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The Word is "Humility": Why the Supreme Court Needed to Adopt a Code of Judicial Ethics

Laurie L. Levenson

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The Word is “Humility”:

Why the Supreme Court Needed to Adopt a Code of Judicial Ethics

Laurie L. Levenson*

“We are not final because we are infallible, . . . we are infallible only because we are final.”¹

ABSTRACT

The Supreme Court is one of our most precious institutions. However, for the last few years, American confidence in the Court has dropped to a new low. Less than 40% of Americans have confidence in the Court and its decisions. Recent revelations regarding luxury trips, gifts, and exclusive access for certain individuals to the Justices have raised questions about whether the Justices understand their basic ethical duties and can act in a fair and impartial manner. As commentators have noted, the Supreme Court stood as the only court in America that was not governed by an ethical code. The question is why and whether that needed to change?

Although there are many reasons for the Court to have adopted an ethical code, one stands out as particularly important—the need for judicial humility. Since ancient times, humility has been a basic quality for judges. It helps ensure that judges understand the need to act fairly and to be perceived as acting impartially. This Article discusses the need for an enforceable ethical

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1. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

code. Despite the fact that the Supreme Court recently adopted what it labeled a “Code of Conduct for Justices of the Supreme Court of the United States,” this code is more an outline of aspirational standards than an actual code of conduct. The so-called “code” lacks an enforcement mechanism. Thus, while it may be modeled on the Code of Conduct for United States Judges, without an enforcement mechanism, it is—at best—a recognition by the Court that it, too, should meet certain minimum ethical standards.

TABLE OF CONTENTS

I.	INTRODUCTION	518
II.	JUDICIAL MISCONDUCT: WHY THERE ARE ETHICAL CODES	528
III.	WHY JUDICIAL HUMILITY IS NEEDED NOW MORE THAN EVER	538
IV.	WHAT KIND OF CODE SHOULD HAVE BEEN ADOPTED?	545
	A. <i>Question 1: Should There Be an Ethical Code for the Supreme Court?</i>	545
	1. Canon 1: A Justice “Should Uphold the Integrity and Independence of the Judiciary.”	547
	2. Canon 2: A Justice “Should Avoid Impropriety and the Appearance of Impropriety in All Activities.”	547
	3. Canon 3: A Justice “Should Perform the Duties of the Office Fairly, Impartially, and Diligently.”	549
	4. Canon 4: A Justice “May Engage in Extrajudicial Activities That Are Consistent with the Obligations of Judicial Office.”	552
	5. Canon 5: A Justice “Should Refrain from Political Activity.”	553
	B. <i>Question 2: What Kind of Ethical Code Should the Court Have Adopted?</i>	554
	C. <i>Question 3: How Should a Judicial Code Be Enforced?</i>	555
V.	CONCLUSION	557

I. INTRODUCTION

Why have an ethical code for the United States Supreme Court? That question can be answered in one word: humility. For the last two years, headlines featuring disclosures about possible misconduct by the Justices on our highest Court have rocked America.² Public confidence in the Supreme Court is at the lowest level ever recorded, and the legal profession looks to be at war with itself.³ The issues range from whether the Justices are being unjustly enriched by billionaires who treat them to luxury vacations, to questions of whether they have financial holdings and ties that must be disclosed.⁴ There

2. See Matt Stieb, *Clarence Thomas Formally Acknowledges His Lavish Lifestyle*, N.Y. MAG. (Aug. 31, 2023), <https://nymag.com/intelligencer/2023/08/clarence-thomas-formally-acknowledges-his-lavish-lifestyle.html>; Nina Totenberg, *Samuel Alito Is the Latest Supreme Court Justice to Face Ethics Questions*, NPR (June 22, 2023, 5:07 AM), <https://www.npr.org/2023/06/22/1183653522/samuel-alito-is-the-latest-supreme-court-justice-to-face-ethics-questions>; Nina Totenberg, *Clarence Thomas, Samuel Alito and the Crisis of Confidence in the Supreme Court*, NPR (June 28, 2023, 5:06 AM), <https://www.nprillinois.org/2023-06-28/clarence-thomas-samuel-alito-and-the-crisis-of-confidence-in-the-supreme-court>; see also Abbie VanSickle, *Justice Thomas Reports Private Trips with Harlan Crow*, N.Y. TIMES (Aug. 31, 2023), <https://www.nytimes.com/2023/08/31/us/thomas-financial-disclosures-scotus.html> (discussing how “Justices Clarence Thomas and Samuel A. Alito Jr. had asked for extensions on their annual forms that show travel, gifts, and other financial information.”); Laura Litvan, *Justice Alito Accused of Misconduct, Escalating Supreme Court Ethics Fight*, BLOOMBERG (Sept. 5, 2023, 8:17 AM), <https://www.bloomberg.com/news/articles/2023-09-05/senator-whitehouse-accuses-alito-of-misconduct-escalating-ethics-fight#xj4y7vzkg>; The Associated Press, *Supreme Court Justice Clarence Thomas Reports He Took 3 Trips on Republican Donor’s Plane Last Year*, THE SENTINEL-RECORD (Sept. 1, 2023, 4:00 AM), <https://www.hotsr.com/news/2023/sep/01/supreme-court-justice-clarence-thomas-reports-he/>; Joshua Kaplan et al., *Clarence Thomas and the Billionaire*, PROPUBLICA (Apr. 6, 2023, 5:00 AM), <https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow> (“For more than two decades, [Justice] Thomas has accepted luxury trips virtually every year from [Harlan Crow] without disclosing them . . .”).

3. See Jeffrey M. Jones, *Supreme Court Approval Holds at Record Low*, GALLUP (Aug. 2, 2023), <https://news.gallup.com/poll/509234/supreme-court-approval-holds-record-low.aspx>. Currently, only 40% of Americans approve of the way the Supreme Court is handling its job. *Id.* Opinions of Chief Justice Roberts have improved slightly to 43%, while opinions of Justice Thomas have fallen to only 39% of Americans viewing him positively, with 42% viewing him negatively. *Id.*; see also *Public Confidence in the U.S. Supreme Court Is at Its Lowest Since 1973*, AP-NORC CTR. (May 17, 2023), <https://apnorc.org/projects/public-confidence-in-the-u-s-supreme-court-is-at-its-lowest-since-1973>; Katy Lin & Carroll Doherty, *Favorable Views of Supreme Court Fall to Historic Low*, PEW RES. CTR. (July 21, 2023), www.pewresearch.org/short-reads/2023/07/21/favorable-views-of-supreme-court-fall-to-historic-low/.

4. See Nan Aron, *Investigate the Shadow Network of Billionaires Funding Supreme Court Justices*, THE HILL (Aug. 2, 2023, 10:30 AM), <https://thehill.com/opinion/judiciary/4131512-investigate-the-shadow-network-of-billionaires-funding-supreme-court-justices>; Brett Murphy & Alex Mierjeski, *Clarence Thomas’ 38 Vacations: The Other Billionaires Who Have Treated the Supreme Court Justice*

are also questions about whether the Justices have cozied up too closely to certain political groups and whether the actions of their spouses should be considered in deciding whether they have a conflict of interest.⁵ Although some of these questions are not new,⁶ their volume reached such a level that it could no longer be ignored.⁷ Nor could it be reined in by the Chief Justice who, for a long time, accepted the traditional approach that all was fine with the Court and it could adequately monitor itself.⁸ While political motivations

to *Luxury Travel*, PROPUBLICA (Aug. 10, 2023, 5:45 AM), <https://www.propublica.org/article/clar-ence-thomas-other-billionaires-sokol-huizenga-novelly-supreme-court>.

5. See Alison Durkee, *Chief Justice Roberts’ Wife Is Latest Supreme Court Spouse to Spark Ethics Concerns*, FORBES (Jan. 31, 2023, 4:36 PM), <https://www.forbes.com/sites/alison-durkee/2023/01/31/chief-justice-roberts-wife-is-latest-supreme-court-spouse-to-spark-ethics-concerns/?sh=f3bf8455bb80> (“[A former colleague of Jane Roberts] provided records to the federal government showing commissions the justice’s wife earned between 2007 and 2014, and asked for an inquiry into the matter, arguing it should be mandatory for justices to disclose information about their spouses’ work.”).

6. See Sofi Sinozich, *Trends: Public Opinion on the US Supreme Court, 1973–2015*, 81 PUB. OPINION Q. 173, 177 (2017) for a discussion of historical trends in public confidence in the Supreme Court. Sinozich finds that according to the NORC at the University of Chicago—General Social Survey (GSS), confidence in the Supreme Court remained stable for many years but has recently trended downward. *Id.* She states:

Since the 1970s, about 30 percent of the public reports having a “great deal” of confidence, 50 percent having “only some,” and between 10 and 20 percent “very little” under this formulation. Based on the GSS, the percentage of those with a “great deal” of confidence declined slowly from 33 to 29 percent between 2006 and 2012, with a sharp drop to 23 percent in 2014. This is the longest measured period of sustained decline, wrapping up with the lowest recorded level of confidence since 1973.

Id.

7. See Murphy & Mierjeski, *supra* note 4 (discussing concerns over Justice Thomas’s various financial connections).

8. Robert Barnes, *Roberts Says Supreme Court Will Address Ethics Issues*, WASH. POST (May 23, 2023), <https://www.washingtonpost.com/politics/2023/05/23/supreme-court-ethics-roberts/> (“Roberts’s remarks [on the ethics of the Court] seemed intended to convey to lawmakers that the Justices are working on it but do not want or need intervention from the political branches.”). In an April 25, 2023, letter to Senator Durbin, Chair of the Senate Judiciary Committee, Chief Justice John G. Roberts, Jr. declined to testify. Letter from John G. Roberts, Jr., Chief Justice of the U.S. Supreme Court, to Richard J. Durbin, Chair of the Senate Judiciary Comm. (Apr. 25, 2023), <https://s3.documentcloud.org/documents/23789636/roberts-letter-to-durbin-4-25-2023.pdf>. In doing so, he catalogued what he believed were sufficient measures by the Court to address any issues regarding its ethical responsibilities. *Id.* While acknowledging that the Judicial Conference’s Code of Conduct only governs the lower courts, they provide guidance to the Justices as well. *Id.* Additionally, he noted that in 1991, “Members of the Court voluntarily adopted a resolution to follow the substance of the Judicial Conference Regulations” on financial disclosure. *Id.* He noted that under Outside Earned Income Regs. § 1020.35(b), Justices may not accept compensation for an appearance or a speech but

may have influenced some of those who called for an ethical code for the Court,⁹ their concerns may still be valid. The problem does not seem to be going away soon, even with the adoption of the recent Code of Conduct.¹⁰ The calls for an effective ethical code for the Supreme Court continue.¹¹

may be paid for teaching a course or participating in an education program. *Id.* They must receive prior approval from the Chief Justice and there is an annual cap of less than 12% of a Justice’s pay. *Id.* However, there is no cap on compensation that a Justice may receive for writing a book. *Id.* In terms of recusal, each Justice decides his or her own recusal issues. *Id.* In making these decisions, the Justices keep in mind the limited number of Justices to decide cases, unlike the availability of other judges on the lower court. *Id.* Finally, the Chief Justice included an Appendix to Judicial Ethics Authorities that statutorily or by practice are applied to the Justices, including: Ethics in Government Act, 5 U.S.C. § 113103(d),(f)(11) (requiring “judicial officers” to file financial disclosure reports); Federal Gift Statute, 5 U.S.C. § 7353(a) (limiting gifts to federal judges; the Supreme Court Justices resolved to comply with the substance of these regulations by Resolution on Jan. 18, 1991); Foreign Gifts and Decoration Act, 5 U.S.C. §§ 7342(a)(1)(A) (limiting gifts from foreign governments); Supreme Court Justices resolved to comply with substance of these regulations by Resolution on Jan. 15, 1993); Honorary Club Memberships limited to \$50 per calendar year (Pub. L. 110-402, § 2(b), 122 Stat. 4254 (Oct. 13, 2008) (Chief Justice states that the Justices comply with the statute); Federal Recusal Statute, 28 U.S.C. § 455 (reflected, in part, in State of Recusal Policy of Nov. 1, 1993); Code of Conduct for U.S. Judges (the Court takes “guidance” from the Code); IPO Purchases and Discussions with Prospective Private Employers: The Stop Trading on Congressional Knowledge Act of 2012, Pub. L. 112-105 §§ 12, 17, 126 Stat. 291 (Apr. 4, 2012) (prohibits government employees from using any nonpublic information derived from the individual’s position for personal benefit).

9. See John Kruzel, *US Senate Democrats Pursue Supreme Court Ethics Legislation*, REUTERS (July 19, 2023, 8:55 AM), <https://www.reuters.com/world/us/us-senate-democrats-pursue-supreme-court-ethics-legislation-2023-07-19/>; see also Alison Durkee, *GOP Senators Slam Democrats’ ‘Unseemly’ Efforts to Impose Supreme Court Ethics Code*, FORBES (May 2, 2023, 11:53 AM), <https://www.forbes.com/sites/alisondurkee/2023/05/02/gop-senators-slam-democrats-unseemly-efforts-to-impose-supreme-court-ethics-code/> (describing efforts on the part of Democrats to impose an ethical code as part of a “partisan attack on conservative justices”).

10. Statement of the Court Regarding the Code of Conduct, *foreword* to CODE OF CONDUCT FOR JUSTICES OF THE SUPREME COURT OF THE UNITED STATES (2023), https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf (last visited Feb. 15, 2024). On November 13, 2023, the Supreme Court issued a statement, signed by all the current Justices, as a foreword to the newly adopted code setting forth basic canons of conduct for members of the High Court. *Id.* Prior to its issuance, there were growing calls for the Court to adopt an ethical code. See Zach Schonfeld, *Kagan Says ‘Good Faith Disagreements’ Holding up Ethics Code*, THE HILL (Sept. 22, 2023, 4:45 PM), <https://thehill.com/regulation/court-battles/4219005-kagan-says-good-faith-disagreements-holdin-g-up-ethics-code/>; see also Robert Barnes & Ann E. Marimow, *Supreme Court Justices Discussed, but Did Not Agree on, Code of Conduct*, WASH. POST, <https://www.washingtonpost.com/politics/2023/02/09/supreme-court-ethics-code/> (last updated Feb. 9, 2023, 5:00 AM).

11. See Robert Barnes & Ann E. Marimow, *Supreme Court, Under Pressure, Issues Ethics Code Specific to Justices*, WASH. POST (Nov. 13, 2023, 2:28 PM), <https://www.washingtonpost.com/politics/2023/11/13/supreme-court-ethics-code/> (“The 14-page document was praised as a first step by some of the [C]ourt’s Democratic critics, but criticized by legal ethics experts and others for not including a specific remedy for a complaint”); Debra Cassens Weiss, *Can the Supreme Court Rely*

So, why does the Supreme Court need an enforceable code of ethics? After all, there is already one mechanism that polices the Justices—impeachment.¹² Yet, everyone knows that because procedural and political hurdles make it nearly impossible for a Justice to be impeached, the constitutional disinfectant is viewed as an unlikely monitoring tool.¹³ There have also been efforts to require more transparency from the Court by augmenting its annual reporting requirements.¹⁴ These too have been resisted by the Court, although some of the Justices under the most scrutiny have recently filed amended disclosure forms that bring into focus exactly why an ethical code is needed.¹⁵

on an ‘Honor System’ for Ethics? *These 3 Proposals Go Further*, ABA J. (Nov. 16, 2023, 10:33 AM), <https://www.abajournal.com/web/article/can-the-supreme-court-rely-on-an-honor-system-for-ethics-not-according-to-these-proposals>; Noah Feldman, *New Supreme Court Code of Conduct Changes Nothing*, BLOOMBERG L. (Nov. 14, 2023, 3:30 AM), <https://news.bloomberglaw.com/us-law-week/new-supreme-court-code-of-conduct-changes-nothing-noah-feldman>; see also April Rivera, *Supreme Court Ethics Regulation: Amending the Ethics in Government Act of 1978 to Address Justices’ Unethical Behavior*, 52 SW. L. REV. 308, 322 (2023) (noting Chief Justice Roberts’s ongoing rejection of an ethical code for the Supreme Court Justices in 2021).

12. U.S. CONST. art. II, § 4 (“The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”); U.S. CONST. art III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their offices during *good Behaviour*”) (emphasis added).

13. See Philip B. Kurland, *The Appointment and Disappointment of Supreme Court Justices*, 183 L. & SOC. ORD. 183, 224 (1972) (explaining Thomas Jefferson’s sentiment that “impeachment is an impracticable thing” inefficient in influencing judges’ behavior because they feel “secure for life”).

14. Nate Raymond & Moira Warburton, *Congress Approves Tougher Financial Disclosure Rules for U.S. Judges*, REUTERS (Apr. 27, 2022, 2:00 PM), <https://www.reuters.com/world/europe/congress-poised-subject-us-judges-more-financial-disclosure-2022-04-27>; Nate Raymond, *US Supreme Court Justices Get Tougher Rules for Reporting Free Trips, Gifts*, REUTERS (Mar. 28, 2023, 7:46 PM), <https://www.reuters.com/world/us/us-supreme-court-justices-get-stiffer-rules-reporting-free-trips-gifts-2023-03-29>.

15. See Mark Sherman, *Justice Clarence Thomas Acknowledges 3 Trips on Republican Megadonor’s Plane Last Year*, PBS NEWS HOUR (Aug. 31, 23), <https://www.pbs.org/newshour/politics/justice-clarence-thomas-acknowledges-3-trips-on-republican-megadonors-plane-last-year>. In Justice Thomas’s amended financial report, he acknowledges that he took three trips last year aboard a private plane owned by Republican megadonor Harlan Crow, but he does not include any earlier gifts he also received from Crow, including, among others, a 2019 trip to Indonesia and a house purchased for Thomas’ mother. *Id.*; see also Justin Elliot et al., *Justice Samuel Alito Took Luxury Fishing Vacation with GOP Billionaire Who Later Had Cases Before the Court*, PROPUBLICA (June 20, 2023, 11:49 PM), <https://www.propublica.org/article/samuel-alito-luxury-fishing-trip-paul-singer-scotus-supreme-court> (“In the years after the undisclosed trip to Alaska, Republican megadonor Paul Singer’s hedge fund has repeatedly had business before the Supreme Court. Alito has never recused himself.”). *But see* Samuel A. Alito Jr., *Justice Samuel Alito: ProPublica Misleads Its Readers*, WALL STREET J. (June 20, 2023, 6:25 PM), <https://www.wsj.com/articles/propublica-misleads-its-readers-alito-gifts-disclosure-alaska-singer-23b51eda?page=1> (responding to the previously cited article, Justice Alito argues he had no obligation to recuse himself from any of the cases mentioned).

The forms have highlighted some of these Justices’ relationships with individuals and groups that may seek influence over the Court.¹⁶ They also highlight what the Justices have been hiding from the public.¹⁷ It is a Court that takes seriously its elevated position and constitutional independence.¹⁸ While an ethical code with enforcement mechanisms, like that used by every other federal judge in this country, would be extremely useful in guiding the Justices on their ethical obligations—whether with regard to conflicts of interests or disclosure of confidential information—there are two overarching reasons why such a code is needed.

An ethical code is needed for the Justices because we need judges who are willing to publicly commit themselves to having key qualities we should prize in all jurists—humility and accountability.

At this crucial time in our nation’s history—when the Justices’ decisions exert enormous power over Americans—it is essential to know they understand the gravity of their decisions and have the essential character traits we should want for all judges. These are standards that were developed ages ago and seem to have become lost in the political tussle over judicial appointments.¹⁹ These are standards that go beyond a Justice’s pedigree, law school ranking, or socio-economic status. They are standards that focus on the individual jurist. What qualities of character does the Justice bring to the bench? In the end, that is what may matter the most in establishing confidence in the Court’s decisions.

Almost a thousand years ago, the great Jewish philosopher, Moses ben Maimon, commonly known as “Maimonides” or “Rambam,” set forth his qualifications for judges.²⁰ They provided the foundation for his principles of

16. See Elliot et al., *supra* note 15 (detailing Justice Alito’s relationship with Paul Singer, “a hedge fund billionaire[.]” who has brought cases before the Court “at least 10 times” and contributes to “Republican political groups,” including some which file “friend-of-the court briefs” with the Court).

17. See *id.* (indicating that Justice Alito did not report his 2008 fishing trip with Paul Singer in “annual financial disclosures”).

18. See Helgi C. Walker, ‘Ethics’ and the Supreme Court’s Independence, WALL STREET J. (June 21, 2023, 12:34 PM), <https://www.wsj.com/articles/ethics-and-judicial-independence-code-of-conduct-congress-complaints-roberts-e0b32d32> (“For 235 years, chief justices from John Marshall to John Roberts have underscored the importance of judicial independence. At times in our history when what was right wasn’t popular, an independent judiciary upheld core American values and defended important individual rights.”).

19. See Michael A. Kahn, *The Appointment of a Supreme Court Justice: A Political Process from Beginning to End*, PRESIDENTIAL STUD. Q. 25, 38 (1995) (explaining how the appointment of Supreme Court Justices is a politically motivated game).

20. The Gale Grp., *Bet Din and Judges*, JEWISH VIRTUAL LIBR. (2008),

judicial conduct.²¹ According to Maimonides, “[t]he seven fundamental qualities of a judge are wisdom, humility, fear of God, disdain of money, love of truth, love of people, and a good reputation.”²² While all these characteristics are important for a good judge, we seem to have lost sight of the role that humility has in framing a Supreme Court Justice’s character and actions. Judges naturally see themselves as unbiased and even wise,²³ although their decisions may demonstrate otherwise. They mostly come with a good reputation and proclaim a love of truth, people, and even God. However, recent events raise the question of whether some of the Justices see value in being humble and disdaining money.²⁴ Criticisms of the current Court may be tied directly to concerns about whether the Justices have these basic ethical qualifications.²⁵ In the current selection process, nothing requires that they do.²⁶ Moreover, without the oversight provided by—or insights gleaned from—an ethical code, there is little reason for the Justices to demonstrate their commitment to these qualities.

Many of the calls for an ethical code focused on how financial conflicts

<https://www.jewishvirtuallibrary.org/bet-din-and-judges> (citations omitted) (outlining the development of Maimonides’s identified characteristics for judges).

21. *Id.*

22. *Id.*

23. Jane W. Nelson, *What Makes a Good Judge?*, 9 J. NAT’L ASS’N ADMIN. L. JUDGES 153, 153–54 (1989).

24. See generally Jessica Gresko, *Amid Ethics Issues, Supreme Court Justices Say No Fix Needed*, PBS NEWS HOUR (Apr. 26, 2023, 5:15 PM), <https://www.pbs.org/newshour/politics/amid-ethics-issues-supremecourt-justices-say-no-fix-needed> (discussing Justice Thomas accepting “luxury trips,” “three properties,” a “transaction worth more than \$100,000” and Chief Justice Roberts’s wife being “paid large sums for placing lawyers at firms that appear before the [C]ourt.”).

25. See Jeffrey J. Rachlinski & Andrew J. Wistrick, *Judging the Judiciary by the Numbers: Empirical Research on Judges*, 13 ANN. REV. L. & SOC. SCI. 203, 223 (2017). A 2017 study of judges by Professor Jeffrey J. Rachlinski and United States Magistrate Judge Andrew J. Wistrick provides statistical support for the fact that judges systematically reach decisions that deviate from the ideal of judicial impartiality. *Id.* Judges rely on snap judgments, implicit stereotypes, emotional responses, moods, and cognitive shortcuts. *Id.*

26. BARRY J. McMILLION, CONG. RESEARCH SERV., R44235, SUPREME COURT APPOINTMENT PROCESS: PRESIDENT’S SELECTION OF A NOMINEE (2022) (explaining qualifications the appointing President “looks for” but notably lacking any required ethical qualifications).

for the Justices can corrupt their decisions.²⁷ This is true.²⁸ But as important as these tangible concerns are, we should not lose sight of how essential the characteristics of humility and a commitment to accountability should be for a judge—especially one who wields as much power as our current Justices. Do they even pause to think they could be wrong? Are they humble enough to be cautious in their decisions so that, if they are wrong, thousands or millions of Americans will not suffer the consequences? Does their humility extend to appreciating how they should interact with others and the impact of their words? Do we trust that they will reconsider their positions if their positions are challenged?

In addition to identifying basic character traits for judges, Maimonides extrapolated from these traits some basic principles of judicial conduct.²⁹ He declared that “[a] judge must show patience, indulgence, humility, and respect for persons when sitting in court”³⁰ and “he may not in any way discriminate between the parties.”³¹

Much of the discussion of an ethical code for the Court now focuses on how that code could be enforced.³² This is a legitimate concern which must still be faced. However, by returning to basics—i.e., asking why it is imperative to have a code that governs the character requirements for a Supreme Court Justice—we may accomplish something even more significant. It may prompt those who select these Justices to consider what basic character requirements qualify a person for the Court, rather than basing their selections solely upon the political and ideological position of the nominated Justice.

27. See generally Martha Kinsella, *Congress Has the Authority to Regulate Supreme Court Ethics—and the Duty*, BRENNAN CTR. FOR JUST. (July 17, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/congress-has-authority-regulate-supreme-court-ethics-and-duty> (“[Congress] would [] require the Court to adopt rules requiring disclosure for gifts, travel, and income that are at least as rigorous as analogous House and Senate Rules.”).

28. For an article exploring in-depth concerns about conflicts of interest for Justices on both sides of the ideological spectrum, see Marianne M. Jennings & Nim Razook, *Duck When a Conflict of Interest Blinds You: Judicial Conflicts of Interest in the Matters of Scalia and Ginsburg*, 39 U. S.F. L. REV. 873 (2005).

29. See The Gale Grp., *supra* note 20 (detailing the qualifications and principles of judicial conduct Maimonides outlined).

30. *Id.*

31. *Id.*

32. See Russell Wheeler, *What’s So Hard About Regulating Supreme Court Justices’ Ethics?—A Lot*, BROOKINGS (Nov. 28, 2011), <https://www.brookings.edu/articles/whats-so-hard-aboutregulating-supreme-court-justices-ethics-a-lot/> (explaining the lack of a process to ensure Supreme Court Justices would abide by a code of ethics should one be implemented).

Ethical codes can serve a myriad of purposes.³³ Sometimes, they are the means to fairly discipline lawyers or judges to keep them in line.³⁴ But another very legitimate purpose of an ethical code is to remind both the Justices and those who select them how judges should perform their roles.³⁵ Frankly, the only downside to the Court in adopting an aspirational code was to those Justices who did not want to be subject to additional scrutiny.³⁶ As we know, no code was going to be adopted that had not been vetted by the Court itself. Thus, the delay in adopting a code—even an aspirational code—led to questions regarding the Justices’ commitment to basic principles of fair judging. Given those questions, the Court, realistically, had no choice but to issue some kind of code that would boost public confidence in the institution. Failure to do so would have perpetuated the one failing the Justices would find hard to overcome: a conceited and elevated sense of self that runs directly contrary to the principles and teachings of Maimonides and other legal philosophers.³⁷

This Article starts in Part II with an eye-popping examination of the range of ethical issues that have arisen for judges in this country. Thankfully, these examples generally do not involve Supreme Court Justices, but they are nonetheless examples of how a judge’s vanity and illusions of power can contribute to astonishingly bad conduct. While making judges and justices more self-aware of how their conduct will be viewed is no guarantee that they will

33. See *infra* Parts II and III.

34. See Marianne M. Jennings, *Moral Disengagement and Lawyers: Codes, Ethics, Conscience, and Some Great Movies*, 37 DUQ. L. REV. 573, 593 (1999) (explaining one purpose of ethics codes is to discipline inappropriate or unprofessional behavior).

35. See Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J. L., ETHICS, & PUB. POL’Y 367, 369–70 (2008) (describing the guidance provided by the Model Code of Judicial Conduct insofar as judges’ roles in, among other things, “promot[ing] public confidence,” “perform[ing] their duties ‘impartially,’” and “remaining ‘patient, dignified, and courteous’”).

36. See Devin Dwyer, *All 9 Supreme Court Justices Push Back on Oversight: ‘Raises More Questions,’ Senate Chair Says*, THE LOOP (Apr. 28, 2023), <https://abc7ny.com/supreme-court-justices-sco-tusethics-code-clarence-thomas/13192491/> (detailing the Justices’ reactions to the cry for a judicial code of ethics applicable to the Supreme Court).

37. Chaim Steinmetz, *The Revolutionary Idea of Humility*, JEWISH J. (Aug. 13, 2021), <https://jewishjournal.com/commentary/opinion/339675/the-revolutionary-idea-of-humility> (quoting Maimonides) (“[T]he proper way is not merely that man be humble, but that one should be of a very diminutive spirit, and their spirit extremely lowly.”); see also Daryl R. Van Tongeren, *Why Being Humble Is Actually in Our Self-Interest*, LITERARY HUB (June 27, 2022), <https://lithub.com/why-being-humble-is-actually-in-our-self-interest> (quoting Socrates) (“Pride divides the men, humility joins them.”); JEANINE GRENBORG, *KANT AND THE ETHICS OF HUMILITY: A STORY OF DEPENDENCE, CORRUPTION AND VIRTUE* (2005).

always act appropriately, it is at least the start of a cure for “federal judge-itis.”³⁸ Such disclosures can show the Court the range of misconduct in the courts, thus creating self-awareness as to why the public is so concerned about the actions of judges at all levels.

Part III reflects on recent controversies regarding the current Supreme Court. What are the underlying causes of the Justices’ actions that have raised so many concerns? Are the Justices humble enough to appreciate why people might be concerned about their actions? Are they humble enough to want to change their behavior? Are they humble enough to consider how their individual acts might taint the institution and their fellow Justices?

Finally, Part IV looks at the nature of judicial ethical codes and whether the Code adopted by the Court meets the need to ensure accountability within the Court. Certainly, there are likely to be differences between an ethical code for lower court judges and one for Supreme Court Justices.³⁹ But the basic rules regarding conflicts of interest, honest dealings, and checks on biases remain the same, and there should be an appropriate mechanism to ensure the Justices’ compliance with these rules. Without such a mechanism, it will be difficult to demonstrate that the Court takes seriously its role and the importance of public faith in its decision-making process.

The Court’s fight with outside groups and legislators to resist an ethical code has not been successful and, to the extent that the Court views the new Code as an attack on its independence, that argument continues to fall flat.⁴⁰ Judges can be independent and ethical at the same time. Justices have life tenure,⁴¹ and a code with consequences need not disrupt that constitutional

38. Samuel C. Stretton, *The Term “Black Robe Disease” Is Used to Describe Judges Who Let Their Own Self-Importance Cloud Their Good Judgment*, THE LEGAL INTELLIGENCER (July 10, 2012, 10:00 AM), <https://www.law.com/thelegalintelligencer/almID/1202562057620/> (“The term ‘black robe disease,’ sometimes also known as ‘judge-itis,’ is a malady that can affect judges of all ages The essence of judge-itis is a judge who thinks he or she is so important that he or she can act unilaterally and arbitrarily.”).

39. See generally *About Federal Judges*, U.S. CTS, <https://www.uscourts.gov/judges-judge-ships/about-federal-judges> (last visited Oct. 21, 2023) (outlining the roles of the Supreme Court Justices alongside the roles of the lower federal court judges).

40. See generally Mark Sherman, *Justice Alito Says Congress Lacks the Power to Impose an Ethics Code on the Supreme Court*, ASSOCIATED PRESS, <https://apnews.com/article/supreme-court-ethics-alito-d98b0edf1340ff3ed66b345c5ddcf0dc> (last updated July 28, 2023, 2:12 PM) (explaining Justice Alito’s position that Congress lacks the authority to establish an ethics code for the Supreme Court).

41. See U.S. CONST. art III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their offices during good Behaviour”); *The Judicial Branch*, WHITE HOUSE, <https://www.whitehouse.gov/about-the-white-house/our-government/the-judicial-branch/> (last visited

status. Even with a code that has enforcement mechanisms, the Justices will have an enormous amount of independence. But the Justices are in desperate need of the infusion of credibility that a robust ethical code can provide.

That leads us back to the issue of humility. Great leaders tend to be ambitious.⁴² That is true for those who aspire to the highest bench.⁴³ Their degrees and supporters adorn them in the trappings of superiority; powerful people “wear[] an invisible crown.”⁴⁴ That crown can give the wearer confidence and can have a positive effect on those in charge. However, it can also separate the decisionmaker from those who are most affected by that person’s judgments. Thus, the Bible refers to the fact that even a monarch shall not feel superior to others.⁴⁵ As written in Deuteronomy:

When [the king] is established on his royal throne, he is to write for himself on a scroll a copy of this Torah It is to be with him, and he is to read it all the days of his life so that he may . . . follow carefully all the words of the law and these decrees and *not feel superior to his brethren* or turn from the law to the right or to the left.⁴⁶

Our Court needs to stop looking to the right or the left. It must recommit to its role to act in a way that conveys a commitment to doing what is correct, not what others might champion it to do. Leaders are not great because they feel superior to others. They are great because they are humbled by their responsibilities and take those responsibilities seriously.⁴⁷ According to Rabbi

Oct. 23, 2023) (describing the process for the appointment of a Justice and giving an overview of the judicial branch, mentioning the lifetime tenure a Supreme Court Justice enjoys).

42. See generally Ron Carucci, *How Ambitious Should You Be?*, HARV. BUS. REV. (Apr. 13, 2020), <https://hbr.org/2020/04/how-ambitious-should-you-be> (identifying ambition as an advantageous leadership quality and a “natural, healthy aspect of being a leader”).

43. See generally William G. Ross, *Legal Scholarship Highlight: Presidential Ambitions of Supreme Court Justices*, SCOTUSBLOG (Apr. 29, 2012), <https://www.scotusblog.com/2012/04/legal-scholarship-highlight-presidential-ambitions-of-supreme-court-justices/> (outlining the high ambitions of Supreme Court Justices).

44. Jonathan Sacks, *The Greatness of Humility*, THE RABBI SACKS LEGACY, <https://www.rabbi-sacks.org/covenant-conversation/shoftim/greatness-of-humility> (last visited Oct. 26, 2023) (“Great leaders have many qualities, but humility is usually not one of them. With rare exceptions they tend to be ambitious, with a high measure of self-regard. They expect to be obeyed, honoured, respected, even feared. They may wear their superiority effortlessly—Eleanor Roosevelt called this ‘wearing an invisible crown’—but there is a difference between this and humility.”).

45. *Deuteronomy* 17:18–20.

46. *Id.* (emphasis added); see also Sacks, *supra* note 44 (quoting *Deuteronomy* 17:18–20).

47. See Sacks, *supra* note 44 (citation omitted) (“You do not have to be religious to understand the importance of humility. In 2014 the *Harvard Business Review* published the results of a survey that

Jonathan Sacks, Aristotle may have believed that humility was for the “lower orders,” but in a democracy, humility is an idea that elevates the decision maker.⁴⁸ It is a recognition that your work is “not about you.”⁴⁹

The Supreme Court has been so focused on asserting it is “right” in its decisions that it has created the perception it is less concerned about what is correct.⁵⁰ With a commitment to humility, the Court may be able to regain the public’s confidence that the Justices are always trying to do what is appropriate, regardless of whether it is in any given Justice’s self-interest.

Others will advocate reforms. Indeed, there is much merit to the variety of ethical codes and legislative reforms being proposed.⁵¹ However, we need to start with the basics. The basics include a focus on those characteristics that will lead to Justices who embrace an ethical code because it gives them an opportunity to monitor themselves in a way that ego and flattery might not. It is a blanket of humility and credibility for the Court.

II. JUDICIAL MISCONDUCT: WHY THERE ARE ETHICAL CODES

There is a range of possible judicial misconduct, and jurists across

showed that ‘The best leaders are humble leaders.’ They learn from criticism. They are confident enough to empower others and praise their contributions. They take personal risks for the sake of the greater good. They inspire loyalty and strong team spirit. And what applies to leaders applies to each of us as marriage partners, parents, fellow-workers, members of communities, and friends.”). Among great men who have written of the importance of humility was the late Rabbi Jonathan Sacks, former Chief Rabbi of the British Commonwealth. See *Biography of Rabbi Lord Jonathan Sacks*, THE RABBI SACKS LEGACY, <https://www.rabbisacks.org/life-of-rabbi-jonathan-sacks/biography/> (last visited Dec. 24, 2023).

48. See Sacks, *supra* note 44 (“Aristotle would not have understood the idea that humility is a virtue. For him the *megalopsychos*, the great-souled man, was an aristocrat, conscious of his superiority to the mass of humankind. Humility, along with obedience, servitude, and self-abasement, was for the lower orders, those who had been born not to rule but to be ruled. The idea that a king should be humble was a radically new idea introduced by Judaism and later adopted by Christianity.”).

49. *Id.*

50. See generally Mark Franke, *Does Anyone Care About Justice Anymore?*, KOKOMO TRIB. (June 22, 2023), https://www.kokomotribune.com/opinion/mark-franke-does-anyone-care-about-justice-anymore/article_42959c90-103c-11ee-9f45-bf3513ed66b2.html (arguing that “[t]he Supreme Court is just one more ideological battleground.”).

51. See, e.g., Carl Hulse, *Senate Panel Approves Supreme Court Ethics Bill with Dim Prospects*, N.Y. TIMES (July 20, 2023), <https://www.nytimes.com/2023/07/20/us/politics/senate-supreme-court-ethics-rules.html> (explaining the Senate’s push for an ethical code that would promote transparency and hold the Justices to ethical and disclosure rules upheld by members of Congress).

America have committed them all.⁵² From being arrested for murder⁵³ to deciding cases when they have a clear conflict of interest, American judges have given citizens a reason to pause and ask whether there are any judges or jurists who can truly be trusted.⁵⁴ By and large, these are judges who are already subject to an ethical code.⁵⁵ Mistrust of the judiciary did not begin with questions about sponsored vacations by Supreme Court Justices.⁵⁶ Rather, it has been brewing as the result of regular reports of conduct unbecoming of a judiciary.⁵⁷

This Article will mention a few such reports. By no means is this listing intended to catalog all judicial misdeeds. Consider it a sampler. Further, I am not suggesting that those on our highest Court have committed these violations, or would ever commit such violations. However, because many people may form their opinions of the justice system from their own exposure to the bench, it is worth considering what Americans have seen in terms of judicial misconduct in the last decade.

Here are some judicial misdeeds that have recently been in the news: In 2023, California Superior Court Judge Jeffrey Ferguson was arrested for killing his wife.⁵⁸ During a personal dispute, he shot his wife in front of his adult

52. See Suzanne Monyak, *Nine Ethics Complaints Against US Judges Sent for Review*, BL (Jan. 30, 2024, 1:06 PM), <https://news.bloomberglaw.com/us-law-week/nine-ethics-complaints-against-us-judges-sent-for-review>. In fiscal year 2023, more than 1,300 complaints were filed against judges. *Id.* This did not include complaints against Supreme Court Justices because there is no formal mechanism for filing such complaints. *Id.*

53. See CARL B. SWISHER, STEPHEN J. FIELD, CRAFTSMAN OF THE LAW 348–49 (1969). For those who are curious, there has indeed been a Supreme Court Justice who was arrested for murder. *Id.* Associate Justice Stephen Field, appointed in 1863 by President Abraham Lincoln, was arrested for the murder of a former chief justice of the California Supreme Court, who was shot by Justice Fields's body guard. *Id.* Justice Fields was arrested but never charged. *Id.*; see also PAUL KENS, JUSTICE STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE 280–83 (1997).

54. See David J. Sachar, *Judicial Misconduct and Public Confidence in the Rule of Law*, UNITED NATIONS OFF. ON DRUGS & CRIME, <https://www.unodc.org/dohadeclaration/en/news/2019/08/judicial-misconduct-and-public-confidence-in-the-rule-of-law.html> (last visited Oct. 27, 2023) (arguing that judicial misconduct has led to a decrease in public trust in the rule of law).

55. See generally *id.* (“Judicial misconduct comes in many forms and ethical standards address problematic actions, omissions and relationships that deplete public confidence.”).

56. See generally Lawrence Hurley, *Justice Clarence Thomas Discloses Trips Paid for by Billionaire Harlan Crow*, NBC NEWS (Aug. 31, 2023), <https://www.nbcnews.com/politics/supreme-court/justice-clarence-thomas-discloses-trips-paid-billionaire-harlan-crow-rcna102539> (reporting Justice Clarence Thomas's admission of vacations paid for by Harlan Crow).

57. See, e.g., *infra* notes 58–60 and accompanying text.

58. Amy Taxin, *California Judge Who's Charged with Murder Texted Court Staff That He Shot His Wife, Prosecutors Say*, ASSOCIATED PRESS, <https://apnews.com/article/california-judge-murder->

son with one of the forty-seven weapons he had at home with 26,000 rounds of ammunition.⁵⁹ He texted his clerk just minutes after the killing, “I just lost it. I just shot my wife. I won’t be in tomorrow. I will be in custody. I’m so sorry.”⁶⁰ Does this incident mean that we need an ethics code for Supreme Court Justices that precludes them from committing murder? Obviously not. But if situations like this are in the public’s consciousness, it does not hurt that the Court adopted a code provision that expressly states, as the current Code of Conduct for United States Judges (Code of Conduct) does: “A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”⁶¹

Just a few months earlier, a federal judge handcuffed a thirteen-year-old girl in the courtroom and ordered her to sit in the jury box during her father’s parole revocation hearing so that she could learn not to get involved in drugs.⁶² Referring to her as “an awfully cute young lady,” he warned her that she could end up back in handcuffs if she, too, chose the wrong path in life.⁶³ This traumatic incident reflects an insensitivity and hubris by a judge who may have the power to take such action, but ethically should not. Again, all lower federal judges in the United States are currently bound by an ethical rule that dictates: “The judge should perform [their] duties with respect for others, and should not engage in behavior that is harassing, abusive, prejudiced or biased.”⁶⁴ Again, it is unlikely that a Supreme Court Justice would be in such a position or choose to act in such a callous manner, but the public has seen firsthand how abusive judges can be in their positions.⁶⁵

There is no lack of reports of bad behavior by judges. From just 2020–

charge-wife-d7d3a5c08eb04bbe7113402d9eab23d8 (last updated Aug. 11, 2023, 2:57 PM).

59. *Id.*

60. *Id.*

61. CODE OF CONDUCT FOR JUSTICES OF THE SUPREME COURT OF THE UNITED STATES, Canon 2(A) (2023), https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf [hereinafter SUPREME COURT CODE OF CONDUCT]; CODE OF CONDUCT FOR U.S. JUDGES Canon 2(A) (JUDICIAL CONFERENCE 2019) [hereinafter JUDGE’S CODE OF CONDUCT].

62. See Alex Riggins, *San Diego Judge Had Defendant’s 13-Year-Old Daughter Handcuffed. Now He’s Under Review*, L.A. TIMES (Mar. 1, 2023), <https://www.latimes.com/california/story/2023-03-01/san-diego-federal-judge-benitez-handcuffgirl> (explaining the judge’s decision to handcuff the defendant’s daughter and the subsequent Ninth Circuit review).

63. *Id.*

64. JUDGE’S CODE OF CONDUCT, *supra* note 61, at Canon 3.

65. See, e.g., *supra* notes 62–63 and accompanying text; *infra* notes 68, 80 (detailing multiple instances of public judicial misconduct).

2022, a judge was suspended for attempting to intimidate witnesses who complained that he roamed the courthouse in his underwear;⁶⁶ a Texas judge was reprimanded for shackling two lawyers in her courtroom;⁶⁷ a federal appeals judge told attorneys to remove their masks during oral arguments, despite their legitimate concern that there had been a spike in COVID-19 transmission;⁶⁸ a Georgia judge pushed a handcuffed defendant against a wall because the man cursed at him during a bond hearing;⁶⁹ another federal appeals judge hired a law clerk who had sent texts stating, “I HATE BLACK PEOPLE”;⁷⁰ a federal judge rejected claims that his wife’s \$22,000 stock holdings in a company that had a matter before him could have affected his decision;⁷¹ a judge personally searched a self-represented litigant’s home for marital property without a warrant;⁷² a judge gave Facebook advice to shoplifters on how to avoid arrest;⁷³ a judge asked an attorney whether he knew about the N-word;⁷⁴

66. Debra Cassens Weiss, *Suspended Judge Is Accused of Trying to Stop Report That He Walked Around Courthouse in Underwear*, ABA J. (Oct. 11, 2022, 10:31 AM), <https://www.abajournal.com/news/article/suspended-judge-is-accused-of-trying-to-stop-report-that-he-walked-around-courthouse-in-his-underwear>.

67. Debra Cassens Weiss, *Texas Judge Is Reprimanded Following the Shackling of 2 Lawyers in Courtroom*, ABA J. (May 10, 2022, 3:13 PM), <https://www.abajournal.com/web/article/texas-judge-is-reprimanded-following-shackling-of-two-lawyers-in-her-courtroom>.

68. Debra Cassens Weiss, *Federal Appeals Judge Should Be Investigated for Telling Lawyer to Remove Mask During Oral Arguments, Says Reform Group*, ABA J. (Feb. 3, 2022, 1:11 PM), <https://www.abajournal.com/news/article/reform-group-seeks-probe-of-federal-appeals-judge-for-telling-lawyer-to-remove-mask>.

69. Bernie Pazanowski, *Georgia Judge Who Shoved Mouthy Defendant Gets 30-Day Suspension*, BLOOMBERG L. (Feb. 2, 2022, 9:04 AM), <https://news.bloomberglaw.com/us-lawweek/georgia-judge-who-shoved-mouthy-defendant-gets-30-day-suspension>.

70. Ruth Marcus, *The Curious Case of the Clerk and the Racist Texts*, WASH. POST: OPINIONS (Jan. 18, 2022, 7:13 PM), <https://www.washingtonpost.com/opinions/2022/01/18/clerk-texts-appeals-court-clanton/>.

71. Debra Cassens Weiss, *Federal Judge Says It’s “Almost Insane” to Assert Wife’s Stock Holdings Affected His Decisions*, ABA J. (Jan. 10, 2022, 11:16 AM), <https://www.abajournal.com/news/article/federal-judge-says-its-almost-insane-to-assert-wifes-stock-holdings-affected-his-decisions>.

72. Debra Cassens Weiss, *Judge Who Searched Litigant’s Home for Marital Property Gets Censure and Fine*, ABA J. (Nov. 22, 2021, 1:07 PM), <https://www.abajournal.com/news/article/judge-who-searched-litigants-home-for-marital-property-gets-censure-and-fine>.

73. Debra Cassens Weiss, *Judge Gets Reprimand Partly for This Facebook Advice to Shoplifters: To Avoid Arrests, Don’t Sport Green Hair*, ABA J. (Nov. 10, 2021, 3:20 PM), <https://www.abajournal.com/news/article/judge-gets-reprimand-for-facebook-advice-on-avoiding-arrest-blend-in-when-shoplifting-no-green-hair>.

74. Debra Cassens Weiss, *Judge Ousted Partly for Racial Comments; He Once Asked Black Employee Whether He Dealt Drugs to Buy Car*, ABA J. (Nov. 2, 2021, 2:22 PM), <https://www.abajournal.com/news/article/judge-is-ousted-for-racial-comments-that-included-asking-a-black-employee-if>

another judge was reprimanded for joining a group that called for the recall of a progressive district attorney;⁷⁵ a judge had ex parte communications with a prosecutor’s office;⁷⁶ a judge joined in an email chain with a group calling itself the “Forum of Hate”;⁷⁷ a judge “told a defendant during plea negotiations that the federal judicial system ‘sucks’”;⁷⁸ a judge referred to a Black juror in a headscarf as “Aunt Jemima”;⁷⁹ another judge told a Black defendant to stop boasting about having “the biggest balls in the courthouse”;⁸⁰ a federal judge lambasted a proposal to rename United States military bases that had been named to honor Confederate officers;⁸¹ a judge asked a sexual assault victim whether she closed her legs to prevent the rape;⁸² two judges pled guilty to felonies of attempted underwear theft and tax evasion;⁸³ a judge forced a child into a holding cell behind her courtroom because of the child’s bad behavior;⁸⁴ a judge told a defendant that she hoped the defendant would have to

he-was-dealing-drugs.

75. Debra Cassens Weiss, *Judge Is Admonished After Joining Facebook Group Calling for Recall of Reform-Minded DA*, ABA J. (Sept. 16, 2021, 9:22 AM), <https://www.abajournal.com/news/article/judge-is-admonished-after-joining-facebook-group-calling-for-recall-of-reform-minded-da>.

76. *United States v. Orr*, 969 F.3d 732, 734 (7th Cir. 2020) (“Judge Bruce, who presided over this case at trial, had engaged in improper ex parte communications with the U.S. Attorney’s Office in other matters.”).

77. Debra Cassens Weiss, ‘Disturbingly Inappropriate’ Emails Bring Suspension for Former Judge and Lawyer, ABA J. (July 1, 2020, 1:21 PM), <https://www.abajournal.com/news/article/disturbingly-inappropriate-emails-bring-suspension-for-former-judge-and-lawyer>.

78. Bernie Pazanoski, *Trial Judge Scolded for Telling Defendant Federal Court ‘Sucks’*, BLOOMBERG L. NEWS (Sept. 10, 2020, 8:54 AM), <https://news.bloomberglaw.com/us-law-week/trial-judge-scolded-for-telling-defendant-federal-court-sucks>.

79. Matt Fair, *Alleged Racist Remark About Juror Lands Judge in Hot Water*, LAW360 (Aug. 12, 2020, 3:35 PM), <https://www.law360.com/articles/1300620/alleged-racist-remark-about-juror-lands-judge-in-hot-water>.

80. Mike LaSusa, *Calif. Judge Censured over Crude Courtroom Comments*, LAW360 (Mar. 25, 2020, 6:51 PM), <https://www.law360.com/articles/1257035/calif-judge-censured-over-crude-courtroom-comments>.

81. Ryan Grim, *Federal Judge Lambasts Amendment to Rename Confederate Bases as “Madness,” Gets Thoroughly Bodied by Clerk*, THE INTERCEPT (June 15, 2020, 6:01 PM), <https://theintercept.com/2020/06/15/dc-circuit-confederate-bases-federal-judge/>.

82. Debra Cassens Weiss, *Judge Is Removed from Bench After Asking Woman Whether She Closed Her Legs to Prevent Rape*, ABA J. (May 28, 2020, 11:05 AM), <https://www.abajournal.com/news/article/judge-is-removed-from-bench-after-asking-woman-whether-she-closed-her-legs-to-prevent-rape>.

83. Debra Cassens Weiss, *2 Judges Resign after Pleading Guilty to Felonies of Attempted Underwear Theft and Tax Evasion*, ABA J. (Apr. 6, 2020, 12:02 PM), <https://www.abajournal.com/news/article/judge-who-pleaded-guilty-in-attempted-panty-theft-resigns-six-months-after-guilty-plea>.

84. Debra Cassens Weiss, *Judge Who Forced Child into Lockup, Traded F-Words with Defendant*,

fight for his life every day in prison after imposing a life sentence;⁸⁵ a judge rarely came to work on time, but when he came, spent his time sexually harassing judicial employees;⁸⁶ a judge claimed that calling a female lawyer “the C-word” was a compliment;⁸⁷ a judge referred to correctional officers as “morons”;⁸⁸ a judge was habitually rude to public defenders;⁸⁹ a judge posted anti-LGBTQ and anti-Muslim Facebook comments;⁹⁰ and the list goes on and on.⁹¹

Certainly, none of these recent incidents involved members of the Supreme Court bench, but as the highest court in the land, which sets standards for the judiciary, these incidents at least explain why the public has a fairly jaundiced view of our courts. There are enough stories of judges acting

Loses Retention Bid, ABA J. (Nov. 25, 2020, 9:44 AM), <https://www.abajournal.com/news/article/judge-who-forced-child-into-lockup-traded-f-words-with-defendant-loses-retention-bid>.

85. Debra Cassens Weiss, *Judge Reprimanded Partly for Telling Defendant, ‘I Do Hope You Do Fight for Your Life . . . Every Day’*, ABA J. (Feb. 10, 2020, 11:01 AM), <https://www.abajournal.com/news/article/judge-reprimanded-partly-for-telling-defendant-i-hope-you-fight-for-your-life-every-day>.

86. Raymond J. McKoski, *Disciplining Federal Judges and the Public’s Right to Know*, JURIST (Nov. 17, 2019, 2:25 PM), <https://www.jurist.org/commentary/2019/11/raymond-mckoski-disciplining-federal/>.

87. Frank G. Runyeon, *NY Judge Who Called Atty C-Word Says it Was a “Compliment,”* LAW360 (June 2, 2020, 9:15 PM), <https://www.law360.com/articles/1279287>.

88. Debra Cassens Weiss, *Federal Judge Complains That New York’s Federal Detention Facilities ‘Are Run by Morons’*, ABA J. (May 10, 2021, 2:07 PM), <https://www.abajournal.com/news/article/federal-judge-complains-that-new-yorks-federal-detention-facilities-are-run-by-morons>.

89. Debra Cassens Weiss, *Judge Is Suspended for Rude Treatment of Public Defenders; He Will Also Have to Hire a Counselor or Life Coach*, ABA J. (June 8, 2021, 12:54 PM), <https://www.abajournal.com/news/article/judge-is-suspended-for-rude-treatment-of-public-defenders-he-will-also-have-to-hire-a-counselor-or-life-coach>.

90. Melissa Heelan, *N.Y. Judge Resigns for Alleged Anti-LGBTQ, Muslim Facebook Posts*, BLOOMBERG L. (June 18, 2021, 8:26 AM), <https://news.bloomberglaw.com/us-law-week/n-y-judge-resigns-for-alleged-anti-lgbtq-muslim-facebook-posts>.

91. See Debra Cassens Weiss, *Judge Gets Public Warning for Telling Jurors About God’s Verdict*, ABA J. (Mar. 6, 2019, 7:30 AM), <https://www.abajournal.com/news/article/judge-gets-public-warning-for-telling-jurors-about-gods-verdict> (explaining that in 2018 a judge was investigated for informing jurors that God told him that the accused sex trafficker was not guilty); Debra Cassens Weiss, *Federal Judge Regrets Appearing in Group Frat Photo with Confederate Flag*, ABA J. (Mar. 5, 2019, 7:30 AM), <https://www.abajournal.com/news/article/federal-judge-says-he-regrets-appearing-in-group-frat-photo-with-confederate-flag> (discussing a federal judge who regretted posing with a Confederate flag in college); Dan Berman & Laura Jarrett, *Judge Alex Kozinski, Accused of Sexual Misconduct, Resigns*, CNN (last updated Dec. 18, 2017, 9:57 AM), <https://www.cnn.com/2017/12/18/politics/alex-kozinski-resigns/index.html> (describing an incident in 2017, in which the Chief Judge of the U.S. Court of Appeals for the Ninth Circuit was forced to resign because of sexual misconduct allegations).

inappropriately—including by ignoring their duties to remain unbiased—that the Court may come to understand why judicial ethics is an extremely serious matter and why, when the Court initially took the approach that it is exempt from an ethical code, this position raised concerns.⁹²

Then, there are the comments and actions (and inactions) of the members of the current Supreme Court to consider. The press, especially *ProPublica*, has reported on how certain Justices have been courted by wealthy individuals who, either directly or indirectly, have matters before the Court.⁹³ In a lengthy report, *ProPublica* detailed how Justice Thomas spent decades taking luxury trips financed by a Dallas businessman—Harlan Crow—that went unreported.⁹⁴ Indeed, one of the leading arguments for the Court to adopt an ethics code was that such trips create either an actual conflict of interest or the appearance of such a conflict.⁹⁵ The call for an ethics code for the highest Court was further fueled by an unprecedented op-ed piece by Justice Samuel Alito, who stated that as a matter of law, Congress lacks the power to impose a code of ethics on the Supreme Court.⁹⁶ This op-ed, ironically, can be interpreted as a violation of the basic Canon⁹⁷ that a judge should not comment on a matter that is likely to come before that jurist.⁹⁸ That being said, the Chief Justice was only willing to go so far as to write that the Court’s nine Justices subscribed to a Statement on Ethics Principles and Practices.⁹⁹ Additionally, three other Justices—Justices Kagan, Barrett, and Kavanaugh—hinted that

92. See Ed Pilkington, *Ethical No Man’s Land: Can the US Supreme Court Be Trusted to Police Itself?*, THE GUARDIAN (Mar. 24, 2023, 3:00 PM), <https://www.theguardian.com/law/2023/mar/24/us-supreme-court-ethics-code-clarence-thomas> (raising potential issues with the lack of a code of ethics for United States Supreme Court Justices before its adoption in November 2023).

93. See Kaplan et al., *supra* note 2.

94. *Id.* As detailed in that report, Justice Thomas has been a guest of Crow on private jet vacations to Indonesia, journeys on Crow’s superyacht, luxury retreats to resorts inside the United States, that his wife received a \$120,000 salary from a group founded by Crow, a gift of \$105,000 to Thomas’s alma mater for the “Justice Thomas Portrait Fund,” and that Crow even paid for a cemetery monument to be dedicated to Thomas’ beloved eighth grade teacher. *Id.* Justice Thomas has claimed that such “hospitality” did not need to be reported, but experts have noted that disclosure was required by the plain language of the financial disclosure forms. *Id.*

95. See Elliot et al., *supra* note 15.

96. See Sherman, *supra* note 40.

97. See JUDGE’S CODE OF CONDUCT, *supra* note 61, Canon 3(A)(6).

98. *Id.* (“The admonition against public comment about the merits of a pending or impending matter continues until the appellate process is complete. If the public comment involves a case from the judge’s own court, the judge should take particular care so that the comment does not denigrate public confidence in the judiciary’s integrity and impartiality.”).

99. See Letter from John G. Roberts, Jr., *supra* note 8 and accompanying text.

they would support a move by the Court to adopt some type of ethical code.¹⁰⁰ Even so, the Justices continued for months to resist the adoption of such a code.

In a recent law review article, Professor Michael J. Gerhardt examined the case for and against a Supreme Court code of ethics.¹⁰¹ Gerhardt supports such a code.¹⁰² Indirectly noting the Justices’ lack of humility, he argued that “the [J]ustices simply have no incentive to abandon the myths and power that elevate them over ordinary citizens and other constitutional actors.”¹⁰³ But, notwithstanding their elevated status, there were several compelling arguments favoring the adoption of a code. First, the Court is a court. All other jurists must comply with a code of ethics.¹⁰⁴ Why not Supreme Court Justices? More power should not mean less accountability; indeed, it should mean exactly the opposite. The Justices are already cloaked in independence because of their lifetime appointments.¹⁰⁵ Setting forth an ethical code that—at minimum—sets aspirational standards for the Justices would not threaten their removal outside of the constitutional system of impeachment. Second, our country “proudly touts the supposed founding principle that ‘no one is above the law.’”¹⁰⁶ Perhaps a code is necessary simply to remind Justices that no one, including them, is above the law. Third, there seems to be no other way to get the Justices to take certain issues seriously—issues such as complete reporting of their finances, ex parte communications, and proper handling of recusal questions.¹⁰⁷ As have others, Gerhardt criticized Justice

100. See Kimberly Strawbridge Robinson, *Kagan Hopeful for Supreme Court Code Amid Ethics Allegations*, BLOOMBERG L. (Sept. 22, 2023, 1:29 PM), <https://news.bloomberglaw.com/us-law-week/kagan-hopeful-for-supreme-court-code-amid-ethics-allegations>; see also Lydia Wheller, *Barrett Says US Supreme Court Ethics Code is a “Good Idea,”* BLOOMBERG L. (Oct. 16, 2023, 2:29 PM), <https://news.bloomberglaw.com/us-law-week/justice-barrett-appearance-interrupted-by-abortion-protest>.

101. See Michael J. Gerhardt, *Supreme Myth Busting: How the Supreme Court Has Busted Its Own Myths*, 2023 WIS. L. REV. 603 (2023).

102. *Id.* at 605 (“If the Court really is a court with its members firmly and unequivocally devoted to the law, then its members have nothing to fear from a code of ethics, whose purpose is to ensure they adhere to standard judicial norms and constraints.”).

103. *Id.* at 623.

104. *Id.* at 625 (discussing how all judges and justices in different court systems follow a code of ethics).

105. See *id.* at 605 (discussing how the Constitution provides life tenure for Supreme Court Justices).

106. *Id.* at 625 n.136 (quoting *United States v. Nixon*, 418 U.S. 683, 715 (1974)).

107. *Id.* at 626–27 (discussing instances of the Justices’ engagement in dubious activities).

Thomas for not even acknowledging that there could be grounds for recusal from cases involving the integrity of the 2020 presidential election given his wife’s active role in supporting those who sought to overturn the election.¹⁰⁸ Finally, a code is necessary because it is just too easy for the Justices to be dismissive of complaints that are brought against them. They have created a myth that somehow their job exempts them from ethical standards that are binding on every other judge. This myth is both dangerous and unsupported.¹⁰⁹

Ethical codes are adopted for a variety of reasons, even when they are completely voluntary.¹¹⁰ For example, years ago an ethical code for legal commentators was drafted so that lawyers, and others who provide commentary on high-profile matters, would have some guidance for performing their jobs in a way that would garner the most public confidence.¹¹¹ It is an important tool for educating the commentators, media, and public on the best and most honest practices by those performing in that role.¹¹² The Supreme Court should not *need* an ethical code to know how to behave in a fair and appropriate matter, but it should also not be up to the Justices to decide whether they need one or not. As an institution with enormous power, its legitimacy can only be enhanced by constructing guardrails for its behavior. Perhaps the first and foremost reason for an ethical code is to promote a heightened awareness by the Justices of how their behavior affects the credibility of their decisions.

Second, an ethical code is educational—both for those who are governed by the code and for those who are exposed to judicial decision-making. A common provision in judicial ethical codes is that “[a] judge should avoid impropriety and the appearance of impropriety in all activities.”¹¹³ Of course,

108. *Id.*

109. *Id.* (discussing how the absence of an ethical code can lead the Supreme Court to act as another political branch).

110. See Erwin Chemerinsky & Laurie Levenson, *The Ethics of Being a Commentator*, 69 S. CAL. L. REV. 1303, 1314 (1996) (“From a practical perspective, a voluntary code of ethics is far easier to implement than a mandatory set of rules.”).

111. See *id.* (arguing for the need for a voluntary ethical code for legal commentators); see Erwin Chemerinsky & Laurie Levenson, *The Ethics of Being a Commentator II*, 37 SANTA CLARA L. REV. 913 (1997) (detailing proposed standards of conduct for legal commentators).

112. See Chemerinsky & Levenson, *supra* note 111, at 916 (discussing how a voluntary code of ethics is an important tool because it both educates the public and the media and frames commentators as taking their jobs seriously).

113. See, e.g., JUDGE’S CODE OF CONDUCT, *supra* note 61, Canon 2.

this language is imprecise. However, it is an important reminder that the Justices should act in a manner such that their fairness and honesty cannot be challenged. In particular, in their isolated world, the Justices seem to become unaware of how their contact with others can affect the integrity of their work.¹¹⁴ Canon 2(B) of the Code of Conduct for United States Judges states:

(B). *Outside influence.* A judge should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment. A judge should neither lend the prestige of the judicial office to advance the private interests of the judge or others nor convey or permit others to convey the impression that they are in a special position to influence the judge.¹¹⁵

It is hard to imagine that Justice Thomas, if operating under such a standard, would not have given at least a second thought to accepting the lavish trips paid for by a Republican donor who was affiliated with organizations that had cases before the Court.¹¹⁶

Third, an ethical code could actually protect the Justices from unwarranted criticism. To the extent the code specifies what types of relationships do and do not require recusal, the Justices could point to their own code to justify the decisions they make.

Finally, an ethical code would make clear to the public that, while we prefer Justices who have clean slates with no political or personal biases, an ethical code does not prohibit all biases. Instead, it is focused on those biases generated by groups outside of the Court. The vetting process for Justices will remain crucial and still be the primary mechanism to ferret out biases.¹¹⁷

114. See generally JUDGE’S CODE OF CONDUCT, *supra* note 61, at Canon 2(B) (detailing the “outside influence[s]” that can affect the integrity of a judge’s work or conduct).

115. *Id.*

116. See Ian Millhiser, *Second Harlan Crow Connected Group Has a Perfect Litigation Record Before Justice Thomas*, THINK PROGRESS (June 23, 2011, 1:50 PM), <https://archive.thinkprogress.org/second-harlan-crow-connected-group-has-a-perfect-litigation-record-before-justice-thomas-1aaf50c21db8/>; see also Adam Liptak, *Justice Thomas Recuses as Supreme Court Turns Down Appeal from Eastman*, N.Y. TIMES (Oct. 2, 2023), <https://www.nytimes.com/2023/10/02/us/politics/clarence-thomas-recusal-eastman-trump.html> (noting that Justice Thomas started recusing himself from decisions that involved the January 2020 election after there were disclosures about his wife’s participation in groups seeking to overturn that election).

117. See Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1207 (1988) (“The entire appointment process is best understood as largely beyond the operations of norms of legal right or wrong; instead, it involves mainly questions of prudence, judgment,

No one should pretend that an ethical code will neutralize any preconceived ideas that a judge may have. The fact that an ethical code is unlikely to have such a provision suggests that one of the key roles of the U.S. Senate’s confirmation process should be identifying a nominee’s biases.¹¹⁸

III. WHY JUDICIAL HUMILITY IS NEEDED NOW MORE THAN EVER

In recent years, the Supreme Court has issued some of the most controversial decisions of our time.¹¹⁹ In doing so, the Justices have jettisoned stare decisis and overturned established law on the right to an abortion,¹²⁰ affirmative action,¹²¹ LGBTQ rights,¹²² religious rights under the First Amendment,¹²³ and the powers of the legislative and executive branches.¹²⁴ This dramatic swing in the Court’s jurisprudence has, rightfully, put the Justices under a greater spotlight. It is one thing for the Court to apply the laws as they had been applied previously; it is another thing for the Court to overturn cases that have been settled law for decades.¹²⁵ Such decisions prompt at least two

and politics.”).

118. *Id.* at 1205–07 (highlighting the role the Senate confirmation process plays in identifying meritorious nominees for the Court, which includes the duty to reject nominees unfit to advance the public good).

119. See Adam Liptak & Jason Kao, *The Major Supreme Court Decisions in 2022*, N.Y. TIMES (June 30, 2022), <https://www.nytimes.com/interactive/2022/06/21/us/major-supreme-court-cases-2022.html> (noting that the members of the public held starkly different views on decisions reached by the Supreme Court in cases such as *Dobbs v. Jackson Women’s Health Organization*, *Kennedy v. Bremerton School District*, and *West Virginia v. EPA*).

120. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022) (overruling *Roe v. Wade*).

121. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023) (overruling affirmative action cases).

122. *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023) (holding that a wedding-website designer may refuse to service same-sex couples because prohibiting her from doing so would be a First Amendment violation).

123. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022) (holding that under the Free Exercise and Free Speech Clauses of the First Amendment a school district could not prevent a football coach from engaging in a personal religious observance at mid-field after a football game).

124. *Biden v. Nebraska*, 143 S. Ct. 2355 (2023) (holding that the Secretary of Education did not have the power to waive student loans under the HEROES Act); *West Virginia v. EPA*, 596 U.S. 697 (2022) (holding that the EPA does not have Congressional authority to limit emissions at existing power plants through generational shifting and using cleaner resources).

125. See generally Michael Gentithes, *Janus-Faced Judging: How the Supreme Court Is Radically Weakening Stare Decisis*, 62 WM. & MARY L. REV. 83, 83–84 (2020) (“The radical weakening of stare decisis presents a grave threat to legal stability This weakening of stare decisis has deep analytical flaws that would allow perpetual changes to legal doctrine based simply on the current Justices’ preferences.”).

instinctive reactions: Who are you to overturn precedent? And, given your political and ideological leanings, why should your decisions be viewed as legitimate?¹²⁶

Indeed, books are now being written about whether the Court’s root problem is overconfidence.¹²⁷ In his recent publication, *Supreme Hubris: How Overconfidence Is Destroying the Court and How We Can Fix It*, scholar Aaron Tang¹²⁸ asks whether the Justices appreciate how their lack of humility affects the substance of their rulings.¹²⁹ Their creation and adoption of grand legal theories creates a seductive belief that they must be right and other Justices on the Court before them (and currently beside them) are wrong.¹³⁰ Tang gives as a prime example Justice Samuel Alito’s decision in *Dobbs v. Jackson Women’s Health Organization*,¹³¹ which overturned *Roe v. Wade*.¹³² In abandoning the fifty-year precedent, the 5–4 majority referred to *Roe* and its progeny as “exceptionally weak” and “egregiously wrong.”¹³³ Such rhetoric reflects not just a firm belief in the merits of the reversal, but a self-assurance devoid of humility. And why does that matter? Because the more arrogant the Court appears in its decisions, the more it will alienate Americans who feel that the Court is disregarding their interests. That, in itself, undermines the credibility of the Court and the likelihood that its decisions will be broadly accepted.¹³⁴ Interestingly, as Tang notes, there have been other controversial decisions by the Court, such as its decision in 2000 in *Bush v. Gore*.¹³⁵ Yet,

126. See generally James L. Gibson, *After Dobbs: A Note of Warning to the U.S. Supreme Court* (Apr. 21, 2023) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4425652 (discussing the Court’s loss of legitimacy after *Dobbs* from a sociological perspective).

127. AARON TANG, *SUPREME HUBRIS: HOW OVERCONFIDENCE IS DESTROYING THE COURT AND HOW WE CAN FIX IT* (2023).

128. *Id.*

129. *Id.* at 5 (“This book is about how overconfidence bias afflicts a small group of exceedingly important people: the nine [J]ustices on the United States Supreme Court.”).

130. *Id.* at 8.

131. *Id.* at 8–9 (citing *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022)).

132. *Id.* at 9 (citing *Roe v. Wade*, 410 U.S. 113 (1973)).

133. See *id.* (quoting *Dobbs*, 597 U.S. at 231).

134. See *id.* at 40. The Court’s decline in public legitimacy matters. See *id.* (“Rampant distrust in the Supreme Court portends dangerous consequences for American democracy.”).

135. *Id.* at 39 (discussing the Supreme Court’s stable popularity throughout the controversy surrounding the *Bush v. Gore* decision); *Bush v. Gore*, 531 U.S. 98, 112 (2000) (holding any manual recount of votes seeking to meet the December “safe harbor” deadline permitted by 3 U.S.C. § 5 would be unconstitutional under the Equal Protection Clause of the Fourteenth Amendment); see also David Cole, *The Liberal Legacy of Bush v. Gore*, 94 GEO. L.J. 1427 (2006) (noting the shift in the Court

the Court’s reputation did not plummet after that decision.¹³⁶ There is something about how the current Court is writing its opinions and messaging its decisions to the public that is clearly having a dramatic impact.

If the goal is to create broad acceptance for the Court’s decisions, those decisions must deliver a message of respect and mutual toleration for advocates on all sides of an issue. This is not just about increasing the popularity of the Court. Rather, it is about safeguarding the guardrails of democracy.¹³⁷ The Court’s rhetoric, both in its opinions and in speeches by some of its members,¹³⁸ has fueled the public’s growing mistrust of the Court.¹³⁹ The public persona of some Court members is a far cry from leaders of the past, whether it be the humble Abraham Lincoln, or Justice John Paul Stevens, who was lauded as a “modest and humble man.”¹⁴⁰

Arrogance and overconfidence can be harmful to any person or

after it essentially called the election in George Bush’s favor by blocking a recount of votes in Florida).

136. See TANG, *supra* note 127, at 39 (“[T]he Court’s high popularity in 2001 and 2002 suggests that it suffered surprisingly little fallout from its controversial decision in *Bush v. Gore*.”).

137. See TANG, *supra* note 127, at 40; see also STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 102, 106 (2018) (discussing the procedural “guardrails” that prevent unhappy citizens from overthrowing a government).

138. *Dobbs*, 597 U.S. at 332 (Thomas, J., concurring) (“[I]n future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is ‘demonstrably erroneous,’ we have a duty to ‘correct the error’ established in those precedents.”) (citation omitted); see also Sara Boboltz, *Amy Coney Barrett Cracks Joke About Abortion Rights Protesters with Federalist Society*, HUFFPOST (Nov. 12, 2022, 2:39 PM), https://www.huffpost.com/entry/amy-coney-barrett-abortion-rights-protesters-federalist-society_n_636fdd60e4b09c4db177099e#; see also Elizabeth Warren, *The Supreme Court Has an Ethics Problem*, POLITICO (Nov. 1, 2017), <https://www.politico.com/magazine/story/2017/11/01/supreme-court-ethics-problem-elizabeth-warren-opinion-215772>. In 2017, Justice Neil Gorsuch attended a luncheon at the Trump International Hotel, where he was to give the keynote address for an event hosted by the Fund for American Studies. *Id.* On the same morning, the Supreme Court announced it would hear the case *Janus v. AFSCME*, 138 S. Ct. 2448 (2018). *Id.* The Fund for American Studies is funded by the Charles Koch Foundation and the Bradley Foundation. *Id.* As it so happens, the Bradley Foundation helped pay the litigation expenses for Mark Janus, who was contesting the payment of union dues. *Id.* These labor unions collectively bargained for higher wages and other employment benefits on behalf of its members. *Id.*

139. See TANG, *supra* note 127, at 197 (suggesting ways the Court can enhance its legitimacy by refraining from partisan politics). See generally David Litt, *A Court Without Precedent*, THE ATLANTIC (July 24, 2022), <https://www.theatlantic.com/ideas/archive/2022/07/supreme-court-stare-decisis-roe-v-wade/670576> (explaining that many Americans were outraged when *Roe v. Wade* was overturned).

140. Mark Walsh, *A Supreme Court Ceremony for Justice Stevens: “A Modest and Humble Man,”* SCOTUSBLOG (July 22, 2019, 1:15 PM), <https://www.scotusblog.com/2019/07/a-supreme-court-ceremony-for-justice-stevens-a-modest-and-humble-man/>.

institution. They dull the ability to be alert to important facts and challenges.¹⁴¹ This type of attitude contributed to the sinking of the Titanic and the loss of 1,500 lives.¹⁴² There needs to be a fair balance between confidence and humility. Think about it this way: If you were being led into battle, would you want a leader (call him “Custer”) who thinks he is invulnerable, or one who is confident but is constantly assessing any additional problems that might arise?

Some of the worst decisions by the Court came from Justices who were absolutely confident in their decisions, although years later they would be proved wrong. Chief Justice Roger Taney, who authored the infamous *Dred Scott* decision,¹⁴³ confidently asserted that slaves were “property” under the Due Process Clause.¹⁴⁴ We can now recognize that “[t]he greatest trick the Supreme Court ever pulled is convincing the American people that it knows all the answers. It’s a trick that has done our society immense harm, which continues to this day. Overconfidence is how the Court pulled it off.”¹⁴⁵

Overconfidence and lack of humility can fall on both sides of the political spectrum. Certainly, there have been liberal Justices who have not been paragons of humility.¹⁴⁶ Legal historians are best to address the specifics of these occasions.¹⁴⁷ Justices on the same end of the political spectrum have engaged

141. See Pedro C. Ribeiro, *Sinking the Unsinkable: Lessons for Leadership*, NASA (Aug. 12, 2012), <https://appel.nasa.gov/2012/08/02/sinking-the-unsinkable-lessons-for-leadership/> (“I cannot imagine any condition which would cause [the Titanic] to founder.”) (quoting Titanic Captain Edward Smith).

142. *Id.*

143. *Scott v. Sandford*, 60 U.S. 393 (1857). *Dred Scott* was an enslaved black man whose enslavers had taken him from Missouri, a slave-holding state, into Illinois and Wisconsin where slavery was illegal. *Id.* at 493. When his enslavers later brought him back to Missouri, Scott sued for his freedom. *Id.* Scott argued because he had been taken into “free” U.S. territory, he was legally no longer a slave. *Id.* The Court ruled that enslaved people were not citizens of the United States and, therefore, could not expect any protection from the federal government or the courts. *Id.* at 475–76.

144. TANG, *supra* note 127, at 101 (noting Chief Justice Taney’s overconfidence that the *Dred Scott* ruling would avert the Civil War).

145. *Id.* at 102.

146. *Id.* at 97 (using Justice Ginsburg’s decision not to retire during the Obama Administration as an example of a liberal Justice being overconfident).

147. See, e.g., Monroe H. Freedman, *Judicial Impartiality in the Supreme Court—The Troubling Case of Justice Stephen Breyer*, 30 OKLA. CITY U. L. REV. 513, 527 (2005) (explaining that in 2003, when the Supreme Court decided *Pharmaceutical Research & Manufacturers of America v. Walsh*, Justice Breyer’s financial disclosure statements suggested that he “continued to hold stock in three major pharmaceutical companies who were suing through the Pharmaceutical Research and Manufacturers of America”); Brian Slodysko & Eric Tucker, *Supreme Court Justice Sotomayor’s Staff Prodded Colleges and Libraries to Buy Her Books*, AP NEWS (July 11, 2023, 2:14 AM), <https://apnews.com/article/supreme-court-sotomayor-book-sales-ethics-colleges-b2cb93493f927f995829762cb8338c02>;

in battles of ego.¹⁴⁸ And, to no surprise, these battles further divide the Court and make it more difficult to create a coherent, cohesive jurisprudence; they lead to a Court where philosophical differences morph into personal and petty controversies.¹⁴⁹

Yet, there are particular risks in being overconfident when one’s philosophy, such as originalism, depends on the meaning of provisions passed hundreds of years ago.¹⁵⁰ Justice Brennan described originalism as “little more than arrogance cloaked as humility.”¹⁵¹ Gauging original intent from an ambiguous historical record is fraught with risks, as even conservative Justice Amy Coney Barrett recently noted in her concurrence in *New York State Rifle & Pistol Ass’n v. Bruen*.¹⁵² She remarked that there are risks in the Court endorsing “freewheeling reliance on historical practice from the mid-to-late 19th century to establish the original meaning of the Bill of Rights.”¹⁵³

Thus, humility plays a role in ensuring that the Court appreciates the outer bounds of its knowledge and does not overstate the support for its position. As some have suggested, a court will have more positive impact if it acknowledges that there is no singular answer to issues that it faces, but explains why it is making the selection that it does for the case before it.¹⁵⁴ An arrogant court is likely to have the most impact on the court’s jurisprudence. But a humble court can appreciate that, at times, the court should consider how to

Charles Gardner Geyh, *The Architecture of Judicial Ethics*, 168 U. PA. L. REV. 2351, 2374–75 (2021) (“In 2016, Justice Ruth Bader Ginsburg criticized then presidential candidate Donald Trump in multiple news outlets Reaction to Justice Ginsburg’s remarks from traditionalists was largely negative. Her statements, they concluded, flouted the Code of Conduct for U.S. Judges, Canon 5(A)(2), which provided that ‘A judge should not . . . publicly endorse or oppose a candidate for public office’”).

148. See Melvin I. Urofsky, *Conflict Among the Brethren: Felix Frankfurter, William O. Douglas and the Clash of Personalities and Philosophies on the United States Supreme Court*, 1988 DUKE L.J. 71 (1988).

149. *Id.* at 111–13 (describing how Justice Felix Frankfurter’s intellectual arrogance alienated his colleagues and caused further divide on the Court).

150. TANG, *supra* note 127, at 125 (explaining how originalist Justices are overconfident because originalism rests on uncertain evidence).

151. William J. Brennan Jr., Address Given at the Georgetown Text and Teaching Symposium (Oct. 12, 1985), in *JUDGES ON JUDGING: VIEWS FROM THE BENCH* 230, 232 (David M. O’Brien, ed., 5th ed. 2017).

152. 597 U.S. 1, 82–83 (2022) (Barrett, J., concurring).

153. *Id.* at 83 (Barrett, J., concurring).

154. See TANG, *supra* note 127, at 12 (highlighting the bipartisan decision in *Trump v. Vance* for acknowledging the complexities of the issue).

do minimal harm by reaching the conclusion that it reaches.¹⁵⁵ In doing so, it leaves the opportunity for other cases to further refine its decision as needed.

We should be concerned that “[t]he major society-altering cases that make it to the Supreme Court have come to resemble all-or-nothing warfare.”¹⁵⁶ Parties regularly take verbal shots at each other¹⁵⁷ because they believe that the Court will tolerate extreme rhetoric and accusations against the opposing parties.¹⁵⁸ Thus, humility by the Supreme Court is important not just for the functioning among the Justices, but to set an appropriate example and tenor for debate between the litigants and their followers. As Professor Jamal Greene observes, in the context of competing framings of constitutional rights, battle “coarsens us, and by leaving us farther apart at the end of a dispute than we were at the beginning, it diminishes us.”¹⁵⁹

Moreover, the language the Court uses in its opinions can have a dramatic impact on those affected by those decisions. Lack of humility can suggest that opponents of its decisions are just not as bright, wise, or worthy because they view the issues differently.¹⁶⁰ This type of rhetoric breeds further contempt for the Court and its decisions. There is a great benefit in a court stating that the issue before it is “hard” and that the Court is doing its best to reach a decision, but in no way has divine powers. As an operating principle, humility tends to breed more tolerance, trust, and cooperation in all sorts of settings.¹⁶¹

Humility can also help the Court anticipate the further challenges it will face even after it reaches a decision. For example, the Court’s decision in *Dobbs*¹⁶² may have overturned *Roe*, but it in no way settled the myriad issues regarding abortion and what limits may be put on it.¹⁶³ Those cases will be percolating up to the Court for the foreseeable future.¹⁶⁴ The same is already

155. *See id.* at 179 (pointing out that the Court regularly uses a “least harm” approach in other areas of law, such as in contract disputes and administrative law).

156. *See id.* at 191.

157. *Id.* at 194 (discussing the contention between the parties in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*).

158. *Id.* (identifying the Court’s overconfidence as causing litigants to unnecessarily ridicule opponents).

159. Jamal Greene, *Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 34 (2018).

160. *See* TANG, *supra* note 127, at 194.

161. *See id.* at 196.

162. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

163. *See* John Dinan, *The Constitutional Politics of Abortion Policy After Dobbs: State Courts, Constitutions, and Lawmaking*, 84 MONT. L. REV. 27, 47 (2023).

164. *Fifth Circuit Ruling on the Abortion Pill*, AM. B. ASS’N (Aug. 18, 2023),

true of the Court’s decision in *District of Columbia v. Heller*.¹⁶⁵ Rather than assuming that the lower courts would be able to automatically apply the Court’s new ruling that the Second Amendment applies to private ownership of firearms, a more humble Court might have anticipated the challenges its new ruling would create for courts across the country.¹⁶⁶ The same is also true for the more recent case of *Bruen*,¹⁶⁷ a case that has already prompted calls to clarify how the Court’s decision should be applied in situations where there may not be clear historical precedents.¹⁶⁸ The new *Bruen* standard, which assumes that judges can and should make their decisions based upon arcane statutes adopted centuries ago, has been referred to as “overconfidence on steroids.”¹⁶⁹

Thus, humility has the salutary effect of not only guiding Justices in their behavior off the Court but also in how they approach their duties on the Court. It can restore confidence to unsuccessful litigants that the Court has taken its arguments and interests seriously. While the Court’s decisions might ultimately be unfavorable, at least they will be delivered by Justices who appreciate and value the need to be unbiased and respectful.

Accordingly, there may be many reasons for adopting an ethical code. But certainly, two key reasons include the Court demonstrating that it is not

https://www.americanbar.org/groups/health_law/section-news/2023/august/fifth-circuit-ruling-on-the-abortion-pill. The Fifth Circuit Court of Appeals in New Orleans ruled that mifepristone, a pill used for medical abortions, should not be prescribed past seven weeks of pregnancy or via telemedicine. *Id.* For the time being, the Supreme Court has issued a stay, preventing the Appellate Court’s decision from going into effect. *All. for Hippocratic Med. v. U.S. Food & Drug Admin.*, 78 F.4th 210, 256 (5th Cir. 2023).

165. 554 U.S. 570 (2008).

166. See SARAH HERMAN PECK, CONG. RESEARCH SERV., R44618, *POST-HELLER SECOND AMENDMENT JURISPRUDENCE* (2019). Peck explains:

Because *Heller* neither purported to define the full scope of the Second Amendment, nor suggested a standard of review for evaluating Second Amendment claims, the lower federal courts have been tasked with doing so in the Second Amendment challenges brought before them. These challenges include allegations that provisions of the Gun Control Act of 1968, as amended, as well as various state and local firearm laws (e.g., “assault weapon” bans, concealed carry regulations, firearm licensing schemes) are unconstitutional.

Id.

167. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022).

168. See *United States v. Rahini*, 61 F.4th 443 (5th Cir. 2023), *cert. granted*, 143 S. Ct. 2688 (2023) (No. 22-915) (raising the question whether limitations on defendants with a history of domestic violence violates their Second Amendment right to possess firearms).

169. TANG, *supra* note 127, at 227.

above the ethical standards set for other judges and showing that it recognizes, notwithstanding its best efforts, that it must remain diligent to ensure that it does not give even the appearance of decisional bias.

IV. WHAT KIND OF CODE SHOULD HAVE BEEN ADOPTED?

At least three different questions have arisen in the debate about whether Supreme Court Justices should be subject to an ethical code: (1) Should the Justices be subject to any ethical code at all?; (2) Assuming they should be subject to an ethical code, what kind of rules should the Code provide?; and (3) How should such a code be enforced?¹⁷⁰

A. Question 1: Should There Be an Ethical Code for the Supreme Court?

The Supreme Court finally answered “yes” to the question of whether there should be an ethical code for the Court. On November 13, 2023, the Court issued its version of a code of conduct consisting of five judicial canons drawn from historical practices, common law, statutory provisions, the U.S. Code of Conduct for Judges, and advisory opinions issued by the Judicial Conference Committee on Codes of Conduct.¹⁷¹ Interestingly, the Court prefaced its code with a statement that it was issuing the “code” to dispel the “misunderstanding that the Justices of [the] Court, unlike all other jurists in this country, regard themselves as unrestricted by any ethics rules.”¹⁷² Commentators referred to the Court’s adoption of the code as a move made “under pressure” because of “controversies over the [C]ourt’s ethics.”¹⁷³

Yet, the Court did not adopt a code that operates like those applicable to other jurists. Rather, it adopted five basic canons that rely on the Justices’ willingness to follow them.¹⁷⁴ These canons are designed to address criticisms

170. Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism*, 26 GEO. J. LEGAL ETHICS (2013) (describing public criticism justices have received for their involvement in political fundraisers, acceptance of gifts, and refusal to recuse themselves from the constitutional challenges to the healthcare reform legislation).

171. Statement of the Court Regarding the Code of Conduct, *supra* note 10.

172. *Id.*

173. Robert Barnes & Ann E. Marimow, *Supreme Court, Under Pressure, Issues Ethics Code Specific to Justices*, WASH. POST (Nov. 13, 2023, 8:16 PM), <https://www.washingtonpost.com/politics/2023/11/13/supreme-court-ethics-code/> (“Supreme Court justices stung by controversies over the court’s ethics pledged Monday to follow a broad code of conduct promoting ‘integrity and impartiality,’ but without a way to enforce its standards against those who fall short.”).

174. *Id.*

directed toward the Court regarding current concerns about its objectivity and independence. They include:¹⁷⁵

Canon 1: A Justice Should Uphold the Integrity and Independence of the Judiciary.

Canon 2: A Justice Should Avoid Impropriety and the Appearance of Impropriety in All Activities.

Canon 3: A Justice Should Perform the Duties of Office Fairly, Impartially, and Diligently.

Canon 4: A Justice May Engage in Extrajudicial Activities that are Consistent with the Obligations of the Judicial Office.

Canon 5: A Justice Should Refrain from Political Activity.

The code also has subsections detailing how the Justices can meet their ethical obligations, as well as commentary at the end of the code that provides further guidance regarding some particularly sensitive issues such as recusal, the Justices’ participation in extrajudicial activities, and financial disclosure of gifts and other outside income.¹⁷⁶

The Court apparently realized that adopting a code would serve not only its own interests, but those of the public as well. Additionally, the Court could decide which provisions it would adopt. Under such circumstances, there really was no downside to the code’s adoption. The Court could make a great impact by simply adopting, in code form, the regulations the Court has already adopted by resolution—those the Justices have indicated they take “guidance” from in making their decisions.¹⁷⁷ Moreover, the Court could pick and choose from the Code of Conduct for U.S. Judges those canons that were already applied to federal judges, set forth below:¹⁷⁸

175. SUPREME COURT CODE OF CONDUCT, *supra* note 61; *see also* Phillip Gordon & Mateo Forero, *Breaking Down High Court’s New Code of Conduct*, LAW360 (Dec. 6, 2023, 4:57 PM), <https://www.law360.com/publicpolicy/articles/1773636/breaking-down-high-court-s-new-code-of-conduct> (providing an overview of the Supreme Court’s new ethical code).

176. SUPREME COURT CODE OF CONDUCT, *supra* note 61, at 10–14.

177. *See* Letter from John G. Roberts, Jr., *supra* note 8, at 5.

178. JUDGE’S CODE OF CONDUCT, *supra* note 61.

1. Canon 1: A Justice “Should Uphold the Integrity and Independence of the Judiciary.”¹⁷⁹

One wonders why it was ever particularly controversial for the Justices to formally commit to maintaining their integrity and independence with the adoption of an ethical code. This initial canon frames the court’s role and protects it from those who would choose to use the code to influence the work of the court. The commentary to Canon 1 already provides that “the Code is not intended to be used for tactical advantage.”¹⁸⁰ Thus, the Court boosts its credibility and further protects its independence by adopting this canon.¹⁸¹

2. Canon 2: A Justice “Should Avoid Impropriety and the Appearance of Impropriety in All Activities.”¹⁸²

In the Code of Conduct for U.S. Judges, this canon has three main provisions, all of which the Justices adopted into their own code. First, (A) *Respect for Law*: The Justices commit to having respect for the law and acting in a manner that promotes public confidence in the integrity and impartiality of the judiciary.¹⁸³ Second, (B) *Outside Influence*:¹⁸⁴ The Justices

[S]hould not allow family, social, political, financial or other relationships to influence official conduct or judgment. A Justice should neither knowingly lend the prestige of the judicial office to advance the private interests of the Justice or others nor knowingly convey or permit others to convey the impression that they are in a special position to influence the Justice.¹⁸⁵

Third, (C) *Nondiscriminatory Membership*:¹⁸⁶ The Justices “should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin.”¹⁸⁷

179. *Id.* at Canon 1.

180. *Id.* at Canon 1 cmt.

181. SUPREME COURT CODE OF CONDUCT, *supra* note 61, at Canon 1.

182. JUDGE’S CODE OF CONDUCT, *supra* note 61, at Canon 2.

183. SUPREME COURT CODE OF CONDUCT, *supra* note 61, at Canon 2(A).

184. *Id.* at Canon 2(B).

185. *Id.*

186. *Id.* at Canon 2(C).

187. *Id.*

Although these provisions should not be controversial, recent disclosures regarding the activities of some of the Justices may have given them pause.¹⁸⁸ Certainly, one could question why the Justices would not realize sooner that their extravagant free trips might, in the mind of a reasonable person, raise questions regarding their impartiality.¹⁸⁹ One notable deficiency in the Supreme Court’s new code is that it does not provide further guidance as to when Justices’ acts might convey the impression that others are in a special position to influence them. The code leaves open key questions of what types of trips, gifts, and private associations are appropriate for the Justices.¹⁹⁰ At some point, in order for the public and litigants to truly have confidence in the independence of the Justices, more specific guidelines must be set. The commentary at the end of the new code expressly sidesteps such attempts.¹⁹¹

Additionally, Canon 2(C) does not address another ongoing concern about the Justices: Should the public be concerned with the Justices affiliating with certain ideological or political groups, such as the Federalist Society? The newly adopted rule prohibits membership in organizations that discriminate on the basis of race, sex, religion, or national origin, but it does not address membership in groups that have set ideological stances such as overturning affirmative action or influencing reproductive rights.¹⁹² Thus, the Court takes a limited view of what it means to be a member of an organization that discriminates.¹⁹³ For years, lower federal court judges resisted any provision that limited their associations, but since the adoption of the Code of Conduct, that is generally not a problem.¹⁹⁴ Now that the High Court has

188. See *supra* notes 2–4 and accompanying text.

189. See JUDGE’S CODE OF CONDUCT, *supra* note 61, at Canon 2.

190. See Barnes & Marimow, *supra* note 173 (criticizing the new ethical code for “not squarely confront[ing]” such significant questions).

191. See SUPREME COURT CODE OF CONDUCT, *supra* note 61, at 10 (“These Canons are broadly worded general principles informing conduct, rather than specific rules requiring no exercise of judgment or discretion. It is not always clear, for example, whether particular conduct undermines, promotes, or has no effect on ‘public confidence in the integrity and impartiality of the judiciary,’ Canon 2A.”).

192. See M. Margaret McKeown, *Politics and Judicial Ethics: A Historical Perspective*, 131 YALE L.J.F. 190, 211 (2021). “Conservative judges have long been associated with the Federalist Society, while liberal-leaning judges have participated in [American Constitution Society] events.” *Id.* As the Honorable Judge McKeown of the United States Court of Appeals for the Ninth Circuit states: “Thankfully, judicial ethics permit participation in a wide range of civic, charitable, educational, religious, social and other activities. While judges’ primary undertaking is hearing and deciding cases, a judge need not live a monastic life isolated from society.” *Id.* at 213.

193. SUPREME COURT CODE OF CONDUCT, *supra* note 61, at Canon 2(C).

194. See generally Natasha A. Phillips, *The Beade Example: Enforcement*, 25 GEO. J. LEGAL

adopted its own ethical code, it needs to to take the next step to demonstrate how its decisions will be independent of the agenda of any outside groups by recognizing in its ethical code that such group affiliations can give the impression of outside influence.

3. Canon 3: A Justice “Should Perform the Duties of the Office Fairly, Impartially, and Diligently.”¹⁹⁵

This canon, as adopted by the Supreme Court in its ethical code, has two separate components and may represent the most significant effort by the Court to address public criticism of the Court for its apparent lack of independence and associations with those who may have matters before the Court.

Part A of Canon 3 (“Responsibilities”) sets for the Justices’ responsibilities to:

[N]ot be swayed by partisan interests, public clamor, or fear of criticism;

. . . [P]articipate in matters assigned, unless disqualified, and [to] maintain order and decorum in judicial proceedings;

. . . [B]e patient, dignified, respectful, and courteous to all individuals with whom the Justice deals in an official capacity;

. . . [N]ot engage in behavior that is harassing, abusive, prejudiced, or biased;

. . . [N]ot retaliate against those who report misconduct;

. . . [T]ake appropriate action upon receipt of reliable information indicating the likelihood of misconduct by a Court employee;

. . . [N]ot initiate, permit, or consider ex parte communications. . . .;

. . . [N]ot knowingly make public comment on the merits of a matter pending or impending in any court, [but] the prohibition on public

ETHICS 733, 734 (2012) (noting the opposition to Canon 2(C) because it would discipline judges for belonging to organizations that discriminated on the basis of race or sex).

195. JUDGE’S CODE OF CONDUCT, *supra* note 61, at Canon 3.

comment does not extend to public statements made in the court of the Justice’s official duties, [and] [f]or scholarly, informational, or educational purposes, a Justice may describe issues in a pending or impending case;

. . . [R]equire similar restraint by Court personnel¹⁹⁶

From the beginning, Canon 3(A) raises questions about the Court’s commitment to rise above “partisan interests, public clamor, or fear of criticism,” given that the selection process for the Justices is inherently political.¹⁹⁷ In reality, it is often partisan interests and public clamor that put a particular Justice on the bench.¹⁹⁸ There is no effort in the commentary to address this issue, and this is one of the code’s glaring deficiencies.

Part B of Canon 3 (“Disqualification”) addresses the issue of when the Justices should recuse themselves.¹⁹⁹ The provisions are lengthy and detailed, and the disqualification provision is the most likely to concern the Justices.²⁰⁰ And, as the Court notes, they are different from those in the code for other federal judges because, as the commentary discusses, recusal of a Justice on the Supreme Court has a greater impact than recusal of a lower court judge who can be replaced by another member of the Court.²⁰¹ As the Justices therein explain, “[t]he loss of even one Justice may undermine the ‘fruitful interchange of minds which is indispensable’ to the Court’s decision-making process.”²⁰² Moreover, the loss of one Justice’s vote is essentially a vote for the other side. The Court also notes that it might be difficult for the Court to know when there are grounds for recusals because of the number of petitions

196. SUPREME COURT CODE OF CONDUCT, *supra* note 61, at Canon 3(A).

197. See generally Michael A. Kahn, *The Appointment of a Supreme Court Justice: A Political Process from Beginning to End*, 25 PRESIDENTIAL STUD. Q. 25, 25–37 (1995) (examining the history of the process of appointing Supreme Court Justices and demonstrating how normal and predictable it is that Justices are selected or rejected based on political affiliations).

198. See *id.* at 35 (discussing the use of vacancies on the Court as “a spoil of partisan politics,” and noting that “Presidents realize that their most enduring legacy may be the decisions of the lifetime Justices they appoint.”).

199. SUPREME COURT CODE OF CONDUCT, *supra* note 61, at Canon 3(B).

200. *Id.* at 2–4; see also Letter from Chief Justice Roberts, *supra* note 8 and accompanying text (explaining why recusal standards for Supreme Court Justices may differ due to the Court’s unique institutional setting).

201. See SUPREME COURT CODE OF CONDUCT, *supra* note 61, at 10.

202. *Id.* at 10 (quoting *Dick v. N.Y. Life Ins. Co.*, 359 U.S. 437, 459 (1959) (Frankfurter, J. dissenting)).

and amicus briefs it receives each year and the Court’s reliance on disclosure statements.²⁰³ While all this may be true, recent criticism of the Court focuses more on the fact that it is the individual Justices, rather than the Court, that decide recusal issues.²⁰⁴ In other words, individual Justices have the last word on whether that Justice may be perceived as having a personal bias in the case. This is one of the major problems with the new code. Essentially, it leaves it up to the individual Justice to decide whether his or her impartiality might reasonably be questioned. Such a protocol fails to provide safeguards against the very problem that the code should be addressing: Do the Justices have enough insight (and humility) to appreciate how their conduct or statements could create the appearance of bias? The adopted “code” offers no explanation why the Court cannot adopt a process by which other members of the Court would have input into the decision of when Justices should recuse themselves.

The third canon also provides that “[t]he rule of necessity may override the rule of disqualification.”²⁰⁵ As drafted, the new rules are unlikely to assuage those who have been concerned about the reluctance of Justices to recuse themselves even when they have had interactions with individuals who may have a stake in their decisions.

The Justices must guard against those who might use filings such as amicus briefs to bring about grounds for their recusal,²⁰⁶ but simultaneously remain willing to recuse themselves when their professional and personal associations create a reasonable basis to question their impartiality.²⁰⁷ Not having any mechanism to interpret and enforce these rules creates a greater likelihood that the new code will fail to cure the pervasive problem that faces the Court—people’s belief that the Justices do not always act in an impartial manner.

203. *See id.* at 11.

204. *See* Michael Broyde, *Let Judges Review Supreme Court Justices’ Recusal Decisions*, BLOOMBERG L. (June 1, 2023, 1:00 AM), <https://news.bloomberglaw.com/us-law-week/let-judges-review-supreme-court-justices-recusal-decisions> (arguing that despite the Court being “less effective when less than the full nine hear a matter . . . the [C]ourt’s critics are also correct that allowing [J]ustices to decide these matters for themselves ought to be viewed skeptically—especially given the current divisive political moment”).

205. SUPREME COURT CODE OF CONDUCT, *supra* note 61, at Canon 3(B)(3).

206. *Id.* at 11. The commentary to the code expressly states that “[i]n light of the Court’s permissive amicus practice, amici and their counsel will not be a basis for an individual Justice to recuse.” *Id.*

207. *Id.* at Canon 3(B)(2).

4. Canon 4: A Justice “May Engage in Extrajudicial Activities That Are Consistent with the Obligations of Judicial Office.”²⁰⁸

As with the U.S. Code of Conduct, the Justices adopted an ethical code that does not tie their hands from speaking, lecturing, or participating in other activities concerning the law, the legal system, and the administration of justice.²⁰⁹ Additionally, “a Justice should not participate in extrajudicial activities that detract from the dignity of the Justice’s office, interfere with the performance of the Justice’s official duties, reflect adversely on the Justice’s impartiality, lead to frequent disqualification, or violate the limitations [in the rules].”²¹⁰

This canon raises issues that are likely to create questions as the code is applied. First, the new rules state that “[a] Justice should not speak at an event sponsored by or associated with a political party or a campaign for political office.”²¹¹ The phrase “associated with” may not be specific enough given how politicized our society has become. Certain groups, such as the Koch Network and the Federalist Society, have sponsored events that are generally viewed as “associated with” the agenda of a particular political party.²¹² Will the Justices now refrain from speaking at those events? The recusal rules are also vague when it comes to speaking before other groups. Canon A(1)(e) counsels the Justices to consider whether speaking to a group “would create an appearance of impropriety in the minds of reasonable members of the public.”²¹³ The Justice is the sole arbiter of whether a reasonable member of the public might be concerned about the Justice’s conduct. As such, this provision really provides little to no restriction on each Justice’s actions. And,

208. JUDGE’S CODE OF CONDUCT, *supra* note 61, at Canon 4.

209. SUPREME COURT CODE OF CONDUCT, *supra* note 61, at Canon 4(A)(1) (“*Speaking, Writing, and Teaching.* A Justice may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, or the administration of justice . . .”).

210. *Id.*

211. *Id.*

212. See Joshua Kaplan et al., *Clarence Thomas Secretly Participated in Koch Network Donor Events*, PROPUBLICA (Sept. 22, 2023, 5:00 AM), <https://www.propublica.org/article/clarence-thomas-secretly-attended-koch-brothers-donor-events-scotus> (detailing Justice Thomas’s presence at a private dinner for the network’s donors); Jacqueline Thomsen, *Standing Ovations for Conservative U.S. Justices at Federalist Society Event*, REUTERS (Nov. 11, 2022, 7:16 AM), <https://www.reuters.com/world/us/standing-ovations-conservative-us-justices-federalist-society-event-2022-11-11/> (explaining that several Justices have spoken at meetings of the Federalist Society, an organization with particular influence in Republican circles).

213. SUPREME COURT CODE OF CONDUCT, *supra* note 61, at Canon 4(A)(1)(e).

curiously, the new code’s commentary does not provide examples or more guidance in on the very provisions that are likely to be problematic, even though it contains commentary regarding various other provisions such as those regarding financial investments.²¹⁴

Second, one of the more significant recent controversies regarding the Court has been the receipt of gifts by Justices.²¹⁵ The new code provides in Canon 4(D)(3) that “[a] Justice should comply with the restrictions on acceptance of gifts and the prohibition on solicitation of gifts set forth in the Judicial Conference Regulations on Gifts now in effect.”²¹⁶ This rule applies to gifts to the Justices’ family members, a group that broadly includes “any person treated by a Justice as a member of the Justice’s family.”²¹⁷ The commentary does not explain when a person is “treated by a Justice as a member” of the family and, based upon recent events, Justices appear to have different interpretations of such a provision.

5. Canon 5: A Justice “Should Refrain from Political Activity.”²¹⁸

The appointment of Justices may be political, but once those Justices take the bench, their political activity should stop.²¹⁹ The provision adopted by the Court has the usual restrictions prohibiting Justices from holding political office, making speeches, formally endorsing a candidate, or soliciting funds for a political organization or candidate.²²⁰ It also bars a Justice from becoming a candidate for political office.²²¹ However, there is a catch-all sentence that leaves open many questions. The code says that “[a] Justice shall not engage in other political activity.”²²² Would this cover, for example, the Justice spending private time with individuals who are known to be major political

214. *Id.* at Canon 4(D).

215. See Abbie VanSickle & Adam Liptak, *Supreme Court Adopts Ethics Code After Reports of Undisclosed Gifts and Travel*, N.Y. TIMES (Nov. 13, 2023), <https://www.nytimes.com/2023/11/13/us/politics/supreme-court-ethics-code.html?auth=login-google1tap&login=google1tap>. Indeed, the reports of undisclosed gifts and travel were likely the main impetus for the Court to adopt its new ethics code. *Id.*

216. SUPREME COURT CODE OF CONDUCT, *supra* note 61, at Canon 4(D)(3).

217. *Id.*

218. JUDGE’S CODE OF CONDUCT, *supra* note 61, at Canon 5.

219. *Id.*

220. SUPREME COURT CODE OF CONDUCT, *supra* note 61, at Canon 5.

221. *Id.*

222. *Id.*

supporters? If not, why not? Political activity does not just occur at formal meetings or rallies. Politics happens in private meetings and engagements. Those situations in particular raise grave concerns as applied to members of the current Court.

Before the new code was adopted, Justice Elena Kagan was quoted as remarking that a code ““would go far in persuading other people that we are adhering to the highest standards of conduct.””²²³ Of course, she was correct. Adopting the code was a step in the right direction, but the code adopted certainly does not address all concerns regarding the Justices’ conduct. There are additional questions still to be answered.

B. Question 2: What Kind of Ethical Code Should the Court Have Adopted?

Before its release, the obvious answer to what kind of ethical code the Court should adopt was one that mirrored that of lower court judges.²²⁴ There were many resources available to the Justices as they drafted their code,²²⁵ including codes adopted by judges in other countries.²²⁶ There were also decisions by the ABA Standing Committee on Ethics and Professional Responsibility that specifically addressed issues of recusal and considerations attendant to those decisions.²²⁷

The imperative was to adopt a code that would increase public confidence

223. See Kimberly Strawbridge Robinson, *Kagan Hopeful for Supreme Court Code Amid Ethics Allegations*, BLOOMBERG L. (Sept. 22, 2023, 1:29 PM), <https://news.bloomberglaw.com/us-law-week/kagan-hopeful-for-supreme-court-code-amid-ethics-allegations> (quoting remarks Justice Kagan made during a visit to Notre Dame Law School).

224. See Judge Jeremy Fogel & Noah Bookbinder, *Building Public Confidence: How the Supreme Court Can Demonstrate Its Commitment to the Highest Ethical Standards*, CREW (Aug. 9, 2023), <https://www.citizensforethics.org/reports-investigations/crew-reports/building-public-confidence-how-the-supreme-court-can-demonstrate-its-commitment-to-the-highest-ethical-standards/> (discussing the evolution of the nation’s judicial ethics framework).

225. See *Judicial Ethics*, JUDICIARIES WORLDWIDE: A RESOURCE ON COMP. JUD. PRAC., <https://judiciariesworldwide.fjc.gov/judicial-ethics> (last visited Feb. 28, 2024).

226. See *Judicial Ethics: Developments, Challenges, and Solutions. Moldova’s Experience in Enforcing Ethics Standards for Judges*, COUNCIL EUR. (last visited Nov. 4, 2023), https://www.coe.int/t/dghl/cooperation/lisbonnetwork/Themis/Ethics/Paper1_en.asp (gathering judicial ethics codes adopted in countries across the world).

227. See, e.g., ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 488 at 1 (2019) (interpreting Rule 2.11 of the Model Code of Judicial Conduct and “address[ing] judges’ obligation to disqualify themselves in proceedings in which they have social or close personal relationships with the lawyers or parties”).

in the Court’s work.²²⁸ Yet, the code adopted by the Court falls short of that mark for one primary reason—it has no enforcement mechanism. At best, it sets forth aspirational standards for Justices, but leaves to each individual Justice to decide whether his or her conduct meets ethical standards. This is particularly problematic for those standards which, as discussed above, provide vague guidance regarding when a Justice’s behavior will be problematic.

C. *Question 3: How Should a Judicial Code Be Enforced?*

Much of the criticism regarding the code adopted by the Court focuses on what will be the best way to enforce the Code’s provisions.²²⁹ Even before the code was adopted, Justice Alito made comments to the *Wall Street Journal* that Congress and others lack the power to force the Justices to adopt ethical rules.²³⁰ Those very comments led to a complaint that the Justice was violating his ethical obligations by commenting on an issue that may come before the Court.²³¹

There are several ways to make the code more effective than it currently

228. *See supra* notes 225–227 and accompanying text (noting how the Justices already had several resources available to them, including international and ABA models).

229. *See* Kimberly Strawbridge Robinson, *Congress Can’t Force Ethics Code on Supreme Court*, BLOOMBERG L. (July 28, 2023), <https://news.bloomberglaw.com/us-law-week/congress-cant-force-ethics-code-on-supreme-court-alito-says>. Although the Senate Judiciary Committee has approved legislation requiring the Justices to adopt a code of conduct, Justice Alito has explicitly rebutted this presumption, arguing that “[n]o provision in the Constitution gives them the authority to regulate the Supreme Court,” and Chief Justice Roberts has also expressed doubts on the enforceability of an ethical code, thus reflecting the controversy over who may impose a code of ethics on the Court. *Id.*

230. *See* David B. Rivkin, Jr. & James Taranto, *Samuel Alito, the Supreme Court’s Plain-Spoken Defender*, WALL STREET J. (July 28, 2023 1:57PM), <https://wsj.com/articles/samuel-alito-the-supreme-courts-plain-spoken-defender-precedent-ethics-originalism-5e3e9a7> (“‘Congress did not create the Supreme Court’—the Constitution did. ‘I know this is a controversial view, but I’m willing to say it,’ he says. ‘No provision in the Constitution gives them the authority to regulate the Supreme Court—period.’”).

231. *See* Letter from U.S. Senator Sheldon Whitehouse, Chairman of Senate Judiciary Subcomm. on Fed. Courts, Oversight, Agency Action, and Fed. Rights, to Chief Justice John G. Roberts of the U.S. Supreme Court (Sept. 4, 2023), <https://thehill.com/wp-content/uploads/sites/2/2023/09/2023-09-04-Complaint-from-Sen.-Whitehouse-Enclosure.pdf> (“Justice Alito’s comments echoed legal arguments made to block information requests from the Senate Judiciary Committee and the Senate Finance Committee, on both of which I serve. Those arguments assert (in my view wrongly) that our constitutional separation of powers blocks any congressional action in this area, which in turn is asserted (also wrongly, in my view) to block any congressional investigation. Sound or unsound, it is their argument against our investigations, as reflected in the letter appended hereto. The subjects of these committee investigations are matters relating to dozens of unreported gifts donated to justices of the Supreme Court.”).

appears to be. One modest suggestion is for the Court to establish a complaint process and designate Justices, or separate judges, to evaluate those complaints.²³² In other words, the enforcement of any of the code’s provisions would remain the same—it would be up to the Justices—but it would not be up to the individual Justice who is under scrutiny for an alleged violation of the code. Rather, the Court would commit to a process to have fellow Justices, a group of experts, or even other members of the judiciary, examine the conduct of the Justices.²³³ This, of course, requires a certain humility in itself, but it is the type of humility that will ultimately make the Court more credible as an institution that is willing to set standards and evaluate its members’ compliance with them.

Another improvement would be for the Court to publicly report on ethical complaints that are raised and how they are resolved. Increasing transparency could help increase confidence in the Court’s commitment to the ethical provisions it claims to have adopted. Finally, even if it is true that no one can force the Court to adopt a specific mechanism to enforce the ethical code, that does not mean the Justices operate independently from other branches of government. Congress has power over the purse strings of the Court and may have other ways to monitor its behavior, such as increased hearings regarding

232. See Sahil Kapur & Lawrence Hurley, *Key Senate Committee Advances Supreme Court Ethics Bill*, NBC NEWS (July 20, 2023), <https://www.nbcnews.com/politics/supreme-court/key-senate-committee-advances-supreme-court-ethics-bill-rcna95171>. A pending bill in the U.S. Senate, the Supreme Court Ethics, Recusal, and Transparency Act (S. 359), “would give the Court 180 days to adopt and publish a code of conduct and allow the public to submit ethics complaints that a randomly selected panel of lower court judges would review.” *Id.* It would establish new rules for disclosing gifts and travel. *Id.*; see also Cassens Weiss, *supra* note 11 (offering the following proposals for an ethics review system: (1) designating randomly selected panels of federal judges to investigate complaints; (2) creating a professional, permanent investigative officer with the powers of an inspector general; (3) having the Chief Justice designate a panel of retired judges to consider ethics complaints and recusal motions).

233. See Alexander Bolton, *Senate Judiciary Panel Advances Supreme Court Ethics Reform Bill*, THE HILL (July 20, 2023, 1:03 PM), <https://thehill.com/homenews/senate/4108246-senate-judiciary-panel-advances-supreme-court-ethics-reform-bill/> (noting that the proposed Supreme Court ethics bill “would require justices to adopt a code of conduct and create a transparent process for members of the public to submit ethics complaints against members of the court,” thus allowing the Justices’ conduct to be scrutinized; see also Erwin Chemerinsky, *Opinion: The Supreme Court Finally Has a Code of Ethics, but It Has a Fatal Flaw* (Nov. 14, 2023, 3:03 PM), <https://www.latimes.com/opinion/story/2023-11-14/supreme-court-justices-recusal-code-of-ethics>. Dean Erwin Chemerinsky has suggested two ways to take the decision out of the hands of the individual Justice: (1) Appointment by the Chief Justice of retired appeals court judges to decide recusal questions; or (2) a procedure in which a Justice’s eight colleagues would decide whether recusal is necessary. *Id.*

the operations of the Court.²³⁴

V. CONCLUSION

Pride can be an obstacle to accomplishing one’s goal. The presumptive goal of the Justices is to apply the law fairly and have their decisions accepted as legitimate by both the litigants and the broader public.²³⁵ If, indeed, that is the goal of the members of the Court, then the Court should continue to strive for ways to improve the ethical code it has promulgated.²³⁶ Creating mechanisms to ensure that Justices are humble and aware enough to take responsibility for their actions would stave off a current avenue of attack on the Court. If the Court does not choose this path, it risks being accused of acting as if it is above the law.²³⁷ History has shown that acts of humility have saved the Court from more extreme measures, such as when a pair of Justices embraced judicial humility after President Franklin D. Roosevelt threatened to pack the Court.²³⁸

You do not need to be religious to understand the importance of humility.

234. See Frost, *supra* note 170, at 459 (noting that in addition to Congress’s power of the purse, Congress has maintained control over the judiciary through legislation in “most of the areas over which it initially assumed authority in 1789,” including “the size of the Court, quorum requirements, dates of the Court’s sessions, and oath of office”).

235. See Mary Ramsey, *Justice Amy Coney Barrett Argues US Supreme Court Isn’t ‘a Bunch of Partisan Hacks’*, COURIER J., <https://www.courier-journal.com/story/news/politics/mitch-mccconnell/2021/09/12/justice-amy-coney-barrett-supreme-court-decisions-arent-political/8310849002/> (last updated Sept. 13, 2021) (“My goal today is to convince you that this court is not comprised of a bunch of partisan hacks.”).

236. SUPREME COURT CODE OF CONDUCT, *supra* note 61, at 14. The Court seems to recognize this need by stating in the code’s commentary that it is directing court officers “to undertake an examination of best practices, drawing in part on the experience of other federal and state courts.” *Id.*

237. See Jim Jones, *Is the Supreme Court Really Above the Law, Justice Alito?*, THE HILL (Aug. 08, 2023, 11:30 AM), <https://thehill.com/opinion/judiciary/4140316-is-the-supreme-court-reallyabove-the-law-justice-alito/>. Justice Alito’s response to demands by congressional Democrats for tougher ethical rules that “[n]o provision in the Constitution gives [Congress] the authority to regulate the Supreme Court” has led to criticism: “It is apparently [Justice Alito’s] considered position that SCOTUS is above the law.” *Id.*

238. See *Supreme Hubris: A Conversation with Aaron Tang*, YALE U. PRESS (Aug. 28, 2023), <https://yalebooks.yale.edu/2023/08/28/supreme-hubris-a-conversation-with-aaron-tang/> (“Recognizing the role that overconfidence has played points up another path forward: unrealized *threats* to pack the Court can pressure the justices into adopting a humbler approach to hard cases. Indeed, that is exactly how the Court saved itself from another legitimacy crisis in 1937, when a pair of justices embraced judicial humility after FDR threatened to pack the Court.”).

Research has shown that “[t]he best leaders are humble leaders.”²³⁹ They build their greatness on their willingness to be guided by principles and not personal interest.²⁴⁰ Humility is best understood as a virtue based on “awareness of and responsibility to others.”²⁴¹ An ethical code that has a mechanism for accountability would help demonstrate the Justices’ dedication to this role. Without an enforceable code, questions will persist about whether the Justices are really committed to principles of fair and objective decision-making.

All the Justices take an oath to faithfully and impartially discharge their duties.²⁴² An ethical code needs to both spell out how the Justices interpret that responsibility and demonstrate their willingness to have a mechanism that ensures they comply with its provisions. Such a code will also better serve to deter the Justices from engaging in conduct that might call their commitment to impartial justice into question. Whether it be to impress on the Justices themselves their ethical duties, or on those who would attempt to influence them, an ethical code provides guardrails for the Court. At a time when its credibility is sinking, a robust code could be just the life preserver that it—and the public—needs.

239. Jeanine Prime & Elizabeth Salib, *The Best Leaders are Humble Leaders*, HARV. BUS. REV. (May 12, 2014), <https://hbr.org/2014/05/the-best-leaders-are-humble-leaders> (“Inclusive leaders are humble enough to suspend their own agendas and beliefs. In so doing, they not only enhance their own learning but they validate followers’ unique perspectives.”).

240. See Hubert Joly, *5 Principles of Purposeful Leadership*, HARV. BUS. REV. (Apr. 6, 2022), <https://hbr.org/2022/04/5-principles-of-purposeful-leadership> (suggesting that one of the five pillars of good leadership is understanding that you are not there to serve your own personal interests).

241. Benjamin L. Berger, *What Humility Isn’t: Responsibility and the Judicial Role*, in CANADA’S CHIEF JUSTICE: BEVERLY MCLACHLIN’S LEGACY OF LAW AND LEADERSHIP (Daniel Jutras & Marcus Moore, eds., 2018).

242. See *Oaths of Office*, SUP. CUT. UNITED STATES, <https://www.supremecourt.gov/about/oath/textoftheoathsofoffice08-10-2009.pdf> (last updated Aug. 10, 2009) (“Justices of the Supreme Court of the United States are required to take two oaths before they may execute the duties of their appointed office.”).