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## District Court En Bancs

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## DISTRICT COURT EN BANCS

Maggie Gardner\*

*Despite the image of the solitary federal district judge, there is a long but quiet history of federal district courts deciding cases en banc. District court en bancs predate the development of en banc rehearings by the federal courts of appeals and have been used to address some of the most pressing issues before federal courts over the last one hundred years: Prohibition prosecutions, bankruptcies during the Great Depression, labor unrest in the 1940s, protracted desegregation cases, asbestos litigation, and the constitutionality of the U.S. Sentencing Guidelines, to name a few. This Article gathers more than 140 examples of voluntary collective adjudication by district judges, supplemented by interviews with sitting judges who participated in recent cases. While the Article's aim is primarily descriptive and doctrinal, it also defends the occasional and disciplined use of such proceedings as enabling deliberation about and increasing the legitimacy of high-stakes district court decisions.*

*More broadly, the Article celebrates the distinct voice of the district courts and their procedural innovations. The district courts handle the vast majority of the federal judiciary's business and bear the brunt of new legal and societal challenges; their ingenuity is often the vanguard for procedural and administrative reform. Indeed, the story of district court en bancs is also the story of the federal courts' constant evolution. The current settlement of the federal courts' institutional design is the product of shifting pressures and compromises, and it would be foolish to assume that the status quo is either perfect now or will continue to function effectively despite changing conditions. In a moment of renewed attention to the federal judiciary, district*

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\* Associate Professor of Law, Cornell Law School. For valuable comments and conversations, I thank Pamela Bookman, Stephen Burbank, Kevin Clermont, Zachary Clopton, Michael Dorf, Seth Endo, Andrew Hammond, Valerie Hans, Robert Hillman, Alexandra Lahav, Marin Levy, Merritt McAlister, Roger Michalski, David Noll, Jim Pfander, Teddy Rave, Danya Reda, Michael Simon, Alan Trammel, Diego Zambrano, and Adam Zimmerman. This project also benefitted greatly from presentation at the Duke Law School Judicial Administration/Judicial Process Roundtable, Cornell Law School, the University of Florida Levin College of Law, the University of Oregon School of Law, and Vanderbilt Law School. My special thanks to the district judges from the Western District of Missouri, the District of Nevada, the Northern District of Texas, and the Western District of Washington, who generously shared their insights with me. Finally, I am grateful for the exceptional research assistance of Alyssa Ertel, Zachary Sizemore, and Ashley Stamegna; the tireless work of the Cornell Law School librarians, especially Alison Shea; and the many Zoom workshops organized by the indomitable Zachary Clopton.

*court en bancs may helpfully challenge our assumptions about the structure of the federal courts and the power of district judges within them.*

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## INTRODUCTION

Most U.S. lawyers (and much of the general public) are aware of federal appellate court en bancs.<sup>1</sup> But few people—including district judges<sup>2</sup>—are aware that there is a longer, albeit more infrequent, history of federal district court en bancs.<sup>3</sup> District court en bancs differ in key ways from their appellate counterparts: there is no formal authorization or set procedure for district court en bancs,<sup>4</sup> they are almost always judge-initiated,<sup>5</sup> and they vary in format and in the number of judges who participate.<sup>6</sup> Most fundamentally, district court en bancs serve not to reconsider decisions but to decide an issue or a case collectively in the first instance.<sup>7</sup>

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1. Judicial opinions and statutes refer interchangeably to “en banc” and “in banc” sessions of the federal courts. Compare FED. R. APP. P. 35 (“en banc”), with 28 U.S.C. § 46(c) (“in banc”). For consistency, this Article uses the currently more common term, “en banc.”

2. This Article refers to district judges (rather than district court judges) because, for the first hundred years of the lower federal courts, district judges staffed both district and original circuit courts. See *infra* Part I.A.1.

3. Even some district judges who have themselves participated in district court en bancs have assumed that their use of the procedure was *sui generis*. See JACK BASS, TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR. AND THE SOUTH’S FIGHT OVER CIVIL RIGHTS 209 (1993) (quoting Judge Johnson as noting, “There’s no statutory basis or any other legal basis of which I’m aware that authorizes a five-judge District Court” like the one that issued *United States v. Wallace*, 222 F. Supp. 485 (M.D. Ala. 1963), and opining that “[t]here’s never been another one anywhere”); Telephone Interview with U.S. District Judge (June 22, 2020) (noting that the judge “hasn’t ever heard of it happening anywhere else”).

4. Federal appellate en bancs are governed by statute, 28 U.S.C. § 46(c), the Federal Rules of Appellate Procedure, and the local rules of the circuit courts. See 28 U.S.C. § 46(c); FED. R. APP. P. 35; see, e.g., 9TH CIR. R. 35-1 to 35-4. In contrast, no statute or Federal Rule of Civil Procedure explicitly authorizes district court en bancs, and I am not aware of any district’s local rules currently providing for en banc hearings or decisions. One district’s bankruptcy rules, however, do allow the bankruptcy judges to sit en banc. See BANKR. W.D. OKLA. R. 7052-1 (“Upon request of a judge of the Court, or upon motion, any matter may be heard en banc if all judges of the Court concur.”).

5. In contrast, litigants may petition for rehearing en banc before the appellate courts, although a judge on the court must call for the vote on whether the petition should be granted, which must in turn be approved by a majority of the court’s active members. See FED. R. APP. P. 35.

6. See Appendix; *infra* Part I.C.1. In contrast, appellate en bancs involve all active judges (and sometimes senior judges) hearing oral arguments together and participating in the decision. See 28 U.S.C. § 46(c). Only the Ninth Circuit holds en banc hearings with fewer than all of its active judges, pursuant to discretion granted for the largest circuits under 28 U.S.C. § 46(c). See 9TH CIR. R. 35-3 (describing selection of eleven-judge en banc panels by lot).

7. The Federal Rules of Appellate Procedure specify that the purpose of an appellate en banc hearing is to reconsider a prior panel decision, either to maintain uniformity within the

Because the practice of district court en bancs has been ad hoc, the precise procedure has varied across courts and cases.<sup>8</sup> Most examples involve all or most of the district's judges participating in a collective hearing and decision.<sup>9</sup> Other examples have involved fewer than all of the district's judges, either via ad hoc panels<sup>10</sup> or by coordinating decisions in related cases.<sup>11</sup> Yet other examples involve a district's judges signing onto or adopting the decision of a single colleague.<sup>12</sup> Given that line-drawing between these variations can be difficult, this Article uses the purposefully broad category of *voluntary collective district court adjudication*.<sup>13</sup> Decisions in this category are connected by the voluntariness of the procedure, meaning that no statute or federal rule requires the judges to decide the case together, and by their collective nature, with more than one district judge joining in a single opinion.<sup>14</sup>

This Article gathers more than 140 examples of voluntary collective adjudication by district courts since 1912,<sup>15</sup> supplemented by interviews with

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circuit's law or to address "a question of exceptional importance," including the possible creation of a circuit split. FED. R. APP. P. 35.

8. These variations are more formally categorized and described with examples in Part I.C.1.

9. See, e.g., *Angle v. Legislature of Nev.*, 274 F. Supp. 2d 1152, 1154 (D. Nev. 2003) (all seven judges of the district declining to intervene in a dispute between the state legislature and the state supreme court), *aff'd sub nom. Amodei v. Nev. State Senate*, 99 F. App'x 90 (9th Cir. 2004).

10. See generally *Olivieri v. Adams*, 280 F. Supp. 428 (E.D. Pa. 1968) (delegated panel considering the permissibility of pendent party jurisdiction).

11. See generally *United States v. Wallace*, 222 F. Supp. 485 (M.D. Ala. 1963) (all federal judges in Alabama coordinating across district lines to enjoin George Wallace and others from continuing to violate court orders regarding desegregation).

12. See, e.g., *Dziwanoski v. Ocean Carriers Corp.*, 26 F.R.D. 595, 599 (D. Md. 1960) (noting that the authoring judge was "authorized by [the other two judges of the district] to say that they concur in this opinion" regarding the plaintiff's right to have an attorney present during a Rule 35 medical examination).

13. For ease of reference, this Article uses "collective proceedings," "collective decisions," and occasionally the more colloquial "district court en bancs" as shorthand for the overarching category of voluntary collective district court adjudication.

14. I have also excluded from the appendix examples of attorney discipline cases in which a district court's local rules require a hearing before a three-judge panel. While I still consider collective adjudication mandated by local rules to be "voluntary" in that the district court can opt to change its rules, enough district courts have at times adopted local rules requiring three-judge disciplinary panels to make their inclusion here impractical.

15. See Appendix. The only prior analysis of district court en bancs is a brief essay by Judge John R. Bartels, who identified thirty-eight reported en banc decisions and another nine examples of en banc panels that had not issued decisions. See John R. Bartels, *United States District Courts En Banc—Resolving the Ambiguities*, 73 JUDICATURE, no. 1, 1989, at 40; see *id.* at 40 n.2 (defining district court en bancs as "any district court in which two or more judges either joined in or bound themselves to a single opinion"). Although Judge Bartels did not list all his examples, I estimate that our lists overlap by no more than thirty-six cases. See *infra* Part I.C.2. Other scholars have at times acknowledged district court en bancs in passing, but without considering their history, function, or legitimacy. See 32 AM. JUR. 2D *Federal Courts* § 523 (2021) (noting that "[a] district court may also occasionally hold an en banc session, or convene a panel of judges" (footnote omitted)); 13 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3505 (3d ed. 2021) ("The statutes do not forbid, and some districts on occasion follow, the practice of having all the judges of the [district] court sit en banc in important matters or of designating a panel of

seven district judges who participated in more recent cases. The list in the appendix is assuredly underinclusive, as no publisher or database labels or tracks district court en bancs. But the results are sufficient to establish that, although uncommon, collective proceedings before district courts have been a relatively consistent phenomenon over the modern history of the federal courts.

In excavating and analyzing this phenomenon, this Article furthers two important conversations about courts and procedure. First, district court en bancs provide a new perspective on the political-institutional development of the federal courts. As scholars since Felix Frankfurter and James Landis have documented, the evolution of the federal courts is intertwined with continuing debates about federalism, the separation of powers, and significant shifts in American society.<sup>16</sup> Not surprisingly, district courts have experimented with collective decisions at moments of great political and institutional pressure over the last century: district court en bancs have addressed Prohibition prosecutions, bankruptcy reforms during the Great Depression, labor unrest, desegregation, and mass torts; they have been used to navigate relations with the higher courts, the executive branch, the states, and the broader public.<sup>17</sup> The proper role of the district court within the federal judiciary and U.S. public life has always been contested and contingent: even today, the U.S. Supreme Court has taken to micromanaging district court dockets,<sup>18</sup> while scholars and judges are casting doubt on

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several judges . . . to establish uniformity within the district on recurring questions.” (footnote omitted); BRYAN A. GARNER ET AL., *THE LAW OF JUDICIAL PRECEDENT* 515 (2016) (noting “rare instances when the judges of a federal district court sit en banc”); Recent Case, *Federal Courts. Jurisdiction. Propriety of Additional Judges Sitting Where Only One Is Necessary*, 48 HARV. L. REV. 132, 133 (1934) [hereinafter Recent Case] (“[T]he opinions indicate that more than one [district] judge has often sat in cases where no statute authorized a three-judge court.”); Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 809–10 (2012) (suggesting district court en bancs, although “extremely rare,” could be used to establish “law of the district”); Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1416 n.172 (1998) (acknowledging district court en bancs as “unusual, interesting, and arguably unauthorized”); Ahmed E. Taha, *How Panels Affect Judges: Evidence from United States District Courts*, 39 RICH. L. REV. 1235, 1244–47 (2005) (noting a few prior examples before analyzing en banc decisions regarding the constitutionality of the U.S. Sentencing Guidelines).

16. The seminal work on the social and political forces behind the development of the federal courts is FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* (1927). More recent works in this vein include STEPHEN B. BURBANK & SEAN FARHANG, *RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION* (2017); JUSTIN CROWE, *BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT* (2012); PETER GRAHAM FISH, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* (1973); and CHARLES GARDNER GEYH, *WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA’S JUDICIAL SYSTEM* (2008).

17. See *infra* Parts II, III.D.

18. See, e.g., Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 124 (2019) (noting recent requests by the U.S. Solicitor General asking “the Court (1) to hear certain appeals before the lower courts have finished ruling; (2) to halt the effect of lower court rulings pending the Supreme Court’s review; or (3) to jump over the courts of appeals and directly issue writs of mandamus to rein in perceived abuses by different district courts”); see also *Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2618–19 (2020)

district judges' remedial powers.<sup>19</sup> The story of district court en bancs reminds us that daring procedural innovation lies behind much of what we take for granted today, from appellate court en bancs to multidistrict litigation. When confronting current challenges in the administration of justice, we need not be locked into the current arrangement of judicial roles and court structures.

Second, district court en bancs are an overlooked example of ad hoc procedure, the propriety of which has been described as “the biggest question currently brewing in civil-procedure scholarship.”<sup>20</sup> Ad hoc procedure is designed on the fly, after a problem has developed and often in the context of specific litigation.<sup>21</sup> It is pragmatic, flexible, and discretionary—which also means it can be unpredictable, unaccountable, and insensitive to due process or separation of powers concerns.<sup>22</sup> As an unexplored example of ad hoc procedure that nonetheless has a long history, district court en bancs can help refine scholars' recent efforts to indicate when ad hoc procedure is beneficial, when it may be problematic, and when (or whether) it should be codified.

Part I defines the phenomenon. It distinguishes district court en bancs from *mandatory* collective adjudication (like statutory three-judge courts) and forms of collective *administration* (like local rulemaking). It then narrows the Article's focus to voluntary collective district court adjudication and defines four subtypes: (1) full en banc decisions, (2) panel decisions, (3) coordinated decisions, and (4) adopted decisions. Part I also establishes district courts' authority to engage in such ad hoc proceedings but argues that the resulting decisions have no more precedential weight than other district court opinions.

Part II provides a chronological account of district court en bancs that illustrates how en bancs have coincided with pressure points for the federal

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(Sotomayor, J., dissenting) (objecting to eighth stay pending appeal granted by the Supreme Court in 2020).

19. See generally Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017). For scholarship questioning the premises of the “national injunction” debate and reaffirming the power of the courts to grant relief that affects nonparties, see generally Zachary D. Clopton, *National Injunctions and Preclusion*, 118 MICH. L. REV. 1 (2019); Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065 (2018); Suzette M. Malveaux, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56 (2017); Portia Pedro, *Toward Establishing a Pre-Extinction Definition of “Nationwide Injunctions,”* 91 U. COLO. L. REV. 847 (2020); James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of Ex parte Young*, 72 STAN. L. REV. 1269 (2020); Mila Sohoni, *The Lost History of the “Universal” Injunction*, 133 HARV. L. REV. 920 (2020).

20. Nora Freeman Engstrom, *The Lessons of Lone Pine*, 129 YALE L.J. 2, 72 (2019).

21. See Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767, 784 (2017) (defining “ad hoc procedure” as procedure “motivated by a problem (or problems) that is specific to a case or set of cases and . . . [that] addresses that problem in the midst of a faltering pending litigation”).

22. See Engstrom, *supra* note 20, at 9–10 (gathering literature on both sides of the debate); Shirin Sinnar, *Procedural Experimentation and National Security in the Courts*, 106 CALIF. L. REV. 991, 1037–38 (2018) (encouraging the use of flexible procedure in the context of government secrecy claims but voicing caution regarding possible abuses).

courts over the last century, including bankruptcy administration in the 1930s, labor unrest in the 1940s, civil rights litigation in the 1960s, and mass tort litigation in the 1980s. Part III provides a functional account of district court en bancs, comparing them to procedural alternatives for achieving similar ends. Other procedural innovations have largely displaced the need for district court en bancs as a tool for furthering judicial economy and intradistrict uniformity. But, district courts have not developed as many alternatives for leveraging their collective wisdom or enhancing the legitimacy of their opinions.

Part IV turns from the past to the future. At a time when states, the executive branch, and the federal courts are once again in tension regarding issues of critical national importance, the occasional (and careful) use of collective district court en bancs might be an appropriate tool for enhancing the deliberation and legitimacy of district court decisions. Part IV thus explores best practices for district court en bancs that respect the limits of district courts' inherent authority and balance the costs imposed by such proceedings.

## I. DEFINING DISTRICT COURT EN BANCS

This part distinguishes district court en bancs from other forms of collective judicial work, defends the authority of district courts to engage in district court en bancs, and describes the methodology by which examples of such cases were identified.

### A. Distinguishing Other Forms of Collective Decision-Making

Since the First Judiciary Act, Congress has called on district judges to work collectively in certain circumstances.<sup>23</sup> These collective duties have helped familiarize district judges with the benefits (and potentially the challenges) of collaborative decision-making, although they are distinct from the voluntary collective decision-making that is the focus of the remainder of this Article.

#### 1. The Common Law and the Original Circuit Courts

The idea that courts of first instance might, at times, decide cases collectively is rooted in the English common-law tradition.<sup>24</sup> Individual judges in England could try cases at nisi prius, or locally where the cause of action arose, but “attacks on the pleadings prior to trial—for instance, demurrers—were heard and decided by the court in banc” in London, and parties who lost before the local jury could “apply to the court in banc for

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23. See *infra* Part I.A.1.

24. Panels of judges are also often used in the civil law tradition. See, e.g., Charles H. Koch, Jr., *The Advantages of the Civil Law Judicial Design as the Model for Emerging Legal Systems*, 11 IND. J. GLOB. LEGAL STUD. 139, 148 (2004).



relief,” for example, by requesting a new trial.<sup>25</sup> These applications by parties were not appeals; the “in banc” court was not reviewing the work of a lower court but rather finishing the work that a single judge had undertaken on its behalf.<sup>26</sup> Some U.S. states adopted this common-law tradition; for example, into the twentieth century, Pennsylvania required at least two of the three judges of the Philadelphia court to decide motions for new trials.<sup>27</sup> Given the Conformity Act of 1872,<sup>28</sup> which required federal courts to apply state court procedure in actions at law,<sup>29</sup> this state requirement likely explains why the Eastern District of Pennsylvania issued numerous self-described “en banc” decisions in the 1920s regarding routine new trial motions.<sup>30</sup>

Perhaps also reflecting this common-law tradition, Congress initially designed the inferior federal courts to require district judges to decide some cases collectively. The First Judiciary Act created “two tiers of trial courts”: the district courts and the circuit courts.<sup>31</sup> While district judges sat independently to hold district court, they were supposed to sit alongside Supreme Court justices as three-judge panels to hold circuit court.<sup>32</sup> These original circuit courts had some appellate jurisdiction, but their primary role was to serve as a court of first instance for weightier cases (for example,

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25. RICHARD H. FIELD ET AL., *MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE* 1680 (13th ed. 2020); *see also* SIR JOHN BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 91–93 (5th ed. 2019).

26. BAKER, *supra* note 25, at 149 (noting that “all these powers [in banc] were exercised before judgment, and not by a court of appeal”). Another example is the Exchequer Chamber, which could collectively consider difficult questions that arose at the local assizes; however, “[t]he assembled judges [of the Exchequer Chamber] had no jurisdiction to decide such cases,” so their role was one of “merely advising the judge who sought their opinion.” *Id.* In an interesting parallel, the U.S. Judicial Conference, as originally conceived, took on a similar advising role. *See* FISH, *supra* note 16, at 71 (“The Conference provided an apt vehicle for pronouncements on issues of law which had not yet reached the highest court of adjudication.”).

27. 12 PA. STAT. & CONS. STAT. ANN. § 680 (West 1931).

28. Ch. 255, 17 Stat. 196.

29. *See* FIELD ET AL., *supra* note 25, at 20–22.

30. *See* *Haveron v. Bantivoglio*, 13 F.2d 644 (E.D. Pa. 1926); *Dodge v. F.A.D. Andrea, Inc.*, 10 F.2d 387 (E.D. Pa. 1926); *Tabas v. Emergency Fleet Corp.*, 9 F.2d 648 (E.D. Pa. 1926); *Ben-Wat Corp. v. David Lupton’s Sons Co.*, 9 F.2d 928 (E.D. Pa. 1925); *Chalmers v. Kolb*, 9 F.2d 924 (E.D. Pa. 1925); *Park Amusement Co. v. McCaughn*, 14 F.2d 553 (E.D. Pa. 1925); *Wilderman v. Roth*, 9 F.2d 637 (E.D. Pa. 1925); *Carnill v. Lederer*, 298 F. 462 (E.D. Pa. 1924); *Makiver v. Mo. State Life Ins. Co.*, 296 F. 715 (E.D. Pa. 1924). Because these en banc proceedings appear to have been required as a matter of state procedural law, I have not included them in the appendix.

31. RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 21 (7th ed. 2015).

32. *See id.* Given the burden this imposed on Supreme Court justices, Congress reduced the panel requirement to one justice and one district judge in 1793, and by 1802, allowed the circuit courts to be held by a single district judge. *See id.* at 26–27. Given geographic constraints and court workloads, many circuit court sessions were held by single district judges, undermining the intention behind the design of the dual-court system. *See* FRANKFURTER & LANDIS, *supra* note 16, at 32, 69, 77, 87 (noting concerns throughout the nineteenth century about circuit courts being held by a single district judge).

diversity cases in which the amount in controversy was greater than \$500).<sup>33</sup> Indeed, after Congress created the circuit courts of appeal in 1891, the “old” circuit courts only sat as courts of first instance until they were fully phased out at the end of 1911.<sup>34</sup> Since then, district judges have continued to gain experience with panel decision-making through sitting by designation on the “new” circuit courts of appeals.<sup>35</sup>

## 2. Three-Judge Courts

As the old circuit courts were phased out, Congress began adopting three-judge court requirements for specific sets of cases. In 1903, Congress required three-judge panels for some antitrust actions (though the panels were comprised primarily of circuit judges); in 1906, it did the same for suits to set aside orders of the Interstate Commerce Commission.<sup>36</sup> But the big expansion came in 1910 in response to the Supreme Court’s decision in *Ex parte Young*,<sup>37</sup> which recognized the power of the federal courts to enjoin state officers from enforcing unconstitutional state statutes.<sup>38</sup> Concerned about the district courts’ power to block Progressive Era reforms in the states,<sup>39</sup> Congress directed that requests for preliminary injunctions to prevent state officials from enforcing state laws must be heard by three-judge panels, which would include at least one circuit judge or Supreme Court justice and could be appealed directly to the Supreme Court.<sup>40</sup> Then in 1937, worried that federal judges were too readily striking down New Deal legislation as well, Congress expanded the use of such three-judge panels to suits seeking to enjoin congressional statutes as unconstitutional.<sup>41</sup>

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33. See FALLON ET AL., *supra* note 31, at 22–23; see also FRANKFURTER & LANDIS, *supra* note 16, at 13 (“The district and circuit courts were in practice two *nisi prius* courts dealing with different items of litigation.”).

34. See FALLON ET AL., *supra* note 31, at 30 n.66.

35. See, e.g., Marin K. Levy, *Visiting Judges*, 107 CALIF. L. REV. 67, 69–70 (2019).

36. See FALLON ET AL., *supra* note 31, at 1090 n.2; PETER CHARLES HOFFER ET AL., THE FEDERAL COURTS: AN ESSENTIAL HISTORY 221 (2016); see also Michael T. Morley, *Vertical Stare Decisis and Three-Judge District Courts*, 108 GEO. L.J. 699, 724–25 (2020) (describing later extensions of this requirement for challenges to rate-setting by other federal agencies).

37. 209 U.S. 123 (1908).

38. See generally *id.*

39. See David P. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1, 5 (1964) (“[T]he states, experimenting with a variety of novel regulatory and tax measures to cope with the needs of the new industrial world, were encountering stubborn obstacles in the persons of federal judges who insisted on reading their own economic theories into the due process and commerce clauses.”). For more on the contemporary context of *Ex parte Young*, in which the strongly Progressive state government of Minnesota was attempting to rein in the railroads, see Michael E. Solimine, *Congress, Ex parte Young, and the Fate of the Three-Judge District Court*, 70 U. PITT. L. REV. 101, 107–10 (2008). For a recent account tracing the origins of *Ex parte Young* to common law writs used to check government power, see generally Pfander & Wentzel, *supra* note 19.

40. See, e.g., HOFFER ET AL., *supra* note 36, at 221–22; Morley, *supra* note 36, at 728–29; Solimine, *supra* note 39, at 113–17.

41. Morley, *supra* note 36, at 734; Solimine, *supra* note 39, at 124–25. Further, whenever a district judge held a federal statute unconstitutional, whether or not an injunction was involved, any party could appeal directly to the Supreme Court. See Morley, *supra* note 36, at 735.

Litigation before three-judge courts grew from about fifty cases per year in the 1950s, to ninety per year in the early 1960s, to a high of 320 cases in 1973 alone.<sup>42</sup> By the 1960s, Professor Michael Solimine has argued, the three-judge court had shifted from serving as a shield for states following *Ex parte Young* to serving as a sword against states in the civil rights era.<sup>43</sup> Desegregation cases, for example, often challenged state statutes, requiring hearings before three-judge courts—a requirement that civil rights attorneys appreciated, according to Solimine, because “it negated the prospect of a single, possibly unsympathetic, judge hearing the case, and because three judges were more likely to take the bolder legal steps, on both the merits and remedies, that the cases demanded,” while also providing a quicker route to the Supreme Court.<sup>44</sup> Congress also expanded the use of three-judge courts in the Civil Rights Act of 1964 and the Voting Rights Act of 1964.<sup>45</sup>

The use of three-judge courts, however, was sharply curtailed in 1976 with the repeal of the 1910 and 1937 statutes, a move meant to reduce the burden on the Supreme Court docket generated by direct review of three-judge courts.<sup>46</sup> Today, three-judge courts are primarily used to hear constitutional challenges to the reapportionment of political districts under 28 U.S.C. § 2284; as a result, there is an uptick in three-judge courts in the years following each decennial census.<sup>47</sup> Other minor pockets of three-judge courts remain due to specific statutory provisions.<sup>48</sup>

Parallel to this history of three-judge courts involving both district and circuit judges, Congress has also authorized three-judge courts composed entirely of district judges. For example, 16 U.S.C. § 831x (repealed in 1968) allowed three district judges to hear exceptions to compensation awards issued by the Tennessee Valley Authority as part of its condemnation proceedings.<sup>49</sup> For certain constitutional claims regarding free trade agreements, the U.S. Court of International Trade must convene a three-judge panel.<sup>50</sup> Professor Michael Morley, in his recent history of three-judge courts, also notes that “the Legislative Branch Appropriations Act of 2006 authorizes a three-judge district court panel to determine whether Congress’s ordinary operations have been disrupted by a national catastrophe, but does not allow for appellate review in any court, including the U.S. Supreme Court.”<sup>51</sup>

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42. Solimine, *supra* note 39, at 126.

43. *See id.* at 134.

44. *Id.* at 127.

45. *See id.* at 131–33.

46. *See* Morley, *supra* note 36, at 744 (tracing decline of three-judge courts).

47. *See* 20 CHARLES ALAN WRIGHT & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE DESKBOOK § 52 n.15 (2d ed. 2019).

48. *See* 17A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4235 n.5 (3d ed. 2021) (gathering examples of “a few other rare instances in which an Act of Congress requires a three-judge court”).

49. *See id.* (discussing 16 U.S.C. § 831x). I have excluded these cases from the appendix as being effectively mandated by statute.

50. *See* 19 U.S.C. § 1516a(g)(4)(B).

51. Morley, *supra* note 36, at 750.

### 3. Court Administration

District judges also work together on non-adjudicatory matters, including court administration and the adoption of local rules.<sup>52</sup> The district courts manage their administrative business in different ways. Many districts convene all of their judges at regularly scheduled meetings.<sup>53</sup> The Northern District of Illinois delegates administrative matters to an executive session,<sup>54</sup> while others delegate some matters to the chief judge.<sup>55</sup> Some district courts have used their local rules to delegate certain attorney discipline matters to three-judge panels.<sup>56</sup>

In short, whether by statutory mandate, local rule, designation to sit on a court of appeals, or mundane court administration, most, if not all, district judges will have some experience with collective decision-making. A separate question is whether the district courts may engage in collective adjudication when they are not explicitly authorized or directed to do so.

#### *B. Questions of Authority and Stare Decisis*

All levels of the federal judiciary have assumed that district courts may choose to decide cases collectively, even when not required. The Supreme Court has acknowledged district court en bancs in cases like *Hickman v. Taylor*<sup>57</sup> and *Zadvydas v. Davis*,<sup>58</sup> and some courts of appeals have praised them.<sup>59</sup> Statutory three-judge courts have also invoked the inherent authority

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52. See *infra* Part III.B.3.

53. See, e.g., N.D. ILL. IOP1(a) (stating that “regular active and senior judges shall assemble not less than once a month” for official meetings to “establish the policies of the Court, determine its programs and adopt and promulgate its rules”). Opinions issued by the Eastern District of Louisiana have referred to the district’s “monthly *en banc* meeting.” See, e.g., *Adams v. Chater*, 914 F. Supp. 1365, 1369 (E.D. La. 1995).

54. See N.D. ILL. IOP2(a) (“This Court shall administer and conduct its business by action of its Executive Committee.”); see also N.D. ILL. IOP2(b) (describing the composition of the Executive Committee).

55. See E.D. MICH. LR 83.3 (“When authorized by the Court, the Chief Judge may issue administrative orders of general scope which apply to all cases pending in the district and administrative orders of a more limited nature which apply to smaller groups of cases.”).

56. See, e.g., W.D. Mo. LR 83.6(d)(3)(A)(i); S.D. TEX. app. A, R. 5(G). As noted above, I have not included decisions issued by such three-judge disciplinary panels in the appendix. But I would still characterize collective decisions required by local rules to be “voluntary” on the part of the district courts, even if not ad hoc; further, disciplinary decisions do constitute “adjudication.” See, e.g., *In re Palmisano*, 70 F.3d 483, 484–85 (7th Cir. 1995) (holding that attorney discipline and disbarment is an Article III case or controversy and thus constitutes a judicial decision).

57. 329 U.S. 495, 499 (1947) (noting district court was “sitting en banc”).

58. 533 U.S. 678, 686 (2001) (noting that district court convened as a “panel of five judges”); see also *Mistretta v. United States*, 488 U.S. 361, 363 n.2 (1989) (noting collective decision of district court); *id.* at 370 n.5 (noting argument before the district court “was presented to a panel of sentencing judges”).

59. See *Banks v. United States*, 490 F.3d 1178, 1182 (10th Cir. 2007) (noting en banc procedure and complimenting the district court’s “impressive and convincing Opinion and Order”); *United States v. Zayas-Morales*, 685 F.2d 1272, 1276 (11th Cir. 1982) (“We . . . commend the judges of the Southern District for the innovative manner in which they handled this massive case.”); see also, e.g., *United States v. Ruggiero*, 846 F.2d 117, 122 n.4 (2d Cir.

of district courts to sit en banc.<sup>60</sup> But not much effort has been made to justify the district courts' authority to choose to decide some cases collectively.

When courts have addressed the authority of district courts to issue collective decisions, they have pointed to past practice and to 28 U.S.C. § 132(c).<sup>61</sup> Section 132, which establishes the district courts, provides that:

Except as otherwise provided by law, or rule or order of court, the judicial power of a district court with respect to any action, suit or proceeding may be exercised by a single judge, who may preside alone and hold a regular or special session of court at the same time other sessions are held by other judges.<sup>62</sup>

Courts and commentators have read the subsection's sparse legislative history, which states that the subsection "merely recognizes established practice,"<sup>63</sup> as acknowledging the prior practice of district court en bancs that predated the 1948 adoption of § 132(c).<sup>64</sup> But on closer inspection, the "established practice" referenced in the legislative history refers instead to the ability of judges in a single district to hold concurrent court sessions.<sup>65</sup>

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1988) (documenting and approving of the practice); *In re Asbestos Litigation*, 829 F.2d 1233, 1236 (3d Cir. 1987) (noting that, "[t]o avoid inconsistent rulings, the district court considered the matter in banc"); *In re Disclosure of Testimony Before Grand Jury*, 580 F.2d 281, 284 (8th Cir. 1978) (noting the district court heard and decided the case en banc).

60. When three-judge courts have been uncertain about whether they were properly convened under statutory authority, they have alternatively labeled their decisions as one issued by the district court sitting en banc. *See, e.g.*, *Tape Indus. Ass'n of Am. v. Younger*, 316 F. Supp. 340, 347 (C.D. Cal. 1970); *Swift & Co. v. Wickham*, 230 F. Supp. 398, 410, 410 n.10 (S.D.N.Y. 1964); *Wilson & Co. v. Freeman*, 179 F. Supp. 520, 524 (D. Minn. 1959); *Int'l Longshoremen's & Warehousemen's Union v. Ackerman*, 82 F. Supp. 65, 93-94, 94 n.59 (D. Haw. 1948), *rev'd on other grounds*, 187 F.2d 860 (9th Cir. 1951). Indeed, circuit judges sitting on three-judge courts have, at times, been formally designated as visiting district judges to ensure the validity of the resulting district court en banc decision, should a higher court determine that the statutory three-judge panel was convened in error and thus lacked jurisdiction. *See Tape Indus.*, 316 F. Supp. at 347; *Int'l Longshoremen's*, 82 F. Supp. at 93-94.

61. *See, e.g.*, *Ainsworth v. Vazquez*, 759 F. Supp. 1467, 1469 (E.D. Cal. 1991); *United States v. Anaya*, 509 F. Supp. 289, 293 (S.D. Fla. 1980); *see also Bartels*, *supra* note 15, at 40, 41 n.10.

62. 28 U.S.C. § 132(c).

63. *Id.* § 132(c) note.

64. *See Anaya*, 509 F. Supp. at 294; *see also Ainsworth*, 759 F. Supp. at 1469 n.2 (citing *Anaya*, 509 F. Supp. at 293-94); *Ruggiero*, 846 F.2d at 122 n.4; *Bartels*, *supra* note 15, at 40, 41 n.10.

65. 28 U.S.C. § 132(c) was "derived from" 48 U.S.C. § 641, "which applied only to the Territory of Hawaii." 28 U.S.C. § 132(c) note ("Subsection (c) is derived from section 641 of title 48, U.S.C., 1940 ed., which applied only to the Territory of Hawaii. The revised section, by extending it to all districts, merely recognizes established practice."). 48 U.S.C. § 641 (1946), in turn, corrected a prior statutory anomaly that permitted only one judge at a time to hold court in Hawaii. *Compare* 60 Stat. 838 (1909) (providing that the district court in Hawaii would have two judges but that "[t]he said court while in session shall be presided over by only one of said judges"), *with* 68 Stat. 890 (1925) ("The two judges [of the District of Hawaii] may each hold separately and at the same time a session of the court[.]"); *see also* H.R. REP. NO. 68-595, at 1 (1924) ("This bill is to permit the judges of the United States District Court for the District of Hawaii to hold sessions of the court contemporaneously."). In other words, after Congress allowed judges in the District of Hawaii to sit concurrently, it made explicit

Even if the legislative history is unilluminating, however, § 132(c) is written permissively—it provides that a district court’s judicial power “may” be exercised by a single judge who “may” preside alone, not that it must be.<sup>66</sup> Historically, that matches the common-law practice of the English courts.<sup>67</sup> Procedurally, that matches the flexibility Congress granted the district courts in 28 U.S.C. § 137(a) to divide their judicial business as they see fit.<sup>68</sup> One could read these provisions—§ 132(c) and § 137(a)—as affirmatively permitting district court en bancs. But, at the very least, Congress has not prohibited the practice despite more than a century of its intermittent use.

That lack of prohibition is significant because it leaves space for district courts to exercise, in the words of the Supreme Court, their “inherent authority to manage their dockets and courtrooms with a view toward the efficient and expedient resolution of cases.”<sup>69</sup> A court’s inherent authority is the power it possesses “simply because it is a court”<sup>70</sup>: the power to control the courtroom and give force to its orders. The Supreme Court has recognized the federal courts’ inherent powers to manage bar admission and discipline, punish litigants for contempt, vacate judgments obtained through fraud on the court, bar criminal defendants who disrupt trial, dismiss cases sua sponte for failure to prosecute, impose sanctions,<sup>71</sup> and (albeit in the context of the appellate courts) to sit en banc.<sup>72</sup>

Because such powers are “inherent,” there is no need for an express grant of authority to exercise them.<sup>73</sup> At the same time, because the lower federal courts are created by Congress, Congress can limit the exercise of their inherent power by statute or rule.<sup>74</sup> There is some disagreement about whether there is a core set of inherent powers that Congress cannot override because the powers are essential to the exercise of the courts’ Article III

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that district courts generally may hold multiple concurrent sessions—a clarification that “merely recognize[d] established practice” in the other district courts. 28 U.S.C. § 132(c) note.

66. See 28 U.S.C. § 132(c).

67. See *supra* Section I.A.1.

68. See 28 U.S.C. § 137(a) (“The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court. The chief judge of the district court shall be responsible for the observance of such rules and orders, and shall divide the business and assign the cases so far as such rules and orders do not otherwise prescribe.”).

69. Dietz v. Bouldin, 579 U.S. 40, 47 (2016). On the invocation of inherent power specifically in the context of case management, see generally Jeffrey C. Dobbins, *The Inherent and Supervisory Power*, 54 GA. L. REV. 411 (2020); Daniel J. Meador, *Inherent Judicial Authority in the Conduct of Civil Litigation*, 73 TEX. L. REV. 1805 (1995).

70. Meador, *supra* note 69, at 1805.

71. See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43–46 (1991).

72. See *W. Pac. R.R. Corp. v. W. Pac. R.R. Co.*, 345 U.S. 247, 260 (1953) (describing the authority of appellate courts to sit en banc as “a necessary and useful power”). See generally *Textile Mills Sec. Corp. v. Comm’r*, 314 U.S. 326 (1941) (approving of appellate en bancs in the absence of a congressional statute or federal rule).

73. See Meador, *supra* note 69, at 1805. But see Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 847–49 (2001) (distinguishing “implied indispensable powers” from “beneficial powers” and arguing that the latter—which would include en bancs—should be explicitly authorized by Congress).

74. See *Chambers*, 501 U.S. at 47.

judicial power.<sup>75</sup> But the ability to sit en banc is not in that category of essential powers: whether a district court decision is issued by one judge or by many, after all, does not affect its ability to issue *any* decision. Congress could thus prohibit district court en bancs if it wished.<sup>76</sup>

In light of this conceptual framework, the flexible language of § 132(c) and § 137(a) leaves ample space for district courts to design and elect procedures for deciding cases collectively. Still, that authority is not limitless. The district court must “exercise caution in invoking its inherent power, and it must comply with the mandates of due process.”<sup>77</sup> Or, as the Supreme Court summarized recently: “Because the exercise of an inherent power in the interest of promoting efficiency may risk undermining other vital interests related to the fair administration of justice, a district court’s inherent powers must be exercised with restraint.”<sup>78</sup>

I will return to these admittedly minimal constraints in Part IV. But one aspect of the required restraint in the exercise of inherent authority warrants preliminary consideration: the precedential weight afforded to a district

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75. Compare *Dietz v. Bouldin*, 579 U.S. 40, 45 (2016) (suggesting that an inherent power cannot be contrary to “any express grant of or limitation on the district court’s power contained in a rule or statute”), with *Chambers*, 501 U.S. at 58 (Scalia, J., dissenting) (asserting that “[s]ome elements of that inherent authority are so essential to ‘[t]he judicial Power,’ U.S. Const., Art. III, § 1, that they are indefeasible” (second alteration in original)), and *Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 562–63 (3d Cir. 1985) (en banc) (distinguishing “irreducible inherent authority” that cannot be overridden by Congress from “necessary” inherent authority that can be regulated but not abrogated and “useful” inherent authority that may be exercised “only in the absence of contrary legislative direction”). Academics generally agree that there may be a core of indefeasible inherent authority but that it would be very limited. See Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 816 (2008) (“[T]here is likely some small core of inherent procedural authority that Congress cannot reach.”); Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1686 (2004) (“[T]he federal courts have very little inherent judicial power in the strong sense—power that prevails as against a conflicting legislative prescription,” but “[t]he federal courts do have substantial inherent power in the weak sense—power . . . in the absence of congressional authorization”).

76. Cf. *Textile Mills Sec. Corp.*, 314 U.S. at 333–35 (1941) (approving of appellate court en bancs in the absence of explicit statutory authority but noting that Congress could foreclose the practice through a clear prohibition). Even so, the Supreme Court has stressed that it will not lightly assume that Congress intends to displace the lower courts’ inherent powers. *Chambers*, 501 U.S. at 47 (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982)). Even if a rule or statute speaks to a particular power, such as the power to issue sanctions, the courts may still invoke their inherent authority to fill in the interstices. See *id.* at 50 (approving sanctions beyond those authorized by federal rules or statutes); see also *Link v. Wabash R.R. Co.*, 370 U.S. 626, 634–36 (1962) (approving sua sponte dismissal for lack of prosecution, even though the rule only specified dismissal based on a party’s motion). As Professor Samuel Jordan has pointed out, that acceptance of interstitial power leaves almost limitless space for the invocation of inherent authority, given that courts seem “resistan[t] to finding a conflict between a formal rule and inherent power.” Samuel P. Jordan, *Situating Inherent Power Within a Rules Regime*, 87 DENV. U. L. REV. 311, 321–22 (2010) (expressing concern that the resulting “clear statement regime” leaves “a role for inherent power that is both unpredictable and excessively broad”).

77. *Chambers*, 501 U.S. at 50. For recent arguments that the courts’ use of inherent powers should be restrained, particularly in light of formal procedural alternatives, see Dobbins, *supra* note 69; Jordan, *supra* note 76.

78. *Dietz*, 579 U.S. at 48.

court's collective decision. The modern view is that district court decisions do not have any stare decisis effect beyond the law-of-the-case doctrine.<sup>79</sup> It would thus be a significant—and problematic—assertion of inherent power for a district court to declare that a decision is binding in future cases because it was issued by multiple judges instead of just one. Put another way, every decision issued by a district judge is an opinion of the district court; how many judges participated in its formulation does not alter the power of the institution for which they speak. Voluntary collective district court adjudication should thus carry no more precedential weight than an individual district court opinion, which is to say, it should carry none.<sup>80</sup>

There are some early examples of collective district court decisions, however, in which judges seemed to assume that the decision had binding effect.<sup>81</sup> It might be that these judges misunderstood the precedential force of en banc decisions, or it might be that they were applying a particularly strong form of intra-court comity.<sup>82</sup> It is also possible that the modern position that district court decisions have no stare decisis effect evolved over the first half of the twentieth century.<sup>83</sup> Regardless, the better understanding

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79. See, e.g., GARNER ET AL., *supra* note 15, at 441 (describing law-of-the-case doctrine); *id.* at 255 (“[T]rial courts aren’t bound at all by other trial-court decisions, or even their own decisions, though trial judges may follow them at their discretion.”); *id.* at 515 (“The stare decisis effect of federal district-court decisions on other trial courts is nil.”); see also *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) (noting in dicta that district courts are not bound by district court precedent).

80. Judge Bartels similarly reasoned that because district court decisions are not binding, en banc decisions cannot have broad stare decisis effect, but he also suggested that the en banc decision would bind all judges participating in the decision, even if they dissented. Bartels, *supra* note 15, at 42; see also GARNER ET AL., *supra* note 15, at 515 (suggesting in passing that, “in those rare instances when the judges of a federal district court sit en banc, the resulting opinion presumably does bind those judges, even dissenters”). The better view is that the decision creates law-of-the-case for the case decided and encourages the participating judges to commit to similar outcomes in future cases.

81. For example, Judge Oliver Booth Dickinson specially concurred in *In re Clover Drugs, Inc.*, 21 F. Supp. 107 (E.D. Pa. 1937), “solely on the ground that I think we are bound to follow the ruling of this court” in *In re Stein*, 17 F. Supp. 587 (E.D. Pa. 1936), a prior “in banc” decision in which Judge Dickinson had dissented. See *In re Clover Drugs, Inc.*, 21 F. Supp. at 109 (Dickinson, J., concurring); see also *Mayer v. Marcus Mayer Co.*, 25 F. Supp. 58, 61 (E.D. Pa. 1938) (“The ruling made in [*In re Stein*] is authoritative and controls this Court, whatever may be the individual opinion of the sitting Judge.”). For other potential examples, see *United States v. Ortega Lopez*, 684 F. Supp. 1506, 1515 (C.D. Cal. 1988) (asserting that “[t]his decision is binding upon the members of this Court in all relevant cases”), *abrogated by United States v. Brady*, 895 F.2d 538 (9th Cir. 1990); *Travelers Ins. Co. v. Cook*, 172 F. Supp. 710, 711 (N.D. Tex. 1959) (asserting that the decision, joined by the district’s other judges, “is governed by our opinion” in *National Surety Corp. v. Chamberlain*, 171 F. Supp. 591 (N.D. Tex. 1959), which had also been adopted by the full court as “an en banc opinion,” *id.* at 600). The Third Circuit has similarly asserted that “[e]very district court has the power to review in banc a decision rendered by one of its individual members and upon such reconsideration by the full bench to overrule the prior decision of the single judge,” but the cases it cited did not involve reconsideration of prior decisions. *TCF Film Corp. v. Gourley*, 240 F.2d 711, 714, 714 n.6 (3d Cir. 1957) (citing *In re Stein*, as well as the *Smith* habeas cases discussed in Part II.B, below).

82. For further discussion of intra-court comity, see *infra* Part III.B.1.

83. See *Mead*, *supra* note 15, at 800–02.



today is that collective decisions by district courts, like all other district court decisions, are not precedential.

Even without binding effect, however, district court en bancs can exert significant limiting effects on future cases. Collective decisions serve as a precommitment device, in that they make it more costly (both internally and externally) for judges to issue conflicting decisions later. Even without the professional pressure to toe the line, the very process of deliberation with fellow judges can produce opinion convergence,<sup>84</sup> such that subsequent cases within the district may become more consistent without a conscious effort at compliance. And sometimes judges and litigants will benefit just from the existence of coordination, which will likewise promote continued adherence.

In sum, district courts have the authority to convene en banc proceedings, and even though the resulting decisions do not have stare decisis effect, they can exert influence beyond the case decided. They should thus be undertaken cautiously, with regard for due process and accountability concerns. The Article returns to such prescriptive considerations in Part IV, after surveying and evaluating the historical practice of voluntary collective adjudication in district courts.

### C. Identifying District Court En Bancs

Having distinguished other forms of collective decision-making and having established the authority of district courts to convene en banc, we can now turn to a finer-grained definition of the Article's focus: voluntary collective district court adjudication. This section describes procedural variations in voluntary collective adjudication, notes some exclusions to the definition, and describes the methodology used to identify examples.

#### 1. Forms of Voluntary Collective Adjudication

A challenge in studying the use of en banc proceedings by district courts is that the courts have used the "en banc" label flexibly, encompassing a broad range of procedural practices. Another challenge is that the lack of written rules has led to a high degree of variability in the precise procedures used. The Article thus uses a broad definition of voluntary collective district court adjudication to sweep in all possible examples of district court en bancs. All the decisions listed in the appendix involve—as far as can be determined from the opinion or its procedural history—multiple *district* judges *voluntarily* choosing to *collectively adjudicate* a dispute. Note that the issues addressed in these decisions are typically discrete legal questions, although they may involve significant evidentiary hearings. Among the gathered

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84. See generally Shari Seidman Diamond & Hans Zeisel, *Sentencing Councils: A Study of Sentence Disparity and Its Reduction*, 43 U. CHI. L. REV. 109 (1975) (documenting a modest reduction in sentencing disparities when district judges gathered to discuss specific cases before sentencing); Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making*, 20 J.L. ECON. & ORG. 299, 324–26 (2004) (interpreting findings that composition of appellate panels affects outcomes as indicating that judges alter voting preferences based on group participation).

cases, relevant points of distinction include whether the initially assigned judge retains control of the case, the number of judges involved, and the degree of deliberation among those judges.

*Full en banc decisions* are those that represent the considered views of all or almost all of the district's judges, typically following a full bench hearing.<sup>85</sup> These proceedings look much like their appellate counterparts. Full en banc decisions comprise the majority of the cases included in the appendix.

*Panel decisions*, which have been relatively rare, involve an ad hoc panel of judges resolving a dispute on behalf of the court as a whole.<sup>86</sup> For a period in the 1970s and 1980s, for example, the chief judge of the Eastern District of Pennsylvania would reassign cases to three- or four-judge panels with the goal of promoting uniform district practice.<sup>87</sup> In other districts, the full court has collectively decided to delegate its authority to a panel of judges for specific cases.<sup>88</sup> And sometimes, one or two judges are asked to assist the originally assigned judge with a particularly high profile or difficult case.<sup>89</sup> The uniting feature of these panel decisions is that judges who were not initially assigned to a case are asked to assist on behalf of the district court as a whole.

*Coordinated decisions* involve judges jointly determining overlapping issues in cases over which they otherwise retain separate control. Typically, the coordinating judges share briefing on the overlapping issue and hear argument together.<sup>90</sup> This category also includes cases involving judges

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85. There are idiosyncratic reasons why one or more judges might be absent from a full en banc decision, from illness to scheduling conflict. Other times, the "missing" judges have been recused or are assigned to multiple districts. *See, e.g., In re Starr*, 986 F. Supp. 1159 (E.D. Ark. 1997) (noting recusals). And sometimes, a dispute will be of a particularly local nature, such that only the judges of one division will participate. *See generally* *United States v. Jones*, 36 F. Supp. 2d 304 (E.D. Va. 1999) (involving all the judges of the Richmond division addressing a law enforcement program in the city of Richmond). Because the intent of these decisions is still to speak for the court as a whole, I would categorize them as full en bancs.

86. One reason this form of collective decision-making is rare is because it requires a district to have a sizeable number of judges. For many of the examples in the appendix, especially before 1970, there simply were not enough judges in any given district to justify delegation to a panel. *See* Appendix (listing number of judgeships per district).

87. *See, e.g.,* *Lovallo v. Pittsburgh Corning Corp.*, 99 F.R.D. 627, 627 (E.D. Pa. 1983); *Kohr v. Raybestos-Manhattan, Inc.*, 522 F. Supp. 1070, 1072 (E.D. Pa. 1981); *Lucas v. "Brinknes" Schiffahrts Ges. Franz Lange G.m.B.H. & Co.*, 379 F. Supp. 759, 760 n.\* (E.D. Pa. 1974).

88. *See generally In re Smith*, 100 F. Supp. 2d 412 (N.D. Tex. 2000) (delegating a question of reciprocal attorney discipline to a three-judge panel).

89. *See, e.g., Ellis v. Mayor & City Council of Balt.*, 234 F. Supp. 945, 946 (D. Md. 1964) (given that "the case involved a question of great local interest, . . . additional judges of this Court were invited to hear and to participate in its decision"), *aff'd*, 352 F.2d 123, 124 n.1 (4th Cir. 1965) (noting in affirming district court decision that "[b]ecause of the importance of the case the District Judge to whom it was assigned invited two of his colleagues on the court to sit with him," even though "[a] statutory three-judge court was not required").

90. *See, e.g., Movement Against Destruction v. Volpe*, 361 F. Supp. 1360, 1367 (D. Md. 1973) (noting that the two authoring judges consolidated the cases "for the sole purpose of the hearing and decision of the class issues"), *aff'd*, 500 F.2d 29, 30 (4th Cir. 1974) (per curiam)

from multiple districts because judges cannot cede or share authority across district lines. The federal judges in Alabama, for example, coordinated across the three federal districts in Alabama in 1963 to enjoin George Wallace and others from continuing to violate desegregation orders<sup>91</sup> and again in 1971 in deciding to dismiss similar environmental lawsuits filed by the same plaintiff in all three districts.<sup>92</sup>

*Adopted decisions* are those in which one judge hears argument and authors an opinion but notes that other judges join in adopting the resulting decision.<sup>93</sup> These decisions reflect agreement among the judges as to how a legal question should be addressed but not necessarily on the specifics of the particular case.<sup>94</sup> They thus differ from full en banc decisions in that they are primarily the work product of a single judge and typically involve less deliberation in the crafting of the opinion.

The lines between these four categories can be blurry, a problem compounded by the lack of information in most of these opinions regarding the procedure used. Nonetheless, the procedural distinctions across these four subtypes provides a useful contrast for evaluating when collective adjudication is beneficial and how it should be carried out going forward.

## 2. Exclusions

While my definition of voluntary collective district court adjudication is broad, it still does not include every example of voluntary collective adjudication at the trial court level. For example, I have excluded all cases before 1912 in order to ensure I have not accidentally included decisions issued by the old circuit courts. I have also omitted examples of collective

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(praising efforts of the two judges while noting the cases remained on the court calendar for separate adjudication).

91. See generally *United States v. Wallace*, 222 F. Supp. 485 (M.D. Ala. 1963).

92. See *Bass Angler Sportsman Soc’y v. U.S. Steel Corp.*, 324 F. Supp. 412, 414 (S.D. Ala. 1971), *aff’d sub nom.*, *Bass Anglers Sportsman Soc’y of Am. v. Koppers Co.*, 447 F.2d 1304 (5th Cir. 1971). For other examples of cross-district decisions, see *In re Constitutionality of Frazier-Lemke Act*, 9 F. Supp. 575, 575 (E.D. Ark. 1934); *Birmingham Tr. & Sav. Co. v. Atlanta, B. & A. Ry. Co.*, 271 F. 743 (N.D. Ga. 1921); *Hannah & Hogg v. Clyne*, 263 F. 599 (N.D. Ill. 1919). The *Birmingham Trust* case involved a bankruptcy receivership that stretched across multiple federal districts. See *A.B. & A. May Be Sold to Frisco*, MACON DAILY TELEGRAPH, Feb. 27, 1921, at 1, 4; *Sibley Rejects Union Petition*, MACON DAILY TELEGRAPH, Mar. 25, 1921, at 1, 9. In *Hannah & Hogg*, the plaintiff (a major distiller) filed similar cases in both the northern and southern districts challenging Prohibition on due process grounds. See *May Lift Dry Ban Here: Judges to Fix Liquor’s Fate by Saturday*, CHI. DAILY TRIB., Nov. 13, 1919, at 1–2.

93. See, e.g., *Slomberg v. Pennabaker*, 42 F.R.D. 8, 12 (M.D. Pa. 1967) (noting that, “[a]fter conference, the judges of the district are in agreement with the views expressed herein”). See generally *Bisserier v. Manning*, 207 F. Supp. 476 (D.N.J. 1962).

94. See, e.g., *United States v. Brittan*, 687 F. Supp. 1329, 1331 (E.D. Ark. 1988) (noting most of the other judges agree with the holding, “although they may not individually agree with the undersigned as to all of the different grounds set forth in the following opinion”), *rev’d*, 872 F.2d 827 (8th Cir. 1989); see also Telephone Interview with U.S. District Judge (June 18, 2020) (distinguishing between adopted decisions involving “back and forth” discussion and editing and decisions in which judges simply agreed on a conclusion of law without necessarily agreeing as to its application in the particular case).

decision-making by non–Article III judges, including territorial courts, agency adjudicators,<sup>95</sup> magistrate judges,<sup>96</sup> and bankruptcy judges.<sup>97</sup> And even among Article III judges, I have focused just on the geographic districts, even though the Court of International Trade and the U.S. Foreign Intelligence Surveillance Court<sup>98</sup> (FISC) are statutorily authorized (but not necessarily required to) hear some cases en banc or as panels.<sup>99</sup> Further, because I am interested in collective decision-making among district judges, I have excluded examples of individual federal district judges coordinating with state court judges in managing complex litigation.<sup>100</sup>

I have also excluded some cases that others have categorized as examples of district court en bancs, either because there is no available opinion<sup>101</sup> or

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95. Cf. Michael Sant’Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action*, 126 YALE L.J. 1634 (2017) (discussing ad hoc procedure used by agencies to aggregate claims).

96. See *In re U.S. for an Order Directing a Provider of Elec. Comm’n Serv. to Disclose Records of the Gov’t*, 534 F. Supp. 2d 585, 616 (W.D. Pa. 2008), *aff’d*, No. 07-524M, 2008 WL 4191511 (W.D. Pa. Sept. 10, 2008), and *vacated sub nom.* 620 F.3d 304 (3d Cir. 2010) (collectively deciding on “a matter of first impression in this District and Circuit on issues concerning the statutory and Constitutional regulation of electronic surveillance which do not hinge on the particulars of the underlying investigation”).

97. There are numerous examples of bankruptcy judges choosing to decide cases collectively. See, e.g., *In re Scott*, 424 B.R. 315, 320 n.3 (Bankr. S.D. Ohio 2010) (“The Court derives its authority to issue this [collective] opinion from 28 U.S.C. § 132(c) . . . .”); *In re Hunter*, 380 B.R. 753, 758 n.5 (Bankr. S.D. Ohio 2008) (invoking 28 U.S.C. § 132(c) as authorizing bankruptcy court to consolidate cases and convene a three-judge panel to hear arguments on related issues); *In re Iron-Oak Supply Corp.*, 162 B.R. 301, 304–05 (Bankr. E.D. Cal. 1993) (discussing authority to do so and collecting additional examples); see also U.S. BANKR. CT. W.D. OKLA. R. 7052-1 (“Upon request of a judge of the Court, or upon motion, any matter may be heard en banc if all judges of the Court concur.”).

98. The U.S. Foreign Intelligence Surveillance Court was established by the Foreign Intelligence Surveillance Act of 1978 (FISA), Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended in scattered sections of 18 and 50 U.S.C.).

99. See 28 U.S.C. § 255(a) (“Upon application of any party to a civil action, or upon his own initiative, the chief judge of the Court of International Trade shall designate any three judges of the court to hear and determine any civil action which the chief judge finds: (1) raises an issue of the constitutionality of an Act of Congress, a proclamation of the President or an Executive order; or (2) has broad or significant implications in the administration or interpretation of the customs laws.”); 50 U.S.C. § 1803(a)(2) (authorizing the FISC to hold “a hearing or rehearing, en banc” when a majority of the court’s judges determine that “en banc consideration is necessary to secure or maintain uniformity of the court’s decisions” or “the proceeding involves a question of exceptional importance”). These FISC en banc proceedings are separate from and preliminary to the court of review also established by the FISA. See *id.* § 1803(b). I am grateful to Steve Vladeck for bringing FISC en bancs to my attention.

100. See generally William W. Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689 (1992) (documenting the phenomenon). I have, however, included a few cases that involved coordination with state court judges, as well as other district judges—in particular, cases involving Judge Jack B. Weinstein in the Eastern District of New York, district judges from the Southern District of New York, and New York state court judges. See generally *In re Breast Implant Cases*, 942 F. Supp. 958 (E.D.N.Y. & S.D.N.Y. 1996); *In re Joint E. & S. Dist. Asbestos Litig.*, 142 F.R.D. 60 (E.D.N.Y. & S.D.N.Y. 1992).

101. Judge Bartels, for example, included nine en banc panels that did not result in a written opinion. Bartels, *supra* note 15, at 40.

because the opinion did not adjudicate a dispute.<sup>102</sup> Finally, I have excluded decisions by mandatory three-judge courts in which the judges, concerned that their statutory authority might not have been properly invoked, have alternatively characterized their decision as that of an en banc district court.<sup>103</sup>

### 3. Methodology

Prior acknowledgments of district court en bancs collectively identified fewer than fifty examples (some of which I have excluded for the reasons explained above).<sup>104</sup> To find additional examples, I leveraged field and segment restrictions within Westlaw and Lexis. In particular, I searched the “Panel” (PA) field within Westlaw’s district court database for the word “judges,” which returned cases that stated the case was “before” multiple judges; by excluding “circuit” from the PA field, I was able to exclude almost all statutorily mandated three-judge courts.<sup>105</sup> Lexis uses a “judges” segment that can be searched similarly.<sup>106</sup> Other searches, which yielded fewer positive results, are noted in the margin.<sup>107</sup>

Although I was able to identify nearly one hundred additional examples through such searches, these results are assuredly underinclusive. Field coding within the databases is inconsistent and imperfect. Such searches are also unlikely to identify collective decisions that are unpublished: not only are unpublished decisions typically not coded, but the online databases do not include most unpublished decisions prior to the 1990s.<sup>108</sup> Further, given my primary reliance on the PA field to locate additional examples, I expect that my results significantly undercount adopted decisions, which typically

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102. For an example of such a non-adjudicatory decision, see General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education, 45 F.R.D. 133 (W.D. Mo. 1968).

103. See *supra* note 60 (collecting cases). I have, however, included a decision in which two district judges from a statutory three-judge panel voluntarily continued to work together to resolve follow-on litigation. See *Arthur v. Schoonfield*, 315 F. Supp. 548, 549, 552 n.3 (D. Md. 1970).

104. See Bartels, *supra* note 15, at 40 (noting forty-seven en banc panels, of which I have excluded at least ten); WRIGHT & MILLER, *supra* note 15, § 3505 nn.10–12 (noting twelve examples that largely overlap with Bartels’s list).

105. The precise search was “PA(judges % circuit).” I also searched “PA(“en banc”)” and variants thereof.

106. A research assistant searched “judges(“Judges” and not “Circuit Judge” and not “Circuit Judges” and not “Court of Appeal” and not “Court of Appeals” and not “Magistrate”), with some additional restrictions, and identified some additional cases not discovered through the Westlaw search.

107. Additional searches within Westlaw included SY(“en banc” “in banc”); SY,DI(“en banc” /5 district); and PR(“per curium” “en banc” (panel /s district)). The DIS and CON fields (for dissents and concurrences) proved to be too erratically coded within the district court database to be helpful.

108. District court en bancs are likely to be published, given the amount of effort put into them. Nonetheless, I have found a few unpublished collective decisions. See *In re Engle Cases*, No. 309-cv-10000, 2014 WL 7010031 (M.D. Fla. Dec. 11, 2014); *In re All Asbestos Cases Pending in the U.S. Dist. Ct. for the Dist. of Md.*, No. BML-1, 1983 U.S. Dist. LEXIS 10719 (D. Md. Dec. 16, 1983).

appear under the name of a single judge but indicate the support of additional judges within the text of the opinion itself.<sup>109</sup> Thus, while the results are sufficient to establish the continuity and breadth of the phenomenon of district court en bancs, they cannot support strong inferences regarding the distribution of collective proceedings, such as the relative frequency of collective proceedings during different time periods or the absence of collective proceedings in particular districts.

An additional caveat is in order. Almost every example of a district court en banc discussed below would warrant its own historical account. I have supplemented, where possible, with district court histories, concurrent news coverage, and (for more recent cases) district judge interviews. But I have based my inclusion of cases primarily on the decisions themselves, which leaves open the possibility that local rules or other requirements were operating in the background. Some gaps in the understanding of individual trees, however, should not undermine the picture presented by the entire forest.

## II. A CENTURY OF DISTRICT COURT EN BANCS

“The history of the federal courts is woven into the history of the times.”<sup>110</sup> This part draws out the connection between district court en bancs and moments of pressure and change for the federal courts. The coverage here is purposefully selective; additional cases are discussed in the functional account of Part III, and a full list of cases is included in the appendix.

### A. *Growing Courts, Growing Dockets (1912–1940)*

When the old circuit courts were abolished in 1912, the federal judiciary was still quite small. As of 1903, only the Southern District of New York and the District of Minnesota had two judges; in other states, one judge would be assigned to multiple districts.<sup>111</sup> Visiting judgeships were used to fill critical gaps.<sup>112</sup> To the extent that judges are likely to follow their own decisions, then, there was a de facto “law of the district” at the time our story begins. But a surge in district court workload created first by Prohibition prosecutions and then by bankruptcy cases led Congress to expand significantly the number of district judges from 140 in 1920 to 250 by

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109. See, e.g., *Hamby v. Zayre Corp.*, 544 F. Supp. 176, 179 (N.D. Ala. 1982) (noting that “[t]he undersigned hereby note our concurrence in the foregoing opinion”); *Pedicord v. Swenson*, 304 F. Supp. 393, 401 (W.D. Mo. 1969) (noting that “this Memorandum Opinion and Order was circulated among all the active judges of this Court for their views and suggestions” and that the judges “have authorized [the authoring judge] to state their concurrence with the standards and principles of law stated”).

110. FRANKFURTER & LANDIS, *supra* note 16, at 59.

111. See ERWIN C. SURRENCY, *HISTORY OF THE FEDERAL COURTS* 394–98 (2d ed. 2002).

112. See *id.* at 409. This created an occasional need for the visiting judge to coordinate with the local judge. For example, in *Dill v. Supreme Lodge*, 226 F. 807 (E.D. Mo. 1915), a visiting judge issued a bankruptcy order that would require further judicial supervision; perhaps because of this practical need, the opinion concluded by noting the local judge’s explicit approval of the decision. See generally *id.*

1940.<sup>113</sup> Perhaps district court en bancs during this period reflected an effort to maintain district-level stare decisis as districts grew from one to two or more judgeships.<sup>114</sup>

It is also notable, however, that most of the district court en bancs from this period pertained to bankruptcy or criminal matters, the two topics dominating the district court dockets at the time, as well as the public's attention. The Volstead Act of 1919,<sup>115</sup> which empowered the federal government to enforce Prohibition,<sup>116</sup> significantly increased the federal criminal docket; by 1929, "83 percent of federal criminal proceedings involved Volstead Act violations," which numbered 71,298 cases that year alone.<sup>117</sup> Some district courts used en bancs to address a range of novel criminal procedure questions.<sup>118</sup> By the time Prohibition ended in 1933, the number of bankruptcy petitions had already exploded. During the 1930s, the federal courts discharged or concluded on average about 60,000 bankruptcy petitions per year.<sup>119</sup> The Eastern District of Pennsylvania repeatedly used en banc decisions for bankruptcy cases that implicated uniformity or were of particular public importance.<sup>120</sup> For example, the court issued two "full bench" opinions regarding the bankruptcy of the Philadelphia Rapid Transit Company, which involved somewhere between \$30 million and \$87 million worth of claims.<sup>121</sup>

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113. See HOFFER ET AL., *supra* note 36, at 259–63, 284–85.

114. For information about the tenure of individual judges and the number of judgeships assigned to specific districts over time, see the Federal Judicial Center's highly informative online database. See *Courts, Caseloads, and Jurisdiction*, FED. JUD. CTR., <https://www.fjc.gov/history/courts/u.s.-district-courts-and-federal-judiciary> [<https://perma.cc/YU9Y-Y35W>] (last visited Feb. 2, 2022).

115. National Prohibition Act, ch. 85, 41 Stat. 305 (1919).

116. See *id.*

117. HOFFER ET AL., *supra* note 36, at 259.

118. See generally *United States v. Delaney*, 8 F. Supp. 224 (D.N.J. 1934) (addressing bail pending appeal); *United States v. Wingert*, 55 F.2d 960 (E.D. Pa. 1932) (weighing district judges' power to decline to issue bench warrants after grand jury indictments); *United States v. Reilly*, 30 F.2d 866 (E.D. Pa. 1929) (considering grounds for quashing of indictment); *United States v. Napela*, 28 F.2d 898 (N.D.N.Y. 1928) (reviewing search warrants in Volstead Act prosecution); *United States v. Am. Brewing Co.*, 296 F. 772 (E.D. Pa. 1924) (same); *United States v. Innelli*, 286 F. 731 (E.D. Pa. 1923) (same); see also *United States v. Grossman*, 1 F.2d 941 (N.D. Ill. 1924) (rejecting presidential pardon for civil contempt in Volstead Act case). Beyond the criminal context, the judges of the Northern and Southern Districts of Illinois coordinated their resolution of due process challenges to Prohibition brought in parallel high-profile suits. See *Hannah & Hogg v. Clyne*, 263 F. 599 (N.D. Ill. 1919); *May Lift Dry Ban Here: Judges to Fix Liquor's Fate by Saturday*, *supra* note 92, at 1–2.

119. HOFFER ET AL., *supra* note 36, at 285.

120. See *In re Jay & Dee Store Co.*, 37 F. Supp. 989 (E.D. Pa. 1941); *In re Clover Drugs, Inc.*, 21 F. Supp. 107 (E.D. Pa. 1937); *In re Collins Hosiery Mills, Inc.*, 18 F. Supp. 89 (E.D. Pa. 1937); *In re Stein*, 17 F. Supp. 587 (E.D. Pa. 1936). For a bankruptcy example from another district, see *In re Anderson*, 22 F. Supp. 928, 929 (D.N.D. 1938) (visiting judges from the District of Minnesota noting that a similar question had been raised in more than 130 bankruptcy petitions).

121. See *In re Phila. Rapid Transit Co.*, 11 F. Supp. 865, 866 (E.D. Pa. 1935); *In re Phila. Rapid Transit Co.*, 8 F. Supp. 51, 52 (E.D. Pa. 1934) ("The instant case . . . affects interests of such importance that it was directed to be submitted to the full bench rather than to a single

Other district judges sat together during the 1930s to hear cases challenging the constitutionality of U.S. statutes, particularly Congress's bankruptcy legislation.<sup>122</sup> Those decisions were part of the broader trend of federal courts blocking New Deal legislation that led Congress in 1937 to extend three-judge court requirements to suits seeking to enjoin federal statutes as unconstitutional.<sup>123</sup>

*B. Judicial Authority Amidst "Our Federalism" (1940–1970)*

After the war, district courts used en bancs to police jurisdictional limits between states and the federal government and between the courts and Congress, particularly in regard to high salience issues like labor unrest and race relations.<sup>124</sup> To take just one example, the Northern District of California issued a collective decision dismissing for incomplete diversity a complaint challenging segregation and discrimination within a labor union.<sup>125</sup> The broader social stakes of the case, however, were not lost on the judges, one of whom wrote separately to stress that jurisdictional limits on federal courts were paramount "[n]o matter how great the appeal of an issue to the conscience of the Court."<sup>126</sup> The controversial Portal-to-Portal Act of 1947<sup>127</sup> also generated district court en bancs.<sup>128</sup> In a decision

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judge"), *aff'd*, *Wilson v. Phila. Rapid Transit Co.*, 73 F.2d 1022 (3d Cir. 1934) (per curiam). Notably, Judge George A. Welsh dissented in both decisions even though it appears he was the assigned judge and had initiated the en banc proceeding. *In re Phila. Rapid Transit Co.*, 8 F. Supp. at 55 (Welsh, J., dissenting) ("But I wish to thank them for their assistance and cooperation in a case of such magnitude. I felt that the cause was of such a nature that instead of being passed upon by a single judge, it warranted the attention and consideration of the entire court."). This pattern was to repeat itself in the *Smith* habeas cases, discussed below in Part II.B.

122. See *In re Schoenleber*, 13 F. Supp. 375 (D. Neb. 1936) (finding farm bankruptcy statute unconstitutional); *In re Young*, 12 F. Supp. 30 (S.D. Ill. 1935) (same); *Gold Medal Foods, Inc. v. Landy*, 11 F. Supp. 65 (D. Minn. 1935) (enjoining collection of federal taxes); *In re Constitutionality of Frazier-Lemke Act*, 9 F. Supp. 575 (E.D. Ark. 1934) (demonstrating agreement between sole judges of Eastern and Western Districts of Arkansas that farm bankruptcy statute was constitutional).

123. See *supra* Part I.A.2.

124. See, e.g., *Linde Air Prods. Co. v. Johnson*, 77 F. Supp. 656, 659 (D. Minn. 1948) (enjoining state labor board from intervening in a unionization dispute); *Yoerg Brewing Co. v. Brennan*, 59 F. Supp. 625, 633 (D. Minn. 1945) (invoking Norris-LaGuardia Act in refusing to enjoin strike related to inter-union dispute). For examples involving labor unrest in the interwar period, see *The Wind*, 22 F. Supp. 883, 885 (E.D. Pa. 1938) (declining to intervene in an inter-union dispute involving Norwegian ship in light of treaty with Norway); *Birmingham Trust & Sav. Co. v. Atlanta, B. & A. Ry. Co.*, 271 F. 743, 745–46 (N.D. Ga. 1921) (allowing bankruptcy receiver of major regional railroad to reduce wages set by the National Labor Board and replace striking workers).

125. See *James v. Int'l Brotherhood of Boiler Makers, Iron Ship Builders and Helpers of Am.*, 54 F. Supp. 94, 94–95 (N.D. Cal. 1944). Complete diversity was lacking because the union, as an unincorporated association, had the same citizenship as every one of its members. *Id.* at 95 (Goodman, J., concurring).

126. *Id.*

127. Pub. L. No. 80-49, 61 Stat. 84 (codified as amended in scattered sections of 29 U.S.C.).

128. The Portal-to-Portal Act walked back the Supreme Court's interpretation of the Fair Labor Standards Act that had required compensation for preliminary work activities; it also purported to strip all courts in the country of jurisdiction over pending cases that had sought



upholding the Act's constitutionality, including its jurisdiction-stripping provision, all five judges of the Eastern District of Michigan emphasized that the "[p]otential liability under those claims amounted to billions of dollars, affecting not only the parties directly involved but seemingly threatening the entire economic and financial fabric of our industrial life and government"—particularly in Michigan, where automobile manufacturers stood to benefit from the Act's legislative fix.<sup>129</sup>

Another growing point of tension between federal courts and state governments was the appropriate scope of postconviction review for state prisoners. Prior to the 1960s, habeas corpus petitions brought by state prisoners were rare, and their successful prosecution even rarer.<sup>130</sup> Yet, as the Supreme Court began articulating greater constitutional protections for criminal defendants in light of (often racialized) miscarriages of justice in state courts, pressure mounted on the federal courts to enforce the constitutional rights of state prisoners. A turning point came with the Court's 1953 decision in *Brown v. Allen*,<sup>131</sup> which "clearly ruled that a federal court should routinely relitigate the merits of federal constitutional issues that the state court had decided adversely to the state prisoner."<sup>132</sup> A companion case to *Brown v. Allen*—*United States ex rel. Smith v. Baldi*<sup>133</sup>—began as a pair of contentious en banc decisions in the Eastern District of Pennsylvania.

James Smith was a 23-year-old Black man with schizophrenia who was awaiting execution by Pennsylvania for a murder he had admitted to committing.<sup>134</sup> His habeas petition was first raised to Judge Welsh of the Eastern District by a Friday night telephone call; after an expedited hearing the next day, Judge Welsh formally announced from the bench that he would grant the writ and stay the execution pending resolution on the merits.<sup>135</sup> He then asked "[his] brother judges to sit with [him]" to consider those merits at a subsequent hearing in order "to get the benefit of the collective wisdom of [his] associates rather than to have the case decided on the opinion of a single judge."<sup>136</sup> Instead of reaching the merits, however, his four brethren dismissed the petition because the state had transferred Smith to a different prison during the course of Judge Welsh's Saturday hearing, such that Smith was no longer within the Eastern District at the time Judge Welsh made his

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back wages based on the Court's holdings. See FALLON ET AL., *supra* note 31, at 326–27. The Act affected nearly two thousand lawsuits that were seeking more than \$5 billion in damages. *Id.* at 326.

129. *Bateman v. Ford Motor Co.*, 76 F. Supp. 178, 180–81 (E.D. Mich. 1948), *aff'd*, *Fisch v. Gen. Motors Co.*, 169 F.2d 266 (6th Cir. 1948); see also *Alameda v. Paraffine Cos.*, 75 F. Supp. 282 (N.D. Cal. 1947) (upholding the Act's constitutionality).

130. See, e.g., John M. Oliver, *Postconviction Applications Viewed by Federal Judge—Revisited*, 45 F.R.D. 199, 204, 204 n.4 (1968–1969).

131. 344 U.S. 443 (1953).

132. FALLON ET AL., *supra* note 31, at 1274.

133. 344 U.S. 561 (1953).

134. See *United States ex rel. Smith v. Warden of Phila. Cnty. Prison*, 87 F. Supp. 339 (E.D. Pa. 1949), *aff'd*, 181 F.2d 847 (3d Cir. 1950).

135. See *Smith*, 87 F. Supp. at 340.

136. *Id.* at 346.

formal announcement from the bench.<sup>137</sup> The majority was also concerned that Smith had not yet exhausted his state remedies.<sup>138</sup>

Smith came back to the district court in 1951, after being denied relief by the Pennsylvania Supreme Court.<sup>139</sup> Judge Welsh again stayed the execution and set the case for consideration on the merits before another en banc court.<sup>140</sup> A four-judge majority denied the habeas petition, with Judge Bard emphasizing the impropriety of “subject[ing] the judicial acts of the highest state court to review by the lowest federal court in routine cases.”<sup>141</sup> Judge Welsh, joined by two other judges, dissented on the grounds that someone—either the Pennsylvania Supreme Court or the district court—should have held an evidentiary hearing on the question of Smith’s mental state.<sup>142</sup> The Third Circuit affirmed Judge Bard’s decision but split 4–3 with a lengthy dissent;<sup>143</sup> the Supreme Court similarly split 6–3 with a dissent written by Justice Felix Frankfurter.<sup>144</sup>

Ten years after *Brown v. Allen*, a trilogy of Supreme Court cases further increased the scope of collateral review of state criminal cases,<sup>145</sup> exponentially increasing the number of state prisoner habeas petitions filed in federal courts.<sup>146</sup> The judges of the Western District of Missouri handled this increase by issuing an en banc opinion that set out “in some detail . . . the principles that control the exercise of our federal habeas corpus

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137. *Id.* at 341.

138. *Id.* Judge Guy K. Bard wrote separately to note that he would have dismissed the writ regardless because, “[w]ith such a record before them[,] courts also have a duty to protect society and to refrain from doing anything that [w]ill interfere with the just punishment of a brutal murderer.” *Id.* at 344 (Bard, J., concurring). Judge Welsh wrote separately as well; though his opinion was not labeled a dissent, he disagreed on the jurisdictional question and also disagreed with Judge Bard on the merits. *Id.* at 349–51 (“I feel that even to permit a good-faith removal to set up a geographic bar to jurisdiction would establish a precedent whereby at some future time a removal not in good faith, but a removal motivated by religious, racial, class or political hatred could destroy the very living soul of the Writ.”).

139. *United States ex rel. Smith v. Baldi*, 96 F. Supp. 100 (E.D. Pa.), *aff’d*, 192 F.2d 540 (3d Cir. 1951), *aff’d*, 344 U.S. 561 (1953).

140. *See id.* at 101.

141. *Id.* at 103.

142. *See id.* at 105–06 (Welsh, J., Ganey, J., and Clary, J., dissenting).

143. *See United States ex rel. Smith v. Baldi*, 192 F.2d 540 (3d Cir. 1951).

144. *See United States ex rel. Smith v. Baldi*, 344 U.S. 561 (1953). Concurrently, the two judges of the Middle District of Pennsylvania were collaborating on another difficult habeas petition. *See United States ex rel. Darcy v. Handy*, 97 F. Supp. 930 (M.D. Pa. 1951), *rev’d*, 203 F.2d 407 (3d Cir. 1953) (per curiam). On remand in that case, Judge John W. Murphy held a two-week evidentiary hearing before denying the habeas petition again, with Judge Albert Leisenring Watson noting his agreement at the end of the opinion. *United States ex rel. Darcy v. Handy*, 130 F. Supp. 270, 277, 299 (M.D. Pa.), *aff’d*, 224 F.2d 504 (3d Cir. 1955), *aff’d*, 351 U.S. 454 (1956).

145. *See Oliver*, *supra* note 130, at 206 (citing *Townsend v. Sain*, 372 U.S. 293 (1963); *Fay v. Noia*, 372 U.S. 391 (1963); *Sanders v. United States*, 373 U.S. 1 (1963)).

146. *See FALLON ET AL.*, *supra* note 31, at 1270 (providing a table of state prisoner habeas petitions from 1950 to 2013 that documents a significant increase between 1960 and 1965).

jurisdiction.”<sup>147</sup> District courts have continued to use collective proceedings to address recurrent procedural issues in state prisoner habeas litigation.<sup>148</sup>

Race remained a uniting theme of district court en bancs through the 1960s. The District of Maryland, for example, used collective proceedings to address equal protection challenges to the apportionment plan for Baltimore City Council<sup>149</sup> and the district’s jury selection processes,<sup>150</sup> as well as habeas petitions related to the jailing of Black citizens for nonpayment of court costs and fines.<sup>151</sup> The five judges of Alabama’s three federal districts collectively enjoined Governor George Wallace and his followers from preventing school boards from complying with desegregation orders.<sup>152</sup>

Not all collective district court activity aimed to further civil rights, however; “[f]or some district judges in the Fifth Circuit, inaction on civil rights matters and disregard of clear and recent legal authority bordered on defiance of the law.”<sup>153</sup> The Western District of Louisiana used en banc decisions to push back on the Fifth Circuit’s impatience with ineffective “freedom of choice” plans for desegregating schools.<sup>154</sup> After the Fifth Circuit drew a more explicit line on appeal,<sup>155</sup> the Western District issued another en banc decision in which it felt “impelled to repeat,” “with all deference to the Court of Appeals,” that freedom of choice remained the best solution.<sup>156</sup> Nonetheless, it complied with the Fifth Circuit’s mandate and followed the lead of the District of South Carolina, which had similarly sat en banc regarding school desegregation cases in 1969,<sup>157</sup> in directing that the local school boards work with the U.S. Department of Housing, Education

147. *White v. Swenson*, 261 F. Supp. 42, 44 (W.D. Mo. 1966).

148. *See, e.g., Ainsworth v. Vazquez*, 759 F. Supp. 1467 (E.D. Cal. 1991); *Hurst v. Hogan*, 435 F. Supp. 125 (N.D. Ga. 1977).

149. *See Ellis v. Mayor & City Council of Balt.*, 234 F. Supp. 945, 946 (D. Md. 1964) (explaining that a three-judge court was not required because the challenge was to a local ordinance rather than a state statute), *aff’d*, 352 F.2d 123, 124 n.1 (4th Cir. 1965) (noting the district court voluntarily convened as a three-member court).

150. *See United States v. Cohen*, 275 F. Supp. 724, 726–29 (D. Md. 1967), *aff’d*, *United States v. DiTommaso*, 405 F.2d 385 (4th Cir. 1968).

151. *See Arthur v. Schoonfield*, 315 F. Supp. 548, 549, 552 n.3 (D. Md. 1970).

152. *See generally United States v. Wallace*, 222 F. Supp. 485 (M.D. Ala. 1963). For more on the contentious context of the case, see BASS, *supra* note 3, at 209–11; Brian K. Landsberg, *Enforcing Desegregation: A Case Study of Federal District Court Power and Social Change in Macon County Alabama*, 48 LAW & SOC’Y REV. 867, 877 (2014).

153. JACK BASS, UNLIKELY HEROES: THE DRAMATIC STORY OF THE SOUTHERN JUDGES WHO TRANSLATED THE SUPREME COURT’S *BROWN* DECISION INTO A REVOLUTION FOR EQUALITY 220 (1981).

154. *See Conley v. Lake Charles Sch. Bd.*, 293 F. Supp. 84, 88 (W.D. La. 1968) (noting that “[w]e have heard these cases ‘en banc’ and rendered this ruling together” and emphasizing that “[w]ith every ounce of sincerity which we possess we think freedom of choice is the best plan available”), *rev’d and remanded sub nom. Hall v. St. Helena Par. Sch. Bd.*, 417 F.2d 801 (5th Cir. 1969).

155. *See Hall*, 417 F.2d at 809 (stating that “[i]t is abundantly clear that freedom of choice, as presently constituted and operating in the Western District school districts before us, does not” satisfy the constitutional demand for an integrated school system).

156. *See Conley v. Lake Charles Sch. Bd.*, 303 F. Supp. 394, 396 (W.D. La. 1969).

157. *See Whittenberg v. Greenville Cnty. Sch. Dist.*, 298 F. Supp. 784 (D.S.C. 1969).

and Welfare to develop new plans.<sup>158</sup> The contentiousness of school desegregation was not limited to the South, either; the protracted litigation in Detroit, for example, led the chief judge of the Eastern District of Michigan to appoint a temporary three-judge panel to oversee the implementation of court orders in *Bradley v. Milliken*.<sup>159</sup>

### C. Managing Mass Litigation (1970–1990)

By the end of the 1960s, the federal courts were searching for ways to manage complex litigation. The 1966 amendments to Federal Rule of Civil Procedure 23 introduced the modern class action, and judges also spearheaded the adoption in 1968 of the multidistrict litigation (MDL) statute.<sup>160</sup> The use of district court en bancs similarly shifted at the end of the 1960s toward addressing mass litigation. An early example involved the explosion of longshoremen cases in the Eastern District of Pennsylvania following the Supreme Court’s expansion of available remedies.<sup>161</sup> In a pair of decisions, a four-judge panel appointed by the Eastern District of Pennsylvania’s chief judge addressed complicated procedural questions arising in more than 1100 pending longshoremen cases.<sup>162</sup> The panel was emphatic about the crisis these cases represented for the district: “Despite [the] herculean efforts” of the district’s judges to diminish their backlog of longshoremen cases, the district still had “the longest median time interval for termination of trials of any federal court in the nation” at forty-one months.<sup>163</sup> “*There is complete unanimity among the Judges of our Court,*” the panel wrote, that Congress must either amend the law or else provide “*additional judges and facilities.*”<sup>164</sup>

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158. See *Conley*, 303 F. Supp. at 397, 398–99.

159. See DAVID GARDNER CHARDAVOYNE, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN: PEOPLE, LAW, AND POLITICS 315–16 (2012) (describing a period of time in which a voluntary three-judge panel managed the case). For an example of a collective decision in the case, see generally *Bradley v. Milliken*, 585 F. Supp. 348 (E.D. Mich. 1984), *vacated*, 772 F.2d 266 (6th Cir. 1985). A similar story might lie behind the per curiam decisions issued by two judges regarding the school desegregation plan for Atlanta. See *Calhoun v. Cook*, 362 F. Supp. 1249 (N.D. Ga. 1973) (per curiam); *Calhoun v. Cook*, 332 F. Supp. 804 (N.D. Ga. 1971) (per curiam).

160. For the seminal history of the MDL statute, see generally Andrew D. Bradt, “*A Radical Proposal*”: *The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831 (2017).

161. See *Turner v. Transportacion Maritima Mexicana S.A.*, 44 F.R.D. 412, 420 (E.D. Pa. 1968) (noting how longshoremen could now sue shipowners directly in admiralty in addition to remedies available under the Longshoremen’s and Harbor Worker’s Act).

162. See *id.*; *Close v. Calmar S.S. Corp.*, 44 F.R.D. 398 (E.D. Pa. 1968), *aff’d*, *Blake v. Farrell Lines, Inc.*, 417 F.2d 264 (3d Cir. 1969). As these opinions note, a similar delegated panel procedure was also used contemporaneously to resolve a recurrent question of pendent party jurisdiction. See *Turner*, 44 F.R.D. at 414 n.1 (referring to *Olivieri v. Adams*, 280 F. Supp. 428 (E.D. Pa. 1968)).

163. *Turner*, 44 F.R.D. at 416.

164. *Id.* at 420 (emphasis in original). Six more judgeships were added to the Eastern District of Pennsylvania in 1970. See Pub. L. No. 91-272, 84 Stat. 294 (1970) (codified as amended at 28 U.S.C. § 133). Congress also overhauled the Longshoremen’s and Harbor Worker’s Compensation Act in 1972. See generally Francis J. Gorman, *The Longshoremen’s*

By the early 1980s, the crush of asbestos litigation was generating collective decisions in multiple districts. The Eastern District of Pennsylvania again used appointed panels to resolve some recurrent questions in asbestos cases.<sup>165</sup> In the District of Maryland, which experimented with consolidating asbestos cases and identifying clusters of cases for trial,<sup>166</sup> six of the district's judges signed an unpublished opinion rejecting defendants' objections to the resulting consolidated trial schedule; given the 424 asbestos cases pending in the district, they emphasized, "these cases cannot proceed on a business as usual basis."<sup>167</sup> Meanwhile, the fourteen judges of the District of New Jersey convened a full en banc hearing to resolve a constitutional law question raised in many pending asbestos cases, splitting 8–6 against the defendants.<sup>168</sup> Because the asbestos cases had been temporarily consolidated for purposes of resolving this particular question, the decision declared that the majority's ruling "shall henceforth be the law of the case for all cases in the asbestos litigation in the District of New Jersey."<sup>169</sup>

The need to resolve recurrent complex legal issues generated numerous coordinated decisions during this time period, from environmental challenges regarding the construction of interstate highways<sup>170</sup> to constitutional challenges of zoning ordinances.<sup>171</sup> In 1988 and 1989, at least

& Harbor Workers' Compensation Act—After the 1972 Amendments, 6 J. MARITIME L. & COM. 1 (1974) (summarizing changes).

165. See *Kohr v. Raybestos-Manhattan, Inc.*, 522 F. Supp. 1070 (E.D. Pa. 1981) (appointed panel); *Lovallo v. Pittsburgh Corning Corp.*, 99 F.R.D. 627 (E.D. Pa. 1983) (appointed panel); see also *Parker v. Bell Asbestos Mines, Ltd.*, 607 F. Supp. 1397 (E.D. Pa. 1985) (collectively deciding identical summary judgment issues in cases before three judges).

166. See *In re All Asbestos Cases Pending in the U.S. Dist. Ct. for the Dist. of Md.*, No. BML-1, 1983 U.S. Dist. LEXIS 10719 (D. Md. Dec. 16, 1983).

167. *Id.* at \*2 ("To prevent an even greater backlog of cases and to conserve judicial [sic] resources, the consolidation today being ordered by this Court is not only warranted but necessary."). For another use of collective decision-making in the management of asbestos litigation, see *In re Asbestos Cases*, 514 F. Supp. 914 (E.D. Va. 1981) (disqualifying local law firm from litigation due to conflict of interests).

168. See *In re Asbestos Litig.*, 628 F. Supp. 774 (D.N.J. 1986), *aff'd*, 829 F.2d 1233 (3d Cir. 1987).

169. *Id.* at 784. This declaration may have been too sweeping, however, as the decision could only be law of the case for the cases consolidated, and thus pending, at the time.

170. See *Movement Against Destruction v. Volpe*, 361 F. Supp. 1360 (D. Md. 1973), *aff'd*, 500 F.2d 29, 30 (4th Cir. 1974) (per curiam). The judges held a conference with the parties to fix a schedule, conducted some joint hearings, and "consolidated" the cases "for the sole purpose of the hearing and decision of the class issues involving the 3-A System as a whole." *Id.* at 1367.

171. See *Nortown Theatre Inc. v. Gribbs*, 373 F. Supp. 363 (E.D. Mich. 1974), *rev'd*, *Am. Mini Theatres, Inc. v. Gribbs*, 518 F.2d 1014 (6th Cir. 1975), *rev'd*, *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50 (1976). For other examples, see *Wash. Metro. Area Transit Auth. v. One Parcel of Land in Montgomery Cnty.*, 549 F. Supp. 584, 586 (D. Md. 1982) (resolving identical legal challenges by landowners arising out of the construction of the D.C. area's subway system); *United States v. Wright*, 516 F. Supp. 1119, 1121 (E.D. Pa. 1981) (hearing common issues in criminal contempt convictions of thirteen defendants who had obstructed construction of integrated housing in defiance of court orders); *Lopez v. Franklin*, 427 F. Supp. 345, 346 (E.D. Mich. 1977) (jointly considering the constitutional rights of infants to prevent the deportation of their noncitizen parents).

eleven districts issued collective decisions regarding the constitutionality of the new U.S. Sentencing Guidelines (“Guidelines”).<sup>172</sup> The Guidelines cases illustrate the diversity of approaches that district courts have used when issuing collective decisions. Most were full en banc involving joint hearings and decisions, although they were not always unanimous.<sup>173</sup> The Eastern District of Arkansas used an adopted decision, in which one judge resolved a particular case and other judges concurred in the legal conclusion.<sup>174</sup> In the District of Arizona, some judges used a coordinated decision to explain their reasoning while resolving their individual cases through separate orders.<sup>175</sup> The decision of the Western District of Missouri—which the Supreme Court reviewed in *Mistretta v. United States*<sup>176</sup>—was the most fragmented of the collective decisions.<sup>177</sup> While the judges heard argument together,<sup>178</sup> they did not all join the decision.<sup>179</sup> The authoring judge instead noted that three of the judges had “authorized” him to indicate that they agreed that the Guidelines were constitutional, while the chief judge filed a “dissenting” opinion to explain that he would continue “to utilize the Guidelines strictly on an advisory basis,”<sup>180</sup> even though it would create a divergent practice within the district.

#### D. Recent Examples (Since 1990)

Since 1990, collective district court proceedings have generally fallen into two categories: those pertaining to sensitive political disputes and those pertaining to overlapping issues in criminal or habeas cases. The first category includes the District of Hawaii’s rejection of a constitutional

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172. Others have identified 14 such decisions, but three of these are not available in Westlaw. For additional discussion of the en banc decisions in the Sentencing Guidelines cases, see Sisk et al., *supra* note 15, at 1416; Taha, *supra* note 15.

173. The Southern District of Florida split 12–4 with two dissenting opinions. See *United States v. Bogle*, 693 F. Supp. 1102 (S.D. Fla. 1988). The Central District of California split 15–9, though the dissenters noted that they intended to follow the majority’s approach to ensure “uniformity of decision . . . pending final resolution of the problem.” *United States v. Ortega Lopez*, 684 F. Supp. 1506, 1515 (C.D. Cal. 1988) (Hupp, J., dissenting).

174. See *United States v. Macias-Pedroza*, 694 F. Supp. 1406, 1409, 1419 (D. Ariz. 1988).

175. See *United States v. Brittan*, 687 F. Supp. 1329, 1331 (E.D. Ark. 1988) (noting that all the judges agreed to follow a “two track” sentencing approach pending Supreme Court resolution, even though “they may not individually agree with the undersigned as to all of the different grounds set forth in the following opinion” and even though one judge dissented), *rev’d*, 872 F.2d 827 (8th Cir. 1989).

176. 488 U.S. 361 (1989).

177. See *United States v. Johnson*, 682 F. Supp. 1033 (W.D. Mo. 1988), *aff’d*, *Mistretta v. United States*, 488 U.S. 361 (1989).

178. See *id.* at 1033 (noting hearing before seven judges).

179. See *id.* at 1033 n.1 (accounting for views of five judges, including one dissent); see also *United States v. Terrill*, 688 F. Supp. 542, 543, 543 n.2 (W.D. Mo. 1988) (noting that, “[s]trictly speaking, the judges who heard the oral arguments [in *Johnson*] were not ‘sitting en banc,’” and explaining that he and two other judges “considered the briefs and heard the oral arguments [in *Johnson*] but did not indicate any view with regard to the questions presented.”). The judge in *Terrill*, coincidentally, was the authoring judge for the district’s earlier en banc decisions in *Pedicord v. Swenson*, 304 F. Supp. 393 (W.D. Mo. 1969), *aff’d*, 431 F.2d 92 (1970), and *White v. Swenson*, 261 F. Supp. 42 (W.D. Mo. 1966).

180. *Johnson*, 682 F. Supp. at 1038 (Wright, C.J., dissenting).

challenge to a state statute that effectively blocked a Republican candidate from the gubernatorial ballot,<sup>181</sup> the Eastern District of Arkansas's rejection of an ethics complaint against independent counsel Kenneth Starr for his handling of the grand jury in the Whitewater investigation,<sup>182</sup> and the District of Nevada's rejection of efforts by state legislators and citizens to block legislative action mandated by the state supreme court.<sup>183</sup> The second category includes cases like *Banks v. Gonzales*,<sup>184</sup> which rejected constitutional objections of probationers to the collection of their DNA, and *United States v. Jones*,<sup>185</sup> which rejected a constitutional challenge to "Project Exile," an arrangement by which state prosecutors referred select cases to federal authorities.

There appear to have been few district court en bancs over the last decade, however. Part III considers whether alternative tools have displaced some of the need for voluntary collective district court adjudication.

### III. BENEFITS AND ALTERNATIVES

This part provides a second perspective on the practice of district court en bancs by drawing out the rationales for collective decision-making and considering what other institutional mechanisms judges have for achieving similar ends. For some purposes—like the husbanding of judicial resources—judges have developed alternative mechanisms that have largely displaced the need for voluntary collective adjudication. For others—like the need for enhanced legitimacy—there are arguably *fewer* alternatives available today than there were fifty years ago. Part IV considers, in light of this remaining need, what future district en bancs might look like.

#### A. Judicial Economy

As Part II described, judicial economy was a significant rationale for collective proceedings by the 1970s. District courts used ad hoc collective proceedings when a high volume of similar cases temporarily overwhelmed

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181. See *Fasi v. Cayetano*, 752 F. Supp. 942, 951, 954–55 (D. Haw. 1990).

182. See *In re Starr*, 986 F. Supp. 1159, 1160 (E.D. Ark. 1997). Four judges had recused themselves; the remaining four judges split 3–1 in dismissing the complaint. See generally *id.* (Eisele, J., concurring in part).

183. See *Angle v. Legislature of the State of Nev.*, 274 F. Supp. 2d 1152, 1153–56 (D. Nev. 2003) (invoking the *Rooker-Feldman* doctrine), *aff'd sub nom. Amodei v. Nev. State Senate*, 99 F. App'x 90 (9th Cir. 2004).

184. 415 F. Supp. 2d 1248 (N.D. Okla. 2006), *aff'd*, *Banks v. United States*, 490 F.3d 1178 (10th Cir. 2007).

185. 36 F. Supp. 2d 304 (E.D. Va. 1999). Other examples of recent collective decisions in criminal cases include *United States v. Vidal-Cruz*, 67 F. Supp. 2d 35, 37 & n.2 (D.P.R. 1999) (rejecting identical jurisdictional challenges to indictments in thirteen criminal cases); *United States v. Shine*, 571 F. Supp. 2d 589, 590–91 (D. Vt. 2008) (rejecting challenges to jury selection process raised by multiple criminal defendants); and *Commodity Futures Trading Comm'n v. Walsh*, Nos. 09 CV 1749, 09 CV 1750, 09 CR 722, 2010 WL 882875 (S.D.N.Y. Mar. 9, 2010) (jointly determining whether assets frozen by one judge in relation to a civil agency enforcement action should be unfrozen to pay the defendants' attorneys' fees in a related criminal case before the other judge).

a district's docket, like the longshoremen cases in the late 1960s or the asbestos litigation in the 1980s.<sup>186</sup> Sometimes the set of cases necessitating collective review is more geographically isolated, like a failed Ponzi scheme in the District of Utah that generated “[o]ver 1,000 appeals” from the bankruptcy court<sup>187</sup> or the eighty-four criminal indictments stemming from the Mariel boatlift dismissed by the Southern District of Florida in *United States v. Anaya*.<sup>188</sup>

Other times, judges have sought to avoid duplication of efforts in more narrow circumstances: not because a set of cases was clogging the court's dockets but because separately assigned cases raised identical issues. By coordinating their hearings and decisions in such cases, judges can avoid reinventing the wheel (and reduce the pressure on attorneys to do the same) while also gaining the benefit of collective decision-making and input from a broader range of litigants. The use of such coordinated decisions appears to have peaked in the 1970s and 1980s,<sup>189</sup> but there are also earlier and later examples.<sup>190</sup>

This need for coordination to avoid duplication of effort and to manage mass litigation, however, also generated other procedural reforms, which have largely displaced the need for voluntary collective adjudication to address concerns for judicial economy.

### 1. Multidistrict Litigation

The MDL statute grew out of the district courts' experience with the electrical equipment price-fixing litigation crisis, in which “[o]ver 1800 cases were filed in thirty-five federal districts.”<sup>191</sup> The judicial sponsors of the MDL statute were worried about future “big cases”—like antitrust and securities litigation—similarly clogging the dockets of the federal courts.<sup>192</sup> Their solution was to allow related cases filed in multiple districts to be brought together before a single district judge for purposes of pretrial proceedings.<sup>193</sup> That MDL judge would then have significant discretion and flexibility to innovate procedural solutions to complex problems.<sup>194</sup>

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186. *See supra* Part II.C.

187. *Merrill v. Abbott (In re Indep. Clearing House Co.)*, 77 B.R. 843, 847 n.1 (D. Utah 1987).

188. 509 F. Supp. 289, 293 (S.D. Fla. 1980) (noting the “avoid[ance of] . . . unnecessary duplication of effort” as a rationale for an en banc proceeding involving all twelve of the district's judges), *aff'd*, *United States v. Zayas-Morales*, 685 F.2d 1272 (11th Cir. 1982).

189. *See supra* notes 170–71 and accompanying text.

190. *See, e.g.*, *Prentiss v. Nat'l Airlines, Inc.*, 112 F. Supp. 306 (D.N.J. 1953) (addressing constitutionality of state statute raised as a defense in multiple cases involving commercial airplane crashes); *see also supra* note 100 (discussing more recent coordination by Judge Weinstein across district lines).

191. Bradt, *supra* note 160, at 854–56.

192. *Id.* at 852–53; *see also* Margaret S. Williams, *The Effect of Multidistrict Litigation on the Federal Judiciary over the Past 50 Years*, 53 GA. L. REV. 1245, 1261 (2019) (“[I]t was initially thought centralization [by MDL] would be for securities and antitrust matters.”).

193. For an overview of how MDL works, *see* Bradt, *supra* note 160, at 842–43.

194. *See id.* at 839 (arguing that this is what the drafters intended). The procedural innovation encouraged by MDLs has itself been the source of much commentary. *See, e.g.*,



Coincidentally, the primary author of the MDL statute, Judge William H. Becker,<sup>195</sup> was also chief judge of the Western District of Missouri when the district issued multiple significant collective opinions.<sup>196</sup> That personal experience might explain why the MDL statute permits more than one district judge to be assigned to an MDL,<sup>197</sup> an option that courts have occasionally exercised.<sup>198</sup>

The statute was not widely used, however, through the 1970s and 1980s.<sup>199</sup> That changed in the 1990s, as MDL became a primary method for aggregating mass tort cases<sup>200</sup> in parallel with the curtailment of federal class actions by the Supreme Court.<sup>201</sup> While class actions cannot aggregate cases in which individual issues predominate, MDLs require only “one or more common questions of fact.”<sup>202</sup> They have thus enabled consolidation of cases alleging similar harms, alleviating some need for district court en bancs. Indeed, the asbestos litigation was itself a turning point for MDLs: it led to one of the first and most significant “mega” MDLs when remaining cases were consolidated before Judge Charles R. Weiner in the Eastern

Engstrom, *supra* note 20, at 9–10 (summarizing debate over ad hoc procedure, much of which pertains to MDLs); Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation’s Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1689 (2017) (describing “the very hallmark of the MDL” as “the ability to deviate from traditional procedures”); Zachary D. Clopton, *MDL as Category*, 105 CORNELL L. REV. 1297 (2020) (warning against overgeneralizations about typical MDLs when debating procedural reforms for MDLs).

195. See Bradt, *supra* note 160, at 838.

196. See generally White v. Swenson, 261 F. Supp. 42 (W.D. Mo. 1966); General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education, 45 F.R.D. 133 (W.D. Mo. 1968).

197. See 28 U.S.C. § 1407(b) (“Such coordinated or consolidated pretrial proceedings shall be conducted by a judge *or judges* to whom such actions are assigned . . . .” (emphasis added)).

198. See *In re Paris Air Crash of March 3, 1974*, 427 F. Supp. 701, 702 n.1 (C.D. Cal. 1977) (reproducing order of the Judicial Panel on Multidistrict Litigation (JPML) that assigned MDL to two judges); see also, e.g., *In re Folding Carton Antitrust Litig.*, 557 F. Supp. 1091 (N.D. Ill. 1983) (indicating MDL before two judges); *In re Air Crash Disaster Near Chi., Ill.*, on May 25, 1979, 500 F. Supp. 1044 (N.D. Ill. 1980) (indicating MDL before same two judges). For an example of the JPML directing judges to coordinate without formally instituting an MDL, see *Nat’l Credit Union Admin. Bd. v. RBS Sec., Inc.*, CV 11-5887, 2014 WL 12597071, at \*1 (C.D. Cal. June 10, 2014) (noting JPML’s deference to intradistrict consolidation within three districts and subsequent interdistrict coordination across the three districts). Professor Brian Fitzpatrick recently called for increased use of multi-judge MDLs. See Brian T. Fitzpatrick, *Many Minds, Many MDL Judges*, 84 LAW & CONTEMP. PROBS. 107, 118–19 (2021).

199. See Bradt, *supra* note 160, at 838.

200. See Williams, *supra* note 192, at 1267 fig.6 (mapping subject matter of proceedings established by the JPML over time). As Margaret Williams has noted, the number of cases assigned to MDL before 1991 was “well below 10,000,” but it subsequently climbed to over 40,000 cases. See *id.* at 1270 fig.7.

201. See, e.g., *AmChem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). On this parallel development of class action curtailment and expanded MDLs, see generally Thomas E. Willging & Emery G. Lee, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After Ortiz*, 58 U. KAN. L. REV. 775 (2010).

202. 28 U.S.C. § 1407(a). In the 1960s, some opponents to the then-pending MDL legislation proposed amendments that would prevent aggregation when individual issues predominated, but the judicial sponsors of the bill successfully opposed these amendments, claiming that the amendments would “cripple the bill.” See Bradt, *supra* note 160, at 896–98.

District of Pennsylvania in 1991.<sup>203</sup> But an MDL also requires cases “pending in different districts,”<sup>204</sup> which cannot reach the problem of related cases filed solely within a single district. That problem has instead been addressed through the use of case assignment rules.

## 2. Case Assignment Rules

Congress has granted district courts flexibility in managing the division of their workload.<sup>205</sup> Under that authority, most districts have adopted some form of a related-cases rule that allows cases with overlapping facts or issues to be channeled to a single judge.<sup>206</sup> There is much variation among these rules, however: some courts leave it to the judges’ discretion whether to transfer related cases to one another;<sup>207</sup> others expect parties to move for transfer;<sup>208</sup> yet others task the chief judge or an executive committee with making the final decision.<sup>209</sup> The Northern District of Illinois even has a mini-MDL rule that allows for pretrial coordination by a single judge of overlapping cases not covered by the MDL statute or the district’s related-cases rule.<sup>210</sup>

These rules serve multiple purposes. As one district judge has explained, “The reason we have relatedness rules in the district courts is to avoid treating similar cases dissimilarly and because it wastes judicial resources by duplicating effort when two judges deal with similar issues.”<sup>211</sup> They are also intended to prevent parties from gaming the random assignment of cases by voluntarily dismissing cases and then refileing them in hopes of being assigned to a more favorable judge. Thus, some districts include in their definition of “related cases” those that are similar to cases that have been terminated within the last year.<sup>212</sup>

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203. See Willging & Lee, *supra* note 201, at 798–99.

204. 28 U.S.C. § 1407(a).

205. *Id.* § 137(a); see also *supra* note 68. For a strong defense of a district court’s authority to self-regulate its case assignments, see Jack B. Weinstein, *The Limited Power of the Federal Courts of Appeals to Order a Case Reassigned to Another District Judge*, 120 F.R.D. 267 (1988).

206. Given the difficulty of tracing changes in local rules, it is hard to ascertain when most districts adopted these rules. Based on the rise and then fall of coordinated decisions during the 1970s and 1980s, however, my hypothesis would be that districts began formalizing related-cases rules in the 1980s and 1990s. Ad hoc assignment is also possible: in 2003, the Eastern District of New York transferred 500 state prisoner habeas corpus cases to Judge Weinstein, empowering him to clear the backlog by the end of the year. *In re Habeas Corpus Cases*, 298 F. Supp. 2d 303, 304 (E.D.N.Y. 2003).

207. See, e.g., W.D. MO. L.R. 83.9(c)(4); W.D. WASH. GEN. ORDER 02-18.

208. See, e.g., M.D. FLA. L.R. 1.04; N.D. ILL. L.R. 40.4.

209. See, e.g., E.D. PA. L.R. 40.1(c)(2) (chief judge); N.D. ILL. L.R. 40.4(d) (executive committee).

210. N.D. ILL. IOP13(e).

211. Richard George Kopf, *A Cheap Shot*, HERCULES & THE UMPIRE (Nov. 3, 2013), <https://herculesandtheumpire.com/2013/11/03/a-cheap-shot/> [<https://perma.cc/7HWA-LKW3>].

212. See, e.g., E.D. PA. L.R. 40.1(b)(3) (limiting the definition of related cases to those that are pending or were terminated within the last year). Indeed, the Northern District of Texas

Related-cases rules have been criticized, however, for allowing judges in turn to game the random case assignment process.<sup>213</sup> Related-cases rules are particularly prone to such abuse when they are not time-limited, allowing judges to lay claim to new filings over multiple decades.<sup>214</sup> The argument for grouping related cases grows weaker the farther apart in time the cases are filed: the likelihood that a party dismissed a case and refiled it in hopes of obtaining a friendlier judge decreases as more time passes, and there is less economy of scale if a judge is not deciding two related cases concurrently. Further, once a judge has resolved a case with a written decision, all of the district's judges would have access to that reasoning in terms of avoiding unintentionally inconsistent judgments in subsequently filed cases.<sup>215</sup> But regardless of detail or potential for reform, case assignment mechanisms may well have displaced the need for coordinated decisions when addressing overlapping issues in complex cases.

### 3. Legislative Intervention

Finally, when a major crisis threatens to swamp the district courts, Congress can legislate specifically to reduce, redirect, or reformulate those cases. Professors Pamela Bookman and David Noll have termed this phenomenon “ad hoc procedural legislation.”<sup>216</sup> The Portal-to-Portal Act of 1947, with its jurisdiction-stripping provision, is a particularly aggressive example.<sup>217</sup> Other examples include the codification of the bankruptcy trust solution for resolving asbestos claims<sup>218</sup> and the handling of the September 11th Victim Compensation Fund.<sup>219</sup> The channeling of certain classes of cases to three-judge courts was also a form of legislative intervention. Although district courts themselves cannot legislate special solutions to particular problems, these legislative interventions have often come at the behest of, or reflect the innovations proposed by, district judges.<sup>220</sup>

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explicitly calls out cases “that the plaintiff dismissed with the intent or for the purpose of obtaining a different assigned presiding judge.” N.D. TEX. L.R. 3.3(b)(1).

213. See, e.g., Katherine A. Macfarlane, *The Danger of Nonrandom Case Assignment: How the Southern District of New York’s “Related Cases” Rule Shaped Stop-and-Frisk Rulings*, 19 MICH. J. RACE & L. 199 (2014). The Southern District of New York subsequently amended its rule to decrease the discretion of individual judges. See *id.*

214. See Jay Krishnan, *Bhopal in the Federal Courts: How Indian Victims Failed to Get Justice in the United States*, 72 RUTGERS L. REV. 101 (2020) (building on Macfarlane’s work to critique the use of the Southern District of New York’s related cases rule to direct all cases related to the Bhopal gas disaster over thirty years to a single judge).

215. Cf. Macfarlane, *supra* note 213 (suggesting reforms to related cases rules).

216. Bookman & Noll, *supra* note 21, at 788.

217. For a discussion of the Portal-to-Portal Act, see *supra* note 128 and accompanying text.

218. See Bookman & Noll, *supra* note 21, at 804–10 (discussing the adoption and effect of 11 U.S.C. § 524(g), which codified the bankruptcy trust solution devised by Johns-Manville Corporation to resolve future asbestos-related claims).

219. See, e.g., Robin J. Effron, *Event Jurisdiction and Protective Coordination: Lessons from the September 11th Litigation*, 81 S. CAL. L. REV. 199 (2008) (discussing Congress’s efforts to channel litigation pertaining to September 11 to the Southern District of New York).

220. See, e.g., Bookman & Noll, *supra* note 21, at 804–10 (describing how the Johns-Manville Corporation trust solution to asbestos litigation began as a procedural

In sum, both MDL and related-cases rules allow for the grouping of cases with some overlapping issues, even if those cases are not similar enough to permit aggregation under rules of joinder or class action. Congress has also proved willing to provide simplified procedures or procedural flexibility when judges are worried about related cases overwhelming their dockets. The need for collective proceedings to avoid inefficient duplication of effort is thus much smaller today than it was fifty years ago. Note, however, that these procedural developments relate primarily to civil litigation; the need to coordinate regarding recurrent legal questions in criminal cases has continued to generate some coordinated decisions.<sup>221</sup>

### B. Consistency

Consistent answers to legal questions promote equitable treatment of litigants, regardless of which judge is assigned to their case.<sup>222</sup> Within the federal judiciary, consistency is achieved primarily through vertical stare decisis. But there are times when the appellate courts simply cannot provide the uniformity required—what Professor Elizabeth Y. McCuskey has termed the “vertical vacuum.”<sup>223</sup> As Professor Stephen Yeazell has argued, that vertical vacuum grew much larger during the twentieth century, as the Federal Rules of Civil Procedure increased the importance of judicial management and the difficult-to-review phase of litigation between pleading and trial.<sup>224</sup>

It should not be surprising, then, that district courts have turned to collective decisions to resolve recurrent questions that evade appellate review,<sup>225</sup> like the transfer of cases<sup>226</sup> and the interpretation of discovery

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innovation in a pending case and evolved into congressional legislation); Bradt, *supra* note 160, at 907–15 (describing the active role of judges in the adoption of the MDL statute).

221. See *supra* Part II.D (gathering recent examples).

222. See, e.g., *Belgian Am. Invs. & Trade, Inc. v. Fed. Sav. & Loan Ins. Corp.*, 717 F. Supp. 462, 465 (N.D. Tex. 1989) (“The right to litigate in a particular forum should not depend upon the random assignment of a case to the docket of a particular judge in that forum.”); *In re Stein*, 17 F. Supp. 587, 589 (E.D. Pa. 1936) (Dickinson, J., dissenting) (“There should be a uniform rule of decision and the parties not left to the accident of to whom the cause is referred or the judge who hears the petition for review.”).

223. Elizabeth Y. McCuskey, *Horizontal Procedure* 27–28, 30 (2017) (unpublished manuscript) (on file with author) (noting that some Federal Rules of Civil Procedure are almost solely cited by district courts).

224. See Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 660–62, 665 (connecting this phenomenon as well as the shift to more deferential standards of review to reduced appellate oversight of many procedural decisions).

225. The Eastern District of Pennsylvania has used delegated panels to ameliorate disparate treatment of trial motions that would be difficult to appeal. See, e.g., *Colombo v. Johns-Manville Corp.*, 601 F. Supp. 1119, 1123 (E.D. Pa. 1984) (noting that a prior decision in that case to permit the defendants to implead the United States conflicted with the subsequent panel decision in *Lovallo v. Pittsburgh Corning Corp.*, 99 F.R.D. 627 (E.D. Pa. 1983), in which the same judge had participated); *Kohr v. Raybestos-Manhattan, Inc.*, 522 F. Supp. 1070, 1077 (E.D. Pa. 1981) (Troutman, J., concurring) (acknowledging that the panel decision required one of the judges to “reverse,” in part, a prior ruling in a similar case).

226. See, e.g., *Pontes v. Calmar S.S. Corp.*, 256 F. Supp. 495 (E.D. Pa. 1966) (transferring longshoremen cases); *Hayes v. Chicago, R.I. & P.R. Co.*, 79 F. Supp. 821, 826 (D. Minn.

rules.<sup>227</sup> A number of districts have used collective proceedings to address motions to remand,<sup>228</sup> which are generally not appealable.<sup>229</sup> The Northern District of Alabama has done so twice: it first issued a collective decision in 1982 regarding the “recurring and vexing” question of calculating time limits for removing cases that include fictitious defendants.<sup>230</sup> In 1988, however, Congress amended the removal statute in a manner that conflicted with the Northern District’s prior guidance and caused defendants in more than 150 pending state court cases to rush to remove to federal court.<sup>231</sup> To address the problem, all nine of the district’s judges participated in an en banc proceeding that reversed the district’s prior position.<sup>232</sup>

Other questions arise at the same time in many cases, risking disparate treatment of parties before appellate review can be obtained.<sup>233</sup> For example, even though the Supreme Court quickly agreed to address the

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1948) (holding that 28 U.S.C. § 1404 displaced prior Supreme Court dictum that forum non conveniens does not apply to Federal Employers’ Liability Act (FELA) cases).

227. This includes the civil procedure classic *Hickman v. Taylor*, 4 F.R.D. 479 (E.D. Pa. 1945), *rev’d*, 153 F.2d 212 (3d Cir. 1945), *aff’d*, 329 U.S. 495 (1947). Other collective decisions have addressed whether plaintiffs can have their attorneys present during a Rule 35 examination, *Dziwanoski v. Ocean Carriers Corp.*, 26 F.R.D. 595 (D. Md. 1960); whether defendants must disclose insurance policy limits, *Slomberg v. Pennabaker*, 42 F.R.D. 8 (M.D. Pa. 1967); *Bisserier v. Manning*, 207 F. Supp. 476 (D.N.J. 1962); and whether personal injury plaintiffs can obtain discovery of surveillance footage of themselves, *Snead v. Am. Export-Isbrandtsen Lines, Inc.*, 59 F.R.D. 148 (E.D. Pa. 1973).

228. *See, e.g.*, *Belgian Am. Invs. & Trade, Inc. v. Fed. Sav. & Loan Ins. Corp.*, 717 F. Supp. 462, 465 (N.D. Tex. 1989) (agreeing on whether certain savings and loan cases could be removed to federal court); *Beckwith v. Am. President Lines, Ltd.*, 68 F. Supp. 353, 353 (N.D. Cal. 1946) (remanding multiple Jones Act claims brought by seamen alleging they were negligently abandoned in Manila at the outbreak of World War II, resulting in their capture and imprisonment by Japanese forces); *Knapp v. Byram*, 21 F.2d 226, 227, 230–31 (D. Minn. 1927) (holding that FELA cases could be removed when brought against receivers appointed as “officers of that court”).

229. *See, e.g.*, Andrew D. Bradt, *Grable on the Ground: Mitigating Unchecked Jurisdictional Discretion*, 44 U.C. DAVIS L. REV. 1153 (2011) (studying the effects of remand orders being shielded from appellate review).

230. *Hamby v. Zayre Corp.*, 544 F. Supp. 176, 177 (N.D. Ala. 1982) (“Hopefully, this opinion, [adopted en banc] . . . will provide guidance to the trial bar in navigating through these troubled waters.”). All seven judges of the district, including senior judges, signed the decision. *Id.* at 179.

231. *See Greer v. Skilcraft*, 704 F. Supp. 1570, 1572 (N.D. Ala. 1989).

232. *Id.* at 1583. The effect of this reversal was that some defendants, who had relied on *Hamby* to wait to remove their cases, were effectively barred from removing to federal court because they had exceeded the time limits now clearly enunciated in the federal statute. *See id.*

233. *See, e.g.*, *United States v. Anaya*, 509 F. Supp. 289, 293 (S.D. Fla. 1980) (justifying en banc proceeding, in part, by its ability to “establish uniformity of treatment for similarly situated [criminal] defendants,” the “significance” of which, “from both an individual and societal point of view, cannot be understated”), *aff’d*, *United States v. Zayas-Morales*, 685 F.2d 1272 (11th Cir. 1982); *Turner v. Transportacion Maritima Mexicana S.A.*, 44 F.R.D. 412, 414 n.1 (E.D. Pa. 1968) (justifying the panel decision as providing “uniformity of action” regarding hundreds of cases “pending a definitive ruling” by the circuit court); *Close v. Calmar S.S. Corp.*, 44 F.R.D. 398, 401 n.3 (E.D. Pa. 1968) (same), *aff’d sub nom. Blake v. Farrell Lines, Inc.*, 417 F.2d 264 (3d Cir. 1969).

constitutionality of the U.S. Sentencing Guidelines in 1988,<sup>234</sup> some districts justified collective proceedings in light of the need “to promote procedural uniformity and avoid disparate sentencing” pending final resolution by the Supreme Court.<sup>235</sup> When intradistrict splits do arise, collective proceedings may help to ameliorate them.<sup>236</sup>

Appellate review similarly does not reach the management of the district court as an institution.<sup>237</sup> The Northern District of Texas used an en banc decision in 1989 “for the purpose of establishing standards of litigation conduct to be observed in civil actions,”<sup>238</sup> while a 1979 en banc decision by the Western District of Missouri clarified local rule limitations on discovery.<sup>239</sup> The District of Maryland has twice used en banc decisions to address whether convicted federal felons must exhaust federal pardon procedures before seeking admission to its bar.<sup>240</sup> District courts are also charged with supervising bankruptcy judges (or, previously, bankruptcy referees); when questions will likely arise repeatedly in bankruptcy cases, then, district courts have at times used en bancs to establish uniform answers.<sup>241</sup>

Collective proceedings are not a panacea for establishing intradistrict uniformity, however. The resulting decisions are not binding,<sup>242</sup> and efforts

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234. *Mistretta v. United States*, 488 U.S. 361, 371 (1989) (noting that the Court had granted certiorari before judgment by the Eighth Circuit because of the importance of the issue and “the disarray among the Federal District Courts”).

235. *See United States v. Bogle*, 689 F. Supp. 1121, 1123 (S.D. Fla. 1988); *see also United States v. Allen*, 685 F. Supp. 827, 828 (N.D. Ala. 1988) (“Because of the desirability of consistency, the judges of this court—like those in several other districts—have elected to consider collectively this issue.” (footnote omitted)).

236. *See Olivieri v. Adams*, 280 F. Supp. 428, 429 (E.D. Pa. 1968) (explaining that, “because of conflicting views” within the district, “a panel of judges was appointed by the court” to decide a question of pendent party jurisdiction in order to “establish uniformity of action within the district pending a definitive ruling by the Court of Appeals”); *see also Bissierier v. Manning*, 207 F. Supp. 476, 477–78 (D.N.J. 1946) (noting consensus of the district’s judges in a discovery ruling that conflicted with a prior ruling from the same district); *Brown v. C.D. Mallory & Co. (The Swiftarrow)*, 34 F. Supp. 541, 543 (E.D. Pa. 1940) (“Because of the conflict in the decisions cited, the court en banc took under consideration the question presented in the instant proceeding.”), *rev’d on other grounds* 122 F.2d 98 (3d Cir. 1941).

237. On the distinction between the work of individual judges and the work of “the court” as an institution, *see generally* James E. Pfander, *The Chief Justice, the Appointment of Inferior Officers, and the “Court of Law” Requirement*, 107 Nw. U. L. REV. 1125 (2013).

238. *Dondi Props. Corp. v. Com. Sav. & Loan Ass’n*, 121 F.R.D. 284, 286 (N.D. Tex. 1988).

239. *Crown Ctr. Redevelopment Corp. v. Westinghouse Elec. Corp.*, 82 F.R.D. 108 (W.D. Mo. 1979).

240. In *In re R.M.W.*, the court “determined *en banc* . . . [to] explicitly overrule[]” a prior en banc decision that had required such exhaustion. 428 F. Supp. 2d 389, 391 (D. Md. 2006) (overruling *In the Matter of G.L.S.*, 586 F. Supp. 375 (D. Md. 1984)).

241. *See, e.g., In re Ret. Inn at Forest Lane, Ltd.*, 83 B.R. 795, 800 (D. Utah 1988) (implementing “new procedure regarding the disposition of all motions for transfer of venue” brought before bankruptcy judges); *In re Stein*, 17 F. Supp. 587, 590 (E.D. Pa. 1936) (explaining that the case was “set down for a hearing before the court in banc so that [bankruptcy] referees would have an authoritative guide” to recurrent questions).

242. *See supra* Part I.B.

to achieve consensus can fail. Recall in this regard the lack of consensus within the Western District of Missouri regarding how to handle sentencing pending Supreme Court resolution of the constitutionality of the U.S. Sentencing Guidelines.<sup>243</sup> Similarly, a judge-initiated effort at prison reform divided the judges of the D.C. District in 1971, with Judge Gerhard A. Gesell asserting that the full court was behind his emergency sentencing procedure for juvenile offenders<sup>244</sup> but with Judge Charles R. Richey refusing a month later to follow it and noting he had never agreed with Judge Gesell's recommendation.<sup>245</sup> Other options for promoting intradistrict consistency include the principle of intra-court comity, interlocutory appeals, and local rules and orders.

### 1. Intra-Court Comity

District judges can promote intradistrict uniformity by voluntarily following each other's precedent, a principle referred to as "intra-court comity." In its strong form, intra-court comity directs that "[j]udges of the same district court customarily follow a previous decision of a brother judge upon the same question except in unusual or exceptional circumstances."<sup>246</sup> Intra-court comity is not the same as stare decisis; rather, it puts a thumb on the scale in favor of uniformity within the district while still allowing judges to forge a different path if they so desire. It is the principle of intra-court comity, not stare decisis, that gives extra weight to district court en bancs and encourages adherence to them in future cases.<sup>247</sup>

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243. See *supra* notes 177–80 and accompanying text.

244. See *United States v. Alsbrook*, 336 F. Supp. 973, 974 n.1 (D.D.C. 1971).

245. *United States v. Lowery*, 335 F. Supp. 519, 520–22 (1971). This disagreement was not mentioned in *Alsbrook*. A similar disagreement played out in the Western District of North Carolina in the 1980s: initially, Judge James B. McMillan had ordered the court clerk to seek judicial review before *ex parte* forfeiture warrants could be issued, an order which Judge Robert Daniel Potter also signed. See *United States v. B&M Used Cars*, 860 F.2d 121, 122–23 nn.1–2 (4th Cir. 1988) (discussing procedural history of the dispute). On the government's motion to reconsider, however, Judge Potter reversed course and joined with Judge David Sentelle to vacate the prior order. *In re Issuance of Warrants by Clerks*, 674 F. Supp. 1182, 1183 (W.D.N.C. 1986). The unsigned order stated that "any rule of this District Court should be voted upon by a majority of the active judges," with "the majority of the active judges" now siding with the government over Judge McMillan's dissent. *Id.*

246. *Buna v. Pac. Far E. Line, Inc.*, 441 F. Supp. 1360, 1365 (N.D. Cal. 1977); *accord, e.g.*, *Fricker v. Town of Foster*, 596 F. Supp. 1353, 1356 (D.R.I. 1984) (quoting similar language and explaining that "[w]hile the judges of a unified federal district are not constitutionally or legally bound to march in lockstep, the seeds of chaos are sown if a single court prances off in sharply conflicting directions"); *E. W. Bliss Co. v. Cold Metal Process Co.*, 174 F. Supp. 99, 121 (N.D. Ohio 1959) ("In this District, we have five District Judges but only one United States District Court. When the Court speaks through one of the Judges, the decision should be followed by his colleagues unless it is clearly wrong."); see also *Mead, supra* note 15, at 801 n.101 (gathering similar statements from older cases).

247. See, e.g., *Close v. Calmar S.S. Corp.*, 44 F.R.D. 398, 401 n.3 (E.D. Pa. 1968) ("The use of this panel procedure does not actually bind the other judges of this District to follow the decision . . . but, like application of the doctrine of intra-court comity, this practice does help provide for a uniform interpretation of the law within any one District"), *aff'd sub nom. Blake v. Farrell Lines, Inc.*, 417 F.2d 264 (3d Cir. 1969).

Intra-court comity should discourage intradistrict splits without resort to en banc proceedings. Yet, as Joseph A. Mead has argued, “the modern trend is moving away from extending any deference” to intradistrict precedent.<sup>248</sup> There are a couple of possible explanations for this shift. One is simply the growing size of the federal judiciary. A district that has just expanded from one to two or three judges may follow prior district decisions out of habit or interpersonal necessity. As judgeships expanded in bursts over the twentieth century, judges may have become more comfortable with the (ever more common) phenomenon of intradistrict disagreements, reducing the motivation to avoid or resolve them.

Another possibility is that an increase in intradistrict comity was displaced by the 1960s by an increase in intra-circuit uniformity. Appellate en bancs only emerged as a practice in the 1940s,<sup>249</sup> which in turn enabled the circuits to refine “law of the circuit” doctrines over the course of the 1960s and 1970s.<sup>250</sup> Today, it is settled doctrine that circuit court panels establish binding “law of the circuit” unless and until the court sitting en banc says otherwise.<sup>251</sup> As Mead has noted, the development of stronger circuit uniformity coincided with the decline of intra-court comity within the district courts.<sup>252</sup>

Reinvigorating the principle of intra-court comity might provide an alternative to district court en bancs for promoting intradistrict uniformity, but it carries some costs. Relying on intradistrict citation to build consistency involves a time lag, which sends weaker signals to litigants; it also runs the risk of judges overlooking prior decisions by colleagues. Intra-court comity is also an easy principle to *over-apply*. I have elsewhere documented the dangers of overreliance on district court precedent: when judges cite district court decisions to establish facts, identify nonfederal law, or develop analogical shortcuts, they risk distorting the common-law process and skewing the substantive development of the law.<sup>253</sup> If districts were to embrace again a strong principle of intra-court comity, they should be careful to limit its application to questions of federal law and perhaps more narrowly to questions of federal procedural law.

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248. Mead, *supra* note 15, at 801–02. Indeed, a recent treatise on precedent barely mentions the principle. See GARNER ET AL., *supra* note 15, at 515 (acknowledging only that “it hasn’t been uncommon for district courts to say that they will follow . . . district precedent ‘absent unusual or exceptional circumstances’” (quoting *Kelly v. Wehrum*, 956 F. Supp. 1369, 1372–73 (S.D. Ohio 1997))).

249. Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213, 227–29 (1999) (noting that the Third and Ninth Circuits initially raised the idea of en bancs in the late 1930s, the Supreme Court approved of the practice in 1941, and Congress codified it in 1948).

250. See Mead, *supra* note 15, at 796.

251. See, e.g., *id.* at 800.

252. *Id.* at 802.

253. See generally Maggie Gardner, *Dangerous Citations*, 95 N.Y.U. L. REV. 1619 (2020).



## 2. Interlocutory Appeal

In 1958, Congress adopted 28 U.S.C. § 1292(b), which allows district courts to certify questions for interlocutory appeal,<sup>254</sup> potentially reducing the scope of the vertical vacuum. “In theory,” Professor Bryan Lammon has explained, § 1292(b) “provides a valuable source of flexibility”—but “[i]n practice, [it] has proved unsatisfactory” because it is “severely underused.”<sup>255</sup> There are several reasons for that underuse. First, both the district judge and the appellate court must exercise their discretion to permit the appeal.<sup>256</sup> That dual discretion is not necessarily a bad model, but it does mean that overzealous gatekeeping by each court can combine to suppress potentially helpful appeals.

Second, the courts are divided over the circumstances in which such interlocutory appeals are, in fact, appropriate. The statute permits interlocutory appeals when they “may materially advance the ultimate termination of the litigation.”<sup>257</sup> That suggests a focus on avoiding unnecessary litigation and trial costs, a focus that is supported by the provision’s legislative history.<sup>258</sup> Scholars have thus debated whether § 1292(b) is an appropriate vehicle for interlocutory appeals that will not necessarily shorten litigation—for example, if interlocutory appeal would serve instead to avoid irreparable prejudice to parties or (of particular relevance here) to resolve a recurrent issue that evades appellate review.<sup>259</sup>

Nonetheless, some courts have used § 1292(b) for this latter purpose.<sup>260</sup> Even if underused, then, interlocutory appeals can provide at least a partial alternative path for promoting consistency for issues that fall within the vertical vacuum.<sup>261</sup>

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254. See FALLON ET AL., *supra* note 31, at 33 & n.93.

255. Bryan Lammon, *Three Ideas for Discretionary Appeals*, 53 AKRON L. REV. 639, 645 (2019). In a recent study covering 2013–2019, the Federal Judicial Center reported that district courts had certified only 636 applications under § 1292(b) and that the federal circuits granted only about 52 percent of the applications that reached them, meaning that they agreed to consider the merits of the appeal. EMERY G. LEE III ET AL., PERMISSIVE INTERLOCUTORY APPEALS, 2013–2019, at 2 (2020).

256. 28 U.S.C. § 1292(b).

257. *Id.*

258. See Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 HARV. L. REV. 607, 611–12 (1975) [hereinafter *Interlocutory Appeals*] (arguing that the legislative history demonstrates that the exclusive purpose of § 1292(b) was to avoid unnecessary trials).

259. Compare *id.* at 635 (arguing no), with Lammon, *supra* note 255, at 645 (arguing yes), and Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1193–94 (1990) (arguing yes).

260. See *Interlocutory Appeals*, *supra* note 258, at 635 & n.117 (gathering cases).

261. The Supreme Court has also approved the supervisory use of mandamus to address important and recurrent issues that fall within the vertical vacuum. See *Schlagenhauf v. Holder*, 379 U.S. 104 (1964) (addressing a federal court’s authority to compel a defendant to undergo a physical examination); see also *Interlocutory Appeals*, *supra* note 258, at 632 & nn. 102–03 (noting that *Schlagenhauf v. Holder*, 379 U.S. 104 (1964), indicates that the need for uniformity can “justify use of the writ of mandamus to settle an important issue of first impression which would not be reviewable on final appeal”). Another option would be to leverage 28 U.S.C. § 1292(e), which invites the use of rulemaking to specify further grounds

### 3. Local Rules and Orders

Some procedural questions might also be addressed *ex ante* through administrative action by the district courts. While local rulemaking was long a source of controversy given the opaqueness of its process and the proliferation of resulting rules,<sup>262</sup> a series of reforms in the 1980s and 1990s have ameliorated those problems. Rule 83 was amended in 1985 to require notice and comment for local rule changes,<sup>263</sup> a requirement that Congress wrote into statutory law in 1988.<sup>264</sup> Further amendments to Rule 83 in 1995 encouraged districts to make local rules simpler and easier to use.<sup>265</sup> They must also be made publicly available<sup>266</sup> (districts routinely post them on their court websites<sup>267</sup>). In short, over the last thirty years, local rulemaking has become more transparent, more participatory, and subject to greater review.

One benefit local rulemaking has over *en banc* decisions is that local rules can be adopted by a mere majority of the district's judges and are then binding on every judge in the district until they are amended or abrogated.<sup>268</sup> But local rules are also limited by their prospective adoption and general application. In contrast, some issues are only crystallized through the facts of a case or set of cases. Opinions also allow judges to say more about a particular issue, providing detailed justification and greater rhetorical emphasis,<sup>269</sup> which is itself a form of guidance to attorneys practicing in the district.

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for interlocutory appeals; that invitation has been used, for example, to permit discretionary appeals of class certification decisions under Rule 23(f). *See* FED. R. CIV. P. 23 committee's note to 1998 amendments.

262. *See* FED. R. CIV. P. 83 advisory committee's note to 1985 amendments (gathering critical scholarship); 12 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3152 (3d ed. 2021) (describing critical studies of local rules since the 1930s); Samuel P. Jordan, *Local Rules and the Limits of Trans-Territorial Procedure*, 52 WM. & MARY L. REV. 415, 436 (2010) (noting history of local rules that were inconsistent with federal rules); Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2012 (1989) (arguing that the Conformity Act was an effort by Congress to rein in the proliferation of local rules).

263. *See* FED. R. CIV. P. 83 advisory committee's note to 1985 amendments.

264. *See* WRIGHT ET AL., *supra* note 262, § 3152 (discussing 28 U.S.C. § 2071).

265. Specifically, the amendments prohibited local rules that merely repeated federal rules or statutory requirements, required that local rules be numbered consistently, and limited sanctions for nonwillful noncompliance. *See* FED. R. CIV. P. 83 advisory committee's note to 1995 amendments.

266. 28 U.S.C. § 2071(d).

267. *See, e.g., Local Rules*, U.S. DIST. CT.: DIST. OF KAN., <https://ksd.uscourts.gov/index.php/local-rules/> [<https://perma.cc/XJL8-U783>] (last visited Feb. 2, 2022); *Local Rules*, U.S. DIST. CT.: DIST. OF ALASKA, <https://www.akd.uscourts.gov/court-info/local-rules-and-orders/local-rules> [<https://perma.cc/52TS-RHW8>] (last visited Feb. 2, 2022); *District Local Civil Rules*, U.S. DIST. CT.: DIST. OF IDAHO, [https://www.id.uscourts.gov/clerks/rules\\_orders/Civil\\_Local\\_Rules.cfm](https://www.id.uscourts.gov/clerks/rules_orders/Civil_Local_Rules.cfm) [<https://perma.cc/8FYG-87KD>] (last visited Feb. 2, 2022).

268. 28 U.S.C. § 2071(c); FED. R. CIV. P. 83(a)(1).

269. Telephone Interview with U.S. District Judge, *supra* note 94 (explaining choice of *en banc* opinion over local rule because an opinion would allow the judges to explain their reasoning in greater detail and would carry more weight with the local bar).

An intermediate option between local rules and en banc decisions is the use of district-wide orders. The 1995 amendments to Rule 83 recognized that district courts may use orders to “regulate practice in any manner consistent with federal law, [the civil] rules, and the district’s local rules.”<sup>270</sup> As the advisory committee explained, Rule 83 as revised “recognizes that courts rely on multiple directives to control practice,” including “internal operating procedures, standing orders, and other internal directives.”<sup>271</sup> As the comment suggests, the language used to label these orders varies widely—again reflecting the diversity of the district courts. For example, while “standing orders” usually refer to single-judge orders,<sup>272</sup> some districts refer to individual judge preferences by other labels, such as “judge specific requirements”<sup>273</sup> or “chambers procedures.”<sup>274</sup> Meanwhile, district-wide directives go by an even wider variety of names, including “Special Orders,”<sup>275</sup> “Miscellaneous Orders,”<sup>276</sup> “General Orders,”<sup>277</sup> “Administrative Orders,”<sup>278</sup> “Internal Operating Procedures,”<sup>279</sup> and—somewhat confusingly—“Standing Orders.”<sup>280</sup>

These district-wide orders are typically technical and administrative, dealing with issues like the appointment of magistrate judges, the setting of fee schedules, and (in recent times) court closures due to COVID-19.<sup>281</sup> Sometimes, however, they can be more substantive. For example, some

270. FED. R. CIV. P. 83(b); *id.* advisory committee’s note to 1995 amendments (explaining subdivision (b)).

271. FED. R. CIV. P. 83 advisory committee’s note to 1995 amendment.

272. *See, e.g.*, FED. R. CIV. P. 83 advisory committee’s note to 1985 amendments (referring to “single-judge standing orders”).

273. *See, e.g.*, *Northern District Judges*, U.S. DIST. CT.: N. DIST. OF TEX., <http://www.txnd.uscourts.gov/northern-district-judges> [https://perma.cc/R8J2-GASE] (last visited Feb. 2, 2022).

274. *See, e.g.*, *Judge Richard A. Jones Chambers Procedures*, U.S. DIST. CT.: W. DIST. OF WASH., <https://www.wawd.uscourts.gov/judges/jones-procedures> [https://perma.cc/8UZ3-KN85] (last visited Feb. 2, 2022).

275. *See, e.g.*, *Rules & Orders*, U.S. DIST. CT.: N. DIST. OF TEX., <http://www.txnd.uscourts.gov/rules-and-orders> [https://perma.cc/7UZL-5ZGP] (last visited Feb. 2, 2022).

276. *See, e.g., id.*

277. *See, e.g.*, *General Orders*, U.S. DIST. CT.: N. DIST. OF ILL., <https://www.ilnd.uscourts.gov/GeneralOrders.aspx> [https://perma.cc/NK7B-KDXF] (last visited Feb. 2, 2022).

278. *See, e.g.*, *Local Rules, Standing and Administrative Orders*, U.S. DIST. CT.: E. DIST. OF PA., <http://www.paed.uscourts.gov/documents2/local-rules> [https://perma.cc/XH6N-UHCU] (last visited Feb. 2, 2022).

279. *See, e.g.*, *Local Rules*, U.S. DIST. CT.: N. DIST. OF ILL., <https://www.ilnd.uscourts.gov/LocalRules.aspx> [https://perma.cc/68PT-J52X] (last visited Feb. 2, 2022).

280. *See, e.g.*, *Active Standing Orders*, U.S. DIST. CT.: DIST. OF OR., <https://www.ord.uscourts.gov/index.php/rules-orders-and-notices/standing-orders/active-standing-orders> [https://perma.cc/2TPX-4UWU] (last visited Feb. 2, 2022); *Local Rules, Standing and Administrative Orders*, U.S. DIST. CT.: E. DIST. OF PA., <http://www.paed.uscourts.gov/documents2/local-rules> [https://perma.cc/JPD4-T5V6] (last visited Feb. 2, 2022).

281. *See, e.g.*, *Current General Orders by Topic*, U.S. DIST. CT.: W. DIST. OF WASH., <https://www.wawd.uscourts.gov/general-orders-current> [https://perma.cc/WGM8-8SX6] (last visited Feb. 2, 2022).

orders set out frameworks for handling discrete sets of cases, like motions for sentence reductions under the First Step Act of 2018<sup>282</sup> or filing requirements for social security cases.<sup>283</sup> Such orders may provide adequate alternatives to en banc decisions that aim to establish frameworks for the handling of future cases, such as, for example, the treatment of state prisoner habeas petitions<sup>284</sup> or the setting of bankruptcy procedures.<sup>285</sup> The issuance of an order might also avoid the problem of an advisory opinion in instances in which the judges wish to coordinate their views on underlying legal questions without resolving particular cases.<sup>286</sup>

There are some drawbacks to district-wide orders, however. Congress and the rule makers have not regulated the process or format of such orders, beyond a requirement that litigants have advance notice of them before being sanctioned for noncompliance.<sup>287</sup> There is no requirement for public notice or comment, as there now is for local rulemaking, or for any consistent labeling, categorization, or publication of the resulting orders—a lack of transparency that can generate challenges by litigants.<sup>288</sup>

In short, there are alternatives to district court en bancs for promoting intradistrict uniformity, even if no one option is perfect on its own. Local rules offer transparency and public input, but they are limited by their prospective and general character. District-wide orders can allow for greater detail and need not be as transsubstantive as rules, but they must still be prospective and are susceptible to the same criticisms that led to the reform

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282. Pub. L. No. 115-391, 182 Stat. 5194 (codified as amended in scattered sections of 18, 21, and 34 U.S.C.); *see, e.g.*, Administrative Order, Defender Motions for Sentence Reductions Under Section 404 of the First Step Act (E.D. Pa. Apr. 26, 2019), <http://www.paed.uscourts.gov/documents/standord/Administrative%20Order%20-%20Defender%20Motions%20for%20Sentence%20Reductions.pdf> [<https://perma.cc/H7XX-6Y57>].

283. *See, e.g.*, General Order 05-15 Re: Social Security Cases (W.D. Wash. June 1, 2015), <https://www.wawd.uscourts.gov/sites/wawd/files/06-01-15GOReSocialSecurityCases.pdf> [<https://perma.cc/YF52-3JAV>].

284. *Compare* White v. Swenson, 261 F. Supp. 42 (W.D. Mo. 1966), with Misc. Order No. 13 Establishing a Procedure to Be Followed in Petitions and/or Motions for Post Conviction Relief (N.D. Tex. Mar. 18, 1977), [http://www.txnd.uscourts.gov/sites/default/files/orders/misc/MiscOrder13\\_31877Prisoner.pdf](http://www.txnd.uscourts.gov/sites/default/files/orders/misc/MiscOrder13_31877Prisoner.pdf) [<https://perma.cc/5DZN-7F6P>] (order signed by all district judges). Another option is to establish the framework as a set of substance-specific local rules, which would presumably trigger notice-and-comment requirements. *See, e.g.*, *Rules of Practice*, U.S. DIST. CT.: DIST. OF UTAH, <https://www.utd.uscourts.gov/rules-practice> [<https://perma.cc/SV2E-4BJZ>] (last visited Feb. 2, 2022) (linking to “Rules Governing Section 2254 & 2255 Proceedings”).

285. For examples of full en bancs used to address the handling of bankruptcy matters, see *City Fire Equip. Co. v. Ansul Fire Prot. Wormald U.S., Inc.*, 125 B.R. 645 (N.D. Ala. 1989) (addressing withdrawal of bankruptcy reference in light of demand for jury trial); *In re Retirement Inn at Forest Lane, Ltd.*, 83 B.R. 795 (D. Utah 1988) (directing bankruptcy judges to resolve motions to transfer venue).

286. *See, e.g.*, General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education, 45 F.R.D. 133 (W.D. Mo. 1968).

287. FED. R. CIV. P. 83(b).

288. *See, e.g.*, *Adams v. Chater*, 914 F. Supp. 1365, 1369–70 (E.D. La. 1995) (describing and rejecting litigant challenge to attorney fee schedule adopted “at the monthly *en banc* meeting” of the district’s judges).

of local rulemaking in the 1980s and 1990s. Where district courts seek a uniform answer to a more precise question, they may be able to use § 1292(b) to encourage appellate review.

En bancs may nonetheless be a helpful tool when a question will arise repeatedly in the short term<sup>289</sup> or when a district split has already emerged.<sup>290</sup> In those circumstances, if interlocutory review is not forthcoming, similarly situated litigants are at risk of different treatment based on the random chance of judge assignment.

### C. Many Minds

Appellate courts routinely sit as panels on the understanding that many minds reach better decisions.<sup>291</sup> There is an aspect of this “many minds” rationale in district court en bancs as well, as the resulting decisions sometimes acknowledge.<sup>292</sup> Even when not explicitly stated, however, the ability to work through a difficult problem with the assistance of colleagues likely underlies many of these decisions.

First, en banc proceedings can help expose judges to more litigant perspectives. When the en banc decision involves multiple cases, judges have access to the briefs and arguments of multiple litigants.<sup>293</sup> Judges convening en banc hearings have also invited participation from additional

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289. See, e.g., *Greer v. Skilcraft*, 704 F. Supp. 1570, 1577 (N.D. Ala. 1989) (resolving apparent conflict between recently amended statute and prior district practice that affected more than one hundred pending cases). The constitutionality of the new U.S. Sentencing Guidelines raised a similar dilemma.

290. Two current procedural issues that have created intradistrict splits, yet largely evade appellate review, are (1) the permissibility of so-called “snap removal,” see Arthur Hellman et al., *Neutralizing the Stratagem of “Snap Removal”: A Proposed Amendment to the Judicial Code*, 9 FED. CTS. L. REV. 103, 104–06 (2016); and (2) whether the pleading requirements of *Twombly* and *Iqbal* apply to affirmative defenses, see Brian Soucek & Remington B. Lamons, *Heightened Pleading Standards for Defendants: A Case Study of Court-Counting Precedent*, 70 ALA. L. REV. 875, 891–95 (2019). For a rare appellate decision on the latter question, see *GEOMC Co. v. Calmare Therapeutics Inc.*, 918 F.3d 92 (2d Cir. 2019). These issues might thus be appropriate topics for collective proceedings to promote intradistrict uniformity pending clearer resolution by higher courts.

291. For a summary of the “many minds” argument and a thoughtful analysis of its applicability to panel decision-making, see Paul H. Edelman, *On Legal Interpretations of the Condorcet Jury Theorem*, 31 J. LEGAL STUD. 327, 339–43 (2002), in particular *id.* at 339–43. See also, e.g., Aaron-Andrew P. Bruhl, *Following Lower-Court Precedent*, 81 U. CHI. L. REV. 851, 863–64 (2014) (summarizing the Condorcet jury theorem); Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1272–76 (2000) (drawing on social science research to link quality of deliberation within juries to correctness in outcome).

292. See, e.g., *United States ex rel. Smith v. Warden of Phila. Cnty. Prison*, 87 F. Supp. 339, 346 (E.D. Pa. 1949) (opinion of Welsh, J.) (explaining that the assigned judge convened “a full Bench to get the benefit of the collective wisdom of [his] associates rather than to have the case decided on the opinion of a single judge”); *United States v. Delaney*, 8 F. Supp. 224, 225 (D.N.J. 1934) (“We have thought it wise in this district to lend perspective by prescribing the assistance of a judge other than the one who presided at the trial.”).

293. When consolidating or coordinating a number of cases, districts have designated multiple “exemplar” cases to be argued before the en banc court, while also allowing the judges to consider “alternative or additional arguments made by counsel in other cases.” *Skilcraft*, 704 F. Supp. at 1572; see also *Phan v. Reno*, 56 F. Supp. 2d 1149, 1151 (W.D. Wash. 1999).

interested parties, who may appear as amici.<sup>294</sup> The hearings themselves may be longer.<sup>295</sup> And given the unusual nature of the proceeding, litigants may rise to the occasion by producing particularly thorough briefs.<sup>296</sup> As one judge described, the en banc proceeding was preferable in a difficult set of cases because, if the judges had heard the cases separately, they “wouldn’t have [the] benefit of questions someone else asked, [and] wouldn’t have [the] benefit of super-enhanced brief[s]” that multiple lawyers had helped to write.<sup>297</sup>

Second, the development of the collective decision itself will entail discussion and deliberation, which can in turn improve decision-making.<sup>298</sup> Collective decisions do not typically describe the procedure or process used, at least not in any detail, but interviews with judges who participated in more recent en bancs are indicative of the collaboration involved in en banc decisions: there may be conferences before and after oral arguments to discuss the disposition of the case,<sup>299</sup> and drafts of the opinion may be circulated, with judges offering changes and compromises.<sup>300</sup>

To the extent that leveraging the many minds of district judges is a benefit worth pursuing, it is hard to achieve through alternative means. The best options include informal discussions and statutory three-judge courts, but both are limited in scope. Instead, the district courts have been encouraged to leverage their collective wisdom through the accumulation of disparate opinions, a solution that comes at the expense of judicial economy and intradistrict uniformity.

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294. See, e.g., *Phan*, 56 F. Supp. 2d at 1151 (noting submission of briefs by amici curiae); *United States v. Bogle*, 693 F. Supp. 1102, 1104 (S.D. Fla. 1988) (same); see also *Ellis v. Mayor and City Council of Balt.*, 234 F. Supp. 945, 946 (D. Md. 1964) (noting that the order convening the panel of judges “was served on a number of potentially interested persons”), *aff’d*, 352 F.2d 123 (4th Cir. 1965); *In re Young*, 12 F. Supp. 30, 34 (S.D. Ill. 1935) (noting that interested parties on both sides of the issue were provided opportunity to submit briefs).

295. See Telephone Interview with U.S. District Judge (June 15, 2020) (noting two-hour hearing).

296. See, e.g., *United States v. Cohen*, 275 F. Supp. 724, 727 n.5 (D. Md. 1967) (“The Court desires to comment that the cases were carefully, fully and completely presented on both sides.”), *aff’d sub nom. United States v. DiTommaso*, 405 F.2d 385 (4th Cir. 1968).

297. Telephone Interview with U.S. District Judge, *supra* note 295; see also Email from U.S. District Judge to Maggie Gardner, Assoc. Professor of Law, Cornell L. Sch. (Sept. 2, 2020) (on file with author) (“[I]f there were more sets of lawyers, we could have the benefit of all they chose to say. We could hear questions from other judges that might not occur to us.”).

298. See, e.g., *Diamond & Zeisel*, *supra* note 84, at 148 (documenting that collective deliberation among district judges decreased sentencing disparities, albeit modestly).

299. Telephone Interview with U.S. District Judge, *supra* note 295; Email from U.S. District Judge to Maggie Gardner, *supra* note 297.

300. See, e.g., Telephone Interview with U.S. District Judge, *supra* note 3 (describing a “group effort” and affirming that “[t]his is the way it should be, an important decision like that”); Telephone Interview with U.S. District Judge, *supra* note 94 (noting rounds of edits and feedback on reasoning of the decision); Email from U.S. District Judge to Maggie Gardner, Assoc. Professor of Law, Cornell L. Sch. (June 19, 2020) (describing the process and concluding that “the end result was a modified version of the original draft that all of us felt comfortable signing on [to]”).

### 1. Informal Discussions

Any discussion of institutional mechanisms available to district judges must acknowledge the reality that judging occurs in a sociological context: even if district judges generally work independently, they operate within a collegial environment in which they interact with their peers in a range of informal to formal settings.<sup>301</sup> Annual circuit conferences encourage socialization, as well as the sharing of best practices.<sup>302</sup> A district's judges may meet for weekly lunches or monthly meetings,<sup>303</sup> or they may more informally run into colleagues in the hall or stop by each other's chambers. Such interactions allow for more informal discussions of procedural problems, unusual cases, or potential intradistrict splits. Indeed, some district court en banc arose out of such routine conversations.<sup>304</sup>

Such interactions by themselves, however, do not approach the level of collaboration entailed by most district court en bancs. For one thing, judges may limit the degree to which they discuss cases (or acknowledge that they discuss cases) because they are concerned about whether such conversations are entirely proper or because they jealously guard their independence as decision-makers. As one judge was quick to emphasize, "I almost never talk to other judges about issues I've got, even if they have a similar one. We decide our own cases."<sup>305</sup> Further, the sort of thorny issues addressed by many en banc decisions requires deeper engagement and analysis than an informal conversation can provide. While conversations and camaraderie are important, they are not a replacement for truly collaborative efforts.

### 2. Three-Judge Courts

On the opposite end of the formality spectrum, statutorily mandated three-judge courts can also promote the epistemic benefits of collective decision-making. Although this was not the only rationale for requiring three-judge courts,<sup>306</sup> a three-judge court does "ensure[] greater deliberation with less chance of error or bias."<sup>307</sup> But the use of three-judge courts has been significantly curtailed since the mid-1970s.<sup>308</sup>

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301. *Cf.* Levy, *supra* note 35, at 113 (quoting federal judge who noted that informal socializing encourages collegiality in both personal interactions and opinion writing).

302. *See* FISH, *supra* note 16, at 147–50.

303. *See, e.g.*, Telephone Interview with U.S. District Judge (June 17, 2020) (noting weekly judges' lunch); Email from U.S. District Judge to Maggie Gardner, Assoc. Professor of Law, Cornell L. Sch. (Sept. 3, 2020) (on file with author) (noting weekly judges' lunch).

304. *See* Email from U.S. District Judge to Maggie Gardner, Assoc. Professor of Law, Cornell L. Sch. (June 17, 2020) (on file with author) (noting that the idea for the en banc hearing arose out of weekly judges' lunch).

305. Telephone Interview with U.S. District Judge, *supra* note 295.

306. Another commonly cited justification was the need for greater legitimacy for controversial federal court decisions, a concern that will be considered in Part III.D.2.

307. Currie, *supra* note 39, at 7; *see also id.* at 7–8 ("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.").

308. *See supra* Part I.A.2.

District courts have some leeway, however, in developing their own three-judge court rules (though limited to the involvement of district judges). For example, the Northern District of Texas in 2000 convened en banc to consider reciprocal attorney discipline and referred the matters to a three-judge panel.<sup>309</sup> When similar reciprocal disciplinary matters arose in 2001 and 2002, the en banc court again delegated the matter to a three-judge panel;<sup>310</sup> it then wrote a three-judge panel requirement for reciprocal disciplinary matters into its local rules.<sup>311</sup> Other districts have similarly adopted local rules requiring a three-judge panel for some attorney discipline cases,<sup>312</sup> while the Northern District of Illinois handles serious disciplinary matters through a seven-judge “executive committee” established through its internal operating procedures.<sup>313</sup> These panel requirements may reflect a concern that, when it comes to serious disciplinary action, judges—particularly those who were affected by the misconduct—may wish to slow down their decision-making process through collective consideration.<sup>314</sup>

Outside of the attorney discipline context, however, district courts appear not to have made much use of three-judge panel requirements. It is perhaps hard to identify in advance which sets of cases would justify the extra resources and efforts that collective decision-making would entail. Given recent debates, one option might be to permit or require three-judge panels for cases in which the plaintiff seeks a so-called “nationwide” injunction.<sup>315</sup> Another option might be to make the invocation of three-judge panels optional for all cases, based on the request of the assigned judge and with the approval of the chief judge or a majority of the district’s judges.<sup>316</sup>

### 3. Percolation

En bancs seek to harness “many minds” through a single, synchronous decision, but the epistemic value of collective decision-making can also be

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309. See *In re Smith*, 100 F. Supp. 2d 412 (N.D. Tex. 2000).

310. See *In re Wightman-Cervantes*, 236 F. Supp. 2d 618 (N.D. Tex. 2002); *In re McTighe*, 131 F. Supp. 2d 870 (N.D. Tex. 2001).

311. See N.D. TEX. LR 83.8(h)(iii); see also *In re Wightman-Cervantes*, 236 F. Supp. 2d at 620 n.1 (describing the development of this practice and local rule).

312. See, e.g., *In re Disciplinary Proceedings Regarding Doe*, 876 F. Supp. 265 (M.D. Fla. 1993) (applying three-judge panel rule); *In re Cintolo*, No. MBD 85-564, 1996 WL 464047 (D. Mass. July 11, 1996) (applying local three-judge panel rule to consider reinstatement of attorney to the bar).

313. N.D. ILL. IOP1, IOP2; N.D. ILL. R. 3.51.D; see also *In re Palmisano*, 70 F.3d 483, 485 (7th Cir. 1995) (approving of the district’s handling of disciplinary matters via executive committee).

314. See Telephone Interview with U.S. District Judge, *supra* note 94; E.D. PA. R. 83.6 R.V(B) (specifying a three-judge panel requirement when an attorney discipline hearing is “predicated upon the complaint of a judge of this court”).

315. Cf. Gregg Costa, *An Old Solution to the Nationwide Injunction Problem*, HARV. L. REV. BLOG (Jan. 25, 2018), <https://blog.harvardlawreview.org/an-old-solution-to-the-nationwide-injunction-problem/> [<https://perma.cc/7GQQ-GS46>] (suggesting statutory three-judge court model could be used for nationwide injunctions).

316. For further discussion, see *infra* Part IV.C.



pursued through sequential decisions by independent judges.<sup>317</sup> Particularly when it comes to lower courts, numerous decisions addressing the same question may help reviewing courts identify not only epistemically correct answers, but also answers that are pragmatically wise and broadly acceptable.<sup>318</sup> As Professor Michael Coenen and Seth Davis have recently explained, this valuing of district court “percolation” on legal questions rose to prominence in the twentieth century,<sup>319</sup> coinciding with the decline of intra-court comity.

That inverse relationship is not surprising as percolation valorizes the fragmentation of the district courts’ voice. As Coenen and Davis argue, percolation comes at the expense of inconsistency in the treatment of litigants, even though its benefits can be achieved through other means.<sup>320</sup> While not among the alternative means discussed by Coenen and Davis, district court en bancs are one such alternative: they can provide many of the benefits of percolation while reducing inconsistency in individual treatment. One perceived benefit of percolation is the collating of different factual circumstances in which a legal question can arise, but en bancs can also achieve that factual collation when multiple exemplar cases are considered together.<sup>321</sup> And in lieu of simply crowdsourcing district judges’ analyses across cases, district court en bancs enable active deliberation among district judges—deliberation that is especially valuable when an issue is either shielded from appellate review or is one in which the district court has particular expertise.

To the extent percolation is worth promoting, however, it can be pursued alongside collective proceedings and intra-court comity: when percolation is paired with collective proceedings, the benefit of many minds is leveraged both within *and* across districts, maintaining uniformity within districts without foreclosing potentially helpful variation across districts.<sup>322</sup>

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317. See, e.g., Fitzpatrick, *supra* note 198, at 111 (noting the Condorcet Jury Theorem can apply to both simultaneous and sequential decision-making).

318. See Bruhl, *supra* note 291, at 861–77 (considering reasons why the Supreme Court might be interested in the collective wisdom of district court decisions).

319. Michael Coenen & Seth Davis, *Percolation’s Value*, 73 STAN. L. REV. 363, 371–72 (2021).

320. See generally *id.*

321. See *supra* note 293 (gathering examples).

322. The debate over the constitutionality of the U.S. Sentencing Guidelines provides an excellent example of such “percolation” across districts, despite the use of collective decisions within individual districts that prevented significant sentencing disparities between defendants sentenced within the same courthouse. See *supra* Part II.C.

#### D. Legitimacy

Group decisions—especially if unanimous—are often perceived as more legitimate,<sup>323</sup> or at least exude greater gravitas.<sup>324</sup> District courts have used en bancs to signal the seriousness with which they are taking issues of great local importance.<sup>325</sup> Speaking with one voice may serve to educate a key audience,<sup>326</sup> reduce future challenges,<sup>327</sup> or simply avoid any one judge having to take sole responsibility for a difficult or high-stakes decision.<sup>328</sup>

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323. See, e.g., Robert J. MacCoun & Tom R. Tyler, *The Basis of Citizens' Perceptions of the Criminal Jury: Procedural Fairness, Accuracy, and Efficiency*, 12 LAW & HUM. BEHAV. 333, 338–39 (1988) (finding that survey respondents considered unanimous twelve-person jury verdicts to be more accurate, fairer, and less biased than nonunanimous jury verdicts, six-person jury verdicts, or rulings by judges).

324. Chief Justice John Marshall famously moved the Supreme Court from seriatim opinions to collective decisions in order to increase the “weight and dignity,” and thus the political power, of the Court. M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent* 24 (John M. Olin Program in L. and Econ., Working Paper No. 363, 2007).

325. See, e.g., *Yoerg Brewing Co. v. Brennan*, 59 F. Supp. 625, 625 (D. Minn. 1945) (“The question raised being deemed highly important and novel, the Judges of this District sat en banc.”); *Mich. Bell Tel. Co. v. Odell*, 45 F.2d 180, 181 (E.D. Mich. 1930) (noting “the cause being of major importance” as the reason for convening a voluntary three-judge court); *Schiff v. Hannah*, 282 F. Supp. 381, 382 (W.D. Mich. 1966) (“This matter is being considered by the Judges of this Court, sitting en banc, because of the importance of the questions involved . . . .”); see also *City Declares Its Right to Regulate*, OREGONIAN, Sept. 27, 1912, at 9 (reporting that, “[w]ith evident full appreciation of the immense importance of the injunction suit[,] United States District Judge [Robert S.] Bean requested that his associate, Judge Charles E. Wolverton, sit with him during the argument and join with him in its decision”). For the resulting joint decisions by Judges Bean and Wolverton, see *Portland Ry., Light & Power Co. v. City of Portland*, 200 F. 890 (D. Or. 1912); *Portland Ry., Light & Power Co. v. City of Portland*, 201 F. 119 (D. Or. 1912).

326. Some of the collective decisions in asbestos cases, for example, sent clear signals to defendants that the judges were unified in their decision to consolidate cases or reject a common defense. See *In re All Asbestos Cases Pending in the U.S. Dist. Ct. for the Dist. of Md.*, No. BML-1, 1983 U.S. Dist. LEXIS 10719 (D. Md. Dec. 16, 1983); *In re Asbestos Litig.*, 628 F. Supp. 774 (D.N.J. 1986), *aff'd*, 829 F.2d 1233 (3d Cir. 1987); see also *Keatley v. Food Lion, Inc.*, 715 F. Supp. 1335 (E.D. Va. 1989) (denying out-of-time demands for jury trials by two judges and gathering all of the other cases in which the same attorney had made the same mistake). *United States v. Wallace*, 222 F. Supp. 485 (M.D. Ala. 1963) (per curiam), used collective proceedings to add extra weight to an injunction directed against state officials, while *Conley v. Lake Charles School Board*, 303 F. Supp. 394 (W.D. La. 1969) (per curiam), used collective proceedings to express disagreement with the Fifth Circuit’s direction to take meaningful action towards desegregating schools.

327. See, e.g., *Angle v. Legislature of the State of Nev.*, 274 F. Supp. 2d 1152, 1154 (D. Nev. 2003) (noting the likelihood of additional cases as justifying en banc proceedings), *aff'd sub nom. Amodei v. Nev. State Senate*, 99 F. App’x 90 (9th Cir. 2004); Telephone Interview with U.S. District Judge, *supra* note 3 (explaining that a collective decision would “put the cork in the bottle” of future complaints).

328. See Recent Case, *supra* note 15, at 133 (“The desire of a judge to avoid sole responsibility especially in bankruptcy and other matters involving large amounts may be the explanation of this procedure [of deciding cases collectively].”). This was apparently the reason extra judges were assigned for a time in the school desegregation litigation in Detroit. See *supra* note 159 and accompanying text. It also factored into Chief Justice Marshall’s decision to move from seriatim to collective opinions. See Henderson, *supra* note 324, at 27 (noting that the collective opinions “carried greater authority, and individual justices were

The ceremonial nature of the en banc hearing itself can signal the seriousness with which the court is treating the matter and the weightiness of any subsequent decision.<sup>329</sup> As one judge put it, for these cases, “the procedure [is] as important as the decision itself.”<sup>330</sup>

Collective proceedings also allow district judges to act as a unified court on matters of institutional integrity.<sup>331</sup> For example, district courts have used full en bancs to address particularly serious misconduct allegations against members of their bar.<sup>332</sup> They have also used full en bancs to protect the integrity of their grand juries: the District of Nebraska sat en banc in 1976 to consider requests for the release of grand jury testimony regarding corrupt local officials,<sup>333</sup> and nine judges of the Eastern District of New York held an en banc hearing in 1988—attended by nearly 200 spectators—to consider whether the U.S. Attorney had misused grand jury proceedings in order to provoke a mistrial in a mob trial.<sup>334</sup> For an example straddling these concerns, consider the Eastern District of Arkansas’s en banc decision to dismiss an ethics complaint lodged against Kenneth Starr for his handling of the district’s grand jury in the Whitewater investigation.<sup>335</sup>

En bancs, by allowing district courts to speak with one weightier voice, can also serve as a form of both interbranch and intrabranched dialogue. In terms of Congress, Professor Ahmed Taha has argued that the use of en banc decisions in the Guidelines cases may have been strategic, given that districts that issued collective decisions were more likely to find the Guidelines unconstitutional than districts that issued individual opinions.<sup>336</sup> Recall also

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shielded from outrage or impeachment charges”); *id.* at 17 (noting Thomas Jefferson’s opposition to the shift because it “insulated any single justice from criticism”).

329. Telephone Interview with U.S. District Judge (June 19, 2020) (noting that interested parties were impressed by the special nature of the hearing).

330. Telephone Interview with U.S. District Judge, *supra* note 3.

331. *See generally* Pfander, *supra* note 237 (documenting the historical distinction between the work of individual judges and collective administrative decisions taken on behalf of the court).

332. *See, e.g., In re Tyler*, 677 F. Supp. 1410 (D. Neb. 1987); *In re Ryder*, 263 F. Supp. 360 (E.D. Va. 1967); *In re Bennethum*, 205 F. Supp. 821 (D. Del. 1962); *In re Schachne*, 5 F. Supp. 680 (E.D.N.Y. 1934).

333. *See United States v. Salanitro*, 437 F. Supp. 240 (D. Neb. 1977), *aff’d*, *In re Disclosure of Testimony Before Grand Jury*, 580 F.2d 281 (8th Cir. 1978).

334. *United States v. Ruggiero*, 846 F.2d 117, 121–22 (2d Cir. 1988) (noting hearing); *see also* Leonard Buder, *In Rare Session, 9 U.S. Judges Convene to Review Mob Trial*, N.Y. TIMES, Jan. 22, 1988, at A1 (listing participating judges, including Chief Judge Jack B. Weinstein, Judge John R. Bartels, and Judge Mark A. Constantino, who was presiding over the mob trial). Judge Bartels later characterized this proceeding as an example of an en banc proceeding being motivated by “the desire to assist a fellow judge in particularly serious cases.” Bartels, *supra* note 15, at 41 n.13. He worried, however, that it might have resulted in an advisory opinion to the extent that the panel left the ultimate question of whether to declare a mistrial to Judge Constantino. *Id.* at 41. I have not included this case in the appendix as I have not been able to locate a decision, despite Judge Bartels’s reference to one.

335. *In re Starr*, 986 F. Supp. 1159, 1163 (E.D. Ark. 1997).

336. *See* Taha, *supra* note 15, at 1235.

that a few district courts similarly used collective proceedings in the 1930s to declare New Deal legislation unconstitutional.<sup>337</sup>

Other cases have involved district courts pushing back against executive power. The Northern District of Illinois in 1924 held en banc that the President could not pardon criminal contempt because it would usurp the essential authority of the courts<sup>338</sup> (though the Supreme Court ultimately disagreed<sup>339</sup>), and the Eastern District of Pennsylvania in 1932 held en banc that it did not have to automatically issue a bench warrant upon a grand jury's indictment<sup>340</sup> (again, the Supreme Court disagreed<sup>341</sup>). It is perhaps notable that these decisions came during a period of tension between the executive branch and the lower federal courts, which were chafing under the administrative oversight of the U.S. Department of Justice. That tension eased once oversight of the courts was moved in 1939 to the newly established Administrative Office of the U.S. Courts.<sup>342</sup> More recently, the five-judge decision in *Phan v. Reno*<sup>343</sup> similarly signaled to the executive branch the strength of the judges' concerns regarding the government's policy of indefinite detention of noncitizens awaiting deportation.

But sometimes the intended audience of the en banc decision is a higher court. Occasionally, this message has been explicit, like the Western District of Louisiana's use of en banc decisions to make clear its disagreement with the Fifth Circuit regarding school desegregation plans.<sup>344</sup> Consider also two collective decisions from the District of Maryland from the same period: in the first decision, all five of the district's judges ordered U.S. Customs to release magazines seized as obscene, citing recent First Amendment precedents.<sup>345</sup> Two of the participating judges issued another joint opinion the following year, applying the same framework to order the release of even more prurient magazines.<sup>346</sup> Both opinions were clear about their distaste for the seized materials.<sup>347</sup> But the later opinion was more explicit about the

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337. See, e.g., *In re Schoenleber*, 13 F. Supp. 375 (D. Neb. 1936); *In re Young*, 12 F. Supp. 30 (S.D. Ill. 1935); *Gold Medal Foods, Inc. v. Landy*, 11 F. Supp. 65 (D. Minn. 1935).

338. *United States v. Grossman*, 1 F.2d 941 (N.D. Ill. 1924).

339. See generally *Ex parte Grossman*, 267 U.S. 87 (1925).

340. *United States v. Wingert*, 55 F.2d 960 (E.D. Pa. 1932). The court noted, however, that its decision to sit en banc—and perhaps its decision to quash the indictment, as a means of creating a final judgment—was intended to encourage and enable appellate review. *Id.* at 963; see also *id.* (“If, however, there is no way of raising the question by appellate review other than by mandamus, we express our entire willingness to have it so raised.”).

341. See generally *Ex parte United States*, 287 U.S. 241 (1932).

342. See FISH, *supra* note 16, at 91–124.

343. 56 F. Supp. 2d 1149 (W.D. Wash. 1999).

344. See *supra* Part II.B.

345. *United States v. 4,400 Copies of Mags., Entitled “Cover Girl” & “Exciting,”* 276 F. Supp. 902, 904 (D. Md. 1967) (per curiam).

346. *United States v. 127,295 Copies of Mags., More or Less, Entitled “Amor,”* 295 F. Supp. 1186, 1188–89 (D. Md. 1968).

347. *127,295 Copies of Mags.*, 295 F. Supp. at 1188 (“It is incredible that those who adopted the First Amendment intended that it should license purveyors of filth to flood the country with the kind of material now held protected.”); *4,400 Copies of Mags.*, 276 F. Supp. at 903 (“The magazines involved in the present case are lewder than any magazines heretofore

lower courts' confusion following the Supreme Court's recent case law and was more emphatic about the harm it had caused.<sup>348</sup> Nonetheless, once it had made its views known, the court—like the Western District of Louisiana in the school desegregation cases—concluded that “the duty of the inferior federal courts is to apply, as best we can, the standards the Supreme Court has decreed with respect to obscenity.”<sup>349</sup>

More often, however, the message to higher courts has been left implicit. Judges with whom I spoke, for example, were cognizant that their decision to sit en banc would “chill the enthusiasm” of appellate courts to get involved, or at least that the resulting decision would carry “more force” on review.<sup>350</sup>

### 1. Opinion Writing

Almost everything a judge does is intended to project the legitimacy of her judgments, from the wearing of robes to the provision of rationales for decisions. Collective decisions project a certain type of legitimacy by representing the unified institutional voice of the court. Although individual judges cannot precisely replicate the signal sent by a collective decision, they can use the rhetoric and style of opinion writing to increase the stature of the district court vis-à-vis other government actors. For example, a judge who authors a 200-page decision filled with citations raises the cost of an appellate court disagreeing with him. Judges can cite prior decisions from within the district to show unity in approach to a common problem or to reinforce a lesson directed at a specific litigant (colloquially referred to as a “benchslap”<sup>351</sup>). They can also employ dicta or emotional rhetoric to criticize law or precedent that they nonetheless feel compelled to apply.

Judges use these rhetorical moves intuitively, but they are not entirely costless. Besides the resources consumed by the writing (and reading) of lengthy opinions, excessive use of citations for persuasive effect can distort the common-law development of doctrines.<sup>352</sup> And at a time when individual judges—and their decisions—are quickly associated with their appointing President, single-authored decisions on controversial or high-stakes cases

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considered by this Court . . . , appeal more blatantly to the prurient interest of the average man or boy, and go further beyond the prevailing standards of candor. They have no social value.”).

348. *127,295 Copies of Mags.*, 295 F. Supp. at 1188 (“As was to be expected, the successive decisions by the Supreme Court have emboldened the purveyors of pornography to import magazines which go further and further beyond the prevailing standards in this country.”).

349. *Id.*

350. Telephone Interview with U.S. District Judge, *supra* note 303.

351. See, e.g., Joe Patrice, *Wal-Mart Benchslapped in Epic String Cite*, ABOVE THE LAW (Oct. 11, 2018, 4:02 PM), <https://abovethelaw.com/2018/10/wal-mart-benchslapped-in-epic-string-cite> [<https://perma.cc/J6VQ-XQPS>] (describing “nuclear string cite” in *Rivera v. Sam’s Club Humacao*, 386 F. Supp. 3d 188 (D.P.R. 2018), in which the judge gathered eighteen prior cases, including fifteen district court opinions, in which the same defendant had been sanctioned for spoliation).

352. See Gardner, *supra* note 253.

may never be able to overcome the shadow of politicization.<sup>353</sup> Some cases may call for greater markers of legitimacy than even the most erudite opinion can provide.

## 2. Three-Judge Courts, Redux

This brings us back to the other rationale for three-judge courts: the added legitimacy of having multiple judges agree to the imposition of a controversial remedy. While it seemed offensive that “one little federal judge” could block the collective will of a state’s governor, legislature, and attorney general following *Ex Parte Young*, “if three judges declare that a state statute is unconstitutional[,] the people would rest easy under it.”<sup>354</sup> Put another way, “[t]hree judges lend the dignity required to make such a decision palatable.”<sup>355</sup>

That intuition spilled over into the practice of district court en bancs, with some voluntary collective proceedings being self-consciously modeled on statutory three-judge courts.<sup>356</sup> It is possible that the statutory repeals of the primary three-judge court requirements removed an important institutional model for collective adjudication, decreasing district judges’ awareness of and willingness to engage in joint decision-making. Regardless, statutory three-judge courts today provide very little scope for collective adjudication at the district court level, leaving district judges with few options for bolstering the legitimacy of deeply considered yet potentially controversial decisions.

In sum, district judges today have alternative mechanisms to promote judicial economy and intradistrict uniformity, but the decline of statutory three-judge courts has left them with fewer options for leveraging collective deliberation and enhancing the legitimacy of difficult or controversial decisions. Note that these needs—economy, consistency, deliberation, and legitimacy—roughly correlate with the different formats of collective district

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353. See Bert I. Huang, *Judicial Credibility*, 61 WM. & MARY L. REV. 1053, 1060 (2020) (summarizing findings that the public’s assessment of judicial credibility in high-profile cases is influenced by the association of the judge with the judge’s appointing president).

354. Currie, *supra* note 39, at 7 & n.40 (quoting Senator Overman); see also Morley, *supra* note 36, at 728 (quoting Senator Overman as explaining that “[t]he people and the courts of the State are more inclined to abide by the decision of three judges than they would of one subordinate inferior Federal judge . . . .”); *id.* at 735 (quoting President Franklin D. Roosevelt and others regarding the need for such procedures).

355. Currie, *supra* note 39, at 7.

356. See, e.g., *United States v. Cohen*, 275 F. Supp. 724, 728 (D. Md. 1967) (noting that while a three-judge court was not required by statute, the Chief Judge would convene a district court panel voluntarily in light of similarly important stakes), *aff’d*, *United States v. DiTommaso*, 405 F.2d 385 (4th Cir. 1968); *Mich. Bell Tel. Co. v. Odell*, 45 F.2d 180, 181 (E.D. Mich. 1930) (noting that while there was “no legal requirement for the convening of a statutory court,” the case was nonetheless heard “before the three judges of the district” given that “the cause [was] of major importance”); see also *Renton Line Fight to Be Heard Again*, SEATTLE STAR, July 11, 1914, at 3 (noting that the three-judge court was being disbanded but that two local district judges would continue to consider the case). For the resulting two-judge decision in the *Renton Line* case, see *Seattle, R. & S. Ry. Co. v. City of Seattle*, 216 F. 694 (W.D. Wash. 1914).

court proceedings—coordinated decisions, adopted decisions, panels, and full en bancs. As more tools have developed for consolidating civil litigation, for example, the need for ad hoc coordinated decisions in civil cases has largely disappeared. To the extent that intradistrict uniformity is valued—for example, to establish consistent treatment of recurrent procedural questions that evade appellate review—occasional adopted decisions may be well-suited to establish it in a resource-efficient manner. But if the greatest remaining need for collective proceedings is deliberation and legitimacy, that is best achieved through panels and full en bancs. In considering the future of district court en bancs, then, the next part focuses primarily on the use of panels and full en banc proceedings.

#### IV. THE FUTURE OF DISTRICT COURT EN BANCs

The use of voluntary collective adjudication by district courts has been extremely rare in relation to the scale of the district courts' dockets. The decisions gathered in the appendix make no mention of local rules, and no district currently appears to have a local rule addressing en banc proceedings.<sup>357</sup> At times, collective decisions have acknowledged other district court en bancs<sup>358</sup> or have been clustered in a single district,<sup>359</sup> suggesting a transmission process from one case to the next, perhaps under the advocacy of a particular judge. But other times it appears that a decision to decide a case collectively arose organically.<sup>360</sup> Indeed, multiple judges with whom I spoke were surprised to learn that other judges had ever done something similar.<sup>361</sup>

The goal of this part is not to stimulate a greater frequency of district court en bancs. Collective proceedings are time and resource intensive, and their overuse could undermine the values they are meant to promote. Frequent invocation might sow rancor or discord among a district's judges, for

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357. It is possible, however, that district courts have had such local rules in the past. *See In re Gaylor*, 123 B.R. 236, 242 n.9 (Bankr. E.D. Mich. 1991) (referencing local rules regarding en banc procedures for the Northern, Eastern, and Western Districts of Oklahoma). The Western District of Oklahoma currently has a local rule allowing its bankruptcy judges to sit en banc. BANKR. W.D. OKLA. R. 7052-1.

358. *See, e.g.,* Ainsworth v. Vasquez, 759 F. Supp. 1467, 1469 n.2 (E.D. Cal. 1991); Dondi Props. Corp. v. Com. Sav. & Loan Ass'n, 121 F.R.D. 284, 286 (N.D. Tex. 1988); United States v. Anaya, 509 F. Supp. 289 (S.D. Fla. 1980), *aff'd*, United States v. Zayas-Morales, 685 F.2d 1272 (11th Cir. 1982).

359. In addition to the Eastern District of Pennsylvania's notable tradition of en bancs, consider the five en banc decisions issued by the District of Utah in the mid-1980s and the five en banc decisions issued by the District of Maryland in the 1960s. *See* Appendix. Judges Matthew M. Joyce and Gunnar Nordbye of the District of Minnesota participated in at least five decisions together in the 1930s and 1940s, including one that they issued jointly as visiting judges in the District of North Dakota. *See In re Anderson*, 22 F. Supp. 928 (D.N.D. 1938).

360. For examples of decisions that explicitly discuss their collective nature but make no reference to other district court en bancs, see *Angle v. Legislature of the State of Nev.*, 274 F. Supp. 2d 1152, 1154 (D. Nev. 2003), *aff'd sub nom.* *Amodei v. Nev. State Senate*, 99 F. App'x 90 (9th Cir. 2004); *Phan v. Reno*, 56 F. Supp. 2d 1149, 1151 (W.D. Wash. 1999); *United States v. State of Haw.*, 564 F. Supp. 189, 195 n.9 (D. Haw. 1983).

361. Telephone Interview with U.S. District Judge, *supra* note 3; Telephone Interview with U.S. District Judge, *supra* note 329.

instance or signal to the public that single-judge decisions are by implication *less* legitimate. Rather, the goal here is to link past practice to future use: to map the outer limits of the courts' authority to decide cases collaboratively and to identify best practices so that future judges need not repeat lessons already learned.

#### A. *The Limits of District Court En Bancs*

While en banc proceedings are a legitimate exercise of the district courts' inherent authority,<sup>362</sup> that authority is not boundless. According to the Supreme Court, (1) "an inherent power cannot be contrary to any express rule or statute,"<sup>363</sup> (2) an inherent power "must be a reasonable response to a specific problem,"<sup>364</sup> and (3) a court in exercising its inherent power "must comply with the mandates of due process,"<sup>365</sup> meaning that the process is fair for those who will be affected by it. Taking these three (admittedly vague) limits as guideposts, this section develops a set of best practices and considerations for future en bancs.

##### 1. Conforming with Existing Legal Rules

As Part I.B established, district courts have much discretion to organize their business as they see fit. Still, the Supreme Court's warning that inherent powers should not contradict existing law can serve as a more general reminder that inherent powers should remain interstitial.

One question on which statutory law suggests caution is the role of senior judges in full en banc decisions. The statute establishing the district courts provides that "[e]ach district court shall consist of the district judge or judges for the district in regular active service."<sup>366</sup> To the extent that a collective decision speaks for the district as a whole, one could argue that the court for which it speaks is comprised only of "judges for the district in regular active service."<sup>367</sup> That would also mirror the explicit decision Congress has made to limit appellate court en bancs to judges in regular active service, unless the senior judge was assigned to the initial panel.<sup>368</sup>

Nonetheless, the statutory language is not entirely clear and Congress has not directly addressed the question. Given the centrality of senior judges to the work of many districts,<sup>369</sup> individual districts might opt to invoke the flexibility of 28 U.S.C. §§ 132(c) and 137(a) in assigning senior judges to en

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362. *See supra* Part I.B.

363. *Dietz v. Bouldin*, 579 U.S. 40, 45–46 (2016).

364. *Id.*

365. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991).

366. 28 U.S.C. § 132(b).

367. *See id.*

368. *Id.* § 46(c); *see also* *United States v. Am.-Foreign S.S. Corp.*, 363 U.S. 685, 685–86 (1960) (interpreting "active service" judges as excluding senior judges who still hear cases).

369. *See* Stephen B. Burbank et al., *Leaving the Bench, 1970–2009: The Choices Federal Judges Make, What Influences Those Choices, and Their Consequences*, 161 U. PA. L. REV. 1, 91–98 (2012) (documenting the critical importance of senior judges in carrying the workload of the federal courts).



banc panels.<sup>370</sup> Further, this potential limitation applies primarily to full en bancs; there is no similar doubt that senior judges should participate in coordinated decisions based on initial case assignments or that they may join adopted decisions to signal their individual views.

## 2. Addressing a Specific Problem

The concern that an inherent power “must be a reasonable response to a specific problem”<sup>371</sup> again emphasizes the interstitial nature of such powers. Especially when paired with the Supreme Court’s call for “restraint” when exercising inherent powers,<sup>372</sup> this guidepost suggests that judges should invoke their inherent power only when no other available tools will suffice. Districts might thus consider whether other congressionally authorized avenues, such as § 1292(b) appeals or local rulemaking, can address their concerns before initiating en banc proceedings.

It also suggests that courts should articulate their rationales for doing so. In the appellate context, for instance, the federal rules indicate that an en banc hearing “ordinarily will not be ordered” unless it is necessary to ensure circuit uniformity or if “the proceeding involves a question of exceptional importance.”<sup>373</sup> Collective district court adjudication should not serve to duplicate or replace appeals; thus, the guiding question should be whether the district court acting collectively can serve a purpose that cannot be achieved through an appellate decision. Such circumstances might include: (1) issues that implicate the integrity of the district court as an institution, (2) issues that are likely to arise in multiple cases in the short term before appellate review can be obtained, (3) issues that will evade appellate review over the longer term, (4) instances in which collective proceedings can significantly conserve judicial resources, or (5) issues that are of exceptional local importance, such that the district court’s closer connection to local government and citizenry makes it an especially suitable body to hear the case collectively.<sup>374</sup>

Whatever the rationales deemed sufficient to justify collective proceedings, they should be specified in any local rule authorizing them. Judges also should explicitly invoke the relevant rationale both in any order coordinating cases or convening an en banc hearing (in order to inform the parties) and in the resulting decision (in order to inform the public).

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370. The Western District of Missouri, for example, already defines the court “en banc” as consisting of “all district judges assigned to the District, including judges on senior status.” W.D. MO. R. 1.1.

371. *Dietz v. Bouldin*, 579 U.S. 40, 46 (2016).

372. *Id.* at 48 (“Because the exercise of an inherent power in the interest of promoting efficiency may risk undermining other vital interests related to the fair administration of justice, a district court’s inherent powers must be exercised with restraint.”).

373. FED. R. APP. P. 35(a)(2).

374. *Cf. Bartels*, *supra* note 15, at 42 (emphasizing the commonality of issues, uniformity in the treatment of litigants, conservation of resources, and particularly serious issues).

### 3. Ensuring Fairness

District court en bancs can affect the interests of both the litigants currently before the court and those who may be in the future. Current litigants should receive fair notice of the collective proceedings in order to conform their litigation strategy appropriately. A best practice would be to consult with the parties regarding the decision to take the case en banc, or, if that is not possible, at least to collaborate with the parties in scheduling briefs and hearings.<sup>375</sup> Judges should also participate in the hearing if they intend to participate in the decision, a requirement that ensures that parties have an opportunity to be heard by all those with a say in the disposition of their case.

Of course, future litigants are routinely affected by the binding law made in appellate cases. But basic institutional mechanisms of the courts of appeals help broaden the perspective of the judges in any one particular case, such as the use of panel decision-making and the opportunity for amici participation. Those same mechanisms can be deployed by district courts when they act collectively. Past district court en bancs have invited amici briefs and selected exemplar cases (sometimes chosen in consultation with counsel), ensuring that the judges are aware of the diversity of circumstances in which a problem may arise.<sup>376</sup>

To the extent that future litigants are expected to follow en banc decisions as a matter of district custom, they must have advance notice of them. This notice requirement flows from Federal Rule of Civil Procedure 83(b)'s limitation that no sanctions can be imposed on a party for failing to comply with "any requirement [set by a district judge] not in federal law, federal rules, or the local rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement."<sup>377</sup> Even if judges do not intend to impose sanctions for noncompliance, publicizing en banc decisions will increase conformity and thus the consistency that the judges may be seeking. Districts may thus wish to post all collective decisions on their websites, alongside rules and orders.<sup>378</sup>

For an example of a collective proceeding that successfully navigated all of these concerns, consider the Western District of Washington's decision in *Phan v. Reno* regarding the indefinite detention of noncitizens who could not be deported to their home countries: whether the rights of an individual habeas petitioner were violated might turn on the crime for which the petitioner was being deported, the country to which the petitioner was supposed to be deported, and the length of time the petitioner had already

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375. See, e.g., *Movement Against Destruction v. Volpe*, 361 F. Supp. 1360, 1367 (D. Md. 1973); *Prentiss v. Nat'l Airlines, Inc.*, 112 F. Supp. 306, 307 (D.N.J. 1953) (noting the agreement of counsel that the two judges would consider the cases together).

376. See *supra* notes 293–94 (collecting examples).

377. FED. R. CIV. P. 83(b).

378. The Northern District of Texas, for example, still posts a copy of its *Dondi* decision on its website, though not under the "Rules & Orders" tab. See *Resources*, U.S. DIST. CT.: N. DIST. OF TEX., <http://www.txnd.uscourts.gov/resources> [<https://perma.cc/X2DX-XV7G>] (last visited Feb. 2, 2022).

been detained.<sup>379</sup> Rather than have one joint decision resolve more than one hundred petitions on behalf of five different judges, the judges of the Seattle division picked five exemplar cases—one from each of their dockets—to be briefed and argued before the five-judge bench.<sup>380</sup> The chief judge then authored a joint order, setting out the legal framework for analyzing these claims, which was followed by short orders resolving each of the exemplar cases.<sup>381</sup> The joint order directed, for the remaining petitions, an expedited briefing schedule in light of the joint decision.<sup>382</sup> There is much to commend in this process. The joint decision carefully considered a range of factual permutations and the perspectives of different interested parties. While agreeing on the legal reasoning set forth in the joint order, the judges retained their discretion to apply that reasoning to their individually assigned cases. And all petitioners were provided an opportunity to respond to that collective decision, as was the U.S. government in regard to each habeas petitioner. In other words, while the collective decision was treated as presumptively correct, it did not claim precedential force over the remaining habeas petitions.

To summarize, the limits on the district courts' inherent powers suggest that collective proceedings not explicitly authorized by Congress should only be invoked in the absence of alternative mechanisms for achieving the same benefits, be explicitly justified, provide advance notice to litigants, include active deliberation by all participating judges, seek broad input from interested parties, and be made publicly available.

### B. Practical Considerations

As these considerations begin to suggest, collective proceedings—particularly full en bancs and panel decisions—are logistically challenging and costly.<sup>383</sup> They require significant investment of judicial time and attention. Full en banc hearings in particular can be expensive and difficult to execute: in geographically dispersed districts, judges may have to travel in order to sit together, increasing both costs and disruption of other judicial work;<sup>384</sup> for district courts that do not have access to an appellate en banc courtroom or that have many judges, there is also the practical problem of attempting to arrange a full bench sitting in a too-small courtroom.<sup>385</sup> While more options for convening remotely may have surfaced through the courts'

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379. *See* Phan v. Reno, 56 F. Supp. 2d 1149, 1155–56 (W.D. Wash. 1999) (describing factors to be weighed in individual petitions).

380. *Id.* at 1151.

381. *See id.* at 1158; *see also* Phan v. Smith, 56 F. Supp. 2d 1158, 1158 (1999) (“appl[ying] the legal framework set forth in the Joint Order to the facts of petitioner Phan’s case” (footnote omitted)).

382. *Phan*, 56 F. Supp. 2d at 1158.

383. Adopted decisions may avoid many of these expenses but at the potential cost of fairness to litigants.

384. Telephone Interview with U.S. District Judge, *supra* note 3.

385. *Id.* (noting the difficulty of arranging for an en banc hearing in a district court courtroom).

experience with the pandemic, such practical concerns further suggest that collective proceedings by district courts should be rare and carefully justified.

Thus, while Federal Rule of Appellate Procedure 35 permits parties to petition for rehearing en banc,<sup>386</sup> there is less need for—and more difficulty caused by—allowing litigants to propose district court en bancs. On the one hand, district court litigants still have an opportunity to appeal as of right; those who petition for rehearing en banc at the appellate level, in contrast, are unlikely to receive any additional review of their cause, whether through an appellate en banc or a Supreme Court grant of certiorari. On the other hand, litigant interest in district court en banc proceedings would likely far exceed the capacity or interest of the district courts to convene them, generating extra work for district judges left to deny litigant requests.<sup>387</sup> Indeed, district judges have often, and sharply, rejected out of hand litigant requests for district court en bancs.<sup>388</sup>

Instead, proposals to convene a full en banc should be initiated solely by the assigned judge.<sup>389</sup> This limitation prevents other judges from calling for a collective proceeding in order to effectively remove a colleague from a controversial case, shunting that judge to a powerless dissent.<sup>390</sup> By leaving the question instead to the (randomly) assigned judge, the call for a vote relates not to whether the initiating judge will be allowed to decide the case, but whether the initiating judge will receive the assistance of colleagues in resolving it.

Once proposed, the decision to convene a panel or the full en banc court could be made by the chief judge or could be taken by the court as a whole.

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386. FED. R. APP. P. 35(b). Nonetheless, the advisory committee notes for Rule 35 make clear that parties can only propose the en banc rehearing; the decision whether to call a vote on the matter is left to the judges. *See id.* advisory committee notes to 1967 amendments.

387. As Justice Frankfurter cautioned in the appellate context, allowing litigants to request en banc rehearsals will encourage the filing of such motions as a matter of course, which “is an abuse of judicial energy[,] . . . results in needless delay[, and] . . . arouses false hopes in defeated litigants and wastes their money.” *W. Pac. R.R. Corp. v. W. Pac. R.R. Co.*, 345 U.S. 247, 270 (1953).

388. *See United States ex rel. Smith v. Baldi*, 96 F. Supp. 100, 101 (E.D. Pa. 1951) (“[W]e denied the respondent’s petition to convene a full bench. We have never granted such a petition. It has been done only, on a few occasions, at the request of the Judge to whom the matter was originally assigned.”); *see also, e.g.*, *Crommelin v. Woodfield*, No. 95-8697-CIV, 1998 WL 188101, at \*3 n.3 (S.D. Fla. Mar. 2, 1998) (rejecting plaintiff’s “unorthodox request” for an en banc panel); *Coker v. Moore-McCormack Lines, Inc.*, No. 737-71-N, 1972 WL 28913, at \*2 (E.D. Va. Apr. 17, 1972) (rejecting plaintiff’s request to convene en banc court because “we know of no rule or statute permitting or requiring the convening of a district court *en banc* for any purpose”); *id.* (“It is true that certain multi-judge courts centrally located sometimes act jointly in various matters, but such a procedure is at the option of the judges and not a matter of right vested in any party.”).

389. This limitation would differ from the appellate practice, which allows the vote to be called by any judge. *See* FED. R. APP. P. 35(f) (“A vote need not be taken to determine whether the case will be heard or reheard en banc unless a judge calls for a vote.”).

390. On the risk of appellate court en bancs being used to overturn judges in the court’s ideological minority, *see* Neal Devins & Allison Orr Larsen, *Weaponizing En Banc*, 96 N.Y.U. L. REV. 1373, 1427 (2021).

Districts might even require a consensus for full en bancs given the unusual burden they impose on the court. In terms of who participates, larger districts may need to adopt a procedure—like the one sanctioned for the largest appellate courts<sup>391</sup>—for randomly selecting a subset of the district’s judges to sit en banc.<sup>392</sup> Another alternative for making such proceedings more manageable would be to delegate the hearing and decision to a panel of judges. The danger of such ad hoc panels is that they invite selection bias in the choice of participating judges (which indeed may have been part of their purpose in the past).<sup>393</sup> If the goal of the panel proceeding is to speak for the district as a whole, the selection of the panel should follow the district’s standard procedure for assigning cases by lot.

### C. *En Banc Rules?*

That leaves the question of whether district courts should adopt local rules formalizing such proceedings. The reasons for codification are well-canvassed in the literature and deeply ingrained within our legal culture: procedures established in advance provide transparency in expectations, predictability in application, and equality of treatment.<sup>394</sup> Ex ante rulemaking also ensures procedures are defined behind a veil of ignorance, without the distorting specifics of a particular dispute.<sup>395</sup> Rulemaking in this instance would have the added benefit of distilling and memorializing best practices from the highly variable examples of past cases. Indeed, in the context of appellate en bancs, the Supreme Court has emphasized the need for clear procedures for the benefit of both litigants and judges.<sup>396</sup>

But there are also costs to codification, starting with the actual cost of formulating and adopting rules for a procedure that will be rarely used.

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391. Congress has provided that “[a]ny court of appeals having more than 15 active judges may . . . perform its en banc function by such number of members of its en banc courts as may be prescribed by rule of the court of appeals.” Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633 (1978) (codified as amended at 28 U.S.C. § 46(c)). Currently the Fifth (17), Sixth (16), and Ninth (29) Circuits have more than fifteen judges, but only the Ninth Circuit has adopted such a procedure. See 28 U.S.C. § 44. By comparison, seven districts currently have more than fifteen judgeships. See *id.* § 133 (listing the number of judgeships by district).

392. For example, the Ninth Circuit has implemented 28 U.S.C. § 46(c)’s invitation through a local rule that provides that “[t]he en banc court . . . shall consist of the Chief Judge of this circuit and 10 additional judges to be drawn by lot from the active judges of the Court” (though it also includes the caveat that “[i]n appropriate cases, the Court may order a rehearing by the full court following a hearing or rehearing en banc”). 9TH CIR. R. 35-3.

393. Recall that some of the Eastern District of Pennsylvania panels were apparently convened to resolve or avoid brewing intradistrict splits caused by prior decisions by panel members. See *supra* Part III.B. During the desegregation battles, the Chief Judge of the Fifth Circuit also purportedly selected judges for statutory three-judge courts based on their willingness to adhere to Supreme Court precedent. See BASS, *supra* note 153, at 223 (noting an “unwillingness to assign judges who demonstrated a disregard for clear precedent in civil rights cases to sit on three-judge district courts that heard such cases”).

394. See, e.g., Bookman & Noll, *supra* note 21, at 772 n.24 (gathering literature).

395. See, e.g., *id.* at 778.

396. See *W. Pac. R.R. Corp. v. W. Pac. R.R. Co.*, 345 U.S. 247, 260–61 (1953) (“It is essential, of course, that a circuit court, and the litigants who appear before it, understand the practice—whatever it may be—whereby the court convenes itself en banc.”).

Further, as the history of district court en bancs bears out, the need for collective proceedings will continue to evolve, and district judges might benefit from flexibility to devise new forms of collective adjudication or to continue refining the best practices gathered here. Of greatest concern, codification would inevitably encourage greater use of district court en bancs—or at least a greater demand for them. Setting out the procedure in advance provides judges with a hammer looking for a nail. Overuse in the short-term could cause problems—in terms of judicial dynamics, district resources, and appellate backlash—that may lead to the rejection of the tool in the long term.

Nonetheless, if a district did desire to codify a process for collective decisions, the local rule should encompass the following considerations: the specific rationales that would justify the procedure, who may call for the en banc proceeding, who may vote, what vote would trigger the en banc, who would participate in the hearing and decision, and how the hearing might be conducted (e.g., whether judges may participate remotely). Districts may also wish to specify briefing procedures, opportunities for broader engagement (i.e., the appropriateness of *amici curiae*), and methods for promoting transparency, such as a commitment to posting any resulting decisions on the district court’s website.

#### CONCLUSION: THE EVOLVING FEDERAL COURTS

In an era when the Supreme Court is micromanaging the district courts’ handling of high-profile cases,<sup>397</sup> the remedial powers of the district court are under attack,<sup>398</sup> and district judges seem increasingly hesitant to disagree with or challenge decisions—even dicta—of higher courts,<sup>399</sup> district court en bancs serve as a useful reminder of the potential power of the district courts.<sup>400</sup> The district courts handle the vast majority of the federal judiciary’s business and address daily fundamental issues of constitutional law, civil rights, interstate commerce, and criminal punishment. They bear the brunt of new legal and societal challenges, and their ingenuity is often the

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397. See *supra* note 18 (gathering sources).

398. See *supra* note 19 (gathering sources).

399. See generally Neal Devins & David Klein, *The Vanishing Common Law Judge?*, 165 U. PA. L. REV. 595 (2017) (arguing that judges have become less willing to challenge, disagree with, or cabin higher court precedent).

400. For other recent accounts of the power of the district courts, see Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921 (2016) (describing how district courts can cabin novel holdings in Supreme Court precedent); Neil S. Siegel, *Reciprocal Legitimation in the Federal Courts System*, 70 VAND. L. REV. 1183 (2017) (describing how district courts may work in partnership with the Supreme Court to develop constitutional law). For a review of these pieces, see Doni Gewirtzman, *The High Power of the Lower Courts*, PUB. BOOKS (Dec. 7, 2016), <http://www.publicbooks.org/high-power-lower-courts/> [<https://perma.cc/6BAS-LP4P>] (noting that, “[m]ore often than not, lower court judges are either entirely missing from accounts of American constitutional law, or portrayed as dutiful agents of the Supreme Court, proudly displaying their ‘What Would SCOTUS Do?’ bumper stickers as they mindlessly enforce the Court’s proclamations about what the Constitution means,” and warning that “this act of collective academic amnesia” obscures “a vision of the federal judiciary that looks less like *The Office* and more like *Silicon Valley*”).

vanguard for procedural and administrative reform. Yet their voice is naturally fragmented and their authority often overshadowed by courts higher in the judicial hierarchy. Collective adjudication provides one means for the district courts to speak with an amplified voice. As Professor Todd Henderson wrote of the Supreme Court, “[t]he content of opinions is obviously an essential element of [the court’s] power, but . . . so is the style or manner in which they are issued.”<sup>401</sup>

The district courts have used that amplified voice at critical moments of social and judicial change, moments that have in turn led to procedural or institutional shifts for the federal judiciary. The emergence of multi-judge districts, the rise and then fall of three-judge courts, the development of circuit court en bancs and the “law of the circuit” doctrine, the creation of the modern class action and multidistrict litigation, reforms to local rulemaking and case assignment rules—all of these changes bear on and are reflected in district judges’ use of voluntary collective proceedings. Tracing the history of district court en bancs, then, also serves as a reminder of the constant evolution of the federal courts.<sup>402</sup> The structure of the courts today, from their three-level hierarchy to the size and docket of the Supreme Court, is historically contingent. It would be foolish to assume that the current status quo is either perfect now or will continue to function effectively despite changing conditions.<sup>403</sup> From this perspective, procedural innovation is something to be nurtured, and the current settlement of the federal courts’ institutional design is best viewed as but a waystation on a longer journey that is still in progress.

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401. Henderson, *supra* note 324, at 3.

402. For descriptions of this evolution, see the sources gathered in *supra* note 16; *see also* Yeazell, *supra* note 224, at 640 (tracing shifts in appellate oversight of district court work and emphasizing that “one should not make the mistake of thinking of the relative positions of trial and appellate courts as stable”).

403. As Frankfurter and Landis wrote a century ago, “Framers of judiciary acts are not required to be seers; and great judiciary acts, unlike great poems, are not written for all time. It is enough if the designers of new judicial machinery meet the chief needs of their generation.” FRANKFURTER & LANDIS, *supra* note 16, at 107; *see also id.* at 5–6, 6 n.10 (describing the experimental nature of the First Judiciary Act and asserting that “these experiments should not be regarded as unalterable”).

## APPENDIX

\* Includes judge(s) from another district

† Includes senior judge(s)

Case	Judges Joining Decision	Active Judges <sup>404</sup>	Topic
Portland Ry., Light & Power Co. v. City of Portland, 200 F. 890 (D. Or. 1912)	2	2	Constitutionality of Local Ordinance
Portland Ry., Light & Power Co. v. City of Portland, 201 F. 119 (D. Or. 1912)	2	2	Constitutionality of Local Ordinance
Seattle, R. & S. Ry. Co. v. City of Seattle, 216 F. 694 (W.D. Wash. 1914)	2	2	Constitutionality of Local Ordinance
Hannah & Hogg v. Clyne, 263 F. 599 (N.D. Ill. 1919)	2*	2	War Powers Act/Prohibition
Birmingham Tr. & Sav. Co. v. Atlanta, B. & A. Ry. Co., 271 F. 743 (N.D. Ga. 1921)	2*	1	Bankruptcy/Labor
United States v. Innelli, 286 F. 731 (E.D. Pa. 1923)	2	3	Warrants (Volstead Act)
<i>In re</i> Comins, 1 F.2d 388 (W.D. Pa. 1923)	2	3	Bankruptcy
Puget Sound Power & Light Co. v. City of Seattle, 300 F. 441 (W.D. Wash. 1924)	3*	2	Constitutionality of Local Ordinance
United States v. Am. Brewing Co., 296 F. 772 (E.D. Pa. 1924)	2	3	Warrants (Volstead Act)
<i>In re</i> Eberhardt, 1 F.2d 347 (W.D. Pa. 1924)	3	3	Bankruptcy
Albert M. Travis Co. v. Heiner, 299 F. 677 (W.D. Pa. 1924)	2	3	Tax
United States v. Grossman, 1 F.2d 941 (N.D. Ill. 1924)	2	3	Contempt
Beatty v. Heiner, 10 F.2d 390 (W.D. Pa. 1925)	2	3	Tax
Guar. Tr. Co. of N.Y. v. Chi., M. & St. P. Ry. Co., 13 F.2d 129 (W.D. Wash. 1926)	2*	2	Bankruptcy
Knapp v. Byram, 21 F.2d 226 (D. Minn. 1927)	3	3	Remand
United States v. Napela, 28 F.2d 898 (N.D.N.Y. 1928)	2	2	Warrants (Volstead Act)
United States v. Reilly, 30 F.2d 866 (E.D. Pa. 1929)	3	3	Challenge to Criminal Indictment

404. See *Courts, Caseloads, and Jurisdiction*, FED. JUD. CTR., <https://www.fjc.gov/history/courts/u.s.-district-courts-and-federal-judiciary> [<https://perma.cc/YU9Y-Y35W>] (last visited Feb. 4, 2022).



Case	Judges Joining Decision	Active Judges <sup>404</sup>	Topic
Mich. Bell Tel. Co. v. Odell, 45 F.2d 180 (E.D. Mich. 1930)	3	3	State Rate-Setting
United States v. Wingert, 55 F.2d 960 (E.D. Pa. 1932)	2	2	Warrants (Arrest)
<i>In re</i> Rowe, 4 F. Supp. 35 (E.D.N.Y. 1933)	5	5	Discipline
<i>In re</i> Schachne, 5 F. Supp. 680 (E.D.N.Y. 1934)	4	5	Discipline
United States v. Delaney, 8 F. Supp. 224 (D.N.J. 1934)	2	4	Bail Pending Appeal
<i>In re</i> Phila. Rapid Transit Co., 8 F. Supp. 51 (E.D. Pa. 1934)	3	3	Bankruptcy
<i>In re</i> Constitutionality of Frazier-Lemke Act, 9 F. Supp. 575 (E.D. Ark. 1934)	2*	1	Constitutionality of Federal Statute
<i>In re</i> Phila. Rapid Transit Co., 11 F. Supp. 865 (E.D. Pa. 1935)	3	3	Bankruptcy
Gold Medal Foods, Inc. v. Landy, 11 F. Supp. 65 (D. Minn. 1935)	3	4	Constitutionality of Federal Statute
<i>In re</i> Young, 12 F. Supp. 30 (S.D. Ill. 1935)	2	2	Constitutionality of Federal Statute/Bankruptcy
<i>In re</i> Schoenleber, 13 F. Supp. 375 (D. Neb. 1936)	2	2	Constitutionality of Federal Statute/Bankruptcy
<i>In re</i> Stein, 17 F. Supp. 587 (E.D. Pa. 1936)	4	4	Bankruptcy
<i>In re</i> Collins Hosiery Mills, 18 F. Supp. 89 (E.D. Pa. 1937)	4	4	Bankruptcy
<i>In re</i> Clover Drugs, Inc., 21 F. Supp. 107 (E.D. Pa. 1937)	4	4	Bankruptcy
<i>In re</i> Anderson, 22 F. Supp. 928 (D.N.D. 1938)	2	2	Bankruptcy
The Wind, 22 F. Supp. 883 (E.D. Pa. 1938)	3	4	Subject Matter Jurisdiction/Labor
The Swiftarrow, 34 F. Supp. 541 (E.D. Pa. 1940)	4	4	Venue/Jones Act
<i>In re</i> Jay & Dee Store Co., 37 F. Supp. 989 (E.D. Pa. 1941)	5	5	Bankruptcy
<i>In re</i> Chopak, 43 F. Supp. 106 (E.D.N.Y. 1941)	6	6	Discipline
James v. Int'l Brotherhood of Boiler Makers, 54 F. Supp. 94 (N.D. Cal. 1944)	3	4	Subject Matter Jurisdiction/Labor
Yoerg Brewing Co. v. Brennan, 59 F. Supp. 625 (D. Minn. 1945)	3	3	Subject Matter Jurisdiction/Labor
Hickman v. Taylor, 4 F.R.D. 479 (E.D. Pa. 1945)	5	5	Discovery
<i>In re</i> Chopak, 66 F. Supp. 265 (E.D.N.Y. 1946)	4	6	Discipline

Case	Judges Joining Decision	Active Judges <sup>404</sup>	Topic
Beckwith v. Am. President Lines, Ltd., 68 F. Supp. 353 (N.D. Cal. 1946)	4 <sup>†</sup>	4	Remand/Jones Act
Gibson v. Int'l Freighting Corp., 8 F.R.D. 487 (E.D. Pa. 1947)	5	6	Discovery
Alameda v. Paraffine Cos., 75 F. Supp. 282 (N.D. Cal. 1947)	3	4	Subject Matter Jurisdiction/Labor
Linde Air Prods. Co. v. Johnson, 77 F. Supp. 656 (D. Minn. 1948)	2	4	Subject Matter Jurisdiction/Labor
Bateman v. Ford Motor Co., 76 F. Supp. 178 (E.D. Mich. 1948)	5	5	Subject Matter Jurisdiction/Labor
Hayes v. Chi., R.I. & P.R. Co., 79 F. Supp. 821 (D. Minn. 1948)	2	4	Venue Transfer/Labor
United States <i>ex rel.</i> Smith v. Warden of Phila. Cnty. Prison, 87 F. Supp. 339 (E.D. Pa. 1949)	5	6	Habeas
United States <i>ex rel.</i> Darcy v. Handy, 97 F. Supp. 930 (M.D. Pa. 1951)	2	2	Habeas
United States <i>ex rel.</i> Smith v. Baldi, 96 F. Supp. 100 (E.D. Pa. 1951)	7	8	Habeas
Prentiss v. Nat'l Airlines, Inc., 112 F. Supp. 306 (D.N.J. 1953)	2	6	Constitutionality of State Statute
United States <i>ex rel.</i> Darcy v. Handy, 130 F. Supp. 270 (M.D. Pa. 1955)	2	2	Habeas
Smallwood v. Days Transfer, Inc., 165 F. Supp. 929 (W.D. Mich. 1958)	2	2	Joinder
Nat'l Sur. Corp. v. Chamberlain, 171 F. Supp. 591 (N.D. Tex. 1959)	3	3	Subject Matter Jurisdiction
Travelers Ins. Co. v. Cook, 172 F. Supp. 710 (N.D. Tex. 1959)	3	3	Subject Matter Jurisdiction
Dziwanoski v. Ocean Carriers Corp., 26 F.R.D. 595 (D. Md. 1960)	3 <sup>†</sup>	2	Discovery/ Longshoremen
<i>In re</i> Kovrak, 194 F. Supp. 204 (E.D. Pa. 1961)	3	8	Discipline
<i>In re</i> Bennethum, 205 F. Supp. 821 (D. Del. 1962)	2	3	Discipline
Bisserier v. Manning, 207 F. Supp. 476 (D.N.J. 1962)	(all) <sup>405</sup>	7	Discovery
United States v. Wallace, 222 F. Supp. 485 (M.D. Ala. 1963)	5*	1	School Desegregation
Ellis v. Mayor & City Council of Balt., 234 F. Supp. 945 (D. Md. 1964)	3	4	Apportionment
Pontes v. Calmar S.S. Corp., 256 F. Supp. 495 (E.D. Pa. 1966)	3	10	Venue Transfer/Labor
Schiff v. Hannah, 282 F. Supp. 381 (W.D. Mich. 1966)	3 <sup>†</sup>	2	Student Discipline

405. The designation “(all)” signifies that the opinion noted the concurrence of all the district’s judges in the decision without listing the concurring judges by name.

Case	Judges Joining Decision	Active Judges <sup>404</sup>	Topic
White v. Swenson, 261 F. Supp. 42 (W.D. Mo. 1966)	4	5	Habeas
<i>In re</i> Ryder, 263 F. Supp. 360 (E.D. Va. 1967)	3	3	Discipline
United States v. Cohen, 275 F. Supp. 724 (D. Md. 1967)	3	5	Criminal Jury Selection
Slomberg v. Pennabaker, 42 F.R.D. 8 (M.D. Pa. 1967)	(all)	3	Discovery
United States v. 4,400 Copies of Mags., Entitled "Cover Girl" & "Exciting," 276 F. Supp. 902 (D. Md. 1967)	5	5	First Amendment
Olivieri v. Adams, 280 F. Supp. 428 (E.D. Pa. 1968)	3	13	Subject Matter Jurisdiction
Close v. Calmar S.S. Corp., 44 F.R.D. 398 (E.D. Pa. 1968)	4	13	Consolidation/ Longshoremen
Turner v. Transportacion Maritima Mexicana S.A., 44 F.R.D. 412 (E.D. Pa. 1968)	4	13	Consolidation/ Longshoremen
United States v. 127,295 Copies of Magazines, More or Less, Entitled, "Amor," 295 F. Supp. 1186 (D. Md. 1968)	2	5	First Amendment
Conley v. Lake Charles Sch. Bd., 293 F. Supp. 84 (W.D. La. 1968)	3	3	School Desegregation
Pedicord v. Swenson, 304 F. Supp. 393 (W.D. Mo. 1969)	4	5	Habeas
Whittenberg v. Greenville Cnty. Sch. Dist., 298 F. Supp. 784 (D.S.C. 1969)	4	4	School Desegregation
Conley v. Lake Charles Sch. Bd., 303 F. Supp. 394 (W.D. La. 1969)	3	3	School Desegregation
Arthur v. Schoonfield, 315 F. Supp. 548 (D. Md. 1970)	2	5	Habeas
Bass Angler Sportsman Soc'y v. U.S. Steel Corp., 324 F. Supp. 412 (S.D. Ala. 1971)	3*	8	Environmental
Calhoun v. Cook, 332 F. Supp. 804 (N.D. Ga. 1971)	2	6	School Desegregation
United States v. Alsbrook, 336 F. Supp. 973 (D.D.C. 1971)	(all)	15	Prison Conditions
Snead v. Am. Export-Isbrandtsen Lines, Inc., 59 F.R.D. 148 (E.D. Pa. 1973)	3	18	Discovery
Movement Against Destruction v. Volpe, 361 F. Supp. 1360 (D. Md. 1973)	2	7	Environmental
Calhoun v. Cook, 362 F. Supp. 1249 (N.D. Ga. 1973)	2	6	School Desegregation
Nortown Theatre Inc. v. Gribbs, 373 F. Supp. 363 (E.D. Mich. 1974)	2	10	First Amendment

Case	Judges Joining Decision	Active Judges <sup>404</sup>	Topic
Lucas v. "Brinknes" Schiffahrts Ges. Franz Lange G.m.B.H. & Co., 379 F. Supp. 759 (E.D. Pa. 1974)	3	18	Longshoremen
Mims v. Dixie Fin. Corp., 426 F. Supp. 627 (N.D. Ga. 1976)	6	6	Joinder
Lopez v. Franklin, 427 F. Supp. 345 (E.D. Mich. 1977)	2	10	Immigration
Hurst v. Hogan, 435 F. Supp. 125 (N.D. Ga. 1977)	5	5	Habeas
United States v. Salanitro, 437 F. Supp. 240 (D. Neb. 1977)	3	3	Grand Jury
Crown Ctr. Redevelopment Corp. v. Westinghouse Elec. Corp., 82 F.R.D. 108 (W.D. Mo. 1979)	4	5	Discovery
United States v. Anaya, 509 F. Supp. 289 (S.D. Fla. 1980)	12	12	Challenge to Criminal Indictments
United States v. Wright, 516 F. Supp. 1119 (E.D. Pa. 1981)	2	19	Contempt
<i>In re</i> Asbestos Cases, 514 F. Supp. 914 (E.D. Va. 1981)	3	7	Discipline/Mass Tort
Kohr v. Raybestos-Manhattan, Inc., 522 F. Supp. 1070 (E.D. Pa. 1981)	4	19	Mass Tort
Hamby v. Zayre Corp., 544 F. Supp. 176 (N.D. Ala. 1982)	7 <sup>†</sup>	6	Remand
Wash. Metro. Area Transit Auth. v. One Parcel of Land in Montgomery Cnty., 549 F. Supp. 584 (D. Md. 1982)	6 <sup>†</sup>	10	Takings
<i>In re</i> Color Craft Press, Ltd., 27 B.R. 962 (D. Utah 1983)	4 <sup>†</sup>	3	Bankruptcy
United States v. State of Hawaii, 564 F. Supp. 189 (D. Haw. 1983)	3 <sup>†</sup>	2	Prison Conditions
Lovallo v. Pittsburgh Corning Corp., 99 F.R.D. 627 (E.D. Pa. 1983)	3	19	Mass Tort
<i>In re</i> All Asbestos Cases Pending in the U.S. Dist. Ct. for the Dist. of Md., No. BML-1, 1983 U.S. Dist. LEXIS 10719 (D. Md. Dec. 16, 1983)	6	8	Consolidation/ Mass Tort
Bradley v. Milliken, 585 F. Supp. 348 (E.D. Mich. 1984)	3	11	School Desegregation
<i>In re</i> G.L.S., 586 F. Supp. 375 (D. Md. 1984)	10 <sup>†</sup>	9	Discipline
Parker v. Bell Asbestos Mines, Ltd., 607 F. Supp. 1397 (E.D. Pa. 1985)	3	18	Mass Tort
<i>In re</i> Asbestos Litig., 628 F. Supp. 774 (D.N.J. 1986)	14 <sup>†</sup>	14	Mass Tort
<i>In re</i> Issuance of Warrants by Clerks, 674 F. Supp. 1182 (W.D.N.C. 1986)	3	3	Warrants (Forfeiture)
<i>In re</i> Roberts, 75 B.R. 402 (D. Utah 1987)	4	4	Bankruptcy

Case	Judges Joining Decision	Active Judges <sup>404</sup>	Topic
<i>In re</i> Indep. Clearing House Co., 77 B.R. 843 (D. Utah 1987)	3	4	Bankruptcy
<i>In re</i> Tyler, 677 F. Supp. 1410 (D. Neb. 1987)	3	3	Discipline
<i>In re</i> Ret. Inn at Forest Lane, Ltd., 83 B.R. 795 (D. Utah 1988)	4 <sup>†</sup>	4	Bankruptcy
United States v. Johnson, 682 F. Supp. 1033 (W.D. Mo. 1988)	5 <sup>†</sup>	7	Constitutionality of Sentencing Guidelines
United States v. Bolding, 683 F. Supp. 1003 (D. Md. 1988)	13 <sup>†</sup>	9	Constitutionality of Sentencing Guidelines
United States v. Macias-Pedroza, 694 F. Supp. 1406 (D. Ariz. 1988)	6	8	Constitutionality of Sentencing Guidelines
United States v. Ortega Lopez, 684 F. Supp. 1506 (C.D. Cal. 1988)	24 <sup>†</sup>	22	Constitutionality of Sentencing Guidelines
United States v. Allen, 685 F. Supp. 827 (N.D. Ala. 1988)	10 <sup>†</sup>	7	Constitutionality of Sentencing Guidelines
United States v. Brittman, 687 F. Supp. 1329 (E.D. Ark. 1988)	(all)	5	Constitutionality of Sentencing Guidelines
United States v. Bogle, 693 F. Supp. 1102 (S.D. Fla. 1988)	16 <sup>†</sup>	15	Constitutionality of Sentencing Guidelines
United States v. Molina, 688 F. Supp. 819 (D. Conn. 1988)	(all)	6	Constitutionality of Sentencing Guidelines
United States v. Williams, 691 F. Supp. 36 (M.D. Tenn. 1988)	3	3	Constitutionality of Sentencing Guidelines
United States v. Serpa, 688 F. Supp. 1398 (D. Neb. 1988)	2	3	Constitutionality of Sentencing Guidelines
Dondi Props. Corp. v. Com. Sav. & Loan Ass'n, 121 F.R.D. 284 (N.D. Tex. 1988)	11 <sup>†</sup>	10	Attorney Standards
United States v. Swapp, 695 F. Supp. 1140 (D. Utah 1988)	5 <sup>†</sup>	4	Constitutionality of Sentencing Guidelines
Greer v. Skilcraft, 704 F. Supp. 1570 (N.D. Ala. 1989)	9 <sup>†</sup>	7	Remand
Belgian Am. Invs. & Trade, Inc. v. Fed. Sav. & Loan Ins. Corp., 717 F. Supp. 462 (N.D. Tex. 1989)	9 <sup>†</sup>	10	Remand
City Fire Equip. Co. v. Ansul Fire Prot. Wormald U.S., Inc., 125 B.R. 645 (N.D. Ala. 1989)	8 <sup>†</sup>	5	Bankruptcy

Case	Judges Joining Decision	Active Judges <sup>404</sup>	Topic
Keatley v. Food Lion, Inc., 715 F. Supp. 1335 (E.D. Va. 1989)	2	8	Jury Demand
Fasi v. Cayetano, 752 F. Supp. 942 (D. Haw. 1990)	3	3	Constitutionality of State Statute
Ainsworth v. Vazquez, 759 F. Supp. 1467 (E.D. Cal. 1991)	4	5	Habeas
<i>In re</i> N.Y.C. Asbestos Litig., 142 F.R.D. 60 (E.D.N.Y. & S.D.N.Y. 1992)	3*	13	Mass Tort
<i>In re</i> Masini-Soler, 882 F. Supp. 23 (D.P.R. 1995)	6	6	Discipline
<i>In re</i> Paoli, 932 F. Supp. 51 (D.P.R. 1996)	6	6	Discipline
<i>In re</i> Breast Implant Cases, 942 F. Supp. 958 (E.D.N.Y. & S.D.N.Y. 1996)	2*		Mass Tort
<i>In re</i> Starr, 986 F. Supp. 1159 (E.D. Ark. 1997)	4	5	Discipline/Grand Jury
United States v. Jones, 36 F. Supp. 2d 304 (E.D. Va. 1999)	3	10	Criminal Jury Selection
Phan v. Reno, 56 F. Supp. 2d 1149 (W.D. Wash. 1999)	5	7	Habeas
United States v. Vidal-Cruz, 67 F. Supp. 2d 35 (D.P.R. 1999)	5	6	Challenge to Criminal Indictments
<i>In re</i> Smith, 100 F. Supp. 2d 412 (N.D. Tex. 2000)	14†	12	Discipline
<i>In re</i> McTighe, 131 F. Supp. 2d 870 (N.D. Tex. 2001)	3	11	Discipline
<i>In re</i> Wightman-Cervantes, 236 F. Supp. 2d 618 (N.D. Tex. 2002)	3	11	Discipline
Angle v. Legislature of Nev., 274 F. Supp. 2d 1152 (D. Nev. 2003)	7	7	Rooker-Feldman
Banks v. Gonzales, 415 F. Supp. 2d 1248 (N.D. Okla. 2006)	3	3	Constitutionality of Federal Statute
<i>In re</i> R.M.W., 428 F. Supp. 2d 389 (D. Md. 2006)	(all)	10	Discipline
United States v. Shine, 571 F. Supp. 2d 589 (D. Vt. 2008)	2	2	Criminal Jury Selection
Commodity Futures Trading Comm'n v. Walsh, Nos. 09 CV 1749, 09 CV 1750, 09 CR 722, 2010 WL 882875 (S.D.N.Y. Mar. 9, 2010)	2	26	Criminal Procedure
<i>In re</i> Engle Cases, No. 309-cv-10000, 2014 WL 7010031 (M.D. Fla. Dec. 11, 2014)	3	14	Civil Jury Selection