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Luke Bierman

North Carolina State University

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FROM THE BENCHES AND TRENCHES

THREE VIEWS OF STATE APPELLATE COURTS

Introduction

LUKE BIERMAN

If trial courts are the workhorses and high courts the elites of the judicial system, then intermediate appellate courts are the judiciary's . . . well, something else. But what exactly are intermediate appellate courts, besides being in the middle, offering appellate review and functioning precisely as courts?

We know so much about the high courts, state and federal, that we sometimes might be missing the forest for the highest trees. After all, we know minute details about how high courts select their cases and how high court judges vote and view the law. We also know an increasing amount about trial courts, especially as we come to respect their essential roles as first actors exercising enormous influence on the direction of law and policy.

Intermediate appellate courts, however, fall into the vast unknown of public law scholarship. Are they workhorses or elites, or some hybrid? Perhaps some insight is available from the recent confirmation battles over federal circuit judgeships, which have crystallized the importance of at least the U.S. Courts of Appeals. There is a growing sense of the dynamic relevance of sitting just beneath the Supreme Court of the United States, which increasingly leaves alone the decisions emanating from the courts of appeals. Thus, attention to these intermediate appellate courts is timely and appropriate, and it has been growing, although occasional conference papers and a book here and there thrown in for good measure have yet to provide anything approaching full understanding of these courts or their judges.

If we do not know all that much about federal courts of appeals, state intermediate appellate courts are a real black hole, a backwater of scholarly pursuit, notwithstanding that state courts resolve some 98 percent of the approximately 100 million cases in the United States each year. Academics just do not seem terribly interested in the what and why of state courts. Shame on us for letting this happen.

The variation across state court systems offers wonderful opportunities for comparative study of both substance and technique. The long history of state courts, some of which predate the federal judiciary, provides the possibility for longitudinal examination. The innovations fostered in state courts permit evaluations with practical application. The number of cases and judges in state courts affords perhaps unlimited investigative potential. What a lode of wonderful data that simply is being missed.

This applies to state intermediate appellate courts in spades. Well more than half the states now have fully functioning midlevel appeals courts. They come in a variety of statewide and regional types. Their jurisdictions range from limited to general, with a concomitant array of roles and functions. Their judges are selected in

many different ways, serve terms of very different lengths, and exercise varied responsibilities. Some of these courts are responsible for attorney admission and discipline, some for judicial discipline. All offer public-law scholars opportunity for study and assessment, for learning more about the judicial process generally and state intermediate appeals courts specifically.

The articles that follow contribute to our knowledge about intermediate appellate courts. Three judges of these courts have provided descriptive color so that we will not be timid when we finally decide to explore these institutions. Certainly these articles offer material that is helpful to our understanding of intermediate appellate courts, but they also go beyond to offer something more—a call to action in a sense, a challenge. These articles demonstrate how much there is to learn, how much we really don't know. Through the illustrations they provide of courts going through their processes, from judicial selection to case selection to case resolution, they ask as many questions as they answer.

We owe much gratitude to these three busy and successful judges for sharing with us their views of their courts. Judges Haselton, Lankford, and McEwen took to this task without hesitation; indeed, they relished it. They are obviously, and deservedly, proud of their judicial responsibilities and work. They are also obviously aware that their courts, and those of colleagues serving at the same level, are not well known, perhaps even to the practitioners in their own states of Oregon, Arizona, and Pennsylvania. Certainly these articles make apparent the need to “get the word out.” I know, from working for state intermediate appellate judges and for a state intermediate appellate court, that this aspect of the tale is true. I also know this from working at the American Bar Association with a group known as the Council of Chief Judges of Courts of Appeals, a group that Judge McEwen has served with distinction as chair. It is the only national organization bringing together the judicial leaders of intermediate appellate courts, yet it labors under a misperception of limited relevance.

Justice Cardozo acutely observed that 90 percent of all cases could come out only one way, yet we have designed our judicial systems to ensure that litigants get a full and fair opportunity to be heard; this typically includes at least one hearing on appeal. As the high courts increasingly focus their attention on the limited number of cases, which, at least in the eyes of the high court itself, raise truly important questions of law and policy, other courts are left to provide the necessary due process of an appeal. It is the intermediate appellate courts that fulfill that goal, and it is up to us to understand whether that the goal is accomplished in the most effective and appropriate ways.

These articles, then, are challenges to the rest of us. They begin a process of encouraging attention to state intermediate appellate courts so that scholars, practitioners, and ultimately citizens—those who use and indeed own the courts—will better understand the role that they play in our republican system of self government. We thank Judges Haselton, Lankford, and McEwen for taking the time and effort to educate us and to encourage us to do more and to know more. The rest is up to us. jsj