Origins of Apex Courts' Codes of Conduct – A Comparative Analysis

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Author's declaration

I, the undersigned, Konstantin Kipp, candidate for the LLM degree in Comparative Constitutional Law declare herewith that the present thesis titled "Origins of Apex Courts' Codes of Conduct – A Comparative Analysis" is exclusively my own work, based on my research and only such external information as properly credited in notes and bibliography. I declare that no unidentified and illegitimate use was made of the work of others, and no part of the thesis infringes on any person's or institution's copyright. I also declare that no part of the thesis has been submitted in this form to any other institution of higher education for an academic degree.

Vienna, 16 June 2025 Konstantin Kipp

Abstract

While recent years have witnessed a "global crisis of constitutional jurisdiction," at the same time—seemingly as a response—a trend toward the codification of legal ethics has evolved. Between January 2018 and November 2023, the Court of Justice of the European Union (CJEU), the German Federal Constitutional Court (FCC), the European Court of Human Rights (ECtHR), and the Supreme Court of the United States (SCOTUS) all adopted codes of conduct. But why exactly have these courts—the most recent one being established 65 years ago—adopted such codes within a relatively short period? This thesis analyzes and compares the origins of these codes of conduct. It understands these origins in a twofold way. On the one hand, the codes result from efforts to articulate the judicial conduct expected at a given court in order to foster public trust. On the other hand, the decision to adopt a code—as well as the specific conduct it aims to prohibit—stems from instances of judicial misconduct. Accordingly, this analysis proceeds in two main steps. The first chapter examines the institutional cultures of the different apex courts and establishes definitions of the ideal judicial conduct the codes seek to entrench. In doing so, it identifies "anonymity" as a key differentiating factor between the courts. The second chapter analyzes the misconduct that occurred at these courts, along with both the stated reasons and the underlying motivations behind the trend to codify judicial ethics. Again, it highlights "anonymity" as a central factor—not only in the occurrence of misconduct, but also in shaping its specific forms. While a detailed analysis of the codes themselves or their enforcement falls beyond the scope of this study, one aim is to show, at various points, how either ideal judicial conduct or misconduct is reflected in the content of the codes.

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1 Introduction

Recent years have witnessed a "global crisis of constitutional jurisdiction."[1] In some states, constitutional courts have been disempowered; in others, their ability to function has been curtailed, or they have lost the trust of the population. A look across borders reveals both the efforts of some nations to repair damaged constitutional jurisdictions and the ambitions of others to strengthen the resilience of functioning, independent ones. While the courts themselves generally assume a spectator role in these processes, a trend can be observed indicating their attempts to contribute to the maintenance of their significance and role. Between January 2018 and November 2023, the Court of Justice of the European Union (CJEU),[2] the German Federal Constitutional Court (FCC),[3] the European Court of Human Rights (ECtHR),[4] and the Supreme Court of the United States (SCOTUS)[5] all adopted codes of conduct. But why exactly have these courts—the most recent one being established 65 years ago—adopted such codes within a relatively short period? What motivations lie behind the proclamation of seemingly self-evident rules? Does their adoption signal the beginning of a broader trend toward stricter oversight of judges' impartiality?

Constitutional courts thrive on the trust placed in them by the public;[6] without it, their legitimacy and survival are at risk. In this context, codes of conduct can play a vital role in

[1] Andreas Voßkuhle, 'Die weltweite Krise der Verfassungsgerichtsbarkeit' (2024) 79 JuristenZeitung 1.
[2] CJEU, 'Code of Conduct for Members and Former Members of the Court of Justice of the European Union - 2021/C 397/1' (*Official Journal of the European Union*, 30 September 2021) <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2021:397:FULL> accessed 30 October 2024.
[3] BVerfG, 'Code of Conduct for the Justices of the Federal Constitutional Court' <https://www.bundesverfassungsgericht.de/EN/Richter/Verhaltensleitlinie/Verhaltensleitlinien_node.html> accessed 30 October 2024.
[4] ECtHR, 'Resolution on Judicial Ethics' (21 June 2021) <https://www.echr.coe.int/documents/d/echr/Resolution_Judicial_Ethics_ENG> accessed 30 October 2024.
[5] SCOTUS, 'Code of Conduct for Justices' (13 November 2023) <https://www.supremecourt.gov/about/code-of-conduct-for-justices.aspx> accessed 30 October 2024.
[6] Andreas Voßkuhle, 'Entmachtung von Verfassungsgerichten: In Schlechter Verfassung! | ZEIT ONLINE' <https://www.zeit.de/2023/48/entmachtung-verfassungsgerichte-demokratie-bundesverfassungsgericht> accessed 17 November 2024.

safeguarding constitutional jurisdiction. The positive effects of codifying judicial ethics have been recognized for a long time: in 1924, the American Bar Association (ABA) promulgated the original *Canons of Judicial Ethics*.[7] As of today, "virtually every state" in the U.S. has a code of judicial conduct derived from the ABA Model Code of Judicial Conduct.[8] However, the codes of conduct for apex courts in particular also raise a range of concerns. In contrast to U.S. state regulation, these codes are typically self-imposed rules. While there may be valid reasons for this approach, self-regulation in such a sensitive area still requires careful and critical scrutiny. When judges determine the ethics of their own actions, there is a risk they may intentionally leave loopholes in the regulations. Moreover, codes of conduct can be misused as a justification: does behavior that does not explicitly violate the codes automatically become morally acceptable? Since the codes are self-imposed, they risk consisting only of the bare minimum of rules that can be expected.

The first step in analyzing whether these codes can effectively ensure judicial impartiality and foster public trust in apex courts is to understand the origins of the different codes of conduct. Scrutinizing their potential effectiveness requires knowing what kinds of conduct they seek to entrench and what forms of misconduct they aim to prevent. Identifying loopholes is possible only when one is aware that judges have engaged in certain behaviors that may conflict with the judicial conduct expected at their court but are not addressed in the codes. Understanding the rules that are present is only possible when one is informed about any misconduct that occurred and that the codes aim to prevent. The proximity in time with which the codes have been adopted suggests that they do not operate in a vacuum but rather observe and influence one another. A rule in one court's code of conduct may only be fully understood in light of misconduct that occurred at another court. Therefore, this thesis aims to analyze and compare the origins of the current codes of conduct of the CJEU, the FCC, the SCOTUS, and the ECtHR.

[7] Jeffrey M Shaman, 'Judicial Ethics' (1988) 2 Georgetown Journal of Legal Ethics 1, 3.
[8] Charles Gardner Geyh, 'The Dimensions of Judicial Impartiality' (2013) 65 Florida Law Review 493, 523.

This thesis understands these origins in a twofold way. On the one hand, the codes result from formulating the judicial conduct expected at a court. On the other hand, the decision to adopt a code—as well as the specific conduct it aims to prohibit—stems from the occurrence of misconduct. Thus, this analysis consists of two main steps. The first chapter will examine the cultures of the different apex courts and establish definitions of the ideal judicial conduct the codes seek to entrench. The second chapter will analyze the misconduct that occurred at the courts, along with both the stated reasons and the underlying motivations behind the trend to codify judicial ethics at these courts. While a thorough analysis of the codes or their enforcement goes beyond the scope of this study, one aim will be to highlight, at various points, how either ideal judicial conduct or misconduct is reflected in the codes. Although the CJEU and the ECtHR are not constitutional courts, they regularly address questions that, in a national context, would fall under the jurisdiction of a constitutional court. Moreover, their importance and influence are comparable to those of the FCC and the SCOTUS, making them suitable subjects for a comparative analysis.

2 Ideal Judicial Conduct

2.1 Conceptualizing Ideal Judicial Conduct

To effectively analyze and compare the different codes of conduct of these courts, it is crucial to understand their underlying purpose. The primary objectives of these provisions appear to be ensuring judicial impartiality,[9] and maintaining public trust in the courts. Assessing whether the codes are effective in achieving these goals requires an understanding of the judicial behavior they seek to regulate. While (perceived) impartiality may be the key driver of public trust, other aspects of judicial conduct also play a significant role. Importantly, the codes analyzed here do not follow a transformative logic; rather, they seek to reinforce an ideal of judicial conduct already understood to be in place. This is clearly reflected in the position of the SCOTUS justices, who assert that "this Code (…) largely represents a codification of principles that we have long regarded as governing our conduct." Analyzing these codes, therefore, first requires identifying the standards of ideal judicial conduct at the four relevant courts. This, in turn, raises the question of how such standards should be defined.

Former CJEU judge Franklin Dehousse stated in his farewell address: "If judges hold exorbitant powers (…), their legitimacy exists only if they impose on themselves the same constraints that they impose on others."[10] While this statement may seem logical at first glance, it raises questions upon closer examination. Is it truly sufficient for a judge to impose only the same constraints on themselves as they do on others? The relationship between a judge and the parties to a case is inherently hierarchical—especially at an apex court. Would it not then be asymmetrical to expect judges to adhere only to the same standards of behavior they impose on others?

[9] ibid.

[10] Alberto Alemanno, Laurent Pech and Franklin Dehousse, 'EU Judge Dehousse's Farewell Address, with a Short Introduction by Professors Alemanno & Pech' [2016] Verfassungsblog <https://verfassungsblog.de/eu-judge-dehousses-farewell-address-with-a-short-introduction-by-professors-alemanno-pech/> accessed 17 November 2024.

A closer analysis of its potential consequences reveals the paradox in Dehousse's statement. The "constraints" that judges impose on others are nothing more than the law (or at least, they should be). However, there can—and never has been—any doubt (at least not in systems that claim to adhere to the rule of law) that a judge must comply with the law just as every other person does. In that sense, Dehousse's words appear to be an empty statement. Moreover, if ideal judicial conduct merely meant that a judge must comply with the law as everyone else does, there would be no need for non-binding codes of conduct. In fact, the code of conduct of an apex court is something (self-)imposed only on the judges of the apex court themselves, and not on others. If a judge of an apex court were to comply solely with the constraints they impose on others, it would render the entire concept of apex court codes of conduct superfluous. Therefore, regardless of what one thinks is right, it must be asserted here—in the context of an analysis of such codes—that ideal judicial conduct encompasses standards that go beyond simple legality. This also seems to be what Dehousse intended to convey. It is the fact that judges "hold exorbitant powers," with which they can "impose" their rulings "on others," that creates the necessity for adherence to behavioral standards beyond merely complying with the law. The asymmetry between a court and the parties to a case is the source of the need for specific judicial conduct. The question remains: how do we define what this conduct encompasses?

One of the works, that will help establish definitions of ideal judicial conduct at apex courts is Uwe Kranenpohl's 2010 analysis of the decision-making processes at the FCC. One part of this analysis, based on anonymous interviews with judges of the court, is the construction of "the role model of a judge at the FCC."[11] He subdivides this role model into aspects of the self-image of a judge in general, as well as aspects of the self-image of the judges specifically of the FCC, as a constitutional body and the highest instance in the German judiciary. This suggests that judges of

[11] Uwe Kranenpohl, *Hinter dem Schleier des Beratungsgeheimnisses: Der Willensbildungs- und Entscheidungsprozess des Bundesverfassungsgerichts* (VS Verlag für Sozialwissenschaften GmbH 2010) 450.

the courts relevant to my study must not only accept restrictions that might be viewed as burdensome by the ordinary citizen, but also that their role as apex court judges entails accepting personal restrictions that judges of other courts do not need to adhere to. Given their unique mandate to interpret constitutions or treaties in a binding manner for everyone, the apex courts relevant to this study must ensure the highest level of acceptance for their judgments.

Kranenpohl's work includes a discussion of the differing opinions among the judges on whether the court has a "share in state governance."[12] This leads us to an aspect crucial for establishing the ideal judicial conduct of apex court judges: In relation to other courts, apex courts—and thereby their judges—are far more politicized, receive far more attention, and therefore—at least in theory—must accept higher, or different, restrictions on their behavior than other judges. This does not mean that the aspects identified as specific to the courts in this study are entirely absent from other courts. However, due to the roles of the apex courts analyzed below, their character and significance shift—making it possible to distinguish them from the general expectations of judicial behavior. Kranenpohl's distinction[13] between general expectations of judicial behavior and the specific expectations placed on FCC judges due to their unique role in the legal system offers an initial insight into the ideal behavior specific to apex court judges.

Then, however, all apex court judges must not be the same. Supreme Court Justice John Roberts once famously stated, a judge's "job [is] to call balls and strikes, and not to pitch or bat."[14] While it seems reasonable to say that this statement applies to all courts relevant to this study; the perception of a judge's role varies significantly among the different comparators. While some

[12] ibid 459.
[13] ibid 450.
[14] 'Chief Justice Roberts Statement - Nomination Process | United States Courts' <https://www.uscourts.gov/educational-resources/educational-activities/chief-justice-roberts-statement-nomination-process> accessed 16 November 2024.

Supreme Court justices gain superstar-like notoriety,[15] the CJEU has been referred to as a "faceless court."[16] Thus, ideal judicial conduct will include aspects expected of judges at all relevant courts—or even of judges in general—as well as elements specific to the particular culture of the courts I analyze. As general behavioral standards have been studied by scholars for centuries, I will confine myself to providing a short definition of key aspects based on existing work (1.2). My main focus, however, will be on establishing—through analysis and comparison—definitions of judicial behavior specific to the courts examined in my study (1.3).

2.2 Ideal Judicial Conduct in General

The aim here is to understand a phenomenon that has occurred at a specific group of apex courts. While general requirements of ideal judicial conduct are important for this analysis, they do not need to be newly established. Rather, it is sufficient to provide definitions of key aspects based on existing scholarship. While, as mentioned, this is a broad topic, three requirements for judicial conduct appear to be recognized almost universally: independence, impartiality, and integrity. These principles are addressed in the opening provisions of each of the codes analyzed: Articles 2, 3, and 4 of the CJEU's code; Sections I.1 and I.3 of the FCC's code; Sections I, II, and III of the ECtHR's code; as well as Canon 1 and Canon 2.1(a) of the SCOTUS Code of Conduct. Since the codes themselves do not clearly define these concepts, one well-respected document[17] that can serve as a helpful reference is the Bangalore Principles of Judicial Conduct established by the United Nations Social and Economic Council.

[15] James Barron, 'Ruth Bader Ginsburg's Collars, Captured by Camera' *The New York Times* (19 January 2024) <https://www.nytimes.com/2024/01/19/nyregion/ruth-bader-ginsburg-collars.html> accessed 16 November 2024.

[16] Paul Gragl, 'The Faceless Court? The Role of Individual CJEU Members' (2023) 30 Maastricht Journal of European and Comparative Law 15.

[17] Jörg Philipp Terhechte, 'Judicial Ethics for a Global Judiciary – How Judicial Networks Create Their Own Codes of Conduct' (2009) 10 German Law Journal 501, 510.

In section 1.1 of the Principles, judicial independence is defined as a judge exercising "the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason." Furthermore, section 1.2 emphasizes that judicial independence is two-dimensional: "A judge shall be independent in relation to society in general and in relation to the particular parties to a dispute that the judge has to adjudicate."

Judicial impartiality, according to section 2.1 of the Principles, requires judges to perform their duties "without favour, bias or prejudice." This principle also has a second dimension—perceived impartiality—as outlined in section 2.2: "A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary."

While the other aspects are already open to broad interpretation, integrity is by far the most difficult to delineate. According to section 3.1, maintaining integrity requires a judge to "ensure that his or her conduct is above reproach in the view of a reasonable observer." Section 3.2 reiterates a well-known but still compelling principle in judicial ethics: "Justice must not merely be done but must also be seen to be done."

While these definitions align with the ideals of all the different courts, a closer examination of the specific contexts reveals that each court gives these principles a particular meaning shaped by its institutional nature. Although they provide a useful foundation, the principles must be understood within the distinct institutional and cultural settings of each apex court. For example, in the case of the CJEU and the ECtHR—supranational courts composed of judges elected by nation states—judicial independence explicitly refers to freedom from influence by national public

institutions and member state governments (see section II of the ECtHR's and Article 3 of the CJEU's Code of Conduct). Understanding these specific contexts of the different courts is what I shall now turn to.

2.3 Ideal Judicial Conduct Specific to the Comparators

In analyzing the behavioral standards specific to the courts examined in my study, I will highlight and compare different aspects that characterize the legal culture—and thereby the expectations placed on judges—at the different courts. However, a full historicization of judges' behavior at the courts and its perception—which would allow for the most robust statements on expectations at each court—is beyond the scope of this analysis. Moreover, while certain aspects of judicial behavior can be measured through quantitative methods, the perception of other aspects is inherently subjective. Therefore, while the following analysis explores the stances different scholars have taken in their academic work, as well as the general reception judicial behavior has received in the public, my work cannot claim to be free from my own subjective perception or that of others.

There is one key characteristic—central to my work—that differentiates the apex courts in this analysis: anonymity. Specific constraints of ideal judicial behavior, on one hand, increase with the level of anonymity an apex court strives to maintain, and conversely, decrease in legal cultures that permit individual judges to assume a more prominent role. In the first case, an individual judge will have to accept more restrictions; in the second, they will be freer. On the other hand, the less anonymously a court operates, the more the behavior of its judges will be scrutinized by the public, which could result in a need for more restrictions to protect public trust in the court. Then again, when judicial misconduct occurs, anonymity can serve as a shield against scandals. In any case, the degree of anonymity will influence the ideal judicial conduct at the courts and is therefore an important aspect of this analysis. Since this is not a concept of two distinct models to which a court can adhere, but rather a spectrum with strong anonymity at one end and visibility at the other—

where different courts occupy different points on that line depending on their tendency toward one or the other—I shall proceed along this spectrum, beginning with the most opaque courts, the CJEU (1.3.1) and the FCC (1.3.2) and then moving toward those where the institution is more transparent and individual judges are consequently more visible, the ECtHR (1.3.3) and finally the SCOTUS (1.3.4).

2.3.1 Ideal Judicial Conduct Specific to the CJEU

The CJEU is the most powerful supranational court in the world and has nevertheless been described as a "faceless court." Although its judgments have been "key to the processes of European integration,"[18] the court has not garnered significant attention from European society and is often mistaken for another European apex court—its "sibling," the ECtHR.[19] While this may be partly attributed to a general characteristic of the European Union—namely, that EU citizens do not accord it attention proportional to its impact on their lives, as its institutions often feel distant—the court has also been accused of deliberately striving to "stay in the shadow" for the first 70 years of its existence by downplaying its significance and resisting efforts to bring it into the public eye.[20]

Various aspects of the court's functioning contribute to its particularly anonymous mode of operation, which in turn shapes a particularly restrictive perception of how individual judges should conduct themselves. The key factor in this is the "principle of collegiality," which governs the court's work. According to the court itself, adherence to this principle requires that decisions

[18] Interview with Marek Safjan, 'The Independence of the European Courts at Risk? – In Conversation with Marek Safjan' (20 November 2024) <https://revdem.ceu.edu/2024/11/20/independence-european-courts-risk/> accessed 20 December 2024.
[19] Gragl (n 16) 17.
[20] Alberto Alemanno, 'The Court of Justice of the EU Goes (Almost) Public' [2022] Verfassungsblog <https://verfassungsblog.de/the-court-of-justice-of-the-eu-goes-almost-public/> accessed 16 March 2025.

be made with the equal participation of all judges involved in a given case, that such decisions undergo collective deliberation, and that, ultimately, all judges involved bear collective responsibility for the final ruling.[21] The principle—particularly the collective responsibility of judges—sets the ideal judicial conduct at the CJEU in stark contrast to that of, for example, the SCOTUS, where Justice Ruth Bader Ginsburg achieved "late-life rock stardom" precisely through her dissenting opinions.[22] At the CJEU, such dissenting opinions are not possible. While this has led to criticism of the court for its "Cartesian discourse"[23]—cohesive yet lacking transparency—the aim of this analysis is not to evaluate which model of judicial behavior is better or worse but rather to identify what is considered ideal judicial conduct within each of the respective courts.

Considering this, and to use the words of Koen Lenaerts, President of the European Court of Justice (the higher instance of the CJEU), the principle of collegiality is of "paramount importance" to the court's work.[24] It strongly influences the behavior of both active and former judges. In this regard, Paul Gragl's research—intended to highlight instances where individual members of the CJEU emerged and attracted attention—identifies two cases in which judges initially advocated for a specific interpretation of EU law but abandoned their positions after the court adopted a different interpretation.[25] These decisions appear to have been made not so much because the judges changed their minds or feared an unequal conflict—both were highly distinguished judges and academics—but rather out of respect for the principle of collegiality.[26] The purpose of this principle is to reflect the unique nature of the CJEU. As the apex court of a

[21] Gragl (n 16) 20.
[22] Linda Greenhouse, 'Ruth Bader Ginsburg, Supreme Court's Feminist Icon, Is Dead at 87' *The New York Times* (18 September 2020) <https://www.nytimes.com/2020/09/18/us/ruth-bader-ginsburg-dead.html> accessed 16 March 2025.
[23] Joseph HH Weiler, 'Epilogue: The Judicial Après Nice' in Gráinne De Búrca and Joseph HH Weiler (eds), *The European Court of Justice* (Oxford University Press 2001) 215 <https://doi.org/10.1093/oso/9780199246021.003.0007> accessed 16 March 2025.
[24] Koen Lenaerts, 'How the ECJ Thinks: A Study on Judicial Legitimacy' (2013) 36 Fordham International Law Journal 1302, 1351.
[25] Gragl (n 16) 31–35.
[26] ibid 31.

union that is constantly facing accusations of infringing on member states' national sovereignty and, more recently, rising Euroscepticism, it must deliver its judgments in the most persuasive manner possible. While national apex courts also face criticism, they are generally perceived by critics as having greater legitimacy than a supranational court, which can be easily accused of disregarding national or local interests or even representing foreign agendas. If CJEU judges were to issue dissenting opinions or publicly contradict the court's rulings in academic publications or other statements, this would provide ammunition for such critics and risk undermining the unity of EU law. The same applies to any other behavior of CJEU judges that could threaten the legitimacy of a court that, while powerful, is built on the fragile foundation of consensus among 27 member states. As CJEU Judge Thomas von Danwitz has pointed out, this foundation demands judges who demonstrate an openness to different viewpoints and a willingness to compromise that exceeds what is typically required at national courts, given that all judges come from diverse legal and cultural backgrounds.[27]

Therefore, the specific ideal judicial conduct of CJEU judges requires the highest possible level of respect and deference to the court's decisions. Judges can deliberate and disagree—but only behind closed doors. To the outside world, ideal judicial conduct for CJEU judges necessitates minimizing their individual roles to the greatest extent, ensuring that all members are perceived as delivering judgments as a unified body. While this especially restrictive conception of ideal judicial behavior is reflected in various parts of the CJEU's Code of Conduct, the clearest example is that—unlike the judges of all other courts—CJEU judges must not only comply with specific rules regarding external activities but, in many cases, as regulated in Article 8(3) and (4), must also obtain prior authorization from the court.

[27] Interview with Thomas von Danwitz, 'Berufsportrait: Richter am EuGH' <https://www.lto.de/karriere/im-job/stories/detail/richter-eugh-thomas-von-danwitz-auswahlverfahren> accessed 28 April 2025.

2.3.2 Ideal Judicial Conduct Specific to the FCC

The second court on the scale of judicial restriction in terms of anonymity is the FCC. What distinguishes the FCC from the CJEU is that this restriction is seen more as a conscious decision than an absolute necessity. While the FCC has not been accused of downplaying its importance, scholars have still highlighted a lack of historicization of the court.[28] Even going so far as to claim that, in the minds of German lawyers, the court has no history; it simply exists.[29] This appears to be the result of various measures deliberately taken by the court throughout its history.

One such measure is the integration of informality into the daily institutional activities of the court to "establish, build, and protect [its] authority across the political sphere."[30] Another is the court's approach to dissenting opinions. While dissenting opinions are allowed at the FCC, they are frowned upon, and the judges make considerable efforts to limit their number in order to present unified decisions.[31] In fact, the option to publish dissenting opinions at the FCC was introduced only in 1970—19 years after the court began its work. The history of their introduction might at least partly explain the judges' reluctance to use this tool more frequently. At the time, the Minister of Justice of the Federal Republic of Germany was an opponent of the court and had long argued for the introduction of dissenting opinions as a means to weaken it.[32] The idea was that exposing conflicts between different judicial interpretations would undermine the authority of its judgments. Ultimately, his plan was unsuccessful. Nowadays, the possibility of giving dissenting

[28] Florian Meinel and Benjamin Kram, 'Das Bundesverfassungsgericht als Gegenstand historischer Forschung: Leitfragen, Quellenzugang und Perspektiven nach der Reform des § 35b BVerfGG' (2014) 69 JuristenZeitung 913, 915.
[29] ibid 914.
[30] Silvia Steininger, 'Talks, Dinners, and Envelopes at Nightfall: The Politicization of Informality at the Bundesverfassungsgericht' (2023) 24 German Law Journal 1300, 1302.
[31] Gertrude Lübbe-Wolff, *Beratungskulturen: wie Verfassungsgerichte arbeiten, und wovon es abhängt, ob sie integrieren oder polarisieren* (2. Auflage, Konrad-Adenauer-Stiftung eV 2023) 145.
[32] Meinel and Kram (n 28) 916.

opinions is widely perceived as strengthening the court's legitimacy by showcasing its internal plurality.[33]

However, this perception—as well as the failure of the plan to weaken the court—appears to be shaped by the way the court's judges handle dissent. Peter Huber, a former judge at the FCC, explained that he always regarded every dissenting opinion as a defeat.[34] This view seems emblematic of the role of the individual judge in ideal judicial conduct at the FCC. Unlike at the CJEU, a judge expressing his or her views—whether through a dissenting opinion, an interview, or a speech—is not inherently unusual or abnormal. Nevertheless, the court's culture dictates that its judges restrict themselves as much as possible, and a judge seeking too much public attention is generally viewed negatively.[35] In Kranenpohl's work, an internal enforcement mechanism becomes apparent: judges discuss adherence to informal rules among themselves, and a judge who breaks these too often or too blatantly will be sidelined and lose influence within the court.[36] For instance, the unusually frequent interactions with the media by the court's former president, Andreas Voßkuhle, resulted in internal controversies at the court,[37] as well as the German Minister of the Interior publicly stating that "judges speak through their judgments."[38] Such events illustrate the concept of ideal judicial conduct at the FCC: judges may step into the public eye—especially through dissenting opinions—but are not encouraged to do so. A judge may break from the unity of the court if he deems it absolutely necessary. However, this always signals that the court is, to some extent, falling short of achieving one of its most important goals—reaching a compromise acceptable to all judges.

[33] ibid.
[34] Peter M Huber, 'Das BVerfG in der Gesellschaft und sein Erfolg' *Frankfurter Allgemeine Zeitung* (5 April 2023) <https://www.faz.net/einspruch/das-bverfg-in-der-gesellschaft-und-sein-erfolg-18802688.html> accessed 16 November 2024.
[35] Kranenpohl (n 11) 455.
[36] ibid 452–455.
[37] Steininger (n 30) 1312.
[38] Katja Gelinsky, 'Voßkuhle und die Presse: Stimmungsumschwung oder Manipulation?' [2013] Verfassungsblog <https://verfassungsblog.de/voskuhle-und-die-presse-stimmungsumschwung-oder-manipulation/> accessed 30 April 2025.

As explained above, this goal is not an end in itself but is based on the belief that unanimous decisions will gain the broadest acceptance among the population, thereby fostering public trust in the court and the law as such. That such "unifying" behavior will be the conduct of the judges at the court is ensured as early as in the appointment procedure. As former ECtHR judge Angelika Nussberger puts it, generally only individuals who are "open to different opinions and driven toward the [political] center" are considered viable candidates for the role of judge at the FCC.[39] Ideal judicial conduct thus manifests itself before a person becomes a judge. Individuals who exhibit behavior that suggests a desire to stand out on their own—rather than fully embracing the role of the institution—are not selected as judges of the FCC from the outset.

However, in contrast to many other countries,[40] FCC judges are not prohibited from remaining members of political parties. In fact, research using methods from political science has shown that there are at least indications that FCC judges nominated by the same political party tend to form groups when voting on court judgments.[41] This, however, is not in itself a problem, according to former FCC judge Lübbe-Wolff. The danger lies not so much in the particular biases of individual judges, but rather in politically one-sided court compositions—structural impartiality, as Lübbe-Wolff calls it.[42] A person does not become an apolitical being upon becoming a judge of the FCC, nor should they. Yet while judges with visible political preferences are accepted, measures are also consciously taken to prevent excessive closeness to politics. In this spirit, the judges deliberately decided that the court should remain in Karlsruhe—a small town whose name has become emblematic of the court—rather than relocate to Germany's political center, Berlin.[43] This

[39] Angelika Nußberger, 'Verfassungskonsenskultur in Gefahr' [2024] Verfassungsblog <https://verfassungsblog.de/verfassungskonsenskultur-in-gefahr/> accessed 10 April 2025.
[40] Lübbe-Wolff (n 31) 185.
[41] Benjamin G Engst and others, 'Zum Einfluss der Parteinähe auf das Abstimmungsverhalten der Bundesverfassungsrichter – eine quantitative Untersuchung' (2017) 72 JuristenZeitung 816, 824.
[42] Gertrude Lübbe-Wolff, 'One-Sidedly Staffed Courts' [2024] Verfassungsblog <https://verfassungsblog.de/one-sidedly-staffed-courts/> accessed 31 October 2024.
[43] Kranenpohl (n 11) 469.

stance toward political activities of judges is reflected in Section I.3 of the FCC's Code of Conduct, which states that affiliation with political groups, as well as other forms of participation in the broader social discourse, are permissible as long as they are exercised with "due restraint."

To conclude, as with the CJEU, ideal judicial conduct at the FCC requires judges to significantly limit their individual roles to ensure the court is perceived as a unified body. In contrast, however, the FCC's legal culture imposes fewer formal constraints—restraint is more a matter of conscious choice—giving individual judges greater freedom to become visible.

2.3.3 Ideal Judicial Conduct Specific to the ECtHR

Although the ECtHR and the CJEU have been dubbed "siblings," the role of individual judges at the two courts differs substantially. While both are composed of judges initially selected by national states, this national selection plays a significantly more important role at the Strasbourg court than in Luxembourg. The ECtHR deals solely with alleged human rights violations by contracting parties of the ECHR, and the principle of the national judge—Article 26(4) ECHR—mandates that in every case before a chamber or the Grand Chamber, the judge elected in respect of the country concerned must be part of the bench. The figure of the national judge at the ECtHR is a "heritage of classical concepts regarding international law and justice."[44] In this conception, the national judge serves as a counterweight to the limitation of sovereignty that a national court accepts when submitting to the jurisdiction of an international court.[45] This aspect may also be present at the CJEU. However, the CJEU is the court of a regional integration organization specifically designed for its member states to retain sovereignty. As such, the fact that EU member states surrender

[44] Luis López Guerra, 'The National Judge and Judicial Independence: The Case of the Strasbourg Court' (2017) 24 Maastricht Journal of European and Comparative Law 552, 553.
[45] ibid.

some of their sovereignty is addressed in various ways, and the CJEU's judges do not need to play a significant role in this balancing act.

Thus, while the principle of collegiality makes the surfacing of individual judges a rare occurrence in Luxembourg (see 2.3.1), the ECHR requires such individual visibility in many cases at the Strasbourg court. Where collegiality leads EU judges to forgo their own interpretations of the law in favor of the majority view,[46] at the ECtHR, judges do not hesitate to express their disagreement in the clearest terms. The examples are too numerous to list here, but to name one, Russian Judge Kovler once went so far as to claim that a judgment "provides an example of a situation in which human rights become a policy."[47] Another example is Judge Eicke's dissenting opinion in the infamous Klimaseniorinnen judgment, in which he argued that the majority had gone "well beyond... the permissible limits of evolutive interpretation."[48] Such direct accusations of judicial activism and political decision-making from within the bench are foreign not only to the CJEU but also to the FCC, where judges may also criticize the court for venturing into areas that belong to the legislature, but do so rarely and in a more nuanced manner. At the ECtHR, the culture of separate, concurring, and dissenting opinions is so entrenched that, although all judgments are freely available in the court's database, there are entire books containing only the opinions a judge has written during their mandate.[49] However, despite the fact that judges are "quasi-representatives" of their countries,[50] and the highly proactive culture of the court's judges regarding individual opinions, research has found that, although there are some striking examples of national bias, there seems to be no (strong) link between the two in general.[51] Rather, at the ECtHR, a

[46] Gragl (n 16) 31–35.
[47] *Case of Ilaşcu and others v. Moldova and Russia* App no 48787/99 (ECtHR, 8 July 2004) Dissenting Opinion of Judge Kovler para 1.
[48] *Case of Klimaseniorinnen Schweiz and others v. Switzerland* App no 53600/20 (ECtHR, 9 April 2024) Dissenting Opinion of Judge Eicke para 3.
[49] Triestino Mariniello, *Judge Pinto de Albuquerque and the Progressive Development of International Human Rights Law* (BRILL 2021).
[50] Angelika Nußberger, *The European Court of Human Rights* (Oxford University Press 2020) 43.
[51] Robin CA White and Iris Boussiakou, 'Separate Opinions in the European Court of Human Rights' (2009) 9 Human Rights Law Review 37, 44.

common pattern in separate opinions is that judges adopt either a more activist or a more deferential stance. In view of the Strasbourg judges, dissents "demonstrate the nuances of human rights protection, (…) indicate that questions of interpretation and application were not always clear-cut, [and can] provide consolation for the losing party."[52] Has this transparency destabilized the court?

While it seems impossible to prove a direct causality with the Court's approach to dissenting opinions, what is certain is that, due to multiple factors, the Court has been under sustained pressure from the contracting states of the ECtHR over the last 15 years.[53] To give just one example, one of Germany's best-known politicians recently accused the ECtHR of judicial activism and claimed that Germany could leave the ECHR unless the entire system of migrant rights protection is overhauled.[54] Against the backdrop of this wave of criticism, non-compliance, and threats of withdrawal, the court has begun to engage with a form of deference to national authorities, commonly referred to as the "procedural turn."[55]

While this is not the place to scrutinize the details of this development, it is worth noting that, in the course of it, individual judges of the ECtHR have become visible not only through separate opinions but also through academic publications outside the Court's work. Robert Spano, then a sitting judge and later President of the Court, published two pieces on this topic during his mandate. The first was published in 2014, in which he declared that the Court was entering the "age of subsidiarity"[56]; the second appeared in 2018, where he discussed "The Future of the

[52] ibid 57.
[53] Miles Jackson, 'Judicial Avoidance at the European Court of Human Rights: Institutional Authority, the Procedural Turn, and Docket Control' (2022) 20 International Journal of Constitutional Law 112, 112.
[54] Oliver Moody, 'Germany Could Leave ECHR over Migration Crisis, Says Party Leading Polls' *The Times* (9 December 2024) <https://www.thetimes.com/world/europe/article/germany-could-leave-echr-over-migration-crisis-say-poll-favourites-5j3cbkht5> accessed 25 April 2025.
[55] Jackson (n 53) 113.
[56] Robert Spano, 'Universality or Diversity of Human Rights?: Strasbourg in the Age of Subsidiarity' (2014) 14 Human Rights Law Review 487.

European Court of Human Rights," arguing that the procedural turn is "normatively justified … and to be lauded."[57] What is interesting here is not so much that a sitting judge published academic work during his mandate—many judges at courts relevant to this analysis do so regularly. What seems notable about this is that the issue Spano wrote about—the procedural turn—is highly contentious, not only in academia,[58] but also within the Court itself.[59] Nevertheless, Spano decided—although he framed it less explicitly—to personally advocate for the procedural turn as a tool to respond to the criticism leveled at the Court and thereby protect its authority in the future. Angelika Nussberger, also a sitting judge at the time, published an article in 2017 in which she took a more critical stance, even noting that there was no consensus on the topic among the judges.[60] These activities show that ECtHR judges not only take a different approach than their counterparts in Luxembourg and Karlsruhe when it comes to expressing internal disagreements through individual opinions in judgments, but also extend such disagreements into external publications. It is important to note that at the FCC, even the mere frequency of a judge's interactions with the media—without any controversial statements—has led to comments that "judges should speak through their judgments" (see 2.3.2). Further, if one considers the CJEU's deliberate efforts to present itself as a unified institution (see 2.3.1), it becomes clear how unusual the actions of ECtHR judges would appear at the courts previously analyzed.

Finally, beyond individual opinions and private publications, ECtHR judges also appear to play a more pronounced individual role in a symbolic capacity than judges at the courts previously analyzed. Owing to the Court's specific focus it serves as a symbol of the protection of human rights. Especially in contracting states where authoritarian tendencies threaten this protection, the

[57] Robert Spano, 'The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law' (2018) 18 Human Rights Law Review 473, 475.
[58] Oddný Mjöll Arnardóttir, 'The "Procedural Turn" under the European Convention on Human Rights and Presumptions of Convention Compliance' (2017) 15 International Journal of Constitutional Law 9.
[59] Jackson (n 53) 113, 114.
[60] Angelika Nußberger, 'Procedural Review by the ECHR: View from the Court' in Eva Brems and Janneke Gerards (eds), *Procedural Review in European Fundamental Rights Cases* (Cambridge University Press 2017) 174.

ECHR and the Court offer hope. The judges, serve as representatives of human rights and symbolize this hope. For example, regarding Turkey, it has been argued that "[t]raditionally in Turkey, the ECtHR Presidents have a strong influence on the public image of the Court and, consequently, on the outcome of the human rights controversies of the time. They have been as impactful as national politicians among the human rights community, if not more."[61] The role of an ECtHR judge, therefore, seems to naturally include an aspect of becoming individually visible to the public as a "representative of human rights."

In conclusion, the ideal of judicial conduct specific to the ECtHR contrasts with the cultures of the FCC and the CJEU. Although some might argue that this conception has been overcome, ECtHR judges are still regarded as "quasi-representatives" of the contracting states they were appointed for, due to the figure of the national judge, and automatically become visible through this. Moreover, the ECtHR's culture encourages judges to engage in disputes over the correct interpretation of the Convention in public—generally through individual opinions, but sometimes even through academic publications. ECtHR judges do not need to align with the majority to the same extent as judges on the other courts; in return, they are expected to strengthen the Court's legitimacy by expressing their personal views. Finally, the judges have a more pronounced symbolic function, which may lead to specific moral expectations regarding their behavior.

[61] Tolga Şirin and Necdet Umut Orcan, 'The Symbolic Downfall of the ECtHR in Turkish Public Opinion' [2020] Verfassungsblog <https://verfassungsblog.de/the-symbolic-downfall-of-the-ecthr-in-turkish-public-opinion/> accessed 26 April 2025.

2.3.4 Ideal Judicial Conduct Specific to the SCOTUS

Several factors contribute to the SCOTUS being the least anonymous of the courts analyzed here. First and foremost, the SCOTUS was established as early as the late 1700s.[62] Thus, it became the most powerful court in the world more than a century and a half before Winston Churchill called for a "United States of Europe" in his Zurich speech.[63] Moreover, while the CJEU, the FCC, and the ECtHR are undeniably crucial to the histories of the EU, Germany, and Europe respectively, none has played a role comparable to that of the SCOTUS within the U.S. context. The court has gone through distinct "eras," which—unlike the less historicized FCC (see 2.3.2)—are well documented.[64]

A first institutional factor that makes SCOTUS judges more visible—and allows for comparison with the ECtHR—is that in a two-party system where one side or the other always nominates judges, they are often perceived, to some extent, as representatives of that side—similar to the quasi-representative role of ECtHR judges. Moreover, while at the CJEU, collegiality dictates collective responsibility for judgments (see 2.3.1), and at the FCC, the names of disagreeing judges are generally disclosed only when they issue separate opinions,[65] at the SCOTUS, the position of each justice is publicly known in the vast majority of cases.[66] Furthermore, the culture of dissent sets the SCOTUS far apart from the FCC. Between 1971 and 2019, out of 2,295 Senate decisions at the FCC, only 168 included separate opinions[67]—about 7.32%. In contrast, in the 2021–2022 term, out of 151 opinions authored by the SCOTUS justices, 94 were either concurring or

[62] Stuart Banner, *The Most Powerful Court in the World: A History of the Supreme Court of the United States* (Oxford University Press 2025) 1 <https://doi.org/10.1093/oso/9780197780350.003.0001> accessed 19 May 2025.
[63] Wendell R Mauter, 'Churchill and the Unification of Europe' (1998) 61 The Historian 67, 70.
[64] Banner (n 62).
[65] Engst and others (n 41) 819.
[66] S Sidney Ulmer, 'The Analysis of Behavior Patterns on the United States Supreme Court' (1960) 22 The Journal of Politics 629, 633.
[67] BVerfG, 'Annual Statistics of the Federal Constitutional Court 2019' 12 <https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Statistik/statistics_2019.html> accessed 20 May 2025.

dissenting, meaning the Court did not speak with one voice in 62.25% of cases.[68] A court that surpasses the SCOTUS in the number of individual opinions is the ECtHR's Grand Chamber. From 1999 to 2018, 83% of its judgments contained at least one (often more) separate opinions.[69] Still, even in terms of individual opinions, the SCOTUS seems more visible than the ECtHR's Grand Chamber. Firstly, the Grand Chamber is composed of 17 judges—nearly twice the number of SCOTUS justices. Moreover, the Grand Chamber only deals with the most important and controversial human rights cases, which generally constitute only about 1.5% of the cases the Strasbourg Court decides on the merits.[70] In contrast, the SCOTUS figures also include judgments in far less controversial cases.

Justice Ruth Bader Ginsburg has given a lecture in which she explained the various purposes a dissenting opinion can serve and even noted that such disagreements did not affect her "friendships" on the Court.[71] In her explanation of the utility of dissenting opinions, it becomes clear that justices perceive them as creating a form of productive concurrence. In some cases, she argues, a dissent may be so persuasive that it eventually becomes the majority opinion.[72] In others, it might not change the outcome but can prompt the justice writing the majority opinion to refine and clarify their reasoning.[73] Thus, at the SCOTUS, ideal judicial conduct not only encourages but often seems to demand that judges write individual opinions.

Another factor that further enhances the visibility of SCOTUS judges is their life-term mandate. Not only is the Court particularly open to the public surfacing of its judges, but the sheer

[68] Angie Gou, Ellena Erskine and James Romoser, 'STAT PACK for the Supreme Court's 2021-22 Term' (*SCOTUSblog*, 1 July 2022) 17.
[69] Laurence R Helfer and Erik Voeten, 'Walking Back Human Rights in Europe?' (2020) 31 European Journal of International Law 797, 800.
[70] Michal Bobek, 'What Are Grand Chambers For?' (2021) 23 Cambridge Yearbook of European Legal Studies 1, 6.
[71] Ruth Bader Ginsburg, 'The Role of Dissenting Opinions' (2010) 95 Minnesota Law Review 1, 4.
[72] ibid.
[73] ibid 3.

length of time justices often serve—Clarence Thomas, for example, has been a judge since 1991—allows them to remain visible over a much longer period than judges at the FCC or the ECtHR. One might argue that judges at the CJEU sometimes serve similarly long terms; still, Koen Lenaerts, who has been a judge since 1989 and is arguably the Court's most visible member, falls far short of the prominence some SCOTUS justices achieve. The CJEU's notably opaque culture (see 2.3.1) prevents such notoriety.

The purpose of the life-term mandate is, of course, not to allow judges time to become prominent, but rather to ensure their independence.[74] While the possibility of re-election might pose a threat to independence at the CJEU[75]—and even in courts where re-election is prohibited, it has been argued that the need to find employment after the mandate might pose similar threats[76]—a Supreme Court justice neither needs to seek re-election nor any other job for the rest of their life. This, among other factors, has led scholars to argue that it "is unlikely that any judge ever sat on a law court enjoying more independence."[77] It has even been argued that, effectively, the SCOTUS experiences a form of judicial independence in "excess," acknowledging that the Court has "settled into the role of a superlegislature devoted to making new law to govern future events."[78] Whatever one thinks about whether this degree of judicial independence is problematic, it points to a key factor in understanding the behavior of SCOTUS justices. Compared to the other judges in this analysis, once appointed, they enjoy an independence that is close to bulletproof. While impeachment is possible, it has only occurred once—in 1804—in a case where impeachment

[74] Steven G Calabresi and James Lindgren, 'Term Limits for the Supreme Court: Life Tenure Reconsidered' (2005) 29 Harvard Journal of Law & Public Policy 769, 774.
[75] Interview with Safjan (n 18).
[76] Helen Keller, 'How to Improve Independence and Impartiality of Judges of the European Court of Human Rights' (2023) 4 European Convention on Human Rights Law Review 259, 265.
[77] Paul D Carrington and Roger C Cramton, 'Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court' (2008) 94 Cornell Law Review 587, 589.
[78] ibid.

was used as "a political solution to a party's discontent with the judiciary."[79] This precedent only strengthened the U.S. conception of judicial independence in its aftermath.[80]

Thus, SCOTUS justices can essentially behave as they wish without fearing immediate consequences. Holding one of the most prestigious positions possible for the duration of their lives—with disciplinary removal theoretically possible but practically improbable—they do not need to adopt certain behaviors to please political actors seeking re-election or potential employers for life after the mandate. This is not to say that judicial conduct at the SCOTUS is unaffected by outside opinions. If that were the case, the Court would have no reason to publish a code of conduct. Still, compared to the other courts in this analysis, SCOTUS justices enjoy greater autonomy. They engage in behaviors that would be considered misconduct at any of the other courts. The visibility of individual judges is aptly captured by this quote:

> "ARE there really only nine Supreme Court justices? It seems that everywhere you look, you see one popping up: giving speeches, signing books, leading workshops, posing for pictures at charity functions."[81]

Even at the most open of the other courts—the ECtHR—it is hard to imagine a sitting judge "posing for pictures at charity functions." At the FCC, a judge's seemingly accidental appearance on television in the rooms of a political party during a conference was considered serious enough misconduct to prompt other judges to warn him that it should not happen again.[82] In contrast, SCOTUS justices openly display their friendships with politicians.[83] While the ECtHR's judges'

[79] Adam A Perlin, 'The Impeachment of Samuel Chase: Redefining Judicial Independence' (2009) 62 Rutgers Law Review 725, 788.
[80] ibid.
[81] Jeff Shesol, 'Should Justices Keep Their Opinions to Themselves?' *The New York Times* (29 June 2011) <https://www.nytimes.com/2011/06/29/opinion/29shesol.html> accessed 22 May 2025.
[82] Kranenpohl (n 11) 465.
[83] Steve Twomey, 'Scalia Angrily Defends His Duck Hunt With Cheney' *The New York Times* (18 March 2004) <https://www.nytimes.com/2004/03/18/politics/scalia-angrily-defends-his-duck-hunt-with-cheney.html> accessed 3 June 2025.

symbolic role allows behaviors closer to the political sphere (see 2.3.3), SCOTUS justices appear largely unconstrained by any such boundaries regarding political behavior. Claiming that the court is now "politicized"[84] seems somewhat hyperbolic, given that SCOTUS justices have been involved in political activities for so long that detailing them all would be too extensive.[85] For example, numerous justices ran for political office.[86] In 1944 liberal Justice William O. Douglas was shortlisted to run for Vice President and again considered in 1948, while conservative Justice Antonin Scalia reportedly contemplated resigning from the Court to run for President in 2000.[87] Although such political candidacies have ceased, political entanglements that would be unimaginable at almost every other apex court continue to persist.

A classic pattern of conduct at the SCOTUS seems to be justices violating behavioral norms they once publicly endorsed. For example, in the run-up to the 2016 elections, Justice Ginsburg openly criticized the Republican candidate Donald Trump, suggesting that it might be time "to move to New Zealand" if Trump were elected.[88] It is important to mention that this is the same Justice who, in an article on the role of dissenting opinions that I cited earlier, expressed the hope that "in the years I am privileged to serve on the Court, I will be granted similar wisdom in choosing my ground" as Justice Brandeis—who wrote dissents only on matters of major importance for the Court and otherwise refrained from surfacing individually.[89] Public comments about the quality of a presidential candidate are not dissenting opinions, but arguably such remarks by a Justice of a court that claims political impartiality can have far more damaging effects on public trust in the

[84] Michael Waldman and Kareem Crayton, 'A Politicized Supreme Court Is Remaking America | Brennan Center for Justice' (20 June 2024) <https://www.brennancenter.org/events/politicized-supreme-court-remaking-america> accessed 31 May 2025.
[85] Peter Alan Bell, 'Extrajudicial Activity of Supreme Court Justices' (1970) 22 Stanford Law Review 587, 590.
[86] ibid 592.
[87] Ronald Feinman, 'The Long History of Supreme Court Justices Getting Political' (*TIME*, 15 July 2016) <https://time.com/4407827/supreme-court-political-history/?utm_source=chatgpt.com> accessed 31 May 2025.
[88] Adam Liptak, 'Ruth Bader Ginsburg, No Fan of Donald Trump, Critiques Latest Term' *The New York Times* (10 July 2016) <https://www.nytimes.com/2016/07/11/us/politics/ruth-bader-ginsburg-no-fan-of-donald-trump-critiques-latest-term.html> accessed 31 May 2025.
[89] Ginsburg (n 71) 8.

Court and on the unity of U.S. citizens than any dissenting opinion ever could. Overriding his self-proclaimed rules in a similar fashion, Justice Thomas—who once stated he would not attend President Obama's "State of the Union" address because these had "become so partisan" and thus "uncomfortable for a judge"[90]—later became one of the Trump administration's closest friends, with his wife being one of its most "ardent supporters."[91] Today Ginsburg's comments would be barred by Canon 5(2) of the SCOTUS code of conduct. Thus these facts might actually belong in the field of judicial misbehavior that I will analyze in the later parts of this text. However, they also raise a critical question about ideal judicial conduct at the SCOTUS. How serious can self-proclaimed behavioral rules be taken, if even judges widely considered "friend[s] to the rule of law and the better functioning of (…) institutions,"[92] disrespect them so blatantly? Another, earlier example of this pattern is Justice Hugo L. Black, who for a long time refused to give public speeches, explaining in 1959 to a friend that judges should speak through their judgments.[93] Yet later, he directly addressed his personal critics in several speeches, stating, "A number of people have been writing about my views in a way that causes me now to express those views for myself."[94] At the SCOTUS, the principle that constitutional judges have "nothing to fear, and nothing to hope for"—while widely regarded as beneficial in other contexts[95]—appears to have the unintended consequence that many justices do not feel constrained by any rules.

Ideal judicial conduct at the SCOTUS embraces a culture of public dissent and individual judicial visibility that far exceeds that of the other courts. While dissenting opinions at the FCC are

[90] Stephanie Condon, 'Clarence Thomas: State of the Union Too Partisan for a Justice' (*CBS News*, 4 February 2010) <https://www.cbsnews.com/news/clarence-thomas-state-of-the-union-too-partisan-for-a-justice/> accessed 31 May 2025.
[91] Joan Biskupic Zeleny Jeff, 'Clarence Thomas: The Go-to Justice to Swear in Trump's Cabinet' (*CNN*, 6 February 2025) <https://www.cnn.com/2025/02/06/politics/clarence-thomas-trump-cabinet-swearing-in> accessed 31 May 2025.
[92] Robert A Katzmann and Brenda Feigen, 'Ruth Bader Ginsburg at Her Quarter Century on the Supreme Court: Brief Reflections' (2021) 121 Columbia Law Review 517, 518.
[93] Christopher W Schmidt, 'Beyond the Opinion: Supreme Court Justices and Extrajudicial Speech' (2012) 88 Chicago-Kent Law Review 487, 488.
[94] ibid 489.
[95] Mathias Möschel, *Ex-Ministers as Constitutional Judges* (Oxford University Press 2025) 110 <https://doi.org/10.1093/9780198930228.003.0004>.

regarded as a "last resort," and at the ECtHR they primarily serve to enhance transparency and offer consolation to losing parties, at the SCOTUS dissents are seen as a productive force. Thus, ideal judicial conduct not only permits but effectively demands that justices express their individual dissent publicly. Regarding the extrajudicial visibility of individual judges, it is difficult to define a clear standard of what constitutes "ideal" conduct. Abstractly, considering the frequent calls for judicial self-restraint and separation from politics often voiced by judges and commentators, one might expect the SCOTUS to uphold standards similar to those of the FCC. However, the reality is quite different. SCOTUS justices engage in a wide range of activities that bring them close to the political sphere, reveal details about their private lives, and make their individual views highly visible—actions that would be deemed misconduct at other courts but appear natural in the U.S. context. Thus, evidence suggests that justices do not feel genuinely constrained by the rules they proclaim.

Now, one might argue that the code of conduct could still establish an ideal judicial conduct based on public statements of restraint. But again, the codes do not seem to follow a transformative logic. Without claiming to have conducted a thorough analysis, what appears to be codified is precisely the pattern of judges not feeling genuinely constrained by behavioral rules. For example, while the codes of all the other courts use mandatory language such as "shall," and even the Judicial Conference of the United States employs such obligatory terms, the SCOTUS code of conduct exclusively uses advisory language like "should."[96] Although other U.S. courts also use similar language, the key difference is that their codes are actively enforced. In contrast, at the SCOTUS, the use of "should" leaves it entirely to the Justices themselves to decide whether or not to follow a given rule.

[96] Charles Gardner Geyh, 'The New SCOTUS Code of Conduct' (*SCOTUSblog*, 24 November 2023) <https://www.scotusblog.com/2023/11/the-new-scotus-code-of-conduct/> accessed 7 June 2025.

3 (Mis-)conduct as an Origin

Having conceptualized a specific ideal judicial conduct for each of the courts, I will now focus on analyzing the origins of the decisions by each court to adopt a code of conduct. While the courts have presented different reasons for their decision to codify judicial ethics, the desire to ensure public trust in the courts seems to be a unifying factor. Although none of the courts communicate this, what must have motivated the decision to codify ideal judicial conduct is the occurrence of actions perceived as misconduct that endanger this public trust. I say "perceived as," because accusations of misconduct do not necessarily imply misconduct, but might still have motivated the courts in their decision. What misconduct is and what is not is often not clear-cut, but rather open to interpretation—and the codes do not necessarily illuminate this question. Therefore, the titles of the following sections are spelled: *(Mis-)conduct.*

In a world without (mis-)conduct, the codification of judicial ethics would be unnecessary. If at all, codes could only have detrimental effects, since not all behaviors can be codified, and judges might adopt new forms of conduct that fall outside their scope. Against this background, critically assessing the codes' suitability for ensuring ideal judicial conduct and maintaining public trust requires examining the very instances of (mis)conduct that motivated their adoption.

Given the specific instances of misconduct at the different courts, this part may also help identify how a rule resulting from misconduct at one court has been transplanted—or, perhaps more accurately, migrated—into the code of another. To enable this, while also allowing for the broadest possible comparisons between instances of judicial misconduct, I will now reverse the order of anonymity established in the previous chapter. The less anonymously a court operates and the more frequently its judges surface individually, the more instances of judicial misconduct are likely to be known. Thus, the least anonymous court will allow for the most extensive analysis.

Starting with it will then enable broader comparisons with the more opaque courts in the subsequent parts of this section. Therefore, I will begin by analyzing the SCOTUS (2.1), followed by the ECtHR (2.2), the FCC (2.3), and conclude with the CJEU (2.4).

3.1 (Mis-)conduct at the SCOTUS

Judicial codes of conduct have been a common practice in the U.S. for over 100 years (see 1). Since 2008, the SCOTUS had been the only remaining court in the country without such a code.[97] When it finally adopted one on November 13, 2023, in a joint statement, the Justices declared that the code "largely represents a codification of principles that we have long regarded as governing our conduct," and explained that the main motivation for codification was that the "absence of a Code (...) has led in recent years to the misunderstanding that the Justices of this Court, (…) regard themselves as unrestricted by any ethics rules."[98] Even before analyzing specific instances of judicial misbehavior, one might question whether it is really the public that is misunderstanding something. As shown through multiple examples (see 2.3.4), SCOTUS Justices have a record of publicly declaring certain behavioral standards only to disregard them later.

In contrast to the Court's official statement, scholars have noted that the code was adopted "amid a parade of missteps by its justices" and as a response to public pressure demanding consequences for these controversies.[99] Indeed, the number of instances in which SCOTUS justices have behaved in ways that raise concerns about misconduct is too great to be fully detailed here. However, the fact that judges generally do not regard rules of conduct as binding often makes it difficult to identify misconduct. In many cases, even the newly adopted code does not clearly

[97] Charles Gardner Geyh, 'The Supreme Court Code of Conduct: Will It Make a Difference? (Forthcoming)' (2024) 86 University of Pittsburgh Law Review 1.
[98] SCOTUS (n 5).
[99] Geyh, 'The Supreme Court Code of Conduct' (n 97) 2.

establish whether a particular action constitutes misconduct, due to its frequent use of hortatory language such as "should," "may," and "could." Along with other loopholes, this choice of wording consistently leaves room for interpretation and deviation (see 2.3.4). For these reasons, I will limit my focus to some of the most clear-cut and widely recognized cases of judicial misbehavior at the SCOTUS.

While many different SCOTUS justices have been accused of improper conduct, there is one judge around whom it seems nearly impossible to avoid in this context: Clarence Thomas. As early as 2004, controversy arose when it was reported that Thomas had declared receiving gifts worth "tens of thousands of dollars," including a Bible once owned by an author valued at $19,000, as well as a free trip aboard a private jet arranged by the "wealthy Texas real estate investor" Harlan Crow.[100] In 2011, it was reported that Crow had once again given a gift—this time $500,000 to a "Tea Party group" founded by Thomas's wife.[101] However, the most significant revelation about Thomas's relationship with Crow came in April 2023—just months before the adoption of the code. The investigative journalism organization ProPublica reported that Thomas had accepted "luxury trips virtually every year" from Crow over the past two decades, without declaring any of them.[102] Through his relationship with Crow, Thomas not only accepted trips on luxury yachts, private jet flights, and stays at expensive hotels, but also met with "major Republican donors" and the "leader of (...) a pro-business conservative think tank"—thus granting political activists direct personal access to one of the most powerful judges in the country.[103]

[100] Richard Serrano and David Savage, 'Justice Thomas Reports Wealth of Gifts' *Los Angeles Times* (31 December 2004) <https://www.latimes.com/archives/la-xpm-2004-dec-31-na-gifts31-story.html> accessed 2 June 2025.
[101] Kenneth Vogel, John Bresnahan and Marin Cogan, 'Justice Thomas's Wife Now Lobbyist' (*POLITICO*, 4 February 2011) <https://www.politico.com/story/2011/02/justice-thomass-wife-now-lobbyist-048812> accessed 2 June 2025.
[102] Joshua Kaplan, Justin Elliott and Alex Mierjeski, 'Clarence Thomas and the Billionaire' (*ProPublica*, 6 April 2023) <https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow> accessed 2 June 2025.
[103] ibid.

While Thomas claimed that, in the early days of his judgeship, he had been advised that personal hospitality from friends who do not have "business before the Court" did not need to be reported,[104] there can be no serious doubt that his actions carry the "appearance of impropriety" that judges in lower U.S. courts have long been required to avoid under their codes of conduct[105]—and that the SCOTUS Code of Conduct now addresses in Canon 2. It does not seem hyperbole to argue that the sheer scale of the scandal—reported by news outlets around the world—may have been the decisive factor prompting the Court to adopt a code of conduct and can therefore be seen as one of its principal origins.

While the most significant revelations came only after other courts had already adopted their codes, the earlier reports about Thomas's conduct may have influenced the FCC and the CJEU to adopt relatively stringent rules regarding the declaration of income and the acceptance of gifts—particularly given that cases similar to Thomas's do not appear to have occurred at those courts. Moreover, the involvement of Thomas's wife may help explain why Canon 4 D(3) of the SCOTUS Code of Conduct explicitly references the acceptance of gifts by justices' family members. Among the other codes, the CJEU's addresses family members, in Article 5(2) and the ECtHR's in Section VIII.

SCOTUS justices have demonstrated not only a particular closeness to party donors and political activists, but also to prominent politicians—even at times when those politicians had "business before the Court." In 2004, the Court agreed to hear an appeal in a case concerning the disclosure of information about participants in a private meeting with Vice President Dick Cheney. Just three weeks later, Justice Scalia chose to go on a "duck-hunting trip" with his "long-term

[104] Joshua Kaplan, Justin Elliott and Alex Mierjeski, 'Clarence Thomas Defends Undisclosed "Family Trips" With GOP Megadonor. Here Are the Facts.' (*ProPublica*, 7 April 2023) <https://www.propublica.org/article/clarence-thomas-response-trips-legal-experts-harlan-crow> accessed 2 June 2025.

[105] Kaplan, Elliott and Mierjeski (n 102).

friend" Cheney, traveling on Cheney's private jet.[106] When asked to recuse himself, Scalia responded that "the nation is in deeper trouble than I imagined" if people believed such a trip could influence his vote, adding that SCOTUS justices had historically maintained friendships with high-ranking government officials.[107] Later in the case, the SCOTUS set aside a judge's order that would have required Cheney to "turn over documents that would show whether industry lobbyists had met secretly with his energy policy task force."[108] The case once again highlights the vast difference between, for example, the FCC—where informal annual dinners between government officials and constitutional judges at the German Chancellery have sparked controversy[109]—and the SCOTUS, where a "longtime friendship" between the second most powerful figure in the executive branch and one of the most powerful judges in the country does not, in itself, raise concern. It took a "duck-hunting trip" and a case about the disclosure of secret government meetings to bring the issue to public attention.

However, once again, the case raises broader questions about what ideal judicial conduct at the SCOTUS is. While some SCOTUS justices—and certainly the judges of other courts—may view Scalia's actions as misconduct, his comments about his friendship with Cheney highlight a critical point: if it is true that justices have historically maintained close relationships with high-ranking government officials, then it becomes difficult to define an ideal standard of judicial conduct based on the culture of the court, that requires them to act differently. Today, Justice Scalia possibly *should* recuse himself under Canon 3 B(2)(a) due to a potential "personal bias," but this is a broadly worded provision that he would have to interpret on his own—an example of what scholars call "Supreme Court exceptionalism."[110] Moreover, Canon 3 B(3) states that the rule of necessity may override the rule of disqualification. Scholars have noted that the SCOTUS

[106] Twomey (n 83).
[107] ibid.
[108] David Savage, 'Section VIII: Bush's Legal Legacy: Looking Back: Cheney v. U.S. District Court' (2008) 2008–2009 Supreme Court Preview 668.
[109] Steininger (n 30) 1316.
[110] Geyh, 'The Supreme Court Code of Conduct' (n 97) 40.

commentary on this provision could be interpreted to suggest that its purpose is to prevent tie votes—even though well-established procedures exist to handle such situations. In a nine-member court, this interpretation would mean that, in order to avoid a 4–4 tie, a justice could, in practice, almost always decline to recuse themselves.[111]

Another event that touches on a different dimension of judicial conduct—and that once again raised significant controversy in close proximity to the adoption of the code—was the leak of a draft majority opinion written by Justice Samuel Alito, in which the Court overturned the *Roe v. Wade* decision, in May 2022. While the identity of the leaker remains uncertain and various theories have emerged, many suggest that one of the justices is the most likely source.[112] Some argue that the leak was intended to entrench the opinion as written, while others believe that the "left" wing of the Court sought to influence the "center" to adopt a more moderate stance.[113] Although the leaking of a draft majority opinion in one of—if not *the*—most controversial decisions of the century has been described as "unprecedented,"[114] Justice Alito had already faced accusations in 2014 of leaking a pending opinion to "anti-abortion leaders."[115] Considering the severe harm that such leaks can cause to public trust in the Court, it seems likely that these events were also a significant factor in the Court's decision to adopt a code of conduct. Still, Canon 4 D(4), which states that a "Justice should not disclose or use nonpublic information," remains fairly broad compared to, for example, the Code of Conduct for law clerks at the SCOTUS, which explicitly and extensively addresses confidentiality—even requiring clerks to sign confidentiality agreements.[116]

[111] Geyh, 'The New SCOTUS Code of Conduct' (n 96).
[112] Matt Stieb, 'A Running List of Theories About the Supreme Court Leaker' (*Intelligencer*, 8 May 2022) <https://nymag.com/intelligencer/2022/05/who-leaked-the-supreme-court-draft-overturning-roe-v-wade.html> accessed 3 June 2025.
[113] ibid.
[114] ibid.
[115] Geyh, 'The Supreme Court Code of Conduct' (n 97) 14.
[116] Marshal of the Supreme Court, 'Marshal's Report of Findings & Recommendations' (Supreme Court of the United States 2023) 5–7 <https://www.supremecourt.gov/publicinfo/press/dobbs_public_report_january_19_2023.pdf>.

Over the last 15 years every single one of the SCOTUS justices has been accused of judicial misconduct.[117] It seems clear that the sheer number of missteps, as well as their gravity, combined with the fact that codes of conduct have a longstanding tradition in the U.S. and that many other apex courts have adopted such codes, created enough pressure that even the most independent court in the world ultimately yielded. While those advocating for stricter oversight of judicial ethics might consider this a success, without claiming to have conducted a thorough analysis, the SCOTUS code of conduct appears to primarily reflect the limitations and negative potential of such codes. Even if one ignores the fact that the code does not provide for enforcement, it allows for broad deviations. In some cases, it might even legitimize acts that had been criticized. One example is Justice Sonia Sotomayor, whose staff assisted in promoting the sale of her book—reportedly earning at least $3.7 million from book sales since joining the Court.[118] While Sotomayor's behavior was criticized as an abuse of office and thus contrary to the lower-level code of conduct in July 2023, just months later the SCOTUS code of conduct was adopted, stating that "consistent with historic practice, chambers personnel including law clerks may assist Justices with speeches, law review articles, and other activities."[119] Thus, the adoption of the code effectively allowed Sotomayor—and other justices—to transform what was once debated to be misconduct into acceptable judicial conduct.

3.2 (Mis-)conduct at the ECtHR

The most recent example of concrete steps toward stricter oversight of judicial behavior comes from the ECtHR. On January 27, 2025, the Court amended its code of conduct and announced

[117] Geyh, 'The Supreme Court Code of Conduct' (n 97) 14.
[118] The Associated Press, 'Justice Sotomayor's Staff Urged Schools and Libraries to Buy Her Memoir or Kid's Books' *NPR* (11 July 2023) <https://www.npr.org/2023/07/11/1187005372/sonia-sotomayor-supreme-court-staff-book-sales-signings-memoir> accessed 3 June 2025.
[119] SCOTUS (n 5) 12.

the creation of an ethics council.[120] While thus joining the current trend of codifying legal ethics at apex courts, the ECtHR actually had a code of conduct as early as 2008.[121] However, although the text of this initial code is no longer available, it has been described as "very short" and offering "little more than one could reasonably infer from the Convention."[122] Thus—while still the shortest code in this analysis—one might reasonably argue that the "Resolution on Judicial Ethics" adopted on June 21, 2021, represents the first "substantial" code of conduct for the ECtHR, the origins of which I will now explore.

While different events contributed to the origins of this code, one process stands out—not only for its apparent significance in the Court's decision to adopt a new code but also for its uniqueness across all four jurisdictions—allowing us to highlight a specific dimension in the codification of legal ethics. In March 2020, the European Centre for Law & Justice published a report titled "NGOs and the Judges of the ECHR, 2009–2019."[123] One of the report's authors explained that its goal was to shed light on "the relationships between the judges of the ECtHR and leading NGOs" and "cases in which doubts about the judges' impartiality might arise" as a result..[124] The report found that, out of 100 permanent judges analyzed, "22 have been administrators, employees or associates" of seven different NGOs that are "active at the Court," and that in 88 of the 185 cases involving these NGOs—as applicants or through third-party interventions—judges sat on the bench who had former affiliations with those NGOs.[125] Is this behavior similar to that of SCOTUS Justices Scalia and Thomas (see 3.1)?

[120] ECtHR, 'European Court to Set up an Ethics Council' <https://hudoc.echr.coe.int/fre-press#{%22itemid%22:[%22003-8142420-11407726%22]}> accessed 3 February 2025.
[121] Antoine Buyse, 'Judicial Ethics' (*ECHRBLOG*) <https://www.echrblog.com/2008/07/judicial-ethics.html> accessed 3 June 2025.
[122] ibid.
[123] Grégor Puppinck and Delphine Loiseau, 'NGOs and the Judges of the ECHR, 2009 - 2019' (European Centre for Law & Justice 2020) <https://eclj.org/ngos-and-the-judges-of-the-echr?lng=en> accessed 3 June 2025.
[124] Grégor Puppinck, 'NGOs and Judges at the ECtHR: A Need for Clarification' (*EJIL: Talk!*, 5 March 2020) <https://www.ejiltalk.org/ngos-and-judges-at-the-ecthr-a-need-for-clarification/> accessed 3 June 2025.
[125] ibid.

This seems rather unlikely. Martin Scheinin was quick to explain why the findings of the report are "rather trivial."[126] Scheinin argues that the report is neither "really a result of academic research, nor does it manage to identify an actual problem."[127] It establishes "ludicrous" links, such as claiming judges are partial solely because they once taught at a university established with the help of NGO funds.[128] More broadly, Scheinin points out that the report fails to recognize that in the ECHR system—which is traditionally biased toward states (see also 2.3.3)—a judge having formerly worked with an NGO mainly signifies independence from the contracting state that nominated them, rather than partisan bias toward the NGO.[129]

However, most importantly, Scheinin claims that the report represents "political advocacy" from an organization whose chief counsel—Jay Sekulow—has been involved in numerous scandals and was described as a "longtime conservative Christian legal crusader."[130] The Centre claims to have collected over 60,000 signatures for the "Petition to End Conflicts of Interest at the ECHR."[131] Moreover, it asserts some success, as the ECtHR's code of conduct—adopted just about a year later—now requires under II. that judges "shall be independent of any body, authority or any private entity." The timing suggests that this report may have influenced the ECtHR's decision to adopt a new code. This reveals a problematic dimension of judicial ethics: the potential for political actors to exert undue pressure aimed at destabilizing courts or undermining public trust in them. While complaints about unethical judicial behavior can be justified, they can also be exploited for other ends. Likewise, this highlights that while broad provisions in codes may grant

[126] Martin Scheinin, 'NGOs and ECtHR Judges: A Clarification' (*EJIL: Talk!*, 13 March 2020) <https://www.ejiltalk.org/ngos-and-ecthr-judges-a-clarification/> accessed 3 June 2025.
[127] ibid.
[128] ibid.
[129] ibid.
[130] Darren Samuelsohn, 'The Trump Lawyer Who Survived' (*POLITICO*, 6 February 2020) <https://www.politico.com/news/magazine/2020/02/06/sekulow-trump-111265> accessed 3 June 2025.
[131] 'Putting an End to Conflicts of Interest at the ECHR' (*European Centre for Law and Justice*) <https://eclj.org/geopolitics/echr/mettre-fin-aux-conflits-dinterets-a-la-cedh?lng=en> accessed 3 June 2025.

judges wide discretion in defining misconduct, they also open a large attack surface vulnerable to abuse from political actors.

While it seems likely that the previously discussed events influenced the ECtHR's decision to adopt a new code, there is a series of events where this influence appears almost certain. These involve a judge we have already encountered: Robert Spano. Interestingly, these events seem correlated with Spano's earlier publications on the "procedural turn" (see 2.3.3). In these writings, Spano argued for a "democracy-enhancing approach to legislative deference."[132] Scholars have argued that this "procedural turn" as such has harmed the ECtHR's reputation as a "flagbearer of human rights."[133] However, Spano adopted a notably "diplomatic" stance toward contracting states not only in his publications but also in his actions once he became President of the Court.

From September 3–5, 2020, Spano visited Turkey—a trip that sparked strong criticism, was claimed to have seriously damaged the reputation of the ECtHR, and even led to calls for his resignation.[134] His visit began with a "comprehensive speech" before the Justice Academy of Turkey, which was harshly criticized for failing to mention, even once, that Turkish authorities have long been "systematically defying the ECHR."[135] The absence of "even a shade of a critical tone"[136] meant that Spano failed to fulfill one of the key components of ideal judicial conduct established earlier: the ECtHR judges' symbolic function (see 2.3.3). This function requires judges to address human rights grievances, especially in a state trending toward authoritarianism with over 60,000 individual applications to the court since otherwise judges risk being "used for public display" by the regime.[137]

[132] Spano (n 57) 488.
[133] Şirin and Orcan (n 61).
[134] Dilek Kurban, 'Why Robert Spano Should Resign as President of the ECtHR' [2020] Verfassungsblog <https://verfassungsblog.de/why-robert-spano-should-resign-as-president-of-the-ecthr/> accessed 10 June 2025.
[135] ibid.
[136] Şirin and Orcan (n 61).
[137] Kurban (n 134).

However, what raised even more criticism was that, following his speech, Spano met with Turkish President Erdoğan, politicians from the ruling AKP party, and even accepted an honorary doctorate from Istanbul University—a university known for expelling numerous academics under government decree laws.[138] Rather than meeting with Turkish human rights NGOs, Spano was mostly accompanied by government officials and AKP representatives.[139] Finally, together with Turkish ECtHR judge Saadet Yüksel, her brother Cüneyt Yüksel—a former AKP parliamentarian—and Mahmut Demirtas, a government-appointed mayor, Spano visited a school in Mardin. This visit was not mentioned on the ECtHR's website and only became public through a Twitter post that was deleted after approximately nine hours.[140] Allegedly, Judge Yüksel's parents donated funds for the school's construction.[141]

When the ECtHR adopted its new code of conduct less than a year later, it included a provision with no identical counterpart in any of the other codes analyzed here: "IX. Judges may not accept (…) honours during their mandate as a Judge of the Court." While it seems safe to assume that the inclusion of this provision stems from Spano's misconduct, other additions—such as point III., which states that judges "shall refrain from any activity, expression and association that may be considered to affect adversely public confidence in their impartiality"—may also have been prompted by it.

[138] ibid.
[139] Şirin and Orcan (n 61).
[140] ibid.
[141] Kurban (n 134).

3.3 (Mis-)conduct at the FCC

The main driving aspect behind the FCC's code of conduct reportedly was former President Voßkuhle's observation of how constitutional adjudication deteriorated in Poland and Hungary. Voßkuhle considered these events a warning sign for other apex courts to maintain a spotless reputation to avoid falling prey to populist agendas.[142] It seems probable that the "parade of missteps" by SCOTUS justices and the Court's coinciding loss of public trust[143] also influenced the FCC's decision. A strong indicator, for example, is that under Section II.9, FCC judges must disclose external income, published annually on the FCC's website. As there are no reports of financial issues involving sitting FCC judges, this measure was very likely inspired by the American experience with Justice Thomas and others.

However, while compared to the SCOTUS there are far fewer accusations of judicial misconduct at the FCC, its history in this regard is certainly not spotless. One behavioral pattern stands out and appears to have strongly influenced the court's decision to adopt a code of conduct. While ideal judicial conduct requires FCC judges to "bow before the institution" to ensure the court is perceived as a unified body—a norm informally enforced by the collective of judges (see 2.3.2)—it seems that once judges' terms end, they have often felt less constrained by these informal rules.

Some former FCC judges regularly comment on legal and political matters through op-eds, interviews in German news outlets, or public speeches. Others, together with prominent German politicians and former high-ranking government officials, develop proposals for "state reforms,"

[142] Steininger (n 30) 1312.
[143] Madiba Dennie, 'Poll: Americans Annoyed By Annual Reminder That Supreme Court Exists' (*Balls and Strikes*, 5 October 2023) <https://ballsandstrikes.org/law-politics/supreme-court-polling-concerning-looking-into-it/> accessed 4 June 2025.

attracting considerable public attention.[144] The regularity with which former FCC judges are engaged as legal experts in highly sensitive political matters underscores the specific weight a person's voice gains after serving on the Court. Even after a judge's mandate ends, the high reputation of the FCC continues to reflect on them, lending their opinions significant authority. While this is not inherently problematic—given that nine years on the FCC undoubtedly lead to deep expertise in constitutional law—it also opens the door to potential misuse and misconduct. In this context, while this does not necessarily imply misconduct, Florian Meinel has recently pointed out how some public statements by former FCC judges increasingly reflect a drift toward right-wing populist circles.[145]

Other well-respected German academics have pointed out that former FCC President Hans-Jürgen Papier "in 2015 attracted attention due to legally untenable claims that would not have been sufficient to pass a beginners' exam."[146] While it seems impossible to prove misconduct solely on the basis of unsound legal reasoning, there remains at least a suspicion that Papier consciously (ab-)uses the authority his words carry to advance his preferred political agenda, even when it runs counter to legal requirements.

What definitely seems to have influenced the FCC's decision to adopt a code of conduct is that Papier also embarked on a highly lucrative and "remarkable career as a universal expert on politically controversial legal issues" concerning major political topics such as Germany's decision

[144] 'Bürokratie: "Initiative für den handlungsfähigen Staat"' (*Legal Tribune Online*) <https://www.lto.de/recht/nachrichten/n/buerokratie-zukunftsstaat-reform-vosskuhle-baer-erstunterzeichner> accessed 4 June 2025.

[145] Florian Meinel, 'Steinmeiers Staatsreform: So sieht der Populismus der Eliten aus' *Frankfurter Allgemeine Zeitung* (14 April 2025) <https://www.faz.net/aktuell/feuilleton/debatten/steinmeiers-staatsreform-so-sieht-der-populismus-der-eliten-aus-110414123.html> accessed 4 June 2025.

[146] Anna Katharina Mangold, 'Zu Äußerungen des ehemaligen Präsidenten des Bundesverfassungsgerichts, Hans-Jürgen Papier, der schon 2015 durch rechtlich nicht haltbare Behauptungen aufgefallen ist, die in keiner Anfängerklausur zum Bestehen reichten. Was ist da nur los?' <https://x.com/feministconlaw/status/1832823407244673374> accessed 4 June 2025.

to abolish nuclear energy.[147] Another example of similar behavior is former Judge Udo di Fabio's 2016 statement attesting to the "good prospects of success" of a potential lawsuit at the FCC by the Federal State of Bavaria against Germany's government's "open border policies" during the so-called "migrant crisis"—a highly significant political issue.[148] These events made clear that, while respect for ideal judicial conduct at the FCC generally led judges to refrain from making controversial political statements while on the bench, some no longer felt constrained by these norms after their mandates ended.

This explains why the FCC's code of conduct addresses conduct after the end of a judge's mandate more broadly than, for example, the ECtHR's code. While Section III.13 requires judges to "exercise restraint (…) in their statements (…) with regard to matters of the Court" this provision is similar to what Section XI of the ECtHR's code demands. However, unlike former Strasbourg judges, former FCC judges are also prohibited from becoming "involved in legal matters that were the subject of proceedings before the FCC during their term of office," according to Section III.14. Finally, Section III.15 provides that, for one year following their departure, judges must refrain from "advisory activities that relate to the subject areas of their cabinet, from submitting expert opinions, and from appearing in court." Even after that period, they are still prohibited from appearing as representatives before the FCC. In contrast, ECtHR judges may represent individuals before the Court just two years after their mandate ends.

While the instances mentioned above seem to have influenced the adoption of the Court's code of conduct, events following its implementation raise questions about its effectiveness. In particular, Judge Peter Müller attracted attention for public comments he made. In 2022, regarding elections in the federal state of Berlin—where problems in the organization of the vote later led to

[147] Constantin Baron van Lijnden, 'Ethikkodex: BVerfG will Vertrauen erhalten' (*Legal Tribune Online*) <https://www.lto.de/recht/hintergruende/h/bverfg-ethik-kodex-vertrauen-bevoelkerung-erhalten-politik-wirtschaft-einfluss> accessed 4 June 2025.
[148] ibid.

its annulment—Müller remarked in an interview that the events resembled what one would expect in a "dictatorial so-called development country."[149] It seems questionable whether such unnecessary remarks are compatible with Section II.12 of the FCC's code of conduct, which requires judges to "ensure that the nature of their statements (…) are compatible with their duties, the reputation of the Court, and the dignity of the office." The matter gained further relevance when the Berlin election became the subject of legal proceedings before the FCC, in which Müller served as rapporteur. In response to a press inquiry, the Court merely stated that he had made the comments in his "private capacity."[150] Perhaps even more controversial, it was reported that in a speech delivered at a party conference of the Christian Democratic Union, Müller claimed that the Paris climate targets are no longer achievable anyway.[151] One might seriously question whether it lies within the province of a sitting constitutional judge to comment on the achievability of state goals concerning one of the most pressing global issues of the 21st century—in a field far removed from constitutional law. Müller might have violated his obligation under Section III.13 to exercise restraint in statements. The events involving Müller raise doubts about the effectiveness of codes of conduct. Although the FCC's code had already been in place for a considerable time, Müller did not refrain from making controversial public statements. The code's broadly worded provisions naturally allow for interpretations under which Müller's comments may not constitute a violation.

However, the FCC's code of conduct also explicitly legitimizes certain forms of conduct. For instance, Section II.9, which addresses extrajudicial income, states that it "is not objectionable if the organiser of an event covers appropriate expenses for travel, accommodation and meals." While the substance of this provision is far less questionable, from a structural perspective it is comparable to how the SCOTUS code of conduct legitimized the use of law clerks to assist justices

[149] Alexander Schmalz, 'Wahlpannen in Berlin: Karlsruher Richter sieht Zustände wie in einer Diktatur' (*Berliner Zeitung*, 5 October 2022) <https://www.berliner-zeitung.de/news/wahlpannen-in-berlin-karlsruher-richter-sieht-zustaende-wie-in-einer-diktatur-li.273785> accessed 4 June 2025.
[150] Steininger (n 30) 1314.
[151] Florian Meinel, 'Legitimation contra Verfahren' [2023] Verfassungsblog <https://verfassungsblog.de/legitimation-contra-verfahren/> accessed 4 June 2025.

with private publications. This is not to suggest that there is anything inherently problematic about the FCC's provision—it may in fact serve to protect the Court from attacks of the kind faced by the ECtHR (see 3.2.). Rather, the point is to remain aware that, as much as codes of conduct may contain restrictions on judicial behavior, they may also originate from a logic of legitimizing certain practices in order to shield them from public criticism.

3.4 (Mis-)Conduct at the CJEU

The final part of this work will focus on the most opaque court analyzed here: the CJEU. It is the only one of the courts that already had two earlier codes of conduct. The first entered into force in 2007, the second in 2017, and the current version has been in force since October 2021. While the text of the earlier ECtHR code is no longer available (see 3.2), it seems that the CJEU's first code went beyond it. The fact that the CJEU had substantial codes of conduct in place before the other courts seems to reflect its institutional culture, in which ideal judicial conduct places strong constraints on judges with regard to individual visibility (see 2.3.1).

For a long time, it appears that the CJEU's emphasis on anonymity has helped prevent major scandals concerning the conduct of its judges. This does not necessarily mean that no misconduct occurred—it might simply mean that any such misconduct escaped public attention. At least this is what one might discern from comments made by former CJEU judge Franklin Dehousse, who claimed that there had been external activities of a "questionable nature" and raised concerns about judges using official drivers for private purposes.[152] Dehousse had intended to raise these issues in his farewell speech; however, in an apparent break with the Court's traditions, no public ceremony was held.[153]

[152] Alemanno, Pech and Dehousse (n 10).
[153] ibid.

Dehousse did not only express his discontent with the behavior of certain judges, but also sought, in 2016, to gain access to internal "working documents (…) leading to the adoption of the [new] code of conduct."[154] He initially directed this request to the Court's registrar, and the response he received highlights yet another function that codes of conduct can serve. Under Article 7(1) of the old code (Article 10(1) of the current version), responsibility for the "proper application" of the behavioral rules lies with the President of the Court, acting jointly with a consultative committee. When faced with Dehousse's request, the registrar consulted this committee, which reportedly advised that if Dehousse were to publish the documents, this would constitute a breach of the code of conduct. Specifically, Article 1(3) of the former code (Article 6(4) in the current version) states that members of the Court "shall refrain from making any statement outside the Institution which may harm its reputation."[155] Whatever one may think about whether publishing documents related to misconduct qualifies as "making a statement," what becomes clear is that, at the CJEU, the code of conduct can serve not only to prevent misconduct, but also to prevent such misconduct from becoming publicly known—thereby reinforcing institutional anonymity. In the subsequent case before the CJEU, Dehousse's request for access to the documents concerning the amendments to the code of conduct was ultimately denied. The Court found that he had not succeeded in rebutting "the general presumption of confidentiality invoked by the CJEU, which aims to prevent the disclosure of certain documents for internal use from seriously undermining the decision-making process."[156]

While there have been accusations of judicial misconduct prior to the adoption of the current version of the CJEU's code of conduct, such cases are rare, have received significantly less public attention than events at the other courts analyzed here, and mostly seem to have been of

[154] Case T-433/17 *Dehousse v Court of Justice of the European Union* [2019] ECLI:EU:T:2019:632, para 8.
[155] ibid. para 3-5.
[156] ibid. para 106

lesser gravity. However, this last point does not apply to all allegations. In 2019—only two years before the adoption of the new code—the Slovenian judge Miro Prek was accused by a former employee of "sexual, psychological and physical violence,"[157] thus moving beyond questions of judicial ethics and into the realm of criminal law. According to press reports, the alleged victim accused Prek of "rape," "assault and battery," and "moral and sexual harassment" within the offices of the Luxembourg court.[158] While Prek seemingly refrained from seeking reappointment as a judge the result of the criminal proceedings initiated against him remains unknown.

While it is hard to imagine the scale of scandal and public attention such revelations would provoke if they had occurred at the FCC, in Prek's case, public attention appears to have remained very limited. However, this is perhaps not surprising when considering that the CJEU has been accused of hushing up the matter.[159] Such accusations once again raise concerns that anonymity at the CJEU not only limits the individual visibility of judges but may also serve to deliberately obscure instances of misconduct. Although the proximity in time might suggest some influence, the allegations against Prek do not appear to have been reflected in the current code of conduct: neither issues of sexual harassment nor the broader relationship between judges and their staff are addressed. More troubling still, in 2024 the Court was reportedly accused of welcoming Prek to festivities marking the 20th anniversary of the EU's eastern enlargement—despite the fact that the allegations against him remain unresolved.[160] The fact that the allegations against Prek do not seem to have had a significant influence on the Court's internal culture is further underscored by the emergence of new—and similar—accusations in 2024. The investigative platform *Follow the Money*

[157] Camille Frati and Lex Kleren, 'Slovenian Enigma at the Court of Justice of the EU' (*Lëtzebuerger Journal*) <https://journal.lu/en/slovenian-enigma-court-justice-eu> accessed 6 June 2025.
[158] Jean Quatremer, 'Comment la Cour de justice de l'UE a étouffé une affaire de violences sexuelles' (*Libération*) <https://www.liberation.fr/international/europe/comment-la-cour-de-justice-de-lue-a-etouffe-une-affaire-de-violences-sexuelles-20230626_U467HXW7PZFUXMHSGHEBPB7RLU/> accessed 6 June 2025.
[159] ibid.
[160] Silvia Mari De Santis, 'Lettera al presidente della Corte di Giustizia Ue: "Non si ostacoli la verità sul caso Prek denunciato per violenza"' (*Agenzia Dire*, 23 May 2024) <https://www.dire.it/23-05-2024/1044366-lettera-al-presidente-della-corte-di-giustizia-ue-non-si-ostacoli-la-verita-sul-caso-prek-denunciato-per-violenza/> accessed 6 June 2025.

reported that a CJEU judge had "allegedly harassed law students at an annual moot court contest."[161] Among a series of acts that would be widely regarded as severe misconduct—not only at apex courts but virtually in any setting—a judge reportedly asked one woman present: "What is it like to sleep in the same room with a woman like [her]?"[162] According to the report, such instances are far from rare at the Court, where judges are said to exert near-dictatorial power over their cabinets. While the accused judge has denied the allegations, court staff cited in the article reiterate a familiar accusation: instead of properly addressing judicial misconduct, the Court allegedly sweeps it "under the carpet."[163]

Thus, it becomes clear that apex court anonymity is, at best, a double-edged sword: while it may help prevent judges from seeking individual visibility and thereby reduce the risk of misconduct through public commentary, it can also serve to conceal other—worse—forms of misconduct. There are strong indications that the CJEU actively discourages transparent discussion of such behavior, and some critical areas appear to be entirely absent from its code of conduct. Arguably, reports like the one from *Follow the Money* would spark major scandals at the FCC or the ECtHR—yet at the CJEU, they appear to go largely unnoticed. This culture makes it difficult to draw a clear connection between judicial misconduct at the CJEU and the adoption or amendment of its codes of conduct. One event that does seem to have influenced the most recent version of the CJEU's code was ECtHR judge Robert Spano's acceptance of an honorary doctorate from Istanbul University. While the current code does not prohibit judges from accepting decorations or honors, it does require them to disclose such awards in their declaration of interests under Art. 5(3). The previous version of the code made no mention of such honors.

[161] Lise Witteman, 'Alleged Sexual Harassment at the EU's Top Court Raises Questions of Ethics Oversight' (*Follow the Money - Platform for investigative journalism*, 23 July 2024) <https://www.ftm.eu/articles/transgressive-behaviour-at-the-european-court-of-justice> accessed 6 June 2025.
[162] ibid.
[163] ibid.

4 Conclusion

While the aim of this analysis was to explore the origins of apex courts' codes of conduct in order to understand whether these codes can foster public trust in the courts, the first important finding appears to lie in the context preceding the codes themselves. In examining the varying levels of court transparency, the impression arises that anonymity can play an important role in ensuring public trust and providing stability to the courts. As mentioned at the outset of this analysis, the results are susceptible to subjectivity, and it is not possible to establish clear causality. Nonetheless, there appear to be strong indicators that more anonymous courts enjoy greater public trust and, as a result, are more stable. It seems evident that anonymity contributes to the rarity of misconduct at the FCC, while its absence appears to fuel instances of misconduct at the SCOTUS. Even when misconduct occurs, anonymity serves the courts, as in a more anonymous court culture, such incidents attract less attention. Today, the FCC appears to be one of the most trusted courts in the world, while the SCOTUS is steadily losing public trust. Similarly, the CJEU does not seem to face the same level of criticism and attacks as its "sibling," the ECtHR. While the latter's culture of judges publicly debating activism and deference may contribute to transparency, it is likely that this has also enhanced the increasingly hostile stance of contracting states toward the court. In contrast, although the EU faces serious challenges such as Euroscepticism, the CJEU does not appear to be subject to similar attacks. While the "representational function" of ECtHR judges might strengthen public trust in the court if properly upheld—and without suggesting that the court could simply abandon this role—it seems to cause harm that outweighs its benefits when judges fail to meet the expected standards. Thus, anonymity appears to strengthen the stability of apex courts. On the other hand, anonymity is far from being an entirely positive feature. As with judicial independence at the SCOTUS, one might argue that anonymity at the CJEU is excessive. It is highly questionable that incidents of sexual harassment at arguably the most powerful court in the world receive so little attention in the EU's member states. Strong anonymity may not only lead judges to avoid

unnecessary individual visibility and protect the image of the court as a unified body, but also enable the concealment of deeply troubling behavior.

Anonymity also has significant effects on courts' decisions to codify judicial ethics, in a twofold way. The CJEU's opaque institutional culture appears to have prompted the court to adopt a code of conduct earlier than any of the other courts. On the other hand, in a less transparent court culture, the instances of misconduct at the SCOTUS might not have triggered the same loss of public trust that ultimately compelled the court to adopt a code. In this latter case, as with the others, it seems that misconduct played a key role, as all the codes appear to address specific incidents in one way or another. However, beyond that, none of the codes seem to follows a transformative logic; instead, they entrench a particular understanding of ideal judicial conduct, grounded in tradition and expressed through broadly worded provisions. It remains to be seen whether this approach will succeed in preventing misconduct—especially of an unprecedented kind. While certain elements—such as the disclosure of external income and rules governing judicial activities after the mandate—clearly seem beneficial, it is important to remain aware that calls for the codification of legal ethics can also have drawbacks. As these rules are self-proclaimed, courts may not only view them as restrictions but also as tools to legitimize certain behaviors. Moreover, apex courts of nation-states tend to adopt less strict rules for themselves than those applied to lower courts within their systems—at least the SCOTUS illustrates this tendency. Finally, one must be aware that the discourse on judicial ethics and broadly worded rules is prone to misappropriation for political purposes—attacks on the ECtHR provide a clear example.

While this analysis has provided insights not only into the origins of the trend toward codifying legal ethics at apex courts but also into some initial conclusions about the codes themselves, it does not offer a comprehensive examination or comparison of their content. Such an analysis will be essential to determine whether the codes of conduct at the courts examined

here—and more broadly—are effective tools for preventing misconduct and fostering public trust in the judiciary. This analysis has also not addressed the controversial issue of whether—and how—the codes of conduct can be enforced. However, the contribution of this thesis lies in providing the foundation necessary for such further analysis. It explores the origins of the codes both in terms of substance and motivation, thereby offering future research the essential background needed to understand and evaluate the content of these codes. In doing so, it highlights various dimensions of ideal judicial conduct and misconduct at apex courts—with the degree of anonymity emerging as a key differentiating factor. The codification of legal ethics at apex courts is a complex issue, with no clear-cut solutions or universal answers. Productive future research and debate on this topic must acknowledge this reality.

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