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FEDERAL COURTS—THREE JUDGES OR ONE? A PROBLEM OF OVERLAPPING POWER IN THE DISTRICT COURTS

*Murrow v. Clifford*¹

Certain sensitive areas of federal litigation are required by various acts of Congress to be heard and determined by district courts composed of three judges.² Congress has also provided for direct appeal from the decisions of these courts to the Supreme Court as a matter of right.³ This procedure has recently become the focus of continuing efforts to streamline the federal judicial system.⁴ For example section 2281 of Title 28⁵ requires a three-judge court whenever a litigant seeks to enjoin the enforcement of a state statute on the ground that the statute violates the federal Constitution.⁶ One problem with this statute concerns the necessity of convening a three-judge court when a litigant seeks to enjoin the enforcement of a state statute on both constitutional and nonconstitutional grounds. Breaking with tradition, the Supreme Court, in *Hagans v. Lavine*,⁷ held it proper for a single district judge to grant an injunction on nonconstitutional grounds without initially convening a three-judge court. In finding such a procedure preferable, the Court attempted to settle one aspect of the procedural maze endemic to the area of three-judge court law.⁸ Despite *Hagans*' apparently clear direction, the recent

1. 502 F.2d 1066 (3d Cir. 1974).

2. The various statutes requiring three-judge courts are compiled in a Cross Reference to 28 U.S.C.A. § 2284 (1965), and *addendum*, (Supp. 1975). The procedures to be followed in convening and operating the courts are controlled by 28 U.S.C. § 2284 (1970), *as amended*, (Supp. II, 1972).

3. 28 U.S.C. § 1253 (1970) provides:

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by an Act of Congress to be heard and determined by a district court of three judges.

4. *See, e.g.*, W. BURGER, ANNUAL REPORT OF THE STATE OF THE JUDICIARY 7 (Feb. 23, 1975).

5. 28 U.S.C. § 2281 (1970) provides:

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

6. *See* text accompanying notes 24-29 *infra*.

7. 415 U.S. 528 (1974).

8. For the Supreme Court's most recent criticism of this complex area of statutory law see *Gonzalez v. Automatic Employees Credit Union*, 95 S. Ct. 289 (1974), discussed

Third Circuit case of *Murrow v. Clifford* illustrates the continuing inability of the courts to solve the complexities arising from the "opaque terms and prolix syntax"⁹ of the statutory law with respect to three-judge courts.

In *Murrow* the plaintiff brought an action in the United States District Court in New Jersey seeking an injunction against the enforcement of a state welfare regulation,¹⁰ claiming that the regulation was discriminatory and that it deprived her of the equal protection of the laws guaranteed by the Constitution.¹¹ She also claimed that the state regulation conflicted with the Social Security Act,¹² and was void by operation of the supremacy clause.¹³

in this note in the text accompanying notes 49-59 *infra*. The Court is not alone in criticizing the statute. See, e.g., The Judicial Conference of the United States, *Reports of the Proceedings of the Judicial Conference of the United States* 78 (October 1970); Currie, *The Three-Judge Federal District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1 (1964). The Senate actually passed a bill which would have eliminated the requirement of three-judge courts in actions to enjoin the enforcement of state or federal statutes on grounds of unconstitutionality. S. 271, 93d Cong., 1st Sess. (1973), passed by voice vote, 119 CONG. REC. S11114 (daily ed. June 14, 1973), but the House of Representatives never reported it out of committee. See Status of Senate Bills, 1 CCH CONGRESSIONAL INDEX 93RD CONGRESS 1973-1974, at 2501, 2504; Current Status of Senate Bills, *id.* at 2453.

9. *Gonzalez v. Automatic Employees Credit Union*, 95 S. Ct. 289, 297 (1974).

10. The state regulation denied AFDC (Aid to Families with Dependent Children) benefits to unborn children. AFDC is a welfare program created by the Social Security Act §§ 401-10, 42 U.S.C. §§ 601-10 (1970), as amended, (Supp. II, 1972). Funding is provided by the federal government, but the administration of the program is left to the individual states. New Jersey's participation is authorized by N.J. STAT. ANN. § 30:4C-31 (1964), and is handled by the New Jersey State Department of Institutions and Agencies, the Commissioner of which was the defendant in this action. HEW, which is charged with the administration of the federal end of the program, interprets the Social Security Act as allowing benefits to unborn children, 45 C.F.R. § 233.90(c)(2)(ii)(1973), but considers the matter to be optional with the states. New Jersey chose to deny the benefits in the regulation challenged in the subject case.

11. Plaintiff's claim was that no rational basis existed for discriminating between pregnant mothers and their unborn children, and all other mothers and their children.

12. 42 U.S.C. § 601-10 (1970), as amended, (Supp. II, 1972).

13. The conflict, plaintiff argued, involved the optional nature of HEW's policy allowing but not requiring the state to aid unborn children. The problem with affording states this option is that 42 U.S.C. § 602(a)(10) requires that if states participate at all, they must extend benefits "to all eligible individuals." Since HEW regards unborn children as within the Social Security Act's definition of "dependent child," 42 U.S.C. § 606(a), the theory was that unborn children were "eligible individuals" and that New Jersey's denial of benefits conflicted with § 602(a)(10) and was therefore void. As of January 31, 1973, some thirty-four states, territories or United States possessions had chosen not to extend eligibility to the unborn, Maryland being one of the minority which had extended the benefits. HEW CHARACTERISTICS OF STATE PUBLIC ASSISTANCE PLANS UNDER THE SOCIAL SECURITY ACT (1973). At least three courts of appeals have held that regulations denying benefits to unborn children conflict with the Social Security Act. *Doe v. Lukhard*, 493 F.2d 54 (4th Cir. 1974), petition for cert. filed, 42 U.S.L.W. 3699 (U.S., May 24, 1974); *Wilson v. Weaver*, 499 F.2d 155 (7th Cir. 1974); *Alcala v. Burns*, 494 F.2d

The district court, sitting as a single judge, found federal jurisdiction under 28 U.S.C. § 1343(3) & (4).¹⁴ On the merits, the court denied the injunction, holding for the state on both the constitutional and the statutory claims. On appeal, the Third Circuit found federal jurisdiction over the constitutional claim under § 1343(3), however, regarding the statutory claim, it found federal power not in the statute, but in the doctrine of pendent jurisdiction.¹⁵ With respect to the constitutional claim, the court held that the single judge lacked power to deny an injunction since 28 U.S.C. § 2281¹⁶ requires that such a claim be heard and determined by a three-judge court. Consequently, it vacated the judgment insofar as it denied this claim and remanded it to the

743 (8th Cir. 1974), *cert. granted*, 43 U.S.L.W. 3208 (U.S., Oct. 15, 1974). *But see, e.g.,* *Mixon v. Keller*, 372 F. Supp. 51 (M.D. Fla. 1974).

[After this Note went to press, the Supreme Court decided *Burns v. Alcala*, 43 U.S.L.W. 4374 (U.S. Mar. 18, 1975). The Court held that an unborn child was not within the meaning of the statutory term "dependent child," and therefore that states could not be forced to pay benefits to pregnant mothers for their unborn children. The Court left open the question whether HEW had authority, under the law, to provide states the option of extending the benefits to unborn children, implying that it is possible that those state AFDC programs, such as the one in Maryland, which have allowed the benefits, may not be authorized by law.]

14. 28 U.S.C. § 1343 (1970) provides:

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

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

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Specifically the district judge found jurisdiction under (3) as to the constitutional claim and under (4) as to the statutory supremacy clause claim. Whether there is independent federal jurisdiction over such statutory claims, either under (4) or (3), is an unsettled issue. For a discussion of the problems involved see Note, *Federal Jurisdiction over Challenges to State Welfare Programs*, 72 COLUM. L. REV. 1404 (1972). The Supreme Court discusses the problem in *Hagans*, 415 U.S. at 533-35 n.5. A recent decision in the fourth circuit reached the conclusion that § 1343(3) jurisdiction is coextensive in scope with the causes of action created by 42 U.S.C. § 1983 (1970), which would include such statutory claims. *Blue v. Craig*, 505 F.2d 830 (4th Cir. 1974).

15. Where a plaintiff has two claims only one of which comes under federal jurisdiction, a federal court has discretion to try the other claim when "[t]he state and federal claims . . . derive from a common nucleus of operative fact" and "if, considered without regard to their federal and state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding . . ." *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725 (1966). The doctrine has been held to be particularly applicable when the pendent claim is one of federal law instead of state law. *Hagans v. Lavine*, 415 U.S. 528, 545-50 (1974).

16. See note 5 *supra*.

district court to hear as a three-judge court. Turning to the judgment on the statutory claim, the court considered it an interlocutory order denying an injunction and thus held that it had appellate jurisdiction under 28 U.S.C. § 1292(a)(1).¹⁷ Purporting to rely on *Hagans*¹⁸ the court held that it was improper for the single judge to *deny* the plaintiff's statutory claim. The court of appeals read *Hagans* as standing for the proposition that the single judge could decide the statutory claim only if the decision would be for the plaintiff, thereby terminating the trial.

THE PRIOR LAW

The effect and merits of this decision are perhaps better understood in the context of the prior developments in this area. When the Supreme Court, in *Ex parte Young*,¹⁹ recognized the

17. This holding was asserted without authority by the majority. 502 F.2d at 1069. Judge Rosenn who dissented from the majority decision in *Murrow* concurred on this point, noting that it was not without its difficulties. 28 U.S.C. § 1292 (1970) provides:

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts . . . or of the judge thereof, granting, continuing, modifying, refusing, or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court

The problem as Judge Rosenn saw it was:

whether a district court's ruling on one of several legal grounds asserted in support of a single claim for which injunctive relief is sought constitutes an interlocutory denial of an injunction within § 1292(a)(1).

502 F.2d at 1071 n.4. *United States v. New York, N.H. & H.R.R.*, 276 F.2d 525 (2d Cir.), cert. denied, 362 U.S. 961, 964 (1960), was cited as basic source material in support of the finding of jurisdiction. There the government alleged that an agreement between defendant and a banking group was invalid, sought a declaratory judgment to that effect, and an injunction to prevent the defendants from carrying the agreement out. There were several grounds for the government's attack. The court denied the government's motion for summary judgment and dismissed one of these grounds entirely. Judge Friendly, writing for the court, held that an appeal from such an order was authorized by section 1292(a)(1). However, the Second Circuit purported to overrule this decision in *Chappell & Co. v. Frankel*, 367 F.2d 197, 200 (2d Cir. 1966) (denial of plaintiff's motion for summary judgment, on ground there was a genuine issue of fact, held not to be appealable). Since the facts of the two cases are distinguishable in that the former was a denial on the merits while the latter was not, it is probable that the rule of the former is still valid within the Second Circuit. See *Western Geophysical Co. v. Bolt Associates, Inc.*, 440 F.2d 765, 770-71 n.4 (2d Cir. 1971); *Build of Buffalo, Inc. v. Sedita*, 441 F.2d 284, 291-95 (2d Cir. 1971) (dissenting opinion); *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 461 F.2d 1040, 1043-44 (2d Cir. 1972) (concurring opinion).

As Judge Rosenn points out in his dissent, allowing interlocutory review in *Murrow* makes it possible for there to be a reduction in the number of "forced" constitutional decisions by the three-judge court, since if the circuit court reverses the single judge's denial, it will be remanded for him to grant the injunction, and the constitutional grounds will never have to be reached.

18. 415 U.S. 528 (1974).

19. 209 U.S. 123 (1908).

power of a federal court to enjoin a state official from enforcing a state statute, there was considerable political reaction, culminating in the passage of the predecessor of section 2281.²⁰ The purpose of that provision was to provide "procedural protection against state-wide doom by a federal court of a state's legislative policy."²¹ The supposition was that three judges would be more careful, less likely to err or to act for corrupt purposes, and more likely to command the respect and gain the compliance of state officials.²² This purpose was largely obviated by the revision of the Federal Equity Rules which provided lesser, but substantial, procedural protection against all federal injunctions.²³ Since the procedure is burdensome on the federal judicial system, the courts have strictly limited the application of section 2281.²⁴ For example, a three-judge court is required only if the relief sought is injunctive; a declaratory judgment, though it may serve the same purpose, should be sought from a single judge.²⁵ Furthermore, the statute challenged must be of statewide applicability,²⁶ and the party sought to be enjoined must be a state officer.²⁷ Finally, the basis of the challenge to the statute must be of constitutional magnitude.²⁸ Claims are not deemed "constitutional" in this

20. Act of Mar. 3, 1911, ch. 231, § 266, 36 Stat. 1162.

21. *Phillips v. United States*, 312 U.S. 246, 251 (1941).

22. See *Gonzalez v. Automatic Employees Credit Union*, 95 S. Ct. 289, 294 n.5 (1974); *Phillips v. United States*, 312 U.S. 246 (1941); 45 CONG. REC. 7256 (1910) (remarks of Senator Overman). For a very thorough analysis of the policy and the history of the statute see Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1 (1964).

23. Equity R. 73, 198 Fed. xxxiv (1912). This rule required notice to be given to the enjoined party whenever a preliminary injunction was issued, and in the case of a temporary restraining order, required notice unless the moving party could clearly show from specific facts that he would suffer immediate and irreparable harm before notice could be served. It also placed a ten day limit on such an *ex parte* order, and provided for the highest priority to be afforded to the hearing on its return. These provisions exist today in substantially the same form in Rule 65 of the Federal Rules of Civil Procedure. See Comment, *The Three-Judge Federal Court in Constitutional Litigation: A Procedural Anachronism*, 27 U. CHI. L. REV. 555 (1960).

24. See, e.g., *Mitchell v. Donovan*, 398 U.S. 427 (1970); *Swift & Co. v. Wickham*, 382 U.S. 111 (1965); *Phillips v. United States*, 312 U.S. 246 (1941).

25. *Mitchell v. Donovan*, 398 U.S. 427 (1970). See also, Note, *Federal Courts Jurisdiction: The Supreme Court Lacks Jurisdiction to Consider a Direct Appeal from a Three-Judge District Court Order Granting or Denying a Declaratory Judgment That a Federal Statute is Unconstitutional*, 49 TEXAS L. REV. 155 (1970).

26. *Board of Regents v. New Left Educ. Project*, 404 U.S. 541 (1972) (rules governing only a portion of a state's higher education system do not have statewide application or effectuate a statewide policy).

27. *Moody v. Flowers*, 387 U.S. 97 (1967) (members of a county board of supervisors are not state officials).

28. *Ex parte Bransford*, 310 U.S. 354 (1940) (mere allegation that statute had been misconstrued, resulting in an unconstitutional tax, was not a constitutional challenge).

sense if merely based on the theory that the state statute conflicts with a federal law and is therefore void because of the supremacy clause.²⁹

More pertinent to the discussion of the instant case, courts have limited the use of the larger panel by expanding the power of the single judge over cases which might appear to be within the purview of the statute. In *Ex parte Poresky*,³⁰ the Supreme Court recognized the single judge's power to make a threshold determination of the substantiality of the constitutional claim for the purpose of determining federal jurisdiction. Thus if the judge found that the claim was insubstantial, he could dismiss the action without convening a three-judge court. In *Bailey v. Patterson*,³¹ the Court also allowed the converse power to the single judge: he could enjoin the enforcement of a state statute when the state's claim that the statute was not unconstitutional was clearly frivolous due to earlier Supreme Court adjudications of the same issue. More recently, it was stated in *Rosado v. Wyman*³² that the three-judge court could remand any nonconstitutional claims to the single judge for his determination.

29. *Swift & Co. v. Wickham*, 382 U.S. 111 (1965). Although the language of section 2281 may appear to prohibit an injunction based on the operation of the supremacy clause as positively as one based on the equal protection clause, the Supreme Court held that "Supremacy Clause cases are not within the purview of § 2281." *Id.* at 122. The justification for the distinction is that supremacy clause cases merely involve the interpretation and application of federal statutes as opposed to "reading meaning into the generalities of the substantive provisions of the Constitution." A.L.I., *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* 322 (1969).

30. 290 U.S. 30 (1933). In *Poresky*, the Supreme Court refused to allow an application for mandamus compelling a single judge to convene a three-judge court. Plaintiff had sought to enjoin Massachusetts state officers from enforcing a state law requiring automobile insurance. In denying mandamus, the Court stated that "in the absence of diversity of citizenship it is essential that a substantial federal question be presented," and whether a substantial federal question is presented is within the power of the single judge to determine. A "question may be plainly insubstantial either because it is 'obviously without merit' or because 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the inference that the question sought to be raised can be the subject of a controversy.'" *Id.* at 31-32 (citations omitted). Thus, if a claim of unconstitutionality is plainly insubstantial the single judge may dismiss the case for lack of subject matter jurisdiction.

31. 369 U.S. 31 (1962). In *Bailey*, black plaintiffs sought to enjoin Mississippi state enforcement of a statute requiring segregation in transportation facilities. The Supreme Court had earlier held several such statutes to be unconstitutional. *E.g.*, *Morgan v. Virginia*, 328 U.S. 373 (1946). The three-judge court abstained pending state court action. On appeal, the Supreme Court remanded to the single judge for enforcement of plaintiffs' rights and stated that a three-judge court was unnecessary where the question of the constitutionality of a statute was "no longer open," "wholly insubstantial," or "essentially fictitious." 396 U.S. at 33.

32. 397 U.S. 397 (1970).

HAGANS V. LAVINE

Hagans continued this expansion of the power of the single judge. The district judge had granted an injunction on the basis of the statutory claim without convening a three-judge court. The Court held that “[s]ection 2281 does not forbid this practice. . . .”³³ It recognized that this procedure might “appear at odds” with older law,³⁴ but thought that it was more attuned to the development of three-judge court law, the efficient operation of the lower federal courts, and the Court’s constrictive view of the statute.³⁵ The Court did *not* hold, however, that it would be improper for the three-judge court to be convened initially and for it to hear the entire case. Since this latter procedure was standard in the past and was not overruled, it would appear that a district court can choose between proceeding as a single judge to the nonconstitutional issues, or initially convening a three-judge court. As a matter of efficiency, it is clear that using three judges is more wasteful than using one,³⁶ and therefore that, absent other considerations, the single judge should always handle everything short of the constitutional claim before convening a three-judge court.³⁷

33. 415 U.S. at 545.

34. *Id.* at 543. The Court cited *Brotherhood of Locomotive Eng’rs v. Chicago, R.I. & P.R.R.*, 382 U.S. 423 (1966); and *Florida Lime & Avocado Growers v. Jacobsen*, 362 U.S. 73 (1960). In the latter, the Court had stated:

[W]hen, in any action to enjoin enforcement of a state statute, the injunctive decree may issue on the ground of federal unconstitutionality of the state statute, the convening of a three-judge court is necessary; and the joining in the complaint of a non-constitutional attack along with the constitutional one does not dispense with the necessity to convene such a court.

Id. at 80.

Doubt was cast on the continuing validity of this in *Rosado v. Wyman*, 397 U.S. 397 (1970), where the Court stated that a three-judge court could remand any nonconstitutional issues to the single judge for his determination. Indeed, several district courts read *Rosado* broadly to allow initial determination of statutory claims without a three-judge court before *Hagans* specifically sanctioned that procedure. *E.g.*, *Norton v. Richardson*, 352 F. Supp. 596 (D. Md. 1972).

35. 415 U.S. at 544.

36. This inefficiency is especially apparent when it is considered that there may not even be independent federal jurisdiction over the statutory claim since it will not usually meet the \$10,000 amount in controversy requirement of 28 U.S.C. § 1331 (1970). *See* note 14 *supra*. If Congress may have denied any federal forum to such a claim if brought by itself, it would seem anomalous to require a three-judge court for the claim, just because it is pendent to a constitutional claim. This anomaly is magnified by *Hagans*, which recognized pendent jurisdiction even though the constitutional claim was weak and the statutory claim made up the plaintiff’s primary case.

37. In *Doe v. Lukhard*, 493 F.2d 54 (4th Cir. 1974), *petition for cert. filed*, 42 U.S.L.W. 3699 (U.S., May 24, 1974), the Fourth Circuit stated that it would be more

The question unanswered by *Hagans* is whether there might be competing considerations which would make the single judge procedure undesirable. *Murrow* appears to be the first case decided after *Hagans* which addresses this question. The *Murrow* court finds such a consideration in the often stated doctrine that nonconstitutional grounds for disposition are to be exhausted before a constitutional decision is reached.³⁸ *Hagans*, the court noted, also stood for this rule. Therefore, the court reasoned that where the single judge *granted* the plaintiff's statutory claim, as in *Hagans*, the constitutional decision became unnecessary, as did the three-judge court; but, where the single judge *denied* the statutory claim, as in *Murrow*, then the only ground left for decision would be the constitutional issue, which would have to be heard by a court of three judges. Moreover, the three-judge court would be precluded by the single judge's decision from deciding the case on anything other than the constitutional grounds.³⁹ In those cases where the other two judges on the court would have

efficient to initially convene a three-judge court, since if the single judge denied the statutory claim, the three-judge court, which would then have to be convened, might disagree with the single judge's ruling, but, being powerless to correct it, would be forced to decide the constitutional issue. Such an unnecessary decision, the court felt, was inefficient. In addition, Judge Winter, writing for the court, saw inefficiency in the fact that appeal from this unnecessary decision would be to the Supreme Court. The court recommended that a three-judge court always be initially convened so that it could look out for this problem, and only remand statutory issues to the single judge in accordance with *Rosado* when it saw little chance of such a result. Admittedly, it is difficult to assess relative efficiencies absent complete statistics, especially where the comparison is between efficiency in the district court and in the Supreme Court's docket, but given the "[Supreme] Court's concern for efficient operation of the lower federal courts," and its statement that "it would be grossly inefficient to send a three-judge court a claim which will only be sent immediately back," 415 U.S. at 544, quoting *Norton v. Richardson*, 352 F. Supp. 596, 599 (D. Md. 1972), the fourth circuit's concern appears to be unwarranted. *Doe* was decided shortly before *Hagans*, which may explain its position. However, the third circuit in *Murrow* relied on *Doe's* reasoning in its opinion, 502 F.2d at 1070, apparently not considering *Doe* to have been overruled. The District Court of Maryland, however, in *Bethea v. Mason*, Civil No. 73-874H (D. Md. Dec. 12, 1974) (notice of appeal by defendant, Jan. 6, 1975), followed *Hagans* without mentioning the *Doe* decision.

38. This is the so-called "Ashwander Principle." Originating in the case of *Siler v. Louisville & Nashville R.R.*, 213 U.S. 175 (1909), it received its most famous formulation in *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Justice Brandeis, concurring). The Supreme Court in *Hagans* discussed the doctrine thoroughly, 415 U.S. at 546-47, & 547 n.12, and concluded that:

The doctrine is not ironclad, but it is recurrently applied, and, at the very least, it presumes the advisability of deciding first the pendant non-constitutional issue. 415 U.S. 546-47 (citations omitted). *But see*, *Francis v. Davidson*, 340 F. Supp. 351 (D. Md.), *aff'd*, 409 U.S. 904 (1972), where a three-judge court denied the constitutional claims before granting an injunction based on the statutory claim.

39. 502 F.2d at 1070. The court also stated its belief that the Supreme Court would be deprived of an opportunity to decide the statutory claim on appeal. *See* note 42 *infra*.

disagreed with the single judge's disposition of the statutory claim, there would be a needless constitutional decision. Since this would contravene the doctrine preferring nonconstitutional decisions, the court held that it was improper for the single judge to decide the statutory claim *against* the plaintiff. *Hagans* was read narrowly to approve the single judge's decision on a statutory claim only if that decision were favorable to the plaintiff, thereby making a constitutional adjudication unnecessary. Thus, the *Murrow* court takes the position that the single judge should refrain from entering an order denying plaintiff relief on the statutory ground. Rather, if the single judge is prepared to find for defendant on this claim, a three-judge court should be convened to determine the statutory as well as the constitutional claims.

ANALYSIS

Judge Rosenn dissented from the court's resolution of this issue,⁴⁰ pointing out that *Hagans* clearly contemplated the possibility of the single judge's decision being *against* the state.⁴¹ The majority's rule, therefore, appeared to be inconsistent with a very recent opinion of the Supreme Court. Moreover, he argued that the majority's view would discourage all action by the single judge because, if, after taking evidence, the single judge found the statutory ground not to be dispositive, a three-judge court would have to be convened to duplicate the work already done by the single judge. Faced with this wasteful possibility, Judge Rosenn argued, the district judge would instead *always* initially convene a three-judge court. In other words, the majority's rule, while purporting only to restrain the single judge in situations which could be distinguished from the situation in *Hagans*, actually would restrain the single judge in other situations, including the one in *Hagans*.⁴²

40. 502 F.2d 1066, 1070 (dissenting opinion).

41. 502 F.2d at 1072. The language relied upon was this: [t]he latter [the statutory-claim] was to be *decided* first and the former not reached if the statutory claim was dispositive It is true that the constitutional claim would warrant convening a three-judge court *and that if a single judge rejects the statutory claim*, a three-judge court must be called to consider the constitutional issue.

502 F.2d at 1071 (emphasis supplied by Judge Rosenn), quoting from *Hagans*, 415 U.S. at 543-44.

42. Judge Rosenn also questioned the majority's assertion that the Supreme Court would be unable to review a single judge's decision on the statutory claim. No authority was cited on either side of the question, although the dissent demonstrated that the

The majority's concern about "forced" constitutional decisions, if the single judge denies the plaintiff relief on the statutory ground before convening a three-judge court, is based on a misconception of the proper application of the doctrine preferring nonconstitutional decisions. The misconception is contained in the *Murrow* court's view of the three-judge court's role in the trial. This view is revealed in the court's discussion:

Any rule which has the effect of requiring the decision of a constitutional issue in order to terminate a lawsuit, without affording the *tribunal making the final decision* an opportunity to reach a preferred statutory supremacy clause ground and thereby possibly avoid the constitutional issue, is inconsistent with the policy laid down in *Hagans* . . .⁴³

The court thus regards the three-judge court as the tribunal to apply the doctrine of avoiding constitutional decisions. The tribunal to be considered, however, is the district court itself, not the particular judge or judges.⁴⁴ The district court applies the doctrine of avoiding constitutional issues when the single judge decides all nonconstitutional claims before convening the three-judge court. It is true in theory that three judges would be "better" at doing this than the single judge, and that there is therefore some value in having the three-judge court handle it. But the statute, as interpreted by *Hagans*, requires the three-judge court

Supreme Court has decided cases on grounds not relied on by the lower court. Judge Rosenn further argued that, if it were true that the Supreme Court could not review the single judge's denial, the same problem, along with the "forced" constitutional decision by the three-judge court would also arise if the single judge *granted* the statutory issue and the Court of Appeals later reversed, since this would have the same result: a three-judge court convened with only the constitutional issue remaining. Thus, the argument went, the majority's distinction between grants (which *Hagans* specifically approved) and denials by the single judge was meaningless. This argument is valid only if the circuit court would reverse rather than merely vacate an erroneous grant by the single judge. The majority's language, however, indicates that they would vacate the single judge's grant and remand so as to give "the tribunal making the final decision an opportunity to reach a preferred statutory supremacy claim ground." 502 F.2d at 1069. This demonstrates the inefficiency and the anomaly which inheres in the majority's position, since after a trial and decision by the single judge, and an appeal and decision by the circuit court on the merits of the statutory claim, no judgment will have been reached and the parties will have to relitigate that issue before the three-judge court. If the Third Circuit would in fact reverse instead of vacating in order to relieve the parties of this burden, then Judge Rosenn's criticism is valid: the majority's distinction between grants and denials is essentially meaningless since the same problems can arise from a grant as from a denial.

43. 502 F.2d at 1069 (emphasis added).

44. Cf. *Rosado v. Wyman*, 397 U.S. 397 (1970), where the Court speaks of jurisdiction being in the district court "*qua* court," *id.* at 402-03, the effect of section 2281 being merely to place remedial power in certain circumstances only with a three-judge court.

only for the constitutional decision. Improvements in other functions of the trial court are clearly not within the purpose of the statute, which the Supreme Court has repeatedly stated should be narrowly construed.⁴⁵

Moreover, the hypothetical situation in which the three-judge court is forced to decide the constitutional issue after a single judge has erroneously denied the plaintiff's statutory claim is not likely to occur very often. Furthermore given the court's holding that the single judge's denial is appealable under section 1292(a)(1),⁴⁶ the plaintiff can obtain a review of that decision in the court of appeals if he believes it to be erroneous.⁴⁷ As Judge Rosenn points out in his dissent, the court of appeals may reverse the denial, and order that the single judge grant the statutory claim, thus obviating the need for a three-judge court altogether. If the court of appeals affirms the denial, and remands for a three-judge court to be convened to hear the constitutional issue, it will have been determined by three circuit judges and a district judge that the statutory issue is not dispositive. It is difficult to justify the notion that a three-judge court might reach a "better" result. In those rare cases in which it would disagree, the fact remains that it is not the role of the three-judge court to review the circuit court's decision on the statutory claim or the other aspects of the trial. That court's only role under *Hagans* is to decide constitutional issues when called upon to do so. Finally, it is true that the plaintiff may decide not to appeal, so that the benefit of the circuit court's holding on the nonconstitutional claim would not be available. It is likely, however, that the decision not to appeal would indicate that the statutory claim was not a particularly strong one.⁴⁸

GONZALEZ V. AUTOMATIC EMPLOYEES CREDIT UNION⁴⁹

Since *Murrow* the Supreme Court has addressed another aspect of the three-judge court procedural maze in *Gonzalez v.*

45. See, e.g., *Mitchell v. Donovan*, 398 U.S. 427 (1970); *Swift & Co. v. Wickham*, 382 U.S. 111 (1965); *Phillips v. United States*, 312 U.S. 246 (1941).

46. See note 17 *supra*.

47. While the three-judge court direct appeal procedure was intended as a "better" and faster procedure for important cases, there is every reason to believe that the usual appellate route would be preferable, since the Supreme Court tends to dispose of many direct appeals in summary fashion. See *Gonzalez v. Automatic Employees Credit Union*, 95 S. Ct. 289, 295 n.17 (1974).

48. See 502 F.2d at 1072 n.6.

49. 95 S. Ct. 289 (1974).

Automatic Employees Credit Union. Again, the Court emphasized its desire to limit the application of the statutory scheme, this time by narrowing its interpretation of section 1253, which creates the right of a direct appeal to the Supreme Court from a three-judge court decision. In *Gonzalez*, plaintiff sought to enjoin as unconstitutional the enforcement of various provisions of Illinois' automobile repossession and resale laws.⁵⁰ The three-judge court dismissed the action, holding that plaintiff lacked standing to seek an injunction, since he failed to show that he was threatened by the statutes (his automobile had already been repossessed and sold).⁵¹ On appeal by plaintiff, defendant argued that the Supreme Court should only hear an appeal from a denial of an injunction by a three-judge court when the denial is based on the constitutionality of the state law.⁵² The Court noted that there were precedents squarely on point allowing appeal from a denial of an injunction on grounds short of the constitutional merits.⁵³ It avoided these precedents, however, by stating that:

[I]n the area of statutory three-judge court law the doctrine of *stare decisis* has historically been accorded considerably less than its usual weight. These procedural statutes are very awkwardly drafted, and in struggling to make workable sense of them, the Court has not infrequently been induced to retrace its steps.⁵⁴

The Court thus found precedent for discarding precedent. However, the Court found it unnecessary "to explore the full sweep of [defendant's] argument,"⁵⁵ merely holding that:

[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 [from the beginning], review of the denial is available only in the Court of Appeals.⁵⁶

The narrow holding does not affect the availability of a direct

50. *Id.* at 291.

51. *Id.* at 292.

52. *Id.*

53. *Id.* at 293 n.11, citing among others, *Flast v. Cohen*, 392 U.S. 83 (1968) (lack of standing); *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972) (lack of subject matter jurisdiction).

54. *Id.* at 293 (footnotes omitted).

55. *Id.* at 295.

56. *Id.* at 296.

appeal from a three-judge court decision on a statutory claim. If the three judges deny the statutory claim, they will also have to decide the constitutional claim, and appeal from the final decision will be to the Supreme Court. If the three-judge court grants an injunction on the statutory claim, appeal has also been to the Supreme Court.⁵⁷ While *Gonzalez* does not compel a contrary result in the latter situation because the holding is limited by its own terms to denials of injunctions, the direction of the Court's reasoning is clear, and it is probable that in the future the Court will require that such appeals be made to the courts of appeals.⁵⁸

In light of the *Gonzalez* opinion, the *Murrow* rule appears contrary to the direction of development in this area. While it is true that *Gonzalez* only deals with the direct appeal provision of the three-judge court procedure, and does not address the question of when such a court should be convened, the purpose of both is to provide procedural protection against the power of the federal courts to enjoin the enforcement of state statutes on constitutional grounds.⁵⁹ Since the tenor of *Gonzalez* is to limit the three-judge court appellate procedure to questions of constitutional significance, insofar as *Murrow* expands the requirement for convening a three-judge court beyond such questions, it is inconsistent with the Supreme Court's strict interpretation of the three-judge court statutes.

To conclude, the Third Circuit's rule that the single judge cannot decide statutory claims *against* the plaintiff is based on a largely illusory possibility of disagreement among judges, and on a misconception of the proper application of the doctrine preferring nonconstitutional decisions. As the dissent points out, it also appears to be irreconcilable with the *Hagans* rule and the reasoning set forth by the Supreme Court to support it. Furthermore, it is inconsistent with the Court's concern for limiting its mandatory appellate docket as expressed in *Gonzalez*. The better procedure would be for the single judge to decide all statutory claims first, and convene a three-judge court only when no dispositive grounds remain except the constitutional issue. Clearly, however, the most appropriate solution would be for Congress to repeal the

57. *E.g.*, *Brotherhood of Locomotive Eng'rs v. Chicago, R.I. & P.R.R.*, 382 U.S. 423 (1966).

58. Professor Moore has argued that appeal should not lie to the Supreme Court in this situation, since the purpose of the direct appeal is to expedite review only where a state statute has been held unconstitutional. 9 J. MOORE, *FEDERAL PRACTICE* ¶ 110.03[3], at 80 (2d ed. 1973).

59. See notes 21-22 and accompanying text *supra*.

statute, thereby eliminating all of these problems in a single act, rather than forcing the courts to hash them out piecemeal. Perhaps the Ninety-Fourth Congress will succeed where its predecessors have not.

[After this note went to press the Supreme Court decided MTM, Inc. v. Baxley, 43 U.S.L.W. 4442 (U.S. Mar. 25, 1975). An Alabama court had enjoined the operation of the Pussycat Adult Theatre as a nuisance. Petitioners sought an injunction in the federal district court on first amendment grounds against enforcement of the state court's preliminary injunction and a declaration that the Alabama nuisance law was unconstitutional. Because of the pendency of the state court proceedings, the three-judge court dismissed the action without prejudice, following the doctrine laid down in Younger v. Harris, 401 U.S. 37 (1971) (federal courts should not enjoin pending state prosecutions begun prior to the federal complaint except in extraordinary circumstances where necessary to prevent irreparable injury). The Supreme Court held that it lacked appellate jurisdiction over the case. Following Gonzalez to its logical end, the Court concluded that:

[A] direct appeal will lie to this 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.

43 U.S.L.W. at 4443. *The Court reserved the question of whether a single judge can dismiss a complaint on the ground of the "impropriety of federal intervention" without convening a three-judge court. Id. at 4443 n.7. However, this continued narrowing of the Court's appellate jurisdiction under § 1253 provides further support for the conclusion that the Murrow rule, because it expands the requirement for three judges, is incorrect. The concurring opinion of Justice White supports this conclusion more directly:*

The more straightforward approach to this case would be to hold that decisions on issues other than requests for injunctive relief challenging the constitutionality of state statutes need not be made by three judges but rather are to be made by single-judge courts where decisions are appealable only to the courts of appeals.

Id. at 4444 (concurring opinion). This approach to the problem supports the notion that the requirements for the two halves of the procedure, i.e., the three-judge court and the direct appeal, should, to the extent possible, coincide. Where they do not, that is, where only the three-judge court is required, Justice White suggests that the three-judge court be "deemed" to have been a single judge court. Justice White would thus achieve symmetry between the two halves by use of a fiction.

Justice White also impliedly refuted the Third Circuit's narrow reading of *Hagens* (see text accompanying notes 39-40 *supra*), by stating that "in [*Hagens*] we held that even where the statutory claim is joined with a substantial constitutional claim, the former could be, and should be, decided first by the single judge." *Id.* at 4444. This statement makes the *Murrow* distinction between grants and denials of statutory claims difficult to accept.]