SUPREME IMPROPRIETY? ASSESSING THE JUSTICES' CONDUCT

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I

INTRODUCTION

Did Justice Clarence Thomas violate ethics rules when he (i) accepted gifts from a Texas billionaire, Harlan Crowe, including travel on a private jet and yacht,[1] (ii) failed to disclose when Crowe purchased property that Thomas co-owned with his mother and brother,[2] and (iii) allowed Crowe to pay for Thomas's grandnephew, who Thomas was raising, to attend a private boarding school?[3] Did Justice Samuel Alito violate ethics rules when he (i) accepted a seat on a private jet owned by a hedge fund manager and (ii) subsequently failed to recuse himself from cases where the manager's businesses had interests?[4] Did Justice Sonia Sotomayor violate ethics rules when her court staff helped to coordinate and promote her book ventures?[5] Did Justices Elena Kagan, Neil Gorsuch, and Brett Kavanaugh violate ethics rules when they taught courses for educational institutions that included what appear to be significant vacation components within the

This Article is also available online at http://lcp.law.duke.edu/.

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1. Joshua Kaplan, Justin Elliott & Alex Mierjeski, *Clarence Thomas and the Billionaire*, PROPUBLICA (Apr. 6, 2023), https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow [https://perma.cc/V3AE-CTFT].

2. Justin Elliott, Joshua Kaplan & Alex Mierjeski, *Billionaire Harlan Crow Bought Property from Clarence Thomas. The Justice Didn't Disclose the Deal*, PROPUBLICA (Apr. 13, 2023), https://www.propublica.org/article/clarence-thomas-harlan-crow-real-estate-scotus [https://perma.cc/K9ZW-FQA3].

3. Joshua Kaplan, Justin Elliott & Alex Mierjeski, *Clarence Thomas Had a Child in Private School. Harlan Crow Paid the Tuition.*, PROPUBLICA (May 4, 2023), https://www.propublica.org/article/clarence-thomas-harlan-crow-private-school-tuition-scotus [https://perma.cc/Z5TN-C8R9].

4. Adam Liptak, *Justice Alito Defends Private Jet Travel to Luxury Fishing Trip*, N.Y. TIMES (June 21, 2023), https://www.nytimes.com/2023/06/21/us/politics/justice-alito-luxury-travel-fishing-trip.html [https://perma.cc/8SF9-3H4B].

5. Brian Slodysko & Eric Tucker, *Supreme Court Justice Sotomayor's Staff Prodded Colleges and Libraries to Buy Her Books*, AP NEWS (July 11, 2023), https://apnews.com/article/supreme-court-sotomayor-book-sales-ethics-colleges-b2cb93493f927f995829762cb8338c02 [https://perma.cc/BLH4-XRZH].

teaching trips?[6] Did Justice Amy Coney Barrett violate ethics rules when she sold her primary residence to a lawyer who worked for an organization that files amicus briefs before the Supreme Court?[7] Did Chief Justice John Roberts violate conflict of interest rules when his wife's work as a legal consultant and recruiter resulted in her matching "top lawyers with elite law firms—including some that had cases before the Supreme Court"?[8]

From April to July 2023, each of the above questions was asked by reporters,[9] politicians,[10] advocates,[11] and academics[12] alike. In many ways, this concentrated period of reporting[13] was the crescendo of what had been a long-term clamoring about the ethical rules and standards that should govern Supreme Court justices,[14] particularly because they were the only federal judges not subject to a

6. Brian Slodysko, *Justices Teach When the Supreme Court Isn't in Session. It Can Double as an All-Expenses-Paid Trip*, AP NEWS (July 11, 2023), https://apnews.com/article/supreme-court-teaching-paradise-travel-46c7d9ed41a5fabc5c64579b45abdd98 [https://perma.cc/66YE-A6D3].

7. Giulia Carbonaro, *Amy Coney Barrett Faces Scrutiny Over Real Estate Deal with Religious Group*, NEWSWEEK (June 23, 2023), https://www.newsweek.com/amy-coney-barrett-scrutiny-real-estate-deal-religious-group-1808590 [https://perma.cc/VG55-B6BD].

8. Nicholas Reimann, *Chief Justice John Roberts' Wife Made Over $10 Million as Legal Consultant, Report Says*, FORBES (Apr. 28, 2023), https://www.forbes.com/sites/nicholasreimann/2023/04/28/chief-justice-john-roberts-wife-made-over-10-million-as-legal-consultant-report-says/?sh=74a969361e9a [https://perma.cc/QKW2-PDA2].

9. *See supra* notes 1–8.

10. *See, e.g.*, Ariane de Vogue, *Key Senate Democrat Makes In-Person Pitch to John Roberts for Supreme Court Ethics Code*, CNN POLITICS (Sept. 13, 2023), https://www.cnn.com/2023/09/13/politics/dick-durbin-john-roberts-supreme-court-ethics/index.html [https://perma.cc/57WU-PVQD] (Senate Judiciary Committee's chairman addressing the Judicial Conference); Martin Pengelly, *Senator Files Ethics Complaint Against Supreme Court Justice Samuel Alito*, THE GUARDIAN (Sept. 5, 2023), https://www.theguardian.com/law/2023/sep/05/samuel-alito-sheldon-whitehouse-supreme-court-ethics [https://perma.cc/WVA5-FZ38] (senator lodging complaint in written letter to chief justice).

11. *See, e.g.*, Press Release, Fix the Court, Thomas and Alito Disclosures Out; Questions Remain (Aug. 31, 2023), https://fixthecourt.com/2023/08/ct-saa-2022-fdr/ [https://perma.cc/YV8X-9VAP] (discussion of financial disclosures from a nonpartisan, 501(c)(3) nonprofit organization).

12. *See, e.g.*, Jessica Gresko, *Supreme Court on Ethics Issues: Not Broken, No Fix Needed*, AP NEWS (Apr. 26, 2023) (quoting Professors Kathleen Clark and Charles Geyh), https://apnews.com/article/supreme-court-ethics-clarence-thomas-2f3fbc26a4d8fe45c82269127458fa08 [https://perma.cc/JU6K-CKUF]. *See also* Stephen I. Vladeck, *The Business of the Supreme Court: How We Do, Don't and Should Talk About SCOTUS*, 67 ST. LOUIS L. REV. 571 (2023) (arguing for broader assessment of the Supreme Court's actions beyond the so-called "merits docket); Veronica Root Martinez, *A Weakened Supreme Court Needs a Code of Ethics*, BLOOMBERG NEWS (Nov. 5, 2020), https://news.bloomberglaw.com/us-law-week/a-weakened-supreme-court-needs-a-code-of-ethics [https://perma.cc/JX36-PRU6].

13. Much of this reporting, as evidenced by the footnotes throughout this piece, has been published by ProPublica. Their investigative reporting has put into question the conduct of Justice Thomas, Justice Alito, and the efficacy of the federal Judicial Conference to thoroughly investigate claims of misconduct. *See supra* notes 1–3, 60, 75.

14. *See e.g.*, Josh Marcus, *Yachts, $10m Payouts and Secret Hunting Trips: The Supreme Court's Long History of Ethics Scandals*, INDEPENDENT (May 2, 2023), https://www.the-independent.com/news/world/americas/us-politics/supreme-court-clarence-thomas-scandal-b2331200.html [https://perma.cc/87YS-H7BG] (noting the history of scandals at the court as well as congressional action aimed at addressing the issue); Debra Cassens Weiss, *Supreme Court Adopts Ethics Code, Addresses 'Misunderstanding' that Justices Feel Unrestrained by Rules*, ABA JOURNAL (Nov. 13, 2023), https://www.abajournal.com/news/article/supreme-court-adopts-ethics-code-addresses-misunderstanding-that-justices-feel-unrestrained-by-rules [https://perma.cc/3AVF-2RBM] (noting that the ABA urged

code of conduct. Advocates for reform of the Court condemned almost all the activity revealed during the summer of 2023 as potentially problematic, but theirs were not the only voices on the topic. In some instances, the justices or their defenders argued that the allegations were unfounded.[15] In other instances, the media and members of Congress argued that the reported allegations regarding potential ethical lapses by justices were politically motivated.[16] The conundrum, of course, is who is right? Are all of the justices engaging in unethical behavior?[17] Is it just some of them?

Answering these questions has traditionally been challenging, because Supreme Court justices were not subject to an ethics code—either from Congress or one of the Court's own making. The Supreme Court consistently resisted attempts to pass a binding ethics code with enforcement mechanisms. Congress has been unable to muster the votes necessary to pass a formal Supreme Court ethics law. And even if Congress were to pass such a law, the Supreme Court has sent strong signals regarding its view that such a statute would unconstitutionally interfere with separation of powers requirements. The result has been a stalemate over the real or perceived ethicality of one of the three co-equal branches of government required by the U.S. Constitution—with no attainable solution in sight.

Yet, on November 13, 2023, the Supreme Court did something unprecedented. It adopted a code of conduct.[18] The code that was adopted and presented to the public, however, was immediately criticized as inadequate.[19] For instance,

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the Supreme Court to adopt an ethics code in February 2023).

15. *See, e.g.*, Samuel A. Alito, Jr., *Justice Samuel Alito: ProPublica Misleads Its Readers*, WALL ST. J. (June 20, 2023), https://www.wsj.com/articles/propublica-misleads-its-readers-alito-gifts-disclosure-alaska-singer-23b51eda [https://perma.cc/LEP3-2UHT] (Justice Alito's response to questions from ProPublica reporters, Messrs. Elliott & Kaplan).

16. *See, e.g.*, Kyle Morris & Cameron Cawthorne, *'Experts' Bashing Conservative SCOTUS Justices Have Undisclosed Ties to Democrats*, FOX NEWS (June 23, 2023), https://www.foxnews.com/politics/experts-bashing-conservative-scotus-justices-undisclosed-ties-democrats [https://perma.cc/8TS2-SGPF]; Press Release, Office of U.S. Sen. Lindsey Graham, Graham: Democrats' Bill Designed to Destroy a Conservative Supreme Court (July 20, 2023), https://www.lgraham.senate.gov/public/index.cfm/press-releases?ID=87807615-053E-4E2F-9EFC-15ABEC2F0464 [https://perma.cc/NQL8-BNLL]; Nina Totenberg, *Dueling Narratives at the Senate Hearing on the Supreme Court*, NPR (May 2, 2023), https://www.npr.org/2023/05/02/1173458063/dueling-narratives-at-the-senate-hearing-on-the-supreme-court [https://perma.cc/FC7Y-T2WT].

17. Justice Ketanji Brown Jackson has been critiqued for improperly filling out disclosure forms while on a lower federal court; corrections were made soon after she was nominated to the Supreme Court by President Biden. Kaelan Deese, *Ketanji Brown Jackson Disclosure Errors Spotlighted in Senate Supreme Court Hearing Amid Thomas Scrutiny*, WASH. EXAMINER (May 2, 2023), https://www.washingtonexaminer.com/policy/courts/kbj-disclosure-errors-senate-hearing-clarence-thomas [https://perma.cc/PPP5-M5K3].

18. Code of Conduct with Statement of the Court, U.S., Code of Conduct for Justices of the Supreme Court of the United States (Nov. 13, 2023) [hereinafter 2023 Code], https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf [https://perma.cc/KF4L-QD8A].

19. *See, e.g.*, Andrew Chung & John Kruzel, *Under Fire, US Supreme Court Unveils Ethics Code for Justices*, REUTERS (Nov. 14, 2023), https://www.reuters.com/legal/us-supreme-court-announces-formal-ethics-code-justices-2023-11-13 [https://perma.cc/2UMV-DLKQ] (discussing public reaction); Adam Liptak, *Supreme Court's New Ethics Code Is Toothless, Experts Say*, N.Y. TIMES (Nov. 14, 2023),

in sections where the code might naturally have included the word "shall" the justices have adopted the word "should"—which means the code lacks an actual prohibition of certain conduct in many places.[20] Additionally, the code does not include an enforcement mechanism,[21] which means a range of questions continue to exist regarding what would or should happen if a justice were to fail to comply with the adopted code. So, after much urging and despite finally adopting a code of conduct, the justices remain in the spotlight as not having done enough on ethics reform.

This continued dissatisfaction with the Court is, however, unsurprising when one considers that arguments about the Justices having or not having an ethics code were less about the code itself and more about concerns about the justices' "goodness." Central to conversations about the justices and their conduct are at least three background questions, which are asking: (i) are the justices good people,[22] (ii) are the justices behaving in a manner that is in fact good, and (iii) are the justices acting ethically? The code of conduct adopted by the justices, while an admirable first step, does not do enough to assure the public that the justices will in fact be good and act ethically when effectuating their unique role within the United States government. The code does not do enough to ensure that the justices—even if they are in fact good people—will do good things. In part, the code fails to make these assurances because there is often a disconnect between the legal mandates that can practically be put into place and the conduct the public wants to see of its public officials. That said, until the above three questions are more pointedly addressed in some manner, the voices critical of the Court and the perceived ethics of its members will not be silenced easily. This Article begins to answer these, and related, questions and contributes toward the larger effort of ensuring better trust and confidence in the Supreme Court and its members.

Part II begins by analyzing the newly adopted code of conduct for the Supreme Court justices. It then discusses the failure of the code to engage with reforms that would assure the public of the "goodness" of the Court's members. It concludes by examining why the justices have resisted the adoption of a binding code and posits that to enact such a code would require the justices to abdicate some of their own power. Part III discusses how one might identify or detect misconduct or unethical behavior by a justice. The Part begins by discussing why

https://www.nytimes.com/2023/11/14/us/politics/supreme-court-ethics-code-clarence-thomas-sotomayor.html [https://perma.cc/Z6SU-PEP8].

20. *See infra* Part 0.

21. *Id.* Note, not everyone thinks the lack of enforcement mechanism is a problem. One commentator stated: "[c]riticizing the Justices' Code for a lack of an enforcement mechanism is a bad rap. Judicial conduct codes rarely contain them." Russell Wheeler, *The Supreme Court's Code of Conduct: Enforcement Confusion, Extrajudicial Activism*, BROOKINGS (Nov. 29, 2023), https://www.brookings.edu/articles/the-supreme-courts-code-of-conduct-enforcement-confusion-extrajudicial-activism [https://perma.cc/B73F-7B9Z].

22. The reality, however, is that even if the justices are good people, the research suggests that good people often do bad things. *See infra* I.B. *See also* YUVAL FELDMAN, THE LAW OF GOOD PEOPLE: CHALLENGING STATES' ABILITY TO REGULATE HUMAN BEHAVIOR (2018).

rules, while necessary, are not going to be sufficient in this space for several reasons. The Part then analyzes the new code of conduct, which provides a set of standards that enable an ex post evaluation of the justices' conduct.

Part IV puts forth this Article's thesis. This Article argues that the current controversies surrounding the ethics of Supreme Court justices will not be satisfied unless and until there is a mechanism in place for Congress and the public to objectively assess the justices' conduct. This Part presents two justifications for this argument, drawing on insights from scholarship addressing (i) the rule of law and (ii) appearance of impropriety standards. This Article proposes a formal intervention by way of an independent ethics commission that will provide guidance on whether current or contemplated conduct by a Supreme Court Justice complies with formal (legal) or traditional (standards or norms) notions of judicial ethics. This guidance is important to at least three distinct constituencies: (i) members of Congress who have a responsibility to determine whether a justice's conduct warrants impeachment; (ii) the public so it can assess whether behavior by the justices is or is not unethical; and (iii) the current justices so they can properly engage in decisionmaking regarding potential ethical issues. While I focus on the creation of an independent ethics commission, the reality is a formal intervention could arise from a range of places—it does not have to come from Congress or the Court itself. The key to an effective intervention is the inclusion of a method for evaluating the justices' conduct that is (i) clear and precise, (ii) free from ideological taint, and (iii) consistently replicable across new sets of facts.

II

THE CODE, GOODNESS, AND POWER.

In Exodus, Moses is exhausted.[23] He is judging all the disputes amongst the Israelites, and his father-in-law, Jethro, realizes it has become too much for Moses.[24] In this Biblical account, Jethro instructs Moses to "select out of all the people able men who fear God, men of truth, those who hate dishonest gain . . . . Let them judge the people at all times."[25] Essentially, Jethro told Moses to choose a set of judges who were good—and who would use their goodness to fairly and impartially judge the disputes that arose amongst the people. The current fight about Supreme Court ethics is about a range of concerns, but at its core, it is about questions surrounding the "goodness" of the Justices and their unwillingness to abdicate some of their own power to assure the public of their goodness.[26]

23. *See Exodus* 17:12 (Douay-Rheims 1899 American Edition) ("And Moses' hands were heavy: so they took a stone, and put under him, and he sat on it: and Aaron and Hur stayed up his hands on both sides.").

24. *Exodus* 18:15–26.

25. *Exodus* 18:21–22 (New American Standard Bible).

26. Some might argue that questions of whether justices are good are no longer of importance. Instead, some might argue that the focus has been on selecting judges and justices that are aligned with certain ideological movements or constitutional interpretive methods. I am not sure that anyone can say

It is important to note that questions about (i) whether the justices are in fact good people, (ii) whether the justices' conduct is good, and (iii) whether the justices are acting ethically are technically different inquiries. Yet, each of these concerns are discussed in conversations about the ethics of Supreme Court justices. This Article does, at separate times, address each of these three concerns in making its larger arguments, although the primary purpose of this Article is to focus on ways in which ethical rules and standards may help provide mechanisms for evaluating whether the justices' conduct is or is not good. That said, I acknowledge that these three questions are analytically distinct, albeit related.

This Part begins by discussing critiques to the code of conduct adopted by the justices. It then turns to the concerns of goodness and power as related to the justices and their adopted code.

A. Critiquing the Code

For more than twenty years, the Court has publicly explained how its members evaluate their ethical obligations. In 1991, the Supreme Court "[a]dopted an internal resolution in which they agreed to follow the Judicial Conference regulations as a matter of internal practice," and these regulations provide "limitations on gifts and outside income."[27] In Chief Justice Roberts's 2011 annual year-end report, he explained that "[a]ll members of the Court do in fact consult" the code of conduct that governs the lower federal courts when "assessing their ethical obligations."[28] Additionally, the justices "may also seek advice from the Court's Legal Office . . . and from their colleagues."[29] In April 2023, the Court issued a "Statement on Ethics Principles and Practices" that all of the current justices purport to adhere to.[30] Finally, on November 13, 2023, the Supreme Court

for sure whether society continues to care about the goodness of their judges or justices, but there is anecdotal evidence that suggests concerns of goodness continue to matter. For example, during Justice Brett Kavanaugh's confirmation hearings, discussions of goodness abounded. Senator "Charles Grassley started off the questioning by asking Kavanaugh to describe his idea of a good judge." Stephanie Ebbs, *5 Key Takeaways from Brett Kavanaugh's Supreme Court Confirmation Hearing*, ABC NEWS (Sept. 5, 2018), https://abcnews.go.com/Politics/protesters-interrupt-brett-kavanaugh-confirmation-hearing-day/story?id=57617263 [https://perma.cc/EAX6-622E]. When asked how he wanted to be remembered, Kavanaugh stated "as a good father and a good judge." *Id.* When allegations emerged about his alleged past with Dr. Christine Blasey Ford, much of the hearing and commentary seemed to be rooted in concerns about whether Kavanaugh was a good person, the hearing ending with Kavanaugh "swear[ing] to God" that he had not done what was alleged. *See* Ezra Klein, *The Ford-Kavanaugh Sexual Assault Hearings, Explained*, Vox.Com (Sep. 28, 2018), https://www.vox.com/explainers/2018/9/27/17909782/brett-kavanaugh-christine-ford-supreme-court-senate-sexual-assault-testimony [https://perma.cc/CUK2-5RP2]. Outside of this anecdotal account, it might be important for society to continue to focus on the goodness of justices' conduct, because it seems doubtful that the rule of law norms this country utilizes will function properly in a world where notions of goodness have been completely preempted by concerns of power.

27. C.J. JOHN G. ROBERTS, 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 6–7 (2011) [hereinafter ROBERTS'S 2011 REPORT], http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf [https://perma.cc/5XYR-NFQ7].

28. *Id.* at 4.

29. *Id.* at 5.

30. Letter from C.J. John G. Roberts to Sen. Richard J. Durbin (Apr. 25, 2023), https://www.judiciary.senate.gov/imo/media/doc/Letter%20to%20Chairman%20Durbin%2004.25.2023.pdf

formally adopted a code of conduct. Importantly, the Court says the code formalizes efforts the justices were already undertaking. The Court never maintained that it failed to adhere to standards, it just had not formally adopted its own set of standards.

Many aspects of the code adopted by the Court do appear to be in line with what the Court said it was already doing. In other words, the code incorporates rules from the code of conduct that governs all lower federal court judges as well as certain statutory disclosure requirements. The adopted code, however, differs from these sources in ways that have opened the Court and its new code up to a range of critiques. These concerns build upon each other, but the primary issues are with the (i) use of the word "should" instead of "shall," which is generally consistent with the lower federal courts code; (ii) the lack of an enforcement mechanism; and the (iii) the deviation from "shall" to "should" with regards to disqualification standards.

Rules of professional conduct are typically quite purposeful in their use of language. Some rules are written permissively—for example using the word "may"—while other rules are written as mandates, which is typically denoted with the word "shall." Importantly, the code of conduct adopted by the justices mirrors the structure of the Code of Conduct for the United States Judges, which adopts a set of aspirational canons, instead of a set of binding rules, on all federal judges other than the Supreme Court justices.[31] Those canons almost exclusively use the word "should" instead of the word "shall." The code adopted by the justices is identical in many respects.

The use of the word "should" instead of the word "shall" creates a permissive structure that does not actually bind, mandate, or prohibit the justices' conduct. The thrust of many of the calls for the justices to enact a code was motivated by a concern that there was nothing constraining the justices' conduct to ensure they acted ethically. The code largely fails to address this concern of the public given its use of the word "should" in many places throughout the code. The word "should" was used in places where a "shall" almost would seem expected of a person who has been installed in one of the most powerful and important positions within the American government.[32] For example, Canon 1 of the code

[https://perma.cc/PSG5-E8SW].

31. The self-regulatory system for lawyers was originally organized around aspirational canons, but this was abandoned and the current structure of the rules of professional conduct was adopted by the American Bar Association in 1983. *See* Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239 (1991); Dana A. Remus, *Out of Practice: The Twenty-First-Century Legal Profession*, 63 DUKE L.J. 1243 (2014). There are some who have argued that it would be beneficial for the legal profession to move back toward the canon model. *See, e.g.*, Benjamin H. Barton, *The ABA, the Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons*, 83 N.C. L. REV. 411 (2005).

32. While I discuss the significant enforcement differences between lower court judges and justices, I think it would be fair to levy this same critique about the code adopted by the lower federal courts, which has identical language. *See generally*, Guide to Judiciary Policy, Chapter 2: Code of Conduct for United States Judges (Mar. 12, 2019) [hereinafter Lower Federal Courts Code],

states: "A Justice of the Supreme Court of the United States should maintain and observe high standards of conduct in order to preserve the integrity and independence of the federal judiciary."[33] In the aftermath of the allegations that have been levied against members of the Court in 2023—concerns that included potentially significant personal and financial conflicts of interest[34]—many will surely find puzzling the use of "should" as opposed to "shall" with regards to a statement referring to the need to "observe high standards of conduct."

Now the Court may have assumed that adopting the same basic underlying code provisions that govern the lower federal courts would be satisfactory. There are, however, two reasons why I do believe the "should/shall" critique is of particular significance and contributes to the sense that the adopted code of conduct is inadequate.

First, even though the code of conduct for the lower federal courts uses the word "should" throughout the canons, it does so within a regime that has enforcement mechanisms where the conduct of judges is subject to investigation and discipline.[35] In other words, the "should" within their canon can be objectively reviewed to determine whether the judges have gone too far astray from acceptable norms of behavior for members of the judiciary. This means there could be consequences for failing to adhere to the "should" if a panel of their peers finds the conduct a judge engages in to be problematic.[36] The justices' code of conduct, however, does not have an enforcement mechanism, which means that there is no external check on the justices' conduct, despite the adoption of this new code.

Second, the justices were aware that the choice between the words "shall" and "should" matters—and chose to adopt a lower standard. We know this because the Court has chosen to depart from the standard used by lower federal courts in at least one provision. In particular, the code of conduct for the lower federal courts has a provision that governs when judges "shall" disqualify.[37] The Supreme Court's code, however, states that "[a] Justice should disqualify himself or herself in a proceeding in which the Justice's impartiality might reasonably be questioned, that is, where an unbiased and reasonable person who is aware of all relevant circumstances would doubt that the Justice could fairly discharge his or her duties."[38]

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https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf [https://perma.cc/9CVV-5FDJ]. Critiquing the code for the lower federal court judges is beyond the scope of this Article.

33. 2023 Code, *supra* note 18, at 1.

34. *See supra* I

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35. Indeed, the code of conduct for the lower federal courts includes a specific reference to a potential enforcement mechanism. "The Code . . . may also provide standards of conduct for application in proceedings under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (28 U.S.C. §§ 332(d)(1), 351–364)." Lower Federal Courts Code, *supra* note 32, at 3.

36. For the lower federal court judges, again, the disciplinary process comes via the Judicial Conduct and Disability Act. *Id.*

37. Lower Federal Courts Code, *supra* note 32, at 8.

38.2023 Code, *supra* note 18, at 3.

Again, this lowers the standard of conduct expectation for the justices versus the judges on the lower federal courts. The justices have long said that they should be subject to different recusal standards, because there is no substitute available for Supreme Court justices when they must recuse, unlike the lower federal courts.[39] This concern from the justices, however, ignores the reality that they could adopt policies governing what to do in the case of a recusal. There are a number of proposals that address this potential occurrence, including proposals that would have the vacancy filled by living, former Supreme Court justices on a rotational basis or by cycling in judges from the lower federal courts.[40] Thus, the lack of a substitute may be, at least in part, a consequence of the justices' own making.

Moreover, the use of the word "should" instead of the word "shall" throughout the justices' new code demonstrates how unwilling the members of the Court are to put themselves in a position where they must diminish the extent of their own personal power. They have retained, in most provisions of the code, the ability to exercise their own independent judgment; to make exceptions for themselves.

B. Goodness

Traditionally, the head of our third branch of government – the Supreme Court – has relied quite a bit on their own goodness to govern their conduct. Much of the response from the Court to calls for regulation over the past ten to fifteen years has amounted to: "you can trust us to do the right thing when issues of ethics arise."[41] The Court pointed to several reasons for why the justices should be trusted. First, the Court had never needed a code before. Second, the Court had adopted policies that directed justices to look to certain sorts of authority—including the ethics code binding the lower federal judges—when confronted with ethical concerns.[42] But underlying these responses from the Court is an assumption that the justices can be trusted to do the right thing without rules or standards in place to ensure their conduct is good.

This assumption has several flaws, but I will focus on just one here. The new code of conduct fails to consider that given the right set of pressures; "good" people will choose unethical paths.

A whole host of studies from different fields—including behavioral ethics, management, organizational behavior, and accounting—reveal that you do not

39. ROBERTS'S 2011 REPORT, *supra* note 27, at 9. The newly adopted code continues to articulate these concerns and notes that "[t]he loss of even one Justice may undermine the 'fruitful interchange of minds which is indispensable' to the Court's decision-making process." 2023 Code, *supra* note 18, at 10.

40. *See* Lisa T. McElroy & Michael C. Dorf, *Coming off the Bench, Legal and Policy Implications of Proposals to Allow Retired Justices to Sit by Designation on the Supreme Court*, 61 DUKE L.J. 81 (2011); Caprice L. Roberts, *The Fox Guarding the Henhouse?: Recusal and the Procedural Void in the Court of Last Resort*, 57 RUTGERS L. REV. 107, 109 (2004).

41. There is a body of political science research that theorizes as to what leads to trust in the courts. *See, e.g.*, James L. Gibson & Gregory A. Caldeira, CITIZENS, COURTS AND CONFIRMATIONS 1, 5 (2009) (noting that longitudinal data on perceptions of the Court over time is relatively scarce).

42. *See generally*, ROBERTS'S 2011 REPORT, supra note 27.

have to be a bad person to do a bad thing. For example, organizational behavior and management scholars have put forth the concept of "bounded ethicality," which argues "that a person's morality is constrained in systematic ways that favor self-serving perceptions, which in turn can result in behaviors that contradict our intended ethical standards."[43] In other words, research suggests that "[p]eople predict that they will behave more ethically than they actually do, and when evaluating past (un)ethical behavior, they believe they behaved more ethically than they actually did."[44]

Additionally, scholars in the accounting field attempted to determine what motivates individuals to engage in fraud. A theorized concept—the fraud triangle—suggests that people engage in fraud when pressure, opportunity, and rationalization converge at the time of an individual's decisionmaking.[45] Scholars have long used this model to evaluate misconduct more generally, and the points of the fraud triangle can be applied to decisions the justices make. Indeed, the Court has already pointed to an area of pressure[46] the justices might face when making at least one decision—recusal determinations—because if a justice recuses from a case, the status quo does not allow for a substitute. This lack of a substitution creates pressure for justices to be available to hear cases. The current code creates an opportunity for the justices to make questionable recusal decisions without oversight or restriction, because the recusal decision remains solely in the hands of individual justices with no possibility for review.[47] And, perhaps, most importantly, the recusal decisions are subject to rationalization.[48] Rationalization allows an individual to align the act they undertake with their own internal thoughts and perceptions of themselves as a good and moral person.[49] The code of conduct not only allows the justices to make their own recusal decisions, but it

43. *See* Ann E. Tenbrunsel, Kristina A. Diekmann, Kimberly A. Wade-Benzoni & Max H. Bazerman, *The Ethical Mirage: A Temporal Explanation as to Why We Are Not as Ethical as We Think We Are*, 30 RSCH. ORG. BEHAV. 153 (2010) (citing Mahzarin R. Banaji, Max H. Bazerman & Dolly Chugh, *How (Un)Ethical Are You,* 81 HARV. BUS. REV. 55 (2003)).

44. Tenbrunsel, *supra* note 43.

45. *See generally*, Emily M. Homer, *Testing the Fraud Triangle: A Systematic Review*, 27 J. FIN. CRIME 172 (2020) (citing D.R. CRESSEY, OTHER PEOPLE'S MONEY: A STUDY OF THE SOCIAL PSYCHOLOGY OF EMBEZZLEMENT (1973)); W.S. ALBRECHT ET AL., HOW TO DETECT AND PREVENT BUSINESS FRAUD (1982).

46. Alexander Schuchter & Michael Levi, *The Fraud Triangle Revisited*, 29 SEC. J. 107, 107 (2016) ("Various situational circumstances may lead to personal or work-related financial pressures, for example, costs because of significant medical expenditures, meeting analysts' forecasts, producing better and better business results or non-financial pressures, for example, preserve social status, working very long hours, divorce, diseases and so on.")

47. 2023 Code, *supra* note 18, at 3. There is social science literature that suggests that when given the opportunity, people will often attempt to appear to choose the moral path while in reality they preference choices that will benefit themselves. *See e.g.*, Daniel C. Batson, Diane Kobrynowicz, Jessica L. Dinnerstein, Hannah C. Kampf, & Angela D. Wilson, *In a Very Different Voices: Unmasking Moral Hypocrisy*, 72 J. PERS. & SOC. PSYCH. 1335 (1997).

48. Importantly, a range of social science literature suggests that people often perceive themselves as less biased than those around them. *See e.g.*, Don. A. Moore & Deborah A. Small, *Error and Bias in Comparative Judgment: On Being Both Better and Worse Than we Think we Are*, 92 J. PERS. & SOC. PSYCH. 972 (2007); Emily Pronin, Daniely Y. Lin, & Less Ross, *The Bias Blind Spot: Perceptions of Bias in Self Versus Others*, 28 PERS. & SOC. PSYCH. BULL. 369 (2002).

49. Leandra Lederman, *The Fraud Triangle and Tax Evasion*, 106 IOWA L. REV. 1153, 1161 (2021).

also specifically includes a provision that "the rule of necessity" may override an otherwise valid disqualification decision.

Importantly, I am not suggesting that the justices would be making these questionable decisions purposefully or with mindfulness. [50] Indeed, behavioral ethics research suggests that people sometimes make decisions without ever actively engaging the question of whether we might be acting unethically in the situation.[51] My goal in highlighting the ways in which the justices' recusal provisions could intersect with the three components of the fraud triangle is not meant to (i) suggest that the policy adopted by the Court was not thought-out carefully or (ii) minimize the difficulties created by the need to balance a number of important priorities. Instead, my hope is to demonstrate that even sensibly created policies can sometimes have the unintended consequence of promoting unethical behavior. Once realities like these are recognized, it presents an opportunity to identify mechanisms to discourage unethical behavior—like, for example, oversight or transparency over recusal decisions.

These lines of research matter when discussing the efficacy of the justices' new code of conduct because the code relies almost solely on the justices' own goodness—the justices' own ability to engage in perfect ethical decisionmaking even in the absence of guardrails to guide them. The code adopts a "should," not a mandatory standard, which allows the justices to make their own determinations about, for example, whether a personal or financial conflict of interest might indeed impact the justice's decisionmaking. This distinction matters, because the "should" allows for more rationalization by a justice than a "shall" would. The word "should" suggests that there are instances when it might be permissible for a justice to do something else; while the word "shall" eliminates at least part of the opportunity for that type of rationalization. Additionally, the code fails to create a mechanism for oversight, review, or enforcement, further cementing the ability of the justices to rationalize their own behavior and to assume their own ability to act ethically on their own. Research from a range of fields demonstrates over and over again that good people will often fall short of their own ideals and moral standards. There is no reason to think the justices of the Supreme Court are immune from basic human fallibility.

In fact, scholarly work on moral reasoning argues "that individuals can marshal complex reasoning in order to justify morally suspect choices."[52] And people are more likely to rationalize future bad behavior when they have already engaged in morally questionable conduct.[53] Codes of conduct can be important tools to encourage ethical conduct, but the code adopted by the Court fails to put the

50. *See supra* note 43.

51. *See supra* note 43.

52. *See* Celia Moore & Ann E. Tenbrunsel, *"Just Think About It"? Cognitive Complexity and Moral Choice*, 123 ORG. BEHAV. & HUM. DECISION PROCESSES 138 (2013) (citing Peter H. Ditto, David A. Pizarro & David Tannenbaum, *Motivated Moral Reasoning*, *in* THE PSYCHOLOGY OF LEARNING AND MOTIVATION 307, 307–38 (2009)).

53. *See e.g.*, Anna C. Merritt, Daniel A. Effron, & Benoît Monin, *Moral Self-Licensing: When Being Good Frees Us to Be Bad*, 4 SOCIAL AND PERSONALITY PSYCHOLOGY COMPASS 344 (2010).

sorts of guardrails in place that would help ensure that good people do not walk down the wrong path and find themselves selecting the unethical choice. Some of what is needed by a code of conduct is the provision of guidance; making clear which path is right and which is wrong. But some of it is about counterbalancing the pressure to do wrong with a different kind of incentive to do right. Even if every current justice on the Supreme Court is, in fact, "good," they still need a code of conduct that is binding and that has enforcement mechanisms.

C. Power

Thus far, this Part has critiqued the contents of the code of conduct adopted by the Court. Some of these concerns, however, would melt away if the code of conduct had an enforcement mechanism. Enforcement mechanisms, however, would require the justices to relinquish some of their own power.

It is important to remember that by adopting a code of conduct the justices have engaged in a form of self-regulation. Self-regulation is common for those who have voluntarily chosen to enter into a profession. Lawyers, for example, are considered members of a profession. One classic hallmark of professions is that the members of that profession get to (i) determine the rules their members should abide by and (ii) sanction members for a failure to comply with such rules.[54] The code adopted by the Court, however, contains much of what appears to be more aspirational standards than formal rules, while also failing to provide a mechanism to sanction its members. Thus, the Court has adopted a self-regulatory tool that fails to self-regulate.

Traditionally, in the United States self-regulation has been treated as more of a privilege than a formal right, and when self-regulation fails state intervention often follows. Take, for example, the conduct of attorneys and accountants following the Enron scandal.[55] Despite a fair amount of advocacy and pushback from lawyers (including the American Bar Association)[56] and accountants,[57] Congress enacted statutory provisions that had a direct impact on the regulation of both groups,[58] which had traditionally been privileged to engage primarily in self-regulation. A more recent example comes from the state of California, where failures by the state bar disciplinary authorities led to formal interventions from the state legislature, which required an overhaul of the self-regulatory system of

54. Veronica Root Martinez & Caitlin-Jean Juricic, *Toward More Robust Self-Regulation Within the Legal Profession*, 69 Wash. U. J.L. & Pol'y 241, 244–45 (2022).

55. *See Opinion: Enron and the Lawyers*, N.Y. TIMES (Jan. 28, 2002), https://www.nytimes.com/2002/01/28/opinion/enron-and-the-lawyers.html [https://perma.cc/F4A8-F5ZA].

56. Arnold Rochvarg, *Enron, Watergate and the Regulation of the Legal Profession*, 43 WASHBURN L.J. 61, 85 (2003).

57. Stephen Taub, *Enron Blame Game: Accountants Take the Offensive*, CFO (Dec. 5, 2001), https://www.cfo.com/news/enron-blame-game-accountants-take-the-offensive/682429 [https://perma.cc/J9M4-WMK8].

58. Rochvarg, *supra* note 56, at 85.

lawyers.[59]

Importantly, judges are also members of a profession that typically engages in self-regulation.[60] Most judges in the United States are subject to some sort of enforcement regime. For example, the Judicial Conduct and Disability Act, which governs the lower federal courts, is in many ways a state intervention meant to promote self-regulation.[61] The Act, which was enacted by Congress, outlines a self-regulatory system but then defers the actual work of regulation to members of the judiciary.[62] In many ways, the Act is Congress saying—judges need to be regulated, so let the judges regulate themselves.

The Supreme Court justices, however, have argued that regulation for themselves would be unconstitutional. They essentially make an exceptionalism argument that is, perhaps, unsurprising given that regulation levied against the Court's members would strip them of some of their power, and those with power seldom want to see it diminished. Yet, there are at least three ways in which an enforcement mechanism could be levied against the members of the court.

First, the Court's members could voluntarily submit to some sort of enforcement mechanism. One of the hallmarks of joining a profession is the knowledge that one is letting go of one's own power and freedoms as part of acceptance into that profession. For lawyers, that means they must sometimes put the needs of the justice system before their own preferences. It also means that when they join the legal profession, lawyers know that they are also submitting to the regulation of the profession. Lawyers are aware that their livelihoods are dependent on their ability to remain in good status with professional norms and rules. And part of why the regulatory regimes are upheld and work is because lawyers voluntarily submit to them. The justices could do the same. The individual justices could choose to submit themselves to an enforcement mechanism of their choosing.

Second, Congress could pass something quite similar to the Judicial Conduct and Disability Act for justices of the Supreme Court. As was noted above, the Judicial Conduct and Disability Act essentially serves as a statute that requires self-regulation on behalf of the lower federal court judges. The actual investigation, decisionmaking, and recommendations come from judges in a format that mimics what we have come to expect of self-regulatory systems in the United States. This sort of congressional action would be relatively narrow and would

59. Michael S. Tilden, CPA, Acting California State Auditor, *The State Bar of California's Attorney Discipline Process: Weak Policies Limit its Ability to Protect the Public from Attorney Misconduct* (Apr. 14, 2022), https://www.auditor.ca.gov/reports/2022-030/index.html [https://perma.cc/JYV6-MXXL].

60. Recent reporting calls into question the effectiveness of the Judicial Conference in overseeing the ethics of federal judges. *See* Brett Murphy & Kirsten Berg, *The Judiciary Has Policed Itself for Decades. It Doesn't Work.*, PROPUBLICA (Dec. 13, 2023), https://www.propublica.org/article/judicial-conference-scotus-federal-judges-ethics-rules [https://perma.cc/2XVU-YXRT]. Time will tell whether this reporting is accurate—but I maintain my argument that self-regulation is permitted until it is clear that it has failed, and then formal regulatory responses are required and, indeed, do often occur via legislative interventions.

61. *See* 28 U.S.C. §§ 351–364.

62. *See* Jeffrey N. Barr & Thomas E. Willging, *Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980*, 142 U. PENN. L. REV. 25, 29 (1993).

confer a great deal of authority on the Court itself, but it would ensure an enforcement mechanism is put into place. The problem, however, is that the justices have argued that congressional intervention is unconstitutional. Congress's Article I power to make laws includes a provision requiring Congress to enact all laws "which shall be necessary and proper" for executing its powers under the Constitution.[63] Several scholars have argued that Congress could require the Court to adopt an ethics code, because they believe it "fits comfortably within Congress's authority under the Necessary and Proper Clause to establish the Court's structure and daily operations, including ethics rules."[64] These arguments have been made while conceding that there are limits to Congress's ability to regulate justices when it comes to "judicial independence, removal of judges (except through impeachment), judicial hierarchy, and the singular Supreme Court."[65]

With the first option unlikely and the second option potentially raising a difficult constitutional question, a third option presents itself. Congress could pass a more aggressive set of legislative enactments for the express purpose of ensuring it has the information required to accurately assess whether the justices have engaged in impeachable offenses. Legislation passed for the purpose of assisting Congress in its constitutionally mandated oversight over the judiciary should, ironically, survive a constitutional challenge more readily than the more conservative approach discussed above. One of Congress's powers is to, if necessary, impeach justices of the Supreme Court if they engage in constitutional misconduct. The Constitution states that the justices will hold their offices "during good Behavior."[66] The question, however, is how would Congress obtain the information necessary to effectuate its constitutional mandate to know whether justices are engaging in the type of misconduct that would require removal from office?

One way for Congress to make this determination in an unbiased, systematic, and objective manner would be for Congress to have (i) a robust disclosure regime in place providing it with information regarding the justices' conduct, (ii) a standard or set of rules against which to evaluate those disclosures to identify potential deficiencies, (iii) a mechanism by which to investigate ethical concerns

63. U.S. CONST. art. I, § 8, cl. 18.

64. Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism*, 26 GEO. J.L. ETHICS 443, 475 (2013). Professor Renee Knake Jefferson has argued that Congress "has authority under the U.S. Constitution [through the Necessary and Proper Clause] to require the Supreme Court to adopt a code of ethics and to specify particular topics that must be covered, for example financial investments, personal bias, prior work on the matter in controversy, and other potential conflicts or influences." *Judicial Ethics and Transparency: The Limits of Existing Statutes and Rules: Hearing Before the H. Comm. on the Judiciary*, 107th Cong. 7 (2021) (statement of Renee Knake Jefferson, Doherty Chair in Legal Ethics & Professor of Law, University of Houston Law Center), https://docs.house.gov/meetings/JU/JU03/20211026/114165/HHRG-117-JU03-Wstate-JeffersonR-20211026-U1.pdf [https://perma.cc/BP8A-T4EM].

65. *See* Frost, *supra* note 64, at 463–75.

66. U.S. CONST. art. III, § 1. Scholars have debated quite a bit about the proper interpretive meaning of the term "good Behavior." *Cf.,* Saikrishna Prakash & Steven D. Smith, *Reply: (Mis)Understanding Good-Behavior Tenure*, 116 YALE L.J. 116 (2006); *with* Martin H. Redish, *Response: Good Behavior, Judicial Independence, and the Foundations of American Constitutionalism*, 116 YALE L.J. 139 (2006); *with* Saikrishna Prakash & Steven D. Smith*, How to Remove a Federal Judge*, 116 YALE L.J. 72 (2006).

raised against a justice to determine whether impeachment proceedings are warranted, and (iv) a method of evaluating when conduct rises to the level of an impeachable offense.[67] The subsequent parts will address these tasks.

III

IDENTIFYING POTENTIAL MISCONDUCT

Scholars have argued that Congress has the authority to prescribe ethics rules but have readily noted that enforcement of a code might be an issue. Professor Jamal Greene has explained "that, apart from impeachment, remedies for violating such rules may require that the Court itself sit atop the chain of enforcement."[68] I, however, am not as concerned with enforcement, because I believe the Constitution has provided an effective enforcement tool when faced with misconduct by a Supreme Court justice—impeachment. As "Alexander Hamilton explained, impeachment is 'a method of national inquest into the conduct of public men' accused of violating the 'public trust.'"[69]

The problem, however, is that Congress has failed to create an appropriate detection and investigative regime that would enable it to know when to enforce its impeachment powers against a particular justice. Congress needs a set of rules and standards that will enable it to make these determinations.

A. Rules: Necessary But Not Sufficient

For Congress to be able to act upon its constitutional mandate regarding impeachment, Congress must know whether the justices are engaged in misconduct. That means that Congress must have formal mechanisms in place that enable it to know what the justices are in fact doing.

There are federal statutes already in place that require disclosures from the justices, although the justices have not affirmatively agreed that it was constitutional for Congress to enact these statutes.[70] Specifically, the 1978 Ethics in Government Act requires the justices, due to their status as government officials, to annually report "all gifts [above a certain monetary threshold/value] received from any source other than a relative."[71] The Ethics in Government Act, however, does not require disclosure of "any food, lodging, or entertainment received

67. The use of impeachment is currently in flux. At one time it was almost never utilized, and in today's political environment one might have concerns that it is being used as a purely political tool. Even if that is the case, the constitution has provided impeachment as the mechanism for Congress to oversee the activities and actions of Article III judges. I will readily admit it is an imperfect tool, but this is the constitutional framework one must work with.

68. *Judicial Ethics and Transparency: The Limits of Existing Statutes and Rules: Hearing Before the H. Comm. on the Judiciary*, 107th Cong. 1 (2021) (statement of Jamal Greene, Dwight Professor of Law, Columbia Law School), https://docs.house.gov/meetings/JU/JU03/20211026/114165/HHRG-117-JU03-Wstate-GreeneJ-20211026-U1.pdf [https://perma.cc/5MA7-W48Z].

69. JARED P. COLE & TODD GARVEY, CONG. RSCH. SERV., R46013, IMPEACHMENT AND THE CONSTITUTION 15 (2023) (citing Federalist Paper 65).

70. ROBERTS'S 2011 REPORT, *supra* note 27, at 6 ("The Court has never addressed whether Congress may impose those requirements on the Supreme Court. The Justices nevertheless comply with those provisions.").

71. Ethics in Government Act of 1978, Pub. L. 95-521, § 102(a)(2)(A), 92 Stat. 1824, 1825.

as personal hospitality."[72] Additionally, the 1989 Ethics Reform Act addresses conflicts of interest and it prohibits government officials, including the justices, from "accept[ing] anything of value from a person . . . seeking official action from the individual's reporting entity [or] whose [financial] interests may be substantially affected by the performance or nonperformance of the individual's official duties."[73]

These acts were put in place to prevent (i) financial conflicts of interest via gifts that could function in a bribery or quid-pro-quo manner and (ii) financial inducements from individuals with business before the government official. The 1978 Ethics in Government Act relies on disclosures to attempt to identify potential quid pro quo, bribery, or influence via gifts. "Often, the unwritten goal of these sorts of disclosure regimes is to decrease the gifts that actually occur. The 1989 Ethics Reform Act, however, bars government officials from engaging in activities that amount to financial conflicts of interest that might influence their official decisionmaking.

Congress should do more in this space as it relates to the justices,[74] and it should do so for the express purpose of gathering information that will allow it to undertake its constitutionally mandated impeachment responsibilities. In particular, Congress should consider what additional disclosures it would need from the justices to ensure it has enough information to fulfill its constitutional mandate. Formal disclosure rules regarding financial and personal conflicts of interest would likely be Congress's primary priority, but it should keep the allegations and concerns of the past decade in mind. What sort of information has the public been concerned with? Is there a way to better disclose that information to the public, so that Congress knows whether the public's concerns should also be its concern for impeachment purposes?

This sort of inquiry immediately highlights an area that is ripe for legislative revision—the meaning, definition, and limits of the term "personal hospitality" in both the 1978 and 1989 Acts. For example, in June 2023, Justice Alito was criticized for failing to report a flight to Alaska that he took on a private jet for a social event.[75] Justice Alito argued that he was not required to report the plane travel, because it qualified as "personal hospitality," thereby exempting it from disclosure requirements.[76] More specifically, Justice Alito explained:

> Until a few months ago, the instructions for completing a Financial Disclosure Report told judges that "[p]ersonal hospitality need not be

72. *Id.*

73. Ethics Reform Act of 1989, Pub. L. 101-194, § 303(a), 103 Stat. 1716, 1746–47.

74. And, for that matter, other governmental officials, but that is beyond the scope of this Article. These two Acts are not as sophisticated as what you see in the most recent anticorruption statutes that have been passed internationally over the past several years. *See, e.g.,* Jose-Miguel Bello y Villarino, *International Anticorruption Law, Revisited*, 63 HARV. INT'L L. J. 343 (2022).

75. 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), https://www.propublica.org/article/samuel-alito-luxury-fishing-trip-paul-singer-scotus-supreme-court [https://perma.cc/997S-VJBP].

76 *Id.*

> reported," and "hospitality" was defined to include "hospitality extended for a non-business purpose by one, not a corporation or organization, . . . on property or facilities owned by [a] person . . ."
>
> When I joined the Court and until the recent amendment of the filing instructions, justices commonly interpreted this discussion of "hospitality" to mean that accommodations and transportation for social events were not reportable gifts. The flight to Alaska was the only occasion when I have accepted transportation for a purely social event, and in doing so I followed what I understood to be standard practice . . . I did not include on my Financial Disclosure Report for 2008 . . . the seat on the flight to Alaska.[77]

Assuming Justice Alito is correct, it is because he is focused on technical compliance with the statute. I understand why this sentence would be frustrating. Technical compliance matters. Technical compliance means a person is not engaged in formal misconduct. But concerns of professional and judicial ethics will never be fully resolved based on technical compliance with legal rules.

One of the realities of a regime that is based solely on bright-line rules is that when one has a bright-line rule, one often fails to consider whether one's actions are in fact ethical. In this case, the rule prompts individuals to make a legal decision—am I legally required to disclose this airline travel? Legally, it appears that if you agree with Justice Alito's interpretation of the words "personal hospitality" in the statute, he is correct—he has done nothing wrong.[78] Legal requirements, however, are not necessarily equivalent to ethical norms or standards.

Indeed, behavioral ethics literature shows that if you change the priming or framing of a question—to one that is ethical as opposed to legal—one often gets different responses.[79] By adopting a bright-line rule, Congress is priming those subject to the rule to consider the legality of their actions without simultaneously prompting them to consider whether their actions—while technically legal—are ethical or will be perceived as ethical. That disconnect—between what one is legally allowed to do and how people will perceive such actions—directly impacts the public's view of a person's goodness. Justice Alito may very well be correct that he did nothing wrong by (i) taking the trip or (ii) failing to report it. But the reality is that the public's perception of the trip was one of largess, excess, elite

77. Samuel A. Alito, Jr., *Justice Samuel Alito: ProPublica Misleads its Readers*, WALL ST. J. (June 20, 2023), https://www.wsj.com/articles/propublica-misleads-its-readers-alito-gifts-disclosure-alaska-singer-23b51eda [https://perma.cc/LEP3-2UHT].

78. Indeed, you see this sort of technical compliance argument in prior correspondence between counsel for the Supreme Court and members of congress concerned with potential actions of the Justice. *See, e.g.*, Letter from Ethan V. Torrey, Legal Counsel, Supreme Court of the United States to The Honorable Sheldon Whitehouse, United States Senate (Nov. 28, 2022), https://www.documentcloud.org/documents/23320580-letter-from-scotus-counsel [https://perma.cc/TH37-7W3V] (Supreme Court legal counsel's response to allegations that Justice Alito revealed the outcome of a 2014 decision before it was released).

79. *See, e.g.*, MAX BAZERMAN & ANN TENBRUNSEL, BLIND SPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT (2014).

cronyism, and corruption, and Justice Alito failed[80] to, at least publicly, take those extralegal concerns into account.

Congress should modify existing disclosure regimes and consider what additional disclosures they would need from the justices to fulfill Congress's constitutional mandate to engage in impeachment proceedings. But the rules on their own will never be enough, because (i) a focus on technical compliance will never be publicly satisfactory, and (ii) it is impossible to adopt all necessary rules of professional conduct ex ante. These realities are, at least in part, why professionals are often subject to a mix of rules and standards.

B. Traditional Standards

There is a robust literature on the role of rules versus standards, including from law and economics scholarship. Professor Louis Kaplow has explained that "the only distinction between rules and standards is the extent to which efforts to give content to the law are undertaken before or after individuals act."[81] Rules tell people what to do ex ante and standards provide a mechanism by which to evaluate conduct ex post.

The code of conduct adopted by the justices does have a few rules, but it is primarily a standards document—with an emphasis on what I will call "permissive" standards, due to the word "should" instead of the word "shall" in the vast majority of the document. The mandatory rules in the code look to be items that the justices were already required to do prior to the enactment of the code.[82] Part of the criticism, I think, of the Court's adopted code is disappointment that the Court failed to adopt more formal rules—that it failed to provide more information ex ante on what is and is not acceptable. Yet, if you view the code of conduct as one piece of a larger effort to ensure ethical conduct, the adoption of the standards can be considered quite valuable. This Part will detail three reasons why the adopted code of conduct—as is—is helpful to the larger effort to ensure that Supreme Court justices are acting ethically.

First, legal scholarship has long recognized that many legal interventions are valuable, in part, because of their expressive function. Professor Cass Sunstein explains that "the expressive function of law" is "the function of law in 'making statements' as opposed to controlling behavior directly."[83] Sunstein's concern was how legal statements contribute to the changing of social norms, but there are a variety of ways in which legal statements have an expressive function. The Supreme Court had long maintained that its members were adhering to ethical standards, and the Court would point to those standards when complaints were

80. Indeed, one sees this failure in his preemptive response to reporting on the matter. Justice Alito rationalizes the trip because "as far as [he was] aware, [the seat] would have otherwise been vacant." Alito, *supra* note 77. And it was his "understanding that this would not impose any extra cost" on the individual who owned the plane. *Id.*

81. Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 560 (1992).

82. For example, "Associate Justices must receive prior approval from the Chief Justices to receive compensation for teaching." 2023 Code, *supra* note 18, at 12–13.

83. Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PENN. L. REV. 2021 (1996).

levied about the lack of a code.[84] Yet, at some point, the members of the Court began noting that adopting a formal code might be helpful for the public. For example, in September 2023, Justice Elena Kagan explained that "it would be a good thing for the [C]ourt" to adopt a code of ethics.[85] And in October 2023, Justice Amy Coney Barrett publicly stated that "she favored an ethics code for the Supreme Court."[86] The code of conduct is helpful, because it provides a clear expression of the standard of conduct the justices aspire to adhere to as members of the Court.[87]

Second, the standards adopted by the Court are typical of what one often sees applied for assessing the conduct of members of the judiciary and members of the legal profession. The code of conduct focuses on (i) avoiding the appearance of impropriety, (ii) minimizing personal or financial conflicts of interest, and (iii) providing methods for dealing with those conflicts of interest, primarily recusal. Additionally, the code includes other standards for justices' conduct, like encouraging the justices to avoid the use of chambers' resources for outside purposes and a suggested prohibition on political activities.

Yet, the public, policymakers, and commentators are largely dissatisfied with the use of standards in the code of conduct, because they had hoped for the Court to adopt a set of binding, ex ante rules.[88] And that hope does not seem unreasonable, given the suggestions of unethical conduct on behalf of the justices over the course of the last few years, paired with the investigative reporting that took place throughout 2023.[89]

That said, the code of conduct adopted by the justices does have a third benefit—it augments the statutory rules Congress already has in place and provides an additional lens that Congress can use when determining whether impeachment proceedings are warranted. While I have already explained that it would be helpful for Congress to increase the required disclosures from the justices to effectuate Congress's constitutional mandate to impeach justices, when necessary, I have also noted that there are limits to ex ante rules. By adopting this code of

84. *See supra* Part I.A.

85. 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 [https://perma.cc/Q6U6-NJKV].

86. Abbie VanSickle, *Justice Barrett Calls for Supreme Court to Adopt an Ethics Code*, N.Y. TIMES (Oct. 16, 2023), https://www.nytimes.com/2023/10/16/us/politics/supreme-court-ethics-code-amy-coney-barrett.html [https://perma.cc/7NR3-YB5H].

87. At a minimum, the code helps to fix a narrative that had circulated across the populace generally that the Supreme Court justices were the only judges in the nation that were not subject to an ethics code. *See* Steven Shepard, *Faith in The Supreme Court Is Down. Voters Now Say They Want Changes*, POLITICO (Sept. 30, 2023), https://www.politico.com/news/2023/09/30/supreme-court-ethics-poll-00119236 [https://perma.cc/H7PS-BVDH]; Michael Waldman, *New Supreme Court Ethics Code is Designed to Fail* (Nov. 14, 2023), https://www.brennancenter.org/our-work/analysis-opinion/new-supreme-court-ethics-code-designed-fail [https://perma.cc/B3BE-YXYM]. That commonly reported narrative was difficult for the public to understand and, quite frankly, struck many as a ludicrous. Whatever one thinks of the adopted code, the fact that the justices have a code helps to stop a narrative that was difficult for many non-lawyer members of the public to situate and understand.

88. *See, e.g.*, Waldman, *supra* note 86.

89. *See infra* Introduction.

conduct, the Supreme Court has provided Congress with standards by which it can better engage in ex post assessments of justices' conduct when Congress is determining whether impeachment proceedings are appropriate. In other words, when you put the statutory rules, which admittedly need revision and supplementation,[90] together with this code of conduct, Congress now has an excellent measure for assessing whether the justices' conduct is worthy of initiating impeachment proceedings.

Take, again, Justice Alito's private plane ride to Alaska. Justice Alito very well may have been in technical compliance with federal statutory requirements when he decided to take the trip without disclosing it based on the interpretation of personal hospitality that he believed to be applicable at the time. The code states that "[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."[91] The problem with allegations of a free trip on a private plane is that it sparks questions about the motives of the free trip. Was it really just a fishing trip? Or was it an opportunity for those on the plane to obtain access to one of the most powerful individuals in the United States?

Justice Alito took pains to explain why he did not know that the person who owned the plane had business before the Court due to the realities of complicated parent and subsidiary corporate relationships.[92] What the public does not know, however, is whether the person who owned the plane knew that he had or might have business before the court. What the public does not know—and presumably Justice Alito does not know—is whether part of what motivated the invitation on the plane was the person's contemplation that at some point he might have business before the Court that Alito might rule upon. Remember, this particular portion of the code is not concerned with whether a person actually influences the justice. The stated concern is whether a justice knowingly engaged in conduct that allows another individual to "convey the impression" that they might influence the justice. And in this instance, there were many who appeared to be concerned—including reporters,[93] members of Congress,[94] and the public more generally—that the trip may have been a mechanism for wealthy elites to gain access to and influence Justice Alito.[95] An appropriate ex ante analysis of Alito's con-

90. Susan Fortney, *The Role of Accountability in Preserving Judicial Independence: Examining the Ethical Infrastructure of the Federal Judicial Workplace*, 87 LAW & CONTEMP. PROBS., no. 1, 2024, at 119.

91. 2023 Code, *supra* note 18, at 2.

92. Alito, *supra* note 15.

93 *See, e.g.*, Elliott, et al., *supra* note 75.

94. *See, e.g.*, Letter from Senator Sheldon Whitehouse to Paul Singer, President, Elliott Investment Management, L.P. (July 11, 2023), https://www.whitehouse.senate.gov/imo/media/doc/Letter%20to%20Singer.pdf [https://perma.cc/QKB2-97FQ] (letter requesting more information regarding the trip).

95. *See, e.g.*, Jesús Rodríguez, *Samuel Alito Ventures into the Court of Public Opinion*, WASH. POST (June 23, 2023), https://www.washingtonpost.com/lifestyle/2023/06/23/samuel-alito-supreme-court-speaking-out/ [https://perma.cc/L3FR-XHJW] (noting Alito's acknowledgement that the Supreme Court's approval rating has gone down as a result, in part, due to claims that the Court is made up of a set of illegitimate members who are

duct, using the standards the Court said its members consult to direct their behavior, suggests that it was in fact improper for Alito to go on the trip. The standards in the code of conduct adopted by the court, therefore, would have strongly cautioned against Justice Alito taking the trip. Note—that is a different determination from whether he was legally required to disclose the trip.[96]

Rules regarding the justices' conduct will never be sufficient, because one cannot identify the full spectrum of rules one might need to put in place ex ante. Additionally, rules encourage formalistic thinking about whether a person is in legal compliance with a particular legal or regulatory mandate without accounting for additional ethical expectations or norms. Standards, however, are also insufficient, as they often fail to incorporate sufficient definiteness and concreteness to ensure minimum standards of conduct are met. The combination of rules and standards governing the conduct of justices, however, can provide guidance (i) to the Justices on what behavior is or should be considered acceptable and (ii) to Congress when determining whether an inquiry into impeachment proceedings may be needed.

C. The Need For Nuance

In the preceding Section, I suggest that Justice Alito's acceptance of a trip on a private plane by a wealthy businessman may have violated the standard of conduct set out by the Supreme Court because it might have conveyed the impression that the owner of the plane was in "a special position to influence the Justice."[97] A fair question, however, is how far would I take that analysis?

For example, some have questioned whether it is permissible for justices to speak at certain organizations, such as the Federalist Society.[98] These critiques, I think, track closely with the rationale I have articulated for why the trip on the private plane was unacceptable conduct. The critique of the connection between conservative justices and the Federalist Society is rooted in allegations that the organization and its members are attempting to influence the conservative jus-

engaging in unethical conduct); *see also* Alicia Bannon, *Ethics Scandals Show the Need for Supreme Court Term Limits*, BRENNAN CENTER FOR JUSTICE (June 23, 2023), (explaining that "[t]he most charitable reading of recent scandals is that many justices have come to experience cozy relationships with billionaires and power brokers as [if it is] normal").

96. Primarily in an effort to adhere to the length restrictions on this Article for the journal, I have limited my examples in this Part thus far to Justice Alito's trip to Alaska. I could have, however, expanded this section and included examples from other justices that would have had similar results. For example, Justice Sotomayor's use of chamber's staff to help promote her children's book and failure to recuse from cases involving her book's publisher appears to have run afoul of the justices' code of conduct. *See, e.g.*, Brian Slodysko & Eric Tucker, *Supreme Court Justice Sotomayor's Staff Prodded Colleges and Libraries to Buy Her Books*, AP NEWS (July 11, 2023), https://apnews.com/article/supreme-court-sotomayor-book-sales-ethics-colleges-b2cb93493f927f995829762cb8338c02 [https://perma.cc/HVE6-Q6QB].

97. 2023 Code, *supra* note 18, at 2.

98. *See, e.g.*, Nathan T. Carrington & Logan Strother, *Gorsuch is Scheduled to Speak to the Right-Wing Federalist Society. Americans Find Such Speeches Inappropriate*, WASH. POST (Feb. 4, 2022), https://www.washingtonpost.com/politics/2022/02/04/gorsuch-federalist-society-republicans [https://perma.cc/U6UE-RMCQ].

tices in a way that will ensure certain outcomes are reached in ideologically controversial cases.[99] Some have argued that the justices should not speak at events hosted by organizations like the Federalist Society,[100] because those activities diminish the legitimacy of the Court and its members and are perceived by many as violating the norm against engaging in impropriety. I disagree with this position.

In many respects, the justices are the most powerful members of the American legal profession. The Federalist Society is an organization explicitly founded for members of the legal profession and law students. It has clear ideologically based foundations, but I can imagine there are some that would say the same of the NAACP. I do not think it would be beneficial to adopt a set of standards that would require the justices to close themselves off from certain membership organizations because their members reflect a particular subset of political views widely held within America.[101] I think it is often mutually beneficial for the justices to find ways to interact with members of the legal profession.

When one considers this example under the new code of conduct, a clear path forward may not immediately reveal itself. Canon 4 states that a justice "may speak . . . on both law-related and nonlegal subjects," but it also states that the justices should not engage in activities "that detract from the dignity of the Justice's office."[102] The initial provision of Canon 4 seems to be encouraging the justices to continue to interact with the public via speeches and other activity, but the latter provision is meant to provide a limiting principle. Some of those that critique the relationship between conservative justices and the Federalist Society, I think, would say that it detracts from the dignity of the office. But I think there are large groups of lawyers—like those in the Federalist Society—who would debate that determination.

And of course, there could be other difficult scenarios that make charting a clear path forward challenging. For example, what if one were to focus on the justices' actual public remarks as opposed to who or where the speech is given. For example, many critiqued Justice Alito's remarks at a 2020 Federalist Society event as being overly political in nature.[103] Would a sanction for the content of

99. *See, e.g.*, Ian Millhiser, *The Federalist Society Controls the Federal Judiciary, So Why Can't They Stop Whining?*, VOX (Nov. 19, 2022) (stating that "[i]dea[s] that begin with the Federalist Society frequently become Supreme Court opinions in just a few years"), https://www.vox.com/policy-and-politics/23457938/supreme-court-federalist-society-whine-first-amendment [https://perma.cc/4WQT-A7Y6].

100. *See, e.g.*, Scott Lemieux, *Supreme Court Justice Alito's Federalist Society Speech Shows How Political the Court Will Get*, NBC NEWS (Nov. 13, 2020), Adam Liptak, *In Unusually Political Speech, Alito Says Liberals Pose Threat to Liberties*, N.Y. TIMES (Nov. 13, 2020), https://www.nytimes.com/2020/11/13/us/samuel-alito-religious-liberty-free-speech.html [https://perma.cc/98KP-EMVJ].

101. In an ideal world, my hope would be that the justices, understanding these critiques, would be mindful in ensuring that they accept an array of speaking engagements across the ideological spectrum. In doing so, my hope would be that the justices would be able to neutralize concerns from the public that the justices are political operatives instead of independent jurists. That said, I think it is important for the justices to interact with members of the legal profession, and I think it is important for the justices to give speeches on a range of topics.

102. 2023 Code, *supra* note 18, at 4.

103. *See* Lemieux & Liptak, *supra* note 100.

Alito's remarks seem appropriate even if one does not want to critique the audience to which the remarks were made?

These sorts of questions demonstrate two of the inherent limitations of any regime that is attempting to create a set of rules and standards directed at ensuring ethical conduct by the justices. First, there must be a way to make these determinations outside the sphere of political influence and in an objective manner.[104] The quest for better ethics cannot and should not become cover for attempting to force one's personal political or policy preferences into being.[105] Second, there must be room for both clarity and nuance. Determining what is and is not ethical conduct requires the evaluation of a set of questions that will necessarily be debated. Moreover, labeling an individual's actions as unethical is often perceived as a deeply personal attack. And, of course, questions about ethical conduct by a justice would have significant political consequences if it could lead to an impeachment process. Determinations regarding whether the justices' actions are or are not ethical must be undertaken with a spirit and process that will allow for fine distinctions, which means that those charged with communicating why or why not a justices' conduct is problematic must do so with the gravest of humility and restraint.

IV

AN INDEPENDENT ETHICS COMMISSION

While a combination of statutory ex ante rules paired with ex post standards of conduct may establish an effective set of expectations on what is and is not ethical conduct for Supreme Court justices, Congress will need a mechanism for evaluating allegations of misconduct once concerns are detected or flagged. As noted above, Congress must have mechanisms for detecting potentially unethical conduct on behalf of the justices and a method of investigating those claims, so that Congress is able to determine whether it should initiate impeachment proceedings. If Congress has a constitutional responsibility to impeach justices, it must also have a responsibility to identify when impeachment would be appropriate. The question, of course, is how.

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104. The public discourse regarding the Supreme Court has, like so much of American life, become infected with political and ideologically polarizing rhetoric to a level that is often unproductive. *See, e.g.,* Stephen I. Vladeck, *The Business of the Supreme Court: How We Do, Don't, and Should Talk about SCOTUS*, 67 ST. LOUIS UNIV. L.J. 571, 583 (2023) (noting that American society has "lost the facility for talking about how to make the Court healthier in ways that aren't intensely and inevitably polarizing"). The contributors to this reality are not just political pundits. My own view is that all members of the legal profession—but particularly law professors—should think carefully about the language they use when discussing the Court and its members.

105. There are already concerns that ethics complaints are sometimes weaponized against individuals. For example, commentators have suggested that an ethics complaint against North Carolina Supreme Court Justice Anita Earls after she criticized "the [North Carolina Supreme] Court's lack of diversity and implicit bias within the North Carolina judicial system" is not founded on a legitimate ethics concern. *See e.g.*, Press Release, NAACP, *Civil Rights Organizations Stand With North Carolina Supreme Court Justice Anita Earls* (Sept. 25, 2023), https://naacp.org/articles/civil-rights-organizations-stand-north-carolina-supreme-court-justice-anita-earls [https://perma.cc/4PD7-PL7N]; Gene Nichol, *NC Can't Have Judicial Standards that Only Apply to Black Female Democrat Justices*, CHARLOTTE OBSERVER (Nov. 25, 2023), https://www.charlotteobserver.com/opinion/article282410773.html [https://perma.cc/B7ZJ-DV9N].

This Part begins by discussing two justifications for enacting an independent ethics commission: (i) rule of law considerations and (ii) the appearance of impropriety standard. This Part then recommends that Congress pass legislation that will create an independent ethics commission with the authority to engage in activities that will detect and investigate allegations of misconduct by Supreme Court justices.[106] The goal of this proposed commission is not to enforce the legislative rules or code of conduct standards the justices comply with; the commission is not an enforcement mechanism. Instead, the goal of this proposed commission is to provide Congress with recommendations on whether potential misconduct (i) occurred and (ii) is worthy of impeachment proceedings. To effectively assess the justices' conduct, the independent ethics commission must have the authority and ability to approach the ethical questions at issue in an (i) objective, clear, and precise manner that is (ii) free from ideological taint or political posturing and (iii) that is consistently replicable across new permutations of potential misconduct. Current controversies surrounding the ethics of Supreme Court justices will not be satisfied unless and until there is a mechanism in place for Congress and the public to objectively assess the justices' conduct. This proposed commission is one such mechanism.

A. Justifications For the Commission

This Part discusses two justifications for enacting an independent ethics commission, as well as some of the thornier issues that enactment might create. The first relies on understandings from jurisprudence and legal philosophy about the rule of law and how it interplays with the public's assessment of officials' conduct. The second relies on the appearance of impropriety standard as applied to judicial conduct.

1. The Rule of Law

There are intense debates within the fields of jurisprudence, legal philosophy, and beyond regarding the importance of the rule of law to legal systems and their legitimacy.[107] And while these debates are ongoing, there are aspects of these debates that appear relevant to the concerns raised by those interested in the ethics

106. I should note—the intervention I propose in this Part is just one proposal. Congress, policymakers, and other academics have a range of proposals targeted at addressing Supreme Court ethics reform. I think many of these proposals seem entirely reasonable, and my suggestion should not be read as a judgment in disfavor on other proposals put forth. Moreover, there has been a range of policy work on how to structure independent commissions. *See e.g.,* Alicia Bannon, *Choosing State Judges: A Plan for Reform,* BRENNAN CENTER FOR JUSTICE (2018), https://www.brennancenter.org/our-work/policy-solutions/choosing-state-judges-plan-reform [https://perma.cc/W7HG-38TY]; Yurij Rudensky & Annie Lo, *A Better Way to Draw Districts,* BRENAN CENTER FOR JUSTICE (2019), https://www.brennancenter.org/our-work/policy-solutions/better-way-draw-districts [https://perma.cc/CY9P-4RVF]. These proposals might also provide aid to Congress in structuring a statute to create an independent ethics commission to aid Congress in its efforts to detect and investigate potential misconduct or unethical behavior by a justice.

107. One famous debate occurred between H.L.A. Hart and Lon Fuller in the 1958 Harvard Law Review. H.L.A. Hart, *Positivism and the Separation of Laws and Morals*, HARV. L. REV. 593 (1958); Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958). Entire volumes have

of the Supreme Court justices. For example, Professor Jeremy Waldron states that "[t]he Rule of Law is seen as a fragile but crucial ideal, and one that is appropriately invoked whenever governments try to get their way by . . . short-circuiting the norms and procedures laid down in a country's laws or constitution."[108] He goes on to explain:

> The Rule of Law is a multi-faceted ideal. Most conceptions of this ideal, however, give central place to a requirement that people in positions of authority should exercise their power within a constraining framework of public norms, rather than on the basis of their own preferences, their own ideology, or their own individual sense of right and wrong.[109]

In other words, for rule of law norms to function properly, actors within the legal system must be formally bound in some way that helps provide legitimacy to and engenders trust by the public.

When one applies insights from the rule of law literature to the continued concerns about the conduct of the justices, it reveals why the justices' original assurances that they were in fact adhering to certain standards were found unsatisfactory. Without an ethics code adopted, the public perception of the Supreme Court—a perception the justices denied—was that of the justices exercising only their own preferences about the ethical situations they confronted. Moreover, these rule of law insights also help explain why the adoption of the ethics code by the justices failed to quell criticisms levied against the Court's members, because so many aspects of the justices' conduct as it relates to ethical concerns, like recusals and conflicts of interest, still remain within the justices' sole authority to make a determination on what is or is not problematic. The adopted ethics code leaves many decisions to what some in the public perceive to be the justices' own preferences and individual assessments of right and wrong.

Rule of law literature would suggest that to provide better legitimacy and promote rule of law norms, there must be something that serves as a check on the justices' conduct beyond their own preferences and ideals. Importantly, the public needs to have awareness of how that check is functioning—which means the public needs to know what rules, standards, and norms the justices are adhering to while also knowing that there is some sort of external check that the justices are complying with. Under our constitutional framework, the check in the system is Congress's impeachment power, which means Congress needs to use its authority in a way that better equips it to know when and when not to pursue impeachment proceedings.

The challenge, however, is how to balance the line between "control" over the Court, which would not be appropriate in the United States's constitutional

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been dedicated to advancing these debates into the modern era. *See e.g.*, Peter Cane, THE HART-FULLER DEBATE IN THE TWENTY-FIRST CENTURY (2010).

108. Jeremy Waldron, *The Concept and the Rule of Law*, 43 GEORGIA LAW REV. 1 (2008).

109. *Id.* at 6.

framework," and appropriate oversight or discipline by Congress when impeachable offenses occur, as required by the constitution. If the method adopted to facilitate Congress's mandate to engage in impeachment proceedings moves too far toward controlling the court, that would upend the independence the Court is meant to have within the United States's constitutional framework. Finding an appropriate balance—while challenging—is crucial to satisfying rule of law concerns while adhering to constitutional constraints.

2. Appearance of Impropriety

Discussions regarding judicial ethics often include mention of the phrase "appearance of impropriety." The American Bar Association's Model Code of Judicial Conduct explicitly references this standard in Canon 1, stating: "A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."[110] Discussions of the appearance of impropriety standard have a long history as applied to members of the judiciary at both the state and federal level.[111] That said, the standard has been criticized as being imprecise and as having "the chilling effect of appearance-based discipline." And yet, the standard was retained by the ABA in 2007 after studied and deliberative decisionmaking by various stakeholders.[112] Importantly, the standard was retained in Rule 1.2 to Canon 1 by the ABA in large part due to the insistence of "the Conference of Chief Justices of the states' highest courts."[113]

The new code adopted by the Supreme Court references this standard twice, with both references focused on a justice's decision to engage in speaking engagements. Specifically, the code states: "[i]n deciding whether to speak or appear before any group, a Justice should consider whether doing so would create an appearance of impropriety in the minds of reasonable members of the public."[114] Yet, despite this narrow invocation of the standard within the Court's ethics code, there are many who continue to believe that the more general appearance of impropriety standard upon which many judges are expected to frame their decisionmaking should also apply to Supreme Court justices.

The appearance of impropriety standard is important because not everything can be regulated, as noted in Part II, through ex ante rules. Professor Nancy Moore explains that "'the appearance of impropriety' denotes judicial conduct that reasonably *appears* to compromise the independence, integrity, and impartiality of the judiciary."[115] Perhaps, unsurprisingly, concerns about the appear-

110. MODEL CODE OF JUD. CONDUCT, CANON 1 (AM. BAR ASS'N 2020).

111. *See, e.g.*, Raymond J. McKoski, *Judicial Discipline and the Appearance of Impropriety: What the Public Sees is What the Judge Gets*, 94 MINN. L. REV. 1914 (2010).

112. There was quite a bit of back and forth by members of the ABA about what to do with the appearance of impropriety standard and whether a violation of that standard should result in discipline. *See id.* at 1932-1936.

113. Nancy J. Moore, *Is the Appearance of Impropriety an Appropriate Standard for Disciplining Judges in the Twenty-First Century*, 41 LOY. U. CHI. L.J. 285, 286 (2010).

114. 2023 Code, *supra* note 18, at 6.

115. Moore, *supra* note 113, at 291.

ance of impropriety as related to members of the judiciary are connected to discussions regarding the rule of law. Moore states that "[a]voiding not only impropriety, but also the appearance of impropriety, is important for judges because public confidence in the independence, integrity, and impartiality of the judiciary is critical to the public's willingness to accept judicial decision-making and submit to the rule of law." For the public to have confidence in the activities and actions of the justices, the harder to define appearance of impropriety standard does appear to have an important role to play in evaluating the justices' conduct.

B. Establishing the Commission

Part III of this Article lays out the need for a set of rules and standards, and this Section has highlighted two justifications for adopting binding rules and standards: rule of law and appearance of impropriety concerns. The question, of course, is how to actually implement such a regime for evaluating the justices' conduct. This Section takes up this effort via a proposed Independent Ethics Commission. In particular, Congress will need to consider the membership, structure, and mandate of the commission.

1. Commission Membership & Structure

A legislative enactment to initiate an independent ethics commission will need to begin with commission membership and structure, which presents a range of decisions to consider in crafting the commission. This Section will address a few of these concerns.

Political Balance. As is often the case when creating a commission that one wants to operate outside the political process, a membership component that requires ideological balance would seem important. For example, one could allow for there to be two Republican commissioners, two Democratic commissioners, and one Independent commissioner. Alternatively, one could imagine a world where two commissioners are appointed by the Republican Party members of the Judiciary Committee, two are appointed by the Democratic members, and one is appointed by a bipartisan group. The goal should be to obtain ideological balance so that the outputs from the commission—its recommendations—are focused on objectively considering and assessing the alleged misconduct and determining whether it is or is not something that warrants an impeachment inquiry from Congress. Additionally, it will be important to appoint individuals who are more committed to notions like adhering to rule of law norms than to preferencing a particular political ideology. The goal should be to appoint a group of individuals who will evaluate the justices' conduct outside of political influence.

Background Expertise. Membership of those on the Commission should be tied to those with expertise in judicial ethics. This might include former state or federal judges who have served on judicial ethics committees. It might include law professors whose scholarly interests and research are related to judicial ethics. It might also include lawyers who have served on judicial ethics matters—perhaps by drafting codes of conduct or sitting on councils assessing potential complaints. The key is to have individuals on the commission who will assess the

justices' conduct objectively, with expertise and skill, and outside the pressure of political punditry. The last year has included many suggestions or insinuations about potential misconduct by justices that, quite frankly, are not misconduct.[116] Those on the commission should have enough experience to be able to put to the side complaints that are invalid or frivolous.

Size. The proposed independent ethics commission is meant to be a deliberative body. The goal is for the members to work with each other to make determinations regarding the justices' conduct and whether referral for impeachment is needed. As such, the number of commissioners should be of a size that will allow fulsome deliberations, but which does not have so many members as to make deliberative conversation difficult to achieve. There should be an odd number to prevent ties in voting.

Terms. Any legislative intervention proposing such a commission should consider whether there should be terms or lengths of service for the commissioners. They should also consider whether terms should be staggered. For example, one might adopt a policy of three-year terms, where in year one, one Republican and one Democrat is replaced, and in year two, the remaining Republican and Democrat is replaced, and the Independent replaced in year three. The goal should be to balance the concerns of institutional knowledge and continuity with entrenchment and capture.

Recusal. When a member of an adjudicating body has a conflict of interest, the general approach is to recuse oneself from the decisionmaking process. On an independent commission like that proposed here, particularly given the small size, recusals could change the outcome of the determinations. As such, members of the commission should commit to refraining from conduct during their term that could result in a recusal (e.g., no commentary on the news, ad hoc discussions with reporters, etc.). That said, to insulate the commission from recusals, a list of alternates should be established who are cycled through in a randomized manner (to attempt to prevent gamesmanship in recusal practices).

2. Commission Mandate

As stated above, the goal of an independent ethics commission would be to provide Congress with recommendations on whether potential misconduct (i) occurred and (ii) is worthy of impeachment proceedings.[117] To do this, the commis-

116. *See, e.g.*, Heidi Przybyla, *Law Firm Head Bought Gorsuch-Owned Property*, POLITICO (Apr. 25, 2023), https://www.politico.com/news/2023/04/25/neil-gorsuch-colorado-property-sale-00093579 [https://perma.cc/W2SN-RWME]. It is not misconduct for a justice to sell their primary residence in a regular, arms-length market transaction.

117. While I focus primarily on detecting and investigating misconduct allegations for purposes of advising Congress regarding impeachment, another potential use of a commission of this nature might be to provide justices the ability to present potential scenarios to the commission and get guidance on whether a potential activity is or is not problematic. That sort of advisory role by an objective and independent body is currently missing, although the Court has indicated that it consults the Court's office of legal counsel to get guidance. That office is within the Court and guidance from an impartial and outside body could be beneficial to (i) the justices and (ii) public perceptions of the justices' conduct.

sion would need to consider a number of factors to ensure that its work is effective, some of which are highlighted here. These concerns, and likely others, would need to be addressed in the legislative enactment that creates the commission.

Notice. The first question is what would trigger an evaluation into misconduct by the commission. A model for this question is already available, however, with the manner in which complaints are handled under the Judicial Conduct and Disability Act. Complaints can be filed by the public, but the Judicial Council can, on its own, open investigations as needed.[118] I think the commission would need to be able to: (i) handle actual complaints from the public or insiders, (ii) initiate investigations sua sponte into matters that come to the commission's attention (whether by reporting or other publicly available data), and (iii) review disclosures that justices are required to submit.

Frivolity. Any system of investigation that relies, at least in part, on complaints from the public will require a procedure for addressing frivolous complaints. If the commission were required to investigate all complaints, the pure volume of complaints would likely inhibit the ability of the commission to do its work. As such, the commission should only be required to take up and respond to matters where strong evidentiary support is included in the complaint regarding a justice. The goal is to create a relatively high bar for determining whether a justice's conduct requires further investigation. The point of the commission is to assist Congress in determining whether impeachment proceedings are necessary, and impeachment proceedings should not be initiated unless significant misconduct is alleged.

Some might propose, instead, to have the commission only investigate claims referred to it by Congress. This, I think, creates the danger of the commission's investigative authority being abused or weaponized as part of the political process. Congress is not objective; it is an inherently political body. This proposed commission, however, is meant to take a nonpolitical stance. The decisions of the commission to investigate must be free from partisan taint. That would not, however, prevent the commission from taking a public complaint from members of Congress regarding potential misconduct from a justice. The existence of the commission also would not prevent Congress from acting sua sponte on an impeachment matter.

Investigation Threshold. Once frivolous claims are discarded, the commission still likely needs to have a specific threshold that will trigger an investigation into the potential misconduct. The threshold should reflect the reality that impeachment should be rare and only pursued in extreme cases.

Subpoena Authority. In order to properly investigate allegations of misconduct, the commission would need relatively broad statutory authority to obtain information from (i) the justices and (ii) people or entities with information relevant to the inquiry. Members of Congress have been attempting to gather information related to possible ethics violations of current justices, and several private

118. *See* 28 U.S.C. §§ 351, 354.

individuals have refused to cooperate, arguing the requests have no legal basis.[119] A commission would not be able to properly investigate claims of misconduct unless it can obtain the evidentiary material needed to thoroughly and completely evaluate claims.

Justice's Opportunity for Response. Prior to making a final determination regarding potential misconduct, the commission should attempt to get information from the justice(s) in the event they might have reasons for why their conduct should not be labeled as unethical. The key here is to ensure enough of the investigation has been undertaken to prevent the manipulation of the inquiry's outcome, but to allow the justice or their representative a meaningful opportunity to provide relevant information to the commission.

Evaluation and Recommendation. The crux of the commission's task will be to determine whether the non-frivolous allegations it investigates are problematic and whether they are so concerning as to warrant a referral from the commission to Congress for impeachment proceedings. In making this determination, the commission will have to determine whether actions and conduct by the justices are or are not ethical—whether the actions violate the rules and standards governing judicial behavior. The commission may at times determine that an action is unethical, yet not refer the matter to Congress to begin impeachment proceedings. There is, however, likely still value in a finding that an action by a justice is unethical in that it will (i) provide guidance to the justices that will help aid their decisionmaking going forward and (ii) if there are repeated instances of unethical, yet initially assessed as not rising to the level of impeachable, conduct, the presence of recidivist behavior in continued violations of ethical rules or standards may at some point cause concerns that the justice's conduct does warrant impeachment.

Reporting and Transparency. Given the purpose of the commission, it will need to provide detailed reporting to Congress about its work. The commission's mandate is to aid Congress in its constitutionally mandated decisions regarding impeachment; thus, Congress should be fully updated on a regular basis about the work the commission has undertaken. The more difficult question, however, is how much of that information should be transmitted to the public more generally. Allegations of misconduct do not mean misconduct has actually occurred, but allegations of misconduct can cause at least short-term reputational harm. Yet, the systems of reporting and transparency must take into account that sometimes there are disincentives to sanction those who are powerful.[120] The reporting and transparency decisions, however, may help to counterbalance some of those disincentives, because they create a structure of public accountability for the commission. Thus, the information provided to the public should be more limited

119. *See* Andrew Solender, *Senate Dems Plan to Subpoena Conservative Justices' Billionaire Patrons*, AXIOS (Oct. 30, 2023), https://www.axios.com/2023/10/31/democrats-supoena-harlan-crow-leonard-leo-supreme-court-justices [https://perma.cc/NQG8-4RFY].

120. Murphy & Berg, *supra* note 60.

and focused upon allegations where the commission's majority of members believe misconduct or unethical behavior occurred. This reporting should occur even if the misconduct or unethical behavior does not rise to the level of an impeachable offense, as that information is still helpful for both Congress and the public to identify.

Public Unanimity. In a multi-member commission of this nature, there are sometimes multiple reports or opinions that are published, including dissents. Dissents have a variety of benefits. They help acknowledge the complexity of issues, and they demonstrate the weaknesses in arguments. I am generally very much in favor of dissent as being important to political processes. This commission, however, is meant to be apolitical. It is meant to provide an objective report and recommendation to Congress, which is the political body. As such, it may be wise to adopt a relatively strong unanimity or majority rule standard for public reports that are issued. The goal of this commission is to provide clear guidance to Congress, in a manner that improves public transparency, about whether conduct by a justice is or is not problematic and is or is not impeachable conduct. Allowing dissent in this setting might encourage the sort of political posturing this proposal is aimed at avoiding.

Defining Impeachable Conduct. A key issue the commission would need to tackle is what would rise to the level of impeachable conduct. The commission will need to know how to differentiate between conduct it deems unethical or appropriately categorized as misconduct and conduct that is so unethical or so egregious that it warrants impeachment. Impeachment has been utilized only rarely against Article III judges, and I am not suggesting that it become normalized or regularized. However, because determinations about the appropriateness of a justice's conduct will necessarily need to be undertaken on a case-by-case basis and evaluated given the context of the situation as well as the current understandings of the rules and standards governing the justices' conduct, it does not seem particularly fruitful to suggest ex ante understandings of what would and would not rise to the level of an impeachable offense. That said, there are two particular sets of references that the commission could consider consulting when evaluating unethical behavior or misconduct by a justice. First, there have been past impeachment trials for federal officials and judges and the outcomes in these cases should inform the commission's determination about whether a recommendation for Congress to pursue impeachment proceedings makes sense.[121]

Second, there have been past instances of alleged misconduct by Article III judges and other top federal officials where they have resigned in an effort to quell investigations,[122] and those resignations may sometimes—not always—provide guidance on the sorts of alleged misconduct that should be considered to be

121. U.S. Senate, *About Impeachment: Senate Trials*, https://www.senate.gov/about/powers-procedures/impeachment/impeachment-list.htm [https://perma.cc/Y3CF-SDEB].

122. I have written about the ways in which Article III judges have used resignation as a means to avoid investigations into potential misconduct, and I have argued that those investigations should be allowed to continue, so the public knows whether the allegations were in fact true. Veronica Root Martinez, *Avoiding Judicial Discipline*, 115 NORTHWESTERN UNIV. L. REV. 953, 971 (2020).

particularly serious. The individuals choosing to resign may have wanted to avoid the time, expense, hassle, and dignitary harms of an investigation, which is why one must assess those decisions to resign carefully, but allegations that lead to resignation may provide another set of indicators of the sort of conduct where the public consensus supported a finding that significant unethical behavior occurred. This suggestion may give some pause, but the reality is that the resignation norm that used to be in place when federal officials were found to have engaged in misconduct has, in many ways, fallen away.[123] That reality makes impeachment—once an almost never used tool—something that should potentially be of greater use going forward.

C. Goodness & Power Revisited

This Article argues that the current controversies surrounding the ethics of Supreme Court justices will not be satisfied unless and until there is a mechanism in place for Congress and the public to objectively assess the justices' conduct. The proposed independent ethics commission would do just that. It would allow for evaluations of the justices' conduct in a manner that attempts to encourage objective determinations free from ideological motivations. This Section will focus on how the commission's work might help contribute to the the justices' acting with "goodness" while addressing some power struggles that exemplify the current status quo.

1. Goodness

Public reporting on allegations of misconduct by the Commission will be helpful in at least three ways. First, it may help the justices pick the "good" or "ethical" path by helping provide guidance to the justices on what the law requires and standards expect. That means a finding of "misconduct" is still valuable information even if the commission does not take the extra step of recommending impeachment proceedings.

Second, the reporting structure will better enable the public to understand when unethical conduct occurs. One potential weakness with the structure I have outlined is that the public reporting is triggered only when it has identified misconduct. There could, however, be public allegations of unethical conduct from reporters or pundits that the commission finds to be invalid or frivolous. In those instances, it may be important for the commission to report on allegations it investigates and finds to be without merit, particularly if members of Congress or a justice would like a public clarification to be provided from the commission.

Third, and finally, in providing a full reporting of its work to Congress, the proposed commission will enable those in the constitutional position to serve as a check and balance on the Supreme Court to better effectuate those responsibilities. Congress must know whether the justices are acting properly to know

123. Veronica Root Martinez, *The Role of Norms in Modern-Day Government Ethics*, 35 J. L., ETHICS, AND PUBLIC POLICY 771, 779 (2021) (arguing that stigma, something that in the past impacted decisionmaking, is currently failing to rein in government officials' behavior).

whether impeachment proceedings are warranted. This Article's proposal provides a mechanism for Congress to better access that information.

2. Power & The Justices

A question one might have regarding this Article's proposal is how one might know if the justices will be willing to give up some of their inherent power and accept the authority of Congress to enact legislation that would create an independent ethics commission mandated to assist in investigating potential misconduct by a justice. Specifically, one might wonder if Congress can force the justices to comply with new disclosure requirements and inquiries from the commission without an enforcement mechanism for noncompliance. The justices have long said that they are not actually required to comply with the Ethics in Government Act. Additionally, reporting suggests that the justices have failed to properly complete disclosure forms in the past.[124] Thus, what happens if the justices either refuse to comply outright or find themselves in incomplete compliance with requested information?

My response is two-fold. First, one of the tensions of the Ethics in Government Act is that it includes a regime of civil monetary penalties for noncompliance.[125] This creates an enforcement mechanism for the Act that would be beyond Congress's clear constitutional mandate of impeachment. I will leave for others to discuss whether the civil monetary penalty system in the Ethics in Government Act is a constitutional act when applied to the justices. But the inclusion of the civil monetary penalties does make that Act distinct from the suggestion I have put forward, which is to assist Congress in obtaining the information necessary for it to properly effectuate its constitutionally mandated responsibility to engage in impeachment exercises when appropriate.

Second, within the American system much of our societal pact depends on the acceptance of the citizenry in complying with the rule of law. Perhaps it is naïve on my part, but my hope would be that Supreme Court justices would believe quite heartily in promoting, and not diminishing, rule of law norms. After all, those rule of law norms are how the Supreme Court is able to make pronouncements that result in widespread compliance even in the presence of broad-based disagreement.

Moreover, this proposal may actually provide opportunities for the justices to increase their power by decreasing the rate and volume of critiques levied against them. For example, the justices will have an explicit and express opportunity to respond to allegations of misconduct prior to any public reporting. If these processes work, it may diminish the need for the justices' to defend themselves on their own, because there will be a natural way for the commission (in an official manner) or members of Congress to discuss the alleged misconduct. The upshot

124. *See* Kim Geiger, *Clarence Thomas Failed to Report Wife's Income, Watchdog Says*, L.A. TIMES (Jan. 22, 2011), https://www.latimes.com/politics/la-xpm-2011-jan-22-la-na-thomas-disclosure-20110122-story.html [https://perma.cc/MR7S-AX9V].

125. *See* 5 U.S.C. App. § 504.

is that this proposal may at times result in the public receiving better information about the justices' conduct.

3. Power and Congress

This Article has been focused on the goodness and power of the Court and the justices, but the power, or lack thereof, of Congress has been a fundamental point of contention between members of the Court and members of the Congress for some time. This proposal harnesses the constitutional power of Congress and creates a mechanism by which it can better fulfill its constitutional responsibilities. Importantly, members of the Court have seemed to suggest that Congress's power in this area is basically nonexistent. The structure of the United States' government, however, is premised on the idea of checks and balances. It cannot be the case that that system would allow one branch of government to have virtually no check at all. Moreover, given the Court's stated view that Congress has no power of enforcement other than impeachment, it may be more important for Congress to consider whether norms have changed in a way that would require impeachment proceedings more often.

When scholars discuss Supreme Court ethics, they often point to the resignation of Abe Fortas.[126] Fortas, amongst other things, had taken "a secret retainer from the family foundation of Wall Street financier Louis Wolfson, a friend and former client subsequently imprisoned for securities violations."[127] This undisclosed and then discovered retainer "effectively ended Fortas' judicial career."[128] On May 14, 1969, "Fortas, denying he had done anything wrong, resigned from the Supreme Court to return to private law practice."[129] If the same norms were in place regarding Supreme Court justices and ethics today as there were in 1969, Justice Thomas would have resigned during the summer of 2023.[130] Instead, he dug in, arguing he had done nothing improper.

If the professional norms of shame that would have allowed the justices to police their own goodness and to step down when caught are no longer in place,[131] it is Congress's duty to adjust with that reality and more forcefully engage in its constitutional mandate to initiate impeachment proceedings. Congress does have power in this space. It is up to Congress to use its power and fulfill its constitutional mandate.

126. *See* Andrew Glass, *Abe Fortas Resigns from Supreme Court, May 15, 1969*, POLITICO (May 2017), https://www.politico.com/story/2017/05/14/abe-fortas-resigns-from-supreme-court-may-15-1969-238228 [https://perma.cc/P234-BPAH].

127. *Id.*

128. *Id.*

129. *Id.*

130. *See, e.g.*, Jonathan Chait, *Even Clarence Thomas's Law Clerks Can't Defend His Misconduct*, N.Y. MAGAZINE (Aug. 29, 2023), https://nymag.com/intelligencer/2023/08/clarence-thomas-law-clerks-letter-scandal-harlan-crow-billionaire-gifts-ethics-scandal.html [https://perma.cc/DC4A-SLED] (noting the volume and significance of the allegations levied against Thomas).

131. Martinez, *supra* note 123.

V

CONCLUSION

The code of conduct the justices adopted in November 2023 is an excellent first step toward addressing the myriad of concerns regarding the ethics of Supreme Court justices. In adopting the code, the justices have adopted a framework for self-regulation, but one of the key elements of submitting oneself to a profession that requires self-regulation is an understanding that there will be consequences if one were to fail to adhere to that framework. The code of conduct adopted by the justices, however, does not include standard elements like an enforcement mechanism to ensure the justices' compliance with the code they have adopted. And without that enforcement mechanism, policymakers, academics, and the public will continue to debate whether the justices are, in fact, truly good.

As such, this Article contends that more must be done. In particular, this Article argues that the current controversies surrounding the ethics of Supreme Court justices will not be satisfied unless and until there is a mechanism in place for Congress and the public to objectively assess whether the justices' actions and conduct are in fact good. As such, this Article proposes an intervention—an independent ethics commission—for the purpose of assessing the conduct of the justices. This commission cannot do its work without the adoption of a robust disclosure regime for Supreme Court justices. This disclosure regime will likely need to occur via the voluntary will of the justices or via congressional intervention. For the commission to use the disclosed information effectively, it is imperative that it be a body that evaluates the justices' conduct in a manner that is (i) objective, clear and precise; (ii) free from ideological taint; and (iii) consistently replicable across new permutations of potential misconduct.