SUPREME MYTH BUSTING: HOW THE SUPREME COURT HAS BUSTED ITS OWN MYTHS

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This Essay challenges various myths of the Supreme Court, including the myth of the Supreme Court as the only branch in the federal government capable of neutral, non-partisan, juridical interpretations of the Constitution. Through various means, I show how the Supreme Court fails to live up to that myth, especially in its failure to abide by the same code of ethics that other judges follow. The Court's excuse is that it is not like other courts, but, if we take that excuse at face value, then there is more, not less, reason to require the Supreme Court adhere to the same ethical standards every other judge must follow. If the Court is just another court, it should of course be constrained like other courts, including through a code of ethics. But, if it is not like other courts, a code of ethics is even more imperative to ensure the justices from lapsing into just another political venue. In addition to highlighting how the Court's recent decisions undercut its claims of being a court rather than just another political branch, I use several case studies to show how the Court needs to adhere to a code of ethics to ensure it does not function as presidents and senators would like it to function as an extension of their political powers.

INTRODUCTION

For the past several decades, three myths about the Supreme Court have been popular in Congress, the press, and academia. The first is the

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myth of the Supreme Court as a neutral arbiter of constitutional disputes. This myth takes various forms, from Alexander Hamilton's famous description of the Court as "the least dangerous branch" because it had "no influence over either the sword or the purse"[1] to the view of the Court as the only branch that is immune to political pressure or retaliation and thus capable of neutral, impartial interpretations of the Constitution.[2] The second myth is that the Supreme Court confirmation process is broken.[3] This myth, too, takes various forms, such as then-Senator Joe Biden's description of Supreme Court confirmation hearings as a "kabuki dance" or Elena Kagan's description of them as "a vapid and hollow charade,"[4] the characterization of them as "political theater,"[5] and the insistence of Republican senators over the past three decades that the Democratically engineered defeat of Robert Bork's nomination was a watershed in transforming confirmation hearings into partisan warfare.[6] The third myth is that Congress lacks the power to impose a code of ethics on the Supreme Court or that any such code is unnecessary because Supreme Court Justices voluntarily follow numerous ethical codes or are subject to impeachment for their misconduct.[7] A longstanding concern has been that subjecting justices to a code of ethics would unleash

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1. THE FEDERALIST NO. 78 (Alexander Hamilton).

2. *See, e.g.*, Joshua Zeitz, *The Supreme Court Has Never Been Apolitical*, POLITICO (Apr. 3, 2022, 7:01 AM), https://www.politico.com/news/magazine/2022/04/03/the-supreme-court-has-never-been-apolitical-00022482 [https://perma.cc/2J2X-G2QG].

3. *See, e.g.*, STEPHEN L. CARTER, THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS (1994) (arguing that the Supreme Court confirmation process is broken); *see also* Ruth Marcus, Opinion, *The Supreme Court Is Broken. So Is the System that Confirms Its Justices.*, WASH. POST (Apr. 8, 2022, 4:29 PM), https://www.washingtonpost.com/opinions/2022/04/08/supreme-court-broken-jackson-kagan-bork.

4. Paul M. Collins Jr. & Lori A. Ringhand, Opinion, *The 'Kabuki' Dance of Confirmation*, DAILY HAMPSHIRE GAZETTE (Mar. 31, 2016, 10:54 AM), https://www.gazettenet.com/Opinion/Columns/The-kabuki-dance-of-the-confirmation-hearing-1247261 [https://perma.cc/2E96-CBAX].

5. Jonathan Bernstein, *Confirmation Hearings Are Political Theater and That's Ok*, BLOOMBERG (Mar. 23, 2022, 6:30 AM), https://www.bloomberg.com/opinion/articles/2022-03-23/ketanji-brown-jackson-hearings-what-s-wrong-with-political-theater [https://perma.cc/6QDP-QT7K].

6. Nina Totenberg, *Robert Bork's Supreme Court Nomination 'Changed Everything, Maybe Forever*,' NPR (Dec. 19, 2012, 4:33 PM), https://www.npr.org/sections/itsallpolitics/2012/12/19/167645600/robert-borks-supreme-court-nomination-changed-everything-maybe-forever [https://perma.cc/V3SH-9PKR]; Retro Report, *Why Supreme Court Confirmations Have Become So Bitter*, YOUTUBE (Mar. 17, 2022), https://www.youtube.com/watch?v=COS3qOFPIsg.

7. *See* Scott Bomboy, *Why the Supreme Court Isn't Compelled to Follow a Conduct Code*, NAT'L CONST. CTR. (July 15, 2016), https://constitutioncenter.org/blog/why-the-supreme-court-isnt-compelled-to-follow-a-conduct-code [https://perma.cc/ZQJ2-MP79].

countless partisan attempts to misuse the code to harass them for purely partisan reasons.[8]

This Essay suggests that all three myths are false, overblown, or otherwise perpetuate the Court's mystique as a non-partisan, impartial decision-maker in constitutional law. But none of these myths are supported by the facts, constitutional structure, or constitutional history. The Supreme Court itself, as well as the history of the Supreme Court confirmation process, has blown these myths up apart.

The first three parts of this Essay use data and examples from the Supreme Court's performances and the Senate's record on Supreme Court confirmation hearings to dismantle each of these three myths of the Court. Part IV briefly considers proposals to replace each of these myths, including reforming confirmation hearings to deal more effectively with the Court as it is and a workable code of ethics for the justices. Indeed, as the Court becomes more powerful, it seems to shed accountability. The time is long overdue to fashion meaningful constraints on the Court's acquisition of power and pleas that it be treated differently than every other court whose members are subject to codes of ethics. If the Court really is a court with its members firmly and unequivocally devoted to the law, then its members have nothing to fear from a code of ethics, whose purpose is to ensure they adhere to standard judicial norms and constraints.

I. THE SUPREME COURT AS A MODEL OF REASONED ELABORATION

This Part first describes the myth of the Court as the only federal branch capable of neutral, impartial constitutional decision-making. Next, I show why this view is more fiction than fact.

A. The Supreme Court as Uniquely Apolitical

The idea of the Supreme Court as distinct from the other branches is, of course, grounded in the Constitution. In particular, the Court has been distinguished by two unique features—one is life tenure or the freedom of justices to perform the duties of their office for life unless they commit impeachable offenses, and the other is guaranteed undiminished compensation while in office.[9] With these guarantees and the Framers' familiarity with the distinct functions of courts to decide

8. PRESIDENTIAL COMM'N ON THE SUP. CT. OF U.S., FINAL REPORT 220 (2021), https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf [https://perma.cc/2PP2-Q3DC] [hereinafter PRESIDENTIAL COMM'N, FINAL REPORT].

9. *See* U.S. CONST. art. III, § 1.

"cases" or "controversies"[10] in mind, former Chief Justice John Marshall famously declared that, "[i]t is emphatically the province and duty of the judicial department to say what the law is."[11] This function is distinct from the duties of the other two branches: the President enforces the law, and Congress makes the law.

The Court's consequent aura of being perfectly apolitical has failed the test of time, even assuming the Court ever was purely uninfluenced or unaffected by partisan politics. Beginning in the 1930s, legal scholars, and the justices who agreed with them, viewed the Court as uniquely capable of "reasoned elaboration," which became both a metric for assessing the Court's performance and an ideal of judicial performance. Justices and scholars such as Benjamin Cardozo,[12] Felix Frankfurter,[13] and Edward Levi[14] emphasized that judges were different than the elected members of Congress or presidents because their judgments were the result (or should have been the result) of carefully applied legal methods. In other words, legal reasoning differed from political decision-making because of its rigor and grounding in the rule of law. The legal process school of thought, closely associated with Herbert Wechsler and Henry Hart,[15] became a popular approach to find a middle ground between legal formalists (who posit that judges should apply legal rules rigidly without regard to social interests and the judge's political preferences) and legal realists (who attacked legal formalism as biased and politically driven).[16] Alexander Bickel is just one example of a legal scholar who defended the model of legal process and judging as grounded in and guided by legal rules and standards.[17] Though the Court made mistakes, they were not necessarily permanent; mistakes can be fixed through the better reasoning of a later Court, constitutional amendments, or the appointments of justices committed to grounding their decisions in law rather than

10. *Id.* § 2.

11. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

12. *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (Quid Pro L. Books 2010) (original publishing in 1921).

13. *See* FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM (1927) (describing the evolution of judicial procedure through the Judiciary Acts).

14. *See* Edward H. Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501 (1948).

15. Edmund Ursin, *Roger Traynor, the Legal Process School, and Enterprise Liability*, 71 HASTINGS L.J. 1101, 1117 (2020).

16. *See* David Wolitz, *Herbert Wechsler, Legal Process, and the Jurisprudential Roots of the Model Penal Code*, 51 TULSA L. REV. 633, 649 n.124 (2016); *see also* Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RSRV. L. REV. 179, 180–81, 184 (1986) (discussing the debate between legal realism and legal formalism).

17. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 25–26 (1962).

personal preferences or party politics.[18] Of these options, the easiest to achieve was appointing justices who were committed to overturning prior decisions.[19]

The myth gained traction, however, through the Supreme Court's own hubris. On the heels of the Court's landmark decision in *Brown v. Board of Education*,[20] striking down state-mandated segregation in public schools,[21] the Court declared in *Cooper v. Aaron*[22] that the Court was "supreme" in deciding questions of constitutional law.[23] In *Cooper*, the Court was right in declaring that the Arkansas Governor's and state legislature's defiance of *Brown* was unconstitutional.[24] But the Court's reasoning for its decision went a step too far in claiming that its constitutional decisions are entitled to the same degree of legal importance as the Constitution itself.[25] Thus, the decision rejected the autonomy of other constitutional actors to have the final say over the constitutional decisions within their respective domains. Subsequent Courts have not dialed back the *Cooper* Court's assertion of supremacy.[26] Instead, "supremacy" has become a hallmark of every other Court, including the Roberts Court, in reshaping constitutional law.[27]

B. The Revelations of Legal Realism and Social Science

As the myth of the Court gained traction in some circles (perhaps best displayed in the perennial assurances of presidents and senators that the justices that they appoint are uniquely committed to the rule of law), the myth was being systematically stripped apart by legal scholars and the justices themselves. In fact, several developments exposed the fallacy of the myth that the Court as neutral or impartial.

The first was the rise of legal realism. James Bradley Thayer at Harvard Law School was an early proponent of legal realism, which suggests that the justices were fallible and thus should defer to the elected branches to make crucial constitutional decisions or to follow practices

18. *Id.* at 20–21, 31–32.
19. MICHAEL J. GERHARDT, THE POWER OF PRECEDENT 9 (2008).
20. 347 U.S. 483 (1954).
21. *Id.* at 495.
22. 358 U.S. 1 (1958).
23. *Id.* at 18.
24. *Id.* at 15, 17.
25. *Id.* at 18.
26. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000).
27. *See* Rebecca E. Zietlow, Cooper *Supremacy*, 41 U. ARK. LITTLE ROCK L. REV. 285 (2019).

that constrained the Court from overstepping its boundaries.[28] Thayer's students, including Justice Oliver Wendell Holmes, Jr., and Judge Learned Hand, followed his teachings in their illustrious careers.[29] Both before his appointment to the Supreme Court and later during his tenure as the longest-serving Supreme Court Justice, William O. Douglas argued that law was nothing other than politics dressed in a different guise and that the business of courts was to assess candidly the real-life effects of its decisions.[30] Over the next century, social scientists developed increasingly sophisticated ways of tracking the alignment between justices and the politics of the presidents appointing them, their personal policy preferences, or both.[31] The work of legal realists and social scientists did not dramatically affect public opinion or confidence in the Court,[32] but, at the very least, it helped to lay a foundation of skepticism and nurtured academic and jurisprudential awareness of the limits of the myth of the Court's infallibility.

The second major problem with the myth of the Court as uniquely apolitical is its conflict with the constitutional structure, which empowered national political authorities—presidents and senators—to appoint Supreme Court justices.[33] That arrangement means that the Court is politically constructed. Its composition and direction are the direct results of the political decisions of the presidents who have nominated them and the Senate which has confirmed them.

The third development follows from the second: It has been no accident that justices overwhelmingly have voted in line with the constitutional commitments or attitudes of the presidents who appointed them and that the overruling of constitutional precedents is most commonly the result of the appointments of new justices.[34] For example, in all ten of his appointments to the Supreme Court, George Washington sought justices who would support the constitutionality of a strong national government—and they did.[35] In making his five Supreme Court

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28. ANDREW PORWANCHER, JAKE MAZEITIS, TAYLOR JIPP & AUSTIN COFFEY, THE PROPHET OF HARVARD LAW: JAMES BRADLEY THAYER AND HIS LEGAL LEGACY 28, 38 (2022).

29. *Id.* at 75, 82–85, 117–23.

30. *See, e.g.*, WILLIAM O. DOUGLAS, THE COURT YEARS, 1939–1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS 33–34, 136–37, 150 (1980); *see also* BRUCE ALLEN MURPHY, WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS 379–80, 391 (2003).

31. *See* Michael J. Gerhardt, *Attitudes About Attitudes*, 101 MICH. L. REV. 1733 (2003).

32. James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?*, 45 L. & SOC'Y REV. 195, 214 (2011).

33. U.S. CONST. art. II, § 2, cl. 2.

34. GERHARDT, *supra* note 19, at 9.

35. Lindsay Chervinsky, *President Washington and the Character of the First Supreme Court*, GOVERNING (Sept. 29, 2020),

appointments, Andrew Jackson sought justices who would uphold the autonomy of states to be free from federal domination—and they did.[36] In all six of his Supreme Court appointments, Lincoln sought justices who would uphold the policies of the federal government made during the Civil War—and they did.[37] In appointing six justices, William Howard Taft wanted justices who would restrict the scope of federal power and uphold and broaden the rights of property owners—and they did.[38] In appointing nine justices, Franklin D. Roosevelt wanted justices who would uphold the constitutionality of the New Deal—and they did.[39] In appointing four justices to the Supreme Court, President Ronald Reagan wanted justices who would curb the excesses of the Warren Court in interfering with the rights of states over a wide range of issues and overrule the Court's decision in *Roe v. Wade*[40] recognizing women's right to terminate unwanted pregnancies—and two of them did.[41] In appointing three justices, President Donald J. Trump sought justices who were in the mold of Justice Anton Scalia and were equally committed to overruling *Roe v. Wade*[42]—and all three were and all three did in *Dobbs v. Jackson Women's Health Organization*.[43] The only thing that changed between *Whole Women's Health v. Hellerstedt*,[44] which faithfully applied *Roe* in 2016, to *Dobbs*, overruling it, was the Court's composition.

It is easy to find many other decisions of the Court illustrating the same dynamic: In the modern era, one of the more egregious was *Bush v. Gore*,[45] in which the five justices appointed by Republican presidents

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https://www.governing.com/now/president-washington-and-the-character-of-the-first-supreme-court.html [https://perma.cc/SP52-5ESW].

36. *See* Lindsay M. Chervinsky, *All Supreme Court Appointments Are Political—and They Should Be*, WASH. MONTHLY (Mar. 19, 2022), https://washingtonmonthly.com/2022/03/19/all-supreme-court-appointments-are-political-and-they-should-be [https://perma.cc/7ZHT-KUJD].

37. Calvin Schermerhorn, Commentary, *Packing the Court: Lincoln and His Republicans Remade the Supreme Court to Fit Their Agenda*, VA. MERCURY (Oct. 13, 2020, 12:04 AM), https://www.virginiamercury.com/2020/10/13/packing-the-court-lincoln-and-his-republicans-remade-the-supreme-court-to-fit-their-agenda [https://perma.cc/7ZHT-KUJD].

38. *See* HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II 130–31 (5th ed. 2008); JONATHAN LURIE, THE CHIEF JUSTICESHIP OF WILLIAM HOWARD TAFT, 1921–1930 xiii (2019).

39. ABRAHAM, *supra* note 38, at 45, 166.

40. 410 U.S. 113 (1973).

41. *See id.* at 271, 275.

42. Jeremy Kidd, *New Metrics and the Politics of Judicial Selection*, 70 ALA. L. REV. 785, 787–88 (2019).

43. 142 S. Ct. 2228 (2022).

44. 579 U.S. 582 (2016).

45. 531 U.S. 98 (2000).

voted to wrap up the 2000 presidential election in favor of the Republican candidate, George W. Bush.[46] This was not the first time that Supreme Court justices had resolved a disputed election strictly along partisan lines: In 1867, Congress appointed a special commission to settle the disputed presidential election that year, with every member's vote aligning with the politics of the presidents who appointed them.[47] Of the Electoral Commission's fifteen members, the eight appointed by Republican members of Congress voted for the Republican candidate, Rutherford B. Hayes, and the seven appointed by Democratic members voted for the Democratic candidate, Samuel Tilden. (Ironically, the Commission met in the Supreme Court's chambers.)[48] Of the fifteen Commission members, five were Supreme Court justices, whose votes aligned perfectly with the politics of the presidents who had appointed them.[49] More recently, the Court's deciding several major cases on its so-called "Shadow Docket"—meaning without oral argument or full briefing—has closely tracked the parties of the presidents who appointed them.[50]

While these examples hardly prove that the alignment between the votes of justices and the political parties of the presidents appointing them was solely based on politics, the dots become more clearly connected when the patterns and specious reasoning of the Court in other, politically salient cases are examined. For example, the Court that overruled *Roe* in *Dobbs* is the same Court that has systematically increased its abuse of the shadow docket, as referenced above; and those abuses arise in the kinds of cases that are most important to the presidents who appointed those justices involving such politically and constitutionally salient issues as abortion, gun, and states' rights, church and state, and freedom of speech.[51] Original meaning, the only purportedly legitimate source of

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46. *See* Louise Weinberg, *When Courts Decide Elections: The Constitutionality of* Bush v. Gore, 82 B.U. L. REV. 609, 612 (2002).

47. *See* William H. Rehnquist, *2003 Albritton Lecture: The Supreme Court and the Disputed Election of 1876*, 55 ALA. L. REV. 527, 530, 533 (2004).

48. James Monroe, *The Hayes-Tilden Electoral Commission*, ATLANTIC (Oct. 1893), https://www.theatlantic.com/magazine/archive/1893/10/the-hayes-tilden-electoral-commission/523971 [https://perma.cc/JY5D-UKW9].

49. *See* MICHAEL F. HOLT, BY ONE VOTE: THE DISPUTED PRESIDENTIAL ELECTION OF 1876, at 213–15 (2008).

50. *See, e.g.*, STEVE VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC (2023); *see also* Rebecca Frank Dallet & Matt Woleske, *State Shadow Dockets*, 2022 WIS. L. REV. 1063, 1071–72.

51. *See* Noah Feldman, Opinion, *Supreme Court's 'Nostalgia Doctrine' Is Trump's Biggest Legacy*, BLOOMBERG, https://www.bloomberg.com/opinion/articles/2022-12-27/trump-legacy-is-supreme-court-s-nostalgia-doctrine [https://perma.cc/J2RC-5RJ9] (Jan. 9, 2023, 2:13 PM); *see also* Adam Serwer, *The Constitution Is Whatever the Right Wing Says It Is*, ATLANTIC (June 25, 2022), https://www.theatlantic.com/ideas/archive/2022/06/roe-overturned-

constitutional decision-making in addition to the text, does not explain the outcomes; indeed, it is rarely cited as the basis for the Court's recent string of conservative decisions, in spite of several justices' declarations in their confirmation hearings that they would adhere to original meaning, or original public meaning, in constitutional adjudication.[52] Otherwise, the Court's opinions in these cases fall well short of reasoned elaboration. Indeed, in the cases decided in the Shadow Docket, there are no majority opinions, only dissents.[53] In high-profile cases, their reasoning often falls short of the kind of carefully reasoned elaboration that the occasion called for.

Dobbs is the perfect example of that problem.[54] To begin with, the tone of Justice Alito's opinion in *Dobbs* is a far cry from the kind of cogency and careful reasoning that is, or should be, the hallmark of reasoned elaboration. It treats the more than twenty justices who joined in the original *Roe* and voted subsequently to reaffirm it as dullards and partisans. Alito's tone is dismissively arrogant, perhaps sadly not surprising given that he has spent most of his career belittling women, as he did when he led (unsuccessfully) a movement to prevent his alma mater Princeton University from admitting women.[55] His failure led to widening the doors of Princeton to outstanding young women, including Michelle Obama and his colleagues Justices Sonia Sotomayor and Elena Kagan.

His *Dobbs* opinion dismisses any credible arguments to be made on behalf of *Roe*; its conclusion that *Roe* was "egregiously wrong" is nothing more than *ipse dixit*.[56] While the Court paid lip service to its

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supreme-court-samuel-alito-opinion/661386 [https://perma.cc/HA7Z-S43F]; Marcia Coyle, *The Double-Edge Sword of the Supreme Court's Conservative Majority*, NAT'L CONST. CTR. (Oct. 5, 2021), https://constitutioncenter.org/blog/the-double-edge-sword-of-the-supreme-courts-conservative-majority [https://perma.cc/F4XZ-9UNC]; Adam Liptak, *How Conservatives Weaponized the First Amendment*, N.Y. TIMES (June 30, 2018), https://www.nytimes.com/2018/06/30/us/politics/first-amendment-conservatives-supreme-court.html.

52. *See* Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 112–13 (2022); *see also* Becky Sullivan, *What Conservative Justices Said—and Didn't Say—About* Roe *at Their Confirmations*, NPR, https://www.npr.org/2022/05/03/1096108319/roe-v-wade-alito-conservative-justices-confirmation-hearings [https://perma.cc/GWV8-ADAH] (June 24, 2022, 3:44 PM).

53. *See* Dallet & Woleske, *supra* note 50, at 1070.

54. *See, e.g.*, Dahlia Lithwick & Neil S. Siegel, *The Lawlessness of the* Dobbs *Decision*, SLATE (June 27, 2022, 2:58 PM), https://slate.com/news-and-politics/2022/06/dobbs-decision-glucksberg-test-lawlessness.html [https://perma.cc/6E72-9ZTR].

55. David D. Kirkpatrick, *From Alito's Past, a Window on Conservatives at Princeton*, N.Y. TIMES (Nov. 27, 2005), https://www.nytimes.com/2005/11/27/politics/politicsspecial1/from-alitos-past-a-window-on-conservatives-at.html.

56. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2243 (2022).

traditional path of determining whether there is some important reason other than error, which justifies the Court's overruling itself,[57] the linchpin of the Court's analysis was brand new—determining whether a decision was not just wrong but "egregiously wrong," which is a standard that offers little to no guidance for future decisions. Nor did the Court faithfully apply its own precedents, claiming that the prevailing standard for determining whether certain individual interests are implied fundamental rights derives from *Washington v. Glucksberg*,[58] which the Court explicitly rejected in *Obergefell v. Hodges*[59] on the ground that the "[*Glucksberg* test] is inconsistent with the approach the Court has used in discussing other fundamental rights, including marriage and intimacy."[60] Further, Justice Alito rejected the claim that the abortion restrictions at stake in *Dobbs* trigger equal-protection concerns in addition to due-process concerns, even though the Court in *Planned Parenthood v. Casey*[61] did exactly what he said it had not done—expressly linked the interests at stake to the Equal Protection Clause, which requires raising the standard of review.[62] After rejecting that *Roe* had "a sound basis in precedent," Justice Alito declared that the precedents on which it claimed a basis "proved too much" because they would also lead the Court to recognize fundamental rights to "illicit drug use, prostitution, and the like."[63] So, in other words, *Roe* had a basis in the Court's precedents on substantive due process, which Alito found inapplicable because none of the earlier cases involved abortion rights. With that, Justice Alito scuttled the basic methodology of reasoning by analogy, which is at the heart of constitutional adjudication.

In *Casey*, the majority reaffirmed *Roe*'s recognition of a fundamental right of women to terminate unwanted or unhealthy pregnancies, emphasizing that women extensively relied on *Roe* in shaping their lives.[64] In *Dobbs*, Alito dismissed women's reliance on *Roe* as beyond the Court's competence to determine, and declared, "We do not pretend to know how our political system or society will respond to

57. *See id.* at 2262–66.

58. 521 U.S. 702, 721 (1997) (asking whether a purported individual right had been "deeply rooted in this Nation's history and tradition"); *see also Dobbs*, 142 S. Ct. at 2247.

59. 576 U.S. 644 (2015).

60. *Id.* at 671.

61. 505 U.S. 833 (1992).

62. *Id.* It seems odd, too, that the Court in *Dobbs* chose to follow what it had characterized as earlier precedents on the question of equal protection but not with respect to *Roe* or *Casey*.

63. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2257–58 (2022).

64. *Casey*, 505 U.S. at 856.

today's decision overruling *Roe* and *Casey*."[65] Yet, his opinion proclaims a more clearly discernible opposition to *Roe*, on which the Court should rely, even though there is at least equally discernible support for, or reliance on, *Roe* in many easily trackable ways, such as the numbers of times the Court reaffirmed *Roe*, briefs filed on behalf of *Roe* in this and other cases, and the Court's general reliance on *Roe* in other constitutional decisions.[66] There are also polls showing the public's overwhelming support for *Roe*;[67] Alito ignores them all. Just because there is elaboration does not mean that it is reasoned or reasoned well.

Yet, it is not just the reasoning in *Dobbs* that falls short of the reasoned elaboration that should be the Court's hallmark. When Justice Alito's draft opinion was improperly leaked beforehand, he declared that the leak "also made those of us who were thought to be in the majority in support of overruling *Roe* and *Casey* the targets of assassination because it gave people a rational reason to think they could prevent that from happening by killing one of us . . ."[68] Hyperbole, indeed, since there is no evidence—thankfully—that the leaked memo was responsible for such violence. After release of *Dobbs*, Justice Alito suggested British Prime Minister Boris Johnson "paid the price" for his criticism of the opinion and mocked the criticism of the opinion from foreign leaders.[69] (This is plainly to be a commentary on a political matter.) He characterized the critics of the Roberts Court's recent opinions upholding religious liberty as people who "don't think religion is a good thing that deserves protection," an assertion (like the one about Boris Johnson) that lacks any empirical foundation whatsoever,[70] and that, frankly, was inappropriate for a justice who should be engaged in partisan politics or hyperbole. Alito went further still, in a speech in Colorado, to declare that "saying or implying that the court is becoming an illegitimate

65. *Dobbs*, 142 S. Ct. at 2279.

66. For more on the Court's problematic analysis of reliance in *Dobbs*, see Nina Varsava, *Precedent, Reliance, and* Dobbs, 136 HARV. L. REV. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4152020.

67. Jeff Diamant & Besheer Mohamed, *What the Data Says About Abortion in the United States*, PEW RSCH. CTR. (Jan. 11, 2023), https://www.pewresearch.org/fact-tank/2023/01/11/what-the-data-says-about-abortion-in-the-u-s-2 [https://perma.cc/4GPQ-94M4].

68. *Justice Alito Says Abortion Opinion Leak Made Majority "Targets of Assassination,"* C-SPAN (Oct. 26, 2022), https://www.c-span.org/video/?c5037923/justice-alito-abortion-opinion-leak-made-majority-targets-assassination [https://perma.cc/D2SJ-B6S9].

69. Robert Barnes, *Alito Dismisses Foreign Criticism of Supreme Court's Abortion Ruling*, WASH. POST (July 28, 2022, 7:32 PM), https://www.washingtonpost.com/politics/2022/07/28/alito-defends-roe-wade-abortion-ruling.

70. Josh Gerstein, *Alito Mocks Foreign Critics of Supreme Court Abortion Ruling*, POLITICO, https://www.politico.com/news/2022/07/28/alito-mocks-foreign-critics-of-ruling-00048607 [https://perma.cc/29GX-WB4L] (July 28, 2022, 9:06 PM).

institution and integrity crosses an important line."[71] Justice Alito is not entitled to the same freedom of speech protections as citizens, since his duties necessarily circumscribe his authority, which does not include imploring people not to make political statements that he finds inappropriate. Meanwhile, Justice Elena Kagan and Chief Justice John Roberts engaged in a public debate about the damage done to the Court's legitimacy from the justices' disagreements over the Court's legitimacy.[72] Airing such disagreements publicly is hard to square with the justices' presumed duty to refrain from engaging in policy or political debates.

The Court's further failure to find fault for the leaking of an earlier draft of the opinion overruling *Roe* is a failure, too, of the Court's policing itself, which, the Court claims, should be how it should be allowed to handle ethical concerns.[73] In light of concerns about justices interacting with people who have vested interests in the Court's business, the Court's failure to adhere to a code of ethics, and the Court's evident failure to police its own staff and each other, the argument for greater supervision of the Court is stronger than ever, particularly with respect to the ethical conduct and lapses of its justices.

Dobbs is not the only means to indict justices with their intemperate unprofessionalism. When the Court ruled six-to-three that the First Amendment protected a football coach in holding a prayer at mid-field after a game,[74] it went to extraordinary lengths to distort or misrepresent the record in the case. For example, Justice Gorsuch, in his opinion for the six-member majority, declared the coach "offered his prayer quietly while his students were otherwise occupied" even though the entire team joined in the prayer.[75] He also said that the coach only wanted to offer a "short, private personal prayer" when, in fact, the prayer was held at mid-field with players, reporters, and members of the public participating.[76] Furthermore, Justice Gorsuch rejected the photographic evidence in the record regarding prayer and instead claimed "not a single Bremerton player joined Mr. Kennedy's quiet prayers" and the players present during the prayer were "from the opposing team."[77] Justice Sotomayor systematically went through the evidence in the record

71. Jess Bravin, *Kagan v. Roberts: Justices Spar Over Supreme Court's Legitimacy*, WALL ST. J. (Sept. 28, 2022, 5:46 PM), https://www.wsj.com/articles/kagan-v-roberts-justices-spar-over-supreme-courts-legitimacy-11664394642.

72. *Id.*

73. Charlie Savage & Adam Liptak, *Supreme Court Says It Hasn't Identified Person Who Leaked Draft Abortion Opinion*, N.Y. TIMES (Jan. 19, 2023), https://www.nytimes.com/2023/01/19/us/politics/supreme-court-leak-roe.html.

74. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2415–16 (2022).

75. *Id.*

76. *Id.* at 2417–18.

77. *Id.* at 2430.

contradicting each of Justice Gorsuch's (mis)characterizations.[78] Justice Gorsuch ignored the affidavit from one player who said he had felt compelled to join the prayer or risk not having any future playing time.[79] Lawyers who misled the Court and distorted the record in their briefs almost certainly would be reprimanded and sanctioned for doing so,[80] but, here, it was Justice Gorsuch doing the distorting and misrepresentations, which were only chastised in the dissent. If Justice Gorsuch cannot be sanctioned for liberties that he took with the record, then the Court's integrity is as much at risk as is its legitimacy.

For example, in their respective confirmation hearings, Justices Gorsuch and Barrett each proclaimed fidelity to original meaning, but, on the Court, they have written or joined opinions reversing constitutional precedents without a word about original meaning. In *Janus v. American Federation of State, County, and Municipal Employees*,[81] Justice Gorsuch wrote the Court's opinion overruling a decision that had upheld the practice of unions requiring people who do not join to pay a fee rather than dues.[82] Yet, no mention was made of original meaning. More recently, oral arguments on the constitutionality of the admission practices of Harvard University and University of North Carolina, had gone on for more than two hours before Justice Kagan noted that no one had yet mentioned original meaning.[83]

Fourth, Supreme Court justices have engaged in partisan or unethical activity without fear of being held accountable. For example, after President Roosevelt proposed a plan to pack the Supreme Court with justices committed to upholding the constitutionality of New Deal programs, Chief Justice Charles Evans Hughes, usually a model of judicial rectitude, met privately with Senator William Borah to share a letter that he and two other justices had signed opposing the plan.[84] Usually, three justices do not have the power to make any decisions for the Court as a whole, but they issued their letter to lend the credibility of their support in opposition to a plan, the constitutionality of which was

78. *Id.* at 2435–41 (Sotomayor, J., dissenting).

79. *Id.* at 2430.

80. *See, e.g.*, Carrie Johnson, *Trump Lawyers Who Spread False Election Claims Are Now Defending Themselves in Court*, NPR (July 16, 2021, 5:01 AM), https://www.npr.org/2021/07/16/1016350616/trump-lawyers-who-spread-false-election-claims-are-now-defending-themselves-in-c [https://perma.cc/WLW7-TBE7].

81. 138 S. Ct. 2448 (2018).

82. *Id.* at 2459–60.

83. *See* David H. Gans, *Justice Kagan's Question: The Glaring Silence of the Supreme Court's Conservative Originalists in the Affirmative Action Cases*, CONST. ACCOUNTABILITY CTR. (Nov. 7, 2022), https://www.theusconstitution.org/blog/blog-justice-kagans-question-the-glaring-silence-of-the-supreme-courts-conservative-originalists-in-the-affirmative-action-cases [https://perma.cc/J66Z-SKCX].

84. *See* JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT (2010).

not pending before the Court. Just as bad, the letter insinuated the opposition to the plan on the Court was perhaps greater than it appeared on the surface.

Fast forward, and the examples are more frequent and arguably more troubling: The New York Times reported that the private Supreme Court Historical Society dangles private meetings with the justices in front of donors.[85] Since these meetings are private, the public cannot know for certain what was said or conveyed in them, but the fact that the donors include people litigating or invested in litigation before the Court undermines confidence that the Court is devoted to non-partisan constitutional interpretations. It came as little surprise that Justices Alito, Thomas, and Kavanaugh were among the justices who met privately with benefactors, since they all had long maintained strong connections with conservative critics of *Roe v. Wade* and other Supreme Court decisions before and after their appointments to the Court.[86] Justice Gorsuch gave a speech behind closed doors to the Federalist Society,[87] while Justice Brett Kavanaugh delivered an emotional speech expressing his gratitude—and thanking friends by name—as the keynote to the Federalist Society convention, where Senator McConnell was in attendance. Justice Kavanaugh declared that his "adversity" had shown him his "true friends."[88] Justice Amy Coney Barrett had the temerity to declare at a private event honoring Senator Mitch McConnell that the justices "are not political hacks" and that "judicial philosophies are not the same as political parties,"[89] apparently missing the irony of such declarations

85. Jo Becker & Julie Tate, *A Charity Tied to the Supreme Court Offers Donors Access to the Justices*, N.Y. TIMES, https://www.nytimes.com/2022/12/30/us/politics/supreme-court-historical-society-donors-justices.html (Jan. 1, 2023).

86. *Id.*; *see also* Lydia Wheeler, *Kavanaugh Holiday Party Appearance Raises Ethics Questions (1)*, BLOOMBERG L., https://news.bloomberglaw.com/us-law-week/kavanaugh-holiday-party-appearance-raises-more-ethics-questions [https://perma.cc/F5DQ-C6PJ] (Dec. 12, 2022, 3:35 PM) (citing Rachel Bade, *POLITICO Playbook: Hunter Biden Goes on Offense*, POLITICO, https://www.politico.com/newsletters/playbook/2022/12/10/hunter-biden-goes-on-offense-00073365 [https://perma.cc/M79Q-VLZW] (Dec. 11, 2022, 8:08 AM)).

87. Greg Stohr, *Gorsuch's Speech at Federalist Society Event Is Only One to Bar Media*, BLOOMBERG (Feb. 2, 2022, 1:59 PM) https://www.bloomberg.com/news/articles/2022-02-02/gorsuch-s-speech-to-conservative-group-is-only-one-to-bar-media [https://perma.cc/7AVS-YMXQ].

88. Ariane de Vogue, *Kavanaugh Expresses 'Gratitude' to Conservative Gala for Support Through Confirmation Process*, CNN https://www.cnn.com/2019/11/14/politics/brett-kavanaugh-washington-federalist-society-speech/index.html [https://perma.cc/47PT-YY9U] (Nov. 14, 2019, 11:45 PM).

89. Martin Pengelly & Joan E Greve, *Amy Coney Barrett Claims Supreme Court 'Not Comprised of Political Hacks,'* GUARDIAN (Sept. 13, 2021, 12:31 PM), https://www.theguardian.com/us-news/2021/sep/13/amy-coney-barrett-supreme-court-not-partisan-hacks-abortion [https://perma.cc/SJ4X-VJVQ].

being uttered before an audience gathered at the University of Louisville's McConnell Center (and later reported around the nation). Yet, these are just the events we know about, not including other, unreported private interactions between justices and others who have stakes in how the Court rules. The odds are the tip of a disturbing iceberg.

II. THE SUPREME COURT CONFIRMATION PROCESS IS (NOT) BROKEN

In this Part, I initially describe the foundations for the myth of the confirmation process as broken. Then, I turn to several arguments undermining that myth.

A. Did Robert Bork's Rejection Break the Confirmation Process?

For more than four decades, Republican presidents and senators have pounded the theme that the Democratic-led rejection of Robert Bork's Supreme Court nomination in 1981 broke the confirmation process.[90] They argue that, after Bork, the process has become more focused on nominees' judicial philosophies than before and filled with Democrats' dirty tricks, such as sandbagging Brett Kavanaugh at his confirmation hearings with a witness who charged he had assaulted her. Many suggest that rejecting Bork introduced a new phenomenon, namely, to "bork" someone, meaning to reject their nomination for illicit reasons.[91]

The claims made against Senate Democrats are a classic example of disinformation: They blame Democrats for what Republicans are doing to them. They presuppose, without any evidence, that the process had somehow been different before Bork—when it was not. They falsely blame Democrats for being the first ever to assess Supreme nominations based on their judicial philosophies when, in fact, they are not.[92] They falsely blame Democrats for being partisan in such hearings when, in fact, Republicans in the Senate as far back as the latter half of the nineteenth century and later during the presidencies of Woodrow Wilson, Franklin Roosevelt, and Lyndon Johnson, stuck together in opposing well qualified nominees because of their judicial philosophies.[93] There has never been a golden era of comity in Supreme Court nominations: One

90. CARTER, *supra* note 3, at 125; *see also* Randy E. Barnett & Josh Blackman, *Restoring the Lost Confirmation*, NAT'L AFFS., Fall 2016, at 97, 97–99.

91. Jack Herrera, *The Ever-President History of 'Getting Borked,'* PAC. STANDARD (Sept. 6, 2018), https://psmag.com/news/history-of-getting-borked [https://perma.cc/C324-B5ZQ].

92. HENRY J. ABRAHAM, JUSTICES & PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 71–73 (3rd ed. 1992).

93. *Id.* at 180, 213–14, 292–94.

in five failed during the nineteenth century, seven failed in the twentieth century, and thus far two have failed in the twenty-first century.[94] Even nominees who were confirmed, such as Louis Brandeis and Thurgood Marshall, faced hostile questioning and negative votes from Republican senators.[95] The point is not that Democrats' hands are clean but rather that Republican senators are making up history to justify their actions.

Within an hour of Justice Scalia's death in 2016, Majority Leader Mitch McConnell declared that any nomination made by President Obama to the vacant seat was dead on arrival.[96] Republicans quickly joined together to oppose the nomination based on a supposed tradition of the Senate's not acting on nominations to the Supreme Court during presidential election years. When that assertion was challenged as ahistorical,[97] Republican leadership claimed they were asserting the "Biden Rule," which was not a rule but a floor statement by then-Senator Biden suggesting—at a time when no nomination was pending—the possibility of the Senate's refraining from doing anything when there is an ongoing presidential election.[98] Besides the fact that Biden's speech reflected only his own thinking at the time, there was plenty of evidence indicating the Senate had acted on Supreme Court nominations during elections, including as recently as the Senate's confirmation of Justice Anthony Kennedy in 1988, a presidential election year.[99] When Justice Ginsburg died just weeks before the 2020 presidential election, Republicans jettisoned concerns for not acting during presidential election years and rushed Amy Coney Barrett's nomination through in record time.[100]

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94. *Id.* at 39; *Supreme Court Nominations (1789–Present)*, U.S. SENATE, https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm [https://perma.cc/4Y5X-X5D7] (last visited Mar. 5, 2023).

95. ABRAHAM, *supra* note 92, at 182–83, 293–94.

96. Eric Bradner, *Here's What Happened When Senate Republicans Refused to Vote on Merrick Garland's Supreme Court Nomination*, CNN, https://www.cnn.com/2020/09/18/politics/merrick-garland-senate-republicans-timeline/index.html [https://perma.cc/5FWP-5RYG] (Sept. 19, 2020, 8:16 PM).

97. Michael Gerhardt, *Getting the Senate's Responsibilities on Supreme Court Nominations Right*, SCOTUSBLOG (Mar. 9, 2016, 11:10 AM), https://www.scotusblog.com/2016/03/getting-the-senates-responsibilities-on-supreme-court-nominations-right [https://perma.cc/UA5N-XSCX].

98. C. Eugene Emery, Jr., *In Context: The 'Biden Rule' on Supreme Court Nominations in an Election Year*, POLITIFACT (Mar. 17, 2016), https://www.politifact.com/article/2016/mar/17/context-biden-rule-supreme-court-nominations [https://perma.cc/MS3A-EVLU].

99. Gerhardt, *supra* note 97.

100. *See* Jenni Fink, *Amy Coney Barrett Confirmation Timeline: From Supreme Court Nomination to Senate Hearings, Votes*, NEWSWEEK (Oct. 12, 2020, 10:39 AM), https://www.newsweek.com/amy-coney-barrett-confirmation-timeline-supreme-court-nomination-senate-hearings-votes-1538320 [https://perma.cc/P2WZ-LZTS].

B. The Real Historical Record

The claim that the process is broken is mistaken for several reasons. The first is that there has been no golden era in which senators rubber stamped Supreme Court nominations, regardless of credentials or judicial philosophy. Indeed, partisans had blocked one of George Washington's nominations to the Court, and most of the failed nominees in the nineteenth and twentieth century were highly qualified.[101] Thus, it is pure fiction to argue that process suddenly changed in 1987. The only thing that changed with the Bork nomination is that Bork himself naively shared far too much of his likely judicial performance and thus gave the opposition more than enough reason to reject the nomination.[102] After Bork, Supreme Court confirmation hearings have largely returned to the pattern beforehand, in which nominees said little or nothing, thus making themselves the smallest targets possible.

Second, presidents generally get the nominees they want for the Court. If the process were broken, presidents would be unable to do what most have done, which is to make appointments that changed constitutional law. If the process were broken, *Roe* would still be good law and there would be no *Dobbs* overruling it. If the process were broken, George Washington would not have been able to ensure that the Court was composed to uphold a strong national government.[103] If the process were broken, Lincoln would not have been able to get justices appointed that later upheld his war policies when they were challenged in court.[104] If the process were broken, President Grant would not have been able to transform the Court so that it would uphold the constitutionality of paper money.[105] If the confirmation process were broken, Taft would have failed in building a Court that protected the rights of private property owners and ruled against labor.[106] And, if the process were broken, Franklin Roosevelt would not have been able to fortify the constitutional foundations of New Deal legislation. While some justices do not work out as presidents had hoped, most do, which is the point,[107] and, when they do not, presidents develop more sophisticated metrics for choosing justices.

Third, Supreme Court confirmation hearings illuminate nominees' constitutional commitments and temperament. Since 1925, when Harlan

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101. ABRAHAM, *supra* note 92, at 39, 72–73.

102. *See* MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 183 (Neal Devins ed. 2003).

103. Abraham, *supra* note 38, at 58.

104. *Id.* at 93.

105. *Id.* at 101–03.

106. *Id.* at 131–35.

107. *Id.* at 166.

Fiske Stone was the first nominee to the Court to testify before the Senate, nominees differ in how much (and in what ways) they characterize their judicial philosophies, talk about earlier Supreme Court precedents, and signal their positions on issues likely to come before the Court that senators care deeply about.[108] For example, Justice Kavanaugh engaged in a series of misleading, false statements under oath—which are irreversibly recorded and cannot be ignored in assessments of his judicial temperament, integrity, and performance. Indeed, the false statements he made (not under oath) reassuring Maine's Republican Senator Susan Collins behind closed doors, did not remain hidden for long—when Kavanaugh joined the majority to overrule *Roe*, she immediately came forth to denounce his reassurances about *Roe* as false or deliberately misleading.[109] Years before, shortly after Justice Hugo Black was confirmed to the Supreme Court, a Pittsburgh newspaper broke the news that Black had hidden his Ku Klux Klan membership from the public and media.[110] Senators and much of the public were furious, prompting Black to cut short a European vacation and deliver a radio broadcast addressing the matter.[111] While the controversy died down, Roger Newman, in his biography of Black, showed that even Black's public statements at the time were dubious.[112] The point is not that the confirmation process worked perfectly in Black's case but instead that it makes it hard, if not impossible, for justices to get away with lies, significant omissions, and misleading statements either at the time of their nominations or later.

Last but hardly least, the confirmation process cannot be declared broken without a metric for assessing its operations. If the process is measured based on some idealistic standard, that should be made crystal clear, but there is not any consensus on such a standard nor has one been declared that senators of different views accept as their metric. If the standard is whether the process has illuminated nominees' characters or judicial philosophies, it plainly has. (Just compare how justices vote with what they said during their hearings about their philosophies.). If the metric is to engage the American people in a seminar-like experience on

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108. *See generally* GERHARDT, *supra* note 102, at 198–201.

109. Carl Hulse, *Kavanaugh Gave Private Assurances. Collins Says He 'Misled' Her.*, N.Y. TIMES (June 24, 2022), https://www.nytimes.com/2022/06/24/us/roe-kavanaugh-collins-notes.html; Jon Skolnik, *Susan Collins Says Brett Kavanaugh Lied to Her About Abortion—but Josh Hawley Is Not Buying It*, SALON (May 3, 2022, 1:22 PM), https://www.salon.com/2022/05/03/susan-collins-says-brett-kavanaugh-lied-to-her-about-abortion--but-josh-hawley-is-not-buying-it [https://perma.cc/7XRD-UL6J].

110. Todd C. Peppers, *Justice Hugo L. Black, His Chambers Staff, and the Ku Klux Klan Controversy of 1937*, SUP. CT. HIST. SOC'Y (Apr. 27, 2021), https://supremecourthistory.org/scotus-scoops/justice-hugo-black-ku-klux-klan-controversy-1937 [https://perma.cc/4H6Y-Z7WM].

111. *Id.*

112. ROGER NEWMAN, HUGO BLACK: A BIOGRAPHY 96, 98 (1994).

issues in constitutional law, Bork's is the only confirmation hearing that followed that standard.[113]

Yet, that is not the metric that presidents and senators have used. Their metric has always been simple and straightforward—either to secure or deny the confirmations of justices, depending on whether they approve or disapprove of their judicial philosophies. Republican senators in the modern era have tended to express their standard as "interpreting the law, not making the law,"[114] but, in practice, they are measuring nominees who will either rule the way senators like or not. Based on the standard of each side approving judicial philosophies and outcomes they like and disapproving those they dislike, the process has achieved its purpose.[115]

III. THE CASE REGARDING A SUPREME COURT CODE OF ETHICS

This Part examines the myth that the Supreme Court should not be subject to a code of ethics. After describing the arguments made on behalf of the myth, I consider the more compelling arguments why the justices should be subject to a code of ethics.

A. The Case Against a Supreme Court Code of Ethics

In its Report on possible reforms relating to the Supreme Court, the special commission assembled by President Joe Biden in 2021 was under order not to make any recommendations.[116] On the possible adoption of a code of ethics for the Supreme Court, something that had interested many members of Congress for years, the Report said nothing consequential.[117] The Commission found more interesting a proposal for doing away with Supreme Court Justices' life tenure.[118] It concluded with a reaffirmation of the Court's legitimacy.[119]

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113. *See* CARTER, *supra* note 3, at 125–26.

114. *See* ABRAHAM, *supra* note 92, at 298.

115. The fact that the process has become a form of political theater or invited abusive or nasty behavior does not mean that it is broken. It is useful to remember the quote usually attributed to Otto von Bismark (but actually stated years earlier by American poet John Godfrey Saxe), "[l]aws are like sausages. It is best not to see them being made." *Otto von Bismark "Laws Are Like Sausages. It Is Best Not to See Them Being Made" Quote or No Quote?*, PROFESSOR BUZZKILL (May 1, 2018), https://professorbuzzkill.com/bismarck-laws-and-sausages [https://perma.cc/NPF4-AJHW]. The political theater Americans witness during contemporary confirmation hearings is the Senate in action, for better or worse.

116. *See* Exec. Order No. 14,023, 3 C.F.R. § 541 (2021).

117. PRESIDENTIAL COMM'N, FINAL REPORT, *supra* note 8, at 216–17.

118. *Id.* at 8.

119. *Id.* at 13.

The Commission was a missed opportunity. Any time a president establishes a commission to study an important problem, there is a concern that it is largely for show—in this case, fulfilling a campaign promise to study the problem, appeasing constituents or others wishing to see some presidential action on the question, but ensuring no radical result that could hurt the president politically. It is the safe thing to do on controversial subjects. When the Report arrived, it had no impact whatsoever on the critical issues confronting the Court, such as whether its legitimacy was at risk, whether life tenure produced more problems than it solved, what are the signs of an over-politicized Court, whether a code of ethics was a good idea or not, and what kinds of conduct should justices not be allowed to engage in during their tenure. As the public's confidence in the Court declines,[120] fights over Supreme Court confirmations rage, and infighting within the Court intensifies, America's political leaders could have sought tangible solutions in the Report, which did nothing other than enrich some public understanding of the issues involved with various proposals to reform the Supreme Court. It is hardly likely to be required reading in Congress or elsewhere.

But, without anyone appointed to the Commission that was willing to think outside the box or put their own interests aside in assessing the need for Court reform, no other outcome seemed likely. Given that members who clerked on the Supreme Court were likely to venerate the Court if only to affirm its importance on their resumes or members who are political allies of the President or political appointees eager for other appointments, the Commission did what its critics most expected—allowed the myths and misconceptions of the Court to fester without offering new insights or solutions.

It is hardly surprising that the Court, too, has never embraced a code of ethics. The justices were appointed to put into place the constitutional objectives of the people who appointed them, not to rethink their power (or the Court's place) in the constitutional order. By and large, justices are invested in preserving and exercising their judicial-review power not abandoning or limiting it.

Nor is it likely that any institution, including the Court, has the capacity to support any radical changes of itself. Operational inertia is, in other words, as much of a problem for the Court as it is for the presidency and Congress.[121] Justices enjoy life tenure, they are treated like royalty, everyone laughs at their jokes, lawyers envy them,

120. *See* Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, GALLUP (June 23, 2022), https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx [https://perma.cc/7KNR-3S7U].

121. *See, e.g.*, SAMUEL B. BACHARACH, TRANSFORMING THE CLUNKY ORGANIZATION 3 (2018).

laypeople and lawyers do not talk back to the justices,[122] even when they are rude, people stand when they enter rooms, they have private drivers and special protection[123]—the justices simply have no incentive to abandon the myths and power that elevate them over ordinary citizens and other constitutional actors. Presidents and senators do not yearn to change the benefits or power given to the justices; they yearn to control who receives the benefits and wields such power. That is a recipe for the justices to resist the adoption of a code of ethics, which rests on the assumption that justices are fallible and potentially corruptible. Leaders rarely think such things about themselves, and presidents and senators tend to think that way only about the justices whose philosophies they dislike.

There are other reasons why the Court—and Congress—have consistently opposed the enactment of a code of ethics. The first is that it might be pointless. Allowing the justices to monitor themselves runs the risk that they will do nothing: They may not want to chastise their colleagues because they do not want to undermine the collegiality of the Court, they want to keep their coalition on the Court strong and intact, or they want the license to do many if not most of the same kinds of things themselves.

Second, a mandatory code of ethics imposed on the Court might be unconstitutional.[124] Compelling justices to abide by a code of ethics authorized by Congress enables Congress to micro-manage the behavior of Supreme Court justices, who require decisional independence from Congress to do their jobs.[125] In his 2011 End-of-the-Year Report on the Federal Judiciary, Chief Justice Roberts suggested that Congress only has the power to impose ethical codes on lower court judges—but not justices—because it has the plenary power to create inferior judicial

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122. For a rare exception, Supreme Court litigator Neal Katyal broke the norm in aggressively pushing back against some justices in the oral arguments in *Moore v. Harper*, a case raising the question of whether courts have no role in supervising state elections. Elura Nanos, *SCOTUS Mulls Radical Restructure of U.S. Elections in Combative Oral Arguments, as Justices Invoke Alexander Hamilton, English Bill of Rights, and 3/5 Compromise*, LAW & CRIME (Dec. 7, 2022, 3:27 PM), https://lawandcrime.com/supreme-court/scotus-mulls-radical-restructure-of-u-s-elections-in-combative-oral-arguments-as-justices-invoke-alexander-hamilton-english-bill-of-rights-and-3-5-compromise [https://perma.cc/HYQ2-7KVR].

123. *See, e.g.*, Joshua Eaton, *Supreme Court Justices' Perks Revealed in New Report*, ROLL CALL (Mar. 24, 2020, 5:20 PM), https://rollcall.com/2020/03/24/supreme-court-justices-perks-revealed-in-new-report [https://perma.cc/4HZ5-TK29].

124. *See* Bomboy, *supra* note 7.

125. *See* CHIEF JUSTICE JOHN ROBERTS, 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 4 (2011), https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf [https://perma.cc/BA77-NUJ2].

tribunals.[126] But, as the Chief Justice notes, the Constitution creates "one Supreme Court"[127] and nowhere vests Congress with the same regulatory power Congress has over lower federal courts. Thus, it has no power to treat the Court as it treats lower courts for regulatory purposes.[128]

Indeed, the Court differs not just in the fact that the Constitution, not Congress, creates it. As the court of last resort, justices' recusals have serious ramifications for the Court's ability to do its job that are unique. The recusal of one federal appellate judge does not undermine the federal appellate court's functioning, because there are other judges to take the recused judge's place. There is no analogous option for the Supreme Court; when justices recuse themselves, they leave the Court without "its full membership," which it needs to do its job.[129]

Third, as Chief Justice Roberts noted in his 2011 End-of-the-Year Report on the Federal Judiciary, there are many checks against misbehavior on the Court that are already in place.[130] These include not only the impeachment process but the Code of Conduct for United States Judges and other ethical requirements, which the Court voluntarily consults,[131] adopts as a guide, and various statutory disclosure requirements, which apply to all federal judges, to make the courts more transparent and accountable.[132] In 2019, Justice Kagan revealed that Chief Justice Roberts is exploring the possibility of the Court adopting its own code of ethics;[133] as of 2023, there has been no word about his progress.

B. The Case for a Code of Ethics

The Court has hoisted itself on its own petard in opposing a code of ethics. The problem is that the Court has wanted to have it both ways, but it cannot: The justices argue that the Court should not have a code of ethics because it interferes with their decisional independence from the political branches, but they also argue that they should not have a code

126. *Id.* at 3–4.

127. U.S. CONST. art. III.

128. *See* Roberts, *supra* note 125, at 3–4.

129. *Id.* at 9.

130. *Id.* at 10.

131. Glenn Fine, *The Supreme Court Needs Real Oversight*, ATLANTIC (Dec. 5, 2022), https://www.theatlantic.com/ideas/archive/2022/12/supreme-court-ginni-thomas-january-6-ethics-oversight/672357 [https://perma.cc/4EPC-N69G].

132. *See* Roberts, *supra* note 125, at 6.

133. Debra Cassens Weiss, *Chief Justice Considering Possibility of Ethics Code for Supreme Court, Kagan Reveals*, ABA JOURNAL (Mar. 8, 2019, 11:37 AM), https://www.abajournal.com/news/article/chief-justice-is-considering-idea-of-ethics-code-for-supreme-court-kagan-reveals [https://perma.cc/7L8H-R395].

of ethics because they are "the court of last resort."[134] Yet, since the Supreme Court is the "court of last resort," it seems that it might need greater supervision and to be subject to greater transparency.

Several arguments make the case for a code compelling. The first is that any justice who previously served as a judge or state court justice has had to comply with a code of ethics. They have had to live with codes of ethics previously and had no apparent problems in doing so. If the Court is a court of law, performing nothing but judicial functions, then it should be treated like every other court and be made subject to the same code of ethics applicable to every other judge in the country.

Second, it is perverse to treat appointment to the Court as a safe harbor from charges made against the justices based on possible misconduct before their confirmation. Thus, as a practical matter, lying under oath in confirmation hearings is nearly impossible to be checked, since, once a justice is confirmed, they are no longer subject to a code of ethics and therefore have greater freedom to engage in misconduct. Elevation, in other words, makes justices less accountable.

To make matters worse, as the Court has become more powerful, it has become less accountable. The Constitution does not vest life tenure in justices so that they may be unaccountable for their misconduct. Nor does it make sense to expect the impeachment process to serve as the only sanction for a justice's misconduct.[135] For one thing, there is misconduct that falls short of an impeachable offense but would be permissible for justices to get away with (while no other judges could). For another, impeachment, as a practical matter, is extremely hard to do against high-profile public figures, like Supreme Court Justices. Relying on the impeachment process is unrealistic, given both the nearly impossible threshold for conviction and the likelihood that senators who fought to get a justice confirmed would oust the person, especially without a guarantee that a like-minded justice would replace them.

Fourth, in a country that proudly touts the supposed founding principle that "no one is above the law,"[136] the Court may be the worst offender among the branches of the federal government in successfully blocking attempts to hold its members accountable for their misconduct. Members of Congress are supposed to abide by certain ethical standards or risk being censured, or worse, by their colleagues. Presidents are under intense scrutiny as candidates and later in office, which makes it difficult if not impossible for them to hide their misconduct for long. Yet, justices are only subject to intense scrutiny in the confirmation process,

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134. *See* Roberts, *supra* note 125, at 9.

135. *See* U.S. CONST. art. II.

136. The Supreme Court has noted on numerous occasions that no one is "above the law." *See, e.g.*, *United States v. Nixon*, 418 U.S. 683, 715 (1974); *Trump v. Vance*, 140 S. Ct. 2412, 2446 (2020).

which, ironically, many senators and scholars find problematic. Once on the Court, justices largely recede from public scrutiny and are left almost entirely to themselves to make decisions about recusal and interactions with politically active partners, friends, relatives, and leaders. Chief Justice Roberts assured the nation that justices consult with their colleagues on recusal questions, but any such consultation is not a panacea, since the final decision rests with the justices themselves.

The final argument in support of a code of ethics is that, in its absence, justices have taken part in dubious activities. Of the current nine justices, as many as five appear to have engaged in misconduct that would be intolerable for lower court judges. I have already noted, as have numerous media outlets, the possibly inappropriate speeches and actions of Justices Barrett, Kavanaugh, and Gorsuch, but Justice Alito has met privately with parties that have stakes in cases before the Court, particularly in abortion rights cases; and, while he denies any inappropriate conversation took place,[137] he fails to recognize, much less discuss, why the meetings ever took place, the precise nature of the conversations taking place, and what impact his decisions have on the donations being made to the Supreme Court Historical Society. People give money to the private outfit to have access to justices who are like-minded and eager to interact with their fans and supporters.

Lastly, Justice Thomas has yet to recuse himself from any cases in which his wife was involved; she encouraged defiance against the certification of the 2020 presidential election and met with President Trump on the subject while the Court made decisions on appeals from lower courts that had rejected the President's challenges to the integrity of the 2020 presidential election.[138] It is not just Thomas's refusal to recuse himself that is troubling to many, but the silence from his

137. Jodi Kantor & Jo Becker, *Former Anti-Abortion Leader Alleges Another Supreme Court Breach*, N.Y. TIMES (Nov. 19, 2022), https://www.nytimes.com/2022/11/19/us/supreme-court-leak-abortion-roe-wade.html.

138. *See* Amanda Frost, *Why the Other Justices Must Censure Clarence Thomas*, SLATE (Dec. 5, 2022, 12:30 PM), https://slate.com/news-and-politics/2022/12/clarence-thomas-conflict-of-interest-consequences.html. Justice Thomas responded to reports that he took lavish trips paid for by a Republican donor. According to Justice Thomas, he was "a close friend who did not have business before the Court." Nina Totenberg, *Justice Thomas Explains Why He Didn't Report Trips Paid for By Billionaire*, NPR, https://www.npr.org/2023/04/07/1168649656/justice-thomas-trips [https://perma.cc/H8E6-BMMW] (Apr. 7, 2023, 7:38 PM). Other justices have similarly failed to make such disclosures, though a Supreme Court justice should know better than to accept lavish expenditures from someone like Thomas's friend, who has been affiliated with organizations that have had cases before the Supreme Court. *See* Ian Millhiser, *Second Harlan Crow Connected Group Has a Perfect Litigation Record Before Justice Thomas*, THINK PROGRESS (June 23, 2011, 1:50 PM), https://archive.thinkprogress.org/second-harlan-crow-connected-group-has-a-perfect-litigation-record-before-justice-thomas-1aaf50c21db8/ [https://perma.cc/KQ84-YJRV].

colleagues—evidencing an apparent lack of concern—is deafening and disheartening.

The point is not that only Republican justices have misbehaved. The point is that *no* justice should be allowed to take such liberties with their office and engage in activities breaching ethical principles applicable to other judges, such as the duty to avoid "impropriety" and the appearance "of impropriety in all the judge's activities."[139]

IV. REFORMING THE SUPREME COURT

There are several possible solutions to the dilemma of formulating a code of ethics. Each should work not just for the Court but has potential to draw support from most members of Congress and the President. First, a code of ethics can be adopted by the Court itself. If Congress lacks the will, for whatever reason, the Court still has the power to impose a code of ethics on itself, which would be enforceable by the justices themselves. A key issue such an arrangement might raise is whether it is constitutional for the justices to impose any sanctions on each other. It seems likely, however, that such an arrangement is constitutional because courts have already upheld the Judicial Disability Act of 1980,[140] which creates mechanisms for courts to police themselves on certain matters. At the core of the arguments upholding the constitutionality of the Act is the recognition that courts inherently have some administrative authority to monitor themselves, especially in matters involving disability (such as a heart attack or other disabling event) or incapacity (such as a justice's imprisonment before, or in the absence of, impeachment). The Supreme Court's failure to do this reveals the justices' determination to avoid being held accountable like every other judge in the country for breaches of codes of ethics. Their failure reinforces the claim that they—the Court—is not like other courts.

The second solution is to adopt new laws or rules restricting, or requiring, certain judicial conduct. Justices are already subject to various federal laws requiring disclosures of their activities and income. Congress could extend those laws, by, for example, expanding financial disclosures. They could bar justices from giving speeches to private groups behind closed doors—or at least require justices to disclose the text and transcript of *all* speeches, whether in public or in secret. It is hard to imagine a good reason why a justice might wish to give a private

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

140. *See generally* STEPHEN BREYER, SARAH EVANS BARKER, PASCO M. BOWMAN, D. BROCK HORNBY, SALLY M. RIDER & J. HARVIE WILKINSON III, JUD. CONDUCT AND DISABILITY ACT STUDY COMM., IMPLEMENTATION OF THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980 5 (2006), https://www.supremecourt.gov/publicinfo/breyercommitteereport.pdf [https://perma.cc/K4JJ-SKTQ].

speech, especially to partisan groups or the public. A law could require disclosing who attended private speeches, gatherings, or meetings, especially with the justices behind closed doors. Indeed, a new rule issued by the Administrative Office of the Courts requires justices and other judges to disclose travel and other perks they receive, a step in the right direction.[141]

Whether the audiences are Republicans, Democrats, students, or judges, there are no comforting answers why any justices might argue they must make a speech—behind closed doors, with no public scrutiny—to a group which exists possibly for partisan reasons or is likely to be involved in litigation before the Court or confirmation proceedings for Supreme Court Justices. If they need to speak in private because of concerns they may say something inappropriate, disclosure is a good thing—and long overdue. Justices do not get to do and say whatever they like. Royalty does, but not Supreme Court justices—or any other federal officials.

Third, public education about the Court matters. An informed citizenry is more capable of holding its leaders accountable for their misconduct. A widely held belief at the time of the Founding remains today: citizens are the ultimate sovereigns.[142] There is much to celebrate and venerate in our history and in the performances of our national leaders, but American history is not fantasy and its purpose is not to make citizens submissive to authority. Rather, education enriches understanding of how our institutions work, including not just the highs but also the lows. And one lesson may be that, if the Court were in truth devoted solely to following the rule of law, presidents, senators, litigants, and interest groups would not be consumed with how to control who sits on the Court.

One likely response to this proposal solution lacks credibility outside partisan circles. Republican presidents and senators may claim, as they often do, that *their* justices are the only ones who follow the rule of law and thus need the support of outside groups to prevent the dreaded liberals from hijacking the Court. Yet, when Republican presidents and senators mischaracterize the opposition and show no concern about the tides of "dark money" flowing into the confirmation process, they reveal their true colors. What they are really saying is that their need to control the composition of the Court is so important to them that any means of achieving it—from making up history, as they did in opposing Merrick

141. *See* Abbie VanSickle, *Justices Must Disclose Travel and Gifts Under New Rules*, N.Y. TIMES (Mar. 29, 2023), https://www.nytimes.com/2023/03/29/us/politics/supreme-court-trips-giftsdisclosures.html.

142. *See, e.g.*, Stephanie Hall Barclay, *Retained by the People: Federalism, the Ultimate Sovereign, and Natural Limits on Government Power*, 23 WM. & MARY BILL RTS. J. 257, 266 (2014).

Garland, to degrading the opposition's nominees in racist stereotypes, as they did with Justice Ketanji Brown Jackson,[143] to refusing to put an end to dark money, as they have done for decades—is legitimate. We all learned in grade school, if not before, that multiple wrongs do not make a right.

There is nothing unconstitutional, or inappropriate, in having a law requiring transparency in funding advertisements or activities on behalf of or against certain nominees. The same is true for a law that barred justices from private meetings with donors from the Supreme Court Historical Society and other organizations or individuals who have a vested interest in who sits on the Court.

CONCLUSION

Mythologizing the Supreme Court serves no good purpose. Both justices and partisans (and, frankly, the two may overlap) mythologize the Court when it suits their purposes. But, in doing so, they merely make the Court less accountable. It is troublesome that, as the Court's power increases to review the constitutionality of nearly every action of presidents and Congress, the justices resist being tied down by a code of ethics. It is not enough for the justices to say they should be trusted. Instead, they should be required to prove their integrity. But, when justices privately consort with people who have stakes in the Court's decisions, it seems inevitable that the justices will rule in ways that perpetuate that interaction. Members of a justice's family should be restricted from participating in matters that come before the Court, or the law should require recusing justices from hearing cases in which members of their family are involved. Justices are human, after all.

The states may point to a solution. Not once, but twice, Roy Moore was removed as Chief Justice of the Alabama Supreme Court through a special procedure authorized in the Alabama State Constitution.[144] The Alabama law establishes a judicial ethics panel, whose members may include members of the bar as well as judges and non-judges. Despite

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143. Mikki Kendall, *What Black Women Saw at Ketanji Brown Jackson's Confirmation Hearing*, TIME (Mar. 25, 2022, 10:50 AM), https://time.com/6160844/ketanji-brown-jackson-black-women-confirmation-hearings [https://perma.cc/QXC6-ESEW]; Elie Mystal, *Ketanji Brown Jackson's Long Pause Explained Racism and Sexism in the United States*, NATION (Mar. 24, 2022), https://www.thenation.com/article/politics/ketanji-brown-jackson-pause [https://perma.cc/89GJ-LNC9]; Marguerite Ward, *GOP Leaders Used Judge Ketanji Brown Jackson's Hearing to Rebuke Critical Race Theory. Scholars Say It's a Disgraceful Attempt to Disqualify Her.*, BUS. INSIDER (Mar. 25, 2022, 1:08 PM), https://www.businessinsider.com/gop-leaders-using-ketanji-brown-jacksons-hearing-to-rebuke-critical-race-theory-2022-3 [https://perma.cc/D5T5-6ZLY].

144. ALA. CONST. amend. CCCXXVIII; *see also id.* at §§ 156–57.

Moore's popularity within the State (he won election as Chief Justice twice), the panel unanimously found twice that his flouting of federal law and the United States Constitution merited his removal from office.[145] The Alabama Supreme Court upheld the panel's recommendation both times.[146]

A similar mechanism could be adapted for the Supreme Court. While there would undoubtedly be political fights over who sits on the judicial ethics panel reviewing the justices' conduct, two checks could be used to preserve the integrity of the mechanism. One is a requirement setting forth criteria for sitting on the panel, including, for example, specifications for who may be placed on the panel. Seats could be set aside for federal or state judges, laypeople, lawyers or legal scholars, and there could be restrictions barring certain kinds of partisans from being members of the panel. Undoubtedly, the fights over who sits on the panel would be as fierce as the fights over the appointment of justices, but at least those fights should have to be made in public. In addition, the panel could be vested with the power to make recommendations to the Supreme Court as a whole, Congress, or both. The final authority to censure, suspend, or recommend the ouster of the justice could be vested in the Court, Congress, or both.

A code of ethics is not a panacea to address every conceivable kind of misconduct in which justices might engage. The new rule requiring justices to be transparent in disclosing sources of the funding they receive for various perks is encouraging, but a code of ethics, at the very least, would go a long way in making it harder for justices to perpetuate or hide behind myths to obscure their misconduct.

145. *See* Amber Roberson, *Timeline: Roy Moore's Political Career, Legal Challenges over the Years*, MONTGOMERY ADVERTISER (Jan. 28, 2022, 10:49 AM), https://www.montgomeryadvertiser.com/story/news/local/2022/01/28/judge-roy-moore-ten-commandments-history-timeline-lawsuits/9211301002 [https://perma.cc/LD97-GDPF].

146. *Id.*