



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 93
Number 6 *North Carolina Issue*

Article 6

9-1-2015

"If It Ain't Broke, Don't Fix It": Evaluating North Carolina's Creation of a Three-Judge Court to Hear Constitutional Challenges to State Law

Joshua A. Yost

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

Joshua A. Yost, *"If It Ain't Broke, Don't Fix It": Evaluating North Carolina's Creation of a Three-Judge Court to Hear Constitutional Challenges to State Law*, 93 N.C. L. REV. 1893 (2015).

Available at: <http://scholarship.law.unc.edu/nclr/vol93/iss6/6>

This Comments is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

**“If It Ain’t Broke, Don’t Fix It”: Evaluating North Carolina’s
Creation of a Three-Judge Court to Hear Constitutional
Challenges to State Law***

INTRODUCTION 1894

I. THE HISTORY AND USE OF THREE-JUDGE COURTS IN
AMERICAN JURISPRUDENCE..... 1896

A. *The History of the Federal Three-Judge Court*..... 1896

1. “The Muted Fury of Congress”: The Beginnings of
the Federal Three-Judge Courts..... 1897

a. *The History of Ex parte Young* 1897

b. *Reaction to the Decision*..... 1899

2. Early Changes to the Three-Judge Court Act 1902

3. FDR, Court Packing, and the Use of Three-Judge
Courts for Constitutional Challenges..... 1903

4. The Beginning of the End: The Three-Judge Court
During the Civil Rights Movement 1904

5. The 1976 Amendment and the Expiration of the
Three-Judge Court 1906

6. The Remnants..... 1908

II. THE NEW LAW: CREATION OF THE THREE-JUDGE
COURT 1908

A. *Creation of a Court to Hear Constitutional Challenges* ... 1910

B. *Trial Consolidation and Venue* 1911

C. *Rights of Appeal* 1912

III. THE CONSTITUTIONALITY OF THE LAW 1912

A. *Does North Carolina General Statutes Section 1-
267.1(a1) Create a New Court?* 1913

B. *Does Amended North Carolina General Statutes
Section 1-81.1 Unconstitutionally Restrict the
Jurisdiction of Constitutional Challenges?* 1916

C. *The Three-Judge Court and the Separation of Powers
Doctrine*..... 1918

IV. “LET REASON HOLD THE REINS”: A CALL TO QUESTION
THE IMPLEMENTATION OF NORTH CAROLINA’S NEW
LAW..... 1919

A. *Practical Problems*..... 1920

1. Efficiency 1920

* © 2015 Joshua A. Yost.

1894	<i>NORTH CAROLINA LAW REVIEW</i>	[Vol. 93]
	<i>a. Ambiguity in the Law</i>	1920
	<i>b. "If Past is Prologue": Lessons from the Federal Use of Three-Judge Courts</i>	1923
	2. Increased Cost and Concomitant Effect on Access to Justice	1925
	<i>B. Political Implications and the Harm to the Integrity of the Judiciary</i>	1927
	1. Lowering the Public's Estimation of the Court	1928
	2. Harm to the Independence of the Judiciary	1930
	<i>C. A Step in the Right Direction</i>	1933
	CONCLUSION	1934

INTRODUCTION

In August 2013, North Carolina Superior Court Judge Robert Hobgood ruled unconstitutional and permanently enjoined the “Opportunity Scholarship Program” passed by the North Carolina General Assembly.¹ The law would have funneled \$10 million in taxpayer money to eligible families to help them pay for private school tuition.² Judge Hobgood dismissed the general assembly’s efforts, stating that “[t]he General Assembly fail[ed] the children of North Carolina”³ because the law failed to provide “sound basic education” as constitutionally mandated by the Supreme Court of North Carolina.⁴ Judge Hobgood added, “it appears to this court that the General Assembly is seeking to push at-risk students from low-income families into non-public schools in order to avoid the cost of providing them a sound, basic education in public schools.”⁵

The hostility towards the school voucher law expressed by Judge Hobgood characterizes a recent trend in North Carolina state and

1. *Hart v. State*, No. 13 CVS 16771, 2014 WL 6724598, at *3 (N.C. Super. Ct. Aug. 28, 2014) *reversed by* *Hart v. State*, No. 372A14, 2015 WL 4488553 (N.C. Sup. Ct. July 23, 2015); see Sharon McCloskey & Lindsay Wagner, *NC School Vouchers Ruled Unconstitutional*, N.C. POL’Y WATCH (Aug. 21, 2014), <http://www.ncpolicywatch.com/2014/08/21/nc-school-vouchers-ruled-unconstitutional-state-must-retrieve-distributed-funds/>.

2. McCloskey & Wagner, *supra* note 1.

3. Transcript at 9, *Hart v. State*, 2014 WL 6724598 (N.C. Super. Ct. Aug. 28, 2014) (No. 13 CVS 16771), available at <http://www.ncjustice.org/sites/default/files/Judge%20Hobgood's%20Ruling%20granting%20Plts'%20MSJ%2008-21-14.pdf>.

4. McCloskey & Wagner, *supra* note 1. *Leandro v. State* held that, while school districts do not have a constitutional right to equal funding, the North Carolina Constitution dictates that all children have a fundamental right to the opportunity to receive a sound basic education. 346 N.C. 336, 354, 488 S.E.2d 249, 259 (1997).

5. See Transcript, *supra* note 3, at 8; McCloskey & Wagner, *supra* note 1.

federal courts: teacher tenure,⁶ abortion restrictions,⁷ and rules to limit political protests⁸ are all examples of legislation passed by the North Carolina General Assembly only to be struck down by courts. This trend has not gone unnoticed by members of the general assembly.

To combat this course of events, state legislators passed a law that changes the procedure for how constitutional challenges are heard in North Carolina.⁹ On August 7, 2014, Governor Pat McCrory signed into law a provision that requires all constitutional challenges to the facial validity of state laws to be heard in front of a three-judge court.¹⁰

Supporters of the law laud the attempt of the general assembly to end plaintiff venue shopping, which state Senator Buck Newton said severely “undercuts the credibility and legitimacy of the judiciary.”¹¹ Others have been more critical of the general assembly’s action. In a statement to the Charlotte Observer, the former President of the North Carolina Bar Association Catharine Arrowood called the move “extremely disturbing.”¹² To Arrowood and others who share her view, the general assembly’s move is not only unnecessary, but also impractical and inefficient.¹³

North Carolina’s new law is unprecedented. No such law has ever been implemented by any other state.¹⁴ The law has provoked controversy and raised many questions. Among these questions, perhaps the most central is simply, is this a good idea? Any answer

6. Jane Stancill, *Wake Judge Orders Halt to End of Teacher Tenure in NC*, CHARLOTTE OBSERVER (May 16, 2014), <http://www.charlotteobserver.com/news/local/education/article9122282.html>.

7. Sandhya Somashekhar, *N.C. Abortion Restriction Violates Free Speech, Judges Rule*, WASH. POST (Dec. 22, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/12/22/n-c-abortion-restriction-violates-free-speech-judges-rule/>.

8. See Anne Blythe, *More ‘Moral Monday’ Cases Dismissed After US Supreme Court Ruling*, CHARLOTTE OBSERVER (Aug. 12, 2014), <http://www.charlotteobserver.com/news/local/crime/article9150071.html>.

9. See Craig Jarvis, *G.O.P. Moves to Restrict Court Challenges of N.C. Laws*, CHARLOTTE OBSERVER (Aug. 16, 2014), <http://www.charlotteobserver.com/news/local/article9152438.html>.

10. Current Operations and Capital Improvements Appropriations Act of 2014, ch. 100, § 18B.16.(a), 2014-4 N.C. Adv. Legis. Serv. 241 (LexisNexis) (codified at N.C. GEN. STAT. § 1-267.1(a1) (2014)); see Jarvis, *supra* note 9.

11. See Jarvis, *supra* note 9.

12. *Id.*

13. *Id.*

14. See *infra* Section I.A. While history shows that the federal courts used a three-judge court to hear constitutional challenges, never before has such a model been implemented at the state court level.

requires an exploration of the constitutionality, practicality, and policy behind the creation of this three-judge court. This Comment begins such a discussion. In doing so, this Comment examines the constitutionality of North Carolina's new law, and, while finding the three-judge court constitutionally acceptable, it argues that North Carolina should not have adopted this procedural mechanism. Drawing on lessons from the federal courts, this Comment contends that the use of such a panel should be abandoned because it will cause more problems than it solves.

Analysis proceeds in four parts. Part I traces the origins and evolution of the three-judge court in the federal judicial system, highlighting the reasons for its creation and its demise. Part II introduces and explains the law creating the three judge-court passed by the North Carolina General Assembly. Part III then addresses the constitutionality of the law, finding that a challenge to the law will likely fail, as precedent forecloses constitutional challenges. Finally, Part IV analyzes the normative concerns raised by the new legislation and calls for its abandonment by suggesting that the law is impractical and unneeded. In doing so, it will argue that the use of a three-judge court to hear constitutional challenges is unfair and inefficient and that it unnecessarily politicizes the state judiciary. The piece concludes by recommending revised statutory language that will make the law more palatable to all citizens in the event that the general assembly does not heed the call to abolish these courts.

I. THE HISTORY AND USE OF THREE-JUDGE COURTS IN AMERICAN JURISPRUDENCE

A. *The History of the Federal Three-Judge Court*

While this Comment focuses on the legal and policy concerns surrounding North Carolina's creation of a three-judge court to hear constitutional challenges, a background on the federal history of these panels is needed. Providing a background on the history of the three-judge courts in the federal court system will contextualize the general assembly's recent actions and offer useful insights for the analysis of the current legislation.¹⁵

15. See *infra* Parts III–IV.

1. “The Muted Fury of Congress”:¹⁶ The Beginnings of the Federal Three-Judge Courts

a. *The History of Ex parte Young*

The genesis of the three-judge court begins in 1908 with the Supreme Court’s landmark decision in *Ex parte Young*.¹⁷ The time period surrounding the case was characterized by “vigorous social, political, and economic expansion.”¹⁸ This growth, however, brought new concerns. Massive industrial expansion led states to feel increasingly pinched by the demands of big businesses.¹⁹ In response, states implemented “novel regulatory and tax measures” in hopes of “cop[ing] with the needs of the new industrial world.”²⁰ These regulatory measures proved ineffective because they were stymied by the private sector’s most powerful and lethal weapon: federal injunctions.²¹

The growing tension between the states and the federal courts reached a fever pitch in 1908 when the Supreme Court decided *Ex parte Young*. Two years before the decision, the state of Minnesota enacted regulatory measures to reduce and fix railroad rates for both passengers and freight.²² Railroad companies attacked the law on Due

16. WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890–1937* (1994).

17. *Ex parte Young*, 209 U.S. 123 (1908).

18. Elliott S. Marks & Alan H. Schoem, *The Applicability of Three-Judge Courts in Contemporary Law: A Viable Legal Procedure or a Legal Horsecart in a Jet Age?*, 21 AM. U. L. REV. 417, 419 (1972). Before 1900, courts had, on occasion, used multiple judges to decide cases, as the first promulgation of such three-judge courts was in 1789, but instances such as these were the exceptions to the use of a single judge. See David P. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1, 1 (1964).

19. Marks & Schoem, *supra* note 18, at 419.

20. Currie, *supra* note 18, at 5. Such measures included taxing, regulating working conditions, and establishing public-utility commissions to set freight and passenger rates on railroads. *Id.*

21. During this time period, federal judges repeatedly enjoined state officers from enforcing regulatory measures, finding that regulations violated due process. *Id.* Such injunctions were harmful to states because they paralyzed efforts by the states to protect themselves from the damaging actions of a business until a final decision was rendered. See *id.* at 6. Resentment and anger arose toward federal judges as these “stubborn obstacles” continuously blocked the exercise of state regulatory power. See *id.* at 5; see also Philip L. Merkel, *The Origins of an Expanded Federal Court Jurisdiction: Railroad Development and the Ascendancy of the Federal Judiciary*, 58 BUS. HIST. REV. 336, 336–37 (1984) (discussing the rapid expansion of federal judicial power in the late 1800s and the “suspicion and contempt” many people felt toward the federal courts as a result).

22. James Leonard, *Ubi Remedium Ibi Jus, or, Where There’s a Remedy, There’s a Right: A Skeptic’s Critique of Ex Parte Young*, 54 SYRACUSE L. REV. 215, 222 (2004). The statute levied heavy fines and carried the possibility of prison sentences for any railroad company that violated the law. *Id.* at 223.

Process and Commerce Clause grounds, arguing that the rates imposed by Minnesota were unconstitutionally confiscatory.²³ The district court issued a preliminary injunction against Minnesota Attorney General Edward Young prohibiting the enforcement of the regulations.²⁴ Young, however, defied the command and issued a petition for a writ of mandamus ordering the Northern Pacific Railway Company to abide by the newly enacted freight laws.²⁵ Young was then held in contempt of court and later challenged the contempt order to the Supreme Court though a writ of habeas corpus.²⁶

Although unconventional in his approach, Young's argument that he could enforce Minnesota's legislation seemed to rest firmly upon Supreme Court precedent.²⁷ The Court had recently held in *Fitts v. McGhee*²⁸ that the Eleventh Amendment prevented individuals from suing state officers for injunctive relief when those offenses were not directly authorized to enforce allegedly offensive state legislation.²⁹ As it was, Minnesota's legislature had drafted the regulatory measures in such a way as to avoid charging any particular state official with the specific duty of enforcing the law.³⁰ Thus, Young argued that the railroad's suit against him was, in effect, against the state of Minnesota, which should guarantee him immunity under the Eleventh Amendment.³¹ Young's argument, however, failed to

23. See Michael E. Solimine, *Congress, Ex Parte Young and the Fate of the Three-Judge District Court*, 70 U. PITT. L. REV. 101, 106–07 (2008).

24. *Id.* at 107.

25. Leonard, *supra* note 22, at 223–24.

26. *Id.* at 224.

27. See *infra* notes 28–31 and accompanying text.

28. *Fitts v. McGhee*, 172 U.S. 516 (1899).

29. *Id.* at 530. Such suits were suits against the state, over which federal circuit courts had no jurisdiction. A year before, the Supreme Court decided *Smyth v. Ames*. There, the court held that actions enjoining state officials from enforcing allegedly unconstitutional laws were not foreclosed by the Eleventh Amendment if the state officials were actually charged with enforcing the law. *Smyth v. Ames*, 169 U.S. 466, 518–19 (1898); Solimine, *supra* note 23, at 106.

30. Solimine, *supra* note 23, at 107.

31. *Ex parte Young*, 209 U.S. at 132. This Comment examines *Ex parte Young* within a very narrow frame, one that uses the case as a vehicle to explore the broader congressional reaction to the decision and the creation and implementation of the three-judge court. Though a full doctrinal discussion of Eleventh Amendment jurisprudence is beyond the scope of this Comment, in any effort to describe *Young's* context, reference to jurisprudence cannot be avoided in its entirety. For a full discussion of Eleventh Amendment jurisprudence, see generally Leonard, *supra* note 22 (analyzing *Ex parte Young* in light of extensive historical background); JOHN V. ORTH, *THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY* (1987) (detailing the history of the Amendment over the last two centuries).

persuade the Court. Justice Peckham wrote for the majority that a federal court could enjoin a state officer from enforcing an unconstitutional statute.³² Young lost his case, and the federal injunction rendered impotent another state regulation. The response to *Ex parte Young* led to the creation of the three-judge court.³³

b. *Reaction to the Decision*

Ex parte Young was not as revolutionary a case as congressional and public reaction may have supposed it to be. The decision did expand the Eleventh Amendment exceptions, but from a doctrinal perspective, *Ex parte Young*'s holding was not entirely disconnected from previous Supreme Court decisions.³⁴ As one scholar noted: “[*Ex parte Young*] did not fundamentally alter the role of the federal courts so much as [it] gradually changed the labels under which litigants continued to do what they had done in the past.”³⁵ Thus, understanding why the case created such a “storm of controversy”³⁶ requires looking to the perception of the case rather than its result.

Ex parte Young ignited a tinderbox of outrage and resentment over the ever-increasing power of the federal judiciary. As alluded to above, the time period in which *Ex parte Young* was decided was a time of tension between the progressive ideals of many states and the conservative notions of economic regulation that pervaded the federal courts.³⁷ This tension, coupled with the Supreme Court's approval of a federal district court judge's seemingly unbridled discretion to issue definite and absolute orders that outstripped the

32. *Ex parte Young*, 209 U.S. at 159.

33. See *infra* notes 34–51 and accompanying text. Scholars and later members of the Supreme Court have been critical of the court's holding and rationale in *Ex parte Young*. See, e.g., Currie, *supra* note 18, at 4 (“Behind the outlandish justification concocted to support this holding lay the not implausible conviction that federal constitutional rights could not be adequately protected without the intervention of federal equity; therefore the philosophy of immunity had to yield.”).

34. Solimine, *supra* note 23, at 112.

35. Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 81 (1997); see also John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1032 n.325 (2002) (arguing that *Ex parte Young* was merely a gap-filler of sorts because the Court “closed a potential gap in the availability of relief, restoring traditional balance without having to repudiate or alter state sovereign immunity itself”).

36. *Steffel v. Thompson*, 415 U.S. 452, 465 (1974) (quoting PAUL M. BATOR ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 967 (2d ed. 1973)).

37. See Solimine, *supra* note 23, at 112–13.

states' regulatory power, became too much for many to overlook.³⁸ This sentiment was best characterized by Senator Lee Overman of North Carolina, paraphrasing Justice Harlan's lone dissent in *Ex Parte Young*: "We have come to a sad day when one subordinate Federal judge can enjoin the officer of a sovereign State from proceeding to enforce the laws of the State passed by the legislature of his own State, and thereby suspending for a time the laws of the State."³⁹

With the controversy now fully ablaze, the next two years of congressional debate sought to find a solution to "placate the state's feelings of resentment and restore the dignity the states felt has been lost."⁴⁰ Much of the debate and discussion centered on ways to limit the breadth of power that the Supreme Court had vested in individual federal judges.⁴¹ Initially, some in Congress called for the complete abolition of federal injunctive power and put forward bills that would have forbid all federal injunctions against the enforcement of state laws.⁴² In support of such a measure, Senator Overman said, "If I had it in my power, I would not allow a federal court to enjoin the enforcement of a state statute."⁴³ But no matter how passionate many in Congress were over the federal judiciary's supposed affront to state regulatory power, those like Senator Overman knew that in order to gain widespread support for reform, they would have to pull their punches and enact a more measured and temperate bill.

Accordingly, in June of 1910, after years of vigorous debate,⁴⁴ the Three-Judge Court Act was passed. Successfully attached as a rider to the Mann-Elkins Railroad Act, the 1910 bill forbid federal district court judges from issuing interlocutory injunctions against unconstitutional state statutes, unless such an injunction were granted by a district court comprised of a three-judge panel.⁴⁵ While the Three-Judge Court Act did not possess the bite that many in

38. See *id.* *Ex parte Young* was decided in the same era as *Lochner v. New York*, a controversial decision striking down a state statute that regulated working conditions on due process grounds. *Lochner v. New York*, 198 U.S. 45, 64 (1905). Many contemporary observers of the Court saw the *Young* decision as indicative of the Court's ongoing commitment to *laissez faire* economic principles. See Solimine, *supra* note 23, at 112.

39. 42 CONG. REC. 4847 (1908).

40. Marks & Schoem, *supra* note 18, at 420.

41. *Id.*

42. 45 CONG. REC. 7256 (1910).

43. *Id.*

44. Senator Overman first introduced a similar bill in 1908, but it died on the House floor after being passed in the Senate. See Solimine, *supra* note 23, at 115–16.

45. Mann-Elkins Act of 1910, Pub. L. No. 218, ch. 309, § 17, 36 Stat. 539, 557 (codified at 28 U.S.C. § 2281 (1910)) (repealed 1976).

Congress had called for, those who supported the bill nonetheless believed that the installation of a three-judge court would adequately shield the states from the power of the federal judiciary.⁴⁶ An examination of the Senate debates at the time reveals this intent. For example, Senator Bacon of Georgia stated that “the purpose of the Bill is to throw additional safeguards around the enormous powers claimed for the subordinate Federal Court.”⁴⁷ Later in the debate, Bacon revealed the fear that many members of Congress had of the federal judiciary and pointed to the potential role that the three-judge court could play in diminishing the court’s power:

If these courts are to exercise the power of stopping the operation of the laws of a state, then at least let it be done on notice and not hastily, and let there be the judgment of three judges to decide such questions, and not permit such dangerous power to one man. The necessity for this legislation is a very grave one. It is a most serious trouble which now exists—that by the action of one judge the machinery of state laws can be arrested.⁴⁸

To men like Bacon and Overman, the three-judge courts would prevent abusive, imprudent exercises of judicial power. Short of taking away injunctive power altogether—the thought was—the three-judge courts afforded an adequate remedy.

Proponents of the bill also sought to even the playing field between the states and the federal courts. The bill provided a direct right of appeal to the Supreme Court from any decision of the three-judge court.⁴⁹ The direct right of appeal sought to diminish the real sting that injunctions brought—the ability to stop enforcement of a state law until a final resolution.⁵⁰ By providing a quick and timely appeal, the bill provided a further layer of protection in case of a panel’s adverse ruling.

Regardless of the bill’s strength, the Three-Judge Court Act ushered in a new congressional disposition toward the federal courts.⁵¹ The three-judge district court was here to stay and played an

46. 42 CONG. REC. 4853 (1908). Congress’s “muted fury” as expressed in the Act can be explained by several factors, including congressional opposition to the three-judge court and uncertainty that such a court would effectively curtail abusive judicial power. ROSS, *supra* note 16, at 2. See Solimine, *supra* note 23, at 118.

47. 42 CONG. REC. 4853 (1908).

48. *Id.*

49. Mann-Elkins Act § 17.

50. See Currie, *supra* note 18, at 6.

51. See Solimine, *supra* note 23, at 152.

increasingly pivotal role in the federal court system throughout the next half-century.

2. Early Changes to the Three-Judge Court Act

It did not take long for Congress to augment the power of the three-judge court. Initially, these changes were minor. In 1913, Congress amended the legislation to have a three-judge panel hear rulings on the constitutionality of state administrative commission orders.⁵² The 1913 amendment also provided that a three-judge district court must stay any federal court proceedings, if a state court had stayed proceedings under state law, pending adjudication of issues in state court. The 1913 Amendment, however, saw little use and was later deemed superfluous by the Supreme Court.⁵³

A more drastic change occurred in 1925. Previously, the three-judge courts were restricted to cases where only temporary injunctive relief was sought, not permanent relief.⁵⁴ This created the potential for conflicting results between the three-judge courts and the individual district court judges. Best stated, “[i]t is an anomaly to require the presence of a circuit judge and two district judges to hear an application for a preliminary injunction and then allow a single district judge to pass upon the cause finally.”⁵⁵ Congress corrected the problem in 1925, adjusting the language of the Act to require three-judge courts to convene for both permanent and interlocutory injunctions.⁵⁶

52. Act of Mar. 4, 1913, ch. 160, § 266, 37 Stat. 1013 (codified as amended at 28 U.S.C. 2281 (1948)) (repealed 1976).

53. See *Okla. Natural Gas Co. v. Russell*, 261 U.S. 290, 292 (1923) (referring to the language of the 1913 Amendment as “superfluous” because “the original statute covered them”).

54. Mann-Elkins Act § 17; see also Solimine, *supra* note 23, at 123 (“[T]his distinction was anomalous, since the rationale for the existence of a three-judge district court did not sharply implicate different types of injunctive relief, and in theory, the one district judge might deny relief when the three judges earlier might have granted it.”).

55. 66 CONG. REC. 2917 (1925) (remarks of Sen. Albert Cummins).

56. Act of Feb. 13, 1925, ch. 229, § 238, 43 Stat. 936, 938 (codified as amended at 28 U.S.C. 1253 (1948)). It should be noted that the 1925 amendment was passed as a part of the Judges’ Bill, which made the Supreme Court’s appellate jurisdiction no longer mandatory, and replaced the appeal of right with the writ of certiorari. See Solimine, *supra* note 23, at 123. For a larger discussion of the history of the Judges’ Bill, see generally Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643 (2000) (tracing and analyzing the history of certiorari in the Supreme Court, with emphasis on the Judges’ Bill).

3. FDR, Court Packing, and the Use of Three-Judge Courts for Constitutional Challenges

The 1930s brought to the forefront a new use for the three-judge court: constitutional litigation. Throughout the decade, President Franklin Roosevelt found many pieces of New Deal legislation declared unconstitutional,⁵⁷ such as the National Recovery Administration⁵⁸ and the Agricultural Adjustment Act.⁵⁹ Mirroring the states' resentment of the courts before *Ex parte Young*, Roosevelt and members of Congress grew increasingly irritated that a single federal judge could enjoin vital federal legislation.⁶⁰ His battle with the courts so infuriated Roosevelt that he suggested Congress pass legislation regardless of concerns of constitutionality.⁶¹ In response to adverse court decisions, Roosevelt concocted his “court packing” plan to diminish the autonomy of the federal courts.⁶² The plan’s most drastic measure was to add more members to the Supreme Court—up to fifteen if Roosevelt had his way.⁶³ This part of the plan, however, did not come to fruition, as the Supreme Court famously upheld a Washington state minimum wage law in *West Coast Hotel Co. v. Parrish*⁶⁴ that “eased the pressure”⁶⁵ and caused Congress to “[ave] the Supreme Court alone.”⁶⁶

57. See Marks & Schoem, *supra* note 18, at 422; Solimine, *supra* note 23, at 124.

58. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935) (invalidating the National Industrial Recovery Act’s delegation of legislative power to the executive branch).

59. See *United States v. Butler*, 297 U.S. 1, 78 (1936) (holding that Agricultural Adjustment Act provisions were an invalid exercise of the federal taxing and spending power).

60. See Currie, *supra* note 18, at 9.

61. For example, in a letter to Representative Samuel Hill, Roosevelt wrote the following: “I hope your committee will not permit doubts as to the constitutionality, however reasonable, to block the suggested legislation.” 79 CONG. REC. 13,449 (1935) (letter from President Franklin D. Roosevelt to Rep. Samuel B. Hill (July 5, 1935)).

62. *February 05, 1937: Roosevelt Announces “Court Packing Plan,”* HISTORY.COM, <http://www.history.com/this-day-in-history/roosevelt-announces-court-packing-plan> (last visited Aug. 17, 2015); see also Stephan O. Kline, *Revisiting FDR’s Court Packing Plan: Are the Current Attacks on Judicial Independence so Bad?*, 30 MCGEORGE L. REV. 863, 864–65 (1999).

63. *February 05, 1937: Roosevelt Announces “Court Packing Plan,”* *supra* note 62.

64. 300 U.S. 379, 399–400 (1937). This case still garners historical attention, as it involved the alleged change of mind by Justice Owen Roberts—“the switch in time that saved nine”—to uphold the law and save the integrity of the Supreme Court as it then existed. For more, see generally Kline, *supra* note 62 (analyzing the court packing plan in detail).

65. Currie, *supra* note 18, at 10.

66. *Id.*

Though much of the ill-fated “court packing” plan “spectacularly failed,”⁶⁷ a remnant of the plan did survive and passed through Congress in 1937—the use of a three-judge court. The new statute expanded the jurisdiction of the three-judge district court to hear all actions for injunctions where the constitutionality of an act of Congress was challenged.⁶⁸ The judges on the panel consisted of the district judge before whom the original action was filed and two other judges appointed by the chief judge of the circuit where the suit was brought.⁶⁹ By mandating a three-judge court for suits attacking congressional legislation, Congress required that acts of Congress be treated with a dignity equal to that required for state legislation.⁷⁰ The 1937 revision to the Three-Judge Court Act propelled these specialized courts’ jurisdiction into another arena—constitutional litigation—an area that would see the use of these courts expand and flourish in the coming decades.

4. The Beginning of the End: The Three-Judge Court During the Civil Rights Movement

The three-judge court originally had a narrow scope and saw few appeals during the early years of its implementation.⁷¹ The same cannot be said for the 1950s and 1960s. During those decades, the quantity of litigation before federal three-judge courts increased greatly.⁷² This increase can be explained in large part by the Civil Rights Movement.⁷³ During this era, the function of three-judge courts shifted from protecting the states from the federal government to protecting private citizens from the states.

During the 1950s and 1960s, plaintiffs in civil rights cases strove to find courts that they perceived as offering the best opportunity to

67. Michael Solimine, *The Fall and Rise of Specialized Federal Constitutional Courts*, 17 U. PA. J. CONST. L. 115, 124 (2014).

68. Act of Aug. 24, 1937, ch. 754, § 3, 50 Stat. 751, 752 (codified at 28 U.S.C. § 2282 (1910)) (repealed 1976).

69. *Id.*

70. See Currie, *supra* note 18, at 11 (quoting 81 CONG. REC. 7045 (1937) (statement of Sen. O’Mahoney)).

71. Cf. Solimine, *supra* note 23, at 123–24 (explaining that a large reason behind the passage of the original 1910 Act was that the perceived burden of gathering three judges to hear a case would be tolerable because those judges would only be hearing federal issues “that were perceived to be more important than the issues raised in a typical case that might end up before the [Supreme] Court”).

72. See *id.* at 126 (citing AM. LAW INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 317–18 (1969)) (“In the 1950s, there were about fifty such cases each year, which steadily increased to about ninety each year during the early 1960s, to 215 in 1969, and to a high of 320 by 1973.”).

73. See *id.*

advance their causes.⁷⁴ As such, from the beginning of its campaign to fight segregation in the federal courts, the National Association for the Advancement of Colored People (“NAACP”) strongly favored litigating in courts with three-judge panels. Perhaps the cleverest use of the three-judge court came in the landmark decision *Brown v. Board of Education*.⁷⁵ The case stands as an example of why three-judge courts were seen as advantageous to the advancement of racial equality. The advantages were twofold.

First, Thurgood Marshall, then lead attorney for the plaintiffs, molded his legal strategy in a way that would take advantage of the three-judge court by tailoring lawsuits to attack state statutes rather than attacking school boards directly.⁷⁶ Marshall believed the three-judge courts both presented a way to potentially insulate his cases from adverse rulings of individual judges and gave judges protection to take the “bolder steps, on both the merits and remedies, that the cases demanded.”⁷⁷ Second, Marshall and the NAACP saw that using the three-judge courts furnished a direct right of appeal to the Supreme Court.⁷⁸ At the time, the Warren Court was perceived as a friendly tribunal, and, as such, the three-judge court offered a direct path to the Supreme Court, especially as compared to the usual appeals process.⁷⁹

The use of three-judge courts by civil rights organizations did not go unnoticed by Congress. Hoping to capitalize on the favorable environment the NAACP found in the courts, Congress provided provisions in the Civil Rights Act of 1964 and the Voting Rights Act of 1965 that expanded the use of three-judge courts.⁸⁰ Of the two, the Voting Rights Act proposed the more expansive use of the three-judge courts. Acknowledging the deep root of racial barriers in the South, the Act vested power in three-judge courts to hear any action in which a set of southern states called for a change in voting

74. See Mark Johnston, *From Exclusion to Integration: The N.A.A.C.P.’s Legal Campaign Against Educational Segregation*, 3 VOCES NOVAE: CHAP. U. HIST. REV. 203, 203–04 (2011).

75. 347 U.S. 483 (1954).

76. See MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961, at 56 (1994).

77. Solimine, *supra* note 23, at 127.

78. *Id.*

79. See *id.* at 136.

80. See *id.* at 131–32; Civil Rights Act of 1964, Pub. L. No. 88-352, § 101, 78 Stat. 241 (codified at 42 U.S.C. § 1971 (1964)) (transferred to 52 U.S.C. § 10101(g) (2014)); Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (codified at 42 U.S.C. § 1973b–c (1965)) (transferred to 52 U.S.C. 10303(a) (2014)).

procedure. The Act also provided a direct right of appeal to the Supreme Court.⁸¹

These uses of three-judge courts to protect individual rights against the states represented a shift away from the original justifications of the 1910 Act. Recall that the original rationale behind the panels was to protect states from the powers of the federal government.⁸² In the Civil Rights Era, the use of the panels changed. No longer were the courts used to protect states, but to attack state policies through the advancement of individual causes.⁸³ Scholar Michael Solimine put it best when he noted that during this time period “Congress [and private citizens] utilize[d] the three-judge court as a sword.”⁸⁴ This ironic evolution of the utility of the three-judge court, however, did not last. The end of the Civil Rights Era marked the twilight of the federal three-judge court.⁸⁵

5. The 1976 Amendment and the Expiration of the Three-Judge Court

Even as Congress expanded the jurisdiction of the three-judge court, there were those in Congress and the legal community who called for its abolition. These voices of dissent eventually won, culminating in 1976 with legislation that ended the use of the courts for suits regarding federal statutes.⁸⁶ The road to the 1976 amendment, which restricted the use of such panels, was paved by many. But the greatest influences were the federal judiciary and the legal academy.

By the 1960s, prominent figures in the academic community were calling for the end of the three-judge court. Perhaps the strongest criticism of the use of the courts came from Professor David Currie of the University of Chicago.⁸⁷ Currie questioned the need for such courts, arguing that “consuming the energies of three judges to conduct one trial is *prima facie* an egregious waste of resources.”⁸⁸

81. Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (codified at 52 U.S.C. § 10303 (a) (2014)).

82. See *supra* Section I.A.1.b.

83. See Johnston, *supra* note 74, at 203–04.

84. Solimine, *supra* note 23, at 134.

85. See *infra* Section I.A.5.

86. Act of Aug. 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119 (codified in part at 28 U.S.C. § 2284 (1976)).

87. See Currie, *supra* note 18, at 2–3. David Currie was a renowned Professor of Law at the University of Chicago who specialized in constitutional history. See *David P. Currie, 1936–2007*, U. CHI. SCH. L., <http://www.law.uchicago.edu/news/currie> (last visited July 12, 2015).

88. Currie, *supra* note 18, at 2.

Other scholars echoed this argument, noting that “it is clear . . . that the three-judge court procedure has given rise to excessive and complex litigation which has become more acute than the original evil it was designed to eradicate.”⁸⁹ To these commentators and others,⁹⁰ the inefficiency of the panels simply outweighed any positives that the courts offered.

This criticism on its own may not have fueled the movement to end the three-judge district court. However, such critiques, when coupled with the increasingly antagonistic disposition of the federal courts, guaranteed the demise of the courts. Upon examination of the early Supreme Court’s tendency to narrowly interpret the court statutes, it is clear that the Court did not support outright the institution’s creation.⁹¹ But the federal judiciary’s largest influence on the abolition of these courts came through Chief Justice Warren Burger.⁹² More than any other chief justice, Chief Justice Burger “brought to the office a desire to increase administrative efficiencies of all sorts at all levels of the federal courts.”⁹³ Chief Justice Burger relied heavily on a 1969 study by the American Law Institute (“ALI”)—which argued that the 1937 amendment should be

89. Marks & Schoem, *supra* note 18, at 439.

90. For other critiques, see Solimine, *supra* note 23, at 137 n.177.

91. Michael Solimine points to several instances where the Supreme Court in the 1930s and 1940s disapproved of the use of such courts. He argues that the narrow interpretation given to the early three-judge statutes signaled that the Court was not willing to support a broad expansion of the courts’ use. *See id.* at 134–35 (“[A]lmost from the beginning, the Court construed the direct appeal statute to permit it to dispose of cases summarily without oral argument or a written explanatory opinion, in a manner similar to the denial of a writ of certiorari.”).

92. *See generally* Carl Tobias, *Warren Burger and the Administration of Justice*, 41 VILL. L. REV. 505 (1996) (discussing Chief Justice Burger’s role in improving the administration of justice throughout the federal court system). This is not to say that other Supreme Court justices were not also critical of the use of the courts. Justice Potter Stewart, in *Gonzales v. Automatic Employees Credit Union*, observed that it was important to continue to narrowly construe the three-judge statutes “in the interest of sound judicial administration.” 419 U.S. 90, 98 (1974). Later courts also cited their displeasure with the use of the three-judge district courts. One federal judge noted:

The legislative history of the repealing bill shows a thorough dissatisfaction with the operation of three-judge courts, finding the procedure to be confusing and inefficient. The Senate report states that “three-judge court procedure has recently been termed by one scholar, ‘the single worst feature in the Federal judicial system as we have it today.’ It has imposed a burden on the Federal courts and has provided a constant source of uncertainty and procedural pitfalls for litigants.”

Gilliard v. Kirk, 614 F. Supp. 1203, 1204 (W.D.N.C. 1985) (quoting S. REP. NO. 94-204, at 2 (1975)).

93. Solimine, *supra* note 23, at 139.

rescinded—to mount a campaign to abolish the use of the three-judge court.⁹⁴ In 1972, the ALI released the Freund Report, which recommended abandoning the three-judge court model.⁹⁵

By 1976, the death knell had sounded for the widespread use of the three-judge court. With growing opposition from the legal academy and the loss of the Supreme Court's support, Congress largely discontinued the sixty-year-old practice.⁹⁶

6. The Remnants

Today, the use of three-judge courts remains most prominently in reapportionment cases.⁹⁷ Congress has occasionally created these specialized courts to hear sensitive constitutional matters that require a rapid resolution and direct appeal to the Supreme Court. As a part of the Bipartisan Campaign Reform Act of 2002, Congress required the use of such panels.⁹⁸ But whatever the three-judge court's future in the federal judiciary, the legacy of its rise and fall stands as a useful starting point for understanding the current debate in North Carolina.⁹⁹

II. THE NEW LAW: CREATION OF THE THREE-JUDGE COURT

The creation of a three-judge court is not an entirely new concept in North Carolina. In 2003, North Carolina introduced

94. *See id.* at 138–39.

95. FED. JUDICIAL CTR., REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT (1972), reprinted in 57 F.R.D. 573, 596–99 (1973).

96. *See* Section I.A.5.

97. For a thorough discussion of the litigation and use of three-judge courts in reapportionment cases, see generally Michael Solimine, *The Three Judge District Court in Voting Rights Litigation*, 30 U. MICH. J.L. REFORM 79 (1996) (discussing the structure, procedures, and operation of three-judge courts in these cases in the 1970s, 1980s, and 1990s).

98. Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, § 403(a), 116 Stat. 81, 113 (2002) (codified at 2 U.S.C. § 437h (2002)).

99. As expansive as is the history of these panels in the federal courts, documentation of the history of its use on the state level is sparse. Few states across the country use three-judge courts; such panels are rare, and where they do exist, they are narrowly tailored to serve a specific subject area of law. *See, e.g.*, KAN. STAT. ANN. § 72-64b03(a)–(b) (2011) (providing for three-judge courts to hear school finance cases, but also all constitutional issues dealing with the power of schools boards, the state Board of Education, and the Commissioner of Education); WISC. STAT. ANN. § 751.035(1) (West Supp. 2012) (providing for three-judge courts to hear redistricting cases). Two other states, Alaska (ALASKA STAT. § 12.55.175 (2010)) and Colorado (Act of July 5, 1995, ch. 244, sec. 1, § 16–11–103 Colo. Sess. Laws 1290, 1290 (repealed 2002)) have used three-judge court statutes to examine or set sentences in some limited number of criminal cases.

legislation to use three-judge courts to hear redistricting cases.¹⁰⁰ The 2003 law created a three-judge court composed of a senior superior court judge from Wake County and two other state superior court judges appointed by the Chief Justice of the Supreme Court of North Carolina.¹⁰¹ The law prohibits former members of the state legislature from serving on these panels and requires that the state court, if it finds that the state's redistricting plan is unlawful, must provide the legislature time to correct and redraw the districts.¹⁰² For ten years, three-judge courts existed solely to hear these matters. But in 2014, this all changed. Now, nestled within the language that allows panels to hear redistricting cases lies a vast departure from state-level civil procedure norms: a three-judge court to hear constitutional challenges.

The North Carolina General Assembly enacted legislation that created a specialized court to hear all constitutional challenges to state laws.¹⁰³ The public statements of legislators allow a glimpse into the motives behind the law. In response to a recent decision striking down the general assembly's teacher tenure plan, then-Senate leader Phil Berger opined that Judge Hobgood's ruling was "a classic case of judicial activism."¹⁰⁴ Francis C. De Luca, a member of the conservative Civitas Institute think-tank, echoed these sentiments, admitting that "it had always bugged [me] that a local judge, maybe not even elected, could just stop in its track an entire state law that had been approved by both bodies and signed by the governor."¹⁰⁵ Thus, as followed *Ex parte Young*, fear of judicial activism and

100. Act of Nov. 25, 2003, ch. 434, 2003 N.C. Sess. Laws (1st Extra Sess. 2003) (codified at N.C. GEN. STAT. § 1-267.1 (2003)), amended by Current Operations and Capital Improvements Appropriations Act of 2014, ch. 100, § 18B.16. (a), 2014-4 N.C. Adv. Legis. Serv. 241 (LexisNexis).

101. *Id.* ("Upon receipt of that complaint, the senior resident superior court judge of Wake County shall notify the Chief Justice, who shall appoint two additional resident superior court judges to the three-judge court of the Superior Court of Wake County to hear and determine the action.").

102. *Id.* ("In order to ensure fairness, to avoid the appearance of impropriety, and to avoid political bias, no member of the panel, including the senior resident superior court judge of Wake County, may be a former member of the General Assembly.").

103. Current Operations and Capital Improvements Appropriations Act of 2014, ch. 100, § 18B.16.(a), 2014-4 N.C. Adv. Legis. Serv. 241 (LexisNexis) (codified at N.C. GEN. STAT. § 1-267.1(a1) (2014)) ("[A]ny facial challenge to the validity of an act of the General Assembly shall be transferred . . . to the Superior Court of Wake County and shall be heard and determined by a three-judge court.").

104. Laura Leslie, *Judge: Stripping veteran teachers of tenure rights unconstitutional*, WRAL (Raleigh) (May 16, 2014), <http://www.wral.com/judge-stripping-veteran-teachers-of-tenure-rights-unconstitutional/13650846/>; see Jarvis, *supra* note 9.

105. See Jarvis, *supra* note 9.

dissatisfaction with courts' invalidation of legislation are at the root of the new law. Now, the North Carolina General Assembly has set a course to remedy these concerns, but it will not come without costs. This Part will explore North Carolina's creation of the three-judge court to hear constitutional challenges and explain the key facets of this law.

A. *Creation of a Court to Hear Constitutional Challenges*

North Carolina law now provides: "any facial challenge to the validity of an act of the general assembly shall be transferred . . . to the Superior Court of Wake County and shall be heard and determined by a three-judge court of the Superior Court of Wake County."¹⁰⁶ As written, the new law requires any and all facial challenges to any law passed by the general assembly to be moved to Raleigh, North Carolina (the seat of the Wake County Superior Court), no matter where in the state the original action is brought.¹⁰⁷ Thus, conceivably any civil lawsuit that wholly or partially consists of a constitutional challenge will be uprooted and moved to Wake County.¹⁰⁸

An additional feature of the panels is that their members will be chosen by the Chief Justice of the Supreme Court of North

106. N.C. GEN. STAT. § 1-267.1(a1) (2014).

107. *Id.* Unfortunately, the statute neglects to define what constitutes a facial challenge as compared to a challenge that is "as applied." *See, e.g.,* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 236 (1994) (stating that courts declare federal and state statutes unconstitutional in two ways. First, "the court may declare it invalid on its face" or a "court may find the statute unconstitutional as applied to a particular set of circumstances." In the former situation, "the state may not enforce it under any circumstances" whereas in the latter "the state may enforce the statute in different circumstance"). However, case law may suggest something of an answer. In the federal courts, a facial challenge requires that a plaintiff "establish that no set of circumstances exists under which [an act] would be valid." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008). North Carolina case law on the subject is limited, but it largely mirrors the federal courts. *See State v. Thompson*, 349 N.C. 483, 496–503, 508 S.E.2d 277, 285–89 (1998) (denying a facial challenge to a domestic violence law but finding the law unconstitutional as it was applied to the present defendant).

108. The problems inherent with this ambiguity will be discussed below. *See infra* Section III.B. It should be noted that these panels will not hear "as applied" challenges. Instead, the original Superior Court judge will continue to hear these cases and will maintain the power to grant or deny an injunction. *See* N.C. GEN. STAT. § 7A-27(b)(3). Also, facial challenges to state laws are strictly circumscribed to civil actions and outside the reach of any criminal proceeding. N.C. GEN. STAT. § 1-267.1(a1) ("Nothing in this section shall be deemed to apply to criminal proceedings, to proceedings under Chapter 15A of the General Statutes, to proceedings making a collateral attack on any judgment entered in a criminal proceeding, or to appeals from orders of the trial courts pertaining to civil proceedings filed by a taxpayer pursuant to G.S. 105-241-17.").

Carolina.¹⁰⁹ This power is not without limits. In order to ensure geographic diversity on the panel, the chief justice “shall appoint to the three-judge court one resident superior court judge from the First, Second, or Fourth Judicial Division, one resident superior court judge from the Seventh or Eighth Judicial Division, and one resident superior court judge from the Third, Fifth, or Sixth Judicial Division.”¹¹⁰ Though the law does set out some parameters within which the chief justice must confine his or her decision, there are few guidelines to ensure methodological consistency in the chief justice’s appointment decisions.

B. Trial Consolidation and Venue

Another facet of this new law is the limited jurisdiction granted to the panels. The panels are not tasked with deciding entire cases, but only those claims facially challenging the constitutionality of a state law.¹¹¹ As the statute is written, a claim will only be transferred and a three-judge court convened if “after all other questions of law in the action have been resolved, a determination as to the facial validity of an act of the general assembly must be made in order to completely resolve any issues in the case.”¹¹² It seems from the language that if the original court can completely resolve the case without reaching the constitutional issue, a potential constitutional claim could be dead on arrival.

Along with their limited scope of review, there is no mechanism in the law to automatically convene the panels. This is because the language of the statute gives the power to transfer venue to the original, superior court “on its own motion.”¹¹³ There is nothing the parties can do. If venue is transferred to a three-judge court, the original action will not be automatically stayed, but all matters that are “contingent on the outcome of the challenge” will be.¹¹⁴ Finally,

109. N.C. GEN. STAT. § 1-267.1(b2) (“[T]he Chief Justice of the Supreme Court shall appoint three resident superior court judges to a three-judge court of the Superior Court of Wake County to hear the challenge.”).

110. *Id.* § 1-267.1(b)(2).

111. *Id.* § 1-267.1(a1) (“[A]ny facial challenge to the validity of an act of the General Assembly shall be transferred . . . to the Superior Court of Wake County and shall be heard and determined by a three-judge court.”).

112. Current Operations and Capital Improvements Appropriations Act of 2014, ch. 100, § 18B.16.(b), 2014-4 N.C. Adv. Legis. Serv. 243 (LexisNexis) (codified at N.C. GEN. STAT. § 1-81.1(a1) (2014)).

113. *Id.*

114. N.C. GEN. STAT. § 1A-1, Rule 42. The original language of the bill called for an automatic stay of all proceedings, but it was dropped before it was passed in the Senate. See Jarvis, *supra* note 9.

following the decision by the three-judge court and after exhaustion of all rights to appeal, the action will be transferred back to the original court for resolution of any remaining issues.¹¹⁵ The bill's language reveals just how specialized and singular the role of these courts will be—decide the constitutional issue and remand the case to the original court.¹¹⁶

C. *Rights of Appeal*

The final aspect of this complicated law is the unique appeals process it establishes. The law bifurcates the appeals process depending on the result reached by the three-judge court.¹¹⁷ If a panel invalidates an act of the general assembly, the new legislation provides an automatic right of direct appeal to the Supreme Court of North Carolina.¹¹⁸ But if a challenge to a state law is rejected, no such right of direct appeal exists.¹¹⁹ Instead, the party bringing the claim must pursue an appeal through the usual appeals process.¹²⁰ This appeals process is unbalanced, providing one side with a fast track to a final decision by the supreme court while relegating the other to the normal pace of the court system.

III. THE CONSTITUTIONALITY OF THE LAW

From the above discussion, it is clear that this legislation stands to impact civil procedure in the state for years to come.¹²¹ But those who study, practice in, and depend on the legal system should not accept this law without scrutiny. Careful examination of the law reveals a variety of concerns and questions to be answered before embracing this procedure. Of the many questions the law raises, the

115. N.C. GEN. STAT. § 1A-1, Rule 42 (“Once the three-judge court has ruled and all appeal rights have been exhausted, the matter shall be transferred or remanded to the three-judge court . . . for resolution of any outstanding matters, as appropriate.”).

116. *See id.* (“[The case shall be transferred] to the Superior Court of Wake County for resolution by a three-judge court if, after all other matters in the action have been resolved, a determination as to the facial validity of an act of the General Assembly must be made in order to completely resolve any matters in the case.”).

117. *See* N.C. GEN. STAT. § 7A-27(a1) (“Appeal lies of right directly to the Supreme Court from any order or judgment of a court, either final or interlocutory, that holds that an act of the General Assembly is facially invalid on the basis that the act violates the North Carolina Constitution or federal law.”).

118. *Id.*

119. Act of Aug. 2, 2014, ch. 102, § 1, 2014 N.C. Sess. Laws at 65–67 (codified at N.C. GEN. STAT. § 7A-27 (2014)).

120. *See id.* (“Appeal lies of right directly to the Court of Appeals in any of the following cases: From any final judgment of a superior court, other than the one described in subsection (a) of this section . . .”).

121. *See supra* Part II.

first and perhaps most pressing question is whether the law passes constitutional muster. Analysis of the North Carolina Constitution, however, reveals weaknesses in arguments contending that these panels are unconstitutional. Specifically, these three-judge courts raise two central issues: (1) whether this three-judge court creates a new court as prohibited by the North Carolina Constitution, and (2) whether the legislation unconstitutionally restricts a court's jurisdiction. These are addressed in turn.

A. *Does North Carolina General Statutes Section 1-267.1(a1) Create a New Court?*

North Carolina General Statute § 1-267(a1) calls for the creation of a three-judge court to hear all facial constitutional challenges raised by any case across the state.¹²² In doing so, it pulls superior court judges from various regions to hear the constitutional challenge and establishes these panels as the sole means through which such a challenge can be heard.¹²³ Article IV, section 1 of the North Carolina Constitution prohibits the legislature from creating new courts and only recognizes four distinct types of courts: the supreme court, the court of appeals, the superior courts, and the district courts.¹²⁴ Though an offshoot of the superior court, these panels seem to be a new court.

The North Carolina Constitution provides no language that allows for the superior courts to sit in a division or panel.¹²⁵ Unlike sections 6 and 7 of Article IV, which authorize the Supreme Court of North Carolina and the North Carolina Court of Appeals to sit in divisions, such language is absent from section 9's discussion of

122. N.C. GEN. STAT. § 1-267.1(b2) (“For each challenge to the validity of statutes and acts subject to subsection (a1) of this section, the Chief Justice of the Supreme Court shall appoint three resident superior court judges to a three-judge court...hear the challenge.”).

123. *See id.* (“To ensure that members of each three-judge court are drawn from different regions of the State, the Chief Justice shall appoint to each three-judge court one resident superior court judge from the First, Second, or Fourth Judicial Division, one resident superior court judge from the Seventh or Eighth Judicial Division, and one resident superior court judge from the Third, Fifth, or Sixth Judicial Division.”).

124. N.C. CONST. art. IV, § 1 (“[The] General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government, nor shall it establish or authorize any courts other than as permitted by this Article.”); *see also id.* §§ 6–10 (detailing the composition of the various North Carolina courts, including the supreme court, court of appeals, superior courts, and district courts).

125. *See id.* § 9.

superior courts.¹²⁶ The language of section 9 does provide for “one or more superior court judges for each district” but does not dictate how those judges are to hear cases.¹²⁷ Even a historical examination of the sections yields no answers as to whether the framers intended for superior courts to empanel.¹²⁸ This absence of express authority is even more conspicuous when analyzed next to provisions that expressly give the general assembly power over the judicial system.

The North Carolina Constitution explicitly grants to the general assembly the power to determine the structure, organization, and composition of the North Carolina Court of Appeals.¹²⁹ Section 6 allows the General Assembly to increase the number of associate justices up to eight.¹³⁰ But the provision dealing with superior courts is silent on the issue.¹³¹ Nowhere does it spell out how many superior court judges are allowed to hear a single proceeding, and the absence of such language in this provision in light of its presence in the other provisions is conspicuous. Examining only the language of the constitution, it is difficult to see how the use of a three-judge court can fit into the constitutional definition of the superior court.

In addition to a four-corners reading of the constitution, case law further calls into question whether the three-judge court constitutes a new court. *State v. Matthews*¹³² presented the Supreme Court of North Carolina with the opportunity to define the meaning of a “court” within section 1 of Article IV of the North Carolina Constitution.¹³³ There, the court ruled that a statute allowing police officers to issue search warrants was unconstitutional because it authorized the use of

126. *See id.* § 6 (providing that the supreme court “shall consist of a Chief Justice and six [but not more than eight] Associate Justices”); *id.* § 7 (“The Court shall have not less than five members, and may be authorized to sit in divisions, or other than en banc.”).

127. *Id.* § 9.

128. Historically, superior court judges have exercised their judicial authority individually, not jointly or empaneled with other judges. *See, e.g.*, JOHN V. ORTH & PAUL NEWBY, *THE NORTH CAROLINA STATE CONSTITUTION* 130–33 (2013) (explaining the North Carolina Constitution’s provisions that allow the supreme court and the court of appeals to sit in panels, but not providing similar commentary with regard to the superior courts).

129. N.C. CONST. art. IV, § 7 (“The structure, organization, and composition of the Court of Appeals shall be determined by the General Assembly.”).

130. *Id.* § 6 (“[T]he General Assembly may increase the number of Associate Justices to not more than eight.”).

131. *Id.* § 9 (containing no such language).

132. 270 N.C. 35, 153 S.E.2d 791 (1967).

133. *Id.* at 41, 153 S.E.2d at 796 (“There remains for consideration whether the General Assembly can confer upon a police officer judicial power sufficient to authorize the issuance of a valid warrant under any circumstances . . . [t]he answer to this question is to be found in Article IV of the Constitution of North Carolina.”).

judicial power by entities not authorized by the constitution.¹³⁴ To the court, allowing a police officer to perform the job of a judge was enough to constitute the establishment of a new court.¹³⁵ In the present context the issue is not nearly as clear-cut. The legislation provides that superior court judges perform their usual duties but in a different form.¹³⁶ But this change in form can be seen as a change with respect to what the constitution contemplates as a “superior court district.”¹³⁷ Though there is no separation of powers issue,¹³⁸ three judges performing the duties of what previously was done by one judge could be construed as an exercise of judicial authority outside the purview of the constitution.

These arguments are unlikely to persuade a court to hold the creation and use of a three-judge court unconstitutional. As noted above, North Carolina has used three-judge courts to hear redistricting cases since 2003.¹³⁹ Because the current statute was added to the language of the redistricting statute, many arguments that the creation of a three-judge court constitutes an unconstitutional new court are foreclosed. *Stephenson v. Bartlett*,¹⁴⁰ which upheld the constitutionality of the panels to hear redistricting cases, addressed many of these arguments.¹⁴¹ The *Bartlett* court gave short shrift to the challenge presented. It was enough that the statute purported to extend the procedures of the superior court without creating a court outside of the constitution’s framework.¹⁴² In fact, the court dismissed any real concern in a sentence, stating, “[t]his language places redistricting challenges in the superior court, the court recognized by the North Carolina Constitution as having original jurisdiction throughout the state.”¹⁴³

134. *Id.* at 43, 153 S.E.2d at 797.

135. *Id.* at 42, 153 S.E.2d at 797 (“A police officer is not an official of the General Court of Justice Hence, the General Assembly lacks constitutional authority to confer judicial power upon a police officer.”).

136. *See* N.C. GEN. STAT. § 1-267.1(b2) (2014).

137. *See* N.C. CONST. art. IV, § 9 (“The General Assembly shall, from time to time, divide the State into a convenient number of Superior Court judicial districts and shall provide for the election of one or more Superior Court Judges for each district.”).

138. *See infra* notes 146–55 and accompanying text.

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

140. 358 N.C. 219, 595 S.E.2d 112 (2004).

141. *Id.* at 227, 595 S.E.2d at 117–18.

142. *Id.* at 227, 595 S.E.2d at 118 (“[The] language [of the statute] places redistricting challenges in the superior court, the court recognized by the North Carolina Constitution as having original general jurisdiction throughout the state.”).

143. *Id.*

Because the current legislation mirrors the language used by the 2003 redistricting statute,¹⁴⁴ there is little reason to expect a different result. The *Bartlett* court's quick dismissal of the issue may be an indicator of the likely result of any challenge to the constitutionality of these panels. Moreover, since the issue is no longer a matter of first impression, *stare decisis* may keep any challenger from getting another bite at the apple.

B. Does Amended North Carolina General Statutes Section 1-81.1 Unconstitutionally Restrict the Jurisdiction of Constitutional Challenges?

The law's venue requirement raises a second question of constitutionality. Venue is a procedural matter that the constitution authorizes the general assembly to establish and dictate for the superior court division.¹⁴⁵ A venue provision simply sets the rules for where an action is to be tried.¹⁴⁶ The problem with the current legislation is that it seems to cross the line from a mere venue provision to one that limits the superior court's jurisdiction to hear constitutional cases.¹⁴⁷ The statute establishes Wake County as the exclusive venue for these three-judge courts.¹⁴⁸ But in doing so, it effectively limits the jurisdiction of constitutional cases to Wake County Superior Court.¹⁴⁹ Ordinarily, limiting the jurisdiction of the

144. N.C. GEN. STAT. § 1-267.1(b2) (2014) (providing for the appointment of similar three-judge courts by the chief justice in cases where the constitutionality of an act of the North Carolina General Assembly is at issue).

145. See N.C. CONST. art. IV, § 13(2) ("The General Assembly may make rules of procedure and practice for the Superior Court and District Court Divisions, and the General Assembly may delegate this authority to the Supreme Court.").

146. See, e.g., N.C. GEN. STAT. § 1-82 ("In all other cases the action must be tried in the county in which the plaintiffs or the defendants . . . reside at its commencement.").

147. The principle that when the jurisdiction of a particular court is constitutionally defined the legislature cannot by statute restrict or enlarge that jurisdiction unless authorized to do so by the constitution is grounded in the separation of powers provisions. See *Smith v. State*, 289 N.C. 303, 327, 222 S.E.2d 412, 427–28 (1976) ("It is well settled that the general assembly is without power to prescribe or to regulate the rules of practice or procedure in the Supreme Court, in accordance with which it shall exercise its appellate jurisdiction.") (internal citations and quotations omitted); *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 140, 337 S.E.2d 477, 484 (1985).

148. Current Operations and Capital Improvements Appropriations Act of 2014, ch. 100, § 1-81.1(a1), 2014-4 N.C. Adv. Legis. Serv. 243 (LexisNexis) (codified at N.C. GEN. STAT. § 1-81.1(a1) (2014)).

149. Venue and jurisdiction are distinct concepts. Venue is the place where a cause is to be tried, whereas jurisdiction refers to the power the court has to render a judgment. See *Jones v. Brinson*, 238 N.C. 506, 508–09, 78 S.E.2d 334, 337 (1953) (explaining the difference between jurisdiction and venue provisions in the North Carolina General Statutes).

superior court is prohibited under the state constitution, as superior courts are deemed courts of “original jurisdiction”¹⁵⁰ that are “open at all times for the transaction of all business”¹⁵¹ This suggests that each superior court judge should have equal and coordinate power as others throughout the state. But the new legislation prevents this. For example, previously, if a case arose in Jackson County, a Jackson County judge would have heard the case. But today, there is no guarantee that a Jackson County judge will be selected to sit on the panel, as the statute only provides that one of the three judges originate from preselected parts of the state.¹⁵² At bottom, the statute seems to usurp power from what are supposed to be equal and coordinate courts.

Despite this contradiction, the new legislation is unlikely to fail a constitutional challenge. The North Carolina General Statutes allow for some flexibility in venue provisions. For example, Section 1-83(2) allows for changing the place of trial “when the convenience of witnesses and the ends of justice would be promoted by the change.”¹⁵³ While this language may not directly approve of the change in venue mandated by the three-judge court statute, the Supreme Court of North Carolina has used it to authorize other superior court panels.¹⁵⁴ In *Bartlett*, the court upheld the use of three-judge courts for redistricting cases by relying, in part, on Section 1-83(2). The court suggested that the “policies implied” in the statutory provision allowed for the redistricting courts to be held in Wake County.¹⁵⁵

Unfortunately, the *Bartlett* court failed to explain why a three-judge court met the criteria of Section 1-83(2). Despite this, venue appears to be a malleable procedural matter subject to minimal constitutional scrutiny.¹⁵⁶ Accordingly, it is hard to see how the current legislation could fall to a challenge on these grounds.

150. See N.C. CONST. art. IV, § 12(3) (“[T]he Superior Court shall have original general jurisdiction throughout the State.”).

151. *Id.* § 9(2).

152. See N.C. GEN. STAT. § 1-267.1(b2) (2014).

153. N.C. GEN. STAT. § 1-83(2) (2013); *Stephenson v. Bartlett*, 358 N.C. 219, 228, 595 S.E.2d 112, 118 (2004) (“In addition, once an action is filed, venue is sufficiently flexible that it may be changed according to N.C. GEN. STAT. § 1-83(2).”).

154. *Bartlett*, 358 N.C. at 228, 595 S.E.2d at 118.

155. *Id.*

156. See N.C. GEN. STAT. § 1-83(2) (providing for a change of venue when “the convenience of witnesses and the ends of justice would be promoted by the change”); *Bartlett*, 358 N.C. at 228, 595 S.E.2d at 118.

C. *The Three-Judge Court and the Separation of Powers Doctrine*

In addition to these more specific constitutional questions, the three-judge court legislation passed by the North Carolina General Assembly raises a broader separation of powers issue. The mechanics of the law create tension between the judicial and legislative branches of the state government. Despite this tension, it is unlikely that the Supreme Court of North Carolina would find a separation of powers argument persuasive.

Article I, section 6 of the North Carolina Constitution provides: “The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.”¹⁵⁷ The wording seems to forbid overlaps of power between the three branches, but North Carolina courts have not interpreted the language so strictly. Perhaps the best example of the provision’s interpretation is found in *Adams v. North Carolina Department of Natural and Human Resources*.¹⁵⁸ In *Adams*, the Supreme Court of North Carolina, in a discussion regarding the relationship between the legislative and judicial branches, stated, “it has long been recognized by this Court that the problems which a modern legislature must confront are of such complexity that strict adherence to ideal notions of the non-delegation doctrine would unduly hamper the General Assembly in the exercise of its constitutionally vested powers.”¹⁵⁹ Though speaking about the non-delegation doctrine, implications for the present context can be seen. The court is unlikely to construe the separation of powers doctrine so as to disallow some overlap in the powers of the branches of government. As Professor John Orth notes, “although separation of powers and the related principle of checks and balances underlie American constitutions, they have rarely figured as such in the important constitutional decisions rendered by American courts.”¹⁶⁰

157. N.C. CONST. art. I, § 6. This doctrine has long held a significant place in North Carolina’s Constitution, and the wording of the clause has remained the same since the first constitution was ratified in 1776. See John V. Orth, “Forever Separate and Distinct”: Separation of Powers in North Carolina, 62 N.C. L. REV. 1, 3 (1983) (“The principle of separation of powers has been explicitly proclaimed in each successive North Carolina Constitution with only slight variations in wording.”).

158. 295 N.C. 683, 249 S.E.2d 402 (1978).

159. *Id.* at 696–97, 249 S.E.2d at 410. For other examples of this interpretation of the separation of powers doctrine, see Orth, *supra* note 157, at 8 n.45 (“Notwithstanding the asserted absence of cases involving a separation of powers claim, the *North Carolina Reports* contain numerous such cases, some of them quite recent.”).

160. Orth, *supra* note 157, at 1; see also Jacob Scot, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 382–83 (2010) (“Judges have developed common law canons to protect and reinforce the separation of powers across constitutionally

Coupled with the diminished state of the separation of powers doctrine, a constitutional challenge would also have to confront the strong presumption of constitutionality courts give to laws passed by the general assembly. The clearest language establishing this presumption is in *Rowlette v. State*.¹⁶¹ There, the North Carolina Court of Appeals gave great weight to the presumption of constitutionality, stating that, “unless the unconstitutionality clearly, positively, and unmistakably appears beyond a reasonable doubt” the state’s legislation will be upheld.¹⁶² Indeed, such a demanding standard will be difficult for potential challenges to overcome.

In the end, any constitutional challenge to this law is likely to fail. The Supreme Court of North Carolina rejected many of the applicable arguments when the three-judge court concept was first brought to the state,¹⁶³ and the three-judge court now created to hear constitutional challenges possesses a structure and function similar to its predecessor. In light of a weak separation of powers doctrine and the strong presumption of constitutionality for laws passed by the General Assembly, it is hard to imagine a court abolishing this new law.

IV. “LET REASON HOLD THE REINS”:¹⁶⁴ A CALL TO QUESTION THE IMPLEMENTATION OF NORTH CAROLINA’S NEW LAW

Even if North Carolina’s new three-judge court is constitutional, this does not answer the question posited at the beginning of this Comment—is this law a good idea? To answer that question, we must look to the law’s probable effects and consequences and weigh them against the purported state interest in empaneling three-judge courts to hear constitutional challenges. On one side of the scale is the importance of protecting legislative action and preventing venue shopping.¹⁶⁵ On the other side, this seismic shift in adjudicative procedure will mar the efficiency of the court system. Additionally,

created governmental organs. The avoidance canon buttresses legislative authority to make law and, at the same time, acknowledges judicial review to prevent the legislature from overstepping its power.”).

161. 188 N.C. App. 712, 656 S.E.2d 619 (2008), *disc. review denied*, 362 N.C. 474, 666 S.E.2d 487 (2008).

162. *Id.* at 715, 656 S.E.2d at 621 (quoting *Guilford Cnty. Bd. of Educ. v. Guilford Cnty. Bd. of Elections*, 110 N.C. App. 506, 511, 430 S.E.2d 681, 684–85 (1993)).

163. *Supra* notes 132–43 and accompanying text.

164. BENJAMIN FRANKLIN, *POOR RICHARD’S ALMANAC* 30 (U.S.C. Publishing Co. 1914).

165. *See Jarvis, supra* note 9 (“We wanted to do something [about venue shopping] that would help the process, also help with the efficiency of having these matters that are challenged heard in a consistent method for that.”).

the law raises serious concern about the politicization of the judiciary, which has the potential to damage the integrity of the courts. Each of these concerns must be addressed in turn.

A. Practical Problems

The procedural mechanisms adopted by this new law are complex.¹⁶⁶ It is important to discern whether this drastic change is practical. This section suggests two lenses through which to evaluate the law's practicality: efficiency and cost.

1. Efficiency

The first way to explore the practicality of this new legislation is by examining its efficiency. The law's ambiguity and the burden it places on the court system will cause inefficiencies in the court system. These problems will be addressed in turn.

a. Ambiguity in the Law

In order to promote justice, courts must run effectively and efficiently.¹⁶⁷ The present legislation fails to advance these goals. This is largely attributable to the law's ambiguity. A close reading of the statute raises more questions than answers. The law will likely cause confusion among practitioners across the state.

First, consider the provision in the law providing that a three-judge court only convene if "all other matters in the action have been resolved" and a determination of constitutionality must be made to resolve the matter.¹⁶⁸ This presents a question of interpretation for courts. To illustrate, consider the following hypothetical: A plaintiff, in this case the state, brings an action alleging that the defendant violated a state statute. In its defense, the defendant argues that it did not actually violate the statute, and in the alternative, that the statute is facially unconstitutional.

The language of the statute offers no clear answer as to what the court should do. If the original superior court judge decides that the factual contentions should be heard first, what happens to the constitutional challenge? If the court finds that the defendant did not violate the state statute, technically this will resolve the lawsuit because a determination as to the constitutionality would have no

166. See *supra* Part II.

167. See Warren Burger, *The State of the Federal Judiciary—1972*, 58 A.B.A. J. 1049, 1049 (1972) ("Those who protest that efficiency is not the role of justice must be reminded that protracting one case imposes hardship on all others awaiting their turn.")

168. N.C. GEN. STAT. § 1A-1, Rule 42 (2014).

bearing on the result. But if the initial judge transferred the initial decision to the three-judge court for a ruling on the constitutionality of the law, and if the three-judge court found the law unconstitutional, it would decide the case before any other matter was considered before the original court. Indeed, the case may reach the same conclusion, but it is discomfiting and confusing that a rather straightforward fact pattern can take either of two different procedural paths and, at least in some instances, limit the arguments brought by both parties. At bottom, it will all depend on the interpretation of what “must be made in order to completely resolve” the matters in the case.¹⁶⁹ But because the law gives no guidance on what factual assertions must be resolved before a three-judge court is needed, litigants may receive inconsistent treatment depending on the discretion of the original trial judge.

The appellate process created by the law adds to its ambiguity and inefficiency. As noted above, the new legislation mandates an asymmetrical appeals process based on the initial ruling of the three-judge court.¹⁷⁰ Recall the hypothetical posed above. Assume that the initial superior court judge sends the case to a three-judge court to hear the constitutional challenge. The case will be sent to Raleigh.¹⁷¹ From there, the path of the case becomes complicated. If the three-judge court holds that the state statute in question is unconstitutional, then the state has a right to immediate appeal to the Supreme Court of North Carolina.¹⁷² If the statute is held constitutional, then the case is sent back to the original superior court, subject only to the usual appeals process.¹⁷³ Once the three-judge court is empanelled, the original superior court must “stay all matters that are contingent upon the outcome of the challenge to the act’s facial validity pending a ruling on that challenge and until all appeal rights are exhausted.”¹⁷⁴ This means that if the plaintiff chooses to appeal the constitutional ruling, then the case will have to go through the entire appellate process before any of the factual matters of the case are heard. Taken

169. *Id.* § 1-81-1(a1).

170. *See supra* notes 117–19 and accompanying text.

171. *See* N.C. GEN. STAT. § 1-267.1(a1) (“[A]ny facial challenge to the validity of an act of the General Assembly shall be transferred . . . to the Superior Court of Wake County.”).

172. *See id.* § 7A-27(a1) (“Appeal lies of right directly to the Supreme Court from any order or judgment of a court . . . that holds that an act of the General Assembly is facially invalid on the basis that the act violates the North Carolina Constitution or federal law.”).

173. *See id.* § 7A-27(b)(1).

174. *Id.* § 1A-1, Rule 42 (“The court in which the action originated . . . shall stay all matters that are contingent upon the outcome of the challenge to the act’s facial validity.”).

to an extreme, if the plaintiff or defendant chooses to appeal the factual ruling of the superior court after all of the constitutional issues have been resolved, then it looks like the case will yet again make its way through the court system until final resolution. In short, the three-judge court could add two different courts, four different judges, and two different locations to any litigation involving a facial constitutional challenge. Such an onerous process is the epitome of inefficiency.

Another concern is that the law does not dictate how colorable a constitutional claim must be before it is sent to a three-judge court. As written, the legislation mandates that “*any* facial challenge” must be sent to Wake County if deemed necessary.¹⁷⁵ It seems, at least from a strict reading of the text, that no matter the viability of the claim, if resolution of a constitutional claim is necessary, it will be sent to a three-judge court. There apparently is no filter for frivolous claims.¹⁷⁶ In the appeals context, the Supreme Court of North Carolina has ruled that an appellant seeking review as a matter of right must “allege and show the involvement of such question or suffer dismissal” and that “[t]he question must be real and substantial rather than superficial and frivolous.”¹⁷⁷ Thus, meritless appeals are sure to be dismissed.¹⁷⁸ It is unclear how the viability of these claims will be judged. Does the trial court make an initial ruling? Or does the claim automatically go to the three-judge court without any scrutiny? The former would defeat some of the purpose of having a panel, and the latter opens up the three-judge courts to becoming a weapon for litigators. If the law stands as is, litigators seeking to gain an upper hand on their opponent could tack on frivolous constitutional claims and force the other party to defend the additional claim.¹⁷⁹ The fear is that that these cases become more about the parties’ financial resources than the merits of the case.

175. *Id.* § 1-267.1(a1) (emphasis added).

176. *Id.* (drawing no distinction between the type of constitutional claim that has to be brought).

177. *State v. Colson*, 274 N.C. 295, 305, 163 S.E.2d 376, 383 (1968), *cert. denied*, 393 U.S. 1087 (1969).

178. *See id.* (“The question must be real and substantial rather than superficial and frivolous.”).

179. To date, this tactic has not been used. However, as North Carolina becomes used to the mechanics of the law, it is not impossible.

b. *“If Past is Prologue”*: Lessons from the Federal Use of Three-Judge Courts

Even if we ignore the problems caused by the law’s ambiguity and concomitant inefficiencies, the North Carolina General Assembly would be wise to consider the demise of the federal three-judge court. History provides a useful reminder of the burdens that flow from this kind of legislation.¹⁸⁰

The federal three-judge court largely owes its abolition to the burdens that the process imposed.¹⁸¹ The 1969 American Law Institute Report and the 1972 Federal Judicial Center Report are instructive. The two main issues raised in the former report were the increasing number of hearings convened before the three-judge courts and the corresponding increase of direct appeals to the Supreme Court.¹⁸² The report found that in the 1950s there were around fifty cases each year, but the number had increased to 215 by 1969.¹⁸³ Three years later, the Federal Judicial Center reviewed those statistical findings and concluded that the increasingly heavy caseload brought by these panels was too great to justify maintaining the panels’ existence.¹⁸⁴

The administrative difficulties examined in these reports also inform the present context. The Supreme Court of North Carolina considered and issued full opinions in more than fifty cases in 2014.¹⁸⁵

180. See *supra* Section I.A.

181. See Currie, *supra* note 18, at 2; see also Michael E. Solimine, *Institutional Process, Agenda Setting, and the Development of Election Law on the Supreme Court*, 68 OHIO ST. L.J. 767, 783 (2007) (“Opposition to the three-judge court eventually arose in the federal judiciary itself, in part based on the inconvenience of convening such courts at the trial level, and in part due to the burden direct appeals placed on the Supreme Court’s docket.”); Michael E. Solimine, *The Fall and Rise of Specialized Constitutional Courts*, 17 U. PA. J. CONST. L. 115, 125 (2014) (“Whatever the benefits of the three-judge district court to litigants, particularly plaintiffs, many other influential observers eventually concluded that they were outweighed by the administrative burdens on the courts.”).

182. AM. LAW INST., *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* 317–18 (1969) (“Concern over the burden that the three-judge court statutes impose on the federal judiciary has heightened as the number of cases heard by such courts has increased.”).

183. See *id.* at 317 (“The annual reports of the Administrative Office show that for the years 1955–1959, the average number of such cases heard was 48.8 per year. In the years 1960–64, the average per year was 95.6 such cases.”).

184. FED. JUDICIAL CTR., *REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT* (1972), reprinted in 57 F.R.D. 573, 596–99 (1972) (recommending elimination of the three-judge court and direct review).

185. *N.C. Appellate Courts*, N.C. CT. SYS., <http://appellate.nccourts.org/opinions/> (last visited July 13, 2015).

In addition, the court considered hundreds of other matters.¹⁸⁶ The new appeals process may greatly increase the number of cases the supreme court could possibly hear.¹⁸⁷ The earlier hypothetical alludes to this problem.¹⁸⁸ If the supreme court hears an earlier direct appeal and then sends the case back down to the original superior court, there is still a chance that other factual matters may find their way back in front of the court.

Such an occurrence may be rare, but another recently enacted bill by the general assembly may exacerbate the problem.¹⁸⁹ Senate Bill 853 rewrote North Carolina General Statute § 71-27, giving an appeal of right to all North Carolina Business Court litigants directly to the Supreme Court of North Carolina.¹⁹⁰ This stands to increase the number of cases that the supreme court will hear.¹⁹¹ Thus, when considered with the business court legislation, there may well be a rise in administrative burdens and a heavier docket for the court.¹⁹²

This inefficiency and increased burden on the judiciary is not worth the law's benefits. History has shown how the experiment will end. The General Assembly has not offered new reasoning for the need for these panels; Phil Berger's exhortation that these panels will cure judicial activism echoes the calls of the past.¹⁹³ The difference is that now we know that the benefits of three-judge courts do not

186. *See id.* (noting that these other matters may include "notices of appeals based upon constitutional questions, petitions for discretionary review, petitions for writ of certiorari in death cases, death stays, petitions for writ of certiorari in other criminal and civil cases, petitions for writ of supersedeas, motions for temporary stays, petitions for writ of mandamus, motions for appropriate relief, and direct appeals from decisions of the Judicial Standards Commissions and the Utilities Commission").

187. *See* N.C. GEN. STAT. § 7A-30 (2013) (instituting an appeal as a matter of right to the Supreme Court from any decision of the court of appeals that involves a "substantial question arising" under the Constitution of North Carolina).

188. *See supra* text accompanying notes 168–70.

189. *See generally* Act of Aug. 2, 2014, ch. 102, § 1, 2014 N.C. Sess. Laws 65–67 (codified at N.C. GEN. STAT. § 7A-27 (2014)).

190. *Id.* (providing an appeal of right directly to the supreme court from specified final judgments and interlocutory orders from the business court).

191. Before this law, the Supreme Court of North Carolina had heard one appeal from the business court since January 1, 2013.

192. Indeed, there are already issues with the funding of North Carolina's judicial branch receives. Adding the numbers of cases that are heard by the Supreme Court will surely add to the burden. *See* Yoon Ju Chung, *NC's Top Judge Says the State's Justice System Needs Funds*, DAILY TAR HEEL (Chapel Hill) (Mar. 18, 2015), <http://www.dailytarheel.com/article/2015/03/ncs-top-judge-says-the-states-justice-system-needs-funds> ("The low budget allotted for local judicial systems [may] hinder timely trials due to the workforce reduction.").

193. *See supra* notes 48 & 104 and accompanying text.

outweigh the harm they cause. As such, it would be wise to heed the warnings of history and do away with these panels.

2. Increased Cost and Concomitant Effect on Access to Justice

Thus far, the discussion of the practical effects of the three-judge court has focused on the ambiguities associated with the law and the burdens that the judicial system will now face. Now we must turn to the possible effects this law will have on litigants. It is particularly vital to assess the negative effects this law could have on the state's indigent population. Though the new panels will force all litigants to adjust to the new procedures, the law's potential adverse effect on access to justice underscores why it should be opposed.

Today, equal access to justice remains something of a chimera.¹⁹⁴ Much blame can be ascribed to the rising cost of litigation. The cost of bringing a matter to court often "prevents more and more Americans from realizing their rights."¹⁹⁵ The poor have a much higher frequency of interaction with the justice system on a day-to-day basis than other groups.¹⁹⁶ For them, the law is "repeatedly encountered in the most ordinary transactions and events of their lives."¹⁹⁷ As such, this group of people depend on constitutional litigation as a means of social mobility and change.¹⁹⁸ As such, the indigent population position within the justice system stands to be further minimized by this new panel.

The history of the Legal Services Program ("LSP") in the 1960s and 1970s proves just how powerful a weapon constitutional litigation can be for the poor. The LSP litigated hundreds of claims in front of the Supreme Court during that time—with most being constitutional

194. See Alan Wertheimer, *The Equalization of Legal Resources*, 17 PHIL. & PUB. AFF. 303, 304 (1988) ("Legal resources can affect legal outcomes in several ways. Those with more legal resources will often win at trial because the quality and quantity of legal assistance makes a difference to the persuasiveness of a case, be it through superior investigative work, specialization of legal talent, better law libraries, or simply because attorneys can devote more time to preparation.").

195. Issachar Rosen-Zui, *Just Fee Shifting*, 37 FLA. ST. U. L. REV. 717, 720 (2010).

196. Austin Sarat, "... *The Law is All Over*": *Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 YALE J.L. & HUMAN. 343, 344 (1990) ("The legal consciousness of the welfare poor is, I will argue, substantially different from other groups in society for whom law is a less immediate and visible presence.").

197. *Id.*

198. This reality is also shown by the NAACP and their usage of the three-judge courts in the 1950s and 1960s. See Johnston, *supra* note 74, at 213–14 (describing the use of a three-judge court in 1950s cases challenging the constitutionality of segregated schools).

claims.¹⁹⁹ In doing so, these lawyers were able to alleviate the financial barriers to access to justice.²⁰⁰ But the three-judge court will dull the sharp blade of constitutional litigation for the poor by seriously depleting the resources of those programs that provide services to these populations.

In 2012, now-retired Supreme Court of North Carolina Chief Justice Sarah Parker reported that there was one lawyer for every 554 people in North Carolina and one legal services attorney to represent every 19,160 of the state's poor.²⁰¹ Moreover, the same report revealed that legal aid offices were forced to turn away almost eighty percent of qualified clients.²⁰² Thus, even for "legal problems affecting basic human needs" there are not enough attorneys.²⁰³ Given the limited resources, programs that provide these services will be hard pressed to muster the kind of diverse constitutional litigation that made the LSP so successful because their limited resources may relegate them to triage work rather than filing constitutional litigation.²⁰⁴

This shortage of resources will only increase because of the cost effects of the three-judge court. The creation of the three-judge court increases the complexity of constitutional litigation across North

199. SUSAN E. LAWRENCE, *THE POOR IN COURT: THE LEGAL SERVICES PROGRAM AND SUPREME COURT DECISION MAKING* 59 (1990) (providing a chart listing the number of constitutional claims before the Supreme Court).

200. *See id.* at 68 ("[T]he LSP presented the Supreme Court with a heterogeneous collection of its clients' problems. [Cases involved] transfer programs, the criminal justice system, shelter, personal well-being, legal procedures, financial relationships, [and] political rights.").

201. Gene Nichol, *Most of NC's Poor Cannot Afford Legal Representation*, NEWS & OBSERVER (Raleigh) (Oct. 26, 2013), http://www.newsobserver.com/2013/10/26/3312112_an-ironic-f-in-access-to-equal.html?rh=1 ("N.C. Supreme Court Chief Justice Sarah Parker reported last year there is one lawyer in North Carolina for every 554 people and one legal services attorney for every 19,160 poor people.").

202. *Id.* ("Heroic legal aid offices are forced to turn away up to 80 percent of qualifying clients because they don't have the resources to serve them."). As sobering as that statistic is, there are further plans to reduce the Legal Aid Budget. *See North Carolina's Legal Aid Funding Threatened by N.C. General Assembly Budget*, LEGAL SERVS. OF S. PIEDMONT, <http://www.lssp.org/north-carolinas-legal-aid-funding-threatened-by-n-c-general-assembly-budget/> (last visited Aug. 22, 2015) ("The N.C. General Assembly budget in its current state includes devastating funding cuts for LSSP and the state's two other legal aid providers, Legal Aid of North Carolina and Pisgah Legal Services.").

203. LEGAL AID OF N.C., <https://www.legalaidnc.org/public/learn/about/default.aspx> (last visited Aug. 30, 2015).

204. For example, the American Civil Liberties Union of North Carolina's existence depends entirely on private donations from concerned individuals, foundation grants, and bequests. *See Join the ACLU*, ACLU, <https://www.acluofnorthcarolina.org/Join/-/Support/support-donate.html> (last visited Aug. 22, 2015).

Carolina.²⁰⁵ And added complexity comes with monetary costs—when “the complexity of law and procedure increase, the total cost of resolving a matter goes up.”²⁰⁶ As noted above, the appellate process as written is unbalanced and can be exceedingly convoluted where an action presents claims other than a constitutional challenge.²⁰⁷ This complexity will likely increase costs for litigants across the state. As American Civil Liberties Union (“ACLU”) of North Carolina Legal Foundation Director Christopher Brook describes it,

The state has resources at its disposal to defend challenged provisions. An individual often does not. The state often has experience defending the constitutionality of provisions. Very few other attorneys in the state do constitutional work. These measures tip the balance even more in favor of the state by making it more costly to challenge provisions. These costs are not borne equally by the parties and the state can now arrive at the conclusion of litigation more quickly than the party challenging the provision.²⁰⁸

Thus, combining the inherently limited resources of the indigent with an increase in cost to bring constitutional challenges will exacerbate an age-old dilemma for many legal service providers: they can represent everyone they possibly can, or they can save resources and only take the strongest cases that they think they will win despite the unfair playing field the law creates. The former expends resources, and the latter reduces access to the courts. Either consequence may be exacerbated by this law, further marginalizing the poor and powerless in North Carolina.

B. Political Implications and the Harm to the Integrity of the Judiciary

The effect that this law will have on litigants and judges is not limited to tangible cost increases and growing caseloads. The new law stands to harm the legitimacy of the court both in the eyes of the public and through political pressures that will be placed on those judges chosen to sit on panels.

205. See *infra* Section IV.A.

206. Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 965 (2000).

207. See *supra* Section IV.A.1.a.

208. E-mail from Christopher Brook, Dir., ACLU of N.C. Legal Found., to author (Nov. 16, 2014, 07:50 EST) (on file with the North Carolina Law Review).

1. Lowering The Public's Estimation of the Court

Scholars have argued that “the effectiveness of the judicial system is dependent on its perceived legitimacy.”²⁰⁹ This concept of “perceived legitimacy” rests in many ways on the public’s perception that the legal system is fair and effective.²¹⁰ In the criminal law context, the legitimacy of police action and the moral credibility of the law are said to “strengthen social norms and increase compliance” because if the law is perceived as fair it is worth being followed.²¹¹ These reflections can shed light on the events in North Carolina. The three-judge court statute threatens to reduce public trust in the fairness of the judiciary.

The panel system will undermine the “perceived legitimacy” of the judicial system because the mechanics of the law adversely affect those challenging constitutional measures.²¹² Creating a mountain for one side to climb, while providing a path of ease for the other, raises basic questions of fairness.²¹³ As described by the North Carolina Bar Association’s former president, Catharine Arrowood, the panel “doesn’t seem like it has the right ring of fairness.”²¹⁴ Law is a public good, especially constitutional law, because it affects not only the

209. See Montre D. Carodine, *Street Cred*, 46 U.C. DAVIS L. REV. 1583, 1592 (2013); Elizabeth E. Joh, *Breaking the Law to Enforce It: Undercover Police Participation in Crime*, 62 STAN. L. REV. 155, 183 (2009) (“[C]ordonning off police decisions from public scrutiny encourages public distrust of the police. As a number of studies of public attitudes toward policing have shown, trust is much more effective as a foundation for public compliance with the law than the threat of punishment or reliance upon personal morality.”); see also TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 57–60 (1990) (studying the effects of people’s judgments about the outcome favorability, distributive fairness, and procedural fairness of their recent personal experiences in small claims court on their attitudes about the legitimacy of legal authorities).

210. Carodine, *supra* note 208, at 1591 (arguing that “the value of the public’s trust to the legitimacy and effectiveness of the legal system” should never be dismissed); see also Harold J. Krent, *Explaining One-Way Fee Shifting*, 79 VA. L. REV. 2039, 2058–69 (1993) (arguing that due to insurmountable obstacles to litigation standing in the way of the less affluent, the current system of civil justice fails to deter public and private actors from engaging in wrongdoings).

211. Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399, 1405 (2005).

212. Recall the bifurcated appeals process the law implements. See N.C. GEN. STAT. § 7A-27(a1) (2014). This uneven appeals process runs afoul of notions of procedural justice. Procedural justice can “affect how litigants react to decisions and how the public views the legitimacy of the judiciary.” Jon P. McClanahan, *Safeguarding the Propriety of the Judiciary*, 91 N.C. L. REV. 1951, 1956 (2013).

213. See Jarvis, *supra* note 9 (“A requirement that appeals go directly to the Supreme Court undermines the current system in which the appellate court filters out most of the cases so that only the most important ones end up on the highest court’s docket . . . [o]nly a limited number of cases can be heard . . . and that restricts citizens’ right to appeal.”).

214. *Id.*

litigants of a case but also all persons across the state.²¹⁵ Thus, if a system the public relies on to be equitable and fair hampers or prevents efficient resolution of constitutional issues, the effectiveness of the judicial system is impaired by reduced public trust.

Moreover, the inner workings of the law cannot be considered in isolation from the political context in which the law was implemented. In the past few years, North Carolina has experienced political turnover that has not come without unrest.²¹⁶ The “Moral Monday” demonstrations have seen over 700 people arrested as a result of protests over Republican legislative policy since last year,²¹⁷ and political tension remains at fever pitch.²¹⁸ The majority of these policies, such as new voter identification laws or the refusal to expand Medicaid, have particularly strained the indigent population of the state.²¹⁹ Situated within this context, it is easy to see how the general assembly’s three-judge court law could further strain the relationship between the government and the governed. If the three-judge court is perceived to be a wall meant to insulate the general assembly’s decision making, it could irreparably harm North Carolina’s view of the justice system. Whatever the general assembly’s intentions, what matters is perception, as any perception of the court system’s illegitimacy damages its utility.²²⁰ By infusing the foul odor of politics into the most apolitical branch of government, the three-judge court, especially in the existing political climate, will create a credibility gap between the government and the people who use the system to hold their government accountable.

215. See Rosen-Zui, *supra* note 194, at 720 (“[S]ince law is a public good, a suit that ends in a judicial resolution often not only serves the litigants at hand but also spills over to many other parties.”).

216. See Richard Fausset, *With State Control, North Carolina Republicans Pursue Smaller Prizes*, N.Y. TIMES (April 6, 2015), http://www.nytimes.com/2015/04/07/us/with-state-control-north-carolina-republicans-pursue-smaller-prizes.html?_r=0 (noting that Republicans control the North Carolina General Assembly for the first time since Reconstruction).

217. Editorial, *The Decline of North Carolina*, N.Y. TIMES (July 9, 2013), http://www.nytimes.com/2013/07/10/opinion/the-decline-of-north-carolina.html?_r=0.

218. See *id.* (“But the bad news keeps on coming from the Legislature, and pretty soon a single day of the week may not be enough to contain the outrage.”).

219. See *id.* (“[S]tate government has become a demolition derby, tearing down years of progress in public education, tax policy, racial equality in the courtroom and access to the ballot.”).

220. See generally Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79 (1998) (arguing that the preservation of democracy depends upon not only the independence of judges but also the public’s perception—and therefore trust—that judges are independent).

2. Harm to the Independence of the Judiciary

Not only will the mechanisms implemented by the three-judge court harm the legitimacy of the court, but the mandate that the chief justice of the supreme court choose the members of the panels is also cause for concern. North Carolina is among the states whose constitutions require election of all judges.²²¹ These elections are comprised of non-partisan primaries, a method thought to maximize the power of the state's voters in the decision-making process.²²² Though there is considerable debate as to the virtues and vices of such a system,²²³ the new legislation's call to have an elected chief justice select the members of each panel will undermine public confidence and unfortunately project an image of a system infested with political bias.²²⁴

To be fair, the law does claim to “ensure fairness, to avoid the appearance of impropriety, and to avoid political bias” by diversifying the membership of each panel, and it prevents any former member of the general assembly from serving on a panel.²²⁵ However, there remain real questions as to the methodology that the chief justice will employ in choosing the panels. Granted, the law mandates that a judge come from three predetermined locations in the state, but the chief justice has no other parameters inside which his or her choices

221. See Paul D. Carrington, *Public Funding of Judicial Campaigns: The North Carolina Experience and the Activism of the Supreme Court*, 89 N.C. L. REV. 1965, 1966 (2011).

222. See *id.* In 1996, the general assembly enacted legislation to ensure that superior court judges were elected in the same non-partisan primaries. See Act of Aug. 2, 1996, ch.9, § 7-20, 1996 N.C. Sess. Laws 2d Extra Sess. 536, 541–44 (codified as amended at N.C. GEN. STAT. § 163 (2013) (“[T]here shall be a primary to narrow the field of candidates to two candidates for each position to be filled.”)).

223. On one side of the debate, commentators laud such elections because they are thought to give a voice to voters in a much more complete manner than others. See Jack Park, *Judicial Elections: The Case For Accountability*, 2 AKRON J. CONST. L. & POL'Y 163, 163 (2011). The other side expresses doubt to these views, arguing that such elections do harm to the rule of law. See Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 726–30 (1995) (“First, the rights of individuals and unpopular minority groups may be compromised by an elective judiciary. Second, and more mundane but no less important, the impartial administration of . . . justice may be compromised.”).

224. A recent Gallup poll captured the tendency of the public to have less than complete trust in the judicial system. Only sixty-eight percent of those polled agreed that Justices on the U.S. Supreme Court did let personal or political views influence how they decided cases. See *Americans' Views on the Issues*, N.Y. TIMES. (June 6, 2013), <http://www.nytimes.com/interactive/2013/06/06/us/new-york-times-cbs-news-poll-june-2013.html>.

225. See N.C. GEN. STAT. § 26A-1-267.1(b) (2013).

will be fenced.²²⁶ This is not to say that the chief justice should not be trusted to make this decision, but he or she should not be placed in such a predicament. The chief justice will be placed into a partisan position by virtue of having to make a choice.

Whatever pressure the new law places on the chief justice will be felt tenfold by the members of the presiding panels. A study of federal three-judge courts showed that judges on these panels handle cases differently than they do individually.²²⁷ Of particular relevance, these studies have found that federal judges do, at least implicitly, decide cases with the hope for unanimous decisions.²²⁸ In basic terms, it means that a Republican judge is more willing to side with two Democratic judges on an issue that they might usually be opposed to, for instance affirmative action.²²⁹ Thus, such studies prove that the political orientation of two judges can be an accurate predictor of how a panel will decide a case.²³⁰ Indeed, this can cut either way for a party trying to challenge a law depending on the members of the panel. So while the results can perhaps be favorable to a given party, these so-called “panel effects” are ugly truths of empanelled judges insofar as a judge’s political orientation plays a larger role in decision making than it should.²³¹

No such study has been conducted for North Carolina courts, but language in one redistricting case can substitute for the lack of empirical evidence. In 2013, a three-judge court convened to hear the initial challenge to new voting maps drawn by the general assembly.²³² The opinion’s introduction squarely addressed the political concerns

226. *Id.* § 1-267.1(b) (2014)).

227. Ahmed E. Taha, *How Panels Affect Judges: Evidence From United States District Courts*, 39 U. RICH. L. REV. 1235, 1235 (2005).

228. *Id.* at 1263.

229. *Id.* at 1238–39 (“The greater willingness to strike down the Guidelines as part of a panel may reflect a hesitance by judges to strike down such an important federal policy without the support of their colleagues. This is especially true given the great political popularity of the Guidelines at the time; some judges may perceive panels as providing political cover for unpopular decisions.”).

230. *Id.* at 1252 (“These panel effects can be dramatic. In some areas of law, the political orientation of the other judges on a panel is an even better predictor of a judge’s vote than is the judge’s own political orientation.”).

231. *Id.*

232. *Dickson v. Rucho*, No. 11 CVS 16896, 2013 WL 3376658, at *2 (N.C. Super. Ct. July 8, 2013), *aff’d* *Dickson v. Rucho*, 367 N.C.542, 746 S.E.2d 238 (2014), *vacated and remanded by* *Dickson v. Rucho*, 135 S. Ct. 1843 (2015) (remanding in light of *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. ___, 135 S. Ct. 1257 (2015)). Later in 2014, the Supreme Court of North Carolina upheld the ruling of the three-judge court and found the voting maps constitutional. See Colleen Jenkins, *North Carolina Judges Uphold GOP-Drawn Voting Districts*, REUTERS (Dec. 19, 2014), <http://www.reuters.com/article/2014/12/19/us-usa-north-carolina-redistricting-idUSKBN0JX2DC20141219>.

that have been discussed in this Comment.²³³ The court acknowledged the political importance of its decision, but was careful to cover its own tracks:

This decision was reached unanimously by the trial court. In other words, each of the three judges on the trial court—appointed by the North Carolina Chief Justice from different geographic regions and each with differing ideological and political outlooks—independently and collectively arrived at the conclusions that are set out below.²³⁴

Notably, the language expressed by the judges seems to be a collective note asking for understanding from the reader; one can feel the tension in the passage. Thus, if anything, this admission by the court suggests that three-judge courts put these judges in a tough spot. This is not to say that arriving at a constitutional decision alone is easy, but the effects of the panels on the political psyches of judges are sure to make their jobs more difficult than is necessary.

A past president of the American Bar Association, Jerome Shestack, once said that “what marks our nation from so many unstable or authoritarian governments is, to a substantial measure, the independence of our judges as preservers of our constitutional rights.”²³⁵ Though referring to the federal judiciary, whose members are appointed for life, Shestack’s words have some salience in the present context. North Carolina’s judges are not appointed for life, so they are not free from, at least in the abstract, political and outside pressures to decide cases in a wholly impartial manner. Forcing the chief justice to choose and the superior court judges to decide as a panel will dilute much needed judicial independence in North Carolina’s courts.

The use of a three-judge court to hear constitutional challenges will harm the judiciary and the citizens who depend on it to function.²³⁶ Inside the judicial chambers, it forces judges to confront the political ramifications of their decisions and possibly even change their votes according to the pressure such a choice will bring.²³⁷ No legislation can be worthwhile if it operates despite these unfortunate consequences. Outside the halls of the courtroom, the politicization of

233. See *supra* Section IV.B.

234. *Rucho*, 2013 WL 3376658, at *2.

235. Kenneth Jost, *The Federal Judiciary, Are the Attacks on U.S. Courts Justified*, 8 CONG. Q. RESEARCHER 217, 221 (1998).

236. See *supra* Section IV.B and accompanying text.

237. See Taha, *supra* note 227, at 1263 (providing statistics on the effect of en banc panels on the decisions and votes of judges).

the three-judge court legislation will sap the trust of the court system from the state's citizens. Both implications damage the integrity of an institution that is worth preserving.

C. A Step in the Right Direction

A critique without a solution adds little value to a discussion. Thus, to conclude, this Comment will briefly recommend some suggestions that could possibly address some of the major concerns presented in this article. Of all of the issues surrounding the passage of this new legislation, of most concern is the unbalanced appellate process. Not only will it contribute to inefficiency in terms of prolonged litigation and wasted time, but it projects an image of unfairness that will taint the judicial system as a whole.²³⁸ The following proposed language to General Statute § 7A-27²³⁹ seeks to address these concerns.

Appeal as a right lies directly to the Supreme Court from any order or judgment of a court, either final or interlocutory that is brought pursuant to G.S. 1-267.1 that holds an act of the General Assembly is facially invalid or valid on the basis that the act violates the North Carolina Constitution or federal law. This subsection shall apply where the State, a political subdivision of the state, or any other litigant is a party in the civil action brought before a three-judge court.

Though this proposed language still mandates that each appeal be heard directly by the Supreme Court of North Carolina, it does not differentiate between parties bringing the appeal. Balancing the appeals process could go a long way toward ameliorating some of the concerns mentioned throughout this section. This proposed solution does not eliminate the effects of panels on judges' decision making or the increased burden on the high court. But this proposal ensures that every litigant enjoys the same treatment under the law. Thus, despite the ambiguity in the law and the effect it will have on the judiciary, this change at least addresses the important need of preserving the legitimacy of the court system.

238. See *supra* Section IV.A–B for discussion of the litany of concerns created by this law.

239. N.C. GEN. STAT. § 7A-27(a1) (2014).

CONCLUSION

A zoning dispute out of Boone, North Carolina marks the beginning of a new era of constitutional litigation in the state.²⁴⁰ Debate about the use of a three-judge court to hear these cases is sure to escalate as each new challenge makes its way to Raleigh to be heard. Chief among the questions raised, however, must be the one posed at the outset of this Comment: Is this a good idea? This Comment has answered with a resounding no and argued that, at this new dawn of civil procedure, the North Carolina General Assembly should reconsider its choice.

Though the law is likely constitutional, legal validity does not equal good policy. Its effects and its consequences must ultimately be the standard by which we measure the validity of a law. Therefore, a more holistic evaluation is necessary. This Comment has shown that the institutionalization of the three-judge court brings with it a litany of concerns ranging from the integrity of the judiciary to the lives of the state's most vulnerable citizens. Such far-reaching consequences cannot be ignored, especially when the general assembly's concern in passing this law is to stop venue shopping and guard against judicial activism. These concerns may be valid, but in this case the means do not justify the ends. We have been here before; the history of the federal courts tells us what will happen.

Stereoscopic sight allows the human eye to combine two images, affording us the ability to see with greater depth and breadth than each eye could see on its own. With one eye on the potential effects that this law will have and the other on the lessons of the past, this Comment is a first effort to peer into the ramifications of this new legislation. Though the future is unclear, the people of North Carolina and the general assembly should not hold their breath waiting for positive change from this law.

JOSHUA A. YOST**

240. Anne Blythe, *Boone Zoning Case is First to Test North Carolina's New Three-Judge Panel*, NEWS & OBSERVER (Raleigh) (Nov 18, 2014), <http://www.newsobserver.com/news/politics-government/state-politics/article10135529.html>.

** As with everything I do, most of the credit for this work goes to those around me. I am grateful to Professor John Orth whose guidance in the early stages of this project proved invaluable. Thank you to Natasha Duarte and the rest of the *North Carolina Law Review* for making this piece far better than I could have done on my own. Special thanks also go to my parents and to Juliana for their endless support and encouragement. Finally, this work is dedicated to Pap—without you, I would never have gone to law school. I hope this makes you proud.