Articles

The Federal Rules of Constitutional Procedure

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Judicial review has distinct purposes, difficulties, and modalities, but there are no guideposts as to how these features ought to be addressed in procedural terms. The reason is a deep-seated, but largely unarticulated, assumption that constitutional litigation is simply governed by the same rules as other civil litigation in the federal courts. Yet the premise is fundamentally false. This Article draws new attention to rules and practices that have historically regulated constitutional cases and set them apart from the typical way all other cases make their way through the judicial system. These procedures include, among other things, the requirement to convene a three-judge federal district court, direct and mandatory appeal to the Supreme Court, and certiorari before judgment in the courts of appeals. When these specialized rules for constitutional litigation are viewed together, as they should be, it becomes evident that they are part of an important but uncharted area of federal procedural law: constitutional procedure.

This Article elaborates on the implications of a unified discourse on the federal rules of constitutional procedure and challenges some broader themes and popular assumptions about the process of judicial review. First, the Article demonstrates that the American model of judicial review does not by definition reject the use of specialized constitutional tribunals. Second, the Article shows that judicial review in the federal court system is not necessarily diffused and decentralized. Third, and relatedly, the Article uncovers the fact that percolation—allowing issues to work their way through the hierarchy of the federal judiciary—has never been a dominant value in constitutional cases as it is in other types of federal litigation. Finally, and perhaps most significantly, the Article makes it clear that our system of judicial review has never been fully committed to a single procedural framework and that much of constitutional procedure is dynamic and ever-changing. Hence, we must not take for granted the current procedural setting, and we should give attention to the impact of procedural design choices—and those who make these choices—on the outcome of constitutional cases and the legitimacy of judicial review.

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INTRODUCTION

Scholars around the world have long insisted that the *process* of constitutional litigation in the United States is governed by the same procedural rules as ordinary litigation between private parties.[1] Consequently, law students have learned for decades that constitutional cases, like all other cases in the federal justice system, follow indiscriminately the same general transsubstantive procedure: the "Federal Rules System."[2] Properly understood, such a procedure means that the resolution of controversies proceeds not arbitrarily but according to some fixed lines set out by a nationwide system of rules, which are applied uniformly in all judicial proceedings regardless of the subject matter of the dispute.[3] This ideal lies at the heart of our commitment to the rule of law, of

1. *See, e.g.*, JOHN B. OAKLEY & VIKRAM D. AMAR, AMERICAN CIVIL PROCEDURE: A GUIDE TO CIVIL ADJUDICATION IN US COURTS 26 (2009) ("The American political tradition, the litigious quality of American culture, and recent developments in American constitutional law have made commonplace the use of civil litigation to challenge the operation of social institutions."); WILLIAM H.J. HUBBARD, CIVIL PROCEDURE: AN INTEGRATED APPROACH 1387 (2021) ("Constitutional law can tell us whether the government violated the Constitution, but it is civil procedure that delivers a judgment constraining the government—or not."); MAARTJE DE VISSER, CONSTITUTIONAL REVIEW IN EUROPE: A COMPARATIVE ANALYSIS 94 (2014) ("Allegations that a particular statute infringes the constitution are raised and resolved in the course of ongoing litigation, in other words, in the context of an ordinary lawsuit between two parties. The United States is the birthplace of the decentralized model of constitutional adjudication."); Andrew Harding, Peter Leyland & Tania Groppi, *Constitutional Courts: Forms, Functions and Practice in Comparative Perspective*, *in* CONSTITUTIONAL COURTS: A COMPARATIVE STUDY 1, 20 (Andrew Harding & Peter Leyland eds., 2009) ("[T]he US model of judicial review established under the *Marbury v. Madison* principle does not provide a right of direct referral on constitutional questions. Rather, it depends upon ordinary litigation through the courts."); Howard M. Wasserman, *Precedent, Non-Universal Injunctions, and Judicial Departmentalism: A Model of Constitutional Adjudication*, 23 LEWIS & CLARK L. REV. 1077, 1098–99, 1129 (2020) (assuming that constitutional adjudication in the United States is governed by the Federal Rules of Civil Procedure); Gustavo Fernandes de Andrade, *Comparative Constitutional Law: Judicial Review*, 3 U. PA. J. CONST. L. 977, 979 (2001) ("All courts, for example, applying the same procedures, decide either the validity of a contract or the right to an abortion."); Dante Figueroa, *Constitutional Review in Chile Revisited: A Revolution in the Making*, 51 DUQ. L. REV. 387, 391 (2013) ("[I]n the U.S. common law system there is no special constitutional procedure, so judges use regular procedures to that effect.").

2. David Marcus, *The Collapse of the Federal Rules System*, 169 U. PA. L. REV. 2485, 2486 (2021) ("[The Federal Rules System] is the dominant procedural system for American civil justice, one taught in virtually every American law school's first-year civil procedure course. Although the Federal Rules of Civil Procedure and their use in the federal courts lie at the system's center, it includes much more. Importantly, the Federal Rules System, by my definition of the term, embraces the procedural regimes of many American jurisdictions. They share many of the system's constituent components, particularly a trans-substantive default architecture for civil litigation."); *see also* GEOFFREY C. HAZARD, JR. & MICHELE TARUFFO, AMERICAN CIVIL PROCEDURE: AN INTRODUCTION, at viii (1993) ("An important characteristic of the American legal system is that the same courts and essentially the same procedural rules govern all types of noncriminal litigation. . . . Apart from criminal matters, however, the same rules of civil procedure govern great public controversies such as *Brown v. Board of Education* and routine litigation between private parties."); OWEN M. FISS & JUDITH RESNIK, ADJUDICATION AND ITS ALTERNATIVES: AN INTRODUCTION TO PROCEDURE 1162 (2003) ("What then are students and teachers to do? . . . A first is to become familiar with a single set of integrated rules, to understand how they respond to problems common to all procedural systems. To that end, we have often used the Federal Rules of Civil Procedure as the exemplary set.").

3. Procedure is the way in which the judiciary carries out its duties and executes its powers to resolve disputes and enforce the substantive law. *See* KARL N. LLEWELLYN, THE BRAMBLE BUSH: THE CLASSIC LECTURES ON THE LAW AND LAW SCHOOL 10 (2008) ("It is worthwhile to mark off a course in procedure, a

treating like cases alike, and is certainly important to our conception of formal justice.[4] In recent years, however, there has been a surge in constitutional litigation across different courts in the United States, with cases swiftly reaching the Supreme Court and then being dealt with in what many perceive as haphazard approaches. This raises serious doubts about whether constitutional cases can truly be assimilated into the ordinary setting of the Federal Rules System.

Here are a few examples. Near the end of October Term 2022, the Supreme Court ruled in a case concerning voting rights in Alabama.[5] The case originated in a three-judge federal district court and was directly appealed to the United States Supreme Court. According to current federal law, the Supreme Court is required to accept appeals and make decisions on the merits in any case that challenges the constitutionality of a congressional or state legislative apportionment plan.[6] Analogously, the two cases that challenged the Texas Heartbeat Act, a state law that imposes a near-total ban on abortions, did not reach the Supreme Court in a regular manner. The Supreme Court permitted the

course in trial practice, a course in evidence, and set them apart as technical studies which run free of any particular substantive subject matter."); David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 BYU L. REV. 1191, 1191 (2013) ("The term 'trans-substantive refers to doctrine that, in form and manner of application, does not vary from one substantive context to the next."); Ramon Feldbrin, *Procedural Categories*, 52 LOY. U. CHI. L.J. 707, 714 (2021) ("[R]ules are considered to be *transsubstantive* in character and effect—[if] the rules are meant to be equally or similarly relevant to different sorts of disputes regardless of subject matter, the parties involved, the relief requested, or the magnitude of the stakes."); Paul Stancil, *Substantive Equality and Procedural Justice*, 102 IOWA L. REV. 1633, 1653 (2017) ("In the parlance of procedure scholarship, formally equal U.S. civil procedure is transsubstantive because most procedural rules apply across different types of substantive legal claims."); Jonathan Remy Nash & D. Daniel Sokol, *The Summary Judgment Revolution That Wasn't*, 65 WM. & MARY L. REV. 389, 412 (2023) ("While scholars have spilled considerable ink questioning the premise that procedure should be trans-substantive, the notion of trans-substantive procedure remains the dominant understanding. Indeed, except to the extent they indicate otherwise, the Federal Rules of Civil Procedure recite their applicability across substantive areas."); A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 354 n.6 (2010) ("A uniform nationwide system of procedure facilitated the development of litigators who could handle cases across the country, which in turn made it a much simpler matter for party litigants to retain competent counsel to represent their cause in the federal courts.").

4. *See* HARRY H. WELLINGTON, INTERPRETING THE CONSTITUTION: THE SUPREME COURT AND THE PROCESS OF ADJUDICATION 12 (1991) ("In resolving disputes treating like cases alike is an ideal that helps to satisfy our conception of fairness and the powerful importance of equal treatment in that conception."); *see also* EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 3 (1949) ("A working legal system must therefore be willing to pick out key similarities and to reason from them to the justice of applying a common classification.").

5. Allen v. Milligan, 599 U.S. 1 (2023); *see also* Zach Schonfeld, *Supreme Court Strikes Down Alabama Congressional Map in Victory for Voting Rights Advocates*, THE HILL (June 8, 2023, 10:30 AM ET), https://thehill.com/regulation/court-battles/4040316-supreme-court-strikes-down-alabama-congressional-map-in-victory-for-voting-rights-advocates [https://perma.cc/8KL2-YEKD].

6. 28 U.S.C. § 2284(a) ("A district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body."); 28 U.S.C. § 1253 (direct appeals of decisions made by three-judge district courts). A decision by a three-judge district court is appealable as a matter of right and is commenced by filing a notice of appeal to the Supreme Court. SUP. CT. R. 18.1. These direct appeals do not follow the certiorari procedure. *Id.* The Court must then decide the appeal on the merits. *Id.* R. 18.12.

Texas law to take effect but agreed to expedite the hearing of the constitutional challenges before the United States Circuit Court of Appeals could issue a decision on the merits.[7] Next, in a case involving former President Donald J. Trump, in which he was charged in the United States District Court with several federal crimes for his conduct in the wake of the 2020 elections, Special Counsel Jack Smith asked the Justices to leapfrog ahead of the federal appeals court to decide whether Mr. Trump is immune from prosecution for actions he took as president. This time, the Supreme Court refused to expedite the case and circumvent the normal appellate process.[8] The brief order denying the Special Counsel's request conveyed the sense that the Court was not inclined to treat the case as exceptional.[9] However, after the Court of Appeals for the District of Columbia upheld the trial court's decision, the Supreme Court suddenly agreed to hear the immunity issue and fast-tracked the case for oral argument, even though the case had not proceeded to a final judgment on the merits.[10] Another case concerning former President Trump, which began in the Colorado state district court, challenged his eligibility to run for office. This case quickly moved through the Colorado Supreme Court and landed in the United States Supreme Court after it agreed to review and decide it on a fast-track schedule.[11] These examples illustrate the kinds of nonorthodox procedural maneuvers arising in

7. United States v. Texas, 142 S. Ct. 14 (2021) (Mem.) (granting certiorari before judgment); Whole Woman's Health v. Jackson, 142 S. Ct. 415 (2021) (granting certiorari before judgment); *see also* Andrew Chung, *U.S. Supreme Court Takes Up Texas Abortion Case, Lets Ban Remain*, REUTERS (Oct. 22, 2021, 4:32 PM PDT), https://www.reuters.com/world/us/us-supreme-court-hear-challenge-texas-abortion-ban-2021-10-22 [https://perma.cc/AX4W-CTRU].

8. United States v. Trump, 144 S. Ct. 539 (2023) (Mem.) (denying certiorari before judgment); *see also* Robert Barnes, *Supreme Court Won't Expedite Ruling on Trump's Immunity Claim*, WASH. POST (Dec. 22, 2023, 5:45 PM EST), https://www.washingtonpost.com/national-security/2023/12/22/supreme-court-trump-immunity-expedition-denied [https://perma.cc/C7VM-9SVW].

9. *See* David B. Rivkin Jr. & Elizabeth Price Foley, *Why the Supreme Court Had to Hear Trump's Case*, WALL. ST. J. (Feb. 29, 2024, 4:43 PM ET), https://www.wsj.com/articles/why-the-justices-had-to-hear-trumps-case-presidential-immunity-125803c6 [https://perma.cc/Y5U7-HAUP] ("Many observers thought the Supreme Court would decline to consider Donald Trump's claim that presidential immunity shields him from prosecution for his conduct on Jan. 6, 2021.").

10. Trump v. United States, 144 S. Ct. 1027 (2024) (Mem.) (granting certiorari); Amy Howe, *Supreme Court Takes Up Trump Immunity Appeal*, SCOTUSBLOG (Feb. 28, 2024, 5:31 PM), https://www.scotusblog.com/2024/02/supreme-court-takes-up-trump-immunity-appeal [https://perma.cc/49QN-SERP]; Adam Liptak, *Pace of Supreme Court Immunity Case Shadowed by Looming Election*, N.Y. TIMES (Feb. 29, 2024), https://www.nytimes.com/2024/02/29/us/politics/supreme-court-immunity-case.html [https://perma.cc/7KJF-2KLS] ("The justices seem to think that decisions of such constitutional significance, as in broadly similar cases concerning claims of immunity from Presidents Richard M. Nixon and Bill Clinton, ought to be settled by the nation's highest court.").

11. Trump v. Anderson, 144 S. Ct. 539 (2024) (Mem.) (granting certiorari); Trump v. Anderson, 601 U.S. 100, 108 (2024); *see also* Adam Liptak, *Supreme Court to Decide Whether Trump Is Eligible for Colorado Ballot*, N.Y. TIMES (Mar. 4, 2024), https://www.nytimes.com/2024/01/05/us/trump-supreme-court-colorado-ballot.html [https://perma.cc/Q5KH-8K2S].

the context of constitutional litigation which call for a new conceptual framework.[12]

Tellingly, formal aberration from ordinary court procedures and the adoption of special constitutional procedures have been regarded as alien to the American model of judicial review. Tailored procedures of this kind are often seen as something that belongs only to those countries that have decided to entrust the power of judicial review to special constitutional courts.[13] For example, as stated by Geoffrey Hazard and Michele Taruffo, "In the American legal system, except for criminal matters, the law of civil procedure also governs the adjudication of public law controversies. These include litigation over the constitutionality of legislation . . . . In most other modern political systems, issues of public law are usually resolved in special courts having jurisdiction of administrative or constitutional questions and using special procedure for determining such questions."[14] But as Professor Hazard and Professor Taruffo further note, "In the United States these questions are resolved in the same courts that have jurisdiction over ordinary litigation between private parties, and according to the same procedure used in ordinary litigation."[15] In a similar vein,

12. *Cf.* Aziz Huq, *The Supreme Court's Confused Ruling or Trump Ballot Case*, TIME (Mar. 4, 2024, 4:50 PM EST), https://time.com/6837636/donald-trump-supreme-court [https://perma.cc/9ZQC-DD2N] ("The Justices' decisions about when to hurry, and when to lollygag, are impossible to understand without attending to the partisan overtones of the cases."); Lauren Camera, *In Trump's Immunity Case, Timing Is Everything for the Supreme Court*, U.S. NEWS (Mar. 1, 2024, 7:18 AM), https://www.usnews.com/news/the-report/articles/2024-03-01/in-trumps-immunity-case-timing-is-everything-for-the-supreme-court [https://perma.cc/6S7G-GLVY] ("While there's no official process for how the justices decide whether to take a case on an expedited basis, or how they set the timeline for oral arguments and the issuance of opinions, there are internal norms for workflow and a judicial culture that they attempt to maintain . . . .").

13. *See, e.g.*, ALLAN R. BREWER-CARÍAS, CONSTITUTIONAL COURTS AS POSITIVE LEGISLATORS: A COMPARATIVE LAW STUDY 186 (2011) (discussing procedural rules for constitutional courts); Mark Tushnet, *Comparative Constitutional Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 1225, 1245 (Mathias Reimann & Reinhard Zimmermann eds., 2006) ("Most modern constitutional courts therefore provide some form of procedure for citizens to complain to such courts."); CHRISTIAN BUMKE & ANDREAS VOßKUHLE, GERMAN CONSTITUTIONAL LAW: INTRODUCTION, CASES, AND PRINCIPLES 9–10 (2019) ("The first proposal was for a sort of a supreme federal court, which would function, like the *United States Supreme Court*, simultaneously as a constitutional court and as the highest federal court of last resort. Doubts were raised on this account by judges, who favored the traditional model of a necessary separation of ordinary nonconstitutional jurisdiction from the political arena of constitutional adjudication. These doubts carried the day, and the Parliamentary Council indeed separated the Federal Constitutional Court from other supreme federal courts."); *id.* at 22–23 ("[The German Federal Constitutional Court's] jurisdiction can be invoked only by specific procedure established for the constitutional court.").

14. HAZARD & TARUFFO, *supra* note 2, at 29.

15. *Id.*; *see also id.* at 29–30 ("[L]egal questions such as those concerning racial discrimination by government agencies, abortion carried out in public hospitals or with public funding, and police handling of arrests can all be presented in the form of an ordinary civil lawsuit. Civil Procedure thereby is the medium for presenting legal claims of social, political, and economic justice, and the courts are the immediate arbiter of the issues, sometimes their ultimate arbiter."); *id.* at 54 ("It is important to recognize that the authority to interpret and apply constitutional law reposes in all courts of first instance and all appellate courts. This authority must be exercised whenever a party properly relies on a constitutional provision in the course of ordinary civil litigation. Constitutional law is therefore merely an aspect of the law applied by all courts in all ordinary litigation."); *id.* at 70 ("[Constitutional] proceedings by which [federal] courts function are primarily governed by the law of civil procedure.").

Christophe Möllers observed that "[s]ome legal systems—such as the German and the French—introduce special kinds of legal procedures [for constitutional review of the democratic process]. . . . Such a process is similar to a court procedure, but it departs to some extent from the judicial function as understood here because the process does not revolve around individualized issues and individual rights, but rather around general issues that inevitably acquire a political dimension. This is not typical of courts. It is therefore no coincidence that Anglo-Saxon legal systems, which take the relationship between court procedure and protection of individual rights particularly seriously, are unfamiliar with such special constitutional procedures and do not make any distinction between 'high courts' and 'constitutional courts.'"[16]

But this dominant understanding of the judicial review process in the United States is misleading and presents a serious blind spot in the literature. Historically, some of the most famous constitutional cases, such as *Brown v. Board of Education*,[17] *Baker v. Carr*,[18] *Roe v. Wade*,[19] and *Citizens United v. FEC*,[20] followed a different procedural course. Indeed, as this Article will uncover, Congress, the Supreme Court, and other rulemakers have taken an active role and given special attention to the administration of constitutional justice, developing far-reaching procedural arrangements for constitutional cases. To be sure, the distinctive rules governing constitutional litigation are not codified in a single rulebook. They are kept incomplete and scattered, and they have (as all other procedural law) changed over time.[21] But they do exist and

16. CHRISTOPH MÖLLERS, THE THREE BRANCHES: A COMPARATIVE MODEL OF SEPARATION OF POWERS 129 (2013); *see also* Martin Shapiro & Alec Stone, *The New Constitutional Politics of Europe*, 26 COMP. POL. STUD. 397, 400 (1994) ("In the American model of review, any judge of any court, in any case, at any time, at the behest of any litigating party, has the power to declare a law unconstitutional. This power is what Americans always think of when they see *judicial review*. According to the central tenets of the European model, however, only separate, specialized jurisdictions—constitutional courts—can exercise review powers, often at the behest of a governmental entity rather than a private litigant, and only in the court of proceedings distinct from regular litigation." (citations omitted)); Vicki C. Jackson, *Congressional Standing to Sue: The Role of Courts and Congress in U.S. Constitutional Democracy*, 93 IND. L.J. 845, 853 (2018) ("Reasonably well-functioning systems of constitutional democracy, as in France or Germany, authorize parts of the legislature to challenge the constitutionality of statutes or, in the case of Germany, to resolve jurisdictional disputes between two organs of the federal government, before the constitutional court. In such countries there is typically a specific constitutional provision contemplating or authorizing such suits.").

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

18. *See* 179 F. Supp. 824 (M.D. Tenn. 1959) (three-judge court), *rev'd*, 369 U.S. 186 (1962).

19. *See* 314 F. Supp. 1217 (N.D. Tex. 1970) (per curiam) (three-judge court), *aff'd in part*, *rev'd in part*, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

20. *See* 530 F. Supp. 2d 274 (D.D.C 2008) (three-judge court), *aff'd in part*, *rev'd in part*, 558 U.S. 310 (2010).

21. *See* HUBBARD, *supra* note 1, at 76 ("The different procedures in ADR remind us that there is nothing necessary or inevitable about the Federal Rules and procedural law that we learn. They are a choice. Judges and legislatures can make or unmake them."); Feldbrin, *supra* note 3, at 707 ("The system of procedure is far from static, and the categories are not fixed or unchanging. The various sets of rules reflect nothing more than our latent—but vitally important—beliefs about the proper way to channel disputes into court."); A.A.S. Zuckerman, *A Reform of Civil Procedure—Rationing Procedure Rather Than Access to Justice*, 22 J.L. & SOC'Y 155, 161

shape each step of the litigation over constitutional matters, and it is simply impossible to understand the modern form of judicial review in the United States without recognizing this body of law. We have specialized rules governing constitutional litigation in a variety of contexts: from the commencement of the case and the fact-finding process to the principle of finality and the related doctrines of precedent and *res judicata*.[22] Reviewing all these rules of procedure is beyond the scope of a single paper, and thus this Article calls attention to the specificity of this body of law by unearthing two of its most quintessential examples: the rules governing the forum and the subsequent appellate review of constitutional challenges brought against state and federal legislation.

As I will show in detail, over the course of the twentieth century, Congress had found it wise to cut off constitutional cases from the general transsubstantive procedure, including from the ordinary appellate process and the certiorari requirement. Congress, with the consent of the Supreme Court, provided a special procedure for the convening of trial courts composed of three federal judges—rather than a single district judge—in certain kinds of constitutional cases.[23] These three-judge panels, composed of two district court judges and one

(1995) ("Civil procedure has evolved into its present shape through a succession of choices, made by the law maker over many decades, which were necessitated by diverse legal, economic and other social factors. The important point to realize is that the present procedural arrangements are not sacrosanct.").

22. *See* HAZARD & TARUFFO, *supra* note 2, at x ("The principle of finality, in both civil law and American usage, is known as the rule of *res judicata*, meaning 'already decided.'").

23. Three-Judge Court Act of 1910, ch. 309, § 17, 36 Stat. 539, 557 (codified as amended at 28 U.S.C. § 2281 (when state laws challenged) (1970)) (repealed 1976); Three-Judge Court Act of 1937, ch. 754, § 3, 50 Stat. 751, 752 (codified as amended at 28 U.S.C. § 2282 (when federal laws challenged) (1970)) (repealed 1976); *see The Judiciary Act of 1937*, 51 HARV. L. REV. 148, 151–54 (1937); David P. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1, 2 (1964) [hereinafter Currie, *The Three-Judge District Court*]; *id.* at 9 ("[T]he three-judge requirement to suits attacking acts of Congress was a product of the parallel running battle over judicial review of federal statutes."); Michael T. Morley, *Vertical Stare Decisis and Three-Judge District Courts*, 108 GEO. L.J. 699, 701 (2020) [hereinafter Morley, *Vertical Stare Decisis*]; Hans Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution*, 4 J. POL. 183, 193–94 (1942); Paul G. Kauper, *Judicial Review of Constitutional Issues in the United States*, *in* CONSTITUTIONAL REVIEW IN THE WORLD TODAY: NATIONAL REPORTS AND COMPARATIVE STUDIES 568, 587 (1962) [hereinafter Kauper, *Judicial Review of Constitutional Issues*] ("Although no single procedure may be identified as a special procedure for raising constitutional questions in the federal court system, Congressional legislation has been directed in a special way to regulate and limit the use of the injunctive remedy in order to restrain the enforcement of statutes or of administrative orders. . . . [A]ny proceeding in a federal court to obtain an injunction in order to restrain the enforcement of a federal or state statute on the ground of unconstitutionality must be heard and determined by a three-judge court."); *see also* Stratton v. St. Louis Sw. Ry. Co., 282 U.S. 10, 13–14 (1930) ("The statute provides that no interlocutory injunction, restraining the action of any officer of a State in the enforcement of a statute of the State, or of an order made by an administrative board or commission pursuant to a state statute, shall be granted by any Justice of the Supreme Court of the United States, or by any District Court, or by any Judge thereof, or by any Circuit Judge acting as District Judge, upon the ground of the unconstitutionality of the statute, unless the application for the injunction shall be heard and determined by three judges. When the application for such an injunction is presented to a justice or judge, he must immediately call to his assistance two other judges."); 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, 426 (1972) ("[W]here a declaratory judgment would have the same effect as an injunction, there is no apparent reason for refusing to convene a three-judge court. A situation where the remedy of injunctive relief

judge from the court of appeals,[24] were in effect, to use Michael Solimine's words, "specialized federal constitutional courts, temporarily convened with borrowed federal judges for the sole purpose of deciding the constitutionality of a federal [or state] statute."[25] Congress had also enacted an unusual procedure of appellate review of district court decisions that hold acts of Congress unconstitutional or otherwise enjoining the enforcement of federal or state laws on the grounds of unconstitutionality.[26] In such constitutional cases, there was neither discretion nor intermediate review: a direct appeal as of right could be taken to the Supreme Court.[27] These arrangements reflect a procedural design choice that resulted from the significant importance of constitutional matters and a general feeling that it is unreasonable to leave the determination of such cases in the hands of a single district judge.[28] Put differently, these unusual procedures

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and that of declaratory judgment are comparable may occur when the result of a declaratory judgment would be so great as to suspend the enforcement of a statute."); Currie, *The Three-Judge District Court*, *supra*, at 15 ("[W]hile 'injunction' is a term of art, it should be construed to effectuate the statutory purpose; 'injunction' can reasonably be interpreted to include all decrees or judgments whose effect is substantially the same, with respect to the purposes of the three-judge statutes, as that of the traditional injunction."); Kesler v. Dep't of Pub. Safety of Utah, 369 U.S. 153, 157 (1962) (holding that a three-judge court is required where it is alleged that a state statute is contrary to a federal statute and therefore invalidated by the Supremacy Clause); *see generally* ROBERT A. CARP & RONALD STIDHAM, JUDICIAL PROCESS IN AMERICA 46–47 (2d ed. 1992). *But see* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 154 (1963) (holding that a three-judge court is inappropriate in an action for declaratory judgment); Swift & Co. v. Wickham, 382 U.S. 111, 128 (1965) (holding that a three-judge panel is not required if the claim is that a state statute conflicts with a federal statute and is thus unconstitutional by virtue of the Supremacy Clause).

24. *See* CARP & STIDHAM, *supra* note 23, at 46.

25. Michael E. Solimine, *The Fall and Rise of Specialized Federal Constitutional Courts*, 17 U. PA. J. CONST. L. 115, 118 (2014) [hereinafter Solimine, *Specialized Federal Constitutional Courts*]; *see also id.* at 122 ("[W]ith the exception of the three-judge district court for forty years of the twentieth century . . . there has not been a standing, specialized federal court to deal with constitutional litigation in general or the constitutional challenges to federal statutes in particular.").

26. Act of Aug. 24, 1937, Pub. L. No. 75-325, ch. 754, § 2, 50 Stat. 751, 752 (codified as amended at 28 U.S.C. § 1252 (1982) (direct appeals from decisions invalidating Acts of Congress) (repealed 1988)); 28 U.S.C. § 1253 (direct appeals from decisions of three-judge courts).

27. *See* Currie, *The Three-Judge District Court*, *supra* note 23, at 2; *id.* at 71 ("Direct appeals are allowed on the merits because to permit review of the merits by the courts of appeals would delay the ultimate decision of important cases requiring expedition."); *The Judiciary Act of 1937*, *supra* note 23, at 154–55; Kauper, *Judicial Review of Constitutional Issues*, *supra* note 23, at 579; Morley, *Vertical Stare Decisis*, *supra* note 23, at 701.

28. *See* MTM, Inc. v. Baxley, 420 U.S. 799, 804 (1975) ("[T]he congressional policy behind the three-judge court and direct-review apparatus [was] the saving of state and federal statutes from improvident doom at the hands of a single judge . . . ."); Flast v. Cohen, 392 U.S. 83, 89 (1968) ("Congress enacted § 2282 'to prevent a single federal judge from being able to paralyze totally the operation of an entire regulatory scheme . . . by issuance of a broad injunctive order.'" (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 154 (1963))); Phillips v. United States, 312 U.S. 246, 248–50 (1941) ("By [the three-judge court statute], Congress provided an exceptional procedure for a well-understood type of controversy. The legislation was designed to secure the public interest in 'a limited class of cases of special importance.' It is a matter of history that this procedural device was a means of protecting the increasing body of state legislation regulating economic enterprise from invalidation by a conventional suit in equity. . . . Congress thus sought to assure more weight and greater deliberation by not leaving the fate of such litigation to a single judge . . . ." (footnote omitted) (citations omitted)); *id.* at 251 ("To bring this procedural device into play—to dislocate the normal operations of the system of lower federal courts and thereafter to come directly to this Court—requires a suit which seeks to interpose the Constitution against enforcement of a state policy[] . . . . The crux of the business is procedural protection against

show Congress's recognition that injunctions against the enforcement of laws reach beyond the private parties in those lawsuits and that this class of cases cannot be left to ordinary procedures.[29]

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an improvident state-wide doom by a federal court of a state's legislative policy."); Cumberland Tel. & Tel. Co. v. La. Pub. Serv. Comm'n, 260 U.S. 212, 216 (1922) ("The legislation was enacted for the manifest purpose of taking away the power of a single United States Judge, whether District Judge, Circuit Judge, or Circuit Justice holding a District Court of the United States, to issue an interlocutory injunction against the execution of a state statute by a state officer or of an order of an administrative board of the State pursuant to a state statute, on the ground of the federal unconstitutionality of the statute."); *id.* ("[There is] no doubt that Congress was by provisions *ex industria* seeking to make interference . . . with the enforcement of state legislation, regularly enacted and in course of execution, a matter of the adequate hearing and the full deliberation which the presence of three judges, one of whom should be a Circuit Justice or Judge, was likely to secure."); *Ex parte* Collins, 277 U.S. 565, 569 (1928) ("Congress deemed it unseemly that a single district judge should have the power to suspend legislation enacted by a State."); Joshua A. Douglas & Michael E. Solimine, *Precedent, Three-Judge District Courts, and the Law of Democracy*, 107 GEO. L.J. 413, 419 (2019) [hereinafter Douglas & Solimine, *Precedent and Three-Judge District Courts*] ("The theory behind the three-judge district court was that a single federal judge should not have the power to invalidate a state law . . . ."); Doug Rendleman, *Preserving the Nationwide National Government Injunction to Stop Illegal Executive Branch Activity*, 91 U. COLO. L. REV. 887, 895 (2020) ("One reaction to federal courts striking down state statutes was the three-judge district court with a direct appeal to the Supreme Court."); Solimine, *Specialized Federal Constitutional Courts, supra* note 25, at 124 ("The striking down of a state statute on these grounds was considered so significant that one federal judge, standing alone, should not possess the power to do so. Instead, any such decision would be better discussed and decided by three federal judges, at least one of whom was a court of appeals judge, and perhaps even better received by the interested public."); 17A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4234 (3d ed. 2024) ("It was the thought of Congress that there would be less public resentment if enforcement of the state statute were stayed by three judges rather than one, and that the provision for direct appeal to the Supreme Court would provide speedy review."); S. REP. No. 94-204, at 2 (1975), *as reprinted in* 1976 U.S.C.C.A.N. 1988, 1989 ("The rationale of the act was that three judges would be less likely than one to exercise the Federal injunctive power imprudently. It was felt that the act would relieve the fears of the States that they would have important regulatory programs precipitously enjoined."); Marks & Schoem, *supra* note 23, at 420 ("Discussion during the Senate debates centered on the scope of the power vested in a single federal judge who had been put in a position to stop all state endeavors to control their developing economic and social programs."); John E. Lockwood, Carlyle E. Maw & Samuel L. Rosenberry, *The Use of the Federal Injunction in Constitutional Litigation*, 43 HARV. L. REV. 426, 445 (1930) ("The three-judge court, as a court of higher dignity less likely to be offensive in its actions and better calculated to secure deliberation and breath of judgment in the granting of relief, has been of great value in reducing the number of improvident orders and in minimizing the antagonism of the states at the interruption of their activities by injunction of a single district judge."); *see also* Michael Morley, *Congressional Intent and the Shadow Docket*, HARV. L. REV. BLOG (Jan. 24, 2020), https://harvardlawreview.org/blog/2020/01/congressional-intent-and-the-shadow-docket [https://perma.cc/DFW8-KYMK] [hereinafter Morley, *Congressional Intent*] ("This measure was adopted during the New Deal Era out of concern that lower federal courts were too readily invalidating the Roosevelt Administration's initiatives."); *see generally* Joseph C. Hutcheson, Jr., *A Case for Three Judges*, 47 HARV. L. REV. 795, 812 (1934) ("That the statute is procedural only cannot be too strongly pointed out.").

29. *See* S. REP. No. 94-204, at 2 (1975) ("This extraordinary procedure was originally designed to protect State and Federal legislative programs from hasty, ill-considered invalidation."); *see also* Currie, *The Three-Judge District Court*, *supra* note 23, at 41–42 ("Quite possibly the greater importance of decisions invalidating statutes, if not simply the fact that Congress was reacting specifically to such decisions, explains why three judges are required only when the validity of a statute or administrative order is challenged and not whenever a constitutional question of any kind is raised."); *id.* at 74 ("The various provisions for mandatory Supreme Court jurisdiction run counter to [the certiorari] policy, presumably because Congress' determination that certain classes of cases are important enough that Supreme Court review should not depend upon the Supreme Court's consent."); *cf.* Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*,

My initial purpose in retelling the history of specialized rules for constitutional issues is to challenge some broader themes and key assumptions about the process of judicial review. First, judicial review in the United States is not necessarily "diffused" and "decentralized" as it is commonly assumed. Second, the American model of judicial review does not by definition reject the adoption of specialized constitutional tribunals. And third, "percolation"—that is, the process of allowing issues to pass through the hierarchy of the federal judiciary—has never been an important value in constitutional cases as in all other types of federal litigation. What's more, the special way constitutional cases make their way through the federal courts shows the range of procedural possibilities. While Congress has since substantially limited the scope of three-judge district courts, this mechanism could provide an appropriate and often superior forum for resolving constitutional claims. More pragmatically, the device of the three-judge district court has the potential to reduce the benefits of forum shopping and similar controversial maneuvers in cases seeking nationwide injunctions. There is perhaps also something to be gained from expediting constitutional disputes to the Supreme Court, which can eliminate costly delays and increase the legal certainty in some of our country's most fraught political issues.[30] Indeed, the Supreme Court has shown a willingness to take the extraordinary step of expediting hearings and granting certiorari ahead of final decisions in the court of appeals in highly charged constitutional cases of "imperative public importance"[31]—even when not required to do so by the three-judge court procedure—such as in the *Nazi Saboteurs* case,[32] the *Steel Seizure* case,[33] the *Nixon Tapes* case,[34] and the *Iran Hostage Crisis* case.[35]

Ultimately, this Article suggests a paradigmatic change in our understanding of the interplay between procedural law and judicial review. The idea that procedure ought to depend on the underlying social purposes of the adjudicative setting is hardly controversial, yet no one has proposed a broad and

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86 IOWA L. REV. 735, 850 (2001) ("Article I allows Congress to supersede . . . judicially created [procedural and evidentiary] rules and to prescribe other adjective laws, which inevitably reflect policy choices that are ultimately committed to the legislative branch.").

30. *See* Steven Shavell, *The Appeals Process and Adjudicator Incentives*, 35 J. LEGAL STUD. 1, 1 (2006) ("The appeals process leads to making of better decisions because it constitutes a threat to adjudicators whose decisions would deviate too much from socially desirable ones.").

31. 28 U.S.C. § 2101(e); SUP. CT. R. 11; *see* James Lindgren & William P. Marshall, *The Supreme Court's Extraordinary Power to Grant Certiorari Before Judgment in the Court of Appeals*, 1986 SUP. CT. REV. 259 (1986).

32. *Ex parte* Quirin, 317 U.S. 1 (1942); *see generally* LOUIS FISHER, NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL AND AMERICAN LAW (2d ed. 2005).

33. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); *see* MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER 135–48 (1994); *see generally* ALAN F. WESTIN, THE ANATOMY OF A CONSTITUTIONAL LAW CASE (1990).

34. United States v. Nixon, 418 U.S. 683 (1974); *see* BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 348–53 (2005).

35. Dames & Moore v. Regan, 453 U.S. 654 (1981); *see generally* Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 191–201 (1981).

unified account of the procedural arrangements for judicial review. This Article's larger goal is to do just that: to lay the conceptual foundation for "constitutional procedure" as a discipline of its own. By connecting the dots backward, this Article sheds new light on the way constitutional litigation is shaped and reshaped through procedural design choices and the ever-changing nature of these procedures. Correspondingly, the Article exposes an underrecognized meeting of minds by players in all three branches of government that judicial review should be regulated by a different system of procedure consistent with its distinct function in our federation's judiciary. It also becomes clear that the rules for constitutional litigation have for too long been left to evolve haphazardly, perhaps because commonly held views about the mundane nature of procedural law tend to obscure them. Looking forward, this Article shows that the rules and practices that define the process by which parties, lawyers, and judges resolve disputes in constitutional law cases are too important to be left in their current undertheorized status because they have the ability to direct constitutional case outcomes and thus have a considerable bearing on the integrity and legitimacy of judicial review.[36] The Article, therefore, concludes that constitutional procedure should be marked off for a separate study and rulemaking process—and, ultimately, for a specialized set of "Federal Rules of Constitutional Procedure." This, in turn, gets at a larger and more fundamental question: Who should decide what forms these procedures take? We must take this matter seriously considering the growing polarization and partisanship among the branches of government.

This Article proceeds in five parts. Part I provides a very short map to our federation's judicial system and the regular way in which a case originating in a federal district court somewhere in the country proceeds until it reaches the United States Supreme Court. Part II explains the evolution of the modern three-tier federal court system and focuses on the development of the Supreme Court's discretionary jurisdiction over its appellate docket through the writ of certiorari. This general overview is key to appreciating how the basic design of our judicial system has changed over time and the way that its elements are open to congressional tinkering. Part III discusses the special forms of process for constitutional litigation and highlights how these procedures have played a role in some of the most contentious constitutional cases. This Part argues that we should view specialized three-judge district courts, mandatory appeals to the Supreme Court, and certiorari before judgment in the courts of appeals, among other things, as characterizing an area of constitutional procedure that is distinct and entirely different from the environment which regulates all other cases in our judicial system. Part IV identifies the special characteristics of judicial

36. *See* PETER CHARLES HOFFER, WILLIAMJAMES HULL HOFFER & N. E. H. HULL, THE FEDERAL COURTS: AN ESSENTIAL HISTORY 26 (2016) ("Congress can also prescribe rules of procedure for the Supreme Court's appellate jurisdiction—'under such regulations as the Congress shall make'—knowing full well that procedural rules may restrict jurisdiction and even dictate outcomes of cases.").

review and provides justifications for why constitutional litigation should be treated differently. Part V ties up the normative and practical implications of the fact that Congress and the Supreme Court have treated constitutional cases differently in a variety of procedural contexts. This Part argues that the mechanism of three-judge district courts and direct appeals to the Supreme Court could offer a positive and tested solution for the kinds of problems which arise out of the use of nationwide injunctions. Finally, it demonstrates the instrumental value of—and metaprocedure takeaways from—treating constitutional procedure as a distinct and independent field for scholarly research and rulemaking.

I. A BRIEF ACCOUNT OF THE FEDERAL COURT SYSTEM

As any student of federal courts well knows, the federal court system currently consists of a pyramid of authority, with the Supreme Court of the United States at the apex, the courts of appeals at the intermediate level, and the district courts at the base.[37] A typical case starts at one of the ninety-four district courts where it is heard before a single judge and often follows an arduous process, including detailed and lengthy discovery, until it reaches the final decision.[38] This stretch of litigation in the federal district court is mostly governed by the Federal Rules of Civil Procedure. A party who loses in the district court and claims some error may then appeal to one of thirteen appellate courts, whose main task is to determine whether or not the law was applied correctly by the trial court.[39] For example, if a case is filed, litigated, and decided in the District of Maine, an appeal from the district court's judgment will go to the Court of Appeals for the First Circuit. An appeal from a case decided in the federal court for the Northern District of Illinois goes to the Court of Appeals

37. *See* ARTHUR T. VON MEHREN & PETER L. MURRAY, LAW IN THE UNITED STATES 118 (2d ed. 2007); *Introduction to the Federal Court System*, OFFS. OF THE U.S. ATT'YS, DEP'T OF JUST., https://www.justice.gov/usao/justice-101/federal-courts [https://perma.cc/CE9A-U7WX] (last visited Nov. 22, 2024).

38. *See* HUBBARD, *supra* note 1, at 47 ("The federal court system has three tiers. The district courts comprise the first tier. They are courts of first impression—in other words, these are the courts where cases begin. The federal district courts are organized into geographical districts, each of which corresponds to all or part of a single state.").

39. 28 U.S.C. § 1291; *see* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 712 (1996) ("The general rule is that 'a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated.'" (quoting Digit. Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 868 (1994))); *see also* HUBBARD, *supra* note 1, at 67 ("The appeal is not a do-over. The process is constrained by standards of review, which define when the reviewing court must defer to the judgment of the district court and, if so, how much to defer."). Generally, all litigants have the right to an appellate court review of the trial court's actions and final decision. In criminal cases, however, the government does not have the right to appeal. Furthermore, in very limited circumstances, involving questions of extraordinary urgency, an appeal may proceed from a federal district court directly to the Supreme Court. HAZARD & TARUFFO, *supra* note 2, at 46. This occurred, for example, in 1974 in *United States v. Nixon*, 418 U.S. 683 (1974), the "Watergate" case involving the President's obligation to respond to an order of the court. *Id.*

for the Seventh Circuit, and so on.[40] The Federal Rules of Appellate Procedure outline the appeal process and govern this stage in the litigation.[41] Despite local variations, the United States courts of appeals conduct their chief business in much the same way throughout the country.[42] These courts sit in panels of three judges who decide the appeal by a majority vote after considering the arguments of the parties. A party disappointed by the decision of an appellate panel may ask the court of appeals for a rehearing and may even request that all judges of the circuit court sit together to rehear the appeal en banc, a procedure reserved only for very important cases.[43]

Lastly, a case might reach the Supreme Court of the United States which sits at the top of the federal court system. A litigant who is disappointed by an adverse decision of a court of appeals may ask the Supreme Court to review that court's legal rulings.[44] Unlike appeals to the federal courts of appeals, review in the Supreme Court is almost always discretionary. That is, the Court chooses to review only those cases that, in the Justices' viewpoint, involve important federal issues or conflicts in lower courts' interpretation of federal law.[45] In other words, a case cannot, as a matter of right, be appealed to the Supreme Court, and, as Barry Sullivan has pointed out, "[T]he path to the Supreme Court is beset with traps for the unwary, all of which must be successfully navigated if even the most important case is to reach the oral argument stage."[46] As such,

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40. The ninety-four federal judicial districts are organized into twelve regional circuits, each of which has a court of appeals. The one exception is the United States Court of Appeals for the Federal Circuit, which has nationwide jurisdiction to hear appeals in specialized federal cases, such as those involving patent laws, and cases decided by the United States Court of International Trade and the United States Court of Federal Claims.

41. FED. R. APP. P. 1(a)(1).

42. In addition to the uniform provisions of the Federal Rules of Appellate Procedure, the courts of appeals may severally adopt their own rules of procedure consistent with the Appellate Rules. 28 U.S.C. § 1271; FED. R. APP. P. 47.

43. FED. R. APP. P. 35, 40; *see* HAZARD & TARUFFO, *supra* note 2, at 46 ("En banc hearings may be held to determine constitutional issues or cases in which panels of the court have reached inconsistent results."). The Ninth Circuit's version of an en banc procedure is the "limited en banc," which consists of only eleven judges: the chief judge plus ten additional circuit judges selected by lot from the active judges of the court. 9TH CIR. R. 35-3 (outlining limited en banc court procedures).

44. 28 U.S.C. § 1254.

45. *See* John M. Harlan, *Manning the Dikes*, 13 REC. ASS'N BAR CITY N.Y. 541, 549 (1958) ("Frequently the question whether a case is 'certworthy' is more a matter of 'feel' than of precisely ascertainable rules."); H. W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 246 (1991) ("Without a doubt, the single most important generalizable factor in assessing certworthiness is the existence of a conflict or 'split' in the circuits."); Wade v. Mayo, 334 U.S. 672, 680 (1948) (noting that grants of certiorari "are matters of grace"). The United States Supreme Court also has jurisdiction to review cases decided by state courts throughout the nation when those cases raise issues of federal law. *See* U.S. CONST., art. III, § 2.; 28 U.S.C. § 1257. And Rule 10 of the Supreme Court Rules states that certiorari might be warranted when multiple state supreme courts have offered conflicting interpretations of federal law. SUP. CT. R. 10(b). However, each state supreme court is the court of last resort for cases which are tried in that state's courts and involve only issues of state law. 28 U.S.C. § 1257.

46. Barry Sullivan, *Book Reviews*, 4 CONST. COMMENT. 452, 452 (1987) (reviewing ROBERT L. STERN, EUGENE GRESSMAN & STEPHEN M. SHAPIRO, SUPREME COURT PRACTICE (6th ed. 1986)); *see also* Robert W. Gibbs, *Certiorari: Its Diagnosis and Cure*, 6 HASTINGS L.J. 131, 133 (1955) ("[T]rue understanding of the

a party seeking to appeal to the Supreme Court from a lower court decision must file a petition for a *writ of certiorari*,[47] of which only a few will be granted review—perhaps one to two percent.[48] If the Court grants the petition, a step that requires the vote of four of the nine Justices, the Court thereby agrees to consider the merits.[49] The Rules of the Supreme Court of the United States prescribe the procedure for this additional review.[50] Ultimately, the Supreme Court—by a majority vote, with six Justices constituting a quorum[51]—affirms, reverses, or modifies the decision being reviewed. A final decision in the Supreme Court usually brings the federal court case to the end of the line.[52]

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institution is rare and at best incomplete. In the words of a former Reporter of the Supreme Court's decisions, 'Certiorari is to the laymen foolishness and to the lawyers a stumbling block.'" (quoting CHARLES HENRY BUTLER, A CENTURY AT THE BAR OF THE SUPREME COURT OF THE UNITED STATES 106 (1952))).

47. SUP. CT. R. 10. Under the Supreme Court's current rules, a party that loses in a state supreme court or federal court of appeals has at least 90 days from the last ruling to file a petition for a writ of certiorari. *Id.* R. 13. That brief is supposed to make the case for why the Court's intervention is justified, and not necessarily why the lower-court ruling was wrong. *Id.* R. 10.

48. *See* STEPHEN M. SHAPIRO, KENNETH S. GELLER, TIMOTHY S. BISHOP, EDWARD A. HARTNETT & DAN HIMMELFARB, SUPREME COURT PRACTICE § 1.19 (11th ed. 2019) (ebook) ("Experience has proved that the Supreme Court cannot possibly hear arguments in and decide more than a small proportion of the cases that parties would like to bring before it. The consequence is that every type of case that reaches the Supreme Court goes through a preliminary sifting process, which is survived only by those cases that the Court deems sufficiently important or meritorious to warrant further review. . . . The importance of the sifting process is proved by the fact that in recent years the Court has consistently disposed of nearly 99 percent of the cases submitted to it without argument."); *The Supreme Court, 2022 Term—The Statistics*, 137 HARV. L. REV. 490, 498 (2023) (showing that in October Term 2022, the Court agreed to review 60 cases out of 4,186 petitions for certiorari that were filed, constituting 1.4%); *see generally* WILLIAM H. REHNQUIST, THE SUPREME COURT 224–38 (2001); Tejas N. Narechania, *Certiorari in Important Cases*, 122 COLUM. L. REV. 923 (2022).

49. *See* REHNQUIST, *supra* note 48, at 233 ("Although our Court otherwise operates by majority rule, as would be expected, the granting of certiorari has historically required only the votes of four of the nine justices."); STEPHEN VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC 81 (2023) ("Very little about the certiorari process is formalized in any statute or rule. Even the most foundational 'rule of four,' that it takes only four 'yes' votes for the Court to grant certiorari, can't be found in the Constitution, in any federal statute, or even in the Supreme Court's own rules."); WOODWARD & ARMSTRONG, *supra* note 34, at xvi–ii ("At least four of the nine Justices must vote to hear a case. These votes are cast in a secret conference attended only by the Justices, and the actual vote is ordinarily not disclosed.").

50. *See* Scott Dodson, *The Making of the Supreme Court Rules*, 90 GEO. WASH. L. REV. 866, 866 (2022) ("[T]he literature on the Supreme Court Rules, and the rulemaking process behind them, is practically nonexistent. Part of the reason is that the rulemaking process for the Supreme Court Rules is a black box—the Court promulgates its rules with neither oversight nor transparency.").

51. 28 U.S.C. § 1; SUP. CT. R. 4.2.

52. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) ("[R]eversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final."). It is worth adding, however, that the Supreme Court Rules allow in very rare circumstances for a rehearing of cases already decided by the Court. Rehearing of decisions on the merits might be granted by a majority of the Court and only when at least one Justice from the previous majority believes that he or she may have decided in error. SUP. CT. R. 44; *see also* WOODWARD & ARMSTRONG, *supra* note 34, at 92–95 ("The Court's rules provided strict guidance on rehearing petitions. . . . [T]here was no reason to reconsider a case unless someone in the original majority had changed his mind, or had found a reason to hear the case again. Otherwise litigation would never end."); Aaron-Andrew P. Bruhl,

Against this backdrop, we have all been taught that constitutional cases, like all other matters, reach the Supreme Court only after they have made their rounds in the lower courts.[53] As Samuel Bray has pointed out, "The practice of the federal courts is premised on the idea of 'percolation'—letting a question be considered by lots of different judges, over time, before it is considered by the Supreme Court."[54] Indeed, when the Supreme Court is deciding whether to hear a case, the criteria include the existence of disagreement among the lower courts. In other words, the premise is that the rigors of litigation have a way of sharpening the record and crystalizing the dispute, ensuring that by the time a case makes its way to the Supreme Court's docket, it is ripe for decision and fairly presents the legal question that the Justices are asked to resolve.[55] Correspondingly, the system of judicial review in the United States has often been described as "decentralized" and "diffused," wherein all courts are empowered to hear constitutional issues and the Supreme Court's intended role is to decide last, after the decisions of at least one district court judge and one panel of three circuit court judges.[56] But this has not always been the case.

II. THE CHANGING TERRAIN OF FEDERAL LITIGATION

The process through which cases navigate the federal court system has changed dramatically over the years. Article III, Section 1 of the United States Constitution provides: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Thus, the only federal court whose existence

When is Finality . . . Final? Rehearing and Resurrection in the Supreme Court, 12 J. APP. PRAC. & PROCESS 1, 8–9 (2011); Gondeck v. Pan. Am. World Airways, Inc., 382 U.S. 25 (1965).

53. WELLINGTON, *supra* note 4, at 3 ("Constitutional interpretation in the Supreme Court of the United States is a method of governing through appellate adjudication.").

54. Samuel Bray, *The Case Against National Injunctions*, *No Matter Who is President*, LAWFARE: CRIMINAL JUSTICE & THE RULE OF LAW (Feb. 4, 2017, 4:00 PM), https://www.lawfaremedia.org/article/case-against-national-injunctions-no-matter-who-president [https://perma.cc/LZ24-NQQ6] [hereinafter Bray, *The Case Against National Injunctions*] ("[A]s soon as one federal district judge finds an executive order invalid and enjoins its enforcement across the nation, the injunction binds the defendant everywhere, at least until it is overturned on appeal. Shop 'til the order drops."); s*ee also* Harold Leventhal, *A Modest Proposal for a Multi-Circuit Court of Appeals*, 24 AM. U. L. REV. 881, 907 (1975) ("There is, indeed, value in percolation among circuits, with room for a healthful difference that may balance the final result."); *see generally* Michael Coenen & Seth Davis, *Percolation's Value*, 73 STAN. L. REV. 363 (2021) ("A common presumption is that percolation is valuable.").

55. VLADECK, *supra* note 49, at 18.

56. *See, e.g.*, TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 90–99 (2003); ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE 32 (2000) ("In American judicial review, 'any judge of any court, in any case, at any time, at the behest of any litigating party, has the power to declare a law unconstitutional.'" (citations omitted)); JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA 138 (3d ed. 2007) (observing that in the United States any ordinary court has the power of judicial review); Szymon S. Barnas, Note, *Can and Should Universal Injunctions Be Saved?*, 72 VAND. L. REV. 1675, 1708 (2019) ("The American judiciary has been generally reticent toward specialized forums. Such forums—including courts that only hear constitutional challenges to national legislation—are more common internationally.").

is required by the Constitution is the Supreme Court of the United States. This Court was seen as essential to resolving disputes between states, to providing uniformity on national matters, and to giving effect to the supremacy clause of Article VI, Section 2.[57] The decision of whether to create "inferior" federal courts, that is, federal trial courts or federal appellate courts below the Supreme Court, was left for Congress to decide—and Congress might have equally decided not to create any lower federal courts.[58] This would have meant that all cases would be litigated in state court trials. However, favoring a strong national government, the first Congress exercised its authority to create lower federal courts in the Judiciary Act of 1789.[59] Since then, Congress has periodically revised the structure, jurisdiction, and procedure of the lower federal courts.[60]

The federal court system Congress first established was not the three-tier system of today. Though, comparably, it consisted of three kinds of federal courts, with the Supreme Court at the top, the inferior courts differed markedly from the current model. Congress created two types of trial courts, known as district courts and circuit courts, but did not give them all that much to do.[61] District courts were exclusively courts of limited original jurisdiction and were manned by district judges, sitting alone.[62] They served as trial courts principally in admiralty cases and in the prosecution of minor federal crimes.[63] There were also three circuit courts, each incorporating several district courts. These tribunals were not assigned permanent judges, but rather were to hold two

57. MARC A. FRANKLIN, THE BIOGRAPHY OF A LEGAL DISPUTE: AN INTRODUCTION TO AMERICAN CIVIL PROCEDURE 21–22 (1968).

58. *See* Stuart v. Laird, 5 U.S. (1 Cranch) 299, 309 (1803) ("Congress [has] constitutional authority to establish from time to time such inferior tribunals as they may think proper; and to transfer a cause from one such tribunal to another. In this last particular, there are no words in the constitution to prohibit or restrain the exercise of legislative power."); AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 121 (2005) ("[T]he Constitution nowhere required the creation of federal trial courts in the hinterlands [and] the crucial trial courts might well [have been] state courts of general jurisdiction."); John Minor Wisdom, *The Frictionmaking, Exacerbating Political Roles of Federal Courts*, 21 SW. L.J. 411, 421–22 (1967) (discussing the compromise on the establishment of inferior federal courts at the 1787 Convention).

59. Judiciary Act of 1789, ch. 20, §§ 3–4, 1 Stat. 73.

60. *See* DAVID P. CURRIE, FEDERAL JURISDICTION IN A NUTSHELL 11 (4th ed. 1999) ("Congress tinkers repeatedly with the jurisdictional provisions; the field is one of constant change."); Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845) (noting that even though the federal judicial system is based on the Constitution, Congress has control over its organization and modes of operation); HOFFER ET AL., *supra* note 36, at 36 ("[T]he Judiciary Act of 1789 and subsequent acts of Congress demonstrated that the federal legislative branch could not only create lower federal courts, it could also apportion jurisdiction among them."); HAZARD & TARUFFO, *supra* note 2, at 43; Feldbrin, *supra* note 3, *passim* (discussing the evolution of procedural law in the federal court system).

61. Judiciary Act of 1789, ch. 20, § 3, 1 Stat. 73 (1789). For a particularly important and thorough history of the act, see WILFRED J. RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE (Wythe Holt & L. H. LaRue eds., 1990) ("Another thesis of this book is that the national judicial system established in 1789 was a historical novelty."); Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 51 (1923).

62. RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 23 (1985).

63. *See* Judiciary Act of 1789 §§ 9, 11, 13, 1 Stat. 76–81; MICHAEL STOKES PAULSEN, STEVEN G. CALABRESI, MICHAEL W. MCCONNEL & SAMUEL BRAY, THE CONSTITUTION OF THE UNITED STATES 489 (2d ed. 2013); Farah Peterson, *Expounding the Constitution*, 130 YALE L.J. 2, 74 (2020).

sessions a year staffed by two Supreme Court Justices (riding circuit) and one district court judge.[64] The circuit courts had both limited original and appellate functions. Although the circuit courts had some appellate responsibilities in relation to the decisions of the district courts, they were primarily trial courts themselves with jurisdiction over diversity cases and major government litigation.[65]

As with the issue of whether to create lower federal courts, the Constitution also left it to Congress to decide the scope of the Supreme Court's power to hear appeals, whether from the lower courts that Congress might create or the existing state courts.[66] These decisions were where most judicial business was to be directed, at least at first. All that the Constitution provided was the outer bounds, listing nine types of cases Congress could empower federal courts, including the Supreme Court, to hear.[67] That being so, Congress decided to give the Supreme Court appellate jurisdiction over the decisions of district and circuit courts—and appellate jurisdiction over decisions by state courts holding invalid any statute or treaty of the United States; decisions holding valid any state law or practice that was challenged as inconsistent with the federal Constitution, treaties, or laws; and decisions rejecting any claim made by a party under a provision of the federal Constitution, treaties, or laws.[68] Importantly, appeal in all cases, including those involving constitutional matters, was a matter of right rather than at the discretion of the appellate tribunal.[69] Thus, the Supreme Court had to hear every appeal over which Congress had given it jurisdiction.[70] As Chief Justice John Marshall would explain in *Cohens v. Virginia*, "With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is

64. *See* LUCAS A. POWE, JR., THE SUPREME COURT AND THE AMERICAN ELITE 1789–2020, at 18 (2d ed. 2021) ("A three-tier court system was authorized: district courts with original jurisdiction, circuit courts with both original and appellate jurisdiction, and a Supreme Court with both original and appellate jurisdiction. Only the district courts and Supreme Court were independently staffed. . . . Circuit courts consisted of the district judge and two Supreme Court justices (and after 1793 one justice and a district judge)."); ERWIN CHEMERINSKY, FEDERAL JURISDICTION 10 (6th ed. 2012).

65. *See* DONALD L. DOERNBERG, FEDERAL COURTS IN A NUTSHELL 5–6 (6th ed. 2021); HOFFER ET AL., *supra* note 36, at 35; *see* CHEMERINSKY, *supra* note 64, at 10–11.

66. U.S. CONST. art. III, § 2, cl. 2.

67. VLADECK, *supra* note 49, at 32.

68. *See* POSNER, *supra* note 62, at 23–24, 48; HOFFER ET AL., *supra* note 36, at 34.

69. *See* POSNER, *supra* note 62, at 24; HOFFER ET AL., *supra* note 36, at 36 ("Appeals from the decisions of the district courts sitting in equity could be taken to the Supreme Court."); Daniel Epps & William Ortman, *The Lottery Docket*, 116 MICH. L. REV. 705, 706 (2018) ("Until 1891, litigants in many classes of cases could appeal to the Supreme Court as a matter of right.").

70. *See* SHAPIRO ET AL., *supra* note 48, at ch. 2, § 2.1. ("During the century following the 1789 Act, the Court was required to decide every case that properly came before it."); VLADECK, *supra* note 49, at 36; REHNQUIST, *supra* note 48, at 236; Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1649 (2000) ("For over one hundred years, the Supreme Court had no power to pick and choose which cases to decide. . . . In short, so long as Congress did not attempt to expand the Supreme Court's jurisdiction to cases and controversies not listed in Article III or to add to its original jurisdiction, the Supreme Court was required to decide those cases within its congressionally-defined jurisdiction and was prohibited from deciding cases outside its congressionally-defined jurisdiction.").

given, than to usurp that which is not given. The one or the other would be treason to the [C]onstitution."[71]

During the first one hundred years or so, cases involving the constitutionality of federal laws occupied a relatively small proportion of the federal courts' workload. Congress elected not to fulfill the broad grant of judicial powers in the Constitution and relied mainly on the state courts to "vindicate essential rights arising under the Constitution and federal laws."[72] The lower federal courts were "subsidiary courts," and, up until the Civil War, diversity jurisdiction was their primary function, with neither the district nor the circuit courts receiving a general grant to adjudicate federal law claims. "The pre-Civil War Supreme Court was," according to Stephan Vladeck, "a loose analogue to the modern institution, resolving a handful of mostly unimportant cases each year."[73] Correspondingly, Justice Joseph Story wrote in an article he published in 1835 that the general mass of the Supreme Court's business consisted of "private controversies respecting property, or personal rights and contracts."[74] And Felix Frankfurter and James Landis observed that out of a total of 193 cases in the 1875 Term of the Supreme Court, "only 17 cases, less than ten [percent] of the total dispositions of the term, dealt with questions of constitutionality, taxation, and other aspects of public law."[75] Indeed, for many decades, lawyers and commentators did not even have a particular term for the authority to refuse to apply unconstitutional legislation. The term "judicial review" was adopted only at the end of the nineteenth century when the practice became too important to go unnamed.[76] "That the phrase was apparently

71. 19 U.S. (6 Wheat.) 264, 404 (1821).

72. Zwickler v. Koota, 389 U.S. 241, 245 (1967); *see also* Whole Woman's Health v. Jackson, 595 U.S. 30, 49 (2021) ("[G]eneral federal question jurisdiction did not even exist for much of this Nation's history."); Sheldon v. Sill, 49 U.S. 441, 448–49 (1850) (holding that lower federal courts' jurisdiction is within Congress's discretion to grant, withhold, or limit as it sees fit); FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 64 (Transaction Publishers 2007) (1928); HOFFER ET AL., *supra* note 36, at 36.

73. VLADECK, *supra* note 49, at 37; *see also* REHNQUIST, *supra* note 48, at 236 ("[T]he task of the [Supreme] Court in these early days was to do what any other appellate court traditionally does: make sure that the trial was fairly conducted, that the judge correctly applied the law, and that the evidence supported the result reached by the lower court. In its earlier days, . . . the Court did not have a great deal to do as an appellate court—for several decades it sat in Washington for only a few weeks a year, hearing appeals from the lower federal courts and from state supreme courts.").

74. 3 Joseph Story, *Courts of Justice—Courts of England*, *in* ENCYCLOPEDIA AMERICANA 588 (Francis Lieber ed., 1844), *reprinted in* JOSEPH STORY AND THE ENCYCLOPEDIA AMERICANA 20, 29 (Valerie L. Horowitz ed., 2006); *see also* VLADECK, *supra* note 49, at 35 ("The largest chunk of federal cases were, perhaps unsurprisingly, maritime disputes.").

75. FRANKFURTER & LANDIS, *supra* note 72, at 300–01.

76. By the 1870s, the Supreme Court was reviewing Congressional statutes—and striking them down—at an unprecedented rate. *See, e.g.*, The Civil Rights Cases, 109 U.S. 3 (1883); United States v. Harris, 106 U.S. 629 (1883); The Trade-Mark Cases, 100 U.S. 82 (1879); United States v. Fox, 95 U.S. 670 (1878); United States v. Reese, 92 U.S. 214 (1876); United States v. R.R. Co., 84 U.S. (17 Wall.) 322 (1873); United States v. Klein, 80 U.S. (13 Wall.) 128 (1872); Collector v. Day, 78 U.S. (11 Wall.) 113 (1871); Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870); Justices v. Murray, 76 U.S. (9 Wall.) 274 (1869); United States v. Dewitt,

unknown to Marshall's contemporaries," Robert Lowry Clinton notes, "may tell us much."[77]

The Civil War precipitated fundamental changes that led to the expansion of the federal courts' jurisdiction.[78] In response to the war, Congress proposed, and the states ratified, the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution.[79] Among other things, these transformational reforms guaranteed individuals, especially the formerly enslaved, the same constitutional rights in their dealings with state and local governments that they already had with the federal government. Furthermore, Congress decided in 1875 to give the district courts general federal question jurisdiction following the understanding that some state courts, particularly in the South, were not upholding the Reconstruction Amendments and other federal rights.[80] As the Supreme Court noted a century later in *Steffel v. Thompson*, "With this latter enactment, the lower federal courts 'ceased to be restricted tribunals of fair dealing between citizens of different states and became the *primary* and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States.'"[81] These developments, together with the expansion of the economy and the central government's growing dominance, propelled a sharp

76 U.S. (9 Wall.) 41 (1869); Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867); *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1866); *see also* KEITH E. WHITTINGTON, REPUGNANT LAWS: JUDICIAL REVIEW OF ACTS OF CONGRESS FROM THE FOUNDING TO THE PRESENT 125 (2019) ("By the 1870s, . . . the justices were reviewing Republican-sponsored statutes—and striking them down—at an unprecedented rate.").

77. ROBERT LOWRY CLINTON, MARBURY V. MADISON AND JUDICIAL REVIEW 7 (1989).

78. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 367 (4th ed. 2019) ("The Civil War, Reconstruction, and the post-Civil War amendments had increased the importance of the federal system. New law, in 1875, expanded the power of the federal courts.").

79. *See id.* at 326–27; BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 44–46 (1993); John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375 (2001).

80. *See* Merrell Dow Pharms., Inc. v. Thompson, 478 U.S. 804, 827 n.6 (1986) (Brennan, J., dissenting) ("Another reason Congress conferred original federal-question jurisdiction on the district courts was its belief that state courts are hostile to assertions of federal rights."); Steven Gow Calabresi, *The Origins and Growth of Judicial Enforcement*, *in* COMPARATIVE JUDICIAL REVIEW 83, 88 (Erin F. Delaney & Rosalind Dixon eds. 2018) ("The creation of general federal question jurisdiction in the lower federal courts in 1875 was done to make the federal courts more powerful so they could redress the *Wrongs* of slavery and of the Black Codes."); Thomas B. Marvell, *The Rationales for Federal Question Jurisdiction: An Empirical Examination of Student Rights Litigation*, 1984 WIS. L. REV. 1315, 1331–32 (1984); John F. Preis, *Reassessing the Purposes of Federal Question Jurisdiction*, 42 WAKE FOREST L. REV. 247, 255–56 (2007); *see also* EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870–1958, at 256 (1992) ("[F]rom the 1870s to the 1940s[] . . . Justices generally if implicitly believed that they should maintain federal jurisdiction over issues and interests that they regarded as having national importance."); POSNER, *supra* note 62, at 52 ("It is plain enough why Congress wanted persons claiming that their rights under the Fourteenth Amendment had been violated to be able to sue in federal courts: the state was often the de facto defendant, and its courts were unlikely to be sympathetic to the plaintiff. . . . [Moreover,] [t]he Civil War had both revealed and exacerbated deep sectional tensions, and it could no longer be assumed that state courts would be sympathetic to assertions of federal right whoever the defendant was.").

81. 415 U.S. 452, 464 (1974) (quoting FRANKFURTER & LANDIS, *supra* note 72, at 65).

uptick in the volume of cases brought to the federal courts each year which eventually made their way to the Supreme Court.[82]

In 1891, Congress was persuaded to tinker again with procedure. To alleviate the increasing flood of cases, Congress created the circuit courts of appeals, staffed by standalone circuit judges, and interposed them between the lower federal courts and the Supreme Court.[83] Most importantly, Congress also gave the Supreme Court, for the first time, some control over its docket by introducing the discretionary *writ of certiorari*.[84] Finally, in the Judiciary Act of 1925, Congress agreed to expand the Supreme Court's discretion to choose most of its cases by certiorari and decide which court of appeals cases should get another review.[85] This law is best known as the "Judges' Bill" because a committee of Supreme Court Justices drafted the legislation and lobbied Congress to pass it.[86] As Professor Vladeck has noted, "To seal the deal, [William Howard] Taft joined three other justices in again publicly appearing before Congress in late 1924 and early 1925 in support of the bill, insisting that the justices would exercise their discretion carefully and prudentially, and that the purpose of the bill was merely to spare the Court from having to waste limited resources unnecessarily."[87] Justice George Alexander Sutherland

82. *See* VLADECK, *supra* note 49, at 37–39; *id.* at 39 ("It wasn't just the lower court that saw a dramatically expanding workload. By 1890, the Supreme Court's docket had three times as many cases on it as it did in 1870, and it still wasn't able to hear all the cases that it was, by law, obligated to eventually decide."); REHNQUIST, *supra* note 48, at 236 ("After the Civil War, court congestion increased. . . . Congress began to enact regulatory legislation, which created new kinds of lawsuits that could be brought in the federal courts. Finally, both the commercial activity and the population of the United States continued to increase dramatically, and both of these kinds of growth naturally caused more litigation."); POSNER, *supra* note 62, at 59 ("The enormous increase in the population of the United States, and in the power and reach of the federal government after the Civil War, made it inevitable that the caseload of the federal courts would expand from its humble beginnings."); Calabresi, *supra* note 80, at 87–88 ("Federal judicial power grew enormously after the Civil War."); *see also* Wisdom, *supra* note 58, at 413 (documenting the increase in the caseload over the years in the Fifth Circuit Court of Appeals and the expansion of the national government).

83. FRIEDMAN, *supra* note 78, at 368 ("Congress tried to make things easier for the federal courts, as they struggled with their new business. . . . A major reform law was passed in 1891. In each circuit, a court of appeals would sit, acting as an appellate court.").

84. VLADECK, *supra* note 49, at 24 ("[T]he Evarts Act for the first time gave the justices discretion over whether to hear four specific categories of appeals by deciding whether to grant a 'writ of certiorari.' The four categories included state-law disputes between citizens of different states; suits under the customs and patent laws; federal criminal appeals; and maritime disputes."); Lindgren & Marshall, *supra* note 31, at 266; *see generally* REHNQUIST, *supra* note 48, at 234–35 ("Whether or not to vote to grant certiorari strikes me as a rather subjective decision, made up in part of intuition and in part of legal judgment. . . . [T]he decision whether to grant certiorari is a much more 'channeled' decision than the decision as to how a case should be decided on the merits; there are really only two or three factors involved in the certiorari decision—conflict with other courts, general importance, and perception that the decision is wrong in light of Supreme Court precedent.").

85. Act of February 13, 1925, ch. 229, 43 Stat. 936, 938; 28 U.S.C. § 1254(1).

86. *See* VLADECK, *supra* note 49, at 29, 42–45; Lindgren & Marshall, *supra* note 31, at 271; Hartnett, *supra* note 70, at 1704–05; Felix Frankfurter & James M. Landis, *The Supreme Court Under the Judiciary Act of 1925*, 42 HARV. L. REV. 1, 1 (1928).

87. VLADECK, *supra* note 49, at 45; *see also* Robert Post, *Taft & the Administration of Justice*, 2 GREEN BAG 2d 311, 312 (1999) ("As Chief Justice, Taft was responsible for vastly expanding the certiorari jurisdiction of the Supreme Court, thus liberating the Court for the first time to function as the manager of the

testified that "when a litigant has had a trial before a trial judge, and has gone to a court of appeals of as high a rank as the Circuit Court of Appeals of the United States, he ought to stop there."[88] Correspondingly, the Judges' Bill limited the access of parties to Supreme Court review and cemented the idea that "fairness to litigants was well served by hearings in two courts, a district court and a court of appeals, and that 'any further review ought to be in the discretion of the Supreme Court.'"[89]

Indeed, the rise of certiorari transformed not only the Supreme Court's docket, but also its role in our constitutional system—from resolving every dispute vested in it by Congress to only those issues that the Justices wanted to resolve.[90] As Professor Vladeck concluded, "Almost everything that the modern Supreme Court does is a result of the fundamental shift in its role that certiorari effected, a shift that has naturally led to a wide array of strategic and tactical behaviors, not just from the justices, but from the parties and the lower courts as well."[91] In other words, the net result of these numerous changes is that today the district courts, at least one in every state, are the principal federal trial courts. There are thirteen courts of appeals with the power to review most district court decisions, and almost all cases come to the Supreme Court through the certiorari process, meaning that review is effectively a matter of the Justices' discretion. Normally, therefore, the Supreme Court hears a case only after it has "percolated" through the lower federal courts.[92] *Normally*, however, is the key word, because although most types of cases follow this transsubstantive procedure, constitutional cases were for a long period of time considered different and were the subject of special arrangements.

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nation's federal law rather than merely as a court of last resort."); *id.* ("Taft always believed that the American judicial system was basically just, that it could serve as a forum for the constructive channeling of social discontent, and that its primary defects were procedural.").

88. *Procedure in Federal Courts: Hearing on S. 2060 and S. 2061 Before a Subcomm. of the S. Comm. on the Judiciary*, 68th Cong. 48 (1924) (statement of Hon. George Sutherland, Associate J. of the United States Supreme Court).

89. Lindgren & Marshall, *supra* note 31, at 271 (quoting 66 CONG. REC. 2750, 2752 (Jan. 31, 1925) (Statement of Sen. Albert B. Cummins)); *see also* Berenyi v. Dist. Dir., Immigr. & Naturalization Serv., 385 U.S. 630, 635–36 (1967) (holding that under the Court's "two-court" rule it does not review conclusions of fact by lower federal courts "in the absence of a very obvious and exceptional showing of error").

90. *See* REHNQUIST, *supra* note 48, at 235–36; Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 389 (2004) ("Once a relatively passive institution which heard all appeals that Congress authorized, the Court is now a virtually autonomous decisionmaker with respect to the nature and extent of its own workload.").

91. VLADECK, *supra* note 49, at 24; *see also* Benjamin B. Johnson, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793, 794 (2022) ("Congress's decision to give the Supreme Court vast power to select cases remains one of the most consequential decisions of the twentieth century. That power—implemented through the writ of certiorari—allows the Court to dodge cases it does not want to decide.").

92. Coenen & Davis, *supra* note 54, at 365 ("The underlying image is intuitive and appealing: Like crude and granular liquid seeping through a purifying filter, a difficult legal issue becomes clearer, cleaner, and more refined as more lower courts have the chance to weigh in on its merits. When at last the time comes for the Supreme Court to resolve that question for itself, the prior percolation of the issue will help the Justices render a decision that is especially thoughtful and well-informed.").

III. SPECIAL PROCEDURES FOR CONSTITUTIONAL CASES

The birth of the modern three-tier federal court system and the rise of the Supreme Court's discretion over its docket correspond to what is generally accepted as the present-day process for constitutional litigation. The prevailing view, as Steven Gow Calabresi has written, is that in the United States "the more than 1,700 lower federal court judges and the thirty thousand or so state court judges all have the power to judicially review the constitutionality of legislation and executive branch actions."[93] Further, Professor Calabresi pointed out that "[t]he U.S. Supreme Court has the last word on the eighty or so questions of judicial review that it chooses to hear every year, but the lower federal courts and state courts have the last word de facto on the hundreds of cases they finally hear and decide as well. U.S. judicial review is thus diffuse because all courts in the U.S. legal system, federal and state, have the power of judicial review."[94] But this wasn't—and still isn't—always the manner or method in which constitutional cases move through the federal court system. In fact, many canonical constitutional cases, including *West Virginia Board of Education v. Barnette*,[95] *Brown v. Board of Education*,[96] *Baker v. Carr*,[97] *United States v. Mississippi*,[98] *Louisiana v. United States*,[99] *Flast v. Cohen*,[100] *Roe v. Wade*,[101]

93. STEVEN GOW CALABRESI, THE HISTORY AND GROWTH OF JUDICIAL REVIEW: THE G-20 COMMON LAW COUNTRIES AND ISRAEL 25 (2021).

94. *Id.*; *see also* Henry Paul Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1375–76 (1973) [hereinafter Monaghan, *Constitutional Adjudication*] ("[A] crucial feature of the American system of judicial review [is] its decentralized character. Every court, high or low, state or federal, passes on the constitutional questions in cases properly before it. . . . The decentralized character of our system of judicial review stands in marked contrast to many other systems in which a single or limited number of tribunals pass on constitutional questions, and then only in certain contexts."); Tushnet, *supra* note 13, at 1243 ("[E]very court in the United States, including the lowest trial-level court in a small town, the lower national courts, and state supreme courts, is authorized, and indeed required, to resolve properly raised constitutional questions. In this sense judicial review in the United States is dispersed."); J. A. C. Grant, *Judicial Review in Canada: Procedural Aspects*, 42 CAN. BAR REV. 195, 195 (1964) ("In keeping with the standard pattern of the Americas this means the ordinary courts of law, not a special 'constitutional court' as in some European countries."); Kauper, *Judicial Review of Constitutional Issues*, *supra* note 23, at 585 ("Under the American system . . . there are no special courts established to deal particularly with constitutional issues.").

95. 47 F. Supp. 251 (S.D. W. Va. 1942) (three-judge court), *aff'd*, 319 U.S. 624 (1943).

96. 98 F. Supp. 797 (D. Kan. 1951) (three-judge court), *rev'd sub nom.* Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954).

97. 179 F. Supp. 824 (M.D. Tenn. 1959) (three-judge court), *rev'd per curiam*, 369 U.S. 186 (1962).

98. 229 F. Supp. 925 (S.D. Miss. 1964) (three-judge court), *rev'd*, 380 U.S. 128 (1965).

99. 225 F. Supp. 353 (E.D. La. 1963) (three-judge court), *aff'd sub nom.* Louisiana v. United States, 380 U.S. 145 (1965).

100. 271 F. Supp. 1 (S.D.N.Y. 1967) (three-judge court), *rev'd sub nom.* Flast v. Cohen, 392 U.S. 83 (1968).

101. 314 F. Supp. 1217 (N.D. Tex. 1970) (three-judge court), *aff'd in part*, *rev'd in part per curiam*, 410 U.S. 113 (1973); *see also* CARP & STIDHAM, *supra* note 23, at 47 ("An example of the use of a three-judge district court is provided by the abortion case of *Roe v. Wade*. Jane Roe (a pseudonym), a single, pregnant woman, challenged the constitutionality of the Texas antiabortion statute and sought an injunction to prohibit further enforcement of the law. The case was initially heard by a three-judge court consisting of district judges Sarah T. Hughes and W. N. Taylor and Fifth Circuit Court of Appeals judge Irving L. Goldberg. The three-judge district court held the Texas abortion statute invalid but declined to issue an injunction against its enforcement on the ground that a federal intrusion into the state's affairs was not warranted. Roe then appealed the denial of the injunction directly to the Supreme Court.").

San Antonio Independent School District v. Rodriguez,[102] *Citizens United v. FEC*,[103] and the recently decided *Allen v. Milligan*,[104] moved along with special procedures: they were adjudicated by three-judge district courts and were appealed directly to the Supreme Court.

Congress enacted the provision for three-judge district courts to limit the interference of lower federal courts with state statutes following the Supreme Court's decision in the 1908 landmark case of *Ex parte Young*.[105] Motivating Congress's legislation was the controversial practice of many federal judges to grant preliminary injunctions or temporary restraining orders against allegedly unconstitutional laws on the strength of affidavits alone and without hearing or without giving notice to the relevant state.[106] As Joseph Hutcheson observed at the time, "Except as guided and restrained by general equitable considerations and principles, neither statute nor rule undertook to govern it. No provision was made for expediting the hearing on a motion for injunction where a restraining order had been issued, nor was any period put to the operation of the restraining

102. 377 F. Supp. 280 (W.D. Tex. 1971) (three-judge court), *rev'd per curiam*, 411 U.S. 1 (1973).

103. 530 F. Supp. 2d 274 (D.D.C. 2008) (three-judge court), *aff'd in part*, *rev'd in part per curiam*, 558 U.S. 310 (2010).

104. 582 F. Supp. 3d 924 (N.D. Ala. 2022) (three-judge court), *appeal dismissed sub nom.* Milligan v. Sec'y of State for Ala., No. 22-10278-BB, 2022 WL 2915522 (11th Cir. Mar. 4, 2022), *aff'd sub nom.* Allen v. Milligan, 599 U.S. 1 (2023).

105. 209 U.S. 123 (1908) (holding that federal courts could enjoin state officials from enforcing unconstitutional state laws); *see* Stratton v. St. Louis Sw. Ry. Co., 282 U.S. 10, 14 (1930) ("Congress sought to make interference by interlocutory injunction with the enforcement of state legislation a matter for the adequate hearing and full deliberation which the presence of a court composed of three judges, as provided by the statute, was likely to secure."); Stephen J. Ledet Jr., *Requirement of Substantial Constitutional Question in Federal Three-Judge Court Cases*, 19 LA. L. REV. 813, 823 (1959) ("[The three-judge court statute] was enacted as a compromise measure following the criticism of *Ex parte Young* that it was unseemly for a single district judge to curtail the enforcement of statutes adopted by the state through its solemn legislative body. The purpose of the three-judge device was to avoid ill-considered interference with state statutes by the use of the federal injunctive power."); Lockwood et al., supra note 28, at 445 ("Agitation starting at the time of the decision in *Ex parte Young*, finally culminated, in 1910, in the passage of this statute, of which the fundamental feature was the jurisdictional requirement that three judges, one of whom must be a circuit judge or Justice of the Supreme Court, shall sit in certain of these [constitutional] cases."); Marks & Schoem, *supra* note 23, at 420–21 ("Congress . . . settled upon a compromise agreement popularly known as the three-judge court act, which forbids federal district court judges from issuing interlocutory injunctions against allegedly unconstitutional state statutes, except by a district court consisting of three judges."); Solimine, *Specialized Federal Constitutional Courts*, *supra* note 25, at 124 ("The 1910 law was a reaction to the then-controversial Court decision in 1908 in *Ex parte Young*, in which the *Lochner* Era Court struck down state Progressive Era legislation regulating railroad rates."); Gregg Costa, *An Old Solution to the Nationwide Injunction Problem*, HARV. L. REV. BLOG (Jan. 25, 2018), https://harvardlawreview.org/blog/2018/01/an-old-solution-to-the-nationwide-injunction-problem [https://perma.cc/QN5A-QLU2] ("Motivated by federalism concerns about *Ex parte Young*, these [three-judge district] courts were created in 1910 for suits seeking to enjoin state laws on federal constitutional grounds."); Douglas & Solimine, *Precedent and Three-Judge District Courts*, *supra* note 28, at 419; Morley, *Vertical Stare Decisis*, *supra* note 23, at 727–29; *see generally* David L. Shapiro, Ex Parte Young *and the Uses of History*, 67 N.Y.U. ANN. SURV. AM. L. 69, 70 (2011) (situating the decision in *Ex parte Young* as part of the *Lochner* era).

106. *See* S. REP. NO. 94-204, at 2 (1975); Diana Greene & Daniel Millstone, *Three-Judge Courts: 1976 Amendments*, 10 CLEARINGHOUSE REV. 782, 782 (1977); Marks & Schoem, *supra* note 23, at 420; Comment, *The Three-Judge Federal Court in Constitutional Litigation: A Procedural Anachronism*, 27 U. CHI. L. REV. 555, 558 (1960) [hereinafter *Procedural Anachronism*].

order, except the decision of the court on the motion. Neither was any provision made for expediting the cases to a final hearing where an interlocutory order had been granted."[107] Later congressional displeasure with federal court injunctions issued against New Deal legislation led to the extension of the three-judge court apparatus to lawsuits seeking to enjoin federal statutes.[108] Michael Morley explains that "[t]hree-judge district courts reached their pinnacle as a belated response to the U.S. Supreme Court's resistance to New Deal Era innovations. Concerned that the federal judiciary was too readily striking down President Roosevelt's initiatives, Congress extended the Mann-Elkins Act yet again in the Judicial Reform Act of 1937, to suits in which the plaintiffs sought preliminary or permanent injunctions against federal statutes on constitutional grounds."[109]

There was a clear understanding that constitutional challenges raise distinctive legitimacy problems and call for different procedures. Senator Joseph O'Mahoney, for example, opined that requiring three judges "would prevent the declaring of laws of Congress unconstitutional except in clear cases."[110] In a

107. Hutcheson, Jr., *supra* note 28, at 795, 800–01; *see also id.* at 803 ("[F]ederal judges were thought to be granting, without sufficient reason, temporary restraining orders on affidavits, and indefinitely and unduly continuing them, instead of exercising their jurisdiction cautiously and with circumspection, as some of the circuit judges declared to be the rule."); *id.* at 804–05 ("The third mischief was the indignity and injustice which it was felt was being done to the states in having their solemn legislative acts, and the efforts of state officers to enforce them, impeded, perhaps frustrated, by the interlocutory fiat of a single judge, issued on affidavits sometimes *ex parte*, sometimes after an informal hearing, and practically without limitation or safeguard except the discretion of the issuing judge. This was the mischief that lay at the root of all the others, dictating the form of the statute, and giving power and reach to the arms of those who contended for its enactment.").

108. *See* S. REP. No. 94-204, at 2–3; Costa, *supra* note 105; Marks & Schoem, *supra* note 23, at 422 ("In 1937, in the wake of numerous federal injunctions suspending many of President Roosevelt's more popular acts, Congress adopted additional legislation which required a three-judge court in all actions for injunctions where the constitutionality of an act of Congress was challenged."); Morley, *Vertical Stare Decisis*, *supra* note 23, at 735 ("President Franklin D. Roosevelt had requested these measures, claiming that conflicting lower court opinions concerning the constitutionality of federal laws were bringing 'the entire administration of justice dangerously near to disrepute.'"); *Procedural Anachronism*, *supra* note 106, at 561 (observing that the three-judge procedure was extended to lawsuits attacking federal laws following "the struggle during the depression between the New Deal Congress and the more conservative judiciary"); Solimine, *Specialized Federal Constitutional Courts*, *supra* note 25, at 123–25 (discussing the history of the statutory requirement for three-judge courts in constitutional challenges to state and federal statutes); Douglas & Solimine, *Precedent and Three-Judge District Courts*, *supra* note 28, at 419–23; *see also* ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS 115 (1941) ("[From 1935–1936], 'hell broke loose' in the lower courts. Sixteen hundred injunctions restraining officers of the Federal Government from carrying out acts of Congress were granted by federal judges. At this time a single district judge could grant an injunction nullifying a federal law passed by a House of Representatives and a Senate, and approved by the President. That was stopped after the court fight in 1937 by requiring a three-judge court to pass upon applications for such injunctions."); *id.* at 118 ("Lawyers bent on destruction of acts of Congress were quick to find out representative judges and to use sharp legal devices to test constitutionality, usually obstructing enforcement while doing so.").

109. Morley, *Vertical Stare Decisis*, *supra* note 23, at 734.

110. Currie, The *Three-Judge District Court*, *supra* note 23, at 11 (quoting 81 CONG. REC. 7045 (1937)); *see also* Comment, *Revision of Procedure in Constitutional Litigation: The Act of 1937*, 38 COLUM. L. REV. 153, 166 (1938) [hereinafter *Revision of Procedure*] ("Where the case requires a three-judge court, the judge to whom the application for the injunction is made must immediately request the senior circuit judge of the district to designate two other judges. One of the concomitants of this procedure is the reduction in

similar vein, David Currie has pointed out that "[t]hree judges lend the dignity required to make [a declaration of unconstitutionality] palatable. The very cumbersomeness and extraordinary nature of the procedure show that the federal courts recognize that important and delicate interests are at stake. More importantly, the presence of three judges also ensures greater deliberation with less chance of error or bias."[111] Professor Currie further explains that "[u]ltimate correction of a judge's initial error is not satisfactory; an erroneous suspension of enforcement for even a few months or weeks may be most damaging. While it is possible that two judges out of a panel of three may be mistaken or even prejudiced, it is more possible that a single judge may be; and if the mistake is an honest one, even one clear-eyed judge among three may be able to forestall a bad decision."[112]

Congress also linked three-judge courts to a special appellate review procedure when it adopted a provision for direct appeal of their decisions to the Supreme Court in order to allow an expediated, mandatory review of constitutional matters.[113] As we have already seen, under normal circumstances, once a judgment is reached in a lawsuit in the district court, the losing party has the right to appeal the case to the appropriate federal circuit court with review by a three-judge panel, and only then can apply for discretionary certiorari review in the Supreme Court.[114] The special procedure departed from this usual pattern and sped up appeals to the Supreme Court by leapfrogging the courts of appeals.[115] As Professor Solimine emphasized, "[T]he Court ostensibly had to hear the appeal, as it was different from the discretionary certiorari jurisdiction which covered almost all of the Court's other cases."[116] The intention behind the

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importance of the personal element as a criterion in the complainant's selection of the judge to receive his application. The result is further secured by refusing the receiving judge, who automatically becomes a member of the court, the privilege of designating the other two."); Ledet, Jr., *supra* note 105, at 827.

111. Currie, *The Three-Judge District Court*, *supra* note 23, at 7–8.

112. *Id.*; *see also id.* at 12 ("The three-judge procedure is a rather effective means of ameliorating the inevitable frictions and reducing the opportunities for abuse."); Ledet, Jr., *supra* note 105, at 815 ("[T]he three-judge court device was adopted in the belief that the more careful consideration afforded each case when it was considered by three judges would minimize the possibility of arbitrary abuse of the injunctive relief power.").

113. *See* Marks & Schoem, *supra* note 23, at 421 ("By allowing immediate Supreme Court review of three-judge court decisions the states were guaranteed speedy justice."); Morley, *Vertical Stare Decisis*, *supra* note 23, at 734 ("A separate provision of the Judicial Reform Act [of 1937] also authorized any party to appeal as of right directly to the U.S. Supreme Court whenever any federal court—including a single judge district court—held a federal statute unconstitutional, regardless of whether the court had been asked to issue an injunction."); *see also* Frankfurter & Landis, *supra* note 86, at 2 ("Direct review by the Supreme Court was abolished as to decisions of the district courts, except as to five strictly confined categories of litigation.").

114. *See* Solimine, *Specialized Federal Constitutional Courts*, *supra* note 25, at 117; Douglas & Solimine, *Precedent and Three-Judge District Courts*, *supra* note 28, at 416.

115. *See, e.g.*, Donovan v. Richland Cnty. Ass'n for Retarded Citizens, 454 U.S. 389 (1982) (dismissing the Secretary's appeal because appeal was erroneously taken to court of appeals when Supreme Court had exclusive jurisdiction to review judgment entered by district court holding an Act of Congress unconstitutional); *id.* at 389 ("[The] right to pursue a direct appeal to this Court also served to deprive the Court of Appeals of jurisdiction.").

116. Solimine, *Specialized Federal Constitutional Courts*, *supra* note 25, at 124; *see also* Michael E. Solimine & James L. Walker, *The Strange Career of the Three-Judge District Court: Federalism and Civil*

direct appeal procedure was to shorten the period of uncertainty by a prompt final determination of the validity of federal and state laws.[117] As an early comment published in the *Columbia Law Review* pointed out, "The device of direct appeal from the trial court to the Supreme Court seems especially suitable to constitutional litigation, often instituted for the primary purpose of obtaining a decision by the Supreme Court. The advantages derived from diminution of the period of public uncertainty by precipitating final adjudication appear desirable, albeit at the price of augmenting the Court's burdens."[118] Notably, the Solicitor General of the day, James M. Beck, wrote to President Calvin Coolidge, in relation to the discretionary certiorari jurisdiction, that he had always believed it to be a citizen's right to have any constitutional issue ultimately decided by the Supreme Court "as the final conscience of the Nation in such matters."[119]

Equally significant is the fact that the Justices themselves have often understood the need for swift resolution of constitutional matters and that such cases should not follow the usual channels of appellate review. In other words, there was a consensus, at least in the first half of the twentieth century, between Congress, the Supreme Court, and the President,[120] that constitutional matters call for different procedures. Chief Justice Taft, who had orchestrated the campaign to expand the Supreme Court's discretion over its appellate docket, urged Congress to do so except in cases involving interpretation of the federal Constitution: "[T]he only jurisdiction that [the Supreme Court] should be obliged to exercise, and which a litigant may, as a matter of course, bring to the court, should be questions of constitutional construction. By giving an opportunity to litigants in all other cases to apply for a writ of certiorari to bring

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Rights, 1954–76, 72 CASE W. RSRV. L. REV. 909 (2022) (suggesting that there was a relatively high rate of appeals to the Supreme Court from three-judge court decisions).

117. *See* Stratton v. St. Louis Sw. Ry. Co., 282 U.S. 10, 14 (1930) ("The gravity of this class of cases was recognized and it was sought to minimize the delay incident to a review upon appeal from an order granting or denying an interlocutory injunction."); S. REP. NO. 94-204, at 2 (1975); Note, *Federal Intervention in Private Actions Involving the Public Interest*, 65 HARV. L. REV. 319, 323–24 (1951); Lockwood et al., *supra* note 28, at 445 ("[T]he act serves to shorten the period of necessary injury to either state or complainant pending the culmination of the litigation, by providing for direct appeal to the Supreme Court from an interlocutory or final order, with precedence on the appellate docket."); Currie, *The Three-Judge District Court*, *supra* note 23, at 76 ("[T]he purpose of the special appeal is to limit the duration of an erroneous suspension of legislation on constitutional grounds."); *cf.* Pa. Coal Co. v. Mahon, 260 U.S. 393, 414 (1922) ("[T]he case has been treated as one in which the general validity of the act should be discussed. . . . It seems, therefore, to be our duty to go farther in the statement of our opinion, in order that it may be known at once, and that further suits should not be brought in vain.").

118. *Revision of Procedure*, *supra* note 110, at 169–70.

119. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 127 (2d ed. 1986) (quoting Memo from Acting Att'y Gen. Beck to the President, Feb. 12, 1925, File No. 72868-2, Justice and Executive Branch, Archives of the United States).

120. *See* Stephen I. Vladeck, *F.D.R's Court-Packing Plan Had Two Parts. We Need to Bring Back the Second*, N.Y. TIMES (Jan. 7, 2022), https://www.nytimes.com/2022/01/07/opinion/supreme-court-vaccine-mandate.html [https://perma.cc/4X4V-R4QR] [hereinafter Vladeck, *F.D.R's Court-Packing Plan*] (observing that Franklin Delano Roosevelt's court-packing plan included also a proposal for special three-judge district court panels to hear cases seeking to throw out state or federal rules).

any case from a lower court to the Supreme Court, so that it may exercise absolute and arbitrary discretion with respect to all business but constitutional business, will enable the court so to restrict its docket that it can do all its work, and do it well."[121] Similarly, future-Justice Robert H. Jackson wrote, "Since constitutional litigation is an essential part of our technique of government, even when confined to its appropriate exercise, both government and private interests have a right to expect from the Justices and lawyers development of a more expeditious, orderly, and centralized procedure."[122] He noted that "[d]istrict courts and circuit courts of appeal are creatures of Congress with no powers except those Congress extends. It is not necessary to scatter the sovereign power of judicial review of constitutionality of legislation among them. Such power should be promptly exercised by a court of finality as well as one of a high sense of responsibility and a national outlook in those cases where the power is properly invoked, and self-restraint should lead to prompt and final declination to interfere with the legislative process in those cases where the lawsuit is inappropriate to overrule statecraft."[123]

The *Nixon Tapes* case affords an illuminating instance, as it wasn't a case that came to the Supreme Court from a three-judge district court and a direct appeal.[124] President Nixon withheld sixty-four tape recordings that were subpoenaed by the Special Prosecutor for use in the criminal trial of six of Nixon's former aides.[125] The district court judge ordered Nixon to produce the tapes, and Nixon's attorneys appealed this decision to the circuit court of appeals.[126] Nevertheless, the Supreme Court heard oral arguments on July 8, 1974, before the court of appeals, and as the House Judiciary Committee's impeachment hearings were about to begin.[127] That proximity was not coincidental. It was the direct result of the Court's decision to grant certiorari, before judgment of the court of appeals, to review the district court's decision and expedite consideration of this important constitutional matter.[128] As Robert Burt has explained, "The Court was not required to hear the case on July 8. On May 24 President Nixon had filed an appeal from the district court's subpoena in the Court of Appeals for the District of Columbia Circuit; on that same day, the special prosecutor filed a certiorari petition requesting immediate review in

121. William H. Taft, *The Attacks on the Courts and Legal Procedure*, 5 KY. L.J. 3, 18 (1916); *see also* VLADECK, *supra* note 49, at 42–43(discussing Taft's efforts to reduce the Supreme Court's caseload); Robert Post, *The Incomparable Chief Justiceship of William Howard Taft*, 2020 MICH. ST. L. REV. 1, 71 (2020); Hartnett, *supra* note 70, at 1660–61.

122. JACKSON, *supra* note 108, at 309–10.

123. *Id.*

124. United States v. Nixon, 418 U.S. 683, 686–87 (1974); *see* WOODWARD & ARMSTRONG, *supra* note 34, at 349 ("Five votes, rather the normal four, were required to hear the case on an expedited basis.").

125. *See* WOODWARD & ARMSTRONG, *supra* note 34, at 348.

126. Lindgren & Marshall, *supra* note 31, at 261–62.

127. ROBERT A. BURT, THE CONSTITUTION IN CONFLICT 318–19 (1992).

128. *See* WOODWARD & ARMSTRONG, *supra* note 34, at 349 ("It was a cert petition asking for an expedited hearing. Jaworski was taking the extraordinary step of asking the Supreme Court to hear the tapes case before the Court of Appeals decision.").

the Supreme Court. On May 31 the Court granted the prosecutor's petition, thus bypassing the ordinary appellate process."[129] Professor Burt observed that "the Court also ordered an expedited briefing schedule, overriding its ordinarily applicable procedure which itself would have delayed argument until fall. As if the need for quick adjudication were self-evident, the Court never explained why it adopted these extraordinary procedural measures."[130]

"By 1971," Professor Vladeck points out, "the idea that the Supreme Court should have the power to pick and choose which cases it heard, and which issues it decided within those cases, had become an article of faith."[131] At about the same time, the Justices began launching their complaints about the administrative difficulties of convening three-judge panels and the increased docket pressure on the Supreme Court's caseload as a result of the direct appeal procedure.[132] In 1976, they finally convinced Congress to restrict the availability of these procedural apparatuses in all but a few areas.[133] Three-judge courts are still used today,[134] for example, to adjudicate constitutional challenges to the

129. BURT, *supra* note 127, at 319.

130. *Id.*; *see also id.* ("Indeed, under ordinary procedural rules, Nixon could not have obtained appellate review of the subpoena until after the trial had been concluded; at the outset of its opinion, however, the Court waived this customary prohibition against interlocutory (or 'piecemeal') appeals in criminal trials on the ground that the President deserved special respect from the courts and should not be subjected to the burdens imposed on ordinary litigants of deciding whether to comply with a subpoena without definitive appellate adjudication.").

131. VLADECK, *supra* note 49, at 54.

132. *See* Greene & Millstone, *supra* note 106, at 783 ("The federal judiciary sought to limit the instances in which a three-judge court need be convened for the obvious reason that such cases consumed a disproportionate amount of court time. This situation was aggravated by the constantly increasing number of cases requiring three-judge courts, of which civil rights cases formed no small part."); Solimine, *Specialized Federal Constitutional Courts*, *supra* note 25, at 126 ("One criticism was the administrative burdens placed on the lower courts. Most cases then and now are litigated in the first instance before a single district judge. Assembling three federal judges to sit as a trial court was an awkward fit on several grounds. . . . Another criticism concerned the caseload of the Supreme Court. Normally the Court manages its discretionary docket through the writ of certiorari, but direct appeals bypassed this process and ostensibly required the Court to decide all such appeals on the merits."); *id.* at 126–27 ("By that time, prominent academic observers, think tanks, and specially appointed committees were calling for the abolition of the three-judge district court, at least as it pertained to constitutional attacks on federal statutes. This criticism was joined by prominent federal judges, not least of whom was Chief Justice Warren Burger."); *see also* Currie, *The Three-Judge District Court*, *supra* note 23, at 78 ("The existing three-judge statutes are in a mess. No one really knows when three judges are required."); *cf. Ex parte* Collins, 277 U.S. 565, 569 (1928) ("Congress realized that in requiring the presence of three judges, . . . it was imposing a severe burden upon the federal courts.").

133. Act of Aug. 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119; S. REP. NO. 94-204, at 4–9 (1975) (discussing the burden of three-judge courts and direct appeals to the Supreme Court); *see* CARP & STIDHAM, *supra* note 23, at 47 ("[I]n 1976 Congress virtually eliminated three-judge district courts except in cases concerning reapportionment of state legislatures and congressional redistricting, and in some cases under the Civil Rights Acts. The number of cases heard by three-judge district courts declined from 208 in 1976 to 9 in 1990."); 17A WRIGHT & MILLER, *supra* note 28, § 4234 ("[I]n 1976 Congress heeded the pleas from the Court, the Judicial Conference of the United States, and others, and virtually abolished the use of three-judge courts."); Morley, *Vertical Stare Decisis*, *supra* note 23, at 744 ("[In] 1976, [Congress] transferred default responsibility for virtually all constitutional litigation—including challenges to the validity of federal and state statutes—back to single-judge district courts.").

134. SHAPIRO ET AL., *supra* note 48, at ch. 2, § 2.10.(A). ("Congress from time to time passes legislation to deal with a specific substantive problem and provides a specific judicial review mechanism for challenging the

reapportionment of statewide and congressional legislative districts, in some voting rights and political campaign-finance cases, and in lawsuits brought by members of Congress to attack the constitutionality of actions related to governmental budget deficits.[135] Ultimately, in 1988, Congress also repealed the general provision that authorized direct appeals to the Supreme Court whenever a district court held a state or federal law unconstitutional.[136] As Professor Morley has concluded, "The Improvement Act completed the process of granting original jurisdiction over nearly all constitutional cases to single-judge district courts, and appellate jurisdiction to review their rulings to regional courts of appeals, subject to a few narrow exceptions in 28 U.S.C. § 2284 and a handful of other discrete statutes."[137] That said, the authors of the *Supreme Court Practice* handbook had rightfully observed that while some of the general provisions calling for three-judge district courts and direct appeals have been repealed, "an important portion of the prior statutory structure has not been repealed."[138]

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constitutionality of such laws. Such statutes may or may not call for the convening of a three-judge district court to hear the constitutional challenge in the first instance. But all such statutes provide for a direct appeal of the district court decision to the Supreme Court, usually mandating that the Court process the appeal as expeditiously as possible.").

135. *See, e.g.*, 28 U.S.C. § 2284(a) ("A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body."); 52 U.S.C. § 10701 (requiring a three-judge court and authorizing direct appeal in lawsuits brought by the Attorney General, in the name of the United States, to enforce the Twenty-Sixth Amendment); Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 403(a), 116 Stat. 81, 113 (2002) (codified at 52 U.S.C. § 30110) ("Special Rules for Actions Brought on Constitutional Grounds") (specifying that any constitutional challenge must be filed in the United States District Court for the District of Columbia and adjudicated by a three-judge panel with direct appeal to the Supreme Court); Balanced Budget and Emergency Deficit Control Act, Pub. L. No. 99-177, 99 Stat. 1098 (1985) (codified as amended at 2 U.S.C. § 922) (requiring a three-judge court in the District Court for the District of Columbia, with a direct appeal to the Supreme Court, and in an expedited litigation process); 26 U.S.C. § 9011(b)(2) (providing for a three-judge court in suits brought to implement the Presidential Election Campaign Fund Act of 1971); *see also* Morley, *Vertical Stare Decisis*, *supra* note 23, at 701–02, 752–56; *see generally* Solimine, *Specialized Federal Constitutional Courts*, *supra* note 25, at 128–32 (providing an overview of statutes with specialized constitutional review provisions); Douglas & Solimine, *Precedent and Three-Judge District Courts*, *supra* note 28, *passim* (observing that today the three-judge court and direct appeals procedures take a small part of the federal judiciary's overall docket but are significant in the context of highly charged election law litigation).

136. Supreme Court Case Selection Improvement Act of 1988, Pub. L. No. 100-352, § 1, 102 Stat. 662 (1988); *see* S. REP. NO. 100-300 (1988); Epps & Ortman, *supra* note 69, at 706 ("As late as 1988, the Supreme Court was obliged to hear any case in which a federal court invalidated a state or federal statute on constitutional grounds."); Morley, *Congressional Intent*, *supra* note 28 ("The Improvement Act repealed § 1252 in order to reduce the Supreme Court's caseload, making the Court's jurisdiction over such constitutional cases almost entirely discretionary.").

137. Morley, *Vertical Stare Decisis*, *supra* note 23, at 745; *see also* SHAPIRO ET AL., *supra* note 48, at ch. 2, § 2.7 ("Direct appeals from federal district courts to the Supreme Court are now limited to a few special types of cases.").

138. SHAPIRO ET AL., *supra* note 48, at ch. 2, § 2.7; *see also id.* at ch. 2, § 2.9 ("Although substantially reduced in number, three-judge courts have not been totally eliminated from the federal court structure."); 28 U.S.C. § 1253 (direct appeals from decisions of three-judge district courts).

It is also worth mentioning that when these statutory changes were debated, some senators expressed concern about eliminating immediate, mandatory Supreme Court review of district court decisions holding laws unconstitutional.[139] To address those concerns, the House Judiciary Committee's report accompanying the Improvement Act emphasized that the removal of the right of automatic direct appeal in all constitutional challenges to laws "should not create an obstacle to the expeditious review of cases of great importance" because certiorari before final judgment in the court of appeals remains available.[140] In other words, the idea was that certiorari before judgment would be a proper alternative to the direct appeal procedure—allowing the Court to respond swiftly and appropriately to questions central to our system of government. The House Committee recognized that "[p]rompt correction or confirmation of lower court decisions invalidating acts of Congress is generally desirable for reasons of separation of powers, avoiding unwarranted interference with the government's administration of the law and protection of the public interest."[141] The report concluded that the House Committee "contemplates that the Court will give appropriate weight to the elimination of direct review" when deciding whether to grant certiorari before final judgment in cases where a lower court has invalidated a federal law.[142]

Of course, certiorari before judgment is an extraordinary procedural device, which directly transfers a case to the Supreme Court without allowing the court of appeals to consider its merits. But in recent years we've witnessed the Supreme Court's increased willingness to bypass the ordinary appellate process and grant certiorari before judgment in the courts of appeals in constitutional cases.[143] Professor Vladeck pointed out that the Court went from no grants of expedited merits review in fifteen years to seventeen grants between February 2019 and the end of the October 2021 Term.[144] The practice has

139. *See* Morley, *Congressional Intent*, *supra* note 28.

140. H.R. REP. NO. 100-660, at 11 & 11 n.24 (1988); *see* 28 U.S.C. § 1254(1) (allowing the Supreme Court to grant certiorari to review cases pending in the courts of appeals "before or after the rendition of judgment").

141. H.R. REP. NO. 100-660, at 11 n.24 (citing Heckler v. Edwards, 465 U.S. 870, 881–84 (1984)); *see also id.* ("Removal of the direct review mechanism of 28 U.S.C. § 1252 increases the importance of the authorization of 28 U.S.C. § 1254(1) for certiorari before final judgment in the court of appeals as a means of securing an expeditious and definitive resolution of questions of statutory unconstitutionality by the Supreme Court.").

142. *Id.*; *see also* Morley, *Congressional Intent*, *supra* note 28 ("[T]he Court's willingness to grant certiorari before judgment to the government when district courts hold federal legal provisions unconstitutional is consistent with Congress' intent when it enacted the Supreme Court Case Selection Improvement Act of 1988.").

143. SUP. CT. R. 11.

144. VLADECK, *supra* note 49, at 124; *see also* Steve Vladeck, *The Rise of Certiorari Before Judgment*, SCOTUSBLOG (Jan. 25, 2022, 5:44 PM), https://www.scotusblog.com/2022/01/the-rise-of-certiorari-before-judgment [https://perma.cc/CJE7-8ENP] ("Cert before judgment is on the rise, and it's not at all clear why."); Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 134, 152 (2019) (noting that the Solicitor General under the Trump administration has sought certiorari before judgment nine times in less than three years, far more than previous administrations, contributing to the rapid growth of the Court's "shadow docket"); Editorial, *The 'Shadow Docket' Diversion*, WALL. ST. J. (Oct. 1, 2021, 7:43 PM ET), https://www.wsj.com/articles/the-shadow-docket-diversion-supreme-court-samuel-alito-11633123922

become so visible that the headline of a recent article in the *New York Times* read: "The Supreme Court Is Turning Into a Court of First Resort."[145] Take, for example, the litigation about the Texas law that outlawed abortion after six weeks of pregnancy and authorized anyone to sue abortion providers for damages.[146] The Court agreed to quickly consider a pair of constitutional challenges to the Texas law even though lower courts had not issued their final rulings.[147] Notably, the speed of intervention in the constitutional litigation turned out to be a contentious issue in the Court. Justice Sonya Sotomayor charged the Court with "delay" in resolving the case,[148] and Chief Justice John Roberts wrote that, "Given the ongoing chilling effect of the state law, the District Court should resolve this litigation and enter appropriate relief without delay."[149] On the other hand, writing for the Court, Justice Neil Gorsuch stated that "this case has received extraordinary solicitude at every turn. This Court resolved the petitioners' first emergency application in approximately two days. The Court then agreed to decide in the first instance the merits of an appeal pending in the Court of Appeals. The Court ordered briefing, heard argument, and issued an opinion on the merits—accompanied by three separate writings—all in fewer than 50 days."[150]

[https://perma.cc/YDT3-YY58] ("The increasing trend of unilateral governance by the executive, rather than legislatures, has also kicked cases to the Court on shorter timelines.").

145. Jamelle Bouie, *The Supreme Court is Turning Into a Court of First Resort*, N.Y. TIMES (Dec. 7, 2022), https://www.nytimes.com/2022/12/07/opinion/supreme-court-student-loan-forgiveness.html [https://perma.cc/FE8W-2KJJ].

146. *See generally* Rebecca Aviel & Wiley Kersh, *The Weaponization of Attorney's Fees in an Age of Constitutional Warfare*, 132 YALE L.J. 2048 (2023) (discussing the unusual attorney's fee-shifting scheme woven into the Texas abortion law).

147. Whole Woman's Health v. Jackson, 595 U.S. 30, 30 (2021) ("The Court granted certiorari before judgement . . . to determine whether petitioners may pursue a pre-enforcement challenge to Texas Senate Bill 8—the Texas Heartbeat Act—a Texas statute enacted in 2021 . . . ."); United States v. Texas, 595 U.S. 74, 75 (2021) (dismissed after oral argument as improvidently granted); *see* Brent Kendall, *Supreme Court Agrees to Quick Consideration of Texas Abortion Case*, WALL ST. J. (Oct. 22, 2021, 5:38 PM ET), https://www.wsj.com/articles/supreme-court-agrees-to-quick-consideration-of-texas-abortion-case-leaves-state-law-in-place-for-now-11634921299 [https://perma.cc/X4KN-657V] ("With Friday's action, the justices stepped into the Texas battle even though lower courts haven't issued final rulings on the law. . . . Under the Supreme Court's normal timelines, rulings would be expected by the end of next June, though the decisions could come earlier since the justices are treating the cases in expedited fashion."); Mary Ziegler, *Supreme Speed: The Courts Put Abortion on the Rocket Docket,* SCOTUSBLOG (Oct. 25, 2021, 12:39 PM), https://www.scotusblog.com/2021/10/supreme-speed-the-court-puts-abortion-on-the-rocket-docket [https://perma.cc/YW28-KRUU] ("[R]ather than sitting on its hands, the court set a breakneck pace. It ordered an accelerated briefing schedule and set a date for oral arguments in both cases just 10 days from when the court agreed to hear them—a near record reminiscent only of the court's speed in resolving the 2000 presidential election in *Bush v. Gore*.").

148. *Whole Woman's Health*, 595 U.S. at 72 (Sotomayor, J., dissenting) ("The Court's delay in allowing this case to proceed has had catastrophic consequences for women seeking to exercise their constitutional right to an abortion in Texas.").

149. *Id.* at 60 (Roberts, C.J., concurring in the judgment in part and dissenting in part).

150. *Id.* at 51 n.6.

IV. THE HALLMARKS OF THE CONSTITUTIONAL PROCESS

Each of the rules and practices discussed in the previous section can be seen as a small deviation from the general scheme of the Federal Rules System. But to pick up Oliver Wendell Holmes's admonition, we must look for the "general" in the "particular."[151] Viewed together, those idiosyncratic procedures reflect an aspect of the unique operational mode of judicial review, which several commentators have marked off as the "special environment" or the "stress points" of the process of constitutional litigation.[152] In other words, some scholars have identified several areas where the differences between constitutional litigation and other forms of litigation may indeed require particular sensitivity. For example, Fritz Scharpf has pointed out that "[e]ven though constitutional questions are decided in ordinary lawsuits, the litigants are in an important sense . . . representatives of the public interest in constitutional government. And the public interest in responsible and realistic constitutional decisions is much too serious to be left unprotected against the accident of ordinary litigation."[153]

Indeed, many features of ordinary litigation seem to fall away when courts adjudicate constitutional cases. For instance, the repeal of a statute infringing upon a basic right poses a particularly problematic case for the legitimacy of judicial action since it may be seen as conflicting with the policies of the democratically elected institutions.[154] When a plaintiff asks a court to invalidate

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151. *See* STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION, at ix (1993).

152. *See, e.g.*, Kenneth F. Ripple & Gary J. Saalman, *Rule 11 in the Constitutional Case*, 63 NOTRE DAME L. REV. 788, 804–07 (1988) (discussing differences between constitutional litigation and civil litigation); *id.* at 805 ("[T]he process of constitutional adjudication thus involves a more uncharted judicial inquiry than is normally necessary in interpreting a statute or elaborating on a principle of common law."); Louis L. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 305 (1961) ("We do not see the public-law function of the courts as simply the rather unfortunate byproduct—or if not unfortunate, at the most the byproduct—of conventional litigation."). A more detailed description of the difference between constitutional litigation and other forms of civil litigation was presented in KENNETH F. RIPPLE, CONSTITUTIONAL LITIGATION §§ 1-1–1-2(c) (1984).

153. Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 528–29 (1966); *see also id.* at 528 ("If litigation is conducted in the form of an adversary contest, in which the initiative rests almost entirely with the parties, and in which the Court is reduced to the role of an impartial umpire, then one must of course also accept the consequence that a litigant who fails to fight hard enough or well enough should lose his case, even though from an objective point of view he ought to have won. But this consequence, which otherwise may be entirely acceptable for Anglo-American jurisprudence, must surely become highly problematic when a constitutional decision is at stake.").

154. *See* WELLINGTON, *supra* note 4, at xi–xii (1991) ("One difficult question that emerges is how we in a democracy can tolerate regulation without representation. I believe that this is a problem for all adjudication . . . [but] special problems are raised by adjudication involving the constitutionality of legislation—or, as it is called, judicial review."); Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 265 (1973) ("Since the power [of judicial review] first was exercised by the Court in Chief Justice Marshall's 1803 opinion in *Marbury v. Madison*, either the legitimacy or the scope of the power has been an overarching problem in constitutional theory."); TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 16 (2003)

a statute on constitutional grounds, the court adjudicates the individual constitutional claim presented in an ordinary procedure—but it does so with the effect of voiding a statute that concerns the whole democratic community.[155] In other words, constitutional cases frequently contain an "aggregate dimension" that has the potential to affect a large number of people.[156] The disputing parties to a constitutional case more often than not represent two political and social problems that collide with each other, and therefore call for an authoritative decision by the highest court.

The counter-majoritarian difficulty is especially acute when a single federal district court judge issues a nationwide injunction,[157] which has become

("Because judicial review is incidental to the basic functions of the courts, the legitimacy of judicial review is always in doubt."); MAURO CAPPELLETTI, THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE, at xiv–xv (Paul J. Kollmer & Joanne M. Olson eds., 1989) ("Constitutional adjudication is, no doubt, an ambiguous institution in any democratic state, for it presents a perplexing encounter, and potentially a conflict, between legislator and judge, between law and adjudication. It is easily understandable, therefore, that the recent major expansion of judicial review in so many countries throughout the Western world—including much of Europe, Canada, and Japan, and with a tentative infiltration since 1982 even in Poland—has caused the 'mighty problem' of democratic legitimacy to become acute, raising serious questions, old and new, to which we are all called to give an answer."); *cf.* Harding et al., *supra* note 1, at 26 ("The extent of the influence exerted by constitutional courts on the political process inevitably raises the vexed question of their legitimacy."). *But see* POWE, JR., *supra* note 64, at ix (arguing that the Supreme Court is a majoritarian institution and that it identifies with and serves ruling political coalitions).

155. *See* Scharpf, *supra* note 153, at 523 ("When the Court is deciding a question of constitutional law . . . its decisions have an importance and an impact which go far beyond a mere determination of the rights and duties of the litigants in the instant case."); Martin H. Redish, *The Passive Virtues, The Counter-Majoritarian Principle and the "Judicial-Political" Model of Constitutional Adjudication*, 22 CONN. L. REV. 647, 656 (1990) ("[I]t would be absurd to doubt that the judicial role, at least in the exercise of the power of judicial review, extends well beyond the vindication of [individual] interests. . . . [T]he counter-majoritarian principle recognizes the important systemic political role the judiciary serves as enforcer of the counter-majoritarian Constitution. Providing a particular individual with a remedy is at best incidental to performance of this function."); *id.* at 656–57 ("[I]t would surely defy reality today to continue the charade of the private rights adjudicatory model in constitutional litigation."); Monaghan, *Constitutional Adjudication*, *supra* note 94, at 1368 ("While one can readily agree that the Court rather than the political branches is uniquely suited for this task, it is by no means evident that it should be a function of ordinary litigation concerning private rights."); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1281 (1976) ("[P]ublic law litigation will often, at least as a practical matter, affect the interests of many people.").

156. *See* Jamal Greene, *The Supreme Court as a Constitutional Court*, 128 HARV. L. REV. 124, 140–41 (2014) ("*Noel Canning* involved what this Comment calls a pure public law dispute, one in which the central interests on both sides of the case are those of public institutions rather than private citizens. The rights of private citizens might well be implicated by such disputes, but those rights are incidental to the central legal claim in the case. The Court's real interest was not in the right of Noel Canning to a properly constituted Board; it was in the right of the President to appoint the Board's members during a disputed recess of the Senate. Both the majority and the concurrence understood, if tacitly, that we should regard as fiction the idea that the case was about the rights of any particular litigant. It was Noel Canning's very commonality with other litigants, past, present, and future, that marked the case . . . ." (discussing NLRB v. Noel Canning, 573 U.S. 513 (2014))).

157. There has been a recent explosion of academic commentary on nationwide injunctions in recent years. *See, e.g.*, VLADECK, *supra* note 49; Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017); Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095 (2017); Getzel Berger, *Nationwide Injunctions Against the Federal Government: A Structural Approach*, 92 N.Y.U. L. REV. 1068 (2017); Howard M. Wasserman, *"Nationwide" Injunctions Are Really "Universal" Injunctions and They Are Never Appropriate*, 22 LEWIS & CLARK L. REV. 335 (2018); Michael T. Morley, *Disaggregating*

increasingly common in recent years in constitutional litigation.[158] Indeed, one of the repeated objections to these injunctions is that it is undemocratic for a single federal judge to pause the enforcement of a federal law—a decision which may be strongly informed by his or her own policy preferences—in a judgment that is binding over the entire country and against nonparties as well.[159] In this way, a single federal judge may effectively remove a highly salient constitutional issue from the political process even though most of the people affected will have no opportunity to be heard in the proceeding. Giving district court judges this power also promotes forum shopping in constitutional challenges and, in some cases, even judge shopping since several divisions have only a single judge assigned to them.[160] As Scott Dodson has pointed out, "[M]eaningful differentiation among judges does exist. Judges, after all, are human, with their own predispositions. And American law is designed to give judges quite a bit of discretion in interpreting and applying the law, even in

Nationwide Injunctions, 71 ALA. L. REV. 1 (2019); Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67 (2019); Russell L. Weaver, *Nationwide Injunctions*, 14 FIU L. REV. 103 (2020); Rendleman, *supra* note 28; Hayden D. Presley, *A Universal Problem: The Universal Injunction*, 81 LA. L. REV. 627 (2021); *cf.* OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION (1978) (conceptualizing the development of the civil rights injunction).

158. *See* Trump v. Hawaii, 585 U.S. 667, 716 (2018) (Thomas, J., concurring) ("[Universal] injunctions are a recent development, emerging for the first time in the 1960s and dramatically increasing in popularity only very recently."); VLADECK, *supra* note 49, at 131 ("[Nationwide injunctions] became far more common toward the end of the Obama administration. And in response to the travel ban and an array of other controversial policies, they proliferated even more during the Trump presidency, starting with a February 3, 2017, ruling blocking the travel ban by Seattle-based judge James Robart, who had been appointed to the district court in 2004 by President George Bush.").

159. *See, e.g.*, Bray, *The Case Against National Injunctions*, *supra* note 54 ("[A]s soon as one federal district judge finds an executive order invalid and enjoins its enforcement across the nation, the injunction binds the defendant everywhere, at least until it is overturned on appeal. Shop 'til the order drops."); William P. Barr, *End Nationwide Injunctions*, WALL ST. J. (Sept. 5, 2019, 6:37 PM ET), https://www.wsj.com/articles/end-nationwide-injunctions-11567723072 [https://perma.cc/42ML-9KLB] ("When a federal court issues an order against enforcement of a government policy, the ruling traditionally applies only to the plaintiff in that case. Over the past several decades, however, some lower court federal judges have increasingly resorted to a procedural device—the 'national injunction'—to prevent the government from enforcing a policy against anyone in the country. Shrewd lawyers have learned to 'shop' for a sympathetic judge willing to issue such an injunction. These days, virtually every significant congressional or presidential initiative is enjoined—often within hours—threatening our democratic system and undermining the rule of law."); Dep't of Homeland Sec. v. New York, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring) (staying a preliminary injunction) ("The real problem here is the increasingly common practice of trial courts ordering relief that transcends the cases before them. Whether framed as injunctions of 'nationwide,' 'universal,' or 'cosmic' scope, these orders share the same basic flaw—they direct how the defendant must act toward persons who are not parties to the case.").

160. *See Trump*, 585 U.S. at 713 (Thomas, J., concurring) ("These injunctions are beginning to take a toll on the federal court system—preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch."); Stephen I. Vladeck, *Don't Let Republicans Game the Courts by Judge Shopping*, N.Y. TIMES, Feb. 8, 2023, at A18; John Fund, *Why Should a Single Federal Judge Be Able to Make Law for the Whole Country?*, NAT'L REV. (July 8, 2018, 6:27 PM), https://www.nationalreview.com/2018/07/federal-district-judges-should-not-make-immigration-law-for-whole-country [https://perma.cc/JB87-VHTF].

making law in the common-law tradition."[161] Professor Dodson has further observed that because federal judges are politically appointed for life, "judges tend to hold, and are understood to hold, partisan political views. Thus, some judges have become known for favoring certain kinds of claims or parties."[162]

Despite the above, there is a strange disconnect between the diagnosis and the cure in the literature about constitutional litigation. Although scholars have observed that judicial review has distinct features, purposes, and modalities, they seem to easily accept the transsubstantive federal procedure as the baseline for constitutional litigation and settle for solutions that are focused on flexible application of the existing rules of civil procedure.[163] Put simply, there has not been any attempt to consider a more holistic and systematic approach to constitutional procedural law, such as promulgating a separate set of federal rules for constitutional litigation. We turn next to fill this gap.

V. ILLUMINATING CONSTITUTIONAL PROCEDURE

Recognizing that constitutional law, and specifically judicial review, has its own procedures, including in some cases three-judge district courts and direct appeals for constitutional matter has several important practical and theoretical consequences for the relationship between judicial review and procedural law. First, the adoption of three-judge district courts to review the constitutionality of legislation challenges the accepted view that judicial review in the United States is inevitably decentralized, diffused, and negative toward specialized constitutional tribunals. The historical evidence on the formation of these constitutional courts shows a much more nuanced interplay between judicial review and ordinary court procedures controlling all other types of cases than is usually presented in the classic literature. And it reveals a normative insight that assessing the validity of statutes for conformity with the federal Constitution is not a routine judicial task but a unique function that necessitates specialized

161. Scott Dodson, *The Culture of Forum Shopping in the United States*, 57 INT'L LAW. 307, 321 (2024) [hereinafter Dodson, *The Culture of Forum Shopping*]; *see also* Chad M. Oldfather, *Judges as Humans: Interdisciplinary Research and the Problems of Institutional Design*, 36 HOFSTRA L. REV. 125, 135 (2007) ("Judges are humans, and a realistic conception of judicial behavior must account for that basic humanity."); David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1995 (1989) ("Judges are human and humans tend to abuse power when they have it."); Chris Guthrie & Tracey E. George, *The Futility of Appeal: Disciplinary Insights into the "Affirmance Effect" on the United States Courts of Appeals*, 32 FLA. ST. U. L. REV. 357, 375 (2005) ("Judges, too, are human beings, and like other human beings, judges surely employ heuristics in their own decisionmaking.").

162. Dodson, *The Culture of Forum Shopping*, *supra* note 161, at 321; *see also* HOFFER ET AL., *supra* note 36, at 3 ("[N]o serious observer believes that the courts are entirely insulated from the currents of political opinion.").

163. *See, e.g.*, Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 345–46 (1989) ("[F]ederal judges can and should apply the [Federal Rules of Civil Procedure] with considerably more solicitude for public interest litigants as the second half-century of the Rules' application opens."); Monaghan, *Constitutional Adjudication*, *supra* note 94, at 1370 ("The analogy to ordinary litigation is largely formal: Constitutional determinations merely occur in the context of the traditional lawsuit familiar to all lawyers.").

mechanisms.[164] Concurrently, the direct appeal procedure, and the more frequent use in recent years of certiorari before judgment, shows that the advantages of percolation were never deemed so strong in the context of reviewing the constitutionality of legislation. Instead, those procedural choices demonstrate a tacit belief that constitutional questions are of such far-reaching importance that it is necessary to have them decided authoritatively rather than accept the hazards of inconsistent decisions by different courts in the country.[165] As Jamal Greene has suggested, "Pure public law disputes over constitutional rules do not require much in the way of judicial factfinding. That is, such disputes tend to be purely legal in addition to being purely public. There is accordingly little to be gained and something to be lost in submitting such controversies to the federal district courts rather than to the Supreme Court directly."[166] Professor Greene explains that if "liberalization in the Court's procedures aims above all to eliminate costly delay and legal uncertainty in resolving a class of constitutional questions, then multifarious pronouncements by different courts around the country ill serves that objective. A statutory workaround would permit immediate (perhaps even interlocutory) appeal to the Supreme Court in denominated cases."[167] Taken together, these special procedures show an underappreciated historical acceptance to concentrate the power of judicial review rather than diffuse it throughout the federal court system, and they cast some doubt on the idea "familiar to citizens of the United States [that] all courts at every level of jurisdiction have the power to decide constitutional issues with *erga omnes* effects."[168] The current decentralized system is only a relatively recent phenomenon and should not be seen as an indispensable element of our federation's judicial system.

Second, if we step back and consider the fluctuations over time in the structure for hearing constitutional challenges to legislation, it is plain that, at least as a descriptive matter, our system has never been fully committed to a

164. *See* Kelsen, *supra* note 23, at 193 ("The interest in the constitutionality of legislation is, however, a public one which does not necessarily coincide with the private interest of the parties concerned. It is a public interest which deserves protection by a special procedure in conformity with its special character. The disadvantages resulting from the lack of such a procedure are widely recognized in American juristic literature. The Act of August 24, 1937 'to provide for intervention by the United States, direct appeals to the Supreme Court of the United States, and regulation of the issuance of injunctions in certain cases involving the constitutionality of Acts of Congress, and for other purposes,' also recognizes the public interest in the judicial review of legislation.").

165. Morley, *Congressional Intent*, *supra* note 28 ("[D]irect Supreme Court review of district courts' rulings on important constitutional issues is also consistent with the structure of constitutional litigation throughout much of the twentieth century."); *see also* BICKEL, *supra* note 119, at 126 ("[I]n no event is constitutional adjudication in the lower federal courts the equivalent of what can be had in the Supreme Court. It lacks, of course, the general authoritativeness.").

166. Greene, *supra* note 156, at 152.

167. *Id.*; *see also* Monaghan, *Constitutional Adjudication*, *supra* note 94, at 1378 ("Congress might reject altogether the decentralized system of judicial review for 'public action' suits. It might, for example, confine such litigation to special constitutional courts with further review to the Supreme Court only by certiorari.").

168. MERRYMAN & PÉREZ-PERDOMO, *supra* note 56, at 138.

single procedural framework. Rather, a significant portion of procedural law in the context of judicial review is in fact dynamic and open to reconsideration. This means that we must not take for granted the current procedural setting. We need to reexamine the existing forms of process to determine whether the rules governing constitutional proceedings meet modern needs. In this respect, the private law orientation that pushes for procedures in which the court subordinates itself as far as possible to the submissions and motions of the parties is certainly outdated. Along similar lines, then future-Justice Robert H. Jackson asked more than eighty years ago: "Can we not establish a procedure for determination of substantial constitutional questions at the suit of real parties in interest which will avoid prematurity or advisory opinions on the one hand and also avoid technical doctrines for postponing inevitable decisions? Should we not at least try to lay inevitable constitutional controversies to early rest?"[169] The recent proliferation of nationwide injunctions by single district court judges presents a perfect opportunity to focus our attention on the administration of constitutional justice.

The prominent use of these injunctions, which has attracted much criticism,[170] underscores the need to go back to the drawing board. One way to overcome the dubious authority and legitimacy of this practice, as well as the concurrent problems of forum shopping and judge shopping, is to reintroduce three-judge district courts and the direct appeals procedure.[171] As Professor Vladeck has suggested, "Returning to this practice would reduce the cherry-picking of outlier judges because it's harder to find three (or two) such judges

169. JACKSON, *supra* note 108, at 306; *see also id.* at 302 ("Constitutional litigation is so important to the preservation of the equilibrium between departments of government, between state and nation, and between effective authority and individual liberty that no effort should be spared to make it modern, systematic, expeditious, and simple.").

170. *See, e.g.*, Trump v. Hawaii, 585 U.S. 667, 712–21 (2018) (Thomas, J., concurring) ("[Universal injunctions] appear to conflict with several traditional rules of equity, as well as with the original understanding of the judicial role."); Transcript of Oral Argument at 73, Trump v. Hawaii, 585 U.S. 667 (2018) (No. 17-965) ("We have this troubling rise of this nationwide injunction, cosmic injunction . . . not limited to relief for the parties at issue or even a class action. . . . And, near as I can tell, that's—that's a really new development where a district court asserts the right to strike down a—a federal statute with regard to anybody anywhere in the world." (Gorsuch, J.)); Dep't of Homeland Sec. v. New York, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring) (staying a preliminary injunction) ("The real problem here is the increasingly common practice of trial courts ordering relief that transcends the cases before them. Whether framed as injunctions of 'nationwide,' 'universal,' or 'cosmic' scope, these orders share the same basic flaw—they direct how the defendant must act toward persons who are not parties to the case."); Barr, *supra* note 159 ("Nationwide injunctions are a modern invention with no basis in the Constitution or common law.").

171. *See* Rendleman, *supra* note 28, at 961; Barnas, *supra* note 56, at 1711 ("There would be greater public confidence in universal injunctions granted by a three-judge panel rather than a single outlier judge, an original motivation for such panels in 1910 and 1937."); Costa, *supra* note 105 ("There is a solution that would allow for uniform and speedier resolution of these [constitutional] challenges while reducing the advantage of forum shopping. It's an idea that comes from the past: three-judge district courts followed by direct review to the Supreme Court."); Solimine, *Specialized Federal Constitutional Courts*, *supra* note 25, at 128–34 (discussing the revival of the three-judge courts requirement in recent decades); *id.* at 131 ("[I]n recent years bills have been introduced in Congress which, in a variety of circumstances, establish special review mechanisms for anticipated constitutional challenges to the law, if enacted.").

than one. And with three-judge panels, we could also expect more consistent decision making and a more efficient path to full merits review by the Supreme Court."[172] Furthermore, a nationwide injunction issued by a three-judge district court, which must include at least one circuit court judge, might have greater legitimacy than one issued by a single judge due to the inclusion of a diversity of perspectives.[173] At the same time, bypassing the court of appeals would accelerate the final resolution of the law's constitutionality to promote the necessary certainty and uniformity throughout the country.[174] There is an obvious trade-off here between authoritative and expeditious resolution of constitutional matters and the advantages of multiple judicial inputs and the percolation of issues through the lower courts.[175] The question as to which values are more important is not easy to answer, but it is clear that several different ways of promoting public trust in the outcomes of judicial review are possible through a wider range of institutional procedures and that the trade-offs created in the area of constitutional litigation warrant special consideration.[176]

Finally, the discussion so far suggests that there are good reasons for treating procedural issues, or, in H. L. A. Hart's words, "rules of adjudication,"[177] in constitutional law cases separately from both substantive constitutional law and general civil procedure. The cultural expectations and specific needs of constitutional litigation differ, sometimes considerably, from those of the ordinary cases governed by the "Federal Rules System."[178] That

172. Vladeck, *F.D.R's Court-Packing Plan*, *supra* note 120; *see also* Barry Sullivan, *Tribute to Doug Rendleman: Teacher, Scholar, Reformer of the Law*, 78 WASH. & LEE L. Rev. 53, 61 (2021) ("If we have to depart from 'ordinary' litigation procedure for constitutional matters, a revived three-judge court overcomes forum shopping and provides expedited access to the Supreme Court. Federal Courts scholars with long memories can contribute to this subject." (quoting a personal exchange with Doug Rendleman)).

173. Costa, *supra* note 105.

174. Solimine, *Specialized Federal Constitutional Courts*, *supra* note 25, at 152 ("[T]here is something to be said for questions over a statute that applies to the whole nation and which must be resolved as quickly as possible."); *cf.* BUMKE & VOßKUHLE, *supra* note 13, at 23 ("To ensure uniformity in the law, only the Federal Constitutional Court may decide the constitutionality of statutes.").

175. *See* Tom Ginsburg, *Economic Analysis and the Design of Constitutional Courts*, 3 THEORETICAL INQ. L. 49, 56 (2002) (discussing the tradeoff between accuracy and deliberation costs in constitutional review); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 14 (2010) ("Viewed realistically, rules of procedure represent policy tradeoffs.").

176. *See* Tobias, *supra* note 163, at 344 ("[E]ven if public law cases are 'statistical rarities on the federal docket,' those suits' importance to the public may warrant special treatment. This significance may be gauged in terms of the public's interest in resolving controversial issues of great moment or the litigation's 'impact on society and on attitudes toward the judicial function and role.'" (quoting Chayes, *supra* note 155, at 1303)).

177. H. L. A. HART, THE CONCEPT OF LAW 97 (3d ed. 2012) ("The minimal form of adjudication consists in such determinations, and we shall call the secondary rules which confer the power to make them 'rules of adjudication.' Besides identifying the individuals who are to adjudicate, such rules will also define the procedure to be followed.").

178. *See* Tobias, *supra* note 163, at 344 ("In light of the experience with the [Federal] Rules' application . . . public law litigation appears to differ from private disputes in ways that call for distinctive consideration under certain and perhaps all of the Rules."); JACKSON, *supra* note 108, at 288 ("Those who understand the characteristics and limitations of the conventional lawsuit technique recognize it as a very dubious instrument for the control of governmental policies.").

system shares common rules, principles, and procedural norms that are oriented towards the resolutions of individual disputes.[179] As several scholars have pointed out, the value choices expressed in the Federal Rules System, which continue to be a driving force, reflect disputes between private parties in which the government has no direct stake or role apart from umpiring the controversy neutrally.[180] Judith Resnik has observed, for example, that "one of the prototypical lawsuits for which the 1938 Federal Rules were designed was the relatively simple diversity case: a dispute between private individuals or businesses in which tortious injury or breach of contract was claimed, private attorneys were hired to represent the parties, and monetary damages were sought."[181] When those private law assumptions do not meet the requirements of a particular subject matter, Congress has historically crafted specialized rules and forms of process, such as the Rules of Criminal Procedure, the Rules of Bankruptcy Procedure, the Rules of the Foreign Intelligence Surveillance Court, and the Rules for Habeas Corpus Proceedings.[182] Similarly, ordinary procedures fail to address the many challenges that arise from contemporary constitutional litigation, and Congress, the Supreme Court, and other rulemakers have therefore revisited transsubstantivity and tailored different procedures for judicial review in a variety of contexts. Beyond the three-judge district courts and direct appeals procedures discussed in this Article, there are other specialized rules and standards for constitutional litigation, such as intervention

179. *See* STEVEN P. CROLEY, CIVIL JUSTICE RECONSIDERED 11–27 (2017) (providing an overview of the civil litigation system).

180. *See* David L. Noll & Luke Norris, *Federal Rules of Private Enforcement*, 108 CORNELL L. REV. 1639, 1639 (2023) ("The role of procedure, the rulemakers believed, was to resolve private disputes fairly and efficiently."); Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183, 185 (2008) (noting the individual-claim premise of our civil procedure system); Mauro Cappelletti & Bryant Garth, *Finding an Appropriate Compromise: A Comparative Study of Individualistic Models and Group Rights in Civil Procedure*, 2 CIV. JUST. Q. 111, 115 (1983) ("Civil procedure then provides the regime according to which individuals can elect whether to assert their private rights. Private rights can either be created by agreement or specified in the civil law. The state, according to this model, has no concern with whether individuals enforce legal rights available to them, much less whether they invoke the procedures of the law."); *id.* at 147 ("An individualistic paradigm remains the basis for modern civil procedure."); JACK H. FRIEDENTHAL, ARTHUR R. MILLER, JOHN E. SEXTON & HELEN HERSHKOFF, CIVIL PROCEDURE: CASES AND MATERIALS 2 (11th ed. 2013) (discussing the individualistic assumption of civil procedure where the lawsuit is a private affair and in which "[t]he community thus is seeking to provide a method for resolving the disputes that arise out of the everyday interactions of private parties"); *see also* David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L.J. 683, 684 (2006) (observing that civil litigation has been essentially privatized whereas criminal litigation is more or less a government monopoly).

181. Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 508 (1986).

182. *See generally Current Rules of Practice & Procedure*, U.S. CTS., https://www.uscourts.gov/rules-policies/current-rules-practice-procedure [https://perma.cc/92TK-B7LA] (last visited Nov. 22, 2024) (providing resources on national federal rules in effect).

by the Attorney General,[183] Congressional participation,[184] appellate fact review,[185] certification of constitutional questions,[186] preclusion,[187] weak stare decisis,[188] and many more. All things considered, these codified and common law rules operate as customized and tailored procedures for constitutional matters. Thus, conceptualizing constitutional procedure as a coherent and integrated branch of procedural law seems to be a natural step from a

183. *See, e.g.*, 28 U.S.C. § 2403(a)–(b); FED. R. CIV. P. 5.1; FED. R. APP. P. 44(a); Paul G. Kauper, *The Supreme Court: Hybrid Organ of State*, 21 SW. L.J. 573, 576 (1967) ("Pursuant to congressional authority, the Attorney General may intervene in a proceeding in a federal court when the constitutionality of a federal statute is challenged and he may in certain instances bring suit to assert the constitutional rights of private [parties]."); Tara Leigh Grove & Neal Devins, *Congress's (Limited) Power to Represent Itself in Court*, 99 CORNELL L. REV. 571, 587 (2014) ("[I]n the wake of several instances of executive non-defense [of federal laws], Congress *expanded* the executive's authority over constitutional litigation—by authorizing the Department of Justice to intervene in private suits involving constitutional questions."); Will Baude, *28 U.S.C. 2403(a) and State Court Litigation*, VOLOKH CONSPIRACY (Sept. 23, 2013, 8:00 PM), https://volokh.com/2013/09/23/28-u-s-c-2403a-state-court-litigation [https://perma.cc/BE5L-4YFA] ("Congress doesn't want a statute struck down without somebody responsible to the federal government having a chance to defend the statute and make the best arguments for it, or maybe to advocate a limiting instruction to save the statute from invalidation.").

184. *See, e.g.*, FRANKFURTER & LANDIS, *supra* note 72, at 311–12 (discussing *Myers v. United States*, 272 U.S. 52 (1926)); *Federal Jurisdiction and Procedure: Civil Procedure—Intervention—Federal Rule of Civil Procedure 24(a)*—Berger v. North Carolina State Conference of the NAACP, 136 HARV. L. REV. 390 (2022); Amanda Frost, *Congress in Court*, 59 UCLA L. REV. 914 (2012); Seth P. Waxman, *Defending Congress*, 79 N.C. L. REV. 1073 (2001).

185. *See, e.g.*, Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985); Martin H. Redish & William D. Gohl, *The Wandering Doctrine of Constitutional Fact*, 59 ARIZ. L. REV. 289 (2017); Frank R. Strong, *Dilemmic Aspects of the Doctrine of "Constitutional Fact*,*"* 47 N.C. L. REV. 311 (1969); MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 40 (1981).

186. *See, e.g.*, 28 U.S.C. § 1254(2); SUP. CT. R. 19; United States v. Seale, 558 U.S. 985 (2009); Tennessee v. Davis, 100 U.S. 257 (1879); *Ex parte* Milligan, 71 U.S. 2 (1866); Amanda L. Tyler, *Setting the Supreme Court's Agenda: Is There a Place for Certification?*, 78 GEO. WASH. L. REV. 1310, 1319–28 (2010); Aaron Nielson, *The Death of the Supreme Court's Certified Question Jurisdiction*, 59 CATH. U. L. REV. 483 (2010).

187. *See, e.g.*, Whole Woman's Health v. Hellerstedt, 579 U.S. 582, 588–606 (2016); Riley T. Keenan, *Identity Crisis: Claim Preclusion in Constitutional Challenges to Statues*, 20 U. PA. J. CONST. L. 371 (2017).

188. Stare decisis carries less weight in constitutional cases, and the Supreme Court generally considers itself freer to overrule constitutional decisions than other decisions. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 263–69, 265 n.48 (2022) ("We have long recognized, however, that *stare decisis* is 'not an inexorable command,' and it 'is at its weakest when we interpret the Constitution,' . . . . But when it comes to the interpretation of our Constitution—the 'great charter of our liberties,' which was meant 'to endure through a long lapse of ages'—we place a high value on having the matter 'settled right.'" (citations omitted)); Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., 585 U.S. 878, 917 (2018) ("[Stare decisis] 'is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions.'" (quoting Agostini v. Felton, 521 U.S. 203, 235 (1997)); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 923 (2007) (Breyer, J., dissenting) ("[T]he Court applies *stare decisis* more 'rigidly' in statutory than in constitutional cases." (citations omitted)); Edelman v. Jordan, 415 U.S. 651, 671 (1974) ("Since we deal with a constitutional question, we are less constrained by the principle of stare decisis than we are in other areas of the law."); LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS 80 (1988) ("The Supreme Court's practice is to apply stare decisis less rigidly to constitutional than to nonconstitutional issues.").

metaprocedure perspective,[189] which should lead in the end to the adoption of a separate set of "Federal Rules of Constitutional Procedure."

An appreciation of the challenges posed by nationwide injunctions during a period of greater polarization and growing partisanship in the federal court system makes the study of how procedural rules for constitutional cases can be created and changed even more urgent.[190] The difficult question is, of course: Who should put together the procedural rules for the federal courts in constitutional cases? The question of how to allocate the power of rulemaking is a central problem for proceduralists.[191] And in a constitutional system that relies heavily on checks and balances, the issue of allocating the rulemaking authority is of additional importance.[192] For example, when the Supreme Court, acting without explicit congressional approval, issued evidence rules in 1973, Congress passed legislation that blocked their effectiveness; and eventually, Congress enacted a set of evidence rules of its own, granting the Court the authority to amend and supplement the legislatively enacted rules.[193] But the allocation of rulemaking authority raises the highest concerns in regard to the control over the administration of constitutional justice. Unlike some state

189. Corresponding to what is known in Latin America and Spain as "Derecho Procesal Constitucional" and in Germany as "Verfassungsprozessrecht." *See, e.g.*, JESÚS GONZÁLEZ PÉREZ, DERECHO PROCESAL CONSTITUCIONAL (1980); HÉCTOR FIX-ZAMUDIO, INTRODUCCIÓN AL DERECHO PROCESAL CONSTITUCIONAL (2002); CÉSAR LANDA, DERECHO PROCESAL CONSTITUCIONAL (2018); KYRILL ALEXANDER SCHWARZ, VERFASSUNGSPROZESSRECHT (2021); Peter Häberle, *Role and Impact of Constitutional Courts in a Comparative Perspective*, *in* THE FUTURE OF THE EUROPEAN JUDICIAL SYSTEM IN A COMPARATIVE PERSPECTIVE 65, 69 (Ingolf Pernice, Juliane Kokott & Cheryl Saunders eds., 2006) ("Since 1976 I have suggested understanding constitutional procedural law as part of 'substantive constitutional law' and as being separate from other rules of procedure."); Peter Häberle, *Die Eigenständigkeit des Verfassungsprozessrechts* [*The Autonomy of Constitutional Procedural Law*], 28 JURISTENZEITUNG 451 (1973).

190. *See* Keith E. Whittington, *Partisanship, Norms, and Federal Judicial Appointments*, 16 GEO. J.L. & PUB. POL'Y 521, 525 (2018) (observing that nominations to the lower federal courts have become highly contested and partisan); Richard L. Hasen, *Polarization and the Judiciary*, 22 ANN. REV. POL. SCI. 261, 262 (2019) (noting the increased polarization in the United States among the political branches and citizenry and its effects on the selection and perception of federal court judges); Adam Liptak, *On Federal Appeals Courts, a Spike in Partisanship*, N.Y. TIMES (Feb. 22, 2021), https://www.nytimes.com/2021/02/22/us/politics/courts-partisanship.html [https://perma.cc/VZ5K-X7MQ].

191. *See* FISS & RESNIK, *supra* note 2, at 1163.

192. *See* William M. Wiecek, *The Debut of Modern Constitutional Procedure*, 26 REV. LITIG. 641, 687 (2007); VON MEHREN & MURRAY, *supra* note 37, at 19 ("An important source of American civil and criminal procedural law that is virtually unknown in the civil law world is court rule making. . . . The authority for this quasilegislative activity has come in some cases from enabling acts adopted by legislatures and in other cases from the court's own conception of its authority as an independent branch of government to regulate its own activities.").

193. *See* VON MEHREN & MURRAY, *supra* note 37, at 20; Ethan J. Leib, *Are the Federal Rules of Evidence Unconstitutional?*, 71 AM. U. L. REV. 911, 914, 918–19 (2022).

constitutions,[194] the federal Constitution is largely silent on the subject.[195] Consequently, the question of whether the power to regulate judicial procedures lies exclusively with Congress or the judiciary, or may be exercised or delegated by either or both, has been a fruitful subject of learned debate.

That said, the weight of authority seems to support the right of Congress to prescribe rules of procedure for the federal courts.[196] Indeed, the whole scheme of the Rules Enabling Act of 1934 and its subsequent amendments is premised on Congress's authority to make procedural rules and to delegate that power to the Supreme Court. Therefore, the existing situation in the federal courts, perhaps with the exception of the Supreme Court's original jurisdiction cases,[197] may be described as judicial rulemaking based on legislative delegation and subject to congressional veto.[198] In other words, Congress and the Supreme Court share rulemaking responsibility and maintain an interbranch dialogue.[199]

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194. *See* ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, THE LAW OF AMERICAN STATE CONSTITUTIONS 328 (2d ed. 2023) ("Supreme courts in many states have constitutional authority to promulgate rules of practice and procedure for the courts. Although this power now is explicitly granted in many constitutions, earlier commentators regarded it as an inherent judicial power. . . . To the extent that state constitutions assign to the judiciary the power to promulgate rules of practice and procedure, conflicting statutes enacted by the legislature arguably constitute an unconstitutional encroachment on specifically enumerated judicial power."); *see also* Winberry v. Salisbury, 74 A.2d 406, 413–14 (N.J. 1950), *cert. denied*, 340 U.S. 877 (1950) (holding that the rulemaking power of the Supreme Court of New Jersey is not subject to overriding legislation).

195. *See* Adam N. Steinman, *Power to Regulate Procedure as Legislative or Judicial*, *in* 4 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1001 (4th ed. 2022). *Compare* John H. Wigmore, Editorial Notes, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally*, 23 ILL. L. REV. 276, 277 (1929) ("[A]ll judiciary power, except the definition of certain parts of jurisdiction and the place of criminal trials, is in the judiciary, not in the legislature. That general power is a power to do all that courts have to do, i.e., a power to regulate their own procedure."), *and* Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 835 (2008) (proposing that Article III's grant of "the judicial power" imbues federal courts, either directly or indirectly, with authority to fashion rules of procedure), *with* Wiecek, *supra* note 192, at 687 (observing that Congress is given explicit authority over the appellate jurisdiction of the Supreme Court in the Exceptions and Regulations Clause of the Constitution); *and* AMAR, *supra* note 58, at 110–11 (suggesting that Congress's power to prescribe court procedures arises from the second half of the Necessary and Proper Clause of the Constitution).

196. *See* Wayman v. Southard, 23 U.S. 1, 42–43 (1825) ("It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself. . . . The 17th section of the Judiciary Act, and the 7th section of the additional act, empower the Courts respectively to regulate their practice. It certainly will not be contended, that this might not be done by Congress [without the intervention of the Courts]. . . . [Y]et it is not alleged that the power may not be conferred on the judicial department.").

197. *See* Stephen R. McAllister, *Can Congress Create Procedures for the Supreme Court's Original Jurisdiction Cases?*, 12 GREEN BAG 2D 287 (2009); *cf.* Wigmore, *supra* note 195, at 279 ("All rules of procedure made by a Supreme Court are valid, notwithstanding any enactment of the legislature that may be inconsistent.").

198. The current rulemaking process under the Rules Enabling Act places primary responsibility on the Supreme Court and judicial committees, though all amendments ultimately are subject to approval by Congress before taking effect. 28 U.S.C. §§ 2071–74.

199. *See* Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 614–15 (1992) ("[I]f the coordinate branches of government are responsible for checking and balancing one another, they must also *cooperate* with each other to run the affairs of government and the nation. . . . [E]ven though we are committed to congressional control over jurisdiction, Congress needs

As we have seen, Congress has already tinkered with the processes for judicial review in the past, but it has mostly done so following the Supreme Court Justices' demands and with their consent. The historical evidence does not offer, therefore, conclusive guidance on the issue. But assuming that Congress has the rulemaking power to regulate constitutional litigation, there is a real risk that partisan politicians would increasingly look to influence the judicial arena, and advance their substantive policy preferences, through the rules of procedure.[200] Due to similar concerns, some constitutional courts around the world, such as the Federal Constitutional Court of Germany and the Constitutional Tribunal of Peru, have asserted autonomy to enact their own rules of procedure even in the absence of explicit authorization in the Constitution or enabling legislation.[201] Just what limits, if any at all, will restrict congressional power over the procedural rules in constitutional litigation and determine whether the judiciary can act autonomously in accordance to its inherent authority, have yet to be established.[202]

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help in setting the court's agenda, because the most valuable input on that subject comes from the courts themselves. . . . Congress needs the courts to manage their own jurisdictional arrangements while Congress exercises its oversight function.").

200. *See* Wigmore, *supra* note 195, at 278 ("The legislature—as experience shows—becomes the catspaw of a few intriguing lawyers, who from time to time secure an alteration of rules of procedure to serve selfish ends or to vent petty spite or to embody some personal narrow view."); Miller, *supra* note 175, at 13–14 ("Increasingly, it has been recognized that procedural rules are a source of societal power, that the formulation and application of those rules are not value neutral, and that the manipulation of procedural rules frequently is used to advance or retard substantive goals."); Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1057 (1993) (arguing that "Congress's involvement in the process of amending Rules has been troubling," and observing that, in at least one instance, a congressional amendment appeared "to be a political response to the pressures of a discrete interest group rather than a carefully crafted response to procedural inadequacies of the prior Rule."); *cf.* Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795 (1991).

201. *See* WERNER HEUN, THE CONSTITUTION OF GERMANY: A CONTEXTUAL ANALYSIS 168 (Peter Leyland, Andrew Harding, Benjamin L. Berger & Andrew Fischer eds., 2011) ("The [German Federal Constitutional] Court claims an autonomy to enact its own rules of procedure (*Geschäftsordnungsautonomie*) without explicit authorisation in the Constitution, while the Basic Law expressly authorises the other constitutional institutions to do so."); BREWER-CARÍAS, *supra* note 13, at 186 ("One of the specific matters in which judicial review of legislative omissions has taken place has been in the cases where constitutional courts have created rules of procedures for the exercise of their constitutional attributions when those have not been established in the legislation regulating their functions. For such purpose, constitutional courts, such as the Constitutional Tribunal of Peru, have claimed to have procedural autonomy in exercising their extended powers to develop and complement their decisions, but the procedural rules applicable in the judicial review process are not expressly regulated in statutes."); *cf.* ARMIN VON BOGDANDY & INGO VENZKE, IN WHOSE NAME? A PUBLIC LAW THEORY OF INTERNATIONAL ADJUDICATION 171 (2014) (observing that international courts "often enact the rules of procedure on their own" and that they "often publish directives on the judicial process, even if the statutes do not establish an explicit competency").

202. *See* Barrett, *supra* note 195, at 841 ("The assertion that Congress's power dominates that of the federal courts in matters of procedure is far less certain. When federal courts make procedural common law, they are speaking on a matter within their particular competence—indeed, with respect to matters of procedure, federal courts can credibly claim that their expertise exceeds that of Congress. Even apart from expertise, which does not itself confer power, the federal courts have a stronger claim to constitutional authority in matters of procedure than in matters of substance. The precise limits of Congress's authority to regulate federal court procedure are a

CONCLUSION

The federal court system employs many different procedures. This is the reason lawyers tend to pile up the relevant rulebooks on their desks, such as the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and the Federal Rules of Appellate Procedure. The distinctive rules and practices governing constitutional litigation, however, are not found in a single rulebook and are usually overlooked in courses on substantive constitutional law and civil procedure. But contrary to the prevailing belief in the literature, this does not mean that such rules and practices do not exist or that constitutional cases follow the ordinary uniform procedures. The histories of specialized constitutional courts and direct appeals to the Supreme Court are perfect examples of what constitute the distinct, but underappreciated, field of constitutional procedure.

To be sure, the existence of the three-judge district courts and speedy appeals for constitutional matters is not a real discovery in a scientific sense of the word. It is also unlike the discovery of Barthold Georg Niebuhr, the preeminent German historian, who happened upon in the Cathedral Library of Verona the lost *Institutes of Roman Law*.[203] But the procedural arrangements of the three-judge district courts and direct appeals seem to have faded from our collective memory and jurisprudential knowledge. Most scholars in the United States and abroad assume that constitutional issues have always been determined according to the same procedures governing ordinary litigation between private parties. They are unaware of the special rules regulating the processes of constitutional litigation, and perhaps for that reason, these processes are normally not mentioned either in courses on substantive constitutional law or civil procedure. Therefore, illuminating the way constitutional cases make their way through our courts enables us to bring out of the shadows some truths regarding the administration of constitutional justice and, in that sense, might be considered a "legal discovery."[204]

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matter of dispute, but as discussed above, courts and scholars have repeatedly argued that there are some procedural matters that Congress cannot regulate. Whether or not any of these particular arguments is sound, the fact that they are often raised reflects an intuition that at least some aspects of federal court procedure lie beyond congressional control."); *id.* at 843–44 (observing that the Supreme Court has explicitly asserted in a number of cases that federal courts possess inherent authority to formulate rules of procedure in the course of adjudication); Monaghan, *Constitutional Adjudication*, *supra* note 94, at 1379 ("'Our Federalism'—as Justice Black termed it in *Younger v. Harris*—might be seen as imposing inherent limitations on congressional power to determine the 'who' and 'when' of constitutional adjudication." (quoting 401 U.S. 37 (1971))); William G. McLaren, *Can a Trial Court of the United States be Completely Deprived of the Power to Determine Constitutional Questions?*, 30 A.B.A. J. 17, 18 (1944) ("Jurisdiction is one thing, judicial power is another. Congress can control the one but not the essentials of the other. It would seem inconsistent to say that the courts possess a power directly from the Constitution to pass on the validity of statutes . . . and at the same time to say that such a power so derived from the Constitution can be interfered with by a Congressional enactment.").

203. GAIUS, INSTITUTES OF ROMAN LAW (Edward Poste trans., 4th ed. rev., Oxford: Clarendon Press 1904) (161 AD).

204. *See* Hans Dölle, *Juristische Entdeckungen* [*Legal Discoveries*], *in* VERHANDLUNGEN DES ZWEIUNDVIERZIGSTEN DEUTSCHEN JURISTENTAGES (1959).

As the recent litigation over the constitutionality of the Texas abortion law and the ongoing debate about the propriety of nationwide injunctions have shown, procedural complications can play a central role in judicial review, and our acknowledgment of the need for specialized techniques has certainly intensified. Correspondingly, this Article is foremost a call for action—a scholarly nudge—to revisit some of the descriptive and normative assumptions that have shaped the procedural attitudes towards judicial review. The changing forms that constitutional justice has taken over the years certainly remind us that nothing is sacrosanct about the current arrangements. "Procedural rules are not crafted in a vacuum,"[205] and decisions about procedure are ultimately a human choice subject to manipulation. Illuminating constitutional procedure is a critical step to preserving the integrity of the rulemaking process and to facilitating the necessary common ground for academic discussion that is so needed to make the right choices.

205. Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 842 (1984).