Michigan Law Review

Volume 61 | Issue 8

1963

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Recommended Citation
Peter W. Williamson S.Ed., *Federal Jurisdiction-Three-Judge Courts-The Recent Evolution in Jurisdiction and Appellate Review*, 61 MICH. L. REV. 1528 (1963).
Available at: https://repository.law.umich.edu/mlr/vol61/iss8/4

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COMMENTS

FEDERAL JURISDICTION—THREE-JUDGE COURTS—THE RECENT EVOLUTION IN JURISDICTION AND APPELLATE REVIEW—During its 1961 term the United States Supreme Court announced three decisions that are likely to have a profound effect on the administration of the Three-Judge Court Act.[1] All of these opinions deal with the question of the authority of a single district court judge to entertain the merits of litigation that meets the literal requirements of the statute and therefore apparently requires three judges for proper disposition; one of them also considers the matter of the jurisdiction of courts of appeals to review erroneous assumptions of jurisdiction by a district judge. While each decision is individual and distinct from the others, there are certain significant points of resemblance.

This comment seeks to analyze each decision against its historical background. No more than a pro forma attempt will be made to integrate one decision with the others, for sufficient material is not yet available to predict with any accuracy the Court's ultimate achievements in this important area of federal civil procedure.

Whenever a plaintiff attacks the constitutional validity of a state statute in a federal court and requests an injunction against its continued operation, the district judge may not hear the case alone, but under the Three-Judge Court Act he must summon two other judges to his aid.[2] Congress enacted this provision in 1910 in response to the vigorous controversy created by *Ex parte*

1 28 U.S.C. § 2281 (1958), which provides: "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title." For a thoughtful and extensive discussion of the statute, its scope and purpose, see generally Note, 49 VA. L. REV. 538 (1963). A similar enactment provides for a three-judge tribunal whenever plaintiff requests an injunction against the operation or execution of a federal statute on constitutional grounds. 28 U.S.C. § 2282 (1958). Certain other proceedings also require the convening of a three-judge court, such as a request for an injunction against the operation of an order of the Interstate Commerce Commission, 28 U.S.C. § 2325 (1958), and in antitrust cases certified by the Attorney General, 63 Stat. 107 (1949), 15 U.S.C. § 28 (1958), amending ch. 544, § 1, 32 Stat. 823 (1903).

2 The composition of all three-judge courts is governed by 28 U.S.C. § 2284 (Supp. IV, 1963), which provides: "[T]he district judge to whom the application for injunction or other relief is presented shall constitute one member of [the] . . . court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge."

Young,[3] in which the Supreme Court held that a single federal district judge could entertain a suit against a state officer requesting an injunction to restrain the enforcement of a state statute. During the early 1900's the authority of federal courts to issue injunctions was as yet uncircumscribed, and indeed interlocutory decrees could then be issued without notice or full hearing.[4] These conditions created a clear opportunity for abuse, presenting the sovereign states with a significant threat to their independence. In response, Congress authorized the convening of a three-judge trial court to hear such cases.[5] This special procedure had previously been adopted for certain antitrust litigation[6] and suits to set aside or restrain orders entered by the Interstate Commerce Commission.[7] As a further safeguard against judicial invalidation of state legislation, and to insure the expedition of such litigation, the statute provided for direct appeal to the Supreme Court from the final decision of three judges.[8]

Although the Court originally took a benevolent approach to the construction of the Three-Judge Court Act,[9] significant developments in state-federal relations and the practical problems in the administration of the federal court system altered the Supreme Court's attitude toward this procedure. First, as the United States moved farther into the twentieth century the growth of social legislation, the increasing size of the federal government and the

3 209 U.S. 123 (1908). The following remarks of Senator Overman are indicative of the congressional reaction: "[W]e have come to a sad day when one subordinate Federal judge can enjoin the officer of a sovereign State from proceeding to enforce the laws of the State. . . . That being so, there . . . [is] great feeling [against] the fact that one Federal judge has tied the hands of a sovereign State." 42 CONG. REC. 4847 (1908). Two years later the same Senator stated: "I saw in Moody's Magazine last week that there are 150 cases of this kind now where one federal judge has tied the hands of the state officers, the governor, and the attorney-general . . . ." 45 CONG. REC. 7256 (1910).

4 "In 1910 the judges of the circuit courts had statutory authority, except as restrained by the prohibition against enjoining proceedings in state courts, to grant restraining orders without notice, and interlocutory and final injunctions after notice and hearing. [The issuance of] . . . such injunctions [was] . . . at the discretion of the judge presiding." Hutcheson, *A Case for Three Judges*, 47 HARV. L. REV. 795, 800 (1934). See generally *id.* at 798-810.

5 See Senator Overman's remarks concerning the proposal: "[I]f this substitute is adopted and three judges have to pass upon the question of the constitutionality of a State statute and three great judges say that the statute is unconstitutional, the officers of the State will be less inclined to resist the orders and decrees of our Federal courts." 42 CONG. REC. 4847 (1908).

6 The Expediting Act, 32 Stat. 823 (1903), as amended, 15 U.S.C. § 28 (1958).

7 34 Stat. 592 (1906) applied the procedure utilized under the Expediting Act, 32 Stat. 823 (1903), to such proceedings.

8 28 U.S.C. § 1253 (1958), amending ch. 309, § 13, 36 Stat. 557 (1910).

9 See, *e.g.*, *Ex parte* Metropolitan Water Co., 220 U.S. 539 (1911), which held that a district judge did not possess subject-matter jurisdiction over a complaint requesting the convening of a three-judge court on proper grounds.

supremacy of the federal courts militated toward a less favorable construction of the Three-Judge Act. It represented the very things which the times did not condone—state sovereignty, independence and freedom from federal control. Secondly, Congress severely restricted the power of federal judges to issue *ex parte* injunctions.[10] This change in the power of the district judge undermined many of the considerations which led to the enactment of the original three-judge statute. Thirdly, the steady increase in the amount of litigation in the federal courts since the turn of the century made the use of the three-judge procedure particularly disruptive of judicial administration.[11] In districts where the docket was crowded or where geographical distance was a consideration, the transfer of two judges to a single district for the purpose of hearing one case was especially burdensome. Finally, the requirement of hearing a direct appeal from every three-judge decision also imposed a not insignificant burden on the time and energy of the Supreme Court.[12] Not surprisingly, therefore, the Court has taken the position that the statute is not a statement of "broad social policy to be construed with great liberality, but . . . an enactment technical in the strict sense of the term and to be applied as such."[13]

This process of limitation by construction, however, has not resulted in a clear definition of the jurisdictional scope of the three-judge court. Instead, it has substantially complicated the problems of the litigant who seeks to invoke the jurisdiction of the appropriate federal court, and of the district judge who, in the first instance, must determine whether or not the case "requires" three judges for proper disposition. Extraordinary confusion on the appellate level is a direct consequence of the distinctions that delimit the ambit of jurisdiction of the single judge and the three-judge tribunal. Because the statute is jurisdictional and not merely procedural, an error in the district court, in failing to convene a three-judge court, by its nature nullifies any subsequent proceedings.

10 As early as 1914 a statute had been enacted prohibiting the issuance of preliminary injunctions without notice except in extreme circumstances, to be stated in the order, and for a time not exceeding ten days. Anti-Trust Act of 1914 (Clayton Act), ch. 323, § 17, 38 Stat. 737, repealed by 62 Stat. 869 (1948). At the same time it was required that injunctions and restraining orders set forth the reasons for their issuance. Ch. 323, § 19, 38 Stat. 738 (1914), repealed by 62 Stat. 869 (1948).

11 See, *e.g.*, statements by Mr. Justice Frankfurter in Phillips v. United States, 312 U.S. 246, 250 (1941) and in Kesler v. Department of Pub. Safety, 369 U.S. 153, 156 (1962).

12 *Id.* at 250-51.

13 *Id.* at 251.

I. *Bailey v. Patterson: Limiting the Jurisdiction of the Three-Judge Court—A Disputed as Well as a Substantial Constitutional Question Is Required for Three-Judge Jurisdiction*

The early interpretations of the Three-Judge Act required a district judge to convene the special tribunal upon a preliminary finding that plaintiff was proceeding directly against a state officer, seeking and pressing for injunctive relief against the operation of a state statute, and alleging a constitutional ground in support of his action.[14] The district judge was considered to be simply without jurisdiction to entertain the merits of such a complaint.

In *Ex parte Poresky*[15] the Supreme Court considered an important issue: whether the district judge could dismiss a suit, apparently suitable only for a hearing before three judges, if the allegations of the complaint raised a clearly insufficient constitutional claim. The Court held that the district judge possessed such authority. While an early writer concluded that this decision rested on the plaintiff's failure to raise a substantial federal question in support of his claim,[16] both the nature of the statute and subsequent cases dictate a different conclusion. The Three-Judge Court Act sets forth its own jurisdictional requisites, which are independent of the other provisions in the *Judicial Code* limiting the jurisdiction of the district courts. The requirement here at issue is whether plaintiff has asserted a substantial constitutional ground for relief. While it is enticing to analogize the quality of the question thus raised to the federal question jurisdiction of the district courts, it is improper to do so.[17] Only after the district judge finds the petition not suitable for a three-judge hearing does he proceed to investigate whether the complaint raises a federal question sufficient to support federal court jurisdiction of the merits. Clearly, three judges are not required to entertain a suit based on a sham pleading or one that raises only issues which the Supreme Court has previously heard and determined.[18]

14 Cumberland Tel. & Tel. Co. v. Louisiana Pub. Serv. Comm'n, 260 U.S. 212 (1922); *Ex parte* Metropolitan Water Co., 220 U.S. 539 (1911).

15 290 U.S. 30 (1933).

16 See Hutcheson, *supra* note 4, at 816. "But the provision requiring the presence of a court of three judges necessarily assumes that the District Court has jurisdiction. In the absence of diversity of citizenship, it is essential to jurisdiction that a substantial federal question should be presented." 290 U.S. at 31.

17 Bailey v. Patterson, 369 U.S. 31 (1962) (per curiam). See also HART & WESCHLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 848-55 (1953).

18 *E.g.*, Stuart v. Wilson, 282 F.2d 539 (5th Cir. 1960), *cert. denied*, 368 U.S. 927 (1961); Bell v. Hood, 71 F. Supp. 813 (S.D. Cal. 1947).

Of course, a dismissal for want of a substantial federal question is an adjudication on the merits by the single judge, and arguably a single judge ruling on the merits is the result that Congress sought to avoid by passing the original statute. The Court failed to recognize that Congress could provide any mode of hearing it desired, and that merely because the claim for relief might not be sustainable was no reason for denying plaintiff his congressionally secured forum. The *Poresky* result satisfies, however, the purposes underlying the original enactment because, at least in denying plaintiff's request for an injunction, the district judge does not place state legislative schemes in jeopardy. This case represents a turning point in the judicial construction of the Three-Judge Act. From this decision flow all of the current major limitations on the jurisdiction of the three-judge tribunal.

Dicta in *Poresky* also indicated that a three-judge tribunal might not be required when an action involved questions which had been considered by the Supreme Court and had become definitely settled in favor of the complainant so that there was no dispute over his right to relief against the state statute being attacked.[19] The validity of this dicta, however, was not tested before the Supreme Court until after its decision in *Brown v. Board of Education*.[20] In *Bailey v. Patterson*[21] the Court decided that a

19 This interpretation was first applied in the district courts. See Ludley v. Board of Supervisors, 150 F. Supp. 900 (E.D. La. 1957), *aff'd*, 252 F.2d 372 (5th Cir. 1958); Bush v. Orleans Parish School Bd., 138 F. Supp. 336 (E.D. La.), *mandamus denied*, 351 U.S. 948 (1956); Willis v. Walker, 136 F. Supp. 181 (W.D. Ky. 1955). See also Shuttlesworth v. Birmingham Bd. of Educ., 162 F. Supp. 372 (N.D. Ala.) *aff'd*, 358 U.S. 101 (1958) (per curiam). See generally Comment, 19 LA. L. REV. 813 (1959).

The following language in *Poresky* gave rise to these decisions: "The existence of a substantial question of constitutionality must be determined by the allegations of the bill of complaint. . . . The question may be plainly unsubstantial, either because it is 'obviously without merit' or because 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.'" 290 U.S. at 31.

20 347 U.S. 483 (1954). Of particular interest is the history of *Tureaud v. Board of Supervisors*. A Negro plaintiff brought suit requesting an injunction to obtain admission to Louisiana State University. The district judge accepted jurisdiction and granted a temporary injunction. 116 F. Supp. 248 (E.D. La. 1953). The case was reversed on appeal on the ground that the complaint alleged a constitutional ground for relief, and the effect of the district judge's decision was to invalidate state legislation. 207 F.2d 807 (5th Cir. 1953). While a petition for certiorari was pending, the Supreme Court's first opinion in the *Brown* decision appeared. Soon thereafter the Court vacated the court of appeals' judgment in *Tureaud* and remanded the decision "for consideration in the light of the segregation cases . . . and conditions that now prevail." 347 U.S. 971 (1954). On remand, the district judge entered the injunction and, on appeal, the court of appeals held that the necessary effect of the Supreme Court's opinion was to place jurisdiction of the merits within the competence of the district judge. 225 F.2d 434 (5th Cir. 1955).

21 369 U.S. 31 (1962) (per curiam).

suit requesting injunctive relief to enforce plaintiff's rights to non-segregated service in interstate and intrastate transportation facilities did not require a hearing before a three-judge tribunal. Thus, a single district judge may grant injunctions impairing the operation of state statutes when he finds the law clearly settled. *Bailey v. Patterson,* while representing the prevalent opinion that the federal judiciary is supreme, presents the spectre of a single federal district judge invading the prerogatives of the states, and denying them the protection of the three-judge procedure and the benefit of the direct appeal provision. The Court refused to consider the Three-Judge Court Act's express requirement that only three judges may issue an injunction against the operation of a state statute. Therefore, in each case the district judge must now decide whether the plaintiff is asserting not only a substantial, but also a disputed, constitutional right.

Obviously, a constitutional right does not either lose all vitality or become firmly established in one decision; rather, a gradual process of evolution is involved. The prevailing view of due process is that it is not a static concept, but rather one containing certain minimal standards "which are 'of the very essence of a scheme of ordered liberty.' "[22] Because the standards of due process are not fixed, it is difficult for a single judge to determine whether the Supreme Court has definitively settled a particular question; if it has, there is no need for a three-judge tribunal, but the failure to convene the special court when required results in a heavy cost to both the litigants and the tribunals involved. The requirement that the constitutional question be disputed, therefore, places the district judge in a difficult position. Under such a test he must make, without the benefit of a hearing on the merits, a value judgment concerning the scope of the constitutional issue. While *Bailey v. Patterson* has obviously complicated the administration of the three-judge provision, its full impact has not yet been felt, for no single judge has denied a three-judge tribunal on questions outside the sphere of the segregation decisions. And here the policy of the Court is clear: no man may be denied his right to equal treatment in public places by reason of his color.

Another policy behind the original Three-Judge Act, however, was the belief that the special tribunal would serve as a buffer between state pride and the necessity of following the dictates of the federal constitution in the shaping of state legislative pro-

22 Adamson v. California, 332 U.S. 46, 65 (1947) (Frankfurter, J., concurring).

grams. Although a series of Supreme Court decisions may settle a previously disputed constitutional issue for the federal judiciary, the states and parties most intimately involved may not consider the issue foreclosed in the sense that it is no longer a proper subject of litigation; even the segregation issue remains viable in many southern states. While most of the issues concerning the segregation of public schools,[23] parks,[24] transportation facilities,[25] and indeed any publicly administered project[26] are settled, does the concept of "state action," as distinguished from private action, include such activities as, for example, the supervision of a discriminatory scholarship fund by a private university?[27] These questions are hardly "settled" today, but if the Supreme Court should decide them with per curiam opinions, as it decided many of the issues concerning the scope of *Brown v. Board of Education*,[28] such decisions would presumably bar a litigant from the three-judge forum.[29] *Bailey v. Patterson* permits the district judge to decide whether the issue is foreclosed, and this certainly is a subjective decision.

II. *Kesler v. Department of Public Safety: Expanding the Jurisdiction of the Three-Judge Court—A Single Judge Cannot Decide a Pre-emption Case When the Constitutional Issue Is Sole and Immediate*

While *Bailey v. Patterson* tends to limit its jurisdiction, *Kesler v. Department of Public Safety*[30] expands the jurisdiction of the special three-judge court. In *Kesler* plaintiff asserted that the federal Bankruptcy Act pre-empted Utah's financial responsibility law, and requested an injunction against the enforcement of the state statute. The district judge heard the complaint on the

23 *E.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954).

24 *E.g.*, New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54, *affirming per curiam* 252 F.2d 122 (5th Cir. 1958).

25 *E.g.*, Gayle v. Browder, 352 U.S. 903, *affirming per curiam* 142 F. Supp. 707 (M.D. Ala. 1956).

26 See St. Antoine, *Color Blindness But Not Myopia: A New Look at State Action, Equal Protection, and "Private" Racial Discrimination*, 59 MICH. L. REV. 993, 994 (1961).

27 See Note, 33 N.Y.U.L. REV. 604, 615-16 (1958); Comment, 1963 WIS. L. REV. 254.

28 See, *e.g.*, State Athletic Comm'n v. Dorsey, 359 U.S. 533 (1959), *affirming per curiam* 168 F. Supp. 149 (E.D. La. 1958) (state-regulated athletic contests); Holmes v. City of Atlanta, 350 U.S. 879, *vacating per curiam* 223 F.2d 93 (5th Cir. 1955) (public golf courses); Mayor of Baltimore v. Dawson, 350 U.S. 877, *affirming per curiam* 220 F.2d 386 (4th Cir. 1955) (public beaches); Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954), *vacating and remanding per curiam* 202 F.2d 275 (6th Cir. 1953) (public theaters).

29 Bailey v. Patterson, 369 U.S. 31 (1962) (by implication).

30 369 U.S. 153 (1962), 111 U. PA. L. REV. 113.

merits and granted injunctive relief.[31] Prior Supreme Court opinions indicated that a pre-emption question did not require a three-judge tribunal,[32] but the Court reversed and remanded with directions that three judges convene to hear the constitutional arguments.

The conflict between a federal and a state statute, where both seek to regulate an activity clearly within the ambit of federal power, involves a direct conflict between the particular state statute and the federal constitution. The basis for a plaintiff's attack is the constitutional argument that the supremacy clause[33] recognizes only the validity of the federal statute and that it overrides state legislation designed to impede its operation. The Court, however, distinguished earlier decisions as involving issues of statutory construction rather than constituting a direct attack on a state statute.[34] Thus, a single judge may grant injunctive relief against the operation of a state statute, but only if a preliminary non-constitutional issue, such as whether plaintiff has standing to challenge the state statute, precedes the constitutional question of pre-emption.[35] If, instead, the constitutional question is clearly the only one presented, plaintiff's claim requires a three-judge court for proper disposition.[36]

Obviously, when a single judge grants injunctive relief against the operation of a state statute, he violates Congress's intent, as

31 *In re* Kesler, 187 F. Supp. 277 (D. Utah 1960).

32 See, *e.g.*, Case v. Bowles, 327 U.S. 92, 97 (1946), where the Court said "the complaint [requesting an injunction against a state statute] did not challenge the constitutionality of the state statute but alleged merely that its enforcement would violate the Emergency Price Control Act. Consequently a three-judge court is not required." In *Ex parte* Bransford, 310 U.S. 354, 359 (1940), the Court also stated that "the supremacy clause gives superiority to valid federal acts over conflicting state statutes but this superiority for present purposes involves merely the construction of an act of Congress, not the constitutionality of the state enactment." See also *Ex parte* Buder, 271 U.S. 461 (1926). *But see* Query v. United States, 316 U.S. 486 (1942) (suit to restrain the enforcement of a state tax on sales at a post exchange as violative of the constitutional immunity of federal agencies held to require a three-judge court).

33 U.S. CONST. art. VI, cl. 2.

34 369 U.S. at 156. The Court said that *Ex parte* Buder, 271 U.S. 461 (1926), and *Ex parte* Bransford, 310 U.S. 354 (1940), involved questions of construction, while Case v. Bowles, 327 U.S. 92 (1946), was not a direct attack on the state statute in question. Query v. United States, 316 U.S. 486 (1942), was cited as controlling.

35 369 U.S. at 158. *Cf. Ex parte* Buder, *supra* note 34.

36 369 U.S. at 158, citing Gully v. First Nat'l Bank, 299 U.S. 109, 117-18 (1936), as the source for determining whether the constitutional question is sole and immediate. See also Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73 (1960), where plaintiff alleged that a California statute violated the commerce and equal protection clauses of the Constitution, as well as an order of the Secretary of Agriculture issued under a federal statute. The Court there held that joining a constitutional and a non-constitutional ground of relief did not defeat the jurisdiction of a three-judge court.

expressed in the Three-Judge Court Act, whether or not there are preliminary questions of construction.[37] The Court might have taken this opportunity to restrict further the scope of the special tribunal's jurisdiction, but it did not. Mr. Justice Frankfurter, writing for the majority in *Kesler*, said, "Neither the language of § 2281 nor the purpose which gave rise to it affords the remotest reason for carving out an unfrivolous claim of unconstitutionality because of the Supremacy Clause from the comprehensive language of § 2281."[38] Thus, the majority opinion in *Kesler* reinforced the efficacy of the three-judge court provision, and indeed retreated from the restrictive language employed in some earlier decisions.

After deciding the jurisdictional issue, Mr. Justice Frankfurter engaged in an extended discussion of the federal and state statutes involved in *Kesler*, ultimately deciding that the plaintiff's claim of federal pre-emption was unfounded.[39] The dissent argued that such extended statutory construction indicated that the action was not meet for three judges because the constitutional question was not immediate.[40] Indeed, in dicta Frankfurter had indicated that the existence of certain preliminary issues might justify the single judge's taking jurisdiction of actions which superficially seemed appropriate only for three judges.[41] The majority opinion, however, skirts any explicit discussion of what such an issue might be. In offering such criticism, the dissenters showed their failure to grasp the full significance of the majority opinion. *Kesler* ably demonstrates that deciding what court has jurisdiction of the merits must be distinguished from whether the plaintiff's claim can be sustained. A federal court must decide the jurisdictional question as an independent issue; it cannot permit this issue to become entangled with the ultimate question of plaintiff's right to relief. Exemplifying the type of distinction to be drawn is *Florida Lime & Avocado Growers, Inc. v. Jacobsen*,[42] in which the Court decided that merely because plaintiff has alleged a nonconstitutional ground of relief, as an alternative to constitutional grounds, the jurisdiction of the three-judge court could not be

[37] See note 1 *supra*.

[38] 369 U.S. at 156.

[39] 369 U.S. at 158-74.

[40] 369 U.S. at 177 (Warren, C.J., dissenting).

[41] "If in immediate controversy is not the unconstitutionality of a state law but merely the construction of a state law or the federal law, the three-judge requirement does not become operative." 369 U.S. at 157.

[42] 362 U.S. 73 (1960).

defeated, the other requirements of the statute having been met. The statutory construction involved in *Kesler*, just as the alternative grounds put forth in *Florida Lime*, related solely to the process of reaching an ultimate decision on the merits and had no bearing on the preliminary question of jurisdiction. The minority in *Kesler* failed to distinguish between the prerequisites for three-judge court jurisdiction, which are the existence of the proper allegations and the request for injunctive relief against the operation of a state statute, and the process of choosing the basis of decision, which in pre-emption cases at least will necessarily involve an extended discussion of the statutes in issue. The basis of the decision, however, should not affect the scope of three-judge court jurisdiction; *Florida Lime* makes this abundantly clear.

Constitutional litigation involving the supremacy clause of course often requires the construction of state legislation and, therefore, may require the federal court to abstain from making any decision until a state court has had an opportunity to review the statute in light of the constitutional issues presented. The Court's refusal to permit a district judge to decide the merits of a pre-emption case, where the constitutional issue is sole and immediate, coincides with the decision of the Court in another important case involving the three-judge tribunal's jurisdiction.

The decision in *Idlewild Bon Voyage Liquor Corp. v. Epstein*[43] indicates that the district judge may abstain and permit the local courts to construe a state enactment to determine a question of purely local law, such as whether the state statute affects plaintiff's trade or business.[44] The Court held in *Idlewild*, however, that a district judge may not abstain merely because the state statute in question has never been construed in the local courts when abstention will necessarily result in litigating the constitutional issue in state tribunals.[45] In terms of the constitutional issue

43 370 U.S. 713 (1962) (per curiam).

44 "This is not a case like *Chicago, Duluth & Georgian Bay Transit Co. v. Nims*, 252 F.2d 317, where a three-judge court was requested only in the event that it should first be held that the state statute was by its terms applicable to the plaintiff's business operations." 370 U.S. at 715 n.3.

45 "When an application for a statutory three-judge court is addressed to a district court, the court's inquiry is appropriately limited to determining whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute. Those criteria were assuredly met here, and the applicable jurisdictional statute therefore made it impermissible for a single judge to decide the merits of the case, either by granting or by withholding relief" or invoking abstention. 370 U.S. at 715.

they raised for the Supreme Court, *Idlewild* and *Kesler* are practically on all fours. In both the plaintiff attacked the validity of a state enactment under the supremacy clause of the Constitution, and in neither was there any preliminary non-constitutional question that would have justified an assumption of jurisdiction on the merits by the single judge.

In *Idlewild* the New York statute in issue had never received the benefit of state interpretation in the light of the substantial constitutional issues presented.[46] Accordingly, the court first hearing such a petition normally could abstain to permit the New York courts to construe the state legislation.[47] Abstention in such a case, however, is quite likely to result in the litigating of plaintiff's constitutional arguments[48] in the state courts. The doctrine of res judicata, moreover, may preclude plaintiff from raising these issues again in the still-pending federal litigation.[49] If the district judge had been permitted to abstain in *Idlewild*, therefore, the three-judge court would have had no control over the forum that determined the validity of plaintiff's constitutional claims. Thus, abstention would have amounted to a federal decision on the

46 Idlewild Bon Voyage Liquor Corp. v. Rohan, 188 F. Supp. 434, 436 (S.D.N.Y. 1960).

47 See Harrison v. NAACP, 360 U.S. 167 (1959), where a three-judge court correctly abstained because an adjudication in the state courts may have materially altered the constitutional issues or removed them from the case. *But see* NAACP v. Bennett, 360 U.S. 471 (1959), where the Court in a per curiam opinion held that a statute should not be automatically referred to the state courts merely because there are questions of state law present; Chicago v. Atchison, T. & S.F. Ry., 357 U.S. 77 (1958), holding that where the meaning of state statutes is clear it is permissible for a federal court to proceed to judgment even where there has been no state adjudication.

48 See Government & Civic Employees Organizing Comm. v. Windsor, 353 U.S. 364 (1957). In that case a three-judge court initially abstained pending an adjudication in the state courts. 116 F. Supp. 354 (N.D. Ala. 1953), *aff'd*, 347 U.S. 901 (1954). Plaintiff then initiated an action in a state court, in which he did not raise any of the constitutional grounds alleged in the district court. This proceeding culminated in an opinion by the Alabama Supreme Court that declared that plaintiff was within the scope of the state statute. 262 Ala. 285, 78 So. 2d 646 (1955). When plaintiff returned to the three-judge court to secure a final hearing on the constitutional issues, the court dismissed the suit with prejudice, noting that "the Alabama courts have not construed the [state enactment] in such a manner as to render it unconstitutional and, of course, we cannot assume that the State courts will ever so construe [it]." 146 F. Supp. 214, 216 (N.D. Ala. 1956). On appeal to the Supreme Court the judgment was vacated and remanded with directions to stay proceedings "until efforts to obtain an *appropriate* adjudication in the state courts have been exhausted." 353 U.S. at 367. (Emphasis added.) An "appropriate adjudication" in the state courts refers specifically to the raising of the pertinent federal constitutional objections so that the state court can interpret the state statute in light of these objections. *Id.* at 366. *Cf.* Propper v. Clark, 337 U.S. 472, 492 (1949). See also England v. Louisiana State Bd. of Medical Examiners, 194 F. Supp. 521 (E.D. La. 1961), *prob. juris. noted*, 372 U.S. 904 (1963); Lassiter v. Northampton County Bd. of Elections, 248 N.C. 102, 102 S.E.2d 853 (1958), *aff'd*, 360 U.S. 45 (1959).

49 England v. Louisiana State Bd. of Medical Examiners, *supra* note 48. See Note, *Consequences of Abstention by a Federal Court*, 73 HARV. L. REV. 1358 (1960).

merits by the single judge, and, until the adjudication in the state courts was complete, plaintiff would have no federal forum in which to seek relief.[50] Finally, the direct appeal provision permits the Supreme Court to maintain close supervision over the progress of three-judge court litigation,[51] while the cases a single judge hears come to the Court only after intermediate appellate review and the grant of certiorari.[52]

Additionally, in *Kesler* the Court indicated that a district judge might be able to decide a pre-emption case involving preliminary questions of construction;[53] and in *Idlewild* the Court concluded by implication that a district judge could abstain for the purpose of obtaining guidance from the state courts on non-constitutional issues.[54] The Court also recognized in *Idlewild* that often purely non-constitutional questions arise that may necessitate abstention.[55] If the district judge should abstain, the subsequent litigation may decide not only the questions of state law but also the validity of the constitutional issues.[56] Although this procedure precludes the three-judge court from having any control over the progress of the action, the orderly administration of justice requires it. Both the holdings and the implications of *Idlewild* and *Kesler* represent a balance between the requirements of the three-judge court statute and the disruption of orderly litigation that employment of this procedure entails.[57] The district judge, therefore, may abstain whenever abstention will not *necessarily* result in adjudication of the constitutional issues in the state courts. Nevertheless, because the ability to abstain is consonant with the power to decide the merits of a case, giving the district judge broader authority to abstain than to decide the merits is inconsistent with his jurisdiction under the statute. Saving to the district judge the authority to abstain, except for the purpose of necessarily allowing the state courts to decide the merits of the constitutional issues, preserves the integrity of the three-judge

50 *E.g.*, Glen Oaks Util., Inc. v. City of Houston, 280 F.2d 330 (5th Cir. 1960); Ray v. Hasley, 214 F.2d 366 (5th Cir. 1954).

51 28 U.S.C. § 1253 (1958), amending ch. 309, § 13, 36 Stat. 557 (1910).

52 Mandamus has also been used by the Supreme Court to review a district judge's decision to abstain. *E.g.*, Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713 (1962).

53 369 U.S. at 157.

54 370 U.S. at 715.

55 *Ibid.* See generally ROBERTSON & KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES § 199, at 356-59 (2d ed. Wolfson & Kurland 1951).

56 See text accompanying note 48 *supra*.

57 See Kesler v. Department of Pub. Safety, 369 U.S. 153, 156-57 (1962).

court provision and permits the district judge to exercise the maximum amount of control over the course of the action that is consistent with his status as delineated in the three-judge statute.[58]

III. *Idlewild Bon Voyage Liquor Corp. v. Epstein: Rationalizing Appellate Jurisdiction—The Courts of Appeals May Issue Corrective Orders When the District Judge Has Invaded the Jurisdiction of the Three-Judge Court*

Not surprisingly, the increasing complexity of the issues that district judges must resolve in deciding whether to impanel a three-judge court has led to substantial problems in defining the scope of appellate jurisdiction in the Supreme Court and the courts of appeals.[59] Before *Poresky* the district judge's decision was relatively unsophisticated and, being so, the need for jurisdiction in the courts of appeals was not demanding.[60] In *Ex parte Metropolitan Water Co.*, therefore, the Supreme Court accepted plaintiff's petition for mandamus as a mode of testing the denial of his petition for a three-judge court.[61] The Court sanctioned the use of the extraordinary writ for two reasons. First, the Three-Judge Act provided no independent appellate remedy for an erroneous decision by the district judge.[62] Secondly, permitting an appeal to one of the courts of appeals and ultimate appeal to the Supreme Court would substitute a slow process involving repeated appeals for the swift procedure of direct Supreme Court supervision outlined in the statute.[63] In *Stratton v. St. Louis Southwestern Ry.* the Supreme Court carried the reasoning of the *Metropolitan* decision to its logical conclusion.[64]

Stratton not only sanctioned mandamus in the Supreme Court as the appropriate appellate proceeding to correct an erroneous

58 *Cf.* Bailey v. Patterson, 369 U.S. 31 (1962); *Ex parte* Poresky, 290 U.S. 30 (1933).

59 See generally ROBERTSON & KIRKHAM, *op. cit. supra* note 55, §§ 192-204, at 344-67; Comment, 27 U. CHI. L. REV. 555, 566-71 (1960).

60 See text accompanying note 14 *supra*.

61 220 U.S. 539 (1911). The extraordinary writ has continued to be the appropriate mode of testing an erroneous assumption of jurisdiction by the district judge. *E.g., Ex parte* Bransford, 310 U.S. 354 (1940); *Ex parte* Poresky, 290 U.S. 30 (1933). See generally ROBERTSON & KIRKHAM, *op. cit. supra* note 55, § 200, at 359-60. *But cf.* Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713 (1962).

62 *Ex parte* Metropolitan Water Co., 220 U.S. 539, 546 (1911).

63 See Stratton v. St. Louis Southwestern Ry., 282 U.S. 10, 16 (1930), *reversing sub nom.* St. Louis Southwestern Ry. v. Emerson, 30 F.2d 322 (7th Cir. 1929) (granting petition for mandamus).

64 *Ibid.*

jurisdictional decision by the district court, but also proscribed the courts of appeals from entertaining appeals from any decision of a district judge entered in excess of his jurisdiction. Although this decision might have been narrowly construed, the courts of appeals accepted it as precluding them from exercising any supervisory control over the district judge when he acted outside his jurisdiction in deciding an issue appropriate only for a three-judge court.[65] Thus, even after *Poresky* permitted the district court to assess the merits of the constitutional issue for a limited purpose, the courts of appeals refrained from taking affirmative action when the district judge erred in refusing to convene the special tribunal.[66] Perhaps the similarity between a decision on the merits that plaintiff was not entitled to injunctive relief, which the district judge had no authority to enter, and a decision that plaintiff had failed to raise a substantial and disputed constitutional question, which was within the competence of the single judge, resulted in confusion at the appellate level concerning the scope of permissible reviewing authority. The failure of the circuit courts to entertain such appeals, however, placed the whole burden of reviewing the orders of district judges on the Supreme Court. The Court therefore was sometimes called upon to review the same controversy twice—once on a jurisdictional question by mandamus, and a second time on the merits following a direct appeal.[67] Moreover, the Court had to scrutinize each petition for mandamus carefully because it represented the only recourse for a litigant denied his petition for a three-judge tribunal.

65 See, *e.g.*, Idlewild Bon Voyage Liquor Corp. v. Rohan, 289 F.2d 426 (2d Cir. 1961). After finding that the district judge had erred in abstaining, the court of appeals said: "Anomalous as our position is, we feel bound by the Supreme Court's opinion in *Stratton*, an opinion which that Court has never seen fit to reverse, and to which its approval has been given when construing a companion section [of the three-judge acts], 28 U.S.C. § 2282. *Ex parte* Cogdell, 342 U.S. 163 (1951)." *Id.* at 429. *Accord*, Chicago, D. &. G.B. Transit Co. v. Nims, 252 F.2d 317 (6th Cir. 1958) (dictum); Waddell v. Chicago Land Clearance Comm'n, 206 F.2d 748, 750 (7th Cir. 1953) (dictum).

66 Although the courts of appeals refused to intervene in a district judge's action in an affirmative manner, they accepted and decided appeals from his decisions when he had properly exercised his jurisdiction. See Chicago, D. & G.B. Transit Co. v. Nims, *supra* note 65; Waddell v. Chicago Land Clearance Comm'n, *supra* note 65.

67 The subsequent history of Stratton v. St. Louis Southwestern Ry., 282 U.S. 10 (1930), presents such an example. After remand, plaintiff had the merits of the action tried in a district court of three judges, which granted relief. On direct appeal, the Supreme Court reversed, holding that plaintiff had an adequate remedy in the state courts. 284 U.S. 530 (1932). Finally, the controversy reached the Supreme Court of Illinois, where the statute was declared unconstitutional. 353 Ill. 273, 187 N.E. 498 (1933), *cert. denied*, 291 U.S. 673 (1934).

Idlewild,[68] however, may change this unsatisfactory situation. In that case, after the district judge had abstained,[69] plaintiff appealed to the Second Circuit.[70] That court found that the district judge had exceeded his jurisdiction in deciding to abstain, but held that *Stratton* prevented it from taking affirmative action to correct the error.[71] Plaintiff then went back to the district court and filed another petition for a three-court tribunal, but again the single judge abstained, finding that, because the court of appeals did not have jurisdiction of the appeal, its opinion that he had erred was merely dicta.[72]

Finally, plaintiff filed both an appeal from the Second Circuit decision and a mandamus petition in the Supreme Court. The issue was squarely presented: Did the courts of appeals have any supervisory control over erroneous jurisdictional decisions on the district court level? The Supreme Court responded by justifying an assumption of jurisdiction at the intermediate appellate level whenever the district judge's decision effectively put plaintiff out of court.[73] In *Idlewild*, invoking abstention did so, because no litigation was pending in the state courts and, of course, this decision foreclosed resort to the federal forum.[74] The decision, however, did not completely overrule the *Stratton* case,[75] but it does intimate strongly that the courts of appeals should be less reluctant to accept such appeals and indeed that their jurisdiction is mandatory in certain limited circumstances.

Because *Idlewild* sanctions review by the courts of appeals of an erroneous decision by a district judge that puts plaintiff out of court, it partially dissipates the confusion that previously existed concerning the scope of appellate jurisdiction. The Supreme Court's opinion, however, is not clear and certainly does not give the appellate courts a mandate to supervise any excess of jurisdiction on the district court level. The Court, for instance, does

68 370 U.S. 713 (1962).

69 Idlewild Bon Voyage Liquor Corp. v. Rohan, 188 F. Supp. 434 (S.D.N.Y. 1960).

70 Idlewild Bon Voyage Liquor Corp. v. Rohan, 289 F.2d 426 (2d Cir. 1961).

71 See note 65 *supra* for a quotation from the court's opinion.

72 Idlewild Bon Voyage Liquor Corp. v. Rohan, 194 F. Supp. 3, 5 (S.D.N.Y. 1961).

73 "*Stratton* does not stand for the broad proposition that a court of appeals is powerless ever to give any guidance when a single judge has erroneously invaded the province of a three-judge court. The Court of Appeals clearly stated its opinion that a court of three judges ought to have been convened to consider this litigation. That view was correct and should have been followed upon the petitioner's renewed motion that such a statutory court be impaneled." 370 U.S. at 716.

74 See *id.* at 714; Idlewild Bon Voyage Liquor Corp. v. Rohan, 289 F.2d 426, 428 (2d Cir. 1961).

75 370 U.S. at 715-16.

not intimate whether the Second Circuit would have been acting properly in accepting an appeal from the district court if the same or similar litigation had been pending in the state courts. Abstention here would merely have foreclosed the federal forum. However, if the Court views the authority to abstain as being the equivalent of jurisdiction to decide the merits, abstention when the constitutional issue is sole and immediate is an invasion of three-judge court jurisdiction. The importance of abstention and its effect of prolonging constitutional litigation certainly makes it appropriate to have a speedy remedy, either of appeal or mandamus, available.

Although it is not possible to decide exactly what are the limits of *Idlewild,* it does point to a more rational system of appellate jurisdiction. Surely, the lack of appellate authority in the courts of appeals to rectify an erroneous jurisdictional determination of a district court is anomalous. For example, when a district judge erroneously accepts a diversity case, the appellate tribunal on review will merely vacate and remand with directions to dismiss.[76] When a district judge decides a case which is appropriate for a three-judge tribunal, the same kind of authority to review and correct the decision of the lower court should exist. The issue in most three-judge court cases is not the broad one of whether there is federal jurisdiction of the cause, but only what court within the federal system may properly exercise jurisdiction over the merits of the litigation.

The courts of appeals, of course, should have appellate jurisdiction over questions that are within the scope of the district judge's authority.[77] Because the district judge may investigate the merits of the complaint to determine whether the constitutional issues presented are substantial, disputed, and sole and immediate, the appellate courts have derivative authority to supervise the district judge's action in these areas. *Idlewild,* therefore, by implication indicates that the courts of appeals are not without authority to supervise the district judge when he exceeds his jurisdiction in one of these matters. But *Idlewild* does not intimate whether the courts of appeals may correct the district judge where he decides the merits of a cause proper for consideration only by three judges.

76 *E.g.,* Tiedemann v. Brownell, 222 F.2d 802 (D.C. Cir. 1955); French v. Jeffries, 149 F.2d 555 (7th Cir.), *cert. denied,* 326 U.S. 755 (1945).

77 See Idlewild Bon Voyage Liquor Corp. v. Rohan, 289 F.2d 426, 430-32 (2d Cir. 1961) (Lumbard, C.J., dissenting).

Prior to *Stratton* a district judge had no power to entertain the merits of a complaint requesting an injunction against the operation of a state statute; the scope of appellate review was thus easily defined. However, the growth of a district judge's authority to issue injunctions in actions previously proper only for three judges has undermined the basic premise on which *Stratton* was decided. Appellate courts are constantly involved in reviewing both errors in jurisdictional decisions and the merits of controversies in which district judges have exercised authority within one of the many exceptions to three-judge court jurisdiction. If *Idlewild* did not overrule *Stratton,* the Supreme Court has certainly indicated dissatisfaction with the piecemeal process of appellate review which that decision encouraged.

IV. *Conclusion*

The scope of three-judge court jurisdiction is definitely in the process of evolution. While *Bailey v. Patterson* restricts the jurisdiction of the special tribunal, *Kesler* and *Idlewild* embark on integrating this procedure with the other decision-making devices utilized in the federal judicial system. But even *Bailey v. Patterson* emphasizes the important nature of the litigation coming before three-judge courts. At the present time, cases involving state-enforced racial segregation are not sufficiently controversial to merit such special consideration—the constitutional principles have been established, and the necessity for an expanded tribunal has waned. However, the two most important recent decisions respecting the role of the three-judge court, *Kesler* and *Idlewild,* foretell an entirely new approach to the whole system of three-judge litigation. In *Kesler* the Court refused to limit further the jurisdiction of the special tribunal, and instead enlarged it. The source of the constitutional issue, so long as it is sole and immediate, has become unimportant. The real test is whether the issue is ripe for decision and whether plaintiff seeks an injunction against the enforcement of a state statute which is in direct conflict with federal legislation or the Constitution. Thus, the Court has simplified the indicia of three-judge court jurisdiction, in rejecting the continued maintaining of tenuous distinctions concerning the construction of state enactments.

Of the three cases here considered, *Idlewild* apparently will have the greatest impact on future developments. One of the keys to an organized and effective judicial system is an orderly and com-

paratively simplified system of appellate jurisdiction. *Idlewild* takes substantial steps in this direction. Now the courts of appeals have jurisdiction to review the procedural errors of the district judge, in failing to convene a three-judge court or in abstaining when to do so will permit a state court to litigate the merits of an action suitable only for three judges. *Idlewild* should be extended to include within the jurisdiction of the courts of appeals the power to issue a corrective order when the district judge has erroneously entertained the merits of a petition proper only for a three-judge court. The utilization of the mandamus proceeding in the Supreme Court should be limited to securing review, at an interlocutory stage, as to whether three judges are required. At such an early stage in the proceedings the parties should not have to take an intermediate appeal, for this may unduly delay a trial on the merits and, in this instance, only the Supreme Court can give them an authoritative opinion.

While the Court had previously concentrated on limiting the jurisdiction of the three-judge court, today it seems to be concentrating on simplifying the administration of the Three-Judge Court Act. Whenever a single judicial system encompasses two courts of original jurisdiction, one for general litigation and the other for specialized actions, difficult questions concerning the jurisdictional scope of each will arise. But the speed with which the three-judge court provision permits current and undecided constitutional questions to reach the Supreme Court makes the maintenance of this procedure, and the development of simple rules as to jurisdiction and appellate review, of no little importance.

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