Vertical Stare Decisis and Three-Judge District Courts

MICHAEL T. MORLEY*

Three-judge federal district courts have jurisdiction over many issues central to our democratic system, including constitutional challenges to congressional and legislative districts, as well as to certain federal campaign-finance statutes. They are similarly responsible for enforcing key provisions of the Voting Rights Act. Litigants often have the right to appeal their rulings directly to the U.S. Supreme Court. Because of this unusual appellate process, courts and commentators disagree on whether such three-judge district court panels are bound by circuit precedent or instead are free to adjudicate these critical issues constrained only by U.S. Supreme Court rulings.

The applicability of court of appeals precedent in three-judge district courts implicates larger questions about the justifications for, and scope of, vertical stare decisis within the federal judiciary. The Appellate Jurisdiction Theory of vertical stare decisis posits that, when adjudicating a case, the only precedent a court is required to apply is that of tribunals with appellate jurisdiction over that particular matter. The Structural Theory, in contrast, contends that a lower court must presumptively follow the precedent of other courts that are superior to it within the judicial hierarchy.

A careful analysis of nearly a century's worth of federal laws establishing three-judge trial courts and allowing certain cases to be appealed directly to the U.S. Supreme Court confirms that Congress does not legislate against the backdrop of the Appellate Jurisdiction Theory. To the contrary, a Hybrid Theory combining both traditional approaches provides the best descriptive fit for past and present jurisdictional statutes and unconventional appellate procedures. The Hybrid Theory specifies that a court presumptively must follow the precedent of other tribunals that either may have appellate jurisdiction over its rulings in a particular case or are superior to it within the constitutional and statutory structure of the judiciary. Applying this approach, a three-judge district court must

* Assistant Professor of Law, Florida State University College of Law; Climenko Fellow and Lecturer on Law, Harvard Law School, 2012–2014; Yale Law School, J.D. 2003. I am grateful to Jenny Carroll, Russell Gold, Randy Kozel, Michael Parsons, James Pfander, and Hannah Wiseman for comments and suggestions. This piece also benefited greatly from feedback at the University of Richmond School of Law Junior Faculty Forum, Florida State University (FSU) College of Law faculty workshop, and Federalist Society Junior Faculty Colloquium. Special thanks to Mary McCormick and Katie Miller of the FSU College of Law Research Center for their indefatigable assistance. I am also indebted to the staff of *The Georgetown Law Journal* for its extraordinary editorial work.

follow its regional court of appeals's precedent, even though its rulings are not subject to review there, because that court occupies a superior position within the federal judicial hierarchy. This approach is most consistent with the structure of three-judge district courts, Congress's purposes in creating them, practical considerations, and the traditional rationales underlying stare decisis.

TABLE OF CONTENTS

INTRODUCTION

Throughout much of the twentieth century, when a plaintiff asked a federal trial court[1] to enjoin an allegedly unconstitutional federal or state law, the case was heard by a panel of three judges, rather than by a single judge.[2] Litigants could appeal the court's ruling directly to the U.S. Supreme Court as of right, bypassing the intermediate appellate court,[3] without filing a petition for certiorari. Some of the most critical cases in the constitutional canon—for example, *Brown v. Board of Education*[4] and *Roe v. Wade*[5]—were adjudicated by three-judge district court panels and appealed directly to the U.S. Supreme Court. Due to the tremendous burdens these requirements imposed on the federal judiciary, Congress restricted the availability of three-judge district courts in 1976.[6]

Though their jurisdiction has been curtailed, three-judge district courts retain authority over some of the most important cases before the federal judiciary: those affecting the electoral process.[7] Federal law empowers three-judge district courts to hear challenges to the constitutionality of congressional and legislative districts[8] and two important federal campaign-finance statutes.[9] Pursuant to this authority, three-judge district courts adjudicated the recent spate of political

1. This Article uses the generic term "trial court" when not referring to a particular point in time because Congress transferred original jurisdiction over constitutional claims between federal courts in the early twentieth century. The Jurisdiction and Removal Act of 1875 granted jurisdiction over such cases to federal circuit courts, subject to a $500 amount-in-controversy requirement. Ch. 137, § 1, 18 Stat. 470, 470. The Judicial Code of 1911 abolished circuit courts and transferred original jurisdiction over those cases to modern district courts. Ch. 231, §§ 1, 24, 289–91, 36 Stat. 1087, 1087, 1091, 1167.

2. *See infra* Section II.C.

3. This Article uses the generic phrase "intermediate appellate court" when not referring to a particular point in time because this entity was originally called the "circuit court of appeals" when it was established in 1891, Evarts Act, ch. 517, § 2, 26 Stat. 826, 826, and renamed the "U.S. Court of Appeals" in 1948, Judicial Code of 1948, ch. 646, 62 Stat. 869, 870 (codified at 28 U.S.C. § 43(a) (2012)).

4. 98 F. Supp. 797 (D. Kan. 1951) (three-judge court), *rev'd*, 347 U.S. 483 (1954).

5. 314 F. Supp. 1217 (N.D. Tex. 1970) (per curiam) (three-judge court), *aff'd in part, rev'd in part*, 410 U.S. 113 (1973), *overruled in part by* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

6. *See infra* notes 313–14 and accompanying text.

7. *See* Michael E. Solimine, *The Three-Judge District Court in Voting Rights Litigation*, 30 U. MICH. J.L. REFORM 79, 81 (1996).

8. 28 U.S.C. § 2284(a) (2012).

9. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 403, 116 Stat. 81, 113–14 (codified at 52 U.S.C. § 30110 note (2012)); Presidential Election Campaign Fund Act, Pub. L. No. 92-178, sec. 801, § 9011(b)(2), 85 Stat. 497, 570 (1971) (codified at 26 U.S.C. § 9011(b)(2) (2012)) *see* FEC v. Nat'l Conservative Political Action Comm'n, 470 U.S. 480, 484–85 (1985) (holding that § 9011(b) applies to suits for declaratory judgments concerning the constitutionality of the Fund Act);

gerrymandering cases in which litigants urged the federal judiciary to treat such claims as justiciable.[10] These courts also have jurisdiction over many types of suits under the Voting Rights Act,[11] as well as actions by the Attorney General to enforce the Twenty-Sixth Amendment[12] and constitutional prohibitions on poll taxes.[13]

Despite the lengthy heritage of three-judge district courts, disagreement persists over whether they must apply the law of the circuits in which they sit.[14] This dispute arises from competing underlying theories of vertical stare decisis.[15] Many courts apply the "Structural Theory," which specifies that a court must presumptively follow the precedent of other courts that are superior to it within the judicial hierarchy, regardless of whether those "higher" courts are able to exercise appellate jurisdiction over a particular case. Under this approach, vertical stare decisis is a function of the judiciary's hierarchical structure. A three-judge district court applying the Structural Theory must follow the precedent of both the U.S.

cf. 26 U.S.C. § 9010(c) (2012) (authorizing three-judge district courts to adjudicate certain actions for injunctive or declaratory relief to enforce the Act).

10. *See, e.g*., Benisek v. Lamone, 348 F. Supp. 3d 493 (D. Md. 2018) (three-judge court) (entering summary judgment for plaintiffs), *vacated and remanded sub nom.* Rucho v. Common Cause, 139 S. Ct. 2484 (2019); Common Cause v. Rucho, 318 F. Supp. 3d 777 (M.D.N.C. 2018) (three-judge court), *vacated and remanded*, 139 S. Ct. 2484 (2019); Benisek v. Lamone, 266 F. Supp. 3d 799 (D. Md. 2017) (three-judge court) (denying motion for preliminary injunction), *aff'd*, 138 S. Ct. 1942 (2018); Whitford v. Gill, 218 F. Supp. 3d 837 (W.D. Wis. 2016) (three-judge court), *vacated and remanded*, 138 S. Ct. 1916 (2018).

11. 52 U.S.C. § 10101(g) (Supp. II 2015) (litigation over whether a jurisdiction engaged in a pattern or practice of racial discrimination with regard to voting); *id*. § 10303(a)(5) (bailout litigation); *id*. § 10304(a) (preclearance litigation); *id*. § 10504 (racial discrimination with regard to voting).

12. *Id*. § 10701(a)(2).

13. *Id*. § 10306(c). Shortly after this provision was enacted, the Twenty-Fourth Amendment was adopted, prohibiting poll taxes for federal elections. U.S. CONST. amend. XXIV, § 1. Soon thereafter, the U.S. Supreme Court held in *Harper v. Virginia Board of Elections* that the Equal Protection Clause similarly proscribes poll taxes for state and local elections. 383 U.S. 663, 670 (1966).

14. *See, e.g*., LaVergne v. U.S. House of Representatives, No. 17-793 (CKK-CP-RDM), 2018 U.S. Dist. LEXIS 152345, at *29 n.3 (D.D.C. Sept. 6, 2018) (three-judge court) ("There is some question as to whether the precedent of the circuit in which a three-judge district court sits is binding on that court."); Ga. State Conference of the NAACP v. Georgia, 269 F. Supp. 3d 1266, 1286–87 (N.D. Ga. 2017) (three-judge court) (Duffey, J., concurring in judgment) (concluding "it is unclear whether a three-judge panel is bound by its circuit's precedent"); Ala. Legislative Black Caucus v. Alabama, 988 F. Supp. 2d 1285, 1342 n.13 (M.D. Ala. 2013) (three-judge court) (Thompson, J., concurring in part and dissenting in part) ("There is a separate question as to whether this three-judge district court convened under 28 U.S.C. § 2284, for which appellate jurisdiction bypasses the Eleventh Circuit and proceeds directly to the U.S. Supreme Court, must apply the case law of the Eleventh Circuit."); Confederated Tribes of the Colville Indian Reservation v. Washington, 446 F. Supp. 1339, 1356 n.16 (E.D. Wash. 1978) (three-judge court) (declining to resolve "whether this Court, as a three-judge District Court, is bound by the law of the Circuit in which it sits"), *aff'd in part, rev'd in part*, 447 U.S. 134 (1980); Poe v. Werner, 386 F. Supp. 1014, 1016–17 (M.D. Pa. 1974) (noting the "difference of opinion among the federal courts" about "whether a three-judge court is bound to follow the decisions of the court of appeals for the circuit in which it is located"); *see also* Joshua A. Douglas & Michael E. Solimine, *Precedent, Three-Judge District Courts, and the Law of Democracy*, 107 GEO. L.J. 413 (2019) (arguing that the U.S. Supreme Court's summary dispositions should get little or no precedential value and that three-judge district courts are not required to follow court of appeals precedent).

15. It is accepted generally accepted that, at a minimum, a three-judge district court is free to voluntarily abide by its circuit's precedents if it finds them persuasive, just as it may choose to follow other circuits' precedents or even recommendations in law review articles.

Supreme Court and its regional U.S. Court of Appeals because of their respective places within the judicial hierarchy.[16]

Other three-judge district court opinions instead defend the "Appellate Jurisdiction Theory," which provides that a court is bound only by the precedent of other courts that have appellate jurisdiction over a particular case.[17] This theory dictates that, because three-judge district courts' rulings are usually appealable only to the U.S. Supreme Court,[18] such courts are not bound by any precedent other than U.S. Supreme Court opinions. Professors Joshua Douglas and Michael Solimine vigorously defend this view in an article in Volume 107 of *The Georgetown Law Journal*.[19] This issue has arisen in numerous contexts, including whether three-judge district courts must follow circuit precedent concerning issue preclusion,[20] Eleventh Amendment sovereign immunity,[21] "one person, one vote" principles,[22] and the Voting Rights Act,[23] as well as numerous other important and potentially dispositive matters.

Little scholarship exists on either vertical stare decisis within the lower courts[24] or the role and functioning of modern three-judge district

16. *See, e.g.*, Lewis v. Rockefeller, 431 F.2d 368, 371 (2d Cir. 1970) (holding that a three-judge district court "sit[s] as a district court" and is therefore bound by its circuit's precedent); *Ala. Legislative Black Caucus*, 988 F. Supp. 2d at 1306 ("A three-judge district court is still a district court within the ordinary hierarchical structure of the federal judiciary."); Russell v. Hathaway, 423 F. Supp. 833, 835 (N.D. Tex. 1976) (three-judge court) ("A three-judge court is bound by apposite decisions of the Court of Appeals for its circuit. The addition by Congress in the three-judge court acts of a second district judge and a Circuit Judge together with direct appeal to the Supreme Court was not a grant of authority with elevated precedential stature but a withdrawal of power from a single judge.").

17. *See, e.g.*, Parker v. Ohio, 263 F. Supp. 2d 1100, 1112 n.3 (S.D. Ohio 2003) (three-judge court) (Gwin, J., concurring) ("If our decision is reviewable only by the Supreme Court, logic suggests that we are not bound by circuit authority."); *see also LaVergne*, 2018 U.S. Dist. LEXIS 152345, at *29 n.3; *Ala. Legislative Black Caucus*, 988 F. Supp. 2d at 1342 n.13 (Thompson, J., concurring in part and dissenting in part); Jehovah's Witnesses of Wash. v. King Cty. Hosp. Unit No. 1 (Harborview), 278 F. Supp. 488, 504–05 (W.D. Wash. 1967) (three-judge court) ("In this special three-judge court case we are not bound by any judicial decisions other than those of the United States Supreme Court."), *aff'd per curiam*, 390 U.S. 598 (1968).

18. *But see infra* Part IV.

19. Douglas & Solimine, *supra* note 14, at 419 (arguing that "circuit precedent is not formally binding on three-judge district courts," and district courts accordingly "have no . . . obligation" to "apply precedent from the circuit in which they sit"). Some scholars, rejecting both views, boldly declare that lower courts have no obligation to accept higher court precedent as binding at all. *See, e.g.*, Paul L. Colby, *Two Views on the Legitimacy of Nonacquiescence in Judicial Opinions*, 61 TUL. L. REV. 1041, 1058 (1987); Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's* Justice Accused, 7 J.L. & RELIGION 33, 85 (1989).

20. *LaVergne*, 2018 U.S. Dist. LEXIS 152345, at *29 n.3.

21. Ga. State Conference of the NAACP v. Georgia, 269 F. Supp. 3d 1266, 1286–87 (N.D. Ga. 2017) (three-judge court) (Duffey, J., concurring in judgment).

22. *Ala. Legislative Black Caucus*, 988 F. Supp. 2d at 1304–05.

23. Parker v. Ohio, 263 F. Supp. 2d 1100, 1112 n.3 (S.D. Ohio 2003) (three-judge court) (Gwin, J., concurring).

24. Professors Evan Caminker and Jeffrey Dobbins have written the seminal articles concerning vertical stare decisis. *See* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 866–67 (1994) (arguing that district courts should not be required to follow court of appeals precedent in all cases, even when the court of appeals may exercise appellate jurisdiction); Jeffrey C. Dobbins, *Structure and Precedent*, 108 MICH. L. REV. 1453, 1490 (2010)

courts.[25] This is consistent with the lack of attention the academy usually pays to lower courts[26] until issues such as nationwide injunctions force public attention on them.[27] Most previously published pieces concerning three-judge trial courts were primarily descriptive, delving into these courts' jurisdictional limits.[28] Many focused on the puzzle of whether a judge's refusal to convene a three-judge

(concluding that a "nonstandard appellate process[]" should neither generate "cross-circuit binding precedent," nor bind a court to precedents of other courts that are "not regularly in a direct appellate relationship" with it, "unless Congress clearly states its view to the contrary"). A powerful defense of the Appellate Jurisdiction Theory may be found in John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 513–31 (2000). For an analysis of the history and development of stare decisis that touches on vertical stare decisis, see Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 664 & n.84 (1999).

Many important works on stare decisis focus on horizontal stare decisis without discussing the separate issues raised by its vertical counterpart. *See, e.g.*, Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787 (2012) (advocating the adoption of horizontal stare decisis within district courts); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987) (defending horizontal stare decisis); David L. Shapiro, *The Role of Precedent in Constitutional Adjudication: An Introspection*, 86 TEX. L. REV. 929 (2008) (developing guidelines for determining when the U.S. Supreme Court should overturn its own precedents).

25. The most comprehensive, though dated, analysis of three-judge federal trial courts is David P. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1 (1964). Professor Solimine provides an engaging history of the development and later curtailment of three-judge trial courts' jurisdiction in Michael E. Solimine, *Congress*, Ex parte Young*, and the Fate of the Three-Judge District Court*, 70 U. PITT. L. REV. 101 (2008). A detailed early history of three-judge trial courts is set forth in Joseph C. Hutcheson, Jr., *A Case for Three Judges*, 47 HARV. L. REV. 795, 803–13 (1934), and their evolution is insightfully described by *The Three-Judge Court Reassessed: Changing Roles in Federal-State Relationships*, 72 YALE L.J. 1646, 1651 (1963) [hereinafter *The Three-Judge Court Reassessed*]. Professor Solimine has also written specifically about the use of three-judge district courts in voting rights litigation. *See* Solimine, *supra* note 7. That piece discusses the unique potential for forum shopping such courts allow, attempts by the chief judges of certain circuits to "stack[]" three-judge district court panels with ideological allies, the way three-judge panels function, and the role of partisanship in their decisions. *Id.* at 82–83. It argues that three-judge district courts are no longer necessary in voting rights cases and that their jurisdiction should not be extended to other areas. *Id.* at 126–29.

26. Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 81 (1994) ("[S]cholars have focused very little on how lower court judges ought to define and execute their subordinate roles . . . .").

27. *See, e.g.*, Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615, 620–21 (2017) (arguing that lower courts should avoid issuing nationwide injunctions in class-action cases against the government by certifying only district- or circuit-wide classes under Rule 23(b)(2)).

28. *See, e.g.*, Alfred W. Bowen, *When Are Three Federal Judges Required?: An Inquiry into the Meaning of Section 266 of the Judicial Code*, 16 MINN. L. REV. 1, 35–41 (1931); Albert C. Harvey, Comment, *The Three-Judge Federal Court in Challenges to State Action*, 34 TENN. L. REV. 235, 239–47 (1967); Elliott S. Marks & Alan H. Schoem, Comment, *The Applicability of Three-Judge Courts in Contemporary Law: A Viable Legal Procedure or a Legal Horsecart in a Jet Age?*, 21 AM. U. L. REV. 417, 425–31 (1972); *The Three-Judge Federal Court: A Study of Injunctions Against Discriminatory State Action*, 1 RACE REL. L. REP. 811 (1956) [hereinafter *A Study of Injunctions*]; *see also* William J. Barnds, Note, *A Survey of the Three Judge Requirement*, 47 GEO. L.J. 161, 164 (1958); Stephen J. Ledet, Jr., Comment, *Requirement of Substantial Constitutional Question in Federal Three-Judge Court Cases*, 19 LA. L. REV. 813, 824–30 (1959).

panel was subject to appeal to an intermediate appellate court, appeal to the U.S. Supreme Court, or mandamus from the U.S. Supreme Court.[29]

Some pieces published during the Civil Rights Era examined the availability of three-judge courts in desegregation cases.[30] Others proposed statutory reforms to simplify their procedural and jurisdictional rules.[31] The American Law Institute (ALI),[32] as well as some commentators,[33] recommended narrowing their jurisdiction. At least one author went further by suggesting that Congress abolish them.[34]

---

29. *See, e.g.*, David P. Currie, *Appellate Review of the Decision Whether or Not to Empanel a Three-Judge Federal Court*, 37 U. CHI. L. REV. 159, 160–62 (1969) (identifying the proper methods of obtaining appellate review for various possible scenarios); George M. Johnson & James A. Washington, Jr., *One or Three, Which Should It Be? Conjectures on Three-Judge Court Procedure*, 1 HOW. L.J. 194, 201–20 (1955) (discussing the scope of a single judge's authority to dismiss a case for want of a substantial federal question without convening a three-judge panel); *see also* John E. Lockwood et al., *The Use of the Federal Injunction in Constitutional Litigation*, 43 HARV. L. REV. 426, 456 (1930) (suggesting statutory amendment to alleviate appellate issues); *cf.* William Berueffy, *The Three Judge Federal Court: Recent Statutory Limitations*, 15 ROCKY MTN. L. REV. 64, 67–74 (1942) (explaining that prudent counsel must sometimes appeal to the court of appeals and seek a writ of mandamus from the U.S. Supreme Court simultaneously when a three-judge district court adjudicates a case outside its jurisdiction); *supra* note 28 (citing sources).

30. Harry Lee Hudspeth, Comment, *Federal Jurisdiction in the Segregation Cases: The Three-Judge Court and Exhaustion of Administrative Remedies*, 36 TEX. L. REV. 812, 813–17 (1958); Johnson & Washington, *supra* note 29, at 199–201; *A Study of Injunctions*, *supra* note 28, at 826–32.

31. Alan M. Gunn, Note, *Three-Judge District Courts: Some Problems and a Proposal*, 54 CORNELL L. REV. 928, 939–42 (1969) (discussing controversies over when a constitutional issue is sufficiently substantial, and a challenged law has sufficiently broad applicability, to require adjudication by a three-judge district court, and arguing that a single judge should be permitted to adjudicate all issues in such cases except for the ultimate constitutional question); Marks & Schoem, *supra* note 28, at 438–43 (discussing multiple proposals to reform three-judge district courts); Note, *The Three-Judge District Court: Scope and Procedure Under Section 2281*, 77 HARV. L. REV. 299, 316–17 (1963) [hereinafter *Scope and Procedure*] (defending the need for three-judge district courts, but arguing that the U.S. Supreme Court should allow individual judges and courts of appeals to play a larger role in dismissing cases without convening such panels); *see also* Lockwood et al., *supra* note 29, at 456 (arguing that federal law should be amended to require federal courts to abstain from adjudicating constitutional challenges to state or local laws when relief is available in state court); Comment, *The Three-Judge District Court in Contemporary Federal Jurisdiction*, 41 WASH. L. REV. 877, 883–89, 892 & n.100 (1966) (discussing the evolution of the Court's approach to three-judge trial courts in Supremacy Clause challenges and suggesting that such courts should be available even when a plaintiff seeks only declaratory relief, while direct appeals to the U.S. Supreme Court should be curtailed).

32. The ALI's study on the respective jurisdictions of federal and state courts called for three-judge district courts to adjudicate constitutional challenges to state laws and administrative orders, but not to federal measures. ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 324–25 (1969); *see also* Sidney B. Jacoby, *Recent Proposals and Legislative Efforts to Limit Three-Judge Court Jurisdiction*, 26 CASE WESTERN RES. L. REV. 32, 53–58 (1975) (discussing the ALI study and legislative responses to it, and suggesting that three-judge district courts be available only for challenges to state laws of general applicability or patterns of illegal or unconstitutional state conduct, and that direct Supreme Court review be available only in certain cases of public importance).

33. *See, e.g.*, *Scope and Procedure*, *supra* note 31, at 303 (arguing that three-judge district courts are appropriate for claims concerning "racial discrimination, legislative apportionment, and religion-in-the-schools"); *The Three-Judge Court Reassessed*, *supra* note 25, at 1660 (arguing that the jurisdiction of three-judge district courts should be limited to desegregation cases, reapportionment cases, and cases involving important federal statutes for which national uniformity is especially necessary).

34. *See, e.g.*, Comment, *The Three-Judge Federal Court in Constitutional Litigation: A Procedural Anachronism*, 27 U. CHI. L. REV. 555, 571 (1960) (noting that "retention of the three-judge procedure is

This Article offers a fresh perspective on the growth and gradual modernization of three-judge trial courts, tracing their role in not only constitutional litigation, but antitrust, civil rights, and judicial review of administrative agencies as well. Based on a close analysis of the statutes governing three-judge trial courts over nearly a century, this Article demonstrates that such panels are bound by their respective intermediate appellate courts' precedents and may not treat such case law as merely persuasive. Finally, this piece presents a new theoretical approach to vertical stare decisis, arguing that federal district courts, including three judge panels, must follow their respective courts of appeals' bodies of precedent based on a hybrid of the Appellate Jurisdiction and Structural Theories.

Under this hybrid approach, a court presumptively must follow the precedents of other courts that *either*: (i) have appellate jurisdiction over its rulings in a particular case, or (ii) are superior to it within the constitutional and statutory structure of the judiciary. Congress may displace either of these presumptions through a clear statement or other persuasive indicia of intent, including the structural implications of a statutory scheme. This Hybrid Theory requires district courts to presumptively follow the precedents of their respective courts of appeals and the U.S. Supreme Court, even in cases over which those courts lack appellate jurisdiction.

The Hybrid Theory has consequences even beyond the context of three-judge district courts. For example, Congress historically did not grant the U.S. Supreme Court jurisdiction over many important types of cases, including capital cases.[35] Even today, certain district court rulings are exempt from any appellate review.[36] The Hybrid Theory specifies that district courts are nevertheless required to apply precedents from both their respective regional courts of appeals and the U.S. Supreme Court in such cases. The theory also helps explain other unusual appellate structures, such as that of the U.S. Court of Appeals for the Federal Circuit.

Critically, however, even if one rejects this theoretical framework and instead adopts the traditional Appellate Jurisdiction Theory, three-judge district courts are still bound by court of appeals precedent because there are numerous, often overlooked circumstances in which courts of appeals have appellate jurisdiction over these panels' rulings.[37]

One might object that it does not matter what body of law a three-judge district court applies, because direct Supreme Court review is available. Rather than granting plenary review of a three-judge district court's judgment, however, the U.S. Supreme Court might instead decide to summarily affirm it.[38] Such summary

---

unjustified" because "[t]he needs for which it was designed are largely a thing of the past, and its remaining functions have been taken over by other procedures").

35. *See infra* notes 75–76 and accompanying text.

36. *See infra* notes 342–46 and accompanying text.

37. *See infra* Part IV; *cf.* Douglas & Solimine, *supra* note 14, at 447 & n.200 (identifying exceptions where a three-judge district court's decisions are subject to appellate review by the regional court of appeals).

38. SUP. CT. R. 18.12 (recognizing the Court's authority to "dispose summarily of [an] appeal").

affirmances carry limited precedential effect[39] and may do little to settle the law for future litigants.[40] Moreover, justiciability or other threshold issues in a case might delay or even preclude the Court from reaching the merits.[41] And even if the U.S. Supreme Court does adjudicate the matter, a three-judge district court's ruling can have serious consequences for litigants in the interim. Indeed, the possibility of eventual Supreme Court review has not prevented trial courts' nationwide injunctions from attracting national attention and generating heated controversy.[42] Finally, most basically, considerations of fairness, equity, and judicial economy require both lower courts and litigants to know the body of law that governs their cases.

Part I of this Article begins by introducing the concept of vertical stare decisis and the two main theories for applying it: the Appellate Jurisdiction Theory and the Structural Theory. Although these theories lead to the same outcomes most of the time,[43] they often yield conflicting results when applied to unusual appellate structures. This Part demonstrates that the judiciary's overall structure, under both the Judiciary Act of 1789[44] and the Evarts Act of 1891,[45] suggests that

39. *See* Comptroller of the Treasury v. Wynne, 135 S. Ct. 1787, 1800 (2015) (noting that a summary affirmance has "considerably less precedential value than an opinion on the merits" (quoting Ill. Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 180–81 (1979))); *see also* Anderson v. Celebrezze, 460 U.S. 780, 785 n.5 (1983) ("A summary disposition affirms only the judgment of the court below, and no more may be read into our action than was essential to sustain that judgment.").

40. *See* STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE 312 (10th ed. 2013) (discussing the "element of confusion" in applying the U.S. Supreme Court's summary dispositions of district court rulings).

41. The recent political gerrymandering cases are a prime example of this possibility. The Court was initially expected to determine the justiciability of political gerrymandering claims in 2018 in *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016) (three-judge court), *vacated and remanded*, 138 S. Ct. 1916 (2018), and *Benisek v. Lamone*, 266 F. Supp. 3d 799 (D. Md. 2017) (three-judge court), *aff'd*, 138 S. Ct. 1942 (2018). The Court held that the plaintiffs in *Gill* lacked standing, 138 S. Ct. at 1933–34, and the plaintiffs in *Benisek* did not satisfy the equitable requirements for obtaining a preliminary injunction, 138 S. Ct. at 1944–45. It therefore did not reach the merits of either case, and the justiciability of political gerrymandering claims remained unresolved for another year, until the Court finally held them to be nonjusticiable in *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019). In the interim, a three-judge federal district court in Ohio struck down the state's congressional maps as an impermissible partisan gerrymander under Article I of the Constitution. Ohio A. Philip Randolph Inst. v. Householder, 373 F. Supp. 3d 978, 993–94 (S.D. Ohio 2019), *stay granted*, 139 S. Ct. 2635 (2019) (mem.), *vacated and remanded*, 140 S. Ct. 101 (2019) (mem.). The U.S. Supreme Court vacated that ruling following *Rucho*. *Householder*, 140 S. Ct. 101 (2019) (mem.).

42. *See, e.g.*, Michael T. Morley, *De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 HARV. J.L. & PUB. POL'Y 487 (2016) (discussing the various approaches to injunctions that lower courts have applied in election law cases); Morley, *supra* note 27 (examining the use of nationwide injunctions in Rule 23(b)(2) class actions against the government).

43. Under the Structural Theory, a district court must presumptively follow the precedents of its regional court of appeals, because the court of appeals is superior to it within the judicial hierarchy. Under the Appellate Jurisdiction Theory, a district court must almost always follow the precedent of its regional court of appeals, because that court has appellate jurisdiction over most of its rulings. *See* 28 U.S.C. § 1291 (2012); *cf. infra* notes 336–41 and accompanying text (discussing the appellate jurisdiction of U.S. Court of Appeals for the Federal Circuit and its impact on vertical stare decisis).

44. Ch. 20, 1 Stat. 73.

45. Ch. 517, 26 Stat. 826.

Congress does not implicitly legislate against the backdrop of the Appellate Jurisdiction Theory.

Part II turns specifically to the history of three-judge trial courts and other laws permitting direct appeals to the U.S. Supreme Court. Reviewing nearly a century's worth of jurisdictional statutes, this Part shows that applying the Appellate Jurisdiction Theory would have led to inconsistent and even incoherent results. Indeed, under several provisions, the court that had appellate jurisdiction over a matter depended on how the trial court ruled or the litigants' actions after final judgment. Such arrangements made it impossible for a trial court to apply the Appellate Jurisdiction Theory to determine which precedents governed its rulings. The modern statute governing most three-judge district courts, 28 U.S.C. § 2284, directly descends from these precursors.

This analysis of the creation and evolution of three-judge trial courts also reveals that allowing them to disregard intermediate appellate courts' precedents would be inconsistent with one of the main purposes of such panels: cabining the discretion of lone, potentially idiosyncratic judges.[46] Moreover, as Congress continuously adjusted the jurisdiction of three-judge trial courts over nearly a century, nothing in either the text or legislative history of the relevant statutes suggested that these jurisdictional shifts affected the body of law that trial judges were required to treat as binding.

Part III explains that a hybrid of the Structural and Appellate Jurisdiction Theories is the best approach to vertical stare decisis. Under the Hybrid Theory, a court's presumptive obligation to follow another court's precedents may arise either from the hierarchical structure of the federal judiciary or that other court's power to exercise appellate jurisdiction over a particular case. The Hybrid Theory provides a better fit with both the century-long history of federal jurisdictional statutes, as well as modern unusual appellate structures, than either the Appellate Jurisdiction or Structural Theories alone. Many of the rationales underlying theories of stare decisis in general also weigh heavily in favor of this hybrid approach. This Part concludes by turning to the specific case of three-judge courts, presenting legal-process,[47] practical, and structural considerations that bolster the Hybrid Theory and confirm that such courts are bound by the precedents of their regional courts of appeals.

Part IV demonstrates that, even if one exclusively applies the Appellate Jurisdiction Theory, modern three-judge federal district courts are still bound by their regional courts of appeals' precedents. Statutory provisions authorizing direct appeals from three-judge district courts to the U.S. Supreme Court nevertheless allow courts of appeals to exercise appellate jurisdiction over a sweeping range of those three-judge courts' rulings. Many of the issues over which courts of appeals have appellate jurisdiction are inextricably intertwined with the cases' ultimate merits. Allowing three-judge district courts to apply different bodies of

46. *See infra* notes 182–83, 269–72 and accompanying text.

47. *See generally* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (1994) (explaining the legal process theory of statutory interpretation).

precedent to various issues within a case, depending on the court to which each is appealable, would be impracticable and invite internally contradictory results.

The Article then briefly concludes, reemphasizing that, regardless of the theory of vertical stare decisis one adopts, three-judge district court panels are bound by court of appeals precedent. As Professors Douglas and Solimine argue, three-judge district courts are responsible for resolving critical issues central to the law of democracy.[48] It is therefore important to have a firm and accurate understanding of the body of law these courts are bound to apply.

I. PRECEDENT AND THE STRUCTURE OF THE JUDICIARY

Vertical stare decisis is the principle that a court must follow and apply (that is, treat as binding law) the precedents of some other court or courts within the judicial system, even if it disagrees with those precedents or believes them to be wrongly decided.[49] The Appellate Jurisdiction Theory of vertical stare decisis, which Professors Douglas and Solimine advocate,[50] provides that a trial court is bound only by the precedents of courts that have appellate jurisdiction to review its rulings in a particular case.[51] Under this view, the body of precedent governing a matter must be determined on a case-by-case basis, depending on the courts that have appellate jurisdiction over it. Because a district court's judgments may typically be appealed to its regional court of appeals,[52] it is usually bound to apply that court's precedents. When cases are directly appealable from a district court to the U.S. Supreme Court, however, the district court is only required to apply U.S. Supreme Court rulings and is not bound by either its court of appeals or other district court precedents.[53]

An alternate explanation of vertical stare decisis is the Structural Theory. This theory posits that a court's presumptive duty to follow another court's precedents

48. Douglas & Solimine, *supra* note 14, at 419; *see also* Solimine, *supra* note 7, at 128–29.

49. Caminker, *supra* note 26, at 3; Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43, 52 (2001); *see also* Schauer, *supra* note 24, at 592–93 ("[A] binding precedent is one that must either be followed or distinguished.").

50. Douglas & Solimine, *supra* note 14, at 441–42 ("A circuit court cannot review the decision of a three-judge district court, so a three-judge district court need not, as a matter of formal judicial decisionmaking, adhere to circuit precedent.").

51. Under the Appellate Jurisdiction Theory, a trial court is bound by the rulings of both the court that has immediate appellate jurisdiction over a case, as well as any other courts to which subsequent appeals in the matter may be taken. *See, e.g.*, Caminker, *supra* note 26, at 12 (explaining that an inferior court must follow the precedents of "courts that exercise revisory jurisdiction over it"); Caminker, *supra* note 24, at 824 ("District courts must follow both Supreme Court decisions and those issued by whichever court of appeals has revisory jurisdiction over its decisions . . . . [A] court can ignore precedents established by other courts so long as they lack revisory jurisdiction over it."); Dobbins, *supra* note 24, at 1463 ("Under the standard model of precedent, the bindingness of a prior decision turns most clearly on whether that prior decision was issued by a court with the power of appellate (or discretionary) review over the court deciding a subsequent case."); BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 28 (2016) ("Vertical precedents follow 'the path of appellate review.'" (quoting Caminker, *supra* note 24, at 825)); Harrison, *supra* note 24, at 518 ("[T]he scope of vertical stare decisis is determined by appellate jurisdiction and it is absolute.").

52. 28 U.S.C. § 1291 (2012).

53. *See* Douglas & Solimine, *supra* note 14, at 441–42; *see, e.g.*, *supra* note 17.

arises from the structure of the judicial system,[54] which is created by a combination of constitutional and statutory provisions.[55] Of course, hierarchically superior courts usually have appellate jurisdiction to review the decisions of courts that are structurally subordinate to them.[56] The Structural Theory's distinguishing characteristic is that a lower court's duty to follow a superior court's precedents neither arises from, nor depends upon, the superior court's ability to exercise appellate jurisdiction over a particular case. Instead, that duty is a function of the overall structure of the judicial hierarchy itself. Lines of appellate jurisdiction comprise only one—admittedly important—aspect of that hierarchy. Most of the time, the Structural Theory directs trial courts to apply the same bodies of precedent as the Appellate Jurisdiction Theory. These theories' directives differ, however, when they are applied to unusual appellate structures such as three-judge district courts.

There is no, and has never been any, federal statute expressly adopting a theory of stare decisis or specifying which precedents a trial court must follow. In the absence of direct textual guidance, this Article applies a variety of related approaches to statutory interpretation. First, it emphasizes the structure of federal jurisdictional laws, drawing inferences and advocating interpretations that, when applied consistently throughout each statute, avoid absurd or anomalous results and prevent disparities or inequities among similarly situated litigants.[57] Second, it seeks to promote coherence in the law, urging interpretations that provide the

54. *See, e.g.*, Dobbins, *supra* note 24, at 1459 ("[T]he structure of the court system within which judicial decisions are made—the structure of the appellate universe—is critical to defining the rules of precedent that function within it."); Amy J. Griffin, *Dethroning the Hierarchy of Authority*, 97 OR. L. REV. 51, 59 (2018) ("[C]ourts are bound by the decisions of courts above them in the court system hierarchy."); Amanda Frost, *Inferiority Complex: Should State Courts Follow Lower Federal Court Precedent on the Meaning of Federal Law?*, 68 VAND. L. REV. 53, 78 (2015) ("The obligation to follow precedent does not perfectly track the power of revisionary review, however."); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 1006 & n.155 (1992) ("Decisions of superior courts are the most powerful form of precedent. They are regarded as legally binding on lower courts. . . . It is not plausible to view this norm [of vertical stare decisis] as simply grounded in an empirical generalization that a lower court will get reversed by a superior court if it fails to follow superior court precedent."); *see also* Hart v. Massanari, 266 F.3d 1155, 1173 (9th Cir. 2001) (explaining that the rules for identifying "binding authority" reflect "the organization and structure of the federal courts"); HENRY CAMPBELL BLACK, HANDBOOK ON THE LAW OF JUDICIAL PRECEDENTS OR THE SCIENCE OF CASE LAW 330 (1912) ("[W]hen a circuit court of appeals has pronounced its decision upon a matter of law, it becomes a closed question for the inferior federal courts in that circuit. . . . The decision of the court above is a conclusive and binding precedent and must be followed."); Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM. J. LEGAL HIST. 28, 53–54 (1959) (tracing American courts' treatment of precedent to the hierarchy of the judiciary and reliability of written reports of opinions); Lawrence B. Solum, *Stare Decisis in United States Courts*, *in* 18 MOORE'S FEDERAL PRACTICE – CIVIL § 134.02[2] (Matthew Bender 3d ed. 2010) ("[T]he district courts in a circuit owe obedience to a decision of the court of appeals in that circuit and ordinarily must follow it until the court of appeals overrules it.").

55. *See* Hutto v. Davis, 454 U.S. 370, 374–75 (1982) (per curiam).

56. *See* 28 U.S.C. § 1291 (2012).

57. Griffin v. Oceanic Contractors, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative explanations consistent with the legislative purpose are available."); *cf.* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (Ox Bow Press 1985) (1969) (advocating a structural approach to constitutional interpretation).

best "fit" with the general fabric of the law and avoid unnecessary or unexplained tensions among legal provisions.[58] Third, by identifying consistencies or patterns, both within particular statutes as they evolve over time, as well as across different statutes, this Article attempts to determine whether Congress implicitly legislates in light of certain assumptions, or against a certain theoretical "backdrop[]."[59] Based on this approach, federal jurisdictional laws should not be interpreted as incorporating, requiring, or even authorizing federal courts to apply the Appellate Jurisdiction Theory. This Part applies this interpretive methodology to the statutes that created the general structure of the federal judiciary: the Judiciary Act of 1789 and the Evarts Act of 1891.

A. PRECEDENT UNDER THE JUDICIARY ACT OF 1789

The Judiciary Act of 1789 established the federal judiciary.[60] It created three tiers of federal courts, divided geographically into districts and circuits. The Act created thirteen judicial districts, each with a district court staffed by a district judge.[61] District courts had exclusive jurisdiction over admiralty cases, seizures on land, and penalties and forfeitures under federal law.[62] They also had concurrent jurisdiction with circuit courts over minor criminal offenses,[63] suits under the Alien Tort Claims Act, and suits by the United States where the amount in controversy exceeded $100.[64]

The districts were arranged into three circuits, each of which had a circuit court.[65] Each circuit court was required to sit twice annually in each of the districts within its region.[66] The circuit courts did not have their own judges. Rather, a circuit court was comprised of two Supreme Court Justices and the district judge of the district in which the court was sitting.[67] Circuit courts acted as both trial and appellate courts. As trial courts, they had original jurisdiction over diversity suits, suits involving an alien, and suits by the United States, all subject to a $500 amount-in-controversy requirement.[68] They also had jurisdiction over all federal criminal offenses, including concurrent jurisdiction with district courts over minor offenses.[69] In their appellate capacity, circuit courts could hear

58. *See* RONALD DWORKIN, LAW'S EMPIRE 225 (1986) (discussing the role of coherence in interpreting the law).

59. *Cf*. Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813 (2012) (discussing various types of "backdrops" that assist in constitutional interpretation).

60. Ch. 20, 1 Stat. 73.

61. *Id*. §§ 2–3.

62. *Id*. § 9.

63. *Id*.; *see also id*. § 11 (confirming circuit courts' concurrent jurisdiction over minor criminal offenses).

64. *Id*. § 9. District courts also had concurrent jurisdiction with circuit courts over suits against consuls and vice-consuls. *Id*.

65. *Id*. § 4.

66. *Id*.

67. *Id*. Congress soon amended this requirement so that each circuit court was comprised of one district judge and one Supreme Court Justice. *See* Judiciary Act of 1793, ch. 22, § 1, 1 Stat. 333, 333.

68. Judiciary Act of 1789 § 11.

69. *Id*.

appeals from district courts' decrees in admiralty cases in which the amount in controversy exceeded $300[70] and grant writs of error from district courts' judgments in other civil cases where the amount in controversy exceeded $50.[71]

Although we typically do not think of it as such, the U.S. Supreme Court was also a combined trial and appellate court,[72] though it tilted much more heavily toward appellate work. The Judiciary Act gave the U.S. Supreme Court original jurisdiction over any civil suits in which a state was a party, except between a state and its own citizens, as well as suits involving certain diplomatic personnel.[73] The Court had appellate jurisdiction over circuit courts' judgments in civil cases in which the amount in controversy exceeded $2,000.[74]

The structure of the Judiciary Act is inconsistent with the Appellate Jurisdiction Theory in several respects. *First*, the Act greatly circumscribed both the U.S. Supreme Court's power to review circuit courts' judgments (whether by appeal or writ of error), as well as circuit courts' authority to review district courts' judgments. Most notably, criminal cases—including capital cases[75]—were not subject to any appellate review,[76] except for the limited relief available through habeas corpus.[77] District court judgments in civil cases involving less than $50 and admiralty cases involving less than $300, as well as circuit court judgments in civil cases where the "matter in dispute" was less than $2,000, were similarly immune from appellate review.[78] It would be unreasonable—and a threat to the U.S. Supreme Court's constitutionally mandated supremacy over the federal judiciary[79]—to interpret the Act as authorizing district and circuit courts to reject Supreme Court precedent when adjudicating criminal and many civil cases, simply because those matters were not subject to Supreme Court review. *Second*, similarly, given that the availability of appellate review in civil cases in both the circuit courts and U.S. Supreme Court depended on the amount in controversy, it would be unreasonable to conclude that a lower court's obligation to apply superior courts' precedents—and hence the body of law that governed a case—depended on the amount at issue. The same court should not be able to

70. *Id.* §§ 11, 21.

71. *Id.* § 22.

72. *See* Lochlan F. Shelfer, Note, *Special Juries in the Supreme Court*, 123 YALE L.J. 208, 210 (2013) ("The Court heard at least three cases with juries in the 1790s, only one of which was reported: *Georgia v. Brailsford*." (citing Georgia v. Brailsford, 3 U.S. (3 Dall.) 1 (1794))).

73. Judiciary Act of 1789 § 13; *see also* U.S. CONST. art. III, § 2, cl. 2.

74. Judiciary Act of 1789 §§ 13, 22; *see also* U.S. CONST. art. III, § 2, cl. 2.

75. The U.S. Supreme Court was not given appellate jurisdiction over capital cases until 1889. *See* Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 655, 656.

76. Laura S. Fitzgerald, *Is Jurisdiction Jurisdictional?*, 95 NW. U. L. REV. 1207, 1226 n.84 (2001); *see* United States v. More, 7 U.S. (3 Cranch) 159, 173–74 (1805) (holding that the Judiciary Act of 1789 did not grant the U.S. Supreme Court appellate jurisdiction over convictions in circuit court); *see, e.g.*, Barry v. Mercein, 46 U.S. (5 How.) 103, 120 (1847) (reading the Judiciary Act to preclude Supreme Court review of cases that do not meet the amount-in-controversy requirement, including criminal cases).

77. Judiciary Act of 1789 § 14.

78. *Id.* §§ 21–22.

79. *See* U.S. CONST. art. III, § 1; *see also id.* art. I, § 8, cl. 9; *infra* note 330.

treat similarly situated litigants presenting the same legal claims differently, based solely on the amount each sought.

Finally, and perhaps most notably, circuit courts were composed of district judges and Supreme Court Justices. District judges could be expected to follow circuit courts' rulings, regardless of the extent of their appellate jurisdiction, because the district judges themselves sat on those courts. Indeed, because Supreme Court Justices were frequently absent from circuit court sittings, the circuit court would often be held by a district judge sitting alone.[80] Likewise, the inclusion of Supreme Court Justices on circuit courts implied those courts would act consistently with Supreme Court precedent, regardless of whether their cases were appealable there.

The 1802 amendments to the Judiciary Act only increased the tension between the judiciary's structure and the Appellate Jurisdiction Theory. Congress expanded the U.S. Supreme Court's appellate jurisdiction, allowing it to hear any issues of law on which the circuit-court judges disagreed in any criminal or civil case.[81] Thus, circuit judges could not know whether the U.S. Supreme Court would have appellate jurisdiction over a criminal case or a civil case involving less than $2,000 until they decided the matter. It would have been untenable, if not impossible, for the applicability of Supreme Court precedent to depend on whether the circuit judges agreed with each other.[82]

In 1889, Congress further expanded the U.S. Supreme Court's jurisdiction by allowing a losing litigant to take an appeal or writ of error from the circuit court

---

80. The Judiciary Act of 1802, ch. 31, § 4, 2 Stat. 156, 158, allowed a single judge, including a district judge, to sit alone as a circuit court. *See* Pollard v. Dwight, 8 U.S. (4 Cranch) 421, 429 (1808).

81. Judiciary Act of 1802 § 6. The procedure for securing U.S. Supreme Court review of issues on which circuit-court judges disagreed was amended by the Practice Conformity Act, ch. 255, §§ 1–2, 17 Stat. 196, 196–97 (1872), and again by 13 REV. STAT. §§ 650–52, 693, 697 (1875). *See* United States v. Rider, 163 U.S. 132 (1896) (tracing the history of these provisions); United States v. Sanges, 144 U.S. 310 (1892) (same).

82. In 1864, Congress enacted a law providing for appeals directly from the district court to the U.S. Supreme Court in prize cases in which either the amount in controversy exceeded $2,000 or the district judge certified "that the adjudication involve[d] a question of general importance." Act of June 30, 1864, ch. 174, § 13, 13 Stat. 306, 310–11. It appears that district courts treated circuit court precedent as binding in cases subject to this statute, even though they were directly appealable to the U.S. Supreme Court. *See* Flaherty v. Doane, No. 4,849, 1867 U.S. Dist. LEXIS 195, at *1 (D. Mass. Mar. 1867) ("The decisions in the circuit court are, that, where the master of a fishing vessel becomes the owner for the voyage, the general owners are not personally liable for such supplies obtained in the home port, as the master had undertaken to furnish at his own expense."); *cf.* The Max Morris, 24 F. 860, 863 (S.D.N.Y. 1885) ("No decision has been made upon the precise point in this circuit.").

This law is inconsistent with the Appellate Jurisdiction Theory because cases in which the amount in controversy was $2,000 or less were potentially appealable to either the circuit court or the Supreme Court, depending on whether the district judge determined that it "involve[d] a question of general importance." Act of June 30, 1864 § 13. There is no indication that Congress intended different bodies of precedent to apply to the same prize cases, depending on the amount in controversy or the importance of the case. Applying the Appellate Jurisdiction Theory could have led to contradictory rulings, and similarly situated litigants being treated differently, by the same court. Also, the Appellate Jurisdiction Theory would have required the judge to determine in advance whether each case involved a "question of general importance" in order to identify the proper route of appellate review and, hence, the body of law that applied.

to the U.S. Supreme Court in any case "in which there shall have been a question involving the jurisdiction of the [circuit] court."[83] This statute specified that, when the final judgment or decree did not exceed $5,000, the Court could review only the jurisdictional question; otherwise, it could review any other issues in the case, as well.[84] Thus, rather than adopt a traditional amount-in-controversy requirement,[85] the 1889 Act provided that the Court's power to review substantive issues in a case involving a jurisdictional dispute depended on its outcome.[86] This provision was inconsistent with the Appellate Jurisdiction Theory because it would have been impossible for the circuit court to determine whether its rulings on substantive issues would be subject to Supreme Court review until final judgment was entered.

The relevance of the Judiciary Act and subsequent jurisdictional statutes building upon it may be limited, however, because Congress fundamentally restructured the judiciary with the Evarts Act of 1891.[87] Moreover, the U.S. Supreme Court's constitutional supremacy relative to other "inferior" federal courts[88] may require them to follow Supreme Court precedent in all cases, regardless of whether the Court has jurisdiction to hear an appeal.[89] Such reasoning would not apply to rulings of congressionally created intermediate appellate courts. Thus, the Judiciary Act of 1789 raises many of the same tensions with the Appellate Jurisdiction Theory as later jurisdictional statutes. Those later stages of development, however, are much more probative of whether the Appellate Jurisdiction Theory "fits" with the current structure of the federal judiciary and Congress implicitly relies upon it as a backdrop for jurisdictional statutes.

B. PRECEDENT UNDER THE EVARTS ACT OF 1891

The Evarts Act of 1891 laid the foundation for the modern federal judiciary, incorporating circuit courts of appeals (later renamed U.S. courts of appeals) into the judicial hierarchy.[90] The Act established a two-track appellate system for federal cases. Under section 5, certain specified matters were directly appealable as of right from a federal trial court (either the district court or circuit court) to the U.S. Supreme Court, including issues relating to the trial court's jurisdiction, prize cases, convictions for "capital or otherwise infamous crime[s]," and cases involving treaties or any constitutional issues (including challenges to the

83. Act of Feb. 25, 1889, ch. 236, § 1, 25 Stat. 693, 693.

84. *Id.* Congress had previously raised the amount-in-controversy requirement for appealing a civil case from the circuit court to the U.S. Supreme Court from $2,000 under the Judiciary Act of 1789, ch. 20, §§ 13, 22, 1 Stat. 73, 81, 84, to $5,000, see Act of Feb. 16, 1875, ch. 77, § 3, 18 Stat. 315, 316.

85. *Cf.* Act of Feb. 16, 1875 § 3 (limiting the U.S. Supreme Court's appellate jurisdiction based on the "sum or value" of the "matter in dispute").

86. *See, e.g.*, Tex. & Pac. Ry. Co. v. Saunders, 151 U.S. 105, 108 (1894) (dismissing a writ of error under the 1889 Act in part because "the judgment does not exceed the sum of five thousand dollars").

87. Ch. 517, § 26 Stat. 826; *see infra* Section I.B.

88. U.S. CONST. art. I, § 8, cl. 9.

89. *See infra* note 330.

90. Ch. 517, § 2.

constitutionality of a treaty, federal statute, or state statute or constitutional provision).[91]

Under section 6, all other final judgments from federal trial courts were appealable to the newly created circuit courts of appeals.[92] A circuit court of appeals could certify questions from cases within its jurisdiction to the U.S. Supreme Court.[93] Its judgments in cases arising exclusively under diversity or alienage jurisdiction, as well as patent, revenue, criminal, and admiralty cases, were deemed "final" and subject only to discretionary review in the U.S. Supreme Court by writ of certiorari.[94] Its judgments in other cases—primarily referring to civil cases that initially arose under federal-question jurisdiction (other than patent, revenue, or admiralty matters)—could be appealed as of right to the U.S. Supreme Court where the amount in controversy exceeded $1,000.[95] The House Judiciary Committee report accompanying the Evarts Act confirmed that it conformed to traditional judicial practice in the states.[96]

The Act's bifurcation of appellate routes was less determinate than it may initially appear. When an appeal fell solely under either section 5 or section 6, the

91. *Id.* § 5. A few years later, Congress also provided for direct appeals from trial courts to the U.S. Supreme Court in prosecutions for violating orders from the Secretary of War to modify or remove bridges or railroads that obstructed navigable waterways. Act of Mar. 3, 1899, ch. 425, § 18, 30 Stat. 1121, 1153–54; *see, e.g.*, Louisville Bridge Co. v. United States, 242 U.S. 409, 416 (1917). The Act designated violations of such orders to be misdemeanors. Act of March. 3, 1899, § 18. Its legislative history does not explain why Congress established this unusual appellate mechanism, and there are no cases under this statute in which a trial court discussed whether it was required to follow intermediate appellate-court precedent. Congress implicitly repealed this provision in the Judges' Bill of 1925, ch. 229, 43 Stat. 936 (providing exclusive list of cases in which an appeal may be taken directly from a district court to the U.S. Supreme Court, without including appeals under the Act of March 3, 1899), and explicitly did so in the Judicial Code of 1948, Pub. L. No. 80-773, § 39, 62 Stat. 869, 995 (listing repealed statutes). *See Supreme Court of the United States: Jurisdiction*, FED.L JUD. CTR., https://www.fjc.gov/history/courts/supreme-court-united-states-jurisdiction [https://perma.cc/VCS6-A48F] (providing a detailed survey of the history of the U.S. Supreme Court's jurisdiction) (last visited Feb. 14, 2020).

92. Ch. 517, § 6.

93. *Id.*

94. *Id.*; *see, e.g.*, Cary Mfg. Co. v. Acme Flexible Clasp Co., 187 U.S. 427, 428 (1903) (holding that a circuit court of appeals's judgment in a criminal case was final and subject to review in the U.S. Supreme Court only by writ of certiorari, even though the case involved a constitutional issue that could have been appealed directly from the circuit court to the U.S. Supreme Court under section 5 of the Evarts Act); Huguley Mfg. Co. v. Galeton Cotton Mills, 184 U.S. 290, 295–96 (1902) (holding that a circuit court of appeals's judgment in a diversity case was final and subject to review in the U.S. Supreme Court only by writ of certiorari); *cf.* Spreckels Sugar Ref. Co. v. McClain, 192 U.S. 397, 410 (1904) (holding that a challenge to the constitutionality of federal revenue laws did not qualify as a "revenue" case for purposes of section 6's finality provision).

95. Ch. 517, § 6; *see* Miss. R.R. Comm'n v. Ill. Cent. R.R. Co., 203 U.S. 335, 341 (1906); Am. Sugar Ref. Co. v. New Orleans, 181 U.S. 277, 281–82 (1901); *see, e.g.*, N. Pac. R.R. Co. v. Amato, 144 U.S. 465, 472 (1892) ("[A]s the judgment of the Circuit Court of Appeals in the present case was not made final by § 6, and as the matter in controversy exceeds $1000 besides costs, the defendant had a right to a writ of error from [the U.S. Supreme Court]."). *See generally* MacFadden v. United States, 213 U.S. 288, 294 (1909) (explaining that the finality of the circuit court of appeals's judgment depended upon "the sources of jurisdiction of the trial court,"—in particular "whether the jurisdiction rest[ed] upon the character of the parties or the nature of the case").

96. *See* H.R. REP. NO. 51-1295, at 4 (1890).

appellant was limited to the statutorily specified court.[97] For example, an appeal exclusively involving a constitutional issue in a case arising solely under federal-question jurisdiction could only be brought in the U.S. Supreme Court under section 5.[98] In cases that fell within both provisions, in contrast, the appellant could choose whether to appeal to the circuit court (subject to the finality rules discussed above[99]), or instead appeal as of right directly to the U.S. Supreme Court.[100] Thus, when a constitutional challenge that was directly appealable to the U.S. Supreme Court under section 5 arose in a diversity case[101] or a case that

97. Gwin v. United States, 184 U.S. 669, 673–74 (1902) ("As this case does not fall within any of the classes excepted by section five, it is clear that if any appeal will lie at all, it should have been taken to the Circuit Court of Appeals . . . .").

98. *See, e.g.*, *Spreckels Sugar Ref. Co.*, 192 U.S. at 407 ("If the case, as made by the plaintiff's Statement, had involved no other question than the constitutional validity of the act of 1898, or the construction or application of the Constitution of the United States, [the U.S. Supreme Court] alone would have had jurisdiction to review the judgment of the Circuit Court."); *Huguley Mfg. Co.*, 184 U.S. at 295 ("If the jurisdiction of the Circuit Court rests solely on the ground that the suit arises under the Constitution, laws or treaties of the United States, then the jurisdiction of [the U.S. Supreme Court] is exclusive . . . ."); *accord Am. Sugar Ref. Co.*, 181 U.S. at 281.

99. *See supra* notes 94–95 and accompanying text.

100. *See Huguley Mfg. Co.*, 184 U.S. at 295 (holding that, when a constitutional defense arises in a diversity case, the matter may be appealed from the circuit court to either the circuit court of appeals or the U.S. Supreme Court). When the only basis for appealing directly to the U.S. Supreme Court under section 5 was a jurisdictional issue, the appellant could choose whether to "take his writ of error to the Supreme Court upon the question of jurisdiction alone, or to the Circuit Court of Appeals upon the whole case." McLish v. Roff, 141 U.S. 661, 668 (1891). In other cases involving a mix of issues that fell within sections 5 and 6—for example, a dispute over statutory interpretation as well as a constitutional challenge to that statute—the appellant could choose whether to appeal the entire matter to the circuit court of appeals or instead directly to the U.S. Supreme Court; either court could resolve all of the issues in the case. *Spreckels Sugar Ref. Co.*, 192 U.S. at 407 (holding that, where an appeal involved both constitutional and statutory interpretation issues, "[t]he plaintiff was entitled to bring it [to the U.S. Supreme Court] directly from the Circuit Court, or, at its election, to go to the Circuit Court of Appeals for a review of the whole case"); *see also* Chappell v. United States, 160 U.S. 499, 509 (1896) (holding that, when the U.S. Supreme Court exercises appellate jurisdiction over a case "in which the constitutionality of a law of the United States was drawn in question," it "has the power to dispose, not merely of the constitutional question, but of the entire case, including all questions, whether of jurisdiction or of merits").

A litigant could not directly appeal the trial court's ruling to both the U.S. Supreme Court under section 5 and a circuit court of appeals under section 6, however. *See* Robinson v. Caldwell, 165 U.S. 359, 362 (1897) ("It was not the purpose of the judiciary act of 1891 to give a party who was defeated in a Circuit Court of the United States the right to have the case finally determined upon its merits both in [the U.S. Supreme Court] and in the Circuit Court of Appeals."); *see also Spreckels Ref. Co.*, 192 U.S. at 407 (holding that a litigant may not "prosecute a writ of error directly from the Circuit Court to [the U.S. Supreme Court]" after previously choosing to appeal the case from the circuit court to the circuit court of appeals).

101. *See, e.g.*, *Huguley Mfg. Co.*, 184 U.S. at 295; Loeb v. Columbia Twp. Trs., 179 U.S. 472, 477–78 (1900) (holding that the appellant in a case that arose solely under diversity jurisdiction could appeal a constitutional issue to either the circuit court of appeals or the U.S. Supreme Court); *see also Am. Sugar Ref. Co.*, 181 U.S. at 282–83 (holding that a circuit court of appeals could not decline to exercise jurisdiction over a diversity appeal pursuant to section 6 of the Evarts Act simply because it involved a constitutional issue that fell within section 5).

also involved a federal statutory claim,[102] the appellant could choose whether to proceed under section 5 or section 6.

The Evarts Act does not fit comfortably with the Appellate Jurisdiction Theory. The theory requires a trial court to apply the precedents of other courts that may exercise appellate jurisdiction over a case. Under the Act, however, a trial court could not always determine whether a case fell within the jurisdiction of the circuit court of appeals, U.S. Supreme Court, or both, until it was over and the issues for appeal were identified. Perhaps more importantly, in many cases, the appellant could choose which court would hear the appeal after final judgment.[103]

In the years immediately after Congress enacted the Evarts Act, federal trial courts treated circuit courts of appeals rulings as binding.[104] Although most of those cases were appealable to the circuit courts of appeals, the trial courts' opinions neither mentioned nor relied on that fact. Moreover, it does not appear that district or circuit courts ever concluded they were free to disregard circuit courts of appeals' rulings in cases subject to section 5 of the Evarts Act, which could be appealed as of right directly to the U.S. Supreme Court.

To the contrary, a few examples exist in which trial courts applied the same rules of vertical stare decisis in cases that were subject to direct appeal to the U.S. Supreme Court, bypassing intermediate appellate courts. Most notably, in *In re Wong Kim Ark*, the U.S. District Court for the Northern District of California issued a writ of habeas corpus to a U.S. citizen of Chinese descent, declaring:

---

102. *See, e.g.*, *Spreckels Sugar Ref. Co.*, 192 U.S. at 407; Lemke v. Farmers Grain Co., 258 U.S. 50, 52–53 (1922) (holding that, where the plaintiff had alleged that a state statute violated both the U.S. Constitution and a federal law, the district court's judgment could be appealed to the circuit court of appeals).

103. *See supra* notes 100–02 and accompanying text.

104. *See, e.g.*, Stover Mfg. Co. v. Mast, Foos & Co., 89 F. 333, 336 (7th Cir. 1898) ("The court below, in obedience to the opinion of this court in *Electric Mfg. Co. v. Edison Electric Lighting Co.*, 18 U.S. App. 641 . . . deemed itself bound to follow the earlier decision . . . ."), *aff'd*, 177 U.S. 485 (1900); United States v. Breese, 172 F. 765, 773 (W.D.N.C. 1909) ("Of course, the decision of the Circuit Court of Appeals for this circuit is controlling on the court here—absolutely so."), *certified questions answered*, 226 U.S. 1 (1912); United States v. Adams Exp. Co., 119 F. 240, 244 (S.D. Iowa 1902) (recognizing that, even if "the weight of the cases in the United States courts" supports a particular resolution to a legal issue, "[t]he pertinent question is, has the supreme court or court of appeals for this circuit so held?"); The Saratoga, 100 F. 480, 481 (D.R.I. 1900) ("The claims of the [plaintiffs] must be disallowed, under the rules of law stated by the circuit court of appeals of this circuit . . . ."); United States v. Loo Way, 68 F. 475, 477 (S.D. Cal. 1895) (issuing a ruling "[c]onformably to this decision of the supreme court of the United States, and to the decision of the circuit court of appeals of this circuit" because the circuit court of appeals's "decision, of course, is authoritative"), *aff'd*, 72 F. 688 (9th Cir. 1896) (per curiam); *cf.* Norcross v. Nathan, 99 F. 414, 416 (D. Nev. 1900) ("As no authoritative decision has been rendered by the circuit court of appeals or by the supreme court of the United States, the various district judges will continually be called upon to wrestle with the disputed question, and pass judgment thereon in accordance with their own individual views."). In *Stover Mfg. Co.*, the Seventh Circuit added that, in considering a motion for a preliminary injunction in a patent case, the district court was not bound by conclusions that a different circuit had reached in another case concerning the underlying patent. 89 F. at 337.

> It is clear that these decisions,—the one rendered in the circuit court of appeals and the other rendered in the circuit court of this district,—determining, as they do, the identical question involved in the case at bar, are conclusive and controlling upon this court, unless the supreme court of the United States has directly and authoritatively, and not by way of dictum, announced and laid down a doctrine at variance with that expounded in the cases in this circuit.[105]

Because this was a constitutional case arising under the court's federal question jurisdiction, it was directly appealable exclusively to the U.S. Supreme Court.[106] The district court nevertheless recognized that it was bound by the rulings of its circuit's intermediate appellate court.

Similarly, in *Skillin v. Magnus*, the U.S. District Court for the Northern District of New York explained its holding by stating, "So far as the jurisdiction of the court is concerned, while the decisions are hopelessly at variance, I am bound to follow the ruling of our Circuit Court of Appeals . . . ."[107] This jurisdictional ruling was directly appealable to either the U.S. Supreme Court or the circuit court of appeals under the Evarts Act.[108] The district court nevertheless treated its regional circuit court of appeals's ruling as binding. Though few, these examples suggest that a district court's general duty to follow the precedent of its regional court of appeals[109] applied even when those courts lacked, or otherwise may have been prevented from exercising, appellate jurisdiction over a case.

The Evarts Act was the backdrop against which Congress enacted later laws to provide for direct appeals from three-judge trial-court panels to the U.S. Supreme Court, culminating in the modern-day 28 U.S.C. §§ 1253 and 2284. In the absence of evidence to the contrary, we should presume that such subsequent jurisdictional statutes are to be interpreted and applied consistently with judicial practice under the Act, as preserving federal trial courts' obligation to obey intermediate appellate-court precedents.

II. PRECEDENT, THREE-JUDGE TRIAL COURTS, AND DIRECT SUPREME COURT REVIEW

A close examination of the history and development of three-judge trial courts confirms that Congress does not legislate against the backdrop of the Appellate Jurisdiction Theory. The jurisdiction and procedure of modern three-judge district courts was governed by 28 U.S.C. § 2284. A companion provision, 28 U.S.C. § 1253, provides that those courts' rulings concerning preliminary or permanent injunctions may be appealed directly to the U.S. Supreme Court. These provisions are the modern descendants of three foundational statutes that Congress repeatedly extended and built upon throughout the Twentieth Century:

---

105. 71 F. 382, 389 (N.D. Cal. 1896), *aff'd sub nom.* United States v. Wong Kim Ark, 169 U.S. 649 (1898).

106. *See* Evarts Act, ch. 517, § 5, 26 Stat. 826, 827–28 (1891); *Wong Kim Ark*, 169 U.S. at 652.

107. 162 F. 689, 689 (N.D.N.Y. 1907) (citing *In re* Baudouine, 101 F. 574 (2d Cir. 1900)).

108. Evarts Act § 5; *see* McLish v. Roff, 141 U.S. 661, 668 (1891).

109. *See supra* note 104.

- The Expedition Act of 1903, which originally governed antitrust and certain other commerce-related enforcement actions in equity by the Government;[110]
- The Mann–Elkins Act of 1910, which originally governed motions for preliminary injunctions against state laws on constitutional grounds;[111] and
- The Urgent Deficiencies Act of 1913, which originally governed actions to enforce, enjoin, or vacate Interstate Commerce Commission (ICC) orders (and superseded the Hepburn Act of 1906,[112] which had applied the Expedition Act to such cases).[113]

These statutes—as originally enacted, and as amended over the better part of a century—are best construed as requiring three-judge trial courts to follow the precedents of both their respective regional intermediate appellate courts and the U.S. Supreme Court. Allowing three-judge trial courts to disregard intermediate appellate-court precedents in cases directly appealable to the U.S. Supreme Court would have led not only to inconsistent results across materially indistinguishable cases before the same court, but sometimes even incoherent results within the same case. Sometimes, the court with appellate jurisdiction over a matter could not even have been determined until the end of the case because it depended on how the trial court ruled or the parties' own post-judgment decisions. Thus, the best reading of these laws is that appellate jurisdiction is not the sole determinant of vertical stare decisis.

A. THREE-JUDGE DISTRICT COURTS UNDER THE EXPEDITION ACT OF 1903

Barely a decade after passing the Evarts Act, Congress began creating exceptions to the judiciary's structure. The Expedition Act of 1903—the first statute requiring three-judge trial courts to adjudicate certain cases based on their subject matter—was the foundation for decades of subsequent development.

1. The Expedition Act of 1903

The Expedition Act of 1903 authorized panels of three circuit-court judges to adjudicate certain cases.[114] It was comprised of two main components: the *direct appeal provision* and the *three-judge panel provision*. The direct appeal provision gave the U.S. Supreme Court exclusive appellate jurisdiction over all suits in equity that the Government brought in circuit court[115] under the Interstate Commerce Act,[116] Sherman Antitrust Act,[117] or other laws "having a like purpose

110. Ch. 544, § 1, 32 Stat. 823, 823; *see infra* Section II.A.1. This provision was sometimes referred to as the Expediting Act.

111. Ch. 309, § 17, 36 Stat. 539, 557; *see infra* Section II.C.

112. Ch. 3591, § 1, 34 Stat. 584, 584–85.

113. Ch. 32, 38 Stat. 208, 219–21; *see infra* Section II.A.2.

114. Ch. 544, § 1. In discussing circuit courts, the Expedition Act was referring to the circuit courts originally created by the Judiciary Act of 1789, rather than the circuit courts of appeals created by the Evarts Act.

115. *Id.* § 2.

116. Ch. 104, 24 Stat. 379 (1887).

117. Ch. 647, 26 Stat. 209 (1890).

that hereafter may be enacted."[118] The three-judge panel provision granted the Attorney General discretion to certify that any such case was, "in his opinion, . . . of general public importance."[119] When the Attorney General filed such a certificate, the court was required to convene a panel of at least three circuit judges to adjudicate the case and expedite it "in every way."[120] If the judges disagreed on what judgment to enter, they were required to certify the case to the U.S. Supreme Court "for review."[121] One of the Act's supporters explained that it was "a measure to expedite cases now pending in order that we might have the judgment of the U.S. Supreme Court upon some of these problems."[122]

The Expedition Act is the earliest antecedent of the modern three-judge district court statute. Over the following century, its provisions were borrowed, expanded, and made more generally applicable.[123] There is no indication in either later statutes or their legislative histories that Congress intended to change the Expedition Act's approach to vertical stare decisis in three-judge trial courts. Thus, like the Evarts Act, the Expedition Act yields important insight into the proper role of precedent in modern three-judge courts.

There are five reasons why the Expedition Act likely did not excuse three-judge circuit-court panels from a federal trial court's general obligation to follow precedents of its circuit court of appeals. *First*, the Act's direct appeal provision was broader than its three-judge panel provision, allowing even cases heard by a single circuit-court judge to be appealed directly to the U.S. Supreme Court.[124] As explained above, the Act authorized appeals directly from circuit courts to the

---

118. Expedition Act § 1.

119. *Id.* The statute specified that the Attorney General "may" file a certificate with the court declaring the case to be of public importance. *Id.*

120. *Id.* The statute required the panel to be composed of "not less than three" circuit judges. *Id.* If the circuit court hearing the case was comprised of fewer than three judges, then a district judge could be appointed to the panel. *Id.*

121. *Id.* In *Baltimore & Ohio Railroad Co. v. Interstate Commerce Commission*, the three judges who convened under the Expedition Act (as amended by the Hepburn Act, *see infra* Section II.A.2) to adjudicate a constitutional challenge to an Interstate Commerce Commission order disagreed as to the proper outcome for the case. 215 U.S. 216, 220–22 (1909). Rather than enter a judgment according to the majority's views, the court certified the case to the U.S. Supreme Court pursuant to the Expedition Act. *Id.* at 223. The Court held that it lacked Article III jurisdiction to consider the matter because, without a judgment from the court below, it would be exercising original, rather than appellate, jurisdiction. *Id.* at 224. Congress amended the Expedition Act the following year to specify that, when the majority of judges on a three-judge panel is unable to agree on a judgment, the Chief Justice of the U.S. Supreme Court must appoint an additional circuit judge to the panel to cast the deciding vote. Trusts and Interstate Commerce Expediting Act Amendments of 1910, ch. 428, 36 Stat. 854.

Those amendments further specified that, if one or more of the circuit judges on a three-judge panel became unavailable or disqualified, either the U.S. Supreme Court Justice assigned to that circuit or the other panel members could designate a district judge as a replacement. *Id.*; *see also* H.R. REP. NO. 61-1416, at 1, 3 (1910) (explaining that this reform was originally suggested by Judge George Gray of the U.S. Circuit Court of Appeals for the Third Circuit to provide a "reasonable plan of substitution in case of sickness or disqualification").

122. 36 CONG. REC. 2153 (1903) (statement of Rep. Overstreet).

123. *See infra* Sections II.A.2, II.B–C.

124. *Compare* Expedition Act § 1 (authorization for three-judge panels), *with id.* § 2 (direct appeal requirement).

U.S. Supreme Court in all cases in equity that the Government filed under the specified antitrust and commerce-related statutes.[125] It allowed circuit courts to convene three-judge panels, however, only when the Attorney General certified that a case was of "general public importance."[126]

This arrangement contemplated that certain cases—those for which the Attorney General did not file a certificate of public importance—would be heard by a single circuit-court judge, yet directly appealed to the U.S. Supreme Court. It is unlikely that Congress would have allowed a single judge to decide antitrust and commerce-related cases free of any case law constraints other than Supreme Court precedent. And the Expedition Act's text provides no basis for distinguishing between the obligations of single judges and three-judge panels to follow superior courts' precedents. Thus, it is reasonable to conclude that the Expedition Act's direct appeal provision did not implicitly excuse circuit courts from following otherwise applicable precedents of their respective circuit courts of appeals.

Second, the Expedition Act's direct appeal and three-judge panel provisions applied only to cases brought by the Government.[127] Antitrust and commerce-related cases brought by private litigants,[128] in contrast, remained subject to appeal to the circuit court of appeals under the Evarts Act.[129] It would have been unreasonable for a trial court to apply one body of law—including appellate-court precedents—in cases brought by private litigants but a different body of law—in which appellate-court precedents were not binding—in identical or closely related cases brought by the Government.

Third, similarly, the Expedition Act's direct appeal and three-judge panel provisions applied only to antitrust and commerce-related cases brought by the Government in equity, not actions at law.[130] The Sherman Antitrust Act and Interstate Commerce Act, however, authorized actions at law for damages as well.[131] It would have been impracticable for the applicability of court of appeals precedent to depend on whether a cause of action was brought at law or in equity. Additionally, a trial court's interpretation of statutory provisions governing substantive rights and duties should not vary based on the nature of the remedy a plaintiff seeks.

Fourth, the Expedition Act imposed certain procedural requirements for cases heard by three-judge circuit court panels. It required panels to give such cases

125. *Id.* § 2.

126. *Id.* § 1.

127. *Id.* §§ 1–2.

128. *See* Sherman Antitrust Act, ch. 647, § 7, 26 Stat. 209, 210 (1890) (creating private right of action for antitrust violations); Interstate Commerce Act of 1887, ch. 104, §§ 8, 9, 16, 24 Stat. 379, 382, 384–85 (creating private right of action against common carriers who violated the Interstate Commerce Act or orders of the Interstate Commerce Commission).

129. Evarts Act, ch. 517, § 6, 26 Stat. 826, 828; *see, e.g.*, Pa. Sugar Ref. Co. v. Am. Sugar Ref. Co., 166 F. 254, 255–56 (2d Cir. 1908) (adjudicating appeal from circuit court to circuit court of appeals in "an action for the recovery of treble damages under . . . the federal anti-trust statute" (citing Sherman Antitrust Act § 7)).

130. Expedition Act §§ 1, 2.

131. Sherman Antitrust Act § 7; Interstate Commerce Act §§ 8, 9.

precedence, expedite them, and schedule hearings at the "earliest practicable" time.[132] The Act did not suggest that panels could disregard generally applicable rules of precedent.[133] Rather, the Act's specification of certain deviations from the ordinary rules of procedure for three-judge panels implied that they should otherwise adjudicate cases in the same way as any other circuit court matters.[134]

Finally, nothing in the Expedition Act's legislative history suggests that Congress intended for a different body of precedent to apply to cases that were heard by three-judge panels or directly appealable to the U.S. Supreme Court. The original bills, as introduced in the House and Senate, applied only to suits in equity brought by the Government under the Sherman Antitrust Act.[135] The House Judiciary Committee amended the measure to also apply to suits under the Interstate Commerce Act, as well as "any other acts having a like purpose that may be hereafter enacted."[136] The Senate Judiciary Committee reported the bill with the same amendments the following month,[137] and both chambers passed it by voice vote.[138]

The House Judiciary Committee report accompanying the bill explains that the Attorney General had recommended it to "speed the final decision" of antitrust cases.[139] A three-judge circuit court panel, the Attorney General explained, would give cases "as full consideration before presentation to the U.S. Supreme Court as if heard by the United States circuit court of appeals."[140] This explanation, endorsed by the House Judiciary Committee,[141] is illuminating because it assumes that three-judge circuit court panels would play the same role as U.S. Circuit Courts of Appeals. The Attorney General's equation of these courts provides at least some support for the notion that three-judge panels would follow court of appeals precedent.

---

132. Expedition Act § 1.

133. *See supra* notes 104–07 and accompanying text.

134. *Cf.* Nixon v. United States, 506 U.S. 224, 230 (1993) (holding that the specification of certain requirements implicitly excludes the existence of others); *see also* Jennings v. Rodriguez, 138 S. Ct. 830, 844 (2018) (applying the *expressio unius* canon).

135. S. 6773, 57th Cong. § 1 (as introduced, Jan. 7, 1903); H.R. 16458, 57th Cong. § 1 (as introduced, Jan. 7, 1903).

136. H.R. 16458, 57th Cong. § 1 (as reported with amendments by H. Comm. on the Judiciary, Jan. 9, 1903); *see also* 36 CONG. REC. 654 (Jan. 9, 1903) (announcing that H.R. 16458 was reported out of committee with amendments).

137. S. 6773, 57th Cong. § 2 (as reported with amendments by S. Comm. on the Judiciary, Feb. 3, 1903).

138. 36 CONG. REC. 1679 (Feb. 4, 1903) (Senate); *id.* at 1747 (Feb. 5, 1903) (House).

139. H.R. REP. NO. 57-3020, at 1 (Jan. 9, 1903); *see also* 36 CONG. REC. 2153 (Feb. 13, 1903) (describing the Expedition Act as "a measure to expedite cases now pending in order that we might have the judgment of the Supreme Court upon some of these problems") (statement of Rep. Overstreet). The Senate Judiciary Committee did not prepare its own report. *See* 36 CONG. REC. 1679 (Feb. 4, 1903) (statement of Sen. Fairbanks).

140. H.R. REP. NO. 57-3020, at 2.

141. The committee report declared, "No reason is perceived why this request of the Department of Justice should not be complied with and at the earliest possible moment." *Id.* at 2.

Consistent with the bill's title,[142] Senator (and future Vice President) Charles W. Fairbanks declared, "It is the purpose of the bill to expedite litigation of great and general importance. *It has no other object*."[143] This explanation confirms that the bill was not intended to exempt three-judge circuit court panels from following court of appeals precedent. Neither the House Judiciary Committee report nor any legislators suggested that the Expedition Act would have such an effect.

2. Expansion of the Expedition Act

A week after adopting the Expedition Act, Congress passed the Elkins Act. This new measure extended the Expedition Act to suits in equity that the Attorney General filed on behalf of the ICC against common carriers for transporting passengers or freight at less than the published rates, or for illegally discriminating among customers.[144]

Like the Sherman Antitrust Act and Interstate Commerce Act, the Elkins Act also permitted private plaintiffs to sue for damages through ordinary judicial channels.[145] As with the Expedition Act itself, it would have been unreasonable to construe the Elkins Act as requiring the trial court to apply a different body of precedent and potentially construe the statute differently, depending on the identity of the plaintiff, the relief sought, or whether the Attorney General filed a certificate of public importance.[146]

Three years later, in 1906, the Hepburn Act gave the ICC authority to directly regulate interstate railroad rates for common carriers.[147] It provided that, when a common carrier violated an ICC order (other than an order for the payment of money), the ICC or any injured party could sue in the circuit court for an

142. The bill's title, as amended, was:

> A bill to expedite the hearing and determination of suits in equity pending or hereafter brought under the act of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," "An act to regulate commerce," approved February 4, 1887, or any other acts having a like purpose that may be hereafter enacted.

36 CONG. REC. 1679 (Feb. 4, 1903).

143. *Id.* (statement of Sen. Fairbanks) (emphasis added).

144. *See* Elkins Act, ch. 708, § 3, 32 Stat. 847, 848 (1903); H.R. REP. NO. 57-3765, at 7 (Feb. 12, 1903) (explaining that the Elkins Act gave the ICC's suits "the benefit of early hearing and disposition in the same manner as is provided for suits commenced in the name of the United States by the recent act").

145. Elkins Act § 3.

146. *See supra* notes 124–30 and accompanying text; *see also* 40 CONG. REC. 1773 (1906) (statement of Rep. Adamson) (explaining that the Expedition Act "did not apply to cases brought by the carrier, far the more numerous class, but was limited to those brought by the Government, and as to the latter and smaller class we left the discretion in the Attorney-General to certify to the necessity of expedition").

147. Ch. 3591, sec. 1, § 1, 34 Stat. 584, 584–85 (1906). The Act required railroads to file their rates with the ICC. *Id.* sec. 2, § 6. If the ICC determined that the rates were not just and reasonable, or that a carrier was either not abiding by those rates or engaging in unlawful discrimination, it could issue cease-and-desist orders and establish maximum rates for that carrier. *Id.* secs. 2, 4, §§ 6, 15. The Act also prohibited common carriers from transporting people for free under most circumstances and from transporting commodities other than timber in which the carrier had an interest. *Id.* sec. 1, § 1. Additionally, carriers were required to build and operate switches to join their lines to "lateral, branch line[s] of railroad, or private side track[s]" constructed to connect with them. *Id.*

injunction compelling compliance.[148] Either side could appeal an adverse ruling directly to the U.S. Supreme Court.[149] The Hepburn Act separately extended the Expedition Act's three-judge panel and direct appeal provisions to any suits to enjoin, set aside, or enforce ICC "order[s] or requirement[s]."[150] The Act specified that the Attorney General was required to file a certificate of public interest in such cases, to ensure that a three-judge panel would hear any trial-level proceedings.[151]

Representative Esch commented that a three-judge circuit panel is "practically an appellate court."[152] Representative Townsend explained that the Hepburn Act "permits three judges to pass upon a question instead of one, and their judgment will have more weight than would the opinion of a single judge and more cases will end with a decision of the expedition court."[153] A three-judge panel's judgment would be less likely to carry such weight or dispositively conclude a matter if the court were free to apply its own idiosyncratic view of the law, rather than circuit's precedent.

Congress reenacted a modified version of the Hepburn Act as part of the Urgent Deficiencies Act of 1913, which reaffirmed that suits for injunctive relief against ICC orders had to be litigated before three-judge trial courts.[154] Such cases, as well as enforcement actions, were directly appealable to the U.S. Supreme Court.[155]

---

148. *Id*. sec. 5, § 16.

149. *Id*. ("From any action upon such petition an appeal shall lie by either party to the Supreme Court of the United States . . . .").

150. *Id*. (providing that the Expedition Act shall apply to any suits "to enjoin, set aside, annul, or suspend" any ICC order, "including the hearing on an application for a preliminary injunction," as well as "any proceeding in equity to enforce any order or requirement of the Commission" or any provision of the Interstate Commerce Act); *see also* 51 CONG. REC. 2007 (1906) (statement of Rep. Esch) ("[T]he provisions of the expediting act under the Sherman trust law are made applicable to the proceedings . . . .").

151. Hepburn Act, sec. 5, § 16 ("It shall be the duty of the Attorney General in every such case to file the certificate provided for in said expediting Act . . . as necessary to the application of the provisions thereof . . . .").

152. 51 CONG. REC. 2007 (1906) (statement of Rep. Esch).

153. *Id*. at 1769 (statement of Rep. Townsend). He explained that the court would have to determine whether the ICC's order was "confiscatory" or "impose[d] a rate which [did] not yield a fair return upon the carrier's investment." *Id*.

154. Ch. 32, 38 Stat. 208, 220–21 (providing that any "interlocutory injunction" against an ICC order must be issued by a three-judge district court, and that the "same requirement as to judges" applied to the "final hearing of any suit brought to suspend or set aside" such orders). For a brief stint, from 1910 through 1913, Congress had granted exclusive jurisdiction over nearly all litigation relating to ICC orders to a short-lived Commerce Court, with direct appeal to the U.S. Supreme Court. Mann–Elkins Act, ch. 309, §§ 1–3, 36 Stat. 539, 539–43 (1910); *see* George E. Dix, *The Death of the Commerce Court: A Study in Institutional Weakness*, 8 AM. J. LEGAL HIST. 238, 239 (1964). The Urgent Deficiencies Act of 1913 transferred that power to three-judge district courts. 38 Stat. at 219–21. Congress could not return jurisdiction over ICC-related matters to circuit courts because it had abolished them in 1911, when it established the federal judiciary's current three-tier structure. *See* Judicial Code of 1911, ch. 231, §§ 1, 24, 289–91, 36 Stat. 1087, 1087, 1091, 1167.

155. Urgent Deficiencies Act of 1913, 38 Stat. at 219–20 (providing that the "right of appeal" in a suit to "enforce, suspend, or set aside" any ICC order "shall be the same as the right of appeal heretofore prevailing under existing law from the Commerce Court," and that the grant or denial of an interlocutory

Over the decades that followed,[156] Congress extended these requirements for ICC orders to certain suits to enforce or set aside actions of various other administrative agencies and officials,[157] including the U.S. Maritime Commission under the Shipping Act of 1916,[158] as amended by the Intercoastal Shipping Act of 1933;[159] the Federal Power Commission under the Federal Water Power Act of 1920;[160] the Secretary of Agriculture under the Packers and Stockyards Act of 1921[161] and Perishable Agricultural Commodities Act of 1930;[162] and certain orders of the Federal Communication Commission under the Communications Act of 1934.[163] The legislative histories of these provisions did not address whether three-judge district courts adjudicating such cases must recognize their regional circuit courts of appeals' precedents as binding.

B. DIRECT APPEALS IN CERTAIN CRIMINAL CASES

In 1907, Congress enacted the Criminal Appeals Act.[164] The statute authorized the Government to take a writ of error in criminal cases directly from the trial court (either a federal district court or circuit court) to the U.S. Supreme Court when the trial court quashed one or more counts in an indictment, set aside a conviction based on defects in the indictment, or sustained a special plea in bar before jeopardy attached.[165] The Government previously lacked any right of

injunction against an ICC order, as well as the court's final judgment in such cases, "may be reviewed by the Supreme Court").

156. In 1910, Congress made technical amendments to the Expedition Act. Trusts and Interstate Commerce Expediting Act Amendments of 1910, ch. 428, § 1, 36 Stat. 854, 854. This law authorized the appointment of substitute members for three-judge panels and provided a procedure for resolving disputes among panel members. *Id.*; *see supra* note 121; H.R. REP. NO. 61-1416, at 1–2 (1910).

157. *See* S. REP. NO. 81-2618, at 3 (1950); H.R. REP. NO. 81-2122, at 3 (1950), *as reprinted in* 1950 U.S.C.C.A.N. 4303.

158. Ch. 451, § 31, 39 Stat. 728, 738 (requiring the "venue and procedure" in suits to enforce, enjoin, or vacate Shipping Board orders to be the same as for ICC orders).

159. Ch. 199, § 5, 47 Stat. 1425, 1427 (specifying that the Shipping Act continues to apply to "common carriers by water in intercoastal commerce").

160. Ch. 285, § 20, 41 Stat. 1063, 1074 (stating that parties subject to regulation under section 20 of the act "shall have the same rights of hearing, defense, and review" as companies under the Interstate Commerce Act of 1887); *see* Safe Harbor Water Power Corp. v. Fed. Power Comm'n, 179 F.2d 179, 185 n.10 (3d Cir. 1949) (recognizing that the Federal Water Power Act made the Federal Power Commission's orders reviewable "by a three-judge district court under the Urgent Deficiencies Act"). Congress transferred jurisdiction to review Federal Power Commission orders to the courts of appeals in 1935. *See* Public Utility Act of 1935, ch. 687, sec. 213, § 313(b), 49 Stat. 803, 860; *see also Safe Harbor Water Power Corp.*, 179 F.2d at 185 n.10.

161. Ch. 64, § 316, 42 Stat. 159, 168 (providing that all laws related to enjoining or vacating ICC orders applied to the Secretary of Agriculture's orders under this Act, as well).

162. Ch. 436, § 11, 46 Stat. 531, 535 (same).

163. Ch. 652, § 402(a), 48 Stat. 1064, 1093 (specifying that the Urgent Deficiencies Act's provisions concerning suits to enforce, enjoin, or vacate ICC orders applied to FCC orders as well, except for construction permits for radio stations and orders relating to radio station licenses). The Communications Act also applied the Expedition Act to enforcement actions in equity by the government against common carriers under Title II. *Id.* § 401(d).

164. Ch. 2564, 34 Stat. 1246 (1907).

165. *Id.*

appeal in criminal cases.[166] When a trial court upheld an indictment or rejected a defendant's special plea in bar, in contrast, the Evarts Act authorized the defendant to appeal to the U.S. Supreme Court upon conviction in capital cases[167] or—following an 1897 amendment—to the circuit court of appeals upon conviction for any other infamous crime.[168]

The Criminal Appeals Act is a more indirect part of the lineage of modern three-judge district court statutes. Although it authorized direct appeals to the U.S. Supreme Court, it did so from certain rulings of trial judges sitting alone. When reasonably possible, however, in the absence of statutory text or statements in the legislative history to the contrary, jurisdictional statutes should presumptively be read consistently with each other, as embodying a coherent set of principles such as vertical stare decisis.

Three important features of the Criminal Appeals Act suggest that it neither implicitly applied the Appellate Jurisdiction Theory of vertical stare decisis nor exempted trial courts from following circuit court of appeals precedent when direct Supreme Court review was available. *First*, as mentioned above, the Act allowed certain rulings from single district or circuit judges to be appealed directly to the U.S. Supreme Court.[169] This statutory scheme cannot reasonably be read as authorizing individual trial judges to adjudicate issues in criminal cases unconstrained by any binding precedent other than Supreme Court opinions.

Second, the Act provided for direct appeals to the U.S. Supreme Court only for certain issues, relating mostly to an indictment's validity.[170] In non-capital cases, all other issues remained subject to appeal to the circuit court of appeals.[171] Questions concerning the validity or proper construction of the statutes under which a defendant was indicted, however, inevitably impact the merits of the case. For example, a court's construction of an indictment may affect its jury instructions concerning the crime's elements, as well as its view of the sufficiency of the government's evidence. It would have been impracticable for a trial court to apply different bodies of precedent to such inextricably intertwined issues, depending on the court to which each was appealable.

Finally, the Act established jurisdictional asymmetries; direct appeal to the U.S. Supreme Court was available only to the Government, and only when the

166. 41 CONG. REC. 2191 (1907) (statement of Sen. Nelson); *see also* United States v. Sanges, 144 U.S. 310, 322–23 (1892) (holding that the Evarts Act did not grant the federal government the right to appeal a criminal conviction).

167. Ch. 517, § 5, 26 Stat. 826, 827–28 (1891).

168. Act of Jan. 20, 1897, ch. 68, 29 Stat. 492. In this context, an "infamous crime" was a crime for which imprisonment in the penitentiary for a term of years was a possible sentence, regardless of whether it was at hard labor or the length of the sentence actually imposed. *In re* Claasen, 140 U.S. 200, 204–05 (1891); *see also* Mackin v. United States, 117 U.S. 348, 352 (1886) (recognizing that federal law authorized imprisonment in the penitentiary only when a sentence exceeded one year or required confinement at hard labor (citing 70 REV. STAT. §§ 5539, 5541–42 (1875))).

169. Criminal Appeals Act, 34 Stat. at 1246.

170. *Id.*

171. *See* Act of Jan. 20, 1897, 29 Stat. at 492.

trial court ruled in the defendant's favor on the specified issues.[172] If the trial court ruled against the defendant on those issues in a non-capital case, the defendant's appeal lay with the circuit court of appeals.[173] But the body of precedent a trial court must apply when ruling on an issue cannot depend on how the court resolves that issue or the party in whose favor it rules. Congress's creation of different channels for appellate review depending on how a trial court ruled strongly suggests that appellate jurisdiction was not the determinative factor in whether intermediate appellate-court precedent was binding in a case.

Moreover, though examples are limited, it appears that district courts treated their respective regional courts of appeals' precedents as binding, even in cases that were subject to direct appeal to the U.S. Supreme Court under the Act. For example, in *United States v. Louisville & N. R. Co.*, the district court quashed an indictment "because of the technical strictness usually required in such matters by the rulings of the Circuit Court of Appeals of this circuit."[174] Though the Government did not appeal, the court's ruling was subject to the U.S. Supreme Court's exclusive appellate jurisdiction.[175]

Of course, one might develop a more detailed and nuanced version of the Appellate Jurisdiction Theory that does not implicate these concerns. The most natural reading of statutes such as the Criminal Appeals Act, however, is that allowing direct Supreme Court review of trial court rulings does not impact the body of precedent the trial court must apply.

C. THREE-JUDGE DISTRICT COURTS AND CONSTITUTIONAL LITIGATION

Although the Expedition Act was the first statute to integrate three-judge trial courts into the structure of the modern judiciary, the Mann–Elkins Act of 1910[176] is the direct predecessor of the current provisions governing three-judge district courts.[177] Starting with the Mann–Elkins Act, Congress repeatedly expanded the jurisdiction of three-judge trial courts throughout much of the twentieth century to encompass an ever-widening range of constitutional litigation.

1. The Response to *Ex parte Young*

In 1908, the U.S. Supreme Court issued *Ex parte Young*, confirming that federal courts may enjoin state officials from enforcing unconstitutional state statutes.[178] Many representatives in Congress reacted with alarm at the prospect of

172. *See* Criminal Appeals Act, 34 Stat. at 1246.

173. *See* Act of Jan. 20, 1897, 29 Stat. at 492.

174. 165 F. 936, 941 (W.D. Ky. 1908); *see also* United States v. Schutte, 252 F. 212, 216–17 (D.N.D. 1918) (sustaining demurrer to the indictment based on "the long-established principles of the Circuit Court of Appeals of this circuit, and of the Supreme Court of the United States"); *cf.* United States v. Doremus, 246 F. 958, 961 (W.D. Tex. 1918) (distinguishing a case from the U.S. Court of Appeals for the Fifth Circuit that the Government argued was "conclusive"), *rev'd on other grounds*, 249 U.S. 86 (1919).

175. *See* Criminal Appeals Act, 34 Stat. at 1246.

176. Ch. 309, § 17, 36 Stat. 539, 557.

177. *See* 28 U.S.C. §§ 1253, 2284 (2012).

178. *See* 209 U.S. 123, 145 (1908).

federal judges issuing ex parte temporary restraining orders against state laws, sometimes immediately upon their enactment and potentially lasting for months. Senator Overman went so far as to suggest that Congress strip federal courts of jurisdiction to enjoin state laws.[179] As a less extreme compromise, Congress adopted the Mann–Elkins Act of 1910, requiring federal circuit courts to convene three-judge panels to decide whether to issue interlocutory orders prohibiting state officials from enforcing state statutes.[180]

Senator Overman explained:

> The people and the courts of the State are more inclined to abide by the decision of three judges than they would of one subordinate inferior Federal judge who simply upon petition or upon a hearing should tie the hands of a State officer from proceeding with the enforcement of the laws of his sovereign State.[181]

In a separate debate, Overman added, "I am opposed to allowing one little federal judge to stand up against the governor and the legislature and the attorney-general of the State and say, 'This act is unconstitutional.'"[182]

Echoing these sentiments, Senator Bacon declared:

> The purpose of the bill is to throw additional safeguards around the exercise of the enormous powers claimed for the subordinate Federal courts. If these courts are to exercise the power of stopping the operation of the laws of a State and of punishing the officers of a State, then at least let it be done on notice and not hastily, and let there be the judgment of three judges to decide such questions, and not permit such dangerous power to one man.[183]

The Mann–Elkins Act required any application for an "interlocutory injunction" prohibiting a state official from enforcing a state law on constitutional grounds to be "heard and determined by three judges," including at least one circuit judge or Supreme Court Justice, and two other district or circuit judges.[184] A single circuit or district judge could grant a temporary restraining order when necessary to prevent irreparable harm until the three-judge panel was able to rule on the request for interlocutory relief.[185] Courts were required to expedite the

179. 42 CONG. REC. 4846–47 (1908) (statement of Sen. Overman); *see also id*. at 4853 (statement of Sen. Bacon) (arguing that federal courts "have no power to issue the injunctions at all restraining a State officer from executing a State law" due to the Eleventh Amendment).

180. *See* Mann–Elkins Act § 17; *see also* 42 CONG. REC. 4847 (statement of Sen. Overman) (describing "more drastic" bills that were set aside in favor of the Mann–Elkins Act).

181. 42 CONG. REC. 4847 (statement of Sen. Overman).

182. 45 CONG. REC. 7256 (1910) (statement of Sen. Overman).

183. 42 CONG. REC. 4853 (statement of Sen. Bacon).

184. Mann–Elkins Act § 17. Although the plain text of the statute might be read as requiring a three-judge court only to grant a preliminary injunction, the U.S. Supreme Court construed it to require that three-judge courts adjudicate such motions even when they are rejected on the merits. *Ex parte* Metro. Water Co., 220 U.S. 539, 545–46 (1911).

185. Mann–Elkins Act § 17.

proceedings, and the panel's ruling on the interlocutory injunction could be appealed directly to the U.S. Supreme Court.[186]

Though the Mann–Elkins Act does not expressly address the issue, it should not be read as permitting three-judge trial-court panels to disregard intermediate appellate-court precedent. The Act applied only to requests for interlocutory injunctions. After a three-judge panel ruled on the motion for an interlocutory injunction, the remainder of the case—including any request for a permanent injunction—was tried before a single judge. He was free to reject the three-judge panel's rulings and reach entirely different results when adjudicating the merits and the plaintiff's request for permanent relief.[187] In many cases, that final judgment could be appealed either to the U.S. Supreme Court under section 5 of the Evarts Act or the circuit court of appeals under section 6, at the appellant's choice.[188] Thus, the Appellate Jurisdiction Theory would have sometimes required the single trial judge to apply circuit court of appeals precedent while exempting the three-judge panel from doing so. The Mann–Elkins Act should not be construed to allow or require a court to apply different bodies of binding precedent to requests for interlocutory and permanent relief in the same case. Applying different bodies of law to such closely related issues in a case could lead to inconsistent, and even incoherent, results.[189]

Congress codified the Mann–Elkins Act as section 266 of the Judicial Code of 1911.[190] The Code abolished circuit courts[191] and transferred their original jurisdiction to district courts.[192] Three-judge trial-court panels were thereafter convened in district courts. As the House debated the final version of the Judicial

186. *Id.*

187. *See* Patterson v. Mobile Gas Co., 271 U.S. 131, 136 (1926); *see also* Stratton v. St. Louis Sw. Ry. Co., 282 U.S. 10, 14 (1930) (discussing the "anomalous situation" under the Mann–Elkins Act "in which a single judge might reconsider and decide questions already passed upon by three judges on the application for an interlocutory injunction"); Smith v. Wilson, 273 U.S. 388, 390 (1927) (explaining that, under the Mann–Elkins Act, "the final hearing might be had before a single district judge who might arrive at a different conclusion from that reached on the preliminary hearing by the three judges"); *cf.* Cumberland Tel. & Tel. Co. v. La. Pub. Serv. Comm'n, 260 U.S. 212, 217 (1922) (holding that a single judge may not grant a temporary restraining order modifying or otherwise disturbing a three-judge panel's ruling about whether to grant or deny an interlocutory injunction).

188. *See supra* notes 100–02 and accompanying text; *see, e.g.*, Lemke v. Farmers Grain Co., 258 U.S. 50, 52–53 (1922); *see also Ex parte* Buder, 271 U.S. 461, 464–65 (1926); McMillan Contracting Co. v. Abernathy, 263 U.S. 438, 442 (1924).

189. *See* Michael T. Morley, *Beyond the Elements:* Erie *and the Standards for Preliminary and Permanent Injunctions*, 52 AKRON L. REV. 457, 477–78 (2018) (discussing the potential for "contradictory results" if different standards for preliminary and permanent relief are applied in a case).

190. Ch. 231, § 266, 36 Stat. 1087, 1162–63. During the debates over codification, the House passed an amendment that eliminated federal courts' authority to enjoin state officials. 46 CONG. REC. 4003 (1911) (statement of Rep. Moon). The Senate instead substituted an amendment reenacting a slightly modified version of the Mann–Elkins Act's three-judge court and direct appeal provisions, transferring responsibility for convening three-judge panels from circuit courts (which were abolished) to the district courts. *See id.*

191. Judicial Code of 1911 § 289.

192. *Id.* § 24(1)(a), (14) (granting district courts original jurisdiction over cases at law or in equity arising under the U.S. Constitution in which the amount in controversy exceeded $3,000, as well as suits against persons acting under color of state law for violating constitutional rights with no amount-in-

Code, several representatives, pointing to the power of single district judges to grant temporary restraining orders, expressed concern that "an unconscionable litigant can go into court and swear irreparable injury will occur and hang up a matter, suspend it for an indefinite time, until they can get three judges together."[193] Such concerns would have been exacerbated, of course, if those lone judges could have enjoined state laws, even temporarily, without abiding by the constraints of circuit precedent.[194]

2. Expansion to State Agencies

In 1913, Congress broadened the Mann–Elkins Act to also require three-judge district courts to adjudicate requests for preliminary injunctions to prohibit state officials from enforcing or executing a state administrative agency's orders on constitutional grounds.[195] This amendment was intended to accord state railroad commissions' orders the same procedural protections against rash or ill-considered injunctions as Congress had created for state statutes.[196] The House Judiciary Report accompanying the measure explained, "This legislation is demanded because a few judges have sometimes hastily or improvidently issued interlocutory injunctions suspending the enforcement of a State statute or an order made by a State railroad commission . . . ."[197] Federal courts had "held up or prevented" enforcement of state administrative orders "for an unjustifiably

controversy requirement); *see also id*. § 291 (stating that all statutory delegations of powers or duties to circuit courts now refer instead to district courts).

193. 46 CONG. REC. 4005 (1911) (statement of Rep. Cullop); *see also id*. at 4005 (statement of Rep. Sherley) ("[Y]ou can now get a temporary restraining order by one judge, but you can not get it set aside until you get three judges together . . . ."); *id*. at 4006 (statement of Rep. Carlin) ("Is not this a fact, that one judge may now grant this interlocutory order, and that it takes three judges to set it aside?"). Representative Moon responded by claiming that the Mann–Elkins Act had "been in operation for over a year, and such a thing has never occurred . . . . and, in my judgment, it never will." *Id*. (statement of Rep. Moon).

194. For a discussion of how various courts have interpreted and applied the requirements for injunctive relief differently, see Morley, *supra* note 189, at 486–90.

195. Act of Mar. 4, 1913, ch. 160, 37 Stat. 1013. This law further specified that when a state court enjoined a state law or administrative order, any constitutional challenges to that provision in federal court must be stayed until the state suit was resolved. *Id*. Representative Clayton explained that Congress should allow state courts to adjudicate such challenges because "[t]he State courts are as competent and as honest as the Federal courts, and these State courts can and will do justice by railroads as they do by other corporations and by the people." 49 CONG. REC. 4774 (1913) (statement of Rep. Clayton). This provision was used infrequently. *See* Barnds, *supra* note 28, at 164; Welch Pogue, *State Determination of State Law and the Judicial Code*, 41 HARV. L. REV. 623, 628 (1928) (explaining that state courts did not take advantage of their power to adjudicate constitutional challenges to state agency orders).

Read literally, the 1913 amendment required a three-judge court to adjudicate challenges to state administrative orders only if the plaintiff alleged that the underlying statute authorizing the order, rather than only the order itself, was unconstitutional. Act of Mar. 4, 1913, 37 Stat. at 1013. The U.S. Supreme Court construed this provision more broadly, however, as including any constitutional challenges to state officials' enforcement of such orders. Okla. Nat. Gas Co. v. Russell, 261 U.S. 290, 292 (1923).

196. *See* 49 CONG. REC. 4773 (1913) (statement of Rep. Clayton).

197. H.R. REP. NO. 62-1584, at 1 (1913).

long time."[198] The report added that the bill "correct[s] grave abuses by Federal judges in issuing interlocutory injunctions restraining State railroad commissions from executing [their] orders" and "prevent[s] . . . interference with State officials."[199]

Representative Clayton elaborated that railroad representatives had boasted about obtaining a "sweeping injunction" against an order of the South Dakota railroad commission setting maximum passenger rates "within 15 minutes" after the legislature passed the law authorizing it.[200] The injunction remained in effect for six years.[201] Clayton emphasized that the amendment required courts to hear such cases "speedily."[202] Representative Mann further noted that the amendment was a response to the judiciary's unexpectedly narrow construction of the Mann–Elkins Act, which Congress had intended to apply to constitutional challenges to railroad commissions' orders.[203] Even following this amendment's expansion of the Mann–Elkins Act, the structural and practical considerations discussed above[204] continued to suggest that three-judge trial-court panels were bound to apply intermediate appellate-court precedent.

Although few cases expressly address the issue, examples persist in this period of district courts treating U.S. Circuit Courts of Appeals precedents as binding in cases that were subject to direct appeal to the U.S. Supreme Court. In *United States ex rel. Hughes v. Gault*, for example, the relator was being removed (extradited) from Iowa to Ohio to be tried for federal offenses.[205] He sought a writ of habeas corpus to block his removal, arguing that the commissioner at his removal hearing had violated his constitutional rights by refusing to consider evidence that he was actually innocent of the charged crimes.[206]

The district court rejected his petition, holding that the issue had been "very definitely disposed of by the Circuit Court of Appeals" in an earlier precedent.[207] The district court emphasized, "It is my duty to follow this last announcement of the Court of Appeals of this circuit."[208] Because the petition involved constitutional issues, the relator appealed the case directly to the U.S. Supreme Court under section 5 of the Evarts Act, as recodified in the Judicial Code of 1911.[209]

198. *Id.*

199. *Id.* at 1–2.

200. 49 CONG. REC. 4773 (1913) (statement of Rep. Clayton); *accord* H.R. REP. NO. 62-1584, at 1; 49 CONG. REC. 4774 (1913) (statement of Rep. Burke).

201. 49 CONG. REC. 4773 (statement of Rep. Clayton).

202. *Id.* (statement of Rep. Clayton).

203. *Id.* at 4774 (statement of Rep. Mann).

204. *See supra* Section II.C.1.

205. 271 U.S. 142, 148–49 (1926), *aff'g* 13 F.2d 225 (S.D. Iowa 1925).

206. *Id.*

207. United States *ex rel.* Hughes v. Gault, 13 F.2d 225, 226 (S.D. Iowa 1925) (citing Looney v. Romero, 2 F.2d 22 (8th Cir. 1924)), *aff'd*, 271 U.S. 142 (1926).

208. *Id.*

209. *See Hughes*, 271 U.S. at 149. Although the U.S. Supreme Court decided the case in 1926, it emphasized that the relator had appealed under section 238 of the Judicial Code of 1911, before the amendments in the Judges' Bill of 1925, ch. 229, 43 Stat. 936, 938, took effect. *Hughes*, 271 U.S. at 149; *see also infra* Section II.C.3 (discussing the Judges' Bill).

Although the regional circuit court of appeals lacked jurisdiction over the case, the district court nevertheless recognized its "duty" to follow that court's precedents.[210]

3. Expansion to Permanent Injunctions

In 1925, Congress enacted the Judges' Bill,[211] transferring most of the U.S. Supreme Court's remaining mandatory appellate jurisdiction to the circuit courts of appeals and making the Court's docket primarily discretionary.[212] In particular, it gave circuit courts of appeals exclusive jurisdiction over appeals from district courts in most constitutional issues,[213] eliminating the direct Supreme Court review established by section 5 of the Evarts Act. The Judges' Bill preserved direct appeals to the U.S. Supreme Court[214] only from interlocutory and final judgments and decrees as authorized by the Expedition Act,[215] Criminal Appeals Act,[216] section 266 of the Judicial Code[217] (the Mann–Elkins Act of 1910,[218] as amended in 1913,[219] concerning preliminary injunctions against state laws and administrative orders on constitutional grounds), the Urgent Deficiencies Act of 1913[220] (superseding the Hepburn Act of 1906,[221] concerning actions to enforce or set aside ICC orders), and the Packers and Stockyards Act of 1921[222] (concerning certain orders of the Secretary of Agriculture).

At Senator Cummins's recommendation, the bill was amended to extend section 266 so that, in cases where a plaintiff sought a preliminary injunction against a state law or administrative order on constitutional grounds, a three-judge district court panel was required to not only adjudicate that request, but render the final judgment.[223] The amendment authorized direct appeals to the U.S. Supreme Court at both stages, as well.[224] Cummins declared, "It is an anomaly to require the presence of a circuit judge and two district judges to hear an application for a preliminary injunction and then allow a single district judge to pass upon the case finally."[225] The legislative history does not appear to contain any further discussion of this amendment.

---

210. *Hughes*, 13 F.2d at 226.
211. Ch. 229, 43 Stat. 936.
212. 66 CONG. REC. 2752 (1925) (statement of Sen. Cummins).
213. Judges' Bill, § 128(a); *see also id.* § 238.
214. *See id.* § 238.
215. Ch. 544, § 1, 32 Stat. 823, 823 (1903); *see supra* Section II.A.
216. Ch. 2564, 34 Stat. 1246 (1907); *see supra* Section II.B.
217. Judicial Code of 1911, ch. 231, § 266, 36 Stat. 1087, 1162–63; *see supra* Sections II.C.1–II.C.2.
218. Ch. 309, § 17, 36 Stat. 539, 557.
219. Act of Mar. 4, 1913, ch. 160, 37 Stat. 1013, 1014.
220. Ch. 32, 38 Stat. 208, 219–20; *see supra* notes 154–55 and accompanying text.
221. Ch. 3591, sec. 5, § 16, 34 Stat. 584, 592.
222. Ch. 64, § 316, 42 Stat. 159, 168; *see supra* Section II.A.2.
223. *See* 66 CONG. REC. 2917 (1925) (statement of Sen. Cummins); Judges' Bill, ch. 229, § 238, 43 Stat. 936, 938 (1925).
224. Judges' Bill, § 238.
225. 66 CONG. REC. 2917 (statement of Sen. Cummins).

Although Cummins's amendment rectified some of the Mann–Elkins Act's anomalies, it created several new ones, further suggesting that three-judge courts were bound by circuit precedent. For example, the Act still required a three-judge court to be convened and provided for direct appeal to the U.S. Supreme Court only when a plaintiff moved for an interlocutory injunction. When a plaintiff sought only a permanent injunction against a state law on constitutional grounds without requesting interim relief, its case was heard by a single judge and, under the Judges' Bill of 1925, appealable to the circuit court of appeals.[226] It would have been unreasonable for a district court to apply different bodies of law to a case depending exclusively on whether the plaintiff requested interlocutory relief. Such an approach could have led to conflicting rulings from the same court concerning the validity of the same statute, causing unnecessarily disparate treatment of similarly situated litigants.

Similarly, the Mann–Elkins Act applied only when plaintiffs sought preliminary injunctions against the enforcement of allegedly unconstitutional state laws specifically by state officials. When plaintiffs sought such interim relief against local officials,[227] or even against state officials enforcing state laws that were "not of statewide concern,"[228] the matter could only be tried by a single judge and, under the Judges' Bill, was appealable exclusively to the circuit court of appeals. The Mann–Elkins Act was likewise inapplicable where plaintiffs challenged the constitutionality of a state official's exercise of discretion under a state statute.[229] Again, such constitutional challenges that fell outside the jurisdiction of three-judge district courts were heard by a single judge and appealable to the circuit court of appeals. The Act should not be read as authorizing a court to apply different bodies of precedent to the same constitutional issues, depending on whether the challenged statute was being enforced by state or local officials or how the statute was drafted. Thus, despite the expansion of three-judge courts' authority under the Judges' Bill, there is no indication that Congress intended to free them from having to follow circuit court of appeals precedent.[230]

---

226. Stratton v. St. Louis Sw. Ry. Co., 282 U.S. 10, 15 (1930).

227. *Ex parte* Collins, 277 U.S. 565, 568 (1928) ("[T]he section does not apply where, as here, although the constitutionality of a statute is challenged, the defendants are local officers and the suit involves matters of interest only to the particular municipality or district involved."); *Ex parte* Pub. Nat'l Bank of N.Y., 278 U.S. 101, 103–04 (1928).

228. Rorick v. Bd. of Comm'rs, 307 U.S. 208, 212–13 (1939).

229. *See* Phillips v. United States, 312 U.S. 246, 252–53 (1941); *Ex parte* Bransford, 310 U.S. 354, 361 (1940).

230. Congress subsequently recodified the federal judicial code again, this time as part of the complete United States Code. Act of June 30, 1926, ch. 712, 44 Stat. 777, 777. Three-judge court requirements were recodified at 15 U.S.C. §§ 28–29 (1925–1926) (antitrust provisions of the Expedition Act of 1903); 28 U.S.C. § 47 (1925–1926) (Urgent Deficiencies Act of 1913, concerning litigation to enforce or challenge ICC orders); and 28 U.S.C. § 380 (1925–1926) (Mann–Elkins Act, as amended, concerning constitutional challenges to state laws and administrative orders); *see also* 7 U.S.C. § 217 (1925–1926) (Packers and Stockyards Act of 1921) (applying laws concerning challenges to ICC orders to lawsuits to enjoin certain actions of the Secretary of Agriculture); 46 U.S.C. § 830 (applying the Urgent Deficiencies Act's judicial review provisions concerning "venue and procedure" to cases involving the U.S. Shipping Board's orders under the Shipping Act of 1916); *cf.* 18 U.S.C. § 682 (1925–

4. Expansion to Federal Laws

Three-judge district courts reached their pinnacle as a belated response to the U.S. Supreme Court's resistance to New Deal Era innovations.[231] Concerned that the federal judiciary was too readily striking down President Roosevelt's initiatives, Congress extended the Mann–Elkins Act[232] yet again in the Judicial Reform Act of 1937, to suits in which the plaintiffs sought preliminary or permanent injunctions against federal statutes on constitutional grounds.[233] In such cases, the Mann-Elkins Act's three-judge court and direct appeal provisions applied to motions for preliminary or permanent injunctive relief, as well as the court's final judgment. A separate provision of the Judicial Reform Act also authorized any party to appeal as of right directly to the U.S. Supreme Court whenever any federal court—including a single-judge distirct court—held a federal statute unconstitutional, regardless of whether the court had been asked to issue an injunction.[234]

1926) (providing for direct Supreme Court review of certain issues in criminal cases as permitted by the Criminal Appeals Act of 1907); 28 U.S.C. § 345 (1925–1926) (providing for direct Supreme Court review of interlocutory and final judgments in all three-judge district court cases).

Several years later, Congress granted three-judge district court panels exclusive jurisdiction over eminent domain cases involving the Tennessee Valley Authority (TVA). Tennessee Valley Authority Act of 1933, ch. 32, § 25, 48 Stat. 58, 70–72. The statute allowed the TVA to condemn property it needed by filing a petition in federal district court. *Id*. The court would then appoint a panel of three commissioners to determine the amount of compensation to which the landowner was entitled. *Id*. Either the landowner or the TVA could object to the commissioners' determination, and a panel of "three Federal district judges" would be convened to resolve the issue. *Id*. The judges conducted a de novo proceeding, which could include viewing the property and taking additional evidence. *Id*.

The TVA Act's three-judge court requirement had three unique features. First, it was optional. The Act stated that the parties could stipulate that any objections to the commissioners' valuation would "be heard before a lesser number of judges." *Id*. § 25. Litigants frequently demanded three-judge courts in the TVA's early years. Charles J. McCarthy, *Land Acquisition Policies and Proceedings in TVA—A Study of the Role of Land Acquisition in a Regional Agency*, 10 OHIO ST. L.J. 46, 59 (1949). When it later became apparent that neither side received any advantage from a three-judge panel, however, litigants often consented to proceed before a single judge to avoid logistical difficulties. *Id*. Second, whereas most other three-judge court provisions required each panel to include at least one intermediate appellate-court judge, the TVA statute specified that all three members were to be district judges. TVA Act § 25. Finally, whereas most other laws requiring three-judge trial courts provided for direct appeal to the U.S. Supreme Court, rulings from three-judge panels under the TVA Act were appealable to the circuit courts of appeals, *id*., subject to Supreme Court review by certiorari. *See, e.g*., United States *ex rel*. TVA v. Welch, 327 U.S. 546, 548 (1946); United States *ex rel*. TVA v. Powelson, 319 U.S. 266, 271 (1943). Congress repealed the requirement for three-judge district courts in TVA condemnation proceedings in 1968. TVA Property Condemnation Proceedings Act, Pub. L. No. 90-536, § 1, 82 Stat. 885, 885 (1968).

231. *See* 81 CONG. REC. 7381 (1937) (statement of Sen. Logan); *see also* S. REP. NO. 75-711 app. A, at 25, 28 (1937) (quoting Letter from President Franklin D. Roosevelt to the Congress of the United States (Feb. 3, 1937)).

232. By this time, the Mann-Elkins Act—formerly incorporated into the Judicial Code of 1911 as 28 U.S.C. § 266, *see supra* note 190—had been recodified, as amended, as part of the United States Code of 1926 as 28 U.S.C. § 380, *see* Act of June 30, 1926, ch. 712, 44 Stat. 777, 909; *supra* note 230.

233. Ch. 754, § 3, 50 Stat. 751, 752–53. Rep. Sumners explained that the bill was based on "the arrangement with reference to drawing into issue by injunction the validity of certain acts of States." 81 CONG. REC. 8703 (1937) (statement of Rep. Sumners).

234. Judicial Reform Act of 1937 § 2. This provision applied regardless of whether the district court held the law unconstitutional on its face, or as applied. Fleming v. Rhodes, 331 U.S. 100, 104 (1947).

President Franklin D. Roosevelt had requested these measures, claiming that conflicting lower court opinions concerning the constitutionality of federal laws were bringing "the entire administration of justice dangerously near to disrepute."[235] He explained that courts "almost automatically" issued injunctions bringing the government's processes "to a complete stop," often "in clear violation" of traditional equitable principles.[236] Moreover, "[i]n the uncertain state of the law, it is not difficult for the ingenious to devise novel reasons for attacking the validity of new legislation or its application."[237] Under this "[g]overnment by injunction[,] . . . no important statute can take effect . . . until it has passed through the whole hierarchy of the courts."[238] He warned that the judiciary was evolving into a "slowly operating third house of the National Legislature."[239]

Attorney General Homer Cummings echoed these sentiments before the Senate Judiciary Committee, where he decried "[t]he impossible situation created by the reckless use of injunctions in restraining the operation of Federal laws."[240] He explained that judges "fail[] . . . to exercise care, discrimination, and self-restraint in the use of this drastic remedy."[241] Senator O'Mahoney agreed that "the courts have upon occasion usurped legislative power," and the three-judge district court requirement would "prevent" them from invalidating federal or state laws "except in clear cases."[242] In a floor colloquy, Representative Sumners explained that the amendment would "expedite the final determination of these constitutional questions by permitting an appeal directly to the U.S. Supreme Court from the judgment of the three-judge court."[243]

Though most of the debate focused on other aspects of the bill, no one ever suggested that the legislation would effectively exempt three-judge district courts from having to follow court of appeals precedent in constitutional challenges to federal statutes. Moreover, applying the Appellate Jurisdiction Theory to the 1937 Act would have created inexplicable contradictions. Any case in which the plaintiff sought an injunction against a federal law on constitutional grounds was subject to the jurisdiction of a three-judge district court; no matter how that court ruled on the merits, the matter could be appealed as of right directly to the U.S. Supreme Court.[244] Single judges, in contrast, retained jurisdiction over all other cases in which the constitutionality of a federal law was drawn into question,

235. S. REP. NO. 75-711 app. A, at 27 (quoting Letter from President Franklin D. Roosevelt to the Congress of the United States (Feb. 3, 1937)).

236. *Id*. at 28.

237. *Id*.

238. *Id*.

239. *Id*.

240. *Reorganization of the Federal Judiciary: Hearings on S. 1392 Before the S. Comm. on the Judiciary*, 75th Cong. 4 (1937) (statement of Homer Cummings, Att'y Gen. of the United States).

241. *Id*.

242. 81 CONG. REC. 7045 (1937) (statement of Sen. O'Mahoney).

243. *Id*. at 8703 (statement of Rep. Sumners).

244. Judicial Reform Act of 1937, ch. 754, § 3, 50 Stat. 751, 752–53.

such as where a plaintiff sought only declaratory relief.[245] When a single-judge court upheld a challenged statute, its ruling was appealable only to the court of appeals.[246] Thus, under the Appellate Jurisdiction Theory, court of appeals precedent was only potentially applicable to plaintiffs that refrained from seeking an injunction and consequently had their cases heard by a single judge. It is difficult to justify why the body of law governing a constitutional case would depend on the nature of the requested relief.

More fundamentally, appellate jurisdiction in constitutional challenges adjudicated by a single-judge district court depended on how the court ruled. An appeal would be heard by the court of appeals if the district court upheld the law at issue, and by the U.S. Supreme Court if the district court invalidated it.[247] The Appellate Jurisdiction Theory cannot specify which other courts' precedents a district court must apply in a case if the path of appellate review cannot be determined until after the district court has ruled.[248] Thus, it does not appear that Congress enacted the Judicial Reform Act of 1937 against the backdrop of the Appellate Jurisdiction Theory.

Another jurisdictional law enacted roughly contemporaneously with the Judicial Reform Act, the Northern Pacific Railroad Land Grants Act of 1936 ("Land Grants Act"), reinforced the notion that Congress did not connect the

---

245. *See, e.g.*, Kennedy v. Mendoza-Martinez, 372 U.S. 144, 154–55 (1963) (holding that a three-judge court was not required where the plaintiff pursued only declaratory relief); *see also* Flemming v. Nestor, 363 U.S. 603, 606–08 (1960) (holding that a three-judge court was not required where the plaintiff challenged the constitutionality of a federal statute while seeking judicial review of the Social Security Administration's decision to terminate his benefits).

246. *C.f.* Judicial Reform Act of 1937 § 2 (allowing direct appeal to the U.S. Supreme Court when a federal court ruled against the constitutionality of a federal law).

247. *Id.*

248. In 1942, Congress amended the procedural requirements governing three-judge district courts. Act of Apr. 6, 1942, ch. 210, § 3, 56 Stat. 198, 199. It provided that, after a three-judge district court was convened, a single judge may nevertheless "perform all functions," "conduct all proceedings," and enter any orders, with several crucial exceptions. *Id.* § 3. A single judge could not try the case, appoint a special master, grant or vacate a preliminary injunction, dismiss the action, or grant partial or complete summary judgment. *Id.* Additionally, the full panel could review any actions taken by a single judge at any time. *Id.* The Administrative Office of the U.S. Courts had sought these revisions "to prevent interference with the normal work of the circuit courts of appeals resulting from" three-judge court requirements. S. REP. NO. 77-1151, at 2 (1942) (letter from Henry P. Chandler, Dir., Admin. Office of the U.S. Courts, to Sen. Frederick Van Nuys, Chair, U.S. Senate Judiciary Comm. (Feb. 11, 1942)).

The 1942 amendments also eliminated some of the subtle distinctions among various statutes' requirements for the composition of three-judge panels. The Expedition Act, which governed antitrust cases and certain cases brought under the Interstate Commerce Act, required the panel to be comprised of either three circuit judges, or two circuit judges and a district judge. Ch. 544, § 1, 32 Stat. 823 (1903). The Mann–Elkins Act of 1910, as amended, concerning constitutional challenges to state and federal laws, required that the panel be comprised of at least one Supreme Court Justice or circuit judge, as well as two additional circuit or district judges. Ch. 309, § 17, 36 Stat. 539, 557. Finally, the Urgent Deficiencies Act of 1913, concerning enforcement of and challenges to ICC orders, required only that the panel contain at least one circuit judge. Ch. 32, 38 Stat. 208, 220.

The 1942 amendments altered the Expedition Act to mirror the Urgent Deficiencies Act, mandating only that a three-judge panel include at least one circuit judge. *See* Act of Apr. 6, 1942 § 1. Congress finished eliminating the distinctions among the various statutes when it recodified the Judicial Code in 1948. *See* Judicial Code of 1948, ch. 646, § 2284, 62 Stat. 869, 968; *see infra* notes 262–65.

bodies of precedent a court was required to apply in a case with the channels of appellate review for it.[249] In the mid-1800s, Congress had granted the Northern Pacific Railroad Company a right of way through public lands to build a railroad and telegraph line from Lake Superior to Puget Sound.[250] Over a half-century later, in 1929, Congress passed a law prohibiting the railroad from claiming public lands that fell within national forests or Indian Reservations and specifying that the railroad was entitled to any compensation for those limitations that a court deemed due.[251]

The law directed the Attorney General to sue to remove any cloud on the government's title to disputed lands.[252] Any such litigation had to be brought in a district court within one or more of seven specified states.[253] The court's final judgment was subject to appeal to the appropriate circuit court of appeals, and further reviewable by the U.S. Supreme Court "as in other cases."[254] The Attorney General sued the railroad in the U.S. District Court for the Eastern District of Washington, and the court referred the case to a special master.[255] The special master issued a report recommending dismissal of certain counts and dispositions for various other motions and special pleas.[256] The court approved the report and referred the case back to the special master for a trial on the merits, which was expected to lead to a second report and ensuing court order.[257]

A few months later, while the case was still pending, Congress passed the Land Grants Act, declaring that any party in *United States v. Northern Pacific Railway Co.* could appeal the district court's first order, as well as any order it subsequently issued pursuant to the special master's forthcoming second report, directly to the U.S. Supreme Court.[258] The Act further specified that any final order that the district court entered in the case remained subject to appeal to the circuit court of appeals.[259] The Act was pervasively inconsistent with the Appellate Jurisdiction Theory. Congress's decision to retroactively change the route of appellate review for the district court's first order suggests that appellate jurisdiction alone does not

249. Act of May 22, 1936, ch. 444, 49 Stat. 1369, 1369–70.

250. United States v. N. Pac. Ry. Co., 311 U.S. 317, 324–25 (1940) (citing Act of July 2, 1864, ch. 217, 13 Stat. 365).

251. *Id.* at 332–33 (citing Act of June 25, 1929, ch. 41, § 1, 46 Stat. 41, 41–42). The Act further specified that any land grants which had not yet been satisfied were forfeited to the government. Act of June 25, 1929 § 2.

252. Act of June 25, 1929 § 5.

253. These included Wisconsin, Minnesota, North Dakota, Montana, Idaho, Washington, and Oregon. *Id.* § 7.

254. *Id.* Proceedings under the act were to "expedited." *Id.*

255. *See* United States v. N. Pac. Ry. Co., 41 F. Supp. 273, 284–85 (E.D. Wash. 1941) (quoting letter from Robert H. Jackson, Att'y Gen., to Henry A. Wallace, Vice President of the United States).

256. *Id.* at 285.

257. *Id.*

258. Act of May 22, 1936, ch. 444, 49 Stat. 1369, 1369–70; *see also* Schmidt v. United States, 102 F.2d 589, 591 (9th Cir. 1939) (discussing the amendment). The law specifically identified the case by name and docket number. Act of May 22, 1936, 49 Stat. at 1369. Both the Government and the railroad ultimately took advantage of this provision. *See* United States v. N. Pac. Ry. Co., 311 U.S. 317, 334 (1940).

259. Act of May 22, 1936, 49 Stat. at 1370 ("The right of review of any final judgment, authorized by said Act of June 25, 1929, shall continue in force and effect.").

determine the body of precedent that governs a case. Similarly, allowing Supreme Court review of certain interlocutory orders while retaining the court of appeals's jurisdiction over the final judgment could have led to inconsistent and potentially even incoherent conclusions if that meant different bodies of precedent governed different issues in the case. And the Act's legislative history does not suggest that Congress intended it to affect the precedents the district court was bound to apply.[260] Thus, the Land Grants Act bolsters the conclusion that federal jurisdictional statutes do not implicitly incorporate the Appellate Jurisdiction Theory.

5. Recodification

The Judicial Code of 1948 consolidated the laws concerning direct appeals from three-judge district courts to the U.S. Supreme Court in 28 U.S.C. § 1253,[261] and recodified provisions governing three-judge courts as 28 U.S.C. §§ 2281 through 2284.[262] According to the accompanying committee report, "[t]he only change in existing law" under the 1948 recodification was to require a three-judge court in challenges to state legal provisions "where [an] interlocutory injunction is not sought."[263] In fact, § 2284 also ironed out the remaining distinctions among various statutes concerning the composition of three-judge courts and established a "uniform method of convoking [them]."[264] A three-judge district court panel convened under any of the provisions that Congress had previously enacted, or subsequent laws that invoked 28 U.S.C. § 2284's procedure, was only required to include at least one circuit judge.[265] The legislative history does not suggest that any of these modifications were intended to affect the body of case law governing three-judge district courts. As a result of the 1948 codification, any case in which a plaintiff sought an injunction against a federal law, state law, or state administrative order on constitutional grounds had to be heard by a three-judge district court, with direct appeal of its rulings concerning preliminary and permanent injunctions to the U.S. Supreme Court.

D. THE DECLINE OF THREE-JUDGE DISTRICT COURTS

The role of three-judge district courts changed substantially over the second half of the twentieth century. Congress incorporated three-judge court requirements, with direct appeal to the U.S. Supreme Court, into the Civil Rights Act of 1964[266]

260. *See* S. REP. No. 74-2020 (1936).

261. Judicial Code of 1948, ch. 646, 62 Stat. 869, 928 (codified at 28 U.S.C. § 1253 (1952)); *see* H.R. REP. NO. 80-308, app. at A106 (1947); H.R REP. NO. 79-2646, app. at A103 (1946). The separate provision of the Judiciary Reform Act of 1937 authorizing direct appeals as of right to the U.S. Supreme Court whenever a district court held a federal law unconstitutional was codified at 28 U.S.C. § 1252. *See* Judicial Code of 1948, 62 Stat. at 928.

262. Judicial Code of 1948, 62 Stat. at 968 (codified at 28 U.S.C. §§ 2281–84 (1952)).

263. H.R. REP. NO. 80-308, app. at A181; *accord* H.R. REP. NO. 79-2646, app. at A172.

264. H.R. REP. NO. 80-308, app. at A182; *accord* H.R. REP. NO. 79-2646, app. at A173; *cf. supra* note 248 (highlighting inconsistencies in the composition of three-judge courts).

265. 28 U.S.C. § 2284; *see* H.R. REP. NO. 80-308, app. at A182; H.R. REP. NO. 79-2646, app. at A173–74.

266. Pub. L. No. 88-352, §§ 206(b), 707(b), 78 Stat. 241, 245, 262 (codified at 42 U.S.C. §§ 2000a-5(b), 2000e-6(b) (2012)).

and Voting Rights Act of 1965.[267] It adopted these provisions to expedite cases[268] and ensure that lone judges in southern courts could not sabotage civil rights plaintiffs[269] or impose racist views.[270] Several judges had "refused to act" to enforce previous civil-rights laws "in the face of convincing evidence" of discrimination.[271] Congress concluded that "three U.S. judges will produce a result which is more likely to be correct."[272] In later enactments, Congress also preserved three-judge districts courts' jurisdiction over constitutional challenges to congressional and legislative districts,[273] and granted them jurisdiction to determine the validity of certain other recent federal statutes.[274]

Outside of these select contexts, however, Congress eliminated three-judge court requirements to reduce the burdens they imposed on both district courts and the U.S. Supreme Court. Critically, as Congress repealed these requirements—returning broad swaths of cases to the jurisdiction of individual district judges, with review in the courts of appeals—no congressional committees or members of Congress ever suggested that they were changing the body of law that applied. The legislative history gives no indication that the elimination of direct Supreme Court review subjected district judges to court of appeals precedents that they had been previously free to disregard.

Moreover, most of the three-judge panel requirements that Congress preserved were intended to constrain the discretion of potentially outlier district judges to ensure they fully and vigorously enforced federal rights.[275] Granting three-judge courts the freedom to disregard otherwise-binding circuit precedent would directly undermine that critical goal.

---

267. Pub. L. No. 89-110, §§ 4(a), 5, 10(c), 79 Stat. 437, 438–39, 442 (codified as amended at 52 U.S.C. §§ 10101(g), 10303(a)(5), 10304(a), 10504 (Supp. II 2015)) (relating to, respectively, litigation concerning whether a jurisdiction has a pattern or practice of racial discrimination with regard to voting, bailout litigation, preclearance litigation, and racial discrimination with regard to voting).

268. H.R. REP. NO. 88-914, pt. 2, at 4–5 (1963), *as reprinted in* 1964 U.S.C.C.A.N. 2391 (additional views of Rep. McCulloch, et al.); 110 CONG. REC. 1535, 1679, 1685 (1964) (statements of Rep. Celler).

269. *See* H.R. REP. NO. 88-914, pt. 2, at 4–5 (additional views of Rep. McCulloch et al.) (opining that a three-judge panel would have "a greater willingness to safeguard the individual's right to vote"); *see also* 110 CONG. REC. 1535 (statement of Rep. Celler) (expressing concern over "serious inadequacies" in civil-rights enforcement by "some judges in the South"); *cf. id.* at 1683 (statement of Rep. Smith) (objecting that the measure would allow the government to obtain more favorable judges in civil rights cases).

270. *Cf.* 110 CONG. REC. 1682 (statement of Rep. Lindsay) (emphasizing "the moderating effect of a three-judge court").

271. H.R. REP. NO. 88-914, pt. 2, at 4 (additional views of Rep. McCulloch et al.); *see also id.* pt. 1, at 19 (discussing "unwarranted delays which have occurred in the course of judicial proceedings under the prior acts").

272. 110 CONG. REC. 1686 (statement of Rep. Lindsay); *see also id.* at 1689 (statement of Rep. O'Hara) (noting that three-judge courts would "protect against the human frailty that is inherent in all mankind").

273. 28 U.S.C. § 2284(a) (2012).

274. *See infra* notes 381–91; *cf. infra* notes 394, 398 and accompanying text (discussing other modern grants of jurisdiction to three-judge district courts).

275. *See, e.g.*, *supra* notes 269–72 and accompanying text.

1. Administrative Orders Review Act (the Hobbs Act)

Congress's first step in curtailing the jurisdiction of three-judge district courts involved judicial review of agency action. As discussed earlier, throughout the first half of the twentieth century, Congress had repeatedly amended the Urgent Deficiencies Act of 1913 to allow three-judge courts to review the validity of various agencies' orders, with direct review by the U.S. Supreme Court.[276] The Administrative Procedure Act,[277] however, standardized many types of administrative proceedings and required agencies to base their actions on administrative records, greatly reducing the need for trial courts to engage in factfinding and generate separate records.[278] Moreover, as early as the Progressive Era, Congress had already authorized courts of appeals to directly review actions of certain other agencies,[279] including the Federal Trade Commission,[280] Securities and Exchange Commission,[281] Bituminous Coal Commission,[282] and National Labor Relations Board.[283] It had even transferred jurisdiction over challenges to the Federal Power Commission's orders from three-judge courts to courts of appeals in 1935.[284] These provisions set attractive precedents for excluding trial courts from the administrative-review altogether.

District courts found the Urgent Deficiencies Act's three-judge panel requirement burdensome.[285] And the Act's direct appeal provisions clogged the U.S. Supreme Court's docket with numerous routine appeals of agency actions that lacked national importance.[286] The Administrative Orders Review Act of 1950, also referred to as the Hobbs Act, addressed these concerns by requiring litigants to challenge the validity of various agencies' actions directly in the courts of appeals.[287] The statute's legislative history lacks any indication that the transition from three-judge district court panels to review in the courts of appeals affected the body of precedent governing judicial review of agency action. FCC Commissioner Rosel Hyde confirmed during questioning before a subcommittee

276. *See supra* notes 154–55, 158–63 and accompanying text.

277. Ch. 324, 60 Stat. 237 (1946).

278. *See* S. REP. NO. 81-2618, at 4 (1950); H.R. REP. NO. 81-2122, at 4 (1950), *as reprinted in* 1950 U.S.C.C.A.N. 4303.

279. *See* S. REP. NO. 81-2618, at 4; H.R. REP. NO. 81-2122, at 3–4; *see also* 96 CONG. REC. 16,626 (1950) (statement of Sen. McCarran) (discussing existing judicial review provisions that were models for the Hobbs Act).

280. *See* Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 717, 720 (1914).

281. *See* Securities Act of 1933, ch. 38, § 9(a), 48 Stat. 74, 80–81.

282. *See* Bituminous Coal Act of 1937, ch. 127, § 6(b), 50 Stat. 72, 85.

283. *See* National Labor Relations Act, ch. 372, § 10(e), 49 Stat. 449, 454–55 (1935).

284. *See* Public Utility Act of 1935, ch. 687, sec. 213, § 313(b), 49 Stat. 803, 860.

285. *See* H.R. REP. NO. 81-2122, at 2, 4 (1950), *as reprinted in* 1950 U.S.C.C.A.N. 4303; S. REP. NO. 81-2618, at 2 (1950); 96 CONG. REC. 16,626 (1950) (statement of Sen. McCarran).

286. H.R. REP. NO. 81-2122, at 2, 4; S. REP. NO. 81-2618, at 2, 5.

287. Ch. 1189, § 2, 64 Stat. 1129, 1129 (1950); *see also* S. REP. NO. 81-2618, at 2 (outlining the purposes of the legislation); 96 CONG. REC. 16,626 (statement of Sen. McCarran) (noting that the statute "change[d] the method of review" of certain administrative actions, from "trial de novo by a district court before three judges" with direct appeal as of right to the U.S. Supreme Court, to "appeal to the circuit court of appeals" with the ability to petition for certiorari).

of the Senate Judiciary Committee that the Act "simply change[d] the method of review and remove[d] the review [as of right] by the Supreme Court."[288] Its only effect was to "move [cases] one bracket higher for review instead of putting them in the [three-judge district] court."[289]

2. Antitrust Cases

Over two decades later, Congress eliminated the Expedition Act's three-judge trial court requirements for antitrust cases,[290] which had fallen into disuse.[291] Under the Antitrust Procedures and Penalties Act of 1974, also known as the Tunney Act, when the United States files an antitrust suit requesting equitable relief, the Attorney General may still file a certificate of public importance, but the only effect is that the district judge must "expedite[]" the case's resolution.[292] Appeals from rulings on preliminary injunctions and final judgments are presumptively heard by the U.S. Courts of Appeals, subject to review by certiorari in the U.S. Supreme Court.[293] After a notice of appeal from the district court's final judgment is filed, however, any party may ask the district court to enter an order "stating that immediate consideration of the appeal by the U.S. Supreme Court is of general public importance in the administration of justice."[294] When a district court makes that determination, the Supreme Court may either resolve the appeal itself or remand it to the court of appeals.[295]

Neither legislative debates concerning the Tunney Act[296] nor the committee reports accompanying it[297] claimed that it affected the body of precedent governing antitrust cases. Rather, the reports explained that the Act would give courts of appeals the opportunity to refine the issues in antitrust cases before they reached the U.S. Supreme Court and reduce the Court's docket.[298] The Act would also

---

288. *To Provide for the Review of Certain Orders: Hearing on H.R. 5487 Before the Subcomm. of the S. Comm. on the Judiciary*, 81st Cong. 4 (1950) (statements of Rosel H. Hyde, Member, FCC, and Sen. Kilgore, Chairman, Subcomm. of the S. Comm. on the Judiciary). The hearing transcript does not specify the name of the subcommittee.

289. *Id*. at 3 (statements of Rosel H. Hyde, Member, FCC, and Sen. Kilgore, Chairman, Subcomm. of the S. Comm. on the Judiciary).

290. Expedition Act, ch. 544, § 1, 32 Stat. 823, 823 (1903); *see supra* Section II.A.1.

291. H.R. REP. NO. 91-1129, at 3 (1970) ("In nearly 30 years, the Department of Justice utilized the three-judge court procedure in antitrust cases only seven times. In the last 10 years, only one antitrust case has been tried before a three-judge court.").

292. Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, § 4, 88 Stat. 1706, 1708-09 (1974).

293. *Id*. § 5.

294. *Id*. § 5(b).

295. *Id*.

296. *See, e.g*., 120 CONG. REC. 36,341 (1974) (statement of Rep. Heinz) ("This bill will speed up Government and defense appeals of antitrust cases by permitting circuit court consideration. . . . Circuit court review would also reduce the Supreme Court's caseload and allow that court to spend its time dealing with only the most important cases."); *see also id*. at 36,344 (statement of Rep. Mayne).

297. *See* H.R. REP. NO. 93-1463, at 10 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 6535; S. REP. NO. 93-298, at 4 (1973).

298. S. REP. NO. 93-298, at 8; *accord* S. REP. NO. 91-1214, at 2 (1970); H.R. REP. NO. 91-1129, at 3 (1970) (lamenting that direct antitrust appeals deny the U.S. Supreme Court "the benefit of consideration by a court of appeals" (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 355 (1962) (Clark, J., concurring))); *see also* United States v. Singer Mfg. Co., 374 U.S. 174, 175 n.1 (1963) ("Direct appeals

enhance antitrust litigants' opportunities to receive substantive appellate review, because the Court typically issued only summary dispositions for antitrust cases directly appealed there.[299]

The Department of Justice noted that allowing courts of appeals to review preliminary injunctions in antitrust cases was not problematic, even though final judgments could be certified for direct appeal to the U.S. Supreme Court.[300] In a letter to the Senate, the Attorney General explained that the district court's "discretion on injunctions can be reviewed, in substantial part, separately from a determination of the ultimate merits of the case and court of appeals review is not, therefore inconsistent with subsequent direct Supreme Court review of the final judgment in the event of certification."[301] One reasonable inference from this statement is that the district court would not be applying different bodies of precedent to its interlocutory and final rulings.[302]

The structure of the Tunney Act confirms that Congress was not legislating against the backdrop of the Appellate Jurisdiction Theory. If the body of precedent that governs a case depends on the court that will hear the appeal, then the identity of that reviewing court must be known at the outset (or at least before final judgment). The Tunney Act, however, allows litigants—after final judgment—to ask that the U.S. Supreme Court hear the appeal directly. Indeed, even if a district court were confident it would certify a case to the U.S. Supreme Court, it could not be assured the Court would agree to hear the matter, rather than remanding it to the court of appeals.[303] The case law a court must apply cannot be based exclusively on the channel of appellate review when that channel is not determined until after the case is over.

3. Further Curtailment

The Tunney Act also abolished three-judge district court requirements for actions by the government to enforce certain commerce-related laws and the Communications Act.[304] Congress transferred jurisdiction over those matters to single-judge district courts with appeal through the ordinary channels to the

not only place a great burden on the Court but also deprive us of the valuable assistance of the Courts of Appeals.").

299. *See* S. REP. NO. 93-298, at 8. The House Judiciary Committee added that allowing courts of appeals to review preliminary injunctions in antitrust cases would "possibly conserve substantial enforcement resources and . . . obviate the need for some trials." H.R. REP. NO. 93-1463, at 10.

300. S. REP. NO. 91-1214, at 4–5 (letter from John N. Mitchell, Att'y Gen. of the U.S., to the Vice President).

301. *Id.*

302. One countervailing piece of evidence is that the Department of Justice believed that district courts should be prohibited from certifying other interlocutory rulings in antitrust cases to courts of appeals under 28 U.S.C. § 1292(b), because "[i]t would be anomalous for the courts of appeals to undertake interlocutory resolution of such issues when, at the end of trial, if a certificate is filed, the final judgment would go directly to the Supreme Court." *Id.* at 5.

303. *See* Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, § 5, 88 Stat. 1706, 1709 (1974).

304. *Id.* at §§ 4–5 (eliminating the Expedition Act's references to the Interstate Commerce Act); *id.* § 6 (repealing § 401(d) of the Communications Act of 1934, which required three-judge courts for actions by the United States to enforce statutory restrictions on common carriers, as well as a provision in the Elkins Act specifying that ICC enforcement actions under that statute were governed by the Expedition Act).

courts of appeals.[305] Yet again, the pertinent legislative history lacks any hint that these jurisdictional changes subjected those cases to a new body of court of appeals precedent that three-judge district courts were previously free to treat as merely advisory or persuasive.

The following year, Congress eliminated three-judge district court requirements for all remaining ICC matters, dividing responsibility between district courts and courts of appeals. It granted single-judge district courts jurisdiction to enforce all ICC orders and adjudicate challenges to orders for the payment of money, fines, penalties, and forfeitures.[306] It also granted the courts of appeals jurisdiction to enjoin or invalidate any other ICC orders.[307]

Representatives Conyers and Cohen explained that these modifications "would modernize the cumbersome and outdated judicial machinery for review of orders of the [ICC]."[308] Conyers noted that requiring three-judge district court panels and direct Supreme Court review tremendously burdened the judiciary.[309] Deputy Assistant Attorney General Bruce B. Wilson claimed that, because courts of appeals would sit in three-judge panels when hearing challenges to ICC orders, the "only change" was that "applications for [TROs] would be submitted to a panel of the court of appeals instead of merely to one district judge."[310] None of the witnesses who testified concerning the legislation,[311] including Deputy Assistant Attorney General Wilson, and neither of the committee reports accompanying it,[312] suggested that transferring original jurisdiction over challenges to ICC orders from three-judge district courts (whose rulings had been directly

305. *Id.* § 5.

306. Act of Jan. 2, 1975, Pub. L. No. 93-584, §§ 1, 5, 88 Stat. 1917, 1917 (codified at 28 U.S.C. §§ 1336(a), 2321(b) (1976)).

307. *Id.* §§ 3–5.

308. 120 CONG. REC. 40,545 (1974) (statement of Rep. Conyers); *accord id.* at 40,546 (statement of Rep. Cohen); S. REP. NO. 93-500, at 1 (1973); H.R. REP. NO. 93-1569, at 1, 6 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 7025.

309. *See* 120 CONG. REC. 40,545–46 (statement of Rep. Conyers) (quoting study group on the caseload of the U.S. Supreme Court); *see also* S. REP. NO. 93-500, at 2; H.R. REP. NO. 93-1569, at 2; 120 CONG. REC. 40,546 (statement of Rep. Cohen). Representative Conyers explained that, according to D.C. Circuit Judge J. Skelly Wright, the "original problems for which three-judge courts were first conceived have been largely eliminated through other reforms," and the laws establishing their jurisdiction "generate[] rather than lessen[] litigation." *Id.* (statement of Rep. Conyers).

310. *Judicial Review of Decisions of the Interstate Commerce Commission: Hearing on S. 663 Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 93d Cong. 9 (1973) (statement of Bruce B. Wilson, Deputy Assistant Att'y Gen. of the United States); *accord* S. REP. NO. 93-500, at 4.

311. *See generally Judicial Review of Decisions of the Interstate Commerce Commission: Hearing on S. 663 Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 93rd Cong. (1973) (documenting testimony of Bruce B. Wilson, Deputy Assistant Att'y Gen. of the United States; George M. Stafford, Chairman, ICC; and John M. Cleary); *Judicial Review of the Interstate Commerce Commission: Hearing on S. 663 and H.R. 785 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 93d Cong. (1974) (documenting testimony of Hon. Harry Phillips, C.J., U.S. Court of Appeals for the Sixth Circuit, and George M. Stafford, Chairman, ICC).

312. *See* H.R. REP. NO. 93-1569; S. REP. NO. 93-500.

appealable to the U.S. Supreme Court) to courts of appeals would change the applicable body of law.

Congress went even further in 1976, adopting the current version of 28 U.S.C. § 2284.[313] It transferred default responsibility for virtually all constitutional litigation—including challenges to the validity of federal and state statutes—back to single-judge district courts. Three-judge district courts with direct Supreme Court review were reserved exclusively for redistricting cases and claims for which some other statute expressly requires them.[314] Yet again, this was treated as a purely procedural change that would conserve judicial resources without affecting litigants' rights.[315]

Finally, the Supreme Court Case Selection Improvement Act of 1988 ("Improvement Act") repealed the provision of the Judicial Reform Act of 1937 authorizing direct appeals to the U.S. Supreme Court whenever a district court held a federal law unconstitutional.[316] The Justices of the U.S. Supreme Court had written to the Senate unanimously endorsing the Improvement Act, "urg[ing] the Congress to enact it promptly."[317] The Act's supporters consistently presented it as a means of reducing the U.S. Supreme Court's mandatory caseload, which in turn would alleviate the need for the Court to issue summary merits dispositions in cases of limited public importance.[318] No committee report, member of Congress, or other supporter suggested that the bill would impact which

313. *See* Act of Aug. 12, 1976, Pub. L. No. 94-381, §§ 1–3, 90 Stat. 1119, 1119 (codified at 28 U.S.C. § 2284).

314. *Id.*

315. *See* S. REP. NO. 93-206, at 3–4 (1973); *accord* S. REP. NO. 94-204, at 3–4 (1975), *as reprinted in* 1976 U.S.C.C.A.N. 1988; *see, e.g.*, *Improvement of Judicial Machinery: Hearing on H.R. 6150 Before the Subcomm. on Courts, Civil Liberties, & the Admin. of Justice of the H. Comm. on the Judiciary*, 94th Cong. 8 (1975) (statement of Harold R. Tyler, Jr., Deputy Att'y Gen. of the United States); *id.* at 16 (statement of Rowland F. Kirks, Dir., Administrative Office of the U.S. Courts). The legislative record included a letter from Professor Charles Alan Wright contending that three-judge district courts "administer[] shabby justice" because opportunities for fact-finding were limited and they often pressured counsel into stipulating key facts. *Id.* at 177 (Letter from Professor Charles Alan Wright to Rep. Robert F. Drinan (Oct. 9, 1974)).

316. Pub. L. No. 100-352, § 1, 102 Stat. 662, 662 (1988). For more information regarding the Judicial Reform Act of 1937, ch. 754, § 2, 50 Stat. 751, 752 (1937), see *supra* note 234 and accompanying text.

317. 125 CONG. REC. 7632–33 (1979) (reprinting Letter from C.J. Warren Berger et al., to Sen. Dennis DeConcini (June 22, 1978)).

318. H.R. REP. No. 100-660, at 5, 11–12 (1988) ("The general effect of the bill is to convert the mandatory or obligatory jurisdiction of the Supreme Court to jurisdiction for review by certiorari, except for a narrow range of cases involving decisions by three judge district courts."); S. REP. No. 100-300, at 4 (1988); 125 CONG. REC. 7632–33 (1979) (reprinting Letter from C.J. Warren Berger et al., to Sen. Dennis DeConcini (June 22, 1978)); *see also* 134 CONG. REC. 13,511 (1988) (statement of Rep. Kastenmeier) ("The net effect of the proposed legislation is to convert the method of Supreme Court review to a discretionary, certiorari approach. . . . Under the current system, it is impossible for the Supreme Court to give its fullest consideration to the mandatory cases that it receives. The Court must resort to summary dispositions that sometimes treat litigants in a cavalier way."); *id.* at 4465 (statement of Sen. Heflin) ("Under current law, the Supreme Court devotes an inordinate amount of time deciding these cases on the merits—not because these decisions will have a significant national impact, but because of the statutory requirements."); 125 CONG. REC. 7647 (statement of Sen. DeConcini, presenting a statement of Sen. Bumpers) (arguing that a ruling "by a court of appeals will help the Supreme Court in its ultimate resolution of the issue, if it decides to grant review . . . ."); *id.* at 7645

precedents district courts must apply in adjudicating constitutional cases. The Improvement Act completed the process of granting original jurisdiction over nearly all constitutional cases to single-judge district courts, and appellate jurisdiction to review their rulings to regional courts of appeals, subject to a few narrow exceptions in 28 U.S.C. § 2284 and a handful of other discrete statutes.

Thus, throughout the twentieth century, the history and evolution of three-judge district courts has been inconsistent with the Appellate Jurisdiction Theory of vertical stare decisis.

III. A HYBRID APPROACH TO PRECEDENT

The Hybrid Theory of vertical stare decisis draws upon the strengths of both the Appellate Jurisdiction and Structural Theories. It provides that a court must presumptively follow the precedents of any other court that either: (i) may exercise appellate jurisdiction over a case, or (ii) is hierarchically superior within the structure of the federal judiciary, accounting for regional and subject-matter-based components of the structure. Clear statutory text or other persuasive indicia of legislative intent may overcome either of these presumptions. In particular, structural considerations, considered in context, may be sufficient to displace the presumption that a court must follow the precedents of other tribunals with appellate jurisdiction over a case.[319]

Under this approach, a trial court generally must follow "higher" courts' precedents, even when they lack appellate jurisdiction over a particular matter. Unlike a pure structural theory, however, the Hybrid Theory also presumptively requires trial courts to apply the precedents of tribunals that have appellate jurisdiction over a matter, even if they are not structurally "superior."

A. A DEFENSE OF THE HYBRID THEORY

A hybrid approach to vertical stare decisis, incorporating both the Appellate Jurisdiction and Structural Theories, is superior to either theory standing alone for a variety of reasons. *First*, as discussed above in Part II, over a century's worth of legislation concerning three-judge trial courts and direct Supreme Court appeals strongly suggests that Congress has not been implicitly legislating against the backdrop of the Appellate Jurisdiction Theory alone. From the Evarts Act of 1891 and Expedition Act of 1903 through modern statutes, the identity of the court with appellate jurisdiction over a matter has sometimes depended upon the

(statement of Sen. DeConcini) ("The purpose of the bill is to give the Supreme Court greater control over managing its docket.").

An earlier version of this Act, introduced in the late 1970s, died in the House because it included an additional provision—omitted from the version Congress ultimately enacted—that would have eliminated the U.S. Supreme Court's jurisdiction to hear any appeal relating to prayer in public schools. *See* S. 450, 96th Cong. § 11 (as referred to H. Comm. on the Judiciary, Apr. 10, 1979); *see also* 125 CONG. REC. 7644 (adopting amendment).

319. *See infra* notes 349–54 and accompanying text.

stage of the case,[320] how the trial court ruled on an issue,[321] or even the parties' choices and actions after the trial court entered judgment.[322] It would have been impracticable, unreasonable, or even impossible for a trial court in such cases to determine the body of applicable precedent based on the court that would exercise jurisdiction over an appeal.

Moreover, several laws provided for direct appeals to the U.S. Supreme Court only over certain issues, such as preliminary injunctions[323] or the validity of indictments.[324] Applying the Appellate Jurisdiction Theory would have required district courts to apply different bodies of precedent to different issues within the same case, creating a risk of internally inconsistent or incoherent results. Additionally, the same issue could fall within the jurisdiction of either a single judge with appeal to the intermediate appellate court, or a three-judge panel with direct appeal to the U.S. Supreme Court, depending on ancillary considerations such as whether the case was brought by the government or a private party,[325] whether the plaintiff sought injunctive relief,[326] and whether the defendant was a state or local officer.[327] Such procedural considerations should not affect the body

320. Mann–Elkins Act, ch. 309, § 17, 36 Stat. 539, 557 (1910) (providing for three-judge district courts and direct Supreme Court review only for preliminary injunctions); Criminal Appeals Act, ch. 2564, 34 Stat. 1246, 1246 (1907) (providing for direct Supreme Court review only of trial court rulings quashing one or more counts in an indictment, setting aside a conviction based on defects in the indictment, or sustaining a special plea in bar before jeopardy attached); *see also* Act of May 22, 1936, ch. 444, 49 Stat. 1369, 1369–70 (providing for direct Supreme Court review only of certain rulings in litigation between the United States and the Northern Pacific Railroad Company); Act of Mar. 4, 1913, ch. 160, 37 Stat. 1013, 1013 (extending Mann-Elkins Act to motions for preliminary injunctions on constitutional grounds against state agencies' administrative orders).

321. Judicial Reform Act of 1937, Ch. 754, § 2, 50 Stat. 751, 752 (providing for direct U.S. Supreme Court review only when a district court held a federal law unconstitutional); Criminal Appeals Act, 34 Stat. at 1246.

322. Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, §§ 4–5, 88 Stat. 1706, 1708–09 (1974) (authorizing litigants in antitrust cases to ask the district court to certify its judgment to the U.S. Supreme Court for direct review); *see also supra* notes 100–03, 188, and accompanying text (explaining that the Evarts Act often allowed litigants in constitutional cases to choose whether to file their appeal with the circuit court of appeals or the U.S. Supreme Court).

323. Mann–Elkins Act § 17; *see also* Act of Mar. 4, 1913, 37 Stat. at 1013.

324. Criminal Appeals Act, 34 Stat. at 1246.

325. Expedition Act, ch. 544, § 1, 32 Stat. 823, 823 (1903) (providing for three-judge trial courts and direct U.S. Supreme Court review only in certain antitrust and commerce-related cases brought by the government); *see also* Elkins Act, ch. 708, § 3, 32 Stat. 847, 848 (1903) (extending the Expedition Act to certain cases in which the government sued on behalf of the ICC).

326. Judicial Code of 1948, ch. 646, 62 Stat. 869, 928, 968 (codified at 28 U.S.C. §§ 1253, 2281–82 (1952)) (requiring three-judge district courts, with direct appeal to the U.S. Supreme Court, when a plaintiff sought a preliminary or permanent injunction against a federal law, or to prevent a state officer from enforcing a state law or administrative order); Judicial Reform Act of 1937 § 3 (requiring three-judge district courts and providing for direct Supreme Court review only where the plaintiff sought a preliminary injunction against an allegedly unconstitutional federal law); Judges' Bill, ch. 229, 43 Stat. 936, 938 (1925) (requiring three-judge district courts and providing for direct U.S. Supreme Court review only where the plaintiff seeks a preliminary injunction against an allegedly unconstitutional state law or administrative order); Expedition Act § 2 (providing for direct U.S. Supreme Court review in certain cases only when the government seeks equitable relief); *see also* Elkins Act § 3.

327. Judicial Code of 1948, 62 Stat. at 928, 968 (codified at 28 U.S.C. § § 1253, 1281 (1952)); Mann–Elkins Act § 17; *see also* Judges' Bill, 43 Stat. at 938; Act of Mar. 4, 1913, 37 Stat. at 1013.

of substantive law that governs a case, particularly when applying different bodies of precedent could lead to inconsistent results across cases involving materially identical issues within the same jurisdiction.

In addition, the jurisdiction of three-judge courts has not always been perfectly co-extensive with provisions allowing for direct appeal to the U.S. Supreme Court. Some statutes made rulings of individual trial-court judges directly appealable to the U.S. Supreme Court.[328] Only the most important issues warrant immediate Supreme Court review. It is highly unlikely that Congress intended to allow lone judges to adjudicate such matters wholly unconstrained by the intermediate appellate-court precedents that would otherwise cabin their discretion.

It is also noteworthy that, as Congress repeatedly expanded and contracted the availability of direct Supreme Court review for trial-court rulings over nearly a century, it never suggested that these jurisdictional changes affected the body of law that trial courts must apply. Neither the sponsors of these bills, other legislators, nor the congressional committees that crafted them ever suggested that a trial court's obligation to follow intermediate appellate-court precedent hinged on whether the trial-court sat in three-judge panels or its rulings were directly appealable to the U.S. Supreme Court. As far back as the turn of the century, federal trial courts themselves recognized that they were bound by intermediate appellate-court precedent, even in cases subject to direct appeal to the U.S. Supreme Court.[329] Overall, both Congress and the judiciary appear to have presumed that federal trial courts are bound by intermediate appellate-court precedent, including in cases not subject to their appellate jurisdiction.

Second, the Hybrid Theory builds upon the Structural Theory's strengths and justifications. As a constitutional matter, Supreme Court precedents presumptively bind lower federal courts by virtue of those tribunals' respective constitutional designations as "supreme" and "inferior."[330] According to the Structural

328. Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, §§ 4–5, 88 Stat. 1706, 1708–09 (1974); Criminal Appeals Act, 34 Stat. at 1246; Expedition Act § 1, 32 Stat. at 823; *see also* Elkins Act § 3, 32 Stat. at 848.

329. United States *ex rel*. Hughes v. Gault, 13 F.2d 225, 226 (S.D. Iowa 1925), *aff'd*, 271 U.S. 142 (1926); United States v. Schutte, 252 F. 212, 216–17 (D.N.D. 1918); United States v. Louisville & N. R. Co., 165 F. 936, 941 (W.D. Ky. 1908); Skillin v. Magnus, 162 F. 689, 689 (N.D.N.Y. 1907); *In re* Wong Kim Ark, 71 F. 382, 389 (N.D. Cal. 1896), *aff'd sub nom*. United States v. Wong Kim Ark, 169 U.S. 649 (1898); *see also supra* note 104.

330. U.S. CONST. art. I, § 8, cl. 9; *id*. art. III, § 1; *see* Caminker, *supra* note 24, at 832 ("[I]nferior courts are 'inferior to' the Supreme Court in that the former must obey the precedents set by the latter."); *see also* Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1176 n.115 (1992) (suggesting that Article III "may constitute an *implicit* grant of power to the Supreme Court" to "bind" inferior courts "with precedents"); James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U. L. REV. 191, 199–200 (2007) ("This requirement of subordination to the Supreme Court may oblige inferior tribunals to give effect to the Court's precedents . . . . Article I requires inferior tribunals to respect decisions of their judicial superiors."); *cf*. James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1441 (2000) ("[R]ather than emphasize the duty of inferior tribunals to obey hierarchical precedents of their judicial superior, I suggest that the Court's supremacy gives it authority to supervise the work of inferior federal tribunals through the exercise of its power to issue discretionary writs, such

Theory, Congress built upon this constitutional scaffolding through the Evarts Act[331] and further refined it through the Judicial Code of 1911,[332] creating a decentralized, hierarchical court system. Based on their place within the structure of the federal judicial system, district courts are presumptively required to follow the rulings of their regional courts of appeals. This obligation does not arise from courts of appeals' ability to exercise appellate jurisdiction in particular cases, but rather from their superior place within the judicial hierarchy.[333] Particular statutes may supersede this structural obligation, requiring district courts to apply a different body of precedent in certain cases. But merely denying regional courts of appeals appellate jurisdiction over a matter is not, on its own, enough to overcome this structural presumption.

The U.S. Supreme Court adopted a structural explanation for vertical stare decisis in *Hutto v. Davis*, declaring that courts of appeals' obligation to follow Supreme Court precedent arises from "the hierarchy of the federal court system created by the Constitution and Congress."[334] The concept of "the law of

---

as mandamus, habeas corpus, and prohibition."); William S. Dodge, Note, *Congressional Control of Supreme Court Appellate Jurisdiction: Why the Original Jurisdiction Clause Suggests an "Essential Role,"* 100 YALE L.J. 1013, 1020–21 (1991) (arguing that the constitutional designation of the U.S. Supreme Court as "supreme" both confirms the importance of its role within the federal judicial hierarchy and carries implications for the scope of its power).

Although it may also be argued that vertical stare decisis is an inherent implication of the "judicial [p]ower" that Article III confers upon the federal judiciary, U.S. CONST. art. III, § 1, Professor John Harrison contends that the Framers did not regard stare decisis an essential component of it. Harrison, *supra* note 24, at 525 ("It is highly unlikely that when the Constitution was adopted Americans believed that the principle of stare decisis was hard-wired into the concept of judicial power."). He points out that "[t]he allocation of judicial authority" within states during the Founding Era "was primarily horizontal, among different courts, rather than vertical with a clear appellate hierarchy." *Id*. at 521. Moreover, the Framers accepted that civil-law courts, which did not apply principles of stare decisis, exercised judicial power as well. *Id*. at 522–23 & n.62.

Professor Akhil Amar has suggested that the U.S. Supreme Court's status as "supreme" might not require lower courts to follow its rulings. Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 221 n.60 (1985). He contends that the term instead refers to the fact that the Court is the only tribunal that the Constitution requires to exist, for which the Constitution specifies the core of its original jurisdiction, and from which further judicial appeals are implicitly prohibited. *Id*. Professor Caminker persuasively rejects this interpretation as inconsistent with Article III's drafting history. Caminker, *supra*, note 24, at 829–30. Caminker likewise discounts alternate proposed interpretations of Article III by Professors Steven Calabresi and Kevin Rhodes, as well as Professor William Dodge. *See id*. at 830–31; *cf*. Calabresi & Rhodes, *supra*, at 1180 n.139 (arguing that the U.S. Supreme Court's designation as "supreme" implies that it is the only court that may exercise broad geographic jurisdiction and plenary subject-matter jurisdiction); Dodge, *supra*, at 1014, 1029–30 (arguing that the U.S. Supreme Court's status as "supreme" derives from its original jurisdiction over the most important types of cases, which have the greatest potential to lead the nation into war).

331. Ch. 517, 26 Stat. 826 (1891); *see supra* Section I.B.

332. Ch. 231, 36 Stat. 1087 (1911); *see supra* notes 190–92 and accompanying text.

333. *See supra* note 54 and accompanying text.

334. 454 U.S. 370, 375 (1982) (per curiam); *see also* United States v. Mitlo, 714 F.2d 294, 298 (3d Cir. 1983) (holding that, under the "common law tradition, . . . precedents set by higher courts are conclusive on courts lower in the judicial hierarchy").

the Circuit"[335] recognized by the Court also implies a body of law that district courts—and perhaps other federal actors as well—are generally required to follow, regardless of technicalities concerning appellate jurisdiction. The Structural Theory's constitutional, statutory, and common-law foundations make it an essential component of any approach to vertical stare decisis.

Third, the Hybrid Theory also provides a robust explanation for vertical stare decisis consistent with other modern deviations from the usual channels of appellate review. For example, the U.S. Court of Appeals for the Federal Circuit, rather than regional courts of appeals, exercises appellate jurisdiction over all patent cases from federal district courts across the nation.[336] The Federal Circuit has held that, because of this exclusive jurisdiction, district courts must follow its rulings concerning substantive patent law.[337] District courts must still treat the precedents of their respective regional courts of appeals as binding for all non-patent issues that arise in patent cases, however, despite those courts' lack of appellate jurisdiction over them.[338]

The Federal Circuit explained that both the "spirit" of its organic statute, as well as the "general policy of minimizing confusion and conflicts in the federal judicial system," suggest that district courts are bound by regional court of appeals precedent, even when those courts lack appellate jurisdiction over a case.[339] Practitioners and district judges should not be required to apply "two different sets of law for an identical issue due to the different routes of appeal."[340] Additionally, it is "difficult to envisage how [a] district court might . . . disregard[] the established guidance of its circuit in favor of a guess" about how the Federal Circuit—a court that lacks an extensive body of precedent concerning the vast run of questions that arise in litigation—might view the issue.[341]

Several types of district court rulings are not subject to appellate review at all. For example, 28 U.S.C. § 1447(d) provides that a district court order remanding a case back to state court following removal due to lack of jurisdiction is not subject to appellate review, either by a court of appeals or the U.S. Supreme

335. *E.g.*, Dart Cherokee Basin Operating Co. v. Owens, 574 U.S. 81, 95 (2014) ("[T]he Tenth Circuit abused its discretion in effectively making the opposing view the law of the Circuit."); Pierce v. Underwood, 487 U.S. 552, 561 (1988); United States v. Am.-Foreign S.S. Corp., 363 U.S. 685, 689 (1960).

336. 28 U.S.C. § 1295(a)(1) (2012).

337. Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d 1564, 1573 (Fed. Cir. 1984).

338. *See id.* at 1574–75 ("[T]he Federal Circuit shall review procedural matters, that are not unique to patent issues, under the law of the particular regional circuit court where appeals from the district court would normally lie. . . . Where the regional circuit court has spoken on the subject, we must apply the law as stated." (footnotes omitted)).

339. *Id.* at 1573–74; *see also* Heat & Control, Inc. v. Hester Indus., Inc., 785 F.2d 1017, 1022 n.4 (Fed. Cir. 1986) (explaining that this approach arises from "policies promoting certainty in the law and *stare decisis*").

340. *Panduit Corp.*, 744 F.2d at 1574; *see also In re* Int'l Med. Prosthetics Research Assocs., Inc., 739 F.2d 618, 620 (Fed. Cir. 1984) ("Dealing daily with . . . procedural questions in all types of cases, a district court cannot and should not be asked to answer them one way when the appeal on the merits will go to the regional circuit . . . and in a different way when the appeal will come to [the Federal Circuit].").

341. Atari, Inc. v. JS&A Grp., Inc., 747 F.2d 1422, 1439 (Fed. Cir. 1984).

Court.[342] District court rulings denying motions to dismiss for lack of plausibility under *Twombly–Iqbal*,[343] or denying motions for summary judgment on the grounds that disputes of material fact exist,[344] are likewise unreviewable, even after final judgment.[345] Additionally, the Legislative Branch Appropriations Act of 2006 authorizes a three-judge district court panel to determine whether Congress's ordinary operations have been disrupted by a national catastrophe, but does not allow for appellate review in any court, including the U.S. Supreme Court.[346]

These complete prohibitions on appellate review cannot reasonably be construed as authorizing district courts to adjudicate these issues entirely on their own, unconstrained by precedent from any court. And in practice, district courts do not claim authority to adjudicate these matters completely unconstrained by precedent, even though such rulings are unreviewable. To the contrary, cases such as *Twombly*[347] and *Celotex Corp. v. Catrett*[348] presuppose that district courts will adjudicate motions to dismiss and for summary judgment consistent with precedent from structurally superior courts.

Conversely, even though rulings from magistrate judges[349] and bankruptcy courts[350] are appealable to district courts, "the majority view is that bankruptcy judges and magistrate judges are free to disagree with and disregard district court precedent."[351] This is consistent with the notion that magistrate and bankruptcy judges are not structurally inferior to district courts. Rather, a magistrate judge is an "adjunct" of the district court[352] and the bankruptcy court is a "unit" of the district court.[353] Under a Hybrid Theory, the unusual non-hierarchical incorporation

342. 28 U.S.C. § 1447(d) (2012) (stating that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise," unless the order was issued pursuant to 28 U.S.C. §§ 1442 or 1443); *see* Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 343 (1976) (holding that, under 28 U.S.C. § 1447(d), remands due to lack of jurisdiction are "not subject to challenge").

343. *See* FED. R. CIV. P. 12(b)(6); Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007). I am grateful to Professor Russell Gold for this suggestion.

344. *See* FED. R. CIV. P. 56(a).

345. *See* Ortiz v. Jordan, 562 U.S. 180, 183–84 (2011) (holding that a party may not "appeal an order denying summary judgment after a full trial on the merits" because "the full record developed in court supersedes the record existing at the time of the summary-judgment motion"); *see also* Nolfi v. Ohio Ky. Oil Corp., 675 F.3d 538, 545 (6th Cir. 2012) ("*Ortiz* also precludes our consideration of defendants' appeal from the district court's denial of its motion to dismiss.").

346. *See* Pub. L. No. 109-55, § 301(2), 119 Stat. 565, 588–89 (2005) (codified at 2 U.S.C. § 8(b)(4)(B) (2012)).

347. 550 U.S. at 544.

348. 477 U.S. 317, 322-24 (1986) (providing detailed guidance for trial courts to apply in determining whether a dispute of material fact exists for summary judgment purposes).

349. 28 U.S.C. § 636(b) (2012).

350. *Id.* § 158(a).

351. Mead, *supra* note 24, at 827 & n.286 (collecting cases).

352. Thomas v. Arn, 474 U.S. 140, 154 (1985); *see also* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 82–83 (1982). *But see* Brown v. United States, 748 F.3d 1045, 1069 (11th Cir. 2014) (arguing that bankruptcy and magistrate judges exercise "'the judicial Power of the United States,' despite the fact that they lack Article III protections").

353. 28 U.S.C. § 151.

of magistrate judges and bankruptcy courts into the structure of the judicial system, combined with the general lack of stare decisis effect for district court rulings,[354] supersedes the presumption that these entities must follow their respective district courts' rulings simply because their rulings are appealable there. Thus, when Congress adopts unconventional appellate structures, courts tend not to apply the Appellate Jurisdiction Theory of vertical stare decisis. To the contrary, the constitutional and statutory structure of the federal judiciary also plays a role in determining which precedents are binding.

Finally, the Hybrid Theory best furthers the key values underlying stare decisis. Fairness considerations dictate treating "like cases alike."[355] Allowing three-judge district court panels to reject circuit precedent that district judges sitting alone must apply allows for disparities among similarly situated rightsholders within the same jurisdiction. Applying vertical stare decisis to court of appeals precedent, in contrast, ensures that all litigants within a jurisdiction have their claims adjudicated and rights enforced equally, avoiding "arbitrary, and consequently unjust" disparities.[356]

The Hybrid Theory also facilitates predictability in the law.[357] Every court of appeals has issued several times more opinions, published and unpublished,[358] than the U.S. Supreme Court.[359] Appellate courts have resolved countless issues that remain open under Supreme Court precedent. And when the Court adjudicates an issue, later court of appeals rulings often clarify, refine, and apply the Court's principles at a much more granular level. If three-judge district courts apply their respective courts of appeals' precedents—rather than treat issues those courts have addressed as potentially open—government officials and other actors can more easily ascertain the legal standards they must follow, and right-sholders can more readily determine whether their rights have been violated.

---

354. *See* Camreta v. Greene, 563 U.S. 692, 709 n.7 (2011).

355. Schauer, *supra* note 24, at 595; *cf*. Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 546–47 (1982) (arguing that the principle of equality, on its own, is insufficient to drive judicial rulings because it does not identify which factors are relevant when attempting to ensure equal treatment).

356. Schauer, *supra* note 24, at 595–96; *see also* Payne v. Tennessee, 501 U.S. 808, 827 (1991) (explaining that stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles").

357. *See* Schauer, *supra* note 24, at 597; *Payne*, 501 U.S. at 827.

358. *See* FED. R. APP. P. 32.1(a)(i).

359. Between June 2017 and June 2018, the regional U.S. Courts of Appeals (excluding the U.S. Court of Appeals for the Federal Circuit) terminated 31,793 cases on the merits, for an average of 2,649 cases per jurisdiction. ADMIN. OFFICE OF THE U.S. COURTS, U.S. COURTS OF APPEALS STATISTICAL TABLES FOR THE FEDERAL JUDICIARY tbl.B-5 (June 30, 2018), https://www.uscourts.gov/statistics/table/b-5/statistical-tables-federal-judiciary/2018/06/30 [https://perma.cc/48Y5-4ZDN]. The U.S. Supreme Court, in contrast, issued full opinions for only 63 cases during the same time period (its 2017 Term). ADMIN. OFFICE OF THE U.S. COURTS, SUPREME COURT OF THE UNITED STATES JUDICIAL BUSINESS tbl.A-1 (Sept. 30, 2018), https://www.uscourts.gov/sites/default/files/data_tables/supcourt_a1_0930.2018.pdf [https://perma.cc/JE6D-2EFG]. Therefore, each regional court of appeals produces, on average, over forty times more merits dispositions than the U.S. Supreme Court annually.

Additionally, the Hybrid Theory promotes judicial economy.[360] As then-Judge Cardozo explained, "the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."[361] Requiring three-judge district courts to abide by circuit precedent alleviates the need for them to reconsider and resolve issues already settled by courts of appeals, allowing them to focus their efforts more precisely on the unique issues raised by the matter before them.

The Hybrid Theory likewise bolsters the legitimacy of the courts and stability of the law.[362] Applying vertical stare decisis "contributes to the integrity of our constitutional system of government" by "permit[ting] society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals."[363] Allowing district courts to disregard court of appeals precedent would likely undermine public confidence in their rulings. Justice Story's *Commentaries on the Constitution of the United States* explains that departures from stare decisis amount to "an approach to tyranny and arbitrary power, to the exercise of mere discretion, and to the abandonment of all the just checks upon judicial authority."[364] For all of these reasons, courts should reject a pure Appellate Jurisdiction Theory of vertical stare decisis in favor of the Hybrid Theory.

B. APPLYING THE HYBRID THEORY TO THREE-JUDGE DISTRICT COURTS

28 U.S.C. § 2284 provides the current framework for three-judge district courts.[365] When the judge initially assigned to a case determines—usually based on a motion filed by the plaintiff—that a federal statute allows or requires a three-judge court to hear it,[366] and the matter is neither completely foreclosed by Supreme Court precedent nor "obviously frivolous,"[367] he or she must refer the matter to the chief judge of the circuit. The chief judge must then appoint two

360. *Cf.* Caminker, *supra* note 26, at 36 ("One justification for an inferior court's duty to obey superior court precedent is the desire to conserve scarce judicial resources."); Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI.-KENT L. REV. 93, 95 (1989).

361. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921).

362. *See Payne*, 501 U.S. at 827 (holding that stare decisis "contributes to the actual and perceived integrity of the judicial process"); Harrison, *supra* note 24, at 531, 533 n.93 ("Rules of stare decisis are justified on the basis of their systemic effects, for example, with respect to stability in the law . . . . It is a commonplace that stability and predictability are central reasons for adherence to precedent."); *see also* Schauer, *supra* note 24, at 601–02 (debating the value of "stability for stability's sake").

363. Vasquez v. Hillery, 474 U.S. 254, 265 (1986); *see also* Bush v. Vera, 517 U.S. 952, 985 (1996) (plurality opinion) ("Our legitimacy requires, above all, that we adhere to *stare decisis*, especially in such sensitive political contexts . . . where partisan controversy abounds.").

364. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 378, at 350 (Hilliard, Gray, & Co. 1833).

365. 28 U.S.C. § 2284 (2012).

366. *Id.* § 2284(b)(1).

367. Shapiro v. McManus, 136 S. Ct. 450, 456 (2015) (quoting Goosby v. Osser, 409 U.S. 512, 518 (1973)).

additional judges, including at least one circuit judge, to hear the case.[368] Even after the three-judge panel is convened, a single judge may "conduct all proceedings" in the case except for hearing a trial, ruling on a motion to grant or vacate a preliminary or permanent injunction, appointing a special master, and entering a final judgment.[369] The panel's rulings either granting a preliminary or permanent injunction, or denying it on the merits, may be directly appealed to the U.S. Supreme Court;[370] most other rulings are appealable to the courts of appeals.[371]

Section 2284 itself requires that three-judge district courts adjudicate constitutional challenges to congressional or state legislative districts.[372] Other federal laws that authorize or require three-judge district courts to adjudicate certain claims often expressly incorporate section 2284's provisions by reference[373] and, reinforcing section 1253's jurisdictional grant, provide for direct appeals of the courts' final judgments to the U.S. Supreme Court.[374]

Most modern three-judge district court requirements relate to election law. For example, three-judge courts, with direct appeal as of right to the U.S. Supreme Court, are required to adjudicate suits for injunctive relief brought by the Attorney General to enforce the Twenty-Sixth Amendment,[375] various provisions of the Voting Rights Act of 1965 (VRA),[376] and constitutional restrictions on poll taxes.[377] Bailout litigation under section 4(a) of the VRA, as well as preclearance litigation under section 5, likewise must be brought before three-judge courts, with the U.S. Supreme Court exercising appellate jurisdiction.[378] When the Attorney General seeks a determination under the VRA that a defendant jurisdiction has engaged in a pattern or practice of racial discrimination with regard to

368. 28 U.S.C. § 2284(b)(1).

369. *Id.* § 2284(b)(3).

370. *Id.* § 1253; MTM, Inc. v. Baxley, 420 U.S. 799, 804 (1975) (per curiam) ("[A] direct appeal will lie to [the Supreme] Court under § 1253 from the order of a three-judge federal court denying interlocutory or permanent injunctive relief only where such order rests upon resolution of the merits of the constitutional claim presented below.").

371. *See infra* Part IV.

372. 28 U.S.C. § 2284(a).

373. *See infra* notes 375–78, 381–91, 394 and accompanying text; *see also infra* note 400.

374. Some statutes requiring certain cases to be heard by three-judge district courts provide different appellate mechanisms, and a few preclude appellate review altogether. *See infra* notes 392, 395, 399, and accompanying text; *see also infra* note 400.

375. 52 U.S.C. § 10701(a)(1)–(2) (Supp. II. 2015).

376. *Id.* § 10504 (requiring three-judge courts to adjudicate actions by the Attorney General challenging racial discrimination in voting rights, as well as violations of absentee ballot provisions concerning presidential elections or bilingual voting requirements).

377. *Id.* § 10306(c).

378. 52 U.S.C. §§ 10303(a)(5), 10304(a). Section 5's preclearance requirements apply only to covered jurisdictions, as determined by section 4(b) of the statute. *Id.* §§ 10303(b), 10304(a). In *Shelby County v. Holder*, the U.S. Supreme Court held that section 4(b)'s formula for identifying covered jurisdictions was unconstitutional. 570 U.S. 529, 557 (2013). As a result, section 5 is not presently in force anywhere in the nation. A handful of jurisdictions that federal courts have found engaged in intentional racial discrimination still remain subject to preclearance requirements under section 3(c)'s "bail-in" provisions. 52 U.S.C. § 10302(c); *see* Edward K. Olds, Note, *More Than "Rarely Used": A Post-*Shelby *Judicial Standard for Section 3 Preclearance*, 117 COLUM. L. REV. 2185, 2196–97 (2017).

voting, either party may require that the case be heard by a three-judge court.[379] This provision contains its own procedure for convening a three-judge panel, however, and does not incorporate section 2284.[380]

Three-judge district courts also have jurisdiction over certain kinds of campaign-finance cases. They must hear any suit to "implement or construe" the Presidential Election Campaign Fund Act, which governs matching public funds in presidential elections.[381] Such panels are governed by section 2284, and the U.S. Supreme Court has direct appellate jurisdiction over any appeals.[382] When the FEC sues under the Act for injunctive or declaratory relief, it also has discretion to demand that the matter be heard by a three-judge district court under section 2284, with direct appeal to the U.S. Supreme Court.[383] Challenges to the constitutionality of the Bipartisan Campaign Reform Act (commonly known as the McCain–Feingold Act) filed before 2007 had to be heard by a three-judge panel of the U.S. District Court for the District of Columbia, convened pursuant to section 2284,[384] with the "final decision" reviewable in the U.S. Supreme Court.[385] For any actions brought in 2007 or afterwards, the plaintiff may choose whether to follow the pre-2007 procedure, or instead have the case proceed normally before a single judge and through the ordinary channels of appellate review.[386]

Outside the context of election law, Congress requires three-judge district courts to adjudicate certain types of constitutional cases, including challenges to: prison conditions in which the plaintiffs seek release as a remedy, under the Prison Litigation Reform Act of 1995 (PLRA);[387] the use of statistical sampling methods in conducting a census;[388] the Children's Internet Protection Act (CIPA) (facial challenges only);[389] must-carry provisions of the Cable Television

379. 52 U.S.C. § 10101(g).

380. *Id*. This provision further specifies that "[a]n appeal from the final judgment of such court will lie to the Supreme Court." *Id*.

381. Presidential Election Campaign Fund Act, Pub. L. No. 92-178, sec. 801, § 9011(b)(1), 85 Stat. 497, 570 (1971) (codified at 26 U.S.C. § 9011(b)(1) (2012)); *see* FEC v. Nat'l Conservative Political Action Comm'n, 470 U.S. 480, 484–85 (1985) (holding that § 9011(b) applies to suits to determine the constitutionality of the Act).

382. *Id*. sec. 801, § 9011(b)(2) (codified at 26 U.S.C. § 9011(b)(2)).

383. *Id*. sec. 801, § 9010(c) (codified at 26 U.S.C. § 9010(c)).

384. Pub. L. No. 107-155, § 403(a)(1), (a)(4), (d)(1), 116 Stat. 81, 113–14 (2002) (codified as amended at 52 U.S.C. § 30110 note).

385. *Id*. § 403(a)(3).

386. *Id*. § 403(d)(2).

387. Pub. L. No. 104-134, sec. 802(a), § 3626(a)(3)(B), 110 Stat. 1321-66, 1321-67 (1996) (codified at 18 U.S.C. § 3626(a)(3)(B)).

388. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998 (Census Act), Pub. L. No. 105-119, § 209(e)(1), 111 Stat. 2440, 2482 (1997); *see* Dep't of Commerce v. U.S. House of Representatives, 525 U.S. 316, 343 (1999) (declining to consider the constitutionality of using statistical sampling to conduct the census because the Census Act prohibits its use).

389. Pub. L. No. 106-554 app. D, § 1741(a), 114 Stat. 2763, 2763A-351 to -352 (2000); *see* United States v. Am. Library Ass'n, 539 U.S. 194, 213 (2003) (plurality opinion) (rejecting facial challenge to

Consumer Protection and Competition Act of 1992 (CTCPCA);[390] and the budget sequestration provisions of the Gramm–Rudman–Hollings Balanced Budget Act of 1985, as amended.[391] Each of these laws contains different provisions governing appellate review; some authorize direct appeals to the U.S. Supreme Court under a narrower range of circumstances than permitted by 28 U.S.C. § 1253.[392] The Court generally does not construe such provisions as implicitly limiting or repealing section 1253, however. Instead, it usually exercises direct appellate jurisdiction over a three-judge district court's rulings to section 1253's full extent.[393]

Certain other civil suits must be heard by three-judge panels convened under section 2284 as well, such as challenges to emergency declarations under the Legislative Branch Appropriations Act of 2006.[394] Those rulings are not subject to any appeal.[395] The Civil Rights Act of 1964 requires a three-judge court to hear any action by the Attorney General to prevent discrimination in places of public accommodations or employment if the Attorney General certifies that the matter

CIPA provision requiring public libraries to install Internet filtering software to limit access to obscene and pornographic material as a condition of receiving federal funds).

390. Pub. L. No. 102-385, § 23, 106 Stat. 1460, 1500 (1992) (codified at 47 U.S.C. § 555(c)(1)); *see* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 224–25 (1997) (upholding constitutionality of "must-carry" provisions).

391. Pub. L. No. 99-177, § 274(a)(5), 99 Stat. 1037, 1098–99 (1985) (codified at 2 U.S.C. § 922(a)(5)) (allowing any member of Congress to challenge the constitutionality or validity of a sequestration order, and a member of Congress or any person adversely affected by a sequestration order to challenge the constitutionality of the statute authorizing it, before a three-judge district court pursuant to 28 U.S.C. § 2284). Challenges under this statute must be filed in the U.S. District Court for the District of Columbia. *Id*. § 274(a)(1)-(a)(3). The U.S. Supreme Court held the original version of the sequestration statute unconstitutional for violating separation-of-powers principles, Bowsher v. Synar, 478 U.S. 714, 736 (1986), but Congress later amended it to address the Court's concerns. *See* Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987, Pub. L. No. 100-119, 101 Stat. 754; *see also* Budget Control Act of 2011, Pub. L. No. 112-25, § 103, 125 Stat. 240, 246 (2011); Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 13101, 104 Stat. 1388, 1388-574 to -601.

392. Gramm–Rudman–Hollings broadly provides that "any order" of the three-judge panel is subject to direct appeal as of right to the U.S. Supreme Court. Gramm–Rudman–Hollings Balanced Budget Act § 274(b). CIPA and the CTCPCA allow direct Supreme Court review of interlocutory or final judgments holding those statutes unconstitutional. Children's Internet Protection Act, app. D § 1741(b); Cable Television Consumer Protection and Competition Act § 23. The Census Act allows any final judgments or permanent injunctions to be directly appealed to the U.S. Supreme Court. Census Act § 209(e)(1). The PLRA does not contain any special provisions regarding Supreme Court review. *See* Prison Litigation Reform Act, sec. 802(a), § 3626(a)(3)(B).

393. *See, e.g*., *Turner Broad. Sys., Inc*., 520 U.S. at 187–89 (exercising jurisdiction pursuant to section 1253 over a direct appeal after a three-judge panel affirmed the constitutionality of the CTCPCA, even though the CTCPCA itself authorizes direct appeals to the U.S. Supreme Court only when it is held unconstitutional); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 634–36 (1994) (same); *cf*. Brown v. Plata, 563 U.S. 493, 510, 512 (2011) (reviewing a three-judge district court's prisoner release order under the PLRA pursuant to § 1253, even though the PLRA does not expressly authorize direct appeals to the U.S. Supreme Court).

394. Pub. L. No. 109-55, § 301(2), 119 Stat. 565, 588–89 (2005) (codified at 2 U.S.C. § 8(b)(4)(B) (2012)).

395. *Id*. § 301(2).

is of "general public importance."[396] Rather than rely on section 2284, the Civil Rights Act contains its own procedure for convening the panel.[397]

The Public Readiness and Emergency Preparedness Act requires a three-judge panel of the U.S. District Court for the District of Columbia to adjudicate pretrial motions in lawsuits arising from death or serious injury due to vaccinations, though the trials themselves must be conducted by a single judge.[398] The Act grants the U.S. Court of Appeals for the D.C. Circuit jurisdiction to hear interlocutory appeals of the panel's rulings on dispositive motions concerning certain statutory defenses; the ordinary channels of appellate review otherwise govern such cases.[399] Other laws requiring three-judge courts to hear certain kinds of disputes have become obsolete.[400]

In addition to the general theoretical reasons supporting the Hybrid Theory discussed above, several other structural, practical, and legal-process considerations

396. Pub. L. No. 88-352, §§ 206(b), 707(b), 78 Stat. 241, 245, 262 (codified at 42 U.S.C. §§ 2000a-5(b), 2000e-6(b) (2012)). The Act grants litigants the right to appeal a final judgment directly to the U.S. Supreme Court. *Id*.; *see, e.g*., Heart of Atlanta Motel v. United States, 379 U.S. 241, 242–43 (1964).

397. Civil Rights Act of 1964 §§ 206(b), 707(b).

398. Pub. L. No. 109-148, sec. 2, § 319F-3(d)(1), (e)(5), 119 Stat. 2680, 2824–26 (2005) (codified at 42 U.S.C. § 247d-6d(d)(1), (e)(5)).

399. *See id*. § 319F-3(e)(5), (10).

400. Congress required a three-judge district court to hear challenges to the U.S. Railway Association's final system plan for railway services in the Northeast and Midwest. Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, § 209(b), 87 Stat. 985, 999–1000 (1974) (codified as amended at 45 U.S.C. § 719(b)(1)). Certain rulings were not subject to appeal in any other court, *id*. § 209(b), while others could be appealed as of right directly to the U.S. Supreme Court, *id*. § 303(d). Rather than rely on § 2284, the statute provided that the three-judge court would be appointed by the Judicial Panel on Multidistrict Litigation. *Id*. § 209(b). The U.S. Railway Association was abolished in 1987. Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 4031(a)(1), 100 Stat. 1874, 1906 (codified at 45 U.S.C. § 1341(a)(1)).

Similarly, a three-judge panel of the U.S. District Court for the District of Alaska was required to adjudicate constitutional challenges to the Alaska Native Claims Settlement Act Amendments of 1987. Pub. L. No. 100-241, § 16(b)(1), 101 Stat. 1788, 1813–14 (1988). Any such constitutional challenges had to be brought within one year of certain events or two years of the law's enactment, depending on the nature of the claim. *Id*. § 16(a)(1)–(3). The Act specified that the panel's final judgment was directly appealable to the U.S. Supreme Court. *Id*. § 16(b)(1).

Congress also required three-judge district courts convened under section 2284 to adjudicate constitutional challenges under the Ineligibility Clause, U.S. CONST. art. I, § 6, cl. 2, to joint resolutions it enacted to enable former Senator William B. Saxbe to serve as Attorney General, Act of Dec. 10, 1973, Pub. L. No. 93-178, § 2(b), 87 Stat. 697, 697; former Senator Edmund Muskie to serve as Secretary of State, Act of May 3, 1980, Pub. L. No. 96-241, § 2(b), 94 Stat. 343, 343; former Senator Lloyd Bentsen to serve as Secretary of the Treasury, Act of Jan. 19, 1993, Pub. L. No. 103-2, § (b)(2), 107 Stat. 4, 4; and former Senator Hillary Clinton to serve as Secretary of State, Act of Dec. 19, 2008, Pub. L. No. 110-455, § 1(b)(2), 122 Stat. 5036, 5036. Most of the resolutions allowed litigants to appeal these rulings directly to the U.S. Supreme Court as of right. Pub. L. No. 93-178, § 2(b), 87 Stat. 697, 697 (Saxbe); Pub. L. No. 103-2, § (b)(3)(A), 107 Stat. at 4 (Bentsen); Pub. L. No. 110-445, § 1(b)(3)(A), 122 Stat. at 5036 (Clinton). The resolution for Senator Muskie, however, provided for direct Supreme Court review by certiorari. Pub. L. No. 96-241, § 2(b), 94 Stat. 343, 343.

Other trial courts that sit in three-judge panels include the Court of International Trade in cases involving either constitutional challenges or other issues with "broad or significant implications in the administration or interpretation of the customs laws," 28 U.S.C. § 255(a) (2012); *see also* 19 U.S.C. § 1516a(g)(4)(B), and the U.S. Court of Federal Claims in congressional reference cases, 28 U.S.C. § 2509(a). Parties are not entitled to direct appeal as of right to the U.S. Supreme Court in these matters.

specific to these modern three-judge court requirements confirm that such panels are bound by court of appeals precedent. *First*, most basically, three-judge district courts typically must be comprised of the judge to whom the case was originally assigned[401] along with two other judges, at least one of whom must be a circuit judge, presumably of that circuit.[402] The most reasonable implication of Congress's decision to include a circuit judge on three-judge panels is that it would help temper the district court's decisionmaking by ensuring conformity with the law of the circuit, reducing the likelihood of idiosyncratic, rash, or otherwise extreme decisions.

Second, 28 U.S.C. § 2284 requires that "[a] district court of three judges" adjudicate the specified categories of cases.[403] Congress's decision to expressly specify that the panel would be "[a] district court," rather than an ad hoc tribunal outside the structure of the regular court system, suggests that the general rules governing district courts—including their obligation to follow circuit precedent—apply.[404]

Third, a hybrid interpretation best furthers the purposes underlying three-judge court requirements. Congress required three-judge courts to hear certain types of cases over the course of the twentieth century specifically to constrain trial courts' discretion and prevent them from either invalidating state laws or refusing to enforce federal civil-rights requirements through idiosyncratic reasoning.[405] As Alexander Hamilton observed in *The Federalist Papers*, "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents . . . ."[406] Allowing district courts to disregard court of appeals precedent and reach their own conclusions about issues like redistricting would frustrate these goals by giving them greater latitude to adopt outlier interpretations.

Fourth, the U.S. Supreme Court has repeatedly affirmed that three-judge courts typically may exercise supplemental jurisdiction over claims that do not independently fall within their jurisdiction.[407] Allowing such courts to ignore circuit

401. This will typically be a district judge, but could also be a circuit judge or Supreme Court Justice, sitting by designation on the district court. *See* 28 U.S.C. § 132(b).

402. *Id.* § 2284(b)(1). The circuit judge is selected and assigned by the "chief judge of the circuit" in which the district court sits. *Id.*

403. *Id.* § 2284(a).

404. *See, e.g.*, Lewis v. Rockefeller, 431 F.2d 368, 371 (2d Cir. 1970) (holding that a three-judge district court is bound by circuit precedent because it "sit[s] as a district court"); Russell v. Hathaway, 423 F. Supp. 833, 835 (N.D. Tex. 1976) ("A three-judge court is bound by apposite decisions of the Court of Appeals for its circuit. The addition by Congress in the three-judge court acts of a second district judge and a Circuit Judge together with direct appeal to the Supreme Court was not a grant of authority with elevated precedential stature but a withdrawal of power from a single judge."); Sunshine Anthracite Coal Co. v. Adkins, 31 F. Supp. 125, 127 (E.D. Ark. 1940) (three-judge court) ("This [three-judge] court's jurisdiction is that of a District Court and it is bound to follow unreversed and unmodified decision[s] by the Circuit Court of Appeals of the circuit."), *aff'd*, 310 U.S. 381 (1940).

405. *See supra* notes 182–83, 196–200, 236, 240–42, 269–72 and accompanying text.

406. THE FEDERALIST NO. 78, at 529 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

407. *See, e.g.*, Rosado v. Wyman, 397 U.S. 397, 404–05 (1970); Fla. Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73, 80–81 (1960).

precedent would have ramifications for areas of law beyond the specific causes of action Congress has authorized them to adjudicate.

Finally, practical considerations counsel strongly in favor of requiring three-judge district courts to accept court of appeals precedent as binding. Binding precedent narrows the scope of parties' disputes. District courts often rely on appellate precedent to not only guide their merits determinations, but also to determine the rules governing innumerable procedural and ancillary issues including personal jurisdiction, justiciability, discovery, the standards governing dispositive motions, and evidentiary rulings. Accepting court of appeals precedent as binding alleviates the need for parties to waste time and resources attempting to persuade a three-judge district court panel to reconsider the wide range of basic rules, procedures, and principles that typically govern the adjudication of cases in that jurisdiction. In conclusion, both the Hybrid Theory of vertical stare decisis, as well as additional considerations specific to three-judge district courts, establish that such courts should treat their respective circuits' precedents as binding.

Professor Jeffrey C. Dobbins is a proponent of the Structural Theory. He has suggested that, when Congress creates a "nonstandard appellate process[]," the default presumption should be that it neither "result[s] in cross-circuit binding precedent, nor in binding precedential effect on any courts not regularly in a direct appellate relationship."[408] Congress may overcome this presumption if it "clearly states its view to the contrary."[409] Such a clear-statement approach, he contends, makes it easier to determine which entities' rulings have binding effect within nonstandard appellate structures, limits the potential for disuniformity among different courts' rulings on an issue, and recognizes Congress's primacy in authorizing departures from the ordinary rules of precedent that flow from the Evarts Act.[410]

His proposal, however, does not directly resolve whether court of appeals precedent is binding on three-judge district court panels. Requiring a three-judge panel to follow the precedents of its regional court of appeals does not violate Dobbins's recommended prohibition on "cross-circuit binding precedent."[411] It is unclear how the second part of his proposed standard applies in this context, however. He argues that a court's precedent should not have binding stare decisis effect on other courts with which it is not "regularly in a direct appellate relationship."[412] On the one hand, regional courts of appeals "regularly" stand "in a direct appellate relationship" with federal district courts, suggesting their precedent should govern three-judge district court panels.[413] On the other hand, three-judge district court panels themselves are, in many respects, not "regularly" subject to

408. Dobbins, *supra* note 24, at 1490.
409. *Id*.
410. *See id*. at 1490–94.
411. *Id*. at 1490.
412. *Id*.
413. *See id*.

regional courts of appeals' appellate jurisdiction.[414] Consequently, Professor Dobbins's theory could arguably support either conclusion.

Professors Douglas and Solimine offer three main reasons why three-judge district courts are not bound by circuit precedent.[415] First, invoking the Appellate Jurisdiction Theory, they argue that three-judge district courts need not follow court of appeals precedent because many of their rulings are appealable only to the U.S. Supreme Court.[416] As discussed earlier, both early practice under the Evarts Act, as well as the history and development of the modern three-judge court statute, strongly suggest that Congress did not legislate against the backdrop of the Appellate Jurisdiction Theory.[417] Moreover, a Hybrid Theory both provides a much more descriptively accurate explanation of how other unconventional appellate structures operate and most effectively furthers the goals of stare decisis.

Second, Professors Douglas and Solimine contend that "unnecessarily binding three-judge district courts would take away an aspect of their independence."[418] Nothing in the legislative history of three-judge courts, however, suggests that Congress intended them to be "independent." To the contrary, one of Congress's main reasons for authorizing three-judge courts over the course of their history was to prevent judges from making rash, idiosyncratic, or legally unwarranted rulings.[419]

Finally, they maintain that allowing three-judge district courts to disregard circuit precedent would increase the likelihood that such courts reach "correct" rulings.[420] There is no reason to believe, however, that three-judge district courts are categorically more likely than three-judge court of appeals panels to identify constitutionally or legally correct rules of law, regardless of the metric by which accuracy is measured. To the contrary, district courts are institutionally geared toward case processing and factfinding, whereas courts of appeals are primarily designed to resolve complex legal issues.[421] Allowing district courts to adjudicate cases free of court of appeals precedent is unlikely to enhance the quality or accuracy of their rulings. Rather, to the extent their rulings are inconsistent with the overall fabric of law within the circuit, they may well be systematically inferior.

IV. THE APPELLATE JURISDICTION THEORY AND THREE-JUDGE DISTRICT COURTS

Even if one accepts the Appellate Jurisdiction Theory of vertical stare decisis, modern three-judge district courts convened under section 2284 should still treat

414. *See* 28 U.S.C. § 1253 (2012). *But see infra* Part IV.

415. Douglas & Solimine, *supra* note 14, at 441.

416. *Id.* at 441–42 ("A circuit court cannot review the decision of a three-judge district court, so a three-judge district court need not, as a matter of formal judicial decisionmaking, adhere to circuit precedent.").

417. *See supra* Parts I–II.

418. Douglas & Solimine, *supra* note 14, at 444.

419. *See supra* notes 182–83, 196–200, 236, 240–42, 269–72 and accompanying text.

420. Douglas & Solimine, *supra* note 14, at 444.

421. Caminker, *supra* note 24, at 846.

their courts of appeals' precedents as binding. The Appellate Jurisdiction Theory advocated by Professors Douglas and Solimine provides that a trial court is only required to apply the precedent of courts with appellate jurisdiction over the particular case before it (though the trial court may also choose to follow whatever persuasive precedents it wishes). Although federal law provides that three-judge district courts' rulings granting or denying injunctions are appealable directly to the U.S. Supreme Court,[422] courts of appeals may nevertheless review a wide range of other issues within such cases, many of which may directly impact the merits.[423]

First, three-judge district courts are required, and direct Supreme Court review is available, only for justiciable cases.[424] Before convening a three-judge panel under section 2284, a single district judge must confirm that the plaintiff has standing,[425] its claims are ripe,[426] the case is not moot,[427] and the matter does not involve a political question.[428] If the district judge determines the case is not justiciable for any of these reasons, he or she must dismiss the complaint for lack of subject-matter jurisdiction without convening a three-judge panel.[429]

Likewise, if the judge convenes a three-judge panel, and the panel itself determines the case is not justiciable, the panel must either dismiss the case, or

422. *See* 28 U.S.C. § 1253 (2012).

423. *See generally* MTM, Inc. v. Baxley, 420 U.S. 799, 804 (1975) (per curiam) ("[A] direct appeal will lie to [the Supreme] Court under § 1253 from the order of a three-judge federal court denying interlocutory or permanent injunctive relief only where such order rests upon resolution of the merits of the constitutional claim presented below.").

424. Gonzalez v. Automatic Emps. Credit Union, 419 U.S. 90, 100 (1974) ("A three-judge court is not required where . . . the complaint is not justiciable in the federal courts.").

425. *See, e.g.*, Feinberg v. FDIC, 522 F.2d 1335, 1341 (D.C. Cir. 1975) ("[A] single district judge may dismiss an application for a three-judge court for lack of standing or jurisdiction without determining the substantiality of the constitutional questions presented."); Wernick v. Matthews, 524 F.2d 543, 546 (5th Cir. 1975) ("[U]pon a finding of lack of standing, a single judge could have properly refused to convene the three-judge court and could himself have entered the order dismissing the complaint."). Although not presently required by Supreme Court doctrine, a district court should determine the standing of each plaintiff in the case to determine the proper scope of relief. *See* Aaron-Andrew P. Bruhl, *One Good Plaintiff Is Not Enough*, 67 DUKE L.J. 481, 543 (2017).

426. *See, e.g.*, Pichler v. Jennings, 347 F. Supp. 1061, 1064 (S.D.N.Y. 1972) ("Questions of ripeness and standing imply jurisdictional issues and it is thus necessary that these questions be reviewed initially by the single judge, rather than by reference to a three-judge Court.").

427. *See, e.g.*, Gray v. Bd. of Trs., 342 U.S. 517, 518 (1952) (affirming dissolution of three-judge district court because plaintiffs' claims had been mooted); Middlewest Motor Freight Bureau v. United States, 433 F.2d 212, 243 (8th Cir. 1970) (holding that a three-judge court is unnecessary when the claims within its jurisdiction are moot); Young v. Walker, 435 F. Supp. 1089, 1094 (M.D. Fla. 1977) ("Where one of the essential claims that require a three-judge district court becomes moot before a three-judge court is convened, it is obvious that one need not be convened."); *see also* Buchanan v. Evans, 423 U.S. 963, 973–74 (1975) (Rehnquist, J., dissenting) (concluding that a moot claim need not be heard by a three-judge district court).

428. *Cf. supra* note 41 (discussing the role of three-judge courts in adjudicating the justiciability of political gerrymandering claims).

429. *See, e.g.*, Republican Party of La. v. FEC, 146 F. Supp. 3d 1, 8–9 (D.D.C. 2015), *summarily aff'd*, 137 S.Ct. 2178 (2017) (mem.); Sharrow v. Peyser, 443 F. Supp. 321, 323 (S.D.N.Y. 1977), *aff'd*, 582 F.2d 1271 (2d Cir. 1978) (mem.).

dissolve and allow the original district judge to dismiss it.[430] Either way, under modern practice,[431] when the district court concludes the plaintiff's claims are not justiciable, the plaintiff must appeal to the court of appeals, rather than to the U.S. Supreme Court.[432]

Although justiciability is distinct from the merits of a claim, it requires courts to consider merits-related factors. For example, to assess whether the plaintiff in any type of gerrymandering case has standing, the court must consider what gerrymandering precedents say about the types of redistricting-related harms that qualify as legally cognizable.[433] Likewise, the political question doctrine's applicability depends, in large part, on whether the plaintiff has presented judicially manageable standards for adjudicating its claim.[434] Thus, at the very least, the Appellate Jurisdiction Theory dictates that district courts must apply court of appeals precedents concerning justiciability. Allowing district courts to later disregard those precedents at the merits stage would be untenable, potentially leading to internally inconsistent or incoherent rulings within the same case.

Second, a three-judge panel may be convened, and direct appeal to the U.S. Supreme Court is available, only when a case presents a "substantial federal question."[435] As the U.S. Supreme Court recently reaffirmed in *Shapiro v. McManus*, a plaintiff cannot invoke a federal court's jurisdiction with an insubstantial claim—one that is "essentially fictitious," "obviously frivolous," or "obviously without merit."[436]

When a single judge determines that a complaint invoking section 2284 does not present a substantial federal question, he or she must dismiss it for lack of subject-matter jurisdiction without convening a three-judge panel.[437] Likewise, if

---

430. Gonzalez v. Automatic Emps. Credit Union, 419 U.S. 90, 101 (1974) ("Where the three-judge court perceives a ground justifying both dissolution and dismissal, the chronology of decisionmaking is typically a matter of mere convenience or happenstance.").

431. Historically, if a district court did not convene a three-judge panel, or the panel dissolved, the plaintiff's remedy was to seek a writ of mandamus from the U.S. Supreme Court ordering the lower court to convene such a panel. *See Ex parte* Metro. Water Co., 220 U.S. 539, 545–46 (1911). *Gonzalez* explained that the Court abandoned that approach because "only a narrow construction" of section 1253's direct appeal requirements furthered Congress's policy "of minimizing the mandatory docket of th[e] Court in the interests of sound judicial administration." 419 U.S. at 98; *cf.* Phillips v. United States, 312 U.S. 246, 251 (1941) (recognizing that three-judge court requirements are not "a measure of broad social policy to be construed with great liberality, but . . . an enactment technical in the strict sense of the term").

432. *Gonzalez*, 419 U.S. at 101 ("[W]hen a three-judge court denies a plaintiff injunctive relief on grounds which, if sound, would have justified dissolution of the court as to that plaintiff, or a refusal to request the convention of a three-judge court *ab initio*, review of the denial is available only in the court of appeals.").

433. *See, e.g.*, United States v. Hays, 515 U.S. 737, 744–45 (1995) (discussing standing requirements for racial gerrymandering claims); Shaw v. Reno, 509 U.S. 630, 641–42 (1993) (considering the circumstances under which non-minority plaintiffs may assert racial gerrymandering claims).

434. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2502–07 (2019); *see, e.g.*, *supra* note 41 (discussing lower-court rulings concerning the justiciability of political gerrymandering claims).

435. Shapiro v. McManus, 136 S. Ct. 450, 455 (2015); *Ex parte* Poresky, 290 U.S. 30, 31 (1933) (per curiam).

436. 136 S. Ct. at 456 (quoting Goosby v. Osser, 409 U.S. 512, 518 (1973)).

437. *See id.* at 455–56.

a three-judge panel determines that a case does not present a substantial federal question, it must either dismiss the case or dissolve so that a single judge may do so.[438] In cases that do not present a substantial federal question, only the court of appeals, and not the U.S. Supreme Court, has appellate jurisdiction.[439] If a three-judge panel adjudicates a case that the U.S. Supreme Court deems insubstantial, the Court will overturn its ruling and remand the matter for entry of judgment by a single judge, to be potentially followed by an appeal to the court of appeals.[440]

As explained above, the Court has held that a claim is insubstantial if the Court's own decisions "foreclose the subject" or the claim is "obviously without merit."[441] This formulation appears to recognize the possibility that a plaintiff's claims may be "obviously without merit" even if previous decisions of the Court itself do not "foreclose the subject." Moreover, the Court's ruling in *Schneider v. Rusk* provides at least some support for the notion that court of appeals precedent may render a plaintiff's claim insubstantial.[442]

The plaintiff in *Schneider* challenged the constitutionality of a federal law stripping U.S. citizenship from any naturalized citizen who, following naturalization, returned to live for three years in the country in which he or she was born or previously held citizenship.[443] The district court refused to convene a three-judge panel because it concluded the plaintiff's claim was insubstantial, noting that the D.C. Circuit had previously upheld the constitutionality of a comparable law.[444] The court of appeals affirmed, but the U.S. Supreme Court reversed, holding that the Court's intervening rulings relating to loss of citizenship had rendered the challenge substantial.[445] The Court never suggested that it was improper for the trial court to reject a claim as insubstantial based solely on a court of appeals precedent. To the contrary, *Schneider*'s analysis suggests that a court of appeals precedent could well be sufficient to eliminate the need for a three-judge court.

Thus, a district court's determination that a plaintiff's constitutional claims are insubstantial is subject to review in the court of appeals. Although substantiality is a jurisdictional inquiry distinct from the merits, it is closely related insofar as the court must determine whether the plaintiff's claims are inconsistent with

438. *See id.*

439. *See* Wilson v. City of Port Lavaca, 391 U.S. 352, 352 (1968) (per curiam); *see also* Okla. Gas & Elec. Co. v. Okla. Packing Co., 292 U.S. 386, 391–92 (1934) ("When it becomes apparent that the plaintiff has no case for three judges . . . direct appeal [to the Supreme Court] must fail . . . .").

440. *See* Gully v. Interstate Nat. Gas Co., 292 U.S. 16, 18 (1934) (per curiam) (reversing injunction entered by three-judge district court because "[n]o substantial question was presented" and, accordingly, "there was no occasion for constituting a court of three judges").

441. *Ex parte* Poresky, 290 U.S. 30, 32 (1933) (per curiam) (quoting Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 105 (1933)); *accord* Hagans v. Lavine, 415 U.S. 528, 537 (1974); Cal. Water Serv. Co. v. City of Redding, 304 U.S. 252, 255 (1938) (per curiam); *see also Shapiro*, 136 S. Ct. at 455–56.

442. *See* 372 U.S. 224, 225 (1963) (per curiam).

443. *Id.* at 224–25 (citing Immigration and Nationality Act of 1952, ch. 477, § 352(a)(1), 66 Stat. 163, 269).

444. *Id.* at 225 (citing Lapides v. Clark, 176 F.2d 619 (D.C. Cir. 1949)).

445. *Id.*

precedent. It would be untenable to require a three-judge district court to consider court of appeals rulings to determine the substantiality of a plaintiff's claims, yet allow the court to disregard those rulings at the merits stage.

Third, a three-judge court is likewise prohibited from adjudicating cases that appear to fall within its jurisdiction when a plaintiff's claims are obviously meritorious and the challenged legal provisions are clearly unconstitutional.[446] In such cases, a single district judge is required to grant relief, and the resulting judgment is directly reviewable only in the court of appeals, not the U.S. Supreme Court.[447] In *Bailey v. Patterson*, the plaintiffs challenged state laws requiring transportation services and facilities to be racially segregated.[448] The district court convened a three-judge panel, then abstained from adjudicating the case to give the state courts an opportunity to construe the challenged provisions.[449]

The U.S. Supreme Court reversed, holding that the district court had erred in convening a three-judge panel.[450] It explained that "three judges are . . . not required when, as here, prior decisions make frivolous any claim that a state statute on its face is not unconstitutional."[451] Because the Court had "settled beyond question that no State may require racial segregation of interstate or intrastate transportation facilities," the district judge should not have convened a three-judge panel, but rather adjudicated the claim himself, with direct appeal to the court of appeals rather than the U.S. Supreme Court.[452]

Bailey's jurisdictional holding is almost certainly wrong. The Court framed its conclusion as a necessary implication of the general principle, discussed above,[453] that a litigant may not invoke federal question jurisdiction with a federal claim that is "wholly insubstantial, legally speaking nonexistent."[454] That rule requires federal courts to determine whether a substantial federal issue appears on the face of a well-pleaded complaint.[455] A plaintiff cannot establish federal jurisdiction by bringing a claim that is squarely foreclosed by binding precedent.[456] A plaintiff whose claims are clearly established by binding precedent, in contrast, properly invokes a federal court's jurisdiction because its claims are not only substantial, but meritorious. If the Court consistently applied its holding in *Bailey*, a plaintiff with a clearly established constitutional claim would be not only denied the chance to litigate before a three-judge district court, but wholly barred from

446. Bailey v. Patterson, 369 U.S. 31, 33 (1962) (per curiam).
447. *See id*. at 34.
448. *See id*. at 32.
449. *Id*.
450. *Id*. at 34.
451. *Id*. at 33.
452. *Id*. at 33–34.
453. *See supra* notes 436, 441 and accompanying text.
454. *Bailey*, 369 U.S. at 33. The U.S. Supreme Court has intimated that only its own rulings may render a defense frivolous. *See* McLucas v. DeChamplain, 421 U.S. 21, 29 n.9 (1975); *cf. supra* notes 442–45 and accompanying text (explaining how the Supreme Court has implied that court of appeals precedent may be sufficient to render a plaintiff's claim insubstantial).
455. *See* Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Tr., 463 U.S. 1, 27–28 (1983).
456. *See supra* note 441 and accompanying text.

federal court altogether. A defendant's lack of a valid, or even nonfrivolous, defense does not diminish the substantiality of the plaintiff's federal claim.[457] And parties may remain adverse to each other for constitutional purposes even if the defendant lacks a valid defense.[458] Thus, a plaintiff should not be able to plead itself out of federal court because its claim is "too strong."

Admittedly, from a prudential standpoint, judicial economy is undoubtedly advanced by eliminating the need for three-judge panels and direct Supreme Court review in easy cases. Such efficiency gains are likely to be outweighed, however, by requiring litigants to engage in meta-litigation over whether the plaintiff's case is *too* meritorious for a three-judge court, especially when a wrong conclusion can result in wasted proceedings, as in *Bailey*.

Regardless, *Bailey* remains good law. If a single district judge determines that a plaintiff's claim is clearly established by Supreme Court precedent, the judge must rule in the plaintiff's favor without convening a three-judge panel, and the case is subject to appeal to the court of appeals.[459] Likewise, if the judge convenes a three-judge panel, and the panel itself determines that precedent clearly establishes the plaintiff's claim, the panel must dissolve so the original district judge may enter judgment for the plaintiff, again subject to appeal to the court of appeals.[460]

When the U.S. Supreme Court determines that the plaintiff's claims in a case appealed to it from a three-judge district court were clearly established by precedent, it will dismiss the appeal for lack of appellate jurisdiction and require the appellant to proceed before the court of appeals instead.[461] In adjudicating any such appeals, of course, the court of appeals will apply its own precedent construing, interpreting, and applying the U.S. Supreme Court's case law. Although this is a purely jurisdictional issue, it is directly related to the merits of the plaintiff's claims and defendant's defenses. Thus, the Appellate Jurisdiction Theory yet again requires three-judge district courts to apply court of appeals precedent to matters inextricably intertwined with the merits.

Fourth, a three-judge district court's ruling typically may be appealed to the U.S. Supreme Court only when it directly involves the merits of the issue that gave rise to the court's jurisdiction.[462] If the district court denies relief on other grounds, such as the plaintiff's failure to satisfy the equitable requirements for

457. *See* Rivet v. Regions Bank, 522 U.S. 470, 475 (1998) ("A defense is not part of a plaintiff's properly pleaded statement of his or her claim.").

458. *See, e.g.*, Michael T. Morley, *Consent of the Governed or Consent of the Government? The Problems with Consent Decrees in Government-Defendant Cases*, 16 U. PA. J. CONST. L. 637 (2014) (discussing Article III's adverseness requirement).

459. *Bailey*, 369 U.S. at 33.

460. *See, e.g.*, Daniel v. Waters, 515 F.2d 485, 492 (6th Cir. 1975).

461. *Bailey*, 369 U.S. at 34 (holding that a case that is not required to be heard by a three-judge panel "cannot be brought here on direct appeal").

462. MTM, Inc. v. Baxley, 420 U.S. 799, 804 (1975) (per curiam).

injunctive relief,[463] an affirmative defense such as laches,[464] or abstention,[465] the case is subject to appeal in the court of appeals rather than the U.S. Supreme Court. It would be impracticable to require a trial court to follow circuit precedent when adjudicating defenses and other potentially dispositive issues in a case that may be closely related to the merits, while allowing it to disregard circuit precedent concerning the core constitutional question.

Fifth, notwithstanding section 1253, the court of appeals may review certain three-judge district court rulings through other procedural vehicles such as mandamus under the All Writs Act[466] and interlocutory appeals under the collateral order doctrine.[467] As noted earlier, a court of appeals may usually exercise appellate jurisdiction after final judgment to review a three-judge district court's rulings on issues other than the central constitutional question in a case through to the ordinary channels of appellate review.[468] Building on this reasoning, courts of appeals have exercised jurisdiction while proceedings remained pending in three-judge district courts over petitions for writs of mandamus concerning discovery orders[469] and interlocutory appeals under the collateral order doctrine concerning matters such as Eleventh Amendment sovereign immunity.[470] The potential for interlocutory review of three-judge courts' rulings in the courts of appeals exacerbates the difficulties of concluding that three-judge courts are bound only by Supreme Court precedent.

In conclusion, even if one accepts the Appellate Jurisdiction Theory of vertical stare decisis, three-judge district courts should still treat court of appeals' precedents as binding. Numerous rulings by three-judge district courts—many of

---

463. *See* Gonzalez v. Automatic Emps. Credit Union, 419 U.S. 90, 99 (1974) (identifying dismissal for lack of "equitable jurisdiction" as an "issue[] short of the merits" that does not warrant a direct appeal to the U.S. Supreme Court); *see, e.g.*, Fishman v. Schaffer, 429 U.S. 1325, 1325 n.2 (Marshall, Circuit Justice 1976) ("In view of the District Court's denial of relief on equitable grounds without deciding the merits of the constitutional attack, applicants properly sought review initially in the Court of Appeals.").

464. *See* McCarthy v. Briscoe, 429 U.S. 1316, 1316 (Powell, Circuit Justice 1976) (denying application for a stay because the district court's decision was based on laches, rather than the merits of the claim, and the court of appeals therefore had appellate jurisdiction).

465. *See MTM, Inc.*, 420 U.S. at 804; *see, e.g.*, B. Coleman Corp. v. Walker, 400 F. Supp. 1355, 1358 (N.D. Ill. 1975) (dismissing case on *Younger* grounds without convening three-judge panel), *aff'd*, 547 F.2d 1170 (7th Cir. 1976) (unpublished table decision).

466. 28 U.S.C. § 1651 (2012); *see, e.g.*, Ohio A. Philip Randolph Inst. v. Larose, 761 F. App'x 506, 511–15 (6th Cir. 2019) (recognizing that mandamus was available against a three-judge district court panel, but declining to order it).

467. *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546–47 (1949).

468. *MTM, Inc.*, 420 U.S. at 804; 28 U.S.C. § 1291.

469. *Ohio A. Philip Randolph Inst.*, 761 F. App'x at 510; Breed v. U.S. Dist. Court, 542 F.2d 1114, 1114–15 (9th Cir. 1976); *see also In re* Slagle, 504 U.S. 952, 953 (1992) (White, J., dissenting from dismissal) (opining that a court of appeals has jurisdiction over a petition for a writ of mandamus challenging the refusal of a member of a three-judge court to recuse); *cf.* Blay v. Young, 509 F.2d 650, 651 (6th Cir. 1974) (holding, pre-*MTM*, that 28 U.S.C. § 1253 precludes courts of appeals from exercising jurisdiction to grant mandamus to order a three-judge district court to grant an intervention motion).

470. NAACP v. Merrill, 939 F.3d 470, 475 (2d Cir. 2019).

which are closely intertwined with the merits of the underlying cases—are subject to appeal in the courts of appeals rather than the U.S. Supreme Court. It would raise a serious risk of inconsistent reasoning or contradictory conclusions to allow a district court to apply a different body of precedent to the main constitutional issue in a case than to the wide range of other jurisdictional, equitable, ancillary, defense-related, procedural, and other closely related questions it must adjudicate. The sheer breadth and diversity of three-judge district court rulings that are subject (or potentially subject) to review in the courts of appeals make it impracticable for three-judge panels to pick and choose when to apply court of appeals precedent.

CONCLUSION

Under the Hybrid Theory of stare decisis, a court must presumptively follow the precedent not only of tribunals that may exercise appellate jurisdiction over a particular case, but also of courts that are superior to it within the judicial hierarchy. The Hybrid Theory suggests that a three-judge district court should follow the precedent of its regional court of appeals, even though many of its rulings are subject to direct appeal exclusively to the U.S. Supreme Court. Nearly a century's worth of statutes concerning three-judge trial courts confirms that Congress has not been legislating against the backdrop of Appellate Jurisdiction Theory alone. Moreover, other modern nonstandard appellate structures appear far more consistent with the Hybrid Theory than the Appellate Jurisdiction Theory. A wide range of practical, purposive, and structural considerations also counsel strongly in favor of treating court of appeals precedent as binding on three-judge district courts.

Even if one accepts the Appellate Jurisdiction Theory, however, three-judge district courts' rulings concerning justiciability, the existence of a substantial federal question, the propriety of injunctive relief, affirmative defenses, abstention, issues subject to mandamus or immediate relief under the collateral order doctrine, and other jurisdictional, procedural, evidentiary, and ancillary issues are subject to review in the courts of appeals. The breadth of these issues and the close relationship many of them have to the merits confirm that, even under the Appellate Jurisdiction Theory, three-judge district courts should treat court of appeals precedent as binding. Enforcing vertical stare decisis helps constrain the discretion of three-judge district courts as they adjudicate some of the most sensitive cases in our democracy; promotes judicial economy; and ensures that litigants within a circuit are treated equitably and protected by the same body of precedent, regardless of whether their claims fall within a three-judge panel's jurisdiction.