

CONCLUSION

I. DEFECTS OF THE PRESENT SYSTEM

The drafters of the 1884 amendment, intending to reduce the work load of the supreme court, structured an intermediate appellate level and allocated original appellate jurisdiction between the two levels by enumerated categories. This system was defective from its inception because almost every appeal could be adapted to the broad language of at least one of the categories. Also, no means other than judicial decision were available for adjusting the flow of appeals to the respective courts. The supreme court, in its decisional law, developed technical jurisdictional criteria for restricting its own work load, but these criteria have proved to be awkward modes of adjustment. The average case load for each supreme court judge remains greater than that of the courts of appeals judges, according to the docket studies printed in Appendices B and C. Also, the restrictive criteria only divest the supreme court and cannot divert appeals to a particular court of appeals whose docket is relatively light.

Moreover, reduction of the supreme court's work load by decisional law has a backlash effect. Desiring to exclude any particular case from its docket, the court must distinguish the case from existing precedents which define the jurisdictional issue. As each case is reconciled or distinguished, the network of decisional law multiplies in bulk and complexity. The result is an increase in the time necessary to adequately consider jurisdiction in each subsequent case.

The present appellate system thus has two principal defects. First, the means by which the case load is apportioned among the courts are inflexible. Second, complexity of the case law precludes simple jurisdictional determinations. A peculiar dilemma exists in the fact that a solution to one defect cannot be attempted without intensifying the other. An example is the court's consideration of the point in the proceedings when appellate jurisdiction vests in the court. The courts have verbalized the general rule that it vests when the appeal is taken and cannot be divested by subsequent events. This rule is simple to apply, but it tends to congest the supreme court docket with cases in which the substantive law issue asserted for jurisdiction has become moot. Therefore, in aid of its policy of restriction, the court has qualified the general rule with complicated rules of "conditional vestment."

Three ramifications of the dilemma seriously impede efficient administration of the appellate system. First, jurisdictional uncertainty adversely

affects the interests of litigants; to research the jurisdictional issue adequately, counsel need to sacrifice effort otherwise spent on the merits of the case. If counsel choose not to make this sacrifice, the likelihood of transfer, with the attendant delay and added litigation costs, is maximized. The court in turn suffers if counsel make the latter choice, because it is deprived of the aid of well-informed counsel in considering the jurisdictional issue.

Second, the time spent on jurisdiction multiplies the total number of judge-hours necessary to dispose of each appeal. The hours expended determining jurisdiction under article V, section three serve only to frustrate the purpose of the provision to lighten the work load of the supreme court.

Third, the time spent by the supreme court discharging its responsibilities under article V, section three tends to neutralize the court's discretionary power—granted by article V, section ten—to review decisions of the courts of appeals. Part II of this conclusion discusses the American tendency to abandon enumerated categories of original appellate jurisdiction in favor of supreme court discretionary power to select important cases for review. Article V, section ten reflects this tendency. Its effect, however, is minimized when the court must exhaust available time either resolving difficult original appellate jurisdictional issues or hearing unimportant cases that happen to conform to one of the enumerated categories.

Under the present system numerous insignificant cases conform to the categories of original appellate jurisdiction. For example, the supreme court must often apply well-settled principles of negligence law to personal injury actions in which the recovery in excess of \$15,000 unquestionably confers jurisdiction. The court has jurisdiction of a felony appeal when the only ground presented for reversal is insufficiency of evidence to support the judgment. The supreme court retains jurisdiction over all cases in which a township is a party even though this is an outmoded political subdivision which accommodates few of the problems of urban dynamism.

The present system is not, therefore, one that could be asserted as an example of modern efficiency in judicial administration. Only a constitutional amendment can remedy the situation. Part II discusses the available alternatives.

II. ALTERNATIVE APPELLATE SYSTEMS

The state needs guidance of the supreme court in matters of importance, those involving constitutional problems, those involving major economic problems, and those involving problems of personal liberty and relationship. The state law must develop as a unit guided by the highest court. There is no reason, however, in order to insure that this concept is developed, that there be either by-pass jurisdiction with all

its attendant problems, or double appeals of right. A high court with power to select cases to be heard will fulfill this function much more capably than will any of the courts having all sorts of matters imposed upon it for determination.¹

This statement reflects the phases through which American appellate systems have passed since it was realized that one tribunal cannot handle the appellate work of a populous state. Intermediate appellate tribunals were established and the work was allocated between them and the supreme court by two principal methods. First, general original appellate jurisdiction was established in the lower courts and double appeals of right were provided for limited categories of cases. Second, original appellate jurisdiction was allocated by enumerated categories. Recently, states have attempted to solve the problems that attend these allocative methods. The trend is in the direction of affording the highest court discretionary control over the nature and quantity of its responsibilities.

A. *Analysis of Representative State Appellate Systems*

1. *Missouri*

The 1884 amendment repealed the provision for double appeals of right and adopted the categorical allocation of mutually exclusive original appellate jurisdiction.² Cases that did not conform to the constitutional categories of supreme court jurisdiction were made appealable to the courts of appeals and, before 1945, could be given a second hearing in the supreme court only under exceptional circumstances.³ The writs of mandamus and certiorari, adjuncts of the supreme court's supervisory power, provided for only minimum control of the decisional law of the courts of appeals. The supervisory power did not authorize the supreme court to *hear* appeals, even under the most unusual conditions, over which it would not ordinarily have jurisdiction.⁴

When, by technical restrictions, the supreme court excluded classes of cases from its original appellate jurisdiction, it therefore lost control over the development of the law in the areas represented by those classes. It did, however, need to exclude classes of cases from its original appellate

1. JOINT COMM. ON MICHIGAN PROCEDURAL REVISION, JUDICIAL ADMINISTRATION AT THE APPELLATE LEVEL—MICHIGAN 31 (1959).

2. "Introduction," notes 10-17 and accompanying text; see THIRD REPORT OF THE JUDICIAL COUNCIL OF MICHIGAN 183-84 (1933) (commenting on the trend toward finality of courts of appeals decisions).

3. "Introduction," notes 43-49 and accompanying text.

4. See *State ex rel. Allen v. Trimble*, 321 Mo. 230, 10 S.W.2d 519 (1928) (en banc); *Schmohl v. Travelers' Ins. Co.*, 197 S.W. 60 (Mo. 1917) (en banc); § 9.013.

jurisdiction because its docket was consistently congested with numerous cases, often of trifling importance, falling within the language of one of the categories. Recognizing this situation as a "jurisdictional strait jacket" the drafters of the 1945 constitution provided an express constitutional authorization for discretionary review. By article V, section ten, a transfer to the supreme court may be ordered when the question involved in the case is of general interest or importance or the decision of the court of appeals necessitates a re-examination of the existing law.⁵

2. Georgia

Problems attendant on a system of enumerated jurisdictional categories are not unique to Missouri; an analogous situation is found in Georgia. The Georgia Constitution by enumerated categories allocated original appellate jurisdiction between the court of appeals and the supreme court. It also vested the supreme court with power to review cases certified to it by the court of appeals and to require review of any determination of the court of appeals by certiorari.⁶ Through a process of judicial interpretation, the supreme court limited its scope of original appellate jurisdiction and expanded its certiorari power. The result was a channeling of most original appeals into the court of appeals so that the supreme court, hearing most cases on certiorari, is in effect performing as a discretionary reviewing court.⁷

5. "Introduction," notes 44-54.

6. GA. CONST. art. VI, § 2-3704 (1945) provides:

The Supreme Court shall have no original jurisdiction, but shall be a court alone for the trial and correction of errors of law . . . in all cases that involve the construction of the Constitution of the State of Georgia or of the United States, or of treaties between the United States and foreign Governments; in all cases in which the constitutionality of any law of the State of Georgia or of the United States is drawn in question; and, until otherwise provided by law, in all cases respecting title to land; in all equity cases; in all cases which involve the validity of, or the construction of wills; in all cases of conviction of a capital felony; in all habeas corpus cases; in all cases involving extraordinary remedies; in all divorce and alimony cases, and in all cases certified to it by the Court of Appeals for its determination. It shall also be competent for the Supreme Court to require by certiorari or otherwise any case to be certified to the Supreme Court from the Court of Appeals for review and determination with the same power and authority as if the case had been carried by writ of error to the Supreme Court . . .

7. New York University Institute of Judicial Administration, *Intermediate Appellate Courts* 3-5, May 11, 1954.

The Institute recommended that:

consideration be given to the reorganization of the Georgia appellate structure with the view towards the establishment of the Court of Appeals as a true intermediate appellate court hearing substantially all appeals in the first instance. Standards for the allowance of appeals from that court to the Supreme Court should be oriented toward the system now in force in New York State, which from experience has proven successful. Such changes, it is submitted, would go far in alleviating criticism of over-restrictive appellate practice, in assuring support and confidence for the judicial system, uniformity and constructive growth in the law, and justice for the individual litigant. *Id.* at 8.

3. *Illinois*

The Illinois Constitution of 1870 contained no enumerated categories of cases to be appealed directly to the supreme court; instead, the legislature was given the power to prescribe such categories.⁸ Pursuant to this provision, the legislature enacted one general statute and numerous specific provisions delineating the categories of original supreme court review.⁹ The general statute provided for original appellate jurisdiction:

(a) in all cases in which a franchise or freehold or the validity of a statute or a construction of the constitution is involved, (b) in all cases relating to revenue, or in which the State is interested as a party or otherwise and (c) in cases in which the validity of a municipal ordinance or county zoning ordinance or resolution is involved and in which the trial judge certifies that in his opinion the public interest so requires.¹⁰

The unchecked proliferation of legislative categories of direct review compelled the supreme court to devote the major portion of its time to cases that were relatively unimportant in terms of general policy,¹¹ leaving little time for the exercise of its function of reviewing decisions of the courts of appeals.¹²

8. "[I]t is not by express provision of the constitution but only by an enactment of the legislature that any appeal goes direct from the trial court to the Supreme Court." Fitzpatrick, *The Reviewing Courts of Illinois*, 1952 U. ILL. L.F. 1, 7.

9. Fitzpatrick, *supra* note 8, at 7 n.46 catalogues this legislation.

10. ILL. REV. STAT. ch. 110, § 75 (1961).

11. "To require the court to take all cases of a particular class presented by litigants may involve the court in cases of trifling importance, although the class itself may be of great importance. It may involve the court in the routine application of well established legal principles to simple fact issues." Fitzpatrick, *supra* note 8, at 22-23. See Edmunds, *Jurisdiction of the Courts*, 1952 U. ILL. L.F. 480, 518-20; Sullivan, *Constitutional and Statutory Bases of Illinois Courts*, 1952 U. ILL. L.F. 463, 479.

It should be noted that the Missouri Constitution now contains a provision for direct supreme court review which potentially allows for the growth of the jurisdictional difficulties encountered in Illinois. The 1945 addition to article V, section three ("other classes of cases provided by law") has, fortunately, not been exploited by the general assembly, as discussed in Chapter Eight.

12. Approximately 75 per cent of the cases heard by the supreme court were direct appeals, as revealed by a 1946-1947 docket study. *A Study of the Illinois Supreme Court*, 15 U. CHI. L. REV. 107, 168-70 (1947). The constitution specified categories of cases entitled as a matter of right to a second hearing in the supreme court—similar to the appellate system originally adopted in Missouri in 1875—and gave the legislature power to provide for further double appeals. ILL. CONST. art. VI, § 11 (1870):

After the year of our Lord 1874, inferior appellate courts, of uniform organization and jurisdiction, may be created in districts formed for that purpose, to which such appeals and writs of error as the general assembly may provide may be prosecuted from circuit and other courts, and from which appeals and writs of error shall lie to the supreme court, in all criminal cases, and cases in which a franchise or freehold or the validity of a statute is involved, and in such other cases as may

The Illinois appellate system proved to be inadequate¹³ and an alternative was sought to alleviate the supreme court's work load.¹⁴ Suggestions were made that the Illinois Constitution be amended to create an appellate system in which the supreme court would have an exclusively discretionary reviewing function;¹⁵ in 1951 a committee was named to draft a proposed constitutional amendment.¹⁶ An explanatory statement published in 1953 to accompany the proposed judicial article gave as one major policy consideration: "The supreme court should be able to regulate the flow of its business so that it will be free promptly to rule on cases of general public importance and fully to discharge its administrative and rule-making responsibilities."¹⁷

Article VI, section five of the Illinois Constitution, as approved by the voters in 1962, reads as follows:

The Supreme Court may exercise original jurisdiction in cases relating to the revenue, mandamus, prohibition and habeas corpus, such

be provided by the law.

There were no recorded reasons for the choice of these particular categories. *A Study of the Illinois Supreme Court*, 15 U. CHI. L. REV. 107, 110 n.8 (1947).

13. "The outstanding characteristic of the result of the constitutional and legislative enactments which have been set out is that the Supreme Court of Illinois is today operating in a jurisdictional strait-jacket." Edmunds, *supra* note 11, at 518. In 1947 the law review staff of the University of Chicago, after a study of the work of the supreme court during one year, published a symposium in which the complexities of the Illinois case law were analyzed. *A Study of the Illinois Supreme Court*, *supra* note 12.

14. Dodd, *The Work of the Supreme Court of Illinois*, 21 ILL. L. REV. 207, 217-23 (1926), suggested, after a discussion of the categorical system, that the Illinois Supreme Court should use commissioners to aid the judges.

A major cause of the congestion was a supreme court holding that if an appellant sought review in the court of appeals on the basis of an issue which was within that court's jurisdiction, and the case contained other issues which fell within the supreme court jurisdiction, the latter issues were deemed waived due to the party's error in appealing to the wrong court. There was, however, no corresponding penalty for an erroneous appeal to the supreme court, so that if a case appealed there included issues falling within the court of appeals jurisdiction, these would be heard along with the supreme court issue; if no supreme court issue was present, the case would merely be transferred. "The inevitable outcome is that litigants, even those with but little hope of success, avail themselves of the opportunity to escape both risk and penalty by proceeding directly to the Supreme Court." *A Study of the Illinois Supreme Court*, *supra* note 12, at 117; see *Central Union Tel. Co. v. Edwardsville*, 269 U.S. 190 (1925).

15. Crampton, *Improving Our Appellate System*, 38 ILL. B.J. 118 (1949); Witwer, *The Illinois Constitution and the Courts*, 15 U. CHI. L. REV. 53, 73 (1947).

16. JOINT COMM. ON THE JUDICIAL ARTICLE, EXPLANATORY STATEMENT ON THE PROPOSED JUDICIAL ARTICLE 2 (1953).

17. *Id.* at 45. The text continues:

One of the great defects in the administration of justice under the present Constitution and statutes is that the supreme court has little control over the number and types of cases in which it will afford final review. So many are the classes of cases which the court is required to take, irrespective of their importance to the state as a whole, that it finds itself unable to grant leave to appeal in many cases which should be decided in the supreme court. *Ibid.*

original jurisdiction as may be necessary to the complete determination of any cause on review, and only appellate jurisdiction in all other cases.

Appeals from the final judgments of circuit courts shall lie directly to the Supreme Court as a matter of right only (a) in cases involving revenue, (b) in cases involving a question arising under the Constitution of the United States or of this State, (c) in cases of habeas corpus, and (d) by the defendant from sentence in capital cases.¹⁸ Subject to law hereafter enacted, the Supreme Court has authority to provide by rule for appeal in other cases from the circuit courts directly to the Supreme Court.

Appeals from the Appellate Court shall lie to the Supreme Court as a matter of right only (a) in cases in which a question under the Constitution of the United States or of this State arises for the first time in and as a result of the action of the Appellate Court,¹⁹ and (b) upon the certification by a division of the Appellate Court that a case decided by it involves a question of such importance that it should be decided by the Supreme Court. Subject to rules, appeals from the Appellate Court to the Supreme Court in all other cases shall be by leave of the Supreme Court.²⁰ (Adopted general election November 6, 1962.)²¹

Although the number of categories of cases in which appeal will lie directly to the supreme court from the trial court has been drastically reduced, direct appeals may be ordered in classes of cases other than those specified in article VI, section five if authorized by court rule. The evils inherent in an appellate system with extensive "by-pass" jurisdiction are not eliminated,^{21a} however, the considerable flexibility now built into the Illinois system by the provision that at least some categories shall be defined and governed by the court itself, rather than through constitutional or statutory provisions, seems to lessen the possibility of the development of a body of highly technical case law such as that found in Illinois prior to 1964.

18. There are only three capital offenses in Illinois: murder, treason and aggravated kidnapping for ransom. Appeal lies from conviction, whether or not a death sentence has been imposed. FINS, ILLINOIS COURT PRACTICE UNDER THE NEW JUDICIAL ARTICLE 57-60 (1964).

19. "Such a case will arise where the appellate court in reversing a trial court decision makes a finding of fact which, in a case in which there is a right to trial by jury, would amount to denial of a constitutional right." JOINT COMM. ON THE JUDICIAL ARTICLE, *op. cit. supra* note 16, at 53.

20. It is to be anticipated that the court is likely to provide by rule for second review (a) in cases in which there is a dissent in the appellate court, (b) in cases where a judge of the appellate court certifies that in his opinion the decision is contrary to existing Illinois law, (c) in cases presenting unsettled questions of law, and (d) in cases involving a substantial public interest. *Ibid.*; FINS, *op. cit. supra* note 18, at 137-40.

21. This article became effective January 1, 1964. FINS, *op. cit. supra* note 18, at 6.
21a. See First Nat'l Bank & Trust Co. v. City of Evanston, 30 Ill. 2d 479, 197 N.E. 2d 705 (1964), *trans'd.*

4. *Michigan*

Michigan, prior to 1964, had never had an intermediate appellate court.²² For many years this state was reluctant to alter its bi-level jurisdictional system for fear that it could not avoid the defects in an intermediate appellate court system: uncertainty of jurisdiction and double appeals.²³ However, in the 1950's the supreme court's work load became so unmanageable that a committee was formed to investigate possible solutions. The committee rejected a tri-level court system with enumerated categories of original appellate jurisdiction,²⁴ but recommended that the constitution be altered to authorize the establishment of an intermediate appellate court which would hear *all* first appeals as a matter of right.²⁵ This recommendation was adopted in the form of article VI, section four of the new Michigan Constitution (effective January 1, 1964):

The supreme court shall have general superintending control over all courts; power to issue, hear and determine prerogative and remedial writs; and appellate jurisdiction as provided by rules of the supreme court.

The governing statute is more specific:

(1) The decisions on appeal of the court of appeals are final, except as reviewed by the supreme court as provided by supreme court rule. (2) The court of appeals is subject to the superintending control power of the supreme court, and this section does not affect the exercise of that power, nor the issuance of writs by the supreme court pursuant to its constitutional powers.²⁶

22. See JOINT COMM. ON MICHIGAN PROCEDURAL REVISION, *op. cit. supra* note 1, at 24-25.

23. *Report of the Special Committee on Intermediate Appellate Courts*, 10 MICH. S.B.J. 43 (1930).

24. The committee reasoned that:

[P]rovision for direct appeal to the high court from the trial court eliminates the double appeal problem. In fact, as to those matters which may be appealed directly to the high court, it eliminates the value of the intermediate appellate court. The practice of specifying certain cases on which direct appeal of right may be had to the highest court, places another problem in its place, namely, that of deciding which cases fall under the direct appeal provisions of the statute [or constitution] and which do not. JOINT COMM. ON MICHIGAN PROCEDURAL REVISION, *op. cit. supra* note 1, at 28-29.

25. *Id.* at 46-47.

26. MICH. STAT. ANN. § 27A.314 (Supp. 1964). It was hoped that through this system all of the principles of judicial administration could be furthered:

(a) A single appeal of right to the court of appeals would be available to correct errors in an individual case, (b) a single supreme court at the top of the system would direct and control the development of the law and to see that it develops consistently throughout the state, (c) more time on the part of the highest court could be devoted to the larger problems of judicial administration. JOINT COMM. ON MICHIGAN PROCEDURAL REVISION, *op. cit. supra* note 1, at 32-33.

The Michigan pattern of completely discretionary review represents the culmination of the trend toward expanded original appellate jurisdiction in intermediate appellate courts. The Michigan court now occupies a position closely analogous to that of the United States Supreme Court in the federal system;²⁷ its work load, under its own control, will be kept at a manageable level.

B. Critique

States have modernized their appellate court systems along two patterns. The first, represented by Illinois, retains the allocation of original appeals between the supreme court and courts of appeals by categories, but subjects the number and definition of the categories to some judicial control.²⁸ This pattern is advisable only if this control can be exercised by the court in such a way as to prevent the growth of a body of technical case law which defines the categories.²⁹ In the New York system this danger is obviated because the highest court has original appellate jurisdiction in a few narrow classes of cases, but is not empowered to create other categories of original appellate jurisdiction by court rule.³⁰

27. See Crampton, *supra* note 15, at 120-21; New York University Institute of Judicial Administration, *Selecting Cases for Appellate Review* 8-9, July 24, 1956.

The Michigan appellate system is patterned after the American Bar Association's Model State Constitution.

Appeals from a judgment of the District Court imposing a sentence of death or life imprisonment, or imprisonment for a term of 25 years or more, shall be taken directly to the Supreme Court. In all other cases, criminal and civil, the Supreme Court shall exercise appellate jurisdiction under such terms and conditions as it shall specify in rules, except that such rules shall provide that a defendant shall have an absolute right to one appeal in all criminal cases. On all appeals authorized to be taken to the Supreme Court in criminal cases, that Court shall have the power to review all questions of law and, to the extent provided by rule, to review and revise the sentence imposed. AMERICAN BAR ASSOCIATION, MODEL STATE CONSTITUTION, JUDICIAL ARTICLE § 2, ¶ 2(B) (1962).

28. See N.J. CONST. art. VI, § 5. The New York University Institute of Judicial Administration, *Judicial Articles 76-78*, May 15, 1958, presents an evaluation of the New Jersey appellate system. A similar discussion is found in New York University Institute of Judicial Administration, *Intermediate Appellate Courts*, May 11, 1954. An analogous proposal was considered in committee at the 1943-1944 Missouri Constitutional Convention. See "Introduction," note 30.

29. See THIRD REPORT OF THE JUDICIAL COUNCIL OF MICHIGAN, *op. cit. supra* note 2, at 174.

30. N.Y. CONST. art. VI, § 7 provides:

Appeals to the court of appeals may be taken in the classes of cases hereafter enumerated in this section:

In criminal cases, directly from a court of original jurisdiction where the judgment is of death, and in other criminal cases from an appellate division or otherwise as the legislature may from time to time provide.

In civil cases and proceedings as follows:

(2) As of right, from a judgment or order of a court of record of original jurisdiction which finally determines an action or special proceeding where the

States that provide direct supreme court review of trial court decisions also give that court supervisory control over the trial and intermediate appellate courts. Double appeals are sometimes prescribed *as of right* if a dissent was filed in the intermediate appellate court or a constitutional question was involved at that level.³¹ In other cases the supreme court can exercise its discretion to provide a second appellate hearing.

The second pattern, illustrated by Michigan, prescribes no original appellate jurisdiction in the supreme court. By allowing first appeals to be heard by the intermediate appellate courts, the supreme court is free to select its cases from those previously decided by the intermediate courts.

The selection of an alternative to the presently existing Missouri appellate system involves a consideration of three factors. First, categorical allocation of original appellate jurisdiction must be evaluated. Constitutional categories can only be modified *de facto* by case law which attempts to implement the goals of the appellate system under conditions that were not anticipated when the categories were originally drafted. The Missouri experience demonstrates that constitutional rigidity can be circumvented only by complex case law. Categories created by legislation are more susceptible to direct modification, but the difficulty is that modification is likely to result from the pressures of special interests rather than from a realistic evaluation of the needs of the system;³² this was probably the cause of the difficulties encountered in Illinois. Categories created by court rule are the least objectionable because the court could, in drafting rules, anticipate more accurately than legislators or constitutional drafters the problems that will arise in their administration. Once drafted, court rules which cause special difficulties could be amended more readily than categories enumerated by the constitution or by legislation. Even these rules, however, require interpretation when applied to individual cases and a conscientious court would notify the profession in opinion form how it is interpreting rules which are this significant with respect to the interests of litigants. This in turn might lead to a complex body of definitive case law.

only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States; and on any such appeal only the constitutional question shall be considered and determined by the court.

"[T]he New York system does not espouse review for the sake of review, but limits it to situations where either on subjective evaluation or objective criteria, a likelihood of error below is present." New York University Institute of Judicial Administration, *Intermediate Appellate Courts* 7, May 11, 1954.

31. N.J. CONST. art. VI, § 5, ¶ 1; N.Y. CONST. art. VI, § 7. Each of these judicial articles provides for double appeal in other situations as well.

32. The drafters of the 1945 Missouri Constitution, by adding a provision for direct supreme court review in cases "provided by law," came dangerously close to a demonstration of this possibility. See § 8.020, note 8.

Although the criteria for the selection of classes of cases enumerated in a constitution are usually not expressed,³³ the categories are implicitly justified on the ground of "importance." It is usually believed that cases involving a constitutional question, title to real estate, a felony or a large amount of money are deemed of such significance that they should be reviewed in the first instance by the highest state court. The difficulty with this argument is that prospective definitions of "important" cases cannot insure that cases of trifling importance will not be included within the definition. Discussion in the foregoing chapters illustrates the defects of prospective enumeration. Due to the inevitable growth of definitional and distinction case law,³⁴ the common provision for direct review of cases involving even a constitutional question seems inadvisable;³⁵ capital convictions constitute the only category that can be justified. The objective importance of a case in which the death penalty could be imposed is undisputed.

The second factor in the selection of an alternative appellate system is the significance of double appeals. Although the losing party in a lawsuit should be entitled to one appeal in any event,³⁶ provision for a second appeal *as of right* is contrary to the principles of sound judicial administration: (1) it delays the settlement of the case,³⁷ (2) it increases litigation costs,³⁸ (3) it increases the supreme court's work load, and (4) it under-

33. See, e.g., note 12 *supra*.

34. In most states the tendency to spell out in constitutional detail the substantive as well as the geographical jurisdiction of courts has needlessly rigidified their functions and has prevented or retarded adoption to meet changing needs. In some states, the mandatory appellate jurisdiction of courts of last resort has resulted in a growing and uncontrollable caseload and mounting backlogs. New York University Institute of Judicial Administration, *The Judiciary* 4, April 20, 1959.

"Moreover, any system of splitting the case load between the two courts results in two tribunals handling different types of cases and runs the risk of creating in the public mind the idea that different qualities of appellate justice are being administered." INSTITUTE OF JUDICIAL ADMINISTRATION, *EXPEDITING APPEALS—A STUDY OF THE SUPREME COURT OF NEW MEXICO* 17 (1963). See *Report of the Special Committee on Intermediate Appellate Courts*, 10 MICH. S.B.J. 43-44 (1930).

35. See Chapter One for a full analysis of the technical jurisdictional rules adopted in this area.

36. "Because of the traditional concept in America that litigants are entitled to one trial and one appeal to another court for the correction of errors, most jurisdictions allow at least one appeal in most cases which meet jurisdictional requirements." American Judicature Soc'y, *Solutions for Appellate Court Congestion and Delay* 13, Information Sheet No. 24, Sept. 16, 1954. A similar conclusion is reached in JOINT COMM. ON MICHIGAN PROCEDURAL REVISION, *op. cit. supra* note 1, at 33.

37. THIRD REPORT OF THE JUDICIAL COUNCIL OF MICHIGAN, *op. cit. supra* note 2, at 189-92.

38. *Id.* at 192-93; see JOINT COMM. ON THE JUDICIAL ARTICLE, *op. cit. supra* note 16, at 47.

mines the influence of the intermediate appellate opinions.³⁹ The specification of cases that must be given a second appellate hearing is based on the assumption that certain appeals involve a question of such importance that the intermediate court's decision should be reviewed. But the conclusion reached on categories of original appellate jurisdiction is applicable here: the highest court should not be fettered by the legislators' or drafters' conceptions of "importance," but should be free to set discretionary standards for double appeals.⁴⁰

The third factor is the evaluation of discretionary review. Chief among the problems that attend this alternative is the amount of paper work involved in selecting for review those cases the supreme court will take. It becomes imperative that only a small percentage of petitions be accorded the review sought, not only to compensate for the time spent on paper work,⁴¹ but to discourage petitions for review of unimportant cases. Discretionary review calls for a relatively small court—the United States Supreme Court has nine judges, which indicates that a state supreme court exercising a similar discretionary review could function with fewer than nine judges.

A factor that relates to the problem of paper work is the identification of the cases which the highest court is likely to review under a discretionary system. The memorandum opinion accompanying a denial or grant of certiorari in the United States Supreme Court does little to notify the profession of the criteria employed by the Court for selection of cases. "Since the profession is unable to ascertain why the applications are refused in particular cases, and cannot, therefore, determine in what types of cases the court will be likely to permit an appeal, there is always ground for hope that the court will grant the application in any case, which tends to stimulate efforts to obtain second appeals."⁴²

39. *Report of the Special Committee on Intermediate Appellate Courts*, *supra* note 34, at 44-45; *cf.* §§ 6.051(a), note 33; 6.060.

40. "Courts and judges are better equipped than legislatures [and constitutional conventions] to know the needs of practice and procedure, and to provide for adjustments to meet those needs as they arise." New York University Institute of Judicial Administration, *The Judiciary* 14, April 20, 1959.

41. JOINT COMM. ON MICHIGAN PROCEDURAL REVISION, *op. cit. supra* note 1, at 8 (pointing out that the United States Supreme Court grants certiorari in about ten per cent of the cases in which review is sought).

42. THIRD REPORT OF THE JUDICIAL COUNCIL OF MICHIGAN, *op. cit. supra* note 2, at 222. In *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912 (1950), Mr. Justice Frankfurter discussed the Supreme Court's certiorari practices:

[I]t has been suggested from time to time that the Court indicate its reasons for denial. Practical considerations preclude. . . . If the Court is to do its work it would not be feasible to give reasons, however brief, for refusing to take these cases. The

Although this alternative pattern has inherent defects and even raises doubt in some quarters about the wisdom of allowing the supreme court to control its own responsibilities,⁴³ the advantages of discretionary review outweigh the disadvantages. Attempts to define in advance what cases will be important cannot approach the adequacy of individualized selection⁴⁴ as a means for assuring that the supreme court will be handling those matters most in need of attention.⁴⁵

III. RECOMMENDATION

Missouri should take one step beyond the Michigan example and not only provide its supreme court with power to selectively review courts of appeals decisions but constitutionally confine the court to that reviewing function. The only sanction for direct appeals to the supreme court should be in capital cases.

Adoption of the proposed system would require handling a problem that appears insignificant compared to those existing under the present system. This problem is the expenditure of judicial effort on double appeals and in the processing of petitions for supreme court review.⁴⁶

time that would be required is prohibitive . . . [T]his Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. *Id.* at 918-19.

43. Zacharias, *The Proposed Illinois Judicial Article*, 30 CHI-KENT L. REV. 303, 321 (1952). *But see* Maryland v. Baltimore Radio Show, Inc., *supra* note 42.

44. See note 40 *supra*.

45. Admittedly, the abolition of direct review by the Supreme Court will further encumber the appellate courts. The effect of a crowded docket, however, with the accompanying inclination toward haste and cursory examination is less serious in an intermediate appellate body than in a body whose time should be occupied with the most important judicial problems arising in the jurisdiction. *A Study of the Illinois Supreme Court*, *supra* note 12, at 118.

46. The supreme court cannot be completely relieved of the need to process some mundane detail. Under the present system, much insignificant detail is presented to the court in direct appeals which must be processed to the completion of an opinion. Other insignificant data is put before the supreme court by petitioners seeking a hearing under article V, section ten.

Under the proposed system, the supreme court would be relieved of the necessity of writing opinions on the detail presented to it in direct appeals, but the need to consider insignificant petitions for discretionary review would remain a considerable drain upon the court's time. Although this cannot be totally obviated, two measures could be taken to limit it. The use of law clerks to perform initial research and prepare memoranda framing the issues presented by a petition for review would permit the judges to direct their efforts to the more pivotal aspects in the processing of a petition. Also, if the court adopted a policy of considerable restraint in its selection of cases for review, litigants would be discouraged from petitioning in unimportant cases.

The policy of restrained selection would partially eliminate also the duplication of judicial effort; if the supreme court selects few cases, there are few double appeals. A possible plan to eliminate further double appeals would allow litigants to petition for transfer to the supreme court for hearing before the court of appeals has rendered an

Accordingly, adoption of the following amendments to article V, sections three and ten of the Missouri Constitution is proposed:

Section 3. Exclusive Original Appellate Jurisdiction of the Supreme Court.—Appeals from a judgment of the circuit court imposing a sentence of death shall be taken directly to the supreme court. All other

opinion. This would serve the dual purpose presently expressed by sections three and ten of article five. The importance of a case may appear as soon as appeal is taken or its significance may not crystallize until a decision of the court of appeals reveals a difficulty calling for further appellate attention. Section three attempts to categorize in advance what cases will be of such inherent importance to merit a supreme court hearing in the first instance. In exercising the power to transfer before opinion, however, the court would face no problem of interpreting the prospective categories and would not be forced to hear trifling cases happening to conform to the categories, because it would be referring only to the case presently before it. When the importance of a case does not appear until the opinion of the court of appeals is rendered, double appeal is warranted in *any* appellate system, and is presently authorized by article V, section ten. Under this plan, therefore, double appeals could be avoided in inherently important cases, and would be needed only in aid of the supervisory power of the supreme court which, by definition, involves double appeals.

The difficulty of this plan to avoid double appeals is that it compounds the supreme court's paper work problem. It increases, of course, the number of petitions the court must process. Also, there would be no way to control the number of these petitions. The policy of discouraging petitions for review by restrained selection may not be as successful with regard to petitions before opinion as it would be with regard to petitions after opinion of the courts of appeals. Litigants preparing briefs for a court of appeals would find that the preparation of a petition for supreme court review takes little extra effort. They would probably petition as a matter of course, even though they entertained little hope of obtaining the supreme court hearing, because it would be worth a little extra effort to take the chance of obtaining the hearing.

In order to discourage as many insignificant petitions as possible, the supreme court would need to select very few of these cases before court of appeals opinions. Thus, the court would process a great many petitions to avoid a few double appeals; this would probably involve a greater total waste of judicial effort than would double appeals.

Anyway there is not complete duplication of effort in double appeals. An initial court of appeals hearing would tend to winnow out frivolous issues, because the court's reaction would discourage litigants from raising the same issues in the supreme court. The patterns of emphasis in the court of appeals opinion would also crystallize the pivotal issues and narrow the range of controversy for the supreme court. In other words, the court of appeals opinion would prepare the case for the second appellate hearing, much the same as pre-trial pleading frames the controversy for trial. This idea, however, focuses attention upon the function and size of the courts of appeals. To what degree should the routine work of the system be shifted to the courts of appeals? Their dockets will be necessarily expanded by the appeals that are now heard by the supreme court on direct review. Failure to relieve the courts of appeals of at least *some* first appeals calls for serious consideration of the shifting of judicial personnel from the supreme court to the courts of appeals, which is discussed more fully in note 49 *infra*.

The adoption of a system of discretionary review in the supreme court is not feasible unless measures are taken to accommodate the concomitant difficulties which the courts of appeals will experience. Therefore, unless such measures can be taken, it is recommended that litigants be allowed to petition for transfer to the supreme court *before* the court of appeals has rendered an opinion.

appeals shall be directed in the first instance to the appropriate court of appeals.

Section 10. Transfer of Causes from Court of Appeals to Supreme Court—Scope of Review.—Cases pending in any court of appeals may be transferred to the supreme court because of the general interest or importance of a question involved in the case, or for the purpose of re-examining the existing law, or pursuant to supreme court rule. Cases may be transferred only under the following conditions: after opinion by order of the supreme court or court of appeals or when any member of the court of appeals or any division thereof dissents from the majority opinion and certifies that he deems said opinion to be contrary to any previous decision of the supreme court or of any of the courts of appeals. The supreme court may finally determine all causes coming to it from any court appeals, whether by certification, transfer or certiorari, the same as on original appeal.

This proposal retains the Missouri institution of certification to the supreme court after opinion of the court of appeals. The certification of a case would not necessarily force the court to conduct a full hearing which it would not normally be inclined to offer. Because it may presumably affirm by memorandum opinion,⁴⁷ the practice is not a significant departure from the principle of discretion in the supreme court to select the cases it will hear. Furthermore, it would not substantially increase the paper work of the supreme court because few records would be examined as the result of a certification that would not otherwise be examined as the result of a petition for review by the litigants. The practice could even have the effect of reducing the supreme court's paper work. The supreme court might consider the petition of a litigant who has been unable to convince the court of appeals to certify as presumptively too insignificant to warrant review. Litigants, notified of the tendency to defer to the court of appeal's assessment of the need for a second hearing, would be discouraged from petitioning in the absence of certification.

Some formalization of the criteria for the selection of cases would notify

47. SUPPLEMENTAL AND FINAL REP. OF THE SPECIAL COMM. ON THE MONETARY JURISDICTION OF THE APPELLATE COURTS (January 24, 1958), on file with Missouri Bar Association, Jefferson City, Mo., contains the following statement:

It is generally recognized that where a judge or commissioner is called upon to dispose of in excess of 22 cases with written opinions per year, danger of inadequate consideration is encountered. This stems from the fact that written opinions are required (Art. V, § 12, Const. of Mo., 1945), a rather fulsome statement of the facts and grounds of the decision is preferred, and historically, memoranda opinions are not favored. See § 1234 R. S. Mo. 1939, now repealed, and *Turner v. Anderson*, 236 Mo. 523, 139 S.W. 180, 181.

Since the memorandum opinion would be an essential tool of a discretionary reviewing court, and since the above doubt has been expressed about its desirability, consideration should be given to providing an express sanction of such opinions in article V, section twelve before any discretionary system is installed in Missouri.

the profession of the types of cases most likely to be selected for supreme court review and would produce a corresponding reduction in paper work. However, there is no need for the supreme court either to adopt the extreme position of the United States Supreme Court and refuse to publicize these criteria or to bind itself to a rigid format defined by court rule. It is suggested that this proposal, which allows the degree of formalization to be adjusted to current needs, is preferable to the system recently adopted in Illinois. The Illinois Constitution, in an effort to avoid double appeals, provides for the delineation in court rules of categories of *direct* review.

Under the foregoing proposal, if the supreme court chose to formalize its criteria for selection of cases, it would have fewer problems of explaining its interpretation of the criteria in opinion form than it would have under rules for direct review. This is true because the litigant's cause would be in the court of appeals when the supreme court denied a petition, and no transfer would result. The court simply would not be moved to formalize to a degree that would be inexpedient. Under the Illinois plan, however, litigants would rely upon court rules when appealing directly to the supreme court; this would require that the language of the rules be precise and that the court's interpretation of them be perpetuated in transferring opinions in order to afford maximum notice of which appeals were likely to be transferred. The thesis of this symposium is that precise jurisdictional rules, regardless of the context in which they are promulgated, necessarily raise knotty problems of interpretation in unique fact situations; a body of case law that deals with these problems tends to become complex.⁴⁸

The proposal retains article V, sections four (superintending control over inferior courts and power to issue and determine original remedial writs) and eleven (want of appellate jurisdiction in any court is not ground for dismissal). The former allows the supreme court to control procedural dispositions in the courts of appeals. The applicability of the latter will be reduced to two situations: (1) when a capital case is appealed to the court of appeals and (2) when any other appeal is taken directly to the supreme court.

The proposal is premised upon the anticipation that only a small percentage of cases will be selected for supreme court review, which calls for a somewhat smaller court than presently exists.⁴⁹ Also the fact that the courts

48. See *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918-19 (1950), quoted *supra* note 42.

49. The proposed system can operate only if a small percentage of cases are heard by the supreme court. Otherwise, much judicial effort would be wasted by double appeals and by administration of the petitions for review that litigants, encouraged by a liberal policy of selection, would present to the court. Furthermore, the proposed system can operate only if finality of courts of appeals decisions is the rule rather than the exception;

of appeals would have heavier responsibilities under the proposed system dictates that some personnel be shifted from the supreme court to the courts of appeals. In this connection, consideration should be given to the "unitary system" proposed during the 1913 proceedings of the Missouri Bar Association. The Bar plan, printed in Appendix A, proposes a merger of the courts of appeals and the supreme court, and the establishment of "divisions" of the latter court. Several variations of the plan are possible. The personnel of the central tribunal could be fixed. Or judges sitting in divisions in St. Louis, Kansas City and Springfield might alternately serve on a central "court en banc" located at Jefferson City. The latter tribunal, which would perform the supervisory function of the system, would thus be composed of rotating judicial personnel. This arrangement would dispel the appearance of a variation in the dignity and competence of judicial personnel, which tends to accompany a dual-level appellate system.

Structurally, the Bar plan differs little from the symposium proposal. Whether designated "divisions" or "courts of appeals," the peripheral tribunals would be subject to the discretionary reviewing function of a central tribunal. The Bar plan, however, provides functional benefits that transcend matters of nomenclature. It could accord a dignity to the divisions surpassing that which would be expressed in a proposal recognizing them as intermediate tribunals handling only mundane matters. The greater dignity would promote the needed public and professional regard for the finality of the divisional decisions, which becomes increasingly important when, as has been proposed, only a small number of cases are selected for second hearing by the central tribunal.⁵⁰ Also, as suggested above, if all appellate judges were operating within the ambit of a single-level structure, flexibility for the shifting of judicial personnel would be maximized. Shifting of personnel does not necessarily call for a standard rotation plan, but

these decisions would represent the last remedy as of right in the state, and should be respected as such by the profession and the public.

A large supreme court could not accomplish these goals because the available work force would either tend to take an unwarranted number of cases to keep it busy or stand idle much of the time. Therefore, the commissioner and perhaps the divisional systems—stop gap measures adopted under the present judicial article to help process the work load of original appeals—should be discontinued in the supreme court. Since neither device is mandatory under the present judicial article, no revision of the article would be necessary to effect this discontinuance. If, however, it were decided that the elimination of these devices were insufficient to effectuate the restrained selection policy, article V, section two could be amended to provide for fewer supreme court judges; perhaps five would be a desirable number. This personnel could then be transferred to other points in the appellate system to help dispose of the direct appeal docket removed from the supreme court.

50. See note 34 *supra*; §§ 6.051 (a), note 33; 6.060.

can be accomplished by transferring judges otherwise affiliated with one tribunal as the need arises. Flexibility to transfer not only from the central court to the divisions, but also between the divisions, is necessary because the present original appeal docket of the supreme court would be shifted to the divisions and some disproportion should be expected in the quantities that would go to the respective divisions.

The foregoing discussion provides only the basic outlines of the "unitary system." Because this system could operate within the basic framework of the proposed amendment without modification of the basic premises of that proposal, it is unnecessary to consider here the details of the system. It is enough to suggest that it provides a means for accommodating the need for adjustment that would accompany abolition of the categories of direct review.⁵¹

It is believed that the present personnel of the Missouri appellate courts could and would effectuate the goals of the proposed appellate system. Although numerous criticisms have been directed at particular jurisdictional decisions of the courts in the foregoing chapters, it is felt that the development of the complex and often inconsistent case law has been impelled by the rigidity of the system. It must further be recognized that the court inquires into jurisdiction *sua sponte* when the litigants fail to raise the issue and in such cases is deprived of the information supplied by adversaries who wish to prevail in the issue up for determination. From this perspective, it may be concluded that the judiciary has done an excellent job in administering the Missouri appellate system.

51. Michigan has adopted the "unitary system." MICH. CONST. art. VI, § 1: "The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals . . ."