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### A Fiduciary Theory of Judging

Ethan J. Leib

ethan.leib@law.fordham.edu

David L. Ponet

*UNICEF*

Michael Serota

*Arizona State University College of Law*, michael.serota@asu.edu

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# A Fiduciary Theory of Judging

Ethan J. Leib, David L. Ponet & Michael Serota\*

*For centuries, legal theorists and political philosophers have unsuccessfully sought a unified theory of judging able to account for the diverse, and oftentimes conflicting, responsibilities judges possess. This paper reveals how the law governing fiduciary relationships sheds new light on this age-old pursuit, and therefore, on the very nature of the judicial office itself. The paper first explores the routinely overlooked, yet deeply embedded historical provenance of our judges-as-fiduciaries framework in American political thought and in the framing of the U.S. Constitution. It then explains why a fiduciary theory of judging offers important insights into what it means to be a judge in a democracy, while providing practical guidance in resolving a range of controversial legal issues surrounding judicial performance, such as judicial ethics at the Supreme Court, campaign contributions in state judicial elections, and the role of public opinion in constitutional interpretation.*

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\* Ethan J. Leib is Professor of Law at Fordham Law School; David L. Ponet is Parliamentary Specialist at UNICEF; and Michael Serota holds a J.D. from the University of California, Berkeley, School of Law. Authors' names are listed in alphabetical order. Thanks to Evan Criddle and Evan Fox-Decent for some excellent early leads; to Bruce Ackerman, Aaron Bruhl, Neal Devins, Tamar Frankel, Stephen Galoob, Paul Horwitz, Kurt Lash, Paul Miller, Chad Oldfather, Michelle Singer, Glen Staszewski, and Alec Stone Sweet for insightful comments on the manuscript; and to audiences at Fordham Law School's Scholarship Retreat, the Law & Society Association's Roundtable on the Fiduciary Foundations of Public Law, the University of Georgia Law School's Faculty Colloquium Series, Pace Law School's Faculty Workshop Series, and Hokkaido University's New Global Law and Policy for Multi-agential Governance Research Project in Sapporo, Japan for helping to refine the arguments presented here. Financial support was generously provided by Fordham Law School and the University of California-Hastings College of the Law. This Essay contains the personal opinions of its authors and contains no official positions of UNICEF or the United Nations.

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## INTRODUCTION

Some fundamental questions of jurisprudence have been with us from time immemorial. What are the qualities of a good judge? What are the relevant normative guideposts that should constrain or inform interpretation for a judge in a democracy? What are the sources of ethics for judicial behavior and performance? Justice Cardozo started the modern conversation about the role of the judge in American democracy,<sup>1</sup> but no one has been able to complete it. We have yet to uncover a satisfactory theory of judging that adequately accounts for the diverse, and oftentimes conflicting, responsibilities judges possess. Recent national controversies over the Supreme Court's judicial ethics,<sup>2</sup> campaign contributions in state judicial elections,<sup>3</sup> and the role of public opinion in judicial interpretation<sup>4</sup> only underscore the growing urgency to

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1. See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

2. See, e.g., R. Jeffrey Smith, *Professors Ask Congress for an Ethics Code for the Supreme Court*, WASH. POST, Feb. 24, 2011, at A2; Letter from Mark N. Aaronson, Professor of Law, Univ. Cal. Hastings Coll. of Law, et al. to Judiciary Comm. on Changing Ethical and Recusal Rules for Supreme Court Justices (Mar. 17, 2011), available at [http://www.afj.org/judicial\\_ethics\\_sign\\_on\\_letter.pdf](http://www.afj.org/judicial_ethics_sign_on_letter.pdf); see also Ashby Jones, 'It's a Mistake,' Says Alito, After Discovering Disney-Stock Oversight, WALL ST. J. L. BLOG (June 1, 2011, 10:46 AM), <http://blogs.wsj.com/law/2011/06/01/its-a-mistake-says-alito-after-discovering-disney-stock-oversight/>.

3. See, e.g., *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009); David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265 (2008); Sandra Day O'Connor, *Take Justice Off the Ballot*, N.Y. TIMES, May 23, 2010, at WK9; Sandra Day O'Connor, *The Threat to Judicial Independence*, WALL ST. J., Sept. 27, 2006, at A18.

4. See, e.g., *A Symposium on the People Themselves: Popular Constitutionalism and Judicial Review*, 81 CHI.-KENT L. REV. 809 (2006); Larry Alexander & Lawrence B. Solum, *Popular?*

clarify the role of the judge.<sup>5</sup> This Essay seeks to break some new ground on the fundamental inquiries surrounding judicial responsibility by proposing a fiduciary theory of judging.

An adequate theory of adjudication in a democracy must illuminate the nature of the relationship between judicial officers and the people they serve. We know that judges owe certain duties to the litigants before them, and that they also have some responsibility to “the state” for implementing its laws. But responsibility to “the state” is impersonal—and *democratic* citizens may reasonably demand from their judges attention and responsiveness. Democratic governance ultimately consists of a series of relationships between rulers and ruled, so even if judges routinely think of our government as one of laws and not persons,<sup>6</sup> self-government means precisely that laws must be traceable to citizens. Canonically, it is for judges to “say what the law is,”<sup>7</sup> but judges speaking the law must be held accountable if their rulings stray too far from the will of the people who authorize the judiciary to exercise this power in the first instance. Yet how to think about the nature of this accountability, thereby reconciling judicial independence with democratic responsiveness, is perplexing exactly because we lack a developed democratic theory of judging.

Although judiciaries exist in all democratic systems, no consensus on the proper relationship between the judge and “the people” has emerged. Are judges best considered “representatives” of the people in some form,<sup>8</sup> or are they “agents” of the legislature—the real democratic representatives?<sup>9</sup> Better yet, perhaps judges are “trustees” of some kind: independent but loosely constrained by precedent and the authorization to try to develop standards slowly over time, subject only to impeachment or elections for accountability.<sup>10</sup>

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*Constitutionalism?*, 118 HARV. L. REV. 1594, 1594, 1640 (2005) (reviewing LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004)); Erwin Chemerinsky, *In Defense of Judicial Review: A Reply to Professor Kramer*, 92 CALIF. L. REV. 1013, 1017 (2004).

5. There has been a resurgence of interest in theories about judicial character and the role of the judge. See AHARON BARAK, *THE JUDGE IN A DEMOCRACY* (2006); DANIEL A. FARBER & SUZANNA SHERRY, *JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW* (2009); PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* (2008); RICHARD A. POSNER, *HOW JUDGES THINK* (2008); H. JEFFERSON POWELL, *CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION* (2008). For an engaging review of Powell, Posner, and Farber & Sherry, see Paul Horwitz, *Judicial Character (and Does It Matter)*, 26 CONST. COMMENT. 97 (2009) (book review).

6. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (“The government of the United States has been emphatically termed a government of laws, and not of men.”). For a book-length meditation on this issue, see PAUL W. KAHN, *THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA* (1997).

7. *Marbury*, 5 U.S. at 177.

8. See *Chisom v. Roemer*, 501 U.S. 380, 389 (1991) (exploring whether judges are “representatives” for purposes of the Voting Rights Act).

9. For one summary of an agency view, see Thomas W. Merrill, *Faithful Agent, Integrative, and Welfarist Interpretation*, 14 LEWIS & CLARK L. REV. 1565, 1566–70 (2010).

10. See, e.g., Edmund Burke, *Speech to the Electors at Bristol*, in *SELECTED WRITINGS AND SPEECHES* (Peter J. Stanslis ed., 1963).

The judicial role may consist of elements of each of these ideas, in a constellation that has yet to be fully mapped. But can a judge be all three at once? And does the fact that a judge is elected or appointed, or is part of the state or federal system, change the analysis at all? The answers to these questions may depend on whether the judge is presented with a constitutional, statutory, or common law question.

Of course, it may be that there is no unified field theory of the judge.<sup>11</sup> Federal judges appointed with life tenure may differ materially from purely elective state judiciaries, who may themselves differ from appointed judiciaries subject to nonpartisan or retention elections. Supreme Court Justices may differ from appellate judges under their charge, who may differ from trial judges.<sup>12</sup> An attempt to describe the judicial role in sufficiently general terms to encompass judicial responsibility in a democracy may seem to be a quixotic endeavor. Yet such a project remains worthwhile, possible, and perennially interesting. We pursue that project in this Essay, suggesting an interpretive framework that can refine thinking about the nature of judicial action, while providing guidance on specific practical applications in judicial ethics and judicial interpretation.

In what follows, we argue that there is a satisfying normative vision of the judicial role that can orient members of the judiciary—and the academics who study them—lost in this thicket.<sup>13</sup> By turning to the fiduciary principle, we uncover a new perspective from which we can better conceptualize the judicial role. Translating the fiduciary principle of private law into a set of obligations for state actors in public law is well grounded theoretically<sup>14</sup> and has historical

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11. For a recent evaluation of the “judicial specialization” literature, see Chad M. Oldfather, *Judging, Expertise, and the Rule of Law*, 89 WASH. U. L. REV. 847 (2012).

12. For an important argument that statutory interpretation practices should be calibrated to judicial hierarchy and therefore differ among courts, see Aaron-Andrew P. Bruhl, *Hierarchy and Heterogeneity: How to Read a Statute in a Lower Court*, 97 CORNELL L. REV. 433 (2012). For an earlier meditation on whether there can be unified theory in light of judicial hierarchy, see Barbara Herman, *Comment on Gavison*, 61 S. CAL. L. REV. 1663, 1663–64 (1988) (“If social role defines judicial virtue, one might well ask whether there is enough unity in the role across courts to provide useful content to the term ‘good judge.’ If there are radical differences, then there is room to question the transitivity of virtue from lower to higher courts.”).

The complexities that arise on account of judicial hierarchy and bureaucracy are not worked out in what follows. We expect to pursue these features of the judicial system in future work. It suffices for now to note that our theory of judging pitched here at a relatively abstract level will both be challenged and further supplemented by practical design considerations that are central in constructing a functional judicial system spanning thousands of people in a bureaucracy trying to dispense justice and the rule of law.

13. None of the recent works on the judge, cited *supra* note 5, consider what can be illuminated by understanding the role of the judge as a fiduciary, as we do here.

14. For some recent work that uses fiduciary obligation as a framework for public law and public officeholders, see EVAN FOX-DECENT, *SOVEREIGNTY’S PROMISE: THE STATE AS FIDUCIARY* (2011); Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441 (2010) [hereinafter Criddle, *Administration*]; Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117 (2006) [hereinafter Criddle,

provenance in the framing of the U.S. Constitution.<sup>15</sup> Once this Essay makes that translation for judges in the political system, it offers insight into what it means to be a judge in a democracy: the judge-as-fiduciary framework confirms features of judgeship that seem obvious and central to the job while providing a useful normative benchmark to help guide some of today's most controversial debates about the judiciary.<sup>16</sup> By rooting the role of the judge in a centuries-old rubric that governs trusting relationships, this Essay sheds new light on the basic structure of and justifications for liberal democracies.<sup>17</sup>

This Essay proceeds as follows. Part I introduces the fiduciary principle as it is applied in the private law, and then explores the virtues of conceptualizing public officials as fiduciaries. Part II then applies the principle of the public fiduciary to the judiciary, arguing that the fiduciary model adequately captures key features of the judicial role; it also explores *for whom* judges are fiduciaries, as well as when—and whether—elected judges occupy a fiduciary status similar to that of their unelected counterparts. Finally, Part III focuses on the obligations that bind judicial fiduciaries. The judge-as-fiduciary model, this

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*Foundations*]; Evan Fox-Decent, *The Fiduciary Nature of State Legal Authority*, 31 QUEEN'S L.J. 259 (2005); Ethan J. Leib & David L. Ponet, *Fiduciary Representation and Deliberative Engagement with Children*, 20 J. POL. PHIL. 178 (2012). In some sense, all this work is a spin on Paul Finn's earlier insights. See Paul Finn, *Public Trust and Public Accountability*, 3 GRIFFITH L. REV. 224 (1994) [hereinafter Finn, *Public Trust*]; Paul Finn, *The Forgotten "Trust": The People and the State*, in EQUITY: ISSUES AND TRENDS 131 (Malcolm Cope ed., 1995) [hereinafter Finn, *The Forgotten Trust*]. But this work has gained some new momentum with the visibility of a recent article in this vein. See D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671 (2013). For some warnings about the perils of this translation exercise, see Ethan J. Leib, David L. Ponet & Michael Serota, *Translating Fiduciary Principles into Public Law*, 126 HARV. L. REV. F. 91 (2013).

15. See Robert G. Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 TEX. REV. L. & POL. 239, 245 (2007) [hereinafter Natelson, *Judicial Review*]; Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077 (2004) [hereinafter Natelson, *The Constitution*]; E. Mabry Rogers & Stephen B. Young, *Public Office as a Public Trust: A Suggestion that Impeachment for High Crimes and Misdemeanors Implies a Fiduciary Standard*, 63 GEO. L.J. 1025 (1975).

16. For one criticism of a "judge-as-fiduciary" model—though one limited to considering the judge as a fiduciary for absent class members in a class action case—see Lisa L. Casey, *Reforming Securities Class Actions from the Bench: Judging Fiduciaries and Fiduciary Judging*, 2003 BYU L. REV. 1239, 1314–23 (2003). To the extent anyone has tried to specify this model as a general account of judging before, there are three pages in a 1995 article that begins the process of thinking through this idea. See Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1330–33 (1995). Idleman assumes that some will think there is something "unacceptably undemocratic" about this theory, but we tend to think judges' fiduciary status actually vindicates their democratic credibility, as we explain below. *Id.* at 1332.

17. Although we do not intend to enter the fray on "virtue" or "aretaic" jurisprudence in what follows, see VIRTUE JURISPRUDENCE (Colin Farrelly & Lawrence B. Solum eds., 2008); Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 METAPHILOSOPHY 178 (2003), it is possible that adherents of this account of judging might find something useful in our fiduciary theory of judging. Indeed, the fiduciary principle provides a unique, institutional approach to understanding "excellence" in judging with a specifically democratic lineage, traceable in the Anglo-American liberal political tradition.

Whether the model here is useful in thinking about civil law regimes is a harder question, one we do not attempt to answer in what follows.

Part will argue, underwrites<sup>18</sup> a judicial duty to avoid conflicts of interest (the duty of loyalty); reinforces a duty to take care in deciding cases (the duty of care); explains a basis for judicial immunities (an outgrowth of the duty of care); suggests disclosure, accounting, and candor duties;<sup>19</sup> and likely requires judges to consider the people's views about some matters of public concern.

This last lesson of the judge-as-fiduciary model can help adherents of various forms of "popular constitutionalism" understand the mechanism by which judges may, as an appropriate part of their judicial role, remain responsive to social movements and public opinion.<sup>20</sup> Popular constitutionalists routinely argue that judges often follow the "court of public opinion" as a positive matter,<sup>21</sup> but they have been less clear about the ways in which the partnership between citizens and judges ought to function. The public fiduciary obligation of "deliberative engagement,"<sup>22</sup> explained in Part III.B below, illuminates how public opinion can become a legitimate source of authority.

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18. When we say these prescriptions are "underwritten by" or are "supported by" the fiduciary theory of judging, we mean only that these broad approaches find consistent and coherent justification within the fiduciary model, not that they are perfectly determined by the theory. Theories rarely determine results in perfectly specific ways; at least our theory here is not intended to work like that. Thanks to Paul Horwitz for encouraging us to clarify this.

19. See generally Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987 (2008) (discussing the concept of judicial candor and arguing for a strong principle of judicial sincerity). Two of us have previously argued for the virtue of judicial candor, quite apart from any fiduciary duty. See Ethan J. Leib & Michael Serota, *The Costs of Consensus in Statutory Construction*, 120 YALE L.J. ONLINE 47, 51 (2010), available at [http://yalelawjournal.org/2010/7/30/leib\\_serota.html](http://yalelawjournal.org/2010/7/30/leib_serota.html). As we will reveal here, that virtue may be a fiduciary obligation of judges in their opinion writing.

20. See Ethan J. Leib, *The Perpetual Anxiety of Living Constitutionalism*, 24 CONST. COMMENT. 353 (2007); Michael Serota, *Popular Constitutional Interpretation*, 44 CONN. L. REV. 1635 (2012).

21. See, e.g., Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27 (2005); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957). For some political science literature on judicial decision making and popular opinion, see TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT (1999); Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596 (2003). This positive account of "majoritarianism"—that the Supreme Court follows public majorities—has recently come under attack in Richard H. Pildes, *Is the Supreme Court a "Majoritarian" Institution?*, 2010 SUP. CT. REV. 103 (2010), and has received some modest empirical support in Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)*, 13 U. PA. J. CONST. L. 263 (2010). Our primary concern here is the normative valence to popular constitutionalism—that the courts *should* follow public opinion.

22. Two of us have pursued the political duty of deliberative engagement elsewhere. See Ethan J. Leib & David L. Ponet, *Representation in America: Some Thoughts on Nancy Pelosi, Gavin Newsom, Tim Johnson, and Deliberative Engagement*, 16 GOOD SOC'Y, 1 (2007); Ethan J. Leib & David Ponet, *When Vermont's, San Francisco's, and Other Cities' and Towns' Constituents Call for Impeachment of the President and Vice-President, Must Their Federal Representatives Listen?: The Ethics of Representative-Constituent Relations*, FINDLAW'S WRIT (July 26, 2007), [http://writ.news.findlaw.com/commentary/20070726\\_ponet.html](http://writ.news.findlaw.com/commentary/20070726_ponet.html). We develop this duty as a product of fiduciary obligation in David L. Ponet & Ethan J. Leib, *Fiduciary Law's Lessons for Deliberative Democracy*, 91 B.U. L. REV. 1249 (2011). One of us has considered a similar duty, that of intelligible juridical communication in the context of the U.S. Supreme Court's opinion-writing process. See Michael

Ultimately, our judge-as-fiduciary model underscores, supports, and advances features of both judicial independence *and* judicial constraint. Although the methods of judicial appointment, cycles of partisan entrenchment,<sup>23</sup> impeachment threats, and judicial elections<sup>24</sup> seem independent sources of and causes for judicial accountability, once the judge is understood as a fiduciary, traditional accountability mechanisms look different: they are part of a matrix designed to enforce judicial fiduciary obligation. The judge-as-fiduciary model, most importantly, reestablishes a fundamentally democratic relationship between citizens and their judges.

## I.

### THE FIDUCIARY PRINCIPLE IN PUBLIC LAW

Although rooted in private law, the fiduciary principle has also been widely employed to provide a descriptive explanation of—and normative frame for—the relationship between the state and its citizens. In this Part, we discuss the three constitutive indicia of fiduciary relationships developed in the private law context. We then explain how these three indicia translate to the public context. We also reveal the overlooked historical pedigree of the fiduciary rendering of public institutions.

#### A. *The Fiduciary Principle*

A fiduciary relationship emerges in contexts where one person (the fiduciary) has discretionary power over the assets or legal interests of another (the beneficiary).<sup>25</sup> Classic examples of fiduciary relationships in private law include attorney-client, agent-principal, trustee-beneficiary, corporate officeholder-shareholder, guardian-ward, and physician-patient relationships.<sup>26</sup> In these settings (and others that the law treats as sufficiently similar to them),

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Serota, *Intelligible Justice*, 66 U. MIAMI L. REV. 649 (2012). We apply the fiduciary duty of deliberative engagement to the judiciary in what follows.

23. See Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001).

24. See David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047 (2010).

25. See generally Evan J. Criddle, *Proportionality in Counterinsurgency: A Relational Theory*, 87 NOTRE DAME L. REV. 1073 (2012) (discussing the fiduciary relationship between a state and its people in the context of armed conflict and international law); Paul B. Miller, *A Theory of Fiduciary Liability*, 56 MCGILL L.J. 235 (2011) (explaining the unique position of fiduciary relationships under the law). According to Justice Wilson's judgment in *Frame v. Smith*,

[r]elationships in which a fiduciary obligation have been imposed seem to possess three general characteristics: (1) The fiduciary has scope for the exercise of some discretion or power. (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests. (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[1987] 2 S.C.R. 99, 102 (Can.).

26. See D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1400 (2002).

the beneficiary is vulnerable to the fiduciary's predatory or self-dealing actions yet must still repose her trust in the fiduciary. Private law traditionally imposes substantial duties upon fiduciaries as a way of keeping them in line and incentivizing them to prioritize their beneficiaries' interests above their own.<sup>27</sup>

Three indicia mark the fiduciary relationship: discretion, vulnerability, and trust. Discretion and vulnerability are, arguably, flip sides of the same coin.<sup>28</sup> Discretionary power vested in the fiduciary means the beneficiary is always vulnerable to potential abuse through predation or self-dealing. For example, Tamar Frankel observes that the beneficiary's vulnerability is not a function of an initial inequality between fiduciary and beneficiary in terms of bargaining power. Rather, the beneficiary is vulnerable even if she is a well-informed, sophisticated, and able negotiator: "The [beneficiary's] vulnerability stems from the *structure* and *nature* of the fiduciary relation" itself.<sup>29</sup> This vulnerability is not a statement about beneficiaries' lack of autonomy or agency. It is precisely to retain a modicum of autonomy and agency for the beneficiary that the fiduciary is ultimately obligated to pursue the beneficiary's interests.

Owing in part to the beneficiary's vulnerability and the fiduciary's discretionary power—and in part to the expertise the fiduciary often holds (which is why she gets discretion in the first place)—the fiduciary relationship must be founded on a substantial degree of trust or confidence.<sup>30</sup> Trust functions to economize on monitoring costs: fiduciary specialization makes it difficult and costly for beneficiaries to monitor their fiduciaries. And because the performance of a fiduciary's responsibilities cannot always be measured objectively, beneficiaries might harm the relationship by constantly looking

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27. See generally LEONARD I. ROTMAN, *FIDUCIARY LAW* (2005); J.C. SHEPHERD, *THE LAW OF FIDUCIARIES* (1981); L.S. Sealy, *Fiduciary Relationships*, 20 *CAMBRIDGE L.J.* 69 (1962); J.C. Shepherd, *Towards a Unified Concept of Fiduciary Relationships*, 97 *L. Q. REV.* 51 (1981); Ernest J. Weinrib, *The Fiduciary Obligation*, 25 *U. TORONTO L.J.* 1 (1975).

28. See Fox-Decent, *supra* note 14, at 299 ("[P]ower and vulnerability are intimately related. The kind of vulnerability at issue . . . arises on account of the fiduciary's unilateral power to affect the beneficiary's interests.")

29. Tamar Frankel, *Fiduciary Law*, 71 *CALIF. L. REV.* 795, 810 (1983). For some recent work attempting to build a comprehensive and innovative political theory from the relationship of vulnerability, see Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 *EMORY L.J.* 251 (2010); Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 *YALE J.L. & FEMINISM*, 1 (2008).

30. See Ethan J. Leib, *Friends as Fiduciaries*, 86 *WASH. U. L. REV.* 665, 682–84 (2009); see also *Higgins v. Chi. Title & Trust Co.*, 143 N.E. 482, 484 (Ill. 1924) ("A fiduciary relation . . . exists in all cases in which influence has been acquired and abused, in which confidence has been reposed and betrayed. The origin of the confidence is immaterial. It may be moral, social, domestic, or merely personal."); *Hoge v. George*, 200 P. 96, 102 (Wyo. 1921) (finding confidential relationships to exist where "there [i]s confidence reposed on the one side and accepted on the other, with a resulting dependence by the one party and influence by the other").

over the fiduciary's shoulder.<sup>31</sup> Constant supervision would undermine the relationship, which works best when the fiduciary and beneficiary bond well.<sup>32</sup> As a result, beneficiaries must ultimately depend on fiduciaries to undertake their responsibilities in good faith and to forbear from exploiting them for personal gain.<sup>33</sup> Notice here that trust is also tied to vulnerability<sup>34</sup>: the harder it is to monitor, the more acute the vulnerability, and the more pronounced the required trust. Accordingly, the stringency of obligations imposed on fiduciaries shifts as these indicia register at different intensities across the varied landscape of private fiduciary law.<sup>35</sup>

Trust is constitutive of the fiduciary principle for reasons that go beyond asymmetrical power dynamics and barriers to monitoring. Although many fiduciaries enjoy their authority by dint of consent or express delegation, neither implied nor express consent are essential components of the fiduciary architecture.<sup>36</sup> Most obviously, guardians who act on behalf of minors or incompetents do so on the basis of trust reposed without consent. Across a range of fiduciary relations, trust is presumed rather than earned or explicitly conferred. Thus, according to the fiduciary principle, the fiduciary acts on the basis of trust without the beneficiary necessarily doing anything specific to confer it.<sup>37</sup>

The difficulties of monitoring notwithstanding, beneficiaries usually retain the right to supervise fiduciary performance. However, these supervisory rights—along with the stringency of the duties owed to beneficiaries—underscore how much the fiduciary relationship varies from one context to another. For example, in the legal agency context, most principals can intervene at will and dismiss agents without notice, whereas dismissing a trustee for malfeasance in private trusts or estates requires judicial intervention.<sup>38</sup> It

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31. See Kenneth B. Davis, Jr., *Judicial Review of Fiduciary Decisionmaking—Some Theoretical Perspectives*, 80 NW. U. L. REV. 1, 7 (1985) (arguing that fiduciary law exists to avoid having the beneficiary “looking over the fiduciary’s shoulder”).

32. See Leib, *supra* note 30, at 692–97.

33. See Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980).

34. The link between trust and vulnerability is a central feature of Annette Baier’s groundbreaking work on the philosophy of trust. See ANNETTE C. BAIER, *Trust and Antitrust*, in MORAL PREJUDICES: ESSAYS ON ETHICS 95, 132 (1995) (“When we trust we accept vulnerability to others.”); see also *id.* at 133 (“Trust is an alternative to vigilance and . . . trustworthiness is an alternative to constant watching to see what one can and cannot get away with, to recurrent recalculations of costs and benefits. Trust is accepted vulnerability to another’s power to harm one, a power inseparable from the power to look after some aspect of one’s good.”).

35. See Davis, *supra* note 31, at 23–34; Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 432 (1993) (noting that duties deviate substantially depending on which relationship is at issue); Smith, *supra* note 26, at 1483–84.

36. See Criddle, *Foundations*, *supra* note 14, at 126.

37. See Fox-Decent, *supra* note 14, at 263 (“[T]he law presumes that the fiduciary acts on the basis of the beneficiary’s trust, though it is really the law rather than any particular act of the beneficiary that entrusts the fiduciary with power.”).

38. See Criddle, *Foundations*, *supra* note 14, at 129.

typically follows that where residual control rights are particularly weak, the beneficiary's vulnerability to predation is greater and, therefore, the fiduciary must meet a higher standard of conduct.<sup>39</sup>

In sum, although the three indicia noted above define the fiduciary relationship and consequent fiduciary liability, the quantum of discretion, trust, and vulnerability used to trigger fiduciary obligation varies according to type of relationship. Fiduciaries and their obligations are not all the same—guardians, for instance, are not identical to corporate officeholders who are themselves different from trustees.<sup>40</sup> What is especially notable about the fiduciary principle and its concomitant obligations for our purposes is how they relate to policing opportunism and discretion in contexts where monitoring costs are high and bonding is critical for the relationship to function.<sup>41</sup> Remedies ultimately tend to be supracompensatory in order to deter abuse.<sup>42</sup> To lesser and greater degrees, certain mechanisms can hold fiduciaries accountable, but all these forms of enforcement are incomplete and rely, in part, on fiduciary altruism. In the next Section, we show why public officeholders are fiduciaries—and how the fiduciary principle translates to that relational context.

### B. Public Fiduciaries

Applying the fiduciary principle to government officials has an impressive lineage. The notion that government keeps power in trust for its citizenry dates back to Plato, Aristotle, and Cicero: sovereign institutions were thought to hold citizens' interests in a public trust, constrained by fiduciary standards.<sup>43</sup> This deeply rooted conceptualization was premised on citizens' vulnerability to the potential abuse of discretionary governmental power and on the citizenry's need to repose trust in its governors<sup>44</sup> and public institutions, sometimes by express delegation and sometimes without explicit conferral.<sup>45</sup>

Conceiving of state authority as fiduciary resonated with widely varying cultures, from ancient Greece to Roman political thought and practice, and ultimately to England, where it found its home in the common law.<sup>46</sup> Seeing

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39. See *id.* at 179.

40. See Eileen A. Scallen, *Promises Broken vs. Promises Betrayed: Metaphor, Analogy, and the New Fiduciary Principle*, 1993 U. ILL. L. REV. 897, 910 n.48, 911.

41. See Leib, *supra* note 30, at 683.

42. See *id.* at 680.

43. See Natelson, *Judicial Review*, *supra* note 15; Natelson, *The Constitution*, *supra* note 15.

44. On electors' trust of representatives, see generally WILLIAM T. BIANCO, *TRUST: REPRESENTATIVES AND CONSTITUENTS* (1994); *DEMOCRACY AND TRUST* (Mark E. Warren ed., 1999).

45. As Professor Criddle has recently written: "All public institutions and officials . . . exercise discretionary powers of an administrative nature over the public's legal and practical interests." Criddle, *supra* note 25, at 1090.

46. See Paul Stanton Kibel, *The Public Trust Navigates California's Bay Delta*, 51 NAT. RESOURCES J. 35, 36 (2011) ("The origins of the public trust reach back centuries and millennium [sic]

public officials as holders of a public trust reached America's shores through its colonial inheritance.<sup>47</sup> In 1662, for example, King Charles II granted a royal charter to the Governor and Company of the English Colony of Connecticut upon trust for the benefit of settlers residing in that colony.<sup>48</sup> And by the time of the federal Constitutional Convention in 1787, state constitutions already used fiduciary language.<sup>49</sup>

The founding generation understood the relationship between government and governed as a fiduciary one—and those who debated and ultimately adopted the Constitution assumed that it would promote fiduciary standards, controlling the political discretion of officeholders.<sup>50</sup> Predictably, then, the Constitution makes ample reference to public trusts and to public offices being “of [t]rust.”<sup>51</sup> In drawing on Greco-Roman as well as Whig political philosophy,<sup>52</sup> the founders fashioned a government “whose conduct would mimic that of the private-law fiduciary.”<sup>53</sup> The Constitution was therefore designed as “the fiduciary law of public power,”<sup>54</sup> delimiting governmental authority and directing it to the benefit of the citizen-beneficiaries.<sup>55</sup>

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to old English and Roman law, yet the public trust continues to have far-reaching effects today throughout the United States.”); Natelson, *Judicial Review*, *supra* note 15 (describing Greek provenance of public fiduciary theory); Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift*, 39 ENVTL. L. 43, 69 (2009) (“The public trust obligation is the oldest expression of environmental law, dating back to Justinian times and Roman law. Trust-like stewardship concepts have been central to indigenous governance back to time immemorial. The public trust is manifest in the legal systems of many nations throughout the world.”) (footnotes omitted).

47. See Joseph L. Sax, *Introduction to the Public Trust Doctrine*, in THE PUBLIC TRUST DOCTRINE AND ITS APPLICATION TO PROTECTING INSTREAM FLOWS: PROCEEDINGS OF A WORKSHOP 5, 8 (Gary E. Smith & Alexander R. Hoar eds., 1999) (“[W]e developed the idea that the states would take over the role that the king had played [as trustee holding the shared natural resources in trust for the benefit of the English people] because, just as the king was the sovereign, the states in America are sovereign. The law of England became the law of America. We imported the Trust idea, but switched the role of the king to the state, and the state became the owner and Trustee for the public.”).

48. *Charter of Connecticut—1662*, THE AVALON PROJECT, [http://avalon.law.yale.edu/17th\\_century/ct03.asp](http://avalon.law.yale.edu/17th_century/ct03.asp) (last visited Mar. 4, 2013).

49. See Finn, *Public Trust*, *supra* note 14, at 224 (quoting the 1776 Maryland Declaration of Rights); Finn, *The Forgotten Trust*, *supra* note 14, at 131 (quoting the 1776 Pennsylvania Declaration of Rights).

50. See Finn, *The Forgotten Trust*, *supra* note 14, at 135 (“[I]n the United States after the Revolution, the fiduciary status of public officials followed inexorably from the embrace in that country of the idea of popular sovereignty.”).

51. U.S. CONST. art. I, § 3, cl. 7; *id.* art. I, § 9, cl. 8; *id.* art. II, § 1, cl. 2; see also Natelson, *The Constitution*, *supra* note 15, at 1085–86.

52. See generally JOHN LOCKE, *Second Treatise: An Essay Concerning the True, Original, Extent, and End of Civil Government*, in TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION (Ian Shapiro ed., Yale University Press 2003) (1690). We explore the Lockean vision in somewhat more detail *infra* Part II.A.

53. Natelson, *Judicial Review*, *supra* note 15, at 245.

54. See TAMAR FRANKEL, *FIDUCIARY LAW* 284–87 (2011).

55. Perhaps one might think of the founding generation as “settlers” for the trust.

An important outgrowth of this fiduciary conceptualization is that American courts can invalidate some laws and official actions that violate the public trust, reinforcing the notion that judicial officers must hold political actors accountable for their fiduciary obligations.<sup>56</sup> In this regard, consider historical legal doctrines, such as the public trust and Indian trust doctrines, themselves explicitly premised upon a fiduciary conceptualization of governance. The public trust doctrine embodies the fiduciary principle that a sovereign government holds the shared natural resources of the polity, such as navigable waters and the soil beneath them,<sup>57</sup> in trust for the benefit of both present and future generations of its citizenry.<sup>58</sup> Based on this theory of sovereign fiduciary obligation, state and federal judges alike routinely apply the doctrine to prevent elected officials from allowing damage to shared natural resources.<sup>59</sup> As Mary Christina Wood puts it, “While the current environmental laws give agencies control over natural systems and authority to allocate rights to private parties to pollute and destroy resources, the trust serves as a fundamental check on this authority.”<sup>60</sup>

Similarly, another direct application of fiduciary principles appears in the Indian trust doctrine, which is “one of the primary cornerstones of Indian

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56. In some ways, this is the same vision of judicial review expressed in Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502 (2006) and in Natelson, *Judicial Review*, *supra* note 15, at 281. Some U.S. cases that follow this general vision include *United States v. Carter*, 217 U.S. 286, 306 (1910); *United States v. Kearns*, 595 F.2d 729, 734 (D.C. Cir. 1978); *Fuchs v. Bidwill*, 334 N.E.2d 117, 119–20 (Ill. App. Ct. 1975); *City of Minneapolis v. Canterbury*, 142 N.W. 812, 815 (Minn. 1913); and *Driscoll v. Burlington-Bristol Bridge Co.*, 86 A.2d 201, 222–23 (N.J. 1952). As we highlight in what follows, much less attention has been paid to the fact that the judge is just another public officeholder in a fiduciary relationship with the governed, requiring some mechanisms to enforce fiduciary standards.

57. See, e.g., *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 453 (1892) (noting the state’s fiduciary obligation to safeguard property “in which the whole people are interested, like navigable waters and the soils under them”).

58. See Wood, *supra* note 46, at 45 (“At the core of the [public trust] doctrine is the antecedent principle that every sovereign government holds vital natural resources in ‘trust’ for the public—present and future generations of citizen beneficiaries.”). See generally FIDUCIARY DUTY AND THE ATMOSPHERIC TRUST (Ken Coghill et al. eds., 2012); Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part II): Instilling a Fiduciary Obligation in Governance*, 39 ENVTL. L. 91 (2009).

59. For application of the public trust doctrine in the federal courts, see, for example, *Geer v. Connecticut*, 161 U.S. 519, 529 (1895); *Illinois Central Railroad Co.*, 146 U.S. at 453; *United States v. 1.58 Acres of Land*, 523 F. Supp. 120, 122–23 (D. Mass. 1981). For application in the state courts, see, for example, *Shepard v. State*, 897 P.2d 33 (Alaska 1995); *Arizona Center for Law in the Public Interest v. Hassell*, 837 P.2d 158 (Ariz. Ct. App. 1991); *National Audubon Society v. Superior Court of Alpine County*, 658 P.2d 709 (Cal. 1983); *Ridenour v. Furness*, 504 N.E.2d 273 (Ind. Ct. App. 1987); *State v. City of Bowling Green*, 313 N.E.2d 409 (Ohio 1974). See also Wood, *supra* note 46, at 45–46 (“In the United States, the [public trust] doctrine is evident in hundreds of judicial decisions, including landmark United States Supreme Court opinions.”).

60. Wood, *supra* note 46, at 68–69.

law.”<sup>61</sup> Like the public trust doctrine, the Indian trust doctrine is a product of judicial craftsmanship designed to ensure that elected officials’ behavior aligns with the public trust; here it is Indian tribes rather than the public at large that serve as the relational beneficiary, with Indian land, resources, and way of life held in trust.<sup>62</sup> As the Supreme Court recently explained, the relationship between the tribes and the federal government is best understood as “one existing under a common law trust, with the United States as trustee [and] the Indian tribes or individuals as beneficiaries.”<sup>63</sup>

The public and Indian trust doctrines thus demonstrate not only that conceptualizing state actors as fiduciaries is a central feature of American political thought,<sup>64</sup> but also that it has entered actual public law doctrine.<sup>65</sup> Although other areas of law besides environmental law and federal Indian law have analyzed public institutions in fiduciary terms,<sup>66</sup> what makes public lands doctrine and Indian law helpful is that they show how the fiduciary foundation of public authority is not just theory, but can be relevant to legal design, too.

61. *Dep’t of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 11 (2000) (quoting F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 221 (1982) (internal quotation marks omitted)); see also *United States v. Cherokee Nation of Okla.*, 480 U.S. 700, 707 (1987); *United States v. Mitchell*, 463 U.S. 206, 225 (1983); *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942).

62. As Wood explains, the special beneficiary status afforded to the tribes is a historical byproduct of Indian land transfers and federal promises of tribal sovereignty upon which they were premised. See Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1495–96 (discussing the historical roots of the Indian trust doctrine); Wood, *supra* note 46, at 71 n.146 (noting that the federal Indian trust doctrine is entirely of common law origin and has no expression in the Constitution but has endured for two centuries of jurisprudence).

63. *Klamath Water Users Protective Ass’n*, 532 U.S. at 11.

64. Canada’s relationship with First Nations is also conceptualized this way (as a “Crown-Native fiduciary relationship”), which produces legally enforceable duties for the Canadian government. See FOX-DECENT, *supra* note 14 at 55–74.

65. Indeed, the U.S. Supreme Court itself has suggested this much in the context of a recent public trust doctrine decision:

[T]he power or control lodged in the State . . . is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good.

*Geer v. Connecticut*, 161 U.S. 519, 529 (1895).

66. See, e.g., Criddle, *Administration*, *supra* note 14 (discussing the application of fiduciary principles in administrative law); Criddle, *Foundations*, *supra* note 14 (applying fiduciary principles to administrative law); Criddle, *supra* note 25 (discussing the application of fiduciary principles in international law); Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT’L L. 331 (2009) (discussing the application of fiduciary principles in international law); Evan Fox-Decent & Evan J. Criddle, *The Fiduciary Constitution of Human Rights*, 15 LEGAL THEORY 301 (2009) (applying fiduciary principles in international law); Fox-Decent, *supra* note 14 (applying fiduciary principles to state authority); Leib & Ponet, *supra* note 14 (discussing the application of fiduciary principles in democratic representation); Natelson, *Judicial Review*, *supra* note 15 (applying fiduciary principles to constitutional law); Natelson, *The Constitution*, *supra* note 15 (discussing the application of fiduciary principles in constitutional law); Ponet & Leib, *supra* note 22 (applying fiduciary principles to legislators).

The structure of the relationship between public officers and citizens generally reflects the three indicia of private fiduciary relationships explored above. This is because government officials have wide discretion in making decisions that affect the interests and resources of their entrustors, irrespective of the level or place these entrustors occupy in the hierarchy of government. Citizens are, therefore, quite vulnerable to the potential abuse of such power, yet have little choice other than to trust those who govern them.

The fiduciary rendering of state action also provides a useful counterpoint to the conventional liberal account of legitimate democratic authority, grounded in the *consent* of the governed.<sup>67</sup> Ultimately, citizens of even the most liberal and democratic of states rarely meaningfully consent to the state's authority. Simply casting a ballot—or declining to voice one's protests by emigrating—hardly confers consent on those officials or institutions ruling over citizens' daily lives. And those officials who enjoy only the thinnest of consent of the governed, whether because they are unelected bureaucrats or because 49 percent of the electorate voted against them—plurality election contest winners can even have a majority voting *against* them—are difficult to explain or constrain under traditional democratic principles. However, under the fiduciary understanding of democratic state authority, a *de facto* relationship of discretion, trust, and vulnerability ultimately grounds the range of fiduciary obligations and the attendant political rights of citizen-beneficiaries.<sup>68</sup> This is in part why the fiduciary principle is so useful, attractive, and appropriate in understanding state authority in democratic polities.

Of course, in understanding public officeholders as fiduciaries, one must consider the differences between private and public fiduciaries. Translation is one thing, but transplanting an idea from one category to another can lead to category mistakes. Private fiduciaries, for example, often only make decisions affecting the interests of particular charges: an agent for a principal, parents for a child, a doctor for a patient. Yet public fiduciaries are generally asked to render decisions for large classes of citizens whose interests may be adverse to each other.<sup>69</sup> This doesn't turn out to be a very disruptive difference, however. Multiple beneficiaries arise in private law too: Consider shareholders in a corporation whose interests may collide. Or a class of beneficiaries to a will or trust with members of the class having interests that do not align perfectly. Or consider a set of claimants in a class action or aggregate litigation who do not have the same incentives for settling litigation. Regardless of the context,

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67. As the Declaration of Independence phrases it, only through the “consent of the governed” are the “just powers” of government derived. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). See also Serota, *supra* note 22, at 649 (“At the heart of American political theory is the foundational principle that legitimate political authority is rooted in public consent.”).

68. See generally FOX-DECENT, *supra* note 14 (developing an account of state authority constrained by fiduciary obligation).

69. See Malcolm Thorburn, *Justifications, Powers, and Authority*, 117 YALE L.J. 1070, 1103 (2008).

fiduciaries are obligated only to act evenhandedly and reasonably toward all.<sup>70</sup> Still, not all points of translations will be so smooth, and one must remember that while public fiduciaries are similar to their private law counterparts and ancestors in form, they differ in important ways.

Despite the risk that something may be lost in translation, in the past decade, scholars have become increasingly interested in the application of fiduciary principles to the public law domain, which has generated fresh insights into areas as diverse as administrative law, constitutional law, international law, and theories of democratic representation.<sup>71</sup> In what follows, we continue the project of understanding public officials as fiduciaries by asking whether judges are fiduciaries, for whom they might be fiduciaries, whether elected judiciaries differ from appointed ones, and what importance any of this has for contested questions of judicial ethics and judicial interpretation. Ultimately, understanding judges as fiduciaries clarifies much about the judicial role and furnishes guideposts for how judges should engage those over whom they govern.

## II.

### ARE JUDGES FIDUCIARIES? FOR WHOM?

With this background in place about the fiduciary principle and how it illuminates certain features of public institutions, we are ready to inquire into whether judges are fiduciaries. In this Part, we explain how thinking of judges as fiduciaries is rooted in the American constitutional tradition and then identify the functional argument for understanding judges as fiduciaries. Next, we address three challenges that must be met prior to applying this understanding in Part III. First, how does one regard the class of beneficiaries that are protected by judges' fiduciary status? Second, are both elected and appointed judges fiduciaries? And, finally, as a bridge to our exploration of the fiduciary duties of judges in Part III, we must ask about fiduciary accountability in the judicial context: Given that judges are routinely considered "enforcers" of fiduciary obligations, can we apply the juridical conception of the private fiduciary to judges themselves?<sup>72</sup>

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70. See Finn, *The Forgotten Trust*, *supra* note 14, at 138 ("It is uncontroversial fiduciary law that where a fiduciary serves classes of beneficiaries possessing different rights . . . the fiduciary is . . . required to act fairly as between different classes of beneficiary in taking decisions which affect the rights and interest of the classes *inter se*."); Fox-Decent, *supra* note 14, at 265 ("In the multiple beneficiary contexts typical of public law, loyalty manifests itself as fairness and reasonableness.").

71. See sources cited *supra* note 66.

72. To the extent others have used the fiduciary principle to develop an ethical framework for governmental conduct, judges have been overlooked in favor of a focus on Congress and the executive branch. See, e.g., Kathleen Clark, *Do We Have Enough Ethics in Government Yet? An Answer from Fiduciary Theory*, 1996 U. ILL. L. REV. 57.

*A. The Historical and Functional Arguments for Treating Judges as Fiduciaries*

From the beginning of the Republic, our Constitution's designers envisioned a judiciary that would resemble a form of public trust, a quintessential fiduciary status. This conception is prevalent in both the founding-era writings of the framers—particularly in the works of Madison, Hamilton, and Jefferson—as well as deeply rooted in the British political thought and the common law practices that influenced them. Consider *The Federalist's* most foundational articulation of the justification for judicial review:

[T]he courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. . . . It therefore belongs to [judges] to ascertain [the Constitution's] meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.<sup>73</sup>

In this authoritative explication of the judge's dual obligations of constitutional and statutory interpretation, the judge's job is to hold the people's will in trust and protect it from legislators who act as "agents" of the people.<sup>74</sup> As a self-conscious design choice to protect the citizenry from the "agency costs" that can result from delegating large governance tasks to political representatives, legal authority is not only understood as a mode of keeping the legislature within its bounded authority, but also as a mechanism for representing the people's will directly.<sup>75</sup>

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73. THE FEDERALIST NO. 78, at 394 (Alexander Hamilton) (Ian Shapiro ed., 2009).

74. For a more comprehensive exploration of legislators' role as fiduciaries, see Leib & Ponet, *supra* note 14; Ponet & Leib, *supra* note 22; Rave, *supra* note 14.

75. Because courts are also authorized through explicit acts of delegation by the people, there is a debate about whether constitutional courts should be considered agents or trustees. See Karen J. Alter, *Agents or Trustees? International Courts in Their Political Context*, 14 EUR. J. INT'L REL. 33 (2008); Giandomenico Majone, *Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance*, 2 EUR. UNION POL. 103 (2001); Alec Stone Sweet, *Constitutional Courts and Parliamentary Democracy*, 25 W. EUR. POL. 77 (2002). Our characterization of judges as fiduciaries supervenes over the agency-trusteeship debate, since both categories are quintessentially fiduciary. See Leib & Ponet, *supra* note 14, at 183–86 (exploring this feature of supervenience). Some judges will be closer to agents (arguably those tied more closely to electoral accountability) and others will more clearly be trustees (arguably those with no electoral connection to their beneficiaries). But even those with electoral connections to local constituents will be called upon to make decisions that require consideration of people that have no right to vote for or against them; imagine a state elected judge called upon to decide a federal constitutional question. In such contexts, the very same judges who are usually agents will have to act as trustees. In all cases, in our view, judges are fiduciaries.

That a judge holds the people's will in trust is as true in the federal government's design as it is in state governmental systems, which often tie judges even more directly to the people's will through elections. As James Madison argued in *The Federalist*, "federal and State governments are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes."<sup>76</sup> All judges, state and federal, fall within this ambit. In this vein, Thomas Jefferson observed that judge and citizen are bound in a relationship of "confidence";<sup>77</sup> confidential relationships are nearly indistinguishable from fiduciary relationships.<sup>78</sup>

According to John Locke, whose writings heavily influenced the founders, the entire state apparatus holds the people's power in trust. The judge, in performing his or her role responsibilities is "to be directed to no other end but the peace, safety, and public good of the people."<sup>79</sup> And when the people delegate legislative power to political representatives, they "put the legislative power into such hands as they think fit; with this trust, that they shall be governed by declared laws."<sup>80</sup> An essential restraint on the authorization given to legislators is that a legal authority will control their behavior with the people's interests held in trust. To be sure, Locke is principally concerned with the trusteeship that the people's legislative representatives hold—and the people's ultimate power to judge whether the trust has been violated.<sup>81</sup> But judicial power and legality can still be deemed delegated authority, and the delegation of judicial office itself establishes a trust.<sup>82</sup>

The deep historical roots of the judge-as-fiduciary conception reach beyond the realm of political thought and into the world of practice: a review of British and American impeachment proceedings demonstrates the pervasive application of this idea. The application of a fiduciary standard to impeachment proceedings originated in England, where it appeared as early as 1640 during the impeachment of Judge Robert Berkley.<sup>83</sup> As E. Marby Rogers and Stephen B. Young observe, Judge Berkley's proceeding "evidenced the substitution of

76. THE FEDERALIST NO. 46, at 239 (James Madison) (Ian Shapiro ed., 2009).

77. See KAHN, *supra* note 6, at 113 (citing Letter from Thomas Jefferson to Justice William Johnson (Oct. 27, 1822), available at <http://www.let.rug.nl/usa/P/tj3/writings/brf/jefl269.htm>).

78. See, e.g., *Rieger v. Rich*, 329 P.2d 770, 778 (Cal. Dist. Ct. App. 1958) (stating "a confidential or fiduciary relationship . . . in law are synonymous"); *Fipps v. Stidham*, 50 P.2d 680, 683 (Okla. 1935) ("Confidential and fiduciary relations are in law synonymous."); see also BLACK'S LAW DICTIONARY 1314–15 (8th ed. 2004) (defining confidential relationships as a synonym of fiduciary relationship).

79. LOCKE, *supra* note 52, at 157.

80. *Id.* at 160.

81. See *id.* at 208; see also *id.* at 166, 169.

82. See *id.* at 190 (expressing concern with "judicial censure or condemnation"). Rogers & Young, *supra* note 15, at 1025–28, trace some of this Lockean heritage too, but they treat all governmental powers as trusts without focusing on the fact that Locke had relatively little to say about the judicial power and judges specifically. We make the relevant connection in the text above.

83. See Rogers & Young, *supra* note 15, at 1038–39 (citing *Articles of Impeachment of Sir Robert Berkley*, in 3 COBBETT'S STATE TRIALS 1283, 1283–85 (Thomas Howell ed., 1809)).

the public at large for the King as the primary beneficiary of the power held in trust by governmental officials”—including, quite pointedly in context, judges.<sup>84</sup>

This view of the judicial role as a public trust came from England to the American colonies. In 1774, an early judicial impeachment proceeding in Massachusetts focused on whether a judge’s behavior or other commitments “violated the people’s right to judge the merits of their own agents.”<sup>85</sup> Those with oversight over the impeachment were clear that the judicial office is a trust, requiring the promotion of the public good.<sup>86</sup>

A similar fiduciary standard applied throughout post-Revolutionary impeachment proceedings as well. Since the adoption of the U.S. Constitution, of the nineteen federal officeholders impeached, fifteen have been judges.<sup>87</sup> Several of these judicial impeachment trials clearly treated those judges as if they were fiduciaries. For example, when Judge John Pickering was impeached in 1803–04, he was charged with acting “contrary to his trust.”<sup>88</sup> Similarly, the committee that helped impeach Judge Robert Archibald applied fiduciary principles to his actions.<sup>89</sup> Most explicitly, when the Senate considered the impeachment of Judge Halsted Ritter in 1936, Senator William McAdoo (D-CA) directly quoted a classic judicial opinion setting forth the fiduciary standard from *Meinhard v. Salmon*.<sup>90</sup> Judges, McAdoo argued, should abide by “something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.”<sup>91</sup> Rogers and Young marshal still further evidence from other historical

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84. *Id.* at 1039.

85. *Id.* at 1031 (recounting the impeachment of Justice Peter Oliver).

86. *Id.* (citing BOS. GAZETTE, Mar. 14, 1774, at 2, col.3).

87. See *Complete List of Senate Impeachment Trials*, U.S. SENATE, [http://www.senate.gov/artandhistory/history/common/briefing/Senate\\_Impeachment\\_Role.htm#4](http://www.senate.gov/artandhistory/history/common/briefing/Senate_Impeachment_Role.htm#4) (last visited Mar. 4, 2012). We take no position here on whether impeachment is the *only* method for removing federal judges. Compare Saikrishna Prakash & Steven D. Smith, *Removing Federal Judges Without Impeachment*, 116 YALE L.J. POCKET PART 95 (2006), <http://www.yalelawjournal.org/the-yale-law-journal-pocket-part/constitutional-law/removing-federal-judges-without-impeachment/> (arguing that Congress is not limited to impeachment to remove judges for bad behavior), and Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72 (2006) (arguing that Congress can remove judges through means other than impeachment), with Martin H. Redish, *Good Behavior, Judicial Independence, and the Foundations of American Constitutionalism*, 116 YALE L.J. 139 (2006) (defending the view that impeachment is the exclusive method for removal). Here, we simply acknowledge the Constitution’s authorization of impeachment for removal of federal officeholders and its relative popularity for removing judges (15) in comparison to senators (1), presidents (2), or executive officials (1).

88. 13 ANNALS OF CONG. 319–22 (1804). Pickering was ultimately convicted and removed from office by the Senate.

89. See Rogers & Young, *supra* note 15, at 1044.

90. 249 N.E. 545 (N.Y. 1928).

91. Rogers & Young, *supra* note 15, at 1044 n.137 (quoting remarks of Senator McAdoo in Senate impeachment trial of Halsted L. Ritter).

impeachment cases establishing that evaluating judges under a fiduciary standard was common practice.<sup>92</sup>

Contemporary impeachment trials demonstrate more of the same. For example, Judge Harry Claiborne's Articles of Impeachment in 1986 described Claiborne's tax evasion as a betrayal of "the trust of the people of the United States" and characterized his behavior as violating several fiduciary obligations.<sup>93</sup> The most recent judicial impeachments of Judges Walter Nixon in 1989,<sup>94</sup> Alcee Hastings in 1989,<sup>95</sup> Samuel Kent in 2009,<sup>96</sup> and G. Thomas Porteous Jr. in 2010<sup>97</sup> confirm that the general standard for impeachments is to assess judges' obligations as holders of a public trust.<sup>98</sup> Finally, in conventional trials against judges on basic fraud claims, courts have readily concluded that judges who accept kickbacks or bribes violate a fiduciary obligation.<sup>99</sup>

The pervasive use of fiduciary principles in judicial impeachment proceedings—and the more general historical pedigree of the judge-as-fiduciary conception—is not surprising given the robust normative foundation that undergirds it. As explained in Part I, three factors determine whether an officer or entity is a fiduciary: (1) *discretion* or power delegated to a dominant party over the legal interests or assets of another, (2) *trust* reposed to a party with meaningful control over the legal interests or assets of another, and (3) resulting *vulnerability* of the dependent party whose interests the party with power and discretion represents. by this Assessed by these criteria, judges qualify as fiduciaries.

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92. See *id.* at 1042–44. They are more interested in impeachment standards generally than in judges specifically.

93. 132 CONG. REC. 31, 493 (1986); 132 CONG. REC. 15, 495–96 (1986) ("Judge Claiborne has violated the public trust. . . . [T]he judges of our Federal courts occupy a unique position of trust.") (statement of Rep. Rodino); 132 CONG. REC. 27, 765 (1986) (citing THE FEDERALIST NO. 65, at 477 (Alexander Hamilton) (Franklin Lib. Ed. 1984)) ("The ultimate issue in any impeachment proceeding is whether there has been a violation of the public trust: A well constituted court for the trial of impeachment . . . [is for] those offenses which proceed from . . . the abuse or violation of some public trust.").

94. See, e.g., 135 CONG. REC. 2476 (1989) (statement of Rep. Sangmeister).

95. See, e.g., 135 CONG. REC. 4227–30 (1989) (statement of Rep. Bryant).

96. See, e.g., 155 CONG. REC. 7055 (2009) (statement of Rep. Conyers).

97. See 156 CONG. REC. 10,229 (2010) (statement of Sen. Levin); 156 CONG. REC. 8565 (2010) (statement of Rep. Schiff) (citing THE FEDERALIST No. 65 (Alexander Hamilton)).

98. We did not undertake an analysis of judicial impeachments at the state level, though there have been approximately ten cases of state judicial impeachment since 1785 (and about thirty-two impeachment-related investigations). Since judges may be removed by multifarious methods at the state level, standards for removal are more diverse. See Christopher Reinhart, *Impeachment of State Officials*, OFF. LEGIS. RES. (Feb. 9, 2004), <http://www.cga.ct.gov/2004/rpt/2004-R-0184.htm>; *Methods of Removing State Judges*, AM. JUDICATURE SOC'Y, [http://www.ajs.org/ethics/eth\\_impeachment.asp](http://www.ajs.org/ethics/eth_impeachment.asp) (last visited Mar. 1, 2013).

99. See *United States v. Frega*, 179 F.3d 793, 803 (9th Cir. 1999); *United States v. Castro*, 89 F.3d 1443, 1443 (11th Cir. 1996). For analysis, see Lisa L. Casey, *Class Action Criminality*, 34 J. CORP. L. 153, 205 (2008).

To start, judges maintain wide discretionary authority. Judiciaries at both the state and federal level are vested with the power to say what the law is. Inherent in this delegation is a zone of discretion within which judges are able to accomplish their judicial duty to uphold the rule of law in cases before them.<sup>100</sup> That discretion is conferred through institutional and cultural independence, and a wide range of actions and reasons for action come comfortably within judges' authority. That judges have control over the legal interests of both those who come before them and those whose laws they interpret and apply is true by definition:<sup>101</sup> they can put us in jail, issue judgments against our property and assets, tell us what our constitutional and statutory rights are, and remove our children from us.

Judicial power is also a form of entrustment. Trust enables the relationship between judges and those over whom they rule to function properly, because it is very difficult for those who delegate legal power to judges to monitor and control a judge's exercise of it.<sup>102</sup> Those in whose name judicial power is exercised cannot oversee judicial decision making easily because they lack legal expertise. To the extent that many fiduciaries, such as lawyers, doctors, and corporate directors, are experts of sorts,<sup>103</sup> judges are expected to be experts within their realm. Usually, the people in whose name decisions are announced must take decisions on a kind of faith. Trust is necessary, too, for citizens' willingness to comply with the law in an ongoing fashion.<sup>104</sup>

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100. "Discretionary control" by the state figures prominently in Fox-Decent's important argument for subjecting state officers to fiduciary duties. See Fox-Decent, *supra* note 14 at 294. His argument should be—but hasn't been—extended to judges.

101. It is not necessary at this juncture to specify with any precision the particular limits of the discretionary freedom judges have, nor must we enter the fray in related scholarship about whether judicial appeal to moral and social norms is actually improperly characterized as a form of discretion. See generally MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY* (1982) (exploring judges' wide discretion); Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, 75 COLUM. L. REV. 359 (1975) (exploring the various senses of "discretion" and explaining why the "no discretion thesis" is implausible).

102. Indeed, it isn't clear that we want constant oversight. Even in jurisdictions with partisan elections for judges, no one really envisions that judges are supposed to be subject to constant monitoring on every case. In recent work focusing on legislator accountability (i.e., in a context with electoral oversight), Jane Mansbridge has developed an argument for why we want discretion and independence from those who govern us—even when controlled by direct and relatively frequent elections. See Jane Mansbridge, *A "Selection Model" of Political Representation*, 17 J. POL. PHIL. 369 (2009).

103. See *Burdett v. Miller*, 957 F.2d 1375, 1381 (7th Cir. 1992). Still, many do not appreciate that expertise is not a required qualification of being a fiduciary. See Paul B. Miller, *Justifying Fiduciary Duties*, 58 MCGILL L.J. (forthcoming 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2083855](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2083855).

104. This is a basic insight about governance in MELISSA S. WILLIAMS, *VOICE, TRUST, AND MEMORY: MARGINALIZED GROUPS AND THE FAILINGS OF LIBERAL REPRESENTATION* (1998) and Philip Pettit, *Republican Theory and Political Trust*, in *TRUST AND GOVERNANCE* 295 (Valerie Braithwaite & Margaret Levi eds., 1998). Although conventional political theory has been comfortable with this vision of trust in legislators and administrators, our contribution here is to extend the insight

Finally, the delegation to judges of substantial legal authority to apply or interpret the law leaves citizens vulnerable. Given the power and control judges have over persons, property, assets, liberty, and rights, this vulnerability is unavoidable. We are all vulnerable to judicial decisions that imprison us, take our homes, fine us, take away our drivers' licenses, tell us our constitutions don't mean what we thought they meant, and subject us to other coercive acts.

As the foregoing analysis reveals, the historical judge-as-fiduciary conception rests upon solid philosophical footing, as evidenced by the discretion, trust, and vulnerability implicated by the exercise of judicial authority. In the remainder of this Part, we address some difficulties for and challenges to thinking about judges as fiduciaries. We then turn in Part III to the fiduciary obligations of judges.

### B. Three Challenges

#### 1. Who Are the Beneficiaries?

Before we can usefully apply a fiduciary model to the judicial role, we must identify the beneficiary of the judge's fiduciary entrustment. That identification is nonobvious. When others have considered the judges-as-fiduciaries model, some (including a few judges) have claimed that judges are fiduciaries for class members in class-action lawsuits.<sup>105</sup> This narrow window into the judge's fiduciary status is not where our argument is pointing,

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to the judiciary as well, an extension supported by much of Tom Tyler's work. *See, e.g.*, TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990).

To be clear, trust is not really imagined here as a psychological state or an emotion that a delegating party feels for the judge all the time. Rather, the fiduciary principle's notion of trust is a structural feature of the relationship at issue that facilitates ongoing willingness by a dependent party to abide by the fiduciary's decision. It is often the power itself, once conferred, that renders the beneficiary in a position where she *needs* to trust, even if she is in a psychological state of distrust.

105. *See, e.g.*, Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 279–80 (7th Cir. 2002) (“We and other courts have gone so far as to term the district judge in the settlement phase of a class action suit a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries.”); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1302 (9th Cir. 1994); Grunin v. Int'l House of Pancakes, 513 F.2d 114, 123 (8th Cir. 1975); Greenfield v. Villager Indus., Inc., 483 F.2d 824, 832 (3d Cir. 1973); *In re BankAmerica Corp. Sec. Litig.*, 228 F. Supp. 2d 1061, 1064 (E.D. Mo. 2002); *In re Sunbeam Sec. Litig.*, 176 F. Supp. 2d 1323, 1332 (S.D. Fla. 2001); *In re Bausch & Lomb, Inc. Sec. Litig.*, 183 F.R.D. 78, 82 (W.D.N.Y. 1998); *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 985 F. Supp. 410, 414 (S.D.N.Y. 1997); *Feinberg v. Hibernia Corp.*, 966 F. Supp. 442, 446 (E.D. La. 1997); *In re Quantum Health Res., Inc.*, 962 F. Supp. 1254, 1256 (C.D. Cal. 1997); *In re Gould Sec. Litig.*, 727 F. Supp. 1201, 1203 (N.D. Ill. 1989); Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1122 (1996); Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2168 (2000); William C. Rand, *The Role of the Judge as Protector in Class Action Settlements*, N.Y. L.J., Sept. 24, 2002, at 27; Joseph A. Grundfest, *Attorneys Fees in Class Action Securities Fraud Litigation: A Proposal for Addressing a Problem That Has No Perfect Solution*, Testimony Presented Before the Third Circuit Task Force on Selection of Class Counsel (June 1, 2001) available at <http://www.ca3.uscourts.gov/classcounsel/Witness%20Statements/grundfest2.pdf>. For a rejection of this model, see Casey, *supra* note 16 at 1318–23.

however. Our historical and functional arguments are much broader and suggest an even larger class of citizens requiring fiduciary protection from judges. One needs a wider net to capture all those in the polity who have delegated authority over their legal interests to judges, reposed trust in them, and now remain vulnerable to judicial action. And in contrast to those commentators who consider judges “trustees” for the “corpus of the common law” and proceed to use such a status to derive certain fiduciary obligations of judges to the “corpus,”<sup>106</sup> our argument ties judges’ fiduciary status to those actual citizens who have authorized and delegated power (expressly or not) to them. In other words, in searching out the relevant beneficiary, one should look to an actual relationship. The fiduciary principle is, as we have explained, a rubric for those in relationships of power and vulnerability; for that reason, the “corpus” is an insufficiently relational conception of the relevant beneficiary.

Rather, as our historical and functional analysis demonstrates, the beneficiary whose interests the judge is supposed to be holding in trust is “the people.” But “the people” is a vague and elusive entity that can vary by jurisdiction. In some respects, “the people” exists only as a construction that emerges when representatives of the people make assertions about the interests and will of “the people.” Consider Paul Kahn:

In a modern democratic polity . . . [a] representational claim must be made. That claim must refer to the people. Because the people do not exist as a thing to be measured or consulted apart from the representation, a claim to represent the people is always contestable. One representational claim confronts another; none can be measured against the people itself.<sup>107</sup>

But Kahn’s sometimes-too-constructivist vision—that the people have virtually no opinion, will, or preference to consult prior to a political articulation thereof<sup>108</sup>—is counterbalanced by his acknowledgement that a first principle of democratic government is that the people are “the conceptual

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106. See Sarah M.R. Cravens, *Judges as Trustees: A Duty to Account and an Opportunity for Virtue*, 62 WASH. & LEE L. REV. 1637, 1639–40 (2005).

107. KAHN, *supra* note 6, at 200 (footnote omitted); see also *id.* at 204 (“There is no neutral ground that shows the real people apart from the representation of the people. The people appear only as an object represented. Do we see the people in the authorized representative or in the court’s articulation of the rule of law [itself a representational claim]? Inevitably, we see the people in both. There is always and everywhere conflict.”); *id.* at 206 (“[T]he contest of power in our democratic political order is a struggle among conflicting claims to represent the people. No person or institution is the people. ‘The people’ is an argument, an assertion of power, a claim to rule. The people show themselves in and through a multiplicity of representations. The sovereign people is an object of faith that creates a field of controversial claims of representation. Every such claim provides a point for interpretation. In their total compass they constitute the interpretive debate that characterizes our political life.”).

108. *Id.* at 210 (“The opinion of the Court is to make appear the opinion of the people.”); *id.* at 216 (“The opinion of the people is not a fact to be discovered either through current opinion polls or historical research. There is not independent access to the ‘truth’ that makes an appearance in the opinion. The opinion of the people exists nowhere but in the interstices of the ‘opinion of the Court.’”).

ground of the authority of the judicial opinion” and that they are the “foundation of the legal order.”<sup>109</sup> Accordingly, since “the people” are both the actual ground and foundation for what the judge does, a judge’s opinion can be legitimate only if it plausibly represents the people.<sup>110</sup> The opinion is, surely, a representation. But the purely constructivist vision cannot be right on account of the acknowledged ground and foundation for a legitimate democratic legal order: the people.

Hard as it may seem to engage in the fiduciary representation of a class as large as “the people,” democratic governance calls for nothing less. To say that judges hold the public’s interest in trust is more than mere rhetoric or analogy; the people are their real beneficiaries and judges should conform their conduct to fiduciary standards. To be sure, in the standard case of a federal judge, the American system of life tenure, concealment of authorship in opinions of “the court,” and other design features can depersonalize the judge and render the relationship of representation less visible.<sup>111</sup> Yet it remains clear that the judge is supposed to be representing the people<sup>112</sup>—and representing the people in a fiduciary capacity. Although this form of representation may conflict with our more typical associations of electorally rooted legislative representation, it is equally compatible with conventional democratic theory. Judges speak and apply the law, which is a democratic expression of the people. Judicial representatives have discretion but must always act in the best interests of their beneficiaries.

We present two caveats, by way of further explanation. First, although rendering judges as fiduciaries personalizes the relationship between judge and citizen (as a member of “the people”), the relationship *could* be rendered even more personal by conceptualizing individual litigants as the relevant beneficiaries or, alternatively, by treating litigants as immediate stand-ins for

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109. *Id.* at 211.

110. See also PERETTI, *supra* note 21, at 84 (arguing that even when a judge’s representative capacity is not enforced “via direct election, the link between the value premises of a justice’s selection and then the value premises of her subsequent decisions is significant and consequential and constitutes an indirect form of political representation”).

111. See KAHN, *supra* note 6, at 218.

112. The debate in *Chisom v. Roemer*, 501 U.S. 380 (1991), about whether judges are “representatives” within the meaning of the Voting Rights Act of 1965 is not exactly on point but is still illuminating. The Court in that case—although limiting its holding to *elected* judges—more basically rejected the view of an earlier case, which held that “it was factually false to characterize judges as representatives because public opinion is irrelevant to the judge’s role; the judiciary serves no representative function whatever[;] the judge represents no one.” *Id.* at 389 (internal quotation marks omitted). The Court in *Chisom* ultimately rejected the theory espoused in Justice Scalia’s dissenting opinion, *id.* at 404–17, that “judicial offices are not representative ones, and their occupants are not representatives.” *Id.* at 389 (internal quotation marks omitted). The decision in *Chisom* certainly turned on the relevant judges being elected, but, as we explain *infra* Part II.B.2, elections are not the *sine qua non* of the judges-as-fiduciaries theory.

“the people.”<sup>113</sup> At first glance, both of these approaches have superficial appeal given the duties of impartiality that judges obviously seem to owe litigants, in addition to the clear duty to listen to their arguments and give them full and fair consideration.<sup>114</sup>

But these duties to litigants are not *directly* fiduciary, nor would creating a duty only to litigants be consistent with our democratic theory of the judge. The actual beneficiary really must be considered “the people” more broadly. The litigant benefits from the duty owed to the public (and may herself be able to enforce that duty, having legal standing to complain about a violation),<sup>115</sup> but the judge is bound by her office as a wholesale public trust. The office is not granted and the judicial power is not authorized or delegated at the retail level. When a judge is tasked with approving a settlement between litigants, the judge must vindicate not only the parties’ interests, but also the more general public interest.<sup>116</sup>

Of course, in most cases, judges focus primarily on the litigants before them, not the people at large. But this doesn’t mean they check their duty to the people at the courtroom door. Rather, the duty to the people reaches into every suit: every fair and just adjudication between adverse parties is a way judges serve the people. By discharging her responsibilities fairly and impartially, and upholding the rule of law, the judge serves her beneficiaries. An arbitrator who disposes of a dispute on account of a contract between litigating parties may serve the “law” and have duties to litigants, but arbitrators do not hold the judicial office in a democracy and therefore do not have a responsibility to the people in the way judges do.<sup>117</sup> For this reason, among others, when public judges are too willing to serve as private arbitrators, they provoke outrage.<sup>118</sup>

The second caveat is that in connection with matters of statutory interpretation—and judges do at least as much statutory interpretation as they

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113. The rhetorical device in which the parts stand in for the whole is known as “synecdoche.” Using synecdoche as a representation device in political theory is discussed and critiqued in BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 181–83 (1991). See also Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312 (1997) (arguing that litigants before a court participate in judicial rulemaking and lend legitimacy by acting as interest representatives of subsequent parties that will be bound to those rules).

114. For more on duties to litigants, see *infra* Part III.

115. Thinking about it this way has the salutary effect of empowering litigants who are not actual members of the relevant “people” (whether because they are fictional people like corporations or foreigners) to still vindicate judicial obligations.

116. See *SEC v. Citigroup Global Mkts., Inc.*, 827 F. Supp. 2d 382 (S.D.N.Y. 2011).

117. Thanks to Aditi Bagchi for the suggestion. The status of arbitrators when they have to apply substantive law that incorporates considerations of the public interest—as in, for example, domestic contract law or international border disputes—is an interesting question. But our model aims to focus on officials holding public offices.

118. See, e.g., Randall Chase, *Group Challenges Secret Court Arbitration in Del.*, BOS. GLOBE, Oct. 25, 2011, [http://www.boston.com/news/local/massachusetts/articles/2011/10/25/group\\_challenges\\_secret\\_court\\_arbitration\\_in\\_del/](http://www.boston.com/news/local/massachusetts/articles/2011/10/25/group_challenges_secret_court_arbitration_in_del/).

do constitutional interpretation and common law adjudication<sup>119</sup>—judges’ fiduciary relationship to the people is structured differently than it is in common law and constitutional cases. This variance can be traced to the conventional view that, in interpreting statutes, the judge is considered an *agent* for the legislature<sup>120</sup> and the legislature itself is supposed to be acting in a fiduciary capacity for the people it represents.<sup>121</sup> Although we will discuss some of the consequences of this structure when we turn to specifying the fiduciary obligations of judges in Part III, it suffices to note here that, setting aside the difficulties of serving two masters as a fiduciary,<sup>122</sup> judges cannot abandon their fiduciary relationship with the people on the grounds that other representatives are also supposed to be pursuing the people’s best interests in administering the state. The checks and balances system functions only if each branch takes its full set of fiduciary obligations seriously.<sup>123</sup>

## 2. *Are Elected Judges Different?*

Having clarified the relevant beneficiaries in the judges-as-fiduciaries model, we must examine whether judicial elections at the state level change the analysis. Although much of the historical and practice-oriented analysis above focuses on federal judges whose “independence” from electoral accountability would seem to justify their discretion and require a fiduciary model to reinforce their accountability to citizens, judges are obviously selected in various ways throughout the polity. At the state level, 89% of state judges face some type of election: some face retention elections (42% of appellate judges and 19% of trial-level judges); some face nonpartisan elections (20% of appellate judges and 41% of trial-level judges); and some face partisan elections (33% of appellate judges and 38% of trial-level judges).<sup>124</sup> Although judicial elections have traditionally been assumed to be sleepy, uncompetitive, and low-profile events (with a few notable exceptions, such as the 1986 judicial retention election in California when California voters refused to return three state

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119. See Ethan J. Leib & Michael Serota, Op-Ed., *Don’t Focus Solely on the Constitution*, USA TODAY, July 1, 2010, [http://www.usatoday.com/news/opinion/forum/2010-07-01-leib30\\_ST\\_N.htm](http://www.usatoday.com/news/opinion/forum/2010-07-01-leib30_ST_N.htm).

120. See Merrill, *supra* note 9. For the more sophisticated version that treats judges as “relational agents,” see William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319 (1989).

121. This is the core argument of Leib & Ponet, *supra* note 14.

122. See *In re Estate of Rothko*, 379 N.Y.S.2d 923, 935 (Sup. Ct. 1975) (“[A fiduciary] cannot serve two masters, and if he has a conflict between his duty to his estate and his duty to his corporation, he must resign or seek the direction of the court in advance.”), *modified*, 392 N.Y.S.2d 870 (App. Div.), *aff’d*, 372 N.E.2d 291 (N.Y. 1977). We discussed this issue, *supra* Part I, at text accompanying notes 69–70.

123. We intend to take up this issue in a future paper. See Michael Serota & Ethan J. Leib, *Fiduciary Governance and the Separation of Powers* (forthcoming 2014) (on file with authors).

124. See Roy A. Schotland, *New Challenges to States’ Judicial Selection*, 95 GEO. L.J. 1077, 1104–07 (2007); Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1063–64 (2010).

Supreme Court justices to their offices because of their prior decisions), many recent judicial elections have been highly visible and effective methods for influencing policy, mobilizing issue advocacy, and unseating judges.<sup>125</sup> There is also increasing concern about the potential disappearance of independence in the states' elective judiciaries because of recent campaign finance decisions in federal constitutional law.<sup>126</sup> However one ultimately evaluates the desirability of judicial elections, these selection mechanisms implicate the relevance of the fiduciary model of judging.

From one perspective, state judges subject to elections meaningfully differ from their federal counterparts.<sup>127</sup> Judicial elections help resolve the "countermajoritarian difficulty"<sup>128</sup> of letting presumptively unaccountable federal judges contort laws passed by democratic majorities.<sup>129</sup> State judiciaries are likely more responsive and accountable to majoritarian preferences than are federal judges in the average case,<sup>130</sup> whether or not elections conduce to the

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125. For some reflections on these recent developments, see David E. Pozen, *What Happened in Iowa?*, 111 COLUM. L. REV. 90 (2011); Roy A. Schotland, *Iowa's 2010 Judicial Election: Appropriate Accountability or Rampant Passion?*, 46 CT. REV. 118 (2011); The Schotland piece examines the recent Iowan judicial elections particularly closely and explains important judicial elections in 2010 in Alaska, Colorado, Florida, Illinois, and Kansas. Schotland, *supra*, at 119–20 n.3. A more updated analysis would have to include closely watched judicial elections in Michigan and Wisconsin. But even in 2008, Michigan judicial elections were "politicizing" methods of judicial interpretation. See Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1808–09 (2010). Two of us commented on these developments in Michigan in Leib & Serota, *supra* note 19, at 52 n.16. More importantly, as Pozen astutely notes about the recent judicial elections in Iowa (though the point could be generalized): "[t]he most profound impact of the ouster campaign likely lies not in its visible effects within Iowa but in its invisible . . . effects on courts beyond." Pozen, *supra*, at 98.

126. See, e.g., Joanna J. Weinberg, *Citizens United and Judicial Elections*, RECORDER, June 9, 2011, at 2. For a comprehensive report about the states' reactions to *Citizens United* in the context of judicial elections especially (written for California's Assembly Judiciary Committee), see Carmen Lo et al., Pub. L. Res. Inst., *Spending in Judicial Elections: State Trends in the Wake of Citizens United* (2011), available at <http://gov.uchastings.edu/public-law/docs/judicial-elections-report-and-appendices-corrected.pdf>. Even before *Citizens United*, concern about judges' behavior in light of special interest funding of judicial elections was prevalent. See generally Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623 (2009); Jed Handelsman Shugerman, *The Twist of Long Terms: Judicial Elections, Role Fidelity, and American Tort Law*, 98 GEO. L.J. 1348 (2010).

127. Rhode Island, like the federal government, appoints judges for life.

128. See, e.g., Mark A. Graber, *The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order*, 4 ANN. REV. L. & SOC. SCI. 361, 380 (2008); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002).

129. See Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1157–60 (1999) (summarizing countermajoritarian arguments); Pozen, *supra* note 3, at 324. It is an odd fixation even on the federal side (does anyone really think our legislative representatives are truly representative?), but that is a story for another time.

130. For literature regarding state judiciaries and majoritarian preferences, see generally Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1659–71 (2010); Amanda Frost & Stefanie A. Lindquist, *Countering the Majoritarian Difficulty*, 96 VA. L. REV. 719 (2010); Joanna M. Shepherd, *The Influence of Retention Politics on Judges' Voting*, 38 J. LEGAL STUD. 169 (2009).

perception of judicial legitimacy<sup>131</sup> or actually justify different forms of judicial review.<sup>132</sup> Accordingly, one might reasonably think that the fiduciary model provides a better account of the federal judiciary. That institution, by constitutional design, appears more obviously to be a public trust of power exercised independently and without regularized oversight or accountability. However, as we'll explain below, the fiduciary model captures something true and interesting about both the federal and state judiciaries.<sup>133</sup>

Let us clarify, then, why the idea of fiduciary representation does not preclude judges who are subject to election from being considered fiduciaries. In short, elections do not affect the core indicia of fiduciary status: elected judges are entrusted with discretionary power that renders beneficiaries vulnerable. Although elections provide the beneficiary *some* residual oversight, monitoring still remains quite difficult on account of asymmetrical information and the inequality of expertise between judge-fiduciary and citizen-beneficiary. Bernard Manin's explanation of the logic of political representation is instructive here: elections confer elite status and cannot abrogate the element of superiority in the relationship between democratic leaders and the people they serve.<sup>134</sup> Even elected democratic rulers are fiduciaries, and, therefore, need strict ethical parameters to control their power as fiduciaries. Just as elected

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131. There is both an empirical and normative debate about whether judicial elections reinforce or derogate from the public's perception of the legitimacy of state courts. Compare CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS 17 (2009) (arguing that elections confer legitimacy), and James L. Gibson et al., *The Effects of Judicial Campaign Activity on the Legitimacy of Courts: A Survey-Based Experiment*, 64 POL. RES. Q. 545 (2011) (finding that elections enhance perceived judicial legitimacy), with Sara C. Benesh, *Understanding Public Confidence in American Courts*, 68 J. POL. 697, 704 (2006) (arguing that elections harm perceived legitimacy), and Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995) (arguing that judicial elections are inconsistent with the rule of law and constitutionalism).

132. See Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833 (2001); Hans A. Linde, *The State and the Federal Courts in Governance: Vive la Différence!*, 46 WM. & MARY L. REV. 1273 (2005); Burt Neuborne, *State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881 (1989); Pozen, *supra* note 24, at 2083–86; Mark Tushnet, *Constitutional Interpretation and Judicial Selection: A View from the Federalist Papers*, 61 S. CAL. L. REV. 1669 (1988).

133. Just because all judges are fiduciaries, it does not follow that all will necessarily have the same ethical and interpretive obligations all the time. Compare Bruhl, *supra* note 12 (exploring how different judges may have different interpretive obligations depending on where they are in the judicial hierarchy), with Todd D. Rakoff, *Statutory Interpretation as a Multifarious Enterprise*, 104 NW. U. L. REV. 1559, 1571–72 (2010) (suggesting that norms surrounding judicial interpretation are not affected by selection methods). In a recent paper, one of us explores whether different selection methods could support interpretive divergence. See Aaron-Andrew Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215 (2012). As we've already suggested in Part I, see sources cited *supra* notes 35 & 40, the extent and scope of fiduciary obligation can vary widely among fiduciaries.

134. See BERNARD MANIN, THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT 139–40 (1997) ("It is no accident that the terms 'election' and 'elite' have the same etymology and that in a number of languages the same adjective denotes a person of distinction and a person who has been chosen.").

representatives in the legislative domain should be held to fiduciary obligation, so should judicial representatives.

The classic “voter ignorance” problem that plagues most democratic elections in the legislative context<sup>135</sup> is likely even more severe in judicial elections because a meaningful understanding of judicial competence requires special expertise and professional education. In judicial elections, voters generally lack sufficient legal education and allow single issues to crowd out other important information in evaluating officeholders.<sup>136</sup> Although voters can probably speak relatively clearly about basic social and moral issues, given both the influence of out-of-state interest groups on judicial elections<sup>137</sup> and the reality that many judges have long terms relative to their legislative counterparts,<sup>138</sup> elections do not tell us all we need to know about the success of judicial representation.

Moreover, some judges win office by local, district elections, even though they adjudicate matters that affect state law generally. State citizens affected by those decisions cannot participate in such elections, giving beneficiaries little control over legal interests affecting them. Thus, given the considerable gap

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135. See generally Ilya Somin, *Deliberative Democracy and Political Ignorance*, 22 CRITICAL REV. 253 (2010); Ilya Somin, *Voter Ignorance and the Democratic Ideal*, 12 CRITICAL REV. 413 (1998).

136. For some discussion about the ways in which political parties might ameliorate knowledge deficits, see Ethan J. Leib & Christopher S. Elmendorf, *Why Party Democrats Need Popular Democracy and Popular Democrats Need Parties*, 100 CALIF. L. REV. 69 (2012). The usefulness of party signals suggests that *partisan* elections might actually be more normatively attractive for judicial elections than nonpartisan elections. See Phillip L. Dubois, *Voting Cues in Nonpartisan Trial Court Elections: A Multivariate Assessment*, 18 LAW & SOC'Y REV. 395 (1984); Marsha Matson & Terri Susan Fine, *Gender, Ethnicity, and Ballot Information: Ballot Cues in Low-Information Elections*, 6 STATE POL. & POL'Y Q. 49 (2006); Brian Schaffner et al., *Teams Without Uniforms: The Nonpartisan Ballot in State and Local Elections*, 54 POL. RES. Q. 7 (2001) (finding higher incumbent effects and lower turnout in nonpartisan elections); Gerald C. Wright, *Charles Adrian and the Study of Nonpartisan Elections*, 61 POL. RES. Q. 13, 13–16 (2008) (finding that voters use less principled heuristics in nonpartisan elections). For some evidence that party cues in judicial elections could be effective in getting voters to focus on relevant criteria, see Cindy D. Kam, *Implicit Attitudes, Explicit Choices: When Subliminal Priming Predicts Candidate Preference*, 29 POL. BEHAV. 343, 362–63 (2007) (reporting that party cues in judicial retention elections can eradicate racial bias). But see Richard P. Caldarone et al., *Partisan Labels and Democratic Accountability: An Analysis of State Supreme Court Abortion Decisions*, 71 J. POL. 560, 571 (2009) (finding that state supreme court judges chosen in contested nonpartisan elections track median voter preferences more closely than do judges selected through partisan races); Herbert M. Kritzer, *Change in State Supreme Court Elections: Is Voting Becoming More Partisan?* (Univ. Minn. Law Sch., Working Paper No. 11-29, 2011), available at <http://ssrn.com/abstract=1879952> (arguing that a subset of nonpartisan elections are becoming more partisan). Some recent analysis of this literature can be found in Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, (Univ. Cal., Davis Law Sch., Working Paper No. 285, 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2010115](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2010115).

137. See Nicole Mansker & Neal Devins, *Do Judicial Elections Facilitate Popular Constitutionalism; Can They?*, 111 COLUM. L. REV. 27, 35–36 (2011).

138. See John O. Haley, *The Civil, Criminal and Disciplinary Liability of Judges*, 54 AM. J. COMP. L. 281, 290–91 (2006).

between meaningful accountability and the real practices of elections, understanding judges as fiduciaries can serve an important function. Elections are not an infallible moral touchstone;<sup>139</sup> rather, they reflect only one blunt mechanism for reinforcing one form of democratic control over public officials.

Even if judicial elections produced specific mandates from constituents (and at least some decisions are probably rendered under some majoritarian pressures), the relationship between judges and citizens would still be a fiduciary one. If the state judicial role were more like an *agent* than a *trustee*, the agency relationship is also paradigmatically fiduciary; indeed, the concept of fiduciary representation supervenes over agency and trustee relationships.<sup>140</sup> This is, in part, what is so powerful about using the fiduciary principle to model governance relationships. Some officers are elected and some are not; some are more agency-oriented and some are more trustee-oriented. Yet it is useful to view all through a fiduciary lens. How we ultimately choose to enforce the fiduciary relationship may differ according to whether a relationship is more like an agency or more like a trusteeship,<sup>141</sup> but they are all fiduciary relationships. Agencies—especially judicial agencies that, even when subject to election, do not really take on the character of at-will agencies in which the principal can terminate the relationship without notice<sup>142</sup>—still embed a grant of discretion in the original authorization. Judicial trusteeships, a relatively intuitive way to render the *federal* judiciary, still allow for certain forms of redress (impeachment) against those who act outside their authorizations or engage in trustee malfeasance.

With this explanation of how elected and appointed state and federal judges are properly modeled as fiduciaries, it is now easier to refine further the relevant classes of beneficiaries. From one standpoint, the elected judiciary's service to "the people" might seem to be limited to their immediate constituents. If a judge is elected from the Fond du Lac County Circuit Court in Wisconsin, one way to draw that judge's class of beneficiaries is by looking to the population of Fond du Lac County.<sup>143</sup> After all, Sheboygan, Portage, and Outagamie Counties have their own judicial representatives.<sup>144</sup> And on purely

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139. HENRY S. RICHARDSON, *DEMOCRATIC AUTONOMY: PUBLIC REASONING ABOUT THE ENDS OF POLICY* 34 (2002).

140. This argument is developed in Leib & Ponet, *supra* note 14, at 181–86.

141. See Criddle, *Foundations*, *supra* note 14, at 179 (explaining that "[t]he scope and potency of a fiduciary's duties to beneficiaries is directly related to the vulnerability of beneficiaries," which is, in turn, related to the strength of residual control rights).

142. For the provisions that control dismissal of fiduciaries in private agency and trustee relationships, respectively, see RESTATEMENT (THIRD) OF AGENCY § 3.10 (2006); RESTATEMENT (THIRD) OF TRUSTS § 37 (2003).

143. We'll bracket for now whether "constituents" include those ineligible to vote like incompetents, children, illegal aliens, and felons.

144. For a breakout of Wisconsin judicial elections by county in 2011, see *Wisconsin Judicial Elections, 2011*, JUDGEPEdia (Aug. 8, 2012), [http://judgepedia.org/index.php/Wisconsin\\_judicial\\_elections\\_2011](http://judgepedia.org/index.php/Wisconsin_judicial_elections_2011).

local matters, this might make sense: the relevant “people” would be the citizens of Fond du Lac.

But notice that if an elected judge in Fond du Lac has to decide matters that touch upon the whole state—or the whole country—it no longer makes sense to see her as a fiduciary only for “the people” in Fond du Lac. As a practical matter, that judge would be motivated to pay more careful attention to the preferences and interests of the voting citizens in her home jurisdiction. But her responsibility and fidelity as a fiduciary demands that she also relate to a much broader class of beneficiaries. If the federal Congress passes a law on which she must speak, she cannot protect the public trust by caring only about the interests of her electorate. Any elected state judge hearing a federal case must pursue the interests of “the people” at large, even though that larger class of “the people” did not elect her. This further reveals how elections don’t quite reshape the essential role of the judge as a fiduciary. And just as a state court hearing a federal case will need to expand the relevant class of “the people” protected by fiduciary governance, so too when federal courts hear state law cases, the class of “the people” to whom they must be faithful may also need to contract.<sup>145</sup>

Before turning to an exposition of the general fiduciary obligations that follow from and further buttress our judges-as-fiduciaries model, there is one final challenge to our project that is worth exploring as an introduction to our coming discussion of judicial fiduciary duties in Part III.

### 3. *Do We Need Juridical Accountability for Fiduciaries?*

A plausible reaction to this modeling of the judicial role might be that a core feature of fiduciary law is to create civil causes of action (or the threat of such) for *judicial* enforcement of fiduciary obligations to prevent fiduciary opportunism. In other words, the fiduciary principle seems to be a *juridical* one, which imposes judicially enforceable duties upon those who undertake fiduciary administration or representation.<sup>146</sup> If this picture is basically right, it is odd to subject judges to fiduciary obligations, since they are usually tasked with enforcing others’ fiduciary duties and enjoy absolute immunity from civil liability for all acts taken in their judicial roles.<sup>147</sup>

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145. For some evidence that regional factors have influence on federal district court decision making, see, for example, C.K. ROWLAND & ROBERT A. CARP, *POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS* 58–116 (1996). And for much more careful attention to complexities associated with “cross-over cases” (when judges selected by one constituency have to interpret and apply law produced by the representatives of another), see Bruhl & Leib, *supra* note 133, at Part IV.C.

146. Miller explores this idea, *supra* note 103, manuscript at 46–67.

147. See, e.g., *Mireles v. Waco*, 502 U.S. 9, 11 (1991); *Stump v. Sparkman*, 435 U.S. 349, 356–57 (1978); *Alzua v. Johnson*, 231 U.S. 106, 111 (1913); *Randall v. Brigham*, 74 U.S. (7 Wall.) 523, 538 (1868). Much turns on whether an act is classified as judicial. See Peter H. Schuck, *The Civil Liability of Judges in the United States*, 37 AM. J. COMP. L. 655, 664 (1989). We discuss how these

But viewing fiduciary principles as solely juridical constructs is misleading in two ways. First, fiduciary law is not constructed only to effectuate direct judicial review over fiduciary actions. Rather, the reinforcement of the fiduciary principle through law is just one way to signal and frame the more basic moral norms that the relationship triggers and that the law recognizes. As a general matter, we tend to see large-scale compliance with private fiduciary obligations because the norms are so deeply rooted and function mostly extrajudicially.<sup>148</sup> To be sure, fiduciary law applies when a fiduciary defaults; but imperfect enforcement is common and expected because it is widely assumed that fiduciary relations will fail if legal micromanaging is excessive.<sup>149</sup>

Second, even without direct civil actions, the legal system can impose fiduciary constraints on judges. Impeachments are the most direct—and juridical—methods of enforcing fiduciary constraints against judges. In the federal system, the Senate sits as a court of impeachment and can use fiduciary standards for evaluating whether to convict and strip judges of their offices.<sup>150</sup> Criminal actions against judges, adjudicated by other judges, are available for substantial fiduciary malfeasance.<sup>151</sup> In the jurisdictions that elect, recall, or vote on whether to retain judges, these elections may very well be understood as a means (albeit an imperfect one) of enforcing fiduciary standards against judges. In such a rendering, the fiduciary principle is made “law” through a portion of “the people” expressing their judgment at the ballot box. Commissions, whether judicial or legislative, also oversee, investigate, and discipline sitting judges;<sup>152</sup> judicial performance evaluations, undertaken by nineteen states (plus the District of Columbia and Puerto Rico), are also used to supervise judges.<sup>153</sup> All of these formalized mechanisms for framing and reinforcing judicial fiduciary obligations augment more “informal” reputational sanctions that are common in policing judicial conduct.<sup>154</sup> And all of these methods of keeping judges accountable can utilize fiduciary obligations as

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immunities might actually be considered consistent with the standard private duty of care, *infra* Part III.A.2.

148. For this general argument, see Leib, *supra* note 30 at 685–86; Lynn A. Stout, *On the Export of U.S.-Style Corporate Fiduciary Duties to Other Cultures: Can a Transplant Take?*, in GLOBAL MARKETS, DOMESTIC INSTITUTIONS: CORPORATE LAW AND GOVERNANCE IN A NEW ERA OF CROSS-BORDER DEALS 46, 47–48, 65 (Curtis J. Milhaupt ed., 2003).

149. See Leib & Ponet, *supra* note 14, at 192.

150. On using fiduciary standards in impeachment proceedings, see Rogers & Young, *supra* note 15.

151. See Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 464 (2004).

152. For a review of these, see Haley, *supra* note 138, at 288–90.

153. See Penny J. White, *Using Judicial Performance Evaluations to Supplement Inappropriate Voter Cues and Enhance Judicial Legitimacy*, 74 MO. L. REV. 635, 652–57 (2009); Rebecca Love Kourlis & Jordan M. Singer, *Using Judicial Performance Evaluations to Promote Judicial Accountability*, 90 JUDICATURE 200 (2007).

154. See Charles Gardener Geyh, *Informal Methods of Judicial Discipline*, 142 U. PA. L. REV. 243 (1993).

baselines to evaluate, assess, and monitor for breaches of fiduciary obligation. These retrospective enforcement mechanisms can also be supplemented by using fiduciary ethical standards to assess an individual's worthiness to hold judicial office in the first place. Fiduciary standards are useful benchmarks for more productive confirmation hearings, for more proper judicial election rhetoric, and for appointments vetting.

### III.

#### JUDGES' FIDUCIARY OBLIGATIONS

Having established the basic fit of the fiduciary model for judges in our governance system in the previous Part, we now explore some practical ramifications. In so doing, we specify the conventional fiduciary duties and then translate what they mean for judges. Although the specific application of these duties may vary according to a judge's particular circumstances, the set of judicial fiduciary duties that follow are widely applicable to all judges. From the most basic aspects of judging, such as judicial impartiality, immunity from civil liability, and legal research and opinion writing, to more provocative areas of inquiry such as judicial ethics and the relevance of public opinion in controversial cases, the fiduciary model illuminates the judge's role in American democracy.

We proceed first by applying the basic fiduciary duties to the judge: the duties of loyalty, care, and a cluster of duties including candor, disclosure, and accounting.<sup>155</sup> We then expand outward to explore a fiduciary command particular to those in public office: the duty of deliberative engagement.<sup>156</sup> The exploration in this Part reveals the extent to which the judge-as-fiduciary model is already reflected in current judicial practices. And it also suggests some areas where we might take the model more seriously in thinking about how to regulate judges and how judges should behave.

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155. One of us has already done the work of collecting cites and elaborating on this area of law. See Leib, *supra* note 30, at 673–78. We draw from that article to introduce the relevant duties here. In this context, we largely leave to one side the fiduciary “duty of good faith,” which might be seen as a subset of the duty of loyalty. See, e.g., Stephen M. Bainbridge et al., *The Convergence of Good Faith and Oversight*, 55 UCLA L. REV. 559, 582–88 (2008); Letter from Deborah A. DeMott to Ethan J. Leib 2 (Sept. 12, 2007) (on file with author) (“My reading of these cases [*Stone v. Ritter*, 911 A.2d 362 (Del. 2006) and *In re the Walt Disney Co. Shareholder Derivative Litigation*, 906 A.2d 27 (Del. 2006)] is that they treat the duty of good faith as a subset of the duty of loyalty, clarifying that a director’s duty of loyalty encompasses more than the negative duty to refrain from unconsented-to self-dealing.”). For potential lessons from the fiduciary duty of good faith, see STEVEN J. BURTON, *JUDGING IN GOOD FAITH* (1992).

156. Two of us have already explained how the fiduciary duties for public officials amount to a command of deliberative engagement. See Leib & Ponet, *supra* note 14, at 188–92; Ponet & Leib, *supra* note 22, at 1256–61. We will expand this argument to judges in what follows and draw from those articles to set up the argument for deliberative engagement as a fiduciary duty.

### A. The Basic Fiduciary Duties

Once two parties establish a fiduciary relationship, the fiduciary becomes subject to a standard set of legal obligations. These obligations are designed to ensure compliance with relational expectations through some measure of deterrence.<sup>157</sup> Although the application of the set of duties that apply to any given fiduciary relationship varies widely,<sup>158</sup> the main duties can generally be sorted under three headings: (1) the duty of loyalty, (2) the duty of care, and (3) the cluster comprising the duties of candor, disclosure, and accounting. In this Section, we briefly introduce each, and then translate what each obligation entails for fiduciary judges.

#### 1. Duty of Loyalty

The core fiduciary duty, applicable to all fiduciaries, is the *duty of loyalty*. Loyalty, properly understood in the fiduciary context, amounts to a duty of unselfishness. As Professor Lynn Stout observes, “The keystone of the duty of loyalty is the legal obligation that the fiduciary use her powers not for her own benefit but for the exclusive benefit of her beneficiary.”<sup>159</sup> The fiduciary is prohibited from engaging in self-interested transactions and is required to pursue the interests of her beneficiary above her own.<sup>160</sup> So “inflexible” is the duty of loyalty that it requires a fiduciary to be “undivided” and “undiluted” in her faithfulness.<sup>161</sup>

Translating the duty of loyalty from the private law to public adjudication requires little effort, at least initially. The idea that judges ought to be loyal to the citizenry is uncontroversial; their loyalty to their beneficiaries can be neatly translated into a requirement that they remain impartial to the litigants before them.<sup>162</sup> Indeed, judicial loyalty and impartiality is the cornerstone of the ethical commitment of judges, both historically and in the contemporary ethical rules governing judges.

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157. See Deborah A. DeMott, *Disloyal Agents*, 58 ALA. L. REV. 1049 (2007).

158. See Smith, *supra* note 26, at 1483–84.

159. Stout, *supra* note 148, at 55.

160. *E.g.*, Bayer v. Beran, 49 N.Y.S.2d 2, 5 (Sup. Ct. 1944) (“The concept of loyalty, of constant, unqualified fidelity, has a definite and precise meaning. The fiduciary must subordinate his individual and private interests to his duty . . . whenever the two conflict.”); RESTATEMENT (SECOND) OF AGENCY § 387 (describing a fiduciary’s duty “to act solely for the benefit of the principal in all matters connected with his agency”).

161. Birnbaum v. Birnbaum, 539 N.E.2d 574, 576 (N.Y. 1989).

162. Notice that the duty of loyalty is generally owed to beneficiaries, but impartiality to the relevant litigants is the most common way to “perform” the duty. Still, the duty of loyalty proper is owed to beneficiaries who are not litigants. *Cf.* FOX-DECENT, *supra* note 14, at 163 (indicating that a judge’s fiduciary obligation includes impartiality); Solum, *supra* note 17, at 186 (exploring how the vice of judicial corruption is “not reducible to our concern that litigants get their due”). See generally Matthew Conaglen, *Public-Private Intersection: Comparing Fiduciary Conflict Doctrine and Bias*, 2008 PUB. L. 58 (2008) (elaborating on what the author treats as an analogy between fiduciary doctrine about conflicts of interest and judicial bias).

For centuries, the paradigmatic judicial figure has been one of an impartial arbiter dedicated to upholding the rule of law<sup>163</sup>—a conception that is also deeply embedded within the American constitutional tradition.<sup>164</sup> The U.S. Supreme Court “has long recognized that the constitutional guarantee of due process may require recusal of judges holding an interest in the outcome of a case.”<sup>165</sup> Most recently, in *Caperton v. A.T. Massey Coal Co.*, the Court went one step further by holding that even the “potential for bias”—that is, not bias in fact, but a “serious risk of actual bias—based on objective and reasonable perceptions” violates the Due Process Clause.<sup>166</sup> This holding derives from the foundational principle that “[j]udicial integrity is . . . a state interest of the highest order.”<sup>167</sup>

It is no surprise, then, that the first canon in the Code of Conduct for United States Judges announces the judge’s fiduciary obligation of impartiality: “An independent and honorable judiciary is indispensable to justice in our society. A judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved.”<sup>168</sup> Canon 3 reinforces the

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163. See, e.g., MAGNA CARTA para. 29 (“To no-one will we sell . . . justice.”); *Deuteronomy* 16:19 (noting Moses’ instruction to Israel’s tribal judges not to “take a gift; for a gift doth blind the eyes of the wise, and pervert the words of the righteous”); Richard M. Esenberg, *If You Speak Up, Must You Stand Down: Caperton and Its Limits*, 45 WAKE FOREST L. REV. 1287, 1287 (2010) (citing THE VISIGOTHIC CODE bk. II, tit. I, para. XIX, at 28 (S.P. Scott ed. & trans., 1910) (“The Lex Visigothorum . . . required that judges who had ruled falsely due, not to ignorance, but to partiality, cupidity, or for the sake of profit would be required to make restitution to the wronged party.”)); Rick Haselton, *Of Judging and Judaism*, 15 LEWIS & CLARK L. REV. 483, 485 (2011) (noting that in Jewish law it is well established that judges must be “incorruptible, and independent”); Thomas Regnier, *Restoring the Founders’ Ideal of the Independent Jury in Criminal Cases*, 51 SANTA CLARA L. REV. 775, 777 (2011) (noting the ancient legal maxim *nemo debet esse iudex in propria causa*—that no one should be judge in his own cause).

164. See, e.g., THE FEDERALIST NO. 10, at 49 (James Madison) (Ian Shapiro ed., 2009) (“No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.”); John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 615 (1947) (“Supreme Court Justices have from the earliest times disqualified themselves in cases involving direct pecuniary interest.”); Stanley A. Leasure, *Cash Justice and the Rule of Law: Post-Caperton Financing of Judicial Elections*, 46 IDAHO L. REV. 619, 642 (2010) (“The courts have long recognized the impartiality of the judiciary as one of the cornerstones of our system of justice.”).

165. Esenberg, *supra* note 163, at 1288; see, e.g., *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 817–19, 820–25 (1986) (holding the Due Process Clause was violated where state supreme court justice sat on a case while being a lead plaintiff in similar case pending in state lower court); *Ward v. Vill. of Monroeville*, 409 U.S. 57, 57–62 (1972) (finding a Due Process Clause violation where mayor in charge of revenue production and law enforcement presided over petitioner charged with traffic offenses, the funds of which, if paid, would go to fund the city); *Tumey v. Ohio*, 273 U.S. 510, 514–20, 531–32 (1927) (holding the Due Process Clause was violated where a mayor presided as judge while receiving payment from fines he imposed).

166. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 884 (2009).

167. *Id.* at 889 (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring)).

168. CODE OF CONDUCT FOR U.S. JUDGES Canon 1 (2009), available at <http://www.uscourts.gov/RulesAndPolicies/CodesOfConduct/CodeConductUnitedStatesJudges/CodeOfConduct.aspx>. The reader should not confuse the references in the Code to the fiduciary as pertaining to our discussion

view of the judge as a fiduciary subject to the duty of loyalty by emphasizing the importance of judges' remaining "impartial" and "faithful."<sup>169</sup> (The umpire metaphor—controversies aside<sup>170</sup>—reflects this basic idea.) And the rules governing state judges are similar.<sup>171</sup> The fiduciary judge's duty of loyalty, accordingly, is deeply embedded in the American conception of the judicial role.

And yet, the fiduciary duty of loyalty not only confirms what we already know about judges, it also reveals where we fail to take impartiality seriously enough. Take, for example, the recent controversy over judicial ethics at the Supreme Court. Currently, the Judicial Code of Conduct is applicable to all federal judges *except* Supreme Court Justices. No binding rules mandate when individual Justices must recuse themselves from cases.<sup>172</sup> Thus, whereas the self-imposed recusal decisions of state court judges and lower federal court judges are ultimately subject to Supreme Court review, no formal review procedure exists for Supreme Court Justices' recusal decisions.<sup>173</sup> Taking the fiduciary model—and its attendant command of impartiality—seriously, however, would likely require that Supreme Court Justices be subject to some recusal rules.<sup>174</sup> The fiduciary's duty of loyalty requires the utmost integrity and lack of bias, regardless of place in the judicial hierarchy.

Another area in which the fiduciary duty of loyalty suggests that the polity is not taking impartiality sufficiently seriously is in the context of the judicial

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here: the Code explicitly discusses when judges take on fiduciary roles outside of their judicial role and we focus here on the fiduciary character of judicial activities. *See also* ABA MODEL CODE OF JUDICIAL CONDUCT PmbL. (2007) ("An independent, fair and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law. 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.") (emphasis added).

169. CODE OF CONDUCT FOR U.S. JUDGES Canon 3 (2009).

170. *See* Aaron S.J. Zelinsky, *The Justice as Commissioner: Benching the Judge-Umpire Analogy*, 119 YALE L.J. ONLINE 113, 119–20 (2010), <http://yalelawjournal.org/2010/03/03/zelinsky.html>.

171. As Professor Stanley A. Leasure explains, "state codes typically parallel the American Bar Association's Model Code of Judicial Conduct." *See* Leasure, *supra* note 164, at 640.

172. *See* Smith, *supra* note 2; *see also* Jones, *supra* note 2 ("Supreme Court justices make up their own rules on recusal—or when they should have to step down from a case due to a perceived conflict. In other words, they don't have to answer to anyone.")

173. *See* Letter to Judiciary Comm., *supra* note 2. However, when Justice Scalia chose not to recuse himself from *Cheney v. U.S. District Court*, 542 U.S. 367 (2004), notwithstanding a friendship with Cheney, Justice Scalia did, in fact, issue a written memorandum explaining his controversial decision. *See* *Cheney v. U.S. District Court*, 541 U.S. 913, 915–16 (2004) (Scalia, J., mem.).

174. For potential frameworks, *see* Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L.J. 657 (2005); Caprice L. Roberts, *The Fox Guarding the Henhouse?: Recusal and the Procedural Void in the Court of Last Resort*, 57 RUTGERS L. REV. 107 (2004); Noah M. Schubert, *Replacement Justice on the United States Supreme Court: The Use of Temporary Justices to Resolve the Recusal Conundrum*, 46 U.S.F. L. REV. 215, 217 (2011).

recusal standards governing elected state court judges. As James Sample and David E. Pozen have pointed out, “Of the emerging threats to judicial impartiality and the appearance of impartiality, perhaps most fundamental is the influence of money.”<sup>175</sup> The following statistics make this point clearly enough: a recent nationwide study, conducted by Joanna Shepherd, analyzed more than 28,000 state supreme court opinions from 1995 to 1998 and revealed a correlation between campaign contributions and judicial outcomes.<sup>176</sup> Specifically, Shepherd’s work found that “in partisan elections, contributions from various interest groups have a statistically significant relationship with the probability that judges vote for litigants that the interest groups favor.”<sup>177</sup> Similarly, another study, conducted by Chris Bonneau and Damon Cann, found that campaign contributions affected the outcome of cases in the Michigan and Texas state supreme courts.<sup>178</sup> Furthermore, a *New York Times* study of Ohio Supreme Court decisions, which took place over the course of a twelve-year period, found that Ohio justices resolved cases in favor of those who contributed to their campaign 70 percent of the time.<sup>179</sup> Finally, a study conducted on Alabama Supreme Court decisions from 1995 to 1999 found a close relationship between judges’ votes in a class of arbitration cases and the source of judges’ campaign funds.<sup>180</sup> As one state appellate judge skeptical of campaign contributions rhetorically asks: “Can a judge accept campaign contributions from attorneys or litigants with cases pending or likely to come

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175. James Sample & David E. Pozen, *Making Judicial Recusal More Rigorous*, 46 JUDGES J. 17, 17 (2007).

176. Shepherd, *supra* note 126, at 628.

177. *Id.* at 669. Lest one think campaign money is merely following preexisting policy positions rather than that policy positions are shifting to generate campaign money, Shepherd’s study highlights that retiring and nonretiring judges show different patterns. As she observes, “[I]f the relationship [between judges’ votes in favor of litigants favored by interest groups and campaign contributions from those groups] was due merely to the campaign contributions permitting the election of a higher proportion of judges who naturally already vote the way that the interest groups prefer, then campaign contributions should have the same relationship with the voting of all judges, whether retiring or not.” *Id.* at 674. But the relationship holds only for nonretiring judges, who still need campaign funding. *Id.* at 673 (“[M]ost interest group contributions have no systematic relationship with the voting of retiring judges.”).

178. Chris W. Bonneau & Damon M. Cann, *The Effect of Campaign Contributions on Judicial Decisionmaking*, 19 (Feb. 4, 2009) (unpublished manuscript), available at [http://ssrn.com/abstract\\_id=1337668](http://ssrn.com/abstract_id=1337668). In Bonneau and Cann’s study, the state of Nevada *did not* reveal a similar connection between campaign contributions and case outcomes. But as they point out, this was at least partly because Nevada has a nonpartisan judicial election system, whereas Texas and Michigan employ a partisan election system. For a more comprehensive argument defending judicial elections and finding relatively little empirical support for the notion that people are able to “buy justice” or that partisan elections derogate from judicial legitimacy, see BONNEAU & HALL, *supra* note 131.

179. Sample & Pozen, *supra* note 175, at 18 (citing Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court’s Rulings*, N.Y. TIMES, Oct. 1, 2006, at A1).

180. *Id.* (citing Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 30 CAP. U. L. REV. 583, 584 (2002)).

before the judge without at least subconsciously compromising his or her impartiality?”<sup>181</sup> Based on the foregoing research, the answer seems to be “no.”

Public polling data similarly reveal how campaign contributions in judicial elections can detrimentally impact public attitudes toward our legal system—and along these lines, recall that trust is an essential component within the fiduciary architecture. As legal ethicist Keith Swisher highlights, over a decade of opinion polling demonstrates that “a supermajority of voters, lawyers, and even judges believe that campaign contributions influence judges’ decisions.”<sup>182</sup> A range of studies reveals that at least 70 percent of voters believe that campaign contributions influence the manner in which judges decide cases.<sup>183</sup> And in a 2002 judicial survey, 26 percent of 2,428 state trial, appellate, and supreme court judges reported that campaign contributions have at least “some influence” on judges’ decisions, while 46 percent said contributions have at least “a little influence.”<sup>184</sup> The same survey also found that more than half of all judges believed that “judges should be prohibited from presiding over and ruling in cases when one of the sides has given money to their campaign.”<sup>185</sup> Another 2004 survey, administered to New York state judges, found that approximately 45 percent of respondents reported that “campaign contributions influence judicial decisions to some degree,” while nearly 60 percent reported that campaign contributions reasonably cast doubt on a judge’s impartiality.<sup>186</sup> In short, there is real public concern about judicial partiality.

Yet in the face of such evidence, the rules governing recusal remain surprisingly weak. In many jurisdictions, elected judges rule on their own disqualification and recusal challenges; state court litigants face significant

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181. Haselton, *supra* note 163, at 488.

182. Keith Swisher, *Legal Ethics and Campaign Contributions: The Professional Responsibility to Pay for Justice*, 24 GEO. J. LEGAL ETHICS 225, 238 (2011).

183. *Id.* (citing ROSNER RESEARCH INC., JUSTICE AT STAKE: FREQUENCY QUESTIONNAIRE 4 (2001), available at [http://www.justiceatstake.org/media/cms/JASNationalSurveyResults\\_6F537F99272D4.pdf](http://www.justiceatstake.org/media/cms/JASNationalSurveyResults_6F537F99272D4.pdf); Press Release, Justice at Stake, Poll: Huge Majority Wants Firewall Between Judges, Election Backers (Feb. 22, 2009), available at [http://www.justiceatstake.org/newsroom/press\\_releases.cfm/poll\\_huge\\_majority\\_wants\\_firewall\\_between\\_judges\\_election\\_backers?show=news&newsID=5677](http://www.justiceatstake.org/newsroom/press_releases.cfm/poll_huge_majority_wants_firewall_between_judges_election_backers?show=news&newsID=5677); ANNENBERG PUB. POLICY CTR., PUBLIC UNDERSTANDING OF AND SUPPORT FOR THE COURTS 3 (2007), available at [http://www.annenbergpolicycenter.org/Downloads/20071017\\_JudicialSurvey/JudicialFindings\\_10-17-2007.pdf](http://www.annenbergpolicycenter.org/Downloads/20071017_JudicialSurvey/JudicialFindings_10-17-2007.pdf); James L. Gibson & Gregory Caldeira, *Judicial Impartiality, Campaign Contributions, and Recusals: Results from a National Survey* (5th Annual Conference on Empirical Legal Studies Paper, July 16, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1641272](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1641272)).

184. *Id.* at 239 (citing GREENBERG QUINLAN, ROSNER RESEARCH INC., JUSTICE AT STAKE—STATE JUDGES FREQUENCY QUESTIONNAIRE 5 (2002), available at [http://www.justiceatstake.org/media/cms/JASJudgesSurveyResults\\_EA8838C0504A5.pdf](http://www.justiceatstake.org/media/cms/JASJudgesSurveyResults_EA8838C0504A5.pdf)); Stuart Banner, Note, *Disqualifying Elected Judges from Cases Involving Campaign Contributors*, 40 STAN. L. REV. 449, 463–66 (1988).

185. Swisher, *supra* note 182, at 239–40.

186. *Id.* at 240 (citing Press Release, N.Y. State Unified Court System, Commission Charged with Scrutinizing Judicial Elections Practices in New York Proposes Landmark Reforms (June 29, 2004), available at [http://www.courts.state.ny.us/press/pr2004\\_14\\_1.shtml](http://www.courts.state.ny.us/press/pr2004_14_1.shtml)).

barriers in seeking campaign disclosure information; state court judges rarely, if ever, have an enforceable obligation to disclose such information; and appellate courts review recusal and disqualification decisions generally under an abuse-of-discretion standard, which “has essentially cut appellate courts out of the picture.”<sup>187</sup>

With this in view, we think that the duty of impartiality demanded by the fiduciary model requires some basic reforms in the recusal process. Consistent with Sample and Pozen’s recent recommendations, judges should probably be required to “transfer disqualification motions immediately to a colleague chosen by a presiding judge or the chief judge,” to disclose at the outset of litigation “any facts that might reasonably be construed as bearing on the judges’ impartiality,” and to apply a “per se rule for campaign contributors,” such as the ABA Canon 3E(1)(e), which requires disqualification “whenever a party, a party’s lawyer, or a party’s lawyer’s law firm has given the judge aggregate contributions above a certain amount, within a certain time period.”<sup>188</sup> Whatever the precise reform package, the judge-as-fiduciary model requires the adoption of laws that will ensure state judges remain impartial and uphold their duty of loyalty to the beneficiaries they serve.

## 2. Duty of Care

The second core fiduciary duty is the *duty of care*,<sup>189</sup> which generally requires reasonable diligence and prudence.<sup>190</sup> Although the duty seemingly requires little more than avoiding negligence,<sup>191</sup> most concede that it entails *affirmative* obligations (unlike the mostly prohibitive duty of loyalty), requiring reason-based decision making.<sup>192</sup> Still, fiduciaries are afforded substantial discretion in performing their responsibilities (the “business judgment rule” is the most famous grant of discretion within the duty of care analysis<sup>193</sup>);

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187. Sample & Pozen, *supra* note 175, at 22.

188. *Id.* Sample and Pozen also recommend that “all judges who rule on a disqualification motion—whether for themselves or for their colleagues—should be required to explain their decision in writing.” *Id.* We think that is also consistent with judges’ fiduciary obligation, though we would probably classify such a reporting duty within the duty to account, *infra* Part III.A.3.

189. *See generally* Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985) (holding that directors of corporations have a duty of care to their shareholders); ROBERT CHARLES CLARK, CORPORATE LAW 123–36 (1986) (describing the duty of care in corporate law).

190. *See* Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2420 (1995).

191. Thus some claim that the duty of care is not distinctively fiduciary after all. *See* Smith, *supra* note 26, at 1409.

192. *See* Bayer v. Beran, 49 N.Y.S.2d 2, 5 (Sup. Ct. 1944); Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045, 1047, 1049 & n.8, 1062 (1991).

193. *See generally* Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83 (2004) (explaining the business judgment rule).

recklessness and gross negligence tend to be the standards as a matter of practice.<sup>194</sup>

Like the duty of loyalty, the duty of care is already a part of how we understand the judicial role. We surely expect judges to fulfill their responsibilities with reasonable diligence and prudence and to engage in reason-based decision making, while giving reasons for their decisions.<sup>195</sup> The duty of care incorporates judges' responsibility to say what the law is and to provide justice to litigants. Judges resolve disputes between litigating parties, and they are required to execute that job with care, drawing their decisions from well-founded authorities consistent with the rule of law. Although litigants are not the direct beneficiaries of judges (as we explained in Part II.B.1), they benefit when judges resolve cases fairly and in accordance with the rule of law. Canon 3 of the Code of Conduct for United States Judges, which directly instructs judges to "diligently discharge" certain responsibilities and to "maintain professional competence" in their adjudicative and administrative responsibilities, describes the basic duty of care.<sup>196</sup>

We also know well that judges have wide discretion in performing their duties of care, consistent with a translation of the "business judgment rule," as applied to judicial business. This wide discretion serves well to explain the robust immunities from civil liability judges enjoy within the scope of their jobs,<sup>197</sup> irrespective of how they are chosen or retained. To be sure, it is often thought that the business judgment rule exists to enable risk taking by a corporation's management. But there is a corollary in judicial business: wide discretion may enable judicial innovation by encouraging risk taking by judges. Although matters of law are generally reviewable *de novo*, much review at the highest courts is discretionary rather than mandatory, so many lower court experiments stand even on matters of law; on matters of fact, of course, lower courts receive considerable deference.

The duty of care not only confirms our model of judges as fiduciaries, but it also directs our attention to at least one provocative area of reform. Beyond demanding comprehensive and competent legal research, writing, and

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194. See Scott & Scott, *supra* note 190, at 2423–24 (discussing the "business judgment rule," a presumption that corporate directors exercise due diligence, their fiduciary duties notwithstanding).

195. See, e.g., Finn, *Public Trust*, *supra* note 14, at 233 (discussing the public's "right to reasons" as a fiduciary obligation); Alon Harel & Tsvi Kahana, *The Easy Core Case for Judicial Review*, 2 J. LEGAL ANALYSIS 227, 249 n.23 (2010). There is an extensive literature about when and how judges may rely on religious "reasons" in their decision making—and the more general intersection between public reason and private conscience. See, e.g., KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS (1995). We don't mean to intervene in that debate here. We are making the more pedestrian point that we expect judges not to be arbitrary or capricious. The notion of that requirement as a function of fiduciary obligation is explored in Fox-Decent, *supra* note 14, at 266.

196. CODE OF CONDUCT FOR U.S. JUDGES Canon 3 (2009).

197. For a review of judicial immunity rules and practices in the United States, see Haley, *supra* note 138, at 183–87; Jeffrey M. Shaman, *Judicial Immunity from Civil and Criminal Liability*, 27 SAN DIEGO L. REV. 1, 1–2 (1990).

supervision over litigation—things we already expect from judges—the duty of care may raise important questions about the role that law clerks play within chambers.<sup>198</sup> Fiduciaries’ ability to delegate their fiduciary responsibilities to others with much less expertise has real limits.<sup>199</sup> The judge-as-fiduciary model may therefore suggest that judges take more responsibility for drafting their own opinions.<sup>200</sup> Of course, the flexibility of the model will permit considerations of docket management and the practicalities of running an office. But the duty of care draws our attention to a basic feature of the relational commitment judges, rather than their charges, owe the public; it cannot be easily delegated away to those with substantially less experience and accountability.

### 3. *Duties of Candor, Disclosure, and Accounting*

Beyond the two core fiduciary duties of care and loyalty are a cluster of duties—the duties of candor, disclosure, and accounting<sup>201</sup>—that are routinely associated with fiduciary obligation. These duties may take the form of requiring doctors as fiduciaries to disclose their personal financial interests to their patients (even when those interests are “unrelated to the patient’s health”)<sup>202</sup> or they may take the form of a more general “accounting” requirement,<sup>203</sup> which demands accurate bookkeeping to enable a beneficiary to hold the fiduciary accountable. This cluster of duties improves the monitoring process, which can often be limited in ensuring compliance.

When applied to the judge as a fiduciary, the duties of disclosure and accounting accord with our basic expectation of judicial transparency.

198. See Alex Kozinski, *The Real Issues of Judicial Ethics*, 32 HOFSTRA L. REV. 1095, 1100 (2004) (noting that he has occasionally seen opinions that look as though they were written entirely by someone one year out of law school); Richard A. Posner, *The Material Basis of Jurisprudence*, 69 IND. L.J. 1, 29 (1993) (“Today . . . the vast majority of judicial opinions at all appellate levels are drafted by law clerks . . . [Only a] tiny and shrinking minority of old-fashioned appellate judges . . . continue to write their own opinions . . .”).

199. See FRANKEL, *supra* note 54, at 130–31 (explaining the “duty not to delegate fiduciary duties”).

200. There is a large literature about this subject. For a recent re-visiting of this issue, see Stephen J. Choi & G. Mitu Gulati, *Which Judges Write Their Opinions (and Should We Care)?*, 32 FLA. ST. U. L. REV. 1077 (2005); David McGowan, *Judicial Writing and the Ethics of the Judicial Office*, 14 GEO. J. LEGAL ETHICS 509, 555–67 (2001). Our purpose here is only to suggest that the role of judges as fiduciaries puts a thumb on the scales in this debate.

201. See *Jordan v. Duffs & Phelps, Inc.*, 815 F.2d 429, 435–36 (7th Cir. 1987) (enforcing a fiduciary duty of disclosure); *Libby v. L.J. Corp.*, 247 F.2d 78, 81 (D.C. Cir. 1957); *Wendt v. Fischer*, 154 N.E. 303, 304 (N.Y. 1926) (“[D]isclosure . . . must lay bare the truth, without ambiguity or reservation, in all its stark significance.”); Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 882 (1988) (arguing that fiduciaries “must be candid”); Frankel, *supra* note 29, at 814.

202. See *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 483 (Cal. 1990).

203. See *Rosenthal v. Rosenthal*, 543 A.2d 348, 352 (Me. 1988); *Herring v. Offutt*, 295 A.2d 876, 879 (Md. 1972); AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS* 452 (4th ed. 1987).

According to the Code of Conduct for United States Judges, for example, judges must disclose the receipt of “gifts and other things of value.”<sup>204</sup> Underlying these rules and similar state law regulations is the basic principle that judges as fiduciaries are subject to disclosure and accounting demands. The fiduciary duty of candor similarly reflects—while also helping to better orient—our understanding of judicial honesty. The idea that judges ought, in general terms, to be honest is intuitive and uncontroversial. The contours of that command, however, have been the locus of some recent controversy—a controversy we think fiduciary principles can help to illuminate.<sup>205</sup>

A full-fledged rehearsal of the entire debate over judicial candor—there are many arguments for<sup>206</sup> and against<sup>207</sup>—is beyond the scope of this Essay. But understanding judges as fiduciaries, and their concomitant duty of candor, would seem to reaffirm the widespread conventional wisdom that judges should be forthright in their opinion writing, explaining honestly why they are deciding as they are.<sup>208</sup> Although this demand may be subject to limited

204. See CODE OF CONDUCT FOR U.S. JUDGES Canon 4(H)(3) (2009). The Code incorporates by reference similar (though more complex and detailed) accounting principles embodied in the Ethics Reform Act of 1989 and other applicable statutes, regulations, and directives.

205. For the main arguments in the debate, see Paul Butler, *When Judges Lie (and When They Should)*, 91 MINN. L. REV. 1785 (2007); Mathilde Cohen, *Sincerity and Reason-Giving: When May Legal Decision-Makers Lie*, 59 DEPAUL L. REV. 1091 (2010); Idleman, *supra* note 16; Robert A. Leflar, *Honest Judicial Opinions*, 74 NW. U. L. REV. 721 (1979); Schwartzman, *supra* note 19; David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987); Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353 (1989). Idleman acknowledges in a footnote, after calling judges fiduciaries, that “one of the fundamental duties of a fiduciary is to be candid.” Idleman, *supra* note 16, at 1331 n.70. Still, he ultimately furnishes a reason for derogating from the candor norm, based in his theory of “prudentialism.” *Id.* at 1395. Although he acknowledges that if one takes the fiduciary model seriously there is a prima facie reason to require candor, Idleman fails to abide by his own characterization of the judge as fiduciary because he thinks that a fiduciary’s discretion allows him or her to choose whether to be candid. *Id.* at 1331 n.70. Our view is that although it is possible to imagine exceptions to fiduciary’s duty of candor, those exceptions cannot be bootstrapped by using fiduciary “discretion,” as Idleman has it: it is the discretion that the fiduciary status affords that goes some way to creating the duty of candor in the first place.

206. See Schwartzman, *supra* note 19, at 989 (“Proponents of greater candor in the courts have argued that transparent decision making constrains the exercise of judicial power, makes judges more accountable to the law, provides better guidance to lower courts and litigants, promotes trust and reduces public cynicism, and strengthens the institutional legitimacy of the courts.”) (citations omitted).

207. See *id.* at 988–89 (noting that opponents of candor argue that it must “be sacrificed to maintain the perceived legitimacy of the judiciary; to obtain public compliance with controversial judgments; to secure preferred outcomes through strategic action on multimember courts; to promote the clarity, coherence, and continuity of legal doctrine; to avoid the destructive consequences of openly recognizing ‘tragic choices’ between conflicting moral values; to preserve collegiality and civility in the courts; and to prevent the unnecessary proliferation of separate opinions. More generally, critics argue that a ‘purist’ emphasis on the need for honesty in judicial decision making ignores the myriad institutional considerations that judges must continuously balance in performing the ‘prudential’ functions assigned to them. To argue for rigid adherence to a norm of sincerity or candor is said to be naïve, foolhardy, and even dangerously utopian”) (citations omitted).

208. The argument that political leaders should be subject to a general duty of candor is nicely explored in and endorsed by JEFFREY EDWARD GREEN, *THE EYES OF THE PEOPLE: DEMOCRACY IN*

exceptions and limitations (because fiduciary duties are always benchmarks rather than perfectly rigid commands that apply identically in all contexts), the duty of candor instructs that judges should say what they mean and not shoehorn ideological reasoning into doctrinal obfuscation.<sup>209</sup>

Here it is worth noting that the judicial discretion afforded by judges' fiduciary status should not include the discretion about being honest. The discretion may not be used to circumvent a fiduciary obligation that exists in part to cabin that discretion and hold the fiduciary to account, enabling beneficiaries to monitor their fiduciaries effectively. Honest judicial opinions are a "concession to democracy—to the exercise of elitist power . . . by explaining and attempting to justify decrees imposed on the majority."<sup>210</sup> Even in jurisdictions with elected judiciaries, judicial opinions serve as the record upon which voters are able to evaluate and decide whether an individual judge deserves to be reelected or retained.

### *B. The Public Fiduciary's Duty of Deliberative Engagement*

Although the public fiduciary and her private law corollary share many similarities, each role's fiduciary obligations differ somewhat. Thus far, we have explored those basic fiduciary duties that have private law analogues. But we believe judges also have fiduciary obligations that flow uniquely from their role as public fiduciaries. These obligations are rooted in certain deliberative virtues implicated by fiduciary law.

In prior work, two of us have described the public fiduciary's dialogic imperative, which extends to beneficiaries and imposes on a public fiduciary the obligation of "deliberative engagement"—that is, an affirmative duty to engage in dialogue with those whose interests the public fiduciary

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AN AGE OF SPECTATORSHIP (2010). Green, however, does not utilize the fiduciary principle in pursuing his argument.

209. None of this argument is intended to derogate from the independent reasons for judicial candor, some of which reinforce the fiduciary duty of candor. See, e.g., JOSEPH GOLDSTEIN, *THE INTELLIGIBLE CONSTITUTION: THE SUPREME COURT'S OBLIGATION TO MAINTAIN THE CONSTITUTION AS SOMETHING WE THE PEOPLE CAN UNDERSTAND* 7 (1992) ("[T]he Court is obligated to provide in its communications to Us, the governed and the governors, a basis for discovering 'faults' in the Constitution and for deliberating and deciding whether to speak out and to seek the correction of its 'errors.'"); Oliver Wendell Holmes, *The Path of the Law*, 110 HARV. L. REV. 991, 991 (1997) (noting the importance of the people understanding what behavior is expected of them based upon prior judgments of the courts); Chad M. Oldfather, *Remedying Judicial Inactivism: Opinions as Informational Regulation*, 58 FLA. L. REV. 743, 747 (2006) ("By disclosing the ostensible justifications for a court's decision, an opinion enables the various audiences to which it is directed to monitor the court's performance and act in response to it.") Our argument here is only that fiduciary status actually entails candor, whatever other reasons there may be for or against it.

210. Ray Forrester, *Supreme Court Opinions—Style and Substance: An Appeal for Reform*, 47 HASTINGS L.J. 167, 173 (1995); see also Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 388 (1978) ("[T]he fairness and effectiveness of adjudication are promoted by reasoned opinions. Without such opinions the parties have to take it on faith that their participation in the decision has been real, that the arbiter has in fact understood and taken into account their proofs and arguments.").

representative holds in trust.<sup>211</sup> Consider the following principles in fiduciary law that hint at this obligation: (1) fiduciaries are supposed to receive informed consent to ensure their compliance with the duty of loyalty and remain beyond censure; (2) the duty of care requires reasoned courses of action; (3) a fiduciary needs some knowledge of beneficiaries' preferences and interests to do a good job as a fiduciary when entrusted to make decisions on their behalf; and (4) the duties of disclosure and accounting have dialogic underpinnings, which require iterative communication to facilitate monitoring those with wide discretion.<sup>212</sup>

Deliberative engagement is, accordingly, a duty rooted in the principles of fiduciary law. This duty requires an authentic effort to uncover preferences rather than a mere hypothetical projection of what beneficiaries might want. Without requiring that public fiduciaries actually seek to discover their beneficiaries' preferences, fiduciary representatives will remain too unconstrained and will likely assume that their own interests align with those they estimate belong to their beneficiaries. To be sure, fiduciaries may always choose their expert assessment of the people's interests over the people's own, but only after they account for the beneficiaries' preferences and assessments. Without being genuinely open to beneficiary preferences and to persuasion, a public fiduciary remains dangerously unmoored from the source of her authorization.

The duty of deliberative engagement, although developed originally to explore the public fiduciary role of executive and legislative branch officials, can be applied to those in judicial office, who also hold their office in trust for the people. It is controversial to think of "the people" as the judiciary's "constituency" (and that constituency can shift depending on whether a court is hearing a local, state, or federal matter).<sup>213</sup> But judges' fiduciary relationship with the people suggests similar relational duties of deliberative engagement.<sup>214</sup>

How, then, should we understand the fiduciary duty of deliberative engagement for judges? Common judicial practices already evince plausible applications of the deliberative engagement requirement: oral arguments; case briefing; open courtrooms; written, intelligible, and widely accessible opinions in a large class of cases; published and citable decisions in the vast majority of cases;<sup>215</sup> and liberal standards for amicus curiae participation. These examples

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211. See Leib & Ponet, *supra* note 14; Ponet & Leib, *supra* note 22.

212. See Leib & Ponet, *supra* note 14, at 188–90; Ponet & Leib, *supra* note 22, at 1255–59.

213. It is no accident—but still an oversight—that one of the most important recent books to appear about the idea of constituency does not discuss the judiciary. See ANDREW REHFELD, *THE CONCEPT OF CONSTITUENCY: POLITICAL REPRESENTATION, DEMOCRATIC LEGITIMACY, AND INSTITUTIONAL DESIGN* (2005). Still, the judicial politics literature does not hesitate to think of judges as representatives. See, e.g., Melinda Gann Hall, *Justices as Representatives: Elections and Judicial Politics in the American States*, 23 AM. POL. Q. 485 (1995).

214. See Peters, *supra* note 113, at 347 (describing the deliberative relationship between judges and litigants).

215. For an argument that this command flows from judges' trustee status (a trustee is a paradigmatic fiduciary), see Cravens, *supra* note 106. Our argument differs from hers because she

validate the judge's role as a fiduciary subject to the dialogic imperative. The next two Parts move beyond these basic features of the judicial process, however, and explore some more controversial applications of the public fiduciary duty of deliberative engagement. First, we articulate some possible demands of deliberative *output*—the duty to report to beneficiaries in a way that facilitates understanding, engagement, and monitoring. Second, we explore some possible demands of deliberative *input*—the duty to engage authentically and responsively with beneficiaries on matters within the scope of the fiduciary relationship.

### 1. *Deliberative Output*

The central means of communication that judges as fiduciaries employ to fulfill their duty of deliberative engagement with the public is through published, publicly accessible judicial opinions.<sup>216</sup> Yet the foundation for a *deliberative* judicial output is *comprehensible* and *intelligible* judicial opinions; meaningful dialogue is impossible without some degree of mutual understanding. That dialogue is important both to monitor and bond with the judiciary.

A basic problem arises, however, for courts under a duty of deliberative engagement: complex legal rules and doctrines are difficult to communicate to “the people,” who have very limited legal knowledge.<sup>217</sup> The noted verbosity and lack of clarity in the Roberts Court's opinions have likely exacerbated this problem.<sup>218</sup> It is important to be intelligible to litigating parties, but judges also have duties to “the people.” Yet if the judge is under obligation to engage in deliberation with “the people,” she will struggle to address adequately the range of arguments at play in any given case.<sup>219</sup> The fiduciary obligation of deliberative engagement suggests reforms sensitive to the public's low levels of

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depersonalizes the beneficiary, rendering it as the “corpus” of “the common law” itself. For the counterintuitive argument that the practice of publishing written opinions might actually produce worse decision making, see Chad Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1287–88 (2008). Although there may be costs to written opinions, beneficiaries must incur some costs to enable the monitoring function of the judicial hierarchy.

216. As Robert Lefflar once noted, “Judicial opinions are the voices of our courts, and they serve the purposes that the courts serve.” Robert A. Lefflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810, 819 (1961).

217. Serota, *supra* note 22, at 659–61; Serota, *supra* note 20, at 1658–61.

218. See, e.g., Ryan C. Black & James F. Spriggs II, *An Empirical Analysis of the Length of U.S. Supreme Court Opinions*, 45 HOUS. L. REV. 621 (2008) (explaining the increasing length of Supreme Court opinions through empirical analysis); Adam Liptak, *Justices Are Long on Words but Short on Guidance*, N.Y. TIMES, Nov. 18, 2010, at A1 (noting the lack of clarity in many of the opinions issued by the Roberts Court).

219. For a meditation on the many different audiences for judicial opinions, see Abner J. Mikva, *For Whom Judges Write*, 61 S. CAL. L. REV. 1357 (1988).

legal knowledge<sup>220</sup>—a reality that brevity and clarity of opinions might not be able to address.

As one of us has explained elsewhere, an attractive approach to solving this problem is through a two-tiered system of publication whereby courts hire a civic educator to translate judicial opinions to accommodate the intellect, educational background, and time constraints of the average American.<sup>221</sup> To wit, a judicial “ombudsperson” could summarize and clarify what the courts are doing for the public’s benefit.<sup>222</sup> We would not want to see the press (the proverbial “fourth branch”) shirking its role of holding public fiduciaries to account because it becomes crowded out by the ombudsperson. But the judiciary itself could, as an institution, make a better effort to communicate with the public—at its level.<sup>223</sup>

An ombudsperson could not, and should not, completely take over fiduciary tasks, however. As we argued earlier, delegating tasks to others can lead to fiduciary default, as when judges have their clerks write opinions without careful oversight. But it is uncontroversial for fiduciaries to enlist the help of others who may be better at a relevant task within the scope of the job.<sup>224</sup> Minor delegation can help judges meet their deliberative engagement requirement, while simultaneously vindicating their duties to explain the bases for their decisions fully and honestly.<sup>225</sup>

220. See, e.g., sources cited *supra* note 217. See, e.g., Ilya Somin, *Political Ignorance and the Counter-Majoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1371 (2004) (noting that “low level[s] of political knowledge among American citizens is one of the best-established findings in all social science”).

221. Serota, *supra* note 22, at 662–69.

222. The use of an ombudsperson to fulfill some deliberative obligations of fiduciaries is explored at length in Leib & Ponet, *supra* note 14, at 192–98.

223. It is still worth pointing out that the mainstream media’s coverage of the judiciary regularly falls short of keeping the people informed as to the range of issues before the Supreme Court, let alone the lower courts. See Serota, *supra* note 22, at 665 (noting that “misrepresentation pervades newsmagazine, newspaper, and television news stories” covering the Supreme Court); Elliot E. Slotnick, *Media Coverage of Supreme Court Decision Making: Problems and Prospects*, 75 JUDICATURE 128, 131 (1991) (“Commentary has been frequent in criticism of the press for its coverage of the judiciary.”); Rorie L. Spill & Zoe M. Oxley, *Philosopher Kings or Political Actors? How the Media Portray the Supreme Court*, 87 JUDICATURE 22, 23, 28 (2003) (finding that “media coverage is a poor reflection of the Supreme Court’s docket” and that “[t]his misrepresentation of the Court’s docket is present in newsmagazine, newspaper, and television news stories”).

224. See FRANKEL, *supra* note 54, at 130–31.

225. It is worth noting that the Canadian Supreme Court employs an Executive Legal Officer (“ELO”) specifically tasked with assisting Canadian journalists in their reporting of the Court’s opinions. As Florian Sauvageau, David Schneiderman, and David Taras explain, during the 1980s, journalists regularly complained about “the complex and abstract legal language” employed by Canadian Supreme Court Justices, and more generally, criticized the overall unintelligibility of their work. FLORIAN SAUVAGEAU ET AL., *THE LAST WORD: MEDIA COVERAGE OF THE SUPREME COURT OF CANADA* 200 (2006). In response to these complaints, the Court created the ELO position, which, in addition to assisting the Court with various administrative tasks and writing speeches for the justices, acts “as the liaison between the court and the news media.” *Id.* at 201. The position of ELO is normally filled by a member of a law faculty in Canada. And while the ELO is a court employee, it nonetheless operates in its liaison role with substantial independence from the justices. As Sauvageau,

## 2. *Deliberative Input*

The fiduciary model requires that judges communicate with their beneficiaries to ensure wide access and public comprehension. Equally important is the ear that judges owe the people and other branches of government. Deliberative engagement is a two-way street, which means that what nonlitigants have to say about cases and controversies deserves more than just lip service from the judiciary. The fiduciary model as applied to judges confirms that public opinion can, under certain conditions, play a role in judicial decision making. Yet we do not think that a fiduciary model turns judges into mere pollsters of the people or legislature. Rather, deliberative engagement entails thought, consideration, and, ultimately, a reasoned decision that accounts for the class of beneficiaries implicated in any given case. But since the class of beneficiaries can vary from case to case, we must consider constitutional, statutory, and common law cases separately.

### *a. Constitutional Cases*

The notion that judges have some obligation to “listen” to the people when interpreting the Constitution has pervaded constitutional theory for centuries,<sup>226</sup> most recently, under the guise of popular constitutionalism.<sup>227</sup> Popular constitutionalists emphasize the important role that public opinion and social movements have played,<sup>228</sup> and, more centrally, *ought* to play, in

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Schneiderman, and Taras put it, ELOs “are not there to defend, editorialize, embellish, or spin what the justices have said,” but rather “are positioned as neutral and independent experts; they explain the law, describe the options the justices face, and point journalists to the key parts of decisions.” *Id.* at 201–02. Thanks to Paul Horwitz for the suggestion.

This is surely both a notable reform and a step in the right direction for enhancing the intelligibility of judicial opinions. And yet, it is still one step removed from what the benchmark of deliberative engagement calls for: accessible judicial communication by the Court directed at the people themselves.

226. See CARDOZO, *supra* note 1, at 108 (noting that where there is no clear legal answer, a judge has “a duty to conform to the accepted standards of the community”); JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* 58 (2001) (pointing to other judges and scholars, such as William Brennan, Terrence Sandalow, and Harry Wellington, who thought courts should look to public opinion in deciding cases); CHRISTOPHER G. TIEDEMAN, *THE UNWRITTEN CONSTITUTION OF THE UNITED STATES* 154 (1890) (“[A]s soon as we recognize the present will of the people as the living source of law, we are obliged, in construing the law, to follow, and give effect to, the present intentions and meaning of the people.”).

227. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002); Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 5 (2001); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323 (2006).

228. See, e.g., BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009); Epstein & Martin, *supra* note 21; Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257 (2004). *But see* Tom Goldstein & Amy Howe,

developing constitutional law.<sup>229</sup> Popular constitutionalists are not monolithic, and views differ within the camp on how authoritative popular constitutional interpretations should be.<sup>230</sup> But, intramural disputes aside, even the most modest popular constitutionalists still reserve a central role for public opinion in the development of constitutional law,<sup>231</sup> however difficult it is to know exactly who “the people” are and what they believe.<sup>232</sup>

Notwithstanding the impressive growth of popular constitutionalism in the academy,<sup>233</sup> popular constitutionalism has its critics. The proposition that the public should have a say in contested matters of constitutional interpretation—thereby making public opinion a legitimate source of constitutional authority—is quite controversial.<sup>234</sup> There is, most essentially, a theoretical lacuna in the popular constitutionalist view: although theorists have demonstrated that public opinion seems to play a role in the resolution of at least some constitutional cases,<sup>235</sup> they have not specified the ways the partnership between judges and the people ought to function and why.<sup>236</sup> We think the fiduciary model can help fill that gap.

The public fiduciary principle of “deliberative engagement” reinforces both judicial responsiveness and judicial independence. That is, the judge as fiduciary must listen to the public in constitutional cases, but need not feel bound by any one voice, or even a large majority screaming in unison. The bifurcated nature of this obligation is the product of two crosscutting fiduciary

*But How Will the People Know? Public Opinion as a Meager Influence in Shaping Contemporary Supreme Court Decision Making*, 109 MICH. L. REV. 963, 967 (2011) (noting that, contrary to Friedman’s account, “the Supreme Court’s modern constitutional jurisprudence overwhelmingly does not correspond to a model in which decisions generate a public debate, to which the Justices then adapt”); Pildes, *supra* note 21, at 155 (similarly rejecting the notion that the Court is a majoritarian institution).

229. See generally sources cited *supra* note 227.

230. See Pozen, *supra* note 24, at 2060–64; Serota, *supra* note 20, at 1641.

231. See Joseph Blocher, *Popular Constitutionalism and the State Attorneys General*, 122 HARV. L. REV. F. 108, 109 (2011), [http://www.harvardlawreview.org/media/pdf/vol124\\_blocher.pdf](http://www.harvardlawreview.org/media/pdf/vol124_blocher.pdf) (noting that “[t]hrough accounts of popular constitutionalism vary in their particulars, they are all connected by the notion that ‘the people’ have a role to play in constitutional interpretation”); see also Frederick Schauer, *Judicial Supremacy and the Modest Constitution*, 92 CALIF. L. REV. 1045, 1050 n.26 (2004) (explaining that popular constitutionalism is “the view that the people should have a major role to play in constitutional interpretation”).

232. For arguments about how difficult it is to draw a circle around the people and how difficult it is to know their opinions, see generally Pildes, *supra* note 21.

233. Andrew B. Coan, *Well, Should They? A Response to If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 213, 238 (2007) (“[P]opular constitutionalism . . . has taken constitutional theory by storm over the last decade.”).

234. See e.g., Alexander & Solum, *supra* note 4.

235. See FRIEDMAN, *supra* note 228; Friedman, *supra* note 228.

236. See, e.g., Larry Kramer, *Response*, 81 CHI.-KENT L. REV. 1173, 1182 (2006) (asking how popular constitutionalism can be implemented effectively); Serota, *supra* note 20, at 1645 (noting the failure of popular constitutionalists to answer these questions); Suzanna Sherry, *Putting the Law Back in Constitutional Law*, 25 CONST. COMMENT. 461, 463 (2009) (arguing that popular constitutionalists have not explained how their theory works in practice).

directives: first, that judges remain attentive to the expressed will of their beneficiaries; and, second, that judges embrace their discretion to ascertain the public's interest within constitutional parameters. As a result, the judge as fiduciary neither can ignore public opinion where it "seems clear, widespread, and of constitutional dimension," nor unilaterally establish it as the binding rule of decision.<sup>237</sup> Indeed, the judicial independence inherent in the judge-as-fiduciary model means that the judge's role is necessarily something more than a mere delegate who acts according to the polls.<sup>238</sup>

While the notion that public opinion can play an authoritative role in the resolution of constitutional cases is highly controversial,<sup>239</sup> it is also important to acknowledge the limited scope of the recommendation: public opinion will meet the prerequisites necessary to make it relevant to the outcome only infrequently. This is because, as various commentators have noted, the people simply do not possess an identifiable opinion on most constitutional issues that confront our courts.<sup>240</sup> Yet the fiduciary model requires that in those instances where public opinion does intelligibly emerge, judges should consider public opinion as one source of constitutional meaning among others.<sup>241</sup> In this way,

237. Pozen, *supra* note 24, at 2082. Richard Primus makes a similar point, noting that the "strongly held view of the public," where it is "something closer to consensus than to simple majority preference . . . can be an ingredient in the right answer to a constitutional question." Richard Primus, *Public Consensus as Constitutional Authority*, 78 GEO. WASH. L. REV. 1207, 1218 (2010) [hereinafter Primus, *Public Consensus*]; see also Richard Primus, *Double-Consciousness in Constitutional Adjudication*, 13 REV. CONST. STUD. 1, 18–20 (2007).

238. David Pozen notes the variety of ways in which judges may value public opinion in the decision-making process without being "mere conduits for public opinion." Pozen, *supra* note 24, at 2082. Judges might, for example, constrain the use of public opinion to cases in which "the legal answer seems uncertain . . . in construing a vague standard such as 'equal protection' or 'due process' . . . to supplement or gloss the traditional interpretive aids . . . [or to be used] when the original meaning of a provision is obscure or when the orthodox legal materials are in equipoise . . ." *Id.*

239. See, e.g., Gail Pison Montany, *Aspen Ideas Festival: Should the Supreme Court Follow the People?*, ASPEN BUS. J. (June 29, 2011, 11:27 pm), <http://www.aspenbusinessjournal.com/article.php?id=5536> (noting that Justice Stephen Breyer and former Justice Sandra Day O'Connor vehemently disagree with the notion that "a judge's decision would be influenced by public opinion"). It should be noted that Justice O'Connor also made it clear during the discussion that—to paraphrase—judges read newspapers, suggesting that the press is used to decipher what public opinion on a subject might be.

240. See Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1549 (2010) (noting that "it seems unlikely that there are strong public feelings about those decisions"); Neal Devins & Nicole Mansker, *Public Opinion and State Supreme Courts*, 13 U. PA. J. CONST. L. 455, 476–77 (2010) (stating the public is likely unaware of state supreme court decisions); Louis L. Jaffe, *Was Brandeis an Activist? The Search for Intermediate Premises*, 80 HARV. L. REV. 986, 994 (1967) (stating that there is no "general thinking" on many of the legal issues that come before courts); Primus, *Public Consensus*, *supra* note 237, at 1222 (noting that "[m]ost Americans have no view about most of the constitutional issues that present themselves in court" and that "[t]his is especially true of the species of issue that involves parsing and implementing constitutional clauses or precedential doctrines").

241. Obviously, the doctrine of stare decisis is another authoritative source of constitutional decision making—and in lower courts, that doctrine is likely often to be outcome determinative, rendering public opinion a less powerful source of authority. Adhering to the duty of care—and abiding precedent seems to be part and parcel of that command—will often be a more important and

the fiduciary model provides a normative foundation for the authoritative status of popular constitutional interpretations. The fiduciary model also allows populism to coexist with judicial independence from majoritarian pressure in the resolution of legal disputes.<sup>242</sup>

*b. Statutory Cases*

Matters change when we analyze statutory interpretation in light of the fiduciary model. In this configuration, elected representatives share an intervening fiduciary relationship with the public, which dictates that the duty of deliberative engagement applies somewhat differently. When interpreting statutes, the fiduciary judge is not as concerned with public opinion directly as she is with the expressed will of the public's own policy-making fiduciary: the legislature.<sup>243</sup>

As we explained earlier, the fiduciary model applies beyond the exercise of judicial power. The people and their elected representatives in the legislature also share a fiduciary relationship. This means that both state and federal legislative officeholders, in their roles as democratic representatives, owe the public a similar cluster of fiduciary obligations. These obligations demand that members of the legislature deliberatively engage their constituencies authentically and meaningfully.<sup>244</sup> Maintaining this vital dialogue not only

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reliable course of action than measuring and abiding public opinion. Still, in matters of grave public concern, if the public has a view that precedent should be overturned, the judicial fiduciary must weigh that in the balance.

242. See Chemerinsky, *supra* note 4, at 1015 (explaining that a pure popular constitutionalist system would “erod[e] constitutional protections for unpopular, marginalized groups”). As Justice Robert Jackson once noted, “Unrestricted majority rule leaves the individual in the minority unprotected. This is the dilemma [between pure populism and antimajoritarianism] and you have to take your choice. The Constitution-makers made their choice in favor of a limited majority rule.” ROBERT H. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 79 (1955). See also FARBER & SHERRY, *supra* note 5, at 30 (applauding those instances where the Supreme Court “has . . . stood up for fundamental rights that any democracy should respect” notwithstanding the antipopulism inherent in those decisions). Cf. Amy Gutmann, *How Not to Resolve Moral Conflicts in Politics*, 15 OHIO ST. J. ON DISP. RESOL. 1, 4–5 (1999) (“Decisions that violate basic liberty and opportunity cannot be justified simply by virtue of the fact that they result from majority rule. Majority rule may still be the best procedural standard for resolving many political disputes, but there is no reason to believe that it is a sufficient standard.”).

243. Glen Staszewski has astutely observed that perhaps matters are not so different in constitutional cases. After all, constitutional law is largely about determining the validity and legality of state actors who are themselves under fiduciary obligations. This seems just right to us—except that the judicial role in this class of cases is to make an independent judgment about what the constitution, as the voice of the people, requires. In constitutional cases, the rule of deference to mediating fiduciaries applies sometimes—this may be an interesting way to think about Thayerian deference, see James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893), but the conventional picture from *The Federalist* 78 does not use this structure for constitutional review of official action.

244. See Leib & Ponet, *supra* note 14, at 189–90.

safeguards the public trust in government but also promotes the democratic pedigree of the laws that are passed.<sup>245</sup>

Accordingly, in statutory interpretation cases, the fiduciary relationship shared between the legislature and the public intervenes, enabling the legislature to serve as the primary beneficiary on behalf of the public. Just as the legislature acts as the people's fiduciary when passing laws, the judiciary acts as the legislature's fiduciary when interpreting those laws. It is commonplace to understand the judiciary as an "agent" for the legislator-principal,<sup>246</sup> and agency is a conventional fiduciary relationship.<sup>247</sup>

As a result of this complex architecture in the statutory context, public opinion no longer retains the same potentially authoritative status it does in the context of constitutional interpretation. But it does not become completely irrelevant, either. The unique fiduciary relationship that judges share with lawmaking bodies shifts the primary focus to the legislative will. Therefore, in those instances where the legislature has failed in its fiduciary capacity, the judge as fiduciary may look to the people, the ultimate beneficiary, directly.<sup>248</sup>

Obeisance to the legislature forces judges to conduct restrained interpretations that hew as closely as possible to the legislative text, and, more generally, to the overarching principle and conventional posture of legislative supremacy.<sup>249</sup> Thus, where the statutory language provides a clear answer to the legal issue before the court, the judge's fiduciary obligation generally demands that she apply it. And in more challenging cases, where judges confront the myriad textual ambiguities in local, state, and federal laws,<sup>250</sup> the judge-as-fiduciary must attempt to discern to the extent possible the legislative will underlying the statute. Justice Breyer labels this approach, which emphasizes congressional purposes and consequences, the key to "maintaining

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245. See *id.* at 191.

246. See Merrill, *supra* note 9, at 1566–70.

247. See Smith, *supra* note 26, at 1400.

248. Although we ignore administrative agency implementation of legislative commands in what follows, if administrative officers are also fiduciaries, similar principles of deference are appropriate. The law and scholarship on the fiduciary nature of administrative authority is not to the contrary. See generally *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984); Criddle, *Administration*, *supra* note 14; Criddle, *Foundations*, *supra* note 14.

249. See generally Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281 (1989).

250. These ambiguities are a necessary result of factors such as congressional time constraints and shortsightedness, political compromise, and the limitations of the English language. See ROBERT A. KATZMANN, *COURTS AND CONGRESS* 61 (1997) (offering several reasons for statutory ambiguity); Amanda Frost, *Certifying Questions to Congress*, 101 NW. U. L. REV. 1, 9–10 (2007) (noting the various reasons for ambiguity in statutes); Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 811 (1983) (explaining that the "basic reason why statutes are so frequently ambiguous in application is not that they are poorly drafted—though many are—and not that the legislators failed to agree on just what they wanted to accomplish in the statute—though often they do fail—but that a statute necessarily is drafted in advance of, and with imperfect appreciation for the problems that will be encountered in, its application").

a strong workable relationship with Congress.”<sup>251</sup> We think that the structural dynamics underlying the fiduciary model reinforce Justice Breyer’s position.

Of course, in some statutory cases, legislative purposes and intent may be out of reach given unique facts or circumstances. When the legislative will is inscrutable, the fiduciary judge must then look to “considerations drawn from some broadly based conception of the public interest,”<sup>252</sup> a principle that finds normative justification in the judiciary’s relationship to the beneficiary behind the beneficiary, as it were: “the people” themselves. The principle of legislative supremacy is defeasible, then, even when legislators try in good faith to meet their own fiduciary obligations.

But what about when judges have a reasonable suspicion that legislators cannot meet their own fiduciary obligations or are failing to live up to fiduciary standards? Because legislative supremacy results from the legislature’s fiduciary relationship with the public, the mandate of legislative deference recedes in situations where the interests of judges’ ultimate beneficiaries are no longer protected. These situations require judges to reengage in direct fiduciary protection of the public through their decision making. Thus, where old statutes no longer reflect current majorities, where legislators are particularly likely to be engaged in aggrandizement or conflicts of interest (e.g., campaign finance, lobbying, election law), where public-choice pathologies suggest democratic deficits, or where representation reinforcement is vital, the judge as fiduciary would be justified in looking to the public will, either through contemporary public opinion or public values more generally, for interpretive guidance.<sup>253</sup> In this way, the authoritative status of public opinion is substantially attenuated in matters of statutory interpretation as compared to constitutional law but does not wholly disappear.<sup>254</sup>

The fiduciary model can illuminate the application of certain interpretive canons that might better facilitate interbranch deliberative engagement, as well. The judicial application of “super-strong” stare decisis to statutory precedents provides a paradigmatic dialogue-enhancing canon.<sup>255</sup> As both the Supreme

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251. STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW 88 (2010).

252. Posner, *supra* note 250, at 820.

253. As Judge Ruggero Aldisert puts it: “Where the legislature has not acted in accordance with changing social policies and seemingly does not so intend to act, the courts have not only the authority, but possibly the duty, to keep pace with the change in consensus.” Ruggero J. Aldisert, *Judicial Declaration of Public Policy*, 10 J. APP. PRAC. & PROCESS 229, 239 (2009); *see also* Hillel Y. Levin, *Contemporary Meaning and Expectations in Statutory Interpretation*, 2012 U. ILL. L. REV. 1103.

254. Indeed, this interplay between legislative deference and, where necessary, legislative discipline, harkens back to Hamilton’s words in *The Federalist* 78 explaining that the proper role of the courts is to function “as an intermediate body between the people and the legislature,” which keeps “the latter within the limits assigned to their authority.” THE FEDERALIST NO. 78, at 394 (Alexander Hamilton) (Ian Shapiro ed., 2009).

255. *See* CBOCS W., Inc. v. Humphries, 128 S. Ct. 1951, 1958 (2008); Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2226 (2002) (citing *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 n.34 (1986)) (noting that “[t]he

Court and a variety of commentators have pointed out, respecting statutory precedents gives Congress an important incentive to override disfavored precedents.<sup>256</sup> This incentive, in turn, generates a fruitful “court-congressional dialogue”<sup>257</sup> that keeps the legislature focused on its representative law-making duties and its fiduciary obligations.

### c. Common Law Cases

Throughout our nation’s legal history, American jurists have struggled with the tension between the common law and democracy.<sup>258</sup> To understand why, one need only look to *The Federalist*, in which James Madison provided the following insight: “Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul, for the *judge* would then be *the legislator*.”<sup>259</sup> From Madison’s perspective, “the uncomfortable relationship of common-law lawmaking to democracy” is apparent.<sup>260</sup> How can rules promulgated through the common law, which lack the democratic provenance of the legislative process, and which complicate the separation of powers, be legitimate?

Democratic principles suggest that legislators, not judges, should usually be responsible for the public policy decisions that common law cases necessarily entail.<sup>261</sup> As Matthew Steilen explains, “democratic law is legitimate because *we* decided on the law, and we can hardly complain about being bound by law we decided on”; but “in common-law adjudication, it is the *judge* who decides on the content of the law, not the *people* bound by that

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blackletter rule is that statutory precedents have especially strong stare decisis effect”); William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988) (using the term “super-strong” stare decisis).

256. Elhauge, *supra* note 255, at 2226 (citing *NLRB v. Int’l Longshoremen’s Ass’n*, 473 U.S. 61, 84 (1985); *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 818 n.5 (1985); *Williams v. Crickman*, 405 N.E.2d 799, 802 (Ill. 1980); *City of Boston v. Mac-Gray Co.*, 359 N.E.2d 946, 948 (Mass. 1977); *Higby v. Mahoney*, 396 N.E.2d 183, 184–86 (N.Y. 1979); *James v. Vernon Calhoun Packing Co.*, 498 S.W.2d 160, 162–63 (Tex. 1973)); *see also* Lawrence C. Marshall, “*Let Congress Do It: The Case for an Absolute Rule of Statutory Stare Decisis*,” 88 MICH. L. REV. 177, 183 (1989). As the Supreme Court itself has noted, by giving statutory precedents “special force,” *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989), judges incentivize Congress “to exercise its responsibility to correct statutes that are thought to be unwise or unfair,” *Neal v. United States*, 516 U.S. 284, 296 (1996).

257. *See* Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMP. L. REV. 425, 428 (1992) (describing an empirical study confirming the value of a strong form of statutory stare decisis in promoting a “court-congressional dialogue”).

258. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 10 (1997); Robert Rantoul, *Oration at Scituate (1836)*, in KERMIT L. HALL ET AL., AMERICAN LEGAL HISTORY: CASES AND MATERIALS 317, 317–18 (1991).

259. THE FEDERALIST NO. 47, at 247 (James Madison) (Ian Shapiro ed., 2009).

260. SCALIA, *supra* note 258, at 10.

261. *See, e.g.*, Aldisert, *supra* note 253, at 231 (noting that “courts are continually called upon to weigh considerations of public policy when adding to the content of the common law”); Roger J. Traynor, *Reasoning in a Circle of Law*, 56 VA. L. REV. 739, 749 (1970) (noting that judges also make policy decisions in common law cases).

law . . . . For this reason, judge-made law lacks the special legitimacy that distinguishes democratic law.”<sup>262</sup> Or as Justice Holmes once put it, common law adjudication boils down to “considerations of what is expedient for the community”—considerations of a quintessential *lawmaking* nature.<sup>263</sup> While the substantial judicial discretion required in common law decision making appears to challenge democracy, a fiduciary model—and specifically, the duty of deliberative engagement—helps slacken the ostensible tension between common law adjudication and democratic legitimacy.

Notably, in the context of common law adjudication, the public serves as the direct structural beneficiary in relation to the judge as fiduciary. No intervening fiduciary relationship exists, as with statutory interpretation. The relationship between judges and the public is actually the most direct here, since in constitutional cases, courts usually review governmental action. And unlike the constraints judges-as-fiduciaries face when interpreting constitutions and statutes, judges enjoy wide discretion in the common law context owing to a lack of a publicly ratified or duly enacted text.

For these reasons, the duty of deliberative engagement is even more stringent here.<sup>264</sup> Public opinion can thus serve as a legitimate source of authority in the resolution of common law cases.<sup>265</sup> As the fiduciary judge adjudicates common law cases, she must maintain a vigorous dialogue with the public. She must be sensitive to both the arguments of the litigants before her, and, where relevant, to the public’s interest. And ultimately she must issue transparent judicial opinions based on publicly accessible and meaningful reasons that reasonable persons could regard as justificatory.

In short, by comporting with her duty of deliberative engagement, the judge-as-fiduciary maintains a vital responsiveness to the public beneficiary—the touchstone of democratic legitimacy.<sup>266</sup> If, as Joshua Cohen suggests, “[d]emocracy is a way of making collective decisions that connects decisions to the interests and the judgments of those whose conduct is to be regulated by the

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262. Matthew Steilen, *Democratic Common Law*, 2011 J. JURISPRUDENCE 437, 448 (2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1872445](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1872445) (discussing the democratic problems with placing lawmaking powers in the hands of judges).

263. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 34–36 (Harvard University Press 2009) (1881).

264. See Benjamin J. Roesch, *Crowd Control: The Majoritarian Court and the Reflection of Public Opinion in Doctrine*, 39 SUFFOLK U. L. REV. 379, 407–08 (2006) (noting that since the judiciary actively creates law in the common law context, “democratic values suggest that the people should have a voice in determining what that law is”).

265. See, e.g., Aldisert, *supra* note 253, at 239 (noting that “the courts have not only the authority, but possibly the duty, to keep pace with the change in consensus” in the development of the common law); Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 236 (1973) (noting that public opinion should be relevant in the development of the common law).

266. See Steilen, *supra* note 262, at 439 (describing responsiveness to those to whom one’s decisions apply as the “hallmark of democratic legitimacy”).

decisions,<sup>267</sup> then the common law lawmaking process, viewed through the fiduciary model's duty of deliberative engagement, is credibly democratic.

Before concluding, one final point is in order. It is important to acknowledge that the realities of judicial administration are such that not all cases will neatly fit into one of the aforementioned three categories. Judges will routinely encounter statutory cases that involve common law issues, common law statutes that require interpretation, or instances where statutes and common law issues come up against a federal or state constitution. These complexities, however, are by no means fatal to the structural paradigms discussed in this Part. The different demands of judges in the different types of cases that we have traced here are only guideposts to help judges wade through a complex mix of requirements that their fiduciary status creates. Still, we hope these baselines provide judges with an important compass, even if they do not always establish a precise map, for resolving constitutional, statutory, and common law problems in their role as a public fiduciary in a democratic state.

#### CONCLUSION

We've attempted here a project of recovery. The idea of judges as fiduciaries presented in this Essay has deep roots in political philosophy and American political thought that have faded from full view. Why and how this vision of judging became occluded is not our current concern.<sup>268</sup> But this account has proven its continuing vitality and utility: the judges-as-fiduciaries model helps explain and guide the proper standards of judicial conduct, a subject that has become hugely contentious in the current political environment. The fiduciary principle also reveals how the judiciary's countermajoritarian structure can be rendered compatible with a deep commitment to democratic governance, linking judges and "the people" in a relationship of discretion, trust, and vulnerability. By showing how the fiduciary principle supervenes over all classes of judges (state, federal, elected, and appointed), this Essay sheds light on some of the most vexing questions about the role of judges in American democracy.

Although the judges-as-fiduciaries model offers a rich framework for thinking about the role of the judge and provides salutary guideposts for potential reform, it is still only a starting point. This Essay offers only a partial theory of judging. Nothing we have argued here denies the real differences among judges, the reality of judicial hierarchy and bureaucracy, and the need

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267. JOSHUA COHEN, *Reflections on Deliberative Democracy*, in PHILOSOPHY, POLITICS, DEMOCRACY 326, 329 (2009); see also Joshua Cohen, *Procedure and Substance in Deliberative Democracy*, in DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS 407, 407 (James Bohman & William Rehg eds., 1997) ("The fundamental idea of democratic legitimacy is that the authorization to exercise state power must arise from the collective decisions of the members of a society who are governed by that power.").

268. See generally Finn, *The Forgotten Trust*, *supra* note 14, at 131 ("There is a real curiosity in the collective amnesia we suffered.").

for more specific learning about what the rule-of-law may require for litigants. But we hope we have recovered in part what ties the complex judiciary in our democracy together—and what ties the judiciary to the people.

