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NOTES

THREE-JUDGE DISTRICT COURTS: SOME PROBLEMS AND A PROPOSAL

Before a federal district court can grant an injunction against the enforcement of a state¹ or federal² statute³ on the ground that the statute is unconstitutional, the case must be heard and determined by a three-judge district court.⁴ The unfortunate draftsmanship⁵ of the three-judge court statutes and the judicial gloss on those statutes have often caused confusion and delay because of the difficulty of determining whether a three-judge court is required in any given case.⁶

¹ Section 2281 of the Judiciary and Judicial Procedure Act provides:

Injunction against enforcement of State statute; three-judge court required.

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 therefor is heard and determined by a district court of three judges under section 2284 of this title.

28 U.S.C. § 2281 (1964).

² Section 2282 of the Judiciary and Judicial Procedure Act states:

Injunction against enforcement of Federal statute; three-judge court required.

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.

28 U.S.C. § 2282 (1964).

³ Also, in the case of the states, "an order made by an administrative board or commission acting under State statutes . . ." 28 U.S.C. § 2281 (1964).

⁴ The composition and procedure of three-judge district courts is described at length in 28 U.S.C. § 2284 (1964).

⁵ Section 2281 has been described as "long-winded, repetitive, and sloppy in draftsmanship." Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1, 12 (1964).

⁶ For example, consider the *Tureaud* cases. Before the Supreme Court's decision in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), Mr. Tureaud sought an injunction compelling his admission to an all-white state college in Louisiana on the ground that colleges open to Negroes were not equal to white colleges as required by *Plessy v. Ferguson*, 163 U.S. 537 (1896). A single district judge granted the injunction. In *Bd. of Supervisors v. Tureaud*, 207 F.2d 807 (5th Cir. 1953), *vacated per curiam*, 347 U.S. 971 (1954), the Fifth Circuit reversed, holding that the case was one for a three-judge court. Judge Rives dissented on the apparently correct ground that the Louisiana statute requiring segregation was constitutional (under *Plessy v. Ferguson*) and that all that had been litigated was the fact question of whether the schools available for Negroes were equal to white schools.

Brown v. Board of Education was then decided. The Supreme Court vacated the *Tureaud* judgment and remanded "for consideration in the light of . . . *Brown v. Board*

Although it has been persuasively argued that the three-judge court system has outlived its usefulness,⁷ Congress has shown no inclination to dispense with such courts in constitutional cases.⁸

Conceptualistic niceties and procedural quibbles have muddled the guidelines for determining when a three-judge court is needed. In particular, the doctrine that a three-judge court is not required to enjoin enforcement of a statute which is "clearly unconstitutional"⁹ or to refuse to enjoin a statute which is "clearly constitutional"¹⁰ has introduced an additional issue into much constitutional litigation. The rule that a single district judge may enjoin the enforcement of a state statute that is of only local applicability has generated needless uncertainty.¹¹ Furthermore, procedures concerning the convening of three-judge courts and the review of their decisions (as well as the review of decisions *not* to convene) have troubled courts and litigants.

The rules concerning three-judge court jurisdiction are the result of a compromise between the desire to have certain cases receive the deliberation of three judges and the need to use judicial manpower efficiently. By revising the method of trial of three-judge cases to give a single judge greater powers and by reforming the system of appellate review of three-judge court decisions, the use of such courts can be

of Education . . . and conditions that now prevail." 347 U.S. at 971. Again, a single district judge issued an injunction. In *Bd. of Supervisors v. Tureaud*, 225 F.2d 434 (5th Cir. 1955), the court of appeals affirmed. The court then granted a rehearing, and in *Bd. of Supervisors v. Tureaud*, 226 F.2d 714 (5th Cir. 1955), set aside its previous decision; but on rehearing the case en banc the Fifth Circuit reinstated the original judgment. *Bd. of Supervisors v. Tureaud*, 228 F.2d 895 (5th Cir.), *cert. denied*, 351 U.S. 924 (1956). In view of the lapse of nearly three years between the first and last opinions in the case by the court of appeals, there is a certain irony in Judge Cameron's dissenting wail that "[d]elusively interests of haste should not be permitted to obscure substantial requirements of orderly procedure." 228 F.2d at 901, quoting *Duke Power Co. v. Greenwood County*, 229 U.S. 259, 268 (1936).

⁷ See Comment, *The Three-Judge Federal Court in Constitutional Litigation: A Procedural Anachronism*, 27 U. CHI. L. REV. 555, 563-71 (1960). *Contra*, Note, *The Three-Judge District Court: Scope and Procedure Under Section 2281*, 77 HARV. L. REV. 299, 301-06 (1963).

⁸ Indeed, two new classes of three-judge court cases were added by the 1964 Civil Rights Act. 42 U.S.C. § 1971(g) (Supp. III 1967) provides for three-judge determination of voting rights cases at the request of the Attorney General or any defendant. 42 U.S.C. § 2000a-5(b) (1964) provides for three-judge courts in public accommodations cases if the Attorney General certifies that the case is one of "general public importance." *But cf.* S. 2687, 90th Cong., 1st Sess. (1967), which would have made orders of the Interstate Commerce Commission reviewable in the courts of appeals rather than by three-judge district courts.

⁹ See *Bailey v. Patterson*, 369 U.S. 31 (1962).

¹⁰ See *Ex parte Poresky*, 290 U.S. 30 (1933).

¹¹ See text accompanying notes 42-50 *infra*.

made more efficient. As a result, clearer lines can be drawn to define three-judge court jurisdiction.

I

THE JURISDICTION OF THREE-JUDGE COURTS

In *Ex parte Young*¹² the Supreme Court emasculated the eleventh amendment¹³ by holding that a federal court could enjoin the enforcement of an unconstitutional state statute. In 1910, two years after the *Young* decision, Congress enacted legislation providing that an interlocutory injunction against the enforcement of a state statute could be issued only by a three-judge district court.¹⁴ The purpose of the act was two-fold: first, to assuage injury to state sensibilities by requiring that a tribunal more impressive than a single judge be convened before state legislation is declared unconstitutional; second, to ensure that the drastic remedy of an injunction is not imposed without adequate deliberation.¹⁵ In 1937, congressional concern over judicial destruction of the New Deal led to legislation requiring three-judge courts in suits to enjoin federal legislation.¹⁶ In order to expedite important cases, Congress provided for direct appeal as of right to the Supreme Court from the decision of a three-judge court.¹⁷

A. "Clearly Constitutional" and "Clearly Unconstitutional" Statutes

Arguably nothing in the three-judge court statutes prevents a single judge from dismissing a claim on the merits,¹⁸ but it has always been held that such action cannot be taken.¹⁹ A single judge can, how-

¹² 209 U.S. 123 (1908).

¹³ U.S. CONST. amend. XI bars a suit against a state by a citizen of another state in a federal court. On its face, the amendment does not seem to bar a suit against a state by its own citizens, but in *Hans v. Louisiana*, 134 U.S. 1 (1890), the Supreme Court held that such a suit cannot be maintained.

¹⁴ Act of June 18, 1910, ch. 309, § 17, 36 Stat. 557. The present provisions are 28 U.S.C. §§ 2281, 2284 (1964).

¹⁵ For a brief discussion of the history and policies of the three-judge court statutes see Currie, *supra* note 5, at 3-12.

¹⁶ Act of Aug. 24, 1937, ch. 754, 50 Stat. 782. The present provision is 28 U.S.C. § 2282 (1964).

¹⁷ 28 U.S.C. § 1253 (1964).

¹⁸ The statutes say only that an injunction "shall not be granted" except by a three-judge court. *But see* note 19 *infra*.

¹⁹ *See, e.g., Ex parte Metropolitan Water Co.*, 220 U.S. 539 (1911). Professor Currie points out that "[s]ections 2281 and 2282 provide only that an injunction shall not be 'granted' by a single judge," and he implies that the *Metropolitan Water Co.* case held contrary to the statutory language. Currie, *supra* note 5, at 20. However, Title 28 was not

ever, dismiss a complaint for lack of federal jurisdiction. Thus it was held in *Ex parte Poresky*²⁰ that if a claim of unconstitutionality is "insubstantial," a single district judge may dismiss for lack of federal jurisdiction.²¹ The problem of whether an allegation of unconstitutionality is "substantial" has often provoked litigation.²² The Supreme Court's penchant for overruling its previous decisions²³ often renders doubtful an assertion that a statute is clearly constitutional—particularly if the statute might be thought of as restricting Bill of Rights or fourteenth amendment freedoms.

Relying on *Poresky*, the Supreme Court held in *Bailey v. Patterson*²⁴ that the requirement of a substantial constitutional question means that a three-judge court is not required in order to enjoin the enforcement of a clearly unconstitutional statute. The Court brushed aside the applicable statutory language and based its decision on the ground that the policy behind the three-judge requirement did not necessitate such courts "when the constitutional issue presented is essentially fictitious."²⁵ Whether the *Bailey* rule can be justified in light of the language of section 2281 seems quite doubtful. The result can perhaps be explained as an example of the Supreme Court's hostility toward the three-judge court statutes—an attitude shown by its frequent citation to Mr. Justice Frankfurter's dictum in *Phillips v.*

law in 1911. Act of March 3, 1911, ch. 321, § 266, 36 Stat. 1162 contained, in substance, what are now § 2281 and § 2284 without the language of § 2284 that requires a three-judge court to be convened "[i]n any action required . . . to be heard and determined by a district court of three judges . . ." The 1911 Act provided instead that a three-judge court be convened upon the *application* for an injunction. Thus the Court's holding in *Metropolitan Water Co.* was supported by the language of the statute. Note that Title 28 is now positive law; the situation illustrates the change in the meaning of a statute which can accompany its codification.

²⁰ 290 U.S. 30 (1933).

²¹ *Id.* at 31-32. If the statute in question is constitutional, the eleventh amendment or *Hans v. Louisiana*, 134 U.S. 1 (1890), prohibits enjoining its enforcement on other grounds. See note 13 *supra*. Thus lack of a substantial constitutional challenge is equivalent to lack of federal jurisdiction. One "exception" may be federal pre-emption cases, which are not constitutional cases in the sense that they require three-judge courts. *Swift & Co. v. Wickham*, 382 U.S. 111 (1965).

²² Some recent cases are: *Kramer v. Union Free Sch. Dist. No. 15*, 379 F.2d 491 (2d Cir. 1967); *Stamler v. Willis*, 371 F.2d 413 (7th Cir. 1966); *Reed Enterprises v. Corcoran*, 354 F.2d 519 (D.C. Cir. 1965).

²³ Compare *Afroyim v. Rusk*, 387 U.S. 253 (1967), with *Perez v. Brownell*, 356 U.S. 44 (1958).

²⁴ 369 U.S. 31 (1962).

²⁵ *Id.* at 33. The statutes do not say that the constitutional issue must be substantial. Although *Poresky* may be justified on the theory that there is no ground of unconstitutionality when the statute is patently constitutional, *Bailey* is a clear case of "judicial wizardry." 50 CALIF. L. REV. 728, 730 (1962).

*United States*²⁶ describing the predecessor of section 2281 as "not . . . a measure of broad social policy to be construed with great liberality, but . . . an enactment technical in the strict sense of the term and to be applied as such."²⁷ The reason for such an attitude is undoubtedly the direct appeal as of right to the Supreme Court of three-judge court decisions.

As a result of *Poresky* and *Bailey*, a district court faced with an application for an injunction against the enforcement of a statute²⁸ on constitutional grounds is faced with the threshold issue of whether the statute lies somewhere between clear constitutionality and clear unconstitutionality. The question is one of degree, "of drawing a line where no important distinction can be seen between the nearest points on the two sides, but where the distinction between the extremes is plain."²⁹ The Court has attempted to prescribe the method for finding a lack of a substantial federal question,³⁰ but the matter is ultimately one of the opinion of the judge involved: what is clearly constitutional to a district judge may well present a substantial constitutional question to the court of appeals that reviews his decision³¹—even though all the judges might agree on the merits that the statute concerned is constitutional. The delay occasioned by the rule is apparent. Suppose a federal judge dismisses a complaint on the ground that the statute is clearly constitutional. The court of appeals in reviewing the dismissal cannot decide the constitutional issues—it can decide only if those issues are substantial, and if it finds that they are, a three-judge court must be convened to decide those issues.

The uncertainty caused by the presence of an issue that would not have to be determined to decide the case on the merits is a powerful argument for the position that all cases within the literal terms of sections 2281 and 2282 should be determined by three-judge courts, but there are compelling arguments to the contrary. Dispensing with the *Bailey* rule would require the awkward three-judge court in routine cases—such as segregation cases³²—where the only real dispute is over

²⁶ 312 U.S. 246 (1941).

²⁷ *Id.* at 251.

²⁸ Or administrative order, under 28 U.S.C. § 2281 (1964).

²⁹ *Klein v. Bd. of Tax Supervisors*, 282 U.S. 19, 23 (1930) (Holmes, J.).

³⁰ In *California Water Service Co. v. City of Redding*, 304 U.S. 252 (1938), the Court said that "lack of substantiality in a federal question may appear either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject." *Id.* at 255.

³¹ There is some question as to whether the review should be by appeal or mandamus. See note 85 *infra*.

³² It is beyond dispute that statutes requiring racial segregation are unconstitutional.

facts. Even if three-judge court procedures were streamlined, as suggested below,³³ the direct appeal provisions would increase the Supreme Court's workload. It is no answer to say that the Supreme Court could routinely affirm without opinion cases enjoining enforcement of clearly unconstitutional statutes.³⁴ Such cases may involve difficult non-constitutional questions. Overruling *Poresky* would permit a litigant to short-circuit the court of appeals and obtain direct Supreme Court review simply by adding a spurious constitutional argument to an ordinary case. Therefore, the troublesome "clearly constitutional" and "clearly unconstitutional" exceptions to three-judge court jurisdiction can feasibly be dispensed with only if three-judge procedure is simplified and the system of review of three-judge court decisions revised.

Problems similar to those concerning the clearly constitutional statute are numerous. A number of courts have said that a single district judge can dismiss an application for an injunction on any of the following grounds: No "case or controversy" is presented;³⁵ the pleadings do not present a proper case for equitable relief;³⁶ the case lacks ripeness.³⁷ When such issues are presented should it matter whether the question is a close one? In *Flast v. Gardner*³⁸ a major issue was whether plaintiffs, solely by virtue of their status as federal taxpayers,³⁹ had standing to sue. The district judge who first heard the case ruled that a substantial question of standing was presented, and a three-judge court was then convened to decide all the issues, including standing.⁴⁰ If the ultimate decision in such a case is that plaintiff has standing, the process followed in *Flast* leads to little waste of judicial effort, since a three-judge court would eventually have to be convened to decide whether the statute is constitutional. If, however, the court finds that plaintiff does not have standing, as did the second *Flast* court,⁴¹ the

³³ See text accompanying notes 94-97 *infra*.

³⁴ This possible approach to review of three-judge court cases is effectively refuted in Note, *The Three-Judge Court Reassessed: Changing Roles in Federal-State Relationships*, 72 *YALE L.J.* 1646, 1655-57 (1963).

³⁵ *E.g.*, *Lion Mfg. Corp. v. Kennedy*, 330 F.2d 833, 834 (D.C. Cir. 1964).

³⁶ *E.g.*, *Levy v. Corcoran*, 389 F.2d 929, 930, 931 (D.C. Cir.), *cert. denied*, 389 U.S. 960 (1967).

³⁷ *E.g.*, *Utica Mut. Ins. Co. v. Vincent*, 375 F.2d 129, 134 n.7 (2d Cir.), *cert. denied*, 389 U.S. 839 (1967).

³⁸ 267 F. Supp. 351 (S.D.N.Y. 1967). See also *Flast v. Gardner*, 271 F. Supp. 1 (S.D.N.Y. 1967), *rev'd sub nom.* *Flast v. Cohen*, 392 U.S. 83 (1968).

³⁹ The leading cases on this point are *Frothingham v. Mellon*, 262 U.S. 447 (1923), and *Flast v. Cohen*, 392 U.S. 83 (1968).

⁴⁰ *Flast v. Gardner*, 267 F. Supp. 351, 355 (S.D.N.Y. 1967).

⁴¹ *Flast v. Gardner*, 271 F. Supp. 1 (S.D.N.Y. 1967), *rev'd sub nom.* *Flast v. Cohen*, 392 U.S. 83 (1968).

cumbersome three-judge court machinery has been invoked to decide a point of procedure rather than a constitutional issue. This consideration illustrates the reason for the requirement that a substantial showing of federal jurisdiction be made before a three-judge court is convened. As in the case of the clearly constitutional or unconstitutional statute, however, the substantiality question introduces a spurious issue into many cases.

B. The "Local Applicability" Exception

For purposes of determining three-judge court jurisdiction a "state statute" is not, as the untutored might think, simply an act passed by a state legislature. For example, in *Rorick v. Board of Commissioners*⁴² plaintiffs were holders of bonds issued by the Everglades Drainage District in Florida. The District had been established by a Florida statute. Later Florida statutes affecting the District were challenged by plaintiffs as impairing the obligation of their "contracts" with the District.⁴³ Citing dicta in *Ex parte Collins*,⁴⁴ the Supreme Court held on appeal from a three-judge court decision that "the matter . . . in controversy is not one of statewide concern but affects exclusively a particular district in Florida."⁴⁵ On that ground it was decided that the case was not one for a three-judge court.⁴⁶

When does a case present "a matter of statewide concern" so as to require a three-judge court? There is no clear test. Factors which may be significant are, first, whether the state or federal statute⁴⁷ applies only to a limited geographic area;⁴⁸ second, whether the issue is such that a decision against the state will have far-reaching effects;⁴⁹ and

⁴² 307 U.S. 208 (1939).

⁴³ *Id.* at 211.

⁴⁴ 277 U.S. 565 (1928).

⁴⁵ 307 U.S. at 212.

⁴⁶ Because the time for appeal to the court of appeals had lapsed, the Supreme Court vacated the three-judge court's decree and remanded to the district court so that a new decree could be entered, from which appeal could be taken. Such is the Court's usual practice when it holds that a three-judge court was wrongly convened, although the appealing party can also protect himself by filing a protective appeal with the court of appeals. The protective appeal may be a poor tactic, however. Mr. Justice Harlan, dissenting in *Alabama State Teachers' Ass'n v. Pub. Sch. & College Auth.*, 393 U.S. 400 (1969), cited appellants' filing of a protective appeal as evidence that they were unsure of three-judge court jurisdiction.

⁴⁷ See text accompanying notes 76-80 *infra*.

⁴⁸ See, e.g., *Sailors v. Bd. of Educ.*, 387 U.S. 105 (1967); *Moody v. Flowers*, 387 U.S. 97 (1967); *Rorick v. Bd. of Comm'rs*, 307 U.S. 208 (1939).

⁴⁹ See text accompanying notes 61-66 *infra*; *Flast v. Cohen*, 392 U.S. 83, 89-90 (1968).

third, whether the actions sought to be enjoined are, although they affect only one area of the state, a reflection of state or federal policy.⁵⁰

Rorick is one example of what might be called the "geographic test." This test seemed to have been clearly formulated by the Supreme Court in a pair of cases decided on the same day in 1967: only if a statute applies throughout a state does an action to enjoin its enforcement require three judges. In *Moody v. Flowers*⁵¹ plaintiffs sought to have a county election scheme enjoined on "one man, one vote"⁵² grounds. The scheme was required by a state statute which applied only to the county concerned. The Court held that a three-judge court should not have been convened, saying:

The Court has consistently construed [section 2281] . . . as authorizing a three-judge court not merely because a state statute is involved *but only when a state statute of general and statewide application* is sought to be enjoined.⁵³

In response to plaintiffs' urgings that similar apportionment statutes applied to all counties in Alabama, the Court suggested "that even a variety of different devices, working perhaps to the same end, still leaves any one device local rather than statewide . . ."⁵⁴ Plaintiffs in *Sailors v. Board of Education*⁵⁵ challenged the method of electing county school board members in Michigan. Three-judge court jurisdiction was upheld on the ground that the statute prescribing the method of election applied generally to *all* county school boards in the state.⁵⁶

Whatever the merits of the *Moody-Sailors* test as an implementation of the policy behind the three-judge court statutes, the rule established by those cases had an appealing clarity. Less than two years after *Moody* and *Sailors*, however, the Supreme Court re-established the previous confusion. Plaintiffs in *Alabama State Teachers Association v. Public School and College Authority*⁵⁷ sought to enjoin enforcement of a statute that authorized defendant to issue bonds to finance con-

⁵⁰ This would seem the logical converse of *Ex parte Collins*, 277 U.S. 565 (1928). For a discussion of the application of this principle to challenges to federal legislation see *Currie*, *supra* note 5, at 34-35.

⁵¹ 387 U.S. 97 (1967).

⁵² See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964).

⁵³ *Moody v. Flowers*, 387 U.S. 97, 101 (1967) (emphasis added).

⁵⁴ *Id.* at 102.

⁵⁵ 387 U.S. 105 (1967).

⁵⁶ *Id.* at 107.

⁵⁷ 289 F. Supp. 784 (M.D. Ala. 1968), *aff'd mem.*, 393 U.S. 400 (1969).

struction of a branch of Auburn University.⁵⁸ It is difficult to conceive of a more "local" statute than one authorizing the financing of a single college in Montgomery, Alabama; yet the Supreme Court affirmed a three-judge district court's denial of the injunction.⁵⁹ Despite Mr. Justice Harlan's vigorous dissent the court wrote *no opinion*.⁶⁰

Although *Alabama State Teachers Association* seems directly opposed to the principles announced in *Moody* and *Sailors*, the result may be justified on policy grounds. Plaintiffs' argument against the Alabama statute was that the state had "an affirmative duty to dismantle" its segregated-in-fact system of higher education.⁶¹ It was argued that the proposed college "did not maximize desegregation"⁶² and that state officials should "utilize new construction or expansion of facilities as an opportunity to dismantle the [segregated] system."⁶³ A ruling for plaintiffs by the three-judge district court clearly would have had a great impact on state policies.⁶⁴ Therefore, if one takes the approach that a three-judge court's primary purpose is to "[increase] the prestige of the district court and [reassure] the public as to the breadth and thoroughness of the court's deliberations"⁶⁵ in cases where important issues are raised, the Supreme Court's decision was correct. On the other hand, if the major reason for the three-judge court system

⁵⁸ 393 U.S. at 402 n.1. A constitutional challenge to the statewide statute creating the Public School and College Authority was abandoned. *Id.*

⁵⁹ 393 U.S. 400 (1969).

⁶⁰ By affirming on the merits, the Court tacitly recognized three-judge court jurisdiction, since a one-judge case would be appealable to the court of appeals rather than to the Supreme Court.

In a concurring opinion, Mr. Justice Douglas argued that three-judge court jurisdiction was proper because the act regulated a state agency. The particular act, however, concerned only one college. It might be argued that the college would be open to all residents of the state, making the act "statewide." *But see* *Rorick v. Bd. of Comm'rs*, 307 U.S. 208 (1939), discussed at pp. 934-35 *supra*. In *Ex parte Pub. Nat'l Bank*, 278 U.S. 101 (1928), a statute establishing a statewide tax to provide funds for the use of one city was held "local" for three-judge court purposes on the ground that "[t]he persons sued are municipal officers, *having no state functions to perform*, but charged only with the duty of collecting . . . taxes . . . in behalf of the city alone." *Id.* at 104 (emphasis added). These cases indicate that the statute was the kind that the Court has considered "local" in the past.

⁶¹ *Alabama State Teachers Ass'n v. Pub. Sch. & Col. Auth.*, 289 F. Supp. 784, 787 (M.D. Ala. 1968), *aff'd mem.* 393 U.S. 400 (1969).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ The district court actually ruled that in dealing with higher education the courts need do no more than enforce nondiscriminatory hiring and admissions policies. *Id.* at 789-90.

⁶⁵ Note, *supra* note 34, at 1653.

is to prevent "one little federal judge"⁶⁶ from tying up an important state regulatory system, a three-judge court hardly seems necessary to enjoin the construction of one college. But regardless of which purpose is considered primary, a test that depends on the importance of the issue hardly seems workable.

A number of cases have held that a single judge can enjoin the enforcement of a statute applicable to an entire state if the "controversy" is local. The leading case is *Ex parte Collins*.⁶⁷ Petitioner argued that Arizona statutes providing for assessment against property abutting local improvements violated the fourteenth amendment due process clause because they did not give the property owners a hearing.⁶⁸ Although the statutes had statewide application, the Supreme Court held that because "defendants are local officers and the suit involves matters of interest only to the particular municipality . . . involved,"⁶⁹ a three-judge court was not required. The Court pointed out that it was the enforcement of the city resolution authorizing the paving of a street, not the statute itself, which petitioner sought to enjoin.⁷⁰ Surely, however, it was the constitutionality of the statute, not the resolution, which was challenged. *Collins* seems to suggest that a statute which is not self-executing but merely authorizes local action may be declared unconstitutional by a single judge. Support for this position is provided by *Griffin v. County School Board*.⁷¹ In 1959, as a result of the Supreme Court's school desegregation decisions, Virginia enacted legislation making school attendance a matter of local option.⁷² Because of court decisions requiring integration, Prince Edward County closed its public schools. An action was brought by Negro children to compel the reopening of those schools. The Court held that the case was properly heard by a single judge, stating:

While a holding as to the constitutional duty of the . . . officials of Prince Edward County may have repercussions over the State . . . , it is nevertheless true that what is attacked in this suit is not something which the State has commanded Prince Edward to do—

⁶⁶ "I am opposed to allowing one little federal judge to stand up against the . . . State and say, 'This act is unconstitutional.'" 45 CONG. REC. 7256 (1910) (Senator Overman). See Currie, *supra* note 5, at 7.

⁶⁷ 277 U.S. 565 (1928).

⁶⁸ *Id.* at 567.

⁶⁹ *Id.* at 568.

⁷⁰ *Id.* at 569.

⁷¹ 377 U.S. 218 (1964).

⁷² Previously, the Virginia legislature had established tuition grants for children attending private nonsectarian schools. *Id.* at 221.

close its public schools and give grants to children in private schools—but rather something which the county with state acquiescence and cooperation has undertaken to do on its own volition, a decision not binding on any other county in Virginia.⁷³

It has been argued forcefully that *Collins* and *Griffin* may have been wrongly decided,⁷⁴ and in any event it is not clear how much of those cases remains after *Alabama State Teachers Association*. But contrary results would either require a three-judge court to enjoin the paving of a single street, as in *Collins*, or introduce one more factor of uncertainty into an already murky area of the law. For it seems that if either case is correctly decided, both are. The only possible distinction between *Collins* and *Griffin*⁷⁵ is that in the latter case an important state policy was involved, while in *Collins* the state would probably not have been greatly disturbed by being required to give property owners a hearing before assessing them. Requiring the courts to decide whether a case concerns an “important” state policy would invite chaos similar to that which flows from the “clearly constitutional—clearly unconstitutional” doctrines.

The basis for the “local” exception with respect to state statutes is the language of section 2281, which provides that three-judge courts are required when a statute is sought to be enjoined “by restraining the action of any officer of such State”⁷⁶ By ruling that a local officer is a “state officer” when he is implementing state policies, and that a state employee is not a “state officer” when implementing policies of local concern,⁷⁷ the courts have reconciled the “local” exception with the language of section 2281. There is apparently no statutory basis for a similar exception with respect to federal statutes, since the section concerning them, section 2282, contains no reference to federal officers. Nevertheless, in *Flast v. Cohen*,⁷⁸ wherein defendants argued that a three-judge court should not have been convened because plaintiffs sought to enjoin federal expenditures made in a single school district, the Court held that a three-judge court was proper because a decision against a particular program “would cast sufficient doubt on similar

⁷³ *Id.* at 228.

⁷⁴ Currie, *supra* note 5, at 34.

⁷⁵ Professor Currie states that if the three-judge court question was first raised in the Supreme Court in *Griffin*, it should have been dismissed as untimely. Currie, *supra* note 5, at 48 n.252. The Court, however, regards such questions as affecting subject-matter jurisdiction and will not allow the matter to be waived. See, e.g., *Flast v. Cohen*, 392 U.S. 83, 88 n.2 (1968).

⁷⁶ 28 U.S.C. § 2281 (1964).

⁷⁷ See, e.g., *Moody v. Flowers*, 387 U.S. 97, 101-02 (1967).

⁷⁸ 392 U.S. 83 (1968).

programs elsewhere that confusion approaching paralysis would surround the challenged statute."⁷⁹ Thus the Court treated the issue much as it might have treated one concerning a state statute.⁸⁰

II

STREAMLINING THREE-JUDGE COURT PROCEDURE: A PROPOSAL

Who should decide initially whether a case requires three judges? Section 2284 provides that the district judge faced with an application for an injunction "shall immediately notify the chief judge of the circuit, who shall designate two other judges . . ."⁸¹ This procedure is to be followed "[i]n any action . . . required . . . to be heard and determined by a district court of three judges . . ."⁸² The statute, therefore, leaves the question open.

In most cases, the initial decision has been made by the district judge.⁸³ If that judge decides that a three-judge court is required, no particular problems arise. If, however, he decides that a three-judge court is not necessary, considerable delay may ensue. Suppose that his decision is wrong and that he decides the case on the merits. The entire case will have to be re-tried by a three-judge court. Or suppose that a single judge wrongly dismisses the action on a ground such as the clear constitutionality of the challenged statute. The court of appeals⁸⁴ must then reverse his decision and somehow (just how is most unclear⁸⁵) convene a three-judge court. The court of appeals will not decide whether the statute was constitutional—it will decide only whether a three-judge court should have determined the constitutional issue.

⁷⁹ *Id.* at 89-90.

⁸⁰ There are few decisions concerning the local applicability exception as applied to federal statutes. Professor Currie argues that although there should be a local applicability exception to § 2282, the test should differ from the tests under § 2281. Currie, *supra* note 5, at 34-37.

⁸¹ 28 U.S.C. § 2284 (1) (1964).

⁸² 28 U.S.C. § 2284 (1964).

⁸³ Alternatively, the chief judge of the court of appeals to whom the request for a three-judge court is made under § 2284 could decide the matter—but if that were the process, who would review his decision? Application to the Supreme Court for a writ of mandamus would seem the only possibility. Decision by the chief judge is the practice in the Third Circuit. See *Miller v. Smith*, 236 F. Supp. 927 (E.D. Pa.), *mandamus denied sub nom.* *Miller v. Biggs*, 382 U.S. 805 (1965). See generally Note, *Reviewing the Grant of a Three-Judge Court*, 69 COLUM. L. REV. 146 (1969).

⁸⁴ It is now settled that review of the decision by a single judge not to convene a three-judge court is available in the courts of appeals. *Schackman v. Arnebergh*, 387 U.S. 427 (1967); *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 716 (1962).

⁸⁵ Both appeal and mandamus to the court of appeals have been used. *Compare*

The problems created by having a single judge decide whether a case is one for three judges have led the Fifth Circuit to a new approach. In *Jackson v. Choate*⁸⁶ a single judge refused to request a three-judge court on the ground that no substantial constitutional question was presented.⁸⁷ Plaintiffs then sought a writ of mandamus to compel the convening of a three-judge court. The court of appeals *did not decide* whether the case required a three-judge court; rather, the application for mandamus was dismissed, and Chief Judge Brown ordered a three-judge court convened.⁸⁸ Whether the case was one for three judges was left for the three-judge court to decide.⁸⁹ Should the three-judge court decide that the case requires a single judge, all three judges could join in the single judge's holding on the merits.⁹⁰

The chief advantage of the *Jackson* procedure is the simplification of appellate review. If the three-judge court decides that a case was one for a single judge, the court of appeals can review that decision as well as the merits.⁹¹ If the court of appeals finds that a three-judge court was proper, there is no need for a new trial, since three judges have already heard the case.⁹²

Chief Judge Brown's approach in *Jackson* seems the best way now available to overcome the waste caused by review only of the "one judge or three" issue. However, since *Jackson* results essentially in a three-judge court's being convened in all cases in which there is even a chance that three judges are needed, the number of three-judge trials may increase considerably. And certainly "[c]onsuming the energies of three judges to conduct one trial is prima facie an egregious waste of resources."⁹³ It is possible, however, to devise a system which preserves any possible advantage of three-judge determination of constitutional

Kramer v. Union Free Sch. Dist. No. 15, 379 F.2d 491 (2d Cir. 1967) (appeal), with *Reed Enterprises v. Corcoran*, 354 F.2d 519 (D.C. Cir. 1965) (mandamus). In *Reed Enterprises* the court of appeals ruled that a three-judge court should have heard the case, but rather than issue a writ of mandamus it took no action, since it "assume[d] that the respondents will take appropriate action in requesting three-judge courts." *Id.* at 524.

⁸⁶ 404 F.2d 910 (5th Cir. 1968).

⁸⁷ *Id.* at 911.

⁸⁸ *Id.* at 914.

⁸⁹ *Id.* at 912, 914.

⁹⁰ *Id.* at 913. This assumes, of course, that all three judges agree on the merits. If they do not, the disagreement itself would seem to establish that there is sufficient doubt about the issues to make the case one which raises a substantial constitutional question and thus properly a three-judge case.

⁹¹ *Id.*

⁹² *Id.* at 913-14.

⁹³ Currie, *supra* note 5, at 2.

issues, yet which eliminates much of the waste necessitated by a three-judge trial.

The reason for the three-judge requirement in constitutional cases is that there be adequate deliberation before a statute is declared unconstitutional.⁹⁴ Why then, should three judges decide anything but constitutional issues? Why should three judges be required to decide questions such as standing? Are three judges required to rule on the admissibility of evidence? To make findings of fact? Three-judge court policy demands no such thing.

The three-judge court statutes should be revised. An application for an injunction, interlocutory or permanent, should be heard by a single district judge who would make findings of fact and decide all questions of law other than those involving the constitutionality of a statute. If, at the end of the trial, it appears that the constitutionality of a statute must be determined, a hearing *on that issue alone* should be held before three judges, one of whom would be the trial judge.⁹⁵ If those judges held a statute unconstitutional their decision should be appealable as of right to the Supreme Court. Otherwise, review should be in the court of appeals.⁹⁶

The above proposal would eliminate much of the awkwardness of three-judge proceedings. As a result, the requirement that a constitutional question be substantial to require a three-judge court could be dispensed with. The exception to three-judge court jurisdiction for statutes of local applicability could be eliminated. Since three judges

⁹⁴ See text accompanying note 15 *supra*.

⁹⁵ This procedure would not eliminate the problem of dealing with frivolous constitutional challenges, and it might at times be necessary to convene three judges for a hearing on such challenges. However, this would seem preferable to the present system of letting a single judge decide such questions with the ever-present possibility of a higher court deciding that the question was, after all, substantial and that a new trial must be had.

In most civil law jurisdictions important civil cases are decided by courts of three or more judges. See R. SCHLESINGER, *COMPARATIVE LAW* 209-10 n.22 (2d ed. 1959). Most of the proceedings in such cases, particularly in Italy, are before a single judge. *Id.* at 223 n.6. Italian three-judge court procedure has been criticized on two grounds. Sereni, *Basic Features of Civil Procedure in Italy*, 1 AM. J. COMP. L. 373, 385-88 (1952). First, it is said that "the entire court, as a rule, is not in a position to hear or see the entire evidence in the vivid, concentrated form and with the immediate effect which is achieved at the trial." *Id.* at 385. This is objectionable only because these courts decide questions of fact. Second, it is said that "the opinion of the inquiring judge acquires a preponderant influence in the decision of the case." *Id.* at 387. Again, this objection applies primarily when a court is determining facts, as do civilian courts. See *id.* at 387-88.

⁹⁶ Perhaps provision should also be made for direct appeal in cases where speedy disposition of the matter is important, as is presently done under the three-judge court provisions of the Civil Rights Act of 1964. See note 8 *supra*.

would not be needed to decide threshold questions, review in the court of appeals of dismissals on the ground of standing, ripeness, mootness, political question, or adequate remedy at law could be on the merits, not on the narrow issue of whether the question presented was substantial. Every advantage of the present three-judge court system would be retained, yet a case could no longer be protracted for years because of the issue of the number of judges needed.⁹⁷

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⁹⁷ Lest there be any doubt as to the importance of this problem, the reader should now re-examine note 6 *supra*.