A growing concern that a "litigation explosion" may outstrip the resources of our judicial system has led to proposals for court reorganization in Minnesota. Prominent among these is the creation of an intermediate court of appeals. In this Article, Mr. Norberg traces the evolution of the issue of court reorganization and examines critically the solution of an intermediate appellate court. After reviewing the experience of neighboring states that have adopted a three-tiered court model and after exploring judicial and legislative alternatives to the creation of a new court, Mr. Norberg suggests that an intermediate court of appeals should not be embraced automatically by the legislature as a solution to the problems of judicial overwork and restricted access to the court system.

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I. INTRODUCTION

More than half the states have chosen to establish some type of appellate court positioned between the state's highest court and its trial court of general jurisdiction. The majority of these intermediate appellate courts were established during two main waves of enthusiasm. The first occurred in the late 19th and early 20th centuries as an offshoot of the "court reform" movement, which at that time reflected a Progressive era emphasis on more efficient organizational structures and centralized administrative authority. The second began in the 1960's and, at least among professional court administrators and standards writers, is still underway. The Progressives had a readily available model for court organization in the Federal Court of Appeals Act of 1891, which created the three-tiered federal court system that exists today. Although a number of states adopted that model, a multi-tiered appellate court structure was never the dominant concern of the Progressive thinkers. Rather, they were mainly interested in centralizing court administration to eliminate waste and duplication, and generally interested in "modernizing" our courts, thereby making the administration of justice more efficient, so as to "look forward to a near future when our courts will be swift and certain agents of justice, whose decisions are acquiesced in and respected by all."
A. The Pound Perspective

Roscoe Pound, who perhaps more than any other person may be called the father of court reform, did not favor the creation of additional courts, but thought that there were too many courts already. In his famous 1906 address on "The Causes of Popular Dissatisfaction with the Administration of Justice," he told the American Bar Association that "[o]ur system of courts is archaic in three respects: (1) in its multiplicity of courts, (2) in preserving concurrent jurisdictions, (3) in the waste of judicial power which it involves. The judicial organizations of the several states exhibit many differences of detail. But they agree in these three respects." Throughout his career, Pound elaborated on his contention that justice could be administered more efficiently without a concomitant sacrifice in quality. Moreover, he understood that in the public mind the court system was but a part of a larger governmental system within which limited public resources were allocated from among competing needs and demands. In his view, it was precisely because "[t]here are so many demands pressing upon the government for expenditure of public money that so costly a mechanism as the system of courts cannot justify needless and expensive duplications and archaic business methods."

The court system posited by Pound's model called for an organization that would resemble remarkably our present Minnesota court system. He thought the entire judicial power of the state should emanate from a supreme court with a chief justice exercising "a superintending control over the entire system." Below the supreme court would be "a superior court of general jurisdiction of first instance for all cases, civil and criminal, above the grade of

5. One writer noted that "Pound was always a little right of center in these progressive movements, but his actual influence happened to be very considerable in the entire development." P. SAYRE, THE LIFE OF ROSCOE POUND 105 (1948). Hofstadter, in his seminal work on the Progressive era, lists Pound among the "large creative minority [of academics] that set itself up as a sort of informal brain trust to the Progressive movement." See R. HOFSHADTER, supra note 2, at 154. Pound has been credited with originating court reform in America. See L. BERKSON & S. CARBON, supra note 2, at 1-5; Volcansek, Conventiona Wisdom of Court Reform, in MANAGING THE STATE COURTS 18 (1977). On Pound generally, see D. WIGDOR, ROSCOE POUND (1974).


7. R. POUND, ORGANIZATION OF COURTS 276 (1940). Pound stated that it was necessary to the creation of an efficient judicial system for the courts to take control of the nonjudicial aspects of court administration and to use modern business methods. See id. at 285-87. "[S]cientific management is needed in a modern court no less than in a modern factory." Id. at 286.

8. Id. at 280.
small causes and petty offenses and violations of municipal ordinances." In some cases, specialized divisions, such as a family court in large cities, might be appropriate depending on "the traditions of the state, the amount of business of each sort, and the conditions in localities." Although in most states the "district court" described the tribunal he advocated, Pound disliked naming this court of general jurisdiction the "district court," because he thought the term suggested parochialism. He felt strongly that "[i]t is important that this branch be thought of and treated as one court for the whole state rather than a congeries of local separate courts.” Finally, the third level of the court system should include "tribunals for the disposition of causes of lesser magnitude”—courts organized along the lines of Minnesota's county and county municipal courts. Pound recognized that some questioned the need for this level of the court system, whose jurisdiction tended to be confined to civil cases falling below a certain jurisdictional amount and criminal cases falling into some legislative classification of pettiness, as compared to those cases heard by the district court. He argued, however, that this classification of trial courts is entirely appropriate because "[t]he amount of money involved has a direct relation to the amount of expense to which the law may reasonably subject litigants and thus may well deter-

9. Id. at 277.
10. Id. at 278.
11. Id.
12. Id. This is the policy thrust of Minnesota's Court Organization Act of 1977. See Act of June 2, 1977, ch. 432, 1977 Minn. Laws 1147. That Act gives to the supreme court the power, subject to the consent of a majority of the district chief judges, to alter the boundaries or change the number of judicial districts in the state (except in Hennepin and Ramsey counties), see id. § 1 (codified at MINN. STAT. § 2.722(2) (1980)); gives the chief justice the authority to assign any judge to serve in any court in the state whenever required by public convenience and necessity, see id. § 2 (codified at MINN. STAT. § 2.724(1) (1980)); establishes the general supervisory powers of the chief justice over the entire state court system, including supervision of the courts' financial affairs, programs of continuing education for both judicial and nonjudicial personnel, planning and operations research, and general administrative operations, see id. (codified at MINN. STAT. § 2.7244(4) (1980)); classifies all judges and district administrators as state employees, see id. § 3 (current version at MINN. STAT. § 43.43 subd. 2(4) (1980)); requires approval by the supreme court of the appointment of district administrators, see id. § 16 (codified at MINN. STAT. § 484.68(1) (1980)); and requires the state court administrator to promulgate and administer uniform standards for court budget and information systems, compile statistical information and manage court records, as well as prepare uniform personnel standards and procedures for nonjudicial personnel (except court reporters and court services officers), see id. § 5 (codified at MINN. STAT. § 480.15(10a)-(10b) (1980)).
13. R. POUND, supra note 7, at 278-79.
14. See id.
mine to which branch of the court a case should be assigned.”

The most important goal, in Pound’s view, was to improve the quality of the judges at this third level of the court system and insist that they possess the same qualifications as judges at the higher levels because

[th]e judges who are assigned to small causes should be of such caliber that they could be trusted and would command the respect of the public, so that there would be no need of retrial on appeal but review could be confined to ascertaining that the law was properly found and interpreted and applied.

Pound foresaw no need for an intermediate appellate court. The creation of such a court, in his view, would by necessity involve duplication of effort and “burdensome multiplication of reports.” The system he outlined should prove sufficiently adaptable to handle an increasing number of appeals. When necessitated by its workload, the supreme court should sit in divisions:

When dockets are swollen, three judges ought to be enough for all but the most difficult and important cases. Thus, there would be more time for oral argument, which with lawyers of the caliber of those who alone should appear in the highest court on cases of any consequence, is of the greatest assistance to the bench. Also there would be more time and opportunity for consultation and consideration of the merits of cases.

Pound recognized that many appeals do not involve fundamental questions of law but rather the need to review the work of the trial judge, or what has come to be called the court’s “error-correcting” function. He thought it might be reasonable to hear

15. Id. at 279.

16. Id. In Minnesota the County Court Act of 1971 required that henceforth county court judges be learned in the law and provided that existing county court judges not learned in the law may not exercise any jurisdiction additional to that possessed at the time of the effective date of the Act. See Act of June 7, 1971, ch. 951, §§ 3-4, 1971 Minn. Laws 1985, 1988-89 (codified at MINN. STAT. §§ 487.03(1), .04 (1980)). The 1977 legislature abolished the office of justice of the peace throughout the state. See Act of June 2, 1977, ch. 432, § 27, 1977 Minn. Laws 1147, 1161 (codified at MINN. STAT. § 487.35 (1980)). The same year the salaries of county court, probate court, and county municipal court judges were raised to the level of district court judges. See Act of April 21, 1977, ch. 35, § 13, 1977 Minn. Laws 64, 73 (codified at MINN. STAT. § 15A.083 subd. 1(3) (1980)).

17. R. POUND, supra note 7, at 282.

18. Id. at 280.

19. Three functions of appellate courts have been identified:
The first is that of correcting erroneous decisions rendered by judicial tribunals inferior to it in the judicial hierarchy. The second is to maintain a consistency among the decisions of those lower courts subordinate to it, so that the law is
these types of cases initially before three district judges at an appellate term. The hearing could be less perfunctory than the usual motion for a judgment notwithstanding the verdict or for a new trial that is heard before the same judge who presided when the verdict was rendered. Appeals from county and county municipal courts could be handled similarly within the existing system of courts.

B. The ABA Standards

Pound's insights became the basis for the conventional wisdom of court reform at least until the decade of the 1960's. Only thirteen states had established intermediate appellate courts by 1911 and no new intermediate appellate courts were created until 1957, almost a half century later. Then, in 1962, the American Bar Association published its Model State Judicial Article, which, in evenhandedly applied within the system. The third is the lawmaking function of creating and amending rules of law, not only so that they may be followed by the lower courts within the system, but also provide guidance to lawyers and their clients as to the propriety of their behavior, their obligations, their duties, their rights, and their remedies. This last function—the lawmaking function—is the genius of the common law system that we inherited from our English forbears.


Cardozo describes three types of appeals. See B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 163-65 (1921). The first type includes cases that "could not, with semblance of reason, be decided in any way but one," and in which the judicial process is one "of search and comparison, and little else." Id. at 163-64. The second type includes cases in which "the rule of law is certain, and the application alone doubtful." Id. at 164. He notes that "[often] these cases and others like them provoke difference of opinion among judges. Jurisprudence remains untouched, however, regardless of the outcome." Id. at 165. The final category consists of those cases "where a decision one way or the other, will count for the future, will advance or retard, sometimes much, sometimes little, the development of the law. These are the cases where the creative element in the judicial process finds its opportunity and power." Id.

20. See R. POUND, supra note 7, at 283.
21. See id. at 284.
22. See id. at 283-84. This kind of initial review of determinations of county and county municipal courts in Minnesota is provided for by Minnesota Statutes sections 484.63 and 487.39, which outline a procedure for appeal to district court by an aggrieved party. See MINN. STAT. §§ 484.63, 487.39 (1980). An appeal from a determination of a district court acting in an appellate capacity may be taken to the supreme court only with leave of the supreme court. See id. § 487.39(2). On the constitutionality of this procedure, see In re O'Rourke, 300 Minn. 158, 220 N.W.2d 811 (1974).
23. See VOLCANSEK, supra note 5, at 19. In 1962 the American Bar Association suggested a new method of court organization. Id. This model included a fourth tier, an intermediate appellate court. Id. It was thought that a fourth tier was necessary to handle the increased volume of appellate litigation. Id.
24. See Marvell & Kuykendall, supra note 1, at 11.
somewhat revised form, became the basis for the ABA Standards Relating to Court Organization that were published in 1974.25 The ABA Standards proposed a three-tier court system, as did Pound, but rather than a judicial hierarchy consisting of a supreme court, district court, and county court, the Standards suggested that the system be composed of a supreme court, intermediate appellate court, and a unified trial court. The Standards reflected a concern that a “litigation explosion” might eventually overwhelm our court systems, and that more layers of courts were needed to contain it.26 Observing that “[t]he weakness of local courts of limited jurisdiction is perhaps the most persistently identified failing of American court systems, and one that is long overdue for remedial action,” the ABA proposed the elimination of those courts and the establishment of a unified trial bench.27 As for appellate justice, the Standards provided that “it should be recognized that a litigant has no unqualified right to an appeal and should have no more than one appeal as of right.”28 The issue of what kind of tribunal would hear that appeal was left largely unaddressed. Rather, the issue of whether and at what point to establish an intermediate appellate court was presented strictly in terms of volume of litigation: “Where a supreme court by reason of workload is unable to perform both of its principal functions, some additional mechanism of appellate review becomes necessary.”29 The assumption made was that this “additional mechanism” should be another appellate court.

Although the ABA Standards suggested that intermediate appellate courts were inevitable as the workload of a supreme court

25. For the original Model State Judicial Article, see President’s Comm’n on Law Enforcement and Administration of Justice, Task Force Report: The Courts 92-96 (1967). For a more current model of judicial organization, see ABA Comm’n on Standards of Judicial Administration, Standards Relating To Court Organization (1974) [hereinafter cited as Standards Relating To Court Organization].

26. For a discussion of the increase in appellate litigation, see Carrington, Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law, 82 Harv. L. Rev. 542 (1969); Goldman, Federal District Courts and the Appellate Crisis, 57 Judicature 211 (1973); Rosenberg, Let’s Everybody Litigate, 50 Tex. L. Rev. 1349 (1972).

27. Standards Relating To Court Organization, supra note 25, § 1.12(a), Commentary, at 21.

28. Id. at 35. The Minnesota Supreme Court has held that the state constitution neither confers an individual right of appeal nor mandates that the supreme court exercise its appellate jurisdiction in all cases, except that the supreme court’s exercise of discretion in granting or denying leave to appeal must not in any case be invidiously discriminatory. See In re O’Rourke, 300 Minn. 158, 176-80, 220 N.W.2d 811, 822-24 (1974).

29. Standards Relating To Court Organization, supra note 25, § 1.13, Commentary, at 35.
increased, they also proposed that the optimum size of a state's highest court should be seven justices.\textsuperscript{30} Somehow "[t]his number facilitates the working relationships required to establish concurrence of opinion on difficult legal questions, while at the same time being large enough to provide breadth of viewpoint and the manpower to prepare the opinions that are the principal work product of appellate courts."\textsuperscript{31} Minnesota, however, instead opted in 1973 to increase the size of its supreme court from seven to nine justices.\textsuperscript{32} Indeed, it seems that a major justification for the increase in the size of the high court was the anticipated opportunity to increase the total work product of the court by hearing cases in divisions of three justices rather than five, thereby avoiding the need to establish an intermediate appellate court.\textsuperscript{33} Chief Justice Sheran believed at the time that the increase would be particularly significant "in its enabling the Court to hear arguments on some cases in three divisions of three justices each, as well as considering cases without oral argument, in divisions of five, and en banc."\textsuperscript{34}

\textsuperscript{30.} Id. at 34. Berkson and Carbon point out that "[d]espite the growing acceptance of intermediate appellate courts, they may not be essential to a unified system. There seems to be an unstated assumption in many proposals that intermediate courts of appeal should be established only in states burdened by extremely heavy caseloads. L. BERKSON & S. CARBON, supra note 2, at 4. See also ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, STATE-LOCAL RELATIONS IN THE CRIMINAL JUSTICE SYSTEM 88 (1971); NATIONAL CONFERENCE ON THE JUDICIARY, JUSTICE IN THE STATES 265, 266 (1971).

\textsuperscript{31.} STANDARDS RELATING TO COURT ORGANIZATION, supra note 25, § 7.13, Commentary, at 34. The Standards also suggest that the maximum number of justices on the state's highest court should be nine, and nowhere in the literature on court organization is it suggested that a state should consider expanding the size of its supreme court beyond that number. In fact, only six states besides Minnesota have a supreme court as large as nine members: Alabama, Iowa, Mississippi, Oklahoma, Texas, and Washington. See COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 1980-1981, at 150.

\textsuperscript{32.} Act of May 24, 1973, ch. 726, § 1, 1973 Minn. Laws 2133, 2134 (codified at MINN. STAT. § 480.01 (1980)). One commentator stated that "many state legislatures have chosen to implement portions of [proposals for court reform] . . . , or to retain their traditional systems. The absence of widespread acceptance may be the result of satisfaction with traditional systems, of political expediency, of a preference for incremental experimentation or of some flaw in the 'conventional wisdom.'" VOLCANSEK, supra note 5, at 23.

\textsuperscript{33.} Although there presently is no express language in Rule 135 of the Minnesota Rules of Civil Appellate Procedure allowing the court to sit in divisions, cases still may be heard by divisions of three or more justices. See Interview with Cynthia M. Johnson, Minnesota State Court Commissioner (Jan. 9, 1981) (on file at William Mitchell Law Review office). When the original version of this rule first became effective in 1968 it provided for divisions of five justices (out of a total of seven), with the chief justice sitting with every division. See Minn. R. Civ. App. P. 135, 9 MINN. STAT. 656 (1980); Knutson, Appellate Review by Divisions, BENCH & B. MINN., Nov. 1967, at 6, 7.

\textsuperscript{34.} See Kirwin, Sheran Returns to the Court as Chief Justice, BENCH & B. MINN., Jan. 1974, at 19, 20.
The court apparently now has decided to abandon entirely the hearing of cases by divisions and has recommended the establishment of an intermediate appellate court. Because the judicial article of the Minnesota Constitution provides that the legislature may only establish courts with jurisdiction "inferior to the district court," to implement this recommendation would require that the legislature propose a constitutional amendment to the electorate. The legislature should not propose such an amendment without full discussion and adequate resolution of the many subissues relating to the structure and organization of a new court. The proposal of any constitutional amendment burdens the electoral process to the extent that the public must consider and evaluate the proposition. In addition, voter approval of an enabling amendment is properly perceived by legislators as a mandate to implement the amendment. Before proposing any amendment, then, the legislature should itself be convinced of the merits of the proposal.

The discussion of a proposal to create an intermediate appellate court must take place among a variety of forums: the bench and bar of the state, the executive branch, the legislature, and the public. Historically, amendments proposing "basic structural change" have had difficulty gaining approval from a Minnesota electorate which while "by no means uniformly negative, nevertheless registers consistent reluctance to embrace this sort of constitutional engineering." For this reason, the case for an intermediate court of appeals must be made forcefully and in detail because a proposed constitutional amendment establishing such a court would fall into the category of "basic structural change."

C. The Wisconsin and Iowa Experience

The experience of Wisconsin in gaining approval of its citizens for an intermediate appellate court is instructive because of Minnesota's similarities to Wisconsin in geography, demography and political climate. Wisconsin's constitution, like Minnesota's, did

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36. MINN. CONST. art. VI, § 1.

37. Mitau, Constitutional Reforms in Minnesota—Change by Amendments 1947-77, in PERSPECTIVES ON MINNESOTA GOVERNMENT AND POLITICS 55, 71 (M. Gieske & E. Brandt ed. 1977). This phenomenon has been noted particularly with regard to rural and small town voters. See id.

38. See id.
not provide for any court between the supreme court and the trial court, so that passage of a constitutional amendment was required to create an intermediate court. As in most states where intermediate courts have been established, the justification for the creation of the court in Wisconsin was a perceived crisis in the caseload of the supreme court.\textsuperscript{39} There, however, the enabling amendment was adopted in the 1977 spring election\textsuperscript{40} as part of a broader “court reform” amendment that arose from recommendations of a Citizens Study Committee on Judicial Organization which was created in 1971 by executive order of Governor Lucey.\textsuperscript{41} The committee was a broad-based citizens committee of forty persons, a majority of whom were nonlawyers and none of whom were judges. It was charged to study the court system of the state, determine its shortcomings, and make recommendations for change, with no boundaries imposed on its examination.\textsuperscript{42} Although the committee filed its report with the Governor in January, 1973, it was not until 1977 that the amendment received the final approval of the legislature and appeared on the ballot.\textsuperscript{43} The 1977 amendment established a unified judicial system in the state under the administrative authority of the supreme court, and mandated the establishment of a court of appeals.\textsuperscript{44} The amendment, however, left to the legislature the task of determining the court’s jurisdic-

\textsuperscript{39} Wisconsin reported: While the number of cases disposed of increased from 291 in the 1962 term to approximately 431 in the 1971 term, the number of unfinished cases carried over the next term increased from 40 to approximately 335 during the same period. ... The backlog of cases is now so large that a litigant obtaining a trial court judgment today will not be likely to have his appeal disposed of before eighteen to twenty-two months have elapsed.

\textsuperscript{40} See note 51 infra and accompanying text.

\textsuperscript{41} See Citizens Study Committee on Judicial Organization, supra note 39, at 80. It was recommended that: In order to create an appellate structure which can fulfill the functions of serving as a check on the arbitrary exercise of power by the trial courts, providing a “second look” at decisions made during the course of the trial, performing a law-stating function, and which is reasonably available to all litigants desiring an appeal, the State of Wisconsin should establish a separate Court of Appeals.

\textit{Id.}

\textsuperscript{42} See id. at 11-12.


\textsuperscript{44} See WIS. CONST. art. VII, §§ 2-3. The 1977 Minnesota Legislature granted the Minnesota Supreme Court substantially the same powers. See note 12 supra.
tion, the number of judges who would sit on it, and the locations where the court would sit.\textsuperscript{45} The amendment also created one trial court of general jurisdiction, called the circuit court\textsuperscript{46} and expressly conferred upon the supreme court the power to suspend or remove a judge for cause.\textsuperscript{47}

Proponents of the amendment had hoped to present the Wisconsin electorate with one amendment that encompassed a package of court reform proposals, including the more controversial intermediate appellate court amendment. Although legislative opponents of an intermediate court of appeals succeeded in dividing the question so that the electorate was presented with four separate amendments, all four amendments passed.\textsuperscript{48} The intermediate court amendment, however, which received the most extensive coverage in the advertising campaign undertaken by proponents of the amendments, had the smallest margin of victory.\textsuperscript{49} Later, in 1977, the legislature implemented the constitutional amendment and the Wisconsin Court of Appeals became operational on August 1, 1978.\textsuperscript{50} Governor Lucey supported the amendments. In fact, it has been noted that the near unanimity of the state judicial conference in support of the proposals may have been in part the result of the Governor’s statement that he would not support any increase in judicial salaries until, in his view, judicial reform had been achieved.\textsuperscript{51}

The Wisconsin experience suggests that any decision to create an intermediate appellate court will take considerable time, effort, and expense to implement. Before the legislature endorses the creation of such a court, it should consider carefully any potentially

\begin{itemize}
\item \textsuperscript{45} See Wis. Const. art. VII, § 5.
\item \textsuperscript{46} See id. §§ 6-8. The suspension or removal of judges for cause is presently provided for in the Minnesota Constitution, which empowers the legislature to “provide for the retirement, removal or other discipline of any judge who is disabled, incompetent or guilty of conduct prejudicial to the administration of justice.” See Minn. Const. art. VI, § 9. The legislature has created a Board on Judicial Standards, which in appropriate circumstances may recommend to the supreme court that a judge be censured, removed, or retired. See Minn. Stat. § 490.16(2)-(3) (1980). The supreme court has held this procedure is not an unconstitutional delegation of power by the legislature to the judicial branch of government and does not violate the doctrine of separation of powers. See In re Gillard, 271 N.W.2d 785, 805-07 (Minn. 1978).
\item \textsuperscript{47} See Wis. Const. art. VII, § 11.
\item \textsuperscript{48} See Martineau, Judicial Reform In Wisconsin: Some More Lessons For Reformers, in Court Reform In Seven States 87, 95-96 (L. Powell ed. 1980).
\item \textsuperscript{49} Id. at 98.
\item \textsuperscript{51} Martineau, supra note 48, at 89.
\end{itemize}
negative baggage that an intermediate court may carry with it. An examination of the experience of our neighboring states is particularly instructive, for in Wisconsin and Iowa (an intermediate court was established by the Iowa Legislature in 1976 and began operation in January, 1977) an intermediate court of appeals has proven to be a mixed blessing. In fact, the concerns raised by the operation of intermediate appellate courts in those states relate so fundamentally to the effective functioning of our court system that it may be presumptuous to suggest that we are capable of overcoming these problems in Minnesota, in light of our neighbors’ failure to do so.

It is accepted that every member of our supreme court is working to full capacity within the confines of the court’s existing structure and procedures. In addition, the workload of the court is increasing and seems likely to continue to increase proportionately in the future. Therefore, any proposal to relieve the pressures felt by the court must proceed from the assumption that the total time available to the justices cannot be increased. It still may not follow necessarily, however, that the optimal solution to the state’s judicial workload problem is the establishment of an intermediate appellate court. Potentially negative aspects of the operation of intermediate appellate courts are their increased costs, both public and private, their invisibility, and their potential for balkanizing the state’s systems of appellate justice with consequent detrimental effect on the case law of the state. A number of alternative proposals exist that may have the effect of easing the court’s workload. These suggestions should be carefully considered and consciously rejected before embarking on the more drastic step of creating a new court.

52. See Act of May 24, 1976, ch. 1241, 1976 Iowa Legis. Serv. (West). The author accompanied the Intermediate Appellate Court Subcommittee of the Minnesota Judicial Planning Committee on its visits to Iowa on July 19, 1979, and to Wisconsin on November 16, 1979. However, no conclusions contained herein should be attributed to that subcommittee or its staff.

53. Chief Justice Sheran states that the caseload of the supreme court is increasing at the rate of approximately 10% annually. See Chief Justice Robert J. Sheran, supra note 35.

54. See notes 58-75 infra and accompanying text.

55. See notes 76-89 infra and accompanying text.

56. See notes 90-116 infra and accompanying text.

57. See notes 117-67 infra and accompanying text.
II. LEGISLATIVE POLICY CONSIDERATIONS

A. Cost and Duplication

A fundamental issue that the legislature must consider is the cost of an intermediate appellate court. This is manifested both as a direct cost to the state treasury and to the litigants who must finance another appeal and an indirect cost to the public who fund the court system. Proponents of an intermediate appellate court must meet the burden of demonstrating clearly that the benefits to be gained from the establishment of such a court in terms of increased accessibility, reduction of delay, and increased efficiency in the administration of justice will outweigh the certainty of these increased costs. For example, it can probably be assumed that any intermediate court would have at least nine judges, and possibly more. In addition to the salaries, fringe benefits, and retirement contributions for these judges, appropriate facilities and staff would have to be provided, and the court's administrative operations would need to be funded. It seems clear, then, that an intermediate appellate court would cost at least as much to operate as is expended presently on the operations of the supreme court.


59. The Wisconsin intermediate appellate court, for example, consists of twelve judges, three each from four statutorily created intermediate appellate court districts. See COUNCIL OF STATE GOVERNMENTS, supra note 31, at 150. There are seven justices on the supreme court. See id. The United States Bureau of the Census estimated that the population of Wisconsin on July 1, 1977 was 4,644,000, compared with 4,019,000 for Minnesota. See id. at 648, 661.

60. Effective July 1, 1980, the salary of an associate justice of the Minnesota Supreme Court is $56,000 annually; the salary of a trial court judge is $48,000. See MINN. STAT. § 15A.083(2)-(3) (1980). The most recent comparative figures indicate that the salary for a supreme court justice in Minnesota is the eleventh highest among the states; and for the trial court judge, the ninth highest. NATIONAL CENTER FOR STATE COURTS, SURVEY OF JUDICIAL SALARIES 2 (1980). Minnesota ranks eighteenth among the states in per capita personal income and nineteenth in population. Id. If an intermediate appellate court were established, the salary of its members presumably would be pegged at some point between the level of the supreme court and the trial court.
It is not as easy to quantify the increased costs that will be borne by parties who must undertake an additional appeal, whether it be a full hearing or an application for further review. Moreover, it is unclear to what degree these costs might be balanced by claimed increased efficiencies in the operation of the system. Ultimately, a policy judgment must be made on the basis of the best evidence available. It is certain, however, that if a new court level is created, there will be an expansion in the total work product of the court system. It has been observed that “court systems may be like

61. The Minnesota Legislature appropriated $5,209,200 to fund operations of the supreme court in the 1980-1981 biennium. See Act of June 5, 1979, ch. 333, § 3, 1979 Minn. Laws 988, 990. In Wisconsin, the preliminary fiscal analysis in 1977 indicated that the ongoing operational cost of the intermediate appellate court beginning in 1978-1979 would be $2,709,400 for that biennium. See Wisconsin Legislative Council Staff, Summary of Chapter 187, Laws of 1977, Creating a Court of Appeals, in WISCONSIN’S NEW COURT OF APPEALS: COMPILATION OF MAJOR STUDY DOCUMENTS 6 (1977). These costs, of course, would be subject to inflation in subsequent bienniums. See id. The Wisconsin analysis also projected start-up costs for the court of appeals of approximately $500,600. See id. At a time of scarce resources and projected deficits in Minnesota’s revenue system, it will be even more important to weigh these figures in the context of other needs and priorities of the state court system.

The Minnesota Judicial Planning Committee is in the process of formulating recommendations for increased state funding of the state court system. See Chief Justice Robert J. Sheran, supra note 35. Nearly every study commission on court systems in the past twenty years has recommended that most (or all) of the cost of the court system should be paid by the state. See Skoler, Financing the Criminal Justice System: The National Standards Revolution, 60 JUDICATURE 32, 34-35 (1976). Proponents of state financing argue that local financing means that the courts must be funded out of property tax revenues, which they view as regressive and burdensome to counties; that county boards have only nominal familiarity with court operations; and that a more equitable system of justice can be achieved through state assumption of financial responsibility for what is, after all, a state court system. See id. at 37. Opponents of state financing of the courts fear that if local governments no longer fund the courts there will be no local voice in policy-oriented decisionmaking because those who control the purse strings control policy to a significant degree; that state financing will result in the growth of an unresponsive state-level bureaucracy to supervise local courts; and that state financing will be more expensive. See id. at 37-38. Minnesota presently is one of ten states that fund less than 20% of the total judicial budget at the state level (the others are Arizona, California, Florida, Georgia, Mississippi, Michigan, Ohio, South Carolina, and Washington). See L. BERKSON & S. CARBON, supra note 2, at 14 & n.101. For a discussion of the arguments in opposition to state financing of the judiciary, see id. at 40-43.

62. In Wisconsin a decision of the court of appeals is reviewable by the supreme court only upon a petition for review granted by the supreme court. See WIS. STAT. ANN. § 808.10 (West Supp. 1980). Similarly, in Iowa, a decision of the court of appeals may be appealed to the supreme court by filing an application for further review. See IOWA CODE ANN. § 684.1(4) (West Supp. 1980). Grounds on which further review may be granted are set forth in the Iowa Rules of Appellate Procedure. See IOWA R. APP. P. 403(b).
highways in that the more we build, the busier they are." Whether the phenomenon is due to a corollary to Parkinson's Law, or whether, in fact, intermediate appellate courts have begun to meet previously unmet needs in the administration of appellate justice is not clear. It should be noted, however, that in states that have established intermediate appellate courts it may be doubted whether the process and cost of filing an appeal with the intermediate court is any more simple a process than had previously been the case with respect to filing an appeal with the state's high court. Moreover, the available evidence suggests that in states that have established intermediate courts the total appellate caseload has increased.

A certain percentage of this increase in the total caseload naturally represents "double appeals," with concomitant increased costs to the litigants involved, and an increased length of time between the initiation and final resolution of a case. If an intermediate appellate court were to be established, the supreme court presumably would become some form of a certiorari court which, in most instances, would hear cases only following the granting of an application for further review from the intermediate court. In the first two and one-half years of the Iowa Intermediate Court, approximately forty percent of the court's decisions resulted in the filing of an application for further review, although not more than ten percent of these applications were granted. In the first year of the Wisconsin Court of Appeals, approximately twenty-four percent of the court's decisions were appealed and approximately twenty percent of these petitions were granted.

The procedure for filing a petition for further review, even if denied, entails additional costs to the litigants, although they would not be as substantial as in a case in which further review was granted. In addition, it is not clear what percentage of these increased costs will be incurred in connection with criminal cases, which comprise a significant proportion of the appellate caseload.

63. P. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL 139 (1976) [hereinafter cited as P. CARRINGTON].
64. See M. OSTHUS, supra note 1, at 3-4; Wisconsin Site Visit Report, supra note 43, at 5.
65. See note 62 supra and accompanying text.
caseload. It is likely, however, that many decisions of a court of appeals in criminal cases will be appealed because lawyers who represent criminal defendants may consider that they have an ethical obligation to appeal, or at least attempt to appeal, their client's case to the supreme court. Those who wish to pursue a federal habeas corpus remedy will be required to do so. In this context, the establishment of an intermediate court will impose increased costs, probably of significant magnitude, on the state's criminal litigation process. This is particularly true in light of the expenditure of public funds in criminal cases to support at least the prosecution and, in many cases, the defense as well.

It has been observed also that additional research is needed to discover whether the increase in the number of initial appeals that seems in most states to follow the establishment of an intermediate appellate court "is caused by an increase in the number of people litigating or by an increase in the frequency of appeals by the same litigants." If it should be discovered that an intermediate court indeed somehow makes the taking of an appeal a simpler procedure, but that the increased simplicity redounds principally to the advantage of the "repeat players" among litigants, as appears to have occurred in our small claims courts, rather than to the "one-shotters," it would be more difficult to conclude that the increased

68. In 1977 (the year for which the most complete recent figures are available) 21.5% of the cases heard by the Minnesota Supreme Court were criminal matters. Letter from Cynthia M. Johnson, Minnesota State Court Commissioner, to Carl Norberg (Oct. 22, 1980) (on file at William Mitchell Law Review office).

69. See ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION AND DEFENSE FUNCTION §§ 8.2-4 (Approved Draft 1971) (lawyer, or defense counsel, is to serve as accused's counselor to utmost of his ability which includes taking whatever steps necessary to protect and pursue accused's right to appeal).

70. See generally C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 53, at 240-45 (3d ed. 1976). In Jackson v. Virginia, 443 U.S. 307 (1979), the United States Supreme Court reviewed the standard governing federal habeas corpus proceedings. The Court concluded that the standard was no longer whether the trial record was totally devoid of evidence in support of the conviction, but rather whether there was sufficient evidence to justify a rational trier of fact finding guilt beyond a reasonable doubt. See id. at 313-24. This holding implies that a federal court must redetermine the issue of sufficiency of the evidence even though that issue has already been adjudicated by both trial and appellate courts at the state level. See id. at 336 (Stevens, J., concurring). If so, it is likely that there will be an increase in the number of appeals of state court convictions to federal court. See id. at 337 (Stevens, J., concurring). See also Comment, Federal Habeas Corpus: Greater Protection for "Innocent" State Prisoners After Jackson v. Virginia, 14 U. RICH. L. REV. 455, 467-68 (1980); 10 CUM. L. REV. 849, 858-61 (1980).

71. See Flango & Blair, Creating an intermediate appellate court: does it reduce the caseload of a state's highest court?, 64 JUDICATURE 75, 78, 80 (1980).
cost of an intermediate court would be outweighed by the public benefits to be gained. 72

Finally, it is not clear that any diminution in the caseload of the supreme court that might follow the creation of an intermediate appellate court would represent anything more significant than a short term phenomenon. A recent study of the effect of an intermediate court concludes:

[C]ase filings and case processing time were reduced in the courts of last resort in the years immediately following the establishment of intermediate appellate courts. At best, however, this was an interruption of the trend toward increasing caseload in the state courts of last resort. Unless other measures were taken, such as increasing the size or jurisdiction of the intermediate appellate court, the caseload of the courts of last resort soon reached the same volume it would have reached if the intermediate appellate court had not been created. 73

Furthermore, the initial decline in the supreme court’s caseload appears to result mainly from the immediate reduction in the court’s backlog “as cases scheduled for the court of last resort are transferred to a new intermediate appellate court.” 74 The study concludes that the creation of an intermediate appellate court cannot be justified on the basis of reducing case volume on anything more than a very transitory basis. If an intermediate court is to be justified, the authors argue, it must be as a response to perceived public demand “to increase participation in the judicial process,” rather than in the hope of reducing high court workload. 75

B. Invisibility

Intermediate courts of appeal have all too often been “invisible” courts, to the detriment of litigants, attorneys, and the general public. Their “invisibility” has been manifested in two ways. First, most intermediate appellate systems limit the publication of their opinions. This policy invariably leads to increased frictional costs to the system as a result of increasing uncertainty as to what is the law of the state. Second, intermediate courts rarely are in

73. Flango & Blair, supra note 71, at 84.
74. See id. at 77.
75. See id. at 84.
the spotlight of public attention. They do not deal with overriding issues of law, as does the supreme court or with spectacular or macabre facts, as on occasion do the trial courts. Intermediate courts tend to be virtually ignored by the state's news media and become, in the absence of public awareness of them, "phantom courts."76

Pound assumed that an intermediate appellate court would write and publish opinions because he thought that was what appellate courts did.77 Contemporary practice, however, does not entirely reflect his assumption. States with intermediate appellate courts tend to allow only very limited publication of written opinions. An Iowa statute, for example, allows the supreme court to prescribe the rules of appellate procedure.78 Pursuant to this authority, the supreme court has severely limited the publication of court of appeals opinions.79 In fact, only about eight to ten intermediate court opinions are published annually. Courts or parties may cite to unpublished court of appeals opinions only "when the opinion establishes the law of the case, res judicata or collateral estoppel, or in a criminal action or proceeding involving the same defendant or a disciplinary action or proceeding involving the same respondent."80 In Wisconsin, published opinions of the court of appeals have statewide precedential effect. These opinions, however, are published only upon approval by a publication committee consisting of one judge from each appellate district and the

76. See Liebert, California's Unseen Courts, 11 CAL. J. 308, 308 (1980). Judge Irving Kaufman has observed:

Communication with the public is the very lifeblood of the "third branch" of government, and inadequate or confusing communication between the judiciary and the populace is a principal cause of modern discontent with our legal system. When a society is as impregnated as ours with the idea of law, it is essential that courts, advocates, and legal scholars be in intimate communion with public opinion.


77. "It is felt that an appellate court, if only as a matter of dignity, must write opinions, and that its filed opinions must be published." R. POUND, supra note 7, at 282.

78. See IOWA CODE ANN. § 684.18(2) (West Supp. 1979).

79. The Iowa Supreme Court rules governing the appellate courts provide that an opinion of the court of appeals may be published only when at least one of the following criteria is satisfied: "(1) the case resolves an important legal issue; (2) the case concerns a factual situation of broad public interest, or (3) the case involves legal issues which have not been previously decided by the Iowa Supreme Court." IOWA SUP. CT. R. 10(b). Effective March 3, 1981, Rule 10 was amended to provide that the court of appeals itself rather than the supreme court shall decide whether to publish an opinion. See IOWA SUP. CT. R. 10, reprinted in 302 N.W.2d LXXII (1981) (advance sheets).

80. IOWA SUP. CT. R. 10(e).
chief judge of the court of appeals.81 The committee meets monthly and approves publication of twenty to twenty-five percent of the decisions.82 Although any party may petition the publication committee to permit publication of a previously unpublished opinion, such a request is seldom granted.83

The justification for a limited publication policy is to reduce costs by eliminating the publication of decisions considered to be of little utility to anyone other than the immediate parties to the action. It should be noted, however, that the determination of which cases are of sufficient importance to justify publication, and which are not, is made in Iowa by another court and in Wisconsin by a statewide committee. In either event, the decision of the importance of a case to a wider public is most often made by judges who have not heard that case and never by members of the wider public reaching their own conclusions in a "marketplace of ideas."84

The Wisconsin and Iowa rule against the citation of unpublished court of appeals opinions is justified on the basis of a limited publication policy. The concern is that "[a]llowing citation of unpublished opinions creates pressures to make such opinions generally available, resulting in a secondary system of unofficial publication which to some extent frustrates the purpose of the

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81. See Wis. R. Civ. P. 809.23(2). The criteria for publication of an opinion in the official reports depends upon whether the opinion:

1. Enunciates a new rule of law or a modification of an old rule;
2. Applies an established rule of law to a factual situation significantly different from that in published opinions;
3. Resolves a conflict between prior decisions of the court; or
4. Decides a case of substantial public interest.

(b) An opinion should not be published when:
1. The issues involve no more than the application of well-settled rules of law to a recurring fact situation;
2. The issue asserted is whether the evidence is sufficient to support the judgment and the briefs show the evidence is sufficient; or
3. The disposition of the appeal is clearly controlled by a prior holding of the court or a higher court and no reason appears for questioning or qualifying the holding.

Id. 809.23(1).

82. See Wisconsin Site Visit Report, supra note 43, at 5.
83. See id.
84. It has been suggested that if there is to be a rule on publication it should include a provision allowing anyone at any time to petition the court to publish an opinion. See Martineau, The Appellate Process in Civil Cases: A Proposed Model, 63 MARQ. L. REV. 163, 212 (1979). "This would allow anyone who thinks that the opinion breaks new ground to point out to the court why he thinks it does and to seek to have the opinion published. It will also allow a person who subsequently wants to cite the opinion to be able to have it published." Id. (footnote omitted).
non-publication rule.'\textsuperscript{85} The entire publication system, however, seems ridden with artifice.\textsuperscript{86} Over time, the likely result will be the creation of a body of law that is to a degree "secret." This must necessarily engender, on the one hand, needless duplication of effort by attorneys who are unaware that the court has already decided a particular issue or, on the other hand, unfair advantage for "institutional" law offices, for example, the attorney general, metropolitan county attorneys, and large firms that possess the resources to develop their own "secondary systems" designed to give them a continuing awareness of unpublished opinions.\textsuperscript{87}

A further problem may develop in the quality of unpublished opinions. To at least some extent, the nature of the audience determines the quality of the written effort. When no broad audience exists, opinions may be written more quickly and carelessly. These opinions may not reflect the quality of decisionmaking found in those that are written with the awareness that they will be published and may be cited in and control future cases.\textsuperscript{88} Pro-

\textsuperscript{85} ABA Comm'N on Standards of Judicial Administration, Standards Relating to Appellate Courts § 3.37, Commentary, at 64 (Approved Draft 1977) [hereinafter cited as Standards Relating to Appellate Courts]. The Commission, however, recommends that litigants should be permitted to cite to opinions not formally published only if they provide the court and opposing parties with a copy of the opinion or otherwise give them reasonable advance notice of its contents. Id. at 65.

\textsuperscript{86} See generally P. Carrington, supra note 63, at 35-41.

Carrington provides a summary of arguments against a nonpublication, no-citation policy: such a policy conflicts with the traditional view that anything a common-law court does is part of the body of law, judicial accountability is reduced, and courts may attempt to hide their decisions in unwritten and unpublished opinions. See id. See also Gardner, Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?, 61 A.B.A.J. 1224 (1975). Gardner contends: "In the United States Court of Appeals for the Ninth Circuit . . . the persistence of 'hidden' conflict between published and unpublished opinions is hard to square with fundamental notions of equal justice." See id.

\textsuperscript{87} The problem may be further compounded if the court is organized in geographic districts. See notes 90-116 infra and accompanying text.

\textsuperscript{88} While many have expressed fear that the body of decisional law threatens to overwhelm us all, one author has classified four categories of objections that might be raised to rebut the suggestion that opinions be published selectively. Those objections are:

\begin{enumerate}
  \item cases are more likely to be decided correctly on the law when there are written opinions;
  \item the writing of opinions is a means of convincing the bar, litigants, and the public that the cases have been carefully considered, and thus results in increased respect for the courts;
  \item the law becomes more certain and understandable when there are written opinions; and
  \item there is no satisfactory method of selecting which cases are to be published and which omitted.
\end{enumerate}

fessor Leflar, discussing the importance of written opinions, stated:

One function that is recognized both by detached students of the judicial process and by opinion writers themselves is that the necessity for preparing a formal opinion assures some measure of thoughtful review of the facts in a case and of the law's bearing upon them. Snap judgments and lazy preferences for armchair theorizing as against library research and time-consuming cerebral effort are somewhat minimized. The checking of holdings in cases cited, the setting down of reasons in a context of comparison with competing reasons, the answering of arguments seriously urged, and the announcement of a conclusion that purportedly follows from the analysis set out in the opinion, are antidotes to casualness and carelessness in decision. They compel thought. It is even necessary that the thought have some quality of rigorousness in it. 89

C. Balkanization

The danger exists that an intermediate appellate court that sits in districts, located throughout Minnesota, may become "balkanized." 90 The problem could be avoided if an intermediate court were not organized in districts, but rather, as is the case in Iowa, would sit exclusively in the state capitol. 91 As noted earlier, however, the cost-benefit argument for establishing an intermediate court will have to be made in terms of increasing public accessibility to the appellate system. 92 Geographic accessibility is a central component of this argument. 93 Furthermore, the realities of the state's political climate as reflected in the composition of its legislature may constitute an insurmountable barrier to a court sitting exclusively in the state capitol, as outstate legislators will likely be hostile to such a scheme. In this context, it may be politically im-

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90. One commentator quotes a retired California justice as follows: "The Los Angeles and San Francisco courts of appeal are characterized by what I like to call 'balkanization.' They are divided into little Ruthenias and Slavonias, each under the rule of a petty king (presiding justice) who doesn't care to communicate very much with the other kings around him." Liebert, supra note 76, at 308. For a general discussion of geographical divisions of court systems, see P. CARRINGTON, supra note 63, at 153-56.
91. See IOWA CODE ANN. § 684.33 (West Supp. 1979). The Iowa Court of Appeals may hear cases in the chambers of the supreme court when not in use by the supreme court. See IOWA SUP. CT. R. 6.
92. See note 58 supra and accompanying text.
93. See M. OSTHUS, supra note 1, at 3.
possible to avoid organizing an intermediate court in districts.94

The experience of Wisconsin may again be illustrative should Minnesota decide to create an intermediate appellate court.95 The constitutional amendment adopted in Wisconsin left to the legislature the decision of whether the court of appeals would be organized in districts.96 In the event that districts were established, however, the appeals court would have appellate and supervisory authority within that district.97 This provision precluded other alternatives—for instance, a procedure under which appeals are centrally filed and allocated to judicial panels not on the basis of geography but on the basis of each panel's respective caseload. The amendment thus implied that district boundaries would define the territorial jurisdiction of the court and determine which trial courts would be reviewed by which districts of the appellate court.98 The amendment further provided that the judges of the court of appeals must be elected by the voters of the districts in which they sit and must be residents of the district from which they are elected.99 In this way, the amendment implied that any districts prescribed must be election districts as well as jurisdictional districts.100 Finally, the amendment provided that regardless of the number of districts established, each district of the court of appeals should sit in more than one location for the convenience of litigants, with the locations to be designated by the legislature.101 The legislature subsequently decided to divide the state into four court of appeals districts,102 with three judges elected at
large within each district. After the initial election, in which all three judgeships would be filled, only one judge would be elected from each district in any year with vacancies filled by appointment of the governor until a successor is elected. The chief judge of the court of appeals is appointed by the supreme court.

The jurisdiction of the Wisconsin Court of Appeals encompasses appeals and supervisory writ matters that were previously heard by the supreme court, which has become largely a discretionary court. The supreme court may assume jurisdiction of an appeal or supervisory writ case pending in the court of appeals upon petition of a party, certification by the court of appeals, or on its own motion. It may review a decision of the court of appeals upon a petition filed by a party within thirty days of the court of appeals decision. Court of appeals cases are now heard by a three-judge division of the intermediate court. Appeals that were previously taken from county court to circuit court—misdemeanor, small

Crosse, Stevens Point, Eau Claire, Superior, and Green Bay. See id. §§ 752.15-.19. The Wisconsin Supreme Court is authorized to designate additional locations by rule if the need arises. See id. § 752.11(2).


107. Id. § 808.05 (West Supp. 1980).

108. See id. § 808.10.

109. See Wisconsin Site Visit Report, supra note 43, at 4-5. The tendency of the district panels to become balkanized can be discouraged, at least to some degree, and the concept of a single court of appeals can be promoted by affirmatively mandating the rotation of panels.

In an intermediate appellate court that sits in panels, membership in the panels should be rotated at least once a year. Intermediate appellate courts with permanently fixed panels tend to become substantially separate courts, with consequent problems of decisional inconsistency and discrepancy in procedural policies and practices. In some courts organized in this way, the dispositional time varies greatly among panels, resulting in further unequal treatment of litigants. Periodic and random rotation of panels reduces these problems and makes the court as a whole, rather than its panels or division, the focus of the loyalty and identity of its judges and court staff.

STANDARDS RELATING TO APPELLATE COURTS, supra note 85, § 3.01, Commentary, at 10.

Critics of rotation question whether the alleged benefits are tangible enough to offset the administrative difficulty of operating the system and the reduction in productivity which results when a judge must travel long distances to sit with a panel whose workload is no more severe than that of the court where the judge normally sits. They are concerned that a judge who is rotated outside his home district might not remain there after oral arguments are concluded for purposes of collegial discussion and decision-making. Finally, they question whether the best qualified candidates will be attracted to a judicial position which requires extensive travel outside of the electoral district, in addition to whatever travel
claims, traffic, municipal ordinance, juvenile, and mental commitment cases—are heard by a single judge of the court of appeals. This was necessitated by the elimination of county courts following the creation of the court of appeals. In a case that would be heard by a single judge, any party on appeal may request that the case be heard by a three-judge panel. The request may be granted or denied ex parte by the chief judge of the court of appeals.

It seems likely that over time increased uncertainty as to what the law of the state is, and increasing fragmentation within the state’s system of appellate justice, will result from a court of appeals whose members sit in districts with chambers located around the state. Of course, our district courts presently sit in locations around the state, with more or less (depending on whom one listens to) frequent communication among them, but appeals from their actions presently are all taken to the same place. In addition to making difficult the development of the kind of collegiality among the members of the court that is thought to be an important ingredient of appellate justice, it is probable that in an appellate court organized into districts, differences among the

may be entailed by sitting at several locations within the district for the convenience of the litigants.

Fullin, Rotating the Membership of Three-Judge Panels of the Wisconsin Court of Appeals, in Wisconsin’s New Court of Appeals: Compilation of Major Study Documents 5 (1977).


It was agreed early [by the Committee on Court Reorganization which prepared the legislation implementing the intermediate appellate court amendment] that the supreme court should have no mandatory appellate jurisdiction and that all appeals previously taken as of right to the supreme court would go to the court of appeals. A more controversial issue concerned the appropriate route of appeals that previously had gone from county court to circuit court (traffic, small claims, juvenile, mental health, and misdemeanors). Some wanted these appeals to continue to be handled initially at the trial court level; others wanted the cases to be heard by the court of appeals. The former were concerned with overburdening the court of appeals, and the latter were concerned that if these appeals were handled at the trial court level, it would be more difficult to establish the single-level trial court. In a series of close votes, the committee decided that all appeals would go to the court of appeals.

Martineau, supra note 48, at 100.


112. See id.

113. The Minnesota Court Organization Act of 1977 requires the chief justice to call a conference of all the judges of the courts of record of the state at least annually. See Act of June 2, 1977, ch. 432, § 8, 1977 Minn. Laws 1147, 1153 (codified at Minn. Stat. § 480.18 (1980)). The chief judges of each judicial district are required to meet at least semi-annually, as are the judges of each judicial district. See Minn. Stat. § 484.69(4)-(5) (1980).

114. See P. Carrington, supra note 63, at 9. “It is both a source of institutional coher-
districts will develop in rulings on identical issues of law. These
differences are even more likely to arise and will be more difficult
to resolve, when the bulk of the court’s opinions are unpublished
and may not be cited. The “split among the circuits” problem
produces significant tensions within the federal appellate court sys-
tem. Some of the differences in decisions among the federal circuits
may be explained, however, and probably can be defended, as le-
gitimate ventings of regional distinctions.\textsuperscript{115} The evolution of
these uncertainties, however, would be counterproductive in a
state court system in which the principal organizational thrust in
recent years appropriately has been toward greater statewide uni-
formity.\textsuperscript{116} In addition, costs to litigants and to the public would
again be escalated because finality in the decision process would
be discouraged. When the law is unclear, attorneys will feel obli-
gated in the representation of their clients to pursue additional ap-
peals to the supreme court to ascertain what the law of the state is.

III. ALTERNATIVE PROPOSALS

The legislature should consider sympathetically any request by
the supreme court for aid in discharging its responsibilities in the
most effective possible manner. It should not, however, propose a
constitutional amendment that would add an additional layer to
our court system unless it is convinced that the public benefits to
be derived outweigh the burden of increased cost and duplication,
and the potential pitfalls to the system that could result from invis-
ibility and balkanization. Moreover, the legislature should recog-
nize that the alternative proposals, which have been raised by
various proponents at various times, may be divided into two cate-
gories: judicial solutions that may be implemented by the court on
its own authority, and legislative solutions that would require ac-
tion by the legislature, but could be accomplished under the terms
of our present constitution.

\textsuperscript{115} For a discussion of the question of conflicts between the federal courts, see R.
Stern & E. Gressman, Supreme Court Practice 264–84 (5th ed. 1978); Stern, Denial

\textsuperscript{116} One example of this thrust toward uniformity is the Court Reorganization Act.
sections of Minn. Stat. chs. 2, 15, 43, 271, 480, 484, 485, 487, 488A, 525 (1980)).
A. Judicial Solutions

1. Sitting in Divisions

The 1957 legislature authorized the Minnesota Supreme Court to provide by rule for the court to hear and consider cases in divisions. The court did not find it necessary to use this authority until 1967, when Rule 22 of the Minnesota Rules of Civil Appellate Procedure took effect. Then Chief Justice Knutson, upon adoption of the rule, stated that “the court believes that sitting in divisions is the most feasible method of hearing more cases without sacrificing the time of the justices which must be devoted to the thorough study and analysis of each case decided by the court.”

Rule 135 formerly provided that the supreme court could hear a case in a division of three or more members of the court as assigned by the chief justice. The court, however, has announced its intention, beginning with the September 1980 term to hear en banc all cases in which oral argument is granted. Apparently, the number of cases heard orally will be determined by the amount of time available for oral argument, with the remaining cases to be considered without oral argument. The court plans to assign “significant responsibility to professional staff working under supervision of the judges.” The chief justice has noted that while

118. See Knutson, supra note 33, at 9-10.
119. See id. at 7.
120. See Minn. R. Civ. App. P. 135(1), 9 MINN. STAT. 656 (1980). the Minnesota Rules of Criminal Procedure state that “[e]xcept as otherwise provided in these rules, the Minnesota Rules of Civil Appellate Procedure to the extent applicable shall govern appellate procedures in such cases.” MINN. R. CRIM. P. 29.01(2).
121. In his State of the Judiciary Message, Chief Justice Sheran indicated that it was the court’s intention commencing with the September 1980 term to hear all oral arguments en banc. See Chief Justice Robert J. Sheran, supra note 35. Chief Justice Sheran estimated that 160 cases would be heard orally and the rest without oral argument. See id. Rule 135, however, was not changed to accord with the court’s intention until January 1, 1981. See Finance and Commerce, Dec. 12, 1980, at 12, col. 2. Rule 135 was amended to read: “(1) Cases scheduled for oral argument shall be heard and decided by the court en banc. Cases submitted on briefs shall be considered by a nonoral panel of the court, comprised of three or more members of the court assigned by the Chief Justice.” MINN. R. CIV. APP. P. 135.
122. The court anticipates 160 cases will be heard orally. See Chief Justice Robert J. Sheran, supra note 35. The decision whether to afford an oral argument in a civil case will be made at the time of the prehearing conference and at the time briefs are filed in criminal cases. See id.
123. Id.
"[n]o case will be decided without being considered by all of the judges . . . the detailed examination of the record, the analysis of legal authorities, and to some extent the expression of the views of the court will be handled by staff."\(^{124}\) It is not clear to what extent, if any, the above will represent an enlargement of the present duties and responsibilities of the supreme court commissioner's office or of the law clerks presently assigned to the individual justices. It is equally uncertain whether any request to the legislature for funds to add to the personnel of the court is contemplated.\(^{125}\)

Perhaps in time the supreme court will reexamine its policy and again hear appropriate cases in divisions. For now, the court appears to have embraced the proposition that it is somehow inappropriate for the highest court of a state to sit in any way other than en banc when considering cases on oral argument.\(^{126}\) It is difficult to understand how the administration of justice will be enhanced by a proposal to transfer cases that were previously

\(^{124}\) Id. The formulation of the views of the court apparently will be significantly influenced by the justice who presides at the prehearing conference held in noncriminal matters pursuant to Rule 133.02 of the Minnesota Rules of Civil Appellate Procedure. One member of the court has pointed out that:

The critical importance of the prehearing conference [PHC] is underscored by the fact that most of the PHC judges, in many if not most of the cases, write post PHC memorandums addressed to the other judges, commissioners, and law clerks, discusses the contentions pro and con, and usually takes a position of how the appeal should be decided. Except for the judge to whom the case is assigned (who is never the PHC judge) the PHC judge will normally have given the appeal considerably . . . [more] time and attention than any of his colleagues. Accordingly there is a predictable tendency to give great weight to the views of the PHC judge both on the part of the judge to whom the case is assigned and other members of the court.


125. "Within the limits of the appropriations for the salaries thereof and subject to the conditions of such appropriations, the supreme court may employ a supreme court reporter, a marshal, and such additional technical, clerical, stenographic, and other personnel as is necessary." MINN. STAT. § 15A.18 (1980). For a comparison of the roles of central staff attorneys and law clerks in the appellate process, see D. MEADOR, APPELLATE COURTS 112-20 (1974). For a general discussion of law clerks, see Judicial Clerkships: A Symposium on the Institution, 26 VAND. L. REV. 1123 (1973).

126. Criticisms raised against the system [of hearing cases in division] by some, but disputed by others, are that it tends to increase the number of applications for rehearings, that it presents the possibility of conflicting decisions by the different divisions, and that it results in two supreme courts in a state instead of one, with lawyers given an opening to select the one of their choice when the divisions are of a permanent character, as some are. The latter may be avoided by a rotating divisional scheme. . . . It seems more in keeping with American tradition and thinking that the matters presented to courts of last resort, many of transcendent importance to the people, call for the composite judgment of more than a division of such court.

heard orally by a three-judge division of the supreme court and
decided by the court en banc to an intermediate court to be heard
and decided by a three-judge division. There are cases, as Pound
pointed out, 127 that seem entirely appropriate for hearing by three-
judge divisions, but no valid reason exists why those cases should
be heard by three judges of an intermediate court rather than by
three judges of the supreme court. Appropriate cases are those in
which the court performs its "correction of error" function by re-
viewing a trial court's application of settled concepts of law. 128
The rationale underlying this function is to provide a mechanism
through which prejudicial errors of the trial court may be cor-
rected. Again, there seems no reason why a panel of three supreme
court judges cannot perform the "error correcting" function as
well as a panel composed of a larger number or as well as a panel
composed of three judges from another court. This is particularly
true when the court's administrative procedures provide, as they
do under Rule 135, workable processes to ensure consistency
among the panels. 129 Of course, cases involving the court's "devel-
opment of the law" function, such as the authoritative interpreta-
tion of statutes or the formation and expression of legal policy in
unsettled and developing areas of the law, should continue to be
heard en banc.

Achieving a workable system of hearing "error correcting" cases
in divisions and "development of law" cases en banc rests signifi-
cantly on the development of an effective system to determine ini-
tially which cases fall into each category. The Minnesota Rules of
Civil Appellate Procedure attempt to create this classification sys-
tem by providing that the initial recommendation of whether a
case should be assigned to the en banc or division calendar is to be
made by a court commissioner in criminal cases and by the pre-
hearing conference judge in civil cases. 130 Any one nondissenting
justice, however, may order a case placed on the en banc calen-
dar. 131 This procedure should involve every member of the court
in the determination of which cases will be heard in divisions and

127. See notes 19-21 supra and accompanying text.
128. See notes 19-20 supra and accompanying text.
129. See Interview with Cynthia M. Johnson, supra note 33.
130. See MINN. R. CIV. APP. P. 134(2).
131. See Interview with Cynthia M. Johnson, supra note 33. Prior to the 1981 amend-
ment Rule 135 provided that:

(1) Cases set for oral argument or submitted on the briefs will be heard
either en banc or by a division of the court. The Chief Justice will assign three
which will be heard en banc. It might, however, be preferable for a court that does hear cases in divisions to formalize the classification system to a greater extent than accomplished in Rule 135 by stating in the rule itself what criteria will govern the determination.\(^{132}\) A problem may occasionally arise with a case that appears on first impression to be routine but turns out otherwise on oral argument. This situation may result in a certain unavoidable duplication due to necessary rehearings. In any event, the involvement of the entire high court implied by Rule 135 seems preferable to the Iowa model. Under the Iowa scheme, the initial recommendation whether a case should be retained by the supreme court or transferred to the intermediate court is made by a research office of attorneys employed by the supreme court.\(^{133}\) This recommendation is screened by a panel of only three justices or more members of the court to sit as a division of the court to hear and decide cases assigned to such division.

(2) A court commissioner is hereby designated as a referee of the court for the purpose of reviewing the record, transcript, and briefs in all cases and submitting to all justices of the court his recommendations for the classification of cases for assignment to the en banc or to a division calendar, according to the legal and judicial significance of the issues raised. Any one justice of the court may order a case to be placed on the en banc calendar rather than a division calendar. The Chief Justice, in his discretion and according to the requirements of composing the calendar, shall accept, reject, or revise the recommended classification of cases. Thereafter, the clerk shall prepare the calendar.

(3) The decision of a case by a division of the court shall be by the concurrence of all members of the division. If all members of the division do not concur in the decision, the case may be re-set for an en banc hearing or considered and decided by the court en banc on the briefs. A copy of the tentative written opinion of a division in each case prior to filing with the clerk, shall be circulated among the justices who did not sit on the case, and any two justices of the court, by questioning the decision, may signify their doubt as to the decision of the division, in which event the case, at a further conference of the court, may be reset for an en banc hearing or considered and decided by the court en banc on the briefs. An en banc hearing under this paragraph shall be scheduled at the earliest practicable date, at which hearing the argument time allotted by Rule 134 shall not apply, but counsel for the parties will appear to answer legal or factual questions posed by the court. No additional briefs need be filed unless requested by the court.

(4) The Chief Justice may appoint a panel or panels of members of the court to review pending cases for disposition under the rules of this court.


132. Former Chief Justice Knutson stated that the discretion of the chief justice in assigning cases to be heard by divisions "will be influenced by such things as the novelty or difficulty of the legal or factual issues involved, the seriousness of the criminal offense charged, the presence or absence of important constitutional questions, or the construction of legislation as a matter of first impression." Knutson, supra note 33, at 7. See also Wolf-ram, Notes From a Study of the Caseload of the Minnesota Supreme Court: Some Comments and Statistics on Pressures and Responses, 53 MINN. L. REV. 939 (1969).

133. See Iowa Site Visit Report, supra note 66, at 3.
of the supreme court. The Minnesota Rule 135 scheme also seems preferable to the Wisconsin model, under which virtually every appellate case is heard initially by a three-judge panel of the intermediate appellate court. An en banc supreme court hearing is possible only as a second appeal and then only following the exercise of the supreme court’s discretion.

The procedures under Rule 135 should ensure consistency among the divisions in those cases assigned to be heard by divisions. These procedures seem far less likely to evolve into a “balkanized” court system that might result from a system under which appeals are heard by an intermediate court sitting in districts around the state promulgating unpublished and uncited opinions.

134. See id. [One individual] went on to say that lawyers were generally disappointed at finding their case would be heard before the Court of Appeals and, at times, did not fully apply themselves when preparing a brief for the Court of Appeals, assuming they could always better themselves if they were granted further review by the Supreme Court.

135. Compare Wis. R. Civ. App. P. 803.03 (final judgment or final order of circuit court may be appealed as matter of right to court of appeals unless otherwise expressly provided by law) with Wis. R. Civ. App. P. 808.10 (“A decision of the court of appeals is reviewable by the supreme court only upon a petition for review granted by the supreme court. The petition for review shall be filed in the supreme court within 30 days of the date of the decision of the court of appeals.”).

136. See note 121 supra. The old rule provided that a decision of a division must be unanimous. Otherwise, “the case [would] be reset for an en banc hearing or considered and decided by the court en banc on the briefs.” Minn. R. Civ. App. P. 135(3), 9 MINN. STAT. 656 (1980). The old rule provided that:

A copy of the tentative written opinion of a division in each case, prior to filing with the clerk, shall be circulated among the justices who did not sit on the case, and any two justices of the court, by questioning the decision, may signify their doubt as to the decision of the division, in which event the case, at a further conference of the court, may be re-set for an en banc hearing or considered and decided by the court en banc on the briefs.

Id. The present procedures continue to allow a nondivision justice to question the decision of the division. See Interview with Cynthia M. Johnson, supra note 33. Ambiguity existed under the old procedure and continues to exist under the present procedure under which one or more justices may question the “decision” of the division. Does the term “decision” encompass only the ultimate disposition of the case or does it, as it should, include the process of reasoning that leads to the ultimate disposition? Cf. Wolfram, supra note 132, at 969 (assurances have been given that the term “decision” includes doubt about either the correctness of the decision or the propriety of its language) (quoting Knutson, supra note 33). There are indications that the court has always construed the procedure to mean “doubt as to the correctness of the decision or the propriety of the language of the opinion.” Knutson, supra note 33, at 8. In any event, the “questioning of the decision” immediately triggers a conference of the court, when presumably, if the difficulties are not resolved, the case will be scheduled for rehearing en banc. See Interview with Cynthia M. Johnson, supra note 33. Thus, a procedure that ensures consistency among judicial divi-
The suggestion that hearing "error correcting" type cases in divisions is an efficient and appropriate method of containing the workload of the supreme court, assumes that hearing cases in divisions will indeed aid the court in disposing of cases reasonably promptly.\textsuperscript{137} If this assumption proves untrue and the court's backlog becomes intolerable, then another solution or combination of solutions to the problem should be considered.

2. Limiting Oral Argument

It is not unusual for appellate courts to deny oral arguments in certain cases and restrict the allotted time for oral argument in others.\textsuperscript{138} Oral argument "contributes to judicial accountability, enlarges the public visibility of appellate decision-making, and is a safeguard against undue reliance on staff work."\textsuperscript{139} Moreover, it can be "a medium of communication that is superior to written expression for many appellate counsel and many judges."\textsuperscript{140} It is clear, however, that there are many cases that present only a few issues of a comparatively simple nature in which oral argument adds little or nothing to the appellate process. In these cases, oral argument could well be curtailed or eliminated.

If a court decides to place substantial limitations on oral argument, the validity of its preliminary screening procedure to determine whether oral argument will be enlarged, shortened, or denied becomes correspondingly more crucial, to ensure that the judgment made will be an informed one. The Commentary to the ABA Standards Relating to Appellate Courts points out that "[t]he bar's knowledge that a preliminary review procedure is reg-

\textsuperscript{137} In 1977 the average processing time from the filing of the notice of appeal with the Minnesota Supreme Court to the entry of the final decision was 15.4 months. Letter from Cynthia M. Johnson, supra note 68. In Iowa, by comparison, in 1976 (the year before an intermediate appellate court was created) it took 17 months from readiness of a case to submission, and, for civil cases an average of 20.2 additional months from submission to issuance of an opinion, an aggregate delay of approximately 37 months. See Iowa Site Visit Report, supra note 66, at 1, 5. In Wisconsin prior to the creation of the intermediate appellate court there was a 7 to 12 month delay between the filing of the notice of appeal and readiness (appeal briefed and ready for argument), and an 18 to 22 month delay between readiness and hearing, an aggregate delay of approximately 30 months. See Wisconsin Site Visit Report, supra note 43, at 2 (statistics refer to 1971).

\textsuperscript{138} See, e.g., MINN. R. CIV. APP. P. 134.02, .07.

\textsuperscript{139} STANDARDS RELATING TO APPELLATE COURTS, supra note 85, § 3.35, Commentary, at 56.

\textsuperscript{140} Id.
ularly used tends to increase confidence in the fairness of a decision by the court to shorten the time for argument or to deny it altogether.\footnote{141}

The Minnesota Supreme Court has apparently chosen to attempt to ease the problem of the backlog it perceives, by reducing significantly the number of oral arguments that the justices will hear.\footnote{142} It is too early to formulate an informed judgment on the merits of the court’s new policy. Concern may be raised, however, by the court’s apparent view that the wholesale limitation of oral argument exists as an alternative to hearing cases in divisions as opposed to the placement of incremental limitations on the number of oral arguments as one of several methods of keeping abreast of its caseload.

3. Reducing the Number and Length of Formal Written Opinions

The written opinion is crucial to the appellate process. It not only informs the parties of the court’s rationale for deciding the case in a particular way, but further serves to guide counsel and judges in similar future controversies. Even so, it may be acceptable for the supreme court to issue more memorandum opinions in appropriate cases.\footnote{143} Appropriate cases may be those that clearly are controlled by a statute that is not challenged on constitutional grounds, cases that clearly are controlled by a prior rule of law and that rule does not require elaboration, or cases involving only factual issues.\footnote{144} Cases involving new or unsettled questions of general importance should continue to be decided by a full written opinion “reciting the facts, the questions presented, and analysis of pertinent authorities and principles.”\footnote{145}

The essential characteristics of “[a] memorandum decision are that it is not signed by a single author; it is addressed to the parties, not to the public at large; and it is as short as possible

\footnotesize{141. Id. at 57.}
\footnotesize{142. See Chief Justice Robert J. Sheran, supra note 35; notes 121-22 supra and accompanying text.}
\footnotesize{143. As one commentator has stated: “The single most promising measure to increase the Iowa court’s decision-making capacity with existing resources, and without sacrificing quality of decision, lies in substantially curtailing the use of full opinions in deciding cases.” McCormick, Appellate Congestion in Iowa: Dimensions and Remedies, 25 DRake L. Rev. 133, 151-32 (1975).}
\footnotesize{144. See Stuart, Iowa Supreme Court Congestion: Can We Avert a Crisis?, 55 IOWA L. REV. 594, 610-11 (1970).}
\footnotesize{145. See Standards Relating To Appellate Courts, supra note 85, § 3.36.}
It is imperative that the memorandum decision contain three elements: (1) it must identify the case decided; (2) it must indicate the ultimate result or disposition; and (3) it must reveal the reasons for the result. The last element is particularly crucial if memorandum opinions are employed. To provide the assurance to litigants and the public that every case has been thoughtfully considered, the decision in each case must "be supported at least by reference to the authorities or grounds upon which it is based." It should be possible, however, in a case appropriate for disposition by memorandum opinion, to indicate concisely the grounds upon which the decision is based and the substance of the court's reasoning.

It may well be necessary for the supreme court to increase the number of memorandum decisions it renders. If so, litigants may be able to take some comfort knowing that their case was decided by the highest court of the state.

B. Legislative Solutions

1. A District Court Appellate Division

Without proposing a constitutional amendment, the legislature could create a more or less formal appellate division of the district court. Pound favored this as an alternative to an intermediate court. He believed that the procedure could be as simple as at the old hearings in bank at Westminster after a trial at circuit. Three judges assigned to hold the term would pass on a motion for a new trial or judgment on or notwithstanding a verdict, or for modification of setting aside of findings and judgment accordingly (as at common law upon a special verdict).

146. P. Carrington, supra note 63, at 33.
147. See id. at 34.
148. See Standards Relating To Appellate Courts, supra note 85, § 3.36, Commentary, at 60. In any event, memorandum opinions require more substance than that offered by the Oklahoma Supreme Court in Allen v. Allison, 290 P.2d 410 (Okla. 1955) (per curiam). The Allen court affirmed the trial court's judgment quieting title to disputed oil, gas, and mineral rights. Id. at 410-11. The opinion neglected to include either the issues of fact or points of law on which the case was decided. Four of the nine justices dissented. Id. at 411. The court did, however, cite to several cases as supportive of its decision. See id. For a discussion of the Allen case and the sufficiency of court opinions, see 9 Okla. L. Rev. 171 (1956).
149. Pound, supra note 7, at 282. Minnesota law provides a similar procedure for hearing appeals from county or municipal court in district court. An aggrieved party may appeal from county or municipal court to a three-judge panel of the district court. See
In the alternative, an appellate division could be more highly formalized and structured, along the lines of the New York system. Under the New York scheme, the intermediate appellate court is the Appellate Division of the Supreme Court and serves as a mechanism for providing substantial justice to litigants by supervising the lower courts and by screening cases for the state's court of appeals.  

A bill introduced in the 1979 session of the Minnesota Legislature would have created such a formalized appellate division of the district court, with the "jurisdiction to hear appeals from the district, county, probate and county municipal courts as the supreme court may establish by rule." The composition of the appellate division would be determined by the appointment of one of the existing district court judges from each judicial district by the Governor. Successors to the initial appointees would be elected to the appellate division for six-year terms. Appellate division judges would receive the same salary as district judges and would sit principally in a city designated by the chief justice of the supreme court, but would be required to hold hearings at least semi-annually in each judicial district in the state. The bill implies that appellate division judges would have as their principal function the deciding of appeals, although they may be assigned as needed to trial court duty by the chief judge of the appellate division. The bill also contemplates that appellate division decisions would be published by providing that "[t]he appellate division court reporter shall publish reports on cases decided by the appellate division."
Legitimate concerns would exist if the legislature were to consider seriously the creation of a district court appellate division organized along the lines of the 1979 proposal. It may be expected, for example, that there would be objections that the workload of the district courts could not tolerate removal of one judge from each district to perform appellate duties.158 If ten new district judgeships were created to replace the judges appointed to the appellate division, however, the resulting cost of the appellate division would be nearly that of an intermediate court. Moreover, accepting appointment to the appellate division may not be attractive to many sitting judges because the proposed bill would provide for no salary differential from the district court and would require appellate division judges to spend significant time traveling around the state.

A formalized appellate division, with judges specifically elected as appellate division judges, would also seem susceptible to all of the disadvantages discussed previously. The principal, and perhaps only, attraction of the idea would be that it would present a method of establishing a de facto intermediate appellate court without the necessity of gaining approval for an amendment to the constitution. On the other hand, it might create a less rigidly structured mechanism for hearing more initial appeals in certain types of cases by district court judges, as Pound thought possible. Thus, the proposal probably should not be entirely discarded.

2. Additional Statutory Courts

If the need is established, the legislature could create one or more additional specialized statutory courts. Minnesota has at least one executive branch specialized court, the tax court,159 that functions successfully. Its organization could serve as a model were such a course contemplated. The 1939 legislature first created a board of tax appeals that was empowered to make initial adjudications of appeals from orders or decisions of the commis-

158. It is expected that the 1981 legislature will consider issues of judicial manpower at all levels of the state court system.

159. See MINN. STAT. § 271.01(1) (1980). The tax court was created as a full-time independent agency of the executive branch with judges to be appointed to six-year terms by the governor. The court was necessarily characterized as an executive agency for two reasons. First, under the Minnesota Constitution, the legislature may only create "judicial courts" that are inferior to the district courts. MINN. CONST. art. VI, § 1. Second, the constitution requires that judges of "judicial courts" be elected. Id. § 7.
sioner of taxation. 160 It was not until 1977, however, that the tax court became a full-time court. The 1977 amendment indicates that the court was designed to focus special expertise on the settlement of tax disputes with statewide jurisdiction as the final authority for the determination of all questions arising under the tax laws of the state subject to the jurisdiction of the supreme court. 161 The supreme court has upheld the constitutionality of the jurisdictional scheme on which the statutory creation of the tax court was based because a litigant in a tax suit may, at his option, file his action in district court and because transfer of the action to the tax court is discretionary with the district court. 162 In its first three years of full-time operation, the tax court has reduced significantly the enormous backlog of tax cases transferred to it upon its formation. 163 It should be noted, however, that it may be possible that tax cases, which usually require detailed statutory construction, may be specially suited to the type of expertise found in a specialized court.

Another specialized court model, some variation of which could be implemented by statute without the necessity of a constitutional amendment, may be found in recent proposals emanating from the Office for Improvements in Administration of Justice of the Federal Department of Justice to create a new court on the same tier as the circuit court of appeals. 164 The new federal court would be formed by merging the Court of Claims with the Court

160. See Act of Apr. 22, 1939, ch. 431, art. 6, §§ 10, 14, 15, 1939 Minn. Laws 908, 932-34 (current versions at MINN. STAT. §§ 271.01, .05-.06 (1980)).


162. See Wulff v. Tax Court of Appeals, 288 N.W.2d 221, 224-25 (Minn. 1979). In Wulff, the supreme court held that because a tax suit may be initiated in district court at the option of the petitioner, and because transfer of that suit to the tax court is discretionary with the district court, the exercise of jurisdiction of the tax court on transfer does not violate Minnesota Constitution article VI, section 3, which provides that the district court has original jurisdiction in all civil and criminal cases. See id. The court was satisfied that the tax court's jurisdictional statute did not deprive litigants of their constitutional rights or usurp judicial functions. See id. at 225.

163. In fiscal year 1978, its first year of operation as a full-time court, 2,177 appeals were filed with the tax court (many of these pending cases were transferred from the district courts) and the court disposed of 1,080 appeals. In fiscal year 1979, 939 appeals were filed and the court disposed of 1,056 appeals. In fiscal year 1980, 877 appeals were filed and the court disposed of 933 appeals. See Letter from Brent Peterson, Clerk of the Minnesota Tax Court, to Carl Norberg (Oct. 1, 1980) (on file at William Mitchell Law Review office).

of Customs and Patent Appeals, which would retain their present jurisdiction, and by adding to the jurisdiction of the new court patent, civil tax, and environmental appeals.\textsuperscript{165} Advocates of the proposal argue, first, that the development of the law in the fields listed is currently being impeded by a lack of consistent judicial interpretation among the existing circuits, and second, that cases in these fields are unusually difficult and complex, presenting a need for judges who will be able to gain a certain amount of expertise in those areas of the law.\textsuperscript{166}

No attempt is made in this Article to evaluate the policy arguments concerning the desirability of specialized courts,\textsuperscript{167} nor will any proposal for the organization of a new specialized court be offered. The suggestion is merely raised that if, indeed, a new court is needed, the legislature should consider the statutory creation of a specialized court that hears appeals or exercises original jurisdiction in certain specific types of cases.

IV. CONCLUSION

No claim is made that this Article represents an exhaustive compilation of the judicial or legislative alternatives to the creation of an intermediate appellate court. Further, it is not suggested that any of the discussed alternatives should be embraced as the perfect solution to any problem of judicial overwork or restricted access to the courts that may exist. It may be, however, that an affirmative case could be made on behalf of any of these alternatives that is as persuasive as that made on behalf of an intermediate appellate court. As the legislature considers how the state's courts should be organized, it should carefully examine all possible alternatives and demand detailed and convincing justification of any course of ac-

\textsuperscript{165} See id.
\textsuperscript{166} See id. at 670-71.
\textsuperscript{167} For an example of the policy arguments that can be made on behalf of a specialized court, see Whitney, The Case for Creating a Special Environmental Court System, 14 WM. & MARY L. REV. 473 (1973). In this article the author discusses arguments for and against the necessity and desirability of an environmental court or court system on the federal level. As the author points out, "[s]pecialized courts are by no means a novel or rare judicial phenomenon in the American experience. A wide variety of specialized courts have been considered by Congress; a lesser number have been tried, and only a few have succeeded." Id. at 475. For a discussion of other specialized courts that have been proposed and/or implemented, see Dix, The Death of the Commerce Court: A Study in Institutional Weakness, 8 AM. J. LEGAL HIST. 238 (1964); Kutner, Due Process of Economy: A Proposal for a United States Economy Court, 15 U. MIAMI L. REV. 341 (1961); Rightmire, Special Federal Courts, 13 ILL. L. REV. 15 (1918) (now published as Northwestern Law Review).
That there appears to be a degree of skepticism among the organized bar of the state regarding an intermediate appellate court is evidenced by the following motion adopted by the General Assembly of the Minnesota State Bar Association on June 19, 1980:

That a Minnesota State Bar Association established a special ad hoc committee and refer the matter of the establishment of an Intermediate Court of Appeals to this committee to study and report to the General Assembly at its next annual meeting on:

a) its recommendation for a solution of the problem in handling the increased caseload at the Supreme Court;

b) a detailed description of the viable alternatives considered;

c) presentation of the additional data upon which the recommendation is based.

That the committee consist of official representatives of affected sections and committees such as Judicial Administrator, Civil Litigation, Criminal Law; or representatives of the Board of Governors; a liaison with the Judicial Planning Committee; and other interests as may be advisable with a total membership of approximately 20 to 25 persons.

That the committee conduct programs and distribute information so that the membership of the bar can be fully informed on these issues. That any funding necessary be provided by the Bar Association.