

Theorizing Transnational Fiduciary Law

A Processual Framework

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1.1 INTRODUCTION

It began with the South Sea Bubble. Shares of the South Sea Company, which had a paper monopoly on trade with South America, had soared after Parliament agreed to have the Company take over the national debt. The bubble burst, as bubbles do. Among the many unfortunate investors was Lord Macclesfield, a chancellor who had taken funds filed by litigants with the Court of Chancery and invested them for his own profit as the South Sea Bubble expanded. Macclesfield was impeached, removed from office, and replaced by the man who presided over his trial, Peter King, lately the Chief Justice of the Court of Common Pleas. To Lord Chancellor King we owe the modern ideal that a fiduciary should not profit from exercising their authority over another person's interests.¹

The problems that fiduciary law addresses today are no less important globally than they were when the South Sea Bubble exposed Chancery's corruption. Then, and much more so today, fiduciary law bears upon the governance of capital that crosses national borders. Fiduciary law's complex relationship with colonialism and imperialism – which began long before the South Sea Company sought a monopoly on a trade focused upon slavery – continues in contemporary struggles against neocolonial and imperial domination. And today, unlike in 1720, there are also international organizations seeking to shape the law of fiduciary duties in response to global problems, such as climate change.

Fiduciary law's reach has grown since the era when the Court of Chancery dominated the development of trust doctrine. It is no longer plausible to understand

¹ See Joshua Getzler, *As If Accountability and the Counterfactual Trust*, 91 B.U. L. REV. 973, 983 (2011). ("It was Lord Chancellor King who crystallized the idea that a fiduciary assumes an office that permits no profit or conflicts of interest.") On the South Sea Bubble, see, e.g., Julian Hoppit, *The Myths of the South Sea Bubble*, 12 TRANSACTIONS OF THE ROYAL HIST. SOC'Y 141 (2002).

the trust as the “distinctive achievement of English lawyers,” a description that F. W. Maitland offered in his influential lectures on equity.² Trust law has gone transnational. Indeed, it had already crossed national borders before the posthumous publication of Maitland’s lectures in 1909. Today, distinctive innovations in trust law are as apt to come from the Cayman Islands as from England. Offshore jurisdictions are competing for the business of holding and managing global wealth. They have enacted comprehensive trust regimes that flout basic precepts of English trust law – the very trust law that scholars have taken as paradigmatic of the field. Onshore jurisdictions – including states within the United States – now follow the lead of these offshore jurisdictions. Competition for transnational trust business, in other words, contributes to the development of trust law transnationally.

Today, stakeholders invoke fiduciary law not only to address traditional private law matters like wealth management. They also point to norms of fiduciary responsibility to enjoin transnational corporations to respect human rights,³ to combat corruption of public officials,⁴ and to constrain national governments so that they respect the rights of Indigenous Peoples.⁵ The appeal of the fiduciary norm lies in its ideal of regard for others, which offers a response to the pursuit of unconstrained self-interest in business relations and the abuse of public office for private gain.

As Justice Benjamin Cardozo famously wrote, fiduciary law’s ideal of other-regarding loyalty demands “something stricter than the morals of the marketplace.”⁶ Fiduciary law thus responds to a pervasive problem that cuts across common law and civil law traditions and state borders and is manifested in discrete domains within

² F. W. MAITLAND, *EQUITY; ALSO THE FORMS OF ACTION AT COMMON LAW* 23 (1909).

³ See Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183 (2016); Jonathan Zittrain, *How to Exercise the Power You Didn’t Ask For*, HARV. BUS. REV. (Sept. 19, 2018), <https://hbr.org/2018/08/how-to-exercise-the-power-you-didnt-ask-for>; Jack M. Balkin & Jonathan Zittrain, *A Grand Bargain to Make Tech Companies Trustworthy*, THE ATLANTIC (Oct. 3, 2016), <https://www.theatlantic.com/technology/archive/2016/10/information-fiduciary/502346>.

⁴ See U.S. HOUSE OF REPRESENTATIVES, *THE TRUMP-UKRAINE IMPEACHMENT INQUIRY REPORT* 8 (Dec. 2019) (quoting Alexander Hamilton for proposition that impeachment is appropriate for “the abuse or violation of some public trust”); U.S. House Committee on Oversight and Reform, Chairman Nadler Announces the Introduction of Articles of Impeachment Against President Donald J. Trump (Dec. 10, 2019), <https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=2179> (reporting Chairman Jerrold Nadler’s remarks that “Our President holds the ultimate public trust”); Andrew Kent et al., *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2119 (2019) (arguing that under the US Constitution, executive officers have a fiduciary duty to faithfully execute the laws); see also EVAN J. CRIDDLE & EVAN FOX-DECENT, *FIDUCIARIES OF HUMANITY: HOW INTERNATIONAL LAW CONSTITUTES AUTHORITY* 79 (arguing that there is a human right against public corruption grounded in fiduciary theory of international human rights law).

⁵ *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942) (holding that United States has fiduciary duties to American Indian Tribes); Seth Davis, *American Colonialism and Constitutional Redemption*, 105 CALIF. L. REV. 1751 (2017) (describing and critiquing the Indian trust doctrine of US law).

⁶ *Meinhard v. Salmon*, 164 N.E. 545, 546 (1928).

different legal fields. The problem is one of holding a person entrusted with discretionary authority over the interests of another to their other-regarding mandate. Fiduciary law seeks to address and solve this problem by imposing norms – such as those regarding a duty of loyalty – that direct fiduciaries to further the purposes of their entrusted authority.

The transnational dimensions of fiduciary law remain largely unexplored. Scholars have tended to study fiduciary norms within specific legal domains, such as agency law, corporate law, and trust law, and they have tended to do so in terms of national private law.⁷ Only recently have they treated “fiduciary law” as a meta-concept and a potentially unified field across subject areas and national legal systems. Most of this scholarship has been conceptual and has focused on formal law. It has treated fiduciary law as something the state – particularly through state courts – makes and applies. When scholars have recognized that the formal law governing fiduciary relations interacts with private ordering and customary practices, moreover, their inquiries have mostly stopped at state borders.

Fiduciary law has a long history that includes the common law and equity, Roman law and civil law, as well as canon law, classical Islamic law, and classical Jewish law. Private fiduciary law – the law of agency, trusts, corporations, and the like – has transnational dimensions, both in its history and in its contemporary applications. So too does public fiduciary law; the revival of interest in fiduciary law’s contemporary application to government actors hearkens back to the Roman Republic, as well as to the origins of modern international law.⁸ Historically, the public and private faces of fiduciary law were not always as distinct, as shown, for example, by Edmund Burke’s famous denunciation of the British East India Company for abusing its public trust.⁹ Today, the line between public and private responsibility remains contested in the regulation of fiduciaries, as exemplified in arguments that governments should establish “public trusts” to protect personal data and that tech companies owe fiduciary duties with respect to their collection, use, and transfer of such data.¹⁰

International organizations and nongovernmental organizations (NGOs) also have challenged settled understandings of fiduciary norms. In 2019, the United Nations, in partnership with private sector finance and institutional investors, issued

⁷ By “private law,” we refer to formal state law governing private relationships (such as the law of contract). This should be distinguished from norm development by private associations and private parties, which we at times refer to as private rulemaking.

⁸ See, e.g., Evan J. Criddle, *Liberty in Loyalty: A Republican Theory of Fiduciary Law*, 95 TEX. L. REV. 993 (2017).

⁹ See Chapter 10.

¹⁰ See Aziz Z. Huq, *The Public Trust in Data*, 110 GEORGETOWN L.J. 333 (2021); see also *supra* note 3 and accompanying text.

a report entitled “Fiduciary Duty in the 21st Century.”¹¹ Its ambitious aim was to restate the fiduciary duties of investors to encompass environmental, social, and governance (ESG) goals. Former United States Vice President Al Gore helped launch this project with a YouTube announcement, proclaiming that “fiduciary duty is not a barrier to investing sustainably.”¹² NGOs such as the Global Legal Action Network and the Children’s Trust have drawn upon fiduciary law through human rights litigation to hold governments responsible for responding to climate change. Domestic courts in the Americas, Europe, and Asia, as well as the European Court of Human Rights, have entertained these claims, with some claimants prevailing on the merits.¹³

These transnational developments acutely present the challenge of theorizing – much less potentially unifying – the field of fiduciary law. The concept of a fiduciary relationship is capacious. It can plausibly encompass everything from wealth management to managing the environment for future generations. Yet, there is tension between applying fiduciary norms to discrete problems in different fields and conceptual scholars’ dream of a unified field of fiduciary law.¹⁴

This book explores this interaction of conceptualizations and discrete problem-solving in the transnational development of fiduciary norms. In particular, the book focuses upon the processes through which conceptualizations of fiduciary relationships and fiduciary norms may or may not settle transnationally – or become unsettled – as actors invoke fiduciary norms to address problems in different domains. It tests the ambitions of a unified theory of fiduciary law that would align theory and practice beyond state borders. In doing so, the book challenges fiduciary theorists to ask whether “unification” of the field of fiduciary law across national boundaries is achievable, and even if achievable in particular subfields, what variations might remain. The complications and challenges of any transnational convergence of fiduciary norms involve political relations, power dynamics, and social norms that fiduciary theorists often elide.

Thus, the aim of this book is not to unify fiduciary law. Instead, it develops a framework for understanding what unification – or in its terms, transnationalization –

¹¹ UNITED NATIONS ENVIRONMENT PROGRAMME FINANCE INITIATIVE, *FIDUCIARY DUTY IN THE TWENTY-FIRST CENTURY* (Oct. 2019), <https://www.unepfi.org/wordpress/wp-content/uploads/2019/10/Fiduciary-duty-21st-century-final-report.pdf>.

¹² Al Gore, *Fiduciary Duty in the Twenty-first Century*, PRI, <https://www.youtube.com/watch?v=PKRIW2yc5WA>.

¹³ For an introduction to this litigation, see Michael C. Blumm & Rachel D. Guthrie, *Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision*, 45 U.C. DAVIS L. REV. 741 (2012).

¹⁴ See, e.g., Hanoch Dagan, *Fiduciary Law and Pluralism*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW (Evan J. Criddle et al. eds. 2019). Cf. Paul B. Miller, *The Identification of Fiduciary Relationships*, in Criddle et al., *id.* at 367 (conceptualizing the field in terms of “several unifying principles”) with Andrew S. Gold, *The Loyalties of Fiduciary Law*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW (Andrew S. Gold & Paul B. Miller eds., 2014) (stressing differences between multiple conceptions of loyalty in different settings).

might entail not just in theory but also in practice. The book draws upon transnational legal theory, and, in particular, the theoretical framework of transnational legal ordering, which can give rise to transnational legal orders, as developed by Terence Halliday and Gregory Shaffer. This work provides a way of understanding processes of transnational legal ordering – involving norm construction, conveyance, contestation, and resistance – which can produce a transnational legal order (or TLO). They define a TLO, in terms of a Weberian ideal type, as “a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions.”¹⁵ TLO theory provides a framework for assessing how norms and institutions interact at the transnational, national, and local levels of social organization, pursuant to which legal norms settle, unsettle, and change in transnational context.

The chapters in this book examine the dynamic and recursive processes through which fiduciary norms are conveyed across borders and shape the practices of transnational, national, and local actors and institutions across an array of issue areas. By bringing together scholars working in both common law and civil law traditions, this book seeks to open new inquiries into the development and practice of fiduciary law in transnational contexts. The chapters’ authors include both fiduciary theorists whose work has aimed to unify fiduciary norms across particular domains, and scholars who work on the gaps between theory and practice in those domains. While some are more open to the promise of a unified fiduciary law, others are quite skeptical of it. The contests over framing among stakeholders thus spill over into these pages in ways that deepen the questions explored, including the following:

- To what extent are fiduciary norms converging such that they can be viewed as part of a TLO, if not generally, then in discrete subject areas? Is a body (or bodies) of fiduciary law at times emerging transnationally as a function of domestic legal responses to common problems of entrusted authority? Or are transnational processes of problem construction, norm propagation, diffusion, and application also playing important roles?
- Has the transnational legal ordering of fiduciary law institutionalized in certain domains? Where that is the case, what processes and mechanisms drive institutionalization?
- How does the legal ordering of private fiduciary law align and compete with other areas of law where fields overlap, such as public regulation in the areas of finance, environmental law, and information law?
- What explains variation in how transnational fiduciary norms are implemented in transnational, national, and local contexts? What are the ways

¹⁵ Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders*, in *TRANSNATIONAL LEGAL ORDERS* 3 (Terence C. Halliday & Gregory Shaffer eds. 2015). It is an “ideal type” in the sense of accentuating aspects of complex phenomena in an analytic construct.

in which different legal traditions – such as common law and civil law – and different histories and cultural contexts shaping how social problems of trust and dependence are addressed through law?

- What are the interactions between the meta-conceptualization of “fiduciary law” and discrete conceptualizations of fiduciary relationships in particular fields? Are the discrete conceptualizations of most importance for national and local practice? How, if at all, do meta-concepts inform analysis and practice within discrete fields?
- What is distinctive about transnational legal ordering in the field of fiduciary law compared to other legal fields?
- What is the relationship between socio-legal (external) and jurisprudential (internal) accounts of fiduciary norms as these norms are marshaled to frame transnational problems and solutions?

Eleven case studies address these questions across different substantive areas. The five chapters in Part I address questions relating to the transnational *formation and institutionalization* of fiduciary law in different domains. They address, in particular, the tension between meta-conceptualizations of fiduciary norms and normative contestation within discrete fields. Part II’s four chapters examine historical, political, and social *factors affecting the recursive development* of transnational fiduciary law over time. They illustrate how transnational fiduciary law involves dynamic processes in which hard and soft law norms and institutions interact, and through which differences in history, culture, and conceptions of social problems shape fiduciary law’s application. Part III’s two chapters address questions at the *frontiers* of transnational fiduciary theory, including the responsibilities of international standard-setting organizations and transnational corporations operating as information platforms. Collectively, these chapters explore how processes of transnational legal ordering can give rise to legal orders in particular areas of fiduciary law that transcend and permeate nation-states, while also assessing how convergence in formal law may nonetheless entail considerable variation in local practice.

This introduction presents the book’s framework for the study of the transnational legal ordering of fiduciary law. It notes the key conceptual tools of TLO theory (such as normative settlement and the recursivity of law) and explains how these tools bear upon analytic, normative, and socio-legal inquiries into transnational fiduciary law. The introduction discusses the role of framing problems in fiduciary terms in transnational legal ordering (Section 1.2), the potential, but uneven, formation and institutionalization of fiduciary law transnationally (Section 1.3), the recursive, transnational development and limits of fiduciary law over time (Section 1.4), the conceptual frontiers of transnational fiduciary law (Section 1.5), and the contributions of the book’s chapters (Section 1.6). The conclusion (Section 1.7) presents the book’s principal findings regarding fiduciary law and its relation to theorizing transnational legal ordering.

1.2 THE FIDUCIARY FRAME IN TRANSNATIONAL LEGAL ORDERING

The development of legal norms by legislatures, courts, and private actors responds to the framing of social and economic problems. The spread and deployment of transnational fiduciary law often entails contests over the framing of such problems. Financial fiduciaries manage trillions of dollars worldwide. Corporate directors cite fiduciary duties to shareholders, which they use as reasons not to invest in more environmentally sustainable ways. At the same time, governments debate whether public and private bodies have fiduciary duties to protect future generations from a rapidly warming planet. Some activists, advocates, lawmakers, and scholars think fiduciary law can meaningfully contribute to resolving a wide range of transnational problems, from public and private corruption to environmental and individual privacy protection. Others do not.

Fiduciary law has emerged as one of many frames for making sense of social problems arising from global markets and transnational governance. Erving Goffman developed the concept of framing to assess how social movement actors diagnose problems, articulate solutions, and motivate others to act collectively for change.¹⁶ Contests over framing help us understand the ways in which different actors and institutions seek to use – or challenge – the fiduciary law framework for ordering behavior in other-regarding ways. Fiduciary law is “semantically permeable,” involving openly textured principles, which social actors with diverse ideological commitments may marshal to construct activities as problems and imagine legal solutions to them.¹⁷

Several factors have increased the salience of the fiduciary frame for legal ordering over the past decades. One is functional – the rise of global markets increased pressure for coordinated business regulation and the convergence of fiduciary norms across jurisdictions. High-profile corporate scandals and governance failures have played important, episodic, and catalytic roles. More quotidian business activities have as well, as fiduciary law offers a way to build trust in transnational market settings when social bonds otherwise may not exist. In parallel, scholars have promoted the ideational development of fiduciary legal theory as a distinct field, illustrated by Tamar Frankel’s pathbreaking work in 1983 that helped to catalyze this field, which has grown rapidly over the past decade.¹⁸ Transnational legal education and legal practice have also contributed to the growing global salience of fiduciary

¹⁶ ERVING GOFFMAN, *FRAME ANALYSIS: AN ESSAY IN THE ORGANIZATION OF EXPERIENCE* (1974); Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. SOC. 611 (2000).

¹⁷ On framing and semantic permeability in US constitutional law, see Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 322 (2001).

¹⁸ Until the 1980s, legal scholars had not sought to theorize fiduciary law as a field. Frankel went beyond studying discrete domains of law to define the “basic vocabulary” of fiduciary norms of loyalty and fidelity that cut across these substantive areas. Tamar Frankel, *Fiduciary Law*, 71

law, as students and lawyers study and practice abroad, helping to bring common law fiduciary concepts to civil law jurisdictions.¹⁹ These patterns reflect a longer history of the spread of common law fiduciary duty concepts through colonialism and imperialism. Yet, the contributions and innovations of civil law countries are often underappreciated, as the development and spread of fiduciary norms among East Asian countries in the past decades show.

Conventional histories of fiduciary law focus on developments within national borders – English borders, in particular. The typical story begins with the feoffment to uses, a predecessor to today’s donative trust, under which one person (the feoffee) would hold title to property for the benefit of another person (the cestuy que use). Then, as now, the entrustment of property was bound up with taxation, as the feoffment developed as a way to avoid Crown taxation of grants or inheritances. “[F]aithless feoffees” who violated their instructions set the stage for the development of fiduciary law.²⁰ As a creature of equity, fiduciary law developed within the English Court of Chancery, which began in the fifteenth century to provide remedies when feoffees abused their authority. The modern conception of a fiduciary duty emerged by 1726, when the Court of Chancery, now headed by Lord Chancellor King, held in *Keech v. Sanford* that a trustee should not seek to profit from managing trust property for the benefit of another.²¹ As this history highlights, English law has been central to the development of fiduciary law, which owes its global importance in part to the historical reach of capitalism and British imperialism.

The fiduciary concept has, however, historical roots that do not lie within English legal history but instead span multiple legal systems. Scholars have traced examples of fiduciary (or fiduciary-like) concepts not only to fourteenth-century devices for transferring land in England, but also to legal institutions for guardianship and the transferring of property within Roman law, as well as the laws of various religious traditions, including Sharia law, Jewish law, and canon law in medieval Europe.²² There is, for instance, more than a passing resemblance between the *waqf*, an Islamic legal institution that allowed for the endowment of charitable institutions such as mosques or hospitals, and proto-trusts in England, such as Merton College,

CALIF. L. REV. 795, 829–30 (1983). (“Loyalty, fidelity, faith, and honor form [fiduciary law’s] basic vocabulary.”)

¹⁹ BRYANT GARTH & GREGORY SHAFFER, *THE GLOBALIZATION OF LEGAL EDUCATION: A CRITICAL PERSPECTIVE* (2022).

²⁰ Henry Smith, *Why Fiduciary Law Is Equitable*, in Gold & Miller, *supra* note 14, at 261, 263 (quoting 1 AUSTIN WAKEMAN SCOTT ET AL., *SCOTT & ASCHER ON TRUSTS* § 1.5, at 14 (5th ed. 2006)).

²¹ (1726) 25 Eng. Rep. 223, 223–24.

²² David Johnston, *Trusts and Trustlike Devices in Roman Law*, in *ITINERA FIDUCIAE: TRUST AND TREUHAND IN HISTORICAL PERSPECTIVE* 45, 51 (Richard Helmholz & Reinhard Zimmermann eds. 1998); see TAMAR FRANKEL, *FIDUCIARY LAW* 79–97 (2010) (discussing historical development of fiduciary law and citing examples from Laws of Hammurabi, Sharia law, Jewish law, Roman law, and Medieval European law).

Oxford, incorporated in 1274, leading some scholars to suggest that Islamic law may have influenced the development of English trust law.²³ On this point, Islamic law may in turn have borrowed from Roman law by way of the Byzantines,²⁴ but whatever the precise influences may be, history reveals fiduciary institutions without English origins.

That is not to deny, however, the crucial role that English law and English imperialism played in the transnational development of fiduciary law. Too often, the role of power is left out of the story of fiduciary law's development. The development of trust law in India, for example, emerged from the collision of the "practices of European settlers," foremost among them codification efforts of British imperial authorities, with "'trust-like' devices" that predated the imperial period, including the *waqf* of Islamic law as well as Hindu devices for charitable and religious endowments.²⁵ Judges trained in English law strained to assimilate these devices, with one leading textbook insisting that the Hindu *benami* was "merely a deduction from [a] well-known principle of equity."²⁶ Similar stories could be told about nineteenth-century legal developments in Hong Kong.²⁷

Indeed, fiduciary law did not just spread with colonialism; it was part of the law of colonial rule. As Antony Anghie has argued, colonial regimes such as the League of Nation's Mandate System justified domination through the "concept of trusteeship," which characterized colonial rule as "directed by concern for native interests . . . rather than by the selfish desires of the colonial power."²⁸ This colonial trusteeship was rooted in a fiduciary conception of government that "stretches back to the early days of European colonialism,"²⁹ and was also marshaled by apologists for slavery in the American South.³⁰ The trusteeship idea appears in multiple jurisdictions as a frame for the relationships between Indigenous Peoples and settler states. Kirsty Gover has compared the emergence of the Crown's common law fiduciary duties to Indigenous Peoples in New Zealand and Canada with its lack of emergence in Australia, tracing dynamics around unilateralism and legitimation

²³ See Avisheh Avini, *The Origins of the Modern English Trust Revisited*, 70 TULANE L. REV. 1139 (1996); Monica M. Guioi, *Comment, The Influence of the Islamic Law of Waqf on the Development of the Trust in England: The Case of Merton College*, 136 U. PA. L. REV. 1231 (1988).

²⁴ Avini, *supra* note 23, at 1156.

²⁵ Stelios Tofaris, *Trust Law Goes East: The Transplantation of Trust Law in India and Beyond*, 36 J. LEGAL HIS. 299, 302–03 (2015).

²⁶ *Id.* at 302–03 (quoting J. D. MAYNE, A TREATISE ON THE HINDU LAW AND USAGE 374 (2d ed. 1880)).

²⁷ S. Po-Yin Chung, *Chinese Tong as British Trust: Institutional Collisions and Legal Disputes in Urban Hong Kong, 1860s–1980s*, 44 MODERN ASIAN STUDIES 1409 (2010).

²⁸ ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 140 (2007).

²⁹ Davis, *supra* note 5, at 286.

³⁰ *Id.* at 282.

that have clear parallels in US law's Indian trust doctrine, which holds that the US government is a fiduciary for American Indians.³¹

In addition, fiduciary law has been central to international law in terms of the responsibility of states and international organizations in colonial and postcolonial transitions. After World War I, the League of Nations set up the Mandate System for administering former colonial territories.³² The mandates applied to territories where, in the words of the Versailles Treaty, peoples were considered not to be "able to stand by themselves under the strenuous conditions of the modern world."³³ Article 22 of the Treaty called for tutelage of these peoples to be "entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility."³⁴ Class A territories were those formally controlled by the Ottoman Empire and included Iraq, Syria, and Palestine. Class B and C territories were former German colonies in Africa and Oceania. After World War II, the mandates were transformed into the Trusteeship System of the United Nations, which created a Trusteeship Council.³⁵ Today, questions about the fiduciary duties of states also arise within the "law of occupied territories,"³⁶ and with respect to the responsibilities of United Nations' peacekeeping missions.³⁷

Thus, historically, actors have referenced fiduciary principles in a diverse array of contexts. They include agency, corporate law, financial services, and trusts (within private law), environmental protection, cultural heritage preservation, and peacekeeping (within public law), as well as the duties of lawyers (which include both private and public responsibilities). Relationships within families entail fiduciary duties, at least sometimes, and some scholars have argued that friends as well may be fiduciaries.³⁸

Many societies "have adopted fiduciary rules or similar initiatives" to regulate relationships of trust and dependence upon another's discretion.³⁹ In common law countries, some fiduciary relationships are recognized as a matter of convention (or, put more technically, "status"), while others are recognized as a matter of

³¹ Kirsty Gover, *The Honour of the Crowns: State-Indigenous Fiduciary Relationships and Australian Exceptionalism*, 38 SYDNEY L. REV. 339 (2016); see Davis, *supra* note 5, at 286.

³² See, e.g., ANGHIE, *supra* note 28, at 115–95 (describing the Mandate System).

³³ Treaty of Peace Between the Allied and Associated Powers and Germany art. 22, June 28, 1919, 2 Bevans 43, 56.

³⁴ *Id.*

³⁵ See CRIDDLE & FOX-DECENT, *supra* note 4, at 57.

³⁶ Eyal Benvenisti, *Occupation and Territorial Administration*, in ROUTLEDGE HANDBOOK OF THE LAW OF ARMED CONFLICT (Rain Liivoja & Timothy McCormack eds., 2016).

³⁷ CRIDDLE & FOX-DECENT, *supra* note 4, at 300–06.

³⁸ See Ethan J. Leib, *Friends as Fiduciaries*, 86 WASH. U. L. REV. 665 (2009); Elizabeth S. Scott & Robert E. Scott, *Parents As Fiduciaries*, 81 VA. L. REV. 2401 (1995).

³⁹ Tamar Frankel, *Transnational Fiduciary Law*, 5 U.C. IRVINE J. INT'L TRANSNAT'L & COMP. L. 15 (2020).

case-by-case context (or, more technically, as “a matter of fact”).⁴⁰ Status-based fiduciary relationships include the well-recognized common law examples of agency and partnership, while fact-based fiduciary relationships include those between banks and their customers in “so-called special circumstances.”⁴¹ Thus, the fiduciary idea is quite flexible.

Civil law countries recognize fiduciary relationships or their functional equivalents. Some Anglophone lawyers assume that civil law countries lack fiduciary law. But fiduciary law’s roots in Roman law make the existence of fiduciary duties in civil law altogether unsurprising. Functionally speaking, for example, civil law has agents, corporate managers, and investment managers, all of whom are subject to a fiduciary duty of loyalty.⁴²

The fiduciary frame suggests that a common problem of trust cuts across these distinct issue areas. In different contexts, people entrust others to act on their behalf. Someone who owns property may entrust it to the care of another on the understanding that they will manage it for a beneficiary and not for their own self-interest. Or a society may entrust someone – a president or a prime minister, for instance – with the authority to act for the public good. In each case, the trustee may betray that trust. The private trustee may misuse the entrusted property to benefit herself. Or a president may trade on the public trust to enhance his power and wealth. Law and economics scholars specify this problem in terms of agency costs. In the moralistic terms of common law decisions, the problem is one of holding a person entrusted with authority over the interests of another to “the punctilio of an honor the most sensitive.”⁴³

Fiduciary norms of loyalty and care for others respond to these problems. The duty of loyalty requires fiduciaries to pursue their beneficiaries’ interests, not their own or some third parties’ interests.⁴⁴ In the common law of trusts, for example, the duty of loyalty prohibits a trustee from engaging in self-dealing or acting on the basis of a conflict of interest.⁴⁵ Civil law countries such as Germany, even though they lack the common law trust, describe the fiduciary’s core obligations in terms of loyalty as well.⁴⁶ The fiduciary duty of care demands competence, diligence, and

⁴⁰ Miller, *supra* note 14, at 367; Seth Davis, *The False Promise of Fiduciary Government*, 89 NOTRE DAME L. REV. 1145, 1156–58 (2014).

⁴¹ Andrew Tuch, *Fiduciary Principles in Banking*, in Criddle et al., *supra* note 14, at 125, 127–28 (“An ‘overwhelming majority’ of jurisdictions . . . recognize that banks may be fiduciaries of their borrow-customers when so-called special circumstances or exceptions exist . . .”).

⁴² See, e.g., Michele Graziadei, *Virtue and Utility: Fiduciary Law in Civil Law and Common Law Jurisdictions*, in Gold & Miller, *supra* note 14, at 287, 294.

⁴³ *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928) (Cardozo, J.).

⁴⁴ See, e.g., Paul B. Miller, *A Theory of Fiduciary Liability*, 56 MCGILL L.J. 235, 281 (2011) (noting “consensus” that duty of loyalty is a universal fiduciary obligation).

⁴⁵ RESTATEMENT (SECOND) OF TRUSTS § 170(1) (1959).

⁴⁶ See, e.g., Thilo Kuntz, *Das Recht der Interessenwahrungsverhältnisse und Perspektiven von Fiduciary Law in Deutschland*, in I FESTSCHRIFT FÜR KARSTEN SCHMIDT ZUM 80. GEBURTSTAG 761 (Katharina Boele-Woelki et al. eds., 2010).

skill.⁴⁷ In trust law, for example, it requires a trustee to manage the trust funds “as a prudent investor would.”⁴⁸

Fiduciary law’s open-ended principles of loyalty and care have adapted as markets, morals, and modes of regulation change. Fiduciary norms are no longer confined to courts of equity in the common law world, if they ever were. As chapters in this volume reveal, public regulatory agencies produce fiduciary norms or their functional equivalents, as do private self-regulatory bodies. UN institutions debate their proper interpretation with business consultants, corporate lawyers, legal academics, and national lawmakers.

As more actors and institutions beyond national courts marshal (and contest) fiduciary norms, some scholars have strived to create a unified theory to describe (and limit) the field. Doctrinal scholars reason from fiduciary relationships that are settled in judge-made law. Law and economics scholars characterize fiduciary duties as facilitating market transactions where transaction costs prevent parties from crafting explicit contractual solutions to agency costs. Moralists zero in on the expressive dimension of fiduciary duties in fostering loyalty and altruism where one person entrusts another who agrees to put their interests first. Debate ranges across questions about what makes a relationship fiduciary; how fiduciary law solutions relate to public regulatory responses, private ordering, and social and moral norms; and the nature and efficacy of enforcement of fiduciary duties.

The elasticity of the fiduciary concept has thus been a source of norm entrepreneurship and controversy. According to one common law jurist, “[t]here are few legal concepts more frequently invoked but less conceptually certain than that of the fiduciary relationship.”⁴⁹ Things are even more complicated in some civil law countries where the lack of the trust as a legal institution has been compensated by a “trust agreement,” combining elements of contract and property law, explicitly establishing a fiduciary relationship.⁵⁰

Much of the recent analytical work in fiduciary legal theory has aimed to develop a more refined understanding of the fiduciary relationship. In her landmark article, Frankel explained that “one party to a fiduciary relation (the *entrustor*) is dependent on the other (the fiduciary) . . . because [the entrustor] must rely on the fiduciary for a particular service.”⁵¹ For Frankel, fiduciary law is unified in its concern for the problem of abuse of fiduciary power.⁵² Paul Miller has defined fiduciary

⁴⁷ See Miller, *supra* note 14, at 282–83 (noting debate about whether duty of care in fiduciary law is distinct from the duty of care in tort law and arguing that duty of care in fiduciary law is distinct because, while “the tort duty demands reasonable care, the fiduciary duty typically also requires reasonable diligence and skill”).

⁴⁸ RESTATEMENT (THIRD) OF TRUSTS § 227 (2007).

⁴⁹ *Lac Minerals Ltd. v. Int’l Corona Res. Ltd.*, 2 S.C.R. 574, 643–44 (1989) (La Forest, J.).

⁵⁰ See, e.g., Stefan Grundmann, *The Evolution of Trust and Treuhand in the Twentieth Century*, in Helmholtz & Zimmermann, *supra* note 22, at 469.

⁵¹ Frankel, *supra* note 18, at 800.

⁵² See *id.* at 817.

relationships in terms of the powers that a fiduciary enjoys, but without Frankel's focus upon the provision of services: "fiduciary relationships arise upon the fiduciary's undertaking of a mandate under which he receives discretionary legal powers to be exercised for other-regarding purposes."⁵³ Another approach, developed by Gordon Smith, defines fiduciary relationships in terms of "critical resources."⁵⁴ A fiduciary, he contends, is a person who wields discretionary powers to administer, invest, or manage another's "critical resources." Evan Criddle and Evan Fox-Decent, who have developed an influential fiduciary theory of public law, define fiduciary relationships in terms of powers and interests: "the law entrusts one party (the fiduciary) with discretionary power over the legal or practical interests of another party (the beneficiary)."⁵⁵ In economic terms, the concern is about agency costs, and scholars working in this vein have theorized fiduciary relationships as a species of underspecified contractual relations and fiduciary duties of loyalty and care as preference-estimating default terms.⁵⁶ Each of these conceptions shares a concern with a problem that arises when one person wields authority over the interests of another.

Construed broadly, fiduciary law is a "master frame" for addressing problems of abuse of authority and betrayal of trust.⁵⁷ States that shut their borders to refugees, regulatory agencies that kowtow to the fossil fuel industry, a broker-dealer pushing the most profitable securities regardless of costs and alternative potential investments, a corporate director who fails to consider ESG factors in investing, and a close friend who betrays one, all involve fiduciaries under some understandings of the field. Some of these understandings have motivated domestic and transnational legal advocacy, while others may be found only in the law reviews. All of these understandings are contested by some as lying beyond the bounds of the fiduciary frame. These different conceptualizations reflect contestation over the appropriate framing of a social "problem," including whether it should be done in fiduciary terms.

This book examines such contests over the legal framing of problems in transnational context. It does not aim to unify the field of fiduciary law, but rather to explore contests over the application across and within borders. Focusing upon these

⁵³ Miller, *supra* note 44, at 379.

⁵⁴ D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399 (2002).

⁵⁵ CRIDDLE & FOX-DECENT, *supra* note 4, at 18.

⁵⁶ See, e.g., Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 426 (1993); Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 STETSON L. REV. 23, 25 (1991). But cf. Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045 (1991).

⁵⁷ On "master frames," see Nicholas Pedriana, *From Protective to Equal Treatment: Legal Framing Processes and Transformations of the Women's Movement in the 1960s*, 111 AM. J. OF SOCIOLOGY 1718, 1725 (2006).

transnational dimensions puts the potential breadth of fiduciary norms and the challenge of a unified conceptual understanding in sharp relief.

Scholars have only begun to examine the extent of convergence of fiduciary norms across jurisdictions from a comparative law perspective. Recent conceptual work in fiduciary legal theory has aimed to develop a jurisprudential understanding that would cut across national legal systems. Yet, such conceptual study leaves unaddressed the processes of convergence and divergence in practice – that is, the ways in which interactions among transnational, national, and local actors, both public and private, may lead (or not lead) to the development of what can be viewed as transnational fiduciary law. The “quest for a unified understanding of fiduciary law”⁵⁸ requires a framework for understanding what unification entails and how it does – or does not – come about. This book provides such a framework.

1.3 THE TRANSNATIONAL FORMATION AND INSTITUTIONALIZATION OF FIDUCIARY LAW

The theory of transnational legal ordering provides a framework to assess the development of fiduciary law in transnational context. It examines how actors and institutions develop legal norms, such as fiduciary norms, in response to perceived social problems. Drawing upon this theoretical framework, this book explores existing tensions between constructing a broader concept of fiduciary responsibility and differentiating fiduciary norms to address discrete problems in particular places. It analyzes processes of norm construction, institutionalization, and contestation through which particular conceptualizations of fiduciaries and fiduciary law become settled and unsettled in practice transnationally. It thereby informs debates as to whether we are witnessing a potential unification of fiduciary law as a field, including through the development of a meta-norm that may be applied to a wide range of private and public law problems.

As developed by Halliday and Shaffer, TLO theory addresses how legal *ordering* is produced transnationally to address particular conceptions of problems.⁵⁹ A TLO is “legal” insofar as it involves norms formalized into recognizable legal texts, whether as hard law or soft law, which ultimately can affect legal practice. These texts may be produced by a legal organization or network that transcends or spans nation-states,

⁵⁸ D. Gordon Smith & Andrew S. Gold, *Introduction to the Research Handbook on Fiduciary Law*, in RESEARCH HANDBOOK ON FIDUCIARY LAW 1, 2 (D. Gordon Smith & Andrew S. Gold eds., 2018).

⁵⁹ Halliday & Shaffer, *supra* note 15, at 5. For a different, process-oriented conception of transnational law, see Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 183–84 (1996). (“Transnational legal process describes the theory and practice of how public and private actors – nation-states, international organizations, multinational enterprises, non-governmental organizations, and private individuals – interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law.”)

and the texts directly or indirectly may engage legal institutions within nation-states, whether in the adoption, recognition, or enforcement of the norms.⁶⁰ A TLO is “ordered” where it involves shared norms and institutions and some regularity of behavior, communication, and social expectations in response to a social “problem,” as the relevant actors understand it.⁶¹ It is “transnational” where the norms transcend and permeate multiple state boundaries.⁶²

TLO theory differs from other approaches to transnational legal theorizing in its focus upon the process of norm construction, its emphasis upon recursive processes between norm construction and application, its applicability to both private and public law, and its attention to the relationship between law and other forms of social ordering. The theory asks how “legal norms are constructed, flow, settle, and unsettle across levels of social organization, from the transnational to the local.”⁶³ Normative settlement can result, in practice, “through the use of . . . written rules, standards, model codes, or judicial judgments,” whether those instruments involve hard or soft law, or public or private ordering.⁶⁴ “Normative settlement” refers to the stabilization of the meaning of terms in the practices of those implementing and applying the law.⁶⁵

The formation and institutionalization of a fiduciary TLO may occur narrowly in response to specific problems within different fields. Consider, for example, trust law. Offshore jurisdictions compete with onshore jurisdictions for trust management business, leading to the development of transnational innovations such as the “international trust.”⁶⁶ The creation of common markets, such as in Europe, led to the development of the Hague Trust Convention.⁶⁷ Even where the fiduciary relationship lies within a single jurisdiction, the development of fiduciary law may involve settlement on legal norms that transcend and permeate multiple state boundaries, such as through transnational judicial dialogue among common law jurisdictions regarding the treatment of private trusts.

⁶⁰ Halliday & Shaffer, *supra* note 15, at 12–17.

⁶¹ *Id.* at 11; Gregory Shaffer and Terence Halliday, *With, Within, and Beyond the State: The Promise and Limits of Transnational Legal Ordering*, in OXFORD HANDBOOK OF TRANSNATIONAL LAW 987 (Peer Zumbansen ed., 2020).

⁶² Halliday & Shaffer, *supra* note 15, at 20.

⁶³ Gregory Shaffer, *Theorizing Transnational Legal Ordering*, 12 ANN. REV. L. & SOC. SCI. 231, 237 (2016).

⁶⁴ Halliday & Shaffer, *supra* note 15, at 15.

⁶⁵ *Id.* at 43.

⁶⁶ Rebecca Lee, *The Evolution of the Modern International Trust: Developments and Challenges*, 103 IOWA L. REV. 2069 (2018).

⁶⁷ Hague Convention on the Law Applicable to Trusts and on Their Recognition, July 1, 1985, 23 I.L.M. 1388; Convention of 1 July 1985 on the Law Applicable to Trusts and on Their Recognition, HCCH, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=59> (last accessed June 28, 2019) (listing fourteen contracting parties to convention, and noting that Convention has not entered into force in United States); Adair Dyer, *International Recognition and Adaptation of Trusts: The Influence of the Hague Convention*, 32 VAND. J. TRANSNAT'L L. 989, 994 (1999).

Actors may deploy fiduciary norms to frame legal ordering across fields. For example, activists, advocates, and scholars have sought to frame the problem of global environmental regulation and climate change in terms of the public trust doctrine. This concept of “nature’s trust,”⁶⁸ which has been called “the law’s DNA,”⁶⁹ would hold governments to fiduciary duties to conserve the environment for future generations. Fiduciary law thus appears as both a meta-concept in diagnostic struggles over the framing of global problems and an instrument for the solution to these problems.

There are many legal and institutional tools through which actors seek transnational normative settlement in relation to the conceptualization of a problem. Treaties, such as the Hague Trust Convention, which governs the recognition of trusts, exemplify one form of vertical ordering based upon fiduciary norms. Formal domestic law also may be shaped by horizontal processes that affect the enactment and application of relevant norms, such as through transnational judicial and administrative dialogues. Privately made soft law can contribute to the development of transnational fiduciary law as well. It ranges from self-regulation and standard-setting, the development of best business practices, and other forms of private ordering that may be formalized in contracts. Fiduciary legal theorists conventionally have focused upon the role of courts. However, public regulatory bodies, private organizations, and NGOs also contribute to the development of legal ordering that applies fiduciary norms. Social expectations regarding trust too play a crucial role in settling – or unsettling – fiduciary norms, especially when it comes to practice.

TLO theory, with its processual focus, contributes to the assessment of fiduciary law by including the lawmaking activities of state and non-state actors within a broader context. Fiduciary law may develop transnationally through a combination of bottom-up and top-down processes involving not only courts and domestic regulatory agencies and legislatures but also non-state actors, such as international organizations, NGOs, and transnational networks. As Thilo Kuntz explains in this volume (Chapter 2), to understand whether discrete bodies of transnational fiduciary law have formed, one must assess horizontal and vertical interactions among these types of actors and institutions. On the one hand, transnational fiduciary law can emerge through horizontal entanglements among domestic actors and legal institutions, as has occurred in East Asia. Yet, the vertical dimension of transnational legal ordering should be addressed as well. The UNEP’s “Fiduciary Duty for the Twenty-first Century” report is one example where bottom-up activism and top-down norm development have contributed to the development of a transnational body of soft law concerning fiduciary duties.

⁶⁸ MARY CHRISTINA WOOD, *NATURE’S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE* (2014).

⁶⁹ Gerald Torres & Nathan Bellinger, *The Public Trust: The Law’s DNA*, 4 WAKE FOREST J.L. & POL’Y 281 (2014).

Fiduciary norms may form through these mechanisms to govern domestic, transnational, or international relationships of trust. Although *domestic law* addresses fiduciary relationships within the borders of a nation-state, it may diffuse to have transnational effects. Corporate governance norms, for example, could migrate across state borders and come to settle at the level of national and local practice to govern domestic relationships in another jurisdiction. Fiduciary relationships themselves could be *transnational*, as may arise, for instance, with wealth planning and trust management for family members located and holding assets in different jurisdictions. Domestic law can address these transnational relationships and activities both through domestic law's extraterritorial application, and through transnational parties' selection of foreign law as the applicable law in a trust arrangement. Particular domestic laws may become predominantly used in practice, such as New York or UK law, or the law of a tax haven for tax avoidance purposes.⁷⁰ In addition, private parties may develop transnational norms to apply to transnational activities and relationships that include fiduciary norms. Finally, fiduciary relationships may exist on the *international* plane as a matter of international law, such as the norms governing UN peacekeepers or the norms of the now-defunct Trusteeship System of the United Nations.

Transnational norm development need not – and often does not – lead to the institutionalization of a full-blown TLO (in its ideal type), although it still may have transnational effects. From the perspective of TLO theory, normative settlement at the transnational level is insufficient. Framing struggles may be won at the transnational and even the national levels without legal norms becoming settled in practice at the local level. TLO theory therefore stresses the importance of assessing whether there is concordant normative settlement at the transnational, national, and local levels. As an ideal type, a fully institutionalized TLO exists only where there is concordance of normative understanding and practice across all three levels.⁷¹ Such institutionalization is challenging in practice, often for good reason given variation in national and local contexts.

This distinction between transnational norms and TLOs suggests that apparent transnational agreement on open-ended fiduciary norms may not correspond with local practice. In this volume (Chapter 9), for example, Jennifer Hill describes the global transmission of corporate governance codes and stewardship codes from the United Kingdom, which, among other things, aimed to empower institutional investors in corporate governance. The adoption of the UK model has not always led to similar corporate governance practices. Singapore's stewardship code is nearly identical to the United Kingdom's; yet it operates locally to strengthen majority

⁷⁰ See generally KATHARINA PISTOR, *THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY* (2019).

⁷¹ Terence C. Halliday & Gregory Shaffer, *Researching Transnational Legal Orders*, in Halliday & Shaffer, *supra* note 15, at 477–78.

shareholders in state and family-controlled firms, quite the opposite from the United Kingdom's practice. The converse may be true as well. Apparent disagreement on formal doctrine may mask correspondence in practice. As Andrew Tuch has argued, the United Kingdom and the United States differ in their doctrinal approaches to fiduciaries who engage in self-dealing. The United Kingdom's no-conflict rule differs from the United States's fairness rule – at least on paper.⁷² While scholars have made much of this distinction, Tuch argues that the two rules operate similarly to require neutral corporate directors to police self-dealing. Thus, doctrinal difference may mask correspondence in practice.

1.4 THE RECURSIVE DEVELOPMENT AND DYNAMIC CONSEQUENCES OF TRANSNATIONAL FIDUCIARY LAW

The transnational formation and institutionalization of fiduciary law is a dynamic process in which local conditions can shape the recursive development and differentiation of transnational legal norms. A number of chapters explore several features of the recursive development of fiduciary law, including the complications that arise from implementing the open-ended concept of fiduciary loyalty, the different relationships between fiduciary norms and the problems they target, and the roles that lawyers, regulatory advisors, and other intermediaries play in the development of transnational fiduciary norms.

The concept of recursivity highlights the cyclical nature of norm development at the transnational, national, and local levels over time.⁷³ Legal ordering may cycle as law on the books is translated into law in action, with transnational, national, and local actors iteratively developing, implementing, and contesting norm making. These cycles begin with the social construction and understanding of a “problem” to be addressed, but they do not end with adoption of one (or more) legal responses.⁷⁴ Transnational legal ordering may expand or recede as actors construct competing conceptions of social “problems” and seek to develop, import, and export norms across jurisdictional boundaries. Recursive cycles of lawmaking and implementation may strengthen the concordance and legitimacy of a TLO, or lead to its erosion. In a contest among rival conceptions of problems and their legal resolution, a particular TLO could win out or different TLOs could exist side by side, interacting in various ways, including to address sub-issues of a larger social problem.⁷⁵

⁷² Andrew F. Tuch, *Reassessing Self-Dealing: Between No Conflict and Fairness*, 88 *FORDHAM L. REV.* 939 (2019).

⁷³ Halliday & Shaffer, *supra* note 15, at 37–42.

⁷⁴ Terence C. Halliday & Bruce G. Carruthers, *The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes*, 112 *AM. J. SOC.* 1135, 1146–52 (2007).

⁷⁵ Halliday & Shaffer, *supra* note 15, at 46–51.

The global development of trust law reveals recursive cycles of transnational legal ordering. Recursivity theory posits four mechanisms that drive recursive processes: diagnostic struggles over the nature of the problem; actor mismatch between those adopting and enacting norms at the transnational, national, and local levels and those applying them; contradictions within legal texts; and the indeterminacy of legal texts.⁷⁶ Masayuki Tamaruya has charted a recursive dynamic in his study of the “the global evolution of the fiduciary norm,” which traces the trust as an institution transmitted throughout East Asia through two routes.⁷⁷ The first route ran through the British Empire and London’s one-time dominance of capital markets. The second began in the United States, particularly after the United States became a creditor nation in the early twentieth century. Along these routes, Tamaruya charts a recursive process through which the trust as an institution “was introduced and developed in Japan and East Asia.”⁷⁸ For example, Tamaruya describes the codification of substantive trust law in Japan from 1918 to 1922, during which drafters in the Ministry of Justice made choices in interpreting indeterminate common law jurisprudence, modified proposed trust provisions drawn from United States and Indian law in an attempt to fit them with Japanese private law, and defined the term “trust” differently than both models in order to limit the ability of trust companies to compete with existing banks. The subsequent development of Japanese trust law also reveals the importance of geopolitical conflict and power in the transnational development of trust law. Following the end of World War II, American lawyers drafted new constitutional law, corporate law, and securities law for Japan, as well as an act “converting trust companies into banking institutions.”⁷⁹ Ultimately, Tamaruya argues, the trust law and practices of common law jurisdictions, including England and the United States, and that of Japan, Taiwan, and Korea have come to interact and evolve together.⁸⁰

The recursive development of fiduciary law is subject to local variation in moral norms and social expectations. Fiduciary law explicitly incorporates moral, open-ended, and indeterminate norms of loyalty.⁸¹ These features of fiduciary law blur the lines between positive law and social norms. The fiduciary duty of loyalty interacts with norms, such as expectations about trust, that vary across cultures. The extent to which adoption of a fiduciary frame will lead to normative concordance at the transnational, national, and local levels depends in part on these variations. As Tamaruya explains (Chapter 8), Japanese business managers’ status-

⁷⁶ Halliday & Carruthers, *supra* note 74, at 1135; Halliday & Shaffer, *supra* note 15, at 37–42.

⁷⁷ Masayuki Tamaruya, *Japanese Law and the Global Diffusion of Trust and Fiduciary Law*, 103 IOWA L. REV. 2229, 2230 (2018).

⁷⁸ *Id.*

⁷⁹ *Id.* at 2240–41.

⁸⁰ *See id.* at 2260.

⁸¹ *See, e.g.*, Meinhard v. Salmon, 164 N.E. 545, 546 (1928). For an overview of fiduciary law and morality, *see* James Penner, *Fiduciary Law and Moral Norms*, in Criddle et al., *supra* note 14.

based expectations of loyalty, which reflect norms of deference to family elders, have persisted even as modern fiduciary law reforms have incorporated Anglo-American common law notions of loyalty to shareholders.

Differences in national legal infrastructure and market practices further complicate the operation of fiduciary law as a TLO. Understanding of fiduciary norms (which shapes what practitioners advise and do), for example, can vary as a function of whether and how the norms are enforced, by whom, and in light of varying market structures. Within common law jurisdictions, for example, fiduciary duties of loyalty and care are part of a complex structure of remedies (such as disgorgement) that have developed over centuries. Arguably, remedies help define the duties they enforce, at least from a legal realist perspective regarding law's relation to behavior.⁸² The interdependence of rights and remedies complicates the effectiveness of horizontally transmitted fiduciary duties across national boundaries without the accompanying remedies. So too does variation in market practices. Tamaruya shows (Chapter 8) that Japanese styles of corporate management mediate the incorporation within Japanese law of Western-inspired fiduciary norms.

Chapters in this book identify several types of relationships between fiduciary TLOs and other legal orders that apply to a problem. Fiduciary norms may be closely aligned with a problem that they are to solve, or only tangential to the problem. They may address only a particular issue within the problem, or their coverage may extend well beyond the problem. A fiduciary TLO could, in theory, dominate the governance of an issue, providing the primary if not exclusive legal solution to a problem, or it could compete with alternative legal approaches that aim to address the same problem under a different frame. Assessing issue alignment with a problem, and the relative role of fiduciary norms compared to other legal norms, sheds light on the relationship of different normative orders and governance mechanisms. These relationships affect the recursive development and success of a fiduciary TLO over time.

Sometimes a fiduciary TLO corresponds closely with an issue and it dominates – or purports to dominate – the regulatory environment. The League of Nation's Mandate System, which aimed to regulate Western colonialism and the decolonization of so-called dependent peoples, provides one example.⁸³ The shareholder primacy model of corporate governance provides another.⁸⁴ Yet, both examples suggest that transnational legal ordering and its legitimacy may be continually resisted.

⁸² Davis, *supra* note 40, at 1201.

⁸³ ANGHIE, *supra* note 28, at ch. 3.

⁸⁴ See, e.g., Lynn A. Stout, *On the Rise of Shareholder Primacy, Signs of Its Fall, and the Return of Managerialism (In the Closet)*, 36 SEATTLE U. L. REV. 1169, 1178 (2013) (“shareholder primacy values were internalized as the dominant norms of a rising generation of business leaders, investors, academics, journalists, and lawmakers”).

In many cases, fiduciary law plays a supplementary role, filling a gap left open by a dominant regulatory approach, or it covers only a subset of the issue alongside other law and governance tools. Many of the chapters in this book explore the gap-filling function of fiduciary law. In so doing, they contribute to the ongoing debate about whether and to what extent fiduciary norms are characteristically supplementary to other legal ordering. Jens-Hinrich Binder's concept of "functional fiduciary law" (Chapter 4) shows how a fiduciary TLO may emerge because of indeterminacy and contradictions within legal orders. Binder points to the development of fiduciary norms in the regulatory treatment of financial intermediaries in Europe, as developed by the International Organization of Securities Commissioners and other transnational bodies such as the European Parliament. This functional fiduciary law aims to resolve tensions between private law and public regulation by imposing cross-cutting fiduciary duties on financial intermediaries.

Finally, the aspiration to develop a fiduciary TLO can be essentially contestatory. Actors and institutions present transnational fiduciary norms as part of a critique of, and effort to destabilize and displace, existing legal orders. For example, Seth Davis (Chapter 6) describes the work of activists, academics, and NGOs to require national governments to take greater action to combat climate change by developing the public trust doctrine as a transnational fiduciary legal norm. They deploy this doctrine to catalyze judicial action to hold governments accountable as fiduciaries of the environment for future generations.

Whether the transnational legal ordering of fiduciary norms becomes institutionalized in light of such contests depends upon structural factors such as governance capacities, perceptions of legitimacy, and the practices and attitudes of intermediaries implementing the relevant norms. As Hill describes (Chapter 9), the structure of governance at the national and local level shapes the content and consequences of transnational legal ordering. She contrasts corporate governance and stewardship codes in the United Kingdom and Australia, which are administered by government-backed regulators, with those in the United States, which were developed by US-based asset owners and managers. Unsurprisingly, the United Kingdom's and Australia's codes impose more robust social obligations than the United States' governance principles, which reflect the greater dominance of the shareholder primacy model in the United States. Japan's adoption of a UK-style stewardship code, which further softened the code's commitment to shareholder activism, again reflects the importance of local norms and perceptions of legitimacy, affecting what, and if so how, a TLO may develop over time.

Legal intermediaries – lawyers, as well as internal and external compliance advisors and the like – also significantly shape transnational legal ordering. They can do so in ways that distort a norm's purported purpose. Take, for example, the application of fiduciary duty norms to the transnational legal ordering of wealth. Within this global system, fiduciary law is not straightforwardly other-regarding. To the contrary, fiduciary obligation may conflict, at a minimum, with social

obligation, with devices like the private trust being used to shield assets and shift risks onto others.⁸⁵ Chapters in this volume, including Rebecca Lee's chapter on the evolution of the modern international trust (Chapter 7), highlight the role of legal intermediaries within systems of global capital where fiduciary law can play a central role in the creation and distribution of wealth. As Katharina Pistor has pointed out, the legal "coding of capital" "is much less static than often assumed"; there is, for instance, more than "one way to set up a trust," having very different distributive outcomes.⁸⁶ The movement of global capital creates common problems that actors and institutions may address through a fiduciary law frame, with intermediaries playing a crucial role in the settling and unsettling of fiduciary norms over time.

1.5 THE FRONTIERS OF TRANSNATIONAL FIDUCIARY LAW

Fiduciary law's commitment to mandatory regard for others, combined with the indeterminacy of the other-regarding obligations it imposes, opens the field to a variety of ideological commitments. On the one hand, fiduciary law is part of systems of financial regulation that undergird global capitalism. On the other hand, fiduciary law might be seen as a counter to the unconstrained pursuit of self-interest. In recent years, activists, advocates, and scholars have pushed the boundaries of the field to apply the fiduciary frame to relationships between states and their citizens, international organizations and those subject to their authority, and transnational digital businesses and their customers.

Recent work in fiduciary theory has pushed beyond the boundaries of private law to treat public officials and international civil servants, together with the states and organizations they represent, as fiduciaries. Public fiduciary theory holds that public officials are fiduciaries for those subject to their authority. This theory invites scholars to think about the abuse of public authority within the same frame as abuse of private authority. Historical examples of public fiduciary law include the law of European colonialism and its treatment of Indigenous Peoples.⁸⁷ Fiduciary law has since been part of public international law in terms of the responsibility of states and international organizations in postcolonial and other transitions. These bodies of law engage transnational legal processes. They involve large numbers of people and considerable territory around the globe, are designed to maintain order through law aimed at local administrative practice, and are transnational in their scope.

⁸⁵ See, e.g., Seth Davis, *Owners and Fiduciaries* 33–34 (working paper).

⁸⁶ PISTOR, *supra* note 70, at 159.

⁸⁷ See, e.g., Ralph Wilde, *Trusteeship Council*, in *THE OXFORD HANDBOOK ON THE UNITED NATIONS* 149 (Sam Davis & Thomas G. Weiss eds., 2007). Compare the duties of occupying forces under the law of war, which conceived of the occupant as a "trustee," but found in practice that it was not possible "to expect the occupant to perform the function of the impartial trustee." EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 4, 6 (2004).

The revival of public fiduciary theory has raised the question whether fiduciary law provides the controlling meta-normative framework for public law. At its most ambitious, public fiduciary theory holds that public authority is fiduciary authority through and through. As a conceptual matter, scholars argue, public law is fiduciary law.⁸⁸ This conceptual claim, however, neglects the question of normative settlement of public fiduciary norms: To what extent do legal actors take for granted that government actors and institutions are fiduciaries with duties of loyalty and care to the public? TLO theory provides a framework for exploring this question, which chapters in this volume (Chapters 11 and 12) address.

In recent years, evidence has mounted that digital businesses may abuse – and have abused – individuals’ trust. Jack Balkin and Jonathan Zittrain have developed the concept of an “information fiduciary” to address this problem,⁸⁹ arguing that digital companies such as Facebook, Google, and Twitter are fiduciaries because they collect and sell individuals’ personal data, a resource that analysts value more than oil.⁹⁰ This conception shares with public fiduciary theory a concern with unconstrained power and dominance. It looks to fiduciary law for other-regarding obligations of loyalty and care to constrain powerful actors to protect user privacy.

The information fiduciary concept has elicited criticism from both the political left and right. Some critics worry that fiduciary norms do not go far enough to address the market power that digital titans such as Facebook possess. They see the information fiduciary concept as a competitor to other forms of regulation, such as antitrust, that would provide more throughgoing regulatory changes to the ways digital business operate.⁹¹ Critics also charge the information fiduciary conception with incoherence: Facebook (now “Meta”), they point out, already owes fiduciary duties to shareholders, and those duties are inconsistent with purported fiduciary duties to users.⁹²

TLO theory sheds light upon this ongoing debate by providing a framework to explore the processes through which different conceptions of a problem and ensuing legal responses to it become settled and unsettled transnationally in practice. There

⁸⁸ See, e.g., Evan J. Criddle et al., *Introduction – Fiduciary Government: Provenance, Promise, and Pitfalls*, in *FIDUCIARY GOVERNMENT* 1, 5 (Evan J. Criddle et al. eds., 2018). (“Public officials, like private fiduciaries, are said to be subject to legal norms designed to prevent, deter, or punish corruption and to ensure that legal powers are exercised properly and carefully for the purposes for which they were conferred.”)

⁸⁹ See Balkin, *supra* note 3; Zittrain, *supra* note 3.

⁹⁰ On data as the new oil, see Kiran Bhageshwar, *Data Is the New Oil – And That’s a Good Thing*, *FORBES*, Nov. 15, 2019. Seven of the eight most valuable listed firms in 2019 profit critically from data: Microsoft, Apple, Amazon, Alphabet (parent of Google), Facebook, Alibaba, and Tencent (parent of WeChat). The eighth is Berkshire Hathaway, a holding company whose largest holding was Apple.

⁹¹ See David E. Pozen & Lina M. Khan, *A Skeptical View of Information Fiduciaries*, 133 *HARV. L. REV.* 497 (2019).

⁹² See *id.* at 508–10. But see Andrew F. Tuch, *A General Defense of Information Fiduciaries*, 98 *WASH. U. L. REV.* 1897 (2021).

is recursive interaction between conceptualizations of problems, norm formation, and practice in terms of the usefulness of conceptualizations and legal norms to address particular situations. This dynamic is emerging in the competition between Europe's General Data Protection Regulation and US privacy law. Whether one approach (such as Europe's) will gradually win out, or advocates' invocation of fiduciary law can play an intermediary role in reconciling these legal approaches, remains highly contested. By examining the frontiers of fiduciary law, this volume opens new questions about diagnostic struggles that are central to this growing and vibrant field of legal theory and doctrinal and empirical study.

1.6 OVERVIEW OF THE CHAPTERS

In the opening chapter to Part I, "Transnational Fiduciary Law: Spaces and Elements," Thilo Kuntz explores the challenge of theorizing a meta-concept of fiduciary law at the transnational level. The problem that fiduciary law seeks to solve, he contends, cuts across common law and civil law traditions, whether it be the English trust or the contract-based *Treuhandverhältnisse* in German law. Thus, from a functional perspective of comparative law, there is a common "point of entry for transnational fiduciary law." The more difficult question, Kuntz argues, is whether a transnational body of fiduciary law is emerging as a result of domestic legal responses to that common problem of trust or through transnational processes. He contends that the transnational element is critical, but that it varies across discrete issue areas.

In Kuntz's account, transnational fiduciary law can emerge from horizontal entanglement among national legal systems, as well as vertical transmission through a transnational body of soft law. As to the horizontal dimension, he charts the cross-border transmission of fiduciary norms among Japan, South Korea, Taiwan, and China. Methodologically, to trace the development of fiduciary law through these transnational ties requires an historical orientation to legal processes that conventional comparative law tends to lack. Theoretically, this analysis challenges a sharp distinction between the national and transnational, and conceptions of fiduciary law norms and practices.

As to vertical conveyance mechanisms, Kuntz examines international efforts to integrate environmental, social, and governance (ESG) goals into corporate decision-making, thereby instilling fiduciary law norms and practices. The UNEP's "Fiduciary Duty for the Twenty-first Century" report, the 2011 UN Guiding Principles on Business and Human Rights, and the G20/OECD 2015 principles on corporate governance constitute a transnational body of soft law that "has to be reckoned with" at the national and local levels. These international soft law developments also illustrate transnational fiduciary law at work. But such law, Kuntz argues, does not constitute a unified meta-concept of fiduciary law. To the contrary, Kuntz finds that diverse TLOs involving fiduciary norms are emerging in response

to the conceptualization of discrete “problems” from the horizontal entanglement of national lawmakers, on the one hand, and the vertical interactions among transnational, national, and local actors, on the other. For Kuntz, there is no unified field.

Andrew Tuch’s chapter, “A Narrow View of Transnational Fiduciary Law,” distinguishes the formation of transnational fiduciary norms from the formation of a TLO. Tuch argues that transnational fiduciary norms have emerged from conflict-of-laws principles and extraterritorial application of fiduciary law, which has led to the predominant application of the fiduciary law of certain states to transnational activity. Similarly, focusing upon financial firms, Tuch also views the development of transnational private ordering and soft law as competing with the traditional domestic fiduciary norms of states. However, because of ongoing differences among state fiduciary law as applied by courts, he questions whether there are distinctively fiduciary TLOs in the sense that relatively common fiduciary norms have settled across national jurisdictions.

Fiduciary law may be transnational in practice to the extent that the hard law of particular states generally applies to the conduct of transnational fiduciaries. This transnational character may arise from the application of conflict-of-laws principles or the extraterritorial effect of domestic fiduciary law, leading to the application (for example) of the law of New York or the United Kingdom. Fiduciary law scholars, Tuch argues, have not given these processes sufficient attention. More difficult, he argues, is identifying whether there are TLOs that are distinctively fiduciary in terms of transnational normative settlement across national jurisdictions. Part of the difficulty lies in the analytically important distinction that Tuch draws between fiduciary norms and non-fiduciary norms that happen to apply to fiduciaries. But the chief difficulty, Tuch argues, lies in the tendency of fiduciary law scholars to equate law with domestic hard law – the pronouncements of courts or legislatures, for instance. Tuch is sympathetic to this picture of fiduciary law and questions whether transnational processes, at least at present, can properly be understood to lead to the development of transnational fiduciary law. TLO theory, by contrast, assesses socio-legal processes of norm formation and implementation, and is thus open to soft law as potentially constituting legal ordering through its implications for not only national law enforcement, but also legal practice. Tuch canvasses several examples of private ordering and standard-setting, such as firm-level conflict of interest management, and questions whether they are settled enough to constitute a TLO and, in any event, whether they constitute distinctively fiduciary norms. Thus, if one limits (fiduciary) law to formal law made and enforced by national lawmakers, the focus of study naturally turns toward choice-of-law and extraterritorial application of domestic law. But if one is open to a conception of law that includes soft law and legal practice, the potential for the development of fiduciary TLOs becomes a more open question.

Together, Kuntz and Tuch pose two questions about the normative settlement of fiduciary law. First, what makes a norm “fiduciary”? Second, what is the relationship between hard law and soft law in fiduciary lawmaking and practice? TLO theory explores these questions in terms of the normative understandings of relevant actors and institutions that affect practice. The first question is one of framing – that is, how do particular social problems become conceived in terms of “fiduciary” relationships? The second question concerns the production of normative order and the regularization of behavior. From the perspective of TLO theory, soft law potentially constitutes legal order through contributing to normative settlement in the application of legal norms in practice.

Jens-Hinrich Binder’s and Moritz Renner’s chapters address these questions of framing and soft law in the formation and institutionalization of a TLO. They focus upon the ways in which transnational legal ordering, including through private agreements and custom, can give rise to settled norms that hold financial firms to other-regarding duties characteristic of conventional fiduciary law. In this way, a TLO can be developed through private lawmaking and practice.

In “Transnational Fiduciary Law in Financial Intermediation,” Binder argues that “functional fiduciary law” has emerged as a regional TLO to govern the obligations of financial intermediaries across Europe. Financial intermediaries provide financial services that range from holding assets on behalf of clients, transacting on their behalf, and providing investment and loan advice. Their relationships with their customers involve aspects common to all fiduciary relationships, including trust, dependency, and vulnerability. In recent years, multiple legal systems have converged in the regulatory treatment of financial intermediaries, such that fiduciary duties are an “increasingly . . . accepted” component. Although the convergence across regulatory regimes is not matched by a convergence in formal private fiduciary law at the state level, Binder contends that a TLO is emerging within Europe to resolve tensions among diverse regulatory and private laws. Binder focuses upon standard-setting by the International Organization of Securities Commissioners (IOSCO) and regulatory requirements developed by European lawmakers. The IOSCO principles, first published in the 1990s, reflected a convergence across legal systems around certain norms to order financial intermediaries’ provision of services. These principles, in turn, influenced lawmaking in the European Union in 1993 (at that time named the European Economic Community), 2004, and 2014 through the Financial Instruments Directives.

To describe this emerging TLO, Binder develops the concept of “functional fiduciary law” as a body of law that has fiduciary roots and characteristics, but is developed by public regulators, not by courts, as per conventional fiduciary law theory. This body of law responds to a common challenge of reconciling public regulation with private fiduciary law, which cuts across European jurisdictions. Binder thus challenges simple narratives about doctrinal convergence as the unifying force of fiduciary law. Rather, he hypothesizes that TLOs with fiduciary norms

can form in response to divergence in private hard law regimes across national jurisdictions.

Renner invites us to see transnational fiduciary law as extending beyond hard law altogether. In “Transnational Fiduciary Law in Bond Markets,” Renner argues that a fiduciary TLO may form from customary practices that lead to settled expectations of trust within industries. In particular, he shows how these practices have given rise to a TLO for bond markets. Renner focuses on “net short debt investing,” a strategy where bondholders take a net short position in credit default swaps to profit from a bond issuer’s eventual default. Net short debt investing gives rise to multiple relationships involving potential vulnerability: that between bondholders and issuers, that among bondholders, and that between the bondholder and the swap counterparty. Although these three types of relationships may be treated differently in common law and civil law jurisdictions, it is unlikely that fiduciary duties would apply to any of them under current private law. Even so, fiduciary law has the potential to support social and business norms, affecting the reasonable expectations of participants in bond markets, thus shaping legal practice.

Renner shows that global bond markets can be understood as operating within a TLO that has emerged from private ordering, and in particular from the practice of using standardized documentation developed by the Securities Industry and Financial Markets Association (SIFMA) and the International Capital Market Association. Bond issuers typically rely upon these standardized provisions, which leave the contracting parties free to create a fiduciary relationship by agreement, even though they do not necessarily mention fiduciary duties. Bond market participants generally expect each other to follow norms that are necessary for market functioning, even though the norms are not specified in hard law. Market participants’ expectations about bondholders’ conduct can, Renner argues, be understood in fiduciary terms. Thus, Renner invites us to see transnational fiduciary law as extending beyond formal law to customary practices that create expectations for conduct involving relationships of trust and vulnerability to self-serving behavior.

Seth Davis’s chapter on “The Public Trust as Transnational Law” considers the formation and institutionalization of public fiduciary law transnationally. He focuses on the degree of transnational normative settlement around a paradigmatic example of public fiduciary law: the public trust doctrine. In the face of threats from climate change, lawyers have turned to the public trust doctrine. The doctrine holds that the state is a trustee with duties to manage and preserve natural resources on behalf of the public. Davis’s chapter explores the degree of normative settlement around the public trust concept, asking whether the public trust doctrine has emerged as a meta-TLO – that is, whether the public trust provides an encompassing framework for thinking about the duties of state actors in the areas of environmental and natural resource law. As Jothie Rajah has argued, a TLO may “frame[] and contextualize[] all efforts to manage and regulate law, legitimacy, and conceptions of legality in the

sphere of the transnational.”⁹³ Drawing upon the public trust doctrine as a kind of meta-TLO, lawyers and activists have pressed for regulatory action to address environmental challenges like climate change at the local, national, and transnational levels.

Examining the horizontal and vertical dimensions of transnational legal ordering, Davis shows that the broader concept that the state is a trustee of natural resources has converged across state boundaries. But what Tuch contends regarding private fiduciary law is true of public fiduciary law too: We should not confuse a transnational norm with a TLO. Convergence on the public trust ideal has not realized the ambitious aims of scholars, activists, and lawyers to create a meta-TLO for environmental law in practice. Davis contrasts the World Heritage Convention, regarding the designation and protection of world heritage sites, where a discrete TLO arguably has formed. For environmental law more generally, however, he highlights the importance of national and local infrastructure in order for public trust principles to become institutionalized, affecting practice.

Part II’s chapters explore questions of legal infrastructure as well as historical, political, and social factors affecting the development of transnational fiduciary law over time. Comparative law scholars working within particular fields of fiduciary law have developed important insights regarding similarities and distinctions in the fiduciary law of different nation-states. There is, for instance, a wealth of studies of comparative corporate law. But much of this work takes a static perspective that tells us little about interactions across jurisdictions linked to changes in fiduciary law over time. The chapters in Part II take a dynamic perspective on transnational processes of legal norm development and application. These chapters highlight the importance of local practices and intermediaries in transnational legal ordering processes, leading to the settlement and unsettlement of legal norms in both private and public fiduciary law and practice.

Rebecca Lee’s chapter, “Transnational Legal Ordering of Modern Trust Law,” examines the rise of global wealth and the role of competition among legal intermediaries in the development of trust law transnationally. Wealthy entrepreneurs look across the globe for trust planners to provide them with ways to secure their family fortunes. In response, these intermediaries have pushed the boundaries of the fiduciary theorist’s conception of trusteeship. Offshore jurisdictions have, for example, adopted settlor-friendly approaches that give the wealthy entrepreneur a great deal of flexibility in structuring the trust. Competition for trust services has resulted in onshore jurisdictions adopting some of these innovations. The story she tells is one in which onshore jurisdictions, such as England and Hong Kong, are playing catch-up to developments in the Cayman Islands. As Lee shows, trust planners’ modifications of the trust device in competition for global wealth and

⁹³ Jothie Rajah, “Rule of Law” as *Transnational Legal Order*, in Halliday & Shaffer, *supra* note 15, at 340, 343.

the creation of new conceptions of trust challenge common conceptual and normative assumptions concerning what a trust is, how it works, and how it should work, shaping the legal ordering of trusts transnationally.

In “Japanese, East Asian, and Transnational Fiduciary Orders,” Masayuki Tamaruya offers a detailed historical account of the dynamic processes of transnational legal ordering of fiduciary norms in Japan. Japanese fiduciary law, he argues, has come to reflect corporate governance norms from Western legal traditions. But the process of transnational legal ordering has been recursive, involving the interaction of norm making and practice. Japanese styles of corporate management and the Japanese concept of the corporation as a community of employees cannot be understood simply by applying the shareholder-primacy model of US corporate law. Rather, they must be understood in relation to long-standing status-based conceptions of loyalty to family elders and to authority within Japan. Modern legislation has not incorporated these status-based conceptions. Nevertheless, these conceptions have persisted as norms that order behavior, including the relationship between corporate managers and employees.

Tamaruya charts the contests over the development of fiduciary norms at the level of local practice. Norm entrepreneurs have sought to incorporate Western fiduciary norms within hard law. But these efforts remain in tension with Japanese conceptions of loyalty. Over time, soft law, optional regulation, and market practices have mediated this process of norm incorporation and resistance. Japan’s ultimate movement toward “the American duty of loyalty” has been a complex process involving the interaction of transnational, national, and local legal norm development and practice. Tamaruya’s study raises important questions for fiduciary legal theory, including the complications that arise when the concept of fiduciary loyalty is implemented in a particular field in a particular locale. These complications include not only ones of legal infrastructure (such as how will the fiduciary norms be enforced), but also of economic systems and normative environments.

Jennifer Hill offers a similarly nuanced assessment of the development of transnational fiduciary law in the area of corporate governance. In “Transnational Migration of Laws and Norms in Corporate Governance: Fiduciary Duties and Corporate Codes,” Hill considers whether fiduciary duties of corporate directors have converged across jurisdictions. In particular, she assesses whether the relatively recent adoption of national corporate governance codes may lead to transnational norm convergence. She concludes that there is less convergence in fiduciary duties across jurisdictions, including across common law jurisdictions, than is typically supposed under the well-known “law matters” hypothesis in institutional economics. This hypothesis holds that superior investor protection rules lead to dispersed capital market structures. Its proponents argue that the common law provides a superior suite of investor protections as compared to the civil law, including through judicial review of corporate directors’ actions by independent judges. The OECD and the World Bank, among other international institutions, have taken up the “law

matters” hypothesis in designing model corporate governance codes and placing conditions on financial assistance, potentially shaping corporate governance law around the world. Yet, Hill argues, the hypothesis supposes a degree of similarity in fiduciary law across common law jurisdictions that simply does not exist. For example, Australia, the United Kingdom, and the United States (especially Delaware) differ in how they define which duties are fiduciary, whether and under what circumstances those duties are waivable, and whether and under what circumstances corporate directors enjoy a safe harbor from liability. They further differ in terms of whether private or public enforcement is the primary mechanism for enforcing fiduciary duties. These differences, Hill argues, reflect path dependence and the importance of historical, political, and social factors, including resistance of regulated firms, corporate scandals, and financial crises.

Hill compares traditional common law norms with the more recent development of private norms through corporate governance codes and shareholder stewardship codes that can shape the behavior of fiduciaries. These relatively recent developments could lead to greater international convergence in corporate governance in practice. However, here too Hill stresses the ways in which local norms can produce divergence. First developed in the United Kingdom, corporate governance codes have been transmitted transnationally through vertical and horizontal interactions, ones in which transnational organizations have played an important role. In particular, the OECD’s 1999 *Principles of Corporate Governance*, which relied upon national codes such as the United Kingdom’s, accelerated a trend of horizontal transmission, resulting in a recursive dynamic of transnational ordering that “became increasingly visible” during the global financial crisis from 2007 to 2009. Yet, again, we should not overstate the degree of convergence. Local variation in capital markets can produce some surprises, as in the case of Singapore, whose stewardship code, despite being nearly formally identical to the United Kingdom’s, operates to *strengthen* majority shareholders in state and family-controlled firms, even though the United Kingdom’s code has the aim of strengthening institutional investors.

Thus, like Tamaruya’s study, Hill’s chapter finds that notwithstanding horizontal and vertical transmission of fiduciary concepts and related regulatory norms, concordant normative settlement may not result at the local level in practice. Not only does it matter who writes the rules, but who administers them matters too. As Tamaruya underscores, the normative environment within which the rules are written and administered complicates analysis of convergence across jurisdictions, as form diverges from practice. While in some cases there may be greater convergence in practice than in form in light of transnational activity and transnational ties, in other cases there may be greater convergence in form than in practice in light of local conditions. In each case, the idea of a unitary transnational field of fiduciary law is called into question.

Seth Davis’s “Empire and the Political Economy of Fiduciary Law” also explores the development of fiduciary law over time. His chapter addresses the origins of

modern international law: the colonial encounter between the Spanish and Indigenous Peoples in the Americas. Spanish theologians and jurists, especially Francisco de Vitoria, developed the concept of a colonial guardianship to respond to the transnational problem that colonialism posed. In embryonic form, this was the “sacred trust of civilization” that the League of Nations placed with so-called advanced nations, a development that might plausibly be described as fiduciary law’s first TLO. While legal scholars have typically described this legal order by reference to an idea about sovereignty – the “sacred trust” – Davis shows that fiduciary law played broader ideological and institutional roles in various European empires and the US empire. It included institutions and practices that are characteristic of private fiduciary relations and encompassed not only what we would now classify as public international law, but also private international law, national law, and private legal ordering. Exploring the development of this TLO, Davis explores how it was bound up with a project of giving the modern nation-state a monopoly over sovereignty. While Vitoria used the idea of “trust” to deny the sovereignty of non-Christian, non-European peoples, thinkers like Edmund Burke employed it to deny the sovereignty of companies, such as the East India Company, that in practice were the actual implementers of Europe’s imperial expansion. What we would now think of as practices of “private” fiduciary law – including the use of fiduciary relationships as investment vehicles and the expectation that fiduciaries will give an accounting – were crucial to imperial administration. As Davis describes, peoples in Africa, Asia, North America, and Oceania contested trust in the Empire’s law, and this contestation should be understood as recursively forming part of the TLO itself. Davis’s chapter thus illustrates the role of resistance in TLO theory, identifying ways in which people (or peoples) may shape the very transnational legal ordering that aims to control them. In the process, Davis highlights how fiduciary law can be enmeshed in oppressive histories of transnational legal ordering, even while purporting to create legal constraints on the “guardians.”

The chapters in Part III address questions at the frontiers of transnational fiduciary theory today, including the responsibilities of international standard-setting organizations and transnational corporations. These chapters explore the jurisprudential conceptualization of particular social activity in fiduciary terms beyond fiduciary law’s traditional application. In both cases, they include private lawmaking as law from a fiduciary perspective, finding that it is transnational, if not global, in its scope.

Evan Fox-Decent’s chapter, “Transnational Law’s Legality,” bridges TLO theory and jurisprudential analysis, revealing how a synthesis of socio-legal and conceptual inquiries should inform both approaches. This synthesis builds upon Fox-Decent’s fiduciary theory of public law, including international human rights law, which holds that public authorities occupy an other-regarding office that entails fiduciary duties of loyalty and care. In his account, fiduciary law is a meta-concept that explains what makes TLOs distinctively *legal* even when they are voluntary and

not developed by state actors, such as courts. Thus, Fox-Decent takes issue with claims that the *lex mercatoria*, or transnational law more broadly, is not really law.

In Fox-Decent's study, the International Organization for Standardization (ISO) exemplifies transnational legal ordering. The ISO is a private standard-setting body that develops transnational standards for various products and technologies, from fasteners to agricultural irrigation. No state or international organization has formally delegated lawmaking or law enforcement authority to the ISO. Rather, the organization develops *voluntary* standards in consultation with a wide array of actors, both private and public. These standards may be recognized by international organizations such as the WTO, national administrative bodies and national courts, private conformity assessment bodies (such as United Laboratories), and in private contracts. They thus constitute ordering that shapes market behavior.

Still, the private character of the ISO and the voluntary nature of compliance with its rulemaking presents a conundrum: What, if anything, makes the ISO's standards part of a *legal* order? From a jurisprudential perspective, Fox-Decent argues, it is the ISO's fiduciary mandate to exercise its authority in an other-regarding manner that makes its standards *law*. The ISO's standards can constitute a TLO in a socio-legal sense insofar as private actors believe they are legitimate and conform to them in practice, including through, but not limited to, contracts. From a jurisprudential perspective, Fox-Decent maintains, the ISO has legal authority insofar as it possesses and exercises fiduciary authority – that is, so long as it exercises its discretionary rulemaking powers impartially as among all affected parties. In this sense, the ISO, though a private actor, occupies a public office representing everyone subject to its standards. Recognition of the ISO's norms by states or international organizations reflects the legal character of its public rulemaking. Such orders are legal, in Fox-Decent's jurisprudential terms, when they emerge from representational processes that impartially address matters of common concern for those subject to them. Fox-Decent contends that fiduciary law as a meta-concept supports TLO theory's socio-legal assessment that formally nonbinding, private transnational orders can constitute a TLO.

Shelly Kreiczer-Levy's "The Fiduciary Role of Access Platforms" similarly combines jurisprudential and socio-legal analyses to explore the consequences of framing a social problem in fiduciary terms. In particular, she emphasizes the role that fiduciary norms can play in filling gaps in hard law instruments with respect to the regulation of transnational digital companies. Activists and scholars, particularly within the United States, contend that companies that collect individual data should hold duties as "information fiduciaries." Kreiczer-Levy explores the boundaries of the fiduciary concept by examining companies such as Airbnb, Turo, Eatwith, and Uber, peer-to-peer platforms that connect customers and businesses. She argues that the concept of an information fiduciary cannot address the transnational legal challenges that these platforms represent.

Rather, access platforms are “market-constituting fiduciaries,” a concept that Kreiczer-Levy has developed to theorize the operation and normative obligations of transnational actors such as Uber. As Kreiczer-Levy explains, these companies create a transnational regulatory challenge, one that cannot be addressed by a single city’s or nation-state’s regulatory regime. From a socio-legal perspective, Kreiczer-Levy argues that there is an emerging TLO for regulation of these market-constituting fiduciaries, one that combines self-regulation by the companies themselves with state and local regulation. From a jurisprudential perspective, she maintains, the concept of a market-constituting fiduciary is capacious enough to give content to a TLO transcending state boundaries. Like Fox-Decent, Kreiczer-Levy seeks to bridge socio-legal and normative analysis in exploring the nature of the authority of private actors that pose and respond to a transnational regulatory problem.

1.7 CONCLUDING REMARKS

This book’s case studies support five main findings regarding the transnational legal ordering of fiduciary law. First, transnational legal ordering can give rise to distinct TLOs in particular fields that incorporate fiduciary norms. Most conceptual theorizing and formal study of fiduciary law has focused on fiduciary law within national private law systems. From both conceptual and socio-legal perspectives, scholarship should place fiduciary law within a broader, dynamic transnational context.

Second, fiduciary law is relatively unique in that it includes both a broader meta-concept of fiduciary loyalty in combination with this norm’s application in discrete subject areas of law, involving distinct actors, institutions, and bodies of law. The general conceptualization of fiduciary norms implicates its contextualized applications, raising the question whether the contextualized applications should not also shape the broader conceptualization. The interaction of the meta-concept of fiduciary loyalty with the conceptualization of discrete fiduciary problems applies in both private and public law, as transnational legal ordering theory makes salient.

Third, the TLO theoretical framework is processual, examining the recursive interactions between norm making and practice over time across different levels of social organization in response to different conceptions of problems. The development of a TLO and the drawing of its boundaries is often highly contested. This book shows how fiduciary law norms may emerge both to contest and complement other legal norms, as reflected in the development of new fiduciary concepts, such as “information fiduciaries,” and the role of fiduciary norms as gap-fillers. The relationship between positive law, on the one hand, and soft law, custom, and other social norms, on the other, is critical for understanding the implications of transnational legal ordering. This book’s studies highlight the interaction and tensions between traditional private law governing fiduciaries and new public regulation and

private rulemaking, implicating the boundaries between them and their impacts on practice.

Fourth, the socio-legal study of fiduciary law sharpens conceptual debates about fiduciary law as a “unified field.” By assessing the horizontal and vertical dimensions of transnational legal ordering and the recursive development of legal orders transnationally, the book addresses the limits of scholars’ quests for a unified understanding of fiduciary law. The book moves beyond conceptual analysis and conventional comparative law by incorporating studies of legal practice over time in transnational context within and across discrete domains. Different TLOs may arise in response to particular problems, but they vary considerably in scope and practice.

Fifth, the transnational study of fiduciary law has implications for theorizing transnational legal ordering in two ways. On the one hand, fiduciary law illustrates how transnational legal ordering can develop through horizontal processes involving the entanglement of distinct national legal orders, without the existence of any international or transnational institution. National legal orders encounter similar legal problems. National courts observe, learn from, and at times cite developments in other national systems in developing national law. National law can thus settle and unsettle in common ways through such entanglements, as legislatures and courts incorporate each other’s legal enactments, interpretations, and applications in addressing common problems.

On the other hand, fiduciary law has distinctive qualities in that it involves both a meta-norm and discrete applications. It thus highlights how actors may use meta-fiduciary norms in discrete domains in particular locations. In addition, because fiduciary law is open-ended and incorporates moral norms, it illustrates how formal law interacts with moral and social norms, affecting law’s normative understanding and settlement in practice. Fiduciary law’s explicit reliance upon open-ended, explicitly moral norms provides a particularly interesting case study of the recursive development of, and variations within, transnational legal ordering for TLO theory more broadly.

Fiduciary law is developing dynamically through application to ever-new problems and contexts. We hope that this book opens the door for further study, critique, theorizing, and effective use of fiduciary norms. Whether it be global or local markets, national or local governments, or international or transnational governance, the problems of trust and other-regarding duties will continue. So too will the relative roles of public and private norm making and practice applying fiduciary norms to address them.