

AGAINST A UNIFORM LAW ON THE INCOME TAXATION OF TRUSTS

*Michelle S. Simon**

ABSTRACT

In many areas, uniformity of state law is both practical and desirable. The Uniform Commercial Code, for example, brought harmony to conflicting state laws regarding the sale of goods and secured transactions, smoothing the way for interstate commerce. The law of trusts and estates is another area to which the Uniform Law Commissioners have recently turned their attention. Given the multitude of conflicts in state law regarding intestacy, fiduciary powers, and remote notarization, greater consistency between the states would be welcome. One area that should be off-limits to uniform lawmaking is the state income taxation of trusts. Despite complex and conflicting state laws on the matter, attempts to harmonize the income tax laws infringes on state sovereignty and disrupts the federalist system of government.

INTRODUCTION

Under what circumstances may a state constitutionally tax a trust? That question lies squarely at the intersection of two bodies of law: the law of trusts and the law of conflicts. A trust is a complicated property arrangement in which the trustee, beneficiary, and assets can potentially “touch” several different states.¹ Whether the trust is subject to income tax at the state level depends on a variety of factors, including whether a state taxes trusts at all, and if so, which state’s law applies.² The considerable differences among the income tax laws of several states,³ as well as the requirements of the United States Constitution, complicate the determination of *which state* can tax *what type* of trust *when*.⁴

* Professor of Law and Walker/Connor Ives Faculty Scholar, Elisabeth Haub School of Law at Pace University. Thanks to Bridget Crawford for always inspiring me, and Maria Profeta, Sabrina Bellantoni, and Francine Michel for their research assistance.

¹ See, e.g., ROBERT H. SITKOFF & JESSE DUKEMINIER, *WILLS, TRUSTS, AND ESTATES* 385 (10th ed. 2017).

² See, e.g., Bradley E.S. Fogel, *What Have You Done For Me Lately? Constitutional Limitations on State Taxation of Trusts*, 32 U. RICH. L. REV. 165, 165–71 (1998) (discussing as relevant factors in the state income taxation of trusts the residence of the trust’s creator and/or trustees, the location of the trust assets, and the principal place of trust administration).

³ See discussion *infra* Part III. Note that there are no state income taxes imposed by law in five states: Delaware, Alaska, Montana, New Hampshire, and Oregon.

⁴ See discussion *infra* Part I.

As a result of these interlocking strands, it is possible—either coincidentally or through strategic manipulation—to craft a trust that completely avoids being subject to state income taxes.⁵ It is equally possible to have a trust that is subject to taxation in multiple states.⁶ One possible way to stop these potentially unfair results is through the creation of a uniform act on the taxation of trusts that addresses this choice of law issue.⁷ A uniform act that includes a provision identifying under what circumstances states may tax trusts could facilitate proper outcomes and bring clarity to this area of conflict of laws.⁸ States struggling with these complex issues would welcome greater clarity, but a uniform act at the intersection of trust and taxation is inadvisable for several reasons.

While a uniform act would harmonize state approaches, it would also take away the autonomy of the individual states.⁹ Some states might choose not to tax trusts because they want to attract assets to their jurisdictions.¹⁰ Others might want to tax in order to create revenue.¹¹ Further, trusts are already subject to federal income tax.¹² Shouldn't each state be able to decide for itself what it wants to do? Creating a uniform approach in this area would be fundamentally disruptive to federalism in a way different from a singular approach across the states regarding whether a commercial contract's governing law clause applies or whether remote notarization will be recognized.¹³ Taxation is unique because it goes to the heart of federalism and the sovereignty of the states.

While we frequently think of federalism as the relationship between the federal government and the state governments,¹⁴ encompassing areas such as Congress's power to regulate an area that is traditionally regulated by the

⁵ See, e.g., Bridget J. Crawford & Michelle S. Simon, *The Supreme Court, Due Process & State Income Taxation of Trusts*, 67 UCLA L. REV. DISC. 2 (2019).

⁶ See, e.g., *Curry v. McCannless*, 307 U.S. 357 (1939) (holding that Alabama and Tennessee could impose a tax on a testamentary transfer of intangible property, from the will of a Tennessee domiciliary to a trustee located in Alabama).

⁷ See discussion *infra* Part I.

⁸ See *id.*

⁹ See discussion *infra* Part III.

¹⁰ See, e.g., S.B. 394, Judiciary Comm., 2006 Session (N.H. 2006) (stating in § 320:1(III) that “[t]his act will serve to establish New Hampshire as the best and most attractive legal environment in the nation for trusts and trust services, and this environment will attract to our state good-paying jobs for trust and investment management, the legal and accounting professions, and support an infrastructure required to service this growing sector of the nation’s economy.”).

¹¹ Christopher M. Reimer, *The Undiscovered Country: Wyoming’s Emergence as a Leading Trust Situs Jurisdiction*, 11 WYO. L. REV. 165 (providing an example of Wyoming, which has crafted its laws to provide attractive grounds for trust settlors with the hopes of also raising revenue within the state).

¹² See I.R.C. §§ 641–92 (codifying under federal law trust treatment as separate entities subject to federal taxes); see also I.R.C. § 641(b) (imposing an income tax on the “taxable” property held within a trust).

¹³ See discussion *infra* Part II.

¹⁴ See discussion *infra* Part III.

states,¹⁵ or whether the federal courts need to abstain from cases that are pending in state court,¹⁶ states are also separate sovereigns that act independently from the federal government and from each other.¹⁷ This type of federalism, called horizontal federalism,¹⁸ encompasses the tension that can arise between states as a result of activities and laws that overlap or cause potential friction between the states.¹⁹ A uniform provision that does not take into consideration the multitude of views of the independent sovereign states undermines horizontal federalism and can increase, rather than decrease, conflict between the states.

Part I of this article will summarize the various approaches that states are currently taking to determine whether a trust is subject to its state income tax, and some of the issues that have arisen under these approaches.²⁰ It will also explore the limitations of those tax laws under the Due Process Clause of the United States Constitution and the resulting problems.²¹

Part II will examine Uniform Acts in general, including the role of the Uniform Law Commission.²² It will explore which uniform acts have been successful, which have been unsuccessful, and why. It will also address why bringing harmony to the states' taxation of trusts might, in fact, hamper the success of a uniform act.²³ The various drafting options create their own problems, including difficulty in deciding the hierarchy for choice of one state's law over another's.²⁴ Since the success of a uniform act is measured by how many states adopt it in its entirety, and a uniform law on the state taxation of trusts likely would be unpopular, it should not be pursued.²⁵

Finally, Part III will address the federalism and sovereignty issues raised by any prospective uniform law that attempts to address when a state may tax a trust.²⁶ While a uniform approach to the problem could discourage crafty drafting and help ensure that due process concerns are addressed, it both diminishes the autonomy of the states in deciding how they want to treat trusts and creates potential friction between the states.²⁷ Thus, this article

¹⁵ *See id.*

¹⁶ *See id.*

¹⁷ *See id.*

¹⁸ *See id.*

¹⁹ *See id.*

²⁰ *See* discussion *infra* Part I.

²¹ *See id.*

²² *See* discussion *infra* Part II.

²³ *See id.*

²⁴ *See id.*

²⁵ *See id.*

²⁶ *See* discussion *infra* Part III.

²⁷ *See id.*

concludes that, in balance, this is not an area where a uniform provision would be successful.

I. STATE APPROACHES TO THE TAXATION OF TRUSTS

The area of state taxation of trusts is very complex. In terms of law, it involves state tax laws, state trust laws, and provisions of the applicable trust instrument.²⁸ In addition, the determination of whether a state can tax a trust includes federal constitutional considerations of due process.²⁹ Factually, the analysis of whether taxation is both appropriate and lawful may include an assessment of the residence of the person who created the trust, either during her lifetime (in the case of an inter vivos trust) or at her death (in the case of a testamentary trust),³⁰ the residence of the trustee,³¹ the residence of the beneficiary,³² the place where the trust is administered,³³ and the location of any trust assets.³⁴ Depending on how these laws and facts converge, a trust may be subject to multiple states' income taxes,³⁵ or may avoid state income tax completely.³⁶

The income taxation of trusts under federal law is simpler and largely depends on the terms of the trust.³⁷ Under the Internal Revenue Code, trusts are classified as either grantor or non-grantor trusts.³⁸ One example of a grantor trust is a revocable inter vivos trust.³⁹ In the case of a grantor trust,⁴⁰ for federal income tax purposes, the trust itself is ignored and instead the

²⁸ *See id.*

²⁹ *See* Crawford & Simon, *supra* note 5, at 12–16 (discussing due process considerations taken up by the Supreme Court of the United States in a 2019 case).

³⁰ Mitchell M. Gans, *Kaestner Fails: The Way Forward*, 11 WM. & MARY BUS. L. REV. 651, 688 (2020).

³¹ *See* Crawford & Simon, *supra* note 5, at 6–7; *see also* N.Y. TAX LAW § 605(b)(3)(D) (McKinney 2018) (allowing for the imposition of an income tax based on residence of trustee in New York).

³² N.C. Dep't of Revenue v. Kimberly Rice Kaestner 1992 Fam. Tr., 139 S. Ct. 2213, 2220–22 (2019).

³³ *Hanson v. Denckla*, 357 U.S. 235, 246–47 (1958) (stating that the situs of a trust, the state in which the trust is administered, has the authority to tax the trust); *see also* Gans, *supra* note 30, at 663 (discussing the Supreme Court's majority opinion in *Kaestner*, citing *Hanson*); *see also* discussion *infra* Part I.

³⁴ *See, e.g.*, *Curry v. McCannless*, 307 U.S. 357 (1939); *see also* Crawford & Simon, *supra* note 5, at 5.

³⁵ *Curry*, 307 U.S. at 374.

³⁶ Crawford & Simon, *supra* note 5, at 17 (discussing a possibility that the situs of a trust does not sit in a jurisdiction which imposes an income tax, or in a jurisdiction where the trustee may determine *ex ante* not to impose a tax); *see, e.g.*, NY TAX LAW § 605(b)(3)(D) (McKinney 2018) (representing New York's approach that if no trustees are domiciled in the state, the trust derives no source income from the state, and there is no property of the trust located within the state, then there shall not be a tax on the trust).

³⁷ *See infra* notes 38–40 and accompanying text.

³⁸ I.R.C. §§ 671, 673(a).

³⁹ SITKOFF & DUKEMINIER, *supra* note 1, at 391.

⁴⁰ I.R.C. §§ 671–77; *see also* Christopher J.C. Jones & Caitlin N. Horne, *Grantor Trust Income Tax Reporting Requirements: A Primer*, 30 PROB. & PROP. 40, 40 (2015) (explaining that grantor trusts may arise in common instances such as irrevocable life insurance trusts, intentionally defective grantor trusts, and grantor retained annuity trusts).

grantor of the trust is treated as the owner of the trust assets and is taxed on any trust income.⁴¹

A non-grantor trust is considered, for federal income tax purposes, to be a separate entity from the person who created it.⁴² A common example of a non-grantor trust is a testamentary trust, created for the decedent's descendants, with a third party acting as trustee.⁴³ When a non-grantor trust accrues, accumulates, or earns income, that income is taxed at the trust level.⁴⁴ This means that the trustee must file tax returns and pay taxes on the trust income, without regard to the person who created it.⁴⁵

The state income taxation of trusts is more complex. States can choose not to tax trusts at all.⁴⁶ States that do tax trusts may opt to have their income tax laws conform to the federal scheme.⁴⁷ Trust income that is considered to be taxable to the grantor under federal law will likely be taxed to the grantor under state tax law and usually does not raise issues of fairness.⁴⁸ States are not obligated to follow the federal model.⁴⁹ A state may consider factors such as the residence of the grantor, trustee, or beneficiary; the location where the trust is administered; the location of trust asset; and/or the source of trust income—all of which may involve different states.⁵⁰ This results in the application of different state laws, as well as the federal constitution.⁵¹ Furthermore, states have different approaches on which state can tax accumulated trust income.⁵² These different approaches, combined with the constitutional due process requirements on the scope of the state's reach, can produce very different results and opportunities for strategic planning behaviors to minimize, or even avoid entirely, state income taxation of trust income.⁵³

⁴¹ Jay A. Soled, *Reforming the Grantor Trust Rules*, 76 NOTRE DAME L. REV. 375, 375 n.3 (2001) (highlighting that most courts, as well as the Internal Revenue Service (IRS), consider a grantor and a grantor trust to be "one and the same taxpayer").

⁴² Jones & Horne, *supra* note 40, at 40; *see also* Crawford & Simon, *supra* note 5, at 5 (discussing how an irrevocable trust is generally taxed only once, either at the trust level or the beneficiary level).

⁴³ SITKOFF & DUKEMINIER, *supra* note 1, at 391; *see* Crawford & Simon, *supra* note 5, at 5.

⁴⁴ *See* Crawford & Simon, *supra* note 5, at 5.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *See* Jared Walczak, *Toward a State of Conformity: State Tax Codes a Year After Federal Tax Reform*, 631 TAX FOUND. 1, 2 (2019) (emphasizing that states often either adopt the federal taxation system in whole and then alter a few minute aspects, or, to reduce the burden on the state, mirror the state's taxation system directly after the federal scheme).

⁴⁸ *See id.*; *see generally* Jones & Horne, *supra* note 40.

⁴⁹ *See* Walczak, *supra* note 47, at 2.

⁵⁰ *See* Crawford & Simon, *supra* note 5, at 4–5.

⁵¹ *See id.* at 5.

⁵² *See id.* at 4.

⁵³ *See id.* at 12–16.

For example, many states divide trusts into two types: resident trusts and non-resident trusts.⁵⁴ Resident trusts are taxed on all income, regardless of the source.⁵⁵ Non-resident trusts, in contrast, are taxed only on income that is derived from a source within the taxing state.⁵⁶ States have vastly different approaches for determining whether a trust is a resident trust or not.⁵⁷ In some states, a trust is a resident trust if one trustee is a resident of that state.⁵⁸ In some states, a trust is a resident trust if the trust is administered in that state, regardless of where the trustee is located.⁵⁹ And that, of course, raises the question of how to determine where a trust is administered.⁶⁰ In some states, that is where the majority of fiduciary decisions are made; in other states, it is where the trustee is located.⁶¹ To complicate matters further, some states determine residency at the time the trust was created.⁶² So, if a testamentary trust was created under the will of a person who was a domiciliary of New York when he died, that trust is considered to be a resident of New York regardless of where the trust is administered.⁶³ And in other states, the trust is a resident of the state if its assets are there, or if income is derived there.⁶⁴ And so a problem is created: a state may seek to tax a trust that has no current connection between the trust and that state, other than that a trustee resides in that state, some fiduciary decisions were made in that state, or, decades before, the trust was created by a resident of that state.⁶⁵

Several states tax trusts based upon the residency of the trustee.⁶⁶ Under this approach, even trust advisers or protectors that act in a fiduciary manner, as is the case under Californian legislation, may be considered a co-trustee, and thus broaden a trust's exposure to additional taxing jurisdictions.⁶⁷

⁵⁴ See, e.g., *id.* at 7.

⁵⁵ See Gregory A. Bergmann & Eric L. Johnson, *Selected Issues Concerning the State Income Taxation of Nonresident Trusts and Estates*, THE TAX ADVISER (Sept. 1, 2011), <https://www.thetaxlawadviser.com/issues/sep/salt-sep2011.html>.

⁵⁶ See *id.*

⁵⁷ See *infra* notes 58–59 and accompanying text.

⁵⁸ See, e.g., ARIZ. REV. STAT. ANN. § 43-1301(5) (2011) (stating that “if a trust has more than one fiduciary, the trust is a resident trust if at least one of the fiduciaries is a resident of this state”).

⁵⁹ See, e.g., KAN. STAT. ANN. § 79-32, 109(d) (West 2022) (stating that “‘resident trust’ means a trust which is administered in this state”).

⁶⁰ See *infra* notes 61–62 and accompanying text.

⁶¹ See Crawford & Simon, *supra* note 5, at 17.

⁶² See *id.* at 6–7.

⁶³ *Id.*

⁶⁴ See *id.* at 4.

⁶⁵ *Id.* at 4–5.

⁶⁶ See Richard Spengler & Katherine Walter, *Would You Like SALT with That Trust?*, THE TAX ADVISER (May 1, 2021), <https://www.thetaxadviser.com/issues/2021/may/trust-state-tax.html> (discussing states that consider residency of the trustee to include Arizona, California, Montana, Oregon, and Virginia).

⁶⁷ *Id.*

Under California's Revenue and Tax Code, an individual does not need to be named as a co-trustee to trigger income tax liability; the definition of fiduciary reaches to "any person . . . acting in a fiduciary capacity."⁶⁸ Yet, even with a broad approach such as that reflected in California's legislation, the residency of a co-trustee can be a mitigating factor.⁶⁹

When a state seeks to tax a trust that has only attenuated connections to that state, it raises constitutional due process concerns. The Supreme Court recently addressed those concerns in *North Carolina Department of Revenue v. Kimberly Rice Kaestner 1992 Family Trust*.⁷⁰ In *Kaestner*, a New York domiciliary created a trust for the benefit of each of his three children and their beneficiaries.⁷¹ He named a New York domiciliary as trustee and made New York law controlling.⁷² He continued to live in New York until his death.⁷³ The trustee moved to Florida in 1995 and continued to administer the trust until he retired in 2005. He was then replaced by a new trustee who was domiciled in Connecticut.⁷⁴ In 1997, one of the beneficiary children moved to North Carolina.⁷⁵

Under the terms of the trust, the trustee was given the absolute discretion to distribute the assets of the trust in the amount and proportions that the trustee might determine.⁷⁶ Once the trust beneficiary reached the age of 40, she was entitled to receive the assets outright.⁷⁷ Prior to this time, however, neither the beneficiary nor any of her descendants (who were discretionary beneficiaries of the trust) were entitled to any income or principal from the trust.⁷⁸

Under North Carolina law at the time, the state imposed an income tax on any trust created for the benefit of a North Carolina resident, whether the beneficiary received trust income or not.⁷⁹ After the trustee filed a fiduciary tax return in North Carolina and paid tax on the accumulated and undistributed tax income for several years, the trustee then filed a refund claim for more than \$1.3 million.⁸⁰ The trustee argued that the North Carolina tax statute violated the Due Process Clause of the Fourteenth

⁶⁸ *Id.*; see also CAL. TAX CODE § 17006 (West 2022).

⁶⁹ See Spengler & Walter, *supra* note 66.

⁷⁰ N.C. Dep't of Revenue v. Kimberly Rice Kaestner 1992 Fam. Tr., 139 S. Ct. 2213 (2019).

⁷¹ See *id.* at 2218.

⁷² See *id.*

⁷³ Gans, *supra* note 30, at 659.

⁷⁴ *Id.*

⁷⁵ See *Kaestner*, 139 S. Ct. at 2218.

⁷⁶ See *id.*

⁷⁷ See *id.* at 2219.

⁷⁸ See *id.* at 2218.

⁷⁹ See *id.* at 2219.

⁸⁰ See *id.*

Amendment of the United States Constitution because North Carolina lacked minimum contacts with the trust.⁸¹

Under the facts, none of the beneficiaries resided in North Carolina when the trust was created.⁸² Although the trust enjoyed significant income in the years at issue, the trustee did not make any distribution of trust income or any other trust assets.⁸³ The trust's records were maintained in New York and the trustee resided outside of the state.⁸⁴ During the years in question, only two meetings between the beneficiary and the trustee occurred, and both meetings were held in New York.⁸⁵ The beneficiary did receive trust accountings, however, presumably sent to her home in North Carolina.⁸⁶

The North Carolina Supreme Court agreed with the arguments made by the trustee, concluding that the imposition of the income tax on the trust's undistributed income violated due process, and the Supreme Court of the United States upheld this decision.⁸⁷ The Court's reasoning was narrow: the presence of the beneficiary in North Carolina is not sufficient, on its own, to permit North Carolina to impose income tax on a trust's undistributed income.⁸⁸ It applied a two-part standard: first, whether there is "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax,"⁸⁹ and second, whether the income attributable to the state for tax purposes is "rationally related to values connected to the taxing state."⁹⁰ Because North Carolina was unable to satisfy the first prong, the Court determined it did not have to reach the second prong.⁹¹

The Supreme Court, thus, left wide latitude in terms of future cases with different factual scenarios.⁹² In addition, the Court did not reach the second prong, which explicitly acknowledges that states may have different values when it comes to taxation (the tax laws must be "rationally related to values connected to the taxing state").⁹³ Given the multitude of choice of law issues,

⁸¹ *See id.* at 2219, 2219 n.4 (the trustee also argued that the tax law violated the Commerce Clause, which requires a substantial nexus between the taxed entity and the state, an apportionment of the tax to the degree of activity connected to the state, and a fair relationship between the tax and the services provided by the state. The trustee argued that the North Carolina income tax failed all of these requirements. Neither the North Carolina Supreme Court nor the United States Supreme Court reached the Commerce Clause issue).

⁸² *See id.* at 2218.

⁸³ *See id.*

⁸⁴ *See id.*

⁸⁵ *See id.* at 2218 n.3.

⁸⁶ *See id.*

⁸⁷ *See id.* at 2219, 2226.

⁸⁸ *See id.* at 2221.

⁸⁹ *See id.* at 2220.

⁹⁰ *See id.*

⁹¹ *See id.* at 2224 n.11.

⁹² *See id.* at 2224.

⁹³ *See id.* at 2220.

it might appear that the state income taxation of trust would be ripe for a uniform approach, but that is undesirable for several reasons, as will be discussed in the next Part.

II. UNIFORM ACTS

A. Role and Function of the Uniform Law Commission

Uniform acts are drafted by the Uniform Law Commission, formally known as the National Conference of Commissioners on Uniform Laws.⁹⁴ The Commission was formed in 1892 to “provide states with non-partisan, carefully considered, and well-drafted legislation that brings clarity and stability to critical areas of the law.”⁹⁵ The Commission is funded through state governments, with expenses apportioned among the states.⁹⁶ Each state determines how many commissioners to appoint, how they should be appointed, and their terms (usually three to four years).⁹⁷ All commissioners are members of the bar and receive no payment for their work.⁹⁸

The Commission solicits proposals for new drafting projects and refers those proposals to an internal committee.⁹⁹ Once a proposal is approved, commissioners are selected to be on a drafting committee.¹⁰⁰ Such

⁹⁴ See Unif. L. Comm’n, *About Us*, <https://www.uniformlaws.org/aboutulc/overview> (last visited July 16, 2021) (noting the ULC’s establishment in 1892 and continued drafting of non-partisan state legislation since) [hereinafter *The ULC*]; see also Am. L. Inst., *Model Penal Code*, <https://www.ali.org/publications/show/model-penal-code/> (last visited July 16, 2021) (providing the ALI and its Model Penal Code as an example of other bodies, in addition to the ULC, that draft and propose model legislation).

⁹⁵ UNIF. L. COMM’N, OBSERVERS’ MANUAL 1 (2020) [hereinafter *Observers’ Manual*], <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=60335478-d340-2e88-2e90-88ced3902cb3&forceDialog=0>.

⁹⁶ See *The ULC*, *supra* note 94 (acknowledging under “Frequently Asked Questions” that the ULC receives the majority of its “financial support from state appropriations.” The ULC supplements the state’s financial support through revenue raised from the publication of uniform acts and “other ULC-copyright materials . . . grants from foundations and the federal government.”).

⁹⁷ See *id.* (noting that the governor of most states appoints the state’s commissioner to serve for a specific length of time; however, in a few states, other ULC commissioners serve for the at-will length of the appointing authority).

⁹⁸ See *id.* (acknowledging that, in addition to the forgone salary, commissioners receive “no other compensation for their public service”); see also UNIF. L. COMM’N, CONSTITUTION, BYLAWS, AND RULES OF PROCEDURE Art. 2 § 2.11: Compensation (2021) [hereinafter *Const., Bylaws & Rules of Proc.*], <https://www.uniformlaws.org/aboutulc/constitution> (stating that “Commissioners and other Members may not be compensated by the Conference for services rendered to the Conference”).

⁹⁹ See OBSERVERS’ MANUAL, *supra* note 95, at 2 (describing the procedure for the proposed uniform acts submitted to the ULC to be referred to the Committee on Scope and Program, which may then choose to recommend the proposal to be further explored to determine the feasibility of a successful draft as reported to the Executive Committee).

¹⁰⁰ See *id.*; see also CONST., BYLAWS & RULES OF PROC., *supra* note 98, at Art. 2 § 2.02: Commissioners (defining the Commissioner’s authority as bestowed by “the several States of the United States of America” or through appointment by the ULC’s president).

commissioners do not always have expertise in that particular area of the law. A reporter, who is not a commissioner, but who has expertise in the subject area, is also appointed for each drafting project.¹⁰¹ The American Bar Association is invited to appoint an advisor to each drafting committee,¹⁰² and other interested groups are also invited to send representatives.¹⁰³ The drafting committee meets throughout the drafting process and invites input from interested outside experts.¹⁰⁴ The drafting process can take several years.¹⁰⁵

When a draft act is completed, it is presented for approval to the Commission.¹⁰⁶ Each state has one vote, regardless of the number of commissioners it has.¹⁰⁷ The draft act is approved if it receives affirmative votes from a majority of the states that are present at the annual meeting.¹⁰⁸ Once the draft act is approved, it becomes a Uniform Act,¹⁰⁹ and it is then sent to all of the state legislatures for their consideration.¹¹⁰ Frequently, the Commissioners advocate in their home jurisdictions for the uniform law's

¹⁰¹ See OBSERVERS' MANUAL, *supra* note 95, at 3; see also Unif. L. Comm'n, *Drafting Committees*, <https://www.uniformlaws.org/projects/committees/drafting> (last visited July 16, 2021) (noting that the selected reporters are often law professors with expertise in the area that the proposed act covers) [hereinafter *Drafting Committees*].

¹⁰² See *Drafting Committees*, *supra* note 101 (highlighting that in addition to at least one ABA representative which serves to represent the ABA as a whole, often ABA section advisors are assigned to represent specific ABA entities); see also CONST., BYLAWS & RULES OF PROC., *supra* note 98, at Art. 10 § 10.01: Cooperation with the American Bar Association (highlighting that the Special Committee shall confer with the appropriate ABA representative).

¹⁰³ See *Drafting Committees*, *supra* note 101 (noting that such representatives are referred to as "Observers"); see also OBSERVERS' MANUAL, *supra* note 95, at 3 (considering that while the label "observers" may connote "a limited role, observers are encouraged and expected to make substantive contributions to the committee discourse").

¹⁰⁴ See *Drafting Committees*, *supra* note 101 (observing that as the drafting meetings are public, there are no restrictions on attendance).

¹⁰⁵ See *id.* (stating that the committee usually meets three times per year, with two of the meetings focused on substantive discussion and the third serving as a forum for a line-by-line reading of the current draft, for a period of at least two years).

¹⁰⁶ See *The ULC*, *supra* note 94 (explaining the process by which acts receive final ULC approval, as proposed at an annual meeting for initial debate, and upon success, sit before the Committee of the Whole for scrutinized consideration); see also CONST., BYLAWS & RULES OF PROC., *supra* note 98, at Art. 8 § 8.08: Procedure to Recommend Approval of Act (stating that once the Committee of the Whole has decided that an Act may proceed past the drafting stage, said committee bears the responsibility of recommending the Act to the Conference for acceptance).

¹⁰⁷ See *The ULC*, *supra* note 94.

¹⁰⁸ *Id.* (indicating that before official approval may be granted, the act must receive preliminary approval by at least twenty states present at the annual meeting); see also CONST., BYLAWS, & RULES OF PROC., *supra* note 98, at Art. 8 §§ 8.01: Procedure, and 8.02: Voting Requirement (acknowledging the existence of a process by which the voting requirement may be waived by the Executive Committee).

¹⁰⁹ Unif. L. Comm'n, *Types of Committees*, <https://www.uniformlaws.org/projects/overview/typesofcommittees> (last visited June 26, 2022) (acknowledging that once the draft act is approved by the Commission, the Drafting Committee transforms into the Standby Committee which remains inactive until it "becomes necessary to consider developments affecting a completed act.").

¹¹⁰ *The ULC*, *supra* note 94.

enactment.¹¹¹ State legislatures are free to enact (or not) a uniform law in whole or in part, and to modify any portions of a uniform act, depending on the state's own policy goals.¹¹²

Uniform acts are widespread, both in terms of subject matter and adoption by the states.¹¹³ They are most useful in areas where nationwide consistency is “desirable and practical.”¹¹⁴ The Uniform Commercial Code is probably the most well-known, but there are currently more than 100 uniform acts that have received over 2,000 enactments in fifty-three jurisdictions.¹¹⁵

B. A Uniform Act Addressing Conflicts Issues in Trusts and Estates

During the November 2019 meeting for the Joint Editorial Board for Uniform Trusts and Estates Acts (JEB-UTEA), the Board voted to address domestic concerns involving conflict in laws surrounding trusts and

¹¹¹ *Id.*

¹¹² *Id.* (stating jurisdictions may choose to enact the proposed act in whole or in part).

¹¹³ Memorandum from Thomas P. Gallanis, Exec. Dir. of The Joint Ed. Bd. for Unif. Tr. & Est. Acts (JEB-UTEA), to the Comm. on Scope & Program (Nov. 10, 2019) (on file with the ULC) (explaining that as states preserve autonomy over which choice of law standards to follow, various approaches have arisen. Several approaches have been put forth or adopted by the American Law Institute through Restatements. Currently, the Third Restatement of Conflict of Laws has several chapters in the drafting stage, with three obtaining both council and membership approval. However, the speed at which Restatements are published, let alone enacted by jurisdictions, is less than desirable as an effective means to resolve an increasingly complicated problem. As discussed in the JEB-UTEA proposal, “it will be years before the Restatement Third’s chapters on trusts and succession are preliminarily drafted.” The drafters have deferred such topics to the latter stages of the project as the drafters do not have “expertise in trusts or succession”) [hereinafter *Nov. JEB-UTEA Memo*].

¹¹⁴ CONSTITUTION, BYLAWS, & RULES OF PROC., *supra* note 98, at Art. 1 § 1.02: Purpose (emphasizing that “[i]t is the purpose of the Conference to promote uniformity in the law among the several States on subjects as to which uniformity is desirable and practicable”).

¹¹⁵ ROBERT A. STEIN, FORMING A MORE PERFECT UNION: A HISTORY OF THE UNIFORM LAW COMMISSION 35 (Matthew Bender & Co., Inc., LexisNexis, 2013).

estates.¹¹⁶ As a result, a drafting committee was appointed,¹¹⁷ and tasked with drafting a uniform act¹¹⁸ to propose resolutions for conflicts of laws in trusts, wills, will subsidiaries, intestacy, estate administration, fiduciary powers and duties, powers of appointments, powers of attorneys, jurisdictional claims, and statutes of limitations.¹¹⁹ While many of these areas are ripe for a consistent approach,¹²⁰ the state taxation of trusts was notably absent from

¹¹⁶ Memorandum from Ben Orzeske, ULC Chief Couns. & Staff Liaison to The Joint Ed. Bd. for Unif. Tr. & Est. Acts (JEB-UTEA), to JEB-UTEA (Nov. 8, 2019) (on file with the ULC); *see also Nov. JEB-UTEA Memo, supra* note 113 (supporting the drafting committee, and in an effort to bypass a study committee on the subject, the proposal based its foundation on the claim that uniformity on the conflict of laws is “highly desirable” in trusts and estates as the often moveable personal property and wealth involved may span across jurisdictional lines. The proposal of a uniform act would address the “considerable divergence among U.S. states on substantive law” for trusts which often involve multi-jurisdictional elements and “harmonize the provisions of existing uniform law.” There are currently over thirty provisions contained in current uniform acts on trusts and estates which address conflicts of law); *see, e.g.*, UNIF. EASEMENT RELOCATION ACT (UNIF. L. COMM’N 2020) (allowing property owners to obtain a court order to obtain easement); *see, e.g.*, UNIF. PROBATE CODE (UNIF. L. COMM’N 2019) (including amendments to the intestacy and class-gifts provisions of the codes by taking into consideration blended families, children with more than two parents (and more than two sets of grandparents) and updating outdated terminology); *see, e.g.*, UNIF. ELECTRONIC WILLS ACT (UNIF. L. COMM’N 2019) (permitting testators to execute an electronic will and allowing probate courts to give electronic wills legal effects); *see, e.g.*, UNIF. FIDUCIARY INCOME & PRINCIPAL ACT (UNIF. L. COMM’N 2019) (focusing on § 104 for the provision regarding Governing Law); *see, e.g.*, UNIF. TR. DECANTING ACT (UNIF. L. COMM’N originally promulgated 2015) (focusing on § 5 Application; Governing Law); *see, e.g.*, REVISED UNIF. ANATOMICAL GIFT ACT (UNIF. L. COMM’N originally promulgated 2006) (focusing on § 19 Law Governing Validity; Choice of Law as to Execution of Document of Gift; Presumption of Validity); *see, e.g.*, UNIF. TR. CODE (UNIF. L. COMM’N 2006) (highlighting §§ 107: Governing Law; 108: Principal Place of Administration; 203: Subject-Matter Jurisdiction; 403: Trusts Created in Other Jurisdictions); UNIF. PROBATE CODE (UNIF. L. COMM’N originally promulgated 1969) (focusing on §§ 1-301: Territorial Application; 2-506: Choice of Law as to Execution; 2-703: Choice of Law as to Meaning and Effect of Governing Instruments; 3-201: Venue for First and Subsequent Estate Proceedings; Location of Property; 3-202: Appointment or Testacy Proceedings; Conflicting Claim of Domicile in Another State; 3-203: Priority Among Persons Seeking Appointment as Personal Representative; 3-307: Informal Appointment Proceedings; Delay in Order; Duty of Registrar; Effect of Appointment; 3-803: Limitations on Presentation of Claims; 3-815: Administration in More Than One State; Duty of Personal Representative).

¹¹⁷ *See* Unif. L. Comm’n., *Conflict of Laws in Trusts and Estates Committee*, <https://www.uniformlaws.org/committees/community-home?CommunityKey=8c219179-daa7-4a25-a070-b11acd9e48f5> (last visited June 26, 2022) (listing the active roster of members involved on the drafting committee, positions held, and affiliations) [hereinafter *Conflict of L. in Tr. & Est. Comm.*].

¹¹⁸ *Cf.* Unif. L. Comm’n., *What is a Uniform Law?*, <https://my.uniformlaws.org/acts/overview/uniformacts> (last visited July 17, 2021) with Unif. L. Comm’n., *What is a Model Act?*, <https://my.uniformlaws.org/acts/overview/modelacts> (last visited June 26, 2022); *see also Nov. JEB-UTEA Memo, supra* note 113 (acknowledging that while the ULC draws a distinction between uniform acts and model acts, the proposal calls for either).

¹¹⁹ *See Conflict of L. in Tr. & Est. Comm., supra* note 117; *see also* Memorandum from Ben Orzeske, ULC Chief Couns. & Staff Liaison to The Joint Ed. Bd. for Unif. Tr. & Est. Acts (JEB-UTEA), to JEB-UTEA (Apr. 15, 2021) (on file with the ULC) (indicating that the drafting committee led by Prof. Robert Sitkoff (chair) and Mr. Turney Berry (vice-chair), planned to hold an initial meeting in the spring of 2021 with an anticipated substantive drafting meeting in the fall of 2021).

¹²⁰ *See generally* Unif. Tr. Code § 107 (Unif. L. Comm’n 2000) (outlining that unless “contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue” the designated jurisdiction’s law applies. Further, in the absence of such designation, the “law of the

this list. For reasons of federalism and state sovereignty, state taxation of trusts should not be the subject of any uniform law in the future either.

C. Making a Successful Uniform Act

An act is designated as “uniform” if uniformity of its provisions among the various jurisdictions is a principal objective and there is a substantial reason to anticipate enactment in a large number of jurisdictions.¹²¹ Legislatures are urged to adopt uniform acts as they are written.¹²² This is distinguished from a model act, where uniformity is not the principal objective and which serves more as guiding legislation that states may borrow from or modify to suit their individual needs.¹²³ Thus, a uniform act is only successful if it is widely adopted by many states. Because a provision that creates uniformity in taxing trusts conflicts with state sovereignty, it is unlikely to have widespread acceptability and should never be the subject of a uniform act.

Uniform acts that have been successful fall into three general categories, based on subject matter or function.¹²⁴ The first group of acts were developed to promote the efficient flow of commerce between states, such as the Uniform Commercial Code, the Uniform Partnership Act, and the Model Employment Termination Act.¹²⁵ The second group of uniform acts were aimed at encouraging reciprocal state cooperation and often involve child-parent relations, such as the Uniform Acts on Adoption.¹²⁶ Finally, uniform projects in the trusts and estates area, such as those identified by the JEB, comprise the third group and seek to avoid conflicts of law that stem from events that arise from facts that touch several states and make it difficult to determine which state’s law should be applied.¹²⁷ Interestingly, whether a uniform act falls into the first, second, or third category appears to have no impact on its likely enactment.¹²⁸ Rather, the successful acts respond to a broad consensus about the flaws in an existing system that are in need of reform.¹²⁹

jurisdiction having the most significant relationship to the matter at issue” applies. Here, however, the subjectivity of the most significant relationship standard may lead to a less than uniform application).

¹²¹ UNIF. L. COMM’N, GUIDE TO UNIFORM AND MODEL ACTS 1 (2022-2023).

¹²² *See id.*

¹²³ *See id.*

¹²⁴ *See generally id.*

¹²⁵ *See generally id.*

¹²⁶ *See generally id.*

¹²⁷ *See generally id.*; see also Nov. JEB-UTEA Memo, *supra* note 113.

¹²⁸ *See generally* UNIF. L. COMM’N, *supra* note 121.

¹²⁹ *See generally id.*

There are several rationales that support creating a uniform act. One is a desire to enhance commercial development between states.¹³⁰ Another is to reaffirm and promote states' rights.¹³¹ A third is the creation of "best practices."¹³² Any proposal in this last category is not meant to enhance commercial development.

If the Uniform Law Commissioners were to decide, in the future, to take up the harmonization of the state income taxation of trust—which, to be clear, they have not done to date—the proposal arguably would seek to create a set of "best practices" through a detached and nonpartisan drafting process aided by experts in the subject matter.¹³³ Even so, consider the view that it is inappropriate for academics and elite lawyers to weigh in on something as basic and fundamental to the states as determining what and when they may tax. Likely for that reason, the Uniform Law Commission has stayed out of this basic and highly politicized issue of tax policy.

III. PRESERVING THE INDIVIDUALITY OF THE STATES

Under the United States Constitution, sovereign power is allocated between the federal government and the states, and between the fifty coequal states.¹³⁴ Discussions of federalism usually invoke *vertical* federalism, the interactions and relationships between the federal and state governments.¹³⁵ Under the Supremacy Clause of the United States Constitution, federal/state interactions are hierarchical, and thus "vertical."¹³⁶ But the states also interact with each other on an equal constitutional surface. In this way, their interactions and relationships are matters of *horizontal* federalism.¹³⁷ States do not exist as a large, undifferentiated mass; each of the fifty states must exercise the shared the power that the United States Constitution allocates to them.¹³⁸ Inevitably, sharing that power creates friction between the states

¹³⁰ James J. Brudney, *Mediation and Some Lessons From the Uniform State Law Experience*, 13 OHIO ST. J. ON DISP. RESOL. 795, 805 (1998).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *See id.*

¹³⁴ *See* Lee H. Rosenthal & Gregory P. Joseph, *Foundations of U.S. Federalism*, 101 JUDICATURE 39, 41 (2017) (describing the process and decisionmaking through which the Framers of the constitution arrived at the federalist system).

¹³⁵ *See id.*; *see also* Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 494–95 (2008) (defining and describing the difference between vertical and horizontal federalism).

¹³⁶ *See* Rosenthal & Joseph, *supra* note 134, at 43; *see also* Erbsen, *supra* note 135.

¹³⁷ *See* Erbsen, *supra* note 135, at 502.

¹³⁸ *See id.*

because there is no way to confine the effects of each state's laws to its borders.¹³⁹ The taxation of trusts is a good example of that.

Federalism involves the relationship between a divided sovereignty.¹⁴⁰ Vertical sovereignty involves issues such as whether Congress can regulate an activity traditionally subject to state oversight, and whether the federal courts should abstain from hearing cases that involve state laws.¹⁴¹ While there are mandatory constitutional principles that structure the relationship between states, as well as restraints that the states impose on themselves through state statutes and common law, activities and laws can overlap with other states, creating interstate conflict.¹⁴² While a uniform provision might not lead to friction from the out-of-state effects of in-state decisions, it would still be troubling because of its lack of respect for individual state sovereignty.

Conforming states to a uniform approach sacrifices sovereignty.¹⁴³ States would be ceding to the uniform approach and would be importing that view as their own.¹⁴⁴ This runs counter to the notion of state autonomy and can be detrimental to the state because the uniform approach might not align with the state's own policy objectives or values.¹⁴⁵ It can also undermine political accountability because it gives states less ability to use state tax policy to respect the values and respond to the preference of the citizens of the particular state.¹⁴⁶

For example, eight states—Alaska, Florida, Nevada, New Hampshire, South Dakota, Texas, Washington, and Wyoming—currently do not impose an income tax on trusts.¹⁴⁷ The other forty-two states impose a tax rate with a range of three to fourteen percent¹⁴⁸ and base their determination of whether or not to tax trusts on factors including the residency of the grantor, trustee, and/or beneficiary, as well as the administration of the trust itself.¹⁴⁹ The decision to not tax trusts provides an attractive environment for individuals and entities wishing to locate themselves or their business or assets in such

¹³⁹ *See id.*

¹⁴⁰ *See id.* at 500.

¹⁴¹ *See id.*

¹⁴² *See id.* at 496.

¹⁴³ *See id.* at 562–64.

¹⁴⁴ *See id.*

¹⁴⁵ *See id.* at 555 n.225.

¹⁴⁶ *See id.* at 525 n.108.

¹⁴⁷ *See Spengler & Walter, supra note 66.*

¹⁴⁸ Richard W. Nenno, *Bases of State Income Taxation of Nongrantor Trusts for 2020*, WILMINGTON TRUST (Feb. 22, 2021), https://www.trusteealliance.com/wp-content/uploads/Nenno_state_nongrantor_tax_survey.pdf (providing a survey of tax rates as of 2021, with Pennsylvania imposing a 3.07% tax rate on taxable income and California imposing a 13.30% on taxable income over \$1 million at the top of the range).

¹⁴⁹ *See id.*

states.¹⁵⁰ Regardless of the state's approach, state trust laws are rapidly evolving at the individual state's legislative policy and judicial interpretation's behest.¹⁵¹

New Hampshire has eliminated the taxation of trusts through the recent ratification of the Trust Modernization and Competitiveness Act ("TMCA").¹⁵² The preamble highlights the purpose of that law: to eliminate taxes on trusts to provide a "more attractive legal environment for individuals and entities to locate their assets in New Hampshire."¹⁵³ The New Hampshire legislature identifies the market for trusts as a rapidly growing and emerging market in the United States economy.¹⁵⁴ The TMCA seeks to set New Hampshire as "the best and most attractive legal environment in the nation for trusts and trust services," in attempts to attract "good-paying jobs for trust and investment" to boost the state's economy.¹⁵⁵ Provisions within the TMCA have created an appealing environment to allow both foreign and domestic trusts the option to migrate their trust to New Hampshire to avoid even the potential of taxation.¹⁵⁶ To be sure, New Hampshire is not alone in the decision to draft and pass legislation to either eliminate the taxation of trusts or to provide a haven for settlors to situate their trusts within the domestic United States.¹⁵⁷

South Dakota, another state which has opted out of the taxation of trusts, has done so in part of a greater scheme to transition the state into an attractive

¹⁵⁰ *Id.*; see also Joseph F. McDonald, III, *Migrating Trusts to New Hampshire: The "Why" and the "How,"* 51 N.H. BAR J. 34 (2010).

¹⁵¹ See McDonald, *supra* note 150, at 34.

¹⁵² See *id.*; see also S.B. 394, 167th Sess. (N.H. 2006) [hereinafter *TMCA*].

¹⁵³ Spengler & Walter, *supra* note 66; see *TMCA*, § 320:1, III (stating in the preamble that "[t]his act will serve to establish New Hampshire as the best and most attractive legal environment in the nation for trusts and trust services, and this environment will attract to our state good-paying jobs for trust and investment management, the legal and accounting professions, and support an infrastructure required to service this growing sector of the nation's economy").

¹⁵⁴ See *TMCA*, § 320:1, II; see also Todd D. Mayo, *Text of the Trust Modernization and Competitiveness Act*, N.H. TRUST COUNCIL (Aug. 16, 2006), <https://nhtrustcouncil.com/2006/08/16/2006-sb-394-trust-modernization-and-competitiveness-act/> (explaining that the passage of the TMCA expanded the existing state laws which governed "directed trusts, trust advisors, and trust protectors, and adopts the Uniform Principal and Income Act"); see also Rachel Emma Silverman, *States Court Family-Trust Business: Legislatures Race to Add Incentives to Capitalize*, WALL ST. J. (Jun. 22, 2006), <https://www.wsj.com/articles/SB115093513991986995> (stating that "[t]he latest entrant in the trust wars is New Hampshire, whose Governor signed into law this week a bill that seeks to surpass most other states in innovative trust features.").

¹⁵⁵ *TMCA*, § 320:1, III.

¹⁵⁶ McDonald, *supra* note 150, at 41.

¹⁵⁷ See Al W. King, III & Pierce H. McDowell, III, *A Bellwether of Modern Trust Concepts: A Historical Review of South Dakota's Powerful Trust Laws*, 62 S.D. L. REV. 266 (2017) (examining the evolution of South Dakota's laws in regard to trusts).

tax haven.¹⁵⁸ As the only pre-1986 dynasty trust state that did not impose an income tax on trusts,¹⁵⁹ South Dakota has continued the development of law favoring tax planning.¹⁶⁰ Primarily, South Dakota has attracted foreign individuals and entities looking for a hospitable situs in the United States.¹⁶¹

With the passage of federal laws which eliminated benefits of the placement of off-shore trusts,¹⁶² states have used the opportunity to provide a haven for migrating trusts.¹⁶³ The Hiring Incentives to Restore Employment Act of 2010 (“HIRE Act”), passed in 2010 by the federal legislature, sought to provide businesses with tax incentives to hire new employees.¹⁶⁴ Congress also enacted the Foreign Account Tax Compliance Act (“FATCA”) to balance any offshore investment loopholes in the HIRE Act by implementing reporting requirements and increasing taxation for offshore accounts and trusts.¹⁶⁵ FATCA extended the definition of a “foreign trust benefitting a U.S. person” to broaden the reach of the U.S. and subject more trusts with U.S. beneficiaries to additional taxation.¹⁶⁶

As with South Dakota, Wyoming has attempted to provide a haven for offshore trusts to migrate into the state’s jurisdiction for additional protections with hopes to generate internal state revenue.¹⁶⁷ Wyoming allows

¹⁵⁸ Howard Gleckman, *South Dakota Turned Itself Into A Tax Haven. But Why?*, FORBES (Oct. 14, 2021, 3:03 PM), <https://www.forbes.com/sites/howardgleckman/2021/10/14/south-dakota-turned-itself-into-a-tax-haven-but-why/?sh=4a758dd92f25>.

¹⁵⁹ King & McDowell, *supra* note 157.

¹⁶⁰ *See id.* at 299 (stating that “[t]he South Dakota special spousal trust (“SST”) was enacted in 2016, making South Dakota one of only three states to allow individuals to opt in to community property laws via trust and to provide a unique strategy to save income taxes”); *see, e.g.*, S.D. CODIFIED LAWS §§ 55-17-1 to 14 (2016); *see, e.g.*, ALASKA STAT. ANN. § 34.77 (West 2017); *see, e.g.*, TENN. CODE ANN. § 35-17 (West 2021).

¹⁶¹ King & McDowell, *supra* note 157, at 302 (stating that “[a] South Dakota Foreign Grantor Trust is established as a ‘foreign’ trust for United States tax purposes and therefore is treated the same as an offshore trust but administered in South Dakota by a South Dakota trustee”).

¹⁶² *See* I.R.C. §§ 1471–74 [hereinafter *HIRE Act*].

¹⁶³ Reimer, *supra* note 11 (explaining Wyoming’s legislative reaction to federal statutes by promoting its jurisdiction as a trust-safe and attractive situs).

¹⁶⁴ *See HIRE Act, supra* note 162; *see* I.R.C. § 6038D (providing the Congressional codification of the HIRE Act, which provides payroll tax breaks and incentives for businesses to hire unemployed workers).

¹⁶⁵ *See* I.R.C. § 501(a) (illustrating that the FATCA provisions are included in Title V, Subtitle A of the HIRE Act, which generally requires “that foreign financial Institutions and certain other non-financial foreign entities report on the foreign assets held by their U.S. account holders or be subject to withholding on withholdable payments”); *see also* I.R.S., *Foreign Account Tax Compliance Act (FATCA)*, <https://www.irs.gov/businesses/corporations/foreign-account-tax-compliance-act-fatca#:~:text=The%20Foreign%20Account%20Tax%20Compliance,to%20withholding%20on%20withholdable%20payments> (last visited March 18, 2022) (categorizing a database of resources available to understand implications of FATCA as a part of the HIRE Act).

¹⁶⁶ Reimer, *supra* note 11, at 169–72; *see also* I.R.C. §§ 531–35 (providing in Part IV of the HIRE Act, the FATCA provisions related to foreign trusts).

¹⁶⁷ Reimer, *supra* note 11; *see generally* Amy M. Staehr, *The Discovered Country: Wyoming’s Primacy as a Trust Situs Jurisdiction*, 18 WYO. L. REV. 283, 288–89 (2018) (providing that Wyoming has emerged among other states as a haven for trust settlors to consider).

for the foreign trustees to receive the same benefits as U.S.-based trusts settled in the state, without the exposure of additional risks or taxes.¹⁶⁸ Made attractive by a difficult-to-amend constitution, Wyoming has never imposed an income tax.¹⁶⁹ While creating the onshore haven for trust situs, Wyoming and other states have fashioned their laws to include additional asset protection¹⁷⁰ and the abolishment of the Rule Against Perpetuities.¹⁷¹ Such a diverse range of state approaches is an example of the horizontal federalism that can lead to strategic behavior by taxpayers. Even so, something as basic as taxation must be left to each state to decide.

CONCLUSION

In conclusion, while a uniform approach to the taxation of trusts could discourage crafty drafting, it fails to recognize and respect the autonomy of the individual states. States should have the option of choosing not to tax trusts at all, to have their tax laws conform to the federal scheme, or to follow some other pattern entirely. While the approach used by a state must satisfy due process, the individuality of the states must also be preserved. Thus, while a Uniform Act that addresses conflict issues in trusts and estates could be very useful and ripe for many areas, the state taxation of trusts, for reasons of federalism and sovereignty, is not.

¹⁶⁸ Reimer, *supra* note 11, at 172 (explaining the “result that trusts settled in Wyoming are subject to the same U.S. tax as foreign trusts with U.S. beneficiaries, without exposing clients to the potential risks of unenforceable trust terms and lack of control that can arise when foreign trustees are involved”).

¹⁶⁹ WYO. CONST. art. 15, § 18 (stating that “[n]o tax shall be imposed upon income without allowing full credit against such tax liability for all sales, use, and ad valorem taxes paid in the taxable year by the same taxpayer to any taxing authority in Wyoming”).

¹⁷⁰ Staehr, *supra* note 167, at 310 (exploring Wyoming’s recognition as an emerging situs for onshore trusts, particularly in light of federal statutory restrictions on foreign loopholes which provide additional privacy protections for trust settlors seeking to relocate there to an on-shore situs with the same protections the comforts of off-shore situs provided).

¹⁷¹ See generally Max M. Schanzbach & Robert H. Sitkoff, *Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust*, 27 CARDOZO L. REV. 2465 (2006) (discussing the increasing availability of perpetual trust forms and the widespread use of perpetual trusts to achieve tax cuts and savings); see also Reimer, *supra* note 11, at 166 (stating that many of the same states who have either eliminated state tax on trust income—or never taxed trust income to begin with—are the same states which have either abolished or extended the Rule Against Perpetuities).