The Three-Judge District Court in Voting Rights Litigation

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In recent Terms the Supreme Court has heard numerous appeals from the decisions of three-judge district courts in controversial Voting Rights Act cases as well as in challenges to congressional districts designed allegedly to facilitate the election of members of minority groups. Although the cases themselves have been followed closely, the institution of the three-judge district court itself has received relatively little attention, even though Congress passed legislation in 1976 that restricted the three-judge court's jurisdiction to reapportionment and certain Voting Rights Act cases. In this Article, Professor Solimine argues that numerous problems attend the formation and operation of such courts. He reviews both structural problems and administrative problems. He concludes that the court should be abolished, permitting a single district judge to consider the cases currently litigated before such courts with normal appellate review thereafter. He considers alternative reforms and critically examines proposals to expand the current jurisdiction of three-judge district courts.

Apportionment is a very high percentage of politics with a very small admixture of definable principle.

—Alexander Bickel¹

Legislative districting is highly political business.

—Justice Ruth Bader Ginsburg²

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[T]hree-judge district courts [are] "a miserable way to do business"—an "abomination," "a monstrosity in concept and practice" . . . .

—Judges of the United States Courts of Appeals

INTRODUCTION

Within the last few years, the Supreme Court has handed down a number of critical decisions in which issues of race or voting rights, or both, were at the heart of the controversy. In the 1994 Term, for example, the Court limited the power of federal judges to desegregate public schools, subjected federal affirmative action programs to heightened standards of judicial scrutiny, and found racially gerrymandered congressional districts unconstitutional. The Court paid increased attention to litigation that challenged congressional districts drawn to increase the election chances of members of minority groups. By the end of the 1995 Term, the Court had considered five such challenges in a three-year period.

What drew little, if any, attention was that all of these gerrymandering cases did not reach the Supreme Court through the usual process: a decision by a federal district judge, with review by a court of appeals, followed by the Supreme Court's grant of a writ of certiorari. Rather, three-judge district courts decided these cases, and the Supreme Court provided direct review. Since Congress amended the statute governing such tribunals in 1976, three-judge courts have

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5. See Missouri v. Jenkins, 115 S. Ct. 2038, 2054–56 (1995) (finding that allowing salary increases for the purpose of "desegregation attractiveness" was an interdistrict solution beyond the scope of the problem).
7. See Miller, 115 S. Ct. at 2490 (requiring that congressional redistricting pass strict scrutiny).
operated in comparative anonymity. They should not. Although these courts now only decide reapportionment and certain Voting Rights Act claims, they nonetheless supply the Supreme Court with many cases involving increasingly volatile voting rights issues. These cases significantly affect the functioning of the American political system. Reapportionment, apportionment, and Voting Rights Act cases challenge the decennial configuration of electoral districts for the U.S. House of Representatives and state legislative bodies. In these types of cases, courts often find the districting plan established by a state legislature unlawful and order the districts redrawn. Yet, despite the important issues resolved by three-judge district courts, the convening and operation of these courts has received comparatively little notice.


This Article addresses the operation of three-judge district courts in the last two decades. Part I reviews the general background of such courts, beginning with their birth in 1910 as a reaction to injunctions granted against state governments by individual federal judges, to the curtailment of the jurisdiction of such courts sixty-five years later. Part I also briefly reviews the effect of a 1976 statutory amendment on three-judge court litigation.

The second Part of this Article considers structural aspects of the modern three-judge district court. That is, Part II addresses legal and policy issues apparent from or inherent in the governing statute. Part II first considers several issues of statutory interpretation left in the wake of the 1976 amendment. It then focuses on the aforementioned jurisdictional coverage of the statute, now restricted to issues regarding the apportionment of congressional districts or state-wide legislative bodies (or when required by an Act of Congress). This Part addresses how Voting Rights Act cases are heard despite this restriction and whether the restriction makes good policy sense. Part II further considers whether the statute can achieve its purpose of thwarting forum shopping by plaintiffs seeking a single sympathetic judge. Finally, Part II reviews and offers a critique of the process of direct review by the Supreme Court.

Part III of the Article turns to issues emanating from the staffing and administration of three-judge courts. This section initially considers the unusual makeup of each particular three-judge court—a combination of district judges and at least one circuit judge, with the chief judge of the circuit selecting two of the members. This procedure raises the possibility of a chief judge “stacking” the membership of a three-judge panel. On a related note, this section discusses the internal dynamics of decisionmaking on three-judge courts, with a consideration of whether district judges defer to their circuit counterparts, and whether ideological motivations help explain voting patterns in these cases. Part III concludes with a brief discussion of the logistics of litigating voting rights cases before a multi-member trial court.

The fourth Part of the Article reviews proposals to change the status quo. Most of these proposals suggest further curtailing,

16. See id. § 2284(a).
17. See id. § 2284(b)(1).
or entirely eliminating, the jurisdictional ambit of such courts or changing the membership and appellate review of such courts. Conversely, the 104th Congress enacted into law one of two proposals to expand the jurisdiction of these courts. The Article concludes by asking whether and to what extent an institution asked to review highly controversial and sensitive political issues has, itself, become politicized and what can or should follow by way of reform.

I. BACKGROUND

A. History of the Three-Judge District Court

The colorful history of the statutory three-judge district court has been recounted elsewhere and need not be described here in great detail. Prior to this century Congress occasionally created three-judge trial courts, but the widespread use of such courts began in reaction to the Supreme Court’s decision in 1908 in Ex parte Young. Charles Alan Wright described the case as one of the “three most important decisions the Supreme Court of the United States has ever handed down,” because it established the power of federal courts to enjoin the actions of state officials when violative of the federal constitution. The Court

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19. On occasion a district court has been constituted informally to consist of three members, but the power of such a court, and review thereof, is typically equivalent to that of a single district judge. See King v. Champion, 55 F.3d 522 (10th Cir. 1995) (describing briefly the creation of such a court). See generally Comment, In Search of Judicial Economy: The Non-Statutory Three Judge Court, 56 IOWA L. REV. 1096 (1971) (discussing the confusion that use of a non-statutory three-judge district can cause).


21. See Currie, supra note 20, at 1–2 (describing its use in certain antitrust cases and appeals from federal administrative agencies).


23. WRIGHT ET AL., supra note 20, § 4231, at 559 (footnote omitted). Wright described Ex parte Young as being as important as Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (establishing power of judicial review) and Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304 (1816) (holding that the Supreme Court could enforce the federal Constitution against state courts). See WRIGHT ET AL., supra note 20, § 4231, at 559.
held that federal judges could exercise such power despite the
purported barrier of the Eleventh Amendment,24 because when
a state official acted unconstitutionally, his actions stripped
him of his official capacity. The Eleventh Amendment would not,
therefore, protect him.25

The spectacle of federal judges enjoining the new regulatory
policies of states engendered much criticism in the Progressive
Era of 1908.26 In Congress, one senator opined that he was
"opposed to allowing one little federal judge to stand up against
the governor and the legislature and the attorney-general of the
State and say, 'This act is unconstitutional.'"27 In 1910 Congress
passed legislation that required parties seeking relief against
state officials, like the suit in Ex parte Young, to bring their suit
before a district court consisting of three judges.28 At least one
of the judges had to be from the federal circuit appeals court and
direct review by appeal would lie in the Supreme Court.29 This
format was designed to encourage greater deliberation among
three minds before a grant of injunctive relief, to lend greater
dignity to the proceedings, and to provide expedited Supreme
Court correction, if necessary.30

In the following decades, the role of the three-judge court
expanded.31 Most notably, a 1925 amendment included suits
seeking both interlocutory and permanent injunctive relief,32 and
another in 1937 extended coverage to suits that challenged the
constitutionality of a congressional statute.33 Whatever the
wisdom of these extensions, the goals of restricting the power
of federal judges acting alone "was attained only at great

24. See U.S. CONST. amend. XI ("The Judicial power of the United States shall not
be construed to extend to any suit in law or equity, commenced or prosecuted against
one of the United States by Citizens of another State, or by Citizens of any Foreign
State.").
25. See Ex parte Young, 209 U.S. at 159–60. Ex parte Young has remained an
integral part of the Court's Eleventh Amendment jurisprudence. See, e.g., Seminole Tribe
JURISDICTION 390–401 (2d ed. 1994).
27. Id. at 7 n.40 (quoting 45 CONG. REC. 7256 (1910) (statement of Sen. Overman)).
(1994)).
29. See id.
30. See WRIGHT ET AL., supra note 20, § 4235, at 596–98; Currie, supra note 20, at
7–8.
Code § 2282).
price.\textsuperscript{34} The price was paid in two ways. First, convening ad hoc three-judge trial courts burdened the lower federal judiciary.\textsuperscript{35} The ostensibly direct and mandatory review function meant that in some years such appeals took up nearly a quarter of the Supreme Court's docket.\textsuperscript{36} Second, the operation of the statutory provisions produced a confusing array of issues regarding when such courts had to be convened.\textsuperscript{37} Finally, the rules that addressed appellate review of orders by or about such courts "were so complex as to be virtually beyond belief."\textsuperscript{38}

**B. The 1976 Amendment**

The complexities of the three-judge district court were not lost upon policymakers. By the 1960s commentators suggested curtailing the court or eliminating it entirely. Professor David Currie, in a 1964 article, acknowledged that the court might be appropriate for cases with high potential for federal-state friction.\textsuperscript{39} At the same time he argued that the normal appellate process should operate unless the court issued an injunction, in which instance there could be a direct appeal.\textsuperscript{40} Similarly, the American Law Institute (ALI) cautioned that with the volatile political issues considered by such courts, "procedural efficiency cannot be the only determinant of when to require three judges."\textsuperscript{41} Nonetheless, the ALI concluded that the original reasons for the three-judge court no longer existed. Modern rules of

\begin{enumerate}
\item \textsuperscript{34} WRIGHT ET AL., supra note 20, § 4234, at 600.
\item \textsuperscript{35} See Phillips v. United States, 312 U.S. 246, 250 (1941).
\item \textsuperscript{37} See WRIGHT ET AL., supra note 20, § 4234, at 601.
\item \textsuperscript{38} Id. Among the complicated issues were whether and to what extent the district judge could issue orders, whether the district judge or a circuit judge would convene the three-judge court, whether a litigant motion was necessary to instigate the convention, and whether there were the appellate consequences of an incorrectly convened three-judge court or one that had not been convened when it should have. See id.; see also Currie, supra note 20.
\item \textsuperscript{39} See Currie, supra note 20, at 75 (referring to "[r]ace-relations and reapportionment cases").
\item \textsuperscript{40} See id. at 76.
\item \textsuperscript{41} AMERICAN LAW INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 318–19 (1969).
\end{enumerate}
procedure safeguarded against district judges granting precipitous ex parte injunctions, and the "image of the federal courts as a barrier against liberal state legislation ha[d] long since disappeared." Moreover, in the 1960s hundreds of such cases were heard each year. Still, the ALI did not call for the court's abolition. Noting that the "moral authority of a federal court order is likely to be maximized" by a three-judge panel, the ALI recommended using three-judge panels for "important" cases. While the ALI acknowledged that "important" was a difficult standard to define, they suggested that a good starting point would be cases with state-wide significance. The ALI concluded that the three-judge procedure with direct review should only operate when the constitutionality of a state statute was attacked. A single judge would hear challenges to federal statutes.

By the early 1970s the Judicial Conference of the United States and other authorities were advocating either total repeal or ALI-like restrictions. Judge J. Skelly Wright placed himself in the camp of supporting some restrictions and approved of a bill to limit three-judge courts to reapportionment cases. He argued that such cases were ones of "great public concern" that require an unusual degree of "public acceptance" and ordinarily would present legal issues based on undisputed statistical facts. In the camp favoring complete repeal, Professor Charles Alan Wright was skeptical. He conceded that reapportionment cases are important, but suggested that such cases are likely to be fact-intensive, and thus particularly unsuitable for decision by three triers of fact.

42. Id. at 319.
43. See id. at 317.
44. Id. at 320. The ALI reasoned that a court's moral authority was increased "if the result cannot be laid to the prejudices or political ambitions of a single district judge." Id.
45. Id.
46. See id. at 321.
47. See id. at 53-56.
48. See id. at 317.
49. For a good summary of the debate over the three-judge court proposals in the early 1970s, see Sidney B. Jacoby, Recent Proposals and Legislative Efforts to Limit Three-Judge Court Jurisdiction, 26 CASE W. RES. L. REV. 32 (1975).
50. See S. 1876, 92d Cong. § 1374 (1971).
52. Id. (quoting Hearings on S. 1876 Before the Subcomm. on Improvements in Judicial Mach. of the Senate Comm. on the Judiciary, 92d Cong. 791 (1971-72) [hereinafter Hearings] (statement of Hon. J. Skelly Wright)).
53. See Hearings, supra note 52, at 774 (statement of Prof. Charles Alan Wright).
Judge Wright's position prevailed in the ninety-fourth Congress. Legislation\(^{54}\) repealed prior statutes and codified the three-judge court in section 2284 of the Judicial Code.\(^{55}\) As amended, section 2284 mandates that three-judge courts shall be convened "when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body," or when otherwise required by a separate statute.\(^{56}\) Section 1253 of the Code, which provided for direct review to the Supreme Court, remained intact.\(^{57}\)

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\(^{55}\) 28 U.S.C. § 2284 (1994). Section 2284 provides:

(a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

(b) In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows:

1. Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.

2. If the action is against a State, or officer or agency thereof, at least five days' notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State.

3. A single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except as provided in this subsection. He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction. A single judge shall not appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits. Any action of a single judge may be reviewed by the full court at any time before final judgment.

\(^{56}\) Id. § 2284(a).

\(^{57}\) Section 1253 governs 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.

The legislative record provides the rationale for the partial repeal. The Senate Judiciary Committee advanced four principal reasons in support of the change. First, there was the considerable logistical burden of convening a large number of such panels—reaching an all-time high of 320 in 1973.\(^{58}\) Second, amendments were necessary to cure some procedural uncertainties of the prior statute.\(^{59}\) Third, changes in procedural practice had largely "eliminated the original reasons" for the statute\(^{60}\)—such as limits on the granting of ex parte injunctive orders.\(^{61}\) Finally, the Committee observed that modern case law placed equitable restraints on the authority of federal judges to grant injunctive relief against state programs or officials.\(^{62}\) Nonetheless, the Committee added, without elaboration:

The bill preserves three-judge courts for cases involving congressional reapportionment or the reapportionment of a statewide legislative body because it is the judgment of the committee that these issues are of such importance that they ought to be heard by a three-judge court and, in any event, they have never constituted a large number of cases.\(^{63}\)

Completely agreeing with the earlier-stated views of the Senate Judiciary Committee,\(^{64}\) the Report added that "[a]lthough the NAACP has spoken in opposition to restriction of three-judge court jurisdiction, the Committee is satisfied that the civil rights of citizens will continue to be well protected by this bill."\(^{65}\)

Representative Robert Drinan from Massachusetts elaborated on this point. He observed that the only explicit opposition to the retraction of three-judge district court jurisdiction came from


\(^{59}\) See id. at 5–7. The report refers to, among other things, questions of what was a state statute, and the implications of a district judge refusing to convene a three-judge court, if that action was later determined by an appellate court to be incorrect. See id.

\(^{60}\) Id. at 4.


\(^{62}\) See S. Rep. No. 94-204, at 8 (referring to, among other cases, Younger v. Harris, 401 U.S. 37 (1971)).

\(^{63}\) Id. at 9.


\(^{65}\) Id. at 4.
the NAACP, which argued that such courts were needed to protect minorities "from the local bias and parochialism of some federal judges" and that abolition would send the wrong signal with regard to the nation's commitment to civil rights enforcement. Representative Drinan took issue with both claims, arguing that the former proved too much because if it were true, all racial discrimination cases should be before three-judge courts and that the latter concerns were addressed by the retention of jurisdiction over certain voting rights cases. The opposition of the NAACP had not been in vain, however, because the partial repeal was evidence of a legislative "compromise," as Drinan labeled it elsewhere.

C. Use of the Three-Judge District Court Since 1976

Since 1976, three-judge district courts are convened for cases challenging a state's reapportionment of its federal and state legislative districts, and in other instances when required by Congress. Among the most important of the latter are the

67. See id. at 14.
68. 122 Cong. Rec. 25,058 (1976) (statement of Rep. Robert Drinan). In the 1970s the NAACP and other civil rights organizations also opposed the breakup of the old Fifth Circuit into two new circuits. These groups felt that the Fifth Circuit, like the institution of the three-judge district court, had been hospitable to their interests. The election of President Jimmy Carter, the support of Fifth Circuit judges, and other factors alleviated fears surrounding this proposed change, and legislation to split the old Fifth Circuit into the Fifth and Eleventh Circuits was enacted in 1980. See Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 (codified as amended at 28 U.S.C. § 41 (1994)); Deborah J. Barrow & Thomas G. Walker, A Court Divided: The Fifth Circuit Court of Appeals and the Politics of Judicial Reform 194–96, 239, 241 (1988); Denton L. Watson, Lion in the Lobby: Clarence Mitchell, Jr.'s Struggle for the Passage of Civil Rights Laws 735 (1990). I thank Judge Nathaniel Jones for bringing this history to my attention.
69. Among the other scenarios that require three-judge district courts are those that involve certain actions by the Attorney General to enforce the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-5(b), 2000e-6(b) (1994) (public accommodations and equal employment); the Voting Rights Act, 42 U.S.C. §§ 1973aa-2, 1973bb(a)(2) (1994) (enforcing the 26th Amendment); see also Wright et al., supra note 20, § 4235, at 604–05.

preclearance provisions of the Voting Rights Act,\(^7\) under which certain political subdivisions in the South\(^1\) must seek permission from the U.S. Department of Justice (DOJ) before changing election processes. Part of that approval procedure may entail a hearing before a three-judge district court convened in the District of Columbia.\(^2\) While § 2284 makes no mention of private enforcement of the Voting Rights Act, courts have routinely exercised pendent jurisdiction over such claims when joined with actions explicitly calling for a three-judge court to be empaneled.\(^3\)

The drafters of the 1976 Amendment accurately predicted that the number of three-judge court cases would fall drastically. As Table 1 indicates, the number of three-judge court hearings,\(^4\) which reached more than 300 annually shortly before the amendment, fell well below 100 annually by the 1980s. Indeed, the annual number of such hearings is usually between ten and


72. For a discussion of preclearance procedures and litigation, see Drew S. Days III & Lani Guinier, Enforcement of Section 5 of the Voting Rights Act, in MINORITY VOTE DILUTION 167 (Chandler Davidson ed., 1984); Drew S. Days III, Section 5 and the Role of the Justice Department, in CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 52 (Bernard Grofman & Chandler Davidson eds., 1992).

73. For further discussion of this jurisdictional point, see infra notes 105-13 and accompanying text.

74. The Annual Reports of the Director of the Administrative Office of the United States Courts, the source of the data in Table 1, refer to "hearings," not to filed cases. The two are not necessarily equivalent. Even if a three-judge district court is convened, the case may be dismissed or otherwise terminated without any sort of hearing. Likewise, any such case presumably can have more than one hearing.
twenty, except for the years 1982 and 1992, when the totals were sixty-two and forty-nine, respectively.

It is easy to establish the subject of these cases. Three-judge courts rarely are convened except for cases that involve reapportionment and pendent Voting Rights Act litigation. The upsurge in the number of cases in the early years of the decades is no surprise, given that reapportionment by states, which takes place decennially was judicially challenged in more than one-third of the states in the 1980s and in about two-thirds of the states in the 1990s. The balance of the cases, as indicated in Table 1, arose from litigation by the federal government or private litigants to enforce the primary provisions of the Voting Rights Act.

The substantive law driving these currents of litigation is well known. Since the 1960s, reapportionment jurisprudence has been relatively well settled, and modern cases involve mostly

75. See Wright et al., supra note 20, § 4234, at 604–05 (discussing circumstances under which three-judge district courts are convened); Days, supra note 72, at 52 n.2 (noting the paucity of three-judge court litigation under preclearance provisions of the Voting Rights Act); Pamela S. Karlan, All Over the Map: The Supreme Court's Voting Rights Trilogy, 1993 SUP. CT. REV. 245, 272 (same); see also Morse v. Republican Party, 116 S. Ct. 1186, 1224 n.2 (1996) (Thomas, J., dissenting) (pointing out that every year “at least several thousand preclearance requests are sent to the Attorney General”).

76. See U.S. CONST. art. I, § 2.


78. As noted in Table 1, the Director of the Administrative Office breaks down the data into “reapportionment” and “civil rights” hearings, with the latter including Voting Rights Act Cases. See, e.g., 1993 DIR. OF THE ADMIN. OFF. OF THE U.S. COURTS ANN. REP., tbl. S-9. However, given that most Voting Rights Act cases before three-judge courts are, technically, pendent to reapportionment claims, see supra text accompanying note 73 and infra notes 105–13 and accompanying text, it is not clear how “civil rights” hearings can be sharply distinguished from apparently pure “reapportionment” hearings. The Administrative Office could provide no further insight on this point, as it merely reports data collected by the clerks of the various federal district courts. See Letter from Steven R. Schlesinger, Chief, Statistics Division, Administrative Office of the United States Courts, to Michael E. Solimine, Donald P. Klekamp Professor of Law, University of Cincinnati College of Law (July 26, 1995) (on file with the University of Michigan Journal of Law Reform). My own empirical study confirms the common sense assumption that many, and perhaps most, three-judge district court cases at least ostensibly involve both reapportionment and Voting Rights Act claims. See infra notes 247–48 and accompanying text and tbl. 5. Of the 89 cases contained in that study, more than 70 formally presented both apportionment and Voting Rights Act claims.

79. See Reynolds v. Sims, 377 U.S. 533 (1964) (applying the one-person, one-vote rule to state legislative apportionment); Wesberry v. Sanders, 376 U.S. 1 (1964) (holding that congressional districts must be apportioned equally); Baker v. Carr, 369 U.S. 186 (1962) (holding that a challenge to state legislative reapportionment is cognizable under the Equal Protection Clause).
the application of the one-person, one-vote principle to disparate factual circumstances. Cases involving the Voting Rights Act are not so easy. As Pamela Karlan has noted, the “right to vote” encompasses three analytically distinct though overlapping interests—rights to participate in voting, to have votes aggregated fairly, and to be governed effectively. Litigation under the Act to further these interests historically encountered several problems. As others have noted, initial enforcement of the Act focused on explicit barriers to voting. The so-called “second generation” of cases shifted to efforts to ensure that minorities would be able to elect members of their groups to office. This trend was stifled by the Supreme Court’s 1980 decision in City of Mobile v. Bolden, which required plaintiffs to prove discriminatory intent in order to have an apportionment scheme or electoral set-up thrown out on constitutional grounds. The trend was revived in 1982 amendments to the Voting Rights Act. Those amendments, as interpreted by the Supreme Court’s decision in Thornburg v. Gingles, banned electoral practices that had the effect of diluting the voting power of minority

80. See, e.g., Board of Estimate v. Morris, 489 U.S. 688 (1989) (applying one-person, one-vote rule to city-wide elections in New York City); Halley v. Junior College Dist., 397 U.S. 50 (1970) (applying one-person, one-vote rule to elections for trustees of junior college district in Kansas City). But see Bush v. Vera, 116 S. Ct. 1941, 2001 (1996) (Souter, J., dissenting) (“Within two years of holding in Baker v. Carr, 369 U.S. 186 (1962), that malapportionment was a justiciable issue, the Court recognized that its general equal protection jurisprudence was insufficient for the task and announced an increasingly rigid, simple to apply, voting-specific mandate of equipopulousness.” (quoting Pamela S. Karlan, Still Hazy After All These Years: Voting Rights in the Post-Shaw Era, 26 CUMB. L. REV. 287, 299 (1996))).


83. See Pildes, supra note 82, at 1363.

84. 446 U.S. 55 (1980).


86. 478 U.S. 30 (1986).
groups. The resulting creation in the 1990s of various legislative districts to ensure the election of persons of color by “packing” certain districts with minority group voters spawned litigation contending that such districts violate the equal protection rights of non-minority voters in those districts. Many cases of this type have been, and will be, brought before three-judge district courts.

This brief survey of voting rights litigation would not be complete without some reference to the nature of such litigation. Aside from developments in statutory and decisional law, modern voting rights litigation not only appears to be increasing but is characterized by a growing sophistication. Much of the litigation at the trial level involves expert witnesses and intricate computer models to construct proposed districts. These developments, coupled with an increasingly complex case law, have recently moved two commentators to suggest that Voting Rights Act litigation is often conducted “in terms unfathomable to the named plaintiffs, defendants, and federal judges.” Not surprisingly, a specialized bar has arisen to litigate these cases. Whether the three-judge district court has influenced or contributed to these developments is the subject of the next two Parts.

88. See Issacharoff, supra note 77, at 1688–90 (noting the increase in challenges to reapportionments from 1980 to 1990); see also Ronald E. Weber, Redistricting and the Courts: Judicial Activism in the 1990s, 23 Am. Pol. Q. 204, 206–09 (1995) (advancing various reasons for the apparent upsurge in litigation, including 1982 amendments to the Voting Rights Act and more split control of state legislatures).
90. See Karlan, supra note 81, at 1726; see also Bush v. Vera, 116 S. Ct. 1941, 1976 n.5 (1996) (Stevens, J., dissenting) (“The dramatic increase in bizarrely shaped districts after 1990 can be traced, at least in part, to the fact that computers allowed legislators to achieve their political goals geographically in a manner far more precise than heretofore possible.”).
II. STRUCTURAL ASPECTS OF THE THREE-JUDGE DISTRICT COURT

The modern three-judge district court results from the unplanned confluence of two developments. One is the limitation of jurisdiction to reapportionment and related Voting Rights Act cases. The other is the growth, both in quantity and importance, of Voting Rights Act litigation since the early 1980s. These developments have to some extent worked at cross-purposes, for the first seemed to destine three-judge courts to relative desuetude, while the second highlighted their features for the few cases they hear. This Part examines some of the features inherent in litigation under § 2284, especially from the litigants’ perspective. The next Part examines the internal workings of the three-judge court.

A. Statutory Interpretation

As described before, inordinately complex issues of interpretation attended the statutes governing the court prior to 1976. The 1976 amendment was meant, in part, to resolve some of those questions. That amendment, coupled with fewer cases litigated before such courts, has led to fewer interpretational difficulties. The amendment is not without its own complexities, but much less satellite litigation attempts to resolve questions over the meaning of § 2284.

94. See supra notes 74–75 and accompanying text.
96. Before 1976, most of the blame could be attributed to the “prolix statute.” See Currie, supra note 20, at 13. But the Supreme Court was not entirely without fault. On various occasions the Court self-consciously followed a non-literal approach to the construction of §§ 2281 and 2282, avowedly to permit the district courts to operate more efficiently. See, e.g., Hagans v. Lavine, 415 U.S. 528, 544–45 (1974) (arguing that where the statutory issue is dispositive, it is unnecessary and inefficient for the district court to defer to a three-judge panel); Swift & Co. v. Wickham, 382 U.S. 111, 124–27 (1965) (favoring a non-literal understanding of § 2281, which restricts three-judge courts to substantive suits under the Constitution for reasons of judicial efficiency). But
Still, a few questions that arose prior to the 1978 amendment apparently remain unresolved. For example, prior law held that the statutory trigger for convening a three-judge court was jurisdictional; that is, it could not be waived and could be raised at any time, even after proceedings on the merits before a single district judge.97 After the amendment, most commentators argued that the trigger was waivable,98 but a few modern courts, pointing to the statutory language “shall be convened,”99 have concluded that no waiver is possible.100 Relatedly, in 1962 the Supreme Court had held in Bailey v. Patterson101 that the three-judge court need not be convened if the unconstitutionality of the statute under attack was obvious. Commentators are unsure whether Bailey survives the amendment,102 and no recent decision apparently has revisited the issue. The better view is that Bailey does not survive the amendment, given the clarification of the powers of the single district judge before whom the action is originally filed. The statute severely limits the ability of that judge to issue merits-related decisions before the full court is convened.103 Determining the “obviousness” of the constitutional question presented by the case seems beyond the purview of a single judge.

More relevant to the issues addressed by this Article, however, is whether three-judge district courts should hear Voting Rights Act claims at all. Section 2284(a) simply states that such courts shall be convened when the constitutionality of a state’s congressional or legislative apportionment is challenged, or when an act of Congress otherwise provides for such courts. The section contains no reference to the Voting Rights Act. Several discrete provisions of the Act do require a three-judge

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see Williams, supra note 95, at 975 n.13 (arguing that the Court did not consistently interpret statutes in a non-literal fashion). Although non-literal interpretation does not necessarily itself lead to doctrinal instability, it may well be a contributing factor.

97. See Wright et al., supra note 20, § 4234.
98. See, e.g., Wright et al., supra note 20, § 4235, at 609–10; Williams, supra note 95, at 975.
102. Compare Wright et al., supra note 20, § 4235, at 618 (arguing that Bailey is good law), with Charles Alan Wright, Law of Federal Courts 318 n.20 (5th ed. 1994) (claiming that Bailey has been overruled), and Currie, supra note 95, at 571 (questioning the viability of Bailey), and Williams, supra note 95, at 983–86 (arguing that applicability of Bailey is limited but not precluded by the amendment of § 2284).
court for adjudication, but no omnibus provision in the Act refers all or some litigation to such courts.

This lack of statutory directive has not been an obstacle because three-judge courts, virtually without discussion, apparently have exercised a form of pendent jurisdiction to adjudicate Voting Rights Act claims concurrently with the constitutional (i.e., apportionment) claim. The result does not seem problematic because the constitutional and statutory claims will almost always relate closely factually, thus falling comfortably within the parameters of traditional pendent jurisdiction. Nonetheless, the Supreme Court’s pre-amendment ruling in *Hagans v. Lavine* does cast a cloud on this conclusion. *Hagans* was not a three-judge court case, but in dicta addressed the pendent jurisdiction issue. There, plaintiffs’ civil rights action advanced both federal constitutional and statutory claims. Despite the apparent weakness of the former claim, the Court held that it was nonetheless “substantial” enough at least to confer subject matter jurisdiction on the district court. While that claim, all assumed, could only be heard by a three-judge district court, the single judge before whom the case was filed could decide the statutory claim, over which there was pendent jurisdiction. Recall that the statute is textually limited to constitutional attacks against state statutes. This result would follow, even if the decision on the statutory claim would moot the need to convene the three-judge court and decide the constitutional issues by granting plaintiff the relief it desired.

If *Hagans* remains good law with respect to three-judge courts, the decision would seem to open the door to a single district judge today deciding a Voting Rights Act claim joined with a constitutional apportionment claim—both of which would

104. See supra notes 69–70 and accompanying text.
105. Commentators rarely have addressed the issue, either. But see Williams, supra note 95, at 987–90. Such pendent jurisdiction would seem permitted under the supplemental jurisdiction statute, which by its terms is not limited to pendent state law claims. See 28 U.S.C. § 1367(a) (1994).
107. See id. at 543. We are told, cryptically, that plaintiffs “originally sought to convene a three-judge court to consider their constitutional claims but later withdrew that request. Pursuant to a stipulation between the parties, the case was then tried before a single judge on the issue of the claimed statutory conflict only.” Id. at 565 n.11 (Rehnquist, J., dissenting).
108. See id. at 536.
109. See id. at 539.
111. See *Hagans*, 415 U.S. at 543–45.
normally be decided by a three-judge court. But no district judge has ruled in this manner. The reason is probably that pendent jurisdiction under Hagans is a discretionary power only, and given the considerable factual overlap between constitutional apportionment and Voting Rights Act claims, it would not be in the interest of judicial economy to try those claims before separate courts. Moreover, there is no guarantee that relief under the latter will moot all relief claimed under the former. It would seem, though, that a single judge could decide a pendent Voting Rights Act claim that dealt with a geographically discrete issue, not one of state-wide concern. Only the latter claims were deemed important enough to survive the 1976 amendment, a subject to which we now turn.

B. Coverage of § 2284

As amended, § 2284(a) is limited to constitutional attacks on apportionment for congressional seats or state-wide legislative offices and, indirectly, related Voting Rights Act claims. The Senate Judiciary Committee report labeled these claims important enough to receive adjudication by three-judge courts. Admittedly, the Senate employed a hopelessly subjective term, but the judgment seems to have been correct. In a democracy, the right to vote is in some sense a predicate for the enjoyment and enforcement of all other rights. As such, how a state carves up its congressional districts is a matter of high concern both to it and to the national government. How it determines its own government structure is obviously of equal if not greater

112. See supra notes 104–08 and accompanying text. Compare Williams, supra note 95, at 989 (arguing that Hagans is good law), with CURRIE, supra note 95, at 571 n.2 (asking if Hagans remains good law in light of the amendment to § 2284).
115. See also LOWENSTEIN, supra note 13, at 21 ("If the election mechanism is at the heart of any democracy, then the right to vote in elections is a central democratic right and the act of voting is the most elemental form of democratic participation."); cf. Reynolds v. Sims, 377 U.S. 533, 562 (1964) (arguing that the right to vote is "preservative of other basic civil and political rights"); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (describing voting as "a fundamental political right, because preservative of all rights").
concern to the state. Recent litigation under the Voting Rights Act has only accentuated these concerns. The Act, both in its pre-clearance requirements and its sanctioning of private enforcement, in effect requires that many states and their political subdivisions obtain the permission of a federal decisionmaker (the DOJ or a federal judge) before making changes to electoral structures. The federalism concerns are coupled with the results of recent cases, such that, as Professor Richard Pildes has remarked, the "Act currently represents the most visible symbol of the struggle over race-conscious public policies." Empirical evidence has buttressed these theoretical concerns. Reapportionment led to shifts of power from state legislators representing rural constituencies to legislators representing urban and suburban voters. This shift, in turn, has led to changes in legislative policymaking benefiting the latter groups. Similarly, administrative and judicial enforcement of the Voting Rights Act has been credited with eradicating policies (particularly in the South) intended to disenfranchise African-Americans, and with increasing dramatically the number of voters and elected officials among African-Americans. All of these circumstances suggest that § 2284(a) does indeed cover important cases.

But important for what purposes? Recall that the original purposes of the three-judge court, as a reaction to Ex parte Young, were to encourage greater deliberation by judges, to lend

118. See id. § 1973gg-9(b).
120. Pildes, supra note 82, at 1361 (footnote omitted); see also Pamela S. Karlan,
121. See David C. Safell, Reapportionment and Public Policy: State Legislators Perspectives, in REPRESENTATION AND REDISTRICTING ISSUES 210 (Bernard Grofman et al. eds., 1982).
122. See id. There is debate among the studies as to the significance to be attributed to changing malapportioned districts because policy outcomes are the result of many different forces and not only the voting power of various constituencies. See RICHARD A. POSNER, OVERCOMING LAW 205 (1995) (surveying this debate).
greater dignity and more acceptance to decisions, and to provide expedited Supreme Court review. Because these are largely subjective criteria, it is difficult to determine definitively whether cases litigated today under § 2284 have led to these results. The workings of a multi-member trial court125 and the operation of direct Supreme Court review are considered below.126 Perhaps the existence of the third factor—greater dignity and acceptance—could be determined objectively by surveying affected publics in a particular state. Acceptance might be examined by measuring the rate of appeal. There is, presumably, some negative correlation between those two considerations. The decision to appeal any trial court decision usually will depend on the losing litigants' perception of the probability of winning the appeal, the availability of resources to pursue the appeal, and the willingness to live with a trial court decision with which the litigants disagree.127 The fact that a three-judge district court rendered the trial decision may suggest that reversal is unlikely, or the losing party may be mollified by the presence of three adjudicators, at least two of whom held against the party. Hence, that party may be less likely to appeal. The evidence mildly undermines this hypothesis. Historically, about one-third of all three-judge district court decisions have been appealed to the Supreme Court,128 and more recent data suggest an appeal rate of closer to forty percent.129 In contrast, in recent times the appeal rate of district court decisions to the appellate courts has only been about twenty percent.130 Still, one should not read too much into this disparity. The typical federal trial court case is quite different from a typical § 2284 case, and perhaps the latter

124. See supra text accompanying note 30.
125. See infra Part III.B.
126. See infra Part II.D.
128. See ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 56 n.35 (7th ed. 1993) (noting that in 1971, 318 three-judge courts were convened, and 120 appeals were filed; in 1981, the numbers were 35 and 13 respectively).
129. See infra note 204. From my database of 89 cases decided between 1976 and 1994, there were 46 appeals, a 51% appeal rate. See also infra app.
are (if only grudgingly) more accepted by the losing party once there is review by the Supreme Court.

Another problem with the ambit of the current version of § 2284 may be the statute’s potential underinclusiveness. Undoubtedly, in 1910 some thought that federal court attacks on all state statutes merited the special three-judge hearing. Presumably, the drafters of the 1976 amendment thought voting rights cases were paramount, as they left three-judge district courts intact for such cases. As the ALI recognized, not including state-wide voting rights cases within the three-judge district court jurisdiction may be a reasonable accommodation of the competing policy concerns. Even so, some voting rights cases may have de facto state-wide implications, and thus not fall under § 2284. Consider recent litigation concerning the Voting Rights Act and elective state judiciaries. In this decade alone, such cases have been litigated in Louisiana, Florida, Alabama, Texas, and Ohio, all challenging the election of judges. All were litigated before a single district judge, even though all seem to have state-wide significance. A recent challenge to a

131. The statute could be viewed as overinclusive as well if we consider the esoteric (albeit little-litigated) instances where a three-judge court can be convened at the direction of specific statutes. See supra note 69.
132. See supra text accompanying notes 41–48.
133. See Chisom v. Roemer, 501 U.S. 380, 384 (1991) (challenging the at-large election of two members of the Louisiana Supreme Court); White v. Alabama, 74 F.3d 1058, 1060 (11th Cir. 1996) (challenging state-wide election of the members of Alabama's appellate courts); SCLC v. Sessions, 56 F.3d 1281, 1284 (11th Cir. 1995) (en banc) (challenging Alabama trial courts in districts that encompassed "a majority of the state's population"), cert. denied, 116 S. Ct. 704 (1996); Nipper v. Smith, 39 F.3d 1494, 1499 (11th Cir. 1994) (en banc) (challenging election of trial judges in and around Jacksonville, Florida), cert. denied, 115 S. Ct. 1795 (1995); League of United Latin Am. Citizens Council No. 4434 v. Clements, 914 F.2d 620, 634 (5th Cir. 1990) (en banc) (Higginbotham, J., concurring) (challenging the at-large election of judges in only nine of Texas' 254 counties, where those counties elected 172 of 390 district judges), rev'd sub nom. Houston Lawyers' Ass'n v. Attorney Gen., 501 U.S. 419 (1991); Mallory v. Ohio, Case No. 94CV2205 (N.D. Ohio 1994) (challenging election of trial and appellate judges in eight of Ohio's most populous counties) (case transferred to S.D. Ohio, now litigated as Mallory v. Ohio, Case No. C-2-95-381 (S.D. Ohio)).
governor’s practice of filling judicial vacancies on a purely partisan basis ran a similar course.\textsuperscript{135}

Nonetheless, it is difficult to propose a statutory change that might include these cases, or other voting rights cases of statewide significance, without defeating the point of the 1976 amendment, or without generating satellite litigation. The ALI may well have made the right decision when it drew a bright line at cases formally attacking apportionment of all state districting.\textsuperscript{136}

\section*{C. Forum Shopping}

The strategy of forum shopping plays some role in virtually all civil litigation in the United States.\textsuperscript{137} Pamela Karlan suggests that three-judge district court litigation is no stranger to such tactics. She argues that after the decennial census,

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135. See Newman v. Voinovich, 789 F. Supp. 1410 (S.D. Ohio 1992) (dismissing case), aff’d, 986 F.2d 159 (6th Cir.), cert. denied, 509 U.S. 924 (1993). The author was co-counsel for the Plaintiff in Newman. The principal claim in Newman was that the governor’s practice violated the First Amendment rights of persons, of the wrong party, who were interested in being considered for the vacancy. The Voting Rights Act claim was that the practice had the effect of appointing fewer members of minority groups which, given the immense advantage of incumbents (at least in Ohio, see Lawrence Baum, The Electoral Fates of Incumbent Judges in the Ohio Court of Common Pleas, 66 JUDICATURE 420, 424–25 (1983)), had the further effect of diluting the votes of persons who desired to vote for a minority judge. The court rejected the constitutional argument on the merits. See Newman, 789 F. Supp. at 1420. The trial court found that the plaintiff lacked standing to pursue the voting rights claim. See id. at 1415–16. The ruling was not challenged on appeal. See id. at 160 n.1.

Courts generally have held that the Voting Rights Act does not apply to appointive offices, at least where there has not been a change from an elective system to an appointive one. See Matthew M. Hoffman, The Illegitimate President: Minority Vote Dilution and the Electoral College, 105 YALE L.J. 935, 974 & n.182 (1996).

136. For a more general discussion of reforms of § 2284, see infra Part IV .

plaintiffs and potential defendants have raced to federal and state courthouses in attempts to secure favorable forums, and that recently such litigation has been characterized by simultaneous federal and state filings. She further asserts that the litigant’s forum shopping can be exacerbated when a result-oriented circuit chief judge “stacks” the panel. She predicts that the result in Shaw v. Reno could permit plaintiffs who live outside the challenged district to bring suit, further increasing the opportunities for lawyers seeking to obtain favorable venues or judges.

Karlan is descriptively accurate, but she may slightly overstate the point. She is concerned rightly about the potential for panel stacking, and this Article addresses that phenomenon below. Her prediction about the effect of Shaw has not come to pass. In the 1994 Term, the Supreme Court held in United States v. Hays that plaintiffs bringing Shaw-type claims must vote in the district under challenge. Those who live outside the district cannot show an injury and, hence, lack standing to bring the claim. Nonetheless, Hays does not seem a particular obstacle to an ambitious attorney and, given the number of voters, it should not be difficult to sign up a plaintiff inside the district. Moreover, voting rights cases do not indicate that standing offers much of a barrier.

A surprising amount of parallel litigation has occurred in both state and federal courts. The Supreme Court addressed this sharing of responsibilities in Growe v. Emison, which held that three-judge courts must defer to apportionment disputes already being litigated in state court. In Growe, a group of plaintiffs affiliated with Minnesota’s Democratic-Farmer Labor Party had sued in state court, while their Republican political

138. See Karlan, supra note 81, at 1726–29.
140. See Karlan, supra note 81, at 1727 n.95.
141. See infra Part III.A.
143. See id. at 2436. The Court added that a plaintiff living outside the challenged district might have standing if she were able to present specific evidence that she had, nonetheless, been subject to a racial classification forbidden by Shaw. See id.
144. See Samuel Issacharoff, The Constitutional Contours of Race and Politics, 1995 SUP. CT. REV. 45, 62. In Hays itself, new plaintiffs (who apparently satisfied standing requirements) were added to the suit, and the case continued to be litigated in 1996. See id. at 62–63.
146. See Growe, 507 U.S. at 34.
opponents brought suit in federal court.\textsuperscript{147} A similar pattern is found in \textit{Voinovich v. Quilter.}\textsuperscript{148} There, after the 1990 census, a Republican-controlled Ohio House of Representatives increased the number of majority-African-American districts. Some Democrats charged that this increase was an effort to pack minority voters in certain districts where minorities already had been able to elect African-American representatives, thereby reducing their voting power in the other districts. Republicans filed an original declaratory judgment motion in the Ohio Supreme Court (with a four to three Republican majority at the time) to have the districting plan declared valid under state law. That declaration followed, but Democrats filed suit in federal court, and the Supreme Court eventually rejected a Voting Rights Act attack on the plan.\textsuperscript{149}

The \textit{Voinovich} litigation continues. A three-judge court found on remand that the plaintiffs' remaining constitutional one-person, one-vote claim had not been proven.\textsuperscript{150} Following this it granted, over a dissent, plaintiffs' motion to file an amended complaint that advanced a new constitutional claim, one that might be called a reverse-Shaw claim.\textsuperscript{151} Plaintiffs now argued that \textit{Shaw}, rendered shortly after the Supreme Court decided \textit{Voinovich}, forbade the packing of African-American voters in certain districts for the express purpose of diluting their voting strength in districts where they had been an influential minority.\textsuperscript{152} Hearings were held on that issue, and in the spring of 1995 a majority of the court found several of the districts to have been designed in a constitutionally improper manner.\textsuperscript{153} In dissent,

\textsuperscript{147} See id. at 28–29; Karlan, supra note 75, at 257.

\textsuperscript{148} 507 U.S. 146 (1993).

\textsuperscript{149} See id. For an excellent review of the complicated \textit{Voinovich} litigation, see Karlan, supra note 75, at 264–67; Karlan, supra note 81, at 1734–36. The author would also like to thank Mark D. Tucker, one of the attorneys representing the defendants in \textit{Voinovich}, for his information and insights on that litigation.


\textsuperscript{151} See Quilter v. Voinovich, 157 F.R.D. 36, 40 (N.D. Ohio 1994); cf. Karlan, supra note 75, at 268–70 (recognizing the possibility of this argument, post-\textit{Shaw}).

\textsuperscript{152} See Quilter, 157 F.R.D. at 38.

\textsuperscript{153} See Quilter v. Voinovich, Case No. 91CV2219 (N.D. Ohio Apr. 28, 1995). Since the spring of 1995 the \textit{Voinovich} litigation has followed a convoluted path. As noted, the original opinion was filed on April 28. On May 26, the majority issued a new opinion, which (among other things) responded more directly to some of the arguments made by Judge Dowd in his dissent on the earlier date. Still later, on August 11, the majority issued another revised opinion. See 912 F. Supp. 1006 (N.D. Ohio 1995) (incorporating the then recently decided Miller v. Johnson, 115 S. Ct. 2475 (1995)). In the meantime, the defendants filed a jurisdictional statement in the Supreme Court on July 24 (Case No. 95-132), appealing the decisions of April 28 and May 26. The Supreme Court dismissed the appeal of the April 28 decision. See 116 S. Ct. 42 (1995). At the end of the
District Judge David Dowd ruefully observed that had a new lawsuit been filed to advance this Shaw-type claim (if the motion to amend the complaint has been denied, as he had urged), then, presumably, a new three-judge district court would have convened. The lawyers, in his judgment, had been given the opportunity "to select the judge[s] they wish to have adjudicate their lawsuit." What Judge Dowd did not add were the specific reasons the mostly Democratic plaintiffs favored the original draw. Judge Dowd is an appointee of a Republican administration, while the other two members, Senior Circuit Judge Anthony Celebrezze and Circuit Judge Nathaniel Jones, are appointees of Democratic presidents. Although partisanship as an explanation of voting behavior on three-judge courts is overblown, there seems little doubt that the attorneys on both sides of Voinovich and in other cases attempted to seek multi-judge forums with a number of seemingly favorable judges of a particular political party.

D. Direct Supreme Court Review

Section 1253 of the Judicial Code states, with little elaboration, that a party may appeal an order from a three-judge

155. See 950 F.2d xviii–xix (1991) (listing the appointment dates for these judges).

For those concerned with partisanship, it is further worth noting that the Chief Judge of the Sixth Circuit, Gilbert Merritt, who appointed Judges Celebrezze and Jones to the panel, was a Democratic appointee. For further discussion of the role of chief judges in constituting panels, see infra Part III.A. Judge Celebrezze resigned from the Sixth Circuit on the next business day after the first Voinovich decision, although he continued to vote on the panel as it considered various motions in 1995. By order of June 23, 1995, Judge Merritt extended Judge Celebrezze's designation on the case "until a final judgment has been entered." The order was entered nunc pro tunc effective May 1, 1995. See Jurisdictional Statement, Voinovich v. Quilter, Case No. 95-132, app. G (filed July 24, 1995), appeal dismissed, 116 S. Ct. 42 (1995). See generally James F. Spriggs II & Paul J. Wahlbeck, Calling It Quits: Strategic Retirement on the Federal Courts of Appeals, 1893–1991, 48 Pol. Res. Q. 573 (1995). Circuit Judge Karen Nelson Moore, a Clinton appointee, was assigned to replace Judge Celebrezze on Voinovich after remand.
156. See infra Part III.C.

157. For further illustrations of such jockeying for forum advantage in modern voting rights cases, see Karlan, supra note 81, at 1727–28 (discussing cases from Illinois, Pennsylvania, California, and New York).
district court granting or denying an injunction.\(^\text{158}\) It has undergone no change since the 1948 general recodification of the Judicial Code, and unlike § 2284 of the Code, Congress did not amend it in 1976.\(^\text{159}\) It remains a controversial piece of the three-judge court institution. Thirty years ago, Professor Currie deemed the burdens imposed by direct review upon the Supreme Court as more serious than those imposed upon the lower courts.\(^\text{160}\) Another commentator has argued that direct review "forc[es] the hand of the Supreme Court without benefit of prior appellate review."\(^\text{161}\) And with regard to voting rights cases, Pamela Karlan has observed that three-judge court decisions practically are unreviewable, given that the Supreme Court only rarely will conduct a full review of any given decision.\(^\text{162}\)

As with other criticisms of the three-judge district court litigation, these arguments are largely subjective. At first blush, it may be difficult to argue that such courts have contributed to lower quality decisionmaking by the Supreme Court. Indeed, perhaps the most famous Supreme Court decisions of this century, *Brown v. Board of Education*\(^\text{163}\) and *Roe v. Wade*,\(^\text{164}\) involved, at least in part, reviews of three-judge courts. In addition, three-judge courts have played a role in many important cases involving voting rights decided by the Supreme Court.\(^\text{165}\) It is hard to say that these decisions would have been


\(^{159}\) Section 1253 has been left intact despite commentators' arguments that it be amended or deleted. See Currie, supra note 20, at 76-79; Williams, supra note 95, at 994.

\(^{160}\) See Currie, supra note 20, at 73-74.

\(^{161}\) Howard, supra note 3, at 283 (summarizing the views of a number of circuit judges).

\(^{162}\) See Karlan, supra note 81, at 1729. Karlan added that a number of important voting rights cases have not received the full appellate review that they deserved. See id. at 1729 & n.108.


The three-judge court has also delivered influential decisions in other areas. See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 53-54 (1973) (upholding property tax funding for schools), rev'g 337 F. Supp. 280 (W.D. Tex. 1971) (per curiam); Mitchum v. Foster, 407 U.S. 225, 242-43 (1972) (holding that 42 U.S.C. § 1983 is an exception
"better," or more acceptable, had the cases reached the Supreme Court by the normal appellate process.

Indeed, statistics available from the United States Supreme Court Judicial Data Base Project\(^{166}\) demonstrate that the Court did not treat appeals from three-judge district courts differently than appeals lodged from the federal courts of appeals or state supreme courts. For example, from the 1953 through the 1993 Terms, the petitioner in appeals from three-judge district court decisions prevailed, in whole or in part, about sixty-three percent of the time, while the comparable figure for appeals from other courts is sixty-two percent.\(^{167}\) But the composition of the two sets is not wholly similar. Appeals from three-judge courts were much more likely to raise civil rights or First Amendment issues as compared to the other appeals.\(^{168}\) Thus, it is fair to say that a disproportionate number of the civil rights cases that dominated the docket of the Warren Court and the early Burger Court were the products of three-judge district courts.

Still, the systemic affect of appeals from three-judge courts upon the Supreme Court has been deleterious. As previously to the Anti-Injunction Act), rev'g 315 F. Supp. 1387 (N.D. Fla. 1970) (per curiam); Lemon v. Kurtzman, 403 U.S. 602, 614–15 (1971) (establishing a three-part test to evaluate Establishment Clause Claims), rev'g 310 F. Supp. 35 (E.D. Pa. 1969); Younger v. Harris, 401 U.S. 37, 53 (1971) (holding that federal court injunctions of state court proceedings are subject to equitable restraints), rev'g 281 F. Supp. 507 (C.D. Cal. 1968); Wickard v. Filburn, 317 U.S. 111, 125 (1942) (holding that Commerce Clause power can extend to intrastate activities that affect interstate commerce), rev'g 43 F. Supp. 1017 (S.D. Ohio 1942).

166. The U.S. Supreme Court Judicial Data Base Project (the project) contains information obtained from coding numerous variables for each of the Supreme Court’s decisions in the terms from 1953 to 1993. The project itself results from the efforts of Professor Harold J. Spaeth of Michigan State University Department of Political Science. See Jeffrey A. Segal & Harold J. Spaeth, Decisional Trends on the Warren and Burger Courts: Results from the Supreme Court Data Base Project, 73 JUDICATURE 103, 103 (1989); Harold J. Spaeth, A Summary Description of the Contents of the U.S. Supreme Court Judicial Data Base, 8 L., CTS. & JUD. PROCESS SEC. NEWSL. 3, 3–6 (Am. Political Science Ass’n, Spring 1991) (on file with the University of Michigan Journal of Law Reform).

I am deeply indebted to Professor James L. Walker for accessing the data base for me. See Memorandum from James L. Walker, Professor of Political Science, Wright State University, to Michael E. Solimine, Donald P. Klekamp Professor of Law, University of Cincinnati College of Law (Jan. 17, 1996) (on file with the University of Michigan Journal of Law Reform) [hereinafter Walker Memorandum].

167. See Walker Memorandum, supra note 166, at 1 (noting that the data were limited to fully argued cases, i.e., those not summarily affirmed or reversed).

168. See id. at 6. Civil rights and First Amendment cases made up 35.16% and 12.87%, respectively, of the three-judge district court cases reviewed by the Supreme Court from 1964 to 1993. The comparable figures for all other appeals were 14.12% and 8.26%, respectively. See id.
observed, in the 1960s and early 1970s, hundreds of such appeals were lodged annually in the Court. As Table 2 demonstrates, in some Terms in the 1970s up to a quarter of the fully argued cases consisted of such appeals. Given the language of § 1253, the Court could have heard every such appeal on a fully argued basis. It is understandable that it did not. While hard to measure, there may well be much truth to the notion that an intermediate layer of appellate review will sharpen the issues of law, streamline the factual record, and weed out cases with inadequate records or those that are otherwise inappropriate vehicles for ultimate review. Had the Court truly attempted to review fully every appeal from a three-judge district court it would have crowded out many or most of the discretionary appeals from the federal courts of appeals and the state supreme courts.

Thus, it is no surprise that the Court has long applied § 1253 in a way that resembles the discretionary writ of certiorari. In its current Rule 18, the Court requires that appellants file jurisdictional statements almost identical to petitions for writ of certiorari. Then the Court “may dispose summarily of the appeal on the merits” or note probable jurisdiction and set the case for briefing and oral arguments on the merits. Thus, even though the Court apparently must hear every appeal under § 1253 if the statute is read literally, under Rule 18 the Court only needs to hear fully those appeals it wishes.

169. See supra notes 43, 58 and accompanying text.
171. See Shavell, supra note 130, at 417–18.
172. See Stern et al., supra note 128, at 56–71; Wright et al., supra note 20, § 4040.
173. See Sup. Ct. R. 18. No substantive changes to this rule were made when the Supreme Court revised it in 1995. See 161 F.R.D. 483, 497–98 (1995).
175. Sup. Ct. R. 18.11.

Evidence suggests that direct appeals are not treated identically to writs of certiorari. For example, one statistical study found that grants of a writ were highly correlated with the filing of amicus curiae briefs in support of or opposed to the granting of the writ. See Gregory A. Caldeira & John R. Wright, Organized Interests and Agenda Setting in the U.S. Supreme Court, 82 Am. Pol. Sci. Rev. 1109, 1118 (1988). Perry's study, based largely on interviews of the Justices and their clerks, finds this correlation as well. See Perry, supra, at 137. The Caldeira-Wright study, however, found no such correlation for the noting of probable jurisdiction on appeals, and concluded that “the Court indeed makes its decisions on appeals in a manner significantly different from those on certiorari.” Caldeira & Wright, supra, at 1124–25 n.12. Caldeira subsequently suggested that while “many of the same considerations go into the decision" to review fully an
This practice seems to be a sound one. Even in an era of a diminished number of three-judge court cases, if every such appeal were heard fully, then for one or two Terms each decade after the wave of litigation generated by the census the Court would do little more than hear voting rights cases. There seems no particular reason why every such case from each state must be heard.

Still, the current manner of disposing of putatively mandatory appeals is not without its costs, which are similar to those attending the certiorari process. Presumably, the Court will devote full treatment to those appeals not grounded in highly specific or peculiar facts and will thereby present opportunities for law development. But the Court might decide incorrectly, giving important cases mere summary treatment. Similarly, the Court might give full treatment to a case that did not deserve it, at least not at that time. The direct appeal from district courts minimizes opportunities for the percolation of legal issues among the lower courts, which can inform the Court's eventual disposition of an issue. Doctrinally, the Court appeal as to grant a writ of certiorari, "the differences [might] stem from the greater ease writs of appeal have in making it on to the plenary docket." Letter from Gregory A. Caldeira, Professor of Political Science, Ohio State University, to Michael E. Solimine, Donald P. Klekamp Professor of Law, University of Cincinnati College of Law 1 (Sept. 5, 1995) (on file with the University of Michigan Journal of Law Reform). Perhaps a related reason is that amicus participation is unnecessary to signal the importance of appeals from three-judge district courts because the Justices (and their clerks) are aware that such appeals are apt to be politically charged.

177. See supra notes 74–75 and accompanying text.


Several authors have studied the question of whether and to what extent the Justices consciously manage their agenda through the certiorari process. See, e.g., RICHARD L. PACELLE, JR., THE TRANSFORMATION OF THE SUPREME COURT’S AGENDA: FROM THE NEW DEAL TO THE REAGAN ADMINISTRATION (1991); Leslie Friedman Goldstein & Diana Stich, Explaining Transformations in Supreme Court Policy, 79 JUDICATURE 80 (1995); David G. Savage, Docket Reflects Ideological Shifts, 81 A.B.A. J. 40 (1995). Empirical evidence demonstrates that cases on direct appeal hinder the Court's ability to decide only one or several of a series of discrete issues that might be raised by a case subject to review. See Kevin T. McGuire & Barbara Palmer, Issue Fluidity on the U.S. Supreme Court, 89 AM. POL. SCI. REV. 691, 693–94, 696–97 (1995) (studying the 1988 Term).

179. See Karlan, supra note 81, at 1727 n.95.


An example of the problem might be Roe v. Wade, which was an appeal from a three-judge court. See 410 U.S. 113 (1973). It has been argued, though by no means
has generated great confusion about the precedential weight it should give to summary dispositions. The Court typically states that such dispositions are entitled to some weight, but not the full weight of a fully argued case. Such amorphous standards are ripe for confusion.

Finally, the effect of the direct appeal on lower court decisionmaking should be considered. Does the knowledge that a direct appeal to the Supreme Court potentially lies at the end of the case affect litigant or judicial behavior? Probably not a great deal. Aware that the Supreme Court summarily disposes of most such appeals, attorneys may take some greater care in properly litigating the case. But the effort probably does not differ significantly from a voting rights case before a single district judge. Likewise, the three-judge panel may be little affected, too, knowing that statistically most cases are not appealed, and of those that are, most receive mere summary treatment.

universally, that the Roe Court's timing was poor. See, e.g., Ruth Bader Ginsburg, Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade, 63 N.C. L. Rev. 375, 379–81 (1985) (noting that the Roe decision “ventured too far in the change it ordered” at a time when “abortion law was in a state of change across the nation”); Ruth Bader Ginsburg, Speaking in a Judicial Voice, 67 N.Y.U. L. Rev. 1185, 1199–1209 (1992) (arguing that a “less encompassing Roe, one that merely struck down the extreme Texas law and went no further on that day, I believe . . . might have served to reduce rather than to fuel controversy”). But see Barry Friedman, Judicial Review and Dialogue, 91 Mich. L. Rev. 577, 647–48, 658–68 (1993) (arguing that judicial decisions, such as Roe, create a dialogue between courts and legislatures, allowing political testing of the finality of judicial lawmaking). It is argued that states were moving slowly to a more pro-choice stance, a development impoverished by the inflexible rules set out in Roe. Had constitutional attacks on state statutes restricting access to abortion percolated in the lower courts—particularly the circuit courts—the timing, content, and acceptance of the Supreme Court’s eventual disposition of the issue might have been different. Cf. Christopher Z. Mooney & Mei-Hsien Lee, Legislating Morality in the American States: The Case of Pre-Roe Abortion Regulatory Reform, 39 Am. J. Pol. Sci. 599 (1995) (discussing influences on state abortion law in the years just prior to Roe). For a recent, skeptical review of the posited argument, see Neal Devins, The Countermajoritarian Paradox, 93 Mich. L. Rev. 1433, 1446–48 (1995) (book review) (discussing the author’s evidence that suggested that legislative efforts to legalize abortion had, at best, mixed results).


III. ADMINISTRATIVE ASPECTS OF THE THREE-JUDGE DISTRICT COURT

No bright line separates those attributes of three-judge district court litigation derived from the text and structure of the statute, and those mainly a function of the internal operation of the court. Nonetheless, this dichotomy serves as a rough handle to evaluate the external and internal operations of the three-judge court. This Part discusses the internal operation of the three-judge district court.

A. Membership

Under § 2284 and its predecessor statutes, the chief judge of the circuit plays the major role in determining the membership of the three-judge district court. In present practice, one member of the court is the district judge before whom the action was originally filed. The chief judge of the circuit then designates "two other judges, at least one of whom shall be a circuit judge." No other criteria are mentioned in the statute or in any applicable rule of procedure. On its face, then, the statute gives essentially unfettered discretion to the chief judge to fill the two vacancies. As Professor Pamela Karlan has observed, this discretion grants a results-oriented chief judge the opportunity to "stack" a three-judge court with members to effectuate a particular policy outcome.

Karlan draws on the evidence of stacking that apparently occurred in the Fifth Circuit in the early 1960s. During that period, of course, the states of the Old South were the focus of the civil rights movement, and the federal trial and appellate judges in those states heard many cases arising out of this movement. Some of that litigation consisted of challenges to

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185. See Karlan, supra note 81, at 1729.
186. Excellent accounts of the struggle in the Fifth Circuit are found in BARROW & WALKER, supra note 68, at 38–41, 55–60 and JACK BASS, UNLIKELY HEROES 231–47 (1981).
state-wide segregationist statutes or policies and thus required the convening of a three-judge district court. Elbert Tuttle, an Eisenhower appointee from Georgia who had progressive views on civil rights, was the chief judge of the Fifth Circuit during this period. Some contended that Chief Judge Tuttle would pack three-judge district courts with jurists who shared his political views to ensure a particular result. The most vociferous proponent of this view was Circuit Judge Ben Cameron of Mississippi, another Eisenhower appointee who, unlike Chief Judge Tuttle, allied himself with opponents of the Civil Rights movement. Judge Cameron felt that Chief Judge Tuttle intentionally (and unfairly) failed to assign him to three-judge courts, and he registered his objections in a published opinion. By letter to the other Fifth Circuit judges, Chief Judge Tuttle admitted to the practice of generally not assigning Judge Cameron as a circuit member of three-judge panels. While the Chief Judge claimed concern for Judge Cameron’s health (Cameron had heart problems), he also argued that Judge Cameron’s judicial philosophy had a “legitimate and proper bearing on the basis on which [he determined] what judges are to be assigned to special three-judge courts.” Even Chief Judge Tuttle’s putatively ideological allies on the Fifth Circuit appeared troubled by the debate, and

187. See BARROW & WALKER, supra note 68, at 124–25 (discussing the high number of three-judge district court cases in the Fifth Circuit in the 1960s).
188. See id. at 12–14.
189. See id. at 18–20, 42–44; BASS, supra note 186, at 84–96. Two Cameron dissents were particularly noteworthy. In United States v. Wood, 295 F.2d 772 (5th Cir. 1961), he accused the majority of causing “the people of the southland to look upon federal functionaries . . . as ‘alien intruders.’” Id. at 788 (Cameron, J. dissenting) (internal citation omitted). In Boman v. Birmingham Transit Co., 292 F.2d 4 (5th Cir. 1961), he further commented that Southerners expected “the judges who function in [the] circuit . . . to render justice in individual cases against a background of, and as interpreters of, the ethos of the people whose servants they are.” Id. at 28 (Cameron, J., dissenting).
190. See Armstrong v. Board of Educ., 323 F.2d 333, 352–61 (5th Cir. 1963) (Cameron, J., dissenting) (stating that in 22 of 25 cases involving racial issues, some combination of the same four judges was appointed to the panel), cert. denied, 376 U.S. 908 (1964).
191. BARROW & WALKER, supra note 68, at 56–57 (quoting Letter from Elbert P. Tuttle, C.J., to Joseph C. Hutcheson, Jr., Richard T. Rives, Ben F. Cameron, Warren L. Jones, John R. Brown, John Minor Wisdom, Walter P. Gewin, and Griffin B. Bell (Nov. 28, 1962); see also BASS, supra note 186, at 246 (quoting Tuttle saying, “Well, I got in the habit of appointing two circuit judges ordinarily because there were not too many district judges who were yet attuned to the problems that we felt were necessary to face.”). Another related reason Chief Judge Tuttle was hesitant to appoint Judge Cameron to three-judge district court cases arising from Mississippi was that at least two district judges from that state (before whom the case was often filed) largely shared Judge Cameron’s views. See BARROW & WALKER, supra note 68, at 39–40.
in 1963 the court as a whole adopted more formal procedures to assign judges to such courts on a more-or-less random basis. 192 But by then, the crisis had generally dissipated.

It is not difficult to understand the troubling nature of the Tuttle-Cameron dispute. Although apparently not mandated by statute or rule, the courts of appeals have long adhered to a practice of randomly assigning judges to sit on three-member panels. 193 If a chief judge packed panels explicitly to achieve desired policy objectives, it would no doubt generate opposition. 194 Although Chief Judge Tuttle, with laudable candor, virtually admitted to keeping Judge Cameron off three-judge district courts, that does not mean necessarily that he was packing such courts. J. Woodford Howard, in his study of the Second, Fifth, and District of Columbia Circuits in the 1960s and 1970s, found some evidence that chief judges did compose three-judge courts “in tune with [their] policy preferences.” 195 That is, he found that certain judges were assigned to those courts more or less often than one would expect if assignment were made on a random basis. 196 But the evidence was not conclusive, and observers seemed to agree that such practices have largely faded. 197

Certainly, the smaller number of three-judge courts convened after the 1976 amendment presents a chief judge with fewer opportunities to compose or to pack such courts. Indeed, the drafters of the 1976 amendment were, perhaps, not entirely oblivious to the Tuttle-Cameron controversy. The House Report states—perhaps optimistically—that in composing three-judge courts, “the role of the chief judge is entirely ministerial.” 198

192. See BARROW & WALKER, supra note 68, at 60.
194. See Henry J. Friendly, Of Voting Blocs, and Cabbages and Kings, 42 U. CIN. L. REV. 673, 675 (1973) (arguing that if packing were attempted the response from other circuit judges “would be vigorous”).
195. HOWARD, supra note 3, at 256.
196. See id. at 240 n.p, 245 n.u.
197. See id. at 241–47. Even if we ascribe result-oriented motivations to Chief Judge Tuttle, his alleged packing of three-judge district courts did not always work. In an important apportionment case, he assigned himself and Circuit Judge Griffin Bell (who had a generally pro-civil rights voting record) to the court, but Tuttle found himself in dissent when Bell and the district judge found for the defendant. See Wesberry v. Vandiver, 206 F. Supp. 276 (N.D. Ga. 1962), rev’d sub nom. Wesberry v. Sanders, 376 U.S. 1 (1964).
198. H.R. REP. NO. 94-1379, at 7 (1976). Perhaps fewer cases can make packing by a chief judge more, not less, likely. With a larger pool of cases, a chief judge might be more likely to develop formal criteria for appointment. If these criteria were not used
To get a sense of the criteria employed by chief judges today, I made inquiries of those judges of the twelve circuits; either the chief judge or circuit executives from eight circuits responded.\textsuperscript{199} All the responses indicated that no formal assignment guidelines existed or were utilized. Informally, however, the common practice was, if possible, to compose three-judge panels of two district judges with most or all of the three judges from the state in question.\textsuperscript{200} The principal reasons for this practice were that it was more convenient for local judges to convene in that state and that local judges presumably would be more knowledgeable about the facts.\textsuperscript{201} Other factors such as workload and schedules were also taken into account.\textsuperscript{202} Two circuits added that there was an attempt to balance the panels politically—\textsuperscript{203} in an effort, one presumes, to create the appearance, and actuality, of fairness. There were no allusions to packing of three-judge courts, and in fact, many responses indicate explicit attempts to avoid it, at least if one makes the reasonable assumption that “balance” is at some odds with the result-oriented aspect of packing.

In an effort to further examine the benign picture of composing three-judge district courts presented by the circuits (as in certain types of cases, these breaks with procedure might well be noticeable. With a smaller number of assignments, formal appointment criteria might be less likely to arise, thereby making the appointment power subject to greater manipulation.

\textsuperscript{199} The inquiries were made by letter in the spring of 1995; seven of the responses were by letter, one by phone. All responses are on file with the \textit{University of Michigan Journal of Law Reform}. The Fourth, Fifth, Tenth, and Eleventh circuits did not respond.


\textsuperscript{201} See, e.g., Letter from Richard S. Arnold, C.J., United States Court of Appeals for the Eighth Circuit, to Michael E. Solimine, Donald P. Klekamp Professor of Law, University of Cincinnati College of Law (Apr. 3, 1995) (on file with the \textit{University of Michigan Journal of Law Reform}); Telephone Interview with Gilbert S. Merritt, C.J., United States Court of Appeals for the Sixth Circuit (Apr. 6, 1995).

\textsuperscript{202} See Telephone Interview with Gilbert S. Merritt, C.J., \textit{supra} note 201.

\textsuperscript{203} See id.; Letter from Collins T. Fitzpatrick to Michael E. Solimine, \textit{supra} note 200.
well as other matters addressed in this Part of the Article), I
analyzed published decisions of three-judge courts after the 1976
amendment. I attempted to obtain all such decisions, and a
computer search yielded eighty-nine cases. 204

Some of the results of that analysis are found in Table 3. Of
the eighty-nine cases, only five had two circuit judges rather
than one. And of those eighty-nine, seventy-three had all three
judges from the state in question, with an additional fourteen
cases having one judge not from the state. The cases only rarely
stated the name of the district judge before whom the case was
originally filed, 205 so it was impossible to determine which judges
were picked to fill out the entire panel. Nonetheless, we can
roughly infer from the data in Table 3 that, on the whole, a
highly politicized composition process has not taken place.
Because the chief judges overwhelmingly picked only one circuit
judge to compose the panel, they were picking one member (i.e.,
the other district judge) whom they presumably knew less well.
Likewise, most of the cases had all the members from the state
in question, further suggesting that chief judges did not go
outside the state to give them more chances to pack the panel.
In contrast, it is worth noting that Judge Tuttle was accused of
and, in part, confessed to picking judges from outside the state
and to picking two circuit judges to fill out the panel. 206

Still, these are just trends, and more intensive case studies—
beyond the scope of this Article—might find evidence of some

204. See Search of WESTLAW, Allfeds Library (Summer 1995); see also infra app.
The WESTLAW search I employed was: "2284" & Three w/2 Judge! & vot! w/2 right!
& date (aft 11111976). The search yielded about 153 cases, of which only 109 were those
of three-judge district courts. Of those, another 20 were deleted as they did not address
the merits or were otherwise irrelevant to the present study. The search has the virtue
of being systematic, but of course caution still must be taken in interpreting any data,
because I did not gather unpublished opinions, and not all published opinions of three-
judge courts are necessarily captured by the search. For example, the list does not
include the three-judge court decision reviewed in Presley v. Etowah County Comm'n,
502 U.S. 491 (1992), a Voting Rights Act case, because the lower court decision was not
published. It is doubtful that such omissions skew the data presented here, however,
because most important decisions of federal district courts are published. See Francine
Sanders, Brown v. Board of Education: An Empirical Reexamination of Its Effects on
Federal District Courts, 29 L. & Soc'y REV. 731, 740-41 (1995); cf. Susan M. Olson,
Studying Federal District Courts Through Published Cases: A Research Note, 15 JUST.
Sys. J. 782, 795-97 (1992) (questioning the use only of published cases when researching
federal district courts). One would assume that most three-judge district court decisions
reviewed by the Supreme Court would be officially published, as are almost all cases
reviewed by the Court.

205. Only five of the 89 cases indicated who was the original district judge.

206. See BARROW & WALKER, supra note 68, at 39-40, 55-56; BASS, supra note 186,
at 246.
sort of packing. Consider the Voinovich litigation, discussed earlier.\textsuperscript{207} In 1991 Chief Judge Gilbert Merritt of the Sixth Circuit (a Democratic appointee) named Democratic appointees, Circuit Judges Nathaniel Jones and Senior Judge John Peck, both from Ohio, to join Ohio District Judge David Dowd (a Republican appointee) on the panel. Thereafter, Judge Peck passed away, and Merritt named Senior Circuit Judge Anthony Celebrezze, another Democratic appointee from Ohio, to complete the panel. On its face, these appointments present slim evidence of packing. At best, it might be said that Judge Merritt was merely attempting to bring some perceived partisan balance to the panel.\textsuperscript{208} Moreover, Judge Merritt may well have taken into equal or greater account the schedules, workloads, or expected recusals of other eligible judges, or other factors far afield from partisanship.\textsuperscript{209} Still, given the other federal district and circuit judges from Ohio available for appointment,\textsuperscript{210} one wonders if the factor of political balance was given extra weight.

\begin{footnotes}
\textsuperscript{207} See supra text accompanying notes 148–57.
\textsuperscript{208} See Telephone Interview with Gilbert S. Merritt, C.J., supra note 201. I should add that I did not ask Judge Merritt about the composition of the three-judge panel in Voinovich or any other particular case.
\textsuperscript{209} See id. Judge Merritt mentioned that in making appointments he took into account, among many other factors, how fact-intensive the case was likely to be. The more of a “law-developing,” appellate-like case it might be, the more he was inclined (in balance with other factors) to appoint two circuit judges. See id.
\textsuperscript{210} By my count, as of the early 1990s, there were the following Ohio federal judges who, in theory, could have been appointed to serve with Judge Dowd on Voinovich: democratic appointed District Judges Lambros, Battisti, White, Aldrich, Holschuh, Rice, Spiegel; republican appointed District Judges Bell, Potter, Matia, Rubin, Weber, Graham, Smith, Manos; republican appointed Circuit Judges Nelson, Norris, Batchelder, Contie. All three Democratic appointed Circuit Judges—Jones, Celebrezze, and Peck—were appointed to the case. For a listing of these judges and their dates of appointment to the federal bench, see 950 F.2d xviii–xx (1991).
\end{footnotes}
B. Status and Decisionmaking

No matter the process of assignment, the three-judge district court will consist of a mix of trial and appellate judges. The unique combination of judges raises two significant questions: does this grouping of judges, at the trial level, contribute positively to the decision of the court? And does the combination of judges from different levels in the judicial hierarchy affect the collective decisionmaking of the court?

With regard to the first question, recall that the drafters of the statute\(^\text{211}\) thought that three judicial minds, deciding collectively, would lead to a better result than just one.\(^\text{212}\) This intuition seems reasonable enough, and is reflected in the widespread system of establishing multi-member appellate courts. But it is by no means clear that a trial level decision is aided by use of a three-member court. The prevalent practice among state and federal courts is to have a single jurist at the trial level.\(^\text{213}\) Given the factfinding that typically occurs at the trial level, it is difficult to believe that increasing the number of decisionmakers, in itself, leads to easier, quicker, or more accurate findings. Likewise, as noted before, the facts presented in modern voting rights cases often consist of sophisticated and complicated expert testimony, requiring findings of fact to be grounded in statistics and mathematical models.\(^\text{214}\) It is unusual to find trial and appellate judges of courts of general jurisdiction who are conversant in such methodologies.\(^\text{215}\)

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212. See supra notes 26–30 and accompanying text.
213. See Currie, supra note 20, at 1. One recent exception to this general rule is the use of three-judge trial courts to hear death penalty cases where the accused has waived the right to a jury trial. See, e.g., Ohio Rev. Code Ann. § 2945.06 (Anderson 1993). See also Robert Brundin, Letter, Newsweek, Oct. 30, 1995, at 16 (suggesting that one solution to the criticisms of the O.J. Simpson trial “would be to replace the jury with a three-judge panel that would be capable of umpiring the cleverness of the legal protagonists”).

Three-judge trial courts are also common in civil law systems. See Mary Ann Glendon et al., Comparative Legal Traditions in a Nutshell 64–65 (1982) (describing procedures in German and French trial courts). Even in those countries there has been some movement toward single-judge trial courts. See, e.g., John Langbein, The German Advantage in Civil Procedure, 52 U. Chi. L. Rev. 823, 827 n.13 (1985) (noting that one reason for movement was slowness of three-judge panels as compared to one judge).

214. See supra notes 89–90 and accompanying text.
215. Historically, the federal court system has placed decisionmaking of similarly sophisticated, specialized matters, like patent or tax litigation, before specialized
Still, as the debate in the 1970s over abolishing the three-judge district court demonstrated, many observers feel that fact-finding in voting rights cases is apt to be relatively straight-forward, with the case instead dominated by legal issues.\textsuperscript{216} In that case, a multi-member court is more appropriate. This debate is insoluble, and generalizations about voting rights litigation are not likely to be helpful. Indeed, much federal question litigation before federal district courts, single-judge or not, is likely to pose complicated factfinding questions as well as difficult questions of law.\textsuperscript{217} The difference on this score between the single-judge cases and voting rights cases before three-judge courts is not likely to be of a quantum nature.\textsuperscript{218}

A second, related set of problems concerns the interpersonal dynamics of temporarily grouping judges from different levels of the federal court system. As we saw, such a mixture can be justified given the putatively dual nature of voting rights cases.\textsuperscript{219} District judges will bring their greater experience and expertise in trial procedure and factfinding, while appellate judges will bring their skills in developing the law.\textsuperscript{220} That

\textsuperscript{216}See generally Rochelle Cooper Dreyfuss, \textit{Specialized Adjudication}, 1990 BYU L. Rev. 377 (discussing the history and future of specialized courts); Richard L. Revesz, \textit{Specialized Courts and the Administrative Lawmaking System}, 138 U. Pa. L. Rev. 1111 (1990) (discussing the merits and varieties of specialized courts). To my knowledge, few if any of these courts, past or present, had multi-member panels as the initial adjudicators.

\textsuperscript{217}One specialized trial tribunal, the Judicial Panel on Multi-District Litigation, consists of seven members, with both trial and appellate judges. See 28 U.S.C. § 1407(d) (1988). That court deals with motions to transfer and consolidate litigation, however, and engages in little if any factfinding as such. See Patricia D. Howard, \textit{A Guide to Multidistrict Litigation}, 124 F.R.D. 479 (1989); J.P.M.L.R. 16 (describing motion practice).

\textsuperscript{218}Consider the extensive and lengthy discussion of the facts by the majority, plurality, and dissenting opinions of the two racial gerrymandering cases decided at the end of the 1995 Term. See Bush v. Vera, 116 S. Ct. 1941, 1952-60 (1996) (plurality opinion); id. at 1979-89 (Stevens, J., dissenting); Shaw v. Hunt, 116 S. Ct. 1894, 1903-07 (1996) (majority opinion); id. at 1912-20 (Stevens, J., dissenting).

\textsuperscript{219}Cf supra note 91 and accompanying text.

apparent advantage may be diluted by the effect of the status of the participants. Small-group theory predicts that junior members of temporary decisionmaking bodies (i.e., those with lesser status) may defer to the member who possesses greater status.\textsuperscript{221} On a three-judge district court, such deference might be manifested by the district judges voting with the circuit judge, or with the latter judge writing most of the opinions. Additionally, the district judges, mindful that their decisions in other cases will be reviewed by their circuit counterpart, may be motivated to reduce any perceived offense by voting with the appellate jurist.\textsuperscript{222}

Two studies of federal courts have brought empirical evidence to bear on these assumptions. The first, by Thomas G. Walker, examined voting behavior among judges on three-judge district courts in the 1960s.\textsuperscript{223} Walker found some support for these assumptions, as the appeals judge issued a written opinion in sixty-four percent of the cases, when randomly we would expect them to author only about a third.\textsuperscript{224} He also found that appeals judges were least likely to dissent in such cases, as they receive the most support for their opinions.\textsuperscript{225} A second study, by Richard Saphire and me, examined similar issues in the context of district judges sitting by designation on the circuit courts of appeals.\textsuperscript{226} Using a data base of all appellate dispositions meeting of the American Political Science Association on file with the University of Michigan Journal of Law Reform (attributing differences in voting behavior of federal district and circuit judges in cases raising voting issues to, inter alia, the possibility that district judges are "more attuned to micro-level details of the case," while circuit judges are more "accustomed to clarifying the legal rules for the trial courts").


\textsuperscript{223} See Thomas G. Walker, Behavioral Tendencies in the Three-Judge District Court, 17 MIDWEST J. POL. SCI. 407 (1973). Walker studied 56 published decisions of such courts rendered between 1963 and 1968 involving civil liberties. He excluded per curiam opinions, cases with more than one appeals judge sitting, and cases where it was impossible to ascertain the identity of the original district judge from the opinion. See id. at 411.

\textsuperscript{224} See id. at 411–12.

\textsuperscript{225} See id. at 412–13.

(published and unpublished) between 1987 and 1992, we found, on a number of dimensions, no great differences between appellate panels that had or did not have a district judge sitting by designation. For example, we found that there was virtually no difference as to the reversal rate of district courts between the two types of appellate panels. In contrast, we did find that district judges sitting by designation appeared to author disproportionately fewer majority, concurring, or dissenting opinions. Although examining a different institution, our study is arguably in some tension with Walker's study with regard to the apparently stark deference by district judges found by the latter.

In an effort to replicate and update Walker's study, I culled similar data from the post-1976 collection of eighty-nine cases heard by the Supreme Court. Some of the data is collected in Table 4. Of the eighty-nine cases, more than a third were per curiam opinions, and another eight were jointly signed opinions. Of the remaining cases, there was a split between those authored by a circuit judge and those by a district judge. Likewise, there were roughly equal numbers of concurring and

227. The data base was compiled by the Administrative Office of the United States Courts and made accessible by the Federal Judicial Center. A detailed description of the data base is found in Saphire & Solimine, supra note 226, at 368 & n.65.

228. There was an overall reversal rate of 17.92%, compared to a rate of 18.30% for panels with judges sitting by designation. See id. at 369.

229. The designated district judges authored about 18% of the opinions of the panels on which they sat and authored concurring or dissenting opinions in 2.0% and 1.6% of the cases, respectively. In contrast, we would expect any given judge to author about 33% of the opinions of panels on which she sat, and studies have shown that such judges concur or dissent in about 3% of the cases. See id. at 370 & nn.71-72. An earlier study, using published opinions decided between 1965 and 1969, reached conclusions largely similar to the Saphire and Solimine study. See Justin J. Green & Burton M. Atkins, Designated Judges: How Well Do They Perform?, 61 JUDICATURE 358, 368-69 (1978) (finding that visiting judges file 1.3% of dissenting opinions and 1.3% of concurring opinions and district judges file 7.0% of dissenting opinions and 4.8% of concurring opinions while circuit judges write 84% of dissenting opinions and 85.6% of concurring opinions).

230. In appellate panel dispositions, relatively few of the opinions are per curiam. See, e.g., 1992 DIRECTOR OF ADMIN. OFFICE OF THE U.S. COURTS ANN. REP., tbl. S-3 (reporting that for the year ending Sept. 30, 1992, only 650 of 6330 published opinions were unsigned). Per curiam opinions frequently are thought to dispose of a case that does not need extended factual or legal discussion. See HOWARD, supra note 3, at 14; Stephen L. Wasby et al., The Per Curiam Opinion: Its Nature and Functions, 76 JUDICATURE 29, 29-30 (1992). In contrast, the prevalence of such opinions by three-judge district courts is probably more a function of the desire to present a united front, or to prepare an opinion perhaps jointly authored in an expeditious manner.

dissenting opinions by district and circuit judges. Overall, there seems little evidence of the deference in opinion writing identified by Walker. Rather, the members of three-judge courts appear to contribute on a roughly proportional basis to the writing of opinions. To be sure, if we leave aside the per curiam opinions, and consider that the vast majority of cases consist of two district judges and one circuit judge, then circuit judges author more than their share. But the difference is not strong. Moreover, perhaps the data indicates that the notion of deference in this context is overblown. These judges are men and women who enjoy life tenure,232 and district judges enjoy significant prestige of their own. Given these circumstances, it is not hard to believe that district judges do not feel a need to be excessively deferential to their appellate colleagues in decisionmaking on three-judge courts.

C. Ideology and Decisionmaking

As we have seen in earlier parts of this Article, the creation of and litigation before three-judge district courts is often predicated, at least in part, on the presumed ideological mindset of the jurists who make up the court. The drafters of the original legislation thought three judges would be more sensitive to issues of federalism. The opponents of total repeal in the 1970s felt that such courts would be more protective of civil rights than single judges.233 Some of the composers of these courts appear to give weight to the predilections of the candidates for appointment to the court. And litigators have opportunities to maneuver to bring their cases before judges who they perceive are predisposed to their cause.

Almost all participants or observers of the legal system indulge in these presumptions, and almost always the predictions are based on anecdotal evidence of past decisional behavior by judges.234 As more fully described below, there have been

233. See supra notes 64–68 and accompanying text.
234. For example, the drafters of the original three-judge district court provisions and of the 1976 amendment did not rely on statistical evidence of the voting behavior of district judges sitting alone as compared to that of three-judge appellate panels, or (in the case of the 1976 amendment) that of three-judge district courts. Instead, the evidence utilized was heavily anecdotal. See generally supra Part I.A–B (discussing the legislative history of 28 U.S.C. § 2284 and predecessor statutes).
some efforts to measure on a more systematic basis whether certain judges vote in predictable ways. For purposes of this Article, one relevant variable would be whether federal judges appointed by Democratic administrations are more likely to vote consistent with their party affiliations on issues such as voting rights before three-judge courts, and whether Republican-appointed judges show similar consistency. A considerable body of literature purports to demonstrate such associations for Supreme Court Justices and lower federal court judges. But there is hardly a consensus on the point. Skeptics point out that the asserted "liberal" voting of a Democratic-appointed Justice may result at least in part from following precedent. More recent studies of federal judges on the circuit and district courts, covering large numbers of both published and unpublished decisions, demonstrate at most a weak association between political background and ideological voting behavior. Federal judges themselves repeatedly decry the picture of a highly politicized judiciary.

At the same time, even supporters of the view that federal court decisionmaking is "principled" and largely free of political bias concede that personal and partisan philosophy can control at the margins. Perhaps modern three-judge district court cases, highly charged with political importance, are more likely

236. See, e.g., Robert A. Carp et al., The Voting Behavior of Judges Appointed by President Bush, 76 JUDICATURE 298, 298–302 (1993) (showing through empirical data, generalizations about the ideology of judges appointed by President Bush).
237. See generally Eskridge & Frickey, supra note 178, at 33–36 (arguing that decisions of Supreme Court Justices are usually explainable as a combination of the force of precedent, the substantive policy preferences of the Justices, and the Justices' perceptions of institutional competence); Tracey E. George & Lee Epstein, On the Nature of Supreme Court Decision Making, 86 AM. POL. SCI. REV. 323 (1992) (arguing that both "legal" and ideological arguments affect judicial decisionmaking).
240. See Friendly, supra note 194, at 677 (asserting that it is incorrect to assume "that judges regularly vote on ideological lines; it is only in the closest cases that such attitudes may tip the balance").
to be among these cases at the margins. Recently, Randall Lloyd has tested this assumption empirically.\textsuperscript{241} He initially observed that most political science studies of federal judicial behavior have assumed that the judge’s ideological values are the same as of the President that appointed her.\textsuperscript{242} But broad use of ideological labels becomes particularly dicey when reapportionment cases are considered. Lloyd persuasively argues that the usual social science stereotypes (Democratic appointees vote liberal, Republican appointees vote conservative)\textsuperscript{243} fail in this context unless we first consider the specific partisan background and nature of the apportionment plan under review. Only then can we rationally attempt to link the judges’ vote in presumed support of their party.\textsuperscript{244} Lloyd examined forty-four three-judge district court cases involving apportionment, decided between 1964 and 1983, and he did find a strong correlation between political background and support, or rejection, of the plan in question.\textsuperscript{245} He did not examine Voting Rights Act cases.\textsuperscript{246}

Lloyd’s study suggests that reapportionment cases are indeed the marginal cases where partisanship plays some role, consciously or otherwise, in judicial decisionmaking. But his study is not the last word, as his data are somewhat outdated and do not address Voting Rights Act cases.\textsuperscript{247} The limits of the present study prevented a replication of Lloyd’s methodology for the reapportionment cases arising out of the 1990 census. That would have required an in-depth examination of the advantages


\textsuperscript{242} See Lloyd, \textit{supra} note 241, at 413.

\textsuperscript{243} See Solimine, \textit{supra} note 193, at 37 n.44 (describing how political scientists have defined these terms operationally when studying judicial voting behavior).

\textsuperscript{244} See Lloyd, \textit{supra} note 241, at 415.

\textsuperscript{245} See \textit{id}. at 417–18.

\textsuperscript{246} See \textit{id}. at 414–15.

\textsuperscript{247} Cf Karlan, \textit{supra} note 81, at 1737 (contending that the Republican politicization of the lower federal judiciary in the 1980s would have an important effect on voting rights cases); King et al., \textit{supra} note 220, at 22 (finding support for the assumption that the partisanship of the appointing President is a good predictor of federal judges’ decisionmaking in cases raising voting issues decided between 1965 and 1993).
provided each political party in each state in the drawing of state and congressional legislative districts. In contrast, Voting Rights Act cases are more accessible. Generally speaking, such claims are brought by minority plaintiffs to enforce the voting claims of minorities. A vote for a plaintiff under the Act can generally be aligned with liberal ideology. Because three-judge courts, of course, vote as a group, it also seems reasonable to consider the votes in that manner.

A review of judicial behavior and outcomes from the eighty-nine cases under study is provided in Table 5. As the Table indicates, a large number of the cases (seventy-two) had some sort of Voting Rights Act claim advanced. To test partisanship, one might expect three-judge courts with a majority of Democratic appointees to hold more consistently for plaintiffs in those cases, and the converse to be true, as well. Table 5 lends mild support to this hypothesis. Overall, plaintiffs advancing Voting Rights Act claims did quite well, prevailing in about two-thirds of the cases. The lowest level of support was when Republican appointees made up two of the three-member panel, but overall the differences are not staggering, and hardly present compelling evidence of systematic partisan voting behavior.

Such lack of evidence can be compared usefully to the purportedly recent upsurge in partisan judicial behavior. In Shaw v. Reno and subsequent Shaw-type cases, with one notable exception.

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248. I regarded any sort of relief obtained by or presumably attributable to the plaintiffs (outright judgment, consent decree, court ordering state legislature to resubmit a plan) as the plaintiff "prevailing." Compare Lloyd, supra note 241, at 415 (characterizing any vote against the state legislature's plan as the plaintiff prevailing), with Weber, supra note 88, at 225 (asserting, with little discussion, that plaintiffs rarely prevail in voting rights litigation).

249. Although the number of decisions included in the analysis is relatively small, it is possible to hypothesize about the probable effect of party affiliation on plaintiff success in three judge courts. For example, we could hypothesize that courts with Democratic majorities will decide for the plaintiff more often than courts with Republican majorities. This hypothesis is based on the (admittedly crude) assumption that "Democratic panels" will be more liberal than "Republican panels," and that plaintiffs in such cases will, more often, be seeking a "liberal" outcome. If we do this, our data show that plaintiffs won 32 out of 40 cases with "Democratic panels" and only 18 out of 32 with "Republican panels." The likelihood of this difference occurring randomly is small. Applying a chi-square test of association yields a value of 4.726, which is significant at the .03 level. Measures of association based on chi-square thus show a moderate association between party and plaintiff victories. On chi-square in general, see HUBERT M. BLALOCK, JR., SOCIAL STATISTICS 279–92 (rev. 2d ed. 1979).


251. For a discussion of Shaw and its progeny, see supra notes 7–9 and accompanying text.
exception, the Republican appointees upheld the constitutional attack on the racially gerrymandered Congressional districts, while Democratic appointees rejected the challenge. Conventional wisdom would expect this pattern, because the districts under attack were meant to boost the election of minority members of Congress, almost all of whom would be Democrats. Yet it is well documented that Republican party operatives helped create these districts in the first instance, a strategy thought attributable to a desire to “pack in” minority voters, thereby increasing the chances of Republican candidates in other districts. Whether these intentions have been fully realized, and whether, given the effects of redistricting, certain minority policymakers were foolish to engage in this putatively Faustian bargain, is a matter of debate. But if we take the cynical view of the intent behind these districts, how should a rational, partisan Republican judicial appointee vote? Would it not be to uphold the districts in question, so as to effectuate the plans of the drafters?


The confusing nature, from a partisan perspective, of the nascent reverse-Shaw litigation, see supra text accompanying notes 145–49, further muddies the water on the conventional wisdom of Shaw. Cf. Howard Wilkinson, Two Districts Here Likely Won’t Change, CIN. ENQUIRER, June 25, 1996, at B1 (noting that after remand of the district court ruling in Voinovich by the Supreme Court, two black Democratic representatives stated that “they never wanted to see their majority-black districts redrawn”).

253. See Fried, supra note 4, at 66 n.355; Pildes, supra note 82, at 1380.

254. For an excellent discussion of the partisan effects of these “safe districts,” see Pildes, supra note 82, at 1365–67, 1378–89; Charles Cameron, et al., Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?, 90 AM. POL. SCI. Rev. 794, 795 (1996) (finding, inter alia, that a “trade-off does exist between maximizing the number of black representatives in Congress and maximizing the number of votes in favor of minority-sponsored legislation”); see also L. Marvin Overby & Kenneth M. Cosgrove, Unintended Consequences? Racial Redistricting and the Representation of Minority Interests, 58 J. Pol. 540, 544–50 (1996) (showing that white incumbents who lost African-American constituents because of redistricting “became less sensitive to the concerns of African-Americans”); Carol M. Swain, The Future of Black Representation, AM. PROSPECT 78 (Fall 1995).

255. See Pildes, supra note 82, at 1380 n.89 (quoting a Republican party official, saying that the GOP would “be nuts” to want the districts in question modified given the results that had been achieved). But see Issacharoff, supra note 144, at 55 n.37 (noting that the Republican National Committee “had a change of heart in 1992 as a result of a Democratic electoral upswing triggered by the presidential election,” and
However the evidence on these questions plays out, it calls into further doubt the use of easy partisan stereotypes to label judges' decisions in voting rights cases.

D. Practice Before the Court

One of the principal complaints about three-judge district courts before the 1976 amendment was the logistical nightmare they created for judges and attorneys. For judges, it was inconvenient to convene and to deliberate from scattered locations. There was also the awkwardness, especially during trial, of three judges ruling on evidentiary points or other discrete issues. For attorneys, cases often had to be tried in a hurried fashion in an injunction-like atmosphere. From the perspective of individual cases, circumstances apparently have not changed much since 1976. Inconvenience for all involved is often the rule, not the exception. The difference, of course, is system-wide. Since 1976, the burdens of the three-judge court upon the lower federal court jurists and bar, as a whole, have been considerably lessened.

Confusion remains, however, with respect to the cases litigated today. As discussed earlier, these cases raise complicated evidentiary and legal issues. Procedural uncertainty and confusion, which often characterized pre-1976 three-judge court litigation, continues in many instances. For example, it is not entirely clear whether a single member of such a tribunal has authority, acting alone, to grant or deny motions, and whether such rulings are appealable to the circuit court or to the

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despite earlier Republican support for majority-minority districts, the Committee filed an amicus brief in Shaw v. Reno "urging the position ultimately advanced by Justice O'Connor" in her majority opinion).

This Article uses the term "partisan" in the narrow sense of advancing the election prospects of one's own party. One might find seemingly partisan voting patterns among judges even if these votes are opposed to their actual ideological positions, i.e., opposition to race-conscious public programs. Based on ideology, Republican appointees might be more likely to oppose such programs, and Democratic appointees less likely, regardless of any partisan advantage gained or lost.

256. See, e.g., Karlan, supra note 75, at 264 (describing the first wave of the Voinovich litigation as "an extremely expedited process in which [the district court] gave each party three hours to present its evidence").

257. See supra notes 88–92 and accompanying text.

258. See supra notes 37–38 and accompanying text.
Supreme Court.\textsuperscript{259} Relatedly, litigation over the same controversy may be split among different forums, given the potential combination of private and preclearance enforcement.\textsuperscript{260}

IV. REFORMS

Dissatisfaction with the three-judge district court led to the reforms embodied in the 1976 amendment to § 2284. This Part of the Article considers whether developments since that time support further revisitation of the statute.

A. Structural Issues

The most important issue regarding the three-judge district court is whether it should exist at all. In the 1960s and 1970s, there were frequent, though by no means unanimous, calls for the institution to be abolished altogether. Instead, a compromise was struck, whereby the court was limited to hearing reapportionment and, indirectly, related Voting Rights Act cases.\textsuperscript{261} The compromise seems to have drawn strength from the symbolic power of the apparent greater fairness of such courts in civil rights cases—a power, no doubt, predicated in part on the experience of those courts in the South in the early 1960s.

Whatever the efficacy of these courts three decades ago, their virtues are questionable today. As detailed in Parts II and III of this Article, the advantages of three-judge district courts—greater deliberation, better systemic results, more rapid Supreme Court review—are modest indeed. Virtually all benefits could be attained in the single-judge, normal appellate review model, with an expedited process added. Today, such courts do

\textsuperscript{259} See WRIGHT ET AL., supra note 20, § 4235, at 614–16, 621–26.

\textsuperscript{260} See, e.g., Morse v. Republican Party, 116 S. Ct. 1186 (1996). In Morse, a majority of the Court authorized a private action to enforce sections 5 and 10 of the Voting Rights Act, 42 U.S.C. §§ 1973c, 1973h, filed before a three-judge district court in the Western District of Virginia, while acknowledging that other claims under the Act would be considered by a single-judge district court. See 116 S. Ct. at 1192 & n.4. The Court also recognized that other and related aspects of the case might be subject to preclearance litigation before the United States District Court for the District of Columbia. See id. at 1209.

\textsuperscript{261} See 28 U.S.C. § 2284(a) (1994); see also supra Part I.B.
have a symbolic value of sorts. To the extent that anyone, inside or outside the legal community, really pays attention, there is perhaps some added value to having three judges, including at least one appellate jurist, hear the case at the outset. The same observer might discount that value if she knew that, in most cases, Supreme Court review consists of a summary affirmance.

But there is often symbolism of another kind, much of it, in my view, in the wrong direction. A modern premise of these courts, informed by the historical origins, is to provide a balance of judges of different political backgrounds to hear cases of admittedly enormous influence for the states’ political systems. That premise is understandable but weak on several grounds. Empirically, it wrongly assumes that federal judges cannot put aside their personal political beliefs and are motivated by overt partisanship. More importantly, even if that assumption is true for some judges in some cases, it sends the wrong signal. It tells the public that a federal judge is simply another political actor, rather than a neutral decisionmaker attempting to enforce even-handed principles of laws. The message, it seems, has already been received. In voting rights cases, the media often routinely report the political background of the judges in question.262 Almost always, journalists report the affiliation


To be sure, the media often appear to report political affiliations of judges in other high-profile cases not involving voting rights. See, e.g., Paul M. Barrett, Paula Jones Suit Receives Go-Ahead From a U.S. Court, WALL ST. J., Jan. 10, 1996, at B6 (reporting the political affiliations of the three-judge panel in Jones v. Clinton, 72 F.3d 1354 (8th Cir.), cert. granted, 116 S. Ct. 2545 (1996)); Jo Thomas, Appeals Court Removes Judge in Oklahoma Bombing Case, N.Y. TIMES, Dec. 2, 1995, at 6 (reporting the political affiliations of the three-judge panel in the Tenth Circuit case that ordered recusal of the trial judge in the Oklahoma City bombing case, Nichols v. Alley, 71 F.3d 347 (10th Cir. 1995) (per curiam)).

I am not aware of any empirical study of this point, but my sense is that the reporting of such affiliations of judges is increasing. Perhaps it is a function of the reporter’s belief that such affiliations have explanatory force for the court’s decision. See Richard Davis, Decisions and Images: The Supreme Court and the Press 146 (1994) (citing a survey of reporters who cover the U.S. Supreme Court indicating that "[t]wo-thirds felt a justice’s personal ideology is a very important factor in decision
without any sort of indication of why it might be relevant—as though its importance is self-evident. In voting rights cases, perhaps even more than other cases, it is of paramount importance that judicial review be far removed from the vicissitudes of partisan politics.263 Making judicial review non-partisan in form as well as content will insure that the distance is maintained.264

Today, just as in the days of the old Fifth Circuit, there will be the occasional parochial and hostile federal judge. The cure for the problem lies not in creating and manipulating three-judge courts, but in having the circuit court reverse the judge. The litigants will still be heard and perhaps vindicated, but without the unseemly and unnecessary political overtones of the three-judge court.

It would seem, then, there is a good case to be made for simply abolishing the three-judge district court. If the court is to be retained, then its jurisdiction should be limited, as now, to reapportionment and related Voting Rights Act cases. As suggested in Part II, there appears to be some consensus that

263. See Frederick Schauer, Judicial Review of the Devices of Democracy, 94 COLUM. L. REV. 1326, 1336–37 (1994) (“Because substantive agendas might thus distort procedural decision making, issues of democratic procedure are best decided by a strategy of precommitment that immunizes procedural decisions most influenced by immediate political agendas from modification in the service of constantly changing political forces.”); see also Bush v. Vera, 116 S. Ct. 1941, 1991 (1996) (Stevens, J., dissenting) (“Given the uniquely political nature of the redistricting process, I fear the impact [that the application of Shaw v. Reno and its progeny by the federal courts] will have on the public’s perception of the impartiality of the federal judiciary.”).

264. It is merely to state a truism that considerable dangers attend the overt politicization of any judicial system. See Gregory A. Caldeira & James L. Gibson, The Etiology of Public Support for the Supreme Court, 36 AM. J. POL. SCI. 635 (1992); Steven P. Croley, The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law, 62 U. CHI. L. REV. 689 (1995); Marvin E. Frankel, Political Demagoguery Threatens Judiciary, NAT’L L.J., Apr. 15, 1996, at A23. For the reasons advanced in the text, I do not think that explicitly staffing three-judge district courts on the basis of the partisan background of the judges would, or should, lead to greater public acceptance of the decisions. The opposite might well be true. But see Albert W. Aalschuler, Racial Quotas and the Jury, 44 DUKE L.J. 704, 718–19 (1995) (arguing in favor of race-conscious jury selection in order to enhance public acceptance of jury rulings). See also Bush, 116 S. Ct. at 2001 n.5 (Souter, J., dissenting) (arguing that “racial balance in jury selection” should not be required since there are “differences between jury decisionmaking and political decisionmaking”).
those types of cases are indeed important, deserving special
treatment, given the centrality of voting to a democracy. Why
not, then, place all cases raising voting rights issues before a
three-judge court? This would prove too much. In some sense,
of course, all voting cases are important, but only the sort of
state-wide voting cases currently before such courts affect states
as states. Federalism concerns are less weighty with regard to
more geographically discrete voting cases. Moreover, apportion-
ment is “one of the most conflictual forms of regular politics in
the United States short of violence.”\(^{265}\) That, coupled with the
recent prominence of certain Voting Rights Act cases, suggests
that these are cases that stand qualitatively apart from other
cases raising voting issues.

Thus, there is no point in expanding the jurisdiction of the
court.\(^{266}\) That is just what was proposed in legislation before the
104th Congress. One bill would have required a three-judge
district court to be convened to hear a constitutional challenge
to a state law adopted by referendum or initiative.\(^{267}\) The

\(^{265}\) Andrew Gelman & Gary King, Enhancing Democracy Through Legislative
Redistricting, 88 AM. POL. SCI. REV. 541, 541 (1994).

Political gerrymanders could be, to some extent, self-correcting. That is, in efforts to
ensure their own re-elections, the members of the majority party in charge of apportion-
ment may (perhaps unintentionally) pack their own districts too much, dilute their
strength elsewhere, and eventually adversely affect their partisan, and incumbent,
advantage. There is empirical evidence that such self-correction occurs. See WILLIAM
N. ESKRIDGE, JR. & PHILIP P. FRICKEY, LEGISLATION: STATUTES AND THE CREATION OF
PUBLIC POLICY 165–66 (2d ed. 1995) (discussing unsuccessful efforts of Indiana
Republicans to effect a partisan gerrymander in the state legislature); LOWENSTEIN,
supra note 13, at 121; Gelman & King, supra, at 553–54 (studying apportionment of all
state legislative bodies from 1968 to 1988); Donald Ostdiek, Congressional Redistricting
and District Typologies, 57 J. POL. 533 (1995) (showing this effect in a study of four
states). If self-correction occurs, does it follow that there is less (or no) need for judicial
oversight? And does it further follow that there is less need for a three-judge district
court to adjudicate disputes over apportionment?

The case for less judicial oversight has not been made convincingly. While the case
for self-correcting gerrymanders appears compelling, the possibility and actuality of
subsequent court review may play a role in the process. A recent major study advancing
the self-correction thesis acknowledges this point, see Gelman & King, supra, at 543–44,
but does not study independently the phenomenon of “court-imposed plans, [because]
many courts (especially state courts) are widely known to be very partisan.” See id. at
558 n.8. That is, courts are treated as simply another partisan actor in the gerrymand-
ering process. I have attempted in this Article to refute that assumption on both
empirical and normative grounds. Moreover, it is not clear how the self-correction model
applies, if at all, to gerrymandering for reasons other than partisanship (i.e., race). Cf.
Issacharoff, supra note 77 (arguing that judicial review of partisan gerrymandering is
unworkable, but that judicial review ex ante of the process of redistricting is feasible).

\(^{266}\) An amendment to § 2284 to clarify pendent jurisdiction over federal claims
might be advisable. See supra Part II.A.

\(^{267}\) See H.R. 1117, 104th Cong. § 1(a) (1995).
legislative history was virtually a repeat of that which attended the initial creation of the court in response to *Ex parte Young*. Asserting the "rise in [the] use of popular referenda by states,"268 it argued that a "single federal judge" should not have the power to "estop the enforcement of the direct will of the people of a State . . . ."269 Moreover, the sponsors contended, the use of such courts would ameliorate forum shopping and will "recognize[] the obvious truth that no matter how objective a judge may attempt to be, her predilections will necessarily influence her decisions, especially when addressing matters of constitutional policy."270 The sponsors added that the bill was not particularly revolutionary, because challenges to referenda are as important as reapportionment and Voting Rights Act cases currently before three-judge district courts.271

Another bill in the 104th Congress, the Prison Litigation Reform Act, limited the ability of federal courts to issue injunctive relief in suits filed by prisoners challenging the conditions of their confinement and was enacted as a rider to the appropriations bill for the Department of Justice for the 1996 fiscal year.272 A relatively obscure provision of the Prison Litigation Reform Act requires that when any such prisoner suit seeks the release of prisoners as one form of relief, a three-judge district court must convene to hear the suit.273 The motivation for the latter provision is obscure,274 but presumably it

269. Id.
270. Id. at 6.
271. See id. at 5. The bill was passed by the House of Representatives on September 28, 1995, by a 266-159 vote. See *House Passes Bill to Require 3 Judges on Ballot Issues*, 53 CONG. Q. 3011, 3011 (1995). The Senate, however, took no substantive action on the bill.
is animated by the same concerns that drove the bill that addressed concerns over federal court enjoining a referendum. That is, in an era of perception of rising crime and of increasing prison populations, suits that seek federal judicial interference into state attempts to address this serious problem raise particularly important federalism concerns.\textsuperscript{275} Thus, the argument would run, such releases should only occur under the more careful treatment afforded by three federal judges, rather than just one.\textsuperscript{276}

Congress should not increase the use of three-judge district courts. To be sure, the rationales of the drafters of these bills do not completely lack force. Federal court challenges to statewide referenda raise important federalism concerns, and probably resonate with the public more than the type of cases now before three-judge district courts. Although courts should undertake scrutiny of such processes with care, it does not follow that the issues raised by these cases require the use of a three-judge district court.\textsuperscript{277} The sponsor of the bill was a Republican member of the California Congressional delegation\textsuperscript{278} who

\begin{itemize}
\item \textsuperscript{275} See Lewis v. Casey, 116 S. Ct. 2174, 2185 (1996).
\item \textsuperscript{276} The Seventh Circuit addressed such concerns in Oliver v. Deen, 77 F.3d 156 (7th Cir. 1996):
\item The role of the federal courts in regard to conditions of confinement in state prisons is an uneasy one. Conditions in prisons in Arkansas, Alabama, and Mississippi led federal judges in the late 1960's to forge legal tools to alleviate deplorable, almost unimaginable situations. From a pioneering attempt to protect inmates, who, for instance, because they feared forcible sexual violence and stabbings spent nights clinging to the bars, a body of law has emerged in which inmates sue their keepers for countless alleged deprivations, ranging from being maced to complaints about the kind of music piped into cellblocks. The improvement of many of the conditions of which prisoners complain would, in the view of some, constitute enlightened policy. But that's not the issue. The issue for the federal courts is, of course, determining the level of deprivation which can reasonably be said to implicate the Constitution and thus become the business of a federal judge. Drawing some hard lines is very important, not just for the courts but, in the long run, for the prisoners also. The number of suits has proliferated to the point that both Congress and the courts have begun to look for ways to curb—or even eliminate—prison litigation. The more federal courts intrude themselves into the prisons on minor matters, the more likely they are to be evicted altogether, leaving prisoners to the extremes of the political climate.
\end{itemize}

\textit{Id.} at 157 (footnotes omitted).


\textsuperscript{278} The bill was introduced by Representative Sonny Bono and 40 other Republican members of Congress. \textit{See} 141 CONG. REC. H2892 (daily ed. Mar. 8, 1995).
expressed concern about one federal district judge, a Democratic appointee, enjoining the effect of California's anti-immigration initiative, Proposition 187. If the judge's decision is wrong, it can and should be reversed by the Ninth Circuit. Appellate review of the district judge's decision can be accomplished in an expeditious manner, and it is overkill to resurrect the unwieldy machinery of the three-judge district court to deal with the unhappy circumstance of the plaintiff in a particular case having successfully forum-shopped. Judicial review of such referenda can involve fact-intensive inquiries pertaining to the intent of the voters, and it is by no means clear that a panel of three federal judges is in any better position to make such inquiries as compared to a single district judge. For similar reasons, requiring three-judge panels to convene to hear certain types of prisoner litigation is unwise. No compelling evidence shows that federal trial judges, acting alone, abuse their power in a systemic way in considering such cases. Incorrect decisions, of course,


283. Cf Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 54 F.3d 261, 270–71 (6th Cir. 1995) (reversing district judge's decision enjoining enforcement of anti-gay rights referendum and ruling that some findings of fact by trial judge were erroneous), vacated, 116 S. Ct. 2519 (1996).
can be reversed through the normal appellate process. Moreover, both bills set an unfortunate precedent for piecemeal expansion of the three-judge district court.\textsuperscript{284}

A final structural reform to be considered is the availability and scope of direct review by the Supreme Court. If, as this Article argues above, the three-judge court should be abolished, then the issue is moot. If, however, the court is retained, then alternatives should be considered seriously. One alternative would be first to lodge review, as in all other cases, with the circuit court of appeals, with certiorari review then available in the Supreme Court. Another alternative might be to replace the current review scheme with an explicit certiorari model. Still another may be to retain the current structure but have the Court at least briefly explain its summary dispositions.\textsuperscript{285} In my view, the current scheme of review is problematic, and the first of the suggested alternatives is the best solution. It would retain the three-judge district court, for whatever virtues it may have, but place it squarely back in the basic organizational scheme of the federal court system. The Supreme Court could still hear such cases, of course, through the writ of certiorari. Expedited appeals, admittedly important to consider in most voting rights cases, could be provided by using existing rules and statutes\textsuperscript{286} or incorporated in a revised § 1253. The need for expedited review might be overstated because “[e]rroneous judicial rulings

\textsuperscript{284}. An even more egregious use of three-judge courts occurred in the late 1970s. Senator James McClure, Republican of Idaho, was upset that President Carter had nominated Democratic Representative Abner Mikva to serve on the D.C. Circuit. Part of the ostensible reason for Senator McClure’s opposition was that the appointment allegedly would violate the Ineligibility Clause, U.S. Const. art. I, § 6, cl. 2, because Mikva had voted for a pay increase for federal judges. Senator McClure managed to get a law passed, Act of Oct. 12, 1979, Pub. L. No. 96-86, § 101(c), 93 Stat. 656, which stated that any constitutional challenge by a member of Congress to an appointment to the D.C. Circuit on Ineligibility Clause grounds (obviously referring to the McClure-Mikva clash without mentioning either name) could only be brought before a three-judge district court. As a nice example of forum-shopping, Senator McClure brought the action in Idaho, but lost for lack of standing. McClure v. Carter, 513 F. Supp. 265 (D. Idaho), aff’d mem. sub nom. McClure v. Reagan, 454 U.S. 1025 (1981).

The story is farcical but not because the constitutional issue raised by McClure is frivolous. See Michael Stokes Paulsen, Is Lloyd Bentsen Unconstitutional?, 46 Stan. L. Rev. 907, 908 (1994) (arguing that the Emolument Clause of Article I, Section 6 should be enforced to disqualify appointments that violate it). Rather, it seems preposterous that a single federal district judge, either in the District of Columbia or Idaho, could not hear the case, with usual appellate review thereafter.

\textsuperscript{285}. See Stern et al., supra note 128, at 220 (arguing that doing so would ease confusion over these cases among lawyers and lower federal courts).

are no more (or less) disruptive in the election context than in other areas.”287 The other alternatives are less convincing. The Court is already, through Rule 18,288 following the certiorari model, and the suggestion to embellish mere summary dispositions seems at odds with a summary process in the first instance.

B. Administrative Issues

Part III of this Article considered issues primarily regarding the internal operation of three-judge district courts. Three aspects of those issues—the composing of the three judges, the mixing of trial and appellate jurists, and the purportedly ideological voting on such courts—are worth revisiting.

Section 2284 frees chief judges of circuits to create three-judge courts with one or two district judges. It also leaves them open to charges of "packing" the courts. This Article has argued in favor of at least striving for the goal of depoliticizing such courts.289 To achieve that purpose, circuits should establish a blind rotation system to staff such courts, much as panels of circuit judges are usually assembled. The preference would be for judges from the state in question. Given the typical mix of trial and appellate issues in much three-judge court litigation, having at least one circuit judge on the panel is not irrational. Nonetheless, the better course is to have the court consist of three trial judges, making it a true three-judge district court. Little evidence supports the notion that circuit judges exert undue influence over their district court counterparts. Yet the additional acumen and prestige lent by a circuit judge does not seem appropriate for a hearing consisting of a large measure of trial-type issues. Moreover, district judges are no strangers to the type of legal issues in which appellate jurists specialize.

287. ESTREICHER & SEXTON, supra note 180, at 68–69; see also id. at 117–18 (arguing that all mandatory appeals should be abolished).

Given the normative importance of elections, the need for timely finality is perhaps higher in the three-judge district court context. If so, then (1) limited or even no appeal rights might be justified, and (2) collective decisionmaking for a de facto final decision is more justified. By fully reviewing only a few three-judge court cases, the Supreme Court arguably is following this model. That might be so, but in my view the model is in need of adjustment.

288. See supra notes 172–76.

289. See supra Part IV.A.
Having three district judges is particularly appropriate if, as argued above, direct Supreme Court review is eliminated.

A final and related concern is the ideological make-up of the three-judge district court. Some chief judges, quite understandably, have attempted to balance the panel with both Democratic and Republican appointees. Indeed, at one point Henry J. Friendly, then Chief Judge of the Second Circuit, virtually argued that the mixed partisan background should be institutionalized. This requirement is not unknown in the federal administrative structure. Although understandable, this benign packing sends the wrong message. If three-judge courts are retained, and assignments thereto are made on a more-or-less random basis, then we should permit the partisan chips to fall where they may. Judge Tuttle's packing of these courts three decades ago was perhaps, in hindsight, not a bad thing. But circumstances in the deep South and elsewhere have changed. The need for partisan packing, if there ever was such a need, is far less now and does not outweigh the negative image created by the politicization of three-judge district courts.

CONCLUSION

The three-judge district court has had a rich political history and has served an important, unappreciated, and at times useful service to the federal court system. Nonetheless, by the 1970s its limitations clearly outweighed its virtues, and Congress was right to limit the jurisdiction of such courts to voting rights

290. See Jacoby, supra note 49, at 39 ("Despite my distaste for three-judge courts . . . . [i]t is more acceptable if such cases are heard by a court whose members include adherents of more than one political party." (quoting Congressional testimony of Friendly, J., Hearings, supra note 52, at 749)).

291. See, e.g., 2 U.S.C. § 437c(a)(1) (1994) (requiring that no more than three members of six-person Federal Elections Commission be from one political party); 15 U.S.C. § 41 (1994) (requiring same with respect to the five-member Federal Trade Commission); 15 U.S.C. § 78d(a) (1994) (requiring that no more than three members of the five-person Securities and Exchange Commission be from one political party). The statute creating the National Labor Relations Board (NLRB), 29 U.S.C. § 153 (1994), has no such requirement, and, perhaps not coincidentally, presidents have long been accused of packing the NLRB with partisan appointments. See, e.g., PETER W. LOW & JOHN C. JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 162 & n.e (3d ed. 1994). This charge is perhaps accentuated by the fact that the NLRB engages in far more adjudication (and much less rulemaking) than other federal administrative agencies. See id. (arguing that the partisan nature of the Board contributes to this trend).
cases. In some ways, restriction to voting rights cases has only accentuated the problematic aspects of these courts. For that reason, Congress should seriously consider abolishing these courts. If it does not, Congress and the federal judiciary should give equally serious thought to reform, particularly the process of selecting members of such courts. If that occurs, the three-judge district court might truly live up to its original promise of a fair and impartial forum to consider important and controversial cases in our nation.
### TABLE 1

**THREE-JUDGE DISTRICT COURT HEARINGS, 1964–1994**

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*After 1976, Tables break "Civil Rights" category into "Voting Rights" and various other categories.
### TABLE 2

**ORALLY ARGUED THREE-JUDGE COURT CASES ON SUPREME COURT'S DOCKET, 1953–1993 TERMS**

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### TABLE 3
**Membership Characteristics of Selected Published Cases, 1976–1994**

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<tr>
<td>Cases with one Judge not from State</td>
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### TABLE 4
**Decisionmaking Characteristics of Selected Published Cases, 1976–1994**

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<tr>
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<td>Dissenting Opinions by District Judges</td>
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<td>TABLE 5</td>
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<tr>
<td>2–1 Democratic: plaintiff wins: 20 loses: 6</td>
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<tr>
<td>1–2 Democratic: plaintiff wins: 8 loses: 12</td>
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<tr>
<td>0–3 Democratic: plaintiff wins: 10 loses: 2</td>
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APPENDIX

PUBLISHED THREE-JUDGE DISTRICT COURT CASES, 1976–1994


City of Rome v. United States, 472 F. Supp. 221 (D.D.C.),
prob. juris. noted, 443 U.S. 914 (1979), aff'd, 446 U.S. 156 (1980).
Charlton County Bd. of Educ. v. United States, 459 F. Supp. 530
Wilkes County v. United States, 450 F. Supp. 1171 (D.D.C.
Matthews v. Leflore County Bd. of Election Comm'rs, 450 F.