

## PACKING AND UNPACKING STATE COURTS

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### ABSTRACT

*When it comes to court packing, questions of “should” and “can” are inextricably intertwined. The conventional wisdom has long been that federal court packing is something the President and Congress simply cannot do. Even though the Constitution’s text does not directly prohibit expanding or contracting the size of courts for political gain, many have argued that there is a longstanding norm against doing so, stemming from a commitment to judicial independence and separation of powers. And so (the argument goes), even though the political branches might otherwise be tempted to add or subtract seats to change the Court’s ideological makeup, for reasons related to the Constitution and history they should not, meaning for reasons related to politics they cannot.*

*But even the strongest norms are susceptible to pressure, and recent moves by scholars and politicians are calling the conventional wisdom about court packing into question. Based largely on the claim that the majority Republican Senate “unpacked” the Supreme Court by refusing to hold hearings upon the nomination of Judge Merrick Garland in 2016, some have begun to argue that court*

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*packing can be done because it recently has been done (by the political right), and now should be done (by the political left).*

*Missing in the debate over the positive question—whether court packing has recently occurred—is that it has unquestionably happened in the past several years in state courts across the country. Specifically, in the last decade, there have been legislative attempts in at least ten states to alter the size of their courts of last resort, with two being “successful.” Moreover, these figures represent an increase from the number of attempts in decades past.*

*This symposium Article makes a gentle intervention in the larger debate about court packing and the consideration of courts more generally in these politically charged times. Specifically, it provides a descriptive account of recent incidents of court packing and un-packing in state supreme courts. It then examines potential commonalities among the states in which such measures have been attempted and then those in which they succeeded. The Article finally considers whether there are lessons to be drawn for those interested in shifting—or keeping static—the size of the U.S. Supreme Court, including members of the Court itself.*

TABLE OF CONTENTS

INTRODUCTION . . . . . 1124

I. THE DEBATE OVER COURT PACKING AND UNPACKING. . . . . 1126

II. COURT PACKING AND UNPACKING AT THE STATE LEVEL . . . 1131

*A. States that Have Changed and Attempted to*  
        *Change the Size of Their Highest Courts . . . . . 1135*  
            1. *Court-Packing Attempts and Successes. . . . . 1135*  
            2. *Court-Unpacking Attempts and Successes . . . . . 1145*

*B. Observations About States that Changed and*  
        *Attempted to Change Their Courts (and Those that*  
        *Did Not) . . . . . 1149*

III. LESSONS FOR THE LARGER DEBATE AND THE COURTS  
    THEMSELVES. . . . . 1154

CONCLUSION . . . . . 1158

## INTRODUCTION

When it comes to court packing, questions of “should” and “can” are inextricably intertwined. The conventional wisdom has long been that federal court packing is something the President and Congress “*just cannot do.*”<sup>1</sup> Even though the Constitution’s text does not directly prohibit expanding or contracting the size of courts to change their political makeup, many have argued that there is a longstanding norm or convention against doing so.<sup>2</sup> This de facto prohibition largely stems from a commitment to judicial independence and a sense that court packing would “undermine the ... system of checks and balances” enshrined in our Constitution.<sup>3</sup> And so (the argument goes), even though the President and Congress might otherwise be tempted to add or subtract seats to affect the Court’s ideological composition, for reasons related to the Constitution and history they should not, meaning for reasons related to politics they cannot.<sup>4</sup>

But even the strongest norms are susceptible to pressure,<sup>5</sup> and recent moves by scholars and politicians are calling the conventional wisdom about court packing into question. Several law professors have recently put forward proposals that would increase the size of

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1. Michael C. Dorf, *How the Written Constitution Crowds Out the Extraconstitutional Rule of Recognition*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION* 74 (Matthew D. Adler & Kenneth Einar Himma eds., 2009); see also Joshua Braver, *Court-Packing: An American Tradition* 2 (Harvard Pub. Law Working Paper No. 19-44, 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3483927](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3483927) [<https://perma.cc/B77P-7PWL>] (“Since the New Deal and until recently, court-packing has been taboo, a tactic that no serious politician would ever publicly entertain.”).

2. See Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Convention, and the Judicial Separation of Powers*, 105 *GEO. L.J.* 255, 269-87 (2017) (discussing arguments sounding in historical practice and constitutional convention against court packing); Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 *VAND. L. REV.* 465, 505-06 (2018) (noting that “[t]here is a strong norm today against ‘packing’ the Supreme Court—that is, modifying the Court’s size in order to alter the future course of its decisions” and arguing that this norm began developing in the late 1950s).

3. Bradley & Siegel, *supra* note 2, at 276.

4. See *id.* at 280-83.

5. See, e.g., Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 *UCLA L. REV.* 1430 (2018) (on the protean nature of constitutional norms, including those surrounding court packing).

the Court.<sup>6</sup> Those proposals, in turn, have gained traction with several candidates running for the 2020 Democratic presidential nomination.<sup>7</sup> The underlying argument rests, in part, on a claim that the majority-Republican Senate “unpacked” the Supreme Court by refusing to hold hearings upon the nomination of Judge Merrick Garland in 2016—in effect, the Senate reduced the number of seats on the Court from nine to eight, for political gain.<sup>8</sup> And so, the argument goes, court packing can be done because it *was* just recently done by the Republicans, meaning it *should* be done by the Democrats in response.

Missing in the debate over the positive question—that is, whether court packing has recently occurred—is that it has unquestionably happened in the past several years in state courts across the country.<sup>9</sup> Specifically, in the last decade, there have been attempts by legislatures in at least ten states to alter the size of their courts of last resort, with two of those attempts succeeding.<sup>10</sup> Moreover, it appears that attempts to alter the size of state supreme courts is on

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6. See Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 193-96 (2019) (proposing two different reforms for the Court, including first increasing the size of the Court from nine to ten Justices—five selected by Democrats and five by Republicans—and then having those ten Justices, in turn, select another five judges from the courts of appeals to sit with them for one-year terms); Michael Klarman, *Why Democrats Should Pack the Supreme Court*, TAKE CARE (Oct. 15, 2018), <https://takecareblog.com/blog/why-democrats-should-pack-the-supreme-court> [<https://perma.cc/2W68-DZX4>].

7. See Pema Levy, *How Court-Packing Went from a Fringe Idea to a Serious Democratic Proposal*, MOTHER JONES (Mar. 22, 2019), <https://www.motherjones.com/politics/2019/03/court-packing-2020/> [<https://perma.cc/S6ZC-SA9K>] (noting that Pete Buttigieg, Beto O'Rourke, Elizabeth Warren, Kirsten Gillibrand, and Kamala Harris said that they would not rule out increasing the number of Justices on the Supreme Court if elected president); see also Philip Elliott, *The Next Big Idea in the Democratic Primary: Expanding the Supreme Court?*, TIME (Mar. 13, 2019), <https://time.com/5550325/democrats-court-packing/> [<https://perma.cc/6LB8-HN4P>].

8. See, e.g., Klarman, *supra* note 6 (describing how court packing is appropriate in light of the fact that Senate Majority Leader Mitch McConnell “straight-out stole the seat vacated by the death of Justice Antonin Scalia” and that the Republican Party has “hijack[ed]” the Court more broadly); see also Amanda Frost, *Academic Highlight: Epps and Sitaraman on How to Save the Supreme Court*, SCOTUSBLOG (Dec. 18, 2018, 4:15 PM), <https://www.scotusblog.com/2018/12/academic-highlight-epps-and-sitaraman-on-how-to-save-the-supreme-court/> [<https://perma.cc/6J7N-LUZV>] (“[B]y refusing to confirm Obama’s nominee for the [C]ourt, Congress effectively shrank the [C]ourt to eight during October Term 2016.”).

9. See *infra* Part II.A.

10. See *infra* Part II.A.

the rise, as the figures reported here represent an increase from the number of attempts in decades past.<sup>11</sup>

This symposium Article seeks to make a gentle intervention in the larger debate about court packing, and the consideration of courts more generally in these politically charged times. It begins in Part I by providing a brief overview of the court-packing debate—and particularly the recent suggestions that court packing be taken up once again. It then turns in Part II to offer a descriptive account of recent incidents of court packing and unpacking at the state level. As part of this discussion, this symposium Article examines potential commonalities among the states in which such measures have been attempted and then those in which they ultimately succeeded. Part III finally considers whether there are lessons to be drawn for those interested in shifting—or keeping static—the size of the U.S. Supreme Court, including members of the Court itself.

## I. THE DEBATE OVER COURT PACKING AND UNPACKING

The starting point for discussions over court packing<sup>12</sup> is almost invariably President Franklin D. Roosevelt's ill-fated attempt to increase the size of the Supreme Court in 1937. Feeling both constrained by a Court that was declaring many of his New Deal programs unconstitutional<sup>13</sup> and emboldened by his recent electoral victory—a “landslide”<sup>14</sup>—FDR proposed a bill to add one Justice to

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11. See William E. Raftery, *Up, Down, All Around*, 100 JUDICATURE 6, 6 (2016) (“The last decade has seen a dramatic uptick in legislative efforts to change the composition of state courts of last resort. In the last two years in particular, several states have attempted to increase or avert a decrease in the number of justices that sit on these courts.”).

12. There are at least a few, different ways that one could define the term “court packing.” Within this Article, I generally use the term to refer to changing the size of a court in order to affect its ideological composition generally. This is consistent with the definition put forward by others. See, e.g., Braver, *supra* note 1, at 3. That said, I recognize that one could use it to mean changing the size of a court to achieve a desired outcome in a particular area of law, to achieve political gains external to the courts, or even some combination of the three.

13. See Grove, *supra* note 2, at 508 n.242 (citing, among others, *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 618 (1936) (holding a New York minimum wage law for women unconstitutional); *Carter v. Carter Coal Co.*, 298 U.S. 238, 317 (1936) (holding that the Bituminous Coal Conservation Act of 1935 exceeded congressional powers under the Commerce Clause); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542-51 (1935) (striking down provisions of the National Industrial Recovery Act)).

14. FED. JUDICIAL CTR., *FDR's 'Court-Packing' Plan*, <https://www.fjc.gov/history/timeline/fdrs-court-packing-plan> [<https://perma.cc/2RRL-W3D6>]; William E. Leuchtenburg,

the Court for each one over the age of seventy who did not retire within six months (up to fifteen Justices total).<sup>15</sup> As history is told, the Justices took notice and began upholding various programs and regulations of the like they had previously declared unconstitutional—the so-called “switch in time that saved ... nine.”<sup>16</sup> FDR’s plan to expand the Court “went down to defeat,”<sup>17</sup> and was cast as a “political disaster.”<sup>18</sup>

Given the notoriety of Roosevelt’s plan, one could be forgiven for skimming over the fact that the Court has not always been composed of nine Justices. Indeed, as others have well documented, Congress repeatedly altered the size of the Supreme Court in the 1800s—and did so, at least in part, “for partisan reasons.”<sup>19</sup>

The Supreme Court was initially set at six Justices by the Judiciary Act of 1789.<sup>20</sup> That figure changed in 1801, when the outgoing Federalist Congress passed the infamous Judiciary Act of that year (also known as the “Midnight Judges Act”<sup>21</sup>), which reduced the Court to five Justices by attrition<sup>22</sup> (an apparent attempt to rob the incoming president, Thomas Jefferson, of making the next appointment).<sup>23</sup> 1802 saw the formal restoration of the sixth seat,

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*The Origins of Franklin D. Roosevelt’s “Court-Packing” Plan*, 1966 SUP. CT. REV. 347, 380.

15. See PRESIDENT OF THE UNITED STATES, RECOMMENDATION TO REORGANIZE JUDICIAL BRANCH, H.R. Doc. No. 75-142, at 9-10 (1937).

16. See BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* 232 (2009). Whether the “switch” and, in particular, Justice Owen Roberts’s vote in conference were brought about by the announcement of the court-packing plan or if the Court’s decisions in the spring of 1937 only helped to deflect any support in Congress for the plan is a matter of scholarly debate. See, e.g., Daniel E. Ho & Kevin M. Quinn, *Did A Switch in Time Save Nine?* 2 J. LEGAL ANALYSIS 69, 71 (2010) (noting how scholars have “battled for decades” over the role and motivation of Justice Roberts, and citing to works within the academic debate).

17. William E. Leuchtenburg, *FDR’s Court-Packing Plan: A Second Life, a Second Death*, 1985 DUKE L.J. 673, 673.

18. Laura Kalman, *Law, Politics, and the New Deal(s)*, 108 YALE L.J. 2165, 2167 (1999); see also Richard H. Pildes, *Is the Supreme Court a “Majoritarian” Institution?*, 2010 SUP. CT. REV. 103, 131 (describing how FDR’s court-packing plan was in “dire shape politically” even before the Justices changed their stance and noting how “[t]wo-thirds of the newspapers that had endorsed FDR came out immediately and vociferously against the plan” on the grounds that “FDR was seeking ‘dictatorial powers’”).

19. Grove, *supra* note 2, at 507; see also Braver, *supra* note 1, at 25-39.

20. Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73.

21. See Kathryn Turner, *The Midnight Judges*, 109 U. PA. L. REV. 494, 494 (1961).

22. See Act of Feb. 13, 1801, ch. 4, § 3, 2 Stat. 89, 89.

23. Bradley & Siegel, *supra* note 2, at 271.

courtesy of the Repeal Act of that year.<sup>24</sup> The Court's size steadily increased over the next half century—first rising to seven Justices in 1807,<sup>25</sup> and then to nine Justices in 1837.<sup>26</sup> Congress expanded the Supreme Court to ten in 1863<sup>27</sup>—a move understood to allow President Abraham Lincoln to shift the Court favorably toward the Republican agenda at the time.<sup>28</sup> Following President Lincoln's assassination and Andrew Johnson's assumption of the office, Congress, in 1866, “unpacked” the Court—reducing the number of seats to seven.<sup>29</sup> Three years later, and with a new Republican President, Ulysses S. Grant, in office, the Republican Congress increased the size of the Court to nine Justices.<sup>30</sup> Notwithstanding FDR's attempts to have it be otherwise, the Court has held constant at nine seats ever since, for 150 years.

Despite a repeated pattern of expansion and contraction in the Court's first hundred years, many have argued in this century that the Court can no longer be altered for political gain.<sup>31</sup> This turn-about can be largely traced back to FDR's failed attempt to pack the Court and its aftermath. As Tara Grove has persuasively written, government officials—Democrat and Republican—“increasingly treated Roosevelt's 1937 Court-packing plan as a negative precedent” in the decades that followed, which in turn led to it being

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24. See Act of Mar. 8, 1802, ch. 8, §§ 1, 3, 2 Stat. 132, 132. As there was never a vacancy, the Court did not actually contract during this time. See *Justices 1789 to Present*, SUP. CT. U.S., [https://www.supremecourt.gov/about/members\\_text.aspx](https://www.supremecourt.gov/about/members_text.aspx) [<https://perma.cc/CE3S-FJTZ>].

25. See Seventh Circuit Act of 1807, ch. 16, § 5, 2 Stat. 420, 421.

26. See Eighth & Ninth Circuits Act of 1837, ch. 34, § 1, 5 Stat. 176, 176.

27. See Act of Mar. 3, 1863, ch. 100, § 1, 12 Stat. 794, 794.

28. See Grove, *supra* note 2, at 507.

29. See Judiciary Act of 1866, ch. 210, § 1, 14 Stat. 209, 209; see also Ian Bartrum, Kathryn Nyman & Peter Otto, *Justice as Fair Division*, 45 PEPP. L. REV. 531, 535 (2018) (“In 1866, Congress reduced the number to seven to prevent President Andrew Johnson from appointing any new members.”).

30. See Circuit Judges Act of 1869, ch. 22, § 1, 16 Stat. 44, 44.

31. See, e.g., Ronald J. Krotoszynski, Jr., *The Unitary Executive and the Plural Judiciary: On the Potential Virtues of Decentralized Judicial Power*, 89 NOTRE DAME L. REV. 1021, 1063-64 (2014) (“Now ... we have a constitutional custom, or constitutional common law, under which court packing is essentially considered a wholly illegitimate means of seeking to alter existing Supreme Court doctrine.” (footnote omitted)); David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 15 n.50 (2014) (suggesting that “it may be unthinkable today that Congress would” pack the Supreme Court, while noting that other scholars have emphasized that it is technically a legally available option).



understood as “off the table” in more recent times.<sup>32</sup> In other words, FDR’s court-packing proposal became viewed more and more as something he should not have put forward, making any subsequent attempt at court packing less and less likely.

And yet, as noted at the outset, there is something of a push-pull relationship between the positive and the normative when it comes to the court-packing debate. Once such reforms became taboo, they in turn became precisely the sort of thing one could accuse the political opposition of attempting, thereby justifying any future attempt to “pack the courts” in response.<sup>33</sup> Indeed, as Grove catalogues, Republicans charged Democrats with court packing in 2013, when the Senate Democratic majority altered the traditional filibuster rule, thereby enabling lower federal court judge confirmation by majority vote—and specifically enabling President Obama to fill three vacancies on the D.C. Circuit.<sup>34</sup> Although the Democrats disputed the claims of court packing at the time—President Obama emphasized that “[w]e’re not adding seats here.... I didn’t just wake up one day and say, let’s add three seats to the [D.C. Circuit]”<sup>35</sup>—the Republicans continued to cast the episode in those terms.<sup>36</sup> Then, when the Republicans blocked the nomination of Judge Merrick Garland to the Supreme Court upon the death of Justice Scalia, Senator Lindsey Graham brought forward the purported justification: “I did tell (then-Senate Majority Leader) Harry Reid and the [P]resident that the consequence of changing the rules in the Senate to pack the [C]ourt will come back to haunt them.”<sup>37</sup>

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32. See Grove, *supra* note 2, at 506.

33. See *id.* at 515-16.

34. See *id.*

35. Remarks on the Nomination of Patricia A. Millett, Cornelia T.L. “Nina” Pillard, and Robert L. Wilkins to Be Judges on the United States Court of Appeals for the District of Columbia Circuit, 1 PUB. PAPERS 524, 526 (June 4, 2013); see also, e.g., 159 CONG. REC. 16,591 (2013) (statement of Sen. Leahy) (“First [Senate Republicans] asserted that the President is somehow packing the court by nominating judges to vacant seats. No student of history can honestly say that nominating candidates to existing vacancies is court-packing.”).

36. See, e.g., 159 CONG. REC. 16,594 (2013) (statement of Sen. Cornyn) (“I think the evidence is overwhelming that what the President is trying to do by nominating these unneeded judges to [the D.C. Circuit], the second most powerful court in the Nation, is he is trying to pack the court in order to affect the outcomes.”).

37. See *GOP Insists Obama Leave Supreme Court Seat Open*, DENVER POST (Feb. 14, 2016, 2:40 PM), <https://www.denverpost.com/2016/02/14/gop-insists-obama-leave-supreme-court->

This brings us to the present moment in the court-packing debate. Although those on the political right might argue that the failed Garland nomination was the “tit” for the Democrats’ earlier filibuster “tat,”<sup>38</sup> many of those on the political left see the matter differently. Specifically, there are those who argue that by holding open Justice Scalia’s seat, the Republicans shrank or “unpacked” the Court by one Justice.<sup>39</sup> And so, the argument goes, because court packing has been done, it can be done again<sup>40</sup>—and now should be done in response.

One cannot know if we have reached an inflection point in the court-packing debate, but it does seem safe to say that there is more momentum in favor of such reform than there has been of late. As Joshua Braver has argued, “At no time since the New Deal has the possibility of court-packing been under such serious discussion.”<sup>41</sup> This shift is largely due to moves by scholars and politicians. In the words of Amanda Frost, “scholars have dusted off the idea of ‘packing’ the Supreme Court.”<sup>42</sup> Here, Frost points to Michael Klarman’s recent arguments<sup>43</sup> and further gestures at new proposals by Daniel Epps and Ganesh Sitaraman, one of which would expand the Court to fifteen Justices (though Epps and Sitaraman propose doing so in an attempt to move the Court above the political fray).<sup>44</sup> As noted earlier, several of the current candidates for the Democratic presidential nomination have declared themselves open to increasing the membership of the Court,<sup>45</sup> with one embracing Epps and

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seat-open/ [https://perma.cc/6REN-PYQL]; see also Grove, *supra* note 2, at 516.

38. See, e.g., 163 CONG. REC. S2185 (daily ed. Apr. 4, 2017) (statement of Sen. Cornyn) (beginning by describing the events of 2013, when “President Obama really wanted to see on the D.C. Circuit Court of Appeals ... more of his Democratic nominees.... So ... Senator Harry Reid changed the cloture rules ... to pack the D.C. Circuit Court of Appeals .... So in a way, we are coming full circle.”).

39. See *supra* note 8.

40. For an important discussion of the malleability and indeterminacy of historical “precedents” more generally, see Josh Chafetz, *Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past*, 131 HARV. L. REV. 96 (2017) (focusing on arguments surrounding judicial appointments).

41. Braver, *supra* note 1, at 8.

42. Frost, *supra* note 8.

43. *Id.* (citing Klarman, *supra* note 6).

44. See *id.* (citing Epps & Sitaraman, *supra* note 6).

45. See Levy, *supra* note 7.

Sitaraman’s plan.<sup>46</sup> And indeed recent poll numbers show that there may be movement in public opinion on the issue. A fall 2019 survey from Marquette Law School showed that respondents opposed expanding the Court by a 57 percent to 43 percent margin, with registered Democrats evenly split on the proposition.<sup>47</sup> As Tara Grove noted, even this level of support represents a “sea change” from times past.<sup>48</sup>

In the midst of what appears to be a key moment in the court-packing debate—and indeed, in larger discussions about the role and treatment of courts in politically charged times—it is critical to consider another set of data points. That is, while we argue about whether court packing has occurred recently in the federal courts, it is worth considering that it has unquestionably occurred recently in the state courts. Part II, then, provides a descriptive analysis of attempts (and successes) to alter the size of state supreme courts to present a thicker, and more nuanced, account of court packing generally.

## II. COURT PACKING AND UNPACKING AT THE STATE LEVEL

Absent from the larger debate about court packing has been a discussion of what is occurring in the states. One reason for this absence may be that a majority of state supreme court justices are not appointed but elected,<sup>49</sup> making those courts more political by

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46. Josh Lederman, *Inside Pete Buttigieg’s Plan to Overhaul the Supreme Court*, NBC NEWS (June 3, 2019, 6:03 AM), <https://www.nbcnews.com/politics/2020-election/inside-pete-buttigieg-s-plan-overhaul-supreme-court-n1012491> [https://perma.cc/LB64-59W8].

47. See Charles H. Franklin, *Public Views of the Supreme Court*, MARQ. U. L. SCH. (October 2019), <https://law.marquette.edu/poll/wp-content/uploads/2019/10/MULawPollSupremeCourtReportOct2019.pdf> [https://perma.cc/2SKZ-VYTG].

48. Robert Barnes, *Polls Show Trust in Supreme Court, but There Is Growing Interest in Fixed Terms and Other Changes*, WASH. POST (Oct. 24, 2019, 1:52 PM), [https://www.washingtonpost.com/politics/courts\\_law/polls-show-trust-in-supreme-court-but-there-is-growing-interest-in-fixed-terms-and-other-changes/2019/10/24/dcbbcba4-f6fc-11ed-8cf0-4cc99f74d127\\_story.html](https://www.washingtonpost.com/politics/courts_law/polls-show-trust-in-supreme-court-but-there-is-growing-interest-in-fixed-terms-and-other-changes/2019/10/24/dcbbcba4-f6fc-11ed-8cf0-4cc99f74d127_story.html) [https://perma.cc/AC95-A9LN].

49. According to a recent report by the Brennan Center for Justice, states select their supreme court justices in the following ways: fifteen through nonpartisan elections; fourteen first through gubernatorial appointment from a merit selection commission and subsequently through retention elections; ten through gubernatorial appointment; six through partisan elections; four through a hybrid of appointive and elective selection methods; and two through legislative appointment. See *Judicial Selection: An Interactive Map*, BRENNAN CTR. FOR JUSTICE, <http://judicialselectionmap.brennancenter.org/?court=Supreme> [https://perma.cc/

nature and potentially an inapposite point of comparison—an argument I consider more below.<sup>50</sup> Another reason may be that state courts tend to be understudied in the academic literature more generally.<sup>51</sup> And this phenomenon, in turn, may be at least partially explained by the fact that, relative to the federal courts, they are challenging subjects of study.

To consider what changes have been made to the size of the state supreme courts over the past decade, one needs to sort through the activity of fifty different legislative bodies. For the purposes of this study, I began my inquiry with the invaluable database of state legislation affecting the courts, *Gavel to Gavel*, which is run by the National Center for State Courts.<sup>52</sup> After consulting with the National Center,<sup>53</sup> I focused my search on those changes that have been categorized as “structural” (as opposed to related to jurisdiction, selection, budget, and the like).<sup>54</sup> Within this category, I searched for any legislation with the words “expand,” “increase,” “reduce,” and “decrease” so as to capture as many attempts to “pack” and “unpack” the courts as possible. I then further narrowed the search by focusing on legislation that only affected the state’s highest court. Finally, I ran additional searches of past *Gavel to Gavel* newsletters, which note legislative attempts to change supreme

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QWR2-XWVP]. For a thoughtful discussion of the history of different selection procedures, see F. Andrew Hanssen, *Learning About Judicial Independence: Institutional Change in the State Courts*, 33 J. LEGAL STUD. 431 (2004).

50. See *infra* Part III.

51. See, e.g., Charles Gardner Geyh, *Can the Rule of Law Survive Judicial Politics?*, 97 CORNELL L. REV. 191, 214 (2012) (noting additional areas for future research, including the “understudied state courts”); see also Tracey E. George & Albert H. Yoon, AM. CONSTITUTION SOC’Y, *The Gavel Gap: Who Sits in Judgment on State Courts?* 2 (2016), <https://gavelgap.org/pdf/gavel-gap-report.pdf> [<https://perma.cc/CP4X-XJYK>] (“For most individuals and organizations, state courts are the ‘law’ for all effective purposes. State courts are America’s courts. But, we know surprisingly little about who serves on state courts—i.e., state judges—despite their central and powerful role.”).

52. See *About*, NAT’L CTR. FOR STATE COURTS: GAVEL TO GAVEL, <http://gaveltogavel.us/about/> [<https://perma.cc/6ZNL-Y563>].

53. Specifically, I corresponded with the National Center’s Senior Knowledge and Information Services Analyst, who maintains the database. See, e.g., Email from William Raftery, Senior Knowledge and Information Services Analyst, Nat’l Ctr. for State Courts, to author (July 15, 2019, 16:23 EDT) (on file with author). Mr. Raftery maintains the *Gavel to Gavel* database.

54. See Database, NAT’L CTR. FOR ST. CTS.: GAVEL TO GAVEL, <http://gaveltogavel.us/database/> [<https://perma.cc/8CWN-L65B>] (click the “Type” dropdown to view the various categories of legislation).

court composition.<sup>55</sup> The cumulative search yielded over twenty results in eleven different states over ten years, described in detail below.<sup>56</sup>

Before turning to the descriptive analysis, a few caveats are in order. First, as the preceding discussion makes plain, this Article's focus is only on attempts to alter the ideological composition of state supreme courts by adding seats to or subtracting seats from the bench. I have not included the myriad of other efforts to affect the composition of the courts through other means—for example, by modifying the selection process for justices.<sup>57</sup> I will simply note here that those efforts also deserve our attention and hope that they will be taken up in future scholarship.

Second, and also noted above, the search was restricted to the highest court in each state—the state supreme court or its equivalent.<sup>58</sup> This was done to provide the most pertinent examples for the debate over federal court packing and unpacking. Accordingly, proposed changes to the size of other courts—for example, to reduce the Oklahoma Workers Compensation Court from ten to seven judges in 2009<sup>59</sup>—are not included. This further means that even proposals to alter the size of intermediate appellate courts—for example, to reduce the size of the North Carolina Court of Appeals,<sup>60</sup> which was cast as politically motivated<sup>61</sup>—are not included. If

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55. See, e.g., William Raftery, *Arizona: New Plan to Stack Supreme Court Introduced and Clears Committee in Hours; Over a Dozen Efforts to Change Supreme Court Composition in Last Decade*, NAT'L CTR. FOR ST. CTS.: GAVEL TO GAVEL (Feb. 12, 2015), <http://gavel.togavel.us/2015/02/12/arizona-new-plan-to-stack-supreme-court-introduced-and-clears-committee-in-hours-over-a-dozen-efforts-to-change-supreme-court-composition-in-last-decade/> [<https://perma.cc/4XCL-5NKY>].

56. See *infra* Part II.A.

57. For example, Iowa recently changed its process for selecting its Supreme Court justices, with charges by Democrats that Republicans enacted the change for political gain. See Stephen Gruber-Miller, *Kim Reynolds Signs Bill Giving Governors More Power Over Iowa Supreme Court Selection*, DES MOINES REG. (May 8, 2019, 7:43 PM), <https://www.desmoinesregister.com/story/news/politics/2019/05/08/kim-reynolds-signs-changes-giving-governors-more-power-over-iowa-supreme-appeals-court-selection/1142445001/> [<https://perma.cc/Z2U7-LMXP>].

58. Notably the New York Court of Appeals is that state's highest appellate court. See *Court of Appeals*, ST. N.Y., <https://www.nycourts.gov/ctapps/> [<https://perma.cc/JAJ9-4TTR>].

59. See S.B. 609, 52d Leg., 1st Reg. Sess. (Okla. 2009).

60. See H.B. 239, 2017 Gen. Assemb., Reg. Sess. (N.C. 2017).

61. See, e.g., Trip Gabriel, *In North Carolina, Republicans Stung by Court Rulings Aim to Change the Judges*, N.Y. TIMES (Oct. 18, 2017), <https://www.nytimes.com/2017/10/18/>

anything, the decision to focus solely on the courts of last resort will lead to an underestimate of the extent to which legislatures are altering the size of courts for political gain.

Third, the data below might be underinclusive in additional ways. This is due to the sheer number of states and the legislative activity generated by them. Indeed, according to the National Center for State Court's Senior Knowledge and Information Services Analyst, the Center has roughly 10,000 bills in its database and tracks an approximate 600 additional bills each year.<sup>62</sup> I relied upon what appeared as the most common phrases in bills to alter the size of a state's supreme court when searching for the relevant legislation and conducted further searches on the *Gavel to Gavel* site, but it is possible that some proposals were missed. For example, a legislative attempt to increase the overall number of justices on the Florida Supreme Court in 2011 by restructuring the court into two larger courts (one civil and one criminal)<sup>63</sup> was not detected in the initial database search, as the bill's description focused on the restructuring.<sup>64</sup> A subsequent review within *Gavel to Gavel* identified the bill,<sup>65</sup> but again, I cannot be certain that others were not overlooked. If anything, as with the point directly above, this has the potential to understate the number of cases, though I readily acknowledge that it also has the potential to limit the observations that can be made in Part II.B.<sup>66</sup>

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us/north-carolina-republicans-gerrymander-judges-.html [https://perma.cc/C2PB-42L6]. By way of full disclosure, the Author filed an amicus brief in the litigation about the General Assembly's attempt to reduce the size of the North Carolina Court of Appeals in support of plaintiff-appellant Governor Roy A. Cooper, III. See Brief of Professor Marin K. Levy as Amicus Curiae in *Cooper v. Berger*, 824 S.E. 2d 403 (N.C. 2019) (No. 315PA18).

62. See Email from William Raftery, Senior Knowledge and Information Services Analyst, Nat'l Ctr. for State Courts, to author (Aug. 14, 2019, 9:34 AM) (on file with author).

63. See H.B. 7199, 2011 Leg., 113th Reg. Sess. (Fla. 2011).

64. See Database: Description of Florida H.B. 7199, NAT'L CTR. FOR ST. CTS.: GAVEL TO GAVEL, <http://gaveltogavel.us/database/> [https://perma.cc/8CWN-L65B] (select "Florida" in the "State" drop-down box; then select "Structure Changes" in the "Type" drop-down box; then select "2011" in the "Year" drop-down box; then click "Search Bills") ("[H.B. 7199] [s]tatutorily implements HJR 7111 [by] splitting supreme court into civil and criminal divisions.").

65. See William Raftery, *Florida: So When Is HJR 7111 Appearing on the Ballot? And Why Does It Matter?*, NAT'L CTR. FOR ST. CTS.: GAVEL TO GAVEL (June 20, 2011), <http://gaveltogavel.us/2011/06/20/florida-so-when-is-hjr-7111-appearing-on-the-ballot-and-why-does-it-matter-2/> [https://perma.cc/2ZNS-F4T9].

66. See *infra* Part II.B.

Finally, the findings below are examples of attempts (and successes) by state legislatures to alter the size of their courts. Whether those attempts were motivated purely by politics is a question that cannot be answered here. That said, one can reasonably conclude that there is at least a colorable claim of partisan motivation to affect the high court's ideological composition in nearly every instance, which is documented below. As such, the legislative activity discussed here appears to provide useful data points for the larger court-packing debate.

*A. States that Have Changed and Attempted to Change the Size of Their Highest Courts*

In the past decade alone, there have been numerous attempts in state legislatures to alter the size of state high courts. Several of those attempts have come in the form of “packing”—meaning an intent to add seats to an existing court. But several more have come in the form of “unpacking”—meaning an intent to eliminate seats (often upon the next retirement of a justice or set of justices.)<sup>67</sup> This Section catalogues both types of proposals, beginning with court-packing attempts and successes, in alphabetical order of the states within each category. Success for the purposes of this Article is defined by whether the proposed bill ultimately passed into law. The Article will consider in Part III whether the legislation was “successful” in the sense that it yielded results consistent with what the legislature and/or governor appeared to have intended.

*1. Court-Packing Attempts and Successes*

The first attempt to expand the size of a high court considered here comes from Arizona. That attempt ultimately succeeded, but only after a few false starts (and several years).<sup>68</sup> Specifically, in 2011, Arizona State Senator Ron Gould, a Republican,<sup>69</sup> introduced

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67. For example, consider a proposal to reduce the size of the Alabama Supreme Court, see *infra* note 163 and accompanying text. Of course, this is not always the way “unpackings” are effectuated. Consider a proposal to reduce the size of the Washington Supreme Court by requiring the justices to draw lots, see *infra* note 158 and accompanying text.

68. See *infra* note 81 and accompanying text.

69. See Arizona State Legislature, Senate Member, Ron Gould, <https://www.azleg.gov/>

Arizona Senate Bill 1481, which sought to amend Section 12-101 of the Arizona Revised Statutes to increase the size of the Arizona Supreme Court from five to seven justices.<sup>70</sup> The Senate Judiciary Committee held a hearing on the bill, at which then-Chief Justice Rebecca White Berch appeared to speak against it.<sup>71</sup> In a remarkable interbranch exchange, the Committee called forward the Chief Justice, mistakenly referring to her as “Rebecca Berch ... from the Arizona Judicial Council.”<sup>72</sup> The Chief Justice then began her testimony:

Actually I'm the Chief Justice of the Supreme Court ... and in that capacity, I was surprised by the bill and surprised to be surprised by the bill. Here's a bill that proposes to change my court and no one asked me about it. Had I been asked, here's what I might have said. We're one of the entities of government ... that's actually current in its workload.... And this particular bill ... we've estimated the cost of this at about a million dollars per year and ongoing.... So given this economic climate, it's just hard to justify this bill at this time.<sup>73</sup>

Moments later, the Committee took a vote.<sup>74</sup> The bill's main sponsor sought permission to explain on the record why he had put it forward, and then said, “I just thought that I might give the opportunity for two additional attorneys to sit on the Supreme Court.”<sup>75</sup> Nevertheless, the Committee voted Senate Bill 1481 down.<sup>76</sup>

Four years later, however, members of the legislature again attempted to expand the size of the Arizona Supreme Court. In 2015, House Bill 2076 was introduced, which originally spoke to the

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senate-member/?legislature=48&legislator=1038 [https://perma.cc/8CVV-G9R9].

70. See S.B. 1481, 50th Leg., 1st Reg. Sess. (Ariz. 2011), <https://apps.azleg.gov/BillStatus/GetDocumentPdf/206385> [https://perma.cc/3CBE-RMJ5]. Additionally, the bill replaced the term “judges” with “justices.” *Id.*

71. *Hearing on S.B. 1481 Before the S. Comm. on the Judiciary*, 50th Leg., 1st Reg. Sess. 1:06:54 (Ariz. 2011), [http://azleg.granicus.com/MediaPlayer.php?view\\_id=13&clip\\_id=8353](http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=8353) [https://perma.cc/5QA2-WHNC].

72. *Id.*

73. *Id.* at 1:07:11-1:08:18.

74. *Id.* at 1:09:00.

75. *Id.* at 1:09:56; see also Raftery, *supra* note 55.

76. *Hearing on S.B. 1481 Before the S. Comm. on the Judiciary*, *supra* note 71, at 1:10:20-1:10:26.



representation of corporations in court.<sup>77</sup> That bill's contents were then struck completely, and new language mirroring Arizona Senate Bill 1481 was added instead, seeking to expand the Supreme Court from five to seven justices.<sup>78</sup> The new Arizona House Bill 2076 was voted out of committee, but ultimately died on the floor of the house.<sup>79</sup>

The same amendment was then proposed in January 2016 in the form of Arizona House Bill 2537.<sup>80</sup> This time, the Republican-controlled legislature approved the measure.<sup>81</sup> Just as his predecessor did, the new Chief Justice, Scott Bales, objected.<sup>82</sup> Specifically, the Chief Justice wrote to the governor urging him to veto the bill: "Additional justices are not required by the Court's caseload, and an expansion of the Court ... is not warranted when other court-related needs are underfunded."<sup>83</sup> Several news outlets at the time called the Republican-sponsored bill an attempt to "[b]ring [b]ack [c]ourt-[p]acking," noting that the Republican governor, Doug Ducey, would himself select the new justices from a list created by the Arizona Commission on Appellate Court Appointments.<sup>84</sup> Days later, the

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77. H.B. 2076, 52d Leg., 1st Reg. Sess. (Ariz. 2015), <https://apps.azleg.gov/BillStatus/GetDocumentPdf/404428> [<https://perma.cc/CWQ3-AFF2>].

78. See Raftery, *supra* note 55.

79. See Bill Raftery, *Arizona: For Third Time in 5 Years, Legislature Attempts to Expand Supreme Court from 5 to 7*, NAT'L CTR. FOR ST. CTS.: GAVEL TO GAVEL (Feb. 1, 2016), <http://gaveltogavel.us/2016/02/01/arizona-for-third-time-in-5-years-legislature-attempts-to-expand-supreme-court-from-5-to-7/> [<https://perma.cc/9UK2-JVA6>].

80. See H.B. 2537, 52d Leg., 2d Reg. Sess. (Ariz. 2016), <https://apps.azleg.gov/BillStatus/GetDocumentPdf/434697> [<https://perma.cc/N4KA-VJWC>].

81. See Bill History, H.B. 2537, 52d Leg., 2d Reg. Sess. (Ariz. 2016), <https://apps.azleg.gov/BillStatus/BillOverview/?BillNumber=hb2537&SessionID=115> [<https://perma.cc/AUF3-TYVX>].

82. Letter from Scott Bales, Chief Justice, Ariz. Supreme Court, to Doug Ducey, Governor, State of Ariz. (May 5, 2016), <https://drive.google.com/viewerng/viewer?url=http://archive.azcentral.com/persistent/icimages/politics/ScottBalesvetoletter05052016.pdf> [<https://perma.cc/XFS2-XQBQ>].

83. *Id.*

84. See Steve Benen, *Arizona Scheme Raises 'Court Packing' Questions*, MSNBC: MADDOWBLOG (May 13, 2016, 11:20 AM), <http://www.msnbc.com/rachel-maddow-show/arizona-scheme-raises-court-packing-questions> [<https://perma.cc/99Y5-88YZ>]; Russell Berman, *Arizona Republicans Try to Bring Back Court-Packing*, ATLANTIC (May 10, 2016), <https://www.theatlantic.com/politics/archive/2016/05/court-packing-enjoys-a-political-renaissance/481758/> [<https://perma.cc/9LX3-JJUP>]; Linda Valdez, *Ducey's Careful Timing on Court Packing Bill*, AZCENTRAL (May 18, 2016, 10:34 AM), <https://www.azcentral.com/story/opinion/op-ed/lindavaldez/2016/05/18/valdez-duceys-careful-timing-court-packing-bill/84544772/> [<https://perma.cc/A83L-ML4C>].

governor signed the bill into law, arguing that “[a]dding more voices will ensure that the courts can increase efficiency, hear more cases and issue more opinions.”<sup>85</sup> The two additional justices, Andrew Gould and John Lopez IV, took their seats in December 2016.<sup>86</sup>

A similar set of changes to the judiciary was enacted in Georgia. And as in Arizona, the attempts to expand the courts in Georgia took several years, and began with a few missteps. In late 2006, Leah Ward Sears, then-Chief Justice of the Georgia Supreme Court, told state lawmakers that “We are doing well. We are getting it done. We have the manpower we need.”<sup>87</sup> The Chief Justice’s comments appear to have been in response to proposals the legislature was considering at the time to expand the size of the Court from seven to nine justices.<sup>88</sup> What followed in the 2007-08 Regular Session was the introduction of Georgia Senate Resolution 370, which proposed amending the Georgia Constitution to ultimately increase the court from seven to thirteen justices.<sup>89</sup> Georgia Senate Resolution 370 ended up stalling and in February 2010, Georgia Senate Bill 429 was introduced “so as to increase the number of Justices of the Supreme Court to nine Justices” from seven, and “increase the number of judges of the Court of Appeals to 15 Judges” from 12.<sup>90</sup> This attempt had the virtue of not increasing the Supreme Court beyond the maximum set by the Georgia Constitution (thereby avoiding the need for a constitutional amendment, as

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85. Statement of Gov. Ducey on Signing House Bill 2537 (May 18, 2016), [https://az.governor.gov/sites/default/files/hb\\_2537\\_signing\\_letter.pdf](https://az.governor.gov/sites/default/files/hb_2537_signing_letter.pdf) [<https://perma.cc/RV48-JHV3>].

86. Howard Fischer, *Ducey Adds Two New Justices to Arizona Supreme Court*, ARIZ. DAILY STAR (Dec. 18, 2016), [https://tucson.com/news/local/govt-and-politics/ducey-adds-two-new-justices-to-arizona-supreme-court/article\\_6b65196d-fec3-5664-8930-3e6230082b1b.html](https://tucson.com/news/local/govt-and-politics/ducey-adds-two-new-justices-to-arizona-supreme-court/article_6b65196d-fec3-5664-8930-3e6230082b1b.html) [<https://perma.cc/TX7G-PB3A>].

87. Bill Raftery, *Over a Dozen Efforts to Alter Number of State Supreme Court Justices Almost All Related to “Packing” the Courts, in the Last Several Years*, NAT’L CTR. FOR ST. CTS.: GAVEL TO GAVEL (Feb. 5, 2013), <http://gaveltogavel.us/2013/02/05/over-a-dozen-efforts-to-alter-number-of-state-supreme-court-justices-almost-all-related-to-packing-the-courts-in-last-several-years/> [<https://perma.cc/XL79-3FMG>] (linking to Jeremy Redmon, *Chief Justice: Leave Court Alone, Sears Rebuffs Push to Add Seats, Make Elections Partisan*, ATLANTA J. CONST., Dec. 13, 2006, at A1).

88. *Id.*

89. See S.R. 370, 2007 Gen. Assemb., 2007-2008 Reg. Sess. (Ga. 2007), <http://www.legis.ga.gov/Legislation/en-US/display/20072008/SR/370> [<https://perma.cc/95U5-YNJ8>]; Raftery, *supra* note 55.

90. S.B. 429, 2010 Gen. Assemb., 2009-2010 Reg. Sess. (Ga. 2010), <http://www.legis.ga.gov/Legislation/en-US/display/20092010/SB/429.pdf> [<https://perma.cc/865N-UF8V>].

Georgia Senate Resolution 370 required).<sup>91</sup> Nevertheless, Georgia Senate Bill 429 died in committee.<sup>92</sup>

But just as in Arizona, lawmakers in Georgia persisted and ultimately succeeded in enlarging their state supreme court. Specifically, in 2016, the Republican-controlled Georgia General Assembly considered a sweeping reform bill, intended not only to expand the supreme court from seven to nine justices, but also to restructure the appellate jurisdiction and procedures for the high court and the court of appeals.<sup>93</sup> There was considerable speculation that the Republican governor was interested in expanding the court purely for political reasons; at the time, Georgia had four Democratic appointees and only three Republican ones.<sup>94</sup> And in Georgia, the governor has full autonomy in selecting justices.<sup>95</sup> Over accusations of court packing,<sup>96</sup> the General Assembly passed the bill in the spring of 2016, and the governor promptly signed it.<sup>97</sup> By the next calendar year, the governor had filled the two new seats, resulting in a “more conservative-leaning court[.]”<sup>98</sup>

Other states have similarly seen attempts to increase the number of seats on their highest courts. In Florida in 2007, the Florida Legislature briefly considered Florida Senate Bill 408, which sought to enlarge the Florida Supreme Court from seven to fifteen justices

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91. See *id.*; S.R. 370, *supra* note 89.

92. See Database Entry for SB 429, NAT'L CTR. FOR ST. CTS.: GAVEL TO GAVEL, <http://gaveltogavel.us/database/> [<https://perma.cc/3UFJ-GS5H>] (follow link; select “Georgia,” “All,” and “2010” in drop-down menus; click “Search Bills” and scroll down to find SB 429).

93. See H.B. 927, 2016 Gen. Assemb., 2015-2016 Reg. Sess. (Ga. 2016), <http://www.legis.ga.gov/legislation/en-US/Display/20152016/HB/927> [<https://perma.cc/P5UJ-KKX4>].

94. Jim Galloway, *Enlarging Georgia's Supreme Court Bench: A GOP Insurance Policy*, ATLANTA J.-CONST. (Oct. 7, 2015), <https://www.ajc.com/blog/politics/enlarging-georgia-supreme-court-bench-gop-insurance-policy/ISj29YwSROUY5Mi61DQ3AN/> [<https://perma.cc/A246-BLYS>].

95. See Bill Raftery, *Plans to Add 2 Justices to the Arizona and Georgia Supreme Courts Pass Committee Hurdles; Critics Call Them Court Packing Plans*, NAT'L CTR. FOR ST. CTS.: GAVEL TO GAVEL (Mar. 17, 2016), [http://gaveltogavel.us/2016/03/17/plans-add-2-justices-arizona-georgia-supreme-courts-pass-committee-hurdles-final-floor-votes-happen-soon/?doing\\_wp\\_cron=1565407782.0958790779113769531250](http://gaveltogavel.us/2016/03/17/plans-add-2-justices-arizona-georgia-supreme-courts-pass-committee-hurdles-final-floor-votes-happen-soon/?doing_wp_cron=1565407782.0958790779113769531250) [<https://perma.cc/PV9F-T6B4>].

96. See, e.g., *id.*

97. See *2015-2016 Regular Session - HB 927 "Appellate Jurisdiction Reform Act of 2016"*, GA. GEN. ASSEMBLY, <http://www.legis.ga.gov/legislation/en-US/Display/20152016/HB/927> [<https://perma.cc/ZBW3-2GPS>].

98. Bill Rankin, *A New Era for Georgia's Highest Court*, ATLANTA J.-CONST. (Jan. 9, 2017), <https://www.ajc.com/news/local/new-era-for-georgia-highest-court/U8aXCg22yOsshBPrGJtfCO/> [<https://perma.cc/JJ43-BULX>].

via an amendment to the state constitution.<sup>99</sup> Unlike some of the other proposed bills, which were couched in terms of increasing efficiency,<sup>100</sup> Florida Senate Bill 408 stated explicitly that it was in response to a prior ruling of the state supreme court.<sup>101</sup> Specifically, the opening sentences of the bill read in part: “the Legislature ... finds that the majority decision by the Florida Supreme Court in *Bush v. Holmes* ... was specious in its posture regarding the doctrine of judicial restraint and was the equivalent of judicial activism in policymaking.”<sup>102</sup> (The court’s decision in *Holmes* found the Florida school voucher system unconstitutional, by a vote of five to two.)<sup>103</sup> The proposed legislation was decried as an attempt to pack the court with “eight new Republican-friendly appointments”—and called a “ham-fisted and unsophisticated” one at that.<sup>104</sup> Two days after being referred to the Senate Judiciary Committee, the joint resolution was withdrawn.<sup>105</sup> In an apparent attempt to distance himself from the bill, its author, Republican State Senator Bill Posey, told the media, “a law student came up with the idea and asked me to have it drafted so he could see how it would look, but it was never supposed to be introduced.”<sup>106</sup>

But Florida Senate Bill 408 is not the Florida Legislature’s only recent attempt to add justices to the Florida Supreme Court—or Courts.<sup>107</sup> Four years later, Florida House Joint Resolution 7111, introduced by four Republican members of the house, proposed to revise the state constitution to increase the number of supreme court justices again, this time by splitting the court into two.<sup>108</sup> The

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99. S.B. 408, 2007 S., Reg. Sess. (Fla. 2007), <https://www.flsenate.gov/Session/Bill/2007/408/BillText/Filed/PDF> [<https://perma.cc/353K-TLAE>].

100. See *supra* note 85 and accompanying text.

101. See S.B. 408, *supra* note 99.

102. *Id.*

103. See *Bush v. Holmes*, 919 So. 2d 392, 412-13 (Fla. 2006); see also Recent Case, *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006), 120 HARV. L. REV. 1097, 1097-99 (2007).

104. Frank Cerabino, *Another Year, Another Try to Oust Supreme Court Justices*, PALM BEACH POST (Oct. 7, 2014, 10:23 PM), <https://www.palmbeachpost.com/article/20141007/NEWS/812054535> [<https://perma.cc/8M5Q-EYNP>].

105. See *Bill History: SB 408: Fla. Supreme Court / Justices Increase*, FLA. SENATE, <https://www.flsenate.gov/Session/Bill/2007/408/?Tab=BillHistory> [<https://perma.cc/D53Z-8XVN>].

106. Bill Cotterell, *Sorry Charlie: No New Justices to Appoint*, TALLAHASSEE DEMOCRAT, Jan. 8, 2007, at B1.

107. See, e.g., H.J. Res. 7111, 22d Leg., Reg. Sess. (Fla. 2011), <https://www.flsenate.gov/Session/Bill/2011/7111/BillText/Filed/PDF> [<https://perma.cc/89YF-JT92>].

108. *Id.*

two new supreme courts, one civil and one criminal, would require an additional three justices added to the bench.<sup>109</sup> But the rub was that the resolution called for the current supreme court to “rank all of the justices then in office by seniority in service,” with the three most senior justices<sup>110</sup>—who happened to be Democratic appointees<sup>111</sup>—to be posted to the criminal supreme court.<sup>112</sup> An article in a local Florida newspaper put it thus: “The maneuver would move the three most liberal justices ... into the criminal division, leaving the Republican-friendly justices as the ultimate arbiter of all the borderline constitutional civil matters that [the Republican governor] and the Republican-state legislature had in mind.”<sup>113</sup> That plan passed in the house, though ultimately failed in the Florida senate.<sup>114</sup>

As in Florida, lawmakers in Iowa were arguably motivated to increase the size of the state supreme court in the wake of a controversial ruling. Following the Iowa Supreme Court’s 2009 decision in *Varnum v. Brien* to strike down a state law limiting marriage to opposite-sex couples,<sup>115</sup> the Iowa Legislature considered amending the Iowa Constitution so as to increase the size of the court to nine.<sup>116</sup> Doing so would provide the governor the opportunity to select the additional justices from a list provided by a nominating commission.<sup>117</sup> That bill, sponsored by Republican

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109. *Id.*

110. *Id.*

111. See Raftery, *supra* note 55.

112. H.J. Res. 7111, *supra* note 107.

113. Cerabino, *supra* note 104.

114. See Fla. H.J. Res. 7111, Bill History, FLA. SENATE, <https://www.flsenate.gov/Session/Bill/2011/7111/?Tab=BillHistory> [<https://perma.cc/T6QT-YCH6>]; see also Raftery, *supra* note 11, at 7 (describing how the joint resolution cleared the house but ultimately died in the senate). It is worth observing that the civil court need not be the more “important” one. Indeed, had Florida had a two-court system earlier, it is quite possible that the criminal court would have decided a larger share of controversial cases between the 1960s and 1980s, in the realm of criminal procedure. This is simply to note the degree of historical contingency in some of these arrangements. With thanks to Josh Chafetz for this point.

115. 763 N.W.2d 862, 872 (Iowa 2009).

116. H.J. Res. 2012, 83d Gen. Assemb. (Iowa 2010), <https://www.legis.iowa.gov/legislation/BillBook?ga=83&ba=HJR%202012> [<https://perma.cc/X79W-YSS8>]; see also Raftery, *supra* note 55 (“After all 7 justices ruled in favor of same-sex marriage in the state, HJR 2012 would have expanded the court to 9.”).

117. *Judicial Selection and Retention*, IOWA JUD. BRANCH, <https://www.iowacourts.gov/for-the-public/judicial-selection-and-retention> [<https://perma.cc/7SAP-2V42>].

Representative Rod Roberts, was referred to the Judiciary Committee and nothing more came of it.<sup>118</sup> This may be because Democrats controlled both houses and the governorship at the time.<sup>119</sup> Though it is also worth noting that three of the “offending” justices were voted out of office the following November following a substantial recall campaign, thereby creating three new nominations for the newly elected Republican governor.<sup>120</sup>

The South Carolina Legislature has also considered bills to amend the state constitution to increase the number of justices on the bench. But the story is somewhat more complicated in the Palmetto State. According to *Gavel to Gavel*, Democrats introduced legislation to amend the state constitution to increase the South Carolina Supreme Court from five to seven justices in *every legislative session* for nearly twenty years.<sup>121</sup> As Bill Raftery noted,

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118. *Bill History for House Joint Resolution 2012*, IOWA LEGISLATURE, <https://www.legis.iowa.gov/legislation/billTracking/billHistory?billName=HJR%202012&ga=83&print=true> [<https://perma.cc/2JKL-6HM9>].

119. *See Party Control of Iowa State Government*, BALLOTPEDIA, [https://ballotpedia.org/Party\\_control\\_of\\_Iowa\\_state\\_government](https://ballotpedia.org/Party_control_of_Iowa_state_government) [<https://perma.cc/3L3K-FS4L>].

120. *See Lee Rood, Justices Ousted Over Gay Marriage Ruling Worry Politics Affecting the Bench*, DES MOINES REG. (Oct. 29, 2016, 4:37 PM), <https://www.desmoinesregister.com/story/news/2016/10/29/justices-ousted-over-gay-marriage-ruling-worry-politics-affecting-bench/92786554/> [<https://perma.cc/Q4VS-3UEF>]; A. G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES (Nov. 3, 2010), <https://www.nytimes.com/2010/11/04/us/politics/04judges.html> [<https://perma.cc/WJ6K-9V5G>]. Legislative attempts to alter the composition of the court did not end with the elections, however. The Iowa Legislature also entertained impeachment proceedings against the remaining justices who had ruled in *Varnum*. *See* Bill Raftery, *Resolutions Filed to Impeach 4 Iowa Supreme Court Justices for Same Sex Marriage Decision*, NAT'L CTR. FOR ST. CTS.: GAVEL TO GAVEL (Apr. 22, 2011), <http://gaveltogavel.us/2011/04/22/resolutions-filed-to-impeach-4-iowa-supreme-court-justices-for-same-sex-marriage-decision/> [<https://perma.cc/G3KK-9272>] (citing H.R. 47, 84th Gen. Assemb. (Iowa 2011); H.R. 48, 84th Gen. Assemb. (Iowa 2011); H.R. 49, 84th Gen. Assemb. (Iowa 2011)). There is also a new selection process in place for the justices, which gives more control to the governor. *See* Gruber-Miller, *supra* note 57.

121. Bill Raftery, *For 2 Decades SC Senate Dem Tried to Expand Supreme Court from 5 to 7, Now It Is a House Republican Trying to Do the Same in 2013*, NAT'L CTR. FOR ST. CTS.: GAVEL TO GAVEL (Jan. 2, 2013), <http://gaveltogavel.us/2013/01/02/for-2-decades-sc-senate-dem-tried-to-expand-supreme-court-from-5-to-7-now-it-is-a-house-republican-trying-to-do-the-same-in-2013/> [<https://perma.cc/U8NQ-VMPF>]; *see also* S. 63, 118th Sess. (S.C. 2009), [https://www.scstatehouse.gov/sess118\\_2009-2010/bills/63.htm](https://www.scstatehouse.gov/sess118_2009-2010/bills/63.htm) [<https://perma.cc/Y2GR-CSRC>]; S. 55, 118th Sess. (S.C. 2009), [https://www.scstatehouse.gov/sess118\\_2009-2010/bills/55.htm](https://www.scstatehouse.gov/sess118_2009-2010/bills/55.htm) [<https://perma.cc/57VL-M2RA>]; S. 23, 117th Sess. (S.C. 2007), [https://www.scstatehouse.gov/sess117\\_2007-2008/bills/23.htm](https://www.scstatehouse.gov/sess117_2007-2008/bills/23.htm) [<https://perma.cc/Y57G-EBWH>] (proposing to expand the South Carolina Supreme Court).

“[c]uriously” the bill was not introduced in the 2011-12 session.<sup>122</sup> But in 2013, the bill was back—this time being put forward by a Republican legislator,<sup>123</sup> in a Republican-controlled General Assembly.<sup>124</sup> In light of the fact that the legislature selects the justices for the supreme court,<sup>125</sup> some have cast the latest move as an attempt to pack the court by “[a] self-interested legislature[.]”<sup>126</sup> That said, the bill did not progress beyond the Judiciary Committee.<sup>127</sup>

There is one final attempt to alter the size of a state supreme court within the last decade that bears mentioning, though its relationship to court packing is more tenuous. Unlike in the states noted previously, justices in Louisiana are not appointed by one of the political branches but elected to the bench in the first instance.<sup>128</sup> There are currently seven supreme court judicial districts, which send one justice to the court apiece.<sup>129</sup> (Those districts have a storied past, and have long been the subject of litigation related to the Voting Rights Act.<sup>130</sup>) In 2017, Democratic Representative Marcus Hunter introduced Louisiana House Bill 406, which sought to create two additional supreme court districts, out of the existing Districts 4 and 5.<sup>131</sup>

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122. Raftery, *supra* note 121.

123. H.B. 3090, 120th Sess. (S.C. 2013), [https://www.scstatehouse.gov/sess120\\_2013-2014/bills/3090.htm](https://www.scstatehouse.gov/sess120_2013-2014/bills/3090.htm) [<https://perma.cc/YU93-JMKY>]; Michael Pitts, BALLOTPEDIA, [https://ballotpedia.org/Michael\\_Pitts](https://ballotpedia.org/Michael_Pitts) [<https://perma.cc/QV4T-3BDN>].

124. *Party Control of South Carolina State Government*, BALLOTPEDIA, [https://ballotpedia.org/Party\\_control\\_of\\_South\\_Carolina\\_state\\_government](https://ballotpedia.org/Party_control_of_South_Carolina_state_government) [<https://perma.cc/8979-EGTL>] (noting that Republicans held the legislative branch during the relevant time period).

125. S.C. CONST. art. V, § 3.

126. John L. Warren III, *Holding the Bench Accountable: Judges Qua Representatives*, 6 WASH. U. JURIS. REV. 299, 326 (2014); see also Elizabeth L. Robinson, *Revival of Roosevelt: Analyzing Expansion of the Supreme Court of North Carolina in Light of the Resurgence of State “Court-Packing” Plans*, 96 N.C. L. REV. 1126, 1137-38 (2018).

127. See H.B. 3090, *supra* note 123.

128. See LA. CONST. art. V, § 4 (describing how the state shall be divided into supreme court districts, with a justice elected from each).

129. *Louisiana Supreme Court*, BALLOTPEDIA, [https://ballotpedia.org/Louisiana\\_Supreme\\_Court](https://ballotpedia.org/Louisiana_Supreme_Court) [<https://perma.cc/28GY-9SXM>].

130. Debbie Elliott, *La. Court in Racially Charged Power Struggle, Again*, NPR (Aug. 14, 2012, 3:33 AM), <https://www.npr.org/2012/08/14/158603523/la-court-in-racially-charged-power-struggle-again> [<https://perma.cc/MPR9-WXR3>].

131. H.B. 406, 2017 Reg. Sess. (La. 2017), <https://www.legis.la.gov/legis/ViewDocument.aspx?d=1030709> [<https://perma.cc/XD2F-9RW9>]; see Marcus Hunter, BALLOTPEDIA, [https://ballotpedia.org/Marcus\\_Hunter](https://ballotpedia.org/Marcus_Hunter) [<https://perma.cc/PFP5-ZMQR>].

It is not clear, on its face, what the impact of these changes would have been. But if one looks to the voting patterns of each parish in the 2016 presidential election (the election directly preceding the proposed bill), one can make an educated guess. The new District 4-A would retain most of the old District 4's parishes; but the new District 4-B would contain East Carroll Parish, Madison Parish, and Tensas Parish<sup>132</sup>—which all went for Hillary Clinton in the 2016 election.<sup>133</sup> It would further contain various precincts within Morehouse Parish, Ouachita Parish, and West Carroll Parish, though, unfortunately, it is not possible to tell from the publicly available data how those individual precincts came out in the 2016 election.<sup>134</sup> The picture is clearer with the new District 5-B, which would carve East Baton Rouge Parish<sup>135</sup>—which went for Hillary Clinton<sup>136</sup>—out of a conservative District 5.<sup>137</sup> If the particular precincts added to the proposed District 4-B historically went for Democrats, the proposed legislation presumably would have added two more Democratic justices to a court that, at the time, was majority-Republican, by four to three.<sup>138</sup> The legislation appears to have stalled, however.<sup>139</sup> And in a noteworthy ending, the representative who introduced Louisiana House Bill 406 has left the Louisiana State

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132. See H.B. 406, *supra* note 131.

133. See *Official Results: Tuesday, Nov. 8, 2016 by Parish*, LA. SEC'Y OF STATE, <https://voterportal.sos.la.gov/graphical> [<https://perma.cc/55PY-EQ4H>] [hereinafter *Official Results*].

134. Although the website of the Louisiana Secretary of State offers voting records by precincts, the particular precinct numbers within Morehouse Parish, Ouachita Parish, and West Carroll Parish did not align with the precinct numbers noted in H.B. 406. Unfortunately, repeated calls to the Secretary of State's Office to clarify this matter were not returned.

135. See H.B. 406, *supra* note 131; *Official Results*, *supra* note 133.

136. See *Official Results*, *supra* note 133.

137. District 5 is composed of Ascension Parish, East Feliciana Parish, Iberville Parish, Livingston Parish, Pointe Coupee Parish, West Baton Rouge Parish, and West Feliciana Parish (in addition to East Baton Rouge Parish). See H.B. 406, *supra* note 131. These parishes (excluding East Baton Rouge Parish) together voted for Donald Trump over Hillary Clinton in the 2016 Presidential Election, 114,962 to 48,380. By contrast, East Baton Rouge Parish voted for Hillary Clinton over Donald Trump, 102,828 to 84,660. See *Official Results*, *supra* note 133.

138. See *Louisiana Supreme Court Elections, 2016*, BALLOTPEDIA, [https://ballotpedia.org/Louisiana\\_Supreme\\_Court\\_elections,\\_2016](https://ballotpedia.org/Louisiana_Supreme_Court_elections,_2016) [<https://perma.cc/RC7X-9YKF>]; *Official Results*, *supra* note 133.

139. H.B. 406, *supra* note 131 (noting the bill's current status as "Pending House and Government Affairs—Considered 5/10/17").



Legislature and is now serving as a district judge from the 4th Judicial District.<sup>140</sup>

## 2. *Court-Unpacking Attempts and Successes*

Just as the political branches in various states have sought to change the ideological makeup of the courts by “packing” or adding seats, so too have they sought to change the makeup by “unpacking” or subtracting seats. Indeed, court unpacking has been attempted several times in various states over the last decade.

One of the boldest attempts to unpack a state supreme court occurred in Montana in 2011, when Republicans controlled both houses and the governor was a Democrat.<sup>141</sup> Montana House Bill 245 was intended to reduce the supreme court from seven to five justices.<sup>142</sup> Specifically, the bill sought to remove two seats that were held by then-Justices James Nelson and Brian Morris<sup>143</sup>—two of the more liberal members of that court.<sup>144</sup> The bill’s sponsor, Republican Derek Skees, was not shy about sharing one of his motivations during his testimony before the House Judiciary Committee: “All of us want tort reform.... [s]o how do we get tort reform? I would suggest that if we took the Supreme Court from 7 down to 5, they have a higher workload, guess who becomes our ally in tort reform? The Supreme Court.”<sup>145</sup> A member of a local chapter of the Republican

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140. See *Hunter Wins 4th Judicial District Judge Seat*, MONROE NEWS STAR (Nov. 6, 2018, 10:53 PM), <https://www.thenewsstar.com/story/news/2018/11/06/hunter-wins-4th-judicial-district-judge-seat/1914406002/> [<https://perma.cc/H5MU-MSGC>].

141. See *Party Control of Montana State Government*, BALLOTPEDIA, [https://ballotpedia.org/Party\\_control\\_of\\_Montana\\_state\\_government](https://ballotpedia.org/Party_control_of_Montana_state_government) [<https://perma.cc/LQ3L-URHU>].

142. H.B. 245, 62d Leg. (Mont. 2011), [http://laws.leg.mt.gov/legprd/LAW0203W\\$BSRV.ActionQuery?P\\_SESS=201111&P\\_BLTP\\_BILL\\_TYP\\_CD=HB&P\\_BILL\\_NO=245&P\\_BILL\\_DFT\\_NO=&P\\_CHPT\\_NO=&Z\\_ACTION=Find&P\\_ENTY\\_ID\\_SEQ2=&P\\_SBJT\\_SBJ\\_CD=&P\\_ENTY\\_ID\\_SEQ=](http://laws.leg.mt.gov/legprd/LAW0203W$BSRV.ActionQuery?P_SESS=201111&P_BLTP_BILL_TYP_CD=HB&P_BILL_NO=245&P_BILL_DFT_NO=&P_CHPT_NO=&Z_ACTION=Find&P_ENTY_ID_SEQ2=&P_SBJT_SBJ_CD=&P_ENTY_ID_SEQ=) [<https://perma.cc/VC3F-FDA5>].

143. See Bill Raftery, *Montana is Considering Shrinking Its Supreme Court*, NAT’LCTR. FOR ST. CTS.: GAVEL TO GAVEL (Jan. 10, 2011), <http://gaveltogavel.us/2011/01/10/montana-is-considering-shrinking-its-supreme-court/> [<https://perma.cc/Z227-64MM>].

144. This statement is based upon a common-space measure of state supreme court ideology, developed by Professor Adam Bonica and Michael J. Woodruff. For a discussion of their methodology, see Adam Bonica & Michael J. Woodruff, *A Common-Space Measure of State Supreme Court Ideology*, 31 J.L. ECON. & ORG. 472 (2015). For access to the dataset that notes the justices’ respective scores, see Adam Bonica, Stanford, <https://web.stanford.edu/~bonica/data.html> [<https://perma.cc/Z73X-5Y7K>].

145. See Bill Raftery, *Plan to Shrink Montana Supreme Court: Designed to Force the Court*

Party shared another purported benefit to the court-unpacking plan: by “tak[ing] control of the reins of the Supreme Court” and “show[ing] them who is in charge,” the supreme court would then be more receptive to upcoming redistricting efforts led by Republicans.<sup>146</sup> Montana House Bill 245 eventually died in committee in April 2011.<sup>147</sup>

Six years later, in 2017, Oklahoma saw a proposal to reduce its supreme court from nine to five justices.<sup>148</sup> It is not entirely clear what the motivation was behind Oklahoma House Bill 1699, but two years earlier, the bill’s author, Republican Representative Kevin Calvey, said that he would “walk across the street and douse [him]self in gasoline and set [him]self on fire” in response to some of the pro-choice decisions of that court, following a proposed bill that would have given raises to the justices.<sup>149</sup> Moreover, Republicans controlled the state house, the state senate, and the governorship at that time,<sup>150</sup> and a majority of the Supreme Court of Oklahoma was appointed by former Democratic governors.<sup>151</sup> And according to the Brennan Center, the way in which Oklahoma House Bill 1699 would have reduced the court’s membership would “most likely have resulted in changed ideological control” of the Oklahoma Supreme Court in only two years time.<sup>152</sup> No votes were ever taken on the bill.<sup>153</sup>

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*into Tort Reform and out of Redistricting Lawsuits?*, NAT’L CTR. FOR ST. CTS.: GAVEL TO GAVEL (Jan. 18, 2011), <http://gaveltogavel.us/2011/01/18/plan-to-shrink-montana-supreme-court-designed-to-force-the-court-into-tort-reform-and-out-of-redistricting-lawsuits/> [https://perma.cc/P6NG-H2PV].

146. *Id.*

147. See H.B. 245, Reg. Sess. (Mont. 2011), <https://legiscan.com/MT/bill/HB245/2011> [https://perma.cc/7JXZ-45LH].

148. See H.B. 1699, 56th Leg., 1st Sess. (Okla. 2017), <http://www.oklegislature.gov/BillInfo.aspx?Bill=HB1699&Session=1700> [https://perma.cc/NF5M-8CK8].

149. See M. Delatorre & Leslie Rangel, *Oklahoma Lawmaker Threatens to Set Himself on Fire Over Abortion Ruling*, OKLA. NEWS 4 (Apr. 28, 2015, 9:55 AM), <https://kfor.com/2015/04/27/state-rep-calvey-i-would-set-myself-on-fire/> [https://perma.cc/NCU4-BVJ2].

150. See *Party Control of Oklahoma State Government*, BALLOTPEdia, [https://ballotpedia.org/Party\\_control\\_of\\_Oklahoma\\_state\\_government](https://ballotpedia.org/Party_control_of_Oklahoma_state_government) [https://perma.cc/PFN8-54AD].

151. *Legislative Assaults on State Courts—2018*, BRENNAN CTR. FOR JUSTICE (Feb. 7, 2018), <https://www.brennancenter.org/analysis/legislative-assaults-state-courts-2018> [https://perma.cc/JK2P-4AXC].

152. See *id.*

153. See H.B. 1699, *supra* note 148.

And in a particularly dramatic interbranch display of hostility, Republicans in the Washington State Senate introduced a bill in the winter of 2013 to shrink the state supreme court from nine justices to five,<sup>154</sup> only six days after the court invalidated a controversial state initiative that required a supermajority to pass a tax.<sup>155</sup> Tension between the two branches had already been running high a year earlier, when the court had decided that the state was not fulfilling its constitutional duty to fund public education.<sup>156</sup> Indeed, the text of Washington Senate Bill 5867 referred to the court's decisions as the reason for reducing its size:

The state Constitution ... provides that there shall be five supreme court judges. For over one hundred years, the legislature has seen fit by statute to add four additional justices to that august body ... Recent opinions by the Washington state supreme court have demonstrated that this legislative decision may be constitutionally problematic.<sup>157</sup>

Adding further to the hostility, the bill called upon the sitting justices to meet “in public” and then draw straws to determine who would remain on the court and who would be terminated.<sup>158</sup> In what appeared to be yet one more jab, one of the bill's sponsors, Republican state Senator Michael Baumgartner, said that the money saved by eliminating four justices would be “automatically funneled” into public education, to meet the requirements set forth by the court in its earlier decision.<sup>159</sup> It is no surprise that the proposal was quickly branded as a plan to “unpack” the court—and one that threatened judicial independence.<sup>160</sup> Although the bill did not gain much

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154. See S.B. 5867, 63d Leg., Reg. Sess. (Wash. 2013), <https://apps.leg.wa.gov/documents/billdocs/2013-14/Pdf/Bills/Senate%20Bills/5867.pdf> [<https://perma.cc/Q22R-XVBL>].

155. See Andrew Cohen, *A “Court Unpacking Plan” Threatens Judicial Independence*, BRENNAN CTR. FOR JUST. (Mar. 8, 2013), <https://www.brennancenter.org/analysis/court-unpacking-plan-threatens-judicial-independence> [<https://perma.cc/AV6G-S6JC>].

156. See Brian M. Rosenthal, *Days After Losing State Supreme Court Case, Republicans Seek to Lay Off Justices*, SEATTLE TIMES (Mar. 6, 2013, 6:11 PM), <http://blogs.seattletimes.com/politicsnorthwest/2013/03/06/days-after-losing-state-supreme-court-case-republicans-seek-to-lay-off-justices/> [<https://perma.cc/GTR3-8MY2>].

157. S.B. 5867, *supra* note 154.

158. *Id.*

159. See Rosenthal, *supra* note 156.

160. See Cohen, *supra* note 155.

momentum in 2013, variations of it have been proposed in the Washington Legislature in the past several years,<sup>161</sup> including Washington House Bill 1081 in 2019.<sup>162</sup>

Finally, it is worth noting two additional attempts to shrink state supreme courts from the past decade, although the motivations behind them are unclear. In 2009 in Alabama, Democratic Senate Majority Leader Zeb Little introduced a bill to reduce the state supreme court from nine justices to seven, by attrition.<sup>163</sup> But unlike in some of the other states noted here, the court was not closely divided; indeed, all of the court's members were Republican, apart from then-Chief Justice Sue Bell Cobb.<sup>164</sup> That bill died when the legislature adjourned in May of 2009.<sup>165</sup> Similarly, in 2014 in Pennsylvania, the Republican-controlled Pennsylvania General Assembly considered reducing the size of its supreme court from seven to five members, via constitutional amendment.<sup>166</sup> That proposal, however, was but one piece of a large reform bill, which would have abolished the Office of Lieutenant Governor, reduced the size of the General Assembly itself, and reduced the size of the superior court.<sup>167</sup> The bill, which had eighteen sponsors of both parties, died by July of that year.<sup>168</sup> These episodes are noteworthy

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161. See H.B. 2784, 64th Leg., Reg. Sess. (Wash. 2016), <https://apps.leg.wa.gov/documents/billdocs/2015-16/Pdf/Bills/House%20Bills/2784.pdf> [<https://perma.cc/B7W4-9LWT>]; S.B. 6088, 63d Leg., Reg. Sess. (Wash. 2014), <https://apps.leg.wa.gov/documents/billdocs/2013-14/Pdf/Bills/Senate%20Bills/6088.pdf> [<https://perma.cc/6PVE-3GFP>].

162. See H.B. 1081, 66th Leg., Reg. Sess. (Wash. 2019), <https://apps.leg.wa.gov/documents/billdocs/2019-20/Pdf/Bills/House%20Bills/1081.pdf> [<https://perma.cc/M8VK-SCNZ>].

163. S.B. 507, 2009 Reg. Sess. (Ala. 2009).

164. Specifically, the Alabama Supreme Court members in 2009 were: Chief Justice Sue Bell Cobb (Democrat), Associate Justice Michael Bolin (Republican), Associate Justice Champ Lyons, Jr. (Republican), Associate Justice Glenn Murdock (Republican), Associate Justice Tom Parker (Republican), Associate Justice Greg Shaw (Republican), Associate Justice Patricia Smith (Republican), Associate Justice Lyn Stuart (Republican), and Associate Justice Thomas Woodall (Republican). See *Annual Statistics for the Fiscal Year Ending September 30, 2010*, SUP. CT. ALA., [http://judicial.alabama.gov/docs/2010\\_SCStats.pdf](http://judicial.alabama.gov/docs/2010_SCStats.pdf) [<https://perma.cc/69RM-P3ER>].

165. See *Entry for Alabama SB 507: Last Action*, NAT'L CTR. FOR ST. CTS.: GAVEL TO GAVEL, <https://www.ncsc.org/gaveltogavel> [<https://perma.cc/4HPB-M3YQ>] (noting that the bill died when the legislature adjourned on May 15, 2009).

166. See S.B. 324, Gen. Assemb. (Pa. 2013) (as amended June 9, 2014), <https://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2013&sessInd=0&billBody=S&billTyp=B&billNbr=0324&pn=2110> [<https://perma.cc/H5XC-Z3SY>].

167. See *id.*

168. See Legislative History of S.B. 324, Gen. Assemb. (Pa. 2013) (as amended June 9,

in that they show a general willingness on the part of some to tinker with the size of the supreme court, but again, they do not seem to clearly fit into the mold of court packing and unpacking attempts as plainly as earlier examples.

*B. Observations About States that Changed and Attempted to Change Their Courts (and Those that Did Not)*

The preceding analysis documents how there have been numerous attempts in the last decade to both increase and decrease the size of state supreme courts for what appears to be political gain.<sup>169</sup> One question that naturally follows is whether anything of a more generalized nature can be said about this set of attempts (and successes) and the state environments in which they arose.

Before turning to this question, it is important, at the outset, to stress the need for circumspection. Although it would be tempting to try to extrapolate a great deal from the episodes discussed above, doing so would be unwise. First, as noted earlier, it is possible that the dataset is underinclusive.<sup>170</sup> Second, there are significant differences across the fifty states along such points as the size and structure of their highest court, how their justices are selected (or elected), the history of the relationship between the judicial and political branches, and the political climate of the state more generally—to name just a few.<sup>171</sup> To make strong claims about why certain reform measures were attempted in some states and not others, for example, would require a deep-dive analysis across all of these points, across all fifty states, and across each year in a span of at least ten years. This is an undertaking for future scholarship, and beyond the scope of this symposium Article. Nevertheless, it is still possible to make some observations about the proposed bills at issue here and their respective states. What follows, then, is a set of modest claims about the data and several questions worth probing in future research.

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2014), [https://www.legis.state.pa.us/cfdocs/billInfo/bill\\_history.cfm?syear=2013&ind=0&body=S&type=B&bn=324](https://www.legis.state.pa.us/cfdocs/billInfo/bill_history.cfm?syear=2013&ind=0&body=S&type=B&bn=324) [<https://perma.cc/6XXH-UAJ4>].

169. *See supra* Part II.A.

170. *See supra* text accompanying notes 57-66.

171. *See supra* Part II.A.

First, one can begin with potential commonalities among the proposed bills and/or states that saw attempts to alter their state supreme courts. The most discernible pattern is also the one that should be least surprising: it appears that various elected officials pushed for changes to their state supreme court when doing so was in their political interest. Specifically, several of the states in which there were proposals to expand or contract the court had the following features: a legislature that was of the same party as the governor; a selection method for justices that hinged on appointment by the governor; and a closely divided supreme court.<sup>172</sup> To be sure, not all of the examples here fit this pattern. To wit, the proposal to expand the Louisiana State Supreme Court would have done so by adding districts for popular election.<sup>173</sup> And the Arizona State Supreme Court was not “ideologically balanced” before its recent expansion; four of the five justices in 2016 were Republican appointees (although the court arguably became more conservative after the change).<sup>174</sup> Notwithstanding these exceptions, the larger point holds: the proposed attempts to alter the courts were often done in ways that would guarantee adding justices from a political party to shift the ideological makeup of the court in a considerable way.

One might wonder if there are meaningful points in common between the two states that did, in fact, alter the size of their supreme courts in recent years: Arizona and Georgia. With such a small set—and again, so many potentially relevant factors—it is possible only to offer a few observations. The two states shared several of the features highlighted above: both state legislatures were majority Republican and both governors at the time were Republican.<sup>175</sup> Furthermore, the governors in both states had the

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172. See, e.g., *supra* text accompanying notes 88-114, 148-53 (discussing proposed legislation in Florida, Georgia, and Oklahoma).

173. See H.B. 406, *supra* note 131.

174. See Maria Polletta, *By Adding Justices to the Arizona Supreme Court, Did Ducey Help the State—Or Help Himself?*, AZCENTRAL.COM (July 8, 2019, 6:30 AM), <https://www.azcentral.com/story/news/politics/arizona/2019/07/08/arizona-governor-said-expanding-supreme-court-would-bring-benefits-has-it-doug-ducey/2842733002/> [<https://perma.cc/S46E-5JR9>]. With the retirement of Chief Justice Scott Bales in August 2019, all of the current justices were appointed by Republican governors, including five by current Governor Doug Ducey. See *Meet the Justices*, ARIZ. JUDICIAL BRANCH, <https://www.azcourts.gov/MeettheJustices> [<https://perma.cc/5SEQ-BZQD>].

175. For Arizona, see *Arizona Elections, 2014*, BALLOTPEDIA, <https://ballotpedia.org/>

opportunity to fill the two new seats on the court.<sup>176</sup> The prime difference, as noted above, is that while the expansion changed the ideological makeup of the court in Georgia, it only added to the seats held by Republican appointees in Arizona.<sup>177</sup> A final point about the two “success stories” bears mentioning. As alluded to earlier, some states—indeed, nearly half—require a constitutional amendment in order to change the composition of the court.<sup>178</sup> By contrast, nearly half permit the state legislature to set the size of the court by statute.<sup>179</sup> The states have different requirements for amending their constitutions but, by and large, it is an easier lift, politically-speaking, to enact legislation than it is to change one’s constitution.<sup>180</sup> Accordingly, it might not be surprising that the two states that saw changes to their high courts could do so via legislation alone (and correspondingly, perhaps not surprising that some of the states that saw failed attempts would have required constitutional change).<sup>181</sup>

Second, it is worth examining key differences across attempts to change the size of state courts. One plain variation is the means by which the elected branches sought to alter the size of the court—by adding or subtracting seats. The decision to pursue one option over the other seems contingent upon at least a few different factors. The first is the starting size of the court. If a court begins with five justices—the smallest size of a state supreme court in the

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Arizona\_elections,\_2014 [<https://perma.cc/CM9Z-MNJP>] (noting that following the 2014 elections, the Republican party held the governorship, as well as a majority in both the state senate and state house); for Georgia, see *Georgia Elections, 2014*, BALLOTPEDIA, [https://ballotpedia.org/Georgia\\_elections,\\_2014](https://ballotpedia.org/Georgia_elections,_2014) [<https://perma.cc/URF7-QNY5>] (similarly noting that, following the 2014 elections, the Republican party maintained a “trifecta” within state government).

176. See *supra* notes 84-86, 95-98 and accompanying text.

177. See *supra* text accompanying notes 94-98 and 174.

178. See Raftery, *supra* note 11, at 6.

179. See *id.*

180. See *The Book of the States 2018: State Constitutions*, COUNCIL OF ST. GOV'TS, <http://knowledgecenter.csg.org/kc/system/files/1.3.2018.pdf> [<https://perma.cc/3Z7A-MCKW>] (noting that a majority of states require a legislative vote of two-thirds or three-fifths for proposing an amendment, often followed by a majority vote on the amendment). This is not to suggest, however, that the process is onerous in every state. Scholars have previously noted the “malleability” of state constitutions generally. See, e.g., Bruce E. Cain & Roger G. Noll, *Malleable Constitutions: Reflections on State Constitutional Reform*, 87 TEX. L. REV. 1517, 1517 (2009).

181. See *supra* Part II.A.

country<sup>182</sup>—it would be difficult to justify reducing seats. (Conversely, if a court begins with nine justices—the largest size of a state supreme court in the country<sup>183</sup>—it would be hard to argue that more seats were necessary.) Thus, even elected officials who were purely motivated by politics would be constrained by the starting size of the court. But another relevant factor, to be sure, is how additions or attritions would affect the court. For example, Oklahoma’s House Bill 1699 would have reduced the state supreme court from nine justices to five, in a way that observers predicted would have swung the court from majority Democrat to majority Republican.<sup>184</sup> And Georgia’s House Bill 927 increased the state supreme court by two justices, taking it from 4-3 majority Democrat to 5-4 majority Republican.<sup>185</sup> Finally, at the extreme end of the examples noted earlier, there is Florida’s House Joint Resolution 7111, which would have added more justices by splitting the state supreme court into two and doing so in a way that would have sidelined the Democratic appointees over in the criminal court.<sup>186</sup>

Another noteworthy difference is the set of events that preceded the proposed legislation—and specifically, whether the proposed reform was framed as a response to a particular case or legal issue. In several of the states noted here, the legislature and state supreme court had just been through a public dust-up. In Florida, for example, the state supreme court had recently struck down the state’s school voucher system as unconstitutional when Senate Bill 408 was proposed to increase the number of justices.<sup>187</sup> Making the point finer still, the bill stated explicitly that it was in response to the court’s decision, which it called “specious” and a display of “judicial activism.”<sup>188</sup> In Washington, too, attempts to alter the size of the supreme court were styled as a reaction to earlier court decisions as

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182. See *State Court Organization: Number of Appellate Court Judges*, NAT’L CTR. FOR ST. CTS., <http://data.ncsc.org/QvAjaxZfc/QvsViewClient.aspx?public=only&size=long&host=QVS%40qlikviewisa&name=Temp/1f3d14e005ea4c1ca38efe385fc46e45.html> [https://perma.cc/QF9L-5R93] (noting the number of judges on the state courts of last resort, which vary between five and nine).

183. See *id.*

184. See BRENNAN CTR., *supra* note 151.

185. *Supra* notes 93-98 and accompanying text.

186. See *supra* notes 107-14 and accompanying text.

187. See *supra* notes 100-03 and accompanying text.

188. See *supra* note 102 and accompanying text.



the text of Senate Bill 5867 underscored.<sup>189</sup> Similarly, Iowa’s House Joint Resolution 2012 to expand the state supreme court came on the heels of the court’s *Varnum* decision, which found an Iowa law that limited marriage to opposite-sex couples unconstitutional.<sup>190</sup> And while perhaps not motivated by a particular case, the author of Montana’s House Bill 245 suggested that the bill was proposed, at least in part, by a desire to bring about tort reform.<sup>191</sup> That said, quite a few of the proposed bills appear “unprovoked.” With some, the suggestion was that altering the court was akin to acquiring an insurance policy; the legislative branches were arguably helping to ensure that future legislation would be upheld as constitutional<sup>192</sup>—through changing the makeup of the court or affecting the behavior of current justices.<sup>193</sup>

Finally, in a similar vein, there are key differences when it comes to whether the particular proposed legislation was part of a larger reform effort, or a more targeted bill aimed solely at altering the state’s supreme court. For example, the original reform effort in Georgia would have added judges to the intermediate appellate court at the same time that it would have added to the court of last resort.<sup>194</sup> Although the bill that eventually passed maintained the size of the Georgia Court of Appeals, it did alter the jurisdiction of both that court and the Georgia Supreme Court.<sup>195</sup> Similarly, the proposal in Pennsylvania was part of a larger reform effort.<sup>196</sup> Many of the other efforts—say, to increase the size of the Louisiana Supreme Court and to decrease the size of the Washington Supreme

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189. See *supra* notes 156-57.

190. See *supra* notes 115-16 and accompanying text.

191. See *supra* note 145 and accompanying text.

192. See, e.g., *supra* note 113 and accompanying text.

193. This latter set of examples can be more generally understood as “power plays” on the part of the legislature. See Miriam Seifter, *Judging Power Plays in the American States*, 97 TEX. L. REV. 1217, 1223-24 (2019) (defining “power plays as actions that alter or aggressively leverage institutional power and do so for partisan ends, in either of two senses: that the actor would not make the same institutional argument if the parties were reversed, or that the actor is undermining apparent majority preferences for self-entrenching purposes” (footnote omitted)).

194. See S.B. 429, *supra* note 90.

195. See H.B. 927, *supra* note 93.

196. See *supra* notes 166-67 and accompanying text.

Court—appear to be focused only on altering the size of the state’s court of last resort.<sup>197</sup>

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In short, the past decade has seen a significant number of attempts to alter state supreme courts—both through proposed packing and unpacking. Indeed, a few of those attempts have been successful, leading to fundamentally altered state courts of last resort. To be sure, further research is needed to gain a better understanding of why these proposals were made in these states at this time, why some were successful, and why some states saw no such proposals at all. But the preceding analysis does bring to light the variation among proposals and at least some of the circumstances that led to them. Though elected officials tended to push for judicial change when it appeared to suit them politically, the ultimate proposals took many forms across many states. The final question is what these findings might mean for the larger discourse around court packing.

### III. LESSONS FOR THE LARGER DEBATE AND THE COURTS THEMSELVES

While scholars and politicians continue to debate whether Republicans unpacked the Supreme Court in 2016, and whether Democrats should pack the Court if they take the Oval Office and the Senate in 2020, they should not overlook the clear instances of court packing that have recently taken place. As Part II discusses, there were attempts in more than 20 percent of all states in the last decade to alter the size of the state supreme court, with two of them successful. What could this state of play mean for the federal courts?

There are different ways to interpret the data from Part II. The most straightforward interpretation, it would seem, is that the norm against court packing might be more vulnerable than some have thought—at least as it concerns the state courts. After all, if court packing and unpacking were considered strictly verboten, one would

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197. See, e.g., H.B. 406, *supra* note 131; S.B. 5867, *supra* note 154.

not expect to see over twenty different bills to pack and unpack the highest court in eleven different states.

One response to this interpretative claim is that while there were indeed numerous attempts to pack or unpack the courts, only two of those attempts were actually successful. In this way, one could argue, the story of Part II is a cautionary tale and simply reinforces the message that the elected branches would be wise to save their political capital. There may be credence to this response, but it is worth noting that when proposed bills did not succeed in the first instance, they were often attempted again. Specifically, in this time period, representatives tried to expand the Arizona Supreme Court several times over a five-year span before ultimately succeeding with Arizona House Bill 2537.<sup>198</sup> Likewise, the Washington State Legislature has considered at least three different house and senate bills since 2013 to reduce the state's supreme court from nine members to five.<sup>199</sup> These data points do not mean that it is necessarily worth the time and political capital of the various elected officials to pursue these reforms. But again, if proposals to pack or unpack the courts were seen as completely illegitimate, one would expect a swift public rebuke after one was brought forward—assuming the proposal garnered sufficient attention—and no subsequent attempts. It is hard to imagine President Roosevelt, for example, continuing to push for his court-packing plan several times more after its failure. It therefore seems reasonable to conclude that the convention against court packing is not completely robust at the state level—at least it has not been in recent years.

The response to this claim might be that the status of court packing at the state level has little bearing on its status at the federal level. After all, most state justices are elected<sup>200</sup> and so their courts are seen as necessarily more political in nature when compared to Article III courts. As such, there is no reason to think that attempts to pack the U.S. Supreme Court would be tolerated simply because they were in Arizona and Georgia.

It is certainly true that the courts, and therefore the norms around them, are different, but perhaps less so than one might

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198. *See supra* notes 68-86 and accompanying text.

199. *See supra* notes 154-62 and accompanying text.

200. *See supra* note 49.

think. Many of the state supreme courts in which court packing has been attempted are states in which the governor appoints the justices in the first instance. Indeed, this is presumably why those courts lent themselves to court packing; it was clear what kind of justice—conservative or liberal—would be packed. Accordingly, this subset of state courts is not quite so removed from their federal analogue as it would appear at first blush.

That said, within those states that rely on gubernatorial appointment for the selection of their justices, there can be key differences. As noted earlier, the governor of Arizona selects justices for the state supreme court from a short list compiled by a merit selection committee. This facet of the process, of course, further distinguishes it from the federal model—a point that was seized upon when the Arizona bill became law. Specifically, the sponsor of the bill noted that he might have felt “less comfortable” if there was a “different person appointing.”<sup>201</sup> The governor himself made the same point:

Some, particularly national activists and media who aren't familiar with our system here, have inaccurately described this as “court packing.” That's just wrong. Arizona's two new justices will be selected under our state's nationally-renowned merit selection system, which includes nominations of qualified applicants by the Commission on Appellate Court Appointments. The fact is, unlike the federal system, I can't simply appoint anyone.<sup>202</sup>

What the governor's comments obscure, however, is that he can nevertheless select more conservative (or liberal) justices from the list of nominees, and therefore can still “pack” the court as desired. His comments also fail to mention that the governor largely populates the Commission himself,<sup>203</sup> further guaranteeing a list of candidates he will find to his liking.<sup>204</sup> The larger point is that while

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201. Benen, *supra* note 84.

202. Ducey, *supra* note 85.

203. See ARIZ. CONST. art. VI, § 36.

204. This appears to have been the case in Arizona. Specifically, Governor Ducey appointed former Maricopa County Attorney William Montgomery to succeed Scott Bales on the Arizona Supreme Court. Montgomery was not nominated for a preceding vacancy. See Polletta, *supra* note 174. The governor then appointed several new members to the nominating commission, which nominated Montgomery and six others for the vacancy resulting from Chief Justice Bales's retirement. *Id.* Some observers contended that Ducey had “packed” the nominating

one might think there are significant differences between the selection processes of these state supreme courts and the U.S. Supreme Court, those differences fade upon a close examination. Accordingly, the status of the norm against court packing within these states may be worth heeding by federal court watchers.

Those watchers should further take note of the fact that court-packing attempts are on the rise. According to Bill Raftery of the National Center for State Courts in 2016—before some of the attempts noted here—the previous decade had witnessed a “dramatic uptick” in proposed legislation to change the composition of state supreme courts.<sup>205</sup> There had been considerably less legislation in the preceding decades, and only five successful attempts to change the size of a state’s highest court between 1980 and 2013.<sup>206</sup> This is surely an empirical question to be tested, but if a substantial portion of the population views the court systems as comparable, then seeing that court packing and unpacking is attempted more and more in the states might make it become less and less of an “off the wall” proposal with the federal courts. That is, if the public becomes increasingly acclimated to these types of bills, the threshold may be lowered at the federal level, thereby increasing the chances of court packing in Article III courts.

There is one final point to consider, further bringing us back to the symposium’s theme of the role of courts in politically charged times. Much of this Article has focused on how courts are being treated in such times, but there is a concluding question about how those courts are reacting. One of the critical moments in FDR’s court-packing attempt is the Court’s own about-face—the “switch in time that saved ... nine.”<sup>207</sup> To be sure, while some legislative attempts noted in Part II were made with an interest in seeing them passed, others presumably were aimed at bringing the justices in line. There are important questions about the role of justices in such moments, and whether they should act with an eye toward staving off attempts to restructure their court.<sup>208</sup> As further work is done to understand the swelling tide of attempts to curb the independence

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committee to secure his desired nominee. *See id.*

205. *See Raftery, supra* note 11, at 7.

206. *See id.*

207. *See supra* note 16 and accompanying text.

208. *See Grove, supra* note 2, at 471.

of courts at the state level, more should be done on how the courts themselves have responded in these times.<sup>209</sup>

### CONCLUSION

When it comes to understanding our own court systems, the states are in many ways the “final frontier.” Relatively little is known about them as compared to the federal courts, and so it should be unsurprising that they have been omitted from the larger debate around court packing. This Article has shown why awareness of, and future research on, the state courts would be of great value.

In particular, more needs to be understood about how the states that have attempted court packing (and unpacking) came to do so. What role did political climate and polarization play? Was altering the size of the court viewed as more or less legitimate following a controversial ruling by the state supreme court? Was it viewed as more or less legitimate when packaged as part of a larger suite of reforms or when it was framed as a stand-alone issue? Along these last lines, more research is needed on other court-curbing measures undertaken in the states, from salary changes to court jurisdiction, and how justices have responded in the face of such proposals.<sup>210</sup> There is much to be learned about matters that relate generally to the independence of our courts.

Returning, finally, to the court-packing debate, it seems the question of whether reforms should be attempted will continue to live on through at least the next political cycle, and probably well into the future. It is critical to understand the positive dimension of the issue—to fully appreciate where court packing has taken place and its effects—while engaging in the normative dimension. As part of this, it is worth remembering that states and their courts are indeed our laboratories, for good and for ill.

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209. Political scientists have noted key ways in which the Justices exercise “self-restraint” in the face of legislative proposals by Congress to curb the Court’s independence. See TOM S. CLARK, *THE LIMITS OF JUDICIAL INDEPENDENCE* 15-16 (2011). There has been far less scholarship on the way state supreme court justices respond to pressures by other branches of government, and more would be extremely valuable. For one notable example, see generally LAURA LANGER, *JUDICIAL REVIEW IN STATE SUPREME COURTS: A COMPARATIVE STUDY* (2002).

210. As one example of the type of scholarship that is needed today on his score, see Meghan E. Leonard, *State Legislatures, State High Courts, and Judicial Independence: An Examination of Court-Curbing Legislation in the States*, 37 *JUST. SYS. J.* 53 (2016).