

SOVEREIGNS, TRUSTEES, GUARDIANS: PRIVATE-LAW CONCEPTS AND THE LIMITS OF LEGITIMATE STATE POWER

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I

INTRODUCTION

When must people obey their government, and when may they resist its commands? The question is perennial in modern political thought, and has its sources much earlier, in classical and medieval inquiry. The problem of odious debt is an instance of this broader question: Are some government actions not binding on the people the government rules? If so, how can we identify the actions a people may resist or, in the case of odious debt, disown?

Proponents of a revived odious debt doctrine propose to address the question through the law of agency. On this theory a government acts as an agent of its people, the principals, whose interests it is bound to protect and promote if it violates either the express terms or the intrinsic limits of its agency authority; the *ultra vires* actions cannot bind the principals. When that government falls to a replacement, the people may then repudiate the debt.¹

What, other than a convenient result, recommends this approach? A great deal of jurisprudential and philosophical history, as it turns out. The modern effort to make tractable the idea of limits to legitimate state action has taken much of its shape from central concepts of private law: agency, trust, and (less familiar now, but conceptually aligned) wardship. These concepts were indispensable to the development of three major jurisprudential areas where

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1. For a discussion of the contemporary odious debt issue, see Lee C. Buchheit, G. Mitu Gulati & Robert B. Thompson, *The Dilemma of Odious Debts*, 56 DUKE L.J. 1201 (2007). For a discussion of odious debt as part of customary international law, see Adam Feibelman, *Contract, Priority, and Odious Debt*, 85 N.C. L. REV. 727, 738–40 (2007). For an overview of the odious debt doctrine's classic formulation, see Ashfaq Khalfan, Jeff King & Bryan Thomas, *Advancing the Odious Debt Doctrine* 13–49 (Centre for International Sustainable Development Law, Working Paper No. COM/RES/ESJ/, 2003), available at http://www.odiousdebts.org/odiousdebts/publications/Advancing_the_Odious_Debt_Doctrine.pdf.

the extent of legitimate state power has been at issue: constitutionalism, colonialism, and the system of international obligations erected under the League of Nations Mandate System.

The centrality of private-law concepts to core issues of public law has become obscure for several reasons. One is the Westphalian cast of international public law, with its presumption of the autonomy of each state vis-à-vis other states.² This presumption, however, became universal only after World War Two: before then, the theory of sovereign power in international law incorporated gradations of authority derived in part from trust, agency, and wardship concepts.³ The principles of the pre-World War Two system persisted deep into the post-War era of international law. The problems that gave rise to it have never receded. A second, closely related reason for the obscurity of private-law concepts inherent in public-law issues is the intellectual disowning of the colonial era, so much a source of retrospective and continuing shame that scholars and politicians have balked at recognizing its jurisprudential complexity and continuity with both the domestic constitutionalism that preceded it and the Westphalian international system that came after.⁴ A third source of obscurity is the artificial division between legal and philosophical history. Before the nineteenth century, figures such as Hugo Grotius, Samuel Pufendorf, Francisco de Vitoria, and John Locke were regarded as both jurists and philosophers, thinkers about the origins and purposes of political society

2. See INTERNATIONAL LAW: CASES AND COMMENTARY 424 (Mark W. Janis & John E. Noyes eds., 3d ed. 2006) (“[S]tates have been central components of the international legal system, at least since the Peace of Westphalia in 1648.”); EDWARD KEENE, BEYOND THE ANARCHICAL SOCIETY: GROTIUS, COLONIALISM, AND ORDER IN WORLD POLITICS 12, 12–39 (“Nowadays, order in modern world politics is usually described in terms of the norms, rules and institutions of the European society of states.”) (proceeding to argue that this perspective has limited application to the problem of international order across time and space).

3. See KEENE, *supra* note 2, at 97–144 (describing historical interaction between two bodies principle in international order, one fitting the Westphalian model, the other derived from the colonial experience, and the attempt the universalize the Westphalian system after World War Two).

4. See, e.g., UDAY SINGH MEHTA, LIBERALISM AND EMPIRE: A STUDY IN NINETEENTH-CENTURY BRITISH LIBERAL THOUGHT (1999); ASHIS NANDY, THE ILLEGITIMACY OF NATIONALISM: RABINDRANATH TAGORE AND THE POLITICS OF SELF (1994); EDWARD W. SAID, CULTURE AND IMPERIALISM (1993). Of course these authors vary widely in their concerns and methods. Said famously insists upon appreciating the extent to which imperial status shaped both the consciousness and the political economy of Europe, with particular attention to the construction of European ideas of “the Orient” and subject peoples generally, which seemed to justify imperial domination. Mehta seeks to demonstrate the plural character of Western thought about imperialism; the chief theme of his book is a contrast between what he regards as the rationalistic and universalistic utilitarian liberalism of James and John Stuart Mill, which served as a major justificatory scheme for imperialism, and the skeptical, pluralist, prudential political thought of Edmund Burke, whom Mehta regards as a pioneering critic of imperialism. Nandy is interested chiefly in the effects of imperial experience on the psychology of colonized peoples, especially in their self-definition as moral and political collectivities. At the heart of his thought is the idea that colonized peoples set aside pluralistic and flexible ideas of self and culture in favor of hard-edged, exclusive identities in response to, and in imitation of, their imperial rulers.

who at once looked to legal concepts to guide their thought and expected their views to have legal consequences.⁵

II

PRIVATE-LAW CONCEPTS IN THE RISE OF CONSTITUTIONALISM

A. Developments Before Contract Theory

Few ever argued that the powers of governments were notionally boundless, that rulers were infallible, or that whatever was, was right. Political thought always included the idea that governments existed to serve the interests of those who lived under them. Such interests were not necessarily pre-political or extra-political. They might have included the wealth and power of the state. They might have lain in citizenship and political participation, and so have been unachievable in a pre-political or extra-political setting. Nonetheless, the idea that states sometimes acted outside their proper powers was enshrined early in the idea of *tyranny*, a state destructive of the interests of its people, which remained a central category in political thought from the time it arose in Classical Greece.

What is not so clear is whether the concept of tyranny implied a theory of *legitimacy*, of definite powers beyond which acts of a state could not bind its people, and conversely a people's right to resist or set aside such acts. The state appears in classical political thought as a natural kind, rather like the family or the temperament of individuals; it might be a healthy specimen or a diseased one, but in either case it was what it was, a part of the backdrop of human activity, not a legal construct whose powers could fail upon crossing an invisible but decisive line of legitimacy.

That idea required a conceptual distinction between an actually existing government and the source of its authority. With this distinction in place, it became possible to identify the source of authority as the source also of normative constraints on the actually existing government. Two basic forms of this distinction arose. One is what we today think of as the natural-law strategy: identifying limits on government power with divine command or the dictates of

5. On the role of these figures as legal and political actors in their respective times, see RICHARD TUCK, *THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT* 78–108 (on Grotius and the political stakes of contemporary jurisprudence), 140–81 (on Pufendorf and Locke) (1999); JAMES TULLY, *AN APPROACH TO POLITICAL PHILOSOPHY: LOCKE IN CONTEXTS* 137–76 (1993) (on Locke and the jurisprudential and theoretical justifications for European expropriation of the Americas); Anthony Pagden, *Dispossessing the Barbarian: The Language of Spanish Thomism and the Debate over the Property Rights of the American Indians*, in *THE LANGUAGES OF POLITICAL THEORY IN EARLY-MODERN EUROPE* 79, 79–88 (Anthony Pagden ed., 1987) (on Vitoria and the internal legal debate over Spanish empire). For instances of their use in legal argument, see *Johnson v. M'Intosh*, U.S. 543, 563–69, 571 (1823) (noting litigants' invocation of Locke, Grotius, and Emmerich de Vattel, another jurist who argued strenuously for the legitimacy of European expropriation) and *Pierson v. Post*, 3 Cai. R. 175, 1805 WL 781 (N.Y. Sup.) (discussing Barbeyrac's commentary on Pufendorf as a partial basis of the resolution of the case).

reason.⁶ The other relied on a conceptual wedge between sovereignty and government: sovereignty, the power to make collective decisions and the jurisdiction over a territory, belonged ultimately to a people. Government was the repository of sovereign power, but not its owner. The sovereign people, not the actually existing state, were the final source of political authority.⁷

This idea was developed by the autonomous cities of Northern Italy's Lombard League in defense of their right, as political communities, to resist incursions by other political entities.⁸ This was quite a different question from discerning the bounds of a state's legitimate power vis-à-vis its own people. For that question, the idea is more metaphysics than doctrine. To become operational, it would require answers to several clusters of questions: (1) How does a sovereign people impose limits on the actions of the state? Are those limits created in a once-and-for-all constitutional act, or may they be revised, and if so, how? Are they limits entirely up to the sovereign people to define, or are there inalienable constraints on the grants of power a people may bindingly make to a state? (2) Who may enforce the constraints on legitimate state action? Does this power fall to the people as a whole, inferior ministers of the state, an aristocratic class (say, landowners) of subjects or citizens, or perhaps to foreign sovereigns? Who, in a phrase, has standing to challenge a tyrannical government? (3) What enforcement action may the party with standing take? Is there a right of active resistance—of rebellion in a domestic people or intervention by a foreign power? Is there a right only of passive resistance, of declining to obey illegitimate government orders? Or is there no enforcement action at all (implying, of course, that no one has standing), so that the only consolation of the oppressed is the knowledge that their oppression is illegitimate?

The first late-medieval attempt to apply such a theory of sovereignty to problems of internal government arose not under a political constitution, but in the other great medieval jurisdiction, the Roman Catholic Church. As early as the end of the twelfth century, Huguccio, the Bishop of Pisa, contended for a

6. For discussion of these strands of normative political thought, see QUENTIN SKINNER, 2 THE FOUNDATIONS OF MODERN POLITICAL THOUGHT: THE AGE OF REFORMATION 137–73 (1978) (on the Thomist Catholic view of political society), 189–238, 302–59 (on the development of Protestant theories of resistance to the state).

7. The origin of this conception of sovereignty in modern thought is the constitutional theory developed by the independent city-states of northern Italy in the twelfth, thirteenth, and fourteenth centuries. As they resisted incursions by the Holy Roman Empire, these cities developed an ideology of liberty that contained the essential ideas of the sovereignty of a people: (1) the right to be free from any outside control of their political life and (2) the right to govern themselves internally as they saw fit. See QUENTIN SKINNER, 1 THE FOUNDATIONS OF MODERN POLITICAL THOUGHT: THE RENAISSANCE 3–7 (1978). This idea flew in the face of the doctrine that the Emperor, putatively the lineal successor of Augustine, was *dominus mundi*, lord of all the world. See *id.* In the fourteenth century, this ideology received a juristic interpretation from Bartolus of Saxoferrato and his student, Baldus, who contended that the ancient law of *dominus mundi* must take account of new, legally salient facts: that the cities of northern Italy did not in fact take orders from the Emperor indicated as a matter of constitutional law that they were *sibi princeps*, each one “an emperor unto itself,” or free-standing sovereign.

8. See discussion *supra* note 7.

conception of church authority that came to be called *conciliarism*: under specified circumstances, the cardinals could call a general council of the church, which had the power to override the authority of the pope.⁹ Whereas Huguccio seems to have regarded conciliar authority as a form of emergency power, which the cardinals might exercise only when the pope fell into heresy or committed serious crimes, by the fourteenth century the legal and political writer Marsiglio of Padua articulated a fully fledged conciliarist theory of church authority.¹⁰ On this view, the pope's power did not rest on divine authority, but was derived from the spiritual authority of the entire church, and was held on condition that the pope use it for the good of entire community of believers.¹¹ These theories came to dramatic fruition in the last decades of the fourteenth century and the beginning of the fifteenth, when a series of schisms produced three concurrent claimants to the papacy.¹² The cardinals of the church were able to resolve this constitutional crisis only by calling a council for a new and dispositive election, thus declaring and acting on the right of the church community to sit in judgment on the head of the church.¹³

Theologian and jurist Jean Gerson extended this conception of church authority to political societies.¹⁴ Gerson took the organizing concept of conciliarism as his basic account of political power, holding (1) that no ruler can be superior in power to the community he governs and (2) the ultimate power over a political community belongs inalienably to the community itself.¹⁵ Gerson combined conciliarism with a view associated with Saint Paul and Saint Augustine: that political societies arise as a result of human imperfection, for fallen creatures cannot live securely without mutual coercion.¹⁶ This account of political society as something self-consciously constructed by human beings to redress their mutual vulnerability and unreliable passions, when combined with the conciliarist doctrine of authority, set the stage for a vision of political authority. In this vision, political authority was limited by the terms of transfer from a people in whom sovereignty ultimately inhered to a state holding it in trust or as an agent.

At the beginning of the sixteenth century, in the course of developing a theory of the respective jurisdictions of secular and religious authority that would enable political rulers to resist incursions by the Catholic Church,

9. See SKINNER, *supra* note 6, at 36–37.

10. See *id.* at 37–38.

11. See *id.* at 38–39. This view was also associated with Marsiglio's contemporary, William of Occam. See *id.* Although Occam is best known today for his recommendation of parsimony in explanation, he is also a progenitor of the constitutional tradition.

12. See *id.* at 39–40.

13. See *id.*

14. See *id.* at 115–17.

15. See *id.* at 116–17.

16. See *id.* at 116. This was in contrast to the view, associated with Aristotle and Thomas Aquinas, that political society was the natural state of human beings and a precondition of affirmative forms of flourishing. See ISTVAN HANT, *JEALOUSY OF TRADE: INTERNATIONAL COMPETITION AND THE NATION-STATE IN HISTORICAL PERSPECTIVE* 159–84 (2005) (discussing this development).

Sorbonne jurists John Mair and Jacques Almain gave more systemic and forceful voice to Gerson's conciliarist account of secular political authority.¹⁷ The Sorbonnists were particularly clear on a critical distinction: whereas on the old theory of *dominus mundi* the ruler had been owner and lord of his realm, in the conciliarist account he had a lesser form of power than an owner because he could not freely dispose of his realm or its population.¹⁸ Rather, he acted as a *minister*, a designated performer of tasks on behalf of the people, in whom ultimate sovereignty resided.¹⁹ This formulation made explicit that the ruler was a *subordinate* of the people: he had no power not derived from and bounded by theirs. Moreover, Almain in particular emphasized that certain acts of a ruler were inherently illegitimate: purporting to transfer a kingdom to another ruler, for instance, would be an attempt to exercise a power that was reserved to the people, and was thus *ultra vires*.²⁰ Both Mair and Almain suggested, although they did not consistently declare, that the people, armed and mobilized, might retake their sovereignty from an overreaching ruler.²¹ At other times they appeared to follow the theory of standing and remedy that the original conciliarists had applied to church governance: that a ruler who overran the limits of his power could be checked by a council of the national estates, as the pope had been checked by a general council of the church.²²

B. The Rise of Contract Theory

1. Grotius

The legal thought surveyed so far is only a rough approximation of a theory of legitimate political action by a state vis-à-vis its own populace. Only the religious conciliarism of Marsiglio and his successors was directed at articulating checks on authority from within its own system of governance. The

17. *See id.* at 117–23.

18. *See id.*

19. *See id.*

20. *See id.* at 122–23.

21. *See id.*

22. *See id.* at 123. Of course, we are telling a story about the development of an idea that includes many omitted tributaries and deltas. A variety of less-comprehensive attempts to designate the limits of political authority figured in the political and juridical thought of this period. For instance, in the sixteenth and seventeenth centuries, legal scholars revived a Roman private-law principle that one might resist by force the enforcement of a judicial order whenever the judge had overstepped his jurisdiction—a clear analogy to the *ultra vires* actions of a ruler, which the same jurists suggested that a people might resist. *See id.* at 124–27. A second argument, derived from the Roman law idea that the sovereign's power of coercion could be exercised by lesser officials than the emperor himself, attached to those “inferior magistrates” a right to act against an *ultra vires* leader on behalf of the political community. *See id.* at 127–29. These ideas represented a considerable challenge to the absolutist idea that sovereign power must be omnipotent and unified. In a third development that brings to mind today's constitutional originalism, legal scholars influenced by the revival of classical history and the perception that law was historically conditioned rather than timeless began investigating the specific circumstances and terms of the emperor Augustus's ascent to imperial power, with the intent of identifying constraints that might continue to bind his successors down to the Holy Roman Empire. *See id.* at 129–31.

expressly political accounts that followed, like the early Italian theories of popular sovereignty, were motivated by resistance to incursion from outside: seeking to refute claims of political sovereignty by the Holy Roman Empire or the Catholic Church on behalf of smaller polities, they paid inconsistent attention to the questions of standards, standing, and remedy which were necessary to an operational theory of legitimate authority. Moreover, in these early theories the internal structure of popular sovereignty is rather mysterious. How does the power of self-government arise? How does one identify the boundaries of the “people” to which it attaches? Is it ever extinguished? These theories stipulate that a people transmits the power to govern to a ruler, but they do little to specify the character of that power.

The fully developed trusteeship theory of constitutional government, which was exemplified in John Locke’s *Second Treatise of Government*, began with the constitutional theory of Hugo Grotius, the early seventeenth-century Dutch jurist often credited with founding the modern theory of international law. Grotius’s innovation was to develop a fully constructivist account of sovereignty as the voluntary coordination and aggregation of powers already inherent in individuals.²³ Rather than be just a mysterious axiom, the power of popular sovereignty is the product of many conjoined powers of individual persons. Grotius began from an anthropological generalization: everyone has an interest in his own survival.²⁴ While he took this human predicament to be indicative of divine design, he derived his account of law mediately, from the features of that design, and not immediately from divine authority.²⁵ “God,” he wrote, “created man free and *sui juris*, so that the actions of each individual and the use of his possessions were made subject not to another’s will but to his own.”²⁶ This freedom of the will was bounded only by a handful of natural powers and duties that Grotius took to be implied by the interest in self-preservation: rights of self-defense and acquisition of useful property and duties not to attack others or to interfere with their duly acquired property rights.²⁷ In all other relations, the

23. Our account of Grotius’s innovation draws heavily on the interpretation given by Richard Tuck. See TUCK, *supra* note 5, at 78–108 (placing Grotius’ thought in the context of the interwoven development of international and domestic political theory); RICHARD TUCK, PHILOSOPHY AND GOVERNMENT, 1572–1651, 154–201 (1993) [hereinafter TUCK, PHILOSOPHY] (locating Grotius’s methodological innovation within the jurisprudential and political currents of his time, as well as the salient events of his own life); RICHARD TUCK, NATURAL RIGHTS THEORIES: THEIR ORIGINS AND DEVELOPMENT 58–81 (1979) [hereinafter TUCK, NATURAL RIGHTS] (emphasizing the radicalism of Grotius’s methodological reliance on individual rights and their voluntary, conditional surrender).

24. See HUGO GROTIUS, ON THE LAW OF PRIZE AND BOOTY 9–10 (Gwladys L. Williams trans., 1964) (1604) (so arguing).

25. We borrow this formulation from Tuck. TUCK, PHILOSOPHY, *supra* note 23, at 171–74.

26. GROTIUS, *supra* note 24, at 18.

27. See *id.* at 10–13 (setting forth this argument). Of course, it is often argued that to move from an interest to a right is a non sequitur, or that moving from a right to a corresponding duty is the same. Hobbes would make the latter point, for instance, in *Leviathan*, a work that radicalizes certain features of Grotius’s method. Because this is a work of jurisprudential history, not normative philosophy, we are not concerned with these difficulties except inasmuch as they may have motivated later jurisprudential developments.

natural situation of human beings was of *dominium* over their own lives: ownership and free action, or individuated sovereignty.²⁸

Grotius conceived of political sovereignty as the product of voluntary coordination of individual sovereignty, an arrangement he described in private-law terms as “a species of covenant binding upon all of its parts.”²⁹ This covenant was constructed out of “the will of individuals, manifested either in the formal acceptance of pacts . . . or in tacit indication of consent.”³⁰ The claim of a political sovereign to authority over its subjects was thus a consequence of those subjects’ exercise of individual sovereignty over their natural liberties and persons: “the will of the whole group prevails” once political sovereignty is established, for “one of the various attributes of free will is the power to accommodate one’s own will to that of another,” including the artificial person of the sovereign.³¹ Here at last was an account of what the right of collective self-government consisted of: the voluntary combination of the individual right of self-government, inherent in each person.

For most of his career as a commentator, Grotius was engaged by problems of international relations—famously including the right of the Dutch to use the maritime trading routes of the East Indies—and constitutional quarrels among the various bodies of Holland’s complicated government.³² Like his predecessors, then, he remained vague on the questions of standards, standing, and remedy in the relationship between a people, once constituted as a political community, and its designated government.³³ By specifying a theory of the inherent rights of individuals that underlay the collective sovereignty of a people, however, he had provided the conceptual tools that would make coherent a trusteeship theory of constitutional authority. That development, however, awaited political circumstances to call it forth. Those circumstances arose in the English Revolution.

28. As Grotius put it in explicating the idea that man is naturally free and *sui juris*, “[L]iberty in regard to actions is equivalent to ownership in regard to property.” *Id.* at 18.

29. *Id.* at 20.

30. *Id.*

31. *Id.* at 22.

32. A helpful account of Grotius’ political activity and context is interwoven with the treatment of his thought in a book by Richard Tuck. TUCK, PHILOSOPHY, *supra* note 23, at 154–201.

33. It is hard to pin Grotius down to a consistent account of which aspects of one’s inherent self-sovereignty one may transfer, and on what terms. In his *Jurisprudence*, for instance, he suggested that “life, body, freedom, and honor” are all inalienable, but then proceeded to specify ways in which a political sovereign or private transferee may acquire at least some rights over each. *See* TUCK, NATURAL RIGHTS, *supra* note 23, at 70–71 (quoting Grotius at length to this effect). In his *Rights of War and Peace*, however, Grotius drew expressly on the permissibility of selling oneself privately into slavery to argue that a political community may bind itself to an oppressive leader by a voluntary transfer of sovereignty: “It is lawful for any man to engage himself as a slave to whom he pleases . . . Why should it not therefore be as lawful for a people that are at their own disposal, to deliver up themselves to any one or more persons, and to deliver the right of governing them upon him or them, without reserving any share of that right to themselves?” TUCK, PHILOSOPHY, *supra* note 23, at 193 (quoting GROTIUS, RIGHTS OF WAR AND PEACE).

2. The English Revolution

In the long seventeenth-century struggle between Parliament and the Crown over the nature and location of English sovereignty, two theories predominated on the parliamentary side. One was an account of England's "ancient constitution," a vision of a Saxon republic of freeholders brought low by "the Norman yoke" of feudal relations and monarchical power after the conquest of 1066.³⁴ The other, which the parliamentary side often offered in conjunction with the first, was a nascent theory that the government held in trust sovereignty that inhered in the people. That popular sovereignty, in turn, was constructed out of the consent of naturally free and self-owning individuals. This was, in other words, a theory of the kind that Grotius had inaugurated, motivated for the first time by conflict between a people and its constituted government.

Writing in the relatively early period of the conflict, parliamentary pamphleteers Richard Overton and William Walwyn addressed the House of Commons in language that exemplified this line of argument. Referring to the election of the parliament "to deliver us from all kind of bondage and to preserve the commonwealth in peace and happiness," they asserted that the parliamentary power was entirely derivative of popular power: "[W]e possessed you with the same power that was in ourselves to have done the same; for we might justly have done it ourselves without you if we had thought it convenient . . ."³⁵ The pamphleteers continued, "[Y]e are to remember that this [conveyance of sovereignty] was . . . but a power of trust, which is ever revocable, and cannot be otherwise—and to be employed to no other end than our own well-being."³⁶ They then elaborated the significance of the trusteeship model: "We are your principals, and you our agents . . . if you or any other should assume or exercise any power that is not derived from our trust and choice thereunto, that power is no less than usurpation and an oppression."³⁷

In another pamphlet later the same year, Overton connected this trusteeship theory to an account of inherent self-sovereignty very close to that of Grotius. "To every individual in nature," he wrote, "is given an individual property by nature not to be invaded or usurped by any."³⁸ He proceeded to derive this claim from the idea of the inherent interest in self-preservation and to deduce from it roughly Grotius's formula: people live naturally in freedom bounded

34. For a major account of this trope of Civil War rhetoric, see CHRISTOPHER HILL, *PURITANISM AND REVOLUTION: STUDIES IN INTERPRETATION OF THE ENGLISH REVOLUTION OF THE 11TH CENTURY* 46–111 (1997) (discussing at length the idea of the "Norman Yoke.") For a discussion of the sometimes complementary and sometimes contradictory invocation of England's "ancient constitution" of liberty, see J.G.A. POCKOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW* 30–55 (1987). Pocock discusses the relationship of this theme to Hill's treatment of the Norman Yoke at 318–21.

35. Richard Overton & William Walwyn, *A Remonstrant of Many Thousand Citizens* (1646), reprinted in *THE ENGLISH LEVELLERS* 33, 33 (Andrew Sharp ed., 1998).

36. *Id.*

37. *Id.* at 34.

38. Richard Overton, *An Arrow Against All Tyrants* (1646), reprinted in *THE ENGLISH LEVELLERS* 54, 55 (Andrew Sharp ed., 1998).

only by their duty not to interfere with the symmetrical freedom of others.³⁹ The basis of “self-propriety” in self-preservation created a clear line between those powers that were alienable and those that were not: of our inherent powers, “no more may be communicated than stands for the better being, weal, or safety” of the one that transfers them.⁴⁰ To do more is to traduce the imperative of self-preservation on which the powers are founded: “He that gives more, sins against his own flesh; and he that takes more is a thief and robber to his kind—every man by nature being a king, priest, and prophet in his natural circuit and compass, whereof no second may partake but by deputation, commission, and free consent from him whose natural right and freedom it is.”⁴¹

The theory, then, is very close to Grotius’s in its premises. Each man has a natural sovereignty, or *self-propriety*, analogous to the *dominium* of a king, over his own belongings and activity. The power of self-government may be freely given over to another; but because no one has the power to abuse or degrade his own person (a restriction Overton seems to take as founded in divine stricture), the familiar rule of property that no one can transfer what he does not have implies that no state can receive the power to act against its people’s interests and freedoms.⁴²

This account went beyond Grotius’s in several respects, both in its more precise specification of standards, standing, and remedy and in the populism or radicalism of its response to these issues. On standards, the extent of legitimate government power, Overton rejected Grotius’s suggestion that, as selling oneself into slavery is legitimate, so a people may accept tyranny so long as it does so freely.⁴³ Instead, he contended that self-sovereignty contains inherent restrictions, and that these persist as limits on the power of any legitimate ruler. The trust or agency relationship envisioned in this account thus includes constraints on the trustee’s power that are not derived from the intent of the settlor or the terms of the trust, but are instead mandatory, defining this type of trust—that is, defining political sovereignty. Those constraints comprise a duty to promote the well-being of the population and a prohibition on violating its liberties.

The issues of standing and remedy are somewhat more ambiguous. Overton was associated with the Leveller movement, so named (by its opponents) in good part because of its call for universal male suffrage.⁴⁴ The critical idea in this

39. *See id.*

40. *See id.*

41. *Id.*

42. Overton makes the points we are paraphrasing quite explicitly: “[A]s by nature no man may abuse, beat, torment or afflict himself, so by nature no man may give that power to another, seeing he may not do it himself; for no more can be communicated from the general [that is, the populace] than is included in the particulars whereof the general is compounded [that is, the natural rights of individuals, contained in their self-propriety or individual sovereignty.]” *Id.* at 56.

43. *See TUCK supra* note 5, at 149–50 (discussing the views of Overton and other Levellers).

44. For a discussion of the Levellers emphasizing that manhood suffrage was not altogether unrealistic in England at the time, see TUCK, *PHILOSOPHY, supra* note 23, at 241–53. For an account emphasizing the radical strands of the Leveller movement, see CHRISTOPHER HILL, *THE WORLD*

strand of thought, then, would seem to be that every citizen had standing to challenge a government that transgressed its proper powers. As the Levellers' stress on the franchise implies, they regarded elections as the preeminent remedy against governments that transgressed their limits.⁴⁵ This view, to the extent that its adherents followed it faithfully, would imply two levels of standing: any male citizen (the term the Levellers preferred to "subject" and used after the declaration of a commonwealth in 1649) had standing to contribute to an electoral judgment; but only a majority of the electorate could invoke the remedy of revoking the "revocable trust" of government. There remained, however, hints of a more populist resistance theory: that subsets of the people could rise in arms if their rights or interests were violated. Overton proposed in *An Arrow Against All Tyrants* that if the Crown exercised unjust force against its subjects, they could resist with commensurate, even fatal force.⁴⁶ There also persisted in Leveller thought an idea that unelected representatives of the people could strike binding agreements with elected representatives at times of crisis, thus restricting government action in novel ways without recourse to elections.⁴⁷ Some forms of standing might thus be available to non-majorities and unelected representatives to enforce remedies more muscular than voting. It was the potential for this kind of resistance in Leveller constitutional theory—resistance that seemed to fall somewhere between constitutional action and self-help—that would inspire the most vociferous objections to the trusteeship theory of constitutionalism, the reactionary monarchism of Sir Robert Filmer. That position, in turn, helped to inspire Locke's systematic and precise rendering of trusteeship theory.

3. Filmer and Locke

Sir Robert Filmer, an arch-reactionary monarchist, addressed these arguments in the course of the English Civil War. With great lucidity and precision he made the case that the trusteeship conception of constitutionalism was theoretically incoherent and dangerously unworkable in practice. His great polemics, *Patriarcha*, *The Anarchy*, and *The Originall of Government* made up the monarchist challenge that Locke would later answer.

Filmer's criticism targeted "a common opinion" that he rightly ascribed to the medieval Catholic universities (particularly the Sorbonne) and "the divines of the reformed churches": that "Mankind is naturally endowed and born with

TURNED UPSIDE DOWN: RADICAL IDEAS DURING THE ENGLISH REVOLUTION 107–50 (1972). For a remarkable transcript of a debate between some Levellers and more conservative members of the parliamentary party, see *At the General Council of the Army, Putney* (1647), reprinted in THE ENGLISH LEVELLERS 102–30 (Andrew Sharp ed., 1998).

45. See TUCK, PHILOSOPHY, *supra* note 23, at 241–53.

46. See Overton, *supra* note 38, at 61. Overton did suggest that there was statutory basis in England for resistance by force against unjust force. See *id.* The idea also appears to be implied by the inalienable right of self-defense, as Locke would later suggest.

47. See *An Agreement of the People* (1647), in THE ENGLISH LEVELLERS 92, 93–101 (Andrew Sharp ed., 1998) (proposing such an agreement to the House of Commons on behalf of representatives of the Levellers and the New Model Army).

freedom from all subjection, and at liberty to choose what form of government it please, and that the power which any man hath over others was at the first by human right bestowed according to the discretion of the multitude.”⁴⁸ Filmer was clear that this contractualist doctrine was tempting—as tempting, indeed, as original sin: “the common people everywhere tenderly embrace it as being most plausible to flesh and blood, for that it prodigally distributes a portion of liberty to the meanest of the multitude, who magnify liberty as if the height of human felicity were to be found in it—never remembering that the desire of liberty was the cause of the fall of Adam.”⁴⁹ This error by itself would have been enough to rouse Filmer’s opposition: but, worse yet, the doctrine of popular sovereignty had given rise to resistance theory: the “perilous conclusion . . . that the people or multitude have power to punish or deprive the prince if he transgress the laws of the kingdom.”⁵⁰ This was the argument that Filmer set out to refute.

Filmer’s argument that all political power is derived from divinely appointed patriarchal power remains mildly notorious, largely because it was Locke’s main target in his *First Treatise on Government*.⁵¹ It is also the least intellectually interesting of Filmer’s arguments.⁵² Filmer’s attacks on the trusteeship theory of constitutionalism are much more powerful.⁵³ His anti-trusteeship argument has two basic stages, one relatively conceptual, the other more operational. Conceptually, Filmer argued that if one took seriously the idea that each man has inherent sovereignty over his person and actions, it would seem all but inconceivable that men would surrender their natural liberty to come under the sovereignty of governments.⁵⁴ This argument has two parts: first, a coordination problem in gathering consent for a single, unifying constitutional proposition;⁵⁵ second, a motivational problem—“he were a madman that being by nature free

48. ROBERT FILMER, *PATRIARCHA OR THE NATURAL POWER OF KINGS* (1680), *reprinted in 2 PATRIARCHA AND OTHER POLITICAL WRITINGS* (Johann P. Somerville ed., 1991).

49. *Id.*

50. *Id.* at 3.

51. *See, e.g., id.* at 11 (“In all kingdoms or commonwealths of the world . . . the authority . . . is the only right and natural authority of a supreme father. There is, and always shall be continued to the end of the world, a natural right of a supreme father over every multitude . . .”).

52. On the status of “natural subjection theory” such as Filmer’s at the time of his writing and Locke’s aims in refuting it, see TULLY, *supra* note 5, at 16–23.

53. Filmer also offers a great time-saver for anti-democrats: a compendium of all slurs against popular government, which remains remarkably current in its images of bloodthirstiness, *libido dominandi*, shirking, opportunism, and, for good measure, craven submission to the powerful. *See id.* at 28–31.

54. ROBERT FILMER, *The Anarchy*, in 2 *PATRIARCHA AND OTHER WRITINGS*, *supra* note 48, at 140–41.

55. *See id.* at 140 (“[I]t follows that natural freedom being once granted, there cannot be any one man chosen a king without the universal consent of all the people of the world at one instant, *nemine contradicente*.”). This argument is more famously associated with Filmer’s argument that property cannot have arisen out of original communism, because each act of appropriation would require the consent of all—a position often thought to have inspired Locke’s theory of the origins of property in Book V of the *Second Treatise*. This relationship between the arguments has been the subject of much exegesis. *See, e.g.,* JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 148–53 (1988).

would choose any man but himself to be his own governor.”⁵⁶ In other words, to take seriously the idea of the inherent self-sovereignty of each person is to make implausible, if not incoherent, the idea of submission to constituted power—which is, after all, the actual condition of humanity in political society, which a theory of the origin and limits of authority must begin from and seek to understand. A theory that cannot generate an account of the reality to which it responds must, in Filmer’s argument, be severely deficient.

The second stage of Filmer’s argument rests on the alleged impossibility of making a trusteeship theory of sovereignty operational. Who is to say when a government (Filmer was concerned mainly with kings) has transgressed the law and triggered the people’s power of reprimand, revision, or resistance? How to resolve the inevitably differing appeals to “fundamental law” that will arise when a constitutional colloquium of every self-sovereign citizen debates the alleged violations of the ruler?⁵⁷ Inevitably, he concluded, the judgment must be an arbitrary, individual, or factional one.⁵⁸ A theory of legitimate resistance or dissent in the name of fundamental constitutional principles must, in practice, become a fig leaf for assertions of opinion, interest, and will.

Filmer’s basic judgment about the character of political power was that “every power of making laws must be arbitrary.”⁵⁹ The issue in designing a government seemed to him to be how to designate the bearer of arbitrary power, not how to check arbitrariness, which he believed inhered in power itself.⁶⁰ Theories of nonarbitrary power were pleasant illusions at best, and often furnished excuses for those who wished their arbitrary power to appear naturally justified.⁶¹ When those theories rested on ideas of popular sovereignty derived from the self-sovereignty of individuals, they would be invitations to anarchy. Writing in the course of a bloody Civil War in which a stacked parliamentary jury voted to behead the King of England, Filmer did not intend his argument to be merely academic.

It was in response to Filmer’s arguments that John Locke formulated the seventeenth century’s most refined trusteeship theory. Arguing along lines that

56. *Supra* note 54, at 141. Filmer rather brilliantly continues, “Thus to avoid the having but of one king of the whole world, we shall run into a liberty of having as many kings as there be men in the world, which upon the matter is to have no king at all, but to leave all men to their natural liberty—which is the mischief the pleaders for natural liberty do pretend they would most avoid.” *Id.*

57. Filmer writes, “I would very gladly learn . . . what a fundamental law is, or else have but any one law named for me that any man can say is a fundamental law of the monarchy.” *Id.* at 153. Anticipating an appeal to higher and still vaguer criteria, he scoffs, “Truly the conscience of all mankind is a pretty large tribunal for the fundamental laws to pronounced sentence in.” *Id.*

58. Continuing the paragraph just quoted, Filmer wrote, “Such a sentence [of the fundamental law] must be upon the hearing of one party only, for it is impossible for a monarch to make his defense and answer, and produce his witness in every man’s conscience, in each man’s cause who will but answer the legality of the monarch’s government.” *Id.*

59. *Id.* at 132.

60. “The question is not, whether there shall be an arbitrary power, but the only point is who shall have that arbitrary power, whether one man or many?” *Id.*

61. Whether Filmer’s deep skepticism and pessimism about the justification of power is at odds with his sanguine endorsement of patriarchal power is a question we do not take up in this article.

Grotius had pioneered, Locke asserted that each person naturally enjoys two powers: (1) a right to do whatever is necessary to his self-preservation and (2) a right to punish those who seek to “harm another in his Life, Health, Liberty, or Possessions.”⁶² When people enter into political society to avoid the inconveniences of natural liberty—frequent conflict and the absence of authoritative arbiters—they surrender this self-sovereignty to the community.⁶³ The inherent rights that Locke described as self-sovereignty he also designated “by the general Name, *Property*,” a term encompassing “Lives, Liberties and Estates.”⁶⁴ Following his predecessors, Locke made two arguments for the inherently limited character of the power individuals transferred to political society. First, it must be limited by the purpose of the transfer, “an intention in every one the better to preserve himself his Liberty and Property,” and thus state power “*can never be suppos’d to extend farther than the common good.*”⁶⁵ Second, because Locke believed that natural right implied a reciprocal duty of non-interference among persons, the state could not exercise “Arbitrary Power” in interfering with its subjects, for “no Body can transfer to another more power than he has in himself,” and the power of the state is built out of the transferred powers of citizens.⁶⁶

Locke’s use of the trust concept is not casual but deliberate and consistent. It is also, of course, congruent with his characterization of inherent self-sovereignty as “Property” which is transferred to the state to be used for the benefit of the settler. He described a legitimate legislature as “acting pursuant to [its] trust,”⁶⁷ characterized persons as “giv[ing] up all their Natural Power [to] put the Legislative Power into such hands as they think fit, with this trust [an assurance against arbitrary power and interference with liberty and possessions],”⁶⁸ and described the legislative power as constrained by “the *Bounds*, which is the trust that is put in them by Society.”⁶⁹ He put the trust concept into full legal operation in his discussion of the superiority of the reserved power of popular sovereignty (assembled out of self-sovereignty) over the constituted legislative power:

Though in a Constituted . . . acting for the preservation of the Community, there can be but one *Supream Power*, which is the *Legislative* . . . yet the Legislative being only a

62. JOHN LOCKE, TWO TREATISES OF GOVERNMENT §II.I.7, at 271. The actions Locke defines as universally punishable are violations of the “Law of Nature,” a law of mutual non-interference or nonharm that Locke takes to be a consequence of the natural freedom and equality of persons and their right of self-preservation. See *id.* §II.I.1-7, at 267–71. Locke states the two powers at §II.IX.128, *id.* at 352.

63. Locke uses the language of political authority to define self-sovereignty: a person in the pre-political condition is “absolute Lord of his own Person and Possessions,” commander of an “Empire” in himself, and not yet “subject . . . to the Dominion and Control of any other Power.” *Id.* §II.IX.123, at 350.

64. *Id.*

65. *Id.* ¶ 131, at 353.

66. *Id.* ¶ 135, at 357.

67. *Id.* ¶ 134, at 356.

68. *Id.* ¶ 156, at 359.

69. *Id.* ¶ 142, at 363.

Fiduciary Power to act for certain ends, there remains still *in the people a Supreme Power* to remove or *alter the Legislative*, when they find the *Legislative* act contrary to the trust reposed in them. For all *Power given with trust* for the attaining an *end*, being limited by that end, whenever that *end* is manifestly neglected, or opposed, the *trust* must necessarily be *forfeited*, and the Power devolve into the hands of those who gave it, who may now place it anew where they shall think best for their safety and security.⁷⁰

Locke elaborated this account in his theory of resistance, which turns on the logic of the trust concept. A trustee has ownership of the trust corpus conditional on his fiduciary obligation to comply with the terms of the trust and pursue the ends it is established to advance. Violation of those conditions ends his (always conditional and purpose-bound) ownership of the corpus, which reverts to the settlor or her successor. Sovereignty, then, is conceived—quite consistently with all of Locke’s terms—as an inherently conditioned property claim that, upon violation of its conditions, dissolves in forfeiture so that sovereignty reverts to the political community built, in turn, out of self-sovereignty, the “Property” each person has in herself. “Resistance” is something of a misnomer for this theory, just as “theft” or “conversion” would misdescribe the acts of a settlor who reclaimed her corpus after a trustee violated his trust.⁷¹

Locke consistently used the image of the trust in describing the dissolution of government by its acting against the ends of the trust, that is, the common good and the liberties of the population. He did not, however, use the term in discussing the dissolution of government by the arrogation of extra-constitutional powers, even though that form of abuse is a violation of the express terms of the transfer of sovereign power to the government.⁷² This distinction suggests that he was interested in the trust not as a private-law simile for the express terms of a constitutional grant of power, but rather as a conceptual key to the nature and inherent limits of sovereign power. The idea of a trust as creating an ownership right conditioned by the purposes of the legal form—the benefit of a party other than the trustee—is Locke’s response to the problem of conventionalism, the alleged possibility of a people’s transfer of sovereignty taking any form at all, including a willing embrace of tyranny.⁷³ It is also his response to Filmer’s claim that no determinate measure of government abuse can indicate where the putative “fundamental law” limits the

70. *Id.* ¶ 149, at 367.

71. As Locke puts it, “Governments are dissolved . . . when the Legislative, or the Prince [acting in executive capacity] . . . act contrary to their Trust . . . when they . . . invade the Property of the Subject . . . make themselves, or any part of the Community, Masters or Arbitrary Disposers of the Lives, Liberties, or Fortunes of the People.” *Id.* ¶ 221, at 412. “By this breach of Trust they *forfeit the Power*, the People had put into their hands, for quite contrary ends, and it devolves to the People, who have a Right to resume their original Liberty[.]” *Id.* ¶ 222 (emphasis in original). Locke’s resistance theory also incorporates his right of self-preservation, which enables one to resist and even to slay another who seeks to put one under his arbitrary or absolute power—a license for mortal resistance that Locke calls a “state of War,” and that he argues obtains between a people and a government that has breached its trust and thus sought unchecked power. *Id.*

72. *See id.* ¶ 211–20, at 406–12 (describing this form is dissolution).

73. *See* TUCK, PHILOSOPHY, *supra* note 33.

powers of rulers, and so any theory of resistance is a counsel of anarchy. Locke looked to the familiar legal form of the trust to solve this problem, and in doing so he perfected an idea of sovereignty as a public species of a private-law arrangement: conditional claims on property backed by a reversionary right to take effect on violation of the conditions.

As a matter of theoretical adequacy, it is not at all clear that Locke accomplished all the tasks that Filmer's challenge set for him. Even if it is true that the trust form addresses some of the issue of standard, that is, what a government may not do, it does nothing for what can be called the problem of standing: who may judge that the government is no longer pursuing the common good and enforce the judgment by resistance? Precisely because the notional dissolution of government power by overreach restores the pre-political situation, with its absence of authoritative arbiters, any attempt to enforce the trust form could simply push the problem of the indeterminate standard back a step, from the standard itself to the indeterminable disagreement of interpreters.

What is nonetheless true is that Locke's trusteeship account was the culmination of a long jurisprudential and political effort to make tractable and persuasive this theory of legitimate government. A set of private-law concepts—trusteeship, property, agency, and fiduciary duty—were among the primary resources of more than a century of early-modern constitutional thought. Moreover, versions of these concepts had histories running back more than five hundred years in European constitutional thought when Locke published his *Two Treatises* in 1689. Without the structuring influence of private-law concepts, those centuries would certainly have generated a theory of the origins and nature of sovereignty; but that theory would just as certainly have been very different from the one they in fact created.

III

FROM CONSTITUTIONALISM TO COLONIALISM

A yawning gap between the vision of the state in domestic constitutional thought and the vision of the state in international law is a seemingly perennial fact. For this reason, it is difficult at best to move from an account of the state developed in domestic constitutionalism to a claim about the duties or powers of the state in international law. This bifurcation came at the beginning of modern political thought: theorists frequently contended that while states might be bound by some set of constraints in their domestic, sovereigns were "in the state of nature" vis-à-vis one another, and thus not subject to any international obligations other than those they voluntarily undertook.⁷⁴ The view of

74. A seminal statement of this idea in political theory is THOMAS HOBBS, *LEVIATHAN* 90 (Richard Tuck ed., 1991) (1651) (discussing the "state of war": "though there had never been any time, wherein particular men were in a condition of warre one against another; yet in all times, Kings, and Persons of Sovereigne authority, are in continuall jealousies, and in the state and posture of Gladiators").

sovereigns as radically independent vis-à-vis one another also arose from the terms of the Peace of Westphalia, with its rejection of international claims to exercise or discipline power within the borders of a state.⁷⁵ This conception marked a deliberate rejection of the same ambitions described above as spurring developments in domestic constitutionalism: claims to universal jurisdiction, by emperors, popes, or others, in the name of some indefeasible obligation of all rulers.⁷⁶

Nonetheless, the trusteeship concept took root in international law, playing precisely the role that Westphalia had seemed to reject categorically: defining the extent of foreign sovereigns' legitimate power to supplant a domestic sovereign that had failed in its obligations to its own people. This important development has been relatively neglected because it took place not in the North Atlantic heartland of international law, but in the attempt to theorize the relationships between imperial powers and their colonial subjects.⁷⁷ Recognition that imperialism was, by and large, a terrible crime has obscured the fact that it generated its own realm of international law, where the trusteeship idea survived to emerge again in the twentieth century. Moreover, the trusteeship idea did not just serve as pro-imperial apologetics: it represented a serious effort to understand and govern legally the inescapable fact that representatives of some countries had assumed the governance of others, with a minimum of accountability to their new subjects.

Describing the division of international law into colonial and noncolonial spheres, Edward Keene has recently argued,

Within Europe, the leading purpose of international order was to promote peaceful co-existence in a multicultural world through the *toleration* of other political systems, cultures and ways of life. Its basic principle of respecting dynastic rulers' rights to govern their domestic possessions in their own way, which gradually changed into the principle that each nation had a right to self-determination, was rooted in the beliefs that different cultures were equally valuable and should be given space to flourish; and that the best way to ensure peace in the society of states was to encourage its members to eschew violence for religious, cultural, or ideological reasons. Beyond Europe, however, international order was dedicated to a quite different purpose: the promotion of *civilization*. Simply put, Europeans and Americans believed that they knew how other governments should be organized, and actively worked to restructure societies that they regarded as uncivilized so as to encourage economic progress and stamp out the barbarism, corruption, despotism and incompetence that they believed to be characteristic of most indigenous regimes.⁷⁸

75. See KEENE, *supra* note 2, at 97–144 (so arguing); Anthony Anghie, *Cultural Difference and International Law: The League of Nations and Its Two Visions of the Nation-State*, 5 ICCLP REV. No. 2 at 5–8 (2002).

76. See Part I.A., *supra*.

77. See Anghie, *supra* note 75; KEENE, *supra* note 2, at 97–144.

78. See KEENE, *supra* note 2, at 98–99 (emphasis in original). Keene later reports, “A consistent theme in textbooks on international law from the middle of the nineteenth century on was the distinction between the family of civilized nations, which was seen as roughly synonymous with the society of states who had achieved recognition as fully independent sovereigns, and the uncivilized world beyond, of territories and peoples that had not yet achieved such recognition.” *Id.* at 114.

The basic theory of this second approach to international law was that all legitimate sovereign power is bound by a set of universal norms. While the specific content of these changed with various specific accounts, the unifying idea was that human beings have inherent interests in (1) certain basic immunities from abuse and arbitrary power and (2) the ability to exercise their capabilities in an institutional setting that adequately ensures basic immunities and gives adequate play to free human activity. These are broadly the criteria of “civilized” government. A sovereign that persistently violates basic immunities or fails to promote its subjects’ interest in free activity has failed in its obligations. To the extent of this failure, an outsider, or “trustee” sovereign, may intervene to assume the functions and authority that the local sovereign cannot. This supplanting, however, may be only partial, and is always regarded as provisional. The trustee sovereign is not a conqueror. It may not expropriate the resources or indefinitely determine the fate of the territory it undertakes to govern. Rather, it must secure and promote the indefeasible interests of the population until its presence is no longer necessary. At that time, its legitimate power ends.

Any operational version of this theory must answer at least four questions.⁷⁹ First, what are the indefeasible interests of the population that the intervening sovereign takes into trust? Which minimal immunities, what pace of progress toward what version of “civilized” development, are so basic to a population’s interests that its government must yield to another sovereign when it violates or neglects them? Second, what is the corpus that the trustee power takes in trust? Is it the territory, the population, or some or all of “sovereignty” regarded as a special, transferable set of powers and obligations? Third, is the beneficiary also the reversioner or remainderman? That is, at the expiration of the trust, does the corpus go to the population, now presumed to be so constituted as to be able to govern itself, or does it go to a sovereign (such as a hereditary monarch) imagined as legally continuous with the abdicating sovereign? Fourth, presuming that the intervening sovereign is bound by the same criteria that bound the local sovereign it supplanted, who can enforce the intervening sovereign’s trusteeship duties? The local population, by right of resistance, or the local sovereign by some residual power not yet (or ever?) returned to the people? A third sovereign, intervening as the intervening sovereign had earlier? Or some transnational or otherwise putatively independent body?

These questions received their most full-bodied treatment in the Mandate System administered by the inter-war League of Nations and certain less well-known successor regimes in international law. These were preceded, however, by three critical junctures in the development of the international-law trusteeship concept in the several centuries of colonial activity before World War One.

79. For an illuminating treatment of the application of today’s agency law for the odious debt doctrine, see Deborah A. DeMott, *Agency by Analogy: A Comment on Odious Debt*, 70 LAW & CONTEMP. PROBS. (forthcoming Autumn 2007).

A. Vitorian Origins

The Dominican jurist Francisco de Vitoria first raised the possibility of a trust relationship between an imperial sovereign and a colonial people. He presented the argument in the course of a trenchant critique of Spanish imperial claims on the Americas. This critique, in turn, was lodged within a conception of the relations among divine authority, political sovereignty, and inherent self-sovereignty that reflected the Dominicans' situation as Catholic jurists in a Catholic empire—Spain—that faced challenges from both the Protestant nations of northern Europe and papal claims to earthly political authority.⁸⁰

The most basic feature of Vitoria's position was the idea of a natural right of *dominium*, ownership of real property and of one's own body, actions, and liberties.⁸¹ *Dominium*, with its clear echoes of Locke's expansively defined "property," figured in Vitoria's thought as belonging to all who enjoyed enough rationality to exercise it, that is, to govern themselves individually.⁸² Vitoria regarded political *dominium*, or sovereignty, as also a product of natural right and the exercise of natural reason, that is, as a purely temporal, even secular matter unrelated to Christianity.⁸³ The intra-European motive behind this position was to resist, on the one hand, Lutheran claims that political authority arose from a state of grace and thus that a ruler could lose his legitimacy if he fell into sin, and, on the other hand, the papal claim to authority in the allocation and government of the Americas.⁸⁴

Despite its origins in European disputes, Vitoria's position had important consequences for his view of Spanish claims to the Americas. Because sovereignty was a secular matter, Native Americans enjoyed the power to rule themselves, and the Spanish could not rest sovereign claims on either the pagan and allegedly sinful nature of American society or putative grants of the new continents by the pope.⁸⁵ Instead, any Spanish claims had to arise from the same

80. See Pagden, *supra* note 5, at 82–85.

81. See FRANCISCO DE VITORIA, POLITICAL WRITINGS 249–51 (Anthony Pagden & Jeremy Lawrance eds., 1991). Here Vitoria contends that it is heresy to argue that Native Americans lack *dominium* because they are pagans or because they are sinful. Kings routinely govern, he points out, and Christians retain property rights, even after they fall into a state of sin.

82. See Pagden, *supra* note 5, at 80–81. This expansive account of "property," as *dominium* is usually translated, has of course much in common with the account that Locke would later give as a basis for resistance theory. For a discussion of the long line of influence and repudiation that links Locke to the Dominicans by way of Hugo Grotius and John Selden, see TUCK, NATURAL RIGHTS, *supra* notes 23, 45–50, 58–100, 143–73.

83. See VITORIA, *supra* note 81, at 251–54; SKINNER, *supra* note 6, at 139–50.

84. For Vitoria's rejection of this claim of Papal power, see VITORIA, *supra* note 81, at 260–64. On the Dominicans' perception of the weakness of this basis for claims of Spanish power in the Americas, see Pagden, *supra* note 5, at 82.

85. See Pagden, *supra* note 5, at 80 (explaining that Vitoria's theory was "the first to claim that 'the affair of the Indies' . . . was a question neither of the limits of papal jurisdiction, nor of Roman Law, but of the law of nature . . . and that the issue was consequently one . . . of natural rights.") (emphasis in original). Vitoria classified these natural rights as *jus gentium*, or the law of peoples—that portion of the laws agreed upon by all peoples that are derived from natural reason and so that are, by convention, not subject to revision. *Id.* at 86. One might therefore regard such rights as a component of

principles of natural right that grounded other dimensions of sovereignty. Having bounded the range of possible arguments in this way, Vitoria then set aside two potential rationales for colonial rule based in natural right: Amerindians could not be said to have voluntarily transferred their sovereignty, because any such transfer had occurred under conditions of coercion, fear, and probable misunderstanding;⁸⁶ nor could the Spanish claim to have conquered the Americas in a defensive war to vindicate the natural rights of travel and trade.⁸⁷

There was, however, another possible basis for Spanish claims to the Americas. In rejecting arguments that Native Americans lacked *dominium* because of their supposedly inferior level of civilization, Vitoria compared them to children. Like children, he argued, they could not be said to lack *dominium* simply because they were presently unable to exercise it on their own behalf. Rather, “the foundation of dominion is that we are formed in the image of God; and the child is already formed in the image of God,” even before she acquires the maturity of reason necessary to manage her own liberty and possessions.⁸⁸ Vitoria thus suggested that Native Americans might belong to a juridical category of people with actual *dominium* but only potential ability to exercise it. Such a person would have inviolable rights, but she would have to surrender management of her *dominium*—her property and her self-sovereignty—to others more fully mature than she. Those mature others—her trustees—would thus treat her *dominium* as a trust corpus, which they would return in full to her upon her entrance into adulthood.

Vitoria seems to have been skeptical of the claim that Native Americans occupied a civilizational childhood to which Europeans should play trustee.⁸⁹ Nonetheless, in introducing the idea he opened the way to a theory of colonial sovereignty founded in the idea that colonial rulers govern as provisional, trustee sovereigns, in the interests of their subjects’ eventual entrance into

the liberty that constitutes *dominium*. Vitoria also includes in this category the liberty of the Spanish to spread the gospel, although not to impose conversion. See VITORIA, *supra* note 81, at 286–88.

86. See VITORIA, *supra* note 81, at 275–76 (noting that the putative transfers “have been made in fear and ignorance, factors which vitiate any freedom of election The barbarians do not realize what they are doing; perhaps, indeed, they do not even understand what it is the Spaniards are asking of them. Besides which, the request is made by armed men, who surround a fearful and defenceless crowd.”).

87. Vitoria insists that defensive retribution be proportionate to the *motive* of the violation as well as its substance. That is, violations of *jus gentium* motivated by ignorance or fear, as he supposes Native American violations tend to be, are to be regarded as less culpable than willful and knowing violations. See VITORIA, *supra* note 81, at 282–83 (“[W]hat we may suppose were understandable fears made them innocent The provocations of the Pharisees are to be met with quite a different response from the one appropriate to weak and childish foes.”).

88. *Id.* at 249. This is an interesting and in some ways novel argument in the Thomist tradition. Aquinas had previously argued that no difference exists between a child before the age of reason and a “natural slave,” an inhabitant of a human body lacking reason.

89. *Id.* at 291. Vitoria was ambivalent at best, suggesting he had raised the trusteeship theory merely “for the sake of argument.” He had already in the same discourse rejected the closely related argument that Native Americans lacked reason, and hence *dominium*, by analogy to madmen. See *id.* at 251.

political and civilizational adulthood as unqualified governors of their own affairs.⁹⁰ That idea, which would flower in the thought of John Stuart Mill and his father, James Mill, and eventually in the Mandate System, came into its own only after the bold marriage of constitutional and colonial trusteeship theory in the thought of Edmund Burke, the conservative critic of British government in India.

B. Trusteeship and British India

1. Edmund Burke

It was almost a hundred years after the resolution of England's decades of constitutional crisis in the Restoration of 1689, and just two years after the loss of Britain's North American colonies to the settlers' assertion of English constitutional theory, that Edmund Burke made a seminal application of trusteeship constitutionalism to the problem of empire. Remembered in much of the twentieth century as an arch-conservative for his visionary assault on the French Revolution, and recently revived among post-colonial scholars as an early critic of empire and of the universalist political ideas that sometimes justified it, Burke was for most of his career a reformer, a defender of minority rights, and a critic on both constitutional and philosophical grounds of most forms of concentrated power.⁹¹ Burke's criticism of the British East India Company's performance as the effective governing power of much of the subcontinent was a constitutional one: Burke regarded all political power as having the form of a trust, and the East India Company as enjoying a derivative trust granted by Parliament and partaking of the same constitutional limits as Parliament's own power.

Rising in Parliament to advocate passage of two bills to place India under direct parliamentary rule—one of which he had authored—Burke opened his argument for revoking the East India Company's charter with a theory of legitimate power:

[A]ll political power which is set over men, and . . . all privilege claimed or exercised in exclusion of them, being wholly artificial, and . . . a derogation from the natural equality of mankind at large, ought to be some way or other exercised ultimately for their benefit. If this is true with regard to every species of political dominion, and every description of commercial privilege, none of which can be original self-derived rights, or grants for the mere private benefit of the holders, then such rights, or

90. A critical bridge between Vitoria's for-the-sake-of-argument theory and the world as viewed by jurists was the development of a progressive or teleological theory of history in which certain (exemplarily European) legal institutions played a critical role in carrying societies toward achievement of a North Atlantic ideal. See Jedediah Purdy, *Property and Empire: The Law of Imperialism in Johnson v. M'Intosh*, 75 GEO. WASH. L. REV. 329 (2007) (discussing some of the jurisprudential and historiographic strains of this argument, particularly in William Blackstone and Adam Smith).

91. For an excellent discussion of Burke's thought emphasizing these themes, see David Bromwich, *Introduction to EDMUND BURKE, ON EMPIRE, LIBERTY, AND REFORM: SPEECHES AND LETTERS 1–39* (David Bromwich ed., 2000). For a summary defense of this view of Burke against more cynical or reductionist treatments of his thought, see CONOR CRUISE O'BRIEN, *THE GREAT MELODY: A THEMATIC BIOGRAPHY AND COMMENTED ANTHOLOGY OF EDMUND BURKE xxxii–lxxv* (1992).

privileges, or whatever else you choose to call them, are all in the strictest sense a trust; and it is of the very essence of every trust to be rendered accountable; and even totally to cease, when it substantially varies from the purposes for which alone it could have a lawful existence.⁹²

Burke had little use for the theories of natural rights that exercised Locke and other figures in the trusteeship tradition. If the issue were the metaphysical status of rights, he would fall much nearer Filmer, regarding rights as the products and customs of particular political communities and traditions.⁹³ He did not regard the inherent rights of persons as conceptually prior to sovereignty or as providing the building blocks of authority from which sovereignty was constructed. Nonetheless—and this was critical—neither was the state prior to its subjects: political authority was “wholly artificial,” a purposive thing that existed to serve human interests and lost its claim to command when it failed that purpose. The power of the state to command depended on its fidelity to the interests of the governed, and thus the state was best imagined as a trustee of the people’s interests. Burke’s endorsement of trusteeship theory gives an existence-proof of the possibility of non-Lockean trusteeship constitutionalism, and thus of the superfluity of Locke’s theory of natural rights to an understanding of political authority as constructed and as answerable to the interests of those who build and rebuild it in each generation.

On Burke’s trusteeship account, the reversioner was not India, the beneficiary, but Parliament, the source of the East India Company’s charter. Parliament was also the enforcer of India’s interests; there is no suggestion in Burke’s account that any of the peoples or subordinate sovereigns of India could themselves have demanded revocation of the East India Company’s trust. Instead, his treatment of misrule in India turned on the special category of “derivative trusts,” those created by the exercise of a power already held in trust.⁹⁴ The original trust relationship that Parliament held to Indian government implied for Burke “a duty on us to interfere . . . wherever power and authority originating from ourselves are perverted from their purposes, and become instruments of wrong and violence.”⁹⁵ Indeed, in a fine application of the trust concept to relations among the branches of constitutional structure, Burke proposed something analogous to the Lockean right of resistance on behalf of Parliament against the East India Company:

[I]f the abuse [of trust] is proved, the contract is broken; and we re-enter into all our rights; that is, into the exercise of all our duties . . . Our own authority is indeed as much a trust originally as the company’s authority is a trust derivatively; and it is use

92. EDMUND BURKE, *Speech on Fox’s East India Bill* (1783), reprinted in ON EMPIRE, LIBERTY, AND REFORM, *supra* note 91, at 286–370, 291.

93. See EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE, AND ON THE PROCEEDINGS ON CERTAIN SOCIETIES IN LONDON 72–76 (Anchor Books ed., 1973) (1790) (arguing that the conception of political society as founded on natural rights is false and hazardous, because rights are conventions imbued with the special force of custom and tradition).

94. BURKE, *supra* note 92, at 291.

95. *Id.* at 291–92.

we make of the resumed power that must justify or condemn us in the resumption of it.⁹⁶

Burke also proposed a standard to make tractable the issue of whether a trust had been broken. To find the trust broken, he insisted,

I must see several conditions: 1st. The object affected by the abuse should be great and important. 2d. The abuse affecting this great object ought to be a great abuse. 3d. It ought to be habitual, and not accidental. 4th. It ought to be utterly incurable in the body as it now stands constituted. All this ought to be made as visible to me as the light of the sun, before I should strike off an atom of [the Company's] charter.⁹⁷

This is both a conjunctive list of factors for finding political power forfeited and a standard of proof: “as visible . . . as the light of the sun,” a metaphor suggesting a requirement of clear and convincing evidence. By specifying the magnitude of the interest harmed and of the harm itself, Burke sought to constrain claims of broken trust founded on minor abuses. The requirement that the harm be recurrent served the same end. The further requirement that the harm be insusceptible to reform within the trustee body placed a particularly high burden on anyone who would invoke a broken trust when lesser remedial action would do. Burke devoted the rest of his marathon speech to demonstrating that the East India Company had met his standard.

2. The Mills

The liberal utilitarianism of nineteenth-century Britain gave a new inflection to trust doctrine by providing an account of what John Stuart Mill called “the permanent interests of mankind as a progressive being.”⁹⁸ Mill understood these “permanent interests” to consist in the development of the whole range of human capabilities into a harmonious, reflective, and autonomous personality, one actively engaged in shaping both its private life and its public circumstances.⁹⁹ Mill assessed societies by their success in producing such “active” characters. Those that did he regarded as prepared for political self-government and personal liberty, including his famous principle that restraints on personal action were justified only to prevent harm to others—at least restraints on “any member of a civilized community.”¹⁰⁰ In societies that produced passive, superstitious, resentful, and disorderly personalities, however, liberty and political self-government would only reproduce existing

96. *Id.*

97. *Id.* at 293–95.

98. JOHN STUART MILL, ON LIBERTY 79 (Everyman ed., 1993) (Geraint Williams ed., PRESS GROUP 1993) (1859) (hereinafter MILL, ON LIBERTY).

99. *See id.* Mill defined the “active” character as “that which struggles against evils, [not] that which endures them; [not] that which bends to circumstances, [but] that which endeavours to make circumstances bend to itself.” JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT, 227 (Everyman ed., 1993) (Geraint Williams ed., PRESS GROUP 1993) (1861) [hereinafter MILL, CONSIDERATIONS].

100. MILL, CONSIDERATIONS, *supra* note 99, at 78 (giving Mill’s own expression of the so-called “harm principle”).

defects, ushering in tyranny, licentiousness, or some unhappy combination. Therefore,

subjection to a foreign government . . . is often of the greatest advantage to a people, carrying them rapidly through several stages of progress, and clearing away obstacles to improvement which might have lasted indefinitely if the subject population had been left unassisted to its native tendencies and chances.¹⁰¹

Thus a country such as nineteenth-century Britain, which enjoyed a measure of personal liberty and self-rule, could fairly assume the governance—at least many of the governance tasks—of a country such as India, which Mill took to be lacking in civilization. Colonial rule in the name of progress is “the highest moral trust which can devolve upon a nation,” Mill wrote.¹⁰² Although less lawyerly in his formulation than the legally trained Burke or the jurist Vitoria, Mill, too, used the image of the trust to evoke a fiduciary obligation. In this vision, colonial sovereignty was more duty than privilege, a power undertaken in the interest of the subject population. Unlike the modestly pluralist Burke, Mill harbored no notion that Indian civilization might present its members with a distinctive version of the “permanent interests” of humankind, let alone give reason to doubt that some of those interests were unalloyed goods. Unlike Burke, he expressed no interest in how trust might be broken or the question of who would then claim sovereignty; these omissions seem not to have troubled a man who believed the trust would last well past his lifetime and that India could, in any event, have nothing better than “a choice of despotisms.”¹⁰³

Mill’s thought was the apex of decades of colonial theory and practice, including that of his father, James Mill, Philip Francis, and Lord Cornwallis, all intensely involved (the last as Governor-General) in the affairs of India.¹⁰⁴ The thrust of their concern was how to reshape India’s institutions, particularly its property and tax systems, to stem what they saw as social despotism and political tyranny.¹⁰⁵ By fits and starts, but with considerable intellectual energy

101. *Id.* at 242.

102. *Id.* at 416.

103. *Id.* at 417.

104. For James Mill on these themes, see JAMES MILL, *THE HISTORY OF BRITISH INDIA* 476–93 (William Thomas ed., University of Chicago Press 1975) (1820). Ranajit Guha gives a neat sketch of the views of Philip Francis on these issues. Francis’s plan for Permanent Settlement, or comprehensive land-title and tax reform, preceded and largely anticipated Cornwallis’s. Guha writes, “Francis had conceived of the agrarian relationship in Mughal India as primarily feudal: he had wanted to replace it by a model derived from contemporary England.” RANAJIT GUHA, *A RULE OF PROPERTY FOR BENGAL: AN ESSAY ON THE IDEA OF PERMANENT SETTLEMENT* 208 (1996). Cornwallis’s writings on the role of reform in property and other institutions in spurring Indian progress appear at 2 LORD CORNWALLIS, *SELECTIONS FROM THE STATE PAPERS OF THE GOVERNORS-GENERAL OF INDIA* 72–126 (George Forrest, ed., 1926).

105. As Cornwallis wrote in 1789,

In a country where the landlord has a permanent property in the soil it will be worth his while to encourage his tenants who hold his farm in lease to improve the property; at any rate he will make such an agreement with them as will prevent their destroying it. But when the lord of the soil himself, the rightful owner, is only to become the farmer for a lease of ten years [Cornwallis was commenting on a proposal to freeze exaction rates for a ten-year period], and if he is then to be exposed to the demand of a new rent, which may perhaps be dictated by ignorance or rapacity, what hope can there be, I will not say of improvement, but of

and reformist zeal, John Stuart Mill's predecessors had begun working out a practice, if not a science, of colonial administration that gave a glimpse of how Britons of the time conceived of the "permanent interests" that imparted legitimacy and limits to trusteeship government.¹⁰⁶ These theories and experience, and much more, came to the fore in the international system that arose after World War One.

IV

THE MANDATE SYSTEM AND THE THEORY OF SOVEREIGNTY

A. The Mandate System

The Mandate System established by Article 22 of the Covenant of the League of Nations was the first coordinated attempt by international institutions to give legal force to a trusteeship theory of sovereignty. The system identified classes of countries ostensibly too undeveloped to sustain self-government and specified obligations in the international community to promote the development of means of indigenous self-governance, with the aim of enabling underdeveloped countries to emerge eventually into full sovereignty. The founding language and subsequent implementation of the system relied centrally on several interrelated private-law concepts. The concept of the trust was foremost among these.

The Mandate System arose from a complex political compromise among liberal idealism, exploitative colonialism, and the expropriationist spirit of wartime victors. Nonetheless, it gave life to ideas of limited sovereignty in several ways. First, the system envisioned its underdeveloped wards as potential sovereigns, pending a state of higher development. It specified two classes of inalienable rights in these populations: first, the right to orderly and non-exploitative government; and, second, the right to progressive institutions that would prepare them for self-rule. Second, the system created a form of limited

preventing desolation? Will it not be in his interest, during the early part of that term, to extract from his estate every possible advantage for himself; and if any future hopes of a permanent settlement are then held out, to exhibit his lands at the end of it in a state of ruin?

2 CORNWALLIS at 74.

Cornwallis saw a similarly critical role for private property and regular taxation in creating political stability:

In case of a foreign invasion, it is a matter of the last importance, considering the means by which we keep possession of the country, that the proprietors of the land should be attached to us from motives of self-interest. A land-holder who is secured on the quiet enjoyment of a profitable estate can have no motive in wishing for a change. On the contrary, if the rents of his lands are raised in proportion to their improvement; if he is liable to be dispossessed should he refuse to pay the increase required of him; or if threatened with imprisonment or confiscation of his property on account of balance due to Government which his lands were unequal to pay, he will readily listen to any offers which are likely to bring about a change that cannot place him in a worse situation, but which hold to him hopes of a better.

2 CORNWALLIS at 113.

106. See MILL, ON LIBERTY, *supra* note 98.

sovereignty in the “mandatory powers” that administered and legislated in the underdeveloped regions. These broad powers were checked by two sets of duties, one owed to the international community, embodied in the League of Nations, which specified the bounds of their powers through express documents termed *mandates*; the other owed to the interests in good government and development of the subject peoples. Third, while these interests and duties were the creatures of positive international law, that is, agreements among nations, they were also styled as acknowledgements of inherent interests and obligations. Probably more important, the duties they created were recognized as having “objective” power independent of their memorialization in express agreements. Finally, the system and its successor, the United Nations Trusteeship System, both reoriented their areas of international public law away from coherent theories of unified sovereignty and toward ideas of overlapping powers, duties, and rights shared among states, peoples, and the international community.

The statesmen who created the Mandate System were steeped in the rhetoric of Burke, Locke, and Vitoria. The writers of the Covenant of the League of Nations, such as Lord Philmore, United States President Woodrow Wilson, and South African General Jan Smuts were primarily Anglo-Saxon in their educations and jurisprudential worldviews.¹⁰⁷ They were also aware of both the enormity of the enterprise and of its fragility.

The underdeveloped regions that were the objects of the Mandate System’s solicitude were former territories of the defeated powers of World War One, chiefly Germany and the Ottoman Empire. After the war, several of the victorious Allied Powers agitated for direct annexation of the territories. The French and British, having spent vastly in blood and treasure, were particularly unreceptive to proposals to internationalize government of the territories or grant them independence.¹⁰⁸ Pre-war rhetoric from men like the future Nobel Peace Prize-winner Sir Norman Angell,¹⁰⁹ the public endorsement of the principle of self-determination by English Prime Minister David Lloyd George and President Wilson, and references to Wilson’s Fourteen Points in pre-Armistice agreements nonetheless made annexation politically impossible.¹¹⁰ Nor was restoration of the colonies to German and Turkish control politically viable, although the defeated nations avidly wished for it.¹¹¹ The fine line that the Mandate System’s authors had to walk produced compromises from the start, but the lodestar remained clear: the Mandate System was designed to hold in trust the sovereignty of less-developed nations while guiding them along the

107. AARON M. MARGALITH, *THE INTERNATIONAL MANDATES: A HISTORICAL, DESCRIPTIVE AND ANALYTICAL STUDY OF THE THEORIES AND PRINCIPLES OF THE MANDATE SYSTEM* 21 (John Hopkins Press 1930).

108. QUINCY WRIGHT, *MANDATES UNDER THE LEAGUE OF NATIONS* 27 (University of Chicago Press 1930).

109. NORMAN ANGELL, *THE GREAT ILLUSION* (1910).

110. MARGALITH, *supra* note 107, at 9.

111. WRIGHT, *supra* note 108, at 29.

road to “civilization” and self-determination. It was not to be empire by mandate, although its conceptual resemblance to the liberal empire that the Mills had envisioned was unmistakable.¹¹²

The language of Article 22 is notable both for its breadth and for its encapsulation of several theories of the complex relations among the mandates, the mandatories, and the League of Nations. Each of those theories partly corresponds to a private-law concept invoked in the Article. In relevant part, Article 22 states,

To those colonies which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such people is a sacred trust of civilization and that securities for the performance of this trust should be embodied in the Covenant.

The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.¹¹³

The Article goes on to detail the different types of mandates, task mandatories with an annual report on conditions in each mandate, and set up the Permanent Mandates Commission to “receive and examine the annual reports of the mandatories and to advise the Council on all matters relating to the observance of the mandates.” The Covenant divided the fourteen mandates into three groups, each graded according to its ability to stand independently as a nation—or in the terms of earlier colonial jurisprudence, its level of civilization.¹¹⁴ The A mandates were those communities that had “reached a stage of development where their existence as independent nations [could] be provisionally recognized”; the mandatory was to give advice and assistance until the community was “able to stand alone.”¹¹⁵ B mandates were deemed to need administrative control over their affairs.¹¹⁶ C mandates were the least developed

112. See text accompanying notes 96–101, *supra* (discussing the colonial visions of James Mill and John Stuart Mill).

113. League of Nations Covenant art. 22, para. 1–2.

114. The A mandates were Iraq/Mesopotamia and Palestine/Transjordan, both given to Great Britain, and Syria and Lebanon, which went to France. France also got two of the B mandates: French Togo and the French Cameroons. Britain was charged with Tanganyika, British Togo, and the British Cameroons, while Ruanda-Urundi (now famously) was given to Belgium. The C mandates were islands in the Pacific, with the exception of South West Africa, which the Union of South Africa had governance over. The South Sea Islands went to Japan, New Guinea went to Australia, Western Samoa to New Zealand, and Nauru to the British Empire. See WRIGHT, *supra* note 108, at 43–48.

115. League of Nations Covenant, art. 22, para. 4.

116. “The Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military or naval bases and of military training of the natives for other than police purposes and the defence of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League.” League of Nations Covenant, art. 22, para. 5.

of the three and were to be administered as “integral parts” of the mandatory, although protected by the guarantees given to B mandates.¹¹⁷

Like the origins of the Mandate System described in Article 22, the Covenant of the League of Nations was otherwise the child of compromise, particularly the articles dealing with former colonial possessions.¹¹⁸ Paul Hymans, a Belgian who was the first President of the League of Nations, wrote (while still the Belgian foreign secretary), “I shall not enter into a controversy—though it would certainly be very interesting—as to where sovereignty in mandated territories resides. We are face to face with a new institution.”¹¹⁹ Indeed, the Mandate System was susceptible to several competing interpretations, none perfectly satisfactory as a matter of technical coherence or theoretical lucidity. To get a sense of the interpretive alternatives and the underlying spirit of the undertaking it is necessary to examine competing theories of sovereignty and the private-law analogies invoked by the authors at the Mandate System’s founding.

Sovereignty could lie in the mandated territories themselves, in the mandatories that governed them, in the Principal and Allied Powers to whom Germany and Turkey formally ceded the territories,¹²⁰ in the League of Nations, or in some combination of these.¹²¹ This confusion stems, in part, from the language of Article 22. The words “mandate,” “trust,” and “tutelage” all figure in the description of the Mandate System, and each has a different meaning in private law. Private law terms in international treaties are presumed to express the meaning that public international law has traditionally given them.¹²² There is scant evidence that any of these terms had fixed meanings in international law at the time the Covenant was written, although the mandate concept had been used diplomatically.¹²³ Perhaps because compromise ran so integrally through the Versailles Conference, the diplomats did not hash out the precise meanings of the terms.¹²⁴ As one contemporary writer quipped, “the ingenuity of statesmen usually outstrips the classificatory skills of jurists.”¹²⁵

B. Precedents in International Law

The Covenant’s use of private-law concepts to describe powers and duties in international relations had a precursor in strands of international jurisprudence in the decades before World War One. Writing in 1894, John Westlake echoed

117. League of Nations Covenant, art. 22, para. 6.

118. MARGALITH, *supra* note 107, at 29–30.

119. Paul Hymans, *Responsibilities of the League Arising out of Article 22 17* (1920), quoted in WRIGHT, *supra* note 108, at 446 n.32.

120. MARGALITH, *supra* note 107, at 149–50.

121. *Id.* at 146–47.

122. WRIGHT, *supra* note 108, at 375.

123. *Id.* at 15–23, 375.

124. *See id.* at 375; MARGALITH *supra* note 107, at 202.

125. T.J. LAWRENCE, *THE PRINCIPLES OF INTERNATIONAL LAW* 79 (7th ed. 1923), quoted in WRIGHT, *supra* note 108, at 265.

the judgment of the Mills and anticipated the conceptual logic of Article 22 when he equated “civilization,” for purposes of international law, with competence for self-government:

Can the natives furnish such a government [able to provide them security and well-being in the context of intercourse with foreign powers], or can it be looked for from the Europeans alone? In the answer to that question lies, for international law, the difference between civilization and the want of it.¹²⁶

Westlake deemed peoples lacking “civilization” in this sense incapable of enjoying legal personality in international relations. European powers could thus legitimately exercise authority over them. Westlake did, however, envisage a relationship akin to the future Mandate System, which he articulated through the practice of the protectorate: a relationship familiar in “the civilized world,” in which one power represented another in all aspects of foreign relations and, depending on the terms of the arrangement, might also exercise a variety of internal powers.¹²⁷ Such a relationship depended conceptually on the international legal personality of both states, and thus could not, strictly speaking, obtain between a civilized state and an uncivilized people.¹²⁸ Nonetheless, Westlake observed that an analogous relationship had begun to arise between civilized states and uncivilized peoples.¹²⁹ He contended that these relationships were “comparable to the personal relation of guardianship”: they were conditional on the civilized state’s protection of the local population, and the guardian state would forfeit its authority if it persistently neglected that responsibility.¹³⁰

The colonial period that Westlake analyzed was later the subject of M.F. Lindley’s study of the principles governing the Mandate System. Acknowledging the seeming anomaly of rights owed to peoples in a system of international law concerned with relations among states, Lindley argued that express agreements and the practices of nations had given rise to a legal concept of a colonial power’s duty to promote the well-being and progress of its subjects.¹³¹ Lindley characterized this duty by the terms “trust” and “wardship.”¹³² On the one hand, these terms combined “in a broad ethical sense to mean the duties which the advanced peoples collectively owe to backward races in general . . . ‘a sacred trust of civilization.’”¹³³ More specifically, Lindley followed Burke in identifying the trusteeship concept with an account of the limited and terminable character of sovereign power: bounded by the interests of the subjects (as beneficiaries), the trustee state can be called to account for

126. JOHN WESTLAKE, CHAPTERS ON THE PRINCIPLES OF INTERNATIONAL LAW 141 (1894).

127. *See id.* at 177–78.

128. *See id.* at 178.

129. *See id.* at 179.

130. *See id.* at 183.

131. *See* M.F. LINDLEY, THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW 325–27 (1926).

132. *Id.* at 329.

133. *Id.*

self-dealing or other breaches of duty, and the trust terminates on showing of a sufficient breach.¹³⁴ Lindley identified wardship with a particular set of duties owed by a superior power to a dependent power with the purpose of making the dependence temporary and ending it with entrance into full adulthood.¹³⁵

Lindley produced a number of examples of express acknowledgements of these duties that had preceded the Covenant. In 1833 the Board of Directors of the East India Company instructed the Indian colonial government to devise a system of criminal law “with an especial regard to the advantages of the natives rather than of the new [British] settlers,” a fair application of Burke’s principle.¹³⁶ Then, in a major international action, the European powers gathered at the Berlin Conference on colonial Africa in 1885 through 1886 had declared in Article 6 of the General Act of the Conference,

All the powers exercising sovereign rights of influence in [the Congo basin] bind themselves to watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being They shall . . . protect and favor all . . . institutions and undertakings created and organized for the above ends, or which aim at instructing the natives and bringing home to them the blessings of civilization.¹³⁷

A third example was an expression of the American understanding of United States incursions on the already-shattered Spanish empire. President McKinley wrote of the Philippines in 1900, “The fortunes of war have thrown on [the United States] an unsought trust which should be unselfishly discharged and devolves upon this Government a moral as well as a material responsibility toward those millions we have freed from an oppressive yoke.”¹³⁸

Both the “broad ethical sense” of the trusteeship and wardship ideas and efforts to pronounce the duties of colonial powers in those terms were thus a familiar, if minority, strain in international law at the time of the League Convention.

C. The Significance of Private-Law Terms in the Mandate System

Three private-law concepts recur in the language of the Mandate System: mandate, trust, and tutelage. Each can be considered a conceptual model for identifying the “ownership,” or location, of sovereignty under the Mandate System. But such classifications are more valuable if viewed as successful analogies than as exact classifications. The overlapping conceptual alternatives point the way toward the distinct achievement of the Mandate System: setting up a legal practice of sovereignty that stressed duties to the population and accountability to the international community over any specific theoretical account of the locus and character of sovereign power.

134. *See id.* at 330.

135. *See id.* at 330–32.

136. *Id.* at 331.

137. *Id.* at 333.

138. *Id.* at 331.

1. The Mandatarius and the Mandate Powers as Agents

The concept of the mandate was closely related to that of agency.¹³⁹ Jan Smuts, the British Field Marshal and South African Prime Minister, introduced the word in the conference and used “agent” and “mandatory” interchangeably.¹⁴⁰ In Roman law, a mandate was a gratuitous execution by one man (*mandatarius*, or agent) of a commission given by another (*mandans* or *mandator*, that is, principal). To undertake a mandate was normally a mark of friendship and altruism.¹⁴¹ Mandates could be limited or general in time and scope: the *mandatarius* could not exceed the scope of the mandate.¹⁴² The *mandatarius* was legally responsible to the *mandans* for the mandate’s execution, as judged by a standard of extraordinary diligence, and to third parties for acts taken in the course of effecting the contract.¹⁴³ The *mandatarius* could not renounce the commission without compelling reason if doing so would have an adverse effect on the principal, or *mandans*.¹⁴⁴ The mandate had no legal force if it benefited only the agent, or *mandatorius*.¹⁴⁵ Although assumption of the mandate was gratuitous,¹⁴⁶ the *mandatarius* would be repaid for reasonable expenses incurred during the execution of the mandate and sometimes would receive an honorarium.¹⁴⁷ The concept in civil law at the time the League of Nations was born was similar—except that compensation was allowed (although not expected), the familiar principle of *respondeat superior* applied, and the degree of competence expected of the *mandatarius* was not as high as in Roman law.¹⁴⁸ In the Anglo-Saxon juridical world, mandate traditionally had a more specialized meaning, referring to personal property upon which some special act is to be performed and to which the *mandans* retains title, although this had expanded slightly by the time of the Covenant.¹⁴⁹

Some authors contend that the concept of mandate implied that the League of Nations held sovereignty over the mandates: the mandatories exercised their authority “on behalf of the League”; the League of Nations had the right to divest and sanction the mandatories; even the word *mandate* implied the “ultimate sovereignty” of the League.¹⁵⁰ Germany, in the years immediately following the Versailles Conference, was a fierce advocate of this viewpoint.¹⁵¹

139. WRIGHT, *supra* note 108, at 377.

140. *Id.* at 378.

141. *Id.* at 382.

142. *Id.* at 378; MARGALITH, *supra* note 107, at 43.

143. WRIGHT, *supra* note 108, at 378.

144. *Id.* at 378.

145. *Id.* at 379.

146. *Id.* at 378.

147. *Id.* at 379.

148. *Id.*

149. *Id.* at 380.

150. *Id.* at 333.

151. *Id.*; MARGALITH, *supra* note 107, at 158.

However, the Roman law and civil law conceptions of mandates did not necessarily involve property, nor did they imply that any property involved was owned by the principal. Any inference from the use of ‘mandate’ that the League of Nations held sovereignty over the mandated territories is therefore not obligatory.¹⁵² The only indispensable conclusions are that the League was a principal and the mandatory an agent; as such, the mandatories were bound to adhere to the contours of their commissions.¹⁵³

In fact, practical considerations militate against the idea that the League was the repository of ultimate sovereignty. The Covenant gave the League enumerated powers inconsistent with the exercise of full sovereignty. These powers were integrally linked to the limited functions of the League: it was constituted for the purposes of peace and security, not governance.¹⁵⁴ In the face of these constraints, some authors have tried to convert the functional structure of the mandate system into a theory of shared or divided sovereignty in which sovereign power was parceled out between the League and the mandatories or the League and the mandated territories.¹⁵⁵ Ultimately, however, the mandate concept is insufficient to define the “ownership” of sovereignty: it describes instead a functional and limited set of powers constitutive of a particular legal relationship among the League of Nations, the mandatory, and the inhabitants of the mandate, with its notional contours ultimately set by the “sacred trust of civilization.”¹⁵⁶

2. Trusteeship

Article 22 announced the “sacred trust” that was to guide the Mandate System, provided that “securities for the performance of this trust should be embodied in the covenant,” and “entrust[ed]” the future of underdeveloped

152. WRIGHT, *supra* note 108, at 281.

153. *Id.* at 382.

154. MARGALITH, *supra* note 107, at 161.

155. *Id.* at 337.

156. See WRIGHT, *supra* note 108, at 334. At the time the League was constituted, many Anglo-Saxon scholars and some of the first members of the Permanent Mandate Commission placed sovereignty in the Principal and Allied Powers. The bones for the argument are that Germany and Turkey ceded sovereignty to the Allied Powers at Versailles and Lausanne by renouncing their territories either “in favour of” the victors (Germany) or to “the parties concerned” (Turkey) and the victors never explicitly handed over sovereignty to the League (or to the mandates or mandatories). Indeed, although the United States did not even join the League, the mandates were not ratified until America was satisfied that it would be treated as a member of the League—keeping a hand in decisions that affected the mandated territories. This too was an offshoot of the mandate concept: the Allied Powers was the *mandans* and had given the *mandatarius* to the League. The contention ran into practical difficulties since, as the United States did not join the League, there was no lasting body corresponding to the Allied Powers. Some scholars also argued that the sovereignty of the League was provisional, ended by their giving notice to the League of both the mandated territories’ boundaries and each territory’s mandatory. The most troubling aspect of the idea was that placing sovereignty in the Allied Powers would cut against the fiduciary principles of the Versailles peace conference. See WRIGHT, *supra* note 108, at 321–22; see also MARGALITH, *supra* note 108, at 44, 156.

populations to “advanced nations.”¹⁵⁷ The fiduciary aspects of the Mandate System find their home signally in this language.

In a trust arrangement, one party, the trustee, undertakes a property right for the benefit of another party.¹⁵⁸ A trust differs from a mandate in that it implies a definite structure of ownership of the corpus, or object owned—here, sovereignty. A trust implies a sort of dual ownership, legal in the trustee, who enjoys the power to use and dispose of the corpus, and equitable in the beneficiary, who has an enforceable right to benefit from the use of the property.¹⁵⁹ The limits of the powers the trustee may exercise by virtue of her legal ownership correspond to the beneficiary’s rights of equitable ownership. The trust arrangement is prominent and widely applied in Anglo-American law, but less so in civil law, as its Roman predecessor was much more limited than its common-law counterpart.¹⁶⁰

If the trust concept were taken seriously as a key to the structure of the Mandate System, it would locate an important dimension of sovereignty in the mandatories themselves. The mandatories would be analogous to trustees and the mandated territories to beneficiaries.¹⁶¹ This reading was heavily promoted by Anglo-Saxon writers, who were familiar with private-law trusts and who had been somewhat habituated by the legacies of Burke and the Mills to define the relationship of colonial powers to their colonies in trusteeship terms.¹⁶² This interpretation also found support in the comprehensive scope of the governance powers, limited only by their moral obligations to do right by and not profit from the mandated territories.¹⁶³

A reading of Article 22 that gave sovereignty directly to the mandatories was vigorously opposed by the Permanent Mandate Commission, which urged instead a broader reading based upon the spirit of Article 22 (that of “no annexation”)¹⁶⁴ and other references to the mandatories in the Covenant. The Covenant refers to the mandatory as “government exercising authority” and “mandatory power acting in that capacity.” It nowhere describes the mandatory powers as sovereign bodies vis-à-vis the mandate territories.¹⁶⁵

157. League of Nations Covenant, art. 22, para. 1–2.

158. WRIGHT, *supra* note 108, at 385.

159. *Id.* at 387.

160. *Id.* The French version of Article 22, for example, uses “*mission*” for trust and “*confier*” for entrusted; neither had, at the time, a technical legal meaning. *Id.* at 377. In both traditions, the emphasis was more moral than it was strictly legal: the emphasis was on the fiduciary aspects of the relationship. *Id.* at 389.

161. *Id.* at 325. Some commentators argued that the League was the trustee. See MARGALITH, *supra* note 107, at 157–60.

162. WRIGHT, *supra* note 108, at 325.

163. *Id.* at 326. Other commentators argued that the mandatories were sovereign because the Allied and Principal powers transferred the mandated territories directly to the mandatories. *Id.* at 324.

164. MARGALITH, *supra* note 107, at 165.

165. WRIGHT, *supra* note 108, at 326–27. The Supreme Courts of South Africa and Palestine agreed that although the mandatories possessed plenary powers, they were not sovereigns. *Id.*

Some commentators have also argued that the language of Article 22—particularly the sentence “the securities for the performance of this trust should be embodied in the covenant”—suggested that the League was the trustee and that any other interpretation would undermine the idea that the mandatories exercised their tutelage “on behalf” of the League.¹⁶⁶ However, to understand the League as the trustee would mean giving up on the independent system of accountability that the Council was supposed to provide to oversee the mandatory powers.¹⁶⁷

Ultimately, the question of who “owned” sovereignty under Article 22 is both less clear and less important than the decision to employ the trusteeship concept, which underscored the fiduciary duties of the mandatories and League to the mandated territories. Article 22 envisaged the inhabitants of the mandates as holding two enforceable interests: one in good government, the other in eventual self-rule. The second, in particular, found expression in the third critical private-law term in the mandate system, one with sources in Vitoria’s first, tentative rationale for colonial rule: wardship.

3. Tutelage and Wardship

Unlike “mandate” and “trust,” *tutelle*, French for tutelage, had a technical use in both civil and common law in the early twentieth century.¹⁶⁸ The object of the tutelage system was the protection of minors. The tutor or guardian stood in a kind of trusteeship relation to the tutee or ward’s free will: like a parent, he directed the ward’s actions toward appropriate development and eventual adulthood and independence. In this capacity, the guardian had a right to monitor and control the minor’s actions and use of property. He could not alienate the minors’ property without consent and was answerable for waste and fraud.¹⁶⁹ Until it ended upon the minor’s attainment of majority, the tutelage was closely supervised by a court.¹⁷⁰

This concept, which was very popular among French academics and politicians, suggests by analogy that sovereignty lies in the mandated communities themselves, although it is exercised during those communities’ periods of minority by the mandatory or the League of Nations. The emphasis of the treaty-makers on progress toward civilization lends support to such a reading.¹⁷¹ The very structure of the Mandate System, with its gradation of peoples according to the degree of their development toward the “mature” end-

166. MARGALITH, *supra* note 107, at 40.

167. *Id.*

168. WRIGHT, *supra* note 108, at 377. The arrangement had roots in Roman law. Under a Roman *tutela* the guardian had unlimited powers over children under seven. From age seven to age fourteen, the adolescent had slightly more independence. *Id.* at 385.

169. *Id.* at 384.

170. *Id.*

171. *Id.* at 328.

point of civilization and independence, bespeaks a worldview to which the tutelage concept was well adapted.¹⁷²

Some contemporary commentary on the Mandate System described it as separating sovereignty, which was located ultimately in the people of a territory, from the authority to govern. As one writer put it,

[T]he exercise of a right does not always imply its possession. The exercise of the attributes of sovereignty by the mandatory is neither more nor less extended according to the arbitrary will of the mandatory or indeed that of the League of Nations, but according to the exigency of the interests of the population under mandate The sovereignty of the territories submitted to mandate resides in the peoples of those territories. The exercise of the attributes of sovereignty is provisionally confided to a power acting in the capacity of tutor to these minor peoples.¹⁷³

Tutelage implies definite duties owed by the mandatory to the mandate: preparing it for the national version of adulthood. The tutelage concept also implies that the guardian has a fiduciary duty to act in the interest of the ward and may be held accountable for failure to do so. On the side of powers rather than duties, the concept implies that the mandatory would have nearly absolute control over the ward. The analogy with a guardian would also suggest that a mandatory could recoup its investment in the mandated territory.¹⁷⁴ It also supplies a point of termination for a successful mandate: sovereignty would revert to the inhabitants of the mandated territory when they achieved the capacity to exercise it.

Such recognition of sovereignty in the populations of the mandates would be notional in a time when none was prepared as a practical matter to govern itself and many did not even have organized institutions encompassing all their inhabitants.¹⁷⁵ That quality, however, is in the nature of tutelage: guardians, like parents, prepare the way for a future that is neither present nor theirs to direct once it arrives. Tutelage corresponded to the aim of Article 22: to prepare the mandates for eventual self-government.

It is possible to combine the trusteeship concept with the theory of tutelage by envisioning tutelage as specifying the enforceable interests of the beneficiaries, and thus the duties of the trustee. In this account, the mandatory powers would “legally” hold sovereignty, but could exercise it only in keeping with the “equitable” interest of the mandate populations in achieving the preconditions of self-government—at which time sovereignty would shift to them. As a formal matter, in this view the mandated territories would retain equitable sovereignty while the mandatories held legal sovereignty.

But these conceptual alternatives are useful more by way of analogy than by way of exact identification of “the” locus and nature of sovereignty under the

172. *Id.*

173. J. STOYANSKY, *La Théorie générale des mandats internationaux* (Paris, 1925), as quoted in *id.* at 328–29.

174. *Id.* at 385.

175. *Id.* at 331.

Mandate System. That system is most interesting not for having transmuted a single private-law relationship wholesale into a theory of sovereignty, but rather for having flexibly adapted several private-law arrangements to a new legal approach to sovereignty: one stressing duties to subjects and accountability to the international community. Although that approach was never robustly enforced, its interpretation by national and international courts and the League of Nations gives some sense of its contours.

D. Adjudication of Mandatory and Trusteeship Relationships

1. Interpretation of Private-Law Principles in International Public Law

Although adjudication of international obligations arising from the mandate and trusteeship systems was scant and divided among quite disparate jurisdictions, it provided several fairly consistent lessons about the legal content of those systems.

a. The Limits of Language. As in other areas of international law, even express use of domestic private-law concepts does not import them in all their particulars into international public law. On the contrary, those concepts carry significance specific to their international public-law usage. Thus, for example, the International Court of Justice (ICJ) emphatically rejected South Africa's argument that, by analogy with the rule that a principal-agent relationship ends with the death of the principle, its mandatory obligations to Southwest Africa had ended with the dissolution of the League of Nations. Perceiving the mandate system as being grounded in the principles and purposes that motivated its founding rather than in the mechanics and metaphors of its operation, the ICJ announced, "The Mandate was created, in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object—a sacred trust of civilization. It is therefore not possible to draw any conclusions by analogy from the notions of mandate in national law or from any other conception of that law."¹⁷⁶

Writing separately, Sir Arnold McNair agreed that "[n]o technical significance can be attached to the words 'sacred trust of civilization.'"¹⁷⁷ He contended in general that when an international tribunal is confronted with "what may at first sight appear to be relevant analogies in private law systems," it must "regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions."¹⁷⁸

Similarly, in the English case of *Tito v. Waddell* concerning phosphorus mining on Ocean Island (which was not a part of the Mandate System), the ICJ

176. Int'l Status of South-West Africa, Advisory Opinion, 1950 I.C.J. 128, 132 (July 11).

177. *Id.* at 148.

178. *Id.*

had noted that there was “no magic in the word ‘trust’” and drew a line between a “true trust” and a “trust in the higher sense.”¹⁷⁹

b. The Aptness of Metaphor. The policy and principles of the mandate system did in fact correspond to the metaphors of mandate, trust, and tutelage. In the Southwest Africa case, the ICJ held that that South Africa took power over the future Namibia conditional upon its performance of the obligations outlined in the mandate.¹⁸⁰ The court went on to delineate the international obligations of mandatory powers that “corresponded to the sacred trust of civilization referred to in Article 22 . . . to promote to the utmost the material and moral well-being and the social progress of the inhabitants.”¹⁸¹ This broadly stated obligation carried a number of specific sequelae: eliminating the slave trade, controlling forced labor, disciplining traffic in arms and ammunition, keeping alcohol from local populations, and securing freedom of conscience—not least in permitting missionary activity without discrimination by nationality.¹⁸² Judge McNair also argued that the obligations of the mandates created conditional governing power. He quoted the High Court of Australia, which had characterized the mandatory “as a kind of international trustee [that] receives the territory subject to the provisions of the mandate which limit the exercise of the governmental powers of the mandatory.”

Thus the title under which the territory is held . . . is different from that under which a territory transferred by simple cession would have been held . . . the intention was to achieve a transfer of a territory without making that territory in the ordinary sense a possession of the mandatory.¹⁸³

The mandate system, then, was interpreted as a structure of power and obligation that reflected the logic of the trust and closely related private-law concepts in creating a species of bounded government power, directed in its exercise to the broad interests of peoples in good government and progress toward self-rule and enforced by the international community in the institutions of the League and the Permanent Mandates Commission (PMC).¹⁸⁴

179. Similarly, Sir Robert Megarry wrote that “the use of a phrase such as ‘in trust for,’ even in a formal document such as a Royal Warrant, does not necessarily create a trust enforceable by the courts The term ‘trust’ is one which may properly be used to describe not only relationships which are enforceable by the courts in their equitable jurisdiction, but also other relationships” such as the responsibility of a government to be just to its people. “True trusts,” he concluded, are justiciable, whereas “trusts in the higher sense” are not. *See Kinloch v. Secretary of State for India in Council*, [1882] 7 App.Cas. 619, 630 (P.C.), as quoted in *Tito v. Waddell*, (1977) Ch. 106.

180. *Int’l Status of South-West Africa*, 1950 I.C.J. at 133.

181. *Id.*

182. See, for example, the mandates for German Samoa, a “C” mandate and Syria and the Lebanon, an “A” mandate, specifically as regards the missionaries art. 5 in the former and art. 6, 8, 9 and 10 in the latter. It is interesting to note that in Samoa, missionary access was protected only for citizens of League of Nations member states.

183. *Int’l Status of South-West Africa*, 1950 I.C.J. at 152 (separate opinion of McNair, J.).

184. McNair also wrote, “I am convinced that in its future development the law governing the trust is a source from which much can be derived. The importance of the Mandates System is marked by the fact that, after the experience of a quarter of a century, the Charter of the United Nations made provision for an ‘International Trusteeship System,’ which was described by a Resolution of the

c. Trust Obligations Above the Law. Whereas mandatories' obligations were anchored in the Covenant of the League, courts did not treat them as purely positive law, dependent on the continued existence of the promulgating authority and corresponding enforcement mechanisms. It was, for example, the major contention of South Africa in the *South-West Africa Case* that its mandatory obligations had ceased when the League was dissolved. The ICJ replied that the obligations connected with the "sacred trust" persisted because "[t]heir *raison d'être* and original object remain. Since their fulfillment did not depend on the existence of the League of Nations, they could not depend on [its] existence."¹⁸⁵ This language is admittedly conclusory; nonetheless it points to a pair of interlaced ideas. First, the obligations set out in Article 22 were of such basic importance as to survive jurisdictional perturbations: they had entered into the substantive rights of peoples and duties of nations as conditions on the power of the mandatory regimes. Second, the persistence of the duties expressed the idea that they were in some sense pre-existing, not created but acknowledged by the League Covenant. The ICJ suggested that the League had selected the mandate system "as the best method for discharging the sacred trust of civilization," language suggesting that the underlying duty was not a creature of positive law.¹⁸⁶ Similarly, Judge McNair proposed that the selection of the trust concept for the Mandate System was not only for its technical usefulness, but also because "it was something which was binding on the conscience of the trustee: that is why it was legally enforced."¹⁸⁷ This is a profoundly nonpositivist thought: that legal enforcement tracks the dictates of conscience, at least as to certain morally significant relationships, and that the relationship between developed and underdeveloped societies is of that sort.

Finally, interpretation of mandate relationships suggested a novel concept of sovereignty, one that judges admitted they could scarcely recognize as sovereignty in the then-regnant positivist sense of a unified and unbounded power of command. As McNair wrote, the mandate system "does not fit into the old conception of sovereignty and . . . is alien to it."¹⁸⁸ He continued, "Sovereignty over a mandated territory is in abeyance; if and when the inhabitants of the Territory obtain recognition as an independent State,

Assembly of the League of April 18th, 1946 as embodying 'principle corresponding to those declared in Article 22 of the Covenant of the League.'" *Id.* at 150.

What matters in considering this new institution is not where sovereignty lies, but what are the rights and duties of the Mandatory in regard to the area of territory being administered by it. The answer to that question depends on the international agreements creating the system and the rules of law which they attract. Its essence is that the Mandatory acquires only a limited title to the territory entrusted to it, and that the measure of its powers is what is necessary for the purpose of carrying out the Mandate. The Mandatory's rights, like the trustee's, have their foundation in his obligations; they are tools given to him in order to achieve the work assigned to him; he has "all the tools necessary for such end, but only those."

Id. (internal quotations omitted).

185. *Int'l Status of South-West Africa*, 1950 I.C.J. at 133.

186. *Id.* at 140.

187. *Id.* at 149 (separate opinion of McNair, J.).

188. *Id.* at 150.

sovereignty will revive and vest in the new State. What matters in considering this new institution is not where sovereignty is, but what are the rights and duties of the mandatory.”¹⁸⁹ Recalling the image of the purpose-bound powers of the trustee, he concluded, “The Mandatory’s rights, like the trustee’s, have their foundation in his obligations; they are tools given him in order to achieve the work assigned to him; he has all the tools necessary for such end, but only those.”¹⁹⁰

In these features, the Mandate System inaugurated in international law a conception of the state continuous with the trusteeship theory that had been developing for centuries in domestic constitutionalism and the theory of colonial governments. The power of the state was neither inherent nor absolute: instead it was constructed or assigned to achieve certain purposes, which in turn were defined by the interests of those it governed (and, for the Mandate System, the interest of the international community in orderly government and development). These concepts were familiar from Vitoria, Locke, Burke, and others, and the Victorian idea of civilization that the Mandate System pursued was pure Mill.

2. Adjudication of the Substance of Mandatory Duties

Nauru, a small island in Micronesia, made history when it filed suit in the International Court of Justice in 1989 against Australia, marking the first time a trust territory sought redress for a violation of a trusteeship authority’s, or mandatory power’s, duties.¹⁹¹ Although the suit was settled in August 1993 without a hearing on the merits, the terms on which Australia settled suggest that Nauru’s arguments had some legal force. Those arguments were based on the fiduciary duties of the Mandate System, which continued under the United Nations Trusteeship System.¹⁹²

Nauru was a rich source of phosphate deposits, which were mined almost continuously from 1899 until the suit was filed.¹⁹³ Initially controlled by the German Empire, the country was up for grabs after World War One.¹⁹⁴ The Australians, who had occupied Nauru during the war, agitated for annexation but, in the face of strong United States opposition, agreed to a compromise: Nauru became a C mandate controlled by the British Empire.¹⁹⁵ The mandate was granted in 1920, more than a year after Great Britain, Australia, and New

189. *Id.*

190. *Id.* (internal quotes omitted).

191. Ramon E. Reyes, *Nauru v. Australia: The International Fiduciary Duty and the Settlement of Nauru’s Claims for Rehabilitation of Its Phosphate Lands*, 16 N.Y.L. SCH. J. INT’L & COMP. L. 1 (1996). The trusteeship system was the United Nations successor to the League’s Mandate System. It was widely regarded as legally continuous in most respects, although its founding terms were much less triumphalist about “civilization” than Article 22’s terms had been. *See Int’l Status of South-West Africa*, 1950 I.C.J. 128.

192. *Id.*

193. Except during the Japanese occupation from 1941–1947. *See Reyes, supra* note 191, at 13.

194. *Id.* at 10.

195. *Id.* at 11.

Zealand entered into a Nauru Island Agreement, which was to provide both for the exercise of the mandate and the division of the island's phosphate.¹⁹⁶ After the Second World War, Nauru became a UN Trust territory and the United Nations, Great Britain, Australia, and New Zealand pledged to ensure the island's well-being and development.¹⁹⁷ The trusteeship agreement incorporated the "sacred trust" language of the Mandate System, although it also provided more concrete stipulations as to the fiduciary duties of the trusteeship authority.¹⁹⁸ Nauru's claims were rooted foremost in the language of the trusteeship agreement, but Nauru also raised claims based on the inherent legal obligations of Australia as a trustee.¹⁹⁹

Nauru's claims stemmed from Australia's management of the island's phosphate deposits, which had primarily benefited Australia (and Great Britain and New Zealand) rather than Nauru's inhabitants. Nauru alleged that it had received far less in royalties than it should have because the mandatory powers kept the price of its phosphate below the world market price, purchasing most of the country's product at this discount and selling excess quantities at the world price for their own benefit.²⁰⁰ Nauru argued that this management policy violated Australia's fiduciary role²⁰¹ and sought compensation for both this profiteering practice and for environmental degradation.²⁰² Nauru's argument took support from the language of relevant PMC proceedings on the fiduciary principle governing mandatory status. As one PMC member noted of an Australian agency's profiting from Nauru's resources, it was "contrary to the spirit of the Covenant for the Mandatory power to derive any direct benefit from a territory under mandate."

In investigating Nauru's claim for redress, a Commission of Inquiry found that rehabilitation of the lands would cost \$72 million, and Nauru alleged that it had lost much more than this because of the unfair pricing structure.²⁰³ Australia agreed to \$107 million, nominally not as reparations but to assist the island with its post-phosphate future—and the settlement was explicitly "without

196. *Id.* at 12.

197. *Id.* at 13

198. Anthony Anghie, *The Heart of My Home: Colonialism, Environmental Damage, and the Nauru Case*, 34 HARV. INT'L L.J. 445, 454 (1993); Reyes, *supra* note 192, at 39.

199. Nauru argued that Australia had breached its duties under specific article of the Trusteeship agreement and the UN Charter; breached international law on self-determination; failed to live up to its general obligations under international law; and finally, that Australia had not given Nauru justice *lato sensu*, "in the broad sense." Reyes, *supra* note 192, at 22. See also *Certain Phosphate Lands in Nauru (Nauru v. Austl.)*, 1989 I.C.J. 4 (May 19).

200. Reyes, *supra* note 191, at 22. See also *Certain Phosphate Lands in Nauru (Nauru v. Austl.)*, 1989 I.C.J. 4 (May 19).

201. *Id.* at 22–24. See also *Certain Phosphate Lands in Nauru (Nauru v. Austl.)*, 1989 I.C.J. 4 (May 19).

202. Anghie, *supra* note 198, at 453. See *Memorial of Nauru (Nauru v. Austl.)*, 1990 I.C.J. Pleadings.

203. Anghie, *supra* note 198, at 454. See *Memorial of Nauru (Nauru v. Austl.)*, 1990 I.C.J. Pleadings, 303–09.

prejudice” to Australia’s rejection of Nauru’s compensation claim.²⁰⁴ Nevertheless, that the settlement amount went beyond rehabilitation to include losses incurred from Australia’s self-serving price structure can be seen as Australia’s tacit recognition of its role as fiduciary and its potential liability to Nauru’s claims.²⁰⁵

E. The Practice of International Administration

Some clues to the operational content of the duties encompassed in Article 22 come from the activity of the PMC, a body created to police the relationship between mandate and mandatory. Although the PMC was technically an advisory committee reporting to the Council of the League,²⁰⁶ in practice the Council almost always accepted its recommendations. The members of the PMC were regarded as exemplary judges of enlightened administration: their proceedings are replete with discussions of the preconditions of civilization and the proper authority of mandatory states. Displaying diplomatic tact that no doubt helped to maintain its prestige with the Council, the PMC sought to avoid conflict with mandatories whenever possible. Nonetheless, the PMC provided the nearest thing to a judicial “accounting” of trustee actions and so an operational picture of the powers and duties of international trusteeship.

1. The Activity of the PMC

The PMC spent a good deal of its resources on monitoring. Its staff collected and reviewed annual reports submitted by each mandatory power, detailing the administration of each mandated territory under its control.²⁰⁷ The PMC dictated the content of these reports through extensive questionnaires. After reviewing each report, it made inquiries to a representative of the mandatory government, sometimes the administrator of the territory, and sometimes a member of the home government.²⁰⁸ The reports were given to the League’s Secretariat, and the PMC forwarded its findings to the Council. Commissioners could supplement the reports with independent inquiry.²⁰⁹

The PMC also played a semi-adjudicatory role. It was the venue for questions about governance of the mandate territories, particularly any that a mandatory power might put forward for resolution. The commission did not rebuke the mandatory lightly; however, when it did, and if the Council adopted

204. Reyes, *supra* note 191, at 32. *See also* Australia–Republic of Nauru: Settlement of the Case in the International Court of Justice Concerning Certain Phosphate Lands in Nauru, Aug. 10, 1993, 32 I.L.M. 1471.

205. *Id.*

206. League of Nations Covenant art. 22, para. 9.

207. WRIGHT, *supra* note 108, at 160.

208. *Id.* at 166–67.

209. MARGALITH, *supra* note 107, at 83.

its finding, that result became binding, subject to revision only by a contrary opinion of the Permanent Court of International Justice.²¹⁰

The PMC also received petitions concerning alleged failures of mandatory powers to conform to the strictures of their mandates.²¹¹ These petitions, often submitted by inhabitants of the mandate territories, were far and away the most direct way for the mandate populations—the “beneficiaries” of the “sacred trust”—to enforce their equitable interest.

The right of petition was guaranteed in 1923.²¹² The petition process was designed to protect the mandatory powers from any avoidable interference.²¹³ Inhabitants of a mandated power could submit petitions to the PMC only through the mandatory, which had six months to attach any comments it deemed elucidatory before sending the petition on to the commission.²¹⁴ Petitions from sources other than inhabitants went directly to the Chairman, who could, at his discretion, forward it to mandatory power for comments and then to the commission for consideration.²¹⁵ The PMC forwarded all accepted petitions to the Council along with its recommendation for their disposition.²¹⁶

2. Limits of PMC Oversight

The efficacy of the petition process was restricted by the commissioners' limited access to information about complicated questions. The bounds of the Mandate System's commitment to “accounting” for fiduciary relations became clear in 1925, when some members of the PMC proposed that inhabitants be given the opportunity to air their grievances in person.²¹⁷ The proposal was roundly defeated by the League. Instead, the Council recommended that the mandatory powers comment on all aspects of received petitions, a considerably weaker measure.²¹⁸

Probably in response to perceived limits on its political support, the PMC adopted jurisdictional constraints that further restricted its adjudicatory role. It

210. WRIGHT, *supra* note 108, at 197. The Court had jurisdiction over any matter brought by a member of the League of Nations regarding the interpretation or application of a mandate and any petitioner who could find a member willing to adopt his claim as the nation's own could have their grievances addressed by the Court. *Id.* at 158. See also *Annex Nine to the Minutes of the Permanent Mandates Comm.*, League of Nations Doc. C.386.M.132 1925 VI, at 168–69 (1925).

211. MARGALITH, *supra* note 107, at 77.

212. *Minutes of the Permanent Mandates Comm.*, League of Nations Doc. A.19 1923 VI, at 9 (1923).

213. And, secondarily, as a “means of giving vent to the feelings of dissatisfaction, whether well-founded or unfounded, to which even the best Administration must inevitably give rise.” *Minutes of the Permanent Mandates Comm.*, League of Nations Doc. A.13.1924 VI, at 41 (1924).

214. *Minutes of the Permanent Mandates Comm.*, League of Nations Doc. A.19.1923 VI, at 9 & 32 (1923).

215. *Minutes of the Permanent Mandates Comm.*, League of Nations Doc. A.19.1923 VI, at 9, 32 & 34 (1923).

216. Initially the Commission's decisions on petitions were passed first to the Council, and only then to the petitioners; after 1925, decisions by the Commission were given to both the petitioner and the mandatory power. WRIGHT, *supra* note 108, at 177.

217. MARGALITH, *supra* note 107, at 90.

218. *Id.* at 88.

would not hear petitions relating to grievances for which local courts could give remedies unless the petitioner alleged that a local court's decision violated the mandate.²¹⁹ Nor would the Commission hear anonymous petitions or petitions expressing grievances about which the mandatory was already on notice.²²⁰

Certain political questions were also outside the PMC's jurisdiction. Although the commission would consider petitions related to questions of governance that implicated the terms of a mandate, it did not hear petitions relating to the validity of a mandate.²²¹ This last restriction not only limited the extent of its supervision, but also pressed interpretation of the Mandate System in a positivist direction: once enshrined in an express mandate, a mandatory's powers were not susceptible to revision on putative general principles of international trusteeship or civilization.

The PMC's avoidance of political questions also occurred *sub rosa*. Questions that seemed to trench on mandatory powers' judgments about public order and state security were often effectively immune from review. In 1923, for example, an official petition on behalf of the African Progress Union, an organization for the "promotion of progress among the natives," complained that the French mandate would not let it open a branch on the grounds that its activity would interfere with public order.²²² France did not reply within six months, so the PMC asked the French representative for comments. After cabling his government, he replied that the opening of the branch appeared to be stalled but that the authorities were going to make further inquiries. On this rather thin procedural record, the PMC deemed the response of the French government "conclusive" and rejected the petition without sending it on to the Council and members at large.²²³

3. Petitions in Practice

Even when the PMC did see fit to correct misgovernment, it addressed many cases by a careful diplomatic ballet that avoided the petition process. In 1923, for example, the PMC Chairman, Marquis Theodoli, mentioned during an examination of the report submitted by France for French Togoland and the French Cameroons that "certain complaints had reached him to which he had not attached much importance," which concerned a troubling preferential

219. *Annex Nine to the Minutes of the Permanent Mandates Comm.*, League of Nations Doc. C.386.M.132.1925 VI, at 168–69 (1925).

220. WRIGHT, *supra* note 108, at 171–72.

221. *Id.* For example, the PMC did not forward to the Council a "general protest against the Zionist policy of Balfour" from the national party of Palestine, Al-Hizd-Al-Watani, or a complaint by the Association of German Togolanders arguing that the mandate of the French should be revoked and that French Togoland should be given back to Germany. *Minutes of the Permanent Mandates Comm.*, League of Nations Doc. C.648.M.237 1925 VI, at 139 (1925).

222. *Minutes of the Permanent Mandates Comm.*, League of Nations Doc. A.19 1923 VI, at 32 (1923).

223. *Minutes of the Permanent Mandates Comm., Fourth Session*, League of Nations Doc. A.13 1924 VI, at 26 (1924).

import scheme for the two Mandated territories.²²⁴ The French representative politely replied that any problems were due to “an excess of zeal” and could easily be corrected by issuing a supplementary decree. The problem was deemed resolved.²²⁵ Nor, later, did the PMC give credence to the claims of various Syrians that the French had gone into private homes looking for individuals connected with protest strikes at Douma and Homs. Rather, the commission announced that it was satisfied with the explanation of the French representative.²²⁶ Most petitions followed a similar script: the PMC expressed satisfaction with the answers given or ameliorative measures taken by the mandatory power and either quashed the petition or recommended no further action to the Council.²²⁷

Sometimes, however, the PMC did rebuke the mandatory power as a result of a petition. Many rebukes worked mainly to preserve the PMC’s procedural role. When the French ignored their duty to pass on petitions with (or without) comment, they were put on polite notice that such conduct showed disregard for the PMC’s procedures and the spirit of the Covenant. The French government quickly announced that it was unaware the petitions had not been forwarded and would remedy the putative oversight.²²⁸ Similarly, when a petition by Samoans complained of a misleading official pamphlet regarding the Samoan right of appeal to the PMC, the commission insisted on assurances from New Zealand that the mandatory would take the necessary steps to give the Samoans full cognizance of their petition rights.²²⁹

Other rebukes were substantive, if cautious in tone. When the British seemed to be violating the mandate for Tanganyika by giving favorable postal rates to letters addressed to British possessions, after heated debate about the compatibility of this practice with the mandate, the PMC warned that “it will watch with special interest such direct and indirect effects as may result both as

224. *Minutes of the Permanent Mandates Comm.*, *supra* note 214, at 27.

225. *Id.*

226. *Minutes of the Permanent Mandates Comm.*, *Thirty-Sixth Session*, League of Nations Doc. C170.M.100 1939 VI, at 236 (1939). See also *Annex 10 to the Minutes of the Permanent Mandates Comm.*, *Thirty-Sixth Session*, League of Nations Doc. C.P.M.2148(1), at 269 (1939).

227. Such a cautious attitude sometimes backfired on the PMC, as illustrated by the case of the Adjigo family of French Togoland, who were expelled from their home in 1922 after a rival clan member’s appointment to political office. *Minutes of the Permanent Mandates Comm.*, League of Nations Doc. A.13 1924 IV, at 41 (1924). The PMC initially acceded to the ejection, drafting a resolution for the Council that concluded, “the decision which was taken in the case of the petitions was not based on any consideration such as might give rise to criticism from the point of view of good administration.” *Id.* at 140. However, in 1926, the PMC was forced to revisit the question and request information from France regarding, among other things, “what were the Government’s motives for treating with equal severity the twelve persons in question (some of whom were old men), whose activities, personal influence, or mere presence at Anecho could not apparently endanger public order in the same degree?” *Appendix to the Minutes of the Permanent Mandates Comm.*, *Ninth Session*, League of Nations (No Document Number Given), at 230–31 (1926).

228. *Minutes of the Permanent Mandates Comm.*, League of Nations Doc. C.545.M.194.1927 VI, at 63 (1927).

229. *Annex 5 to the Minutes of the Permanent Mandates Comm.*, *Thirteenth Session*, League of Nations Doc. C.P.M.762(1), at 221 (1928).

regards the administrative efficiency and cost of the unified service [and as regards the autonomy of the mandated territory].”²³⁰ Such carefully modulated language was typical even in response to extreme actions by mandatory powers. After reviewing the fairly aggressive French quashing of the Syrian rebellion of 1925–1926 the PMC found no reason to think that the suppression involved “reprehensible excesses” but also made a point of insisting that “such measures are only defensible in so far as they are necessary for the restoration of peace and do not create unnecessary suffering or arouse justifiable resentment.”²³¹

Even this intervention may seem striking in light of the PMC’s habitual avoidance of political questions. It may have bespoken a particular sensitivity, consistent with the liberal cast of the Mandate System’s trust concept, to what we might now deem human-rights violations. The PMC took particular cognizance of discrimination by nationality and intrusions on liberty of conscience. On the point of nationality, the only claim regarding land expropriation it answered sympathetically was a claim by a Mr. Eichoff, a German in South West Africa, who alleged that he had suffered harassment and economic hardship arising from anti-German bias. The commission, after considering his petition on two separate occasions, recommended that the mandatory power buy his farm so as to dispel his grievances.²³²

Freedom of conscience, enshrined in every mandate, was a particular concern of the PMC. During the Ninth Session, the *Waad Leumi* (National Council) of the Jews in Palestine submitted a long petition enumerating their grievances against the mandatory power.²³³ Among their contentions were that the mandatory government had adopted “a negative policy” toward the Jews in Palestine—including giving Arabs better and more land, not delegating enough funds for schools, and treating Jewish workers worse than their Arab counterparts.²³⁴ In its response, the PMC adopted a broadly deferential view of British settlement policy and labor practices.²³⁵ It reserved its strongest rebuke for the abridgement of liberty of conscience in the requirement that Jews work on religious holidays: “[I]n view of the terms of Article 23 of the Mandate, [the PMC] draws the attention of the mandatory Power to this complaint.”²³⁶ Although a weak rebuke in ordinary language, it was a rather focused and directive response for the PMC.

230. *Report to the Council on the Work of the Session, Annex 23, to the Minutes of the Permanent Mandate Comm., Twenty-Third Session*, League of Nations (No Document Number Given) (1933), at 191 (brackets in original). See also *Annex 18 to the Minutes of the Permanent Mandates Comm., Twenty-Third Session*, League of Nations Doc. C.P.M.1415(1), at 179 (1933).

231. Quoted in WRIGHT, *supra* note 108, at 198–99.

232. *Annex 15 to the Minutes of the Permanent Mandates Comm., Twenty-Fourth Session*, League of Nations Doc. C.P.M.1467(1), at 130 (1933).

233. *Annex 8 to the Minutes of the Permanent Mandates Comm., Ninth Session*, League of Nations Doc. (No Document Number Given), at 204 (1926).

234. *Id.* at 206.

235. *Appendix to the Minutes of the Permanent Mandates Comm., Ninth Session*, League of Nations Doc. (No Document Number Given), at 226–30 (1926).

236. *Id.* at 230.

The conduct of the PMC in response to petitions shows that it both understood the enormous diplomatic pressure on the League of Nations and took seriously the obligations of the mandatory powers to fulfill the fiduciary duties outlined by the concepts of trust, tutelage, and mandate. Regrettably, however, the caution of the commissioners and the political constraints on their action combined to limit their contribution to the interpretation of the Mandate System's announced principles. In some respects, the activity of the PMC leaves this analysis in the same position as the survey of judicial decisions and consideration of the Covenant itself. The moral and political ambition of applying fiduciary principles to the relationship between certain classes of governments and governed populations represented a genuine addition to the body of international law. The metes, bounds, and operational significance of the fiduciary relationship, however, never became clear in the absence of effective and authoritative interpreters. The fiduciary concept remained vague and substantially aspirational throughout the period of the Mandate System, despite its status as a dimension of international law.

V

CONCLUSION

One major tradition of understanding the powers and duties of sovereigns has particular relevance to arguments for revival and refurbishment of the odious debt doctrine. It derives from Bartolus, Ockham, Grotius, and Locke, developed in the thought of Burke and the Mills, and was transiently enshrined in the League of Nations mandate system and its successors. We have surveyed the critical role of private-law concepts in the development of this tradition. In this account, the state is a constructed and purposive legal actor, composed of a set of powers assigned by its subjects for the pursuit of certain human interests and bound by the obligation to secure and respect those interests. If there are inherent powers in a sovereign, they are only those that are implied by its inherent duties. In this conception, it is evidence of a state's maturity that it is restricted in a variety of ways, that certain of its decisions are subject to appeal or annulment, that it has obligations running downward to its people and upward to supra-national principles and institutions. This conception has been persistently articulated in the language of private-law arrangements that confer limited and purposive powers, particularly those surrounding divided ownership. These legal relations furnished signal concepts for organizing the idea of divided and restricted sovereignty: trusts, mandates, and wardships.

Our point in setting out this history is a modest one. There is nothing alien, or even novel, in proposing to use private-law concepts to articulate limits on the legitimate powers of states. On the contrary, this is a time-honored and productive conceptual strategy for making tractable the idea of the state as an organ of inherently limited powers. The proposal to revive the odious debt doctrine is a new instance of an important tradition in conceptions of sovereign

power, a tradition seeking to make states answerable to the well-being of their peoples.