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 benefiting legal and financial service providers and some of their privileged clients.

TABLE OF CONTENTS

I. INTRODUCTION ................................................................................. 530
II. THE STRIPPING PROCESS ................................................................. 537
   A. The Reform of Trust Investment Law: From Prudent Man to Prudent Investor ......................................................... 537
   B. The Liberalization of Trustee Delegation .................................. 539
   C. The Fall of the Rule Against Perpetuities ................................. 541
   D. The Rise of Self-settled Asset Protection Trusts ...................... 542
   E. Curtailment of Trustees’ Duties and Liabilities ....................... 543
   F. Curtailment of Beneficiaries’ Rights ....................................... 546
   G. Trusts Without Equity ............................................................... 548
   H. Elimination of Requirement that Trustees Own the Trust Property ................................................................. 550

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III. Evolutionary Scripts ................................................................. 552
   A. From Drafted Opt-Outs, Through Uniform Laws, to Legislation: Trust Investment Law and Trustee Delegation Reform ......................................................... 552
      1. Reform of Trust Investment Law ........................................ 552
      2. Trustee Delegation Reform ............................................... 552
   B. Jurisdictional Contests: Fall of the R.A.P., Rise of Asset Protection Trusts, and Curtailment of Trustees’ Duties and Liabilities ............................................. 553
      1. Fall of the R.A.P. .............................................................. 553
      2. Rise of Asset Protection Trusts ......................................... 554
      3. Curtailment of Trustee Duties and Liabilities .................. 554
   C. From Client Demand, Through Drafting, to Legislation: Curtailment of Beneficiaries’ Rights ................................................................. 554
   D. A Preference for Systemic Coherence: Letting Go of Equity and the Trustee Ownership Requirement .......................................................... 555
      1. Trusts Without Equity ....................................................... 555
      2. Elimination of Requirement that Trustees Own the Trust Assets ............................................................................................................................. 556
IV. Distributive Results ........................................................................ 557
   A. Reforms Enriching Trust Users and Service Providers at Non-parties’ Expense ................................................................. 558
   B. Reforms Empowering Settlors at Beneficiaries’ Expense...... 559
   C. Reforms Enriching Trust Service Providers at Trust Users’ Expense ................................................................................................................. 560
   D. Reforms Without Clear Distributive Results ....................... 562
V. From Evolutionary Scripts to Distributive Results: Correlation and Normative Implications ......................................................... 566
   A. Evolutionary Scripts and Distributive Results Correlated ................................................................. 566
   B. Normative Implications ....................................................... 569
VI. Conclusion ..................................................................................... 570

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, protect vulnerable beneficiaries, and prevent the use of state trust law to avoid the claims of settlers’ creditors, including their spouses, children, and federal and state governments. Recent examples abound. Virginia law now includes an “Asset Protection Trust” regime, effective since 2012. 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. 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. 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, also permits “perpetual trusts,” which may last forever. 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. 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 V.A. 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.
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


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. While some scholars identify specific jurisdictional contests as having been made for improvement in the law, most studies of such contests characterize them as “races to the bottom,”

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”).


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. 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.


Melanie Leslie—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.

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. 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

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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.
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. 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. 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

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. 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. 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. 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.

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,” and invest funds


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.” The Rule encouraged trustees to invest in both government and corporate bonds, seen as prima facie proper trust investments.

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. 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.” 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.”

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), were applied to trust investment law generally in the Restatement (Third) of Trusts: Prudent Investor Rule (1992),

.. 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.

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.
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.” 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.” 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.” 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.’” “Nearly all states” have adopted the reformed Prudent Investor Rule by legislation.

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.” The courts distinguished between ministerial functions, which could be delegated, and discretionary functions, which could not. 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. 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. 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,” and later legislation modeled on the Uniform Probate Code (UPC), which included a similar provision, 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,” 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.’”

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.

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

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.
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.” A Restatement (Third) comment provides that trustees may even
sometimes have a duty to delegate their investment functions. 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. Aggrieved beneficiaries “must
look exclusively to the agent.”

C. The Fall of the Rule Against Perpetuities

Under the rule against perpetuities, a part of the traditional common law, “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.” By 2012,
twenty-nine states and the District of Columbia had either abolished the Rule or
extended their perpetuity periods to several hundred years.

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], 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.

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

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,
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.
(1988); A. I. Ogus, The Trust as Governance Structure, 36 U. TORONTO L.J. 186, 214–17
(1986).
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. 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. Once Delaware abolished its rule in 1995, abolition spread quickly among the states. 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. Appointment as trustee and deposits of trust funds both generate fees for the service providers involved.

D. The Rise of Self-settled Asset Protection Trusts

While U.S. trust law has, since the late nineteenth century, permitted spendthrift trusts, 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. 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.” 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. U.S. states started reversing the rule against self-settled spendthrift trusts.
settled spendthrift trusts in 1997. 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. 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.

E. Curtailment of Trustees’ Duties and Liabilities

Trustees’ duties under traditional law, which many scholars believe to be indispensable, 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. 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, and their personal liability for torts


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


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. In other cases, trust creditors’ sole recourse is against the trust fund. Many offshore jurisdictions have similarly restricted trustees’ personal liability to trust creditors.

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.


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 inexcusable, 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).

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


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.”\textsuperscript{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.\textsuperscript{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,”\textsuperscript{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,”\textsuperscript{84} most states enacting the Code have enacted those duties, if at all, in weakened form,\textsuperscript{85} and they were


\textsuperscript{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.); \textit{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 \textit{PANICO}, \textit{supra} note 77, at 182–84.


\textsuperscript{85} Information on the amendments enacting states have made to the UTC is provided on the Uniform Law Commission website. \textit{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. \textit{See UNIF. TRUST CODE} § 105(b)(9), 7C U.L.A. 428 (2006).
made optional in a 2004 amendment to the Code. The 2007 installment of the Restatement (Third) also permits some curtailment of beneficiaries’ rights to information about the trust. 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” is not best approached, as in the earlier case of O’Rourke v. Darbishire, 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.” 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.

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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.).


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.” Non-beneficiary enforcers having first appeared in legislation permitting non-charitable purpose trusts, 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, while the Restatement (Third) permits non-beneficiary enforcers as an addition to, but not a replacement for, beneficiaries’ enforcement powers.

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.


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. 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. 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. Colonial-era Ceylon adopted the Indian solution in its own Trusts Ordinance. More recently, Jersey, the original island, has “enact[ed] the central body of English trusts law without any reference to legal or equitable estates.” And despite having been adopted in frank imitation of the common law trust, the fiducie and fideicomiso regimes of Latin civil law systems all

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).


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).


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


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.”

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.

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.”

The Québécois 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.

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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 Tomáš 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 laquelle un ou plusieurs biens sont constitués en une masse autonome, pour etre administrée par une personne, le fidéïcommissaire, selon les instructions données par le constituant du fidéïcommissis” (“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.\footnote{See Jeffrey N. Gordon, The Puzzling Persistence of the Constrained Prudent Man Rule, 62 N.Y.U. L. REV. 52, 76 n.99 (1987).} 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.\footnote{See Schanzenbach & Sitkoff, Reform, supra note 18, at 685 n.11.} 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
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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\(^{113}\) See Sterk, *Jurisdictional Competition*, supra note 19, at 2097–98.

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. 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. 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.

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.” As Leslie noted, “[i]t is difficult to attribute this sea change in the law to anything other than effective lobbying by banks.”

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

115 See supra text accompanying note 68.
116 See supra note 56 and accompanying text.
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. 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.” The Scots law of trusts grew out of Scots legal practice after the 1603 union of the English and Scottish Crowns. 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...
systemic coherence. 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,” and those who later adapted the Indian Act to form the Ceylon Trusts Ordinance adopted the same solution. Exceptionally, the South African courts rejected the split ownership trust model so that it did not disturb an unrelated policy, their land registration system. 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. 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. 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. 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,

123 See id. at 510.
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.

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

\(^{135}\) Sitkoff & Schanzenbach, Jurisdictional Competition, supra note 18, at 410–11.

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.


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); Uniform 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 Uniform 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. 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.

Several readers of this Article 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
settlers 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 class¹⁴⁶
are likely to have made such settlors a minority, as Dunn’s study of English
settlers 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-

¹⁴⁵ See Trustee Exemption Clauses, A Consultation Paper ¶¶ 3.38–3.40 (The Law
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
settlers. 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.
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

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.
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.


\(^{154}\) 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).

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


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

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**

<table>
<thead>
<tr>
<th>Law Reform Episode</th>
<th>Evolutionary Script Followed</th>
<th>Distributive Results</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Reform of Trust Investment Law</strong></td>
<td>User and service provider dissatisfaction → drafted opt-outs → uniform law reform → state enactment</td>
<td>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</td>
</tr>
<tr>
<td><strong>Trustee Delegation Reform</strong></td>
<td>User and service provider dissatisfaction → drafted opt-outs, fictional compliance → uniform law reform → state enactment</td>
<td>Burden of agency costs increased, and shifted from trustee to beneficiary. More service providers earn fees from each trust</td>
</tr>
<tr>
<td><strong>Abolition of the Rule Against Perpetuities</strong></td>
<td>Jurisdictional contest between U.S. states</td>
<td>Tax-saving and judgment proofing advantages of trusts amplified; trust non-users harmed</td>
</tr>
<tr>
<td><strong>Rise of Self-settled Spendthrift Trusts</strong></td>
<td>Jurisdictional contest between offshore jurisdictions and U.S. states</td>
<td>Judgment proofing advantages of trusts amplified; trust non-users harmed</td>
</tr>
<tr>
<td><strong>Trusts Without Equity</strong></td>
<td>Doctrinal evolution, aiming at systemic coherence; hints of a jurisdictional contest</td>
<td>Increased uncertainty; otherwise unclear</td>
</tr>
<tr>
<td><strong>Elimination of Requirement that Trustees Own the Trust Assets</strong></td>
<td>Doctrinal evolution, aiming at systemic coherence</td>
<td>Increased uncertainty</td>
</tr>
<tr>
<td><strong>Curtailment of Trustee Duties and Liabilities</strong></td>
<td>Worldwide jurisdictional contest; (regarding “trading trusts” alone) client demand</td>
<td>Risk of loss shifted from trustees to beneficiaries, their creditors and dependents</td>
</tr>
<tr>
<td><strong>Curtailment of Beneficiaries’ Rights</strong></td>
<td>Client demand → drafted responses → service provider lobbying → legislative responses</td>
<td>Stronger settlors, weaker beneficiaries; some threat to effective trustee monitoring</td>
</tr>
</tbody>
</table>
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 regime163 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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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


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.