

# A HISTORY OF THE MISSOURI COURT OF APPEALS: THE ROLE OF REGIONAL CONFLICTS IN SHAPING INTERMEDIATE APPELLATE COURT STRUCTURE

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## I. BACKGROUND: INTERMEDIATE APPELLATE COURTS IN THE UNITED STATES

During the course of the history of the American legal system, appellate courts have steadily gained importance. While there was no right to an appeal in a criminal case in the early portion of American history, by the beginning of the twenty-first century, most jurisdictions provide for a right to an appeal, either by rule or statute.<sup>1</sup> Currently, many people simply assume that there is a universal right to some type of appeal.<sup>2</sup>

Appellate courts correct procedural errors that occur in trial courts and help interpret and define the law, increasing the accuracy of judicial determinations and the legitimacy of the decisions made by the court system.<sup>3</sup> These courts ensure “that

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1. Hillary A. Taylor, *Appellate Delay as Reversible Error*, 44 WILLAMETTE L. REV. 761, 774 (2008).

2. Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. REV. 503, 504 (1992) (pointing out that “[i]t is difficult for any lawyer—or lay person, for that matter—to believe that the Supreme Court would uphold the withdrawal of all right to review of state law errors in criminal cases,” and that “most people—if not most law school graduates—simply assume that the constitutional guarantee of due process of law includes some right to appeal a criminal conviction”).

3. JOHN P. DOERNER & CHRISTINE A. MARKMAN, *THE ROLE OF STATE INTERMEDIATE APPELLATE COURTS: PRINCIPLES FOR ADAPTING TO CHANGE* 5 (2012); DANIEL JOHN

the law is interpreted and applied correctly and uniformly.”<sup>4</sup> Furthermore, in the large majority of cases in which an appeal is filed the final determination is rendered by an intermediate appellate court.<sup>5</sup> Thus, the intermediate appellate court is an ever-more important part of the American justice system.

Despite this critical role and the fact that state intermediate appellate courts have existed for over 150 years, the historiography of state intermediate appellate courts is still in its infancy. There has been some good work regarding the federal courts of appeals,<sup>6</sup> but with respect to the state intermediate appellate courts, the work has generally been in the nature of chronicles rather than histories. That is, the writers explain the laws that were passed and provide biographical information about some of the key players and first judges without providing analysis of cause and effect.<sup>7</sup> This has left the impression that there is a simple reason explaining the development and structure of intermediate appellate courts: They function to

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MEADOR & JORDANA SIMONE BERNSTEIN, *APPELLATE COURTS IN THE UNITED STATES* 4–5 (1994).

4. MEADOR & BERNSTEIN, *supra* note 3, at 3.

5. See Joseph R. Weis, Jr., *Disconnecting the Overloaded Circuits—A Plug for a United Court of Appeals*, 39 ST. LOUIS U. L.J. 455, 460 (1995) (noting that in 1990, the United States Supreme Court reviewed fewer than one percent of the cases presented to the federal courts of appeals).

6. E.g., Thomas E. Baker, *A Generation Spent Studying the United States Courts of Appeals: A Chronology*, 34 U.C. DAVIS L. REV. 395, 396 (2000) (introducing survey of studies); Weis, *supra* note 5, at 455–56 (listing topics for study); PAUL D. CARRINGTON, DANIEL J. MEADOR & MAURICE ROSENBERG, *JUSTICE ON APPEAL* (1976); RUSSELL R. WHEELER & CYNTHIA HARRISON, *CREATING THE FEDERAL JUDICIAL SYSTEM* (1989); FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* (1927).

7. E.g., DOERNER & MARKMAN, *supra* note 3, at 1 (providing general overview of reasons for establishment of intermediate appellate courts, their caseloads, and their funding); Rosemary Shaw Sackett & Richard H. Doyle, *History of the Iowa Court of Appeals*, 60 DRAKE L. REV. 1, 3 (2011) (describing circumstances surrounding establishment of Iowa Court of Appeals); Robert W. Higgason, *A History of Texas Appellate Courts: Preserving Rights of Appeal through Adaptations to Growth, Part 1 of 2: Courts of Last Resort*, 39 HOUS. LAWYER 20, 24 (2002) (describing early expansion of state’s appellate court system); Joy I. Hannel, *Celebrating 125 Years of Justice: A History of the Missouri Court of Appeals, Eastern District, 1876–2001* (Douglas R. Bader ed., 2001), MO. CT. APP., E.D., <https://www.courts.mo.gov/file.jsp?id=3500>; George H. Maitland, *A History of the Kansas City Court of Appeals*, 31 UMKC L. REV. 215, 215 (1963) (noting that “in the middle 1880’s, the Missouri Supreme Court docket was more than 1000 cases behind”); Laurance M. Hyde, *Historical Review of the Judicial System of Missouri*, 27 V.A.M.S. 1 (1952).

relieve supreme courts of crushing workloads.<sup>8</sup> This treatment fails to explain why intermediate appellate courts assumed the structure they ultimately did and so provides little help for those interested in improving the structure and function of state intermediate appellate courts.

Among the most pressing problems facing American appellate courts over the past 150 years has been the issue of increasing numbers of cases. One response to this problem has been the creation of intermediate courts of appeal.<sup>9</sup> Missouri was one of the first states to experiment with a two-tier appellate system employing an intermediate appellate court.<sup>10</sup> For that reason, examining the development of Missouri's appellate system may be useful for students of all state intermediate appellate courts.

This article contributes to the development of a more nuanced view of the social and political forces that shape the structure of state intermediate appellate courts by looking closely at the creation of the Missouri Court of Appeals. It first examines the public documents available regarding the creation of the Missouri Court of Appeals during the period from 1865 through 1910. This examination shows that while the caseload of the Supreme Court of Missouri was a factor in convincing politicians of the need for intermediate appellate courts of

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8. *E.g.*, DOERNER & MARKMAN, *supra* note 3, at 1 (“In most states . . . intermediate appellate courts were established to relieve the workload of the state’s highest court by serving as the courts where most litigants obtain review of adverse decisions from trial courts and various administrative agencies”); STEPHEN L. WASBY, THOMAS B. MARVELL, & ALEXANDER B. AIKMAN, VOLUME AND DELAY IN STATE APPELLATE COURTS: PROBLEMS AND RESPONSES 4 (1979) (observing that the “decrease in caseloads in courts of last resort has been more than offset in most states . . . by the growing caseloads of the intermediate appellate courts”); Joseph Fred Benson, *Ages of the Law: A Brief Legal History of Missouri, Part II—1860 to 1918*, 68 J. MO. BAR 200, 200 (2012) (noting backlog of cases in St. Louis appellate court “[o]n the eve of the Civil War” and establishment of two new courts); Higgason, *supra* note 7, at 24; Weis, *supra* note 5, at 455–56 (discussing federal courts of appeals); MEADOR & BERNSTEIN, *supra* note 3, at 35.

9. WASBY ET AL., *supra* note 8, at 16, 51 (pointing out that “[t]he option of creating intermediate courts has been exercised in a majority of states” and introducing discussion of history and role of intermediate appellate courts by characterizing their creation as “a major way to add resources to deal with caseload problems in supreme courts”); Edmund My Leong, *The Changing Role of Hawai’i’s Intermediate Appellate Court*, 10 HAW. B. J. 6, 6 (2006); DOERNER & MARKMAN, *supra* note 3, at 1; MEADOR & BERNSTEIN, *supra* note 3, at 35; CARRINGTON, MEADOR & ROSENBERG, *supra* note 6, at 148–49.

10. WASBY ET AL., *supra* note 8, at 51.

appeal, political and social factors—especially the conflict between different regional interests within the state—were the driving force in determining the ultimate structure and organization of the Missouri Court of Appeals. Next, the article examines how constitutional amendments in the mid-twentieth century pushed the Missouri Court of Appeals toward a more unified system. The article ends with a brief discussion of current features of the Missouri appellate system, which suggest that the regional forces that shaped the structure of the system initially still have power today.

## II. THE FIRST INTERMEDIATE APPELLATE COURTS IN MISSOURI

From the state's inception until 1865, Missouri, like all of the states and the federal government, had a single-tier appellate system.<sup>11</sup> Although there were numerous inferior courts, the primary trial courts were the circuit courts.<sup>12</sup> The Supreme Court, which was composed of three judges, had appellate jurisdiction to review the decisions of the circuit courts.<sup>13</sup>

Missouri first experimented with an intermediate appellate court during the upheaval after the Civil War. Missouri was badly divided during the Civil War.<sup>14</sup> Guerrilla activity was rampant, and military courts exercised jurisdiction over civilians in portions of the state for almost the entire span of the war.<sup>15</sup> Additionally, an oath of loyalty was required for voting and office holding, among other things.<sup>16</sup> As the war neared its end, the newly formed Radical Republicans—a political party loyal to the Union that favored immediate emancipation throughout the state and strengthening the loyalty oaths—gained power.<sup>17</sup> At the November elections in 1864, the Radical Republicans

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11. Hyde, *supra* note 7, at 8; see also Charles B. Blackmar, *Missouri's Appellate System: Is It Adequate for the 21st Century?* 24 J. MO. BAR 380, 381 (1968); *The Allocation of Original Appellate Jurisdiction in Missouri: Introduction*, 1964 WASH. U. L. QUARTERLY 424, 425–26 (1964) (tracing relevant history) [hereinafter *Allocation*].

12. Hyde, *supra* note 7, at 8.

13. *Id.*

14. 3 WILLIAM E. PARRISH, A HISTORY OF MISSOURI: 1860–1875, at 61 (2001).

15. *Id.* at 51, 64–65.

16. *Id.* at 67–68.

17. *Id.* at 101–02.

won by large margins, and the voters approved a proposal authorizing a new constitutional convention.<sup>18</sup>

The delegates to the Missouri Constitutional Convention of 1865 proposed a document that created sweeping changes in Missouri's government. With respect to the judicial branch, the delegates created one of the first intermediate appellate court systems in the nation.<sup>19</sup> As finally adopted, the Missouri Constitution of 1865 created five district courts outside of St. Louis County and provided that appeals from the circuit courts were to be brought to the district appellate courts.<sup>20</sup> The legislature was to determine when an appeal from the district courts to the Supreme Court would be allowed.<sup>21</sup>

The intermediate appellate courts conceived by the delegates of the 1865 Convention were different from current conceptions of intermediate appellate courts. In some ways, the first appellate courts in Missouri reflected old-fashioned ideas regarding the role of an appeal in the judicial system. In the early days of the United States, appeals were considered an adjunct to the regular work of the trial courts. As scholars of the United States appellate system have observed, "purely appellate courts and the sharp separation of trial and appellate work were not characteristic of the American judiciary in the beginning."<sup>22</sup> During the early years of the American republic, appellate courts were composed of a number of trial judges who sat together periodically to review litigants' allegations of trial-court error.<sup>23</sup> Missouri's first intermediate appellate courts followed this model. The Missouri Constitution of 1865 created circuit courts as trial courts, with one judge serving in each circuit. The district courts each included several circuits and functioned as appellate courts. The judges of the district courts included all the judges of the circuit courts within that district.<sup>24</sup>

To those accustomed to the modern system of appellate review, the striking feature of this system is that in each case the

18. *Id.* at 114–15.

19. Hyde, *supra* note 7, at 12.

20. *Id.* at 12–13.

21. *Id.* at 13.

22. MEADOR & BERNSTEIN, *supra* note 3, at 6.

23. *Id.* at 6–7.

24. Hyde, *supra* note 7, at 13.

reviewing panel included the judge who tried the case. This in part explains why Missouri's first intermediate appellate courts did not last long. Later lawmakers criticized the system because it required the judge who tried the case to sit on the panel that decided whether an error had been made during the trial.<sup>25</sup> Because of the composition of the district courts, one newspaper commenter complained that the judges "each became in turn an attorney to sustain himself."<sup>26</sup> In 1870, the district courts were abolished by constitutional amendment.<sup>27</sup> After the district courts were abolished, the increased appellate workload was accommodated by the addition of two Supreme Court judges, bringing the total number of judges on the Supreme Court to five.<sup>28</sup>

Nevertheless, because of the press of business at the state Supreme Court, many lawyers saw the need for additional reform,<sup>29</sup> and the topic of reforming Missouri's appellate court system again became a subject of discussion in 1875. Around this time, the practice of taking an appeal to cause delay for strategic advantage was also sufficiently common to cause concern to those interested in the administration of justice.<sup>30</sup> Additionally, by 1875, those who had fought for the South were beginning to regain their political rights, and many reformers thought a new constitution was needed.<sup>31</sup>

Voters approved a new constitutional convention in 1874.<sup>32</sup> The convention convened the next January and lasted through most of the year. During the proceedings, delegates spent more than a week discussing the proposed judicial article for the new constitution.<sup>33</sup> An examination of the debates reveals some of

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25. See 6 DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1875, at 324–25, 331 (Isidor Loeb & Floyd C. Shoemaker eds., 1940) [hereinafter DEBATES].

26. FAIR PLAY, Feb. 17, 1883, at 2.

27. Hyde, *supra* note 7, at 14.

28. *Id.*

29. See Joseph Fred Benson, *A History of the St. Louis Court of Appeals: The Early Years—1875–1910*, 30 ST. LOUIS B. J. 43, 43 (1983–1984).

30. A. Moore Berry, *Introduction*, 1 Mo. App. v (1877).

31. *Id.* at 44; PARRISH, *supra* note 14, at 238–49, 264–66, 289–90.

32. PARRISH, *supra* note 14, at 290.

33. JOURNAL, MISSOURI CONSTITUTIONAL CONVENTION OF 1875, at 387–446 (Isidor Loeb & Floyd Shoemaker eds., 1920) [hereinafter JOURNAL].

the forces that determined the structure of the Missouri intermediate appellate courts.

### III. THE MISSOURI CONSTITUTIONAL CONVENTION OF 1875

By 1875, Missouri had experienced many changes since it had achieved statehood. The first was a steep rise in population. In 1820, just as the territory was becoming a state, the population was 66,586.<sup>34</sup> By 1870, that number was over 1.7 million.<sup>35</sup> A second change involved industrialization. In the years immediately following the Civil War, railroads expanded rapidly across the state.<sup>36</sup> Railroads spurred economic development, but also brought an increase in litigation.<sup>37</sup> Some of that additional litigation arose from injuries to workers and passengers.<sup>38</sup> Railroad companies also borrowed money from the state and defaulted on those loans at alarming rates.<sup>39</sup> Finally, manufacturing interests increased dramatically.<sup>40</sup> These developments were especially noticeable in St. Louis,<sup>41</sup> and they all led to increased amounts of litigation.<sup>42</sup>

Lawyers from St. Louis, “alarmed at the congested docket of the Supreme Court,” played an important role in focusing the Convention’s attention on the state’s appellate court system.<sup>43</sup> Their concern was more immediate than that of other Convention delegates. More cases went to the Supreme Court from St. Louis than from any other part of the state.<sup>44</sup> For that

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34. *Resident Population and Apportionment of the U.S. House of Representatives—Missouri*, U.S. CENSUS BUREAU (n.d.), [www.census.gov/dmd/www/resapport/states/missouri.pdf](http://www.census.gov/dmd/www/resapport/states/missouri.pdf). (showing population totals by decade from 1810 through 2000).

35. *Id.*

36. PARRISH, *supra* note 14, at 214–22.

37. *Id.* at 223.

38. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 223 (3d ed. 2005).

39. PARRISH, *supra* note 14, at 223 (noting that some railroads’ defaults were resolved through compromise with bondholders, and that some “continued to pay off their obligations well into the twentieth century”).

40. *Id.*

41. *Id.*

42. *See* WASBY ET AL., *supra* note 8, at 13 (“The rise [in appellate caseloads] in the 19th Century would seem to follow the expanding population, commerce, and industry of the nation.”).

43. Hannel, *supra* note 7, at 3.

44. DEBATES, *supra* note 25, at 333–34.

reason, St. Louis lawyers were more affected by the congestion in the Supreme Court docket than other attorneys. The St. Louis delegation to the Convention led the push to create a single intermediate appellate court to serve St. Louis County as a means of relieving the overcrowded Supreme Court docket.<sup>45</sup> The role of St. Louis lawyers in the Convention is the first place in which regional forces play a visible role in shaping the structure of the Missouri intermediate appellate courts.

The St. Louis Bar Association—founded in March, 1874, with the goal “to maintain the honor and dignity of the profession of the law; to cultivate social intercourse among its members, and for the promotion of legal science and the administration of justice”<sup>46</sup>—was the first organization to leave historical evidence of a suggestion for a new intermediate appellate court.<sup>47</sup> Under Thomas Tasker Gantt, its initial chairman,<sup>48</sup> the St. Louis Bar Association submitted its idea for a St. Louis Court of Appeals to the Convention.<sup>49</sup>

Gantt had been admitted to the bar in Maryland and moved to St. Louis a year later in 1839.<sup>50</sup> In addition to practicing law, he was a tireless crusader for reform. “[I]n 1858, he was prominent in the movement by which the St. Louis county court was abolished on account of maladministration of its affairs, and the board of county commissioners was established, which worked an emphatic reformation for some years.”<sup>51</sup> He also served as a U.S. attorney and as a city attorney for the City of St. Louis.<sup>52</sup> Gantt’s background and his participation in the creation of the St. Louis Bar Association may in part explain the appellate system the St. Louis delegates proposed. During the

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45. *Id.*

46. 1 ENCYCLOPEDIA OF THE HISTORY OF ST. LOUIS: A COMPENDIUM OF HISTORY AND BIOGRAPHY FOR READY REFERENCE 88 (William Hyde & Howard L. Conard eds., 1899) [hereinafter 1 ENCYCLOPEDIA].

47. *Id.* at 495.

48. *Id.* at 88.

49. *Id.* at 495; DEBATES, *supra* note 25, at 319–20.

50. 2 ENCYCLOPEDIA OF THE HISTORY OF ST. LOUIS: A COMPENDIUM OF HISTORY AND BIOGRAPHY FOR READY REFERENCE 865 (William Hyde & Howard L. Conard eds., 1899).

51. *Id.*

52. *Id.*



debates, Gantt often spoke in favor of the creation of a St. Louis Court of Appeals.<sup>53</sup>

The St. Louis delegation to the Convention also included Lewis Gottschalk, a native German who immigrated to Missouri when he was thirteen.<sup>54</sup> After serving in the Union forces during the Civil War, he had a successful legal and political career in St. Louis that included terms as city attorney and judge on the St. Louis Circuit Court.<sup>55</sup> During the Convention, Gottschalk was the first to step up to speak for the need for a St. Louis Court of Appeals.<sup>56</sup> St. Louis delegates also dominated the committee that drafted the proposed revisions for the section of the new constitution detailing the structure of Missouri's judicial branch.<sup>57</sup>

Delegates from other parts of the state had different ideas about the proper structure of Missouri's appellate court system. Benjamin Dysart, a young attorney representing Macon County,<sup>58</sup> an area very different from St. Louis, was the most vocal. While the French had begun settling in the St. Louis area to trade in the 1700s, Macon County was not established until 1837, and it remained a predominantly agricultural area in the 1870s.<sup>59</sup> This regional difference may have been what allowed Dysart to develop a view of Missouri's appellate court system that differed from that held by the St. Louis delegates.

Even before the delegates began discussing the precise structure of the intermediate appellate courts that would be

53. See, e.g., DEBATES, *supra* note 25, at 381 (indicating that Gantt “wished to embrace the two courts,” referring to the new St. Louis Court of Appeals and the Missouri Supreme Court).

54. JOURNAL, *supra* note 33, at 85–86, 115. During the early days of the convention, the members voted to create a Committee on St. Louis Affairs to “take into consideration all matters that may be introduced into this Convention which have specific reference to the organization and government of the county and city of St. Louis and none other.” *Id.* at 185.

55. *Id.* at 86.

56. DEBATES, *supra* note 25, at 295.

57. JOURNAL, *supra* note 33, at 134.

58. Floyd C. Shoemaker, *A Biographical Account of the Personnel of the Convention in Missouri*, *supra* note 33, at 82.

59. *A Brief History of St. Louis*, CITY OF ST. LOUIS, <https://www.stlouis-mo.gov/visit-play/stlouis-history.cfm>; *History of Macon County Missouri*, MACON CNTY. HISTORICAL SOC'Y, [www.maconcountyhistoricalsociety.com/history.html](http://www.maconcountyhistoricalsociety.com/history.html) (pointing out that county has always been “an agricultural area”).

created by the new constitution, the sectional division between St. Louis and the rest of the state was clear. The Convention began discussion of the Judicial Article on the morning of June 21, 1875.<sup>60</sup> Section I of the Judicial Article created the judicial branch, and before its passage proponents of both proposals moved to amend that section so that it would specifically mention the intermediate appellate courts they hoped to create.<sup>61</sup>

When the Convention took up the question of where and when the Supreme Court of Missouri would meet, the sectional interests again shone through. The initial proposal provided that the Supreme Court would hold court in Jefferson City.<sup>62</sup> Amos Taylor from St. Louis suggested adding language that would require the Court to sit once each year in St. Louis.<sup>63</sup> R.F. Fyan of Webster County asked if Taylor expected to get the St. Louis Court of Appeals, and Westley Halliburton from Sullivan County quipped, "As a matter of course he does, and he expects to get the capital down there too, I suppose."<sup>64</sup> This exchange was followed by proposals to have the Supreme Court sit in various locations across the state including St. Joseph, Brunswick, Glenwood, and Carter County, until Taylor ultimately withdrew his proposed amendment.<sup>65</sup> This tongue-in-cheek exchange demonstrates that at the time, many saw the creation of the St. Louis Court of Appeals as simply a concession to St. Louis interests.

When the Convention finally turned to explicit discussion of the creation of the intermediate court of appeals, the delegates seriously considered two proposals, and each of those proposals reflected regional interests. The majority proposal came from the St. Louis delegates, who demanded an intermediate appellate court that would sit in St. Louis.<sup>66</sup> In the rest of the state, the appellate system would remain a single-tiered system under this proposal, appeals going directly from the trial courts to the Supreme Court. Many of the other members of the Committee

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60. DEBATES, *supra* note 25, at 291, 294.

61. *Id.* at 294–95.

62. *Id.* at 308.

63. *Id.* at 311.

64. *Id.* at 312.

65. *Id.* at 313–14.

66. *Id.* at 324.

on the Judiciary concurred in the proposal of the St. Louis delegation because they believed it would help relieve the workload of the Supreme Court of Missouri.<sup>67</sup>

The St. Louis delegation's proposed intermediate appellate court for St. Louis foreshadowed many characteristics of Missouri's later appellate court system. As envisioned by this proposal, it would have had general appellate jurisdiction for most cases arising in the county of St. Louis,<sup>68</sup> which would ideally have been finally resolved in this new court. Only in specified cases would appeals have been allowed from the St. Louis Court of Appeals to the Supreme Court of Missouri.<sup>69</sup>

Benjamin Dysart put forth the second proposal in his minority report from the Committee on the Judiciary.<sup>70</sup> Dysart's proposal would have created a state-wide intermediate appellate court system.<sup>71</sup> That is, instead of having a two-tier appellate system in St. Louis County and a single-tier appellate system in the rest of the state, Dysart proposed two intermediate appellate courts—one for the northern half of the state and one for the southern half of the state.<sup>72</sup>

Dysart made this proposal because he believed the increase in litigation caused by population growth and industrialization would in the future affect the rural parts of the state in the same way those developments affected St. Louis in the years leading up to the Convention.<sup>73</sup> He predicted that “[f]ive years will not pass before three intermediate Appellate Courts will be necessary.”<sup>74</sup> He also thought that the majority report's

67. *Id.*

68. *Id.* at 333.

69. *Id.* at 316 (“Appeals shall lie from the decisions of said St. Louis Court of Appeals to the Supreme court, and writs of error may issue from the Supreme Court to said court in the following cases only: In all cases where the amount claimed, exclusive of costs, exceeds the sum of \$2,500; in cases involving the construction of the Constitution of the United States or of the State; in cases where is drawn in question the validity of a treaty or statute of, or authority exercised under the United States; in cases involving the construction of the revenue laws of the State, or the title to any office under the State; in cases involving title to real estate; in cases where a county or other political subdivision of the State or any State officer is a party, and in all cases of felony.”).

70. *See id.* at 330.

71. *Id.* at 337.

72. *Id.* at 337, 341.

73. *Id.* at 339.

74. *Id.* at 337.

recommendation would not “so lessen the appeals to the Supreme Court, that it [would] be enabled to discharge all of the business that [came] before it.”<sup>75</sup> In support of this argument, Dysart used case statistics to show that while one third of the Supreme Court’s workload came from St. Louis, the total appellate workload in the State was increasing by more than that each year.<sup>76</sup>

Dysart’s words were prescient, but other delegates raised political concerns—in this case cost—in rebuttal. Even taking into account the fact that Dysart’s proposal would also reduce the number of Supreme Court judges from five back to three, Dysart’s plan involved more judges and thus more expense than the majority plan.<sup>77</sup> During Dysart’s discussion, one member of the Convention asked who would pay the salary of the judges under his plan, implying that a state-wide intermediate appellate court system would be an undue burden on the taxpayers of the entire state.<sup>78</sup> Dysart replied the cost was not so much greater than a system involving a St. Louis Court of Appeals and could be covered by reducing other government departments.<sup>79</sup> Nevertheless, when it came to a vote, the Convention rejected Dysart’s proposal and adopted the Judicial Article in the majority report by a vote of forty-seven to five.<sup>80</sup>

Dysart foresaw the problems that would face Missouri’s judicial system in the following decades, though his colleagues could not. The delegates recognized the problem of congestion in the Supreme Court docket and that many of the Supreme Court’s cases came from St. Louis. Nevertheless, the delegates apparently believed that the further expense that would be incurred to create intermediate appellate courts for the entire state was unnecessary. In fact, one delegate even suggested that the Supreme Court’s docket would decrease in the future.<sup>81</sup> However, Dysart’s prediction of Missouri’s judicial needs proved more accurate.

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75. *Id.* at 330.

76. *Id.* at 332–34.

77. *Id.* at 341–42.

78. *Id.* at 334.

79. *Id.* at 336.

80. *Id.* at 345.

81. *Id.* at 344–45.

## IV. KANSAS CITY AND SPRINGFIELD

By the 1880s congestion had again become a problem for the Supreme Court of Missouri.<sup>82</sup> At that time, the delay involved in getting a case heard before the Supreme Court was about three years.<sup>83</sup> Members of the bar believed that this delay caused a denial of justice as rich litigants oppressed the poor.<sup>84</sup> As a representative of the bar association in Mexico, Missouri, asserted, “many forego their rights rather than take upon themselves the delays incidental to litigation.”<sup>85</sup>

During the 1884 session, the legislature sought to address the overcrowded dockets, creating a system of appellate commissioners to assist the judges of the Supreme Court in hearing cases and drafting opinions.<sup>86</sup> The commissioners were assigned quasi-judicial powers, which allowed them to hear litigants’ arguments and prepare draft opinions.<sup>87</sup> Each commissioner submitted a draft opinion to the judges, who then could approve or reject it.<sup>88</sup> If the report was approved, it became the opinion of the court.<sup>89</sup> This system was designed to help the Supreme Court judges focus on what were considered the more important cases and to allow the Supreme Court to keep current with its docket.<sup>90</sup> Nevertheless, many members of the bar did not believe the commissioner system would fully

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82. *Allocation*, *supra* note 11, at 428 (noting that “[i]t was soon evident that the provisions of the 1875 constitution were inadequate to solve the problem of the supreme court’s workload”).

83. B.F. Dobyms, *First Constitutional Amendment—Yes*, LEXINGTON WEEKLY INTELLIGENCER, Nov. 1, 1884, at 4; H.C. Wallace, *Constitutional Amendment*, LEXINGTON WEEKLY INTELLIGENCER, Nov. 1, 1884, at 2; *Constitutional Amendment, Concerning the Judiciary—Opinion of Members of Mexico Bar*, MEXICO WEEKLY LEDGER, Oct. 30, 1884, at 2 [hereinafter *Mexico Bar Opinion*].

84. *Mexico Bar Opinion*, *supra* note 83 (asserting that “[m]any cases are appealed for mere delay” so that “[t]he rich and unscrupulous can oppress the poor and honest”); Dobyms, *supra* note 83 (asserting that “those who have small means” could be “forced into a ruinous compromise by the financially stronger party”).

85. *Mexico Bar Opinion*, *supra* note 83.

86. *Id.*

87. Blackmar, *supra* note 11, at 381.

88. GERALD T. DUNNE, *THE MISSOURI SUPREME COURT: FROM DRED SCOTT TO NANCY CRUZAN* 101 (1993).

89. *Id.*

90. *Id.*; Hyde, *supra* note 7, at 16–17.

resolve the problem because the judges still had to review the work done by the commissioners.<sup>91</sup>

Having failed to achieve relief through the commissioner system, reformers next sought a constitutional amendment. On November 4, 1884, a proposed constitutional amendment was submitted for approval by voters.<sup>92</sup> This proposed amendment created a state-wide intermediate appellate court system by making three adjustments to the Judicial Article of the Missouri Constitution of 1875.<sup>93</sup> First, it expanded the jurisdiction of the St. Louis Court of Appeals so that it served the entire eastern portion of the state, rather than just the St. Louis metropolitan area.<sup>94</sup> Next, it created the Kansas City Court of Appeals to serve the western portion of the state.<sup>95</sup> The amendment further gave the General Assembly the power to create one additional court of appeals.<sup>96</sup>

Proponents of the amendment believed it would improve Missouri's judicial system in several ways. First, it would permit the judicial system to handle growing numbers of cases.<sup>97</sup> Second, the amendment would provide flexibility to adjust the workload in light of future developments.<sup>98</sup> And finally, although the jurisdiction of the Supreme Court of Missouri was fixed under the Constitution of 1875,<sup>99</sup> the 1884 amendment would allow the legislature to change the Supreme Court's jurisdiction as circumstances required.<sup>100</sup>

The proposed amendment received significant attention from the press. As election day approached, the text of the amendment was printed in local papers across the state as was

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91. *Mexico Bar Opinion*, *supra* note 83.

92. Maitland, *supra* note 7, at 215.

93. *Mexico Bar Opinion*, *supra* note 83.

94. *Id.*; Hyde, *supra* note 7, at 15.

95. Hyde, *supra* note 7, at 15.

96. *Id.*

97. Dobyms, *supra* note 83 (reporting that Missouri Supreme Court was unable to "perform the work assigned to it" under existing provisions of state constitution and had recently been "all of four years behind" on its docket).

98. *Id.* (characterizing the system outlined in the proposed amendment as one that could be "readily adapted to the increasing demands of litigation in the state").

99. Hyde, *supra* note 7, at 15.

100. Dobyms, *supra* note 83 (indicating that jurisdiction of appeals courts could be changed and some work could be apportioned between them and supreme court "in such a manner as could entirely prevent an excessive accumulation of cases in any one court").

typical at the time.<sup>101</sup> The Missouri Bar Association also endorsed the amendment,<sup>102</sup> its support converging with the interest of the press: Many lawyers wrote to local newspapers explaining the advantages of the proposed amendment to voters.<sup>103</sup> While some detractors thought the new appellate system unnecessarily burdened taxpayers, supporters of the bill responded by noting that the judges of the courts of appeals would be paid the same as the then-existing Supreme Court commissioners, making the new court cost no more than the commissioner system.<sup>104</sup> Ultimately, the amendment passed.<sup>105</sup>

The arguments put forth in support of the 1884 amendment, when viewed in isolation, seem to support the simple conclusion that the creation of Missouri's intermediate appellate court system was just a matter of caseload management. That is, most supporters pointed to delay in the Supreme Court of Missouri as the first reason to vote in favor of the amendment.<sup>106</sup> However, subsequent events again show regional interests in play.

Almost as soon as the ink was dry on the 1884 amendment, people from Springfield and southwest Missouri began to petition the legislature and the governor to establish an appellate court in southwest Missouri. In January 1885, a bill was introduced to create a court of appeals in Springfield.<sup>107</sup> Although that bill did not make it out of the legislature, a similar bill passed both houses in 1887, though the governor vetoed

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101. See, e.g., *Amendments to the Constitution of the State of Missouri Proposed by the Thirty-Second General Assembly*, LEXINGTON WEEKLY INTELLIGENCER, Nov. 1, 1884, at 4; *Amendments to the Constitution of the State of Missouri Proposed by the Thirty-Second General Assembly*, MEXICO WEEKLY LEDGER, Oct. 30, 1884, at 2; *Amendments to the Constitution of the State of Missouri Proposed by the Thirty-Second General Assembly*, FAIR PLAY, Nov. 1, 1884, at 4 [hereinafter, collectively, *Voter-Education Printing*].

102. Dobyns, *supra* note 83.

103. See, e.g., *id.*

104. Compare *id.* with *Why Is Farm Labor Not More Remunerative?* LEXINGTON WEEKLY INTELLIGENCER, May 2, 1885, at 2 (railing against expenses associated with establishment of new appellate court as benefiting only court personnel, “cranky litigants,” “seedy wrangling lawyers,” and murderers bent on “prolong[ing]” their “worthless” and “crime stained” lives).

105. See Hyde, *supra* note 7, at 15.

106. See, e.g., *Voter-Education Printing*, *supra* note 101.

107. *Missouri Legislature*, WEEKLY CHILLICOTHE CRISIS, Jan. 22, 1885, at 1 (indicating that the bill was introduced on January 19).

it.<sup>108</sup> In the veto message accompanying that action, Governor John Sappington Marmaduke gave reasons similar to those voiced by members of the Constitutional Convention of 1875 who opposed the creation of the St. Louis Court of Appeals. The governor explained that the cost was too high and the measure would not decrease the Supreme Court's workload.<sup>109</sup>

Another attempt to pass a bill creating a Springfield Court of Appeals was made in 1903. Records show that the agitation for the bill came from Springfield itself.<sup>110</sup> When the bill passed in the legislature, Springfield residents lobbied Governor Alexander Monroe Dockery, urging him to sign the bill, but he vetoed it.<sup>111</sup> His reasons were almost identical to those Governor Marmaduke gave in 1887: The new court was unnecessary and would be an expensive burden to the taxpayers of the state.<sup>112</sup> In support of his conclusion, Governor Dockery discussed the caseloads of both the St. Louis Court of Appeals and the Kansas City Court of Appeals.<sup>113</sup> Those courts had been able to keep current with their dockets and resolve appeals in a timely manner.<sup>114</sup> A third attempt in 1905 was vetoed by Governor Wingate Folk for similar reasons.<sup>115</sup>

Despite these vetoes, the governors recognized the problems of delay caused by the overcrowded Supreme Court docket.<sup>116</sup> Yet they believed an intermediate court of appeals would not provide an effective solution to the problem. As Governor Folk stated in his veto message, “[s]uch a court can not in any way operate to relieve the crowded condition of the

108. 7 THE MESSAGES AND PROCLAMATIONS OF THE GOVERNORS OF THE STATE OF MISSOURI 52 (Sarah Guitar & Floyd C. Shoemaker eds., 1926) (recording text of veto message) [hereinafter 7 MESSAGES].

109. *Id.* at 52–53.

110. See 9 THE MESSAGES AND PROCLAMATIONS OF THE GOVERNORS OF THE STATE OF MISSOURI 92 (Sarah Guitar & Floyd C. Shoemaker eds., 1926) (noting that “my approval is especially urged by the good citizens of the delightful ‘Queen City of the Ozarks’”) [hereinafter 9 MESSAGES].

111. *Id.*; *Dockery Vetoes New Court Bill*, THE REPUBLIC, Mar. 31, 1903, at 3 [hereinafter *Dockery Veto*].

112. 9 MESSAGES, *supra* note 110, at 92.

113. *Id.*

114. *Id.*

115. *Change Is Evident*, SCOTT COUNTY KICKER, Apr. 22, 1905, at 1 (including text of veto message).

116. 7 MESSAGES, *supra* note 108, at 53; 9 MESSAGES, *supra* note 110, at 416–17.



Supreme Court docket, as there is no change in the jurisdiction of the present courts of appeal, and there is no delay at present in having cases heard in those courts.”<sup>117</sup> Instead of adjusting the jurisdiction of the two appellate levels, however, the preferred solution was to resort to the older remedy of using Supreme Court commissioners.<sup>118</sup>

Because of the political pressures, especially the perceived cost, the Springfield Court of Appeals was not created for twenty-five years after it had been constitutionally authorized.<sup>119</sup> Finally, in 1909, the legislature passed a bill creating a Springfield Court of Appeals that Governor Herbert Spencer Hadley approved.<sup>120</sup>

The decision to create the Springfield Court of Appeals was another step in the development of Missouri’s intermediate appellate court system that shows how regional interests sometimes trumped purely administrative concerns during that process. When the Springfield Court of Appeals was created, there was no corresponding adjustment in the allocation of appellate jurisdiction between the intermediate appellate courts and the Supreme Court of Missouri.<sup>121</sup> Consequently, the only practical effect of the creation of the Springfield Court of Appeals was to take cases away from the St. Louis Court of Appeals and the Kansas City Court of Appeals. But as Governor Dockery had noted just a few years earlier, those courts were not overwhelmed with work.<sup>122</sup> As might have been expected, adjustments in allocation of jurisdiction eventually became necessary, and those adjustments ultimately created the Missouri Court of Appeals as it is known today.

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117. 9 MESSAGES, *supra* note 110, at 416–17.

118. DUNNE, *supra* note 88, at 103 (noting that “the office of commissioner was reinstated in 1911”).

119. See text accompanying note 96, *supra*.

120. 1909 Mo. Laws 393 (June 15, 1909) (“Courts of Record: Kansas City Court of Appeals—Commission Created”).

121. See Hyde, *supra* note 7, at 15.

122. Dockery Veto, *supra* note 111.

## V. THE 1970 CONSTITUTIONAL AMENDMENT

While many thought that creation of the Courts of Appeals would solve the Supreme Court caseload problem, that challenge persisted even after the creation of the Springfield Court of Appeals.<sup>123</sup> Ultimately, this was a reflection of two conceptual difficulties. The first was a lack of clear boundaries between the role of an intermediate appellate court—to correct trial court errors—and the role of a supreme court—to provide uniformity in the law. The second was a corresponding misunderstanding of the most efficient way to allocate jurisdiction between the Supreme Court of Missouri and the Missouri Court of Appeals. Thus, by the middle of the twentieth century, reformers again looked for ways to improve the structure of Missouri's judicial system, this time suggesting more distinct boundaries separating the function of the Supreme Court of Missouri and the Missouri Court of Appeals achieved through adjusting the constitutional provisions regarding jurisdiction. Once the roles of the two appellate courts were clarified, and the jurisdictional provisions amended accordingly, the Missouri Court of Appeals could finally fulfill its designed goal of relieving the Supreme Court of the heavy burden of appellate review.

Even after the adjustments made necessary by the initial creation of the original Courts of Appeals, the Missouri Constitution gave the Supreme Court fairly broad appellate jurisdiction. At that time, the Supreme Court had jurisdiction:

In all cases where the amount in dispute, exclusive of costs, exceeds the sum of two thousand five hundred dollars; in cases involving the construction of the Constitution of the United States or of this State; in cases where the validity of a treaty or statute of, or authority exercised under the United States is drawn in question; in cases where the validity of a treaty or statute of, or authority exercised under the United States is drawn in question; in cases involving the construction of the revenue laws of this State, or the title to any office under this State; in cases involving title to real estate, in cases where a county or other political

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123. Hyde, *supra* note 7, at 16.

subdivision of the State or any State officer is a party, and in all cases of felony.<sup>124</sup>

In all other cases, appeals were to be made to the appropriate Court of Appeals based on geographical boundaries.<sup>125</sup> The only flexibility in this scheme was a provision that allowed the legislature to alter the threshold for amount-in-controversy jurisdiction.<sup>126</sup> Furthermore, the right to have the Supreme Court review a decision made by one of the Courts of Appeals was limited: Such review was allowed only if a judge of the Court of Appeals certified that he believed a decision to be contrary to previous decisions of the Courts of Appeals or of the Missouri Supreme Court.<sup>127</sup>

At first, this allocation of responsibility relieved the Supreme Court of some of its workload.<sup>128</sup> However, the relief was temporary: Caseloads continued to rise.<sup>129</sup> To combat the delay this caused, constitutional amendments allowing the Supreme Court to sit in divisions and to use commissioners to aid in the decision of cases were adopted.<sup>130</sup> As one member of the Missouri Supreme Court recognized in the 1950s, “[t]he Commissioner system has become well established and our Appellate Courts could not have kept up with their large dockets without their assistance.”<sup>131</sup> However, scholars and members of the bar criticized these measures.<sup>132</sup> Use of a division system, which allowed cases to be heard and decided by three of the judges of the Supreme Court of Missouri rather than all of them, resulted in decisions on important issues decided by less than a majority of the Court.<sup>133</sup> The use of commissioners to aid in decisions was not a satisfactory solution either, according to these commentators.<sup>134</sup> Commissioners were not authorized by

124. *Id.* at 15.

125. *Id.*

126. Blackmar, *supra* note 11, at 381.

127. Hyde, *supra* note 7, at 15–16.

128. *Id.* at 16.

129. See Blackmar, *supra* note 11, at 381.

130. Hyde, *supra* note 7, at 16.

131. *Id.* at 17.

132. *E.g.*, Blackmar, *supra* note 11, at 381 (referring to then-current Missouri system as a “monstrosity”).

133. *Id.* at 383.

134. *Id.* at 381.

the Missouri Constitution, and their commissions had to be reaffirmed on a periodic basis by the legislature.<sup>135</sup> Furthermore, commissioners participated in the court's lawmaking function by deciding important issues of state law even though they were not voting members of the court<sup>136</sup> and had not been through the screening process of judicial selection.

Agitation for change began in law reviews and legal periodicals. In the early 1960s, a former commissioner of the Missouri Supreme Court who was also a lecturer at Washington University in St. Louis wrote that the method of dividing the original appellate jurisdiction among the appellate courts of Missouri did not work well in practice.<sup>137</sup> In an effort to keep its caseload down, the Supreme Court narrowly interpreted its constitutional grant of jurisdiction, resulting in a morass of "rules and principles which [were] sometimes difficult for the members of the Bar to understand and apply."<sup>138</sup> Often cases bounced back and forth between the Supreme Court and one of the Courts of Appeals before a decision on the merits was rendered,<sup>139</sup> resulting in what one jurist called a "jurisdictional merry-go-round."<sup>140</sup>

In 1964, the Washington University Law Quarterly devoted an entire issue to the problem of appellate jurisdiction in Missouri.<sup>141</sup> In that landmark publication, scholars "catalogued every appellate jurisdiction case decided since 1875."<sup>142</sup> Each clause of Article V, Section 3, of the Missouri Constitution was thoroughly examined in its own chapter. There were two reasons for this "exhaustive discussion":

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135. *Id.* at 383.

136. *Id.* at 383–84.

137. Frank P. Aschemeyer, *Foreword*, 1964 WASH. U. L.Q. 421, 422. Mr. Aschemeyer was a Commissioner of the Missouri Supreme Court from 1950 to 1951.

138. *Id.*

139. *Id.*

140. *Corp. v. Joplin Cement Co.*, 323 S.W.2d 385, 386 (Mo. Ct. App. 1959).

141. *Neidhart v. Areaco Inv. Co.*, 499 S.W.2d 929, 931 (Mo. 1973) (Finch, C.J., concurring) (recognizing the issue for "spell[ing] out in detail the difficulty that lawyers and courts have had in the resolution of the matter of appellate jurisdiction," and acknowledging that "[i]n a few cases it has taken two or three transfers, back and forth, to settle the question and get the case decided on the merits").

142. *Allocation*, *supra* note 11, at 441.

- the detailed treatment of every problem encountered tends to reflect the complexity and unworkability of the case law and thereby indicates the need for fundamental changes; and
- the detailed treatment should serve as an aid to judges and lawyers who are researching the case law to decide jurisdictional questions.<sup>143</sup>

And it was not only scholars who were interested in these problems. The Missouri Bar published a series of articles on the issues in its monthly journal in the later 1960s.<sup>144</sup> Perhaps the best known of the authors was Charles B. Blackmar, who began his career as a Kansas City attorney before becoming a law professor at St. Louis University, and, eventually, Chief Justice of the Supreme Court of Missouri.<sup>145</sup> He was a prolific writer and was passionately involved with the development of the law and Missouri courts.<sup>146</sup> In his contributions to the Missouri Bar's series regarding appellate reform, Judge Blackmar suggested that the personnel of the courts needed to be changed and that the allocation of jurisdiction between the Courts of Appeals and the Supreme Court should be adjusted.<sup>147</sup>

The root of the problem was that the constitutional standards in place during that time did “not necessarily guarantee that the most important cases [would] reach the Supreme Court.”<sup>148</sup> The converse of this observation was that the Supreme Court often wasted time working on cases that could be competently reviewed and decided by the intermediate appellate courts. The best way to solve this problem, Judge Blackmar argued, was to recognize the different functions of the

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143. *Id.*

144. *E.g.*, Fred L. Howard, *The Need for a Unified Court System in Missouri*, 24 J. MO. BAR 433 (1968); Blackmar, *supra* note 11; Charles Blackmar, *Judicial Article for the Voters*, 25 J. MO. BAR 476 (1969).

145. Press Release, *Former Missouri Chief Justice Charles B. Blackmar Dies After Brief Illness*, MISSOURI COURTS (Jan. 22, 2007), <https://www.courts.mo.gov/page.jsp?id=90054>.

146. Michael A. Wolff, C.J., Mo. S. Ct., Eulogy, *Charles B. Blackmar: Professor, Judge, Chief Justice . . . and Charlie* (Jan. 26, 2007) (on file with author).

147. Blackmar, *supra* note 11; Blackmar, *supra* note 144.

148. Blackmar, *supra* note 11, at 381.

two courts.<sup>149</sup> He and many other scholars of the time believed that appellate review had two primary functions: “to afford the litigant a studied review of his case on the record made in the trial court,” and to allow for “developing and harmonizing the law of the state.”<sup>150</sup> Intermediate appellate courts should handle the first function while the Supreme Court should handle the second.<sup>151</sup> One part in creating such a system was to give the Supreme Court discretionary jurisdiction, which would allow it to choose which cases to decide.<sup>152</sup> Under the system Judge Blackmar envisioned, most cases would be decided first by the intermediate appellate courts, and then from among those cases, the Supreme Court would identify those presenting opportunities for clarifying and harmonizing the state’s law.<sup>153</sup> When caseloads expanded, judges could be added to the intermediate appellate courts without impairing the lawmaking function of the Supreme Court.<sup>154</sup>

A proposed amendment along these lines was finally passed by the General Assembly in 1969.<sup>155</sup> Among the principal changes made by this proposed amendment was a drastic reduction in the Supreme Court’s mandatory jurisdiction.<sup>156</sup> The categories involving real estate, state officials as parties, and the amount in controversy were removed.<sup>157</sup> The amendment also eliminated the commissioners and merged the three Courts of Appeals into a single Missouri Court of Appeals having “as many districts as the legislature sees fit to establish.”<sup>158</sup> These changes were intended to ensure that most appeals would be presented to and finally decided in the Court of Appeals, allowing the Supreme Court to finally focus on its function as the primary lawmaking court of Missouri.<sup>159</sup>

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149. *Id.*

150. *Id.* at 380.

151. *Id.*

152. *Id.* at 384.

153. *Id.* at 380.

154. *Id.*

155. Blackmar, *supra* note 144, at 476.

156. *Id.*

157. *Id.*

158. *Id.* at 477.

159. Garrett v. State, 481 S.W.2d 225, 229 (Mo. banc 1972) (Finch, C.J., concurring).

Since that amendment passed in 1970, the majority of all appellate cases in Missouri are properly presented to the Court of Appeals in the territorial district from which each case arose.<sup>160</sup> The Supreme Court “functions primarily as a court of last resort.”<sup>161</sup> Most of the cases heard and determined by the Supreme Court are within its discretionary jurisdiction, chosen because they present issues of general interest or importance or because they involve questions on which the districts of the Missouri Court of Appeals have issued conflicting decisions.<sup>162</sup>

## VI. A UNIFIED COURT?

On the surface, the 1970 constitutional amendment eliminated regional influences in the structure of the Missouri Court of Appeals.<sup>163</sup> This conclusion is supported not only by the text of the amendment itself, but also by the citation practices of some judges. In their citations in opinions, a number of judges on both the Court of Appeals and the Supreme Court designate a Missouri Court of Appeals opinion with the abbreviation “Mo. App.”<sup>164</sup> as opposed to using “Mo. App. E.D.,” “Mo. App. W.D.,” or “Mo. App. S.D.,” as is also common.<sup>165</sup> The authors of the Bluebook also note no distinction. The Bluebook suggests that the proper abbreviation for citations to decisions by the Missouri Court of Appeals is

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160. Daniel P. Card II, Alan E. Freed, *Appellate Jurisdiction of the Missouri Appellate Courts*, 24 MO. PRAC., *Appellate Practice* § 1.3 (2d ed. 2013).

161. *Id.*

162. *Id.*; MO. CONST. Art. 5, § 10.

163. At least one commentator has argued that this structural change should be strengthened in some respects. Ryan Westhoff, *Missouri's One and Only Court of Appeals*, 64 J. MO. BAR. 294, 299 (2008).

164. *E.g.*, *State v. Sisco*, 458 S.W.3d 304, 310 (Mo. banc 2015) (citing “*State v. Clinch*, 335 S.W.3d 579, 583 (Mo. App. 2011)”); *Welch v. Dir. of Revenue*, 465 S.W.3d 550, 553 (Mo. Ct. App. 2015) (citing “*In re Marriage of Harris*, 446 S.W.3d 320, 324 (Mo. App. 2014)”).

165. *E.g.*, *Wiley v. Daly*, 472 S.W.3d 257, 261 (Mo. Ct. App. 2015) (citing “*Mays-Maune & Assoc., Inc. v. Werner Bros., Inc.*, 139 S.W.3d 201, (Mo. App. E.D. 2004)”); *Carter v. Cott Beverages, Inc.*, 471 S.W.3d 724, 725 (Mo. Ct. App. 2015) (citing “*Peavy v. Div. of Emp’t Sec.*, 440 S.W.3d 569, 571 (Mo.App.W.D. 2014)”); *Estate of Meyer v. Presley*, 469 S.W.3d 857, 861 (Mo. Ct. App. 2015) (citing “*In the Estate of Lambur*, 397 S.W.3d 54, 62 (Mo. App. S.D. 2013)”).

“Mo. Ct. App.”<sup>166</sup> In fact, the Supreme Court of Missouri, relying on the constitutional provisions, has explicitly stated that there is only one Missouri Court of Appeals. As the Supreme Court noted in one case, “[t]he southern, western and eastern districts of the court of appeals established pursuant to article V, section 13[,] are not separate courts but simply different districts of a unitary court of appeals.”<sup>167</sup>

Nevertheless, other evidence suggests that regional influences still affect Missouri appeals. Missouri’s Rules of Appellate Procedure, for example, seem to contemplate that the various districts are not strictly bound by each other’s decisions. Under the current rules, review by the Supreme Court of Missouri is requested through an application for transfer. One of the grounds a party may raise in such an application is that the decision of the Court of Appeals was “contrary to a previous decision of an appellate court of this state.”<sup>168</sup> As the Court of Appeals is constitutionally bound to follow the decisions of the Supreme Court of Missouri,<sup>169</sup> the primary way an appellate decision could be contrary to a previous appellate decision would be for one of the districts to decline to follow a precedent set by one of the other districts. And this does happen on occasion.<sup>170</sup> Furthermore, the operating rules of the three districts of the Court of Appeals provide special procedures for deciding a case in a manner that conflicts with the precedent set by a sister district.<sup>171</sup>

Perhaps the most telling piece of evidence showing the continued influence of regional forces in shaping the Court of

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166. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 274 (Colum. L. Rev. Ass’n et al. eds., 20th ed. 2015); see also COLEEN M. BARGER & ASS’N OF LEGAL WRITING DIRS., ALWD GUIDE TO LEGAL CITATION (5th ed. 2014) 505.

167. *Akins v. Dir. of Revenue*, 303 S.W.3d 563, 567 n.4 (Mo. 2010).

168. Mo. Ct. R. 83.04 (2015).

169. MO. CONST. art. V, §2 (providing that supreme court’s decisions “shall be controlling in all other courts”); see also *Forester v. Clarke*, 334 S.W.3d 581, 583–84 (Mo. Ct. App. 2011) (acknowledging controlling force of supreme court decisions); *Weil v. Dir. of Revenue*, 304 S.W.3d 768, 770 (Mo. Ct. App. 2010) (same); *State v. Aaron*, 218 S.W.3d 501, 511 (Mo. Ct. App. 2007) (same).

170. *E.g.*, *Gerlt v. State*, 339 S.W.3d 578, 581 (Mo. Ct. App. 2011) (acknowledging both that the court’s decision “conflicts with the Eastern District’s contrary holding,” and that “[t]he Southern District has followed the Eastern District’s holding”).

171. MO. CT. APP. W. DIST. R. 31 (2015); MO. CT. APP. E. DIST. R. 403 (2015); see also MO. S. CT. OPERATING R. 22.01 (2017) (outlining rules and procedures).



Appeals involves judicial qualifications. A judge of any district of the Court of Appeals must be a resident of the district in which he or she sits.<sup>172</sup> If the Court of Appeals were simply a unitary court created to relieve the Supreme Court of a heavy caseload, there would be no reason for such a requirement. Rather, this suggests a continuing bias in Missouri in favor of regional interests shaping appellate structure and practice.

## VII. CONCLUSIONS

Many discussions of the development of state intermediate courts of appeals present a simplified picture of the causes involved, asserting that the development of intermediate appellate courts was a response to rising caseloads in supreme courts. However, the history and current practice in the Missouri appellate court system demonstrate that there are also other factors influencing the ultimate structure of appellate courts. In Missouri, from the initial creation of the St. Louis Court of Appeals to the procedural rules governing the current courts, regional forces have combined with increasing caseloads to shape the structure of the Missouri Court of Appeals. This situation is not without controversy. Some commentators and practitioners embrace the idea of a single court of appeals.<sup>173</sup> Others argue that the fractured structure of Missouri's intermediate appellate courts is useful in that it allows for "percolation of issues in the lower courts" prior to an authoritative Supreme Court resolution in much the same manner as occurs in the federal system.<sup>174</sup>

While this article does not provide a plan or solution for determining which of those approaches is better, it suggests that political and social factors affect appellate structure. The sources examined here, especially the debates of the long-ago Constitutional Convention of 1875, show that regional interests helped shape the structure of the present-day Missouri Court of Appeals. The existence of those forces suggests traditional explanations indicating that intermediate appellate courts were

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172. MO. CONST. art. V, § 21.

173. *E.g.*, Westhoff, *supra* note 163, at 299.

174. *E.g.*, Letter from Ron Ribaud to Editor, *J. Mo. Bar*, in 65 *J. MO. BAR* 96, 97 (2009) (responding to Westhoff, *supra* note 163).

created to relieve caseload pressures are too simplistic. Thus, other types of interdisciplinary study might yield additional ideas for appellate reform. Such study might include comparison of the relative efficiency of the Missouri Court of Appeals and the appellate systems of other states that employ a unitary intermediate appellate court, or more research on the benefits of the percolation theory. Empirical research along those lines would allow for more enlightened discussion of both the current structure of intermediate appellate courts and the preferred structure for the intermediate appellate courts of the future.

