

## CODES OF CONDUCT AND SPOUSAL AUTONOMY

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## CODES OF CONDUCT AND SPOUSAL AUTONOMY

*Note*

## INTRODUCTION

For the first time in United States history, the Supreme Court of the United States is formally bound to a code of conduct.<sup>1</sup> The Justices were already subject to federal statutes relating to recusal, financial disclosures, and limitations on gifts;<sup>2</sup> however, until recently, there was no official code of conduct that applied to the Justices.

The Code of Conduct for Justices of the Supreme Court of the United States was adopted against a backdrop of increasing pressure,<sup>3</sup> in part due to the activities of the Justices' spouses. Reports of text messages suggesting that Ginni Thomas, the wife of Supreme Court Justice Clarence Thomas, played a role in the effort to overturn the 2020 presidential election prompted questions around the Justices' ethical obligations when it comes to spousal activity.<sup>4</sup> Citing this controversy, some observers called for Justice Thomas to recuse himself from Supreme Court cases involving the 2020 election.<sup>5</sup> Recent articles have also identified possible conflicts of interest for Chief Justice John Roberts and Justice Amy Coney Barrett due to their spouses' work in the legal field.<sup>6</sup>

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1. CODE OF CONDUCT FOR JUSTICES OF THE SUP. CT. OF THE U.S. (SUP. CT. OF THE U.S. 2023); *see also* Annie Gersh & Nina Totenberg, *The Supreme Court Adopts First-Ever Code of Ethics*, NPR (Nov. 13, 2023, 4:56 PM), <https://www.npr.org/2023/11/13/1212708142/supreme-court-ethics-code> [<https://perma.cc/4A7S-HW4L>].

2. *See infra* Part II.A.

3. *See, e.g.*, AM. BAR ASS'N, RESOLUTION 400 (2023), <https://www.americanbar.org/content/dam/aba/administrative/news/2023/mym-res/400.pdf> [<https://perma.cc/8YQV-S7VZ>]; Supreme Court Ethics, Recusal, and Transparency Act of 2023, S. 359, 118th Cong. (2023).

4. *See, e.g.*, Robert Barnes & Ann E. Marimow, *Ethics Experts See Ginni Thomas's Texts as a Problem for Supreme Court*, WASH. POST (Mar. 25, 2022, 11:28 AM), <https://www.washingtonpost.com/politics/2022/03/25/clarence-thomas-ginni-thomas/>; Charles Gardner Geyh, *Judicial Ethics and Identity*, 36 GEO. J. LEGAL ETHICS 233, 236 (2023) (“[R]ecent disqualification controversies concern conflicts created by the identities of judges as spouses, stockholders, and university board members.”).

5. *See* Barnes & Marimow, *supra* note 4; Ed Pilkington, *Ginni Thomas Texts Spark Ethical Storm About Husband's Supreme Court Role*, GUARDIAN (Mar. 25, 2022, 1:02 PM), <https://www.theguardian.com/law/2022/mar/25/ginni-thomas-texts-clarence-ethics-supreme-court-conflict-of-interest#:~:text=The%20direct%20connection%20between%20Ginni's,6%20committee%20demanded%20to%20see.> [<https://perma.cc/89TP-RUCU>].

6. Hailey Fuchs et al., *Justices Shield Spouses' Work from Potential Conflict of Interest Disclosures*, POLITICO (Sept. 29, 2022, 3:09 PM), <https://www.politico.com/news/2022/09/29/justices-spouses-conflict-of-interest-disclosures-00059549> [<https://perma.cc/8A8X-4JQ9>]; Alison Durkee, *Chief Justice Roberts' Wife Is Latest Supreme Court Spouse to Spark Ethics Concerns*, FORBES (Jan. 31, 2023, 4:36 PM), <https://www.forbes.com/sites/alisondurkee/2023/01/31/chief-justice-roberts-wife-is-latest-supreme-court-spouse-to-spark-ethics-concerns>; *see also* Lydia Wheeler & Kimberly Strawbridge Robinson, *'New Era' of Scrutiny Brings Calls for Supreme Court Ethics Code*, BLOOMBERG L. (Mar. 20, 2023, 3:50 AM), <https://news.bloomberglaw.com/product-liability-and-toxics-law/new-era-of-scrutiny-brings-calls->

Commentators urged the Supreme Court to voluntarily adopt its own code of conduct, or alternatively, urged Congress to impose the Code of Conduct for United States Judges on the Supreme Court.<sup>7</sup>

In November 2023, the Supreme Court responded by issuing its own Code of Conduct.<sup>8</sup> Commentators quickly reacted to the Code by pointing out the lack of an enforcement mechanism,<sup>9</sup> the advisory rather than mandatory nature of the Code,<sup>10</sup> and the Code's self-proclaimed lack of novelty.<sup>11</sup> However, none of these criticisms adequately addresses the spousal piece of the puzzle.

The current debate implicates a broader issue—the historically disproportionate effect that ethics laws have had on women. Because men have historically held public office in greater numbers than women, ethics laws that restrict spousal activity have disproportionately limited career and political opportunities for the wives of public officials. This disparity is especially stark concerning the Supreme Court—94.8% of Supreme Court Justices have been men.<sup>12</sup> Even though every male officeholder does not necessarily have a female spouse, ethics laws applicable to spouses have largely fallen on the wives of male public officials.

To understand why ethics laws often affect the spouse of an officeholder, Part I of this Note examines the family law concept of coverture. Coverture reflects the idea that a husband and wife become one person upon marriage. Under this regime, the legal existence of the wife is erased, and her legal status is subsumed by her husband after marriage. While the legal structures associated with coverture are a relic of the past, the idea that husband and wife operate as a unit after marriage is still prevalent today. Under this view of marriage, it follows that any activity, political or otherwise, undertaken by either spouse necessarily has some connection with or effect on the non-actor spouse. This explains why many ethics laws implicate the spouses of public officials—if a judge's wife, for example, is employed by a casino, many would expect the judge to be unable to impartially preside over a dispute involving that casino or

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for-supreme-court-ethics-code-22 (listing recent situations where the Justices' impartiality has been questioned).

7. See, e.g., Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism*, 26 GEO. J. LEGAL ETHICS 443, 445–46, 459–60 (2013).

8. See *supra* note 1.

9. Andrew Chung & John Kruzal, *Under Fire, US Supreme Court Unveils Ethics Code for Justices*, REUTERS (Nov. 13, 2023, 11:56 PM), <https://www.reuters.com/legal/us-supreme-court-announces-formal-ethics-code-justices-2023-11-13/>.

10. Devon Ombres, *With Its Release of a New Nonbinding Code of Conduct, the Supreme Court Fails on Ethics Again*, CTR. FOR AM. PROGRESS (Nov. 15, 2023), <https://www.americanprogress.org/article/with-its-release-of-a-new-nonbinding-code-of-conduct-the-supreme-court-fails-on-ethics-again/> [<https://perma.cc/Z8CN-4XTZ>].

11. Noah Feldman, *New Supreme Court Code of Conduct Changes Nothing*, BLOOMBERG L. (Nov. 14, 2023, 5:30 AM), [https://www.bloomberglaw.com/bloomberglawnews/us-law-week/XC9898AC000000?bna\\_news\\_filter=us-law-week#jcite](https://www.bloomberglaw.com/bloomberglawnews/us-law-week/XC9898AC000000?bna_news_filter=us-law-week#jcite).

12. *Justices 1789 to Present*, SUP. CT. OF THE U.S., [https://www.supremecourt.gov/about/members\\_text.aspx](https://www.supremecourt.gov/about/members_text.aspx) [<https://perma.cc/2J5W-35XE>].

gambling generally.<sup>13</sup> Thus, ethics rules and codes of conduct both explicitly limit the activities one spouse can undertake while the other serves in a public capacity and implicitly constrain spousal activity by requiring recusal in a variety of contexts.<sup>14</sup>

Part II surveys the preexisting ethical framework that governs the Supreme Court and analyzes the new Code of Conduct, concluding that the Code appropriately preserves the longstanding distinction between ethical rules and standards in a way that protects spousal autonomy. The Code of Conduct gathers the existing ethics rules and clarifies their application to the Justices, recognizing that the current system of statutory rules combined with advisory opinions provides a balanced framework that addresses ethical concerns without unnecessarily curtailing spousal autonomy across the board. While the imposition of stricter ethics rules appears to be a straightforward fix, unequivocal recusal requirements would not adequately allow for spousal freedom. Instead, the connection between ethical requirements and spousal autonomy requires an approach that respects the interplay of the two issues. The Note concludes by arguing that despite the current focus on the Supreme Court, the core issue lies in the realm of public opinion. Instead of rushing to the conclusion that the spouses of Supreme Court Justices should not be involved in politics or have high-profile careers, we should reinforce the idea that marriage does not require spouses to lose all sense of independent identity or to abandon their lifelong ambitions.

## I. FAMILY LAW CONCEPT OF COVERTURE

### A. *English Roots*

The common law concept of coverture declared that “[b]y marriage, the husband and wife are one person in law.”<sup>15</sup> Blackstone explained in his *Commentaries on the Laws of England* that “the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband . . . and her condition during her marriage is called her *coverture*.”<sup>16</sup> Upon marriage, any personal property previously owned by a wife was transferred to her husband, and any money she earned also belonged to her husband.<sup>17</sup> A husband gained sole possession and control

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13. See *infra* notes 59–68 and accompanying text.

14. See *infra* Part I.E.

15. 2 WILLIAM BLACKSTONE, COMMENTARIES \*430; see also *Obergefell v. Hodges*, 576 U.S. 644, 660 (2015) (“Under the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity.”).

16. 2 BLACKSTONE, *supra* note 15, at \*430.

17. Margaret Valentine Turano, *Jane Austen, Charlotte Brontë, and the Marital Property Law*, 21 HARV. WOMEN’S L.J. 179, 180–82 (1998); John D. Johnston, Jr., *Sex and Property: The Common Law Tradition, the Law School Curriculum, and Developments Toward Equality*, 47 N.Y.U. L. REV. 1033, 1045–46 (1972).

of any real property owned by his wife prior to the marriage.<sup>18</sup> During marriage, coverture dictated that contracts made by wives were legally unenforceable,<sup>19</sup> and wives could not sue or be sued without the involvement of their husbands.<sup>20</sup>

Coverture reflected an ideal of marriage as lifelong and unifying.<sup>21</sup> This view of marriage flowed naturally from the idea that husband and wife become “one person”<sup>22</sup> or “one flesh”<sup>23</sup> upon marriage, and it meant that there were relatively few opportunities for women to leave an unworkable marriage.<sup>24</sup> Before the mid-seventeenth century in England, full divorce with the accompanying right to remarry was only allowed by an Act of Parliament.<sup>25</sup> Divorce became more accessible after the Matrimonial Causes Act of 1857, but social and religious norms often prevented women from seeking divorce even then.<sup>26</sup> The legal and social restrictions on divorce that coverture shaped were “as central a component of coverture as was the unity of property or political interests of the married couple.”<sup>27</sup>

### B. Early American Law

The common law of England heavily influenced every aspect of early American law;<sup>28</sup> its influence was no different regarding women’s legal rights within marriage. Early American law reflected many of the same aspects of coverture as the English common law system did.<sup>29</sup> While differing social and economic landscapes in America allowed American women to “attain[] a measure of individuality and independence in excess of that of their English sisters[,]’ . . . the fact remain[ed] that the oppressive English common law of marital property rights persisted without substantial change in America.”<sup>30</sup> In

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18. Turano, *supra* note 17, at 181; Johnston, *supra* note 17, at 1045–46.

19. Joan C. Williams, *Married Women and Property*, 1 VA. J. SOC. POL’Y & L. 383, 386–87 (1994); Turano, *supra* note 17, at 181.

20. 2 BLACKSTONE, *supra* note 15, at \*431.

21. Allison Anna Tait, *The Return of Coverture*, 114 MICH. L. REV. FIRST IMPRESSIONS 99, 106–08 (2016).

22. 2 BLACKSTONE, *supra* note 15, at \*430.

23. *Mark* 10:7–9 (King James).

24. Tait, *supra* note 21, at 107.

25. *Id.*

26. *Id.* at 107–08.

27. *Id.* at 107; *see also id.* at 108 (“[T]he idea of lifelong marriage . . . is also tied to a historical notion of marriage defined by coverture, interest unification, and the suppression of female agency.”).

28. *See generally* William B. Stoebuck, *Reception of English Common Law in the American Colonies*, 10 WM. & MARY L. REV. 393 (1968).

29. Johnston, *supra* note 17, at 1058 (“Thus, the married woman’s disabilities concerning owning and managing property, engaging in business activity and retaining income earned by her became an integral part of American common law.”).

30. *Id.* at 1058–59 (quoting RICHARD B. MORRIS, *STUDIES IN THE HISTORY OF AMERICAN LAW* 128–29 (2d. ed. 1959)).

fact, American wives may have had fewer property rights than English women in the same time period because equitable remedies available to English women were not as common in colonial America.<sup>31</sup> The availability of divorce varied across the early American states.<sup>32</sup> As in England, the rarity of divorce in America before the mid-nineteenth century was attributable to a combination of legal, social, and religious barriers.<sup>33</sup>

### C. Marital Unity and Separate Spheres Ideology

Coverture was grounded in the concept of marital unity—the idea that “marriage was a merger of husband and wife into one juridical unit, the husband.”<sup>34</sup> The common law rule that spouses could not testify for or against one another in court illustrates the marital unity concept.<sup>35</sup> The rationale behind this prohibition was “partly because it is impossible [that spouses’] testimony should be indifferent; but principally because of the union of person.”<sup>36</sup> Allowing or requiring spousal testimony in court was said to violate the legal maxims that no one should judge his own case and that no man must accuse himself.<sup>37</sup> Blackstone did not merely assume that spouses would usually choose to testify in solidarity with each other—he concluded that spouses are *incapable* of providing unbiased testimony because to do so is akin to testifying against oneself.<sup>38</sup>

The marital unity doctrine demonstrates that it was not womanhood alone, but womanhood plus marriage, that significantly impaired women’s legal rights under coverture.<sup>39</sup> Coverture rules reflected the traditional view that the interest and ambition of husband and wife were inseparable—what is good for one

31. *Id.* at 1059.

32. Tait, *supra* note 21, at 107–08.

33. *Id.*

34. Sarah L. Swan, *Conjugal Liability*, 64 UCLA L. REV. 968, 978 (2017); *see also* Hoepfer v. Tax Comm’n of Wis., 284 U.S. 206, 219 (1931) (Holmes, J., dissenting) (“[H]usband and wife are one, and that one the husband . . .”); *United States v. Yazell*, 382 U.S. 341, 361 (1966) (Black, J., dissenting) (“[T]he old common-law fiction that the husband and wife are one . . . has worked out in reality to mean that though the husband and wife are one, the one is the husband.”).

35. 2 BLACKSTONE, *supra* note 15, at \*431.

36. *Id.*

37. *Id.* (“[I]f they were admitted to be witnesses *for* each other, they would contradict one maxim of law, ‘*nemo in propria causa testis esse debet* [no one should be a witness in his own cause];’ and if *against* each other, they would contradict another maxim, ‘*nemo tenetur seipsum accusare* [no one is bound to accuse himself].”’) (second and third alterations in original).

38. *Id.*

39. *See* Johnston, *supra* note 17, at 1045 (“The common law did not treat unmarried men and women equally; still, it imposed no special disabilities upon single women. Thus, a *sui juris* single woman, like her male counterpart, was free to own, manage and transfer property; to sue and be sued; and to enjoy the income attributable to her property and personal labor. At the instant she was married, however, her status changed radically . . .”) (footnote omitted).

must be good for the other. The ubiquity of “separate spheres” ideology<sup>40</sup> and the idolization of the “cult of domesticity”<sup>41</sup> reinforced the idea that spouses became two complementary parts of one whole upon marriage. The prevailing social view during coverture’s reign was that public life and family life composed two separate spheres: “[t]he market was a male sphere of competitive self-seeking, while the home was celebrated as a female sphere.”<sup>42</sup> Marriage was envisioned as an institution in which “a husband braves the ‘turmoil’ of public life” and returns to a “peaceful home that is ordered and run by his wife.”<sup>43</sup>

The confluence of the doctrine of marital unity and separate spheres ideology cemented the notion that only husbands should pursue public life outside of the marital home. Justice Bradley’s concurrence in *Bradwell v. Illinois* articulated this widespread view: “The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.”<sup>44</sup> The notion that a wife’s independence was a threat to the institution of marriage had an easily identifiable impact on coverture rules. While modern society bristles at the outdated ideas about women and marriage that Justice Bradley expressed, these ideas still lurk in modern ethics restrictions, similarly hampering wives’ autonomy on account of their marital status.

#### D. Coverture’s Formal End

During the nineteenth century, statutes referred to collectively as Married Women’s Property Acts and Married Women’s Earning Acts marked the beginning of coverture’s formal end. The Married Women’s Property Acts granted wives the right to own property in their own name; the Married Women’s Earning Acts gave wives legal capacity to contract and the right to

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40. See, e.g., *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (“On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.”).

41. Reva B. Siegel, *Home as Work: The First Woman’s Rights Claims Concerning Wives’ Household Labor, 1850-1880*, 103 *YALE L.J.* 1073, 1093 (1994).

42. *Id.*; see also 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 304 (Phillips Bradley ed., Henry Reeve trans., 1989) (“[W]hen the American retires from the turmoil of public life to the bosom of his family, he finds in it the image of order and of peace . . . [H]e afterwards carries [that image] with him into public affairs.”); Tait, *supra* note 21, at 105 (describing the view of marriage under coverture as “consist[ing] of two clearly delineated and separate spheres that partition men and women into the dichotomous roles of female domesticity and male wage-earning”).

43. Tait, *supra* note 21, at 105.

44. *Bradwell*, 83 U.S. at 141 (Bradley, J., concurring).

control their own earnings.<sup>45</sup> While this legislation did “gradually eradicate the most obvious facets of coverture,”<sup>46</sup> the statutes did not “fully emancipate wives from the common law of marital status.”<sup>47</sup> The uniform motivation behind the Married Women’s Property and Earning Acts was not to advance women’s rights per se, but rather to achieve desired change in “matters of land law, debtor-creditor relations, family welfare, codification, and capital accumulation.”<sup>48</sup> Nineteenth-century America also saw changes in the realm of divorce law. And while many states extended existing divorce statutes to make divorce more widely available, states required a showing of marital fault to obtain a divorce until the no-fault divorce revolution of the 1970s and 1980s.<sup>49</sup>

*E. The Relationship Between Coverture and Spousal Restrictions in Ethics Laws*

While coverture’s grip on women has loosened over time with the passage of additional legislation and successful equal rights cases, “the remnants of coverture are holding [women] back in unsuspected ways.”<sup>50</sup> Coverture reflected deeply held beliefs about the essence of marriage, and those beliefs continue to impact the way women are viewed in the context of marriage. The idea of marital unity is still prevalent, informing many areas of law—scholars link the gendered implications of coverture to the inequitable effects that conjugal liability and bankruptcy law have on women.<sup>51</sup> A similar connection exists between coverture and modern ethics laws that restrict spousal activity.

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45. Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives’ Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127, 2127, 2141 (1994); see also Robert B. Chapman, *Coverture and Cooperation: The Firm, the Market, and the Substantive Consolidation of Married Debtors*, 17 BANKR. DEV. J. 105, 112 (2000).

46. Tait, *supra* note 21, at 102.

47. Siegel, *supra* note 45, at 2127; see also *id.* at 2128 (“Statutory reform modified but did not abolish the law of coverture . . .”).

48. *Id.* at 2135–36 (“Crucially, this account of reform . . . qualifies, if not refutes, the progressive premises of earlier historiography. Among the competing preoccupations driving reform . . . considerations of gender equity play a conspicuously minor role.”); see also Williams, *supra* note 19, at 389 (“Many of the Acts, passed simultaneously with other debtor relief statutes, were designed to protect family property from husbands’ creditors, not to achieve gender equality. In fact, equality for women was not an invariable—or perhaps even a frequent—goal or effect of the statutes.”) (footnote omitted).

49. Tait, *supra* note 21, at 107–08.

50. Catherine Allgor, *Coverture: The Word You Probably Don’t Know But Should*, NAT’L WOMEN’S HIST. MUSEUM (Sept. 4, 2012), <https://www.womenshistory.org/articles/coverture-word-you-probably-dont-know-should> [<https://perma.cc/924B-72R2>] (noting coverture’s contemporary effect on real estate transactions, tax matters, employment, and housing).

51. See Swan, *supra* note 34, at 979–80 (“The tension between ‘the unity of the family and the individuality of its members’ is particularly evident in marriage. Although the marital unity doctrine is supposed to be defunct, a married couple is still often imagined as a single marital unit in both law and culture, and the idea of a marital couple as a ‘single economic unit’ informs many legal and policy decisions. Marriage, in short, implies solidarity. The urge to paint both spouses with the same brush, and to attribute one spouse’s wrong to the other thus, in many ways, seems like a natural extension of the marital bond. Our impulse to blame a spouse (particularly a wife) for a partner’s wrongdoing thus exists at the same time as we profess allegiance to the avoidance of ‘punishing the innocent, imposing guilt by association, or failing to treat people as individuals.’ It is here that we find conjugal liability.”) (footnotes omitted); Chapman, *supra* note 45, at 219–

Ethics laws explicitly and implicitly restrict the career and political opportunities available to wives of elected officials and thus operate in a gendered way. While such restrictions are facially neutral in that they apply to the “spouse” of a public official rather than the “wife” of a public official, in practice these restrictions fall largely on women because men have historically held public office in greater numbers.<sup>52</sup> Modern ethics laws assume an underlying unity of spouses reminiscent of coverture’s marital unity, presupposing the impossibility of spouses operating independently of each other’s interests just as the prohibition on spousal testimony did. Instead of treating married people as separate individuals with distinct opinions and ambitions, these restrictions effectively treat spouses as “one person” in determining the permissibility of career and political activities. Thus, ethics laws that place limitations on spousal activity significantly impact female individuality and equality.

Two cases involving the wives of New Jersey judges illustrate the harms inherent in ethics laws that assume uniform spousal interests. The first case, *Application of Gaulkin*, involved the proposed candidacy of a New Jersey Superior Court judge’s wife for the local Board of Education.<sup>53</sup> Because of the New Jersey Supreme Court’s administrative policy prohibiting a judge’s spouse from engaging in political activities, Mrs. Gaulkin refrained from running for the position but later challenged the policy.<sup>54</sup> Noting that the prohibition on spousal political involvement stemmed from outdated ideas about marriage and spousal autonomy,<sup>55</sup> the New Jersey Supreme Court relaxed the policy’s

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20 (“The treatment of marital income and expense in bankruptcy represents an overlap of and conflict between commercial law and domestic relations law, the public and private spheres, and the unity of the family and the individuality of its members . . . . The prevailing characterization of marriage in bankruptcy court, which includes expectations of income-sharing as conditions to relief, depends on constructions of marital unity, privacy, and domesticity that have direct links to the law of coverture. A consideration of spousal consolidation must ask how bankruptcy law addresses a spouse’s separate and publicly visible legal rights in resources that may or may not be claimed and shared.”); see also Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 844–48 (2004) (detailing the relationship between coverture and the marital rape exception, interspousal tort immunity, the prohibition on interspousal contracts for domestic services, and the doctrine of necessities).

52. See, e.g., Tierney Sneed et al., *Ginni Thomas’ Political Activism Brings Scrutiny to Justice Clarence Thomas and the Supreme Court’s Recusal Rules*, CNN (Feb. 4, 2022, 6:56 PM), <https://www.cnn.com/2022/02/04/politics/ginni-clarence-thomas-supreme-court-recusal> [<https://perma.cc/5GQ4-3L4D>] (“For a justice to have a spouse with a high-profile profession in politics is itself a somewhat modern development, given that women only fully entered the workforce in the last half-century and the court did not get its first female justice until 1981.”).

53. *Application of Gaulkin*, 351 A.2d 740 (N.J. 1976).

54. *Id.* at 741–42.

55. See *id.* at 742 n.1 (quoting the former administrative director’s directive that “it is undesirable for the wife of a judge to be politically active, since it invariably creates the impression that the judge himself may be politically active, albeit not openly”); *id.* at 744 (recognizing the “trend of modern law which reflects society’s realistic appreciation of the independence of both spouses in marriage and more specifically represents modern awareness and sensitivity to individual freedoms, rights, responsibilities and development”).

prohibition on spouses' political activity.<sup>56</sup> The court bolstered its decision with an analysis of the American Bar Association's Code of Conduct, noting that the Code balances spouses' First Amendment rights with the need for an independent judiciary by imposing only "very limited restrictions" on spousal activity and allowing for disqualification from "any matter which would or could embarrass the court."<sup>57</sup>

While the relaxation of the administrative policy prohibiting judicial spouses from running for elected office in *Gaulkin* seems to be a resounding victory for spousal autonomy, the court's fallback reliance on recusal standards is still problematic. The practical effect of strict recusal standards is that judicial spouses are expected to refrain from activity that would require their spouse to recuse from a case.<sup>58</sup> This is especially true in the case of the United States Supreme Court, where recusal of one of only nine Justices can have an outsized impact on the result.

Another New Jersey case similarly represents a clash between a judicial spouse's autonomy and judicial integrity. In *Greenberg v. Kimmelman*, the wife of a New Jersey Superior Court judge challenged the constitutionality of an amendment prohibiting the immediate family members of judges from working for casinos.<sup>59</sup> Mrs. Greenberg alleged that the amendment violated her right to employment opportunity, right to marry, and right to familial association.<sup>60</sup> Under both the federal and New Jersey constitutions, the Supreme Court of New Jersey upheld the amendment's constitutionality.<sup>61</sup> Emphasizing the need to avoid "not only . . . impropriety, but . . . its appearance," the court held that the state's interest in judicial integrity outweighed Mrs. Greenberg's due process rights.<sup>62</sup> While sympathetic to the idea that "a wife may pursue a career of her own," the court emphasized that "in the eyes of the world, she and her husband comprise a single economic entity."<sup>63</sup> Because marriage takes spouses "beyond independence to interdependence, to a mutual sharing of aspirations, earnings, and assets," the court concluded that it was reasonable for the legislature to assume that a judicial spouse's casino employment would create the appearance of impropriety.<sup>64</sup>

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56. *Id.* at 748.

57. *Id.* at 745–47.

58. See Sneed et al., *supra* note 52 ("[Justice Thomas's] wife's activism has no parallels in the Supreme Court's history . . . [O]ther justices' spouses have pivoted their careers towards lower-profile roles once their partners took the bench.").

59. *Greenberg v. Kimmelman*, 494 A.2d 294, 297 (N.J. 1985).

60. *Id.* at 303.

61. *Id.* at 307–08.

62. *Id.* at 299; *id.* at 307 ("The state interest in preserving the integrity of the judiciary outweighs her interest in unrestricted employment opportunities."); *id.* at 308 ("[W]e find that the state interest outweighs the slight imposition upon plaintiff's rights [to marry and to familial association].").

63. *Id.* at 306.

64. *Id.*

Interestingly, Mrs. Greenberg also challenged the amendment on equal protection grounds, arguing that because 95% of New Jersey judges were men, the casino ethics amendment “impacts disproportionately . . . spouses who are women.”<sup>65</sup> The court rejected her claim, both because the statute applied to the total pool of state employees, which was majority female, and because the facially neutral statute did not have an invidious purpose.<sup>66</sup> The casino ethics amendment is still on the books today,<sup>67</sup> prohibiting judicial spouses from employment in an industry that is often both the largest and best-paying employer in casino communities.<sup>68</sup>

While explicit restrictions on judicial spouses’ political and career opportunities are less common today<sup>69</sup> (though not eradicated, as demonstrated by New Jersey’s prohibition on casino employment<sup>70</sup>), the combination of modern ethics rules and social expectations continues to constrain judicial spouses. For example, Ninth Circuit Judge Stephen Reinhardt faced pressure to recuse from an appeal involving California’s Proposition 8 because his wife, Ramona Ripston, was the former executive director of an organization with extensive involvement in litigation involving the prohibition on same-sex marriage.<sup>71</sup> Explaining his decision to hear the appeal, Judge Reinhardt wrote:

Proponents’ contention that I should recuse myself due to my wife’s opinions is based upon an outmoded conception of the relationship between spouses . . . . [M]y wife and I share many fundamental interests by virtue of our marriage, but her views regarding issues of public significance are her own, and cannot be imputed to me, no matter how prominently she expresses them . . . . [S]he has the right to perform her professional duties without regard to whatever my views may be . . . .<sup>72</sup>

Both Judge Reinhardt and Justice Thomas<sup>73</sup> faced pressure to recuse because of their wives’ political and career connections to controversial issues. Even though explicit bans on judicial spouses holding public office and

65. *Id.* at 308.

66. *Id.*

67. N.J. STAT. ANN. § 52:13D-17.2(b) (West 2021).

68. *See, e.g., Greenberg*, 494 A.2d at 305 (“[T]he casino industry provides the most significant number of job opportunities in Atlantic County . . . . Plaintiff estimates that she would receive significantly greater compensation from casino employment than from another employer.”).

69. *See* Roger J. Miner, *Judicial Ethics in the Twenty-First Century: Tracing the Trends*, 32 HOFSTRA L. REV. 1107, 1130–31 (2004) (“When I first became a judge, I acquainted my wife with the then-applicable 1972 ABA Model Code, which provided that a judge ‘should encourage members of his [note the archaic ‘his’] family to adhere to the same standards of political conduct that apply to him.’ My wife, a well-known political activist at that time, responded: ‘Consider me encouraged,’ and went on to lead some statewide and national campaigns. The encouragement to adhere to judicial conduct rules now applies only in regard to the judge’s own political campaign.”) (alteration in original) (footnote omitted).

70. *See supra* note 67 and accompanying text.

71. James Sample, *Supreme Court Recusal from Marbury to the Modern Day*, 26 GEO. J. LEGAL ETHICS 95, 136 (2013).

72. *Perry v. Schwarzenegger*, 630 F.3d 909, 912 (9th Cir. 2011) (footnotes omitted).

73. *See supra* notes 4–5 and accompanying text.

engaging in political activity are less common today, the legacy of coverture and marital unity continues to impact the interpretation of facially neutral ethics rules, particularly when it comes to recusal guidelines.

## II. THE CODE OF CONDUCT FOR JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

### A. *The Existing Ethical Framework*

Recent ethical controversies, including several involving judicial spouses, renewed calls for the adoption of formal ethics rules to govern the Supreme Court.<sup>74</sup> This pressure culminated in the Supreme Court's promulgation of its own Code of Conduct in November 2023.<sup>75</sup> But before evaluating the Supreme Court's recent Code, it is important to understand the preexisting ethical framework, and in particular, the provisions that relate to judicial spouses. In addition to the new Code of Conduct, the Supreme Court Justices are subject to statutory requirements and abide by other sources of ethical guidance, as discussed below.

#### 1. *Recusal*

28 U.S.C. § 455 governs the recusal of “[a]ny justice, judge, or magistrate judge of the United States,” and thus applies to the Supreme Court Justices.<sup>76</sup> Section 455(a) requires a judge to “disqualify himself in any proceeding in which his impartiality might reasonably be questioned,”<sup>77</sup> and § 455(b) goes on to list five situations that require recusal.<sup>78</sup> Among the enumerated grounds for recusal are personal bias or prejudice, prior involvement in the case, financial interest, and family connections to the case.<sup>79</sup>

As it pertains to spouses specifically, § 455 requires a judge to recuse when:

- (4) He knows that he, individually or as a fiduciary, or *his spouse* or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
- (5) He or *his spouse*, or a person within the third degree of relationship to either of them, or the spouse of such a person:
  - (i) Is a party to the proceeding, or an officer, director, or trustee of a party;
  - (ii) Is acting as a lawyer in the proceeding;

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74. *See supra* notes 4–6.

75. *See supra* note 1.

76. 28 U.S.C. § 455(a).

77. *Id.*

78. *Id.* § 455(b).

79. *Id.*

- (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
- (iv) Is to the judge's knowledge likely to be a material witness in the proceeding.<sup>80</sup>

A judge also has the responsibility to “inform himself about his personal and fiduciary financial interests, and [to] make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.”<sup>81</sup>

Finally, § 455 contains provisions addressing definitions,<sup>82</sup> rules about waiver of the grounds for disqualification,<sup>83</sup> and authorization for divestment of financial interests.<sup>84</sup> Justices are required to recuse themselves from a case if the relevant scenario exists regardless of whether a party to the case requests recusal.<sup>85</sup> Generally, a Justice's decision around recusal is made independently and is not reviewed by the other Justices of the Supreme Court.<sup>86</sup>

## 2. *Financial Disclosures and Gifts*

In addition to the recusal requirements of § 455, Supreme Court Justices are subject to financial disclosures and gift rules. The Justices are required to publicly disclose any outside income, the employment of their spouses and dependent children, investments, reimbursements for travel-related costs, gifts, and household liabilities.<sup>87</sup> All federal officials, including Supreme Court Justices, are limited in their outside income<sup>88</sup> and outside employment opportunities.<sup>89</sup> Supreme Court Justices are also prohibited from accepting gifts from any person “whose interests may be substantially affected by the performance or nonperformance” of the Justices' official duties.<sup>90</sup> The recently passed Courthouse Ethics and Transparency Act subjects the Justices to the same financial disclosure rules as Congress and requires that the disclosures be entered into a publicly accessible online database.<sup>91</sup>

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80. *Id.* § 455(b)(4)–(5) (emphasis added).

81. *Id.* § 455(c).

82. *Id.* § 455(d).

83. *Id.* § 455(e).

84. *Id.* § 455(f).

85. Lori Ann Foertsch, Comment, *Scalia's Duck Hunt Leads to Ruffled Feathers: How the U.S. Supreme Court and Other Federal Judiciaries Should Change Their Recusal Approach*, 43 HOUS. L. REV. 457, 462 (2006).

86. Frost, *supra* note 7, at 450 (“Although there are no written rules governing recusal procedures, the longstanding practice has been for each Justice to decide for him or herself whether to step aside, usually without issuing any explanation. Conceivably, a litigant could ask the entire Supreme Court to review a Justice's decision not to recuse him or herself, but none has ever done so.”) (footnotes omitted).

87. 5 U.S.C. § 13104.

88. *Id.* § 13143.

89. *Id.* § 13144.

90. *Id.* § 7353(a)(2).

91. Courthouse Ethics and Transparency Act, Pub. L. No. 117-125, 136 Stat. 1205 (2022).

### 3. *Published Advisory Opinions*

The Judicial Conference of the United States's Committee on Codes of Conduct publishes formal advisory opinions on ethical issues in the judiciary.<sup>92</sup> The opinions cover a range of topics from recusal to extrajudicial activities to provide guidance for judges and to assist in the interpretation of the codes of conduct and ethics regulations that apply to the judiciary.<sup>93</sup> While not binding on Supreme Court Justices, the advisory opinions round out the ethical guidelines that the Justices refer to and provide additional guidance for more specific situations.

The advisory opinions specifically address recusal obligations in the context of a spouse's political involvement or employment at a law firm. When a judge's spouse is employed by a law firm participating in a case, the Committee advises that the judge recuse if the spouse either represents a party in the case or is an equity partner at a participating law firm.<sup>94</sup> Recusal is not mandated when a spouse is employed by a participating law firm in a role other than equity partner, but the Committee emphasizes the judge's obligation to promote public confidence in the judiciary and to avoid a situation where his impartiality might reasonably be questioned.<sup>95</sup>

Concerning a spouse's political activity, the Committee notes that while judges should refrain from political activity and avoid the appearance of impropriety in all cases, the Code of Conduct does not govern the conduct of judicial spouses.<sup>96</sup> The Committee advises judges to disassociate from their spouses' political involvement, giving several examples of how judges should properly distance themselves.<sup>97</sup> The opinion also notes that judges should "pay attention" to the "increased likelihood" that they will be required to recuse when their spouse is involved in political activities or candidacy for public office.<sup>98</sup>

The number and specificity of the Committee's advisory opinions demonstrates the fact-specific nature of the ethical questions facing the judiciary. For example, the Committee advises that a law clerk should recuse from *any* case in which a party is represented by a law firm employing his spouse, not just those cases in which the spouse acts as an attorney or is an

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92. See *Published Advisory Opinions*, U.S. COURTS, <https://www.uscourts.gov/rules-policies/judiciary-policies/ethics-policies/published-advisory-opinions> [<https://perma.cc/ZZ3M-78DM>].

93. See *id.*

94. U.S. COMM. ON CODES OF CONDUCT, PUBLISHED ETHICS ADVISORY OPINIONS 76 (2022), [https://www.uscourts.gov/sites/default/files/guide-vol02b-ch02-2019\\_final.pdf](https://www.uscourts.gov/sites/default/files/guide-vol02b-ch02-2019_final.pdf) [<https://perma.cc/YJ6Y-M45C>].

95. *Id.* at 77.

96. *Id.* at 71.

97. *Id.*

98. *Id.*

equity partner at the firm.<sup>99</sup> Considering the need for public confidence in the integrity and impartiality of the judiciary and the fact that most judges have more than one clerk available to work on any given case, the Committee concludes that requiring recusal in such situations is more beneficial than disruptive.<sup>100</sup> In other opinions addressing areas not directly implicated by the Code, the Committee does not give straightforward rules but instead relies on the judge's responsibility to avoid the appearance of impropriety when deciding whether recusal from a case is appropriate.<sup>101</sup>

#### 4. *Statement on Ethics Principles and Practices*

As a precursor to the Code of Conduct for Justices of the Supreme Court of the United States, all nine Supreme Court Justices signed a Statement on Ethics Principles and Practices in April 2023.<sup>102</sup> The statement explains that the Justices consult “a wide variety of authorities” regarding their ethical obligations, including regulations issued by the Judicial Conference such as the Code of Conduct for United States Judges.<sup>103</sup> The statement also discusses recusal, noting that the Justices “follow the same general principles and statutory standards as other federal judges” while considering the “unique institutional setting of the Court.”<sup>104</sup> Because the Supreme Court is composed of nine Justices who cannot be replaced, the statement emphasizes that the Justices have a duty to hear cases that “precludes withdrawal from a case as a matter of convenience or simply to avoid controversy.”<sup>105</sup> The statement explains that the Justices make decisions about recusal on an individual basis, and these decisions are not reviewable by the other Justices.<sup>106</sup>

#### B. *Code of Conduct for Justices of the Supreme Court of the United States*

In November 2023, the nine Justices released a newly adopted Code of Conduct for Justices of the Supreme Court of the United States. The Justices

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99. *Id.* at 66–67. Compare with the requirements for judges, *supra* notes 94–95.

100. U.S. COMM. ON CODES OF CONDUCT, *supra* note 94, at 66–67.

101. *See id.* at 28–29 (emphasizing that a judge should disqualify in any proceeding in which his impartiality might reasonably be questioned in response to an inquiry about disqualification based on spouse's interest as a beneficiary of a trust from which defendant leases property); *id.* at 205–10 (emphasizing that when recusal is not mandatory in situations involving less direct or consequential spousal business relationships, recusal must be evaluated “on a case-by-case basis to determine . . . whether ‘the judge’s impartiality might reasonably be questioned’”).

102. *See* SUP. CT. OF THE U.S., STATEMENT ON ETHICS PRINCIPLES AND PRACTICES 1 (2023), <https://www.judiciary.senate.gov/imo/media/doc/Letter%20to%20Chairman%20D%20urbin%2004.25.2023.pdf> [<https://perma.cc/M2PB-KNBR>].

103. *Id.* at 1.

104. *Id.* at 2.

105. *Id.*

106. *Id.*

did not purport that the Code was novel. Rather, they emphasized that the “rules and principles [in the Code] are not new” and the Code simply serves to “gather in one place” the rules and principles that the Justices abide by.<sup>107</sup>

Due to its similarity to the statutory standards the Justices were already subject to, the Code of Conduct does not disturb the preexisting balance of spousal autonomy and judicial integrity. The portions of the Code of Conduct for Justices of the Supreme Court of the United States that impact judicial spouses are those relating to recusal. According to Canon 3B(2),

(2) A Justice should disqualify himself or herself in a proceeding in which the Justice’s impartiality might reasonably be questioned . . . . Such instances include, but are not limited to, those in which . . .

(c) The Justice knows that the Justice, individually or as a fiduciary, or *the Justice’s spouse* or minor child residing in the Justice’s household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding;

(d) The Justice or *the Justice’s spouse*, or a person related to either within the third degree of relationship, or the spouse of such person, is known by the Justice: (i) to be a party to the proceeding, or an officer, director, or trustee of a party; (ii) to be acting as a lawyer in the proceeding; (iii) to have an interest that could be substantially affected by the outcome of the proceeding; or (iv) likely to be a material witness in the proceeding.<sup>108</sup>

A justice also has the responsibility to “keep informed about the Justice’s personal and fiduciary financial interests and make a reasonable effort to keep informed about the personal financial interests of the Justice’s spouse and minor children residing in the Justice’s household.”<sup>109</sup> Finally, the Code authorizes divestment of financial interests to avoid recusal.<sup>110</sup>

The requirements for recusal in the Code of Conduct for Justices of the Supreme Court of the United States as they relate to judicial spouses are not substantially different from the statutory recusal requirements that Supreme Court Justices are already subject to follow. Both require recusal when a judge’s spouse has a financial interest in the subject matter or a party to the proceeding;<sup>111</sup> when a judge’s spouse is connected to the proceeding as a party,

107. SUP. CT. OF THE U.S., STATEMENT OF THE COURT REGARDING THE CODE OF CONDUCT 1 (2023), [https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices\\_November\\_13\\_2023.pdf](https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf) [<https://perma.cc/4NZP-5MMV>].

108. CODE OF CONDUCT FOR JUSTICES OF THE SUP. CT. OF THE U.S. Canon 3B(2) (SUP. CT. OF THE U.S. 2023) (emphasis added).

109. *Id.* Canon 3B(5).

110. *Id.* Canon 3B(7).

111. *Compare id.* Canon 3B(2)(c) (requiring recusal when “[t]he Justice knows that the Justice, individually or as a fiduciary, or the Justice’s spouse or minor child residing in the Justice’s household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding”), *with* 28 U.S.C. § 455(b)(4) (requiring recusal when the judge “knows that he, individually or as a fiduciary, or his spouse or minor child residing in

a lawyer, or a material witness;<sup>112</sup> and when a spouse has an interest that could be substantially affected by the proceeding.<sup>113</sup> Both require that a judge stay informed about the financial interests of his spouse.<sup>114</sup>

The Code of Conduct and § 455 differ in their standards that allow divestment of financial interests to avoid disqualification. Section 455 sets a higher standard, requiring that “substantial judicial time [must have been] devoted to the matter” before divestment of a financial interest would allow a Justice to continue working on the case.<sup>115</sup> And while the divestment provision of the Code of Conduct applies “because of a [Justice’s] financial interest,”<sup>116</sup> the divestment provision of § 455 applies “because of the *appearance* or discovery” of a financial interest in the matter.<sup>117</sup> Because § 455 sets the higher standard, the Code of Conduct for Justices of the Supreme Court of the United States has no practical effect on the Justices’ divestment practices.

A final difference between the Code of Conduct for Justices of the Supreme Court of the United States and § 455 is that the Code of Conduct makes no provision for waiver of a ground for disqualification, while § 455 does. Only when the ground for disqualification arises under § 455(a), which requires recusal when a judge’s “impartiality might reasonably be questioned,” can the parties waive the disqualification requirement.<sup>118</sup> By contrast, the Code of Conduct for Justices of the Supreme Court of the United States makes no mention of party waiver of certain grounds for disqualification. Again, because § 455 already applies to the Supreme Court, the Code of Conduct does not change the waiver rules that already applied to Supreme Court cases.

his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding”).

112. Compare CODE OF CONDUCT FOR JUSTICES OF THE SUP. CT. OF THE U.S. Canon 3B(2)(d)(i)–(ii), (iv) (SUP. CT. OF THE U.S. 2023) (requiring recusal when the Justice or Justice’s spouse is “a party to the proceeding, or an officer, director, or trustee of a party,” “acting as a lawyer in the proceeding,” or “likely to be a material witness in the proceeding”), with 28 U.S.C. § 455(b)(5)(i)–(ii), (iv) (requiring recusal when the judge or his spouse is “a party to the proceeding, or an officer, director, or trustee of a party,” “acting as a lawyer in the proceeding,” or “to the judge’s knowledge likely to be a material witness in the proceeding”).

113. Compare CODE OF CONDUCT FOR JUSTICES OF THE SUP. CT. OF THE U.S. Canon 3B(2)(d)(iii) (SUP. CT. OF THE U.S. 2023) (requiring recusal when the Justice or Justice’s spouse is known by the judge “to have an interest that could be substantially affected by the outcome of the proceeding”), with 28 U.S.C. § 455(b)(5)(iii) (requiring recusal when the judge or judge’s spouse is “known by the judge to have an interest that could be substantially affected by the outcome of the proceeding”).

114. Compare CODE OF CONDUCT FOR JUSTICES OF THE SUP. CT. OF THE U.S. Canon 3B(5) (SUP. CT. OF THE U.S. 2023) (“A Justice should keep informed about the Justice’s personal and fiduciary financial interests and make a reasonable effort to keep informed about the personal financial interests of the Justice’s spouse and minor children residing in the Justice’s household.”), with 28 U.S.C. § 455(c) (“A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.”).

115. 28 U.S.C. § 455(f).

116. CODE OF CONDUCT FOR JUSTICES OF THE SUP. CT. OF THE U.S. Canon 3B(7) (SUP. CT. OF THE U.S. 2023).

117. 28 U.S.C. § 455(f) (emphasis added).

118. *Id.* § 455(a), (e).

### C. *Analysis*

As discussed in Part I, ethics rules often have a negative impact on the spouses of public officials.<sup>119</sup> The connection between ethical requirements and spousal autonomy requires an approach that respects the interplay of the two issues. The Code of Conduct for Justices of the Supreme Court of the United States formalizes the applicability of the body of existing ethical rules without displacing the careful balance that the recusal rules and advisory opinions previously created. In doing so, the Code minimizes the danger of inhibiting spousal autonomy while also promoting public confidence in the judiciary.

The distinction between rules and standards is a familiar one in the law.<sup>120</sup> Rules set out requirements *ex ante* based on “well-specified, easily ascertainable facts.”<sup>121</sup> On the other hand, standards operate at a higher level of specificity, “provid[ing] a general description of the required conduct, based on substantive objectives and values.”<sup>122</sup> While 28 U.S.C. § 455 and the Code of Conduct provide concrete rules for certain situations,<sup>123</sup> the advisory opinions contain numerous examples where individual discernment is the answer to difficult ethical questions in fact-specific situations.<sup>124</sup> Some ethical questions are easily resolved: a judge should not rule in a case where he or his spouse has a direct financial interest.<sup>125</sup> Others are less clear: when does a spouse’s employment by a law firm constitute a financial interest, and does the answer to that question depend on whether the relevant party is the judge or a law clerk?<sup>126</sup> Especially when countervailing interests like spousal autonomy intersect with these questions, it is crucial to distinguish between scenarios requiring rules and those requiring guidance.

119. See *supra* Part I.

120. See, e.g., Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1685–88 (1976); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 560 (1992); Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985); Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 969–96 (1995).

121. Daphna Lewinsohn-Zamir et al., *Law and Identifiability*, 92 IND. L.J. 505, 540 (2017).

122. *Id.*

123. See 28 U.S.C. § 455(b)(5)(ii) (requiring recusal in cases where a judge’s spouse acts as a lawyer in the proceeding); CODE OF CONDUCT FOR JUSTICES OF THE SUP. CT. OF THE U.S. Canon 3B(2)(d)(ii) (SUP. CT. OF THE U.S. 2023) (same).

124. See U.S. COMM. ON CODES OF CONDUCT, *supra* note 94, at 205–10 (evaluating recusal based on several factors in cases involving a judge’s spouse’s business relationships).

125. 28 U.S.C. § 455(b)(4); CODE OF CONDUCT FOR JUSTICES OF THE SUP. CT. OF THE U.S. Canon 3B(2)(c) (SUP. CT. OF THE U.S. 2023).

126. Compare U.S. COMM. ON CODES OF CONDUCT, *supra* note 94, at 76–77 (a judge must recuse when his spouse is an equity partner at a law firm involved in a case but recusal is not mandated when his spouse is an associate or non-equity partner), with *id.* at 66–67 (a judge’s law clerk should not work on any cases of the firm that employs the law clerk’s spouse, regardless of whether the spouse is an associate, non-equity partner, or equity partner because clerks are not “as steeped in or sensitive to the ethical issues that govern a judge’s conduct” and because “the disqualification of a judge is far more disruptive to the administration of justice than the disqualification of a law clerk”).

In addition to preserving the preexisting balance between statutory rules and advisory opinions, the Code of Conduct itself recognizes that in some areas, rules are necessary, while in other areas, standards are more fitting. First, the provisions of the Code relating to financial interests sensibly contain rules: “A Justice should disqualify himself . . . [when] [t]he Justice knows that the Justice . . . or the Justice’s spouse . . . has a financial interest in the subject matter in controversy.”<sup>127</sup> The economic conception of marriage is now dominant,<sup>128</sup> and many if not most married couples share finances, so the rules that equate spouses’ financial interests are logical. While there is an obligation for the Justices to keep informed about their spouses’ financial interests,<sup>129</sup> there is no corresponding duty to keep informed about spouses’ personal or political interests. This distinction appropriately safeguards judicial spouses’ abilities to pursue their own career and political interests without unduly interfering with their spouse’s job by constantly triggering recusal. A web of ethics rules with more specific mandates regarding the Justices’ duty to investigate possible conflicts due to a spouse’s work or political activities would be overly time-consuming and would practically result in significant limitations on spousal activity.<sup>130</sup>

Finally, there is an open-ended standard contained in the Code: “A Justice should disqualify himself or herself in a proceeding in which the Justice’s impartiality might reasonably be questioned, that is, where an unbiased and reasonable person who is aware of all relevant circumstances would doubt that the Justice could fairly discharge his or her duties.”<sup>131</sup> Because the Code implements a reasonable person standard, its application is to some extent influenced by public opinion. The legal structures put into place by coverture prove that social understandings and expectations of marriage have a direct impact on the law. Although coverture’s constraints on women have mostly dissipated, the doctrine of marital unity and separate spheres ideology continue to shape societal expectations of spousal behavior. The current conversations regarding Supreme Court ethics exhibit this phenomenon, prioritizing the establishment of rigid ethical rules to the detriment of spousal autonomy.

A system of absolute rules regarding spousal behavior is more reminiscent of coverture than the current system. Instead of rushing to the conclusion that the spouses of Supreme Court Justices should not be involved in politics or have high-profile careers, it is important to reinforce the idea that marriage does

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127. CODE OF CONDUCT FOR JUSTICES OF THE SUP. CT. OF THE U.S. Canon 3B(2)(c) (SUP. CT. OF THE U.S. 2023).

128. *See supra* note 51.

129. CODE OF CONDUCT FOR JUSTICES OF THE SUP. CT. OF THE U.S. Canon 3B(5) (SUP. CT. OF THE U.S. 2023).

130. *See supra* text accompanying note 58.

131. CODE OF CONDUCT FOR JUSTICES OF THE SUP. CT. OF THE U.S. Canon 3B(2) (SUP. CT. OF THE U.S. 2023).

not require spouses to lose all sense of independent identity or to abandon their lifelong ambitions. The growing prevalence of modern ideas of marriage as the union of two people who maintain their individual identities and autonomy<sup>132</sup> suggests that judicial spouses' maintenance of independent careers is a development that society is poised to accept.

#### CONCLUSION

While commentators have dissected the potential flaws and shortcomings of the newly adopted Code of Conduct for Justices of the Supreme Court of the United States,<sup>133</sup> not enough consideration has been given to the important countervailing interest of spousal autonomy. The legal constraints imposed on women under coverture have mostly dissolved, but coverture's legacy lives on in ethics rules that assume that any activity undertaken by either spouse necessarily has some connection with or effect on the non-actor spouse. These ethical requirements operate in a gendered way, disproportionately impacting the political and career opportunities of the wives of public officials.

The interplay between judicial ethics and spousal autonomy requires a thoughtful approach that ensures the judiciary's integrity while avoiding overly broad regulations. The Code of Conduct's compilation of existing ethical requirements recognizes that stricter recusal requirements would remove fact-specific determinations that properly balance ethical requirements with the need for spousal freedom. The preexisting framework of statutory rules combined with advisory opinions provides a balanced approach that addresses ethical concerns without unnecessarily curtailing spousal autonomy. Despite the current focus on the Supreme Court, progress ultimately depends on the public's unequivocal rejection of the notion that the spouses of Supreme Court Justices must forfeit their own careers and ambitions.

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132. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (“[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup.”); Karli Ramirez, *To Catch a Snooping Spouse: Reevaluating the Roots of the Spousal Wiretap Exception in the Digital Age*, 170 U. PA. L. REV. 1093, 1096 (2022) (“[M]arriage has evolved from an institution built on the notion that husbands are their wives’ keepers to a partnership in which each spouse retains a certain level of autonomy over their private affairs.”); *id.* at 1103–04 (noting the “distinct ideological shift[] . . . away from marital unity to marital individualism”).

133. See *supra* text accompanying notes 9–11.

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