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# Reflections on the State as Fiduciary

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This review article discusses the arguments developed in *Sovereignty's Promise: The State as Fiduciary* by Evan Fox-Decent. *Sovereignty's Promise* provides a compelling and ground-breaking fiduciary conception of the state and its agents. As the book indicates, fiduciary principles can give us valuable insights for constitutional law, administrative law, and statutory interpretation. The book's fiduciary account also provides an original theory of political obligation. This article suggests that the theory of political obligation faces significant challenges, at least if fiduciary principles are to establish a certain type of legitimacy. Even if these challenges are problematic, however, *Sovereignty's Promise* offers a powerful argument that the fiduciary state is more legitimate than a non-fiduciary alternative.

*Keywords:* fiduciary law, political obligation, consent theory, trust, agency law

### 1 Introduction

*Sovereignty's Promise: The State as Fiduciary* is a major development for both public law and private law theory. The book is filled with important insights about the nature of fiduciary relationships, the content of fiduciary duties, and the applicability of fiduciary concepts to public law cases. Moreover, these insights are applicable to a wide range of public law concerns. Coverage includes statutory interpretation, administrative law, constitutional law, and more generally, the rule of law.

This breadth should be unsurprising. Fiduciary law offers an incredibly rich set of principles for addressing legal questions, and it is now recognized for its relevance to multiple settings. In part thanks to Evan Fox-Decent's earlier work, scholars have turned to fiduciary principles for a variety of public law insights.<sup>1</sup> Fiduciary principles have been

\* Professor, DePaul University College of Law. I wish to thank Lisa Austin, Paul Miller, and an anonymous reviewer for helpful comments on an earlier draft. Any errors are my own.

† A review of Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (Oxford: Oxford University Press, 2011). Subsequent references appear parenthetically in the text.

1 See Evan Fox-Decent, 'The Fiduciary Nature of State Legal Authority' (2005) 31 *Queen's LJ* 259.

applied to administrative law, election law, and the practice of judging, among other fields.<sup>2</sup> *Sovereignty's Promise* is a significant new development in this area and will be a must-read for anyone interested in the fiduciary perspective.

Theorists sometimes disagree on the precise details of a fiduciary relationship, and there are certainly differences of opinion on the normative basis for fiduciary duties.<sup>3</sup> There are, nevertheless, basic features of fiduciary relationships which are commonly recognized. As a recent commentary suggests, '[A] fiduciary relationship is one in which one party (the fiduciary) enjoys discretionary power over the significant practical interests of another (the beneficiary).'<sup>4</sup> This relationship also has legal consequences. In private law settings, the fiduciary will owe a duty of loyalty to the beneficiary.

A core theme of *Sovereignty's Promise* is the flexibility of fiduciary law as a public law resource. It is often thought that fiduciary principles don't fit well with public law fact patterns because a loyal fiduciary will have difficulty serving multiple beneficiaries.<sup>5</sup> *Sovereignty's Promise* shows how a duty of loyalty can remain useful in these contexts.<sup>6</sup> Fox-Decent argues that, when confronted with multiple beneficiaries with conflicting interests, a loyal fiduciary will owe duties of fairness and reasonableness to each (34–7). The effect is different from the application of loyalty to a single beneficiary, but it is still consistent with a loyalty mandate. Once granted, this conception of loyalty allows public actors to be fiduciaries to all citizens, even citizens with divergent interests.

In addition, courts may be reluctant to recognize public fiduciary relationships outside of limited contexts. As Fox-Decent notes, courts may

2 E.g., Evan Criddle, 'Fiduciary Foundations of Administrative Law' (2006) 54 UCLA L Rev 117; Ethan J Leib, David L Ponet, & Michael Serota, 'A Fiduciary Theory of Judging' [forthcoming, Cal L Rev]: online: SSRN <<http://ssrn.com/abstract=2029001>>; D Theodore Rave, 'Politicians as Fiduciaries' (2013) 126 Harv L Rev 671.

3 So, for example, some would say that fiduciary relationships are grounded in contractual norms, while others would question that understanding. C.f. Frank H Easterbrook & Daniel R Fischel, 'Contract and Fiduciary Duty' (1993) 36 JL & Econ 425, providing a contract-oriented theory; Tamar Frankel, 'Fiduciary Duties as Default Rules' (1995) 74 Or L Rev 1209 at 1225–6, describing differences between contract and fiduciary rules.

4 See Paul B Miller, 'A Theory of Fiduciary Liability' (2011) 56 McGill LJ 235 at 262 [italics omitted] [Miller, 'Fiduciary Liability']. For a further development of this account, see Paul B Miller, 'The Fiduciary Relationship' in Andrew S Gold & Paul B Miller, eds, *Philosophical Foundations of Fiduciary Law* (Oxford: Oxford University Press) [forthcoming in 2014] [Gold & Miller, *Philosophical Foundations*].

5 C.f. *Harris v Canada*, 2001 FCR 1408; [2002] 2 FC 484 (FCTD).

6 Indeed, in private law settings, the problem of multiple beneficiaries is common. See Steven L Schwarcz, 'Fiduciaries with Conflicting Obligations' (2010) 94 Minn L Rev 1867, discussing the issue of conflicting fiduciary obligations.

find that, in order for a fiduciary obligation to exist, ‘the claimant must show either a statutory entitlement or a pre-existent right to property that a public official has a duty to administer’ (152). *Sovereignty’s Promise* suggests that states may owe fiduciary duties to their citizens even if the interests at stake do not fit standard conceptions of property (110–2). Private law offers a helpful template. Private law decisions recognize that fiduciaries are often obliged to protect such interests.<sup>7</sup> For example, corporate directors may owe duties to share business opportunities with their corporation, even though these are not otherwise legally protected interests (110). Fox-Decent extends this idea, suggesting that fiduciary principles can apply to cases where it is hard to identify citizens’ legal interests apart from the state–subject fiduciary relationship itself (112). As he notes, ‘[A] subject’s interest in being the subject of a legal order is not one in which typical property rights lie’ (112). If the subject’s interest is a substantial or vital interest, however, Fox-Decent contends that fiduciary principles may still apply (112). The result is an understanding of fiduciary principles which can ably address a broad range of legislative, administrative, and judicial actions.

As the book indicates, cross-fertilization between private law and public law can be a healthy development (165). Public law may benefit, and in fact, so may private law – each can provide insights for the other. Yet, while many of the applications of fiduciary principles to public law are novel, the overarching idea is grounded in experience. There is already substantial precedent for viewing at least some public law doctrine in fiduciary terms. *Sovereignty’s Promise* provides an extended treatment of the Native–Crown relationship in Canada and indicates how fiduciary principles can successfully function in this setting (55–86). This framework, in turn, suggests how fiduciary principles can be extended to relations between a state and all of its subjects.

Ultimately, *Sovereignty’s Promise* makes a powerful case for the application of fiduciary approaches to public law problems. This argument also includes concrete suggestions for the development of legal doctrine. As the book develops, fiduciary principles offer appealing and nuanced answers to specific controversies in administrative law and statutory interpretation (175–233).

For example, in the administrative law setting, fiduciary principles may provide a basis for norms of procedural fairness. Fox-Decent argues

7 On the applicability of fiduciary principles to cases in which traditional property is not at stake, see Miller, *Fiduciary Liability*, supra note 4 at 276: ‘Nothing in the nature of fiduciary power suggests that it may be exercised only in relation to proprietary or economic interests, or that these interests are more significant or susceptible than others.’

that, consistent with fiduciary principles, 'fiduciary power must be exercised exclusively for the sake of the purposes for which it is granted' (182). An arbitrary use of power does not generally reflect statutory purposes. Accordingly, fiduciary principles would bar arbitrary exercises of public power (182). In addition, this limit should apply to decision makers even when they are given broad grants of discretion (182).

Fiduciary principles can also offer new perspectives on statutory interpretation. On the proposed fiduciary view, '[a]gencies and judges are under an obligation to interpret statutes in light of fundamental values . . . because they stand in a fiduciary relation to the people over whom administrative and judicial power is exercised' (203). Fiduciary principles call for a focus on the interests of those parties subject to a statute's mandate. Consequently, Fox-Decent suggests that statutes may be interpreted in light of values 'such as equality and a concern for children's best interests' (203). In Fox-Decent's words, there is 'a public fiduciary duty of solicitude' (204).

At a more fine-grained level, fiduciary principles may offer insights into the levels of deference which courts give to administrative agencies. Fox-Decent suggests that fiduciary principles provide an argument in favour of judicial deference to labour boards (208). The inquiry, he argues, should focus on the following question: '[w]ho is best situated to interpret statutory purposes and fundamental values protective of vulnerable interests in this decision-making context, the judiciary or the legislature's delegates?' (208). While the answers to such institutional questions are empirical, the suggested approach would provide a basis for varying levels of deference.

As these examples suggest, there should be little doubt that fiduciary principles can fruitfully apply to public law, especially with respect to the state's responsibilities. The most likely challenges here will stem from indeterminacy. Duties of loyalty are read differently across the various private law relationships, with varying levels of stringency. Public law settings will sometimes be open to more than one plausible understanding of what fiduciary loyalty entails.<sup>8</sup> That said, even where indeterminacy is

8 *C.f.* Deborah A DeMott, 'Beyond Metaphor: An Analysis of Fiduciary Obligation' (1988) *Duke LJ* 879 at 879 ('Although one can identify common core principles of fiduciary obligation, these principles apply with greater or lesser force in different contexts involving different types of parties and relationships. Recognition that the law of fiduciary obligation is situation-specific should be the starting point for further analysis.'). Even within the same fiduciary relationship, the law may offer multiple conceptions of loyalty. See Andrew S Gold, 'The New Concept of Loyalty in Corporate Law' (2009) 43 *UC Davis L Rev* 457 at 485–96, describing multiple conceptions of loyalty in corporate law. In addition, there may be important questions concerning which parties are the beneficiaries of a public fiduciary. See Ethan J Leib, David L

a concern, strong arguments are offered for particular readings of a fiduciary's obligations.

*Sovereignty's Promise* is not solely devoted to legal policy, however. It is also a book of political and legal theory. Several chapters are devoted to theories of state authority and theories of law, and these analyses are both original and illuminating. Two of these chapters are especially likely to draw controversy. Chapter 5 argues that the fiduciary understanding of the state can solve the problem of political obligation (113–47). Chapter 9 argues for a conceptual connection between law and morality, in light of fiduciary principles (255–60). Both chapters make notable contributions to their fields. This review will focus on the problem of political obligation.

## II *The problem of political obligation*

One of the core questions in political theory is the question of political obligation. Do citizens owe a moral obligation to obey the state's requirements because they are the state's requirements? In addressing this question, a distinction is often drawn between showing that the state is justified and showing that the state is legitimate. John Simmons's approach to this distinction has been influential. On his understanding, justifying the state may involve 'showing that some realizable type of state is on balance morally permissible (or ideal) and that it is rationally preferable to all feasible nonstate alternatives.'<sup>9</sup> Legitimacy demands something more.<sup>10</sup> On Simmons's view, 'state legitimacy is the logical correlate of various obligations, including subjects' political obligations.'<sup>11</sup> A demonstration that the state is justified may thus fall short of showing that it is legitimate.

Ponet, & Michael Serota, 'Mapping Public Fiduciary Relationships' in Gold & Miller, *supra* note 4.

9 A John Simmons, *Justification and Legitimacy* (Cambridge, UK: Cambridge University Press, 2001) at 126 [Simmons, *Justification*].

10 Or at least it does under the rubric suggested by John Simmons, *ibid* at 131–3, noting alternative approaches. Other readings are available. *C.f.* Max Weber, *The Theory of Social and Economic Organization*, translated by AM Henderson & Talcott Parsons (New York: The Free Press, 1947) at 130–2, describing distinct bases for the legitimacy of an order. See also Christopher Heath Wellman, 'Toward a Theory of Political Obligation' (2001) 111 *Ethics* 735 at 741: 'Political legitimacy entails only the moral liberty to create *legally* binding rules, not the power to create *morally* binding rules.'

11 See Simmons, *Justification*, *supra* note 9 at 130. See also A John Simmons, 'The Duty to Obey and our Natural Moral Duties' in Christopher Heath Wellman & A John Simmons, *Is There a Duty to Obey the Law?* (New York: Cambridge University Press, 2005) 92 at 148 [Simmons, 'Duty to Obey']: 'legitimizing an arrangement that involves some

A closely related concern is the ‘particularity requirement.’ Under this requirement, a successful argument for the legitimacy of a state’s authority must show that the political obligation is tied to a specific state.<sup>12</sup> It is not enough to show that individuals owe an obligation to obey state commands. In theory, they could owe that obligation to any one of many states and might have discretion to choose among them. An adequate account should show why one state stands out from the others. Arguably, it will take a moral relationship between the state and the state’s subject to ground this particularized political obligation.<sup>13</sup>

Fox-Decent rejects the idea that consent is required for political obligation, but he does adopt key premises from the voluntarist camp. He seeks to show legitimacy in Simmons’s sense, and he seeks to show that the political obligation at issue is particularized. In addition, Fox-Decent adopts the view that ‘legitimacy must flow from an actual and moral relationship between state and subject’ (120). There is a difference, however. Simmons sees this moral relationship in terms of consent. In contrast, Fox-Decent concludes that non-consensual relationships may also ground a general theory of political obligation. The fiduciary relationship is thus offered as an alternative moral relationship between a state and its subjects.

An initial step in Fox-Decent’s argument is the idea that fiduciary theories of authority are ‘fractal.’ That is, these theories ‘retain the same fundamental normative structure on any scale’ (113). One could imagine a normative structure that specifically applies to one-on-one interpersonal relationships, but simply doesn’t make sense when adapted to large-scale relationships. A fractal theory is more flexible – it can apply to many different types of relationship if they have the right features. In saying that a fiduciary view of authority is fractal, Fox-Decent suggests that it offers a type of non-consensual authority that ranges from parent-child relations all the way to state–subject relations (48).

This claim seems reasonable as a starting point. Several private law relationships support fractal theories of authority. With appropriate sensitivity to context, consent is an example. But consent is not the only

claiming the authority to control others involves showing that a special relationship of a morally weighty kind exists between those persons, such that those particular persons should have authority and those particular others should have a duty to respect that authority.’

12 See A John Simmons, *Moral Principles and Political Obligations* (Princeton, NJ: Princeton University Press, 1979) at 31, describing the particularity requirement; equally, Leslie Green, *The Authority of the State* (Oxford: Oxford University Press, 1988) at 227–8 [Green].

13 For development of this view in Simmons’s work, see Simmons, ‘Duty to Obey,’ *supra* note 11 at 148–9.

option available when we look for relationships that support state authority. If *Sovereignty's Promise* is correct, a fiduciary relationship is another relationship that could account for political obligation. The next step is to think about what it means to be a fiduciary.

On Fox-Decent's account, there are three conditions which are necessary and sufficient to justify practical authority under a fiduciary theory:

First, the putative authority must hold administrative power capable of affecting the interests of others. Second, persons subject to administrative power must be incapable of exercising or controlling that power because of their circumstances (contextual incapacity) or . . . because of the nature of the power (juridical incapacity). Finally, a fiduciary relationship must arise as a result of the first two conditions, obligating the power-holder to exercise her power in accordance with its other-regarding purpose. (114)

Fiduciary relationships vary across different settings. Given the importance of locating a special moral relationship that can ground authority, we now need to determine what small-scale fiduciary relationships might offer a normative structure suitable for the large-scale relationship between the state and its subjects. Fox-Decent builds on two fiduciary relationships. The first is the relation between parents and their children. The second is the relation recognized by the legal doctrine of agency of necessity.

#### A THE PARENT–CHILD RELATIONSHIP

Different jurisdictions have different views on whether there is a fiduciary relation between parents and children.<sup>14</sup> But it is commonly thought that parents are fiduciaries who must act on behalf of their children. *Sovereignty's Promise* looks to the Kantian understanding of this relationship. As Kant argues,

[C]hildren, as persons, have by their procreation an original innate (not acquired) right to the care of their parents until they are able to look after themselves, and they have this right directly on the basis of principle (*lege*), that is, without any special act being required to establish this right.<sup>15</sup>

14 See D Gordon Smith, 'The Critical Resource Theory of Fiduciary Duty' (2002) 55 Vand L Rev 1399 at 1415, n 63, discussing United States cases which reject the fiduciary understanding of the parent–child relationship. *C.f.* Elizabeth S Scott & Robert E Scott, 'Parents as Fiduciaries' (1995) 81 Va L Rev 2401 at 2430 [Scott & Scott], describing challenges for an application of fiduciary duties to parents.

15 Immanuel Kant, *The Metaphysics of Morals*, trans. Mary Gregor (Cambridge: Cambridge University Press, 1991) at 6:280; page citations are to volume 6 of the Prussian Academy edition of Kant's works, upon which Gregor's translation is based; these page numbers appear in the margin of Gregor's translation. For insightful analysis of how

One might point toward the child's vulnerability as a basis for the parents' fiduciary obligation. As Fox-Decent interprets Kant's understanding, the parental fiduciary obligation does not stem from the child's inability to care for herself but rather from the child's inability to consent (44). An anti-unilateralism principle grounds the obligation: 'the parents' obligation takes hold because no party can unilaterally impose terms of interaction on another' (45).

Yet the parent-child relationship is not merely one in which parents owe obligations. Fox-Decent argues that this relationship also includes a child's duty to obey (121-5). And this part of the argument poses some crucial challenges. It is reasonable to think that parents are fiduciaries toward their children and also that they may legitimately exercise coercion in their children's best interests. Many of us will also agree that children owe an obligation to obey their parents.<sup>16</sup> Yet it is not immediately clear why the fiduciary principle should ground a child's obligation to obey her parents. Not every fiduciary relationship includes a requirement that the beneficiary obey the directives of the fiduciary.

Examining the origins of the parent-child fiduciary relationship does not seem to help. Kant emphasizes the parents' procreative role, as does Fox-Decent (44). But assuming this procreative role is the key feature in the private law setting, it is not obvious how the parents' apparently *sui generis* status will be applicable to the relationship between state and subject. The state did not bring its citizens into existence and it is not evident what feature of the state-subject relationship could be analogous to procreation. Whether or not the theory of authority in the parent-child case is fractal, it is questionable whether it is fractal in a way that covers state-subject interactions.

There may be an answer if we shift our focus. Fox-Decent offers a further explanation of the fiduciary principle. As he suggests, '[A] complementary and perhaps more accessible way to understand the Kantian moral basis of the fiduciary principle is that it is premised on a presumption of trust' (105). He contends that 'trust operates as an expressly normative concept that triggers the fiduciary principle regardless of whether or not the beneficiary has actually done something to repose trust in the fiduciary' (105).

Ordinarily, we think of trust in terms of one person's trusting another. In many cases, it can be described as a three-part relation: 'A trusts B to do C on behalf of A.' Fox-Decent argues that this relation can be

fiduciary relations fit within Kant's approach to authority, see Arthur Ripstein, 'Authority and Coercion' (2004) 32 *Philosophy & Public Affairs* 2 at 17-20.

16 But see Simmons, *Justification*, *supra* note 9 at 51-2, questioning whether children owe a duty to obey their parents.

interpreted to include the following formulation: 'the *law* entrusts an actor, B, to do C on behalf of A. In the critical case of this study, the fiduciary principle entrusts the state to establish legal order on behalf of the people' (106). Read literally, this formulation may seem puzzling. A fiduciary principle does not have a mind and it does not have emotions or sentimental reactions. It is not even an organization, like a corporation or a state. It is unclear in what sense a principle can do the trusting. In this case, moreover, the meaning of trust is not a minor quibble. Fox-Decent concludes that 'the fiduciary principle's capacity to impose obligations of trust on the fiduciary reveals the sense in which trust is to fiduciary relations what consent is to contractual relations' (107). The meaning of trust is apparently vital to the argument.

By way of illustration, Fox-Decent gives the example of a doctor in an emergency room who treats an unconscious patient. As he notes, the doctor 'may be thought to be acting on the basis of the patient's trust, and therefore the doctor must treat the patient with due regard for his best interests' (108). This seems accurate if trust is read to include the feelings or attitudes the patient would likely have if he were conscious. The patient is not literally trusting the doctor (because not conscious), but we know what it means to say the patient trusts the doctor to do a good job. Using our language in this extended sense, 'trust' is an apt word.

Since the patient is not cognizant of the doctor's existence, we might call this a relationship of hypothetical trust. Indeed, Fox-Decent refers to trust as 'presumptive' in the fiduciary setting. This raises a concern, however. We will want to be careful in adopting this extended sense of trust – this presumptive understanding of trust. Arguably, we need the real thing. Fox-Decent contends that the doctor–patient case is not properly explained in consensual terms because no true consent was given (108). Isn't trust in this case just as fictional as consent?

Admittedly, trust and consent operate differently. It is true that trust can exist in contexts where consent cannot. Infants may trust their parents before they are capable of consent.<sup>17</sup> And, as Fox-Decent concludes, 'we can act on the basis of another party's consent only if that party has actually given consent, but we can act on the basis of another party's trust even if that party has done nothing to repose trust in us' (108–9). Trust may arise without any conscious thought at all. On the other hand,

17 See Annette Baier, 'Trust and Antitrust' (1986) 96 *Ethics* 231 at 244–5: 'Whereas it strains the concept of agreement to speak of unconscious agreements and unchosen agreements . . . there is no strain whatever in the concept of automatic and unconscious trust, and of unchosen but mutual trust. Trust between infant and parent, at its best, exhibits such primitive and basic trust.'

it is not at all clear how one can have actual trust while *distrusting* someone, which is certainly an issue in state–subject relations. Fox-Decent nevertheless contends that ‘the state is required to act on the basis of our trust (and so within fiduciary limits) even if we happen to distrust the state intensely’ (109). This language suggests that trust is no more actual here than consent is in the doctor–patient example.<sup>18</sup>

And so we are brought back to the original puzzle of how fiduciary principles support a beneficiary’s obligation to obey. If trust will not provide a solution, we could instead look to the effects of the parent’s fiduciary conduct for insights into the duty to obey. This path is more promising. For Fox-Decent, the reason for a child’s duty of obedience is that a child should act to benefit her present and future selves (123). Dutiful parents will act on behalf of the child and this, in turn, supports the child’s duty to obey (123).

Perhaps this formulation is right. But what if a variety of parties take on fiduciary duties to look out for the child’s best interests? Fox-Decent recognizes that even kidnappers may owe a child fiduciary duties, although not in their capacity as kidnappers (100, n 23). Read broadly enough, this justification for obedience raises concerns that children might have duties to obey fiduciaries other than their parents, in contexts that are less intuitively appealing. Or, it may result in the child’s owing inconsistent duties to obey where multiple fiduciaries are involved. Furthermore, this theory might call for duties to obey in a variety of fiduciary relationships which the law does not presently recognize as creating duties for beneficiaries.

Even so, let us assume that a fiduciary principle grounds a child’s obligation to obey her parents. Now a further challenge appears. Even if we also accept that the normative features of the parent–child relationship have applicability well beyond parent–child relationships, there is still something troubling about applying this understanding to ordinary state–subject relations. There is a substantial paternalism concern.<sup>19</sup> In many cases, citizens are not children, and they are more than competent

18 It should be noted that multiple conceptions of trust may be relevant to fiduciary law. It is not clear that there is an alternative conception which will fit the structure of Fox-Decent’s argument, however. *C.f.* Joshua Getzler, ‘“As If”: Accountability and Counterfactual Trust’ (2011) 91 BUL Rev 973 at 973, describing a notion of ‘as if’ trusting which the law enforces to address fiduciary breaches. If trust is linked to entrustment, for example, it is not apparent how it will provide the necessary support for a beneficiary’s obligation to obey.

19 There may also be a concern that the theory of authority in parent–child relationships is less clearly fractal than in some other fiduciary relationships. *C.f.* Scott & Scott, *supra* note 14 at 2402–3, noting that the parent–child relationship is distinguishable from most traditional fiduciary relationships.

to make decisions on their own behalf. Adult subjects are quite capable of consenting, even if children are not. As Fox-Decent concedes, '[T]here may remain a nagging sense that, where competent adults are concerned, the beneficiary must give prior consent to the fiduciary's exercise of obligation-conferring authority' (129).

Consent theories thus exert a powerful pull. Recognizing this, Fox-Decent seeks additional ways to break the link between fiduciary relationships and consent and to further develop the idea that fiduciary relationships can ground obligations. In some respects, this effort succeeds admirably. For it is clear that a variety of fiduciary relationships are non-consensual, with parent-child relationships as just one example. In other respects, this stage of the argument runs into difficulty. The challenge is twofold. The argument for obligations grounded in fiduciary relations must show that non-consensual fiduciary relationships map onto the state-subject relationship; and it must show that these non-consensual fiduciary relationships support obligations on the part of the beneficiary to obey the fiduciary.

#### B AGENCY OF NECESSITY

Fox-Decent's primary examples of non-consensual fiduciary relationships come from the law of agency. There is also clear support for the idea that agency relationships can arise by operation of law rather than by consent.<sup>20</sup> Yet, these non-consensual cases are often designed to protect third parties and are only distantly related to the alleged fiduciary relationship between state and subject. The outcomes of these relationships often involve liability for an agent's principal based on the agent's choices but not a duty on the part of the principal to *obey* the agent. As a consequence, many of the cases in which courts deem an individual to be an agent without the principal's consent are unlikely to map onto the relationship between subjects and their state; at least, not in a way that illuminates political obligations. The theories of authority for these relationships may be fractal, but they are not helpfully fractal.

For example, Fox-Decent looks to the doctrine of apparent or ostensible authority to support the idea that agency is not best explained by consent (130). Apparent authority is a nettlesome example, however. Some have questioned whether it is desirable to use the word authority in this context.<sup>21</sup> Assuming that 'apparent authority' involves authority proper, it nonetheless seems to involve the wrong kind of authority. Agents with

20 It is true, however, that some see agency relationships as consensual. See e.g. Warren Seavey, 'The Rationale of Agency' (1920) 29 Yale LJ 859 at 863.

21 Ibid at 861.

apparent authority may create liability for their principals through conduct which was not consented to. But in many of these cases, the principal can then sue the agent for exceeding her *actual* authority – the agent has acted wrongfully! For present purposes, we want a non-consensual agency context in which the agent's exercise of authority is not wrongful as between the agent and the principal. Moreover, we want a non-consensual agency context in which the agent has authority to tell the principal what to do.

Fortunately, *Sovereignty's Promise* provides a non-consensual agency relationship in which the agent's actions are considered appropriate. This relationship is agency of necessity. As Fox-Decent suggests,

The clearest case of agency of necessity involves shipmasters who find themselves in an emergency situation that places the cargo they are carrying in imminent peril (e.g. cases in which the ship has run aground and is floundering). Shipmasters normally have no contract with the owners of the cargo. Nonetheless, courts have held that the shipmaster may act without prior authority as an agent of the cargo's owner in order to protect the goods or their value, usually by selling them to a third-party or contracting services to safeguard them. (132)

There are important limitations on this agency relation. The shipmaster 'must adhere to fiduciary constraints by acting in good faith, in the interests of the principal, and with reasonable care' (132). In addition, 'communication with the cargo's owner must be practically impossible; the shipmaster must have made whatever reasonable efforts she could to communicate with the owner in order to receive instructions' (132). Still, if these constraints are met, the shipmaster may sell the cargo owner's goods.

Agency of necessity is also particularly important for present purposes. While much of the intuitive work in *Sovereignty's Promise* is done by the parent-child example, agency of necessity provides the overarching framework which accounts for political obligation. *Sovereignty's Promise* expressly describes the state as a 'public agent of necessity' (140, 141). Accordingly, the agency-of-necessity relationship merits close scrutiny to see if it can bear this conceptual and normative burden. Since the premise of *Sovereignty's Promise* is that fiduciary theories of authority are fractal, this calls for understanding the small-scale fiduciary relationships at issue in order to see how their structure might apply to large-scale political relationships.

An initial hurdle is that the agency of necessity doctrine may seem to prioritize consent. Consider the example of the shipmaster and the cargo owner. The doctrine here can be seen as the law's best effort to provide what the cargo owner would have agreed to, if a contract had existed. Hypothetical bargains do not amount to consent, but in some

cases, this type of analysis may at least indicate the importance of consent as a guiding principle.<sup>22</sup> We might see the agency of necessity doctrine as an effort to approximate what would likely have been consented to if the conduct at issue had been anticipated by the parties. This interpretation is reinforced by a basic legal constraint on agency of necessity. Agency of necessity does not generally apply when the cargo owner can easily be reached for instructions.

In other words, the agency of necessity doctrine may arise by operation of law, but it may also be focused on the importance of consent throughout. On this view, the cargo owner's choice is the best outcome, and the cargo owner's predicted choice is the second best outcome. The justification for agency of necessity from this perspective is that it is the closest we can get to consent under exigent circumstances. Agency of necessity involves a justified but limited exercise of power without consent. If we are reasonably able to find out what the owner wants, then we should opt for actual consent.<sup>23</sup>

Furthermore, on this view, treating agency of necessity as a fractal normative structure may indicate that the state should allow opt-outs from its commands whenever the subject can successfully be communicated with for purposes of opting out. Agency of necessity doctrine might then suggest that the state has legitimate authority with respect to children, individuals in a coma, or individuals who are mentally incompetent. Extending the agency of necessity doctrine to the public setting, the state's legitimate authority would be quite limited. It could not exercise power over other individuals unless it was unable to communicate with them. This would be far from the notion defended in *Sovereignty's Promise*.

Yet Fox-Decent has a broad idea of incapacity. The above discussion is focused on contextual incapacity (for example, the incapacity of an absent cargo owner to tell a shipmaster what she wants done). Juridical incapacity is a different type. It covers those situations where a particular form of conduct is not available to someone as a matter of law. Juridical incapacity may be implicated here. Fox-Decent adopts the Hobbesian

22 For analysis of potential links between hypothetical bargains and autonomy concerns, see David Charny, 'Hypothetical Bargains: The Normative Structure of Contract Interpretation' (1991) 89 Mich L Rev 1815 at 1825–35.

23 Of course, the real concern here is with locating a moral principle that governs these relationships and not with figuring out the legal understanding. It may well be that Fox-Decent correctly captures the legal point of view on agency of necessity. If legal understandings were sufficient to resolve questions concerning political obligations, however, the analysis would be much simpler than it is. *C.f.* Green, *supra* note 12 at 225, noting that 'it is trivially true that we all have a legal obligation to obey the state: that is a mere reflection of law's nature as a normative system which purports to impose duties on its subjects.'

view that only impartial third parties can resolve good faith disagreements justly (137). On this view, an individual citizen is incapable of exercising the powers which the state legally exercises over its citizens, much as a child cannot exercise the powers which the parent exercises over it (128).

A committed Lockean may not be convinced by this argument. But if we accept the above view on unilateral coercion, then the subject – the party who occupies the position of the cargo owner – is juridically incapable of enforcing law as the fiduciary state does. Moreover, Fox-Decent contends that the citizen need not have a child-like incapacity to implicate this moral relationship. Instead, '[a]ll that is required . . . is an inability on the part of the principal to exercise the power the law has entrusted to the agent' (135). With these premises in place, there is a potential fiduciary basis for political obligation. It is at least arguable that the 'public agent of necessity' idea involves a large-scale variation on the traditional agency of necessity relationship.

This still leaves us with the problem of determining what kind of powers a public agent of necessity will possess. Fox-Decent suggests that '[t]he power-conferring aspect of subjection to fiduciary duty is a general feature of fiduciary relations' (134). We cannot assume that the power conferred will adequately address the problem of political obligation. Agency of necessity in the private law setting offers doubtful support. For example, shipmasters may make choices to sell a cargo owner's goods without permission. This is not equivalent to the shipmaster's having the power to tell the cargo owner what to do. We are looking for a political obligation to obey the state's laws, and lawmaking involves a qualitatively different power from the power the shipmaster has. Granted, fiduciary relationships are context-sensitive, but agency of necessity may not be context-sensitive in a suitable fashion.

### C IMPLICATIONS

For those who accept the view that the state is a public agent of necessity, *Sovereignty's Promise* offers a substantial development for the theory of political obligation. The particularity problem is a central challenge for non-voluntarist approaches. If Fox-Decent is right about fiduciary duties and the special moral relationship that they involve, then the fiduciary principle provides for particularized political obligations (146). Under this account, specific states hold a fiduciary status with respect to each individual subject to their control. Assuming the fiduciary principle grounds the right kind of political obligations, this a very significant step forward.

Not all readers will adopt the political obligation arguments. Voluntarists may reject several premises which the fiduciary argument relies

upon. They may resist the anti-unilateralism that underpins the juridical incapacity claim or they may challenge the proposed rationale for agency of necessity. Even if this scepticism is warranted, the account in *Sovereignty's Promise* should still be valuable. Legitimacy, as Fox-Decent notes, may be a matter of degree (125). For those who accept the possibility of partial legitimacy for state authority, the fiduciary principle may render the state legitimate in comparison to the alternatives. Voluntarists might recognize a fiduciary state as the best option short of consent-based authority.<sup>24</sup> A state that acts as a fiduciary toward its subjects may be much more legitimate than a state which does not.

In addition, a fiduciary theory of the state offers a variety of independent benefits. There are good reasons to think that states can and should act as fiduciaries toward their citizens, and *Sovereignty's Promise* elaborates on these reasons in convincing terms. Among other considerations, a fiduciary state may more readily claim that its governance is justified. It is not necessary to adopt the view that fiduciary principles support political obligations in order to conclude that fiduciary principles should guide state conduct. Readers from a voluntarist perspective (or even non-voluntarists of a different stripe) may still find great value in fiduciary principles.

### III Conclusion

*Sovereignty's Promise* is a truly thought-provoking book and one which covers a wide range of important problems in both public and private law theory. The arguments in *Sovereignty's Promise* show the plausibility and resonance of a fiduciary account of the state, and on multiple levels. At the level of political theory, the book offers a compelling argument for a state authority constrained by fiduciary principles. At the level of legal policy, the book offers detailed analyses of statutory interpretation and administrative law from a fiduciary perspective.

In focusing attention on fractal theories of authority, *Sovereignty's Promise* also provides an important service. Fiduciary relationships – like consensual relationships – may share the same basic normative and conceptual structures when applied to both small-scale and large-scale settings. Not all private law relationships will fit public law problems, but where there is a fit, private law insights offer values and frameworks that can greatly augment public law reasoning. This is particularly so where

24 C.f. Simmons, *Justification*, supra note 9 at 156: 'States become more legitimate as they more closely approach the ideal of voluntary association, but no existing states are legitimate with respect to even a majority of their subjects.'

the private law relationship can adapt to public law settings without losing its coherence.

The context-sensitivity of fiduciary law is clearly one of its strengths, and Fox-Decent ably shows how fiduciary principles are flexible enough to cover public law circumstances. This also suggests an occasional weakness. Fiduciary law is a variegated field, and the judge who seeks fiduciary templates may find multiple options among which to choose. Differences of opinion, moreover, can extend well beyond parent-child relationships and the doctrine of agency of necessity. For example, it is quite possible that a different fiduciary theorist would derive different answers to the administrative law problems assessed in *Sovereignty's Promise*. This theorist might still claim, in good faith, to be applying fiduciary principles.

Even if these challenges are substantial, however, this need not be taken as a strike against fiduciary theories of the state. Other approaches to state authority are subject to similar difficulties. In addition, there is much to be said for adopting fiduciary principles as a starting point, even if this may lead to divergent outcomes. If fiduciary understandings of the state do not always give the clear answers we desire, they can still orient our legal and political reasoning in a helpful direction. State actors who genuinely attempt to act as fiduciaries will, one hopes, also act more legitimately.