CAMBRIDGE

Cambridge University Press
978-1-108-48042-0 — Fiduciaries and Trust
Edited by Paul B. Miller , Matthew Harding
Excerpt
More Information

Introduction

PAUL B. MILLER AND MATTHEW HARDING

We begin with two bibliographical observations. First, scholarly interest in trust is no recent phenomenon, but lately there has been a flowering of academic literature studying numerous dimensions of trust from the standpoints of philosophy, economics, sociology and psychology. The depth and richness of this literature is impressive but hardly surprising, given that trust itself is a notoriously complex, elusive and fact-specific phenomenon. Secondly, scholarly interest in the fiduciary principle that plays such a central role in common law legal systems with a tradition of equity was scarce until the late twentieth century. However, that situation has most definitely changed (for the better), and we now enjoy an abundance of scholarship exploring the fiduciary principle in private law. Moreover, there is a growing body of work exploring ideas of fiduciary government and international law. Scholars are puzzling over fiduciaries and trust as never before.

Given this, one might expect to see a flourishing of academic interest in the relation of fiduciaries and trust, especially as it is often assumed or asserted that such a relation exists and that it has descriptive or normative significance for fiduciary law and practice. Yet this is not the case. Systematic analysis of fiduciaries and trust is rare. The aim of this volume is to help fill this gap. Our contributors explore the interactions of fiduciary law and trust, drawing on literatures on trust that have been generated in a variety of disciplines. They do so with an eye to the full scope of extension claimed for the fiduciary principle, from its heartland in private law to its frontiers in public law and government more broadly. Overall, the volume advances an integrated and wide-ranging understanding of the relation of fiduciaries and trust that illuminates key legal and political problems, and challenges and deepens our understanding of fiduciaries and trust themselves.

1 Personal Trust and Fiduciary Relationships

It has been widely suggested that fiduciary law is significant to personal trust, and likewise that personal trust is salient to fiduciary law. And when this is said, it is often on the basis that fiduciary relationships are premised on personal trust, or that they invite or cultivate personal trust, or both. The notion that fiduciary relationships are premised on personal trust is sometimes framed as a characterization of – or assumption about – the motivations of the parties forming a fiduciary relationship. Thus, it might be suggested that a grantor or beneficiary was motivated to enter into the relationship because of his trust in the fiduciary, whether spontaneous or a response to the fiduciary's invitation to trust. In turn, it might be thought that

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE
Cambridge University Press
978-1-108-48042-0 — Fiduciaries and Trust
Edited by Paul B. Miller , Matthew Harding
Excerpt
More Information

fiduciaries are routinely motivated to solicit or undertake trust out of a desire to be seen as, and/or to prove, trustworthy. Alternatively, personal trust may be understood in terms of conduct, encompassing a position of dependence or vulnerability willingly accepted by the grantor or beneficiary, in which case the relationship is one of trust in the sense that its formation involves acts of entrustment. Finally, independently of concern over how trust factors in the formation of fiduciary relationships, some have argued that trust is significant to the ongoing performance of a fiduciary relationship, insofar as it factors in the moral regard that the fiduciary and beneficiary have for one another and the quality of cooperation achieved by them. Ultimately, however one conceives of trust and its bearing in fiduciary relationships, it is clear that there are many difficult questions to be addressed in sorting out the intuition that trust is important to fiduciary relationships and vice versa. The chapters gathered in Part I of this volume identify and address these questions.

In "Fiduciary Grounds and Reasons," Paul Faulkner aims to clarify the significance of consent and trust in fiduciary relationships. He focuses on two issues: first, the roles of consent and trust in grounding the transfer of power through which fiduciary relationships are formed; and second, their salience for the reasons fiduciaries have for acting on behalf of their beneficiaries.

Faulkner takes as his starting point Paul Miller's Fiduciary Powers Theory of the fiduciary relationship. As Miller explains, fiduciary duties are premised on the formation of a fiduciary relationship, which in turn arises upon the authorization of one person or group of persons to exercise discretionary legal powers for another person or group in pursuit of other-regarding purposes. Mechanisms of authorization include, Miller says, the mutual consent of a grantor and fiduciary and (more rarely) unilateral undertaking or legal decree. Faulkner aims to clarify the place of consent and trust in each of these modes of authorization. He also aims to clarify what this implies about the moral reasons fiduciaries have in acting for their beneficiaries.

Faulkner begins with relationships formed by mutual consent. He clarifies that consent here serves as a mechanism of authorization where expressed intentionally to another via a communicative act, and where recognized as such. In this sense, it is a second-personal mode of authorization (i.e., it is means by which one person intentionally confers authority on another). According to Faulkner, consent also gives fiduciaries second-personal reasons for acting in accordance with their mandate, where the consent includes specific requests or directions. Personal trust is salient to fiduciary relationships formed by mutual consent to the extent that it is presumed to factor in the beneficiary's willing acceptance of dependence on the fiduciary. Beneficiaries are, in consenting, presumed to have a trusting expectation that fiduciaries will act on their behalf, in accordance with the terms of their mandate, for the reason (in part) that they have been trusted with faithful execution of same.

Turning to relationships formed by unilateral undertaking or decree, Faulkner suggests that the grounds of fiduciary authority are here supplied by presumed consent. The presumption of consent is supposed by Faulkner to be premised on the beneficiary's filial bond with, and robust trust in, the fiduciary. In turn, Faulkner believes that in these circumstances, fiduciaries are inclined to serve in a fiduciary

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-108-48042-0 — Fiduciaries and Trust
Edited by Paul B. Miller , Matthew Harding
Excerpt
More Information

capacity because of a background relationship of robust personal trust that foregrounds the formation of the fiduciary relationship.

In "Trust and Advice," Andrew Gold takes on difficult questions about the justification for extension of fiduciary duties to relationships that do not have settled fiduciary status: advisory relationships, and ad hoc fiduciary relationships. As Gold recognizes, these relationships raise hard questions for fiduciary theory for different, but related, reasons. Advisory relationships are often, but not always, treated as fiduciary, and where they are, it is seemingly not on the basis that the fiduciary wields fiduciary power. Advisory relationships are thus outliers for leading theories of the fiduciary relationship. How can we make sense of the courts' willingness to hold that advisors are sometimes fiduciaries, if advice giving is not inherently fiduciary? Ad hoc fiduciary relationships raise other questions. Notably, what grounds (juridically) and justifies (morally) the imposition of fiduciary duties on relationships that do not fall into the presumptions generated by the attachment of fiduciary status to broad categories of relationship? According to Gold, in both cases, the answers turn on epistemic dependence and trust.

Gold begins by arguing that while trust is not an essential element of all fiduciary relationships, it does figure significantly in some of them. It factors in those advisory relationships that are fiduciary to the extent that thick trust may result in epistemic dependence, the latter being a strong form of cognitive dependency whereby advice recipients tend to accept and act uncritically on trusted advice. Gold builds on Paul Miller's observation that the law differentiates advisory relationships and his suggestion that it might sort fiduciary from non-fiduciary advisory relationships on the basis of epistemic dependence (the latter understood by Miller as entailing effective rather than formal authority to act for another). Gold explains that epistemic dependence can be a common and therefore predictable phenomenon within certain kinds of relationship, and is thus relied on at law to support the extension of fiduciary status to certain categories of advisor. Put briefly, where one can reasonably expect epistemic dependence in a kind of advisory relationship, one has a compelling reason to treat it as presumptively fiduciary, and the reason tracks that established by Miller's Fiduciary Powers Theory (fiduciary impositions should be borne by those with the power to decide for others).

Gold also sees a critical role for thick trust in ad hoc fiduciary relationships. Here, he explains, the key interpretive challenge is one of explaining and justifying the imposition of fiduciary duties ad hoc, on parties whose relationships don't conform to a general fiduciary type. Why allow for the recognition of fiduciary relationships on an ad hoc basis, and how can one address concerns about unfair surprise? Gold notes that the case law is replete with reference to trust and reliance. And he thinks that this is telling. Relationships can be differentiated, ad hoc as well as categorically, on the basis of trust giving rise to robust reliance, and thick trust of this sort generates moral expectations of regard that serve as a kind of moral constructive notice to fiduciaries. A person cannot claim unfair surprise – or, at least, not compellingly – if the nature of her involvement with the beneficiary is such that she ought to have known that she was to act in an other-regarding and self-restrained way.

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE
Cambridge University Press
978-1-108-48042-0 — Fiduciaries and Trust
Edited by Paul B. Miller , Matthew Harding
Excerpt
More Information

In "Contracts, Fiduciary Relationships and Trust," Matthew Harding explains the significance of personal trust to contractual and fiduciary relationships. He argues that contractual and fiduciary relationships "orient and channel" trust in different ways, and likewise that these relationships are formed against different background levels of confidence in systems for enforcement of contractual and fiduciary duties.

Harding begins by stipulating the meaning of trust and confidence, respectively. Trust, he explains, is an "attitude of optimism" about the choices that one's object of trust will make, bearing in mind risks attendant in depending on those who have freedom of choice. Harding says further that trust is a protean concept, implying that trusting attitudes might be connected with any of a number of beliefs about the object of one's trust, whether of their good will, character or other matters. Confidence, by contrast, is marked by positive belief in, and reliance on, the predictable operation of systems, including, notably, legal and regulatory systems.

Harding argues that trust and confidence are both important to contractual and fiduciary relationships, but tend to figure differently in each. Because contractual duties of performance are not usually specifically enforced, a robust system of contract enforcement will support confidence in the availability of an adequate remedy for breach but *not* for an expectation of performance. By contrast, enforcement of strict prophylactic (no profit, no conflict) fiduciary rules will mean greater reason for confidence in performance by fiduciaries. Turning to trust, Harding argues that contractual relationships implicate trust, but in the thin sense of reliance on the tendency of persons to behave in rational self-interest. Fiduciary relationships, by contrast, tend to implicate thick trust, and so beliefs about the good will or virtuous character of fiduciaries, and fiduciary duties signal the importance of these qualities in a fiduciary while furnishing fiduciaries with legal reasons to meet more robust expectations of trustworthiness.

Harding acknowledges that these tendencies become complicated in practice by the fact that fiduciary and contractual relationships are often overlapping. And yet, he says, in case law on contracting out of, or within, fiduciary relationships, one can see the law aiming for a balanced accommodation of contractual and fiduciary norms.

In "Trust, Autonomy and the Fiduciary Relationship," Carolyn McLeod and Emma Ryman critically examine the conventional wisdom that the formation of fiduciary relationships, and the presence of trust within them, come at the expense of beneficiary autonomy. As the authors explain, some have argued that fiduciary relationships involve a "transfer of autonomy" inasmuch as the fiduciary is placed in a position of power over the beneficiary. Others have suggested that fiduciary relationships feature structural paternalism, to the extent that fiduciaries are granted authority to make decisions for others. McLeod and Ryman reject each of these claims on the basis that they assume a defective concept of autonomy and miss the sense in which the bearing of trust and fiduciary relationships on autonomy is contingent: they can be autonomy enhancing or inhibiting.

McLeod and Ryman acknowledge that, formally, the formation of a fiduciary relationship means a transfer of legal power to fiduciaries to be wielded relative to beneficiaries. Thus, fiduciaries assume positions of significant potential influence over

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE
Cambridge University Press
978-1-108-48042-0 — Fiduciaries and Trust
Edited by Paul B. Miller , Matthew Harding
Excerpt
More Information

beneficiaries. Trust of beneficiaries in fiduciaries is, on their view, instrumentally significant insofar as it is entailed by the formation of a fiduciary relationship, or is a significant motivational factor in the decision whether to enter into a fiduciary relationship. But whether trust and fiduciary relationships impair or enhance autonomy turns on the behavior of the parties, and how the law aims to shape that behavior. Where a beneficiary cedes all of her decision-making power in respect of a particular matter to, or relies blindly on, the fiduciary, there is clearly significant diminishment of her autonomy. But it needn't be this way. The beneficiary can assume an active role in a fiduciary relationship, asserting retained control rights, and, in turn, the fiduciary can support beneficiary autonomy by refusing broad delegation and blind reliance, and by providing the beneficiary with informational and other supports requisite to the realization of meaningful autonomy. In making these points, McLeod and Ryman explain that this contextual perspective is consistent with analyses of relational autonomy in moral philosophy.

In "The Psychology of Trust and Fiduciary Obligations," Tess Wilkinson-Ryan canvasses the results of psychological research on trust and highlights their implications for fiduciary law. Her chapter suggests that certain intuitions about trust and fiduciary relationships are well supported empirically – for example, our preference for delegating decision-making on financial matters to experts in trust that they will make decisions that are more competent, and that better reflect our risk preferences, than we could ourselves. But her chapter also challenges other beliefs – for example, the belief in the value of forced disclosure as a device for enhancing fiduciary accountability and integrity.

Wilkinson-Ryan begins by noting that trust, understood psychologically, is a matter of social perception. The person considering whether to trust has to determine, based on her perception of a possible object of trust, whether that person is trustworthy in respect of the subject matter of trust. In turn, one who wishes to invite trust must be concerned with social perceptions of their trustworthiness, and will show that concern through efforts – deliberate or otherwise – to shape these perceptions. While philosophers are often anxious to distinguish trust from reliance, Wilkinson-Ryan notes that psychologists view trust as a choice that arises in situations where one is confronted with the question whether to take a chance in relying on another, despite the risk of disappointment. Fiduciary relationships, she explains, instantiate this kind of situation (i.e., a situation calling for trust).

On the assumption that fiduciary relationships are relations of trust – or, at least, relations that call for trust – Wilkinson-Ryan focuses attention on the implications of various fiduciary obligations for trust and trustworthiness. She explains that psychological research provides support for the notion that the duty of loyalty promotes loyal behavior, on the basis that norms rich in moral content like that of loyalty tend to elicit conscientious responsiveness. That said, Wilkinson-Ryan argues that loyalty rules are sensibly given strict formulation in order to mitigate the effects of self-serving biases. Interestingly, Wilkinson-Ryan extrapolates concerns about the duty of disclosure from research on the effects of disclosure on trust. For example, ironically, disclosure might make a beneficiary *less* likely to question a fiduciary as a result of "insinuation anxiety," self-blame and fear of being judged foolish in one's questioning.

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE
Cambridge University Press
978-1-108-48042-0 — Fiduciaries and Trust
Edited by Paul B. Miller , Matthew Harding
Excerpt
More Information

Additionally, disclosure might make a fiduciary more likely to disappoint reliance on the basis of their perception that disclosure licenses self-serving conduct.

Wilkinson-Ryan concludes by highlighting topics ripe for further research. She recommends research on the impact of role-related perceptions of fiduciaries on trust in fiduciary relationships. She notes also the need for research on the impact of sex stereotyping on role-related trust and perceptions of trustworthiness of fiduciaries. Finally, Wilkinson-Ryan suggests that it might be illuminating to place fiduciary relationships within psychological typologies of relationship. This would help us to better locate fiduciary relationships within the broader fabric of social and economic relations.

2 Personal Trust and Fiduciary Duties

Reflecting the belief that trust is consequential to the formation and flourishing of fiduciary relationships, it is also widely believed that fiduciary duties are – directly or indirectly – responsive to the value of trust. Thus, for example, it is said that a function of the duty of loyalty is to attract and sustain the trust of grantors and beneficiaries in their fiduciaries, and that the duty is justified in part by the inherent or instrumental value of trust. Similarly, it is said that trust is often reposed in fiduciaries on account of their superior expertise, and thus that the duty of care secures a trust-based expectation of competent judgment by fiduciaries. And one sees the suggestion from time to time that information-forcing rules help to ensure that trust in fiduciaries is warranted and that betrayals will be caught out and redressed.

These suggestions all have a ring of plausibility. But they are made without mind to finer-grained questions that we ought to be asking, and distinctions that we ought to be drawing. For example, to what extent does trust in fiduciaries suggest that the duty of loyalty should be articulated and enforced in conventional terms, as forbidding conflicts? To what extent might trust extend to expectations of good faith performance? Why, independently of threatened sanctions, might a fiduciary reasonably think she has trust-based reasons for proving worthy of a trust accepted? The chapters collected in Part II address these and other questions, sharpening our thinking about the normative significance of trust to fiduciary law.

In "Stakeholder Fiduciaries," Evan Criddle questions conventional wisdom about the fiduciary duty of loyalty. He does so by drawing attention to different ways parties to a fiduciary relationship form bonds of trust. Fiduciary relationships are, he explains, ordinarily established for the exclusive benefit of beneficiaries, in which case the bond of trust is an asymmetrical one under which the fiduciary is to act exclusively in the beneficiaries' interests. For relationships of this sort, the duty of loyalty reinforces trust by forbidding the fiduciary from entertaining his own interests or those of third parties when performing his mandate. But, Criddle observes, many fiduciary relationships have a different structure. In these relationships, the fiduciary has a lawful stake in the performance of his mandate, one that entitles him to a share in profits realized thereby. Here, fiduciary and beneficiary are allied to a common enterprise. Their bond of trust is one of solidarity, and in these circumstances the duty of loyalty reinforces solidarity in interest rather than exclusivity of interest.

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-108-48042-0 — Fiduciaries and Trust
Edited by Paul B. Miller , Matthew Harding
Excerpt
More Information

Criddle's core aim is to establish that "stakeholder fiduciaries" are a properly distinctive subset of fiduciaries. According to Criddle, all stakeholder fiduciaries are alike in having a lawful stake in a common enterprise in which they are engaged in fiduciary administration for the common benefit of all beneficiaries, including themselves. The lawfulness of the stake held by fiduciaries is recognized, in part, through adjustment of fiduciary standards of conduct. Stakeholder fiduciaries are not required to forgo self-interest or to rigorously justify their actions. Rather, they are permitted to profit from their endeavors provided they maintain solidarity with other beneficiaries by ensuring that each receives their fair share. And courts are more willing to defer to the judgment of stakeholder fiduciaries in recognition of the bonding effect of their stake.

There are, Criddle says, a number of stakeholder fiduciary arrangements. General partnerships, structured through the reciprocal agency of partners, are just the most obvious example. Others include fiduciary relationships between joint venturers and members of other common enterprises. In each case, Criddle argues, the law is evidently concerned to vindicate trust and to promote loyalty, but it does so with mind to keeping the fiduciary to his commitment of solidarity; the fiduciary is permitted to share in profits in keeping with his stake but is forbidden from undermining the enterprise by taking more than he is due.

Trust is widely considered normatively salient to fiduciary loyalty. But it is also believed to be pertinent to expectations of good faith performance by fiduciaries. Indeed, it might be thought that trust in a fiduciary just is an expectation that the fiduciary will perform his mandate competently and in good faith, with *fides* being a matter of the fiduciary's commitment to the mandate. James Penner pursues questions about the relationship between trust, good faith and fiduciary duty in "Trustees and Agents Behaving Badly: When and How Is 'Bad Faith' Relevant?" In his chapter, Penner draws a number of striking conclusions. One is that the concept of "good faith" is empty; it merely signifies the absence of bad faith. Another is that good faith is not pertinent to fiduciary regulation of the exercise of powers by fiduciaries.

Penner begins by distinguishing good faith from other obligations that attend fiduciary relationships. Penner rejects the notion, once embedded in US corporate law, that good faith is a component of fiduciary loyalty. According to Penner, what are misleadingly framed "loyalty" norms can be tidily encapsulated within principles regulating conflicts. Penner also counsels against conflating good faith with the proper purposes doctrine. While a fiduciary might act for improper purposes in bad faith, regulation of propriety of purposes is aimed at ensuring adherence to purposes specified by a grantor for a mandate. Fiduciaries can and do act for improper purposes in ways having nothing to do with good (i.e., bad) faith, including mistake and inadvertence.

Having distinguished good faith from the foci of other modes of fiduciary regulation, Penner clarifies its significance. He argues that good faith is a matter of the motivation of fiduciaries, and in particular their honesty and integrity. According to Penner, good faith is presumed absent evidence of bad faith; that is, evidence that a fiduciary has been dishonest, exploitative, or corrupt. Finally, Penner notes that the legal consequences of bad faith by fiduciaries are hard to decipher because there are

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE
Cambridge University Press
978-1-108-48042-0 — Fiduciaries and Trust
Edited by Paul B. Miller , Matthew Harding
Excerpt
More Information

few cases in which liability has turned on it. However, he suggests that the law seems to respond to bad faith by limiting or denying compensation and by providing for summary removal or dismissal of fiduciaries.

Discussions of the significance of fiduciary norms to trust and vice versa sometimes trade on questionable claims about the norms' content and scope. Penner suggests that this is true of good faith; a chapter by Lionel Smith argues that it is also true of rules associated with the duty of loyalty. In "Conflict, Profit, Bias, Misuse of Power: Dimensions of Governance," Smith aims to disentangle and clarify these rules. Briefly, he suggests that private and public fiduciary relationships raise concerns about fidelity to the other-regarding purposes attached to discretionary powers. The trust requisite to these relationships is fostered by what is conventionally referred to as the "duty of loyalty." But there are several different rules that aid in ensuring abidance of other-regarding purposes, and distinctions between them are rarely kept in view.

Some accounts of the duty of loyalty suppose that it is exhausted by conflict rules. Smith urges greater care and precision in analysis. He notes that fiduciaries are subject to rules designed to prevent misuse of power – including the proper purposes doctrine – but explains that, accurately construed, they have nothing to do with conflicts or loyalty as such. They govern the exercise of all powers, fiduciary or otherwise, and are jurisdictional. Second, Smith suggests the need for greater clarity on conflict rules. He emphasizes, for instance, that it is not *being* in a conflict that is wrongful, but rather acting on a conflict or mishandling it. Third, Smith argues that it is important to distinguish no-profit from conflict rules, noting that the former is an attribution rule attaching to the occupation of a fiduciary role rather than a liability rule constraining the exercise of fiduciary powers. Finally, Smith situates conflict rules in the broader context of concern over bias in private and public administration. Smith shows that the law deploys a variety of methods to secure private and public trust in fiduciary administration, and that its primary focus is on ensuring adherence to the other-regarding purposes that fiduciaries are charged with pursuing.

3 Political Trust and Fiduciary Government

One of the more exciting recent developments in fiduciary theory has been scholarship exploring the idea of fiduciary government. Notions of trust promise to illuminate theories of fiduciary government in significant ways. Indeed, via doctrinal conceptions of public trust and the fiduciary Crown, the legal system has for many years sought to explain and justify the exercise of state authority through appeal to trust and fiduciary principles. But a range of questions remain underexplored. What is the relationship between political trust and authority? Are they mutually reinforcing, or in tension? What about the relationship between political trust and the rule of law? What roles do ideas of trust and fiduciary responsibility play in understanding the relationship between the state and Indigenous peoples? Does trust help us to grasp similarities and differences in the operation of fiduciary principles in private law and public law and, if so, how? The chapters collected in Part III of this volume explore these and other important questions.

© in this web service Cambridge University Press www.cambridge.org

Cambridge
Cambridge University Press
978-1-108-48042-0 — Fiduciaries and Trust
Edited by Paul B. Miller , Matthew Harding
Excerpt
More Information

Evan Fox-Decent's "Trust and Authority" examines the mutual relationship of trust and political authority. Fox-Decent begins by drawing a distinction between authorization, which he understands to be the process by which a decision maker comes to have authority, and authority itself, which for Fox-Decent is to be understood through reflection on the nature and effects of the legal power that a decision maker holds. Fox-Decent then applies this distinction to address an interpretive puzzle in the work of Thomas Hobbes. On the one hand, Hobbes famously thinks that people in a state of nature consent to subjection to sovereign power in exchange for peace and order; on the other hand, for Hobbes the power of the sovereign is to be exercised only within certain constraints set by the law of nature and is held on trust for the sovereign's subjects. How can these two seemingly conflicting positions be reconciled? For Fox-Decent, the answer lies in seeing that popular consent is a matter of authorization, and does not tell us everything, or even much, of what we need to know in order to understand the nature and limits of sovereign authority.

Deeper insight is, Fox-Decent thinks, found in Hobbes's account of mutual trust between sovereign and subject. The subject trusts the sovereign in the sense that the authorization brought about by popular consent is conditioned by a trusting expectation that the sovereign undertake and exercise that power for the purpose of securing peace and order for the benefit of subjects. The sovereign trusts the subject insofar as the subject enjoys liberty and is not ruled by coercive force alone. For Fox-Decent, this mutual trust helps to explain the nature and limitations of the sovereign's authority (it does not extend to exercising political power for purposes that are inconsistent with the trust in which it is held), including the conditions on the authority of the sovereign's law (governance by law is possible only where subjects enjoy liberty; slaves cannot be ruled by law, but only by brute force).

Fox-Decent concludes by arguing that the mutual trust necessary for the maintenance of political authority renders the sovereign's law gapless; even where rules and norms do not constrain the sovereign's power, the implications of mutual trust provide such constraints, demanding that power be exercised consistent with the trust in which it is held.

Kirsty Gover and Nicole Roughan explore the relation of the state and Indigenous peoples in "The Fiduciary Crown: The Private Duties of Public Actors in State–Indigenous Relationships." States around the world with a colonial legacy are grappling with this relation, working through the difficult questions of how to conceptualize it and to realize its political, moral and legal implications. Gover and Roughan take issue with the view of Evan Fox-Decent and others that the relationship of the settler state and its Indigenous peoples reveals the state in an archetypal public fiduciary role. They instead argue that it this relationship is better characterized as a private law relationship. In defending this claim, Gover and Roughan draw on leading decisions from Canada and New Zealand in which private law aspects of the relationship of the state and Indigenous peoples have been emphasized.

Alongside Gover and Roughan's interpretive argument is another of a more overtly political character. Conceptualizing the state–Indigenous relationship as a private law relationship enables an argument to be made that the legally recognized interests that Indigenous peoples bring to that relationship are insulated from third-party claims

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-108-48042-0 — Fiduciaries and Trust
Edited by Paul B. Miller , Matthew Harding
Excerpt
More Information

and competing public interests in the way that is typical of the protection afforded to beneficiary interests in private law. In public law, the balancing of Indigenous interests alongside such competing claims and interests might be achieved through principles such as proportionality or public policy. In private law, this is often thought to be impermissible. Gover and Roughan do not think that a private law characterization is entirely satisfactory. Rather, they think that the relationship is best conceived as a matter for international or "interpublic" law. But they see the private law characterization as a valuable staging post on the road to the international characterization that they think will best serve the political goals of Indigenous recognition, self-determination and sovereignty.

In "Political (Dis)Trust and Fiduciary Government," Paul Miller brings together two key ideas in modern political thought: political trust and fiduciary government. Much has been written about these ideas, but considerably less about the way they interact and whether indeed they are distinct.

Miller begins by reflecting on the idea of fiduciary government. He distinguishes "thick" from "thin" accounts of this idea. Thick accounts of fiduciary government lay substantial normative weight on the idea; for example, for Evan Fox-Decent, the idea of fiduciary government solves the problem of political authority. Thin accounts of fiduciary government make more modest demands of the idea. Miller's own thin account suggests that fiduciary government articulates conditions under which the conduct of government is truly representative; this account rests on Miller's more general theory of fiduciary relationships as relationships of representation.

Having clarified his thin conception of fiduciary government, Miller develops a conception of political trust to serve his analysis. Miller draws on the work of Phillip Pettit to argue that political trust is best understood as *particularized*, in the sense of being directed at a certain focal point, as well as *objective*, in the sense of being more a matter of externally manifested action than internal affective or cognitive states. Miller argues that particularized and objective political trust does distinct work in understanding public life that cannot be done by the idea of fiduciary government. Put briefly, Miller argues that political trust illuminates understanding of the political conditions and activity on which fiduciary government depends. That said, Miller also notes that the demands of fiduciary government enable the state and its officials to prove trustworthy in ways that promote political trust.

Miller concludes by introducing a seemingly counterintuitive proposition: that moderate citizen distrust in government is a desirable state of affairs. For Miller, the idea of fiduciary government helps to understand this proposition; citizen distrust tends to accompany active citizen engagement in democratic processes by which government is held accountable in light of fiduciary standards of representation. Bringing political trust and distrust together with the idea of fiduciary government thus grounds a vision of democratic and representative government that tells us much about where political systems the world over are currently falling short.

In "Trust, Distrust and the Rule of Law," Gerald Postema, like Miller, focuses on the working of trust and distrust in political life. Postema begins by introducing what he calls the "Trust Challenge" to the rule of law. To the extent that the rule of law depends on citizens holding each other and public officials accountable under law, the rule of

© in this web service Cambridge University Press www.cambridge.org