The Stripping of the Trust: From Evolutionary Scripts to Distributive Results

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The law of trusts has spent the last twenty years rapidly shedding many traditional requirements, forms, and restrictions which imposed liability on negligent trustees, protected vulnerable beneficiaries, and prevented the use of state trust law to avoid the claims of settlors' creditors, including their spouses, children, and federal and state governments. This Article studies the "stripping of the trust" so as to develop a new paradigm for identifying proposed law reforms likely to reduce social welfare before they are enacted: I show that injurious proposals can be identified according to the legal evolutionary script they followed. I propose an innovative bright-line rule: reforms enacting into law legal and financial service providers' earlier opt-outs from the existing default law, and reforms originating in inter-jurisdictional contests over clients, invested funds, jobs, and tax revenue, should be carefully scrutinized before enactment, with particular attention to their likely distributive results. Such reform proposals tend, more than others, to reduce overall social welfare while benefitting legal and financial service providers and some of their privileged clients.

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I. INTRODUCTION

Recent years have seen traditional fields of law change rapidly. State legislatures have been abolishing and replacing centuries-old rules. The replacements are often designed to serve the interest of legal and financial service providers in attracting clients, or that of states in attracting investment, jobs, and revenue. Their overall distributive consequences often reduce social welfare.

The law of trusts is one field that has changed radically in recent decades. For about twenty years, state legislatures have been eliminating traditional rules of trust law designed to impose liability on negligent trustees,[1] protect vulnerable beneficiaries,[2] and prevent the use of state trust law to avoid the claims of settlors' creditors, including their spouses, children, and federal and state governments.[3] Recent examples abound. Virginia law now includes an "Asset Protection Trust" regime, effective since 2012.[4] Under that regime, a settlor may transfer assets to trustees for the settlor's own benefit, so that the settlor's beneficial interest in the assets is not subject to seizure by many of his or her creditors.[5] The regime transfers wealth from creditors to beneficiaries of asset protection trusts, who will be able to benefit from property unreachable by many of their creditors. Other winners under the new regime are Virginia residents and entities authorized to engage in trust business in Virginia: one or the other must be appointed trustee in order for the settlor to enjoy the benefits of asset protection.[6] Losers include both beneficiaries' creditors and borrowers who are not beneficiaries of such trusts: the latter will bear the increased costs of credit brought about by asset protection beneficiaries' bad debts. Ohio, having recently enacted an Asset Protection Trust regime of its own, effective March 27, 2013,[7] also permits "perpetual trusts," which may last forever.[8] Perpetual trusts owe their popularity to the possibility of transferring assets worth up to the federal wealth transfer tax exemption on trust, where they may appreciate. Such trusts then permit generations of beneficiaries to enjoy the benefit of that appreciation, free of wealth transfer taxes. The tax savings beneficiaries enjoy contribute to the federal deficit, making necessary either the degradation of government services, the imposition of future taxes, or both. Trustees, however, earn perpetual fees.[9] The groups benefitted by such law reforms (those using and those providing such trusts) are relatively small, while the group harmed (everyone else) is much larger. It is almost certain, therefore, that the reforms reduce overall social welfare.

The Virginia and Ohio reforms, and hundreds like them, are already on the statute books. How can such welfare-reducing reforms be blocked before they are enacted? As legislators often have insufficient time to carefully analyze each

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1 *See infra* Part II.E.

2 *See infra* Part II.F.

3 *See infra* Parts II.C–D.

4 *See* VA. CODE ANN. § 64.2-745.1–745.2 (2012).

5 *See id.* § 64.2-745.1.(D)–(E).

6 *See id.* § 64.2-745.2(A) (defining "qualified trustee" and "qualified self-settled spendthrift trust," which must "at all times" contain "at least one qualified trustee" for the Asset Protection regime to apply). See discussion of asset protection trusts *infra* Part II.D, of their evolution *infra* Part III.B.2, and of their distributive results *infra* note 138 and accompanying text.

7 OHIO REV. CODE ANN. § 5816 (West 2013) (entitled "Ohio Legacy Trust Act").

8 *See id.* § 2131.09(B).

9 See discussion of perpetual trusts *infra* Part II.C, of their evolution *infra* Part III.B.1, and of their distributive results *infra* Part IV.A.

proposal's distributive consequences before enactment, a bright-line rule enabling quick and sure identification of welfare-reducing reforms would be of high value. This Article proposes such a bright-line rule: I argue that reforms enacting into law legal and financial service providers' opt-outs from the existing default law, and reforms originating in inter-jurisdictional contests over clients, invested funds, jobs, and tax revenue, should be carefully scrutinized before enactment, with particular attention to their likely distributive results. Such reform proposals tend, more than others, to reduce overall social welfare while benefitting legal and financial service providers and some of their privileged clients.

Nowhere in the existing literature on legal evolution and law reform does one find such a bright-line rule, distinguishing welfare-enhancing from welfare-reducing reforms. Each of two relevant bodies of literature focuses on a single script, or path, of legal evolution, characterizing it as likely to lead to either positive or negative results. One is Professor Richard Posner's "positive theory of the economic analysis of law," holding that legal evolution by way of the accretion of judicial precedent tends to improve the law.[10] Posner argued that judge-made law evolves in an efficient direction as a result of judges either attempting to provide efficient rules, or providing such rules without consciously intending to change the law in an efficiency-enhancing direction.[11] Posner's theory has been a bone of scholarly contention for forty years, with some scholars, including, recently, Judge Posner, arguing that judge-made law is not particularly predictable or efficient.[12] The other relevant body of literature

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[10] *See generally* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (1972).

[11] *See id.* §§ 1.2, 9.8.

[12] *See* Anthony Niblett, Richard A. Posner & Andrei Shleifer, *The Evolution of a Legal Rule*, 39 J. LEGAL STUD. 325, 355 (2010) (concluding that "the hypothesis that, in commercial fields, the common law is predictable and efficient, or at least is moving there, is not supported by our study"). For earlier criticism of Posner's "positive theory" see, for example, George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65, 66–67 (1977) (arguing that while the common law is indeed efficient, it is not because judges attempt to fashion the law so as to maximize efficiency, but because litigants are likelier to sue and refrain from settling in cases where the legal rules governing the dispute are inefficient, so that such rules tend to be litigated and re-litigated until they are brought into better accord with efficiency, while efficient rules would be re-litigated more rarely and thus tend to remain part of the law); Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J. LEGAL STUD. 51, 51 (1977) (same). *But see* Note, *The Inefficient Common Law*, 92 YALE L.J. 862, 883–85 (1983) (arguing that the accumulation of precedent under a common law system will systematically favor inefficient, rather than efficient, legal rules). For scholarship in support of the theory see, for example, Robert C. Clark, *The Interdisciplinary Study of Legal Evolution*, 90 YALE L.J. 1238, 1242–56 (1981) (reviewing six instances of legal evolution in corporate and commercial law and arguing that in each there was a general pattern of evolution toward cost reduction); John F. Duffy, *Inventing Invention: A Case Study of Legal Innovation*, 86 TEX. L. REV. 1, 5 (2007) ("The history of the nonobviousness doctrine shows that in the very long run, considerations of economic efficiency do put pressure on legal actors (not only on judges, but legislators, commentators, attorneys, and other actors in the legal culture) to create, adopt, and justify economically

focuses on jurisdictional contests. Such contests involve jurisdictions changing their law so as to attract businesses and investment from out of state, create demand for local products and services, and gather tax revenue. Jurisdictions pursue these goals by offering rules of law they hope business owners, managers, investors, and clients would find attractive. Legal changes made by one jurisdiction often provoke reactions by others, sometimes snowballing into a state-wide abandonment of traditional rules of law. Many such contests lead to the reduction of regulatory demands, from the duties imposed on corporate management, to employees' rights, to tax rates.[13] While some scholars identify specific jurisdictional contests as having been made for improvement in the law,[14] most studies of such contests characterize them as "races to the bottom,"

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efficient doctrines. However, the relevant time span within which those considerations can operate is very long—on the order of several decades at least."); Thomas J. Miceli, *Legal Change: Selective Litigation, Judicial Bias, and Precedent*, 38 J. LEGAL STUD. 157, 159 (2009) (arguing that "judicial bias does not impede the evolution of the law toward efficiency as long as the fraction of judges biased against efficiency is smaller than the conditional probability that a case being litigated involves an inefficient law"); Giacomo A. M. Ponzetto & Patricio A. Fernandez, *Case Law Versus Statute Law: An Evolutionary Comparison*, 37 J. LEGAL STUD. 379, 381 (2008) (concluding that "case law is a continuous, never-ending process of evolution of legal rules that is characterized by probabilistic convergence toward greater efficiency and predictability, which supports Posner's hypothesis").

[13] *See* Rosanne Altshuler & Harry Grubert, *The Three Parties in the Race to the Bottom: Host Governments, Home Governments and Multinational Companies*, 7 FLA. TAX REV. 153, 154 (2005) (explaining that tax rates affect competition among countries for the capital of multinational companies); William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 677–78 (1974); Stephen F. Diamond, *The "Race to the Bottom" Returns: China's Challenge to the International Labor Movement*, 10 U.C. DAVIS J. INT'L L. & POL'Y 39, 65–68 (2003) (arguing that international organizations have undermined international labor unions by reducing international labor regulations); *see also* Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573, 1603–11 (2000); Daniel R. Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 NW. U. L. REV. 913, 923 (1982); Timothy P. Glynn, *Interjurisdictional Competition in Enforcing Noncompetition Agreements: Regulatory Risk Management and the Race to the Bottom*, 65 WASH. & LEE L. REV. 1381, 1382 (2008); Christopher Paul, *Innovation or a Race to the Bottom? Trust "Modernization" in New Hampshire*, 7 PIERCE L. REV. 353, 354 (2009); Peter P. Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, 14 YALE L. & POL'Y REV. 67, 68 (1996).

[14] Studies identifying such "races to the top" include, for example, ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 14–24 (1993); Jonathan H. Adler, *Interstate Competition and the Race to the Top*, 35 HARV. J.L. & PUB. POL'Y 89, 89–92 (2012); David S. Law, *Globalization and the Future of Constitutional Rights*, 102 NW. U. L. REV. 1277, 1308–13 (2008); Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 254–57 (1977) (offering counterarguments to the commonly accepted theory that Delaware corporate law is leading a "race to the bottom"). Tiebout's classic article, arguing that competition among municipalities could generate efficient provision of public goods, could also be seen as identifying a "race to the top."

leading to suboptimal legal equilibria.[15] Stewart Sterk's conclusion, formed in a trusts context, is characteristic:

> Jurisdictional competition is likely to lead a number of jurisdictions to adopt trust law rules that those jurisdictions would not otherwise adopt—rules that, historically, those jurisdictions have long rejected. Those rules may undermine the policy of the enacting state without generating any compensating efficiency advantages and are likely to undermine other states' policies without generating compensating benefits.[16]

Other literature describes some of the recent dramatic developments in the trusts field. Each of the leading authors in the field—Professors John Langbein,[17] Robert Sitkoff and Max Schanzenbach,[18] Stewart Sterk,[19] and

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Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418–20 (1956).

[15] *See* sources cited *supra* note 13; *see also* Tomer Broude & Doron Teichman, *Outsourcing and Insourcing Crime: The Political Economy of Globalized Criminal Activity*, 62 VAND. L. REV. 795, 828 n.134 (2009); Doron Teichman, *The Market for Criminal Justice: Federalism, Crime Control, and Jurisdictional Competition*, 103 MICH. L. REV. 1831, 1833 nn.10–16, 1858 n.147 (2005). For additional studies of jurisdictional competition see, for example, ERIN A. O'HARA & LARRY E. RIBSTEIN, THE LAW MARKET 65–84 (2009); Lucian Arye Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 YALE L.J. 553, 554 (2002); William W. Bratton & Joseph A. McCahery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World*, 86 GEO. L.J. 201, 243–64 (1997); Dennis Epple & Allan Zelenitz, *The Implications of Competition Among Jurisdictions: Does Tiebout Need Politics?*, 89 J. POL. ECON. 1197, 1198, 1200 (1981); Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 684 (2002); Daniel Klerman, *Jurisdictional Competition and the Evolution of the Common Law*, 74 U. CHI. L. REV. 1179, 1179 (2007); Larry E. Ribstein & Erin Ann O'Hara, *Corporations and the Market for Law*, 2008 U. ILL. L. REV. 661, 662; Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 590 (2003); Mark J. Roe, *Delaware's Shrinking Half-Life*, 62 STAN. L. REV. 125, 126 (2009).

[16] *See* Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035, 1074 (2000).

[17] *See generally* John H. Langbein, *Burn the Rembrandt? Trust Law's Limits on the Settlor's Power To Direct Investments*, 90 B.U. L. REV. 375 (2010) [hereinafter Langbein, *Burn the Rembrandt*]; John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105 (2004) [hereinafter Langbein, *Mandatory Rules*]; John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE L.J. 929 (2005) [hereinafter Langbein, *Duty of Loyalty*]; John H. Langbein, *Reversing the Nondelegation Rule of Trust-Investment Law*, 59 MO. L. REV. 105 (1994) [hereinafter Langbein, *Nondelegation Rule*]; John H. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing*, 81 IOWA L. REV. 641 (1996) [hereinafter Langbein, *Uniform Prudent Investor Act*]; John H. Langbein & Richard A. Posner, *Market Funds and Trust-Investment Law*, 1976 AM. B. FOUND. RES. J. 1.

[18] *See generally* Max M. Schanzenbach & Robert H. Sitkoff, *Did Reform of Prudent Trust Investment Laws Change Trust Portfolio Allocation?*, 50 J.L. & ECON. 681 (2007) [hereinafter Schanzenbach & Sitkoff, *Reform*]; Max M. Schanzenbach & Robert H. Sitkoff,

Melanie Leslie[20]—has written on one or more specific recent instances of trust law reform. Sitkoff, Schanzenbach and Sterk showed how jurisdictional contests brought about the rise of perpetual trusts and asset protection trusts.[21] This Article innovates in aggregating no less than eight recent instances of trust law reform, analyzing the evolutionary script followed by each and the distributive consequences of each.[22] My analysis yields a correlation between the consequences of each reform for trust service providers, their clients ("trust users"), and the rest of society ("trust non-users" or "trust non-parties") and the evolutionary script followed by that reform, leading to the Article's normative conclusions: two evolutionary scripts, the enactment into law of positions that service providers earlier adopted by opting out of the then default law and jurisdictional contests, are likelier than others to lead to welfare-reducing reforms. Legislators should therefore examine reform proposals that followed either of these two scripts with care, paying special attention to their distributive consequences. I found that reforms originating in service providers' opt-outs from the earlier law tended to transfer wealth from clients to service providers, while reforms originating in jurisdictional contests tended to transfer wealth from non-parties to both service providers and their clients. Regarding

Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust, 27 CARDOZO L. REV. 2465 (2006); Robert H. Sitkoff & Max Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356 (2005) [hereinafter Sitkoff & Schanzenbach, *Jurisdictional Competition*].

[19] *See generally* Sterk, *supra* note 16; Stewart E. Sterk, *Jurisdictional Competition To Abolish the Rule Against Perpetuities: R.I.P. for the R.A.P.*, 24 CARDOZO L. REV. 2097 (2003) [hereinafter Sterk, *Jurisdictional Competition*]; Stewart E. Sterk, *Rethinking Trust Law Reform: How Prudent Is Modern Prudent Investor Doctrine?*, 95 CORNELL L. REV. 851 (2010) [hereinafter Sterk, *Rethinking*].

[20] *See generally* Melanie B. Leslie, *Common Law, Common Sense: Fiduciary Standards and Trustee Identity*, 27 CARDOZO L. REV. 2713 (2006) [hereinafter Leslie, *Common Law*]; Melanie B. Leslie, *In Defense of the No Further Inquiry Rule: A Response to Professor John Langbein*, 47 WM. & MARY L. REV. 541 (2005) [hereinafter Leslie, *Response to Langbein*]; Melanie B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 GEO. L.J. 67 (2005) [hereinafter Leslie, *Trusting Trustees*].

[21] *See* Sitkoff & Schanzenbach, *Jurisdictional Competition*, *supra* note 18, at 359 (discussing the jurisdictional contests that led to the enactment of perpetual trust and asset protection trust regimes, to 2003); Sterk, *supra* note 16, at 1037–39 (discussing the jurisdictional contest that led to the enactment of asset protection trust regimes, to 2000).

[22] My review of the recent transformation of the trust is far from complete. To keep the proportions of this Article reasonable, I addressed eight reforms *abolishing* traditional trust law rules, while omitting some of the new features *introduced* into trust practice. I do not address, for example, the introduction of settlor-retained powers (for which see Terence Tan Zhong Wei, *The Irreducible Core Content of Modern Trust Law*, 15 TR. & TRUSTEES 477, 491–93 (2009)) or of the "equitable deviation" doctrine (for which see Lee-ford Tritt, *The Limitations of an Economic Agency Cost Theory of Trust Law*, 32 CARDOZO L. REV. 2579, 2627–29 (2011)). I intend to discuss these innovations—the "clothing of the trust"—in future work.

jurisdictional contests, I affirm the majority view, holding that they tend to be "races to the bottom," leading to suboptimal legal equilibria.

This is also the first Article to expand the conversation regarding the recent wave of trust reforms beyond purely domestic reforms. Trusts have become a field of law where Americans often use both foreign service providers and regimes offered by foreign legal systems. Domestic trust reforms often emerge as responses to reforms undertaken abroad: domestic asset protection trust regimes, for example, were enacted in response to the enactment of similar regimes by offshore legal systems.[23] Domestic trust reforms thus cannot be understood absent at least some discussion of trust reforms abroad, and I have attempted to integrate such discussion into this Article. This expanded ambit makes possible a discussion of some recent trust reforms adopted internationally which uproot fundamental trust law principles, such as the trend favoring the adoption of trust regimes not involving equity.[24] I show that the distributive consequences of such reforms are less harmful than those of reforms adopted domestically, and that this difference is a result of the different evolutionary scripts followed by each type of reform.

The Article unfolds as follows. In Part II, I describe eight aspects of "the stripping of the trust": the current transformation of the law of trusts whereby requirements, forms, and restrictions which were features of traditional trust law are gradually eliminated. The reforms described are the 1990s reform of trust investment law according to the lessons of Modern Portfolio Theory, abolishing the earlier idea that some asset classes do not belong in a trust portfolio; the concurrent reform of the rules governing the delegation of trustees' powers, abolishing the traditional restrictions on such delegation; the rolling abolition of the traditional rule against perpetuities, permitting perpetual trusts; the abolition of the rule prohibiting asset protection trusts; the rise of "trusts without equity," trust regimes lacking the traditional law/equity duality, abolishing the traditional idea that beneficiaries have rights in the trust assets; the abolition of the traditional requirement that the trustee own the trust assets; the transformation of much of the traditional law imposing extensive duties and liabilities on trustees into default law; and the progressive curtailment of beneficiaries' rights against their trustees. In Part III, I explain how each reform described in Part II developed, emphasizing the evolutionary script followed by each. In Part IV, I analyze the consequences of each reform, identifying the impact of each on the various parties to trust relationships and on persons unlikely to be parties to a trust. In Part V, I establish a correlation between the evolutionary script followed and the distributive result obtained in each case, and identify the normative implications of this correlation: that proposed reforms originating in service providers' opt-outs of earlier law or jurisdictional contests should be carefully scrutinized prior to enactment, as they are likely to

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[23] *See infra* text accompanying note 68.

[24] *See infra* Part II.G.

have welfare-reducing distributive results. The Conclusion sums up my argument.

II. THE STRIPPING PROCESS

Anglo-American law has long employed a fairly consistent understanding of the trust. According to this understanding, a trust is an equitable obligation imposed on the owner of an asset to hold it in a fiduciary capacity, using it for the benefit of another or a permitted purpose, the asset being immune from the owner's personal creditors and the beneficiary enjoying both rights in the asset and personal rights against the trustee.[25] Absent express provision to the contrary, the fiduciary is not subject to either the trust creator's or the beneficiaries' instructions concerning its exercise of its powers and discretions.[26] Recent decades, however, have seen the trust concept undergo a rapid process of increasing variation: feature after feature of the traditional trust concept has been changed, eliminated or made a mere default term.[27] State after state has modified aspects of the traditional model or made what were mandatory requirements into default rules. This Part offers short descriptions of eight aspects of the stripping process, consisting of the curtailment of requirements, forms, and restrictions which were features of the traditional trust model.[28]

A. *The Reform of Trust Investment Law: From Prudent Man to Prudent Investor*

Until the 1990s, the law governing trustees' investment of trust property was centered, in the United States, on the Prudent Man Rule, under which trustees were required to "observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested,"[29] and invest funds

[25] I rely, principally, on a recent English treatise, GERAINT THOMAS & ALASTAIR HUDSON, THE LAW OF TRUSTS 11–12 (2d ed. 2010). The statement that trustees own the trust property is taken from DAVID HAYTON, PAUL MATTHEWS & CHARLES MITCHELL, UNDERHILL AND HAYTON: LAW OF TRUSTS AND TRUSTEES 3 (18th ed. 2010). Martin emphasizes, alternatively, that "property is vested in (a person or) persons called the trustees." JILL E. MARTIN, HANBURY AND MARTIN MODERN EQUITY 47–48 (16th ed. 2001).

[26] *See, e.g.*, DONOVAN W. M. WATERS, THE INSTITUTION OF THE TRUST IN CIVIL AND COMMON LAW 428, 434–35 (1995).

[27] Dagan noticed "the recent trend in property law . . . away from mandatory rules and toward default rules." HANOCH DAGAN, PROPERTY: VALUES AND INSTITUTIONS 34 (2011). For earlier waves of trust law reform see John H. Langbein, *Why Did Trust Law Become Statute Law in the United States?*, 58 ALA. L. REV. 1069, 1070–78 (2007).

[28] Despite aggregating more aspects of the process than discussions elsewhere in the literature, my description is still, of necessity, selective. *See supra* note 22.

[29] Harvard Coll. v. Amory, 26 Mass. (9 Pick.) 446, 461 (1830).

under their administration similarly. The Prudent Man Rule was adopted by most states in enacting the Model Prudent Man Investment Act, a 1940 model statute sponsored by the American Bankers Association. While the Prudent Man Rule and its statutory guises permitted trustee investment in equities generally, it barred "speculative" investment by trustees, including investment in "speculative" equities, defined to include stock in any company other than one "with regular earnings and paying regular dividends which may reasonably be expected to continue."[30] The Rule encouraged trustees to invest in both government and corporate bonds, seen as prima facie proper trust investments.[31]

The Prudent Man Rule's pro-bond bias produced suboptimal results during the post-World War II decades, which were characterized by stock rallies and rising inflation. Once it was clear that conservative investment could lose money, many felt a need for reform of trust investment law.[32] As John Langbein put it in 1996, "[w]e now know that, in inflation-adjusted terms, the long-term real rate of return on equities has greatly exceeded bonds."[33] Concurrently, Modern Portfolio Theory, which has steadily gained in popularity through the second half of the twentieth century, taught that industry-specific risk and firm-specific risk could be greatly reduced through diversification, and that "the risk intrinsic to any marketable security is presumptively already discounted into the current price of the security."[34]

These lessons of 1970s inflation and Modern Portfolio Theory, first applied in a regulation interpreting the prudence standard in the Employee Retirement Income Security Act of 1974 (ERISA),[35] were applied to trust investment law generally in the Restatement (Third) of Trusts: Prudent Investor Rule (1992),

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[30] RESTATEMENT (SECOND) OF TRUSTS § 227 cmts. f, m (1959); *see* Mayo Adams Shattuck, *The Development of the Prudent Man Rule for Fiduciary Investment in the United States in the Twentieth Century*, 12 OHIO ST. L.J. 491, 501–03 (1951); Langbein & Posner, *supra* note 17, at 5; Schanzenbach & Sitkoff, *Reform*, *supra* note 18, at 683–86 (describing the adoption of the Prudent Man Rule and reforms that eventually led to its current form). For the earlier history of U.S. trust investment law, see Lawrence M. Friedman, *The Dynastic Trust*, 73 YALE L.J. 547, 551–72 (1964).

[31] *See* RESTATEMENT (SECOND) OF TRUSTS § 227 cmt. f (1959).

[32] *See* Sterk, *Rethinking*, *supra* note 19, at 867–79, 881 (outlining the challenges with trust investment generally and noting that even government bonds carry some risk).

[33] Langbein, *Uniform Prudent Investor Act*, *supra* note 17, at 645.

[34] *Id.* at 647–49.

[35] *See* 29 C.F.R. § 2550.404a-1(b)(1)(i) (2010) (interpreting Employee Retirement Income Security Act of 1974, § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B)). The official commentary to the regulation explains,

> generally, the relative riskiness of a specific investment or investment course of action does not render such investment or investment course of action either *per se* prudent or *per se* imprudent, and . . . the prudence of an investment decision should not be judged without regard to the role that the proposed investment or investment course of action plays within the overall plan portfolio.

Rules and Regulations for Fiduciary Responsibility; Investment of Plan Assets Under the "Prudence" Rule, 44 Fed. Reg. 37,221, 37,222 (June 26, 1979).

the first installment of the Restatement (Third) of Trusts, completed in 2012 (Restatement (Third)), and the Uniform Prudent Investor Act of 1994 (UPIA). While the prudence of diversification has long been a part of trustees' duty of prudence, "[t]he 1992 revision of the Restatement of Trusts integrated the duty to diversify into the very definition of prudent investing."[36] The UPIA demands that the "trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying."[37] Further, no longer were any investments prima facie "proper" or "speculative." Any investment could now be either proper or improper, depending on the characteristics of the trust in which it was held, such as the trust's liquidity requirements, often dictated by the needs of its beneficiaries. The Restatement (Third) states that the Prudent Investor Rule "is to be applied to investments not in isolation but in the context of the trust portfolio and as a part of an overall investment strategy."[38] The UPIA provides "that the 'trustee's investment and management decisions' are required to 'hav[e] risk and return objectives reasonably suited to the trust.'"[39] "Nearly all states" have adopted the reformed Prudent Investor Rule by legislation.[40]

B. *The Liberalization of Trustee Delegation*

Under traditional trust law, trustees were "under a duty to the beneficiary not to delegate to others the doing of acts which the trustee can reasonably be required personally to perform."[41] The courts distinguished between ministerial functions, which could be delegated, and discretionary functions, which could not.[42] As some discretionary functions, notably the investment of trust funds, have become increasingly complex during the twentieth century, opt-outs from the non-delegation rule became common in trust instruments. Trustees of trusts not including an opt-out developed a practice of de facto delegation, with investment advisors recommending courses of action and trustees independently, yet consistently, deciding to adopt them.[43] The new reality of frequent delegation of discretionary functions raised additional legal issues:

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[36] Langbein, *Uniform Prudent Investor Act*, *supra* note 17, at 646.

[37] UNIF. PRUDENT INVESTOR ACT § 3, 7B U.L.A. 16 (Supp. 1995); *see* Langbein, *Uniform Prudent Investor Act*, *supra* note 17, at 646.

[38] *See* RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE § 227(a) (1992) (now at RESTATEMENT (THIRD) OF TRUSTS § 90(a) (2007)); *see also* Langbein, *Uniform Prudent Investor Act*, *supra* note 17, at 647 n.46.

[39] *See* Langbein, *Uniform Prudent Investor Act*, *supra* note 17, at 650 (quoting UNIF. PRUDENT INVESTOR ACT § 2(b)).

[40] *See* RESTATEMENT (THIRD) OF TRUSTS § 90 (2007).

[41] *See* RESTATEMENT (FIRST) OF TRUSTS § 171 (1935); RESTATEMENT (SECOND) OF TRUSTS § 171 (1959).

[42] *See* Langbein, *Uniform Prudent Investor Act*, *supra* note 17, at 651.

[43] *See id.*

trustees feared that even purchasing mutual funds for the trust might be construed as (forbidden) "double dipping," as both trustees and fund managers were being paid for investment services.[44] The increasing inconvenience of the non-delegation rule led to the states' enactment of legislation reversing it: first legislation modeled on the Uniform Trustees' Powers Act, which included a clause permitting trustees "to employ one or more agents to perform any act of administration, whether or not discretionary,"[45] and later legislation modeled on the Uniform Probate Code (UPC), which included a similar provision,[46] the Uniform Management of Institutional Funds Act, which "authorize[d] the governing boards of eleemosynary institutions, who are trustee-like fiduciaries, to delegate investment matters,"[47] and ERISA, which "allows a pension or employee benefit plan to provide that 'authority to manage, acquire or dispose of assets of the plan is delegated to one or more investment managers.'"[48]

The progressive liberalization of trustee delegation continued in the Restatement (Third) of Trusts: Prudent Investor Rule, which provided that:

> [a] trustee has a duty personally to perform the responsibilities of the trusteeship except as a prudent person might delegate those responsibilities to others. In deciding whether, to whom and in what manner to delegate fiduciary authority in the administration of a trust, and thereafter in supervising agents, the trustee is under a duty to the beneficiaries to exercise fiduciary discretion and to act as a prudent person would act in similar circumstances.[49]

The UPIA provides similarly, and "imposes duties of care, skill, and caution on trustees in selecting agents, in formulating the terms of the delegation, and in reviewing 'the agent's performance and compliance with the terms of the

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[44] *See* Sterk, *Rethinking*, *supra* note 19, at 898.

[45] *See* UNIF. TRS.' POWERS ACT § 3(24), 7B U.L.A. 748 (1985). The Act has been adopted by sixteen states. *See* Langbein, *Nondelegation Rule*, *supra* note 17, at 111 & n.27.

[46] *See* UNIF. PROBATE CODE § 3-715(21) (amended 2010), 8 U.L.A. 170 (1998); Langbein, *Nondelegation Rule*, *supra* note 17, at 111 n.27.

[47] Langbein, *Nondelegation Rule*, *supra* note 17, at 111 (quoting UNIF. MGMT. OF INST. FUNDS ACT § 5, 8 U.L.A. 170 (1998)). The Act has been adopted by thirty-four states and the District of Columbia. *Id.* at 112.

[48] Langbein, *Nondelegation Rule*, *supra* note 17, at 112–13 (quoting ERISA § 403(a)(2), 29 U.S.C. § 1103(a)(2) (2012)).

[49] RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE § 171 (1992). In the full *Restatement (Third)*, the section has been renumbered Section 80, and somewhat rephrased:

> (1) A trustee has a duty to perform the responsibilities of the trusteeship personally, except as a prudent person of comparable skill might delegate those responsibilities to others. (2) In deciding whether, to whom, and in what manner to delegate fiduciary authority in the administration of a trust, and thereafter in supervising or monitoring agents, the trustee has a duty to exercise fiduciary discretion and to act as a prudent person of comparable skill would act in similar circumstances.

Id. § 80.

delegation.'"[50] A Restatement (Third) comment provides that trustees may even sometimes have a duty to delegate their investment functions.[51] Under both the Restatement (Third) and the UPIA, trustees who comply with these duties are thereby rendered not liable where despite their compliance, the delegate's actions or omissions cause loss to the trust.[52] Aggrieved beneficiaries "must look exclusively to the agent."[53]

C. *The Fall of the Rule Against Perpetuities*

Under the rule against perpetuities, a part of the traditional common law,[54] "a contingent future interest must vest, if at all, within twenty-one years after the expiration of some life in being when the interest was created."[55] By 2012, twenty-nine states and the District of Columbia had either abolished the Rule or extended their perpetuity periods to several hundred years.[56]

> The driving force behind the erosion of the Rule was not a careful reconsideration of the ancient common law policy against perpetuities, but rather a 1986 reform to the federal tax code. Under the 1986 Code [as amended to 2013, a transferor can pass $5 million, either during life or at death[57]], free from federal wealth transfer taxes. By passing this [exempted amount] in trust, a transferor can ensure that successive generations benefit from the trust fund [and any appreciation], free from federal wealth transfer taxes, for as long as state perpetuities law will allow the trust to endure.[58]

The 1986 tax code thus made the rule against perpetuities into "a highly salient margin of differentiation"[59] between the states, and soon enough, state banking and lawyer associations were pressuring state legislatures to abolish the

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[50] Langbein, *Uniform Prudent Investor Act*, *supra* note 17, at 652–53 (quoting UNIF. PRUDENT INVESTOR ACT § 9(a)(3) (1994)).

[51] *See* RESTATEMENT (THIRD) OF TRUSTS § 90 cmt. j (2007).

[52] *Id.* § 80 cmt. g; UNIF. PRUDENT INVESTOR ACT § 9(c) (1994).

[53] Langbein, *Uniform Prudent Investor Act*, *supra* note 17, at 653.

[54] The rule was settled gradually, in a long series of English cases. The most frequently cited are: The Duke of Norfolk's Case, [1682] 22 Eng. Rep. 931 (Ch.) 949; Cadell v. Palmer, [1832–1833] 6 Eng. Rep. 956 (H.L.) 961 (appeal taken from Ch.).

[55] Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303, 1304 (2003). For early attempts at economic analysis of the rule see Jonathan R. Macey, *Private Trusts for the Provision of Private Goods*, 37 EMORY L.J. 295, 306–10 (1988); A. I. Ogus, *The Trust as Governance Structure*, 36 U. TORONTO L.J. 186, 214–17 (1986).

[56] *See Dynasty Trust States*, L. OFF. OSHINS & ASSOCIATES LLC, http://www.oshins.com/dynastytruststates.html (last visited July 22, 2013).

[57] *See* I.R.C. § 2010(c)(3)(A) (LexisNexis 2013).

[58] Sitkoff & Schanzenbach, *Jurisdictional Competition*, *supra* note 18, at 359.

[59] *Id.* at 374.

rule, so as to sustain the state's attractiveness as a site of trust management.[60] Lawyers' anxiety to have the rule abolished was further founded on the traditional rule's quirky complexity, a potential source of lawyer liability for professional malpractice.[61] Once Delaware abolished its rule in 1995, abolition spread quickly among the states.[62] The choice of state A's trust law as governing law of a trust settled by a resident of state B benefits trust service providers in state A because to make the choice of that state's perpetuity-friendly law stick, the settlor is likely to appoint a resident of state A as trustee and transfer at least some of the trust funds to a financial institution in that state.[63] Appointment as trustee and deposits of trust funds both generate fees for the service providers involved.[64]

D. *The Rise of Self-settled Asset Protection Trusts*

While U.S. trust law has, since the late nineteenth century, permitted spendthrift trusts,[65] beneficiaries' entitlements under which cannot be reached by their creditors, it has not, until recently, permitted settlors to shield their assets from their own creditors by placing them in spendthrift trusts for their own benefit.[66] Nor does the traditional law regard the granting of discretion to trustees as to the amounts distributed to a settlor who is also a beneficiary of the same trust as barring that settlor's creditors from access to trust monies: "[e]ven if the trust is discretionary, spendthrift, or both, the settlor's creditors can reach the maximum amount that the trustee can pay the settlor or apply for the settlor's benefit."[67] Looking to draw foreign clients to their local trust service providers, offshore jurisdictions started offering self-settled spendthrift trusts, often called "asset protection trusts," during the 1980s, their legislation providing that funds transferred on trust shall not be accessible by the settlor–beneficiary's creditors.[68] U.S. states started reversing the rule against self-

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[60] *See id.* at 374 n.57 and sources cited (noting, for example, that the New Jersey legislation abolishing the rule against perpetuities was "sponsored by the New Jersey Bankers Association . . . so that New Jersey trust institutions could avoid losing potential dynasty trust business and other types of trust business to Delaware, South Dakota, and Alaska" (internal quotation marks omitted)); *see also* Stephen Clowney, *Property in Law: Government Rights in Legal Innovations*, 72 OHIO ST. L.J. 1, 10–12 (2011).

[61] *See* Sterk, *Jurisdictional Competition*, *supra* note 19, at 2100–01.

[62] *See* Sitkoff & Schanzenbach, *Jurisdictional Competition*, *supra* note 18, at 376.

[63] *See id.* at 374.

[64] *See id.*

[65] For the different trajectories of English and U.S. law on this regard, see Joshua Getzler, *Transplantation and Mutation in Anglo-American Trust Law*, 10 THEORETICAL INQUIRIES LAW 355, 358–61 (2009).

[66] *See id.* at 360.

[67] Sitkoff & Schanzenbach, *Jurisdictional Competition*, *supra* note 18, at 380.

[68] *See* Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 32–38 (1996) (contains a fine explanation of how such a trust judgment-proofs); Sterk, *supra* note 16, at

settled spendthrift trusts in 1997.[69] Alaska and Delaware were the first of (so far) fourteen states to enact Domestic Asset Protection Trust (DAPT) statutes, again targeting mainly out-of-state settlors.[70] The political economy mechanism behind these legislative adjustments is similar to that behind abolition of the rule against perpetuities: choice of a state's law to govern a trust generates income to trust service providers resident in that state.[71]

E. *Curtailment of Trustees' Duties and Liabilities*

Trustees' duties under traditional law, which many scholars believe to be indispensable,[72] have, in fact, long been stripped away by trust service providers. Such providers have since, at the latest, the mid-eighteenth century been drafting trust instruments so as to exempt themselves from parts of the heavy burden of liability imposed on them by the default law.[73] The last thirty years have seen a further erosion in the extent of liability trustees must bear, as onshore and offshore jurisdictions have raced to reduce that extent so as to attract trustees to the trust regimes they offer. Many U.S. states have limited trustees' personal contractual liability to trust creditors to cases where trustees' fiduciary capacity was not disclosed,[74] and their personal liability for torts

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1047–51. On offshore jurisdictions' impact on the world economy see NICHOLAS SHAXSON, TREASURE ISLANDS 63–148, 193–220 (2011).

[69] *See* John K. Eason, *Home from the Islands: Domestic Asset Protection Trust Alternatives Impact Traditional Estate and Gift Tax Planning Considerations*, 52 FLA. L. REV. 41, 47–51 (2000); Sitkoff & Schanzenbach, *Jurisdictional Competition*, *supra* note 18, at 380–82; Sterk, *supra* note 16, at 1051–55.

[70] *See* AM. COLL. OF TRUST & ESTATE COUNSEL, ACTEC COMPARISON OF THE DOMESTIC ASSET PROTECTION TRUST STATUTES (David G. Shaftel ed., 2012), *available at* http://www.actec.org/public/documents/studies/shaftel_dapt_chart_06_30_2012.pdf; Kenneth J. Laino, *Ohio Enacts Domestic Asset Protection Statute*, ASSET PROTECTION L.J. (Jan. 3, 2013), http://www.assetprotectionlawjournal.com/2013/01/articles/domestic-asset-protection-trus/ohio-enacts-domestic-asset-protection-trust-statute. For the development of DAPTs, see John K. Eason, *Policy, Logic, and Persuasion in the Evolving Realm of Trust Asset Protection*, 27 CARDOZO L. REV. 2621, 2654–62, 2667–77 (2006); Adam J. Hirsch, *Fear Not the Asset Protection Trust*, 27 CARDOZO L. REV. 2685, 2697 (2006).

[71] *See* Sitkoff & Schanzenbach, *Jurisdictional Competition*, *supra* note 18, at 383.

[72] *See, e.g.*, Edward Rock & Michael Wachter, *Dangerous Liaisons: Corporate Law, Trust Law, and Interdoctrinal Legal Transplants*, 96 NW. U. L. REV. 651, 661–63 (2002) (contrasting trust law, supposedly characterized by a strict application of such duties, with corporate law, which imposes weaker standards and does not seriously enforce them). *Compare* Luc Thévenoz, *Trusts: The Rise of a Global Legal Concept*, *in* EUROPEAN PRIVATE LAW: A HANDBOOK 22, 22–23 (Mauro Bussani & Franz Werro eds., 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1723236, *with id.* at 22 (comparing his acceptance that "the vesting of legal title with the trustee is inconsequential").

[73] *See* CHANTAL STEBBINGS, THE PRIVATE TRUSTEE IN VICTORIAN ENGLAND 123–25 (2002); Peter Luxton, *Trustee Exclusion Clauses: Lost in the Heather?*, *in* 1 MODERN STUDIES IN PROPERTY LAW 59, 59–75 (Elizabeth Cooke ed., 2001).

[74] The British Virgin Islands have since 2003 provided a similar regime as an option. BVI Trustee Act, 1961 § 97(3) (amended 2003) (Virgin Is.).

committed in the course of administering a trust and obligations arising from ownership or control of trust property to cases where trustees were personally at fault.[75] In other cases, trust creditors' sole recourse is against the trust fund.[76] Many offshore jurisdictions have similarly restricted trustees' personal liability to trust creditors.[77]

As for "exculpatory terms," exempting trustees from liability to beneficiaries for infringing actions and omissions, different jurisdictions allow them to different extents. Most U.S. states, as well as England, the Bahamas and the Cayman Islands, permit the exclusion of all trustee liability to beneficiaries except liability for fraudulent actions and those taken in bad faith, dishonestly, or out of a reckless indifference to the impact of trustee actions on beneficiaries' interests.[78] California, as well as Canada, Scotland, Jersey, Guernsey, Malta,

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[75] See UNIF. TRUST CODE § 1010 (a)–(b), 7C U.L.A. 657–58 (2006), the substance of which has been enacted, as of 2012, in twenty-seven states and the District of Columbia; see references to each state statute in the RESTATEMENT (THIRD) OF TRUSTS § 105 reporter's notes cmt. c (2012). The UPC, having been substantially adopted by nineteen states, provides similarly in Section 7-306, adding a requirement that for trustees to be personally liable "on contracts properly entered into in [their] fiduciary capacity," they must fail to identify the liable trust estate in the contract. UNIF. PROBATE CODE § 7-306, 8 U.L.A. 483–84 (1997); *see also* 4 MARK L. ASCHER, AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, SCOTT AND ASCHER ON TRUSTS § 26 (5th ed. 2010) [hereinafter SCOTT ON TRUSTS]; 14 AMY MORRIS HESS, GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES §§ 712–16, 732, 735 (3d ed. 2009); Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434, 459–61 (1998).

[76] *See* UNIF. TRUST CODE § 1010(c), 7C U.L.A. 657–58 (2006); UNIF. PROBATE CODE § 7-306(c), 8 U.L.A. 484 (2010); RESTATEMENT (THIRD) OF TRUSTS §§ 105–106. For the traditional law, limiting trust creditors' recourse to the trust fund to an indirect approach by way of subrogation into the trustee's right to indemnity from that fund, see Kalev J. Crossland, *Unsecured Creditors and the "Uncorporation": Issues with Trading Trusts Post Global Financial Crisis*, 17 TR. & TRUSTEES 185, 194–98 (2011); Paul Heath, *Bringing Trading Trusts into the Company Line*, 16 TR. & TRUSTEES 690, 692–99 (2010). Under that law, in order to limit their liability to the trust fund, trustees must expressly contract "as trustee and not otherwise." Crossland, *supra*, at 190.

[77] *See* PAOLO PANICO, INTERNATIONAL TRUST LAWS 253–61 (2010). See, for example, Jersey, where third parties knowing that the trustee is acting as such have recourse against the trust property alone, unless the trustee acted in breach of trust. Trusts Law, 1984, art. 32 (Jersey) (discussed in Bruce Lincoln & Andrew Bridgeford, *Trustees' Liability to Third Parties: Jersey v England*, 17 TR. & TRUSTEES 930, 930–36 (2011)).

[78] In the United States, Uniform Trust Code Section 1008, adopted in twenty-seven states, *see supra* note 75, provides that exculpatory terms are unenforceable to the extent that they relieve trustees "of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries." UNIF. TRUST CODE § 1008, U.L.A. 654–55 (1998). It is further provided that in case a trustee drafted the exculpatory term, or caused it to be drafted, the trustee must prove in court that the term is "fair under the circumstances and that its existence and contents were adequately communicated to the settlor," otherwise the term is held "invalid as an abuse of a fiduciary or confidential relationship" and is unenforceable. *Id.*; *see* Langbein, *Mandatory Rules*, *supra* note 17, at 1123–25 (discussion); Leslie, *Common Law*, *supra* note 20, at 2742–52;

Mauritius, and the Dubai International Financial Center hold liability for gross negligence, too, to be inexcludable,[79] while Bermuda, the Turks and Caicos Islands, and, last but not least, New York, safeguard even liability for plain negligence from exclusion (the latter, as regards executors and testamentary trustees).[80]

Settlors of "trading" trusts, constituted as succession vehicles for family-controlled businesses, often want their trustees to refrain from intervening in, or

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Leslie, *Trusting Trustees*, *supra* note 20, at 85–88, 96–119 (noting that the Uniform Trust Code followed the lead of many state legislatures in authorizing exculpatory clauses). The RESTATEMENT (THIRD) OF TRUSTS § 96(1) (2012) uses similar language, adding that provisions purporting to relieve trustees of accountability for profits derived from a breach of trust are unenforceable. Some U.S. courts seem to be more restrictive in construing specific exculpatory terms than the statutory provisions cited appear to require. *See* Leslie, *Trusting Trustees*, *supra* note 20, at 74 n.42 (citing cases); *see also* SCOTT ON TRUSTS, *supra* note 75, §§ 24.27–27.3; HESS, BOGERT & BOGERT, *supra* note 75, § 542. For English law, see Armitage v. Nurse, [1998] Ch. 241 at 251–56 (Eng.), followed by the majority of the Privy Council panel to hear Spread Tr. Co. Ltd. v. Hutcheson, [2011] UKPC 13, [2012] 2 A.C. 194, [57], [108] (appeal taken from Gue.), as well as in *Walbrook Tr. (Jersey) Ltd. v. Fattal,* [2008] EWCA (Civ) 427 (Eng.); Derinda Baker v. JE Clark & Co. (Transport) UK Ltd., [2006] EWCA (Civ) 464, [15]–[20] (Eng.); Walker v. Stones, [2001] Q.B. 902 at 903 (Eng.); Bogg v. Raper (1998, 1999) 1 I.T.E.L.R. 267, 278–87 (Eng.); Re Clapham, Barraclough v. Mell, [2005] EWHC (Ch.) 3387, [89–102]. For the older English cases see Joshua Getzler, *Duty of Care*, *in* BREACH OF TRUST 41, 50–73 (Peter Birks & Arianna Pretto eds., 2002). For the Cayman Islands, see Lemos v. Coutts Ltd., [2003] CILR 381 at 401–12 (Grand Ct.). For the Bahamas, see PANICO, *supra* note 77, at 298–301.

[79] California: CAL. PROB. CODE § 16461(b) (West 2012). Canada: *see* David Fuller & Laura Kerr, *Delegation to Agents*, *in* WIDDIFIELD ON EXECUTORS AND TRUSTEES § 9.3.1 (Carmen S. Thériault ed., 6th ed. 2002); DONOVAN W.M. WATERS, MARK R. GILLEN & LIONEL D. SMITH, WATERS' LAW OF TRUSTS IN CANADA 981–84 (4th ed. 2012). Scotland: Wyman v. Paterson, [1900] A.C. 271 (H.L.) 274–79 (appeal taken from Scot.); Carruthers v. Carruthers, [1896] A.C. 659 (H.L.) 662–66 (appeal taken from Scot.); Rae v. Meek, (1889) 14 App. Cas. 558 (H.L.) 563–73 (appeal taken from Scot.); Knox v. Mackinnon, (1888) 13 App. Cas. 753 (H.L.) 764–67 (appeal taken from Scot.); Lutea Trs. Ltd. v. Orbis Trs. Guernsey Ltd., (1997) S.C. 255, 264 (Scot.); Wilson v. Guthrie Smith, (1894) 2 S.L.T. 338, 339–40 (Scot.); Carruthers v. Cairns, (1890) 17 R. 769, 769–81 (Scot.); Seton v. Dawson, (1841) 4 D. 310, 310–24 (Scot.). Jersey: Trusts (Jersey) Law, 1984, art. 30(10); Midland Bank Trust Co. (Jersey) Ltd. v. Federated Pension Servs., [1995] J.L.R. 352, 391–94; West v. Lazard Bros. & Co. (Jersey) Ltd., [1993] J.L.R. 165, 301. Guernsey: The Trusts (Guernsey) Law, 2007, § 39. Malta: Malta Trusts and Trustees Act, 1998, c. 331, § 21(7) (amended 2004). Mauritius: Trusts Act, 2001, § 50(6). Dubai International Financial Centre: Trust Law, 2005, § 58(10). See discussion in PANICO, *supra* note 77, at 302–09, 315–16.

[80] Bermuda: Trustee Act, 1975, § 22(1) (amended 2009). Turks and Caicos Islands: Trusts Ordinance, 1990, § 20(10); New York: N.Y. EST. POWERS & TRUSTS LAW § 11–1.7 (McKinney 2012). *Compare* PANICO, *supra* note 77, at 315 (discussion), *with In re* Shore, 854 N.Y.S.2d 293, 296 (Sur. Ct. 2008) (concluding that the New York statute "applies equally to inter vivos trusts where by its terms there is no one in a position to protect the beneficiaries from the actions of the trustee"). For the history of the *Estates Powers and Trust Law* section in question, and some earlier New York cases parsing it, see Leslie, *Trusting Trustees*, *supra* note 20, at 104 nn.171–80 and accompanying text.

even monitoring, company management, leaving the settlor, and later his or her chosen successors, at the helm. The official comment to the UPIA recognizes that "[t]he wish to retain a family business is [a] situation in which the purposes of the trust sometimes override the conventional duty to diversify."[81] English courts have approved clauses permitting the retention of such businesses even when unprofitable, absolving trustees from involving themselves in management and from considering sale and reinvestment.[82]

F. *Curtailment of Beneficiaries' Rights*

Even beneficiaries' rights against their trustees, perhaps the most entrenched element of the traditional trust model, are now gradually declining. While the Uniform Trust Code (UTC) provided, upon its 2000 promulgation, that trustees must notify at least some beneficiaries of irrevocable trusts who are twenty-five or older "of the existence of the trust, of the identity of the trustee, and of their right to request trustee's reports,"[83] and that they must respond to a request by such beneficiaries "for trustee's reports and other information reasonably related to the administration of a trust,"[84] most states enacting the Code have enacted those duties, if at all, in weakened form,[85] and they were

[81] UNIF. PRUDENT INVESTOR ACT § 3 cmt. (1994); Langbein, *Burn the Rembrandt*, *supra* note 17, at 394–95 (discussion). For judicial decisions validating trustee conduct based on retention clauses, see, for example, *In re* The Jervis C. Webb Trust, No. 263759, 2006 WL 173172, at *2–4 (Mich. Ct. App. Jan. 24, 2006); Nat'l City Bank v. Noble, No. 85696, 2005 WL 3315034, at *5 (Ohio Ct. App. Dec. 8, 2005), which are both discussed in David Thayne Leibell et al., *Holding Family Business Interests in Trust: Does a Trustee's Duty To Diversify Override a Settlor's Intent?*, 151 TR. & EST., Mar. 2012, at 48, 50, 52–53, 55–56.

[82] Absent such clauses, trustees' duties of care, prudence and the fiduciary duties they owe beneficiaries would have mandated, under English law, close monitoring of director action, trustees' joining the board, and potential replacement of existing directors, as well as serious consideration of selling the shareholding when alternative investment opportunities appear more lucrative. Bartlett v. Barclays Bank Trust Co. (No. 2), [1980] 1 Ch. 539 at 542–46 (Eng.); *In re* Lucking's Will Trusts, [1968] 1 W.L.R. 866 (Ch.) at 873–77 (Eng.). For English courts' approval of "anti-Bartlett clauses," see Gregson v. HAE Trs. Ltd., [2008] EWHC (Ch.) 1006 (Eng.); A v. A, [2007] EWHC (Fam.) 99 (Eng.); *see also* PANICO, *supra* note 77, at 182–84.

[83] UNIF. TRUST CODE § 813(b)(2)–(3), 7C U.L.A. 609–10 (2006) (made mandatory in Section 105(b)(8), 7C U.L.A. 428). On the necessity of providing beneficiaries with information sufficient for them to enforce trustees' duties see Langbein, *Mandatory Rules*, *supra* note 17, at 1125–26.

[84] *See* UNIF. TRUST CODE § 813(a) (2005), 7C U.L.A. 609 (2006) (made mandatory in Section 105(b)(9), 7C U.L.A. 428).

[85] Information on the amendments enacting states have made to the UTC is provided on the Uniform Law Commission website. *Trust Code*, UNIFORM L. COMMISSION, http://www.uniformlaws.org/Act.aspx?title=Trust%20Code (last visited July 22, 2013). Of the twenty-five states to have enacted the Code as of July 2012, fifteen have made trustees' duties to give beneficiaries information default law, contrary to the original UTC recommendation that they be made mandatory. *See* UNIF. TRUST CODE § 105(b)(9), 7C U.L.A. 428 (2006).

made optional in a 2004 amendment to the Code.[86] The 2007 installment of the Restatement (Third) also permits some curtailment of beneficiaries' rights to information about the trust.[87] In England, the Judicial Committee of the Privy Council held in *Schmidt v. Rosewood Trust Ltd.*, a 2003 decision, "that a beneficiary's right or claim to disclosure of trust documents or information"[88] is not best approached, as in the earlier case of *O'Rourke v. Darbishire*,[89] as a function of his or her proprietary rights in the trust property, but as "one aspect of the court's inherent jurisdiction to supervise, and where appropriate to intervene in, the administration of trusts."[90] What was earlier seen as an aspect of beneficiaries' rights in the trust property is now seen as a remedy in the discretion of the court.[91]

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[86] *See* UNIF. TRUST CODE § 105 cmt. entitled "2004 Amendment," 7C U.L.A. 431–32 (2006); T.P. Gallanis, *The Trustee's Duty To Inform*, 85 N.C. L. REV. 1595, 1598–1605 (2007) (discussion).

[87] The Restatement (Third) allows the curtailment of beneficiaries' rights to information, while stating that enough information should be provided so that beneficiaries are able to safeguard their rights. While permitting the modification "in the terms of the trust" of trustees' duty to provide beneficiaries with information about "the existence of the trust . . . their status as beneficiaries and their right to obtain further information, and . . . basic information concerning the trusteeship . . . significant changes in their beneficiary status; and . . . changes involving the trusteeship and about other significant developments concerning the trust and its administration," RESTATEMENT (THIRD) OF TRUSTS § 82(1) (2007), the Restatement warns that:

> a beneficiary is always entitled under [§ 82(2)] to request such information as is reasonably necessary to enable the beneficiary to prevent or redress a breach of trust and otherwise to enforce his or her rights under the trust. Furthermore, although subject to modification by trust provision, the duty to provide information to certain beneficiaries under [§ 82(1)] may not be dispensed with entirely or to a degree or for a time that would unduly interfere with the underlying purposes or effectiveness of the information requirements.

Id. § 82 cmt. a(2). As regards beneficiaries' rights to trustees' reports or accountings, the Restatement allows that they may be modified, and even satisfied by trustees' submitting reports or accountings only to a "designated person," who may or may not be a beneficiary; but such arrangements are subject to judicial review for abuse. *Id.* § 83 cmts. b, d.

[88] [2003] UKPC 26 [50], [66], [2003] 2 A.C. 709, 729, 734 (appeal taken from the Isle of Man) (Eng.).

[89] [1920] A.C. 581 (H.L.) 592–93 (Eng.).

[90] *Schmidt*, 2 A.C. at 729, 734. For further discussion, see, for example, Gerwyn LL H Griffiths, *"You Just Gotta Keep the Customer Satisfied": Where Stands the Beneficiary's Right to Information?*, *in* 5 MODERN STUDIES IN PROPERTY LAW 145, 152–57 (Martin Dixon ed., 2009); Jonathan Hilliard, *The Rights to Information of an Object of a Fiduciary Mere Power*, 10 J. INT'L TR. & CORP. PLAN. 209, 216–20 (2003); Lionel Smith, *Access to Trust Information:* Schmidt v. Rosewood Trust Ltd., 23 EST. TR. & PENSIONS J. 1, 4–7 (2003); Richard Wilson & Henrietta Labes, Schmidt v Rosewood*: A Closer Inspection*, PRIVATE CLIENT BUS., May & June 2004, at 161, 162–68. *See generally* Gavin Lightman, *The Trustees' Duty To Provide Information to Beneficiaries*, PRIVATE CLIENT BUS., no. 1, 2004, at 23.

[91] *See Schmidt*, 2 A.C. at 734.

While few jurisdictions deny that for an arrangement to qualify as a trust, someone must have the power to control trustees' exercise of their powers, some now decouple that power from beneficiary status. Most radically, Cayman Islands trust law has since 1997 included an elective "Alternative Regime," under which the rights of a beneficiary of an ordinary trust—to bring actions against trustees and third parties, to apply to the court concerning the trust and to receive trust documents and other information concerning the trust from its trustees—are allocated to an "enforcer," who may or may not be a beneficiary. Unless appointed enforcers, beneficiaries have no standing to enforce the trust, "an enforceable right against a trustee or an enforcer, or an enforceable right to the trust property."[92] Non-beneficiary enforcers having first appeared in legislation permitting non-charitable purpose trusts,[93] where absent an enforcer or protector no one could control the trustees, the Cayman Islands innovated by inserting them in "people trusts," decoupling trust enforcement from beneficiary status. The UTC accorded non-beneficiary enforcers a far cooler welcome, only permitting them in non-charitable purpose trusts and trusts for animal beneficiaries,[94] while the Restatement (Third) permits non-beneficiary enforcers as an addition to, but not a replacement for, beneficiaries' enforcement powers.[95]

G. *Trusts Without Equity*

The final two trust reforms to be discussed are yet to occur domestically (outside Louisiana), while accelerating in many foreign jurisdictions. First is the noticeable trend of jurisdictions adopting "trusts without equity," trusts absent the law/equity duality and beneficiaries' consequent rights in the trust assets. The Supreme Court of Louisiana has recently decided that "a beneficiary has no title to or ownership interest in trust property, but only a civilian 'personal right'

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[92] Trusts Law (2009 Revision) § 100 (Cayman Islands); *see also id.* §§ 95–109 (incorporating Cayman Islands Special Trusts (Alternative Regime) Law, 1997, as Part VIII); *id.* § 102 (laying out the rights of enforcers). Perhaps importantly, Section 106, entitled "theft," provides that "for the purpose of the Penal Code . . . property held upon a special trust shall be regarded [as against its trustees and enforcers] as belonging to others . . . [and a trustee or enforcer's intention] to defeat the trust shall be regarded . . . as an intention to deprive others of their property." *Id.* § 106.

[93] As in Jersey: Trusts (Amendment No. 3) (Jersey) Law, 1996, art. 10A–B; the Isle of Man: Purpose Trusts Act, 1996, §§ 1, 3; and Bermuda: Trusts (Special Provisions) Amendment Act, 1998, §§ 12A–B.

[94] The UTC permits non-beneficiary enforcers where beneficiaries are animals alive during the settlor's lifetime, UNIF. TRUST CODE § 408, 7C U.L.A. 490 (2006), and otherwise for up to twenty-one years, *id.* § 409, 7C U.L.A. 493–94 (2006). The UTC's drafters rejected the freer use of non-beneficiary enforcers common in some offshore jurisdictions. David M. English, *The American Uniform Trust Code*, *in* EXTENDING THE BOUNDARIES OF TRUSTS AND SIMILAR RING-FENCED FUNDS 313, 322 (David Hayton ed., 2002).

[95] *See* RESTATEMENT (THIRD) OF TRUSTS § 94 cmt. d(1) (2012).

vis-à-vis the trustee."[96] The first trust jurisdiction to let go of beneficiaries' rights in the trust property, however, was Scotland. Its civilian system of private law being attached, like other civilian legal systems, to the unitary ownership ideal, Scots law could never admit that beneficiaries own the trust property side-by-side with their trustees.[97] The next jurisdiction to welcome trusts while leaving equitable ownership at the door was India: beneficiaries under the Indian Trusts Act have rights against their trustees rather than rights in the trust property.[98] South Africa rejected beneficiaries' equitable ownership of the trust property in 1905, fearful of its land registration system being subverted by beneficiaries of unregistered trusts of immovables, to use the South African term, enjoying a preference over their insolvent trustees' personal (non-trust) creditors.[99] Colonial-era Ceylon adopted the Indian solution in its own Trusts Ordinance.[100] More recently, Jersey, the original island, has "enact[ed] the central body of English trusts law without any reference to legal or equitable estates."[101] And despite having been adopted in frank imitation of the common law trust, the *fiducie* and *fideicomiso* regimes of Latin civil law systems all

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[96] Bridges v. Autozone Props., Inc., 900 So. 2d 784, 796–97 (La. 2005); *see also* Read v. United States *ex rel.* Dep't of Treasury, 169 F.3d 243, 248 (5th Cir. 1999); EDWARD E. CHASE, JR., 11 LOUISIANA CIVIL LAW TREATISE: TRUSTS 4 (2d ed. 2009).

[97] *See* George Gretton, *Scotland: The Evolution of the Trust in a Semi-civilian System*, *in* ITINERA FIDUCIAE: TRUST AND TREUHAND IN HISTORICAL PERSPECTIVE 507, 509–10 (Richard Helmholz & Reinhard Zimmermann eds., 1998) [hereinafter Gretton, *Scotland*]; George Gretton, *Trusts*, *in* 1 A HISTORY OF PRIVATE LAW IN SCOTLAND 480, 481–82 (Kenneth Reid & Reinhard Zimmermann eds., 2000); George L. Gretton, *Trusts Without Equity*, 49 INT'L & COMP. L.Q. 599, 599, 619–20 (2000); K.G.C. Reid, *National Report for Scotland*, *in* 1 PRINCIPLES OF EUROPEAN TRUST LAW 67, 69–72 (D.J. Hayton, S.C.J.J. Kortmann & H.L.E Verhagen eds., 1999); Kenneth G. C. Reid, *Patrimony Not Equity: The Trust in Scotland*, 3 EUR. REV. PRIVATE L. 427, 431 (2000).

[98] *See* Indian Trusts Act, Act No. 2 of 1882, INDIA CODE (1993), vol. VIII-B, § 3 (describing the trustee as "the owner" and noting that the "'interest' of the beneficiary is his right against the trustee as owner of the trust-property"). For pre-1882 Indian trusts law, see Tagore v. Tagore (1872) I.A. 47, 80–85 (India); *see also* B. M. GANDHI, EQUITY, TRUSTS AND SPECIFIC RELIEF 239–40 (1983).

[99] *See Lucas' Tr. v. Ismail & Amod* 1905 TS 239 (CC) at 240–46 (S. Afr.) (analyzed in Tony Honoré, *Trust*, *in* SOUTHERN CROSS: CIVIL LAW AND COMMON LAW IN SOUTH AFRICA 849, 862–63 (Reinhard Zimmermann & Daniel Visser eds., 1996)).

[100] *See* Ceylon Trusts Ordinance, No. 9 of 1917, Ch. 11; 3 LEGISLATIVE ENACTMENTS OF CEYLON ch. 87 (1956) (defining, in Section 3(a), a trust as "an obligation . . . of such a character that, while the ownership is nominally vested in the owner, the right to the beneficial enjoyment of the property is vested or to be vested in [the beneficiary]," and the "beneficial interest," in Section 3(g), as "[the beneficiary's] right against the trustee as owner of the trust property"); *see also* L. J. M. COORAY, THE RECEPTION IN CEYLON OF THE ENGLISH TRUST 65 (1971).

[101] WATERS, *supra* note 26, at 362–63; *see id.* at 362–64; *see also* Trusts (Jersey) Law, 1984.

reject the split ownership trust model and beneficiaries' rights in the trust assets.[102]

H. *Elimination of Requirement that Trustees Own the Trust Property*

More radically, some trust jurisdictions, not including any U.S. state, do not require that the trustee own the trust property. The jurisdictions concerned fall into two groups. The first consists of "shapeless trust"[103] jurisdictions, which leave those settling trusts free to allocate title in the assets to whichever point of the "trust triangle" they choose: settlor, trustee, or beneficiary. There are currently two such jurisdictions: China and Israel. The Chinese Trust Act of 2001 defines a trust as a situation where:

> the settler, based on his faith in trustee [sic], *entrusts* his property rights to the trustee and allows the trustee to, according to the will of the settlor and in the name of the trustee, administer or dispose of such property in the interest of a beneficiary or for any intended purposes.[104]

Both the Chinese courts and commentators have interpreted this definition, in light of the other provisions of the Act, not to mandate the transfer of title in the trust assets from settlor to trustee.[105] The Israeli Trust Act of 1979 defines

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[102] *See* François Barrière, *The French* Fiducie*, or the Chaotic Awakening of a Sleeping Beauty*, *in* RE-IMAGINING THE TRUST: TRUSTS IN THE CIVIL LAW 222, 237 (Lionel Smith ed., 2012) (France); Dante Figueroa, *Civil Law Trusts in Latin America: Is the Lack of Trusts an Impediment for Expanding Business Opportunities in Latin America?*, 24 ARIZ. J. INT'L & COMP. L. 701, 706 (2007) (*fideicomisos* of Latin America); *see also* NICOLAS MALUMIAN, TRUSTS IN LATIN AMERICA 25, 144–54 (2009) (same). For the Québec *fiducie*, see sources cited *infra* note 108.

[103] The "shapeless trust" moniker was coined by Maurizio Lupoi for the definition of the trust in the Hague Convention on the Law Applicable to Trusts and on their Recognition. Maurizio Lupoi, *The Shapeless Trust*, 1 TR. & TRUSTEES 15, 16–17 (1995); and see full discussion in MAURIZIO LUPOI, TRUSTS: A COMPARATIVE STUDY 327–67 (Simon Dix trans., 2000).

[104] Xintuo Fa (信托法) [Trust Law] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 28, 2001, effective Oct. 1, 2001) 2001 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 311 (China) (emphasis added).

[105] *See* Yanxin Co. v. Huabao Trust & Inv. Co., (Shanghai High People's Ct. Mar. 16, 2005) (China); Beijing Haidian Sci. & Tech. Dev. Co. v. Shenzhen Xinhua Jinyuan Touzi Fazhan Youxian Gongsi, (Chongqing High People's Ct. Mar. 19, 2007); LUSINA HO, TRUST LAW IN CHINA 37–42 (2003); Frances H. Foster, *American Trust Law in a Chinese Mirror*, 94 MINN. L. REV. 602, 629–30, 638–42 (2010); David Hayton, *The Core of the Chinese Trust Law 2001*, 3 TR. Q. REV. 24 (2005); Lusina Ho, *China: Trust Law and Practice Since 2001*, 16 TR. & TRUSTEES 124, 124–25 (2010); Lusina Ho, *The People's Republic of China*, *in* THE INTERNATIONAL TRUST 825, 828 (John Glasson & Geraint Thomas eds., 2d ed. 2006); Lusina Ho, *The Reception of Trust in Asia: Emerging Asian Principles of Trust?*, 2004 SING. J. LEGAL. STUD. 287, 293–303; Lusina Ho, *Trust Laws in China: History, Ambiguity and Beneficiary's Rights*, *in* RE-IMAGINING THE TRUST, *supra* note 102, at 183, 193–97 [hereinafter Ho, *Trust Laws in China: History*]; Rebecca Lee, *Conceptualizing the Chinese*

the trust as "a relationship to any property by virtue of which a trustee is bound to hold the same, or to act in respect thereof, in the interest of a beneficiary or for some other purpose."[106] Ending thirty years of uncertainty, the Israeli courts have recently ruled that the 1979 Act does not in fact require that title in the trust property vests in the trustee.[107]

The second group of trust jurisdictions which do not require that title in the trust assets vests in the trustee is led by Québec, which provided in its civil code that "[t]he trust patrimony . . . constitutes a patrimony by appropriation, autonomous and distinct from that of the settlor, trustee or beneficiary and in which none of them has any real right."[108] The Québecois model, providing that the trust assets are owned by no one but rather form an autonomous "patrimony by appropriation," has in recent years been adopted in Uruguay, and is about to be adopted in the new Czech Civil Code.[109]

Trust, 58 INT'L & COMP. L.Q. 655, 659–63 (2009); Donovan Waters, *The Future of the Trust Part I*, 13 J. INT'L TR. & CORP. PLAN. 179, 219–22 (2006).

106 Trust Law, 5739–1979, 33 LSI 154, § 1 (1978–1979) (Isr.).

107 *See* CA 5955/09 Amster v. Tauber Tov 4–5 [2011], Nevo Legal Database (by subscription) (Isr.); CA 6406/03 Endowment Trs. of the Sephardi Cmty. of Sephad & Meiron v. Kamus 7–12 [2005], Nevo Legal Database (by subscription) (Isr.); CA 1631/02 Gorban v. Tshuva Yitzchak Ass'n for Solving the Hous. Shortage, 5–8 [2003], Nevo Legal Database (by subscription) (Isr.); DC (Jer) 4044/07 Hoffmann v. Official Receiver—Jerusalem Dist., 7, 9–10 [2009], Nevo Legal Database (by subscription) (Isr.); DC (TA) 548/06 Arnon v. Pyotrkovski 21–23, 25–26 [2009], Nevo Legal Database (by subscription) (Isr.); *see also* SHLOMO KEREM, TRUSTS 37–39 (4th ed. 2004); LUPOI, TRUSTS: A COMPARATIVE STUDY, *supra* note 103, at 279, 305 n.228, 334; Avraham Alter, *The "Cestui que Trust's" Right in the Trust Property*, 35 HAPRAKLIT 307, 307 (1984); WATERS, *supra* note 26, at 376–78; Avraham Alter, Taxation of Ordinary Trusts in Israel 22–62 (Jan. 1985) (unpublished Ph.D. dissertation, Tel-Aviv University) (on file with author). A notable early article argued, *contra*, that the Act should be read to require that title in the trust assets be transferred to the trustee, as in the orthodox common law model. Joshua Weisman, *Shortcomings in the Trust Law, 1979*, 15 ISR. L. REV. 372, 379–80 (1980).

108 Civil Code of Québec, S.Q. 1991, c. 64, art. 1261 (Can.); *see* discussion by JOHN B. CLAXTON, STUDIES ON THE QUEBEC LAW OF TRUST 59–60, 174–75 (2005); WATERS ET AL., *supra* note 79, at 1409–44; Madeleine Cantin-Cumyn, *La Fiducie, un Nouveau Sujet de Droit?*, *in* MÉLANGES ERNEST CAPARROS 129, 129–43 (Jacques Beaulne ed., 2002); WATERS, *supra* note 26, at 396–407, 429–32.

109 See, for Uruguay, Ley de Fideicomiso, N° 17.703 (Uru.); *see also* Waters, *supra* note 105, at 197–98. For discussion of the new draft civil code of the Czech Republic, see Tomáŝ Richter, *National Report for the Czech Republic*, *in* 10 TOWARDS AN EU DIRECTIVE ON PROTECTED FUNDS 59, 65–70 (S.C.J.J. Kortmann et al. eds., 2009). See also the *fidéicommis* under the Civil Code of the Empire of Ethiopia, Proclamation No. 165 of 1960, which is defined in section 516 as "l'institution en vertu de la quelle un ou plusieurs biens sont constitues en une masse autonome, pour etre administrée par une personne, le fidéicommissaire, selon les instructions données par le constituant du fidéicommis" ["the institution under which one or more properties are constituted into an independent fund, to be administered by a person, the trustee, in accordance with the instructions of the settlor"].

III. EVOLUTIONARY SCRIPTS

In this Part, I examine the evolutionary scripts followed by the eight trust reforms described in Part II. Part IV then analyzes their distributive consequences, leading to the identification, in Part V.A, of a correlation between the evolutionary script followed by each reform and its distributive consequences. This in turn leads to my normative recommendations, which follow in Part V.B.

A. *From Drafted Opt-Outs, Through Uniform Laws, to Legislation: Trust Investment Law and Trustee Delegation Reform*

1. *Reform of Trust Investment Law*

The evolutionary script followed by the early 1990s reform of trust investment law started with practitioner and client dissatisfaction at the losses consequent on following the Prudent Man Rule, as construed by the courts, during the high-inflation 1960s and 1970s. This dissatisfaction first led to the ousting of the Rule by drafters of individual trusts, allowing trustees to invest in any asset.[110] Even trustees emboldened by such clauses, however, remained subject to potential ex post review by the courts, which interpreted even broad investment clauses against the background of the existing Rule.[111] In response, the National Conference of Commissioners on Uniform State Laws (NCCUSL) and American Law Institute (ALI), both principally staffed by academics and practicing lawyers, proposed the switch from prudent man to prudent investor, a proposal which was soon enacted by nearly all states.

2. *Trustee Delegation Reform*

Much as in the case of trust investment law reform, the evolutionary script followed in the reform of the law of trustee delegation involved legal practice falling out of sync with the law, which drove the affected practitioners and concerned academics to recommend that the law be changed so as to catch up with practice. While the classical law of trusts demanded that trustees not delegate functions involving discretion, the tasks given trustees in practice and the composition of trust funds changed so as to practically require, in many cases, that trustees delegate at least some discretionary functions. Trust drafters first responded by either drafting trust instruments so as to opt out of the non-delegation rule or practicing de facto delegation, disguised as consultation. Later, trustees' dissatisfaction with that rule led them to move the NCCUSL and

[110] *See* Jeffrey N. Gordon, *The Puzzling Persistence of the Constrained Prudent Man Rule*, 62 N.Y.U. L. REV. 52, 76 n.99 (1987).

[111] *See* Schanzenbach & Sitkoff, *Reform*, *supra* note 18, at 685 n.11.

ALI to propose, and state legislatures to enact, a liberalized regime governing trustee delegation.[112]

B. *Jurisdictional Contests: Fall of the R.A.P., Rise of Asset Protection Trusts, and Curtailment of Trustees' Duties and Liabilities*

1. *Fall of the R.A.P.*

The evolutionary script followed by the statewide trend of abolishing the rule against perpetuities involved lawyers, bankers and their professional associations pressing abolition on state legislatures.[113] Once Delaware abolished its version of the rule, an inter-state jurisdictional contest dynamic developed: each state rushed to abolish its version of the rule or extend its perpetuity period to hundreds of years, worried that if it remained less perpetuity-friendly than other states, its resident service providers and financial institutions would incur a trust fund drain.

While regarding the reform of trust investment and trustee delegation law—the NCCUSL and ALI were among the principal generators of change—the NCCUSL has adopted a conservative position regarding perpetuities reform, urging that the rule be retained, if in a simplified form.

> In general terms, the *Restatement* [(Third) of Property: Wills and Other Donative Transfers, adopted by the ALI at its 2010 annual meeting] provides that a trust or other donative disposition of property is subject to judicial modification to the extent that it does not terminate on or before the expiration of the perpetuity period. The perpetuity period expires at the death of the last living measuring life, defined as a group composed of the transferor and the beneficiaries of the disposition who are no more than two generations younger than the transferor.[114]

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[112] *See* Langbein, *Nondelegation Rule*, *supra* note 17, at 118–19; Langbein, *Uniform Prudent Investor Act*, *supra* note 17, at 650–54; Langbein & Posner, *supra* note 17, at 18–24.

[113] *See* Sterk, *Jurisdictional Competition*, *supra* note 19, at 2097–98.

[114] Lawrence W. Waggoner, *Curtailing Dead-Hand Control: The American Law Institute Declares the Perpetual-Trust Movement Ill Advised* 1 n.1 (Univ. Mich. Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 199, 2010) [hereinafter Waggoner, *Curtailing Dead-Hand Control*], *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1614934; Lawrence W. Waggoner, *The American Law Institute Proposes a New Approach to Perpetuities: Limiting the Dead Hand to Two Younger Generations* (Univ. Mich. Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 200, 2010) [hereinafter Waggoner, *American Law Institute*], *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1614936.

2. *Rise of Asset Protection Trusts*

The appearance of asset protection trusts since the 1980s followed an evolutionary script similar to that followed by the abolition of the rule against perpetuities. Two differences claim our attention. One is that in the case of asset protection trusts, it was foreign jurisdictions which ignited the jurisdictional contest.[115] Foreign jurisdictions did not play a similar role regarding abolition of the rule against perpetuities. The other is that the spreading of asset protection trusts is a much slower process than that of perpetual trusts. The inter-state contest over the latter having started with Delaware's 1995 statutory amendment abolishing the traditional rule, more than half the states have by 2013 either abolished it or extended their perpetuity periods to several hundred years.[116] While the inter-state contest regarding asset protection trusts started two years later, with their 1997 recognition by Alaska and Delaware, these trusts have by 2013 been recognized by only fourteen states.[117]

3. *Curtailment of Trustee Duties and Liabilities*

The law of trustees' duties and liabilities has for the last twenty years followed a clear trajectory: jurisdiction after jurisdiction enacted legislation defining a core of duties, liability for infringing which cannot be excluded. Such legislation effectively approved trust service providers' exculpatory clauses so long as they left trustees' liability for infringing core duties intact. The resulting inter-jurisdictional contest reflects the influence of trust service providers—lawyers, bankers, accountants and other trustees—on legislatures, judges and law commissions. One case in point is statutes enacted since 1990 by most states, providing that, contrary to prior law, "trustee investments in vehicles owned by the trustee or a related company do not give rise to a breach of the duty of loyalty."[118] As Leslie noted, "[i]t is difficult to attribute this sea change in the law to anything other than effective lobbying by banks."[119]

C. *From Client Demand, Through Drafting, to Legislation: Curtailment of Beneficiaries' Rights*

The evolutionary script followed by the erosion of beneficiaries' rights against their trustees started with many settlors' distrust of their beneficiaries and desire to monitor their trustees themselves. Settlors are often uneasy with

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[115] *See supra* text accompanying note 68.

[116] *See supra* note 56 and accompanying text.

[117] Domestic Asset Protection Trust Statutes are still being enacted. Virginia's statute became effective July 1, 2012. *See* VA. CODE ANN. §§ 64.2-745.1–745.2 (2012). Ohio's became effective on March 27, 2013. *See* OHIO REV. CODE ANN. § 5816 (LexisNexis 2012).

[118] Leslie, *Trusting Trustees*, *supra* note 20, at 116–17 (noting that UNIF. TRUST CODE § 802(f) reflects these statutes).

[119] Leslie, *Common Law*, *supra* note 20, at 2734; *see also id.* at 2720–34 (discussion).

giving away their property to trustees. In the frequent cases where beneficiaries are minors, unborn, incompetent, or otherwise seen, rightly or not, as unreliable, settlors find little solace in that according to the traditional trust model, the key persons able to control trustees' execution of their office are beneficiaries. Settlor apprehension of trustees being controlled by such beneficiaries gave birth to the trust protector, an additional trust officer, empowered to monitor and control trustees. Settlors often appoint themselves, or a confidante, as protectors of their trusts.[120] Protectors and non-beneficiary enforcers having first been made available by way of drafting, both domestic legislation curtailing beneficiaries' rights to information about the trust and legislation such as the Cayman Islands' "Alternative Regime" are products of trust service providers having lobbied legislatures to provide statutory products responding to these common settlor worries. Non-beneficiary enforcers are, again, often settlors themselves or their confidantes. Trust service providers' need for new clients is thus changing the trust concept, modifying it so as to respond to apprehensions the traditional model raises in potential settlors.

D. *A Preference for Systemic Coherence: Letting Go of Equity and the Trustee Ownership Requirement*

1. *Trusts Without Equity*

The adoption of "trusts without equity" by civilian and "mixed" legal systems was largely a result of local legal professionals' preference for systemic coherence. Their systems being committed to the civilian ideal of indivisible ownership, they sought to receive the trust into their systems without disturbing this fundamental commitment. The drafters of the Louisiana Trust Code omitted equity and beneficiaries' rights in the trust assets from their Code in order to "give Louisiana citizens a sound, reasonable and flexible basis for the creation of trusts within the ambit of the civil law, and expressed in civil law terminology."[121] The Scots law of trusts grew out of Scots legal practice after the 1603 union of the English and Scottish Crowns.[122] Once the Scottish courts and Institutional writers had to fit the trust in their civilian system of private law, they omitted equity and the split ownership trust model for the sake of

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[120] On protectors see, for example, RESTATEMENT (THIRD) OF TRUSTS § 64(2) cmt. d and reporter's notes to cmts. b–d (2003); *id.* § 75 (2007); *id.* § 94 cmt. d(1) & reporter's notes (2012); PANICO, *supra* note 77, at 405–45; Robert Ham, Emily Campbell, Michael Tennet & Jonathan Hilliard, *Protectors*, *in* THE INTERNATIONAL TRUST, *supra* note 105, at 193–209; Donovan W.M. Waters, *The Protector: New Wine in Old Bottles?*, *in* TRENDS IN CONTEMPORARY TRUST LAW 63, 63–122 (A.J. Oakley ed., 1996). *See generally* ANDREW HOLDEN, TRUST PROTECTORS (David Brownbill ed., 2011).

[121] 11 LEONARD OPPENHEIM & SIDNEY PUGH INGRAM, LOUISIANA CIVIL LAW TREATISE: TRUSTS 38 (1977).

[122] *See* Gretton, *Scotland*, *supra* note 97, at 518–22.

systemic coherence.[123] The British colonial officials who drafted the Indian Trusts Act of 1882 stated their desire to keep the Indian law of trusts "free from the complication of double estates in which it is becoming entangled,"[124] and those who later adapted the Indian Act to form the Ceylon Trusts Ordinance adopted the same solution.[125] Exceptionally, the South African courts rejected the split ownership trust model so that it did not disturb an unrelated policy, their land registration system.[126] The civilian and "mixed" legal systems which have more recently adopted "trusts without equity" followed Scotland and Louisiana in choosing this form of trust because it better coheres with the undivided ownership principle they champion.[127] The insertion of the trust, in any form, into the legal systems of France and several Latin American jurisdictions seems to have been a result of a global jurisdictional contest, with bankers and lawyers in each jurisdiction fearing the loss of business unless their jurisdiction adopt some form of trust.[128] Those jurisdictions' choice of "trusts without equity," however, resulted from legal professionals' preference for systemic coherence.

2. *Elimination of Requirement that Trustees Own the Trust Assets*

Finally, the Chinese and Israeli "shapeless" trust regimes, as well as the Québec, Uruguay and future Czech trust regimes, are all products of recent statutory efforts, undertaken in full view of the traditional common law trust model and reflecting a conscious decision to deviate therefrom by not requiring that title in the trust assets be allocated to any one point of the trust triangle. One reason the Chinese chose a "shapeless" model was apparently a belief that the Chinese population shall make more use of the jurisdiction's new trust regime should trust creation be possible absent a transfer of title away from the settlor.[129] As one purpose of the Chinese Trust Act was supplying China's sometimes unstable trust and investment companies and other Chinese investment funds with a stricter regulatory framework, this belief was,

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[123] *See id.* at 510.

[124] *See* COORAY, *supra* note 100, at 29 (quoting Indian Law Comm'n, *Report*, *in* GAZETTE OF INDIA [1880] Supp. 104).

[125] *See* COORAY, *supra* note 100, at 28–29.

[126] *See supra* note 99 and accompanying text.

[127] *See, e.g.*, Ho, *Trust Laws in China: History*, *supra* note 105, at 207–08, 219–21 (China); MALUMIAN, *supra* note 102, at 19–27 (Latin America).

[128] *See, e.g.*, Barrière, *supra* note 102, at 223 (France).

[129] *See* Ho, *Trust Laws in China: History*, *supra* note 105, at 201 n.49. For "[t]he shaky finances of Chinese trusts" during the late 1990s see *China Ready To Shut 5 Investment Trusts*, N.Y. TIMES, Feb. 3, 1999, http://www.nytimes.com/1999/02/03/business/china-ready-to-shut-5-investment-trusts.html (reporting the Chinese government's intention to "shut down five of the largest state investment trusts," and explaining that "[s]uch state-owned trusts were created in the late 1980s to sustain free-market-style economic change. But many became mired in debt after engaging in stock and real estate speculation; indeed, many of the nation's 240 trusts are on the verge of bankruptcy, regulators say").

according to Lusina Ho, "understandable"[130]: people are likelier to permit their assets to be managed by organizations known to be unstable where such management is possible absent the transfer of title in the assets to the manager. Another reason for the Chinese choice not to require the transfer of trust assets to trustees was a fear that given China's indivisible ownership model, beneficiaries' rights may not be appropriately protected where title to the assets was transferred to trustees.[131] Israel chose a "shapeless" trust model so that its trust regime fit its trust practice, which having predated the formal introduction of a trust regime, grew a broad, vague view of the trust, understanding the term to encompass any fiduciary situation involving property.[132] The Québec *fiducie* is the result of a decades-long scholarly controversy focusing on the difficulty of fitting the trust into a civilian legal system loyal to the undivided ownership principle.[133] The Uruguayan and Czech trust models appear to be simple transplants of the solution found in Québec. The two predominant motives which drove the adoption of the trust models discussed in this Section were a desire for systemic coherence and a wish that *the local population* use the regime adopted. Compare the aspiration of, for example, those domestic and offshore jurisdictions that permit self-settled spendthrift trusts, that clients from *outside* the jurisdiction use the new trust forms.[134]

IV. DISTRIBUTIVE RESULTS

In this Part, I analyze the distributive consequences of the eight trust law reforms described in Part II, grouping them according to their impact on parties to trust relationships, on non-parties affected by trusts and, where relevant, on the general population and overall economy. Parties to trust relationships include settlors, trustees, beneficiaries, protectors, enforcers and some others. Non-parties affected by trusts include trustee delegates, as well as the trustee's trust creditors and key trust actors' non-trust creditors, including non-kin creditors by contract, tort, unjust enrichment and other law (such as tax and other authorities), and heirs, spouses, cohabitants, former spouses and cohabitants, and children. This varied cast of actors can be fruitfully divided into trust service providers, their clients, whom I call "trust users," and third (or non-) parties, with a further distinction between savvy, sophisticated or well-advised clients (who may be made settlors, trustees, beneficiaries, protectors, enforcers or some combination of these roles) and less sophisticated purchasers of mass-market trust services.

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130 *See* Ho, *Trust Laws in China: History*, *supra* note 105, at 187–91, 202.

131 *See id.* at 201.

132 For the genesis of the Israeli trust regime see Adam Hofri, *Shapeless Trusts and Settlor Title Retention: An Asian Morality Play*, 58 LOY. L. REV. 135, 149–59 (2012).

133 See the literature cited in WATERS ET AL., *supra* note 79, at 1413 n.26.

134 *See supra* text accompanying notes 68–70.

A. *Reforms Enriching Trust Users and Service Providers at Non-parties' Expense*

Two of the trust reforms discussed in Parts II and III—abolition of the rule against perpetuities and the rise of asset protection trusts—benefit trust users, both settlors and beneficiaries, as well as trust service providers, by shifting burdens to trust non-parties: trust and non-trust creditors, taxpayers and the general population.

Some of the empirical consequences of *R.A.P. abolition* were identified by Sitkoff and Schanzenbach, who found that "through 2003, roughly $100 billion in trust funds have poured into the states that have validated perpetual trusts. Assuming the applicability of typical industry commission schedules, these funds are worth perhaps as much as $1 billion in yearly trustees' commissions."[135] The capital flow to perpetuity-friendly states has doubtlessly continued since 2003. Analytically, the rise of perpetual trusts appears to serve all three of the immediate parties to the trust—settlors, trustees and beneficiaries—well. Settlors enjoy the prospect of defining and controlling the allocation of their property between beneficiaries, and perhaps the use those beneficiaries will be able to make of that property, for a much longer time than hitherto. They further enjoy the exempting of at least some of their property from federal transfer taxes for a much longer time than is possible absent perpetual trusts. Trustees enjoy the prospect of drawing trust management fees for an unlimited period of time and the end of the nontrivial potential for professional malpractice litigation consequent on the traditional rule's complexity. Beneficiaries enjoy the potential for receiving gifts settled on trust by long-deceased settlors, the tax-saving advantages of perpetual trusts, and a great prolongation of their enjoyment of spendthrift trusts settled in their favor.

The further removed one is from the trust core of settlor, trustee and beneficiary, the less advantageous perpetual trusts appear. If perpetual trusts stay available for long enough, the number of spendthrift trust beneficiaries is likely to grow, to the detriment of their creditors—a group including their current and former spouses and cohabitees, their children, and anyone to whom they owe a debt, including tort creditors. From the point of view of society at large, perpetual trusts have grave disadvantages. Not only does the prolongation of spendthrift trusts into the indefinite future enable the perpetual peppering of society with uncompensated harm, but, as Lau observed, a settlor's plan for allocating his or her property several centuries into the future may eventually allocate that property in a suboptimal manner.[136] Further, the tax planning advantages of perpetual trusts from the point of view of trust users imply disadvantages for trust non-users, who will have to either bear a greater tax burden, live with a lower standard of government services, or both. Perpetual trusts are also likely to contribute to the preservation of the current distribution

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135 Sitkoff & Schanzenbach, *Jurisdictional Competition*, *supra* note 18, at 410–11.
136 *See* M. W. LAU, THE ECONOMIC STRUCTURE OF TRUSTS 171–72 (2011).

of society into classes, increasing the likelihood that the descendants of today's wealthy class will be members of the wealthy class of a hundred or two hundred years hence. In sum, perpetual trusts increase the externalities consequent on trust use. They exacerbate socio-economic inequality. Given these disadvantages, the income that trust service providers earn by providing perpetual trusts is, from the point of view of social welfare, money spent suboptimally.[137]

Much like perpetual trusts, *asset protection trusts* transfer wealth from the settlor-cum-beneficiary's creditors to him or herself and his or her trust service providers. They also harm borrowers as a whole, since by increasing the proportion of bad debts, they make credit more expensive. It may be that the slower spreading of asset protection trusts among the states is a consequence of their more obvious nature as an anti-creditor measure, while abolition of the rule against perpetuities helps trust parties avoid both their creditors and the tax authorities. Tax planning enjoys more popular and political legitimacy than evading the claims of non-tax creditors, including spouses, children and tort creditors.[138] Yet analytically, the impact of perpetual trusts and asset protection trusts on trust parties and non-parties is similar: both reforms concentrate wealth and control over assets in the hands of trust parties, and make possible trust parties' infliction of more externalities than before on trust non-parties and the public.

B. *Reforms Empowering Settlors at Beneficiaries' Expense*

The curtailment of beneficiaries' traditional rights to information and to enforce the trust redistributes power *between* the immediate parties to a trust: from beneficiaries to settlors. Settlors, traditionally powerless once a trust has been constituted, are given ongoing monitoring and enforcement powers by appointing either themselves or a confidante as protectors or enforcers. Beneficiaries are greatly weakened by the removal of their traditional monitoring and enforcement powers. As for the quality of trustee monitoring provided, while the financially astute settlor of an inter vivos trust may monitor his or her trustee more effectively than the feckless beneficiary of the same trust, the removal of beneficiaries' monitoring powers may become more problematic once the settlor is dead.

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[137] For discussion of the advantages and disadvantages of perpetual trusts see, for example, Bridget J. Crawford, *Who Is Afraid of Perpetual Trusts?*, 111 MICH. L. REV. FIRST IMPRESSIONS 79 (2012), http://www.michiganlawreview.org/assets/fi/110/Crawford.pdf; Joshua C. Tate, *Perpetual Trusts and the Settlor's Intent*, 53 KAN. L. REV. 595, 613–20 (2005); Waggoner, *Curtailing Dead-Hand Control*, *supra* note 114, at 4–9; L. W. Waggoner, *U.S. Perpetual Trusts*, 127 L.Q.R. 423, 425 (2011).

[138] Though asset protection trust statutes often except creditors with maintenance or child support judgments, spouses looking for property division, and (less frequently) tort creditors, from the trusts' protection. *See* AM. COLL. OF TRUST & ESTATE COUNSEL, *supra* note 70.

C. *Reforms Enriching Trust Service Providers at Trust Users' Expense*

Two other reforms discussed in Parts II and III—the liberalization of trustee delegation and the curtailment of trustees' duties and liabilities—transfer wealth from trust users, particularly beneficiaries, to trust service providers, including both trustees and their delegates.

One distributive consequence of *trustee delegation reform* has drawn adverse academic comment. Whereas under traditional law, a trustee who delegated was usually liable to the beneficiaries for loss caused by its agent, the reformed law makes clear that where the trustee delegated properly, chose an appropriate agent and monitored it correctly, the delegate will be solely liable for loss it caused.[139] Should the delegate be insolvent, the reformed rule lays the loss at the beneficiaries' door. Trustee delegation reform thus shifted some risk from trustees to beneficiaries.[140] Reform also harms beneficiaries, and all other non-service providers looking to collect from either trust funds or beneficiaries' non-trust assets, by rendering trustees' employment of agents easier and more acceptable, thus multiplying agents, agency costs and agents' fees.[141] The principal effect of trustee delegation reform is thus transferring wealth from trust users to the service providers serving them. While trustees' power to delegate discretionary functions, acquired as a result of that reform, may be thought ex ante to provide trust users with access to a more complete expertise, the availability, before reform, of opt-outs from the no delegation rule and of de facto delegation means that improvement is likely to be limited to potential savings of negligible transaction costs incurred earlier.

The eclipse of trustee duties and liabilities has transferred the risk of loss by trustee negligence from trustees to trust funds and the beneficiaries entitled to them. This risk reallocation negatively impacts trust creditors, as well as all parties dependent on beneficiaries, such as their creditors, spouses and children. It benefits trustees, particularly professional trustees such as bank trust departments, which tend, more than lay trustees, to be regular users of

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[139] *See* RESTATEMENT (THIRD) OF TRUSTS § 80 cmt. g (2007); UNIF. PRUDENT INVESTOR ACT § 9(b)–(c) (1994); Langbein, *Uniform Prudent Investor Act*, *supra* note 17, at 653.

[140] See criticism of this consequence of trustee delegation reform in Leslie, *Common Law*, *supra* note 20, at 2735–42 (holding that the reformed rule is appropriate for lay trustees, while professional trustees should always be liable for loss caused by agents to whom they delegated); Sterk, *Rethinking*, *supra* note 19, at 897–904 (commenting that the reformed rule creates harmful incentives).

[141] *See* UNIF. PRUDENT INVESTOR ACT § 9 (providing that "[t]he trustee must be alert to protect the beneficiary from 'double dipping.' If, for example, the trustee's regular compensation schedule presupposes that the trustee will conduct the investment management function, it should ordinarily follow that the trustee will lower its fee when delegating the investment function to an outside manager"); *see also* RESTATEMENT (THIRD) OF TRUSTS § 88 cmt. c & reporter's note.

exculpatory clauses.[142] Legislation providing that trust creditors shall look to the trust fund, rather than to the trustee's own property, for satisfying trust debts, also transfers wealth from the beneficiaries entitled to that fund to their trustees. The larger trend that legislation is a part of the gradual "entification" of the trust under American law, serves service providers' interests by limiting liability for trust debts to the trust fund. That many jurisdictions' current law of trustee exculpatory clauses expresses trust industry positions, serving the interests of trust service providers, is underlined by the belief of many trust scholars that the current law is too permissive.[143]

Several readers of this Article[144] doubted whether the decline of trustee liability transfers value from trust users to trust service providers. Surely, they suggested, trust users would react to that decline by reducing trustee fees, returning the market for trustee services to equilibrium. It appears doubtful, however, that most settlors possess, on settling their trusts, the level of legal and commercial savvy expected by these readers. In the most important empirical study of settlors' attitudes to trustee exculpatory clauses conducted so far, Professor Alison Dunn found that

> the vast majority of [English] settlors are not particularly interested in the issue of trustee exemption clauses [the English term]. Settlors are primarily concerned with achieving a specific goal, not the means by which that goal is achieved, and so their concern with trustee exemption clauses is only incidental. . . . [S]ettlors tend to accept trustee exemption clauses as part of the package of the modern day trust, especially if they have received advice to this effect. Moreover . . . many settlors regard the choice of trustee as more important than the presence of a trustee exemption clause; about a third of . . . respondents thought that settlors include a trustee exemption clause in trusts either in order to attract professional trustees or because the clause was

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[142] For the different impact of the law governing exculpatory clauses on lay and professional trustees see Leslie, *Common Law*, *supra* note 20, at 2742–52; Leslie, *Trusting Trustees*, *supra* note 20, at 73–75.

[143] *See* Hilary Delaney, *Trustee Exemption Clauses—Proposals for Regulation in Ireland*, 23 TR. L. INT'L 89 (2009); Alastair Hudson, *The Regulation of Trustees*, *in* CONTEMPORARY PERSPECTIVES ON PROPERTY, EQUITY AND TRUSTS LAW 163, 173–74 (Martin Dixon & Gerwyn LL. H. Griffiths eds., 2007); Leslie, *Common Law*, *supra* note 20, at 2752; Leslie, *Trusting Trustees*, *supra* note 20, at 72; Luxton, *supra* note 73, at 69; James Penner, *Exemptions*, *in* BREACH OF TRUST, *supra* note 78, at 253. *Compare* Langbein, *Duty of Loyalty*, *supra* note 17, at 987–90 (Langbein's advocacy of the modification of trustees' duty to administer the trust solely in the interest of the beneficiary into a duty to administer it in the beneficiary's best interest, permitting trustees to draw benefit, beyond their fees, from their administration), *with* Leslie, *Response to Langbein*, *supra* note 20, at 586 (Leslie's response, arguing for the retention of the sole interest rule). *See generally* Christopher Groves & Judith Ingham, *Trustee Exemption Clauses: Who Are We Trying To Protect?*, PRIVATE CLIENT BUS., no. 6, 2003, at 404.

[144] Ilan Benshalom, Hanoch Dagan, Yonatan Givati, Ariel Porat and Eyal Zamir.

> requested by the trustee. . . . [I]n practice the issue of non-inclusion of trustee exemption clauses rarely arises.[145]

Unless American settlors have vastly different attitudes than the English settlors Dunn studied, it appears that most settlors are unlikely to be sufficiently aware of the implications of exculpatory clauses for the service they are purchasing to demand a fee reduction as quid pro quo. The parties to the trust deal, potential settlors and trustees, enter into negotiations under conditions of asymmetrical information about the consequences of exculpatory clauses. Due to settlor disinterest, non-comprehension, or both, they are likely to conclude their negotiations without that asymmetry having been corrected. It is possible that some unusually sophisticated or well-advised settlors may possess the understanding of exculpatory clauses and their import necessary to drive them to demand a fee reduction as quid pro quo for the insertion of such a clause. However the routinization of trust practice and its spread to the middle class[146] are likely to have made such settlors a minority, as Dunn's study of English settlors demonstrates.

Unlike legislation allowing the exclusion of trustees' liability for negligence generally, legislation permitting trustees to refrain from intervening in the affairs of companies the shares of which they hold in trust, and retain those shares, despite the existence of more propitious investment opportunities, without becoming liable to beneficiaries or others for the potentially infelicitous results of the management practices they have allowed to continue, serves *both* trust service providers' interest in decreased liability and business owners' interest in using trusts as succession mechanisms for control of the family firm. The adaptation of the trust form to serve as such a mechanism creates an additional niche market for trust services.

D. *Reforms Without Clear Distributive Results*

Finally, the reform of trust investment law, the rise of "trusts without equity," and the emergence of trust regimes which do not require the transfer of title in the trust assets to the trustee do not, at present, appear to have well-

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[145] *See Trustee Exemption Clauses, A Consultation Paper* ¶¶ 3.38–3.40 (The Law Comm'n, Consultation Paper No. 171, 2002), *available at* http://lawcommission.justice.gov.uk/docs/cp171_Trustee_Exemption_Clauses_Consultation.pdf. Commissioned by the Commission "to conduct research into the economic implications of trustee exemption clauses and the potential consequences of regulation of such clauses," *id.* ¶ 3.4, Dunn mailed questionnaires to sample groups of 2050 trustees and 400 legal advisers to trustees and settlors. *Id.* ¶¶ 3.10, 3.15. She also conducted sixty-five interviews with respondents in both groups. *Id.* ¶ 3.18. Her findings on settlors' attitudes are derived from the responses of trustees and legal advisors.

[146] For the spread of trusts to the middle class, see the comment of Matthew Blattmachr of the Alaska Trust Company that "[t]rusts have hit the mainstream." Scott Martin, *Trust Companies Struck Gold in December Setting Up $5 Million Estate Planning Trusts*, TR. ADVISOR (Jan. 6, 2013), http://thetrustadvisor.com/news/2012boom.

defined distributive results. As for *the reform of trust investment law*, which allowed the trustees of some trusts to hold assets seen, under the previous law, as too risky to be held on trust, it both imposed additional risk on, and promised potentially enhanced returns to, both trustees and beneficiaries. The beneficiaries of trusts the circumstances of which permit, under the Prudent Investor Rule, higher-risk investments, may now bear the risk, as well as enjoy the potential rewards, of such investments. Increased investment in equities may create a hedge against inflation. The effects of reform on trust and beneficiary creditors reflect its effects on beneficiaries. Trustees have lost the earlier safe haven of conservative investment choices; they may now be sued for having failed to properly invest in riskier assets.[147] Where trustee fees are measured by a given percentage of the trust fund, however, the potentially enhanced appreciation now possible also bears the promise of enhanced fees. The effects of reform on non-trustees concerned with trust administration—protectors, enforcers and trustee delegates—reflect its effects on trustees, at least so long as protectors and enforcers serve in a fiduciary rather than a personal capacity.[148] Trust investment reform may also have a positive influence on overall social welfare, by releasing trust monies for potential investment in asset classes which could not, before reform, obtain the benefit of trust capital. Reform may thus contribute to the allocation of wealth across asset classes and economic activities more closely approximating the optimal such allocation.

Some empirical findings are now available respecting the consequences of trust investment law reform. According to Iris Goodwin, large banks and institutional trustees have, to 2010, baulked at realizing the more radical implications of the prudent investor standard, sticking to relatively conservative strategies.[149] Robert Sitkoff and Max Schanzenbach report, however, that

> trusts in the states that adopted the new prudent-investor rule held more stock (on the order of 1–4 percent depending on the year) at the expense of safe investments. . . . Prior to the reform . . . [s]tocks composed 41 percent of the average reform state's detrended aggregate portfolio, and safe investments averaged 39 percent. After the reform . . . [s]tocks accounted for 47 percent of the average reform state's detrended aggregate portfolio, and safe investments averaged 34 percent.[150]

Trust investment law adjusted to 1970s inflation late—just in time for the crashes of 2000–2002 (dot-com) and 2007 (subprime leading to general crisis).[151] Sterk believes that the

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[147] *See* Sterk, *Rethinking*, *supra* note 19, at 885–89.

[148] See discussion of fiduciary and non-fiduciary protectors in RESTATEMENT (THIRD) OF TRUSTS § 75 cmts. c–c(2), f, & reporter's note to cmts. b–f (2007); HOLDEN, *supra* note 120, at 33–53.

[149] *See* Iris J. Goodwin, *How the Rich Stay Rich: Using a Family Trust Company To Secure a Family Fortune*, 40 SETON HALL L. REV. 467, 504–10 (2010).

[150] Schanzenbach & Sitkoff, *Reform*, *supra* note 18, at 697.

[151] *See* Sterk, *Rethinking*, *supra* note 19, at 867.

> shift to equity investments did not generate tangible benefits for trust beneficiaries. The 2008–9 stock market decline was dramatic. But even over a longer time horizon of ten years, equity investments have performed poorly: both the Dow Jones Industrial Average and the Standard & Poor's 500 Index . . . stood at lower levels in June 2009 than they did ten years earlier. In other words, trust law's implementation of modern portfolio theory appears to have left many trust beneficiaries worse off than if trust law had retained traditional principles of trust investing.[152]

Were stock market performance between 1999–2009 typical, one would be justified in concluding that the reform of trust investment law was contrary to beneficiaries' interests. There is no justification, however, for assuming that the disappointing results of that decade will be replicated in decades to come.

As for *trust regimes not involving the law/equity duality*, they are prima facie likely to increase social welfare, compared to trust regimes based on that duality, which introduces unnecessary complexity into the law. While the administration of law and equity by separate courts is largely a thing of the past in the United States,[153] the substance of law and equity has remained at least partly unfused. So long as our legal system distinguishes between legal and equitable causes of action, rights, remedies and precedents, some overlaps, inconsistencies and contradictions remain likely, especially given the common law tradition's characteristic satisfaction with local coherence.[154] The adoption of a trust regime not reliant on the law/equity duality permits a legal system to include a form of trust without thereby making the achievement of a high degree of coherence and consistency more difficult. It is unclear, however, whether the introduction of a non-equity trust regime into a civilian or "mixed" legal system increases social welfare, compared to the same legal system anterior to the introduction of trusts. The addition of property holding on trust to a system's repertoire of security provision techniques may lead to the conclusion of some welfare-increasing transactions which would not have been realized absent the trust institution.[155] But the adoption of a trust form less familiar to local and other practitioners than even the traditional common law form may increase uncertainty, pushing practitioners to prefer foreign trust regimes to the local form.

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[152] *Id.* at 855.

[153] *See, e.g.*, Langbein, *supra* note 27, at 1080; Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 912 (1987).

[154] For this characteristic of the common law tradition see Gerald J. Postema, *Classical Common Law Jurisprudence (Part II)*, 3 OXFORD U. COMMONWEALTH L.J. 1, 5 (2003); *see also* KAARLO TUORI, RATIO AND VOLUNTAS: THE TENSION BETWEEN REASON AND WILL IN LAW 58, 63 (2011).

[155] See François Barrière, *The Security Fiducie in French Law*, *in* THE WORLDS OF THE TRUST 101, 112 (Lionel Smith ed., 2013), for a discussion of the introduction of the French "security trust" (fiducie-sûreté).

Analytically, *permitting settlors to retain title in trust property while appointing another as trustee, or grant title in trust property to (non-trustee) beneficiaries*, is likely to reduce the potential for trustees' abuse of their fiduciary position, because non-owner trustees are likely to be less powerful than owner trustees: non-owner trustees are likely to need the owner's cooperation in conveying title to trust property. It is concurrently likely, however, to make trustees' management of the trust assets less efficient and abuse by settlors or beneficiaries, depending on the locus of title, more likely. The likelihood of creditors mistakenly believing that trust property is the trustee's individually, or that the trustee's individual property is trust property, may be reduced where the trustee no longer has title in the trust assets, though as the trustee will still manage the assets and control them, some potential for such confusion may remain, depending on asset type, registration requirements and the rights, less than title, given the trustee in, or respecting, each asset. Where the settlor or a beneficiary holds title to the trust assets, mistaken beliefs that trust property is the titleholder's individually, and vice versa, may appear or increase. The balance of social welfare is thus far from clear, depending on the likelihood and gravity of the various risks.[156]

Empirically, the consequences of abolishing the requirement that for a trust to be constituted, settlors must transfer title in the trust assets to their trustees have been various. In China, trust creation in practice almost always involves transfer of title in the trust assets to trustees,[157] while the Chinese People's Courts held, in two much-discussed decisions applying the Trust Act, that where settlors transferred assets to trustees in trust for the settlors themselves, the settlor–beneficiaries remained, despite the transfer, substantial owners of the assets, the trustee being a mere "titular owner."[158] In Israel, the "shapeless" statutory definition of the trust made local practitioners prefer using foreign trust regimes for sophisticated family trusts, while the courts took thirty years to conclude that the Israeli Trust Act permits title in the trust assets to be lodged in either settlor, trustee or beneficiary.[159] It thus appears that making dramatic changes to foundational characteristics of the trust institution creates significant

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[156] For analysis of the pros and cons of not requiring transfer of title to trustees, see Ho, *Trust Laws in China: History*, *supra* note 105, at 200–01; Kenneth G.C. Reid, *Conceptualising the Chinese Trust: Some Thoughts from Europe*, *in* TOWARDS A CHINESE CIVIL CODE: COMPARATIVE AND HISTORICAL PERSPECTIVES 209, 213–17 (Lei Chen & C.H. (Remco) van Rhee eds., 2012); Hofri, *supra* note 132, at 140–43, 172–77.

[157] *See* Ho, *Trust Laws in China: History*, *supra* note 105, at 202.

[158] *Id.* at 202–10 (describing *Yanxin v. Huabao Trust* and *Beijing Haidian*).

[159] *See* Hofri, *supra* note 132, at 162–65 (practitioners); *id.* at 159–62 (courts). According to senior Israeli trusts and estates practitioners Alon Kaplan and George Rosenberg, they and their fellow practitioners have in the last few years been making more use of the local Act than heretofore, having discovered the potential of its free-form approach to the trust concept. Interviews with Alon Kaplan, Founding Partner, MMG Kaplex, in Tel-Aviv, Israel (Jan. 10, 2010, May 11, 2011 & Aug. 7, 2012); E-mail from George Rosenberg, Founding Partner, Rosenberg, Abramovich, Keren-Polak, Epelman, to author (Sept. 19, 2012) (on file with the Ohio State Law Journal).

uncertainty. Users and service providers may choose to follow the traditional trust model rather than the more adventurous varieties made available by legislatures, despite the latter having been made available on the assumption that local users and service providers would find them more attractive, and easier to understand and use, than traditional trusts. Or users and service providers may prefer to avoid the local trust regime completely, preferring tried-and-true alternatives abroad. It is only in Québec, which had a better-established trust practice anterior to legislating its innovative trust model than either China or Israel had when enacting theirs, that the recent trust regime has led to the enrichment and diversification of trust practice.[160]

V. FROM EVOLUTIONARY SCRIPTS TO DISTRIBUTIVE RESULTS: CORRELATION AND NORMATIVE IMPLICATIONS

A. *Evolutionary Scripts and Distributive Results Correlated*

Some of the distributive results described in Part IV are, from a social welfare point of view, highly undesirable. The abolition of the rule against perpetuities and the rise of Asset Protection Trusts have created perpetual trusts and APTs as fortresses of privilege, externalizing harm onto the part of society which neither uses trusts nor administers them. Trustee delegation reform and the curtailment of trustees' duties and liabilities transfer wealth from trust beneficiaries, who often acquire their beneficiary status involuntarily, may be unsophisticated and sometimes rely on the trust fund as their principal source of support, to trust service providers, who have succeeded in refashioning the legal form they employ so as to obtain an ever-larger, ever more sure income stream. From a social welfare perspective, these trust reforms appear to be clear failures of the law reform process, turning the trust into a less attractive legal institution, inviting unscrupulous, welfare-reducing rent seeking.[161] Undesirable reforms already enacted will have to be corrected, if at all, by re-amending the law on the same issues.[162] How may similar failures be prevented, in the trust field or elsewhere, *before* further welfare-reducing rules are enacted into law?

My discussion, in Part III, of the evolutionary scripts which led to each instance of law reform studied in this Article, together with the analysis of their distributive results in Part IV, provide a clue. They expose a correlation between the evolutionary script followed by each instance of law reform and its

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[160] See, for example, the breadth of trust practice evident in CLAXTON, *supra* note 108.

[161] The rent seeking concept has been centrally developed by Gordon Tullock. *See, e.g.*, 5 GORDON TULLOCK, *The Rent Seeking Society*, *in* THE SELECTED WORKS OF GORDON TULLOCK (Charles K. Rowley ed., 2005). For Tullock's distinction between efficient and inefficient rent seeking, see *id.* at 63–66.

[162] For one attempt at such re-amendment, see the NCCUSL's attempt to roll back the perpetual trusts revolution by offering a modernized rule against perpetuities. *See generally* Waggoner, *American Law Institute*, *supra* note 114; Waggoner, *Curtailing Dead-Hand Control*, *supra* note 114.

distributive results. That correlation, in turn, makes possible the identification of certain legal evolutionary scripts as especially likely to produce welfare-reducing law reforms. Law reforms promoted through these scripts should be treated with particular caution.

The substance of Parts III and IV, and the resulting correlation, are succinctly expressed in Table 1.

Table 1: *Evolutionary Scripts and Distributive Results Correlated*

Law Reform Episode	Evolutionary Script Followed	Distributive Results
Reform of Trust Investment Law	User and service provider dissatisfaction → drafted opt-outs → uniform law reform → state enactment	Beneficiaries bear more risk and may enjoy higher return. Trustees lost investment safe havens. Trusts hold more stock, and suffered from recent bear markets. Possibly some optimization of trust capital allocation
Trustee Delegation Reform	User and service provider dissatisfaction → drafted opt-outs, fictional compliance → uniform law reform → state enactment	Burden of agency costs increased, and shifted from trustee to beneficiary. More service providers earn fees from each trust
Abolition of the Rule Against Perpetuities	Jurisdictional contest between U.S. states	Tax-saving and judgment proofing advantages of trusts amplified; trust non-users harmed
Rise of Self-settled Spendthrift Trusts	Jurisdictional contest between offshore jurisdictions and U.S. states	Judgment proofing advantages of trusts amplified; trust non-users harmed
Trusts Without Equity	Doctrinal evolution, aiming at systemic coherence; hints of a jurisdictional contest	Increased uncertainty; otherwise unclear
Elimination of Requirement that Trustees Own the Trust Assets	Doctrinal evolution, aiming at systemic coherence	Increased uncertainty
Curtailment of Trustee Duties and Liabilities	Worldwide jurisdictional contest; (regarding "trading trusts" alone) client demand	Risk of loss shifted from trustees to beneficiaries, their creditors and dependents
Curtailment of Beneficiaries' Rights	Client demand → drafted responses → service provider lobbying → legislative responses	Stronger settlors, weaker beneficiaries; some threat to effective trustee monitoring

The evolutionary scripts and distributive results studied in this Article, and expressed in Table 1, show that reforms which were *first implemented in drafted opt-outs from the traditional law*, *before being received into state legislation*, tend to increase the burden of agency costs, grant the service providers involved additional discretion, and sometimes increase their fee take. Reforms which developed and spread by way of *jurisdictional contests* tend to amplify the insider priming effect of the reformed legal institution, distributing benefits to users and service providers and costs to the rest of society. The case of exculpatory clauses is exceptional among reforms which evolved by way of jurisdictional contest, in that service providers were able to monopolize the benefit of the reform, harming users. The consequences of reforms developed by way of *considered, non-competitive, statutory doctrinal innovation*, *focused on retaining systemic coherence*, differ according to whether reform was imposed on a set of well-established legal practices, or imposed in the process of first receiving a legal institution into a given system. Where reforms of this sort are imposed on well-established legal practices they can matter relatively little in practice, so long as they do not make unavailable a remedy used earlier. Where imposed on the initial reception of a legal institution, reforms shaping the domestic form of that institution as doctrinally different from forms commonly found in other systems can create uncertainty, result in frequent amendment of the new regime[163] and even impede the absorption of the new domestic version of the institution into domestic practice, as domestic users and service providers may choose the more familiar form of the institution offered by foreign systems.

Using this correlation to re-examine the common identification of jurisdictional contests as likely to lead to welfare-reducing equilibria, I find that while jurisdictional contests do tend to lead to such equilibria, they are not alone. Many elements of the rapid "stripping of the trust" have resulted in regimes that appear, from a social welfare perspective, unattractive. The liberalization of trustee delegation, for example, leads to the transfer of wealth from trust users to trust service providers, as does the curtailment of trustee duties and liabilities. Reforms propagated by way of jurisdictional contest are unique not in their results being welfare-reducing, but in the specific groups of winners (small) and losers (large) delineated: some, though not all, such reforms tend to refashion the legal institution in question as an externalizing island, privileging both users and service providers at the expense of non-users. Reforms which first appeared as drafted opt-outs in individual trust instruments also tend to have welfare-reducing results, though they transfer wealth between the parties to a trust—from beneficiaries to trust service providers—rather than from non-parties to all the trust parties. Doctrinally focused reforms created by jurisdictional legislatures, official law reform organs and expert scholars absent

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[163] As with the French *Fiducie*, introduced in 2007 and amended in 2008, 2009 and 2010. *See* Barrière, *supra* note 155, at 115–16.

the added propulsion of jurisdictional contests or existing drafting practices paving the way for reform tend to have less damaging distributive results. The costly consequences of such reforms are often limited to a protracted uncertainty. Because they do not create a well-defined benefitted group, their projected user populations tend to adopt them with far less enthusiasm than those using reformed regimes which evolved by way of drafted opt-outs or jurisdictional contests.

B. *Normative Implications*

I thus argue that two of the legal evolutionary scripts studied in this Article appear especially likely to lead to welfare-reducing consequences: the adoption as default law of arrangements earlier imposed as drafted opt-outs from the existing law, and jurisdictional contests. Legislators should be wary of law reform initiatives following either of these two scripts, and carefully examine their distributive results before enactment.

That the adoption into law of arrangements earlier imposed as drafted opt-outs would tend to produce undesirable distributive results is unsurprising. Opt-outs are often inserted in governing instruments, such as contracts or trust deeds, by the stronger, more sophisticated party to a deal. Stronger, more sophisticated parties, such as service providers in their relationships with clients, are often better informed than their adverse parties about both the applicable law and the content of the instrument governing a relationship with a specific client. Consequently, many opt-outs express and promote the interests of stronger, more sophisticated parties. The default law out of which they opt may well be a penalty default rule, intended to force stronger parties to openly negotiate their way to alternatives they find preferable.[164] As Dunn's research on settlor attitudes to trustee exculpatory clauses has shown, however, stronger, better-informed parties can often opt out of penalty defaults with their adverse parties either unaware of the opt-out or believing it does not materially affect their interests.[165] Opt-outs are thus themselves likely to express the preference of stronger parties that they win the largest possible part of the benefits of a relationship, while most of the costs are borne by weaker parties. It follows that opt-outs are likely to reduce social welfare, and that so is the adoption of positions opted into as default law. Similarly with many law reform initiatives proposed as part of an inter-jurisdictional contest. Driven by service providers' need for clients or jurisdictions' need for investment, revenue and jobs, the fear

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[164] *See* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989) (penalty default rules); *see also* Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 YALE L.J. 2032 (2012); Ian Ayres, *Ya-Huh: There Are and Should Be Penalty Defaults*, 33 FLA. ST. U. L. REV. 589 (2006); Eric Maskin, *On the Rationale for Penalty Default Rules*, 33 FLA. ST. U. L. REV. 557 (2006); Eric A. Posner, *There Are No Penalty Default Rules in Contract Law*, 33 FLA. ST. U. L. REV. 563 (2006).

[165] *See supra* note 145 and accompanying text.

of clients, investment, revenue or jobs escaping elsewhere may bring legislatures to dramatically compromise protections afforded to deserving interests, such as those of creditors or taxpayers. While some jurisdictions may gain revenue or jobs from dismantling the protections traditional law offered such interests, that gain imposes large externalities elsewhere. Legislators should thus see proposed law reforms enacting into law arrangements earlier opted into by service providers, as well as reforms proposed as part of an inter-jurisdictional contest, as inherently suspicious, and carefully examine, before enactment, their implications for social welfare.

VI. CONCLUSION

Trust law has spent the last quarter-century changing at an exhilarating speed. Much, though not all, of the change consisted of the casting off of traditional restrictions and requirements, a "stripping of the trust." Traditional rules limiting trustees' investment practices and their delegation power were liberalized; the rule against perpetuities and the ban on self-settled spendthrift trusts were abolished; many jurisdictions adopted trust regimes without adopting equity, some even abolishing the classical requirement that title in the trust assets be transferred to the trustees; while both trustee duties and liabilities and beneficiaries' rights were curtailed. Each jurisdiction adopted a different selection of trust reforms.

My purpose with this Article was to identify the causes of the social welfare-reducing changes recently made to trust law, and propose a means for preventing further welfare-reducing law reforms, in trust law or in other fields. To that end, I have analyzed both the legal evolutionary scripts followed by eight recent trust law reforms and their distributive results. I found that most aspects of the recent trust reforms reallocated costs and benefits so as to reduce social welfare, and that most of these welfare-reducing reforms either enacted into law positions earlier adopted by service providers in opting out of the then default law, or were adopted as one move in an ongoing inter-jurisdictional contest. Those reforms that evolved by way of jurisdictional contests were rather more unique in having evolved as parts of competitive races than in the bottom-bound direction of the race. They were also notable for spreading the benefits of reform among both users of the reformed institution and service providers supplying it, creating a clutch of privileged winners made of both users and service providers while externalizing the cost of their winnings onto the rest of society. Reforms that enacted into law service providers' earlier opt-outs transferred wealth from users to service providers. I concluded that legislatures should examine proposed reforms originating either in service provider-initiated opt-outs from earlier law or in jurisdictional contests with great care, identifying their likely consequences for overall social welfare.