A spate of recent scholarship uses fiduciary metaphors to model the roles of various public officials. One such article in the California Law Review posits that judges are fiduciaries of the people and therefore have the power (akin to that of corporate directors) to do whatever is in the best interests of the people, even if that means disregarding precedents or statutes. By contrast, a more traditional model sees judges as agents or servants of the law and therefore bound to follow the law rather than use it to advance their preferred policies.

This essay examines both approaches with particular emphasis on their use in ordinary business litigation. The essay concludes that telling judges to act as fiduciaries of the people encourages court-led social change. Telling judges they are agents of the law is more consistent with the judicial oath, the rule of law, and the role of courts in the American democratic system.

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I. INTRODUCTION

What should judges do in ordinary business litigation when the requirements of the law and the demands of justice seem to conflict? This question comes up all the time. The plaintiff has a sympathetic claim with a technical defect or gap in proof. The defendant’s conduct seems lawful but unfair or technically illegal but entirely reasonable. Conventional legal reasoning leads to one conclusion; gut instinct or sophisticated policy analysis leads to another. Which takes priority?

In practice, of course, judges will strive for a decision that is consistent with both law and justice, adjusting their definitions of law and justice as needed to create an overlap. Failing that, judges will lean one way or another depending on a host of factors. But, in theory, what should judges do when law and substantive justice seem at odds? How should judges be encouraged to resolve the conflict?

Opinion is divided on this issue. There are two leading schools of thought. Each has its preferred metaphor for the judicial role. One philosophy, which sees judges as fiduciaries or guardians of the people, believes that judges should prefer substantive justice over law. The opposing philosophy sees judges as agents or servants of the law who must do what the law requires.

II. THE SUBSTANTIVE JUSTICE MODEL

A. The Moral Imperative of Altruism

The idea that judges should be impartial and decide cases in accordance with law has its critics. For many, it is preferable that judges do whatever they can to foster a more just, equitable and equal society.

A 2017 article by Robin West calls one variant of this attitude “relational justice” and says it is based on a moral commitment to substantive equality and individual self-determination.1 To satisfy that commitment in the realm of contracts, for example, the law must go beyond “formal equality and a formal commitment to liberty” to ensure actual justice whenever parties “formally agreed” to contracts that are nevertheless “operating unconscionably upon them, or … lack the maturity to best determine sensible contract terms.”2

A classic article in the Harvard Law Review by Duncan Kennedy dubs this philosophy “altruism” and contrasts it to the

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2. Id. at 152-53.
opposing theory of individualism.³ The altruist philosophy is based on what the 1976 article calls the “universal ideal of human brotherhood.”⁴ The “essence of altruism is the belief that one ought \textit{not} to indulge a sharp preference for one’s own interest over those of others. Altruism enjoins us to make sacrifices, to share, and to be merciful.”⁵ Altruism rejects the individualist idea of freedom. As the article explains: “The ‘freedom’ of individualism is negative, alienated and arbitrary. . . . We can achieve real freedom only collectively, through \textit{group} self-determination.”⁶

According to the Kennedy article, a key tenet of the altruist philosophy is that “there is simply no way for the judge to be neutral.”⁷ The common law rules of freedom of contract and private property reflect a deliberate choice to protect “the actions of the aggressive and competent even when those actions are directly at the expense of the weak.”⁸ Far from being apolitical or natural, these rules are an expression of “concrete individualist economic interests dressed up in gibberish.”⁹ Therefore, “[t]hose who enforce that legal order must accept responsibility for the allocation of resources and distribution of income it produces. . . . All outcomes are equally ‘natural.’ The question is which one is best.”¹⁰ Judges cannot avoid personal responsibility for the unjust consequences of their decisions by saying they are just doing their jobs. According to the altruists, “[t]he dichotomy of the private and the official is untenable, and the judge must undertake to practice justice”¹¹ even if that means ignoring settled law.

This approach finds support in the pragmatic idea that law is “a means to an end, [a] purposeful human activity aimed at achieving social goals.”¹² For many, this means that legal doctrines should be evaluated based on whether they advance a “progressive and enlightened” vision of social justice.¹³ If existing rules do not lead to proper results, those rules should be disregarded or changed.

⁴. \textit{Id.} at 1772.
⁵. \textit{Id.} at 1717.
⁶. \textit{Id.} at 1774.
⁷. \textit{Id.} at 1766.
⁸. \textit{Id.} at 1745.
⁹. \textit{Id.} at 1749.
¹⁰. \textit{Id.} at 1748.
¹¹. \textit{Id.} at 1773.
An example of this approach in constitutional adjudication is a 1986 article\textsuperscript{14} by Erwin Chemerinsky, now Dean of the University of California Law School. The article notes “that formalism is impossible in deciding cases and the inevitable discretion ensures that values enter into the interpretive process.”\textsuperscript{15} Given the necessity of choice, the article argues, the Supreme Court should choose progressive values over “the Framers’ values—values that were racist and sexist.”\textsuperscript{16}

Those who adhere to this philosophy reject theories of justice that direct judges to follow rules. As Anthony Sebok notes, the terms “formalism” and “positivism” are “frequently used as an epithet” in modern academic circles.\textsuperscript{17} Indeed, some scholars go further and take on the shibboleth of the rule of law.

A 1977 article in the Yale Law Journal by Morton Horwitz, for example, points out that while the rule of law “undoubtedly restrains power, . . . it also prevents power’s benevolent exercise.”\textsuperscript{18} The article goes on to criticize the rule of law because it “promotes substantive inequality by creating a consciousness that radically separates law from politics, means from ends, processes from outcomes.”\textsuperscript{19} The article also finds fault with the rule of law because “it enables the shrewd, the calculating, and the wealthy to manipulate its forms to their own advantage. And it ratifies and legitimates an adversarial, competitive, and atomistic conception of human relations.”\textsuperscript{20}

To similar effect is a 2003 article by David Kairys, which argues that “[t]he broad, grandiose vision of the rule of law . . . lends a false legitimacy to existing social and power relations.”\textsuperscript{21} Judges always have the option (and, indeed, the moral duty) to read progressive values into the law. Consequently, there is no legitimate excuse for judges who reach unjust results. As the article puts it: “the common theme of legal opinions—the law made me do it—is wrong and misleading.”\textsuperscript{22}

Another trope of this school of thought is that democracy is corrupt. Legislatures do not serve the public interest because

\begin{itemize}
\item \textsuperscript{14} Erwin Chemerinsky, \textit{Wrong Questions Get Wrong Answers: An Analysis of Professor Carter’s Approach to Judicial Review}, 66 B.U. L. REV. 47 (1986).
\item \textsuperscript{15} Id. at 60.
\item \textsuperscript{16} Id. at 59.
\item \textsuperscript{17} Brian Leiter, \textit{Positivism, Formalism, Realism}, 99 COLUM. L. REV. 1138, 1144 (1999) (reviewing ANTHONY SEBOK, \textit{LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE} (1998)).
\item \textsuperscript{18} Morton Horwitz, \textit{The Rule of Law: An Unqualified Human Good?}, 86 YALE L. J. 561, 566 (1977).
\item \textsuperscript{19} Id.
\item \textsuperscript{20} Id.
\item \textsuperscript{22} Id. at 322.
\end{itemize}
legislation is “a sale by legislators to interest groups.” As a 1991 article by Einer Elhauge explains: “Modern interest group theory . . . offers a compelling explanation for something we all know is true: our democratic system regularly produces some results that appear contrary to the interests of the general public.”

Judges, on the other hand, are viewed positively. For example, a 1989 article by William Eskridge suggests that courts are better able to “articulate public values” because their “independence reduces the inertia and interest group pressures of everyday politics, and because their open, reasoned, and incremental [decision-making] assures a more rational discussion of public issues.”

Under the principle that law should be construed to advance the public good, it follows for these scholars that appellate judges should, must and therefore do have the power to “make decisions for society” based on what they determine “to be the public’s intermediate-and long-term best interests” even if their “choices . . . are not entirely in accordance with legislative will, current public sentiment, or the existing body of case law and settled principles.”

Great judges, it is said, are the ones who use this power most freely. All judges should be encouraged to follow their example. As a 2007 article by Neil Siegel explains: “there is much to be said . . . for judicial boldness and even heroism in appropriate cases. Some of the most celebrated Supreme Court opinions in American history were hardly models of judicial restraint.”

B. Judges as Guardians or Fiduciaries of the People

A 2013 article in the California Law Review entitled A Fiduciary Theory of Judging by Ethan J. Leib, David L. Ponet and Michael Serota brings these ideas together and combines them with the burgeoning field of fiduciary theory to provide a conceptual justification for an expansive view of the judicial role. The article

starts and concludes that judges are, in fact, fiduciaries of the people, stating: “To say that judges hold the public’s interest in trust is more than mere rhetoric or analogy; the people are the real beneficiaries and judges should conform their conduct to fiduciary standards.”

Fiduciaries come in many varieties. Some, like servants, are bound to follow orders. Others, like guardians, have discretion to do whatever they deem to be in the best interest of their charge. The article likens judges to guardians and other fiduciaries with broad discretion by describing judges as to “‘trustees’ of some kind: independent but loosely constrained by precedent and the authorization to try to develop standards over time, subject only to impeachment or elections for accountability.” At another point, the article compares judges to corporate directors, saying “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.”

These broad powers, the article explains, do not require legislative authority or an electoral mandate, but instead accrue to judges from their status as fiduciaries. As the article notes, “neither implied nor express consent are essential components of the fiduciary architecture. Most obviously, guardians who act on behalf of minors or incompetents do so on the basis of trust reposed without consent.” The article goes on to note that this “fiduciary rendering of [judicial power] provides a useful counterpoint to the conventional liberal account of legitimate democratic authority, grounded in the consent of the governed.”

Reasoning from these premises, the article concludes that judges have both the power and the duty to do whatever is in the best interests of the people. This includes the power to do what the legislature should have done to protect the people. As the article puts it, “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.” “These situations require judges to reengage in direct fiduciary protection of the public through their decision making.” The fiduciary authority of judges also includes the power to override precedent. As the article explains, recognition of the “wide discretion” of judges should “enable judicial innovation by encouraging risk taking by judges.”

30. Id. at 721.
31. Id. at 701.
32. Id. at 737.
33. Id. at 707.
34. Id. at 712.
35. Id. at 748.
36. Id. at 749.
37. Id. at 737.
III. CRITIQUE OF THE SUBSTANTIVE JUSTICE MODEL

The fiduciary theory proposed by Leib, Ponet and Serota would repurpose the judiciary into a spearhead for moral progress and social change. For those who agree with the authors’ agenda, their article provides a valuable blueprint. For those who disagree, the article illustrates the flaws of a tempting but mistaken approach to judging.

A. Which People?

Taken literally, the mandate that judges act as fiduciaries of the people puts judges in a hopeless conflict position. There is, in fact, no monolithic “people.” Society is composed of “a bunch of individuals” (associated with each other in many different groups). These individuals have differing interests, so that “on most issues the people’s interests will diverge and will often be in direct conflict.”

Therefore, telling judges they should decide cases based on the best interest of the people gives no meaningful guidance. A 1930 article by the legal realist Karl Llewellyn makes this point well by asking: “Where is the unity, the single coherent group? Where is the demonstrable objective which is social, and not opposed by groups well nigh as important as those which support it?”

To make sense of a charge to act as popular fiduciaries, judges would need to select particular groups of people to treat as surrogates for the people as a whole and give lesser weight to the interests of other groups. Two recent articles in the California Law Review anticipate this need by offering formulae that judges could use in selecting favored and disfavored groups.

But judging is supposed to be impersonal and impartial. Decisions should not depend on whether litigants come from groups that the judge likes, hates or fears. The federal judicial oath requires judges to “swear (or affirm) that [they] will administer justice without respect to persons, and do equal right to the poor and

and impartially . . ."43 Similarly, the “common law judicial oath . . . binds a judge to ‘do right to all manner of people . . . without fear or favor, affection or ill-will[.]’”44 The same idea appears in the Bible. Right after the prohibitions against cursing the deaf and putting stumbling blocks before the blind, the Bible says: "You shall do no injustice in court. You shall not be partial to the poor or defer to the great, but in righteousness shall you judge your neighbor."45

Consider the consequences of departure from this norm. Once it becomes clear that judges are puissant policymakers who favor the interests of particular groups, various groups would vie (even more than they do today) to put their champions on the bench. The outcome of these struggles would vary from jurisdiction to jurisdiction. In some places, dominant law firms might prevail. In others, big business might come out on top. In still other jurisdictions, small business or the working class or members of particular racial or religious groups might dominate. In other places, the police might succeed.

The law would vary from jurisdiction to jurisdiction (or from courtroom to courtroom) depending on the affiliation of the resident judges. Some courts might strike down minimum wage laws based on testimony from economic experts that the regulations are contrary to the best interests of the people. Other courts might double the minimum wage based on reports from other experts that the rate prescribed by the legislature is too low. It is even possible that some judges might take orders from their political leaders and permit abuses of executive power.

The dystopian possibilities can be seen in the history of revolutionary tribunals, vigilance committees and politicized courts. For example (to quote Cass Sunstein), “in the Nazi period, German judges rejected formalism. They did not rely on the ordinary or original meaning of legal texts. On the contrary, they thought that statutes should be construed in accordance with the spirit of the age, defined by reference to the Nazi regime.”46

**B. Popular Champions?**

But suppose that the fiduciary of the people model of judging just nudges the judiciary into a more activist role, so that judges take bolder action and exercise wider discretion to promote what they

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believe to be the public interest. Would that be a good thing? Not necessarily.

Judges are unlikely popular champions. As James Andrew Wynn, Jr. & Eli Paul Mazur point out: “The life experiences of judges are overwhelmingly white, male, and affluent.” Moreover, judges do not have the data or expertise needed to assess the interests of the people or to figure out how those interests can best be served. As a 1988 article by Judge Michael McConnell notes, “[Judges] are carefully insulated from the real world.” They are not personally accountable for the practical impact of their decisions or even generally aware of them. “They are dependent for information and ideas upon people with an inherent professional axe to grind.” Furthermore, judges do not have the time to determine how they might better advance the people’s best interests. “Their caseloads . . . are overwhelming.”

If judges were required to make decisions based on the public interest, they would likely equate the unknowable public interest with something they do know, such as their own values and the values of their class. As a result, “[i]t is hardly clear that liberating those who wield legal power from the ‘mistaken’ belief that legal doctrine constrains their actions will have a progressive effect.” Consider history. As David Kairys points out, the “the courts have more often been a barrier to [progressive] human rights than a means for their realization.” Alternatively, consider how today’s Supreme Court (no doubt believing it is acting in the best interests of the people) has been reinterpretting the First Amendment in a way that Amy Kapczynski denounces as a “market-supremacist” attack on “democratic governance.”

Also, as a 2019 article by Uri Weiss points out, increased uncertainty as to the enforceability of rights “stimulates the transfer

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49. Id. at 106 (“judges are irresponsible in the most fundamental sense: they are not accountable for the consequences of their decisions and ordinarily are not even aware of them.”).
50. Id.
51. Id.
52. Id. at 105 (“judges are more likely to impose upon us the prejudices of their class.”).
of wealth from risk-averse to risk-neutral people via settlements. Therefore, because poor people are more risk-averse than rich people are, legal uncertainty transfers wealth from the poor to the rich."\(^{56}\)

Interestingly, libertarians such as Randy Barnett endorse the idea of judges as fiduciaries of the people but see the mission as the protection of liberty. \(^{57}\) Other scholars have doubts about this program. A 2007 article by Thomas McAfee warns that rather than providing “the ticket to ‘rights nirvana.’ . . . the ‘freedom’ we thereby grant to courts is as likely to lead to injustice and the denial of basic rights as it is to advance [worthy] goals.”\(^ {58}\) A 2018 article by Mark Pulliam calls it a “sophomoric reverie to imagine that enlightened judges will always be on the right side of history.”\(^ {59}\) After all, the article notes, “judges are just government officials wearing robes, not High Priests whose rulings are infallible or divinely inspired.”\(^ {60}\)

C. Democracy

Another flaw in the idea that judges should make decisions based on the best interests of the people, rather than legislative directives, is that it is inconsistent with constitutional democracy. Under our system, the people are sovereign and have the right, within limits prescribed by the Constitution, “to govern themselves through representative self-government.”\(^ {61}\) A corollary principle is “that all legitimate authority, including that of judges, stems initially from the consent of the governed.”\(^ {62}\) In other words, “all government officials are mere agents, exercising only such authority as is delegated by law.”\(^ {63}\)

Legislation is a task delegated to the elected legislatures. Judges are supposed to decide cases based on the evidence and the law. Obviously, this involves some discretion in figuring out what the law means. But under democratic theory the discretion is one of a subordinate, not a superior. Thus, for example, in interpreting statutes, (to quote John Manning, now Dean of Harvard Law

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57. See Barnett & Bernick, *supra* note 43.
60. Id. at 463.
61. Id. at 439.
School) “it is widely assumed that federal judges must act as Congress’s faithful agents.” Giving judges the power to disregard statutes whenever they believe the legislature has failed to act in the best interests of the people, the-fiduciary-of-the-people thesis violates “the bedrock principle of our constitutional government—popular sovereignty.” The thesis invites (indeed, requires) judges to “usurp a power which our democracy has lodged in its elected legislature” and engage in what a 1988 article by Michael McConnell describes as “the judicial equivalent of a coup d’état.”

Or, as Mark Pulliam puts it in attacking a libertarian version of judicial activism: “By giving unelected federal judges carte blanche to second-guess all federal, state, and local laws, the theory of judicial engagement effectively eviscerates state sovereignty and makes the American people wards of the federal courts . . .”

Over the years, different sides have made the argument for democracy. A century ago, progressives who felt frustrated by a conservative judiciary sounded the theme. Thus, a 1921 book by Justice Benjamin Cardozo says that judges deciding cases based on their “individual sense of justice . . . might result in a benevolent despotism if the judges were benevolent [but it] would put an end to the reign of law.”

In the latter half of the twentieth century, the pro-democracy rhetoric became a conservative trope. For example, a dissent by Justice Sandra Day O’Connor states: “the Constitution does not constitute us as ‘Platonic Guardians’ . . .” A dissent by Justice Hugo Black (once a liberal hero) says that for the Supreme Court to use theories of ‘“natural justice,” . . . or whatnot to veto federal or state laws simply takes away from Congress and States the power to make laws based on their own judgment of fairness and wisdom and transfers that power to this Court . . .”

In this century, the conservatism of the current Supreme Court has led many on the left to return to the pro-democracy argument for limiting courts. As a 2008 article by Josh Benson notes, these “Anti-

68. Pulliam, *supra*, note 58, at 439.
Court scholars [believe] that the American political process is robust and open; that courts intervening against it are undemocratic; that lawyers, judges, and academics are to be regarded as dangerous elites; and that judicial power stifles grassroots empowerment."  

D. The Rule of Law

The theory that judges should decide cases based on the best interests of the people, rather than laws, also violates the rule of law (sometimes called the “Rule of Law”): the principle that the rights of individuals are to be determined through the impartial application of “rules previously declared” and not by the arbitrary will of government officials. This principle, and the corresponding ideal of a government of laws, provides “predictability, certainty and stability.” It gives people the freedom to exercise their rights under the protection of the law. And it promotes equality because decisions are not based on the identity of the parties.

The Rule of Law requires judges to decide based on the legality of the defendant’s actions at the time of challenged conduct. But the fiduciary of the people model of judging requires a different approach. Technical legality or illegality of past conduct is not controlling. The question, rather, is about the future: whether a decision for one party or the other would be in the best interests of those people who matter to the judge.

The fiduciary model also undermines the idea that judges speak as and for the law and, therefore, should be accorded the respect that the law's authority commands. Consider J. Harvie Wilkinson’s comments about pragmatic judging: “Pragmatic judges are ‘forward-looking’ and ‘future-oriented,’ have a ‘taste for empirical inquiry,’ and lack any sense of duty to the traditional sources of legal

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75. See Don Herzog, As Many As Six Impossible Things Before Breakfast, 75 CALIF. L. REV. 609, 626 (1987).
76. Alexander & Solum, supra note 38, at 1629.
79. Id. at 568 (discussing how Leib, Serota, and Ponet proposal requires prospective analysis).
authority. In a very real sense, these attributes mean pragmatists aren’t really judges after all . . .”

IV. SERVANT OF THE LAW MODEL OF JUDGING

A. Agency and the Oath

If judges are not fiduciaries of the people, what are they? There are other ways to characterize the role and set a frame from which norms can be deduced. One way matches up well with how judges conceive their job. Under this alternative, judges are agents or servants. Technically, they are government servants; practically and metaphorically, judges are agents or servants of the law.

To understand why casting judges as agents makes a difference, definitions are helpful. According to the Restatement (Third) of Agency: “Agency is the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.” A servant (now called an “employee”) is an agent whose principal (formerly called “master” but now known as “employer”) has the right to control the physical details of how the servant carries out the job.

Thus, agents and servants differ from guardians and trustees in three crucial ways. First, the creation of the agency relationship requires the assent of the principal. Second, the agent acts “on behalf” of the principal: meaning that the agent acts as the principal (not simply for the benefit of the principal), so that the actions of the agent within the scope of the agency are deemed to be the actions of principal. Third, the agent is subject to the control of the principal. The agent must follow the lawful instructions of the principal and reasonably interpret those instructions so as to further the known wishes and purposes of the principal.

Technically, judges are government employees. In a practical and metaphorical sense, however, judges can be seen as agents or servants of the law. To assume office, judges must take an oath, prescribed by law, in which they pledge loyalty and obedience to the law in much the same way that a servant would pledge loyalty and

82. Restatement (Third) of Agency § 1.01 (Am. Law. Inst., 2006).
85. See Restatement (Third) of Agency § 1.01 cmt. e, 2.01, 8.09 (Am. Law. Inst., 2006); Id. § 2.01; Id. § 8.09.
obedience to a master. Once in office, judges act on behalf of the law. Their rulings are treated as law and not as their personal opinions. Furthermore, judges are bound to follow the law in carrying out their duties.

The language of the oath reinforces the idea that judges are acting as servants of the law. The federal judicial oath requires a judge to “solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as [Judge or Justice] under the Constitution and laws of the United States. So help me God.”

Of course, treating the law as the judges’ master (even metaphorically) requires reification of the law. But that is precisely the point. A key function of agency theory is to enable intangible legal fictions such as corporations to operate in the real world through representation by human agents. The Rule of Law is an intangible legal fiction that is vital to our society. For the Rule of Law to operate, it needs human agents in the same way that a corporation needs employees. Judges (and others) perform that role.

Interestingly, the Constitution anticipates its need for judges to act as its human agents. Article VI, Section 3 of the Constitution provides that all “judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . .” As Chief Justice John Marshall pointed out in Marbury v. Madison, “the framers of the constitution contemplated that instrument, as a rule for the government of courts, as well as of the legislature. Why otherwise does it direct the judges to take an oath to support it?”

B. The Ideology of the Judiciary

The idea that judges are agents or servants of the law also has the support of the current Chief Justice of the United States. At his confirmation hearing, John Roberts defended the idea of an impartial judiciary by comparing judges to umpires. In that same testimony, he also stated: “judges and Justices are servants of the law, not the other way around.” At a ceremony in 2018, the Chief Justice repeated the idea, saying that “a certain humility should
characterize the judicial role. Judges and justices are servants of the law, not the other way around.\(^91\)

The word "servant" is an old-fashioned word associated with old-fashioned virtues such as loyalty, obedience and respect for authority. The Chief Justice's use of the word is a prime for traditional morality. It is also the first step in an argument for a conservative version of the judicial role. The statement that judges are servants of the law leads naturally to the conclusion that judges are bound to follow the law in the same way servants are bound to obey their master. The next phrase "not the other way around" rejects the progressive idea that judges should use the law to improve society or otherwise advance their preferred policy agenda. The bottom line is very similar to something Chief Justice John Marshall said on behalf of the Supreme Court in 1824: “Courts are the mere instruments of the law, and can will nothing . . . Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law."\(^92\)

The servant model is also better for the Rule of Law. This approach is consistent with democratic theory because it accords pride of place to the elected legislature when it comes to changing the law. Jurisprudence is more stable. Cases are decided (with rare exceptions) based on the law as it was at the time the parties acted and not on how the law should be going forward. Judges play a neutral role, taking the law as given. They do not act as partisans for some theory of social change or moral progress.

Both parts of the servant-of-the-law model have practical advantages for the judiciary and its traditional ideology. The word "servant" (rather than director or guardian) indicates that judges will play a subordinate role. Courts will not undertake to legislate; judges will follow the constitutional directives of the legislature and lower court judges will obey higher courts. The servant model also evokes the virtue of self-abnegating identification with the master (\(i.e.\) the law), which makes it easier for judges to become their role, follow authority, and carry out the unpleasant parts of the job, such as sending people to prison.

Making the law the “master” gives judges a job they know how to do and saves them from a task that is beyond their expertise. If judges were required to decide based on the best interests of the people, they would be at sea. Analyzing legal materials, by contrast, is their strong suit. And if judges consider policy when resolving ambiguities in the law, that consideration is incidental to their primary task of discerning the intent and meaning of the law.

\(^91\) Chief Justice John Roberts, About the William H. Rehnquist Award, 54(1) CT. REV. 1, 44 (2018).

\(^92\) Osborn v. President, Directors & Co. of Bank, 22 U.S. 738, 866 (1824).
Moreover, because they are serving the law, not the general public, judges can give greater weight in their policy analysis to the interests of the legal system, such as consistency with precedent and ease of judicial administration.\textsuperscript{93}

Still another advantage of subordinating judges to the law is that it preserves the independence of the judiciary. If judges were servants of the government, they could not be impartial when adjudicating disputes between citizens and the government. If judges were servants of the people, judges would be pressured to defer to elected officials who have a direct mandate from the people and a better sense of what the people want. By contrast, as servants of the law, judges have home field advantage. They are interpreting the commands of a master they know better than anyone else. As Chief Justice John Marshall said on behalf of the U.S. Supreme Court in \textit{Marbury v. Madison} in 1803: “It is emphatically the province and duty of the judicial department to say what the law is.”\textsuperscript{95}

The word “servant” sounds humble. But sometimes servants must display great initiative to figure out what the master means and how best to carry out the master’s wishes.

\textbf{C. Academic Opinion}

Some scholars support the notion that judges should serve the law. For instance, a 2015 article by Paul Miller and Andrew Gold posits that some fiduciaries may be “engaged to determine or advance certain \textit{abstract purposes}.”\textsuperscript{96} As examples, the article cites charitable trustees\textsuperscript{97} and judges.\textsuperscript{98} Also in support is a 2017 book by Gary Lawson and Guy Seidman, which says that “the specific task with which federal judges are charged is to decide cases by law.”\textsuperscript{99}

Similarly, a 2005 article by Sarah Cravens sees judges as “trustees” entrusted with the care of the common law and, therefore, obliged “to uphold and maintain” the corpus of that law “in individual cases in accordance with the underlying aims of the corpus.”\textsuperscript{100}

Along these same lines, a recent book by Randy Kozel argues that judges following precedent, rather than their own personal vision of justice, “is a valuable thing in a system that aspires to

\textsuperscript{95} \textit{Marbury v. Madison}, 5 U.S. 137, 177 (1803).
\textsuperscript{96} Miller & Gold, supra, note 78, at 517.
\textsuperscript{97} \textit{Id}. at 528.
\textsuperscript{98} \textit{Id}. at 570.
promote the rule of law as opposed to the rule of individual men and women.”

Paul Horwitz also endorses “an office-centered vision of justice” that requires judges to identify with their office and not remake the law based on their personal views.

A similar idea in the field of statutory construction—that judges should act as faithful agents of the legislature, not as independent policy makers—has the support of scholars such as John Manning, Jonathan Molot and Judge Amy Coney Barrett. In the same vein, a 2010 article by Thomas Merrill points out that if judges were to interpret statutes based on the best interests of society, the law would constantly change depending on the policy views of the most recent decision-maker. Similarly, a 2017 article by William Baude and Stephen Sachs argues that rules of interpretation for resolving statutory ambiguities are needed to fill “gaps that would otherwise be filled by the interpreter’s normative priors.”

On the other hand, many scholars reject the idea of judges following law. In their view, the legalistic approach limits adaptation to changing circumstances and dooms decision-making “to mediocrity by mandating the inaccessibility of excellence.” A related criticism is that “[b]ecause the rules that determine existing legal rights and duties were … established in the past, ‘legalism … has a … conservative hue.’” Or as a 2019 article by W. Bradley Wendel on legal advice puts it: “If the only reasons that count … are those that are part of existing law, then legal discourse itself will

102. Id. at 176.
107. See Merrill, supra note 65, at 1587.
tend to ratify existing maldistributions of wealth and power in society.”\textsuperscript{112}

Another critique is that legalism is a fiction that allows judges to avoid personal responsibility. To quote a 2007 article by J.C. Olesen: “By treating themselves as humble servants of the law … judges can indulge in a mythic illusion” and thereby “become blind to the consequences of their decisions.”\textsuperscript{113} To similar effect, a 1930 book by Jerome Frank characterizes the idea of judges following law as “pretense” and “self-delusion” and says judges “must rid themselves of this reliance on a non-existent guide, they must learn the virtue, the power and the practical worth of self-authority.”\textsuperscript{114}

\textbf{D. Judicial Practice}

In practice, do judges follow the law or their own sense of justice? When asked, judges say the law determines the outcome about ninety percent of the time.\textsuperscript{115} This includes many cases the judge would prefer to see come out the other way. To quote U.S. Court of Appeals Judge Theodore A. McKee: “judges often render decisions that achieve a result they do not like and enforce laws they do not agree with. . . . It is not something we like to do, but it is something that we do routinely regardless of the level of personal difficulty.”\textsuperscript{116}

Academics tend to focus on the most politically charged cases. A broader sample indicates that judging (particularly in the lower federal courts) is not as partisan or free-wheeling as some might assume. A 2013 study found Republican-appointed U.S. Supreme Court Justices voted conservatively 57% of the time while Democratic Supreme Court appointees voted conservatively 40% of the time, for a partisan difference of 17%. The comparable partisan gap for the courts of appeal was 4.5%.\textsuperscript{117} So it appears professional norms do in fact “produce much more consensus than would be

\begin{itemize}
\item \textsuperscript{113} J.C. Olesen, \textit{The Antigone Dilemma: When the Paths of Law and Morality Diverge}, 29 CARDozo L. REV. 669, 689 (2007).
\item \textsuperscript{114} JEROME FRANK, LAW AND THE MODERN MIND 130-31 (1930).
\item \textsuperscript{116} Theodore A. McKee, \textit{Judges as Umpires}, 35 HOFSTRA L. REV. 1709, 1709 (2007).
\item \textsuperscript{117} See LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 168 (2013).
\end{itemize}
expected if judges’ decisions mirrored the disagreements in legislative bodies or political debates.”

V. CONCLUSION

Neither of the models discussed in this Essay establish algorithms for judges to follow. Both are metaphors designed to prime thought and influence behavior. In practice, many judges operate with both in mind and strive to make decisions consistent with both. When forced to choose, they answer the easier question: going with justice if the law is ambiguous or with law if there is no intuitively just result.

But, in theory, which model should be the norm? What should judges be told to do in ordinary business litigation when the two metaphors clearly point in opposite directions and the conflict between law and justice seems inescapable? While the call of justice is tempting, telling judges they should act as agents or servants of the law, and not assume the role of guardians of the people, is more consistent with the judicial oath, stability, freedom, democracy, limited government and the rule of law.
