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FOREWORD

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State courts are dynamic institutions. Their structure and business have changed significantly in the course of American history. The class and ethnic backgrounds of their judges has dramatically broadened and women judges have joined the judicial ranks. I sit on the Superior Court of Pennsylvania, at the intermediate level of the three-tiered system, which (with its parallel court, the Commonwealth Court) forms the youngest branch of this state's judiciary.

In the United States, intermediate state appellate courts came into being in the second half of the nineteenth century to ease the workload of state supreme courts. In 1870, the era of Reconstruction, most states had only one appellate forum, a state supreme court. These courts had little or no discretion in selecting the cases they adjudicated. Instead, state supreme courts decided whatever cases litigants chose to appeal. It has been said that supreme court dockets were *reactive* rather than *proactive,* i.e., both the volume and content of their caseloads were "litigant-controlled."[1]

With increasing industrialization, population growth, and the accompanying complexity of society, the volume of supreme court business grew dramatically. Judges, lawyers, and legal scholars perceived that the flood of cases threatened the quality of decision making and created intolerable delays for the parties. Between 1870 and 1900, most states responded by creating intermediate appellate systems.

In Pennsylvania, the problem of overcrowded dockets was met initially by changes in 1873 which increased the number of judges on the Supreme Court from five to seven, abolished *nisi prius,* and limited the original jurisdiction of the Court.[2] Unfortunately, these changes did not effect a substantial or longlasting improvement, and

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1. Black, *The Mobilization of Law,* 2 J. LEGAL STUD. 125 (1973); Kagan, Cartwright, Friedman & Wheeler, *The Evolution of State Supreme Courts,* 76 MICH. L. REV. 961 (1978) [hereinafter cited as Kagan, *Evolution*]; Kagan, Cartwright, Friedman & Wheeler, *The Business of State Supreme Courts, 1870-1970,* 30 STAN. L. REV. 121 (1977) [hereinafter cited as Kagan, *Business*].

2. 3 F.M. EASTMAN, COURTS AND LAWYERS OF PENNSYLVANIA 1623-1923, 789 (1922).

in 1895 the legislature created the Superior Court. The Act of 1895, P.L. 212, provided for a court of intermediate appeal consisting of seven judges who were elected for terms of ten years. Throughout this period of change, however, and for eighty-five more years, the Supreme Court continued to hear cases as before. Then, with the passage of the Act of 1980,[3] the legislature substantially modified the high court's jurisdiction. This "certiorari" statute transferred mandatory appellate jurisdiction to the Superior Court, enabling the Supreme Court to hear only those cases in which the appellants successfully petition for appeal. The change in 1980 marked more than a century of evolutionary progress aimed at producing a more efficient judicial system. As a result, for the overwhelming majority of litigants, the Pennsylvania Superior Court has become the court of last resort, and the Pennsylvania Supreme Court is less litigant-controlled and more self-directed.

Across the nation, a general reform movement led to the creation of appellate courts at the intermediate level and to the reorganization of many supreme courts. Not coincidentally, this movement usually included the reorganization of the trial courts and local magistrates as well. These changes, however, did not come about without resistance. Legislators and political leaders had other priorities and did not regard court backlogs and overloaded dockets as an urgent problem requiring time or attention. Creating a new intermediate bench, which would require increased allocation of funds, was not viewed as politically expedient. Some legislators, in fact, regarded judges as reactionaries and believed that society would be improved by reducing their number rather than enlarging it.[4]

In Pennsylvania, history reveals that many specific objections were voiced concerning the new judicial structure. Specifically, many feared that the new court would produce judgments lacking in finality, that its decisions would lead to uncertainty and confusion, that adding an intermediate appellate court would complicate the traditional simplicity of Pennsylvania procedure, and that the new court would be an unwarranted expense.[5] Nevertheless, the Superior Court was created in 1895 and remained essentially unchanged until 1980, when the number of judges was increased from seven to fifteen. The newly enlarged court and the present status of the Supreme Court as

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3. Act of Sept. 23, 1980, No. 137, § 722, 1980 Pa. Laws 686, 686 (codified at 42 PA. CONS. STAT. §§ 722, 744 (1980).

4. Kagan, *Evolution*, *supra* note 1, at 978.

5. 3 F.M. EASTMAN, *supra* note 2, at 792.

a certiorari court has freed the Supreme Court to control its docket and to experiment with improving the quality and efficiency of Pennsylvania justice.[6]

As the Superior Court became the final court for most litigants, its caseload exploded and its importance increased substantially. From the time of its inception, and even more so now, the Superior Court has had an outstanding jurisprudential tradition from which the Supreme Court and the Commonwealth Court have drawn in drafting their decisions.

The Superior Court in Pennsylvania is typical of those in other parts of the country; it serves as an indispensible testing ground to determine where change or clarification of the law is required. As such, the intermediate bench has added to its traditional error-correcting function, and has evolved into a creative force in developing the common law. The Pennsylvania Superior Court, by virtue of its heavy workload, has gained wide experience and has placed itself in a position to suggest areas for change to the Supreme Court and the legislature.

Throughout the country it has been observed that intermediate appellate courts highlight difficulties and conflict, sharpen questions of law, and present alternative solutions. As a result of the intermediate courts' work, states' highest courts are better able to decide what cases present questions of such significance that they should be decided at the highest level. Ideally, as a result, decisions by the highest state courts should become more thoughtful, more analytically precise, and more efficient.[7] Indeed, studies have shown that high-discretion courts move more rapidly into new areas of the law, resolve more constitutional questions, and produce longer and more scholarly opinions.[8]

The importance of intermediate appellate courts also derives from another perspective of the judicial hierarchy: their decisions flow down as well as up. In Pennsylvania, the Superior Court is the court whose decisions most frequently and most immediately affect the work of the trial bench. This effect obliges Superior Court judges to strive constantly for maximum clarity and consistency in their opinions.[9]

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6. Roberts, *Foreword, The Supreme Court of Pennsylvania: Constitutional Government in Action*, 54 TEMP. L.Q. 403 (1981).

7. Hopkins, *The Role of an Intermediate Appellate Court*, 41 BROOKLYN L. REV. 459 (1975).

8. Kagan, *Business, supra* note 1, at 152.

9. Baum, *Implementation of Judicial Decisions*, in THE SOCIOLOGY OF LAW 300 (W.M.

Legal historians have discovered that the structural evolution in the state courts was accompanied by a second, parallel evolution. As legislatures were altering the shape of court systems, the nature of the controversies brought before the courts was also changing. In the period beginning in 1870, state courts in general, and especially state supreme courts, were primarily concerned with commercial and property law disputes and the settlement of private controversies arising out of market transactions. In the century that followed, the United States became more industrialized and the market place expanded in volume. One would predict that the volume of commercial and industrial litigation would increase. This development did not occur, however, and commercial cases gradually occupied proportionately less time of supreme courts. Instead, the courts were confronted with an expanding array of disputes. Cases involving citizen and the state, cases reflecting the impact of machines (accident cases), and questions of due process and human rights all became part of supreme courts' agendas.

In recent years, the number of tort, criminal, family, and public law cases has increased while the number of contract, debt-collection, and property (except for government regulation of land) cases has declined. This shift is noteworthy because supreme court judges select cases which they view as significant and the cases they select are now more concerned with the individual and social change[10] and less concerned with property rights and voluntary business relationships. This issue of the *Temple Law Quarterly* reflects that change. The Pennsylvania Supreme Court cases selected for inclusion follow the described trend. Of the thirteen Pennsylvania cases, only one is a question of debt on a contract. The rest deal with constitutional questions (five), criminal law (three), employee's rights, divorce, civil procedure, and rules.

One of the most significant recent national trends in law has been the growth of state constitutional law. State courts have produced a body of civil liberty protections that in some cases go considerably beyond current doctrine emerging from the United States Supreme Court. In the long view of institutional development, this trend represents a return to an earlier pattern. Prior to the American Revolution, the colonists were distrustful of the power of the English Parliament. After independence, American political thinkers adopted the position that legislatures could exercise only those powers dele-

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Evans 1980).

10. Kagan, *Business, supra* note 1, at 133.

gated to them by the people. These political planners then incorporated this philosophy into state constitutions which, in the eighteenth century view, became repositories of the rights of the people. In the first generations after 1776, the Bills of Rights of state constitutions, even more than the federal Bill of Rights, stood as guardians of the people's rights and freedoms. By the 1960's, the due process revolution of the Warren Court had changed this relationship so that federal constitutional law rather than state constitutional law was recognized as the primary source of civil rights. Since the 1970's, however, the United States Supreme Court has reassessed its activist posture, giving greater prominence to the role of the states in producing a new body of constitutional law.[11]

Pennsylvania has been notably active in this new era of constitutional law. In granting protection against self-incrimination, the right to counsel, protection of free speech, the right to privacy, and the guarantee of equal rights to women, Pennsylvania law has supplemented the protection offered by the federal Constitution.[12] Professor Laurence H. Tribe of Harvard Law School has stated:

> There is a reciprocal relationship between the U.S. Supreme Court and the state courts. . . . As the Supreme Court's own energy flags or it reaches the limits of appropriate Federal judicial activity, it may nonetheless have marked the path that creative state jurists will want to follow. In the long view of history, most of the truly creative developments in the American law have come from the states.[13]

State courts have made a distinct and distinguished contribution. One reason is that they are different from their federal counterparts and bring a different perspective to their work. State judges, whether appointed or elected, usually come more directly from the ranks of the political parties than federal judges. Also, state courts are common law courts of general jurisdiction. State judges consequently receive more comprehensive lawmaking experience in many areas of law.[14]

The personnel of the Pennsylvania Superior Court bench has

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11. Scheiber, *Federalism and the Constitution: The Original Understanding*, in AMERICAN LAW AND THE CONSTITUTIONAL ORDER 85 (L.M. Friedman & H.N. Scheiber 1978); *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982) [hereinafter cited as *Developments*]; Margolick, *State Judiciaries Are Shaping Law that Goes Beyond Supreme Court*, N.Y. Times, May 19, 1982, at A1, col. 1.

12. *See Developments*, *supra* note 11, at 1370; Margolick, *supra* note 11.

13. *See* Margolick, *supra* note 11, at B8, col. 4.

14. *Developments*, *supra* note 11. *See also* Resnick, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) on judicial activism.

changed significantly in recent years. All the original members of the Superior Court were white males with previous experience in political office or in the lower courts. Of the original seven, four were veterans of the Union forces in the Civil War. Most were admitted to the bar in the small towns or rural areas of the state; only one was a Philadelphian.[15] Since that time, the composition of the Court has gradually been enriched. The Superior Court now includes representatives of ethnic and racial minorities and, with my appointment in 1981, one woman.[16] As a result, the base from which judicial decisions are made has positively broadened, an important factor in the judicial system of a democratic society.

More than half a century ago, Roscoe Pound pointed out the importance of the human factor in judicial decision making, a process which is inseparable from the judges' views of fair play, public policy, and their general sense of what is right and just.

> It is becoming clear that men count for more than machinery and that there are many subtle forces at work of which we are but partially conscious. Tradition, education, physical surroundings, race, class and professional solidarity, and economic, political and social influences of all sorts and degrees make up a complex environment in which men endeavor to reach certain results by means of legal machinery.[17]

State appellate courts are indeed a dynamic force in American jurisprudence. In Pennsylvania their structure has evolved so as to permit the highest court in the state to give more thoughtful consideration to those few cases presenting the most pressing jurisprudential issues. Consequently, the intermediate appellate courts have played an important role in developing the common law along a broader frontier. The agenda of all appellate courts has evolved so that the questions posed and answered are more frequently of a state constitutional dimension and more often concern the vindication of civil rather than property rights. The well-being of the Pennsylvania judicial system, as well as that of other states, depends upon the continuation of such evolutionary growth.

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15. *See* 3 F.M. EASTMAN, *supra* note 2, at 794. A prosopography of the state court benches would make an interesting and important study. It is, unfortunately, beyond the scope of this foreword.

16. Induction Ceremony of P.W. Beck, 283 Pa. Super. xxxi (June 23, 1981).

17. Haines, *General Observations on the Effects of Personal, Political, and Economic Influences in the Decisions of Judges*, in READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 461, 465 (Cohen & Cohen 1951).