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Division of Labor: The Modernization of the Supreme Court of Georgia and Concomitant Workload Reduction Measures in the Court of Appeals

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**DIVISION OF LABOR: THE MODERNIZATION OF
THE SUPREME COURT OF GEORGIA AND
CONCOMITANT WORKLOAD REDUCTION
MEASURES IN THE COURT OF APPEALS**

**Kyle G.A. Wallace, Andrew J. Tuck, and Max Marks,
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ABSTRACT

This article addresses two distinct yet interrelated topics: the arcane and unnecessarily complex jurisdictional division between the Georgia Supreme Court and Georgia Court of Appeals, and the excessive caseload at the Georgia Court of Appeals. The topics relate to one another because, as will be seen, any attempt to clarify the jurisdictional division of labor between these courts, and convert the Supreme Court into more exclusively a court of last resort, will necessarily increase the caseload at the already-overworked Court of Appeals. Consequently, any amendment to appellate jurisdiction in Georgia requires concomitant measures to reduce the per judge caseload at the Court of Appeals. In Part I.A., this article discusses Georgia's appellate system—its history, the jurisdictional division that arose, the confusion the current jurisdictional framework creates, and the limitations and burdens it places on Georgia's highest court. In Part I.B., the article discusses the current caseload at the Court of Appeals and the burden any jurisdictional reforms would have on the Court of Appeals. In Part II, the article presents a new clear jurisdictional framework for the Georgia Supreme Court and Georgia Court of Appeals, and at the same time, offers cost-effective solutions to ease the burden at the Court of Appeals, so that these jurisdictional changes can be implemented.

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I. BACKGROUND

A. Georgia's Appellate System

1. Brief History

Georgia's early history is marked by "apparent hostility . . . toward appellate courts in general."¹ For its first seventy years of existence, Georgia did not have any appellate courts at all, and Georgia's courts have grown slowly since that time.² In 1845, after extensive legislative debate about the unchecked power of superior court judges, the Supreme Court of Georgia was created and staffed with three Justices, making Georgia the last state then in existence to create an appellate court system.³ As the only appellate court in the state, the Supreme Court's primary role was "the correction of errors in judgments rendered in the superior courts of this state."⁴ Because the Supreme Court had jurisdiction over all appeals, as Georgia steadily grew, the court's workload increased.⁵ By 1894, "the workload of the court became so heavy that Chief Justice Logan Bleckley resigned . . . because he was physically exhausted."⁶

The Georgia legislature addressed the Supreme Court's overload in two ways. First, the legislature voted to expand the Supreme Court from three Justices to six in 1895 (the court would reach its current size of seven in 1945).⁷ Second, the legislature created a three member Court of Appeals in 1907 "[t]o further relieve the increasing workload of the Supreme Court."⁸ As originally conceived, the Court of Appeals was "designated a court of final jurisdiction."⁹ Though the Court of

1. *The Supreme Court of Georgia: A History*, SUPREME COURT OF GA., <http://www.gasupreme.us/history/> (last visited Apr. 4, 2014).

2. See *History of the Court of Appeals*, GA. COURT OF APPEALS, <http://www.gaappeals.us/history/index.php> (last visited Apr. 4, 2014).

3. *Id.*

4. *Cent. of Ga. Ry. Co. v. Yesbik*, 91 S.E. 873, 873 (Ga. 1917).

5. THOMAS S. CHAMBLES ET AL., REPORT OF THE COMMISSION ON THE APPELLATE COURTS OF GEORGIA 2 (Dec. 1996) (on file with the Georgia Administrative Office of the Courts).

6. *Id.*

7. *Id.*

8. *Id.*

9. *History of the Court of Appeals*, *supra* note 2.

Appeals could itself certify questions to the Supreme Court, the Supreme Court did not have certiorari jurisdiction.¹⁰ Consequently, the Supreme Court could not review any decisions of the Court of Appeals and could only decide cases that fell within the Court of Appeals' direct appellate jurisdiction if the Court of Appeals asked for guidance by certifying a question to the Supreme Court.¹¹ For practical purposes, during this time the Supreme Court and Court of Appeals were parallel courts of last resort depending on which court had jurisdiction over the appeal.¹²

In 1916, the Georgia legislature doubled the size of the Court of Appeals to six, and Georgia's Constitution was amended to redistribute jurisdiction between the Court of Appeals and Supreme Court in two ways.¹³ First, the direct appellate jurisdiction of each court was modified to be based on the subject matter of the case rather than the lower court from which the case was appealed.¹⁴ The subject matter-based jurisdictional division in the 1916 Constitution is essentially the same as the jurisdictional split under today's Constitution.¹⁵ Second, the 1916 Constitution gave the Supreme Court certiorari jurisdiction over all cases within the Court of Appeals' direct appellate jurisdiction, making the Supreme Court a true court of last resort sitting in review of decisions of the Court of Appeals, while at the same time retaining considerable direct review jurisdiction.¹⁶

As Georgia continued to grow, the Court of Appeals—bearing a majority of the direct appeal jurisdiction with only six judges—began to experience strain.¹⁷ The Georgia legislature dealt with this problem primarily by increasing the number of judges.¹⁸ In the early 1960s, the Court of Appeals grew to seven in 1960 and then to nine in 1961.¹⁹ In

10. *Id.*

11. *See id.*

12. *See id.*

13. CHAMBLESS ET AL., *supra* note 5, at 2.

14. *History of the Court of Appeals*, *supra* note 2.

15. CHRISTOPHER J. MCFADDEN ET AL., *GEORGIA APPELLATE PRACTICE WITH FORMS* § 1:3, at 9 (2012–2013 ed. 2013).

16. *Id.*

17. *See* CHAMBLESS ET AL., *supra* note 5, at 2.

18. *Id.*

19. *Id.*

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the late 1990s, the Court of Appeals expanded again, first growing to ten in 1996, then reaching its present size of twelve in 1999.²⁰ This history of “intermittent increases in judgeships” on the Court of Appeals from its creation with three judges in 1907 to the increase to nine judges in 1961 roughly kept pace with Georgia’s population growth.²¹ As shown by the table below, Georgia’s population has more than doubled since 1961, yet the State has added only three judges to the Court of Appeals.

Table 1—Population and Judges Over Time

Date	Ga. S.Ct. Justices	Ga. App. Judges	Total Appellate Judges	Population*	Population/Appellate Judge
1835	0	0	0	604,108	N/A
1845	3	0	3	798,789	266,263
1895	6	0	6	2,026,842	337,807
1907	6	3	9	2,505,000	278,333
1916	6	6	12	2,856,000	238,000
1945	7	6	13	3,119,000	239,932
1960	7	7	14	3,949,000	282,071
1961	7	9	16	4,015,000	250,937
1996	7	10	17	7,501,000	441,235
1999	7	12	19	8,046,000	423,474
2012	7	12	19	9,920,000	522,105

* Population figures are approximate based on census data. For instance, the figure for 1895 is the average of 1890 and 1900 census data. Data for years after 1900—also based on census data—was pulled from https://www.google.com/publicdata/explore?ds=kf7tgg1uo9ude_&ctype=l&strail=false&bcs=d&nselm=h&met_y=population&scale_y=lin&ind_y=false&rdim=country&idim=state:13000&ifdim=country&hl=en&dl=en&ind=false.

20. Richard W. Creswell, *Georgia Courts in the 21st Century: The Report of the Supreme Court of Georgia Blue Ribbon Commission on the Judiciary*, 53 MERCER L. REV. 1, 11 (2001).

21. *Id.*

2. *Structure and Jurisdictional Division*

Under Georgia's Constitution, the Supreme Court has a dual role. First, the Supreme Court retains its historical role as an error-correcting court by exercising direct appellate jurisdiction over certain classes of cases.²² Second, the court has the familiar modern role as a court of last resort and carries the "ultimate responsibility for maintaining uniformity and coherence in [Georgia's] legal doctrine."²³ The court acts as a single body in presiding over its cases. The Georgia Constitution requires a majority of Justices present to hear each case.²⁴ While the maximum number of Justices is capped at nine by the Constitution, there has been no substantial push to increase the size of the Supreme Court beyond seven.²⁵

The Supreme Court's direct appellate jurisdiction covers ten different subject areas. Under Article VI, Section 6, Paragraph 2 of the Georgia Constitution, the Supreme Court has exclusive appellate jurisdiction over: "(1) All cases involving the construction of a treaty or of the Constitution of the State of Georgia or of the United States and all cases in which the constitutionality of a law, ordinance, or constitutional provision has been drawn in question; and (2) [a]ll cases of election contest."²⁶ In addition, unless the Georgia legislature provides otherwise (and it has not), the Supreme Court has direct (or "general") appellate jurisdiction over:

- (1) Cases involving title to land; (2) All equity cases; (3) All cases involving wills; (4) All habeas corpus cases; (5) All cases involving extraordinary remedies; (6) All divorce and alimony cases; (7) All cases certified to it by the Court of Appeals; and (8) All cases in which a sentence of death was imposed or could be imposed.²⁷

22. *Id.* at 13.

23. *Id.*

24. GA. CONST. art. VI, § 6, para. 1.

25. *Id.*

26. *Id.* at para. 2.

27. *Id.* at para. 3.

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In addition to its areas of direct appellate jurisdiction, the Supreme Court “review[s] by certiorari cases [from] the Court of Appeals which are of gravity or great public importance.”²⁸ Lastly, the Supreme Court has the “jurisdiction to answer any question of law from any state appellate or federal district or appellate court.”²⁹

The Court of Appeals has jurisdiction over “all cases not reserved to the Supreme Court or conferred on other courts by law.”³⁰ The Court of Appeals “sit[s] in panels of not less than three Judges.”³¹ If any judge on the three-judge panel dissents, the case must be decided by a seven-judge panel consisting of the panel to which the case was assigned, the next three-judge panel in line in rotation, and an additional seventh judge.³² The seven-judge panel does not hear oral argument, but may review the transcript of any argument that occurred before the original panel.³³ There is no constitutional limit on the maximum number of judges who can serve on the Court of Appeals.³⁴

Unless the subject matter of a case is governed by Georgia’s discretionary appeals statute, both the Supreme Court and the Court of Appeals must hear appeals of final judgments and other directly appealable rulings that fall within their respective subject matter jurisdictions.³⁵

Under Georgia’s discretionary appeal statute, O.C.G.A. § 5-6-35, the parties must apply for discretionary appellate review for certain classes of fact-intensive, routine, or low-stakes cases.³⁶ This

28. *Id.* at para. 5.

29. *Id.* at para. 4. The Supreme Court also has the jurisdiction to answer certified questions from the Court of Appeals. *Id.* at § 5, para. 4 (“The Court of Appeals may certify a question to the Supreme Court for instruction, to which it shall then be bound.”).

30. GA. CONST. art. VI, § 5, para. 3.

31. *Id.* at para. 2.

32. O.C.G.A. § 15-3-1(c)(1) (2012).

33. § 15-3-1(c)(3).

34. *See* GA. CONST. art. VI, § 5, para. 1.

35. *See* O.C.G.A. § 5-6-34(a) (2013). In addition to final judgments, O.C.G.A. § 5-6-34(a) lists several other rulings that are directly appealable as a matter of right, including: grants or denials of applications for interlocutory injunctions or final injunctions; mandamus or any other extraordinary remedy, except for temporary restraining orders; and judgments and orders sustaining the dismissal of a caveat to the probate of a will. All these examples would go directly to the Supreme Court by virtue of its jurisdiction over “[a]ll cases involving wills” and “[a]ll cases involving extraordinary remedies.” GA. CONST. art. VI, § 6, para. 3(3), (5).

36. O.C.G.A. § 5-6-35 (2012).

discretionary procedure was originally adopted by statute in 1979 “to ameliorate the appellate courts’ massive case loads[,]”³⁷ serving as the major workload reform in the Georgia appellate courts between the 1961 addition of three judges to the Court of Appeals (bringing the total from six to nine), and the increase of three additional judges in the late 1990s (bringing the court to its current twelve).³⁸ O.C.G.A. § 5-6-35 makes twelve categories of appeals discretionary including cases involving \$10,000 or less, divorce, alimony, other domestic relations cases, denials of petitions for habeas corpus, grants or denials of temporary restraining orders, revocations of probation, grants or denials of petitions for release, terminations of parental rights, distress and dispossessory warrants involving only rent due of \$2,500 or less, garnishments, and O.C.G.A. § 9-15-14 attorneys’ fees awards.³⁹ Additionally, only discretionary appeals are taken from decisions of superior courts acting in a review capacity over state and local boards and administrative agencies (e.g., State Board of Workers’ Compensation) and lower courts (e.g., magistrate courts), with limited exceptions as set forth in the statute.⁴⁰ Of course, the same jurisdictional divide applies to discretionary appeals as well, creating somewhat of a counterintuitive situation where certain cases deemed insignificant enough to deny appeal as a matter of right will nevertheless fall within the appellate jurisdiction of the Supreme Court. Some prominent examples include divorce and alimony cases, as well as petitions for habeas corpus. As a result, the Supreme Court decides more discretionary applications per judge than the Court of Appeals.⁴¹ The Supreme Court decides around 600–700 discretionary applications each year, not far behind the approximately 850 decided by the Court of Appeals.⁴²

In addition, the courts must hear direct interlocutory appeals of trial court decisions granting summary judgment, even in part, unless the

37. *Scruggs v. Ga. Dep’t of Human Res.*, 408 S.E.2d 103, 104 (Ga. 1991).

38. *Id.*

39. § 5-6-35.

40. *Id.*

41. *See infra* Table 5—Approximate Potential Increase in Applications for Discretionary Appellate Review.

42. *Id.*

case is governed by O.C.G.A. § 5-6-35.⁴³ The courts must also hear interlocutory appeals of orders certifying or refusing to certify a class pursuant to O.C.G.A. § 9-11-23.⁴⁴ The courts also have the discretionary authority to review other interlocutory decisions upon application where a trial judge has certified “that the order, decision, or judgment is of such importance to the case that immediate review should be had.”⁴⁵

B. Georgia’s Overworked Court of Appeals

1. 1996 Report of the Commission on the Appellate Courts of Georgia

In 1996, after a request was made for the addition of four judges to the Georgia Court of Appeals, Georgia’s General Assembly added one judge and created the Commission on the Appellate Courts of Georgia.⁴⁶ The Commission was tasked with “undertaking a study of the current structure and operations of the appellate courts of the State of Georgia with the goal of determining what changes, if any, should be recommended in such structure and operations in order to” meet six specific goals, including (1) ensuring “a high quality of appellate review of trial court decisions where such review is required or appropriate” and (2) facilitating “the development of an organized and consistent body of appellate decisions for the guidance of the bench, the bar, and the general public.”⁴⁷ Its membership included state legislators, judges, the state bar president, and a practicing attorney.⁴⁸

The Commission determined “that the most immediate problem” facing Georgia’s appellate court system “is the caseload of the Court of Appeals.”⁴⁹ The Commission observed that there are “two approaches” to address this problem: “(1) more judges, or (2) fewer

43. O.C.G.A. § 9-11-56(h) (2012).

44. § 9-11-23(g).

45. § 5-6-34(b).

46. CHAMBLESS ET AL., *supra* note 5, at 1.

47. *Id.* (internal quotations omitted).

48. *Id.* at 7.

49. *Id.* at 2.

appeals, either by shifting jurisdiction to other courts or reducing the right to appellate review.”⁵⁰ In addition to simply hiring more judges, the Commission considered ten potential options aimed at reducing the court’s workload through structural changes:

- 1) The clarification or redefinition of the jurisdiction of the Supreme Court of Georgia and the Court of Appeals, either through enactment of legislation or amendment of the Constitution;
- 2) The creation of new district courts of appeal or the division of the current Court of Appeals into a Court of Civil Appeals and a Court of Criminal Appeals, with additional judges;
- 3) The creation of an appellate division of the superior courts staffed by superior court judges, senior judges, and other judges willing to serve voluntarily on such cases with adequate staff, offices, state funding, and compensation;
- 4) The shifting of workers’ compensation cases from the Court of Appeals to the Supreme Court;
- 5) The elimination of one level of appeal in workers’ compensation, which now can go through four levels of appeal at great cost and delay and with infrequent reversal;
- 6) An increase in monetary amounts covered by the discretionary appeal procedure of Code Section 5-6-35 of the O.C.G.A.;
- 7) The establishment of a court with jurisdiction to hear appeals in matters involving family law, including divorce, child custody, support, and juvenile matters, or the consolidation of these appeals into the same court;
- 8) The consolidation of appeals in cases in which a sentence of life imprisonment or the death sentence is or could be imposed into the same court;
- 9) Making appeals in misdemeanor cases discretionary rather than direct appeals, making appeals of one or more types of misdemeanors discretionary, or making appeals in traffic cases discretionary; and

50. *Id.* at 4.

10) Abolishing the right to an interlocutory appeal from the partial grant of summary judgment.⁵¹

The Commission did not recommend any of these options, concluding that “[a] suggestion for significant jurisdictional changes is an important decision which, if to be recommended, should be undertaken only after very careful further study.”⁵² Highlighting the competing tensions between the two basic ways to reduce the Court of Appeals’ caseload—hiring more judges or reducing the number of appeals—the Commission noted both that “[i]t is difficult to reach a decision which reduces the access of Georgia’s citizens to their courts[,]” and that “[t]he costs of each proposal must [] be studied.”⁵³

Ultimately, the Commission recommended the immediate addition of a new panel of three Court of Appeals judges and the establishment of a new commission to develop

a plan to modernize and improve the appellate court system This plan should include the possible revision of jurisdiction between the Supreme Court and the Court of Appeals, the possible future addition of judges to the Court of Appeals, and the possible creation of an appellate division of the superior courts. The goal should be to have in place by the year 2000 a streamlined, modern, and efficient appellate court system in which jurisdictional division is clear and the appellate courts are given the resources needed, on a continuing basis, to render high quality and cost effective service to the people of Georgia.⁵⁴

2. *2001 Report of the Supreme Court of Georgia Blue Ribbon Commission on the Judiciary*

In March 1999, the Supreme Court of Georgia created the Blue Ribbon Commission on the Judiciary.⁵⁵ The Commission was created

51. *Id.* at 4–5.

52. CHAMBLESS ET AL., *supra* note 5, at 5.

53. *Id.*

54. *Id.* at 6.

55. Creswell, *supra* note 20, at 3.

“for the express purpose of considering the ‘structure and organization of the courts as they relate to efficiency and effectiveness in the dispensation of justice.’”⁵⁶ The Commission was led by former Georgia Supreme Court Justice Hardy Gregory, Jr. and consisted “of twenty members including current and former judges and justices, practicing lawyers, and private citizens.”⁵⁷

In its discussion of Georgia’s appellate system, the Commission noted the recommendations of the 1996 Commission and the progress that the state had made toward those goals by adding three Court of Appeals judges.⁵⁸ Though the Commission generally agreed with the 1996 Commission’s basic recommendations, the Commission did not substantively discuss any of the major structural changes suggested by the 1996 Commission.⁵⁹

Instead, the Blue Ribbon Commission recommended the following changes to Georgia’s appellate system: (1) increasing the size of the court of appeals “in the future as may become necessary to accommodate its caseload[,]” and (2) reassigning direct appellate jurisdiction for divorce and equity cases from the Supreme Court to the Court of Appeals.⁶⁰ As the report itself suggests, both of these recommendations are modest.⁶¹ With regard to the first recommendation, the Blue Ribbon Commission acknowledged that “[t]he work of deciding appeals in both of Georgia’s appellate courts has increased dramatically due to the effects of several forces” related to population growth.⁶² As a result, Georgia’s “supreme court and court of appeals [are] described as carrying a caseload burden per judge that is among the highest in the United States.”⁶³ Despite these observations, the Commission did not recommend an immediate expansion of judgeships from the twelve approved in 1999.⁶⁴ Instead,

56. *Id.* (quoting the 1999 Georgia Supreme Court Order establishing the Blue Ribbon Commission on the Judiciary).

57. *Id.*

58. *Id.* at 11, 13.

59. *See id.* at 11–14.

60. *Id.* at 10–11.

61. *See* Creswell, *supra* note 20, at 11, 14.

62. *Id.* at 12.

63. *Id.*

64. *See id.* at 11–14.

the Commission noted that “[t]here is no doubt that the latest increase in the size of the court of appeals will not be the last as the forces producing more lawsuits and more appeals continue to transform our state.”⁶⁵

Similarly, the Blue Ribbon Commission report recommendation regarding the Supreme Court’s jurisdiction was restrained. The Commission acknowledged the “national movement against by-pass appeals directly to the court of last resort in states having intermediate appellate courts[,]” the American Bar Association’s recommendation that state supreme courts “exercise only discretionary review[,]” and the recommendations of previous Georgia commissions to limit the direct appellate jurisdiction of the Supreme Court to “cases on writs of certiorari, certified cases from state and federal appellate courts, constitutional cases, election contests, death penalty cases, habeas cases and extraordinary writs.”⁶⁶ Despite this movement against direct appeals to the Supreme Court, the Commission “recommend[ed] an incremental step in the direction of narrowing the supreme court’s jurisdiction”—eliminating the supreme court’s equity and divorce jurisdiction.⁶⁷ Shifting these two types of appeals from the Supreme Court to the Court of Appeals is a conservative and incremental emphasis of the Court of Appeals’ role in the correction of errors and of the Supreme Court’s responsibility for the coherence and integrity of legal doctrine and the legal process.⁶⁸

These modest recommendations were consistent with the Blue Ribbon Commission’s ultimate conclusion “that the judicial needs of Georgians are being well served.”⁶⁹ “While each recommendation of the Commission is submitted in the belief that its implementation will result in the incremental enhancement of our judicial system, the Commission has concluded that there is no need for sweeping revision of the structures and processes of our courts.”⁷⁰ Since the Blue Ribbon

65. *Id.* at 12.

66. *Id.* at 13–14.

67. Creswell, *supra* note 20, at 14.

68. *Id.* at 13.

69. *Id.* at 39.

70. *Id.*

Commission report was published, the Georgia legislature has not increased the number of court of appeals judgeships or modified the direct appellate jurisdiction of the Supreme Court.⁷¹

II. ANALYSIS AND PROPOSAL

A. Problems From 1996 Still Exist

Although the Blue Ribbon Commission's report struck a largely positive tone, the problems identified by the 1996 Commission's report still exist.⁷² Despite some modest improvements, Georgia's appellate courts continue to be some of the busiest in the nation, and the anachronistic jurisdictional split continues to create unnecessary tension and confusion within the appellate system.⁷³

1. *The Georgia Court of Appeals Continues to be one of the Busiest Intermediate Appellate Courts in the Nation*

As shown by the statistical tables below,⁷⁴ the workload of the Georgia Court of Appeals has improved since the 1996 Commission published its report. Despite Georgia's rapid population growth, annual filings in both the Court of Appeals and the Supreme Court have held remarkably steady from 1992 to 2012. The steady number of filings during this time period and the addition of three new judges on the Court of Appeals have combined to appreciably reduce the number of opinions each Court of Appeals judge must write every year. But there is still work to be done. Even with these improvements, "both Georgia appellate courts regularly remain in the top four state supreme and intermediate appellate courts in opinion load."⁷⁵

Furthermore, the changes to the direct appellate jurisdiction of the Supreme Court discussed in this article will necessarily increase the

71. MCFADDEN ET AL., *supra* note 15, § 1:5, at 20.

72. *See generally id.* § 1:6, 1:7 (discussing the structural problems of Georgia's appellate courts).

73. *Id.*

74. The statistical tables in this section present the total number of cases filed in and decisions written by the Supreme Court and Court of Appeals from 1992 through 2012, including per-judge filings and written decisions.

75. MCFADDEN ET AL., *supra* note 15, § 1:7, at 25–26, app. 1.

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workload of the Court of Appeals.⁷⁶ For instance, in 2011, approximately 1,500 of the 2,107 filings in the Georgia Supreme Court did not first go through the Court of Appeals.⁷⁷ While most of these matters did not require a written opinion,⁷⁸ shifting these filings to the Court of Appeals would increase the total number of filings in the already-overworked court by over 40%.⁷⁹ Without an increase in the number of judges, this increase in the Court of Appeals' workload may lead the court to dispose of more cases with non-binding "physical precedent" opinions,⁸⁰ which have been described as "a counterbalance to [the] institutional and caseload pressures that inhibit deliberation among the judges of the Georgia Court of Appeals."⁸¹ These pressures are made all the greater—both at the Court of Appeals and Supreme Court—by Georgia's constitutional mandate that the Court of Appeals decide all appeals within two court terms (the "two-term rule").⁸² This means that three times a year, at the end of each of the courts' three terms, the judges and Justices must scramble to finish the cases set for the previous term lest they be automatically affirmed without opinion.⁸³

The statistical tables below collect data published in the 1994–2012 Annual Reports of the Administrative Office of the Courts.⁸⁴ The tables show the total annual filings, written opinions, filings per judge, and opinions per judge for both the Court of Appeals and the Supreme Court from 1992 through 2012.

76. See *infra* notes 77–79 and accompanying text.

77. See JUDICIAL COUNCIL OF GA., ADMIN. OFFICE OF THE COURTS, ANNUAL REPORT: GEORGIA COURTS FY 2012 20 (2012).

78. *Id.*

79. *Id.*

80. In Georgia, decisions in which a member of a three-judge panel concurs in the judgment only is called "physical precedent" and cannot be cited as binding authority. See, e.g., *Muldrow v. State*, 744 S.E.2d 413, 418 nn.27 & 29 (Ga. Ct. App. 2013) (describing physical precedent rule).

81. James C. Bonner, Jr. et al., "Physical Precedent" Under Court of Appeals Rule 33(a), *APP. REV.*, Jan./Feb. 2003, at 1, 3.

82. GA. CONST. art. VI, § 9, para. 2 ("The Supreme Court and the Court of Appeals shall dispose of every case at the term for which it is entered on the court's docket for hearing or at the next term.").

83. MCFADDEN ET AL., *supra* note 15, § 2:4, at 38–39.

84. The Georgia Administrative Office of the Courts releases annual reports. *Annual Reports*, ADMIN. OFFICE OF THE COURTS, <http://georgiacourts.gov/index.php/researchcaseload/105> (last visited Apr. 5, 2014).

Table 2—Total Filings and Written Opinions*

Year	Court of Appeals	Opinions (Published/ unpublished)	Supreme Court	Written Opinions
1992	3,412	2,065**	1,784	305
1993	3,530	2,183**	1,910	344
1994	3,911	2,315**	1,961	401
1995	3,635	1,860**	2,080	421
1996	3,450	1,805**	1,975	404
1997	3,513	1,875**	2,118	364
1998	3,366	1,899 (1,592/307)	1,899	394
1999	3,359	1,920 (1,667/253)	1,828	402
2000	3,434	1,877 (1,551/326)	1,879	371
2001	3,313	1,858 (1,448/410)	1,856	356
2002	3,260	1,803 (1,540/263)	1,889	356
2003	3,444	1,782 (1,488/294)	1,882	364
2004	3,238	1,765 (1,497/268)	1,976	347
2005	3,139	1,581 (1,389/192)	1,949	400
2006	3,303	1,596 (1,390/206)	2,167	352
2007	3,280	1,624 (1,359/265)	1,877	347
2008	3,273	1,533 (1,322/211)	2,073	391
2009	3,260	1,644 (1,277/367– includes Rule 36) ⁸⁵	1,979	325
2010	3,212	1,500 (1,070/430– includes Rule 36)	2,036	357
2011	3,448	N/A	2,107	314
2012	3,464	1,703 (1,239/464)	1,936	231

85. Under Georgia Court of Appeals Rule 36, cases may be affirmed without opinion when: (1) the evidence supports the judgment; (2) no reversible error of law appears and an opinion would have no precedential value; (3) the judgment of the court below adequately explains the decision; and/or (4) the issues are controlled adversely to the appellant for the reasons and authority given in the appellee's brief. . . . Rule 36 cases have no precedential value.

GA. CT. APP. R. 36; *see also* MCFADDEN ET AL., *supra* note 15, § 21:1, at 643–44.

* Data taken from the 1994–2012 Annual Reports of the Georgia Administrative Office of the Courts.

** Prior to 1998, the Annual Reports make no distinction between published and unpublished opinions.

Table 3—Total Filings and Published Opinions Per Judge*

Year	Filings Per CoA Judge	Published Opinions Per CoA Judge	Filings Per S.Ct. Justice	Opinions Per S.Ct. Justice
1992	379	229**	255	44
1993	392	243**	273	39
1994	435	257**	280	57
1995	404	207**	297	60
1996	345	181**	282	58
1997	351	188**	303	52
1998	337	159	271	56
1999	280	139	261	57
2000	286	129	268	53
2001	276	121	265	51
2002	272	128	270	51
2003	287	124	269	52
2004	270	125	282	50
2005	262	116	278	57
2006	275	116	310	50
2007	273	113	268	50
2008	273	110	296	56
2009	272	106	283	46
2010	268	89	291	51
2011	287	N/A	301	45
2012	289	103	277	33

* Data taken from the 1994–2012 Annual Reports of the Georgia Administrative Office of the Courts.

** Includes unpublished opinions.

2. *The Jurisdictional Division Between the Supreme Court and the Court of Appeals Continues to Create Tension and Confusion*

As explained above, the jurisdictional division between the Supreme Court and Court of Appeals has been essentially unchanged since 1916.⁸⁶ This historical conception of the respective roles of the courts is out of line with modern appellate practice, and the subject matter split in direct appellate jurisdiction continues to cause confusion in Georgia's appellate system.⁸⁷ The Supreme Court and Court of Appeals were originally viewed as dual courts of last resort.⁸⁸ Today, the "large majority" of the forty states with an intermediate appellate court "have a supreme court with exclusively or primarily certiorari or other discretionary jurisdiction, and an intermediate court of appeals for original appellate jurisdiction in most cases."⁸⁹

In its first decision discussing its new certiorari jurisdiction under the 1916 Constitution, *Central of Georgia Railway Co. v. Yesbik*, the Supreme Court recognized the tension created by grafting certiorari review onto an appellate system that historically functioned as dual courts of last resort.⁹⁰ The *Yesbik* Court observed that, under both the 1907 and 1916 Constitutions, the Court of Appeals and the Supreme Court were:

each final in their respective jurisdictions, but the latter was bound to follow the decisions of the former The cleavage of jurisdiction between the two courts of review was clearly drawn, and within its jurisdiction the Court of Appeals was designed to be a court of last resort. The jurisdiction of the Supreme Court and the Court of Appeals is not concurrent, but exclusive in the particular sphere of each

[The certiorari] provision [in the 1916 Constitution] was manifestly intended to vest in this court a comprehensive power, extending to the review of any decision pronounced by the Court

86. MCFADDEN ET AL., *supra* note 15, § 1:3, at 9.

87. *See id.* § 1:6, at 21–22.

88. *Cent. of Ga. Ry. Co. v. Yesbik*, 91 S.E. 873, 874 (Ga. 1917).

89. MCFADDEN ET AL., *supra* note 15, § 1:6, at 20–21.

90. *Yesbik*, 91 S.E. at 874.

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of Appeals; but, when considered in connection with the whole constitutional scheme of two reviewing courts, and in the light of the history of the two courts, it is manifest that a careless exercise of the power would defeat the very purpose of the institution of the Court of Appeals This court, therefore, should be chary of action in respect to certiorari, and should not require by certiorari any case to be certified from the Court of Appeals for review and determination unless it involves gravity and importance.⁹¹

In more recent years, the Supreme Court has explicitly addressed the issues created by Georgia's jurisdictional division.⁹² Most famously, in *Redfearn v. Huntcliff Homes Ass'n, Inc.*, Presiding Justice Fletcher's concurring opinion observed with respect to equity jurisdiction that the Supreme Court and Court of Appeals:

often spend more time in routine cases deciding which court has jurisdiction than in deciding which party should win on appeal and why. The disproportionate amount of time spent on resolving disputes concerning appellate jurisdiction creates unnecessary tension between our appellate courts, squanders limited judicial resources, and ultimately harms society by diverting attention from the resolution of more important issues.⁹³

To address this issue, Justice Fletcher observed that “[t]his state needs to move away from its parallel appellate court structure, which is antiquated, inefficient, and confusing, to a two-tier structure where the supreme court functions as a court of last resort.”⁹⁴ Justice Fletcher advocated adopting the appellate structure described in the American Bar Association's Model Judicial Article:

Under this model, the intermediate appellate court serves

91. *Id.*

92. *Redfearn v. Huntcliff Homes Ass'n*, 524 S.E.2d 464, 469–70 (Ga. 1999) (Fletcher, J., concurring).

93. *Id.* at 469.

94. *Id.* at 470.

primarily as a court to correct error in individual cases and the supreme court functions to interpret and develop case law for general application. Thus, this division gives the supreme court the discretion to decide cases involving an issue of first impression, the subject of conflicting authorities, or a matter of importance to the general public or the administration of justice.

. . . .

Until our state revises the structure and jurisdiction of our appellate courts, however, this court and the court of appeals must continue to struggle with how to define the classes of cases for which the supreme court has general appellate jurisdiction, of which equity cases are a small part, and this court must continue to spend most of its time functioning as a court to correct error rather than to develop the law.⁹⁵

In addition to causing confusion, the jurisdictional split creates institutional tension between the Supreme Court and the Court of Appeals.⁹⁶ As discussed in *Redfearn*, the Supreme Court would best serve its institutional function by focusing on developing the law.⁹⁷ And as set forth in the previous section, any reduction in the Supreme Court's direct appellate jurisdiction would necessarily increase the already heavy workload of the Court of Appeals.⁹⁸ Notably, the 1996 Commission believed that the tension between the interests of the two courts was significant enough that:

any continuation of this commission or another commission be restructured so that no current members of the Supreme Court or Court of Appeals are included as members of the commission. Current or former members of the appellate courts have valuable information which should be received and utilized; however, recommendations that involve choosing between sometimes competing points of view can be made more easily and effectively

95. *Id.*

96. *Id.* at 469.

97. *Id.* at 470.

98. *See supra* Part II.A.1.

by those with no immediate or direct stake in the appellate courts.⁹⁹

To date, the Georgia legislature has made no change to the division of jurisdiction between the Supreme Court and the Court of Appeals, and the problems described by Justice Fletcher in *Redfearn* persist.¹⁰⁰ These problems are front and center in the recent decision, *Durham v. Durham*.¹⁰¹ *Durham* was originally appealed to the Court of Appeals, which transferred it to the Supreme Court because it involved the internal affairs of a trust.¹⁰² Under the Georgia statute, “[t]rusts are peculiarly subjects of equity jurisdiction.”¹⁰³ Consequently, at the trial level, “[a]ctions concerning the construction, administration, or internal affairs of a trust”¹⁰⁴ must be filed in superior court because, under Georgia’s Constitution, the superior courts have “exclusive jurisdiction in ‘equity cases.’”¹⁰⁵ Despite the fact that Georgia’s constitutional and statutory law recognizes the inherently equitable nature of trusts, the Supreme Court held in a 4–3 decision that the case did not fall within the Court’s equity jurisdiction, even though it was in the equitable jurisdiction of the trial court.¹⁰⁶

In a dissent, Presiding Justice Hunstein stated that “as a matter of policy” she “agree[s] with the majority that ‘equity cases’ should go to the Court of Appeals.”¹⁰⁷ However, in the absence of legislative changes to the Supreme Court’s jurisdiction, Justice Hunstein disapproved of the Supreme Court’s trend toward unilaterally limiting its direct jurisdiction by adopting narrow interpretations of the Georgia Constitution’s jurisdictional grant:

In this case, I would retain jurisdiction for two reasons. One, if the

99. CHAMBLESS ET AL., *supra* note 5, at 6.

100. *See generally* *Durham v. Durham*, 728 S.E.2d 627 (Ga. 2012).

101. *See generally id.*

102. *Id.* at 628.

103. *Id.* at 629 (quoting O.C.G.A. § 53-12-6(a)–(b)).

104. *Id.* (quoting O.C.G.A. § 53-12-6(a)–(b)).

105. *Id.* (quoting GA. CONST. art. VI, § 4, para. 1).

106. *Durham*, 728 S.E.2d at 629–31.

107. *Id.* at 631 (Hunstein, J., dissenting).

term “equity cases” means anything today, then it should include appeals in express trust cases where the remedies to beneficiaries are exclusively equitable and the issue on appeal is the legality or propriety of that equitable relief. Second, if we continue our recent practice of narrowly defining the issue on appeal, the result will be the same as in this case—a transfer to the Court of Appeals—even in subject matter areas that have in the past been exclusively within our jurisdiction.¹⁰⁸

Justice Hunstein’s dissent seems to recognize that the expansive category of cases that are directly appealed to the Supreme Court has led to carving out exceptions and the narrow construing of these categories when what is needed is real reform of the Supreme Court’s appellate jurisdiction.

Finally, as discussed by Justice Fletcher in *Redfearn*, it is not ideal for the Supreme Court to spend significantly more time reviewing trial court decisions for error than it spends stating and clarifying important points of Georgia law.¹⁰⁹ For example, it seems absurd that the highest court in Georgia must decide whether a trial court correctly determined that a tattoo parlor suffered “irreparable harm” when a former employee stole a single tattoo design, simply because the appeal falls within the court’s equity jurisdiction.¹¹⁰ While not all of the direct appeals to the Supreme Court involve petty matters, the overwhelming majority of the cases that the court disposes of by written decision do not have the benefit of first going through the Court of Appeals. For instance, in 2011, only 58 of the 314 cases that the Supreme Court decided by written opinion came from the Court of Appeals either by certification or certiorari.¹¹¹

The most alarming waste created by the archaic jurisdictional split in Georgia’s appellate system is the time that the Supreme Court and Court of Appeals spend considering which appellate court has jurisdiction over the appeal to hear it on the merits. This issue often

108. *Id.* at 633 (Hunstein, J., dissenting).

109. *Redfearn v. Huntcliff Homes Ass’n*, 524 S.E.2d 464, 469–70 (Ga. 1999) (Fletcher, J., concurring).

110. *See Owens v. Ink Wizard Tattoos*, 533 S.E.2d 722, 723–24 (Ga. 2000).

111. JUDICIAL COUNCIL OF GA., *supra* note 77, at 20.

results in transfers from the Court of Appeals to the Supreme Court, which sometimes result in transfers back to the Court of Appeals and split decisions like *Redfearn* resulting in a tremendous waste of Georgia's already taxed judicial resources.

B. *Time for a New Look at Structural Change*

Despite persistent calls to modernize Georgia's appellate system from both the judiciary and those who have studied it,¹¹² Georgia's legislature has failed to take significant action.¹¹³ While the increase in the size of the Court of Appeals to twelve following publication of the 1996 Report addressed the immediate workload crisis, that reform effort did not go far enough. Over a decade has passed since the Blue Ribbon Commission made its "conservative and incremental" recommendations for modest jurisdictional reforms that would place proper "emphasis [on] the court of appeals' role in the correction of errors and [on] the supreme court's responsibility for the coherence and integrity of legal doctrine and the legal process."¹¹⁴ And yet, no changes have been made since the Commission issued its report, and Georgia retains fundamentally the same appellate system that it has had since 1916.

Georgia is the eighth most populous state in the nation and the center of commerce in the Southeast,¹¹⁵ yet it continues to operate with an appellate system that is the product of historical accident rather than rational thought. Though Georgia's judges and Justices have done a commendable job in challenging circumstances, Georgia would benefit from reforms modernizing its appellate court system. For example, because Georgia's Supreme Court must spend the vast

112. See *Redfearn*, 524 S.E.2d 464, 469–70 (Fletcher, J., concurring); Creswell, *supra* note 20, at 13; CHAMBLESS ET AL., *supra* note 5.

113. MCFADDEN ET AL., *supra* note 15, § 1:5, at 20.

114. Creswell, *supra* note 20, at 14.

115. See Andy Ambrose, *Atlanta*, NEW GA. ENCYCLOPEDIA (June 5, 2014), <http://www.georgiaencyclopedia.org/articles/counties-cities-neighborhoods/atlanta>; U.S. Census Bureau, *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2013*, AM. FACT FINDER, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2013_PEPANNRES&prodType=table (last visited Apr. 6, 2014).

majority of its time reviewing trial court decisions for error,¹¹⁶ it cannot focus on using its role as a certiorari court to ensure a coherent, reasoned, and uniform body of law for the state. While the great many who have studied the issue agree that the Supreme Court's direct appellate jurisdiction should be significantly reduced,¹¹⁷ the reality that any change would further increase the Court of Appeals' heavy workload has served as a major roadblock to meaningful change.

It is time for comprehensive change that fulfills the promise of the Blue Ribbon Commission report and brings our appellate system into the 21st century.

1. Recommendations for Comprehensive Reform of Georgia's Appellate System That Should Occur Now

As previous studies have recognized, meaningful reform of Georgia's appellate system must address two interrelated issues: (1) the jurisdictional split between the Supreme Court and the Court of Appeals and (2) the Court of Appeals' caseload.¹¹⁸ While adopting either of these changes alone would be an improvement over Georgia's current system, Georgia would be best served by simultaneously adopting both changes as part of a comprehensive reform effort. The legislature can only resolve the tension between the Supreme Court and the Court of Appeals by adopting both changes at once. Eliminating most of the Supreme Court's direct appellate jurisdiction without increasing the size of the Court of Appeals would eliminate the confusion in the current system, but it would exacerbate the Court of Appeals' current workload problems. On the other hand, increasing the size of the Court of Appeals would reduce the court's workload and potentially improve the quality of its opinions, but it would do nothing to address the fundamental structural problems caused by a jurisdictional split that survives today as an out-of-place relic of an earlier era.

116. *See supra* Part II.A.2.

117. *See supra* Part I.B.

118. *Id.*

a. Converting the Supreme Court of Georgia Into a True Certiorari Court of Last Resort

First, consistent with the recommendations in the 1996 Report, the legislature should reform the Supreme Court into a true certiorari court of last resort retaining direct appellate jurisdiction over only a select few types of appeals. While the Supreme Court's direct appellate jurisdiction over constitutional issues and election contests can only be modified through a constitutional amendment,¹¹⁹ the legislature can, and should, eliminate the court's direct appellate jurisdiction over all other categories of cases. There is no principled reason for the Supreme Court to serve as an error-correcting court over the vast majority of cases that are currently within its jurisdiction—equity cases, divorce cases, habeas corpus cases, cases involving extraordinary remedies, cases involving title to land, cases in which the death penalty was or could have been imposed, and cases involving the construction of wills. Moving direct appeals of these cases to the Court of Appeals will resolve the current confusion over the scope of the Supreme Court's jurisdiction, and it will allow the Supreme Court to focus on serving the function that it should serve—creating a coherent, uniform body of legal precedent in Georgia.

b. The Size of the Court of Appeals Should be Increased to Address Historical Shortfalls and to Compensate for the Court's Expanded Direct Appellate Jurisdiction

Any change in the Supreme Court's direct appellate jurisdiction requires a corresponding increase in the size of the Court of Appeals. It would make no sense to shift direct appellate jurisdiction over several categories of appeals from the Supreme Court to the Court of Appeals and not provide a corresponding expansion of the Court of Appeals to accommodate the change. Any benefit from the jurisdictional reform would be squandered by placing an additional unsustainable burden on the Court of Appeals. Due at least in part to

119. Creswell, *supra* note 20, at 13.

the Court of Appeals' heavy workload,¹²⁰ oral argument occurs in only a small fraction of the appeals and the court's members spend less time conferencing and discussing cases amongst themselves than is typical in other jurisdictions.¹²¹ Increasing the Court of Appeals' workload through jurisdictional reform could exacerbate these problems and lead the court to further rely on unpublished and "physical precedent"¹²² decisions. Increasing the size of the court both to offset the court's expanded jurisdiction and to remedy historical shortfalls in judicial capacity would give the judges more time to deliberate, hear oral arguments, and draft high quality opinions.

Because many of the categories of cases within the Supreme Court's direct appellate jurisdiction are subject to discretionary review under O.C.G.A. § 5-6-35,¹²³ shifting direct appellate jurisdiction to the Court of Appeals may only moderately increase the court's workload as measured by opinions-per-judge. As shown by the table below, after subtracting the Supreme Court's certiorari cases, the number of opinions that the Supreme Court has written annually from 2005 to 2012 has ranged from 357 to 181. If all of these cases were transferred to the Court of Appeals, it would result in approximately a 25% increase in the court's annual number of published cases. Because the Supreme Court would retain direct appellate jurisdiction over cases within its exclusive constitutional jurisdiction, the actual impact on the Court of Appeals in terms of written opinions would be smaller than these numbers suggest.

At the same time, the number of applications for discretionary review filed in the Court of Appeals will increase by over 75%, and the additional time and resources that the court must spend on these cases should not be ignored.

As suggested by the tables below, the legislature will need to expand the Court of Appeals by at least another three-judge panel—a 25% increase over the size of the current court—in order to handle the

120. See *supra* Part I.B.

121. MCFADDEN ET AL., *supra* note 15, § 1:7, at 26.

122. See GA. CT. APP. R. 33.

123. See O.C.G.A. § 5-6-35 (2012).

increase in workload caused by the proposed changes to the Supreme Court's appellate jurisdiction.

Table 4—Approximate¹²⁴ Maximum Potential Increase in Court of Appeals Opinion Load*

Year¹²⁵	S.Ct. Opinions w/o CoA Review¹²⁶	Published CoA Opinions	Potential Total Published CoA Opinions	Percent Increase
2005	357	1,389	1,746	25.7%
2006	312	1,390	1,702	22.4%
2007	311	1,359	1,670	22.9%
2008	324	1,322	1,646	24.5%
2009	269	1,277	1,546	21.1%
2010	298	1,070	1,368	27.9%
2012	181	1,239	1,420	14.6%

* Data taken from the 2005–2012 Annual Reports of the Georgia Administrative Office of the Courts.

124. This table overestimates the extent to which the jurisdictional changes discussed in this article would increase the Court of Appeals' opinion load. Because the annual reports do not include more detailed statistics, it is impossible to determine how many of the Supreme Court's opinions involve the court's exclusive constitutional direct appellate jurisdiction. In addition, a small number of the Supreme Court's decisions every year answer questions certified by federal courts or the Georgia Court of Appeals. O.C.G.A. § 15-2-9 (2012); *History of the Court of Appeals*, *supra* note 2. Consequently, this table assumes a hypothetical worst-case scenario where all of the Supreme Court's opinions that do not involve its certiorari jurisdiction would fall to the Court of Appeals.

125. 2011 is not included in this table because the Court of Appeals has not published a complete data set.

126. The figures in this column consist of the total number of written opinions published by the Supreme Court in a given year minus the number of granted petitions for certiorari listed in the "cases disposed" section of the Annual Reports for the Georgia Administrative Office of the Courts during the same year. Because it is unlikely that all—or perhaps any—of the writs of certiorari that are granted in a given year are disposed of by a written opinion the same year, the numbers in this column are not exact. However, because it is likely that the court eventually writes an opinion regarding most—if not all—of the cases that it deems important enough to grant a writ of certiorari, the numbers in this table serve as a reasonable year-to-year approximation of the number of opinions that the Supreme Court writes in cases where there has not been a Court of Appeals opinion.

Table 5—Approximate¹²⁷ Potential Increase in Applications for Discretionary Appellate Review*

Year	Discretionary Applications Considered by the S.Ct.¹²⁸	Discretionary Applications Considered by the CoA¹²⁹	Potential Increase Discretionary Applications	Percent Increase
2005	748	786	1,534	95.2%
2006	632	798	1,430	79.2%
2007	605	771	1,376	78.5%
2008	715	830	1,545	86.1%
2009	702	850	1,552	82.6%
2010	670	848	1,581	79.0%
2011	710	876	1,586	81.1%
2012	600	850	1,450	70.6%

* Data taken from the 2005–2012 Annual Reports of the Georgia Administrative Office of the Courts.

There is a recent indication that the Georgia legislature is giving some thought to these issues. In the 2014 session, a resolution was introduced for the creation of the “Senate Study Committee on the Court of Appeals Workload.”¹³⁰ The resolution noted that the total filings in the Court of Appeals in 2012 was 3,404 cases and a “study is needed to examine the workload of the Court of Appeals to determine if the composition of the Court of Appeals should be

127. While almost all of the discretionary applications for appellate review currently within the Supreme Court’s jurisdiction will shift to the Court of Appeals if the reforms in this article are implemented, the Supreme Court would retain jurisdiction for discretionary interlocutory applications that fall within its exclusive constitutional jurisdiction. GA. CONST. art. VI, § 6, para. 2.

128. The figures in this column include habeas corpus cases, cases covered by the discretionary appeals statute, discretionary interlocutory appeals, and applications for interim review of pre-trial superior court orders entered in cases in which the State intends to seek the death penalty.

129. The figures in this column include cases covered by the discretionary appeals statute, applications for discretionary interlocutory review, and emergency motions filed under Georgia Court of Appeals Rule 40(b).

130. S. Res. 1053, 152d Gen. Assemb., Reg. Sess. (Ga. 2014).

increased to include another division of three judges.”¹³¹ The resolution sought to establish a committee to study “the conditions, needs, issues, and problems[,]” and “recommend any action or legislation which the committee deems necessary or appropriate.”¹³² The resolution was sponsored by Senators Joshua McKoon,¹³³ Curt Thompson, Jesse Stone, and Bill Cowsert. While it was favorably reported out of the Judiciary Committee, it did not pass the Senate prior to the end of the 2014 legislative session. Fifteen years since the 1999 addition of the twelfth judge to the Court of Appeals,¹³⁴ perhaps this is a glimmer of hope that more progress will be made in the 2015 session, and the Georgia legislature will soon take steps to increase the size of the Court of Appeals to fifteen judges.¹³⁵

2. *Additional Caseload-Easing Proposals That Should be Considered*

Any effort to reform the jurisdiction of the Supreme Court by shifting appellate jurisdiction over several categories of cases to the Court of Appeals would require, at a minimum, the addition of three judges to the Court of Appeals. After thoroughly reviewing the prior commission reports, analyzing the Georgia appellate courts system, and conducting numerous interviews of former and current Georgia appellate judges, legislators, and distinguished law professors, this much is clear. But this does not mean that adding judges is the only measure that should be considered for relieving the caseload burden of the Court of Appeals. There are additional, less expensive reforms that could also be considered for providing further relief, including several reviewed or suggested by the 1996 Commission Report. The discussion of the advantages and disadvantages of the potential reform efforts discussed below comes in large part from the authors’ off-the-

131. *Id.*

132. *Id.*

133. Senator McKoon currently serves as the chairman of the Senate Judiciary Committee. *See Senate Judiciary*, GA. STATE SENATE, <http://www.senate.ga.gov/committees/en-US/committee.aspx?Committee=80&Session=23> (last visited July 1, 2014).

134. *History of the Court of Appeals*, *supra* note 2.

135. The authors applaud the senators for introducing this resolution and giving thought and attention to this very important issue for our state.

record interviews with current and former Court of Appeals judges and Supreme Court Justices.¹³⁶

a. Amending O.C.G.A. § 15-3-1(g) to Allow Use of Current Superior Court Judges to “Sit by Designation” on Panels of the Court of Appeals

One potential way to reduce the Court of Appeals’ workload without significantly increasing costs is to allow current superior court judges to sit by designation as a third judge on panels along with two of the current members of the Court of Appeals.¹³⁷ Though this measure would be complex to implement, it has several advantages. Superior court judges are already on the state’s payroll, they know Georgia law, and it is likely that at least some superior court judges would appreciate the opportunity to serve temporarily on the Court of Appeals. In interviews, former and current judges and Justices reacted strongly to this proposed reform. While some interviewees thought the idea should be implemented, others raised objections.

The first and most commonly raised objection was that superior court judges are busy with their own dockets and many judges may not have any time to devote to the Court of Appeals.¹³⁸ This objection is undoubtedly true, but it can be addressed by creating a voluntary opt-in program, where superior court judges with some availability and interest in handling appeals could participate as much or as little as they see fit. These judges would only need to travel to Atlanta for oral arguments and could sit as a third judge on non-argument panels that review appeals once briefing is completed and either recommend the case for oral argument or decide the case on the briefs. Optimistically, it is believed that many superior court judges would agree to participate once a year as a third judge on a dozen non-argument cases and sit in on a day or two of oral argument. In such a scenario, the

136. Interview notes are on file with the authors. The interviewees declined to be identified for attribution.

137. Senior appellate judges and superior court judges could also be utilized assuming that it would be economically feasible to pay for their services.

138. JUDICIAL COUNCIL OF GA., *supra* note 77, at 24.

superior court judge would likely only be responsible for drafting a handful of actual opinions.

The second major objection was that the proposed reform would be administratively infeasible because of limited chambers space and the logistics of using “outside” judges who may not be familiar with the internal procedures and norms of the Court of Appeals. It may be too difficult to effectively handle appeals in which they are involved. One concern, for example, is that under the current system panels sit together on all cases for an entire calendar year.¹³⁹

Like the first objection, the second objection raises legitimate issues, but they are issues that can be addressed. First, it would not be necessary to do away with three-judge panels. Instead, the panels could remain in place with superior court judges added in lieu of one of the three current panel members for certain cases. An equal distribution of this substitution would provide caseload relief to the existing members of the Court of Appeals without undoing the panel assignment system. Second, superior court judges can draft opinions and review draft opinions from their own chambers, and the administrative staff and clerk’s office of the Court of Appeals can continue to handle all administrative aspects of the appeal. While the superior court judge would need to understand the timing and process for handling the appeals, a complete understanding of all the details of the internal operations of the Court of Appeals would not be necessary. With respect to the formatting of the opinions, the Court of Appeals’ staff attorneys would provide assistance as needed.

Any of these same concerns could be suggested about the district judges who sit by designation on the federal courts of appeals.¹⁴⁰ In the modern age of communication—with reliance on telephone and email—the administrative issues would not seem to impose a serious impediment to the use of superior court judges to sit by designation as a third judge on three-judge panels of the Court of Appeals.

139. GA. CONST. art. VI, § 5, para. 2; *History of the Court of Appeals*, *supra* note 2.

140. Alyson M. Palmer, *Expect to See More Visiting Judges at 11th Circuit*, DAILY REPORT (Jan. 13, 2014), <http://www.dailyreportonline.com/id=1202637693627>.

This idea borrows aspects of internal operations at the federal circuit courts of appeal. For instance, the Eleventh Circuit has long operated as one of the busiest regional appellate courts in the federal system,¹⁴¹ but has relieved pressure on its sitting judges by routinely having a third judge from a district court or different courts of appeal sit on appellate panels.¹⁴² In addition, federal courts of appeal use panels to separate more easily decided appeals that can be efficiently resolved without oral argument from more difficult appeals for which oral argument would be beneficial.¹⁴³

When caseload overtaxes the capacity of appellate judges to review personally, to discuss collegially, and to endorse collectively a written statement of the reasons for decision in each case on their docket, the imperative to decide is in tension with other fundamental values of appeal. If mechanisms are not developed to cope with docket overload, an appellate court cannot satisfactorily meet its obligation to individual litigants—the correction of prejudicial trial court error—much less its institutional obligations to declare precedent and to supervise the overall administration of justice by the trial courts. But unless caseload control mechanisms permit adequate participation by the parties in the proceedings which determine their fate, while preserving the court-like characteristics that legitimate the exercise of judicial power, other significant values of appeal are in jeopardy. The principal caseload control mechanism developed by the United States courts of appeals and similarly burdened state appellate courts is the practice of “screening” their dockets to

141. In 2013, the Eleventh Circuit produced 319 written opinions per judge, while the second busiest court last year produced 243 written opinions, and the national average was 186 written opinions. *U.S. Court of Appeals—Judicial Caseload Profile*, U.S. COURTS, <http://www.uscourts.gov/viewer.aspx?doc=/uscourts/Statistics/FederalCourtManagementStatistics/2013/appeals-fcms-profiles-september-2013.pdf&page=21> (last visited Apr. 6, 2014). This caseload is part of a long-term trend. From 2008 to 2013, the Eleventh Circuit produced an average of 251 opinions per judge, while the national average was 165. *Id.*

142. In fact, because the Eleventh Circuit has four vacancies, Chief Judge Ed Carnes has declared an emergency and allowed the use of *two* visiting judges on three-judge panels. Palmer, *supra* note 140.

143. John B. Oakley, *The Screening of Appeals: The Ninth Circuit's Experience in the Eighties and Innovations for the Nineties*, 1991 BYU L. REV. 859, 863 (1991).

identify cases appropriate for procedural short-cuts.¹⁴⁴

Notably, the statutory framework for this use of superior court judges is already in place. The Georgia Code Section governing procedures in the Georgia Court of Appeals provides:

Whenever the court unanimously determines that the business of the court requires the temporary assistance of an additional judge or additional judges or one additional panel, the court may request the assistance of senior appellate judges as provided in Chapter 3A of this title or senior superior court judges as provided in Code Section 47-23-101 [*see also* O.C.G.A. § 15-1-9.2]. The Judge whose case assignment is transferred to the additional judge shall not vote on the case.¹⁴⁵

This provision could be repurposed to remove its limited application to senior superior court judges and temporary nature. It could then be amended to set forth a screening procedure, or screening could be left to the Court of Appeals to handle through its rules and internal operating procedures.

While allowing superior court judges to serve by designation on the Court of Appeals would be a complex reform to implement, it is also one of the most feasible ways to reduce the court's workload without significantly increasing costs. Because district court judges already sit by designation in the Eleventh Circuit, there is evidence that this reform can be successfully implemented. Furthermore, because Georgia already has an existing statutory framework for judges who sit by designation, it should be straightforward for the legislature to expand the circumstances in which designation is appropriate. In sum, further consideration should be given to whether some use of superior court judges sitting by designation would help reduce the workload of the Court of Appeals. Even modest relief would be welcomed, and the

144. *Id.* at 860.

145. O.C.G.A. § 15-3-1(g) (2012).

experience gained by the superior court judges would benefit Georgia's trial court system.

b. Allowing Dissents in Three-Judge Panels

Unlike other courts sitting in three-judge panels, the Georgia Court of Appeals does not have two-to-one split decisions.¹⁴⁶ If any judge on a three-judge panel dissents, rather than issuing an opinion, the case is decided by a seven-judge panel.¹⁴⁷ This requirement, coupled with pressure created by the two-term rule, has given rise to situations where a third judge on a three-judge panel will simply concur in the judgment without joining the opinion or drafting a separate concurring opinion.¹⁴⁸ Under Court of Appeals Rule 33, these opinions that do not achieve the full panel's consensus are called physical precedent and are not binding on future panels.¹⁴⁹ The workload at the Court of Appeals could be reduced by a simple amendment to O.C.G.A. § 15-3-1(c) eliminating the automatic seven-judge panel, and yet preserving the en banc review process:

(1) Each division shall hear and determine, independently of the others, the cases assigned to it, ~~except that the division next in line in rotation and a seventh Judge shall participate in the determination of each case in which there is a dissent in the division to which the case was originally assigned.~~

(2) In all cases which involve one or more questions which, in the

146. See, e.g., *Bd. of Comm'rs of Jefferson v. Teton Corp.*, 3 N.E.3d 556, 571 (Ind. Ct. App. 2014); *State v. Sanders*, 753 S.E.2d 713, 718 (N.C. Ct. App. 2014); *Salvato v. Salvato*, 2 N.E.3d 974, 989–90 (Ohio Ct. App. 2013).

147. § 15-3-1(c)(1).

148. See, e.g., *Floyd v. State*, 369 S.E.2d 316, 318 (Ga. Ct. App. 1988) (Deen, J., concurring dubitante).

149. GA. CT. APP. R. 33. To prevent a considered opinion from becoming physical precedent, Judge Braswell Deen in the late 1980s revived a practice not widely used at the court since the early twentieth century by concurring dubitante. Judge Deen “consider[ed] dubitante a weak concurrence, but nevertheless a full concurrence” which had many “laudable attributes” including making the decision binding precedent. *Floyd*, 369 S.E.2d at 318 (Deen, J., concurring dubitante). The concurrence dubitante has reappeared in the last few years, though by reading the opinions it seems the judges do not consider a concurrence dubitante a full concurrence. *Nalley v. Langdale*, 734 S.E.2d 908, 922 (Ga. Ct. App. 2012) (Dillard, J., concurring dubitante) (“Unfortunately, our constitutional duty to resolve this appeal today (within two terms of docketing) precludes me from engaging in the type of extended study necessary to achieve a high degree of confidence that my experienced, able colleagues are right.”) (footnotes omitted).

opinion of the majority of the Judges ~~of the division or of the two divisions plus a seventh Judge to which a case is assigned~~, should be passed upon by all the members of the court, the questions may be presented to all the members of the court; and if a majority of all the members of the court decide that the question or questions involved should, in their judgment and discretion, be decided by all the members of the court, the case shall be passed upon by all the members of the court, provided that a majority of the Judges passing upon the case concur in the judgment.¹⁵⁰

With the enactment of this reform, it would no longer be mandatory for a seven-judge panel to decide any case in which there is a dissent. This would reduce the court's workload to some extent, and it may encourage judges to issue written dissents, which could potentially aid the development of Georgia's law.

Instead of automatically reviewing cases in which there is a dissent in seven-judge panels, the Court of Appeals could consider whether to permit parties to file motions seeking rehearing en banc following a decision by a panel in addition or in lieu of the traditional motion for reconsideration. There is currently no means in the Court of Appeals' rules for a party to seek rehearing en banc or initiate any review of the decision by other members of the court not involved in the panel's decision.¹⁵¹ Many appellate practitioners in Georgia consider this a significant shortcoming, and replacing the seven-judge panels for cases involving a dissent with an opportunity for parties to seek rehearing en banc would be a significant improvement in the Georgia appellate system.

c. Appellate Mediation

The Court of Appeals has attempted in the past to create an appellate mediation program to relieve part of its caseload.¹⁵² Meetings were

150. O.C.G.A. § 15-3-1(c) (2012) (suggested amendment added).

151. See GA. CT. APP. R. 37.

152. Details regarding the Georgia Court of Appeals prior attempt at creating a mediation program came from multiple interviews with former and current Court of Appeals' judges. The interviewees declined to be identified for attribution, and interview notes are on file with the authors.

held with Steve Kinnard, the eponymous mediator from the Eleventh Circuit Court of Appeals mediation center. The mediation program did not ultimately succeed, with reasons ranging from a lack of enthusiasm from the bench and bar to the fact that the mediation program was not mandatory (i.e., the court lacked the power to send appeals to mediation without the consent of the parties).

In interviews, judges were split on whether it would be worthwhile to implement an appellate mediation program, but everyone agreed that it would be necessary to make changes to the prior system. Most significantly, interviewees uniformly agreed that any mediation program would need to be mandatory for it to have any chance of working, and the judges would get to select which cases go to mediation. Even with a mandatory program, some judges and Justices were skeptical that an appellate mediation program would work because, in most cases, one of the parties in mediation would have just won at the trial level and might not be inclined to negotiate away the win. Another obstacle is the constitutionally-imposed two-term rule. Some of the interviewed judges expressed legitimate concern that time spent on an unsuccessful mediation may leave the court with too little time to resolve the appeal.

Ultimately, appellate mediation is an idea that merits further consideration, but it may not be worth implementing. Although the resolution of even a small number of appeals each year through the mediation process would likely provide some relief to the Court of Appeals, the anticipated reduction in workload would need to be compared to the cost of the mediation program (and the cost of other alternatives that might be more effective).

d. Subject Matter and Regional Courts of Appeal

Looking at the intermediate appellate court structure of some other states, the prior commissions included consideration of dividing the Court of Appeals into a civil court and a criminal court or creating regional courts of appeal. For instance, Texas partially splits appellate

jurisdiction between civil and criminal.¹⁵³ Florida splits its intermediate appellate courts into regional districts of appeal.¹⁵⁴

Specialized subject-matter courts necessarily have more specialized judges than those sitting on the current Georgia Court of Appeals—a completely generalist institution. By developing more specialized judges, that follow a more uniform jurisprudence, specialized appellate courts can create efficiencies in appellate practice.¹⁵⁵ Any inefficiency created by different judges being able only to hear certain types of appeals (for example, if the civil caseload vastly outstrips the criminal caseload) can be cured by appropriately redistributing the judgeships between the two courts as retirements create new judicial openings, and perhaps even at the end of election cycles for members of the court. Potential divisions include not only civil and criminal, but also specialized courts for workers' compensation or family law.¹⁵⁶ At the same time, there is some concern that having elected judges to a court who handle only criminal appeals results in candidates battling each other for the title of “toughest on crime.”¹⁵⁷

A second, potentially more complicated, option for decreasing the caseload of the Georgia Court of Appeals would be to divide the court into regional circuit courts of appeal. The regional court system would comprise combinations of Georgia's forty-nine already existing superior court circuits. In such a system, the court could still meet in Atlanta-based sessions for en banc hearings to resolve splits among the regional circuits. Any amount of regional courts of appeal would require new courtrooms, courthouses, and administrative personnel. Moreover, with the concentration of people in metropolitan Atlanta and the absence of other large population centers in the state, Georgia

153. *Texas*, COURT STATISTICS PROJECT, http://www.courtstatistics.org/Other-Pages/State_Court_Structure_Charts/Texas.aspx (last visited Apr. 6, 2014).

154. *Florida*, COURT STATISTICS PROJECT, http://www.courtstatistics.org/Other-Pages/State_Court_Structure_Charts/Florida.aspx (last visited Apr. 6, 2014).

155. Jay P. Kesan & Gwendolyn G. Ball, *Judicial Experience and the Efficiency and Accuracy of Patent Adjudication: An Empirical Analysis of the Case for a Specialized Patent Trial Court*, 24 HARV. J.L. & TECH. 393, 408–09 (2011).

156. CHAMBLESS ET AL., *supra* note 5, at 5.

157. Joanna Cohn Weiss, Note, *Tough on Crime: How Campaigns for State Judiciary Violate Criminal Defendants' Due Process Rights*, 81 N.Y.U. L. REV. 1101, 1109–12 (2006).

is not the same natural fit for regional courts of appeal as other states, such as Florida.¹⁵⁸

In interviews, Georgia's current and former appellate judges were uniformly opposed to creating regional courts of appeal or dividing the Court of Appeals into a civil and criminal division. Though the judges acknowledged that having one generalized court might be impractical once the court reaches a certain size, everyone interviewed believed that the current court is nowhere near that size. The interviewees were concerned that dividing the court would negatively impact the court's culture and working relationships.

In sum, these ideas may warrant further consideration, should the Georgia Court of Appeals become so large in number to necessitate it (e.g., increase beyond the fifteen judges proposed in this article). But splitting the court is not itself a solution for reducing the workload of the Court of Appeals. As the 1996 Commission put it, it comes down to more judges or fewer appeals.¹⁵⁹

CONCLUSION

Significant change to the Georgia appellate courts will require a far more detailed study than this article. As the 1996 Commission suggested, “[a]s an example, the addition of [appellate] divisions to the superior courts may require more full-time judges, law clerks, support personnel, office space, library materials, and equipment for those courts,”¹⁶⁰ to highlight some of the logistical complexity. This article is merely an attempt to amplify the faint echo of the 1996 Commission's call to develop a plan to modernize Georgia's courts—“to have in place . . . a streamlined, modern, and efficient appellate court system in which jurisdictional division is clear and appellate courts are given the resources needed, on a continuing basis, to render

158. *District Courts of Appeal*, FLA. COURTS, <http://www.flcourts.org/florida-courts/district-court-appeal.shtml> (last visited Apr. 6, 2014).

159. CHAMBLESS ET AL., *supra* note 5, at 6.

160. *Id.* at 5.

high quality and cost effective service to the people of Georgia.”¹⁶¹ For now, the authors believe that the Georgia legislature should:

1. Increase the size of the Court of Appeals to fifteen judges and also provide sufficient funding necessary to maintain appropriate central staffing;
2. Convert the Supreme Court into a true certiorari court by providing the Georgia Court of Appeals with direct appellate jurisdiction over (1) cases involving title to land; (2) all equity cases; (3) all cases involving wills; (4) all habeas corpus cases; (5) all cases involving extraordinary remedies; (6) all divorce and alimony cases; and (7) all cases in which the death penalty is or could have been imposed;
3. Amend O.C.G.A. § 15-3-1(g) to give the Court of Appeals the flexibility to utilize current and former superior court judges to sit by designation as the court deems appropriate upon further consideration; and
4. Amend O.C.G.A. § 15-3-1(c) to abolish the automatic seven-judge panel rule to relieve an unnecessary workload burden on the Court of Appeals.

161. *Id.* at 6.

