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Essay

Judicial Ethics, the Supreme Court, and the Rule of Law

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This Essay begins with a short history of judicial ethics regulation in the United States, ending with the adoption of codes of conduct by every state and federal judicial system except the Supreme Court of the United States. It then turns to a series of ethics controversies encircling the Supreme Court and its justices, which culmainated in the Supreme Court adopting a Code of Conduct in 2023. Tapping into the social science literature, it argues that for codes to improve the ethical climate of an institution they must encourage psychological ownership of and "buy-in" to a code by those subject to its terms, which the Suprme Court of The United States Code has failed to do, as evidenced by the Court's resistance to adopting a Code and its efforts to dilute Code obligations. The Essay then proposes several reforms that the Court could implement over time, in a "business as usual," world to better acclimate itself to the code culture that other judicial systems have embraced. It concludes, however, by arguing that beginning in 2025, the second Trump administration has stress-tested the rule of law in ways that have forced the Supreme Court into confrontations with the President that threaten the Court's legitimacy in unprecedented ways and add urgency to the need for the Court to ensure that its ethics are above reproach.

ESSAY CONTENTS

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CHARLES GARDNER GEYH*

INTRODUCTION

It's a great time to be alive for a judicial ethicist. There aren't very many of us. We tend to tag along in the shadow of the lawyer ethics people—the cool kids in the schoolyard. Pimply and off-putting though we may be, we have a particular set of skills that, thanks to the Supreme Court and its recent shenanigans, have suddenly acquired relevance as judicial misconduct has been thrust into the national spotlight. So don't step on my moment. I want to make the most of it.

Part of the reason judicial ethics has been marginalized is that it is typically framed as a hyper-specialized subfield that brings arcane rules to bear for the limited purpose of deciding whether judge *x* violated rule *y* when she did *z*. But I'm going to swing for the fences here and argue that judicial ethics implicates much more than that. It provides us with a framework for thinking about the role judges play in a democratic republic. At a time when the Supreme Court's legitimacy is in a tailspin,[1] judicial ethics offers insights into why—and an avenue for reform.

I'm going to begin with a short history of judicial ethics regulation, ending in 2011, when the Court declined overtures to adopt a code for itself. Second, I'll summarize ensuing ethics controversies involving Supreme Court justices—controversies that elicited mounting criticism and calls for the adoption of a code that the Court ultimately heeded in 2023. Third, I'll explore what social science tells us about when codes of conduct work and when they don't. Fourth, in light of that social science literature, I'll explain why the Supreme Court's new Code and the circumstances under which it was adopted do not bode well for its success in promoting a more ethical climate on the Court. Fifth, I will offer some modest, business-as-usual recommendations, on how, over time, the Supreme Court can join the rest of the American judiciary in embracing a code culture. Sixth, and finally, I will talk about the relationship between the Court's ethical lapses and its

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[1] Charles Gardner Geyh, *To Legitimacy and Beyond: A Reform Agenda to Restore Public Confidence in the Federal Courts*, 87 L. & CONTEMP. PROBS. 1, 18 (2024).

declining legitimacy before turning to the circumstances of the second Trump administration and discussing why the need for reform becomes more urgent in a world on fire.

I. A SHORT HISTORY OF ETHICS REGULATION

First, a bit of history. Codes of judicial conduct are of comparatively recent vintage. Although Sir Matthew Hale developed one for his own use in the seventeenth century,[2] they are pretty much a twentieth century innovation. The story begins, improbably enough, with the Chicago White Sox, who threw the 1919 World Series that led Major League Baseball to hire its first commissioner.[3] It recruited a federal district judge with a name that sounds like it was taken from a Dickens novel: Kennesaw Mountain Landis.[4] Trouble was, Landis became commissioner without resigning his judgeship. Congress explored the possibility of impeaching him but was unsure whether moonlighting was an impeachable high crime or misdemeanor.[5] Even if Landis's conduct did not rise to the level of an impeachable offense, however, there was a consensus within the legal profession that his conduct was less than good.[6] To better articulate the norms of good and bad judicial conduct, the American Bar Association (ABA) appointed Chief Justice William Howard Taft to chair a commission that promulgated the Canons of Judicial Ethics in 1924.[7]

In the decades that followed, most state supreme courts adopted the Canons of Judicial Ethics, but they were, by design, a collection of vaguely worded platitudes. In the 1960s, the states began to establish commissions equipped with the authority to discipline judges for misconduct—commissions that needed more specific standards for imposing discipline than the canons supplied.[8] Push came to shove later that decade as ethics controversies encircled the Supreme Court: President Johnson withdrew his nomination of Abe Fortas to be Chief Justice following allegations of ethical

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[2] Matthew Hale, *Things Necessary to be Continually Had in Remembrance*, *reprinted in* LORD CAMPBELL, 2 THE LIVES OF THE CHIEF JUSTICES OF ENGLAND 208–09 (1874).

[3] *Black Sox Scandal*, BRITANNICA, https://www.britannica.com/event/Black-Sox-Scandal (last updated July 29, 2025).

[4] *The Man Who Rescued Baseball*, N.Y. TIMES ARCHIVES (Nov. 12, 1920), https://archive.nytimes.com/www.nytimes.com/packages/html/sports/year_in_sports/11.12.html.

[5] *See* H.R. REP. NO. 66-1407, at 1, 3 (1921) ("No violation of any law has been called to the attention of the committee, nor is it claimed that the judge is guilty of any act that would establish moral turpitude.").

[6] CANONS OF JUDICIAL ETHICS 761, 761 (AM. BAR ASS'N 1924).

[7] *See* JOHN P. MACKENZIE, THE APPEARANCE OF JUSTICE 182–83 (1974) (explaining the logic behind the appointment of Taft); CANONS OF PROFESSIONAL AND JUDICIAL ETHICS 761, 761 (AM. BAR ASS'N 1924).

[8] Robert J. Martineau, *Enforcement of the Code of Judicial Conduct*, 1972 UTAH L. REV. 410, 411 (1972).

improprieties during Fortas's tenure as Associate Justice;[9] Congressman Gerald Ford sought to impeach Justice William O. Douglas for presiding over cases in which he had conflicts of interest;[10] and the Senate rejected President Nixon's nomination of Judge Clement Haynsworth to the Supreme Court, in part because Judge Haynsworth had presided over cases in which he too was allegedly conflicted.[11] And so the ABA convened another commission, which issued a Code of Judicial Conduct in 1972.[12] Like the old canons, the 1972 Code sought to inspire and guide, but it supplied more specific do's and do not's that were intended to operate as rules for emerging state judicial conduct commissions to enforce against judges in disciplinary proceedings.[13]

In 1973, the Judicial Conference of the United States—a group of federal judges who oversee the circuit and district courts but have no regulatory authority over the Supreme Court—adopted a variation of the ABA's 1972 Code for judges in the lower federal courts.[14] In 1974, Congress amended the federal disqualification statute (which applies to federal judges at all levels) to incorporate disqualification provisions from the 1972 ABA Code, thereby binding Supreme Court justices to its terms.[15]

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[9] Andrew Glass, *Abe Fortas Resigns from Supreme Court, May 15, 1969*, POLITICO (May 14, 2017, 11:43 PM), https://www.politico.com/story/2017/05/14/abe-fortas-resigns-from-supreme-court-may-15-1969-238228; Ciara Torres-Spelliscy, *The Cautionary Tale of Abe Fortas*, BRENNAN CTR. FOR JUST. (Feb. 6, 2018), https://www.brennancenter.org/our-work/analysis-opinion/cautionary-tale-abe-fortas; *Filibuster Derails Supreme Court Appointment*, U.S. SENATE (Oct. 1, 1968) https://www.senate.gov/about/powers-procedures/nominations/filibuster-derails-supreme-court-appointment.htm (last visited Aug. 9, 2025).

[10] Will Fassuliotis, *Impeachment Stories: Congressman Gerald Ford's Attempt to Remove Justice William O. Douglas*, VA. L. WKLY. (Apr. 11, 2019), https://www.lawweekly.org/col/2019/4/11/impeachment-stories-congressman-gerald-fords-attempt-to-remove-justice-william-o-douglas.

[11] *See* Barbara Maranzani, *6 Supreme Court Nomination Battles*, HISTORY (May 28, 2025), https://www.history.com/news/a-brief-history-of-supreme-court-battles (noting that several high-ranking Republican senators joined Democrats to reject his nomination after he had earlier ruled in favor of a vending machine business in which he had stake); *Clement F. Haynsworth Jr.; Judge Was Rejected as 1969 Supreme Court Choice*, L.A. TIMES ARCHIVES (Nov. 23, 1989, 12:00 AM), https://www.latimes.com/archives/la-xpm-1989-11-23-mn-3-story.html ("The most damaging [allegati on] centered on his participation in a case involving a company that did extensive business with another company in which he owned a one-seventh interest.").

[12] MODEL CODE OF JUD. CONDUCT: PREFACE, (AM. BAR ASS'N 2020).

[13] *Id.* ("The canons and text establish mandatory standards unless otherwise indicated"); *See also* Martineau, *supra* note 8, at 411 ("Even in those jurisdictions that have not accepted the Canons as binding rules, the Canons have been given the status of guidelines or have been used as frames of reference in rendering advisory opinions on judicial conduct.").

[14] Scott Bomboy, *Why the Supreme Court Isn't Compelled to Follow a Conduct Code*, NAT'L CONST. CTR. (July 15, 2016), https://constitutioncenter.org/blog/why-the-supreme-court-isnt-compelled-to-follow-a-conduct-code.

[15] Act of Dec. 5, 1974, Pub. L. No. 93-512, § 455, 88 Stat. 1609, 1609–10; Act of June 25, 1948, Pub. L. No. 80-773, § 455, 62 Stat. 869, 908 (1948) (codified as amended at 28 U.S.C § 455 (2006)) (including "[a]ny justice or judge of the United States" in recusal requirements). Part of the impetus for the 1948 changes to include the Supreme Court was criticism of Justice Black's participation in cases his former law partner argued before the Court. *See, e.g.*, John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 607, 612 (1947) ("The Jackson charge raises a substantial issue of whether judges should disqualify themselves in cases presented by former partners.").

In 1990, the ABA overhauled its Model Code and did so again in 2007.[16] In 2008, Montana became the last state to adopt some variation of the ABA model.[17] Ironically, concern over the ethical misconduct of U.S. Supreme Court justices and nominees inspired a movement culminating in the adoption of codes of conduct everywhere except the U.S. Supreme Court. In 2011—as pressure mounted for the Supreme Court to adopt its own Code of Conduct—Chief Justice Roberts devoted his annual report on the federal judiciary to the subject, concluding that it was unnecessary for the Court to adopt a code because its justices already consulted the Code of Conduct for United States Judges, which the Judicial Conference had adopted for the lower federal courts.[18]

II. SUPREME COURT ETHICS CONTROVERSIES

In the years that followed, members of the Court were repeatedly accused of violating the Code of Conduct for United States Judges that Chief Justice Roberts had claimed the Court consulted. In 2016, Justice Ginsburg harshly criticized then-presidential-candidate Donald Trump, called him a "faker," and said that her husband would have wanted them to move to New Zealand if Trump became president.[19] Such statements appeared to violate Canon 5A(2) of the lower court Code, which provides that "[a] judge should not . . . publicly endorse or oppose a candidate for public office."[20]

In 2022, Justice Thomas did not disqualify himself from a case in which he cast the lone dissent from a Supreme Court order authorizing a congressional committee investigating the January 6, 2021, insurrection to subpoena Trump administration records—records that included correspondence from Thomas's spouse.[21] Canon 3C of the lower court Code (and the federal disqualification statute) calls for a judge to disqualify himself when the judge knows that his spouse has "an interest that could be substantially affected by the outcome of the proceeding."[22]

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[16] CHARLES E.[SIC] GEYH & W. WILLIAM HODES, REPORTERS' NOTES TO THE MODEL CODE OF JUDICIAL CONDUCT at viii–ix (2009).

[17] CHARLES GARDNER GEYH, JAMES J. ALFINI & JAMES SAMPLE, JUDICIAL CONDUCT AND ETHICS § 1.03, 1-6 to -7 (6th ed. 2020).

[18] 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY, U.S. SUPREME CT. 1, 4–5 (2011), http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf.

[19] Joan Biskupic, *Justice Ruth Bader Ginsburg Calls Trump a 'Faker,' He Says She Should Resign*, CNN (July 13, 2016, 7:45 AM), https://www.cnn.com/2016/07/12/politics/justice-ruth-bader-ginsburg-donald-trump-faker; *Ruth Bader Ginsburg: If Trump Wins, Time to Move to New Zealand*, THE HILL (July 10, 2016, 7:16 PM), https://thehill.com/homenews/287179-ruth-bader-ginsburg-if-trump-wins-time-to-move-to-new-zealand.

[20] CODE OF CONDUCT FOR U.S. JUDGES, Canon 5A(2), *in* U.S. CTS., GUIDE TO JUDICIARY POLICY, vol. 2A, ch. 2 (2019).

[21] Jacqueline Alemany, Josh Dawsey & Emma Brown, *Ginni Thomas Corresponded with John Eastman, Sources in Jan. 6 House Investigation Say*, WASH. POST (June 15, 2022), https://www.washingtonpost.com/national-security/2022/06/15/ginni-thomas-john-eastman-emails.

[22] CODE OF CONDUCT FOR U.S. JUDGES, Canon 3C(1)(d)(iii), *in* U.S. CTS., GUIDE TO JUDICIARY POLICY, vol. 2A, ch. 2 (2019).

In 2024, Justice Alito declined to recuse himself from a case addressing Donald Trump's immunity from criminal prosecution, following reports that pro-Trump flags were flown above two of Justice Alito's houses after Trump lost the 2020 election.[23] Justice Alito explained that he acquiesced to his wife's desire to fly the flags.[24] But the Code of Conduct and the federal disqualification statute require judges to recuse when their "impartiality might reasonably be questioned."[25] To the extent that a reasonable person fully informed of the circumstances would suspect that Justice Alito was complicit in this show of political support for President Trump, it would seem to cast doubt on his impartiality to decide whether Trump was immune from prosecution for his post-election conduct.

During Justice Kavanaugh's confirmation proceedings in 2018, a witness testified that Kavanaugh had sexually assaulted her in high school.[26] When Justice Kavanaugh took the stand, he went on a partisan tirade, accusing his opponents of exacting "revenge on behalf of the Clintons" by participating in an "orchestrated political hit."[27] Code of Conduct Canon 2A provides that "[a] judge should . . . act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."[28] Over 2,400 law professors signed a statement opposing Justice Kavanaugh's confirmation on the grounds that his testimony displayed a lack of impartial temperament.[29] A flurry of disciplinary complaints followed, which the circuit judicial council characterized as "serious," but dismissed for lack of jurisdiction after he was confirmed to the Supreme Court.[30]

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[23] Amy Howe, *Alito Rejects Calls to Recuse from Trump, Jan. 6 Cases in Light of Flag Controversies*, SCOTUSBLOG, https://www.scotusblog.com/2024/05/alito-reject-calls-to-recuse-from-trump-jan-6-cases-in-light-of-flag-controversies (last updated May 30, 2024, 4:20 PM).

[24] *Id.*

[25] CODE OF CONDUCT FOR U.S. JUDGES, Canon 3C(1), *in* U.S. CTS., GUIDE TO JUDICIARY POLICY, vol. 2A, ch. 2 (2019); 28 U.S.C. § 455(a).

[26] Emily Stewart, *Support for Brett Kavanaugh is Dwindling Among Voters Amid Sexual Assault Allegations*, VOX (Sept. 23, 2018, 10:43 AM), https://www.vox.com/policy-and-politics/2018/9/23/17892530/brett-kavanaugh-confirmation-poll-christine-blasey-ford (discussing opposition to Kavanaugh's appointment due to sexual assault allegations).

[27] Lisa Mascaro, *Kavanaugh's 'Revenge' Theory Spotlights Past with Clintons*, AP NEWS (Oct. 3, 2018, 11:37 AM), https://apnews.com/article/donald-trump-ap-top-news-supreme-courts-sexual-misconduct-north-america-50fc0c4a19574060a3d38a4525a573fc.

[28] CODE OF CONDUCT FOR U.S. JUDGES, Canon 2A, *in* U.S. CTS., GUIDE TO JUDICIARY POLICY, vol. 2A, ch. 2 (2019).

[29] *See* Opinion, *The Senate Should Not Confirm Kavanaugh: Signed, 2,400+ Law Professors*, N.Y. TIMES (Oct. 3, 2018), https://www.nytimes.com/interactive/2018/10/03/opinion/kavanaugh-law-professors-letter.html ("We have differing views about the other qualifications of Judge Kavanaugh. But we are united, as professors of law and scholars of judicial institutions, in believing that he did not display the impartiality and judicial temperament requisite to sit on the highest court of our land."). I was among the signatories on the letter. *Id.*

[30] *See In re: Complaints Under the Judicial Conduct and Disability Act*, 9 (10TH CIR. JUD. COUNCIL, COUNS., Dec. 18, 2018) ("The allegations contained in the complaints are serious, but the Judicial Council is obligated to adhere to the Act. Lacking statutory authority to do anything more, the

In 2023, it was reported that Justice Thomas accepted over $500,000 in trips and vacations courtesy of Republican megadonor Harlan Crow, who also paid for the boarding school tuition of Justice Thomas's grandnephew.[31] Another friend loaned Justice Thomas over $250,000 to purchase a motor coach—and then forgave the loan before any principal was repaid.[32] Likewise, it was reported in 2023 that Justice Alito accepted a flight on a private jet to a fishing vacation, courtesy of a benefactor who later had business before the Court.[33] Code of Conduct Canon 2B provides that "[a] judge should [not] . . . lend the prestige of the judicial office to advance the private interests of the judge," which has been interpreted to prohibit judges from accepting gifts, perks, or special deals that they are offered because of their status as judges.[34] Questions were also raised about whether the justices improperly failed to report some of the gifts in question which, if true, would violate Code of Conduct Canon 4H, directing judges to "make required . . . disclosures of gifts . . . in compliance with applicable statutes and Judicial Conference regulations and directives."[35] And as an overarching principle, even though Harlan Crow had no cases pending before the Court he is a devotee of conservative causes that are likelier to receive a sympathetic hearing on a conservative Court. Crow's ambitions are aided by a steady stream of gifts that inspire Justice Thomas's gratitude and ensure Crow's access to the Justice's ear. And by allowing himself to be placed in that position, Justice Thomas risked running afoul of his Canon 2A duty to act at all times in a manner that "promotes public confidence in the integrity and impartiality" of his Court.[36]

In recent years, Justices Barrett, Gorsuch, Jackson, Sotomayor, and others have signed lucrative book deals in which the justices have used their staffs to promote their books and have credited clerks for researching and

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complaints must be dismissed because an intervening event—Justice Kavanaugh's confirmation to the Supreme Court—has made the complaints no longer appropriate for consideration under the Act.").

[31] Justin Elliott, Joshua Kaplan & Alex Mierjeski, *Clarence Thomas and the Billionaire*, PROPUBLICA (April 6, 2023, 5:00 AM), https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow; Alison Durkee, *Clarence Thomas: Here Are All the Ethics Scandals Involving the Supreme Court Justice Amid New Ginni Thomas Report*, FORBES (Sept. 4, 2024, 10:25 AM), https://www.forbes.com/sites/alisondurkee/2024/09/04/clarence-thomas-here-are-all-the-ethics-scandals-involving-the-supreme-court-justice-amid-new-ginni-thomas-report/.

[32] *See* Durkee, *supra* note 31.

[33] Justin Elliott, Joshua Kaplan & Alex Mierjeski, *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.

[34] CODE OF CONDUCT FOR U.S. JUDGES, Canon 2B *in* U.S. CTS., GUIDE TO JUDICIARY POLICY, vol. 2A, ch. 2 (2019); MODEL CODE OF JUD. CONDUCT r. 1.3 (AM. BAR ASS'N 2020).

[35] CODE OF CONDUCT FOR U.S. JUDGES, Canon 4(H)(3), *in* U.S. CTS., GUIDE TO JUDICIARY POLICY, vol. 2A, ch. 2 (2019).

[36] *See* GEYH, ALFINI & SAMPLE, *supra* note 17, § 9.03[3], at 9-6 to -7; CODE OF CONDUCT FOR U.S. JUDGES, Canon 2A, B, *in* U.S. CTS., GUIDE TO JUDICIARY POLICY, vol. 2A, ch. 2 (2019).

editing those books.[37] The lower court Code does not object to judges writing books or profiting from their sales if the amounts they receive are reasonable and are not attributable to their special status as judges.[38] But the Code is concerned about judges misappropriating court resources for personal use. And so, Canon 4G provides: "A judge should not to any substantial degree use judicial chambers, resources, or staff to engage in extrajudicial activities"—a canon multiple justices appear to have violated.[39]

Justices Scalia and Thomas were frequent featured speakers at Federalist Society fundraising events.[40] The concern about judges lending the prestige of their office to advance the interests of themselves or others, extends to judges trading on their stature to fundraise for favored organizations. Consequently, Canon 4C commentary admonishes that "[a] judge may attend fund-raising events . . . [but] may not be a speaker, a guest of honor, or featured on the program of such an event."[41] In a similar vein, Justice Kagan was criticized for lending the prestige of her office to advance the interests of the Aspen Institute by serving as the featured speaker at an Institute event limited to major Institute donors who were granted special access to the justice—even though the event did not technically qualify as a fundraiser.[42]

Pressure continued to mount. In 2023, the Senate Judiciary Committee invited Chief Justice Roberts to testify on a bill calling for the Supreme Court to adopt a code of conduct. Roberts declined the invitation.[43] Instead, he submitted a statement on behalf of the Court in which all nine justices

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[37] Steve Eder, Abbie VanSickle & Elizabeth A. Harris, *How Supreme Court Justices Make Millions from Book Deals*, N.Y. TIMES (July 27, 2023), https://www.nytimes.com/2023/07/27/us/politics/supreme-court-justices-book-deals.html (reporting that some of the acknowledgements in the books thank members of the justices' staff).

[38] CODE OF CONDUCT FOR U.S. JUDGES Canon 4H(1), *in* U.S. CTS., GUIDE TO JUDICIARY POLICY, vol. 2A, ch. 2 (2019).

[39] *Id.* at Canon 4G.

[40] *See* Andrew Rosenthal, *Step Right Up. Buy Dinner with a Justice*, N.Y. TIMES (Nov. 10, 2011, 4:30 PM), https://archive.nytimes.com/takingnote.blogs.nytimes.com/2011/11/10/step-right-up-buy-dinner-with-a-justice (discussing Justices Scalia and Thomas as "special honored guests" at the Federalist Society's annual fundraising dinner); *Hours After Considering Challenges to Health Care Reform, Supreme Court Justices are Honored at Fundraiser Sponsored by Law Firms Representing Reform Opponents*, COMMON CAUSE (JAN. 30, 2014), https://www.commoncause.org/press/hours-after-considering-challenges-to-health-care-reform-supreme-court-justices-are-honored-at-fundraiser-sponsored-by-law-firms-representing-reform-opponents (discussing Scalia and Thomas as the featured speakers at the same event in 2014).

[41] CODE OF CONDUCT FOR U.S. JUDGES, Canon 4C Commentary, *in* U.S. CTS., GUIDE TO JUDICIARY POLICY, vol. 2A, ch. 2 (2019).

[42] Jack Newsham, Mattathias Schwartz & Katherine Long, *Buying Face Time: A Secret Invite List Shows How Big Donors Gain Access to Supreme Court Justices*, BUS. INSIDER (July 24, 2023, 5:00 AM), https://www.businessinsider.com/aspen-institute-donors-supreme-court-justice-elena-kagan-brett-kavanaugh-scotus-ethics-2023-7.

[43] Letter from U.S. Sen. Richard J. Durbin, Chair of the U.S. Senate Comm. on the Judiciary, to John G. Roberts, Jr., Chief J. of the U.S. Sup. Ct. (Apr. 20, 2023); Letter from John G. Roberts, Jr., Chief J. of the U.S. Sup. Ct., to Sen. Richard J. Durbin, Chair of the U.S. Senate Comm. on the Judiciary (Apr. 25, 2023).

sought to "dispel . . . common misconceptions" by "reaffirm[ing] and restat[ing] foundational ethics principles" to which they already subscribed—which, by negative implication, reiterated the Court's longstanding position that a code of conduct was unnecessary.[44] In an interview, Justice Alito bluntly added that "[n]o provision in the Constitution gives [Congress] the authority to regulate the Supreme Court—period,"[45] a statement at least in tension with the Canon 3A(6) duty not to comment publicly on the merits of impending matters.[46]

As the parade of alleged ethical transgressions continued, however, individual justices began to voice their support for a code of conduct, and in November 2023, the Court finally relented and promulgated a code. [47]

III. WHAT SOCIAL SCIENCE TELLS US ABOUT WHEN CODES OF CONDUCT WORK

With the Supreme Court's Code now in place, the question becomes whether it will make a difference. Social science has something to say about that. A body of institutional psychology literature has studied when codes of conduct will and will not improve an organization's ethical culture. There are two objectives key to the success of code projects. First, those subject to a code of conduct must buy in to the project.[48] They must see the Code's value in promoting an ethical climate within the institution. They must be committed to its success. Second, and related to the first: members of the organization must take psychological ownership of their code.[49] They must

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[44] Letter from John G. Roberts, Jr., to Sen. Richard J. Durbin, *supra* note 43.

[45] David B. Rivkin Jr. & James Taranto, *Samuel Alito, the Supreme Court's Plain-Spoken Defender*, WALL ST. J. (July 28, 2023, 1:57 PM), https://www.wsj.com/opinion/samuel-alito-the-supreme-courts-plain-spoken-defender-precedent-ethics-originalism-5e3e9a7.

[46] CODE OF CONDUCT FOR U.S. JUDGES, Canon 3A(6), *in* U.S. CTS., GUIDE TO JUDICIARY POLICY, vol. 2A, ch. 2 (2019).

[47] *See*, *e.g.*, Joe Hernandez, *Amy Coney Barrett Says She Supports an Ethics Code for Supreme Court Justices*, NPR (Oct. 17, 2023, 3:10 PM), https://www.npr.org/2023/10/17/1206509876/amy-coney-barrett-ethics-code-supreme-court (noting that Justice Coney Barrett favors the idea for increased transparency); Adam Liptak, *Justice Kagan Calls for the Supreme Court to Adopt an Ethics Code*, N.Y. TIMES (Sept. 22, 2023), https://www.nytimes.com/2023/09/22/us/supreme-court-kagan-ethics.html (noting that Justice Kagan supports the idea for the Court's public image); CODE OF CONDUCT FOR JUSTICES OF THE SUPREME COURT OF THE UNITED STATES, Canon 2B (2023) [hereinafter SCOTUS CODE]; (undersigning all nine members of the Supreme Court).

[48] Stephen B. Burbank, *Implementing Procedural Change: Who, How, Why, and When?*, 49 ALA. L. REV. 221, 235 (1997) (arguing that, for change to be effective, the leaders "must not be simply involved, but committed").

[49] Francesca Gino, *How to Make Employees Feel Like They Own Their Work*, HARV. BUS. REV. (Dec. 7, 2015), https://hbr.org/2015/12/how-to-make-employees-feel-like-they-own-their-work (arguing that increasing a sense of "ownership" in a job can improve engagement and productivity); James B. Avey, Bruce J. Avolio, Craig D. Crossley & Fred Luthans, *Psychological Ownership: Theoretical Extensions, Measurement and Relation to Work Outcomes*, 30 J. ORGANIZATIONAL BEHAV. 173, 186 (2009) (stating that studies support that promoting "ownership" improves outcomes).

see it as their code, and as an expression of their values, that they wish to perpetuate in their organization.

Studies show that successful code of conduct projects facilitate buy-in and psychological ownership in three ways—each of which, the lower federal courts have implemented in relation to their code. First, institutions with effective codes integrate their codes into a larger ethics program.[50] The lower federal courts do just that, beginning with ethics training when judges ascend the bench, continuing judicial education programs developed by the Federal Judicial Center, and the Judicial Conference Committee on Codes of Conduct, which answers ethics questions from judges on request, and issues periodic advisory opinions on ethics issues.[51]

Second, in successful code projects, institutional leadership demonstrates an ongoing commitment to the code.[52] The lower federal courts are overseen by the Judicial Conference, which has established the ethics program I just described, and which has amended its Code nine times over the years.[53] In addition, it has revised its disciplinary rules to police misconduct more effectively, which, while not related to the Code of Conduct per se, underscores the Conference's ongoing commitment to judicial conduct and ethics.[54]

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[50] Itai Beeri, Rachel Dayan, Eran Vigoda-Gadot & Simcha B. Werner, *Advancing Ethics in Public Organizations: The Impact of an Ethics Program on Employees' Perceptions and Behaviors in a Regional Council*, 112 J. BUS. ETHICS 59, 73 (2013).

[51] *"Baby Judges School" Is Underway for New Federal Judicial Appointees*, CBS NEWS (Feb. 7, 2018, 8:01 AM), https://www.cbsnews.com/news/baby-judges-school-is-underway-for-new-federal-judicial-appointees/ [https://perma.cc/F8C3-WRRP] (describing the ethics training judges receive before they ascend the bench); FED. JUD. CTR., FEDERAL JUDICIAL CENTER ANNUAL REPORT 2023, at 5–7 (2023), https://www.fjc.gov/sites/default/files/materials/10/FJC-Annual-Report-2023.pdf [https://perma.cc/2U9A-U6TH] (describing the continuing judicial education programs); *Examining the State of Judicial Recusals After* Caperton v. A.T. Massey*: Hearing Before the Subcomm. on Cts. & Competition Pol'y of the H. Comm. on the Judiciary*, 111th Cong. 8 (2009) [hereinafter *Examining the State of Judicial Recusals After* Caperton v. A.T. Massey] (statement of M. Margaret McKeown, J. of the United States Court of Appeals for the Ninth Circuit) (explaining the committee that was formed for the code and how judges received ethics advice); 2 JUD. CONF. OF THE U.S., GUIDE TO JUDICIARY POLICY pt. B, ch. 2, at 1-3 (2024), https://www.uscourts.gov/sites/default/files/guide-vol02b-ch02_1.pdf [https://perma.cc/B3EP-TC9B] (describing the requests from judges).

[52] *See About the Judicial Conference*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/governance-judicial-conference/about-judicial-conference [https://perma.cc/C27N-PXDG] (last visited Aug. 10, 2025) (explaining the history and structure of the Judicial Conference); Beeri, Dayan, Vigoda,-Gadot, Werner, *supra* note 50, at 73 ("[Ethical leadership] has a very substantial predictive ability for [ethical climate]."); Vanya Smythe, *Codes of Ethics*, *in* APPLIED ETHICS: STRENGTHENING ETHICAL PRACTICES 47, 51 (Peter Bowden, ed. 2012) (noting that the most important factor in the success of ethics codes was "how well" the codes "are embedded in the organisation by both senior and local management.").

[53] *See Examining the State of Judicial Recusals After* Caperton v. A.T. Massey, *supra* note 51 at 8 (explaining the Judicial Conference's relationship to the courts, ethics programs, and the code).

[54] *See* 2 JUD. CONF. OF THE U.S., GUIDE TO JUDICIARY POLICY pt. E, ch. 3, at 2–3 (2019), https://www.uscourts.gov/sites/default/files/judicial_conduct_and_disability_rules_effective_march_12_2019.pdf [https://perma.cc/9MC3-Y9F4] (establishing rules for judicial conduct and judicial disability proceedings, noting amendments in both 2015 and 2019).

Third, effective code of conduct projects include the workforce in code development and revision, as the lower federal courts have.[55] In that regard, it bears emphasis that the Judicial Conference and its Committee on Codes of Conduct are comprised of a rotating array of federal judges, and that judges are invited to comment on code changes when they are proposed.[56]

IV. PROBLEMS WITH THE SUPREME COURT'S CODE OF CONDUCT

The Supreme Court's Code of Conduct does none of that. The Court has never acknowledged the need for a code. The justices adopted their Code under intense political pressure. And when they finally capitulated, the preamble to the new Code did not state or imply that their goal was to enhance an ethical climate on the Court by achieving buy-in among the justices to embrace the new Code as their own. Rather, their stated aim was to "dispel" the "misunderstanding" of Court critics that they were not already as ethical as the day is long.[57] In other words, they had adopted a Code not to inspire or guide the justices, but to mollify their detractors.

More fundamentally, the proof is in the pudding. The Supreme Court Code has been drafted not to inspire good judicial conduct or improve the Court's ethical climate, but to shrink its ethical responsibilities and deflect blame. Let me offer a few examples.

First, all codes of conduct dating back to the ABA's 1924 Canons of Judicial Ethics include a provision calling upon judges to uphold and apply the law[58]—a canon that would seem to be of particular relevance to the Supreme Court, given Chief Justice Marshall's declaration in Marbury that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[59] And yet, the Supreme Court deleted that canon from its Code, thereby avoiding disputes over the meaning of a broadly worded directive at the expense of signaling that the Court is unbounded by an ethical duty to take the law seriously.

Second, lower court judges have a duty to "take appropriate action" when they become aware that a fellow judge has violated the Code.[60] Oftentimes, appropriate action involves no more than calling the judge aside

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[55] *About the Judicial Conference*, *supra* note 52; Smythe, *supra* note 52, at 53 ("Studies have shown that the closer staff can be to the making of the code, the stronger will be their sense of ownership and appreciation of the code.").

[56] *About the Judicial Conference*, *supra* note 52; *see, e.g.*, *Public Comment on Proposed Changes to Code of Conduct for U.S. Judges and Judicial Conduct and Disability Rules*, U.S. CTS., https://www.uscourts.gov/rules-policies/judiciary-policies/proposed-changes-code-and-jcd-rules/public-comment-proposed [https://perma.cc/MT5Q-4ABY] (last visited Aug. 10, 2025) (noting examples of judges' comments).

[57] SCOTUS CODE, *supra* note 47, pmbl.

[58] CANONS OF JUD. ETHICS CANON 20 (AM. BAR ASS'N 1924).

[59] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[60] CODE OF CONDUCT FOR U.S. JUDGES Canon 3B(6), *in* U.S. CTS., GUIDE TO JUDICIARY POLICY, vol. 2A, ch. 2 (2019).

for a quick chat in the hallway or dropping a note to the chief judge, who can follow up with a quiet conversation. My early empirical work shows that these informal means of regulation can be highly effective in the lower courts.[61] The Supreme Court, however, has deleted any such duty from its Code, which suggests that the justices' commitment to taking ownership of their Code and helping each other to abide by its terms is eclipsed by a desire to avoid ruffling feathers. Corroborative of that point, the Court's new Code provides that a justice should "take appropriate action" upon learning that a *Court employee* has committed misconduct—but not a fellow justice.[62]

Third, the Court has addressed the problem of its justices misappropriating court resources for personal use by giving it a big thumbs-up. Whereas lower court judges are admonished not to make extrajudicial use of court resources to any substantial extent, the Supreme Court—citing the unique role and security needs of the Court—authorizes its justices to use Court staff and resources to do anything that the Code permits the justices themselves to do, without limitation.[63] Because Canon 4 effectively permits the justices themselves to engage in any and all extrajudicial activities that do not raise ethical concerns,[64] the Supreme Court's Code thereby permits a justice to appropriate Court staff and resources to assist her in any of those activities, be it organizing a prayer vigil at the justice's church, managing her stock portfolio, editing her novel, or cleaning her house. Enabling justices to expend public funds on all their extrajudicial activities, unbounded by any restrictions limiting such expenditures to those that accommodate the unique needs of the Court, betrays indifference to an abuse of power that other codes of conduct across the country regulate.

Fourth, the Court diluted the duty to avoid lending the prestige of judicial office to advance the justice's personal interests by limiting the canon to knowing violations.[65] Judges across the state and federal systems must proceed with caution and make inquiries to ensure that the gifts, benefits, or other preferential treatment they are offered are not attributable

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[61] Charles Gardner Geyh, *Informal Methods of Judicial Discipline*, 142 U. PA. L. REV. 243, 246 (1993).

[62] SCOTUS CODE, *supra* note 47, Canon 3A.

[63] *Compare* CODE OF CONDUCT FOR U.S. JUDGES, Canon 4G, *in* U.S. CTS., GUIDE TO JUDICIARY POLICY, vol. 2A, ch. 2 (2019) ("A judge should not to any substantial degree use judicial chambers, resources, or staff to engage in extrajudicial activities permitted by this Canon."), *with* SCOTUS CODE, *supra* note 47, Court's Commentary at 12 ("[Canon 4 G] also allows Court officials and chambers staff to perform their official duties in enhancing security and providing legal, ethics, and other appropriate assistance to the Justices in light of the high public interest in the Justices' activities and the acute security concerns that are distinct from such concerns for lower court judges.").

[64] SCOTUS CODE, *supra* note 47, Canon 4 ("A Justice may engage in extrajudicial activities, including law-related pursuits and civic, charitable, educational, religious, social, financial, fiduciary, and government activities, and may speak, write, lecture, and teach on both law-related and nonlegal subjects. However, 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 set forth below").

[65] SCOTUS CODE, *supra* note 47, Canon 2B.

to their status as judges.[66] For the Supreme Court, in contrast, ignorance is bliss. If a justice does not "know" that she is receiving special treatment because she is a judge—regardless of whether a reasonable person would suspect as much—she is free to cover her ears and revel in the largesse of her benefactors.

Fifth, the Court revised the canon governing disqualification to read less like an ethical duty to be honored than an obstacle to be circumvented. Every change the Court made is oriented toward shrinking its ethical responsibilities, in the name of Supreme Court exceptionalism. The Court's disqualification canon replaces the "shalls" in the Code of Conduct for United States Judges and the federal disqualification statute with "shoulds," to underscore that, statutory directives notwithstanding, the Court regards its disqualification duties as advisory, not binding.[67]

Pointing to its special need to avoid tie votes, the Court freights its Code with specious rationales for diluting its ethical and statutory duty to disqualify relative to the lower courts. The first words in the Court's new Canon 3B are that "[a] Justice is presumed impartial and has an obligation to sit unless disqualified."[68] It is universally understood that the party seeking disqualification must overcome the reasonable default that the judge is impartial enough to preside.[69] But that presumption concerns the movant's burden of production in disqualification proceedings. It has no meaningful relevance to a judge's ethical responsibilities, which explains why it is in no other code of conduct.

At first, the "obligation to sit unless disqualified" appears to be a harmless redundancy, in that it reiterates a duty in the preceding canon to participate in matters assigned unless disqualified—a duty in codes across the state and federal systems.[70] But adding the duty to sit is calculated to highlight what the Court regards as its unique responsibility to avoid tie votes by presiding when judges on other courts would recuse. The duty to sit was an established term of art that Justice William Rehnquist used to justify his non-disqualification from a case in 1972. When Justice Rehnquist

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[66] *See, e.g.*, *Advisory Opinion No. 67: Attendance at Independent Educational Seminars*, *reprinted in* 2 GUIDE TO JUDICIARY POLICY, pt. B, ch. 2, at 98–99 (2024) (discussing the inquiries judges should make before accepting gifts of travel and lodging associated with corporate-sponsored educational seminars).

[67] *Compare* CODE OF CONDUCT FOR U.S. JUDGES, Canon 3C, *in* U.S. CTS., GUIDE TO JUDICIARY POLICY, vol. 2A, ch. 2 (2019) (stating a Justice "shall" disqualify themselves if they are unable to be impartial), *with* SCOTUS CODE, *supra* note 47, Canon 3B (declaring that a Justice only "should" disqualify themselves if there are concerns they will not be impartial).

[68] SCOTUS CODE, *supra* note 47, Canon 3B.

[69] CHARLES GARDNER GEYH, JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW 8–9 (Federal Judicial Center, 3d ed. 2018), https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1222&context=facbooks.

[70] *See, e.g.*, MODEL CODE OF JUD. CONDUCT r. 2.7 (AM. BAR ASS'N 2020) (requiring judges to "hear and decide matters" unless disqualified); CODE OF CONDUCT FOR U.S. JUDGES, Canon 3A, *in* U.S. CTS., GUIDE TO JUDICIARY POLICY, vol. 2A, ch. 2 (reiterating that judges "should" hear cases).

was President Nixon's Assistant Attorney General, he testified before Congress that a pending case, in which plaintiffs were challenging an Army intelligence surveillance program, was non-justiciable.[71] Then, after being appointed to the Supreme Court, he declined to disqualify himself from that very case, citing the duty to sit, and cast the decisive fifth vote in favor of holding that the matter was non-justiciable.[72] Congress disagreed and sought to abrogate the duty to sit two years later by amending the disqualification statute to require justices and judges to recuse whenever their impartiality might reasonably be questioned.[73] By resurrecting its duty to sit in 2023, the Court thumbed its nose at this legislative history and reinterpreted both Code and statute to limit its disqualification responsibilities relative to the district and circuit courts.

Finally, the Court's new Code declares that "[t]he rule of necessity may override the rule of disqualification," which, the Court explains in commentary, purportedly amplifies its unique responsibility to avoid tie votes.[74] The ancient, common law rule of necessity stands for the proposition that if all judges on a court would be disqualified, none is disqualified, and can indeed "override the rule of disqualification."[75] For example, if Congress were to enact a statute imposing term limits on Supreme Court justices, the rule of necessity would allow the Court to review the statute, because otherwise all justices would be disqualified, leaving none to decide the case. But the rule of necessity has no bearing on the Court's desire to avoid tie votes. Litigants receive their day in court when fewer than all justices participate, and there are established procedures for resolving cases that end in a deadlock.[76] If avoiding the risk of a tie vote was deemed a "necessity" under the rule it would obliterate a justice's duty to disqualify in all cases.

In short, the Court's goal in adopting a revised disqualification canon is aimed not at honoring its ethical duty to disqualify but at minimizing it. The net effect is a new canon calculated to permit 5 to 4 rulings, where the decisive vote is cast by a justice whose impartiality is so deeply in doubt that it would force the recusal of a district or circuit judge applying the

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[71] Memorandum of Mr. Justice Rehnquist, Laird v. Tatum, 409 U.S. 824, 824–25 (1972). *See generally* Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589 (1987) (reviewing the matter in detail).

[72] *Laird*, 409 U.S. at 837. *See generally* Jeffrey W. Stempel, *Chief William's Ghost: The Problematic Persistence of the Duty to Sit*, 57 BUFF. L. REV. 813 (2009) (reviewing the matter in detail).

[73] Stempel, *supra* note 71, at 594; S. REP. NO. 93-419, at 5 (1973); *Disqualification of Judges: Hearing before the Comm. on the Judiciary on S. 1064*, 93d Cong. 14 (1973).

[74] SCOTUS CODE, *supra* note 47, Canon 3B(3); *see also* Nancy Gertner & Stephen Gillers, *Supreme Court Justices' Unethical Code of Conduct*, BOS. GLOBE (June 29, 2023, 3:00 AM), https://www.bostonglobe.com/2023/06/29/opinion/supreme-court-justices-unethical-code-conduct (stating that the Supreme Court's declining reputation is in part due to the recusal statute and the rule of necessity).

[75] SCOTUS CODE, *supra* note 47, Canon 3B(3).

[76] *See* Gertner & Gillers, *supra* note 74 (pointing out that in the event of a deadlock, the lower court's decision still stands, and the Supreme Court has the opportunity to decide the same issue in a different case).

identical disqualification standard, in the same disqualification statute, under the same circumstances.

One last difference between the Supreme Court's Code and the codes of other jurisdictions is that the Court stripped its code of explanatory commentary that the ABA developed and that the lower federal courts and most state supreme courts have revised and adopted. The Supreme Court, which used the Code of Conduct for United States Judges as a template, explained that it had excluded that commentary because "much" of it was "inapplicable" to justices on the high court.[77] But the commentary in the Code of Conduct for United States Judges is derived from ABA models that state supreme court justices around the country have deemed applicable to all judges within their jurisdictions, including themselves.[78] And a cursory reading of the commentary that the Court excluded belies claims that it has no bearing on its justices. The ABA Model Code explains that code commentary serves to "provide guidance regarding the purpose, meaning, and proper application of the Rules" and to "identify aspirational goals for judges."[79] By excluding such commentary, the Court has signaled that it was adopting a code less as a source of guidance and aspiration than as a performative display to quiet Court critics.

V. RECOMMENDATIONS IN A BUSINESS-AS-USUAL WORLD

All of which begs the question: Now what? I'm going to tackle that question as a two-parter: first, in a business-as-usual world where we have been accustomed to operating; and then, in the new normal that began in 2025.

As soon as the Court adopted its Code in 2023, Court observers were quick to argue that what ailed the Code was the lack of an enforcement mechanism.[80] I do not dispute the value of disciplinary processes. Nor do I suggest that it would be inappropriate for the Court to police its code in some way. But the problem with the Code as drafted, is that it has been written defensively, by justices acting like tax lawyers trying to limit their liability—a problem that will only be exacerbated by obsessing over the Code as a yardstick for discipline. What we need are justices committed to acting like good judges buying into their code as a source of guidance and inspiration—as judges in the lower federal courts generally do. Now that the dust is beginning to settle on the Code kerfuffle, the Court can and should quietly take four steps to integrate the Code into the Court's culture.[81]

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[77] SCOTUS CODE, *supra* note 47, Court's Commentary at 10.

[78] MODEL CODE OF JUD. CONDUCT Scope (AM. BAR ASS'N 2011).

[79] *Id.*

[80] *Judicial Ethics*, 137 HARV. L. REV. 1677, 1688–89 (2024).

[81] The four proposals that follow are elaborated upon in Charles Gardner Geyh, *Mending a Broken Ethics Culture: The Promise and Pitfalls of the Supreme Court's Code of Conduct*, 86 U. PITT. L. REV. 547, 587–98 (2024).

First, the Court can deploy the Code as part of a more comprehensive effort to create an ethical climate on the Court. It can introduce new members of the Court to its Code as part of its onboarding process; it can revisit and revise its Code on a regular basis; it can devise periodic ethics programs under the auspices of its Office of Legal Counsel.

Second, the Court should begin to take the Code's role as an aspirational guide seriously. It can take the high road and employ the Code as a source of guidance that interprets the canons with reference to their spirit and purpose, to the end of steering a wider berth around gray areas where the Court has become mired in code disputes. As former federal circuit judge Michael Luttig has put it, "the Supreme Court should want, without quibble, to subject itself to the highest possible professional and ethical standards that would render the Court beyond reproach . . . ."[82] As to disqualification, I respect the Court's need to resist partisans who make exaggerated claims of bias or conflicts of interest to force a justice off a case as a way to manipulate the outcome. But taking the high road should inspire the justices to think long and hard before deciding against disqualifying themselves on the grounds that their impartiality could not reasonably be questioned, when it would call the impartiality of a circuit judge into question who is applying the same disqualification standard under the same circumstances.

Third, the Court can augment the Code's application by seeking guidance and elaboration. The Court's Office of Legal Counsel can serve as a repository of information about the Code and its interpretation in the federal courts. The Office of Legal Counsel can gather information from state courts too, where codes of conduct are derived from the same ABA models, and where the National Center for State Courts digests ethical rulings around the country on a quarterly basis.[83] And the justices can take greater advantage of the Codes of Conduct Committee that fields over 1,000 ethics inquiries a year from federal judges in the lower courts.[84]

Fourth, it can remediate the Code's problems with informal corrective action. The Court has relieved its justices of a formal duty to take corrective action upon learning that a colleague has violated the Code. But with rare exceptions, Supreme Court justices have served on circuit courts prior to their elevation, where such a duty is in place and judges do raise and resolve ethical concerns informally, sometimes through the chief judge, sometimes not. At a minimum there is virtue in a justice, who is called out for an ethical lapse, self-correcting by confessing error and committing to doing better.

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[82] *Supreme Court Ethics Reform: Hearing on S.B. 325 and S.B. 359 Before the S. Comm. on the Judiciary*, 118th Cong. 3 (2023) (statement of J. Michael Luttig, Former Judge of the United States Court of Appeals for the Fourth Circuit).

[83] *Judicial Conduct Reporter*, NAT'L CTR. FOR STATE CTS., https://www.ncsc.org/consulting-andresearch/areas-of-expertise/court-leadership/center-for-judicial-ethics/judicial-conduct-reporter [https://perma.cc/F56R-5R64] (last visited Dec. 16, 2024).

[84] *Examining the State of Judicial Recusals After* Caperton v. A.T. Massey, *supra* note 51, at 7.

Given the Court's grudging—if not hostile—approach to the Code to date, this transformation is unlikely to occur quickly if the Court is left to its own accord. Institutional culture tends to change slowly. New ethics controversies spawning new dialogs over Code rules and principles, paired with changes in Court personnel will need to occur before the Supreme Court joins the rest of the American judiciary in sharing a sincere commitment to the Code.

VI. RECOMMENDATIONS IN THE NEW NORMAL OF A RAPIDLY CHANGING LANDSCAPE

Under ordinary circumstances, I would stop there, pump my fist in the air, bellow "thank you!" and hope for a smattering of pity applause. But these are not ordinary circumstances. More is at stake than devising a system of judicial ethics that guards against technical code violations. And those rising stakes imbue the need to repair the Court's ethics problems with new urgency.

We live in perilous times. Public confidence in the U.S. government has declined from nearly 80% in the mid 1960s to under 20% today.[85] Public support for the judiciary remains higher than for the other branches but is eroding: those who profess "'quite a lot' of confidence" in the Court has declined from nearly 50% in 1990 to 25% in 2022.[86] Social science data show that the public has long been at peace with a Court comprised of justices who are influenced by their ideological predilections.[87] The justices are called upon to fill indeterminate spaces in the law. That requires an exercise of judgment in which the justices are unavoidably influenced by their backgrounds, judicial philosophies, and policy perspectives, which does no violence to the rule of law. But data shows that the public does lose faith in a Court that it perceives as partisan or agenda driven. And that perception is at the heart of the ongoing, downward spiral in the Court's perceived legitimacy.[88]

Driving the public perception that the Court is increasingly partisan and agenda-driven is the Court's recent rightward turn in rulings on abortion, presidential immunity, and other hot-button issues, which has deepened skepticism of the Court's motives for all but the far right on the ideological spectrum. But this, by itself, is not new. Throughout our history, we've

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[85] Charles Gardner Geyh, *Judicial Independence at Twilight*, 71 CASE W. RSRV. L. REV. 1045, 1086 (2021).

[86] Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, GALLUP (June 23, 2022), https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx (reporting that the American public's confidence in the Supreme Court has "reached a new low in Gallup's nearly 50-year trend," with the rating five percent lower than the previous record low in 2014).

[87] James L. Gibson & Michael J. Nelson, *Reconsidering Positivity Theory: What Roles do Politicization, Ideological Disagreement, and Legal Realism Play in Shaping U.S. Supreme Court Legitimacy?*, 14 J. EMPIRICAL LEGAL STUD. 592, 595 (2017).

[88] *Id.*

weathered cycles of anti-court sentiment animated by unpopular Supreme Court rulings during political regime changes.[89]

What makes this cycle different, in addition to its intensity, is that it has traveled in tandem with a flurry of alleged ethical lapses that threaten to intensify the cycle's impact. One recent study found that reports of ethics violations by Justice Kavanaugh diminished respect for him, but not for the Court as a whole.[90] The researchers cautioned, however, that that could change if ethics problems became more pervasive.[91] Not only have ethical lapses become more pervasive, as described here, but many betray partisan allegiances that heighten public suspicion that the justices are pursuing political agendas. Recall Justice Ginsburg attacking then-candidate Donald Trump; pro-Trump flags flying over Justice Alito's homes; Justice Thomas accepting lavish gifts from a Republican megadonor and participating in a case reviewing a Trump subpoena to obtain records that included his wife's correspondence; Justice Kavanaugh going on a partisan rant during his confirmation hearings; and Justice Scalia effectively fundraising for the Federalist Society.

In past cycles of anti-court sentiment, court defenders have stepped in to protect the courts from what they regarded as unfair attacks on court independence and legitimacy—efforts instrumental to blunting the attacks and winding down the cycles. But as Justice Alito noted in a 2023 interview with the *Wall Street Journal*, "We are being hammered daily . . . . [a]nd nobody, practically nobody, is defending us."[92] Justice Alito thinks those attacks are unfair. But when he stands before the crowd and shouts, "who's with me!?" only to be greeted by the sound of crickets, it is time for him to consider the possibility that the problem does not lie with the crowd.

Rallying citizens in defense of the Court requires a defensible Court. If you build it, they will come. The justices, like the rest of us, are immersed in a divisive, polarized, partisan age. Some justices have yielded to partisan impulses in their judicial and extrajudicial activities, which have transgressed their ethical responsibilities and contributed to a decline in the Court's legitimacy. The Court needs to understand that taking steps to restore its ethical climate along the lines I have described is not just the right thing to do—it may be necessary for the judiciary's survival as a strong, separate, and independent branch of government.

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[89] CHARLES GARDNER GEYH, WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM 4–5 (2006).

[90] Joshua Boston, Benjamin Kassow, Ali Masood & David Miller, *Your Honor's Misdeeds: The Consequences of Judicial Scandal on Specific and Diffuse Support*, 56 PS: POL. SCI. & POL. 195, 197–99 (2023).

[91] *Id.* at 199.

[92] James Taranto & David B. Rivkin Jr., *Justice Samuel Alito: 'This Made Us Targets of Assassination'*, WALL ST. J. (Apr. 28, 2023, 2:06 PM), https://www.wsj.com/us-news/justice-samuel-alito-this-made-us-targets-of-assassination-dobbs-leak-abortion-court-74624ef9?mod=article_inline.

Eroding confidence in the rule of law is a pervasive phenomenon, and we find ourselves in a fight not just for the legitimacy of the Court but for the future of our democracy. What Alexander Bickel called the "secular religion of the American republic" is in jeopardy.[93] The public is angry, disillusioned, and losing what Sanford Levinson has called our "constitutional faith."[94] If the rule of law is a tenet in the secular religion of the American republic, then judges, who interpret and apply the law, are akin to priests, for whom codes of conduct are rules of the rectory that embody the norms to which judges must aspire if the rule of law is to persevere. The justices who have doubled down in defiance of those norms must be persuaded to step back now.

Because we need a Court with its legitimacy intact now more than ever. We need a strong and independent Court that the public trusts to keep the executive branch in check. We need a Court deserving of a full-throated defense that enjoys public support robust enough to keep defiance of its orders unthinkable. And for that, we need a Court that is willing to think strategically and act decisively to correct its course sooner rather than later.

The world around us is burning—in some places, literally. Some view it as a cleansing, controlled burn, others as a raging dumpster fire, but there is no denying that it is a conflagration of the likes of which we have not experienced in living memory. Against that backdrop, the issues we confront seem overwhelming, and what I have to say about judicial ethics and the Supreme Court may feel trivial and beside any number of larger points that are screaming for attention. But we have to start somewhere.

The rule of law itself is at risk. During the first hundred days of his second term in office, President Trump tested the limits of his constitutional authority with a series of executive orders.[95] He described himself as a king;[96] stated that any action he took to save the country does not violate the law;[97] replied "I don't know," when asked whether he had a duty to uphold the Constitution;[98] characterized judges who invalidated his orders as "radical";[99] defied court orders to return an immigrant who had been deported to a

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[93] ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 24 (1975).

[94] SANFORD LEVINSON, CONSTITUTIONAL FAITH 15–16 (1988).

[95] Rachel Treisman, *10 Key Numbers that Sum Up Trump's First 100 Days*, NPR (Apr. 29, 2025, 6:10 AM), https://www.npr.org/2025/04/29/nx-s1-5379554/trump-100-days-numbers-laws-immigration.

[96] @WhiteHouse, *"CONGESTION PRICING IS DEAD. Manhattan, and all of New York, is SAVED. LONG LIVE THE KING!"*, X (Feb. 19, 2025, 2:31 PM), https://x.com/WhiteHouse/status/1892295984928993698 (featuring an illustration of President Trump with a crown).

[97] @realDonaldTrump, *He who saves his Country does not violate any Law.*, X (Feb. 15, 2025, 1:32 PM), https://x.com/realDonaldTrump/status/1890831570535055759.

[98] Amanda Terkel & Lawrence Hurley, *Trump, Asked if He Has to 'Uphold the Constitution,' Says, 'I Don't Know'*, NBC NEWS (May 4, 2025, 9:00 AM), https://www.nbcnews.com/politics/trump-administration/trump-asked-uphold-constitution-says-dont-know-rcna204580.

[99] @realDonaldTrump, TRUTH, (Mar. 18, 2025, 9:05 AM), https://truthsocial.com/@realDonaldTrump/posts/114183576937425149; @realDonaldTrump, TRUTH, (Mar. 30, 2025, 9:53 AM), https://truthsocial.com/@realDonaldTrump/posts/114251714651932084.

Salvadoran prison without due process;[100] and enlisted Congress to curb judicial power to issue preliminary injunctions and deploy contempt citations to coerce executive branch compliance with court orders.[101]

For those of us in the legal profession—the bench, bar, and legal academy—the commitment to the rule of law is baked into our professional DNA beginning in law school. As standard bearers for the rule of law, we are uniquely suited to rise in its defense and push back. President Trump understands that too and has issued orders seeking to punish law firms that have represented his opponents.[102] Some of those firms have risen to the occasion and challenged the constitutionality of those orders; others, more craven, have caved.[103] If the rule of law is to persevere, we must find the courage to defend it.

When I survey the vast and growing pile of problems before us, I feel a twinge of helplessness and despair that there is nothing I can say or do to make a dent or difference. But I take inspiration where I find it. And I found it, of all places, on the bumper sticker of a garbage truck, which declared: "Making the world a better place, one load at a time." My truckful may not make a difference by itself. But with each of us carrying a load, we can move the pile.

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[100] J.G.G. v. Trump, No. 1:25-cv-00766-JEB, Mem. Op. at 1 (D.C. Cir. Apr. 16, 2025); Ian Millhiser, *Trump Defied a Court Order. The Supreme Court Just Handed Him a Partial Loss.*, VOX, (Apr. 10, 2025, 8:01 PM), https://www.vox.com/scotus/408253/trump-supreme-court-order-abrego-garcia-el-salvador.

[101] Kevin Freking, *Republican-led House Passes Bill to Limit Nationwide Orders From Federal District Judges*, AP NEWS, (Apr. 9, 2025, 8:10 PM), https://apnews.com/article/gop-bill-district-court-injunction-trump-doge-764231e50ae5e7119a8bdc9c0d7daf89.

[102] Chad de Guzman, *The Law Firms Trump Has Targeted, Why, and How They've Each Responded*, TIME (Apr. 1, 2025, 12:00 AM), https://time.com/7272466/law-firms-trump-wilmerhale-jenner-block-paul-weiss-covington-burling/; Michael S. Schmidt, *Trump's Revenge on Law Firms Seen as Undermining Justice System*, N.Y. TIMES (Mar. 12, 2025), https://www.nytimes.com/2025/03/12/us/politics/trump-law-firms-perkins-coie.html.

[103] Kathryn Rubino, *Biglaw Is Under Attack. Here's What the Firms Are Doing About It.*, ABOVE THE LAW (Apr. 4, 2025, 3:12 PM), https://abovethelaw.com/2025/04/biglaw-is-under-attack-heres-what-the-firms-are-doing-about-it.