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The Secret Life of the Trust: The Trust as an Instrument of Commerce

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Essay

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In the culture of Anglo-American law, we think of the trust as a branch of the law of gratuitous transfers. That is where we teach trusts in the law school curriculum,[1] that is where we locate trusts in the statute books,[2] and that is where American lawyers typically encounter the trust in their practice. The trust originated at the end of the Middle Ages as a means of transferring wealth within the family,[3] and the trust remains our characteristic device for organizing intergenerational wealth transmission when the transferor has substantial assets or complex family affairs. In the succinct formulation of Bernard Rudden, Anglo-American lawyers regard the trust as "essentially a gift, projected on the plane of time and so subjected to a management regime."[4]

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1. *See, e.g.*, JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES (5th ed. 1995); JOHN RITCHIE ET AL., DECEDENTS' ESTATES AND TRUSTS. CASES AND MATERIALS (8th ed. 1993). EUGENE F. SCOLES & EDWARD C. HALBACH, JR., PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS (5th ed. 1993); LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS (2d ed. 1997).

2. *See, e.g.*, CAL. PROB. CODE §§ 10400-21406 (West 1993). UNIF. PROBATE CODE §§ 7-101 to -307 (1983).

3. I have recently summarized the historical literature on the origins of the trust in John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 632-43 (1995).

4. Bernard Rudden, *John P. Dawson's Gifts and Promises*, 44 MOD. L. REV. 610, 610 (1981) (book review).

The *Restatement (Second) of Trusts*, the most authoritative exposition of American trust law, exemplifies our tradition of thinking about the trust exclusively as a branch of the law of gratuitous transfers. Austin W. Scott, the reporter, excluded commercial trusts from the *Restatement* on the ground that "many of the rules" of trust law are inapplicable in commercial settings.[5] Scott offered no support for that claim,[6] which is mistaken. The familiar standards of trust fiduciary law protect trust beneficiaries of all sorts, regardless of whether the trust implements a gift or a business deal (unless, of course, the terms of the transaction expressly contraindicate). Indeed, one of the great attractions of the trust for the transaction planner who is designing a business deal is the convenience of being able to absorb these standards into the ground rules for the deal, merely by invoking the trust label.

Scott carried his disdain for commercial trusts into his treatise, refusing to speak of them.[7] George G. Bogert, the other leading American treatise writer on trusts, was more tolerant; his book supplies introductory (although now quite antiquated) coverage of some types of commercial trust.[8]

My theme in this Essay is that the American legal intellectual tradition, which characterizes the trust as a branch of the law of gratuitous transfers, is at odds with the reality of American trust practice. In truth, *most of the wealth that is held in trust in the United States is placed there incident to business deals*, and not in connection with gratuitous transfers. It will be seen that well over 90% of the money held in trust in the United States is in commercial trusts as opposed to personal trusts.

In Part I of this Essay I undertake to identify and categorize the principal types of commercial trust that are currently employed in the United States. Part II points to the attributes of the trust that make it attractive as an instrument of commerce. Part III offers some thoughts about the puzzling neglect of the commercial trust in our juristic tradition—why, that is, we so resolutely conceive of the trust as a mode of gift, even while we employ it ever more as an instrument of commerce.

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5. RESTATEMENT (SECOND) OF TRUSTS § 1 cmt. b (1959). The full text of the passage reads:

> A statement of the rules of law relating to the employment of a trust as a device for carrying on business is not within the scope of the Restatement of this Subject. Although many of the rules applicable to trusts are applied to business trusts, yet many of the rules are not applied, and there are other rules which are applicable only to business trusts. The business trust is a special kind of business association and can best be dealt with in connection with other business associations.

Id.

6. Neither the text of the *Restatement*'s official comment, nor the reporter's note, supplies any authority for Scott's claim that "many of the rules" of trust law do not apply to business uses of the trust.

7. *See* 1 AUSTIN W. SCOTT & WILLIAM F. FRATCHER, THE LAW OF TRUSTS § 2.2, at 40 (4th ed. 1987) (excluding "the so-called business trust or Massachusetts trust").

8. *See* GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES §§ 247-251, 255 (rev. 2d ed. 1992) (introducing business trusts, investment and real estate trusts, bond indenture trusts, and pension trusts).

I touched upon the subject of commercial trusts in an earlier article in the *Yale Law Journal*, discussing the contractarian basis of trust law.[9] I observed that even conventional donative trusts have a contract-like character, in the agreement between trustee and settlor about the terms of the trust.[10] Trust and third party beneficiary contract are the closest of substitutes. The commercial trust, because it arises in a business setting and lacks all donative purpose, is the easiest case for the view that trusts are deals. The present Essay directs attention to a very different question—not whether commercial trusts are deals, but why deal-makers choose the trust form.

I. VARIETIES OF COMMERCIAL TRUSTS IN THE UNITED STATES

A word about definitions: When I speak of a commercial trust, I refer to a trust that implements bargained-for exchange, in contrast to a donative transfer. Accordingly, I exclude the charitable trust from the category of commercial trust. Charitable trusts and foundations originate as donative transfers; they are gifts for the benefit of persons and causes beyond the family.[11]

I exclude from this discussion all the various governmental budgeting conventions that have appropriated—I am tempted to say misappropriated—the trust label. Things such as the Leaking Underground Storage Tank Trust Fund,[12] the Violent Crime Reduction Trust Fund,[13] or the Highway Trust Fund[14] have, at best, only a metaphorical connection to actual trust practice.[15] They are, however, ubiquitous. A computer search of state statutes turned up 677 purported trust funds in Florida alone,[16] including the Citrus Advertising Trust Fund,[17] the Quarter Horse Racing Promotion Trust Fund,[18] and the *Florida Law Review* Trust Fund.[19]

I also exclude from my account of commercial trusts some activities such as the administration of bankrupt or decedents' estates, in which the nomenclature of trusts and trustees appears, but without the substance.

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9. *See* Langbein, *supra* note 3.

10. *See id.* at 627-28, 650, 657-60.

11. The assets of charitable trusts and foundations are consolidated with those of personal trusts for federal reporting purposes, in FEDERAL FIN. INSTS. EXAMINATION COUNCIL, TRUST ASSETS OF FINANCIAL INSTITUTIONS—1994 (1995) [hereinafter TRUST ASSETS]. On the choice between trust and corporate form for the conduct of charity, see *infra* note 135 and accompanying text; on the character of charitable purposes, see RESTATEMENT (SECOND) OF TRUSTS § 368 (1959).

12. 26 U.S.C. § 9508 (1994).

13. 42 U.S.C. § 14211 (1994).

14. 26 U.S.C. § 9503 (1994).

15. For example, federal law requires that such funds limit their "investing" to "buying" federal government paper. 26 U.S.C. § 9602 (1994).

16. Search of WESTLAW, FL-ST-ANN Database (Sept. 1, 1997) (search for records containing "regulation" and "trust fund").

17. *See* FLA. STAT. ANN. § 601.15(7) (Harrison 1978 & Supp. 1996).

18. *See* FLA. STAT. ANN. § 215.20(4)(y) (Harrison Supp. 1996).

19. *See* FLA. STAT. ANN. § 240.276 (Harrison Supp. 1996).

Bankruptcy only infrequently leads to the appointment of a trustee.[20] Unlike the trustee under an intentional trust, the bankruptcy trustee is essentially an officer of the court,[21] who operates under statutory authority to disregard the terms of many of the antecedent commercial transactions that led to the bankruptcy. For similar reasons, I exclude the work of personal representatives, guardians, and conservators, who are held to trustee-like standards in administering the assets of decedents' estates and of protected persons.[22]

Finally, I exclude for present purposes the deed of trust mechanism that is used for transferring real property. In California and other states in which this mode of conveyancing is prevalent, real estate finance takes the nominal form of the trust rather than the mortgage. "This device normally involves a conveyance of the realty to a third person in trust to hold as security for the payment of the debt to the [lender] whose role is analogous to that of the mortgagee."[23] The deed of trust, when properly drafted, is essentially indistinguishable in function from a conventional mortgage. The so-called trustee is a stakeholder, not a manager of the trusteed property.

I turn now from excluded categories to the task of identifying the principal forms of commercial trust presently used in the United States.

A. *Pension Trusts*

The species of commercial trust that is perhaps best understood in its relation to the personal trust is the pension trust. American pension trusts have attained stupendous size and importance. As of year-end 1996, the assets of American private (that is, nongovernmental) pension funds held in trust were valued at $3 trillion.[24] (These plans held nearly a further $900 billion of assets in insurance company accounts, mostly so-called life insurance company separate accounts, which are trusts in all but name.)[25] State and local pension plans for governmental employees held another $1.6 trillion in assets, mostly

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20. "Appointment of a trustee is extraordinary," requiring "clear and convincing evidence" of the danger of fraud, gross mismanagement, or other such cause. 3 DAVID G. EPSTEIN ET AL., BANKRUPTCY § 10-8, at 17 (1992).

21. Comparable officers serve in the nontrust legal systems of the Continent, further indication that our tradition of calling this court functionary a trustee is a misnomer. For a capsule treatment, see EUROPEAN BANKRUPTCY LAWS (David A. Botwinik & Kenneth W. Weinrib, American Bar Ass'n, eds., 2d ed. 1986).

22. The Uniform Probate Code treats the personal representative as "a fiduciary who shall observe the standards of care applicable to trustees," UNIF. PROBATE CODE § 3-703 (1993), and it requires the conservator to "act as a fiduciary and observe the standards of care applicable to trustees," *id.* § 5-416.

23. GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW § 1.6, at 11 (3d ed. 1994). Trust-based conveyancing is also common in England, although for other reasons. *See, e.g.*, ANGELA SYDENHAM, TRUSTS OF LAND (1996).

24. *See* PENSION INVESTMENT REPORT—1ST QUARTER 1997 (Employee Benefit Research Inst., Washington, D.C.), July 1997, at 29 tbl.13 [hereinafter PENSION INVESTMENT REPORT] (on file with the *Yale Law Journal*).

25. *See id.* On the trust-like character of life insurance separate accounts, see Langbein, *supra* note 3, at 668-69.

in trust form.[26] American pension funds own more than a quarter of American equities and about half of all corporate debt.[27]

The pension trust arises from the contract of employment, providing for deferred compensation to be paid in retirement. The Employee Retirement Income Security Act[28] (ERISA), the pension regulatory law enacted in 1974, imposes a rule of mandatory trusteeship, requiring that "all assets of an employee benefit plan shall be held in trust."[29] (There is an exception for plan assets that take the form of insurance contracts.)[30] Actually, the federal policy of promoting the trust form for pension funds is older than ERISA. As far back as 1921, the Internal Revenue Code effectively required pension funds to utilize the trust form (unless the plan assets were entirely invested in insurance contracts).[31] In 1947, the Taft-Hartley Act[32] imposed a similar requirement for collectively bargained multiemployer pension plans.[33]

Of the varieties of commercial trust that I discuss in this Essay, only the pension trust has been much assimilated to conventional trust law. ERISA codifies the central principles of trust fiduciary law,[34] and ERISA's legislative history makes clear that Congress meant to track the common law of trusts.[35] Thus, agencies and courts interpreting and applying ERISA have inclined to rely upon the *Restatement of Trusts* and upon the major trust-law treatises. In turn, the updaters of these authorities have tended to collect the decisions of courts that cite them. Another reason that it has been easier to relate pension trusts to personal trusts is that most pension plans, in addition to facilitating retirement saving for the worker, provide for the transfer of undistributed

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26. *See* PENSION INVESTMENT REPORT, *supra* note 24, at 29 tbl 13

27. Data is collected in JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 20 (2d ed. 1995).

28. 29 U.S.C. §§ 1000-1461 (1994).

29. ERISA § 403, 29 U.S.C. § 1103. In drafting ERISA the congressional conference committee explained that it wanted to "apply rules and remedies similar to those under traditional trust law to govern the conduct of [ERISA] fiduciaries." H.R. REP. NO. 93-1280 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5076.

30. *See* ERISA § 403(b)(1)-(2), 29 U.S.C. § 1103(b)(1)-(2). The Internal Revenue Code is in accord with this exception. *See* I.R.C. §§ 403(a), 404(a)(2) (1994) (stating that the requirement of mandatory trusteeship does not pertain to a plan funded exclusively by insurance or annuity contracts)

31. *See* Revenue Act of 1921, ch. 136, § 219(f), 42 Stat. 227, 247 (codified as amended at I.R.C. § 401(a) (1994)) (insisting upon the use of the trust as a condition of what we now call "qualifying" a pension plan for tax benefits).

32. Labor Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-144, 151-167, 171-187, 557 (1994)).

33. *See* Labor Management Relations (Taft-Hartley) Act § 302(c)(5), 29 U.S.C. § 186(c)(5).

34. *See* ERISA § 404(a), 29 U.S.C. § 1104(a) (1994) (codifying the principles of loyalty, prudence, and diversification).

35. "ERISA's legislative history confirms that the Act's fiduciary responsibility provisions 'codif[y] and mak[e] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts.'" Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989) (quoting H.R. REP. NO. 93-533, at 11 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4649). ERISA's "fiduciary duties draw much of their content from the common law of trusts, the law that governed most benefit plans before ERISA's enactment." Varity Corp. v. Howe, 116 S. Ct. 1065, 1070 (1996).

pension account balances to the worker's survivors.[36] In this respect the pension trust exhibits a hybrid trait: Although it is a commercial trust, it commonly gives rise to a gratuitous transfer.

B. *Investment Trusts*

Next to the pension trust, the most prominent category of commercial trust is the investment trust,[37] which exists in a variety of forms.

1. *Mutual Funds*

Until recent decades, the investor who wished to own stocks, bonds, or other financial assets generally had to assemble a portfolio of individually selected securities. Today's investor increasingly prefers to buy shares in a pooled investment vehicle, usually a mutual fund. Investment professionals select and manage the fund's assets, according to guidelines that define the fund's investment objectives.[38] The mutual fund offers expertise, economies of scale, and a level of diversification far superior to that obtainable by the typical investor constructing an individual portfolio. Since the 1970s, the trend toward investing in mutual funds has become immensely important in American financial markets. As of May 1997, American mutual funds held nearly $4 trillion in assets.[39] A mutual fund can take the form either of a corporation, called an investment company, or of an investment trust.

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36. Transfer on death of undistributed account balances pursuant to a beneficiary designation is characteristic of defined contribution plans, *see* I.R.C. §§ 401(k), 403(b) (1994), as well as individual retirement accounts (IRAs), *see* I.R.C. § 408 (1994). Defined benefit plans commonly make no provision for survivor benefits other than for spouses.

Pension law also resembles conventional family wealth-transmission law in mandating spousal shares. As amended in 1984, ERISA requires most pension benefits of a married worker to be distributed in the form of a joint and survivor annuity for the lives of both spouses, thus transferring a portion of the worker's retirement savings to the spouse. *See* ERISA § 205(A), 29 U.S.C. § 1055(A) (1994); I.R.C. § 401(a)(11) (1994); *see also* LANGBEIN & WOLK, *supra* note 27, at 553 (describing the ERISA spousal entitlement as "a *federal-law, asset-specific forced-share* system, a forced share for pensions").

Many forms of financially intermediated wealth may now be subject to transfer-on-death (TOD) instructions. On the causes of this practice, see John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984). A widely enacted uniform act encourages the use of TOD designations for securities and mutual fund accounts. *See* UNIF. TRANSFER ON DEATH SEC. REGISTRATION ACT, 8B U.L.A. 479 (1993) (codified as UNIF. PROBATE CODE art. 6, pt. 3 (1993)).

37. This category obviously overlaps the pension trust in the sense that a main function of the pension trust is to invest workers' savings for retirement. When I speak of investment trusts, however, I refer to general-purpose vehicles, not those limited to retirement plans.

38. Regarding disclosure of fund investment policies, see 3 TAMAR FRANKEL, THE REGULATION OF MONEY MANAGERS: THE INVESTMENT COMPANY ACT AND THE INVESTMENT ADVISERS ACT, ch. 24, § 8.3, at 472-78 (1980 & Supp. 1996).

39. The precise figure is $3,904.6 billion, according to data supplied by the Investment Company Institute (ICI), the industry's trade association. *See* Facsimile from Investment Company Institute (July 8, 1997) [hereinafter ICI Data Sheet] (on file with the *Yale Law Journal*).

Currently, about half or more of American mutual funds take the trust form.[40] I shall have more to say about why.[41]

2. *Real Estate Investment Trusts (REITs)*

The real estate investment trust (REIT) is a mutual fund that invests in real property or in mortgages on real property, or in both. Congress authorized REITs in 1960, amending the Internal Revenue Code to allow pass-through tax status to such trusts.[42] Currently, there are 199 REITs that are nationally traded. Their capitalization as of May 1997 was over $98 billion.[43]

3. *Oil and Gas Royalty Trusts*

Another asset-specific form of investment trust, found in the oil producing states, is the oil and gas royalty trust. Such entities are tax-driven.[44] In a typical transaction, a corporation that has developed an oil field (or some other extractive asset) will transfer ownership to a trust, distributing beneficial interests in the trust to the corporation's shareholders. As owner of the royalty-bearing asset, the trust distributes directly to the beneficiaries of the trust the royalty income that the trust asset generates. The beneficiaries then escape corporate-level taxation.[45] These trust interests are marketable, and a number

40. A total of 1562 of the 2345 mutual funds surveyed by ICI were organized as trusts. The ICI's data, however, covers less than half the approximately 5900 mutual funds that report to the ICI. *See* Letter from Amy Lancellotta, Associate Counsel, ICI (June 11, 1996) (on file with the *Yale Law Journal*).

A sample of mutual funds formed during the period July 1985 through December 1987 found that half were organized as Massachusetts business trusts and 28% as Maryland business corporations. *See* Sheldon A. Jones et al., *The Massachusetts Business Trust and Registered Investment Companies*, 13 DEL. J. CORP. L. 421, 422 (1988). On the preference for Maryland corporations, see *infra* text accompanying notes 129-131, regarding the revisions to Maryland law that now allow the corporate form to approximate more closely the advantages of the trust.

41. *See infra* text accompanying notes 126-135.

42. *See* Real Estate Investment Trusts Act, Pub. L. No. 88-272, 74 Stat. 1004 (1960) (codified as amended at I.R.C. §§ 856-858 (1995)). In 1976 the Code was further amended to allow such real estate investment funds to use the corporate form. For a detailed exposition of the current tax treatment of REITs, see Steven F. Mount, *Real Estate Investment Trusts*, Tax Mgmt. Portfolios (BNA) No. 107 (1996)

43. *See* National Association of Real Estate Investment Trusts, *Document on Demand—Document #201* (visited June 25, 1997) <http://www.nareit.com/faxondem/201.html>.

44. In addition to dispensing with corporate-level taxation, *see infra* text accompanying note 45, some oil and gas royalty trusts are structured as tax credit royalty trusts under I.R.C. § 29 to maintain the benefits of tax credits awarded for the production of unconventional fuels. *See* John L. Crain et al., *Section 29 Tax Credit Royalty Trusts: A Win-Win Proposition for Investors and Oil and Gas Companies*, 43 OIL & GAS TAX Q. 295 (1994). Illustrative transactions are discussed in industry journals. *See, e.g.*, Danielle Robinson, *Royalty Trust Is a Break for Burlington Resources*, 61 PETROLEUM ECONOMIST 70 (1994); *BP Raises $334 Million Through Sale of Royalty Interest in Prudhoe Bay Output*, PLATT'S OILGRAM NEWS, Mar. 3, 1989, at 2; *Williams Raising Additional Cash for Further Pipeline Expansions*, INSIDE F.E.R.C.'S GAS MARKET REP., Nov. 6, 1992, at 2.

45. On the mechanics, see Thomas Crichton IV, *Royalty Trusts and Other Exotic Distributions to Shareholders*, 1 N.Y.U. FORTIETH ANN. INST. FED. TAX'N (MB), § 12.04, at 12-17 to 12-25 (Nicolas Likias ed., 1982); and Stephan G. Dollinger & Jeanne K. Helsley, *Royalty Trusts*, 30 OIL & GAS TAX Q 262 (1981). For a comparison with the partnership structure, see John L. Crain et al., *A Comparison of Royalty Trusts and Master Limited Partnerships*, 36 OIL & GAS TAX Q. 29 (1987).

of the larger royalty trusts are stock-exchange traded.[46]

4. *Asset Securitization*

Asset securitization[47] has become one of the most important commercial uses of the trust. A large fraction of all mortgage, credit card, automobile, and student loan debt is financed—or somewhat more accurately, refinanced—through asset securitization trusts. I have not been able to locate reliable data on the magnitude of asset securitization, but the sums involved number in the trillions of dollars. Patchy Federal Reserve data shows nearly $1.9 trillion in mortgage pools and $225 billion in automobile and other consumer credit as of July 1996.[48]

Asset securitization trusts are best understood by recalling the older pattern of bank-intermediated financing that is now being displaced by asset securitization. Take, for example, the case of a bank that used to finance credit card receivables in the ordinary way. These receivables are assets, debtors' promises to pay credit card debt. The bank used to buy the receivables from merchants, thereby placing them on the bank's books. To pay for these new assets, the bank required additional financing. Typically, the bank borrowed from large institutional sources—insurance companies, mutual funds, pension funds, and so forth. These lenders acquired no ownership interest in the underlying receivables that induced the bank to increase its borrowing. Rather, the lenders became general creditors of the bank, and the receivables remained as assets of the bank.

Contrast the new pattern. The bank in my example, now called the originator or packager, buys the credit card receivables as before, but then transfers them in trust to a separate trustee. Shares in that trust are sold to various participating investors, who, under the new scheme, are not lenders to the bank but share owners in the trust. Notice that I have taken a bank as my example, but nonbank intermediaries such as General Motors Acceptance Corporation and Caterpillar also engage in asset securitization, spinning off

46. *See* John L. Crain, *Royalty Trusts Continue To Play Useful Role*, 133 TRUSTS & ESTATES 25 (1994) (reporting more than 20 publicly traded oil and gas royalty trusts created since 1976, most of which are still trading).

47. I follow the insightful introductory account by Steven L. Schwarcz, *The Alchemy of Asset Securitization*, 1 STAN. J.L. BUS. & FIN. 133 (1994); and the treatise by Tamar Frankel, *see* TAMAR FRANKEL, SECURITIZATION: STRUCTURED FINANCING, FINANCIAL ASSETS POOLS, AND ASSET-BACKED SECURITIES (1991 & Supp. 1995).

48. *See* 82 FED. RESERVE BULL. at A35 to A36 tbls.1.54, 1.55 (1996). For a useful account of finance and tax issues arising in connection with mortgage-backed securities, see Gary J. Silversmith, *REMICs and Other Mortgage-Backed Securities*, Tax Mgmt. Portfolios (BNA) No. 117 (1996). Regarding the newest entity, the Financial Asset Securitization Trust (FASIT), approved in the Small Business Job Protection Act of 1996, Pub. L. No. 104-188, 110 Stat. 1867 (codified at I.R.C. § 860H-L (1997)), see 82 FED. RESERVE BULL. at A-113 to A-120.

automobile and equipment debt into separate trusts, and then selling shares in the trusts.

The asset securitization trust has two major advantages over conventional financing. First, securitization is thought to lower the costs of some credit. Securitization separates the particular assets into a trust that is distinct from the rest of the liabilities of the bank. Because these assets are specialized to a single recurrent class, they are easier for outside investors and rating agencies to evaluate than is the bank's general portfolio of assets. These assets are commonly less risky than the bank as a whole, for reasons that include the high quality and fixed duration of most of the securitized credits, as well as various credit-enhancing guarantees from the originator or other contractual parties. Investors in the trust accept lower interest rates, commensurate with the reduced risk, thereby lowering the cost of capital.

In addition to this lowered cost of funds, the other great advantage to the trust form[49] for these transactions is that, in the jargon of the financial community, asset securitization trusts are "bankruptcy remote."[50] In the traditional, bank-intermediated pattern of financing the credits, when the bank borrowed from the lender, the lender was a mere creditor of the bank, exposed to default risk in the event that the bank became insolvent. Under the regime of asset securitization, however, the investor is no longer a lender to the bank but rather the owner of a beneficial interest in a distinct pool of trust assets. Should the bank that originates the trust become insolvent, the trust and its shareholders would not be affected.

C. *Corporate Trust Functions Under the Trust Indenture Act*

Under the Trust Indenture Act of 1939,[51] most debt securities issued in the United States are required to provide for the services of a corporate fiduciary to act as trustee for the bondholders or other obligees. The magnitudes are large. The Federal Financial Institutions Examination Council estimates that as of year-end 1994 corporate trust departments served as indenture trustees for just over $3 trillion in debt.[52] The 1939 Act standardized a pattern of trust usage that had developed in financial practice across the previous century.[53] Unlike a conventional private trust, and unlike the various forms of commercial trust that I have previously discussed—that is, pension and investment trusts—under a bond indenture the trustee has less responsibility for the trust property. "The fundamental characteristic of the

49. Securitization can take the form of a share company owning the assets, but the trust form is thought to bring superior protection against the risk of insolvency of the bank or other originator.

50. *See, e.g.*, Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 23-30 (1996)

51. Pub. L. No. 76-253, 53 Stat. 1149 (1939) (codified at 15 U.S.C. § 77aaa (1994))

52. *See* TRUST ASSETS, *supra* note 11, at 98 tbl.C1-A.

53. *See* BOGERT & BOGERT, *supra* note 8, § 250.

ordinary personal trust is possession by the trustee of a specific trust *res* that he or she holds and administers for the benefit of" the beneficiaries, whereas "[t]he trustee under a corporate indenture . . . has no possession, or right to possession, of the mortgaged property until after a default occurs."[54] The indenture trustee "has no control of the business of the obligor . . . nor, except for infrequent and unusual circumstances, any voice in the management of its affairs."[55] The trustee under a bond indenture acts primarily under the terms of the contract creating the relationship, and acquires actual possession of the particular assets only in the event that the issuer breaches the covenants of the loan agreement. The indenture regime imposes, therefore, a species of contingent or standby trusteeship.[56]

What commends the trust form for these corporate and municipal bond transactions is the ability to have a sophisticated financial intermediary—that is, a trust company—act on behalf of numerous and dispersed bondholders in the event that a loan transaction does not work out routinely. The indenture trustee overcomes the coordination problem that inheres in widespread public ownership of debt securities. The trust form also starts from the well-developed platform of trust fiduciary law, which specifies the duties of the trustee. The 1939 indenture legislation tailors the background norms of trust fiduciary law to the indenture setting.[57]

D. *Regulatory Compliance Trusts*

The next stop on my tour of commercial trusts is a category I call the "regulatory compliance trust," a trust created primarily for the purpose of discharging responsibilities imposed by law.[58] My examples are illustrative

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54. ROBERT I. LANDAU, CORPORATE TRUST: ADMINISTRATION AND MANAGEMENT 25 (4th ed. 1992). Landau, author of the leading text on trust indenture practice, explains the trustee's role:

> [T]he essential function of [such] a trustee is the administration of the security provisions of a contract between the issuing corporation and the holders of the indenture securities. . . .
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> . . . [I]f the issue is secured in any way, the trustee holds and deals with the security. . . . [For example, i]f the security for the bond issue is personal property, such as equipment, the trustee will normally "perfect" its security interest in the property by filing a financing statement pursuant to the Uniform Commercial Code of the applicable state.
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> . . . [A]s administrator of the contract, the trustee has the responsibility of making sure that the covenants and other indenture provisions are performed in the agreed manner. . . .
>
> . . . [I]n the event of default the trustee has a primary responsibility for enforcing the remedial provisions of the contract.

Id. at 54.

55. *Id.* at 25.

56. Hence, a commentator can ask the question posed in Martin D. Sklar, *The Corporate Indenture Trustee: Genuine Fiduciary or Mere Stakeholder?*, 106 BANKING L.J. 42 (1989). *See also* Martin Riger, *The Trust Indenture as Bargained Contract: The Persistence of Myth*, 16 J. CORP. L. 211 (1991).

57. *See* Trust Indenture Act of 1939 §§ 315-318, 15 U.S.C. § 77ooo-rrr (1994).

58. Two of the categories of commercial trust noticed earlier can be said to straddle this category. The bond issue (under the Trust Indenture Act of 1939) and the pension trust (pursuant to federal pension, tax, and labor law) now require the trust form, but these varieties of commercial trust appeared in practice before regulation mandated them. *See supra* text accompanying notes 31-33, 53.

only; anyone who cares to comb the statute books and the administrative sources can find others. Indeed, pressure to use the trust form as a regulatory compliance device is also seen in the realm of personal trusts. Congress has designed the transfer tax system to make use of the so-called "bypass" or "credit shelter" trust all but irresistible in estate planning for spouses with sufficient means.[59]

1. *Nuclear Decommissioning Trusts*

Federal law requires that when a public utility builds a nuclear power plant, the utility must make future provision for the costs of "decommissioning" the plant at the end of its safe period of use. The regulation invites the utility to save for the costs of removing the plant from service and dismantling it safely through the device of a "nuclear plant decommissioning trust fund."[60] The Internal Revenue Code contains a special provision[61] granting a current income tax deduction for the money contributed to the trust, even though the contributed funds will be invested and not expended for years to come.

2. *Environmental Remediation Trusts*

To facilitate tax exemption for compliance with environmental laws that require the cleanup of waste sites and the like, the Internal Revenue Service has by rule authorized the creation under state law of so-called environmental remediation trusts. The Service explains that the primary purpose of such a trust is "environmental remediation of an existing waste site and not the carrying on of a profit-making business."[62] The regulation envisages creation of such a trust "to resolve, satisfy, mitigate, address, or prevent the liability or potential liability . . . imposed by federal, state, or local environmental laws."[63]

3. *Liquidating Trusts*

It may also be useful to view the so-called liquidating trust, which is a staple of tax practice in corporate dissolutions, as a species of regulatory compliance trust. Assets in liquidation can escape entity-level taxation when

59. The bypass trust avoids taxation in the decedent's estate by utilizing the unified credit, currently $600,000, *see* I.R.C. § 2010 (1994), and it avoids taxation in the surviving spouse's estate by limiting the spouse to an income interest that expires on the spouse's death.

60. 18 C.F.R. § 35.32(a) (1994).

61. *See* I.R.C. § 468A (1994).

62. 26 C.F.R. § 301.7701-4(e)(1) (1996); *see also* William P Streng, *Choice of Entity*, Tax Mgmt. Portfolios (BNA) No. 700, at A-16 (1993) (reviewing regulations).

63. 26 C.F.R. § 301.7701-4(e)(1).

placed in trust. However, the Internal Revenue Service cautions, if the liquidation is unreasonably prolonged or if the liquidation purpose becomes so obscured by business activities that the declared purpose of the liquidation can be said to be lost or abandoned,[64] entity-level tax treatment may result. When assets are segregated in a liquidating trust, the tax authorities are better able to monitor the claim that the assets are being deployed in a dissolution mode.

4. *Prepaid Funeral Trusts*

State governments require regulatory compliance trusts in a variety of settings. For example, many states regulate the sale of prepayment plans for funeral services, requiring that the proceeds paid in advance under contract for funeral services and related merchandise be placed in trust until the death that occasions the mortician's performance of the contract.[65]

5. *Foreign Insurers' Trusts*

Many state insurance codes require foreign insurers to place assets within the United States to back up the insurers' American risks.[66] The statutes allow an insurer to deposit these assets with the state insurance commissioner or to place the assets in trust with an American trust company. The Massachusetts act, for example, requires the assets to be placed "in exclusive trust for the benefit and security of all [the insurers'] policyholders and creditors in the United States."[67] The National Association of Insurance Commissioners sponsors a model act to facilitate this species of regulatory trust.[68]

6. *Law Office Trust Account*

Another prominent species of regulatory compliance trust arising in response to state law is the trust account that a law firm operates in order to discharge its duty to safekeep clients' funds.[69] Comparable requirements exist

64. *See* 26 C.F.R. § 301.7701-4(d) (1996); *see also* Streng, *supra* note 62, at A-15 (reviewing regulations and discussing patterns of use). For a recent case holding that a liquidating trust could not escape coverage under the Coal Act, 26 U.S.C. § 9701-22 (1994), and rejecting the trust's claim that it was no longer "in business" under the terms of the Act, see *Lindsey Coal Mining Co. v. Chater*, 90 F.3d 688, 692 (3d Cir. 1996).

65. *See, e.g.*, 225 ILL. COMP. STAT. 45/1 (West Supp. 1996); IND. CODE § 30-2-10-2 to -3 (1989).

66. *See, e.g.*, ALA. CODE § 27-3-14 (1975); MD. CODE ANN., INS. § 4-106 (1997); OKLA. STAT. tit. 36, § 613 (1990).

67. MASS. ANN. LAWS. ch. 175, § 155 (Law. Co-op. 1996); *accord, e.g.*, CAL. INS. CODE §§ 1583(d), 1596(c) (West 1996); DEL. CODE ANN. tit. 18, § 514 (1996); OKLA. STAT. tit. 36, § 613(B)(3).

68. *See* STATE OF ENTRY MODEL LAW §§ 3(A)(2), 4, 5 (National Ass'n of Ins. Comm'rs 1993).

69. On the lawyer's duty to segregate client funds and prevent commingling with personal funds, see CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 4.8, at 175-84 (1986). In addition to trust law remedies, the lawyer's duty is enforced by means of disciplinary sanctions. *See generally* Debra T. Landis,

elsewhere in state law, for example, for real estate brokers who handle client funds.[70]

E. *Remedial Trusts*

Remedial trusts are created to settle or to resolve disputes in judicial or administrative proceedings. The Internal Revenue Code was amended in 1986 to facilitate such trusts.[71] Section 468B authorizes the creation of an entity called the "designated settlement fund," or DSF, which in practice utilizes the trust form.[72] Congress envisioned the DSF as a vehicle for "resolving and satisfying present and future claims . . . arising out of personal injury, death or property damage."[73] The DSF "primarily grew out of asbestos cases and other toxic tort litigation."[74] Since 1993, Treasury regulations have permitted the use of the settlement trust in certain environmental and other nontort cases.[75] The court order that creates the trust embodies the terms of the settlement agreement.

The DSF is, in large measure, tax-driven. It allows the defendant who pays into the fund to overcome the constructive receipt doctrine, which would ordinarily prevent the taxpayer from obtaining a current income tax deduction for a payment made as a business expense unless the payee recognizes current income.[76] A defendant who pays into a DSF obtains the current deduction even though the fund may hold the proceeds for some years before making distribution to the ultimate payees.[77]

F. *Comparing Magnitudes*

Having concluded my tour of prominent species of commercial trust, I want to tote up. Recall the assertion voiced at the outset of this Essay, that in terms of assets, commercial trusts are far more important than personal trusts.

Annotation, *Attorney's Commingling of Client Funds with His Own as Ground for Disciplinary Action—Modern Status*, 94 A.L.R.3d 846 (1979).

70. *See, e.g.*, MINN. STAT. ANN. § 82.24(1) (West Supp. 1997)

71. *See* Pub. L. No. 99-514, § 1807(a)(7)(A), 100 Stat 2085, 2814 (1986)

72. I.R.C. § 468B (1994).

73. I.R.C. § 468B(d)(2)(D).

74. William L. Winslow, *Resolving Mass Torts with Designated Settlement Funds*, TRIAL, Oct 1994, at 82. Regarding the most prominent examples of mass tort DSFs to date, see Kenneth R Feinberg, *The Dalkon Shield Claimants Trust*, 53 LAW & CONTEMP PROBS 79 (1990), and Frank J Macchiarola, *The Manville Personal Injury Settlement Trust: Lessons for the Future*, 17 CARDOZO L REV 583 (1996)

75. These trusts are known as "qualified settlement trusts." 26 C F R § 1 468B-B 5 (1995)

76. For a general explanation of the constructive receipt doctrine, see 4 BORIS I BITTKER, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 105.2.3 (1981).

77. The pension trust also overcomes the constructive receipt doctrine, because the employer receives an immediate deduction for contributions to the plan, while the corresponding pension benefits are not fully paid out until the retirement or death of the worker (and spouse), commonly decades later

The data available on the asset values of the various forms of trust has many shortcomings, but the drift is unmistakable. Begin with personal trusts. We do not know how much money is held in personal trusts in the United States. We do have reliable data from the federal regulatory agencies on the assets held in trust by trust companies and other institutional trustees. As of year-end 1994, these institutions managed $532 billion of discretionary personal trust assets, and they held another $140 billion of nondiscretionary assets (that is, assets managed by outsiders), for a total of $672 billion.[78] This figure may somewhat overstate the assets of strictly personal or family trusts because it includes assets held in trust by financial institutions for charitable trusts and foundations. The $672 billion figure understates the total assets held in personal trusts, however, because it does not include assets held exclusively by individual (that is, noninstitutional) trustees. The use of individual trustees is quite common in family wealth transmission, but mostly in smaller trusts. As a generality to which there certainly are exceptions, I would posit that the larger the assets of a trust, the more likely it is that the settlor will provide for an institutional trustee or cotrustee, which would cause the trust to show up in the federal data that I have reported.

Turning to commercial trusts, recall that I reported pension trust assets at $4.6 trillion,[79] and trust-type mutual funds at perhaps $2 trillion (half the $4 trillion total for all types of mutual funds).[80] To this $6.6 trillion running total, I then add the $2 trillion in identifiable asset securitization trusts,[81] which takes my total to $8.6 trillion. Next, I add the $3 trillion of trust-indentured corporate and municipal debt,[82] bringing my tab to $11.6 trillion. I would need to add some further figures, surely in the hundreds of billions of dollars, for the values in REITs, in royalty trusts, and in the various regulatory compliance trusts and remedial trusts. On the other hand, an accurate total would also require a downward adjustment to correct for instances of double counting, for example, pension assets that are held in mutual fund shares or in indenture-backed bonds.

I regret that my data suffers from so many lacunae that it can only be suggestive. Nevertheless, the data leaves me on solid ground in asserting, as I did at the outset of this Essay, that well above 90% of the wealth in trust in the United States is held in commercial as opposed to personal trusts.

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78. *See* TRUST ASSETS, *supra* note 11, at 9 tbl.A-2.

79. *See supra* text accompanying notes 24-26 (reporting $3 trillion in trusteed private pension plan assets and $1.6 trillion in state and local government plans).

80. *See supra* notes 39-40.

81. *See supra* text accompanying note 48.

82. *See supra* text accompanying note 52.

II. ATTRIBUTES OF THE TRUST THAT INVITE COMMERCIAL USES

What explains the attractiveness of the trust form for modern transaction planners in the world of commerce? I find it useful to think of the trust as a competitor, locked in a sort of Darwinian struggle against other modes of business organization and finance, in particular the corporation, but also the partnership and the various techniques of secured finance. The challenge is to understand why the trust prevails when it does.

I shall point to four key attributes of the trust device that entice the transaction planner: (1) the protection of beneficial interests in the event that the trustee becomes insolvent; (2) the ease with which the trust lends itself to favorable, conduit-type taxation; (3) the protective regime of trust fiduciary law; and (4) the trust's flexibility of design in matters of governance and in the structuring of beneficial interests.

A. *Insolvency Protection*

To the planners of commercial transactions, a central attraction of the trust form is the treatment under trust law of an unusual but most worrisome event, the insolvency of the trustee. The rule is well-settled that "[a]lthough a trustee becomes insolvent or bankrupt, the beneficiary retains his interest in the subject matter of the trust" and, accordingly, the beneficiary "is entitled [to retain that interest] as against the general creditors of the trustee."[83] The conceptual structure of the trust, which treats the trust beneficiaries as the true owners of the trust property (that is, as the owners of beneficial or equitable title), supplies the doctrinal justification for this treatment of trustee insolvency.[84]

Another foundational principle of trust law, the segregation requirement, reinforces the insolvency regime by insisting that the trustee make a sharp distinction between the trustee's own property and the property of the trust.[85] Associated rules require trust property to be earmarked appropriately and forbid the trustee from commingling trust property with the trustee's own

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83. RESTATEMENT (SECOND) OF TRUSTS § 12 cmt. f (1959). I have elsewhere had occasion to observe "how central this topic is in the comparative law literature. Europeans, who lack the trust, regard the law of trustee insolvency as a defining element of the Anglo-American trust, and they find this feature of the trust perhaps the hardest to replicate in purely contractual arrangements." Langbein, *supra* note 3, at 667-68. In emphasizing the importance of insolvency protection as a fundamental characteristic of trust law, I wish to acknowledge my debt to the unpublished paper, Henry Hansmann & Ugo Mattei, The Comparative Law and Economics of Private Trusts 21-25 (Sept. 1995) (unpublished manuscript, on file with the *Yale Law Journal*), which contrasts the advantages of the insolvency protection under the Anglo-American trust with the devices available in European legal systems.

84. "The beneficiary of a trust has the beneficial interest in the trust property," whereas a creditor of a trustee "has merely a personal claim against the debtor." RESTATEMENT (SECOND) OF TRUSTS § 12 cmt. a.

85. *See id.* § 179.

property.[86] This segregation regime separates the trustee's trust property from nontrust property without having to lodge ownership of the trust property in a distinct entity endowed with juridical personality, such as a corporation.[87] In the pension trust, for example, the segregation requirement forces the employer or other sponsor of a pension plan to recognize that the plan's assets belong to the plan participants, even when the employer continues to manage the assets.[88]

Consider how the insolvency regime functions in the pension trust to protect pension beneficiaries against employer insolvency. Were the pension promise merely a liability of the firm, as it is in some European systems,[89] the employee or retiree would be a creditor like any other. Were the employer to become insolvent—a common enough occurrence in commercial life—the pension claims would be exposed to reduction or loss in like measure with the employer's other debts. Under the trust mechanism, however, the employer creates and funds a separate trust to defray the pension promises, and the employer's insolvency need not disrupt the pension plan because the plan's assets are segregated in the trust. Present and future beneficiaries look to the trust, not to the bankrupt employer, for payment of their pensions.

B. *Conduit Taxation*

The trust form invites pass-through or conduit taxation.[90] The corporation

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86. *See id.* § 179 cmts. b, d.

87. In conventional trust doctrine, the trustees are the juridical persons who own the trust property, but subject to their trust duties. This contrast between corporation as entity and trust as personal obligation has eroded in common parlance. The draft *Restatement (Third) of Trusts* remarks:

> Increasingly, modern common law and statutory concepts and terminology tacitly recognize the trust as a legal "entity," consisting of the trust estate and the associated fiduciary relation between the trustee and the beneficiaries. This is increasingly and appropriately reflected both in language (referring, for example, to a trustee's duties or liability to "the trust") and in doctrine . . . .

RESTATEMENT (THIRD) OF TRUSTS § 2 cmt. a (Tentative Draft No. 1, 1996). By way of illustration, consider the provisions of the Uniform Prudent Investor Act of 1994 that, while authorizing trustees to delegate investment and management functions to an agent, impose a duty of care that the agent owes "to the trust." UNIF. PRUDENT INVESTOR ACT § 9(b), 7B U.L.A. 30 (Supp. 1997). The trustee who complies with the standards of the Act governing delegation "is not liable to the beneficiaries or to the trust" for the agent's conduct. *Id.* § 9(c), 7B U.L.A. 30.

88. ERISA spells out the requirement that "all assets of an employee benefit plan shall be held in trust," ERISA § 403(a), 29 U.S.C. § 1103 (1994), and ERISA imposes fiduciary responsibilities on anyone who "exercises any authority or control respecting management or disposition of [plan] assets," ERISA § 3(21)(A)(i), 29 U.S.C. § 1002(21)(A)(i) (1994).

89. In Germany and elsewhere in Europe, where pension credits are "book reserved" on the employer's accounts, the employer is required to buy external insurance to protect workers against the risk of employer default. *See* JAMES H. SMALHOUT, THE UNCERTAIN RETIREMENT: SECURING PENSION PROMISES IN A WORLD OF RISK 223-30 (1996); *see also* EMPLOYEE BENEFIT RESEARCH INST., PENSION PLAN TERMINATION INSURANCE: DOES THE FOREIGN EXPERIENCE HAVE RELEVANCE FOR THE UNITED STATES? 31-41 (1979).

90. Subchapter J of the Internal Revenue Code allows a trust to qualify for conduit treatment—that is, for exemption from taxation—when the trust distributes its income to the beneficiaries, who are taxed directly on the income. *See* I.R.C. §§ 641(a), 651, 661 (1994). *See generally* MARK L. ASCHER, FEDERAL

as a juridical entity has attracted entity-level taxation in the American system of income taxation, resulting in double taxation when the corporation's shareholders are taxed again on income they derive from corporate distributions. Because we treat the trustee's ownership of trust property as merely nominal, with real ownership remaining in the beneficiary, we have tended to tax trust proceeds at the beneficiary level only. This ability to use the trust form to avoid entity-level taxation has been a driving force in the growth of commercial uses of the trust.

Consider, for example, the tax advantages of the pension trust.[91] The employer obtains a current tax deduction for sums contributed to the pension trust, even though the employee receives no taxable income until retirement, which may be years, even decades later.[92] Furthermore, the pension trust is exempt from current taxation on its investment income,[93] and thus investment gains compound without taxation. Contributions to and earnings of the pension fund are taxed only when finally distributed to retirees,[94] who are commonly in lower tax brackets than when they were in the work force.

On the other hand, tax-favored treatment need not be an inevitable functional attribute of the trust in its struggle for turf with the corporate form. To the contrary, Subchapter S of the Internal Revenue Code allows comparable treatment for certain corporations,[95] and not all trusts qualify for conduit taxation.[96] There is a rich literature arguing for complete elimination of the corporate income tax.[97] In 1936 Congress simply extended trust-type conduit tax treatment to mutual funds organized in corporate form;[98] and in 1976 a similar step was taken to extend trust-type taxation to corporate-form REITs.[99] Thus, the trust form undoubtedly facilitates favorable tax treatment, but Congress can always even that playing field for other modes of business organization.

INCOME TAXATION OF TRUSTS AND ESTATES (2d ed. 1996), M CARR FERGUSON ET AL., FEDERAL INCOME TAXATION OF ESTATES, TRUSTS, AND BENEFICIARIES (2d ed. 1993 & Supp. 1996)

91. For summary treatment of the tax advantages of qualified plans, see LANGBEIN & WOLK, *supra* note 27, at 149-50; for greater detail, see *id.* at 147-374. Regarding the nontax reasons for employers to sponsor plans, see *id.* at 30-33.

92. *See* I.R.C. §§ 401(a)(9), 404(a)(1) (1994).

93. *See* I.R.C. § 501(a) (1994).

94. *See* I.R.C. § 402(a) (1994).

95. *See* I.R.C. §§ 1366-76 (1994).

96. *See* I.R.C. § 641(a) (1994).

97. This literature is extensively canvassed in U S DEP'T OF THE TREASURY, REPORT OF THE DEPARTMENT OF THE TREASURY ON INTEGRATION OF THE INDIVIDUAL AND CORPORATE TAX SYSTEMS TAXING BUSINESS INCOME ONCE (1992).

98. *See* Revenue Act of 1936, Pub. L. No. 74-740, 49 Stat 1648 (1936), *see also* Jones et al., *supra* note 40, at 448-49.

99. *See* Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520 (1976); *see also* Jones et al., *supra* note 40, at 453.

C. *Fiduciary Regime*

Another trait of the trust form that is of fundamental importance to transaction planners is that the trust automatically invokes the distinctive protective regime of trust fiduciary law for safeguarding the interests of investors or other beneficiaries. Effective management of modern financial assets usually requires that the trustee be granted extensive powers to transact with the trust property.[100] Trust fiduciary law offsets and controls this power, requiring the trustee to exercise it in the best interests of the trust beneficiaries.[101]

There are two great principles of trust fiduciary law: loyalty and prudence. The duty of loyalty requires the trustee "to administer the trust solely in the interest of the beneficiaries,"[102] hence it forbids the trustee from self-dealing in the management of trust assets and from engaging in conflict-of-interest transactions adverse to beneficiaries' interests. The other great principle of trust fiduciary law, the duty of prudent administration, imposes a reasonableness norm that places the trustee "under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property."[103] Subrules of fiduciary law abound, implementing the duties of loyalty and prudence in particular settings. Examples include the duties to invest prudently, to diversify investments, to keep and render accounts, to preserve trust assets and make them productive, to enforce and defend claims, and to minimize costs.[104]

In the development of American pension law, the ability to adopt and to adapt this potent fiduciary regime was a central attraction of the trust form. ERISA was devised in part in reaction to scandals in which congressional investigators discovered that corrupt labor union leaders had misappropriated union-sponsored pension and benefit funds.[105]

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100. *See* Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 426 (1993).

101. *See generally* Langbein, *supra* note 3, at 640-43 (discussing the evolution of fiduciary obligation as a response to the growth of trustees' powers of management).

102. RESTATEMENT (SECOND) OF TRUSTS § 170(1) (1959), *continued in* RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE § 170(1) (1992). The *Restatement (Third)* slightly revises the text of section 170(1) but leaves the official comments from the *Restatement (Second)* in force.

103. RESTATEMENT (SECOND) OF TRUSTS § 174. The *Restatement (Third)* applies the prudence norm to investing and managing the trust assets. *See* RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE § 227. The prudent investing standards of the *Restatement (Third)* are codified in the UNIF. PRUDENT INVESTOR ACT, 7B U.L.A. 18 (Supp. 1996), which has thus far been enacted in 19 states; comparable nonuniform legislation has been enacted in Florida, Illinois, and New York. For detail, see John H. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing*, 81 IOWA L. REV. 641 (1996).

104. *See* RESTATEMENT (SECOND) OF TRUSTS §§ 172-78; RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE § 227(b).

105. The origins of ERISA are discussed in Michael S. Gordon, *Overview: Why Was ERISA Enacted?*, *in* U.S. SEN. SPECIAL COMM. ON AGING, 98TH CONG., THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: THE FIRST DECADE 6-25 (1984), *substantially reprinted in* LANGBEIN & WOLK, *supra* note 27, at 67-78.

Trust fiduciary law is default law that the parties can alter to their needs.[106] Often, however, the protections of trust fiduciary law are exactly what the parties wish to absorb into their transaction. For example, investors are more likely to buy into the deal when they can rely upon the managers being bound by conventional fiduciary standards. Furthermore, in certain commercial trusts, such as pension[107] and indenture trusts,[108] supervening regulatory law has forced the parties to the business deal to incorporate some or all of the fiduciary regime. In such circumstances the regulatory regime transforms default law into mandatory law.

D. *Flexibility in Design*

Transacting parties who employ the trust for commercial purposes appear to value the flexibility that trust law permits, both in matters of internal governance and in the creation of beneficial interests. Investment trusts provide the best examples. Transaction planners designing asset securitization trusts especially welcome the freedom to carve beneficial interests without regard to traditional classes of corporate shares. They have manipulated the trust form to create a dizzying array of so-called tranches,[109] each embodied in its own class of trust security.

Why have so many mutual funds chosen to organize as trusts?[110] In the

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106. Even the duty of loyalty is default law that yields to contrary terms of the trust deal. The *Restatement* says:

> By the terms of the trust the trustee may be permitted to sell trust property to himself individually, or as trustee to purchase property from himself individually, or to lend to himself money held by him in trust, or otherwise to deal with the trust property on his own account.

RESTATEMENT (SECOND) OF TRUSTS § 170(1) cmt. t, *discussed in* Langbein, *supra* note 3, at 659

107. *See* ERISA § 403(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D) (1994).

108. *See* 40 U.S.C. § 121 (1994) (precluding exculpation clauses).

109. A tranche is simply a slice of a deal, a payment stream whose expected return increases with its riskiness. Speaking of collateralized mortgage obligations (CMOs), a prevalent form of asset securitization, Crawford and Sen report:

> Today, most CMOs have a large number of tranches, each geared to a specific customer's needs. In 1982, one of the earliest CMOs was issued for $50 million: It had two tranches. In 1983, there were eight CMO issues, with a dollar volume of $4,748 million, and an average of 6.6 tranches. In 1992, there were approximately 375 CMOs issued for $188,458 million, with an average of 17.7 tranches.

GEORGE CRAWFORD & BIDYUT SEN, DERIVATIVES FOR DECISION MAKERS 45 (1996). Regarding the design and administration of tranches in CMOs, see *id.* at 43-45.

110. For discussion of the advantages of the trust form for a mutual fund, see Jones et al., *supra* note 40, at 452-58. The main disadvantage to the trust form for the mutual fund industry, by comparison with the corporation, has been the concern that the legal doctrine is not absolutely unambiguous on the question of whether investors are protected from personal liability for the obligations of the trust, even though no such liability has ever been imposed. *See id.* at 439-43. Thus, limited liability, the central trait of the corporate form, continues to exert a powerful attraction in the competition between corporate and trust forms. A mutual fund organized as a trust typically contains language in its organizing and disclosure statements declaring that the shareholders shall not be liable for the obligations of the trust and, furthermore, indemnifying shareholders from the assets of the trust in the event that the declaration were to be disregarded. *See id.* at 441. Delaware's recently enacted business trust act attempts to resolve the matter by providing that shareholders of a business trust are entitled to the same limitation of personal liability as shareholders of a business corporation. *See* DEL. CODE ANN tit. 12, § 3803(a) (1995); *see also*

words of a practitioner's manual, "[T]he business trust eliminates a layer of regulation, i.e., the state corporation statute."[111] The flexibility to eliminate governance procedures that are obligatory under the corporate form has been one great attraction of the trust form. For example, the trust instrument can be drafted to dispense with routine shareholder meetings. As a result, the costs of proxy solicitation and other meeting-related expenses that are mandated under corporation codes can be eliminated.[112]

Another aspect of the flexibility of the trust form that appeals to the mutual fund industry is the comparative ease in creating and extinguishing trust shares. The so-called money market funds that burst upon the scene in the mid-1970s, being quite sensitive to short-term interest-rate fluctuations, are subject to large variations in the number of outstanding shares. When interest rates decline, redemptions increase; when rates rise, billions of new shares are issued. Money market funds prefer the trust form because the trust instrument can be drafted to allow an unlimited number of shares. Corporate law limits a company to the maximum number of shares authorized in the corporation's certificate of incorporation.[113] Increasing that number puts the fund and its shareholders to the expense of soliciting and obtaining shareholder approvals. On the other hand, avoiding that expense by having the fund's certificate authorize some vast number of presently unneeded and unissued shares has a different drawback: State corporate franchise and filing fees (taxes in effect) increase with the number of authorized shares.[114]

The trust's inherent flexibility for tailoring beneficial interests and mechanisms of governance reflects, I think, the origins of the Anglo-American trust as a donative transfer. If you start with the root principle that the owner of property has absolute freedom to give it away as he or she pleases,[115] there seems no basis for interfering with this liberty to make arrangements for giving the property away less than absolutely—no reason, in other words, for preventing the donor from tailoring whatever organizational regime the donor cares to devise for implementing the gift. Compare the corporation, which is the main competitor of the commercial trust. When the modern business corporation developed in the nineteenth century, it emerged encumbered with restrictions of a regulatory character, designed to protect creditors and

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infra notes 132-133 and accompanying text.

111. Philip H. Newman et al., *Legal Considerations in Selecting the Form and Jurisdiction of Organization of a Mutual Fund*, A.L.I.-A.B.A., CONTINUING LEGAL EDUC., May 11, 1995, at 21, 23.

112. *See id.*; *see also infra* note 133.

113. *See, e.g.*, DEL. CODE ANN. tit. 8, § 102(4) (1995).

114. *See* Jones et al., *supra* note 40, at 454-55; *see also infra* note 133. Regarding other minor state tax advantages to the trust form over the corporate form in Massachusetts, see Jones et al., *supra* note 40, at 456-57. The greater flexibility of the trust form has also been noted in connection with its use for REITs: REIT trusts offer "[g]reater flexibility in . . . conferring powers on the trustees," "[l]ow or no franchise and/or income tax," and flexibility in the issuance of shares. STEPHEN P. JARCHOW, REAL ESTATE SYNDICATION: SECURITIZATION AFTER TAX REFORM § 7.2, at 221 (2d ed. 1988).

115. This freedom, of course, does not include perpetuities and similar dead hand protections.

shareowners. To be sure, across the twentieth century, the corporate form has become more permissive,[116] but the commercial trust continues to offer the transaction planner nearly unlimited flexibility in design.[117] This flexibility harkens back to the origins of the trust form, in the absolute dominion of donor over donative property.

III. THE RELATIONS OF PERSONAL AND COMMERCIAL TRUSTS

I conclude this introductory investigation by inquiring about the relations of the commercial trust and the conventional personal trust.

A. *Straddling the Line Between Gratuity and Bargain*

The distinction between gratuitous transfer and bargained-for exchange—that is, between gift and deal—is a fundamental line in Anglo-American law.[118] A promise to make a gift is not enforceable,[119] and different formalities pertain to gifts (delivery) and to contracts (consideration).

Ought it to matter that the commercial trust appears to straddle the two systems of exchange, gift and bargain? Recall Rudden's account of the trust as "essentially a gift, projected on the plane of time and so subjected to a management regime."[120] The commercial trust, by contrast, although still a management regime, does not effect a gift. Does it matter that this staple mechanism of the law of gifts is being put to use in the law of deals?

I have elsewhere made the point that even in the law of donative transfers the trust functions as a deal, in the sense that what trust law does is to enforce the trustee's promise to the settlor to carry out the terms of the donative transfer.[121] Thus, although the typical trust implements a donative transfer, it embodies a contract-like relationship in the underlying deal between the settlor and the trustee about how the trustee will manage the trust assets and distribute them to the trust beneficiaries. The difference between a trust and a third-party beneficiary contract is largely a lawyers' conceptualism.[122]

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116. The trend is well summarized in Bernard S. Black, *Is Corporate Law Trivial? A Political and Economic Analysis*, 84 NW. U. L. REV. 542 (1990). Some nonwaivable features of Delaware corporation law are catalogued in Jeffrey N. Gordon, *The Mandatory Structure of Corporate Law*, 89 COLUM L REV 1549, 1553 n.16 (1989).

117. This intrinsic flexibility includes the settlor's power to surrender some of the flexibility—for example, by restricting the trustee's powers to transact, or by tailoring particular standards for amending or terminating the trust. Regarding the settlor's power to impose a regime for amending or terminating the trust, see BOGERT & BOGERT, *supra* note 8, § 1001.

118. *See, e.g.*, JOHN P. DAWSON, GIFTS AND PROMISES 1-3 (1980).

119. *See* E. ALLAN FARNSWORTH, CONTRACTS § 2.5, at 69-71 (2d ed. 1990)

120. Rudden, *supra* note 4, at 610.

121. *See* Langbein, *supra* note 3, *passim*.

122. "[T]he three-cornered relation of settlor, trustee, and [beneficiary is] easily explained in the modern law in terms of a contract for the benefit of a third party." F.H. LAWSON, A COMMON LAWYER LOOKS AT THE CIVIL LAW 200 (1953), *discussed in* Langbein, *supra* note 3, at 628

When, therefore, we enforce a trust, even the conventional donative or personal trust, we are already in the realm of contract-like behavior. That is why not much turns on the distinction between donative and commercial trust. In the commercial setting, the typical wealth-holder, instead of transferring property for his widow and orphans, is an investor buying shares in an asset pool for the investor's own benefit. In either case, the wealth-holder places property at the trustee's disposal in reliance upon the safeguards of the trust form.

The key insight is that the great principles of trust fiduciary law, loyalty and prudence, do not depend upon the transferor's motive, whether making a gift or doing a deal. Hence nothing of importance is lost by allowing the commercial trust to straddle the categories of gift and deal. The real advantage, already observed,[123] from the proximity of gift to deal in the law of commercial trusts, is the ability of the transaction planner to draw upon that freedom of design that has so characterized the donative transfer.

Comparative law provides a compelling endorsement of the proposition that the trust need not be rooted in donative transfers. Outside the Anglo-American legal systems, the trust is generally unknown, except in Japan.[124] The Japanese have built a trust industry with assets amounting to $2 trillion, all but exclusively in various forms of commercial trusts, including mutual funds, real estate development trusts, and various time deposit products.[125] Japanese experience shows that it is possible to have a vibrant trust system that is virtually untouched by donative transfers.

B. *Corporation and Trust*

The commercial trust, I have said, is locked in a struggle for turf against competing modes of finance and competing modes of business organization, especially the corporation. As I have explained, the flexibility of the trust form has facilitated innovation in enterprise organization.

Innovations pioneered in the trust form sometimes spread through legislation to the corporation. I have mentioned this phenomenon in connection with trust-type conduit taxation, which Congress has extended to mutual funds

123. *See supra* text accompanying notes 109-117.

124. *See* William F. Fratcher, *Trust*, *in* 6 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW (1972) (pamphlet print). Various microstates operating as tax havens have imitated Anglo-American trust law to facilitate offshore flows. For a compilation of these and other foreign trust laws, see INTERNATIONAL TRUST LAWS (J. Glasson ed., rev. ed. 1994).

125. The trust "was introduced [into Japan] in 1900 or thereabouts from the United States primarily to provide a business framework for investment management by trust companies." Makoto Arai & Koichi Kimura, *Financial Revolution and Trust Banks in Japan: Challenges in the Deregulation and Internationalisation Process*, 4 J. INT'L TR. & CORP. PLAN. 67, 68 (1995). "[T]he use of trusts for inheritance purposes is quite rare in Japan." *Id.* at 68 n.1. Current usage is discussed in Makoto Arai, *Japan*, *in* INTERNATIONAL TRUST LAWS, *supra* note 124, at A21-A23.

and REITs.[126] Likewise, under the Investment Company Act of 1940,[127] Congress made identical fiduciary standards applicable to the managers both of investment companies and investment trusts.[128]

In the 1980s, the state of Maryland, which is home to the T. Rowe Price firm, one of the largest American mutual fund groups, amended its corporation law to allow investment companies to ape the flexibility of the commercial trust in governance.[129] A Maryland investment company may now provide by charter for dispensing with annual meetings[130] and their attendant proxy costs, one of the distinctive advantages of trust-type mutual funds. A survey in the late 1980s found that half of all newly organized mutual funds took the form of trusts, but that a further 28% were organized as Maryland corporations.[131] Once again we see the pattern that commercial trust innovations are absorbed into corporate practice. But the balance of advantage is slight, and a counter-trend can also be detected. In 1988, Delaware, long the home of permissive business corporation laws, enacted a liberal business trust act.[132] Mutual funds wishing to escape state corporate franchise taxes have since reorganized themselves as Delaware business trusts.[133] Sixteen states

126. *See supra* notes 98-99 and accompanying text.

127. Pub. L. No. 76-768, 54 Stat. 789 (codified as amended at 15 U.S.C. §§ 77b, 80a-1 to 80a-64, 80b-1 to 80b-21 (1994)).

128. *See* Jones et al., *supra* note 40, at 450.

129. *See* 1987 Md. Laws 242.

130. *See* MD. CODE ANN., CORPS. & ASS'NS § 2-501 (1993).

131. *See* Jones et al., *supra* note 40, at 422.

132. *See* Delaware Business Trust Act, 66 Del. Laws 279 (1988) (codified as amended at DEL. CODE ANN. tit. 12, §§ 3801-3820 (1995 & Supp. 1996)); *see also supra* note 110. For an overview on the topic, see Wendell Fenton & Eric A. Mazie, *Delaware Business Trusts*, *in* 2 THE DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS §§ 25.1-25.12 (R. Franklin BaLotti & Jesse A. Finkelstein eds., Supp. 1997).

133. See, for example, the September 11, 1996, proxy statement of the Van Kampen American Capital Fund, proposing the conversion of two Texas-based funds from Maryland corporations to Delaware business trusts:

> There are two principal reasons for reorganizing the Maryland Funds in Delaware as business trusts. The first is to take advantage of certain beneficial aspects of Delaware law with respect to business trusts. The second reason is to eliminate the payment of an annual Texas franchise tax by each Maryland Fund.
>
> Delaware law provides that the trustees of a Delaware business trust may authorize for issuance an unlimited number of shares. Maryland corporate law provides that the articles of incorporation of a Maryland corporation must set forth the number of shares authorized for issuance. In addition, Delaware law with respect to business trusts has been specifically drafted to accommodate the unique corporate governance needs of investment companies and provides that its policy is to give maximum freedom of contract to the trust instrument of a Delaware business trust. Maryland corporate law, although it contains many provisions specifically applicable to investment companies, is less customized for use by investment companies.
>
> Each Maryland Fund is subject to Texas franchise tax. A Delaware business trust is not subject to Texas franchise tax. Consequently, the reorganization into a Delaware business trust will eliminate the need for each Maryland Fund to pay a Texas franchise tax [which in 1995 amounted to $18,600 for one of the two funds and $7,800 for the other].

Van Kampen American Capital Funds, Notice of Joint Annual Meeting of Shareholders 14 (Sept. 11, 1996) (on file with the *Yale Law Journal*). Similar reasons were given in 1984 when the Fidelity Magellan Fund converted from a Massachusetts business corporation to a Massachusetts business trust. *See* Mary Ann Tynan, *Form of Investment Organization: Corporation vs. Massachusetts Business Trust*, *in* INVESTMENT

in addition to Delaware have legislation authorizing business trusts.[134]

From our understanding that the trust and the corporation are competitors for organizing commercial activity, it follows that we should in principle be able to specify why one or the other prevails in a particular setting. I am not yet able to do this. Sometimes the cumulative weight of the advantages of the trust form appear unbeatable, as for example in the pension trust. Sometimes, by contrast, the trust and the corporation seem the closest of substitutes, as in the case of the mutual fund, where both forms are in current use. We are reminded that in the world of nonprofit organizations, both the charitable trust and the charitable corporation have remained in constant use for decades.[135]

IV. CONCLUSION: THE COMMERCIAL TRUST IN LEGAL CULTURE

I conclude where I began, with the puzzle of legal culture. The commercial trust is vastly more important in raw economic terms than the personal trust. Yet those of us who think of ourselves as trust lawyers often have scant exposure to commercial trusts, and we have little awareness of their size and extent. Why is the magnitude of commercial trust practice not appreciated? Why do we continue to think of the trust as a branch of the law of gifts?

I could point to convenient targets—the first and second *Restatements of Trusts*, and Austin W. Scott, the *Restatement* reporter and treatise writer, who labored to exclude the subject of the commercial trust from polite discourse in the United States.[136] If Bogert rather than Scott had been in charge of the *Restatement*,[137] the *Restatement* would have noticed commercial trusts.

A better explanation for the neglect of commercial trusts in our trust tradition is the relative recency of so many of the commercial uses of the trust. To be sure, the business trust was already a prominent device for the conduct

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COMPANIES 1986, at 55 app. at 66 (PLI Corp. Law & Practice Course Handbook Series No. 515, 1986) (reprinting Fidelity Magellan Fund, Inc., Notice of Special Meeting in Lieu of the Annual Meeting of Shareholders). In 1994, Fidelity converted a group of money market funds from Massachusetts business trusts to Delaware business trusts, in part because Delaware's statutory business trust law allows fewer shareholder meetings and a smaller quorum of voting shares. *See* Karen Blumenthal, *Fidelity Sets Vote on Scope of Investments*, WALL ST. J., Dec. 8, 1994, at C1.

134. *See* Irving S. Schloss, *Some Undiscovered Country: The Business Trust and Estate Planning*, 22 TAX MGMT. ESTS. GIFTS & TRS. J. 83, 83 (1997).

135. Among the factors that bear on that choice, the charitable trust can be created more rapidly and without the risk of publicity attendant to a public filing with the secretary of state for a nonprofit corporation charter. The corporation is thought to offer superior protection to directors in the event of liability for tort, because while the liability of a trustee is in theory personal and unlimited, *see* RESTATEMENT (SECOND) OF TRUSTS § 402 (1959), the liability of a corporate director is limited to the assets of the corporation. Similarly, the standard of care for administration of the entity is nominally less onerous in the case of a corporation—the business judgment rule as opposed to the trust standard of prudent administration. *See generally* JAMES J. FISHMAN & STEPHEN SCHWARZ, NONPROFIT ORGANIZATIONS 61-65 (1995). For historical background on the two forms, see MARION R. FREMONT-SMITH, FOUNDATIONS AND GOVERNMENT 36-43 (1965).

136. *See supra* notes 5-7 and accompanying text.

137. *See supra* note 8 and accompanying text.

of enterprise in the nineteenth century,[138] until the general corporation statutes made the company form easily available. American competition law still bears the curious label of "antitrust," a legacy from the monopolists of the Gilded Age, who organized their firms as trusts. With the routinization of the corporate form, the trust fell from scholarly attention among business lawyers. Meanwhile, among trusts and estates lawyers, preoccupied as ever with family wealth transmission, the commercial trust was distant turf.

The main forms of commercial trust that I have discussed in this Essay have been twentieth-century inventions. The mutual fund industry was effectively organized in the 1920s. Indenture trusts took their modern form with the 1939 legislation. The pension trust was a trickle until after World War II. REITs appeared in the 1960s, while asset securitization was unimportant into the 1970s. The ink is hardly dry on the legislation that has called forth nuclear decommissioning trusts and designated settlement fund trusts.

I should also emphasize that commercial trust practice has grown up in the hands of specialized bars, out of contact with the trusts and estates bar. Securities lawyers have nurtured mutual funds, the real estate bar has handled REITs, pension law was a subspecialty of taxation in most law firms until well after the enactment of ERISA in 1974, and asset securitization has been centered in the hands of the banking and commercial transactions bar.

The lack of awareness of commercial trusts among American trust lawyers thus reflects both the antiquity of the trust in the practice of donative transfers and the relative recency of so many of the forms of commercial trust. The ultimate challenge of this intriguing topic is to explain when and why trust dominates corporation for particular commercial tasks. Although that is supremely a question for business law scholars, as a trust lawyer I still find it odd to be admitting that the trust in its most important dimension—as an instrument of commerce—has become the province of others.

There is no mystery, however, in understanding why the trust appears so attractive as a commercial form. Although the trust resembles the corporation in supplying for the particular venture a highly adaptable, contract-like regime of rights, of fiduciary duties, and of internal governance, the trust offers investors an insolvency regime superior to that of corporate law, packaged in a way that facilitates pass-through taxation.

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138. Early 20th-century treatises collect the case law. *See, e.g.*, WILLIAM C. DUNN, TRUSTS FOR BUSINESS PURPOSES (1922); JOHN H. SEARS, TRUST ESTATES AS BUSINESS COMPANIES (1912), SYDNEY R. WRIGHTINGTON, THE LAW OF UNINCORPORATED ASSOCIATIONS AND SIMILAR RELATIONS (1916), *see also* GUY A. THOMPSON, BUSINESS TRUSTS AS SUBSTITUTES FOR BUSINESS CORPORATIONS (1920), EDWARD H. WARREN, CORPORATE ADVANTAGES WITHOUT INCORPORATION (1929)