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Empire and the Political Economy of Fiduciary Law

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10.1 INTRODUCTION

For five weeks in the waning months of 1923, Zitkala-Ŝa, a Dakota writer, activist, and public intellectual, traveled around Eastern Oklahoma as a researcher for the General Federation of Women's Clubs (GFWC).[1] The topic of her research – Oklahoma probate law – may sound uncontroversial. Yet Zitkala-Ŝa, an advocate of American Indian suffrage and critic of the US Bureau of Indian Affairs' corruption, was no stranger to controversy.[2] And her report on Oklahoma's probate system, published by the Indian Rights Association, was explosive. Zitkala-Ŝa and her coauthors found nothing less than "legalized plunder" of land and wealth from members of Native nations in Oklahoma.[3]

Fiduciary law was at the center of this system of legalized "exploitation."[4] According to the report, "Indians are virtually at the mercy of groups that include the county judges, guardians, attorneys, bankers, merchants – not even overlooking the undertaker – all regarding Indian estates as legitimate game."[5] The game was played through the appointment of non-Native guardians to manage the resources of Native people. County judges, who were elected every two years, were happy to hand out "Indian guardianships" as "plums" to their "faithful friends" by declaring

[1] *See* Gertrude Bonnin et al., Oklahoma's Poor Rich Indians: An Orgy of Graft and Exploitation of the Five Civilized Tribes – Legalized Robbery (1924). Zitkala-Ŝa was the name that Gertrude Bonnin, then Gertrude Simmons, chose for herself. Cathy N. Davidson & Ada Norris, *Introduction*, *in* Zitkala-ša, American Indian Stories, Legends, and Other Writings xi, xv (Cathy N. Davidson & Ada Norris eds. 2003).

[2] *See* Davidson & Norris, *supra* note 1, at xxv.

[3] Bonnin et al., *supra* note 1, at 26. Zitkala-Ŝa's coauthors were Charles Fabens, a representative of the Indian Defense Association, and Matthew Sniffen, of the Indian Rights Association. *See id.* at 1.

[4] *Id.* at cover page.

[5] *Id.* at 5.

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Indians to be incompetent to manage their own affairs.[6] These "professional" guardians took their cut of the wealth of their wards, as did banks and merchants, not to mention attorneys.[7] Thus, fiduciary law was the frame for legalizing the domination of Native people and facilitated commerce based upon the expropriation of their resources.[8]

This is not a familiar description of the economic structure of fiduciary law. In the typical account, fiduciary law facilitates market exchanges by supplying legal standards to govern the behavior of agents who are entrusted with discretion over the interests of their principals. These government-supplied standards – the fiduciary duty of loyalty and the duty of care – make it less costly for private parties to contract for services.[9]

The exchange-facilitating account is a law-and-economics version of the idea that fiduciary law enhances autonomy. Fiduciary law, that is, creates opportunities for individuals to pursue their own goals and be authors of their own lives. This autonomy-enhancing vision has widespread appeal, and not just for those who think fiduciary law is a species of contract law. Fiduciary law, the ideal holds, "emphasizes not personal conflict and domination," but rather "cooperation and identity of interest pursuant to acceptable but imposed standards."[10]

I want to suggest that the familiar description of fiduciary law has a problem. Most scholarship on fiduciary law says nothing about European or US imperialism. There is no discussion of the ways in which fiduciary law framed imperial struggles over political and economic power. There is no mention of the roles that fiduciary law

[6] *Id.* at 6.

[7] *Id.* at 15.

[8] To be sure, the report's findings were questioned, sometimes with bigoted disdain, and the report's tone was criticized, including by the Commissioner of Indian Affairs at a hearing of the Committee on Indian Affairs shortly after the report's publication. *See* HOUSE OF REPRESENTATIVES, 68TH CONG., HEARING BEFORE THE COMMITTEE ON INDIAN AFFAIRS ON H.J. RES. 181, at 28 (Feb. 21, 1924) (Rep. Sproul) (criticizing proposal to fund further "investigation based upon a report of some women folks"); *id.* at 24–25 (statement of Comm'r of Indian Affairs Charles H. Burke) (stating that "I deplore propaganda"). But the Commissioner agreed with the substance of the report, which has been reaffirmed by subsequent studies. *See id.* at 25 (statement of Comm'r of Indian Affairs Charles H. Burke); *see also* Andrea Seielstad, *The Disturbing History of How Conservatorships Were Used to Exploit, Swindle Native Americans*, UNIV. OF DAYTON MAGAZINE (Aug. 20, 2021), *at* https://udayton.edu/magazine/2021/08/conservatorship.php.

[9] *See, e.g.*, Robert H. Sitkoff, *The Economic Structure of Fiduciary Law*, 91 B.U. L. REV. 1039, 1040–45 (2011) (arguing that fiduciary law is a solution to an agency problem that stems from incomplete contracting due to transaction costs); Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. ECON. 425, 426 (1993) (describing fiduciary duty of loyalty as legal rule that "promote[s] the benefit of contractual endeavors in a world of scarce information and high transaction costs").

[10] Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 802 (1983). For a qualified autonomy-enhancing account, *see* Hanoch Dagan, *Fiduciary Law and Pluralism*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW 832, 839 (Evan J. Criddle et al. eds. 2019) ("fiduciary types are not always autonomy enhancing, but many fiduciary types are").

played in various European empires and the US Empire between the late fifteenth century, when imperial expansion began, and the time of rapid decolonization in the 1960s.[11]

What follows is a summary of a political economy of fiduciary law and imperialism that I hope to develop at length and in detail.[12] My argument is that the familiar description of the economic structure of fiduciary law is incomplete. So too is the autonomy-enhancing account of fiduciary law. Fiduciary law, I want to argue, may enhance exploitation to facilitate market exchange. It provided an ideological justification for imperial expansion in the interests of opening up trade between peoples. And as Zitkala-Ŝa's report found, and as many other examples show, fiduciary law played institutional roles in the financing, administration, and oversight of imperial exploitation and the facilitation of trade among those who benefitted from it.[13]

10.2 IMPERIALISM AND THE TYPICAL PICTURE OF FIDUCIARY LAW

The case, then, for including imperialism within the picture of fiduciary law is straightforward. Imperial powers claimed to be fiduciaries acting on behalf of peoples under their rule. They used the vocabulary of "guardianship" and "trusteeship," paradigmatic fiduciary relationships that trace back to Roman law.[14] To be sure, this fiduciary ideal was not universal, much less universally adhered to. Imperial legal systems changed over time and differed from one another. Unsurprisingly, the fiduciary ideal developed more clearly and more fully in the common law empires of Britain and the United States than in civil law systems, which never had the common law trust. Various empires, moreover, resisted the

[11] In stopping with the 1960s, I do not mean to imply that international trusteeship has disappeared altogether as a concept or practice. *See* Ralph Wilde, International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away (2008).

[12] On law and political economy, *see*, *e.g.*, Jedediah Britton-Purdy et al., *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 Yale L.J. 1784 (2020); David Kennedy, *Law and the Political Economy of the World*, 26 Leiden J. Int'l L. 7 (2013).

[13] This chapter builds upon prior studies by bringing both fiduciary legal theory and TLO theory to bear upon questions about not only the ideological roles but also the institutional roles that public and private fiduciary law played in imperialism. *See* Wilde, *supra* note 11; Antony Anghie, Imperialism, Sovereignty, and the Making of International Law (2005); William Bain, Between Anarchy and Society: Trusteeship and the Obligations of Power (2003); Robert A. Williams, Jr., The American Indian in Western Legal Thought (1992); Andrew Fitzmaurice, *Sovereign Trusteeship and Empire*, 16 Theoretical Inq. L. 447 (2015).

[14] *See* Joshua Getzler, *Rumford Market and the Genesis of Fiduciary Obligations*, *in* Mapping the Law: Essays in Memory of Peter Birks 577, 590–93 (Andrew Burrows & Alan Rodger eds. 2006); R. M. Helmholz, *The Roman Law of Guardianship in England, 1300–1600*, 52 Tul. L. Rev. 223, 224 (1978).

idea that the law of nations governed their relations with peoples subject to imperial rule.[15] Even so, we can trace a pattern of greater institutionalization of fiduciary norms over time as modern states emerged and consolidated their political sovereignty. By 1919, a fiduciary norm was so settled that the newly formed League of Nations system enshrined the "sacred trust of civilization" as an institution of international relations.[16]

If that were not enough reason to take imperialism more seriously than the field of fiduciary law does, here is another: The "sacred trust of civilization" has a plausible claim to being fiduciary law's first transnational legal order (TLO).[17] The League's Mandate System entrusted authority over various territories and peoples in Africa, the Middle East, and Oceania to various mandatory powers, primarily though not exclusively European states. It included norms and institutions we typically associate with fiduciary relations, including mechanisms for oversight of the mandates. The fiduciary office – the office of the "sacred trustee," that is – provided a frame for resolving disputes among imperial powers by allocating authority to exploit persons and resources among them.[18] Thus, the Mandate System was arguably was the first fiduciary TLO, a point that I return to later.

Fiduciary law, moreover, played a broader role in the construction and management of empires. Its role, that is, was not limited to the sacred trust of civilization or even the law of nations. What we now think of as institutions and practices associated with "private" fiduciary law – including the separation of ownership from control of property, the use of fiduciary institutions as investment vehicles, and the expectation that fiduciaries will give an accounting – were part of the financing and administration of various European and US Empires.

In short, fiduciary law played both ideological and institutional roles in various European empires and the US Empire. The ideological role of fiduciary law in

[15] *See* Lauren Benton, A Search for Sovereignty: Law and Geography in European Empires, 1400–1900, at 226–27 (2010) (discussing works by international lawyers and colonial officials who "argued for the limits of applying international law to systems of quasi-sovereignty [within imperial contexts] and at times imagined imperial power as trending irreversibly toward a unified system of sovereignty").

[16] Treaty of Peace between the Allied and Associated Powers and Germany art. 22, June 28, 1919, 2 Bevans 43, 56.

[17] *See* Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders*, *in* Transnational Legal Orders 3, 5 (Terence C. Halliday & Gregory Shaffer eds. 2015) (defining a "transnational legal order," or TLO, as "a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions").

[18] It is worth stressing the point that fiduciary law played an institutional role in framing relations *among* imperialists and not just a role in framing relations between imperial powers and those subject to their rule. *See infra* notes 68–71 (making this point with respect to role of trusteeship in controversies between Parliament and English East India Company); *id.* at 108–10 (same with respect to Berlin Conference of 1884–85 and the Congo Free State).

imperial rule has gotten more attention, particularly among legal scholars.[19] The norm of fiduciary responsibility – the idea, that is, that fiduciaries are not self-serving actors but instead representatives acting on behalf of someone else – lent itself to discourses that legitimated imperial power based upon religious bigotry and cultural racism. The institutional dimension deserves more attention, especially in legal scholarship.[20] Some institutions, particularly the "company-states" that actually administered imperial rule on behalf of European sovereigns, bridged the "sacred trust" and the private entrustment of authority for business purposes.[21] Consider the best-known example, the English East India Company, whose violence and corruption in Indian prompted debates in London about the allocation of trust authority within the Empire.[22] "Public" and "private" fiduciary authority were entangled in other ways that facilitated domination. For example, during the 1830s, the largest firms pooling American and British capital to finance the removal of Native nations from the southeastern United States, such as the Boston and Mississippi Land Company, were structured as trusts.[23] The US government forced these Native nations to resettle in Indian Territory, which later became the State of Oklahoma. By the early twentieth century, as Zitkala-Ŝa reported, Oklahoma's law of guardianship and probate was the key to a system of "legalized robbery" of the lands and wealth of Native families, including many from those nations that the United States had forcibly moved a century early.[24] Thus, together, private and public fiduciary law were tools of subordination.

As these examples show, fiduciary law could enhance subordination in either of two ways. On the one hand, legal norms and institutions could facilitate subordination *within* a fiduciary relationship. The Mandate System of the League of Nations is one example. On the other hand, fiduciary law also facilitated subordination *outside* the fiduciary relationship, as with, for example, the use of trusts to funnel global capital toward the forced removal of Native nations from their homelands.

Thus, fiduciary law's relationship to autonomy is more complicated than the field's ideals might suggest. Many scholars argue that fiduciary law enhances

[19] *See, e.g.*, Anghie, *supra* note 13; Williams, *supra* note 13. My own contribution is Seth Davis, *American Colonialism and Constitutional Redemption*, 105 Calif. L. Rev. 1751 (2017).

[20] An important exception is Antony Anghie's argument that the Mandate System of the League of Nations' Mandate System established "an intricate and far-reaching network of economic relationships" involving the exploitation of the labor and resources of peoples in the mandate territories. Anghie, *supra* note 13, at 180.

[21] *See* Andrew Phillips & J. C. Sharman, Outsourcing Empire: How Company-States Made the Modern World (2020); Philip J. Stern, The Company-State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India (2012).

[22] *See, e.g.*, Nick Robins, The Corporation That Changed the World (2012).

[23] *See* Claudio Saunt, *Financing Dispossession: Stocks, Bonds, and the Deportation of Native Peoples in the Antebellum United States*, 106 J. Am. Hist. 315, 318 (2019).

[24] Bonnin et al., *supra* note 1.

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autonomy by supplying standards of behavior that facilitate bargains for fiduciary services. Fiduciary law responds to the risk that comes whenever someone is in charge of someone else's interests. People put fiduciaries in charge of their property or other interests for many reasons. Maybe the fiduciary's an expert. Or maybe they just want someone else to do the work. Whatever the reason, the risk is the same. "Abuse of power" is one way to put the problem that comes when one person has discretionary authority over the interests of another.[25] Or we might call it "an agency problem."[26] Fiduciary law aims to solve this problem by requiring fiduciaries to be loyal, that is, to subordinate their interests to the beneficiaries' interests. Thus, fiduciary law protects people who trust others to provide them with services and expertise. In so doing, fiduciary law enhances individual autonomy.

This autonomy-enhancing account has obvious appeal. After all, many fiduciary relationships exist only because people agreed to them. For those who think fiduciary law is contract law, fiduciary duties enhance autonomy by providing default rules to fill gaps in incomplete contracts. Transaction costs prevent the parties from spelling out the details of fiduciary duties in every contract. Fiduciary law's duty of loyalty requires the agent to pursue the principal's interests, not the agent's own or some third party's interest. And the duty of care demands the agent pursue the principal's interests with reasonable competence. The government facilitates fiduciary bargains by supplying and enforcing those duties.[27]

The autonomy-enhancing account has appeal even for those scholars who reject the contractarian view of fiduciary law. Consider this description by Tamar Frankel, who more than anyone is responsible for the idea that fiduciary law is a distinct body of law: "a fiduciary society emphasizes not personal conflict and domination among individuals, but cooperation and identity of interest pursuant to acceptable but imposed standards."[28] Fiduciary law, that is, facilitates relationships in which "entrustors" rely upon the services of fiduciaries for the entrustors' own benefit.[29]

[25] *See* Tamar Frankel, Fiduciary Law xviii (2011).

[26] *See*, *e.g.*, Sitkoff, *supra* note 9, at 1040.

[27] *See*, *e.g.*, Easterbrook & Fischel, *supra* note 9, at 426.

[28] Frankel, *supra* note 10, at 802. Frankel's description of a fiduciary society as one that does not emphasize domination is echoed by Evan Criddle's account, which links fiduciary law and republican political theory to argue that fiduciary law "safeguard[s] individuals from 'domination,' understood as subjection to another's alien control." Evan J. Criddle, *Liberty in Loyalty: A Republican Theory of Fiduciary Law*, 95 Texas L. Rev. 993, 995 (2017).

[29] Frankel, *supra* note 25, at 6–7. Not everyone concurs in the autonomy-enhancing account, of course. Lionel Smith has argued that "[i]n every fiduciary relationship, the fiduciary acquires control over a part (or in some cases, all) of another person's autonomy." Lionel Smith, *Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on Behalf of Another*, 130 LQR 608, 613 (2014). In arguing to the contrary that trust and autonomy are not necessarily at odds, Carolyn McLeod & Emma Ryman have argued that "fiduciaries can, and should, act as relational supports for their beneficiaries' (relational) autonomy." Carolyn McLeod & Emma Ryman, *Trust, Autonomy, and the Fiduciary Relationship*, *in* Fiduciaries and Trust: Ethics, Politics, Economics, and Law 74, 86 (Paul Miller & Matthew Harding eds. 2020). Qualifying the autonomy-enhancing account even further, Hanoch Dagan has

In this chapter, I want to ask how this picture of fiduciary law changes if we put imperialism within it.

10.3 FIDUCIARY EXPLOITATION AND FREE EXCHANGE

Scholars have begun to explore how fiduciary law, when understood as a distinctive body of law in its own right, influenced the emergence of modern markets. In recent work, for example, Michael Halberstam and Justin Simard have argued that "lawyers as trusted agents" were important to economic development in the nineteenth-century United States.[30] The story they tell is one in which lawyers performed a wide array of services for clients in "high-risk markets," where businesspeople had to rely upon agents they could not monitor due to physical distance, the use of bills of exchange and private bank notes, and the lack of rapid means of communication.[31] As economic actors, lawyers were crucial to securing trust in these markets. Their work was not limited to drafting briefs. The list of typical tasks is illustrative: "lawyers surveyed land, hired workers, paid taxes, collected notes, drafted agreements, examined titles, prepared and interpreted insurance policies, managed finances, organized partnerships, transferred money, and prepared detailed reports."[32] Many of these lawyers were graduates of Litchfield Law School, where both Aaron Burr and John C. Calhoun were once students, and whose graduates constituted "nearly 5 percent of the lawyers in the United States" by the 1830s, when the school closed.[33] One of these graduates was Elisha Whittlesey, whose work as a land agent in Ohio is representative of the practice of lawyers as trusted agents in the early nineteenth century. Lawyers like Whittlesey "worked as long-distance land agents, helping eastern speculators sell land located in the West."[34]

In the twilight of this career, when he was now the "Honorable Elisha Whittlesey," the former Comptroller of the US Treasury, Whittlesey gave a speech to the Mahoning County Agricultural Society.[35] The Society's meeting was an opportunity for the aged attorney to reflect on the history of Ohio. Whittlesey was especially struck by an exhibition representing "pioneer life in the log cabin," which, he commented, "reminds every old settler, of the country as it was fifty years

argued that fiduciary law is a "heterogeneous" legal category, one within which some, but not all, types of fiduciary relationships "enhance autonomy." Dagan, *supra* note 10, at 832.

[30] Michael Halberstam & Justin Simard, *Lawyers as Trusted Agents in Nineteenth-Century American Commerce*, 45 L. & Soc. Inquiry 132 (2020).

[31] *Id.* at 135–36.

[32] *Id.* at 134.

[33] *Id.* at 139. On Aaron Burr and John C. Calhoun, *see* Catherine R. Blondel-Libardi, *Rediscovering the Litchfield Law School Notebooks*, 46 Conn. Hist. Rev. 70, 70 (2007).

[34] Halberstam & Simard, *supra* note 30, at 140.

[35] Twelfth Annual Address Delivered before the Mahoning County Agricultural Society, at Canfield, Ohio (Oct. 1858).

ago."[36] The longtime Ohioan went on to offer some advice on best agricultural practices, including how to cultivate "cucumbers, tomatoes and other garden vegetables," as well as "Indian corn."[37] Whittlesey's references to Indian corn were his address's only hints of what listeners must have known but were already in the process of forgetting: Land speculation and pioneer life in the West involved the sale and settlement of Indian lands. The name of Mahoning County, where Whittlesey gave his address, not to mention the name "Ohio," and the names of all of Ohio's "major waterways – the Mahoning, Cuyahoga, Walhonding, Miami, Sandusky, Tuscarawas, Maumee, Scioto, and Ohio rivers" – testify to the presence of Native peoples.[38]

Lawyers as trusted agents in nineteenth-century America were playing an important role in a system of land exchange that was built at least in part upon the exploitation of Native nations and the expropriation of their lands.[39] The role of fiduciary law in this system was not limited to the role of lawyers like Whittlesey who acted as land agents for the eastern land speculators. Fiduciary law, that is, played a bigger market-constituting role than the one that Halberstam and Simard recount.

* * *

To begin to understand the ideological and institutional roles of fiduciary law in facilitating exploitation *and* exchange, there is no better place to start than Tizatlan, a city in what today is Mexico, and no better time than 1519, long before the 1795 Treaty of Greenville cleared the way for settlement of much of the Ohio Territory, and even longer before the so-called sacred trust of civilization had become a TLO with the Covenant of the League of Nations.

In September 1519, an alliance was struck at the palace of Xicotencatl, the tlatoani, or "one who speaks," of Tizatlan, located in a place that today is part of the Mexican state of Tlaxcala.[40] For weeks, the Tlaxcalans had battled a company of several hundred men who burned villages and maimed "emissaries suing for peace."[41] Now, this company, dependent upon their translator Malintzin, a noblewoman from one of the Tlaxcalans' traditional trading partners, promised to join

[36] *Id.* at 4.

[37] *Id.* at 16.

[38] H. F. Raup, *An Overview of Ohio Place Names*, 30 NAMES: A JOURNAL OF ONOMASTICS 49, 49 (1982).

[39] Not every transfer of land from Native peoples was coerced or obtained through fraud. But not every transfer was free and fair, either. *See generally* STUART BANNER, HOW THE INDIANS LOST THEIR LAND (2005).

[40] CAMILLA TOWNSEND, FIFTH SUN: A NEW HISTORY OF THE AZTECS 103 (2019). "Tlatoani" may be translated as "king." *Id.* at x. For much of its history, however, Tlaxcala was more like what political theorists would today call a "republic" than a "monarchy." DAVID STASAVAGE, THE DECLINE AND RISE OF DEMOCRACY: A GLOBAL HISTORY FROM ANTIQUITY TO TODAY 41 (2020).

[41] TOWNSEND, *supra* note 40, at 103.

forces with the Tlaxcalans against a long-standing foe, the Mexica of Tenochtitlan.[42] Tlaxcalan painters would later record the peace in images on palace walls and bark paper, so that all could "recall[]" the alliance in "perpetuity."[43] In December 1519, several thousand Tlaxcalans marched with several hundred of their Spanish allies into one of the largest cities in the world, with avenues so broad that they "put the tiny, mazelike streets of European cities to shame."[44]

This grand city, Tenochtitlan, would fall two years later to allied forces. The next year, Charles V, Holy Roman Emperor and King of Spain, appointed Hernán Cortés, the leader of the Spanish company of adventurers who allied with the Tlaxcalans, as the captain-general of New Spain. As a sovereign with imperial aspirations, and no small measure of anxiety about competition from the Ottoman Empire,[45] Charles V had placed great trust in Cortés's company. Cortés, who "knew Spanish law well,"[46] was not much troubled by those who would come to question the legitimacy of the Spanish Crown's assertion of sovereignty over the lands of the Mexica and other Indigenous Peoples. But Charles V, a pious man, apparently was, and consulted confessors to quiet his troubled mind.[47]

Spanish intellectuals were divided on the question of whether European sovereigns could legitimately claim authority over those peoples they called *Indios*. The key figure, at least for modern international law scholars, is Francisco de Vitoria, a theologian and jurist. In a series of public lectures, which his students scribbled down, Vitoria disagreed with those who argued that Indians had did not have moral agency, natural rights, or their own governments. Instead, Vitoria argued that the Spanish claim of sovereignty over the Indigenous lands was legitimate to the extent that Spaniards acted to stop violations of natural rights, particularly "human sacrifices," and to protect the right of all people to travel and seek to trade with one another.[48]

Guardianship itself was not a new idea. Roman law had the *tutela* and *cura*, the former a legal device for the administration of property for the benefit of children who had no *paterfamilias* exercising authority over them, and the latter a relationship in which one adult had authority over the interests of another deemed

[42] *Id.* at 85, 103.
[43] *Id.* at 103–04.
[44] *Id.*
[45] *See* Ayşe Zarakol, Before the West: The Rise and Fall of Eastern World Orders 176 (2022).
[46] Townsend, *supra* note 40, at 100.
[47] On Charles V's piety, *see, e.g.*, Martti Koskenniemi, To the Uttermost Parts of the Earth: Legal Imagination and International Power 1300–1870, at 119 (2021) (explaining that royal confessor's "influence on Charles V … was pervasive" and that "for Charles hardly any matter lacked … a [spiritual] dimension").
[48] Francisco de Vitoria, Political Writings 288 (Anthony Pagden & Jeremy Lawrance, eds. 1991). ("[I]n lawful defence of the innocent from unjust death, even without the pope's authority, the Spainards may prohibit the barbarians from practicing any nefarious custom or rite.")

incapable of managing their own affairs.[49] Canon law carried forward the idea of guardianship as the medieval church required tutors and curators "to act as fiduciaries" for those subject to their authority.[50] Vitoria did not conclude that Indians were children or incapable of reason, but nevertheless invoked the idea of guardianship to argue that the Spanish Crown had the right to wage war against Indians in order to prevent injustice.[51]

Vitoria imagined a world in which the Spanish and Indians could trade freely with one another, only to deny them equal status as political communities. Indians "lack [ed]" many "wares" that the Spanish could provide in exchange for "either gold or silver or other wares of which the natives have abundance."[52] Trade bound them as equals, and the right to trade demanded that the Indians and Spanish treat with one another. As Vitoria put it, "it is certain that the aborigines can no more keep off the Spaniards from trade than Christians can keep off other Christians."[53] Both had a right to travel and seek to trade. If Indians refused to accept Spanish attempts to travel, the Spanish were justified in intervening to protect this universal right.[54]

This ideology of guardianship was a serious response to a problem of conscience. Vitoria was not the only metropolitan elite who questioned the violence of conquest. He was, however, among the most creative in offering a justification for Spanish sovereignty and identifying limits on its exercise. The key was his pairing of guardianship with a discourse of religious and cultural difference – a discourse that, as Robert Williams has put it, was the "perfect instrument of empire."[55]

At the same time, Indigenous Peoples sought to use the Spanish system to protect their rights and sometimes punctured the pretensions of Spanish guardianship. In the mid-1550s, for example, Tlaxcalan leaders prepared a lienzo in connection with a petition to the Spanish Crown. In the *Lienzo de Tlaxcala*, "[i]n scene after scene, the Spaniards are in the capable hands of Indians," as the "[t]he Tlaxcalans fight everywhere alongside the Spanish, [with] their alliance ... symbolized in the person of Malintzin herself."[56] The lienzo thus reflects the reality of an alliance in which "the Spanish really were dependent on Indians"[57] – not the other way around, as Cortés liked to imply in his letters and as Vitoria's idea of guardianship

[49] David Johnston, *Fiduciary Principles in Roman Law*, *in* Criddle et al., *supra* note 10, at 505, 507–08.

[50] Richard H. Helmholz, *Fiduciary Principles in the Canon Law*, *in* Criddle et al., *supra* note 10, at 490, 495–96.

[51] Franciscus de Victoria, Des Indis et de Ivre Bellis Relectiones 159 (Ernest Nys ed.; John Pawley Bate trans. 1917).

[52] *Id.* at 152.

[53] *Id.* at 153.

[54] see Anghie, *supra* note 13, at 21 (arguing that "Indians *seem* to participate in this system as equals") (emphasis added).

[55] Williams, *supra* note 13, at 59.

[56] Camilla Townsend, Malintzin's Choices: An Indian Woman in the Conquest of Mexico 75 (2006).

[57] *Id.* at 76.

would suggest to later generations of scholars of international law. It is worth remembering, however, that the Tlaxacan's *lienzo* was retelling events from 1519 to 1521. By the 1550s, the balance of power had shifted in the heartland of New Spain.[58] Even there, however, Indigenous Peoples, such as the Nahuas, sometimes succeeded in using the tools of Spanish rule, such as litigation in the *Juzgado General de los Indios*, to protect their lands and personal rights.[59]

The lesson is that people (or peoples) may shape the very legal order that aims to control them. Even so, we should not assume that New Spain had an institutionalized scheme for the faithful guardianship of the rights of Indigenous Peoples. We should not, in other words, mistake the power of an ideology for its institutionalization in practice.[60] Despite all that its etymology might suggest,[61] the *encomienda* system was not a settled fiduciary institution. Under this system, the Crown entrusted Spanish conquerors with rights to labor and tribute from Indigenous Peoples and imposed duties on the *encomenderos* to convert them to Christianity and to protect them from violence. During the early-to-mid-sixteenth century, the Crown's attempts to constrain settlers' most violent abuses, including through laws such as the *Leyes Nuevas* of 1542, sparked murderous resistance in some cases and were largely ignored in others. Nor should we assume that the institution of the *Protectoria de Los Indios*, established in response to the advocacy of Bartolomé de las Casas and Fray Francisco Jimenez de Cisneros, was a full-fledged fiduciary institution.[62]

* * *

The company-states that emerged as transnational actors in the seventeenth century were closer to what we now think of as fiduciary institutions. One of the biggest differences between the Spanish empire on the one hand and the Dutch and

[58] That was not the case throughout the Americas. *See* Grant Jones, The Conquest of the Last Maya Kingdom (1998) (retelling story of Spanish occupation of Nojpeten, the capital of the Itzas, in 1697).

[59] *See* Micaela Wiehe, Making Their Voices Heard: The Nahua Fight to Secure Agency through the Spanish Colonial Legal System, 1575–1820 (2021) (unpublished dissertation).

[60] Vitoria has loomed large for modern scholars searching for early critics of empire and founders of international law. Some might trace the "sacred trust of civilization" as a transnational legal order (TLO) all the way back to Vitoria's idea of guardianship. Felix Cohen, an American scholar whose *Handbook of Federal Indian Law* continues to be the leading treatise, saw the origins of his field in Vitoria and the *encomienda* system of colonial Mexico. *See* Felix S. Cohen, *Spanish Origin of Indian Rights in the Law of the United States*, 31 Geo. L.J. 1 (1942). But Cohen's account goes too far in tracing a through line between the *encomienda* system and US law, which drew upon distinctive traditions and institutions of the common law and equity.

[61] *Encomienda* is derived from *encomendar*, "to entrust."

[62] *See generally* Caroline Cunill, *La protectoría de indios en América: Avances y perspectivas entre historia e historiografía*, 28 Colonial Latin Am. Rev. 478 (2019).

English empires on the other hand was the latter's reliance upon chartered companies. The Dutch and English East India Companies were formed by merchants and held charters from their respective sovereigns. As institutions, they combined functions and aims that we divide between "private" companies and "public" governments. Their charters, like constitutions, assigned various powers and rights, including powers that we associate with the sovereignty of states. These included powers to maintain armed forces, make war, and enter into treaties with foreign sovereigns. At the same time, these chartered companies had features that today we associate with private businesses, including some features, such as the separation of ownership from control of property, that are characteristic of private fiduciary relationships.[63] To call the managers of these companies "fiduciaries" would be anachronistic, at least if we mean to suggest that they were subject to judicially enforceable fiduciary duties of loyalty and care in the way that corporate directors are today. Modern fiduciary law did not exist when these companies were chartered. Indeed, it began to develop during the period of their imperial expansion.

It would be too much to say that modern fiduciary law developed because of imperialism. That is not my point. It is not too much, however, to say that imperial histories and the history of fiduciary law are intertwined.[64]

It is, moreover, fair to say that chartered companies such as the East India Companies "pioneered" various "institutional features" that are characteristic of modern business firms: separate legal personality, limited liability, joint-stock ownership, and the separation of management and ownership. Imperialism did entail institutional challenges that required legal innovation. European companies seeking to establish forts and factories in Asia needed to make long-term investments, not least in their armed forces. To make such investments, they needed to lock in capital. The Dutch were the first movers in the institutional innovation of locking-in capital, which the *Vereenigde Oost-Indische Compagnie* (the VOC, or Dutch East India Company), deployed for trade and violence, or, perhaps more accurately, violence and then trade. By the second half of the seventeenth century, the English East India Company had "emulate[d] the VOC's consolidation of equity maturity."[65]

The agency problems resulting from the companies' institutional innovations are obvious. First, there was the problem of high-level managers failing to act as faithful agents of shareholders. For example, while the Le Maire controversy is better known

[63] *See* Phillips & Sharman, *supra* note 21, at 3–15.

[64] In recent work, I have shown how the history of British Empire shaped the principle that equity will not intervene to protect political rights, which had implications for the fiduciary relationship between imperial powers and Indigenous Peoples. Seth Davis, *Empire in Equity*, 97 Notre Dame L. Rev. 1985 (2022).

[65] Giuseppe Dari-Mattiacci et al., *The Emergence of the Corporate Form*, 33 J. L. Econ. & Org. 193, 214 (2017).

today,[66] there is something strikingly familiar in the complaints about VOC mismanagement from shareholders who published pamphlets and lobbied for charter amendments from 1622 to 1625. As one pamphleteer put it, quoting the Bible, "Give an account of your stewardship, because you cannot be manager any longer."[67] Second, there was the problem of servants of the East India Companies pursuing their own interests while working abroad. The English East India Company, for example, permitted its employees to engage in their own trades abroad and dismissed them if they strayed too far from the limits on private trading and their obligation to pursue trades on the Company's behalf.[68]

The English East India Company is perhaps the best-known example of an institution that bridges the sacred trust of civilization and the private entrustment of authority for business purposes. The Company's corruption and maladministration in India prompted legal and political debates about the entrustment of sovereign authority for business purposes. While Vitoria used the idea of guardianship to limit the sovereignty of non-Christian, non-European peoples, Edmund Burke employed the idea of "trust" to deny the sovereignty of the East India Company, accusing it of plundering India and abusing the authority entrusted to it. Burke demanded that Parliament take greater control of imperial policy and supported a bill before the House of Commons that would have radically changed the management of the Company and the rights of its shareholders. As Burke put it in a 1783 speech to Parliament, "it is of the very essence of every trust to be rendered accountable."[69] To his listeners, whatever their views of the proposed bill, Burke's statement about the enforceability of a trust was familiar doctrine.[70] And while the bill failed, to be followed shortly by the enactment of a different bill reforming governance of the Company,[71] Burke's ideas about the trust obligations of imperial officials would resonate for later generations that institutionalized the fiduciary law of British imperialism, both in India and elsewhere.

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[66] *See, e.g.*, Henry Hansmann & Mariana Pargendler, *The Evolution of Shareholder Voting Rights: Separation of Ownership and Consumption*, 123 YALE L. J. 948, 1003–04 (2014).

[67] Johan Matthijs de Jongh, *Shareholder Activists Avant la Lettre: The "Complaining Participants" in the Dutch East India Company, 1622–1625*, *in* ORIGINS OF SHAREHOLDER ADVOCACY 61, 61 (J. G. S. Koppell ed. 2011).

[68] *See* Santhi Hejeebu, *Contract Enforcement in the English East India Company*, 65 J. ECON. HIST. 496 (2005).

[69] Edmund Burke, *Speech on Mr Fox's East India Bill 1 December 1783*, *in* I THE WORKS OF THE RIGHT HON EDMUND BURKE 176 (1842).

[70] *Keech v. Sanford*, a foundational case on the enforceability of the trustee's obligation to avoid conflicts of interest, had been decided almost sixty years earlier. *See* (1726) 25 Eng. Rep. 223.

[71] For a summary of the historical context of Burke's speech, *see* ROBINS, *supra* note 22, at 135–36.

Burke's trust speech to Parliament took place on December 1, 1783, less than two months after the signing of the Treaty of Paris between Britain and the United States. After losing their empire over thirteen colonies in North America, the British pivoted to consolidate their empire in India.[72] For its part, the fledgling United States hoped to secure in the eyes of the world its claims to sovereign authority. In so doing, it confronted Native nations, some of which had treaties with the English, French, and Spanish crowns recognizing them as independent peoples.[73]

Long before the American Revolution, Native nations in what is now the eastern United States engaged in diplomacy with various European sovereigns, including the English Crown. For many of these Native nations, concepts of kinship framed diplomacy between peoples. Parties to a treaty might refer to each other as brothers. A people that depended upon the military protection of another might use the term "father" to refer to their treaty partner. Native diplomats sometimes had to remind their English treaty partners that the use of these terms did not imply submission.[74]

In its earliest treaties, negotiated during the American Revolution when the United States needed military support, the Continental Congress recognized Native nations as independent peoples. US officials often used kinship terms drawn from Indigenous diplomacy when treating with Native diplomats.[75] During this period, the United States typically would promise to protect Native nations from military threats as well as from white settlers. Native nations emphasized this duty of protection when demanding that the United States make good on its guarantees of security for their lands.[76]

The best-known example is the Cherokee cases of 1831–32.[77] After gold was discovered within the territory of the Cherokee Nation, the State of Georgia enacted a series of laws that purported to regulate Cherokee territory. The Cherokee Nation unsuccessfully petitioned Congress and President Andrew Jackson for redress. It also bought a bill in equity in the original jurisdiction of the Supreme Court, which dismissed the bill on jurisdictional grounds. The leading opinion, written by Chief Justice John Marshall, reasoned that the Cherokee Nation was a "domestic dependent nation," not a "foreign State" entitled under the US Constitution to sue in the

[72] *See generally* P. J. Marshall, The Making and Unmaking of Empires: Britain, India and America C. 1750–1783 (2005).

[73] *See* Gregory Ablavsky, *Species of Sovereignty: Native Nationhood, the United States, and International Law, 1783–1795*, 106 J. Am. Hist. 591, 593 (2019).

[74] *See* Charles W. A. Prior, Settlers in Indian Country (2020); Robert A. Williams, Jr., Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600–1800 (1999).

[75] *See generally* Williams, *supra* note 74.

[76] For a summary of this duty of protection, *see* Daniel I. Rey-Bear & Matthew L. Fletcher, *We Need Protection from Our Protectors: The Nature, Issues, and Future of the Federal Trust Responsibility to Indians*, 6 Mich. J. Envtl. & Admin. L. 397 (2017).

[77] The history of these cases is summarized by Rennard Strickland, *The Tribal Struggle for Indian Sovereignty: The Story of the Cherokee Cases*, *in* Indian Law Stories 64–79 (Carole Goldberg et al. eds., 2011).

Court's original jurisdiction.[78] Marshall added that the relationship between the Cherokee Nation and the United States might be described as one between a "ward" and its "guardian." The Cherokee Nation did not, however, let the matter drop. It authorized its attorneys to represent a missionary who had been convicted of violating a Georgia law requiring whites to obtain the State's permission before entering Cherokee territory. In the second case, *Worcester v. Georgia*, the US Supreme Court held that the State of Georgia had no authority over the Cherokee Nation by virtue of its treaties with the United States.[79] The Cherokee Nation's lawyers pointed to European international law in their arguments. Accepting those arguments, the Court cited Vattel's Law of Nations, analogizing the Cherokee Nation to those European "tributary" states that had entered into treaties placing themselves under the protection of a more powerful sovereign while retaining their rights of self-government.[80]

The Cherokee cases give us a sense of the ways in which a fiduciary idea framed struggles over political and economic power between Native nations and settler governments. In essence, the Cherokee Nation argued that it was the beneficiary of a specific trust – a treaty promise of protection. It was like various European states that enjoyed similar treaty promises. In making this argument, the Cherokee Nation pushed back on those strands of European international law that were cited to oppose Indigenous sovereignty.[81]

There is a second sense in which the Cherokee cases are illustrative. The Supreme Court's decision in *Worcester* did not stop the US government from forcing the Cherokee Nation and other Native nations to leave their homelands. Fiduciary law and its associated institutions facilitated removal and the land grab that followed. As Claudio Saunt has explained, removal "was a financial as well as political and military operation, the mechanics of which were scrutinized by New York and London bankers as much as by federal officials."[82] Financial firms from Wall Street, State Street, and London provided capital that went toward the dispossession of Native people. Many of these firms were trusts. They invested in land speculation, which was carried out through schemes that "were both banal and appalling": Speculators, for example, "burned down houses and drove off the

[78] Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

[79] Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

[80] *See id.* at 559–61.

[81] Vattel, for instance, argued that Spaniards usurped the sovereignty of the Mexica Empire – better known to world today as the Aztec Empire – when they captured Tenochtitlan and deposed Emperor Moctezuma. By contrast, Vattel mused, Indians in New England were "wandering tribes," not "sovereign states." Emer de Vattel, The Law of Nations, or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origins and Nature of Natural Law and on Luxury bk. I, § 209, at 216 (Béla Kapossy & Richard Whatmore eds. 2005) (1797). For further discussion, *see* Seth Davis et al., *Persisting Sovereignties*, 170 U. Pa. L. Rev. 549, 573–75 (2022).

[82] Saunt, *supra* note 23, at 315–16.

residents."[83] The result was not a well-functioning market, but one in which fraud, violence, and collusion between companies combined to deprive Native people of market value for lands they did not want to leave in the first place.[84]

Perhaps most appalling is the way in which Native peoples' own assets were used to finance their own exploitation. Removal treaties, which were negotiated between the US and Native nations under duress, put Native assets into trust with the United States acting as the trustee. These treaties were an example of what Emilie Connolly has recently called "fiduciary colonialism."[85] During its first few decades, the United States promised to provide annuities to various Native nations, a practice that echoed Indigenous traditions of gift diplomacy. Over time, the US government began to promise payments of specie as annuities – a crucial development, as specie was "an exceedingly scarce and attractive form of capital to Natives' trading partners."[86] By the time of the removal era, the Jackson Administration had moved to the use of investments in trust funds, with the United States investing the principal and dispensing the interest as an annuity. These investments funded "banks, canals, railways, and other state-financed carriers of westward expansion."[87] During the removal period, Indian agents invested Native money at the instance of land speculators and state banks, leading to a system where a speculator might, for example, borrow specie certificates tied to Native money and use those certificates to buy Native land.[88]

In short, the story of removal is one of exchange through fiduciary exploitation. It is a story that would be repeated in US history. For instance, as we saw with Zitkala-Ŝa's report on Oklahoma guardianship and probate law, Native people whose ancestors were forced to leave their homelands in the nineteenth century would lose their wealth to fiduciary exploitation in the twentieth.

The juridical expression of this institutional dynamic may be found in the US Supreme Court's opinion in *Lone Wolf v. Hitchcock*.[89] In the late nineteenth century, the US Congress authorized the allotment of the lands of various Native nations with the aim of assimilating Native people. Allotment meant parceling out tribal lands into individual plots, with some plots to be held in trust for tribal members, while others would be sold to white settlers. Lone Wolf and other leaders of the Kiowa, Comanche, and Apache Nations filed a bill in equity to enjoin implementation of the allotment policy, arguing that the Constitution protected their treaty-guaranteed property rights against allotment. The Supreme Court

[83] *Id.* at 320.
[84] *Id.* at 324–26.
[85] Emilie Connolly, *Fiduciary Colonialism: Annuities and Native Dispossession in the Early United States*, 127 Am. Hist. Rev. 223 (2022).
[86] *Id.* at 228.
[87] *Id.* at 228.
[88] Saunt, *supra* note 23, at 329.
[89] Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

dismissed the bill. It reasoned that allotment was a "mere change in the form of investment" of Native assets, one that a trustee was entitled to make.[90]

* * *

Investing the assets of Native people required an administrative apparatus for accounting for those assets. This was not the only sort of accounting that institutionalized the fiduciary ideal of imperial rule. The compiling of population statistics was another. The idea that imperial powers were guardians for particular peoples both supported, and was supported by, the institution and expansion of accounting practices that sought to quantify populations and their resources.[91]

Consider, for example, the instruction that Chief Protector George Augustus Robinson sent in 1839 to every assistant protector working at the Port Phillip Aboriginal Protectorate in New South Wales.[92] The Protectorate was brand new, established in 1838 at the direction of the Colonial Office of the British Empire in response to an 1837 report of the House of Commons Aborigines Committee.[93] What the Empire needed, the report concluded, was an institution to put Aboriginal peoples on the path to civilization, which required, among other things, protecting them from white settlers.[94]

To this day, Taungurung people remember the violence of the first encroachment of white settlers into their homelands, which are in what today is the state of Victoria, Australia. As Taungurung Elder Roy Patterson put it, "there was a big fight" between white sheep and cattle ranchers and Aboriginal people over access to water.[95] In this fight, "[t]he white people shot the Aboriginals for killing their animals."[96]

The Colonial Office's idea of protection was to settle Aboriginal populations around protectorate stations and turn them into sedentary farmers. Chief Protector Robinson of Port Phillip Protectorate thought that only a gradual process of resettlement would succeed. Assistant protectors should therefore periodically travel to meet with the Aboriginal peoples entrusted to their care. On his instructions, the

[90] *Id.* at 568.

[91] *See* Tim Rowse, *The Statistical Table as Colonial Knowledge*, 41 Itinerario 51, 65 (2017).

[92] *See id.*

[93] Rachel Standfield, *'The vacillating manners and sentiments of these people': Mobility, Civilisation and Dispossession in the Work of William Thomas with the Port Phillip Aboriginal Protectorate*, 15 L. Text Cult. 162, 162 (2011).

[94] *See* British House of Commons, Report from the Select Committee on Aborigines (British Settlements) with the Minutes of Evidence, Appendix and Index (1837).

[95] Uncle Roy Patterson & Jennifer Jones, On Taungurung Land: Sharing History and Culture 15 (2020).

[96] *Id.* For more on violence between settlers and the Aboriginal peoples of the region, *see* Jennifer Jones, *Acknowledging Sovereignty: Settlers, Right Behaviour and the Taungurung Clans of the Kulin Nation*, 8 L. & Hist. 117, 126–27 (2021).

protectors at Port Phillip had to give biannual accountings of "the number of journeys you have made, the number of cases you have enquired into, with the results of such journey, the number of days spent at any fixed station, [and] the number of days in traveling or elsewhere."[97] One assistant protector, Edward Stone Parker, a teacher and lay preacher, responded with all that and more, including statistical tables offering daily average attendance figures for the Taungurung people at this station over an eight-year period ending in 1849, when the Protectorate was shut down. Never mind that Parker's daily averages were almost certainly a "fantasy" – that is, a "projection" of Parker's desire that the Taungurung would settle at his station and become farmers.[98] In the end, Assistant Protector Parker was a good fiduciary. He gave his account.

The history of the British Empire is full of fiduciaries who gave their account. One of the most influential and representative was *The Dual Mandate in British Tropical Africa*, a work of imperial theory by the Right Honourable Lord Frederick John Dealtry Lugard, whose many administrative positions include the Governor-Generalship of Nigeria and the Governorship of Hong Kong. The title page of the 1922 edition, published in Edinburgh and London by William Blackwood and Sons, included a pithy quotation from Joseph Chamberlain that stated the dual mandate of European empires: "We develop new territory as Trustees for Civilisation, for the Commerce of the World."[99] Imperial administrators, that is, had a fiduciary duty to civilize peoples subject to their rule and open up markets for their benefit and the benefit of the people of the imperial metropole. For Lugard, the most effective system for fulfilling this dual mandate was indirect rule, which incorporated local leaders and political systems into imperial administration. Assimilation would be gradual and "progressive"; the imperial government would be "sympathetic" to the "aspirations" of peoples "and the guardians" of their "natural rights."[100] At the same time, the peoples of Africa could not deny the right of Europeans to trade in Africa's natural resources. The "task of developing these resources was . . . a 'trust for civilisation' and for the benefit of mankind."[101] Indeed, this sacred trust had already been institutionalized as a principle of international relations.

* * *

Four hundred years after Tlaxcalans and Spaniards marched to Tenochtitlan, the US Government Printing Office in Washington, DC, printed two monographs on the same subject: "wardship" in international law. That was the title of the

[97] Rowse, *supra* note 91, at 65 (internal quotation marks omitted).
[98] *Id.* at 65–66.
[99] The Right Hon. Sir F.D. Lugard, The Dual Mandate in British Tropical Africa title page (1922).
[100] *Id.* at 34, 194.
[101] *Id.* at 615.

monograph by Charles Fenwick, a political scientist whose career included a stint as the president of the American Society of International Law (ASIL).[102] His *Wardship in International Law* focused upon states that were (or had been) wards of other states. The other monograph was *The Question of Aborigines in the Law and Practice of Nations* by Alpheus Henry Snow, who, like Fenwick, was a member of ASIL.[103] Snow's monograph concluded that "Aboriginal Tribes," as he put it, are wards of whatever "civilized State" colonizes their lands.[104] According to Fenwick and Snow, wardship was a settled TLO.

The year 1919 not only marked the four-hundredth anniversary of the alliance between the Tlaxcalans and Cortes's company. It also was an important one in the history of European international law – and in the history of the idea that "civilized States" were guardians for colonial wards. In that year, the Covenant of the League of Nations entered into force. Article 22 of the Covenant created the Mandate System, which proclaimed that so-called "advanced nations" would hold a "sacred trust of civilization" for "peoples not yet able to stand by themselves under the strenuous conditions of the modern world."[105]

Thus, four hundred years after Cortes's company and their Tlaxcalan allies marched several thousand strong into Tenochtitlan, and three hundred and eighty years after Vitoria delivered his lectures at the School of Salamanca, the League of Nations treated trusteeship as an organizing idea of international law and international relations.

It is not surprising that the US government printed monographs on trusteeship in 1919. US President Woodrow Wilson played an important role in the creation of the League of Nations' mandate system. The original proposal for the mandate system, crafted by General Jan Smuts of South Africa, included parts of Europe that had been under the rule of the Austro-Hungarian Empire, the Ottoman Empire, and the Russian Empire. Wilson's counterproposal, which carried the day, applied the Mandate System of trusteeship to peoples outside Europe. So-called class A territories in the Middle East were formerly controlled by the Ottoman Empire and placed under the mandate power of France or the United Kingdom. The remaining Class B and C territories had been German colonies. Belgium, France, and the United Kingdom assumed authority with respect to the Class B mandates, which were in East Africa, the Cameroons, and Togoland. Class C mandates in Oceania were assigned to Australia, Japan, New Zealand, and the United Kingdom, while South West Africa was assigned to South Africa. Wilson claimed that the

[102] Charles Fenwick, Wardship in International Law (1919).
[103] Alpheus Henry Snow, The Question of Aborigines in the Law and Practice of Nations (1919).
[104] *Id.* at 7.
[105] Treaty of Peace Between the Allied and Associated Powers and Germany art. 22, June 28, 1919, 2 Bevans 43, 56.

Mandate System would protect "helpless peoples" from "exploitation" and support them on the path to collective self-determination.[106]

The Mandate System's "sacred trust of civilization" is arguably fiduciary law's first TLO. We can, of course, trace the "sacred trust" from the League of Nations through legal commentary all the way back to Vitoria.[107] In doing so, we would pause over international predecessors to the League of Nations' trusteeship system, including the Berlin Conference of 1884–85 and the international response to the Congo Free State.[108] The former arguably confirmed that trusteeship was a transnational norm of European imperialism.[109] Trusteeship was linked with the Conference's aim to settle disputes about European claims to African territory, with European imperialists assuming a dual mandate in the interests "of free commerce, tutelage, and security from war."[110] The horrors of the Congo Free State, and the international response, repeated this theme.[111] These examples underscore the role of fiduciary law in allocating authority among imperial powers; in this sense, imperial trusteeship was not about the relationship between a fiduciary and a beneficiary, but rather about the relationships among fiduciaries. The League of Nation's innovation was to institutionalize trusteeship as a system of colonial administration subject to transnational oversight.

The result was a full-fledged TLO. In the terms of TLO theory, a TLO emerges as people (and institutions) settle upon legal norms that order how they act. Thus, a TLO is "a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions."[112] In these terms, a TLO is fully institutionalized when people "simply take for granted" the relevant "set of legal norms," following them at the transnational, national, and local levels.[113]

The Mandate System was an institutionalized TLO. Its norms were *legal* norms formalized in the Covenant of the League of Nations, not to mention other legal

[106] *See* Anna Su, *Woodrow Wilson and the Origins of the International Law of Religious Freedom*, 15 J. Hist. Int'l L. 235, 250 (2013) (quoting Wilson). For more on the history and institutionalization of the Mandate System, *see* Veronique Dimier, *On Good Colonial Government: Lessons from the League of Nations*, 18 Global Soc'y 279 (2004). On Smuts's vision for Europe and the League, *see* Joseph Kochanek, *Jan Smuts:Metaphysics and the League of Nations*, 39 Hist. European Ideas 267, 272 (2013).

[107] In this sense, Anthony Pagden has described Vitoria's work as "the most consistently influential text on the question of the legitimacy of European imperialism." Anthony Pagden, *Stoicism, Cosmopolitanism, and the Legacy of European Imperialism*, 7 Constellations 3, 7–9 (2000).

[108] *See* Bain, *supra* note 13, at 63–74.

[109] *See id.* at 63 (arguing that Berlin Conference "effectively internationalized the idea of trusteeship").

[110] *Id.*

[111] *Id.* at 68–74.

[112] Halliday & Shaffer, *supra* note 17, at 5.

[113] *Id.* at 32.

documents, such as the mandate agreements that the League and the mandate powers agreed to and the questions that the Permanent Mandates Commission (PMC) propounded to the mandatory powers, not to mention the annual reports from those powers to the League.[114] These norms were directed toward the mandate powers, the territories subject to the mandates, and the League as an overseer of the Mandate System. These norms aimed – and, in some measure, succeeded – at "produc[ing] *order*" in response to the disorder of war among imperial powers.[115] And this legal order was *transnational*: It ordered legal and political relationships that transcended the boundaries of the nation-state and, indeed, helped (re)constitute the system of state sovereignty after World War I.[116] This TLO was institutionalized over time through the work of the League Council, the Permanent Mandates Commission (PMC), and the Permanent Court of International Justice, as well as the administrative and reporting activities of the mandate powers. In addition, the peoples of the mandate territories could and did petition the League, notwithstanding the limits that the Commission put on the right to petition.[117]

There is perhaps no better evidence of the institutionalization of the Mandate System than the accounting practices that it generated. Fiduciaries are expected to account for their administration of another's interests. And that is precisely what the Mandate System demanded. As Antony Anghie has summarized it, "the PMC sought an immense amount of information" from the mandatory powers on various topics, including the economy and labor.[118] In 1926, for example, the PMC drew up 118 questions for B and C Mandates on this wide-ranging set of topics: "Status of the Territory"; "Status of the Native Inhabitants of the Territory"; "International Relations"; "General Administration"; "Public Finance"; "Direct Taxes"; "Indirect Taxes"; "Trade Statistics"; "Judicial Organisation"; "Police"; "Defence of the Territory"; "Arms and Ammunition"; "Social, Moral and Material Condition of the Natives," including the telling query, "please state approximately the total revenue derived from the natives by taxation and the total amount of the expenditure on their welfare"; "Conditions and Regulation of Labour"; "Liberty of Conscience and Worship"; "Education"; "Alcohol, Spirits and Drugs"; "Public Health"; "Land Tenure"; "Forests"; "Mines"; and, finally, "Population."[119] The production of legal

[114] *See id.* at 20 (defining "legal" to refer to an order that "[1] has legal form, [2] is produced by or in connection with a transnational body or network, and [3] is directed toward or indirectly engages national legal bodies").

[115] *See id.* (defining "order" to refer to aim of TLO "to produce *order* in a domain of social activity or an issue area that relevant actors have construed as a 'problem' of some sort").

[116] *See id.* (defining "transnational" to refer to a legal order that "orders social relationships that transcend the nation-state").

[117] *See* Susan Pedersen, *Samoa on the World Stage: Petitions and Peoples before the Mandates Commission of the League of Nations*, 40 J. of Imperial and Commonwealth Hist. 231 (2012).

[118] Anghie, *supra* note 13, at 152.

[119] Annex 899b. B and C Mandates: List of Questions which the Permanent Mandates Commission Desires Should Be Dealt with in the Annual Report

documents is not necessarily the production of legal order. But the accounting that the League demanded from the mandatory powers, and the annual reports they provided, underscore the depth of the institutionalization of the "sacred trust" as a frame for administration.

For a system nominally adopted to enhance the autonomy of colonized peoples, the Mandate System proved well adapted to facilitating their subordination. As Antony Anghie has argued, the Mandate System maintained significant continuity with prior periods of imperialism, even as it departed from the sort of "outright exploitation of native peoples by charter companies that took place in the nineteenth century."[120] For example, though members of the PMC sometimes questioned it, the familiar pattern of fiduciary administration in which peoples paid "for their own exploitation and conquest" continued.[121]

Here too, however, people could and did shape the legal order that sought to control them.[122] As Anghie points out, for instance, "the people of Nauru succeeded in protecting their interests, at least in part, through an astute use" of international procedures.[123] Citing the terms of the Mandate System, as well as those of the successor UN Trusteeship system, the Republic of Nauru brought a case to the International Court of Justice against Australia for destructive mining and other practices that violated its rights to self-determination and permanent sovereignty over natural resources.[124] More recently, however, Nauru has become the site of an offshore immigration detention facility for the Australian government, suggesting that legacies of the Mandate System persist.

Following World War II and the creation of the United Nations, the Trusteeship Council, which began its work in 1947, took up the task of overseeing the fiduciary administration of trust territories, most of them former mandate territories.[125] In 1994, the Council ended its work when Palau became a UN member. Decolonization in the 1960s punctuated the Council's period of operations.

of the Mandatory Powers, 10 League of Nations Official Journal 1322, 1322–28 (1926).

[120] Anghie, *supra* note 13, at 161.

[121] *Id.* at 172. ("For example, the people and territory of Ruanda-Urundi, [a Class B mandate,] paid for the large projects that were essentially designed to extract the country's resources for the principal benefit of Belgium itself.")

[122] *See* Gregory Shaffer & Carlos Coye, *From International Law to Jessup's Transnational Law, from Transnational Law to Transnational Legal Orders*, *in* The Many Lives of Transnational Law: Critical Engagements with Jessup's Bold Proposal 126, 133–40 (Peer Zumbansen ed. 2020).

[123] Anghie, *supra* note 13, at 194.

[124] Certain Phosphate Lands in Nauru (Nauru v. Australia) (Preliminary Objections) [1992] ICJ Rep 240.

[125] For a discussion of UN Trusteeship system and a proposal that the Council might be reimagined and revived as a peacebuilding institution, *see* Saira Mohamed, *From Keeping Peace to Building Peace: A Proposal for a Revitalized United Nations Trusteeship Council*, 105 Colum. L. Rev. 809 (2005).

During the decolonization era, nationalist leaders such as Nnamdi Azikiwe of Nigeria and Kwame Nkrumah of Ghana criticized the ideology and institution of international trusteeship as paternalistic and exploitative[126] – a far cry from scholars' typical story about fiduciary law.

10.4 CONCLUSION

Imperialism is part of the big picture of world history. Yet, it is not part of the typical picture of fiduciary law. This omission has made for incomplete theory and an incomplete political economy of fiduciary law. By putting imperial histories into the picture of fiduciary law, this chapter has explored what fiduciary law has done in the world and the values it has served. The aim is to think about fiduciary law descriptively in a way that may have implications for normative theory building.

Taking imperialism seriously would mean recognizing that fiduciary law can simultaneously be for autonomy *and* for domination. There is much to be said for a pluralist view of fiduciary law, one that, as Dagan puts it, sees fiduciary law as a "heterogeneous" legal category in which some fiduciary relationships "enhance autonomy."[127] This heterogeneity raises the question whether it makes sense to think of fiduciary law as a field in its own right. Perhaps the lesson of this chapter is that certain categories of legal relationships – guardianship, for example – are just so different from other categories – agency, let's say – that we should not lump them. Yet, I think, the lesson is that we should be thinking of these sorts of relationships together, because they are bound together as a matter of political economy. Not simply autonomy enhancing, nor simply subordinating, fiduciary law has framed struggles over political and economic power, while fiduciary institutions have been sites of those struggles.

[126] *See* Adom Getachew, Worldmaking after Empire: The Rise and Fall of Self-Determination 81–82 (2019).
[127] Dagan, *supra* note 10, at 832.

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