THE UNDERAPPRECIATED VIRTUES OF THE SUPREME COURT'S ETHICS CODE

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I. INTRODUCTION

Supreme Court recusal is having a moment.[1] Over the last two years, more than half of the sitting Justices have been the subject of a public debate over recusal. Justice Jackson recused herself from a pending affirmative action case against Harvard due to her role on one of Harvard's governing boards.[2] Justices Gorsuch and Sotomayor were criticized for participating in decisions to deny certiorari in cases against the publishers of their books.[3] Justices Alito and Thomas were the subjects of detailed investigations into their personal relationships with wealthy conservative political donors and activists with interests before the Court.[4]

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1. Recusal, the practice of a Justice removing themselves from a specific case, typically for ethical reasons, is used here (and consistent with common parlance) as a synonym for disqualification. *See* RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES 4 (2d ed. 2007) ("In fact, in modern practice 'disqualification' and 'recusal' are frequently viewed as synonymous and employed interchangeably.").

2. James Romoser, *Jackson Says She'll Recuse Herself from Case Challenging Affirmative Action at Harvard*, SCOTUSBLOG (Mar. 23, 2022, 11:42 PM), https://www.scotusblog.com/2022/03/jackson-says-shell-recuse-herself-from-case-challenging-affirmative-action-at-harvard [https://perma.cc/6EA5-FBDU]. Justice Jackson committed to recuse herself from the Harvard case at her Senate confirmation hearing. *Id.*

3. *See, e.g.*, Devan Cole, *2 Supreme Court Justices Did Not Recuse Themselves in Cases Involving Their Book Publisher*, CNN, https://www.cnn.com/2023/05/04/politics/sonia-sotomayor-neil-gorsuch-book-recusal-supreme-court-cases/index.html [https://perma.cc/E4Z9-27UQ] (May 5, 2023, 1:01 PM).

4. 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) [hereinafter Elliot et al., *Property*], 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,

Justice Thomas was also criticized for dissenting in a case ordering the disclosure of presidential records relating to the January 6, 2021 insurrection at the U.S. Capitol at the same time his wife, Ginni Thomas, was secretly trying to overturn the results of the election that gave rise to that insurrection.[5] Ginni Thomas's opposition to the 2020 election also spurred calls for Justice Thomas to recuse himself from the recent case at the Court about whether former President Trump's involvement in the January 6th insurrection disqualified him from running for president under Section 3 of the Fourteenth Amendment.[6] Justice Thomas participated in the decision.[7]

As the Justices' conduct has come under more intense scrutiny, the public and, indeed, some legal professionals were surprised to learn that there is not, and never has been, a code of ethics for the Supreme Court.[8] Those two circumstances—heightened public awareness of the Justices' conduct and a lack of any applicable ethics code—caused legislators and legal commentators to advocate for additional ethical constraints on the Justices, including their recusal decisions. After several failed attempts by Congress, the Court ultimately adopted its own voluntary Code of

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11:49 PM) [hereinafter Elliot et al., *Fishing*], https://www.propublica.org/article/samuel-alito-luxury-fishing-trip-paul-singer-scotus-supreme-court [https://perma.cc/K3ZD-LX2P].

5. Jo Becker & Danny Hakim, *Ginni Thomas Urged Arizona Lawmakers to Overturn Election*, N.Y. TIMES (Sept. 29, 2022), https://www.nytimes.com/2022/05/20/us/politics/ginni-thomas-election-trump.html [https://perma.cc/67XS-3UJK]. It is important to note that the case that Justice Thomas participated in, Trump v. Thompson, 142 S. Ct. 680 (2022) (mem.), did not directly involve any of his wife's activities and that Ginni Thomas stated in testimony before the congressional committee investigating the insurrection on January 6, 2021, that "she never discussed [her] efforts [to overturn the election] with her husband[.]" Luke Broadwater & Stephanie Lai, *Ginni Thomas Denies Discussing Election Subversion Efforts with Her Husband*, N.Y. TIMES (Sept. 29, 2022), https://www.nytimes.com/2022/09/29/us/politics/ginni-thomas-jan-6-committee.html [https://perma.cc/69JC-R3HJ]. The event is nevertheless noteworthy for present purposes because it serves an example of a Justice's conduct raising serious ethical questions about the appearance of impartiality among the Justices that only came to light after it was reported in the press. Had Justice Thomas elected to recuse himself from the case, which was decided 8-1 with him as the lone dissenter, the ethical controversy would never have arisen. Had the press never uncovered Ginni Thomas's attempts to subvert the election results, the ethical issue would never have been brought to the public's attention.

6. Devin Dwyer & Patty See, *Should Justice Thomas Recuse in Trump 14th Amendment Case Because of Wife's Jan. 6 Role?*, ABC NEWS (Feb. 6, 2024, 5:21 AM), https://abcnews.go.com/Politics/justice-thomas-recuse-14th-amendment-case-wifes-jan/story?id=106803474 [https://perma.cc/435L-88QS].

7. Trump v. Anderson, 601 U.S. 100, 100 (2024) (per curiam).

8. There are disclosure and recusal statutes that purport to bind the Justices, but these are generally understood to be unenforceable against the Justices, constitutionally suspect, or both. *See* 28 U.S.C. § 455 (recusal); Courthouse Ethics and Transparency Act, Pub. L. No. 117-125, 136 Stat. 1205 (2022) (disclosure); *see also* discussion *infra* Part IV.A (outlining the Court's view of its recusal obligations).

Conduct for Justices of the Supreme Court of the United States (the "Supreme Court Code") on November 13, 2023.[9]

The Supreme Court Code did little to quell public apprehension about ethics at the Court, and in some cases may have exacerbated existing concerns.[10] Although many applauded the Court for taking a first step toward ethics reform, the overwhelming consensus from a watchful public was that the Court missed an opportunity to adopt its own clear, binding ethics rules and, in turn, to buttress waning public confidence in its legitimacy.[11]

While it is certainly understandable that proponents of ethics reform had greater aspirations for the Supreme Court Code, there is at least one significant virtue that has been overlooked. The newly promulgated Supreme Court Code told the truth about the Justices' recusal practices, a truth that has held for over two centuries and has persisted despite legislative efforts to influence recusal at the Court. Beyond its historical pedigree, the reality of Supreme Court recusal is grounded in law, in particular in the structure of the Constitution. The Supreme Court Code confirmed what the Justices have been telling us indirectly through their actions and (admittedly infrequent) words since the Founding—that recusal at the Court is more than a purely ethical issue. It involves institutional questions about the Court's responsibilities and competence in our tripartite government. By highlighting the different facets of Supreme Court recusal, the Supreme Court Code allows us to have a more productive and targeted debate about ways to improve the Justices' recusal practices.

II. THE GROUNDWORK

In 2021, following the controversial appointment of Justice Amy Coney Barrett to the Court within days of a presidential election,[12]

9. CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. (U.S. SUP. CT. 2023).

10. *See, e.g.*, Erwin Chemerinsky, *Opinion: The Supreme Court Finally Has a Code Of Ethics, but It Has a Fatal Flaw*, L.A. TIMES (Nov. 14, 2023, 3:03 PM), https://www.latimes.com/opinion/story/2023-11-14/supreme-court-justices-recusal-code-of-ethics [https://perma.cc/V23H-AZCH]; Adam Liptak, *Supreme Court's New Ethics Code Is Toothless, Experts Say*, N.Y. TIMES (Nov. 14, 2023), https://www.nytimes.com/2023/11/14/us/politics/supreme-court-ethics-code-clarence-thomas-sotomayor.html [https://perma.cc/4XNX-7SJQ].

11. *See* Peter Wade, *Supreme Court Implements Extremely Vague Code of Ethics*, ROLLING STONE (Nov. 13, 2023), https://www.rollingstone.com/politics/politics-news/supreme-court-implements-ethics-code-1234876834 [https://perma.cc/PY9D-8BLM]. *See generally* CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. (U.S. SUP. CT. 2023).

12. Annie Linskey, *Biden, Squeezed on the Supreme Court, Promises a Commission to Consider Changes*, WASH. POST (Oct. 22, 2023, 8:50 PM),

President Biden convened a Presidential Commission on the Supreme Court of the United States in response to the "ongoing debate about the Court's composition, the direction of its jurisprudence, and whether one political party or the other has breached norms that guide the process of confirming new Justices."[13] The Commission's report included a discussion of ethics at the Court. It offered a qualified endorsement of a code of conduct for the Justices, but acknowledged that a code drafted by the Justices, rather than Congress, may be useful in part because "the considerations involved in the recusal context might be different for the Justices, even though the statutory standards are the same as for other judges."[14]

Despite the Commission's valuable work, its report did not immediately result in any tangible ethical reforms, and public support for the Supreme Court was trending toward an "historic low."[15] Not surprisingly, as the Court was experiencing this unprecedented public skepticism, momentum built for reform. Since 2011, both houses of Congress have introduced dozens of failed reform bills addressing ethics at the Court.[16] In the wake of controversy over Justice Thomas's refusal to recuse himself from cases pertaining to the 2020 presidential election (the same presidential election his wife was ostensibly working to overturn), Congress focused on Supreme Court ethics with renewed energy and public support.[17] Less than a year later, on February 9, 2023, Senator

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https://www.washingtonpost.com/politics/biden-promises-commission-on-overhauling-supreme-court/2020/10/22/4465ead6-121d-11eb-ba42-ec6a580836ed_story.html [https://perma.cc/N2HV-TUGH] (noting that the confirmation of Justice Barrett within days of the 2020 presidential election created pressure on President Biden to address Court reform, but that the president was wary not to "turn the Supreme Court into just a political football").

13. PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., FINAL REPORT 12 (2021) ("In October of 2020, then-presidential candidate Biden stated his intention, if elected, to create a bipartisan Commission to examine Supreme Court reform.").

14. *Id.* at 218.

15. Katy Lin & Carroll Doherty, *Favorable Views of Supreme Court Fall to Historic Low*, PEW RSCH. CTR. (July 21, 2023), https://www.pewresearch.org/short-reads/2023/07/21/favorable-views-of-supreme-court-fall-to-historic-low [https://perma.cc/4PCL-JLP9]. This is particularly noteworthy because the courts, as the only unelected branch of government, depend for their legitimacy "on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation." Planned Parenthood v. Casey, 505 U.S. 833, 865-66 (1992).

16. *See, e.g.*, Supreme Court Transparency and Disclosure Act of 2011, H.R. 862, 112th Cong. (2011); Supreme Court Ethics Act of 2017, S. 835, 115th Cong. (2017); Supreme Court Ethics, Recusal, and Transparency Act of 2022, S. 4188, 117th Cong. (2022).

17. *See, e.g.*, Aaron Blake, *Ginni Thomas's Texts Make Clarence Thomas's Non-Recusal Look Even Worse*, WASH. POST (Mar. 25, 2022, 1:06 PM), https://www.washingtonpost.com/politics/2022/03/25/thomas-texts-recusal-worse [https://perma.cc/K7C3-DTQS]; Erin Mansfield et al., *Lawmakers to Look at Supreme Court Ethics*

Sheldon Whitehouse introduced the Supreme Court Ethics, Recusal, and Transparency Act of 2023 ("SCERT").[18] SCERT included provisions requiring the Justices to adopt an ethical code of conduct for the Court, creating a reviewing body to issue opinions regarding the Justices' ethical practices, and expanding recusal requirements.[19] Although it shared many of the same substantive provisions as previous Supreme Court ethics bills that died in committee, SCERT attracted far more public attention than its predecessors. This was due to a concerted effort by proponents of the bill, particularly Senator Whitehouse, to garner public support,[20] as well as a highly publicized interaction between members of the Judiciary Committee and the Chief Justice over its passage.

The chair of the Judiciary Committee, Senator Dick Durbin, sent a letter to Chief Justice John Roberts inviting him to "testify at a public hearing regarding the ethical rules that govern the Justices,"[21] which the Chief Justice declined.[22] The Chief Justice's declination letter, however, included a Statement on Ethics Principles and Practices signed by all nine sitting Justices.[23] This was a significant—and exceedingly rare—decision by the Court. The Justices have only issued a handful of public statements regarding ethics at the Court in its history. The most recent (prior to the Justices' publication of the Supreme Court Code) was Chief Justice Roberts's 2011 Year-End Report on the Federal Judiciary.[24] Prior

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Changes After Ginni Thomas' Election Texts Stirred Debate, USA TODAY (Apr. 27, 2022, 11:00 AM), https://www.usatoday.com/story/news/2022/04/27/congress-ethics-supreme-court/7278891001/?gnt-cfr=1 [https://perma.cc/K3TB-FC2E].

18. Supreme Court Ethics, Recusal, and Transparency Act of 2023, S. 359, 118th Cong. (2023). SCERT effectively replaced the Supreme Court Ethics Act, which was introduced by Senator Chris Murphy and simply required the Judicial Conference of the United States to issue a code of conduct that included the Justices.

19. *Id.* §§ 2, 5.

20. Press Release, U.S. Sen. Sheldon Whitehouse, Whitehouse Lodges Ethics Complaint Against Supreme Court Justice Samuel Alito (Sept. 5, 2023), https://www.whitehouse.senate.gov/news/release/whitehouse-lodges-ethics-complaint-against-supreme-court-justice-samuel-alito [https://perma.cc/MER2-JD7A].

21. Letter from Sen. Richard J. Durbin, Chair, U.S. Senate Comm. on the Judiciary, to John G. Roberts, Jr., C.J., U.S. Sup. Ct. (Apr. 20, 2023), https://www.judiciary.senate.gov/imo/media/doc/chair_durbin_invitation_to_chief_justice_roberts_to_testify_before_sjc.pdf [https://perma.cc/LQ7U-NTTW].

22. Letter from John G. Roberts, C.J., U.S. Sup. Ct., to Sen. Richard J. Durbin, Chair, U.S. Senate Comm. on the Judiciary (Apr. 25, 2023), https://www.judiciary.senate.gov/imo/media/doc/Letter%20to%20Chairman%20Durbin%2004.25.2023.pdf [https://perma.cc/J9R3-VFY5].

23. *Id.*

24. C.J. JOHN ROBERTS, 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 3-4 (2011), https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf [https://perma.cc/53XH-9HDC].

to that, seven of nine Justices signed a 1993 Statement of Recusal Policy that focused exclusively on recusal due to a Justice's familial relationship with a participant in a given case.[25]

Nevertheless, the Judiciary Committee was not impressed. Senator Durbin described the Statement as "rais[ing] more questions than it resolves"[26] and responded with a new letter to the Chief Justice asking a series of more specific questions about the Court's ethical practices, including whether a Justice had ever incurred any repercussions "for failure to abide by any of the principles and practices now contained in the Statement on Ethics Principles and Practices[.]"[27] According to the committee, the Chief Justice's responses to its more detailed questions were inadequate, and "further highlight[ed] the need for meaningful Supreme Court ethics reform[.]"[28]

While members of Congress were exchanging letters with the Chief Justice about the need for ethics reform, questions about the Justices' conduct were also being raised in the press. A report surfaced from *ProPublica* in April 2023 describing Justice Thomas's longstanding relationship with billionaire Harlan Crow, which included undisclosed luxury vacations, at least one secret real estate deal, and private school tuition for Justice Thomas's great-nephew, who was under the Justice's legal guardianship and was being raised by him "as a son."[29] In June 2023, *ProPublica* published another report, this time focusing on Justice Alito's relationship with wealthy conservatives, including his accepting a luxury vacation from a billionaire whose fund was a named party in a

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25. William H. Rehnquist et al., *Statement on Recusal Policy*, U.S. SUP. CT. (Nov. 1, 1993), https://www.politico.com/f/?id=00000183-8648-d513-a19b-9fdc5acd0000 [https://perma.cc/2F8N-WAHD].

26. Dan Mangan, *Senate Judiciary Democrats Underwhelmed by Supreme Court Chief Roberts' Ethics Respons*e, CNBC (May 1, 2023, 6:39 PM), https://www.cnbc.com/2023/05/01/supreme-court-chief-justice-roberts-responds-to-senate-ethics-question.html [https://perma.cc/45RC-Y9V3].

27. Letter from Sen. Richard J. Durbin, Chair, U.S. Senate Comm. on the Judiciary, et al., to John G. Roberts, Jr., C.J., U.S. Sup. Ct. (Apr. 27, 2023), https://www.durbin.senate.gov/imo/media/doc/Letter%20to%20Chief%20Justice%20Roberts%20-%204.27.23.pdf [https://perma.cc/KV5K-SA8T].

28. Mangan, *supra* note 26.

29. Joshua Kaplan et al., *Clarence Thomas and the Billionaire*, PROPUBLICA (Apr. 6, 2023, 5:00 AM), https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow [https://perma.cc/DXN8-LTBP]; Elliott et al., *Property*, *supra* note 4; Dan Mangan, *Supreme Court: Harlan Crow Paid School Tuition for Clarence Thomas' Nephew, Report Says*, CNBC (May 4, 2023, 1:37 PM), https://www.cnbc.com/2023/05/04/supreme-court-harlan-crow-clarence-thomas-nephew.html [https://perma.cc/TPH6-9K3F]; 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/X5YZ-MYGY].

case that Justice Alito participated in at the Court.[30] Justice Alito responded with an op-ed in the *Wall Street Journal* denying allegations that he engaged in any unethical conduct.[31]

Justice Alito returned to the spotlight a little more than a month later when he agreed to be interviewed for the *Wall Street Journal* by David Rivkin, a lawyer representing a party in an active tax case before the Court.[32] Justice Alito explained to Mr. Rivkin that, in his view, congressional regulation of Supreme Court ethics was a nonstarter because "[n]o provision in the Constitution gives [Congress] the authority to regulate the Supreme Court—period."[33] Justice Alito's interview inspired two separate controversies. First, he was criticized for granting an interview to a lawyer involved in a case before the Court.[34] Second, his substantive comments drew criticism for their defiant tone toward congressional regulation of ethics at the Court.[35] Senator Durbin sent another letter to Chief Justice Roberts, this time asking him to require Justice Alito to recuse himself from both *Moore v. United States*, the tax case involving Mr. Rivkin as counsel, and "any future cases concerning legislation that regulates the Court[.]"[36] In another highly unusual move, Justice Alito responded with a four-page statement appended to the Court's summary granting of a minor procedural motion in *Moore*.[37] Justice Alito rejected arguments for his recusal and cited multiple examples in which "Justices have participated in interviews with representatives of media entities that have frequently been parties in cases before

30. Elliott et al., *Fishing*, *supra* note 4.

31. 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].

32. Dan Berman, *Samuel Alito Tells Congress to Stay Out of Supreme Court Ethics Controversy*, CNN, https://www.cnn.com/2023/07/28/politics/samuel-alito-congress-ethics-rules-wall-street-journal/index.html [https://perma.cc/C5W5-TSDR] (July 28, 2023, 5:36 PM).

33. *Id.*

34. *See* Alison Durkee, *Samuel Alito Refuses to Recuse from Supreme Court Case with Attorney Who Interviewed Him for Wall Street Journal*, FORBES (Sept. 8, 2023, 10:41 AM), https://www.forbes.com/sites/alisondurkee/2023/09/08/samuel-alito-refuses-to-recuse-from-supreme-court-case-with-attorney-who-interviewed-him-for-wall-street-journal [https://perma.cc/62Q9-286M].

35. *See id.*

36. Letter from Sen. Richard J. Durbin, Chair, U.S. Senate Comm. on the Judiciary, et al., to John G. Roberts, Jr., C.J., U.S. Sup. Ct. (Aug. 3, 2023), https://www.judiciary.senate.gov/imo/media/doc/durbin_judiciary_committee_dems_urge_chief_justice_to_address_justice_alitos_wall_street_journal_interview_that_violates_the_courts_statement_on_ethics.pdf [https://perma.cc/XWS3-ETAK].

37. Moore v. United States, No. 22-800, 144 S. Ct. 2 (2023) (mem.) (statement of Alito, J.).

the Court" and "have been interviewed by attorneys who have also practiced in this Court."[38]

The fact that Supreme Court ethics and recusal remained in the forefront of public debate about the Court for the last two years may or may not have driven the Court to adopt its own code of conduct. Correlation is not causation. The sheer number of unusual and, in some cases, unprecedented events leading up to the Supreme Court Code makes it seem, however, that public venting of these issues at minimum caught the Court's attention and, perhaps, incentivized the Justices to adopt their own code.[39] The Justices' own statements support this idea. In the weeks leading up to the Supreme Court Code, Justices Barrett, Kagan, and Kavanaugh all made public statements supporting the Court's adoption of its own code.[40] Whether caused by the preceding events, the newly adopted Supreme Court Code shifted the debate over Supreme Court ethics away from SCERT and toward the Justices' own view of their ethical obligations.

III. THE CODE AND ITS AFTERMATH

The Supreme Court Code is, by its own account, derived from the Code of Conduct for United States Judges ("lower court code").[41] Like the lower court code, the Supreme Court Code addresses several distinct ethical issues. The two features of the Supreme Court Code that have

38. *Id.* at 2-3.

39. *See, e.g.*, Devin Dwyer, *Under Ethics Pressure, Supreme Court Announces It's Adopting Code of Conduct*, ABC NEWS (Nov. 13, 2023, 3:04 PM), https://abcnews.go.com/Politics/ethics-pressure-supreme-court-announces-adopting-code-conduct/story?id=104856337 [https://perma.cc/J3KH-LPVT] (describing publication of Supreme Court Code as "responding to years of criticism that the nation's highest court does not have transparent or enforceable ethics guidelines").

40. Robert Barnes & Ann E. Marimow, *For Supreme Court, Ethics Have Become the Elephant in the Courtroom*, WASH. POST (Oct. 2, 2023, 12:41 PM), https://www.washingtonpost.com/politics/2023/10/01/supreme-court-new-term-ethics [https://perma.cc/4W2B-8YN5] (describing as a "concern" for the Court at the start of its term "how to convince the public that the [J]ustices take seriously their ethical obligations"); Lawrence Hurley, *Justice Elena Kagan Says Supreme Court Ethics Code Would Be 'a Good Thing*,*'* NBC NEWS (Sept. 22, 2023, 4:51 PM), https://www.nbcnews.com/politics/supreme-court/justice-kagan-says-supreme-court-ethics-code-good-thing-rcna116945 [https://perma.cc/MR8F-4WC9] (noting that Justices Kagan and Kavanaugh expressed support for the Court adopting its own code of conduct); Abbie VanSickle, *Justice Barrett Calls for Supreme Court to Adopt an Ethics Code*, N.Y. TIMES (Oct. 16, 2023), https://www.nytimes.com/2023/10/16/us/politics/supreme-court-ethics-code-amy-coney-barrett.html [https://perma.cc/5PEG-NUPL].

41. CODE OF CONDUCT FOR U.S. JUDGES, ch. 2 (U.S. JUD. CONF. 2019). The Code of Conduct for United States Judges does not apply, by its own account, to the Justices of the Supreme Court. *See id.* at 2 ("This Code applies to United States circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges, and magistrate judges.").

drawn the most critical attention, however, are those that most clearly diverge from the lower court code—the recusal (or disqualification) provisions and the absence of any concrete enforcement mechanism.[42]

The Supreme Court Code's recusal provisions include the substantive terms of the lower court code and the federal recusal statute.[43] They also contain some features that materially distinguish them from existing recusal standards. For example, while both the lower court code and recusal statute state that judges (or Justices) "shall" recuse themselves under certain conditions, the Supreme Court Code uses the arguably more permissive term "should."[44] Second, the Supreme Court Code contains unique provisions stating that a "Justice is presumed impartial and has an obligation to sit unless disqualified," and that the "rule of necessity may override the rule of disqualification."[45] Finally, the Supreme Court Code makes clear that neither amicus briefs nor the identity of amicus counsel are grounds for recusal of a Justice.[46] As explained in the Commentary to the Supreme Court Code, all of these provisions are driven by the fact that "application of [recusal] principles can differ [from those in the lower courts] due to the effect on the Court's processes and the administration of justice in the event that one or more

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42. *See, e.g.*, Jennifer Ahearn, *What's Missing from the Supreme Court's New Ethics Code*, BRENNAN CTR. FOR JUST. (Nov. 16, 2023), https://www.brennancenter.org/our-work/analysis-opinion/whats-missing-supreme-courts-new-ethics-code [https://perma.cc/6U7Q-PKXS] (arguing that the rule of necessity provision in the new Code's recusal standards suggests that "the Court's members continue to hold themselves to lower ethics standards than all other federal judges"); Chemerinsky, *supra* note 10 ("Although it is welcome and overdue that the Supreme Court finally adopted an ethics code for its [J]ustices . . . the approach is seriously flawed in that it includes no enforcement mechanism.").

43. CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. Canon 3(B) (U.S. SUP. CT. 2023); CODE OF CONDUCT FOR U.S. JUDGES Canon 3(C) (U.S. JUD. CONF. 2019); 28 U.S.C. § 455.

44. CODE OF CONDUCT FOR U.S. JUDGES Canon 3(C)(1) (U.S. JUD. CONF. 2019) ("A judge *shall* disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned[.]") (emphasis added); 28 U.S.C. § 455(a) ("Any justice, judge, or magistrate judge of the United States *shall* disqualify himself in any proceeding in which his impartiality might reasonably be questioned.") (emphasis added); CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. Canon 3(B)(2) (U.S. SUP. CT. 2023) ("A Justice *should* disqualify himself or herself in a proceeding in which the Justice's impartiality might reasonably be questioned[.]") (emphasis added).

45. CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. Canons 3(B)(1), 3(B)(3) (U.S. SUP. CT. 2023). The Commentary to the Supreme Court Code also notes that Canon 3 "omit[s] the remittal procedure of the lower court Code," which is rendered unnecessary by the rule of necessity provision in Canon 3(B)(3). COMMENTARY ON CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. 11 (U.S. SUP. CT. 2023).

46. CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. Canon 3(B)(4) (U.S. SUP. CT. 2023).

Members must withdraw from a case."[47] More specifically, the Commentary highlights the most critical difference between recusal at the Supreme Court and lower courts—the fact that a recused Justice may not be replaced. As the Court explains:

> The loss of even one Justice may undermine the "fruitful interchange of minds which is indispensable" to the Court's decision-making process. Recusal can have a "distorting effect upon the certiorari process . . . ." And the absence of one Justice risks the affirmance . . . by an evenly divided Court—potentially preventing the Court from providing a uniform national rule of decision on an important issue.[48]

In addition to modifying the recusal standard for Justices, the Supreme Court Code also included a notable omission—the lack of any means of enforcing the Justices' compliance with the Code. Lower court judges are subject to the Judicial Conduct and Disability Act, but it does not apply to the Justices.[49] SCERT created judicial investigation panels of sitting federal judges empowered to review ethics complaints about the Justices and "publish a report" on their findings.[50] It also established that the "Court . . . not including the [J]ustice who is the subject of a [recusal] motion . . . shall be the reviewing panel for such motions."[51] By contrast, the Supreme Court Code presents the Justices' compliance as self-regulated. The Commentary to the Supreme Court Code explained that the Justices "must bear the primary responsibility for requiring [appropriate] judicial behavior" and directed Court officers to "undertake an examination of best practices" to "assist the Justices in complying with these Canons."[52]

Many proponents of a written code of conduct for the Justices were disappointed by the Code's deviation from the lower court code and recusal statute. A wide range of well-respected commentators, including Dean Erwin Chemerinsky and Professor Amanda Frost, criticized the

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47. COMMENTARY ON CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. 10 (U.S. SUP. CT. 2023).

48. *Id.* (citations omitted).

49. 28 U.S.C. § 351(d)(1) (defining "judge" subject to discipline under the Act as "a circuit judge, district judge, bankruptcy judge, or magistrate judge").

50. Supreme Court Ethics, Recusal, and Transparency Act of 2023, S. 359, 118th Cong. § 367 (2023).

51. *Id.* § 1660(d).

52. COMMENTARY ON CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. 13-14 (U.S. SUP. CT. 2023).

new Code for lacking an enforcement mechanism.[53] Others, like the Brennan Center's Jennifer Ahearn, were critical of the duty to sit and rule of necessity provisions, claiming that they represent a "big loophole in the disqualification rule" and make it "easier for justices to engage in the very same actions that have drawn forceful objections from the public, Congress and the president."[54]

From a purely ethical perspective, it is difficult to argue with critics of the Supreme Court Code. A clear, legally enforceable set of ethical standards is unquestionably the best way to ensure compliance with those standards. To the extent the Supreme Court Code fails to deliver that clarity and legal constraint on the Justices, it is rightfully subject to criticism. What critics tend to underestimate, however, are the Code's obvious virtues—its honesty and transparency.

IV. THE VIRTUES

The Supreme Court Code is the first official statement in the Court's history to accurately describe its recusal practices. While commentators tend to focus (understandably) on the ethical ramifications of the Justices' recusal decisions, too little attention is often paid to the institutional consequences of those decisions—specifically that recusal results in a change to the composition of the Court due to the lack of replacement Justices.[55] Institutional considerations played a significant

53. Chemerinsky, *supra* note 10 ("Although it is welcome and overdue that the Supreme Court finally adopted an ethics code for its [J]ustices . . . the approach is seriously flawed in that it includes no enforcement mechanism."); Liptak, *supra* note 10 ("The new . . . code . . . looks good on paper, experts in legal ethics said. But . . . [i]ts lack of an enforcement mechanism means that it will operate on the honor system, with individual [J]ustices deciding for themselves whether their conduct complies with the code."); Michael Waldman, *New Supreme Court Ethics Code Is Designed to Fail*, BRENNAN CTR. FOR JUST. (Nov. 14, 2023), https://www.brennancenter.org/our-work/analysis-opinion/new-supreme-court-ethics-code-designed-fail [https://perma.cc/CSU7-LBRM] ("The Supreme Court has been the only court in the country without a binding ethics code. Now it has one of the country's weakest. These new rules are more loophole than law. . . . There is no mechanism to enforce the code—no arbiter to enforce, apply, or even interpret these rules.").

54. Ahearn, *supra* note 42 (arguing that the rule of necessity provision in the new Code's recusal standards suggests that "the Court's members continue to hold themselves to lower ethics standards than all other federal judges"); Hassan Kanu, *U.S. Supreme Court's 'Duty to Sit' in New Ethics Code Could Strengthen Shield for Misconduct*, REUTERS (Nov. 16, 2023, 2:31 PM), https://www.reuters.com/legal/legalindustry/column-us-supreme-courts-duty-sit-new-ethics-code-could-strengthen-shield-2023-11-16 [https://perma.cc/KGB9-5QXK] ("The new [recusal] provisions seem to make it harder to compel the [J]ustices to recuse themselves . . . .").

55. To be fair, institutional concerns are not entirely lost on critics of the Court's new Code. *See* Ahearn, *supra* note 42 ("It makes sense for the Court to consider these issues when adopting its code of conduct. Two competing interests must be balanced against each other: the potential harms to the Court's work when [J]ustices do not participate and the potential harms to the Court's work when a biased [J]ustice does participate."). Moreover, some commentators have argued that a sys-

role in the Commentary accompanying the Code,[56] and roughly 225 years of history demonstrate that institutional concerns have always played a significant role in the Court's understanding of its own recusal practices.[57] What's more, constitutional structure—specifically the separation of powers—supports the Court's position that it is the ultimate protector of its institutional prerogatives, especially the ability to decide cases properly before it. The recent Supreme Court Code simply codifies these principles. It behooves us to acknowledge the reality of the Justices' recusal practices in order to better understand how to promote judicial ethics at the Court.

A. History of Supreme Court Recusal

Judicial recusal is as old as courts. From Justinian to Blackstone, judges around the world have long retained the power to decide whether to remove themselves from a case.[58] American judges are no exception. At the Founding, recusal was an almost exclusively financial issue. Based on Blackstone's account of recusal standards from English common law, American judges were statutorily required to recuse only when they had a pecuniary interest in the outcome or "ha[d] been counsel for either party" in the case.[59] The federal recusal statute did not include the Justices until 1948.[60] The 1948 amendments required recusal where a judge or Justice had been a material witness, of counsel, or was related to an attorney or party in the case, or when a judge or Justice had a substantial interest in the case.[61] It did not, however, limit judicial discretion over recusal. Recusal was required only when it would be "improper, in

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tem of replacement Justices is a viable way of mitigating the institutional problems with recusal at the Court. *See* Lisa T. McElroy & Michael C. Dorf, *Coming Off the Bench: Legal and Policy Implications of Proposals to Allow Retired Justices to Sit by Designation on the Supreme Court*, 61 DUKE L.J. 81, 96, 102 (2011) (arguing that retired Justices, but not those that have resigned their commissions, may be eligible to substitute for recused Justices in Supreme Court cases).

56. *See* discussion *supra* notes 47-55 and accompanying text. The primary shortcoming tends to be underappreciating the Court's commitment to being the arbiter of its own recusal decisions and the quality of the constitutional arguments in support of that position.

57. *See generally* LOUIS J. VIRELLI III, DISQUALIFYING THE HIGH COURT: SUPREME COURT RECUSAL AND THE CONSTITUTION (2016) (cataloging the history of Supreme Court recusal).

58. CODEX OF JUSTINIAN, lib. III, title 1, No. 16 (cited in Harrington Putnam, *Recusation*, 9 CORNELL L.Q. 1, 3 (1923)).

59. Act of May 8, 1792, ch. 36, § 11, 1 Stat. 275, 278-79; 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 361 (1768). Blackstone explained that "the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice," and was content to leave the remedy for judicial partiality outside of pecuniary interest to "a heavy censure from those to whom the judge is accountable for his conduct." *Id.*

60. 28 U.S.C. § 455 (1948).

61. *Id.*

[the judge's] opinion" for the judge to sit in the case,[62] and a judge's decision whether to recuse themselves remained reversible on appeal only when that decision represented an abuse of discretion.[63]

The recusal statute remained unchanged until 1974. Between 1948 and 1974, every federal appellate court to consider the question recognized a "duty to sit," the principle that "[i]t is a judge's duty to refuse to sit when he is disqualified but it is equally his duty to sit when there is no valid reason for recusation."[64] The 1974 amendments to the recusal statute were a response to the 1972 revision to the ABA Model Code of Judicial Conduct.[65] The amended recusal statute stated that a judge or Justice shall recuse themselves in any case in which their "impartiality might reasonably be questioned."[66] By codifying this objective standard, Congress rendered it legally enforceable on all federal judges and—for the first time—explicitly applied it to members of the Supreme Court. It also ostensibly overrode the duty to sit.[67]

Despite Congress's amendments to the recusal statute, Supreme Court recusal practice has been largely the same since the Founding and has always reflected the Justices' belief that the applicable legal standard is only one factor in their ultimate decision to recuse. Faced only with Blackstone's common law pecuniary interest standard, Chief Justice Marshall refused to recuse in *Marbury v. Madison*,[68] in which he had a direct personal interest, yet removed himself from *Stuart v. Laird*,[69] in which he had participated as a judge in the proceeding below. Regardless of the prudence of either decision, they were not applications of the legal standard governing recusal at the time, nor were they left to anyone other than Chief Justice Marshall; each determination represented an unreviewable choice by the Chief Justice that apparently incorporated institutional, or other non-legal, considerations.[70]

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62. *Id.*

63. *See* FLAMM, *supra* note 1, at 983-88.

64. Edwards v. United States, 334 F.2d 360, 362 n.2 (5th Cir. 1964).

65. *See* ABA MODEL CODE OF JUDICIAL CONDUCT Canon 3C (1972), *reprinted in* Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736, 742-44 (1973). The Code also mandated recusal where a judge was personally biased, had served as a lawyer in the controversy, had a financial interest in the outcome of the case, or was within the third degree of relationship with a party, lawyer, interested person, or material witness in the case. *See id.*

66. 28 U.S.C. § 455(a) (1974).

67. CHARLES GARDNER GEYH, JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW 7 (Kris Markarian ed., 2d ed. 2010) ("In 1974, Congress adopted . . . an amendment to § 455, which . . . was generally seen as qualifying, if not ending the 'duty to sit.'").

68. 5 U.S. (1 Cranch) 137 (1803).

69. 5 U.S. (1 Cranch) 299 (1803).

70. VIRELLI, *supra* note 57, at 17-22.

That approach to recusal continued into the twentieth century, when Chief Justice Stone reversed his decision to recuse from a securities case before the Court (without explanation or any indication that the relevant facts had changed) in order to preserve a quorum so the Court could decide the case.[71] After the recusal statute was amended to include the Justices in 1948, what little insight we have into the Justices' rationale behind their recusal decisions confirms what Chief Justice Stone indicated in his pre-statutory decision to un-recuse himself in order to preserve a quorum—recusal has never been a purely (or even primarily) legal question for members of the Court.

The Court's 1993 Statement of Recusal Policy was its first public statement regarding recusal after the 1974 amendments to the recusal statute. The Recusal Policy was signed by seven of the nine sitting Justices and focused on cases in which the Justices' relatives appear as counsel before the Court.[72] Most importantly for present purposes, the Recusal Policy did not approach the recusal issue like a strict question of statutory interpretation. It relied on policy arguments wholly unrelated to the statutory language, such as the need to protect "the public interest" by preventing recusal from "impair[ing] the functioning of the Court."[73] It cited concerns about litigants "'strategizing' recusals" by hiring law firms that would trigger recusal for unsympathetic Justices, and about recusals leading to tie votes in cases due to the lack of replacement Justices.[74] As Professor Sherrilyn Ifill described it, "the Recusal Policy simply reflects the Justices' own sense of what *to them* would constitute a reasonable basis on which to question a judge's impartiality."[75]

Over a decade later, in perhaps the most high-profile public statement about recusal from a member of the Court, Justice Scalia explained his decision not to recuse in *Cheney v. United States District Court*,[76] despite recently going on a hunting trip with Vice President Dick Cheney, who was a named party in the suit. Justice Scalia's explanation relied almost exclusively on institutional, as opposed to statutory, arguments

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71. *See* N. Am. Co. v. SEC, 327 U.S. 686, 711 (1946). Chief Justice Stone originally recused himself from the case, only to reverse his decision and participate when he realized his recusal could defeat a quorum due to the fact that a number of his colleagues had also decided to recuse themselves.

72. Statement of Recusal Policy, *reprinted in* FLAMM, *supra* note 1, at 1101. Justices Blackmun and Souter did not sign the policy. *Id.*

73. *Id.* at 1102.

74. *Id.* at 1103.

75. Sherrilyn A. Ifill, *Do Appearances Matter?: Judicial Impartiality and the Supreme Court in* Bush v. Gore, 61 MD. L. REV. 606, 626 (2002) (emphasis in original).

76. 541 U.S. 913 (2004).

against recusal. He rejected the suggestion that he should "resolve any doubts in favor of recusal" because the "Supreme Court . . . is different."[77] He pointed to the lack of substitutes for recused Justices and the potential problem of a "tie vote [leaving the Court] unable to resolve the significant legal issue presented by the case."[78] He described recusal as "effectively the same as casting a vote against the petitioner,"[79] and cited two prior recusal decisions by other Justices—one of which occurred before the reasonable appearance standard was codified—as support for the proposition that no reasonable observer could question his impartiality.[80] He concluded by warning that his recusal would further "harm the Court" by effectively "giv[ing] elements of the press a veto over participation of any Justices who had social contacts with . . . a named official,"[81] and by encouraging "so-called investigative journalists to suggest improprieties and demand recusals."[82] Seven years later, in a 2013 interview with *New York Magazine*, he described his memorandum in *Cheney* as "the most heroic opinion—maybe the *only* heroic opinion I ever issued."[83]

When Congress questioned Chief Justice Rehnquist about the Court's recusal practices in response to Justice Scalia's memorandum,[84] Chief Justice Rehnquist explained that each Justice "strives" to comply with the recusal statute,[85] and

77. *Id.* at 915.

78. *Id.*

79. *Id.* at 916. Some proponents of legislative reform of Supreme Court recusal have suggested using circuit court judges to review Supreme Court recusal decisions. Supreme Court Ethics, Recusal, and Transparency Act of 2023, S. 359, 118th Cong. § 367(b)(1) (2023). While such an arrangement may appeal to those concerned with the ethical ramifications of current Supreme Court recusal practices, there are significant constitutional problems with such an arrangement, including Article III's mandates that there be only "one supreme Court," and that Congress have power to create only "inferior courts." U.S. CONST. art. III, § 1.

80. Justice Scalia cited decisions by Justices White and Jackson not to recuse themselves despite their close friendships with high-ranking members of the governing administration. *Cheney*, 541 U.S. at 924-26. Justice Jackson's decision occurred in 1942, six years before the federal recusal statute was amended to include members of the Court. *Id.* at 1926; 28 U.S.C. § 455 (1948).

81. *Cheney*, 541 U.S. at 927.

82. *Id.*

83. Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 4, 2013), http://nymag.com/news/features/antonin-scalia-2013-10 [https://perma.cc/H3T6-P3HB] (emphasis in original).

84. Letter from Sen. Patrick Leahy, Ranking Member, Comm. on the Judiciary, & Sen. Joseph I. Lieberman, Ranking Member, Comm. on Governmental Affs., to William H. Rehnquist, C.J., U.S. Sup. Ct. (Jan. 22, 2004), *reprinted in From the Bag: Irrecusable and Unconfirmable*, 7 GREEN BAG 277, 277-79 (2004).

85. Letter from William H. Rehnquist, C.J., U.S. Sup. Ct., to Sen. Patrick Leahy, Ranking Member, Comm. on the Judiciary (Jan. 26, 2004), *reprinted in From the Bag: Irrecusable and Unconfirmable*, 7 GREEN BAG 277, 280 (2004).

> [w]hile a member of the Court will often consult with colleagues as to whether to recuse in a case, there is no formal procedure for Court review of a Justice in an individual case. This is because it has long been settled that each Justice must decide such a question for himself.[86]

The issue largely laid dormant for another seven years, until controversy over individual Justices' recusal decisions in high-profile cases before the Court spurred Congress to reexamine whether the Supreme Court should be bound by a code of conduct.[87] In testimony before Congress, Justices Kennedy and Breyer reiterated the Court's extra-statutory approach to recusal. Justice Kennedy noted a potential "constitutional problem" with a binding ethics code that is adopted by a conference of lower court judges,[88] and Justice Breyer cited the fact that recused Supreme Court Justices cannot be replaced as a reason for treating them differently than lower court judges.[89] In a separate appearance before Congress, Justice Breyer described statutory ethical standards as binding the Court, but went on to explain that in deciding ethical issues he does not focus on the distinction between binding and non-binding legal sources.[90] He reiterated that because there are no available replacements for a recused Justice, one Justice's decision to recuse "could change the result" in that case, thereby creating "an obligation to sit . . . as well as an obligation to recuse," that must be balanced by the individual Justice.[91]

Later that year, Chief Justice Roberts took the unusual step of commenting on recusal at the Court in his 2011 Year-End Report on the Federal Judiciary.[92] After noting that the constitutionality of Congress

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86. *Id.*

87. *See, e.g.*, *Should Supreme Court Justices Clarence Thomas, Elena Kagan Sit Out Health Care Case?*, ABC NEWS (Feb. 9, 2011, 5:24 PM), http://abcnews.go.com/Politics/supreme-court-justice-clarence-thomas-sit-health-care/story?id=12878346 [https://perma.cc/MAY9-GG9E]; *Groups Target Thomas' Wife's Work to Force Him to Sit Out High Court Rulings on Health Care*, FOX NEWS (Dec. 23, 2015, 10:35 AM), https://www.foxnews.com/politics/groups-target-thomas-wifes-work-to-force-him-to-sit-out-high-court-rulings-on-health-care [https://perma.cc/ZBC8-CCTW].

88. Eileen Malloy, *Supreme Court Justices Already Comply with Ethics Rules, Kennedy, Breyer Say*, BLOOMBERG L. (Apr. 19, 2011, 12:00 AM), https://www.bloomberglaw.com/bloomberglawnews/white-collar-and-criminal-law/XDQR842K000000?bna_news_filter=white-collar-and-criminal-law#jcite [https://perma.cc/S79J-72MB].

89. *Id.*

90. *Considering the Role of Judges Under the Constitution of the United States, Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 27 (2011) (statement of Stephen Breyer, J., U.S. Sup. Ct.).

91. *Id.* at 27-28.

92. ROBERTS, *supra* note 24, at 7-12.

seeking to regulate the Court's recusal practices remains an open question,[93] he went on to defend the Court's recusal procedures by pointing out that both lower court judges and Supreme Court Justices make their own initial recusal decisions,[94] and that they rely on the same set of materials to do so, including "judicial opinions, treatises, scholarly articles, and disciplinary decisions."[95] He also noted that no court at any level of the federal judiciary reviews the recusal decisions of its own members.[96]

Four years later, Justices Breyer and Kennedy again found themselves testifying to Congress about recusal at the Court, and their answers had not changed. Justice Breyer repeated that the Court is different due to the lack of replacement Justices and thus there is a duty on the Justices to sit as well as to recuse.[97] Justice Kennedy explained that the Justices' recusal decisions "should never be discussed," even with other members of the Court, because "[t]hat is almost like lobbying."[98]

Regardless of whether it is normatively persuasive, this brief account of the Court's perspective on recusal reveals a consistent theme—even if they concede (which they never have) that Congress can regulate recusal at the Court in some fashion, the Justices have consistently treated their recusal obligations as more than simple ethical issues. They have always treated recusal as implicating important institutional concerns that can only be judged by individual Justices making unreviewable decisions for themselves. This is not only consistent with the presumption of impartiality and the rule of necessity provisions in the Supreme Court Code, but also indicative of the Court's views on how constitutional structure impacts its recusal jurisprudence.

B. Constitutional Argument

In his 2011 Year-End Report, Chief Justice Roberts went beyond historical and practical concerns to highlight the potential constitutional problems with congressional regulation of Supreme Court recusal.[99] Although such constraints do not limit the Court's power to adopt its own

93. *Id.* at 7.

94. *Id.* at 7-8.

95. *Id.* at 5.

96. *Id.* at 8-9. Federal judges may voluntarily submit their decisions for review by their peers on the court. *In re* United States, 158 F.3d 26, 34 (1st Cir. 1998).

97. *Financial Services and General Government Appropriations for 2016: Hearings Before the Subcomm. on Fin. Servs. & Gen. Gov't Appropriations of the H. Comm. on Appropriations*, 114th Cong. 128 (2015) (statement of Stephen Breyer, J., U.S. Sup. Ct.).

98. *Id.* at 127 (statement of Anthony Kennedy, J., U.S. Sup. Ct.).

99. ROBERTS, *supra* note 24, at 7 (noting that Congress's ability to regulate recusal at the Court is an open question).

code of conduct, the Justices' awareness of those limitations is an important factor in understanding how and why the Supreme Court Code came to be. The Court's inherent power to decide cases under Article III is, arguably, exclusive of congressional power to regulate recusal at the Court.[100] Due to the lack of replacement Justices, a legal mandate to recuse could ultimately deprive the Court of enough members to decide a case over which it has jurisdiction, which in turn would unconstitutionally deprive it of its inherent power to resolve cases under Article III.[101] The Justices' longstanding recusal practices, in addition to their (admittedly oblique) references to constitutional problems with binding recusal standards, reflect at least their sympathy with this view of the Court's constitutional prerogative over recusal.[102]

In addition to imposing substantive limitations on Congress's ability to regulate the Justices' recusal decisions, constitutional law also creates procedural limits on enforcement. The Justices' strong views as to why they should not review one another's recusal decisions apply even more stringently to external enforcement mechanisms. For the same hierarchical constitutional reasons that the lower court code cannot be binding on the Supreme Court, there is no law enforcement entity with the clear authority to make, or force Justices to comply with, a specific recusal decision. Although commentators have argued for recusal standards to be binding and enforceable on the Justices,[103] SCERT did not take that approach, and the general consensus is that enforcement is unavailable, unwise, or both.[104] Regardless of whether enforceability is constitutionally and practically possible, the Justices clearly do not believe it is, and that is reflected in the Supreme Court Code.[105]

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100. *See* James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 771 (1998) (describing the core judicial power under Article III as the ability to "independently, finally, and effectually decide the whole case").

101. *See* Louis J. Virelli III, *The (Un)Constitutionality of Supreme Court Recusal Standards*, 2011 WIS. L. REV. 1181, 1220-21 (2011).

102. *See generally* VIRELLI, *supra* note 57. For a detailed analysis of the constitutional argument against statutory recusal standards for the Court, see *id.* at 1207-33.

103. *See* Liptak, *supra* note 10 (quoting Professor James Sample: "Congress can and should pursue meaningful mechanisms to enforce the code").

104. *See, e.g.*, Russell Wheeler, *What's So Hard About Regulating Supreme Court Justices' Ethics?—A Lot*, BROOKINGS INST. (Nov. 28, 2011), https://www.brookings.edu/research/whats-so-hard-about-regulating-supreme-court-justices-ethics-a-lot [https://perma.cc/3B6Y-9847] (contending that a court of lower court judges sitting in review of Supreme Court recusal decisions "would most likely violate the Constitution's 'one Supreme court' mandate" and that "[t]he Judicial Conduct Act provides for the disposition of complaints about all federal judges except the [J]ustices").

105. *See* CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. Canon 3(B)(2) (U.S. SUP. CT. 2023) ("A Justice *should* disqualify him or herself . . . .") (emphasis added).

V. CONCLUSION

The Supreme Court's new ethics code has been a long time coming. For over a decade, proponents of a binding ethics code for the Justices have been advocating for clear, legally enforceable standards to guide the Justices' ethical decisions. In the absence of a congressionally promulgated code, and in the face of significant public pressure based on the Justices' recent conduct, the Court voluntarily adopted a set of guidelines addressing a wide range of ethical questions, including recusal at the Court.[106] At least two aspects of the Supreme Court Code's recusal canon are troubling to reform advocates—the codification of the rule of necessity and the lack of an enforcement mechanism. This is certainly understandable, but it is not, nor should it have been, surprising. In fact, the Court has been telling us for more than two centuries that it believes recusal at the Court involves unique institutional obligations that are reflected in the rule of necessity, and that an individual Justice's recusal decisions are necessarily unreviewable.

So, while disappointment may be understandable, it need not be the predominant reaction to the Court's new ethics code. Instead, there is value in reading the Code for what it is—the most frank and transparent view into the Court's understanding of its recusal obligations. This new (for some) insight into the Court's approach to recusal allows for a more productive discussion of viable and productive avenues to reform. At minimum, the adoption of the Code suggests the value of public pressure in influencing the Justices' conduct and encouraging internal reforms.

106. *See generally* CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. (U.S. SUP. CT. 2023).