

## Breaking Down the Supreme Court's Code of Ethics

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**[00:00:00] Jeffrey Rosen:** Last week, the Supreme Court announced that it has formally adopted a code of ethics endorsed by all nine justices. Hello, friends. I'm Jeffrey Rosen, President and CEO of the National Constitution Center and welcome to We The People, a weekly show of constitutional debate. The National Constitution Center is a non-partisan nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people.

**[00:00:25] Jeffrey Rosen:** In this episode of We The People, we'll dive into the new Supreme Court ethics code and we'll discuss outstanding questions about how it'll be applied and enforced. Joining me to discuss this important question is Professor Daniel Epps of Washington University School of Law and Professor Stephen Vladeck of the University of Texas School of Law.

**[00:00:45] Jeffrey Rosen:** Daniel Epps is a professor at Washington University School of Law. His work focuses on Supreme Court reform and he's co-written with Ganesh Sitaraman about proposals to reform the Supreme Court. He currently co-hosts Divided Argument with Professor William Baude, a podcast that analyzes the court's work. Daniel, it's great to have you back on We The People.

**[00:01:05] Daniel Epps:** Glad to be here, Jeff. Thank you.

**[00:01:07] Jeffrey Rosen:** And Steve Vladeck holds the Charles Alan Wright Chair in Federal Courts at the University of Texas School of Law. He's the co-host together with Professor Bobby Chesney of the National Security Law Podcast and he's the Supreme Court analyst for CNN. He's editor and author of One First, a weekly newsletter about the Supreme Court and the New York Times bestselling book, The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic. Steve, it's great to welcome you back to We The People.

**[00:01:35] Stephen Vladeck:** Thanks, Jeff. Great to be back.

**[00:01:38] Jeffrey Rosen:** Dan, you told The New York Times that the new code of ethics reflects a recognition, if nothing else, that the court had the act. You said it's good that they did this. It's good that they feel some obligation to respond to public criticism and act like they care which you added. In terms of the content, it doesn't seem to move the ball much. Tell us more about your general thoughts about the Supreme Court ethics code.

**[00:02:01] Daniel Epps:** Yeah. So two different points. The first one being that at least in terms of some statements by individual justices, the response to the series of ethics controversies that have been going on for the last number of months. The response of some individual justices, and particularly, I think it's fair to say Justice Alito, has been, "This is ridiculous. This is partisan criticism. Nothing to see here. I can't believe anybody would second guess us."

**[00:02:37] Daniel Epps:** And this statement this press release you know, with the attached code of conduct, doesn't take that approach. It takes the approach that, there's been a misunderstanding in the public. The people seem to think we don't follow any ethics rules, and we should correct that. We should tell people, actually we do follow ethics rules and here are the rules. And I generally think it's a good thing if the court at least acts like it has some obligation to show the public that it's legitimate, that they deserve our respect, and really to not act like they're holding people who maybe don't agree with them in contempt, which I think sometimes we see that attitude from the justices in public statements.

**[00:03:31] Daniel Epps:** So I think this is a step in the right direction and I think it's striking that they all were able to agree with it and especially given that individual justices had said things in the last recent months and years about, "Oh, maybe we're working on this in the background, but there's not necessarily agreement."

**[00:03:51] Daniel Epps:** I didn't necessarily expect that they would be able to all agree, not just on the content so much, but just agree to even do this, right? Agree to even produce a document like this. So I think that's good.

**[00:04:04] Daniel Epps:** In terms of the content, my sense is that really it is what it purports to be, which is not a radical change from prior practice but basically what they claim to be sort of a set of principles that come from various places that they follow, that they've never kind of gotten together and put all in one place.

**[00:04:31] Daniel Epps:** And so, it doesn't, I think purport to change any of the rules that the justices follow or at least claim to be following. But it does put it all in one place, and that's something, right? For members of the public who are trying to evaluate what the court is doing, you know, you can say, "Well, they put out the statement in 1991 or there's this thing by Justice Scalia about his recusal."

**[00:04:59] Daniel Epps:** And it's helpful for people to be able to say, "Okay. What are the rules they follow? Let's take a look at it, and maybe this doesn't break new ground, but okay." We can, we can hold up their actions in light of this. We can say, "Does it square with this, their own set of rules?" And then, we can ask further question, which is, are these good rules or do we need more?

**[00:05:19] Jeffrey Rosen:** Steve in your Substack post, one and a half cheers for the Supreme Court, you said that against the backdrop of the court's initial refusal to adopt a code, the fact that the court felt the need to take even the half steps reflected in the code of conduct is to me really striking. Tell us more about that.

**[00:05:37] Stephen Vladeck:** Yeah. I mean I think what Dan said is exactly right. I mean it's been seven and a half months since ProPublica published its first couple of stories about Justice Thomas and then the subsequent stories about Justice Alito. And I think it's this is a court that as you guys know very well, moves glacially when it moves at all and that it's moved this much in less than eight months is nothing short of remarkable.

**[00:06:00] Stephen Vladeck:** To me, that the important point is that even if you are unsatisfied, as I am with what they actually adopted, and even if you think that there's still the pesky little problem of enforcement that the code doesn't address and couldn't address, it is still a remarkable concession on the part of the unanimous court that it actually has some responsibility to assuage public concern and to respond to this kind of public pressure in ways that, as Dan said, Justice Alito had pushed back against rather vigorously in an op-ed in the Wall Street Journal and a pair of interviews in the Wall Street Journal.

**[00:06:43] Stephen Vladeck:** This is why I'm sort of two minds on this. I think it's a remarkably salutary development from the perspective of the court reminding us that we matter and that public discussion of public debate about the court actually resonates inside the court, while also I think highlighting the extent to which there's still a long way to go and in which the sort of the broader problem that I think the ethics piece is just a symptom of, which is a more holistic lack of accountability on the court's part, really is not gonna be solved by the justices alone and we should not expect it to be solved by the justices alone.

**[00:07:26] Stephen Vladeck:** And so, I think that's why you really do have both sides of the coin in the release of this remarkable and yet I think deeply flawed document.

**[00:07:36] Jeffrey Rosen:** Both of you talked about helping the public feel like their views matter and there's a sentence in the ethics code, which you both noted the justices said, "The absence of a code has led in recent years to the misunderstanding that justices of this court, unlike all other jurists in the country, regard themselves as unrestricted by any ethics rules."

**[00:07:58] Jeffrey Rosen:** Dan, did you take that as a defensive statement or a candid statement? And, what did it say about the justices' attitude toward public opinion?

**[00:08:06] Daniel Epps:** Yeah. I don't know if I would necessarily call it defensive in the pejorative sense, but I do think that part of the statement that you zeroed in on is really, to me, the most striking part of it, because it is a direct acknowledgement that about what the public thinks about the court, right? Which we see the court do sometimes, in certain cases the court will sometimes say, "Well, we have to do this" This came up in abortion cases. "We have to do X or Y so that we have public legitimacy."

**[00:08:42] Daniel Epps:** It's very controversial, but for the most part, the justices seem to rest on this idea that we're just gonna do our jobs and it's up to other people to make decisions about whether we're doing them well. And here is a place where every single justice on the court I think the statement, it's a statement of the court and then later you have all the justices signing on to the Code of Conduct. But we're seemingly willing to say, "Gosh, there's this public misconception and we should correct the record. We should tell you all that that's not the way it works."

**[00:09:19] Daniel Epps:** I think it's striking and I think it's important. I'm basically where Steve is. I think that this part of it is commendable.

**[00:09:29] Jeffrey Rosen:** Steve, what do you make of that sentence? You said if the question is what led to the misunderstanding the statement identifies, it sure seems like the culprit is not the lack of a formal code, but the alarming reports of behavior by several of the justices and you suggested that a more candid response might have been more appropriate. Tell us more.

**[00:09:48] Stephen Vladeck:** Yeah. I mean more candid, Jeff, or at least less uncandid if those are different things right? I think it's pretty clear even to folks who are more sympathetic to the court and to the justices whose behavior has been the subject of all of these stories, that it was the stories that sparked this conversation and not the absence of an ethics code by itself.

**[00:10:11] Stephen Vladeck:** I think, too clever to try to suggest, "Oh, we're here to correct a misimpression that you had based on the absence of this code." When insofar as it's a misimpression, as opposed to just an impression it's not because folks went looking for a Supreme Court ethics code and didn't find one, it's because folks have been reading these very salacious and troubling stories from ProPublica and other outlets that have raised, I think, very serious questions, not in all cases, I think some of the stories have been a little ridiculous, but in at least some cases, about the behavior of at least two justices.

**[00:10:50] Stephen Vladeck:** It seems like it might not have been realistic to expect the court to say that this was a reaction to these stories, but then I just wish the court had said nothing, right? Then I just wish that there had been no attempt to sort of attribute cause, because now it looks like the statement is trying to say, "You poor, misinformed members of the public" when it seems like what's really going on is, "You worried, troubled members of the public, let us try to tell you why you shouldn't be worried." Those are different conversations.

**[00:11:24] Stephen Vladeck:** I think it was an awkward note to start on, 'cause literally, right? Like the fourth or fifth sentence of the opening statement and it really sort of makes this whole project seem a lot more defensive than I think it had to be to be successful.

**[00:11:40] Jeffrey Rosen:** Of course, the big news items that gave rise to the ethics code include Justice Alito's Wall Street Journal interviews, the questions about Justice Thomas's great nephew's tuition, Justice Sotomayor's book sales. Dan Epps, would the new code have changed the way the court deals with any of those allegations or not?

**[00:12:03] Daniel Epps:** My understanding is not necessarily that it purports to the extent that the justices have acknowledged that at least in some cases there are certain things that should have already been reported as gifts. But it does not purport to go above and beyond pre-existing requirements saying the justices shall never accept gifts and so forth.

**[00:12:30] Daniel Epps:** It suggests that the justice should comply with restriction on acceptance of gifts and the prohibition and solicitation of gifts set forth in the judicial conference regulations of gifts now in effect.

**[00:12:42] Daniel Epps:** It does have some language about justice's family members. You could say, "Well, are there implications about this for Justice Thomas and Jenny Thomas?" There's been some questions raised about sources of payments to her. They're not categorized as gifts. But it certainly doesn't have something that says justices shall not accept gifts.

**[00:13:08] Daniel Epps:** There are questions you can make about different things, right? There's the justices taking trips on private jets which is one thing. But there's some more recent allegations, in particular, the one that I think stands out is this question about Justice Thomas's RV. He got a loan from a friend. We have some serious uncertainty about exactly the terms of the loan and was it forgiven as a gift?

**[00:13:44] Daniel Epps:** And so in that case, I think something that would really be, demand the justices be maybe more forthcoming, right? Maybe there's reasons that we want them to be even more forthcoming than we expect kind of ordinary judges to be. And I don't see that.

**[00:14:04] Jeffrey Rosen:** Steve, the section that Dan flagged is Section D financial activities. D3, a justice should comply with restrictions on acceptance of gift and prohibition on solicitation of gifts set forth in the judicial conference regulations on gifts now in effect.

**[00:14:18] Jeffrey Rosen:** And then, there is some further definition of what a member of a justices family means. Here it means any relative of a justice by blood, adoption or marriage or any person treated as a justice as a member of the justices' family. Do those definitions of familial relationships change the context? And how would these allegations be dealt with if Justice Thomas were an appellate judge?

**[00:14:42] Stephen Vladeck:** I don't know that they actually change any of the episodes that have been reported. I think you can make a pretty good argument that absolutely none of the stories that have been reported would clearly fall on the wrong side of these new rules any more than they already did. Right? That it doesn't change the status quo.

**[00:15:01] Stephen Vladeck:** If it were a lower court judge, I mean we have a process and part of the problem, Jeff, let me take a half a step back, is much of what's happening publicly is, ProPublica runs a story and folks who might already be somewhat skeptical of the court or some of the justices, say, "Oh, my gosh, here's another example of corruption on the court." And folks who are defensive of those justices or the court rush to defend them by, sort of conjuring arguments of varying degrees of persuasiveness about why nothing wrong happened.

**[00:15:34] Stephen Vladeck:** And Jeff, that's where it ends right? That the debate is hashed out in the court of public opinion and there's no arbiter of who's right. And it seems to me that that problem persists even under this new code.

**[00:15:46] Stephen Vladeck:** First, right, even the provision you read says should not shall suggesting that it's not even a mandate, it's just a sort of a norm, like that we should do this. But second, Jeff, who's the person who's going to decide the next time there's one of these cases, whether, in fact, a family member received improper consideration, right? Whether the person at issue falls within the definition of family member, which is to some degree as you read subjective.

**[00:16:13] Stephen Vladeck:** And the answer, at least under the current system, is the justices by themselves. That's a contrast to the lower courts where the lower courts, there is a process in place where if a complaint is filed, there's a mechanism by which other judges can review the complaint, can act on the complaint, can arbitrate whether in fact the complaint of conduct transgress the relevant rules.

**[00:16:36] Stephen Vladeck:** That's not possible for the justices. I am fairly critical of the court and agree that the Constitution forbids putting someone else above the court when it comes to judging the justices' behavior. But there's other ways to get at solving that problem.

**[00:16:53] Stephen Vladeck:** The code that the justices put out last week is just mum on the subject that even in the future, we're going to have the same interpretive disputes where the justice does whatever the justice is going to do. The justices' defenders try to rationalize it, and the justices critics say, "No, this violates the rules." And the conversation just repeats in this permanent feedback loop.

**[00:17:17] Jeffrey Rosen:** There are canons parsing the rules included as part of the code, and there's one detail which seems new. It says, "In regard to the financial disclosure requirements regarding teaching and outside-earned incomes, a justice may not accept compensation for an appearance or a speech but may be paid for teaching a course of study at an accredited educational institution."

**[00:17:42] Jeffrey Rosen:** And then, it says, "Associate justices must receive prior approval from the Chief Justice to receive compensation for teaching." The Chief Justice must receive prior approval from the court. And then finally, compensation for writing a book is not subject to the cap. Dan, is that new? And why that interesting mechanism of associate justices getting approval from the chief and the chief from the court?

**[00:18:04] Daniel Epps:** Yeah. I think that's quite interesting. Steve may know, but I don't know for certain. My sense is that's not new but maybe not necessarily something that is in writing somewhere else. I'm not totally sure. There are other places where the Chief Justice has a certain kind of decision-making power with respect to other justices.

**[00:18:23] Daniel Epps:** The Chief Justice has to kind of certify that a retired justice is doing their job in order to continue to have an office and a law clerk. I think it's a very important thing for you to highlight because it does not fully answer, but it does maybe give us the beginnings of an answer to Steve's concern.

**[00:18:42] Daniel Epps:** Just to back up a second, I think there are two concerns you can raise about this. And one is, what's the content? What are the rules? And the other is, what's the enforcement mechanism? And who decides?

**[00:18:54] Daniel Epps:** And that shows you that, there is some hypothetical way you could imagine having the decider not be a justice him or herself, right? You could make it just the chief who reviews these things. And if there's any complaints you could make it the other justices collectively and not including the justice who's the subject of the complaint and put them in a position where they're supposed to kind of look at it.

**[00:19:21] Daniel Epps:** Now, in terms of practical effect I'm skeptical that even that solution would make much of a difference because you think about the justices, they're all going to work together for decades. And they all are trying to be collegial, play nice with each other. And I think for any given justice, they're probably gonna be disinclined to go out of their way to call out one of their colleagues and say that their colleagues is behaving unethically. Because first of all, they wanna just get along and not be acrimonious in the conference room, but maybe they wanna kind of be able to persuade that justice on a substantive legal point in the future even if they disagree about a lot of things.

**[00:19:59] Daniel Epps:** And so, I think any given justice is not gonna wanna poison the well. Now, as a response to that, you could say, "Well, maybe no justice or the chief is gonna be willing to call out a colleague." That said, if you have to write it down and check with somebody else, maybe that changes your behavior. Maybe if you're saying, "I have a friend who's going to forgive this massive loan for a vehicle."

**[00:20:26] Daniel Epps:** And again, we're not 100% sure exactly what happened there. And, and I'm just going to have to run this by my colleagues. You might think I really don't wanna do that. Like that, that's going to make feel a little awkward, and maybe they're going to ask some questions about it. And maybe I should just, just not do that.

**[00:20:40] Daniel Epps:** So, maybe that's something, even if the other justices are maybe not gonna call them out and in any event, you know, don't have the ability to remove their colleague from the bench. I mean the other justices can't say, "You're impeached and you're removed from office." That's just not the way it works. And so, but maybe that's something.

**[00:21:01] Jeffrey Rosen:** Steve, what do you make of that provision authorizing the chief to give permission to the associates and the court to authorize the chief. And I'm just gonna read a little more of that provision, which is interesting. Justices may not have outside earned income, including income from teaching in excess of an annual cap established by statute and regulation, although the book writing is exempt from the cap.

**[00:21:24] Jeffrey Rosen:** Do you happen to know what that cap is? And then, this kind of closes by saying, "In deciding whether to speak before any group of justice should consider whether doing so would create an appearance of impropriety in the minds of reasonable members of the public." What do you make of all this?

**[00:21:40] Stephen Vladeck:** It's funny that one of my friends Leah Litman, who's one of the hosts of the Strict Scrutiny Podcast, refers to this as the as the Federal Society permission provision right? That is basically sanctioning the justices practices of going to speak at the Federal Society conventions.

**[00:21:56] Stephen Vladeck:** I must confess, I am less troubled in the grand scheme of things by the justices speaking to groups like the Federal Society or the American Constitution Society, or going to, you know, other sort of institutions that have some perceived political ideological bend.

**[00:22:14] Stephen Vladeck:** I mean being part of public discourse is part of their job. I think that to me really pales in comparison to some of the more, in my view, shady and nefarious financial arrangements with wealthy benefactors, the travel, the gifts, etcetera.

**[00:22:30] Stephen Vladeck:** I do think the sort of the notion that the chief now has at least a little bit of, if not rulemaking power, at least norm setting power is an interesting step. But again, it is to call it a half measure is to radically overstate it. Right?

**[00:22:45] Stephen Vladeck:** The problem is who is actually going to police cooperation and compliance with these bounds? I've been on the soapbox about creating some kind of article three instructor general not necessarily so that you can have a disciplinary body. I don't think you could create an officer who could discipline the justices, but just as a way of having some kind of ombudsperson monitoring when the justices are even complying with the rules they've laid down that could then publicly report that compliance, right? To us, to Congress, to whomever, like that to me seems like a much more meaningful step toward actually ensuring that whatever the rules are followed the chief can set a cap.

**[00:23:32] Jeffrey Rosen:** Your proposal of an inspector general raises the important question of enforcement. Of course, this code decided in favor of self-enforcement, but the cannon ends by saying after quoting Justice Tom Clark about the need for judges to bear the primary responsibility for requiring appropriate judicial behavior. The cannon says the same is true for justices to assist the justices in complying with these cannons. The Chief Justice has directed court officers to undertake an examination of best practices, drawing in part on the experience of other federal and state courts.

**[00:24:06] Jeffrey Rosen:** The court will assess whether it needs additional resources in its clerk's office or office legal counsel to perform initial and ongoing review over cues on other ethics issues and will also consider whether amendments to its rules on the disclosure obligations of parties and counsels may be advisable.

**[00:24:21] Jeffrey Rosen:** Dan, right now the clerk's office of legal counsel is rather small. Is this suggesting that it might be ramped up and how significant is this part of the cannon?

**[00:24:34] Daniel Epps:** You know I wouldn't necessarily take that as a promise for the court to do anything. I mean the court sometimes says, "You know, we'll look at that." And then, they look at it and they say, "Everything is fine."

**[00:24:49] Daniel Epps:** Now I mean one thing it might be suggesting is less that they're going to hire some ethics expert who's gonna give them substantive advice about, "Should you accept this gift?" It might be something like we're gonna have a better process for identifying recusals. And there have been some examples where justices have voted in cases where it turns out they own stock and to my understanding the process heretofore has been a lot of it has been chambers based.

**[00:25:24] Daniel Epps:** You've got the clerks, they're sort of looking for cases in which Justice Kagan participated as solicitor general. Maybe having a slightly better process there of kind of double checking let's make sure that this isn't a company that's owned by a company that Justice Alito has shares in. That's probably more what I'm imagining rather



than someone who's gonna really be addressing the kind of larger concerns that we're worried about.

**[00:25:54] Daniel Epps:** That's not nothing. I mean it raises this other question about, should justices own individual stocks at all. I strongly believe that they should not. I think it's inappropriate. There's ways that they can sell their stock without incurring capital gains. I think they should all take advantage of that. But if they're gonna continue to do that, I mean it would be great, it would be great for them at least to not to avoid cases where they're voting because, I don't think that any of them are consciously voting in ways that are designed to pump up stock prices of stocks they own.

**[00:26:26] Daniel Epps:** Nonetheless, as this code recognizes this kind of rules are not just about avoiding impropriety. They're about avoiding the appearance of impropriety, which really matters. We need people in the public to believe that our judges are not crooks, right? We need them to really believe it and that requires them to do more than just not actually be corrupt. It requires them to be a little bit more removed and to erect kind of a wall, right? That is a little bit of a ways away from actually the core of unethical conduct.

**[00:27:01] Jeffrey Rosen:** Steve in talking about enforcement, you've noted that Congress historically has exercised great substantive control over the courts' jurisdiction, it made the courts entire 1802 term disappear when Congress eliminated it in the fight of the Jeffersonians against Chief Justice Marshall, and also that in 1868 dispute over the constitutionality of military governments in the South, Congress stopped the court from resolving individual cases. Your great book on the court reviews some of this history. What is the history of Congress's battles with the Supreme Court? Tell us about what Congress could or should do in the future.

**[00:27:42] Stephen Vladeck:** I think Jeff it's easier than it should. So they have a rich history of Congress using any number of levers to nudge the court in different directions. I mean you mentioned some of them. I recently wrote about how Congress used to use the control of the justices pensions as a way of nudging justices off the court or keeping them on the court right? Congress using its power over circuit riding as a way of keeping the court at least somewhat in line with Congress's preferences.

**[00:28:12] Stephen Vladeck:** There's a lot Congress could do. Congress could expand the courts docket. I mean, right? The courts currently hearing the fewest cases each term since 1864. All with an eye towards sort of getting the court to be more beholden to Congress and to the democratically elected branches.

**[00:28:29] Stephen Vladeck:** What should Congress do? The real question for me remains accountability and just how do we put pressure on the justices to, as Dan put it, right? To avoid not just impropriety, but to actually be incentivized to avoid the appearance of impropriety. The code of conduct is not gonna do it by itself. So whether that means having some kind of ombudsperson who can actually look at all of this stuff, right? Whether it's starting to talk about whether some of the courts budget should be beholden to the justices agreeing to certain things. Right?

**[00:29:07] Stephen Vladeck:** I mean one statistic I think a lot of folks don't know. The Supreme Court's budget request for this fiscal year is \$151 million, only three million of that is the justices' salary, which are constitutionally protected. The other 98% is leverage. And so, to me, it's not so much about any one specific reform as it is about Congress once again just reminding the court that they're one of three branches.

**[00:29:32] Stephen Vladeck:** One of the things the court should be doing is trying to look like it is responsive to public pressure, to public pushback, not because we want the court to follow the election returns, we have an independent court for a reason, but judicial independence is not supposed to be the same thing as judicial unaccountability.

**[00:29:50] Stephen Vladeck:** For me the story is, "Hey, Congress, you are best situated to leverage the court, to put pressure on the justices so that they actually want to look like they're over enforcing these rules." You have to take some measures to actually get us there, to actually move us in that direction.

**[00:30:10] Jeffrey Rosen:** Dan, what does the history of Congress's efforts to influence the court say now that we're back in one of the most polarized times since before the Civil War? For much of the 19th century as Steve suggested there were open attempts by Congress to control the court, eliminating its term in the Jeffersonian era, expanding the number of seats leading up to the Civil War. Things really didn't settle into a nonpartisan harmony until after the Taft reforms of the 1920s and the defeat of FDR's court packing plan.

**[00:30:43] Jeffrey Rosen:** Now that things are really polarized, might we see a return to that kind of tug of war and is that good or not?

**[00:30:51] Daniel Epps:** I agree largely with what Steve just said in this, this question is something I've thought about. I have a recent piece co-written with Alan Trammell about jurisdiction stripping, about which is the tool by which Congress can do some of what Steve was talking about, remove cases from the court's jurisdiction as a way to nudge them.

**[00:31:11] Daniel Epps:** And one of the things, our takeaways is this strategy is fraught, right? The court can push back on it, but doing it and also threatening to do it does send a signal, right? It tells the court we're watching you and you have gotten a little bit out of line with a big chunk of public opinion. and you know, some of them care about that, some of them don't.

**[00:31:34] Daniel Epps:** I don't think that they should just take an opinion poll and that should decide every case. But I do think that if they're doing stuff that is extremely unpopular very controversial very divisive that might be a place where we want courts to step back from the brink a little bit. And there's a ton of historical examples of them doing that. Sort of seeing that they're facing a lot of the examples that Steve talked about in your question.

**[00:32:06] Daniel Epps:** Our places where the court was maybe gonna do something and Congress was like here's what we're gonna do or did something very aggressive and the court maybe stepped back from the brink.

**[00:32:17] Daniel Epps:** I think are we going to see that? We're already seeing that. We're not seeing that in terms of Congress actually going out and passing jurisdiction strapped statutes. We're seeing that in terms of members of Congress proposing things that would have been radical and unthinkable. I don't know, maybe five years ago, six, seven years ago. Certainly a decade ago. We're seeing actual senators and members of the House of Representatives coming forward with court packing bills.

**[00:32:44] Daniel Epps:** Let's add justices. We're seeing people coming forward with bills that would impose term limits by statute. Now do any of those have a meaningful chance of passing today given where Congress is? No. But it's changing the conversation and if I was a justice, I certainly would feel maybe a little bit more like the institution is in jeopardy that it has been in decades.

**[00:33:09] Daniel Epps:** Now one other thing though to say about that long run of historical episodes, what we do also see historically is the court over time developing more and more power and prestige, right? The court now is pretty unrecognizable from the court 200 plus years ago where they didn't have a building. They were just sitting in the basement of Congress. And they were not the court now declares federal statute is unconstitutional all the time.

**[00:33:34] Daniel Epps:** They really have kind of put themselves in this position of, you know, we're the teachers and we're checking Congress's homework. That's newer in the long run of history. That something the court has kind of earned over a long time. And maybe we're gonna start seeing the old paradigm emerge, which is other branches saying, "You know, no. That's not what you are. You're co-equals but we have a big role in interpreting the Constitution. You're not right about everything."

**[00:34:04] Daniel Epps:** And maybe, over time we will start to see a little more of that equilibrium return.

**[00:34:11] Jeffrey Rosen:** Thanks so much for that and for letting us know about your new piece *The False Promise of Jurisdiction Stripping* written with Alan Trammell, which we'll post on the resource page.

**[00:34:22] Jeffrey Rosen:** Steve Vladeck, what does the history of efforts to control the court by Congress say about what kind of pressure is effective? And are there kinds of pressure, short of court packing, that might be effective in this era in the future?

**[00:34:41] Stephen Vladeck:** Sure. I mean I think one of the things that you really can get an appreciation for, especially if you look to before 1937. I mean we're, we're so fixated on thinking about the court packing fight in the FDR administration as the BLN doll. But there are lots of smaller examples of Congress nudging the court.

**[00:35:00] Stephen Vladeck:** During reconstruction, for example around about the same time the House had even just sort of introduced a bill to require a supermajority to strike down acts of Congress. You see the court actually taking a bit of a softer stance towards some features of reconstruction. In the sort of early 1900s, you see Congress responding to some of the court's decisions at the early years of the *Lochner* era, where the court is more aggressive

in striking down economic regulation. Congress responds by limiting the powers of individual federal judges to actually issue those kinds of injunctions.

**[00:35:36] Stephen Vladeck:** There are lots of examples that are very context specific, but that all have at their core the notion that Congress is not supposed to tell the court how to do its job. There's this delphic 1872 case *US versus Klein* that actually comes pretty close to saying that almost literally. But Congress can basically provide lots of carrots to the court to act in ways that Congress believes are more responsible.

**[00:36:03] Stephen Vladeck:** When the carrots don't work, that's when we get to the sticks. And I think part of the phenomenon that we are witnessing today, whether you're a progressive or a conservative, whether you have strong views about the court or not. What I think really makes our current court stand out is not its ideological orientation. It's the lack of dialogue between the court and the democratically elected branches.

**[00:36:27] Stephen Vladeck:** Justice Alito says in the *Wall Street Journal* in July, "Congress lacks the power to regulate us period." He's clearly wrong. But the fact that that idea is even in the zeitgeist I think is reflecting this absence, this departure of the kind of institutional pressure that historically I think put a lot more pressure on the court to behave.

**[00:36:48] Stephen Vladeck:** I mean just one really, really brief example when Justice Fortas resigned in May of 1969. He resigned at least largely because of pressure from his colleagues on the bench from Chief Justice Warren and from Congress. Where the concern was that if he stayed on the court, it would make the court look bad. It would undermine public confidence in the court.

**[00:37:14] Stephen Vladeck:** It's remarkable, lots of folks have sort of lined up the allegations against Justice Fortas with some of the reporting about Justice Thomas. Forget the sort of the factual relationship, right? It's remarkable that the institutional conversation has evolved, or I would say devolved, right? So much in a half century.

**[00:37:34] Jeffrey Rosen:** Dan, what does the Fortas example and this current example tell us about what kind of public pressure is effective? Today, as you both have suggested the court adopted the ethics code because of a broad bipartisan consensus that the justices shouldn't be above the law and they should be bound by ethics, rules along with other judges.

**[00:37:56] Jeffrey Rosen:** By contrast, in your article, the False Promise of Jurisdiction Stripping, which I'm now just reading the summary of it looks totally fascinating. You say that the conventional understanding is wrong that jurisdiction stripping is effective, although Congress may have the power to do it, in practical terms, it's unlikely to succeed because the court has ways of fighting back. But does that suggest that kind of openly partisan court curbing measures like jurisdiction stripping may not work whereas creating a public consensus about the need for good behavior might?

**[00:38:27] Daniel Epps:** So I'd certainly say that to the extent that everybody in the public agrees the justices are doing something wrong. That is gonna be much more effective as a regulatory tool, right? I mean the court is gonna be much more likely to respond to public criticism when it sees that criticism is coming from all sides.

**[00:38:51] Daniel Epps:** I wouldn't necessarily endorse the idea that it can't be effective if it's seen as kind of partisan. I think that you can look back at some of the very early historical examples, which you have to see through a partisan lens. Congress canceling the court's term. That was the product of a very intense partisan political debate.

**[00:39:15] Daniel Epps:** Steve mentioned the Fortas precedent, which I think is really fascinating because it has kind of flavors of both in the sense that there was this public once the news got out and I think it's probably fair to say that the stuff that we learned about Justice Fortas was maybe more troubling than what we've learned about Justice Thomas so far in that there was a little bit more reason to think there might have been an actual quid pro quo here from someone who had interest before the court.

**[00:39:45] Daniel Epps:** And so, there was enough kind of public controversy about that, that it was very, very hard, would have been very, very hard for him to remain on the court. That said, it was happening in this intensely partisan backdrop where President Johnson was trying to move him over to be chief justice. He was really close with President Johnson.

**[00:40:04] Daniel Epps:** Steve's book has some really fascinating stuff about Fortas's role in President Johnson's election to the Senate. And, the Republicans were trying to kind of stall things out so that they can get their own person on the court, which is ultimately successful.

**[00:40:21] Daniel Epps:** I don't think it shows you that things that are kind of initially motivated by partisan reasons can't be effective. It maybe depends a little bit on what exactly comes to light and how troubling people find it even if the initial motivation is partisan.

**[00:40:41] Jeffrey Rosen:** Steve, how much of the current controversy reflects concern about partisanship justices traveling with conservative donors, for example, or speaking at organizations devoted to conservative activities and how much has to do with appearance of ethics issues, stock ownership, and getting favors from friends. We historically have efforts to control the court, dealt more with partisanship with individual allegations of corruption.

**[00:41:11] Stephen Vladeck:** It's really hard to separate them out, Jeff, right? Because we're seeing such alignment between the critics of the court and the sort of the polarity of the justices who they're criticizing.

**[00:41:25] Stephen Vladeck:** The Fortas example is a great counter example, right? Fortas was a liberal Democratic appointee pushed off the court by a liberal Republican chief justice during a Republican presidency right? In a moment where the move was actually so perfectly institution preserving where Warren, I think to his credit thought it was more important for the institution to let Nixon fill Fortas' seat even though Warren and Nixon were, of course, bitter enemies dating back to their times in California together.

**[00:42:00] Stephen Vladeck:** I think part of the mess we're in today, Jeff, is because the court today is so uniformly divided, right? Because for the first time in the court history over the last 13 years. The ideological division among the justices perfectly aligns with the party of the president who appointed them, which had never been true before 2010.

**[00:42:22] Stephen Vladeck:** It is increasingly difficult to separate out what are partisan or ideological critiques from what are really institutional critiques. And I don't mean to go back to my book, but part of what the book is trying to do is to actually get us to talk about the court in more institutionalist terms in the hope that maybe there's common cause to be found across the ideological spectrum that it's a good thing for the justices to look like they're behaving above board right? That it's a good thing for the court to be perceived as not being in the pockets of wealthy benefactors.

**[00:42:57] Stephen Vladeck:** These ought to be uncontroversial non-ideologically infused principles and I think, Jeff, part of why it's so hard to have any meaningful conversation about Supreme Court form, part of why I think President Biden's Supreme Court Reform Commission wasn't able to make any headway is because we have so much trouble right now differentiating between the institutional critiques and the ideological critiques so that even when folks like me make institutional critiques, we are accused of being disingenuous and of sort of hiding ideological critiques behind institutional critiques.

**[00:43:32] Stephen Vladeck:** I think part of why it's been so hard to make progress on the court reform conversation at least outside of the court. And just to go back to where we started, part of why it's so remarkable that the court took this step in the first place.

**[00:43:46] Jeffrey Rosen:** That's an optimistic take on the current reform, as you say, it could be viewed as a triumph of institutionalism, and indeed the commentary on canon B notes that the Supreme Court consists of nine members who sit together the loss of even one justice may undermine the fruitful interchange of minds, which is indispensable to the Supreme Court's decision process. Here's all nine justices talking about why selective refusals can have a distorting effect on the institution itself.

**[00:44:15] Jeffrey Rosen:** Dan, in that sense is this a good thing for the ability of the court to act as a court?

**[00:44:21] Daniel Epps:** I do think it shows something important about the way the court is functioning right now. As Steve noted a moment ago we do have a court that is ideology matches partisan affiliation, right? I mean the justices are no longer party members but they were appointed by presidents of particular parties.

**[00:44:42] Daniel Epps:** I think there's a lot of reason to think that's troubling for many reasons. In part, it's gonna change how people perceive the court and whether it's political institution, but it does show you and the justices, I think really try very hard in various ways to convince the public that that's not what's happening behind the scenes.

**[00:45:02] Daniel Epps:** They talk about how much they like each other. They talk about how much they have in common. They talk about how they think they're all acting in good faith. And even the liberal justices who are really in terms of winning cases or not doing very well, they still try to remind us of that.

**[00:45:17] Daniel Epps:** So I mean this is just another example of that which is whatever their substantive disagreements about the law, they seem to all share some larger view about the institution and its integrity.

**[00:45:30] Jeffrey Rosen:** Steve, you've talked about in your great book ways that the court could shore up its institutional legitimacy. We see some other recent developments of the court reacting to public criticism of its practices including Justice Kavanaugh very recently endorsing the end of nationwide injunctions. Are there other areas where the court is responding to criticism and trying to shore itself up as an institution?

**[00:45:58] Stephen Vladeck:** One big one is how the court has been handling emergency applications. This is my soapbox so when you're a hammer, everything looks like a stay.

**[00:46:09] Stephen Vladeck:** I think the sort of the court has in response to criticisms from Justice Kagan and even from Chief Justice Roberts, I think has been a little more selective in, when it's granting emergency relief over the last 12 to 18 months. I think you can even date the sort of beginning of this trend to this very cryptic concurring opinion that Justice Barrett wrote in October 2021 in a case about whether healthcare workers in Maine could be required to be vaccinated against COVID.

**[00:46:39] Stephen Vladeck:** What that says to me is that there are contexts away from the high profile culture war disputes and away from high profile statutory and constitutional debates where the justices really are, or at least some of the justices really are thinking in institutional terms not necessarily the same way I would if I were them, but at least what makes the most sense for us at this stage?

**[00:47:06] Stephen Vladeck:** You mentioned Justice Kavanaugh's recent statement in the Florida anti-drag law case about nationwide injunctions. I think there's really an interesting emerging split between Kavanaugh and Barrett and the Chief Justice on one hand and Thomas, Alito, and Gorsuch on the other about these kinds of procedural maneuvers that to me is at least impart a response to the critiques that they've received.

**[00:47:32] Stephen Vladeck:** So I think that's another example. I think the court is sort of changing some of its behaviors in more subtle ways in response to public complaints. This is a really wonky one. Justice Alito, when he would issue administrative stays used to have them expire at 11:59 PM. Now they expire at 5:00 PM. I think that's a response to someone saying to him there's no reason to keep people up until midnight.

**[00:47:59] Stephen Vladeck:** Like these are little things, Jeff, but they are all I think signs of the justices actually listening to what folks are saying, not always saying, "Yes, you're right. We're gonna change it." But not always saying no. And I think, it should be telling to us that the place where this appears to have the most purchase is institutional issues about the court unrelated to specific substantive legal questions.

**[00:48:29] Jeffrey Rosen:** Very interesting indeed. Time for final thoughts in this great discussion as Thanksgiving approaches. Dan Epps, these are extraordinarily challenging times for the rule of law where the legitimacy of course may continue to be challenged on many fronts. Thoughts about ways that the Supreme Court productively can listen to institutional suggestions for shoring up its legitimacy and areas where it might continue to do that in the future.

**[00:49:02] Daniel Epps:** Yeah. It's a very hard, big picture question and I share the big picture concerns about the rule of law. I do think one really important component of that is for people to believe that law as a project is not partisan. And that's why going back to something we talked about a minute ago. That's why this idea that the justices now are party aligned in terms of ideology is so troubling if we have the conservative decisions are just Republicans and the liberal votes are always Democrats.

**[00:49:38] Daniel Epps:** I do think that can be threatening to that idea that people on the left are just gonna start saying, "Why should we listen to this court? This is a Republican court. What's in it for me?" Right?

**[00:49:51] Daniel Epps:** For the project of constitutionalism to work, and I think the project of law more generally, people have to be willing to abide by and respect decisions where they don't win. And I do think that we haven't lost that yet, but we are, that is, that notion I think is under threat more than it ever has been probably in a couple of generations.

**[00:50:19] Daniel Epps:** And to the extent the court can try to hold down the middle just a little bit I think that's gonna be really good for the country. I don't expect them to start flip-flopping on liberal conservative decisions all the time. I do think we know one reason why the court has been able to maintain so much prestige is that they really have decided cases that kind of both sides of our divided country like. We have a court that's made up of Republicans, but they still voted one of them voted in favor of gay marriage.

**[00:50:52] Daniel Epps:** The more the court can like not give in to the temptation to just opt for all the, you know, conservative wins. I think that's good for the rule of law, and the more that the liberal justices can try to do what they can to maintain that middle ground. I think that's really the court lives or dies in that space.

**[00:51:16] Jeffrey Rosen:** A great definition of judicial legitimacy. People have to be willing to abide by decisions where they don't win, you said, and to the extent the court can hold down the middle a little bit that's good. Steve Vladeck, reflections about ways that the court can maintain its nonpartisan legitimacy in a fiercely divided age as Thanksgiving approaches.

**[00:51:36] Stephen Vladeck:** Well, the justices control which cases they hear. And I think we don't account for that enough in talking about how the court looks. Jeff, I think it's entirely possible that by the end of this term there are gonna be a lot of stories about how the court took a moderate turn if for no other reason than because they're granting so many cases where the Fifth Circuit went very, very, very far to the right.

**[00:51:58] Stephen Vladeck:** And where I think the relevant point is not gonna be that the court is moderate, it's just that's gonna be less extreme than the Fifth Circuit, but that will have value unto itself. I think the real question and the one that we ought to at least start saying out loud is what the Supreme Court looks like depending upon the two most likely outcomes of the election next November. A Supreme Court during a second Biden administration or a Supreme Court during a second Trump administration, I think we're gonna have two very different views of what we're gonna want the courts' relationship with the political branches to look like in those two different administrations.



**[00:52:38] Stephen Vladeck:** And to me the way to sort of convince folks that this is not about ideology is exactly to Dan's point, right? Is to make the point that we're gonna want a legitimate court in both of those circumstances. And that might lead the court in different directions, right? But that's the common theme here is that unless you really don't want a court anymore and I'm not one of those progressives. How do we get a court that can be both a part of the separation of powers during the second Biden administration and perhaps the critical bulwark against a second Trump administration.

**[00:53:17] Stephen Vladeck:** And it's the kinds of reforms that are gonna shore up the court in both of those scenarios that we should be especially focused on over the next 12 months.

**[00:53:26] Jeffrey Rosen:** We're gonna want a legitimate court regardless of who wins the next election, fine non-partisan wisdom from Steve Vladeck. Thank you so much, Steve Vladeck and Dan Epps for a meaningful discussion of this very important topic as Thanksgiving approaches in 2023. Lots of gratitude to both of you and to We The People listeners for learning and growing and educating yourself about these crucially important constitutional issues during this important time for America. Thanks to all. See you soon.

**[00:53:59] Jeffrey Rosen:** Today's episode was produced by Lana Ulrich, Bill Pollock and Samson Mostashari, was engineered by Bill Pollock. Research was provided by Samson Mostashari, Cooper Smith, and Yara Daraiseh. Please recommend the show to friends, colleagues, or anyone anywhere who's eager for a weekly dose of constitutional debate. Sign up for the newsletter at [constitutioncenter.org/connect](https://constitutioncenter.org/connect). Always remember in your waking or sleeping hours that the National Constitution Center is a private non-profit.

**[00:54:25] Jeffrey Rosen:** As Thanksgiving approaches, it would be wonderful if you could make a donation of any amount \$5, \$10, or more to support the mission and you can do that by becoming a member at [constitutioncenter.org/membership](https://constitutioncenter.org/membership) or by logging on to [constitutioncenter.org/donate](https://constitutioncenter.org/donate). On behalf of the National Constitution Center, Happy Thanksgiving. I'm Jeffrey Rosen.