

## INTRODUCTION: ACCOUNTABILITY AND THE FUTURE OF THE SUPREME COURT

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In Fall 2023, Hofstra Law School hosted a Symposium on the accountability, or lack thereof, at the United States Supreme Court.<sup>1</sup> The Symposium was the second public event at Hofstra devoted to this topic in a twelve-month period, and among numerous panels, symposia, and presentations around the country taking a hard look at the Supreme Court's lack of an ethical code or accountability of any kind. Academics, politicians, the media, and the public were all reacting to, among other things, Justice Clarence Thomas's failure to recuse himself from a case which involved a subpoena of his wife's text messages to the White House on January 6; the evisceration of stare decisis in *Dobbs v. Jackson Women's Health Organization*;<sup>2</sup> and the current liberal-conservative imbalance on the Court. At the Fall 2023 Symposium, eight experts on the Supreme Court provided their insights and views on three key aspects of the accountability crisis: the history and context for the current scrutiny; the role of the media and the public in holding the Court accountable; and what solutions (if any) should be implemented to address the accountability crisis.

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1. Links to recordings of the Symposium Keynote and Panels are available at Hofstra Law, *Freedman Institute*, YOUTUBE, <https://www.youtube.com/playlist?list=PLSJFUS0hHgXTVQ5402oU2FGHzFMmd8Yin> [<https://perma.cc/F33Y-TT7E>] (last visited Apr. 15, 2024).

2. 597 U.S. 215 (2022).

Supreme Court accountability was an urgent issue then, and it has only become more so since. The public's faith in the Court, which has always been essential to a government institution that has neither the power of the purse nor the power of the sword, has dropped precipitously. In recent polling, only 41% of U.S. adults say they "approve . . . of the way the Supreme Court is handling its job[.]"<sup>3</sup> This represents an eight-point drop from 2021 and a seventeen-point drop from 2020.<sup>4</sup> Polling similarly shows historic lows in the public's "confidence" level in the Court, with only 25% of respondents in 2022, and 27% in 2023, saying they had either a "great deal" or "quite a lot" of confidence in the Court; in contrast, 74% and 72%, respectively, had "some," "very little," or "no" confidence in the Court.<sup>5</sup> No other year since polling began in 1973 has ever seen the confidence level dip into the twenties.<sup>6</sup>

The diminishment in the public's perception of the Court should not be surprising, as the popular media has continued to expose questionable behavior by the Justices, and in general cover the Court more closely. Journalists at investigative programs like *ProPublica* have rolled out one revelatory article after another regarding the personal relationship of billionaire and major Republican donor Harlan Crow with Justices Thomas and Samuel Alito.<sup>7</sup> Podcasts covering—and criticizing—the Court have proliferated.<sup>8</sup> The topic of Supreme Court accountability has even found its way onto bestselling book lists and into premium television programming.<sup>9</sup>

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3. *Supreme Court*, GALLUP, <https://news.gallup.com/poll/4732/supreme-court.aspx> [<https://perma.cc/SD5V-SMR6>] (last visited Apr. 15, 2024).

4. *Id.*

5. *Id.*

6. *Id.*

7. *See, e.g.*, 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/PP3C-K3GE>]; Justin Elliott 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/K3ZD-LX2P>].

8. Amicus with Dahlia Lithwick, *Strict Scrutiny, Contempt of Court, and Dissenting Opinions* are just a few of the podcasts covering the Supreme Court. *See* Amicus with Dahlia Lithwick, SLATE, <https://slate.com/podcasts/amicus> [<https://perma.cc/5TGP-6TWE>] (last visited Apr. 15, 2024); *Strict Scrutiny*, CROOKED, <https://crooked.com/podcast-series/strict-scrutiny> [<https://perma.cc/GE4Y-NQCT>] (last visited Apr. 15, 2024); *Contempt of Court*, NATION, <https://www.thenation.com/content/contempt-of-court> [<https://perma.cc/X4AM-XN6H>] (last visited Apr. 15, 2024); *Dissenting Opinions*, UNIV. OF CHI. L. SCH., <https://dissenting-opinions.simplecast.com> [<https://perma.cc/U44W-PQ9A>] (last visited Apr. 15, 2024).

9. *See, e.g.*, STEPHEN VLADEK, *THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC* (2023); *Deadlocked: How America Shaped the Supreme Court* (Showtime documentary series 2023).

Elected officials have also been maintaining a focus on the question of Supreme Court accountability. The Senate Judiciary Committee has been holding hearings, and legislation has been repeatedly introduced to establish eighteen-year regular service terms and impose other restrictions on the Court.<sup>10</sup> Even federal judges from both parties, who rarely speak out on controversial issues, have expressed concern over the Court's accountability problem.<sup>11</sup>

The biggest development since the Fall 2023 Symposium, by far, has been the adoption of an ethics code by the Supreme Court. On November 13, 2023, the nine Supreme Court Justices signed a statement promulgating the Code of Conduct for Justices of the Supreme Court of the United States (“the Code”) in order to “set out succinctly and gather in one place the ethics rules and principles that guide the conduct of the members of the Court.”<sup>12</sup> The opening statement of the Code attempts to downplay the import of the occasion, introducing the Code by stating the following:

The 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. To dispel this misunderstanding, we are issuing this Code, which largely represents a codification of principles that we have long regarded as governing our conduct.<sup>13</sup>

In spite of the attempt by the Court to claim its new Code is merely putting long-established principles into one place, there is no doubt its adoption was historic. It was the first time that the Supreme Court, in its entire 235-year history, had formally promulgated its own ethical guidelines. And it provides an actual document that lawyers, parties before the Court, politicians, or members of the public challenging behavior by Justices can reference. While momentous, though, the limited and purely

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10. See, e.g., Press Release, Sen. Sheldon Whitehouse, Whitehouse, Booker, Blumenthal, Padilla Introduce New Supreme Court Term Limits Bill (Oct. 19, 2023), <https://www.whitehouse.senate.gov/news/release/whitehouse-booker-blumenthal-padilla-introduce-new-supreme-court-term-limits-bill> [<https://perma.cc/YVM3-LS8G>]; Press Release, Rep. Hank Johnson, Rep. Johnson, Sen. Markey Announce Legislation to Expand Supreme Court, Restore Its Legitimacy Alongside Senator Smith, Reps. Schiff and Bush (May 16, 2023), <https://hankjohnson.house.gov/media-center/press-releases/rep-johnson-sen-markey-announce-legislation-expand-supreme-court> [<https://perma.cc/H745-EDHY>].

11. See James J. Sample, *The Supreme Court and the Limits of Human Impartiality*, 52 HOFSTRA L. REV. 579, 580, 582 & nn.5 & 15-16 (2024).

12. *Statement of the Court Regarding the Code of Conduct*, U.S. SUP. CT. (Nov. 13, 2023), [https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices\\_November\\_13\\_2023.pdf](https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf) [<https://perma.cc/4G5H-5863>].

13. *Id.*

aspirational nature of the new Code has only exacerbated the issue of accountability for many Court commentators and observers. The Code, for example, provides no enforcement mechanism, requires no transparency for any recusal determinations by Justices of the Court, and contains precious little mandatory language.

The Articles in this Issue build on the ongoing public and academic discussion on Supreme Court accountability, particularly with respect to the new Code. In *The Role of Congress in Enforcing Supreme Court Ethics*, Jennifer Ahearn and Michael Milov-Cordoba of the Judiciary and Democracy Programs at the Brennan Center for Justice take on the position, articulated most consistently and dogmatically by Justice Alito,<sup>14</sup> that the Supreme Court cannot be regulated by Congress.<sup>15</sup> They analyze the historical and constitutional bases for congressional regulation of the Supreme Court to show Alito's extreme position is unsupportable, and then go through a range of options Congress could legitimately use to enforce a Supreme Court ethics code. Each of those options—an Inspector General, a House Complaints Review Committee, a Judicial Investigation Panel, and a Designated Complaint Recipient—has been proposed in Congress in recent years as the public has become more aware of the ethical lapses and lack of accountability of Supreme Court Justices. Although each proposal comes with advantages and drawbacks, Ahearn and Milov-Cordoba point out that each is well within the constitutional authority of Congress. Their Article sets the stage for ongoing serious discussion about the feasibility and advisability of each option.

Professor James J. Sample, in his Article *The Supreme Court and the Limits of Human Impartiality*, emphasizes the need for transparency and enforcement in any meaningful reform to Supreme Court ethics.<sup>16</sup> Professor Sample first takes us through recent commentary on the need for Supreme Court ethics reform from politicians from both parties, as well as comments by current Justices appointed by Presidents from both parties, to buttress his point that meaningful reform is essential. After analyzing the limitations of the recent effort by the Court to address public perception by instituting a Code of Conduct, Professor Sample goes through specific instances of questionable decisions and behavior of seven of the nine current Justices to show how the current Code of Conduct, without the two elements of transparency and enforceability, is of

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14. See Samuel A. Alito Jr., *Justice Samuel Alito: ProPublica Misleads Its Readers*, WALL ST. J. (June 20, 2023, 6:25 PM), <https://www.wsj.com/articles/propublica-misleads-its-readers-alito-gifts-disclosure-alaska-singer-23b51eda> [<https://perma.cc/M3JR-PZPC>].

15. Jennifer Ahearn & Michael Milov-Cordoba, *The Role of Congress in Enforcing Supreme Court Ethics*, 52 HOFSTRA L. REV. 557, 558-59 (2024).

16. Sample, *supra* note 11, at 609-10.

limited value. Finally, Sample argues that these flaws are well within the authority of Congress to fix using existing mechanisms.

In *Recency Bias and the Supreme Court: The Problem Is the Institution, Not the People Who Sit On It*, Eric J. Segall both broadens the context, and tightens the prescription, for the lack of accountability at the Supreme Court.<sup>17</sup> Professor Segall, the Ashe Family Chair Professor of Law at Georgia State University College of Law, takes us through the “long and tortured path” of controversy surrounding the Supreme Court’s power and lack of accountability.<sup>18</sup> He begins with controversies dating from before the Constitution was ratified and takes us through *Dred Scott*,<sup>19</sup> the *Lochner* Era, the Warren Court, and *Bush v. Gore*<sup>20</sup> to more current controversies, such as *Citizens United*<sup>21</sup> and *Obergefell*,<sup>22</sup> to support his conclusion that, more often than not, the Court has inflamed and polarized the public and our other political bodies. Common solutions to this problem, such as term limits, jurisdiction stripping, or Court packing, are, in Segall’s view, not sufficient. His solution—controversial by his own admission—is that the Executive Branch simply refuse to enforce any Court decision that “unduly burdens and interferes with our democracy without first showing an ‘irreconcilable variance’ between a law and clear constitutional text or largely undisputed history behind the text.”<sup>23</sup>

Where Segall focuses on controversial cases to show the lack of accountability at the Supreme Court, in *Americans and the Court: How Public Outcry Has Influenced the Court to Address Judicial Ethics Crises*, Brie Sparkman Binder and Debra Perlin take us through the most prominent ethics scandals at the Supreme Court to argue for reform.<sup>24</sup> Sparkman Binder and Perlin look at the power of public pressure after ethics scandals to institute reform, how most previous attempts at reforms have come in response to such pressure, and the limited success of such reforms. They go through scandal after scandal and illustrate how each “reform” made afterward was so watered down that it would not

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17. Eric J. Segall, *Recency Bias and the Supreme Court: The Problem Is the Institution, Not the People Who Sit on It*, 52 HOFSTRA L. REV. 617, 618 (2024).

18. *Id.* at 619.

19. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

20. 531 U.S. 98 (2000).

21. *Citizens United v. FEC*, 558 U.S. 310 (2010).

22. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

23. Segall, *supra* note 17, at 629.

24. Brie Sparkman Binder & Debra Perlin, *Americans and the Court: How Public Outcry Has Influenced the Court to Address Judicial Ethics Crises*, 52 HOFSTRA L. REV. 631, 635, 638, 643, 647 (2024).

have even prevented the scandal to which it was responding. Ultimately, Sparkman Binder and Perlin conclude that the new Supreme Court Code of Conduct falls into that same category and urge the public to continue to pressure the Court to add an enforcement mechanism to the Code and close other loopholes. Ms. Sparkman Binder is Senior Policy Counsel at Citizens for Responsibility and Ethics in Washington (“CREW”) and has served in numerous roles on Capitol Hill, including as Legislative Counsel to Representative Henry C. “Hank” Johnson, Jr. when he was the Chairman of the House Judiciary Committee’s Subcommittee on Courts, Intellectual Property, and the Internet. Ms. Perlin is the Policy Director at CREW and previously was a Supreme Court Fellow in the Office of the Counselor to the Chief Justice at the U.S. Supreme Court.

Professor Louis J. Virelli, in *The Underappreciated Virtues of the Supreme Court’s Ethics Code*, acknowledges the criticisms of the new Supreme Court Code of Conduct, but points out that there are important merits that should be appreciated.<sup>25</sup> Professor Virelli first guides us through the back-and-forth between Chief Justice Roberts and members of the U.S. Senate Judiciary Committee, as well as the recent public reporting on recusal scandals, that led to the adoption of the Code. Professor Virelli urges us to curb the disappointment with the limits of the Code, which are explained in the other Articles in this Symposium, and appreciate the Code for what it is—a clear view into how the Court understands its own recusal obligations, and a springboard for discussing possible future reforms.

The challenge of Supreme Court accountability is an essential one in our democracy. No nine individuals should have opaque and unexamined power to determine the law on crucial societal questions in a democratic political system. A lack of accountability will also have a devastating effect on the future viability of the Court as an institution. The Court lacks any mechanism to enforce its decisions; therefore, without the respect of a significant element of the public, and the will of the other branches of government to fund and enforce the rulings handed down by the Court, its determinations will carry little weight, and our balance of powers will have been eviscerated. Although the authors of the Articles in this Issue, and the participants at the Symposium, have different perspectives on the question of accountability at the Supreme Court, there is uniform acknowledgement that law students, lawyers, the media, and the public must stay attuned to the accountability issue and provide the pressure needed for meaningful reform.

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25. Louis J. Virelli III, *The Underappreciated Virtues of the Supreme Court’s Ethics Code*, 52 HOFSTRA L. REV. 657, 659 (2024).