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Three-Judge District Courts, Direct Appeals, and Reforming the Supreme Court's Shadow Docket

Michael E. Solimine*

Abstract: The “shadow docket” is the term recently given to a long-standing practice of the United States Supreme Court, in granting or denying requests for stays of lower court decisions, often on a hurried basis with rudimentary briefing and no oral argument, and with little if any explanation by the Court or individual Justices. Recently the practice has received unusual attention inside and outside the legal community, because of its apparently greater use by the Court in high-profile cases, with the emergency orders often sought by the federal government or state officials. Scholars have advanced various reforms to ameliorate the perceived problems of the shadow docket. One suggestion is to require suits against federal statutes and policies to be litigated before a specially convened three-judge district court, perhaps in the District of Columbia, with a direct appeal to the Court. Supporters argue that this process would result in more consistent decision making by the Court and lower courts.

This Essay critically examines the suggested reform. As its supporters acknowledge, the reform would largely replicate the procedure Congress established from 1937 to 1976 for challenges to the constitutionality of federal statutes. Congress abolished the special procedure in 1976, given opposition from the federal judiciary and others, in part due to it being perceived as unnecessary, and burdening the Court with mandatory appeals. The Essay first evaluates the recent suggestion considering the prior experience, an evaluation that includes an empirical analysis of Supreme Court decisions under the earlier process. It then considers proposals to establish exclusive jurisdiction in the federal courts in the District of Columbia, which would reduce forum shopping but deprive the Court of the benefits of percolation of multiple suits. The Essay concludes that the suggested reform could ameliorate some of the problems of the shadow docket, but should be undertaken with an appreciation of the decidedly mixed past experience with similar institutional arrangements.

INTRODUCTION

The Supreme Court's so-called “shadow docket,” as coined by Professor William Baude¹ is not a new phenomenon but is currently receiving unprecedented attention and critical scrutiny inside and outside the legal community.² The term lacks a precise definition, but it usually refers to the Court deciding emergency orders, granting or denying requests for stays of lower court decisions, often on a hurried basis with rudimentary briefing and no oral argument, and with no or limited explanation by the Court as a whole or individual Justices. This is dramatically different from the Court's regular order of business, which almost always involves ordinary

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¹ William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 NYU J. L. & LIBERTY 1 (2015).

² For an example of the latter, see Charlie Savage, *Court's 'Shadow Docket' Draws Scrutiny, and Fire, From All Sides*, N.Y. TIMES, Sept. 1, 2021, at A1 (front page article).

litigation in the lower courts, followed by a fully-briefed (by the parties and frequently by amici curiae) writ of certiorari, which the Court will take months to consider, which if granted will result in more briefing, oral arguments, and a decision on the merits still more months later, with a lengthy explanatory opinion.³ Recently the practice has received attention because of its seemingly greater use by the Court in high-profile cases involving immigration, environmental, and COVID-regulatory policies, among others, with the orders often sought by the federal government or by state attorneys general, and the perception that the Court uses the shadow docket in inconsistent ways.⁴ Shadow docket cases were prominent in the Court's 2021 Term,⁵ which by some accounts the Court decided over sixty such cases.⁶

Critics of the shadow docket have suggested a variety of reforms, not to outlaw the process as such, but to increase transparency and procedural regularity when it is used. One of those reforms has been advanced by Professor Stephen Vladeck, a prominent chronicler and critic of the modern shadow docket,⁷ has proposed one way to reform the perceived ills of the docket: all suits seeking injunctive relief against federal statutes and policies should be litigated before a three-judge district court, with a direct appeal to the Court.⁸ He argues that process would result in more consistent decision making by the Court with a fuller record for an appeal. As Vladeck acknowledges, his proposal is modeled after the process that governed similar litigation, as mandated by Congress in 1937, that stood until repealed in 1976. Other scholars and commentators have discussed or endorsed this reform.⁹

This Essay critically examines Vladeck's proposal considering that experience. Part I summarizes the shadow docket and its precursors, the recent heightened controversy over the practice, and reform proposals. Part II addresses the reasons Congress adopted the 1937 reform. It notes that the special process for constitutional challenges came to be severely criticized by

³ See Richard J. Pierce, Jr., *The Supreme Court Should Eliminate Its Lawless Shadow Docket*, 74 ADM. L. REV. 1, 1-2 (2022).

⁴ *Id.* at 2-4. See Part I *infra*.

⁵ See, e.g., *Merrill v. Milligan*, 142 S. Ct. 879 (2022)(per curiam)(granting stay of relief ordered under Voting Rights Act, and noting probable jurisdiction). For examples shortly before the 2021 Term officially started, see *Whole Women's Health v. Jackson*, 141 S. Ct. 2494 (2021)(per curiam)(not ordering stay of denial of challenge to Texas law permitting private parties to enforce abortion restrictions); *Alabama Assn. of Realtors v. Dep't of Health and Human Serv.*, 141 S. Ct. 2485 (2021)(per curiam)(invalidating federal eviction moratorium).

⁶ Kimberly Strawbridge Robinson, *Supreme Court Conservatives Want More Robust 'Shadow Docket'*(1), Bloomberg Law, July 8, 2022 (documenting 66 shadow docket decisions during the 2021 Term).

⁷ See, e.g., STEPHEN I. VLADECK, *THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER--AND UNDERMINE THE REPUBLIC* (Basic Books, forthcoming 2023); Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123 (2019)[hereinafter Vladeck, *Solicitor General*]. See also PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES, DRAFT FINAL REPORT 228 n.9 (December 2021)(referring to Vladeck as "[t]he leading critic" of the Shadow Docket)[hereinafter BIDEN COMMISSION REPORT].

⁸ Stephen I. Vladeck, *F.D.R.'s Court-Packing Plan Had Two Parts. We Need to Bring Back the Second*. N.Y. Times, Jan. 7, 2022. <https://www.nytimes.com/2022/01/07/opinion/supreme-court-vaccine-mandate.html> [hereinafter Vladeck, *FDR Second Part*]; Steve Vladeck, *The Supreme Court is Handing Down its Fewest Decisions in Decades. Here's What That Means*, MSNBC, June 4, 2022, <https://www.msn.com/opinion/msnbc-opinion/supreme-court-no-decision-bad-decision-it-s-happening-too-n1295991>.

⁹ See, e.g., Pierce, *supra* note 3, at 17; Mark Joseph Stern, *Congress Finally Scrutinizes One of SCOTUS's Most Disturbing Practices*, Slate, Feb. 18, 2021. Other scholars have discussed the proposal or argued for its adoption for other types of cases as well (e.g., requests for nationwide injunctions), which may overlap in part with cases on the shadow docket. See Part I *infra*.

many in the legal community and by the Court itself, due to the awkwardness of assembling three judges to try the many challenges to federal and state statutes, coupled with the many resulting direct appeals to the Court. The ostensibly mandatory appeals, which needed to be decided on the merits, in the minds of many unnecessarily burdened the Court with cases that could otherwise be litigated in the usual manner, of one district judge's decision, with an appeal as of right to a circuit court, followed by discretionary certiorari review by the Court. Due to the criticisms, Congress largely abolished the 1937 reforms in 1976, leaving the arrangement intact for only reapportionment cases. Most of the criticism of the 1937-1976 experience was focused on the many suits against *state* statutes, and less so regarding the fewer suits challenging *federal* statutes. Drawing on a database of Supreme Court decisions which considered the constitutional of federal statutes, Part II includes an empirical analysis of the decisions from 1937 to 1976 which were on direct appeal from three-judge district courts.

Part III of the Essay utilizes the 1937 through 1976 experience, as well as other uses of three-judge district courts to govern challenges to particular federal statutes, as a baseline to evaluate reintroducing the 1937 reform to ameliorate the perceived deficiencies of the modern shadow docket. The related proposal to lodge venue of all challenges to federal statutes and policies in the District of Columbia would eliminate forum shopping but generate its own concerns, including depriving the Court of the advantages of percolation of issues among different federal courts. The exclusive venue aspect has the advantages and disadvantages of any specialized court, ranging from the expertise of a well-regarded federal court on administrative laws issues, to the possibility of politicizing the judicial selection process for the court.

The Essay concludes that the three-judge district court with direct appeals, if adopted, could ameliorate some of the problems with the modern shadow docket, but should be undertaken with an appreciation for the mixed experience under similar institutional arrangements.

I. THE SHADOW DOCKET AND ITS DISCONTENTS

The “shadow docket” lacks a precise definition, but the consensus seems to be that it refers to decisions of the Supreme Court not on the “merits,” but on emergency orders, typically seeking a stay of a lower court decision or of an action by the federal or state government. They are decided with few of the characteristics of the merits cases, that is, full briefing, oral argument, opportunity for amicus briefs to be filed, followed by a full explanatory decision months later. Instead, they are typically rendered after limited briefing, no oral argument, and only days after the request for an order, often with no or only limited explanation by the Court as a whole or by individual Justices.¹⁰

Despite the recent attention, the Court has had a shadow docket of some kind for almost a century. The most obvious example are Court's decisions on thousands of writs of certiorari filed each Term, the vast majority of which are granted or denied with no additional opinion by the Court or by individual Justices. Nor is concern over such decision-making anything new. As Baude pointed out, decades earlier the Court, in varying degrees, had been called out for

¹⁰ See, e.g., Baude, *supra* note 1, at 1-2; Pierce, *supra* note 3, at 1-3; BIDEN COMMISSION REPORT, *supra* note 7, at 203-04.

summarily reversing lower court decisions with brief *per curiam* opinions offering little or no explanation, and often not in the context of requests for emergency orders as such.¹¹

Nonetheless, the practice appears to have accelerated in recent years. Professor Richard Pierce attributes the change in part to party polarization and resulting less legislation passing in Congress, and in consequence Presidential administrations of both parties relying on executive orders and similar policymaking. In turn, state attorneys general of both parties, often acting in concert, have frequently filed suits in federal court challenging those actions and seeking nationwide injunctions against their implementation.¹² Whether acting alone or together, state attorneys general often have forum-shopped and filed suit in a federal district court whose jurists are presumably favorably disposed, by their record and ideological or political background, to the relief sought in the suit.¹³

Similarly, Professor Vladeck has examined the litigation strategies of the Solicitor General (SG), representing the United States, and finds that in recent years, especially during the Trump Administration, the SG has “aggressive[ly]” sought to “short-circuit the ordinarily course of appellate litigation” by seeking stays of district court decisions in the Court.¹⁴ Vladeck also attributes the rise of the shadow docket to doctrinal shifts on the Court. In making such decisions, Vladeck argues that the Court has often assumed that there is irreparable injury (one of the prerequisites for a stay) whenever a district court enjoins a federal statute or policy, which makes another prerequisite, the likelihood of success on the merits, almost always the controlling factor.¹⁵ Among other problems with the shadow docket, Vladeck contends that by frequently inviting and granting extraordinary relief of district court decisions, the Justices deprive themselves of the informational value of percolation of possible decisions by other district courts, or of review by the Courts of Appeals.¹⁶ He has also argued that the Court should avoid the unsigned and unexplained decisions characteristic of the shadow docket since, he contends, the practice reduces the public’s perception of the integrity and legitimacy of the Court.¹⁷

Some have argued that the criticisms have been overblown. Justice Samuel Alito has argued in a speech that the shadow docket is a “catchy and sinister term” which misleadingly suggests that the Court “resorts to sneaky and improper methods to get its way.” Instead, Alito stated, the Court had to act quickly on these “emergency orders” (his preferred term) because of the time-sensitive nature of the lower court order being reviewed.¹⁸ In other words, as the report of the Biden Commission on the Supreme Court put it, the shadow docket arguably “is not illegitimate,” and is simply a function of “the nature of emergency adjudication.”¹⁹ On this

¹¹ Baude, *supra* note 1, at 19-21 (discussing scholarly commentary and criticisms in the 1950s and 1960s). See also BIDEN COMMISSION REPORT, *supra* note 7, at 203-04 (same).

¹² Pierce, *supra* note 3, at 3, 10-12.

¹³ *Id.* at 12.

¹⁴ Vladeck, *Solicitor General*, *supra* note 7, at 125.

¹⁵ *Id.* at 126.

¹⁶ *Id.* at 153-58.

¹⁷ Stephen I. Vladeck, *The Supreme Court Needs to Show Its Work*, ATLANTIC, March 10, 2021, www.theatlantic.com/ideas/archive/2021/03/supreme-court-needs-show-its-work/618338.

¹⁸ Adam Liptak, *Alito Responds to Critics of the Supreme Court’s ‘Shadow Docket,’* N.Y. TIMES, Sept. 30, 2021, <https://www.nytimes.com/2021/09/30/us/politics/alito-shadow-docket-scotus.html>.

¹⁹ BIDEN COMMISSION REPORT, *supra* note 7, at 205.

account, there is nothing “inherently suspect about emergency orders,” and presumably no fundamental reforms are necessary. Much of the recent controversy over the shadow docket might be largely a function of deep policy disagreements over the substantive legal and policy issues at stake in cases regarding such matters as the COVID pandemic, immigration issues, and death penalty appeals.²⁰

Nonetheless, commentators with different views on the propriety of the shadow docket have advanced or suggested a variety of reforms, such as enhancing transparency by the Court giving reasons for the decision, especially when a lower court is reversed, and by revealing the votes of Justices; bringing more clarity to the precedential effect (if any) of shadow docket decisions, whether reasoned or not; and limiting forum shopping in cases where nationwide injunctions are sought by requiring that such cases be transferred to courts in the District of Columbia.²¹

As a related reform, Professor Vladeck has argued that some of the cases that currently are the basis of much of the shadow docket be litigated before a three-judge district court with a direct appeal to the Supreme Court. Such a process, he argues, would ameliorate some of the infirmities of the litigation of and decision-making for the emergency orders that form the docket.²² Vladeck observes that this step would reinstate the lesser-known component of President Franklin Roosevelt’s storied and failed Court-packing plan in 1937, that was enacted by Congress that year. As Vladeck points out, FDR was concerned about numerous, individual district judges issuing injunctions against various New Deal statutes, which would stay in place while ordinary appeals would grind on. The three-judge district court process would insure that three federal judges, including at least one appeals judge, rather than mere one possibly outlier district judge, would render the decision, followed by a prompt direct appeal to and decision by the Court. This would allow, Vladeck continues, “the merits of the dispute to reach the justices quickly (by combining the function of two levels of lower federal courts) but on a full record.”²³

This path was subsequently changed by Congress in 1976, but it should be used again, Vladeck argues, this time for shadow docket cases, as it would reduce judge-shopping and result in “more consistent decision making and a more efficient path to full merits review by the Supreme Court.”²⁴ Other commentators have also advocated further discussion of this proposal (sometimes coupled with a requirement that suit be brought in the District of Columbia), especially in the context of plaintiffs seeking, and obtaining from one district judge, a nationwide injunction against the enforcement of a federal law or policy.²⁵

II. THE 1937 REFORMS, CONSTITUTIONAL CHALLENGES TO FEDERAL STATUTES AND POLICIES, AND EXCLUSIVE JURISDICTION IN THE DISTRICT OF COLUMBIA COURTS

²⁰ Id. at 206.

²¹ For discussion of these and other reforms, see BIDEN COMMISSION REPORT, *supra* note 7, at 209-12; Baude, *supra* note 1, at 3-4; Pierce, *supra* note 3, at 16-19.

²² Vladeck, *FDR Second Part*, *supra* note 8.

²³ Id.

²⁴ Id.

²⁵ See, e.g., Gregg Costa, *An Old Solution to the Nationwide Injunction Problem*, HARV. L. REV. BLOG (Jan. 25, 2018), <https://blog.harvardlawreview.org/an-old-solution-to-the-nationwide-injunction-problem/>; Pierce, *supra* note 3, at 17; Thomas P. Schmidt, *Judicial Minimalism in the Lower Courts*, 108 VA. L. REV. 829, 907 (2022); Mila Sohoni, *The Lost History of the “Universal” Injunction*, 133 HARV. L. REV. 920, 995-96 (2020).

Grounded as they are in history, Professor Vladeck's suggestions can be evaluated by using the experience of similar practices in the federal courts. First considered is the use of the three-judge district court of litigate constitutional changes to federal statutes, followed by the separate example of the occasional use by some statutes of the federal courts in the District of Columbia to litigate such challenges. This Part of the Essay is mainly descriptive in nature, regarding the use of three-judge district courts as the institution for constitutional challenges to federal statutes in various contexts. Part III of the Essay will be mainly evaluative, considering Professor Vladeck's proposal in light of that experience.

A. The 1937 Reform and the Three-Judge District Court

Since Congress established the Courts of Appeals in 1891, and given subsequent statutory developments, most civil and criminal cases in the federal courts have been litigated in the familiar pattern of proceedings before a single District Judge; followed by an appeal as of right to a regional Court of Appeals; and followed by a writ of certiorari to the Supreme Court, which has the discretion to grant or deny.²⁶ A notable exception to this pattern came in the wake of the Supreme Court's then-controversial decision in 1908 in *Ex parte Young*,²⁷ which recognized an exception to state sovereign immunity by permitting plaintiffs to bring constitutional challenges to state statutes in federal court by suing not the State, but the state official charged with enforcing the law. The decision was controversial because it enabled plaintiffs (a railroad in *Ex parte Young*) to more easily challenge Progressive Era regulatory laws in federal court, and empowered one federal district judge to enjoin the operation of a statewide law.²⁸

Congress responded to *Ex parte Young* in 1910 by enacting legislation which required such suits to be brought before a three-judge district court, with a direct appeal available to the Supreme Court.²⁹ The statute required that the court consist of one district judge and at least one court of appeals judge, with the third judge being appointed by the Chief Judge of the circuit (typically, though not always, another district judge). Supporters of the statute thought three judges, rather than one, would bring greater thought to the important issue of the constitutionality of a state law, and the result would arouse less public controversy as compared to the decision of a single judge. The direct appeal provision would make it more probable that any appeal would be more rapidly resolved as contrasted to the usual appellate process.³⁰

Constitutional challenges to federal statutes were added to the ambit of the three-judge district court in 1937.³¹ That legislation was a small part of the fabled and failed Court-packing plan proposed by President Franklin Roosevelt in that year. The plan was primarily a reaction to a majority of the Supreme Court holding New Deal legislation unconstitutional, but the President

²⁶ See generally RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 28-33 (7th ed. 2015)(discussing changes in 1891 and beyond).

²⁷ 209 U.S. 123 (1908).

²⁸ For discussion of *Ex parte Young* and its aftermath, see Michael E. Solimine, *Congress, Ex parte Young, and the Fate of the Three-Judge District Court*, 70 U. PITT. L. REV. 101, 106-14 (2008)[hereinafter Solimine, *Congress*].

²⁹ Act of June 19, 1910, § 266, 36 Stat. 1100 (codified at 28 U.S.C. §§ 1253, 2281).

³⁰ For further discussion of Congressional adoption of the 1910 legislation, see Michael T. Morley, *Vertical Stare Decisus and Three-Judge District Courts*, 108 GEO. L.J. 699, 727-30 (2020); Solimine, *Congress, supra* note 28, at 114-18.

³¹ Act of Aug. 24, 1937, ch. 754, 50 Stat. 752 (codified at 28 U.S.C. § 2282).

and his supporters in Congress were also concerned with the many suits in the district courts leading to no less than 1600 separate injunctions of legislation.³² They argued that constitutional challenges to federal statutes should be treated with “equal dignity” to that against state statutes,³³ and largely tracking the rationale for the 1910 Act, the amendment was passed with relatively little fanfare in August of 1937, after the Court-packing plan had been rejected.³⁴

Professor Vladeck is right to draw parallels between proposed reforms of the present shadow docket and the 1937 reform. In both there were concerns with possibly outlier federal district judges frequently enjoining federal legislation and policies. Forum- and judge-shopping seem to characterize both eras. As the Supreme Court later observed in a case challenging certain aspects of the immigration laws, the legislative history of the 1937 Act indicates that it was “enacted to prevent a single federal judge from being able to paralyze totally the operation of an entire regulatory scheme...by issuance of a broad injunctive order....[The history emphasizes] the heavy pecuniary costs of the unforeseen and debilitating interruptions in the administration of federal law which could be wrought by a single’s judge’s order, and the great burdens entailed in coping with the harassing actions brought by one after another to challenge the operation of an entire statutory scheme...until a judge was ultimately found who would grant the desired injunction.”³⁵ The passage was written in 1965, but there are obvious parallels to the recent, numerous district injunctions sought and obtained against federal statutes and regulatory policies, especially during the Obama and Trump Administrations.

And at least some of the injunctions entered in the mid-1930s arguably were in substance, if not in form, national or universal relief.³⁶ Nonetheless, it appears that the appeals from such injunctions were typically not characterized by modern shadow-docket behavior by litigants or courts. That is, it appears parties were usually not seeking or obtaining emergency orders in the Supreme Court to stay lower court decisions while direct appeals were pending, though there are

³² David P. Currie, *the Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1, 11 (1964). See also Felix Frankfurter & Adrian S. Fisher, *The Business of the Supreme Court at the October Terms, 1935 and 1936*, 51 HARV. L. REV. 577, 611 (1938)(referring to the “voluminous outpouring” of district court decisions enjoining various parts of New Deal legislation).

³³ Currie, *supra* note 32, at 11 (quoting 81 Cong. Rec. 7045 (1937)(remarks of Sen. O’Mahoney)). See also Frankfurter & Fisher, *supra* note 32, at 617-18 (“[T]he inevitable irritation of Congress at the free-handed way in which single judges throughout the country enjoined the enforcement of some of the most vital measures ever enacted, made inevitable the requirement...for a court of three judges to set aside the will of Congress.”)

³⁴ For further discussion of the 1937 amendment to the three-judge district court statute, see Currie, *supra* note 32, at 10-11; Barry Cushman, *the Judicial Reforms of 1937*, 61 WM. & MARY L. REV. 995, 1045-47 (2020); Morley, *supra* note 30, at 734-35; Solimine, *Congress, supra* note 28, at 124-25.

³⁵ *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 154-55 (1963)(citing legislative history of the 1937 Act).

³⁶ There is a lively debate about whether the federal judiciary, until relatively recently, entered injunctions against federal statutes or policies that purported to apply to the entire country, that is, not simply to the parties to the lawsuit or the geographic boundaries of the lower court. Compare Sohoni, *supra* note 25, at 974-76, 982-87 (arguing that injunctions entered against federal statutes and programs in the 1930s were very similar to the modern national or universal injunctions) with Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 428, 434-35 (2017)(arguing that injunctions entered against New Deal legislation were limited to the named parties, and that no national injunctions were entered by federal courts before the 1960s) and Michael T. Morley, *Disaggregating the History of Nationwide Injunctions: A Response to Professor Sohoni*, 72 ALA. L. REV. 239, 242 (2020)(arguing that Sohoni’s evidence does not support the conclusion that the federal judiciary had a practice of issuing defendant-oriented injunctions in the early decades of the twentieth century).

examples of such orders.³⁷ If that is the case, though, it was likely due to norms of litigant and judicial behavior that were distinct from those of the present regarding rapid appeals of such orders.

The impetus for the 1910 and 1937 legislation eventually faded, and Congress severely cut back the jurisdiction of the three-judge district court in 1976. In part the reforms were a victim of their own success. By the 1960s and 1970s, hundreds of three-judge district courts were being convened each year, and scores of direct appeals were being lodged in the Supreme Court.³⁸ Most of each were challenges to state statutes, with not coincidentally many related to the burgeoning Civil Rights era and attendant litigation. Influential figures and organizations in the legal community, not least of whom were Justices on the Court itself, came to conclude that the virtual flood of litigation was a burden on both district courts (given the time-consuming logistics of assembling three judges rather than one to decide a case at the trial) and on the Supreme Court (given that the direct appeals were ostensibly mandatory and had to be decided on the merits). Moreover, many argued that the original perceived need for the three-judge district court process had largely faded, that even controversial and important litigation could be handled appropriately by a single district judge with the normal appeal process.³⁹

The criticism of the three-judge district court was driven in substantial part by the large number of cases concerning state laws. But there is a parallel and largely similar story regarding the smaller number of cases generated by the 1937 reform. There as well, influential commentators came to conclude that the court had outlived the usefulness claimed in 1937. For example, the American Law Institute, in an influential study commissioned by Chief Justice Earl Warren and published in 1969, concluded that “the conditions that gave rise to the 1937 legislation no longer exist,” and that other procedural mechanisms “safeguard federal legislation from ill-considered invalidation by federal district courts.”⁴⁰ Similar reasons, referring to the numerous cases and appeals from challenges to federal and state statutes, were advanced by the another influential report from the Federal Judicial Center, convened by Chief Justice Warren Burger.⁴¹ The calls for repeal of the three-judge district court were cast almost exclusively in terms of sound procedure and judicial administration, as opposed to substantive concerns with the need or output

³⁷ For examples of such orders from the 1920s when direct appeals were permitted for constitutional challenges to federal statutes, see *Hill v. Wallace*, 257 U.S. 310 (1921); *Bd. of Trade of Chi. v. Clyne*, 260 U.S. 704 (1922). For more recent examples, see STEPHEN M. SHAPIRO, ET AL., *SUPREME COURT PRACTICE 17-13--17-14* (11th ed. 2019).

³⁸ For a discussion of the numbers, see Part II.B. *infra*.

³⁹ For further discussion of the reasons advanced to abolish the court, see Morley, *supra* note 30, at 738-44; Solimine, *Congress, supra* note 28, at 134-44.

⁴⁰ AMERICAN LAW INSTITUTE, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* 325 (1969)[hereinafter ALI STUDY]. By other mechanisms, the study referred, *id.*, to the statutory requirement that the United States be notified of and be permitted to intervene in private suits that raise the constitutionality of a federal statute (28 U.S.C. § 2403), itself part of the 1937 reform, and the then-provision which permitted direct appeals to the Supreme Court of any district court holding a federal law unconstitutional (28 U.S.C. § 1252).

⁴¹ FEDERAL JUDICIAL CENTER, *REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT* (1972), reprinted in 57 F.R.D. 573, 596-99 (1972)[hereinafter Freund Report].

of those courts.⁴² With support from jurists and members of Congress of different ideological stripes, the court was abolished in 1976,⁴³ save for an exception for reapportionment cases.⁴⁴

Despite the almost complete abolishment in 1976, the three-judge district court has enjoyed a robust afterlife. Left standing was a separate such court established by the 1965 Voting Rights Act, to decide declaratory judgment actions regarding whether certain States and political subdivisions were, in making changes to election laws, subject to preclearance by the Department of Justice.⁴⁵ Since the 1976 repeal, several federal statutes have been passed in the past several decades with judicial review provisions for that particular law, mandating that any constitutional challenges thereto be litigated before a three-judge district court, with a direct appeal to the Supreme Court.⁴⁶ It is not uncommon for proposed federal legislation that some may feel may have constitutional problems or otherwise concern particularly important policies to be accompanied by such provisions.⁴⁷

B. Three-Judge District Courts and Constitutional Challenges to State and Federal Statutes: Empirical Studies

The usefulness of the three-judge district court as a procedural vehicle for suits, that may ameliorate the perceived deficiencies of the shadow docket, can be informed by empirical evaluations of the operation of those courts in other contexts. First consider the use of the court for constitutional challenges to state legislation, which by far outnumbered suits challenging federal statutes. James Walker and I recently conducted such a study.⁴⁸ We were especially

⁴² Solimine, *Congress*, *supra* note 28, at 143-48.

⁴³ Act of Aug. 12, 1976, Pub.L. No. 94-381, 90 Stat. 1119 (codified in part at 28 U.S.C. § 2284). The other statutes permitting direct appeals from single district judges holding federal statutes unconstitutional were repealed in 1988. Pub. L. 100-352, 102 Stat. 662. See generally Bennett Boskey & Eugene Gressman, *The Supreme Court Bids Farewell to Mandatory Appeals*, 121 F.R.D. 81 (1988).

⁴⁴ The reasons for the exception are not clear from the legislative record. Based on that limited record and the chorus of critics in general of the three-judge district court, it was apparently thought that reapportionment cases were still important and controversial ones, raising difficult issues of federal-state relations, that would benefit from continued adjudication before three-judge district courts. See Carolyn Shapiro, *Docket Control, Mandatory Jurisdiction, and the Supreme Court's Failure in Rucho v. Common Cause*, 2020 WIS. L. REV. 301, 309-13; Michael E. Solimine, *Institutional Loyalty and the Design of Partisan Gerrymandering Adjudication in the Federal Courts*, 14 NYU J. LAW & LIBERTY 171, 179-81 (2020).

⁴⁵ Section 5 of the 1965 Voting Rights Act, 52 U.S.C. § 10304. For discussion of the legislative history of this provision, see Solimine, *Congress*, *supra* note 28, at 132-33. This provision became dormant when the Supreme Court held unconstitutional section 4 of the Act, 52 U.S.C. § 10303(b), the provision which determined which States and political subdivisions were covered by the preclearance requirements. *Shelby Cty. v. Holder*, 570 U.S. 529 (2013).

⁴⁶ For discussion of these laws and their legislative history, see Michael E. Solimine, *The Fall and Rise of Specialized Federal Constitutional Courts*, 17 U. PA. J. CONST. L. 115, 128-36 (2014)[hereinafter Solimine, *Fall and Rise*].

⁴⁷ *Id.* at 131-32. For recent examples, see For the People Act of 2021, H.R. 1, 117th Cong. (2019); Freedom to Vote, John R. Lewis Act, H.R. 5746, § 4, 117th Cong. (2022); Carl Hulse, *Bipartisan Bill Aims to Block Jan. 6 Abuses*, N.Y. TIMES, July 21, 2022, at A1, A17 (proposed amendments to the Electoral Count Act provide that claims against a State's slate of electors could be challenged through a three-judge district court with a direct appeal to the Supreme Court).

⁴⁸ Michael E. Solimine & James L. Walker, *The Strange Career of the Three-Judge District Court: Federalism and Civil Rights, 1954-1976*, 72 CASE W. RES. L. REV. 909 (2022). Prior empirical studies of three-judge district court decisions regarding state statutes were more limited than ours in coverage. *Id.* at 929-30.

interested in analyzing the increase in such suits during the Civil Rights Era and its aftermath in the 1960s and 1970s. Three-judge district courts for all situations were convened in hundreds of cases each year during that period, until severely falling off after the 1976 legislation.⁴⁹ Similarly, starting in the early 1960s and continuing into the late 1970s, direct appeals decided on the merits by the Supreme Court took up scores of cases each Term.⁵⁰

We took a closer examination of 885 decisions in the district courts challenging state statutes (the original purpose of the 1910 Act) from 1954 (the beginning of the Warren Court and a proxy for the start of the civil rights era) until 1976, when Congress greatly restricted the coverage of the three-judge district court.⁵¹ Among other things, we found at the trial level that most constitutional challenges were raised under the Fourteenth Amendment (i.e., due process or equal protection), voting rights, free expression, and race; and that in total the courts granted (in whole or in part) 51 percent of the injunctions sought by plaintiffs.⁵² Almost half of the decisions resulted in a direct appeal. Of those, the Supreme Court summarily affirmed 44%, and with merits opinions affirmed or reversed in 12% and 11%, respectively (with the remainder being resolved by dismissals or in other ways).⁵³

The Supreme Court's disposition of the appeals raises issues relevant to the present Essay. Most striking is that despite the direct appeal provision, which might imply that an explanatory opinion on the merits is expected,⁵⁴ almost half of the appeals resulted in a summary affirmance with no such opinion. Almost always the summary affirmances were made without extended briefing or oral argument.⁵⁵ These shadow docket-like dispositions illustrate an unusual aspect of the Court's jurisprudence in dealing with the statutes setting up three-judge district courts. For many decades the Court has interpreted the statutes in an openly and unapologetic narrow manner, to minimize its mandatory docket and keep most of its docket discretionary through writs of certiorari.⁵⁶

The summary dispositions have led to another jurisprudential problem for the Court to grapple with, one that it never satisfactorily resolved. What precedential weight, if any, should the

⁴⁹ Id. at 947 (tbl. 1)(relying on data reported in the Annual Reports of the Administrative Office of the U.S. Courts).

⁵⁰ Id. at 948 (tbl. 2).

⁵¹ We constructed a database of relevant district court decisions through Westlaw searches. For details on those searches and other methodological aspects of the study, see id. at 974-75.

⁵² Id. at 948-49 (tbls. 3-5).

⁵³ Id. at 950-51 (tbls. 7-8).

⁵⁴ Joshua A. Douglas & Michael E. Solimine, *Precedent, Three-Judge District Courts, and the Law of Democracy*, 107 GEO. L.J. 413, 424 (2019).

⁵⁵ SHAPIRO, *supra* note 37, at 5-57—5-63.

⁵⁶ See, e.g., *Gonzalez v. Automatic Emps. Credit Union*, 419 U.S. 90, 98 (1974) (“only a narrow construction is consonant with the overriding policy, historically encouraged by Congress, of minimizing the mandatory docket of this Court in the interests of sound judicial administration”)(footnote omitted); *Phillips v. United States*, 312 U.S. 246, 251 (1941)(statutes were “not measure[s] of broad social policy to be construed with great liberality, but as...enactment[s] technical in the strict sense and to be applied as such.”). The statement in *Phillips* came to be “the Court’s favorite quotation” on how the three-judge district court statutes should be interpreted. 17A CHARLES ALAN WRIGHT, ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 4234 at 197 (2007)(footnote omitted). The canon of construction was applied in cases regarding, e.g., when a three-judge district court should be convened, when relief other than an injunction was sought, and whether the federal issue needed to be “substantial.” The classic and critical survey of the Court’s arguably confusing and inconsistent application of the canon is Currie, *supra* note 32. The Court still invokes the canon, see *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018).

numerous summary dispositions have? One option would be no weight at all, given the lack of full briefing and an explanatory opinion. Not taking that route, the Court has stated that the summary affirmances are strictly speaking on the merits,⁵⁷ and entitled to *some* precedential weight, depending on how close the facts are to a subsequent case.⁵⁸ This muddled standard has understandably confused lower courts and commentators.⁵⁹

There is apparently no parallel study of the three-judge district courts convened for constitutional challenges to federal statutes under the 1937 Act. There are at least two complimentary ways to engage in such a study. One would parallel my study with Walker, and assemble a database of such cases at the district court level. Another would be to identify relevant Supreme Court decisions which have their origin in cases governed by the 1937 Act. Fortuitously there is a recently created database that permits use of the latter approach. Professor Keith E. Whittington has assembled a Judicial Review of Congress Database of every Supreme Court decision, from 1789 to the present, that ruled on the merits of a constitutional challenge to a federal statute.⁶⁰ Drawing on that database, I determined which decisions from the passage of the 1937 Act to 1978 were direct appeals from three-judge district courts.⁶¹

According to the Judicial Review Database, in this time frame there are approximately 400 Supreme Court decisions that reached the merits of a constitutional challenge to a federal statute. Of those, 64 were direct appeals from three-judge district courts.⁶² The federal statute was upheld in 46 and determined to be unconstitutional, in whole or in part, in 18. They include

⁵⁷ E.g., *Hicks v. Miranda*, 422 U.S. 332, 344 (1975); *Edelman v. Jordan*, 415 U.S. 651, 671 (1974).

⁵⁸ E.g., *Mandel v. Bradley*, 432 U.S. 173 (1977)(per curiam).

⁵⁹ See SHAPIRO, *supra* note 37, at 4-80—4-82; Douglas & Solimine, *supra* note 54, at 424-27.

⁶⁰ See Keith E. Whittington, *The Judicial Review of Congress Database*, <https://scholar.princeton.edu/kewhitt/judicial-review-congress-database>. For further discussion and analysis of the database, see KEITH E. WHITTINGTON, *REPUGNANT LAWS: JUDICIAL REVIEW OF ACTS OF CONGRESS FROM THE FOUNDING TO THE PRESENT* (2019).

⁶¹ All the cases in the database with variables coded for each are available at the website cited in note 60 *supra*. Among the variables coded was whether the Court's decision came up by way of a writ of certiorari, or not. See Keith E. Whittington, *Judicial Review of Congress Dataset Description of Variables 4* (January 2019), available at the database website. I checked the cases that did not come up on certiorari to determine which were direct appeals from three-judge district courts. I checked decisions for two years after the 1976 legislation, because it did not apply retroactively, and there were cases in the pipeline that eventually reached the Court in 1977 or 1978. A list of the cases is available from the author and on file with the *Indiana Law Journal*. The database does not include Court decisions which did not reach the merits, e.g., were dismissed on jurisdictional or other non-merits grounds. WHITTINGTON, *supra* note 60, at 317. Thus, excluded were direct appeals from three-judge district courts which dismissed for lack of standing, see, e.g., *Tenn. Elec. Power Co. v. TVA*, 306 U.S. 118 (1939), *aff'd* 21 F. Supp. 947 (E.D. Tenn. 1938)(three-judge court); *Flast v. Cohen*, 392 U.S. 83 (1968), *rev'd*, 267 F. Supp. 351 (S.D.N.Y. 1967)(three-judge court). See also *United States v. Richardson*, 418 U.S. 166, 169 n.2 (1974)(decision not in database, reversing Court of Appeals decision holding that plaintiffs had standing to challenge the CIA Act regarding the secrecy of the CIA's budget, and noting that the lower courts considered but decided not to convene a three-judge district court). Conversely, the database includes a small number of cases not governed by the 1937 Act, but from a statute that had its own provision requiring constitutional challenges to be brought before a three-judge district court. E.g., *Nixon v. Adm. Gen. Serv.*, 433 U.S. 425 (1977)(Presidential Recordings and Materials Preservation Act of 1974).

⁶² The number does not include about 60 cases involving federal constitutional issues that came up on a direct appeal, but not from a three-judge district court decision. Most of these were direct appeals statutorily authorized from convictions in federal criminal cases, or other cases, and those statutes were eventually repealed in 1988, see note 43 *supra*.

several notable decisions familiar to students of constitutional law.⁶³ The rate of invalidation appears to be about the same as it is for all the decisions in the database for the 1937-1978 period.⁶⁴ So this route of cases to the Court's docket was not an avenue to either frequently uphold or invalidate federal statutes, and by result if nothing else seems to mirror the disposition of cases that arrived at the merits docket by other means.

The record of those cases can be compared to the larger number of direct appeals of three-judge district courts in cases challenging state statutes. Of the 64 decisions, only two were summary dispositions.⁶⁵ Other than not facing the large number of appeals for state statutes, perhaps the Court felt an institutional obligation to not send a signal, even if unintended, that it was not taking a suit against a federal statute seriously. In contrast, the Court in cases dealing with federal statutes repeated the mantra that the statutes setting up the three-judge court system with direct appeals were to be construed narrowly.⁶⁶

C. Exclusive Jurisdiction of Three-Judge District Courts in the District of Columbia

While Professor Vladeck has not so argued, others have suggested that a three-judge district court requirement should include a provision, not found in the 1910 and 1937 iterations, that exclusive venue for the action be in the U.S. District Court for the District of Columbia.⁶⁷ Several reasons can be advanced in favor of such exclusivity. Start with the notion that reducing venue to one district will limit or eliminate forum shopping. Critics of a particular judge's decision to issue an injunction against a federal law will no longer be able to label it the result of a plaintiff's selecting a predisposed jurist.⁶⁸ Another reason is that when a federal statute or policy is at issue, it makes some sense for the case to be litigated in the national seat of the federal government, not unlike venue being appropriate in the federal courts in a state when that

⁶³ See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942)(intrastate activity and Commerce Clause); *United Public Workers v. Mitchell*, 330 U.S. 75 (1947)(Hatch Act); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964)(Title II of 1964 Civil Rights Act); *Shapiro v. Thompson*, 394 U.S. 618 (1969)(residency requirement for welfare); *Frontiero v. Richardson*, 411 U.S. 677 (1973)(sex discrimination); *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976)(Tenth Amendment challenge).

⁶⁴ See WHITTINGTON, *supra* note 60, at 26 (fig. 1-1, comparing numbers of upholding and invalidations from 1791 to 2011).

⁶⁵ See *Richardson v. Davis*, 409 U.S. 1069 (1972), *sum. aff'g*, 342 F. Supp. 588 (D. Conn. 1972)(three-judge court); *Chief of the Cap. Police v. Jeannette Rankin Brigade*, 409 U.S. 972 (1972), *sum. aff'g*, 342 F. Supp. 575 (D.D.C. 1972)(three-judge court). The *Richardson* affirmance did cite a case in support. See *Richardson*, 409 U.S. at 1069 (citing *Weber v. Aetna Cas. & Surety Co.*, 406 U.S. 164 (1972)).

⁶⁶ See, e.g., *Fleming v. Nestor*, 363 U.S. 603, 606 (1960)(three judge court need not be convened when constitutionality of federal statute is at issue, absent a request for an injunction); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 155 (1963)(three-judge court need not be convened when only a declaratory judgement was sought); *Swift & Co. v. Wickham*, 382 U.S. 111, 128-29 (1965)(decision not in database, holding that claim arising under Supremacy Clause does not fall within ambit of three-judge court statutes, in part due to the Court's "constrictive" interpretation of those statutes). Compare *Zemel v. Rusk*, 381 U.S. 1, 5-7 (1965)(challenge to immigration laws substantial enough to justify convening of three judge court); *Fleming v. Rhodes*, 331 U.S. 100 (1947)(1937 Act applies to as-applied challenges to federal statutes, in addition to facial challenges).

⁶⁷ See, e.g., *Costa*, *supra* note 25. Vladeck has instead argued that the government could be given the *option* of seeking transfer of such suits to the District of Columbia courts. See BIDEN COMMISSION REPORT, *supra* note 7, at 211 & n.72 (summarizing Vladeck testimony).

⁶⁸ *Sohoni*, *supra* note 25, at 995-96.

state's laws are challenged. This seems especially apt when the suit involves a nationwide or universal injunction.

Finally, the federal judges in the District of Columbia, at both the trial and appellate levels, have a long-standing and by most accounts well-earned reputation for being particularly excellent and smart jurists, especially though not only for administrative law matters.⁶⁹ The best of both these worlds could combine in a three-judge court consisting of at least one judge from both levels. For many of these reasons, Congress has long vested permissive or exclusive jurisdiction in the U.S. Court of Appeals in the District of Columbia for many court challenges to the actions of federal administrative agencies.⁷⁰

There are impressive counterarguments that can be made. True, exclusive venue in the District of Columbia will limit or eliminate forum shopping. But when coupled with a direct review provision to the Supreme Court, it will also deprive the Court of the benefits of percolation. That is, currently different federal judges around the country, at both the trial and appellate levels, might come out the same on the same challenge to a federal law, and the Court can take that into in deciding whether to grant or deny certiorari. If different courts come out differently, it may benefit the Court in making its own decision resolving the conflict.⁷¹ Nor it is obvious, with all due respect to the estimable federal judges in the District of Columbia, whether they have superior legal acumen as compared to their able counterparts throughout the United States. Nor is clear that judges ensconced in the District will have a better sense of national issues or that their decisions will be more accepted, inside or outside the legal community, as compared to the federal courts elsewhere in the United States.⁷² Also, confirmation battles over the federal judges appointed for the District of Columbia may become more contentious if that District is the sole venue for resolution of suits for nationwide injunctions against federal programs.

For further guidance we can look to two examples of three-judge district courts with exclusive venue in the District of Columbia. One is the now dormant⁷³ Section 5 of the 1965 Voting Rights Act, which required certain States that historically discriminated against the voting rights of Black Americans to preclear their changes to elections with the U.S. Department of Justice, or file a declaratory judgment action with a three-judge district court in the District of Columbia.

⁶⁹ Solimine, *Fall and Rise*, *supra* note 46, at 148-49. A related reason that federal judges in the District of Columbia are highly regarded is that the President may appoint those judges without the hurdle of Senatorial courtesy, as is true for the judges serving in the States. However, due to changes in the Senate's filibuster rules, and the changing perception and reality that appointments to the D.C. Circuit are a steppingstone to the Supreme Court, the nomination and confirmation process has become increasingly politicized. *Id.* at 149-50. This may diminish the perceived advantage of a more expert and apolitical judiciary in the District.

⁷⁰ See Eric M. Fraser, et al., *The Jurisdiction of the D.C. Circuit*, 23 CORNELL J.L. & PUB. POL'Y 131 (2013).

⁷¹ Solimine, *Fall and Rise*, *supra* note 46, at 142-44. On the other hand, some are skeptical of the purported benefits of percolation, given the uncertainty created by different judge ruling different ways, and the arguable lack of evidence that the Supreme Court (or lower courts) frequently internalize or use the additional information supplied by percolation. See Michael Coenen & Seth Davis, *Percolation's Value*, 73 STAN. L. REV. 363 (2021); Solimine, *Fall and Rise*, *supra* note 46, at 144-45.

⁷² Bradford Mank & Michael E. Solimine, *State Standing and National Injunctions*, 94 NOTRE DAME L. REV. 1955, 1979-80 (2019). See also Alan Gura, *Congressional Democrats' Court Picking (Not Packing) Scheme*, WALL ST.J., May 10, 2021, <https://www.wsj.com/articles/congressional-democrats-court-picking-not-court-packing-scheme-11620684937>.

⁷³ See note 45 *supra*.

The latter venue was selected, the historical record shows, because it was thought that federal judges there would give the Voting Rights Act more expansively and sympathetic treatment than might federal judges in the covered jurisdictions.⁷⁴ Affected jurisdictions overwhelmingly used the administrative process to preclear their changes, but between 1972 and 2012, such jurisdictions filed 92 declaratory judgment actions.⁷⁵ Fifty-nine of those were dismissed by the parties or the courts, leaving 33 that were resolved on the merits. Of those, the courts granted a declaratory judgment in favor of the jurisdiction in 18 cases and denied in 15. Fifteen of the decisions were appealed to the Supreme Court, which held oral arguments and rendered full opinions in eight and summarily affirmed or dismissed the others.⁷⁶ The court side of preclearance, then, did not impose substantial burdens on either the district or the Supreme Court, despite the considerable activity involved in the administration of preclearance.

The other example is the Bipartisan Campaign Reform Act (BCRA) of 2002, popularly known as the McCain-Feingold law, which regulates campaign financing for elections to federal office, and requires that any constitutional challenges be filed before a three-judge district court in the District of Columbia, with a direct appeal available to the Supreme Court.⁷⁷ The legislative history of this provision is sparse, but the rationale for the provision appears to be that First Amendment challenges to various provisions of the BCRA were expected, relatively rapid resolution of the challenges were intended, and the federal judges in the District of Columbia had the political sophistication and legal acumen to expertly deal with the inevitable litigation.⁷⁸

The drafters of the provision predicted correctly. By my count, there have been at least ten such challenges to various provisions of the BCRA, from 2003 to 2022.⁷⁹ All of the district court decisions have been appealed, and the Supreme Court has promptly held oral argument and resolved them with full opinions in six, while summarily affirming or disposing of four others.⁸⁰ It is not clear how much value-added was the special review provision,⁸¹ but on the whole, the BCRA litigation was not particularly procedural controversial or burdensome to the courts (the substance of the cases was another matter).

⁷⁴ Michael E. Solimine, *Rethinking District of Columbia Venue in Voting Rights Preclearance Actions*, 29 GEO. L.J. ONLINE 29, 31-32 (2014).

⁷⁵ *Id.* at 33, 37.

⁷⁶ *Id.* at 37. There was preclearance litigation outside of the District of Columbia as well, since the Attorney General was permitted to sue locally when a jurisdiction failed to seek preclearance, and the Supreme Court also held that private parties have an implied right of action to do so. *Id.* at 38. I am not aware of an empirical study of these Section 5 enforcement actions, but at least 100 were filed between 1982 and 2006, and between 1971 and 2008 at least 12 of those were appealed to the Supreme Court. *Id.* at 39 nn. 63-64.

⁷⁷ Pub. L. No. 107-155, 116 Stat. 113, § 403(a).

⁷⁸ Michael E. Solimine, *Institutional Process, Agenda Setting, and the Development of Election Law on the Supreme Court*, 68 OHIO ST. L.J. 767, 772-75 (2007); Joshua Panas, Note, *Out of Control? Congressional Power to Shape Judicial Review of New Legislation*, 1 GEO. J.L. & PUB. POL'Y 151, 164-66 (2002).

⁷⁹ See Michael Solimine, *Partisan Balance in Three-Judge District Courts under BCRA*, Election Law Blog, June 3, 2016, <https://electionlawblog.org/?p=83380> (referring to nine cases). The tenth case is *FEC v. Cruz*, 142 S. Ct. 1638 (2022).

⁸⁰ Solimine, *Fall and Rise*, *supra* note 46, at 129 nn. 52-53 (listing BCRA cases from 2002 to 2014).

⁸¹ *Cf. id.* at 146-47 (discussing whether percolation might have aided the Supreme Court in the absence of the special review provision, and noting that the Court in the BCRA cases seemed to draw relatively little on the legal analysis of the three-judge district court opinions). The same conclusion might be drawn regarding the Court's latest BCRA decision, *FEC v. Cruz*, which made only fleeting references to the lower court opinion.

III. SHOULD THE THREE-JUDGE DISTRICT COURT BE REVIVED TO RESPOND TO THE SHADOW DOCKET?

An evaluation of proposals to reinstate a three-judge district court with a direct appeal to the Supreme Court, to ameliorate some of the perceived problems of the shadow docket, can be informed by the history of past iterations of the three-judge district court.

The evaluation can be organized around several factors Professor Vladeck identified in his proposal. Start with the coverage of the court. He observes that “[r]easonable minds will differ as to exactly what cases should go to such panels, but it’s increasingly clear that many should.”⁸² The 1910 and 1937 Acts covered federal constitutional challenges to state and federal statutes, respectively. Simply to literally reinstate these statutes is surely not what Vladeck has in mind. Although shadow docket cases can come from challenges in federal court to federal or state law, the main thrust of the critics of the docket is the former. But any literal reinstatement of the 1937 Act would be overinclusive; any particular challenge to a federal statute or its application will not necessarily raise issues of a national or universal injunction, to which the shadow docket is closely but not inextricably tied.⁸³ But it also could be underinclusive: shadow docket cases can involve not the constitutionality of a federal statute, but non-constitutional questions regarding the administrative application or executive enforcement of federal statutes.⁸⁴ One approach would be a statute that covers challenges to the legality of a federal statute, or its application by executive orders or otherwise, but coupled with coverage of only those cases where plaintiff seeks a national injunction.

Professor Vladeck also argues that the proposal would “allow the merits of the dispute to reach the justices quickly...but on a full record[,]” which would lead to “more consistent decision making and a more efficient path to full merits review by the Supreme Court.”⁸⁵ These are laudable goals, but it not entirely clear how the proposal would lead to their effectuation. On a full record being assembled, in many shadow docket cases a decision on an injunction by a single district court is reviewed, often bypassing the Courts of Appeals on a stay application. The proposal seems to contemplate that three federal judges working together would be able to, with the aid of the attorneys, assemble a full record to enable better review by the Supreme Court, either on stay application or a plenary review of a judgment (or sequentially both).

This too is a laudable goal, but past experience is not encouraging. One of the criticisms of the three-judge district court was that it was logistically awkward for multimember trial courts, constituted temporarily by judges pulled from other courts, to permit full adjudication and

⁸² Vladeck, *FDR Second Part*, *supra* note 8.

⁸³ As Professor Vladeck has observed, cases where a nationwide injunction is sought account for “only one modest slice of the shadow docket,” BIDEN COMMISSION REPORT, *supra* note 7, at 234 n.71 (quoting Vladeck testimony). There are other controversial uses of the docket, e.g., summary reversals (some explained, some not) in qualified immunity, death penalty, and religious liberty cases that do not involve such injunctions.

⁸⁴ Since the 1910 and 1937 Acts were limited to constitutional challenges to federal and state statutes, courts had to grapple with the issue of requiring a three-judge district court to be convened for a challenge to the *application* of those statutes, as compared to a challenge to the underlying statute. For an extensive critique of the sometimes-inconsistent answers the Supreme Court and lower courts provided, see Currie, *supra* note 32, at 37-55.

⁸⁵ Vladeck, *FDR Second Part*, *supra* note 8.

assemble a full record.⁸⁶ In one well-known case, involving a challenge to a state statute, the Supreme Court remanded for further fact-finding by the three-judge panel.⁸⁷ Perhaps this problem was the exception, not the rule, but it seems likely to recur. That said, the three-judge district court process may enable the Court to better engage in plenary review at the stay stage if it comes to that. In other words, it could reduce the ability of litigants to forum- and judge-shop, while accelerating the Court's opportunity to review the merits of the case on fuller record, even at the stay stage.

A mandatory appeal provision may be thought to encourage the Supreme Court to issue full explanatory opinions on appeal from three-judge district courts, whether on stay applications or otherwise. This would address the problem of the shadow docket decisions that are underexplained or not explained at all. Again, past practice suggests this may not always happen. As outlined above, the Court from 1954 to 1976 summarily disposed of over 40 percent of the direct appeals in cases involving challenges to state statutes. In contrast, there was only a tiny number of such dispositions in challenges to federal statutes. Much will likely depend on the number of cases that come to the Court by direct appeal, depending on the coverage of cases by an adopted proposal. The larger number of such cases, the more summary, shadow-docket-like dispositions are probable.⁸⁸

That said, the Court may be less likely to fall back on such a practice given its current historically shrunken docket, and a renewed interest in reinstating some mandatory appeals. To be sure, Congressional adoption of the Judges' Bill in 1925, heavily promoted by Chief Justice William Howard Taft, was a seismic event which gave the Court almost total discretion via certiorari to control its own merits docket.⁸⁹ But the change has not been without controversy, as it arguably calls into question the ability of the Court to objectively apply the rule of law with public legitimacy.⁹⁰

⁸⁶ See, e.g., SHAPIRO, *supra* note 53, at 2-25. See also Freund Report, *supra* note 41, at 599 ("A three-judge court is not well adapted for the trial of factual issues. Courts of that kind are reluctant to hold an evidentiary trial, even when there are factual matters to explore, and the judges are likely either to attempt to induce the parties to stipulate facts, where often a trial might be advisable, or to resort to procedural devices to shortcut the factual hearing.") Contemporary accounts from lawyers who practiced before three judge courts agreed. E.g., Alfred L. Scanlan, *The Trial and Appeal of Constitutional Issues*, 20 CATH. LAW. 386, 389-90 (1974).

⁸⁷ *Askew v. Hargrave*, 401 U.S. 476, 478-89 (1971)(per curiam). Critics added that this "situation" was "far from uncommon." Freund Report, *supra* note 41, at 599. Presently, if an appeal is taken of a decision granting or denying a request for a preliminary (as compared to a permanent) injunction, there may not be as complete a record given possibly truncated hearings and discovery. This could be true whether the decision is from a single judge or a three-judge district court.

⁸⁸ In addition to summary dispositions, the Court could also use such avoidance doctrines like standing (e.g., *Gill v. Whitford*, 138 S. Ct. 1916 (2018)) or the political question doctrine (e.g., *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019)) to delay or avoid rulings in particularly difficult or controversial cases on direct appeal from three-judge district courts. See Solimine & Walker, *supra* note 48, at 946 n.155 (discussing such avoidance mechanisms in this context).

⁸⁹ It is then curious that apparently neither Taft nor anyone else at the time seriously considered limiting or abandoning the direct appeals mandated by the 1910 legislation. It seems that they thought they were an exception justified by the perceived importance of the cases. Solimine, *Congress*, *supra* note 28, at 123-24.

⁹⁰ See Matthew J. Franck, *The Problem of Judicial Supremacy*, NAT'L AFF., Spring 2016, at 137, 147-49; Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1713-30 (2000).

Throughout much of American history, even after 1925, and at least until the 1976 Act, mandatory appeals constituted significant percentages of the Court’s merits docket.⁹¹ Not coincidentally with recent concerns over the shadow docket, there have been increased calls for reviving the Court’s mandatory docket.⁹² The possibility of the Court falling back on the use of summary dispositions to handle an increased caseload from mandatory appeals could be ameliorated by the Court not giving any precedential weight to such orders (nor expecting lower courts to). If the appeal, whether of a stay order or on the merits, does not earn full treatment by the Court, then it should not earn the honor of enjoying stare decisis effect.⁹³

A recent shadow docket order, on a direct appeal from a three-judge district court, illustrates the possible options for the Court if Professor Vladeck’s proposal was implemented. In *Merrill v. Milligan*⁹⁴ the Court considered an application to stay the reapportionment decision of the district court which held that Alabama had violated the Voting Rights Act when drawing Congressional districts.⁹⁵ In a brief order by a 5-4 vote, the Court granted a stay but also noted probable jurisdiction and set the case for argument on the merits in the 2022 Term. In a concurring opinion, Justice Kavanaugh defended the stay by arguing that the district court’s remedial order of redrawing Congressional districts came too close to impending primary elections.⁹⁶ In a dissent, Justice Kagan charged that the majority was “us[ing] its shadow docket to signal or make changes in the law, without anything approaching full briefing and argument.”⁹⁷ In this high-profile case, the majority combined an unarticulated stay order with explanatory opinions by concurring and dissenting Justices. The separate explanatory opinions and their content make *Merrill* less of an objectionable shadow docket decision.

Finally, consider proposals to lodge a new three-judge district court in the District of Columbia. The use of that option seems to have worked reasonably well for preclearance under the Voting Rights Act, and for constitutional challenges to the BCRA. I nonetheless have previously expressed some skepticism of that option. No doubt that it would achieve the worthy goal of limiting forum shopping. But it does so at the cost of prohibiting any percolation in the lower courts, and of violating the general norm of the regional dispersion of venue in the federal courts, and in my judgment, there are reasons, but not strong ones, to automatically make the District of

⁹¹ WHITTINGTON, *supra* note 60, at 177 (fig. 6-2, showing discretionary and mandatory docket in judicial review cases, 1850-2018).

⁹² E.g., JACK BALKIN, THE CYCLES OF CONSTITUTIONAL TIME 154-55 (2020); Tejas N. Narechania, *Certiorari in Important Cases*, 122 COLUM. L. REV. 923, 992-93 (2022).

⁹³ Lisa Schultz Bressman, *The Rise and Fall of the Self-Regulatory Court*, 101 TEX. L. REV. (forthcoming 2022)(manuscript at 49-50), <http://ssrn.com/abstract=4030997>; Douglas & Solimine, *supra* note 54, at 431-36.

⁹⁴ 142 S. Ct. 879 (2022).

⁹⁵ *Singleton v. Merrill*, 582 F. Supp.3d 924 (N.D. Ala. 2022)(per curiam)(three-judge court).

⁹⁶ *Merrill*, 142 S. Ct. at 879-82 (Kavanaugh, J., concurring). On the timing of relief issue, Justice Kavanaugh relied on the “*Purcell* principal,” taken from another Shadow Docket decision, *Purcell v. Gonzalez*, 549 U.S. 1 (2006)(per curiam).

⁹⁷ *Id.* at 889 (Kagan, J., dissenting). Justice Kagan emphasized “the massive factual record developed over seven days of testimony” in the district court, *id.* at 883; argued that the district court correctly applied the law, *id.* at 884-88; and disputed the State’s reliance on the *Purcell* principal. *Id.* at 888-89. In response, the concurrence argued that Kagan’s “catchy but worn-out rhetoric about the ‘shadow docket’ was similarly off-target,” since the “stay will allow this Court to decide the merits in an orderly fashion...and ensure that we do *not* decide the merits on an emergency docket.” *Id.* at 879 (Kavanaugh, J., concurring).

Columbia the sole venue.⁹⁸ A less drastic option could be to permit venue in any appropriate district court, but permit multiple suits, if there are any, to be consolidated in one district, using first-in-time filing and other factors.⁹⁹

CONCLUSION

In his seminal article, Professor Baude argued that the Supreme Court in most of its low-profile cases “behave[d] in a professional, organized, and lawyerly manner.” But, he added, it “is just in the hot-button, high-stakes, sharply divided cases that law runs out and politics and personal preferences take over.” The Court’s shadow docket decisions, he concluded, sometimes “deviate from its otherwise high standards of transparency and legal craft.”¹⁰⁰

Some critics of the shadow docket, led by Professor Vladeck, have argued that the Court’s transparency and legal craft can be enhanced by Congress requiring that certain cases, now typically litigated on that docket, be adjudicated in three-judge district courts with a direct appeal to the Court. Such a process could indeed ameliorate some of the perceived problems of the shadow docket, such as forum shopping and the frequent lack of explanatory opinions by the Court, and in doing so enhance and perhaps restore the public legitimacy of both the Court and lower federal courts. These would be no small accomplishments, especially given heightened partisanship that in the public mind seems to characterize the actions of many public officials, judges included,¹⁰¹ but policymakers should undertake these reforms with an appreciation of the decidedly contentious history of prior iterations of the three-judge district court, which led to Congress significantly limiting the jurisdiction of that court in 1976. The upsides of a revival of the court almost a half-century later may not outweigh the downsides, and so should only be done by Congress after further input from the Court, and other stakeholders inside and outside the legal community.

⁹⁸ See notes 70-81 & accompanying text *supra*.

⁹⁹ The consolidation here would be modelled on 28 U.S.C. § 2112(a)(3), which uses random assignment for the consolidation of multiple challenges to federal administrative actions in one Court of Appeals. For a recent example of its use that resulted in a shadow docket decision, albeit one where some percolation occurred prior to consolidation, see *Nat’l Fed. Indep. Bus. v. OSHA*, 142 S. Ct. 661, 663 (2022)(*per curiam*).

¹⁰⁰ Baude, *supra* note 1, at 40.

¹⁰¹ One difference between 1937 and the present time is that in the former time criticism of the many district judges enjoining New Deal legislation was not cast in ideological terms—i.e., of judges driven by partisanship, however one might define those terms, on which see Adam Bonica & Maya Sen, *Estimating Judicial Ideology*, 35 J. ECON. PERSP. 97 (2021). I am unaware of any study of judicial partisanship among district judges in the 1937 era, but it is telling that it has long been thought in some quarters that the “moral authority of a federal court order is likely to be maximized if the result cannot be laid to the prejudices or political ambitions of a single district judge,” ALI STUDY, *supra* note 40, at 320, which is an argument in favor of the three-judge district court.