

CHAPTER THREE

JUDICIAL ETHICS

[T]he [S]upreme [C]ourt . . . [will] have a right, independent of the legislature, to give a construction to the [C]onstitution and every part of it, and there is no power provided in this system to correct their construction¹ Men placed in this situation will generally soon feel themselves independent of heaven itself.²

— Brutus

Starting in the spring of 2023 and continuing into the summer, media outlets reported that some Supreme Court Justices had received undisclosed gifts valued at hundreds of thousands of dollars from wealthy benefactors — and failed to recuse themselves when those benefactors' matters went before the Court, or otherwise misused their positions and influence for personal gain. With each exposé, Supreme Court ethics gradually became a matter of public concern to a degree not seen since 1969 — when Justice Fortas resigned in a scandal over receiving \$20,000 from a Wall Street financier.

These recent scandals have sparked discussion about the adequacy of existing ethical standards and financial disclosure rules for Supreme Court Justices, and how best to enforce them. The Court first responded to these discussions with claims, expressed both implicitly and explicitly, that any sort of ethics reform imposed by Congress would violate constitutionally required separation of powers principles. Then, in November 2023, the Court promulgated an ethics code that excused the Justices' problematic conduct and included no enforcement mechanism, leaving the status quo largely intact.

Several of the open constitutional questions related to Supreme Court ethics reform are a result of Congress historically giving the Court a wide berth, and it is time to resolve those questions once and for all. This Chapter argues that constitutional challenges to Congress's power to regulate the Court are vague, unavailing, and should not stop Congress from acting to enforce ethics standards on the Supreme Court. Congress has a variety of avenues it can and should take to regulate the extrajudicial behavior of Justices. Section A explores past and present movements for Supreme Court ethics reform. Section B provides an overview of the ethics guidelines that currently govern judicial conduct in the lower federal courts and, to an extent, at the Supreme Court. Section C contextualizes these lapses within a framework, espoused by

¹ Essays of Brutus (No. XV), *reprinted in* THE ANTI-FEDERALIST 185 (Herbert J. Storing & Murray Dry eds., 1985).

² *Id.* at 183.

the Court, that it is above regulation by Congress. Section D refutes that framework by examining the constitutional bases for Congress's power to regulate Supreme Court ethics and provides ways in which Congress can act now, without waiting for future legislation.

*A. Billionaires and Benefactors:
The Past and Present of Supreme Court Ethics*

Since its creation over two centuries ago, the Supreme Court has confronted a range of ethical dilemmas that persist to this day. Section 1 begins by examining the early years of the judiciary, which were marked by vague ethical obligations and the absence of clear boundaries for judicial conduct. Section 2 transitions into a discussion of recent Supreme Court ethics lapses. Section 3 addresses the significance of these ethical lapses and the necessity for ethics reform to restore confidence in the Supreme Court.

1. The History of Ethical Issues on the Court. — The Judiciary Act of 1789,³ which established the federal court system, only loosely addressed the ethical obligations of judges and Justices; the legislation simply required that judges and Justices take an oath to “do equal right to the poor and to the rich” and “faithfully and impartially” discharge the duties of the office.⁴ Then, in 1792, Congress enacted the nation's first federal disqualification statute, which required judges to recuse themselves in cases where they had an interest in the proceeding.⁵

These efforts to impose boundaries on judicial conduct did little to constrain the next century and a half of political extrajudicial behavior by Supreme Court Justices. For example, in 1795, Chief Justice Jay ran for election as Governor of New York while serving as Chief Justice of the Court.⁶ Justice McLean was a presidential candidate, though he never won the nomination, in 1836, 1848, 1852, 1856, and 1860, all while serving on the Court.⁷ And, in 1868, Chief Justice Chase sought the presidency while serving as Chief Justice of the Court.⁸

The early 1920s saw a notable and surprising turning point for judicial ethics: a major league baseball scandal. A federal judge was appointed as the Commissioner of Baseball to address a 1919 incident of game fixing,⁹ leading the public to question whether one person could execute the duties of both offices while remaining faithful to the ethical

³ Ch. 20, 1 Stat. 73.

⁴ *Id.* § 8, 1 Stat. at 76 (codified as amended at 28 U.S.C. § 453).

⁵ See Act of May 8, 1792, ch. 36, § 11, 1 Stat. 275, 278–79 (codified at 28 U.S.C. § 455).

⁶ 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 275 (Cosimo Classics 2011) (1923).

⁷ Peter Alan Bell, Note, *Extrajudicial Activity of Supreme Court Justices*, 22 *STAN. L. REV.* 587, 593 n.41 (1970).

⁸ *Id.*

⁹ See JOHN P. MACKENZIE, *THE APPEARANCE OF JUSTICE* 180–82 (1974).

obligations set forth in the Judiciary Act of 1789.¹⁰ The scandal spurred the American Bar Association (ABA) to form a commission on judicial ethics, headed by Chief Justice Taft,¹¹ which in turn formulated the advisory Canons of Judicial Ethics (“the Canons”) in 1924.¹² The Canons aimed to regulate all manner of extrajudicial activities from political activities¹³ to business promotions,¹⁴ but did not have any enforceable, legal effect over state or federal judges.¹⁵

The Canons’ lack of bite made them an ineffective stopgap for judicial misbehavior. After the Canons’ publication, Chief Justice Taft himself “rode roughshod over the [C]anons’ injunction against political activity”¹⁶ by remaining involved in the Republican Party, openly vocalizing support for political candidates, and advising sitting presidents on a broad range of topics.¹⁷ Justice Douglas routinely offered political advice to President Franklin D. Roosevelt¹⁸ and was nearly ousted from the Court for receiving a stipend from a nonprofit foundation.¹⁹

The 1960s brought with them controversies that catalyzed renewed efforts to reform ethics regulations. In 1968, Justice Fortas was not confirmed as Chief Justice after stirring controversy by advising President Lyndon B. Johnson on political matters and receiving \$15,000 for speaking engagements.²⁰ Though Justice Fortas remained on the Court, evidence of his receipt of outside income finally forced his resignation in 1969.²¹ Fortas’s resignation and society’s increasing focus on the (mis)conduct of public officials²² likely spurred the ABA to create the 1972 Code of Judicial Conduct.²³ A year later, the Judicial Conference

¹⁰ See *id.*

¹¹ Jeremy Fogel & Noah Bookbinder, *Building Public Confidence: How the Supreme Court Can Demonstrate Its Commitment to the Highest Ethical Standards*, CITIZENS FOR RESP. & ETHICS IN WASH. (Aug. 9, 2023), <https://www.citizensforethics.org/reports-investigations/crew-reports/building-public-confidence-how-the-supreme-court-can-demonstrate-its-commitment-to-the-highest-ethical-standards> [https://perma.cc/2PYM-MDD3].

¹² See CANONS OF JUD. ETHICS pmbl. (AM. BAR ASS’N 1924).

¹³ *Id.* Canon 28.

¹⁴ *Id.* Canon 25.

¹⁵ Andrew J. Lievens & Avern Cohn, *The Federal Judiciary and the ABA Model Code: The Parting of the Ways*, 28 JUST. SYS. J. 271, 273 (2007).

¹⁶ See MACKENZIE, *supra* note 9, at 16.

¹⁷ ALPHEUS THOMAS MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE 279–84 (1965).

¹⁸ Diary of Supreme Court Justice William O. Douglas (Mar. 19, 1939–Oct. 19, 1940), in Sheldon S. Cohen & Philip E. Urofsky, *The Court Diary of Justice William O. Douglas*, 1995 J. SUP. CT. HIST. 77, 94–95.

¹⁹ See JOSHUA E. KASTENBERG, THE CAMPAIGN TO IMPEACH JUSTICE WILLIAM O. DOUGLAS: NIXON, VIETNAM, AND THE CONSERVATIVE ATTACK ON JUDICIAL INDEPENDENCE 5–7 (2019).

²⁰ See Dagmar Hamilton, *Murphy on Fortas: The Tragedy of an Ambitious Man*, 68 TEX. L. REV. 673, 675, 685–86 (1990) (book review).

²¹ *Id.* at 686.

²² See Andrew L. Kaufman, *Judicial Ethics: The Less-Often Asked Questions*, 64 WASH. L. REV. 851, 853 (1989).

²³ CODE OF JUD. CONDUCT (AM. BAR ASS’N 1972); see also Lievens & Cohn, *supra* note 15, at 274–76.

followed suit and adopted the Code of Conduct for United States Judges (“the Code”),²⁴ which was functionally identical to the ABA’s code save for some slight modifications.²⁵

Though the Code explicitly governs the conduct of lower court judges, it does not include Supreme Court Justices within its purview.²⁶ Consequently, recent reform efforts have centered on the Supreme Court, particularly following the 2000 presidential election recount decision in *Bush v. Gore*.²⁷ The late Justice Scalia’s hunting excursion with Vice President Cheney,²⁸ whom Justice Scalia voted in favor of in *Cheney v. United States District Court for the District of Columbia*,²⁹ elicited accusations of extrajudicial and politically motivated impropriety.³⁰ The late Justice Ginsburg’s scathing critiques of then-presidential candidate Donald Trump drew similar public scrutiny.³¹

2. *Recent Supreme Court Ethics Lapses.* — The spring and summer of 2023 brought particularly jarring Supreme Court ethics lapses to the fore. This section provides a brief overview of 2023’s most widely reported Supreme Court ethics lapses and, consequently, focuses on Justices Thomas, Gorsuch, Alito, and Sotomayor.

(a) *Justice Thomas.* — On April 6, 2023, *ProPublica* revealed that Justice Thomas had joined billionaire Republican megadonor Harlan Crow on undisclosed luxury trips for more than two decades.³² These trips included flights on Crow’s private jet, vacations aboard his superyacht, and stays at his resorts.³³ In fact, in only three decades on

²⁴ CODE OF CONDUCT FOR U.S. JUDGES (JUD. CONF. OF THE U.S. 2019).

²⁵ These modifications included (1) clarifying the role of existing federal statutes, (2) deleting commentary about supplemental judicial income, and (3) addressing certain bankruptcy issues, among others. See REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 10 (1973). Since 1973, the Code has been revised nine times: in 1987, 1992, 1996 (twice), 1999, 2000, 2009, 2014, and 2019. *Code of Conduct for United States Judges*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges> [<https://perma.cc/9MD3-2LHD>].

²⁶ JOANNA R. LAMPE, CONG. RSCH. SERV., LSB11078, THE SUPREME COURT ADOPTS A CODE OF CONDUCT 1 (2023).

²⁷ 531 U.S. 98 (2000); see generally, e.g., Sherrilyn A. Ifill, *Do Appearances Matter?: Judicial Impartiality and the Supreme Court in Bush v. Gore*, 61 MD. L. REV. 606 (2002).

²⁸ Timothy J. Goodson, Comment, *Duck, Duck, Goose: Hunting for Better Recusal Practices in the United States Supreme Court in Light of Cheney v. United States District Court*, 84 N.C. L. REV. 181, 182 (2005).

²⁹ 542 U.S. 367, 372 (2004); see also Goodson, *supra* note 28, at 184.

³⁰ Goodson, *supra* note 28, at 183.

³¹ Joan Biskupic, *Justice Ruth Bader Ginsburg Calls Trump a “Faker,” He Says She Should Resign*, CNN (July 13, 2016, 7:45 AM), <https://www.cnn.com/2016/07/12/politics/justice-ruth-bader-ginsburg-donald-trump-faker/index.html> [<https://perma.cc/3QEG-UFV9>]. Three days later, Justice Ginsburg apologized for her comments about Trump. See Jessica Taylor, *Ginsburg Apologizes for “Ill-Advised” Trump Comments*, NPR (July 14, 2016, 10:44 AM), <https://www.npr.org/2016/07/14/486012897/ginsburg-apologies-for-ill-advised-trump-comments> [<https://perma.cc/VU9F-DLNN>].

³² Joshua Kaplan et al., *Clarence Thomas and the Billionaire*, PROPUBLICA (Apr. 7, 2023), <https://www.propublica.org/article/clarence-thomas-sotomayor-undisclosed-luxury-travel-gifts-crow> [<https://perma.cc/44WY-G6Q5>].

³³ *Id.*

the Court, Justice Thomas was treated to at least thirty-eight destination vacations funded by a cadre of industry billionaires.³⁴ He did not report any of these trips in the financial disclosures he filed each year.³⁵

ProPublica also reported that in 2014, Crow paid Justice Thomas and his family \$133,363 in exchange for three properties in Georgia, one of which was the house where the Justice's mother lived and reportedly continued to reside as of April 2023.³⁶ Crow also donated half a million dollars to a conservative political organization founded by Justice Thomas's wife³⁷ and paid for the private school education of Justice Thomas's grandnephew.³⁸ The *New York Times* also revealed that Justice Thomas failed to repay a "significant portion" of a quarter of a million dollar loan from wealthy businessman Anthony Welters.³⁹ The loan was inexplicably forgiven nine years later.⁴⁰

Some ethics law experts say that these failures to report were clear violations of the Ethics in Government Act of 1978⁴¹ (EGA), which was intended to apply to all federal officials and requires disclosure of both real estate transactions and most gifts.⁴²

(b) *Justice Gorsuch*. — On April 25, 2023, *Politico* reported that in 2017, Justice Gorsuch sold a forty-acre property to Brian Duffy, the chief executive of major law firm Greenberg Traurig.⁴³ Justice Gorsuch's property had languished on the market for two years before finally being purchased just nine days after his appointment to the bench.⁴⁴ Justice

³⁴ Brett Murphy & Alex Mierjeski, *Clarence Thomas' 38 Vacations: The Other Billionaires Who Have Treated the Supreme Court Justice to Luxury Travel*, PROPUBLICA (Aug. 10, 2023, 5:45 AM), <https://www.propublica.org/article/clarence-thomas-other-billionaires-sokol-huizengano-velly-supreme-court> [<https://perma.cc/VBP6-R3MK>].

³⁵ *Id.*

³⁶ Justin Elliott et al., *Billionaire Harlan Crow Bought Property from Clarence Thomas. The Justice Didn't Disclose the Deal*, PROPUBLICA (Apr. 13, 2023, 2:20 PM), <https://www.propublica.org/article/clarence-thomas-harlan-crow-real-estate-scotus> [<https://perma.cc/A2JG-EEVS>].

³⁷ Kaplan et al., *supra* note 32.

³⁸ Joshua Kaplan et al., *Clarence Thomas Had a Child in Private School. Harlan Crow Paid the Tuition*, PROPUBLICA (May 4, 2023, 6:00 AM), <https://www.propublica.org/article/clarence-thomas-harlan-crow-private-school-tuition-scotus> [<https://perma.cc/NTK2-82MD>].

³⁹ Jo Becker, *Justice Thomas's R.V. Loan Was Forgiven, Senate Inquiry Finds*, N.Y. TIMES (Oct. 26, 2023), <https://www.nytimes.com/2023/10/25/us/politics/clarence-thomas-rv-loan-senate-inquiry.html> [<https://perma.cc/CHC4-LJ4Z>].

⁴⁰ *Id.*

⁴¹ Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended in scattered sections of 2, 5, and 28 U.S.C.).

⁴² Letter from Walter M. Shaub, Jr. & Sarah Turberville, Representatives of the Project on Gov't Oversight (POGO), to Brian M. Boynton, Principal Deputy Assistant Att'y Gen. of the Civil Div. of the U.S. Dep't of Just. (Apr. 16, 2023), https://s3.amazonaws.com/docs.pogo.org/letter/2023/POGO_Letter_DOJ-Investigate-Clarence-Thomas-Seek-Civil-Penalties.pdf [<https://perma.cc/XK8R-DR9F>].

⁴³ Heidi Przybyla, *Law Firm Head Bought Gorsuch-Owned Property*, POLITICO (Apr. 25, 2023, 4:30 AM), <https://www.politico.com/news/2023/04/25/neil-gorsuch-colorado-property-sale-00093579> [<https://perma.cc/H46T-SMRV>].

⁴⁴ *Id.*

Gorsuch made between \$250,001 and \$500,000 from the sale, according to federal disclosure forms.⁴⁵

Though Justice Gorsuch reported the sale on his federal disclosure forms, he failed to disclose the identity of the land's purchaser and left that box on the form blank.⁴⁶ After the sale, Greenberg Traurig was involved, as either an amicus brief filer or representative counsel, in at least twenty-two cases that came before or were presented to the Court; Justice Gorsuch sided with the firm at least eight times.⁴⁷ While Justice Gorsuch's property sale may not be a clear violation of existing ethics laws, the conflict of interest presented by the transaction underscores the need for financial disclosure reform for Supreme Court Justices.⁴⁸

(c) *Justice Alito*. — On June 20, 2023, *ProPublica* reported that in 2008, Justice Alito took a luxury fishing trip to a remote corner of Alaska and stayed at the King Salmon Lodge.⁴⁹ He flew to the lodge for free aboard a private jet owned by Republican megadonor Paul Singer.⁵⁰ His three-day stay was paid for in full by Robin Arkley II, another wealthy conservative donor.⁵¹ Leonard Leo, the then-leader of the conservative legal group the Federalist Society, helped organize the fishing vacation and arranged Justice Alito's spot aboard Singer's jet.⁵² Justice Alito failed to disclose the entire excursion in his end-of-year federal disclosure forms.⁵³ Justice Alito also did not recuse himself from reviewing the numerous cases involving Singer's hedge fund that came before the Court after his Alaska trip.⁵⁴

(d) *Justice Sotomayor*. — On July 11, 2023, the *Associated Press* revealed that taxpayer-funded staffers of Justice Sotomayor routinely prodded public institutions to buy “hundreds, sometimes thousands” of copies of Justice Sotomayor's books in anticipation of the Justice's speaking engagements.⁵⁵ These mass purchases were often presented by staffers as the implicit price of a speaking appearance by Justice Sotomayor.⁵⁶ Such conduct is prohibited for members of Congress and

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Justin Elliot et al., *Justice Samuel Alito Took Luxury Fishing Vacation with GOP Billionaire Who Later Had Cases Before the Court*, PROPUBLICA (June 20, 2023, 11:49 PM), <https://www.propublica.org/article/samuel-alito-luxury-fishing-trip-paul-singer-scotus-supreme-court> [<https://perma.cc/7V3K-XX4J>].

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Brian Slodysko & Eric Tucker, *Supreme Court Justice Sotomayor's Staff Prodded Colleges and Libraries to Buy Her Books*, AP NEWS (July 11, 2023, 5:14 AM), <https://apnews.com/article/supreme-court-sotomayor-book-sales-ethics-colleges-b2cb93493f927f995829762cb8338c02> [<https://perma.cc/ME68-N2MX>].

⁵⁶ *See id.*

the executive branch, who are statutorily barred from using government resources, such as their staffers, for personal financial gain.⁵⁷ Such conduct also plainly violates the Code of Conduct for United States Judges, which prohibits the substantial use of “chambers, resources, or staff” to further such private interests.⁵⁸

Additionally, when the Court considered several cases that involved her publisher, Penguin Random House, Justice Sotomayor failed to recuse herself.⁵⁹ Though the Justice had no direct financial interest in the outcome of the Penguin Random House cases, her continuing receipt of royalties from the company likely merited disqualification because her “impartiality might reasonably be questioned.”⁶⁰

3. *Judicial Ethics and Public Confidence.* — Efforts to downplay these lapses in ethical conduct have taken several forms. Justice Thomas’s attorney, Elliot S. Berke, decried news reports of the Justice’s behavior as “political blood sport . . . motivated by hatred for his judicial philosophy, not by any real belief in any ethical lapses.”⁶¹ Conservative pundits such as the Heritage Foundation’s Thomas Jipping have expanded the charge of partisan witch hunt to include the Court as a whole, calling the Left’s hand-wringing over Court conduct a “smokescreen” and “misdirection” driven by those who consider the Court’s “independence an obstacle to be overcome.”⁶²

However, recent Supreme Court ethics reform proposals would apply to *all* Supreme Court Justices, no matter which party’s President appointed them. Increased transparency would allow the Court to subvert any anticonservative narratives perpetuated by the media and ensure an unbiased account of *all* Justices’ activities and ethics breaches. And most importantly, ethics reform would create guardrails for the institution itself and reinstate public confidence. Though some change has finally come from within the Court,⁶³ that change is insufficient to properly address the recent problematic conduct of several Justices, and Congress must create enforceable ethics rules for the Justices to follow.

B. Current and Proposed Ethics Rules

This section begins by delving into the intricacies of existing judicial

⁵⁷ *Id.*

⁵⁸ CODE OF CONDUCT FOR U.S. JUDGES Canon 4G (JUD. CONF. OF THE U.S. 2019).

⁵⁹ Slodysko & Tucker, *supra* note 55.

⁶⁰ 28 U.S.C. § 455(a); *see also* Slodysko & Tucker, *supra* note 55.

⁶¹ Press Release, Elliot S. Berke, Managing Partner, Berke Fara LLP, Statement on Behalf of Client Justice Clarence Thomas (Aug. 31, 2023), <https://www.berkefara.com/news/2023/8/31/elliott-s-berke-releases-statement-on-behalf-of-client-justice-clarence-thomas-1> [<https://perma.cc/75BU-8WKR>].

⁶² *See* Thomas Jipping, *Judicial Decisions, Not Judicial Ethics, Are the Real Target*, HERITAGE FOUND. (May 3, 2023), <https://www.heritage.org/courts/commentary/judicial-decisions-not-judicial-ethics-are-the-real-target> [<https://perma.cc/26J9-WMFF>].

⁶³ *See* CODE OF CONDUCT FOR JUSTICES OF THE SUP. CT. OF THE U.S. (2023) [hereinafter SCOTUS CODE], https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf [<https://perma.cc/6P8U-VMUX>].

ethics statutes and their applicability to the federal judiciary, with a focus on the Supreme Court. Section 2 discusses the Court's responses to external judicial ethics reform efforts. Section 3 concludes by examining the Court's new Code of Conduct. This section aims to underscore the urgent need for Congress to establish a formal, enforceable code of ethics for the Supreme Court.

I. Ethics Regulations in the Federal Judiciary. — As mentioned previously,⁶⁴ the Code of Conduct for United States Judges provides guidance on a broad range of judicial conduct; for example, it advises judges to “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”⁶⁵ Though the Code applies to most lower-level judges, it does not explicitly apply to Justices of the U.S. Supreme Court.⁶⁶

In 2011, Chief Justice Roberts assured the public that members of the Court “do in fact consult [the Code] in assessing their ethical obligations.”⁶⁷ He noted that the Justices also have several avenues in addition to the Code at their disposal, including the Judicial Conference's Committee on Codes of Conduct, the Court's Legal Office, and their fellow Justices.⁶⁸ They may also turn to “judicial opinions, treatises, scholarly articles, and disciplinary decisions.”⁶⁹ Thus, said Chief Justice Roberts, “the Court has had no reason to adopt the Code of Conduct as its definitive source of ethical guidance.”⁷⁰ However, like other federal judges, the Court's consultation of the Code is voluntary.⁷¹ And in his 2011 report, Chief Justice Roberts was careful to note that while the Justices complied with Congress's requirements pertaining to financial reporting and limitations on the receipt of gifts and outside earned income, Congress's constitutional authority to include the Justices in those laws had never actually been established.⁷²

Outside of the Code, some statutes impose ethical requirements on the Justices. For example, 28 U.S.C. § 455 requires all federal judges, including Supreme Court Justices, to recuse themselves from cases under particular circumstances such as when they “ha[ve] a personal bias or prejudice concerning a party”⁷³ or “a financial interest in the subject

⁶⁴ See *supra* 1679–80.

⁶⁵ CODE OF CONDUCT FOR U.S. JUDGES Canon 2A (JUD. CONF. OF THE U.S. 2019).

⁶⁶ See *id.* intro.

⁶⁷ JOHN G. ROBERTS, JR., U.S. SUP. CT., 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 4 (2011), <http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf> [<https://perma.cc/Z9RH-2W9H>].

⁶⁸ *Id.* at 5.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ VALERIE C. BRANNON & JOANNA R. LAMPE, CONG. RSCH. SERV., R45300, QUESTIONING JUDICIAL NOMINEES: LEGAL LIMITATIONS AND PRACTICE 5–6 (2022).

⁷² ROBERTS, *supra* note 67, at 6.

⁷³ 28 U.S.C. § 455(b)(1).

matter in controversy.”⁷⁴ Congress, through the Ethics in Government Act of 1978 and the Ethics Reform Act of 1989,⁷⁵ also directs high-ranking officials in all three branches to file annual financial disclosure reports and observe limits on the acceptance of gifts.⁷⁶ The Judicial Conference has also issued regulations concerning statutory reporting⁷⁷ and gift acceptance.⁷⁸ Chief Justice Roberts has noted that the Court voluntarily complies with these laws.⁷⁹

Unfortunately, these ethics rules are rife with ambiguities. Though the Judicial Conference recently clarified that “transportation that substitutes for commercial transportation,” such as private jet rides, must be disclosed under the Ethics Reform Act of 1989, that rule does not apply to stays at luxurious resorts due to the Act’s “personal hospitality” exemption.⁸⁰ Further, there is no limit on how much “personal hospitality” wealthy benefactors can lavish upon a Justice, all of which can legally go undisclosed today.⁸¹

Additionally, 28 U.S.C. § 455 does not provide a clear enforcement mechanism to challenge a Justice’s failure to recuse, giving each Justice leeway to decide whether they will recuse themselves from a particular case. While most federal judges’ failure to recuse in response to a motion or sua sponte is appealable,⁸² there is no appellate court with the power to assess a Supreme Court Justice’s failure to recuse.⁸³ Thus, the Justices’ recusal decisions are almost always made without public explanation and are unreviewable.⁸⁴

2. *The Court’s Reactions to Ethics Reform.* — On April 20, 2023, Senator Richard Durbin, Chairman of the Senate Judiciary Committee, sent a letter to Chief Justice Roberts, inviting him or one of his fellow Justices to testify before a panel considering changes to current ethics

⁷⁴ *Id.* § 455(b)(4).

⁷⁵ Pub. L. No. 101-194, 103 Stat. 1716 (codified as amended in scattered sections of the U.S. Code).

⁷⁶ 5 U.S.C. §§ 7351, 7353, 13103, 13104.

⁷⁷ 2 GUIDE TO JUDICIARY POLICY, pt. D (Admin. Off. of the U.S. Cts. 2023).

⁷⁸ *Id.* ch. 3, § 330.

⁷⁹ ROBERTS, *supra* note 67, at 6–7.

⁸⁰ 2 GUIDE TO JUDICIARY POLICY, *supra* note 77, pt. D, ch. 1, § 170.

⁸¹ *See id.*

⁸² *See* 28 U.S.C. § 455 (allowing judges to disqualify sua sponte); *id.* § 144 (allowing judges to disqualify on a party’s motion); *Litigation, Overview — Motion to Disqualify/Recuse a Federal Judge*, BLOOMBERG L., <https://www.bloomberglaw.com/document/X4617L7G00000> [https://perma.cc/V64R-NL4G].

⁸³ Russell Wheeler, Commentary, *Justice Thomas’s Failure to Recuse May Be Wrong But It’s Not Judicial Misconduct*, BROOKINGS INST. (Mar. 29, 2022), <https://www.brookings.edu/articles/justice-thomass-failure-to-recuse-may-be-wrong-but-its-not-judicial-misconduct> [https://perma.cc/9E6M-FEFK].

⁸⁴ John Crawley & Kimberly Strawbridge Robinson, *Alito, Kagan Top Justices in Supreme Court Recusal “Black Box,”* BLOOMBERG L. (Feb. 13, 2023, 4:46 AM), <https://news.bloomberglaw.com/us-law-week/alito-kagan-top-justices-in-supreme-court-recusal-black-box-1> [https://perma.cc/P4MF-KT2C].

rules.⁸⁵ “The time has come for a new public conversation on ways to restore confidence in the Court’s ethical standards,” Senator Durbin wrote, “I invite you to join it, and I look forward to your response.”⁸⁶

Five days later, Chief Justice Roberts sent a letter to the committee declining its invitation.⁸⁷ Chief Justice Roberts wrote that such appearances by a Chief Justice before Congress were “exceedingly rare, as one might expect in light of separation-of-powers concerns and the importance of preserving judicial independence.”⁸⁸ Chief Justice Roberts affixed to the letter a “Statement on Ethics Principles and Practices” signed by all nine Justices and to which, he said, “all of the current Members of the Supreme Court subscribe.”⁸⁹

Chief Justice Roberts’s message was clear: the existing guidance around gifts, travel, and other financial disclosures was sufficient and need not be changed. Senator Durbin publicly rejected the Chief Justice’s reasoning for refusing to testify.⁹⁰ First, while a Chief Justice testifying before the Senate Judiciary Committee has only occurred twice, sitting Justices of the Court have appeared at ninety-three congressional hearings since 1960.⁹¹ In fact, in 2019, Justice Kagan testified at a congressional hearing where she revealed that the Supreme Court was looking into adopting a judicial code of conduct at that time.⁹² Second, the Chief Justice’s letter ignored the obvious: the flurry of reports throughout early 2023 demonstrated, quite publicly, that the Justices *hadn’t* adhered to existing ethics laws and standards.

⁸⁵ Carl Hulse, *Senate Democrats Invite Chief Justice to Testify on Supreme Court Ethics*, N.Y. TIMES (Apr. 20, 2023), <https://www.nytimes.com/2023/04/20/us/politics/roberts-testify-supreme-court-ethics.html> [https://perma.cc/38H9-3M99].

⁸⁶ Press Release, U.S. Senate Comm. on the Judiciary, Durbin Invites Chief Justice Roberts to Testify Before the Judiciary Committee Regarding Supreme Court Ethics (Apr. 20, 2023), <https://www.judiciary.senate.gov/press/dem/releases/durbin-invites-chief-justice-roberts-to-testify-before-the-judiciary-committee-regarding-supreme-court-ethics> [https://perma.cc/FZW8-TBTT].

⁸⁷ Abbie VanSickle, *Chief Justice Declines to Testify Before Congress Over Ethics Concerns*, N.Y. TIMES (Apr. 25, 2023), <https://www.nytimes.com/2023/04/25/us/politics/justice-roberts-supreme-court-ethics.html> [https://perma.cc/TW4X-8Q3U].

⁸⁸ *Id.*

⁸⁹ Letter from John G. Roberts, Jr., Chief J. of the U.S. Sup. Ct., to Richard J. Durbin, Chair of the U.S. Senate Comm. on the Judiciary (Apr. 25, 2023) [hereinafter Chief Justice Letter to Chair Durbin], <https://int.nyt.com/data/documenttools/supreme-court-ethics-durbin/cf67ef8450eao24d/full.pdf> [https://perma.cc/KA6K-J7CP].

⁹⁰ Press Release, U.S. Senate Comm. on the Judiciary, Durbin Statement on Chief Justice Roberts Declining to Testify Before the Judiciary Committee Regarding Supreme Court Ethics (Apr. 25, 2023), <https://www.judiciary.senate.gov/press/dem/releases/durbin-statement-on-chief-justice-roberts-declining-to-testify-before-the-judiciary-committee-regarding-supreme-court-ethics> [https://perma.cc/J85C-QV7K].

⁹¹ BARRY J. MCMILLION & JENNIFER E. MANNING, CONG. RSCH. SERV., IN12155, APPEARANCES BY SITTING U.S. SUPREME COURT JUSTICES AT CONGRESSIONAL COMMITTEE AND SUBCOMMITTEE HEARINGS (1960–2022) 1 (2023).

⁹² Robert Barnes, *Supreme Court Justices Tell Congress They Are Not Considering Televising Hearings*, WASH. POST (Mar. 7, 2019, 6:39 PM), https://www.washingtonpost.com/politics/courts_law/supreme-court-justices-tell-congress-they-are-not-considering-televising-hearings/2019/03/07/5fb28684-4116-11e9-9361-301ffb5bd5e6_story.html [https://perma.cc/XD4X-DHY3].

Most troubling, however, was Chief Justice Roberts’s assertion that testifying before Congress would implicate judicial independence and the separation-of-powers doctrine.⁹³ He made a similar claim in his 2011 year-end report on the state of the federal judiciary, writing that Article III of the Constitution established “only one court” and left the rest of the judiciary to Congress.⁹⁴ And in 2012, Chief Justice Roberts rejected⁹⁵ calls from the judiciary committee⁹⁶ to adopt a binding ethics code after it was revealed that Justice Thomas failed to disclose years’ worth of his wife’s income from various political employers.⁹⁷

In July 2023, Justice Alito echoed the Chief Justice. Responding to proposed legislation requiring the Court to adopt a binding code of ethics, Justice Alito remarked, “Congress did not create the Supreme Court’ — the Constitution did.”⁹⁸ “No provision in the Constitution gives [Congress] the authority to regulate the Supreme Court — period.”⁹⁹

In other words, “[t]he court checks . . . but cannot be checked.”¹⁰⁰ As Senator Durbin wrote in response to Chief Justice Roberts’s refusal to testify, “[i]t is time for Congress to accept its responsibility to establish an *enforceable* code of ethics for the Supreme Court, the only agency of our government without it.”¹⁰¹

3. *The Court’s Code of Ethics.* — On November 13, 2023, the Court released its first code of ethics governing the behavior of its members.¹⁰² In it, the Court could have acknowledged the gravity of its recent financial and political scandals and positioned the new Code of Conduct as part of a larger, ongoing internal reform effort. Instead, the

⁹³ Chief Justice Letter to Chair Durbin, *supra* note 89.

⁹⁴ ROBERTS, *supra* note 67, at 4.

⁹⁵ Letter from John G. Roberts, Jr., Chief J. of the U.S. Sup. Ct., to Patrick J. Leahy, Chairman of the U.S. Senate Comm. on the Judiciary (Feb. 17, 2012) [hereinafter Chief Justice Letter to Chairman Leahy], https://www.washingtonpost.com/t/2010-2019/WashingtonPost/2012/02/21/National-Politics/Graphics/Ltr_to_Chairman_Leahy.pdf?itid=lk_inline_manual_2 [<https://perma.cc/7G62-TCRY>].

⁹⁶ Letter from the U.S. Senate Comm. on the Judiciary to John Roberts, Chief J. of the U.S. Sup. Ct. (Feb. 13, 2012), https://www.durbin.senate.gov/imo/media/doc/letter_from_chair_durbin_to_chief_justice_roberts_-_021312.pdf [<https://perma.cc/PDW3-GK4T>].

⁹⁷ *Justice Clarence Thomas Amends 20 Years of Disclosure Forms with Wife’s Employers*, ABC NEWS (Jan. 24, 2011, 4:28 PM), https://abcnews.go.com/Politics/Supreme_Court/justice-clarence-thomas-amends-financial-disclosure-reports-virginia/story?id=12750650 [<https://perma.cc/SJ4Y-3K6W>].

⁹⁸ David B. Rivkin Jr. & James Taranto, *Samuel Alito, The Supreme Court’s Plain-Spoken Defender*, WALL ST. J. (July 28, 2023, 1:57 PM) (quoting Justice Samuel Alito), <https://www.wsj.com/articles/samuel-alito-the-supreme-courts-plain-spoken-defender-precedent-ethics-originalism-5e3e9a7#> [<https://perma.cc/K73U-HDRT>].

⁹⁹ *Id.* (quoting Justice Samuel Alito).

¹⁰⁰ Jamelle Bouie, *The Polite Disdain of John Roberts Finds a Target*, N.Y. TIMES (Apr. 28, 2023), <https://www.nytimes.com/2023/04/28/opinion/john-roberts-clarence-thomas-supreme-court.html> [<https://perma.cc/VN59-8RMV>].

¹⁰¹ VanSickle, *supra* note 87 (emphasis added) (quoting Sen. Richard Durbin).

¹⁰² SCOTUS CODE, *supra* note 63.

Justices wrote in a brief introduction that “[t]he absence of a Code . . . has led in recent years to the *misunderstanding* that the Justices of this Court, unlike all other jurists in this country, regard themselves as unrestricted by any ethics rules.”¹⁰³ Further, despite recent reports of arguably unethical conduct, the Court’s statement assured the public that the rules and principles within the Code were “not new” and “largely represent[] a codification of principles that [it] ha[d] long regarded as governing [its] conduct.”¹⁰⁴

The nine-page Code of Conduct echoes the code that applies to lower court judges, with some notable differences. For instance, lower court judges are told not to “lend the prestige of the judicial office to advance the[ir] private interests.”¹⁰⁵ The Justices are merely advised not to do so “knowingly,”¹⁰⁶ a loophole that may swallow the rule. The Code spells out some restrictions on the Justices’ participation in fundraising,¹⁰⁷ reiterates requirements to file disclosure reports and limit gift acceptance consistent with the relevant statutes and regulations,¹⁰⁸ and states that the “Justice[s] should not participate in extrajudicial activities that detract from the dignity of the Justice’s office, interfere with the performance of the Justice’s official duties, reflect adversely on the Justice’s impartiality, [or] lead to frequent disqualification.”¹⁰⁹

The main difference between the Court’s Code and the one that applies to lower court judges is its treatment of recusal. The Commentary accompanying the Code explains that the Justices must be warier of recusing themselves because they cannot be replaced when they do.¹¹⁰ Thus, the Commentary explains that the Code’s provision on recusal “should be construed narrowly.”¹¹¹

One would think that an ethics code promulgated due to public pressure would advise against the unethical conduct that spurred the uproar, but not so with this Code of Conduct. For example, on the matter of outside influences on the Justices, the Code states that “[a] Justice should not allow family, social, political, financial, or other relationships to influence official conduct or judgment” and 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.”¹¹² Would this rule have stopped Justices Thomas and Alito

¹⁰³ *Id.* (emphasis added).

¹⁰⁴ *Id.*

¹⁰⁵ CODE OF CONDUCT FOR U.S. JUDGES Canon 2B (JUD. CONF. OF THE U.S. 2019).

¹⁰⁶ SCOTUS CODE, *supra* note 63, at 1.

¹⁰⁷ *Id.* at 6.

¹⁰⁸ *Id.* at 7–8.

¹⁰⁹ *Id.* at 4.

¹¹⁰ *Id.* at 10–11.

¹¹¹ *Id.* at 11.

¹¹² *Id.* at 1.

from maintaining relationships with billionaire donors? The rules suggest that, as long as Justices claim not to be “influenced” by their moneyed connections or “knowingly” give the impression they are, there is no ethical violation. Without an enforcement mechanism to determine when such relationships have gone too far, the scandals of last summer are free to repeat themselves under the new Code.

The Court’s Code of Conduct is still meaningful. It signals that the Justices recognize some obligation to communicate with and appease the American people. It signals that public pressure works, even on powerful institutions that are, by design, insulated from public pressure. It is an act of public accountability, symbolic though it may be. And, frankly, it’s better than nothing.

However, the Code’s lack of an enforcement mechanism leaves the bottom line where it has always been: Who will judge the Justices? Who will ensure that the Code’s rules are followed? As Professor Stephen Vladeck argues: “Even the most stringent and aggressive ethics rules don’t mean all that much if there’s no mechanism for enforcing them. And the [J]ustices’ unwillingness to even nod toward that difficulty kicks the ball squarely back into Congress’ court.”¹¹³

C. Enforcement

Even if one concedes that ideally the Supreme Court Justices should follow an ethics code, such a code does not explain what happens when a Justice commits potential misconduct. The simplest measure would be the Supreme Court’s self-imposition of an ethics code that outlines sanctions for violations of its standards, essentially a self-enforcing code. As outlined above, the American Bar Association,¹¹⁴ advocacy groups,¹¹⁵ legal scholars,¹¹⁶ and even former lower court judges¹¹⁷ urged the Supreme Court to adopt its own code, resulting in the November 13, 2023 announcement.¹¹⁸ However, the difficulty the nine had in finding

¹¹³ Joshua Kaplan et al., *The Supreme Court Has Adopted a Conduct Code, But Who Will Enforce It?*, PROPUBLICA (Nov. 13, 2023, 4:47 PM) (quoting Professor Stephen Vladeck), <https://www.propublica.org/article/supreme-court-adopts-ethics-code-scotus-thomas-alito-crow> [<https://perma.cc/2DVN-486Q>].

¹¹⁴ *Supreme Court Justices Should Follow Binding Code of Ethics, ABA House Says*, AM. BAR ASS’N (Feb. 27, 2023), https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/feb-23-wl/scotus-ethics-0223wl [<https://perma.cc/7XAQ-WRUE>].

¹¹⁵ See, e.g., Glenn Fine, Commentary, *Yet Another Ethics Allegation — When Will the Supreme Court Act?*, BROOKINGS INST. (Oct. 2, 2023), <https://www.brookings.edu/articles/yet-another-ethics-allegation-when-will-the-supreme-court-act> [<https://perma.cc/22DT-KV8M>].

¹¹⁶ See, e.g., Joan Biskupic, *Supreme Court Under Fresh Pressure to Adopt Code of Ethics*, CNN (Feb. 9, 2023, 6:12 PM), <https://www.cnn.com/2023/02/09/politics/supreme-court-ethics-reform/index.html> [<https://perma.cc/XH3T-RFNG>].

¹¹⁷ See, e.g., Ruth Marcus, Opinion, *A Former Judge Explains How to Fix the Supreme Court’s Ethics Problem*, WASH. POST (July 17, 2023, 7:30 AM), <https://www.washingtonpost.com/opinions/2023/07/17/supreme-court-legal-ethics-jeremy-fogel/> [<https://perma.cc/8YU6-S2M6>].

¹¹⁸ See *supra* pp. 1687–89 (describing new Code).

consensus¹¹⁹ seems clear in the promulgated Code, which does not actually condemn any of the conduct questioned by the public, Congress, and former judges.¹²⁰ The Justices' Code is also not binding, both because it leaves determinations of propriety entirely up to individual Justices and because it does not outline any mechanism for enforcing the code or sanctioning misconduct.¹²¹ Since the Court has not bound itself to any ethical standards, protectors of the Court's legitimacy should look to enforcement by another branch.

Any enforcement plan must first ask: Who could pass judgment on the behavior of the nation's highest adjudicators? The very structure of the three branches of the federal government may pose a problem for enforcement. Life tenure and salary protections ensure the Justices' "independence to best interpret the law by shielding their judgments from outside political pressures."¹²² This insulation is necessary to ensure that the Court can properly evaluate legislation and executive action without fear of retribution. However, it also means that Congress and the Executive must tread carefully in wading into ethics, lest regulation of nonjudicial behavior should infringe upon that judicial independence.

Despite these structural protections, Congress frequently regulates the Supreme Court. Few question Congress's authority to circumscribe the Court's appellate jurisdiction, set its budget and length of session, and even expand or contract (upon death or retirement) the number of Justices. This section argues that Congress is in the best position to impose some ethical standards on the Court.

Many, including a number of the Justices themselves, advocate for self-regulation by the Supreme Court and reject all potential enforcement mechanisms by another body as unconstitutional.¹²³ However,

¹¹⁹ See Melissa Quinn, *Kagan Says Congress Has Power to Regulate Supreme Court: "We're Not Imperial,"* CBS NEWS (Aug. 4, 2023, 2:08 PM), <https://www.cbsnews.com/news/elena-kagan-congress-regulate-supreme-court-ethics-code/> [<https://perma.cc/44EQ-SWSX>].

¹²⁰ See *supra* pp. 1687–88; see also Jeannie Suk Gersen, *The Supreme Court's Self-Excusing Ethics Code*, NEW YORKER (Nov. 21, 2023), <https://www.newyorker.com/news/daily-comment/the-supreme-courts-self-excusing-ethics-code> [<https://perma.cc/8QXE-SAGW>] (“[N]one of the alleged ethical breaches by Justices that have been reported in the past several years would likely be a violation of the new code of conduct.”).

¹²¹ See Russell Wheeler, Commentary, *The Supreme Court's Code of Conduct: Enforcement Confusion, Extrajudicial Activism*, BROOKINGS INST. (Nov. 29, 2023), <https://www.brookings.edu/articles/the-supreme-courts-code-of-conduct-enforcement-confusion-extrajudicial-activism/> [<https://perma.cc/9HVV-49WD>].

¹²² Charlie Savage, *Tightening Supreme Court Ethics Rules Faces Steep Hurdles*, N.Y. TIMES (May 5, 2023), <https://www.nytimes.com/2023/05/05/us/politics/supreme-court-ethics-rules-justice-thomas-crow.html> [<https://perma.cc/2749-TLQK>]; see Jonathan L. Entin, *Getting What You Pay For: Judicial Compensation and Judicial Independence*, 2011 UTAH L. REV. 25, 25.

¹²³ See ROBERTS, *supra* note 67, at 7 (noting that “the limits of Congress’s power to require recusal [of Supreme Court Justices] have never been tested”); Rivkin & Taranto, *supra* note 98; *Supreme Court Ethics Reform: Hearing on S.B. 325 and S.B. 359 Before the S. Comm. on the Judiciary*, 118th Cong. 2–3 (2023) (statement of Thomas H. Dupree, Jr., Partner and Co-Chair of the Appellate and Constitutional Law Practice Group, Gibson, Dunn & Crutcher); Chief Justice Letter to Chairman Leahy, *supra* note 95.

whether Congress can regulate the behavior of the Justices is an open constitutional question,¹²⁴ and history and current practice both imply that Congress has the constitutional authority to do so. This section first addresses Congress's general power to regulate the Supreme Court and why, despite statements by the Justices, this power is constitutionally valid. Enforcement mechanisms can be broadly divided into two categories. In the first, Congress acts as a direct enforcer of ethical standards. In the second, Congress deputizes some other body with oversight over the nonjudicial conduct of Justices. Looking to state court systems shows how lower court judges may also serve a role in policing the conduct of the Justices. This section argues that Congress has several constitutional paths to act on Supreme Court ethics reform.

I. Congressional Power to Regulate Justices' Behavior. — This section argues that the congressional power to regulate the extrajudicial behavior of Supreme Court Justices is at worst constitutionally unclear and at best textually supported. It first addresses the vague arguments raised by opponents of congressional regulation — including some of the Justices themselves — and concludes that those arguments lack clear constitutional reasoning and are ultimately unavailing. Instead, the Necessary and Proper Clause and historical practice provide a clear, textual constitutional argument that Congress may regulate the conduct of individual Justices.

(a) Separation of Powers. — Some argue that the separation of powers implied in the Constitution disables Congress from enforcing any kind of legislation regarding Supreme Court ethics.¹²⁵ However, given the above-mentioned constitutional structure, Congress has asserted some level of input in the day-to-day functions of the Court, from the very mundane details all the way to foundational, structural issues.¹²⁶ Ethics do not present some never-before-seen threat to the independence of the judiciary. In fact, the Court has mostly complied with ethics-related statutes, gesturing at its constitutional insulation from them but adhering nonetheless.¹²⁷

¹²⁴ See Russell R. Wheeler, *A Primer on Regulating Federal Judicial Ethics*, 56 ARIZ. L. REV. 479, 484 (2014); Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism*, 26 GEO. J. LEGAL ETHICS 443, 457 (2013).

¹²⁵ See, e.g., *Supreme Court Ethics Reform: Hearing on S.B. 325 and S.B. 359 Before the S. Comm. on the Judiciary*, *supra* note 123, at 2–3 (statement of Thomas H. Dupree, Jr.).

¹²⁶ See Gordon Bermant & Russell R. Wheeler, *Federal Judges and the Judicial Branch: Their Independence and Accountability*, 46 MERCER L. REV. 835, 846 (1995); Stephen B. Burbank, *The Past and Present of Judicial Independence*, 80 JUDICATURE 117, 122 (1996) (noting that “[f]or most of our history the federal courts had no central organization and were dependent on the political branches not only for budget allocations but for administrative support,” which, he argues, supports the constitutionality of legislation affecting the administration of the federal courts).

¹²⁷ See, e.g., ROBERTS, *supra* note 67, at 6 (“Congress has directed Justices . . . to comply with both financial reporting requirements and limitations on the receipt of gifts and outside earned income. The Court has never addressed whether Congress may impose those requirements on the Supreme Court. The Justices nevertheless comply with those provisions.”).

Admittedly, enforcing any kind of sanction for an ethical violation is a relatively new proposition for Congress. However, at core, the separation of powers principle protects judicial independence,¹²⁸ which is not necessarily implicated in ethics enforcement. Congress's focus on extrajudicial ethical violations and issues related to recusal is part and parcel of ensuring judicial legitimacy and the proper functioning of statutes meant to protect that legitimacy. Many separation of powers critiques may arise from this normative view of the congressional role based on the structure of the Constitution.¹²⁹ Chief Justice Roberts and Justice Alito, who have commented most directly on the subject, have not illuminated the constitutional reasoning for their conclusions.¹³⁰ While this kind of pronouncement has weight, Congress need not accept it as binding constitutional law. The separation of powers principle may even benefit from Congress pushing forward some kind of ethics regulation, encouraging the Court either to accept such regulation or to articulate firm separation of powers grounds for rejecting it.

(b) *Status of the Court.* — Justices and other opponents of congressional ethics enforcement cite the special status of the Supreme Court as a constitutionally created body, in contrast to lower federal courts, which are created by Congress.¹³¹ However, as a constitutional matter, Justices as individuals are treated the same as other Article III judges. All Article III judges have tenure and salary protections guaranteed by the Constitution.¹³² The fact of constitutional creation does not put Justices' extrajudicial behavior beyond the reach of legislative regulation, particularly with regard to actions taken as individuals, such as engaging in political activity or receiving gifts.

Recusal is the only category of ethics regulation that touches on judicial decisionmaking. The status question is more difficult to answer here, but again does not weigh against the congressional power to guard against a runaway Court. Although recusal violations require careful consideration and raise questions of constitutional legitimacy, no clear answer has emerged from the history and text of the Constitution.¹³³ This difficulty only speaks to the relative political expediency of

¹²⁸ John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 965 (2002) ("Everyone agrees that we need 'decisional independence,' meaning judges' ability to adjudicate facts and interpret law in particular cases 'free from any outside pressure: personal, economic, or political, including any fear of reprisal.'" (quoting Archibald Cox, *The Independence of the Judiciary: History and Purposes*, 21 U. DAYTON L. REV. 565, 566 (1996))).

¹²⁹ See, e.g., THE FEDERALIST NO. 51, at 318 (James Madison) (Clinton Rossiter ed., 2003) ("Were the executive magistrate, or the judges, not independent of the legislature in [receiving a salary], their independence in every other would be merely nominal.").

¹³⁰ See Chief Justice Letter to Chair Durbin, *supra* note 89; Rivkin & Taranto, *supra* note 98.

¹³¹ See ROBERTS, *supra* note 67, at 3–4; Rivkin & Taranto, *supra* note 98.

¹³² U.S. CONST. art. III, § 1.

¹³³ See Louis J. Virelli III, *Congress, The Constitution, and Supreme Court Recusal*, 69 WASH. & LEE L. REV. 1535, 1542 (2012).

increased enforcement of acts regulating extrajudicial activities of the Justices.

(c) *Legitimacy of the Court.* — Opponents of congressional intervention rightfully note that Congress and the Court are coequal branches of government.¹³⁴ While that is true, Congress is better situated to navigate the quagmire of ethics violations and plummeting public trust that the Court has created. Congressional action is first more legitimate in the eyes of the public, given the perception of the Court as failing to police itself,¹³⁵ and second “offer[s] greater possibilities for coordinated efforts between the two Branches.”¹³⁶ Congress needs to begin enforcing these ethics statutes to begin the process of shaping this constitutional gray area.¹³⁷ The legislature has the power to act upon its interpretations of the Constitution,¹³⁸ and while regulation of ethics is sensitive, that does not mean that Congress should abdicate its normal duties.

(d) *The Necessary and Proper Clause.* — Given the above general constitutional arguments, the Constitution provides a textual “hook” for this congressional power to regulate in the Necessary and Proper Clause. The Constitution establishes the Supreme Court in sparse language in Article III, leaving many of the details to be filled in (or not) by Congress.¹³⁹ These gaps in Article III, which include foundational questions such as the size of the Court, the processes by which it hears cases, and the scope of its appellate jurisdiction, all underscore the congressional role in establishing and regulating the Court.¹⁴⁰ Congress has exercised this Necessary and Proper authority by expanding and contracting the size of the Court, establishing and adjusting procedural rules, and even regulating the oath that Justices take when assuming office.¹⁴¹ Scholars have noted that, in contrast to Article III, Article I of the Constitution establishes detailed procedural rules for the legislative branch,¹⁴² implying that Congress was not only empowered but

¹³⁴ See, e.g., *Supreme Court Ethics Reform: Hearing on S.B. 325 and S.B. 359 Before the S. Comm. on the Judiciary*, *supra* note 123, at 2–3 (statement of Thomas H. Dupree, Jr.).

¹³⁵ See Gersen, *supra* note 120.

¹³⁶ Virelli, *supra* note 133, at 1542.

¹³⁷ Cf. Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 997 (2008) (explaining that constitutional showdowns create new constitutional precedents).

¹³⁸ James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 136 (1893) (“[I]t is the legislature to whom this power is given, — this power, not merely of enacting laws, but of putting an interpretation on the [C]onstitution which shall deeply affect the whole country . . .”).

¹³⁹ See U.S. CONST. art. III; see also RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 20–21 (7th ed. 2015).

¹⁴⁰ See JOANNA R. LAMPE, CONG. RSCH. SERV., R47382, CONGRESSIONAL CONTROL OVER THE SUPREME COURT 5, 26–27 (2023).

¹⁴¹ See Michael Waldman, *Alito vs. History, Again*, BRENNAN CTR. FOR JUST. (Aug. 1, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/alito-vs-history-again> [<https://perma.cc/K6BG-E22F>].

¹⁴² E.g., Frost, *supra* note 124, at 457.

“perhaps even obligated” to establish governing rules for the Supreme Court.¹⁴³

These noticeable gaps in Article III, when paired with the Necessary and Proper Clause of Article I, “confirm[] this perception of congressional primacy by empowering Congress to make[] laws necessary and proper for carrying into execution the powers vested in the judicial department.”¹⁴⁴ Using the Necessary and Proper Clause in combination with some of the below powers, Congress can act today to enforce existing ethical rules, rather than attempt to empower itself via new legislation. The constitutional structure explains why Congress could act and why its previous legislation, including acts requiring financial disclosures and barring outside income and gifts, validly applies to the Court.

2. *Enforcement Directly by Congress.* — “The non-judicial conduct and activities of the Supreme Court are subject to law, just like every other citizen’s conduct and activities are subject to the law. Much of the Justices’ non-judicial conduct and activities are of course subject to law today.”¹⁴⁵ The Code of Conduct for United States Judges, which applies to the lower federal courts, is not technically “binding” on them because it itself is merely advisory.¹⁴⁶ While a valuable resource, it cannot be the final answer to these ethical questions because, by definition, it has no teeth.¹⁴⁷ Additionally, the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980¹⁴⁸ (Judicial Conduct Act) offers an avenue for nearly anyone to file a complaint against a federal judge who “has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts.”¹⁴⁹ However, this statute also does not reach the Justices of the Supreme Court.¹⁵⁰ While expanding both the Code and the Judicial Conduct Act, as well as potentially establishing a new Inspector General for the Supreme Court¹⁵¹

¹⁴³ *Id.*

¹⁴⁴ JAMES E. PFANDER, ONE SUPREME COURT 2 (2009).

¹⁴⁵ *Supreme Court Ethics Reform: Hearing on S.B. 325 and S.B. 359 Before the S. Comm. on the Judiciary*, *supra* note 123, at 4 (statement of J. Michael Luttig, Former Judge of the United States Court of Appeals for the Fourth Circuit).

¹⁴⁶ See Wheeler, *supra* note 124, at 503; *id.* at 505 (“The Code of Conduct . . . help[s] in divining what ‘constitutes conduct prejudicial to the effective and expeditious administration of the business of the courts.’ But it is highly misleading to regard it as a cure for whatever ethical problems the Justices may exhibit.” (quoting 28 U.S.C. § 351(a))).

¹⁴⁷ See *id.*

¹⁴⁸ Pub. L. No. 96-458, 94 Stat. 2035 (codified as amended at 28 U.S.C. §§ 331–332, 372, 604); see also Judicial Improvements Act of 2002, Pub. L. No. 107-273, 116 Stat. 1848 (codified as amended at 28 U.S.C. §§ 351–364).

¹⁴⁹ 28 U.S.C. § 351(a); see Wheeler, *supra* note 124, at 507.

¹⁵⁰ Wheeler, *supra* note 124, at 507; see 28 U.S.C. § 351(d)(1).

¹⁵¹ See, e.g., Press Release, Senator Chuck Grassley & Representative James Sensenbrenner, Grassley, Sensenbrenner See Need for Inspector General for the Judiciary (Jan. 31, 2007) <https://www.grassley.senate.gov/news/news-releases/grassley-sensenbrenner-see-need-inspector-general-judiciary> [<https://perma.cc/E29P-2MWX>].

are promising steps, this section instead focuses on ways that Congress can require the ethical adherence of the Justices today.

In the most extreme case, Congress can impeach a Justice for misconduct. Equally extreme would be the withholding of appropriations, which could have some major repercussions for the continued functioning of the judicial branch. Finally, Congress could look to extant statutes for ways to enforce ethical standards.

(a) *Impeachment.* — Congress is authorized to impeach a Supreme Court Justice.¹⁵² This power cuts both ways in evaluating what Congress can do in the face of an unethical Justice. On one hand, this constitutional backstop evinces the Framers' intent to ensure that the legislative branch retained some control in the face of tenure and salary guarantees. On the other hand, the authority to impeach may, by implication, exclude any other authority to discipline.¹⁵³ However, the impeachment power cannot be the only regulation of Justices, given that other limits still apply to their behavior, including criminal law.

In practice, “no Supreme Court [J]ustice has ever been [successfully] impeached and removed by Congress.”¹⁵⁴ While some may argue that the threat of impeachment changes Justices' behavior, impeachment practically cannot be the only mechanism for Congress to regulate Article III judges, given the incredibly high bar for starting and completing impeachment proceedings.¹⁵⁵

Some argue that impeachment *is* the only mechanism by which Congress can regulate the Supreme Court, to the exclusion of other statutes, even criminal ones.¹⁵⁶ However, several federal appellate courts have concluded that a federal judge may be prosecuted without first being impeached.¹⁵⁷ In 1795, the House of Representatives declined to impeach Judge George Turner after the Attorney General decided to prosecute him, providing Founding-era evidence that the existence of

¹⁵² U.S. CONST. art. II, § 4; *id.* art. I, § 2, cl. 5; *id.* art. I, § 3, cl. 6.

¹⁵³ Peter M. Shane, *Who May Discipline or Remove Federal Judges? A Constitutional Analysis*, 142 U. PA. L. REV. 209, 220 (1993) (“[I]t is suggested that all politically controlled disciplinary mechanisms short of impeachment are precluded by implication because any such mechanisms would undermine the value of judicial independence that the [Good Behavior and Compensation] Clauses are intended to protect.”).

¹⁵⁴ Ron Elving, *Congress Has Clashed with Supreme Court Justices over Ethics in the Past*, NPR (Apr. 22, 2023, 10:18 AM) <https://www.npr.org/2023/04/22/1171289725/congress-has-clashed-with-supreme-court-justices-over-ethics-in-the-past> [<https://perma.cc/GG4Z-THCM>]. The closest Congress has come to removing a sitting Justice was in 1804 when the House voted to impeach Justice Chase on charges of partisanship, but he was acquitted by the Senate. *See id.* More recently, Justices Douglas and Fortas were threatened with impeachment proceedings, which never materialized. *See id.*

¹⁵⁵ *See, e.g., id.*

¹⁵⁶ *See, e.g.,* Shane, *supra* note 153, at 220, 223.

¹⁵⁷ *See, e.g.,* United States v. Claiborne, 727 F.2d 842, 845 (9th Cir. 1984) (“[T]he Constitution does not immunize a sitting federal judge from the processes of criminal law.”); United States v. Isaacs, 493 F.2d 1124, 1142 (7th Cir. 1974) (holding that life tenure does not immunize federal judges from criminal prosecution).

the impeachment procedure does not bar other laws, such as the criminal code, from reaching federal judges.¹⁵⁸

Impeachment is a blunt tool for Congress in attempting to enforce ethical rules at the Court. Despite its bluntness, it has a strong basis in the Constitution, thus offering a legitimate toehold for Congress to enter the fray. However, given the polarization in the legislature, the difficulty of impeachment proceedings, and the post-hoc nature of the remedy, it does not offer the most practical avenue for ethics regulation.¹⁵⁹

(b) *Appropriations*. — Using its power of the purse, Congress could sanction and deter violations of ethical rules by the Supreme Court Justices. The Senate Appropriations subcommittee that oversees the Court's budget has recently evaluated its options in approving the Court's budget for 2024.¹⁶⁰ Senator Chris Van Hollen has proposed that the Senate can leverage the appropriations process for the Court's budget to force the Court to bind itself to ethical standards.¹⁶¹

This issue is still politically live, but it does offer an avenue for immediate action to punish previous violations of the Ethics Reform Act of 1989 and the Ethics in Government Act of 1978, among others. However, the appropriations power is a similarly blunt instrument that does run the risk of compromising the Court's ability to function at all.

(c) *Enforcement of Extant Statutes*. —

(i) *Ethics in Government Act*. — The Ethics in Government Act applies to all three branches of the federal government, setting rules related to outside income and employment, gifts, and financial disclosure requirements.¹⁶² Chief Justice Roberts is authorized, via the Judicial Conference, to issue regulations specifically for the Court.¹⁶³ While he does so, and while the Justices do submit financial disclosures yearly as required by statute, he has stated that the Justices follow the EGA “as a matter of internal practice” and cautioned that the Court has yet to rule on the regulations' legal applicability to itself.¹⁶⁴ It is worth examining what could result from Congress declaring the EGA applicable to the Court, as well as the specific enforcement mechanisms Congress might use to ensure compliance.

The Court does not need to have the first word on the applicability of the EGA to itself — Congress can today declare that the EGA does

¹⁵⁸ See Frost, *supra* note 124, at 476 & n.157 (citing Warren S. Grimes, *Hundred-Ton-Gun Control: Preserving Impeachment as the Exclusive Removal Mechanism for Federal Judges*, 38 UCLA L. REV. 1209, 1217 n.43 (1991)).

¹⁵⁹ See Grimes, *supra* note 158, at 1220–23 (discussing the decline of judicial impeachment as a method of judicial discipline and its replacement by nonimpeachment disciplinary authorities).

¹⁶⁰ See Tobi Raji et al., *Democrats Weigh Trying to Force Supreme Court to Adopt Ethics Rules*, WASH. POST (Apr. 3, 2023, 6:08 AM) <https://www.washingtonpost.com/politics/2023/04/03/democrats-weigh-trying-force-supreme-court-adopt-ethics-rules> [<https://perma.cc/NX7K-4TKB>].

¹⁶¹ *Id.*

¹⁶² Wheeler, *supra* note 124, at 486.

¹⁶³ *Id.*

¹⁶⁴ See ROBERTS, *supra* note 67, at 6–7.

bind the Justices. The resulting constitutional showdown would arguably address the ethical crisis at the Court, no matter the outcome. Ideally, the Court would simply accept Congress's interpretation. A constitutional question would be answered, and the move might restore some faith in the Court. Alternatively, the Court could explicitly reject Congress's interpretation. However, this result seems unlikely as the Court would not reach the constitutionality of this interpretation unless an enforcement action or other case or controversy were brought before it. In the unlikely scenario that the Court rejects any application of the EGA to itself, the issue around ethics crystallizes. There is value to forcing the Court to firmly stake a position, rather than make statements to news outlets or vague allusions in the Year-End reports.¹⁶⁵

In either of these two scenarios, Congress must act first. Under the EGA, judicial officers who “willfully fail to file or falsify their financial disclosure statements are subject to referral to the Attorney General and may face civil penalties.”¹⁶⁶ While many disagree as to whether individual Justices' behavior meets the “willful” standard for referral,¹⁶⁷ a public referral to the Attorney General is a powerful enforcement action and does not require an intense investigation by Congress on the merits. By viewing enforcement as merely a publicized referral, rather than the civil penalties themselves, applying the EGA to the Justices is likely more politically palatable.

As a general matter, violations of the EGA by any government official, which include “knowingly and willfully falsify[ing]” or “knowingly and willfully fail[ing] to file or report any information that such individual is required to report,” are enforceable by civil action brought by the Attorney General.¹⁶⁸ The Attorney General, upon referral, may bring this civil action in “any appropriate United States district court.”¹⁶⁹ The court in which the civil action is brought can assess a civil penalty, with the maximum possible penalty being \$50,000.¹⁷⁰ In the alternative or in addition to fines, the violator might even face incarceration for up to one year for “knowingly and willfully falsify[ing] . . . information.”¹⁷¹

In practice, bringing an enforcement action after a violation of the EGA by a Justice would be tricky, given not only the concerns raised above, but also the role of the Judicial Conference in enforcing the EGA. The EGA states that the Judicial Conference is the correct body to refer

¹⁶⁵ See sources cited *supra* note 123.

¹⁶⁶ April Rivera, *Supreme Court Ethics Regulation: Amending the Ethics in Government Act of 1978 to Address Justices' Unethical Behavior*, 52 SW. L. REV. 308, 324 (2023).

¹⁶⁷ See Wheeler, *supra* note 124, at 487; Dahlia Lithwick & Mark Joseph Stern, *Clarence Thomas Broke the Law and It Isn't Even Close*, SLATE (Apr. 6, 2023, 4:26 PM), <https://slate.com/news-and-politics/2023/04/clarence-thomas-broke-the-law-harlan-crow.html> [<https://perma.cc/96TF-FSZH>] (excavating EGA provisions).

¹⁶⁸ 5 U.S.C. § 13106(a)(1).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* § 13106(a)(2)(A)(i).

potential violations to the Attorney General.¹⁷² The Judicial Conference has established a Committee on Financial Disclosure, “consisting of [sixteen] judges from across the country,” which reports to the broader Conference.¹⁷³ The Conference has delegated authority to the Committee “with respect to the implementation of the financial disclosure provisions of the Ethics in Government Act, including reviewing financial disclosure reports and referring matters to the Attorney General. Allegations of financial disclosure errors or omissions submitted to the Conference are referred to the Committee for review and appropriate action.”¹⁷⁴ The Judicial Conference has rarely initiated proceedings against lower court federal judges¹⁷⁵ and has never referred a filer for “willingly falsifying” or withholding necessary disclosures.¹⁷⁶

However, Congress does not have to wait idly. Senator Sheldon Whitehouse and Representative Henry C. Johnson have written publicly to the Conference requesting that the Committee refer Justice Thomas to the Attorney General for violating the EGA.¹⁷⁷ The Senate Judiciary Committee as a whole could make a statement and add more pressure to the Conference. Although it is unlikely that an actual referral would be made to the Attorney General and unlikelier still that the Attorney General would act against a sitting Supreme Court Justice, there is value in the Senate Judiciary Committee (or any congressional body, for that matter) making a public statement about the enforceability of the EGA. Given the utter lack of clarity on the constitutional reasons *against* congressional intervention, a statement from Congress could spur the Court (or particular members) to outline its reasoning and further the constitutional law in this area. Current congressional silence on the statute’s constitutionality begets further silence from the Court.

(ii) *Disqualification Statutes.* — There are several disqualification statutes currently on the books, which do apply to the Supreme Court

¹⁷² *Id.* § 13106(b).

¹⁷³ Letter from Roslynn R. Mauskopf, Sec’y, Jud. Conf. of the U.S., to Sheldon Whitehouse, Jr., Chairman of the Subcomm. on Fed. Cts., Oversight, Agency Action & Fed. Rts. of the Senate Comm. on the Judiciary 2 (May 15, 2023) [hereinafter Judicial Conference Letter] (on file with the Harvard Law School Library).

¹⁷⁴ *Id.*

¹⁷⁵ See Fogel & Bookbinder, *supra* note 11.

¹⁷⁶ Judicial Conference Letter, *supra* note 173, at 3.

¹⁷⁷ See Press Release, Sheldon Whitehouse, Chairman of the Subcomm. on Fed. Cts., Oversight, Agency Action & Fed. Rts. of the Senate Comm. on the Judiciary, Whitehouse and Johnson Urge Judicial Conference to Consider Breadth of Secret Billionaire-Funded Gifts to Justice Thomas as Support for Referral to Attorney General (Aug. 15, 2023), <https://www.whitehouse.senate.gov/news/release/whitehouse-and-johnson-urge-judicial-conference-to-consider-breadth-of-secret-billionaire-funded-gifts-to-justice-thomas-as-support-for-referral-to-attorney-general> [https://perma.cc/838U-HWJ7].

Justices.¹⁷⁸ 28 U.S.C. § 455, which has its roots in the late eighteenth century,¹⁷⁹ requires that any judge or Justice recuse herself in a variety of circumstances, including most notably in cases of personal bias toward a party or a financial interest in the matter.¹⁸⁰

While there have been accusations that many Justices have already violated this statute, Congress likely lacks constitutional authority to regulate the Supreme Court's decisions in this area because the decisions are more inherently judicial than say, vacation plans or real estate transactions.¹⁸¹ Instead, Professor Louis Virelli argues that Congress needs to exert pressure using other powers (including investigations, appropriations, and other clear areas of constitutional authority) and thus influence the Court to improve its recusal practices.¹⁸² While issues of recusal gain public notoriety, Congress should not lose sight of where it has the strongest constitutional footing to act.

3. *Deputizing Lower-Level Federal Judges.* — The regulation of state supreme courts offers some insight into how the Supreme Court would function under some form of ethical oversight.¹⁸³ Many states have an independent agency that enforces its binding judicial ethics code on not only lower court judges, but also state supreme court justices.¹⁸⁴ These commissions have the power to impose a range of sanctions, including removal from office.¹⁸⁵

While these agencies are not direct outgrowths of the states' respective legislatures, but rather sit within the judiciary,¹⁸⁶ they offer insight into how supreme courts can function under binding ethics regulation and enforcement. Justice Alito has stated “that it is inconsistent with the constitutional structure for lower court judges to be reviewing things

¹⁷⁸ See generally CHARLES GEYH, JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW (3d ed. 2020) (focusing primarily on the main statute for federal judicial disqualification, 28 U.S.C. § 455).

¹⁷⁹ Wheeler, *supra* note 124, at 488.

¹⁸⁰ *Id.* (citing 28 U.S.C. § 455(b)).

¹⁸¹ See Virelli, *supra* note 133, at 1535.

¹⁸² See generally *id.*

¹⁸³ See Wheeler, *supra* note 124, at 520 (“Most state supreme courts are integral parts of their state judicial system’s administration, and the judicial discipline mechanism can usually discipline a member of the state supreme court.”).

¹⁸⁴ In Alabama, the Court of the Judiciary can “remove from office, suspend without pay, or censure a judge” for an ethical violation. *Alabama Appellate Courts: Court of the Judiciary Overview*, ALA. JUD. SYS. (citing ALA. CONST. § 157(a)), <https://judicial.alabama.gov/appellate/judiciary> [<https://perma.cc/ELH2-GKVZ>]. In Arizona, the Commission on Judicial Conduct is “an independent state agency responsible for investigating complaints against” all members of the judiciary, including state supreme court justices. *Commission on Judicial Conduct: About Us*, ARIZ. JUD. BRANCH, <https://www.azcourts.gov/azcjc/AboutUs.aspx> [<https://perma.cc/75DL-STVX>]. “While the majority of California’s judges are committed to maintaining the high standards expected of the judiciary, an effective method of disciplining judges who engage in misconduct is essential to the functioning of our judicial system.” *State of California Commission on Judicial Performance*, CA.GOV., <https://cjp.ca.gov/> [<https://perma.cc/8CUC-ZT54>].

¹⁸⁵ See sources cited *supra* note 184.

¹⁸⁶ See sources cited *supra* note 184.

done by Supreme Court Justices for compliance with ethical rules.”¹⁸⁷ Justice Kennedy similarly implied that such a structure, where lower court judges would have a say in the ethical codes of the Justices, would violate the Constitution.¹⁸⁸ However, neither has offered any constitutional support for this position. There are no separation of powers concerns raised by lower court judges weighing in on ethical standards. While unorthodox at the federal level, trial and appellate judges weigh in on nonjudicial standards in many states, whose constitutional orders have not yet crumbled. Given the legitimacy crisis facing the Court, and if the Justices remain averse to direct congressional oversight, allowing the other Article III judges to weigh in on standards (and whether behavior violates those standards) offers a possible middle ground for ethics regulation.

Conclusion

Today’s ethics problems are symptomatic of a Court that has ridden roughshod over any attempt to cabin its power.¹⁸⁹ Enforcement of ethical rules at the Supreme Court cannot wait on the Justices, nor should it wait on future legislation. The Court is not the only institution tasked with interpreting the Constitution. The Executive regularly makes constitutional determinations in exercising its power to take care that the laws are faithfully enforced. Congress is faced with a constitutional question every time it legislates. An impending constitutional question does not require inaction — if anything, it encourages action to spur its resolution.¹⁹⁰ While potential legislation is being debated,¹⁹¹ Congress can act now based on its own interpretation of the Constitution and the multitude of avenues it has to check the extrajudicial behavior of the Justices. Starting the conversation between Congress and the Justices is the most viable way to restore the damaged legitimacy of this Court.

¹⁸⁷ *Supreme Court of the United States: Hearing on Financial Services and General Government Appropriations for 2020 Before the Subcomm. on Fin. Servs. & Gen. Gov’t of the H. Comm. on Appropriations*, 116th Cong. 96 (2019) (statement of Justice Samuel Alito).

¹⁸⁸ Wheeler, *supra* note 124, at 502 (“[W]e would find it structurally unprecedented for district and circuit judges to make rules that [S]upreme [C]ourt judges have to follow.” (quoting *U.S. Supreme Court Budget: Hearing Before the Subcomm. of Fin. Servs. and Gen. Gov’t of the H. Comm. on Appropriations*, 112th Cong. 8 (2011) (statement of Justice Anthony Kennedy))).

¹⁸⁹ See, e.g., Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 97 (2022).

¹⁹⁰ Scholars across the ideological spectrum have discussed the role of the executive and legislative branches in constitutional interpretation. See, e.g., Mark V. Tushnet, *The Hardest Question in Constitutional Law*, 81 MINN. L. REV. 1, 25–28 (1996) (arguing that nonexclusivity is the route to a socially desirable populist constitutional law); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1966 (2003) (“Both the Court and Congress interpret the Constitution from the perspective of a particular institution.”); Posner & Vermeule, *supra* note 137, at 997 (defining “constitutional showdown[s]” as interbranch disputes over constitutional authority that end in the development of new constitutional precedents).

¹⁹¹ E.g., Judicial Ethics and Anti-Corruption Act of 2023, H.R. 2973, 118th Cong. (2023), <https://www.warren.senate.gov/imo/media/doc/SIL23572.pdf> [<https://perma.cc/7PRG-T7LE>].