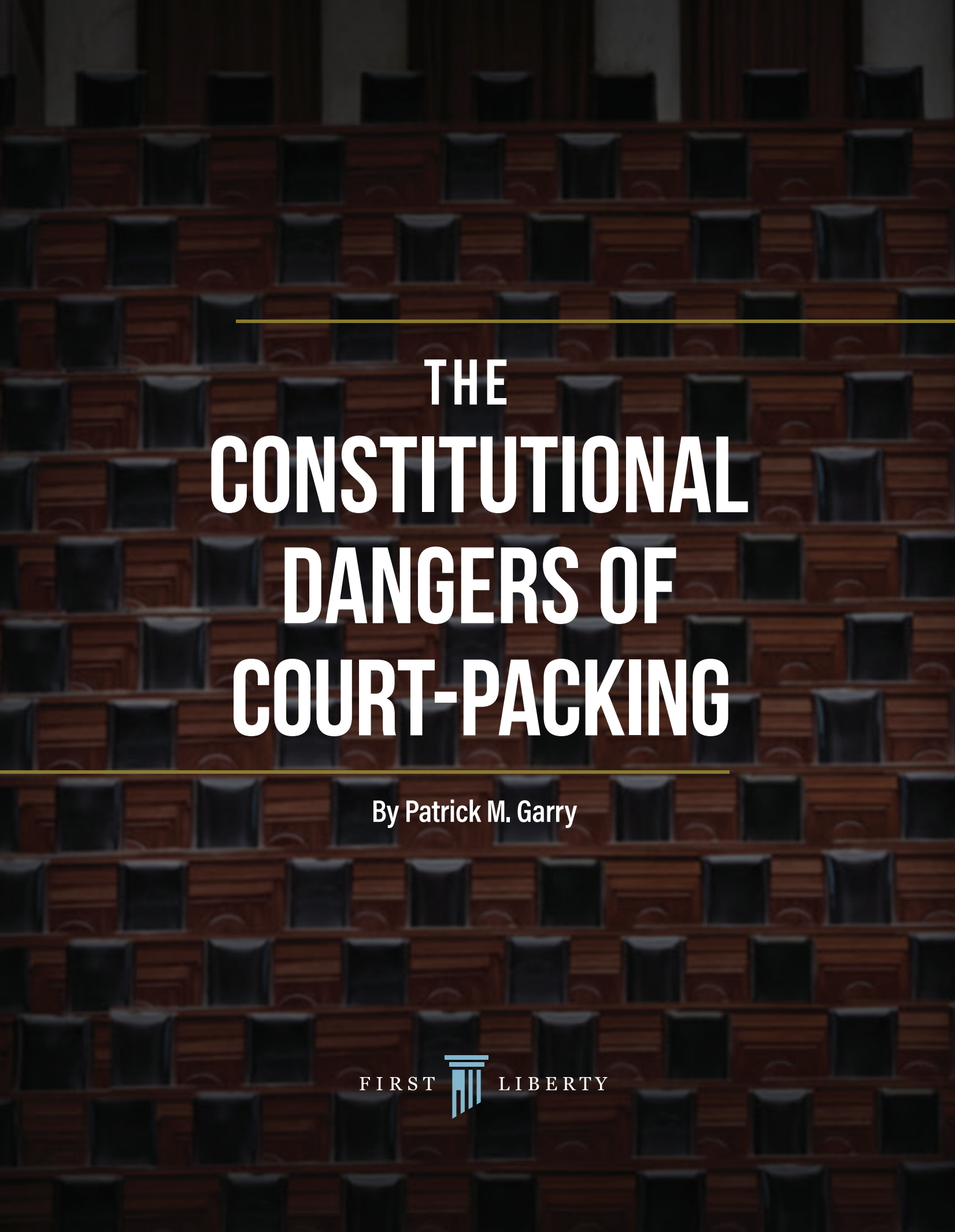

THE CONSTITUTIONAL DANGERS OF COURT-PACKING

By Patrick M. Garry

FIRST LIBERTY

INTRODUCTION

Shortly after President Donald J. Trump nominated Judge Amy Coney Barrett for the U.S. Supreme Court position left vacant by the death of Justice Ruth Bader Ginsburg, threats arose from the political left in general and the Democratic Party in particular that should Judge Barrett be confirmed and should Democrats prevail in the November elections, as expected, a court-packing plan would be introduced in Congress. This court-packing plan would increase the number of justices on the Court, thereby giving the anticipated presidency of Joe Biden an opportunity to nominate ideologically left leaning justices to outnumber the conservative voices on the Court and hence achieve constitutional decisions in line with the ideology of progressives.

The Barrett nomination angered the political left in two ways. First, Judge Barrett would replace a leading liberal voice on the Court.[1] And, second, Judge Barrett's judicial philosophy resembled that of her mentor and one of the 20th century's leading conservative jurists, the late Justice Antonin Scalia, for whom Barrett had once served as law clerk. Moreover, Judge Barrett had long demonstrated a strong religious faith, which itself caused great concern to the political left. For instance, during the 2017 hearings on her nomination to the Seventh Circuit Court of Appeals, Barrett was questioned by Sen. Diane Feinstein (D-CA) about her religious faith. As Feinstein responded, with more than a little anguish in her voice: "The dogma lives loudly within you."

Given the growing antagonism of the political left in America to religious institutions in general and deeply held Christian beliefs in particular, the prospect of a Supreme Court committed to protecting the religious liberty of Christian believers evokes great fear and outrage. Indeed, a steady stream of religious liberty cases have come to the Court recently, including most recently cases involving efforts by civil authorities to impose COVID shutdown rules on religious worship services that are not imposed on secular gatherings. Who could forget how local government officials punished a Christian baker who declined to design cakes for same-sex weddings, and government attempts to shut down the elderly relief houses run by the Little Sisters of the Poor — Catholic nuns who would not violate their religious principles by providing contraceptive services to their employees as required by the Affordable Care Act?

These are only isolated examples. More pervasively, the political left has increasingly come to define any religious belief that interferes in any way with progressive secularism as bigotry. The Equality Act now before Congress, in further promoting the sexual and gender identity politics of modern progressivism, completely disregards any effect on or violations of widely held religious beliefs. Even though religious liberty is the first freedom protected in the Bill of Rights, the political left in America has tried to erode that freedom, elevating in its place a progressive version of gender and sexual identity rights.

Because progressives have come to rely heavily on the Supreme Court in cementing their new code of sexual and gender rights, the prospect of having Justice Ruth Bader Ginsburg replaced by Justice Amy Coney Barrett produced such heated opposition that plans were immediately formulated to pack the Supreme Court. These court-packing proposals sought to change the make-up and structure of the Court should the nomination succeed, which of course it ultimately did. A panoply of media-oriented advocacy groups, such as Demand Justice and the American Constitution Society, have joined in the court-packing campaign as part of a larger progressive movement to push the Supreme Court and lower federal courts in a leftward direction. Legal scholar Joshua Braver defines court-packing as "manipulating the number of Supreme Court seats primarily in order to alter the ideological balance of the Supreme Court" and hence to exert a direct influence on the content of the Court's decisions.[2]

Calls for Congress to pass a court-packing plan further increased once Justice Barrett took her seat on the Court and once Joe Biden was elected. Such calls raise alarms not just because of their effects on the institution of the Supreme Court and the state of constitutional law, but because attempts to ideologically pack the Court by raising the number of justices that a new president can appoint have little if any historical support.

Ever since President Franklin Delano Roosevelt's failed attempt to pack the Court to advance his New Deal programs in the 1930s, the matter of court-packing "has been taboo – a tactic that no serious politician would ever publicly entertain."[3] Despite this taboo, the progressive left in 2021 eagerly carries its court-packing banner in the vanguard of its political march. This paper will attempt to show how historically unprecedented are the current attempts to alter the make-up of the Court. The paper will also demonstrate the ways in which a court-packing attempt can threaten the very legitimacy of the Supreme Court, as well as distorting and undermining the enduring authority of the U.S. Constitution. And finally, the paper will seek to outline the probable consequences for cherished individual freedoms, such as religious liberty, should a court-packing plan be passed by Congress.

II. THE CURRENT COURT-PACKING MOVEMENT

As of the writing of this paper, no specific court-packing plan has been introduced in Congress.[4] However, several significant efforts have already occurred. President Biden has launched what he calls a "bipartisan" commission to study reforming the Supreme Court and federal judiciary.[5] This commission will have 180 days to present its findings and recommendations.

Moving at a significantly faster pace are developments in Congress. In February 2021, hearings commenced on court-packing proposals. With Democratic control over the judiciary committees of the House and Senate, and with strong support flowing from the progressive wing of the Party, developments in Congress may well proceed quickly.

The forceful and intensifying progressive push for court-packing occurs in striking contrast to longstanding accepted beliefs, as reflected by an array of prominent legal scholars. Until this current progressive push for court-packing, according to Ronald Krotoszynski, "no serious person, in either major political party, [would] suggest court packing as a means of overturning disliked Supreme Court decisions."[6] Indeed, any court-packing proposal would have been seen as ridiculous and condemned by both sides of the political aisle.[7] But in 2021, the bipartisan opposition to court-packing has come under its most serious assault since the New Deal, nearly 90 years ago. As many progressives now advocate, the Democratic Party, having taken control of Congress and the White House, should act quickly to pack the Court, transform constitutional law, and thereby ensure the future success of its political agenda.[8]

[1] Justice Ruth Bader Ginsburg, shortly before her death, reiterated her opposition to a liberal-progressive proposal to expand the size of the Supreme Court. See Nina Totenberg, Justice Ginsburg: "I Am Very Much Alive," NPR, July 24, 2019.

[2] Joshua Braver, *Court-Packing: An American Tradition?* 61 Boston College Law Review 2747, 2748 (2020).

[3] Id. at 2749.

[4] Although there are also calls to expand the numbers of lower court federal judges, this paper will focus only on the efforts to alter the make-up of the U.S. Supreme Court. Adding justices to the high court is probably the fastest way to not only change the Court but ultimately to alter the interpretation and demands of constitutional law.

[5] Madison Alder, *Term Limits More Likely Than Court Packing From Biden Panel*, US Law Week, Feb. 16, 2021..

[6] Ronald J. Krotoszynski, Jr., *The Unitary Executive and the Plural Judiciary: On the Potential Virtues of Decentralized Judicial Power*, 89 Notre Dame Law Revew 1021, 1064 (2014).

[7] Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 Vanderbilt Law Review 465, 505 (2018)

[8] *See* Braver, *supra* at 2754-56.

III. THREATS POSED BY COURT-PACKING

A. The Threat to Judicial Independence

The most immediate and obvious threat posed by congressional attempts to alter the Court so as to produce certain desired ideological results involves the time-honored principle of judicial independence. The annals of constitutional and Supreme Court history are filled with recognitions of the need for the Court to be independent of political efforts to influence its decisions. Indeed, a commitment to individual liberty commands that the judicial branch be safely insulated from manipulation by outside majoritarian forces.

As Alexander Hamilton recognized in Federalist 78, because it is the weakest of the three branches of government, the judiciary must be independent from encroachments by the executive and legislative branches. Hamilton argued the Court must not only protect itself but must protect and defend the Constitution against violations by the other branches.

Perhaps America's most prominent and respected authority on the Constitution, Joseph Story demonstrated the necessity for independence of the Supreme Court in interpreting the Constitution. In his Commentaries on the Constitution of the United States, published in 1833, Story explains the role of the Court in interpreting and enforcing the Constitution.[9] He describes the final arbiter of constitutional questions as the Supreme Court, "to whose decisions all others are subordinate."[10] To Story, the Constitution created the Court, and the Court preserves the Constitution. It was the Court that "lacked all the trappings of democracy," and consequently should be insulated from those trappings.[11] But if the Court became vulnerable to political encroachment, if it could not be protected against such encroachment and manipulation, then it would have to "bend its law to the political and economic realities of the new age." [12]

The independence of the Court and its protection from ideological encroachment from the other branches of government stem fundamentally from the principle of separation of powers enshrined in the U.S. Constitution. As Gouverneur Morris of New York explained, "the Constitution has given us ... an independent judiciary," which should be "preserved ... in its vigor, and in great controversies where the passions of the multitude are aroused."[13] In the constitutional scheme, the Supreme Court was intended to be the independent head of a unified system of justice administration.[14]

B. The Threat to Separation of Powers

Attempts to pack the Court so as to manipulate the decisions of the Court pose a serious and unprecedented assault on the basic constitutional principle of separation of powers.

The Constitution creates a government with three separate branches, each vested with different powers and responsible for different functions. This particular structure reflects the doctrine of separated powers. The Framers adopted this doctrine to diffuse government power and thereby protect individual liberty from government overreaching. [15] Each branch is apportioned certain powers that enable it to act as a check on the other branches: "To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them." [16]

By parceling out governmental power among the three branches, the Framers sought to "make ambition counteract ambition," thereby restricting the overall power of the state.[17] In this way, the system of separated powers is "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." [18] Legislative encroachments in the form of court-packing violate this separation of powers scheme built into the Constitution.

Separation of powers "is at the core of American ideology."[19] It is "part of the essence of American government, as fundamental as the vote or representative government." [20] It provides a system of checks and balances, as well as a guard against improvident and impetuous government decisions as well. [21] Not only are the three different functions of government separated — executive, legislative and judicial — but they are allocated to three different branches. [22] Furthermore, each branch must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Court-packing efforts by the executive and legislative branches obviously constitute an improper encroachment into the workings of the Supreme Court.

C. Judicial Review and Separation of Powers

The Court's duty of judicial review reflects the role of the Court in a separation of powers scheme. Indeed, the conduct of judicial review – examining the constitutionality of laws passed by Congress – requires and envisions a Court free of and protected from pressure by the political branches.

Judicial review was established in the Court's landmark 1803 decision of Marbury v. Madison, which marked the first time the Supreme Court declared unconstitutional an act of Congress. [23] Contrary to the desires of Thomas Jefferson and his new Democratic-Republican Party, Chief Justice John Marshall held that the Court possessed an independent power to overrule legislative acts that violated the Constitution. In the words of one scholar, the decision "probably saved the country from the sore affliction of such a Supreme Court as Jefferson would have appointed" – e.g., a Court acting as a rubber stamp of the political branches.[24]

In *Marbury*, Marshall saw the need to assert the Court's independent role so as to prevent constitutional law from being overwhelmed by the majoritarian Jeffersonians. [25] When conflicts arose between legislative laws and the dictates of the Constitution, the Court's duty was to declare void any unconstitutional act of Congress.[26] But this role of judicial review cannot retain its independence if Congress is allowed to ideologically pack the Court.

[9] *See* Joseph Story, Commentaries on the Constitution of the United States, Ronald Rotunda & John Nowak, eds., Book III, chs. 4 and 5 (1987).

[10] *Id.* at Ch. 4, Book III. *See* also R. Kent Newmyer, Supreme Court Justice Joseph Story: Statesman of the Old Republic, 186 (1985).

[11] Newmyer, at 190.

[12] *Id.* at 203.

[13] *Annals*, 7th Cong. 1st Sess. 66 (February 6, 1802). The constitutional checks were devised to protect the Court from the dangers of popular governments; otherwise, "the Constitution is all nonsense." *Id.*

[14] See William Winslow Crosskey, Politics and the Constitution in the History of the United States, 711 (1965). The framers of the Constitution thought of the Court as "the guardian of the new Constitution." *Id. at 1046.*

[15] *See Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (stating that the separation of powers was meant to "diffuse power the better to secure liberty"); *United States v. Brown*, 381 U.S. 437, 442-43 (1965) (opining that the separation of powers is "a bulwark against tyranny").

[16] *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923). Article I of the Constitution places all legislative powers in Congress. Article II vests executive power in the presidency. And Article III places the judicial power in the federal courts.

[17] *The Federalist No. 51, 356* (James Madison)(Benjamin Fletcher Wright ed., 2002).

[18] *Buckley v. Valeo,* 424 U.S. 1, 122 (1976). Without such a self-executing system, the Framers feared the onset of the kind of tyranny against which they had revolted.

[19] Carl T. Bogus, *The Battle for Separation of Powers in Rhode Island*, 56 ADMIN. L. REV. 77, 78 (2004).

[20] *Id.*

[21] *Id.* at 80.

[22] M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 603 (2001). As Madison wrote: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with al the violence of an oppressor." *The Federalist No.* 47, 303 (James Madison) (Clinton Rossiter, ed., 1961).

[23] 5 U.S. 137, 1 Cranch 137 (1803).

[24] Crosskey, *supra* at 1046.

[25] Alfred H. Kelly & Winfred A. Harbison, The American Constitution: Its Origins and Development, 214 (1976).

[26] 1 Crouch at 214. Alexander Hamilton moreover had called for the right of judicial review in *The Federalis*t.

Even though judicial review has been a hallmark of the U.S. constitutional system since Marshall's opinion in Marbury v. Madison, and even though judicial review requires an independent judiciary, the current proponents of court-packing also seek to eliminate this essential feature of our constitutional system. Many of the legal scholars now advocating for court-packing have previously articulated a desire to eliminate judicial review. In Taking the Constitution Away from the Courts, for instance, Mark Tushnet argued that the removal of judicial review would foster more self-government.[27] And Sanford Levinson, who likewise supports the current attempt at court-packing, has derided judicial review as "undemocratic."[28] Therefore, according to these legal scholars' arguments, to support court-packing essentially requires an abandonment of judicial review.

IV. THE LACK OF HISTORICAL PRECEDENCE

A. Previous Changes in Court Size Do Not Apply

Current proponents of court-packing often claim that history supports their efforts. They claim that the size of the Court has been expanded numerous times in the past. What they do not admit is that the reasons for those expansions are quite inapplicable to the current attempt at expansion.

Proponents of court-packing cite the seven instances in the nation's history when changes were made to the Court's size as proof that court-packing is an accepted historical practice.[29] This citation is greatly misleading. First, no changes to the Court's size have occurred in more than 150 years. Second, this argument fails to recognize the difference between changes in Court size due to court-packing and changes in size due to workload requirements.

Under the accepted definition of court-packing, only two previous changes in the Court's size can arguably be categorized as a court-packing attempt – the changes that occurred in 1802 and 1869.[30] All the other changes in Court size resulted from the necessity of having more Supreme Court justices to travel to and preside over the increased number of circuit courts. Justices complained bitterly about the rigors of travel to these far-flung jurisdictions, and the practice of circuit-riding has long since been discontinued.

As states and judicial circuits were added in the early 19th century, more justices had to be added to the Court in 1807, 1837 and 1863 to staff the increased number of circuit courts.[31] These changes in court size resulted only because of increased workloads, not from any congressional attempt to ideologically influence the Court. Only the Court changes occurring in 1802 and 1869 involve facts even remotely resembling court-packing.

In 1801, President John Adams and his Federalist Party, subsequent to losing the presidential election of 1800, reduced the number of seats on the Court to block President-elect Thomas Jefferson from filling any vacancies on the Court. However, this effort failed because President Jefferson and his newly triumphant Republican Party restored those seats in 1802, thus giving Jefferson the opportunity to appoint the same number of justices he would have had if the Federalists had not previously reduced the Court's size.[32]

Somewhat similar is the size change made in 1869, when Congress restored seats that had been removed three years earlier. In 1866, the Reconstruction Congress, greatly distressed by southerner President Andrew Johnson, passed legislation cutting the size of the Court from ten seats to seven. This reduction denied Johnson an opportunity to fill any Court vacancies. Three years later, with the election of Ulysses S. Grant to the presidency, Congress increased the Court's size to its present nine seats. This gave President Grant a chance to immediately fill a vacancy. The increase to nine, rather than to the previous size of ten, also decreased the chances of tie votes by making the Court size an odd number.

According to Joshua Braver, this 1869 increase in Court seats arguably qualified as court-packing, since it may well have caused the Court to reverse itself on one of the most important legal issues of the time – the constitutionality of paper money.[33] However, the dangers posed by this court-packing were minimal, since it was not going to lead to "a self-destructive pattern in which each party would be incentivized to pack whenever it controls all the elected branches."[34] Because President Johnson was essentially a president without a party, having been abandoned by the Democratic Party, there was little chance of partisan retaliation for the Court's increase in size.[35] Consequently, although the changes to the Court's size in 1869 may have reflected a court-packing effort, "it offers little guidance for how, in a very different partisan environment, packing would play out today."[36]

B. The New Deal Court-Packing Plan

The most notorious, though unsuccessful, court-packing attempt in American history occurred during the New Deal era, when President Roosevelt in 1937 announced his plan to expand the size of the Supreme Court to advance his legislative agenda.

President Roosevelt's opposition to the existing Supreme Court grew steadily more intense throughout his first term in office. The Court had declared unconstitutional numerous New Deal enactments.[37] Indeed, some of the most prominent and sweeping of the New Deal programs were overturned by the Court. In his attacks on the Court, Roosevelt branded the Court as a group of old men, resistant to the changes necessary for the good of the country.[38] To remedy this "age" problem and achieve a Court more accommodating of his New Deal agenda, Roosevelt in February of 1937 presented a bill to Congress authorizing him to appoint an additional justice to the Court for every sitting justice over seventy years of age, with the maximum size of the Court fixed at fifteen. This "thinly-disguised court-packing plan evoked a powerful emotional response both in Congress and in the public at large against such an invasion of the sacred judicial precincts ... [because] the belief had long since grown up that the Court was an inviolable guardian of constitutional light and truth, holding forth far above the noisome sea of politics and secure against congressional meddling."[39]

Roosevelt's court-packing plan not only outraged the public and the Republican Party, but it also met with opposition in the Democratic Party, with even Vice President John Nance Garner opposed to it.[40] Henry Fountain Ashurst, who would later be tasked with trying to steer the court-packing plan through the Senate Judiciary Committee, denounced the plan as "the prelude to tyranny."[41]

[27] Mark Tushnet, Taking the Constitution Away from the Courts, 163 (1999).

[28] Sanford Levninson Our Democratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It), 124 (2006).

[29] For a citation to instances where Court size was changed, *see* Kelly & Harbison, supra at 715.

[30] *See* footnote 2 *supra.*

[31] The need for more justices arose from the now obsolete requirement that Supreme Court justices ride the circuits so as to staff all the circuit courts. *Id.*

[32] Professor Braver characterizes this increase in Court seats as "a mere restoration of the status quo." Id. at 2779. Moreover, "since all understood that the Federalists' reduction of the Supreme Court's size was reversible, its reversal was relatively uncontroversial." *Id.* at 2780.

[33] *Id.* at 2020. After President Grant made his appointments to the Court under the newly expanded size, the Court reversed a previous decision in *Hepburn v. Griswold,* which declared paper money unconstitutional. 75 U.S. (8 Wall.) 603, 626 (1869). *See The Legal Tender Cases,* 79 U.S. (12 Wall.) 457 (1871).

[34] Braver, *supra* at 2020.

[35] As Professor Braver explains: "The anti-packing norm is less relevant when the dispute is not between the political parties. For example, a bipartisan decision to pack the court poses little danger of degenerating into tit-for-tat packing because the parties are not attacking each other. A similar dampening of escalation occurs when the packing targets a President who lacks the support of either political party." *Id.* at 2786.

[36] Id. at 2788. For further discussion on the 1869 Court change, see Kelly & Harbison, *supra* at 449-55.

[37] For instance, in *Schechter Corp. v. United States,* 295 U.S. 495 (1935), the Court invalidated the National Industrial Recovery Act, which FDR considered the key ingredient of the New Deal recovery program. And in *United States v. Butler*, 297 U.S. 1 (1936), the Court struck down the Agricultural Adjustment Act. The Court struck down these and other New Deal enactments on the grounds that they unconstitutionally expanded the power of the federal government in general or the federal executive branch in particular.

[38] Although FDR's "emphasis upon old age as the core of the Court problem," this argument that "age bred conservatism was particularly inept, for the oldest man on the Court, Justice Brandeis, was also the Court's greatest liberal." Kelly & Harbison, *supra* at 715.

[39] *Id.* at 716.

[40] Much of the legal profession was against the plan, and President Roosevelt had failed to foresee the hostile public reaction to his court-packing plan. Ted Morgan, FDR: A Biography, 471 (1985).

[41] William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's Court-Packing Plan*, 1966 Supreme Court Review 347, 396 (1966).

Sen. Burton K. Wheeler, Democrat of Montana, warned of a deep politicization of the nation's highest court under FDR's plan. "What kind of judges could they be if they promised the President in advance that they would do his will?" he said in a Chicago speech. "They may be sworn to support, maintain, and defend the Constitution, but if they are to carry out the President's wishes, or what seemed to be the needs of the time, they must owe to him an obligation superior to their oath."

Because he knew that court-packing "violated taboos," Roosevelt tried to couch his plan in a more benign attack on a court of "nine old men," but the public largely saw this as a "bogus issue" and that the real desire was to pack the Court with liberal sympathizers.[42] As historian and legal scholar William Leuchtenburg observed, "in attempting to alter the Court, Roosevelt had attacked one of the symbols which many believed the nation needed for its sense of unity as a body politic." [43]

Given the widespread opposition to Roosevelt's court-packing plan, it was doomed to fail – and it did.[44] The legislation never even made it out of the Democrat-controlled committee. Moreover, the FDR court-packing proposal contributed to significant political losses for the Democrats in the 1938 mid-term elections. In the House, 81 Democrats lost their seats, another 7 in the Senate. Nonetheless, despite its legislative defeat, the plan exerted a powerful influence on the Court. Historians differ as to whether the plan directly caused the Supreme Court to dramatically switch positions on Roosevelt's New Deal programs, but it cannot be disputed that the Court's reversal came quickly and completely. On March 29, 1937, in *West Coast Hotel Company v. Parrish*, the Court upheld the constitutionality of a state minimum wage law, reversing its previous ruling that freedom of contract was protected by the Due Process Clause. Then, two weeks later, the Court in another 5-4 vote in Jones & Loughlin v. NLRB upheld the constitutionality of the Wagner Act and in so doing significantly changed its previous definition of the scope of congressional authority to regulate interstate commerce.

Following these decisions, the Court went on to essentially rubber stamp all New Deal legislation. But in so doing, the Court effected a change even more dramatic than the changes that would have been involved in the court-packing plan. Termed "the New Deal constitutional revolution," the Supreme Court wiped away nearly a century and a half of constitutional jurisprudence on such fundamental principles as limited government, separation of powers, and federalism. These principles had to be swept away to sustain the sweeping legal transformations brought about by the New Deal. Indeed, it would be nearly 60 years before the Court would once again recognize the foundational constitutional principle of federalism, as it did during the "federalism revolution" accomplished during the Rehnquist Court (1986-2005).

The New Deal constitutional revolution would shape the role of the Supreme Court for the remainder of the 20th century and into the 21st. To uphold the economic and social legislation being sponsored by Roosevelt, the Court abandoned the constitutional doctrines that had been used by the Court during FDR's first term to invalidate various federal programs that usurped traditional state powers and breached the traditional lines of separation between the branches of government.

Initiating a new era of constitutional interpretation, the Supreme Court endorsed a permanent enlargement in the scope of federal power, largely at the expense of the states. [45] As historian Forrest McDonald notes, because of Roosevelt's court-packing plan, "If the Court were to save itself as a functioning part of constitutional government, it would have to retreat."[46] From 1937 until the 1990s, with judicial enforcement of federalism provisions having virtually disappeared and the Court consistently supporting the expansion of federal power, the Court did not overturn any laws for exceeding the scope of Congress's commerce power. The only decision in which the Court held that a law violated the Tenth Amendment was overruled just nine years later.[47]

According to legal scholar Steven Calabresi, the New Deal "secured a lasting change in the Supreme Court's federalism and economic liberty case law." The Court gave almost complete deference to Congress in any conflict with the 10th Amendment. After 1937, the Court consistently rejected 9th and 10th Amendment arguments that federal legislation infringed on state and local autonomy.[48]

A similar constitutional change occurred regarding the constitutional dictates on separation of powers, which were greatly eroded by the New Deal's transfer of legislative authority to the executive branch, resulting in a phenomenal growth of the administrative state. Here the Court began allowing Congress to delegate unbounded and largely undefined powers to the executive branch.[49] As a result, the American administrative state has grown to a point where it now "often looks like Hobbes' Leviathan itself." [50] Congress has actively participated in this explosive growth, eagerly passing off to agencies the task of legislating complex public policies and politically tough decisions that members of Congress would just as soon avoid. And ever since FDR's court-packing plan, the Court has put its stamp of approval on this development.

Administrative agencies have been called the "fourth branch" of government.[51] And contrary to the idealistic hopes of the New Dealers, agencies are now often rigidly bureaucratic and blatantly partisan entities. Unquestionably, the modern administrative agency is in considerable tension with constitutional principles.[52] Legal scholar Gary Lawson argues that a strict reading of the Constitution yields the conclusion that the modern administrative state is flagrantly unconstitutional, and that the only way to preserve the administrative state is to essentially redefine the Constitution, which was exactly what the New Deal Court did.[53]

Because of the New Deal constitutional revolution, ignited by the court-packing plan, the Court has acquiesced in the constitutionality of the administrative state.[54] Since that revolution, for instance, the Court has not invalidated any federal legislation on the grounds that it violates the nondelegation doctrine, which prohibits a transfer of legislative authority to the executive branch.[55]

Thus, even though the court-packing plan of 1937 did not succeed in changing the size of the Court, it did exert a powerful and transformational effect on the substance of constitutional law as articulated by the Court. It might well be said that the 1937 court-packing plan ignited the New Deal constitutional revolution that would dramatically transform constitutional law from that envisioned by the ratifiers of the Constitution.

[42] William E. Leuchtenburg, Franklin D. Roosevelt and the New Deal, 232-33 (1963).

[43] *Id.* at 235. But President Roosevelt had been determined not to let the Court thwart his legislative agenda, even if opposing the Court led to a constitutional crisis. *See Leuchtenburg, The Origins*, supra at 352. The President in his attack on the Court would refer to it as a collection of "old men" holding to a "horse-and-buggy" jurisprudence. *Id.* at 390, 347.

[44] The defeat of the court-packing plan "made it obvious that a majority of the American public did not want even a very popular president to tamper with the Supreme Court." William H. Rehnquist, The Supreme Court: how It Was, How It Is, 234 (1987).

[45] *Con. Ed. Co. v. NLRB*, 305 U.S. 197 (1938); *NLRB v. Fainblatt*, 306 U.S. 601 (1939).

[46] Forrest McDonald, *A Constitutional History*, 197.

[47] *See National League of Cities v. Usery*, 426 U.S. 833 (1976).

[48] *See Tennessee Electric Power Co. v. Tennessee Valley Authority,* 306 U.S. 118, 119 (1939)(ruling that federal involvement in the local electricity market did not amount to an exercise of regulatory power). And in *Wickard v. Filburn*, the Court held that Congress' interstate commerce power applied even to a farmer growing wheat for his own livestock.

[49] The judicial shift to accommodating broad congressional delegations can be seen in the first post-New Deal nondelegation case decided by the Court. In *Yakus v. United States*, the Court upheld a broadly worded delegation and stated that Congress should not be confined to the "rigidity" of a strictly defined nondelegation doctrine, but should instead be given "the flexibility attainable by the use of less restrictive standards." *Id.* at 425-26. Contrary to its decisions issued just several years earlier, the Court in *Yakus* had completely shifted to valuing congressional flexibility and freedom over a strict application of the nondelegation doctrine. *See Mistretta v. United States*, 488 U.S. 361, 372 (1989)(stating that "our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate under broad general directives").

[50] Jamison Colburn, *Democratic Experimentalism: A Separation of Powers for Our Time* 37 Suffolk U. L. Rev. 287, 287 (2004).

[51] Jonathan Zasloff, *Taking Politics Seriously: A Theory of California's Separation of Powers*, 51 UCLA L. Rev. 1079, 1139 (2004).

[52] Sunstein, *Constitutionalism After the New Deal*, 497-98.

[53] Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

[54] M. Elizabeth Magill, *The Revolution That Wasn't*, 99 NW. U. L. REV. 47, 68 (2004).

[55] Michael Herz, *The Rehnquist Court and Administrative Law*, 99 Nw. U. L. Rev. 297, 357 (2004).

V. THE POLITICAL FALL-OUT FROM COURT-PACKING

As revealed by the impact of the New Deal constitutional revolution, even the attempt at court-packing can have radical effects on the substance of constitutional law. But court-packing also carries significant political dangers. The most dramatic of these is the instigation of an unending series of political interferences in the make-up of the Court. If the current progressive-left campaign for court-packing succeeds, there will be nothing to stop a similar conservative-right campaign should Republicans control the political branches of government. Consequently, there could be an unending series of attempts to alter the make-up of the Court, with the conceivable result that the Court could reach the size of a legislature. When expansion of the Court is accomplished in a partisan way, rather than in a workload-easing manner of the early 19th century, court-packing can "cause long-lasting, perhaps irreparable, damage to the Supreme Court's legitimacy." [56]

Aside from this political attempt to alter institutional make-up and ideology, court-packing may also reinforce and escalate the growing movement to politicize the Court in general. Reflecting this movement, the confirmation process for nominated justices has become increasingly bitter, shoving the Court into partisan conflict every time a new justice is nominated. As any observer knows, the Supreme Court nomination process "has become fraught with difficulty" and partisanship.[57] As a result, a "substantial majority of the public perceives of the Court in politicized terms." [58]

More than three decades ago, a prominent historian wrote that the Framers could not have foreseen "the role political parties" have "come to play in the appointment process." [59] On the other hand, as Chief Justice William Rehnquist noted, "we want our ... Supreme Court to be independent of popular opinion."[60] Unfortunately, the history of Supreme Court nominations demonstrates how immersed the Court has become in partisan conflict.

The Senate confirmed President Trump's three Supreme Court nominees by narrow margins: Amy Coney Barrett (52-48); Brett Kavanaugh, (50-48); and Neil Gorsuch, (54-45). President Obama's nominees had broader support: Elena Kagan, (63-37) and Sonia Sotomayor, (68-31). President George W. Bush's nomination of John G. Roberts was confirmed on a 78-22 vote but support narrowed with Samuel Alito, confirmed on a 58-42 vote. The Senate overwhelmingly confirmed President Bill Clinton's nominees Stephen Breyer (87-9) and Ruth Bader Ginsburg, (96-3). Vote totals are from a Feb. 23 research paper by Barry J. McMillion at the Congressional Research Service.

Going back slightly further in history, one can see that the votes on Supreme Court justices was even less contentious in earlier eras. President Kennedy's two Supreme Court nominees (Arthur Goldberg and Byron White) were confirmed by by voice vote, as did three of President Eisenhower's nominees (Charles Evans Whittaker, William Brennan and Earl Warren). The Senate confirmed President Eisenhower's other two nominees Potter Stewart (70-17) and John Marshall Harlan (71-11). The Senate confirmed seven of the President Franklin D. Roosevelt's nine Supreme Court nominees by voice votes, and it confirmed the other two William O. Douglas (62-4) and Hugo Black (63-16). This history reveals that until recently the Supreme Court, at least in its appointment process, remained relatively free of partisan conflict. However, with every one of President Trump's nominees, partisan affiliation more or less determined a senator's vote on the nominee.

This increasing politicization of the Court raises serious separation of powers concerns, as well as threatening the legitimacy of the Court. If the public perceives the Court's decisions as mere political opinions, acceptance of those decisions will erode. Likewise, if the current court-packing plan succeeds, the public will only increase its belief that the Court's opinions are influenced by politics. Even the mere attempt at court-packing will further erode public confidence that the Court is above the partisanship of politics.

The problem with court-packing is that it will entrench and institutionalize the politicization of the Court, whereas the nomination battles are as of yet confined to a case-by-case politicization.

VI. COURT-PACKING AND THE THREAT TO RELIGIOUS LIBERTY

Religious liberty has become increasingly vulnerable. Religion and religious liberty have been targeted by the progressive left, which sees religion as a major obstacle to the rebuilding of society along progressive secular values. The greatest enemy of progressives seems to be religious institutions and believers. Much of the progressive opposition to the nomination of Judge Amy Coney Barrett, for instance, was based on the depth of her religious faith. If the progressive left takes control of the federal courts, it is logical to assume that religious liberty would be in jeopardy. Indeed, the whole point of the progressive campaign to pack the Court is to elevate progressive secular values over religious liberty in the hierarchy of constitutional rights. A number of Court cases in favor of religious liberty in recent decades have been decided by 1- or 2-vote margins.

Another reason for the vulnerability of religious liberty is that religion occupies an increasingly diminished or marginalized role within the larger American culture. Membership in Christian churches continues to decline, while the number of people having no religious affiliation is on the rise.[61] The three percent of Americans who in the 1950s had no religious affiliation has grown to nearly ten times that figure today.[62] Moreover, both legally and politically, people of faith often find themselves the object of attack and scorn. As constitutional law scholar Gerard Bradley writes, "For the first time in American history, it has become respectable to publicly oppose religious liberty and its supreme value in our polity." [63]

The decline in the percentage of the population religiously affiliated translates into a similar decline in the social and legal sensitivity toward religious beliefs. While the general society might once have possessed an instinctive respect for or at least understanding of strongly held religious beliefs, if for no other reason that a vast majority of Americans had some affiliation with organized religion, such may not be the case now, especially with large numbers of Americans having no experience with organized religion.[64] Consequently, legal deprivations of religious liberty are on the rise.

[56] Braver, *supra* at 2750.

[57] Paul D. Clement, The Federalist No. 48, The Separation of Powers, and The Impetuous Vortex, 44 Harv. J. L & Pub. Pol'y 1, 3 (2021).

[58] Brandon L. Bartels & Christopher D. Johnston, *Political Justice? Perceptions of Politicization and Public Preferences Toward the Supreme Court Appointment Process*, 76 Public Opinion Quarterly 105, 110 (2012).

[59] Henry J. Abraham, Justices & Presidents: A Political History of Appointments to the Supreme Court, 26 (1985).

[60] William H. Rehnquist, The Supreme Court: How It Was, How It Is, 236 (1987).

[61] While the percentage of adults who describe themselves as religiously affiliated has shrunk, the percentage of those who are religiously unaffiliated has jumped. *U.S. Public Becoming Less Religious*, Pew Research Center, November 3, 2015. White Christians now account for less than half of the public, and America's youngest religious groups are all non-Christian. See *America's Changing Religious Identity*, Public Religion and Research Institute (September 6, 2017)(stating that no religious group is larger than those who are unaffiliated from religion, which make up 24 percent of the public, and that young adults are more than three times as likely as seniors to identify as religiously unaffiliated). Recent studies show that people having no religious affiliation are tied with Catholic and evangelicals as the three largest religious (or nonreligious) groups in the U.S. Jack Jenkins, *Nones Now as Big as Evangelicals, Catholics in the U.S.*, https://religionnews.com/2019/03/21/nones-now-as-big-as-evangelicals-catholics-in-the-us/. Other studies show that Christian membership continues to decline in the U.S., while those having no religion continues to increase. *Protestants Decline, More Have No Religion In a Sharply Shifting Religion Landscape,* ABC News, May 10, 2018, https://abcnews.go.com/Politics/protestants/decline/religion-sharply-shifting-religious-landscape-poll/story?id=54995663. In a recent poll, twenty-nine percent of Americans were found to be nonreligious, with another thirty-two percent only somewhat religious, thus constituting a clear majority of the public. Pew Research Center, *The Religious Typology: A New Way to Categorize Americans by Religion*, August 19, 2018. A 2019 Wall Street Journal poll found that just twenty-nine percent of Americans attend religious services once a week, down from forty-one percent in 2000. Gerald Seib, *Cradles, Pews, and Shifting Politics*, The Wall Street Journal, A4, June 25, 2019.According to the same poll, the numbers of those aged 18 to 34 who never attend religious services has more than doubled since 2000, now thirty-six percent. *Id.* For a discussion on how the nonreligious are becoming more secular, *see* Michael Lipka, *Religious 'Nones' Are Not Only Growing, They're Becoming More Secular*, FactTank: News in the Numbes, November 11, 2015. This "generational replacement" effect means that as "older Americans with relatively strong religious commitments die off, younger less affiliated Americans gradually will take their place....[and the] Nones will make up an increasingly large percentage of the population." Movsesian, *infra* at 723.

[62] Mark L. Movsesian, *Masterpiece Cakeshop and the Future of Religious Freedom*, 42 Harv. J. L. & Pub. Poly 711, 723 (2019).

[63] Gerard Bradley, *Sexual Identity Politics and Relgiious Freedom in a Secular Age*, Public Discourse, https://www.thepublicdiscourse.com/2019/04/50836/. See also Patrick M. Garry, *The Cultural Hostility to Religion*, Modern Age, 121 (Spring, 2005).

[64] *See* Movsesian, *supra* at 729.

In *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, the Court found that the Colorado Civil Rights Commission had shown religious animosity in its rulings that Jack Phillips, a Christian baker, violated state civil rights laws by refusing a make a cake for a gay couple's wedding.[65] In part through the "inappropriate and dismissive comments showing lack of due consideration for Phillips' free exercise rights," the Commission showed "a clear and impermissible hostility toward [Phillips'] sincere religious beliefs." [66] The Court cited the statements of one commissioner, who "went so far as to compare Phillips' invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust." [67] Another statement referred to the "despicable" nature of Phillips's religious beliefs regarding same-sex weddings.[68]

To the Court, the Commission had been blatantly biased against the religious liberty claims of Phillips. Moreover, all throughout the agency and appellate process, the agency and courts never considered Phillips' religious claims to be of any merit or worthy of judicial consideration; the only question addressed by the Colorado courts was whether the secular anti-discrimination norms were violated. As legal scholar Steven Smith points out, because the actions of Jack Phillips caused no measurable damages to the same-sex complainants, the whole prosecution against Phillips was really all about punishing his religious beliefs.[69]

In a case involving Oregon bakers who were fined for refusing to bake a cake for a same-sex wedding, the commissioner of the Oregon Bureau of Labor and Industries, as part of his 2015 ruling imposing the fine, also ordered the former owners of Sweet Cakes by Melissa to "cease and desist" from speaking publicly about their Christian beliefs preventing them from baking cakes for same-sex weddings.[70]

Little Sisters of the Poor, a Catholic order of nuns whose mission involves caring for the elderly poor, had to sue the government because the Affordable Care Act put them in an unresolvable position: either sacrifice their religious beliefs or give up their religious mission. The Sisters took their fight all the way to the U.S. Supreme Court in opposition to the Act's mandate that they offer contraceptive and abortion-inducing drugs in their health-care plans for their employees. [71] This was not a case of the federal government wanting those employees to have access to such contraceptives; it was a case of the federal government trying to force a charitable religious order to violate their core beliefs and distribute contraceptives through their own health plan.

Aside from the fact that the federal government seemed intent on forcing the Little Sisters of the Poor to either violate their Catholic beliefs or give up their social mission, the contraceptive mandate was not actually enacted by Congress. It was the Department of Health and Human Services that defined the "preventative care" language in the Act to cover contraceptives. Not only did HHS know that its ruling would force religious believers like Little Sisters of the Poor to violate their religious beliefs; it also knew that the regulations would burden religious free exercise more generally.[72] Yet because the contraceptive mandate wasn't in the statute, because the government was under no legal obligation to include contraceptive coverage under the ACA's mandates, and because the federal government knew how the mandate conflicted with religious beliefs, it is obvious that the federal government deliberately provoked the fight with the nuns.[73] The federal government's animosity to religion was also evident in Hosanna-Tabor Evangelical Lutheran Church v. EEOC, where the government's attempt to regulate the ministerial officials of a religious organization was struck down by a rare unanimous ruling by the Supreme Court.[74]

Religious hospitals, social service providers and universities have been besieged by a regulatory environment that can be overtly hostile to religious doctrine regarding such issues as abortion, same-sex marriage and transgender surgeries.[75] For instance, Catholic social service agencies, long admired for their efficient and compassionate care, have now found themselves in the crosshairs of government hostility.[76] This marks a dramatic turnaround from nearly two decades earlier, when religious social service groups experienced a much more supportive environment under President George W. Bush's Faith-Based Initiatives.[77]

Pursuant to a growing political trend, administrative agencies at both the federal and state levels are committed to enforcing an equality based on secular norms, which in turn see religious norms as hostile to this new equality being pursued by an increasingly active administrative state. [78] In the guise of promoting equality, albeit an equality inherently biased against religion, the administrative state has turned its sights on breaking down "the social boundaries" that religious believers erect "to maintain their distinctiveness and preserve their values."[79]

Constitutional developments on religious liberty protections of the First Amendment have reflected the progressive-left assault on religion. Progressive and liberal justices, harboring a deep suspicion that religion is divisive, consistently interpret the Establishment Clause to limit and marginalize the public presence of religion. This suspicion, and corresponding assault on religion, has been brewing for more than 50 years.

During the 1960s a cultural revolution arose that attempted a comprehensive transformation of American cultural values. This revolution had many targets, one of which was religion, which was seen as the bastion of traditional moral values. Religion stood for everything that the '60s revolution opposed: self-restraint, the subservience of the individual to a higher spiritual authority, the reality of sin, the individual's subjection to moral judgment, self discipline, and the elevation of virtue over self-actualization. Consequently, religious institutions came to be seen as perpetrators of repression and injustice.

The crusade for sexual freedom has consistently focused its sights on religion, since it is religion that most actively opposes such a lifestyle. And to a significant degree, the crusade for abortion rights has evolved out of and now cloaks a larger crusade against religion -- a crusade for the complete liberation of the individual from any subservience to a higher authority.

[65] 138 S. Ct. 1719, 1729, 1731 (2018). Some scholars note that the Commission was tainted by prejudice against Christians. Douglas Laycock & Thomas Berg, *Masterpiece Cakeshop: Not as Narrow as May First Appear*, SCOTUSBLOG (June 5, 2018, 3:48 pm).

[66] 138 S. Ct. at 1729.

[67] *Id.* at 1729-30. In a somewhat similar case in Washington, a florist who is an evangelical Christian declined to do floral arrangements for the same-sex wedding of a longtime customer and friend. The customer accepted the decision and left the shop. Later, the Washington Attorney General saw a social media from the customer's partner concerning the florist and immediately, without any complaint from the customer, sued the florist in the case of *The State of Washington v. Arlene's Flowers*.

[68] Movsesian, supra at 720.

[69] Steven Smith, *What Masterpiece Cakeshop is Really About*, Public Discourse, (October 24, 2017) http://www.thepublicdiscourse.com/2017/10/20148/. As a further show of bias, the Commission had refused on numerous occasions to take any action against bakers who, because of conscience, refused to make cakes with anti-gay marriage messages, thus demonstrating that it was not being fair or neutral to Phillips' conscientious actions. *Masterpiece Cakeshop*, 138 S. Ct. at 1730-31.

[70] *Klein v. Oregon Bureau of Labor & Industries*, 289 Or. App. 507 (2017).

[71] *See Little Sisters of the Poor Home for the Aged v. Burwell*, 578 U.S. (2016).

[72] Ilya Shapiro & Josh Blackman, *Obamacare Again? A Second Chance for the Little Sisters*, The Weekly Standard, March 28, 2016, p.20-21.

[73] The Affordable Care Act required all health plans to include coverage for certain preventive care services for women. *See* Pub. L. 111-148 Sec. 2713, 124 Stat. 131 (Mar. 23, 2010). However, the Act never defined contraceptive products or services within the definition of "preventive care services." The so-called contraceptive mandate was promulgated by the Department of Health and Human Services, as part of the regulations promulgated to implement the ACA.

[74] In *Hosanna Tabor*, the Court held that the internal governance of a religious institution is absolutely protected by the First Amendment. In a quite different example of hostility to religion, a Washington school district fired a high school football coach for taking a knee in silent prayer. *Kennedy v. Bremerton School District*, 2017 08 23 Opinion, #16-3580-1 (9th Cir. 2017), D.C. No. 3:16-cv-05694-RBI. The coach was fired after he refused to obey a school order that he cease praying after football games. His appeal for an injunction setting aside his firing was denied all the way to the U.S. Supreme Court.

[75] Angela Carmella, Catholic Institutions in Court: The Religion Clauses and Political-Legal Compromise, 120 W. Va. L. Rev. 1, 66 (2017).

[76] *Id.* at 75, 78.

[77] See Ira Lupu & Robert Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DePaul L. Rev. 1 (2005).

[78] *See* Movsesian, *supra* at 714 (arguing that this governmental activism seriously infringes on the beliefs and practices of the traditionally religious population).

[79] *Id.* at 740 (arguing that the "Traditionally Religious face an expanding set of rules and policies that promote new understandings of equality, particularly with respect to sexuality and gender, along with an every-expanding bureaucracy dedicated to enforcing them"). "The Traditionally Religious face increasing pressure to accept the new understandings and comply with the new rules or face a 'looming threat of a wide range of legal sanctions.'" *Id.* at 741.

Another source of attack on religion has been the self-actualization movement, which has cast religious beliefs as unhealthy and repressive causes of psychological dysfunction. Unquestionably, American culture has become more secular and more inhospitable to religion. But this shift in cultural values, by putting religion in a more precarious position, should give the courts more reason to protect religion and create constitutional doctrines that provide a bulwark against social hostility.

Religious liberty is the first freedom protected in the Bill of Rights, followed by free speech. Both are fundamental freedoms, and yet the courts treat the two in substantially different ways. The law, for instance, allows regulatory burdens on religious exercise that would not be tolerated in connection with speech activities. Religious speech may be curtailed if found to have an unwelcome effect on nonbelievers, even though profane or indecent speech cannot usually be restricted no matter how offensive it is to unwilling listeners. Government scholarship programs can refuse to cover a student pursuing a degree in theology studies, even though such programs could never make such a refusal regarding a degree in radical Marxism. And religious proselytizing in public venues can be restricted in ways that raw, violent music lyrics cannot be.

The primary reason why religious expression has been so regulated is because of the Establishment Clause. As most high school students of American history learn, the constitutional framers intended the Establishment Clause to prevent the new federal government from setting up and enforcing an exclusive national religion, as the English had done with the Anglican Church. But contrary to this original intent, American courts in the latter half of the 20th century began applying the Establishment Clause not to the threat of an exclusive, state-mandated religion, but to trivial issues such as candy canes with religious messages distributed at school, or a public school's performance of a religious song, or free snowplowing services for religious organizations.

By employing the Establishment Clause at the fringes of religious life, where religion intersected with some government program or public venue, the courts effectively banished religious expression into a kind of social closet. At the same time, however, those same courts were using the Equal Protection Clause to facilitate the liberation of various other constituencies, such as gender-identity and sexual-preference groups. But the confusing and often incomprehensible nature of the court's Establishment Clause decisions stems in large part from the fact that the Clause has been thrust into the center of a wider cultural conflict over the role of religion in contemporary society. Within this conflict, the Establishment Clause has been employed to try to reverse the course of American history and help transform the nation's culture into a more secular one. Contrary to the 18th century understanding of establishment as a government-supported religion whose articles of faith are mandated by the state, the modern notion of establishment widens to any point at which religion and state intersect.

As the reach of the Establishment Clause broadened, with judges taking an expansive view of what constitutes an establishment, the case law began reflecting certain political attitudes toward religion more than it did historical precedent or constitutional principles. The cultural criticisms of religion became increasingly echoed by judges. In the Cleveland school voucher case, for instance, Justices John Paul Stevens and Stephen Breyer argued that public aid to religion would foster political discord and tear apart the social fabric underlying American democracy. Drawing on experiences from the Balkans, Northern Ireland and the Middle East, Justice Stevens wrote: "Whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy."

Surprisingly, this view exists amid a heightened multicultural sensitivity in America. Differences in ethnic, racial and cultural identities are being celebrated and encouraged. Tolerance for divergent and opposing attitudes and lifestyles is being valued far more than assimilation of those differences into one uniform culture. But not so with religion. Instead, it is seen as a divisive force, with the courts serving as cultural supervisors, quelling any conflicts that might arise from the religious practices of a diverse people.

Throughout the years of a jurisprudence of minutiae, the purpose of the Establishment Clause has been diverted into something the Framers of the Constitution feared – the promotion of a religion-free America. Yet the fact that the religion clauses are even included in the First Amendment proves that, to the Framers, religion was something special, deserving of extra protection – a protection that was to be constant, irrespective of the changing winds of cultural and political attitudes. Though tolerance has become the most extolled of public virtues, judges still wrestle with how much of a religious presence American civil society should have to tolerate.

Ever since the Supreme Court embarked upon its Establishment Clause jurisprudence, progressive justices have attempted to use the Clause to limit the religious presence and activism within society. One of the aims of the current progressive campaign to pack the court is to fulfill the long-time goal of replacing the religious liberty focus of the First Amendment with one that reflects a progressive secularism. And with this goal of subverting First Amendment freedoms, the current court-packing plan poses the most serious of constitutional dangers.

CONCLUSION

It is no surprise that FDR's 1937 court-packing plan was defeated by a bipartisan and widespread opposition. Given the dangers that such a plan posed to the independence of the Supreme Court and the legitimacy of constitutional law, it is no surprise that no other serious effort to pack the court occurred over the next eight decades. The surprise, however, is the uninhibited boastfulness with which the progressive left is now brandishing its current court-packing attempt.

The progressive court-packing plan coincides with a blatant disregard if not outright opposition to the foundational principles of the Constitution. The separation of powers doctrine, a central constitutional tenet, holds that the judiciary in general and the Supreme Court in particular must be free from the encroaching manipulations of the executive and legislative branches. But court-packing is a direct attempt of the two political branches to manipulate the constitutional decisions of the Court. Moreover, as the progressive left has long demonstrated, it will go to any lengths to force the Court to undermine or even reverse revered First Amendment freedoms. The object of the current court-packing attempt, in fact, is not so much the make-up of the Court as it is the very body of First Amendment law.

Not only does the court-packing attempt completely contradict historical principles and practice, but it also ignores the destructive examples of other countries that have tried similar approaches. Events abroad have demonstrated the dangers of when the political branches attempt to control or influence the judiciary. In recent years, governments in Hungary, Poland, Turkey and Venezuela have packed their courts in an effort to weaken the judiciary vis-à-vis the executive branch. These court-packing efforts have turned out to be a first step in the undermining of those nations' constitutional systems. In 2004, for instance, President Hugo Chavez increased the Venezuela Supreme Court's size from 20 to 34 justices; he then appointed the additional 14 justices. In the more than 45,000 rulings since 2004, the Venezuela Court issued no rulings against the Chavez and successor Maduro regimes. And, of course, it was in 2006, only two years after his court-packing effort, that Chavez introduced his extreme socialist agenda.

Aside from the possible exception of the Reconstruction Congress following the Civil War, Roosevelt's effort was the first serious attempt to increase the size of the Supreme Court for purely political reasons. But it must be remembered what the opponents of the New Deal plan said: It would "violate all precedents in the history of our Government and would in itself be a dangerous precedent for the future."[80]

[80] S. Rep. No. 75-711, at 3 (1937).

The New Deal court-packing plan lacked historical precedent and legitimacy back in 1937, just as the current court-packing plan does. And the New Deal attempt violated constitutional principles of separation of powers and judicial independence, just as the current one does. Now is the time, as it was during FDR's administration, for a staunch, bipartisan opposition to any plan that would subject the Supreme Court to a deeply politicized and damaging packing scheme.

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