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The Behavioral Case for Supreme Court Ethics Reform

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In 2023, following a series of high-profile ethics scandals, the Supreme Court adopted a code of conduct for the first time in its history. Critics quickly noted that the Code contains no enforcement mechanism of any kind, but that it instead relies on the Justices to police their own conduct. This Note argues that such self-regulation is both institutionally unsound and psychologically unrealistic. Drawing from empirical studies in cognitive psychology and behavioral science, this Note demonstrates that the Justices—like all decision-makers—are vulnerable to subconscious cognitive biases which compromise their ability to impartially police their own conduct. This biased cognition, combined with institutional incentives to preserve the Court's legitimacy and reputation as well as the Justices' personal incentives to self-deal, make impartial self-policing implausible.

Accordingly, this Note argues that meaningful ethics reform must include some mechanism of external enforcement. It endorses a range of constitutionally viable reforms, such as enhanced civil and criminal liability for ethics violations. Where direct enforcement may be constitutionally prohibited, this Note recommends instituting evidence-based debiasing strategies, such as requiring written explanations of recusal decisions.

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Ultimately, this Note makes a behavioral case for reform; without meaningful external constraints, the Supreme Court's ethics framework rests on the flawed psychological assumption that the Justices can be impartial arbiters of their own conduct. Legislators and reformers must not maintain blind faith in judicial integrity; instead, they must confront the realities of human cognition in the self-policing context.

Introduction

In the spring and summer of 2023, the Supreme Court found itself floating amidst a sea of controversy. After reports circulated that Justice Thomas had received numerous undisclosed gifts from billionaire megadonor Harlan Crow, many began to question the ethics of the Justices.[1] After months of backlash and public pressure, the Court took the unprecedented step of publishing the Code of Conduct for Justices of the Supreme Court of the United States ("Code")—the first ethics code in the Court's history.[2]

However, the Code hardly brought an end to the Court's ethics crisis. Opening with a noticeably defensive tone, the Code purports to outline the rules and principles governing the Justices' conduct while asserting that the Justices have always adhered to such ideals.[3] The Code claims to merely clarify a

1. Joshua Kaplan, Justin Elliot & Alex Mierjeski, *Clarence Thomas and the Billionaire*, PROPUBLICA (Apr. 6, 2023, at 05:00 ET), https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow [https://perma.cc/AA5B-UZL8]; *see also Justice Thomas Quid Pro Quo Renews Calls for Resignation*, ALL. FOR JUST. (Dec. 18, 2023), https://afj.org/article/justice-thomas-quid-pro-quo-renews-calls-for-resignation [https://perma.cc/VU6N-PUDU] (calling for Justice Thomas's resignation).

2. Annie Gersh & Nina Totenberg, *The Supreme Court Adopts First-Ever Code of Ethics*, NPR (Nov. 13, 2023, at 16:56 ET), https://www.npr.org/2023/11/13/1212708142/supreme-court-ethics-code [https://perma.cc/XKF4-N446].

3. *See* CODE OF CONDUCT FOR JUSTICES OF THE SUPREME COURT OF THE UNITED STATES (2023) [hereinafter SCOTUS CODE],

"misunderstanding" that the Justices were unbound by any rules of ethics.[4] It also indicates no recognition of wrongdoing for any of the controversies that gave rise to the document, nor does the Code even mention any of them.[5] However, by far the most notable feature of the Code is its lack of any kind of enforcement mechanism.[6]

Critics have questioned the effectiveness of an ethics code that provides no means of enforcing itself.[7] Many argue that the lack of an enforcement mechanism renders the Code non-binding and thus functionally useless.[8] However, others dismiss the need for such regulation, arguing that calls for external constraints are motivated by pure partisan animus against the conservative Justices.[9]

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https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf [https://perma.cc/U64E-R6BK] ("[The Code] largely represents a codification of principles that we have long regarded as governing our conduct.").

4. *Id.*

5. *See generally id.* (containing no mention of the various controversies that arose during 2023).

6. *See* Michael Waldman, *New Supreme Court Ethics Code is Designed to Fail*, BRENNAN CTR. FOR JUST. (Nov. 14, 2023), https://www.brennancenter.org/our-work/analysis-opinion/new-supreme-court-ethics-code-designed-fail [https://perma.cc/H8SG-DS9Y] (noting the Code's lack of an enforcement mechanism).

7. *See, e.g.*, *id.* (criticizing the Code's lack of an enforcement mechanism and reliance on self-policing); Jesse Wegman, *We Waited 200 Years for This Supreme Court Ethics Code?*, N.Y. TIMES (Nov. 14, 2023), https://www.nytimes.com/2023/11/14/opinion/supreme-court-ethics-code.html [https://perma.cc/4Y98-8YR9] (providing similar criticisms).

8. *See, e.g.*, Joshua Kaplan et al., *The Supreme Court Has Adopted a Conduct Code, but Who Will Enforce It?*, PROPUBLICA (Nov. 13, 2023, at 16:47 ET), https://www.propublica.org/article/supreme-court-adopts-ethics-code-scotus-thomas-alito-crow [https://perma.cc/S49U-YT5M] (discussing Senator Sheldon Whitehouse's disapproval of the SCOTUS Code).

9. *See, e.g.*, Michael S. McGinniss, *Declaring Independence to Secure Integrity: The Supreme Court Justices' Code of Conduct*, 25 FEDERALIST

What this debate has lacked, however, is a research-based analysis of how well the Justices could realistically be expected to police their own ethics. Lacking in evidentiary support, opinions about the Code and the Court's ability to enforce it have remained largely speculative. Such conjectural debate about the Code is then vulnerable to entrenchment along the battle lines of political tribalism and debaters' innate optimism (or pessimism) concerning the Justices' capacity to self-regulate. A more objective analysis is warranted.

This Note will accordingly contribute a behavioral science perspective to this debate. Empirical studies demonstrate how the influence of cognitive biases on the Justices' decision-making can compromise their ability to fairly and impartially police their own ethics. In the face of such vulnerability to bias and the existence of incentives encouraging exemption from self-regulation, some mechanism of external enforcement is necessary. Furthermore, in areas where enforcement may be unconstitutional, behavioral science can help inform debiasing strategies to help Justices remain more impartial in their self-evaluation. This Note thus seeks to provide a research-based understanding of the Court's ethics vulnerabilities and encourages policy makers to pursue stricter ethics enforcement.

This Note proceeds as follows. Part I explores the state of Supreme Court ethics following the promulgation of the Code by highlighting its gaps and failures. Part II examines the institutional and personal incentives that compromise the Justices' ability to impartially evaluate their own conduct. Part III draws on behavioral science research to demonstrate how cognitive biases further undermine the feasibility of self-enforcement. Part IV examines potential solutions by arguing for constitutionally

SOC'Y REV. 272, 273–74 (2024) (dismissing calls for ethics reform as mere attacks on the conservative Justices).

viable reforms and debiasing strategies where direct regulation is unavailable.

I. The SCOTUS Code

After months of backlash in response to numerous ethics scandals, the Supreme Court promulgated a code of ethics for the first time in its history on November 13, 2023.[10] The Code (rather defensively) declared in its introduction that "[t]he absence of a Code . . . has led in recent years to the *misunderstanding* that the Justices of this Court, unlike all other jurists in this country, regard themselves as unrestricted by any ethics rules."[11] The Court further asserted that the principles of the Code are "not new" and the Code "largely represents a codification of principles that [the Court] ha[d] long regarded as governing [its] conduct."[12]

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10. SCOTUS CODE, *supra* note 3. The most notorious scandals, which no doubt were in part responsible for the creation of the Code, included Justice Thomas receiving undisclosed gifts—likely worth millions of dollars—from Harlan Crow and fraternizing with other wealthy partisan donors, Kaplan et al., *supra* note 1; Brett Murphy & Alex Mierjeski, *Clarence Thomas' 38 Vacations: The Other Billionaires Who Have Treated the Supreme Court Justice to Luxury Travel*, PROPUBLICA (Aug. 10, 2023, at 17:45 ET), https://www.propublica.org/article/clarence-thomas-other-billionaires-sokol-huizenga-novelly-supreme-court [https://perma.cc/4MQG-TBKR], Justice Alito receiving similar luxury gifts, Justin Elliot, Joshua Kaplan & Alex Mierjeski, *Justice Samuel Alito Took Luxury Fishing Vacation with GOP Billionaire Who Later Had Cases Before the Court*, PROPUBLICA (June 20, 2023, at 23:49 ET), https://propublica.org/article/samuel-alito-luxury-fishing-trip-paul-singer-scotus-supreme-court [https://perma.cc/NZ6U-AHJC], and Justice Sotomayor pressuring colleges and libraries to buy her books as an implicit price for her speaking events, Brian Slodysko & Eric Tucker, *Supreme Court Justice Sotomayor's Staff Proffered Colleges and Libraries to Buy Her Books*, AP NEWS (July 11, 2023, at 04:14 CT), https://apnews.com/article/supreme-court-sotomayor-book-sales-ethics-colleges-b2cb93493f927f995829762cb8338c02 [https://perma.cc/7AZ4-YK4R].

11. SCOTUS CODE, *supra* note 3 (emphasis added).

12. *Id.*

Like previous attempts to regulate the Court's ethics, the Code leaves much to be desired. Generally, it purports to imitate the code of conduct that applies to lower court judges,[13] observable through the Code's use of similar restrictions on partisan influence[14] and recusals.[15] However, the Code deviates from the lower courts' ethics framework in several important ways. For example, lower court judges are required not to "lend[] the prestige of judicial office to advance the private interests of the judges or others."[16] Meanwhile, the Justices of the Supreme Court are merely advised not to do so *knowingly*, a significant loophole.[17] Further, the Code is riddled with uses of "should" and "should not" rather than "shall" and "shall not," a crucial softening of words that can nullify such "rules."[18]

The Code also provides less-than-ideal restrictions on behaviors related to the controversies of 2023 that gave rise to its existence. Regarding improper outside influences on the Justices, the Code states that "[a] Justice should not allow family,

13. *Id.* at 10 ("[t]his Code of Conduct is substantially derived from the Code of Conduct for U.S. Judges, but adapted to the unique institutional setting of the Supreme Court.").

14. *Compare id.* at 1 ("A Justice should not be swayed by partisan interests, public clamor, or fear of criticism."), *with* CODE OF CONDUCT FOR U.S. JUDGES Canon 3(A)(1) (JUD. CONF. OF THE U.S. 2019), https://www.uscourts.gov/administration-policies/judiciary-policies/ethics-policies/code-conduct-united-states-judges [https://perma.cc/SHJ2-6YQD] ("A judge should be faithful to, and maintain professional competence in, the law and should not be swayed by partisan interest, public clamor, or fear of criticism.").

15. *Compare* SCOTUS CODE, *supra* note 3, at 2 ("A Justice should disqualify himself or herself in a proceeding in which the Justice's impartiality might reasonably be questioned . . . ."), *with* CODE OF CONDUCT FOR U.S. JUDGES *supra* note 14, at Canon 3(C)(1) ("A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . . .").

16. CODE OF CONDUCT FOR U.S. JUDGES, *supra* note 14, at Canon 2(B).

17. SCOTUS CODE, *supra* note 3.

18. *See, e.g.*, *supra* note 15. The SCOTUS Code's use of "should" rather than "shall" arguably nullifies its recusal standards.

social, political, financial, or other relationships to influence official conduct or judgment."[19] Additionally, the Code provides that the Justices should "neither knowingly lend the prestige of the judicial office to advance the private interests of the Justice or others nor *knowingly* convey or permit others to convey the impression that they are in a special position to influence the Justice."[20] The pivotal words here are, of course, "influence" and "knowingly"; so long as the Justices can claim that they were not *influenced* by luxury vacations, yacht trips, hunting expeditions, portrait funds, and private school tuitions, their acceptance of such gifts apparently falls outside the restriction.[21] Moreover, the Justices can claim ignorance—that they did not *knowingly* give the impression they were influenced.

But, as inadequate as they are, these provisions are hardly the greatest failure of the Code. The most troublesome question presented by the Code is the issue of *who* gets to interpret and enforce its loophole-ridden, ambiguous standards. Absent a formal enforcement mechanism, the power to enforce the Code currently lies in the hands of the Justices—the very individuals the Code is attempting to restrain. Was Justice Thomas *influenced* by the lavish gifts of Harlan Crow?[22] It is up to Justice Thomas to decide, as is the matter of whether anything should be done in response. The question then remains: How reliably can Justice Thomas evaluate his own behavior?

19. SCOTUS CODE, *supra* note 3, at 1.

20. *Id.* (emphasis added).

21. *See* Kaplan et al., *supra* note 1 (detailing the gifts received by Justice Thomas); Elliot et al., *supra* note 10 (detailing the same, but for Justice Alito).

22. *See* Kaplan et al., *supra* note 1.

II. Incentives Working Against Impartial Self-Enforcement

Before turning to the cognitive biases that make impartial self-regulation implausible, it is necessary to examine the incentives already in existence whenever a Justice must evaluate their own conduct. A brief analysis of such incentives reveals both institutional and personal forces that undermine impartial self-policing.

The Justices have strong motives to protect both the Court's institutional legitimacy and their own reputations. Admitting to having committed an ethics violation risks upending both of those things. The motivation to avoid public embarrassment and preserve reputation is only magnified in a forum as public as the Supreme Court. Further, the Justices (presumably) have a natural desire to view themselves as principled and ethical.[23] This desire incentivizes a self-policing actor to try and avoid shame rather than admit error.

Material incentives only deepen the problem. Financial and personal benefits (like those at issue in the cases of Justices Thomas and Alito) disincentivize the admission of wrongdoing. To concede impropriety in such situations would mean forfeiting tangible, monetary benefits and potentially the relationships that provide them. Similar dynamics can arise in recusal decisions: Justices may hesitate to step aside from a case simply to preserve influence over an outcome they care about. We need not view this as some particularly egregious sin, either; it is a predictable desire for a self-interested human being to have. Our legal system recognizes how such pressures can distort the judgments of

23. *See* Yuval Feldman, *Using Behavioral Ethics to Curb Corruption*, 3 BEHAV. SCI. & POL'Y., Oct. 2017 at 87, 91 ("[T]he underlying assumption . . . is that individuals want to view themselves as ethical agents.").

decision-makers; hence lawyers and lower court judges alike are subject to external ethics enforcement for precisely this reason.[24]

Yet the Supreme Court stands alone in its freedom from meaningful ethics oversight when personal interests are at issue. As discussed further in Part IV, impeachment, while theoretically available, is neither a procedurally realistic nor a proportionate response to most ethics issues. Accordingly, in practice, the Justices operate without any credible external check, and the Code certainly did not create one. Instead, the absence of such enforcement leaves us with nothing but faith. Those who live under the Court's authority can only hope that the Justices are both virtuous enough and objective enough to police their own ethics violations in an impartial manner. But is such faith warranted? Can we reasonably expect a self-regulating actor to rule against their own interests in the absence of meaningful ethics constraints? Unfortunately, as shown in the next section, behavioral research gives us little reason to believe in such superhuman impartiality. The research is clear: Like all human beings, the Justices are vulnerable to subconscious biases that skew their decision-making towards their preferred outcomes.

III. The Justices' Vulnerability to Cognitive Bias

This Part will explore the relevant behavioral science literature regarding self-regulated ethics. It will demonstrate that the Justices, like all actors, are vulnerable to subconscious cognitive biases that compromise their ability to impartially police their own ethics. Subpart A will introduce the cognitive bias of motivated cognition and its prevalence among laypersons. Subpart B will examine the bias's effect on legally trained actors. Subpart C will present research studying the bias's presence among lower court judges and then extend that research to the Justices.

24. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT (A.B.A. 2025); CODE OF CONDUCT FOR U.S. JUDGES, *supra* note 14.

Subpart D will analyze how motivated cognition interacts with preexisting incentives to undermine objective self-regulation.

A. An Illustration of Motivated Cognition

The cognitive bias posing the greatest threat to impartiality in self-policed ethics is known as *motivated cognition*, or motivated reasoning. The theory of motivated cognition explains that when decision-makers have a preference regarding the outcome of an evaluative decision, they are more likely to arrive at a conclusion that leads to their preferred outcome by engaging in biased cognitive processes.[25] In short, the decision-maker is biased towards reaching the outcome they desire.

For example, consider a case in which a passionate fan of a football team evaluates a highly uncertain play. Imagine it is unclear—even after reviewing slow-motion replay—whether the team's receiver was in or out of bounds while catching a pass that, if caught in bounds, would win the game for the team. In the face of such uncertainty, the fan's motivation to see the team win will tend to skew the evaluation towards the fan's preferred outcome—that the catch was made in bounds.

A 1954 study of a Dartmouth–Princeton football game created an experiment similar to this hypothetical.[26] This study had students from both schools watch a film of a football game and asked each student to count the number of rule violations committed by each team.[27] The Dartmouth students reported that each team committed approximately the same number of violations.[28] In contrast, the Princeton students reported *twice* as many violations from the Dartmouth team in comparison to the

25. Avani Mehta Sood, *Motivated Cognition in Legal Judgments—An Analytic Review*, 9 ANN. REV. L. & SOC. SCI. 307, 309 (2013).

26. Albert H. Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 49 J. ABNORMAL & SOC. PSYCH. 129, 130 (1954).

27. *Id.*

28. *Id.* at 132.

Princeton team.[29] These different conclusions illustrate how motivated cognition biases decision-makers towards their preferred outcomes, even when those conclusions are drawn from the same set of facts.

Motivated cognition is far-reaching; it affects judgments concerning the self, others, and events.[30] It also operates subconsciously, affecting everything from how actors selectively recall information[31] to how they visually process their environment.[32] Most importantly, the bias exists under an "illusion of objectivity," tricking actors into *believing* they remain impartial despite the influence of their subconscious motivations.[33] This illusion thus puts motivated cognition in a potent position to compromise the work of legal decision-makers—the bias skews their evaluations while they nevertheless *believe* they are operating with the kind of objectivity that our legal system demands.

A plethora of studies have documented the influence of motivated cognition when laypeople are asked to make legal decisions. One series of experiments showed that when a harmful act occurs, people tend to assign responsibility to an actor who evokes a negative emotional response—even if that response is legally irrelevant to the incident.[34] Participants were more likely to view a speeding driver as the cause of an accident (over other

29. *Id*. at 130.

30. Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCH. BULL. 480, 483 (1990).

31. *See id.* at 486 (demonstrating that motivated reasoners conduct biased memory searches for relevant information).

32. Emily Balcetis & David Dunning, *See What You Want to See: Motivational Influences on Visual Perception*, 91 J. PERSONALITY & SOC. PSYCH. 612, 613–18 (2006).

33. Sood, *supra* note 25, at 309 (citing Tom Pyszczynski & Jeff Greenberg, *Toward an Integration of Cognitive and Motivational Perspectives on Social Inference: A Biased Hypothesis-Testing Model*, 20 ADVANCES EXPERIMENTAL SOC. PSYCH. 297, 302 (1987)).

34. Mark D. Alicke, *Culpable Control and the Psychology of Blame*, 126 PSYCH. BULL. 556, 567 (2000).

factors, such as an oil spill) if the driver was speeding home to hide a vial of cocaine than if he was speeding home to hide a surprise anniversary gift.[35] Here, the evaluator's otherwise rational assessment of culpability was shifted by emotional bias against the transgressor.

Another study presented participants with a case of a woman whose dogs mauled a child to death. If the woman was described as having "bad" character (antisocial tendencies and physically unhealthy habits) she was assigned more blame and intentionality in the child's death than if she was described as having "good" character (sociable tendencies and physically healthy habits), even though her character should have no logical bearing on the evaluation.[36]

B. Motivated Cognition Among Legally Trained Actors

Further studies have demonstrated that having legal training does not necessarily insulate an actor from the effects of motivated cognition. One experiment asked law students to determine whether a proposed change in a tax rate violated a state constitution.[37] Half of the students were told the change raised taxes, while the other half were told it lowered them.[38] The students were provided with identical materials regarding the relevant precedents and the new law's legislative history.[39] The result was that the students' evaluations tended to match their policy preferences; politically liberal law students were more likely to overturn the law if it lowered taxes, while conservative

35. *Id.*

36. Janice Nadler & Mary-Hunter McDonnell, *Moral Character, Motive, and the Psychology of Blame*, 97 CORN. L. REV. 255, 285–88 (2012).

37. Joshua R. Furgeson, Linda Babcock & Peter M. Shane, *Do A Law's Policy Implications Affect Beliefs About Its Constitutionality? An Experimental Test*, 32 L. & HUM. BEHAV. 219, 220–21 (2008).

38. *Id.* at 221.

39. *Id.*

students were more likely to do so if it increased taxes.[40] Despite their legal training, these law students fell victim to cognitive bias.

At least one study has shown that legal training may even make a person *more* vulnerable to motivated cognition than laypersons. This experiment studied the effects of motivated cognition on law students and undergraduates by asking them to evaluate how similar a hypothetical discrimination case was to a reference case, *Boy Scouts of America v. Dale*.[41] In *Boy Scouts*, the Supreme Court held that the Boy Scouts of America could discriminate against prospective members seeking to join the organization for being gay.[42]

Again, both the law students and undergraduates were found to exhibit motivated reasoning along policy preference lines. If *Boy Scouts* supported students' preferred position regarding discrimination, they were more likely to view it as similar and therefore controlling with regard to the hypothetical case.[43] If *Boy Scouts* contrasted with students' preferred position, they were more likely to find it dissimilar to the hypothetical case at issue.[44]

Most notably, the study found that the motivated cognition effect was "stronger and more consistent" in the law student

40. *See id.* at 222–25 (finding that 35% of liberals vs. 24% of conservatives overturned the tax decrease, while 44% of conservatives vs. 18% of liberals overturned the tax increase).

41. Eileen Braman & Thomas E. Nelson, *Mechanism of Motivated Reasoning? Analogical Perception in Discrimination Disputes*, 51 AM. J. POL. SCI., 940, 948–49 (2007); Boy Scouts of America v. Dale, 530 U.S. 640 (2000).

42. *See Boy Scouts*, 530 U.S. at 644 (holding that New Jersey's public accommodations law requiring that the Boy Scouts readmit a gay member violated the Boy Scouts' First Amendment right of association).

43. Braman et al., *supra* note 41, at 949 ("Participants' preferences concerning the policy matter in dispute led them to see cases that reinforced those preferences as more similar to the dispute than cases that did not.").

44. *Id.*

participants than in the college students—a finding that undermines hopes that legal training can insulate against the bias.[45] One possible explanation for this is that legal training better equips an actor to rationalize their policy-motivated decisions. More familiar with the nuances of evaluating facts and case law, legally trained actors can perhaps better marshal information that supports their preferred positions and create more innovative justifications for how it does so.

C. Motivated Cognition Within the Judiciary

Judges do not appear to be exempt from motivated cognition either. One experiment demonstrated this by studying the influence of character evidence on judicial decision-making.[46] The researchers presented a group of judges with a hypothetical products liability case and asked them to award damages to the plaintiff.[47] The judges were split into two groups, one being exposed to evidence about the plaintiff's prior criminal history (despite it having no bearing on the case) and the other being shielded from such information.[48] Even though the majority of the judges who were exposed to the information declined to admit it into evidence, the exposed judges still awarded the plaintiff an average of 12% less in damages (about $93,000) than the judges who had not received the criminal history information.[49] One explanation for this result is the animus created against the plaintiff by learning about the plaintiff's criminal history—an animus mobilized by motivated cognition and expressed in lesser damages awards.

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45. *Id.* at 952.

46. *See* Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1282–85 (2005) (detailing their experimental design).

47. *Id.* at 1305–06.

48. *Id.*

49. *Id.* at 1306–07.

The researchers found similar influences on judges from other generally inadmissible evidence, such as a rape victim's past sexual history[50] or offers made during a settlement conference.[51] The experimenters ultimately concluded that the judges were generally unable to disregard such inadmissible information when making their decisions.[52] In the face of motivating and prejudicial evidence, the judges, like laypersons and law students, fell victim to their cognitive biases.

Another study found additional evidence of motivated cognition influencing judges' tendencies to admit or refuse the use of social science evidence in death penalty cases.[53] In this study, judges and law students were given information about two death penalty cases in which the Supreme Court examined the admissibility of social science research.[54] Participants were then asked, among other things, to determine if such evidence should be admitted or excluded and how much weight it should be given.[55] After viewing the materials, the participants were asked about their responses as well as their own views on the death penalty.[56]

The researchers found that both the judges and students considered the social science evidence to be more relevant and therefore admissible when the evidence supported their own

50. Wistrich et al., *supra* note 46, at 1303 (finding that judges' exposure to a rape victim's sexual history lowered the conviction rate by almost 30%).

51. *Id.* at 1291.

52. *Id.* at 1323 ("[O]ur studies show that judges do not disregard inadmissible information when making substantive decisions in either civil or criminal cases.").

53. Richard E. Redding & N. Dickon Reppucci, *Effects of Lawyers' Sociopolitical Attitudes on Their Judgments of Social Science in Legal Decision Making*, 23 LAW & HUM. BEHAV. 31, 47–48 (1999) (finding that participants were more accepting of social science evidence when it affirmed their views on the death penalty).

54. *Id.* at 36.

55. *Id.* at 36–37.

56. *Id.* at 37.

views on the death penalty than when it contrasted with their views.[57] Such an alignment of personal opinion and legal evaluation provides a clear example of motivated cognition in action—the judges elected to ignore or accept *factual information* in order to support their preferred evaluative outcome.

Worse yet, the researchers found a deepening of the "illusion of objectivity" in their results: The judges were *more* confident than the law students that other actors would agree with their reasoning.[58] This occurred despite there being *greater variability* between the judges' ratings than between the law students'.[59] Even though they had more legal training and experience, the judges' illusion of objectivity had been exacerbated, which ironically resulted in more subjective decision-making.[60]

It is thus clear that despite their high status and legal expertise, judges are not free from the reins of cognitive bias in their decision-making. While there may be some variation in the degree to which judges are affected by such biases compared to law students or laypersons, there is no evidence to suggest judges are meaningfully resistant to motivated cognition.[61]

The most natural, albeit uncomfortable, conclusion to be drawn from these findings is that, like all other legal actors, Supreme Court Justices are also vulnerable to motivated cognition. After an examination of the relevant behavioral science literature, there is little reason to believe that the Justices would be immune from motivated cognition. If neither legal training nor a position within the judiciary can confer on individuals a

57. *Id.* at 47–48.

58. *Id.* at 49.

59. *Id.*

60. *See id.*

61. *See* Sood, *supra* note 25, at 318 (noting that while there is some evidence for reduced cognitive biases among judges as compared with law students and laypersons, there is no evidence for a lack of bias among the judiciary altogether).

meaningful ability to mitigate motivated cognition, why would being on the Supreme Court provide some unique shield against it?

If anything, being on the highest court in the nation might *worsen* vulnerabilities to motivated cognition in some ways. The experiments previously discussed indicate that the negative effects of motivated cognition may be exacerbated by one's accrual of legal experience. Legal training augments the effects of motivated cognition in law students relative to laypersons.[62] Further, judges were more confident than law students in the objective validity of their decisions regarding the admission of social science research, despite there being greater variability among the judges' decisions.[63] These findings could evidence a general pattern of increased vulnerability—or, at least, one's perceived immunity—to motivated cognition the more legal experience one has.

Ultimately, the exact extent to which the Justices of the Supreme Court are affected by motivated cognition and other biases is difficult to prove without direct examination of the Justices themselves. However, the existing evidence fails to indicate that the Justices would be uniquely exempt from the influence of the far-reaching, deep-rooted bias of motivated cognition. Until science proves otherwise, the Justices of the Supreme Court should be considered at least as vulnerable to the effects of motivated cognition as any other legal actor.

D. How Motivated Cognition Compromises the Court's Ethics Regulation

In light of the research demonstrating motivated cognition's influence on legal actors, it is easy to see how motivated cognition could skew Justices' evaluation of their own ethics. Like any

62. Braman et al., *supra* note 41, at 952.

63. Redding et al., *supra* note 53, at 49.

legal judgment, ethics enforcement requires the decision-maker to make an evaluative decision that provides a ready opportunity for motivated cognition to bias the judgment. For example, consider the Code's treatment of compensation and reimbursement. The Code forbids the Justices from accepting payments that appear "improper," a term left without a definition.[64] One must then evaluate what "improper" means: What does impropriety look like? What makes a payment cross the threshold from "proper" to "improper?" Are luxury gifts from a billionaire megadonor with deep partisan ties "improper?" These are substantive, complex questions, the answers to which could populate an entire body of case law.

Unfortunately, when the policing of a standard like this is left to the person allegedly transgressing that standard, motivated cognition begins to influence the evaluation; actors' incentive to view themselves as ethical will command some level of influence over their decision-making.[65] Desires to protect the institutional legitimacy of the Court, as well as to protect the actor's personal and material interests, also provide incentives which motivated cognition then manifests into biased decision-making.

Self-evaluating actors will accordingly, to some degree, rationalize ways to interpret and apply a rule to avoid conceding their own violation of it. In turn, a Justice might rationalize the receipt of a luxurious private jet flight to a speech as a "proper" travel accommodation, dismissing the possibility that the benefactor sought to purchase the Justice's influence. This tendency parallels the example of the football fans tasked with evaluating their team's rule violations; even if the fans pledge to do so impartially, their subconscious preference for their team will tend to skew their evaluation towards the outcome that promotes

64. SCOTUS CODE, *supra* note 3, at 8.

65. *See* Feldman, *supra* note 23, at 88 (noting that motivated reasoning allows actors to maintain a moral image of themselves).

their team's victory.[66] If we accept the research indicating the vulnerability of legal actors to motivated cognition, we would be deluding ourselves to believe the Justices of the Supreme Court possess some exceptional resistance to it while facing no realistic threat of external enforcement. In light of this, the need for binding ethics reform on the court becomes clear.

IV. Solutions

This section will discuss potential ethics reforms in light of this need for external enforcement. Subpart A discusses impeachment and why it is inadequate as a sole means of ethics regulation. Subpart B briefly addresses the constitutional question surrounding ethics reform and why certain proposals should be pursued in spite of potential constitutional barriers. Subpart C presents a list of potential solutions that implement some form of external enforcement. Subpart D presents debiasing strategies supported by behavioral science for contexts in which direct enforcement is likely unconstitutional.

A. On Impeachment

Opponents of an external ethics enforcement mechanism might look towards the impeachment power as a sufficient solution for ethics violations.[67] However, impeachment is too procedurally burdensome to be practically employed and inappropriately punitive for many lesser ethics violations. This renders impeachment functionally non-existent as an enforcement mechanism.

No Supreme Court Justice has ever been impeached and removed by Congress.[68] Justice Chase was impeached in 1804 on

66. *See* Hastorf et al., *supra* note 26, at 130–32 (finding a disparity in how the two teams' fans evaluated violations).

67. U.S. CONST. art II, § 4; *id.* art I, § 2, cl. 5; *id*. art. I, § 3, cl. 6.

68. *See* Ron Elving, *Congress Has Clashed with Supreme Court Justices over Ethics in the Past*, NPR (Apr. 22, 2023, at 10:18 ET),

charges of partisanship, but he was acquitted by the Senate.[69] The last attempted use of the impeachment power was against Justice Fortas in 1969, but impeachment proceedings did not materialize before the Justice's resignation.[70] Both the initiation and conclusion of impeachment proceedings must clear a high procedural bar.[71] This alone renders impeachment a less-than-ideal approach to ethics enforcement because it poses no probable or procedurally realistic threat to the Justices.

Impeachment is also an excessively harsh means of enforcing many kinds of ethics rules. While it may be an appropriate tool for more egregious violations, it is difficult to justify impeachment for the more marginal violations, such as Justice Sotomayor's staff pressuring event hosts to buy her books as an implicit "price" for her speaking arrangements.[72] While behaviors such as Justice Sotomayor's are almost certainly unethical, punishing them with impeachment is hardly proportional to the violation at issue. The problem then is that as long as impeachment remains the sole means of ethics enforcement, lesser violations are either (a) over-punished with a burdensome procedure or (b) unpunished entirely. Both outcomes are undesirable. Therefore, a less punitive and more adaptable solution is needed.

B. On the Constitutional Question

The question of whether and how Congress can impose external ethics enforcement on the Court (and, if so, to what

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https://www.npr.org/2023/04/22/1171289725/congress-has-clashed-with-supreme-court-justices-over-ethics-in-the-past [https://perma.cc/UAM3-4WUC].

69. *Id.*

70. *Id.*

71. *See, e.g.*, *id.* (discussing unsuccessful efforts to initiate and conclude impeachment proceedings).

72. Slodysko et al., *supra* note 10.

degree), is complex and remains largely unanswered.[73] Arguably, the separation-of-powers principles implied in the Constitution prevent Congress from enacting any kind of ethics reform for the Court. On the other hand, some propose that Congress has plenty of constitutional avenues available to it in order to deter violations.[74] The Court itself has taken care to avoid answering the question of its ethical regulation by Congress, as the Justices voluntarily adhere to ethics statutes like the Ethics in Government Act ("EGA") and Ethics Reform Act while simultaneously implying that they are not actually required to do so.[75] However, the Court's voluntary compliance arguably supports the theory that Congress can indeed police the Court's ethics.

Furthermore, the separation-of-powers doctrine is not necessarily implicated by all regulation of federal judges. Restrictions on extrajudicial activity (such as the receipt of large donations) arguably do not enter the territory of the Court's judicial function. Congress has successfully walked the constitutional line between the legislative and judicial powers by regulating, for example, the number of Justices on the Court,[76]

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73. For one approach to the resolution of this question, see generally *Judicial Ethics*, 137 HARV. L. REV. 1677 (2024) (presenting arguments for the constitutionality of Congress's power to regulate the Court's ethics).

74. *See id.* at 1691 ("Congress has asserted some level of input in the day-to-day functions of the Court, from the very mundane details all the way to foundational, structural issues.").

75. *See* JOHN G. ROBERTS, JR., U.S. SUP. CT., 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 4 (2011), http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf [https://perma.cc/Q59N-8E4U] (asserting that, while the Justices viewed both the general judicial codes of conduct and specific ethical restrictions prescribed by Congress as "key source[s] of guidance," the constitutionality of Congress' authority to statutorily impose financial reporting requirements on the Justices had not yet been established).

76. 28 U.S.C. § 1.

constraints on the Court's appellate jurisdiction,[77] and even the outcome of a pending case via last-minute legislation.[78] If such legislative constraints on the Court are constitutional, then surely restrictions on extrajudicial conduct would be constitutionally permissible.

A comprehensive analysis of Congress' constitutional capacity to regulate Supreme Court Justices' conduct is beyond the scope of this Note, as is any conjecture with regard to how the Court might respond to such legislation. Regardless, the answers to those inquiries have little bearing on the main point of this Note—that stricter ethics enforcement must be pursued to the extent our constitutional structure allows, whatever that extent may be. In this pursuit, Congress should not be afraid to test boundaries in order to expedite the determination of these separation-of-powers questions. The sooner such questions are answered, the sooner that Congress can identify which avenues *are* available for enacting effective, constitutionally compliant reforms.

C. Solutions for Establishing an External Enforcement Mechanism

1. Criminal and Civil Liability for Ethics Violations

Justices are almost certainly bound by the same framework of criminal laws to which the rest of the nation must adhere. If Justice Alito runs a stop sign on his way to oral arguments, he must submit to the legal consequences (in this case, pay a traffic

77. *See, e.g.*, 28 U.S.C. § 1257 (restricting the Supreme Court's appellate jurisdiction over state supreme court decisions to cases that involve a federal question).

78. *See, e.g.*, Bank Markazi v. Peterson, 578 U.S. 212, 215 (2016) ("Congress . . . may amend the law and make the change applicable to pending cases, even when the amendment is outcome determinative.").

fine) like everyone else.[79] Why not extend similar liability to ethics violations? As it stands, Congress may already have the ability to do this in certain circumstances.

Congress has a built-in mechanism to enforce the Ethics in Government Act via both criminal and civil liability. The EGA provides in essence that judicial officers who "willfully fail to file or falsify their financial disclosure statements are subject to referral to the Attorney General and may face civil penalties."[80] Upon referral, the Attorney General may bring civil action in order to assess a civil penalty (up to $50,000)[81] or even imprison a violator for up to one year.[82] Provided that the Court is constitutionally within the purview of the EGA, this referral mechanism would apply to the Justices.

An EGA referral is likely the best starting point for Congress to begin to exert some degree of control over the Court's ethics violations. First, the constitutionality of such a referral is plausible since a resulting action would only concern extrajudicial activity, not the Court's judicial function.[83] Application of the EGA to the Court would allow Congress to meaningfully address ethics violations while avoiding the procedural burdens of alternatives like impeachment. The EGA could therefore prove to be a

79. This is at least the case for lower court judges. *See, e.g.*, United States v. Clairborne, 727 F.2d 842, 845 (9th Cir. 1984) (per curiam) ("[T]he Constitution does not immunize a sitting federal judge from the processes of criminal law."); United States v. Isaacs, 493 F.2d 1124, 1142 (7th Cir. 1974) (holding that life tenure does not immunize federal judges from criminal prosecution).

80. April Rivera, Note, *Supreme Court Ethics Regulation: Amending the Ethics in Government Act of 1978 to Address Justices' Unethical Behavior*, 52 SW. L. REV. 308, 324 (2023).

81. 5 U.S.C. § 13106(a)(1).

82. *Id.* § 13106(a)(2)(B)(i).

83. *See Judicial Ethics*, *supra* note 73, at 1696–98 (discussing the constitutionality of this proposal).

powerful deterrence tool, as it would arm Congress with a reliable way to review and punish extrajudicial misconduct.

2. Withholding Appropriations

Some have suggested that Congress could utilize its power of the purse to deter ethics violations by the Justices.[84] Senator Chris Van Hollen, who chairs the Senate Appropriations subcommittee, proposed that the Senate could leverage its influence over the Court's budget in order to coerce the Court to adhere to desired ethics standards.[85] For example, if a Justice failed to disclose a received gift in their annual reports, the Senate could sanction the Court for an amount appropriate for such a violation.

While this would enable responsive punishment for ethics violations, it runs the risk of being overly punitive, similar to impeachment. An excessive withholding of appropriations would cripple the Court's ability to function, an obviously undesirable outcome. Withholding would thus have to be used sparingly to avoid such a result. In light of this, criminal and civil liability for ethics violations are likely the more adaptable, and therefore better, means of enforcement. However, the withholding of appropriations could nonetheless remain a useful enforcement tool if such alternatives are held unconstitutional.

D. Debiasing Strategies in the Face of Constitutional Barriers

1. Public Recusal Decisions

A Justice's refusal to recuse themselves from a case creating a conflict of interest presents one of the more difficult ethical

84. *Id.* at 1696.

85. *See* Tobi Raji, Dave Clarke, Leigh Ann Caldwell & Theodoric Meyer, *Democrats Weigh Trying to Force Supreme Court to Adopt Ethics Rules*, WASH. POST (Apr. 3, 2023), https ://www.washingtonpost.com/politics/2023/04/03/democrats-weigh-trying-force-supreme-court-adopt-ethics-rules/ [https://perma.cc/W8E6-FRPT].

issues for an external body to regulate. While 28 U.S.C. § 455 already demands the Justices' recusal in certain situations, Congress almost certainly lacks the authority to directly regulate the Justices' decisions over this matter because doing so would implicate the Court's judicial function.[86] Professor Louis Virelli has argued that this provides reason for Congress to set aside disqualification regulations and instead act on other areas of enforcement where constitutional authority is more apparent.[87] However, Virelli's advice is perhaps unnecessary because there may be action Congress can still take regarding recusals. Congress could instead look to debiasing strategies to help fight against the effects of motivated cognition.[88]

The proposed Judicial Ethics and Anti-Corruption Act of 2023 offered a regulatory solution requiring the Justices to author written opinions regarding their decisions not to recuse from a case.[89] The regulation would operate as follows: First, a litigant could request a written explanation relating to a Justice's recusal decision.[90] Then, the Judicial Conference would issue an advisory opinion addressing whether the Justice ought to be disqualified.[91] If the Judicial Conference recommends

86. *See Judicial Ethics*, *supra* note 73, at 1699 ("Congress likely lacks constitutional authority to regulate the Supreme Court's decisions in this area because the decisions are more inherently judicial than say, vacation plans or real estate transactions.").

87. *See generally* Louis J. Virelli III, *Congress, the Constitution, and Supreme Court Recusal,* 69 WASH. & LEE L. REV. 1535 (2012) (arguing that Congress needs to exert pressure via other powers such as investigations, where constitutional authority is more firmly established).

88. *See, e.g.*, Elliot et al., *supra* note 10 (discussing Alito's suspect failure to recuse).

89. Judicial Ethics and Anti-Corruption Act of 2023, H.R. 3973, 118th Cong. § 7 (2023).

90. *Id.*

91. *Id.*

disqualification, the Justice would then be required to provide a public explanation of the recusal decision.[92]

Professor Avani Mehta Sood believes such a process can work to debias legal decision-makers. Sood postulates that "reining in" motivated cognition among legal actors "might [require] drawing attention to inadvertently and inappropriately motivating factors."[93] Professor Feldman provided a similar endorsement, hypothesizing that corporate and government decision-makers could use written declarations of conflicts to force the regulated actors to confront their conflicts.[94] Here, the Judicial Conference's advisory opinion could serve this debiasing purpose. By publicly and explicitly highlighting a potential conflict of interest, the Judicial Conference puts the Justice on notice as to possibly motivating (i.e., biasing) factors influencing the Justice's decision-making. This notice, in turn, could help reduce the biasing effects of such factors by forcing the Justice to bring such previously subconscious motivations into the forefront of his or her conscious (and public) reasoning.[95]

2. Eliminating Ambiguities

As a general matter, Congress (and the Justices) should seek to eliminate ambiguities in judicial ethics statutes and codes as much as possible. While eliminating all instances of ambiguity is an impossible task, aspiring to this end will nevertheless minimize opportunities for biased readings or motivated violations of ethics rules.

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92. *Id.*

93. Sood, *supra* note 25, at 320.

94. Feldman, *supra* note 23, at 94.

95. *See id.* at 96 ("From a behavioral perspective, writing out a declaration prevents a person who wants to maintain an ethical self-image from failing to announce a conflict of interest; such omissions can be downplayed in a person's mind more than a [sic] stating an outright a [sic] lie can.").

Professor Feldman highlights how ambiguity can "enable[] people who view themselves as moral to convince themselves that unethical behavior is ethical."[96] Feldman accordingly promotes more explicit language in ethics codes.[97] Feldman presents the example of a company's ethics code using the specific term "employees" instead of the more general "we"; even this small change helped remind employees that they were bound by the code.[98] In the realm of judicial ethics, providing more clear definitions as to what constitutes an "improper" relationship or the types of gifts that must be disclosed would help eliminate areas where motivated cognition can influence a self-policing Justice. The less room a code or statute provides for textual interpretation, the less room there is for bias to inform the interpretation.[99]

Conclusion

This Note provides empirical support for the contention that the Court cannot impartially police its own ethics. The scientific understanding of motivated cognition among legal decision-makers indicates that the Justices of the Supreme Court are not exempt from motivated cognition or other threats to their impartiality. Motivated cognition leads individuals, especially those with legal training, to rationalize their own biased decisions and unethical behavior. Accordingly, the Supreme Court's Code fails to meaningfully regulate the Justices' behavior because it entrusts to the Justices the power to enforce the Code against themselves and thereby invites the Justices to rationalize their behavior, all while believing such rationalizations are objective. In light of this, lawmakers should remain pessimistic about the

96. *Id.* at 94.

97. *Id.* at 93.

98. *Id.*

99. *See* Sood, *supra* note 25, at 309 (discussing the tendency of motivated cognition to affect evaluative decisions).

Justices' ability to self-regulate and pursue some form of external enforcement.

At the same time, it is important to note that the preceding analysis does not mean to assign moral blame to any Justice. To do so would not only be improper and unhelpful but is also beside the point of this Note. The problem does not lie with a few "bad apples" or instances of bad behavior but instead with the nature of an institution that asks its own members to regulate conduct that implicates their material and institutional interests.

Congress should therefore continue to pursue ethics reform and protect bills such as the Judicial Ethics and Anti-Corruption Act from fading into obscurity while stuck in committee.[100] What remains of the political momentum from the 2023 ethics crisis should be capitalized on before the public's attention is lost. The outcry resulting from that crisis led the Court to adopt its Code, an unprecedented step in the Court's history. Now, continued pressure is necessary to bring about *meaningful* ethics reform at the Court.

100. *See H.R. 3973 – Judicial Ethics and Anti-Corruption Act of 2023*, CONGRESS.GOV, https://www.congress.gov/bill/118th-congress/house-bill/3973/all-actions [https://perma.cc/6Z6V-ZCEX] (indicating that the latest action taken with the bill was its referral to the Judiciary Committee on Jun. 9, 2023).