Presidential Commission on the Supreme Court of the United States

Composition of the Supreme Court

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Written Statement of Marin K. Levy
Professor of Law, Duke University School of Law

Co-Chair Bauer, Co-Chair Rodriguez, and distinguished members of the Commission:

Thank you for the opportunity to testify on the subject of Supreme Court expansion and composition. By way of background, I am a Professor of Law at the Duke University School of Law and a faculty advisor to the Bolch Judicial Institute. My research and teaching over the past twelve years have focused on judicial administration and appellate courts. It is a distinct honor and privilege to speak with you on these matters.

Court expansion and other changes to the Court's composition implicate fundamental questions about the role and operation of our nation's highest court. These include whether expanding the Court would harm the institution's legitimacy, whether expansion would prompt a series of expansions in the future, whether an expanded Court could function well as a single decision-making body, and whether expansion would contradict existing constitutional norms and conventions. Even if the answers to these questions were known, there is a larger background question to be answered—namely how such considerations should be weighted in assessing any proposal to change the Court's structure. It is no easy task that the Commission has been given, and I hope that the legal community and public at large is cognizant of this.

In contrast to the subject of the panel, my own testimony will be fairly circumscribed. What I hope to offer the Commission is additional context by providing information about recent changes and attempts to change the size of state supreme courts. The descriptive analysis that follows does not itself constitute a normative argument. Rather, my goal is to provide the Commission with *intra*-country comparative data concerning changes to court structure, from which the Commission can draw its own conclusions. I would stress at the outset that I believe experiences with state court expansion do not offer easy lessons about the wisdom of the enterprise; and, as in any comparative discussion, one should be mindful of the differences between systems when attempting to derive meaning. Those differences include, *inter alia*, that the majority of state supreme court justices are not appointed but elected,[1] that the majority

[1] 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*, BRENNAN CTR. FOR JUSTICE, http://judicialselectionmap.brennancenter.org/?court=Supreme [https://perma.cc/ QWR2-XWVP].

serve for terms and must be reelected (or, less often, reappointed) to continue service, and that the majority have mandatory retirement ages and not life tenure.

Part I will provide information regarding attempts (and successes) to alter the size of the highest court in eleven different states over a recent period of approximately one decade. Then, Part II will briefly consider the size of each state court of last resort, as they stand today.

I: Court Packing and Unpacking: A View from the States

At least until recently, the conventional wisdom had long been that "court packing" was something the President and Congress "*just cannot do*."[2] Even though the Constitution's text does not directly prohibit expanding or contracting the size of courts to change their composition—and even though the size of the Supreme Court was altered several times in its first eighty years[3]—scholars have argued that there is a constitutional norm against doing so.[4] This de facto prohibition has been thought to stem from a commitment to judicial independence and a belief that court packing would undermine the system of checks and balances enshrined in our Constitution.[5]

Given the collective understanding of the norm against court packing, it is surprising that there have been numerous recent attempts to change the size of different courts of last resort at the *state* level. Indeed, over roughly the past decade, lawmakers in eleven states have introduced at least twenty bills to expand or contract the size of their supreme courts—and two of those attempts were successful. With the majority of these attempts and successes, there is at least a colorable claim that the intention was to affect the ideological composition of the court. What follows is a descriptive account beginning in 2007 of state court-packing attempts and successes, and then state court "un-packing" attempts, in alphabetical order of the states within each category.[6]

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[2] 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?*, 61 B.C. L. REV. 2747, 2749 (2020).

[3] The Supreme court was initially set at six Justices by the Judiciary Act of 1789. That figure changed in 1801, when the outgoing Federalist Congress passed the infamous Judiciary Act of that year, which reduced the Court to five Justices by attrition. 1802 saw the formal restoration of the sixth seat, courtesy of the Repeal Act of that year. The Court's size then rose to seven Justices in 1807, and then to nine Justices in 1837. Congress expanded the Supreme Court to ten in 1863. 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. Three years later, with a new Republican President, Ulysses S. Grant, the Republican Congress increased the size of the Court to nine Justices—and it has held constant at nine seats ever since.

[4] *See* Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 269-87 (2017); Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 505-06 (2018). *See also* Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430, 1440-41 (2018) (describing the anti-court-packing norm, though also noting its potential instability and the protean nature of constitutional norms more generally).

[5] *See* Bradley & Siegel, *supra* note 4, at 276.

[6] This section largely draws on an essay I wrote on the court-packing experiences at the state level. *See* Marin K. Levy, *Packing and Unpacking State Courts*, 61 WM. & MARY L. REV. 1121 (2020). In order to identify attempts at court packing and unpacking, I ran key word searches in *Gavel to Gavel*, the invaluable database of state legislation affecting the courts, which is run by the National Center for State Courts and maintained by Bill Raftery. I began with 2007 as that is the

A. *Attempts to Expand or Pack State Supreme Courts*

Only five years ago, the Arizona Supreme Court was expanded from five to seven justices. This change in Court structure came after several failed attempts by lawmakers, and over the objection of two different Chief Justices.

Specifically, in 2011, a Republican state senator introduced Arizona Senate Bill 1481, which sought to amend Section 12-101 of the Arizona Revised Statutes to increase the size of the state's highest court from five to seven justices. The Senate Judiciary Committee held a hearing on the bill, at which then-Chief Justice Rebecca White Berch appeared to speak against it. She argued that it was "hard to justify the bill" given that the Court was current in its workload and the cost of expansion significant.[7] Shortly thereafter, the Committee voted the bill down.

Four years later, Republican members of the Legislature again attempted to expand the size of the Arizona Supreme Court. In 2015, Arizona House Bill 2076 was introduced, which contained language mirroring Arizona Senate Bill 1481, seeking to expand the Supreme Court from five to seven justices. House Bill 2076 was voted out of Committee, but ultimately died on the floor.

Court expansion was again proposed by a Republican lawmaker in January 2016 via Arizona House Bill 2537. The Republican-controlled Legislature approved the measure, despite no support from Democrats. Nor was it supported by any of the Court's five justices, with the Chief Justice writing to the Governor that additional seats were "not required by the Court's caseload" and in fact would be "unwarranted" given how costly such a proposal would be at a time when other court-related needs were "underfunded."[8] Several news outlets called the Republican-sponsored bill an attempt to "Bring Back Court-Packing," 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 (a commission the Governor populates).[9] Over these objections, the Governor signed the bill into law and the two new justices took their seats in December 2016, tilting the Court further to the right.

The Georgia Supreme Court was also expanded in this timeframe, and also after a few unsuccessful attempts by lawmakers. In late 2006, Leah Ward Sears, then-Chief Justice of the Georgia Supreme Court, told state lawmakers that "We have the manpower we need."[10] The

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first year covered by the database. For more information on my methodology, see pages 1132-35 of the aforementioned essay. (Internal citations are largely omitted here but can be found in the essay.)

[7] *Hearing on S.B. 1481 Before the S. Comm. on the Judiciary*, 50th Leg., 1st Reg. Sess. 1:06:54 (Ariz. 2011).

[8] Letter from Scott Bales, Chief Justice, Ariz. Supreme Court, to Doug Ducey, Governor, State of Ariz. (May 5, 2016).

[9] *See* Steve Benen, *Arizona Scheme Raises 'Court Packing' Questions*, MSNBC: MADDOWBLOG (May 13, 2016), 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); Linda Valdez, *Ducey's Careful Timing on Court Packing Bill*, AZCENTRAL (May 18, 2016), 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].

[10] 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),

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. Despite such assurances from the Chief Justice, 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. Senate Resolution 370 ultimately stalled, and in February 2010, Georgia Senate Bill 429 was introduced to increase the number of supreme court justices from seven to nine, and to increase the number of Court of Appeals judges from twelve to fifteen. Notably, the new bill would not have increased the Supreme Court beyond the maximum set by the Georgia Constitution (and thus avoided the need for a constitutional amendment). Nevertheless, Georgia Senate Bill 429 died in committee (though the Court of Appeals was expanded to fifteen seats a few years later[11]).

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 appellate jurisdiction and procedures for the high court and the newly-enlarged court of appeals.[12] There was speculation that the Republican Governor was interested in expanding the Court for political reasons; at the time, Georgia had four Democratic, and only three Republican, appointees on the bench. The General Assembly passed the bill in the spring of 2016 and the Governor promptly signed it. By the next calendar year, the Governor had filled the two new seats, resulting in a "more conservative-leaning court."[13]

Other states have seen recent attempts to increase the number of seats on their highest courts. In 2007, the Florida Legislature briefly considered Senate Bill 408, which sought to enlarge the Florida Supreme Court from seven to fifteen justices via an amendment to the state constitution. In contrast to some of the other proposed bills noted here, Senate Bill 408 stated explicitly that it was in response to a prior ruling of the state supreme court. The opening of the bill reads 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."[14] (The Court's decision in *Holmes* found the Florida school voucher system unconstitutional, by a vote of five to two.[15]) The proposed legislation was decried as an attempt to pack the Court with "eight new Republican-friendly appointments."[16] Two days after being referred to the Senate Judiciary Committee, the bill was withdrawn.

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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).

[11] *See* H.B. 279, 2015 Gen. Assemb., 2015-2016 Reg. Sess. (Ga. 2015).

[12] *See* H.B. 927, 2016 Gen. Assemb., 2015-2016 Reg. Sess. (Ga. 2016).

[13] Bill Rankin, *A New Era For Georgia's Highest Court*, ATLANTA J. CONST. (Jan. 9, 2017).

[14] Fla. S.B. 408, 2007 S., Reg. Sess. (Fla. 2007).

[15] *See* Bush v. Holmes, 919 So. 2d 392, 412-13 (Fla. 2006).

[16] Frank Cerabino, *Another Year, Another Try to Oust Supreme Court Justices*, PALM BEACH POST (Oct. 7, 2014).

Senate Bill 408 is not the Florida Legislature's only recent attempt to add justices to the Florida Supreme Court—or Courts. Four years later, Florida House Joint Resolution 7111, introduced by four Republican members, proposed to revise the state constitution to increase the number of supreme court justices again, this time by splitting the Court into two. The two proposed supreme courts, one civil and one criminal, would have come with an additional three justices. The resolution called for the existing Supreme Court to "rank all of the justices then in office by seniority in service," with the three most senior justices—who happened to be Democratic appointees—to be posted to the Criminal Supreme Court.[17] That plan passed in the House, though ultimately failed in the Florida Senate.

As in Florida in 2007, lawmakers in Iowa were arguably motivated to increase the size of their 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,[18] the Iowa Legislature considered amending the Iowa Constitution to increase the size of the Court to nine.[19] Doing so would have provided the Governor with the opportunity to select the additional justices from a list provided by a nominating commission. That bill was referred to the Judiciary Committee and nothing more came of it. This may be because Democrats controlled both Houses and the Governorship at the time. 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 vacancies to be filled by the newly-elected Republican Governor.

The South Carolina Legislature has also considered bills to amend the state constitution to increase the number of justices on the bench. According to *Gavel to Gavel*, a publication of the National Center for State Courts, a Democratic State Senator 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, ending in the 2011-12 session.[20] In 2013, there was again a proposed bill to expand the state's highest court—this time put forward by a Republican legislator, in the Republican-controlled General Assembly.[21] In light of the fact that the Legislature selects the justices for the Supreme Court, some Court observers saw the bill as an attempt to pack the Court by "[a] self-interested legislature[ ]."[22] That said, the bill did not progress beyond the Judiciary Committee.

There is a 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 unclear. Unlike in the states noted previously, justices in Louisiana are not appointed by one of the political branches but

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[17] Fla. H.J. Res. 7111, 22d Leg., Reg. Sess. (Fla. 2011).

[18] 763 N.W.2d 862, 872 (Iowa 2009).

[19] H.J. Res. 2012, 83d Gen. Assemb. (Iowa 2010).

[20] 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].

[21] H.B. 3090, 120th Sess. (S.C. 2013).

[22] 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).

elected to the bench in the first instance. There are currently seven Supreme Court Judicial Districts, from which the seven Supreme Court Justices are elected. In 2017, a Democratic Representative introduced Louisiana House Bill 406, which sought to create two additional Supreme Court Districts, out of existing Districts 4 and 5. It is not plain, on its face, how these changes likely would have affected the ideological makeup of the Court. After examining publicly-available voting data from the 2016 presidential election (the election directly preceding the proposed bill), I conjectured that the proposed legislation would likely have added one Democratic justice and quite possibly two to a Court that was majority-Republican by four to three.[23] The legislation appears to have stalled.

B. *Attempts to Contract or Unpack State Supreme Courts*

Just as the political branches in various states have sought to pack or add seats to their highest court, so, too, have some sought to "unpack" or subtract seats. Indeed, court unpacking has been attempted several times in different states over the last decade.

Introduced in 2011, Montana House Bill 245 would have reduced the state supreme court from seven to five justices. At a time when there was Republican control of both Houses, and the Governor was a Democrat, the bill sought to remove two seats that were held by two of the more liberal members of Montana's court of last resort. The bill's sponsor, Republican Derek Skees, provided the following rationale for the bill 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."[24] A member of a local chapter of the Republican Party put forward another purported benefit to the court-unpacking plan during the hearing: 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.[25] Montana House Bill 245 eventually died in the Standing Committee in April 2011.

In 2017, Oklahoma saw a proposal to reduce its Supreme Court from nine to five justices. Republicans controlled the state House, the state Senate, and the Governorship at that time, and a majority of the Supreme Court of Oklahoma had been appointed by Democratic governors. According to the Brennan Center, Oklahoma House Bill 1699 would have reduced the Court's membership in a way that would "most likely have resulted in changed ideological control" of the Oklahoma Supreme Court in only two years time.[26] No votes were ever taken on the bill.

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[23] *See* Levy, *supra* note 6, at 1144.

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

[25] *Id.*

[26] *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].

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. The text of Washington Senate Bill 5867 referred to recent decisions by the Court 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.[27]

The bill would have required the sitting justices to meet "in public" and then draw straws to determine who would remain on the Court.[28] The bill did not gain much momentum in 2013, though variations of it have been proposed in the Washington Legislature in the past several years, including Washington House Bill 1081 in 2019.

Finally, it is worth noting two additional attempts to shrink state supreme courts from the past decade, although they do not clearly fall under the heading of "unpacking." In 2009 in Alabama, the Democratic Senate Majority Leader introduced a bill to reduce the state supreme court from nine justices to seven, by attrition.[29] 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 the then-Chief Justice. That bill died when the Legislature adjourned in May of 2009. 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.[30] That proposal, however, was but one piece of a large reform bill, which would have reduced the size of the superior court, abolished the Office of Lieutenant Governor, and reduced the size of the General Assembly itself. The bill, which had eighteen sponsors of both parties, died by July of that year.

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These twenty attempts to alter the size of eleven state supreme courts over this roughly decade-long period are striking, particularly when considered alongside the norm against court packing at the U.S. Supreme Court. But, as noted at the outset, one should be careful when attempting to draw lessons from one context to the other.

First, we currently lack data that would allow us to gain purchase on some of the fundamental questions implicated by court expansion. Ideally, we would have public opinion data from each state in which the supreme court was expanded, both pre and post expansion, to gauge if the court's perceived (or sociological) legitimacy was affected by the expansion.

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[27] S.B. 5867, 63rd Leg., Reg. Sess. (Wash. 2013).

[28] *Id.*

[29] S.B. 507, 2009 Reg. Sess. (Ala. 2009).

[30] 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].

Unfortunately though, like other scholars before me, I have found public opinion data about state supreme courts to be wanting.[31]

Considering other questions (and other data), it would be valuable to know, again in each state where expansion has occurred, if there are subsequent efforts to expand the state supreme court in the event that the opposing party gains control of the legislature and governorship. Writing in 2016, Bill Raftery of the National Center for State Courts noted that "[t]he last decade has seen a dramatic uptick in legislative efforts to change the composition of state courts of last resort."[32] And so to put a finer point on the question, if we are witnessing more "first moves" in the direction of court packing, will there be "second moves" in response in the years to come? Unfortunately this data is unavailable—not because of a failure to collect it but because the time for collecting it is not yet up.

This is not to say that we have no information from which to draw upon when considering the questions posed at the outset. It seems noteworthy that the state officials who favored court expansion seem not to have faced significant repercussions; Governor Ducey in Arizona handily won reelection following the expansion of the state supreme court, and Governor Deal in Georgia left office an enormously popular figure two years after the Supreme Court of Georgia's expansion. The fact that political elites were willing to support court expansion and seem to have faced no significant sanctions for doing so might be evidence that the anti-packing norm, at the state level, is not so robust as it can be overcome by other considerations (say of partisanship). One response to this interpretative claim is that many more attempts to pack or unpack courts failed—and so, perhaps, the experiences at the state court level provide a cautionary tale for the elected branches. There may well 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. For example, lawmakers tried to expand the Arizona Supreme Court several times over a five-year span before ultimately succeeding with Arizona House Bill 2537. If proposals to pack or unpack courts at the state level were viewed as illegitimate, one would expect a swift public rebuke after one was brought forward and not subsequent attempts. The larger point is that while we can sift through what data we have and make some conjectures, we are not yet in a position to fully know what lessons can be drawn from the state court experiences.

Second, even if we did know what lessons the state court experiences held, it is not clear how they should apply to the federal courts. The two are different judicial systems (and, indeed, not all state court systems are alike). To return to one clear difference, a majority of state supreme court justices are not appointed but elected, which may change the judicial independence of these courts and the relationship between the three branches of government.[33] Accordingly, what can be learned from one context simply may not translate to the other.

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[31] *See, e.g.*, Neal Devins & Nicole Mansker, *Public Opinion and State Supreme Courts*, 13 U. PA. J. CONST. L. 455, 479 (2011) (noting that "little data exists regarding state public opinion of state supreme courts, issues, or decisions[.]").

[32] William E. Raftery, *Up, Down, All Around*, 100 JUDICATURE 6, 6 (2016).

[33] For a valuable discussion of these themes, and the history of judicial elections at the state level more generally, see JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA (2012).

That said, one should also not overstate the differences between the federal court system and the relevant state court systems. In the two states in which court expansion recently occurred, the new justices were not elected but appointed by the governor in the first instance. And while it is the case that the governor in Arizona was required to appoint the two new justices from a list provided by a nominating commission, that difference becomes less salient when one considers that the nominating commission is populated by the governor, and that observers contended he had stacked the commission to secure at least one desired nominee.[34] In Georgia, it is worth noting that the two new justices had to stand for election the following year after being seated—but this difference from the federal system should be understood against the backdrop that no sitting justice had been defeated in the over one hundred years since Georgia began electing its justices.

In sum, it is challenging, as yet, to parse the lessons from the state court experiences with attempts at court packing and unpacking. Such experiences may indicate that the norm against court packing is not particularly robust at the state level, as it did not rule out repeated and occasionally successful attempts to pack state courts of last resort. But additional data would be helpful in answering this and other questions implicated by court expansion. Moreover, it should be appreciated that the differences between the state and federal court systems—which ultimately impact notions of judicial independence and separation of powers—affect which lessons will translate and to what extent.

II: Current Supreme Court Size: The State Perspective

Quite plainly, any proposal to expand the U.S. Supreme Court would necessarily result in a decision-making body of more than nine members. A Court composed of more than nine Justices is not entirely unheard of—indeed, there was a brief time when the Court was composed of ten.[35] Still, an expansion raises questions about whether such a court can still function well as a single unit. Just as it may be helpful to consider the different sizes of courts of last resort in other countries in answering this question, so, too, is it worth considering the size of state supreme courts as they stand today.

There are currently fifty-two state courts of last resort across the country. (Oklahoma and Texas have a bifurcated system of final appeals courts; both have state supreme courts, which are the courts of last resort for civil matters, and courts of criminal appeals, which are the courts of last resort for criminal matters.) The fifty-two state courts of last resort range in size from five to nine justices. Specifically, seven are composed of nine justices; twenty-eight have seven; and seventeen have five. The following table notes the size of each court.

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[34] *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].

[35] *See supra* note 3.

Table 1: Current Size of State Courts of Last Resort

State Supreme Court	Number of Authorized Judgeships
Supreme Court of Alabama	9
Alaska Supreme Court	5
Arizona Supreme Court	7
Arkansas Supreme Court	7
Supreme Court of California	7
Colorado Supreme Court	7
Connecticut Supreme Court	7
Delaware Supreme Court	5
Florida Supreme Court	7
Supreme Court of Georgia	9
Supreme Court of Hawai'i	5
Idaho Supreme Court	5
Illinois Supreme Court	7
Indiana Supreme Court	5
Iowa Supreme Court	7
Kansas Supreme Court	7
Supreme Court of Kentucky	7
Louisiana Supreme Court	7
Maine Supreme Judicial Court	7
Maryland Court of Appeals	7
Massachusetts Supreme Judicial Court	7
Michigan Supreme Court	7
Minnesota Supreme Court	7
Supreme Court of Mississippi	9
Supreme Court of Missouri	7
Montana Supreme Court	7
Nebraska Supreme Court	7
Supreme Court of Nevada	7
New Hampshire Supreme Court	5
New Jersey Supreme Court	7
New Mexico Supreme Court	5
New York State Court of Appeals	7
Supreme Court of North Carolina	7
North Dakota Supreme Court	5

Supreme Court of Ohio	7
Supreme Court of Oklahoma	9
Oklahoma Court of Criminal Appeals	5
Oregon Supreme Court	7
Supreme Court of Pennsylvania	7
Supreme Court of Rhode Island	5
Supreme Court of South Carolina	5
South Dakota Supreme Court	5
Tennessee Supreme Court	5
Supreme Court of Texas	9
Texas Court of Criminal Appeals	9
Utah Supreme Court	5
Vermont Supreme Court	5
Supreme Court of Virginia	7
Washington Supreme Court	9
Supreme Court of Appeals of West Virginia	5
Wisconsin Supreme Court	7
Wyoming Supreme Court	5

Again, one should be careful in attempting to draw definitive lessons from this comparative data. Former Judge McConnell, in his written testimony for this Commission, concluded that "it seems that constitutional drafters at different times, in different places, of different views, uniformly have rejected the idea of a supreme court with more than nine justices."[36] That may well be correct, with the lesson being that common wisdom suggests a court of more than nine is undesirable, and quite possibly difficult to administer. And yet it is worth noting that the drafters may not have independently arrived at this conclusion. It is possible that at least some of those drafters were influenced by the size of the U.S. Supreme Court—and nine might have seemed, for some, a Rubicon that could not be crossed while it is the size of the nation's highest court. Additionally, some drafters may have taken into account the size of their sister state courts, and so nine became a collectively-reinforcing limit.

It is also worth bearing in mind, as seen in Part I, that there have been attempts to take some state supreme courts above nine justices. For example, Georgia Senate Resolution 370 would have increased the state supreme court from seven to thirteen justices. This is all to say that consulting with *intra*-country comparative data about court size can be illuminating, but one must be judicious when trying to draw hard conclusions.

[36] Michael W. McConnell, *Written Testimony Before the Presidential Commission on the Supreme Court of the United States*, (June 30, 2021), at 5.

Conclusion

The task of the Commission is no easy one; there are several distinct questions implicated by Court expansion and other changes to the Court's composition. These questions range from the empirical to the historical; from matters of constitutional theory to matters of judicial administration and institutional design. The hope is that the data provided here will help the Commissioners gain some purchase on them.

One might well say that the states are judicial laboratories. In light of how limited the data is with respect to U.S. Supreme Court expansion (certainly of late), it is worth looking to the experiences of state courts of last resort across the country. But we should bear in mind that these experiments have not fully run; we are still *in medias res*, parsing through limited data. And when the full results are in, there will still be worthy questions to consider about the extent to which they can be generalized to the nation's highest court.

Thank you.