Avoiding Institutional Corruption Through a Self-Regulating Federal Judiciary

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Introduction

The federal judiciary is largely a self-regulated institution, a point of controversy among Americans that has long sparked debate.[1] The Constitution allows Congress to regulate the judiciary through the impeachment power,[2] but otherwise protects judicial tenure during "good behavior" and prohibits Congress from lowering judges' salaries.[3] In addition to these constitutional provisions, federal judicial conduct is subject to a regulatory regime including a Code of Conduct promulgated by a body within the judiciary as well as Congressional statute, but this system allows for significant self-regulation and applies only to the lower federal courts.[4] The Supreme Court lacks formal external regulation and considers formal internal judicial regulations like the Code of Conduct only guidelines for its purposes.[5]

Recent commentary has highlighted that self-regulation is inherently corrupting.[6] This may particularly be the case in the context of the judiciary, an insular institution with lifetime tenure during good behavior.[7] In order to maintain the integrity of judicial review, ensure judges conduct themselves properly, and promote judicial legitimacy in the eyes of the public, critics argue the federal judiciary should be regulated by a third party.[8] Based on existing constitutional provisions and the concept of separation of powers, regulation by Congress, a coordinate political branch, seems an obvious choice. Recently, many debates have centered around the possibility of Congress increasing the number of

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1. *See generally* Sarah MR Cravens, *Regulating Judges in the United States: Concerns for Public Confidence*, *in* Regulating Judges: Beyond Independence and Accountability 390 (Richard Devlin & Adam Dodek, eds., 2016); Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 Ind. L. J. 153 (2003).

2. U.S. Const. art. II, § 4.

3. U.S. Const. art. III, § 1.

4. *See* Dana A. Remus, *The Institutional Politics of Federal Judicial Conduct Regulation*, 31 Yale L. & Pol'y Rev. 33, 34 (2012); Cravens, *supra* note 1 at 391.

5. Cravens, *supra* note 1, at 391, 393–94.

6. *See, e.g.*, Remus, *supra* note 4, at 71.

7. *Id.*

8. *See* Cravens, *supra* note 1, at 390 (noting the lack of official external regulation of the Supreme Court and "various efforts to change that").

Justices on the Supreme Court. Specifically, if a President from the American Democratic Party is elected in the United States 2020 election, some Democrats argue that a Democratic-majority Congress should work with the President to add seats to the Court in order to gain an ideologically sympathetic majority.[9] By exercising its power to control the number of Justices on the Court, Congress would be expanding its direct regulation over the Court's numbers, composition, and decisions. As this Note will discuss, Congress has a number of constitutional and statutory means at its disposal for increasing its ability to regulate judicial conduct, decision-making, and administrative processes, including court packing. However, this Note argues external regulation of the judiciary by a coordinate political branch beyond what the system currently allows is not desirable because political influence is more corrupting than the existing scheme of self-regulation. The judiciary should remain largely self-regulating in order to stay insulated from the negative consequences that could result from increased political regulation, particularly potential damage to individual rights and liberties.

Part I of this Note explains the American debate between a self-regulated judiciary and one externally regulated by a coordinate political branch. This section then discusses the means Congress has for extending its regulatory control over the judiciary. In light of relevant contemporary debates in American society, particular attention is given to the possibility of regulating the judiciary through increasing the number of Justices on the Supreme Court. Part II engages in a case study of Poland in order to illustrate the corrupting potential of judicial regulation by a coordinate political branch, using the impact on abortion access in Poland to demonstrate the danger such regulation may pose to individual rights and liberties. Finally, Part III draws on outcomes in Poland as well as elements of the American regulation debate to argue against increasing regulation of the judiciary by a coordinate political branch.

I. REGULATING THE JUDICIARY

A. THE SELF-REGULATION DEBATE

1. BACKGROUND

Conceptualizing judicial independence and which dimensions of the judiciary are being regulated may involve multiple dimensions.[10] Independence may be held by, and regulation imposed on, individual judges, the judiciary as an institution, or the judiciary as a bureaucracy.[11] When considering judicial regulation,

9. *See* Walter Shapiro, *The Case Against Court-Packing*, BRENNAN CTR. FOR JUSTICE (June 24, 2019), https://www.brennancenter.org/our-work/analysis-opinion/case-against-court-packing [https://perma.cc/GV34-99ES].

10. *See* Richard Devlin & Adam Dodek, *Regulating Judges: Challenges, Controversies, and* Choices, *in* REGULATING JUDGES: BEYOND INDEPENDENCE AND ACCOUNTABILITY 1, 12–13 (Richard Devlin & Adam Dodek, eds., 2016).

11. *See id.* at 13–14.

one might first think of disciplining misconduct, but this is only one form of possible regulation.[12] For instance, appellate review by courts functions as a self-regulating mechanism for proper decisions and conduct.[13] Furthermore, judicial appointment processes may be the most powerful regulatory instruments because of their ex-ante filtering function.[14] In the federal context appointment serves as an admission to the practice of judging, a privilege conferred on a small number of people who are deemed qualified based on particular criteria.[15]

The existing federal judicial regulatory scheme includes elements of both external and self-regulation. External regulations, which Peter Shane calls "political mechanisms,"[16] include discipline and removal methods that the coordinate political branches may initiate and fully execute without the involvement of the judiciary, such as impeachment.[17] Self-regulating mechanisms, which Shane calls "judiciary-dependent mechanisms,"[18] are those that the political branches cannot fully execute because the judiciary itself plays an important or exclusive role in implementation, such as criminal prosecution or discipline under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980.[19] While the Constitution provides for regulation of the federal judiciary's conduct only through impeachment, today the existing regulatory scheme addresses a range of judicial behaviors and includes both the aforementioned 1980 Act as well as the Code of Conduct for United States Judges promulgated by the Judicial Conference of the United States.[20] The Judicial Conference serves as a policy-making body for the federal courts, addresses federal rules of practice, sets codes of conduct, and addresses other matters of judicial ethics.[21] However, while the lower federal courts are subject to specific internally-administered regulations, the United States Supreme Court notably lacks formal mechanisms of self-regulation, [22] a point of controversy among Americans.[23]

2. ARGUMENTS FOR AND AGAINST SELF-REGULATION

In the eyes of its proponents, a largely self-regulated federal judiciary is not cause for concern, particularly because the judiciary is always subject to certain minimum external controls which encourage diligent self-regulation in uncovered

12. *Id*. at 21.
13. *See id*. at 19.
14. *Id*. at 18.
15. *See id*.
16. *See* Peter M. Shane, *Who May Discipline or Remove Federal Judges? A Constitutional Analysis*, 142 U. PA. L. REV. 209, 211.
17. *Id*.
18. *Id*. at 211–12.
19. *Id*.
20. Remus, *supra* note 4, at 34.
21. *See* Cravens, *supra* note 1, at 391.
22. *See id*. at 390.
23. *See, e.g*., Remus, *supra* note 4; Geyh, *supra* note 1.

areas. According to Charles Geyh, the judiciary operates with an awareness that Congress may intervene if dissatisfied by the way federal courts administer themselves, and a desire to avoid this intervention leads it to exercise caution and restraint in governing itself.[24] For instance, Congress holds the constitutional power to impeach federal judges and the interpretive power of deciding when judges have left the realm of "good behavior" and have committed impeachable high crimes and misdemeanors.[25] Further, while under the Constitution Congress may not control judges' salaries, it can control the administrative funds necessary to operate courtrooms and maintain efficient administration.[26] As a corollary of its power to establish lower courts, Congress may disestablish lower courts, and it is also able to alter and limit the Supreme Court's jurisdiction through statute.[27] These two regulatory measures might be considered overreactions by many, including members of Congress, and are unlikely to be utilized in response to an unfavorable decision or two. Nevertheless, they are potential means of restraining a judiciary Congress comes to see as overly activist – a judiciary extending its own political preferences and institutional power at the expense of Congress' in a concerted effort over a period of time. Thus, not only do existing external regulations by the political branches encourage stricter internal regulation, but they could also be considered to limit the judicial independence created by constitutional protections of tenure and salary.[28] The impact of these external political controls has implications for both constitutional separation of powers and institutional regulation. They constrain the judiciary's ability to exercise independent judicial review and regulate its own conduct and decision-making processes.

Additionally, some scholars identify a "decisional-institutional independence dichotomy"[29] in the judiciary which distinguishes between individual judges and the judiciary as an institutional body.[30] According to this model, tenure and salary protection provides "individual judges with considerable decision-making independence" which is limited only by Congress' power of impeachment.[31] On the other hand, the judiciary's institutional independence is more closely restricted by congressional mechanisms of control aimed at promoting accountability, such as Congress' power over federal courts' "budget, structure, administration, and jurisdiction."[32] The resulting system is one of independent judges operating within a "more or less" dependent judiciary, although this is a generalization as there are not always clear lines between the two dimensions and the ways

24. *See* Geyh, *supra* note 1, at 162.
25. *See id.* at 160.
26. *See id.*
27. *See id.*
28. *See id.* at 159–60.
29. *Id.* at 163.
30. *Id.*
31. *See id.*
32. *Id.*

political constraints are used to impact the judiciary's operation.[33] Under this conception, self-regulation of individual judges by other judges and judicially-created bodies can be seen as unthreatening because of the greater separation of powers constraints on the independence of the judiciary as a constitutional body.

Others, however, see judicial self-regulation as vast and largely unconstrained. This assessment is particularly pronounced in regard to the Supreme Court, which some scholars argue is not "self-regulated" but "unregulated."[34] The Supreme Court is not bound by any code of conduct or formal regulatory process besides the Justices' annual financial disclosures.[35] Chief Justice Roberts has remarked that the Code of Conduct for United States Judges is a source of guidance for the Supreme Court, but only one of many and inadequate to answer certain questions unique to the Court.[36] Critics argue constitutional restraints on the judiciary are very limited, as the text of the Constitution protects judicial tenure and compensation and only allows for explicit regulation by the political branches through impeachment.[37]

Many critics have proposed changes to judicial regulation through term limits, age restrictions, and retirement policies.[38] Their rationale for these policy changes is that the current largely self-regulating system is dangerous to the constitutional order and judicial legitimacy. [39] Many see self-regulation as making any institution "vulnerable to pathologies of self-interest," particularly the federal judiciary because of its unique insularity.[40] Not only are federal judges and Justices appointed for life and protected from salary reductions, but judicial culture also places a high value on collegiality and discretion and may motivate judges to protect themselves and courts from "undue criticism or publicity."[41] Furthermore, proponents of greater regulation over the Supreme Court in particular may argue such measures will enhance public trust and institutional legitimacy, both of which are threatened by Americans' concerns over judicial self-regulation.[42] Others argue the Court has "nothing to gain from making a change and nothing to lose by keeping things as they are," which further militates in favor of external regulatory reform for the sake of accountability.[43]

33. *Id.*
34. *See* Cravens, *supra* note 1, at 391.
35. *See id.*
36. *See id.* at 391, 394.
37. *See* Shane, *supra* note 16, at 209.
38. Cravens, *supra* note 1, at 395.
39. *See id.* at 404; Remus, *supra* note 4, at 71.
40. Remus, *supra* note 4, at 71.
41. *Id.*
42. *See id.* at 38; Cravens, *supra* note 1, at 404.
43. Cravens, *supra* note 1, at 398.

B. MEANS OF INCREASING EXTERNAL REGULATION

While the judiciary is largely self-regulated, Congress has a number of means at its disposal should it desire to exercise greater restraint or greater influence, especially in regard to the Supreme Court. First, Congress could utilize coercive means like withholding the judiciary's budget (though not Justices' salaries) or impeaching and removing Justices who issue unfavorable opinions.[44] It could also take aim at the Supreme Court's decision-making capacity by excluding certain categories of cases from its appellate jurisdiction or pass a constitutional amendment limiting judicial review.[45] In addition, Congress could target the composition of the Court itself in hopes of creating a majority of ideologically sympathetic Justices by manipulating the appointments process to impact the confirmation of judges or enlarging the size of the Court with help from the President.[46] Through all of these methods, Congress is able to intervene in judicial regulation and increase the judiciary's institutional accountability to Congress' political preferences.[47]

Amongst all the possible means of regulation and intervention by the political branches, Americans have recently focused most on the Supreme Court's ideological composition.[48] The number of United States Supreme Court Justices has varied from six to ten at various points in American history but has been fixed at nine since 1869.[49] Today, however, some members of the Democratic Party advocate changing that number again.[50] In particular, they suggest adding additional seats to the Supreme Court if Democrats obtain the Presidency and a congressional majority in 2020, with the aim of securing a liberal majority that will be sympathetic to the Democratic policy agenda and protect individual rights and liberties viewed as currently under attack by conservatives.[51] Presently, more Justices on the Supreme Court were appointed by Republican presidents than Democratic presidents—five versus four.[52] Some Americans maintain that

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44. *See* Geyh, *supra* note 1, at 156. The latter option may be available more in theory than practice. In 1804, the House of Representatives initiated impeachment proceedings against Justice Samuel Chase largely due to a perception that his personal politics impacted his decisions on the Supreme Court. *See Senate Prepares for Impeachment Trial: November 30, 1804*, THE UNITED STATES SENATE, https://www.senate.gov/artandhistory/history/minute/Senate_Tries_Justice.htm [https://perma.cc/79L9-WWNE]. The Senate's acquittal of Justice Chase is considered an effective insulation of the judiciary "from congressional attacks based on disapproval of judges' opinions" that would likely still apply today. *Id*.

45. Geyh, *supra* note 1, at 156.

46. *See id*.

47. *See* Remus, *supra* note 4, at 68.

48. *See, e.g*., Shapiro, *supra* note 9.

49. *Id*.

50. *See id*.

51. *See id*.

52. Olivia B. Waxman, *Some Democrats Want to Make the Supreme Court Bigger. Here's the History of Court Packing*, TIME (Oct. 17, 2019), https://time.com/5702280/court-packing-history/ [https://perma.cc/AL3C-K9HQ]. Chief Justice John Roberts and Justices Clarence Thomas, Samuel Alito, Neil Gorsuch, and Brett Kavanaugh were appointed by Republican Presidents; Justices Ruth Bader Ginsburg, Stephen Breyer,

Justices' appointing Presidents and political ideologies do not impact judicial independence. For example, Current Chief Justice John Roberts has claimed, "We do not have Obama judges or Trump judges, Bush judges or Clinton judges... What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them."[53] Many American voters and politicians disagree, however, and see an ideological majority on the Supreme Court as a powerful tool of either democracy or repression, depending on whether that majority aligns with their own ideologies.[54]

Democrats in favor of adding seats to the Supreme Court tend to rely on arguments concerning history, the failed 2016 nomination of Merrick Garland, and current political and judicial threats to individual rights.[55] First of all, the Constitution grants Congress the right to make the Supreme Court as large or small as it likes, which supporters of court packing argue allows Congress to prevent "stagnant visions of... law" from threatening the growth of democracy.[56] Those in favor of adding seats to the Supreme Court point to the fact that the number of Justices has changed seven times throughout history and each time the court remained independent.[57] Mayor Pete Buttigieg, who has proposed increasing the number of Supreme Court Justices to fifteen,[58] argues that not only has the makeup and size of the Court changed multiple times throughout history, but "it was also changed in 2015 when the Republicans changed the number of Justices on the Supreme Court temporarily to eight. And then they changed it back to nine when they took power."[59] Indeed, when Justice Scalia died in 2016, President Obama nominated Merrick Garland to fill the vacancy, but before Obama even named Garland, Senate Majority Leader Mitch McConnell stated that any appointment made by Obama would be null and void because it was so close to a

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Sonia Sotomayor, and Elena Kagan were appointed by Democratic Presidents. *Current Members*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/biographies.aspx [https://perma.cc/V4XN-UH6P].

53. Adam Liptak, *Impeachment Trial Looming, Chief Justice Reflects on Judicial Independence*, N.Y. TIMES (Dec. 31, 2019), https://www.nytimes.com/2019/12/31/us/john-roberts-trump-impeachment.html [https://perma.cc/59ZQ-QSAD].

54. *See* Tim Burns, *Court-Packing is Not a Threat to American Democracy. It's Constitutional.*, THE NEW REPUBLIC (Mar. 15, 2019), https://newrepublic.com/article/153325/court-packing-not-threat-american-democracy-its-constitutional [https://perma.cc/BVV9-KKYU] ("Having the ability to change the composition of the Court. . . ensures that Congress has the power to prevent stagnant visions of our law from threatening the growth of our democracy."); Shapiro, *supra* note 9 ("it is dangerous to tamper with the mechanisms of democracy . . . restructuring the Supreme Court could have lasting repercussions"); Joan Biskupic, *Democrats look at packing the Supreme Court to pack the vote*, CNN (May 31, 2019), https://www.cnn.com/2019/05/31/politics/democrats-supreme-court-packing-politics/index.html [https://perma.cc/T2M2-FHH2] ("The most critical issues of our lifetimes, before and in the future... will be decided by that United States Supreme Court.").

55. *See, e.g.*, Shapiro, *supra* note 9; Burns, *supra* note 54; Biskupic, *supra* note 54.

56. *See* Burns, *supra* note 54.

57. *Id.*

58. Waxman, *supra* note 52.

59. Shapiro, *supra* note 9.

presidential election; according to McConnell, the next Supreme Court Justice should be chosen by the next President, to be elected later in the year.[60] Soon after, the eleven Republican members of the Senate Judiciary Committee signed a letter expressing their unwillingness to accept any Obama nominee.[61] As the minority party, Democrats were unable to force a committee or floor vote, and were ultimately unable to seat a Democratic President's choice.[62] The Supreme Court vacancy served as a motivating force for conservatives in the 2016 Presidential election, and newly elected President Trump nominated conservative Neil Gorsuch to fill Justice Scalia's seat.[63] Justice Gorsuch was ultimately confirmed by the Senate.[64] For some Democrats, Republicans' departure from judicial appointment norms in order to advance the possibility of securing a Republican-appointed Supreme Court Justice represents both a change in the number of Justices for one party's benefit as well as a direct threat to Democratic policies and certain individual rights and liberties.[65]

Not all Democrats support an expansion of Supreme Court seats for short-term policy or regulatory benefits, and those who oppose the move also tend to draw on historical,[66] slippery slope,[67] and legitimacy arguments.[68] In terms of history, many opponents point to President Franklin D. Roosevelt's court-packing scheme embodied in the Judicial Procedures and Reform Bill of 1937.[69] In the mid-1930s, Roosevelt felt Americans were largely in favor of New Deal programs addressing the Great Depression.[70] However, the Supreme Court, which held a majority of conservative-leaning Justices, struck down several pieces of New Deal social legislation, raising concerns that the program may be in jeopardy despite popular support.[71] As a result of these concerns, Roosevelt proposed reforms in which the size of the Supreme Court "would increase each time a sitting Justice reached his seventieth birthday and failed to retire," with a cap at 6

60. Ron Elving, *What Happened With Merrick Garland In 2016 and Why It Matters Now*, NPR (June 29, 2018), https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now [https://perma.cc/EA6D-YTWX].

61. *Id.*

62. *Id.*

63. *Id.*; *See* Adam Liptak & Matt Glegenheimer, *Neil Gorsuch Confirmed by Senate as Supreme Court Justice*, N.Y. TIMES (Apr. 7, 2017), https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html [https://perma.cc/6SRT-HLLA].

64. Liptak & Glegenheimer, *supra* note 63.

65. *See* Shapiro, *supra* note 9; Kurt Bardella, *Remember Merrick Garland? Democrats Can't Let Mitch McConnell Rewrite History Ahead of Brett Kavanaugh's Confirmation*, NBC NEWS THINK (July 16, 2018), https://www.nbcnews.com/think/opinion/remember-merrick-garland-democrats-can-t-let-mitch-mcconnell-rewrite-ncna891626 [https://perma.cc/T7CG-684F].

66. *See* Shapiro, *supra* note 9.

67. *See* Burns, *supra* note 54.

68. *See* Waxman, *supra* note 52; Biskupic, *supra* note 54.

69. *See* Waxman, *supra* note 52.

70. *See id.*

71. *See id.*

additional Justices.[72] In practice, this legislation if passed would have allowed Roosevelt to immediately appoint six new Justices to the Court to compensate for the six Justices already on the court older than age seventy.[73] The bill received strong criticism and was never passed into law.[74] Some Democrats view the unpopularity of Roosevelt's court-packing plan as an indication any contemporary scheme would engender a similarly hostile reception and injure public faith in an independent judiciary.[75] Others find an additional moral in this historical saga: "in a functional democracy, structural problems often solve themselves" without legislative change.[76] In the end, even without a reform bill, "five Supreme Court Justices either died or retired during Roosevelt's second term allowing him to at last create a liberal majority."[77]

Arguably, the threat of Roosevelt's court packing plan did in fact have a real effect on judicial decision-making, as evidenced by the "switch in time."[78] As the story goes, Roosevelt's plan incited Justice Robert, who previously voted with conservative Justices in rejecting New Deal legislation, to reverse course by voting with the Court's liberal members to uphold a minimum wage law for women in *West Coast Hotel v. Parrish*.[79] This switch, it is said, "resurrected the New Deal and spared the Court from packing."[80] However, many historians argue *Parrish*, the case in question, was decided before Roosevelt revealed his court-packing plan.[81] Furthermore, as previously mentioned, the public backlash to Roosevelt's proposal was so strong it calls into question how significant a threat the plan actually was to the Court.[82] Finally, while Roberts may indeed have shifted "sharply and temporarily to the left in the 1936 term,"[83] this single switch pales in impact and significance compared to the subsequent liberal realignment of the Court which resulted from the natural course of Justices' deaths and retirements.[84]

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72. Shapiro, *supra* note 9; Waxman, *supra* note 52.

73. Shapiro, *supra* note 9.

74. *Id*.

75. *See id*.; Waxman, *supra* note 52 (noting Justice Ginsburg's expression that adding Justices to the Supreme Court was a bad idea in 1937 and remains a bad idea eight decades later because it would "make the court look partisan.").

76. Shapiro, *supra* note 9.

77. *Id*.

78. Daniel E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?*, 2 J. OF LEGAL ANALYSIS 69, 69 (2010).

79. *Id*. at 70.

80. *Id*.

81. *See id*. at 71; Waxman *supra* note 52.

82. Ho & Quinn, *supra* note 78, at 71.

83. *Id*. at 102.

84. *See id*. at 72 (calling Roberts's shift "irrelevant" in the long run as a result of a "drastic realignment" of the Court); Shapiro, *supra* note 9 (noting that five Supreme Court justices either died or retired during Roosevelt's second term, which allowed him to form a liberal majority).

Following this lesson, expansion of the Court by majority party for political gain is a dangerous and short-cited solution because times change, power ebbs, and the system corrects itself.[85] Restructuring the Court, on the other hand, may have long-lasting institutional consequences.[86] Such consequences may include a "tit-for-tat" response from Republicans at best and the loss of an independent judiciary at worst.[87] Many opponents of court packing argue that if Democrats make changes to the Supreme Court in 2020 to advance their policy agenda, Republicans will do the same once they return to power.[88] Democratic presidential candidate Senator Bernie Sanders is among such critics, and has expressed his fear that if Democrats alter the Court's composition for their gain, "the next time the Republicans are in power they will do the same thing."[89] Such a back-and-forth could continue across multiple administrations, dealing a significant blow to judicial independence.

Even if judicial independence is not in fact destroyed by tit-for-tat court packing, increased politicization of the judiciary will lead to increased questioning of judicial review by Americans and put the Supreme Court's legitimacy at risk.[90] At the 2019 Democratic Primary debate in Ohio, Vice President Joe Biden highlighted this concern, explaining that if Democrats alter the Court's composition, "we begin to lose any credibility the court has at all."[91] Supreme Court Justice Ruth Bader Ginsburg agrees—she has called Roosevelt's court-packing plan a "bad idea" and has remarked that such schemes "would make the court look partisan," which impairs belief in an independent judiciary.[92] As Justice Ginsburg has explained, public trust is vital to the notion of an independent judiciary—when Americans believe the judiciary is independent, they will accept its decisions even when they might vehemently disagree.[93] As the Court appears increasingly partisan, Americans will increasingly question its independence and legitimacy. If the Court loses legitimacy, the rulings Democrats hope to see under a majority of liberal Justices may not be heeded anyway.[94]

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85. *See* Shapiro, *supra* note 9.

86. *See id*.

87. *See* Burns, *supra* note 54.

88. *See id*.

89. Gregory Krieg, *Bernie Sanders floats modified term limits for Supreme Court justices*, CNN (Apr. 2, 2019), https://www.cnn.com/2019/04/01/politics/bernie-sanders-supreme-court/index.html [https://perma.cc/6HBM-35ES].

90. *See* Biskupic, *supra* note 54.

91. Waxman, *supra* note 52.

92. Nina Totenberg, *Justice Ginsburg: 'I Am Very Much Alive'*, NPR (July 24, 2019), https://www.npr.org/2019/07/24/744633713/justice-ginsburg-i-am-very-much-alive [https://perma.cc/4PJ9-NETS].

93. *See id*.

94. *See* Dylan Matthews, *Court-packing, Democrats' nuclear option for the Supreme Court, explained*, VOX (Oct. 5, 2018), https://www.vox.com/2018/7/2/17513520/court-packing-explained-fdr-roosevelt-new-deal-democrats-supreme-court [https://perma.cc/2ZLB-KBV4] ("The Supreme Court has no army. Its authority rests on the thin reed of public acceptance and political forbearance. If it were to be weaponized in a court-packing scheme, its rulings might suddenly stop being obeyed.").

II. POLAND: A CASE STUDY

A. WHY COMPARE?

At least as early as 2007, signs indicated the Law and Justice Party, referred to by the acronym PiS in Polish, sought to curb judicial independence and thereby increase the political bodies' powers.[95] When PiS secured a parliamentary majority in Poland's 2015 election, it quickly began taking measures that have pulled Poland towards authoritarianism in the intervening years, particularly by eliminating judicial review and restricting the effectiveness of democratic institutions.[96] While PiS's efforts to politicize and hollow out the Polish judiciary exceeded those that have occurred or been suggested in the United States, an examination of Poland's trajectory provides valuable learning experiences for our own country.

Aziz Huq and Tom Ginsburg argue there are two roads to the loss of constitutional democracy.[97] The first is the short road of authoritarian reversion, which involves a rapid, wholesale collapse.[98] The second is the longer road of constitutional regression, marked by incremental simultaneous reversals along rule-of-law, democratic, and liberal margins.[99] Constitutional liberal democracy can "degrade without collapsing"[100] through "decay in the three basic predicates of democracy —competitive elections, liberal rights to speech and association, and the rule of law."[101] It is important to acknowledge that since 2015 Poland has been experiencing a PiS-led backslide into authoritarianism and its liberal democracy has dissolved at a far greater rate than in the United States.[102] This means the extent of the decline of judicial independence in Poland is much larger than what has occurred or been proposed in the United States. Notably, other Polish democratic institutions such as political, media, and social bodies have degraded under a full-on assault by the political branches to an extent not yet seen in the United States.[103]

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95. *See* INT'L BAR ASS'N, JUSTICE UNDER SIEGE: A REPORT ON THE RULE OF LAW IN POLAND 5 (2007).

96. *See* WOJCIECH SADURSKI, POLAND'S CONSTITUTIONAL BREAKDOWN 98–99 (2019).

97. *See* Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 92 (2018).

98. *See id.*

99. *See id.*

100. *Id.* at 94.

101. *Id.* at 96.

102. *See* SADURSKI, *supra* note 96, at 96.

103. *See id.* at 132. Scholar Aziz Huq argues President Donald Trump's administration has "set the United States, perhaps irreversibly, on a new and perilously uncharted course that may, one day, lead us beyond democracy." Aziz Huq, *Under Trump, the United States Has Joined the Sad Roster of Backsliding Democracies*, VOX (Jan. 30, 2018), https://www.vox.com/the-big-idea/2018/1/30/16950680/democratic-backsliding-loss-of-democracy-state-of-union-authoritarian-trump [https://perma.cc/2WPZ-A8GC]. However, based on the state of its courts and democratic and social institutions, which are under full-out assault by the political branches, Poland, has arguably already reached "one day" and is "beyond democracy." *Id*; *see* SADURSKI, *supra* note 96, at 96, 132.

While the United States' liberal democracy is clearly not devolving at the same rapid pace as Poland, any erosion in the aforementioned areas should prompt Americans to examine the integrity of their institutions and any potential threats to rule of law. Thus, although Poland and the United States face differing levels of democratic erosion, American Democrats can still learn a lesson from Poland in determining how to best address the judicial regulation debate, particularly in considering whether regulation by a coordinate political branch is wise. In particular, Poland illustrates the negative consequences to independent judicial review and individual rights that could result from increasing a coordinate political branch's regulation of the judiciary.

B. POLITICAL REGULATION OF THE POLISH JUDICIARY

1. CONSTITUTIONAL TRIBUNAL

The Polish Constitutional Court "CT" oversees compliance of legislation and international agreements with the constitution, rules on the constitutionality of state institutions and the powers of constitutional bodies.[104] The CT also regulates political parties for constitutional compliance, making it a central target of PiS's alterations.[105] Although political interference with the CT has taken place to a greater extent than has been proposed in the United States and has occurred in the context of an overall authoritarian backslide, there are notable parallels between developments in the United States and Poland. Like the proposed alterations to the Supreme Court in the United States, changes to the CT have stemmed from a desire to achieve a court that makes rulings in line with the political party in power. Furthermore, alterations are centered around the goal of increasing political control over the Court and allowing the ruling party to appoint enough justices to gain an ideological majority on the Court which will rule favorably on questions involving its policy agenda.

Through court packing and overwhelming the CT with legislation, PiS effectively disabled the CT and transformed it into an active aid in its political agenda.[106] Just before the 2015 election, the Polish Parliament elected five new justices to the CT when it was constitutionally permitted to elect only three; however, after the election the new PiS president refused to take oaths of office from all five of the justices, even the two that were legally elected, and Parliament subsequently adopted a resolution declaring the election of all five justices was null and void.[107] This "extra-constitutional" method of removing justices from office allowed Parliament to elect five new justices loyal to PiS instead of the two they were authorized under the Constitution.[108] PiS continued to remove pre-2015 CT

104. INT'L BAR ASS'N, *supra* note 95, at 19.
105. *Id*.
106. *See* SADURSKI, *supra* note 96, at 79.
107. *See id*. at 62.
108. *Id*.

justices and replace them with new justices loyal to the party throughout the next several years through a variety of tactics.[109] For instance, after Party members falsely claimed three justices were elected improperly in 2010, PiS engineered the removal of those justices from panels for alleged bias against the Prosecutor General, an active PiS politician.[110] PiS effectively achieved removal of another justice by forcing him to use his optional holiday leave entitlement – which lasted until the end of his official term – due to alleged budget concerns.[111]

In 2016, the PiS-led Parliament also adopted new rules and procedures for the CT that would exempt recent PiS legislation from constitutional scrutiny, paralyze the court's decision-making, and increase the executive and legislature's powers over the court.[112] As a result, the CT was forced to deal largely with the constitutionality of laws about itself and thereby neglect the substantive laws PiS was adopting during the same period.[113] Once the CT achieved a majority of PiS justices, the court's paralysis came to an end and the CT began to actively support and advance PiS's political aims by legitimizing the government,[114] producing merit rulings that created legal circumstances aiding PiS's agenda,[115] and even vocally supporting the PiS government outside the courtroom.[116]

2. SUPREME COURT AND OTHER LOWER COURTS

The Polish Supreme Court (SC) is a court of last resort dealing with appeals from lower district, provincial, and appeals courts, which are referred to as general courts and adjudicate on family, civil, labor, and criminal law.[117] The SC also has jurisdiction over some specific types of issues beyond appeals.[118] When the SC and lower courts appeared to be countervailing powers that might check PiS's legislation and politics, PiS conducted a propaganda campaign intended to smear the judiciary then proposed a set of judicial "reforms" intended to extend political control over the courts.[119]

First PiS targeted the National Council of the Judiciary, known as KRS,[120] a body established by the Polish Constitution with power to nominate to the President all candidates for judicial positions in Poland.[121] Parliament changed the KRS appointment rules so that politicians elect twenty-three out of twenty-

109. *See generally id*. at 67–68.
110. *See id*.
111. *See id*. at 68.
112. *See id*. at 72.
113. *See id*. at 70.
114. *See id*. at 82.
115. *See id*. at 79.
116. *See id*. at 82.
117. *See* INT'L BAR ASS'N, *supra* note 95, at 19–20.
118. *Id*. at 19.
119. *See* SADURSKI, *supra* note 96, at 98.
120. *Id*. at 68.
121. *Id*. at 99.

five members of the body, giving Parliament—and its PiS majority—essentially full and unconstrained power to appoint members of the institution that then appoints all Polish judges.[122] In dealing with the SC itself, Parliament instituted a new, lower retirement age for judges, who are permitted to continue serving on the court past retirement age only with consent of the president, who must seek the opinion of the newly PiS-loyal KRS.[123] PiS also increased the number of judges on the SC, and together these two reforms allowed the Party to appoint a number of loyal new judges to the court.[124]

Further extending political control over the judiciary, another PiS-instituted reform granted the Minister of Justice a new power to appoint and dismiss the presidents of all common courts without giving a reason or seeking advice from any other body.[125] This reform is especially significant in light of the high level of control court presidents have over the judges in their courts and the substantial role they play in managing cases.[126] According to Wojciech Sadurski, the Minister of Justice has "enthusiastically made use" of this power of appointment and dismissal without counterbalance.[127] Finally, since PiS began its reforms, Poland has seen an increase in the prosecution of judges "on the basis of the *substance of their judgments*" attributable to a new law which allows public prosecutors, who are members of the executive branch, to prosecute disciplinary proceedings.[128] This trend has increased political control over the judiciary both by eliminating judges not popular with PiS and by creating a "chilling effect" on judges' speech and decisions.[129]

As with efforts to alter the Polish CT and with proposed alterations to the United States Supreme Court, PiS's reforms targeting the SC and other lower courts have been focused on increasing political control over the judiciary's ideological composition. A primary strategy for achieving such control is allowing the ruling party to appoint more judges than it would be allowed under existing norms. Through these methods as well as eroding checks and balances against the political branches' influence over the courts, PiS secured from Poland's lower courts ineffective opposition, if not total loyalty.

C. EFFECT ON INDIVIDUAL RIGHTS: ABORTION

Poland's abortion policies were quite liberal under Soviet rule but have become extremely restrictive since the 1990s.[130] Under the 1993 Act on Family

122. *See id.* at 101.
123. *See id.* at 106.
124. *Id.* at 111.
125. *Id.* at 115–16.
126. *See id.* at 117.
127. *Id.* at 116.
128. *Id.* at 119–120.
129. *Id.* at 119.
130. *See* Julia Hussein et al., *Abortion in Poland: Politics, Progression and Regression*, 26 REPROD. HEALTH MATTERS 11, 11–12 (2018).

Planning, Protection of the Human Fetus, and Conditions for Pregnancy Termination currently in place, abortion may only be performed legally when (1) before viability, the pregnancy involves severe danger to the life of the woman or fetus[131] or (2) up to twelve weeks gestation, the pregnancy is the result of an unlawful act such as rape or incest.[132] The Polish government has made several attempts to pass legislation further restricting abortion or banning the practice entirely, most notably in 2011, 2016, and 2018; however, each of these attempts faced strong public backlash, including mass protests in 2016 and 2018, and the legislative efforts have not yet been successful.[133] Within that context, however, conscience clause legislation allows physicians and medical personnel to withhold abortion services that conflict with their personal beliefs.[134] Both the 1991 Medical Code of Ethics and Article 39 of the Doctor and Dentist Professions Act (1996) as originally instituted allow a physician to withhold healthcare services not in agreement with his conscience, but require that physician to refer the patient to a provider where the patient has a realistic possibility of obtaining the service.[135]

However, just a few weeks before PiS took power in the 2015 parliamentary election, the Polish CT ruled that Article 39's requirement that physicians refer patients elsewhere for care violates the Polish Constitution by interfering too greatly with physicians' freedom of conscience protected under Article 53.1.[136] The CT also held that Article 39 was unconstitutional insofar as it required physicians to perform medical procedures that conflict with their consciences in cases of immediate emergency, finding "immediate urgency" an imprecise standard that does not allow unambiguous determinations as to when the law applies.[137] In reaching the latter holding, the court found it could not analyze the legal requirement under a proportionality test because it was impossible to determine what constitutional values the legislature intended to protect at the expense of physicians' freedom of conscience, and noted that any right of the patient other than life and health would not take precedence over freedom of conscience anyway.[138]

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131. *Id.* at 11; Kornelia Zareba, *Moral Dilemmas of Women Undergoing Pregnancy Termination for Medical Reasons in Poland*, 22 EUR. J. OF CONTRACEPTION & REPROD. HEALTH CARE 305, 305 (2017).

132. Hussein, *supra* note 130, at 11; Zareba, *supra* note 131, at 305.

133. *See* Hussein, *supra* note 130, at 12; Mark Santora & Joanna Berendt, *Polish Women Protest Proposed Abortion Ban (Again)*, N.Y. TIMES (Mar. 23, 2018), https://www.nytimes.com/2018/03/23/world/europe/poland-abortion-women-protest.html?module=inline [https://perma.cc/T7EK-UNNF].

134. *See* Joanna Z. Mishtal, *Matters of "Conscience": The Politics of Reproductive Healthcare in Poland*, 23 MED. ANTHROPOLOGY Q. 161, 163 (2009); Hillary Margolis, *Dispatches: Abortion and the 'Conscience Clause' in Poland*, HUMAN RIGHTS WATCH (Oct. 22, 2014), https://www.hrw.org/news/2014/10/22/dispatches-abortion-and-conscience-clause-poland [https://perma.cc/SB8N-HGDL].

135. Mishtal, *supra* note 134, at 163; Margolis, *supra* note 134.

136. COMMUNICATION TO THE SEC'Y OF THE COMM. OF MINISTERS, COUNCIL OF EUROPE FROM THE HELSINKI FOUND. FOR HUMAN RIGHTS (Sept. 1, 2017), at 8; K 12/14 of Oct. 3, 2015 of the Constitutional Tribunal.

137. COMMUNICATION TO THE SEC'Y OF THE COMM. OF MINISTERS, *supra* note 136, at 8.

138. *See* K 12/14 ¶5.3.6.

The court purported to engage in a proportionality test in analyzing the referral requirement, finding that patients have other ways of getting the information that do not interfere with doctors' consciences, but devoted only a short paragraph to this "balancing" of patient's interests while devoting an extensive number of pages to describing the importance of freedom of conscience.[139] In a dissenting opinion, Justice Biernat argued the CT's decision was based on the "overriding importance of the freedom of conscience" relative to other freedoms and constitutional rights.[140]

Prior to this decision, Polish prosecutors and courts had already demonstrated a disinclination to prioritize patients' rights and freedoms in cases involving abortion and conscientious objection.[141] *P and S v. Poland* provides an illustrative example.[142] The case came before the European Court of Human Rights ("ECtHR") in 2012 after a fourteen-year-old girl with a legal right to an abortion under Polish law was refused by three doctors who conscientiously objected to performing the abortion and failed to refer her to an alternative provider, in violation of the Article 39 provision still in effect at the time.[143] Not only was the girl's access to abortion significantly delayed, but authorities initiated criminal and custody proceedings against her and her mother, and her personal medical information was leaked to the public when she finally received the procedure.[144] Polish district courts dismissed the case against the police officers involved and upheld a prosecutor's decision to discontinue the investigation into the disclosure of the girl's personal information.[145] The ECtHR found Poland violated Articles 3, 5, and 8 of the European Convention of Human Rights and noted that states are "obliged" to organize their health service systems in a way that ensures physicians' exercise of freedom of conscience "does not prevent patients from obtaining access to services to which they are entitled under the applicable legislation."[146]

Thus, due to restrictive legislation, widespread conscientious objection, and a judicial preference for freedom of conscience over patients' health and access to care, abortion access in Poland is extremely limited. As *P and S* illustrates, even women who are legally entitled to an abortion under Polish law are in practice often unable to obtain the care or excessively burdened in obtaining it. Conscience clause objections are often invoked by health institutions as a whole rather than individual doctors; if the director of a hospital is against abortion, he or she could

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139. *Id.* ¶ 6.2.6, 6.2.7.

140. *Id.* ¶ 1 (Biernat, J., dissenting).

141. *See, e.g.*, P and S v. Poland, No. 57375/08 ¶ 33–51(Eur. Ct. H.R. 2012).

142. P and S v. Poland, No. 57375/08 (Eur. Ct. H.R. 2012).

143. *See id.* ¶ 5–27; COMMUNICATION TO THE SEC'Y OF THE COMM. OF MINISTERS, *supra* note 136, at 4.

144. *See P and S*, ¶ 33–38, 42.

145. *See id.* ¶ 49–51.

146. *Id.* ¶ 106, 149, 169. The Court had already chastised Poland the year before with the same instruction. R.R. v. Poland, 2011-III Eur. Ct. H.R. 209, 253.

conscientiously object on behalf of the entire institution and declare abortions will not be performed there, sometimes without consulting other physicians' opinions.[147] As explained, the Polish CT has also invalidated physician referral requirements designed to protect patients' access to care in the face of conscientious objection.[148] Conscience clauses, even when invoked by individual physicians, end up aiding the Polish state's conservative, anti-abortion agenda as well as reinforcing the moral authority of the Catholic Church, which is closely aligned with the state.[149] Both PiS and the Church have made their opposition to abortion in nearly any circumstance clear,[150] and the government, with the Church's support, has unsuccessfully attempted to pass a complete ban on the procedure into law several times.[151] In the absence of a legalized ban, conscientious objection yields the same effect when invoked widely and institutionally: a practical inability to receive abortion services. When ruling on conscience clauses, Polish courts engage in virtually no balancing of the opposing rights at stake; they show a clear preference for freedom of conscience over patient autonomy and have even invalidated portions of legislation aimed at balancing patients' interests, namely the referral requirement.[152] Further, conscientious objection is only even relevant in a small number of cases because the circumstances in which abortion is legally sanctioned in Poland are so narrow.

III. AN ARGUMENT AGAINST EXTENDING POLITICAL REGULATION IN THE UNITED STATES

Poland's trajectory counsels against external political regulation of the United States judiciary. This applies to political regulation of judicial conduct, decision-making, term limits, age restrictions, retirement policies, and—most relevant to contemporary American debates—increasing the number of Supreme Court Justices. As Poland demonstrates, any regulations that increase the control of the political branches over the Court beyond what the current system allows endangers the long-term preservation of individual rights. The extent of this danger outweighs any short-term political benefits to the body or political party that initiates the regulations.

In Poland, political regulation of the judiciary has had serious consequences for a variety of individual rights and liberties, including access to abortion, which is now often extremely restricted even for women with a legal right to receive the care. This state of affairs effected by the political branches' control has been

147. *See* Mishtal, *supra* note 134, at 170; KARAT COALITION, ALTERNATIVE REPORT ON THE IMPLEMENTATION OF THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: POLAND 2014 54 (2014).

148. K 12/14 of Oct. 3, 2015 of the Constitutional Tribunal ¶ 6.2.7.

149. *See* Mishtal, *supra* note 134, at 173.

150. *See* Santora & Berendt, *supra* note 133.

151. *See id.*

152. *See generally* K 12/14 of Oct. 3, 2015 of the Constitutional Tribunal.

further aided by the unique relationship between Polish society and the Catholic Church that has spanned the country's history.[153] The Catholic Church's close practical and symbolic relationship throughout history with the Polish state, experience as a political actor, and longstanding invocation by politicians has made those in power quite amenable to supporting its policy agenda and allows Catholic morality to dominate Polish society.[154] However, while the United States does not share this unique characteristic in common with the Poland, the effects political regulation of the Polish judiciary has had on abortion access is still relevant to considerations of regulatory reform in the United States. American society, too, is currently engaged in a contentious debate over abortion, and concerns about abortion access are sometimes infused into arguments about extending political regulation over the judiciary. Some Democrats see the threat a conservative-majority court poses to abortion access as a significant reason in and of itself to undertake regulatory reform, particularly at the Supreme Court level.[155] For instance, before leaving the 2020 presidential election, Senator Kamala Harris said she was open to adding more Justices to the Court in light of the fact that it will decide the "most critical issues of our lifetimes," noting specifically that "[e]veryone's been worried about 'Will the Supreme Court overturn *Roe v. Wade*.'"[156]

However, regulatory reforms made today by parties interested in preserving abortion access and other individual rights and liberties in the short term will be subject to use by other political actors who come into power after and who may have very different priorities. It is entirely possible that several elections down the line, the political branches will use their regulatory powers over the judiciary to restrict or eliminate access to abortion. The same argument is true for any other individual right or liberty political actors might have an interest in attempting to bolster or restrict. This risk to individual rights which could result if the judiciary were controlled and corrupted by political influence is, put simply, not worth it in light of the current system's operation. The judiciary's self-regulation is not only less corrupting than external political regulation but also still constrained to an extent by the political branches. As previously mentioned, Congress retains the power, derived from the Constitution and statutes, to intervene in the regulation of "the judiciary's budget, structure, administration, and jurisdiction."[157] The threat of using these powers encourages the judiciary to regulate itself more diligently than it might otherwise if it was purely self-regulating and not subject to

153. *See* JOANNA MISHTAL, THE POLITICS OF MORALITY: THE CHURCH, THE STATE, AND REPRODUCTIVE RIGHTS IN POSTSOCIALIST POLAND 19 (2015).

154. *See id.* at 32–33; Mark Santora & Joanna Berendt, *Mixing Politics and Piety, a Conservative Priest Seeks to Shape Poland's Future*, N.Y. TIMES (Sept. 21, 2019), https://www.nytimes.com/2019/09/21/world/europe/poland-elections-tadeusz-rydzyk.html [https://perma.cc/PLY2-NFDP].

155. *See* Biskupic, *supra* note 54.

156. *Id.*

157. Geyh, *supra* note 1, at 163.

any external political control.[158] Separation of powers, a concept distinct from but related to regulation, also imposes higher-level checks that may not constrain individual judges in their daily operations but do limit the judiciary's influence as an institution.[159] Some powers, like impeachment, are both forms of external regulation and checks and balances that enforce the constitutional separation of powers.[160] Others, such as Congress' ability to pass laws correcting or negating Supreme Court decisions on statutes, are simply checks that keep the judicial institution at least somewhat accountable to political preferences.[161]

Most of the tools at Congress' disposal, like impeachment, are not very precise means of regulating the conduct of individual judges.[162] However, they are means of regulating the accountability of the judiciary as an institutional body, which provides sufficient encouragement for the judiciary to take its self-regulation of individual judges seriously. Furthermore, even if this is not the case, extending political regulation over the judiciary beyond what currently exists has the potential to be far more corrupting of the institution than self-regulation has proved so far. If this path is taken, many more individual rights and liberties could be at stake to a greater extent than some believe they are now. In light of these considerations, the United States judiciary should remain a largely self-regulated institution subject only the political controls that are currently in place.

CONCLUSION

While leaving the judiciary to regulate itself has corrupting potential that concerns many Americans, external regulation by a coordinate political branch like Congress is actually cause for far greater concern. If political bodies increase their regulation of the judiciary's conduct, processes, administration, funds, age limits, numbers, or ideological composition, the judiciary could become subject to the political preferences of those bodies and lose its independence.

Political control over the judiciary, particularly the Supreme Court, may seem attractive to some parties in some instances. This is especially the case for members of Congress' majority party when a majority of Supreme Court Justices hold opposing ideological viewpoints. In these cases, political operators may sincerely believe that regulating the judiciary will work in service of the individual rights and liberties they value. However, political regulation can just as easily be abused by later actors and effect the restriction or elimination of those same rights and liberties. The fate of abortion access in Poland as a result of judicial regulation by a coordinate political branch demonstrates this risk. Furthermore, the corrupting potential of political regulation is not worth risking in light of the current

158. *Id*. at 162.

159. *Id*. at 163.

160. U.S. CONST. art. II, § 4.

161. *See* Neal Devins, *Congressional Responses to Judicial Decisions*, FACULTY PUBLICATIONS 400, 400 (2008).

162. *See* Remus, *supra* note 4, at 34.

system's operation, especially considering the institutional accountability measures to which the judiciary is subject. Through constitutionally-imposed checks and balances and other regulatory powers the political branches have the option of using, the judiciary as an institution is kept within certain bounds even if regulation of individual judges and court functions are largely left to its own determination. Additionally, the possibility of authorized political intervention may also encourage the judiciary to self-regulate with greater care than it might if it was truly unchecked by any external source.[163]

Critics of judicial self-regulation and Democratic proponents of a 2020 court-packing scheme must consider the current system's relative stability and the great risks that could result to individual rights and liberties if the judiciary were regulated by a coordinate political branch. In these circumstances, political regulation is likely to be far more corrupting of the judiciary as an institution than self-regulation currently is. The federal judiciary should continue to self-regulate in order to insulate itself from the negative and potentially long-lasting consequences of political influence.

163. *See* Geyh, *supra* note 1, at 162.