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Trust as Uncorporation: A Research Agenda

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# Trust as Uncorporation: A Research Agenda

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## **Abstract**

Trust has long been a competitor of corporation as a form of business organization. Though corporation today dominates trust for operating enterprises, trust dominates corporation in certain specialized niches. The market value of these niches measures in the trillions of dollars. Yet the modern business trust has only recently begun to be subjected to scholarly inquiry. Accordingly, this essay outlines a research agenda for the study of the trust - in particular, the modern statutory business trust - as a form of business organization. Put into the parlance of the conference on which this symposium issue is based, this essay is a call for research on the business trust as uncorporation.

## TRUST AS “UNCORPORATION”: A RESEARCH AGENDA

Robert H. Sitkoff\*

*Trust has long been a competitor of corporation as a form of business organization. Though corporation today dominates trust for operating enterprises, trust dominates corporation in certain specialized niches. The market value of these niches measures in the trillions of dollars. Yet the modern business trust has only recently begun to be subjected to scholarly inquiry. Accordingly, this essay outlines a research agenda for the study of the trust—in particular, the modern statutory business trust—as a form of business organization. Put into the parlance of the conference on which this symposium issue is based, this essay is a call for research on the business trust as “uncorporation.”*

### I. INTRODUCTION

The purpose of this essay is to outline a research agenda for the study of the modern business trust—in particular, the *statutory business trust*—as a form of business organization. Despite its extraordinary capital markets and transactional significance, the modern business trust is not well understood. Illustrations of this point abound. Take the brochure that advertised the conference on which this special issue is based:

For the past 200 years business law and scholarship has been dominated by a single business form—the corporation. Indeed, the study of business organizations is often called “corporate law,” and business lawyers are often referred to as “corporate lawyers.” The age of corporate dominance may, however, be coming to an end. The last decade has seen the rapid development of new types of business associations, including limited liability companies and limited liability partnerships . . . We have also seen increased flexibility in existing business forms such as the lim-

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ited partnership and business trust. These business forms may be ushering in a new age of the “uncorporation.”<sup>1</sup>

The basic claim that the emergence of new business forms, coupled to the resurrection of older forms, might portend the end of the corporation’s hegemony is certainly plausible. Regarding business trusts, however, the specific claims, though often repeated, are misleading in two important respects.

First, the characterization of the past 200 years as being dominated by corporation unfairly diminishes the historic role of the business trust. In the late 1800s and early 1900s, before the corporate form had matured, the common-law business trust (also known as the Massachusetts trust because of its prevalence there) was a strong competitor to corporation as a mode of business organization.<sup>2</sup> Thus, in a 1929 article in the *Harvard Law Review*, it was remarked that “modern business has become honey-combed with trusteeship. Next to contract, the universal tool, and incorporation, the standard instrument of organization, it takes its place wherever the relations to be established are too delicate or too novel for these coarser devices.”<sup>3</sup> Treatises on the business trust proliferated in the early 1900s.<sup>4</sup> Rockefeller’s infamous Standard Oil Company was organized as a trust, not a corporation. Trust’s salience as a form of business organization during this era explains why today we have anti-trust law, not competition or monopoly law, as it is known abroad.<sup>5</sup>

Second, today’s common-law business trust is not more flexible than the common-law business trust of yore. On the contrary, in the late 1800s and early 1900s, the flexibility of the common-law business trust was widely remarked as its chief virtue. For example, in the 1929 article mentioned in the prior paragraph, Professor Isaacs wrote that “[f]oremost among the advantages of trusteeship over the standardized legal devices is its flexibility.”<sup>6</sup>

To be sure, the proliferation of business trust statutes—in particular the 1988 Delaware Business Trust Act (which has since been recast as the Delaware Statutory Trust Act)<sup>7</sup>—has wrought significant change in the law of business trusts. But the entity that arises under those statutes might better be thought of as the “statutory business trust.” It is useful to distinguish the common-law business trust from the statutory business trust, because what I am calling the statutory business trust appears to differ, by design, on several margins from the common-law business trust. The statutory business trust is not only exceedingly flexible, but more importantly it resolves the problems of

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1. Brochure, *Uncorporation: A New Age?*, University of Illinois College of Law (on file with the University of Illinois Law Review).

2. See 16A JENNIFER L. BERGER & CAROL A. JONES, *FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 8227 (rev. ed. 2003) [hereinafter *FLETCHER*].

3. Nathan Isaacs, Note, *Trusteeship in Modern Business*, 42 *HARV. L. REV.* 1048, 1060–61 (1929).

4. See WILLIAM C. DUNN, *TRUSTS FOR BUSINESS PURPOSES* (1922); JOHN H. SEARS, *TRUST ESTATES AS BUSINESS COMPANIES* (2d ed. 1921); SYDNEY R. WRIGHTINGTON, *THE LAW OF UNINCORPORATED ASSOCIATIONS AND BUSINESS TRUSTS* (2d ed. 1923); see also GUY A. THOMPSON, *BUSINESS TRUSTS AS SUBSTITUTES FOR BUSINESS CORPORATIONS* (1920).

5. See RICHARD A. POSNER, *ANTITRUST LAW* 34–35, 38–39 (2d ed. 2001).

6. See Isaacs, *supra* note 3, at 1052.

7. DEL. CODE ANN. tit. 12, §§ 3801–3862 (2001).



limited liability and spotty judicial recognition that have cast a pall over the use of the common-law business trust.<sup>8</sup>

My point in criticizing the conference brochure is not to undermine the conference’s mission, but rather to drive home the point that domestic business law scholars have a stunning lack of familiarity with the business trust. There is very little modern scholarship on business trusts.<sup>9</sup> None of the leading casebooks on “business organizations” or “business associations” covers the business trust at all.<sup>10</sup> Though perhaps ironic, the errors in the brochure for this conference on alternative forms of business organization are symptomatic of a larger pathology.

Readers familiar with the domestic law school curriculum might assume that, because trusts and estates is a separate course from business organizations, the business trust has become the purview of trusts and estates scholars. It has not. Trusts and estates is organized as a coherent field around gratuitous wealth transfer. Trusts and estates scholars have therefore focused on the trust as an instrument of gratuitous transfer, not as a mode of business organization.<sup>11</sup> Leading trusts and estates casebooks offer little to no coverage of the commercial uses of trust law; one of the two leading trust law treatises and the 2003 Restatement (Third) of Trusts expressly exclude the business trust altogether; and in a recent article on “trends in American trust law,” Edward Halbach, the Reporter for the Third Restatement, discusses only trends in donative trust law.<sup>12</sup>

8. See, e.g., Tamar Frankel, *The Delaware Business Trust Act Failure as the New Corporate Law*, 23 CARDOZO L. REV. 325, 326, 332 (2001) (citing Herbert B. Chermiside, Jr., Annotation, *Modern Status of the Massachusetts or Business Trust*, 88 A.L.R.3d 704 (1978 & Supp. 2004)); Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434, 474 (1998).

9. The academic literature appears to be limited to the following: Frankel, *supra* note 8; John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165 (1997); Steven L. Schwarcz, *Commercial Trusts as Business Organizations: Unraveling the Mystery*, 58 BUS. LAW. 559, 568–69 (2003); see also Hansmann & Mattei, *supra* note 8, at 466–69, 472–78; Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 681 (2004) [hereinafter Sitkoff, *Agency*]; George G. Triantis, *Organizations as Internal Capital Markets: The Legal Boundaries of Firms, Collateral, and Trusts in Commercial and Charitable Enterprises*, 117 HARV. L. REV. 1102, 1143 (2004).

10. See WILLIAM T. ALLEN & REINIER KRAAKMAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION (2003); MELVIN ARON EISENBERG, CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS: CASES AND MATERIALS (8th ed. 2000); THOMAS LEE HAZEN & JERRY W. MARKHAM, CORPORATIONS AND OTHER BUSINESS ENTERPRISES: CASES AND MATERIALS (2003); WILLIAM A. KLEIN, J. MARK RAMSEYER & STEPHEN M. BAINBRIDGE, BUSINESS ASSOCIATIONS: CASES AND MATERIALS ON AGENCY, PARTNERSHIPS, AND CORPORATIONS (5th ed. 2003); CHARLES R.T. O’KELLEY & ROBERT B. THOMPSON, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS (4th ed. 2003); LARRY E. RIBSTEIN & PETER V. LETSOU, BUSINESS ASSOCIATIONS (4th ed. 2003); D. GORDON SMITH & CYNTHIA A. WILLIAMS, BUSINESS ORGANIZATIONS: CASES, PROBLEMS, AND CASE STUDIES (2004). The only book of this sort that has any coverage of the business trust is WILLIAM A. GREGORY & THOMAS R. HURST, UNINCORPORATED BUSINESS ASSOCIATIONS 786–800 (2d ed. 2002).

11. The principal exception is Langbein, *supra* note 9.

12. See RESTATEMENT (THIRD) OF TRUSTS § 1 cmt. b (2003); ROGER W. ANDERSEN & IRA MARK BLOOM, FUNDAMENTALS OF TRUSTS AND ESTATES (2d ed. 2002); ELIAS CLARK ET AL., GRATUITOUS TRANSFERS (4th ed. 1999); JOEL C. DOBRIS ET AL., ESTATES AND TRUSTS (2d ed. 2003); JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES (6th ed. 2000); EUGENE F. SCOLES ET AL., PROBLEMS AND MATERIALS ON DECEDENTS’ ESTATES AND TRUSTS (6th ed. 2000); 1 AUSTIN W. SCOTT & WILLIAM F. FRATCHER, THE LAW OF TRUSTS § 2.2 (4th ed. 1987) [hereinafter SCOTT ON TRUSTS]; VALERIE J. VOLLMAR ET



So the business trust is something of an orphan in the domestic legal academy.<sup>13</sup> Those who study business law tend not to give it much attention, perhaps assuming that it falls within the purview of the trust scholars. Likewise, those who study trust law have cast it aside as the province of the business law scholars. Of course, showing the existence of a scholarly and teaching lacuna, without more, is not terribly interesting. Such lacunas abound. The crucial question is whether the academy's inattention to the business trust is justifiable.

In an important recent article, John Langbein persuasively showed that the answer to this question is No, a conclusion seconded in a subsequent article by Steven Schwarcz.<sup>14</sup> The business trust is widely used in structured finance transactions, and more than half of all mutual funds are organized as trusts.<sup>15</sup> These activities measure in the trillions of dollars. What is more, federal law imposes a trust form on employee pension funds, which also measure in the trillions of dollars. To put those figures in perspective, in 2001 the capitalization of the entire domestic public stock market topped out at \$14.72 trillion.<sup>16</sup>

A further indication of the timeliness of academic scrutiny is the formation in 2003 of a drafting committee for a Uniform Business Trust Act by the National Conference of Commissioners on Uniform State Law.<sup>17</sup> The relevance for that project of a better understanding of the uses and nature of the business trust as configured under existing state statutes is manifest.<sup>18</sup>

Accordingly, this essay outlines a research agenda for the study of the trust—in particular, the statutory trust—as a mode of business organization. I focus on the *statutory* business trust for two reasons.<sup>19</sup> First, the business trust statutes appear to have been designed to perfect, and so to replace, the common-law business trust. Second, preliminary data that I have collected and am

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AL., AN INTRODUCTION TO TRUSTS AND ESTATES (2003); LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW (3d ed. 2002); Edward C. Halbach, Jr., *Uniform Acts, Restatements, and Trends in American Trust Law at Century's End*, 88 CAL. L. REV. 1881 (2000); see also GEORGE G. BOGERT ET AL., CASES AND MATERIALS ON THE LAW OF TRUSTS (7th ed. 2001). The Dukeminier text allots a few pages to this topic in the forthcoming seventh edition. JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES (7th ed. forthcoming 2005).

13. On the position of the business trust abroad, see *infra* Part VI.

14. Langbein, *supra* note 9, at 165–67; Schwarcz, *supra* note 9, at 559.

15. Langbein, *supra* note 9, at 171.

16. See SEC. INDUS. ASS'N, 2002 SECURITIES INDUSTRY FACT BOOK 6 (2002), available at [http://www.sia.com/research/pdf/2002Fact\\_Book.pdf](http://www.sia.com/research/pdf/2002Fact_Book.pdf) (last visited Aug. 20, 2004).

17. Press Release, National Conference of Commissioners on Uniform State Laws, New Drafting Committees to be Appointed (Jan. 24, 2003), at <http://www.nccusl.org/Update/DesktopModules/NewsDisplay.aspx?ItemID=94> (last visited Sept. 17, 2004). In January 2005, the draft act was recast as the Uniform Statutory Trust Act and the drafting committee was renamed accordingly.

18. Although the author serves as the Reporter for the Uniform Statutory Trust Act, the views expressed in this essay are those of the author alone and do not necessarily represent the views of the Uniform Law Commissioners or the drafting committee.

19. For an examination of both as modes of business organization, see generally Schwarcz, *supra* note 9.



refining for presentation in a future study indicate that the statutory business trust has begun to supplant the common-law business trust in practice.<sup>20</sup>

Put into the parlance of this conference, this essay is a call for research on the statutory business trust as unincorporation. To that end, this essay suggests five lines of inquiry for future research:

1. the rise of the statutory business trust as a form of business organization;
2. the jurisdictional competition between the states over statutory business trusts;
3. empirical investigation of the statutory business trust phenomenon;
4. examination of why trust continues to abide as a form of business organization now that we have enabling corporation law, and why corporation emerged when we already had highly flexible trust law; and
5. comparative analysis of trust as a business organization within and without the rest of the common-law world.

Each of those lines of inquiry, which overlap (especially items 1 and 4) and are not exhaustive, are commented upon in the remainder of this essay. It must be remembered, however, that this essay sets forth a call for research on, and some discussion of, those questions. It is not a proper engagement of any of them.

## II. THE STATUTORY BUSINESS TRUST

The first line of suggested inquiry is the rise of the statutory business trust as a form of business organization. Numerous research questions abound. To begin with, it would be useful simply to collect the business trust statutes and then to impose some kind of taxonomy upon them. The existing literature, such as it is, puts the count of states with general business trust legislation anywhere from seventeen to thirty-four.<sup>21</sup> Based on fresh electronic searches, I put the current count at twenty-nine.<sup>22</sup> The oldest is the Massachusetts statute,

20. This work-in-progress is tentatively titled "The Rise of the Statutory Business Trust."

21. See Langbein, *supra* note 9, at 187–88 (listing seventeen) (citing Irving S. Schloss, *Some Undiscovered Country: The Business Trust and Estate Planning*, 22 TAX MGMT'EST. GIFTS & TR. J. 83, 83 (1997)); Sheldon A. Jones et al., *The Massachusetts Business Trust and Registered Investment Companies*, 13 DEL. J. CORP. L. 421, 431–32 n.69 (1988) (listing nineteen); Takemi Ueno, Comment, *Defining a "Business Trust": Proposed Amendment of Section 101(9) of the Bankruptcy Code*, 30 HARV. J. ON LEGIS. 499 app. (1993) (listing thirty-four).

22. See ALA. CODE §§ 19-3-60 to -328 (1997); ARIZ. REV. STAT. ANN. §§ 10-1871 to -1879 (West 2004); CONN. GEN. STAT. §§ 34-500 to -547 (1997); DEL. CODE ANN. tit. 12, §§ 3801–3862 (2001); FLA. STAT. ANN. §§ 609.01–.08 (West 2001); IND. CODE §§ 23-5-1-1 to -11 (1999); KAN. STAT. ANN. §§ 17-2027 to -2038 (1995); KY. REV. STAT. ANN. §§ 386.370–.440 (Michie 1999); MD. CODE ANN., [CORPS. & ASS'NS] §§ 12-101 to -810 (2003); MASS. GEN. LAWS ANN. ch. 182, §§ 1–14 (West 1996); MINN. STAT. ANN. §§ 318.01–.06 (West 2004); MISS. CODE ANN. §§ 79-15-1 to -139 (2001); MONT. CODE ANN. §§ 35-5-101 to -204 (2003); NEV. REV. STAT. 88A.010–.930 (2004); N.H. REV. STAT. ANN. §§ 293-B:1 to -B:23 (1999); N.C. GEN. STAT. §§ 39-44 to -49 (2003); OHIO REV. CODE ANN. §§ 1746.01–.99 (Anderson 2004); OKL. STAT. ANN. tit. 60, §§ 171–181 (West 1994 & Supp. 2004); OR. REV. STAT. §§ 128.560–.600 (2003); 15 PA. CONS. STAT. ANN. §§

which dates from 1909. The youngest is the Virginia statute, which took effect in 2003. In addition, as indicated above, a uniform act is in the works.

A glance at the enactment dates of the statutes reveals that there was a flurry of business trust legislation in the early 1960s, and then again in the wake of the Delaware Business Trust Act of 1988. This suggests that there are perhaps as many as four generations of business trust legislation: the first comprises the older statutes such as the Massachusetts act; the second comprises those that were enacted in the 1960s flurry; the third comprises the legislation passed in the 1980s but before the Delaware Act; and the fourth comprises the Delaware Act and the Delaware-style statutes that have been enacted since 1988.

What was the motivation for these enactments? The leading practitioner commentary on the Delaware Act tells us that the “principal purpose of the [statute is] to recognize the statutory trust as an alternative form of business organization.”<sup>23</sup> Why was that desirable? To the extent that there is literature on the subject, it tells us that, at common law, “business trusts posed a number of potential legal uncertainties.”<sup>24</sup> Some states refused to recognize the validity of business trusts on the ground that they amounted to an impermissible evasion of local corporate law.<sup>25</sup> A further problem was the lack of statutory recognition of limited liability for investors.<sup>26</sup> Even in jurisdictions that recognized the legality of the business trust, courts sometimes held the beneficial owners liable for the debts of the enterprise.<sup>27</sup> The question thus arises, do the business trust statutes merely resolve those problems, or did the legislatures use the occasion of codification to improve and to innovate?

There is an irony, plain to those who study donative trusts, to the use of the trust as a form of business organization: the traditional prudence-based conception of the duty of care in trust law forbade entrepreneurial activity. The 1959 Second Restatement provides that the “employment of trust property in the carrying on of trade or business” is per se imprudent unless expressly authorized by the trust instrument.<sup>28</sup> Yet most of the modern business trust

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9501–9507 (West 1995 & Supp. 2004); S.C. CODE ANN. §§ 33-53-10 to -50 (Law. Co-op. 1990); S.D. CODIFIED LAWS §§ 47-14-1 to -12 (Michie 2000); TENN. CODE ANN. §§ 48-101-201 to -207 (2002); UTAH CODE ANN. §§ 16-15-101 to -110 (2001); VA. CODE ANN. §§ 13.1-1 to -200 (Michie 1999); WASH. REV. CODE §§ 23.90.010–.900 (West 1994); W. VA. CODE ANN. §§ 47-9A-1 to -5 (Michie 1999 & Supp. 2003); WIS. STAT. § 226.14 (West 2001); WYO. STAT. ANN. §§ 17-23-101 to -202 (Michie 2003). This count includes only states with a general business trust statute, thereby excluding states with specialized real estate investment trust statutes or simple definitional provisions.

23. Wendell Fenton & Eric A. Mazie, *Delaware Statutory Trusts*, in *THE DELAWARE LAW OF CORPORATIONS & BUSINESS ORGANIZATIONS* § 19.2 (9th ed. 2004 Supp.); see also C. Porter Vaughan, III et al., *Corporate and Business Law*, 37 U. RICH. L. REV. 1, 2 (2002).

24. Frankel, *supra* note 8, at 326 (citing Herbert B. Chermiside, Jr., Annotation, *Modern Status of the Massachusetts or Business Trust*, 88 A.L.R.3D 704 (1978 & Supp. 2004); see also FLETCHER, *supra* note 2, § 8233; Hansmann & Mattei, *supra* note 8, at 474.

25. See Leland S. Duxbury, *Business Trusts and Blue Sky Laws*, 8 MINN. L. REV. 465, 475–76 (1924).

26. Hansmann & Mattei, *supra* note 8, at 474–75.

27. *Id.*

28. RESTATEMENT (SECOND) OF TRUSTS § 227 cmt. f (1959). For comparison of the duty of care in trust law and corporate law, see Sitkoff, *Agency*, *supra* note 9, at 654–57; Robert H. Sitkoff, *Trust Law, Corporate Law, and Capital Market Efficiency*, 28 J. CORP. L. 565, 574–76 (2003) [hereinafter Sitkoff, *Trust Law*].





statutes provide that, in the event of statutory silence or a gap in the trust instrument, the common law of trusts applies.<sup>29</sup> True, the default rule of the Second Restatement against operating a business has been replaced with a more permissive standard.<sup>30</sup> But that is a recent development. The general point is that, by providing for trust law to fill the gaps, the modern statutes appear to incorporate the stricter fiduciary standards of trust law instead of corporate law's more relaxed approach.

This raises the broader question of mismatch between traditional trust law, which evolved in the context of donative transfers, and the exigencies of enterprise organization.<sup>31</sup> In addition to differences in fiduciary standards, under traditional trust law principles managerial action requires unanimity among the trustees;<sup>32</sup> the trustee is to act impartially with respect to different classes of beneficiaries;<sup>33</sup> and the Rule Against Perpetuities sets a limit (albeit indirect) on trust duration.<sup>34</sup> Each of those principles is contrary to the analogous rule in corporate law. Managerial action almost never requires unanimity; residual equity claimants are usually preferred over debt and other equity claimants;<sup>35</sup> and corporations have perpetual life.

The modern business trust statutes have provisions that speak to some of these issues, such as derivative suits and perpetual life.<sup>36</sup> It seems unlikely, however, that the statutes address all instances of mismatch. Indeed, trust law's more rigorous duties of loyalty and care, which evolved in the donative context,<sup>37</sup> appear to be incorporated by reference by the modern business trust

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29. See CONN. GEN. STAT. § 34-519 (1997); DEL. CODE ANN. tit 12, § 3809 (2001); MD. CODE ANN., [CORPS. & ASS'NS] § 12-102(a) (1999); NEV. REV. STAT. 88A.160(1) (1999); N.H. REV. STAT. ANN. § 293-B:10 (1999); S.D. CODIFIED LAWS § 47-14A-42 (Michie 2000 & Supp. 2003); WYO. STAT. ANN. § 17-23-113 (Michie 2003). A further puzzle: the 1960s wave of business trust legislation provides that corporate law applies in the event of statutory silence and a gap in the trust instrument. See ARIZ. REV. STAT. ANN. § 10-1879 (West 2004); IND. CODE § 23-5-1-9 (1999); KAN. STAT. ANN. § 17-2035 (1995); MISS. CODE ANN. § 79-15-29 (2001); MONT. CODE ANN. § 35-5-103 (2003); OR. REV. STAT. § 128.580 (2003); TENN. CODE ANN. § 48-101-207 (2002); WASH. REV. CODE § 23.90.040(4) (1994); W. VA. CODE § 47-9A-4(a) (1999).

30. See UNIF. PRUDENT INVESTOR ACT § 2(e) (1994); RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE § 227 cmt. f (1992).

31. See generally Schwarcz, *supra* note 9, at 575-79 (discussing general governance of trusts and corporations).

32. The unanimity rule is on the decline. See Sitkoff, *Agency*, *supra* note 9, at 656 n.176 (collecting authority). For application to business trusts, see FLETCHER, *supra* note 2, § 8251.

33. For discussion and references on the duty of impartiality and the contrary corporate law rule, see Sitkoff, *Agency*, *supra* note 9, at 650-52; see also Schwarcz, *supra* note 9, at 579.

34. Recently, however, there has been considerable erosion of the common-law rule. See Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303, 1304 (2003); see also Joel C. Dobris, *The Death of the Rule Against Perpetuities, or the RAP Has No Friends—An Essay*, 35 REAL PROP. PROB. & TR. J. 601, 631 (2000); Stewart E. Sterk, *Jurisdictional Competition to Abolish the Rule Against Perpetuities: R.I.P. for The R.A.P.*, 24 CARDOZO L. REV. 2097, 2097 (2003).

35. See ALLEN & KRAAKMAN, *supra* note 10, § 6.3.1 (discussing corporate law's favoritism of residual claimants); STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS § 7.4, (2002) (same); see also Schwarcz, *supra* note 9, at 578-80.

36. CONN. GEN. STAT. §§ 34-522, -518 (1997); DEL. CODE ANN. tit. 12, §§ 3816, 3808 (2001); NEV. REV. STAT. 88A.410, .260 (1999); N.H. REV. STAT. ANN. §§ 293-B:18, -B:9 (1999); S.D. CODIFIED LAWS §§ 47-14A-72 to -76, -14A-35 to -36 (Michie 2000 & Supp. 2003); VA. CODE ANN. §§ 13.1-1232 to -1233, -1218 (Michie 1999 & Supp. 2004); WYO. STAT. ANN. §§ 17-23-120, -112 (Michie 2003).

37. See Sitkoff, *Agency*, *supra* note 9, at 654-57 (care); Sitkoff, *Trust Law*, *supra* note 28, at 572-76 (loyalty and care).



statutes. As noted above, most of the recent statutes provide that the common law of trusts applies unless otherwise displaced by a specific statutory provision or the terms of the trust instrument.

Another important task that falls within this line of inquiry is to ascertain what the statutory business trust is used for. A leading compendium on business law states that “the motivation for organizing these trusts has largely disappeared. This topic is largely of historical interest today.”<sup>38</sup> This is demonstrably wrong; the six states that have enacted Delaware-style acts since 1988, and the Uniform Law Commissioners, are not tilting at windmills.<sup>39</sup>

One common use of the statutory business trust is in the organization of mutual funds.<sup>40</sup> Many well-known mutual funds, for example some sponsored by Vanguard and TIAA-CREF, are organized as statutory business trusts.<sup>41</sup> Another use of the statutory business trust is in structured finance transactions—in particular, asset securitization.<sup>42</sup> These industries measure in the trillions of dollars.

If structured finance and mutual funds represent its primary uses, then it would appear that the modern statutory business trust is used mainly as an entity of convenience that is adapted by its users to comport with federal tax, bankruptcy, and securities laws such as the Investment Company Act of 1940.<sup>43</sup> In more general terms, this means that the statutory business trust has been used chiefly for issuing passive equitable participation rights over asset pools or funds that are in turn subject to external regulatory limitations. This analysis is consistent with the otherwise puzzling experience that, despite there being trillions of dollars in statutory business trusts, I could find only one reported decision under the Delaware business trust statute.<sup>44</sup> To the extent that in practice substantive regulation of statutory business trusts is supplied by other law, there is no inconsistency with this lack of case law and my preliminary empirical finding, which will be presented more formally in a future paper, that Delaware is the leading jurisdiction for statutory business trusts.

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38. FLETCHER, *supra* note 2, § 8232.

39. See CONN. GEN. STAT. § 34-500 to -547 (1997); MD. CODE ANN., [CORPS. & ASS'NS] §§ 12-101 to -810 (1999); NEV. REV. STAT. 88A.010–910 (1999); N.H. REV. STAT. ANN. §§ 293-B:1 to -B:23 (1999); S.D. CODIFIED LAWS §§ 47-14A-72 to -76, -14A-35 to -36 (Michie 2000 & Supp. 2003); VA. CODE ANN. §§ 13.1-1200 to -1284 (Michie 1999 & Supp. 2004).

40. See Philip H. Newman, *Legal Considerations in Forming a Mutual Fund* (ALI-ABA Course of Study 2002).

41. See Declaration of Trust of TIAA-CREF Mutual Fund (Feb. 19, 1997); Amendment and Declaration of Trust of Vanguard Treasury Fund (Sept. 13, 1996).

42. See Langbein, *supra* note 9, at 172–73; Schwarcz, *supra* note 9, at 564–68, 573. On securitization, see COMMITTEE ON BANKR. & CORP. REORGANIZATION, ASS'N OF THE BAR OF THE CITY OF NEW YORK, *New Developments in Structured Finance*, 56 BUS. LAW. 95 (2000); Claire A. Hill, *Securitization: A Low-Cost Sweetener for Lemons*, 74 WASH. U. L.Q. 1061 (1996); Steven L. Schwarcz, *The Alchemy of Asset Securitization*, 1 STAN. J. L. BUS. & FIN. 133 (1994); see also Edward M. Iacobucci & Ralph A. Winter, *Asset Securitization and Asymmetric Information*, 34 J. LEGAL STUD. 161 (2005).

43. 15 U.S.C. §§ 80a-1 to -64 (2000 & Supp. I 2001).

44. *Nakahara v. NS 1991 Am. Trust*, 739 A.2d 770 (Del. Ch. 1998); see also *Simon v. Navellier Series Fund*, No. 17734, 2000 WL 1597890 (Del. Ch. Oct. 19, 2000).



The suggestion that the statutory business trust is used mainly as a malleable entity of convenience may also explain why more has not been made of its extreme freedom of contract. The Delaware-style acts state that their underlying policy is to “give maximum effect to the principle of freedom of contract and to the enforceability of governing instruments.”<sup>45</sup> Taken literally, several appear to authorize indemnification of the trustees for even willful breach of duty.<sup>46</sup> To put this in context, under Delaware corporate law, indemnification of corporate managers typically requires that they have acted in good faith.<sup>47</sup> Likewise, although the common law of trusts permits indemnification and exculpation clauses, a total exoneration from all fiduciary obligations—that is, authorization of a bad faith trusteeship—is forbidden.<sup>48</sup>

Close examination of the various state statutory regimes, the uses to which the statutory business trust has been put, and a sampling of exemplary declarations of trust will no doubt help resolve some of the many open issues regarding the nature and function of the statutory business trust. Also helpful in getting at those issues will be an examination of the political economy of the business trust statutes. This point segues nicely into the next line of inquiry—regulatory competition.

### III. REGULATORY COMPETITION

The second line of suggested inquiry is the regulatory competition between the states over statutory business trusts. Regulatory competition, sometimes called jurisdictional competition, refers to the phenomenon in which lawmakers try to attract business to their jurisdiction by providing a regulatory environment that is favorable to the business being wooed.<sup>49</sup> The idea, which is thought to have been identified first by Charles Tiebout, is that firms can “vote with their feet,” moving from one jurisdiction to another based on changes in the local regulatory climate.<sup>50</sup> Thanks to American federalism, this phenomenon can manifest domestically between the states to the extent a field is not entirely preempted by federal law. Though regulatory competition has

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45. CONN. GEN. STAT. § 34-546 (1997); DEL. CODE ANN. tit. 12, § 3823(b) (2001); NEV. REV. STAT. 88A.160 (1999); N.H. REV. STAT. ANN. § 293-B:1 (1999); S.D. CODIFIED LAWS § 47-14A-95 (Michie 2003); VA. CODE ANN. § 13.1-1282(B) (Michie 2004); WYO. STAT. ANN. § 17-23-302(b) (Michie 2003); *see also* 15 PA. CONS. STAT. ANN. § 9502(e) (West 1995 & Supp. 2004).

46. *See, e.g.*, CONN. GEN. STAT. § 34-524 (1997); DEL. CODE ANN. tit. 12, §§ 3806, 3817 (2001); NEV. REV. STAT. 88A.400 (1999); S.D. CODIFIED LAWS §§ 47-14A-77 to -78 (Michie 2003); VA. CODE ANN. § 13.1-697 (Michie 1999); WYO. STAT. ANN. § 17-23-121 (Michie 2003). In the only reported case under the Delaware act, the court denied the trustees' claim for indemnification on the ground of unclean hands. *Nakahara*, 739 A.2d at 772.

47. *See* DEL. CODE ANN. tit. 8, § 145 (2001); *Waltuch v. Conticommodity Servs.*, 88 F.3d 87, 89 (2d Cir. 1996); *Mayer v. Executive Telecard, Ltd.*, 705 A.2d 220, 225 (Del. Ch. 1997); *BAINBRIDGE*, *supra* note 36, § 6.6.

48. *See* *McNeil v. McNeil*, 798 A.2d 503, 509 (Del. 2002); UNIF. TRUST CODE § 1008, 7C U.L.A. 258 (Supp. 2004); RESTATEMENT (SECOND) OF TRUSTS § 222 (1959); *Sitkoff, Agency*, *supra* note 9, at 642–46.

49. For an introductory discussion, see Konstantine Gatsios & Peter Holmes, *Regulatory Competition*, in 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 271, 271–75 (Peter Newman ed., 1998).

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



been studied perhaps most famously in corporate law,<sup>51</sup> it also manifests itself in numerous other fields such as securities, bankruptcy, environmental, tax, secured transactions, welfare, and antitrust law, to name just a few.<sup>52</sup> Application of regulatory competition theory to statutory business trusts raises both positive and normative questions.

In the wake of Delaware's enactment of a business trust statute in 1988, several other states enacted statutes modeled on the Delaware Act. The positive task is to ascertain why. Aside from insignificant filing fees, statutory business trusts do not pay regular franchise fees. Hence discerning the driving force behind regulatory competition over statutory business trusts will require greater subtlety than the standard franchise-fee account of corporate regulatory competition.<sup>53</sup> The interesting positive inquiry, in other words, will be to ascertain the political economy of the modern statutes. One might predict that it will prove to be lawyer-driven.<sup>54</sup> News accounts suggest that lawyers lobby for business trust legislation on the ground that such legislation is necessary for the state to remain competitive.<sup>55</sup> In a similar vein, it will be interesting to study what role, if any, the uniform act will play.<sup>56</sup>

Two further wrinkles regarding the use of business trusts for organizing mutual funds are worth mentioning. First, in this context, the business trust

51. The classics are Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977), and William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663 (1974).

52. See Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 682–84 (2002) (collecting examples). The phenomenon has been shown to exist with respect to donative trusts—to the tune of \$100 billion. See Robert H. Sitkoff & Max Schanzenbach, *Jurisdictional Competition in Trust Law: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. (forthcoming 2005), available at <http://ssrn.com/abstract=666481>.

53. See, e.g., ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* 6–12, 15–16 (1993). For criticism of the traditional account, see Kahan & Kamar, *supra* note 52, at 687–94; Robert H. Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. CHI. L. REV. 1103, 1143 (2002) [hereinafter Sitkoff, *Corporate Political Speech*]; Sitkoff & Schanzenbach, *supra* note 52.

54. See generally Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469 (1987) (arguing that Delaware lawyers, as a dominant interest group in that state, will continue to shape and benefit from Delaware corporate law); see also Larry E. Ribstein, *Lawyers as Lawmakers: A Theory of Lawyer Licensing*, 69 MO. L. REV. 299, 327–33 (2004).

55. See Dominic Bencivenga, *Push to Modernize: Lawyers See Need for Competitive Business Laws*, 219 N.Y. L.J. 5 (1998) (“Delaware, Maryland and other states already have a business trust statute and attorneys say New York needs one to be competitive.”); Paul Frisman, *In the Nick of Time*, CONN. L. TRIB., May 13, 1996, at 1 (stating that “certain financing transactions, although possible . . . under common law, have often gone out of state, or relied on the services of out-of-state parties”).

56. There is a significant literature on the economics of uniform lawmaking. See, e.g., John Linarelli, *The Economics of Uniform Laws and Uniform Lawmaking*, 48 WAYNE L. REV. 1387 (2003); Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83 (1993); Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131 (1996); Larry E. Ribstein & Bruce H. Kobayashi, *Uniform Law, Model Laws and Limited Liability Companies*, 66 U. COLO. L. REV. 947 (1995); Edward Rubin, *Efficiency, Equity and the Proposed Revision of Articles 3 and 4*, 42 ALA. L. REV. 551 (1991); Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995); Robert E. Scott, *The Uniformity Norm in Commercial Law: A Comparative Analysis of Common Law and Code Methodologies*, in *THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW* 149–92 (Jody S. Kraus & Steven D. Walt eds., 2000).



appears also to compete with the Maryland corporation.<sup>57</sup> So this is an example of both interstate and interentity competition, one that might be amenable to formal empirical analysis.<sup>58</sup> Second, mutual funds are subject to extensive federal regulation under the Investment Company Act of 1940 and other securities laws.<sup>59</sup> This raises the question of what exactly is left for the states to compete over.<sup>60</sup> That is an important positive question with implications for the normative analysis. Consider again the broad indemnification provisions discussed earlier. To the extent that those provisions are preempted by federal law (and with respect to mutual funds, they probably are), they cannot serve as examples of a race to the top or a race to the bottom.

Turning to the normative analysis, the first step will be to ascertain the descriptive accuracy of my suggestion that the statutory business trust is used primarily as a vehicle for compliance with external regulatory regimes. If that is correct, then classical race to the top and race to the bottom considerations seem inapplicable, as the states are not providing substantive rules of governance. At its most extreme, this view would imply that the states are not really supplying competing forms of regulation.

On the other hand, if the substantive state law of statutory business trusts does matter (perhaps the federal regulatory overlay is not entirely preclusive), then at least two consequences follow. First, the substantive choices of the Uniform Law Commissioners in the design of the uniform act will be of considerable import, not only substantively if it is widely adopted, but also to the initial question of whether the uniform act will be adopted in the first place. If the substance matters, then the relevant interest group(s) that drive(s) the regulatory competition will have a keen interest in the content of the act.

Second, if the substance matters, then the difficult inquiry for the normative analysis will be to ascertain the motives of the relevant lawmakers. Put differently, what are the incentives of those who drive the legislative process concerning business trust statutes? If the process is driven by those who use the statutory business trust in order to sell interests in public or private capital markets—for example, in an asset securitization transaction—a race to the bottom does not necessarily follow. Those actors have a powerful incentive to lobby for statutory terms, and to offer provisions in their trust instruments, that investors find favorable. Provided that investors are aware of problematic pro-

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57. See Newman, *supra* note 39; Theo Francis, *Shareholders, Fund Firms Debate Maryland Law*, WALL ST. J., Apr. 20, 2001, at C1.

58. See *infra* Part IV.

59. See Mark J. Roe, *Political Elements in the Creation of a Mutual Fund Industry*, 139 U. PA. L. REV. 1469 (1991); Paul G. Mahoney, *Manager-Investor Conflicts in Mutual Funds*, 18 J. ECON. PERSP. 161 (2004); see also Victoria E. Schonfeld & Thomas M. J. Kerwin, *Organization of a Mutual Fund*, 49 BUS. LAW. 107, 109 (1993).

60. On the relevance of federal regulation, or the threat of federal regulation, to regulatory competition, see Mark Roe, *Delaware's Competition*, 117 HARV. L. REV. 588 (2003). In an earlier article I suggested that the threat of increased federal incursions into corporate law curtailed Delaware's lawmaking discretion. Sitkoff, *Corporate Political Speech*, *supra* note 53, at 1146.

visions (always the crucial qualification), they will discount accordingly the price that they are willing to pay for interests affected by those provisions.<sup>61</sup>

#### IV. EMPIRICAL INQUIRY

The third line of suggested inquiry is empirical, and once again research questions abound. Statutory business trusts are required to register with the state in which they are formed. Hence it should be possible to obtain from the various state registry offices the number of statutory business trusts in each state. This data, which as noted earlier I have begun to collect and am refining for presentation in future work, should be helpful for at least two purposes.

First, this data should provide an initial measure, albeit somewhat raw, of the relative positions of the states in the regulatory competition over statutory business trusts. On this question my preliminary data indicate that Delaware dominates the field by an order of magnitude. In a similar vein, this data should also provide an indication of the market's assessment of the relative worth of the different generations of business trusts. Again, my preliminary data indicate that the Delaware-style statutory trusts are on the ascendancy (Connecticut, in particular, appears to be experiencing significant growth). This comports with the observation that lawyers in states without a Delaware-style business trust statute are lobbying for one. Potential further refinements include weighting the number of trusts by their aggregate size and disaggregating the data to specify how many were used for mutual funds, structured finance, or other purposes, though this more refined data may not be available. In any event, this sort of empirical analysis might provide additional insights into whether there is anything inherent to mutual funds and structured finance that causes one entity to be a good fit for both.<sup>62</sup>

Second, this data should facilitate basic comparative study of the statutory business trust and other forms of business association. My preliminary data indicate that, in the aggregate, the total number of corporations vastly exceed the total number of statutory business trusts. This is consistent with the idea that the latter are used primarily as specialized entities for asset pooling, not for operating enterprises more generally.

Another useful set of data would be the aggregate volume, in dollars, of business conducted by statutory business trusts. Even if the total number of statutory business trusts may be small in comparison to the number of corporations, it does not necessarily follow that the number of dollars in statutory business trusts are few. On the contrary, John Langbein has identified trillions of dollars of commercial trust business,<sup>63</sup> a fair share of which makes use of

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61. The seminal discussion of managerial incentives at the moment the firm goes public is Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 313 (1976).

62. See generally Schwarcz, *supra* note 9, at 583–84 (discussing when business planners should use trusts).

63. See Langbein, *supra* note 9, at 178.



the statutory business trust. Asset securitization and mutual funds are big business.

Another potentially fruitful empirical study would be a survey of a representative sample of statutory business trust declarations of trust.<sup>64</sup> A potential problem here is that obtaining exemplary instruments for private statutory business trusts may be difficult. It appears, however, that in its most important uses—mutual funds and structured finance—statutory business trusts often issue publicly-traded shares. As a result, under various federal securities laws, the declarations of trust for those entities are publicly disclosed.

Moving beyond these initial approaches, more formal empirical study may be feasible. Recall that the statutory business trust competes with the Maryland corporation as the preferred form of organization for mutual funds. Perhaps the selection of one form or the other impacts fund value. Especially if there are events such as the reorganization of a fund from one to the other, it may be possible to test formally the impact, if any, that choice of entity has on fund value.

#### V. TRUST VS. CORPORATION

The fourth line of suggested inquiry is an examination of trust versus corporation. Why does trust continue to abide as a form of business organization even after we developed enabling corporation law? Why did enabling corporate codes emerge when we already had highly flexible trust law? Why does corporation trounce trust for the organization of operating enterprises? Why is trust preferred in certain niches such as mutual funds and structured finance? Thus far, we have only preliminary answers to these questions. Yet Henry Hansmann, Reinier Kraakman, and Richard Squire are probably correct in remarking elsewhere in this issue that “[i]n theory, any entity that can be formed as a business corporation, an LLC, an LLP, or an LLLP could be formed instead as a statutory business trust.”<sup>65</sup> If so, we are left with the puzzle of why the business corporation, LLC, LLP, and LLLP continue to dominate the statutory business trust for the organization of operating enterprises.

Others have flagged this question:

- “There are not even clear answers to the fundamental question of whether trusts are a better form of business organization than corporations or partnerships.”—Steven Schwarcz (2003).<sup>66</sup>
- “Given the existence of the trust, why does one need the corporate form?”—Henry Hansmann and Ugo Mattei (1998).<sup>67</sup>

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64. See generally Sitkoff, *Trust Law*, *supra* note 28, at 587–88.

65. Henry Hansmann et al., *The New Entities in Historical Perspective*, 2005 U. ILL. L. REV. \_\_\_\_, \_\_\_\_. A related question is how to fit the rise of the statutory business trust within recent calls for entity rationalization. See, e.g., Symposium, *Entity Rationalization: What Can or Should be Done About the Proliferation of Business Organizations* (pts. 1 & 2), 58 BUS. LAW. 1003, 1385 (2003).

66. Schwarcz, *supra* note 9, at 560 (footnotes omitted).

67. Hansmann & Mattei, *supra* note 8, at 473.

- “The ultimate challenge of this intriguing topic is to explain when and why trust dominates corporation for particular commercial tasks.”—John Langbein (1997).<sup>68</sup>

Schwarcz, Hansmann and Mattei, and Langbein each make contributions toward understanding the nature of the competition between trust and corporation as alternative modes of business organization.<sup>69</sup> But more work remains to be done, including the development of a persuasive positive account of the evolutionary competition between trust and corporation and then a normative account of whether the current equilibrium is efficient.

The standard account of the history of trust versus corporation is that trust was used in the late 1800s and early 1900s primarily as a means to escape arbitrary regulatory limits in state corporate codes. This use of the trust was especially pronounced in Massachusetts, which forbade corporate ownership of real estate. The term “Massachusetts trust” thus emerged as a synonym for business trust.<sup>70</sup> Over time, however, corporate law became increasingly enabling and permissive. As corporate law’s regulatory limits fell away, so did the principal rationale for using trust rather than corporation.

The defect in this account is that it assumes the superiority of the corporate form. Trust was used only because of imperfections with corporation, and once those imperfections were resolved, corporation prevailed. Because this account assumes the inevitability of corporate hegemony, it tells us nothing about why corporation prevails for operating enterprises but not in the various niches, such as mutual funds and structured finance, where trust prevails. Why did mutual funds, which began in the 1920s; indenture trusts, which took modern form in 1939; the pension trust, which took off after World War II; real estate investment trusts, which took off in the 1960s; and asset securitization, which took off in the 1970s, embrace trust instead of corporation?<sup>71</sup>

Perhaps a more fruitful approach would be to develop an evolutionary theory of trust and corporation as competing business entities.<sup>72</sup> Capital markets drive the selection process. To the extent that managers must appeal to capital markets for financing, they will have an incentive to choose the form of organization that maximizes investor return.<sup>73</sup> Mutation takes the form of change in the relevant law—state corporate law, state trust law, federal tax law, or federal bankruptcy law. If a mutation better equips one form to poach turf, or to protect its turf, from the other, then by causing the mutation lawmakers (legislative or judicial) upset the prior equilibrium. The new equilibrium that emerges reflects the revised balance of relative costs and benefits to the use of one or the other in the relevant business environment. Viewed in this manner,

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68. Langbein, *supra* note 9, at 189.

69. See Hansmann & Mattei, *supra* note 8, at 472–78; Langbein, *supra* note 9, at 179–85; Schwarcz, *supra* note 9, at 573–85.

70. See Wheeler A. Rosenbalm, *The Massachusetts Trust*, 31 TENN. L. REV. 471, 471 (1964).

71. This listing comes from Langbein, *supra* note 9, at 189.

72. Langbein’s arresting characterization of the trust as being “locked in a struggle for turf” with corporation fits nicely into the evolutionary paradigm. *Id.* at 186–87.

73. See Jensen & Meckling, *supra* note 61.





the relative positions of trust and corporation reflect the tightness of fit, subject to switching costs, of their innate characteristics—their default rules under state law as well as their treatment by federal tax and bankruptcy law—and the uses to which they have been put.<sup>74</sup>

A better positive understanding of the competition between trust and corporation will lead to a better normative analysis of whether the current equilibrium is inefficient in any meaningful sense. In discussion at conferences and elsewhere, others have suggested that the story is one of path dependence. Even if the current equilibrium is in large part an artifact of history, however, it does not necessarily follow that the current equilibrium is inefficient. Path dependence does not always indicate an efficiency loss: nicknames and the side on which one parts one’s hair are nice examples.<sup>75</sup> Still, it is possible that the Delaware-style statutory business trust offers advantages that in practice are being eschewed as a result of the related phenomena of network externalities and status quo bias.<sup>76</sup> This idea is worth further consideration. Regardless of whether trust and corporation join the (probably apocryphal) tales of the competition between QWERTY and Dvorak keyboards, and Betamax and VHS recorders,<sup>77</sup> a possible further contribution of this approach is that it might speak to the importance of default rules and the transaction costs of opting out of (possibly suboptimal) defaults.

Another factor worth examining is agency costs in the legal market; it may well be that the identity of one’s lawyer drives the decision of whether to make use of a corporation or a Delaware statutory (or a Massachusetts common-law) trust. As John Coates, Robert Daines, and Guhan Subramanian have each shown in other corporate contexts, choice of lawyer can have a significant impact on transactional structure.<sup>78</sup> An analogy to health care is instructive. Whether you take antibiotic *A* or *B* to fight an infection is almost always determined by your physician’s preference for *A* or *B*.

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74. This suggestion is not incompatible with the traditional account. See Hansmann & Mattei, *supra* note 8, at 472–78; Langbein, *supra* note 9, at 179–85; Schwarcz, *supra* note 9, at 573–81.

75. See Lucian Arye Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127, 131–32 (1999); S.J. Liebowitz & Stephen E. Margolis, *Path Dependence, Lock-In, and History*, 11 J.L. ECON. & ORG. 205, 206–08 (1995).

76. See, e.g., Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479 (1998); Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or “The Economics of Boilerplate”)*, 83 VA. L. REV. 713 (1997); Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608 (1998).

77. See Liebowitz & Margolis, *supra* note 75. Compare Paul A. David, *Clio and the Economics of Qwerty*, 75 AM. ECON. REV. 332 (1985) (finding path dependency in the keyboard market), with S.J. Liebowitz & Stephen Margolis, *The Fable of the Keys*, 33 J.L. & ECON. 1 (1990) (rejecting path dependency in the keyboard market).

78. See John C. Coates IV, *Explaining Variation in Takeover Defenses: Blame the Lawyers*, 89 CAL. L. REV. 1301 (2001); Robert Daines, *The Incorporation Choices of IPO Firms*, 77 N.Y.U. L. REV. 1559, 1580–82 (2002); Guhan Subramanian, *Post-Siliconix Freeze-Outs: Theory, Evidence & Policy* (Harvard Law & Econ. Discussion Paper No. 472, 2004), available at <http://ssrn.com/abstract=530284> (last visited Aug. 24, 2004).



## VI. COMPARATIVE ANALYSIS

Despite differences in the doctrinal details,<sup>79</sup> there is a growing global consensus on the nature and purpose of corporate organization, including the primacy of long-term shareholder value.<sup>80</sup> This consensus raises the interesting question of how the domestic competition between trust and corporation fits, if at all, within a global context.<sup>81</sup> Here there are at least two potential avenues that warrant further research.

First, what of the competition between trust and corporation elsewhere in the common-law world? The business trust has had more prominence in the English and commonwealth literature than it has had domestically, but it is unclear whether this greater prominence reflects its greater use in those systems.<sup>82</sup> Indeed, as an historical matter, Ron Harris contends that, in England, the “trust was by no means an omnipotent device in the context of the unincorporated company . . . . It thus did not turn this form of organization into the first choice of the business community.”<sup>83</sup> Further study of the experience in England and the commonwealth is warranted.

Second, although it is often said that the trust is uniquely Anglo-American,<sup>84</sup> in view of its manifest usefulness in commercial transactions and gratuitous transfers, one should approach this claim of uniqueness with some skepticism. If the trust is so useful, would not other legal systems have developed something similar? The answer is that they have. A trust device—the *fideicommissum*—existed in Roman law. The English judges who developed the common-law trust were strongly influenced by the German *treuhand*. In Hindu law, one finds a trust-like device called *benami*. In Islamic law one finds the *waqf*.<sup>85</sup> Today there is a Japanese trust law,<sup>86</sup> and trust or trust-like

79. See Bebchuk & Roe, *supra* note 75.

80. See Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001).

81. See Steven L. Schwarcz, *Commercial Trusts as Business Organizations: An Invitation to Comparatists*, 13 DUKE J. COMP. & INT. L. 321 (2003).

82. See, e.g., Michael Bryan, *Reflections on Some Commercial Applications of the Trust in Key Developments*, in CORPORATE LAW AND TRUSTS LAW 225–306 (Ian Ramsay ed., 2002); Robert Flannigan, *Business Applications of the Express Trust*, 36 ALTA. L. REV. 630 (1998); David Hayton, *The Uses of Trusts in the Commercial Context*, in MODERN INTERNATIONAL DEVELOPMENTS IN TRUST LAW 145 (David Hayton ed., 1999); Sarah Worthington, *The Commercial Utility of the Trust Vehicle*, in EXTENDING THE BOUNDARIES OF TRUSTS AND SIMILAR RING-FENCED FUNDS 135–62 (David Hayton ed., 2002).

83. RON HARRIS, INDUSTRIALIZING ENGLISH LAW: ENTREPRENEURSHIP AND BUSINESS ORGANIZATION, 1720–1844, at 159 (2000); see PAUL L. DAVIES, GOWER’S PRINCIPLES OF MODERN COMPANY LAW 18–53 (6th ed. 1997).

84. Maitland’s is perhaps the most famous, and most hyperbolic, statement: “If I were asked what is the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence I cannot think that we should have any better answer to give than this, namely, the development from century to century of the trust idea.” FREDERIC MAITLAND, SELECTED ESSAYS 129 (1936).

85. A useful summary, plus references to apposite scholarly discussion, may be found in 1 AUSTIN W. SCOTT & WILLIAM F. FRATCHER, TRUSTS § 1.9 (4th ed. 1987); see also RICHARD HELMHOLZ & RICHARD ZIMMERMAN, *ITINERA FIDUCIAE: TRUST AND TREUHAND IN HISTORICAL PERSPECTIVE* (1998); DAVID JOHNSTON, THE ROMAN LAW OF TRUSTS 156–57 (1988); GILBERT PAUL VERBIT, THE ORIGINS OF THE TRUST (2002).

86. See Hideki Kanda, *Politics, Formalism, and the Elusive Goal of Investor Protection: Regulation of Structured Investment Funds in Japan*, 12 U. PA. J. INT’L BUS. L. 569 (1991).



devices may be found in a host of other countries—including those that follow the civil-law tradition.<sup>87</sup> In a similar vein, the 1985 Hague Convention on the Law Applicable to Trusts and on their Recognition was established to provide guidance on the recognition of, and choice of law for, trusts in jurisdictions that lack a native trust law.<sup>88</sup> The question thus arises, is the use of the trust or trust-like devices outside of the common-law world primarily donative, commercial, or both? If there is heavy commercial use, how do these devices interact with the company law of those jurisdictions? Particularly interesting would be a comparison of the entities used abroad in structured finance and mutual funds.<sup>89</sup>

## VII. CONCLUSION

The aspiration of this special issue, and the symposium on which it is based, is to redirect scholarly attention to alternative forms of business organizations—uncorporations. This effort is laudable. The recent proliferation of new business entities, and the resurrection of older entities such as the business trust, is a fascinating development.

Owing in large part to the Delaware Statutory Trust Act, the common-law business trust has been born again as the statutory business trust. Since 1988, six states have enacted Delaware-style business trust legislation. More are on the way. These acts have solidified the position of the statutory business trust as a viable form of business organization, one that is of considerable import in the mutual fund and structured finance industries. As such, the statutory business trust has considerable significance for capital markets and commercial transactions.

Despite its extraordinary practical significance, however, the statutory business trust has not received much scholarly scrutiny. Nor is it regularly included in the standard teaching materials on business organizations or trust law. This is regrettable, but remediable. Accordingly, this essay outlined a research agenda for the study of the trust—in particular, the statutory business trust—as a form of “uncorporation.”

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87. See MAURIZIO LUPOI, TRUSTS: A COMPARATIVE STUDY (Simon Dix trans., 2000); Maurizio Lupoi, *The Civil Law Trust*, 32 VAND. J. TRANSNAT'L L. 967, 970–73 (1999).

88. See JONATHAN HARRIS, THE HAGUE TRUSTS CONVENTION: SCOPE, APPLICATION AND PRELIMINARY ISSUES (2002); Emmanuel Gaillard & Donald T. Trautman, *Trusts in Non-Trust Countries: Conflict of Laws and the Hague Convention on Trusts*, 35 AM. J. COMP. L. 307, 312–13 (1987). But see Jeffrey A. Schoenblum, *The Hague Convention on Trusts: Much Ado About Very Little*, 3 J. INT'L TR. & CORP. PLAN. 5, 6 (1994) (analyzing the various ways in which the Trust Convention “fails truly to clarify the status of the trust and the law governing resolution of trust issues in civil law forums”).

89. For a comparative analysis of mutual fund structure, see Wallace Wen Yeu Wang, *Corporate Versus Contractual Mutual Funds: An Evolution of Structure and Governance*, 69 WASH. L. REV. 927 (1994).