Green Ethics for Judges

*Tom Lininger**

Abstract

As a sequel to Green Ethics for Lawyers*, which appeared in the* Boston College Law Review *in 2016, this Article proposes new ethical rules for judges in order to ensure proper cognizance of environmental risks. The Article considers arguments for and against the promulgation of unique rules for environmental cases. Concluding that such customized rules would not be appropriate, the Article advocates new rules of general application that would incidentally improve judicial ethics in the context of environmental matters, as well as in other contexts.*

This Article offers a comprehensive set of proposed amendments to the American Bar Association ("ABA") Code of Judicial Conduct. The proposals would import the "precautionary principle" to judicial ethics and would establish an ethical imperative to find scientific facts accurately. The proposals would increase transparency, require inclusion of diverse stakeholders, necessitate greater candor by judicial candidates, expand the bases for disqualification of judges, clarify the boundaries of the political question doctrine, and demand greater patience from judges presented with arguments to extend current law. The proposed rules would also insist that judges consider nonhuman interests as well as intergenerational equity.

These proposals are likely to draw objections. The last section of the Article anticipates and refutes concerns that the new judicial ethics would impose improper constraints on judges' substantive rulings, would unduly politicize the judiciary, would require judges to make determinations beyond their expertise, would infringe judges' First Amendment rights, and would prove less efficacious than alternative means of regulating judicial conduct. The Article closes by arguing that the proposed amendments are not a radical departure from current rules, but are instead a logical extension of the principles underlying those rules.

Table of Contents

* Orlando J. and Marian H. Hollis Professor of Law, University of Oregon. This Article benefited from feedback received in presentations at Boston College Law School, Columbia Law School, NYU School of Law, SMU Dedman School of Law, and Yale Law School, as well as at the International Legal Ethics Conference and at the annual conference of the ABA Section of Environment, Energy and Resources. Special thanks to the Environmental Law Institute and the National Science Foundations' Paleoclimate Program for sponsoring interdisciplinary workshops in which the author and others discussed the ethics of scientific uncertainty. Alexander Erwig has been a fantastic research assistant.

INTRODUCTION

Does the duty of environmental protection belong in the ethical rules for our profession? A number of scholars,[1] including this Article's author,[2] have explored whether lawyers should bear such duties. But little attention has focused on the possibility that "green ethics" would also be appropriate for judges.[3]

The time is ripe to discuss this topic. In 2018, the judiciary plays a more critical role than ever before in reviewing—and sometimes barring—public and private actions that could affect the environment.[4]

---

1 *See, e.g.*, Irma S. Russell, *Unreasonable Risk: Model Rule 1.6, Environmental Hazards, and Positive Law*, 55 WASH. & LEE L. REV. 117, 171–81 (1998) (advocating amendment of ABA Model Rule to allow reporting of certain environmental hazards notwithstanding ordinary obligations to maintain client confidences); Douglas R. Williams, *Loyalty, Independence and Social Responsibility in the Practice of Environmental Law*, 44 ST. LOUIS U. L.J. 1061, 1066 (2000) (offering "suggestions for reforming the Model Rules' extreme limits on the lawyer's ability to 'blow the whistle' on the environmental practices of clients that threaten harm to third parties"). Some scholarship has focused on ethical challenges confronting the subset of attorneys who specialize in the practice of environmental law. *See, e.g.*, John French III, *Ethical Issues in the Practice of Environmental Law*, 2 PACE ENVTL. L. REV. 66, 80–82 (1984) (raising concerns about ethical dilemmas that might arise in the in environmental practice, but offering no proposals for reform); J. William Futrell, *Environmental Ethics, Legal Ethics, and Codes of Professional Responsibility*, 27 LOY. L.A. L. REV. 825, 836–39 (1994) (discussing the general growth of environmental law as a practice area and briefly mentioning the need for new ethical rules to guide practitioners of environmental law, but offering no such proposal); Stanford M. Stein & Jan M. Geht, *Legal Ethics for Environmental Lawyers: Real Problems, New Challenges, and Old Values*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 729, 747 (2002) (addressing some of the particular problems that environmental lawyers might face, but offering no particular solutions to those problems, acknowledging that "[t]his article poses more questions then [sic] it answers"). Some publications addressing ethical challenges in the context of environmental practice have explained the application of the current rules rather than urging reform of those rules. *See, e.g.*, Pamela R. Esterman, *Environmental Law Practitioner's Guide to the Model Rules*, 25 NAT. RESOURCES & ENV'T 12, 12–15 (2011) (explaining how environmental practitioners can comply with current rules).

2 *See* Tom Lininger, *Green Ethics for Lawyers*, 57 B.C. L. REV. 61, 76 (2016) (proposing a set of amendments to the ABA Model Rules of Professional Conduct in order to impose various duties of environmental protection).

3 *Cf.* David S. Wilgus, *The Nature of Nuisance: Judicial Environmental Ethics and Landowner Stewardship in the Age of Ecology*, 33 MCGEORGE L. REV. 99, 116 (2001) (noting the importance of environmental consciousness among judges, but suggesting that "it is not necessary to reduce our environmental ethic to a black letter maxim").

4 *See generally* Rosemary O'Leary, *Environmental Policy in the Courts*, *in* ENVIRONMENTAL POLICY: NEW DIRECTIONS FOR THE TWENTY-FIRST CENTURY, 128, 147–48 (Norman J. Vig & Michael E. Kraft eds., 9th ed. 2016) (observing that U.S. courts "have become permanent players in environmental policymaking," and will play an increasingly important role in this area in upcoming years); Robert V. Percival, *The "Greening" of the Global Judiciary*, 32 J. LAND USE & ENVTL. L. 333, 333 (2017) (analyzing the increasingly important role played by the global judiciary in environmental matters).

Dockets now include a vast number of environmental matters.[5] The cases range from local NIMBY suits[6] to challenges of regional energy projects.[7] A local judge might hear a small-scale nuisance action while a federal judge down the street is adjudicating a complex complaint filed under the Clean Air Act.[8] Environmental advocates are offering novel, game-changing theories: some are invoking the public trust doctrine to sue the federal government for neglecting to address climate change,[9] and some are raising the necessity defense to fend off prosecutions of civil disobedience in environmental protests.[10] The volume and sophistication of environmental litigation is unprecedented in the history of our legal system.[11]

---

5 *E.g.*, *U.S. District Courts—Judicial Business 2016*, ADMIN. OFF. U.S. COURTS, http://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2016 [https://perma.cc/L7CJ-NX36] [hereinafter AOUSC Report] (setting forth statistics on dockets of federal courts in 2016, and noting that the number of cases involving environmental matters climbed 165% from 2015 (565) to 2016 (1495)).

6 NIMBY stands for "not in my back yard." *See generally* Jeff Collins, *Does California's Environmental Protection Law Impede Economic Development?*, MERCURY NEWS (Sept. 5, 2016, 3:41 PM), http://www.mercurynews.com/2016/08/29/does-californias-environmental-protection-law-impede-development/ [https://perma.cc/L4YA-5FZR] (summarizing recent study exploring whether so-called NIMBY suits filed under California Environmental Protection Act are impeding economic growth and the development of affordable housing).

7 *E.g.*, Merrit Kennedy, *Judge Rules that Construction Can Proceed on Dakota Access Pipeline*, NPR (Sept. 9, 2016), http://www.npr.org/sections/thetwo-way/2016/09/09/493280504/judge-rules-that-construction-can-proceed-on-dakota-access-pipeline [https://perma.cc/DXT4-YAMG] (discussing litigation seeking to block construction of pipeline that would cross an area of cultural and environmental significance to a nearby Native American tribe).

8 For example, the U.S. Department of Justice recently filed a complaint alleging that Chrysler and Fiat manufactured over 100,000 diesel vehicles lacking adequate equipment to meet federal emissions standards. Complaint at 2, United States v. FCA US LLC, No. 2:17-cv-11633 (E.D. Mich. May 23, 2017), 2017 WL 2242762.

9 Michelle Nijhuis, *The Teenagers Suing over Climate Change*, NEW YORKER (Dec. 6, 2016), https://www.newyorker.com/tech/elements/the-teen-agers-suing-over-climate-change [https://perma.cc/L4YA-5FZR] (discussing landmark litigation filed by youth plaintiffs in U.S. District Court for the District of Oregon; the suit alleges that the federal government's inattention to climate change and resulting harms has violated obligations arising under the public trust doctrine).

10 CLIMATE DEF. PROJECT, CLIMATE NECESSITY DEFENSE CASE GUIDE 1–14 (2017), https://climatedefenseproject.org/wp-content/uploads/2017/06/CDP-ClimateNecessityOutcomes-June-13-2017.pdf [https://perma.cc/M9J3-B8D5] (listing cases in which defendants asserted necessity defense to excuse civil disobedience relating to climate protests); Lance N. Long & Ted Hamilton, *Case Comment*—Washington v. Brockway*: One Small Step Closer to Climate Necessity*, 13 MCGILL J. SUSTAINABLE DEV. L. 153, 168–72 (2017) (discussing invocation of necessity defense by climate protestors who blocked coal shipment by rail).

11 *See, e.g.*, AOUSC Report, *supra* note 5 (noting 165% increase from 2015 to 2016 in federal cases involving environmental matters); William Becker, *The Most Important Lawsuit on the Planet*, HUFFINGTON POST (June 18, 2017, 3:01 PM), http://www.huffingtonpost.com/entry/the-most-important-lawsuit-on-the-planet_us_593d55bce4b0b65670e56b6e [https://perma.cc/

The judiciary's interaction with the executive and legislative branches has become increasingly important in the context of environmental matters.[12] Sometimes the courts salvage environmental protections that executive or legislative officials want to abandon.[13] Indeed, some analysts believe that that the courts may present the best hope for environmental advocacy at the national level in 2018.[14] By contrast, recent history is rife with examples of judicial intervention to frustrate environmental initiatives undertaken by the executive or legislative branches.[15] The courts have tremendous power to demand or

---

MHY8-KMVS] (quoting Yale Law Professor Douglas Kysar, who described the atmospheric trust litigation pending in the U.S. District Court for the District of Oregon as "the most important lawsuit on the planet right now and the government knows it"); Nathaniel Rich, *The Most Ambitious Environmental Lawsuit Ever*, N.Y. Times Mag. (Oct. 2, 2014), https://www.nytimes.com/interactive/2014/10/02/magazine/mag-oil-lawsuit.html [https://perma.cc/WCS6-4CZJ] (discussing lawsuit seeking to hold oil and gas industry responsible for Louisiana's disappearing coast).

12 *See* Christopher McGrory Klyza & David J. Sousa, American Environmental Policy: Beyond Gridlock 142–43 (2013) (observing that legislative gridlock has increased courts' importance with respect to environmental matters); O'Leary, *supra* note 4, at 128–47.

13 *E.g.*, Craig N. Oren, *Will the Trump Administration Drastically Deregulate Environmental Protection?*, Reg. Rev. (Feb. 22, 2017), https://www.theregreview.org/2017/02/22/oren-trump-administration-deregulate-environmental-protection/ [https://perma.cc/CV6L-82DM] (noting that courts have sometimes served as a bulwark when agencies have sought to roll back environmental protections); Lisa Friedman, *Court Blocks EPA Effort to Suspend Obama-Era Methane Rule*, N.Y. Times (July 3, 2017), https://www.nytimes.com/2017/07/03/climate/court-blocks-epa-effort-to-suspend-obama-era-methane-rule.html [https://perma.cc/2G2X-Y2Z4] (listing various examples of litigation, some of it successful, to stop Trump Administration from dismantling environmental measures of Obama Administration); Susan Phillips, *PA Supreme Court Rules with Environmentalists over Remaining Issues in Act 13*, StateImpact Pa. (Sept. 28, 2016, 6:56 PM), https://stateimpact.npr.org/pennsylvania/2016/09/28/pa-supreme-court-rules-with-environmentalists-over-remaining-issues-in-act-13/ [https://perma.cc/8ZEQ-B229] (reporting that Pennsylvania Supreme Court ruled for environmental plaintiffs and struck down provisions of state statute regulating oil and gas industry).

14 *See* Alessandra Potenza, *It's Judges, Not Trump, Who Will Decide Obama's Environmental Legacy*, Verge (Jan. 20, 2017, 8:00 AM), https://www.theverge.com/2017/1/20/14316574/donald-trump-environment-climate-change-obama-legacy [https://perma.cc/5U4P-FZZK] (identifying courts as crucial arena for environmental activists in 2017); *cf.* Michael Burger, *The Battle Against Trump's Assault on Climate Is Moving to the Courts*, Yale Env't 360 (May 2, 2017), https://e360.yale.edu/features/stopping-trump-the-battle-to-thwart-the-assault-on-climate-moves-to-the-courts [https://perma.cc/9GD3-P7Z7] ("[C]ourts can, should, and do serve as a last resort when other branches of government fail the people.").

15 *See* Ariane de Vogue et al., *Supreme Court Blocks Obama Climate Change Rules*, CNN (Feb. 9, 2016, 8:15 AM), http://www.cnn.com/2016/02/09/politics/supreme-court-obama-epa-climate-change/index.html [https://perma.cc/ZA9A-BGCV] (discussing Court's decision to block Environmental Protection Agency's ("EPA") rules limiting power plant emissions); Adam Liptak & Coral Davenport, *Supreme Court Blocks Obama's Limits on Power Plants*, N.Y. Times (June 29, 2015), https://www.nytimes.com/2015/06/30/us/supreme-court-blocks-obamas-limits-on-power-plants.html [https://perma.cc/S76C-RHRF] (reporting that Supreme Court struck down some EPA initiatives and was reviewing others); *Report Finds Activist Judges Are Threatening*

block environmental protection, notwithstanding the common perception that the executive and legislative branches have primary responsibility in this area of the law.[16]

Rules of judicial ethics frame the manner in which judges take account of environmental concerns. At present, these rules provide very little guidance that is relevant to environmental matters.[17] Many judges have a general inclination to favor private property rights[18] or to defer to governmental approvals of development projects,[19] but there is no countervailing authority that counsels judges to consider environmental priorities.[20]

Why should we worry that codes of judicial ethics fail to address environmental considerations? When the ethical rules do not call for judicial cognizance of environmental harm, judges tend to undervalue

---

Environmental Protections, Disregarding Judicial Fairness, NAT. RESOURCES DEF. COUNCIL (July 18, 2001), https://www.nrdc.org/media/2001/010718 [https://perma.cc/8TBN-C3BP] ("[A] study of federal court rulings over the past decade reveals a pattern of anti-environmental judicial activism that threatens long-standing environmental protections.").

16 *See* Patricia M. Wald, *The Role of the Judiciary in Environmental Protection*, 19 B.C. ENVTL. AFF. L. REV. 519, 519–21 (1992) (noting that "[i]n the United States the framework for environmental protection is primarily a statutory one"; nonetheless, there are opportunities for the judiciary to become involved with environmental protection).

17 No provision in the ABA Model Code of Judicial Conduct explicitly addresses the environment, and very few of the Code's general provisions pertain in any way to this context.

18 Richard J. Lazarus, *Judging Environmental Law,* 18 TUL. ENVTL. L.J. 201, 207 (2004) (describing challenges faced by judges in environmental cases, and noting that environmental values sometimes appear to be in conflict with "a natural and often healthy" instinct to favor private property rights).

19 When adjudicating disputes under development proposals that are subject to the National Environmental Policy Act ("NEPA") or its state analogs, judges defer to the lead agency's factual findings. *See* David J. Hayes et al., *Comments and Recommendations on NEPA Reform for the White House Council on Environmental Quality*, STAN. L. SCH. 26 (July 15, 2014), https://www-cdn.law.stanford.edu/wp-content/uploads/2015/04/NEPA-Submittal-to-CEQ-FINAL-5.pdf [https://perma.cc/4SNV-M22D] (observing that when agencies follow the procedural requirements set forth in NEPA, courts "typically show great deference to agency fact-finding and decision-making," and uphold the agencies' determinations in the vast majority of cases). Judges also defer to agencies' statutory interpretation. *See* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 908 (2017) ("Judicial deference to executive statutory interpretation—a doctrine now commonly associated with the Supreme Court's decision in *Chevron v. Natural Resources Defense Council*—is one of the central principles in modern American public law.").

20 There is a dearth of such guidance in both the black-letter law of the ABA Model Code and in the commentary that accompanies the black-letter law. The commentary does insist that judges should be free to advocate their own private property rights in zoning hearings. MODEL CODE OF JUDICIAL CONDUCT r. 3.2 cmt. 3 (AM. BAR. ASS'N 2007) ("In general, it would be an unnecessary and unfair burden to prohibit judges from appearing before governmental bodies or consulting with government officials on matters that are likely to affect them as private citizens, such as zoning proposals affecting their real property.").

such harm. On the other hand, if the rules of judicial ethics were to focus judges' attention on climate change and other environmental matters, judicial vigilance in these areas would likely increase.[21] The result could be a more robust system of checks and balances, guided by consideration of environmental risks in every instance.[22]

The greater engagement of judges in environmental matters would be a salutary development. As they have shown in rejecting both Republican and Democratic initiatives, judges can exert a steadying influence in overpoliticized areas of the law.[23] In particular, federal judges are naturally suited to be guardians of the environment: with life tenure, federal judges have longer time horizons than do the executive and legislative officials who show little patience for the short-term sacrifices that environmental protection necessitates.[24]

This Article proposes to revise the ethical rules for judges in order to elevate the importance of environmental stewardship. Part I will explore the various authority that presently governs judicial ethics. Part II will consider the arguments for and against the adoption of specific rules for environment cases and will conclude that the wisest course is to adopt more general rules that would be relevant in environmental matters, as well other categories of cases. Part III will offer a set of particular proposals to the ABA Model Code of Judicial Conduct. Part IV will consider foreseeable objections and will refute them to the extent possible.

---

21 *Cf.* Lininger, *supra* note 2, at 74–76 (making similar argument about potential for increasing lawyers' attention to environmental issues if ethical duties of lawyers included obligations to consider environmental risks).

22 *Cf.* John Echeverria, *The Fate of Environmental Law in a Trump-Era Supreme Court*, Sci. Am. Blog Network (Feb. 8, 2017), https://blogs.scientificamerican.com/guest-blog/the-fate-of-environmental-law-in-a-trump-era-supreme-court/ [https://perma.cc/3G7W-KVLS] (discussing potential for judiciary to check other branches of government and thereby influence development of environmental law).

23 *E.g.*, Laura Jarrett & Ariane de Vogue, *9th Circuit Deals Trump Travel Ban Another Defeat*, CNN (June 13, 2017, 6:59 AM), http://www.cnn.com/2017/06/12/politics/9th-circuit-travel-ban/index.html [https://perma.cc/5U2R-VDYS] (discussing judiciary's obstruction of Trump Administration's attempt to ban travel to the United States by residents of certain predominantly Muslim countries); Richard Wolf, *Court Challenges to Trump Policies May Multiply*, USA Today (May 4, 2017, 10:35 AM), https://www.usatoday.com/story/news/politics/2017/05/04/court-challenges-trump-policies-may-multiply/101243776/ [https://perma.cc/2HGQ-BXA9] (indicating that "courts have acted as a check against Trump's assertion of broad executive powers, much as they did against President Barack Obama").

24 Echeverria, *supra* note 22 (suggesting that a Justice with life tenure is "beholden to no one").

I. Existing Regulation of Judicial Ethics

At the outset, it is important to survey the existing authority that prescribes ethical duties for judges. Four sources of authority are particularly noteworthy: the ABA's Model Code of Judicial Conduct, the Code of Conduct for Federal Judges, the various statutes that govern federal and state judges, and the self-regulation by the U.S. Supreme Court. As will be seen below, the ABA Model Code of Judicial Conduct is the most important body of authority, and it exerts influence in all the other contexts.

A. ABA Model Code of Judicial Conduct

The codification of judicial ethics traces its origin to 1924, when the ABA formulated the original Canons of Judicial Ethics.[25] The impetus for standardizing judicial ethics came from the Progressive Movement and from a parallel effort to standardize ethics for lawyers,[26] which culminated in the ABA's adoption of the Canons of Professional Ethics in 1908.[27] An ABA commission chaired by newly confirmed Supreme Court Justice William Howard Taft drafted the Canons of Judicial Ethics, and the ABA approved this draft with virtually no revisions.[28] Highly general in nature, the 1924 Canons provided standards with which judges could resolve ethical challenges. The Canons did not set forth specific bright-line rules.[29]

Lacking jurisdiction to discipline individual judges directly,[30] the ABA presented its standards of judicial ethics as a blueprint for state bars.[31] Most states adopted this template as their own ethical code for

---

25 Canons of Judicial Ethics (Am. Bar Ass'n 1924).

26 *See generally* Andrew J. Lievense & Avern Cohn, *The Federal Judiciary and the ABA Model Code: The Parting of the Ways*, 28 Just. Sys. J. 271, 272–73 (2007) (discussing influences that led to adoption of ABA Canons of Judicial Ethics in 1924).

27 The ABA has posted a PDF of the report proposing the original Canons of Professional Ethics adopted in 1908. *Final Report of the Comm. on Code of Prof'l Ethics*, 33 A.B.A. Rep. 567 (1908), https://perma.cc/96AW-LEB3. For a history of the ABA's regulation of lawyers' ethics, see John M. Tyson, *A Short History of the American Bar Association's Canons of Professional Ethics, Code of Professional Responsibility, and Model Rules of Professional Responsibility: 1908–2008*, 1 Charlotte L. Rev. 9 (2008).

28 Lievense & Cohn, *supra* note 26, at 272–73.

29 *See* Canons of Judicial Ethics, *supra* note 25. *See generally* Ronald D. Rotunda, *Judicial Ethics, the Appearance of Impropriety, and the Proposed New ABA Judicial Code*, 34 Hofstra L. Rev. 1337, 1352 (2006) (noting that ABA Canons of Judicial Ethics were "more sermonizing than statutory" in nature).

30 Lievense & Cohn, *supra* note 26, at 273 ("The 1924 Canons did not have any independent legal effect over state or federal judges.").

31 *See* James J. Alfini et al., *Dealing with Judicial Misconduct in the States: Judicial Independence, Accountability and Reform*, 48 S. Tex. L. Rev. 889, 890–91 (2007).

judges. States adopting the ABA Canons generally did not depart from them in any significant way.[32] Many states formed judicial conduct commissions in order to discipline judges who committed serious violations.[33]

The ABA's template for judicial ethics evolved over the next one hundred years. The 1924 Canons remained virtually unchanged for four decades, but by the late 1960s, the ABA determined that a more comprehensive code was necessary.[34] Among other objectives, the ABA sought to standardize judicial practice, improve predictability, reduce forum shopping, simplify the training of new judges, and provide guidance with respect to increasingly complex challenges arising in modern litigation.[35] Approved by the ABA House of Delegates in 1972,[36] the ABA Model Code of Judicial Conduct was more nuanced than its predecessor, but it was still more general than the present version. Whereas the ABA's 1924 Canons were hortatory in nature, the 1972 Model Code contained a greater number of enforceable rules.[37] A total of forty-seven states adopted the 1972 Model Code or some variation of it.[38]

Major amendments to the ABA Model Code occurred in the following decades. A wholesale revision took place in 1990.[39] Most states adopted the 1990 revision to the ABA's Model Code of Judicial Ethics.[40] The ABA updated the Model Code again in 2007, and a total of

---

32 *See* JOHN P. MACKENZIE, THE APPEARANCE OF JUSTICE 191 (1974) (noting that 1924 ABA Canons did not undergo significant revisions when adopted by states).

33 *See* Dana A. Remus, *The Institutional Politics of Federal Judicial Conduct Regulation*, 31 YALE L. & POL'Y REV. 33, 43–44, 43 nn. 46–49 (2012) (explaining emergence of judicial conduct commissions).

34 *See* MACKENZIE, *supra* note 32, at 191–92 (indicating that the ABA Canons generally remained static until the ABA was ready to revise them four decades later).

35 *See* Walter P. Armstrong, Jr., *The Code of Judicial Conduct*, 26 Sw. L.J. 708, 711, 713 (1972); *cf.* Tyson, *supra* note 27, at 15.

36 For more detail about the adoption of the ABA Model Code of Judicial Conduct in 1972, see E. WAYNE THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT (1973).

37 Benjamin B. Strawn, Note, *Do Judicial Ethical Canons Affect Perceptions of Judicial Impartiality?*, 88 B.U. L. REV. 781, 786 (2008) ("With this new [1972] model, the ABA made the canons enforceable . . . .").

38 *Id.* at 787 (reporting the extent to which states had adopted the ABA's 1972 Code by the time of the ABA's 1990 amendments).

39 *Model Code of Judicial Conduct*, ABA, https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct.html [https://perma.cc/56XS-2G6S] (indicating that ABA adopted a new version of the ABA Model Code of Judicial Conduct on August 7, 1990).

40 The ABA website includes links to state codes of judicial conduct, and virtually all of these are derivative of the 1990 ABA Model Code of Judicial Conduct in one way or another. *See State Judicial Ethics Resources*, ABA, https://www.americanbar.org/groups/professional_re

thirty-five states adopted the 2007 revisions in whole or in part. Another ten states have established committees to consider whether adoption of the ABA's 2007 revisions would be appropriate.[41]

To be sure, the state analogs of the ABA Model Code of Judicial Conduct include some variations that reflect local preferences and quirks. But the vast majority of states have adopted approximately ninety percent of the provisions in the ABA's boilerplate.[42] Because state court judges vastly outnumber other categories of judges,[43] it is accurate to say that the ABA Model Code and its state counterparts are the most prevalent source of authority concerning judicial ethics.

B. Code of Conduct for Federal Judges

Federal judges have their own ethical rules, due in part to the Supremacy Clause and to concerns about the uniqueness of the federal judiciary.[44] For present purposes, it is important to note that the ethical rules for federal judges generally track the ABA's boilerplate, both in form and in substance.[45]

This resemblance is no coincidence. In 1922, Congress created the Judicial Conference of Senior Circuit Judges (later renamed the Judicial Conference of the United States) to "monitor the business of the

---

sponsibility/policy/judicial_code_revision_project/resources_state.html [https://perma.cc/RP6J-8MZL]; *see also* Peter L. Ostermiller, *The New ABA Judicial Code as a Basis for Discipline: Defending a Judge*, 28 JUST. SYS. J. 310, 310 (2007).

41 The website of the ABA's Center for Professional Responsibility includes a map that indicates the extent to which various states have adopted the 2007 version of the ABA Model Code of Judicial Conduct. *State Adoption of Revised Model Code of Judicial Conduct*, ABA, https://www.americanbar.org/groups/professional_responsibility/resources/judicial_ethics_regulation/map.html [https://perma.cc/LE7L-VS95].

42 The ABA Center for Professional Responsibility posted a Comparison of State Codes of Judicial Conduct to the Model Code of Judicial Conduct. *See Comparison of State Codes of Judicial Conduct to Model Code of Judicial Conduct*, ABA, https://www.americanbar.org/groups/professional_responsibility/resources/judicial_ethics_regulation/comparison.html [https://perma.cc/4FM5-PHPE].

43 HOWARD M. ERICHSON, INSIDE CIVIL PROCEDURE 15 (2d ed. 2012) (stating that "federal judges are vastly outnumbered by state court judges").

44 U.S. CONST. art. VI, cl. 2; Letter from Denise A. Cardman, Acting Dir., ABA Governmental Affairs Office, to Gordon J. Quist, Chairman, Comm. on Codes of Conduct, Judicial Conference of the U.S. 1 (Apr. 18, 2008), https://www.americanbar.org/content/dam/aba/migrated/poladv/letters/judiciary/2008apr18_conduct_l.authcheckdam.pdf [https://perma.cc/NY3V-7RA9] (observing that the uniqueness of the federal judiciary necessitates differences between the ethical codes for federal and state judges).

45 *Compare* CODE OF CONDUCT FOR U.S. JUDGES (Mar. 20, 2014), http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges [https://perma.cc/3769-6NMS], *with* MODEL CODE OF JUDICIAL CONDUCT (AM. BAR ASS'N 2010), https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct.html [https://perma.cc/RA3K-KGBD].

federal courts."[46] Chief Justice Taft became the chair of the Judicial Conference at the same time that he was chairing the commission drafting the 1924 Canons of Judicial Ethics.[47] The Judicial Conference passed a resolution that looked to the ABA Canons as the standard for judicial ethics.[48] The Judicial Conference would go on to serve as the primary authority in promulgating ethical standards for federal judges.[49]

In 1973, shortly after the ABA adopted the Model Code of Judicial Conduct, the Judicial Conference adopted the Code of Conduct for United States Judges. Compliance with this code is mandatory for all federal judges.[50] The Code of Conduct for United States Judges mirrored the ABA Model Code of Judicial Conduct for the most part, except for a few differences that the Judicial Conference deemed necessary due to the unique circumstances of the federal judiciary.[51]

The Judicial Conference, at the end of the twentieth century, showed less willingness to follow the ABA's lead in updating the ethical rules for federal judges.[52] This divergence may have reflected a purposeful commitment to independence or a preference for the earlier iteration of the ABA model. In any event, some scholars believe the divergence between federal and state court rules should narrow.[53] The Judicial Conference must occasionally fend off legislative encroachment on the autonomy of the judicial branch, and closer cooperation with the ABA helps with this effort.[54]

---

46 Lievense & Cohn, *supra* note 26, at 274.

47 *Id.*

48 For a summary of this early history, see *id.* at 273–74 (discussing the influence of the 1924 ABA Canons on the development of ethical standards for federal judges, and noting that thirty-nine federal court opinions issued between 1924 and 1972 cited the ABA's 1924 Canons).

49 *See generally Code of Conduct for United States Judges*, ADMIN. OFF. U.S. COURTS, http://www.uscourts.gov/rules-policies/judiciary-policies/ethics-policies [https://perma.cc/R2SC-38WW] (describing role played by Judicial Conference with respect to ethical requirements for federal judges); *see also* Lievense & Cohn, *supra* note 26, at 276–77 (specifying particular roles played by Judicial Conference in ethical regulation of federal judiciary).

50 *Code of Conduct for United States Judges*, *supra* note 49 (stating "[f]ederal judges must abide by the Code of Conduct for United States Judges, a set of ethical principles and guidelines adopted by the Judicial Conference of the United States" and describing role played by Judicial Conference with respect to ethical requirements for federal judges).

51 *See* Letter from Denise A. Cardman to Gordon J. Quist, *supra* note 44.

52 Lievense & Cohn, *supra* note 26, at 278 (discussing divergence and reasons for it); Remus, *supra* note 33, at 54–58 (recounting Judicial Conference's "fracture with the bar").

53 *See* Remus, *supra* note 33 at 73–74 (discussing prospects for "renewed alliance" between Judicial Conference and ABA).

54 *Id.* (discussing political value of partnership between bar and federal judges).

C. *Statutes*

To some extent, statutes regulate the ethical duties of judges in both the federal and state court systems.[55] Examples of relevant provisions in title 28 of the U.S. Code include § 454 (prohibition on the practice of law), § 455 (requirement of disqualification under certain circumstances) and § 458 (prohibition of nepotism). These statutory provisions are strikingly similar to the ABA Model Code of Judicial Conduct. Indeed, the early version of the federal statute on disqualification invoked the pertinent language in the ABA Canons of Judicial Ethics,[56] and the later version of this statute followed the new approach set forth in the ABA Model Code of Judicial Conduct.[57] Statutes have rarely imposed ethical duties on judges that are separate obligations already appearing in the ABA Model Code.

In 1980, Congress passed legislation to create a new process for dealing with allegations of judicial misconduct. Chapter 16 in title 28 established what some observers have called a regime of "decentralized self-regulation" whereby the federal judicial circuits have primary responsibility for adjudicating such complaints.[58] Studies have shown that the system almost always results in dismissals.[59] In any event, the substantive rules used to evaluate the propriety of judicial conduct seem derivative of the ABA Model Code.

Occasionally Congress has attempted to regulate federal judges more stringently. For example, in response to concerns that existing law did not adequately address potential bases for disqualification, Senator Charles Grassley has proposed to establish an inspector general for the federal judiciary. Senator Grassley's bill would empower this official to investigate judicial misconduct and propose revisions of

---

55 Title 28 of the U.S. Code governs the judiciary and judicial procedure. 28 U.S.C. §§ 1–5001 (2012).

56 This version of the disqualification provisions in 28 U.S.C. § 455 became law in 1948, when the ABA Canons of Judicial Ethics were the prevailing standards for judicial conduct. Act of June 25, 1948, ch. 646, 62 Stat. 908.

57 This version of the disqualification provisions became law in 1974, shortly after the ABA had approved the new Model Code of Judicial Conduct, and the statute reflected the more detailed taxonomy of conflicts set forth in the Code provision. Pub. L. No. 93-512, 88 Stat. 1609 (1974).

58 *See* Arthur D. Hellman, *Judges Judging Judges: The Federal Judicial Misconduct Statutes and the Breyer Committee Report*, 28 JUST. SYS. J. 426, 434 (2007) ("In establishing a regime of decentralized self-regulation, Congress entrusted the judiciary itself with the task of policing misconduct within its ranks.").

59 *Id.* at 429 (observing that "[t]he overwhelming majority of the complaints—more than 95 percent—are dismissed").

the ethical requirements for judges.[60] The proposal has drawn opposition since Senator Grassley originally made it in 2006: critics have suggested that it would undermine judicial independence and encroach on the separation of powers.[61] Proponents of close congressional supervision over the courts point to the constitutional authorization for Congress to create (and presumably supervise) lower federal courts.[62] The regime proposed by Senator Grassley has yet to garner sufficient support in Congress,[63] and it seems more likely that Congress will continue the present regulatory regime.

D. Self-Regulation by Supreme Court Justices

The Supreme Court is not subject to either the ABA Model Code, the Code of Conduct for United States Judges, or most of the ethical strictures in the U.S. Code that apply to lower court judges in the federal system.[64] Justices of the U.S. Supreme Court are among only eleven federal employees who are not bound by any federal ethics requirements; the other two are the President and Vice President.[65]

The exemption of the Supreme Court from external ethical regulation is due to a number of unique circumstances. Congress has less authority over the Supreme Court than over lower federal courts because the Court derives its authority directly from the U.S. Constitution, whereas Congress created all of the other federal courts.[66]

---

60 Senator Grassley summarized his bill in a press release. "The Judicial Transparency and Ethics Enhancement Act would establish an Office of Inspector General for the judicial branch, which would function in a similar fashion to that of inspectors general in federal agencies of the executive branch. The inspector general's responsibilities would include conducting investigations of possible judicial misconduct, investigating waste fraud and abuse, and recommending changes in laws and regulations governing the federal judiciary." *Grassley Bill Would Improve Oversight of the Federal Judiciary*, CHUCK GRASSLEY: NEWS RELEASES (May 22, 2015), https://www.grassley.senate.gov/news/news-releases/grassley-bill-would-improve-oversight-federal-judiciary [https://perma.cc/2L2D-9YET].

61 *See* Remus, *supra* note 33, at 61–65.

62 *See id.* at 69.

63 *See id.* at 67.

64 *See* Louise Slaughter, *Supreme Court Unaccountability: The Nine Justices to Whom No Code of Ethics Applies*, 26 STAN. L. & POL'Y REV. ONLINE 9, 10–15 (2014) (explaining that none of these external rules apply to Supreme Court Justices and proposing federal legislation to establish an ethics code for the Court).

65 Rich Gardella, *Why Don't Supreme Court Justices Have an Ethics Code?*, NBC NEWS (Apr. 11, 2017, 2:26 PM), http://www.nbcnews.com/news/us-news/why-don-t-supreme-court-justices-have-ethics-code-n745236 [https://perma.cc/7FWD-RL2B] ("Of the 4 million employees who work for the federal government, 11 of the highest-ranking ones are not bound by some of the ethics laws, rules and regulations which other public servants must follow: the president, the vice president, and the nine justices of the Supreme Court.").

66 U.S. CONST. art. III, § 1; Lincoln Caplan, *Does the Supreme Court Need a Code of Con-*

Congress established the Judicial Conference to manage the lower federal courts, but the Judicial Conference has no mandate or jurisdiction with respect to the Supreme Court.[67] Chief Justice Roberts has written that another distinctive circumstance justifies the exemption of the Supreme Court from the ordinary recusal rules: there are no stand-ins for Supreme Court Justices.[68] The application of conventional recusal rules to the Court would invite gamesmanship, with litigants seeking to disqualify seemingly unsympathetic Justices and maximize the influence of those who remain.[69]

Occasionally the lack of external ethical regulation for the Supreme Court has led to controversy. In 2004, Justice Antonin Scalia went on a hunting trip with Vice President Dick Cheney shortly before deciding a case in which the Sierra Club had sued Cheney; Scalia wrote a memorandum indicating that his participation on the hunting trip did not necessitate disqualification.[70] In 2011, Koch Industries "featured" two Justices at a closed-door, invitation-only political fundraiser, the explicit purpose of which was to "change the balance of power in Congress."[71] Questions have arisen as to whether investments held by Chief Justice Roberts, Justice Alito, and Justice Breyer should have led to their recusal from matters that would have an impact on the value of those investments.[72] From time to time, such controversies have spurred Congress to consider legislation that would subject the Court to an ethics code, but such proposals seem unlikely to gain political traction in the near term.[73]

---

duct?, NEW YORKER (July 27, 2015), http://www.newyorker.com/news/news-desk/does-the-supreme-court-need-a-code-of-conduct [https://perma.cc/3QLA-T5YW] (distinguishing bases for authority of U.S. Supreme Court and lower federal courts).

67 *See* JOHN G. ROBERTS, JR., 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 3–4 (2011).

68 *See id.* at 9 (arguing that unavailability of substitutes requires heightened caution and counsels against granting recusal on grounds that might possibly lead to recusal in lower courts).

69 *See id.* at 9–10 (contending that disqualification could affect rulings by stacking the Court).

70 Steve Twomey, *Scalia Angrily Defends His Duck Hunt with Cheney*, N.Y. TIMES (Mar. 18, 2004), http://www.nytimes.com/2004/03/18/politics/scalia-angrily-defends-his-duck-hunt-with-cheney.html [https://perma.cc/7C2H-KPFZ] (assuring that if people felt a hunting trip would be enough to sway his vote, "the nation is in deeper trouble than I had imagined").

71 Slaughter, *supra* note 64, at 12 (noting that another Justice appeared at a fundraising gala for which the price of tickets ranged from $250 to $250,000).

72 Caplan, *supra* note 66 (indicating that these three Justices "voted in thirty-seven cases where a company in which they owned stock filed a friend-of-the-court or amicus brief").

73 Gardella, *supra* note 65 (referring to the Supreme Court Ethics Act introduced in 2017); Slaughter, *supra* note 64, at 10 (referring to the 2014 bill version of this Act).

Even though not directly bound by the ABA Model Code, the Supreme Court seems to regard the Code as persuasive authority. Chief Justice Roberts has indicated that he and his colleagues "consult the Code,"[74] even though they do not acknowledge an obligation to follow it.[75] At his confirmation hearing in 2017, nominee Neil Gorsuch mentioned that when serving on the Supreme Court, he would instinctively follow the ethical rules he abided by as a lower court judge.[76] It is reasonable to assume that others on the Supreme Court have a similar awareness of those rules, because the majority of them ascended to the Court after serving on lower courts,[77] but it is also reasonable to doubt that their fealty to these rules will be as strong when compliance is no longer mandatory.[78]

II. Are Environmentally Conscious Rules Appropriate for Judges' Codes?

The discussion in Part I has established that disparate authority governs the ethics of judges in various court systems. The principles in each system are approximately similar, however, because they all seem to derive from the blueprint set forth by the ABA in the Model Code of Judicial Ethics. The basic similarity of the ethical regimes for judges throughout the United States raises the possibility that amendments to the ABA template might have influence at all levels of the court system. In other words, a change to the ABA Model Code of Judicial Conduct might, over time, lead to changes in judicial ethics at all levels.

The next question is a substantive one: should judicial ethics address the specific subject of environmental protection? The following subparts will survey the arguments for and against such specificity, before suggesting a middle ground that may offer the best hope for addressing environmental concerns.

---

74 Roberts, *supra* note 67, at 4.

75 *Id.* at 5 (noting that "as a practical matter, the Code remains the starting point and a key source of guidance for the Justices as well as their lower court colleagues").

76 Gardella, *supra* note 65.

77 Slaughter, *supra* note 64, at 14 ("Most Justices appointed to the Supreme Court come directly from Federal Circuit Courts, where they were subject to the Code of Conduct; therefore, they are already familiar with and have been in compliance with the requirements of the Code.").

78 Charles Geyh & Stephen Gillers, *SCOTUS Needs a Code of Ethics*, Politico (Aug. 8, 2013, 5:20 AM), http://www.politico.com/story/2013/08/the-supreme-court-needs-a-code-of-ethics-095301 [https://perma.cc/BF35-HJES] (pointing out that "there is an obvious difference between committing to abide by a code of ethics and consulting a code that a justice is free to disregard").

A. Arguments in Favor

Environmental issues are increasingly urgent. Climate change is arguably the most important issue of the twenty-first century.[79] The magnitude and gravity of environmental problems will require attention from all branches of government, including the judiciary.[80] Under these circumstances, it is appropriate that the ABA Model Code provide judges with some guidance about how to handle environmental matters. For an instructive precedent, consider the amendments to the ABA Model Code addressing what was arguably the greatest challenge of the twentieth century: racial injustice.[81] In the early 1900s, the United States had not yet begun to recognize that racial injustice required sweeping reforms, and the 1924 Canons of Judicial Ethics were silent on this issue.[82] After the Civil Rights Movement drew attention to the challenge of racial discrimination in the 1960s and 1970s, the ABA Model Code began to address this issue explicitly, first with commentary[83] and eventually with new provisions in the black-letter rules.[84] Under the current version of the Code, a judge's duty to avoid

---

79 *See, e.g.*, Lisa Friedman, *Scientists Fear Trump Will Dismiss Blunt Climate Report*, N.Y. TIMES (Aug. 7, 2017), https://www.nytimes.com/2017/08/07/climate/climate-change-drastic-warming-trump.html [https://perma.cc/4JMU-CHS3] (indicating that during the Trump Administration, thirteen federal agencies collaborated to produce report indicating the strong evidence for, and catastrophic dangers of, anthropogenic climate change); Madison Park, *Obama: No Greater Threat to Future than Climate Change*, CNN (Jan. 21, 2015, 8:27 AM), http://www.cnn.com/2015/01/21/us/climate-change-us-obama/index.html [https://perma.cc/NST7-9Y4U] (reporting that Obama considered climate change to be a more urgent problem than other challenges such as terrorism, ISIS, or rogue states).

80 *See generally* Burger, *supra* note 14; Klyza & Sousa, *supra* note 12, at 142–143; O'Leary, *supra* note 4, at 147–48.

81 RONALD N. JACOBS, RACE, MEDIA AND THE CRISIS OF CIVIL SOCIETY 13 (2000) (citing W.E.B. DuBois for the proposition that "the color line has provided the greatest challenge to twentieth-century America"); *see* Paul C. Light, *Government's Greatest Achievements of the Past Half Century*, BROOKINGS INSTITUTION: REFORM WATCH (Dec. 1, 2000), https://www.brookings.edu/research/governments-greatest-achievements-of-the-past-half-century/ [https://perma.cc/ST4L-6NDL] (identifying the response to racial injustice as the greatest achievement by the U.S. government in solving a domestic problem during the latter half of the twentieth century).

82 *See* CANONS OF JUDICIAL ETHICS, *supra* note 25.

83 In the 1972 version of the ABA Model Code, the commentary to Canon 2 included the following language: "It is inappropriate for a judge to hold membership in any organization that practices invidious discrimination on the basis of race . . . ." MODEL CODE OF JUDICIAL CONDUCT Canon 2 cmt. (AM. BAR ASS'N 1972) (the ABA House of Delegates added this language at its 1984 meeting).

84 In the 1990 version of the ABA Model Code of Judicial Conduct, the language forbidding membership in discriminatory organizations moved from the commentary of Canon 2 to become its own black-letter rule. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 2.C (AM. BAR ASS'N 1990) ("A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race . . . ."). By 2007, that language had evolved to become

racial prejudice now extends to both procedural and substantive matters, including decisions on the merits.[85] Because the challenge of climate change is arguably as urgent in the twenty-first century as was the challenge of racial injustice in the twentieth century, the ethical rules for judges should include specific language on this subject.

A separate reason to address environmental questions in the ABA Model is the frequency with which environmental matters arise in modern litigation. Each year, judges consider hundreds, possibly even thousands, of cases in which litigants present environmental claims.[86] The number of such cases increases significantly each year.[87] In addition, a huge amount of other litigation presents ancillary questions relevant to environmental matters. For example, the review of a new zoning ordinance might necessitate consideration of environmental issues not raised directly by any party to the matter; the adjudication of a dispute about ownership of property might incidentally require exploration of issues relating to environmental contamination for which the owner might be liable; and the consideration of a complaint alleging retaliatory firing for whistleblowing might require examination of the environmental problems about which the discharged employee had complained. The prevalence of environmental matters is so great in modern litigation that Professor Robert Percival de-

---

more expansive. The prohibition of a judge's membership in a discriminatory group moved to Rule 3.6(A), and the list of discriminatory groups subject to this provision expanded to include groups discriminating on the basis of sexual orientation. *Id.* r. 3.6(A) (Am. Bar Ass'n 2007). The 2007 version of the ABA Model Code also included separate language preventing judges from expressing racial prejudice while performing their official duties, and requiring the judge to prohibit court staff and lawyers from expressing such prejudice. *Id.* r. 2.3(B) ("A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice . . . based upon race . . . and shall not permit court staff, court officials, and others subject to the judge's direction and control to do so."); *Id.* r. 2.3(C) ("A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race . . . ."). For a comparison of the 1990 and 2007 editions of the ABA Model Code, see *Text Comparison—1990 Model Code to 2007 Code*, ABA Ctr. for Prof'l Responsibility, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/pic_migrated/old_new.authcheckdam.pdf [https://perma.cc/DD2L-2YQQ].

85 Model Code of Judicial Conduct r. 2.3(B) (Am. Bar Ass'n 2007) (prohibiting judges from engaging in any official conduct that manifests bias or prejudice; drawing no distinction between judges' handling of procedural and substantive matters).

86 *See, e.g.*, David Markell & J.B. Ruhl, *An Empirical Survey of Climate Change Litigation in the United States*, 40 Envtl. L. Rep. 10644, 10649–50 (2010), http://ir.law.fsu.edu/cgi/viewcontent.cgi?article=1066&context=articles [https://perma.cc/ARE3-U287] (attempting to quantify the extent of climate change litigation, which is a subset of overall environmental litigation).

87 *See, e.g.*, AOUSC Report, *supra* note 5 (noting 165% increase from 2015 to 2016 in federal cases involving environmental matters).

scribes the phenomenon as the "greening of the global judiciary"[88]—a circumstance that arguably necessitates a new set of "green" ethical rules for judges.

Another reason to incorporate environmental ethics into the ABA Model Code is the need to maintain public confidence in the judiciary. This consideration ranks highly among the priorities mentioned in the existing language in the Code.[89] The public has become very concerned about environmental problems[90] and is anxious that the executive and legislative branches are not doing enough to address the problems.[91] Public confidence in the judiciary has generally been low in recent years,[92] except that the public appreciates the judiciary's active involvement in checking other branches that are pursuing unpopular policies, such as the Trump Administration's travel ban[93] or

---

88 Percival, *supra* note 4, at 333–34 (noting the surge in environmental cases pending before judges throughout the world).

89 Language concerning the judicial obligation to promote public confidence in the judiciary appears fifteen times in the current version of the ABA Model Code. *E.g.*, MODEL CODE OF JUDICIAL CONDUCT pmbl. ¶ 1 (AM. BAR ASS'N 2007) ("Inherent in all the Rules contained in this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system."); *id.* ¶ 2 (declaring that judges "should aspire at all times to conduct that ensures the greatest possible public confidence").

90 *Gallup Historical Trends: Environment*, GALLUP, http://www.gallup.com/poll/1615/environment.aspx [https://perma.cc/RAM2-BRCC] (last visited Mar. 7, 2018) (setting forth results of nationwide poll indicating that public's anxiety about environmental problems is at an all-time high).

91 *Id.* (reporting poll results indicating low levels of public confidence in Congress and executive agencies with respect to environmental stewardship); Michael Biesecker & Emily Swanson, *Poll: Few Favor Trump Move to Ditch Paris Accord*, PBS NEWSHOUR (June 20, 2017, 9:10 AM), http://www.pbs.org/newshour/rundown/poll-favor-trump-move-ditch-paris-accord/ [https://perma.cc/B2UV-74D3] (reporting poll results showing that "[l]ess than one-third of Americans support President Donald Trump's decision to withdraw from the Paris climate accord"); Tom Caiazza, *Release: New Research Finds Public Opinion Stacked Against Anti-Environmental Agenda of New Congress*, CTR. FOR AM. PROGRESS (Jan. 18, 2017), https://www.americanprogress.org/press/release/2017/01/18/296675/release-new-research-finds-public-opinion-stacked-against-anti-environmental-agenda-of-new-congress/ [https://perma.cc/3U5W-LWCD] (setting forth national poll results indicating opposition to congressional rollbacks of environmental protections).

92 Jeffrey M. Jones, *Trust in U.S. Judicial Branch Sinks to New Low of 53%*, GALLUP (Sept. 18, 2015), http://www.gallup.com/poll/185528/trust-judicial-branch-sinks-new-low.aspx [https://perma.cc/Y5P3-XAVL] (reporting results of Gallup poll indicating that Americans' trust in judicial branch reached a record low).

93 *See* Alicia A. Caldwell & Emily Swanson, *Poll: Courts Are Right in Blocking Trump's Travel Ban*, FOX NEWS (June 19, 2017), http://www.foxnews.com/us/2017/06/19/poll-courts-are-right-in-blocking-trumps-travel-ban.html [https://perma.cc/BA3Y-Q26V] (reporting that majority of respondents to an Associated Press poll believed that courts rejecting President Trump's travel ban had reached the right decision).

various state legislatures' restrictions on the right to marry.[94] The public also tends to favor stricter ethical standards for judges.[95] While no poll has directly presented respondents with the question of whether judges should bear an ethical duty to protect the environment, the public's enthusiasm for vigorous checks and balances in other contexts seems to suggest that an active judicial role as to environmental matters would enhance judicial legitimacy.[96]

To be sure, judicial ethics should not necessarily bend to the winds of public opinion. The judiciary depends less on public approval than do the other branches of government,[97] and the ABA Model Code currently stresses that judges "shall not be swayed by public clamor."[98] Nonetheless, the ABA Model Code has indeed adapted to public opinion over the last several decades, reflecting the reality that judicial ethics need to change with the changing times. When the first version of the ABA Model Code prohibited discrimination, the list of impermissible discriminatory grounds consisted of "race, sex, religion or national origin."[99] The list expanded in subsequent years as social mores changed. The current list forbids discrimination based on "race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation."[100] Just as judges' conception of discrimination has evolved over

---

94 *See* Marcy Kreiter, *Gallup Poll: Confidence in U.S. Government Rises; Courts Most Popular Branch*, Int'l Bus. Times (Sept. 19, 2016, 8:29 PM), http://www.ibtimes.com/gallup-poll-confidence-us-government-rises-courts-most-popular-branch-2418745 [https://perma.cc/8ZCB-T24F] (indicating that public confidence in the judiciary increased between 2014 and 2015; a crucial consideration was the judiciary's involvement in issues of public importance such as the Supreme Court determination that same-sex couples have the right to marry); *see also* Jennifer Agiesta, *Poll: Majorities Back Supreme Court Rulings on Marriage, Obamacare*, CNN (June 30, 2015, 1:47 PM), http://www.cnn.com/2015/06/30/politics/supreme-court-gay-marriage-obamacare-poll/index.html [https://perma.cc/GL7B-SXVJ] (indicating that majority of respondents in national poll expressed support for the Supreme Court decision to invalidate state statutes forbidding same-sex marriage).

95 *Cf.* Caplan, *supra* note 66 (noting that approval ratings for Supreme Court have declined in response to what appears to be questionable ethics); Roger J. Miner, *Judicial Ethics in the Twenty-First Century: Tracing the Trends*, 32 Hofstra L. Rev. 1107, 1108 (2004) (indicating that an important variable in low public approval ratings for judiciary is unethical conduct of judges resulting from their failure to abide by professional rules of conduct).

96 *See* Miner, *supra* note 95, at 1108.

97 *See* Eric Hamilton, *Politicizing the Supreme Court*, 65 Stan. L. Rev. Online 35 (2012), https://www.stanfordlawreview.org/online/politicizing-the-supreme-court/ [https://perma.cc/4L8R-VP3D] (recounting the history of the U.S. Constitution to explain that the Framers intended to insulate the judiciary from political pressure, at least by comparison to the executive and legislative branches).

98 Model Code of Judicial Conduct r. 2.4(A) (Am. Bar Ass'n 2007).

99 Model Code of Judicial Conduct Canon 2 cmt. (Am. Bar Ass'n 1984).

100 Model Code of Judicial Conduct r. 2.3(B) (Am. Bar Ass'n 2007). Note that Rule

time to reflect the evolution of societal beliefs, so too should judges take account of the public's increasing concern about environmental harm.

Judicial ethics should—at least to a degree—match lawyers' ethics. Lawyers increasingly have obligations to third parties and interests not represented in the courtroom.[101] Among other categories of interests, lawyers must consider harm to human health (especially the health of children) and financial harm.[102] The addition of environmental protection to the list of cognizable external interests that lawyers must consider would be a logical extension of existing ethical rules for lawyers, and proposals have emerged for such reforms.[103] There would be an odd asymmetry in ethical regulation if lawyers had an obligation to alert judges to third-party and environmental interests, but judges had no duty to accord these interests any consideration or weight.[104] The only way to make progress in improving lawyer ethics is to expect similar ethics from judges.[105]

Perhaps the most compelling reason to incorporate environmental ethics into the ABA Model Code of Judicial Conduct is the paramount objective of the legal system: to achieve justice. The oath of

---

3.6(A), which prohibits judges from holding membership in discriminatory groups, sets forth a slightly shorter list of impermissible grounds for discrimination. *See id.* r. 3.6(A) ("A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation.").

101 *See* Lininger, *Green Ethics for Lawyers*, *supra* note 2, at 68–71 (summarizing emergence of lawyers' obligations to attend to concerns other than their clients' self-interest).

102 *See*, *e.g.*, MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(1) (AM. BAR ASS'N 2004) (authorizing breach of client confidentiality where disclosure would help to avert a third party's death or substantial bodily harm); *id.* r. 1.6(b)(2)–(3) (similar rules authorizing disclosure to protect third parties from financial harm); *id.* r. 1.6(b)(6) (authorizing disclosure when necessary to comply with statutes, such as those that require reporting of child abuse).

103 *See, e.g.*, Russell, *supra* note 1, 180–82 (advocating amendment of ABA Model Rule to allow reporting of certain environmental hazards); Lininger, *supra* note 2, at 76–107 (offering several proposals for reforms of ABA Model Rules of Professional Conduct in order to establish ethical obligations relating to environmental protection).

104 For example, if ABA Model Rule 3.3 were amended to impose an ethical obligation on lawyers to alert judges of client conduct that could cause imminent, substantial, and irremediable environmental harm, there would be scant possibility of remediation unless the judge also had some duty of environmental protection. *See* Lininger, *supra* note 2, at 101–02 (proposing amendment to ABA Model Rule 3.3 requiring lawyers to notify the court of significant environmental risks).

105 Of course, newly appointed or elected judges almost always come from the ranks of practicing lawyers, so they will expect similar ethical regulation when they ascend to the bench. Judicial ethics that are incongruous with lawyers' ethics might frustrate such judges or might lead to inconsistent treatment of environmental matters, with more recent appointees favoring the approach in the lawyers' codes, while more senior judges would favor the longstanding approach in judges' codes.

office for federal judges requires that they "administer justice without respect to persons."[106] As this language makes clear, the obligation of the judge is not simply to find middle ground between the parties in the courtroom, but to reach a just result. New ethical rules would increase the likelihood of achieving justice if they focused judges' attention on the need for environmental protection and intergenerational equity—priorities that the adversarial system undervalues.

One could argue that increasing specificity improves the regulation of judicial ethics.[107] Clearer rules would put judges on notice of boundaries for their conduct. Such rules would increase predictability and uniformity. The greater the specificity, the less need for subjective discretion in interpreting the rules. Due largely to these considerations, the overall trend in the last one hundred years has been for ethical rules to become more detailed.[108] When ethical rules consist of general standards, such as the exhortation to avoid the "appearance of impropriety," the rules are rarely efficacious.[109] Specificity is necessary to give the judicial ethics rules any teeth.

B. Arguments in Opposition

There are several arguments against increasing the specificity of ethical rules for judges. No matter how specific the rules, issues will arise that are beyond the scope of any specific rule. General rules are advantageous because they set forth principles that can guide judges in the interstices. Judges arguably need less precise ethical rules than lawyers do because the vetting process ensures that judges must have high ethical standards in order to qualify for their offices. In any event, judges are already subject to the ethical rules for lawyers, so the ethical code for judges need not match the specificity of the ethical rules for lawyers.

---

106 28 U.S.C. § 453 (2012) (oath of office for federal judges). Chief Justice John Roberts has stressed that the oath is the starting point for judicial ethics. Roberts, *supra* note 67, at 1.

107 *See generally* Rotunda, *supra* note 29 (discussing harm caused by imprecision in ethical codes).

108 *Compare* CANONS OF JUDICIAL ETHICS (AM. BAR ASS'N 1924) (consisting only of general standards), *with* MODEL CODE OF JUDICIAL CONDUCT (AM. BAR ASS'N 1972) (increasing detail under canons), *and* MODEL CODE OF JUDICIAL CONDUCT (AM. BAR ASS'N 2015) (offering much more specific guidance in the form of rules). The total length of the ABA's template increased more than ten-fold in order to accommodate the more specific provisions.

109 *See* Raymond J. McKoski, *Judicial Discipline and the Appearance of Impropriety: What the Public Sees Is What the Judge Gets*, 94 MINN. L. REV. 1914, 1964–67 (2010) (discussing unlikelihood that disciplinary authorities will base any sanctions solely on alleged violation of general appearance-of-impropriety language).

Specificity can be harmful. One potential problem is that specificity makes omissions more conspicuous. For example, when rules explicitly prohibit a category of conduct, but are silent as to another category, the implication might be that the latter category is permissible.[110] The interpretive canon *expressio unius est exclusio alterius* suggests that omissions are purposeful and are tantamount to the exclusion of alternatives.[111] As a practical matter, once a set of rules becomes specific, it must also become much more thorough and comprehensive because the lack of precise and on-point rules addressing a particular matter will have more meaning than such a gap in a code with more general language.[112] Accordingly, there might be a vast increase in proposed amendments to the ABA Model Code of Judicial Conduct. If successful, these amendments might clutter the code, making it harder to use and less accessible to laypeople.

Some writers have suggested that specificity in judicial ethics could weaken the judicial branch. Roger Miner, a judge on the Second Circuit Court of Appeals, warned that "too many rules" can "impact the enterprise of judging in a negative way."[113] According to Judge Miner,

> Ultimately, such excesses can result in timid judges who continually seek advisory opinions on ethical matters, recuse when it is unnecessary to do so, and generally look over their shoulders to see if they are being fitted up by lawyers for some ethical violation or other. Such activities can be a waste of precious judicial time and an unnecessary distraction from the judicial business at hand, and may even have an untoward effect on the decision-making process itself. These concerns are magnified by unwarranted threats or unjustified instigations of disciplinary proceedings. The ultimate consequence of all these concerns could very well be the undermining of judicial independence.[114]

---

110 According to principle of *expressio unius est exclusio alterius*, the express mention of one or more things of a particular class may be regarded as impliedly excluding others. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107–11 (2012) (discussing the negative-implication canon, whereby "[t]he expression of one thing implies the exclusion of others").

111 *See id.* at 107–08.

112 *Cf. id.* at 108.

113 Miner, *supra* note 95, at 1108–09 (discussing dangers of overregulation).

114 *Id.* at 1109.

Judge Miner expressed his dismay that the "judicial conduct industry" has exaggerated the extent of ethical problems and the need for more rules.[115]

Even if there were no disadvantages to specificity in codes of judicial ethics, one could argue that judges do not need "green ethics" as much as lawyers do. The lawyer's role is highly partisan.[116] The imposition of a duty to protect the environment—for example, a duty of whistleblowing to expose imminent environmental harm—makes sense because lawyers might otherwise favor their clients' interests over environmental interests. Judges, by contrast, have no client-based loyalty that would instinctively lead them to disfavor environmental interests. Another reason why environmentally conscious rules might be less suitable for judges than for lawyers is the passivity of the judge's role in fact finding. The judge relies on lawyers to present facts, and the judge usually cannot gather information sua sponte.[117] Thus, the duty to consider environmental harm rests more naturally with lawyers, who will have access to evidence of such harm and who are the filter that determines whether this evidence will ever reach the judge.

Finally, one could argue that environmental cases are not so exceptional that they deserve their own set of ethical rules. There is no principled reason to create unique ethical duties for judges to avert large-scale environmental harm, but to create no such duties in other contexts involving large-scale harm outside the environmental context. The reforms that are necessary for environmental protection—e.g., increased transparency, inclusion of diverse stakeholders and consideration of intergenerational equity—are equally necessary in many categories of cases, including those that do not involve environmental issues. If heightened ethical duties applied uniquely in environmental cases, then parties would spend a great deal of time arguing about whether or not their cases deserve classification as "environmental." A more sensible approach would be to apply the amended rules in all cases presenting circumstances that implicate the policy considerations underlying the rules.

---

115 *Id.* at 1136 ("[T]he ethical condition of the judiciary is not as much in need of repair as the judicial conduct industry sometimes makes it out to be.").

116 *See* Harry W. Jones, *Lawyers and Justice: The Uneasy Ethics of Partisanship*, 23 VILL. L. REV. 957, 960–61 (1978).

117 *See* Bradley Scott Shannon, *Some Concerns About Sua Sponte*, 73 OHIO ST. L.J. FURTHERMORE 27, 27–28, 32 (2012) (discussing that while judges have the ability to raise legal issues sua sponte, the practice goes against the adversarial system which requires judicial neutrality).

C. *The Need for Rules of General Application, Not Customized Rules*

As noted above, the best way to amend the ethics rules is with a broad brush.[118] Rather than limit application to a narrow category of cases in which certain ethical problems might arise, the amendments should apply to all cases presenting such issues. This inclusive approach would be more likely to garner support in the ABA House of Delegates. A small portion of the ABA's electorate consistently represents clients who are seeking greater environmental protection, but if the rules applied equally to harmful pharmaceuticals, risky construction, etc., the base of support for the amendments would likely broaden. Rules of general application offer the additional advantage that they could apply in contexts not anticipated by the framers at the time of drafting—e.g., a new category of tort law that first emerges ten years after adoption of the amendments.

There will be plenty of opportunity to address environmental cases in the commentary to the new rules. Indeed, there are already a few examples of such commentary in the existing versions of the ethical codes for judges[119] and lawyers.[120] Commentary is particularly valuable in interpreting ethical codes because there are few published judicial opinions on these codes, compared with the large number of published opinions addressing other categories of codes.

III. New Duties to Add to Judicial Codes of Ethics

The following subparts offer proposals for changes to the ABA Model Code of Judicial Conduct. Rather than clutter this Article with draft language for revision of every state and federal code or statute regulating judicial ethics, this Article focuses on the ABA's Code because it is the primary template for judicial ethics.

Each of the subparts below begins with the relevant language (current or proposed) in the ABA Code, all of which is in italics. Un-

118 *See supra* Section II.B.

119 *See, e.g.*, Model Code of Judicial Conduct r. 3.2 cmt. 3 (Am. Bar Ass'n 2007) (permitting judges to appear before government bodies considering zoning proposals that could affect the value of the judges' property).

120 *See, e.g.*, Model Rules of Prof'l Conduct r. 1.9 cmt. 3 (Am. Bar Ass'n 2004) (providing an example of impermissible side-switching by an environmental attorney when that attorney's advocacy for a new client might risk revelation of information provided by a former client); *id.* r. 5.7 cmt. 9 (mentioning "environmental consulting" among thirteen examples of law-related services that lawyers might perform without following the ABA Model Rules if lawyers make clear to clients that they are not practicing law); *id.* r. 6.1 cmt. 6 (designating environmental protection to be a second-priority category of pro bono).

derlining of text indicates a proposed insertion. Striking of text (e.g., ~~*example of stricken text*~~) indicates a proposed deletion. Italicized text that is neither underlined nor stricken is the current language of the Code.

A. Duty of Accuracy in Factfinding

Canon 2 of the ABA Model Code should be amended to include the following new rule:

> *Rule 2.17: Accuracy in Factfinding*
>
> *In hearings, bench trials, and other settings that necessitate judicial factfinding, a judge shall carefully consider all available evidence and shall find facts as accurately as possible. A judge shall not knowingly issue any order that mischaracterizes the factual record.*

Why impose an ethical duty on judges to find facts accurately? One reason is that such an amendment would correct an asymmetry between the ethical codes for lawyers and judges. Both lawyers and judges bear an ethical duty of accuracy when they make statements about the law,[121] but only lawyers bear the same duty when they refer to facts.[122] No specific language in the ABA Code requires judges to find facts as carefully as they apply the law.

---

121 *Compare* MODEL RULES OF PROF'L CONDUCT r. 3.3(a)(1) (AM. BAR ASS'N 2004) (prohibiting a lawyer from knowingly making a false statement of fact or law), *with* MODEL CODE OF JUDICIAL CONDUCT r. 2.2 (AM. BAR ASS'N 2007) (requiring a judge to apply and uphold the law).

122 Lawyers violate ABA Model Rule 3.3(a)(1) when they knowingly misrepresent facts, even if the facts at issue are not material. *See* MODEL RULES OF PROF'L CONDUCT r. 3.3(a)(1) (AM. BAR ASS'N 2004). Here is the entire text of ABA Model Rule 3.3:

> Rule 3.3: Candor Toward the Tribunal
> (a) A lawyer shall not knowingly:
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
> (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
> (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

This contrast between lawyers' and judges' ethics is perplexing. While the client-centered paradigm distinguishes lawyers from judges and may heighten the likelihood that lawyers exaggerate, judges are not immune from distorting facts. The possibility of judicial bias is evident in the large number of disqualification rules—a set of rules that is approximately equal in breadth to the conflicts rules for lawyers.[123] The potential for judicial bias suggests a potential for judges to mischaracterize facts.

Though juries find the facts in most trials, judges also play a significant role in factfinding. When parties stipulate to a bench trial, the judge serves as the sole trier of fact. Even in litigation that culminates with a jury trial, the judge usually has sole responsibility for finding facts in hearings on various matters including motions to exclude evidence, motions for summary judgment, and motions for temporary restraining orders.[124]

The factual findings by the trial judge are rarely reversed. Appellate courts exhibit a great deal of deference to trial courts' factual findings and credibility determinations, assuming that trial judges are in a unique position to weigh evidence and assess the credibility of witnesses.[125] The infrequent reversal of trial judges' factual findings, compared with the more rigorous appellate review of trial judges' interpretation of controlling legal authority, counsels in favor of imposing an ethical duty on judges to find facts as carefully as they construe the law.

The danger of erroneous factfinding by judges is particularly stark in environmental cases. Consider, for example, the possibility

---

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

123 *Compare id.* r. 1.7–1.12 (setting forth various circumstances that might create conflicts of interest for lawyers), *with* MODEL CODE OF JUDICIAL CONDUCT r. 2.11 (AM. BAR ASS'N 2007) (enumerating several different grounds that might necessitate disqualification of judges).

124 FED. R. EVID. 104 (explaining that the court finds facts as to preliminary matters and in hearings when the jury is not present). *But see* FED. R. EVID. 1008 (assigning some factfinding duties to juries with respect to evidence challenged under the Best Evidence Doctrine set forth in FED. R. EVID. 1002).

125 As Judge Friendly famously admonished, the appellate judge should defer to the trial judge because the latter has "the feel of the case." *See* United States v. Hooker Chems. & Plastics Corp., 749 F.2d 968, 991 (2d Cir. 1984). This deference is strongest as to factual findings. The cold appellate record is no substitute for the trial judge's first-hand perspective. *See id.*; *see also* Anderson v. Bessemer City, 470 U.S. 564, 565 (1985).

that a judge might refuse to acknowledge anthropogenic climate change. In one recent case, a state judge in Washington had to determine whether a climate protester could present the necessity defense to defeat a criminal prosecution arising from his involvement in briefly shutting down a pipeline carrying oil into the United States from Canada.[126] The judge barred the defendant from presenting evidence on the harm caused by climate change.[127] Incredibly, the judge asserted that "there's tremendous controversy over the fact whether [climate change] even exists."[128] The prevalence of such views among judges is impossible to gauge, but the number of "climate deniers" in judicial office could be substantial. This number could increase in the future because the executive authorities who appoint both federal and state judges—including President Trump and governors in fifteen states—have expressed skepticism about whether climate change results from human activities,[129] and the environmental views of an appointed judge tend to mirror the views of the appointing authority.[130] A judge who dogmatically denies that humans affect the climate could reach incorrect results in cases with significant ramifications and could

126 *See* Sam Levin, *Judge in Environmental Activist's Trial Says Climate Change Is a Matter of Debate*, GUARDIAN (Jan. 31, 2017, 6:00 AM), https://www.theguardian.com/environment/2017/jan/31/environmental-activist-trial-judge-questions-climate-change-ken-ward [https://perma.cc/QVG8-8ZQV] ("A Washington state judge has sparked outrage for remarks questioning the existence of climate change and the role of humans in global warming.").

127 *See id.*

128 *See id.*

129 *See* Jeremy Schulman, *A Timeline of Every Ridiculous Thing Trump Has Said About Climate Change*, NEWSWEEK (Apr. 2, 2017, 9:10 AM), http://www.newsweek.com/timeline-every-ridiculous-thing-trump-has-said-about-climate-change-576238?amp=1 [https://perma.cc/Z2WD-L9G6] (recounting various statements made by President Trump about climate change, including his allegation that it is a "hoax," a "con," and "a scam invented by the Chinese," as well as his statement that former Vice President Al Gore "should be stripped of [his] Nobel Prize because it's cold outside"). Approximately fifteen governors dispute the validity of anthropogenic climate change, even though the vast majority of the scientific community has confirmed the occurrence of this phenomenon. *See* Benton Strong, *Release: Gov. Abbot Joins Republican Governors Denying Climate Change*, CTR. FOR AM. PROGRESS (Jan. 27, 2015), https://www.americanprogressaction.org/press/release/2015/01/27/105387/release-gov-abbott-joins-republican-governors-denying-climate-change/ [https://perma.cc/5VQQ-ZXCP] (noting that "more than half of Republican governors deny or question the science behind climate change," while "97[%] of climate scientists [believe] climate change is real and caused by human activities").

130 One study of judges' rulings under NEPA found that partisan affiliation correlated with the judges' receptiveness to certain arguments. *See* JAY E. AUSTIN ET AL., JUDGING NEPA: A "HARD LOOK" AT JUDICIAL DECISION MAKING UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT 13 (2004), https://grist.files.wordpress.com/2004/10/judgingnepa.pdf [https://perma.cc/5VQQ-ZXCP] ("Simply put, the fact that an environmental plaintiff's chances of winning a NEPA case before the circuit courts varies by a factor of nearly six-to-one depending on the party of the judges' nominating president runs counter to our notions of impartial justice.").

end up handling a disproportionate number of climate-related cases due to forum shopping.

The extent of scientific consensus about anthropogenic climate change leaves little room for doubt. A recent survey by the National Aeronautics and Space Administration ("NASA") involving several categories of scientists found nearly universal agreement on the deleterious effects of global warming and the role of human activities in causing it.[131] NASA estimates the rate of concurrence at ninety-seven percent of the relevant scientific community.[132] Michael Burger, executive director of the Sabin Center for Climate Change Law at Columbia University, wrote that "no court could uphold a conclusion that climate change does not endanger public health and welfare."[133] A judge who mischaracterizes this scientific consensus as a "tremendous controversy" is so brazenly misrepresenting facts as to erode public confidence in the judicial system—a problem that the ABA Code is usually careful to avoid.[134]

To be sure, it would be a mistake to insist on unquestioning orthodoxy in factfinding about climate change. Legitimate disagreements can and do arise about particular aspects of the climate problem. A rule that prevents judges from choosing a side in such disagreements would ill serve the judicial system.[135] On the other hand, when the accuracy of a judge's factfinding is readily verifiable or falsifiable—as in the case of a ruling reporting the state of research on climate change in 2017—a judge should be accountable for errors to the same extent that the judge is accountable for errors in the characterization of controlling legal authority.[136] Justice cannot abide a knowing error as to law or fact.

---

131 *Scientific Consensus: Earth's Climate is Warming*, NASA, https://climate.nasa.gov/scientific-consensus/ [https://perma.cc/T4SL-E2RA] (collecting and summarizing findings of various scientific societies, government agencies, and international bodies, the majority of which agree that "[c]limate-warming trends over the past century are extremely likely due to human activities").

132 *Id.*

133 Burger, *supra* note 14.

134 *E.g.*, MODEL CODE OF JUDICIAL CONDUCT pmbl. ¶¶ 1–2 (AM. BAR ASS'N 2007).

135 *See generally* Christopher Booker, *QC Calls for Ruling to 'Scotch' Claims that Challenge 'Consensus' on Global Warming*, TELEGRAPH (Oct. 11, 2015, 1:43 AM), https://www.telegraph.co.uk/comment/11924776/QC-calls-for-ruling-to-scotch-claims-that-challenge-consensus-on-global-warming.html [https://perma.cc/25C9-2JA4] (inveighing against a proposal that was under discussion at an international conference of judges and complaining that such an attempt to "suppress any further debate").

136 MODEL CODE OF JUDICIAL CONDUCT r. 2.2 (AM. BAR ASS'N 2007) (requiring a judge to apply and uphold the law).

Some judges might consider an ethical duty of accuracy in factfinding to be daunting, especially with respect to the sort of scientific matters that arise in environmental cases, but judges have been finding facts on scientific matters relevant to expert testimony for decades.[137] Judges have the ability to appoint experts sua sponte at public expense if guidance from these experts would be valuable, and the ethical rules already permit judges to consult with experts on their own initiative,[138] so long as judges share all such communication with the parties.[139] An increasing number of publications are available to guide judges in considering climate science.[140] An ethical duty to find facts accurately would indeed increase the burden on judges, at least in the short term, but this burden is less onerous than the hardships that could result from unmitigated global warming.

B. Duty of Caution when Addressing Catastrophic Risk

Canon 2 of the ABA Model Code should be amended to include the following new rule:

Rule 2.18: Caution When Addressing Catastrophic Risk

---

137 Judges in the United States have long been able to assess the degree of agreement within a particular scientific community. Indeed, the existence of such an agreement was the dispositive consideration in judges' evaluation of proposed expert testimony from the 1920s to the 1990s, pursuant to the test set forth in *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). Even when the federal courts replaced the *Frye* test with a new reliability test set forth in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 590–91 (1993), some state courts continued to use the *Frye* test, and those jurisdictions utilizing the *Daubert* test still considered the extent of acceptance within the relevant scientific community to be a weighty factor bearing on the reliability of expert testimony. *See* 22 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE: EVIDENCE § 5168.1 (2d ed. 2017); *see also Daubert*, 509 U.S. at 594. Therefore, an ethical rule necessitating that judges consider the views of the relevant scientific community with respect to environmental matters would not require an unfamiliar type of factfinding.

138 FED. R. EVID. 706 (setting forth procedure for judicial appointment of experts).

139 MODEL CODE OF JUDICIAL CONDUCT r. 2.9(A)(2) (AM. BAR ASS'N 2007) (providing that judicial consultation of a "disinterested expert" is not a violation of the rule against ex parte contacts, so long as the judge furnishes the parties with a record of the communication between the judge and the expert).

140 *See, e.g.*, Carolyn Brickey et al., *How to Take Climate Change Into Account: A Guidance Document for Judges Adjudicating Water Disputes*, 40 ENVTL. L. REP. 11215, 11224–26 (2010) (providing tips to help judges understand climate science in the context of climate change bearing on water disputes); Kirsten Engel & Jonathan Overpeck, *Adaptation and the Courtroom: Judging Climate Science*, 3 MICH. J. ENVTL. & ADMIN. L. 1, 27–31 (2013) (identifying challenges that arise when judges evaluate climate science, and offering principles to guide judges in weighing expert testimony and other scientific evidence relating to climate change).

> *(A) A judge shall exercise caution when addressing catastrophic risk, including risk as to which some degree of uncertainty exists.*
> *(B) The judge shall thoroughly review all reasonably available information in order to ascertain whether the risk at issue is catastrophic. This review shall include consideration of any expert testimony or other evidence offered by the parties that is relevant, credible, and helpful to the court.*
> *(C) Upon determining that the risk at issue is catastrophic, the judge shall exercise caution in any procedural or substantive ruling relating to the risk. When other considerations are in or near equipoise, and more than one option is available for the judge's ruling, the judge will favor the option that minimizes the risk.*
> *(D) The existence of uncertainty does not relieve the judge of the duty to minimize catastrophic risk.*

An amendment to the "Terminology" section at the outset of the ABA Model Code is necessary to define the term "catastrophic risk":

> *"Catastrophic risk" means risk of large-scale harm to human health or to the environment. In assessing whether a risk is catastrophic, the court shall evaluate not only the gravity of the harm, but shall also the probability of the harm. This definition excludes a risk so remote that its occurrence is entirely speculative. For example, if a majority of the relevant scientific community has determined that there is no credible evidence of risk, then the risk should fall outside this definition. Uncertainty in the relevant scientific community does not defeat a finding that risk is catastrophic.*

The precautionary principle is a natural fit for judicial ethics. Indeed, the terms "judicious" and "prudent"—commonly used to describe the ideal judicial temperament—are virtually synonymous with "cautious." The judicial branch is generally the voice of caution within the tripartite framework of the U.S. federal government. Through judicial review, the courts rein in rash actions by the executive and legislative branches.[141] A vast number of provisions in the current ABA Code prescribe caution with respect to various matters: to identify only a few, the disqualification rules apply when there exists any possibility of conflict (not just an actual conflict),[142] and the mere possibil-

---

141 *See supra* note 23 (providing recent illustrations of courts' steadying influence when other branches act precipitously).

142 MODEL CODE OF JUDICIAL CONDUCT r. 2.11 (AM. BAR ASS'N 2007) (setting forth various bases for disqualification of judges due to actual and potential conflicts of interest).

ity of future harm is sufficient to trigger other duties such as limiting public comments,[143] reporting misconduct by others,[144] and avoiding entanglements in extrajudicial activities that could give rise to potential conflicts.[145] Given courts' longstanding commitment to the notion of caution, it is but a small step to apply this principle to cases involving catastrophic risk.

As presently written, the ABA Code does not adequately articulate a duty to proceed cautiously in the face of catastrophic risk. The Code does not explicitly mention either catastrophic risk or scientific uncertainty. In the absence of specific guidance, judges instinctively favor private property rights or defer to agency decisions,[146] even if the private property owner or agency is advocating development that departs significantly from the status quo and portends ominously for the environment. One might argue that the current default position for the judiciary is not caution with respect to environmental devastation, but caution with respect to overriding the preferences of property owners or agencies.

In omitting the precautionary principle, the ethical rules for judges stand in contrast to their domestic and international counterparts. Various professions including nursing,[147] engineering,[148] homebuilding,[149] landscape design,[150] and several categories of busi-

143 *Id.* r. 2.10 (forbidding public statements about pending or impending cases due to potential for appearance of impropriety).

144 *Id.* r. 2.15 (requiring judges to address misconduct by lawyers or other judges to prevent the possibility that such misconduct could recur).

145 *Id.* Canon 3 (enumerating several categories of judges' personal or extrajudicial activities that could potentially lead to conflicts or the appearance of impropriety).

146 *See supra* notes 18–19 and accompanying text.

147 Am. Nurses Ass'n, ANA's Principles of Environmental Health for Nursing Practice with Implementation Strategies 16 (2007), https://www.nursingworld.org/~4afaf8/globalassets/practiceandpolicy/work-environment/health—safety/principles-of-environmental-health-online_final.pdf [https://perma.cc/SY9H-32YM] ("The Precautionary Principle guides nurses in their practice to use products and practices that do not harm human health or the environment and to take preventative action in the face of uncertainty.").

148 *See* Robin Attfield, *Engineering Ethics, Global Climate Change, and the Precautionary Principle*, *in* Satya Sundar Sethy, Contemporary Ethical Issues in Engineering 38, 38–47 (2015) (discussing ethical obligation of engineers to avoid exacerbating environmental problems such as climate change).

149 Rebecca Mirsky & John Schaufelberger, Professional Ethics for the Construction Industry 101–04 (2015) (analyzing environmental challenges and discussing application of precautionary principle to professionals working in construction).

150 Kelly Fleming, *The Evolving Practice of Ecological Landscape Design*, Field (Aug. 1, 2017), https://thefield.asla.org/2017/08/01/the-evolving-practice-of-ecological-landscape-design/ [https://perma.cc/C948-89QZ] (referring to precautionary principle and admonishing against risking harm to human or environmental health).

ness-related professions[151] have promulgated ethical guidelines incorporating a version of the precautionary principle with specific language addressing environmental harm. Countries around the world are following the precautionary principle.[152] International instruments have adopted it as well.[153]

Courts and agencies in the United States have occasionally embraced the precautionary principle. An early example is *Ethyl Corp. v. EPA*,[154] in which the D.C. Circuit upheld the Environmental Protection Agency's ("EPA") decision to regulate lead as an additive to gasoline.[155] While noting that the case involved a high degree of uncertainty, the court rejected the argument that uncertainty necessitated inaction.[156] The court concluded that Congress had, in effect, endorsed the EPA's invocation of the precautionary principle with respect to the uncertainty about the potential harm of emissions attributable to leaded gasoline.[157] Municipal governments have also adopted the precautionary principle, following it in a wide range of official decisions, from reviewing development proposals to contracting with outside vendors.[158]

Some judges may find the precautionary principle to be unwieldy. In particular, the need to exercise caution in the face scientific uncertainty may cause frustration for judges accustomed to basing their decisions on a clear evidentiary record and defaulting to protection of private property rights or approval of agency decisions. The reality,

---

151 KEVIN MCKAGUE & WESLEY CRAGG, COMPENDIUM OF ETHICS CODES AND INSTRUMENTS OF CORPORATE RESPONSIBILITY 2–125 (2007), http://www.yorku.ca/csr/_files/file.php%3Ffileid%3DfileCDOICwJiei%26filename%3Dfile_Codes_Compendium_Jan_2007.pdf [https://perma.cc/JX6T-3JRX] (collecting codes of corporate responsibility, some of which include a duty of environmental protection, explicitly mentioning the precautionary principle).

152 *See, e.g.*, CHARTE DE L'ENVIRONNEMENT [CHARTER FOR THE ENVIRONMENT] 2004, art. 5 (Fr.), http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/charter_environnement.pdf [https://perma.cc/B2MA-6TYF]; *See also* Robert V. Percival, *Who's Afraid of the Precautionary Principle?*, 23 PACE ENVTL. L. REV. 21, 21 (2005) (noting the precautionary principle "has been [so] widely embraced throughout the world," including the in the European Union that "some argue . . . it should be recognized as customary international law").

153 *E.g.*, U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (Vol. I), annex I, Principle 15 (Aug. 12, 1992) ("In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.").

154 541 F.2d 1 (D.C. Cir. 1976).

155 *Id.* at 55.

156 *Id.* at 24–25.

157 *Id.* at 13, 24–28.

158 *E.g.*, S.F., CAL., ENVIRONMENT CODE ch. 1, § 101 (2017).

however, is that scientific uncertainty remains ineluctable in environmental law, particularly in the area of climate change.[159] Judges have frequently confronted scientific uncertainty since 1993, when the Supreme Court's ruling in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[160] changed the test for admission of scientific evidence: general acceptance by the relevant scientific community was no longer the crucial determinant of admissibility, so individual judges had no choice but to assess the reliability of novel scientific theories themselves.[161] Even if scientific consensus were necessary, there is widespread agreement as to the validity of the science predicting grave harm from anthropogenic climate change.[162]

Perhaps judges might worry that the evaluation of catastrophic risk would consume undue time. But the language above in proposed Rule 2.18(B) should allay these fears. Judges would have no ethical duty to consider expert testimony and other evidence on the subject of catastrophic risk unless the testimony were "relevant, credible, and helpful to the court." This language is no more expansive than the current language in the Federal Rules of Evidence governing the admission of expert testimony about scientific matters,[163] so there is no reason to believe that the new ethical rule will cause excessive delay (especially when one considers that catastrophic risk would very well be a material issue in the litigation even without the proposed ethical rule). In any event, the consumption of additional time and resources to address catastrophic risk seems to be worth the trouble.

C. Duty of Transparency

Canon 2 of the ABA Model Code should be amended to include the following new rule:

> *Rule 2.19: Transparency*
>
> *Unless limits are necessary for the protection of safety, privacy, or other legitimate interests in accordance with applicable law, a judge shall maximize public access to court*

159 *Ethyl Corp.*, 541 F.2d at 24 ("Questions involving the environment are particularly prone to uncertainty."); Lazarus, *supra* note 18, at 206–07 (discussing "tremendous scientific uncertainty" that is unavoidable in field of environmental law).

160 509 U.S. 579 (1993).

161 *Id.* at 590–93. *See generally* Christopher B. Mueller & Laird C. Kirkpatrick, EVIDENCE UNDER THE RULES 663–64 (8th ed. 2015) (explaining how transition from the *Frye* standard to *Daubert* required judges to play a more active role in evaluating scientific evidence instead of simply assessing the degree of acceptance in the relevant scientific community).

162 *See supra* notes 14, 131–32 and accompanying text.

163 FED. R. EVID. 702 (requiring that expert testimony must be reliable and helpful).

> *proceedings and to court records. A judge shall not allow court personnel to charge fees for reproduction of court records except to the extent that such fees are necessary to defray the actual costs of reproducing the records in question. A judge shall instruct court personnel to comply promptly with requests for information.*

The United States judicial system has long recognized the value of transparency. Public access to court proceedings and court records improves the legitimacy of the legal system. Justice seems more accessible when the proceedings themselves are open to the public. Transparency promotes public understanding of court procedure and of the substantive matters handled by the courts. The vigilance of the public provides an incentive for witnesses to testify truthfully, and publicity of trials might lead other witnesses to step forward.[164] Ready access to court proceedings and court files can level the playing field between rich and poor citizens; when only the former can follow the courts' affairs, this disparity heightens political inequality.[165] In addition, transparency is crucial for the accountability of the judiciary. Corruption and improper influence are more difficult when court proceedings are subject to close public scrutiny. The words of Justice Louis Brandeis still ring true: "Sunlight is said to be the best of disinfectants."[166]

For these reasons and others, the Constitution provides for open proceedings in U.S. courts. The Sixth Amendment requires public trials in criminal cases,[167] and the First Amendment also allows public access to various court proceedings.[168] In determining whether the

---

164 *Judicial Transparency and Ethics: Hearing before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 115th Cong. 18 (2017) [hereinafter *Judicial Transparency and Ethics*] (testimony of Mickey H. Osterreicher, General Counsel, National Press Photographers Association), https://judiciary.house.gov/wp-content/uploads/2017/02/115-1_24270.pdf [https://perma.cc/99TC-HC4G] (noting various benefits of media coverage in United States courtrooms).

165 *See generally* Memorandum from Judge Samuel A. Alito, Jr., Chair, Advisory Comm. on Appellate Rules, to Judge David F. Levi, Chair, Standing Comm. on Rules of Practice and Procedure (May 6, 2005), *quoted in Judicial Transparency and Ethics*, *supra* note 164, at 27–28 (testimony of Thomas R. Bruce, Co-Founder & Director, Legal Information Institute), https://judiciary.house.gov/wp-content/uploads/2017/02/115-1_24270.pdf [https://perma.cc/99TC-HC4G] ("The disparity between litigants who are wealthy and those who are not is an unfortunate reality. Undoubtedly, some litigants have better access to unpublished opinions, just as some litigants have better access to published opinions, statutes, law review articles—or, for that matter, lawyers.").

166 LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914).

167 U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .").

168 *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 556–57 (1980) (holding that

First Amendment right of access extends to a particular type of proceeding, the Supreme Court has considered two factors: first, "whether the place and process have historically been open to the press and general public"; and second, "whether public access plays a significant positive role in the functioning of the particular process in question."[169] Lower courts have extended the right of access to both criminal and civil proceedings,[170] and have found a right of access to hearings at various stages of litigation, as well as to court records.[171] The case law has created a presumption of access,[172] but opponents can overcome the presumption by demonstrating the potential for prejudice or other harm.[173]

Why should the rules of judicial ethics promote transparency? While the benefits of open access may seem compelling on a theoretical level, judges who must deal with the reality of crowded galleries, intrusive reporters, and burdensome requests for documents might tend to favor a restrictive interpretation of the access rules. In other words, judges might instinctively believe that transparency is a nuisance.[174] Significant media attention can transform a trial into something akin to a circus, causing difficulties for court personnel and prejudice to parties. Even outside the context of high-profile cases, requests for public records can divert court personnel from their other tasks. Some judges might fear public monitoring for other reasons relating to the judges' self-interest: transparency could subject them to

---

the public's right of trial attendance is "implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and of the press could be eviscerated").

169 Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8 (1986) (finding a right of access to transcripts of a preliminary hearing despite defense objections that publicity would cause prejudice).

170 *See* NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 980 P.2d 337, 358 (Cal. 1999) (indicating that "every lower court opinion of which we are aware that has addressed the issue of First Amendment access to *civil* trials and proceedings has reached the conclusion that the constitutional right of access applies to civil as well as to criminal trials").

171 *See Press-Enterprise Co.*, 478 U.S. at 6–13; Associated Press v. U.S. Dist. Court, 705 F.2d 1143, 1145 (9th Cir. 1983) (opining that "the public and press have a first amendment right of access to pretrial documents in general").

172 *E.g.*, *Richmond Newspapers, Inc.*, 448 U.S. at 573 (observing that "a presumption of openness inheres in the very nature of a criminal trial under our system of justice").

173 *See Press-Enterprise Co.*, 478 U.S. at 13–14 (opponents could overcome presumption if the trial court were to find that "closure is essential to preserve higher values and is narrowly tailored to serve that interest").

174 *Cf.* Ronald D. Rotunda, *Judicial Transparency, Judicial Ethics, and a Judicial Solution: An Inspector General for the Courts*, 41 LOY. U. CHI. L.J. 301, 303 (2010) ("Judges seem to prefer to give criticism rather than receive it.").

social opprobrium, could threaten their chances for reelection, or could embroil them in disciplinary proceedings.

The proposed new ethical rule on transparency would require that judges maximize public accessibility until it conflicts with other legitimate concerns. Under the new rule, judges would have an obligation to prevent court personnel from charging fees for records in excess of the actual costs incurred in retrieval and reproduction. While charging such fees might seem tempting as a means of raising revenue or discouraging burdensome requests, the hindrance to public access is too great a price to pay.[175] Indeed, a federal judge has recently certified a class action suit on behalf of plaintiffs who believe they paid excessive fees for records obtained through the Public Access to Court Electronic Records ("PACER") system.[176]

Greater transparency would be valuable in environmental litigation. When risks to human or environmental health are at issue, the public has a right to know about these risks; failure to alert the public might cause harm before the ultimate disposition of the case.[177] Observers with a potential interest in pending environmental litigation need access to information so they can consider whether to file a motion for intervention or for leave to file an amicus brief. The manner in which the court reviews a private development proposal or an agency's decision could provide useful guidance to other similarly situated parties and could promote compliance with the law. Finally, greater transparency could promote the public's sense of judicial accountability, and accordingly, could enhance the legitimacy of the court system.

There are potential disadvantages to greater transparency in environmental litigation. As Professor Richard Stewart has noted, an increase in transparency might potentially delay proceedings, limit

---

175 *See Judicial Transparency and Ethics*, *supra* note 164, at 27–28 (explaining importance of public access to court records, and urging reduction of fees charged for such access).

176 Nat'l Veterans Legal Servs. Program v. United States, 235 F. Supp. 3d 32, 35 (D.D.C. 2017) (certifying class action alleging that PACER charged fees in excess of costs). For details on the class action litigation alleging that PACER charges excessive fees for records, see PACER FEES CLASS ACTION, https://www.pacerfeesclassaction.com/Home.aspx [https://perma.cc/YX2H-5657].

177 *Cf.* Carrey Gillam, *Judge Threatens to Sanction Monsanto for Secrecy in Roundup Cancer Litigation*, HUFFINGTON POST (Mar. 10, 2017, 1:59 PM), https://www.huffingtonpost.com/entry/judge-threatens-to-sanction-monsanto-for-secrecy-in_us_58c2de66e4b0c3276fb78433 [https://perma.cc/53E8-HZTF] (discussing pending litigation filed against Monsanto, the manufacturer of herbicide that includes glyphosate; plaintiffs alleged that glyphosate is carcinogenic, and judge threatened sanctions if Monsanto was not forthright in discovery).

options available to litigants, and make settlement more difficult.[178] In unusual cases, the secrecy is necessary to protect parties or witnesses from suffering financial harm or even physical injury. The proposed rule recognizes that exceptions to transparency are sometimes prudent, and the rule allows the judge to impose limits on transparency when "necessary for the protection of safety, privacy, or other legitimate interests." In other situations that do not present such circumstances, sunlight is just as salutary in the justice system just as it is in nature.

D. Duty of Inclusion

Rule 2.6 of the ABA Model Code should be amended to provide as follows:

> *Rule 2.6: Including Stakeholders and Ensuring the Right to Be Heard*
>
> *(A) When a judge adjudicates motions to intervene, motions to submit amicus briefs, and other requests for participation in pending proceedings, a judge shall strive to maximize the inclusion of stakeholders, subject to applicable law and considerations of efficiency, courtroom capacity, and fairness to current parties.*
> *(AB) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.*
> *(C) In identifying potential legal interests that might deserve inclusion in pending litigation, the judge shall not deny an opportunity for participation based only on the lack of capacity to testify or direct legal counsel. In such circumstances, the judge shall explore the possibility of allowing an appearance by a guardian ad litem, conservator, or other representative.*
> *(BD) A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a matter that coerces any party into settlement.*

Inclusion of diverse stakeholders is generally advisable so that the courtroom does not become the exclusive province of well-heeled "insiders." Broad participation increases the likelihood that the court will consider the full range of interests. By allowing inclusion of stakeholders while the matter is pending, the court can reduce the time-consum-

178 Richard B. Stewart, *Confidentiality in Government Enforcement Proceedings*, 2 N.Y.U. ENVTL. L.J. 232, 233 (1993) (listing potential disadvantages of greater transparency in environmental litigation).

ing subsequent litigation that is necessary for excluded parties to have their day in court.

An inclusive approach is crucial in environmental cases. The involvement of many stakeholders is sometimes necessary to meet statutory requirements for environmental review,[179] and in any event, is a prudent approach in identifying and addressing potential concerns about the environmental dimensions of the matter at issue. Commentators have generally expressed enthusiasm for allowing broad participation by stakeholders in pending environmental cases, either as intervenors or amici.[180]

The proposed rule contemplates the possibility of involving nontraditional stakeholders. For example, young children suffering the long-term effects of environmental problems, or even nonhuman stakeholders, might have important interests that the courts should bear in mind when adjudicating environmental matters.[181] The proposed rule would accommodate nontraditional stakeholders even if they are unable to testify or express their preferences to attorneys. Judges could appoint guardians ad litem, conservators, or other representatives to assist in this process, just as ABA Model Rule 1.14 has prescribed procedures for representing adults with diminished capacity.[182]

Inclusion of more stakeholders could bring logistical challenges. For example, the necessity to hear many different viewpoints could prolong litigation and could diminish the influence of those parties who are central to the action. But the proposed rule does not require judges to maximize participation under all circumstances. Judges could limit participation when necessary due to such considerations as

---

179 *See Public Participation: Environmental Impact Assessment (EIA) in the United States*, EPA (Sept. 5, 2012), https://www.epa.gov/sites/production/files/2014-05/documents/us-eia-experience.pdf [https://perma.cc/NHJ8-FE4Y] (explaining requirements relating to public participation under NEPA).

180 *See* Peter A. Appel, *Intervention in Public Law Litigation: The Environmental Paradigm*, 78 WASH. U. L.Q. 215, 304–09 (2000) (urging that courts should be more restrictive in adjudicating motions to intervene, but should liberally grant opportunities for filing amicus briefs); Carl Tobias, *Rethinking Intervention in Environmental Litigation*, 78 WASH. U. L.Q. 313, 314 (2000) (arguing that intervenors in environmental cases make valuable contributions, and suggesting that a more permissive approach in adjudicating motions to intervene would be appropriate).

181 For further discussion about the inclusion of younger generations in environmental litigation, see *infra* Section III.K. For further discussion about the inclusion of nonhuman stakeholders, see *infra* Section III.J.

182 MODEL RULES OF PROF'L CONDUCT r. 1.14 (AM. BAR ASS'N 2004) (providing when a lawyer represents a client with diminished capacity, the lawyer may make use of several tools including "seeking the appointment of a guardian ad litem, conservator or guardian").

"efficiency, courtroom capacity, and fairness to current parties." Of course, the rules of standing and courtroom procedure will continue to impose constraints that are separate from the ethical rules for judges.

E. Duty of Candor and Forthrightness for Judicial Candidates

Rule 2.10 of the ABA Model Code should be amended to provide as follows:

> *Rule 2.10: Judicial Statements on Pending and Impending Cases*
>
> *(A) A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.*
> *(B) A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office. <u>This limitation does not impair the ability of a judge or candidate for judicial office to share general viewpoints on matters relevant to judging, including substantive matters, in order to provide information to the electorate or to officials involved with the appointment or confirmation of judges</u>.*
> *(C) A judge shall require court staff, court officials, and others subject to the judge's direction and control to refrain from making statements that the judge would be prohibited from making by paragraphs (A) and (B).*
> *(D) Notwithstanding the restrictions in paragraph (A), a judge may make public statements in the course of official duties, may explain court procedures, and may comment on any proceeding in which the judge is a litigant in a personal capacity.*
> *(E) Subject to the requirements of paragraph (A), a judge may respond directly or through a third party to allegations in the media or elsewhere concerning the judge's conduct in a matter.*

In addition, Rule 4.1 of the ABA Model Code should be amended to provide as follows:

> *Rule 4.1: Political and Campaign Activities of Judges and Judicial Candidates in General*
>
> *(A) Except as permitted by law, or by Rules 4.2, 4.3, and 4.4, a judge or judicial candidate shall not:*

(1) act as a leader in, or hold an office in, a political organization;
(2) make speeches on behalf of a political organization;
(3) publicly endorse or oppose a candidate for any public office;
(4) solicit funds for, pay an assessment to, or make a contribution to a political organization or a candidate for public office;
(5) attend or purchase tickets for dinners or other events sponsored by a political organization or a candidate for public office;
(6) public identify himself or herself as a candidate of a political organization;
(7) seek, accept, or use endorsements from a political organization;
(8) personally solicit or accept campaign contributions other than through a campaign committee authorized by Rule 4.4;
(9) use or permit the use of campaign contributions for the private benefit of the judge, the candidate, or others;
(10) use court staff, facilities, or other court resources in a campaign for judicial office;
(11) knowingly, or with reckless disregard for the truth, make any false or misleading statement;
(12) make any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court; or
(13) in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office., but this limitation does not impair the ability of a judge or candidate for judicial office to share general viewpoints on matters relevant to judging, including substantive matters, in order to provide information to the electorate or to officials involved with the appointment or confirmation of judges.
(B) A judge or judicial candidate shall take reasonable measures to ensure that other persons do not undertake, on behalf of the judge or judicial candidate, any activities prohibited under paragraph (A).

In the landmark case *Republican Party of Minnesota v. White*,[183] the U.S. Supreme Court made clear that judges and judicial candidates have a First Amendment right to communicate their general views to the electorate. The Court struck down the "announce clause"

183 536 U.S. 765 (2002).

in the earlier version of the ABA Model Code.[184] That clause had barred judges from announcing their positions on legal issues.[185] The Court did not disturb the "pledges and promises clause," which forbids judges from making commitments about particular matters that will come before them in the near future.[186]

Judicial candidates do not always exploit the opportunities for candor that the Court has created. To the contrary, some candidates are wary of disclosing their general views about legal issues.[187] These candidates worry that a forthright revelation of their true positions could cause division among voters (in the case of elected judges) or could alienate legislators involved with the confirmation process (in the case of appointed judges). When such a candidate would rather dodge a tough question, the candidate might invoke the pledges and promises clause and apply its preclusions too broadly: "I wish I could answer that question about [hot-button issue *X*], Senator, but the ethical rules prevent me from prejudging uses that could come before my court."[188]

The Code of Judicial Ethics should make plain that the pledges and promises clause does not foreclose a forthright comment about the views of a judge concerning a general legal issue.[189] Indeed, as Justice Antonin Scalia noted in *White*, the democratic process requires that the public must be able to learn the ideology of candidates, or judicial elections will be a hollow exercise.[190] The proposed amendments set forth above would provide clearer guidance about the ability of judges to share their opinions about matters lying outside the scope of the pledges and promises clause.

The need for candid, forthright judicial candidates is particularly stark with respect to environmental law. Matters such as climate change are urgent, and judges play an important role in addressing

184 *See id.* at 776.

185 *Id.*

186 *See id.* at 770.

187 *Cf.* Model Rules of Prof'l Conduct r. 8.2 (Am. Bar Ass'n 2004) (cross-applying the relevant provisions of the ABA Code of Judicial Conduct during the period when a lawyer is a candidate for judicial office, even if the candidacy is ultimately unsuccessful).

188 *See* Tom Lininger, *On Dworkin and Borkin'*, 105 Mich. L. Rev. 1315, 1324–27 (2007) (discussing tendency of judicial candidates to evade questions about sensitive political issues, and lamenting the lack of any *langue* in the ABA Model Code that necessitates forthright disclosure of candidates' beliefs).

189 *See id.* at 1328–29 (calling for stricter ethical rules that would necessitate forthright disclosure of judicial candidates' views).

190 *See* Republican Party of Minn. v. White, 536 U.S. 765, 787–88 (2002).

those matters.[191] Judicial candidates facing election might try to avoid discussing such issues if the boundaries of the pledges and promises clause remained unclear. The appointing authorities may not always be concerned with the importance of remediating carbon emissions,[192] but the general public is highly alarmed about this issue.[193] Rules that clarify the ability of judges to reveal their views should result in greater accountability of elected and appointed judges to the public, and accordingly might provide a greater incentive for judges to protect the environment.

F. Duty of Continuing Education in Law and Science

Rule 2.5 of the ABA Model Code should be amended to provide as follows:

> *Rule 2.5: Competence, Diligence, and Cooperation*
>
> *(A) A judge shall perform judicial and administrative duties, competently and diligently.*
> *(B) A judge shall obtain continuing education in law, legal ethics, and science. The total time commitment devoted by the judge to continuing education shall be equivalent to the total time commitment required of a lawyer in the judge's jurisdiction. In choosing among providers of continuing education, the judge shall bear in mind the importance of neutrality, objectivity, and overall ideological balance.*
> *(~~B~~C) A judge shall cooperate with other judges and court officials in the administration of court business.*

Both judges and lawyers have an ethical duty of competence.[194] State bars generally require that lawyers must receive continuing legal education for a minimum number of hours each year in order to maintain their competence.[195] The 1972 version of the ABA Model Code of

---

191 *See supra* notes 4–14 and accompanying text.

192 *See supra* note 129 and accompanying text (noting significant skepticism among appointing authorities at federal and state level concerning anthropogenic climate change, despite strong consensus in the relevant scientific community).

193 *See supra* note 90 and accompanying text (discussing poll results indicating extent of public fear about climate change).

194 MODEL CODE OF JUDICIAL CONDUCT r. 2.5 (AM. BAR ASS'N 2007) ("A judge shall perform judicial and administrative duties, competently and diligently."); MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2002) ("A lawyer shall provide competent representation to a client.").

195 *See* MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS'N 2004) ("To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."); *see also Mandatory CLE*, ABA, http://www.americanbar.org/cle/

Judicial Conduct included language requiring that judges should maintain judicial competence[196]—implying an ongoing duty to receive instruction and training in relevant areas—but the current ABA Model Code does not include this language, nor does the commentary mention any duty of continuing education. The Code should declare that judges have the same duty as lawyers to maintain their competence and to receive continuing education each year.

Environmental law is changing constantly. Judges need to stay abreast of fast-breaking developments in various areas including atmospheric trust litigation[197] and the invocation of the necessity defense by climate protestors.[198] Of course, education about such subjects would not obligate judges to take a particular position, but judges should learn how statutes and common law are evolving, and how other judges have addressed recent challenges.

The duty of education should extend to instruction on scientific subjects. For example, climate science is distinctive and presents unique issues with which judges may not have prior exposure.[199] The ubiquity of climate-related impacts would make education about climate science relevant to judges at all levels.

In selecting among educational opportunities judges should be careful to avoid creating the appearance of bias. Judges should strive for balance and objectivity as they choose among presenters.[200] Some putative "judicial education" may just be a junket designed to curry favor from the judge.[201] Caution is necessary to maintain public confidence in the impartiality of the judiciary.

---

mandatory_cle.html [https://perma.cc/JDZ6-3H7K] (maintaining web page with a state-by-state analysis of CLE requirements).

196 MODEL CODE OF JUDICIAL CONDUCT Canon 3A(1) (AM. BAR ASS'N 1972) ("A judge should be faithful to the law and maintain professional competence in it.").

197 *See* Nijhuis, *supra* note 9.

198 *See, e.g.*, Long & Hamilton, *supra* note 10; *Climate Necessity Defense Case Guide*, *supra* note 10.

199 Engel & Overpeck, *supra* note 140, at 2.

200 Several scholars have highlighted the appearance of impropriety arising from private funding of judicial education. *See, e.g.*, Bruce A. Green, *May Judges Attend Privately Funded Educational Programs? Should Judicial Education Be Privatized? Some Questions of Judicial Ethics and Policy*, 29 FORDHAM URBAN L.J. 941, 943–44 (2002); Douglas T. Kendall & Eric Sorkin, *Nothing for Free: How Private Judicial Seminars Are Undermining Environmental Protections and Breaking the Public's Trust*, 25 HARV. ENVTL. L. REV. 405, 405 (2001). *But see* Jonathan H. Adler, *Junkets for Judges*, NAT'L REV. (June 23, 2005, 7:55 AM) ("Contrary to critics' beliefs, privately sponsored judicial conferences broaden judges' minds.").

201 *See* Editorial, *Justices' Junkets: Our View*, USA TODAY (Mar. 7, 2016) ("It's one thing for a justice to fly to another city for a night to speak at a university or a bar association event. It's quite another if the trip is to an expensive resort for an event paid for by someone such as

G. Duty to Avoid Political Questions, Not Political Implications

Rule 2.7 of the ABA Model Code should be amended to provide as follows:

> *Rule 2.7: Responsibility to Decide*
>
> *A judge shall hear and decide matters assigned to the judge, except when disqualification is required by rule 2.11 or other law. A judge may properly decline to hear a matter or argument that would require the judge to usurp functions committed to the legislative or executive branches by explicit provisions of the Constitution or other law, but a judge shall not decline to hear a matter merely because it has political implications or might otherwise arouse political interest.*

Opponents of litigation filed by environmental activists sometimes raise the defense that such litigation improperly calls on courts to address a "political question." These opponents are essentially contending that the courts would overstep their boundaries and violate the separation of powers if they took up questions of a political nature.

For example, the U.S. Department of Justice raised such a defense in a motion to dismiss the atmospheric trust litigation filed by youth in Eugene, Oregon, who claimed that the government had neglected its obligation to protect against degradation of the climate.[202] U.S. District Judge Ann Aiken rejected the defense,[203] citing the multifactor test that the Supreme Court set forth in *Baker v. Carr*.[204] This

billionaire Charles Koch, who has poured hundreds of millions of dollars into conservative political causes.").

202 Federal Defendants' Memorandum of Points and Authorities in Support of Their Motion to Dismiss at 17–19, 22, Juliana v. United States, 217 F. Supp. 3d 1224 (D. Or. 2015) (No. 6:15-cv-0517-TC), ECF 27-1 (arguing that the plaintiffs were seeking to usurp political functions that were the domain of other branches).

203 *Juliana*, 217 F. Supp. 3d at 1235–41 (ruling against defendants' motion to dismiss because the plaintiffs' claims, some of which raised constitutional provisions, were squarely within the purview of the judicial system; the mere fact that the case raised issues of political interest was not dispositive).

204 369 U.S. 186 (1962). *Baker* lists the controlling factors in descending order of importance: (1) "[a] textually demonstrable constitutional commitment of the issue to a coordinate political department"; (2) "a lack of judicially discoverable and manageable standards for resolving it"; (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"; (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government"; (5) "an unusual need for unquestioning adherence to a political decision already made"; or (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.* at 217; *see* Vieth v. Jubelirer, 541 U.S. 267, 278 (2004) ("The[*Baker*] tests are probably listed in descending order of . . . importance and certainty.").

result was noteworthy because it stood in contrast to many other cases in which the political question doctrine had defeated climate-related suits.[205]

While the political question doctrine might conceivably require dismissal of certain cases, it would be unduly facile for defendants to argue that this defense can overcome any suit with political implications. Most environmental litigation is politically controversial, at least in some circles, but that fact does not deprive the courts of jurisdiction.[206] When a suit has a permissible basis in statute or the Constitution, the fact that it incidentally raises politically charged issues is not fatal.

A judge has an obligation to decide all matters properly presented to the judge, including matters fraught with political consequences.[207] The proposed revision to Rule 2.7 simply presents a logical corollary to that rule, which is that political implications are not tantamount to a political question requiring dismissal. Although critics of environmental litigation may insist that there's no place for politics in the courtroom,[208] they cannot contrive the political controversy themselves and then complain about it in a motion to dismiss.

H. Duty of Disqualification Due to Board Memberships

Rule 2.11(A) of the ABA Model Code of Judicial Conduct should be amended to provide as follows:

> *Rule 2.11: Disqualification*
>
> *(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:*
> *(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.*

---

205 For an excellent of discussion of climate suits and the political question doctrine, see this short article by my son: Henry Lininger, *Is Climate Litigation Too 'Political'?*, YALE CLIMATE CONNECTIONS (June 27, 2017), https://www.yaleclimateconnections.org/2017/06/is-climate-litigation-too-political/ [https://perma.cc/F8EM-WKHG] (indicating that prior to the *Juliana* case, climate litigation had generally been unable to overcome motions to dismiss based on the political question doctrine).

206 *Juliana*, 217 F. Supp. 3d at 1241 (determining that "this case raises political issues yet is not barred by the political question doctrine").

207 MODEL CODE OF JUDICIAL CONDUCT r. 2.7 (AM. BAR ASS'N 2007) ("A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law.").

208 *See supra* note 202.

(2) The judge knows that the judge, the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is:
(a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;
(b) acting as a lawyer in the proceeding;
(c) a person who has more than a de minimis interest that could be substantially affected by the proceeding; or
(d) likely to be a material witness in the proceeding.
(3) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, domestic partner, partner, or child, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding.
(4) The judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has within the previous [insert number] year[s] made aggregate contributions to the judge's campaign in an amount that is greater than [$[insert amount] for an individual or $[insert amount] for an entity] [is reasonable and appropriate for an individual or an entity].
(5) The judge, while a judge or judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.
(6) The judge:
(a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;
(b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;
(c) was a material witness concerning the matter; ~~*or*~~
(d) previously presided as a judge over the matter in another court.; *or*
(e) served on the board of directors of a law reform organization that has been directly involved in the matter, or that has taken an advocacy position with respect to a category of issues that include an issue arising in the present matter, such that the judge's participation in the matter would raise reasonable questions about the judge's impartiality.

Professor Charles Geyh, one of the country's leading experts on judicial ethics, recently stressed the importance of disqualification to maintain the public's confidence in the impartiality of the judiciary:

> For centuries, impartiality has been a defining feature of the Anglo-American judge's role in the administration of justice. The reason is clear: in a constitutional order grounded in the rule of law, it is imperative that judges make decisions according to law, unclouded by personal bias or conflicts of interest. When the impartiality of a judge is in doubt, the appropriate remedy is to disqualify that judge from hearing further proceedings in the matter.[209]

As is the case in many areas of judicial ethics, general standards concerning impartiality are not as valuable as specific rules identifying what is off limits. The broad exhortations provide little notice to the judge or to litigants about what misconduct could expose the judge to discipline, and they provide scant basis for enforcement.[210]

Presently Rule 2.11(A) offers a hybrid of general and specific guidance to judges concerning possible bases for disqualification.[211] Some grounds—such as a judge's prior work on a matter as a lawyer, or a family member's substantial investment in a business with a stake in the matter—are subject to clear provisions that guide the judge in determining whether recusal would be appropriate.[212] Other possible grounds not covered by specific rules are subject to general language at the outset of Rule 2.11(A): "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned . . . ."[213]

A judge's board memberships do not seem to fit within any of the specific provisions of Rule 2.11(A). The proposed amendment to Rule 2.11 would add language at the end of Rule 2.11(A) clarifying that a judge's membership on the board of a law reform organization[214]

---

209 *Judicial Transparency and Ethics*, *supra* note 164, at 34 (testimony of Charles Geyh, Professor of Law, Indiana Law School) https://judiciary.house.gov/wp-content/uploads/2017/02/115-1_24270.pdf [https://perma.cc/99TC-HC4G] (urging new procedures for judicial disqualification so that the system does not rely so heavily on the judge's own assessment of his or her ability to be impartial).

210 *Id*. at 42 ("So general a standard offers no clear guidance as to what does or does not constitute misconduct, and contributes to under-enforcement, insofar as judicial councils are reluctant to impose sanctions on judges for conduct that the judges may not know violates the statute.").

211 *See* MODEL CODE OF JUDICIAL CONDUCT r. 2.11(A) (AM. BAR ASS'N 2007).

212 *Id.* r. 2.11(A)(3), (6)(a).

213 *Id.* r. 2.11(A).

214 MODEL RULES OF PROF'L CONDUCT r. 6.4 & annot. (AM. BAR ASS'N 2015) regulates

could prevent the judge from hearing a matter in which the organization is a party. The new language would also necessitate disqualification if the organization for which the judge served as a board member has taken an advocacy position with respect to a category of issues that include an issue arising in the present matter, subject to the caveat that this coincidence would only foreclose the judge's participation where a reasonable person would reasonably raise questions about the impartiality of the judge.

How might the new version of Rule 2.11 operate? Judges serving on the boards of advocacy groups would not be able to hear cases directly involving those groups, or cases involving a category of issues as to which those groups had expressed such a clear position that the judges' impartiality might be questioned. For example, the federal judges who served on the board of the Foundation for Research on Economics and the Environment ("FREE"), a group urging rollback of certain environmental regulations, would not be able to hear cases in which litigants challenged the very regulations that FREE opposed.[215] But a judge who was merely a member of the Audubon Society would later be able to hear a case in which intervenors other than the Audubon Society advocated environmental interests.[216] The main difference between the two scenarios is the degree of the judge's immersion in the advocacy group. While board service is not quite as preclusive as representing a client, board service does signal a deeper commitment to the group's goals than does mere membership.

The proposed amendment to Rule 2.11 would not limit judges' freedom of association or freedom of speech. A judge's ability to join

---

lawyers' service on the boards of "law reform" organizations, but neither the rule nor its commentary ever define the term law reform. Because Rule 6.3 sets forth similar regulations for lawyers who serve on boards of legal service organizations, the dichotomy between the latter and "law reform" organizations seems to mirror the definition used to determine which organizations are eligible to receive funding from the Legal Services Corporation. *Id.* r. 6.3. In other words, "law reform" organizations are those that devote a substantial amount of their energy and resources to changing, and attempting to change, the law, while legal services organizations focus on providing services directly to clients.

215 *See* Adam Liptak, *3 Judges Criticized for Being on Advocacy Group's Board*, N.Y. TIMES (Mar. 23, 2004), http://www.nytimes.com/2004/03/23/us/3-judges-criticized-for-being-on-advocacy-group-s-board.html [https://perma.cc/87LP-AMNX] (noting that environmental attorneys raised concerns about the neutrality of these federal appellate court judges, but at least two of the judges commented that they saw no impropriety).

216 *See* STATE OF CONN. JUD. BRANCH COMM. ON JUD. ETHICS, MINUTES, at 1 (Sept. 23, 2011), https://www.jud.ct.gov/Committees/ethics/ethics_min_092311.pdf [https://perma.cc/X9XJ-F862] (determining that disqualification was not necessary when a judge had a family membership in the Audubon Society in order to go bird watching; the Audubon Society did not appear in the case that the judge later heard, but other intervenors raised environmental concerns).

an advocacy group or speak his or her mind would be no different than under current rules. However, such a judge who served on the board of an advocacy group would not thereafter be able to hear a case implicating an issue as to which the group had advocated while the judge was a member of the group's board. The proposed rule is arguably less restrictive than current rules forbidding a judge form becoming a member of certain discriminatory groups or espousing discriminatory views.[217] In any event, disqualification rules do not police association or speech; they just limit the categories of official business that the judge can handle based on the judge's voluntary choices outside of work.

A critic might point out that if the ABA adopted the amendment proposed here, the ABA would treat "positional conflicts" more strictly for judges than for lawyers. That is indeed true. Under the proposed rule, judges' past board service for advocacy groups addressing particular issues could necessitate that judges avoid adjudicating cases involving those issues, while lawyers would have more leeway to take a position at variance with their advocacy for past clients or their past board service.[218] But this disparity makes sense. The role of a lawyer is to be a partisan advocate—a hired gun, more or less—while the role of a judge is to be neutral. Past board service for an organization advocating reform of the law in particular areas would make it hard for a judge to maintain neutrality in a case presenting the exact same issues, so disqualification of the judge would be appropriate.

I. Duty to Consider Arguments for Extension of Law

Rule 1.1 of the ABA Model Code should be amended to provide as follows:

---

217 MODEL CODE OF JUDICIAL CONDUCT r. 3.6 (AM. BAR ASS'N 2007) (forbidding membership in certain discriminatory groups); *id.* r. 2.3 (forbidding discriminatory comments).

218 MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 24 (AM. BAR ASS'N 2007) ("Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients."). Commentators have noted that the present version of Rule 1.7(a) does not categorically forbid positional conflicts. *See, e.g.*, Helen A. Anderson, *Legal Doubletalk and the Concern with Positional Conflicts: "A Foolish Consistency"?*, 111 PENN. STATE L. REV. 1, 2 (2006) ("According to most authorities today, a positional conflict is not a per se ethical violation . . . ."); Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 78 FORDHAM L. REV. 2357, 2392–93 (2010) ("Positional conflicts . . . do not require disqualification under ethical rules . . . ."). A positional conflict could possibly be cognizable under the catchall conflicts rule, 1.7(a)(2), if it presented "a significant risk that the representation of one or more clients will be materially limited," but such a general provision is hard to enforce, as Professor Geyh has noted. MODEL RULES OF PROF'L CONDUCT r. 1.7(a)(2) (AM. BAR ASS'N 2007); *see also supra* note 209.

Rule 1.1: Compliance with the Law

A judge shall comply with law, including the Code of Judicial Conduct. A judge does not violate this obligation when the judge departs from existing law because the judge believes in good faith that an extension, modification, or reversal of existing law is necessary to achieve justice and serve the principles underlying existing law.

Rule 2.2 of the ABA Model Code should be revised to provide as follows:

Rule 2.2: Impartiality and Fairness

A judge shall uphold and apply the law, and except when the judge believes in good faith that an extension, modification, or reversal of existing law is necessary to achieve justice and serve the principles underlying existing law. A judge shall perform all duties of judicial office fairly and impartially.

The present versions of Rules 1.1 and 2.2 require adherence to the law, which is defined as all "court rules as well as statutes, constitutional provisions, and decisional law."[219] Neither Rule 1.1 nor Rule 2.2 mentions any opportunity for a judge to depart from or modify present law. These rules requiring compliance with law are arguably stricter than the language that previously appeared in Canon 3A(1) of the 1972 ABA Model Code, which provided that "[a] judge should be faithful to the law"[220]—implying, perhaps, that a judge could meet the requirement by fealty to the principles underlying the law, if not the black-letter law itself.

The ethical rules for lawyers actually give wider latitude to depart from current law. Rule 3.1 of the Model Rules of Professional Conduct provides that a lawyer does not violate the obligation to comply with current law when the lawyer makes "a good faith argument for an extension, modification or reversal" of this law.[221] Various categories of lawyers, and environmental lawyers in particular, have made significant progress in law reform by urging positions that would depart from present law.[222]

---

219 This definition of "law" comes from the "Terminology" section at the outset of the MODEL CODE OF JUDICIAL CONDUCT (AM. BAR ASS'N 2007).

220 MODEL CODE OF JUDICIAL CONDUCT Canon 3A(1) (AM. BAR ASS'N 1972).

221 ELLEN J. BENNETT ET AL., ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 337 (AM. BAR ASS'N 2015). The first sentence of Rule 3.1 provides as follows: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." *Id.*

222 Throughout U.S. history, many have benefited from attempts by public interest attor-

The judge's ethical obligation to enforce current law strictly is incongruous with the lawyer's ability to urge modification of current law. The disparity between the two ethical regimes might have a chilling effect on imaginative and resourceful advocacy in many areas, including environmental law.[223] In order to realize the potential for innovation that seems to be the rationale for ABA Model Rule 3.3, the ABA should harmonize the ethical rules for judges and lawyers concerning adherence to, and departure from, current law.

J. Duty to Recognize Nonhuman Interests

Section III.D above proposed an amendment to Rule 2.6 so that judges would have an ethical obligation to maximize the inclusion of stakeholders as intervenors and amici. The proposed amendment would allow the inclusion of stakeholders lacking the capacity to testify or advise their attorneys. A court could permit the involvement of such a stakeholder via the appearance of a guardian ad litem, conservator, or other representative. Assuming the ABA were to adopt the proposed amendment to Rule 2.6, the commentary to that rule should include the following language:

> *A judge should take account of nonhuman interests when they are relevant, when consideration of those interests would not consume undue time or unfairly burden the parties currently involved in the proceeding, and when no statute or other law forecloses consideration of such interests. In ascertaining nonhuman interests, the judge may consider arguments and submissions from a guardian ad litem, conservator, or other*

neys to expand standing rules and related laws. "Children, slaves, women, Native Americans, racial minorities, aliens, fetuses, endangered species—all have been the beneficiaries of this drive to give legal voice and legal rights to those who once lacked both voice and rights." Joseph J. Perkins, Jr., *Christopher Stone and the Evolution of Environmental Justice*, PRINCETON INDEP. (2013), http://www.princetonindependent.com/issue01.03/item10d.html [https://perma.cc/7KH7-CBL3]; *see, e.g.*, Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 451, 467 (1972) (noting that advocacy for legal reform has led to the recognition of legal rights for women, minorities, fetuses, etc., and discussing efforts to recognize legal rights for natural objects).

223 Some novel environmental claims might seem close to the line of "frivolous" advocacy, potentially exposing their proponents to sanctions if the ethical rules for judges are not as solicitous of innovative legal arguments as are the ethical rules for lawyers. *See* Monica Dias, Morris-Smith v. Moulton Niguel Water District*: The Double Standard for Attorney Fees Under the Clean Water Act*, 27 N. KY. L. REV. 549, 563–64 (2000) (noting that environmental lawyers sometimes need to push the envelope and present theories that might seem frivolous under current law); Elizabeth Glass Geltman, *Environmental Ethics in an Era of Fiscal Austerity*, SB52 ALI-ABA 749, 755 (1997) ("A related ethical problem environmental lawyers routinely face is the duty to pursue novel or unpopular theories of law. There is a fine line between 'pushing the law for change' and bringing a frivolous lawsuit.").

> *representative, in the same way that the judge would consider the interests of a human party with diminished capacity. Cognizable nonhuman interests could include those of animals, other living things in nature, or even the inanimate world, to the extent that judge deems such interests relevant to the matter before the court.*

The importance of considering nonhuman interests is clear in the context of environmental litigation. Nature has intrinsic worth.[224] Under present rules, however, courts tend to consider the value of nature only to the extent that an animal or other natural human feature constitutes human property, and interference is actionable as an infringement of human property rights.[225] The ethical rules should make clear that a judge may consider nature for nature's sake, not simply for its instrumental value to humans.

Recognizing nonhuman interests is not a radical break with current practice in the United States court system. Indeed, the ABA has taken special care to protect the interests of one nonhuman entity, the corporation,[226] and the U.S. Supreme Court has even recognized that corporations have constitutional rights.[227] The ABA has also provided guidance about representing human clients who lack capacity.[228] The need to consider interests of humans who cannot communicate suggests a similar need to consider the interests of other creatures with whom lawyers are incapable of communicating.

Since 1789, every federal judge has taken the same solemn oath to "administer justice without respect to persons."[229] While the rationale for this particular language was probably not to allow considera-

---

224 *See* Christopher D. Stone, *Should Trees Have Standing? Revisited: How Far Will Law and Morals Reach? A Pluralist Perspective*, 59 S. CAL. L. REV. 1, 2–7 (1985) (renewing proposal that nonhuman environment could be a plaintiff and a human advocacy group could be a guardian ad litem for that plaintiff).

225 Henry Lininger & Tom Lininger, *Unlocking the "Virtual Cage" of Wildlife Surveillance*, 27 DUKE ENVTL. L. & POL'Y F. 207, 240–41 (2017) (indicating that current law does not accord rights to animals, but sometimes protects animals to the extent that human owners assert property rights with respect to animals).

226 *See, e.g.*, MODEL RULES OF PROF'L CONDUCT r. 1.13 (AM. BAR ASS'N 2016) (establishing obligations of lawyers who represent corporations, including a duty of loyalty to the corporation when a constituency is acting in a manner contrary to the interests of the corporation).

227 *See generally* Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PENN. L. REV. 95, 110–36 (2014) (discussing "corporate personhood" under the U.S. Constitution and listing the various corporate constitutional rights recognized by the U.S. Supreme Court).

228 MODEL RULES OF PROF'L CONDUCT r. 1.14 (AM. BAR ASS'N 2016) (providing guidance to lawyers about how to ascertain the interests of clients with diminished capacity).

229 28 U.S.C. § 453 (2012) (oath of office for federal judges).

tion of nonhuman interests, the notion of justice as a transcendent imperative—one that rises above the expressed interests of the human parties in the courtroom—is instructive for present purposes.

K. Duty to Account for Intergenerational Equity

Assuming again that the ABA were willing to adopt the proposed revision of Rule 2.6 set forth in Section III.D, the commentary to that rule should include the following language:

> *When judges assess the range of stakeholders who might deserve inclusion as intervenors or amici, judges should adopt a long-range temporal perspective. So long as a prospective intervenor or amicus could further the court's inquiry as to a material issue, and no statute or other law forbids the inclusion of that intervenor or amicus, the court should not rule against participation simply because the intervenor or amicus offers arguments and information concerning future occurrences and risks. If permitted to do so under relevant law, judges may properly consider the interests of intervenors and amici who presently lack capacity, and even future generations, to the extent consideration of such interests is relevant to pending matters.*

The need for a long-range outlook is particularly great in environmental matters. According to Professor Richard Lazarus of the Georgetown Law Center, "[i]n the natural environment, cause and effect are also spread out over long periods of time. Actions taken today can have environmental impacts that last for centuries and, in some instances, do not even have any perceptible impact for decades."[230] Litigants are beginning to argue that climate change causes harm to children and future generations.[231] Long-term environmental degradation can lead to intergenerational rivalry. While the present generation of adults might abide certain tradeoffs between economic growth

---

230 Lazarus, *supra* note 18, at 206 (noting that the lack of temporal proximity between cause and effect creates challenges for judges handling environmental matters).

231 *See* Patrick C. McGinley, *Climate Change and the Public Trust Doctrine*, 65 PLAN. & ENVTL. L., no. 8, Aug. 2013, at 7, 7, 10 (noting that young plaintiffs have attempted in several states to invoke the public trust doctrine in order to prevent ongoing climate change that could be disastrous in the future; "[s]everal cases have been dismissed on standing"); *see also* OUR CHILDREN'S TRUST, https://www.ourchildrenstrust.org [https://perma.cc/KY7H-4BNW] (maintaining an up-to-date list of actions filed on behalf of young plaintiffs in various countries); *The Status of Climate Change Litigation: A Global Review*, UNITED NATIONS ENV'T PROGRAMME 10 (May 2017), http://columbiaclimatelaw.com/files/2017/05/Burger-Gundlach-2017-05-UN-Envt-CC-Litigation.pdf [https://perma.cc/4BYL-SYJG] (noting that plaintiffs have filed hundreds of climate change cases around the world).

and environmental protection, that set of tradeoffs could prove much more detrimental to younger generations as consequences worsen over time.

Issues of intergenerational equity arise in other contexts as well. Reform of Social Security seems to necessitate a zero-sum game: some options under consideration would involve paying current recipients a greater amount than future recipients.[232] So too does the financial crisis in state pension systems portend ominously for future taxpayers who may need to bear hardships in order to pay off states' obligations to present retirees.[233]

In such circumstances, the ethical rules should counsel judges to consider the interests of various generations vis-à-vis one another. Evaluating equity over time is not an easy task, but the judiciary is the branch of government that has the hope of undertaking such an evaluation. While short terms in other offices make legislative and executive officials more sensitive to the preferences of current adults, the relative political security of judges allows them to think about the long-term with less risk that they will lose their jobs.[234]

Of course, statutes and rules that determine jurisdiction and standing will establish a framework for the courts' consideration of any interests, including those of different generations. In some cases, this framework will not allow much room to ponder intergenerational equity. But to the extent that the opportunity exists, courts should seize it.

---

232 *See* Brent Green, *Intergenerational Equity: The Mother of All Guilt Trips*, HUFFINGTON POST (July 21, 2012, 6:46 PM), http://www.huffingtonpost.com/brent-green/intergenerational-equity-_b_1534118.html [https://perma.cc/RG4M-Y5VC] ("Intergenerational equity means cancelling longstanding socioeconomic contracts between generations that help pay the costs of growing old, becoming sick and eventually dying. When the nation curtails public obligations to cover high costs of old age, society lifts crushing fiscal burdens off the backs of younger generations.").

233 *See* Editorial, *Intergenerational Fairness*, PENSIONS & INV. (June 27, 2016), http://www.pionline.com/article/20160627/PRINT/306279997/intergenerational-fairness [https://perma.cc/R8RD-XHJ4] ("[P]ension plan sponsors and boards must take into account intergenerational equity to ensure fairness of their decisions across generations . . . . Future generations must be protected from decisions contracted against their interests by the current generation.").

234 Federal judges have life tenure. At the state level, most judges are elected, but once they are in office, they have a stronger incumbency advantage than do other elected officials. *See* Rebecca D. Gill, *Beyond High Hopes and Unmet Expectations: Judicial Selection Reforms in the States*, 96 JUDICATURE 278, 285 (2013) (noting that the vast majority of incumbent judges win their elections).

L. Duty to Promote Conservation in Courthouse

Rule 2.12 of the ABA Model Code should be amended to read as follows:

> *Rule 2.12: Supervisory Duties*
>
> *(A) A judge shall require court staff, court officials, and others subject to the judge's direction and control to act in a manner consistent with the judge's obligations under this Code, and shall require that all such personnel minimize the consumption of resources, the generation of waste, the discharge of pollution, or any other degradation of the environment.*
> *(B) A judge with supervisory authority for the performance of other judges shall take reasonable measures to ensure that those judges properly discharge their judicial responsibility, including the prompt disposition of matters before them.*

Judges should follow the leadership of the private bar and should take steps to ensure that court personnel practice conservation to the maximum extent possible. There are numerous model policies that judges can consider as they decide which conservation measures would be appropriate for a courthouse. The ABA[235] and state bars in California,[236] Massachusetts,[237] Oregon,[238] and Pennsylvania[239] have

---

235 The ABA's Section on Environment, Energy and Resources ("SEER") has created a website with various references for law firms that are interested in improving sustainability. *See Law Firm Sustainability Framework*, ABA (Dec. 2, 2010), https://www.americanbar.org/groups/environment_energy_resources/public_service/model_law.html [https://perma.cc/JX3J-T4VB].

236 The website of the California Lawyers Association includes information concerning a voluntary "Eco-Pledge" and "Model Law Office Sustainability Policy." *See Environmental Law: It's Easy to Be Green*, CAL. LAW. ASS'N, http://calawyers.org/Environmental/About-CLA/Privacy-Policy#eco [https://perma.cc/RBD3-EX8T].

237 The Massachusetts Bar Association ("MBA") established "Green Guidelines" and offered to publicize a list of firms that pledged to "do their best to follow" the guidelines and other relevant protocols published by the MBA. *See* MBA ECO-CHALLENGE: GREEN GUIDELINES, MASS. B. ASS'N (2009), https://www.massbar.org/docs/default-source/mba-reports/ecochallenge2009.pdf?sfvrsn=6 [https://perma.cc/46D6-7ZDP]. At the present time, the list of firms, organizations and lawyers that signed the pledge totals over 100. *Id.* The MBA Lawyers Eco-Challenge is now inactive, but information is available online. *See id.*

238 The Sustainable Future Section of the Oregon State Bar has established criteria for law firms that want to qualify for recognition as "partners in sustainability." *See Partners in Sustainability*, OR. ST. B., https://sustainablefuture.osbar.org/ [https://perma.cc/38PZ-DL2Q]. Lawyers for a Sustainable Future, a national network inspired by Oregon's program, has created a web page offering tools for firms that want to strengthen their commitment to sustainability. *See* LAW. FOR A SUSTAINABLE FUTURE, http://www.sustainablelawyers.org [https://perma.cc/Z22D-EKEC].

239 The Pennsylvania Bar Association's PLUS Program provides the following:

> By action of the Pennsylvania Bar Association House of Delegates meeting May

established guidelines for law offices seeking to minimize their environmental impact.

Courthouse personnel should set a good example for the public. The ABA Model Code of Judicial Ethics already seems to acknowledge this obligation in provisions that stress the need for judges to avoid conduct unbefitting their position,[240] to avoid any form of racial discrimination,[241] and to ensure that the public generally has esteem for the judiciary.[242] Courts will enhance their legitimacy if they make a commitment to conservation. As a practical matter, the willingness of courts to reduce waste and minimize consumption of resources could have a significant aggregate effect, both directly and indirectly through emulation of the courts' conservation strategies.

IV. Foreseeable Objections

This Part will consider possible objections to the proposals discussed above. Space constraints limit the extent of the analysis in the following subparts, but it is useful to list and begin responding to certain foreseeable objections. A more thorough treatment must await future scholarship.

A. Extension of Ethical Rules Outside Heartland of Procedure

One possible objection is that the proposed rules include amendments that would affect the substance of judicial rulings rather than the procedures used by judges to ensure fairness. For example, some proposals would require accuracy in factfinding, mandate caution in the face of catastrophic risks, and necessitate that judges accord greater consideration to novel arguments at variance with current law. Critics might argue that such rules would veer outside the normal heartland of judicial ethical regulation, which tends to relate to proce-

---

> 14, 2010, the PBA adopted the Pennsylvania Lawyers United for Sustainability (PLUS) Program, which provides Pennsylvania attorneys and law firms an opportunity to demonstrate publicly their commitment to environmental sustainability in their professional practices. The House also gave the go-ahead to the PBA Environmental and Energy Law Section to advertise the PLUS Program and make the program's guidelines and pledge form available . . . on the PBA website.

Pennsylvania Lawyers United for Sustainability (PLUS) Program, Pa. B. Ass'n, http://www.pabar.org/public/sections/envco/plusprogram.asp [https://perma.cc/N23Y-SFUM].

240 Model Code of Judicial Conduct r. 3.1 (Am. Bar Ass'n 2007).

241 *Id.* r. 2.3.

242 *Id.* r. 1.2.

dural matters. Further, critics might inveigh against any constraint on judicial discretion with respect to substantive rulings.[243]

In fact, the procedure-substance dichotomy is not as clear in current rules as this criticism would suggest.[244] For example, the current rules against racial discrimination apply to procedural and substantive rulings.[245] The current rules requiring adherence to law apply in both contexts as well. The proposed rules address a hybrid of procedural and substantive matters, just as the current rules do. For example, the proposal to incorporate the "precautionary principle" would apply this principle equally to procedural rulings and substantive orders.[246] In any event, it is fitting to insist that judges abide by the same high ethical standards in all aspects of their work, whether they are ruling on procedure or issuing substantive orders.

B. Judicial Activism and Usurpation of Other Branches' Functions

A common refrain from certain critics of the judicial branch is that judges should passively await cases presented to them and should resolve those cases merely by applying existing law to the facts presented. According to this view, judges should eschew any role in politics or policymaking—functions that the Constitution has reserved for other branches. Critics who hold this view might find fault with proposals that would involve the judicial branch more significantly in environmental protection, which has historically fallen within the jurisdiction of the legislative and executive branches.[247] Even environmental advocates sometimes worry that the resolution of environmental matters and imposition of austerity measures by judges rather than legislative and executive officials may seem too an-

---

243 *See* Booker, *supra* note 135 (implying that new ethical rules should not constrain judges' discretion as to substantive matters).

244 One significant purpose of the procedural rules is to ensure that improper processes do not influence the substance of the judge's ruling, so it is somewhat artificial to posit a rigid taxonomy in which procedure and substance are entirely distinct from one another. *See* Ofer Malcai & Ronit Levine-Schnur, *When Procedure Takes Priority: A Theoretical Evaluation of the Contemporary Trends in Criminal Procedure and Evidence Law*, 30 CAN. J.L. & JURIS. 187, 188 (2017).

245 A judge would violate Rule 2.3 of the ABA Model Code of Judicial Conduct through racial discrimination in court procedures or through overt racism in an official order. The rule applies equally to substantive and procedural matters. *See* MODEL CODE OF JUDICIAL CONDUCT r. 2.3 (AM. BAR ASS'N 2007).

246 *Supra* Section III.B. The proposed rule includes the following sentence: "Upon determining that the risk at issue is catastrophic, the judge shall exercise caution in any *procedural or substantive ruling* relating to the risk." (emphasis added).

247 *See supra* note 16 and accompanying text.

tidemocratic[248] and elitist,[249] perhaps provoking a backlash against progressive environmental policy.[250]

There are several reasons why concerns of judicial activism should not derail the adoption of the proposals set forth in this Article. First, the volume of environmental litigation has skyrocketed in recent years[251] even though the current ethical rules have remained in place throughout that period. Second, politics are inextricable from judicial review of politically charged cases, and this fact alone cannot deprive the courts of jurisdiction.[252] Third, judicial activism is sometimes appropriate when outdated laws are plainly unjust.[253] Fourth, the Constitution has not committed environmental matters solely to the executive and legislative branches, and climate suits sometimes present constitutional claims that no other branch of government can appropriately resolve.[254] In any event, there is no reasonable possibility of shielding the courts from hearing a growing number of environmental matters, so it makes sense to equip the judiciary with ethical rules that are appropriate for such matters.

---

248 Justin Gundlach of Columbia's Sabin Center for Climate Change Law has acknowledged this possible criticism. *See* Tamara Micner, *Courts Now at Front Line in Battles over Climate Change*, CHRISTIAN SCI. MONITOR (Mar. 29, 2017), https://www.csmonitor.com/Environment/Inhabit/2017/0329/Courts-now-at-front-line-in-battles-over-climate-change [https://perma.cc/A3KE-9JYY] ("The distribution of power between legislators and judges is a delicate balance, and one argument against the court strategy, says Gundlach, is that 'you're avoiding the democratic aspects of the process.'"). Interestingly, liberal environmentalists were sometimes the ones who complained about judicial activism in the 1980s. *See Report Finds Activist Judges Are Threatening Environmental Protections, Disregarding Judicial Fairness*, NAT. RESOURCES DEF. COUNCIL (July 18, 2001), https://www.nrdc.org/media/2001/010718 [https://perma.cc/48B4-UDSD] ("[A] study of federal court rulings over the past decade reveals a pattern of anti-environmental judicial activism that threatens long-standing environmental protections.").

249 Micner, *supra* note 248 ("In Norway, too, some are concerned that 'a legal elite is going to decide about environmental policies,' says Truls Gulowsen, head of Greenpeace Norway, who helped launch the lawsuit there.").

250 *See id.* ("In the long run, the power of courts will be circumscribed by politics. Judges' ability to block infrastructure projects will depend on a country's legal framework and climate commitments, as set by public officials.").

251 *See supra* notes 4–14 and accompanying text.

252 Juliana v. United States, 217 F. Supp. 3d 1224, 1235 (D. Or. 2016) (rejecting motion to dismiss climate change litigation as unduly political; "As Alexis de Tocqueville observed, '[t]here is hardly any political question in the United States that sooner or later does not turn into a judicial question.'" (alteration in original)).

253 For example, the Supreme Court's recent recognition of the fundamental right to same-sex marriage was a proper exercise of the Court's authority despite criticism of "judicial activism." Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015) (determining that same-sex couples have a constitutional right to marry just as if they were heterosexual couples).

254 *E.g.*, *Juliana*, 217 F. Supp. 3d at 1237–39 (holding Constitution does not reserve climate policy for other branches, and therefore climate suit presenting constitutional claims is justiciable).

C. *Lack of Expertise on Environmental Matters*

Some critics might point to judges' lack of expertise in scientific matters—and environmental matters in particular—as a reason why the proposals in this Article are inappropriate. Whereas agencies and congressional committees have highly specialized personnel to address the nuances of environmental matters, generalist judges must learn about environmental science on the fly. Due to judges' lack of expertise on scientific matters, critics might doubt the judiciary's ability to comply with some of the proposals in this Article, such as the adoption of the "precautionary principle" in cases presenting catastrophic risks.

Judges' lack of scientific expertise will indeed pose some challenges, but it should not diminish enthusiasm for the proposals offered here. To begin with, it is important to bear in mind that environmental litigation presenting complicated scientific questions is coming whether judges are ready or not: as of May 2017, U.S. courts were already hearing hundreds of climate-related cases,[255] and the amount of this litigation is increasing at an astronomical rate.[256] This Article offers proposals to help deal with that ineluctable reality. One proposal would require judges to receive continuing education in both law and science, and would likely improve the competence levels of the entire judiciary if adopted.[257] The proposal calling on judges to assess risk does not require performing this task with certainty; indeed, the rule expects that certainty will be rare, and counsels caution in the face of uncertainty.[258] Concerns about judges' discomfort with science seem to be unduly alarmist after a quarter-century of judicial experience with evaluating scientific evidence pursuant to *Daubert*,[259] and judges can always avail themselves of helpful resources,[260] including expert testimony,[261] when necessary.

D. *Restriction of Judges' First Amendment Freedom*

The Supreme Court has declared emphatically that judges do not forfeit their First Amendment rights of free speech or free association when they assume the bench.[262] Any constraints on judges' First

255 *Supra* note 231.
256 *Supra* notes 4–14.
257 *Supra* Section III.F.
258 *Supra* Section III.B.
259 *Supra* note 137 and accompanying text.
260 *Supra* notes 138–39.
261 *Supra* note 140.
262 *Supra* note 183 and accompanying text.

Amendment rights are especially pernicious because judges will come to expect that all of us can live with reduced liberties. Critics might complain that the proposals offered in this Article encroach upon judges' expressive freedoms because they would necessitate that judges advocate environmental protection and they would penalize judges serving on the boards of certain advocacy groups.

Such objections would mischaracterize the proposals that this Article advocates. None of the proposed reforms would necessitate that judges rule a certain way. Judges would need to find facts accurately—a sensible requirement that is tantamount to a rule of competence.[263] Judges would need to exercise caution when addressing scientific risk, but this caution does not dictate a particular result, and in any event, the precautionary principle is a tie breaker when other considerations are in equipoise.[264] Judges do not have unfettered First Amendment right to rule however they please; that is why the current prohibition of racial discrimination in judicial rulings can withstand constitutional scrutiny.[265] Disqualification rules attendant to board service do not undermine freedom of association, but simply attach consequences to judges' voluntary choices in order to ensure neutrality on the bench.[266] Critics should not forget that one of the proposed rules actually fortifies freedom of expression during confirmation hearings and judicial elections.[267]

E. Limited Efficacy of Ethical Rules Compared with Statutes

One final possible criticism is that the amendments proposed in this Article do not go far enough. Perhaps Congress and state legislatures should take up the task of regulating judicial ethics. A regime that relies on the ethics rules must depend on judges to interpret and enforce those rules. By contrast, a legislative scheme might have more teeth. Senator Grassley, for example, has proposed the appointment of an inspector general to police the ethics of the federal judiciary.[268]

In fact, there is little reason to believe that legislative action will bring about more environmentally conscious ethical standards for the judiciary. One huge impediment is the separation of powers. While

---

263 *Supra* Section III.A.

264 *Supra* Section III.B.

265 MODEL CODE OF JUDICIAL CONDUCT r. 2.3 (AM. BAR ASS'N 2007) (prohibiting judges from expressing racial and other categories of discrimination in connection with judges' official duties).

266 *Supra* Section III.H.

267 *Supra* Section III.A.

268 *Supra* note 60 and accompanying text.

Congress does have authority to pass laws on subjects like judicial disqualification and impeachment, the appointment of an inspector general seems too great an encroachment on the independence of the judicial branch.[269] Assuming that the separation of powers could abide a greater legislative role in setting ethical boundaries for judges, legislators have less expertise than judges in this area, and that expertise deficit could undermine the legitimacy of the new ethics laws. Congress also does not appear to have the political will to impose new ethical rules on judges,[270] and even if Congress could muster the will, odds are slim that the current Congress would adopt ethical rules heightening the need for environmental protection.

Conclusion

On August 16, 2017, the Baltimore Public Works Department removed a statute honoring Roger G. Taney.[271] His rise from humble origins in Maryland to a seat on the U.S. Supreme Court in the mid-1800s was a point of pride for residents of Baltimore. But he also became infamous for his lack of judicial imagination.

Taney authored the Court's opinion in *Dred Scott v. Sandford*,[272] widely regarded as the worst judicial ruling of all time. In *Dred Scott*, the Court ruled that a slave who had traveled with his owner to a free state remained a slave.[273] More generally, the Court held that Congress lacked the power to outlaw slavery in states newly added to the Union.[274] This ruling rested on an old-fashioned conception of the separation of powers, an inflexible interpretation of standing requirements, and a commitment to preserving historical property rights—in short, a backward-looking judicial philosophy that blinded the Court to manifest injustice.[275]

---

269 *See* Remus, *supra* note 33, at 68–69 (noting that the bill calling for an inspector general in the judicial branch appears to encroach on judicial independence and could violate the Constitution by undermining the separation of powers).

270 *See id.* at 67 (reporting that this bill has failed in successive sessions from 2006 to 2011).

271 Nicholas Fandos et al., *Baltimore Mayor Had Statues Removed in 'Best Interest of My City*,' N.Y. Times (Aug. 16, 2017), https://www.nytimes.com/2017/08/16/us/baltimore-confederate-statues.html?mcubz=1 [https://perma.cc/5NF9-EHDW] (reporting that Baltimore mayor authorized removal late at night without prior notice because mayor wanted to avoid possibility of violence between pro-Taney and anti-Taney demonstrators).

272 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. Const. amend. XIV.

273 *See id.* at 452–53.

274 *See id.* at 432–37.

275 *See generally* DeNeen L. Brown, *Removing a Slavery Defender's Statue: Roger B. Taney Wrote One of the Supreme Court's Worst Rulings*, Wash. Post (Aug. 18, 2017), https://www.washingtonpost.com/news/retropolis/wp/2017/08/16/removing-a-slavery-defenders-statue-

History does not look fondly on Taney's legacy. Maryland outlawed slavery on the day of Taney's death, October 12, 1864.[276] By the summer of 2017, Taney's retrograde judicial philosophy was so plainly antithetical to Baltimore's values that the Baltimore City Council could no longer tolerate a public monument in his honor.[277]

Taney's example should remind us that jurisprudence is an evolving and dynamic enterprise. Hidebound historical practice must give way to new approaches better suited to modern challenges. For this reason, the ethical rules for judges have undergone several revisions since their first appearance a century ago.

Today it is time for another set of revisions. Our society's abuse of the environment is arguably the most urgent problem we face, just as slavery was the most urgent problem of the mid-nineteenth century. Historical approaches to judicial ethics will not be sufficient to address the present challenge.

This Article has proposed a comprehensive set of amendments to the ABA Model Code of Judicial Ethics. The new rules would apply to all categories of cases, but they would be particularly valuable in cases involving environmental matters. The rules would import the "precautionary principle" to judicial ethics, insisting on reasonable caution in the face of catastrophic risk, even in the absence of scientific certainty as to the extent of the risk. The rules would obligate judges to find facts accurately, to increase transparency, to include diverse stakeholders as intervenors and amici, to expand the grounds for disqualification, to consider novel legal arguments, and to take account of both nonhuman interests and intergenerational equity. Such reforms will not alone be sufficient to ensure proper cognizance of environmental risk, but they will help with the process of retooling the judicial branch in order to address modern environmental challenges.

Judges are in a unique position to promote or hinder environmental protection. The judges' relative insulation from political pres-

---

roger-b-taney-wrote-one-of-supreme-courts-worst-rulings/?utm_term=.965c0447dd39 [https://perma.cc/ZG84-U9VC] (criticizing Taney's opinion in *Dred Scott* and discussing movement to take down statues honoring Taney in his home state of Maryland).

276 *See* Rosalind S. Helderman, *Dealing with Sins of the Forefathers*, WASH. POST (July 23, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/07/22/AR2007072201078.html [https://perma.cc/JQQ4-HHJZ] (noting that Taney died on the same day that Maryland officially prohibited slavery).

277 Maryland officials also voted to take down a Taney statute on the grounds of the Maryland State House in Annapolis. Pamela Wood, *Maryland State House Trust Votes to Remove Taney Statue*, BALT. SUN (Aug. 16, 2017, 7:15 PM), http://www.baltimoresun.com/news/maryland/politics/bs-md-taney-state-house-vote-20170816-story.html [https://perma.cc/EWR8-2RXV] (indicating that the vote was a reaction to the *Dred Scott* decision).

sure—especially in the federal system, where judges have life tenure—allows the repose in which to consider what justice truly requires. With respect to the environment, justice requires a vigilant judiciary with the commitment, efficacy, and accountability to undertake meaningful remedial measures. Justice requires green ethics for judges.