



“Court Packing”: Legislative Control over the Size of the Supreme Court

December 14, 2020

In the past year, [legal commentators](#), [policymakers](#), and the [national press](#) have devoted significant attention to proposals to increase the size of the Supreme Court, sometimes colloquially called “court packing.” Many recent court expansion proposals are premised on the belief that, if more seats were added to the Supreme Court, it would give the President who nominates the new Justices significant power to shape the Court in a way that aligns with the policy preferences of the President and the controlling political party. The Constitution generally grants Congress control over the size and structure of the federal courts and, during the first century of the Republic, Congress enacted multiple statutes changing the size of the Supreme Court. However, since the Reconstruction era, the Court’s size has been set at [nine Justices](#). The last notable attempt to enlarge the Court occurred in 1937, when President Franklin Delano Roosevelt’s Administration proposed legislation [broadly viewed](#) as an effort to make the Court more favorable to President Roosevelt’s New Deal policies. Congress declined to act on the Roosevelt Administration’s proposal in large part because of [concerns](#) that it impermissibly infringed on the principle of judicial independence enshrined in [Article III of the Constitution](#). Recent Supreme Court expansion proposals [have likewise prompted debate](#) about the role of the judiciary and the means by which political actors may influence the Supreme Court’s approach to interpreting the law.

This Legal Sidebar provides an overview of the legal issues surrounding Supreme Court expansion. It first briefly discusses Congress’s constitutional power to structure the federal courts, then surveys past legislation changing the size of the Supreme Court. The Sidebar next considers constitutional constraints on Congress’s power to change the size and structure of the Supreme Court, including both express textual limits and implied limits that may restrict Congress’s ability to alter the Court’s makeup. Finally, the Sidebar surveys selected proposals to modify the size or composition of the Court through legislation or constitutional amendment.

Congressional Power over the Supreme Court

The Constitution establishes a federal judicial branch that is separate from the legislative and executive branches, but also grants the political branches, and especially Congress, significant power over the federal courts’ size and composition. [Article III, section 1](#) of the Constitution provides: “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the

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LSB10562

Congress may from time to time ordain and establish.” Although the Constitution provides that there shall be “one supreme Court,” it does not specify the High Court’s size or composition. And, while [Article I](#) gives Congress the power to “constitute Tribunals inferior to the supreme Court,” the Constitution does not expressly grant Congress the authority to set or modify the size of the Supreme Court. Instead, Congress is understood to [possess](#) that power by virtue of the [Necessary and Proper Clause](#), which allows Congress to legislate as needed to support the exercise its enumerated powers and “all other Powers vested by th[e] Constitution in the Government of the United States,” including those of the [judicial branch](#). Using these powers, Congress has enacted legislation to [constitute the Supreme Court](#) and establish federal [district courts](#), [courts of appeals](#), and numerous [courts of special jurisdiction](#).

In addition to structuring the federal judiciary, the political branches hold other controls over the composition of the federal bench. [Article II](#) of the Constitution grants the President the power to appoint federal judges, including Supreme Court Justices, with the “Advice and Consent” of the Senate. The Senate [may opt](#) to confirm or reject the President’s nominees, or it may [choose not to act](#) on them. In addition, [Articles I](#) and [II](#) give Congress the power to impeach and remove federal officers for “Treason, Bribery, or other high Crimes and Misdemeanors.” Congress has [repeatedly exercised](#) that power to address perceived violations of the law and abuses of power by federal judges.

Historical Changes to the Size of the Supreme Court

[For over 150 years](#), the size of the Supreme Court has been set by [statute](#) at nine Justices—one Chief Justice and eight Associate Justices. However, as noted above, the Constitution does not specify the size of the Supreme Court, and the Court has not always had nine members. Rather, Congress changed the Court’s size multiple times during the nineteenth century. Many commentators argue that Congress has at times exercised its power to [alter the structure of the Supreme Court](#) for [political reasons](#).

Congress first exercised its authority to structure the federal courts in the [Judiciary Act of 1789](#). In addition to establishing federal district and circuit courts, the 1789 act created a six-member Supreme Court with one Chief Justice and five Associate Justices. In 1801, Congress reduced the size of the Court to [five Justices](#). However, the 1801 statute did not eliminate an occupied seat on the Court; instead, it provided that the change would take effect “after the next vacancy.” Congress [repealed](#) the 1801 law before any vacancy occurred, leaving the size of the Court at six Justices. Over the following decades, Congress enacted multiple statutes changing the size of the Court. At its largest, during the Civil War, the Court had [ten Justices](#). While some scholars assert that the expansion to ten Justices was driven by [docket needs](#), others [contend](#) that Congress enlarged the Court to allow President Abraham Lincoln to “appoint Justices who favored the Republicans’ agenda of combatting slavery and preserving the union.” In 1866, Congress [reduced](#) the size of the Court to seven Justices. (Like the 1801 legislation, the 1866 law provided that the Court would decrease in size as vacancies arose rather than eliminating any occupied seats on the bench.) Some commentators argue the reduction stemmed at least in part from concerns that a [ten-judge Court was too large](#), or from the sitting Chief Justice’s desire to [increase the Justices’ salaries](#), but others assert that [political conflict](#) between Congress and President Andrew Johnson motivated the change. In 1869, under a new presidential administration, Congress expanded the Court to include [nine Justices](#). Overall, scholars dispute Congress’s motives in changing the Court’s size during the nineteenth century. While some argue that [practical needs](#) justified most or all of the changes, many point to political considerations, with one scholar [asserting](#) that every change in the Court’s size “was intended to affect the Court’s balance of partisan or ideological control.” Regardless, the 1869 legislation was the last time Congress changed the size of the Supreme Court.

However, the Reconstruction Era was not the last time that Congress considered legislation that would expand the Supreme Court. In the 1930s, President Franklin Delano Roosevelt backed sweeping measures designed to promote recovery from the Great Depression, only to see the Supreme Court [strike down multiple pieces of New Deal legislation](#). In response, President Roosevelt developed a plan to appoint

additional Supreme Court Justices, seeking to swing the Court in his favor. The Roosevelt Administration proposed the Judicial Procedures Reform Bill of 1937, which would have authorized the President to nominate one new judge for each federal judge with ten years of service who did not retire within six months of reaching the age of 70, including up to six new Supreme Court Justices. (Among other things, the proposal would also have allowed the President to appoint additional judges to the lower federal courts.) The Senate Judiciary Committee issued a report emphatically condemning the measure. Members of the Supreme Court also publicly opposed the bill, and it languished in the legislature. Ultimately, Justice Owen Roberts, who had previously voted with a majority of the Supreme Court to strike down New Deal legislation, voted to uphold a minimum wage law in *West Coast Hotel Co. v. Parrish*. The precise reasons for Justice Roberts's vote remain disputed, but his action became known as the "switch in time that saved nine," and President Roosevelt eventually abandoned his plan to enlarge the Supreme Court. Lively academic discussion continues around the broader historical and legal implications of the New Deal court expansion proposal, but many view the episode as a political failure that has deterred subsequent attempts to enlarge the Supreme Court.

Constitutional Constraints on Changes to the Supreme Court

Legal scholars almost universally agree that Congress has the constitutional authority to enact legislation changing the size of the Supreme Court for practical reasons, such as managing caseload. (In fact, while Congress has not recently changed the size of the Supreme Court, it has repeatedly expanded the lower federal courts to accommodate increasing caseload.) However, some contend that expanding the Court with the intent to shape the Court's composition and obtain more favorable case outcomes may raise constitutional questions.

The Constitution contains some express provisions that limit any legislation affecting the structure of the federal courts, regardless of Congress's underlying motivations. Article III provides that all federal judges "shall hold their Offices during good Behaviour," a provision that the Supreme Court has interpreted to mean that federal judges enjoy life tenure unless impeached. Article III also states that judges may not have their compensation reduced while in office. Aside from those relatively sparse requirements, the Constitution entrusts control over the size and structure of the federal courts to Congress. Nothing in the Constitution's text expressly restricts Congress's ability to expand the Supreme Court in an attempt to influence the Court's ideology. As a practical matter, outside the context of court expansion, political and policy considerations often affect the selection of Supreme Court Justices. For instance, Presidents and presidential candidates may publicly indicate their intent to nominate Justices with viewpoints that they believe will further their policy preferences. Senators evaluating a judicial nominee may consider how they believe the nominee might vote on certain issues if confirmed, and confirmation hearings have given the Senate Judiciary Committee the ability to ask nominees about their judicial philosophy and prior statements. Supreme Court Justices may also choose to retire at a time that allows a particular President to select their successors. In light of these practices, and absent constitutional language to the contrary, many scholars contend that Congress possesses the constitutional authority to enlarge the Supreme Court even if the expansion is intended to shape the Court's political composition.

On the other hand, legislative efforts to alter the political composition of the federal judiciary may raise concerns related to the constitutional principle of separation of powers. The Constitution's Framers aimed to ensure that the Judiciary would be independent from the political branches of government. For instance, in the *Federalist Papers*, Alexander Hamilton advocated for courts that would interpret the law impartially and explained that the "independence of the judges is . . . requisite to guard the Constitution and the rights of individuals" from encroachment by the legislature. The considerations that Hamilton discussed are embodied in Article III, which established the federal judiciary as a fully discrete branch of government (in contrast to the British system at the time, where a branch of the legislature also functioned as the tribunal of last resort). Article III's life tenure requirement was also designed to insulate judges

from political pressure. If Congress were to change the size or composition of the federal courts in an attempt to obtain desired outcomes in future cases, some might raise separation of powers objections that the legislature was improperly attempting to control a coequal branch of government. Congress itself has voiced such objections in the past: in its report rejecting the Judicial Procedures Reform Bill of 1937, the Senate Judiciary Committee declared that the bill “applies force to the judiciary and . . . would undermine the independence of the courts,” and that the “theory of the bill is in direct violation of the spirit of the American Constitution.” Some commentators have likewise opposed recent court expansion proposals on separation of powers grounds.

Other commentators assert that, by remaining stable for a century and a half, a nine-Justice Supreme Court has now become a settled constitutional norm that would be undermined by efforts to expand the Court for political reasons. Some scholars cite the rejection of the 1937 court expansion proposal as further support for such a norm. On the other hand, some scholars contend that novelty alone does not signal that a proposal is unconstitutional. And some dispute whether politically motivated court expansion proposals would be novel, pointing to the historical changes to the Court’s size discussed above, among other congressional actions, as prior examples of political influence over the Court.

In light of concerns including the foregoing separation of powers questions and historical norms, some commentators argue that even if Supreme Court expansion and related proposals comply with the express limitations of the Constitution, those tactics are nonetheless incompatible with the non-textual rules, norms, and institutions that guide American government, sometimes referred to as the “small-c” constitution (in contrast to limits explicitly spelled out in the Constitution itself). Assuming politically motivated expansion of the Supreme Court would raise constitutional questions, the Court itself might consider those issues, though there is some question whether the federal courts would exercise jurisdiction over a challenge to a court expansion statute. In addition, Members of Congress and the President may independently consider constitutional arguments for and against proposed court expansion legislation.

Considerations for Congress

Discussion of Supreme Court expansion recently experienced a resurgence following the death of Justice Ruth Bader Ginsburg and the nomination and confirmation of Justice Amy Coney Barrett in the weeks leading up to the 2020 presidential election. A number of recent proposals advocate changing the size or structure of the Supreme Court in an effort to change the Court’s perceived political composition. The proposals vary in scope. Some commentators have suggested simply increasing the size of the Supreme Court, for example by adding two or four seats. Other proposals would alter the size of the Court while also changing the Court’s structure or composition. For example, a proposal known as the “balanced bench” would expand the Court to include fifteen Justices: five permanent Justices selected by Republicans, five permanent Justices selected by Democrats, and five temporary Justices drawn from the lower federal courts and chosen unanimously by the ten permanent Justices. Another proposal would reduce the size of the Court to eight Justices, evenly divided between Democratic- and Republican-selected jurists.

To the extent a proposal would enlarge the Supreme Court while otherwise maintaining the Court’s current structure, most scholars agree that Congress may pursue that change through legislation, as it has in the past. On the other hand, any proposal that would immediately decrease the size of the Court or otherwise remove a sitting Justice from the bench would violate the constitutional requirement that federal judges enjoy life tenure during good behavior. Congress could avoid that issue, as it has in prior legislation, by making any reduction effective only once a vacancy occurs due to the death or retirement of a sitting Justice. Specific proposals may also raise other constitutional questions under provisions such as Article III’s life tenure requirement (by creating temporary judgeships), the Appointments Clause (by restricting the President’s discretion to select judicial nominees), or the First Amendment (by limiting

eligibility for judgeships based on Justices' political party affiliation). If a court reform proposal conflicted with existing constitutional limitations, the reform would require a [constitutional amendment](#).

Proposals to modify the size and composition of the Court with the aim of obtaining favorable judicial outcomes also raise complex questions about the role of the judiciary within the American political system and how judges decide cases. Before examining those questions in detail, it is important to note that Supreme Court expansion is not the only practice that can raise such issues. Although proposals to enlarge the Supreme Court have attracted popular attention recently, supporters of both major political parties have previously proposed or adopted different means to increase the number of federal judges appointed by a President of their own party, or decrease the number of judges appointed by a President of the opposing party. Examples include [encouraging strategic retirements](#) by sitting Supreme Court Justices; delaying, [expediting](#), or [taking no action](#) on judicial confirmation hearings; and seeking to [expand](#) or [shrink](#) the lower federal courts to increase or decrease the number of judges the President could nominate. All of those strategies have generated controversy, and all raise certain overlapping issues.

First, many of the foregoing proposals are premised on the view that a judge appointed by a certain President is likely to rule in ways that advance the policy agenda of that President or the President's political party. However, selecting judges based on their perceived ideology may not necessarily be an effective way to control the outcome of future cases. As a recent [CRS report](#) discusses in more detail, it is difficult to predict how judicial nominees will rule in future cases based solely on their past writings and statements. There are multiple areas of law where Supreme Court alignments may [not divide neatly along political lines](#). Moreover, even assuming it is possible to determine a judge's personal partisan affiliation, the judge may follow a judicial philosophy—encompassing the judge's approach to [constitutional](#) and [statutory interpretation](#)—that yields results that differ from his or her perceived political affiliation. For instance, Justice Neil Gorsuch's recent opinion in *Bostock v. Clayton County* surprised some observers who did not expect a jurist “widely considered [one of the more conservative justices](#) on the Supreme Court” to author an opinion extending federal employment discrimination protections to gay and transgender employees. However, other commentators viewed Justice Gorsuch's opinion as driven by a [textualist approach](#) to statutory interpretation and thus consistent with his past jurisprudence. Commentators also debate the efficacy of politically motivated court expansion in particular. Some proponents of Supreme Court expansion assert that Congress should enlarge the Court in order to [preserve certain legal doctrines](#) or to [correct a perceived political imbalance](#) on the Court. On the other hand, some who oppose court expansion worry that if one political party enlarges the Supreme Court, the other party could later simply [retaliate by adding additional Justices](#). They contend that a [court expansion tit-for-tat](#) could thwart attempts to shift the Court's political balance and, if carried to the extreme, yield an [absurdly large Court](#).

Second, efforts to control the political composition of the federal judiciary may conflict with the traditional understanding of courts as independent, non-political entities. Besides the possible constitutional issues discussed above, many commentators worry that proposals that seek to control which party nominates federal judges may [increase](#) the perceived [politicization](#) of the judiciary and [decrease](#) its [perceived legitimacy](#). They contend that if the public comes to view courts, and especially the Supreme Court, as political bodies, people may lose confidence in the ability of the federal judiciary to administer justice impartially. Some proponents of court expansion counter that the Supreme Court has already become overly politicized in recent decades and argue that structural changes may help [depoliticize the Court](#). In response to concerns that court expansion would upset institutional norms, some commentators contend that those norms are [overstated or observed inconsistently](#), or that the policy benefits that would result from changing the Court's composition would [outweigh any institutional harm](#).

While court expansion proposals have multiplied in recent months, many commentators and policymakers oppose attempts to change the size of the Supreme Court. Some Members of Congress have proposed a [constitutional amendment](#) that would set the size of the Supreme Court at nine members, preventing

future attempts to enlarge the Court through legislation. Another [recent bill](#) would bar the Senate from considering legislation to change the size of the Supreme Court unless two-thirds of Senators assented to such consideration. Other commentators advocate for court reform but favor [alternatives to court expansion](#) that would not involve changing the size of the Supreme Court.

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