The Constitution allows Congress to add or subtract seats, and it has done so several times, though not since 1869. Over the years, Congress has reduced the number of seats to as few as five and increased it to as many as 10. The changes were often made for partisan advantage. There are contemporary analogies, too. The two states were controlled by Republicans, and the moves made the courts more conservative. "At the very least, that practice is in tension with the current Republican claim that court packing is an affront to separation of powers and must be off the table," said Marin K. Levy, a law professor at Duke and the author of the study, which was published in The William & Mary Law Review.

Democrats are threatening to pack the Supreme Court by enacting legislation to expand its size if they take the White House and Senate in 2020. That would instantly replace a 5-4 conservative majority with a left-leaning one that would be irreversible unless Republicans win control of the government and expand it even further. As in 1937, when Democrats first mooted the idea, such legislation is unlikely to pass. Yet as in 1937, the threat itself may be enough to produce the desired effect by intimidating the justices. For 150 years, the Constitution's Commerce Clause had been understood to reach only transactions that crossed state lines. Thus the justices struck down as unconstitutional virtually every New Deal program passed in FDR's first term. $13.95. - Packing the Courts: The Conservative Campaign to Rewrite the Constitution. By Herman Schwartz. New York: Charles Scribner's Sons, 1988. An overwhelming majority vote to tear up the dictatorship-era constitution and create a new one. There have been jubilant scenes in Chile after an overwhelming majority voted in support of rewriting Chile's constitution, which dates to the military rule of Gen Augusto Pinochet. With almost all the ballots counted, 78% had voted "yes" in a referendum that was called after mass protests against inequality.