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The Architecture of Judicial Ethics

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ARTICLE

THE ARCHITECTURE OF JUDICIAL ETHICS

CHARLES GARDNER GEYH[†]

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[†] Indiana University Distinguished Professor, and John F. Kimberling Professor of Law, Indiana University Maurer School of Law. This Article is dedicated to Steve Burbank—a scholar’s scholar and my mentor for more than thirty years, whose encouragement and support made my career in this profession possible. Many thanks to Jim Alfini, the late, great Mark Harrison, Greg Sisk, and Keith Swisher, for their insightful comments on earlier drafts. Thanks as well to Mahrukh Ali, Rebecca Fadler, Alex Myers, Hussein Mohamed, Pooja Patel, Charles Rice, and Hadley Smithhisler, for their outstanding research assistance. In the spirit of full disclosure, I have participated in several projects and events described in this Article and have flagged my role in footnotes.

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INTRODUCTION

In 1999, Professor Stephen Burbank wrote an article entitled *The Architecture of Judicial Independence*.¹ It is a foundational piece that gave structure to what was then an understudied field. At the heart of that article is a profound insight: stable and enduring judicial systems are the product of forces in constructive tension. Thus, in the context of judicial administration, Burbank conceptualized judicial independence with reference to judicial accountability, and characterized pressure points in the relationship between them as complementary, not contradictory; and in later work, he made a similar point about the interplay between the law and policy in judicial decisionmaking. I could pay homage to Steve in this symposium by praising his many contributions to our understanding of judicial administration and decisionmaking. But I did that recently in the online edition of this law review,² and I am concerned that if I gave his ego yet another pump, his head would pop and deflate when he cut himself shaving. Instead, my ambition for this Article is to honor Steve's scholarly legacy by emulating his approach to illuminate the architecture of an under-theorized subset of the judicial independence and accountability literature: judicial ethics.

As a field of study, judicial ethics is typically relegated to the role of introverted child in the professional responsibility family, where it is overshadowed by its outgoing, older sibling, legal ethics. The net effect is three-fold. First, professional responsibility scholars tend to focus their intellectual energy on legal ethics and the law of lawyering and show judicial ethics comparatively little love. Second, what attention judicial ethics does receive is circumscribed by the professional responsibility "bucket" in which it is placed, as a consequence of which judicial ethics tends to be conceptualized, taught, and tested as a body of rules of professional conduct. The net effect is that judicial ethics scholarship has generally fixated on this ethical dilemma or that in relation to applicable canons without attempting to theorize more broadly. Third, by confining judicial ethics to the

¹ Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315 (1999).

² Charles Gardner Geyh, *Considering Reconsidering Judicial Independence*, 168 U. PA. L. REV. ONLINE 35, 36 (2019).

professional responsibility bucket, its relevance to subjects in adjacent buckets is overlooked.

As a consequence of its diminished niche in a different subfield, judicial ethics has not featured prominently in discussions of judicial independence and accountability. The relationship between them, however, is close and clear. Codes of judicial conduct promote judicial independence as an instrumental good and exhort judges to avoid sources of influence on their decisionmaking that could compromise their independent judgment. Those same codes describe bad judicial conduct, which is the target of accountability mechanisms generally and disciplinary processes in particular. Accordingly, understanding how judicial ethics works is integral to understanding how judicial independence and accountability work.

Notwithstanding the dearth of scholarship on the role of judicial ethics in relation to independence and accountability, controversies arising out of efforts to hold judges accountable for alleged ethical lapses have arisen in federal and state systems throughout the twenty-first century. In the federal system:

There has been a high-profile, intra-judicial squabble over whether it is unethical for federal judges to be members of the Federalist Society, the American Constitution Society, and the American Bar Association.³

Members of Congress and others have called for the U.S. Supreme Court to adopt its own code of ethics, prompting the Chief Justice to demur, arguing that such a code is unnecessary and warning that the constitutionality of ethics-related legislation obliging the Supreme Court to comply with disqualification rules and periodic financial disclosure requirements remains untested.⁴

Justice Ruth Bader Ginsburg was called to task for criticizing then presidential candidate Donald Trump, in violation of the Code of Conduct for U.S. Judges, which is applicable to federal judges in the lower courts.⁵

Justices Antonin Scalia and Clarence Thomas were criticized in the news for being featured speakers at Federalist Society fundraising events, likewise in violation of the Code of Conduct for U.S. Judges.⁶

The Judicial Conference of the United States revised its code of conduct (and disciplinary procedures) in response to widely publicized sexual harassment scandals.⁷

³ See *infra* notes 133–138 and accompanying text.

⁴ See *infra* notes 192–209 and accompanying text.

⁵ See *infra* notes 112–116 and accompanying text.

⁶ See *infra* notes 117–121 and accompanying text.

⁷ See *infra* notes 82–90 and accompanying text.

The Chair of the House Judiciary Committee introduced legislation to establish an Inspector General in the federal judiciary to oversee the federal courts. This was done in response to perceived underenforcement of the Judicial Conduct and Disability Act, amid the Ninth Circuit's protracted investigation of District Judge Manuel Real for ethical lapses, including abuse of power and improper *ex parte* communications.⁸

The media have reported on highly publicized cases in which Supreme Court Justices Scalia, Thomas, Kagan, and Ginsburg did not disqualify themselves, despite critics' exhortations that they do so—an issue with one foot firmly planted in judges' ethical obligation to disqualify themselves when their impartiality might reasonably be questioned.⁹

Court critics in Congress and the media have questioned the ethics of federal judges attending expense-paid educational seminars at luxury resorts courtesy of corporate sponsors with litigation pending before the federal courts on issues relevant to the seminars.¹⁰

After Supreme Court nominee Brett Kavanaugh was accused of sexual assault and lashed out against his accusers during his Senate confirmation proceedings, he became the subject of multiple disciplinary complaints, and over two thousand law professors signed a letter opposing his appointment on the ground that his outburst called his judicial temperament into question.¹¹

In state systems:

There has been a hard-fought dispute over whether judges should be subject to discipline for violating an ethical duty to avoid the “appearance of impropriety.”¹²

Judicial candidates have (with mixed success) filed suits in federal court, challenging the constitutionality of ethics rules that forbade them from announcing their views on disputed legal issues; making pledges, promises, or commitments in relation to cases that may come before them; making false or misleading campaign statements; directly soliciting campaign contributions; and engaging in other forms of political conduct.¹³

The U.S. Supreme Court reversed two state supreme court rulings on due process grounds because justices on the state high courts of Pennsylvania and West Virginia declined to disqualify themselves despite probable bias.¹⁴

⁸ See *infra* notes 91–95 and accompanying text.

⁹ See *infra* notes 117, 153–156, 184 and accompanying text.

¹⁰ See *infra* notes 105–111 and accompanying text.

¹¹ See *infra* notes 175–178 and accompanying text.

¹² See *infra* notes 122–126 and accompanying text.

¹³ See *infra* notes 96–104 and accompanying text.

¹⁴ See *infra* notes 150–151 and accompanying text.

A protracted ABA ethics initiative that sought to reform disqualification procedure and require judges to disqualify themselves from cases in which the campaign support they received called their impartiality into question collapsed in the face of opposition from the ABA's Judicial Division.¹⁵

These developments have generated scholarship analyzing isolated ethical problems with reference to rules and principles embedded in codes of judicial conduct, statutes, constitutions, advisory opinions, and judicial rulings. But there has been little effort to step back and think about these judicial ethics issues on a more conceptual plane, with reference to forces in constructive tension, in a manner akin to Burbank's seminal analysis of judicial independence and accountability. As a result, commonalities among seemingly unrelated ethics problems have gone largely unnoticed, which has obscured the path to common solutions.

In Part I of this Article, I conceptualize judicial ethics in a tripartite architecture, with macro, micro, and relational elements. Macroethics concern the core principles that define the essential attributes of a good judge. Microethics refer to the specific canons and rules that have emerged and evolved to delineate the more practical contours of ethical and unethical judicial conduct, guided by macroethics principles. Relational ethics refer to a judge's ethical responsibilities in relation to other values that constrain the application of micro and macroethics. Relational ethics thus represent the outer bounds of a judge's ethical obligations in relation to, and sometimes in tension with, other values. These other values include the right of judges to speak, associate, and conduct themselves without unduly vague or burdensome regulation; and the interests of judges collectively, as courts and judicial systems, to operate effectively and with a presumption of legitimacy.

To illustrate this tripartite relationship, impartiality is a macroethics value that underscores the importance of good judges being unbiased and open-minded. A code of conduct canon prohibiting judges and judicial candidates from announcing their views on disputed issues that they are likely to decide as judges was a microethics rule that sought to promote judicial impartiality by forbidding judges from taking public positions on issues that could later compromise their ability to decide those issues with an open mind. But the judge's First Amendment freedom operates as a relational interest that invalidates the microethics rule unless that rule is the least restrictive means to preserve the macroethics principle of impartiality—and in *Republican Party of Minnesota v. White*, the Supreme Court deemed this speech-limiting rule unconstitutional.¹⁶

¹⁵ See *infra* notes 163–169 and accompanying text.

¹⁶ 536 U.S. 765, 788 (2002).

The dictates of micro and macroethics, and the competing values that relational ethics weigh in the balance, can best be conceptualized with a metaphor Burbank has deployed to describe the relationship between judicial independence and accountability: a two-sided coin.¹⁷ On one side is the body of microethics rules guided by macroethics principles that delineate the conduct of an ethical judge; on the other side are competing relational values that circumscribe the outer limits of acceptable ethics regulation. Properly understood, neither side of the coin contradicts or negates the other. Rather, they complement each other and coexist in constructive tension.

In Part II, I situate the ethics imbroglios summarized at the outset of this Article, in the tripartite architecture described in Part I. These controversies have played out in two ways: one, when a consensus emerges, and the other, when it does not. First, when a consensus emerges, it arises out of a general agreement that microethics reform is necessary (or not). When controversial judicial conduct is deemed at odds with macroethics principles, under-regulated by microethics rules, and unsupported by offsetting relational interests, reform will follow; otherwise, it will not. Second, when consensus fails to emerge, microethics reform proposed in response to controversial judicial conduct is resisted on the grounds that such action is unwarranted by macroethics principles and is offset by countervailing, relational interests. The first context encompasses traditional ethics reform scenarios. The second context describes a spate of recent controversies that signals something new: an eroding consensus on the limits of appropriate ethics regulation.

Recent developments, in which ethics regulation has been flouted or challenged, call the continuing viability of the current macro and microethics regimes into question. Competing values are gaining strength as the judiciary's shared sense of the appropriate scope and contours of micro and macroethics has begun to fracture. In Part III, I argue that there is an inevitability to this development, given the nature of judicial politics in the modern era and a judiciary that is less homogeneous (in terms of race, gender, ethnicity, and consequently life experience) than when codes of conduct were first promulgated. I conclude, however, by arguing that ethics conflicts can be better managed, and respect for macro and microethics improved, by strengthening the role of codes of conduct in disciplinary processes and

¹⁷ Burbank, *supra* note 1, at 339 (describing the double-sided coin metaphor and its application to judicial accountability theory); Stephen B. Burbank, *On the Study of Judicial Behaviors: Of Law, Politics, Science, and Humility*, in *WHAT'S LAW GOT TO DO WITH IT?* 41, 51 (Charles Gardner Geyh ed., 2011) [hereinafter Burbank, *On the Study of Judicial Behaviors*] (explaining that the sides of the coin are complements, not opposites); Stephen B. Burbank, *The Past and Present of Judicial Independence*, 80 *JUDICATURE* 117, 118 (1996) (arguing judicial independence and accountability "need not and should not be at war with one another" and that it "should be impossible . . . to think about one without thinking about the other").

revitalizing a consensus in favor of core ethics norms that has been eroded by neglect, partisan politics, and judicial self-interest.

I. THE TRIPARTITE ARCHITECTURE OF JUDICIAL ETHICS

Judicial accountability is a busy place. Judges are variously subject to impeachment (as well as other forms of removal in state systems), discipline, disqualification, popular elections (in most state systems), appellate review, and legislative oversight, among other accountability-promoting processes. In the judicial accountability venture, judicial ethics occupies the role of omnipresent silent partner. Ethical lapses, manifested in misconduct antithetical to judicial impartiality, integrity, or independence, are at issue in virtually all judicial impeachment proceedings and disciplinary actions. Ethical transgressions are likewise at issue in judicial disqualification proceedings, when judges preside over cases in the teeth of patent bias or conflicts of interest; in judicial elections, when the ethics of judicial candidates—including campaign ethics—become an issue; appellate review, particularly in the context of original mandamus actions that focus on judicial usurpations of power; and legislative oversight of judicial conduct—including oversight of the judiciary’s disciplinary and disqualification processes.

The architecture of judicial ethics includes three distinct elements: the overarching principles of judicial ethics, the specific rules of judicial ethics, and the limits of judicial ethics in relation to competing values and objectives. I denominate these features macroethics, microethics, and relational ethics, respectively.

A. *Macroethics*

Macroethics, as I use the term here, are first principles. They encompass the instrumental values associated with being a good judge, and the objectives that those values serve. Four such values recur in literature spanning millennia: a good judge is honest, impartial, independent, and capable.¹⁸

Honesty or integrity is a defining feature of a good judge that has long been highlighted in literature—often by its absence. The dishonest judge who abuses his office by taking bribes, soliciting gifts, or trading on the power of his position for personal gain in other ways has been a persistent object of concern for literally thousands of years.¹⁹

¹⁸ CHARLES GARDNER GEYH, *COURTING PERIL: THE POLITICAL TRANSFORMATION OF THE AMERICAN JUDICIARY* 63-69 (2016) (describing four recurring values in literature, with examples).

¹⁹ See, e.g., Shudraka, *The Little Clay Cart*, in 9 *HARVARD ORIENTAL SERIES* 1, 134 (Charles Rockwell Lanman ed., Arthur William Ryder trans., 1905) (depicting a story from around the second

Impartiality is a second essential quality of a good judge, which is likewise ancient in origin. Conceptions of impartiality have included multiple facets: an absence of bias or conflict of interest against or in favor of an individual party; an absence of bias or prejudice against a party's socioeconomic class, race, gender, or ethnicity; and an absence of pre-commitment in relation to an issue before the court.²⁰

Independence, a third instrumental value, has a more uncertain past. On the one hand, the New Testament story of Pontius Pilate—whom Christians revile for judging Jesus blameless but relenting to his crucifixion after an angry crowd warned Pilate that if he released Jesus he was “no friend of Caesar”²¹—suggests that concern for judicial dependence is longstanding. On the other hand, because judges were historically adjuncts to the monarch, judicial independence from political interference and control is not as deeply rooted a defining quality of the “good judge.”²² In Anglo-American law, that came later, beginning with the 1701 Act of Settlement in England, which guaranteed English judges tenure during good behavior,²³ and the ratification of the U.S. Constitution in 1789, which did the same for federal judges in the United States.²⁴ It warrants clarification that judicial independence can be conceptualized in structural and behavioral terms.²⁵ Structural independence refers to formal structures—like clauses in constitutions that protect judicial

century B.C.E., suspected to have been written by an Indian king, warning judges to be “[u]ntouched by avarice”); KATHLEEN E. KENNEDY, MAINTENANCE, MEED, AND MARRIAGE IN MEDIEVAL ENGLISH LITERATURE 92, 96 (2009) (recounting the views of Nassington and Gower expressing concerns about the pervasiveness of problematic gifts and bribes in fourteenth century England).

²⁰ For example, the judge in Joan of Arc's trial was criticized in biographical non-fiction for presiding despite a bias against her: “[T]his proposed judge was the prisoner's outspoken enemy, and therefore he was incompetent to try her.” 2 MARK TWAIN, PERSONAL RECOLLECTIONS OF JOAN OF ARC 114-15 (New York, Harper & Bros. Publishers 1896). Medieval poets decried “class justice” as a form of partiality: “[A] poor man can hardly ever win against a rich man or a nobleman, no matter how just his case may be . . .” Theo Meder, *Tales of Tricks and Greed and Big Surprises: Laymen's Views of the Law in Dutch Oral Narrative*, 21 HUMOR 435, 438 (2008). And authors chided the nineteenth century hanging judge for ideological bias in relation to the issue of capital punishment: “[H]e did not affect the virtue of impartiality; this was no case for refinement; there was a man to be hanged, he would have said, and he was haanging [sic] him. Nor was it possible to see his lordship, and acquit him of gusto in the task.” ROBERT LOUIS STEVENSON, THE WEIR OF HERMISTON 25 (Catherine Kerrigan ed., Edinburgh Univ. Press 1995) (1896).

²¹ *John* 19:12.

²² For example, in *The Little Clay Cart*, Shudraka described the role of a judge and its limits: “An open door to truth, his heart must cling . . . yet shun each thing [t]hat might awake the anger of the king.” Shudraka, *supra* note 19, at 134.

²³ Wilfrid Prest, *Judicial Corruption in Early Modern England*, 133 PAST & PRESENT 67, 82 (1991) (explaining that William III's judges were appointed during “good behaviour”).

²⁴ U.S. CONST. art. III, § 1.

²⁵ Charles Gardner Geyh, *Judicial Independence as an Organizing Principle*, 10 ANN. REV. L. & SOC. SCI. 185, 190 (2014) (“The preponderance of judicial independence scholarship is devoted to qualified independence, which subdivides naturally into structural (or relational) and behavioral forms . . .”)

tenure during good behavior—that buffer judges from external interference with their decisionmaking.²⁶ Behavioral independence refers to the rectitude of individual judges to make decisions independently of external pressures (which can be aided by structural independence).²⁷ In the context of macroethics, behavioral independence is of primary concern.

The fourth principle, that judges should be “capable,” seeks to capture at least three qualities associated with judicial fitness: a judge should be competent, diligent, and possessed of a judicial temperament. The duty of competence embraces the longstanding view that judges should be well versed in the facts of their cases and the law they apply.²⁸ Diligence reaches a related, deeply rooted concern (related, insofar as laziness breeds incompetence) that judges should be vigilant in doing their jobs, keeping up with their caseloads, and administering justice expeditiously.²⁹ A judicial temperament, in turn, concerns the patience and thoughtfulness required to decide cases wisely, rather than arbitrarily.³⁰

As “instrumental values,” judicial integrity, impartiality, independence, and capability are not ends in themselves, but are instrumental to achieving other objectives—namely the rule of law, the effective administration of justice, and institutional legitimacy. The instrumental nature of judicial impartiality and independence is easy to appreciate. There is nothing intrinsically virtuous about impartiality. In a democratic republic, legislators are expected to be partial to the preferences of their constituents when making law. Impartiality is a virtue for judges, because of its instrumental character: it enables them to apply the law that others (be it legislatures, agencies, or higher courts) have made, without conflicts of interest or bias, and in so doing promotes public confidence in the administration of justice and the essential fairness of the judiciary. The same is true of independence: whereas independence from majoritarian influence can be antithetical to the role of a democratically elected legislator, it is essential to the role of a judge, who is expected to divine facts and uphold the law, unencumbered by fear or favor.

²⁶ *Id.* at 190-91.

²⁷ *Id.* at 191, 193-96.

²⁸ HENRY FIELDING, *AMELIA* 27 (The Floating Press 2010) (1751) (“[T]his office of a justice of peace requires some knowledge of the law: for this simple reason; because, in every case which comes before him, he is to judge and act according to law. . . . I cannot conceive how this knowledge should be acquired without reading; and yet certain it is, Mr. Thrasher never read one syllable of the matter.”).

²⁹ *Id.* (attributing judge’s incompetence in law to lack of diligence to do the required reading).

³⁰ FRANKLIN PIERCE ADAMS, *FPA BOOK OF QUOTATIONS* 466 (1952) (quoting Socrates for the proposition that the attributes of a good judge include “to hear courteously, to answer wisely, to consider soberly”).

Integrity and capability, in contrast, might seem to be intrinsically good qualities, and thus ends in themselves. But the reason that integrity and capability occupy a special place in judicial ethics is because they too are instrumental values that further other objectives core to the judiciary's mission: forthright and capable judges are better suited to uphold the law and promote public confidence in the legitimacy of the judiciary, than are dishonest incompetents.

The American Bar Association's Model Code of Judicial Conduct—some version of which has been adopted by the high courts of every state and the Judicial Conference of the United States—describes in its preamble the relationship between these instrumental values and the objectives they serve:

The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law. Inherent in all the Rules contained in this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.³¹

These macroethics principles animate the body of rules in the Code itself, which segues to the second element of judicial ethics architecture: microethics.

B. *Microethics*

Microethics rules are the specific dos and don'ts of good behavior that judicial systems have embedded in their codes of conduct, which are guided by macroethics values and objectives. Unlike macroethics principles, which are centuries old, the detailed rules of microethics are, with isolated exception, of comparatively recent vintage.³²

In the United States, the circuitous route to establishing codes of judicial conduct began in the early twentieth century. In 1908, the American Bar Association (ABA) promulgated the Canons of Professional Ethics, governing the ethical responsibilities of lawyers.³³ The ABA contemplated a companion project for judges, but decided against it: state and federal courts

³¹ MODEL CODE OF JUD. CONDUCT Preamble (AM. BAR ASS'N 2007).

³² For a seventeenth century exception, see 2 LORD CAMPBELL, *THE LIVES OF THE CHIEF JUSTICES OF ENGLAND* 207-09 (Boston, Estes & Lauriat 1873) (reproducing Sir Matthew Hale's eighteen self-imposed rules for his judicial guidance: "Things necessary to be continually had in remembrance").

³³ CANONS OF PRO. ETHICS (AM. BAR ASS'N 1908), [http://www.minnesotalegalhistoryproject.org/assets/ABA%20Canons%20\(1908\).pdf](http://www.minnesotalegalhistoryproject.org/assets/ABA%20Canons%20(1908).pdf) [<https://perma.cc/2HBD-L7SB>].

were under protracted fire for invalidating Progressive Era workplace reforms on due process grounds, and bar leaders feared that moving forward with a judicial ethics initiative at that time could be misunderstood as another attack on judges and courts.³⁴

The catalyst for reform came over a decade later, in the unlikely form of the so-called “Black Sox” scandal, in which members of the Chicago White Sox took bribes to throw the 1919 World Series, and major league baseball responded by hiring a federal judge (and former minor league baseball player), Kenesaw Mountain Landis, as its first commissioner.³⁵ Ironically, the hiring of Landis would salve baseball’s black eye, only to give the judiciary a shiner of its own. When Landis became Commissioner (and began receiving his \$42,500 salary), he did not relinquish his judicial office (or its \$7,500 salary).³⁶ The House Judiciary Committee initiated an impeachment inquiry and in a preliminary report was sharply divided as to whether he had committed an impeachable crime.³⁷ Although a majority of the Committee thought Landis had behaved badly, a substantial minority believed that he had committed no impeachable offense, which underscored the inability of the impeachment process to address ethics problems falling short of impeachable high crimes and misdemeanors.³⁸ Landis resigned from his judgeship before the impeachment inquiry was concluded, but the episode prompted the ABA to convene a commission—chaired by the recently appointed Chief Justice of the United States, William Howard Taft—which promulgated the Canons of Judicial Ethics that the ABA approved in 1924.³⁹

³⁴ See JOHN P. MACKENZIE, *THE APPEARANCE OF JUSTICE* 182 (1974) (explaining one of the prevailing concerns as being that the project would be associated with the “popular movement to strike back at perceived judicial oppression”); WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890–1937*, at 23–25, 41–44 (1994) (explaining how Populist and Progressive Era anger with the state and federal judiciaries was provoked by *Lochner v. New York* and its progeny).

³⁵ Andrew J. Lievens & Avern Cohn, *The Federal Judiciary and the ABA Model Code: The Parting of the Ways*, 28 JUST. SYS. J. 271, 272–73 (2007).

³⁶ Charles Gardner Geyh, *Preserving Public Confidence in the Courts in an Age of Individual Rights and Public Skepticism*, in *BENCH PRESS: THE COLLISION OF COURTS, POLITICS, AND THE MEDIA* 21, 27 (Keith J. Bybee ed., 2007).

³⁷ See H.R. REP. NO. 66-1407, at 2 (1921) (“From a careful consideration of the charges made against Judge Landis and the evidence adduced in their support, it is believed that the findings in the foregoing report are unsupported and the recommendation for further investigation entirely unjustified.”).

³⁸ *Id.* at 3. (“No violation of any law has been called to the attention of the committee, nor is it claimed that the judge is guilty of any act that would establish moral turpitude. One or both of those grounds would have to be established before impeachment proceedings could be maintained.”).

³⁹ See MACKENZIE, *supra* note 34, at 182–83; *id.* at 183 (“Taft, a former president of the United States and past president of the ABA, was a logical man for the task, a symbol of public correctness whose stature as a jurist and bar organization man would ensure acceptance of the canons.”); CANONS OF JUD. ETHICS (AM. BAR ASS’N 1924) (enumerating each of the thirty-four canons of judicial ethics).

While a majority of the state judiciaries would adopt the Canons of Judicial Ethics, the Canons were bound for obscurity.⁴⁰ They consisted of hortatory pronouncements “intended to be nothing more than the American Bar Association’s suggestions for guidance of individual judges.”⁴¹ They were thus crafted to operate behind the scenes—gentle exhortations that judges could ignore without fear of consequence.⁴²

In 1960, California established a Judicial Qualifications Commission with authority to review judicial conduct and impose discipline on errant judges.⁴³ By 1980, all fifty states had judicial conduct organizations in place.⁴⁴ As that movement gained momentum, several high-profile ethics controversies accompanied a new wave of agitation over the liberal Warren Court. House Republicans sought to impeach and remove Justice William O. Douglas for alleged ethical improprieties.⁴⁵ Justice Abe Fortas resigned from the Court over ethical lapses.⁴⁶ Chief Justice Earl Warren was criticized for moonlighting as chair of the “Warren Commission” that investigated the assassination of President John F. Kennedy.⁴⁷ And President Nixon’s Supreme Court nominee, Clement Haynesworth, was rejected, in part, for presiding over cases as a circuit judge in the teeth of alleged conflicts of interest.⁴⁸ In

⁴⁰ See Robert J. Martineau, *Enforcement of the Code of Judicial Conduct*, 1972 UTAH L. REV. 410, 411 (“Notwithstanding this, state supreme courts in a majority of states have ‘adopted’ the Canons of Judicial Ethics or similar ethical standards, either as suggested guidelines or as binding rules of conduct.”).

⁴¹ *Id.*

⁴² The net effect was to relegate the task of judicial discipline to more cumbersome mechanisms—the lumbering dinosaurs of impeachment and, in various state systems, legislative address, recall elections, and felony convictions.

⁴³ See Edward J. Schoenbaum, *A Historical Look at Judicial Discipline*, 54 CHI.-KENT L. REV. 1, 20 (1977) (“This new method of handling cases of judicial misconduct and disability through a permanent judicial disciplinary commission was first adopted by California voters in 1960 as an amendment to the California Constitution.”).

⁴⁴ See ALLISON COMBS, JUDICIAL DISCIPLINE COMMISSIONS: BACKGROUND PAPER 95-5, at 1 (1995), <https://www.leg.state.nv.us/Division/Research/Publications/Bkground/BP95-05.pdf> [<https://perma.cc/YQL6-KC9X>].

⁴⁵ *Justice Douglas Impeachment*, in CONG. QUARTERLY ALMANAC: 91ST CONGRESS, 2ND SESSION 1025, 1025-27 (1970).

⁴⁶ See Allen Pusey, *May 14, 1969: The Spectacular Fall of Abe Fortas*, ABA JOURNAL (Apr. 1, 2020, 12:05 AM), <https://www.abajournal.com/magazine/article/the-spectacular-fall-of-abe-fortas> [<https://perma.cc/9VR4-MSHT>] (noting that Fortas resigned after it was revealed that he was receiving regular payments from a former Wall Street client convicted of fraud).

⁴⁷ See Warren Weaver Jr., *Tough Code of Ethics Adopted For Judges in Federal Courts*, N.Y. TIMES, Apr. 7, 1973, at 1 (“The new code reflects criticism in legal circles of Chief Justice Earl Warren’s agreement to serve as head of the commission investigating President Kennedy’s assassination and former Associate Justice Abe Fortas’s acceptance of counsel fees while sitting on the Supreme Court.”).

⁴⁸ See Barbara Maranzani, *6 Supreme Court Nomination Battles*, HISTORY: NEWS (Oct. 28, 2018), <https://www.history.com/news/a-brief-history-of-supreme-court-battles> [<https://perma.cc/H7FQ-3K8K>] (noting that several high-ranking Republican senators joined Democrats to reject his nomination after he had earlier ruled in favor of a vending machine business in which he had stake);

the minds of bar leaders, these imbroglis highlighted the inadequacy of the Canons of Judicial Ethics,⁴⁹ and in 1969, ABA President Bernard Segal established a Special Committee on Standards of Judicial Conduct, which promulgated a Code of Judicial Conduct that the ABA adopted in 1972.⁵⁰

Foremost among the perceived failings of the old Canons was that they had been purely advisory.⁵¹ To address that problem, the preamble to the 1972 Code declared that “[t]he canons and text establish mandatory standards unless otherwise indicated,” adding that “[i]t is hoped that all jurisdictions will adopt this Code and establish effective disciplinary procedures for its enforcement.”⁵² In effect, the 1972 Code weaponized the Canons to augment the disciplinary authority of emerging judicial conduct organizations. Whereas the Canons of Judicial Ethics had been comprised of thirty-four broadly worded canons or principles, the 1972 Code reduced the number of canons to seven. Subsumed with each of the seven canons were a series of more specific provisions, articulated with relative brevity and precision, which rendered them better suited for enforcement than the more gaseous pronouncements of the discarded Canons of Judicial Ethics.

Despite the “mandatory” character of the 1972 Code, the Code itself was phrased in hortatory terms: it featured no “shalls” or “musts”—only “shoulds.” Such nomenclature may have made sense for jurisdictions like the federal judiciary, which adopted the new ABA Code in 1973, when it had no formal disciplinary process in place to enforce and thereby render “mandatory” the ethical standards it promulgated. But as disciplinary processes became universal, the aspirational phrasing of the Code engendered a “misunderstanding” that compromised the Code’s utility for disciplinary purposes—particularly among states that did not adopt the preamble where the mandatory character of Code provisions was highlighted.⁵³

In 1990, the ABA approved a new Model Code of Judicial Conduct.⁵⁴ The 1990 Model Code shrank the number of general, overarching canons again—

Clement F. Haynsworth Jr.; Judge Was Rejected as 1969 Supreme Court Choice, L.A. TIMES, Nov. 23, 1989, at A32 (“The most damaging [allegation] centered on his participation in a case involving a company that did extensive business with another company in which he owned a one-seventh interest.”).

⁴⁹ See Whitney North Seymour, *The Code of Judicial Conduct from the Point of View of a Member of the Bar*, 1972 UTAH L. REV. 352, 352 (“In the controversies over the activities of Justices Fortas and Douglas, and in the inquiries into the qualifications of Judge Haynesworth for appointment to the Supreme Court, the inadequacies of the canons became particularly apparent.”).

⁵⁰ *Id.*

⁵¹ See Martineau, *supra* note 40, at 411 (footnote omitted) (“Even in those jurisdictions that have not accepted the Canons as binding rules, the Canons have been given the status of guidelines or have been used as frames of reference in rendering advisory opinions on judicial conduct.”).

⁵² CODE OF JUD. CONDUCT Preface (AM. BAR ASS’N 1972).

⁵³ See LISA L. MILORD, *THE DEVELOPMENT OF THE ABA JUDICIAL CODE* 8 (1992).

⁵⁴ MODEL CODE OF JUD. CONDUCT Preface (AM. BAR ASS’N 1990) (“On August 7, 1990, the House of Delegates of the American Bar Association adopted the *Model Code of Judicial Conduct*.”).

this time, from seven to five—and swapped out most of the precatory “shoulds” for mandatory “shalls.”⁵⁵ In the preamble, the drafters of the 1990 Model Code made their intentions explicit. First, the drafters underscored the Code’s dual purpose: “The Code is designed to provide guidance to judges and candidates for judicial office and to provide a structure for regulating conduct through disciplinary agencies.”⁵⁶ Second, the drafters emphasized the significance of the term “shall”: “When the text uses ‘shall’ or ‘shall not,’ it is intended to impose binding obligations the violation of which can result in disciplinary action.”⁵⁷ The phrase “can result in disciplinary action,” however, was used advisedly: “It is not intended,” the drafters cautioned, “that every transgression will result in disciplinary action.”⁵⁸ Rather, “[w]hether disciplinary action is appropriate . . . should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system.”⁵⁹

In 2007, the ABA approved another Model Code of Judicial Conduct.⁶⁰ Like the 1990 Model Code, the preamble to the 2007 edition reiterated the Code’s dual purpose.⁶¹ But the evolution of microethics away from its original focus on guidance, toward discipline and enforcement, continued apace. The number of canons was dropped from five to four, and the specific provisions underlying those canons were recast as numbered “rules” to emulate the ABA’s Model Rules of Professional Conduct,⁶² where the disciplinary orientation of rules phrased in mandatory terms was explicit.⁶³ Consistent with this ongoing reorientation of the Code toward discipline, the preamble to the 2007 Model Code omitted its predecessor’s caveat that not all Code violations warranted disciplinary action.⁶⁴

In the 1990 *Model Code*, a Preamble and a Terminology section were added, and an Application Section followed the Canons.”).

⁵⁵ *Id.* Contents, Preamble (noting that the preamble only lists five canons, with each one stating that a judge “shall” rather than a judge “should”).

⁵⁶ *Id.* Preamble.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ MODEL CODE OF JUD. CONDUCT (AM. BAR ASS’N 2007). I served as co-reporter to the ABA Commission that promulgated the 2007 Model Code.

⁶¹ *Id.* Preamble.

⁶² CHARLES E.[SIC] GEYH & W. WILLIAM HODES, REPORTERS’ NOTES TO THE MODEL CODE OF JUDICIAL CONDUCT ix (2009).

⁶³ MODEL RULES OF PRO. CONDUCT Scope, at 3 (AM. BAR ASS’N 2007) (“Some of the Rules are imperatives, cast in the terms ‘shall’ or ‘shall not.’ These define proper conduct for purposes of professional discipline.”).

⁶⁴ MODEL CODE OF JUD. CONDUCT Preamble (AM. BAR ASS’N 2007).

Microethics rules are explained, interpreted, and justified with reference to macroethics rationales. Some microethics rules further particular instrumental values. For example, the rule that judges “shall not abuse the prestige of judicial office to advance the personal or economic interests[] of the judge or others”⁶⁵ preserves integrity; the rule governing disqualification of judges for real or perceived bias and conflicts of interest promotes impartiality;⁶⁶ the rule that judges shall not “permit family, social, political, financial, or other interests or relationships to influence the judge’s judicial conduct”⁶⁷ encourages independence; and rules regulating judicial competence,⁶⁸ diligence,⁶⁹ and demeanor,⁷⁰ seek to ensure that judges are capable adjudicators. Other microethics rules are directed toward furthering the overarching objectives of macroethics generally. For example, the rule that judges shall “uphold and apply the law,”⁷¹ seeks to promote the rule of law, while the rule that judges shall “act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary,”⁷² protects the judiciary’s institutional legitimacy (in addition to promoting specified instrumental values).

C. *Relational Ethics*

Macroethics principles and microethics rules, paired with a disciplinary regime, establish and enforce standards of good (and bad) judicial conduct. But the limits of appropriate ethics regulation are not delineated by macro and microethics alone. That is because the dictates of microethics rules and the reach of macroethics principles can be constrained in relation to competing values. Relational ethics thus embody countervailing constraints that test and limit the operation of ethics regimes. “Relational ethics” may not feel like ethics at all, insofar as it exerts a negative, limiting force on the judicial ethics schema. But the boundaries of good and bad conduct that judicial ethics seeks to delineate cannot be fully explained or justified without recourse to relational ethics values—the dark energy of the judicial ethics universe. The competing values that comprise relational ethics will be elaborated upon with examples in Part II, but for purposes here, it is enough to thumbnail the principal categories.

⁶⁵ *Id.* r. 1.3.

⁶⁶ *Id.* r. 2.11.

⁶⁷ *Id.* r. 2.4.

⁶⁸ *Id.* r. 2.5.

⁶⁹ *Id.*

⁷⁰ *Id.* r. 2.8.

⁷¹ *Id.* r. 2.2.

⁷² *Id.* r. 1.2 (asterisks omitted).

1. Guarding Against Constitutional Overreach

Ethics regulation is subject to constitutional constraints. Judges, like the rest of us, enjoy First Amendment freedoms to speak and associate.⁷³ At the margins, the macroethics principles served by microethics rules that restrict judicial speech and association must be weighed against the countervailing rights of judges. In addition, judges who are subject to discipline for ethics violations have a due process interest in rules that are written with sufficient precision and clarity for them to know what the rules require so that judges can avoid transgression.⁷⁴ This interest in clarity and precision can conflict with the need for microethics rules to be phrased broadly enough to encompass and implement macroethics principles. Finally, microethics regulations that legislatures seek to impose on judges can give rise to separation of powers concerns that, even if never litigated, may exert leverage as a countervailing relational interest in policy debates, when judges question the constitutionality of legislation that they would be in a position to invalidate as judges.

2. Encouraging Extrajudicial Engagement

Judges have an interest in pursuing their avocations by seeking out educational opportunities, affiliating themselves with civic, charitable, and fraternal organizations, teaching, writing, and speaking in public forums. Codes of conduct encourage judges to be active as citizens in the communities they serve as judges—activities that can make judges better-informed, engaged, and empathic jurists.⁷⁵ Microethics rules that offer contestable, macroethics justifications for restricting such engagement—for example, because participation in a given extrajudicial activity arguably calls a judge's impartiality into question—must be balanced against this competing interest.

⁷³ *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002).

⁷⁴ See, e.g., Leslie W. Abramson, *Canon 2 of the Code of Judicial Conduct*, 79 MARQ. L. REV. 949, 955 (1996) (“[L]ack of specificity as to what conduct makes a judge vulnerable to a charge of appearance of impropriety raises serious due process concerns. Leaving the rules unidentified while expecting them to be observed is bound to burden judges with uncertainty . . .”).

⁷⁵ See MODEL CODE OF JUD. CONDUCT r. 1.2 cmt. 6 (AM. BAR ASS'N 2007) (“A judge should initiate and participate in community outreach activities for the purpose of promoting public understanding of and confidence in the administration of justice.”); CHARLES GARDNER GEYH, JAMES J. ALFINI & JAMES SAMPLE, *JUDICIAL CONDUCT AND ETHICS* § 1.02 (6th ed. 2020) (discussing the importance and propriety of judges engaging with the outside world and avoiding isolation).

3. Promoting Operational Effectiveness

Judges have an institutional interest in the efficient and expeditious operation of their courts.⁷⁶ Ethics rules that burden court operations by imposing restrictions on judicial conduct driven by macroethics rationales that judges find dubious invite assessments of whether the ethics gains of a given microethics rule justify the efficiency losses.

4. Preserving Institutional Legitimacy

The judiciary's interest in preserving the institutional legitimacy of its courts cuts both ways. Ethics regimes serve to promote public confidence in the judiciary, but overly aggressive regulation can arguably have the opposite effect by cultivating the misperception that unethical conduct is more prevalent than it is.⁷⁷

Note that this list of relational interests does not include simple self-interest. Although judges may have an "interest" in taking bribes to pay for their cabanas, or winning elections by any means necessary, naked self-interest offers no normative heft for good judges to weigh in the balance against macroethics values.⁷⁸ To the contrary, microethics rules exist to manage and control manifestations of judicial self-interest that are antithetical to macroethics values. An ongoing challenge is to differentiate legitimate relational interests (that can sometimes align with judicial self-interest) from ersatz relational interests that operate as a skill.

In short, relational ethics pit the dictates of micro and macroethics against competing priorities, to the end of delineating the boundaries of appropriate ethics regulation. This is where the conversation takes a turn for the Burbankian. In his work, Burbank has explored the tensions between judicial independence and accountability in judicial oversight, and between law and policy in judicial decisionmaking.⁷⁹ He takes pains to emphasize that these principles in tension are not opposites but are two sides of the same coin: the

⁷⁶ For example, in the federal system, judicial misconduct under the Judicial Conduct and Disability Act is defined as conduct "prejudicial to effective and expeditious" court administration. 28 U.S.C. § 351(a).

⁷⁷ See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 890-91 (2009) (Roberts, C.J., dissenting) ("[Interpreting the Due Process Clause to require judicial disqualification for probable bias] will inevitably lead to an increase in allegations that judges are biased, however groundless those charges may be. The end result will do far more to erode public confidence in judicial impartiality than an isolated failure to recuse in a particular case.").

⁷⁸ The relational interest in extrajudicial engagement transcends self-interest because it is concerned with forms of engagement that make judges better judges.

⁷⁹ Burbank, *supra* note 1, at 339-40; see also Burbank, *On the Study of Judicial Behaviors*, *supra* note 1717, at 41 ("[T]here is no dichotomy between law and judicial politics; they are complements, each needing (or relying on) the other.").

appropriate limits of judicial independence are constrained by the need for accountability; and in judicial decisionmaking, law constrains policy, while policy informs law.⁸⁰ They are thus not contradictory; rather, each informs the other—and so it is with relational ethics. The competing priorities that relational ethics introduce do not contradict but circumscribe the dictates of micro and macroethics. They are complementary.

II. SITUATING ETHICS CONTROVERSIES IN THE ETHICS ARCHITECTURE

Having described the tripartite architecture of judicial ethics, it is possible to revisit the ethics controversies summarized in the introduction to this Article and situate them in the context of that architecture. In so doing, patterns emerge to reveal recurring pressure points in contemporary judicial ethics analysis that pose a challenge to the future of ethics regulation.

The ethics controversies synopsized in the introduction arise when putatively proper or improper judicial conduct comes to light that is allegedly overregulated or underregulated. From there, the controversies have proceeded along one of two tracks: 1) A general consensus emerges, either that controversial judicial conduct is in tension with macroethics values, underregulated by microethics rules, unjustified by countervailing relational interests, and should be regulated as improper; or that the conduct in question does not raise such concerns and should be deregulated or left be; 2) In the absence of consensus, controversial remedial action that is taken or proposed in response to putatively improper judicial conduct is resisted on the grounds that the conduct is not sufficiently in tension with macroethics principles and microethics rules to offset countervailing relational interests.

A. *When Consensus Emerges on the Ethical Propriety of Controversial Conduct*

Traditional judicial ethics controversies follow a well-worn path common to law reform generally: an underregulated problem arises, is identified as such, and is fixed. The birth and evolution of microethics regulation were catalyzed by this kind of controversy: the Landis affair exposed the inability of impeachment to address unethical conduct falling short of high crimes and misdemeanors and led to the promulgation of the ABA Canons of Judicial Ethics.⁸¹ Subsequent ethics scandals, in turn, highlighted the impotence of

⁸⁰ Burbank, *supra* note 1, at 339-40; Burbank, *On the Study of Judicial Behaviors*, *supra* note 17, at 51-58.

⁸¹ See *The Landis Case*, 7 AM. BAR ASS'N J. 87 (1921); *About the Commission, Background Paper: ABA Activities in Judicial Ethics*, AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/policy/judicial_code_revision_project/background [<https://perma.cc/6QMN-2BSC>].

the hortatory Canons, and led to the promulgation of mandatory standards of judicial conduct in the 1972 Code of Judicial Conduct.

Among the recent ethics controversies summarized in the introduction, the sexual harassment scandals in the federal judiciary fall into this traditional category. The evolution of the ABA Model Code of Judicial Conduct reflects a growing awareness of and concern for the problem of sexual harassment in the judiciary. The 1972 iteration made no mention of bias, prejudice, or harassment;⁸² the 1990 Model included a black letter prohibition on judges performing their duties with “bias or prejudice,” and added commentary directing judges to avoid conduct “that could reasonably be perceived as sexual harassment;”⁸³ and the 2007 Model Code elevated the prohibition on harassment to a black letter rule that explicitly forbade harassment based on sex and gender.⁸⁴ The Judicial Conference of the United States, however, declined to amend its Code in light of either the 1990 or 2007 Models: the canons themselves addressed neither gender bias nor harassment; rather, the federal Code relegated the issue to a comment noting that the duty to be “respectful,” included “the responsibility to avoid comment or behavior that could reasonably be interpreted as harassment, prejudice or bias.”⁸⁵

An antiquated Code of Conduct for U.S. Judges combined with rigid confidentiality rules and complainant-unfriendly procedures resulted in gender bias and sexual harassment going underreported and underinvestigated.⁸⁶ Isolated episodes of sexual misconduct reached critical mass

⁸² MILORD, *supra* note 53, at 17-18 (noting that canons addressing bias and prejudice and commentary addressing sexual harassment were “new” to the 1990 Code).

⁸³ *Id.* at 18, 75.

⁸⁴ See GEYH & HODES, *supra* note 62, at 28-29 (“The 1990 Code included nothing in the black letter about harassment, . . . [but] [t]he Commission agreed that harassment was a form of bias or prejudice that should be specifically proscribed by the Rules . . . [and so] deci[ded] to enshrine harassment in the black letter . . . including sexual harassment.”).

⁸⁵ 2 GUIDE TO JUDICIARY POLICY pt. A, ch. 2, at 10 (2014) [hereinafter 2014 GUIDE TO JUDICIARY POLICY], https://www.uscourts.gov/sites/default/files/volo2a-cho2_o.pdf [<https://perma.cc/9L4W-GB6A>].

⁸⁶ See generally Abbey Meller & Joy Bagwell, *Sexual Harassment in the Judiciary*, CTR. FOR AM. PROGRESS: COURTS (Oct. 25, 2018, 9:58 AM), <https://www.americanprogress.org/issues/courts/news/2018/10/25/460038/sexual-harassment-judiciary> [<https://perma.cc/7S2S-WZLG>] (discussing the sexual assault allegations against Justice Brett Kavanaugh during his confirmation hearings and the threat to women’s rights posed by former President Trump’s confirmation of largely male judges to the federal judiciary); Joan Biskupic, *CNN Investigation: Sexual Misconduct by Judges Kept Under Wraps*, CNN: POL. (Jan. 26, 2018, 12:35 PM), <https://www.cnn.com/2018/01/25/politics/courts-judges-sexual-harassment/index.html> [<https://perma.cc/WXF4-9MF6>] (reporting on allegations that the judiciary has obscured the extent of judicial misconduct); see also, e.g., *Protecting Federal Judiciary Employees from Sexual Harassment, Discrimination, and Other Workplace Misconduct: Hearing Before the Subcomm. on Cts., Intell. Prop., & the Internet of the H. Comm. on the Judiciary*, 116th Cong. (2020) (testimony of Olivia Warren) (explaining the obstacles faced by a former federal law clerk in reporting the sexual harassment she experienced); Dahlia Lithwick, *He Made Us All Victims and Accomplices*, SLATE (Dec. 13, 2017, 3:11 PM), <https://slate.com/news-and-politics/2017/12/judge-alex->

with multiple allegations against Circuit Judge Alex Kozinski and, ignited by the Me Too movement, exploded into scandal.⁸⁷

In response to the scandal, the Judicial Conference established a Federal Judiciary Workplace Conduct Working Group.⁸⁸ The Working Group undertook a review of its Code and complaint procedures, held hearings, and issued an array of recommended changes (including Code amendments to address sexual harassment) that the Judicial Conference adopted.⁸⁹ In the revised Code, the duty not to engage in harassment was elevated to the black letter of Canon 3 itself as well as Canon 3B(4), and received multiple mentions in commentary.⁹⁰ The decision to regulate sexual harassment more closely encountered no widespread opposition. Outlier judges, whose insensitivity to the issue and its impact on the judiciary's integrity and legitimacy prompted reform, did not rise up to impede the effort.

This same template was followed in 2006, in response to allegations that the Judicial Conference and the Circuit Judicial Councils were mishandling and under enforcing complaints of ethical misconduct in disciplinary proceedings. Congressional critics focused their ire on a complaint against California District Judge Manuel Real that had been pending fitfully for

kozinski-made-us-all-victims-and-accomplices.html [https://perma.cc/HNG2-AWET] (describing the problem with reference to the “worshipful” relationship between law clerks and their judges).

⁸⁷ See generally Matt Zapotosky, *Prominent Appeals Court Judge Alex Kozinski Accused of Sexual Misconduct*, WASH. POST (Dec. 8, 2017), https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef_story.html [https://perma.cc/256L-RRDQ]; see also Matt Zapotosky, *Nine More Women Say Judge Subjected Them to Inappropriate Behavior, Including Four Who Say He Touched or Kissed Them*, WASH. POST (Dec. 15, 2017), https://www.washingtonpost.com/world/national-security/nine-more-women-say-judge-subjected-them-to-inappropriate-behavior-including-four-who-say-he-touched-or-kissed-them/2017/12/15/8729b736-e105-11e7-8679-a9728984779c_story.html [https://perma.cc/7Q23-F9XD]; Niraj Chokshi, *Federal Judge Alex Kozinski Retires Abruptly After Sexual Harassment Allegations*, N.Y. TIMES (Dec. 18, 2017), <https://www.nytimes.com/2017/12/18/us/alex-kozinski-retires.html> [https://perma.cc/9CFX-BAZL].

⁸⁸ FED. JUDICIARY WORKPLACE CONDUCT WORKING GRP., U.S. CTS., REPORT OF THE FEDERAL JUDICIARY WORKPLACE CONDUCT WORKING GROUP TO THE JUDICIAL CONFERENCE OF THE UNITED STATES 1 (2018).

⁸⁹ I was among those asked to testify at these hearings. For details of the proposed changes, see *Proposed Changes to Code of Conduct for U.S. Judges and Judicial Conduct and Disability Rules*, U.S. CTS., <https://www.uscourts.gov/rules-policies/judiciary-policies/proposed-changes-code-conduct-judges-judicial-conduct-disability-rules> [https://perma.cc/7EYG-2V4S]; FED. JUDICIARY WORKPLACE CONDUCT WORKING GRP., *supra* note 88; *Judicial Conference Approves Package of Workplace Conduct Reforms*, U.S. CTS. (Mar. 12, 2019), <https://www.uscourts.gov/news/2019/03/12/judicial-conference-approves-package-workplace-conduct-reforms> [https://perma.cc/6XQH-82S9]. I testified on the draft revisions at the Working Group's invitation.

⁹⁰ 2 GUIDE TO JUDICIARY POLICY pt. A, ch. 2, at 4-5, 7, 10-11 (2019), https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_1_2_2019.pdf [https://perma.cc/E38A-6X2H].

years.⁹¹ Congressional leaders introduced legislation to install an Inspector General in the federal judiciary and initiate impeachment proceedings against Judge Real.⁹² These controversial proposals (which, with the Inspector General proposal, raised concerns that Congress was seeking to encroach on the judiciary's autonomy) effectively yielded to a consensus reform effort spearheaded by a committee appointed by Chief Justice Roberts and chaired by Justice Stephen Breyer.⁹³ The Breyer Committee found systemic problems with the procedures that the Judicial Conference and Circuit Judicial Councils employed to investigate disciplinary complaints, and recommended limited reforms that the Judicial Conference subsequently adopted.⁹⁴ Legislation to establish an Inspector General was reintroduced in later congresses but had lost momentum and was left to languish;⁹⁵ the consensus in favor of the Breyer Committee alternative, while rough and incomplete, was nonetheless sufficient to block a reform deemed unnecessary to protect the integrity of the judiciary and its disciplinary process.

B. When Consensus Fractures on the Ethical Propriety of Controversial Conduct

Most of the judicial ethics controversies highlighted in the introduction do not follow the traditional, consensus-driven reform template. Rather, recent ethics kerfuffles have tended to feature deep disagreement within the ranks of the bench, bar, and academy on the propriety of the judicial conduct at issue and the need for a regulatory response. These twenty-first century scenarios highlight competing perspectives on whether controversial judicial conduct is in tension with macroethics values, and the extent to which relational ethics interests offset macroethics concerns.

Part I identified four relational interests that constrain the operation of microethics rules as guided by macroethics values: guarding against

⁹¹ Henry Weinstein, *Impeachment Inquiry of Judge Sought*, L.A. TIMES (July 18, 2006, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2006-jul-18-me-real18-story.html> [<https://perma.cc/V82Q-G3S4>] (discussing then-House Judiciary Committee Chairman F. James Sensenbrenner Jr. (R-Wis.)'s efforts to look into the possible impeachment of Judge Manuel L. Real).

⁹² H.R. Res. 916, 109th Cong. (2006). I testified before the House Judiciary Committee in opposition to the Inspector General proposal and in opposition to the impeachment of Judge Real.

⁹³ See JUD. CONDUCT AND DISABILITY ACT STUDY COMM., IMPLEMENTATION OF THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980: A REPORT TO THE CHIEF JUSTICE (2006) [hereinafter BREYER COMMITTEE REPORT].

⁹⁴ *Id.*; 2 GUIDE TO JUDICIARY POLICY pt. E, ch. 3 (2019) [hereinafter 2019 GUIDE TO JUDICIARY POLICY], https://www.uscourts.gov/sites/default/files/judicial_conduct_and_disability_rules_effective_march_12_2019.pdf [<https://perma.cc/KZE8-F53U>] (Judicial Conference implementation of Breyer Committee Report).

⁹⁵ See generally Judicial Transparency and Ethics Enhancement Act of 2015, S. 1418, 114th Cong. (2015); Judicial Transparency and Ethics Enhancement Act of 2017, S. 2195, 115th Cong. (2017).

constitutional overreach; encouraging extrajudicial engagement; promoting operational effectiveness; and preserving institutional legitimacy. This Section explores how recent debates over these relational interests have played out to the end of showing the ascendance of relational interests in the regulation of judicial ethics, an emerging skepticism of the macroethics rationales for microethics rules, and the obscuring of ethics analysis by partisan divides and judicial self-interest. These developments have manifested as a one-two punch, in which critics of a given microethics proposal 1) challenge the macroethics justification for the measure, and 2) argue that the marginalized justification for the measure is offset by one or more relational interests.

1. Guarding Against Constitutional Overreach

This one-two punch is well-illustrated by episodes in which critics have challenged microethics rules as unconstitutional. The twenty-first century origin story for this form of relational challenge can be traced to the Supreme Court's 2002 decision in *Republican Party of Minnesota v. White*.⁹⁶ In *White*, Justice Antonin Scalia, writing for a five-member majority, invalidated a Canon in the Minnesota Code of Judicial Conduct that prohibited candidates in judicial election campaigns from announcing their views on disputed legal issues (the "Announce Clause")—a Canon that the state of Minnesota argued was necessary to preserve and promote judicial impartiality.⁹⁷ The Court opined that an ethics rule such as this, which imposed a content-based restriction on fully protected speech, could survive constitutional scrutiny only if it was the least restrictive means to achieve a compelling state interest.⁹⁸ That set up the Court's one-two punch: the Announce Clause, the majority observed, "barely" furthered the state's interest in impartiality (because the clause was underinclusive, proscribing announcements during but not before or after judicial campaigns), which rendered the macroethics justification for the clause insufficiently muscular to offset the relational First Amendment interest at stake.⁹⁹

White emboldened judicial candidates to contest an array of additional microethics restrictions on their speech, with varying degrees of success. In another 5–4 decision, the Supreme Court rejected a challenge to a rule that

⁹⁶ 536 U.S. 765 (2002).

⁹⁷ *Id.* at 788.

⁹⁸ *Id.* at 774–75.

⁹⁹ *Id.* at 776; *see also id.* at 777 n.7 ("[W]e are careful to say that the announce clause is 'barely tailored to serve that interest' [in promoting impartiality]. . . . The question under our strict scrutiny test, however, is not whether the announce clause serves this interest *at all*, but whether it is *narrowly tailored* to serve this interest. It is not.").

forbade judicial candidates from personally soliciting campaign contributions.¹⁰⁰ Lower courts invalidated rules that barred judicial candidates from making misleading campaign statements,¹⁰¹ struck down rules that prohibited candidates from declaring their partisan affiliations,¹⁰² and were divided on whether ethics rules could prevent judicial candidates from making pledges, promises or commitments,¹⁰³ or engaging in other forms of partisan, political campaign conduct.¹⁰⁴

In the federal system, First Amendment claims have operated as a relational ethics interest in less formal ways. In 2001, the Community Rights Counsel published an exposé that accused federal judges of attending expense-paid educational seminars at luxury resorts sponsored by corporations with cases before the federal courts—seminars that allegedly slanted seminar content in favor of the corporate sponsors’ positions in litigation.¹⁰⁵ Senators John Kerry and Russ Feingold introduced legislation to prohibit these so-called “junkets for judges.”¹⁰⁶ Federal judges who supported the seminars were unsympathetic to the macroethics concern at issue, dismissing claims that judges could be improperly influenced by educational

¹⁰⁰ *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1659 (2015) (“Unlike a politician, who is expected to be appropriately responsive to the preferences of supporters, a judge in deciding cases may not follow the preferences of his supporters or provide any special consideration to his campaign donors.”).

¹⁰¹ *See Weaver v. Bonner*, 309 F.3d 1312, 1319 (11th Cir. 2002) (“[P]rohibiting false statements negligently made . . . does not afford the requisite ‘breathing space’ [because] . . . ‘erroneous statement is inevitable in free debate . . .’” (quoting *Brown v. Hartlage*, 456 U.S. 45, 60, 61 (1982))); *Winter v. Wolnitzek*, 56 F. Supp. 3d 884, 889 (E.D. Ky. 2014) (holding that a canon that prohibited judicial candidates from making misleading statements violated the First Amendment).

¹⁰² *See Winter v. Wolnitzek*, 834 F.3d 681, 689 (6th Cir. 2016) (holding that canons cannot prevent judges from campaigning as a member of a political party or making speeches for or against a political organization or candidate); *Republican Party of Minn. v. White*, 416 F.3d 738, 766 (8th Cir. 2005) (en banc) (overturning a Minnesota partisan activities clause that prohibited judges and judicial candidates from attending political gatherings and seeking, accepting, or using a political organization’s endorsement).

¹⁰³ *Compare Bauer v. Shepard*, 634 F. Supp. 2d 912 (N.D. Ind. 2009), *aff’d as modified*, 620 F.3d 704 (7th Cir. 2010) (invalidating Indiana’s prohibition on pledges, promises, and commitments), *with Pa. Fam. Inst., Inc. v. Celluci*, 521 F. Supp. 2d 351, 383 (E.D. Pa. 2007) (upholding Pennsylvania’s “commits” clause).

¹⁰⁴ *See Siefert v. Alexander*, 608 F.3d 974, 978, 990 (7th Cir. 2010) (invalidating a rule that directed judges and judicial candidates to “refrain from inappropriate political activity”).

¹⁰⁵ Douglas T. Kendall & Eric Sorkin, *Nothing for Free: How Private Judicial Seminars Are Undermining Environmental Protections and Breaking the Public’s Trust*, 25 HARV. ENV’T L. REV. 405 (2001).

¹⁰⁶ Judicial Education Reform Act of 2000, S. 2990, 106th Cong. (2000); *see also* Bruce A. Green, *May Judges Attend Privately Funded Educational Programs? Should Judicial Education be Privatized?: Questions of Judicial Ethics and Policy*, 29 FORDHAM URB. L.J. 941, 942-43 (2002) (discussing “Junkets for Judges” and the Kerry-Feingold bill).

programs as foolish.¹⁰⁷ In 2001, Chief Justice Rehnquist highlighted the relational issue at stake, declaring bluntly that “[t]he approach of the Kerry-Feingold bill is antithetical to our American system and its tradition of zealously protecting freedom of speech”¹⁰⁸—a clear signal of how his Court might review the legislation if it was passed and challenged. In 2004, the Judicial Conference Committee on Codes of Conduct issued a revised ethics advisory opinion urging judges to be mindful of the potential macroethics concerns associated with attending such seminars and elaborating on the due diligence judges should undertake before accepting invitations to attend.¹⁰⁹ But deep fissures remained. Senator Feingold persisted in his efforts to enact a bill to ban the seminars,¹¹⁰ and in 2010, a new dispute erupted over whether federal judges could serve on the boards of private organizations hosting the seminars—a dispute perpetuated and exacerbated by progressive commentators who opposed the seminars and conservative commentators who supported them.¹¹¹

In 2016, Justice Ruth Bader Ginsburg criticized then presidential candidate Donald Trump in multiple news outlets, most notably in an interview with CNN in which she described him as a “faker,” adding that “[h]e has no consistency about him. He says whatever comes into his head at the moment. He really has an ego. . . . How has he gotten away with not turning over his tax returns? The press seems to be very gentle with him on that.”¹¹² Reaction to Justice Ginsburg’s remarks from traditionalists was

¹⁰⁷ A. Raymond Randolph, *Private Judicial Seminars: A Reply to Abner Mikva*, LITIGATION, Fall 2002, at 3, 6 (“[Judge Mivka] has unjustly attacked their honor and integrity.”).

¹⁰⁸ Chief Justice William H. Rehnquist, Remarks at the American Law Institute’s Annual Meeting 1 (May 14, 2001) (transcript available at https://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_05-14-01 [<https://perma.cc/EFT8-JEUU>]).

¹⁰⁹ See Committee on Codes of Conduct, Advisory Opinion No. 67: Attendance at Independent Educational Seminars (2009) [hereinafter Advisory Opinion No. 67] (“In determining whether to attend and accept benefits associated with a particular seminar, a judge should be guided by Canon 2 and should consider any consequent recusal obligation under Canon 3C(1).”) reprinted in 2B GUIDE TO JUDICIARY POLICY ch. 2, at 67-1, 67-2 (2019), <https://www.uscourts.gov/sites/default/files/volo2b-cho2-advisory67.pdf> [<https://perma.cc/9GR7-5RLC>].

¹¹⁰ Brendan Smith, *Judicial Seminars Divided As Junkets Under Scrutiny*, BLT: BLOG LEGALTIMES (Jan. 30, 2008, 4:20 PM), <https://legaltimes.typepad.com/blt/2008/01/judicial-seminars.html> [<https://perma.cc/P2MN-DNE4>].

¹¹¹ *CAC Asks Three Federal Judges to Resign from FREE’s Board of Directors, Citing Ethics Opinion*, CONST. ACCOUNTABILITY CTR. (Dec. 9, 2010), <https://www.theconstitution.org/blog/cac-asks-three-federal-judges-to-resign-from-frees-board-of-directors-citing-ethics-opinion> [<https://perma.cc/48C5-6R4W>] (arguing that judges commit ethical violations when attending partisan conferences); Jonathan H. Adler, *Junkets For Judges*, NAT’L REV. (June 23, 2005, 11:55 AM), <https://www.nationalreview.com/2005/06/junkets-judges-jonathan-h-adler> [<https://perma.cc/UBY8-5PAY>] (arguing that CRC is misled in believing that seminars pose an ethical threat to judges).

¹¹² Joan Biskupic, *Justice Ruth Bader Ginsburg Calls Trump a ‘Faker,’ He Says She Should Resign*, CNN: POLITICS (July 13, 2016, 7:45 AM), <https://www.cnn.com/2016/07/12/politics/justice-ruth-bader-ginsburg-donald-trump-faker/index.html> [<https://perma.cc/FQP2-A4MZ>].

largely negative. Her statements, they concluded, flouted the Code of Conduct for U.S. Judges, Canon 5(A)(2), which provided that “A judge should not . . . publicly endorse or oppose a candidate for public office,” and thrust her into the partisan maelstrom unnecessarily, to the detriment of public confidence in her impartiality.¹¹³ Although Supreme Court justices were subject to neither the Code of Conduct nor a disciplinary process, Justice Ginsburg promptly and publicly conceded error, expressed regret, and vowed not to repeat the transgression.¹¹⁴

It would, however, be a mistake to characterize this as a consensus resolution. In an op-ed, Professor Noah Feldman questioned the macroethics rationale for condemning her public statements, arguing that “[n]othing in the Constitution . . . demands that the justices be nonpartisan, or even pretend to be” and that Justice Ginsburg should feel no need to perpetuate the discredited myth of an apolitical and impartial Court.¹¹⁵ Dean Erwin Chemerinsky, in turn, raised a countervailing relational interest, arguing that silencing Justice Ginsburg was “inconsistent with one of the most basic underlying principles of the 1st Amendment: that more speech is better in a democracy because it leads to a better-informed population.”¹¹⁶

Chemerinsky’s focus on the relational, First Amendment value of judicial speech, from the audience’s perspective, was likewise implicated by a controversy surrounding Justices Antonin Scalia and Clarence Thomas’

¹¹³ 2014 GUIDE TO JUDICIARY POLICY, *supra* note 85, pt. A, ch. 2, Canon 5; *see also* Laurence H. Silberman, *A ‘Notorious’ 2016 for Ginsburg and Comey*, WALL ST. J. (Feb. 24, 2017, 6:22 PM), <https://www.wsj.com/articles/a-notorious-2016-for-ginsburg-and-comey-1487978570> [<https://perma.cc/6LKX-E3Y7>]; Daniel W. Drezner, *Justice Ruth Bader Ginsburg Has Crossed Way, Way Over the Line*, WASH. POST (July 12, 2016, 9:11 AM), <https://www.washingtonpost.com/posteverything/wp/2016/07/12/justice-ruth-bader-ginsburg-has-crossed-way-way-over-the-line> [<https://perma.cc/ZNX9-C5PM>]; Rick Hasen, *Do Justice Ginsburg’s Comments on Donald Trump Require Recusal in a Clinton v. Trump Case?*, ELECTION L. BLOG (July 10, 2016, 7:47 PM), <https://electionlawblog.org/?p=84177> [<https://perma.cc/P8JG-8RWN>].

¹¹⁴ *See* Robert Barnes, *Ginsburg Expresses ‘Regret’ for Remarks Criticizing Trump*, WASH. POST (July 14, 2016), https://www.washingtonpost.com/politics/ginsburg-expresses-regret-over-remarks-criticizing-trump/2016/07/14/f53687bc-49cc-11e6-bdb9-701687974517_story.html [<https://perma.cc/97Y4-F6CE>] (“On reflection, my recent remarks in response to press inquiries were ill-advised and I regret making them. . . . Judges should avoid commenting on a candidate for public office. In the future I will be more circumspect.” (Quoting Justice Ginsburg)).

¹¹⁵ Noah Feldman, *It’s Fine for Supreme Court Justices to Speak Their Minds*, BLOOMBERG: OP. (July 12, 2016, 12:31 PM), <https://www.bloomberg.com/opinion/articles/2016-07-12/it-was-fine-for-justice-ginsburg-to-speak-her-mind> [<https://perma.cc/77NC-3WZ2>].

¹¹⁶ Erwin Chemerinsky, *Op-Ed: Ruth Bader Ginsburg Has Nothing to Apologize for in Her Criticism of Donald Trump*, L.A. TIMES (July 18, 2016, 5:00 AM), <https://www.latimes.com/opinion/op-ed/la-oe-chemerinsky-ginsburg-trump-comments-20160718-snap-story.html> [<https://perma.cc/BG5M-Z56V>]; *see also* Dmitry Bam, *Seen and Heard: A Defense of Judicial Speech*, 11 LIBERTY U. L. REV. 765, 768-69 (2017); Paul Butler, *Ginsburg Knows, If Trump Wins, the Rule of Law Is at Risk*, N.Y. TIMES (Jan. 17, 2017, 5:44 PM), <https://www.nytimes.com/roomfordebate/2016/07/12/can-a-supreme-court-justice-denounce-a-candidate/ginsburg-knows-if-trump-wins-the-rule-of-law-is-at-risk> [<https://perma.cc/6LK9-K8Y5>].

appearances as featured speakers at Federalist Society events.¹¹⁷ Insofar as those events were fundraisers, the appearances ran afoul of Canon 4C of the Code of Conduct for U.S. Judges, which states that “a judge should not personally participate in fund-raising activities,” and elaborates in commentary that “[a] judge may attend fund-raising events . . . although the judge may not be a speaker, a guest of honor, or featured on the program of such an event.”¹¹⁸ That Code applied only to judges in the lower federal courts, but the episode fueled arguments in support of legislation directing the Supreme Court to establish such a code for itself.¹¹⁹ Defenders of Scalia and Thomas, in contrast, trivialized the macroethics concern associated with the speeches. Circuit Judge Laurence Silberman, for example, dismissed the justices’ critics as “hypocrites pushing phony concerns.”¹²⁰ Moreover, the countervailing relational interest of audiences in hearing what judges had to say, given the leadership role judges serve in the legal community, led the ABA to revise its 2007 Model Code to authorize judges to appear at law-related fundraisers that the Code of Conduct for U.S. Judges forbade.¹²¹

Some judicial ethics controversies have featured other constitutional concerns, which critics have raised as relational interests to curb the reach of given microethics measures. In state systems, the foundational ethics rule that judges avoid the “appearance of impropriety” has been challenged with the familiar two-stage attack, featuring a due process objection. First, critics have taken aim at the macroethics justification for the rule, arguing that it serves no useful purpose because it proceeds on the dubious premise that the appearance of impropriety evidences actual impropriety, which enables scurrilous court critics to make judges look bad as a way to insinuate that they are bad; it fixates on perceived impropriety that distracts from a more sensible focus on actual impropriety; and it makes actual impropriety more difficult to detect and prevent by directing judges to avoid—and in practice, conceal—perceived impropriety.¹²² Second, critics raised the relational ethics concern

¹¹⁷ See Rmuse, *Justices Thomas and Scalia Violate Judicial Ethics By Headlining Right Wing Fundraisers*, POLITICUSUSA (Nov. 16, 2013), <https://www.politicususa.com/2013/11/16/justices-thomas-scalia-violate-judicial-ethics-headlining-wing-fundraisers.html> [<https://perma.cc/6AB3-VMTE>].

¹¹⁸ 2014 GUIDE TO JUDICIARY POLICY, *supra* note 85, pt. A, ch. 2, at 12, 15-16.

¹¹⁹ See Andrew Rosenthal, *Step Right Up. Buy Dinner With a Justice*, N.Y. TIMES: OP. PAGES (Nov. 10, 2011, 4:30 PM), <https://takingnote.blogs.nytimes.com/2011/11/10/step-right-up-buy-dinner-with-a-justice> [<https://perma.cc/6FZL-JBE3>].

¹²⁰ Nina Totenberg, *Bill Puts Ethics Spotlight On Supreme Court Justices*, NPR (Aug. 17, 2011, 12:01 AM), <https://www.npr.org/2011/08/17/139646573/bill-puts-ethics-spotlight-on-supreme-court-justices> [<https://perma.cc/BQ84-RT94>].

¹²¹ MODEL CODE OF JUD. CONDUCT r. 3.7(A)(4) (AM. BAR ASS’N 2007); GEYH & HODES, *supra* note 62, at 70.

¹²² See Peter W. Morgan, *The Appearance of Propriety: Ethics Reform and the Blifil Paradoxes*, 44 STAN. L. REV. 593 (1992); Alex Kozinski, *The Appearance of Propriety*, LEGAL AFFS., Jan.–Feb. 2005, at 19.

that holding judges accountable for an appearance of impropriety—that is to say, for looking bad—is so vague a standard as to be meaningless, which, in the context of a rule that subjects violators to discipline, encroaches on due process.¹²³ The ABA Commission charged with revising the most recent overhaul of the Model Code initially relented to critics and moved the admonition to avoid appearances of impropriety from the text of an enforceable rule to an unenforceable, overarching canon (a glorified caption).¹²⁴ But the media excoriated the Commission, and the Conference of Chief Justices—which regarded a rigorous appearance standard as essential to preserving public confidence in the courts—warned that state judiciaries would not approve a code that demoted the standard to the status of an unenforceable principle.¹²⁵ The ABA relented and restored the standard to the status of an enforceable rule shortly before the Code was approved.¹²⁶

In the federal system, Chief Justice Roberts has raised separation of powers concerns as a gentle warning to Congress that its authority to impose microethics measures on the federal courts may have relational limits. In his 2011 annual report, the Chief Justice noted that, in a spirit of comity, Supreme Court justices complied with statutes imposing financial disclosure and disqualification requirements, but that the constitutionality of those requirements had never been tested.¹²⁷ He made this observation in a report that focused on a proposal for the Supreme Court to adopt its own Code of Conduct.¹²⁸ His commentary on the code proposal dwelled on what he perceived to be a lack of macroethics need for the reform: the justices already consulted the Code of Conduct for U.S. Judges and had no need for their own code.¹²⁹ Because Congress had yet to introduce legislation directing the

¹²³ Raymond J. McKoski, *Judicial Discipline and the Appearance of Impropriety: What the Public Sees Is What the Judge Gets*, 94 MINN. L. REV. 1914, 1919-20 (2010); Letter from Ronald Minkoff, Chair, APRL Comm. on Model Code of Jud. Conduct, on behalf of the Ass'n of Pro. Resp. Laws., to the ABA Comm'n on the Model Code of Jud. Conduct (June 30, 2004) (available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/judicial_ethics/resources/comm_rules_minkoff_063004.pdf [<https://perma.cc/KHU8-23NG>]).

¹²⁴ Adam Liptak, *A.B.A. Panel Would Weaken Code Governing Judges' Conduct*, N.Y. TIMES (Feb. 6, 2007), <https://www.nytimes.com/2007/02/06/us/06aba.html> [<https://perma.cc/73NW-TTTY>].

¹²⁵ *Id.*; see also Editorial, *Weakening the Rules for Judges*, N.Y. TIMES, May 22, 2004, at A16; PROFESSIONALISM & COMPETENCE OF THE BAR COMM., CONF. OF CHIEF JUSTS., OPPOSING THE REPORT OF THE ABA JOINT COMMISSION TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT IN LIGHT OF ITS FAILURE TO PROVIDE FOR ENFORCEABILITY OF THE CANON ON 'APPEARANCE OF IMPROPRIETY' (2007), https://ccj.ncsc.org/_data/assets/pdf_file/0013/23710/02072007-opposing-report-aba-joint-commission-judicial-conduct-provide-enforceability.pdf [<https://perma.cc/NNU9-A9TQ>].

¹²⁶ GEYH & HODES, *supra* note 62, at 17-18.

¹²⁷ 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 6-7 (2011), <https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf> [<https://perma.cc/RZ3K-SXMT>].

¹²⁸ *Id.* at 3-5.

¹²⁹ *Id.*

Court to establish such a code,¹³⁰ the Chief Justice had no occasion to opine on its constitutional status. But for close observers, his gratuitous reference to the uncertain constitutionality of related statutes anticipated legislation imposing a code on the Supreme Court and flagged the relational limits of congressional power in advance, as a warning.¹³¹

2. Encouraging Extrajudicial Engagement

In some instances, microethics measures restricting extrajudicial activities have been challenged on the grounds that the macroethics rationale for the rule is offset by a countervailing relational interest in exposing judges to experiences and ideas that make them better-informed and engaged jurists. Professors Alfani, Sample, and I explain the relationship between extrajudicial engagement and the judicial role in the introduction to our treatise on judicial conduct and ethics:

It is frequently said that impartial judges should be neutral and detached, but this does not mean that judges have to isolate themselves [T]o place judges in a monastery or an ivory tower would diminish their judicial ability. . . . Involvement in the outside world enriches the judicial temperament and enhances a judge's ability to make difficult decisions. As Justice Holmes once said: "[T]he life of the law has not been logic: it has been experience."¹³²

At the margins, this relational interest in exposing judges to ideas and experiences that inform their perspectives and judgments can push back against concerns that such exposure threatens judicial impartiality, integrity, or independence.

In 2020, a draft ethics advisory opinion addressing whether it was proper for federal judges to be members of the American Constitution Society (ACS), the Federalist Society, and the American Bar Association (ABA) was circulated to other federal judges by the Judicial Conference Committee on Codes of Conduct and leaked to the public.¹³³ The draft noted that the Federalist Society "describes itself as 'a group of conservatives and libertarians dedicated to reforming the current legal order,'" while the American Constitution Society "describes itself as a 'progressive legal

¹³⁰ Cf. Supreme Court Ethics Act of 2013, S. 1424, 113th Cong. (2013).

¹³¹ Cf. KEVIN M. LEWIS, CONG. RSCH. SERV., LSB10255, A CODE OF CONDUCT FOR THE SUPREME COURT? LEGAL QUESTIONS AND CONSIDERATIONS 3 (2019).

¹³² GEYH ET AL., *supra* note 75, § 1.02.

¹³³ Committee on Codes of Conduct, Advisory Opinion No. 117: Judges' Involvement With the American Constitution Society, the Federalist Society, and the American Bar Association (Jan. 2020) (exposure draft) (available at <http://eppc.org/wp-content/uploads/2020/01/Guide-Volo2B-Cho2-AdvOp11720OGC-ETH-2020-01-20-EXP-1.pdf> [<https://perma.cc/WS56-SKHP>]).

organization,” and concluded that it eroded public confidence in judicial impartiality for judges to be members of organizations dedicated to such ideologically aligned causes.¹³⁴ In contrast, the draft offered cautious approval for ABA membership, opining that the ABA’s mission, “unlike that of the ACS or the Federalist Society, is concerned with the improvement of the law in general and advocacy for the legal profession as a whole,” and that while the ABA House of Delegates sometimes advocated for individual policy agendas, such advocacy was “ancillary to the ABA’s core, neutral, and appropriate” objectives.¹³⁵ Controversy erupted when conservative judges and commentators took issue with the draft’s recommendations relating to the Federalist Society and the ABA.¹³⁶ A letter signed by over 200 federal judges argued at length that the Committee’s macroethics justification for prohibiting membership in the Federalist Society was overblown, while the Committee’s diminished concern for ABA membership reflected a “double standard.”¹³⁷ Featured prominently on the first page of their eight-page letter was the corresponding, relational ethics follow-through: “[t]he Judicial Code of Conduct urges that judges ‘not become isolated from the society in which [we] live[,],’” the letter observed, adding that “[w]e are all better served when judges expose themselves to a wide array of legal ideas.”¹³⁸

The “junkets for judges” imbroglio, in which interest groups lobbied to stop federal judges from attending expense-paid seminars sponsored by corporations with an interest in cases pending in the federal courts, was previously highlighted as an episode in which judges, resistant to reform, argued that the First Amendment freedom of speech operated as a relational interest that offset the macroethics concerns at issue.¹³⁹ But a second relational interest in encouraging extrajudicial engagement was also in play.

¹³⁴ *Id.* at 5-6.

¹³⁵ *Id.* at 11. I was among the signatories of a letter from judicial ethics scholars in support of the Committee’s draft conclusions.

¹³⁶ See Jess Bravin, *Justice Clarence Thomas Questions Proposal to Bar Judges From Membership in Ideological Groups*, WALL ST. J. (Feb. 2, 2020, 12:27 PM), <https://www.wsj.com/articles/justice-clarence-thomas-questions-proposal-to-bar-judges-from-membership-in-ideological-groups-11580664462?mg=prod/com-wsj> [https://perma.cc/D9AV-7NVE]; Ed Whelan, *Draft Judicial Ethics Opinion Favors ABA Over Federalist Society and ACS*, NAT’L REV. (Jan. 21, 2020, 2:47 PM), <https://www.nationalreview.com/bench-memos/draft-judicial-ethics-opinion-favors-aba-over-federalist-society-and-acs> [https://perma.cc/Q653-U8DZ]; Ed. Bd., *Judicial Political Mischief*, WALL ST. J. (Jan. 21, 2020, 7:22 PM), <https://www.wsj.com/articles/judicial-political-mischief-11579652574?st=n9h48xzggtrrtou> [https://perma.cc/N9G2-U8XG]; Ed. Bd., *Judicial Code of Misconduct*, WALL ST. J. (May 5, 2020, 7:28 PM), <https://www.wsj.com/articles/judicial-code-of-misconduct-11588721293> [https://perma.cc/29FM-7NNQ].

¹³⁷ Letter from Fed. Judges to Robert P. Deyling, Assistant Gen. Couns., Admin. Off. of the U.S. Cts. 1 (Mar. 18, 2020), https://s.wsj.net/public/resources/documents/ResponseToAdvisoryOpinion117.pdf?mod=article_inline [https://perma.cc/Z98X-MEG9].

¹³⁸ *Id.* at 1.

¹³⁹ See *supra* notes 105–111 and accompanying text.

In a spirited defense of the seminars, Circuit Judge A. Raymond Randolph devoted most of his attention to disputing the macroethics rationale for prohibiting judges from attending the educational programs, arguing that attendance did not give rise to an appearance of impropriety.¹⁴⁰ But he began his critique with the observation that “[i]t is well known that education is good for lawyers. It is less well known that education is also good for judges.”¹⁴¹ Later, he quoted an excerpt from Judicial Conference Advisory Opinion 67 for the proposition that “[t]he education of judges in various academic disciplines serves the public interest,” adding that the statement “should be enshrined in the hall of wisdom.”¹⁴² In a like vein, George Mason University’s Law and Economics Center, which hosted many of the seminars at issue, justified its role with the explanation that “fundamental principles of a free and just society depend on a knowledgeable and well educated judiciary.”¹⁴³

3. Promoting Operational Effectiveness

By their nature, microethics rules direct judges to do or not to do things that are, respectively, compatible or incompatible with macroethics principles. When requiring judges to take the putatively ethical highroad impedes court operations, it begs the question of whether and when ethics gains are offset by operational losses.

Nowhere is this relational interest in operational effectiveness on more prominent display than in the context of disputes over judicial disqualification. The tension between disqualification and operational effectiveness is, to some extent, baked into microethics rules themselves. The Model Code of Judicial Conduct directs judges to disqualify themselves when their “impartiality[] might reasonably be questioned.”¹⁴⁴ At the same time, the Code admonishes judges to “hear and decide matters assigned to the judge, except when disqualification is required,”¹⁴⁵ because “respect for [the] fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge’s colleagues” require that a judge avoid “[u]nwarranted disqualification.”¹⁴⁶

Disputes over when the need for judicial disqualification should yield to the relational interest of operational effectiveness litter the landscape of

¹⁴⁰ Randolph, *supra* note 107, at 3.

¹⁴¹ *Id.*

¹⁴² *Id.* at 5 (quoting Advisory Opinion No. 67, *supra* note 109, at 67-1).

¹⁴³ *Judicial Education Program*, LAW & ECON. CTR., <https://masonlec.org/divisions/mason-judicial-education-program> [<https://perma.cc/KZ4R-DA7Y>].

¹⁴⁴ MODEL CODE OF JUD. CONDUCT r. 2.11(A) (AM. BAR ASS’N 2020); *see also* 28 U.S.C. § 455(a) (directing the same).

¹⁴⁵ *Id.* r. 2.7.

¹⁴⁶ *Id.* r. 2.7 cmt.

disputes summarized in the introduction.¹⁴⁷ For judges resistant to disqualification, a first and by now-familiar step in the analysis is to contest the macroethics need to withdraw pursuant to the microethics disqualification rule. In *Caperton v. Massey Coal Co.*, for example, West Virginia Justice Brent Benjamin refused to disqualify himself on the grounds that he was not actually biased in the defendant's favor, notwithstanding the fact that the defendant's CEO had spent \$3 million in support of Benjamin's election while the appeal was pending.¹⁴⁸ In a 5–4 ruling, the Court held that whether Benjamin was subjectively biased was not necessary to determine; his failure to disqualify despite an objective probability of bias was enough to violate the plaintiff's due process rights.¹⁴⁹ Similarly, in *Williams v. Pennsylvania*, Pennsylvania Justice Ronald Castille declined to disqualify himself from a case in which, prior to ascending the bench, he had been the district attorney who authorized the state to seek the death penalty against the defendant.¹⁵⁰ Castille defended his non-disqualification on the grounds that his role in the underlying prosecution was limited, but the Supreme Court concluded that Castille had presided despite probable bias and thereby deprived Williams of his Fourteenth Amendment right to due process of law.¹⁵¹

In other settings, disqualification-related disputes have paired skepticism of the macroethics need for a more muscular disqualification response with a countervailing, relational interest in operational effectiveness of the courts that is putatively undermined by a shortfall of judges resulting from aggressive disqualification requirements. In a high-profile case, Supreme Court Justice Antonin Scalia flew to Louisiana on Airforce 2 with Vice President Dick Cheney for a weekend of duck hunting while Cheney was the named defendant in a case pending before the Supreme Court.¹⁵² Justice Scalia declined to disqualify himself.¹⁵³ First, he challenged the macroethics need for disqualification: his impartiality could not reasonably be questioned under the federal disqualification statute because, since the nation was

¹⁴⁷ See *supra* notes 1–15 and accompanying text. A judge's duty to disqualify when she is less than impartial or reasonably perceived to be so is enshrined as an ethics rule in the Model Code of Judicial Conduct that every state and federal judicial system has adopted in one form or another. See generally ABA Jud. Disqualification Project, *Taking Judicial Disqualification Seriously*, 92 JUDICATURE 12 (2008). In addition to being an ethical duty imposed on judges, disqualification is a means to enforce the procedural right of litigants to an impartial judge pursuant to the Due Process Clause of the Fourteenth Amendment or procedural statutes such as 28 U.S.C. § 455. CHARLES GARDNER GEYH, JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW 2 (3d ed. 2020) (discussing ethical and procedural dimensions of disqualification).

¹⁴⁸ 556 U.S. 868, 872–73 (2009).

¹⁴⁹ *Id.* at 886.

¹⁵⁰ 136 S. Ct. 1899, 1903 (2016).

¹⁵¹ *Id.* at 1907.

¹⁵² *Cheney v. U.S. Dist. Ct. for D.C.*, 541 U.S. 913, 914–15 (2004).

¹⁵³ *Id.*

founded, Supreme Court justices had fraternized with public officials in the political branches who would have business before the Court.¹⁵⁴ He also contended that disqualification was unwarranted because Cheney was being sued in his official, not personal, capacity.¹⁵⁵ In rejecting the argument that the macroethics need to preserve the appearance of impartiality argued in favor of him erring on the side of caution and self-disqualifying, Scalia conceded the possible wisdom of such an approach for lower court judges, but concluded that in his case, a relational interest in the operational effectiveness of the Supreme Court, and avoiding 4–4 votes, offset such concerns.¹⁵⁶

Implicit in the Scalia episode is one whopper of an irony that underscores the extent to which relational ethics have trumped macroethics in the context of judicial disqualification. The original disqualification rule, embedded in English common law since the seventeenth century¹⁵⁷ and entrenched in the U.S. Supreme Court's due process jurisprudence since the 1920s,¹⁵⁸ is that no judge may preside over his own case. And yet, when a litigant claims that her presiding judge is less than impartial, the norm across state and federal systems remains that the judge who is to decide that claim is the very judge whose impartiality is being challenged.¹⁵⁹ It is difficult, if not impossible, to defend such a norm in macroethics terms, except to argue that most disqualification requests are groundless, and rooted in a party's strategic desire to avoid a judge who, though not demonstrably partial, is unlikely to be supportive on the merits. And so the heavy lifting is done by the relational argument that transferring disqualification requests to a different judge would impose excessive operational burdens on court systems.¹⁶⁰ Efforts to side-step the irony of calling upon judges to grade their own homework by enabling parties to exercise a one-time right to automatic substitution of judges (akin

¹⁵⁴ *Id.* at 916–17.

¹⁵⁵ *See id.* (listing prior justices and executive officials who were friends to emphasize that a “no-friends” rule has no grounding in historic practice).

¹⁵⁶ *Id.* at 916.

¹⁵⁷ *See Dr. Bonham's Case* [1610] 77 Eng. Rep. 646, 653 (K.B.).

¹⁵⁸ *Tumey v. Ohio*, 273 U.S. 510, 524 (1927) (“[I]t is very clear that the slightest pecuniary interest of any officer, judicial or quasi-judicial, in the resolving of the subject matter which he was to decide, rendered the decision voidable.”).

¹⁵⁹ *See* Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 KAN. L. REV. 531, 583–84 (2005) (pointing out that the norm is for the challenged judge to make the ruling on a recusal motion, even though the law would permit the challenged judge to pass the motion to an objective judge).

¹⁶⁰ *See* Deborah Goldberg, James Sample & David E. Pozen, *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L.J. 503, 531 (2007) (“[W]hile independent adjudication of recusal motions does raise efficiency costs, those costs should not be substantial if decisions are based on written affidavits and oral argument, rather than full-blown adversarial hearings. The increased procedural integrity and public trust fostered by an independent decision-maker may be well worth the price.”).

to a peremptory challenge) have encountered a similar fate.¹⁶¹ Such proposals have been resisted by judges in jurisdictions that do not already have those mechanisms in place, on the grounds that they too would impose significant operational burdens on court systems, particularly in rural areas.¹⁶²

The fate of the long-suffering American Bar Association Judicial Disqualification Project underscores the triumph of the relational interest in operational efficiency over macroethics principles. The project was inaugurated in 2007.¹⁶³ In its first phase, a discussion draft focused its recommendations on disqualification procedure, and urged states to move away from their traditional reliance on judicial self-disqualification. The draft was quietly withdrawn following objections from the ABA Judicial Division.¹⁶⁴ Then, in its second phase, the initiative shifted toward revising the Model Code of Judicial Conduct in the aftermath of *Caperton* to address the circumstances in which judges must disqualify themselves from cases when parties or lawyers had sponsored independent campaigns in support of the judge's election.¹⁶⁵ Once again, the Judicial Division objected, effectively killing the project, in a manner consistent with the by-now familiar one-two punch. First, the judges sought to minimize the macroethics concern, arguing that the reform was ill-suited for the Model Code because it involved the conduct of others beyond the judges' control and was better regulated as a matter of procedure, not ethics.¹⁶⁶ This objection, which the Chair of the ABA Standing Committee on Ethics and Professional Responsibility dismissed as "stonewalling,"¹⁶⁷ was difficult to reconcile with the existing Model Code, which already imposed an ethical duty on judges to disqualify themselves for direct campaign contributions from parties or lawyers in excess of amounts that individual states specify.¹⁶⁸ Second, the Judicial Division expressed the

¹⁶¹ See Charles Gardner Geyh, *Why Judicial Disqualification Matters. Again.*, 30 REV. LITIG. 671, 683-84 (2011) (summarizing 28 U.S.C. § 144, which allows parties to secure disqualification of a judge by presenting an affidavit that the judge is biased or prejudiced; the courts eventually made this statute obsolete by imposing onerous requirements related to the affidavit).

¹⁶² "Judicial Transparency and Ethics": *Hearing Before the Subcomm. on Cts., Intell. Prop., & the Internet of the H. Comm. on the Judiciary*, 115th Cong. 7 (2017) (testimony of Charles G. Geyh, John F. Kimberling Professor of L., Ind. Univ. Maurer Sch. of L.).

¹⁶³ ABA Jud. Disqualification Project, *supra* note 147, at 12. I was the director of and consultant to the project in its first phase.

¹⁶⁴ Geyh, *supra* note 161, at 727-28.

¹⁶⁵ Charles Geyh, Myles Lynk, Robert S. Peck & Toni Clarke, *The State of Recusal Reform*, 18 LEGIS. & PUB. POL'Y 515, 520 (2015).

¹⁶⁶ *Id.* at 525-26, 530.

¹⁶⁷ *Id.* at 525.

¹⁶⁸ MODEL CODE OF JUD. CONDUCT r. 2.11(A)(4) (AM. BAR. ASS'N 2007).

relational concern that requiring judges to disqualify themselves for the campaign support they received would burden the judicial workforce.¹⁶⁹

4. Preserving Institutional Legitimacy

When an institution exposes and addresses bad behavior within its ranks in a forthright and transparent way, it sends a mixed message. On the one hand, the institution shows that it is serious about keeping its house in order and fixing its problems. On the other hand, the institution conveys the impression that it has serious problems in need of fixing. If the goal is to preserve public confidence in the institution, an overly aggressive response to a problem can be counterproductive insofar as it creates the misperception that the institution is more troubled than it is. When it comes to judicial ethics and their regulation, then, the need to remedy macroethics problems with microethics rules is tempered by a relational ethics interest in assuring that the cure is proportionate to the disease—that enforcement of a given rule achieves a net gain for the judiciary’s institutional legitimacy.

The controversy at the core of the *Caperton* case is illustrative.¹⁷⁰ In that case, a slender majority of the U.S. Supreme Court ruled that litigants enjoyed a due process right to disqualify state judges who exhibited probable bias. In so holding, the Court was mindful of the concern that its decision could open the floodgates to litigants challenging judges’ impartiality at every turn and took pains to emphasize how rarely its holding would come into play.¹⁷¹ The Chief Justice, writing for four dissenters, was unpersuaded. In his view, judges were entitled to a presumption of legitimacy: “All judges take an oath to uphold the Constitution and apply the law impartially, and we trust that they will live up to this promise.”¹⁷² In Roberts’ view, a microethics rule (of constitutional dimension, no less) that authorized 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 in a

¹⁶⁹ Geyh et al., *supra* note 165, at 540 (noting practical concerns such as cost, lost time, and finding a new judge to preside over a matter when judges must recuse themselves from a case).

¹⁷⁰ *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009).

¹⁷¹ *Id.* at 887 (“Our decision today addresses an extraordinary situation where the Constitution requires recusal. . . . The facts now before us are extreme by any measure. The parties point to no other instance involving judicial campaign contributions that presents a potential for bias comparable to the circumstances in this case.”).

¹⁷² *Id.* at 891 (Roberts, C.J., dissenting); *see also id.* at 891-92 (stating that the Due Process Clause requires disqualification of a judge in only two situations: when the judge has a financial interest in the case and when the judge is presiding over certain types of criminal contempt matters).

particular case.”¹⁷³ Ultimately, for Roberts, this was a case in which “the cure [was] worse than the disease,” because “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.”¹⁷⁴

III. THE LESSONS OF ETHICS CONTROVERSIES AND THE FUTURE OF REFORM

Part I of this Article conceptualizes the inherent tension between microethics rules guided by macroethics principles on the one hand, and countervailing, relational ethics interests on the other, as two sides of the same coin—in the spirit of the two-sided coin that Professor Burbank used to characterize the relationship between judicial independence and accountability. The scope of judicial independence is delineated by the contours of the stamp on its own side of the coin (circumscribed, for example, by the purposes judicial independence serves) and constrained by the needs of accountability on the reverse side of the coin. In a like vein, microethics rules are contoured by macroethics principles on one side of the judicial ethics coin and constrained by relational ethics interests on the other.

Part II underscores the extent to which recent developments reveal deepening disagreements over the balance to be struck between the two sides of the judicial ethics coin. The traditional reform template—in which problems arise, a consensus on the need for reform emerges, and reform follows (or not, if the consensus is against the need for reform)—fails to describe many recent ethics controversies. The traditional, consensus-driven reform template relies on a shared understanding of how problematic conduct implicates macroethics values and should be regulated by microethics rules in light of offsetting relational interests. In the twenty-first century, this shared understanding has proved elusive. With increasing frequency, ethics controversies have generated fractious disagreement within the judiciary and the legal profession, over whether microethics rule reform is warranted by a demonstrable macroethics need, and whether that need, sapped of its strength by divisive attack, is offset by countervailing relational interests.

There are several explanations for why consensus has become harder to achieve. First, partisan and ideological divisions—which have dominated public debates over federal judicial appointments, state judicial elections, and judicial decisionmaking—have wormed their way into discussions of judicial ethics. The ethics controversies embedded in the 2018 confirmation

¹⁷³ *Id.* at 891.

¹⁷⁴ *Id.* at 902.

proceedings of Supreme Court Justice Brett Kavanaugh offer a powerful example. As a Supreme Court nominee, Circuit Judge Kavanaugh was the subject of two allegations with ethics implications. The first allegation was that as a high school student he committed sexual assault, which, his critics contended, reflected so badly on his integrity and character as to disqualify him from service on the Supreme Court.¹⁷⁵ The second allegation, supported in a letter signed by over 2,400 law professors, was that when Kavanaugh took the witness stand and denied the sexual assault allegations, he attacked his Senate accusers with such partisan venom as to impugn his temperament to serve as a Justice.¹⁷⁶ While Kavanaugh's nomination was pending and he remained a circuit judge, a flurry of disciplinary complaints related to these allegations were filed against the judge. The complaints were transferred to a circuit judicial council that dismissed them for (in effect) lack of jurisdiction after Kavanaugh was confirmed to the Supreme Court, but not before characterizing the allegations as "serious."¹⁷⁷ Whether Kavanaugh committed the assault; whether, if he did, the assault disqualified him from service on the Court; and whether his testimony displayed an unacceptable lack of judicial temperament divided along partisan lines. The split was reflected in both the Senate vote and public opinion surveys.¹⁷⁸

Ideological and partisan divides have exacerbated many of the ethics controversies mentioned elsewhere in this Article. While Justice Ginsburg's public criticism of Donald Trump was questioned by traditionalists across the

¹⁷⁵ See Benjamin Wittes, *I Know Brett Kavanaugh, but I Wouldn't Confirm Him*, ATLANTIC (Oct. 2, 2018), <https://www.theatlantic.com/ideas/archive/2018/10/why-i-wouldnt-confirm-brett-kavanaugh/571936> [<https://perma.cc/3JUP-96KZ>] (opposing Kavanaugh because of sexual assault allegations); Emily Stewart, *Support for Brett Kavanaugh is Dwindling Among Voters Amid Sexual Assault Allegations*, VOX (Sept. 23, 2018, 10:43 AM), <https://www.vox.com/policy-and-politics/2018/9/23/17892530/brett-kavanaugh-confirmation-poll-christine-blasey-ford> [<https://perma.cc/5JQ2-ZW46>] (discussing opposition to Kavanaugh due to sexual assault allegations).

¹⁷⁶ Wittes, *supra* note 175; Letter from 2,400+ Law Professors to the U.S. Senate (Oct. 4, 2018) (available at <https://www.nytimes.com/interactive/2018/10/03/opinion/kavanaugh-law-professors-letter.html> [<https://perma.cc/R9Z7-ZNJP>]) ("We have differing views about the other qualifications of Judge Kavanaugh. But we are united, as professors of law and scholars of judicial institutions, in believing that he did not display the impartiality and judicial temperament requisite to sit on the highest court of our land."). I was among the signatories on the letter.

¹⁷⁷ See Order at 9 (Jud. Couns. of the 10th Cir. Dec. 18, 2018), <https://www.uscourts.gov/courts/ca10/10-18-90038-et-al.O.pdf> [<https://perma.cc/38XL-KPRU>] ("The allegations contained in the complaints are serious, but the Judicial Council is obligated to adhere to the Act. Lacking statutory authority to do anything more, the complaints must be dismissed because an intervening event—Justice Kavanaugh's confirmation to the Supreme Court—has made the complaints no longer appropriate for consideration under the Act.").

¹⁷⁸ See Steven Shepard, *Poll: Kavanaugh Support Falls Along Party Lines*, POLITICO (Sept. 4, 2018, 5:50 AM), <https://www.politico.com/story/2018/09/04/kavanaugh-confirmation-support-poll-806300> [<https://perma.cc/6G9S-5U9S>] ("Among Republican voters, two-thirds, 67 percent, support confirming Kavanaugh A majority of Democratic voters, 53 percent, say the Senate shouldn't confirm Kavanaugh").

political spectrum, her most fervent critics and defenders divided along ideological lines.¹⁷⁹ Judicial participation in expense-paid seminars—hosted by ideologically conservative organizations—has been defended by conservatives and attacked by liberals.¹⁸⁰ The draft ethics advisory opinion that recommended against judges being members of the conservative Federalist Society was opposed by a cohort of largely Republican-appointed judges.¹⁸¹ Objections to conservative Justices Antonin Scalia and Clarence Thomas serving as featured speakers at Federalist Society fundraisers were voiced by liberal-leaning interest groups.¹⁸² Public calls for the disqualification of conservative Justice Antonin Scalia from the *Cheney* case were led by liberal commentators, while public calls for the disqualification of liberal Justice Ruth Bader Ginsburg over her criticism of Donald Trump were led by conservative commentators.¹⁸³ Similarly, in the months preceding

¹⁷⁹ Examples of liberal-leaning commentators who defended Ginsburg's statements include Noah Feldman and Erwin Chemerinsky. Feldman, *supra* note 115 (“[There is] nothing wrong with a sitting Supreme Court justice expressing her personal political views when they don't implicate any case that's currently before the court.”); Erwin Chemerinsky, *Justices Have Free Speech Rights Too*, N.Y. TIMES (July 12, 2016, 3:22 AM), <https://www.nytimes.com/roomfordebate/2016/07/12/can-a-supreme-court-justice-denounce-a-candidate/justices-have-free-speech-rights-too> [<https://perma.cc/UNF3-UEGA>] (“The judicial code of ethics says that judges are not to endorse or oppose candidates for elected office. But these provisions do not apply to Supreme Court justices. Nor do I believe that such restrictions are constitutional or desirable.”). Examples of conservative-leaning commentators who criticized Ginsburg's statements include Ed Whelan and Laurence Silberman. Aaron Blake, *In Bashing Donald Trump, Some Say Ruth Bader Ginsburg Just Crossed a Very Important Line*, WASH. POST (July 11, 2016, 12:05 PM), <https://www.washingtonpost.com/news/the-fix/wp/2016/07/11/in-bashing-donald-trump-some-say-ruth-bader-ginsburg-just-crossed-a-very-important-line> [<https://perma.cc/3GLS-VHNG>] (quoting Ed Whelan who remarked that Ginsburg's comments here “exceed[ed] [her previous public comments] in terms of her indiscretions”); Silberman, *supra* note 113 (“[Justice Ginsburg] reached her low point in a stunning interview last summer in the New York Times (where else?). Her comments were as openly political as any justice has been in my memory—perhaps ever . . .”).

¹⁸⁰ Brendan Smith, *Judicial Seminars Derided As Junkets Under Scrutiny*, BLT: BLOG LEGALTIMES (Jan. 30, 2008, 4:20 PM), <https://legaltimes.typepad.com/blt/2008/01/judicial-seminars.html> [<https://perma.cc/P2MN-DNE4>] (quoting the liberal leaning Community Rights Counsel in opposition to the seminars, and the libertarian organization, Foundation for Research in Economics and the Environment, in defense of them).

¹⁸¹ See Caroline Fredrickson & Eric J. Segall, *Trump Judges or Federalist Judges? Try Both*, N.Y. TIMES (May 20, 2020), <https://www.nytimes.com/2020/05/20/opinion/trump-judges-federalist-society.html> [<https://perma.cc/PQ5B-CRHA>] (describing how over 200 federal judges, nearly a quarter of the federal judiciary, wrote to oppose the idea that judges should not be a part of the Federalist Society).

¹⁸² See Alliance for Justice, *A Question of Integrity: Politics, Ethics, and the Supreme Court*, YOUTUBE (Oct. 21, 2011), <https://www.youtube.com/watch?v=GMoawSfR-No> [<https://perma.cc/QX3J-TBAY>] (criticizing Justice Scalia and Justice Thomas for speaking at Federalist Society fundraisers).

¹⁸³ See Mark Sherman, *Ginsburg Apologizes for “Ill-Advised” Criticism of Trump*, ASSOCIATED PRESS (July 14, 2016), <https://apnews.com/9258b1e65517469fa0b011f1cb532a8e> [<https://perma.cc/72X7-TRFB>] (“Senate Majority Leader Mitch McConnell of Kentucky . . . called Ginsburg's remarks ‘totally inappropriate,’ . . . [and Senate Judiciary Committee Chairman Chuck Grassley, R-

Supreme Court review of the Obama administration's Affordable Care Act, conservative commentators demanded the disqualification of liberal Justice Elena Kagan because of her comments on the legislation when she was President Obama's Solicitor General, while liberal commentators demanded the disqualification of conservative Justice Clarence Thomas because of his spouse's work for an organization opposed to the Affordable Care Act.¹⁸⁴

A second explanation for escalating discord in the ethics arena relates to the first: over the course of the past century, a heightened fixation on judicial politics has bred burgeoning skepticism of an impartial judiciary. Empirical studies that document the influence of ideology on the decisionmaking of federal judges generally, and Supreme Court justices in particular, have been echoed in media reports and internalized by the general public in ways that threaten to relegate the unbiased, open-minded judge to the status of myth.¹⁸⁵ A natural consequence of this development is to second-guess, as naïve or hypocritical, rules aimed at regulating the appearance of impartiality generally—or specifically—in the context of prohibitions on judges speaking their minds, affiliating with ideologically aligned organizations, or attending expense-paid seminars.

Third, some of the recent pressure points in judicial ethics have been exacerbated by judicial self-interest. When judges unite in opposition to proposed legislation restricting their autonomy—for example, when the Judicial Conference of the United States has opposed bills to establish an

Iowa said] “[s]he oughta stay out of it. . . . It hurts the court when she does that.”); *Opinion: Justice Scalia and Mr. Cheney*, N.Y. TIMES (Feb. 28, 2004), <https://www.nytimes.com/2004/02/28/opinion/justice-scalia-and-mr-cheney.html> [<https://perma.cc/PNG9-YYKU>] (“By vacationing in a small group with Mr. Cheney and taking things of value, Justice Scalia created an appearance of bias in Mr. Cheney’s favor. . . . Recusal rules protect not only litigants, but also the court itself. . . . If Justice Scalia stays on the case and votes in Mr. Cheney’s favor, the court will no doubt face more criticism. Justice Scalia should recuse himself, either of his own volition or with encouragement of his colleagues.”).

¹⁸⁴ Lamar Smith, a Republican representative from Texas, said: “The NFL wouldn’t allow a team to officiate its own game. If, as solicitor general, Kagan did advise administration officials on the constitutionality of the president’s health-care law, she should not officiate when the matter comes before the Supreme Court.” Lamar Smith, *The White House Needs to Come Clean on Elena Kagan and the Affordable Care Act*, WASH. POST (Dec. 1, 2011), https://www.washingtonpost.com/opinions/the-white-house-needs-to-come-clean-on-elena-kagan-and-the-affordable-care-act/2011/11/30/gIQAUUOPIO_story.html [<https://perma.cc/VP67-L45M>]; see also Michael O’Brien, *Democrats: Justice Thomas Should Recuse Himself in Healthcare Reform Case*, THE HILL (Feb. 9, 2011, 4:10 PM), <https://thehill.com/blogs/blog-briefing-room/news/142969-democrats-justice-thomas-should-recuse-himself-in-healthcare-reform-case> [<https://perma.cc/9Y4G-QDQJ>] (“A group of 73 House Democrats on Wednesday demanded U.S. Supreme Court Justice Clarence Thomas recuse himself from any case examining the constitutionality of healthcare reform . . . citing the work by Thomas’s wife on behalf of efforts opposing that healthcare law.”).

¹⁸⁵ See, e.g., Feldman, *supra* note 115 (“The arguments against Ginsburg’s candor almost all come down to the idea that she should have respected propriety and upheld the myth of judicial neutrality. But who, exactly, believes in that myth in the year 2016?”).

Inspector General in the federal judiciary—principled-seeming objections grounded in separation of powers and judicial independence can converge with self-interested desires to avoid accountability. Similarly, when judges and judiciaries oppose proposals because their implementation would impose additional workload burdens (such as proposals to assign disqualification requests to a different judge), differentiating high-minded concern for the judiciary’s operational effectiveness from a lowbrow desire to maximize leisure time can be difficult.

When judges disagree among themselves on the wisdom of a proposed ethics reform, self-interest may likewise play a role, insofar as those who object are those whose ox is being gored. To some extent, the point is so obvious as to be banal: some judges may oppose proposals to ban “junkets for judges” because they want in on the junkets, while some judges may oppose proposals to ban membership in the Federalist Society because they want to be members of the Federalist Society. But self-interest can also operate in subtler ways. Take, for example, the controversy surrounding first amendment challenges to state judicial campaign ethics rules. As it turns out, *White* and its offspring have not changed the character of judicial campaigns to a measurable extent.¹⁸⁶ State judges, it would seem, have declined to embrace the ethos of *White* and have not taken to trumpeting their views on legal issues from the campaign stump in game-changing ways. It is possible to explain this non-development as principled: judges do not announce their views from the campaign stump because their relational “right” to do so is offset by a deeply entrenched, macroethics norm that such announcements are antithetical to preserving their impartiality (the Supreme Court’s holding to the contrary notwithstanding).¹⁸⁷ It is, however, at least as easy to explain this development in terms of judicial self-interest: incumbent judges enjoy an electoral advantage that is preserved by avoiding controversies created by airing their views, which may be why, with rare exception, it has been challengers, not incumbents, who have sought to invalidate microethics

¹⁸⁶ See Chris W. Bonneau, Melinda Gann Hall & Matthew J. Streb, *White Noise: The Unrealized Effects of Republican Party of Minnesota v. White on Judicial Elections*, 32 JUST. SYS. J. 247, 247 (2011) (“Our primary assumption is that if *White* has had the presumed effects, we should see measurable changes in key judicial election characteristics: an increased willingness of challengers to enter the electoral arena, decreased electoral support for incumbents, elevated costs of campaigns, and declines in voter participation. Overall, we find no statistically discernable changes in state supreme court or state intermediate appellate court elections on these dimensions . . .”).

¹⁸⁷ Justice Scalia, for example, belittled the claim that the announce clause promoted judicial impartiality in his capacity as the opinion writer in *White*. Judge Scalia, however, in his capacity as a Supreme Court candidate, declined to announce his views to the Senate Judiciary Committee on the grounds that doing so would compromise his impartiality. Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO STATE L.J. 43, 66-67 (2003).

restrictions on their campaign speech.¹⁸⁸ Challengers, in turn, can fairly be accused of harboring a self-interested desire to win by any means necessary, most noticeably in the context of cases where they have sought to invalidate rules that restrict their “right” to make misleading campaign statements.¹⁸⁹

The varied explanations for eroding intra-judicial consensus on ethics controversies can be synthesized: the judiciary is becoming a more political place that holds increasingly divergent perspectives on when regulation is needed to preserve public confidence in the judiciary’s impartiality, integrity, and independence—divergences that widen the spaces for relational, partisan, and self-interests to operate. The task of managing these divergences to the end of preserving intra-judicial consensus on ethics norms is further complicated by the fact that the judiciary is a bigger, busier, and less homogeneous place than it was half a century ago.¹⁹⁰

It is tempting to overburden the two-sided coin metaphor and sound an alarm that the judicial ethics coin is out of balance—that because consensus on when microethics rules are adequately supported by macroethics need has begun to wear thin, the coin is increasingly weighted toward relational interests. But thinking about the problem in this way is wrongheaded for two reasons.

First, such an approach implies that when it comes to the judicial ethics coin, there is some transcendental, “true” balance in which the forces in tension are equally weighted. That, in turn, invites naïve solutions aimed at returning us to an earlier and simpler time when judicial politics was disavowed, public perception of macroethics values was less jaded, and relational ethics were less influential. For better or worse, however, the toothpaste of legal realism cannot be returned to its tube, and disagreements over the scope of macroethics values and the corresponding need for microethics regulation are likely to persist into the foreseeable future.

Second, this Article’s focus on heightened disagreement over the macroethics need for proposed microethics rules, and the corresponding rise of offsetting relational ethics interests, should be kept in perspective. These

¹⁸⁸ For a study of judicial ethics rules governing campaign conduct and their relationship to judicial self-interest, see C. SCOTT PETERS, *REGULATING JUDICIAL ELECTIONS: ASSESSING STATE CODES OF JUDICIAL CONDUCT* (2018).

¹⁸⁹ See *Weaver v. Bonner*, 309 F.3d 1312, 1319 (11th Cir. 2002) (holding that Georgia’s judicial ethics rules governing misleading campaign statements does not afford the requisite “breathing space” to protect free speech (quoting *Brown v. Hartlage*, 456 U.S. 45, 60 (1982))); *Winter v. Wolnitzek*, 56 F. Supp. 3d 884, 889 (E.D. Ky. 2014) (holding that a canon that prevents judicial candidates from campaigning as a member of a political organization as well as a canon prohibiting judicial candidates from making misleading statements violated the First Amendment).

¹⁹⁰ Greg Goelzhauser, *Intersectional Representation on State Supreme Courts*, in *OPEN JUD. POL.* 65, 71-75 (Rorie Spill Solberg, Jennifer Segal Diascro & Eric Waltenburg eds., n.d.) (discussing judicial diversification and its effect on the courts).

disagreements may dominate public and academic discourse on contemporary judicial ethics, but, with a few exceptions, they remain disagreements at the margins. As emphasized in Part I, the high courts of all fifty states, and the Judicial Conference of the United States, have adopted substantially similar codes of conduct, derived from one of three ABA models. In our treatise on judicial conduct and ethics, Alfini, Sample, and I chronicle a considerable degree of consistency in the interpretation and application of ethics rules across jurisdictions.¹⁹¹ The disagreements featured in this Article, then, cannot and should not be spun as harbingers of systemic collapse, because core judicial ethics norms remain relatively stable and strong. Rather, these disagreements are indicative of a well-woven system of ethics that has begun to fray at the edges. In the spirit of “a stitch in time, saves nine,” these loose threads need hemming, but crisis talk is unwarranted.

The common denominator for most twenty-first century ethics controversies is that the disputants have been unable to agree over whether the macroethics need for a microethics rule is sufficient to offset countervailing relational interests. With the possible exception of the Supreme Court’s decision in *White*, which gave new bite to relational First Amendment challenges to ethics rules that restrict judicial speech, these controversies have arisen not because relational ethics interests are becoming more muscular, but because macroethics interests are becoming less so. As reflected in Part II, in setting after setting, the macroethics need for microethics rules has been challenged as wanting, and when the perceived need for a given rule is diminished, offsetting relational interests gain relative heft. The challenge, then, is to reexamine the reach of macroethics values and microethics rules, to the end of addressing an eroding consensus as to their scope and thwarting spurious obstructions to consensus motivated by judicial self-interest, partisanship, and unwarranted skepticism of macroethics principles. That, in turn, implicates the need to strengthen codes of conduct in their two primary roles: as a basis for discipline, and as an aspirational guide.

A. *The Role of the Code of Conduct in Judicial Discipline*

To reenergize the search for consensus on ethics norms, the stakes must be high enough to fixate the attention of participants in the process. If judicial systems do not take ethics seriously enough to impose consequences for failure to abide by shared norms, the impetus to forge and live by such norms is weakened. For the most part, state court systems have internalized this point, at least in principle. They have generally embraced the rules embedded in their codes of conduct as mandatory standards, the violation of which will

¹⁹¹ See generally GEYH ET AL., *supra* note 75.

expose judges to discipline.¹⁹² Even so, state judiciaries have come under recent fire for failing to impose discipline often or aggressively enough.¹⁹³

The federal judiciary, in contrast, has resisted bringing the Code to bear in its disciplinary process for decades. In 1973, the Judicial Conference adopted the 1972 ABA Code of Judicial Conduct with “only a few changes”¹⁹⁴—one change being to exclude the Code preface, which emphasized that the “canons and text establish mandatory standards” to be enforced by disciplinary processes.¹⁹⁵ This exclusion made sense, given that the federal judiciary had no formal disciplinary process in place at the time. In 1980, Congress authorized the circuit judicial councils to discipline federal judges for conduct “prejudicial to the effective and expeditious administration of the business of the courts,”¹⁹⁶ and the Senate Committee Report accompanying the legislation noted that when imposing discipline under the new standard, “the judicial council may consider, but is not bound by” the Code of Conduct for U.S. Judges.¹⁹⁷ This qualification likewise made sense: the Judicial Conduct and Disability Act imposed a system of self-discipline on a judiciary that was hostile to encroachments on its autonomy generally, and suspicious of this encroachment in particular.¹⁹⁸ Reserving to the federal judiciary the discretion to decide for itself the role that the Code would play in disciplinary proceedings was in keeping with the spirit of comity Congress sought to preserve.

In 1990, the ABA revised its Model Code to replace the “shoulds” with “shalls,” to highlight the mandatory character of the Code and its disciplinary purpose.¹⁹⁹ The Judicial Conference, however, declined to follow the ABA’s lead. In 1992, it made modest updates to its Code in light of the 1990 Model, retained the “shoulds,” and, in commentary accompanying Canon 1, explained

¹⁹² *Id.* § 1.06.

¹⁹³ See, e.g., Michael Berens & John Shiffman, *Thousands of U.S. Judges Who Broke Laws or Oaths Remained On the Bench*, REUTERS (June 30, 2020, 12:00 PM), <https://www.reuters.com/investigates/special-report/usa-judges-misconduct/> [<https://perma.cc/9WAV-C8RC>]; Micheal Berens & John Shiffman, *With Judges Judging Judges, Rogues on the Bench Have Little to Fear*, REUTERS (July 9, 2020, 10:00 AM), <https://www.reuters.com/investigates/special-report/usa-judges-deals/> [<https://perma.cc/HYX2-XGPL>]; John Shiffman & Michael Berens, *The Long Quest to Stop a ‘Sugar Daddy’ Judge Accused of Preying on Women*, REUTERS (July 14, 2020, 12:00 PM), <https://www.reuters.com/investigates/special-report/usa-judges-commissions/> [<https://perma.cc/G3AV-WRJK>].

¹⁹⁴ Weaver Jr., *supra* note 47.

¹⁹⁵ Walter P. Armstrong Jr., *The Code of Judicial Conduct*, 26 SW. L.J. 708, 715 (1972) (citing MODEL CODE OF JUD. CONDUCT, Preface (AM. BAR ASS’N 1972)); see also *supra* note 52 and accompanying text.

¹⁹⁶ 28 U.S.C. § 351(a).

¹⁹⁷ S. REP. NO. 96-362, at 9 (1979).

¹⁹⁸ See Irving R. Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671 (1980) (arguing that the proposed Judicial Conduct and Disability Act threatened judicial independence).

¹⁹⁹ See *supra* notes 55–57 and accompanying text; see also MODEL CODE OF JUD. CONDUCT (AM. BAR ASS’N 1990).

that “it is not intended that disciplinary action would be appropriate for every violation” of the Code, because “[m]any of the proscriptions in the Code are necessarily cast in general terms, and it is not suggested that disciplinary action is appropriate where reasonable judges might be uncertain as to whether or not the conduct is proscribed.”²⁰⁰

In 1993, the National Commission on Judicial Discipline and Removal reached a similar conclusion for slightly different reasons. Given the “indeterminacy” of the statutory standard for discipline, the Commission opined that “it was to be expected that chief judges and circuit councils would seek more concrete guidance in the Code of Conduct.”²⁰¹ “Yet,” the Commission added, “the Code was not intended as a source of disciplinary rules, and not all of its provisions are appropriately regarded as enforceable under the Act.”²⁰²

In 2006, a committee chaired by Justice Stephen Breyer issued a report on the state of the federal disciplinary process.²⁰³ The committee observed that the statutory standard for discipline “does not appear susceptible to precise definition,”²⁰⁴ adding that “[t]he standard is given such coherence as it has by the Code of Conduct for U.S. Judges and the accumulated precedent of the circuits.”²⁰⁵ In at least two case summaries, the committee criticized the circuit judicial councils for failing to take adequate account of the Code of Conduct in disciplinary proceedings.²⁰⁶ The Judicial Conference, however, revised its disciplinary procedures in response to the Breyer Committee Report, by doubling down on its preexisting view that, unlike nearly identical codes of judicial conduct adopted by state supreme courts in their respective jurisdictions, the Code was neither mandatory nor enforceable:

Although the Code of Conduct for United States Judges may be informative, its main precepts are highly general; the Code is in many potential applications aspirational rather than a set of disciplinary rules. Ultimately,

²⁰⁰ Beth Nolan, *The Role of Judicial Ethics in the Discipline*, in I RESEARCH PAPERS OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE & REMOVAL 867, 881 (n.d.) (quoting CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 1, commentary ¶ 3 (1992)).

²⁰¹ *Report of the National Commission on Judicial Discipline & Removal*, in 152 F.R.D. 265, 344 (1994). I served as a consultant to the Commission.

²⁰² *Id.*

²⁰³ BREYER COMMITTEE REPORT, *supra* note 93.

²⁰⁴ *Id.* app. E at 147. This Appendix was prepared by the Breyer Committee for its own use. *Id.* at 17.

²⁰⁵ *Id.* app. E at 147.

²⁰⁶ *Id.* at 79, 86.

the responsibility for determining what constitutes misconduct under the statute is the province of the judicial council of the circuit²⁰⁷

In their current incarnation, Judicial Conference rules governing disciplinary proceedings reiterate that the Code may be “instructive” in disciplinary proceedings, but that “ultimately,” discretion lies with the judicial councils to determine “what constitutes cognizable misconduct” under the Act.²⁰⁸ Commentary to the current Code of Conduct for U.S. Judges, in turn, acknowledges that the Code “may . . . provide standards of conduct for application” in disciplinary proceedings, but reiterates the Judicial Conference’s longstanding view that “[n]ot every violation of the Code should lead to disciplinary action,” because “[m]any of the restrictions in the Code are necessarily cast in general terms,” and “judges may reasonably differ in their interpretation.”²⁰⁹

In the four decades since the Judicial Conduct and Disability Act became law, the Judicial Conference and its helpmates have curtsied to the relevance of the Code of Conduct in the disciplinary process,²¹⁰ before adding a “but,” followed by explanations for why that relevance is sharply limited. The federal judiciary’s reticence to employ the Code in disciplinary proceedings is measurable: whereas state supreme courts and judicial conduct commissions routinely analyze and apply their respective codes of conduct to explain and justify their decisions in disciplinary proceedings, the Code has been referenced only three to four percent of the time in federal disciplinary proceedings.²¹¹

The varied explanations offered in support of the federal judiciary’s chronic reticence to bring the Code to bear in disciplinary proceedings are specious and unpersuasive. The assertion that “the Code was not intended as a source of disciplinary rules” is correct in the hyper-technical sense that the Judicial Conference adopted its Code before a disciplinary process was in place but is wrong in the more meaningful sense that the 1972 ABA Code of Judicial

²⁰⁷ JUD. CONF. OF THE UNITED STATES, RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS 5 (2008).

²⁰⁸ 2019 GUIDE TO JUDICIARY POLICY, *supra* note 94, pt. E, ch. 3, at 9.

²⁰⁹ CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 1 commentary (2019), https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf [<https://perma.cc/H6KF-AFNZ>].

²¹⁰ *See* JUD. CONF. OF THE UNITED STATES, *supra* note 207, at 5 (“The Code of Conduct for United States Judges expressly covers a wide range of extra-official activities, and some of these activities may constitute misconduct.”).

²¹¹ *See* Jeffrey N. Barr & Thomas E. Willing, *Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980*, 142 U. PA. L. REV. 25, 84 (1993) (“Only thirteen (3%) of the chief judges’ orders sampled have cited the Code of Conduct for U.S. Judges.” (citing ADMIN. OFF. OF THE U.S. CTS., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 62 (1992))); BREYER COMMITTEE REPORT, *supra* note 93, at 35 (“They rarely cited the Code of Conduct for United States Judges (4% of the orders)”).

Conduct—which the Judicial Conference adopted wholesale—was promulgated for the explicit purpose of establishing mandatory standards of conduct for use in disciplinary proceedings. The claim that the Code of Conduct for U.S. Judges is too generally phrased to serve as a basis for discipline is belied by the fact that nearly identical codes have been so used in state systems since 1972. While it borders on the tautological to say that judges should not be sanctioned for violating the Code when it is “uncertain” whether they have violated the Code, five decades of precedent interpreting nearly identical codes across fifty jurisdictions have reduced those uncertainties considerably.

Ultimately, the Judicial Conference’s defense of its longstanding view flirts with incoherence. The federal statutory standard subjecting judges to discipline for “conduct prejudicial to the effective end expeditious administration of the business of the courts”²¹² is indisputably Delphic. To conclude, as the Judicial Conference has, that when applying this murky standard, it is better for federal judicial councils to exercise largely unguided discretion than to default to the more specific provisions of a Code that was designed by its ABA drafters for use in disciplinary proceedings—because Code standards are sometimes generally phrased—borders on nonsensical.

Three consequences flow from the federal judiciary’s reluctance—but not refusal—to impose discipline with reference to its Code of Conduct. First, marginalizing the Code in disciplinary proceedings invites more seemingly arbitrary decisionmaking, insofar as judicial councils are discouraged from tethering their analysis of judicial conduct to clearly articulated canons in the Code in favor of exercising discretion guided only by the unilluminating terms of the Act itself (and whatever past practice has to offer). Second, it liberates judicial councils to spare judges’ discipline under the Act for conduct that the judiciary’s own code of conduct deems unethical and improper. As the Ninth Circuit Judicial Council rationalized it, “Congress imposed a standard for discipline that is significantly lower than, and conceptually different from, the ideals embodied in the Canons.”²¹³ The optics of judicial councils dismissing complaints of misconduct for behavior that the Judicial Conference’s own Code characterizes as unethical are unfortunate. Third, it makes loose cannons of the Canons. By declaring that the Code “may”—but mostly does not—provide standards of conduct in disciplinary proceedings, rank and file judges cannot know whether or when disciplinarians will disregard the Canons as so many damp squibs, or lock and load them as live ammunition in disciplinary proceedings.

²¹² 28 U.S.C. § 351(a).

²¹³ *In re Charge of Judicial Misconduct*, 62 F.3d 320 (Jud. Couns. for the 9th Cir. 1995).

Reform begins by accepting several propositions. First, unethical judicial conduct is conduct prejudicial to the effective administration of the courts, within the meaning of the Judicial Conduct and Disability Act. Second, the Code of Conduct for U.S. Judges delineates the scope of unethical judicial conduct. If the Code of Conduct deems specified conduct unethical, then presumptively, that conduct should be subject to discipline under the Act. There may be times when it is unclear whether the Code has been violated because the Code is phrased broadly enough to be ambiguous in some contexts—and discipline is inappropriate in those instances. But decades of accumulated precedent interpreting codes of conduct in the state and federal systems—codes adapted from the same ABA models—have significantly reduced those ambiguities over time.

My recommendation, then, is to establish a default in favor of Code of Conduct violations constituting conduct prejudicial to the effective and expeditious administration of the business of the courts and therefore subject to discipline under the Judicial Conduct and Disability Act. The federal judiciary should replace the “shoulds” in its Code with “shalls,” as nearly every state system has. If a standard of conduct that the Code specifies addresses behavior that is undesirable but too inconsequential to warrant discipline, the “should not” can be retained, a qualification added, or the standard removed from the Code.²¹⁴ A “default,” allows for exceptions when, for example, discipline is inappropriate because the judge’s conduct violates the literal terms of a Code provision in ways that do not constitute an ethical lapse. But in the much more common scenario of judges who commit minor ethical transgressions proscribed by the Code, it is better to structure discipline to fit the infraction by addressing lesser misfeasances via corrective consultations with the chief judge or private reprimands (as the Act authorizes), than by looking the other way.

B. *The Role of the Code of Conduct as an Aspirational Guide*

To some extent, the federal judiciary’s chronic reticence to enforce its code of conduct in disciplinary proceedings (in contrast to state systems), can be attributed to a misguided conception of Article III exceptionalism and a self-interested desire to minimize accountability from ethical oversight. But there are also more legitimate concerns in play. The peril of weaponizing codes of conduct for use in disciplinary proceedings is that they strengthen the disciplinary role of the Code at the expense of

²¹⁴ For example, rules governing disqualification might clarify that honest mistakes in the application of disqualification rules do not constitute ethical lapses warranting discipline.

eclipsing and so diminishing the second role of the Code as a source of aspiration and guidance.

If the Code is understood, first and foremost if not exclusively, as an adjunct to discipline, it transforms the Code from a body of principles to a body of rules. That, in turn, risks shifting the inquiry from what a good judge should do, to what a bad judge must do to avoid sanctions. Oliver Wendell Holmes argued that:

If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.²¹⁵

But in the context of judicial ethics, we want to know more than “the law and nothing else.” The peril of a discipline-dominated code is that it can encourage judges subject to its authority to view the Code through the eyes of a Holmesian “bad man,” set aspiration aside, and structure their behavior to comply with the minimum standards necessary to avoid discipline. Such a code thus invites a race to the bottom and effectively makes “bad men” of all subject to its authority.²¹⁶ Randall Shepard, former Indiana Chief Justice and past President of the Conference of Chief Justices makes this point wistfully in his foreword to our treatise:

[W]hile the word “canons” still appears in today’s judicial rules, they now read much more like a “code” and just about every “should” has become a “shall” or a “must.” This shift to codification doubtless provides solace to those who prosecute or defend in disciplinary cases, and it was probably an inevitable product of a judiciary grown to tens of thousands of judges. I can accept all that—and still sense that we have lost something of value in the course of moving from aspiration to regulations.²¹⁷

This state of affairs is by no means inevitable. Exhorting judges to do the right thing and subjecting them to discipline if they do the wrong thing are ultimately compatible courses of action. For jurisdictions that have given primacy to the role of the Code in enforcement, the challenge is to revitalize the aspirational purpose of the Code and bring that purpose into parity with the disciplinary focus.

²¹⁵ Justice Holmes, *The Path of the Law* 10 HARV. L. REV. 457, 459 (1897).

²¹⁶ David Luban expresses a similar concern that if a lawyer structures the advice she gives her client on the assumption that her client is a Holmesian “bad man,” “the lawyer will shape the legal representation in a way that makes the assumption come true.” David Luban, *The Bad Man and the Good Lawyer: A Centennial Essay on Holmes’s The Path of the Law*, 72 N.Y.U. L. REV. 1547, 1572 (1997).

²¹⁷ Randall T. Shepard, *Forward*, in GEYH ET AL., *supra* note 75.

The spirit and purpose of the Code are embodied in the macroethics values that microethics rules operationalize. Those values—most notably impartiality, independence, and integrity—are core to the judiciary’s mission, as stated in the Model Code’s preamble.²¹⁸ But in this polarized, politicized era, macroethics values are under scrutiny, if not under attack. The documented suspicion that political ideology plays a role in judicial decisionmaking has called the existence of an impartial judiciary into question. To the extent that judges are seen less as neutral arbiters of law than ideologically motivated legislators in robes, judicial independence from popular and political control is perceived less as virtue and more as a vice. And a judiciary that the public thinks is peopled with “activists” who feign impartiality while abusing their independence casts doubt on judicial integrity.

The judiciary is ill-positioned to allay burgeoning public suspicion of judges’ commitment to their own core values when judges, because of their inability to agree on the scope of those values and their application, are complicit in their own gradual descent into nihilism. Reenergizing the judiciary’s commitment to its code of conduct and the macroethics values that animate it requires broader and deeper participation in the process of reviewing and revising the Code itself.

While processes vary, few rank and file judges play an active role in the promulgation and review of ethics codes that govern their conduct. Rather, the norm is for chief justices to delegate that task to committees, as they do rules governing practice, procedure, administration, and lawyer conduct.²¹⁹ Those committees may hold public hearings or invite public comment on proposed rules, which affords highly motivated judges in the field an opportunity to participate.²²⁰ And if the only objective were to ensure that revised codes of conduct are sound and well-crafted, that is process enough,

²¹⁸ See *supra* note 31 and accompanying text.

²¹⁹ *New Code of Judicial Conduct Under Review*, IND. CT. TIMES (Feb. 29, 2008), <http://indianacourts.us/times/2008/02/new-code-of-judicial-conduct-under-review> [<https://perma.cc/TA87-LU6L>] (“In 2007, the Supreme Court appointed a subcommittee of the Ethics and Professionalism Committee, Hon. Marianne Vorhees, Chair; Hon. Marc R. Kellams; Hon. Margret G. Robb; Hon. Evan S. Roberts; Hon. Michael P. Scopelitis; and Hon. Dean A. Sobecki, to study the new ABA Model Code of Judicial Conduct and to draft a new Indiana Code.”); see also Howard W. Brill, *The Arkansas Code of Judicial Conduct of 2009*, 2009 ARK. L. NOTES 1, 3.

²²⁰ Cathal Conneely, *Supreme Court Adopts Changes to Code of Judicial Ethics*, CAL. CTS. (Nov. 14, 2012), <https://www.courts.ca.gov/19892.htm> [<https://perma.cc/FCD6-EJBR>] (“The committee twice invited public comment on its proposed revisions and carefully reviewed comments from a wide range of individuals and entities. The California Judges Association and the Commission on Judicial Performance submitted comments that were particularly helpful to the committee. Individual judicial officers and attorneys, the American Bar Association, the Los Angeles County Superior Court, the Alliance of California Judges, and others also provided useful comments.”).

given that state committees begin their review with an ABA Model that has already undergone years of careful vetting.

If, however, the objective is to reinvigorate support for the aspirational role of the code among the hundreds, and sometimes thousands, of judges within a given jurisdiction, more may be necessary. There is a body of psychological science that confirms the value of actively engaging the members of a group in articulating and affirming support for group objectives, as a means to achieve “buy in.”²²¹ Judges are busy people, and it is unlikely that they will drop what they are doing and collectively engage in a protracted process of reviewing, revising, and embracing their codes of conduct as a kind of mission statement. But it is quite realistic for state judicial conferences and continuing judicial education providers to feature programs oriented toward consensus-building around code principles in the course of working through some of the more provocative ethical dilemmas that judges face.²²² A silver lining of the COVID pandemic is that it has normalized remote-meeting technology, which enables large gatherings to break into small groups and promote universal engagement at low cost. Conscripting that technology into the service of revitalizing the aspirational role of the code in the lives of American judges is a worthy project.

CONCLUSION

This Article synthesizes the architecture of judicial ethics in a manner akin to Professor Burbank’s seminal blueprint of judicial independence. Differentiating between the macro, micro, and relational elements of judicial ethics reveals an emerging pattern in modern ethics controversies, wherein diminished consensus over the macroethics need for microethics rules has enabled countervailing relational interests to take precedence with increasing frequency. This eroding consensus, exacerbated by partisan and judicial self-interest, bespeaks a need to revisit the disciplinary and aspirational objectives of judicial ethics to the end of stabilizing the common ground that judges who subject themselves to the dictates of ethics rules must share, if those rules are to continue serving their purpose.

²²¹ See Kevin Thomson, Leslie de Chernatony, Lorrie Arganbright & Sajid Khan, *The Buy-in Benchmark: How Staff Understanding and Commitment Impact Brand and Business Performance*, 15 J. MKTG. MGMT. 819 (1999) (detailing a study of 350 employees and managers that found a link between buy-in, both intellectual and emotional, and perceived performance); Sarah E. Pinkelman, Kent McIntosh, Caitlin K. Rasplca, Tricia Berg & M. Kathleen Strickland-Cohen, *Perceived Enablers and Barriers Related to Sustainability of School-Wide Positive Behavioral Interventions and Supports*, 40 BEHAV. DISORDERS 171, 175 (2015) (discussing a study of factors in implementing a Positive Behavioral Interventions and Supports (PBIS) program that found staff buy-in to be most influential).

²²² Judicial systems routinely include ethics issues in their educational programming, but the consensus-building “buy in” I am proposing here is a different kind of project.

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