I would err on the other to avoid abuse by delay. A temporary order might last eleven months during consideration of the equities; decision of the equitable issues may well be detailed, factual, and time-consuming. That these statements are equally true of many jurisdictional questions prompts me to suggest caution on the part of a single judge in dealing with the latter; it does not prompt me to carve still another area from what I consider the salutary policy that three judges should be called as quickly as possible to assure that the statute is not circumvented.

The Supreme Court in *Idlewild Bon Voyage Liquor Corp. v. Epstein* recently hinted at the problem of equitable jurisdiction in enumerating the duties of the judge to whom a complaint is presented. He is to decide whether there is a substantial constitutional question, "whether the complaint at least formally alleges a basis for equitable relief," and whether in other respects three judges are required.<sup>147</sup> The list purports to be complete, but it is ambiguous. Does "at least" mean that as a minimum he decides whether an injunction is requested, and that the Court refuses to decide whether he also determines equity jurisdiction in fact? The syntax makes it more probable that the Court means his job is over once he decides that an injunction is "at least formally" sought—that is, whether or not there is "equitable jurisdiction."<sup>148</sup> It would be dangerous to take this dictum as deciding an issue not presented, but it is some support perhaps for the desirable holding that a single judge may not pass upon such issues as the adequacy of a legal remedy.

The issue in *Idlewild* was whether a single judge may "abstain"—*i.e.*, whether he may suspend proceedings while the parties seek clarification

<sup>146</sup> *E.g.*, NOTE, 77 HARV. L. REV. 299, 309, 317 (1963).

<sup>147</sup> 370 U.S. 713, 715 (1962).

<sup>148</sup> *Brotherhood of Locomotive Firemen v. Certain Carriers*, 331 F.2d 1020, 1022 (D.C. Cir. 1964), is consistent with this reading of *Idlewild*. There, a single judge's power was upheld because, among other things, there was no "allegation that enforcement is threatened and therefore imminent."

of disputed issues of state law from the state courts. In itself such a disposition, like a dismissal, does not interfere with a state program. In addition, far from offending state sensibilities, abstention, like the three-judge court itself, is specifically designed to assuage them.<sup>149</sup> Yet the Supreme Court held that a single judge may not abstain, apparently because he may not "decide the merits."<sup>150</sup> This is not a reason. The very essence and purpose of abstention is to postpone, rather than to decide, the merits. On the other hand, although the question smacks of jurisdiction in that the inquiry determines whether or not the federal court will now decide the case, the courts have been careful to say, in other contexts, that abstention is not "jurisdictional" either.<sup>151</sup> Thus the court of appeals in *Idlewild* could fairly distinguish *Poresky* on its own wobbly ground: Abstention "presupposes that the court has jurisdiction to decide the controversy."<sup>152</sup>

The statute provides that a single judge shall not appoint a master or "order a reference."<sup>153</sup> Probably this applies only to one member of a three-judge court, not to the judge who receives the complaint.<sup>154</sup> Arguably it is nonetheless some guide to what the latter should do, but there are additional hurdles. While in a loose sense the judge does "order a reference" when he "refers" the parties to a state court, "reference" rather plainly is used in the technical sense respecting referees in bankruptcy. Still, the section possibly indicates a policy that the judge should not on his own send the case off for decision in part by someone else. But the master and the referee are federal officers, and a decision on the merits by one federal officer of dignity inferior to the district judge would plainly offend the three-judge policy. Not so decision by a state-court judge after abstention.

If there is no restraining order, the single judge should be allowed to abstain. This distinction cannot be made without going against the whole course of Supreme Court decisions, but without it, consideration of three-judge policy leads nowhere. There are possibilities of duplicated effort and of temporary restraint pending a decision to abstain, but these were present in *Poresky* too. If it were proper to continue a restraining order while awaiting a state-court decision, the case would be clear, but an order of such clearly extensive duration would run squarely

<sup>149</sup> *Railroad Comm. v. Pullman Co.*, 312 U.S. 496, 501 (1941).

<sup>150</sup> 370 U.S. at 715.

<sup>151</sup> See *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 416 (1964); *Martin v. Creasy*, 360 U.S. 219, 225 (1959) (Brennan, Jr., concurring) ("abstention from the exercise of its properly invoked jurisdiction").

<sup>152</sup> 289 F.2d 426, 429 (2d Cir. 1961).

<sup>153</sup> 28 U.S.C. § 2284(5) (1958).

<sup>154</sup> See text accompanying notes 116-21 *supra*.

afoul of the three-judge requirement, regardless of the appellation.<sup>155</sup> It has been suggested that the decision to abstain is a complex one closely bound up with the merits, but the author recognizes that the same may be true of jurisdictional and other questions which are left to the judge alone.<sup>156</sup> Abstention used to be described as an exercise of equitable discretion not to act contrary to the public interest,<sup>157</sup> but this similarity does not tell us whether all such issues should be solved by one or by three judges. Within the framework of past decisions, I think the Court was right in *Idlewild*, but it is more important that this issue is now settled, perhaps with rather strong hints that the question of equity "jurisdiction" will be solved the same way.<sup>158</sup>

There are other unanswered questions of this nature. If it seems obvious that a single judge may dismiss for lack of jurisdiction over the person, what of a motion to dismiss for improper venue? The policies underlying venue restrictions resemble those relevant to personal jurisdiction, and the decision as to venue is likely to be if anything an easier one; but venue is said not to be a "jurisdictional" requirement. And suppose the defendant moves to transfer the case to another district for the convenience of the parties?<sup>159</sup> This is not "jurisdictional" either, in the usual sense. It smacks both of venue and of forum non conveniens; it resembles abstention in that the court is asked to decide to send the case elsewhere for decision. It has been held that a single judge may dismiss a suit lacking adverseness between the parties, since the existence of a "case or controversy" is required by the Constitution and statutes pertaining to "jurisdiction."<sup>160</sup> But may the judge also decide whether

<sup>155</sup> Cf. *Stratton v. St. Louis S.W. Ry. Co.*, 282 U.S. 10, 17 (1930).

<sup>156</sup> Note, 77 HARV. L. REV. 299, 309 (1963).

<sup>157</sup> *Railroad Comm. v. Pullman Co.*, 312 U.S. 496, 500 (1941).

<sup>158</sup> After *Idlewild* there would seem to be no doubt that only a three-judge court may certify a state law question to a state court under FLA. STAT. ANN. § 25.031. Similarly, it has been held that one judge may not stay proceedings pending the outcome of a similar Supreme Court case. *Svejkovsky v. Tamm*, 326 F.2d 657, 658 (D.C. Cir. 1963). Although this certainly did not "decide the merits of the case," it is not within the single judge's powers enumerated in *Idlewild*.

But the prohibition on single-judge abstention may not be absolute. The Court in *Idlewild* distinguished *Chicago, Duluth & Georgian Bay Transit Co. v. Nims*, 252 F.2d 317 (6th Cir. 1958), where a single judge had abstained, because there "a three-judge court was requested only in the event that it should first be held that the state statute was by its terms applicable to the plaintiff's business operations." 370 U.S. at 715 n.3. But this exception is not peculiar to abstention. When the plaintiff agrees to postpone the constitutional question, a single judge may construe the statute himself and dismiss on the merits, for there is no danger of restraint on constitutional grounds. *Kelly v. Illinois Bell Tel. Co.*, 325 F.2d 148, 151 (7th Cir. 1963).

<sup>159</sup> 28 U.S.C. §§ 1404(a), 1406 (1958).

<sup>160</sup> *Lion Mfg. Corp. v. Kennedy*, 330 F.2d 833, 840 (D.C. Cir. 1964). *Permutt v. Armstrong*, 112 F. Supp. 247, 251 (N.D. Ill. 1953), is similar. In *Lion* there was no allegation of a threat to enforce the statute against the plaintiff. Note the resemblance

the plaintiff has standing to litigate the issue? Whether the question is too "political" for judicial disposition? Whether, if he is a judge of a specialized court, sitting by assignment, he himself is an "Article III judge" with power to hear cases in the district courts?<sup>161</sup>

It should be obvious that the Court's apparent rule that a single judge may decide whether there is "jurisdiction" and whether three judges are required leaves something to be desired in terms of clarity as well as of policy. It would be preferable had the Court instead drawn a more vivid line: either that the single judge may decide all questions prior to holding a hearing, that he may do anything except grant an injunction, or that he must ask for a special court whenever one is requested. The first alternative is the most preferable, with the very important proviso that in any event, if a three-judge court is requested and a temporary restraining order granted, the judge must comply with the request unless he has decided the preliminary questions himself within five days after the request is filed.<sup>162</sup>

### 3. *The Object of the Attack: "Acts of Congress," State "Statutes," and "Orders" of State "Administrative Boards or Commissions"*

Not every request for an injunction against state or federal action need be heard by three judges. The statutes specify that the special court is necessary only if the plaintiff seeks to restrain the "enforcement, execution, or operation" of an "Act of Congress," a state "statute," or an "order" made by a state "administrative board or commission." The exclusion of challenges to executive or judicial acts as such is evident, but the precise limitations of the requirement are not easy to ascertain. In general the Court has adhered to Mr. Justice Frankfurter's statement that "the crux of the business is procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy."<sup>163</sup> But this is only the visible part of the iceberg.

#### A. *State Constitutions, Ordinances, and Statutes of Local Applicability; Territorial Laws*

"In our view," said the Supreme Court in *AFL v. Watson*,<sup>164</sup> "the word 'statute' in § 266 [predecessor of § 2281] is a compendious summary

of this question of constitutional jurisdiction to questions of "equitable jurisdiction," text accompanying note 137-47 *supra*.

<sup>161</sup> One district judge dismissed for failure to join an indispensable party, *Osage Tribe v. Ickes*, 45 F. Supp. 179 (D.D.C. 1942); another because applicable Illinois law did not permit filing of a cross-claim for injunction, *United States v. Meyer*, 113 F.2d 387, 396 (7th Cir. 1940). These cases raise a whole range of additional possibilities.

<sup>162</sup> On appeal from a dismissal the trial judge may enter a restraining order, but this is in the control of the court of appeals, which is at least as august as a three-judge trial court.

<sup>163</sup> *Phillips v. United States*, 312 U.S. 246, 251 (1941).

<sup>164</sup> 327 U.S. 582, 592-93 (1946).

of various enactments, by whatever method they may be adopted, to which a State gives her sanction. . . ." Therefore three judges were required in a suit to enjoin enforcement of a provision of the Florida Constitution. The Court thought it would be "somewhat incongruous to hold that a single judge, while prohibited from enjoining action under an act of the state legislature, would be free to act if the state constitution were involved."<sup>165</sup> The decision was plainly right.<sup>166</sup>

However, the all-inclusive definition of "statute" indicated in *Watson* has not been followed. Municipal ordinances are "enactments . . . to which a State gives her sanction,"<sup>167</sup> and have been held to be "statutes" within the provision for appeals to the Supreme Court from state courts in cases where "the validity of a statute of any State" is challenged and upheld. Ordinances are "legislative" acts in the sense of "rules having continuing force and intended to be observed and applied in the future," the Court reasoned, and it is irrelevant to the purposes of the appeal statute by what agency the state chooses to exercise its legislative power.<sup>168</sup>

But ordinances are not "statutes" within the three-judge provision. "That section," Justice Brandeis wrote for the Court in *Ex parte Collins*, "was intended to embrace a limited class of cases of special importance and requiring special treatment in the interest of the public . . ."; "cases of unusual gravity."<sup>169</sup> It does not apply if "the suit involves matters of interest only to the particular municipality or district involved." While the Supreme Court has never been squarely presented with the question of an ordinance, its opinion in *Collins* contains the first of several explicit dicta approving a spate of lower-court decisions that three judges are not required.<sup>170</sup> Ordinances, said one district judge

<sup>165</sup> *Id.* at 592.

<sup>166</sup> There is precedent for construing the word "statute" as not limited to acts of the legislature when this is appropriate to accomplish the purpose of Congress. *King Mfg. Co. v. City Council of Augusta*, 277 U.S. 100, 102-14 (1928). An attack upon a state constitutional provision not only presents the same danger of paralysis by error as if a statute were challenged; there is also at least as great an affront to the dignity of the state. Injunctions against state constitutions fit perfectly into Senator Overman's peroration: "[L]et one little judge stand up against the whole State, and you find the people of the State rising up in rebellion." 45 CONG. REC. 7256 (1910). *Watson* was followed in *Sincock v. Duffy*, 215 F. Supp. 169, 171-72 (D. Del. 1963).

<sup>167</sup> *AFL v. Watson*, 327 U.S. 582, 593-94 (1946).

<sup>168</sup> *King Mfg. Co. v. City Council of Augusta*, 277 U.S. 100, 103-04 (1928), construing the predecessor to 28 U.S.C. § 1257(2) (1958).

<sup>169</sup> 277 U.S. 565, 567-69 (1928). This is supported by legislative history, see note 230 *infra*. Compare Brandeis' similar dissent in *King Mfg. Co. v. City Council of Augusta*, 277 U.S. 100, 115-35 (1928): when an ordinance is in issue, "the controversy may often be of trifling significance."

<sup>170</sup> *E.g.*, *City of Cleveland v. United States*, 323 U.S. 329, 332 (1945); *Ex parte Collins*, 277 U.S. 565, 568 (1928); *Calhoun v. City of Seattle*, 215 Fed. 226 (W.D. Wash.

in a well-reasoned opinion, are numerous and often of little importance.<sup>171</sup>

In terms of the actual numbers of people affected, this is not entirely accurate; a New York City ordinance is far more important in this sense than a Delaware statute (unless it relates to corporations). But this quibble does not obscure the fact that in the general run of things, statutes are of more widespread effect than ordinances; and within each state, at least, no ordinance is as general as a state-wide statute. The language of section 2281 is an invitation to holding ordinances not included, for, while "statute" can be stretched to include them if necessary to accomplish congressional purpose, this is hardly the most common usage. Couple the statutory language and Brandeis' policy argument with the historical fact that Congress was reacting to cases dealing with statutes and not ordinances, and with the Court's developing sense of the burdensome qualities of the procedure;<sup>172</sup> and the exclusion of ordinances should be no surprise.

But the Court has carried these policies a step further. *Ex parte Collins* held that three judges are not required in an action to enjoin even a genuine act of the state legislature, unless the controversy is of state-wide importance. Single judges have been permitted to test: a Florida statute applicable only to lands in the Everglades Drainage District,<sup>173</sup> a New York statute imposing state-wide taxes but assessed "by, and for the sole use of, the city" of New York,<sup>174</sup> and an Arizona statute authorizing municipalities to assess costs of street improvements against abutting property, where the result of an injunction "would have been merely to delay a municipal improvement"—the paving of a single street.<sup>175</sup>

The Court has not been deterred by the language of section 2281. It has never quite held that "statute" means "statute of general application";<sup>176</sup> it has explicitly held that a municipal officer or even a state employee is not "an officer of the State" against whom suit must be brought to invoke section 2281, if "charged with duties under a statute not of state-wide concern."<sup>177</sup>

1914); *Cumberland Tel. & Tel. Co. v. City of Memphis*, 198 Fed. 955 (W.D. Tenn. 1912). See also the long list of early cases cited by Brandeis, J., in support of his dissenting opinion in *King Mfg. Co. v. City Council of Augusta*, 277 U.S. 100, 119 (1928).

<sup>171</sup> *Calhoun v. City of Seattle*, 215 Fed. 226 (W.D. Wash. 1914).

<sup>172</sup> The Court first asserted this as a factor in *Ex parte Collins*, 277 U.S. at 569, though it had been a ground for opposition to the bill in Congress. 45 CONG. REC. 7254-55 (1910) (Senators Heyburn & Sutherland).

<sup>173</sup> *Rorick v. Board of Comm'rs*, 307 U.S. 208 (1939).

<sup>174</sup> *Ex parte Public Nat'l Bank*, 278 U.S. 101 (1928).

<sup>175</sup> *Ex parte Collins*, 277 U.S. 565, 567, 569 (1928).

<sup>176</sup> *Rorick v. Board of Comm'rs*, 307 U.S. 208, 212 (1939); *Ex parte Collins*, 277 U.S. at 567-68.

<sup>177</sup> *Rorick v. Board of Comm'rs*, *supra* note 176, 307 U.S. at 213; *Ex parte Public*



Linguistic difficulties apart, however, there is one important difference between ordinances and statutes of equally limited application: the nature of the enacting body. Ordinances are excluded, one court said, because section 2281 was designed to prevent the substitution of the judgment of a single district judge for "the combined wisdom of the legislative body of the entire state."<sup>178</sup> However limited their application, the collective decisions of a state legislature are arguably entitled to greater respect than are those of a municipal council. The affront to the state, an important factor behind the three-judge legislation, is greater with statutes than with ordinances.

Yet the principle that three judges are not required unless the statute is state-wide is a good one. Bruised feelings are not the major concern of section 2281, and a statute that imposes a tax only within one city is of no more widespread effect than an ordinance that does the same. It would be an unfortunate waste of resources to require three judges to grant, and the Supreme Court to review, an injunction against a bill granting an individual pension or rezoning a single parcel of land.<sup>179</sup>

However, the Court has not limited the exclusion to suits attacking statutes applicable only to a particular municipality or county. Single judges have been allowed to enjoin local officials acting under statutes of state-wide applicability, but acting only for the benefit of a particular part of the state. In *Ex parte Public Nat'l Bank*<sup>180</sup> the Court accepted the argument that three judges were not required to test a statute imposing a state-wide tax on national bank shares because the tax was col-

---

Nat'l Bank, 278 U.S. 101, 103-05 (1928); *Ex parte Collins*, 277 U.S. 565, 568 (1928) (*semble*). This reasoning derives some support from the converse proposition that a "locally" employed official, such as a district attorney, is an "officer of the State" when enforcing state-wide laws. *City of Cleveland v. United States*, 323 U.S. 329 (1945); *Spielman Motor Co. v. Dodge*, 295 U.S. 89 (1935). But only a little, for the probable purpose of the "officer of the State" provision was only to exclude suits against private citizens acting under state laws, a requirement omitted in the section on federal statutes. See *Coffman v. Breeze Corps.*, 323 U.S. 316 (1945).

<sup>178</sup> *Calhoun v. City of Seattle*, 215 Fed. 226 (W.D. Wash. 1914).

<sup>179</sup> The grounds for regarding a statute as sufficiently narrow for single-judge treatment are solely geographical. I have not seen it suggested that statutes enacted only for fixed and temporary periods, or applicable only to retail grocers or hat manufacturers, may be tested by one judge, although they affect only some people or only affect people for a little while. *Ex parte Collins*, 277 U.S. 565, at 568. Congress in 1910 was thinking specifically of state-wide laws: "It is a very serious matter to the people of a State who . . . enact a legislation which affects all the people of the State to have a law set aside . . ." 45 CONG. REC. 7257 (Senator Brown).

There is no reason to fear that the limitation will encourage statutes omitting insignificant corners of states in order to evade the three-judge law. The special court is there to protect the state, and in such an "evasion" the legislature would hurt only itself.

<sup>180</sup> 278 U.S. 101 (1928).

lected by city officials and paid into the city's treasury.<sup>181</sup> In a sense the suit was "of direct interest" only to the city,<sup>182</sup> but the petitioner was quite right that a decision against the statute would have affected not only the city but the entire state.<sup>183</sup> On the basis of Justice Frankfurter's classic statement of the operative principle, *Public Nat'l Bank* should have been heard by three judges: "The crux of the business is procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy."<sup>184</sup> The policy under attack was state-wide and had been announced by the legislature; its "doom" would have been no less "state-wide" because the moneys collected by the defending officer were for the use of a city.

It was not determinative that the defendants were officers chosen by the city and not by the state. "What is decisive," the Court has rightly said, ". . . is not the formal status of the officials sued but the sphere of their functions regarding the matter in issue."<sup>185</sup> A state official enforcing a local statute may be enjoined by a single judge,<sup>186</sup> and a local officer acting in a matter of general importance is entitled to three.<sup>187</sup> Nor is the view that three judges should have been required in *Public Nat'l Bank* refuted by the fact that an injunction would have left other officials free to enforce the statute elsewhere. This was equally true in cases where the Court held three judges required because the controversy was of general importance.<sup>188</sup>

In *Collins*, too, the statute attacked was one of state-wide application, generally authorizing municipalities to assess the costs of improvements against neighboring properties;<sup>189</sup> yet the Court concluded that "the suit involves matters of interest only to the particular municipality or district involved."<sup>190</sup> Similarly, in *Wilentz v. Sovereign Camp* the Court held three judges were not needed to pass upon a New Jersey statute providing "an elaborate scheme for the control and management of the affairs of any municipality . . . unable to meet its obligations," because the functions performed by the defendants under the statute were "not state, but

<sup>181</sup> See Return of Judges L. Hand, A. Hand, and Bondy to Order to Show Cause, p. 4; Memorandum on Behalf of the Receiver of Taxes, p. 6. So provided in N.Y. LAWS 1923, ch. 897, § 24(f).

<sup>182</sup> Memorandum, *supra* note 181, at 6.

<sup>183</sup> Memorandum for Petitioner, p. 3.

<sup>184</sup> *Phillips v. United States*, 312 U.S. 246, 251 (1941).

<sup>185</sup> *Rorick v. Board of Comm'rs*, 307 U.S. 208, 212 (1939).

<sup>186</sup> *Ibid.*

<sup>187</sup> *City of Cleveland v. United States*, 323 U.S. 329 (1945); *Spielman Motor Co. v. Dodge*, 295 U.S. 89 (1935).

<sup>188</sup> *Ibid.*

<sup>189</sup> ARIZ. CIV. CODE, 1913 tit. VII, ch. 13.

<sup>190</sup> 277 U.S. 565, 568. *Accord*, *Pierre v. Jordan*, 333 F.2d 951, 956-57 (9th Cir. 1964).

local functions."<sup>191</sup> And in *Griffin v. County School Bd.* the Court upheld single-judge injunctions reopening the public schools and forbidding tuition grants to pupils attending segregated private schools because "only a suit involving 'a statute of general application' and not one affecting 'a particular municipality or district' can invoke" section 2281: "Even though actions of the State are involved, the case, as it comes to us, concerns not a state-wide system but rather a situation unique to Prince Edward County."<sup>192</sup> But there was no statute in the case applicable only to Prince Edward. One statute authorized tuition grants to pupils anywhere in the state; others, it was argued, authorized local units throughout the state to close the schools, and the Court noted with no recognition of inconsistency that a Louisiana case attacking just such a statute had been tried by three judges and appealed directly.<sup>193</sup>

*Griffin* may be explained on other grounds,<sup>194</sup> but *Collins, Public Nat'l Bank*, and *Wilentz* clearly extend the "local" exclusion beyond statutes of local application. It does not matter that the policy in suit was enunciated by the state legislature; it does not matter that the policy is state-wide or that the defendants are state officers. A single judge may act if the defendants are acting for the immediate benefit of only a part of the state.<sup>195</sup> But this is not relevant to the importance of the suit or to the policy of the three-judge provision. In *Collins*, for example, while probably few people outside Phoenix cared whether the particular street got paved, the plaintiff alleged that Arizona cities could not assess paving costs against abutting owners without a hearing, and if it had been so held, every town in the state would have been affected. Three judges should have been required.

The parallel three-judge requirement of section 2282 does not appear to be similarly limited to federal statutes of nation-wide applicability. Federal statutes in a sense applicable in only a part of the country are capable of producing violent nationwide feelings—*e.g.*, the statute authorizing the TVA.<sup>196</sup> Perhaps this is one area in which, because of the

<sup>191</sup> 306 U.S. 573, 575, 581 (1939).

<sup>192</sup> 377 U.S. 218, 227-28 (1964).

<sup>193</sup> 377 U.S. at 231-32, citing *Hall v. St. Helena Parish School Bd.*, 197 F. Supp. 649 (E.D. La. 1961), *aff'd mem.*, 368 U.S. 515 (1962).

<sup>194</sup> See notes 250, 252 *infra*.

<sup>195</sup> See *Spielman Motor Co. v. Dodge*, 295 U.S. 89, 94 (1935).

<sup>196</sup> The TVA, well deserving of the three-judge treatment it received, is "local" in the same sense as the Florida statute for the development of the Everglades, which one judge was held entitled to consider in *Rorick v. Board of Comm'rs*, 307 U.S. 208 (1939). State construction projects too can be important to the whole state. Moreover, though the principal impact of the legislation in *Rorick* was localized, investors living elsewhere were affected by provisions respecting the issuance of bonds. To separate important construction projects such as TVA from unimportant ones such as a post

greater potential effect of federal than of state projects, a distinction in treatment under section 2281 and under section 2282 is justified.

But recognition that different tests are appropriate for state and for federal laws does not require a holding that three judges are required to enjoin every federal statute. The invalidation of a District of Columbia traffic law, for example, is a far cry from the serious interference with Congressional policy that prompted passage of the three-judge law. One judge should be permitted to enjoin enforcement of an act of Congress applicable only in geographical areas within exclusive federal jurisdiction, for in such areas Congress exercises essentially local lawmaking functions of insufficient importance to justify the burden of three judges. The language of section 2282 does not contain the particular peg upon which the comparable exception to section 2281 was hung, for the suit need not be against an "officer of the United States."<sup>197</sup> But no more inexcusable liberties need be taken with syntax to hold that a local statute is not an "Act of Congress" than the Court took in holding state employees not "officers of the State" when enforcing laws of limited applicability; and neither goes too far.<sup>198</sup>

Statutes enacted by territorial legislatures are plainly not "Acts of Congress" within section 2282. Are they "State Statutes" subject to the same requirement under section 2281? In *Stainback v. Mo Hock Ke Lok Po*<sup>199</sup> the Supreme Court held no; three judges need not be called in a suit to enjoin the enforcement of a statute of the Territory of Hawaii. Although the word "state" might be construed to include territories if statutory purpose so required, the Court reasoned,<sup>200</sup> the purpose of sec-

---

office in Tallahassee would be too uncertain for practical administration. Arguably all projects endorsed by a legislature and financed by general taxation or borrowing should be for three judges to consider. But *Rorick* is not shocking.

<sup>197</sup> The Court has held § 2282 applicable in a suit against a private defendant, where the complaint sought to enjoin payment of royalties to the federal treasury as required by statute. *Coffman v. Breeze Corps.*, 323 U.S. 316, 317 n.1 (1945). A contrary result had been predicted by 48 YALE L.J. 125 (1938).

<sup>198</sup> Cf. *Keyes v. Madsen*, 179 F.2d 40, 43 (D.C. Cir. 1949) (alternative holding); *Hamilton Nat'l Bank v. District of Columbia*, 176 F.2d 624, 630 n.3 (D.C. Cir. 1949) (alternative holding), both holding that 28 U.S.C. § 2403, enacted concurrently with § 2282, 50 Stat. 752 (1937), and requiring notice to the Attorney General and an opportunity to be heard when the validity of an "Act of Congress" is in issue, does not apply to laws applicable only in the District of Columbia. Though the District is somewhat analogous to a state, three-judge protection for District-wide legislation seems less necessary because judicial review of laws for the District is uncomplicated by the ticklish claims of federalism. Congress is likely to be greatly aroused only if more important matters are at stake.

<sup>199</sup> 336 U.S. 368 (1949), *overruling* *ILWU v. Ackerman*, 82 F. Supp. 65, 89-93 (D. Hawaii 1949).

<sup>200</sup> 336 U.S. at 378-79, citing *Andres v. United States*, 333 U.S. 740 (1948), where "state" was held to include "territory" in a statute prescribing local methods of

tion 2281 did not so require. "[T]he predominant reason for the enactment of [the three-judge law] . . . was a congressional purpose to avoid unnecessary interference with the laws of a sovereign state. In our dual system of government, the position of the state as sovereign over matters not ruled by the Constitution requires a deference to state legislative action beyond that required for the laws of a territory."<sup>201</sup>

But what of Puerto Rico, which enjoys the unique and semi-autonomous status of "commonwealth"? The First Circuit Court of Appeals, detailing the sovereign attributes of the Commonwealth, has come close to urging that Puerto Rico is a "state" for three-judge purposes, but has stopped short of actually deciding the question.<sup>202</sup> Prior to its commonwealth status Puerto Rico was empowered to elect her own governor and legislature,<sup>203</sup> which could enact any appropriate laws,<sup>204</sup> subject to the Constitution and to a rather detailed Bill of Rights prescribed by Congress.<sup>205</sup> But the President of the United States had a limited power to veto territorial statutes;<sup>206</sup> and Congress had the power to annul any laws passed by the territorial legislature<sup>207</sup> and to legislate as to local matters in the territory.<sup>208</sup> Thus the laws of Puerto Rico as a territory were not given the force of state laws as regards either the President or Congress; there is no reason to think Congress would have wanted them accorded such respect by the federal courts.

Puerto Rico as a commonwealth, however, is a horse of another color. As the First Circuit has pointed out, Puerto Rico has its own constitution, not imposed by Congress, but adopted by the people of Puerto Rico.<sup>209</sup> More important than the form of the supreme law or the method of its enactment, however, is the striking alteration made in the real relationship between Puerto Rico and the federal government. Not one word is

---

executing federal criminals. See also *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 604 (1949) (Rutledge & Murphy, JJ., concurring).

<sup>201</sup> 336 U.S. at 377-78.

<sup>202</sup> See *Mora v. Mejias*, 206 F.2d 377, 386-88 (1st Cir. 1953); *Penagaricano v. Allen Corp.*, 267 F.2d 550, 554 (1st Cir. 1959). Without discussion a district court has applied 28 U.S.C. § 2283, which invites federal injunctions "to stay proceedings in a State court," to Puerto Rico. *Rosso v. Puerto Rico*, 226 F. Supp. 688 (D.P.R. 1964).

<sup>203</sup> Act of March 2, 1917, ch. 145, §§ 12, 26-27, 39 Stat. 955, 958-59, as amended, ch. 490, § 1, 61 Stat. 730 (1947).

<sup>204</sup> 39 Stat. 964 (1917), as amended, 48 U.S.C. § 821 (1958).

<sup>205</sup> Act of March 2, 1917, ch. 145, § 2, 39 Stat. 951, as amended, ch. 34, § 1, 41 Stat. 1096 (1921), as amended, ch. 490, § 7, 61 Stat. 772 (1947).

<sup>206</sup> Only if the statute had been passed over the governor's veto and the governor still refused approval. Act of March 2, 1917, ch. 145, § 34, 39 Stat. 960.

<sup>207</sup> Act of March 2, 1917, ch. 145, § 34, 39 Stat. 961.

<sup>208</sup> U.S. CONST. art. IV, § 3.

<sup>209</sup> *Mora v. Mejias*, 206 F.2d 377, 387 (1st Cir. 1953).

said in the constitution, which Congress approved, about a reserved power of Congress, the President, or the federal courts over matters of local significance.<sup>210</sup> The sections of former law providing for presidential or congressional veto of Puerto Rican legislation were repealed.<sup>211</sup> The district court for Puerto Rico has concluded that Congress has relinquished its general legislative power over the Commonwealth and cannot unilaterally alter the "compact" described in the ratifying statute.<sup>212</sup> If so, Puerto Rico enjoys substantially the same degree of sovereignty in its own affairs as do the states, and therefore the reasons for requiring three judges—avoidance of delay in enforcing valid laws and respect for the legislative decisions of an autonomous political entity—are fully applicable to suits attacking Puerto Rico's statutes.<sup>213</sup>

### B. Statutes and Executive or Administrative Action

In *Ex parte Bransford*,<sup>214</sup> plaintiff sought to enjoin the collection of a tax on bank stock, partly on the ground that the valuation of its stock violated the fourteenth amendment. Unless the assessment included shares which were immune from taxation, it was argued, the valuation was confiscatory because it was twice the actual value of the stock and discriminatory because the stock of other banks was assessed at seventy-five per cent. The assessor contended that his valuation was required by statute.

In *Phillips v. United States*,<sup>215</sup> the United States sued to enjoin the governor of Oklahoma from interfering with the construction of a federally supported dam. The governor had obtained a state-court injunction and declared martial law; he justified his actions by invoking state constitutional and statutory provisions granting him "Supreme Executive Power," constituting him Commander-in-Chief of the militia, and au-

<sup>210</sup> See 48 U.S.C.A. § 731 d, note.

<sup>211</sup> Act of July 3, 1950, ch. 446, § 5(2), 64 Stat. 320.

<sup>212</sup> *Mora v. Torres*, 113 F. Supp. 309 (D.P.R. 1953).

<sup>213</sup> *Puerto Rico Ry. v. Colom*, 106 F.2d 345, 354-55 (1st Cir. 1939), held the United States District Court for Puerto Rico was not a "district court of the United States" within § 2282 because it is a "congressional," not a "constitutional" court. *Contra*, *ILWU v. Ackerman*, 82 F. Supp. 65, 88-89 (D. Hawaii 1949), noting that 28 U.S.C. § 451 defines "district court of the United States," "as used in this title," to include all "district courts constituted by chapter 5," §§ 91 and 132 of which create the Hawaii district court. The danger of injury to legislative pride, though not of excessive zeal in attacking Congress, is more enhanced than diminished if the trial judge is not given the dignity and independence of an Article III judge, and *Colom* is wholly inappropriate when the act of an autonomous legislature is tested. At least in this application its force has been silently impaired by later First Circuit decisions. See note 202 *supra*.

<sup>214</sup> 310 U.S. 354 (1940).

<sup>215</sup> 312 U.S. 246 (1941).

thorizing him to call out the National Guard in order to execute the laws or "at all other times he may deem necessary."

In neither case, the Supreme Court held, was a three-judge court required. In neither case was the Court right. The doctrines of *Phillips* and *Bransford* are vague and impracticable and have provoked a good deal of confusion in the lower courts. It would be better to return to the comprehensible test enunciated by two early district court decisions that were overruled by *Phillips*: "Since . . . the plaintiffs seek to enjoin the defendants . . . from doing what they claim they are authorized and required to do by the Constitution and laws of the state, the causes are properly to be determined by a statutory court . . ." <sup>216</sup> Even though this may not be subtle, complexity is no desideratum in matters of procedure. Nor do the Court's reasons justify this additional complexity.

*First.* Although in both cases the defendants had cited statutory authority for their actions, the Court said that the attack was upon "executive action" in *Phillips* and "administrative action" in *Bransford*.<sup>217</sup> And so it was, but this proves too much. The enforcement of statutes is always an executive or administrative task, yet section 2281 requires three judges whenever enforcement is attacked on the ground that the statute is unconstitutional. The key to *Phillips* and *Bransford*, therefore, cannot be that executive action was challenged; it must be that the validity of the authorizing statutes was not.

*Second.* The obvious way to find out what is challenged in a lawsuit is to look at the complaint. Neither in *Phillips* nor in *Bransford* did the complaint mention the authorizing statutes, and there is support in both opinions for the view that this was determinative. "It is significant," wrote Mr. Justice Frankfurter in *Phillips*, "that the United States in its complaint did not charge the enabling acts of Oklahoma with unconstitutionality, but assailed merely the Governor's action as exceeding the bounds of law."<sup>218</sup> Mr. Justice Reed said in *Bransford*:

It is necessary to distinguish between a petition for injunction on the ground of the unconstitutionality of a statute as applied, which requires a three-judge court, and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as un-

<sup>216</sup> Powers Mercantile Co. v. Olson, 7 F. Supp. 865, 866 (D. Minn. 1934); Cox v. McNutt, 12 F. Supp. 355, 356 (S.D. Ind. 1935). This was also the interpretation of § 2281 employed by the Supreme Court in *Sterling v. Constantin*, 287 U.S. 378, 393 (1932). *Phillips* distinguished *Sterling* because in the latter the Governor had called out the militia to enforce an order of the Railroad Commission, and enjoining him was incidental to enjoining enforcement of the order. 312 U.S. at 253. This is true, but it was not the ground relied on in *Sterling*.

<sup>217</sup> 312 U.S. at 252; 310 U.S. at 361.

<sup>218</sup> 312 U.S. at 252.

constitutional. . . . Until the complainant in the district court attacks the constitutionality of the statute, the case does not require the convening of a three-judge court, any more than if the complaint did not seek an interlocutory injunction.<sup>219</sup>

Did the Court mean to imply that three judges would have been necessary had the plaintiffs alleged that Oklahoma's National Guard statutes were unconstitutional as construed by the Governor to authorize the use of troops to interfere with a federal project or that the Arizona tax statute was unconstitutional if it required discriminatory and excessive assessments? Such a complete pleader's choice has apparently been sanctioned by the Court in construing the very similarly worded section 1257(2). That section grants an appeal to the Supreme Court as of right from state-court judgments "where is drawn in question the validity of a statute of any state" on constitutional grounds. In *Memphis Natural Gas. Co. v. Beeler*<sup>220</sup> the plaintiff argued that a tax violated the commerce clause, and the Court refused to hear the appeal because "it is not enough that an appellant could have launched his attack upon the validity of the statute itself as applied; if he has failed to do so we are without jurisdiction over the appeal." But the analogy is a poor one. It is one thing to permit the party for whose benefit an appeal is provided to lose the privilege by artless pleading; it is quite another to permit one party, by artful pleading, to avoid a procedural requirement designed for the protection of the other. The three-judge requirement was enacted to protect the States, not plaintiffs; if in substance the case is within the requirement, the statute should not be frustrated by a form of words.

*Third.* Fortunately, other language in both *Phillips* and *Bransford* indicates that the nature of the controversy, not the plaintiff's characterization of it, placed these cases beyond the three-judge requirement. The constitutionality of a statute is not in question, said the Court in *Phillips*, simply because a "misreading of the statute" is invoked as justification for official acts.<sup>221</sup> There is some merit to this idea. If indeed it is established that no statute authorizes the challenged action, there is

<sup>219</sup> 310 U.S. at 361. *School Bd. v. Atkins*, 246 F.2d 325, 327 (4th Cir. 1957), has been cited as establishing a complete pleader's choice, Annot., 4 L. Ed. 2d 1931, 1945 (1960). It comes close to this, although the statute pleaded in defense was enacted after the complaint was filed.

<sup>220</sup> 315 U.S. 649, 650-51 (1942). See HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 565 (1953); ROBERTSON & KIRKHAM, *JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES* 24-25 (2d ed. Wolfson & Kurland 1951); STERN & GRESSMAN, *SUPREME COURT PRACTICE* 58 (2d ed. 1954).

<sup>221</sup> 312 U.S. 246, 252. See Note, 77 HARV. L. REV. 299, 312 (1963): A three-judge court was denied in *Phillips* "on the ground that the Governor had acted beyond the scope of his statutory authority." See also *Williams v. Ball*, 294 F.2d 94, 95 (2d Cir. 1961).



no danger that a statute will be held invalid, and a single judge may proceed.<sup>222</sup> But "misreading" in this sense cannot fully explain the Court's decisions. Even if the passing reference in *Phillips* be exalted into an authoritative construction, the Court expressly declined to construe the statute in *Bransford*.<sup>223</sup>

Certainly the Court did not mean to imply that the mere possibility that the statute has been misconstrued avoids the need for three judges. When statutory authorization is in doubt, the court might grant the injunction without holding the statute unconstitutional; but it is also possible the statute may be held applicable and invalid. Precisely the same possibilities exist when a plaintiff has pleaded both constitutional and non-constitutional grounds for enjoining the enforcement of a statute. In such a case, *Florida Lime & Avocado Growers, Inc. v. Jacobsen*,<sup>224</sup> the Supreme Court held that section 2281 is not inapplicable simply because an injunction might be issued without holding the statute invalid; whenever "the injunctive decree may issue on the ground of federal unconstitutionality of the state statute, the convening of a three-judge court is necessary . . . ."<sup>225</sup>

<sup>222</sup> As in *Nichols v. McGee*, 169 F. Supp. 721 (N.D. Cal. 1959), where the plaintiff sought to enjoin segregation in a prison. He did not contend segregation was authorized by statute, and there was no appearance for the defendants. Even if we must adhere to the silly rule that three judges are required whether the state asks for them or not, see text accompanying notes 371-78 *infra*, surely the courts need not search behind the pleadings to ascertain whether the state is failing to make a possible claim for three judges by not asserting statutory authority that really exists. Similarly, three judges would not have been required in *Phillips* if the Governor had made only the frivolous contention that his action was authorized by statutes giving him authority to enforce the revenue laws. Again, three judges are not required if the defendants concede the unconstitutionality of the statutes, for in substance this too is to disclaim reliance on statute. *Gibson v. Board of Pub. Instruction*, 170 F. Supp. 454, 457 (D. Fla. 1958); *McKissick v. Durham Bd. of Educ.*, 176 F. Supp. 3, 12 (M.D.N.C. 1959).

<sup>223</sup> 310 U.S. at 360.

<sup>224</sup> 362 U.S. 73 (1960).

<sup>225</sup> *Id.* at 80. Cf. *Mosher v. Phoenix*, 287 U.S. 29 (1932), holding that an action "arises under the Constitution," 28 U.S.C. § 1331 (1958), even though it is also alleged that the challenged act is unauthorized by state law.

In *Bartlett & Co. v. State Corp. Comm'n*, 223 F. Supp. 975, 980-82 (D. Kan. 1963), plaintiff sought to enjoin state regulation of its intrastate truck shipments for reshaping outside the state. The statute was made applicable to persons or vehicles "only to the extent permitted by the constitution and laws of the United States." The court quoted from an annotation apparently, but if so erroneously, based on *Phillips*: "[A] three-judge court is not required where the statute is susceptible of a construction and application which does not violate the Federal Constitution, and is only misconstrued or erroneously applied in an individual case. . . ." Annot., 4 L. Ed. 2d 1931, 1934 (1960). The statute was interesting in that it could never be unconstitutional; it must be construed as inapplicable to cases beyond state power. But to deny the state three judges because it has tried to obey the Constitution seems improper. The question before the court is the same, the latitude for a judge's views as wide, and

Moreover, it would be unfortunate if the Court were suggesting that a detailed analysis of state law should be undertaken as a threshold question in determining the propriety of a three-judge court. If the claim of statutory authority is plainly frivolous, let one judge say so and retain the case. But the claim was not frivolous in either *Phillips* or *Bransford*.<sup>226</sup> Threshold issues ought to be kept as simple as practicable, for complication means delay, unnecessary effort, and the possibility of abuse of a temporary restraining order.<sup>227</sup>

*Fourth.* A more promising basis for the decision in *Phillips* has to do with the breadth of the plaintiff's constitutional arguments. "No one questions Oklahoma's authority to give her governor 'Supreme Executive Power' nor to make him Commander-in-Chief of her militia. What is here challenged is a single, unique exercise of these prerogatives of his office."<sup>228</sup>

The impression is conveyed that the constitutional question was not very important. It would have been important if the Governor's power to command the militia had been challenged, but it was not important whether he could act in the narrow situation before the Court. Speaking of section 2281 in a related context, Mr. Justice Brandeis once pointed out that "the section was intended to apply only to cases of general importance" or "unusual gravity."<sup>229</sup> Legislative history supports this view.<sup>230</sup> Quite possibly the greater importance of decisions invalidating

---

the chance for abuses as great, as if the statute had mentioned neither interstate commerce nor the Constitution. *Cf.* *Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942).

<sup>226</sup> In the former, it could be argued that the legislature had given the Governor *carte blanche* to determine when to call out the Guard; in the latter, the statute appeared to require an assessment for each county in an amount not less than the value of the bank's tangible property there. ARIZ. REV. CODE § 3071 (1928).

<sup>227</sup> The Court did not suggest in *Lime Growers* that nonconstitutional grounds for an injunction should be first passed upon by one judge. *But cf.* *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715 n.3 (1962).

<sup>228</sup> 312 U.S. at 253.

<sup>229</sup> *Ex parte Collins*, 277 U.S. 565, 569 (1928).

<sup>230</sup> The first three-judge district courts were provided in anti-trust and railroad cases which the Attorney General certified to be of "general public importance," Act of Feb. 11, 1903, ch. 544, 32 Stat. 823. "The far-reaching importance of the cases arising under the antitrust laws . . . and the general public interest therein" were given as reasons for providing for expeditious handling and a direct appeal. 36 CONG. REC. 1679 (1903) (Senator Fairbanks). Senator Overman, sponsor of the three-judge provision for state laws, was concerned about the kind of decision that would cause the people of the state to come "rising up in rebellion." 45 CONG. REC. 7256 (1910). There was much talk in 1937 of the "great public importance" attached to decisions invalidating federal statutes, e.g., H.R. REP. NO. 212, 75th Cong. 1st Sess. 2; 81 CONG. REC. 3273 (1937) (Representative Chandler), and Senator O'Mahoney, suggesting the three-judge requirement, rhetorically asked, "Is not a law of Congress of equal dignity with a ruling of the Interstate Commerce Commission?" 81 CONG. REC. 7045 (1937).

statutes, if not simply the fact that Congress was reacting specifically to such decisions, explains why three judges are required only when the validity of a statute or administrative order is challenged and not whenever a constitutional question of any kind is raised.

Again an analogy to the provision for Supreme Court review of state-court decisions is in order. Review in the Supreme Court's discretion is available whenever a right is "claimed under the Constitution," but the Supreme Court is (in theory) required to hear the case "where is drawn in question the validity of a statute of any state" on federal grounds and the statute is upheld.<sup>231</sup> Why the difference? Mr. Justice Brandeis, dissenting in *Dahnke-Walker Milling Co. v. Bondurant*, thought the reason was that the validity of a statute "is usually a matter of general interest";<sup>232</sup> the validity of a "statute" is not at issue if the challenge is to a "unique" application of statutory power. Particular applications, like local statutes, are not very important.

But how is this distinction to be expressed? Again an *ad hoc* decision of the importance of each case would not be satisfactory. The statutory language is no help; would not an injunction against the collection of a tax in the circumstances of *Dahnke-Walker* have been entered "upon the ground of the unconstitutionality of such statute" as applied to the case? Perhaps three judges should be required only if the statute is attacked on its face, not as applied. The most important decision of all is one that expunges the statute from the books entirely. The Court rejected this position as to direct appeals in *Dahnke-Walker*, pointing out that no litigant has standing to question the validity of a statute as applied to other people, and therefore, every challenge to a statute is a challenge to its application. This is true enough, but it hardly meets the problem, for there have been a great many cases in which, because there were no special facts requiring a narrow decision, application to the plaintiff has been declared invalid in terms that left no doubt as to the fate of almost all future litigants. Three-judge cases have established such general princi-

---

See Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 510 (1928).

<sup>231</sup> 28 U.S.C. § 1257(2), (3) (1958).

<sup>232</sup> 257 U.S. 282, 294 (1921). *Dahnke-Walker* was an action for breach of a contract to deliver wheat. The defendant argued that the contract was unenforceable because the plaintiff had not qualified to do business in Kentucky, as required by statute; the plaintiff responded that the statute could not constitutionally be applied because its business was solely interstate commerce. To Justice Brandeis an appeal was improper; the validity of the statute had not been drawn in question. Kentucky decisions had established that the statute did not apply to corporations engaged only in interstate commerce, and the only question was whether the transaction in suit was one in interstate commerce. The decision of this issue was "a matter of merely private interest," not one of general importance.

ples as that a state may not compel school children to salute the flag; that it may not conduct prayers in public schools; that it may not segregate school children on the basis of race; that it may not outlaw private schools.<sup>233</sup> If the three-judge procedure is ever appropriate, it is for these cases; arguably it should be limited to them.

A disheartening number of lower courts have so interpreted *Phillips* and *Bransford*.<sup>234</sup> But in *Bransford* itself the Court flatly rejected such a limitation, saying, as it has said again, that three judges are required when a statute is attacked "as applied."<sup>235</sup> In *Query v. United States* the Court held three judges necessary to determine whether a state tax statute, otherwise admittedly valid, could constitutionally extend to a military PX, because an injunction was sought "upon the ground of the unconstitutionality of the threatened application."<sup>236</sup> Moreover, the Court has squarely held that a direct appeal under section 1252 from a district court decision "holding an Act of Congress unconstitutional" is available when the statute has been invalidated as applied to the case;<sup>237</sup> and *Dahnke-Walker* held the same as to state statutes upheld by state courts under section 1257. Even Mr. Justice Brandeis in *Dahnke-Walker* did not suggest that the statute must be attacked at its broadest; he would have allowed an appeal if the state court had upheld Kentucky's power to require corporations to qualify although they were engaged solely in interstate commerce.

Mr. Justice Brandeis thought the unimportant cases could be eliminated by holding that the validity of a statute was "drawn in question" if the statute was attacked as "construed," but not if it was challenged as "applied." He explained his distinction this way:

The word "apply" is used in connection with statutes in two senses. When construing a statute, in describing the class of persons, things or functions which are within its scope; as that the statute does not "apply" to transactions in interstate commerce. When discussing the use made of a statute, in referring to the process by which the statute is made operative; as where the jury is told to "apply" the statute of limitation if they find

<sup>233</sup> *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (flag salute); *Engel v. Vitale*, 370 U.S. 421 (1962) (school prayers); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (private schools).

<sup>234</sup> See text accompanying notes 244-49 *infra*.

<sup>235</sup> *E.g.*, 310 U.S. 354, 361 (1940) (dictum); *Kesler v. Department of Pub. Safety*, 369 U.S. 153, 157 (1962) (dictum).

<sup>236</sup> 316 U.S. 486, 489 (1942). However, the Court was not answering a claim that unconstitutionality on the face must be alleged, but a claim that no constitutional question was in issue.

<sup>237</sup> *Fleming v. Rhodes*, 331 U.S. 100, 102-04 (1947).

that the cause of action arose before a given date. In this opinion, it is used in the latter sense.<sup>238</sup>

The test appears to rely heavily on the language used by the lower court in describing what it is doing. The Kentucky court had obligingly held that the statute did not apply to interstate commerce and that the transaction in suit was not in interstate commerce. Thus what was alleged to be unconstitutional was not its description of the class of transactions to which the statute was directed, but rather its process of making the statute "operative"—determining whether the facts of the case brought it within the description. But suppose the Kentucky court had said the statute extends to all foreign corporations buying grain in this state for shipment outside? To all foreign corporations entering into contracts in this state for the delivery of grain to a carrier in this state for shipment outside? The last statement is phrased to resemble "construction" in Brandeis' sense: the holding under attack is one "describing the class of persons, things or functions which are within [the statute's] . . . scope." But this "description" includes every fact relied on by the Court in holding the transaction itself to be in interstate commerce. Brandeis' own formulation of the distinction between construction and application, then, is not well designed to meet its purpose. For although intended to isolate those cases presenting broad constitutional questions of general importance, in fact the test determines jurisdiction on the basis of the language of the challenged decision without regard to the breadth of its impact.

The idea of construing the three-judge requirement as applicable only to important cases is commendable, but there seems to be no workable test to serve the purpose.

*Fifth.* Section 2281, said the Court in *Phillips*, was designed to protect against federal invalidation of a state's "legislative policy."<sup>239</sup> In the classic case that prompted the enactment of the statute, *Ex parte Young*, the state legislature had decided to reduce railroad rates, and the federal court said it could not. The legislature had enunciated the policy whose validity was in issue.<sup>240</sup> In *Phillips*, on the other hand, it was the Governor, not the legislature, who had decided to block construction of the dam. If the legislature had directed him to call out the militia whenever someone attempted to build a dam in Oklahoma, the case would have been differently decided.

<sup>238</sup> *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 295 n.1 (1921). This dichotomy is reminiscent of the division of functions between judge and jury, between "law" and "fact," but it is not the same. Brandeis conceded that it was a question of law "whether the fact that the wheat was so sold and bought makes the transaction one in interstate commerce," yet called this question one of application, not of construction.

<sup>239</sup> 312 U.S. at 251.

<sup>240</sup> 209 U.S. 123 (1908).

The same consideration was urged in *Bransford*: "Variations by assessors, . . . if invalid, are so because of a wrong done by officers under the statute rather than because of the requirement of the statute itself."<sup>241</sup> In other words, three judges are required whenever an injunction based on the Constitution would frustrate the purposes of the legislature, because legislative decisions are important and deserving of special respect. But invalidation of an assessment would not interfere with legislative plans because the legislature did not entertain a policy of discriminatory or confiscatory assessment; the taxing officers dreamed it up themselves. Therefore there was no attack upon any "statute" of the state within section 2281.

A second statutory peg supports the same policy argument. Even if a "statute" is attacked, three judges are not required unless an injunction is sought to restrain a state officer in the "enforcement or execution" of the statute. The Court relied on this language in *Ex parte Collins* as an alternative ground for upholding the power of a single judge to pass upon a state statute granting municipalities the right to assess improvements costs against landowners. "That act merely authorizes further legislative action to be taken by the city . . . . It is that municipal action, not the statute of a state, whose 'enforcement, operation or execution' the petitioner seeks to enjoin."<sup>242</sup> The decision under attack was the city's; there was no challenge to state legislative policy and no threat of disruption of a state legislative program.

If the unfortunate arguments respecting the phrasing of the complaint are excised, this distinction between attacks upon legislative and upon administrative decisions is the heart of both *Phillips* and *Bransford*.<sup>243</sup>

<sup>241</sup> 310 U.S. at 359.

<sup>242</sup> 277 U.S. 565, 569 (1928).

<sup>243</sup> *Bransford*, however, was probably wrong even on this test, for a reasonable contention was made that a statute required discriminatory assessment. 310 U.S. at 361. This was overlooked by Note, 77 HARV. L. HARV. 299, 312 (1963). This contention was met largely by the untenable argument that the plaintiff had rooked the state out of its right to a three-judge court by clever pleading. But at the end of the opinion appears this cryptic sentence, directed to the same point: "Even where the statute is attacked as unconstitutional, § 266 is inapplicable unless the action complained of is directly attributable to the statute." This may be an irrelevant reprise of the argument that most assessments (although not this one) are products of administrative decision alone. Possibly, however, the Court was making a further and quite sophisticated point. The statute required apportionment of the assessed stock value among places in which the bank did business so that "the amount apportioned to each county, city or town shall not be less than the actual cash value of the real and personal property of such bank situated in such county, city or town." Arguably the invalid assessment, while compelled by the statute, was not "directly attributable" to it, for discrimination and overvaluation were not policies of the legislature but incidental products of the legislative policy of apportioning assessments to the bank's tangible property in each county. If this is what "directly attributable" means, the distinction is comprehensible but unsound, for an injunction would have forbidden

Of all the tests suggested by these cases, moreover, this is the most completely in accord with the purpose of the three-judge law. Yet *Phillips* and *Bransford*, contrary to the statement in a recent law review note, have not "worn well."<sup>244</sup> True it is that the Supreme Court has not been flooded with cases in which the issue has arisen. But the lower courts have not been so blessed, and the results have been unfortunate. The courts have been confused by the many vague and interrelated tests suggested in the two Supreme Court opinions and consequently have rendered numerous decisions inconsistent with their essential rationale.

On the authority of *Phillips* and *Bransford*, the First Circuit upheld the power of a single judge to decide whether a statute requiring landlords to make repairs could "be constitutionally enforced against" owners whose leases, which could not be altered without the consent of the Federal Housing Commissioner, provided that the tenants make their own repairs.<sup>245</sup> An Indiana court cited *Bransford* to prove three judges were not needed to enjoin the arrests of the plaintiff's truck drivers for operating in Indiana without authority from the state Public Service Commission, although the plaintiff alleged that the arrests were based on an Indiana statute and that "section 11 of the Indiana Act as interpreted and enforced contravenes the commerce clause of the Constitution." Said the court: "It is not alleged that the statute itself is unconstitutional."<sup>246</sup> Confronted with a complaint admitting the validity of medical licensing but contending that chiropractors could not constitutionally be included, the Third Circuit went completely to pieces, apparently holding not simply that three judges were not required but that no federal court could entertain an attack upon the state court's construction of an admittedly valid statute.<sup>247</sup>

These three decisions are dead wrong even if *Phillips* and *Bransford* are right. Neither of the latter requires the statute to be attacked in all its applications, and *Bransford* expressly declared three judges were needed if a statute were attacked "as applied." In all three cases under consideration the plaintiff phrased his attack as one upon the statute as construed or applied, and in all three the administrative officer appeared to be elaborating, applying, and enforcing legislative policy, if that is ever what is done in statutory construction.<sup>248</sup> This is not to disparage

---

the assessment the legislature arguably commanded. The same analysis can be applied to *Wichita Falls Junior College Dist. v. Battle*, 204 F.2d 632 (5th Cir. 1953), and *Gray v. Board of Trustees*, 100 F. Supp. 113 (E.D. Tenn. 1951).

<sup>244</sup> Note, 77 HARV. L. REV. 299, 313 (1963).

<sup>245</sup> *Penagaricano v. Allen Corp.*, 267 F.2d 550 (1st Cir. 1959).

<sup>246</sup> *Andrew G. Nelson, Inc. v. Jessup*, 134 F. Supp. 218, 221 (S.D. Ind., 1955).

<sup>247</sup> *Steinbach v. Metzger*, 63 F.2d 74 (3rd Cir. 1933).

<sup>248</sup> The same mistake was made in *Maison v. Confederated Tribes*, 314 F.2d 169,

the obvious truth that those who "construe" statutes inject a good deal of themselves into the search for legislative purpose. But it is no less evident that in the construction process, as contrasted with the process of formulating original policy under an express delegation of rule-making power, one is attempting to conform with generalized expressions of policy made by the legislature, even though ultimately these may be of little guidance.

These errors in applying the *Phillips-Bransford* rule prove only that the rule should be more clearly stated, not that it should be abandoned. Other decisions, however, indicate a more fundamental objection: the impracticability of drawing a clear line between legislative and administrative policy-making.

A distinction has been suggested between "mandatory" statutes requiring administrative action and "permissive" ones simply authorizing it.<sup>249</sup> In the former case the legislature has manifested its decision that something shall be done; in the latter it has simply permitted someone else to make such a decision. Certainly if the legislature has said nothing, but has omitted to forbid counties to close their schools, there is no plausible argument of statutory authorization and thus no statute is in issue.<sup>250</sup> Similarly, if a city ordinance is defended as "authorized" by a general home-rule statute, there may be no reasonable argument that the legislature's policy is at stake. *Phillips* may have been such a case, for the Governor was given discretion to call out the Guard not only in specified circumstances but "at all other times he may deem necessary."<sup>251</sup> Even in

170 n.1 (9th Cir. 1963), *cert. denied*, 375 U.S. 829 (1963); *Keyes v. Madsen*, 179 F.2d 40 (D.C. Cir. 1949), *cert. denied*, 339 U.S. 928 (1950); *Flax v. Potts*, 204 F. Supp. 458, 462-63 (N.D. Tex. 1962), *aff'd*, 313 F.2d 284 (1963); *Clemmons v. C.O.R.E.*, 201 F. Supp. 737, 745-46 (E.D. La. 1962), *rev'd*, 323 F.2d 546 (5th Cir. 1963), *cert. denied*, 375 U.S. 992 (1964); *Marcello v. Kennedy*, 194 F. Supp. 748 (D.D.C. 1961). To be distinguished, however, is *Moss v. Hornig*, 214 F. Supp. 324, 328-29 (D. Conn. 1962), *aff'd*, 314 F.2d 89 (1963), where it was alleged that one prosecutor had been "arbitrary and discriminatory in prosecuting violations" of a Sunday statute. It is not likely that the state plausibly contended the asserted pattern of enforcement was authorized by the statute; more likely the allegation was simply denied.

<sup>249</sup> *Davis v. City of Little Rock*, 136 F. Supp. 725, 728 (E.D. Ark. 1955). See *Griffin v. County School Bd.*, 377 U.S. 218, 228 (1964): "[W]hat is attacked in this suit is not something which the State has commanded Prince Edward to do . . . but rather something which the county with state acquiescence and cooperation has undertaken to do on its own volition." *Accord*, *James v. Duckworth*, 170 F. Supp. 342, 351 (E.D. Va. 1959).

<sup>250</sup> See text accompanying notes 221-22 *supra*. This cannot justify the denial of three judges in *Griffin v. County School Bd.*, 377 U.S. 218, 227-28 (1964), for § 136 of Virginia's constitution entitled "Local school taxes," provided that "each . . . school district is authorized" to raise and spend money "in establishing and maintaining such schools as in their judgment the public welfare may require." The state's highest court held that the state had "given to its localities an option to operate or not to operate public schools." *County School Bd. v. Griffin*, 204 Va. 650, 133 S.E. 2d 565, 580 (1963).

<sup>251</sup> OKLA. STATS. ANN. tit. 44, § 72 (1951).



this kind of suit, care should be taken not to permit one judge to act if the legislature's policy of delegation is itself attacked.<sup>252</sup>

Unfortunately, however, even the distinction between permissive and mandatory statutes proves a will-o'-the-wisp under the stress of application to real cases. To begin with, statutory use of the apparently permissive word "may" is but poor evidence that the officer is enforcing his own and not legislative policy. For example, in *Keyes v. Madsen*<sup>253</sup> the plaintiff contended that an administrative board had deprived her of property without due process when it condemned her buildings as "insanitary." The Board had acted under a statute giving it "jurisdiction and authority" to examine and condemn insanitary buildings, but in deciding which buildings to condemn, the Board was clearly furthering a congressional policy of condemnation in proper cases.

Clearly we must look beyond "may" or "shall" if we are to discover whose policy is at stake. In the famous Little Rock segregation case the Eighth Circuit held that *Phillips* permitted a single judge to enjoin Governor Faubus from using the national guard to keep Negro students out of Central High School.<sup>254</sup> Faubus had acted pursuant to a statute providing that the Governor "shall" call out the militia when he "may deem it necessary for the enforcement of the laws of this State, or to pre-

<sup>252</sup> In *Hall v. St. Helena Parish School Bd.*, 197 F. Supp. 649, 658-59 (E.D. La. 1961), *aff'd mem.*, 368 U.S. 515 (1962), three judges enjoined the closing of schools under a statute giving local school boards "authority to suspend or close, by proper resolution, the operation of the public school system . . . in said parish." LA. REV. STAT. 17:350.1 (1961). The principle of local option had been attacked and held invalid: "[W]hatever inequalities result from the implementation of Act 2 must be attributed directly to the Louisiana Legislature." In *Griffin v. County School Bd.*, 377 U.S. 218, 228 (1964), although Virginia's local option school-closing plan was under similar attack, the Supreme Court held one judge enough because school closing was "something which the county . . . has undertaken to do on its own volition." An injunction in either case restrained the "operation," if less likely the "enforcement," of the statutes, and three-judge policy requires a special court to pass upon legislative policy. Moreover, the plaintiffs in *Griffin* also attacked grants made under a statute providing that "every child in this Commonwealth . . . who desires to attend a non-sectarian private school . . . shall be eligible and entitled to receive a State scholarship." CODE OF VA. § 22-115.30 (1950). It is possible that the defendants did not adequately plead statutory authorization for their actions, see Record, pp. 30-32, 42-43. More fundamentally, if, as seems likely, the question of three judges was first raised in the Supreme Court, the Court should have rejected the plea as untimely. See text accompanying notes 371-78 *infra*. For discussion of the Court's suggestion that the controversy was local, see text accompanying notes 191-93 *supra*.

<sup>253</sup> 179 F.2d 40 (D.C. Cir. 1949). The court held one judge was enough, citing *Bransford*, because "the complaint did not challenge the constitutionality of the statute but alleged merely that the act of the board amounted to deprivation of property without due process." *Id.* at 43. If this is a statement of fact, it contradicts the court's earlier declaration that "the appellant alleged in her complaint that the statute was being unconstitutionally applied to her." *Id.* at 42. If it is a legal conclusion on the basis of the earlier declaration, it is patently contrary to the dictum in *Bransford*.

<sup>254</sup> *Faubus v. United States*, 254 F.2d 797, 805 (8th Cir. 1958).

serve the public health or security.”<sup>255</sup> As in *Phillips*, this statute reposed discretion in the governor; but, unlike the statute in *Phillips*, it confined that discretion to the accomplishment of stated legislative purposes. In much the same language the Arkansas legislature in 1958 provided that the Governor “shall” close any public school whenever “he shall determine that such action is necessary in order to maintain the peace . . . or that a general, suitable, and efficient educational system cannot be maintained in any school district because of the integrating of the races . . . .”<sup>256</sup> This language is as permissive as that of the Arkansas militia statute, but the context of the crisis makes clear that the authority to close the schools was given in furtherance of a legislative design to prevent integration.<sup>257</sup> Only the details of the skirmish, not the formulation of policy, had been left to the Governor.

If Governor Faubus, in closing the schools, was “enforcing” the statute because he was implementing legislative policy, was he also enforcing a statute when he called out the militia in furtherance of the legislative policy of “preserving the public . . . security”? Or must we say three judges are required in the one case and not the other—despite the identical statutory language—because the legislative policy seems more remote in the latter? Or would it be sensible to distinguish between *Phillips* and *Faubus* on the basis of the greater degree of legislative control over the latter’s discretion? If so, how specific must the statutory standards be? What of *Flax v. Potts*, where the defendants justified their refusal to send children to integrated schools on the basis of a pupil-placement statute? Arguably the legislature had delegated the job of pupil assignment to the board, but the detailed list of criteria to be considered indicates the board could not stray very far from the kind of assignment the legislature wanted, and some of the criteria were thinly disguised attempts by the legislature to preserve segregation.<sup>258</sup> Should we hold that in all these cases the legislature has lost its chance for three judges because, whether it meant to confer much discretion or not, it used more or less permissive

<sup>255</sup> ARK. STATS. § 11-506 (1947).

<sup>256</sup> Ark. Acts 1959, pp. 2000-01.

<sup>257</sup> See *Aaron v. Cooper*, 261 F.2d 97 (8th Cir. 1958), holding that a single judge might enjoin the members of the Little Rock School Board from leasing public school buildings to a private educational corporation in violation of the integration decree. The board acted under a long-standing statute providing “the directors may permit a private school to be taught in the district schoolhouse,” ARK. STATS. § 80-518 (1947), which plainly expressed no policy of segregation, although the board took its cue from contemporary legislative pronouncements. This decision was probably right under *Bransford* and *Phillips*, for the only legislative plan that was frustrated was one unconnected with the statute under which the administrators acted.

<sup>258</sup> 204 F. Supp. 458 (N.D. Tex. 1962); *VERNON’S TEX. CIV. STATS.* art. 2901a (Supp. 1963).

language? Would it be consistent with three-judge policy to do so in *Keyes*, where congressional authorship of the policy is plain?

It seems evident that apparently permissive words are too meaningless, and the search for breadth of discretion or remoteness from legislative determinations too vague, to furnish a satisfactory distinguishing factor to justify *Phillips* and *Bransford*. In order that the three-judge statute may be administered with a minimum of uncertainty and jurisdictional litigation, those decisions should be set aside and three judges required whenever "the plaintiffs seek to enjoin the defendants . . . from doing what they [defendants] [reasonably] claim they are authorized and required to do by the Constitution and laws of the state."<sup>259</sup>

### C. Administrative Orders

As enacted in 1910, section 2281 required three judges only when an injunction was sought against enforcing an unconstitutional state "statute," and at least one lower court held that orders of administrative agencies were not "statutes" within the provision.<sup>260</sup> But there had been some concern in 1910 about administrative orders as well as statutes,<sup>261</sup> and enough of a flurry was raised about their exclusion that in 1913 the statute was extended to suits to enjoin enforcement of "an order made by an administrative board or commission acting under and pursuant to the statutes of such State."<sup>262</sup> The purpose of this amendment was quite clear: "to put the order of a State railroad commission upon an equality with a statute of a State . . ."<sup>263</sup> But the draftsman was not quite careful, for the statute as amended still provided only that one judge could not enjoin the enforcement of orders "upon the ground of the unconstitutionality of such statute." Recognizing that this was but an oversight, the Supreme Court in *Oklahoma Natural Gas Co. v. Russell* held it sufficient that the administrative order itself was alleged to be unconstitutional, because of the amendment's purpose to "prevent any question that such orders were within the section."<sup>264</sup> Moreover, said the Court, the amendment was "superfluous," as the original statute included administrative orders.<sup>265</sup> Accordingly, despite the painstaking attempts of the Court in

<sup>259</sup> *Powers Mercantile Co. v. Olson*, 7 F. Supp. 865, 866 (D. Minn. 1934).

<sup>260</sup> See H.R. REP. NO. 1584, 62d Cong., 3d Sess. (1913).

<sup>261</sup> See 45 CONG. REC. 7253 (1910) (Senator Crawford).

<sup>262</sup> Act of March 4, 1913, ch. 160, 37 Stat. 1013.

<sup>263</sup> 49 CONG. REC. 4773 (1913) (Representative Clayton).

<sup>264</sup> 261 U.S. 290, 292 (1923).

<sup>265</sup> In *Sweeney v. Board of Pub. Assistance*, 36 F. Supp. 973 (M.D. Pa. 1941), a single judge was held authorized to determine the validity of a regulation promulgated by the State Board of Public Assistance. According to the district court, the Supreme Court in *Ex parte Bransford* held that, "where the constitutionality of a board regula-

*Phillips* and in *Bransford* to permit single judges to decide cases in which only administrative and not legislative policy is at stake, Congress has made it plain that three judges are required to test certain state administrative decisions.

This is not true, however, of federal administrative orders. Section 2282, enacted later, provides for three judges only when an injunction is sought against the enforcement of "any Act of Congress." This phrase, the Supreme Court said in *William Jameson & Co. v. Morgenthau*,<sup>266</sup> "is not an apt description of administrative regulations or orders. We must regard the choice of language as deliberate. . . ." Three judges are therefore not required to test federal administrative orders.

What is an "administrative order"? In *Jameson* it was a regulation established by the Secretary of the Treasury under the Alcohol Administration Act, forbidding importation of mislabeled whisky. In *Oklahoma Natural Gas* it was an order of the state corporation commission refusing to permit an increase in rates. *Jameson* indicates that the two tests are correlative; presumably what Congress is supposed to have excluded from section 2282 are the cases included by the amendment to section 2281. A general test was offered by the Court in *Ex parte Williams*, holding that a tax assessment was not an "order made by an administrative board or commission" under section 2281. An assessment, said the Court, is but a finding of fact, not an order.

An assessment does not command the taxpayer to do, or to refrain from doing anything; does not grant or withhold any privilege, authority, or license; does not extend or abridge any power or facility; does not determine any right or obligation.

. . . .

The orders contemplated by § 266 are directed to railroads or others, of whom action, or non-action, is commanded, as it is by a statute.<sup>267</sup>

---

tion is attacked, a three-judge court does not need to be convened unless the complaint also attacks the constitutionality of the statute pursuant to which the administrative board has formulated its order." 36 F. Supp. at 974. If this is what *Bransford* held, it overruled *Oklahoma Natural Gas* without mentioning it. There is language in *Bransford* that might be read to cast shadows on this decision if taken out of context: three judges are not required to judge the validity of a tax assessment because the petition seeks relief "on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional." 310 U.S. 354, 361 (1940). But this statement can only be understood against the background of *Ex parte Williams*, 277 U.S. 267 (1928), in which the Court had held that an assessment was not an "order made by an administrative board or commission" within § 2281 because it was simply a finding of fact. Thus the *Bransford* statement is of no relevance if there is an attack on the validity of a regulation or rule which is an "administrative order" within the section.

<sup>266</sup> 307 U.S. 171, 173 (1939).

<sup>267</sup> 277 U.S. 267, 271-72 (1928). *Williams* was followed in *Marshall v. Sawyer*, 301

If one were asked to suggest the single category of cases whose elimination from the three-judge requirement would be the least damaging to statutory policy and the most beneficial in terms of conserved effort, one would be tempted to suggest state administrative orders. At least forty-five cases involving such orders reached the Supreme Court between 1920 and 1940 by direct appeal, approximately one-third of all three-judge constitutional appeals during that period.<sup>268</sup> Many of these cases confronted the courts with such great public questions as whether it was unreasonable to order the Western & Atlantic Railroad to construct an industrial spur to a warehouse abutting the railroad's right of way in Smyrna, Georgia;<sup>269</sup> or whether rates for natural gas supplied to the Little Rock Gas & Fuel Co. and the Consumers' Gas Co. in Hot Springs, Arkansas, as fixed by contract and required to be maintained by order of the Railroad Commission, were confiscatory.<sup>270</sup> The decision in such cases is likely to rest entirely upon facts and to establish no general principles. The policies under attack—the decision to build a spur at Smyrna and to fix a gas rate at x cents per mcf.—are enunciated by inferior administrative tribunals. There is no affront to an august and dignified state legislature. There is no frustration of a state-wide legislative policy, nor, in many cases, of any state-wide policy at all. It is scandalous that the Supreme Court should be burdened by such trivia on mandatory and direct appeal, or that the time of three federal judges must be consumed in poring over the intricate and insignificant facts. It would be better if section 2281 were amended to eliminate the three-judge court with regard to state administrative orders.

To hold that an administrative order is not a "statute," however, as the Court has done in cases under section 2282, is to look at only part of the picture. We still must face the *Phillips-Bransford* problem: When is an attack on an administrator who defends his conduct as authorized

---

F.2d 639, 644-45 (9th Cir. 1962), a suit alleging the unconstitutionality of a "black book" distributed by Nevada officials to casino operators and of an accompanying letter saying: "In order to avoid the possibility of license revocation for 'unsuitable manner of operation' your immediate cooperation is requested in preventing the presence in any licensed establishment of all 'persons of notorious or unsavory reputation' including the above individuals . . ." The court said the book and letter were "only informational and advisory releases . . . . The booklet is limited to a recital of the findings made by the state agencies and officials concerning the alleged undesirable character of identified individuals. . . . The letter . . . requests 'cooperation' . . ." and therefore one judge was enough. This is absurd. The mandatory nature of the letter could not have been more plain if it had said "you are ordered to keep these people out of your casinos."

<sup>268</sup> My research on this point does not purport to be exhaustive, but on a quick rundown of Shepard's I encountered 45 administrative cases and 84 statutory ones.

<sup>269</sup> *Western & Atl. R.R. v. Railroad Comm'n*, 261 U.S. 264 (1923).

<sup>270</sup> *Arkansas Natural Gas Co. v. Arkansas R.R. Comm'n*, 261 U.S. 379 (1923).

by statute not an attack on the statute as construed? If an administrator adopts a regulation, he must base it on some statute which he believes authorizes his action. If the statute does authorize this rule, the plaintiff can argue, the statute as construed is unconstitutional. I do not believe this is what the Court meant in *Oklahoma Natural Gas* when it said the amendment referring to administrative orders was "superfluous"—the purport seemed to be that an order was a "statute" within section 2281. This has been held to be true under section 1257(2), so that an appeal of right is permitted to the Supreme Court from a state court decision upholding a state regulation over constitutional challenge.<sup>271</sup> But, under the reasoning of *Dahnke-Walker Milling Co. v. Bondurant*,<sup>272</sup> it has been suggested that this decision was unnecessary, because in any event jurisdiction could be sustained as an attack on the authorizing statute as construed by the administrative regulation.<sup>273</sup> And this, in fact, is the result of the test suggested in the preceding section for determining when there is an attack upon a statute.

The Court was clear, however, in holding that attacks upon federal administrative orders do not require three judges. Under present law, therefore, it is necessary to distinguish between administrative order cases and statutory cases. If a workable distinction can be found consistent with three-judge policy, attacks upon state administrative orders should be likewise excluded.

Unless the exception is to swallow the rule, it cannot be that a single judge may act whenever action by an administrative officer is attacked, for this is the case whenever a statute is enforced. *Jameson*, therefore, must turn upon the nature either of the administrative decision or of the plaintiff's attack. The test of *Ex parte Williams* is superficially attractive. Statutes were assumed to be under attack when injunctions were sought in *Pierce v. Society of Sisters* and *Board of Education v. Barnette*,<sup>274</sup> against threatened prosecutions for failure to attend public schools or for refusal to salute the flag; in *Baker v. Carr*,<sup>275</sup> against conducting an election; in *Ex parte Metropolitan Water Co.*,<sup>276</sup> against a threat to take possession of plaintiff's land; and in *Tennessee Elec. Power Co. v. TVA*,<sup>277</sup> against the generation and distribution of electric power in competition with private companies. In all these cases an administra-

<sup>271</sup> *Sultan Ry. & Timber Co. v. Dep't of Labor & Indus.*, 277 U.S. 135 (1928).

<sup>272</sup> 257 U.S. 282 (1921). See text accompanying notes 230-33 *supra*.

<sup>273</sup> HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 569 (1953).

<sup>274</sup> 268 U.S. 510 (1925); 319 U.S. 624 (1943).

<sup>275</sup> 369 U.S. 186 (1962).

<sup>276</sup> 220 U.S. 539 (1911).

<sup>277</sup> 306 U.S. 118 (1939).

tor had made some decision—to prosecute, to hold an election, to sell electricity, to condemn a parcel of land—but there was no formal directive to the plaintiff to act. In contrast, the “administrative order” cases typically involve such matters as a refusal to permit an increase in gas rates<sup>278</sup> or a direction to construct a siding.<sup>279</sup>

But it cannot be that a single judge may act whenever an administrative agency has made a regulation or order directing a person, or people in general, to do or not to do something. While a great many unimportant cases in which only administrative decisions are in issue would be eliminated, so would a great many cases in which the statute itself is attacked on broad grounds of general importance. In *Rusk v. Cort*<sup>280</sup> an administrative decision had been made to revoke the plaintiff's citizenship, but the claim was that Congress had prescribed an unconstitutional ground for denaturalization, and the Court did not doubt that the validity of the statute was questioned. In *Douglas v. Noble*<sup>281</sup> an administrator had denied the plaintiff a license to practice dentistry, and the Court considered a challenge to the statute itself, based upon delegation by the legislature of allegedly arbitrary authority without governing standards. If the exception for administrative orders is not to exclude from three-judge courts important cases raising questions of the validity of purely legislative policies, it cannot be the nature of the order that excludes administrative cases; it must be the nature of the complaint.<sup>282</sup>

Of course it cannot be left to the plaintiff to characterize his complaint as attacking administrative rather than legislative action. The need for three judges must be judged by the breadth and object of the attack. But here we have returned full circle to *Phillips* and *Bransford*. Is the distinction to turn on the particularity of the complaint—three judges if it is alleged that the state cannot require a license to practice dentistry, one if alleged that it cannot deny me a license? This involves us in the quagmire of the Brandeis dissent in *Dahnke-Walker*, requiring an impossible distinction between “construction” and “application” or an in-

278 *Oklahoma Natural Gas Co. v. Russell*, 261 U.S. 290 (1923).

279 *Western & Atl. R.R. v. Railroad Comm'n*, 261 U.S. 264 (1923).

280 Decided *sub. nom.* *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

281 261 U.S. 165 (1923).

282 In *Zemel v. Rusk*, 228 F. Supp. 65, 67-69 (D. Conn. 1964), plaintiff claimed he had been unconstitutionally denied a passport to travel to Cuba. One judge thought no special court was required, because “the focal point of the plaintiff's attack is clearly upon the regulation itself.” 228 F. Supp. at 77. This would bring the case within *Jameson*, but the majority rightly held that three judges must sit because the authorizing statute was also attacked as an unconstitutional delegation. The possibility of decision without declaring a statute invalid does not remove the need for three judges if there is a substantial claim that a statute is unconstitutional. *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73 (1960).

definable case-by-case determination as to whether an injunction is "unique" and not "important."

Certainly specious is the possible distinction that the typical "administrative order" is the product of a degree of administrative discretion, whereas the function of the administrator in "statutory" cases is largely ministerial. This is the *Bransford* question, whether an injunction would frustrate legislative or only administrative policy, and is probably the test to be employed under *Jameson*. But there are all degrees of discretion. An administrative regulation may simply restate the statute, as do some of the tax regulations. A pupil assignment may be the product of an assessment of factors laid down with great particularity by the statute. Isolating cases concerning only administrative policy is not made easier by christening them "administrative order" cases.

It is striking that the Supreme Court has never suggested that the geographical and particularistic exceptions of *Collins* and of *Phillips* are applicable to administrative orders as well as to statutes. A statute that applies to only one area within a state may be tested by one judge; administrative orders of no wider scope—indeed "unique" orders directed toward individual companies—have been given three-judge and direct-appeal treatment without question. But in *Hatfield v. Bailleaux*,<sup>283</sup> the Ninth Circuit refused to go along. The suit attacked regulations apparently applicable only in a single prison; citing *Rorick*,<sup>284</sup> the court held three judges not to be required because the orders "are not of general statewide application."<sup>285</sup> This is good. An administrative order may be as important to the state as a statute, but it is certainly not more important.

#### 4. *The Ground of the Attack: "The Unconstitutionality of Such Statute"*

##### A. *Conflicts with State Constitutions and Federal Statutes*

Even if an injunction is sought against the enforcement of a statute, three judges are not required unless the ground of the complaint is that the statute is unconstitutional. Thus, if the plaintiff alleges only that the statute does not apply to him, one judge may act. Moreover, it has always been assumed, and occasionally held, that "unconstitutionality"

<sup>283</sup> 290 F.2d 632 (9th Cir. 1961).

<sup>284</sup> *Rorick v. Board of Comm'rs*, 307 U.S. 208 (1939).

<sup>285</sup> *Id.* at 212. See *Marshall v. Sawyer*, 301 F.2d 639, 644-45 (9th Cir. 1962) (dictum); *Sheldon v. Fannin*, 221 F. Supp. 766, 770-71 (D. Ariz. 1963), reporting the earlier decision of three judges to dissolve because a challenged requirement that all children stand during the National Anthem had been imposed by the local school board and "had no application to any other school district." This decision could also have been sustained on the authority of *Bailey v. Patterson*, text at notes 325-34 *infra*.



means violation of the federal constitution; a single judge may hear the case if it is alleged only that the state statute is contrary to the state constitution.<sup>286</sup>

Are three judges required, however, when it is argued that state law conflicts with a federal statute? Until recently the Court had seemed to say no.

In *Ex parte Buder*,<sup>287</sup> suit was brought to enjoin the collection of a state tax. A federal statute permitted the states to tax shares or dividends or the income of national banks, but to tax only one of the three. A long-standing Missouri statute provided for taxing shares, but a later statute laid a tax on income. It was alleged that the tax on shares was invalid because the state had not elected between the two. The Supreme Court held the case was not one for three judges:

The claim that the tax is void rests, not upon a contention that the state statute under which it was laid is unconstitutional, but upon a contention that the statute is no longer in force. The State confessedly has the same power to tax the shares that it had before Congress enacted the 1923 amendment.

Whether the state must enact new legislation in order to make its election depends upon the construction of the Act of Congress. Whether, if this is not necessary, it has manifested its election by the existing legislation, depends upon the construction of the state statutes. But in neither of these questions is the constitutionality of the state statutes involved . . . .<sup>288</sup>

*Ex parte Bransford*,<sup>289</sup> like *Buder*, was an attempt to enjoin the collection of a state tax on national bank shares, but on different grounds. The decision in *Bransford* that three judges were not required to decide whether the assessment was confiscatory or unequal has been explored already.<sup>290</sup> But the bank contended, in the alternative, that unless the assessment was excessive the tax had been laid upon preferred stock owned by the Reconstruction Finance Corporation and withdrawn from state tax power by federal statute. Again the Court held three judges unnecessary.

<sup>286</sup> *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73, 80 (1960) (dictum); *Ex parte Williams*, 277 U.S. 267, 271 (1928) (dictum). I have found one square holding. *Cook v. Burnquist*, 242 Fed. 321, 323 (D. Minn. 1917).

<sup>287</sup> 271 U.S. 461 (1926).

<sup>288</sup> *Id.* at 466-67 (1926). The result might have been upheld on the ground that, as the Court pointed out, there was no request for an interlocutory injunction, as required until 1948. But the Court did not so hold.

<sup>289</sup> 310 U.S. 354 (1940).

<sup>290</sup> See text accompanying notes 214-59 *supra*.

If such assessments are invalid, it is because they levy taxes upon property withdrawn from taxation by federal law or in a manner forbidden by the National Banking Act. The declaration of the supremacy clause gives superiority to valid federal acts over conflicting state statutes but this superiority for present purposes involves merely the construction of an act of Congress, not the constitutionality of the state enactment.<sup>291</sup>

In *Case v. Bowles*,<sup>292</sup> an injunction was sought against a state law providing a minimum price for the sale of timber. The state's request for three judges was rejected because "the complaint did not challenge the constitutionality of the state statute but alleged merely that its enforcement would violate the Emergency Price Control Act." In *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, the Court held that three judges were required when a complaint alleged that a California statute restricting the importation of avocados was contrary to the commerce clause, the equal protection clause, the Federal Agricultural Marketing Agreement Act, and an administrative order thereunder. It was sufficient, said the Court, that there was one ground of unconstitutionality alleged, even if there were additional grounds not based on the Constitution. *Buder* was distinguished as holding "merely that a claim of conflict between a state statute and a federal statute was not a constitutional claim requiring the convening of a three-judge court . . ." <sup>293</sup>

Mr. Justice Frankfurter, in dissent, said that one judge was enough because the complaint included an attack based on the "asserted conflict with the Federal Agricultural Marketing Agreement Act of 1937, a claim which in the first instance requires construction of both the Federal Act and the California statute, and which for purposes relevant to our issue is not a constitutional claim," citing *Ex parte Buder*.<sup>294</sup>

It was at this point that one Harold Beck Kesler, having lost his driving privileges as a result of failure to pay an accident judgment, filed suit to enjoin the enforcement of the Utah Motor Vehicle Safety

<sup>291</sup> 310 U.S. at 358-59. The Court cited, in addition to *Buder*, *Lemke v. Farmers Grain Co.*, 258 U.S. 50, 53 (1922), where the same result had been reached under a statute providing for direct appeals to the Supreme Court from the district courts if the sole issue was the constitutionality of a state statute: "The attack upon the state statute because of its repugnancy to the federal statute required a consideration and construction of both statutes, and their application to the facts found. These considerations presented a ground of jurisdiction arising under a law of the United States, and was not dependent solely upon the application and construction of the Federal Constitution."

<sup>292</sup> 327 U.S. 92, 97 (1946). *Accord*, *General Elec. Co. v. Callahan*, 294 F.2d 60, 65-66 (5th Cir. 1961); *Williams v. Ball*, 294 F.2d 94, 95 (2d Cir. 1961). See I MOORE, *FEDERAL PRACTICE* 2238 (2d ed. 1961).

<sup>293</sup> 362 U.S. 73, 82 (1960).

<sup>294</sup> 362 U.S. at 90.

Responsibility Act.<sup>295</sup> He had received a discharge in bankruptcy, he said, which, according to section 17 of the Federal Bankruptcy Act, was supposed to free him from all pre-existing debts.<sup>296</sup> Yet Utah had refused to give him back his license and registration, he complained, because the state statute provided that a discharge in bankruptcy is no defense. This, argued Kesler, was contrary to section 17 of the Bankruptcy Act, and therefore the state statute violated the supremacy clause of the federal constitution.

Kesler's claim was heard and rejected by a three-judge court, and a direct appeal was taken to the Supreme Court of the United States. Neither party questioned the Court's jurisdiction, but the Court quite properly raised the issue itself, for if the case were not one for three judges, the Supreme Court would not be burdened with the direct appeal. But the Court held that the case was one for three judges, reasoning that "neither the language of § 2281 nor the purpose which gave rise to it affords the remotest reason for carving out an unfrivolous claim of unconstitutionality because of the Supremacy Clause from the comprehensive language of § 2281."<sup>297</sup>

Thus the Court unblinkingly ruled that if it is alleged that a state statute is contrary to a federal statute and therefore invalidated by the supremacy clause, three judges are required. But what of *Buder*? *Bransford*? *Case*? *Lime Growers*? Had not the Court held in all those cases that supremacy clause questions are not "constitutional" for purposes of section 2281? Chief Justice Warren, joined by Mr. Justice Stewart, thought *Kesler* was contrary to all of them.<sup>298</sup> More surprisingly still, the opinion in *Kesler* was written by Mr. Justice Frankfurter, who in earlier opinions had held to the principle that three judges should be avoided whenever possible, and who had argued that one judge could act in *Lime Growers* because one of the claims was that of conflict with a federal statute.

The Court, however, did not admit to overruling anything. The earlier cases, as indeed the Court had said at the time as well as in *Kesler*, "presented issues of statutory construction even though perhaps eventually leading to a constitutional question."<sup>299</sup> "If in immediate controversy is not the unconstitutionality of a state law but merely the construction of a state law or the federal law, the three-judge requirement does not become operative."<sup>300</sup>

<sup>295</sup> UTAH CODE ANN. tit. 41, c. 12 (1963).

<sup>296</sup> 52 Stat. 851 (1938), 11 U.S.C. § 35 (1958).

<sup>297</sup> *Kesler v. Utah Dept. of Pub. Safety*, 369 U.S. 153, 156 (1962).

<sup>298</sup> *Id.* at 175-79. *Accord*, 111 U. PA. L. REV. 113, 116 n.29 (1962). *Buder* may be a special case, since both sides admitted that the state could tax either shares or income but not both.

<sup>299</sup> 369 U.S. at 157.

<sup>300</sup> *Id.* at 158.

But was not the Court asked to construe the Bankruptcy Act in *Kesler*? Not so, said the Court; *Kesler* "presents a sole, immediate constitutional question."<sup>301</sup> "We are confronted at once with the constitutional question whether the discharge in bankruptcy of a debt ousts the police power of a State from a relevant safety measure . . . ."<sup>302</sup> The Court decided the "constitutional" question by examining the purposes of the state and federal statutes and precedents as to the meaning of "discharge" in section 17. Its conclusion was that:

"The Bankruptcy Act does not forbid a State to attach any consequence whatsoever to a debt which has been discharged . . . . [T]he bearing of the statute on the purposes served by bankruptcy legislation is essentially tangential."<sup>303</sup>

The Chief Justice and Mr. Justice Stewart thought this was statutory construction. It looks like statutory construction. It also looks like exactly the process required in *Bransford* and in *Case*.

Not only was the Court's test illogical, the dissent maintained, it was "unworkable" too.<sup>304</sup> How are the lower courts to distinguish questions of "statutory construction" from "immediate constitutional questions" under the supremacy clause? Some language in *Kesler* suggests, as the same Justice hinted in a different context in *Phillips v. United States*,<sup>305</sup> that the choice is up to the pleader. The Court emphasized that the complaint alleged explicitly that the Utah law was "unconstitutional," while in *Buder* "the Supremacy Clause was not invoked."<sup>306</sup> Pleader's choice is no more acceptable here than in *Phillips*; section 2281 is for the state's protection, and it cannot be left to the plaintiff to determine its availability.<sup>307</sup>

Fortunately the main thrust of *Kesler* is that regardless of the plaintiff's description of his claim there was no question of construction in the case. Perhaps, since the Court found no question of statutory construction in *Kesler*, it will never find one; *Bransford*, *Case* and the rest are "except-

<sup>301</sup> *Ibid.*

<sup>302</sup> 369 U.S. at 157.

<sup>303</sup> *Id.* at 171, 174.

<sup>304</sup> *Id.* at 178. *Accord*, Note, 77 HARV. L. REV. 299, 313 (1963); 111 U. PA. L. REV. 113, 118 (1962); Note, 49 VA. L. REV. 538, 554-55 (1963). See *Swift & Co. v. Wickham*, 230 F. Supp. 398, 410 (S.D.N.Y. 1964).

<sup>305</sup> 312 U.S. 246, 253 (1941).

<sup>306</sup> 369 U.S. at 157.

<sup>307</sup> See text accompanying notes 217-21 *supra*. This reading of *Kesler* was rejected in *Bartlett v. State Corp. Comm.*, 223 F. Supp. 975, 978, 980 (D. Kan. 1963), where *Kesler* was held not to require three judges though the complaint charged that "Congress by enacting the Motor Carrier Act has preempted and occupied the field . . . , and any state statutes and regulations in the field are therefore unconstitutional by reason of . . . the Supremacy Clause."

tions" consumed by the rule.<sup>308</sup> Or, to draw the opposite conclusion, *Kesler* was wrong on its own test, and there will never be another "supremacy clause" case, for pre-emption cases always involve statutory construction.<sup>309</sup>

A more faithful test would attempt to distinguish between the process of construction in *Bransford* or *Case* and that in *Kesler*. "When we reflect on what we have written, we think we have indeed construed the Poultry Products Inspection Act," wrote one court. "The question is whether we have engaged in so much more construction than in *Kesler* as to make that ruling inapplicable."<sup>310</sup> Another lower court has bravely said there was no issue of construction in the latter because "there was a direct conflict between a federal and a state statute."<sup>311</sup> Wrong; the Court found no conflict at all and upheld the state law. If the Court's assessment of the impact of state law upon the bankruptcy policy was not statutory construction, this was not because the act was too plain. The contrary seems more likely: that the Court viewed itself not as interpreting the language of a specific section of the statute but as dealing with more general policy considerations emanating from the statute as a whole.

The Court has often shied from the term "statutory construction" when statutes are inexplicit. Cases involving the pre-emption of state labor laws by the Labor Management Relations Act, the Court has said,

involved a more complicated and perceptive process than is conveyed by the delusive phrase, "ascertaining the intent of the legislature." Many of these problems probably could not have been, at all events were not, foreseen by the Congress. Others were only dimly perceived and their precise scope only vaguely defined. This Court was called upon to apply a new and compli-

<sup>308</sup> In this vein one lower court hazarded that: "The rationale of these cases [such as *Case*] would seem to be seriously questioned by Justice Frankfurter in *Kesler*." *Borden Co. v. Liddy*, 309 F.2d 871, 874 (8th Cir. 1961) (dictum). See also Note, 49 VA. L. REV. 538, 555 (1963): "[T]he doctrine, in effect, requires a three-judge court when a state statute is in conflict with a federal act."

<sup>309</sup> See Note, 77 HARV. L. REV. 299, 314 (1963). In *Bartlett & Co. v. State Corp. Comm.*, 223 F. Supp. 975, 980 (D. Kan. 1963), plaintiff contended that Kansas could not constitutionally require state authorization and regulate rates, for trucking grain to rail and water terminals in the state for shipment to other states. Among other things, the Kansas statutes were said to conflict with the Motor Carrier Act. Conceding that *Kesler* "would seem to expand the jurisdiction of three-judge courts," the court held it distinguishable: "[I]n the *Kesler* case the constitutional issue was sole and immediate. . . . In the instant case, it is apparent the Court has to make a determination on the character of truck shipments of grain as a matter of fact before reaching any constitutional issues." As *Kesler* called the constitutional issues in *Case* and *Bransford* "statutory construction," *Bartlett* calls the constitutional issue a "matter of fact."

<sup>310</sup> *Swift & Co. v. Wickham*, 230 F. Supp. 398, 409-10 (S.D.N.Y. 1964).

<sup>311</sup> *Bartlett Co. v. State Corp. Comm.*, 223 F. Supp. 975, 980 (D. Kan. 1963).

cated legislative scheme, the aims and social policy of which were drawn with broad strokes while the details had to be filled in, to no small extent, by the judicial process.<sup>312</sup>

Similarly, the effect of the Bankruptcy Act upon possible future Motor Vehicle Safety Responsibility Acts was surely not foreseen in 1898, before the automobile was in any sense a safety problem. The task of the Court in *Kesler* was not in any meaningful way to "ascertain the intent of the legislature" on this precise question, but to fill in the details with regard to aims and policies that had been "drawn with broad strokes" in the Bankruptcy Act.

Such a distinction between "construction" and, perhaps, "pre-emption" by judicial implication from inexplicit statutes would not be inconsistent with the essential policy of the three-judge statute, as I shall explain below. But certainly this distinction, like any other attempt to give meaning to both halves of *Kesler*, lends, as the Chief Justice said, "additional confusion to an already difficult area of federal jurisdiction."

Explicitness comes seldom in black or in white, but commonly in myriad shades of intermediate gray. Most specific situations, perhaps, that crop up in litigation are unforeseen by the legislature. It may be candid, and it may aid analysis, to recognize that the legislature did not provide for the case and that independent judgment is being exercised. But it hardly is useful to deny that the process is one of construction. For wide though the area of judgment may be, the Court is bound to act within the framework of statutory policy, which it is after all seeking to effectuate. "In the abstract," as the Court said of labor pre-emption problems, "these problems came to us as ordinary questions of statutory construction"—although the policies were "drawn with broad strokes" and their individual applications not foreseen.<sup>313</sup> A distinction based upon the degree of explicitness of the statutory language or ascertainable legislative intention would be too inscrutable and imprecise for the facility of administration requisite in matters of procedure.

There is one further disturbing aspect of *Kesler*. Three judges are not called for, said the Court, if the immediate controversy concerns "the construction of a state law or the federal law."<sup>314</sup> Earlier the Court had cited *ILGWU v. Donnelly Garment Co.*<sup>315</sup> for the proposition that three judges are not to be called on a "contingent" constitutional question.

<sup>312</sup> *San Diego Unions v. Garmon*, 359 U.S. 236, 239-40 (1959).

<sup>313</sup> *San Diego Unions v. Garmon*, 359 U.S. 236, 239-40 (1959).

<sup>314</sup> 369 U.S. at 157.

<sup>315</sup> 304 U.S. 243, 251 (1938).

At the end of the opinion the Court cited *Gully v. First Nat'l Bank*<sup>316</sup> as illustrative of the importance of "differentiating between different stages of adjudication at which issues are reached."<sup>317</sup> Both *Donnelly* and *Gully* are harmless enough. Both opinions, however, contain language that could be troublesome if taken out of context, as it was taken in *Kesler*. The assertion of unconstitutionality in *Donnelly* was said to be "but an anticipation of a defense;" apparently this is what *Kesler* meant by "contingent." In *Gully* the Court pointed out that "petitioner will have to prove that the state law has been obeyed before the question will be reached whether anything in its provisions . . . is inconsistent with the federal rule." Whenever a state law requires construction it is possible that the constitutional question may be avoided, and thus the constitutional question is "contingent." But the Court has not elsewhere suggested that three judges may be dispensed with if the state law is ambiguous, as all statutes are. If the Court meant in *Kesler* to overrule its recent decision in *Lime Growers*, it has overruled itself again: "A three-judge court was therefore required even if other issues that might not pass muster on their own were also tendered."<sup>318</sup>

The Court has had no opportunity to apply the rules it enunciated in *Kesler*, but has uttered one interesting dictum:

We have presented here more than an isolated issue whether a state law conflicts with a federal statute and therefore must give way by reason of the Supremacy Clause. Cf. *Kesler v. Department of Public Safety* . . . Direct conflict between a state law and federal constitutional provisions raises of course a question under the Supremacy Clause but one of a broader scope than where the alleged conflict is only between a state statute and a federal statute that might be resolved by the construction given either the state or the federal law.<sup>319</sup>

This comes close to saying, despite the citation of *Kesler*, that where the only question of constitutionality results from a conflict between federal and state statutes, one judge may act—in other words, it casts some small doubt on *Kesler's* survival. The word "construction," however, is employed in such a way as to provide a possible escape hatch. *Kesler*, as the Court saw it, did not present a conflict "that might be resolved by . . . construction." In any event the later decision was based upon allegations of "direct conflict between state law and federal

<sup>316</sup> 299 U.S. 109, 117-18 (1936).

<sup>317</sup> 369 U.S. at 158.

<sup>318</sup> *Paul v. United States*, 371 U.S. 245, 250 (1963).

<sup>319</sup> *United States v. Georgia Pub. Serv. Comm.*, 371 U.S. 285, 287 (1963). See also *Paul v. United States*, 371 U.S. 245, 249-50 (1963).

constitutional provisions," so any reflections on *Kesler*, if not unintended, were beside the point.

What ought to be done about supremacy clause cases? Writing before *Kesler*, Judge Friendly suggested that as an original matter the decisions excluding these cases from section 2281 were "doubtful." "[T]he invalidity of state action derives from the supremacy clause, Article VI, whether the conflict is with the Constitution or with 'Laws of the United States which shall be made in Pursuance thereof'; and the evil at which § 2281 was directed would seem the same whether state action is sought to be enjoined as conflicting with a Federal statute or with the Constitution itself."<sup>320</sup> As Mr. Justice Frankfurter said in *Kesler*, a state law that violates a federal statute is undeniably unconstitutional. Yet in common usage there is a difference between saying that a law is unconstitutional and saying that it is contrary to a federal statute.<sup>321</sup> And the difference is real: Congress may permit a state to enact a statute that is merely contrary to federal statute; it may not always do so if the statute violates the Constitution "directly."

In terms of three-judge policy, moreover, the distinction so firmly drawn before *Kesler* and so rudely treated there is far from unreasonable. It is only tangentially important that the Congress was reacting largely to due process cases; obviously the same possibility of abuse may exist when other constitutional provisions are invoked. But the particular harm of the decisions prompting section 2281 was that individual federal judges had enjoined state laws on the basis of what Mr. Justice Holmes happily summed up in the phrase "Mr. Herbert Spencer's Social Statics": by reading into the broad and unconfining phrases of due process their own economic predilections. There is not always such latitude when the issue is conflict with a federal statute.<sup>322</sup> On the other hand, as the Taft-Hartley pre-emption cases show, the courts are not in a strait jacket whenever they deal with conflicts between state and federal statutes.

It is in the light of this policy that one might suggest that *Kesler* required three judges because the statute left the courts too free to find policies of their own, tangential to the Bankruptcy Act, with which to destroy the state law. But the degree of vagueness is too slippery a test.<sup>323</sup> Far better the old rule of *Bransford*, or its opposite: Three judges are never (or always) required in supremacy clause cases. If the question were an open one, the broad statement in *Kesler* that three judges are always required would be persuasive. But after a series of decisions

<sup>320</sup> *Bell v. Waterfront Comm.*, 279 F.2d 853, 858 (2d Cir. 1960).

<sup>321</sup> See 111 U. PA. L. REV. 113, 116 (1962).

<sup>322</sup> *Ibid*; Note, *The Supreme Court, 1959 Term*, 74 HARV. L. REV. 81, 138 (1960).

<sup>323</sup> *Accord*, Note, 77 HARV. L. REV. 299, 315 (1963).



stretching over thirty years and enunciating a clear opposite holding, consistent with the policy of keeping down the number of direct appeals and justified, though not compelled, by three-judge policy itself, I would not have discarded *Bransford*.

The language of section 2281 is also broad enough to encompass claims of unconstitutionality based upon state constitutions. But not only was Congress reacting to decisions based on the Federal Constitution. Decisions based on state constitutions, like those based on interpretation of state law, are correctible by the states themselves. Yet this easy reason ignores the focus of section 2281 upon the time element. It was the danger of temporary suspension by a wrong decision that underlay section 2281, and this danger is the same whatever the ground of the federal court's decision.<sup>324</sup>

The exclusion of state constitutional claims does not seem to be based on a greater degree of latitude available to judges dealing with federal questions, for state constitutional precedents may be as uncertain as federal. The more likely explanation is found in the less important policy of cushioning the affront of constitutional decisions to state sensibilities. If the federal court says the state law does not apply, or is forbidden by the state constitution, this is as inconvenient, but perhaps not as insulting, as a decision based on the national law.

### B. *The Clearly Unconstitutional Statute*

*Bailey v. Patterson*<sup>325</sup> was a suit for injunctions to enforce the plaintiffs' rights to non-segregated transportation, allegedly refused them under color of state statutes. On appeal from an abstention order of a three-judge court, the Supreme Court held that the case was one for a single judge. Prior decisions had settled beyond argument that statutes requiring segregation of transportation are unconstitutional. It had been held in *Ex parte Poresky* that three judges are not needed "when the claim that a statute is unconstitutional is wholly insubstantial, legally speaking nonexistent . . . . We hold that three judges are similarly not required when, as here, prior decisions made frivolous any claim that a state statute on its face is not unconstitutional."<sup>326</sup>

This somewhat startling decision had been foreshadowed by several opinions from the Fifth Circuit,<sup>327</sup> where, confronted with great num-

<sup>324</sup> This is especially striking in the light of the footnote in *Idlewild Bon Voyage Liquor Corp. v. Rohan*, 370 U.S. 713, 715 n.3 (1962), which may permit one judge to enter a temporary restraining order on nonconstitutional grounds if the plaintiff is willing to postpone the constitutional issue. See note 158 *supra*.

<sup>325</sup> 369 U.S. 31 (1962).

<sup>326</sup> *Id.* at 33.

<sup>327</sup> *E.g.*, *Board of Supervisors v. Tureaud*, 225 F.2d 434, 446 (5th Cir. 1955) (*Rives*,

bers of segregation cases all presenting the same, already decided question, the courts were understandably eager to avoid the burden of so many extraordinary benches. *Poresky* is, however, weak authority. It held that a single judge may dismiss for lack of jurisdiction; there is no lack of jurisdiction to enjoin enforcement of a statute that is clearly unconstitutional.<sup>328</sup> Moreover, *Poresky* permitted the judge neither to issue an injunction nor to frustrate state policy. *Bailey* permitted him to do both. And what, if not the "unconstitutionality of such statute," was the ground for the injunction?<sup>329</sup> Said the Court: "There is no such ground when the constitutional issue presented is essentially fictitious."<sup>330</sup> Perhaps "ground" means "question": Three judges are required if there is a substantial question of the validity of a state statute. Perhaps, as when the invalidity of the statute is conceded, there is no plausible claim of authorization by a "statute."<sup>331</sup> The punishment of the language of section 2281 is considerable, but the result makes sense in light of three-judge policy. If, as suggested above, the vice of single-judge injunctions was that the judges wrote their own views into the vague provisions of the Constitution, there is no such danger when the case is squarely governed by a prior decision that the statute, or one like it, is invalid.<sup>332</sup>

Yet, as others have pointed out,<sup>333</sup> *Bailey* injects still another element of uncertainty into the three-judge statute. When is a question so foreclosed by prior decisions as to be no longer a "ground" of unconstitutionality? Examples have been given of the difficulties in discussing the problem of the obviously constitutional statute.<sup>334</sup> So long as *Bailey* is confined to segregation cases, it should cause little trouble and serve

J., concurring); *Bush v. Orleans Parish School Bd.*, 138 F. Supp. 336 (D. La. 1956); Comment, 19 LA. L. REV. 813, 824 (1959); 70 HARV. L. REV. 1103, 1104-05 (1957).

<sup>328</sup> See Note, 50 CALIF. L. REV. 728, 730, (1962); Note, 77 HARV. L. REV. 299, 315 (1963); Comment, 19 LA. L. REV. 813, 826-27 (1959); 70 HARV. L. REV. 1103, 1104 (1957).

<sup>329</sup> Note, 77 HARV. L. REV. 299, 316; Note, 49 VA. L. REV. 538, 552 (1963). See Note, 50 CALIF. L. REV. 728, 730 (1962): "This case contradicts the explicit command of section 2281."

<sup>330</sup> 369 U.S. at 33.

<sup>331</sup> See text accompanying notes 221-22 *supra*.

<sup>332</sup> See Note, 77 HARV. L. REV. 299, 315-16 (1963); 50 CALIF. L. REV. 728, 731 (1962). The latter note rejects this reasoning as inconsistent with the desire to palliate public feelings engendered by constitutional decisions. But another writer terms the decision "salutary" because "to require three judges to convene and to allow direct appeal to the Supreme Court in routine segregation cases would be ludicrous." Note, 49 VA. L. REV. 538, 552 (1963).

<sup>333</sup> Note, 50 CALIF. L. REV. 728, 734 n.38 (1962); Note, 77 HARV. L. REV. 299, 315-16 (1963); Comment, 61 MICH. L. REV. 1528, 1533-34 (1963). See *Turner v. Memphis*, 369 U.S. 350 (1962), for one illustration of the difficulties.

<sup>334</sup> See text accompanying notes 116-31 *supra*.

to eliminate many noncontroversial cases from the three-judge docket. But the principle is a volatile one that could easily get out of control. And an erroneous decision not to convene three judges requires the parties to start all over, after considerable delay often accompanied by frustration of a state or federal program.

#### IV. APPELLATE REVIEW IN THREE-JUDGE CASES.

The Idlewild Bon Voyage Liquor Corporation, believing that New York statutes could not constitutionally be applied to its liquor sales for delivery to international airline passengers outside the United States, filed suit for an injunction in the federal district court. A single judge abstained pending state court interpretation of the state statutes, and Idlewild filed an appeal in the Court of Appeals for the Second Circuit. That court decided that the single judge lacked power under section 2281 to make this disposition. But it did not reverse the judgment and order a three-judge court to be convened. It dismissed the appeal for want of its own jurisdiction.<sup>335</sup>

Judge Lumbard loudly dissented. "Jurisdictional questions are surely not beyond the scope of this court's authority. We are often called upon to decide whether diversity jurisdiction was properly exercised by a district court, although in deciding that it was not we must vacate the decision below and oust ourselves of jurisdiction to go any further."<sup>336</sup> Idlewild returned to the district court and again asked for three judges. That court, taking the court of appeals at its word, dismissed as "dictum" the clear holding that one judge lacked power to abstain and sweetly refused to change its decision.<sup>337</sup> Idlewild petitioned the Supreme Court for both certiorari and mandamus to review the decisions of both courts, and the district court was reversed: "The Court of Appeals clearly stated its opinion that a court of three judges ought to have been convened to consider this litigation. That view was correct and should have been followed."<sup>338</sup>

Yes, the district judge lacked power to abstain. But did the court of appeals lack jurisdiction of the appeal, as it held?

The courts of appeals are given jurisdiction to review all district court final decisions, or interlocutory orders granting or denying injunctions, "except where a direct review may be had in the Supreme Court."<sup>339</sup> The exception relevant here is that "any party may appeal to

<sup>335</sup> *Idlewild Bon Voyage Liquor Corp. v. Rohan*, 188 F. Supp. 434 (S.D.N.Y. 1960), *appeal dismissed*, 289 F.2d 426 (2d Cir. 1961).

<sup>336</sup> *Id.* at 432.

<sup>337</sup> 194 F. Supp. 3 (S.D.N.Y. 1961).

<sup>338</sup> 370 U.S. 713, 716 (1962).

<sup>339</sup> 28 U.S.C. §§ 1291, 1292(a) (1958).

the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."<sup>340</sup> *Idlewild* was such a case, and the court of appeals thought the effect of the abstention order was to deny, at least for a time, the injunction. It should follow that the company had a right to appeal directly to the Supreme Court and therefore not to the court of appeals. For although the court of appeals usually has power to vacate district court decisions rendered without jurisdiction, the three-judge appeal statute is phrased differently; the jurisdiction of the court of appeals is based not upon the issuance of a judgment below but upon the existence of a case for one and not three judges.

But the Supreme Court has made it quite clear that one cannot appeal to the Supreme Court either if a district judge has acted where three were required. "The statute plainly contemplates such a direct appeal only in the case of an order or decree entered by a court composed of three judges."<sup>341</sup> The statute does not seem to say so at all. But if this is what it means it should follow that there is jurisdiction in the court of appeals, for the statutes certainly contemplate that every decision of a district court may be appealed to one court or to the other. The court of appeals may review "interlocutory orders of the district courts . . . refusing . . . injunctions, except where a direct review may be had in the Supreme Court." No direct review may be had; therefore the court of appeals has jurisdiction.

In holding to the contrary the Second Circuit in *Idlewild* was relying upon rather explicit language in the Supreme Court's decision in *Stratton v. St. Louis S. W. Ry.*<sup>342</sup> There a single judge had dismissed an injunction suit on the merits and had been reversed on the merits by a circuit court of appeals. The Supreme Court denied that it could have reviewed the judge's order directly and continued: "Nor does an appeal lie to the Circuit Court of Appeals . . . for to sustain a review upon such an appeal would defeat the purpose of the statute by substituting a decree by a single judge and an appeal to the Circuit Court of Appeals for a decree by three judges and a direct appeal to this Court."

This, thought the Second Circuit in *Idlewild*, was determinative. The proper remedy when a single judge has exceeded his power, as the Court said in *Stratton*, was to seek mandamus from the Supreme Court to require the special court to be convened. Judge Lumbard, however,

<sup>340</sup> 28 U.S.C. § 1253.

<sup>341</sup> *Stratton v. St. Louis S.W. Ry.*, 282 U.S. 10, 16 (1930).

<sup>342</sup> *Id.* at 16.

termed the language of *Stratton* "dictum" and argued that the case was distinguishable: "The Supreme Court in *Stratton* was concerned with the effects of appellate review of the *merits* of an unauthorized order entered by a single district judge and did not proscribe ordinary review of matters going to the jurisdiction of the single district judge if his order is otherwise appealable."<sup>343</sup> This is true; the Circuit Court in *Stratton* had not held the district court to be without jurisdiction but had ordered it to enter an injunction. The holding of *Stratton* was that the court of appeals lacked power to make this decision.<sup>344</sup> But the opinion in *Stratton* left no doubt as to what the Court thought was the proper remedy for a trial judge's excess of power: not an appeal to the circuit court on jurisdictional grounds but a petition for mandamus in the Supreme Court.

The Supreme Court in *Idlewild* accepted Judge Lumbard's reading of *Stratton* as denying the circuit court's power to review the merits. Then the Court said, "*Stratton* does not stand for the broad proposition that a court of appeals is powerless ever to give any guidance when a single judge has erroneously invaded the province of a three-judge court."<sup>345</sup> But, having distinguished *Stratton*, the Court did not go on to set at rest the jurisdictional notion of the court of appeals. The district court should have followed the decision that one judge lacked power to abstain, said the Court, because that decision was "correct." That is not why district courts must follow decisions by courts with jurisdiction to reverse them. So, despite the chilly treatment of *Stratton*, those who argue that *Idlewild* establishes the power of the court of appeals to review the jurisdiction of a single judge<sup>346</sup> are too eager. The opinion seems to go out of its way to avoid deciding the question.

But the Supreme Court's reflections upon the *Stratton* dictum are even less persuasive evidence than this that the Second Circuit's opinion was disapproved. All the Court said was that *Stratton* did not hold a court of appeals "powerless ever to give any guidance when a single judge has erroneously invaded the province of a three-judge court." This much was admitted by the court of appeals in *Idlewild*, in a strange

<sup>343</sup> 289 F.2d at 432.

<sup>344</sup> Moreover, the reasoning of *Stratton* is inapposite in *Idlewild*: An appeal to the court of appeals on the correctness of the trial judge's decision not to call three judges would not substitute "a decree by a single judge and an appeal to the Circuit Court of Appeals for a decree by three judges and a direct appeal."

<sup>345</sup> 370 U.S. at 716.

<sup>346</sup> See *Svejkovsky v. Tamm*, 326 F.2d 657, 658 (D.C. Cir. 1963); Note, 77 HARV. L. REV. 299, 310 (1963); Note, 49 VA. L. REV. 538, 563-64 (1963); Comment, 61 MICH. L. REV. 1528, 1542-44, (1963), which recognized that *Idlewild* "did not completely overrule the *Stratton* case." WRIGHT, FEDERAL COURTS 167 (1963), is properly skeptical.

passage that renders its opinion even more weird than has already appeared. Less than one year before *Idlewild*, the Second Circuit had decided a case entitled *Bell v. Waterfront Comm'n*,<sup>347</sup> in which it had upheld a dismissal by one judge of a case otherwise appropriate for three judges, on the ground that there was no substantial constitutional question and therefore no federal jurisdiction. There the court had noted, with clear approval, a number of decisions assuming, and some stating, that "the courts of appeals may review the action of a district judge dismissing, for lack of a substantial federal question, a complaint that would require a three-judge court if the constitutional claim were substantial." Such decisions, the court continued, "necessarily hold that the appeal is not from 'an order denying an injunction in any civil action, suit or proceeding required by any act of Congress to be heard and determined by a district court of three judges'; for if it were, § 1253 would provide a direct appeal to the Supreme Court and review by the court of appeals would be excluded, § 1291."<sup>348</sup> One might be tempted to suggest that *Bell* established the principle that the court of appeals may review the correctness of a single judge's refusal to convene a three-judge court, and to set aside his order and demand a special court be convened if it finds error. And it was just this that was denied in *Idlewild*.

But the Second Circuit purported to distinguish, not to overrule, *Bell*. In *Bell*, said *Idlewild*, "we first found that the district court could determine the preliminary question of whether there was a substantial federal question to be adjudicated upon, and therefore the court of appeals had jurisdiction to review that preliminary determination." In *Idlewild*, on the other hand, it was held that the district court lacked "power to determine a jurisdictional question"—whether to abstain—and therefore the court of appeals had no jurisdiction to review his decision. A distinction was thus drawn between erroneous decisions not to convene a special court, when the judge has jurisdiction to decide the question, and decisions which, right or wrong, it is not within the single judge's power to make. One judge may decide whether there is a substantial constitutional question, so the court of appeals may reverse him if he wrongly says no; he may not decide whether to abstain, or decide the merits, and the court of appeals may not reverse him if he does so.<sup>349</sup>

<sup>347</sup> 279 F.2d 853 (2d Cir. 1960).

<sup>348</sup> *Id.* at 858. It is true that the court in *Bell* found the district judge to have been correct in refusing to convene a special court, as was the case in all the decisions cited to support appellate jurisdiction. But this was not made the basis of appellate jurisdiction, as it was in *Idlewild*.

<sup>349</sup> See *Wicks v. Southern Pac. Co.*, 231 F.2d 130, 134-5, (9th Cir. 1956): "It is only

Finally, the per curiam opinion of the Supreme Court in *Idlewild* was rendered without dissent. This is significant in assessing its impact on the Second Circuit's decision because Justice Stewart, who did not register disapproval of the Court's opinion, had written an opinion while a circuit judge that had foreshadowed the Second Circuit decision. The issue was again abstention. Wrote Judge Stewart: "Were we to agree with the appellant's position that a court of three judges should have been convened, it would be our duty now to dismiss the appeal for want of jurisdiction. . . . *Stratton v. St. Louis S. W. Ry.*"<sup>350</sup> This is not to say that every Justice of the Supreme Court always endorses every statement in its per curiam opinions, or that Mr. Justice Stewart might not have changed his mind in the meanwhile, but it casts additional doubt upon the already questionable effect of the Supreme Court's opinion on the jurisdictional decision of the Second Circuit.

The extraordinary opinion of the court of appeals cried out for comment; yet the Court inexcusably, and it seems deliberately, muffed the opportunity to set it straight. What considerations should determine appellate review of the decision to convene or not to convene three judges?

If three judges are erroneously convened, no one is hurt; there is no necessity, and no provision, for an interlocutory review of the decision. After an injunction is granted (or denied, under present law), the losing party may appeal directly to the Supreme Court on the merits; if there was no need for three judges the appeal should be transferred, as in substance is the result now, to the court of appeals.<sup>351</sup> But when a request for three judges is erroneously denied there is need for immediate review to protect the right of the state or federal government to the special court. Therefore a special provision should be made

---

where a single district judge decides that a complaint raises a substantial constitutional issue and proceeds to decide that issue on its merits, that he acts without jurisdiction. The remedy for such action is to seek mandamus from the Supreme Court to compel the convening of a three-judge court . . . ." But where the question is "whether the district court correctly decided that there was no substantial constitutional issue raised," the court of appeals does have jurisdiction.

<sup>350</sup> *Chicago, Duluth & Georgian Bay Transit Co. v. Nims*, 252 F.2d 317, 319 (6th Cir. 1958).

<sup>351</sup> Unless a precautionary appeal has been filed in the court of appeals, the Supreme Court's practice has been to vacate the district court judgment to permit entry of a new judgment from which a timely appeal may be taken to the court of appeals. See *Phillips v. United States*, 312 U.S. 246 (1941). This requires an undesirable trip back to the trial court, and the statute should be made simpler. I see no basis for the suggestion, noted in *Swift & Co. v. Wickham*, 230 F. Supp. 398, 410 n.10 (S.D.N.Y. 1964), that the judgment should be set aside if rendered over the dissent of the judge to whom the application was first presented. Nothing in the statutes forbids three judges to participate in a case one could decide.

for review of single-judge decisions refusing to convene three-judge courts, and of three-judge decisions dissolving them. The question posed by *Idlewild* is whether such review should be in the courts of appeals or in the Supreme Court.

The appellate procedures provided by sections 1253 and 1291 were obviously designed with appeals on the merits in mind, and bear no relation to the considerations relevant to appeals from decisions refusing to convene three judges. No one has suggested that the language of the statutes should be strictly followed as to such appeals. This would, as said before, make the jurisdiction of the courts of appeals dependent upon the correctness of the decision below. As in *Idlewild* itself, this would entail a colossal waste of effort. Having determined that three judges were required, the court had to refuse to say so. This is not only not required by the policy underlying direct appeals in three-judge cases; it is squarely contrary to that policy. Direct appeals are allowed on the merits because to permit review of the merits by the courts of appeals would delay the ultimate decision of important cases requiring expedition.<sup>352</sup> But once the court of appeals has determined that three judges should have sat, it does not expedite matters to forbid it to order three to sit. Quite the opposite; if thereafter a petition for mandamus must be filed in the Supreme Court in order to set the proper machinery in motion, it is that much longer before the special court will meet and the direct appeal on the merits can be taken. Moreover, the Supreme Court has not adhered to the literal command of the statutes when confronted with the converse cases in which three judges were erroneously convened.<sup>353</sup> For the Supreme Court has jurisdiction only if the case was in fact required to be heard by three judges; if the statutes are read literally, it should be powerless to pass upon the correctness of the decision to call three judges if it decides that decision was incorrect. The Court does refuse to deal with the merits, just as *Stratton* forbade the courts of appeals to do if three judges should have been called. However, four months before its decision in *Idlewild* the Supreme Court decided *Bailey v. Patterson*, in which it held itself without jurisdiction to review the merits of a three-judge court order of abstention because the case was not one for three judges. But the Court did not dismiss the appeal. "We have jurisdiction," said the Court, "to determine the authority of the court below and 'to make such corrective order as may

<sup>352</sup> But if the trial judge has decided the merits, three-judge policy is not served by sending the case back for a new trial by three judges. See text accompanying notes 375-76 *infra*.

<sup>353</sup> Nor in dealing with the merits, as I have already shown, in *Stratton* itself. See text accompanying notes 340-42 *supra*.



be appropriate to the enforcement of the limitations which that section imposes.'"<sup>354</sup> It is not and should not be the case that jurisdiction to review the decision to convene or not to convene three judges is always dependent upon the correctness of the decision under review.

The Second Circuit's halfway answer in *Bell* and *Idlewild* has nothing whatever to recommend it. It combines the undesirable features of the literal construction, operating to delay rather than to expedite ultimate decision of the merits, with a completely untenable distinction between errors by the trial judge on questions within his jurisdiction to resolve, on the one hand, and his decisions on matters beyond his jurisdiction.

This is an awkward distinction that makes no sense at all in terms of the purposes of the three-judge law. Both in *Bell* and in *Idlewild* a single judge had in substance refused a request to assemble three judges. If he was wrong in this, it was important in both cases that the error be corrected expeditiously so that the proper court might be convened. Whether the error was in deciding there was no substantial question or in deciding that he had power to decide whether to abstain, has nothing to do with the advisability of an appeal to the court of appeals as opposed to mandamus to correct the error.

Nor is there support for the distinction between *Bell* and *Idlewild* in the strange language of the appeal statutes. The Supreme Court is given jurisdiction over orders denying injunctions—as both abstention and dismissal for want of jurisdiction unquestionably do—“in any civil action, suit or proceeding required by any act of Congress to be heard and determined by a district court of three judges.” If *Bell* was not such a proceeding, this was because the trial judge was right that there was no substantial federal question, not because he had power to decide whether or not there was a substantial question. If one were to follow the statutory language, one would be forced to conclude in *Bell* as in *Idlewild* that the court of appeals lacked jurisdiction whenever in fact the suit ought to have been heard by three judges. *Idlewild* alters this language; the court of appeals has

no jurisdiction over any matter properly entertainable by a three-judge district court. . . . No appeal may be preferred to a court of appeals from an action taken by a district judge upon an application to convene a three-judge district court unless

<sup>354</sup> 369 U.S. 31, 34 (1962). The Court went much too far in *Bailey*. It did not vacate the judgment below for lack of jurisdiction, as indeed there is no lack of jurisdiction in three judges to act where one is sufficient. Rather the Court vacated the judgment and remanded the case “for expeditious disposition, in light of this opinion, of the appellants’ claims of right to unsegregated transportation service.” In other words, the decision to abstain was erroneous and was reversed, although the Court’s power presumably was limited to determining whether the trial court had jurisdiction.

there first was jurisdiction in the district court over the subject matter ruled upon.<sup>355</sup>

Finally, the Second Circuit in *Idlewild* was wrong even on its own test, for the single judge had jurisdiction to determine his own jurisdiction. Though the court of appeals held it had no jurisdiction to review the correctness of the abstention order, it had jurisdiction to review his decision that he had power to decide whether or not to abstain.<sup>356</sup>

If the Court's treatment of *Stratton* means that the court of appeals was wrong in *Idlewild*, the problem of appeals is greatly simplified. If one judge has acted, questions of his power should be taken to the court of appeals. If three have acted, the Supreme Court has repeatedly held it cannot review the merits, but it has clarified the jurisdictional question and sent the case back so that an appeal on the merits may be taken to the court of appeals. This is to make jurisdiction to determine jurisdiction of one or three judges depend, not upon whether the case should have been heard by three judges, as the statutory language implies, but upon whether one or three judges in fact sat. This is comprehensible, simple, and efficient, and a vast improvement over the Second Circuit's position.

But whether one judge or three heard the case has little to do with the need for expedition by direct appeal on jurisdiction. Should not all questions of the propriety of three judges be referred to the same court?<sup>357</sup> The discrepancy in treatment, however, arises because there is no need for review at all if the trial judge decides three judges are necessary. The only question concerns the Supreme Court's jurisdiction, which it always determines itself. The true thrust of *Stratton* was that the Supreme Court should also decide at once whether it was error to refuse three judges. But I see no reason why the courts of appeals, which sit in panels of three, should not be trusted to safeguard the Government's right to a special trial court.

This raises the general question whether, accepting the continued desirability of the three-judge court, the direct appeal ought to be retained. In my view the appeal imposes a more serious burden than the three-judge court itself.<sup>358</sup> It is no news that the Supreme Court is

<sup>355</sup> 289 F.2d at 428, 429.

<sup>356</sup> Cf. *General Elec. Co. v. Callahan*, 294 F.2d 60, 65 (5th Cir. 1961): "The district judge before whom a complaint is presented must decide in the first instance whether it is one that requires the convening of a three-judge court. And if he errs in ruling that it does not then certainly appeal lies to the appropriate court of appeals."

<sup>357</sup> See Comment, 27 U. CHI. L. REV. 555, 568-69 (1960).

<sup>358</sup> *Accord, Id.* at 564.

busy.<sup>359</sup> More than 2000 cases reach the Court now each year.<sup>360</sup> Of these the Court disposes of about 130 by full opinion annually.<sup>361</sup> The certiorari policy wisely leaves it to the Court to determine which of the far-too-numerous cases shall be once more reviewed. The various provisions for mandatory Supreme Court jurisdiction run counter to that policy, presumably because of Congress' determination that certain classes of cases are important enough that Supreme Court review should not depend upon the Supreme Court's consent.<sup>362</sup>

Congress is not as well equipped as the Court to determine in which cases or classes of cases there should be mandatory review. While Congress may properly ask the courts to provide a forum to air grievances that it is in a position to sense, in so doing it must act prospectively and generally. It must estimate the significance of cases by broad categories, necessarily a rough measure, while the Court may make more accurate case-by-case decisions as to significance.<sup>363</sup> The Court can be trusted to find the important cases. Its limited time, therefore, is more efficiently used if it is given discretion to decide which cases to review. This is well illustrated by the provision for Supreme Court review by three-judge-court decisions in constitutional cases. Congress was right that the Court should hear cases like *Brown v. Board of Education* and *Baker v. Carr*, but there is no need for an appeal statute here, for these cases would be heard anyway.<sup>364</sup> The Court should not, however, be burdened with deciding questions of limited import, such as whether—to use a prior example—there was justification for ordering a railroad to build a warehouse spur at Smyrna, Georgia.<sup>365</sup>

When the Court is required to deal with unimportant cases, as Mr.

<sup>359</sup> See FREUND, *THE SUPREME COURT OF THE UNITED STATES* 15-16 (1961); HART, *Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959).

<sup>360</sup> See, e.g., Note, *The Supreme Court, 1962 Term*, 77 HARV. L. REV. 62, 90 (1963).

<sup>361</sup> *Ibid.*

<sup>362</sup> See *Hearings Before the Committee on the Judiciary* on S. 2176, 74th Cong., 1st Sess. 20 (1935) (Senator Black).

<sup>363</sup> See Comment, 27 U. CHI. L. REV. 555, 566 (1960).

<sup>364</sup> *Ibid.*

<sup>365</sup> Practical realities—the pressure of the crowded docket—have also rendered less than successful Congress' attempts to require the Supreme Court to hear appeals. It has often been observed that the dismissal of an appeal, technically an adjudication of the merits, is in practice often the substantial equivalent of a denial of certiorari. See FREUND, *THE SUPREME COURT OF THE UNITED STATES* 14 (1961); STERN & GRESSMAN, *SUPREME COURT PRACTICE* §§ 4-28, 4-29 (3d ed. 1962); Frankfurter & Landis, *The Business of the Supreme Court at October Term, 1929*, 44 HARV. L. REV. 1, 12-14 (1930). When the device of dismissal cannot be resorted to, or, often as an alternative to dismissal, the Court affirms or reverses by memorandum opinion—a practice that has been justly criticized as revealing insufficient deliberation and affording inadequate guidance as precedent. See Brown, *Process of Law*, 72 HARV. L. REV. 77-82, 94-95 (1958).

Justice Harlan has pointed out in connection with direct appeals in antitrust cases, it does so "often either at the unnecessary expenditure of its own time or at the risk of inadequate appellate review if a summary disposition of the appeal is made."<sup>366</sup> This problem is accentuated in cases of direct review of district court decisions, for inadequate consideration by the Supreme Court then means no adequate review by any appellate court.<sup>367</sup>

On the other hand, whatever need there was for a direct appeal to avoid abuse of the injunction in 1910 and 1937 seems still to exist. Race-relations and reapportionment cases, in particular, have caused a good deal of friction between the states and the courts. Without the appeal, the three-judge statute provides some protection; three judges are less likely than one to block a legislative program erroneously. But they may, and the most effective way to correct such a mistake quickly is direct review. Speed, rather than the safeguard of three judges, was emphasized in arguments for the Expediting Act of 1903,<sup>368</sup> which the state-law section copied, and for the 1937 bill extending the procedure to suits against federal laws.<sup>369</sup>

Despite the burden on the Supreme Court, therefore, Congress might be unwilling even now to abolish the direct appeal in three-judge cases.<sup>370</sup> But that appeal under present law goes beyond the demands

<sup>366</sup> *Brown Shoe Co. v. United States*, 370 U.S. 294, 365 (1962) (concurring in part and dissenting in part).

<sup>367</sup> Appeals as of right from the courts of appeals or the state supreme courts ought to be abolished outright. Direct appeals from district courts are more troublesome; simply to give the Court discretion to refuse such appeals would be contrary to the long-time and salutary tradition that every litigant in the federal trial courts is entitled to one appeal as of right. The answer to direct appeal in ICC cases is easy. Review of ICC orders, as of other administrative orders, ought to be in the courts of appeals, with discretionary certiorari thereafter. It would be hard to argue that individual railroad orders today are so important as to require a hearing by the Supreme Court. As for government civil antitrust cases, Mr. Justice Harlan's answer is persuasive: "The legal issues in most civil antitrust cases are no longer so novel or unsettled as to make them especially appropriate for initial appellate consideration by this Court, as compared with those in a variety of other areas of federal law." *Brown Shoe Co. v. United States*, *supra* note 367, at 364. Therefore, normal appeal should be provided to the courts of appeals, with subsequent certiorari.

<sup>368</sup> This dealt with antitrust and railroad cases. See 36 CONG. REC. 1679 (1903) (Remarks of Senator Fairbanks).

<sup>369</sup> See 81 CONG. REC. 8703 (1937) (Remarks of Representatives May and Summers). The contemporaneous provision for direct appeal from decisions by single judges holding Acts of Congress invalid further emphasizes Congress' concern with expedition, but is not very persuasive as to the importance of expediting three-judge cases. For speed in correcting abuse may be less necessary when the initial decision is rendered by a court specially designed to avoid abuse. The debates in 1910 were not much concerned with the direct appeal.

<sup>370</sup> Abolition of direct appeal is advocated in Comment, 72 YALE L.J. 1646, 1657 & n.61 (1963).

of its generating policy. The losing party may appeal whether the injunction is granted or denied, and whether granted on constitutional or other grounds. Yet the purpose of the special appeal is to limit the duration of an erroneous suspension of legislation on constitutional grounds. The sole reason I can see for permitting direct appeals beyond this is the desire to avoid the incongruity of three judges reviewing three judges. But this happens now whenever a three-judge panel is wrongly called together,<sup>371</sup> and the incongruity does not seem so great as to justify the continued burden on the Supreme Court.

Without in the least impairing Congress' policy, therefore, the Court can be unburdened of a great many direct appeals. Direct appeals should be allowed only if an injunction is granted on grounds of unconstitutionality, or if an injunction pending appeal of a denial is entered. In other cases appeal should be to the courts of appeals, with discretionary certiorari thereafter.

#### V. THE "JURISDICTIONAL" NATURE OF THE REQUIREMENT.

*Kennedy v. Mendoza-Martinez* reached the Supreme Court three times. Mendoza was suing to recover his citizenship, on the ground that the statute taking it away was unconstitutional. He did not ask for three judges. Neither did the Attorney General. The case was tried three times by a single judge and his decision twice set aside. On the third appeal the Supreme Court on its own motion raised the question whether all along the case had not been one for three judges. Both parties objected. The Court was obviously reluctant to start the merry-go-round once more: "If § 2282 governs this litigation, we are once again faced with the prospect of a remand and a new trial, this time by a three-judge panel."<sup>372</sup> The Court was able to avoid this only by deciding, and I think wrongly, that three judges are not required in suits for declaratory judgments.

It has not always been possible to avoid new trials in such situations. In *Borden Co. v. Liddy*,<sup>373</sup> for example, the question of three judges was first raised by the court of appeals, and the case was sent back over the protests of both parties. The statutes seem to be written in jurisdictional terms: "An interlocutory or permanent injunction . . . shall not be granted by any district court or judge thereof unless the application

<sup>371</sup> See *Phillips v. United States*, 312 U.S. 246 (1941).

<sup>372</sup> 372 U.S. 144, 153 (1963). See *Marshall v. Sawyer*, 301 F.2d 639, 644 (9th Cir. 1962), where the plaintiff was permitted to raise the three-judge issue after oral argument in the court of appeals.

<sup>373</sup> 309 F.2d 871 (8th Cir. 1962). See also *Svejkovsky v. Tamm*, 326 F.2d 657, 658 (D.C. Cir. 1963), where the United States had procured a stay of proceedings from a single judge, and the Court of Appeals held such a stay beyond the judge's power.

therefor is heard and determined by a district court of three judges."<sup>374</sup> If read literally, this seems to demand the investigation undertaken by the Court in *Mendoza* and the result in *Liddy*.

This is the most obnoxious feature of the entire three-judge scheme. The three-judge statute was designed to protect the interest of the state or federal government. Like such procedural protections for defendants as the requirements of venue and personal jurisdiction, or jury trial, it should be waivable. No policy is served by forcing the Government to accept a protective device it does not want. Nor should the defendant be allowed to raise the three-judge issue on appeal; like other questions, this one should be raised at trial or forgotten, because there is an interest in finality of litigation. Moreover, *Liddy* subjects the state to far longer delay before a judgment on the merits by a dignified court than would the opposite rule. Once a single judge has already decided the case, it is certainly quicker to allow the court of appeals to review the merits than to require it to set aside the judgment for lack of jurisdiction, impanel a three-judge district court, and order a new trial—perhaps with a temporary restraining order still in force.<sup>375</sup>

If a request for three judges is rejected at trial, therefore, immediate review should be sought; if it is not sought, the court of appeals should consider the merits.<sup>376</sup> By considering the three-judge provisions for what they were—safeguards for the state and federal governments—the Court might easily have construed the statute as providing only that the defense is entitled to three judges if it makes a timely claim.<sup>377</sup> If the statute seems too clear to permit this construction, a good model for an amendment is at hand. The 1964 Civil Rights Act provides for three judges in certain cases when requested by the proper party before trial; if no request is made, the case is tried by one judge and his decision cannot later be impeached for want of power.<sup>378</sup>

<sup>374</sup> 28 U.S.C. §§ 2281, 2282 (1958).

<sup>375</sup> Cf. Comment, 27 U. CHI. L. REV. 555, 570 (1960).

<sup>376</sup> *Accord*, Note, 77 HARV. L. REV. 299, 310 (1963). Under present statutes a decision by the court of appeals that a single judge had erred in holding a federal or state law invalid would deprive the plaintiff of an appeal to the Supreme Court as of right, 28 U.S.C. § 1254, but that would be all to the good. See text accompanying notes 370-71 *supra*.

<sup>377</sup> The Ninth Circuit seems to have held the question of three judges must be raised before trial. *Carrigan v. California State Legislature*, 263 F.2d 560, 568 (9th Cir.), *cert. denied*, 359 U.S. 980 (1959), *Carrigan v. Sunland-Tujunga Tel. Co.*, 263 F.2d 568, 572 (9th Cir. 1959) (alternative holding).

<sup>378</sup> Act of July 2, 1964, §§ 101(d), 206(b), 707(b), 78 Stat. 241.

An occasional district judge has held he must dismiss requests for injunctions within §§ 2281 and 2282 unless the plaintiff requests a three-judge court. *Cities Service Oil Co. v. McLaughlin*, 189 F. Supp. 227, 228 (D.D.C. 1960); *Wreiole v. Waterfront Comm'n*, 132 F. Supp. 166, 168 (S.D.N.Y. 1955). This myth was exploded in *Aaron v. Cooper*, 261

## CONCLUSION

The existing three-judge statutes are in a mess. No one really knows when three judges are required. The *Phillips* and *Bransford* decisions, holding three judges not necessary when the policy under attack is that of an administrative officer and not of the legislature, *Kesler*, holding three judges necessary in supremacy clause cases unless there is an issue of statutory construction, and perhaps *Bailey v. Patterson*, holding one judge may act if the challenged statute is obviously invalid, all create unjustifiable uncertainty in the administration of sections 2281 and 2282 and should be overruled by statute. *Mendoza*, permitting the plaintiff to frustrate state or federal legislative policy without three judges by seeking a declaratory judgment, is wrong and should be changed. The rule that a single judge's decision must be set aside although neither party asked for three judges is wrong and should be changed. The power of a single judge to decide preliminary questions, and the uncertain and unsatisfactory situation with respect to appeals from decisions to convene or not to convene three judges, should be clarified and simplified. Direct appeals should be limited in accord with statutory purpose. When all this is done the three-judge law, while burdensome, will serve a useful purpose with a minimum of friction.

The following proposed statute incorporates these suggestions:

- a) A three-judge court shall be convened when:
  - 1) An action is filed seeking an injunction or declaratory judgment against a state or federal officer on the ground that his acts or threatened acts are contrary to the Constitution of the United States or, in the case of state officers, contrary to the laws or treaties of the United States; and
  - 2) The officer defends his action as authorized by a state statute of general applicability, or by a federal statute not limited in applicability to geographical areas of exclusive federal jurisdiction; and
  - 3) The officer files a request for three judges within ten days after the complaint is filed.
- b) If three judges are requested, the judge to whom the request is made may determine any questions preliminary to trial, and may

---

F.2d 97, 105 (8th Cir. 1958) (alternative holding), where the court pointed out that the statute required the judge to whom the application for injunction is presented to determine the need for three judges and to convene them if necessary. It is bad enough that the defendant is not required to look out for himself in asking for the protection of three judges; it would be far worse to throw the plaintiff out of court for failing to look after him.

enter a temporary restraining order. He may not enter an interlocutory or permanent injunction, or declaratory judgment of invalidity. Five days after the filing of the request for three judges, if the judge has not disposed of the case or decided that three judges are not required, he shall notify the chief judge of the circuit, who shall designate two additional judges, one of whom shall be a circuit judge.

- c) The courts of appeals shall have jurisdiction to review decisions of district courts denying requests for three-judge courts or dissolving such courts.
- d) If no request for three judges is made within ten days after the complaint is filed, or if no interlocutory appeal is taken from the trial judge's denial of such a request or from the dissolution of a three-judge court, the power of the district judge shall not thereafter be questioned, whether in the district court or on appeal, on the ground that three judges should have been convened.
- e) Decisions by three-judge courts holding the acts of federal officers contrary to the Constitution or the acts of state officers contrary to the Constitution, laws, or treaties of the United States, in cases required by this section to be heard by three judges, may be appealed to the Supreme Court. If the Supreme Court determines that three judges need not have been convened, it shall transfer the appeal to the appropriate court of appeals.