

Why court-packing suddenly looks appealing to Democrats

Anybody remember that fellow named Merrick Garland?

By **Paul Waldman**

Opinion writer

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As Democratic candidates for president seek to win the hearts of the primary electorate, they're not just proposing ambitious policy ideas. They're also trying to show that they envision a Democratic Party that's tougher than the one that exists today.

And one of the ways some of them are doing it is by considering expanding the size of the Supreme Court.

Sens. Kamala D. Harris, Elizabeth Warren, and Kirsten Gillibrand, former congressman Beto O'Rourke, and South Bend, Ind., Mayor Pete Buttigieg have all [expressed](#) at least an openness to the idea, and the rest are being pushed by liberal activists to consider it. There's even an organization called [Pack the Courts](#) that is urging Democrats to expand the court by four seats (though two is the number more often mentioned).

Not everyone is on board, however. To see the kind of reaction the idea can get, James Hohmann [reports](#) from Concord, N.H., the colorful response one senator and potential candidate had to the idea:

Sen. Michael Bennet (D-Colo.) slammed his head on the table four times when I asked what he thought about other Democratic presidential contenders embracing the idea of expanding the Supreme Court.

"Having seen up close just how cynical and how vicious the tea party guys and the Freedom Caucus guys and Mitch McConnell have been, the last thing I want to do is be those guys," he said during an interview at a coffee shop here the Friday night before last. "What I want to do is beat these guys so that we can begin to govern again."

That's a legitimate argument, which I'll address in a moment. But it's important to keep in mind that there is one and only one reason why we're discussing this at all: Merrick Garland.

It's been three years since Antonin Scalia died and President Barack Obama, looking for a justice Republicans would have a hard time objecting to, chose Garland, a mild-mannered moderate whom some Republican senators had praised in the past. Sen. Orrin Hatch **had called** Garland "a consensus nominee," promising that "I will do my best to help him get" confirmation votes.

But Majority Leader Mitch McConnell, with the support of almost every Republican (including Hatch), simply refused to allow Garland either a hearing or a vote. True to his bottomless cynicism, McConnell **calls** his decision to hold open the seat until it could be filled by a Republican president one of the proudest moments of his career.

It was one of the most despicable official acts either party has undertaken in decades. And while McConnell still no doubt giggles in joy every time he thinks of it, it continues to fill Democrats with rage.

In order to rebalance the scales, many believe, the next Democratic president should be given two extra seats to fill, because, had Garland been seated, there would have been a 5-to-4 liberal majority, and instead there's a 5-to-4 conservative majority. It should be noted that the size of the court is not specified by the Constitution, and in the country's early decades it **bounced around** between six and 10 justices, sometimes changing from one administration to the next. It has stayed at nine since 1868, but all that's necessary to change it is for Congress to pass a law doing so that the president signs.

The argument that Democrats shouldn't stoop to Republicans' level is not without some merit. If you believe that norms of reasonable behavior have inherent value, then you should uphold them even if there's sometimes a cost to doing so. But that raises the question: When is the cost too high?

We may find out before long. Consider the following scenario: Democrats take back the White House and the Senate in 2020. Then they eliminate the legislative filibuster, preventing the Republican minority from stymieing policy changes the majority passes. Then they pass the agenda that the new president ran on, including health-care reform, a \$15 minimum wage, a Green New Deal and new guarantees of voting rights.

Then the five conservative justices on the Supreme Court strike it all down.

After, that is, they're done undoing *Roe v. Wade*, eviscerating collective bargaining rights, and who knows what else. That is not at all an outlandish scenario. We could very easily see a president and Congress elected by a majority of the public thwarted over and over again by five justices.

At that point, expanding the court might look less like a radical piece of political hardball and more like a necessary attempt to restore something resembling majority rule in America. After all, right now we have an extremely conservative court that owes its majority to the fact that McConnell refused to allow Obama to fulfill his constitutional responsibility, and then a president who got fewer votes than his opponent filled two seats. And don't forget that McConnell is the majority and not minority leader, and so had the ability to do that in the first place, despite the fact that [millions more](#) Americans voted for Democrats rather than Republicans to represent them in the Senate.

There is one powerful counter-argument, which is that if Democrats expand the court when they have control of Congress and the White House, Republicans will just do the same the next time they get the chance, and then we'd be locked in an endless tit-for-tat. One thing we know for sure is that Republicans won't say, "Well played, folks — you got us that time, so let's just keep things the way they are now from this point on."

But the mere fact that Democratic presidential candidates are even talking about this shows that the party — not everyone in it, but a healthy portion of its members and elected representatives — is simply fed up with getting walked all over for being noble. As I've said before, when it came to exploiting loopholes, stomping all over norms and fighting dirty, for some time Republicans have been the party of "Yes we can" while Democrats have been the party of "Maybe we shouldn't." But that may be changing.

Democrats' Court-Packing Plan is as Dumb Today as It Was Under FDR

They're losing because their ideas are unpopular, not because of the justices.

By [BRUCE FEIN](#) • March 19, 2019

<https://www.theamericanconservative.com/articles/democrats-court-packing-plan-is-as-dumb-today-as-it-was-under-fdr/>

The Democratic Party is foolishly resurrecting court-packing as a political issue for 2020.

Former attorney general Eric Holder [has endorsed it](#). Democratic presidential candidates Kirsten Gillibrand, Elizabeth Warren, Kamala Harris, Beto O'Rourke, and Pete Buttigieg have also [expressed interest](#). A new Democratic group, [Pack the Courts](#), has become a brain trust for the idea.

But unlike wine, court-packing hasn't improved with age since its embrace by President Franklin D. Roosevelt in 1937. It also hasn't grown more popular.

FDR's court-packing legislation would have increased the size of the Supreme Court from nine justices, where Congress had fixed it in 1869, to 15. The purpose was to challenge decisions that had arrested the New Deal by filling six new vacancies with FDR disciples.

Roosevelt was emboldened by his landslide 1936 victory over Alf Landon and backed by overwhelming Democratic majorities of 334-88 in the House and 74-17 in the Senate. But his court-packing scheme proved a nightmare. His bill never received a Senate vote. Democrats lost seats during the 1938 midterms. His popularity plunged. The plan was correctly perceived by the American people as undermining an independent judiciary, a cornerstone of the separation of powers. As James Madison elaborated:

If they [the first 10 amendments] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.

The Supreme Court has proven less courageous than Madison had hoped, having neither the purse nor the sword. Throughout history, the justices have often bowed to popular opinion. They follow the election returns as much as if not more than the law. They have often ignored Justice Benjamin Cardozo, who said that “[t]he great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by.”

Mortality and retirements periodically bring new blood to the high court through a partisan political process: appointment by the president with the advice and consent of the Senate. So even without Roosevelt’s court-packing legislation, the Supreme Court accommodated the New Deal in *West Coast Hotel v. Parrish*(1937). Popular opinion ultimately had its way.

Despite the lamp of experience, however, Democrats are absurdly crusading for court-packing to alter decisions rendered and anticipated by the Supreme Court under the stewardship of Chief Justice John Roberts. Court-packing would transform constitutional law into a jumble of political calculations with ulterior motives. It would shake public confidence in the administration of justice and cripple separation of powers—a structural Bill of Rights—by making the Supreme Court an appendage of the political branches. Moreover, the public is unconvinced of the wisdom of court-packing. At present, it holds the Supreme Court in higher regard than either the presidency or Congress.

The Constitution is silent on the number of Supreme Court justices. The Judiciary Act of 1789 fixed the number at six. As the nation expanded, the number climbed by statute to 10 under President Abraham Lincoln. The Radical Reconstruction Congress lowered the number to seven to foreclose any appointments by President Andrew Johnson. In 1869, Congress jumped the number to nine under Johnson’s successor, President Ulysses S. Grant, to reverse a decision adverse to legal tender laws. The number nine has remained unchanged for 150 years, which crowns it with quasi-constitutional status.

Democrats are losing the Supreme Court because their ideas are unpopular, not because of the number of justices. Should they prevail with the public, the Supreme Court won’t be far behind. Peter Finley Dunne’s Mr. Dooley presciently observed more than a century ago regarding a fighting issue of that day, “No matter whether th’ constitution follows h’ flag or not, th’ Supreme Court follows th’ election returns.” He was right.

Bruce Fein was associate deputy attorney general and general counsel of the Federal Communications Commission under President Reagan and counsel to the Joint Congressional Committee on Covert Arms Sales to Iran. He is a partner in the law firm of Fein & DelValle PLLC.

Why court-packing suddenly looks appealing to Democrats

1. What is one of the ways Democratic candidates for president are trying to show that they envision a tougher Democratic Party than the one that exists today?

2. Which Democratic presidential candidates have expressed interest in the idea? (hint: 5)

3. How does Sen. Michael Bennet (Democrat from Colorado) feel about the idea?

4. What is the one and only reason this idea is being floated at all?

5. What is one of Senate Majority Leader Mitch McConnell (Republican from Kentucky)'s proudest career moments?

6. What do many believe must be done to rebalance the scales?

7. How many Supreme Court justices does the Constitution specify must serve on the court? What is required to change the number?

8. Why is there a conservative majority on the Supreme Court now?

9. What is the most powerful counter-argument to expanding the court?

10. What does the fact that this idea is even being discussed indicate?

Democrats' Court-Packing Plan is as Dumb Today as It Was Under FDR

11. What was the purpose of FDR's proposed expansion of the Supreme Court?

12. What were the political consequences of FDR's court-packing proposal?

13. How did James Madison (primary author of the Constitution, contributing author of *The Federalist Papers*, and the fourth President of the United States) view as the role of the judiciary?

14. Why has the Supreme Court proven less courageous than Madison had hoped? What trends have they followed instead?

15. What does the author believe would be the consequences of court-packing?

16. How long has the number of Supreme Court justices remained unchanged?

17. Why does the author believe that Democrats are losing the Supreme Court? How could Democrats change this?