

## FIDUCIARIES AND TRUST

Systematic analysis of fiduciaries and trust is rare. The aim of this volume is to help fill this gap. The authors 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.

PAUL B. MILLER is Professor and Associate Dean for International and Graduate Programs, and Director of the Notre Dame Program on Private Law, Notre Dame Law School, Indiana, USA. He is a leading private law theorist specializing in fiduciary law, the law of trusts and corporate law. His other books include *Philosophical Foundations of Fiduciary Law*, *The Oxford Handbook of Fiduciary Law* and *Civil Wrongs and Justice in Private Law*.

MATTHEW HARDING is Professor and Deputy Dean at Melbourne Law School, University of Melbourne, Australia. He is a leading expert on fiduciary law and on trust, and has published extensively in both areas. More generally, he is considered a leading authority on equity and trusts and the law of charities and other not-for-profits.

Cambridge University Press  
978-1-108-48042-0 — Fiduciaries and Trust  
Edited by Paul B. Miller , Matthew Harding  
Frontmatter  
[More Information](#)

---

# FIDUCIARIES AND TRUST

Ethics, Politics, Economics and Law

Edited by

PAUL B. MILLER

*University of Notre Dame*

MATTHEW HARDING

*University of Melbourne*



Cambridge University Press  
978-1-108-48042-0 — Fiduciaries and Trust  
Edited by Paul B. Miller, Matthew Harding  
Frontmatter  
[More Information](#)

## CAMBRIDGE UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom  
One Liberty Plaza, 20th Floor, New York, NY 10006, USA  
477 Williamstown Road, Port Melbourne, VIC 3207, Australia  
314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India  
79 Anson Road, #06–04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.  
It furthers the University's mission by disseminating knowledge in the pursuit of  
education, learning, and research at the highest international levels of excellence.

[www.cambridge.org](http://www.cambridge.org)  
Information on this title: [www.cambridge.org/9781108480420](http://www.cambridge.org/9781108480420)  
DOI: 10.1017/9781108616225

© Cambridge University Press 2020

This publication is in copyright. Subject to statutory exception  
and to the provisions of relevant collective licensing agreements,  
no reproduction of any part may take place without the written  
permission of Cambridge University Press.

First published 2020

Printed in the United Kingdom by TJ International Ltd, Padstow Cornwall

*A catalogue record for this publication is available from the British Library.*

*Library of Congress Cataloging-in-Publication Data*

Names: Fiduciaries and trust (Conference) (2018 : University of Melbourne, Law School) | Miller, Paul B.  
(Law teacher), editor. | Harding, Matthew, 1974– editor. | University of Melbourne. Law School, host institution.

Title: Fiduciaries and trust : ethics, politics, economics and law / edited by Paul B. Miller, University of  
Notre Dame [and] Matthew Harding, University of Melbourne.

Description: Cambridge, United Kingdom ; New York, NY, USA :

Cambridge University Press, 2020. | Includes index.

Identifiers: LCCN 2019048223 (print) | LCCN 2019048224 (ebook) | ISBN 9781108480420 (hardback) |  
ISBN 9781108727389 (paperback) | ISBN 9781108616225 (epub)

Subjects: LCSH: Trusts and trustees—English-speaking countries—Congresses.

Classification: LCC K795.A6 F53 2018 (print) | LCC K795.A6 (ebook) | DDC 346.05/9—dc23

LC record available at <https://lccn.loc.gov/2019048223>

LC ebook record available at <https://lccn.loc.gov/2019048224>

ISBN 978-1-108-48042-0 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy  
of URLs for external or third-party internet websites referred to in this publication  
and does not guarantee that any content on such websites is, or will remain,  
accurate or appropriate.

For my mentors, with gratitude:

Peter Lipton, Arthur Ripstein, Ross Stanway,  
Charles Weijer and Cyril Welch.

PBM

For Clare, Isabel and Charlie, as always.

M.H.

Cambridge University Press  
978-1-108-48042-0 — Fiduciaries and Trust  
Edited by Paul B. Miller , Matthew Harding  
Frontmatter  
[More Information](#)

---

## CONTENTS

|  |            |
|--|------------|
| <i>List of Contributors</i>  | ix         |
| <i>Acknowledgements</i>  | xi         |
| <b>Introduction</b>  | <b>1</b>   |
| PAUL B. MILLER AND MATTHEW HARDING   |            |
| <b>PART I Personal Trust and Fiduciary Relationships</b>                           | <b>15</b>  |
| <b>1 Fiduciary Grounds and Reasons</b>   | <b>17</b>  |
| PAUL FAULKNER  |            |
| <b>2 Trust and Advice</b>  | <b>35</b>  |
| ANDREW S. GOLD   |            |
| <b>3 Contracts, Fiduciary Relationships and Trust</b>                              | <b>55</b>  |
| MATTHEW HARDING  |            |
| <b>4 Trust, Autonomy and the Fiduciary Relationship</b>                            | <b>74</b>  |
| CAROLYN MCLEOD AND EMMA RYMAN  |            |
| <b>5 The Psychology of Trust and Fiduciary Obligations</b>                         | <b>87</b>  |
| TESS WILKINSON-RYAN  |            |
| <b>PART II Personal Trust and Fiduciary Duties</b>                                 | <b>103</b> |
| <b>6 Stakeholder Fiduciaries</b>   | <b>105</b> |
| EVAN J. CRIDDLE  |            |
| <b>7 Trustees and Agents Behaving Badly: When and How Is ‘Bad Faith’ Relevant?</b> | <b>128</b> |
| JAMES PENNER   |            |
| <b>8 Conflict, Profit, Bias, Misuse of Power: Dimensions of Governance</b>         | <b>149</b> |
| LIONEL D. SMITH  |            |
| <b>PART III Political Trust and Fiduciary Government</b>                           | <b>173</b> |
| <b>9 Trust and Authority</b>   | <b>175</b> |
| EVAN FOX-DECENT  |            |

- 10 The Fiduciary Crown: The Private Duties of Public Actors in State–Indigenous Relationships** 198  
KIRSTY GOVER AND NICOLE ROUGHAN
- 11 Political (Dis)Trust and Fiduciary Government** 223  
PAUL B. MILLER
- 12 Trust, Distrust and the Rule of Law** 242  
GERALD J. POSTEMA
- PART IV Trust and Fiduciary Law in Context** 273
- 13 For-Profit Managers as Public Fiduciaries: A Neoclassical Republican Perspective** 275  
ROB ATKINSON
- 14 Fiduciary Law and the Preservation of Trust in Business Relationships** 302  
BRIAN J. BROUGHMAN, ELIZABETH POLLMAN AND D. GORDON SMITH
- 15 How Much Trust Do Trusts Require?** 316  
THOMAS P. GALLANIS
- Index* 332



## CONTRIBUTORS

ROB ATKINSON, Greenspoon Marder Professor of Law, Florida State University  
College of Law

BRIAN J. BROUGHMAN, Professor of Law, Indiana University Maurer School of Law

EVAN J. CRIDDLE, Cabell Research Professor of Law, William and Mary Law School

PAUL FAULKNER, Professor in Philosophy, Department of Philosophy, University of  
Sheffield

EVAN FOX-DECENT, Professor of Law, McGill University Faculty of Law

THOMAS P. GALLANIS, Allan D. Vestal Chair in Law and Associate Dean for  
Research, University of Iowa College of Law

ANDREW S. GOLD, Professor of Law, Brooklyn Law School

KIRSTY GOVER, Professor of Law, Melbourne Law School

MATTHEW HARDING, Professor of Law and Deputy Dean, Melbourne Law School

CAROLYN MCLEOD, Professor of Philosophy, Department of Philosophy, Western  
University

PAUL B. MILLER, Professor of Law and Associate Dean for International and  
Graduate Programs, Notre Dame Law School

JAMES PENNER, Kwa Geok Choo Professor of Property Law, Faculty of Law, National  
University of Singapore

ELIZABETH POLLMAN, Professor of Law, University of Pennsylvania Carey Law  
School

GERALD J. POSTEMA, Professor of Philosophy Emeritus, University of North  
Carolina at Chapel Hill

NICOLE ROUGHAN, Associate Professor of Law, Faculty of Law, University of Auckland

EMMA RYMAN, JD Candidate, University of Toronto Faculty of Law

D. GORDON SMITH, Dean and Glen L. Farr Professor of Law, J. Reuben Clark School of Law, Brigham Young University

LIONEL D. SMITH, Sir William C. Macdonald Professor of Law, McGill University Faculty of Law

TESS WILKINSON-RYAN, Professor of Law and Psychology, University of Pennsylvania Law School

## ACKNOWLEDGEMENTS

This book follows a workshop on the themes of trust and fiduciaries held at the Melbourne Law School in December 2018. We received generous financial support for the workshop from the Melbourne Law School's international collaboration fund and from the Notre Dame Program on Private Law, and we are grateful for this support. We also thank those colleagues from the Melbourne Law School and elsewhere who joined us and the contributors for the workshop and who enriched our conversation and understanding in many ways as a result. Finally, thanks to our respective families for their patience through yet another book project. One of the greatest satisfactions of this project was that it enabled our families to meet and spend some time together in Melbourne, and it deepened a friendship as well as an ongoing academic collaboration.

Cambridge University Press  
978-1-108-48042-0 — Fiduciaries and Trust  
Edited by Paul B. Miller , Matthew Harding  
Frontmatter  
[More Information](#)

---