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Is Court Packing Constitutional? Don't Be So Sure

The precedents don't support what the Democrats want to do, which would be an assault on the separation of powers.

By James Piereson
Sept. 7, 2026 11:26 am ET

The Supreme Court in Washington, Aug. 25. J. SCOTT APPLEWHITE/ASSOCIATED PRESS

Democrats are trying to revive an idea left for dead nearly 90 years ago: packing the Supreme Court. Many members of the party have proposed expanding the court from nine justices to 13 the next time they win control of the presidency and Congress. That would transform a 6-3 conservative majority into a 7-6 liberal one.

Last week only one House Democrat, North Carolina's Don Davis, voted for a measure to propose a constitutional amendment fixing the court's size at nine. But it's unclear that such an amendment is necessary. Democrats cite several precedents from the 19th century in which Congress voted to increase the number of justices. But there are no clear precedents that support a partisan court-packing plan and a strong argument that it would be an unconstitutional assault on judicial independence and the separation of powers.

Article III establishes "one Supreme Court," and Article I mentions "the Chief Justice," but otherwise the Constitution leaves to Congress the authority to establish the structure of the federal judiciary, including the number of justices. In the Judiciary Act of 1789, Congress created the Supreme Court with six justices.

That number fluctuated during the early 19th century, mostly for administrative reasons. Justices were expected to "ride the circuits"—to spend part of each year hearing appeals and presiding over trials in the

geographical circuits they represented. As the country expanded westward, Congress created new circuits, along with new justices to hear cases in those circuits.

The Seventh Circuit Act of 1807 created a new judicial circuit made up of Ohio, Kentucky and Tennessee and added a justice to ride it. The Eighth and Ninth Circuits Act of 1837 and the Tenth Circuit Act of 1863 expanded the high court further. But the Judicial Circuits Act of 1866 consolidated the circuits into nine, and the Judiciary Act of 1869 fixed the high court's size at nine justices. By the time Congress created the modern 10th Circuit in 1929, it had abolished circuit riding.

There were two occasions on which Congress reduced the size of the court for political reasons. In 1801 lame-duck Federalist lawmakers eliminated one justice to deprive President Thomas Jefferson of an appointment. Congress repealed that law in 1802, before a vacancy arose, and reset the number of justices to six. The Judicial Circuits Act of 1866 would have reduced the size of the court from 10 to seven to deprive President Andrew Johnson of new appointments. The court shrank to eight justices before President Ulysses S. Grant signed the 1869 act.

Franklin D. Roosevelt initiated the only effort to expand the court for partisan reasons. Frustrated that a coalition of conservative justices had declared New Deal legislation unconstitutional, he proposed in 1937 to expand the court gradually to 15 justices by adding a new seat when justices reached age 70 and 10 years on the court and didn't retire within six months. Democrats held more than three-fourths of the seats in both congressional chambers, but the proposal stirred bipartisan opposition from lawmakers who said it would politicize the court and turn the president into a dictator.

In short order, the Senate Judiciary Committee issued a stinging rebuke, declaring that the plan "should be so emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America." One conservative justice began voting with FDR, and the controversy passed, having scuttled the idea of partisan court packing.

Until now. Democrats say that if they gain power in Washington, they will kill the Senate filibuster, expand the court by a simple majority vote, and then confirm new justices as soon as the president appoints them.

But the courts will have something to say about all this. Republican lawmakers will likely file a lawsuit challenging the legislation, so that those appointments will be held in abeyance while the issue works its way to the Supreme Court.

Ruling on their own institution would put the justices in an awkward position. But there are good reasons to think such a law would be

unconstitutional, in that it would undermine the separation of powers and the independence of the judiciary. The history of court expansion in the 19th century provides no support for the Democrats' plan, nor does the language of the founders in their commentary on the Constitution or FDR's ill-fated experiment with court packing.

The justices may also consider the long-term implications of court packing. Once one party starts it, the other party will have every reason to follow suit, leading to further expansions of the court. A court composed of 20 or 50 or 100 members at some point would come to look like another legislative body.

No matter how this legal battle played out, a court-packing law would undermine respect for the rule of law and further politicize the Supreme Court. That would be the only effect if the Democrats were to lose in court.

Instead of tossing aside Senate rules and breaking other norms and precedents to pack the court, Democrats would be better advised to follow the example of Thomas Jefferson's Republicans, not to mention Ronald Reagan's and Donald Trump's. Influence the court the old-fashioned way, by electing presidents and senators who will appoint justices more to their liking.

Mr. Piereson is a senior fellow at the Manhattan Institute.

Appeared in the September 8, 2026, print edition as 'Is Court Packing Constitutional? Don't Be So Sure'.

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