Requirement of Substantial Constitutional Question in Federal Three-Judge Court Cases

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COMMENTS

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The United States Code\(^1\) provides that an interlocutory or permanent injunction restraining the enforcement of any state statute by restraining the action of any officer of such state in

\(^1\) 28 U.S.C. § 2281 (1952): “Injunction against enforcement of State statute, three judge court required. An interlocutory or permanent injunction restraining the enforcement, operation, or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of
the enforcement of such statute shall not be granted unless the application therefor is heard and determined by a district court of three judges. There is ample authority that before this provision will be applicable the complaint must present a substantial claim of unconstitutionality.\(^2\) Several recent race relations cases\(^3\) may have misapplied this requirement and created in effect an additional requirement that the statute attacked in the complaint be not clearly unconstitutional. Under the holdings in these cases a three-judge court, once convened, may remand a case to the district court for decision when the statute attacked is clearly unconstitutional, or the district court may refuse to convene a three-judge court initially for this same reason. The purpose of this Comment is to discuss the history and development of the three-judge court provision to determine the validity of the requirement and procedure adopted in these cases.

The requirement of a three-judge court was enacted by Congress as a compromise measure, following the United States Supreme Court’s decision in *Ex parte Young*.\(^4\) It was there held that the actions of a state official, even though taken directly pursuant to and authorized by a state statute, could be enjoined by a federal court if it was alleged that the statute under which the official was acting was repugnant to the United States Con-

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\(^1\) 62 Stat. 908, c. 646, § 1 (1948). (The former statute providing for the three-judge court when the constitutionality of a state’s action was questioned was Section 228 of the Judicial Code. The present Section 2281 of Title 28, U.S.C, is with minor modifications the same section.)


\(^4\) 209 U.S. 123 (1908). This was an original application for a writ of *habeas corpus*. The legislature of Minnesota passed an act fixing maximum rates for intrastate commerce. An injunction was sought in the federal district court against the enforcement of the statute on the ground that it violated the Federal Constitution. The Minnesota Attorney General, Edward T. Young, moved to dismiss the action on the ground that the suit was against the State of Minnesota, which had not consented to be sued. This motion was overruled, and a temporary injunction was issued. Young refused to obey the injunction, and the federal district court convicted him for contempt. The United States Supreme Court denied the writ of *habeas corpus* on the ground that notwithstanding the Eleventh Amendment, which prohibits individual suits against a state, federal courts could issue injunctions against state officials seeking to enforce state statutes that violate the United States Constitution.
stitution. This decision evoked severe and widespread criticism. It was felt that it was unseemly for a single district judge to curtail the enforcement of statutes adopted by the state through its legislature and high-ranking officers. In spite of this criticism, Congress did not see fit to divest the district courts of jurisdiction entirely. By way of compromise the three-judge court device was adopted in the belief that the more careful consideration afforded each case when it was considered by three judges would minimize the possibility of arbitrary abuse of the injunctive power. As an additional safeguard, review by direct appeal to the Supreme Court was provided.

5. For a detailed discussion of the indignity and injustice which it was felt was being done to the states in having their solemn legislative acts, and the efforts of state officers to enforce them, impeded by the interlocutory fiat of a single judge, see Hutcheson, A Case for Three Judges, 47 Harv. L. Rev. 795 (1934).

6. State ire which was aroused by the Young decision is perhaps best expressed in the words of Senator Overton, who sponsored the act which became Section 268 of the Judicial Code: "We think, sir, that if this [adopting Section 268] could be done, it would allay much of the feeling in the states. As was said by Mr. Justice Harlan, in his dissenting opinion in the Minnesota case, we have come to a sad day when one subordinate Federal Judge can enjoin the official of a sovereign State from proceeding to enforce the laws of the State passed by the legislature of his own State, and thereby suspending for a time the laws of the State. . . . That being so [a suit against a state officer not a suit against the State] there being great feeling among the people of the States by reason of the fact that one federal judge has tied the hands of a sovereign and enjoined in this manner the great officer who is charged with the enforcement of the laws of the State, causing almost revolution, as it did in my State, and if this substitute is adopted and three judges have to pass upon the question of the constitutionality of a State statute and three judges say the statute is unconstitutional, the officers of the State will be less inclined to resist the orders and decrees of our Federal Courts." 42 Cong. Rec. 4846 et seq. (1908).


8. Cumberland Tel. & Tel. Co. v. Louisiana Public Service Comm., 260 U.S. 212, 216 (1922): "The wording of the section leaves no doubt that Congress was by provisions ex industria seeking to make interference . . . with the enforcement of state regulations . . . regularly enacted and in course of execution, a matter of the adequate hearing and the full deliberation which the presence of three judges . . . was likely to secure. It was to prevent the improvident granting of such injunctions by a single judge, and the possible unnecessary conflict between federal and state authority always to be deprecated."

9. 28 U.S.C. § 1253 (1952): "Direct appeal from decisions of three-judge courts. Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." 62 Stat. 926 (1948).

The major distinction between the 1911 three-judge courts and those as presently constituted is that the former were authorized to hear applications only where interlocutory injunctions were sought, while the latter are authorized as well to entertain applications where only permanent injunctions are sought. Various amendments have increased the jurisdiction of the three-judge court to include orders of state boards or commissions as well as state statutes; to include petitions for final as well as interlocutory injunctions; to add the analogous statute granting injunctive relief from the operation of unconstitutional federal statutes; and to perfect the method of appeal to the United States Supreme Court. For a detailed discussion of the history of these statutes as well as the early case law
The three-judge requirement, however, being in the form of a compromise, has never been construed as a measure of broad social policy, but rather as an enactment technical in the strict sense of the term. The courts have generally recognized the narrow and technical character of the requirement and have enunciated specific requisites for the formation of the special three-judge court: (1) injunctive relief must be sought; (2) the act in question must be attacked as repugnant to the United States Constitution; (3) the suit must seek to restrain an officer of the state. When these requisites are not present, the


10. In Phillips v. United States, 312 U.S. 246, 250 (1941), Mr. Justice Frankfurter expounded on the narrowness of application of the three-judge court statute: "It is a matter of history that this procedural device was a means of protecting the increasing body of state legislation regulating economic enterprise from invalidation by a conventional suit in equity. While Congress thus sought to assure more weight and greater deliberation by not leaving the fate of such litigation to a single judge, it was no less mindful that the requirement of three judges . . . entails a serious drain upon the federal judicial system . . . . Moreover, inasmuch as this procedure also brings direct review of a district court to this Court, any loose construction . . . . would defeat the purpose of Congress . . . . to keep within narrow confines our appellate docket . . . . The history . . . . the narrowness of its original scope, the piece-meal explicit amendments which were made to it . . . . the close construction given the section in obedience to Congressional policy . . . . combine to reveal [it] not as a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such."


12. Phillips v. United States, 312 U.S. 246 (1941); *Ex parte* Bransford, 310 U.S. 354, 361 (1940) ("It is necessary to distinguish between a petition for injunction on the ground of the unconstitutionality of a statute as applied, which requires a three-judge court, and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional. The latter petition does not require a three-judge court."); *Ex parte* Hobbs, 280 U.S. 168 (1929). The phrase "any statute" has been interpreted to include provisions of state constitutions. AFL v. Watson, 327 U.S. 582 (1946).

Section 266 of the Judicial Code was amended by the Act of March 4, 1913, c. 160, 37 Stat. 1013, to include the words "enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statute of such State." For the interpretation and application accorded this provision, see Grubb v. Public Util. Comm’n of Ohio, 28 U.S. 470 (1930); Herkness v. Irion, 278 U.S. 92 (1928); Oklahoma Nat. Gas Co. v. Russell, 261 U.S. 290 (1923). See also Bowen, *When Are Three Federal Judges Required?*, 16 Minn. L. Rev. 1, 10-14 (1931) for the discussion and cases there cited.

13. Injunction must be sought against the actions of state rather than purely local officers. *Ex parte* Public Bank of New York, 278 U.S. 101 (1928) (municipal taxing officials not state officers within meaning of Section 266); *Ex parte* Collins, 277 U.S. 565 (1928) (suit to restrain city from paving street and paying for improvement with bond issue was not within scope of Section 266).

However, local officials have been held to be state officers within the meaning of Section 266, if the statute which they seek to enforce embodies a policy of
formation of a three-judge court is not required, and no direct appeal will lie to the Supreme Court. In the absence of any of these requisites, the district judge may refuse to convene a three-judge court since the suit is not the type that must be heard by three judges. However, whenever all of these requisites are present, the single district judge is without jurisdiction to dismiss the bill on the merits or to grant either an interlocutory or permanent injunction.

In addition to the three requisites above, the cases have clearly developed a fourth requirement: that the claim of unconstitutionality be substantial. In the language of one of the decisions, the claim must present a substantial question of constitutionality. This requisite appears to concern the jurisdiction of the court, not as a three-judge court as such, but as a federal court generally. Since the statute requires an allegation of unconstitutionality before the three-judge court provisions are applicable, it would seem necessarily to follow that the jurisdiction of the three-judge court is predicated on district court federal question jurisdiction.

State-wide concern. Spielman Motor Sales Co. v. Dodge, 295 U.S. 89 (1935) (district attorney of the County of New York was a state officer when he attempted to enforce a New York statute making it a misdemeanor to violate any provisions of a code of fair competition approved by the President of the United States under the NIRA). Conversely state officials charged with duties under a statute not of state-wide concern have been held not to be state officers within the purpose for which Section 266 was designed. Rorick v. Commissionrs, 307 U.S. 208 (1939) (defendant officers, though state officials, were acting in the particular case in a manner which concerned only a single taxing district).

15. Ex parte Bransford, 310 U.S. 354 (1940); Ex parte Collins, 277 U.S. 565 (1928).
17. Jameson & Co. v. Morgenthau, 307 U.S. 171 (1939); California Water Co. v. City of Redding, 304 U.S. 252 (1938); Ex parte Poresky, 290 U.S. 30 (1933); Stratton v. St. Louis Southwestern R.R., 282 U.S. 10 (1930) (the statute applies only where there is a substantial claim of invalidity under the Federal Constitution); In re Buder, 271 U.S. 461, 467 (1926) ("a substantial claim of unconstitutionality is necessary for the application of section 266"); Louisville & Nashville R.R. v. Garrett, 231 U.S. 298, 304 (1913) ("This statute applies to cases in which the preliminary injunction is sought in order to restrain the enforcement of a state enactment upon the ground of its 'unconstitutionality.' The reference, undoubtedly, is to an asserted conflict with the Federal Constitution, and the question of unconstitutionality, in this sense, must be a substantial one.") (Emphasis added.)
18. "The existence of a substantial question of constitutionality must be determined by the allegations of the bill of complaint." (Emphasis added.) Ex parte Poresky, 290 U.S. 30, 32 (1933).
19. Id. at 31: "The provision requiring the presence of a court of three judges necessarily assumes that the District Court has jurisdiction. In the absence of diversity of citizenship, it is essential to jurisdiction that a substantial federal question should be presented."
20. The language of the decisions seem to support such a conclusion. California Water Service Co. v. City of Redding, 304 U.S. 252, 254 (1938): "We have held that Section 266 of the Judicial Code [28 USCA § 380] does not apply unless
the United States Code provides that “the district courts shall have original jurisdiction of all civil actions wherein the matter in controversy arises under the Constitution, laws or treaties of the United States.” It was early decided that to sustain the jurisdiction of federal courts in such cases, the question presented had to be substantial. A discussion here of the substantial question requirement of federal question jurisdiction will be helpful in understanding the problems raised in the recent race relations cases. The language of Article III of the Constitution extending federal judicial power to “cases arising under” the Constitution, laws, or treaties of the United States was given a broad scope in Osborn v. Bank of the United States. It would seem a fair interpretation of that case that the jurisdiction of the district courts will be sustained if some right relied on by the parties has its origin in federal law, even though that right be not itself the subject of litigation. The same constitutional language which was interpreted by the court in the Osborn case was subsequently used by Congress in granting original federal jurisdiction to the district courts. Although the broad scope accorded this language in the Osborn case has not been denied, the courts have in many cases limited the

there is a substantial claim of the unconstitutionality of a state statute or administrative order as there described. It is, therefore, the duty of the district judge, to whom an application for an injunction restraining the enforcement of a state statute or order is made, to scrutinize the bill of complaint to ascertain whether a substantial federal question is presented, as otherwise the provision for the convening of a court of three judges is not applicable.” (Emphasis added.) See note supra for the language used by the court in Ex parte Poresky.

21. 28 U.S.C. § 1331 (Supp. 1958) : "Federal question; amount in controversy; costs. (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.” Act of July 25, 1958, 72 Stat. 415.


23. U.S. Const. art. III, § 2: “The judicial Power shall extend to all Cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority....”

24. 22 U.S. (9 Wheat.) 738 (1824). The Osborn case held that the “arising under” of Article III authorized the conferring of jurisdiction on the federal courts over all suits brought by or against a congressionally chartered bank. Chief Justice Marshall reasoned that such suits arose under federal law because in every such case the questions of the bank’s capacity to sue or to be sued, to contract, or to make any legal move, had to be decided explicitly or taken for granted in order for a decision to be made; such an issue was an “original ingredient” sufficient to sustain the constitutionality of federal jurisdiction.


26. This was made clear by Mr. Justice Cardozo in Gully v. First Nat. Bank, 299 U.S. 109, 113 (1936): “Looking backward we can see that the early cases
application of the statutory language. The test formulated by the courts in these latter cases for a case to meet the original federal question jurisdiction of the district courts is that the plaintiff's claim must be founded "directly" upon federal law in a complaint properly pleaded. This differential treatment is said to be compelled by practical considerations. The potential judicial power of the United States over federal questions must necessarily be extremely broad. But to hold that the federal trial courts are invested in every instance with virtually the full constitutional range of jurisdiction over federal questions might well flood the national courts with purely local state matters, thereby deflecting them from their real function. For this same reason it has been required that the claim be not frivolous or clearly untenable. If a clearly untenable assertion of a federal right were sufficient to support the exercise of judicial power, there would be no end to attempts to create federal jurisdiction over state causes of action. Although it has been asserted that dismissal by the district court because the


28. See cases cited note 27 supra. This requirement that the claim be founded "directly" upon national law is thoroughly discussed in Mishkin, The Federal "Question" in the District Courts, 53 COLUM. L. REV. 157 (1953).

29. The controversy must be disclosed upon the face of the complaint unaided by the answer or by a petition for removal. Taylor v. Anderson, 234 U.S. 74 (1914); The Fair v. Kohler Die & Specialty Co., 228 U.S. 22 (1913); Louisville & Nashville R.R. v. Motley, 211 U.S. 149 (1908); Tennessee v. Union & Planters' Bank, 152 U.S. 454 (1894).


31. Id. at 162.

complaint is frivolous or clearly untenable is a dismissal on the merits,\textsuperscript{33} it seems to be well established that a substantial federal question is necessary to sustain the jurisdiction of the court.\textsuperscript{34} This requirement that the claim be not frivolous or clearly untenable appears to be the same requirement that has been adopted in the three-judge court cases which require that the claim of unconstitutionality be substantial.\textsuperscript{35} A lack of a substantial claim of unconstitutionality has been said to exist when the complaint was obviously without merit or its unsoundness so clearly resulted from previous decisions as to foreclose the subject.\textsuperscript{36} This is the same test which is employed by the district courts in deciding whether the federal question presented is frivolous or clearly untenable.\textsuperscript{37} Although in the earlier Supreme Court decisions the requisite that the claim of unconstitutionality be substantial was only hinted at by way of dictum,\textsuperscript{38} in subsequent cases it was made the basis for decision.\textsuperscript{39} The procedure adopted in these cases was for the three-judge court to dismiss the complaint completely for want of jurisdiction.

It has likewise been established that a single district judge may dismiss a complaint, even though a three-judge court is requested when the claim of unconstitutionality is not substan-


\textsuperscript{34} However, it is not required that the claim necessarily be a valid one to sustain jurisdiction. As long as the claim is not frivolous or clearly untenable, the district court has jurisdiction if the federal claim is direct, even though the court subsequently dismiss on the ground that the complaint does not state a cause of action. Such a dismissal of the case is on the merits, and not for want of jurisdiction. Bell v. Hood, 327 U.S. 678 (1946). Similarly, it has been held that in a suit involving both state and federal questions dismissed by the district court on local or state grounds only is a dismissal on the merits, even though the court decided the federal questions adversely to the party raising them, or omitted to decide them altogether. Hurn v. Ousler, 289 U.S. 238 (1933).

\textsuperscript{35} See notes 18, 19, and 20 supra, and accompanying text.

\textsuperscript{36} California Water Service Co. v. City of Redding, 304 U.S. 252 (1938); \textit{Ex parte} Poresky, 290 U.S. 30 (1933).


\textsuperscript{39} California Water Service Co. v. City of Redding, 304 U.S. 252 (1938) (plaintiff had alleged that certain federal grants to a city were unconstitutional and that therefore the acts of the city officials in receiving such grants were illegal. Between the time of filing of the suit and its hearing by the three-judge court, a holding by the Supreme Court in another unconnected case had resolved the question of the constitutionality of the grants. The three-judge court dismissed the complaint on the ground that no substantial constitutional question remained for consideration.). See also Jameson & Co. v. Morgenthau, 307 U.S. 171 (1939) ; Bauer v. Acheson, 106 F. Supp. 445 (D.D.C. 1952).
tial. This is the result of the Supreme Court's decision in the landmark case of *Ex parte Poresky.* In that case a motion to dismiss for want of jurisdiction was heard by a single judge, who held that since the bill did not present a substantial federal question, jurisdiction was lacking, and dismissed the bill. The Supreme Court denied mandamus, and held that since a substantial question of unconstitutionality was required before the three-judge court requirement was applicable, the district court was required to examine the complaint and determine whether jurisdictional requirements were met. In the absence of a substantial federal question, the district court was authorized to dismiss the bill for want of jurisdiction. The result reached in *Poresky* has been consistently adhered to by the courts.

Although the application of the rule announced in *Ex parte Poresky* has been extensive, it has not gone without criticism. Legal writers have been persistent in their assertion that the rule as applied shakes the foundation of the three-judge requirement. Thus it has been said that the rule permits a single district judge to nullify the recognized intention of Congress which was to insure careful and deliberate consideration of constitutional cases by a court of more dignity than the single judge district court. This criticism is predicated on the well-established rule in three-judge cases that a federal district judge is without authority to dismiss on the merits a suit involving the constitutionality of a state statute. In *Ex parte Metropolitan Water Co.,* the first case involving an application of the three-

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40. 290 U.S. 30 (1933).
44. *Berueffy,* The Three Judge Federal Court, 15 ROCKY MT. L. REV. 64, 71 (1943).
46. 220 U.S. 539 (1911). In that case the district judge interpreted Section 266 of the Judicial Code literally and held that while the statute deprived him of the power to grant a temporary injunction, it did not affect his power to deny such relief. A writ of mandamus was granted by the Supreme Court, which held
judge requirement, the Supreme Court held that an application for an interlocutory injunction must be heard before the enlarged court whether the claim of unconstitutionality was or was not meritorious. This rationale was followed in *Ex parte Northern Pacific RR.* and in subsequent Supreme Court cases. While these cases can be distinguished from *Poresky* on the ground that in *Poresky* the court was deciding on a question of jurisdiction and not on the merits, the distinction has been asserted to be more verbal than real. In 1942 Congress passed an amendment to what is now Section 2284(5) of the Judicial Code to provide that “a single judge shall not appoint a master or order a reference, or hear and determine any application for, an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment.” It has been suggested that the intent of Congress in passing this amendment was to preclude dismissals on the ground of jurisdiction as well as on the merits. The Supreme Court has not yet ruled on this contention, but one appellate court decision has found it to be without merit. The district

that the purpose of the statute was to insure a full consideration of the merits by the special court of three judges, and that therefore the single judge was without jurisdiction to hear the cause on the merits.

47. 280 U.S. 142 (1929). That case concerned a petition for a temporary restraining order and an interlocutory injunction against the enforcement of certain rate orders issued by the Board of Railroad Commissioners of Montana, which petitioner alleged violated certain commerce laws and the Constitution of the United States. One district judge granted the restraining order pending final determination by a three-judge court, but before the court could be assembled another judge dissolved this temporary order and dismissed on the merits. The Supreme Court granted mandamus, holding that the single judge was without authority to hear either the motion to dissolve the temporary restraining order or the motion to dismiss the bill on the merits.


The legislative history reveals that one of the bar associations supporting this provision stated that it would overrule *Ex parte Poresky*, and argued that such a result was desirable so as to prevent the single judge from making a preliminary determination of a statute's constitutionality. See H.R. Rep. No. 1677, 77th Cong., 2d Sess. 5 (1942) (Report of Association of the Bar of the City of New York).

53. Jacobs v. Tawes, 250 F.2d 611, 614 (4th Cir. 1957): “The rule laid down in *Ex parte Poresky* ... has not been changed by anything contained in 28 USC § 2284. That section was enacted to codify and clarify the practice with respect to the composition of and procedure before courts of three judges. Subsection 5 of the section was manifestly intended to regulate procedure after the court of three judges had been constituted, not to abrogate the salutary rule that the judge before
courts have in the meanwhile continued to apply the *Poresky* rule.\textsuperscript{54}

The explanation for the rule adopted by the Supreme Court in *Ex parte Poresky* would appear to lie in the area of general federal question jurisdiction. As already pointed out above, it was early decided that to sustain the jurisdiction of the federal courts in cases arising under the Federal Constitution, the claim presented had to be substantial. If a clearly untenable assertion of federal right were sufficient to support the exercise of judicial power there would be no end to attempts to create federal jurisdiction over state causes of action. These same policy considerations exist in three-judge cases. In addition, administrative factors, such as time and expense in convening three-judge courts, plus over-crowded court dockets, would militate in favor of dispensing with the necessity of convening a three-judge court when the plaintiff's allegation of unconstitutionality is clearly without merit and perhaps but a subterfuge to secure federal jurisdiction and direct appeal to the Supreme Court which is permitted in three-judge cases. Granted that dismissal by the district judge for lack of jurisdiction technically involves a consideration of the merits, and that the distinction between *Poresky* and the *Metropolitan* and *Northern* cases is actually more verbal than real, practical considerations in the administration of three-judge courts would seem to justify this result. The legislative intent in enacting the three-judge court statute is in no way interfered with by the *Poresky* decision. The statute was enacted as a compromise measure following the criticism of *Ex parte Young*\textsuperscript{55} that it was unseemly for a single district judge to curtail the enforcement of statutes adopted by the state through its solemn legislative body. The purpose of the three-judge device was to avoid ill-considered interference with state statutes by the use of the federal injunctive power. This purpose is left intact by *Ex parte Poresky*, since activity under the state statute is not enjoined, and the complaint is dismissed for want of jurisdiction. If anything, the solemnity of the state legislative enactments is added to by the *Poresky* decision.\textsuperscript{56}


\textsuperscript{55} 209 U.S. 123 (1908). See note 4 supra and accompanying text.

\textsuperscript{56} Several cases, relying on *Ex parte Poresky*, have established the right of
Recent Race Relations Cases

Starting with the premise that a substantial constitutional question must be presented for the formation of a three-judge court, several recent race relations cases have created what appears to be a new requirement for three-judge courts: that the statute attacked be not clearly unconstitutional. This requisite seems to be predicated on a misapplication of the substantial claim of unconstitutionality requirement. These cases, employing the same line of reasoning, have been decided in different federal circuits. To facilitate the presentation and discussion of the problem, only those cases decided in the fifth circuit will be analyzed in the text. The questions raised are perhaps best presented by a discussion of these cases in the order of their decision.

In Tureaud v. Board of Supervisors a Negro plaintiff instituted a class action in the federal district court seeking an injunction to require admission to Louisiana State University. The plaintiff's prayer alleged the unconstitutionality of Louisiana state law as well as praying for injunctive relief. The one-judge district court took jurisdiction and decided the case solely on the grounds of equal protection. No Louisiana statutes were construed, but the court granted a temporary injunction, recognizing the separate-but-equal doctrine as valid law, but finding that the facilities in Louisiana for Negroes did not meet the test of substantially equal facilities. The court of appeals reversed.


While the Supreme Court's decision in Ex parte Poresky can be justified for reasons outlined in the text, these latter cases dismissing for lack of equity jurisdiction appear in direct conflict with the rule announced in the Metropolitan Water and Northern cases. Lack of equity jurisdiction does not go to the power of the district court as a federal court to hear and decide the case, but to the propriety of granting the extraordinary relief afforded by equity.


59. 207 F.2d 807 (5th Cir. 1953).
holding that the complaint required the convening of a three-judge court. While a petition for certiorari was pending before the Supreme Court, the first decision in Brown v. Board of Education was handed down. Subsequently in a brief per curiam opinion, the Supreme Court vacated the judgment of the court of appeals and remanded the case "for consideration in the light of the segregation cases . . . and conditions that now prevail." On remand, the district court without taking new evidence again granted a temporary injunction. The court of appeals affirmed, concluding that the Supreme Court by its actions had necessarily held that the matter for consideration was within the jurisdiction of a single-judge district court. Judge Rives, in a separate opinion, concurred in the result on the ground that a three-judge court is authorized only when the claim of unconstitutionality presents a substantial federal question. He felt that the federal question presented no longer required analysis and exposition for its decision and was therefore "frivolous." Judge Cameron dissented on the ground that a three-judge court was required. Conceding that where a substantial claim of unconstitutionality is not presented, the district court may dismiss for want of jurisdiction, he concluded that such is "quite a different course of action from the one here invited where a single district judge is called upon to strike down a state statute as unconstitutional. He has no jurisdiction to do this."

The indefiniteness surrounding the Tureaud decision renders uncertain its value as a statement of the proper rules concerning the application of the three-judge court statute. The action by the Supreme Court may indicate dissatisfaction with the stand taken by the court of appeals on the three-judge court issue; on the other hand the Supreme Court may have implied that the plaintiff was entitled to relief in any event in light of the Brown decision. The Tureaud decision is useful to the discussion here only as the backdrop before which the problem in the subsequent cases developed.

The rationale of Judge Rives' concurring opinion in the Tureaud case was made the basis for decision in Bush v. Orleans

60. 347 U.S. 483 (1954).
62. Ibid.
63. 225 F.2d 434 (5th Cir. 1955).
64. Id. at 446.
65. Id. at 442.
Parish School Board. In that case plaintiffs sought an injunction against officers of the public schools of Orleans Parish alleging the unconstitutionality of the Louisiana Constitution and statutory law relative to segregation as well as the Louisiana pupil assignment statute. A three-judge court heard the case initially and held that since under the Supreme Court's second decision in *Brown v. Board of Education* the Louisiana statutes and constitutional provisions were invalid insofar as they required segregation in public schools, no substantial question of constitutionality was presented. Consequently the case was not one for three judges, but should be decided by a single district judge. The Supreme Court's ruling in *Ex parte Poresky* was cited by the court as authority for its conclusion that a substantial question of constitutionality was required for the formation of a three-judge court.

The *Bush* decision clearly stands for the proposition that before a case must be heard by three judges it must appear that the statute attacked is not clearly unconstitutional. Such a requisite is not expressly provided for in the three-judge court statute, nor had it been suggested or applied prior to the *Tureaud* and *Bush* decisions. While practical considerations in the administration of three-judge courts may explain the reason for the court's conclusion, it seems to this writer that the ruling in *Ex parte Poresky* certainly does not stand for such a proposition. The misapplication of the *Poresky* rule in the *Bush* case perhaps results from the use of the words "substantial constitutional question" in the *Poresky* decision. But in *Poresky* these words were used to require that the claim of unconstitutionality be substantial; in other words, the claim of unconstitutionality must not be frivolous or clearly untenable on its face. This was necessary to support the jurisdiction of the court. No such jurisdictional question is presented in the *Bush* case. This is evidenced by the fact that the case was remanded to the federal district court for decision. This would not have been possible under the *Poresky* rule, since in the absence of a substantial claim of unconstitutionality the district court itself would have been with-
out jurisdiction, there being present no other federal question, diversity of citizenship, or other ground for federal jurisdiction.

The procedure adopted in the *Bush* case would appear to be in direct violation of the three-judge requirement. All of the requisites necessary for the formation of a three-judge court would seem to the writer to be present, i.e., injunctive relief was sought against the activity of state officers in enforcing a state statute in a complaint which alleged a substantial claim of unconstitutionality. Yet the case was remanded to the district court for decision on the merits. Such decision on the merits was expressly prohibited by the *Metropolitan Water* and *Northern* cases. Although the rationale in *Ex parte Poresky* will not support the *Bush* procedure, practical considerations in the administration of three-judge courts identical with those underlying the *Poresky* decision perhaps explain the court's conclusion. But even these practical considerations do not seem to justify dispensing with the three-judge requirement where the court clearly has jurisdiction. Congress was certainly aware of the additional administrative burden that would be imposed on the federal judiciary when they enacted the three-judge court statute. This statute was designed to serve as a psychological balm to assuage state ire aroused by the *Young* decision and to prevent "unnecessary conflict between federal and state authority always to be deprecated." This legislative intent would seem to be directly avoided by a requirement that the statute attacked be not clearly unconstitutional.

The three-judge device was adopted in the belief that the more careful consideration afforded each case when it was considered by three judges would minimize undue interferences with state legislation by abuse of the federal injunction power.

It has long been the rule that the constitutionality of a state statute will be presumed until the contrary is clearly established. The enactment of the three-judge court requirement served to strengthen this presumption. Under the *Bush* pro-

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73. See notes 46 and 47 *supra*, and accompanying text.
74. Phillips *v.* United States, 312 U.S. 246, 250 (1941): "While Congress thus sought to assure more weight and greater deliberation by not leaving the fate of such litigation to a single judge, it was no less mindful that the requirement of three judges... entails a serious drain upon the federal judicial system."
77. Phillips *v.* United States, 312 U.S. 246, 251 (1941): "The crux of the
procedure both of these safeguards for state legislative enactments are avoided. In remanding the case to the district court, the three-judge court indicates, without a full hearing on the merits, the unconstitutionality of the statute. With this in mind the district court is left to decide the unconstitutionality of the statute on the merits as well as to issue the requested injunctive relief. Such a procedure can hardly be said to be conducive to the careful consideration of state statutes which the three-judge requirement was designed to afford or to foster the healthy respect so much to be desired between federal and state authority. This is especially true when, as in the Bush case, the injunction granted by the district judge is not specific, but the state is left to proceed "with all deliberate speed" in accomplishing that which the statute sought to prevent. The possibility of future litigation in the administration of the injunction is obvious, especially when the subject matter of the injunction is a matter of such state concern as segregation.

Under the Bush decision a statute was said to be clearly unconstitutional when its unsoundness clearly appeared from previous Supreme Court decisions. The difficulty to be encountered in applying this test is further evidence of the danger underlying the requirement that the statute be not clearly unconstitutional. Unless the statute attacked were identical with a statute whose constitutionality had previously been adjudicated, remand to the district court will result in a determination of the constitutionality of the statute by that court for the first time on the merits. Such a procedure was expressly prohibited by the Metropolitan and Northern cases and would be clearly violative of the three-judge requisite. This in effect happened in the Bush case. The validity of the Louisiana pupil assignment statute had not been specifically ruled upon prior to that decision. The three-judge court preliminarily decided that it was unconstitutional because of the previous segregation cases. This left the

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79. But see Davis v. County Board of Prince Edward County, 142 F. Supp. 616 (E.D. Va. 1956), where it was held that a three-judge court was not required to administer the injunction granted once the Supreme Court affirmed the three-judge court's initial declaration of unconstitutionality. It is interesting to note that this case likewise concerned the constitutionality of a state segregation statute.
district court to decide for or against the constitutionality of the statute on the merits.

At least one important question is left unanswered by the *Bush* decision. It is interesting to conjecture what would be the result if the state should carry the unwieldy burden thrust upon it by the three-judge court's declaration that the statute is clearly unconstitutional and successfully convince the district judge of the statute's validity. Technically speaking the district court would seem to be without jurisdiction since the ground for remand by the three-judge court would have been eliminated. Conceivably the plaintiff might ultimately appeal to the Supreme Court, only to find that the district court was without jurisdiction to try the case initially. The incongruity of such a result is obvious.

In *Ludley v. Board of Supervisors of L. S. U.* the requirement created by the *Bush* case that the statute be not clearly unconstitutional was applied one step further by the district court. In that case the plaintiffs sought to enjoin the action of school officials in enforcing two Louisiana statutes which were alleged to be unconstitutional. The first of these statutes required a certificate of eligibility signed by the parish superintendent of education and by the principal of the high school from which the applicant graduated, before the applicant could be admitted to any publicly financed institution of higher learning. The second statute provided for the removal from office of any permanent public school teacher who advocated or performed any act furthering integration of the races within any public institution of higher learning. The district court, relying on the *Bush* case, refused to convene the three-judge court requested by the defendant, and held the statutes unconstitutional on the merits. The court of appeals concurred in the district court's refusal to convene a three-judge court on the ground that because of the Supreme Court's decision in *Brown v. Board of Education* no substantial question was presented.

This procedure appears open to greater criticism than was directed at that adopted in the *Bush* case. Here there was no effort at compliance with the three-judge requirement. At least in

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84. 252 F.2d 372 (5th Cir. 1958).
the *Bush* case a three-judge court was initially convened, and it decided that a three-judge court was not required. As in the *Bush* case the constitutionality of the statute under attack in *Ludley* had not been previously adjudicated. This being so, the district court, having decided preliminarily that a three-judge court was not required because the statute was clearly unconstitutional, was left to dispose of the case for the first time on the merits. Such a procedure is hardly in keeping with the legislative intent in enacting the three-judge requirement. Practical considerations in the administration of three-judge courts may explain this procedure but in the opinion of this writer certainly do not justify a refusal to apply the three-judge statute where it was clearly applicable.

*Stephen J. Ledet, Jr.*

**The Plight of the Attorney-Certified Public Accountant—An Evaluation of a Proposed Code of Conduct**

In August 1958 a subcommittee¹ appointed by the American Bar Association Committee on Professional Relations submitted to its parent committee and to the National Conference of Lawyers and Certified Public Accountants, a draft of a proposed Code of Conduct dealing with problems of joint practice and publicity by attorneys and certified public accountants practicing together, and persons possessing dual qualifications. No action has as yet been taken by either committee concerning this proposed Code, for it is desired that the members of both professions be given time to study its provisions and consider their probable effects.

The Proposed Code of Conduct divides the attorney-CPA problem into four sections: (1) the lawyer employed by a CPA firm, (2) the CPA employed by a law firm, (3) partnerships between lawyers and CPAs and (4) the individual who possesses dual qualifications. This Comment will consider only the fourth situation—the problems presented when an individual is both a lawyer and a CPA.²

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1. This subcommittee was composed of four attorneys: Mr. William T. Gossett, Dean Erwin N. Griswold, Mr. Louis Boxleitner, and Mr. George E. Brand.
2. No attempt will be made to provide a comprehensive review of the prior