

Indiana Law Review

Volume 35

2002

Number 2

SYMPOSIUM

CAUGHT IN THE MIDDLE: THE ROLE OF STATE INTERMEDIATE APPELLATE COURTS

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On March 30 and 31, 2001, the Indiana Court of Appeals and the *Indiana Law Review* co-sponsored a national symposium in Indianapolis on the role of state intermediate appellate courts entitled "Caught in the Middle: The Role of State Intermediate Appellate Courts." The idea for the symposium originated with Randall T. Shepard, Chief Justice of Indiana, and it was held in connection with the Court of Appeals' 2001 centennial celebration. It was my privilege to co-chair the symposium with Matthew T. Albaugh, then editor-in-chief of the *Indiana Law Review*.

Judges from twenty-two states attended, representing over half of the thirty-nine states that have intermediate appellate courts. To our knowledge, this was the first time a conference has been organized to consider the institutional role of state intermediate appellate courts. The symposium addressed eight topics. Professor Michael E. Solimine of the University of Cincinnati College of Law spoke on the judicial federalism and state jurisprudence. Justice Gary E. Strankman of the California Court of Appeal spoke on managing the appellate process. Chief Justice Shepard spoke on appellate judicial ethics. Dean Lauren K. Robel of the Indiana University School of Law—Bloomington spoke on published and unpublished opinions. Florida attorney John Paul Jones spoke on appellate alternative dispute resolution. Chief Justice Shirley S. Abrahamson of the Wisconsin Supreme Court spoke on judicial selection, retention and accountability. Justice Warren D. Wolfson of the Illinois Appellate Court spoke on the significance of oral argument. Chief Judge Sidney S. Eagles, Jr. of the North Carolina Court of Appeals spoke on the many constituencies of intermediate appellate courts. Responders included Professors Jeffrey W. Grove and Jeffrey O. Cooper of the Indiana University School of Law—Indianapolis, Chief Judge John T. Sharpnack and Judges Margret G. Robb and Paul D. Mathias of the Indiana Court of Appeals, and Jon Laramore, Special Counsel, Office of the Attorney General. The symposium dinner speaker was Linda Greenhouse, United States Supreme Court correspondent for the *New York Times*.

The symposium began with the premise that the role of state intermediate appellate courts has never been fully studied or acknowledged. The traditional law school curriculum emphasizes the federal courts. As Professor Grove

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correctly observes, the singular focus of some academics on the importance and excellence of the federal judicial system comes at the expense of a more balanced view of the complementary roles of federal and state courts.¹ The law schools and the profession would benefit if more emphasis were placed on the study of state jurisprudence and state court systems. With concurrent jurisdiction, state courts interpret and apply state law; they also adjudicate federal claims and federal rights. In recent years, a shift has occurred in the allocation of judicial power between the national government and the states. This “new judicial federalism” means more work for state intermediate appellate courts.

State trial and appellate courts handle most of the nation’s judicial business and dominate the judicial landscape with many more judges, courts and cases than their federal counterparts. Most litigation begins and ends in the courts of original jurisdiction—the trial courts, and appeals from trial court judgments are the exception. But in thirty-nine states, when an appeal is taken, that appeal is almost always to the state intermediate appellate court.

State intermediate appellate courts typically exercise mandatory jurisdiction over those appeals taken as a matter of right.² As such, they produce more opinions than any other state or federal appellate tribunal. With some exceptions, the highest courts of most states enjoy a discretionary docket. As Chief Judge Eagles notes, relatively few cases reach a state’s highest court.³ Thus, as a practical matter, state intermediate appellate courts are the *de facto* courts of last resort for most litigants.

State intermediate appellate courts are commonly considered courts of error, as distinguished from courts of doctrine. Federal appellate Judge Frank M. Coffin has observed, however, that the distinction between correcting error and developing law is often exaggerated.⁴ In fact, state intermediate appellate courts play a very substantial role in the development of the common law, the interpretation of statutes, the judicial review of administrative action, and

1. Jeffrey W. Grove, *Supreme Court Monitoring of State Courts in the Twenty-first Century: A Response to Professor Solimine*, 35 IND. L. REV. 365, 370-71 n.41 (2002).

2. The Indiana Constitution requires the Indiana Supreme Court to provide by rule “in all cases an absolute right to one appeal.” IND. CONST. art. 7, § 6. In almost all cases, that right of appeal is to the Indiana Court of Appeals. A constitutional right to appeal can also be found in Florida (appeals to district courts of appeal “may be taken as a matter of right”). FLA. CONST. art. 5, § 4(b)(1); Georgia (“The Court of Appeals shall be a court of review and shall exercise appellate and certiorari jurisdiction in all cases not reserved to the Supreme Court or conferred on other courts by law.”) GA. CONST. art. 6, § 5; Illinois (appeals to the appellate court “are a matter of right”) ILL. CONST. art. 6, § 6; Louisiana (“No person shall be subjected to imprisonment or forfeiture of rights or property without the right of judicial review based upon a complete record of all evidence upon which the judgment is based.”) LA. CONST. art. 1, § 19; and Missouri (“The court of appeals shall have general appellate jurisdiction in all cases except those within the exclusive jurisdiction of the supreme court.”) MO. CONST. art. 5, § 3. In most other states, the right to appeal is statutory.

3. Sidney S. Eagles, Jr., *Address from Chief Judge Eagles*, 35 IND. L. REV. 457, 463 (2002).

4. FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING, AND JUDGING 57 (1994).

virtually all areas of civil and criminal law. And as Professor Solimine observes, the vast majority of cases raising federal issues are litigated in state courts, not federal courts.⁵

In sum, as much as “ninety to ninety-five percent of the law work in the nation takes place in the state judicial systems.”⁶ Nevertheless, the impact of state intermediate appellate courts on the jurisprudential life of the nation has not been fully considered. Most of the scholarly literature on state courts focuses on state supreme courts and trial courts, not on intermediate appellate courts.⁷

In our federal system, “[t]he powers not delegated to the United States by the Constitution . . . are reserved to the States . . . or to the people.”⁸ Under this division of powers, state judiciaries have residual authority to decide state law questions, subject only to the Supremacy Clause. As early as 1874, in *Murdock v. City of Memphis*,⁹ the United States Supreme Court held that the meaning of state law is the province of the states and that the Supreme Court has no jurisdiction where the state court’s decision is sufficiently supported on state law grounds.¹⁰ This has been a well-established feature of our federal system. In *Michigan v. Long*,¹¹ an opinion grounded in principles of dual sovereignty and judicial federalism, the United States Supreme Court not only reiterated this doctrine but also adopted a new plain statement rule which, in order to avoid federal review of constitutional issues, requires the state court to enunciate “bona fide separate, adequate, and independent [state law] grounds” for its decision.¹² This rule can have a significant practical effect on state trial and appellate court judges, although Professor Solimine posits that the plain statement rule “has had relatively little effect on state court decision-making. . . .”¹³ Still, there is no sound reason why a state intermediate appellate court should not, when appropriate, invoke the plain statement rule and indicate whether or not the state constitution is the basis for its ruling, even when the state’s highest court has not previously addressed the issue.

Michigan v. Long rekindled widespread discussion over the constitutional relationship between the federal and state judicial systems. In addition, after *Michigan v. Long*, the Supreme Court has issued a number of decisions that indicate a shift in the allocation of power between the federal government and the states. In what Linda Greenhouse has called the Supreme Court’s “federalism revolution,” the Court has shown deference to the states in a number of cases,

5. Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-first Century*, 35 IND. L. REV. 335, 362 (2002).

6. MICHAEL E. SOLIMINE & JAMES L. WALKER, *RESPECTING STATE COURTS: THE INEVITABILITY OF JUDICIAL FEDERALISM* 133 (Greenwood Press 1999).

7. Solimine, *supra* note 5, at 360.

8. U.S. CONST. amend. X.

9. 87 U.S. (20 Wall.) 590 (1874).

10. *Id.* at 635.

11. 463 U.S. 1032 (1983).

12. *Id.* at 1041.

13. Solimine, *supra* note 5, at 340.

including *United States v. Lopez*,¹⁴ *Printz v. United States*,¹⁵ *United States v. Morrison*,¹⁶ signaling that the Commerce Clause of the United States Constitution is not an unlimited source of federal authority. As the Supreme Court continues to emphasize limitations on the exercise of federal power, the role of the states will be enhanced, with a corresponding increase in the demands placed upon state court systems.

In addition, the Supreme Court has recognized the sovereign right of the states to afford individual liberties a more expansive interpretation under their own constitutions, and to impose greater restrictions on the police power than those deemed minimal under federal law.¹⁷ Thus, attorneys are more frequently raising state constitutional claims in the trial courts. Although the ultimate resolution of such claims remains the province of a state's highest court, state constitutional issues are more often presented in the intermediate appellate courts. Consequently, when both state and federal constitutional questions are raised, intermediate appellate courts usually have the first opportunity to declare whether the outcome rests on independent and adequate state grounds.

Alexis de Toqueville concluded in 1835, "Scarcely any question arises in the United States which does not become, sooner or later, a subject of judicial debate."¹⁸ Americans look to the courts to adjudicate not only the ordinary, traditional disputes but also the complex and far-reaching questions that confront our society, often driven by changing social, political and economic forces. As the first appellate tribunal to address such questions, state intermediate appellate courts are "caught in the middle" of many audiences and constituencies. These include the opposing parties, the state's highest court, the trial court, the practicing bar, the state legislature, the academic community, the general public, and the media.

These high volume appellate courts are also "caught in the middle" of a case management predicament. Sworn to consider each case on its merits, state intermediate appellate judges preside over growing caseloads with finite resources. They must determine how best to handle an avalanche of paper, leverage productivity through technology, and manage human resources and facilities to produce a steady stream of timely, well-reasoned written opinions. As the California Appellate Process Task Force chaired by Justice Strankman noted, "[t]here are an irreducible number of steps that must be taken to decide appeals correctly and prepare a written opinion explaining the basis of the appeal. . . ."¹⁹

The bulk of American law is made by the states and enforced by the states.²⁰

14. 514 U.S. 549 (1995).

15. 521 U.S. 898 (1997).

16. 529 U.S. 598 (2000).

17. See *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980).

18. ALEXIS DE TOQUEVILLE, *DEMOCRACY IN AMERICA* 207 (Oxford Univ. Press 1946).

19. APPELLATE PROCESS TASK FORCE, REPORT OF THE APPELLATE PROCESS TASK FORCE 29 (2000).

20. SOLIMINE & WALKER, *supra* note 6, at 7.

Given recent trends, we can anticipate that state intermediate appellate courts will continue to carry more than their weight in the administration of our nation's judicial business, despite being "caught in the middle."