

Packing the Supreme Court

Spurred by the U.S. Supreme Court's recent racial redistricting decision, Democrats are once again calling for court packing if their party can run the table in 2028. From members of Congress to political strategists, even a former vice president, their hopes to pack the nation's highest court hinges on winning the presidency and both houses of Congress. But what exactly does "packing the court" mean?

Packing the Supreme Court doesn't mean filling vacancies; instead, it refers to a legislative effort to increase the number of Justices on the bench to shift the court's ideological balance in favor of the party in power. The concept functions through several key details¹:

- **How it works:** The U.S. Constitution does not set a specific number of Supreme Court Justices. That power belongs to Congress. By passing a law, Congress can expand the court and allow the President to appoint new Justices to immediately outvote the existing majority.
- **Historical Context:** The size of the Court has been fixed at nine Justices since 1869. The most famous attempt to alter this number occurred in 1937 when President Franklin D. Roosevelt proposed the "Judicial Procedures Reform Bill" (widely called the court-packing plan) to add up to six new Justices in order to stop the Court from overturning his New Deal legislation. The effort failed and met widespread bipartisan backlash.
- **Controversy:** Critics argue that packing the court violates democratic norms, undermines the judiciary's independence, and triggers retaliatory expansion whenever a new party takes control. Proponents view it as a necessary check against an entrenched, partisan judiciary.

In conducting our research, Operation Wildfire found what we believe is one of the best articles on the subject authored by The Free Press,² and provides one of the major reasons that Republicans must maintain control of the U.S. Congress. The article follows.

But winning the trifecta – the White House, the Senate and the House – is not enough to pack the Court. Democrats would have to do something else first. They wouldn't have to amend the Constitution, which does not specify how many Justices there are. That's up to Congress. So, in theory, a Democrat-controlled Congress could pass a statute expanding the number to 13.

Nuke the Filibuster

Under current Congressional rules, a statute increasing the number of Justices would have to get through a Senate filibuster, and the odds of Democrats getting 60 votes in the Senate are small.

If Democrats are seriously telling the world that they're going to court-pack on "day one" after winning the trifecta, then they're saying they're going to nuke the filibuster on day one as well. Which they could do, because the Senate can eliminate the filibuster by majority vote.

But if that's their plan and announced intent, they're not only inviting Senate Majority Leader John Thune and his fellow Republicans to do the same thing – they're leaving the Republicans no choice.

Democrat leadership, their consultants, even the former vice president seem to forget that Republicans have the trifecta right now and could do exactly what the Democrats are proposing. They could nuke the filibuster and ram through their legislative agenda, which they haven't been able to do precisely because of the filibuster. They could even pack the Court, appointing additional conservative Justices to cement their control.

¹ "Court Packing": Legislative Control over the Size of the Supreme Court, <https://www.congress.gov/crs-product/LSB10562>

² Packing the Court would Shred the Constitution, <https://www.thefp.com/packing-the-court-would-shred-the-constitution>

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But suppose Democrats fail to win the trifecta in 2028? Then their calls to court-pack, if heeded, will result in a huge Republican win. Responding to that threat, Republicans will pass laws that Democrats can't undo, and Republicans could preemptively pack the Court, creating an overwhelming conservative majority perhaps for decades to come.

Of course, it's possible that the current Republican Congress might refrain from taking action, believing that Democrats can't be serious about the nuclear option. And maybe the Democrats will achieve their goal, running the table in 2028, nuking the filibuster and packing the Court.

That would force the Republicans to do the same thing that next time they win the trifecta, leading the Democrats to do even more court-packing the next change they get. We could have 13 Justices in 2028 with a liberal majority, then 17 in 2032 with a conservative majority, and on and on. And that brings us to the harmful effect.

Destruction of the Constitution

If that's the America Democrats are looking forward to – with ever-increasing court-packing cycles swinging from left to right and back again – then they might as well repeal the Constitution.

The point of constitutional law is to have one branch of government, headed by the Supreme Court, that can stand against majority will when it violates the nation's fundamental law. The point of court-packing is the opposite: to create a Supreme Court that won't stand in the way of majority will. In other words, court-packing is a wrecking ball to demolish the Constitution itself.

The premise behind Democrat calls for court-packing is that the current conservative Supreme Court is out of touch with, and repeatedly thwarting, majority will. That claim is exaggerated. Often, the conservatives on the Court are simply thwarting outcomes preferred by the left wing of the Democratic Party but opposed by a majority of Americans.

For example, the Court has been hostile to the trans agenda, upholding laws keeping biological males out of women's sports and halting the medical or surgical transitioning of minors. The left hates those cases, but large majorities of Americans are with the Court. It's hard to be sure, but a majority of Americans probably also support the Court's recent racial redistricting decision, which sharply limited legislators' ability to use race to draw district lines.

In the end, it's court-packing that would defy majority will. Americans don't want their Constitution destroyed. Popular approval of the Court has certainly fallen in recent years, but polls consistently show that 54 percent to 58 percent of Americans oppose court-packing.

If Democrats genuinely favor majority will, they shouldn't go court-packing. They should stop advocating so many policies and positions Americans don't want.