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THE ABOLITION OF THREE-JUDGE COURTS: TOO HIGH A PRICE FOR JUDICIAL EFFICIENCY?

Recent concern with increased judicial burdens,\(^1\) occasioned by growing caseloads\(^2\) which have inundated both the federal district and appellate courts,\(^3\) has provoked calls for the selective elimination of the three-judge court. Under the present federal statutes,\(^4\) a three-judge court must be convened when a plaintiff

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\(^1\) Between 1968 and 1974 the work of federal judges increased "79.8 percent in terms of filings, 87.1 percent in terms of terminations and 73.5 percent in terms of pending cases." REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 109 (1974).

\(^2\) In fiscal 1974 the increase in new cases docketed in the courts of appeals increased more than 5 percent over fiscal 1973 and 80 percent over 1968, while terminations increased only slightly. The Division of Information Systems (DIS) reported that "the backlog of pending cases skyrocketed by almost 101%." REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 109 (1974). Growing caseloads in the Supreme Court have also caused concern:

The statistics of the Court's current workload, both in absolute terms and in the mounting trend, are impressive evidence that the conditions essential for the performance of the Court's mission do not exist. . . . [T]he pressures of the docket are incompatible with the appropriate fulfillment of its historic and essential functions.


\(^3\) REPORT OF THE SENATE COMM. ON THE JUDICIARY, SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY, pursuant to S. Res. 340, 91st Cong., 2d Sess. at 6 (1971).

\(^4\) 28 U.S.C. §§ 2281, 2282 (1970). These sections provide as follows:

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 uncon-
institutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.


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.


Three-judge district court composition; procedure.

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days' notice of the hearing shall be given to the governor and attorney general of the State.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.
challenges the constitutionality of a state or federal statute. A companion statute provides for direct appeal to the Supreme Court. On June 20, 1975, the United States Senate passed a bill which would eliminate the requirement for a three-judge court in most cases. The bill, if passed by the House of Representatives, would retain the three-judge court only when explicitly invoked by an act of Congress and in congressional or statewide reapportionment cases. The House is likely to approve the proposed legislation in the near future. Similar measures have been under

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enjoin the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State.

5. 28 U.S.C. § 1253 (1970), which provides as follows:
   Direct appeals from decisions of three-judge courts.
   Except as 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.


7. On June 23, 1975, S. 537 was referred to the House Committee on the Judiciary. 1 CCH CONG. INDEX, 94th Cong., 1st Sess., 1975-1976, at 2505.

8. For example, a three-judge court is preserved for certain cases arising under the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-5(b), 2000e-6(b) and in cases under the Voting Rights Act of 1965, 42 U.S.C. §§ 1971g, 1973 (a), 1973c, 1973h(e). In two recent enactments, however, the 93d Congress eliminated three-judge courts in areas where they had previously been expressly required by an Act of Congress. The Antitrust Procedure and Penalties Act, 88 Stat. 1706 (1974), abolished the three-judge court device which was available for proceedings subject to the Expediting Act of 1903, as amended, 15 U.S.C. § 28; 49 U.S.C. § 44. In another legislative action, taken January 2, 1975, Congress provided that the Judicial Review Act of 1950 (Hobbs Act) 28 U.S.C. §§ 2341-2351 applies to proceedings to enjoin or suspend any rule, regulation, or final order of the Interstate Commerce Commission. This reform is contained in 88 Stat. 1917 (1975). Section 7 of the enactment repeals the provision for the three-judge court in these ICC cases (28 U.S.C. § 2325), and section 5 provides for review by the courts of appeals. 28 U.S.C. § 2321, as amended, § 5 Pub. L. No. 93-584 (1975). Direct appeal to the Supreme Court for these cases (see note 5 supra) is therefore unavailable. For a discussion of these two pieces of reform legislation see B. Boskey & E. Gressman, Recent Reforms in the Federal Judicial Structure—Three-Judge District Courts and Appellate Review, 67 F.R.D. 135 (1975).

9. Three-judge courts are preserved in these cases because the Judiciary Committee felt they were of great importance and "in any event, they have never constituted a large number of cases." COMM. ON THE JUDICIARY, REVISION OF THE JURISDICTION OF THREE-JUDGE COURTS, S. REP. No. 94-204, 94th Cong., 1st Sess. 9 (1975) [hereinafter cited as S. REP. No. 94-204].

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consideration by both houses since 1971 without significant opposition. Moreover, the Supreme Court has construed the existing statutes strictly since its decision in *Ex parte Collins* in 1928, thereby paving the way for further narrowing.

These legislative developments have taken place against a background of mounting criticism of the existing statutes by

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10. See notes 52 & 53 infra.

11. 277 U.S. 565 (1928) (municipal resolution not a "statute" for purposes of invoking a three-judge court). Justice Brandeis, writing for the majority, agreed with lower court opinions which held that the statute was to govern "only those [suits] in which the object . . . is to restrain the enforcement of a statute of general application or the order of a state board or commission." *Id.* at 568. The *ALI Study* states, referring to the *Collins* opinion: "The distinction was there drawn, and since repeatedly applied, between cases of state-wide significance and those that are of only local interest." *ALI Study* § 1374, supra note 1, at 320 (1969).

12. See *Bailey v. Patterson*, 369 U.S. 31 (1962), where blacks sought to enjoin enforcement of allegedly unconstitutional Mississippi statutes providing for segregation in transportation services. The Court ruled that three judges were not required when "prior decisions make frivolous any claim that a state statute on its face is not unconstitutional." *Id.* at 33. In construing the three-judge statute strictly, the Court relied on *Phillips v. United States*, 312 U.S. 246 (1941), where Justice Frankfurter deemed the enactment of the three-judge court legislation 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." *Id.* at 251. See also *Swift v. Wickham*, 382 U.S. 111 (1965) (three-judge court not required when a state statute is in conflict with, or preempted by a federal statute, even though the claim ultimately rests on the supremacy clause); *California Water Serv. Co. v. City of Redding*, 304 U.S. 252 (1938) (insubstantial constitutional challenge will not suffice); *International Ladies Garment Workers Union v. Donnelly Garment Co.*, 304 U.S. 243 (1938) (allegation of unconstitutionality of congressional act without application of injunction insufficient to invoke three-judge court); *Ex parte Poresky*, 290 U.S. 30 (1933) (single district judge need not invoke the three-judge panel to dismiss for lack of jurisdiction if claim of unconstitutionality is "insubstantial"); *Hatfield v. Bailleaux*, 290 F.2d 632, 635 (9th Cir. 1961) (three-judge court not required where challenged administrative orders with respect to prison regulations "are not of general state-wide application and do not represent state policy").

13. The procedural aspect of three-judge courts has been recognized as providing "a constant source of uncertainty and procedural pitfalls for litigants." S. REP. No. 94-204, supra note 9, at 2. The *Freund Report* adds its criticism of the device:

When, where, and how to obtain appellate review of an order by or relating to a three-judge court is a hopelessly complicated and confused subject that in itself has produced much unnecessary litigation. Judicial and other literature on the subject is voluminous. There are rules and subrules and exceptions to rules. . . . [R]eview of these matters has become so mysterious that even specialists in this area may be led astray.

advocates who have been touting judicial reform for years. The three-judge panel has, for example, been termed "cumbersome" by several legal commentators and "the single worst feature in the Federal judicial system" by Professor Charles Alan Wright. This article will not join these critical voices or provide a comprehensive view of the three-judge court and its judicially-imposed limitations. That has been done too often and too well to be further expanded. Although it might well be too late to prevent the demise of the three-judge panel, it is still important to examine the arguments for and against its elimination and the possible implications for litigants, particularly in the area of civil rights.

THE THREE-JUDGE PANEL: HISTORY AND CURRENT APPLICATION

The original Three-Judge Act was a response to the 1875 statute which had granted lower federal courts jurisdiction over all cases arising under the Constitution, laws and treaties of the United States. In 1903 the first three-judge court was created.


14. As early as 1928, one commentator predicted potential difficulties in statutory interpretation of this jurisdictional enactment:

The judicial interpretation of the long series of statutes dealing with [lower federal court] jurisdiction has involved not only putting meaning into words as a matter of grammar and logic, but all decisions on underlying issues, perhaps not always explained, calling for the statesman’s vision in adjusting the relations between state and nation.


15. Note, 54 CORNELL L. REV., supra note 13, at 934. See also B. Boskey & E. Gressman, supra note 8, at 135.


20. For a discussion of the background of the conflicts and popular resentments which arose between the passage of the 1875 Act and the Three-Judge Court Act, see Note, The Three-Judge District Court and Appellate Review, 49 VA. L. REV. 538, 539-42 (1963). For a detailed discussion of the jurisdiction of lower federal courts over cases
to insure against improvident decisions by a single federal judge in injunction actions arising under the Sherman Anti-Trust Act\textsuperscript{22} and the Act to Regulate Commerce.\textsuperscript{23} If an act of Congress was to be nullified, Congress reasoned, the decision of more than one judge should be required.\textsuperscript{24} This plan also provided for direct appeal to the Supreme Court.

In 1910 Congress, elaborating upon this prior legislation, provided for the three-judge device in federal suits to enjoin state officers from enforcing an allegedly unconstitutional state statute.\textsuperscript{25} More specifically, the need for the three-judge court in suits of this type was created by the Supreme Court’s 1908 decision in \textit{Ex parte Young},\textsuperscript{26} which made it possible for a federal judge to enjoin a state officer from enforcing laws enacted by the legislature of his own state which are repugnant to the United States Constitution. The Court’s decision, that the eleventh amendment is not a bar to federal suits of this nature, gave rise to a need for a procedure which would guard “against an improvident statewide doom by a federal court of a state’s legislative policy.”\textsuperscript{27} Vociferous senatorial outcries\textsuperscript{28} culminated in an act which provided, in part, that three judges must pass upon the constitutionality of a state statute.\textsuperscript{29} While lobbying for the legislation involving the constitutionality of state laws and state actions, see Pogue, \textit{supra} note 14. The author notes that the Act of 1875 granting lower federal courts jurisdiction “was a drastic inroad upon the states’ prerogative . . . .” \textit{Id.} at 625.

\begin{itemize}
    \item 22. Ch. 647, 26 Stat. 209 (1890).
    \item 23. Ch. 104, 24 Stat. 379 (1887).
    \item 24. For a discussion of the historical background of the three-judge panel see Pogue, \textit{supra} note 14, at 625-26.
    \item 26. 209 U.S. 123 (1908).
    \item 27. Phillips v. United States, 312 U.S. 246, 251 (1941). \textit{See also} Cumberland Tel. & Tel. Co. v. Louisiana Pub. Serv. Comm’n, 260 U.S. 212, 216-17 (1922); 1A J. Moore, \textit{Moore’s Federal Practice} \textsuperscript{f} 0.205, at 2236 (2d ed. 1974).
    \item 28. For the Senate debates which led to the 1910 Act see 42 \textit{Cong. Rec.} 7253-57 (1910). The feelings of some United States citizens about the implications of the \textit{Young} opinion were expressed by Senator Overman:
        \[\text{[T]here is great feeling among the people of the States by reason of the fact that one Federal judge has tied the hands of a sovereign State and enjoined in this manner the great officer who is charged with the enforcement of the laws of the State . . . .}\]
        \textit{42 Cong. Rec.} 4847 (1908).
\end{itemize}
in 1910, Senator Overman remarked:\(^3\)

The point is, the Amendment is for the peace and good order in the State. Whenever one judge stands up and enjoins the governor and the attorney-general, the people resent it, and public sentiment is stirred . . . whereas if three judges declare that a state statute is unconstitutional the people would rest easy under it. But let one little judge stand up against the whole State, and you will find the people of the State rising up in rebellion. The whole purpose of the proposed statute is for peace and good order among the people of the States.

Today the three-judge court serves as a forum for litigants who seek to protect their civil rights by enjoining a state officer from enforcing an allegedly unconstitutional statute. To convene the three-judge device a plaintiff must challenge a state statute or administrative order\(^3\) or a federal statute on the ground that it is unconstitutional, seek an injunction, and name a state official as a party defendant.\(^3\) While the focus of the arguments for the three-judge court has shifted,\(^3\) many of the same concerns which Senator Overman expressed still prevail\(^3\) and are alleviated when three judges hear a case.

**LEGISLATION TO ELIMINATE THE THREE-JUDGE FORUM**

The bill passed by the Senate on June 20, 1975,\(^3\) would repeal sections 2281 and 2282 of Title 28\(^3\) and amend section 2284 of Title 28.\(^3\) These amendments would not significantly change

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was revised and the section became the present 28 U.S.C. § 2281 (1970). The present 28 U.S.C. § 2282 (1970), which provides for three-judge courts in cases involving federal statutes, was originally the Act of August 24, 1937, 50 Stat. 75 (1937). For further discussion of the 1937 Act see note 43 infra.

30. 45 Cong. Rec. 7256 (1910).
31. The 1910 Act was amended in 1913 to include administrative orders made by an administrative board or commission acting under and pursuant to a state statute. Act of Mar. 4, 1913, ch. 160, 37 Stat. 1013.
32. See note 4 supra. See also Bowen, supra note 17, at 9.
33. See note 93 infra and accompanying text.
34. See notes 128-29 infra and accompanying text.
the procedure for convening three judges; however, the device could be employed only when specifically authorized by an act of Congress or in actions which alleged the unconstitutionality of apportionment of congressional districts or of any statewide legislative body. The bill has had a multitude of legislative predecessors. The apparent catalyst for the first and all subsequent bills was a nine-year study which the American Law Institute (ALI) undertook in 1960 in response to a request by then Chief Justice Earl Warren. The Chief Justice deemed it "essential that we achieve a proper jurisdictional balance between the federal and state court systems, assigning to each system those cases most appropriate in light of the basic principles of federalism." The most significant proposal of the ALI was the repeal of 28 U.S.C. § 2282, which provides for a three-judge court when a litigant challenges the constitutionality of an act of Congress. In proposing the repeal, the ALI suggested that the original reasons which influenced Congress in 1937 to require a three-judge court in challenges to the constitutionality of federal statutes were no longer apposite. The proposal recommended, however, the retention of the three-judge court in cases in which the unconstitutionality of a state statute or administrative order was alleged.

The basic premise underlying the ALI proposal—

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38. In addition, the bill would amend 28 U.S.C. § 2403 (1970) to provide for intervention by a state for presentation of admissible evidence and argument in an action in federal court in which the constitutionality of a state statute is in issue and to which the state or an agency, officer, or employee of the state is not a party. The present statute provides for intervention by the United States in actions where the constitutionality of an act of Congress is in question.

39. See notes 52 & 53 infra and accompanying text.

40. See ALI Study, supra note 1.


42. ALI Study, supra note 1, at 325.

43. As part of The Judiciary Act of 1937 Congress extended the three-judge court requirement to federal statutes as well. 50 Stat. 751 (1937), as amended, 62 Stat. 968 (1948). The enactment was a reaction to the federal judiciary which had been granting injunctions restraining allegedly unconstitutional New Deal legislation. See 1A J. Moore, supra note 27, at 2231; Comment, 27 U. Chi. L. Rev., supra note 17, at 561-63.

44. Many who appeared before both houses of Congress also testified that the 1937 legislation was no longer applicable. See, e.g., Testimony of J. Skelly Wright, Judge of the U.S. Court of Appeals for the District of Columbia, in Hearings on S. 1876, supra note 16, at 766; Hearings on S. 271, supra note 1, at 7.

45. ALI Study, supra note 1, at 53. The ALI recommended, however, that plaintiffs who allege the unconstitutionality of a state statute or administrative order be required to file a request for a three-judge court instead of the device operating automatically. Id.
ever purposes the statute originally served were no longer applicable—was to prove one of the most compelling arguments in the effort to eliminate the three-judge court in injunction proceedings challenging the constitutionality of both state and federal statutes.\(^4\) Otherwise, the general reaction to the proposals was that they were only the prelude to the necessary reform legislation.\(^7\) The ALI's recognition that "the burden on the federal judicial system that a three-judge court creates is outweighed by the beneficial effect it has on federal-state relations"\(^8\) was accorded less weight as concern about judicial burdens grew and federal court caseloads mounted.\(^49\)

In October, 1970, the Judicial Conference of the United States,\(^50\) relying on the report of its Committee on Court Administration that three-judge courts were imposing increased caseloads on an already overloaded court system,\(^51\) expanded the ALI proposal and submitted draft legislation to the 92d Congress. This legislation would have eliminated the requirement for three-judge courts in injunction cases in which the plaintiff alleges the unconstitutionality of state as well as federal statutes.\(^2\) Subsequently,
various bills were introduced which incorporated parts of both the ALI and Judicial Conference proposals. On May 14, 1971, Senator Quentin Burdick introduced the Federal Court Jurisdiction Act of 1971. This 1971 Senate bill, as amended, was the forerunner of legislation proposed in the 93d Congress in 1973 which was passed by the Senate and sent to the House, where it died. The 1973 bill was a direct response to the vigorous and widespread opposition to the three-judge court and is identical to the proposed legislation currently before the House.

**Impetus for the Elimination of the Three-Judge Court**

Since the early 1960's commentators have relied on two prime arguments to justify their criticism of the three-judge court: first, the conditions which originally brought about the need for three-judge courts no longer obtain and, second, judicial administration is further burdened by three-judge courts.

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53. S. 1876, 92d Cong., 1st Sess. (1971). This bill was a codification of the ALI's proposals and differed from the Celler legislation, see note 52 supra, in that it retained the three-judge court for suits in which the plaintiffs alleged the unconstitutionality of a state statute. Almost a year later, however, the Senator, swayed by "judicial and scholarly thinking [which] suggested that mere refinement of procedure may not [have been] sufficient," proposed an amendment to his bill, which would have had the effect of "eliminating three-judge courts in all constitutional cases except those involving reapportionment." 118 CONG. REC. S.6764 (daily ed. April 27, 1972). The 1971 Senate bill differed from the House bill in essentially two respects: (1) it retained the three-judge device for reapportionment cases and (2) it did not provide for a state attorney general to take a direct appeal to the Supreme Court from an injunction against the enforcement of an allegedly unconstitutional state statute. See *Hearings on S. 1876*, supra note 16, at 749; S. REP. No. 93-206, supra note 45.


57. The House Judiciary Committee held hearings on the bill in October 1973, but the bill did not go any further. See generally *Hearings on S. 271*, supra note 1.

58. The Report of the Committee on the Judiciary cites two further reasons for the legislation: the ambiguity which exists in the application of the three-judge statutes, and judicial decisions which have provided "safeguards against precipitous injunctive action by Federal judges." S. REP. No. 93-204, supra note 9, at 3-4, 8.
Three-Judge Courts

Original Reasons for Three-Judge Courts No Longer Apply

The consensus among commentators, judges, and Members of Congress has been that the original reasons for the three-judge court are now obsolete. The Senate Committee on the Judiciary, for example, reported that statutory and regulatory changes have restrained the power of federal courts from interfering with state-enacted statutes. In its report, the Committee mentioned first the Federal Equity Rules, enacted in 1912, which prohibit federal courts from granting ex parte temporary restraining orders for more than ten days and which added a requirement for notice and a hearing when a state statute is challenged. Also cited were two statutes passed in the 1930's which restrict injunctions in certain cases involving state tax and public utility programs. Whether these statutes are sufficient to eliminate the need for the three-judge court seems far from certain. In any event, they apply only to specific objects of concern during the period in which they were enacted. Moreover, changed circumstances have bred new problems in state and federal relations which require no less attention than the original situations for which Congress provided the three-judge court in 1910.

Judicial Burdens

The second and probably more often-cited motive for eliminating the three-judge court is concern with judicial economy. Many opponents of the three-judge panel base their proposals on statistical evidence which purports to demonstrate the mounting judicial burden. For example, when the ALI conducted its study

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59. In 1972 Judge J. Skelly Wright stated: "The original rationale for the three-judge court has long been obsolete and, as one commentator pointed out, began to disappear soon after the original legislation was enacted in 1910." *Hearings on S. 1876; supra note 16, at 788.* The commentator referred to by Judge Wright is Harris S. Ammerman. Ammerman, *Three-Judge Courts: See How They Run!,* 52 F.R.D. 293, 297 (1971). See also S. Rep. No. 94-204, supra note 9, at 7; ALI Study, supra note 1, at 319 (1969); Comment, 27 U. Chi. L. Rev., supra note 17, at 571; Note, 72 Yale L.J., supra note 17, at 1651. One commentator has even argued that today the device only seems to represent a congressional distrust of the judiciary. Comment, 27 U. Chi. L. Rev., supra note 17, at 571.

60. S. Rep. No. 94-204, supra note 9, at 7-8.

61. Id. at 8.


63. *See note 93 infra and accompanying text. See also* Note, 72 Yale L.J., supra note 17, at 1651. "[T]he same changing circumstances which worked to diminish the relevance of the original Congressional intent provide important new functions which the three-judge court may be able to perform." Id.

64. *See notes 1 & 2 supra.*
and wrote its proposal for the elimination of the three-judge device in certain instances, it relied on annual reports of the Division of Information Systems for 1967. In 1970, statistics of the Committee on Court Administration showed an increase over previous years in the number of hearings before district courts composed of three judges. The numerical increase prompted the Judicial Conference to approve the draft legislation which was sent to the 92d Congress. The Conference emphasized the Committee on Court Administration's report that the workloads of the Supreme Court, which heard these cases on direct appeal, as well as that of the district courts, were affected by this increase.

Between the time of the introduction of the 1971 legislation and the Senate's most recent bill, other critics have surfaced armed with statistics and studies. In 1972 the Federal Judicial Center made available its Report of the Study Group on the Case Load of the Supreme Court (the Freund Report) which

65. See text accompanying notes 40-49 supra.
66. The Division of Information Systems is a department of the Administrative Office of the United States Courts.
67. ALI STUDY, supra note 1, at 317-18.
68. REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 135 (1970). The report showed that there were 291 hearings in 1970, an increase of 76 cases over 1969 and 112 over the 1968 figure. Of the 291 hearings, 162 were in connection with civil rights cases.
69. See note 52 supra.
70. REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 78 (1970). Upon reviewing the report of the Committee on Court Administration, the Conference noted:

[T]he direct appeal from such courts to the Supreme Court has often brought that Court into the review process prematurely and placed the burden of direct appeal on the Supreme Court in many cases where the winnowing process of appellate review at the circuit court level would have better served the interests of justice.

Id.
72. The Federal Judicial Center was established by Congress in 1967 “to conduct research and study the operation of the courts of the United States . . . .” 28 U.S.C. § 620(b)(1) (1970). The Study Group chairman was Paul A. Freund. Other members included professors of constitutional law and federal procedure and lawyers who had experience litigating before the Supreme Court. Three of the Study Group members were former law clerks to Supreme Court Justices. FREUND REPORT, supra note 2, at ix, 57 F.R.D. at 576.
73. See note 2 supra.
corroborated earlier findings that the Supreme Court was overworked. Essentially, the Study Group recommended the elimination of three-judge courts and direct appeal in cases seeking to enjoin the enforcement of an allegedly unconstitutional state or federal statute.\(^7\) Pointing out that the ALI’s proposal was based on 1967 figures, the Freund Report dismissed the suggestion that the three-judge court provided benefits which outweighed the burden on the federal judiciary\(^7\) and urged that “the balance now be struck differently.”\(^6\) The Study Group’s findings showed that the number of cases requiring a three-judge court had increased by 86 percent between 1967 and 1971.\(^7\) Moreover, concern was expressed about the “disproportionate amount of the limited time for oral argument” which three-judge courts consumed.\(^7\) Critics of the three-judge device readily accepted the findings set forth in the Freund Report, and the movement to eliminate the device gained strength while support for its retention seemed virtually to cease.\(^7\) These critics, however, may have been too anxious to buttress established arguments without addressing themselves to other important considerations.

ARGUMENTS FOR RETAINING THE THREE-JUDGE COURT

The submission of ALI and Judicial Conference proposals\(^80\) to Congress for study and legislative examination\(^81\) provoked the expression of other considerations which surfaced in hearings be-

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75. See note 48 supra and accompanying text.
76. Freund Report, supra note 2, at 28, 57 F.R.D. at 598. See also Hearings on S. 1876, supra note 16, at 773, where Charles Alan Wright stated that “more drastic surgery is required than the Institute has proposed.”
77. Freund Report, supra note 2, at 28, 57 F.R.D. at 598.
78. Id. at 29, 57 F.R.D. at 598. The Study Group therefore regarded the percentage of appeals from three-judge courts of the total docket (2.7 percent) as misleading, for the cases represented 22 percent of the cases argued orally. Id. See also S. Rep. No. 94-204, supra note 9, at 4-5 (3 percent of total docket “consume a disproportionate amount of the limited time [22 percent] for argument in the Supreme Court”); Hearings on S. 271, supra note 1, at 12 (amount of work required by Court on direct appeals is relatively large even though the percentage is small).
79. The dearth of support for the three-judge forum sparked Charles Alan Wright to remark: “If there is any informed opinion that today favors retention of the three-judge court, I am unaware of it.” Hearings on S. 1876, supra note 16, at 773.
81. See note 52 supra and accompanying text.
fore the House Judiciary Committee in 1973 and 1974.82 Even before that time, the important functions which three-judge courts perform had not gone unrecognized. At least some commentators,83 studies,84 and judicial opinions85 expressed support for the value of the three-judge device. After the ALI’s proposals86 were announced, however, and the possibility of congressional action increased, the three-judge court could no longer be praised solely from an academic or theoretical perspective. The judicial machinery, which seemed to be in a state of disrepair, was ready for a proposal to lighten its ever-increasing load. The first and all subsequent legislation was introduced in the interest of judicial economy. Arguments that the three-judge court was now obsolete substantiated these claims. Other concerns were soon voiced, however, which had to be addressed in any proposal for reform legislation. Before these other factors are considered the arguments that the need which originally brought three-judge courts into existence is no longer present and that the judicial burdens are insurmountable must be examined.

Original Reasons for the Three-Judge Court Still Exist

The three-judge court was first created as a “more responsible forum for the litigation of suits which, if successful, would render void state statutes embodying important state policies.”87 Concern with federal intervention in the determination of state law continues to be important today.88 As one commentator has

82. See Hearings on S. 271, supra note 1, at 83. Representative Drinan expressed concern that under the proposal, the 183 civil rights “cases would be rendered impossible.”
84. See ALI Study, supra note 1, at 318-20.
85. See, e.g., Swift & Co. v. Wickham, 382 U.S. 111 (1965). In that case the Court stated that three-judge courts “allow a more authoritative determination and less opportunity for individual predilection in sensitive and politically emotional areas.” Id. at 119.
86. See text accompanying notes 42-45 supra.
87. Phillips v. United States, 312 U.S. 248, 251 (1941). See also Swift & Co. v. Wickham, 382 U.S. 111, 119 (1965), where the Court stated: “Section 2281 was designed to provide a more responsible forum for the litigation of suits which, if successful, would render void state statutes embodying important state policies.”
88. The Supreme Court’s concern with federalism and comity continues to underlie its recent decisions involving federal intervention in pending state court proceedings. See, e.g., Younger v. Harris, 401 U.S. 37 (1971), where the Court held that a federal court could
observed, the three-judge court “still [serves] one of its original functions as a valuable palliative to states which must occasionally accept the invalidation of their legislation by federal authority.”98 If the purpose behind the three-judge court in 1910 and again in 193799 was to insure careful deliberation concerning allegations of the unconstitutionality of state and federal statutes, that factor can be of no less significance today. The three-judge procedure has been characterized as one which “recognizes the delicate balance inherent in federal-state relations and attempts to guarantee to the states reasonable freedom in local affairs, while preserving constitutional rights.”100 This suggests that there is a functional justification as well as historical reasons for relying on three judges.101 Indeed, the dominant concern today is that a single judge might wrongly refuse to enjoin the enforcement of an allegedly unconstitutional statute and not that he or she might wrongly enjoin a statute that later proved to be constitutional.102 Three judges, one of whom is a circuit judge, would feel less restrained to declare a state statute unconstitutional.103

Three-Judge Courts Do Not Increase Judicial Burdens

The concerns expressed by the Freund Report, Chief Justice


99. See note 9 supra.

90. See note 43 supra.

91. See note 49 supra.

92. But see authorities cited at note 59 supra.

93. See Letter from John A. Buggs, Staff Director, U.S. Comm'n on Civil Rights, to Hon. Robert F. Drinan, Dec. 18, 1973, as quoted in Hearings on S. 271, supra note 1, at 151: “A new need and hence a new rationale . . . has replaced the old one: to protect against imprudent judicial decisions to refrain from taking action.” (Emphasis in original.)

94. See notes 120-29 infra and accompanying text. It must be noted, of course, that federal courts, whether composed of one judge or three, are bound by the abstention doctrine. See, e.g., Burford v. Sun Oil Co., 319 U.S. 315 (1943); Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941). See also note 88 supra.
Burger, and other critics of the three-judge device focus on the growing burdens on court dockets and judges. Other findings and views, however, support the theory that these figures do not accurately reflect the facts and that elimination of the three-judge device will not effect a substantial reduction in the workload of either the lower federal courts or of the Supreme Court. Justice Brennan, for example, contends that the Supreme Court is not overworked and that:

[Its] docket has most definitely not swollen to a point where the burden of screening cases has impaired our ability to discharge our other vital responsibilities . . . . Even if it were as time-consuming and difficult as the Study Group believes, that would underscore, not diminish its importance . . . .

It is true, of course, that the number of cases docketed has increased greatly over the past thirty or forty years . . . . But to concentrate merely on raw statistics, as the Study Group seems principally to have done, is misleading . . . .

Other commentators argue that the Freund Report draws its conclusion that the Supreme Court is overworked from “a minimum of statistical and conceptual analysis . . . .”96 In addition, the House hearings elicited further support for the view that the increased burden which these direct appeals place on the Supreme Court is exaggerated. Professor Anthony Amsterdam, in his days as law clerk for a Supreme Court Justice, found that most appeals were disposed of in as much time as it would take to deny a petition for certiorari which reached the Court through the dis-

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95. Brennan, The National Court of Appeals: Another Dissent, 40 U. CH. L. REV. 473, 476 (1973). This remark, it should be noted, was made with reference to a National Court of Appeals which, Justice Brennan believes, should not be allowed to screen cases. For a discussion of how the Supreme Court decides which cases to review see id. at 477-83. For a description of what happens when a decision from a three-judge court is referred to the Supreme Court see Rehnquist, Whither the Courts, 60 A.B.A.J. 787, 790 (1974).

96. Gressman, The National Court of Appeals: A Dissent, 59 A.B.A.J. 253 (1973). Although Mr. Gressman confines his remarks to a discussion of the National Court of Appeals, his observations are applicable in this context as well. With respect to the statistics about the workload of the Court he states:

Raw statistics as to case filings, in short, are but the starting point for identifying and evaluating the real workload of the Court. How much time is actually spent by the nine justices and their law clerks in screening these thirty-six hundred cases? How many of the cases are easily and quickly disposed of, and how many require more prolonged consideration?

Summary disposition of mandatory appeals is apparently still the rule. A recent decision limiting direct appeals to the Supreme Court from three-judge panels noted that between two-thirds and three-fourths of the cases from three-judge courts are disposed of summarily. There does not appear, then, to be any conclusive empirical data to support the contention that Supreme Court Justices are overly occupied with appeals from three-judge district courts. Indeed, the House hearings could not produce any time studies which would substantiate the argument.

The increasing judicial burden of lower federal courts has also been attributed, at least in part, to the three-judge court. It is difficult to imagine, however, how the elimination of the right to a direct appeal would decrease the burden of lower federal courts. Since suits in which a violation of federal civil rights is alleged fall within the “federal question” jurisdiction of federal courts, these suits would not necessarily go to a state court but might instead go to another federal district court. As Professor Amsterdam has observed, elimination of three-judge courts will:


98. See Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90, 99 n.17 (1974), citing Douglas, The Supreme Court and Its Case Load, 45 CORNELL L.Q. 401, 410 (1960). The Court included these statistics to bolster its opinion that a review by the court of appeals in these cases would provide more detailed consideration than they now receive.


MR. KASTENMEIER: Do any statistics exist which might be useful for us to justify . . . in terms of judge man-hours or cost in dollars, the saving of which would justify affirmative action on this bill?

JUDGE WRIGHT: We have made no studies as far as I know, time studies with reference to three-judge district court cases. All we have with reference to them is our experience and the bare statistics as to the number and increasing numbers . . . .

Id. at 11.

100. See notes 1 & 2 supra.

101. 28 U.S.C. § 1343(3) (1970) provides inter alia:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege, or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States . . . .

102. Letter from Anthony G. Amsterdam, Professor of Law, Stanford Law School,
[R]educe the burden upon the district courts somewhat, and increase the burden on the courts of appeals somewhat. Both the reduction and the increase would be a drop in the bucket of the over-all workload of the lower federal courts.

Furthermore, the ALI based its proposals on the marked increase in three-judge hearings between 1967 and 1971. Statistics indicate, however, that their number decreased in 1972, and that in 1973 there were only two more hearings than in fiscal year 1971. In 1974, the number of three-judge hearings decreased once again, resulting in the smallest figure since 1969. The statistics for 1975 are not now available so it is difficult to determine whether the declining trend will continue. Even if statistics show an increase in the number of hearings, however, those cases—because

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103. See notes 42-45 supra and accompanying text.


<table>
<thead>
<tr>
<th>Fiscal year</th>
<th>Total</th>
<th>Review of ICC orders</th>
<th>Civil Rights</th>
<th>Reapportionment</th>
<th>All other</th>
</tr>
</thead>
<tbody>
<tr>
<td>1963</td>
<td>129</td>
<td>67</td>
<td>19</td>
<td>16</td>
<td>27</td>
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<td>1964</td>
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<td>21</td>
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<td>1965</td>
<td>147</td>
<td>60</td>
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<td>1966</td>
<td>162</td>
<td>72</td>
<td>40</td>
<td>28</td>
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<tr>
<td>1967</td>
<td>171</td>
<td>64</td>
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<td>1968</td>
<td>179</td>
<td>51</td>
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<td>6</td>
<td>67</td>
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<td>1969</td>
<td>215</td>
<td>64</td>
<td>81</td>
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<td>69</td>
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<td>1970</td>
<td>291</td>
<td>42</td>
<td>162</td>
<td>8</td>
<td>79</td>
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<td>1971</td>
<td>318</td>
<td>41</td>
<td>176</td>
<td>2</td>
<td>99</td>
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<td>1972</td>
<td>310</td>
<td>52</td>
<td>166</td>
<td>32</td>
<td>60</td>
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<td>1973</td>
<td>320</td>
<td>52</td>
<td>183</td>
<td>7</td>
<td>78</td>
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<tr>
<td>1974</td>
<td>249</td>
<td>51</td>
<td>171</td>
<td>8</td>
<td>19</td>
</tr>
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</table>

Percent change
1974 over 1973

<table>
<thead>
<tr>
<th>Percent change</th>
</tr>
</thead>
<tbody>
<tr>
<td>-22.2</td>
</tr>
<tr>
<td>-1.9</td>
</tr>
<tr>
<td>-6.6</td>
</tr>
<tr>
<td>14.3</td>
</tr>
<tr>
<td>-75.6</td>
</tr>
</tbody>
</table>

Id. at 241.
of their inherent complexity and importance—must be afforded the best possible forum in which to be heard.105

Effect of Elimination of Three-Judge Courts on Civil Rights Litigation

One of the essential aspects of the three-judge forum which has been underplayed by its critics is the effect its demise will have on civil rights litigants. The statistics for 1973 show that 320 hearings were held before three-judge courts. Of these, 183 involved civil rights cases.106 Proponents of the bill are generally anxious to point out that the civil rights category includes much more than racial discrimination cases,107 and that of the 349 civil rights cases heard in 1972 and 1973 only 2 involved allegations of racial discrimination.108 A closer analysis, however, reveals the importance of the civil rights issues involved in these cases109 and

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105. See, e.g., Letter from John A. Buggs, Staff Director, U.S. Comm’n on Civil Rights, to Hon. Robert F. Drinan, Dec. 18, 1973, as quoted in Hearings on S. 271, supra note 1, at 151:

[T]he way to ease this judicial burden is not by leaving the baggage on the train but by getting more porters. If the need for these additional judges causes a strain on the judiciary, the Congressional solution should be the appointment of more judges, not the denial of the extra judicial care and consideration that three-judge court cases merit. The cases in which three-judge courts are convened are precisely the cases in which this Nation should maximize its use of judicial manpower.


106. See note 104 supra.

107. “It appears that a large number of the 183 cases are only tangentially related to civil rights.” Letter from Judge J. Skelly Wright to Hon. Robert W. Kastenmeier, Chairman, Subcomm. on Courts, Civil Liberties and Administration of Justice, House Comm. on the Judiciary, Oct. 10, 1973, as quoted in Hearings on S. 271, supra note 1, at 15.

108. Letter from Rowland F. Kirks, Director of the Administrative Office of the United States Courts, to Hon. Robert W. Kastenmeier, Chairman, Subcomm. on Courts, Civil Liberties and Administration of Justice, House Comm. on the Judiciary, Oct. 10, 1973, as quoted in Hearings on S. 271, supra note 1, at 108. The House bill proposes to provide three-judge courts for the few cases involving racial discrimination. See note 35 supra.

109. The following table further categorizes the type of litigation classified as “civil rights.”

| CASES HEARD BY 3-JUDGE COURT WHICH WERE CLASSIFIED AS CIVIL RIGHTS CASES IN FISCAL YEARS 1972 AND 1973—SHOWING THE SUBSTANTIVE NATURE OF THE LITIGATION |
|---|---|---|---|
| Type of civil rights case | Fiscal year— | |
| | 1972 | 1973 |
| Total | 166 | 183 |
| Abortion laws | 8 | 3 |
| Assistance to nonpublic schools | 4 | 3 |
the reliance civil rights litigants have placed on the three-judge panel.

The cases heard in 1972 and 1973 include, for example, an action by women who were denied welfare benefits when they sought abortions, an action to secure education for retarded children, an action to restrain the seizure of an allegedly obscene film, a class action seeking injunctive and declaratory relief in connection with the denial to plaintiff-inmates of credit for time served, and a class action seeking a declaratory judgment that a House bill conditioning the receipt of welfare benefits on a one-year residency requirement was unconstitutional. Because of the importance and complexity of these suits and the delicate balance between state and federal governments which they affect, the decision to deny a three-judge hearing must rest on more than judicial economy.

During the House hearings, an apparent insensitivity to federalism and the problems of civil rights litigants on the part of the critics of three-judge courts was typified by the following

<table>
<thead>
<tr>
<th>Category</th>
<th>Cases</th>
<th>Suits</th>
</tr>
</thead>
<tbody>
<tr>
<td>Education for the handicapped</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Employment</td>
<td></td>
<td>8</td>
</tr>
<tr>
<td>Expelling students</td>
<td></td>
<td>3</td>
</tr>
<tr>
<td>Housing</td>
<td></td>
<td>3</td>
</tr>
<tr>
<td>Obscenity</td>
<td>7</td>
<td>12</td>
</tr>
<tr>
<td>Prejudgment attachments, seizure of property without notice</td>
<td>4</td>
<td>10</td>
</tr>
<tr>
<td>Penal codes and prisoner positions</td>
<td>12</td>
<td>11</td>
</tr>
<tr>
<td>Residency requirements</td>
<td>21</td>
<td>25</td>
</tr>
<tr>
<td>Sobriety tests</td>
<td></td>
<td>2</td>
</tr>
<tr>
<td>Taxes</td>
<td>5</td>
<td>3</td>
</tr>
<tr>
<td>Voting and election laws</td>
<td>35</td>
<td>30</td>
</tr>
<tr>
<td>Welfare, social security, and unemployment benefits</td>
<td>23</td>
<td>23</td>
</tr>
<tr>
<td>Constitutionality of a State statute (not classified above)</td>
<td>9</td>
<td>12</td>
</tr>
<tr>
<td>Other (not cited in sufficient frequency to classify above)</td>
<td>28</td>
<td>29</td>
</tr>
</tbody>
</table>

Hearings on S. 271, supra note 1, at 109.

110. Id.
111. Id. at 110.
112. Id.
113. Id.
114. Id. at 111. For the substantive nature of other cases classed as civil rights see id. at 109-22.
115. Nathaniel R. Jones, General Counsel of the NAACP, interpreted the increase in suits requiring a three-judge court as follows:
What these figures say to me . . . is that the [three-judge] court is a highly desirable mechanism for dealing with serious constitutional problems facing citizens. Why should a mechanism that is so highly utilized be crippled, or worse, eliminated?

Statement of Nathaniel R. Jones before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice, Hearings on S. 271, supra note 1, at 143.
interchange between Assistant Attorney General Robert G. Dixon, Jr., and Congressman Robert Drinan:\textsuperscript{116}

MR. DRINAN: Well, sir, I am just asking you for a reason now; and the enforcement of civil rights, I do not have to remind you, is a very difficult thing; and why should we say to 183 plaintiffs all over this country that we are wiping away the remedy that you have elected as the best possible way for you to assert your rights?

. . .

MR. DIXON: We have to balance objectives here. Historically there was felt to be a problem of prejudice on the part of a single judge who was sought by plaintiffs to enjoin operations of State regulatory statutes in the early days, and the three-judge court was thought to be beneficial to broaden the viewpoint and avoid casual invalidation of State law. We have gotten away from feelings that we used to have that a single judge would be either prejudiced or more parochial in his viewpoint than three judges. The problem has receded.

MR. DRINAN: Well who says that, sir? . . . [W]ho is the we who gets away from these feelings? I do not see that in the figures reflected here. I do not see that in the civil rights movement and I do not see my lawyers here saying that we [would] just as soon have one [judge]. You are saying this for the Department of Justice and you do not even have . . . any statistics to [justify] a belief that we have gotten away from the Federal judges [sic] biases and give us some evidence of that.

The historical argument upon which Mr. Dixon relied palls when other considerations are introduced. The cases which civil rights litigants bring before the three-judge forum reflect modern sensibilities and new areas of potential conflict between state and federal governments.\textsuperscript{117} The equal protection clause, especially as it has been used in suits for injunctive relief brought under 42 U.S.C. § 1983,\textsuperscript{118} is no less of a threat to federal-state relations

\textsuperscript{116} Id. at 83, 84-85.

\textsuperscript{117} The ALI expresses these concerns in its study:

But if the particular problems that strained relations between the states and the federal courts a half century ago are no longer present, other controversies have arisen that are not less sensitive. Federal courts still force social and political changes on the states by injunctions against state practices that violate the Constitution of the United States.

\textit{ALI STUDY, supra} note 1, at 319. \textit{See also} Note, 72 \textit{Yale L.J.}, \textit{supra} note 17, at 1651.

\textsuperscript{118} 42 U.S.C. § 1983 (1970) provides:

\textbf{Civil action for deprivation of rights.}

Every person who, under color of any statute, ordinance, regulation, cus-
than the due process clause was in former years.\textsuperscript{119}

Another important factor which must be evaluated to decide whether to eliminate the three-judge court is the influence of local bias on a single judge. Suits which allege the violation of a civil right often arise in a community which has little sympathy with the litigant’s claim.\textsuperscript{120} This was certainly the situation in racial discrimination cases which arose in the aftermath of \textit{Brown v. Board of Education}.\textsuperscript{121} This observation appears to hold true in other civil rights cases as well. In a letter written to Representative Kastenmeier, Chairman of the House Committee on the Judiciary, Professor Amsterdam hastened to de mythologize the belief in the impartial federal district court judge:\textsuperscript{122}

Under the circumstances, it would be unnatural—it would be superhuman—if the force of local sentiment were not reflected to some extent in the attitudes and reactions of the local federal district judges to the cases that come before them. To say, as I am quick to say, that some federal district judges have long and consistently managed to hold the balance true notwithstanding these local pressures, is an enormous tribute to them. It is not, however, an accurate description of how most federal district judges can humanly be expected to behave most of the time. However much integrity, strength and good-will they may
have, they are—like all of us—affected by their environment in
a host of unconscious or half-conscious ways.

Professor Amsterdam’s forthright letter was not the only occasion
on which this concern was expressed. Justice Douglas echoed
these thoughts when he dissented in *MTM, Inc. v. Baxley*,\(^ {123} \) which limited direct appeals to the Supreme Court.\(^ {124} \) In attempt-
ing to present an impartial view of the three-judge court,\(^ {125} \) Justice
Douglas argued that “[t]hree judges may well display more
sensitivity to national policies and perspectives than would a
single judge . . . .”\(^ {126} \) John A. Buggs, Staff Director, United
States Commission on Civil Rights, in a letter to Representative
Drinan, stated:\(^ {127} \)

A single judge confronted by such a controversial statute is
less likely than two or three judges to find the facts and make
the judgments which would subject him to hostile public opin-
ion.

Another reason for retaining the three-judge court emerged

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\(^ {123} \) 420 U.S. 799, 807 (1975).

\(^ {124} \) The majority in *MTM, Inc. v. Baxley*, 420 U.S. 799 (1975), held that the
Supreme Court had no jurisdiction over a direct appeal from a three-judge court under 28
U.S.C. § 1253 (1970) where the order of the three-judge court denying injunctive relief was
based not on the merits of the constitutional claim but on the impropriety of federal
intervention in state proceedings. The Court based its decision in large part on its recent
decision in *Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90 (1974), where it
had held that the right of direct appeal did not lie from a three-judge court dismissal for
lack of standing. Id. at 101. The *Gonzalez* Court also considered the question of what
constitutes an order “denying” injunctive relief for the purposes of 28 U.S.C. § 1253. Id.

\(^ {125} \) Justice Douglas refrained from expressing his opinion with respect to whether
the three-judge court should be eliminated, attributing to Congress, not the courts, the
responsibility for that decision. *MTM, Inc. v. Baxley*, 420 U.S. 799, 808-09 (1975) (Doug-
las, J., dissenting).

\(^ {126} \) Id. at 808, referring to *Hearings on S. 271*, supra note 1, at 150 and Note, 72 YALE
L.J., supra note 17, at 1652-53.

\(^ {127} \) *Hearings on S. 271*, supra note 1, at 150. See also Testimony of Nathaniel R.
Jones, General Counsel, NAACP, *id.* at 142-43, where further concern with political and
local biases was expressed:

> We would be closing our eyes to reality . . . were we not to acknowledge aware-
ness of the process by which many lawyers are selected for the federal bench. It
would be expecting super-human powers on the part of the jurists to expect that
an immediate transformation occurs and they suddenly become insensitive to
the feelings, inclinations and predilections of those who participated in their
elevation to the bench. . . .

> . . . *T*hree-judge courts are more resistant to local influence and the mem-
bers who constitute the court can thereby deal with the issues with greater
concern for the merits and the law.
from the hearings: considerably greater weight is given to a de-
cision to invalidate state or federal legislation when it is reached
by three judges. Since the local district judge has made a rea-
soned decision with two other judges, one of whom is a circuit
judge, that judge need not bear the brunt of local hostilities
alone. Of additional import, especially in constitutional areas,
is that the opinion itself will be accorded more respect by other
courts, by the community in which the controversy arises, and by
the litigants themselves:

Because of its inherent prestige, the input of two additional
minds and the presence of at least one circuit court judge, the
decision of a three-judge court carries greater legal and moral
authority than the decision of a single judge. Accordingly, it is
more likely that three-judge court orders in controversial cases
will be voluntarily complied with and on the whole better ac-
cepted by whichever side loses.

The effect which the elimination of the three-judge forum would
have on civil rights litigants is too severe to be dismissed by
unsubstantiated and misplaced concerns about judicial overbur-
dening and erroneous statements that the policy behind the use
of these courts no longer exists.

PROCEDURAL CONSEQUENCES OF THE ELIMINATION OF THE THREE-
JUDGE COURT

In addition to arguments based on judicial economy and pol-
icy, there are important procedural implications of abolishing
the three-judge forum. Testimony before the House Subcommit-
tee indicated that a more stable forum of three is important in
the procedural and evidentiary, as well as the substantive aspects
of cases. While a hearing before a single judge need not be the
ultimate determination in that an appeal can be taken to a multi-

128. See Letter from Anthony G. Amsterdam Professor of Law, Stanford Law School,
to Robert W. Kastenmeier, Chairman, Subcomm. on Courts, Civil Liberties and Adminis-
tration of Justice, House Comm. on the Judiciary, Dec. 13, 1973, as quoted in Hearings
on S. 271, supra note 1, at 123.

129. Letter from John A. Buggs, Staff Director, U.S. Comm'n on Civil Rights, to Hon.
Robert F. Drinan, Dec. 18, 1973, as quoted in Hearings on S. 271, supra note 1, at 150.

130. Letter from John A. Buggs, Staff Director, U.S. Comm'n on Civil Rights, to Hon.
Robert F. Drinan, Dec. 18, 1973, as quoted in Hearings on S. 271, supra note 1, at 150.
judge appeals court, this may be an inadequate procedure by which to insure the protection of inviolable constitutional rights.

First, the opportunity to appear before several judges might depend on whether the litigant can afford to take an appeal to a higher court, with the possibility of additional expense if appeal to the Supreme Court is warranted. Furthermore, because of the limited review powers of an appeals court, appellate judges are bound in most instances by the trial judge’s findings of fact. When a determination of the constitutionality of a statute rests on facts concerning the statute’s “application,” “operation,” and “effects,” it is particularly important to have the benefit of three judges: the findings of fact may well determine if the statute is unconstitutional, and the findings will be reversed only in the event that they are clearly erroneous. A trial judge’s ruling on a procedural matter, while it can be corrected on appeal, could be “extremely damaging to the posture of a civil rights case and to the political movement which generated it.” In addition, any discretionary decision which the trial judge makes which could effectively determine the outcome of the litigation may not be able to be corrected on appeal. In a discussion of appellate review in his letter to the House Subcommittee, Professor Amsterdam noted that the date set for an injunction proceeding is determined by the trial judge and is not reviewable on appeal. The forms of interlocutory and final equitable relief and the conduct of settlement conferences are also mentioned by Professor Amsterdam as items which are outside the province of the appellate court. Moreover, he cited additional examples of the procedural implications of the elimination of the three-judge court:

131. See Note, 72 Yale L.J., supra note 17, at 1654.
132. See Letter from Anthony G. Amsterdam Professor of Law, Stanford Law School, to Robert W. Kastenmeier, Chairman, Subcomm. on Courts, Civil Liberties and Administration of Justice, House Comm. on the Judiciary, Dec. 13, 1973, as quoted in Hearings on S. 271, supra note 1, at 123. Professor Amsterdam argues that especially when the facts are “constitutional” rather than “adjudicative” it is essential to have a three-judge determination, for the trial court in these instances “has enormous discretion as to whether to permit them to be proved at all.” Id. The professor further opines that this “discretion may affect the rule of law that eventually emerges from the case.” Id.
133. Letter from John A. Buggs, Staff Director, U.S. Comm’n on Civil Rights, to Hon. Robert F. Drinan, Dec. 18, 1973, as quoted in Hearings on S. 271, supra note 1, at 150. Rulings on evidence and the court’s timing of what it will hear and do are examples of such discretionary determinations.
134. Id. at 123-24.
In other cases, the shape of the court's remedial decree—a subject almost wholly within trial-court discretion—determines whether plaintiffs win a paper victory or a real one. In still other cases, low-visibility-procedural decisions, such as whether the defendant's motion for summary judgment is consolidated for hearing with the plaintiff's motion for a preliminary injunction, or whether the preliminary injunction hearing is deferred until the completion of discovery depositions, may determine the outcome of the case.

It is difficult to applaud the demise of the three-judge court in light of the serious procedural consequences which would follow. Unless their claims meet the requirements of the appropriate sections of the Civil Rights Act of 1964, future civil rights litigants will no longer be able to appear before a circuit judge and two district judges. This will be the case even if they allege a violation of 42 U.S.C. § 1983, which gives a remedy to those deprived of their civil rights but does not require a three-judge court.

An additional implication of the demise of the three-judge court in cases alleging the unconstitutionality of state or federal statutes is the possible elimination of the requirement of a three-judge forum in reapportionment cases and cases brought under the pertinent sections of the Civil Rights Act and the Voting Rights Act. When asked at the House hearings whether the three-judge device might be made unavailable in these cases, Judge J. Skelly Wright did not rule out the possibility but stated that such a proposal would have to be deliberated by the Judicial Conference. Furthermore, the Conference did not find the issue bothersome since there are few cases which arise under these statutes. The possibility is not remote, however, and all the arguments against the elimination of three-judge courts in constitutional cases apply with equal force to cases arising under these statutes.

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139. Id.
141. Hearings on S. 271, supra note 1, at 10.
142. Id.
143. Mr. Dixon, in his statement before the Subcommittee, conceded: "Further study might show that three-judge courts could be eliminated in all of these [I.C.C., antitrust, and certain civil rights] cases as well." Hearings on S. 271, supra note 1, at 91. Subsequent to the hearings, antitrust cases brought under the Expediting Act, 15 U.S.C. § 28 (1970), 49 U.S.C. § 44 (1970), and I.C.C. cases under 28 U.S.C. § 2325 (1970) were deemed no longer to require a three-judge forum. See note 8 supra.
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This is true despite the fact that only a few cases are involved. The opportunity to appear before a three-judge court should not be denied to litigants who bring suit in these crucial constitutional areas.

CONCLUSION

In 1964 Professor Currie suggested that the three-judge provisions "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." The ALI Study pays heed to Professor Currie's words, adding: "With political issues of such moment as these involved, procedural efficiency cannot be the only determinant of when to require three judges." In light of available statistics, it is not likely that legislation to eliminate three judges will achieve the desired result of a lesser-burdened, more efficient federal judiciary. Moreover, this result, to the extent it is realized at all, will be reached at a high price: the frustration of the still valid policy reasons which, though lately redirected, originally gave rise to the implementation of three-judge courts. Whatever the presumed benefits in administrative efficiency may be, they cannot outweigh the injury which will accrue to civil rights litigants seeking to assert their federally-guaranteed rights and the resulting harm to the federal system that guarantees those rights.

Wendy G. Singley

145. ALI STUDY, supra note 1, at 318-19.