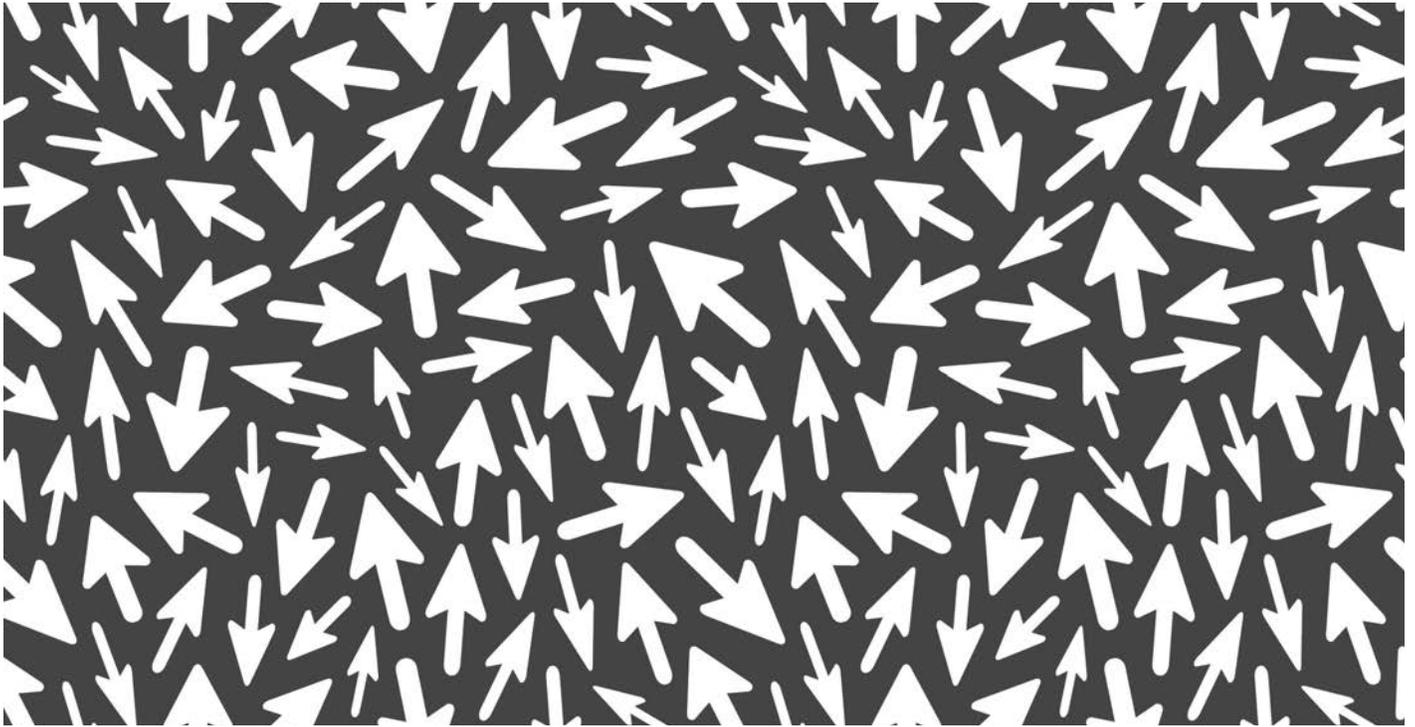


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## Up, down, all around

*Legislative proposals to change state supreme court compositions gaining popularity*

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. Proponents argue they are seeking more efficient courts; opponents claim these efforts are often no more than modern-day court-packing schemes.

In order to change court composition and numbers, 24 states require a constitutional amendment, 24 states give the legislature power to set the number of seats by statute, and two states require consent of the court itself plus legislative action (Alaska and South Dakota). In the 24 states where the state legislature controls the number and composition of the court, the following rules apply:

- Eight state constitutions do not prescribe the number of justices on the court, leaving it entirely to the legislature to set the number.
- Eight states prescribe a minimum but no maximum number of seats on the court. For example, the Arizona Supreme Court must be made up of “not less than five justices. The number of justices may be increased or decreased by law, but the court shall at all times be constituted of at least five justices.” However, several of these states have court-packing restrictions that limit the number of seats that can be added at any one time (Iowa) or that require supermajorities in two separate legislative sessions (Virginia).
- Seven states prescribe a minimum and a maximum. Indiana’s Supreme Court is made up of a “Chief Justice of the State and not less than four nor more than eight associate justices.”
- One state, Georgia, prescribes a maximum with no minimum (“not more than nine Justices”).

From 1980 to 2013, five legislative efforts to change the number of justices on courts of last resort were successful.

In two instances, the number of justices dropped. In 1998, Iowa’s Supreme Court was reduced from nine justices to seven in exchange for an expansion of the Court of Appeals, from six judges to nine. In Minnesota, a similar reduction occurred when that state’s Court of Appeals was created in 1983.

In another three instances, the number of justices increased. Connecticut’s Supreme Court

was expanded from six justices to seven in 1987. The Oklahoma Court of Criminal Appeals, the state's court of last resort in criminal matters, was expanded in 1998 from three judges to its current five. Nevada's Supreme Court was expanded from five justices to seven in 1997 after the defeat of a constitutional amendment to create a Court of Appeals in 1992.

#### RECENT PROPOSALS OVERTLY POLITICAL

Beginning with the 2007-08 legislative cycle, serious interest in changing the number of justices dramatically increased. Several attempts were remarkable in that they were explicitly introduced to punish the court by adding (or removing) justices based on their decisions on controversial issues. A Republican member of the Florida Senate, for example, introduced a plan to expand that state's Supreme Court from seven to 15 members specifically to overturn a 2006 court decision that found a school-voucher program unconstitutional. A modified version of this plan, one that would have split the Florida Supreme Court into two larger courts (civil and criminal), cleared the House in 2011 but died in the Senate. At almost the same time, Democrats in Michigan circulated an initiative to reduce the state's Supreme Court by removing the two most recently elected justices, both of whom were Republicans, just before the 2010 census required the drawing of legislative district lines. Publicly touted as a nonpartisan cost-savings measure, the proposal collapsed when a PowerPoint presentation entitled "Changing the rules of politics in Michigan to help Democrats" was accidentally posted to a union website. In Montana, a

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plan to reduce the Supreme Court from seven to five was also explicitly introduced in order to "rein in" the court before legislative lines were redrawn and as a means to force the court to accept tort reform or face an overwhelming civil caseload.

Also notable in these legislative efforts are attempts to link court expansion with additional funding for the judiciary. In Georgia, a 2009-10 plan to expand the Supreme Court was coupled with a \$100 "judicial operations fee" added to all civil actions to pay for judicial salaries. The 2011 plan in Florida to split that state's Supreme Court into two larger courts included a constitutional guarantee of at least 2.25 percent of all general revenue funds to the judiciary. Tying funding to court expansion arose most recently in Arizona in 2016.

Of these proposals, three have been enacted. In the case of Nevada, a planned reduction in the court was repealed. The previously mentioned 1997 law that expanded the Supreme Court from five justices to seven contained a reduction provision: In the

event voters ever approved an intermediate appellate court, the Supreme Court would lose the two seats. Voters did approve the creation of the Court of Appeals in 2014; however, a 2015 law repealed the 1997 provision and ensured that the Nevada Supreme Court would remain at seven.

In 2016, both the Arizona and Georgia legislatures approved plans to expand their courts by two justices, from five to seven for Arizona and from seven to nine for Georgia. As in prior efforts, proponents argued that increased court sizes would lead to more diverse opinions and more efficient courts. Critics claimed legislators' real motivation was to give governors of their party the ability to appoint more justices.

Both Arizona and Georgia took different approaches in their expansions. Georgia's increase was part of a larger bill that restructured the jurisdiction, practice, and procedures of both the Supreme Court and Court of Appeals. Arizona's bill simply increased membership of the Supreme Court, but reports indicated the change was wrapped up in discussions regarding court funding. Arizona Chief Justice Scott Bales wrote in an op-ed that while "our caseload and population do not mandate more justices," the courts were underfunded and therefore he would support the expansion as part of a larger effort to increase court funding and judicial salaries, which was proposed in separate legislation.

– **WILLIAM E. RAFTERY** is the author of *Gavel to Gavel*, a National Center for State Courts blog that reviews state legislation affecting the courts.

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