Lessons from the States for Promoting Procedural Regularity in U.S. Supreme Court Justice Recusals

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ABSTRACT: Public faith in the U.S. Supreme Court is plummeting and one of the major reasons has been the stumbling way that individual Justices in recent years have handled requests that, because of the appearance of bias, they should recuse themselves from participating in a series of high-profile cases before the Court. The Court's November 2023 inaugural publication of a written substantive code of ethics on when recusal is warranted is plainly an important, though limited, step in the right direction. What is still missing, however, is a procedure for applying those substantive guidelines in individual matters to provide the public with at least some bare assurance that the guidelines are not mere lip service. Substantive criteria absent procedural regularity for their administration is an illusory promise.

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This Article considers how the Court should now address the procedural issue. The Article, moreover, looks to lessons from the states to inform the ways the Court might achieve some procedural regularity. Legal scholars and policy pundits writing about Justice recusal have largely overlooked the experience and practices of state supreme courts and their justices. The U.S. Supreme Court, in short, may be on top, but it can learn from the longstanding practices and experiences of state supreme courts, which, while not identically situated, are similar enough to warrant consideration. Some of those state practices hold promise, while others, if applied to the Court, seem highly problematic at best. Either way, they offer lessons for what might and might not work.

The lack of an enforceable ethics code by SCOTUS is impacting state courts. I am now routinely fielding questions from the public, and a fair degree of criticism, about judicial ethics even though our state has an enforceable ethics code. In short, the terrible behavior by SCOTUS is, unfortunately, impacting the public confidence in state courts.

– Comment of a State Supreme Court Justice[1]

1. This comment was in response to my survey of all state supreme court justices conducted in the summer of 2024 concerning each of their respective courts' recusal policies. The identity of the commenter in most every instance, including this one, is known to me, but in accordance with the terms of the survey, not publicly identified. *See* Richard J. Lazarus, Comprehensive Survey of State Supreme Court Recusal Policies (2024) [hereinafter State Survey].

INTRODUCTION

In early December 2024, the Clerk of the Supreme Court notified the counsel of record only a few days before oral argument that Justice Gorsuch had decided to recuse himself from their case—a significant environmental law case before the Court.[2] Because no explanation was offered by the Clerk or by Justice Gorsuch, it is impossible to know for sure the Justice's reasons, although there are grounds to speculate they related to allegations that a close social acquaintance of the Justice, from whom he had received gifts of value and once co-owned property, had a financial interest in the case.[3]

A few weeks later, on January 24, 2025, the Supreme Court granted review in *Oklahoma Statewide Charter School Board v. Drummond*, one of the Court's highest profile cases of the term, which raised the question whether a state violated the Free Exercise Clause by excluding privately run religious schools from the state's charter school program.[4] The Court order granting review simultaneously announced that Justice Barrett "took no part in the consideration or decision of this petition."[5] Justice Barrett offered no reasons for her recusal, but it may have been prompted by her reportedly very close personal relationship with a Notre Dame law professor who had been actively involved in representing in earlier, related litigation, the same religious school at issue before the Court.[6]

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2. Letter from Scott S. Harris, Clerk of the U.S. Sup. Ct., to Paul D. Clement, Elizabeth B. Prelogar, William McGinley Jay & Kirti Dalta, Counsel, Seven Cnty. Infrastructure Coal. v. Eagle County, 145 S. Ct. 1497 (2024) (No. 23-975).

3. One can fairly speculate that Justice Gorsuch made the decision in response to a letter he had received several weeks earlier from several members of Congress asserting that his recusal in the case was required. The letter argued that a former client of the Justice, who is also a close social acquaintance of the Justice—and whose home the Justice had frequently visited and at whose private events the Justice had received "luxury accommodations, exquisite meals, and entertainment"—had a financial interest in the case, as reflected in an amicus brief filed in the case on behalf of an oil and gas company the former client owned. Letter from Henry C. "Hank" Johnson, Jr. et al., Members of Cong., to Neil Gorsuch, J., Sup. Ct. (Nov. 20, 2024) (on file with the *Iowa Law Review*); *see* John Fritze, *Justice Gorsuch Recuses Himself from Key Environmental Case with Ties to Longtime Ally*, CNN (Dec. 4, 2024, 6:59 PM), https://www.cnn.com/2024/12/04/politics/gorsuch-anschutz-eagle-county-supreme-court [https://perma.cc/A5ZD-QLS7]. Because, however, the letter from members of Congress set forth so many disparate facts for recusal, one is still left to speculate which alleged fact, or combination of alleged facts, prompted recusal. Was the Justice's reasoning related to his receipt of things of value from an individual who was a former client, mere social acquaintance, or close friend? That individual's actual financial interest in the case? Or merely the appearance of the Justice's bias to a reasonably objective person? Were the factual assertions of the letter even true, at least in part?

4. Okla. Statewide Charter Sch. Bd. v. Drummond *ex rel.* Oklahoma, 145 S. Ct. 1134 (Jan. 24, 2025) (mem.) (order granting certiorari); *see* Petition for Writ of Certiorari, Okla. Statewide Charter Sch. Bd. v. Drummond *ex rel.* Oklahoma, 145 S. Ct. 1134 (2024) (No. 24-394).

5. *Okla. Statewide Charter Sch. Bd.*, 145 S. Ct. at 1134 (order granting certiorari). "Certiorari" is sometimes hereinafter referred to as "cert."

6. Abbie VanSickle & Sarah Mervosh, *Justice Amy Coney Barrett Recuses Herself in a Charter School Case*, N.Y. TIMES (Apr. 30, 2025), https://www.nytimes.com/2025/04/30/us/politics/amy-coney-barrett-recuse.html (on file with the *Iowa Law Review*).

Whatever the actual reasons for either Justices Gorsuch or Barrett to recuse, we know they must have been serious and substantial, given the Justices' repeated admonishment that they have a "duty to sit."[7] This "duty" weighs against recusal absent very strong reasons; the bias against recusal is even greater than that of lower court judges, in light of the significant impact on the Court of having one of its nine members not available to decide a case. In the *Oklahoma* case, there is good reason to believe that Justice Barrett's recusal had an enormous effect on the result. Following oral argument, the Court affirmed the lower court judgment by an equally divided Court, without reasoning.[8] Because, however, Justices Gorsuch and Barrett declined to explain their respective decisions, the public is left with no understanding of their rationale.[9]

Nor is this an isolated instance of the Justices falling short in addressing when recusal is warranted. Justices Gorsuch's and Barrett's examples here are actually some of the better ones of Justices clearly taking their recusal responsibilities seriously. The Court's approach and that of its individual Justices has been strikingly stumbling, including in high-profile, politically salient cases. When individual Justices have faced public outcry in recent years that they may harbor biases or reasonably objective appearances of biases warranting recusal, there is no discernible pattern to how they assess those claims, if at all. Justice Thomas has essentially ignored, without explanation, all the claims that his spouse's apparent association with and support of the January 6 insurrection warranted his recusal from related matters before the Court.[10] And on other occasions, Justices have dismissed claims of bias in a highly personal, cavalier, hostile, and conclusory way, extending (oddly) even to publishing op-eds rather than issuing formal statements released by the Court.[11] The latest is Justice Alito's wholly misguided agreement to take a

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7. SUP. CT. CODE OF CONDUCT cmt. (2023); John G. Roberts, Jr. et al., Statement on Ethics Principles and Practices (Apr. 25, 2023) [hereinafter Statement on Ethics] (on file with the *Iowa Law Review*).

8. Okla. Statewide Charter Sch. Bd. v. Drummond *ex rel.* Oklahoma, 145 S. Ct. 1381, 1382 (2025) (per curiam), *aff'g by an equally divided court* 558 P.3d 1 (Okla. 2024).

9. The significance of Justices Gorsuch's and Barrett's silence also extends beyond not informing the general public to not providing guidance to other judges and justices as to the Justices' reasoning for concluding that there was an actual conflict or circumstances sufficient for a reasonably objective person to conclude the Justices harbored an impermissible bias. One is instead left with the impression of Justice Gorsuch's late-breaking recusal decision, even when a Justice has taken the extreme and presumably responsible step of deciding to recuse from a major case, that the entire process is a matter of serendipity. Here, it turned on who other than Court personnel or the parties might or might not discover on their own facts relevant to recusal and also send a letter at a certain time.

10. *See, e.g.*, Adam Liptak, *Justice Thomas Ruled on Election Cases. Should His Wife's Texts Have Stopped Him?*, N.Y. TIMES (Mar. 25, 2022), https://www.nytimes.com/2022/03/25/us/supreme-court-clarence-thomas-recusal.html (on file with the *Iowa Law Review*).

11. *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-gif

reference phone call from President-elect Trump only a few hours before the latter's front-page news effort to persuade the Court to provide him with the extraordinary relief of staying his sentencing for state law felony convictions.[12]

To its credit, the Court has responded to rising concerns about the lack of formal guidance for the decision whether to recuse by adopting in November 2023 its first ever formal written code of ethics governing recusal.[13] The Court's announcement of a formal code was plainly a good step, a remarkable half-century after the U.S. Judicial Conference had first done so for lower federal appellate and district court judges in 1973,[14] and decades after state courts, including state supreme courts, had adopted their own standards,

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ts-disclosure-alaska-singer-23b51eda (on file with the *Iowa Law Review*); Adam Liptak, *Justices Thomas and Alito Ignored Calls for Recusal in Jan. 6 Case*, N.Y. TIMES (June 28, 2024), https://www.nytimes.com/2024/06/28/us/politics/justices-thomas-and-alito-recuse.html (on file with the *Iowa Law Review*); Adam Liptak, *Alito Refuses Calls for Recusal over Display of Provocative Flags*, N.Y. TIMES (May 29, 2024), https://www.nytimes.com/2024/05/29/us/alito-supreme-court-recusal-flag.html (on file with the *Iowa Law Review*); Liptak, *supra* note 10; Adam Liptak, *Experts Question Alito's Failure to Recuse Himself in Flag Controversy*, N.Y. TIMES (May 30, 2024), https://www.nytimes.com/2024/05/30/us/politics/alito-flags-recusal.html (on file with the *Iowa Law Review*); Press Release, U.S. Senate Comm. on Judiciary, Durbin Reveals Omissions of Gifted Private Travel to Justice Clarence Thomas from Harlan Crowe (June 13, 2024), https://www.judiciary.senate.gov/press/releases/durbin-reveals-omissions-of-gifted-private-travel-to-justice-clarence-thomas-from-harlan-crow [https://perma.cc/GQ3U-JUHJ].

12. Jonathan Swan, Charlie Savage & Maggie Haberman, *How a Phone Call Drew Alito into a Trump Loyalty Squabble*, N.Y. TIMES (Jan. 9, 2025), https://www.nytimes.com/2025/01/09/us/politics/alito-trump-phone-call-ethics.html (on file with the *Iowa Law Review*). Alito sought to explain away any problem by claiming that he was completely unaware that the President-elect would only hours later file a petition seeking extraordinary relief and that the Justice and the President-elect never discussed Trump's legal proceedings in court. Although of course possibly true, they do strain credibility given that most every reader of the news was aware of the Trump litigation and how his attorneys were planning to seek next Supreme Court review and the President-elect is not well-known for his narrowly focused, disciplined conversations. Indeed, the accounts of the call indicate that Trump was wholly unaware of the purpose of his phone call when he called the Justice, let alone its far-fetched nature: a vouching by the Justice of a former clerk's loyalty to Trump. *Id.*

13. SUP. CT. CODE OF CONDUCT Canon 3(B) (2023). In 1948, Congress enacted a law requiring that all judges, including Justices, disqualify themselves in "any case in which he has a substantial interest . . . as to render it improper, in his opinion, for him to sit . . . ." Act of June 25, 1948, Pub. L. No. 80-773, § 455, 62 Stat. 869, 908 (1948). Congress amended the law in 1974 to provide that "any justice . . . shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Act of Dec. 5, 1974, Pub. L. No. 93-512, 88 Stat. 1609, 1609 (1974). Although the Court has made clear that the Justices "comply" with the federal recusal act, the Court has never formally stated that Congress has the authority to require such compliance. *See* SUP. CT. CODE OF CONDUCT cmt.

14. ADMIN. OFF. OF THE U.S. CTS., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 10 (1973), https://www.uscourts.gov/sites/default/files/1973-04.pdf [https://perma.cc/NY9M-YXXY] ("The Judicial Conference, on recommendation of the Joint Committee, adopted [the American Bar Association] Code of Judicial Conduct . . . ."); *see also Judicial Ethics, in Developments in the Law—Court Reform*, 137 HARV. L. REV. 1677, 1678–80 (2024) [hereinafter *Judicial Ethics*] (summarizing the history of ethical issues on the Court).

most of which are modeled after the American Bar Association ("ABA") Model Code of Judicial Conduct.[15]

Others have commented on the substance of the Court's new code of ethics.[16] This Article instead addresses the procedural dimension of the recusal issue. The Court's 2023 inaugural publication of a written substantive code is plainly an important, though limited, step in the right direction. At least now the Justices have indicated that they share a view on the relevant substantive factors in determining whether recusal is warranted. What is still missing, however, is a procedure for applying those substantive guidelines in individual matters to provide the public with at least some bare assurance that the guidelines are not mere lip service. Substantive criteria absent procedural regularity for their administration is an illusory promise.[17]

The glaring absence of any accompanying procedure to administer the Court's ethics code is not mere oversight. It was reportedly deliberate, because the Justices could not agree on an administrative procedure, including whether it should include an enforcement mechanism. Justices Sotomayor, Kagan, and Jackson favored an enforcement mechanism that would allow for guidance from other federal judges.[18] At least Justices Gorsuch and Alito opposed an

15. The American Bar Association adopted a Model Code of Judicial Conduct in August 1990, and many state court codes reflect that ABA model as it has since undergone several modifications. *See Jurisdictional Adoption of Revised Model Code of Judicial Conduct*, A.B.A., https://www.americanbar.org/groups/professional_responsibility/resources/judicial_ethics_regulation/map [https://perma.cc/TQ7V-AMSJ] (listing thirty-seven jurisdictions); 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, 637 (2024).

16. For instance, this Article does not address the cogent complaint raised by my faculty colleague Niko Bowie, that given the precedential reach of U.S. Supreme Court rulings is frequently orders of magnitude greater than is standard of lower federal court and even state supreme court rulings, it makes little sense for the Court's ethics rules, like those of these other courts, to focus so much on the financial interests of the parties formally before the Court. Far greater financial interests, with the potential to reach the Justices and their immediate families are likely to be affected. The Article also does not address the far broader issue, which overlaps in part with the recusal issue, of the Justices' failure to disclose gifts, which has attracted great media attention. *See infra* notes 54–57 and accompanying text; STAFF OF S. COMM. ON THE JUDICIARY, 118TH CONG., AN INVESTIGATION OF THE ETHICS CHALLENGE AT THE SUPREME COURT 30–60 (2024) (describing specific instances of "[m]isconduct by Supreme Court Justices in [a]ccepting and [f]ailing to [d]isclose [e]xtravagant [g]ifts").

17. An analogous concern has been raised arising out of the Court's reliance on the so-called "shadow docket," when the Court makes rulings of major practical and legal significance without all the normal procedural safeguards provided when the Court decides cases after full briefing and oral argument. The lack of procedural regularity thereto promotes public distrust of the Court's ruling. *See* Taraleigh Davis, *In the Light: Procedural Legitimacy, the Shadow Docket, and Support for the U.S. Supreme Court*, 53 AM. POL. RSCH. 193, 193–94 (2025).

18. *See* Jodi Kantor & Abbie VanSickle, *Inside the Supreme Court Ethics Debate: Who Judges the Justices?*, N.Y. TIMES (Dec. 5, 2024), https://www.nytimes.com/2024/12/03/us/supreme-court-ethics-rules.html (on file with the *Iowa Law Review*).

enforcement mechanism, expressing concern that any oversight of the Justices would undermine their essential independence.[19]

This Article, moreover, looks to lessons from the states to inform the ways the Court might achieve some procedural regularity. Legal scholars and policy pundits writing about Justice recusal have largely overlooked the experience and practices of state supreme courts and their justices.[20] The U.S. Supreme Court, in short, may be on top, but it can learn from the longstanding practices and experiences of state supreme courts, which, although not identically situated, are similar enough to warrant consideration. As described in more detail below, some of those state practices hold promise, while others, if applied to the Court, seem highly problematic at best. Either way, they offer lessons for what might and might *not* work.

The Article's aim is to offer suggestions for how the Justices could restore some of the lost faith in the Court and its rulings.[21] For some, this purpose is no doubt itself controversial because it rests on the premise that the Court's recent loss of public faith in its rulings is a bad thing.[22] I understand that others would likely challenge my premise on the ground that the loss of public faith is deserved because it reveals the Court for what it actually is and always has been: an intrinsically conservative, highly partisan lawmaking entity that has historically failed to protect the interests of the less powerful.[23]

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19. *Id.*

20. As this Article was nearing completion for submission to law reviews for possible publication, Senator Sheldon Whitehouse issued a press release announcing his staff's survey of the recusal practices of all fifty states. Press Release, Sheldon Whitehouse, U.S. Sen., New Whitehouse Report Finds Supreme Court Alone Among U.S. High Courts with No Enforcement Mechanism for Ethics Violations (Dec. 2, 2024), https://www.whitehouse.senate.gov/news/release/new-whitehouse-report-finds-supreme-court-alone-among-u-s-high-courts-with-no-enforcement-mechanism-for-ethics-violations [https://perma.cc/5ADP-P8RL]; OFF. OF SENATOR SHELDON WHITEHOUSE, REPORT: JUDICIAL MISCONDUCT PROCEDURES IN ALL FIFTY STATES AND THE DISTRICT OF COLUMBIA 1–20 (2024), https://www.whitehouse.senate.gov/wp-content/uploads/2024/12/2024-11-26-Judicial-Ethics-50-State-Survey.pdf [https://perma.cc/33EC-EQHU]. The report's headline notwithstanding, it does not amount to a comprehensive survey of state supreme court justice recusal laws and practices. Unlike the survey I conducted in the summer and fall of 2024, the Whitehouse survey considers only one aspect of state supreme court recusals and the one least important as a practical matter and least likely to have any applicability to the U.S. Supreme Court. Unlike my survey, the Whitehouse survey also merely reviews some laws on the books, not their actual application in practice, which is very different, and the Whitehouse report does not include a survey of the state supreme court justices themselves. *See generally id.*

21. Some academics characterize this loss of faith as reflecting a loss of the Court's "[s]ociological legitimacy," which as characterized by Professor Richard Fallon, refers to "prevailing public attitudes toward [the Court] . . . . It depends on what factually is the case about how people think or respond—not on what their thinking ought to be." *See* RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 21 (2018).

22. *See infra* note 293 and accompanying text (describing recent public polling results).

23. Michael J. Klarman, *The Supreme Court: 2019 Term—Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 229–31 (2020); Ryan D. Doerfler & Samuel Moyn, *A Plea to Liberals on the Supreme Court: Dissent with Democracy in Mind*, N.Y. TIMES (Dec. 20, 2022),

That is not my view, at least in terms of where the Court has always been and must be in the future. Although the Court has certainly proved itself capable of playing such a negative role, and its actions at times in our nation's history may well fit that description,[24] it is nonetheless not a view to which one should simply surrender rather than work to overcome. As this Article concludes, however, the Justices themselves must do much of that necessary work.

The Article is divided into three parts. Part I describes the recusal issue as part of a larger problem with political partisanship and Justice celebrity. Part II explores possible procedures for applying judicial ethics codes relating to recusal by describing the current recusal practices of *state* supreme court chief justices and associate justices. This description is based on my own recent survey of those justices, in which over eighty percent of state supreme courts participated. This survey is novel: In recent years, the recusal practices of state supreme court justices have been almost completely ignored.[25] Borrowing partly from some of the most promising practices of state supreme court justices, and rejecting less promising ones, Part III in turn proposes a modest procedure for the Supreme Court in applying its own recent code of ethics for determining whether a Justice's recusal is warranted in a specific case.

I. POLITICAL PARTISANSHIP, JUSTICE CELEBRITY, AND RECUSAL

The Supreme Court has a problem. The Court is ultimately dependent on public acceptance of the legitimacy of its rulings. But public faith in the Court is plummeting.[26] Justices insist that they are not mere political partisans.[27]

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https://www.nytimes.com/2022/12/20/opinion/supreme-court-liberal-dissent.html (on file with the *Iowa Law Review*).

24. *See* NIKOLAS BOWIE, PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., THE CONTEMPORARY DEBATE OVER SUPREME COURT REFORM: ORIGINS AND PERSPECTIVES 3–4 (2021), https://web.archive.org/web/20220630142334/https:/www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony.pdf [https://perma.cc/94K2-PDYB] (written testimony submitted to the Presidential Commission on the Supreme Court of the United States listing Supreme Court rulings that "invalidated dozens of federal laws designed to expand political equality").

25. One exception is a brief discussion of state practices in the *Developments* issue of the *Harvard Law Review* on court reform, including judicial ethics. *See Judicial Ethics*, *supra* note 14, at 1699–1700.

26. *Trust in U.S. Supreme Court Continues to Sink*, ANNENBERG PUB. POL'Y CTR. (Oct. 2, 2024), https://www.annenbergpublicpolicycenter.org/trust-in-us-supreme-court-continues-to-sink [https://perma.cc/X5U6-M9S6]; Jeffrey M. Jones, *Party Divisions in Views of Supreme Court Keep Ratings Low*, GALLUP (Oct. 3, 2024), https://news.gallup.com/poll/651527/party-divisions-views-supreme-court-keep-ratings-low.aspx [https://perma.cc/JP72-LTUT]; Theo Liebmann, *Introduction: Accountability and the Future of the Supreme Court*, 52 HOFSTRA L. REV. 551, 552 (2024).

27. STEPHEN BREYER, THE AUTHORITY OF THE COURT AND THE PERIL OF POLITICS 51–63 (2021); Robert Barnes & Michael Karlik, *Roberts Says Supreme Court Will Reopen to Public and Defends Legitimacy*, WASH. POST (Sept. 10, 2022, 9:08 AM), https://www.washingtonpost.com/politics/2022/09/10/supreme-court-roberts-legitimacy (on file with the *Iowa Law Review*) (Chief Justice before the Tenth Circuit Judicial Conference remarking "[b]ut simply because people disagree with an opinion is not a basis for criticizing the legitimacy of the court"); Adam Liptak, *Justice Barrett Says the Supreme Court's Work Is Not Affected by Politics.*, N.Y. TIMES (Sept. 13, 2021), https://w

But their message increasingly falls on deaf ears for a variety of compounding reasons. To start, the other two branches of government treat the Justices as just that during both the nomination and confirmation process.[28] The vote breakdown in cases also increasingly mirrors the ideological agenda of the political party of the President who nominated the Justices.[29] Many leading scholars regularly characterize the Court as merely political.[30] And several individual Justices fuel rather than challenge that partisan narrative in their activities outside the Court itself.[31] Dissenting Justices, moreover, add to the chorus with public statements questioning whether the Court can "survive the stench" produced when its rulings are perceived by the public as merely an "extension of the political process."[32] Finally, as emphasized by the Chief

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ww.nytimes.com/2021/09/13/us/politics/amy-coney-barrett-politics-supreme-court.html (on file with the *Iowa Law Review*) (Justice Barrett at University of Louisville's McConnell Center remarking "[t]o say the court's reasoning is flawed is different from saying the court is acting in a partisan manner"); *see* Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks 'Obama Judge,'* N.Y. TIMES (Nov. 21, 2018), https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html (on file with the *Iowa Law Review*).

28. *See* FALLON, *supra* note 21, at 165.

29. The percentage of nonunanimous cases in which the Justices nominated by a Democratic President all voted in opposition to all the Justices nominated by a Republican President went from almost zero percent from 1960 to 2010 to twenty-one percent in 2021. *See* Amelia Thomson-DeVeaux & Laura Bronner, *The Supreme Court's Partisan Divide Hasn't Been This Sharp in Generations*, FIVETHIRTYEIGHT (July 5, 2022), https://fivethirtyeight.com/features/the-supreme-courts-partisan-divide-hasnt-been-this-sharp-in-generations [https://perma.cc/EG9Q-VL5C]; LAWRENCE BAUM & NEAL DEVINS, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT 130–40 (2019) (describing rise in recent decades of partisan divisions reflected in the voting of individual Justices). *See generally* Richard L. Hasen, *The Stagnation, Retrogression, and Potential Pro-Voter Transformation of U.S. Election Law*, 134 YALE L.J. 1673 (2025) (describing appearance of political partisanship reflected in votes of individual Justices in major election law cases). The practical explanation is the retirement on the Court beginning in 2009 of several Justices appointed by Republican Presidents, such as Justices Souter, Stevens, and Kennedy, who were either progressive or more moderately conservative than the appointments of Justices by Republican Presidents since then. Hasen, *supra*, at 1698–99.

30. *See, e.g.*, Klarman, *supra* note 23, at 231; Leah M. Litman, *"Hey Stephen,"* 120 MICH. L. REV. 1109, 1117 (2022) (reviewing STEPHEN BREYER, THE AUTHORITY OF THE COURT AND THE PERIL OF POLITICS (2021)); Ryan D. Doerfler & Samuel Moyn, *Stephen Breyer's Supreme Delusions*, NEW REPUBLIC (Oct. 13, 2021), https://newrepublic.com/article/163929/stephen-breyer-book-review-supreme-delusions [https://perma.cc/5JFU-FFMC].

31. *See infra* notes 47–53 and accompanying text.

32. *See* Transcript of Oral Argument at 15, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392) (statement of Sotomayor, J.) ("Will this institution survive the stench that this creates in the public perception that the Constitution and its reading are just political acts?"); *Justice Elena Kagan Warns Supreme Court Can Forfeit Legitimacy when Overturning Precedent*, CBS NEWS (Sept. 13, 2022, 9:08 AM), https://www.cbsnews.com/news/supreme-court-elena-kagan-forfeit-legitimacy-precedent [https://perma.cc/Z7QK-CHEZ] ("Judges create legitimacy problems for themselves . . . when they instead stray into places where it looks like they're an extension of the political process . . . ."); Justin Jouvenal, *One of the Supreme Court's Sharpest Critics Sits on It*, WASH. POST (July 5, 2025), https://www.washingtonpost.com/politics/2025/07/05/justice-jackson-dissent-supreme-court-divisions (on file with the *Iowa Law Review*) ("Justice Ketanji Brown Jackson emerges as a strong voice on an unusually fractious U.S. Supreme Court."); Ruth

Justice, disinformation campaigns fueled by social media "provide[] a ready channel to 'instantly spread rumor and false information.'"[33]

The partisan narrative currently dominating public discourse about the Court has, moreover, placed a spotlight on the recusal issue. That narrative begins in current times with the President and Congress. Presidents and presidential candidates make campaign promises to fill open seats on the Court only with nominees who will vote in a particular way in highly politically charged cases or be of a particular race and gender important to the political base of the President or a candidate for that office.[34] The votes of Senators for or against a particular Justice's nomination mirror almost exactly whether the Senator's party affiliation is the same as the nominating President's.[35] Millions of dollars are spent for advertisements in support of the nominated Justice, akin to a political campaign mounted for a partisan candidate running for elected office.[36] Democrats and Republicans reportedly spent nearly forty million dollars in the efforts to support or oppose the confirmation of then-Judge Amy Coney Barrett.[37]

Marcus, *Justice Ketanji Brown Jackson's Declaration of Independence*, NEW YORKER (June 25, 2025), https://www.newyorker.com/news/the-lede/justice-ketanji-brown-jacksons-declaration-of-independence [https://perma.cc/ET85-Q3FP].

33. JOHN G. ROBERTS, JR., 2024 YEAR END REPORT ON THE FEDERAL JUDICIARY 7 (2024), https://www.supremecourt.gov/publicinfo/year-end/2024year-endreport.pdf [https://perma.cc/Z329-5W7C] (quoting JOHN G. ROBERTS, JR., 2019 YEAR-END REPORT ON THE FEDERAL JUDICIARY 2 (2019), https://www.supremecourt.gov/publicinfo/year-end/2019year-endreport.pdf [https://perma.cc/4PUQ-525G]).

34. Alan Rappeport & Charlie Savage, *Donald Trump Releases List of Possible Supreme Court Picks*, N.Y. TIMES (May 18, 2016), https://www.nytimes.com/2016/05/19/us/politics/donald-trump-supreme-court-nominees.html (on file with the *Iowa Law Review*); Reuters, *Trump Reveals List for Possible Supreme Court Picks*, N.Y. TIMES (Sept. 9, 2020), https://www.nytimes.com/video/us/politics/100000007332233/trump-supreme-court-list.html (on file with the *Iowa Law Review*); Michael D. Shear, *Biden Made a Campaign Pledge to Put a Black Woman on the Supreme Court*, N.Y. TIMES (Jan. 26, 2022), https://www.nytimes.com/2022/01/26/us/politics/biden-supreme-court-black-woman.html (on file with the *Iowa Law Review*).

35. *See* Jessica Yarvin & Daniel Bush, *Is the Hyper-Partisan Supreme Court Confirmation Process 'The New Normal'?*, PBS NEWS (Sept. 13, 2018, 4:51 PM), https://www.pbs.org/newshour/nation/is-the-hyper-partisan-supreme-court-confirmation-process-the-new-normal [https://perma.cc/4SGU-WPWW].

36. Litman, *supra* note 30, at 1132; Editorial, *Who Is Paying for the Next Supreme Court Justice?*, WASH. POST (July 15, 2018), https://www.washingtonpost.com/opinions/who-is-paying-for-the-next-supreme-court-justice/2018/07/15/8894e4d8-8538-11e8-8553-a3ce89036c78_story.html (on file with the *Iowa Law Review*) ("Judicial Crisis Network . . . pledged . . . $10 million . . . to help Neil M. Gorsuch get confirmed . . . . [and] has already announced it would spend $2.4 million on Mr. Kavanaugh's confirmation."); Lachlan Markay, *Scoop: Progressives Prep Big Spending for SCOTUS Confirmation*, AXIOS (Mar. 6, 2022), https://www.axios.com/2022/03/06/progressives-scotus-confirmation-spending (on file with the *Iowa Law Review*) ("Demand Justice has already announced a $1 million ad campaign in support of Jackson and said it's prepared to spend much more.").

37. Kenneth P. Vogel, Maggie Haberman & Jeremy W. Peters, *Political Groups Begin Dueling over Barrett in a Costly Clash*, N.Y. TIMES (Oct. 13, 2020), https://www.nytimes.com/2020/09/27/us/politics/amy-coney-barrett-confirmation-battle.html (on file with the *Iowa Law Review*).

Gone from the nomination and confirmation process is even the pretense of a nonpartisan search for the best legal minds for service on the high Court. To be sure, partisan factors have no doubt long played a role in presidential nominations to the Court: for example, President Reagan's desire to appoint the first woman, Justice Sandra Day O'Connor,[38] to the Court; President Eisenhower's recess appointment of Justice William J. Brennan, Jr., to appeal to Catholic voters;[39] and President Lincoln's nomination of Justice Stephen Johnson Field to "'pack' the Supreme Court with friendly judges."[40] Presidents today are anything but subtle in their efforts to appeal to their political bases by nominating individuals who they believe will vote in certain ways on hot-button issues and appeal to particular political constituencies whose support they seek.[41] As a result, even if they did not appear to be partisan actors prior to their nomination, the newly minted Justices emerge at the other end of the confirmation process looking very much like just that.

There is also reason to worry that some of the Justices in fact became politically partisan as a result of the process itself, naturally more sympathetic to those who heaped them with praise rather than those who denounced them harshly. Justice Thomas has not hidden his now-decades-long bitterness at the way he was treated—which he emotionally described as a "lynching"—by Democratic Senators during his confirmation process now more than three decades ago.[42] And, far more recently, Justice Kavanaugh underwent a visible transformation during his confirmation hearing. As a judge on the D.C. Circuit, Kavanaugh was well-known as a strongly conservative judge but also for personal geniality with both liberals and Democrats.[43] But after Democratic Senators sought to discredit him based on accusations that, as a high school student, he had sexually assaulted a young woman, his dramatically changed countenance and tone of his voice left no doubt about the depth of his outrage and anger at what he viewed as partisan attacks, which culminated in the ominous warning to his Democratic opposition that "[w]hat goes around comes around."[44]

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38. *See* Hedrick Smith, *Reagan's Court Choice: A Deft Maneuver*, N.Y. TIMES, July 9, 1981, at A17.

39. William Fassuliotis, *Ike's Mistake Part II—The Nomination of William J. Brennan Jr.*, VA. L. WKLY. (Oct. 24, 2018), https://www.lawweekly.org/col/2018/10/24/ikes-mistake-part-ii-the-nomination-of-william-j-brennan-jr [https://perma.cc/76UB-GT62] ("Eisenhower didn't nominate Brennan for what he believed, but for who he was: an Irish, Catholic, Democrat from the Northeast.").

40. BRIAN MCGINTY, LINCOLN AND THE COURT 168 (2008); *see* We the People, *The 19th-Century History of Court Packing*, NAT'L CONST. CTR., at 28:21 (Sept. 24, 2020), https://constitutioncenter.org/news-debate/podcasts/the-19th-century-history-of-court-packing [https://perma.cc/GPF4-PYAB].

41. *See supra* note 34 and accompanying text.

42. CLARENCE THOMAS, MY GRANDFATHER'S SON: A MEMOIR 271 (2007).

43. *See* Scott Shane et al., *Influential Judge, Loyal Friend, Conservative Warrior – and D.C. Insider*, N.Y. TIMES (July 14, 2018), https://www.nytimes.com/2018/07/14/us/politics/judge-brett-kavanaugh.html (on file with the *Iowa Law Review*).

44. Nicholas Fandos, *Kavanaugh Proceedings Drive a Senate Once Governed by Decorum into Rancor*, N.Y. TIMES (Oct. 2, 2018), https://www.nytimes.com/2018/10/02/us/politics/kavanau

The Justices have, in turn, made matters worse with a series of unforced errors. A new Justice could easily make loud and clear their judicial independence from partisan politics by, immediately upon confirmation, declining to join in any remotely politically charged celebrations, whether in the White House[45] or back in the home state of the highly partisan legislative leader most central to their confirmation,[46] which are headlined by speakers characterizing the Justice's appointment as a political victory. The new Justices could seek to further diminish the inevitable partisan taint created by the nomination and confirmation process by shying away from immediate consideration of the same legal issues that created the partisan frenzy accompanying their confirmation. They might even seek opportunities to hear cases that provide an opportunity to demonstrate their independence from partisan political debates.

But, in recent years, too many Justices have done just the opposite. They affirmatively seek, rather than shy away from, their newly discovered celebrity and opportunities to support their political sponsors. They join in partisan-tainted celebrations, thank their partisan supporters, and voluntarily appear before adoring audiences, where they are thunderously applauded based on expectations of how they will vote or already have voted on certain legal issues.[47] Newly confirmed Justices exhibit no patience in terms of the cases the

gh-senate-breakdown.html (on file with the *Iowa Law Review*); *see* Ainara Tiefenthäler, *The Two Sides of Kavanaugh*, N.Y. TIMES (Sept. 28, 2018), https://www.nytimes.com/video/us/100000006134502/kavanaugh-hearings-comparison.html (on file with the *Iowa Law Review*).

45. *See* Amy Davidson Sorkin, *Justice Amy Coney Barrett Is Sworn in Under Darkness at the White House*, NEW YORKER (Oct. 27, 2020), https://www.newyorker.com/news/daily-comment/justice-amy-coney-barrett-is-sworn-in-under-darkness-at-the-white-house [https://perma.cc/L3FY-5U34].

46. *See* Philip Bump, *Amy Coney Barrett Assures America that Partisanship Is One Step Removed from the Court*, WASH. POST (Sept. 13, 2021), https://www.washingtonpost.com/politics/2021/09/13/amy-coney-barrett-assures-america-that-partisanship-is-one-step-removed-court (on file with the *Iowa Law Review*).

47. *See* Richard L. Hasen, *Siloed Justices and the Law/Politics Divide*, BALKINIZATION (Apr. 2, 2019), https://balkin.blogspot.com/2019/04/siloed-justices-and-lawpolitics-divide.html [https://perma.cc/29NM-2TKL] (noting Justices became "rock star Justices, drawing adoring crowds who celebrate [them] as though they were teenagers meeting Beyoncé"); Nina Totenberg (@NinaTotenberg), X (Sept. 4, 2019, 2:26 PM), https://x.com/NinaTotenberg/status/1169330870458757125 [https://perma.cc/46KQ-54ZB] (noting that journalist Nina Totenberg's live interview of Justice Ginsburg sold out a 15,500-seat stadium in Little Rock, with an additional 16,000 people on a waiting list); *see, e.g.*, Adam Liptak, *Neil Gorsuch Speech at Trump Hotel Raises Ethical Questions*, N.Y. TIMES (Aug. 17, 2017), https://www.nytimes.com/2017/08/17/us/politics/gorsuch-speech-trump-hotel-ethics.html (on file with the *Iowa Law Review*); Adam Liptak, *In Unusually Political Speech, Alito Says Liberals Pose Threat to Liberties*, N.Y. TIMES (Nov. 13, 2020), https://www.nytimes.com/2020/11/13/us/samuel-alito-religious-liberty-free-speech.html (on file with the *Iowa Law Review*); Josh Gerstein, *Gorsuch Takes a Victory Lap at Federalist Dinner*, POLITICO (Nov. 16, 2017, 11:54 PM), https://www.politico.com/story/2017/11/16/neil-gorsuch-federalist-society-speech-scotus-246538 [https://perma.cc/QZ7C-8AUA]; Mariana Alfaro, *Gorsuch to Headline GOP Lineup of Speakers at Federalist Society; Media Barred from His Speech*, WASH. POST (Feb. 4, 2022), https://www.washingtonpost.com/politics/2022/02/04/gorsuch-federalist-society-supreme-court (on file with the *Iowa Law Review*); Adam Liptak, *Kavanaugh Recalls His Confirmation at Conservative Legal Group's Annual Gala*, N.Y. TIMES (Nov. 14, 2019), https://www.nytimes.com/2019/11/14/us/kavanaugh-federalist-society.html (on file with the *Iowa Law*

Court agrees to hear. They instead embrace the first opportunity to decide highly charged issues, and then they vote in ways that largely reflect the views of their recent partisan supporters.[48] Some even then travel and speak before audiences where they are cheered and celebrated for their votes in individual cases.[49] Justice Gorsuch recently published a book, which, unlike those published by his colleagues, was neither autobiographical nor an abstract discussion of principles of judicial reasoning. The book, *Over Ruled: The Human Toll of Too Much Law*,[50] instead reads like the deliberatively provocative work of a politician seeking support or a policy pundit[51] seeking attention—dependent on hyperbole and exaggerated anecdotal accounts—and not the work product of a serious scholar, let alone a Supreme Court Justice. Supreme Court Justice as celebrity is, to say the least, not a good look,[52] and it invariably feeds the narrative that Justices seek to be popular based on their policy views.[53]

Review); Ann E. Marimow, *Justice Barrett Gets Standing Ovation at Federalist Society Gala*, WASH. POST (Nov. 9, 2023), https://www.washingtonpost.com/politics/2023/11/09/justice-barrett-at-federalist-society-gala (on file with the *Iowa Law Review*).

48. STEPHEN BREYER, READING THE CONSTITUTION: WHY I CHOSE PRAGMATISM, NOT TEXTUALISM 256 (2024) ("[M]ajor cases have come before the Court while several new Justices have spent only two or three years at the Court. Major changes take time, and there are many years left for the newly appointed Justices to decide whether they want to build the law using only textualism or originalism . . . .").

49. *See* Jesús Rodríguez, *Samuel Alito Ventures into the Court of Public Opinion*, WASH. POST (June 23, 2023), https://www.washingtonpost.com/lifestyle/2023/06/23/samuel-alito-supreme-court-speaking-out (on file with the *Iowa Law Review*); Notre Dame Law School, *2022 Religious Liberty Summit: U.S. Supreme Court Justice Samuel Alito*, YOUTUBE (July 28, 2022), https://www.youtube.com/watch?v=uci4uni6o8E [https://perma.cc/8XJS-QR2Q] (recording a video of Justice Alito's speech); Robert Barnes, *Alito Dismisses Foreign Criticism of Supreme Court's Abortion Ruling*, WASH. POST (July 28, 2022), https://www.washingtonpost.com/politics/2022/07/28/alito-defends-roe-wade-abortion-ruling (on file with the *Iowa Law Review*).

50. *See generally* NEIL GORSUCH & JANIE NITZE, OVER RULED: THE HUMAN TOLL OF TOO MUCH LAW (2024); *see also* Ruth Marcus, Opinion, *Justice Gorsuch's Book of Fish Tales*, WASH. POST (Aug. 22, 2024), https://www.washingtonpost.com/opinions/2024/08/22/justice-gorsuch-book-incomplete-facts (on file with the *Iowa Law Review*) (negatively reviewing the book).

51. The last Justice to engage in such writing may well have been William Douglas, who published multiple books addressing policy issues, and made no secret of his ambitions to be elected Vice President and then President of the United States. *See* Eliot Goldman, *Justice William O. Douglas: The 1944 Vice Presidential Nomination and His Relationship with Roosevelt, an Historical Perspective*, 12 PRESIDENTIAL STUD. Q. 377, 378 (1982); M. MARGARET MCKEOWN, CITIZEN JUSTICE: THE ENVIRONMENTAL LEGACY OF WILLIAM O. DOUGLAS—PUBLIC ADVOCATE AND CONSERVATION CHAMPION 36 (2022).

52. *See, e.g.*, Richard L. Hasen, *Celebrity Justice: Supreme Court Edition*, 19 GREEN BAG 2D 157, 170–73 (2016); Suzanna Sherry, *Our Kardashian Court (and How to Fix It)*, 106 IOWA L. REV. 181, 185–89 (2020); Craig S. Lerner & Nelson Lund, *Judicial Duty and the Supreme Court's Cult of Celebrity*, 78 GEO. WASH. L. REV. 1255, 1267–75 (2010); Richard A. Posner, *The Supreme Court and Celebrity Culture*, 88 CHI.-KENT L. REV. 299, 300 (2013).

53. BREYER, *supra* note 27, at 64–66. To be sure, Justices like Gorsuch are hardly without historical analogues. Several Justices have harbored presidential ambitions, including Justices William Douglas, Charles Evans Hughes (before later becoming Chief Justice), Chase, and McLean.

Of particular relevance to the focus of this Article, several Justices have further exacerbated the damaging public perception by the seemingly tone-deaf way in which they have responded to concerns that they might harbor biases affecting their ability to serve as impartial decision-makers in high-profile, politically salient cases. For both Justices Thomas and Alito, the concerns relate to personal gifts of significant value from social acquaintances[54] and to the professional and personal activities of their spouses that suggest the latter harbor strong views and interests in how the Court decides certain politically charged cases.[55] These facts raise issues warranting serious consideration and response. Yet, the two Justices to date have left the impression they view these claims as merely partisan attacks unworthy of their serious consideration. And, wholly apart from whether the gifts should have required recusal, their failure to disclose the gifts in the first instance, as required by the Ethics in Government Act,[56] fuels the public narrative that the Justices have something to hide.[57] The more liberal Justices have also been

54. Joshua Kaplan, Justin Elliott & Alex Mierjeski, *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/39ZP-747B]; Lawrence Hurley, *Clarence Thomas Says Trips Paid for by Billionaire Were 'Personal Hospitality,' Not Business*, NBC NEWS (Apr. 7, 2023, 1:40 PM), https://www.nbcnews.com/politics/supreme-court/justice-clarence-thomas-explains-failure-report-trips-paid-conservativ-rcna78696 [https://perma.cc/LK3K-PRQH]; Justin Elliott, Joshua Kaplan & Alex Mierjeski, *Billionaire Harlan Crow Bought Property from Clarence Thomas. The Justice Didn't Disclose the Deal.*, PROPUBLICA (Apr. 13, 2023, 2:20 PM), https://www.propublica.org/article/clarence-thomas-harlan-crow-real-estate-scotus [https://perma.cc/98DC-MSUB]; Joshua Kaplan, Justin Elliott & Alex Mierjeski, *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/KZ4A-GD2R]; Justin Elliott, Joshua Kaplan & Alex Mierjeski, *Justice Samuel Alito Took Luxury Fishing Vacation with GOP Billionaire Who Later Had Cases Before the Court*, PROPUBLICA (June 20, 2023, 11:49 PM), https://www.propublica.org/article/samuel-alito-luxury-fishing-trip-paul-singer-scotus-supreme-court [https://perma.cc/4DRL-RGTP].

55. Jodi Kantor, *At Justice Alito's House, a 'Stop the Steal' Symbol on Display*, N.Y. TIMES (May 16, 2024), https://www.nytimes.com/2024/05/16/us/justice-alito-upside-down-flag.html (on file with the *Iowa Law Review*); Jodi Kantor, Aric Toler & Julie Tate, *Another Provocative Flag Was Flown at Another Alito Home*, N.Y. TIMES (May 22, 2024), https://www.nytimes.com/2024/05/22/us/justice-alito-flag-appeal-to-heaven.html (on file with the *Iowa Law Review*); *see infra* text accompanying notes 67–71.

56. The Ethics in Government Act of 1978, which requires federal government officials to file financial disclosure acts, expressly applies to Supreme Court Justices, and is administered by the Judicial Conference of the United States in its application to the federal judiciary. Ethics in Government Act of 1978, 5 U.S.C. §§ 13101–13104, 13109(1) (2018). The Court has recently made clear that the Justices comply with the Act, but it has never formally agreed that the congressional enactment is legally binding rather than a voluntary undertaking by the Justices. SUP. CT. CODE OF CONDUCT cmt. (2023).

57. *See, e.g.*, Ann E. Marimow, Justin Jouvenal & Tobi Raji, *Justice Thomas Discloses Two 2019 Trips Paid for by Harlan Crow*, WASH. POST (June 7, 2024), https://www.washingtonpost.com/politics/2024/06/07/supreme-court-financial-disclosures-gifts-thomas (on file with the *Iowa Law Review*); Abbie VanSickle, *Justice Thomas Reports Private Trips with Harlan Crow*, N.Y. TIMES (Aug.

the subject of sharp criticism for not recusing in certain matters related to their financial interests or prior professional practice.[58]

Whether recusal is warranted in these circumstances, however, is not nearly as easy to resolve as either the Justices or their critics too quickly assume. The facts of these recent controversies do not neatly fit into long-settled categorical recusal guidelines reflected either in the Court's recent code of ethics or those rules of judicial conduct long applicable to lower federal court judges and state judges. Those categorical rules require judicial recusal when a matter before the Court relates to the Justice's *financial* interests or prior employment,[59] the *financial* interest and professional employment of spouses and minor children living with the Justice,[60] or *financial* interests and professional activities related to a case engaged in by a person related within the "third degree of relationship" of a Justice.[61] So too

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31, 2023), https://www.nytimes.com/2023/08/31/us/thomas-financial-disclosures-scotus.html (on file with the *Iowa Law Review*).

58. Although the loudest recent complaints about failure to recuse have been launched in more recent years at the conservative Justices Thomas and Alito, more liberal members of the Court have not been immune from such challenges. Conservative legislators objected to Justice Kagan's participation in the Affordable Care Act litigation before the Court, expressing disbelief that, as Solicitor General of the United States, Kagan had played no role in the defense of that Act, which was ongoing at the Justice Department when she was Solicitor General. Mark Sherman, *Sen. Hatch: Kagan Should Sit Out Health Care Case*, USA TODAY (Feb. 5, 2011, 3:49 AM), https://web.archive.org/web/20110307123941/http:/www.usatoday.com/news/topstories/2011-02-04-3661380121_x.htm [https://perma.cc/64FG-KZ4L]; *see* James J. Sample, *The Supreme Court and the Limits of Human Impartiality*, 52 HOFSTRA L. REV. 579, 593–94 (2024). Justice Sotomayor has been criticized for not recusing herself from cases in which the publisher of her book, Penguin Random House, is involved, from which the Justice has received and continues to receive sizeable royalties. Nick Mordowanec, *Conservatives Call Out Sotomayor's $3M from Publisher Amid Thomas Reports*, NEWSWEEK (May 4, 2023, 4:52 PM), https://www.newsweek.com/conservatives-out-sotomayor-3-million-dollar-publisher-thomas-reports-1798460 [https://perma.cc/H4HE-2B3P]. So too there were complaints that Justice Ketanji Brown Jackson's recusal from the Harvard University affirmative action admissions case—required because she had served on Harvard's Board during the lower court litigation—was mere window dressing, because she had declined also to withdraw from the University of North Carolina affirmative action admissions case that raised, as a practical matter, the same legal issue. Richard M. Re, *Did Justice Jackson Actually Recuse from* Students for Fair Admission v. Harvard*?*, RE'S JUDICATA (June 30, 2023, 2:17 PM), https://richardresjudicata.wordpress.com/2023/06/30/did-justice-jackson-actually-recuse-from-students-for-fair-admissions-v-harvard [https://perma.cc/WH7L-E9UN]. Finally, "[i]n March 2004, thirteen Republican members of Congress asked Justice Ginsburg to 'withdraw from all future cases having to do with abortion because of her affiliation with the NOW Legal Defense and Education Fund.'" James Sample, *Supreme Court Recusal from* Marbury *to the Modern Day*, 26 GEO. J. LEGAL ETHICS 95, 122 (2013) [hereinafter Sample, *Supreme Court Recusal*] (quoting *GOP Lawmakers Ask Ginsburg to Withdraw from Abortion Cases*, L.A. TIMES (Mar. 19, 2004, 12:00 AM), https://www.latimes.com/archives/la-xpm-2004-mar-19-na-ginsburg19-story.html (on file with the *Iowa Law Review*)).

59. SUP. CT. CODE OF CONDUCT Canon 3(B)(2)(b)–(c) (2023). For instance, Justice Thurgood Marshall recused himself for a period of time upon joining the Court from cases involving his prior employer. *See* Sample, *Supreme Court Recusal*, *supra* note 58, at 112–15.

60. SUP. CT. CODE OF CONDUCT Canon 3(B)(2)(c).

61. SUP. CT. CODE OF CONDUCT Canon 3(B)(2)(d). In response to my survey, one state supreme court justice described how there was "shockingly little national guidance" on when

the ethical code categorically requires recusal when a family member or even a close personal acquaintance is a party or witness in a case in their personal capacity.[62]

The application of these standards, while they may be challenging in isolated factual circumstances, is generally fairly straightforward in application to matters like financial interests. All federal and state courts, including the U.S. Supreme Court, have regularized procedures for counsel appearing before the court to notify the court of the identity of their clients with direct and

recusal was warranted when a justice's spouse was an elected official or involved in politics. *See* Email from State Sup. Ct. J., to Richard J. Lazarus, Charles Stebbins Fairchild Professor of L., Harv. L. Sch. (June 25, 2024) (name not public given assurances of strict confidentiality provided to all justices).

62. SUP. CT. CODE OF CONDUCT Canon 3(B)(2)(d). The Justices draw a distinction here between a social or professional acquaintance's personal capacity and their official capacity. For instance, Justices do not regularly recuse from cases where a government official with whom they personally know and have socialized is sued in their official capacity. But if that same person was a party or witness in the case in their personal capacity, recusal might well be warranted. An analogous distinction is drawn for lawyers who appear before the Court. The Justices are not infrequently close friends of Supreme Court advocates who appear before them, but none appear to take the position that this, standing alone, is cause for recusal. But were that same person the defendant in a major civil lawsuit or criminal prosecution, the Justices might treat it differently. For instance, Justices Scalia, Souter, and Thomas all recused themselves from a matter that involved the prosecution of the murder of a father of a federal judge, with whom they had worked or were personally close, who had testified in the case. *See* Raymond Bonner, *Three Abstain as Supreme Court Declines to Halt Texas Execution*, N.Y. TIMES (Aug. 14, 2001), https://www.nytimes.com/2001/08/14/us/three-abstain-as-supreme-court-declines-to-halt-texas-execution.html (on file with the *Iowa Law Review*). In declining to recuse from a case in which Vice President Dick Cheney was a named party in his official capacity, Justice Scalia, who was a social acquaintance of Cheney, relied on that personal/official capacity distinction. *See* Cheney v. U.S. Dist. Ct. for D.C., 541 U.S. 913, 916 (2004) (mem. of Scalia, J.) ("But while friendship is a ground for recusal of a Justice where the personal fortune or the personal freedom of the friend is at issue, it has traditionally *not* been a ground for recusal where *official action* is at issue, no matter how important the official action was to the ambitions or the reputation of the Government officer."). An interesting twist on this is whether a Justice need recuse not because the attorney before them is a friend, but instead someone toward whom the public has reason to think the Justice harbors animosity or the Justice in fact does. Apparently yes. After being confirmed for Chief Justice, though without public explanation, Rehnquist, for several years, recused himself from matters in which one of the attorneys in the case had testified against his confirmation on the grounds that Rehnquist had offered a misleading account of his actions as a local elections judge decades earlier. *See* Tony Mauro, *The Justices' Imperial Code of Silence*, LEGAL TIMES, Feb. 9, 1987, at 3. The lawyer's testimony essentially accused the future Chief Justice as engaging in racist conduct by "challenging voters and upsetting them, apparently in an effort to slow the vote in the precinct, which was predominantly Democratic and had many minority voters." Stuart Taylor, Jr., *4 Rebut Testimony of Rehnquist on Challenging of Voters in 60's*, N.Y. TIMES (Aug. 2, 1986), https://www.nytimes.com/1986/08/02/us/4-rebut-testimony-of-rehnquist-on-challenging-of-voters-in-60-s.html [https://perma.cc/5H38-XGCG]. To my knowledge, no Justice has acted similarly when an attorney appearing before them gave highly favorable testimony in support of their confirmation.

immediate financial stakes in the outcome.[63] And the judges and Justices routinely provide court personnel tasked with identifying possible conflicts of interest with the list of the financial investments they or designated members of their immediate family possess to allow the judge or Justice to recuse when a classic financial conflict arises.[64] Of course, unintentional, good-faith mistakes can be made. The Court often passes on highly complex matters, sometimes involving hundreds of parties—not to mention the thousands of certiorari petitions the Court processes annually, which are littered with various corporate disclosure statements.[65] But the administration of recusal codes relating to such traditional financial interests has generally not proven so problematic as to impugn the Court's core legitimacy.[66]

The proper treatment for recusal purposes of *nonfinancial* interests—such as deeply held personal views of spouses and social acquaintances on matters of great public concern implicated by the Court's rulings—is not subject to such categorical treatment.[67] The inquiry is more factually nuanced and there is often far less there than meets many a partisan eye critical of a Justice. Especially for social acquaintances, the same kinds of claims could be made of the more progressive Justices as are made of the more conservative Justices. Yet that is where recent high-profile recusal controversies have largely arisen.[68] Whether, for instance, a spouse, close family member, or close personal friend has strongly held views about how a high-profile politically salient case should be decided falls outside a categorical basis for recusal.[69] So too does the fact that close friends with such views about case outcomes may provide things of value to a Justice, such as meals or places to stay.[70] But those kinds of social gifts, absent the extreme circumstance that there is evidence that a

63. *See, e.g.*, SUP. CT. R. 14(1)(b)(i)–(ii) (requiring that cert petitions must list all parties and include corporate disclosure statements); SUP. CT. R. 24(1)(b) (requiring same for merits briefs); SUP. CT. R. 29(6) (corporate disclosure requirement).

64. Although the Justices are not bound by rules set forth by the Judicial Conference, they follow the mandatory conflict screening established by the Conference for all federal judges. *See* GUIDE TO JUDICIARY POL'Y vol. 2, pt. C, ch. 4 § 410 (JUD. CONF. OF THE U.S. CTS. 2025) (mandatory conflict screening).

65. *See* SUP. CT. CODE OF CONDUCT cmt. (2023) ("The Court receives approximately 5,000 to 6,000 petitions for writs of certiorari each year. Roughly 97 percent of this number may be and are denied at a preliminary stage, without joint discussion among the Justices, as lacking any reasonable prospect of certiorari review. Recusal issues must be considered in light of this reality.").

66. *See* STAFF OF S. COMM. ON THE JUDICIARY, *supra* note 16, at 66–68 (providing examples of instances in which Justices mistakenly failed to recuse, or initially failed to recuse, from a case before the Court in which they had a financial interest based on stock ownership).

67. *See supra* notes 59–61 and accompanying text.

68. *See supra* text accompanying notes 54–58.

69. *See infra* text accompanying notes 92–99.

70. *See supra* note 54.

Justice is being effectively bribed to vote in a certain way, do not trigger a categorical recusal requirement based on financial interests.[71]

These factual circumstances fall instead into the Court's code of ethics' general catchall inquiry whether "the Justice's impartiality might reasonably be questioned, that is, where an unbiased and reasonable person who is aware of all relevant circumstances would doubt that the Justice could fairly discharge his or her duties."[72] The "unbiased and reasonable person" test is necessarily challenging because it flips the question whether the Justice is biased to whether others are biased. This can quickly become problematic because the loudest voices on either side of a recusal debate are likely to be those who, while insisting they are "unbiased and reasonable," are in fact just the opposite.[73] They are frequently the quintessentially biased observer favoring or opposing a Justice's recusal based on how they perceive the Justice's likely vote relates to their preferred outcome. That bias is what drives them to speak out.

Those loud, clearly biased voices demanding attention, moreover, drown out whatever actual reasonable and unbiased voices might believe. The latter, by their nature, are largely if not completely silent. The tendency in recent years is for a Justice who is the target of recusal demands to discount what the complainant claims, because of the complainant's obvious bias. These Justices

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71. For instance, the mere fact, standing alone, that Justice Thomas apparently changed his mind on the efficacy of deference to agency interpretation of ambiguous statutory language under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), does not, standing alone, mean the Justice has done anything untoward, even if that shift coincides with the views of wealthy friends of the Justices. Justin Jouvenal, Jon Swaine & Ann E. Marimow, *How Billionaire Charles Koch's Network Won a 40-Year War to Curb Regulation*, WASH. POST (Dec. 8, 2024), https://www.washingtonpost.com/politics/2024/12/08/supreme-court-koch-chevron-ruling-administrative-state (on file with the *Iowa Law Review*). Absent evidence of bribery, Justices are allowed to change their minds over time—there is nothing inherently suspicious about doing so—and with *Chevron*, Thomas was hardly alone in fundamentally changing his view of the prior precedent. Justice Scalia did so too, Richard J. Lazarus, *The Scalia Court: Environmental Law's Wrecking Crew Within the Supreme Court*, 47 HARV. ENV'T L. REV. 407, 453 (2023), and many of Thomas's new colleagues were promoting arguments about *Chevron*'s lapses that had not previously been made. *See, e.g.*, De Niz Robles v. Lynch, 803 F.3d 1165, 1171 (10th Cir. 2015) ("[O]ne might question whether *Chevron* step two muddles the separation of powers by delegating to the Executive the power to legislate generally applicable rules of private conduct.").

72. SUP. CT. CODE OF CONDUCT Canon 3(B)(2) (2023).

73. For example, Democratic Senators Durbin and Whitehouse are the major critics of the failure of Justice Thomas and Justice Alito to recuse. *See, e.g.*, Press Release, U.S. Senate Comm. on the Judiciary, Durbin Highlights the Supreme Court's Ethical Crisis on the Senate Floor (July 29, 2024), https://www.judiciary.senate.gov/press/releases/durbin-highlights-the-supreme-courts-ethical-crisis-on-the-senate-floor [https://perma.cc/6LAY-VPM3]; Press Release, Off. of Sen. Sheldon Whitehouse, ICYMI: Whitehouse 'Scheme' Speech Shines Spotlight on Little-Known Judicial Agency that Has Begun to Hold Supreme Court Accountable (Feb. 9, 2024), https://www.whitehouse.senate.gov/news/release/icymi-whitehouse-scheme-speech-shines-spotlight-on-little-known-judicial-agency-that-has-begun-to-hold-supreme-court-accountable [https://perma.cc/Y9SC-6D7Q]. Additionally, Republican Senator Orrin Hatch was a leading proponent of the view that Justice Kagan should recuse herself from the Affordable Care Act cases then before the Court. *See* Sherman, *supra* note 58.

accordingly do not address the truly hard question presented by a suggestion of recusal, which is whether persons *other than the complainant*, such as members of the public who are not biased, might reasonably have doubts about the Justice's objectivity.[74] The Justice's resulting conclusion that there is no problem of judicial bias lacks even a pretense of the procedural rigor needed to suggest that any serious inquiry has been undertaken about the propriety of recusal. It also provides a ready reminder of the force of the Court's own "general rule that 'no man can be a judge in his own case.'"[75]

There are also worrisome signs that the loss of public faith from the outside is beginning to promote corrosive effects within the Court. Even during earlier challenging episodes such as the immediate aftermath of the Court's 2000 ruling in *Bush v. Gore*,[76] the immediate condemnation from many upset with the result did not result in long-lasting public distrust of the Court or rancor and bitterness within the Court itself.[77] Was there great frustration and disappointment? Of course, and the strong personal ties between the Justices themselves no doubt frayed, but they did not break. And the Court went on with its work.

But times have changed. As evidenced by recent leaks from within designed to fuel partisan political condemnation of the Court from the outside, personal relations between the Justices are being strained to an extent that threatens to undermine those close personal relations between the Justices that are critical for the Court to do its deliberative work. The leak of the draft opinion of the Court in the *Dobbs*[78] abortion case in 2022[79] was highly destructive to relations

74. Some commentators similarly make that same mistake, focusing on the fact that the "real beef" of those making the complaints "is with the outcomes the current Court is reaching" to then wrongly discount the possibility that the ethical concerns they raise may nonetheless have merit. Kannon K. Shanmugam, Remarks at Duke Law School Federalist Society Student Chapter: The Legitimacy of the Supreme Court 14 (Sept. 16, 2024), https://prod-i.a.dj.com/public/resources/documents/Kannon_Shanmugam_Duke_2024_speechfin.pdf [https://perma.cc/PP5R-8PVB].

75. Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 880 (2009) (citing *In re* Murchison, 349 U.S. 133, 136 (1955)); *see* THE FEDERALIST No. 10 (James Madison) ("No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity."). For an outstanding empirical analysis of judicial reluctance in general to decide in favor of recusal, see generally Dane Thorley, *The Failure of Judicial Recusal and Disclosure Rules: Evidence from a Field Experiment*, 117 NW. U. L. REV. 1277 (2023).

76. Bush v. Gore, 531 U.S. 98, 110 (2000) (per curiam) (holding that Florida's recount procedures for the 2000 presidential election violated the Equal Protection Clause and requiring an end to the recount).

77. *See* FALLON, *supra* note 21, at 20–21, 156; BREYER, *supra* note 27, at 27–28; JOHN PAUL STEVENS, THE MAKING OF A JUSTICE: REFLECTIONS ON MY FIRST 94 YEARS 225–26 (2019) (describing his long-lasting friendship with Justice Scalia).

78. Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228, 2242 (2022) (overturning *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and holding that the U.S. Constitution does not confer a right to abortion).

79. Adam Liptak, *Justice Thomas Says Leaked Opinion Destroyed Trust at the Supreme Court*, N.Y. TIMES (May 14, 2022) [hereinafter Liptak, *Leaked Opinion Destroyed Trust*], https://www.nytimes.c

within the Court,[80] as reflected in Justice Thomas's willingness to speak publicly about the resulting personal rancor in the Court at that time. Thomas described the leak as "like kind of an infidelity" causing Justices "to look over [their] shoulder," contrasting it with relations between Justices when Chief Justice Rehnquist presided, when "[the Justices] actually trusted each other."[81]

Nor is it clear that the distrust generated within the Court apparently has ebbed since 2022. It is admittedly hard for any outsider to know for sure. On several recent occasions, some of the Justices have gone out of the way to create an impression that they still get along well notwithstanding their different views.[82] But in September 2024, additional leaks strongly suggested the trust within the Justices was far from being restored. The *New York Times* published an article regarding the Court's deliberations in the recently decided Trump immunity case.[83] The *New York Times* article claimed the reporters had gained access to multiple internal, strictly confidential documents—far greater in number than the single draft opinion leaked in the *Dobbs* abortion case, from multiple internal sources, both liberal and conservative, that by the leaks' nature strongly suggested the leaks were from the Justices themselves, all designed to undermine the Chief Justice.[84] The article reported on the contents of a confidential memo sent by the Chief Justice to the Associate Justices detailing his early views on the Trump immunity case, including how he then anticipated the Court would rule on it.[85] The *New York Times* claimed access to the "details from the justices' private memos, documentation of the proceedings and interviews with court insiders, both conservative and liberal."[86] The article's stated thesis was that the Chief Justice had rebuffed efforts to embrace narrower rulings in favor of "steer[ing] rulings that benefited Mr. Trump."[87]

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om/2022/05/14/us/politics/supreme-court-clarence-thomas.html (on file with the *Iowa Law Review*); Adam Liptak, *A Supreme Court in Disarray After an Extraordinary Breach*, N.Y. TIMES (June 24, 2022), https://www.nytimes.com/2022/05/03/us/politics/supreme-court-leak-roe-v-wade-abortion.html (on file with the *Iowa Law Review*).

80. This is true whether the leak originated from a progressive or a conservative, which is not clear. Either way, the purpose was to generate criticism of the Court.

81. Liptak, *Leaked Opinion Destroyed Trust*, *supra* note 79.

82. *See, e.g.*, Mark Sherman & Lindsay Whitehurst, *Supreme Court Justices Barrett and Sotomayor, Ideological Opposites, United to Promote Civility*, L.A. TIMES (Mar. 14, 2024, 9:28 AM), https://www.latimes.com/world-nation/story/2024-03-14/supreme-court-justices-barrett-and-sotomayor-ideological-opposites-unite-to-promote-civility [https://perma.cc/XB2X-ES9Z]; Ariane de Vogue, *Sonia Sotomayor Says She and Clarence Thomas Share a 'Common Understanding About People and Kindness,'* CNN POL. (June 16, 2022, 5:26 PM), https://www.cnn.com/2022/06/16/politics/sonia-sotomayor-supreme-court-clarence-thomas/index.html (on file with the *Iowa Law Review*).

83. *See* Trump v. United States, 603 U.S. 593, 637–42 (2024).

84. Jodi Kantor & Adam Liptak, *How Roberts Shaped Trump's Supreme Court Winning Streak*, N.Y. TIMES (Nov. 6, 2024), https://www.nytimes.com/2024/09/15/us/justice-roberts-trump-supreme-court.html (on file with the *Iowa Law Review*).

85. *Id.*

86. *Id.*

87. *Id.* This Author's personal view is that the content of the article does not remotely support its thesis, but that is a topic for another day.

The recusal issue itself is plainly causing division and rancor internally. It was reportedly a Herculean task to get all nine Justices to sign on to the November 2023 ethics code.[88] But the absence of any hint of a procedural process for its administration is glaring and telling. No consensus could be reached. Did some of the Justices harbor doubts about whether the recusal decision should be entirely up to each Justice? Did some believe there should be a regularized, internal process for addressing recusal matters beyond whatever currently exists for potential financial conflicts of interest? Did some on the Court believe that implementing procedures should include a requirement or at least a general guideline that a Justice provide a written explanation of a decision to recuse or not to recuse? And, of course, did some on the Court believe their recusal procedures should allow for any reviewing role by anyone outside the Justices themselves?

In July 2024 and then again in September, Justice Kagan publicly broke ranks, later joined by Justice Jackson, to suggest that the Chief Justice might consider appointing an outside panel of highly respected lower court federal court judges to review whether a Justice's recusal was warranted in a particular matter.[89] The import of Justice Kagan's recommendation is obvious. She either is skeptical of the merits of her colleagues' decisions to decline to recuse, or she believes their failure to do so in a transparent, reasoned way reflecting procedural rigor is undermining the Court in the public's eye.

But Justices Kagan and Jackson were not the only ones who had misgivings about how their colleagues were handling recusal issues. They were simply the only ones who did so publicly. According to that same *New York Times* article, so too did the Chief Justice Roberts in a more dramatic way, but entirely hidden from public view. The *Times* reported that the Chief took back from Justice Alito an opinion assignment he had given him only a few weeks earlier.[90] Justices sometimes lose their initial opinion assignment when votes change during the opinion drafting process and what had been an opinion of the Court supported by a majority becomes a dissent.[91] But that is reportedly not what happened here. Instead, according to the *Times*, the Chief affirmatively reassigned the opinion to himself after he learned of facts that might suggest

88. *See* Robert Barnes & Ann E. Marimow, *Supreme Court Justices Discussed, but Did Not Agree On, Code of Conduct*, WASH. POST (Feb. 9, 2023, 5:00 AM), https://www.washingtonpost.com/politics/2023/02/09/supreme-court-ethics-code (on file with the *Iowa Law Review*).

89. Ann E. Marimow, *Justice Kagan Calls for a Way to Enforce Supreme Court Ethics Code*, WASH. POST (July 25, 2024), https://www.washingtonpost.com/politics/2024/07/25/supreme-court-kagan-ethics-code-reform (on file with the *Iowa Law Review*); Ann E. Marimow, *Justice Kagan: Lower Court Judges Could Enforce Supreme Court Ethics Code*, WASH. POST (Sept. 9, 2024) [hereinafter Marimow, *Justice Kagan: Lower Court Judges*], https://www.washingtonpost.com/politics/2024/09/09/supreme-court-kagan-melissa-murray (on file with the *Iowa Law Review*).

90. Kantor & Liptak, *supra* note 84.

91. *See, e.g.*, Richard J. Lazarus, *Back to "Business" at the Supreme Court: The "Administrative Side" of Chief Justice Roberts*, 129 HARV. L. REV. F. 33, 49 (2015); Saul Brenner, *Reassigning the Majority Opinion on the United States Supreme Court*, 11 JUST. SYS. J. 186, 193 (1986).

Justice Alito harbored an actual, or appearance of, bias that the Chief worried would taint the Court were Alito to remain the opinion's author.[92]

The case, *Fischer v. United States*, concerned whether those who had broken into the Capitol building on January 6, 2021, in an effort to stop Congress from certifying the votes in the 2020 presidential election, could be convicted under 18 U.S.C. § 1512(c) impeding an "official proceeding."[93] According to the *New York Times*, the Chief Justice initially assigned the drafting of the opinion of the Court to Justice Alito, which divided at conference 5-4 in favor of the defendants.[94] But the Chief apparently later concluded he had made a mistake when only a few weeks later the national news media reported in early May that Justice Alito's spouse had flown flags at their homes in Virginia and New Jersey that some complained suggested support of the January 6 rioters and President Trump for his conduct in resisting the results of the November 2020 election.[95]

In late May, Justice Alito publicly rejected in a letter addressed to Democratic members of Congress their claims that he should recuse himself from the *Fischer* case as well as from *Trump v. United States*, relating to President Trump's immunity from criminal prosecution.[96] Alito argued that he played no role in the raising of the flags, which were solely the result of actions by his wife, and therefore the flags on his property did not suggest that his "impartiality might reasonably be questioned, that is, where an unbiased and reasonable person who is aware of all relevant circumstances would doubt that the Justice could fairly discharge his or her duties,"[97] the standard established by the Court's November 2023 code of ethics. The gravamen of the Justice's reasoning for both events was that whatever views the flags may or may not reflect are those of his spouse alone, because she alone was responsible for the flags and she was plainly entitled to "possess[] the same First Amendment rights as every other American."[98] Alito expressed confidence that "a reasonable person who is not motivated by political or ideological considerations or a desire to affect the outcome of Supreme Court cases would conclude that the events recounted above do not meet the applicable standard for recusal."[99]

There is good reason to suppose that the Chief Justice's reassignment of the *Fischer* opinion reflected that he did not totally agree. The Chief has *no* express or precedential authority to order that a colleague recuse themselves

92. Kantor & Liptak, *supra* note 84.

93. Fischer v. United States, 603 U.S. 480, 483–84 (2024).

94. *See* Kantor & Liptak, *supra* note 84.

95. Kantor, *supra* note 55; Kantor et al., *supra* note 55.

96. Letter from Samuel A. Alito, Jr., J., Sup. Ct., to Richard J. Durbin & Sheldon Whitehouse, U.S. Sens. (May 29, 2024) (on file with the *Iowa Law Review*).

97. *Id.* (quoting SUP. CT. CODE OF CONDUCT Canon 3(B)(2) (2023)).

98. *Id.*

99. *Id.*

from a case.[100] But, as the senior Justice in the majority in *Fischer* and by Court tradition, the Chief accordingly *did* possess the authority to assign the opinion of the Court in *Fischer*.[101] The most obvious basis for such a dramatic action by the Chief, exercising the only authority he had over *Fischer*, would have been his concern that the flag issue created a legitimate appearance problem for the Court were Alito to be the opinion's author. In short, Justice Alito did not believe there was any problem. But the Chief apparently did not entirely agree. And, lacking the authority to recuse Alito, should he have thought that was warranted, the Chief exercised the only authority he did have, which was to mitigate the appearance problem that Alito's actions had created for the Court, by taking the extreme step of taking the opinion away from him.

Perhaps the Chief thought that removing Alito from being the opinion author was sufficient to address the issue, and he did not believe Alito was wrong to decline to recuse. But that is a fairly thin, if not entirely elusive, distinction. The Chief's target audience for the opinion reassignment was either unbiased, objective observers outside the Court or some of his colleagues within the Court, who worried about the impact of Justice Alito's authorship. It is exceedingly doubtful he took this action to pander to biased outside critics. The Chief, in short, may well have used one of the few, yet most significant authorities he possesses—to assign opinions of the Court when he is in the majority—to take a prior assignment away from Justice Alito in an effort to safeguard the Court's institutional stature. I very much doubt, but do not know, whether the Chief took this action at Justice Alito's request.[102]

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100. *See* Louis J. Virelli III, *Congress, the Constitution, and Supreme Court Recusal*, 69 WASH. & LEE L. REV. 1535, 1565–69 (2012); *see also supra* notes 13–19 and accompanying text (discussing recusal authority).

101. *See* Lazarus, *supra* note 91, at 39.

102. Of course, although the Chief took formal action, with the limited authority he possesses in opinion assignments, the impact was itself quite limited. Reassigning the opinion to himself left the five-Justice majority intact, which otherwise, absent Alito's participation, would have been compelled to affirm the judgment of the lower court, which had ruled in favor of the prosecution. However, a senior federal district court judge, who publicly criticized Justice Alito's failure to recuse in a *New York Times* op-ed, Michael Ponsor, *A Federal Judge Wonders: How Could Alito Have Been So Foolish?*, N.Y. TIMES (May 24, 2024), https://www.nytimes.com/2024/05/24/opinion/alito-flag-supreme-court.html (on file with the *Iowa Law Review*), was himself later found by the U.S. Court of Appeals for the Fourth Circuit to have violated the Judicial Code of Conduct because the judge's "essay expressed personal opinions on controversial public issues and criticized the ethics of a sitting Supreme Court justice. Such comments diminish the public confidence in the integrity and independence of the federal judiciary in violation of Canons 1 and 2A." *See In re* Jud. Complaint Under 28 U.S.C. § 351, No. 04-24-90094, at 5 (Dec. 10, 2024) (mem.). The Fourth Circuit ruling was in response to a complaint filed in the First Circuit against the judge pursuant to the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351–364, which the Chief Justice transferred from the First Circuit to the Fourth Circuit. *Id.* at 1 & n.1. The senior judge responded to the ruling with a formal apology and acknowledgment of his error. *See* Letter from Michael Ponsor, Senior J., D. Mass., to Albert Diaz, C.J., 4th Cir. (Nov. 20, 2024) (on file with the *Iowa Law Review*).

The Chief's highly unusual action makes sense under the circumstances. But what doesn't make sense is that there are no established procedures for Justices in applying the Court's new code of ethics to recusal determinations. As the Justices know well, procedural regularity promotes better-reasoned decisions when crafted to promote more deliberate and more thoughtful consideration of all relevant factors and contrasting perspectives. That is true for any kind of decision-maker, whether a committee of many or only one person. And as talented and bright as the Justices may be, they are no exception, particularly when they are assuming the inevitably awkward responsibility of serving as the judges of their own conduct. They are more likely to make mistakes or, no less significantly, leave the impression that they are doing so. And not just to the biased observers. To the unbiased ones as well, including apparently their own colleagues.

II. LESSONS FROM STATE SUPREME COURTS

So what kinds of implementing procedures should the Justices use in administering their new code of ethics? And what might they consider in trying to fashion such procedures? They have apparently largely rejected the analogue offered by the Judicial Conference for lower-court judges on the ground that those judges, unlike Supreme Court Justices, can be readily replaced should recusal be warranted and, given the high stakes in Supreme Court cases, the risk of recusal being used to try to influence the outcome is far greater.

Barely tapped by any prior academic inquiry addressing the recusal of Supreme Court Justices is an alternative important source of information for crafting what procedures the U.S. Supreme Court and an individual Justice could and should embrace in administering the Court's newly announced recusal policy: what *state* supreme courts and their justices have done for decades in addressing the same issue.[103] These courts similarly provide the last word, as least on matters of state law, and, while some states have created procedures for substitute justices, it is not as routinely done as in the lower federal courts.

This Part of the Article examines the practices of state supreme courts because of the obvious lessons of both "dos" and "don'ts" they may offer to their federal counterpart.[104] This discussion is based on what I believe to be the first comprehensive survey of the recusal practices of state supreme court

103. *See supra* note 25 and accompanying text.

104. Two differences between states and the U.S. Supreme Court include, of course, that with the exception of Rhode Island, no state supreme court justices enjoy life tenure, and second, for many state supreme courts, the length of their tenure turns on elections and, accordingly, in theory, ethical issues may prompt voters to reject their reappointment. *See* Michael Milov-Cordoba, *Life Tenure Is a Rarity on State Supreme Courts*, BRENNAN CTR. FOR JUST. (Oct. 2, 2024), https://www.brennancenter.org/our-work/analysis-opinion/life-tenure-rarity-state-supreme-courts [https://perma.cc/4YFL-CHHN].

justices. The survey was sent in the summer of 2024 to justices on the highest courts of all fifty states and the District of Columbia. Justices from forty-two of those high courts responded, including many chief justices. The survey sought only factual information about the recusal practices of their respective courts. It did not ask for their own views on what the best practices should be. The survey topics included:

- Whether their state supreme court has nonmandatory, informal procedures their justices tend to follow in deciding whether to recuse from an individual case;
- Whether their state supreme court has mandatory procedures a judge must follow in deciding whether to recuse from an individual case; and
- Whether the decision to recuse is ultimately for the justice themselves or whether there is any other entity with authority to overturn or otherwise question a justice's decision not to recuse.

Based on the responses received, there was follow-up research into the state constitutional provisions, statutes, and judicial rules of the states governing judicial recusals both to determine whether there were written state laws to confirm the validity of the responses and to learn more about their application of those rules in individual matters.[105]

A. SUMMARY OF STATE SUPREME COURT RECUSAL SURVEY RESULTS

The survey results reveal that most state supreme courts, like the U.S. Supreme Court, have no mandatory procedures for enforcing their recusal policies.[106] They leave it to the justices to administer at their discretion. But the survey also reveals that a significant number of state supreme courts,

105. Unless otherwise indicated, the remainder of this Part presents the findings of the survey and cites follow-up research where appropriate.

106. Nor does the current Court's practice appear to be an outlier internationally. For instance, the Code of Judicial Conduct of the Supreme Court of the United Kingdom provides that "[t]he primary responsibility for deciding whether a particular activity or course of conduct is appropriate rests with the individual Justice." GUIDE TO JUDICIAL CONDUCT § 1.4 (UKSC 2019). Unlike for the U.S. Supreme Court, however, the United Kingdom Code expressly adds that "[i]n cases of doubt, a Justice should seek the advice of the President or Deputy President of the Court." *Id.* There is no suggestion in the United Kingdom Code, however, for a procedure to review and reverse a decision of an individual Justice. Notably, although there are twelve Justices on the United Kingdom Court, they decide most matters with panels of five, and have a panel of as many as eleven only when the issues presented are of great importance, meaning that there is always at least one Justice available to substitute for a Justice who recuses. *See* GRAEME COWIE & DAVID TORRANCE, THE UK SUPREME COURT 14 (2024), https://researchbriefings.files.parliament.uk/documents/CBP-9536/CBP-9536.pdf [https://perma.cc/BRP5-54ZM]. There do appear, however, to be instances in which the decision of whether a Justice should recuse was heard by the entire Court in South Africa and in a perplexing way by the Canadian Supreme Court, in which the entire Court heard the matter, but only the Justice at issue wrote an opinion. *See* Philip Bryden, *Legal Principles Governing the Disqualification of Judges*, 82 CANADIAN BAR REV. 555, 594–96 (2003). The highest courts in Germany are too structurally different from the United States to draw any useful analogies.

unlike the Supreme Court, have procedures that allow for a more considered determination by a justice whether recusal is warranted. And a significant number of state supreme courts go further still by embracing mandatory enforcement procedures that allow for justices on the court to order a colleague to recuse themselves from a particular case being heard.

The state supreme court survey further reveals the remarkable fact that, in extreme cases, all fifty states and the District of Columbia have available disciplinary procedures that in theory could lead to sanctions, including removal of a justice, for having failed to recuse in a case where recusal was required. As explained in more detail below,[107] this after-the-fact disciplinary option has in practice never been utilized in any state against a justice for failing to recuse, and appears to play no meaningful role in enforcing recusal policies. Nor does it have any remote applicability to the U.S. Supreme Court.

Finally, the state supreme court survey also casts doubt on the force of some of the concerns—while bolstering others—that U.S. Supreme Court Justices have raised to justify giving individual Justices complete discretion to decide recusal matters without any procedural oversight. For instance, the U.S. Supreme Court routinely contrasts its circumstances to those of lower federal courts. The Justices point out that if a federal trial judge or appellate judge recuses, there is a deep bench of ready substitute judges who can take their place.[108]

Not so for a U.S. Supreme Court Justice. If a Justice recuses, the cost is enormous. Missing a single Justice can result in the lack of a majority in a case that, as reflected in the very fact that it is before the Court, is of sufficient national importance to warrant a Supreme Court opinion.[109] That is why the Court's newly-issued code of ethics embraces the premise that "[a] Justice is *presumed* impartial and has an *obligation* to sit unless disqualified."[110]

On this factor, the experience of state supreme courts cuts both ways. Some state supreme courts, but not all, allow for temporary appointment of

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107. *See infra* notes 229–33 and accompanying text.

108. *E.g.*, JOHN G. ROBERTS, JR., 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 9 (2011), http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf [https://perma.cc/ET3E-RH63].

109. Statement on Ethics, *supra* note 7, at 2 ("A recusal consideration uniquely present for Justices is the impairment of a full court in the event that one or more members withdraws from a case."); *see* SUP. CT. CODE OF CONDUCT cmt. (2023) ("When hearing a case on the merits, the loss of one Justice is 'effectively the same as casting a vote against the petitioner. The petitioner needs five votes to overturn the judgment below, and it makes no difference whether the needed fifth vote is missing because it has been cast for the other side, or because it has not been cast at all.'" (quoting Cheney v. U.S. Dist. Ct. for D.C., 541 U.S. 913, 916 (2004) (mem. of Scalia, J.))). Justice Kagan has more recently publicly modified her position to raise the possibility of review of a Justice's recusal decision by a panel of federal appellate judges. *See supra* note 89 and accompanying text.

110. SUP. CT. CODE OF CONDUCT Canon 3(B)(1) (emphases added).

substitute justices.[111] To the extent that such substitutes are allowed by some states, those state courts are clearly not analogous to the U.S. Supreme Court in terms of the institutional costs of recusal, but are more akin to lower federal courts.

Second, all nine Justices agreed in a joint statement in April 2023 that it would be inappropriate for anyone other than the Justices themselves, including the Justices' own colleagues, to decide that recusal is required: "If the full Court or any subset of the Court were to review the recusal decisions of individual Justices, it would create an undesirable situation in which the Court could affect the outcome of a case by selecting who among its Members may participate."[112] Yet, here a different lesson is told by the experience of those states that allow for such peer review. Their experience does not deny that such acrimony within a court may result,[113] but that appears to happen rarely and the advantage of peer approval is significant. In not one case over dozens of years has a state justice's failure to recuse been rejected in either any of the fourteen states that allow for the reversal of a justice's decision not to recuse, or in any of the fifty states that provide for the disciplining of a justice who fails to recuse when required.[114] And, of course, one reason that may be so is that justices subject to either such regime have an added incentive to be rigorous in their recusal decisions in the first instance.[115]

Finally, all nine Justices in that same joint April 2023 statement questioned the efficacy of a Justice publicly disclosing their basis for recusal. The statement suggested that "[i]n some cases, public disclosure . . . would be ill-advised."[116] The example offered was when disclosure "might encourage strategic behavior by lawyers who may seek . . . recusals in future cases."[117] The statement, however,

111. The States of Washington, Hawaii, Missouri, Tennessee, and Mississippi all allow for substitute justices, while Michigan and Indiana do not. *See* State Survey, *supra* note 1 (showing that substitute justices are available in Washington and Missouri, with the latter being picked by the Chief Justice, while Michigan and Indiana provide no mechanism for substitution of recused justices); HAW. R. APP. P. 5(d); TENN. CONST. art. VI, § 11 (authorizing state legislature to pass legislation to allow for the naming of substitute judges); MISS. CONST. art. 6, § 165 (stating that if a justice is disqualified and the parties cannot agree on his replacement, the governor may appoint a replacement to preside over the matter); MICH. CT. R. 2.003(D)(4)(c) ("In the Supreme Court, when a justice is disqualified, the underlying action will be decided by the remaining Justices of the Court.").

112. Statement on Ethics, *supra* note 7, at 2.

113. The most infamous instance when a dispute between Justices caused a major fission on the Court, which became public, was between Justice Robert Jackson and Justice Black regarding the latter's failure to recuse from a case in which his former law firm was counsel to a party. *See infra* note 260 and accompanying text.

114. *See* State Survey, *supra* note 1.

115. As discussed below, however, another explanation might be that a Justice's colleagues are naturally reluctant to create precedent that might in a subsequent matter be applied to their decision not to recuse. *See infra* notes 170–71 and accompanying text.

116. Statement on Ethics, *supra* note 7, at 2.

117. *Id.*

further acknowledged the possibility that when such "concerns are not present, a Justice may provide a summary explanation of a recusal decision" and in others "an extended explanation."[118] There is no hint in the public record in the states that those public explanations have proven problematic.

B. JUSTICE CONSULTATION OPPORTUNITIES

Many of the state supreme court justices, regardless of whether or not they are subject to mandatory procedural requirements for considering recusal motions, reported that they do not rely only on their own judgment but also rely on the advice of others with whom they consult. According to multiple justices on the Arizona Supreme Court, they consult with the attorney who leads the state's judicial conduct commission for advice prior to making a decision.[119] According to a justice on the California Supreme Court, the court has a designated staff person to assist in resolving recusal issues as well as a court-created committee devoted to judicial ethics, which publishes opinions that interpret the state's code of judicial ethics.[120]

In Colorado, the justices discuss recusal issues as a group and also have an in-house counsel to the judicial department available for consultation.[121] In Washington, D.C., the D.C. Court of Appeals judges consult with the Advisory Committee on Judicial Conduct consisting of several judges who field inquiries about recusal.[122] In Hawaii, Hawaii Supreme Court Rule 8.15 grants the Hawaii Commission on Judicial Conduct the power to issue advisory opinions, typically written generically without naming names, interpreting the Hawaii Revised Code of Judicial Conduct.[123] The Idaho Judicial Council has an executive director who can provide advice to the justices, upon request;[124] and the Indiana Judicial Qualifications Committee can issue both formal advisory opinions and informal guidance of Commission staff.[125] Other states with general consultation options include Kentucky,[126] Minnesota (where "the Court's internal manual encourages the Justice to seek privilege[d] counsel

118. *Id.* at 2–3.
119. State Survey, *supra* note 1.
120. *Id.*
121. *Id.*
122. *Id.*
123. *See* HAW. SUP. CT. R. 8.15(a).
124. State Survey, *supra* note 1.
125. *Id.*
126. KY. SUP. CT. R. 4.310.

from the Supreme Court Commissioner . . . [and] the court's lawyer"),[127] North Dakota,[128] Ohio,[129] Tennessee,[130] and Utah.[131]

New York has an especially robust procedure, creating an added incentive for a justice to seek advice. If a justice asks the Advisory Committee for Judicial Ethics for written guidance as to whether a particular course of conduct would comport with the ethical rules and the Committee indicates that it would (or would with caveats), the justice is insulated from disciplinary action even if the Conduct Commission subsequently determines that the ethical rules were violated. The Advisory Committee can also give informal advice, which is quicker but does not provide the insulation afforded by a written opinion. "The written advice is published and searchable, and the insulating benefits apply to other [justices and] judges who follow the guidance, even if they made no request themselves."[132]

C. *ORDERING RECUSAL*

Ten states provide that parties to a case may file motions to recuse and that a justice's decision not to recuse is not the last word.[133] The only practical difference within those states is whether a party must formally appeal a justice's decision not to recuse to that higher authority or whether it is automatically reviewed without the necessity of a party filing a formal appeal.

In Massachusetts,[134] Michigan,[135] Minnesota,[136] Mississippi,[137] Oregon,[138] and Tennessee,[139] the justice whose disqualification is sought decides the

127. State Survey, *supra* note 1.

128. *Id.*

129. *Id.*

130. *Id.*; *see Judicial Ethics Committee*, TENN. CTS. (2025), https://www.tncourts.gov/boards-commissions/boards-commissions/judicial-ethics-committee [https://perma.cc/W3DR-CANP].

131. State Survey, *supra* note 1.

132. *Id.*; *cf.* N.Y. JUDICIARY LAW § 212(2)(*l*)(iv) (Consol. 2006 & Supp. 2023) ("Actions of any judge or justice of the uniform court system taken in accordance with findings or recommendations contained in an advisory opinion issued by the panel shall be presumed proper for the purposes of any subsequent investigation by the state commission on judicial conduct.").

133. My survey responses suggested that this was true for an eleventh state. State Survey, *supra* note 1 ("For the most part, a recusal is an individual decision. However, a majority (4 judges) can disqualify a judge. But in [thirteen years] . . . on the Court it never happened."). But I could not find any source of that state's law that backed up that statement.

134. MASS. SUP. JUD. CT. R. 1:22(b).

135. MICH. CT. R. 2.003(D)(1)(c), (D)(3)(a).

136. MINN. R. APP. P. 141.01(b)–(c).

137. MISS. R. APP. P. 48C(a)(iii).

138. OR. R. APP. P. 8.30(3); *see also* OR. REV. STAT. § 14.210 (2023) (specifying statutory grounds for judicial disqualification); OR. CODE OF JUD. CONDUCT R. 3.10(A) (2013) (noting that "[a] judge shall disqualify himself or herself in any proceeding in which a reasonable person would question the judge's impartiality" and specifying circumstances under which disqualification is required).

139. TENN. SUP. CT. R. 10B, § 3.03(a).

motion in the first instance, but if that justice denies the motion, the moving party can seek review and potential reversal by a reviewing court. In Hawaii,[140] Nevada,[141] and Texas,[142] the only difference is that if a justice denies the recusal motion, it is automatically reviewed by the full court. Finally, in Vermont, the justice whose disqualification is sought must either grant the motion themselves or refer it to the full court for a decision. They have no option to unilaterally deny the motion.[143]

There are significant differences in approaches apart from whether review of a justice's denial of a motion triggers automatic Supreme Court review. Some state supreme courts make clear that the justice whose participation is at issue is not allowed to vote as a member of the otherwise full court on the validity of the denial, including Massachusetts,[144] Nevada,[145] Tennessee,[146] and Texas.[147] In Hawaii, the justice who is the subject of the recusal motion does not participate, but a substitute justice will be appointed by the chief justice for the limited purpose of deciding the recusal issue.[148] In Vermont, the justice does not participate unless needed for quorum.[149] Mississippi is an example of a state that has full court participation,[150] as Nevada once did.[151]

The standard of review on further review differs among the states. For Massachusetts, it is an abuse of discretion standard.[152] For Michigan, the standard of review is de novo.[153] Another difference is whether the justice who denies a motion to recuse must state reasons for the denial. In Michigan,[154]

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140. HAW. R. APP. P. 5(d).

141. NEV. REV. STAT. § 1.225(4) (2023).

142. TEX. R. APP. P. 16.3(a)–(b) ("The motion must be filed promptly after the party has reason to believe that the justice or judge should not participate in deciding the case. . . . [T]he challenged justice or judge must either remove himself or herself from all participation in the case or certify the matter to the entire court, which will decide the motion by a majority of the remaining judges sitting en banc.").

143. *See* VT. R. APP. P. 27.1(b)(2).

144. MASS. SUP. JUD. CT. R. 1:22(b).

145. NEV. REV. STAT. § 1.225(4)–(5).

146. TENN. SUP. CT. R. 10B, § 3.03(a).

147. TEX. R. APP. P. 16.3(b).

148. HAW. R. APP. P. 5(d); HAW. REV. STAT. § 602-10 (2016) ("In case of a vacancy, . . . the place of such justice may be temporarily filled by a circuit judge designated by the chief justice or by the appointment of a justice who has retired from the supreme court.").

149. VT. R. APP. P. 27.1(b)(3).

150. MISS. R. APP. P. 48C(a)(iii) ("[S]uch decision shall be subject to review by the entire court . . . .").

151. *See infra* note 183.

152. Commonwealth v. Rivera, 39 N.E.3d 732, 733–34 (Mass. 2015) (involving review of a single justice's denial of criminal defendant's motion to recuse).

153. MICH. CT. R. 2.003(D)(3)(b).

154. *Id.*

Minnesota,[155] and Tennessee[156] a statement is required, in Massachusetts it is "encouraged,"[157] and in Hawaii,[158] Nevada,[159] and Oregon[160] it is optional.

Finally, while in most states (Massachusetts,[161] Michigan,[162] Mississippi,[163] Nevada,[164] Tennessee,[165] Texas,[166] and Vermont[167]), the state's supreme court is the ultimate decider of the recusal issue, there are a few permutations. Oregon's procedure assigns the decision to the chief justice but then the chief has discretion to send the question to the full court.[168] Minnesota follows a very different procedure: Review is conducted by a randomly selected three-member panel designated as acting justices for the purposes of resolving such motions.[169]

Most remarkably, however, in none of the states that allow for a justice's decision to be reviewed and to be reversed has the state supreme court or other reviewing panel ever taken that drastic action.[170] In dozens of years, there is not a single instance of a justice being ordered to recuse. Of course, there are several possible explanations, with quite differing import.

It might of course be because no justice has ever mistakenly denied a motion to recuse: All justices take seriously their duty to recuse and never deny a motion that should be granted. Or it could be because the reviewing justices are deterred from reversing a colleague's decision for reasons of collegiality or concerns about their own discretionary authority to recuse should a future motion be directed to them. The precedent of overturning a colleague's recusal decision may make it easier to do so again in the future, perhaps even for retaliatory purposes.

The absence of any former reversals by the court might also mask the fact that the mere prospect of such review by one's peers causes the justice in

155. MINN. R. APP. P. 141.01(b).
156. TENN. SUP. CT. R. 10B, § 3.03(a).
157. MASS. SUP. JUD. CT. R. 1:22(b).
158. HAW. R. APP. P. 5(d).
159. NEV. R. APP. P. 35(b)(2).
160. OR. R. APP. P. 8.30(3)(b)(i).
161. MASS. SUP. JUD. CT. R. 1:22(b).
162. MICH. CT. R. 2.003(D)(3)(b).
163. MISS. R. APP. P. 48C(a)(iii).
164. NEV. REV. STAT. § 1.225(4) (2023).
165. TENN. SUP. CT. R. 10B, § 3.03(a).
166. TEX. R. APP. P. 16.3(b).
167. VT. R. APP. P. 27.1(b)(2).
168. OR. R. APP. P. 8.30(3)(b)(i)–(ii). If the recusal motion is directed, however, to the chief justice, then the next most senior justice assumes the role of the chief for purposes of considering whether recusal is warranted. *Id.*
169. MINN. R. APP. P. 141.01(c). In the highly unusual case of *MacDonald v. Simon*, one Minnesota Supreme Court justice declined to participate at all. The six remaining justices all recused and in their place appointed "a neutral and disinterested panel of acting justices" from the state appellate and trial court bench to decide the case. *See* Order Appointing Acting Justices to Determine the Petition at 2–3, MacDonald v. Simon, 12 N.W.3d 445 (Minn. 2024) (No. A24-1022).
170. *See supra* notes 113–14 and accompanying text.

question to more readily recuse to avoid a possible adverse ruling by colleagues, which would be professionally embarrassing. My data does not extend to whether justices are more likely to recuse to avoid further review or, further along in the process, to recuse once they realize that their colleagues harbor serious concerns.

The absence of any court ordering a justice to recuse does not, however, mean that those rulings have all been unanimous. There have been a few occasions where one or more justices have dissented. And within those dissents, there is evidence of the very rancor and disruption of collegiality that the U.S. Supreme Court has suggested is a reason not to allow for such collegial oversight.[171]

For instance, when the Michigan Supreme Court decided in 2009 to change its rule to allow for such full court oversight, dissenting justices asserted that it was unconstitutional for some justices to order recusal of other justices.[172] They further argued that the vagueness of the "appearance of impropriety" standard rendered an order of mandatory recusal a violation of a justice's due process and First Amendment rights.[173] Mississippi is another state in which some friction between the justices has resulted from each other's recusal decisions. In *Hyundai Motor America v. Applewhite*, Presiding Supreme Court Justice King dissented in a recusal review matter, accusing the Chief Justice of "completely ignor[ing]" the state's code of judicial conduct, which requires judges to "disqualify themselves in proceedings in which their impartiality might [reasonably] be questioned."[174]

Nevada's experience with full court review has mostly yielded only unanimous rulings,[175] but on a few occasions it has resulted in some sharply

171. *See supra* text accompanying notes 88–92.

172. Pellegrino v. AMPCO Sys. Parking, 789 N.W.2d 777, 787–804 (Mich. 2010) (mem.) (statements of Corrigan and Young, JJ., not participating).

173. *Id.* at 800–01.

174. Hyundai Motor Am. v. Applewhite, 319 So. 3d 987, 1020 (Miss. 2021) (King, Presiding J., dissenting). According to Presiding Justice King, there was an objectively reasonable basis to doubt the Chief Justice's impartiality in this case. Because Horne—the Chief Justice's law clerk—was a material witness in the case, "her credibility [was] an important factor" in the court's decision. *Id.* at 1019. "[E]mployment as a law clerk suggests a high degree of trust," Presiding Justice King pointed out. *Id.* Thus, it would be reasonable for both the public and the parties to assume that the Chief Justice would have difficulty "objectively weigh[ing] the testimony and credibility of a law clerk in his . . . employ." *Id.* Nor, in Presiding Justice King's view, did Chief Justice Randolph's compliance with Rule 48C's notification requirement absolve him of responsibility for his improper failure to recuse. *Id.* at 1020. Presiding Justice Kitchens also dissented, joined in relevant part by Presiding Justice King, arguing that the Chief Justice was being "highly inconsistent." *Id.* at 1018 (Kitchens, Presiding J., dissenting).

175. *See, e.g.*, Shahrokhi v. Eighth Jud. Dist. Ct. *ex rel.* County of Clark, No. 85705, 2023 WL 1438754, at *2 n.4 (Nev. Jan. 4, 2023) (unpublished disposition) (summarily denying motion to disqualify two supreme court justices); Taylor v. Brill, 521 P.3d 782, 783–84 (Nev. 2022) (concluding that disqualification was not required under Nevada Code of Judicial Conduct because the supreme court justice did not previously "preside" over the matter during earlier stages of litigation); Olausen v. Nev. Comm'n on Jud. Discipline, No. 58719, 2013 WL 309197,

worded language by one or more dissenting justices about the integrity of another justice. In *Nevius v. Warden*, for instance, the court denied appellant Thomas Nevius's motion to disqualify Justice Cliff Young.[176] The motion was based on: (1) Justice Young's relationship with the attorney general, who had supported Justice Young's campaign for judicial office; and (2) public statements the justice had made concerning his pro-death penalty record—namely, that "[the justice] had voted to uphold the death penalty seventy-six times."[177] In a per curiam opinion, the court concluded that the appellant's allegations "[did] not constitute a disqualifying bias or the appearance thereof."[178]

Justice Springer dissented.[179] "If the public praise and endorsement of Justice Young by the attorney general were not enough in itself," Justice Springer wrote, "Justice Young's putting forth his 'record' of fighting crime rather than judging crime adds up, in my opinion, to an unacceptable appearance of bias in this case."[180]

Another example is *Martin v. Beck*,[181] in which the Nevada Supreme Court rejected appellant's motion to disqualify Justice Rose.[182] Justice Rose—who was the subject of the motion—participated in the decision.[183] Justice Springer concurred in part and dissented in part.[184] Justice Springer challenged the propriety of Justice Rose's participation in the court's decision. "The problem with the majority opinion," he wrote, "is that one of the majority justices is

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at *1 n.1 (Nev. Jan. 24, 2013) (summarily rejecting motion to disqualify under the rule of necessity); Blandino v. Carr, No. 52719, 2009 WL 3195301, at *1 n.1 (Nev. Sept. 9, 2009) (summarily denying motion to disqualify one retired justice and one sitting justice); Ainsworth v. Combined Ins. Co. of Am., 774 P.2d 1003, 1007–08, 1026 (Nev. 1989) (per curiam) (summarily rejecting party's motion to disqualify former chief justice and concluding that because motion alleged "no legally competent grounds supporting a reasonable inference of bias . . . . the hearing before unchallenged justices that is provided under NRS 1.225(4) is inapplicable"), *abrogated on other grounds by* Powers v. United Servs. Auto. Ass'n, 962 P.2d 596 (Nev. 1998).

176. Nevius v. Warden, Nev. State Prison, 944 P.2d 858, 859 (Nev. 1997) (per curiam).

177. *Id.*

178. *Id.*

179. *Id.* at 859–61 (Springer, J., dissenting).

180. *Id.* at 860–61. Justice Springer's dissent—unlike the majority opinion—discusses the issue in the underlying case. *Id.* at 859–60 ("Nevius seeks rehearing principally because of evidence that a prosecutor made the following out-of-court comment to one of Nevius' attorneys: 'You don't think I wanted all of those n[*****]s on my jury do you?'"). Justice Springer also clarified that he would not necessarily support Justice Young's disqualification "in every case in which his political ally in law enforcement is counsel of record" but that the specific facts surrounding Nevius's motion were grounds for his disqualification "in *this* death case." *Id.* at 861.

181. Martin v. Beck, 915 P.2d 898, 898 (Nev. 1996).

182. *Id.* at 899.

183. *See id.* at 899–900 (Rose, J., concurring). In 2015, Nevada law shifted to provide that a hearing on a motion to recuse a justice "shall be had before the *other* justices of the Supreme Court." *See* NEV. REV. STAT. § 1.225(4) (2023) (emphasis added).

184. *Martin*, 915 P.2d at 900 (Springer, J., concurring in part and dissenting in part).

Justice Rose, who, again, is not only sitting in judgment of his own qualifications, *he is the deciding or 'swing vote' in making the decision.*"[185]

Finally, in response to my State Survey, a justice from a fourth state commented that a colleague on the court had repeatedly failed to recuse in cases involving his father, a high-ranking government official. As described by the justice,

> [t]his has resulted in tremendous public criticism of the court and opaque partisan accusations against another judge that she should recuse when based on flimsy accusations, seeming to try to 'even the score' so the son [of the high ranking state official] can continue to participate in matters where the appearance of his impropriety in doing so is manifest.[186]

There is clearly an internal institutional cost, accordingly, even if not public, from the failure of a justice to recuse when they should.

On balance, the experience of those states that allow for the full court to reverse a colleague's decision not to recuse does not bear out the U.S. Supreme Court's concerns about such a review process causing significant and lasting damage to relations within the Court itself. To be sure, some harsh words have occurred, but very rarely.[187] And when they have occurred, they are not remotely as biting and frequent as what Supreme Court Justices (unfortunately) regularly launch at each other in the Court's most high-profile, divisive cases.[188]

D. DISCIPLINING PAST FAILURES TO RECUSE

Left completely unnoticed, moreover, by prior scholarship is that all fifty states and the District of Columbia currently provide procedures that in theory would allow for the *after the fact* discipline of judges, including supreme court justices, for having failed to recuse in a matter where recusal was required. Based largely upon an ABA Model "Standards Relating to Judicial Discipline and Disability Retirement,"[189] every state has adopted a procedure that provides for the sanctioning of judges, including justices, for judicial misconduct. Because the scope of misconduct includes violation of codes of ethics and those ethical codes in turn extend to recusal requirements, the upshot is that a justice could be sanctioned for failure to recuse.[190] Available sanctions under these state programs for judicial misconduct include private

185. *Id.* (emphasis added).

186. State Survey, *supra* note 1.

187. It is of course possible that there is lasting harm caused by harsh criticism exchanged in private and not in public written opinions, which my research could miss.

188. *See supra* note 32 and accompanying text.

189. *See* MODEL RULES FOR JUD. DISCIPLINARY ENF'T preface (AM. BAR ASS'N 2018), https://www.americanbar.org/groups/professional_responsibility/model_rules_judicial_disciplinary_enforcement/preface [https://perma.cc/7QWK-BABK].

190. *See supra* Section II.C.

reprimand, admonishment, professional counseling, public censure, involuntary retirement, and removal.[191]

No doubt because of their common ABA origins, the states' disciplinary programs all include the same essential elements, with some incidental permutations here and there in nomenclature and in the assignment of investigative and adjudicatory responsibilities. They include a commission on judicial conduct, comprised of lower court judges, members of the bar, and nonattorney citizens selected by judges, governors, and legislative leaders for fixed terms.[192] These commissions either themselves conduct investigations and adjudications or have hearing boards and disciplinary counsel who do so on their behalf. Depending on the state, the commission might be empowered to impose some less significant sanctions on a judge but any harsh sanction, including of a justice—such as a commission recommendation of suspension, involuntary retirement, or removal—would be ultimately subject to state supreme court review.[193]

A few state programs make clear that the act of removal (or retirement) would require legislative action.[194] Others, like the Kentucky Supreme Court, have expressly ruled that the commission "does not have the authority to permanently remove a judge from office."[195] The court reasoned that a grant of such authority would infringe the state legislature's exclusive powers of impeachment.[196]

Hawaii's approach is typical of most states. The Hawaii Commission on Judicial Conduct has jurisdiction to investigate alleged misconduct of any state court judge, including supreme court justices.[197] Upon receipt of a written

191. *See, e.g.*, HAW. SUP. CT. R. 8.9(f).

192. *See, e.g.*, *Judicial Conduct Commission*, KY. CT. JUST., https://www.kycourts.gov/Courts/Pages/Judicial-Conduct-Commission.aspx [https://perma.cc/FTB2-C82V]; MICH. JUD. TENURE COMM'N, http://jtc.courts.mi.gov/index.php [https://perma.cc/53BJ-28A2]; *Commission on Retirement, Removal and Discipline*, MO. CTS., https://www.courts.mo.gov/page.jsp?id=230 [https://perma.cc/6Z6Z-HJQN]; *Board of Judicial Conduct (BJC)*, TENN. CTS., https://www.tncourts.gov/board-of-judicial-conduct [https://perma.cc/T8JW-AMBW]; UTAH CODE ANN. § 78A-11-103 (LexisNexis 2018); VT. SUP. CT. DISCIPLINARY CONTROL OF JUDGES R. 4.

193. Massachusetts is an exception. In Massachusetts, "[t]he Supreme Judicial Court generally is responsible for the discipline of judges." State Survey, *supra* note 1. However, Massachusetts law provides, "[t]he chief justice and the six most senior justices of the appeals court other than the chief justice shall serve in the place of the supreme judicial court when charges are brought against a member of the supreme judicial court." MASS. GEN. LAWS ch. 211C, § 9 (2022).

194. *See, e.g.*, TENN. CODE ANN. § 17-5-310(a) (2021) (providing that, if the supreme court affirms the disciplinary board's recommendation of removal, "the recommendation . . . must be transmitted to the general assembly for a final determination"); TENN. CONST. art. VI, § 6 (specifying procedures for legislative removal of state judges). For historical perspective, see generally John T. Nugent, Note, *Removal of Judges by Legislative Action*, 6 J. LEGIS. 140 (1979) (discussing legislative involvement in judicial removal decisions over time).

195. Jameson v. Jud. Conduct Comm'n, 701 S.W.3d 236, 242 (Ky. 2024).

196. *Id.* at 283.

197. *See* HAW. SUP. CT. R. 8.2(b).

complaint, on its own motion, or on any other "reasonable basis,"[198] the Commission may investigate any judge whose failure to recuse putatively violates Hawaii's Code of Judicial Conduct.[199] The Commission will conduct an initial investigation and evaluation of the alleged misconduct.[200] If, upon concluding this investigation, the Commission finds sufficient information and cause to proceed, it may either: (1) recommend a disposition to the supreme court;[201] or (2) if it determines that additional proceedings are necessary, request that the supreme court appoint a special counsel to investigate further.[202]

Upon the conclusion of either the Commission's or the special counsel's investigation (which may include a formal hearing),[203] as applicable, the Commission will file a report with the Hawaii Supreme Court.[204] The Commission may also recommend sanctions as provided in Rule 8.6(i) (private reprimand, admonition, professional counseling or assistance, or conditions on the judge's conduct) or Rule 8.9(f) (removal, retirement, limitations or conditions on performance on judicial duties, professional counseling or assistance, private informal admonition, private reprimand, public censure, referral to the Office of Disciplinary Counsel and Disciplinary Board, or any combination thereof).[205] Finally, following receipt of the Commission's report and in keeping with the procedures in Rule 8.10, "the [supreme] court shall promptly enter an appropriate order" to dispose of the matter.[206] Any supreme court justice who is the subject of a disciplinary charge is automatically disqualified from hearing the matter.[207]

There are, however, some significant differences in some state approaches, including some evidentiary limits that render it especially hard to find a

198. HAW. SUP. CT. R. 8.6(a).

199. *See* HAW. SUP. CT. R. 8.5(a) ("Grounds for discipline shall include . . . [a]ny conduct that constitutes a violation of the Code of Judicial Conduct . . . ."); *see also* HAW. REVISED CODE OF JUD. CONDUCT R. 2.11(a) (STATE OF HAW. JUDICIARY 2008) ("[A] judge shall disqualify or recuse himself or herself in any proceeding in which the judge's impartiality[] might reasonably be questioned . . . .").

200. HAW. SUP. CT. R. 8.6(f).

201. HAW. SUP. CT. R. 8.6(i).

202. HAW. SUP. CT. R. 8.6(g); HAW. SUP. CT. R. 8.7 ("The supreme court, however, may also, upon receipt of the report from the Commission pursuant to Rule 8.6 of these Rules, review the record *de novo* and, in its discretion, appoint special counsel *sua sponte*.").

203. HAW. SUP. CT. R. 8.9.

204. HAW. SUP. CT. R. 8.6(i), 8.9(f), 8.10.

205. HAW. SUP. CT. R. 8.6(i), 8.9(f)(2).

206. HAW. SUP. CT. R. 8.10.

207. HAW. SUP. CT. R. 8.11 (confirming that, except as provided in Rule 8.11, charges against supreme court justices proceed in the same manner as charges against lower-court judges, and further specifying the procedures for appointing replacement judges if the requisite panel of three qualified supreme court justices cannot be assembled to preside over the matter); *see also* HAW. SUP. CT. R. 8.2(e)(2) ("The power to enforce [the discovery] process may be delegated by the supreme court to any other court.").

violation. For instance, in Massachusetts, the Massachusetts Supreme Judicial Court ruled unanimously in 2012 that "judicial deliberative privilege" exempts judges from being questioned in any proceedings about their nonpublic "mental impressions and thought processes" and from turning over confidential communications among judges and court staff related to their deliberative process.[208] In New York, almost all recusal decisions are left to discretion of justices except for a few mandatory categories related to traditional financial interest conflicts.[209]

Ohio is distinct from most other states because of its especially robust procedures for investigating and sanctioning state supreme court justices and because the final decision is not made by the state supreme court, but by lower court of appeals judges. In Ohio, grievances that allege misconduct by a sitting justice must be filed with its Office for Disciplinary Counsel.[210] If, upon its initial review, that office determines that the grievance alleges an ethical violation, it must forward the grievance to the Chief Justice of the Court of Appeals, which is a distinct judicial position in Ohio, for further proceedings.[211] Upon receiving a grievance from the disciplinary counsel, the Chief Justice of the Court of Appeals draws lots to select a three-member review panel of appellate judges.[212] The review panel notifies the justice, who is given fourteen days to provide a written response.[213] After receiving the response—or if no response is provided—the panel has thirty days to determine if there is good cause for further investigation.[214] If no good cause is found, the grievance is dismissed.[215]

If good cause is found, the Chief Justice of the Court of Appeals appoints a special disciplinary counsel to conduct further investigation.[216] After the investigation, the special counsel may recommend dismissing the grievance or file a formal complaint with the Chief Justice of the Court of Appeals if credible evidence of misconduct is found.[217]

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208. *In re* Enf't of Subpoena, 972 N.E.2d 1022, 1032–35 (Mass. 2012).

209. People v. Glynn, 999 N.E.2d 1137, 1139 (N.Y. 2013); N.Y. JUD. LAW § 14 (Consol. 2006) ("A judge shall not sit as such in, or take any part in the decision of, an action, claim, matter, motion or proceeding to which he is a party, or in which he has been attorney or counsel, or in which he is interested, or if he is related by consanguinity or affinity to any party to the controversy within the sixth degree."); *see also In re* Murphy, 626 N.E.2d 48, 50 (N.Y. 1993) ("The Code of Judicial Conduct requires a Judge's recusal when his or her 'impartiality might reasonably be questioned' . . . . Absent a legal disqualification, however (*see, e.g.*, Judiciary Law § 14), a Judge is generally the sole arbiter of recusal . . . ."); *cf.* People v. Moreno, 516 N.E.2d 200, 201 (N.Y. 1987) ("Absent a legal disqualification under Judiciary Law § 14, a Trial Judge is the sole arbiter of recusal. This discretionary decision is within the personal conscience of the court . . . .").

210. OHIO SUP. CT. JUD. GOV'T R. II, § 2(B).

211. *Id.*

212. *Id.* § 4(A)(1).

213. *Id.*

214. *Id.* § 4(A)(2).

215. *Id.*

216. *Id.* § 4(B)(1)(a)(i).

217. *Id.* § 4(B)(2)(a).

Once a formal complaint is filed, a probable cause panel, consisting of three former members of the Board of Professional Conduct, reviews the complaint and investigatory materials.[218] This panel does not hold a hearing but makes an independent determination based solely on the written materials.[219] Upon making its determination, "the panel . . . issue[s] an order to the Chief Justice of the Court of Appeals certifying the complaint, in whole or in part, or dismissing the complaint and investigation in its entirety."[220] If the case moves forward, "a hearing panel of three fulltime trial court judges" is appointed.[221] The hearing panel holds a formal hearing where evidence is presented by both sides.[222] The panel may dismiss the complaint if the evidence is insufficient, or, if a majority finds clear and convincing evidence of misconduct, it submits a certified report with its findings and recommended sanctions to the Chief Justice of the Court of Appeals.[223]

Finally, an adjudicatory panel of thirteen appellate judges, led by the Chief Justice of the Court of Appeals, reviews the hearing panel's report.[224] The adjudicatory panel may hear oral arguments if objections are raised to the findings.[225] After deliberation, the panel issues a final order "as it finds proper."[226] "The [Ohio] Supreme Court Reporter [must] publish the disciplinary order in the *Ohio Official Reports*."[227] There is no review by any justice on the Ohio Supreme Court.[228]

But here again is the rub. With only one extreme exception, in neither Ohio nor any of the forty-nine other states has a supreme court justice been disciplined for failing to recuse.[229] The one exception is Alabama when in

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218. *Id.* § 4(C)(1). Alternatively, the justice named in the complaint may choose to waive the independent probable cause requirement. *Id.*

219. *Id.*

220. *Id.*

221. *Id.* § 4(C)(2)(a).

222. *See id.* § 4(C)(3). All hearings are recorded by a court reporter, and the panel may grant continuances for good cause. *Id.*

223. *Id.* § 4(C)(4)–(5).

224. *Id.* § 4(D)(1).

225. *Id.* § 4(D)(4).

226. *Id.*

227. *Id.* § 4(D)(5).

228. *See id.* § 4(D)(4).

229. There is, however, one outstanding state supreme court justice recusal disciplinary matter still pending. On October 11, 2024, the Maine Committee on Judicial Conduct submitted a report, amended on December 16, 2024, to the Maine Supreme Court recommending that Justice Connors be disciplined for failing to recuse herself from two foreclosure cases decided earlier that year. Report to the Supreme Judicial Court Recommending Disciplinary Action at 5–7, *In re* Connors, No. 24-2 (Me. Oct. 11, 2024); Amended Report to the Supreme Judicial Court Recommending Disciplinary Action, *In re* Connors, No. 24-3 (Me. Dec. 16, 2024) (reclassified from No. 24-2). The Maine Supreme Court has not yet acted on the recommendation of the Committee on Judicial Conduct that the state supreme court publicly reprimand Justice Connors. *See, e.g.*, *In re* Complaint Against Resnick, 842 N.E.2d 31, 31–32 (Ohio 2005)

2016, the Alabama Supreme Court affirmed the Alabama Court of the Judiciary's unanimous ruling that then-Chief Justice Roy Moore had violated the state ethics code by, among other reasons, failing to recuse himself from participating in a case before the state supreme court.[230] The Alabama Court of the Judiciary had previously removed Moore from the Chief Justice position in 2004 for defying a binding federal court order to remove a monument to the Ten Commandments from the courthouse,[231] only to have him elected Chief Justice again in 2012.[232] In 2016, the Alabama Supreme Court suspended Moore for the remainder of his term.[233]

Of course, as with the absence of any state supreme court ordering a justice to recuse, the absence of any formal disciplinary action by a state for a justice's failure to recuse when required does not mean that the availability of an investigative body and the possibility of discipline are without effect. It is just as likely, if not more likely, that the mere prospect of their availability affects the way a justice treats a motion to recuse. The mere threat of review, standing alone, could understandably prompt a justice to consider more closely a recusal motion. And it could also understandably prompt a justice to be more likely to grant the motion to avoid triggering the subsequent review process.

On the other hand, it is striking that the results of my survey of state supreme court justices exhibited little acknowledgment that the disciplinary process for judicial misconduct might apply to recusal decisions. Only four justices from four states responded to my survey question asking whether their recusal rulings were subject to further review by referring to the possibility that a wrongful recusal could lead to a disciplinary sanction.[234] All the others

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(accepting stipulated sanction of public reprimand for a justice found to have violated the Code by driving while under the influence of alcohol).

230. *See generally* Moore v. Ala. Jud. Inquiry Comm'n, 234 So. 3d 458 (Ala. 2017) (per curiam), *overruled on other grounds by* Jinks v. Ala. Jud. Inquiry Comm'n, 375 So. 3d 755 (Ala. 2022).

231. *See generally* Moore v. Jud. Inquiry Comm'n of Ala., 891 So. 2d 848 (Ala. 2004) (per curiam) (affirming Moore's removal from office).

232. Kim Chandler, *Roy Moore Wins Chief Justice Race*, AL.COM (Nov. 7, 2012, 3:59 AM), https://www.al.com/spotnews/2012/11/roy_moore_bob_vance_chief_just.html [https://perma.cc/F97F-SHXX].

233. Kent Faulk, *Roy Moore's Suspension Upheld by Alabama Supreme Court; Decision Next Week on Senate Race*, AL.COM (Apr. 19, 2017, 4:43 PM), https://www.al.com/news/birmingham/2017/04/suspended_alabama_supreme_cour.html [https://perma.cc/QRP3-A6XC]; *Moore*, 234 So. 3d at 488.

234. *See* State Survey, *supra* note 1 ("I think the backstop of the Commission on Judicial Discipline is important. *Although we each exercise independent judgement, we do know that we can be held accountable by a neutral decisionmaker if we are accused of a failure to comply with our ethical obligations.*" (emphasis added)); *id.* ("In practice, the decision to recuse is generally left to the discretion of each Justice on our court. In theory, a Justice who sits despite an ethical obligation to recuse is subject to discipline, including removal from the bench. But I'm not aware [that has] ever happened on our court."); *id.* ("A violation of the Code is subject to investigation and formal recommendation by the Board of Judicial Standards. Rule 14 of the Rules of the Board on Judicial Standards, promulgated by the Supreme Court, provides that, in instances of charges against Supreme Court Justices, the review shall be heard by a panel consisting of the Chief [Judge] of

apparently did not view the disciplinary pathway, while theoretically available, as a plausible possibility.

E. CAPERTON V. A.T. MASSEY COAL CO.

Ironically, the only recent instance of the overturning of a state supreme court justice decision not to recuse was by the U.S. Supreme Court in *Caperton v. A.T. Massey Coal Co.*, decided in 2009.[235] Not surprisingly, the case arose in a state (West Virginia) where a justice's decision not to recuse was, as is true in a majority of the states, not subject to any formal oversight by any other justice, apart from the theoretical possibility of an after-the-fact disciplinary proceeding.[236] The matter made its unlikely path from the state supreme court to the U.S. Supreme Court by way of a due process challenge to the state court's ruling by the losing party, who had sought a justice's recusal on the ground that the justice's participation violated due process.[237] The U.S. Supreme Court agreed in an opinion authored by Justice Kennedy for a five-Justice majority.[238] Chief Justice Roberts and Justices Scalia, Thomas, and Alito dissented.[239]

The facts of *Caperton* were extraordinary. By a vote of three to two, the West Virginia Supreme Court had reversed a trial court judgment, which had entered a jury verdict of $50 million in a tort case in favor of the plaintiffs.[240] The plaintiffs had requested before the state supreme court that one of the justices, who later became one of the three justices in the majority, recuse himself, because of his close ties to the president of the defendant corporation.[241]

Following the jury verdict and before the appeal to the West Virginia Supreme Court, the defendant's corporate president decided to support the replacement of a sitting justice with the justice who ended up voting against the plaintiffs. The company president contributed $1,000 directly to the justice's campaign (the statutory maximum) and $2.5 million to a political organization that opposed the existing justice and supported the president's favored replacement.[242] In addition, the president spent $500,000 in independent expenditures to support the new justice.[243] According to the U.S. Supreme Court, the defendant's president spent "more than the total amount

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the Court Appeals and six other Court of Appeals Judges."); *id.* ("The decisional guide is the decisions of the Commission on Judicial Conduct, which has the power to discipline judges for ethical violations, including removal of judges.").

235. *See generally* Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009) (considering non-recusal by a justice of the Supreme Court of Appeals of West Virginia).

236. *See id.* at 873–76.

237. *See id.* at 876.

238. *Id.* at 872, 890.

239. *Id.* at 890.

240. *Id.* at 874–75.

241. *See id.* at 872–74.

242. *Id.* at 873.

243. *Id.*

spent by all other [of the candidate justice's] supporters and three times the amount spent by [the candidate's] own committee."[244]

In ruling that the new justice's failure to recuse violated due process, the Court "conclude[d] that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case . . . ."[245] The majority rejected the defendant's argument that reversal was warranted only upon a showing that the corporate president's "contributions were a necessary and sufficient cause" of the new justice's election.[246]

None of the five Justices in the *Caperton* majority are still on the Court. By contrast, three of the four dissenters, including the Chief Justice and Justices Thomas and Alito, are.[247] The Chief's dissent, which all three of the other dissenting Justices joined, necessarily casts doubt on the current Court's willingness to embrace a robust procedure for overturning a Justice's decision not to recuse:

> It is an old cliché, but sometimes the cure is worse than the disease. I am sure there are cases where a "probability of bias" should lead the prudent judge to step aside, but the judge fails to do so. Maybe this is one of them. But I believe that opening the door to recusal claims under the Due Process Clause, for an amorphous "probability of bias," will itself bring our judicial system into undeserved disrepute, and diminish the confidence of the American people in the fairness and integrity of their courts. I hope I am wrong.[248]

As of now, the Chief's hope that he would be "wrong" has been realized. To the extent *Caperton* "open[ed] the door to recusal claims under the Due Process Clause,"[249] "no flood" of such claims has occurred.[250] Instead, the greater threat to "the confidence of the American people in the fairness and integrity" of their Supreme Court has been the failure of the Justices to develop a regularized procedure in addressing recusal requests needed to restore the public's confidence in the Supreme Court.[251]

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244. *Id.*

245. *Id.* at 884.

246. *Id.* at 885.

247. *Justices 1789 to Present*, SUP. CT. U.S., https://www.supremecourt.gov/about/members_text.aspx [https://perma.cc/76LN-CYSG].

248. *Caperton*, 556 U.S. at 902 (Roberts, C.J., dissenting).

249. *Id.*

250. DANIEL HAYS LOWENSTEIN, RICHARD L. HASEN, DANIEL P. TOKAJI & NICHOLAS O. STEPHANOPOULOS, ELECTION LAW: CASES AND MATERIALS 799 (7th ed. 2022).

251. *Caperton*, 556 U.S. at 902.

III. A MODEST PROPOSAL FOR PROCEDURAL REFORM

This Article's aim is not to propose that the Court adopt what might in theory be the optimal procedures for administering its recusal policies when it is clear that the current Court would never adopt them or, that if Congress ever successfully enacted their preferred procedures into law, that the Court would strike them down as unconstitutional.[252] This Article seeks instead the more modest goal of suggesting some new procedures that would significantly improve the administration of the decisions of Justices whether to recuse and that might be acceptable to the current Court.

A. TWO NON-STARTERS: DISCIPLINARY SANCTIONS AND PEER REVIEW

So, here is what is off the table. First, the Court will not embrace the approach adopted in theory by all fifty states and the District of Columbia, which allows for the formal disciplining of a justice, including potential removal from office, for failing to have recused in a case when recusal was required. What proponents of this approach for the U.S. Supreme Court

252. The pending legislative proposals are, unsurprisingly, sharply critical of the Court's new code for lack of an enforcement mechanism and provide for the appointment of an ethics counsel authorized to enforce the code against individual Justices, including for potential disciplinary action. *See* Supreme Court Ethics and Investigations Act, H.R. 8609, 118th Cong. (2024); Supreme Court, Ethics, Recusal, and Transparency Act of 2023, S. 359, 118th Cong. (2023); *Supreme Court Ethics Reform*, U.S. SENATE COMM. ON JUDICIARY, https://www.judiciary.senate.gov/supreme-court-ethics-reform [https://perma.cc/FK26-RGUZ] ("By refusing to take the sensible steps needed to establish an enforceable code of conduct, the justices have ensured that public confidence in the Court and its integrity will continue to plummet."). Others provide for review of a motion for recusal of a Justice by the Judicial Conference of the United States and also by a "Supreme Court Review Committee," appointed by congressional leaders. Judicial Ethics and Anti-Corruption Act of 2023, H.R. 3973, 118th Cong. §§ 7, 10 (2023). The Supreme Court Complaints Review Committee consists of two persons appointed by the Speaker of the House, two persons appointed minority leader of the House, one person appointed by agreement of the Speaker of the House and the minority leader of the House. *Id.* § 10; Judicial Ethics and Anti-Corruption Act of 2023, S. 1908, 118th Cong. § 10 (2023). The Attorney General would have the authority to file a civil action against a Justice, subjecting the Justice to up to a $50,000 fine for each violation of certain provisions of a mandatory ethics code. H.R. 3973 § 2(c); S. 1908 § 2(c). It is worth noting that the Judicial Conference recently declined a request by Senator Whitehouse that the Conference refer accusations that Justice Thomas had engaged in ethical misconduct in violation of the Ethics in Government Act to the U.S. Attorney General. *See* Letter from Robert J. Conrad, Jr., Sec'y, Jud. Conf. of the U.S., to Sheldon Whitehouse, Sen. (Jan. 2, 2025) (on file with the *Iowa Law Review*). Among the reasons given for declining, the Judicial Conference stated that "[t]here is reason to doubt that the [Judicial] Conference has any such authority" and "any effort to grant the Conference such authority would raise serious constitutional questions." *Id.* Legal scholars advocate alternatively in favor of congressional legislation that would create panels of lower court federal judges with the authority to investigate the Justices and order their recusal, or assign the other Justices the power to reverse a colleague's decision not to recuse, or have somehow secured the prior agreement of a Justice to do so, or even possibly resign. *See* Ian Ayres & Richard Re, *Enforceable Ethics for the Supreme Court*, HARV. L. REV. BLOG (Aug. 8, 2024), https://harvardlawreview.org/blog/2024/08/enforceable-ethics-for-the-supreme-court [https://perma.cc/WM68-WPCL]; Molly Connolly, Note, *Our Collective Misunderstanding: The True Purpose of the Supreme Court*, 35 GEO. J. LEGAL ETHICS 579, 604–05 (2022).

overlook in asserting that this state approach belies "[t]he [Supreme] Court's insistence that this is hard, or can't be done"[253] is that in all but thirteen states, this disciplinary procedure was authorized by amendment to the state constitution.[254] The isolated exceptions are Maine, New Hampshire, New Jersey, Ohio, South Carolina, and West Virginia (where the state supreme court adopted the new procedure by rule)[255] and Massachusetts, Minnesota, North Carolina, North Dakota, Oregon, Rhode Island, and Tennessee (where the new disciplinary procedure was established by legislation).[256] Notably the disciplinary procedures to which lower federal court judges are subject for misconduct do not extend to a judge's decision not to recuse from a case,[257] unless a judge "deliberately failed to do so for illicit purposes."[258] The states that allow for disciplinary action based on code of conduct violations, including those relating to recusal, are split on whether evidence of such intentionality is required.[259]

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253. Press Release, Sheldon Whitehouse, *supra* note 20.

254. *See generally* OFF. OF SENATOR SHELDON WHITEHOUSE, *supra* note 20 (reporting the legal bases for the practices of each state and citing relevant state constitutional provisions).

255. *Id.* at 8 & n.78, 11 & n.118, 12 & n.122, 13 & n.142, 15 & n.163, 18 & n.195.

256. *Id.* at 9 & nn.86 & 94, 13 & nn.134 & 138, 14 & n.150, 15 & n.159, 16 & n.171.

257. *See* GUIDE TO JUDICIARY POL'Y vol. 2, pt. E, ch. 3, § 320, art. II, r. 4(b)(1) (JUD. CONF. OF THE U.S. 2019) ("Cognizable misconduct does not include an allegation that calls into question the correctness of a judge's ruling, including a failure to recuse."). None of the fifty state disciplinary programs discussed above, see *supra* Section II.D, include a similar general exclusion for failures to recuse.

258. THE JUD. CONF. COMM. ON JUD. CONDUCT & DISABILITY, DIGEST OF AUTHORITIES ON THE JUDICIAL CONDUCT AND DISABILITY ACT 59 (2024), https://www.uscourts.gov/sites/default/files/digest_of_authorities_judicial_conduct_and_disability.pdf [https://perma.cc/UWH4-NVE5] (quoting STEPHEN BREYER ET AL., THE JUD. CONDUCT & DISABILITY ACT STUDY COMM., IMPLEMENTATION OF THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980, at 146 (2006)). Based on a determination by the Judicial Conference that a federal district court judge had committed judicial misconduct, including improperly denying a motion to recuse for illicit purposes, and that impeachment might be warranted, the House of Representatives impeached the judge by a unanimous vote in 2010 and the Senate subsequently convicted the judge and forever disqualified him from holding any future federal office. *See G. Thomas Porteous, Jr.*, LIBR. CONG., https://guides.loc.gov/federal-impeachment/thomas-porteous [https://perma.cc/SD3R-LEUB].

259. For example, disciplinary action is permitted only for *willful* violations of the code of judicial conduct in Wisconsin. Wis. Jud. Comm'n v. Ziegler (*In re* Disciplinary Proc. Against Ziegler), 750 N.W.2d 710, 728–29 (Wis. 2008) (per curiam) ("Not every violation of the Code constitutes judicial 'misconduct' warranting disciplinary action. [A judge's] conduct . . . qualifies as judicial misconduct only if her violation was 'willful' . . . ."). Willfulness is also always required for judicial discipline in New Mexico. *In re* Schwartz, 255 P.3d 299, 303 (N.M. 2011) (per curiam) ("[J]udges may be disciplined only for 'willful misconduct in office.'" (quoting N.M. CONST. art. VI, § 32)). Willfulness is *not* necessarily required in Alabama, *see In re* Sheffield, 465 So. 2d 350, 356 (Ala. 1984) (affirming sanctions for non-recusal where "the 'totality of the facts'" would have led a reasonable person to "question[] the judge's impartiality" (first quoting Wallace v. Wallace, 352 So. 2d 1376, 1379 (Ala. Civ. App. 1977); and then quoting E. Wayne Thode, *The Code of Judicial Conduct – The First Five Years in the Courts*, 1977 UTAH L. REV. 395, 402)); Arizona, *see* ARIZ. COMM'N ON JUD. CONDUCT R. 6 (ARIZ. COMM'N ON JUD. CONDUCT 2021) ("The grounds for judicial discipline include . . . a violation of the code."); Arkansas, *see* ARK. CONST. amend. 66(b)

The likelihood of a comparable amendment to the U.S. Constitution is essentially nil, rendering the vast majority of these examples wholly irrelevant, and certainly undermining the notion that the adoption of such a disciplinary approach by the U.S. Supreme Court would be easy. Nor is it remotely likely that the Supreme Court itself would ever adopt by rule such a procedure, creating a Judicial Commission comprised of lower court judges, members of the bar, and citizens selected by lower court judges, leaders of the bar, legislative leaders, and the President (instead of a governor) to recommend the disciplining of a Justice, even embracing the unlikely assumption that the Court concluded it had the authority to impose such a disciplinary regime on its colleagues by a majority vote.

To be sure, there is nothing under current rules that prevents some Justices from publicly admonishing others for failing to recuse—which in fact has occurred in the past with great fanfare and blazing headlines in national newspapers. The most extraordinary example was when Justice Robert Jackson publicly accused Justice Black of unethical conduct for failing to recuse in a case in which his personal lawyer and former law firm served as counsel, leading to front page headlines in both the *New York Times* and the *Washington Post*.[260] But such an extreme circumstance is not one the Justices seem remotely likely to codify into a formal practice, let alone acquiesce in its being forced upon

("Grounds for sanctions imposed [or recommended] by the Commission . . . shall be violations of the professional and ethical standards governing judicial officers . . . ."); Colorado, *see* COLO. R. JUD. DISCIPLINE 5(a) ("Grounds for judicial discipline shall include . . . [a]ny conduct that constitutes a violation of the Code."); Florida, FLA. CONST. art. V, § 12(c)(1) ("Malafides, scienter or moral turpitude on the part of a justice or judge shall not be required for removal from office of a justice or judge whose conduct demonstrates a present unfitness to hold office."); Iowa, *In re* Howes, 880 N.W.2d 184, 195 (Iowa 2016) ("Proving scienter is not necessary to establish a violation of the rule [requiring recusal where judge's impartiality might reasonably be questioned]."); Montana, *see* MONT. CONST. art. VII, § 11(3) ("Upon recommendation of the commission, the supreme court may . . . [c]ensure, suspend, or remove any justice or judge for . . . violation of canons of judicial ethics . . . ."); and New Hampshire, *In re* Snow's Case, 674 A.2d 573, 577 (N.H. 1996) (holding intent is not required to discipline judge for violating judicial conduct canons). By contrast, Delaware permits discipline for "*persistent misconduct* in violation of the Canons of Judicial Ethics." DEL. CONST. art. IV, § 37, cl. 3 (emphasis added).

260. Justice Robert Jackson took issue with Justice Hugo Black's decision not to recuse himself from the case *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers*, 325 U.S. 161 (1945). Sample, *Supreme Court Recusal*, *supra* note 58, at 108–12; Dennis J. Hutchinson, *The Black-Jackson Feud*, 1988 SUP. CT. REV. 203, 208, 218. When Chief Justice Harlan Fiske Stone later died, and President Harry Truman was considering whom to nominate to succeed Stone as Chief Justice, Jackson heard that Justice Black was saying negative things about Jackson to the White House in what Jackson perceived as an effort to derail Jackson's possible nomination. Hutchinson, *supra*, at 215–18. Jackson reportedly went ballistic. *See id.* at 217–20. He sent cables to the President about Black's misbehavior and to the Chairs of the Senate and House Judiciary Committees excoriating Black on ethical grounds for failing to recuse from cases in which he had an interest. *Id.* at 219–21. And, for good measure, he sent copies of those letters to both the *New York Times* and the *Washington Post*. *See* The Associated Press, *Jackson Attacks Black for Judging Ex-Partner's Case*, N.Y. TIMES, June 11, 1946, at 1; *Text of Court Statement by Jackson*, WASH. POST, June 11, 1946, at 1.

the Court by Congress. Finally, as noted above,[261] it is significant that, with only one extreme exception, no state supreme court has in fact ever used this theoretically available procedure to discipline a justice for failure to recuse.

The slightly less difficult question, but still a nonstarter for the Justices, is whether the current Justices might be willing to accept a procedure adopted by ten states that, as described above, allows for their colleagues on the Court to reverse an individual Justice's decision not to recuse. Here too, the experience of the states is intriguing and suggests that this procedural mechanism may have some distinct value to it. No state supreme court has ever actually exercised that authority and ordered a recusal.[262] But the procedure has led to some public airing of disagreement within the court, including pointed language by the dissenting justices highly critical of their colleague for declining to recuse.[263] These disagreements have occurred in the more challenging contexts involving recusal rather than the more technical issues relating to a justice's financial investments: cases involving the personal or professional relationship of the state justice to the parties, counsel, or witness in the case or public statements the justice has made that might suggest a preconceived view of how a case should be decided.[264] And the fact that the justices in these states have this power in theory, but have basically never declined to exercise it, provides strong testimony that they believe its institutional costs exceed its benefits.

But, here too, the absence of any formal order of recusal does not negate the possibility that the procedure has prompted justices to decide to recuse rather than risk such a review by their colleague or even to change their mind once they discern that others on their court have concerns.

The notion, however, that the current U.S. Supreme Court Justices might agree that their ability to participate in a case depends on the approval of their colleagues is most certainly a nonstarter. In his annual report on the State of the Judiciary in 2011, the Chief Justice left no doubt of his views. At that time, there were claims that both Justices Thomas and Kagan should recuse themselves from cases then pending before the Court concerning the legality of the Affordable Care Act.[265] The Chief made clear his faith in the ability of his colleagues to fairly resolve those recusal matters on their own and the impropriety of overseeing his colleagues: "[T]he Supreme Court does not sit in judgment of one of its own Members' decision whether to recuse in

261. *See supra* text accompanying notes 229–30.

262. *See supra* Sections II.C–.D.

263. *See supra* notes 172–86 and accompanying text; Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 874–75 (2009).

264. *See supra* text accompanying notes 58–71.

265. *See* Ariane de Vogue, *Groups Suggest Elena Kagan, Clarence Thomas Should Be Recused from Health Law Challenge*, ABC NEWS (Nov. 16, 2011), https://abcnews.go.com/blogs/politics/2011/11/groups-suggest-elena-kagan-clarence-thomas-should-be-recused-from-health-law-decision [https://perma.cc/7BML-BX73].

the course of deciding a case."[266] And in implicitly referring to Justices Thomas and Kagan, in particular, the Chief commented that "[t]hey are jurists of exceptional integrity and experience whose character and fitness have been examined through a rigorous appointment and confirmation process. I know that they each give careful consideration to any recusal questions that arise."[267] In their joint April 2023 Statement of Ethics and Principles, all nine Justices, moreover, made clear they did not support such an internal review process:

> Individual Justices, rather than the Court, decide recusal issues. If the full Court or any subset of the Court were to review the recusal decisions of individual Justices, it would create an undesirable situation in which the Court could affect the outcome of a case by selecting who among its Members may participate.[268]

Justice Kagan has more recently twice broken ranks publicly and expressed possible support for the establishment of an outside panel of highly respected lower court judges to review allegations of Justice wrongdoing, including the need for recusal.[269] Justice Jackson has suggested she is similarly inclined.[270] That is a significant development. But until she is joined by others on the Court, especially one or two of the more conservative members of the Court, such an approach also still seems like a nonstarter.[271]

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266. ROBERTS, *supra* note 108, at 9.

267. *Id.* The Chief's skepticism of second-guessing a justice's decision not to recuse is also highlighted in his dissent in *Caperton v. A.T. Massey Coal Co.*, when he argued that the majority's allowance of due process challenges to a judge's impartiality would not promote the judiciary's legitimacy, as intended, but undermine it, because the rule would "inevitably lead to an increase in allegations that judges are biased, however groundless those charges may be. The end result [would] do far more to erode public confidence in judicial impartiality than an isolated failure to recuse . . . ." *Caperton*, 556 U.S. at 891 (Roberts, C.J., dissenting).

268. Statement on Ethics, *supra* note 7, at 2. The depth of concern about Justices deciding to negate the vote of a colleague is further underscored when Justices face the challenging question whether a colleague is no longer competent to serve. In the early 1970s, the Justices were reportedly highly concerned that after several strokes Justice William Douglas lacked the mental capacity to vote and decide on cases before the Court. A majority of the Justices (other than Douglas) apparently reached an informal understanding that they would not allow Justice Douglas's vote to be decisive. But Justice White admonished the others that they lacked any such authority. According to Justice White, the only legitimate way to deny a Justice the right to vote was for Congress to remove them from office through the impeachment process. When Justice Douglas's health declined even more, after a series of additional strokes, he finally resigned, which avoided further confrontation between colleagues. *See* ARTEMUS WARD, DECIDING TO LEAVE: THE POLITICS OF RETIREMENT FROM THE UNITED STATES SUPREME COURT 186–92 (2003).

269. *See supra* note 89 and accompanying text.

270. Marimow, *Justice Kagan: Lower Court Judges*, *supra* note 89.

271. A less intrusive alternative would be that the other Justices would be regularly consulted for their views, but their views would not be controlling. And the Justice subject to a recusal request would retain discretion to decide. The prospect of such regularized collegial review, absent authority, might standing alone effectively prompt more thoughtful decisions.

B. TWO MORE PROMISING PROCEDURAL REFORMS

There are, however, two promising procedural reforms that the Supreme Court could adopt that could have a very positive impact on improving their administration of its newly announced recusal policies. Both are rooted in the experience of the state supreme courts. And, if embraced by the Court, could both promote better recusal decisions and suggest to the general public that the Justices are taking these matters more seriously.

Inspired by what many states already do, the first would be to establish a formal office of ethics within the Court staffed by seasoned, professional, career attorney-experts in matters of ethics, including recusal. These attorneys would be appointed by the Chief Justice and akin to how career attorneys have historically performed at the Justice Department, current threats to undercut that career role notwithstanding. There are plenty of outstanding attorneys who, if hired by the Court, would appreciate the wholly nonpartisan role of their jobs and its strictly confidential nature. It should not prove hard to recruit an outstanding group of expert counsel to that role and to develop within that office the necessary culture, including, of course, strict confidentiality. That is what outstanding lawyers do all the time in places like the Justice Department, perhaps not unlike the role of the parliamentarian in the Senate.

The Justices would be required by joint agreement to refer any nontrivial requests for recusals, especially those based on the elusive question whether a "Justice's impartiality might reasonably be questioned, that is, where an unbiased and reasonable person who is aware of all relevant circumstances would doubt that the Justice could fairly discharge his or her duties."[272] The ultimate question whether the Justice recuses would remain, as it is clear they would all (except perhaps Justice Kagan[273]) insist, with the Justice themselves. But they would have the enormous advantage of an independent assessment by an expert within the Court but outside their own chambers in making that decision. The result should be much more thoughtful and better reasoned recusal decisions, which at least mitigate in part the obvious limits of a Justice's ability to be their own judge. That the Justices all agreed to follow the procedure would also remove any possible stigma of such a consultation and send a message to the general public that the Justices are taking the recusal issue more carefully.[274]

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272. SUP. CT. CODE OF CONDUCT Canon 3(B)(2) (2023).

273. *See supra* note 89 and accompanying text.

274. The Justices currently often refer vaguely to how they consult with others. Such informal consultation offers none of the rigor and independence of the proposal above. The former naturally leads to responses, prompted by the Justice's own framing, that naturally conform to the Justice's preferences. My understanding is that this kind of internal consultation with objective experts is a rarity, notwithstanding repeated statements in the media to the contrary. *See, e.g.*, Kantor & VanSickle, *supra* note 18. The Justices do not consult with counsel within the Court's staff on these challenging issues of recusal. They at most on relatively rare occasions consult with close friends, who are hardly well-positioned to offer objective advice.

There is, moreover, reason to believe that the Justices discussed this kind of heightened role within the Court for ethics counsel but simply could not reach consensus before they published their November 2023 ethics code. Buried in the commentary on that code is a potentially revealing discussion:

> The Court will assess whether it needs additional resources in its Clerk's Office or Office of Legal Counsel to perform initial and ongoing review of recusal and other ethics issues. The Court will also consider whether amendments to its rules on the disclosure obligations of parties and counsel may be advisable. . . . The Office of Legal Counsel will maintain specific guidance tailored to recurring ethics and financial disclosure issues . . . .[275]

The Court should now follow through on this suggestion, which currently is little more than lip service, and, like many of the state supreme courts, create a formal office of ethics counsel within the Court who routinely provide the Justices with advice.

It would be better still if the Justices were able to further agree that the opinion of the ethics counsel would be shared with the other Justices, while of course kept strictly confidential within all chambers. The other Justices would, as described, possess no authority to second-guess a colleague's ultimate decision, but such transparency would make it harder to give unduly short shrift to the potentially unwelcome advice received. That additional requirement of internal transparency would allow the Justice considering a request for their recusal an opportunity to address any concerns their colleagues might privately harbor. The criticism that such sharing should not be done because of the risk of one chamber publicly leaking the results of that internal opinion deserves no weight. Any such assumption is fundamentally at odds with how the Court historically has worked on a daily basis. The recent leak in the *Dobbs* abortion case notwithstanding,[276] any such leaks of internal Court documents have been the exceedingly rare exception and the Court's internal decision-making would be severely harmed were internal procedures to be based on the assumption of leaking. The result of sharing would ultimately be a stronger, not more divided, Court. In short, the Justices should continue to strive to govern themselves based on the presumption that there will not be damaging leaks.

An alternative to this consultation process would be to have, as Justice Kagan has suggested,[277] a group of highly respected senior federal lower court judges serve instead in that advisory role. Although I have no objection to that alternative should the Justices be willing to embrace it, my view is that the better approach is to have an office of expert ethics counsel within the Court

275. SUP. CT. CODE OF CONDUCT cmt.

276. *See supra* notes 78–84 and accompanying text.

277. *See supra* note 89 and accompanying text.

both because there is a meaningful area of legal expertise to be tapped, and because it is better to have such confidential advice imparted by actual employees of the Court.

The Judicial Conference, notably, has adopted an approach in which lower court federal judges can seek confidential advice from ethics counsel employed by the Administrative Office of the U.S. Courts.[278] There is also a Committee on Codes of Conduct of the Judicial Conference charged with providing guidance on ethical behavior to federal appellate, trial, bankruptcy, and magistrate judges.[279] To that end, the Committee publishes formal advisory opinions on ethical issues that lower judges frequently face.[280]

A second procedural requirement, inspired by the experience of the state supreme courts, would be for the Justices, absent unusual circumstances, to release formal written statements explaining their reasons for recusing or not recusing. For reasons the Justices themselves have made clear, a decision to recuse is highly significant because it denies the Court a full bench.[281] The basis for that decision may be briefly described and, as needed, generically, i.e., a potential financial interest due to an investment by the Justice or their spouse. Nothing more is needed. As the Court has recently acknowledged by finally agreeing to be fully transparent in the correction of errors in the Court opinions,[282] such transparency ultimately does not undermine the Court, but promotes its essential rigor and integrity. Unnecessary secrecy invariably creates the contrary impression.[283]

The value of the same procedure for decisions not to recuse is no less compelling. The Justices are an impressive lot. They are, after all, experts in explaining the reasons for their conclusions. Although the length of Justice Scalia's memorandum explaining why he was declining to recuse in *Cheney v. U.S. District Court for the District of Columbia*[284] need not be emulated by others, it ultimately underscored the force of his position and the corresponding lack of rigor and persuasiveness of those claiming recusal was needed. The Justices

278. *See Ethics Policies*, U.S. CTS., https://www.uscourts.gov/administration-policies/judiciary-policies/ethics-policies [https://perma.cc/YWC9-564W]; GUIDE TO JUDICIARY POL'Y, vol. 2, pt. A, ch. 2, Canon 1 (JUD. CONF. OF THE U.S. CTS. 2019); GUIDE TO JUDICIARY POL'Y, vol. 2, pt. B, ch. 2, Advisory Op. No. 58 (JUD. CONF. OF THE U.S. CTS. 2025).

279. *See Ethics Policies*, *supra* note 278; GUIDE TO JUDICIARY POL'Y, vol. 2, pt. B, ch. 2, Advisory Op. No. 58 (JUD. CONF. OF THE U.S. CTS. 2025).

280. *Ethics Policies*, *supra* note 278.

281. *See supra* text accompanying notes 7–8.

282. Kimberly Strawbridge Robinson, *Supreme Court's Greater Revision Transparency Gets Little Notice*, BLOOMBERG L. (June 11, 2024, 9:59 AM), https://news.bloomberglaw.com/us-law-week/supreme-courts-increased-revision-transparency-goes-unnoticed (on file with the *Iowa Law Review*).

283. Richard J. Lazarus, *The (Non)Finality of Supreme Court Opinions*, 128 HARV. L. REV. 540, 617 (2014) ("Such error correction is embarrassing only when one attempts to hide it, and it is discovered nonetheless."); *id.* at 622 ("Even more important, such public postings will invariably prompt the Court to be more careful and systematic in deciding when and how to make revisions.").

284. *See generally* Cheney v. U.S. Dist. Ct. for D.C., 541 U.S. 913 (2004) (mem. of Scalia, J.) (denying motion to recuse); *see also* discussion *supra* note 62.

should be confident of their ability to write persuasive statements explaining their decisions. And if in fact a Justice discovers that the statement "does not write," then that is of course a reason to rethink the position.

There can, however, more fairly be limits to the need for statements explaining why a recusal motion has been denied. The mere filing of a formal recusal motion or highly publicized demand by a legislator is not enough, by itself, to warrant that a Justice provide a written statement. The vast majority of those claims are likely to be frivolous, especially by outsiders if they know that they so easily can compel a Justice to respond in writing. Others relating to a Justice's financial investments, in contrast to their partiality based on matters like personal relationships and public statements, may be straightforward—requiring only a formal reference to the financial statements the Justices file each year. A Justice should accordingly possess significant discretion to decide that time is better spent on more pressing matters, especially with claims filed by nonparties in the case. For that reason, a Justice can effectively use the expert ethics counsel office, as described above, to filter out such requests without the need for the Justice's individual consideration. When, however, a Justice decides in favor of recusal, the reasons for recusal must plainly have been significant to warrant such a decision.

Finally, there is obvious weight to the concern of the Chief Justice,[285] likely shared by others on the Court, that added procedures will encourage more recusal requests that, while lacking in merit, invariably cast a cloud on the Court by their mere publicity.[286] A recent decision by a Canadian Supreme Court Justice, the first Muslim on that court,[287] offers reason to worry about justices being pressured to recuse themselves because of the publicity generated merely by the demands for recusal rather than the actual merits of the recusal request. Justice Jamal recused himself from hearing a case involving a legal challenge to Quebec's secularism law following formal motions filed by Quebec and two advocacy organizations for his recusal on the ground that Jamal, five years earlier, had served as President of the Board of Directors of one of the

285. *See* Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 899 (2009) (Roberts, C.J., dissenting).

286. A related concern is reflected in a recent effort to defeat a state supreme court justice's reelection. *See* Kyle Ingram, *Tensions Escalate in NC Supreme Court Election over Abortion Attack Ad, Ethics Complaint*, NEWS & OBSERVER (Jan. 7, 2025, 4:43 PM), https://www.newsobserver.com/news/politics-government/election/article294308224.html [https://perma.cc/S5YL-N6BD]. Apparently, those who supported the justice's defeat filed and publicized an ethics complaint, which the justice's election opponent then used to claim the justice was "under investigation" for ethics violations. *Id.* Thanks to Professor Richard Re for alerting me to this example of a possible weaponization of the recusal process.

287. *See* Daniel Leblanc, *'A Different Perspective': Justice Mahmud Jamal on Minority Rights, Bilingualism and the Supreme Court*, CBC (June 6, 2022, 4:00 AM), https://www.cbc.ca/news/politics/mahmud-jamal-supreme-court-1.6473878 [https://perma.cc/UFK4-XBPW].

plaintiffs, the Canadian Civil Liberties Association.[288] While rejecting the merits of the recusal motion, Justice Jamal said he had nonetheless decided to recuse to avoid the controversy becoming a "distraction."[289]

So too, there is force to the notion that some lawyers and parties may try to game the system to prompt recusals by exploiting the reasons Justices give in writing for prior recusal decisions. But I am also confident of the Justices' ability to address any such efforts, even were it to lead to the claimed avalanche of meritless recusal requests. The courts and the individual Justices are quite a capable lot, and they can develop procedures to quickly dismiss such frivolous claims, thereby reinforcing the Court's seriousness rather than its detachment. Nor are the Justices helpless in response to efforts by lawyers and parties to somehow game the system by manipulating counsel and parties to somehow create the impression of a conflict. Such machinations by themselves create an obvious basis to decline to recuse—as reflected in the experiences of the lower federal courts who routinely deny such recusal requests[290]—and here too a Justice or court's outing of such misbehavior will both serve a strong deterrent to such conduct and reinforce the Court's contrasting rigor. If Canada's Supreme Court Justice Jamal truly believed that the recusal claim lacked merit, that should have been the end of the matter, and he should have explained why. He should not have allowed the controversy created by the recusal claim, by itself, to prompt recusal. In all events, the U.S. Supreme Court's current approach of silence has not worked well.

CONCLUDING THOUGHTS

The decisions of Justices Gorsuch and Barrett to recuse in December 2024 and January 2025, respectively, warrant praise for the obvious seriousness of their consideration of the propriety of recusal in light of the appearance of a conflict of interest. For Gorsuch in particular, it was impressive that, notwithstanding the clearly politically partisan origins of those arguing he should recuse, Gorsuch, seemingly unlike some of his colleagues, was able to separate the identity of the claimants—Democratic members of Congress accusing the Justice of accepting things of value from a friend and former client with financial interests in the case[291]—from the merits of the suggestion of recusal based on application of the relevant standard of a reasonably objective person. Others should follow his lead. But for that same reason, Gorsuch and Barrett both would have done better still had they taken the further step of explaining their reasons, rather than remain silent. That silence underscores the Court's need for procedural reforms to accompany its new code of ethics.

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288. Cassandra Yanez-Leyton & Holly Cabrera, *Supreme Court Justice Recuses Himself from Quebec Secularism Law Case*, CBC (July 10, 2024, 9:31 PM), https://www.cbc.ca/news/canada/montreal/scj-mahmud-jamal-recusal-1.7259008 [https://perma.cc/253J-7NUJ].

289. *Id.*

290. *See* THE JUD. CONF. COMM. ON JUD. CONDUCT & DISABILITY, *supra* note 258, at 63–67.

291. *See supra* note 3 and accompanying text.

My claim is not that my proffered procedural reforms will remotely solve the problem of diminishing public trust in the Court in its entirety. The Court's problems in this respect are not merely a product of the lack of a coherent procedure for administering its recusal requirements. Even more fundamentally, my proposed reforms will fall short because I am limiting my recommendations to what I think the current members of the Court might in fact have the capacity—though with some stretching required by some—to accept rather than what I think would be the best possible procedural approach in theory. My working assumption is that I have a reluctant audience. They are angered by the repeated partisan attacks, which they understandably believe has promoted threats to their physical well-being. They are also likely too self-persuaded of their own ability to decide for themselves without outside advice whether recusal is warranted in particular circumstances and unduly wary of exposing their thinking to public scrutiny.

Persuading the Justices to adopt procedural reforms accordingly will not be easy, even those modest in nature. The Chief is himself wary of enforceable codes of ethics and is very unlikely to ever agree, absent a consensus, to a procedure for administrating the code of ethics, including recusal requirements. Several Justices, moreover, are no doubt battle-scarred by the heaps of accusations they have faced in recent years for not recusing, the vast majority of which were clearly launched by political partisans seeking to eliminate their votes in high-profile cases. As a result, they may well be too bunkered in and persuaded of their own self-righteousness to appreciate that some of those claims, despite their partisan origins, still have merit. But, of course, that is precisely why the Justices are in need of regular procedures for considering whether recusal is warranted—procedures that would improve their own reasoning and, in doing so, help restore public faith in the Court.

As suggested at the Article's outset, it is not just the Court's own legitimacy that is at stake. As the highest profile representative of our nation's judicial system, when the U.S. Supreme Court Justices fall short, the repercussions are not limited to the Court itself. They extend to the entire judiciary, including the state courts as well as the lower federal courts. Such was the central insight by the state supreme court justice who responded to my survey with the comment that "the terrible behavior by SCOTUS is, unfortunately, impacting the public confidence in state courts."[292] That state supreme court justice's impression is reinforced by recent polling suggesting that confidence in the U.S. courts overall has plummeted in recent years to unprecedentedly low rates far below those rates evident in peer nations.[293]

292. *See supra* note 1 and accompanying text.

293. *See* Adam Liptak, *Confidence in U.S. Courts Plummets to Rate Far Below Peer Nations*, N.Y. TIMES (Dec. 17, 2024), https://www.nytimes.com/2024/12/17/us/gallup-poll-judiciary-courts.html (on file with the *Iowa Law Review*).

This Article seeks to offer the Court some guidance on what modest steps are worthy of their immediate consideration. The Justices are correct that it is not their responsibility to ensure their rulings bend to the popular will or to the loudest voices. But so too they should not decline to adopt reasonable recusal policies and procedures out of spite for their accusers. They should at a minimum be willing both to seek objective advice from experts in ethics and to explain their reasons for deciding to recuse and, when significant issues are raised,[294] for deciding not to recuse. That is part of their job too. It falls easily within the Chief Justice's recent admonishment to all federal judges, including the Supreme Court Justices, that they "must do their part to preserve the public's confidence in our institutions."[295] Otherwise, as the Chief recently warned, the costs of the lack of such confidence in the Court's work could prove devastatingly large, extending even to "defiance of judgments lawfully entered by courts of competent jurisdiction," including the Supreme Court itself.[296]

Neither of the central proposals of this Article, moreover, would remotely undermine the right of each Justice ultimately to decide for themselves whether recusal is warranted. That is what makes the proposals modest. They would assist the Justices in reaching a more reasoned, rigorous conclusion not clouded by the frequently off-putting identity of those who are the loudest in favor of recusal. That added rigor, and the Justices' willingness to take this step, would send a much-needed message to the public about the Court and why its rulings—and those of the lower federal courts and the state courts as well—warrant respect.

294. Of course, there is invariably ambiguity on when that threshold trigger is met, whether dubbed "significant," as in the text above, or alternatively as "significant" or "substantial." That is true for any legal test that turns on questions of degree. But that is also why the inevitable ambiguity of whatever terminology is used should not, by itself, be a reason to abandon any threshold standard at all. The public message is that there is no need to spend any time publishing a response to the vast majority of what may well be trivial recusal requests, but there is a responsibility of a Justice, in consultation with the Court's ethics efforts, to determine which requests rise to the level requiring a written explanation of the reasons for the Justice's recusal decision.

295. ROBERTS, *supra* note 33, at 9.

296. *Id.* at 7. As of the writing of this Article, outright defiance of the Supreme Court has not occurred. But there is evidence that accusations of judicial bias have promoted repeated defiance of the lower court federal judiciary by the Trump Administration. *See* Justin Jouvenal, *Trump Officials Accused of Defying 1 in 3 Judges Who Ruled Against Him*, WASH. POST (July 21, 2025), https://www.washingtonpost.com/politics/2025/07/21/trump-court-orders-defy-noncompliance-marshals-judges (on file with the *Iowa Law Review*).