THE (UNIFIED?) FIDUCIARY THEORY OF JUDGING
ON HEDGEHOGS, FOXES AND CHAMELEONS

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ABSTRACT
This article examines the most developed Judge-as-Fiduciary-Model, presented by Ethan J. Leib, David L. Ponet & Michael Serota, according to which the Anglo-American judge is a fiduciary, since he was empowered over the assets and legal interests of the public. The Judge-as-Fiduciary-Model incentivizes the judge to prioritize the interests of the public above his own by imposing substantial duties (duty of loyalty, duty of care and duties of candor, disclosure and accounting) upon him.

This article argues that, notwithstanding shedding light by the fiduciary principle on some important features of judging in the Anglo-American tradition (i.e., discretion, public trust and vulnerability), the judge-as-fiduciary model fails to provide a convincing unified theory of the judicial role. The reasons for this failure lies in the reductionist nature of the Judge-as-Fiduciary model of Leib, Ponet & Serota. The article will revisit the private fiduciary principle, focusing on other characteristics of the private fiduciary principle, and enrich by it our understanding of the judicial role. However, the “new” fiduciary principle will question the whole attempt of creating a unified theory of “the Anglo-American judge” as fiduciary. The article concludes with remarks about the inability of legal theory to break free from judicial tools and limitations.

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I. INTRODUCTION

In recent years there has been a resurgence of interest in constitutional theories about the role of the judge in the Anglo-American Tradition. Another recurrent theme in contemporary American constitutional writing is the construction of fiduciary theories of government to limit and guide public officials’ discretion. Hence, the emergence of a unified fiduciary theory of judging — able to account for the responsibilities judges possess and the nature of the judicial office itself — was almost inevitable. After initial and immature attempts mostly as inspiring metaphor, Ethan J. Leib, David L. Ponet & Michael Serota have presented the most direct and well-developed judge-as-

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fiduciary-model, according to which the judge is a fiduciary since he was empowered over the assets and legal interests of the public.⁴

This article examines the judge-as-fiduciary-model, and explores the ways by which it resolves disagreements about the role of the judge in the Anglo-American tradition. The judge-as-fiduciary-model is rooted in private English and American law. A fiduciary relationship emerges in contexts where one person (the fiduciary) has discretionary power over the assets or legal interests of another (the beneficiary). In this setting private law imposes substantial duties (duty of loyalty, duty of care and duties of candor, disclosure and accounting) upon fiduciaries incentivizing them to prioritize their beneficiaries’ interests above their own. Leib, Ponet & Serota argue that their judge-as-fiduciary-model offers important insights into what it means to be a judge in the Anglo-American Tradition, while providing practical guidance in resolving a range of controversial constitutional issues surrounding judicial behavior.⁵

This article argues that, notwithstanding shedding light by the fiduciary principle on some important features of judging in the Anglo-American Tradition (i.e., discretion, public trust and vulnerability), the judge-as-fiduciary-model fails to provide a convincing unified theory of the judicial role, which puts into question its attractiveness in resolving current disagreements. The reasons for this failure lie in the reductionist nature of the judge-as-fiduciary-model of Leib, Ponet & Serota. By reducing the private fiduciary principle to a unified system of duties and goals, they provide a unified theory of the role of the judge in modern democracies.

I will revisit the private fiduciary principle, focusing on other characteristics of the private fiduciary principle, and enrich by it our understanding of the judicial role. The article achieves this goal by reviewing the methods by which fiduciary duties have been developed over time in the Anglo-American jurisprudence; the different kinds of fiduciaries acknowledged by courts (i.e. principle, trustee, guardian); and the plurality of justifications used to account for fiduciary duties and remedies. However, my “new” fiduciary principle will question the whole attempt of creating a unified constitutional theory of “the Anglo-American judge” as fiduciary. The article concludes with remarks about the inability of the constitutional theory to break free from judicial tools and limitations: the principle of fiduciary in private law is a judicial product,


⁵ Id. at 699, 702-703.
hence it is engraved by the same problems, controversies and dilemmas that characterize the constitutional law debates regarding the judicial role.

The discussion proceeds as follows: first, it describes the judge-as-fiduciary-model of Leib, Ponet & Serota (part II). Second, it analyzes the goals and challenges of the fiduciary theory of judging (III). Third, the article revisits the private law fiduciary principle shedding light on other features of fiduciary principle (IV). Forth, based on this discussion the article construes a "new" and fuller judge-as-fiduciary-model, which will help us understand its problems and limits in resolving contemporary disagreements about the role of the judge in the Anglo-American tradition (V). The article concludes with two insights regarding the whole attempt to construe a fiduciary theory of judging (VI).

II. The Judge-as-Fiduciary-Model

III. Three Challenges: Explanation, Guidance and Respect

   The Historical Origin of the Judge-as-Fiduciary-Model
   Explanation, Guidance and Respect

IV. The Private Law Fiduciary Doctrine: Revisited

   The Historical Background
   The Content of Fiduciary Duties
   The Remedies of Fiduciary Duties
   The Normative Foundation of Fiduciary Duties

V. The "New" Judge-as-Fiduciary-Model

VI. Two Conclusions: On Hedgehogs, Foxes and Chameleons
THE JUDGE AS DIGITAL CITIZEN: PROS, CONS, AND ETHICAL LIMITATIONS ON JUDICIAL USE OF NEW MEDIA

Summary

From judges posting about their cases on Facebook in states like Minnesota, Texas, and New Mexico to jurists like Kentucky Judge Olu Stevens speaking at on social media about racially-charged issues in his court (including racial content in victim impact statements and exclusion of African-Americans in jury selection), judges are making increasing use of social networking platforms. Through examination of several case studies, this presentation and accompanying article will examine the ethical constraints and constitutional considerations in judicial use of social media.

I. Introduction

A. Reasons for increased use of social media by judges

B. Need for guidance as judges assume the role of “digital citizen”

C. Two recent examples of the tension between technology and judicial ethics: Judge Kerry Neves (Texas) and his “blue lives matter” Facebook order, and 2016 New Mexico Supreme Court decision in State v. Thomas.

II. Individual Case Studies of the Judge as Digital Citizen

A. Judge Olu Stevens (Kentucky) and Use of Facebook as a Platform for Racial Commentary
- Victim impact statements and race relations
- Commentary on racial animus in jury selection

B. U.S. District Judge Richard Kopf (Nebraska)
- Blogging as a form of judicial transparency
- Crossing the line drawn by judicial canons of ethics

C. Judge Michelle Slaughter (Texas) and Public Outreach via Facebook
- Public sharing via Facebook of the court’s docket
- Accusations of improper commentary and appearance of bias lead to judicial ethics charges

III. Conclusion
- Social media is here to stay, and judicial use of it will only increase as society’s use increases.
- Judges should be accessible to the public they serve and should embrace social media.
- However, judges should use caution in doing so and more ethical guidance and education is needed for judges in this arena.
The Corrective Careers of Concurrences and Dissents

By Allen Mendenhall

I. A Brief History of the Opinion Form in the United States
II. Concurrences and Dissents Are Constructive
III. Concurrences and Dissents Enact the Meliorative Processes of the Common-Law System
IV. Judges Should Author Concurrences and Dissents, Whenever Possible, as a Service to the Profession

This talk begins by supplying an account of the opinion practices of the United States Supreme Court. It then surveys concurrences and dissents that have enjoyed, as it were, a successful career. The success of these nonbinding opinions owes to their ability to shape the character and facilitate the development of American constitutional law. The talk concludes by discussing how concurrences and dissents reflect and enact the common-law theories on which the American legal system has flourished, and finally by celebrating concurring and dissenting opinions as an intricate and important form of judicial service to the legal profession.

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