The power of the Supreme Court Ethics Act

Law schools are thinking hard about curriculum these days. Infusing ethics into more course discussions is a recurring theme in many innovative curricular changes. An expansion of clinical opportunities likewise puts ethics issues front and center for law students.

The goal of an expanded and holistic ethics curriculum is to impress upon law students, our future lawyers and judges, that the legal profession is bound by a high ethical code and that ethics issues are confronted every day, not just during the Multistate Professional Responsibility Exam.

Embedded within ethics discussions are problems of access to justice. Leaders in the legal community have brought renewed attention to the issue. Here in Illinois, for instance, the Supreme Court formed an Access to Justice Commission last year. This panel focuses on helping the legal community remove barriers to justice throughout the legal system.

What do recent curricular trends and the Supreme Court's commission have in common? Without a strong ethics code and a professionwide signaling of its support, the rule of law is threatened and access to justice severely curtailed. Enter the Supreme Court Ethics Act of 2013.

Earlier this month, a group of legislators in both the U.S. Senate and the House of Representatives proposed the act, a bill that would require the U.S. Supreme Court justices to be bound by an ethics code similar to the one that currently regulates the behavior of all other federal judges. The Code of Conduct for United States Judges, written by the Judicial Conference of the United States, requires all lower federal court judges to follow certain guidelines regarding fundraising, recusals and general demeanor on and off the bench. Most state Supreme Courts have similarly adopted ethics codes.

There are different ways to approach discussion of this proposed legislation. The first approach is the purely legal approach — whether it is constitutional for Congress to regulate the Supreme Court. Chief Justice John G. Roberts Jr., in his 2011 Report on the Federal Judiciary, has implied that it might not be, pointing to the constitutional creation of the Supreme Court in Article III and differentiating it from the concurrent vesting of power in Congress to create the lower federal courts.

Congress has in the past, however, mandated financial reporting, gift limitations and recusal guidelines for all federal judges, including the Supreme Court justices. These past legislative mandates have never been challenged and the court complies with them. The Code of Conduct goes further and prohibits all lower federal judges from political activity, fundraising and the avoidance of impropriety generally.

This Code of Conduct has not been formally adopted by the Supreme Court justices, although Roberts has stated that the justices consult it for guidance.

Beyond the question of constitutionality lies the extra-legal discussion. The introduction of such legislation and the current Supreme Court's resistance to adopting a formal code of ethics, particularly one focused on political activity and fundraising by the justices, signals something even more disconcerting.

The legal profession is at an ethics crossroads. There are constant exhortations for academics and the bar to reform the profession. Law schools are approaching ethics curricula with new vigor. These discussions are creative and vital to the future of our profession. This focus on ethics from academics and practitioners and other judges is, however, woefully discordant with the Supreme Court's reluctance to voluntarily adopt the code for itself.

The Supreme Court's position is similarly out of sync with the growing attention being paid to transparency and accountability in the judicial system. Former Justice Sandra Day O'Connor, writing on the future of the judiciary in the Denver Law Review, pointed out that judicial accountability and judicial independence are two sides of the same coin. The coin itself is one of judicial integrity. It may be that greater respect (and signaling) for judicial accountability and integrity will be the key to maintaining judicial independence.

These larger concerns led more than 200 legal academics to urge the court to adopt a code of ethics in 2011. Recent Gallup polling confirms that the Supreme Court's appearance of propriety is being questioned, with a public approval rate at an all-time low of 43 percent. The public's faith in the Supreme Court is waver. The court, and the rule of law, is only as strong as the people's trust in the impartiality of those who judge.

By many accounts, this particular bill has little chance of making it through the legislative process. Previous similar bills have also failed. But its mere proposal amplifies a discussion that has long been quietly resonating throughout the profession.

How are law schools and the bar supposed to impress upon our newest members the integrity of the profession, the importance of ethics, and the necessity of constant vigilance to conflicts of interest, when our most esteemed legal institution turns away?

On such a vital question of judicial accountability, this unfortunate signaling by the Supreme Court speaks quite loudly.