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Why Civil Law Countries Might Forego the Individual Trustee: Provocative Insights from the New-to-the-Fold

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Why Civil Law Countries Might Forego the Individual Trustee: Provocative Insights from the New-to-the-Fold, in THE WORLDS OF THE TRUST (ed. L. Smith), Cambridge University Press, 2012 (forthcoming)

At the center of this article lies a decision in several civil law countries that have adopted the common law trust to restrict the office of trustee to banks and similar financial service institutions. Having had an opportunity to consider the trust anew, these countries represent a challenge to the common law where the individual – indeed the untutored individual – can still qualify as trustee (and serve in this capacity alone). This permissive common law regime obtains notwithstanding the size of the trust endowment or the number of beneficiaries whose interests might be at stake. Indeed, in some common law countries individuals can qualify as trustee not only of a personal trust (for transmission of family wealth), but also of a pension trust holding assets under a retirement plan sponsored by a large employer, or even of an indenture for holders of significant corporate debt. While it may be a rare individual who would be nominated to serve in these latter situations, nothing in the law directly precludes an individual from qualifying as sole trustee of even these trusts.

That an untutored individual can still qualify as trustee in common law jurisdictions is especially interesting considering the movement over the last thirty years, spearheaded by the American academic bar,¹ to bring about a doctrinal reformation in the law of trusts and otherwise propel the trust into the modern era. One of the larger themes in this multi-faceted movement has been to recognize the trust in its essential identity as an investment vehicle, whether it is used as an instrument of commerce or for family wealth transmission. Part and parcel of this effort to usher the trust into the modern era has been the professionalization of the office of trustee. Nevertheless, scant attention has been paid in this literature to whom or what type of entity should be able to qualify as trustee. Rather, the effort to professionalize the office has largely centered on the duties incumbent upon the fiduciary (and, further, the status of these requirements as mandatory or default rules). And there is no doubt that evolving standards for the investing of trust assets coupled with widening discretion in choosing appropriate vehicles is to the uninitiated a powerful caveat. But the question raised for common law jurisdictions remains: If the goal is to professionalize the office of trustee, why continue to allow the untutored individual to qualify and, moreover, serve alone?

The decision by these civil law countries to preclude the individual from serving is provocative in deeper ways as well – ways that implicate fundamental aspects of this effort at doctrinal reformation by common law academics. While little attention has been paid in this literature to the prerequisites of the fiduciary office, the movement to see the trust into the

¹ If lead by the American academy, it was embraced in other jurisdictions. Regarding the change in the fiduciary standard of care from Prudent Man to Prudent Investor, for the history of the American doctrine, see, e.g., Stewart Sterk, *Rethinking Trust Law Reform: How Prudent is Modern Prudent Investor Doctrine?*, 95 CORNELL L. REV. 851 (2009). For the similar Canadian doctrine, see DONOVAN W.M. WATERS ET AL., *WATERS' LAW OF TRUSTS IN CANADA* 950-53 (3d ed. 2005).

modern era has hardly been neutral with respect to whom or what entity might be selected as trustee. In fact, at some level, this movement has lent new vitality to the individual trustee. Beyond the effort to secure the identity of the trust as an investment vehicle, this literature has set about to recover for the trust its historic role as a vehicle of innovation under the common law, in any era a device that can circumvent – even subvert – onerous and possibly dysfunctional aspects of the property regime.² To secure the trust in this historic dimension, this literature has sought to recast the weight of much legal authority away from the prevailing view, first, that the trust was an institution founded in property (so that the constitutive act was the transfer of assets from the property-holder to the trustee) and, second and as a corollary to the first, that the essential rules incumbent upon the trustee were mandatory rules.³ This literature has offered instead a view of the trust as a creature of contract such that the constitutive act is an agreement between the settlor and the trustee and, again with a corollary as to the status of the rules, that virtually all the fundamental precepts of fiduciary duty are default rules, to be embraced or not as per the settlor's agreement with the trustee. In this way, the trust is to be reinvigorated as a flexible and innovative device for the transfer and administration of property as the settlor exercises wide discretion in crafting trust terms.

But this new rubric harbors an implication with respect to the choice of a trustee: if the settlor is to exercise his freedom of contract to create a trust consistent with his preferences (potentially opening new avenues with respect to the stewardship of property), he must have a counter-party for whom his terms are congenial. In short, if the settlor is to craft the trust as he sees fit, he needs broad discretion in selecting a trustee. But further, as it works out, the magnitude of this discretion – and the potential for innovation -- is likely to be larger if the settlor contracts with an individual trustee. As between an individual and a bank or other financial services institution, the settlor's latitude in negotiating trust terms is almost certainly greater with an individual trustee as a counter-party. Because financial services institutions are enmeshed in a regulatory framework that operates with an eye to the overall health of the institution as well as the larger banking sector, such institutions tend to be risk-averse, looking over their shoulders for that court that would adhere to some precept drawn from the regime of mandatory rules, however the trust terms might invoke a different rubric. For this reason, banks and other financial services institutions often decline to serve as trustee where an agreement contains innovative terms, insisting instead on trust terms that, absent doctrinal reformation, align with rules long believed mandatory. From the settlor's perspective, where the terms of the trust are particularly innovative, the individual trustee winds up being not merely a choice, but a preferable one.

Securing this core capacity for innovation by reliance upon the individual trustee comes at a price, however. And it is this cost that is brought to the fore by statutes in these civil law countries that eliminate the individual trustee. Allowing the settlor to name an individual as trustee jeopardizes trust property by potentially subjecting it to the unprepared or unscrupulous. And while the risk attendant upon the settlor's discretion might be mitigated where the beneficiary can recover against the trustee upon breach of fiduciary duty, the potential for recovery is mitigated by the possibility (especially in the case of the individual trustee) that an

² See *infra* Part III.

³ See *infra* Part III.

errant trustee does not have the resources to make the trust whole. If banks and other financial institutions are embedded in a regulatory apparatus, that apparatus is calculated to ensure capital resources against which an aggrieved beneficiary can recover.

But those civil law countries that allow only a bank or similar financial service institution to qualify also pay a price. If there is a trade-off between capacity for innovation and security of trust assets, what adopting jurisdictions gain in predictability and institutionalized accountability by restricting the fiduciary office to regulated entities must be set off against lost flexibility in a vehicle for the management of wealth for which flexibility is a primary appeal. While there is an increased likelihood of recovery against the errant trustee where the trustee is a regulated entity, such a regime effectively becomes a creature of mandatory rules and the trusts that emerge from it will almost inevitably be formulaic. Any innovation with respect to the trust itself must then emanate from the state regulatory authority, as the initiative of private individuals is rendered nugatory. But further, when the donor's options in drafting trust terms are limited, the trust loses that historic potential, where aspects of the property regime have grown untimely, to draw upon individual initiative to challenge and indeed circumvent dysfunctional elements.

This article has three parts. Part I centers on the common law requirements for undertaking the office of trustee and focuses on the fundamental rules and doctrines that are constitutive of the fiduciary office. This inquiry lays the groundwork to appreciate the hold that the individual trustee continues to exert over the common law imagination. Part II turns to laws recently adopted in certain civil law jurisdictions that preclude the individual from qualifying and instead require a bank or other regulated entity serve in the office. This resistance to the individual trustee is considered against the background of an historical distaste for the trust in the civil law. Part III returns to the common law and surveys aspects of the American literature of doctrinal reformation where the permissive posture of the common law with respect to the individual trustee stands unchallenged. This literature of reform indicates that there are deep normative biases in the common law that underpin the continued vitality of the individual trustee there.

Part I: The Common Law Requirements of the Fiduciary Office

The hold that the individual trustee exerts over the common law imagination has historical roots and survives into this era in doctrines that remain constitutive of the fiduciary office. To qualify as a common law trustee, the candidate must have two fundamental legal capacities. First, the would-be fiduciary needs to be capable of the full sweep of legal agency attendant upon fee simple ownership. Second, the trustee must be of a character such that he can be responsive in equity.

a. Fundamental requirements of the common law fiduciary office.

Owner in fee simple. Under the common law, the trust itself has never been deemed a legal person and, accordingly, the trust (as distinct from the trustee) has never been able to

effectuate any legal act.⁴ Indeed, as the trust has developed under the common law, the entire edifice came to hang on the legal persona of the trustee and, specifically, his capacity to act with respect to the property as a fee simple owner. For this reason, the common law has demanded that the would-be occupant of the fiduciary office meet several requirements calculated to ensure the officeholder the full sweep of legal agency attendant upon fee simple ownership.⁵ These requirements appear in all the common law commentaries but they are perhaps most concisely put forth in the American treatises. For example, both Bogert and Scott summarize these fundamental necessities in a threefold requisite for the office⁶: First, with respect to any property that is to be transferred into the trust, the would-be trustee must be able to take title; second, assuming title can pass, this candidate must be able to hold the title that has been received; and third, going forward, the would-be trustee must be able to administer the property in the trust.⁷

At a practical level, these distinctions, first between taking title and holding it and then between holding title and administering the property, seem needlessly subtle. But these three requisites of the office speak to doctrines and statutes from diverse areas of the law that govern aspects of legal capacity integral to exercising the legal agency entailed in fee simple ownership. They also reflect the nuanced view that the law takes with respect to legal capacity for some persons. For example, neither infants⁸ nor the insane⁹ have been able to qualify as trustee

⁴ While the trustee may be a corporate entity, the transfer of property in trust to a trustee—be it an individual or a corporation—does not create a corporation or any other entity deemed a person under the law. See F.W. MAITLAND, *EQUITY—ALSO THE FORMS OF ACTION AT COMMON LAW—TWO COURSES OF LECTURES* (A.H. Chaytor & W.J. Whitaker eds., 1929).

⁵ GEORGE GLEASON BOGERT ET AL., *THE LAW OF TRUSTS AND TRUSTEES* § 125 (3d ed. 2006 & Supp. 2009).

⁶ For the requirements under English law, see DAVID J. HAYTON, *UNDERHILL AND HAYTON: LAW RELATING TO TRUSTS AND TRUSTEES* art. 13, at 268 (16th ed. 2003) (“Who may be a settlor or trustee. Every person, male or female, married or unmarried, human or corporate, who has power to hold and dispose of any legal or equitable estate or interest in property can create a trust in respect thereof, and can be a trustee thereof.”). For English law, see also JOHN MOWBRAY ET AL., *LEWIN ON TRUSTS* 31 (18th ed. 2008). For Canadian common law, see DONOVAN W.M. WATERS ET AL., *WATERS’ LAW OF TRUSTS IN CANADA* 114-15 (3d ed. 2005).

⁷ MARK L. ASCHER ET AL., *SCOTT AND ASCHER ON TRUSTS* § 11.1 (5th ed. Supp. 2009); *see also* RESTATEMENT (THIRD) OF TRUSTS § 32(b) (2003) (“A person who lacks capacity to contract or make a conveyance . . . cannot serve in a capacity, because such a person cannot properly fulfill the duties of a fiduciary . . .”). Of course, there may be additional statutory requirements in any particular jurisdiction.

⁸ MARK L. ASCHER ET AL., *SCOTT AND ASCHER ON TRUSTS* § 11.1.1 (5th ed. Supp. 2009); GEORGE GLEASON BOGERT ET AL., *THE LAW OF TRUSTS AND TRUSTEES* § 127 (3d ed. 2006 & Supp. 2009); DAVID J. HAYTON, *UNDERHILL AND HAYTON: LAW RELATING TO TRUSTS AND TRUSTEES* 269 (16th ed. 2003); JOHN MOWBRAY ET AL., *LEWIN ON TRUSTS* 33 (18th ed. 2008).

⁹ MARK L. ASCHER ET AL., *SCOTT AND ASCHER ON TRUSTS* § 11.1.2 (5th ed. Supp. 2009); DAVID J. HAYTON, *UNDERHILL AND HAYTON: LAW RELATING TO TRUSTS AND TRUSTEES* 269 (16th ed. 2003).

because contracts or deeds made such persons can be voided.¹⁰ This means that, while an infant or an insane person can receive and hold property, such a person will inevitably encounter obstacles in administering this property. At an earlier point in history, aliens could not qualify as trustee because, while they were able to take title to real property, they could not hold it against the sovereign.¹¹ Similarly, until the advent of the Married Women's Property Act, a married woman could receive property but she could not hold it against her husband (or more specifically, his creditors).¹²

Responsive in equity. So much does the legal operation of the trust depend on the legal persona of the trustee (expressed as a fee simple owner) that the test for the requisite capacity is whether the trustee can take, hold and administer property *for his own benefit*. And there's the rub. While the edifice of the trust is erected on the trustee's fee simple capacity to act for his own benefit, there is an agreement appurtenant to the transfer of property from the settlor to the trustee stipulating that this agency in all its potential is to be exercised for the benefit of someone else, the beneficiary. Once this beneficial interest is introduced and made the object of the trust, erecting this trust on the trustee's fee simple right would appear to create little else than a ready instrument of exploitation.¹³

The common law provides an antidote, however:¹⁴ for the person who would qualify as a trustee, there is an additional requirement layered on to the necessary capacity in fee simple. As

¹⁰ GEORGE GLEASON BOGERT ET AL., *THE LAW OF TRUSTS AND TRUSTEES* § 127 (3d ed. 2006 & Supp. 2009).

¹¹ GEORGE GLEASON BOGERT ET AL., *THE LAW OF TRUSTS AND TRUSTEES* § 126 (3d ed. 2006 & Supp. 2009).

¹² Of course, even if the person named as trustee does not have capacity to take title, the intended trust does not fail, but the court will simply appoint someone to serve who can qualify. MARK L. ASCHER ET AL., *SCOTT AND ASCHER ON TRUSTS* § 11.1 (5th ed. Supp. 2009); GEORGE GLEASON BOGERT ET AL., *THE LAW OF TRUSTS AND TRUSTEES* § 126 (3d ed. 2006 & Supp. 2009); JOHN MOWBRAY ET AL., *LEWIN ON TRUSTS* 33 (18th ed. 2008); DONOVAN W.M. WATERS ET AL., *WATERS' LAW OF TRUSTS IN CANADA* 114 (3d ed. 2005).

¹³ ROBERT A. PEARCE & JOHN STEVENS, *THE LAW OF TRUSTS AND EQUITABLE OBLIGATION* 683 (3d ed. 2002).

¹⁴ The contemporary legal imagination can conjure up various alternative ways of conceiving the office of trustee and the relationship between the trustee and the beneficiary, any of which would avoid or at least mitigate this potential for abuse. For various reasons, alternative formulations did not materialize when the trust was in its nascence. While the common law could have vested the beneficiary with a legal right in the trust property, the venerable Frederic Maitland argues that such a right would almost certainly have had to have been grounded in the contract between the settlor and the trustee (for which the beneficiary could have been conceived a third-party beneficiary), but that the common law contract was itself nascent in this period and was thus limited in ways that precluded founding the trust in the contract. F.W. MAITLAND, *EQUITY—ALSO THE FORMS OF ACTION AT COMMON LAW—TWO COURSES OF LECTURES* 28-30 (A.H. Chaytor & W.J. Whitaker eds., 1929). In the alternative, the common law could have subjected trustees to intense, perhaps day-by-day, regulatory scrutiny (something now done in the case of charitable and pension trusts which exist for important public purposes). But again, in the era in which the

important as is the legal ability to take, hold and administer property in fee simple, the trustee must also be capable of embracing a standard of meticulous probity anchored in the jurisdiction of the Court of Equity and the jurisprudence spawned there. In short, to forestall the potential for abuse, the common law again looks to the trustee, but this time to predicate the trust not merely on his legal persona, but on his moral persona as well. The common law trustee must not merely be amenable but, most importantly, he must be susceptible to the subtle supervision of the court of equity – to be willing and able to exercise his right of fee simple subject to standards particularly attuned to evaluating the exercise of discretion. The court of equity will supervise only those that are amenable to its supervision. In this way, the trustee’s fee simple discretion is not attenuated, but rather any potentially self-serving purposes for which this discretion might be exercised are redirected, courtesy of the agreement between the settlor and the trustee and subject to the supervision of the court.¹⁵ This equitable oversight gives rise to the beneficiary’s unique right, one that runs not against the trust property (such as to diminish the trustee’s fee simple interest), but against the trustee personally.

This requisite moral agency has been famously rendered rhapsodic in the phrase, “a punctilio of an honor the most sensitive.”¹⁶ Historically, this moral agency has operated as a categorical disqualification for certain individual candidates whose lives bespoke a lack of rectitude – like felons and bankrupts. And there are common law jurisdictions that still prohibit felons from qualifying.¹⁷ But even those that do not exclude particular categories of people as inherently unfit continue to reserve discretion in the court to deny appointment to individuals that are deemed to be fundamentally unsuitable, including the dishonest, the improvident, and candidates with other defects of character suggesting that they will not be amenable to equitable supervision.¹⁸

b. Corporations as trustees.

Throughout much of the history of the common law trust, corporations have been unable to qualify as trustee. The essential attributes deemed to inhere in those individual candidates that succeeded in qualifying for the fiduciary office – the full sweep of agency attendant on fee simply ownership together with a capacity to be responsive in equity – were found lacking in corporations. In the early centuries of the trust, judges refused to allow a corporation to be

trust developed, the apparatus of government was not sufficiently mature to render such oversight. F.W. MAITLAND, *EQUITY–ALSO THE FORMS OF ACTION AT COMMON LAW–TWO COURSES OF LECTURES* 29-30 (A.H. Chaytor & W.J. Whitaker eds., 1929).

¹⁵ This requirement of probity is coupled with draconian remedies that operate to deprive a trustee of any gain made through abuse of his position. *See* ROBERT A. PEARCE & JOHN STEVENS, *THE LAW OF TRUSTS AND EQUITABLE OBLIGATION* 686 (3d ed. 2002).

¹⁶ But within the jurisprudence of equity, this “punctilio of an honor” consists in far more than mere moral finesse, and has been rendered legally choate in the duties of loyalty and prudence. *See* *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

¹⁷ N.Y. SURR. CT. PROC. ACT LAW § 707(1)(d) (McKinney 2010).

¹⁸ N.Y. SURR. CT. PROC. ACT LAW § 707(1)(e) (McKinney 2010); *see also* UNIF. TRUST CODE § 706 (2006). In addition to the draconian tort remedies (see *supra* note 15), some abuses, particularly the misappropriation of trust property, constitute criminal offences. *See* ROBERT A. PEARCE & JOHN STEVENS, *THE LAW OF TRUSTS AND EQUITABLE OBLIGATION* 685 (3d ed. 2002).

seised to a “use” (the aboriginal common law trust) because, while a corporation could take title to property, it could not, consistent with its corporate purposes, hold and administer it in trust. In that event, attempting to do so was inevitably an *ultra vires* act. As an artificial person in the law, the corporation had no capacity to act beyond those express objects set forth in its charter (plus any implied powers incidental to the realization of these express purposes).¹⁹ And early in the history of the corporation purposes tended to be specific and, read narrowly, they precluded the holding and administering of property in trust. Further, beyond the limitations emanating from a corporate charter, some judges resisted the idea that a corporation could be responsive in equity. The corporation was deemed a “dead body” and, as such, could not be made subject to the *in personam* jurisdiction of a court of equity.²⁰

By the eighteenth century, however, judicial rhetoric about the corporation being a “dead body” with its implications with respect to equitable jurisdiction was set aside.²¹ And the constraints of the narrowly drawn corporate charter were a problem that abated in the late nineteenth century. At that point a movement emerged to less the legislative strictures on corporations so that they ceased to be created for stipulated and narrow purposes but the grant of authority became typically broad.²² Then, whether a corporation had the capacity to hold and administer property in trust came to turn on whether the trust as per its terms furthered the purposes of the corporation as per the charter and the essential endeavors undertaken consistent with the charter (and other constitutive documents).²³ So, for example, as the jurisprudence moved forward here, it was readily apparent that a corporation could, consistent with its corporate charter, serve as trustee of a trust holding retirement funds or otherwise benefiting employees.²⁴

c. Fiduciary Regulation.

But even if a broad grant of authority might address *per se* reservations with respect to the corporate trustee, in many common law jurisdictions corporate trustees have yet to obtain an equal footing with the individual trustee when it comes to qualifying for the office. This is because, a broad grant of authority notwithstanding, corporations remain creatures of legislative

¹⁹ DAVID J. HAYTON, UNDERHILL AND HAYTON: LAW RELATING TO TRUSTS AND TRUSTEES 270-72 (16th ed. 2003).

²⁰ GEORGE GLEASON BOGERT ET AL., THE LAW OF TRUSTS AND TRUSTEES § 131 (3d ed. 2006 & Supp. 2009).

²¹ MARK L. ASCHER ET AL., SCOTT AND ASCHER ON TRUSTS § 11.1.6 (5th ed. Supp. 2009).

²² See JAMES D. COX AND THOMAS LEE HAZEN, COX & HAZEN ON CORPORATIONS (2d ed.) sections 2.02-2.06.

²³ The nature of the property to be held in trust could also present a stumbling block under the charter of the would-be corporate trustee. GEORGE GLEASON BOGERT ET AL., THE LAW OF TRUSTS AND TRUSTEES § 131 (3d ed. 2006 & Supp. 2009); see also RESTATEMENT (THIRD) OF TRUSTS § 33 (2003) (“A corporation has capacity to take and hold property in trust except as limited by law, and to administer trust property and act as trustee to the extent of the powers conferred upon it by law.”).

²⁴ Companies Act, 1985, c. 6, § 33 (Eng.), substituted by Companies Act, 1989, c. 40, § 108 (Eng.), repealed by Companies Act, 2006, c. 46, sch. 16 (Eng.); DAVID J. HAYTON, UNDERHILL AND HAYTON: LAW RELATING TO TRUSTS AND TRUSTEES 270-72 (16th ed. 2003).

grace and, where a corporation would qualify as trustee, regulatory requirements for the office potentially overlay those the common law imposes. In some common law jurisdictions this regulatory authority has been particularly exigent for corporations that would enter into the business of being a trustee. Indeed, where common law jurisdictions have come to differ quite significantly is in the degree to which they subject to regulation corporations conducting a fiduciary business. For these professional corporate trustees, the additional requirements of office are calculated to ensure solvency as well as other elements of fiduciary integrity -- appropriate risk management (including investment of trust assets), custody of assets, segregation of assets, and liability of bank property with respect to trust losses.²⁵ Note that, however reasonable such requirements might be, given the opportunity for abuse inherent in the trust, individual trustees have never been subjected to such *ex ante* supervision. Typically in common law jurisdictions, if individual trustees are supervised at all, it occurs after the fact, upon breach of fiduciary duty, when the errant trustee is held accountable pursuant to tort standards by disgruntled beneficiaries either in court or in negotiations occurring under the threat of litigation.²⁶

Jurisdictions within the U.S. regulate corporations engaging in the business of being a trustee. In these jurisdictions, such corporations must have “trust powers” which can be acquired only as a term (express or implied) of a bank or trust company charter.²⁷ Chartering occurs either at the state or the federal level, but in every instance requires that the institution meet and maintain certain capital requirements. For banks chartered at the state level, it is the legislature in the state where the bank has its principal place of business that authorizes the corporation to enter into the banking business in that state and (if trust powers are sought) to offer fiduciary services to the public there. States can also charter trust companies.²⁸

Banks can also be chartered at the federal level in the U.S., historically under the Federal Reserve Act, under which approval could be granted for undertaking trust services (in addition to banking activities).²⁹ In 1962, this authority was transferred to the Comptroller of the Currency³⁰

²⁵ 12 C.F.R. § 9.13(a) (2010) requires that, with respect to each trust account, investments shall be kept separate from the assets of the bank and shall be placed in the joint custody or control of the bank with officers in control of these assets adequately bonded.

²⁶ For consideration of this issue in the English context, see Alastair Hudson, *The Regulation of Trustees*, in CONTEMPORARY PERSPECTIVES ON PROPERTY, EQUITY AND TRUSTS LAW 163 (Dixon & Griffiths eds., Oxford Univ. Press 2007).

²⁷ In order to protect the public, it is now often provided by statute that only corporations authorized to do a trust business can use the words “trust” or “trustee” in their corporate names. See GEORGE GLEASON BOGERT ET AL., THE LAW OF TRUSTS AND TRUSTEES § 131 (3d ed. 2006 & Supp. 2009).

²⁸ While state-chartered banks typically offer services as trustee as alongside a larger package of banking services (checking and savings accounts, lending, investment vehicles, etc.), state-chartered trust companies are chartered for the purpose of administering trusts and other fiduciary relationships with banking services available as ancillary offerings. GEORGE GLEASON BOGERT ET AL., THE LAW OF TRUSTS AND TRUSTEES § 136 (3d ed. 2006 & Supp. 2009).

²⁹ Until 1962, regulatory authority with respect to nationally chartered banks arose under the Federal Reserve Act of 1913 that, pursuant to Regulation F, authorized national banks to act as

who now promulgates rules and otherwise supervises the exercise of trust powers by national banks under Regulation 9.³¹ In exercising trust powers, national banks must segregate trust property and comply with state regulations regarding the deposit of securities, filing of bond, etc., so far as these requirements are also laid down for state banks and trust companies in the state.³² Where conduct is continuously improper, the Comptroller can revoke a national bank's authority to provide trust services.³³

In the U.S., this regulatory framework has operated to allow banks and state-chartered trust companies to edge out non-bank corporations that would engage in the business of being a trustee.³⁴ A well-known exception to this stranglehold can be found in Massachusetts where corporations – “limited purpose trust companies” – may conduct trust and fiduciary business where the commissioner of banking is “satisfied that public convenience and advantage will be promoted and that competition among banking institutions will not be unreasonably affected.” Other state statutes afford the commissioner of banking or such other state official similar

trustees (among other banking services). Federal Reserve Act of 1913 § 11(k), 12 U.S.C. § 248(k) (1913) (repealed 1962).

³⁰ 12 U.S.C.A. § 92a (West 2010); 12 C.F.R. §§ 9.1-9.101 (2010) [hereinafter Reg. 9].

³¹ The provisions of Part 9 are issued under Act of September 28, 1962 § 1, 12 U.S.C.A. § 92a (West 2010).

³² 12 U.S.C.A. § 9(c), (f)-(g) (West 2010). If the laws of the state in which the national bank is located permit the exercise of trust powers by state banks or trust companies, the granting to and exercise of a power to act by a national bank is not deemed in contravention of state law.

GEORGE GLEASON BOGERT ET AL., *THE LAW OF TRUSTS AND TRUSTEES* § 134 (3d ed. 2006 & Supp. 2009).

³³ This can be done without going into court at the state level and asking a court of equity to remove the trustee. 12 U.S.C.A. § 9(c), (f)-(g) (West 2010).

³⁴ The regulatory framework surrounding the U.S. banking industry has been in flux for two decades. The goal has been to deregulate the industry “to eliminate statutory and regulatory barriers that segmented the banking industry between commercial banks and thrift institutions and that created a noncompetitive environment between these industry segments.” Joseph Jude Norton, *The 1982 Banking Act and the Deregulation Scheme*, 38 BUS. LAW 1627, 1627 (1983). Under the 1980 Omnibus Banking Act, federal savings and loan associations were authorized to make application to the Federal Home Loan Banking Board to secure trust powers. Depository Institutions Deregulation and Monetary Control Act of 1980 § 403, Pub. L. No. 96-221, 24 Stat. 132 (codified as amended in scattered sections of 12 U.S.C. and 15 U.S.C.). A federal savings and loan association may be authorized to exercise trust and fiduciary powers. *See* 12 U.S.C.A. § 1464 (West 2010). By § 704 of the Depository Institutions Deregulation and Monetary Control Act of 1980, the provision of the national Banking Laws regarding the power of the Comptroller to revoke trust powers for the unlawful or unsound exercise of powers or for failure to exercise powers were amended. *See* 12 U.S.C.A. § 92a (West 2010) (Developments authorizing interstate banking). Further, savings banks and savings or savings and loan association have recently become eligible by statute to act as trustees. *See* GEORGE GLEASON BOGERT ET AL., *THE LAW OF TRUSTS AND TRUSTEES* § 135 (3d ed. 2006 & Supp. 2009); *see also* 12 U.S.C.A. § 1464(a) (West 2010).

discretion, but such authorities in other states are typically unable to satisfy themselves that the introduction of these non-bank trustees will indeed serve “public convenience and advantage.”³⁵

In Canada, corporations in the business of being a trustee are also subject to a highly restrictive regulatory regime, but not via the banking laws. Historically, in Canada neither banks nor insurance companies have been permitted enter into the business of being a trustee. Instead, Canada has regulated those corporations that would enter into this business as special purpose financial companies, institutions peculiar to Canada and known as “trust companies.” These requirements for corporations that would serve as trustee still obtain.³⁶ Any Canadian trust company is subject to the jurisdiction of both federal authorities and those provincial authorities where the trust company is incorporated.³⁷

Until quite recently, England and Wales have had an exceedingly liberal regulatory regime where corporate trustees are concerned. In fact, in England and Wales (which are effectively one regime for purposes of the law of trusts and trustees), there has been no requirement either of registration or of licensure. A corporation that is neither a bank nor a trust company has been able to enter into the business of being a trustee of personal trusts for members of the public without being subject to any regulatory regime. This liberal regime endures, with the exception of two recent statutory additions -- first, the Financial Services and Market Act 2000 and, second, the Money Laundering Regulations 2007 (Statutory Instrument 2007 No 2157). The Financial Services Act introduces only modest burdens into the enduring liberal regime. First, the 2000 Act applies only to a trustee that engages in investing, requiring that this trustee be authorized to undertake this activity and then be subject to a regulatory regime administered by the Financial Services Authority (which is created under this Act).³⁸ This statute would appear to apply to virtually any professional trustee, as any professional trustee effectively holds itself out as offering investment management as part and parcel of being a professional trustee. Nevertheless, a corporate trustee can avoid the 2000 Act if it does not hold itself out as offering investment services and does not receive remuneration for investment services in addition to fees charged for serving as trustee. What must be avoided is seeking to draw business to the corporation by advertising expertise in investments. And the second exception may be satisfied if the corporate fiduciary only takes its fees as a percentage of assets under management.³⁹

³⁵ See, e.g., MASS. GEN. LAWS ANN. ch. 172, § 9A (West 2010).

³⁶ DONOVAN W.M. WATERS ET AL., WATERS' LAW OF TRUSTS IN CANADA 119-20 (3d ed. 2005). Regulatory changes and market pressure in recent years have resulted in discretionary fiduciary services being provided primarily by trust companies that are subsidiaries of banks. Independent trust companies, while still an important part of the market for discretionary fiduciary services, are much less significant than they were in the past.

³⁷ DONOVAN W.M. WATERS ET AL., WATERS' LAW OF TRUSTS IN CANADA 119-20 (3d ed. 2005).

³⁸ The specific language is “deals in investments or arranges deals in investments or manages investment or safeguards and administers assets belonging to another” Financial Services and Markets Act, 2000, c. 8 (Eng.).

³⁹ See DAVID J. HAYTON, UNDERHILL AND HAYTON: LAW RELATING TO TRUSTS AND TRUSTEES 271-72 (17th ed. Supp. 2009). For consideration of this issue in the English context, see Alastair

The 2007 Money Laundering Regulations require only that a corporate trustee register with Her Majesty's Revenue & Customs, an agency that has discretion to reject entities deemed at risk with respect to money laundering activities or terrorist financing. The 2007 Act can also be satisfied by registering with the Financial Services Authority created under the Financial Services & Markets Act 2000 (treated in the preceding paragraph). The Regulations impose due diligence measures, monitoring and record keeping requirements, all of which facilitate the monitoring of sources and recipients of funds.

d. Continued appeal of the individual trustee under the common law.

The common law fiduciary office was developed on the legal persona of the individual. But if at some point the common law doctrines governing the fiduciary office matured in such a way as to permit the corporation to qualify, the individual trustee has in no way been legally jettisoned or even side-lined in the course of these changes. There are multi-layered reasons that the individual trustee endures in common law jurisdictions and the deepest of these will be addressed in Part III of this article. At this juncture, however, suffice it to note that, for certain settlors, because the corporate trustee is almost certain to be regulated *ex ante*,⁴⁰ the appeal of the individual trustee has endured. While regulation *ex ante* may remove certain risks to beneficiaries (particularly the risk of the insolvent trustee),⁴¹ settlors attracted to the flexibility of the trust and seeking wide discretion in crafting trust terms often have reason, when choosing a trustee, to avoid financial services institutions enmeshed in a regulatory framework.⁴² When asked to serve under trust agreements with innovative terms, such institutions tend to be risk-averse and fear liability with respect to duties considered (by some lights) to inhere in the office even where the trust agreement, consistent with innovative terms, directs otherwise.⁴³ In the individual trustee, the common law continues to afford the settler a comparatively free hand and, as we shall see in Part III, secures the long-standing innovative potential of the trust where fundamental property norms are concerned.

Hudson, *The Regulation of Trustees*, in CONTEMPORARY PERSPECTIVES ON PROPERTY, EQUITY AND TRUSTS LAW 163 (Dixon & Griffiths eds., Oxford Univ. Press 2007).

⁴⁰ Certain common law jurisdictions have of late seen the advent of trust companies that are exempt from regulation (In the United States, these are state-chartered entities). These new entities are not addressed in the body of this article because, as they are restricted to serving only a related group of people, they remain a relatively minor phenomenon and, further, their appeal to settlors validates the larger argument of this piece. In establishing a "family trust company," settlors are seeking to use the corporate form to minimize the liability of the trustee without losing the discretion that the unregulated individual trustee has long afforded the settler. See Iris J. Goodwin, *How the Rich Stay Rich: Using a Family Trust Company to Secure a Family Fortune*, 40 SETON HALL L. REV. 467 (2010).

⁴¹ Carol Harrington & Ryan M. Harding, *Private Trust Companies and Family Offices: What Every Estate Planner Needs to Know*, A.L.I.-A.B.A. CONTINUING EDUC., Sept. 4-5, 2008, at 689, available at SP020 ALI-ABA 675.

⁴² See Iris J. Goodwin, *How the Rich Stay Rich: Using a Family Trust Company to Secure a Family Fortune*, 40 SETON HALL L. REV. 467 at 487-88 (2010).

⁴³ See *infra* Part III.d.

Part II: The civil law trustee

In contrast to the common law where the individual remains the quintessential trustee, civil law jurisdictions that have adopted the common law trust over the last sixty or so years evidence a clear preference not merely for the corporate trustee, but a corporate trustee subject to regulation *ex ante*, such as a bank or insurance company. But to the extent that this apparent distaste for the individual trustee might constitute a challenge to the common law, it is instructive to locate this civil law preference in the context of the longstanding and quite fundamental ideological discomfort with the trust.

a. Historical Discomfort.

As a prelude to considering the particulars of the civil law challenge to the common law on the point of the individual trustee, it is worth noting that for centuries now the civil law has exhibited considerable discomfort with the trust itself. In particular, the civil law has shown discomfort with bifurcated ownership as well as the attendant successive beneficial substitutions that commonly occur within any property settlement (like the trust) lasting multiple decades.⁴⁴ This article suggests that, where the choice of a trustee is concerned, any civil law predilection for an entity regulated *ex ante* bespeaks a continuing discomfort with the trust in general, a discomfort that bespeaks certain core principles embedded in the civil law, especially with respect to property. These ideas came to the fore in the legal reforms of the French Revolution, ideas that, in the wake of the Revolution, were exported via the Code Napoleon, first to European countries occupied by the French during the Revolution and later to regions throughout the world as these areas were subjected to colonial rule by European countries.

Whether the civil law could have ultimately produced an institution equivalent to the common law trust remains a matter of some controversy.⁴⁵ There is no doubt that, with a binary judicial system, England provided especially fertile ground for the realization of this particular institution in all its vitality. The dual judicial apparatus of common law courts standing side-by-side with courts of equity made for two distinct forms of pleadings, each ultimately recognizing two distinct but coextensive types of ownership embedded in the trust.⁴⁶ Nevertheless, under the Roman law (the precursor to the civil law in Continental Europe), there did emerge certain agency relationships and other types of transfers similar at least to the common law trust in its early, medieval guise. Like the nascent common law trust, these Roman law strategems operated

⁴⁴ This discomfort is of a piece with the legendary early twentieth century story where the illustrious common law scholar Frederic Maitland attempted to explain the trust to the equally illustrious civil law scholar Otto von Gierke only to have the great German jurist confess that the idea still made no sense to him. Maitland recounts the story and clearly takes it to be evidence of the uniqueness of the trust, a validation of the trust as a quintessentially common law institution. F.W. MAITLAND, EQUITY—ALSO THE FORMS OF ACTION AT COMMON LAW—TWO COURSES OF LECTURES 23-24 (A.H. Chaytor & W.J. Whitaker eds., 1929).

⁴⁵ For a subtle view of the civil law tradition, see Vera Bolgar, *Why No Trusts in the Civil Law?*, 2 AM. J. COMP. L. 204 (1953); see also F. WEISER, TRUSTS ON THE CONTINENT OF EUROPE (1936).

⁴⁶ NICOLAS MALUMIAN, TRUSTS IN LATIN AMERICA xxvi (Oxford Univ. Press 2009).

as measures of limited application, devised to circumvent laws limiting disposition at death or (with respect to the Roman law in particular) to navigate idiosyncratic circumstances not contemplated within the governing legal rubrics. For example, under the Roman *fideicommissum*,⁴⁷ if a transfer to a particular donee was proscribed (such as a transfer to a foreigner), a donor could make the transfer instead to a third party with a direction to convey the property at the donor's death to the designated recipient.⁴⁸ Of course, consistent with the primitive simplicity of this particular finesse, the intended recipient of the property had no legal recourse in the event the property was not delivered.⁴⁹

None of these Roman law strategems ever developed sufficiently as a legal institution to invite – like the mature common law trust -- the management of significant wealth over an extended period on behalf of diverse legal interests with respect to the assets. Nevertheless, by the eighteenth century, the French aristocracy had made the most of a stratagem akin to the Roman *fideicommissum*, what in this later era was termed the *substitution fideicommissaire* – a gift to one person with an understanding that he convey it to a third -- to entail property over multiple generations. But as the French often employed the *substitution*, the initial transferee had ceased to be a strawman (as was the case with the Roman law *fideicommissum*), but was a bonafide recipient in his own right – at least for his lifetime. Typically, the *paterfamilias* transferred his patrimony to his eldest son on condition that the son transfer it to his firstborn son and so on. The nobility used the *substitution* in this way to sustain the institution of primogeniture, ensuring thereby that wealth remained concentrated in aristocratic hands.

Whether the *substitution* would have continued to develop into something akin to the full-blown common law trust is hard to know. With the French Revolution, substitutions (and by implication, similar institutions such as the common law trust) became anathema in the civil law. In 1792 the Legislative Assembly prohibited such arrangements as undermining the pursuit of equality throughout the larger body politic.⁵⁰ To ensure the appropriate legal underpinnings to a bourgeois republic, the Revolution put in place a property regime in which transparency with respect to title was key. Ownership was co-extensive with the legal interest of that person who had an immediate right to the asset (for example, to be on the land).⁵¹ The simplicity of this regime ensured that someone was always legally empowered to transfer the property and, further, that this person was readily discoverable. Land could come into the stream of commerce

⁴⁷ WILLIAM W. BUCKLAND & BARON A.D. MCNAIR, ROMAN LAW AND COMMON LAW 173 et seq. (1952)

⁴⁸ In a similar vein were the *fiducia* and the *pactum fidiuciae*. In the case of the *fiducia* there was actually a transfer of property to a party who had an obligation (based on trust) to transfer the property to a third party after of a period of time had passed or a condition was met. See WILLIAM W. BUCKLAND & BARON A.D. MCNAIR, ROMAN LAW AND COMMON LAW 177 (1952).

⁴⁹ WILLIAM W. BUCKLAND & BARON A.D. MCNAIR, ROMAN LAW AND COMMON LAW (1952).

⁵⁰ The Civil Code codified the proscription at Article 896. See RICHARD HYLAND, GIFTS ¶¶ 448-50 (2009). As Hyland notes, there were a number of exceptions. *Id.*; see also Paul Matthews, *The French Fiducie: And Now for Something Completely Different?*, 21 TR. L. INT'L, no. 1, 2007, at 17.

⁵¹ *Cultural Variations on Property Law*, in 6 ENCYCLOPEDIA OF COMPARATIVE LAW, ¶ 10 (1978).

where it could change hands frequently like any other asset. The new property regime fostered equality by quite literally cutting the ground from feudalism.⁵²

When the Code Napoleon was drafted, this prohibition against substitution (with the attendant distaste for the common law trust) deeply informed the precepts of law promulgated there. This attitude was exported to countries occupied by the French during the Napoleonic Wars. Influence spread further as French, Spanish and Portuguese colonies around the world tracked the French canons in drafting their own codes at independence. Finally, the influence of the Code Napoleon became virtually global as modernizing non-Western countries with little historical connection to Continental Europe – indeed, some of them former British colonies⁵³ -- modeled their statutes on the civil law. At a premium in these modernizing countries has been a legal system characterized by lucid precepts solidly grounded in the legitimating provenance of a democratically-elected legislature. Such nascent polities could scarcely afford the luxury of a legal system such as the historic common law, maturing by accretion over decades, even centuries, as judges layered one nuanced, fact-intensive holding upon another. In these jurisdictions this quest for legal simplicity further militated against the trust, a creature of seeming legal contradictions, a rich stew of apparent incompatibles predicated upon the competing jurisdictions of law and equity.

b. The trust nevertheless.

Whatever civil law norms with respect to the institution of property might be, however, from early in the twentieth century, civil law jurisdictions have struggled to reconcile the essential elements of the trust with these fundamental principles as a first step to assimilating this quintessential common law institution.⁵⁴ Any discomfort with the trust notwithstanding, in the twentieth century civil law jurisdictions began to discern its significant utility. First, while there are a few essential rights and obligations with respect to property that must be present for a structure to do be deemed a trust, few devices for holding and administering property are so flexible as to form as the trust. In establishing a trust, a settlor has enormous discretion in formulating managerial duties and creating beneficial rights. And as modern economies saw increasingly sophisticated forms of intangible property, this flexibility made the trust an attractive device to hold such interests, for purposes of making intra-family transfers of wealth but also for myriad other purposes. Indeed, in a significant number of civil law jurisdictions, the trust became an expedient to utilize in securitizing certain assets, making it a vehicle for the creation of such complex financial instruments.⁵⁵ Second, if the requisites to formation are minimal, once the trust is formed, its terms are almost impossible to change (absent authority in the contract or application to court or some supervisory authority). Such legal barriers to reformation offer settlors assurance of desired outcomes, especially for any trust the object of which can be realized only over an extended period of time. The trust thus stands in marked

⁵² RICHARD HYLAND, GIFTS ¶¶ 448-50 (2009).

⁵³ See *infra* Part II.a.

⁵⁴ The history of the reception varied jurisdiction by jurisdiction. With respect to Mexico, see, e.g., Roberto Molina Pasquel, *The Mexican Fideicomiso: The Reception, Evolution and Present Status of the Common Law Trust in a Civil Law Country*, 8 COLUM. J. TRANSNAT'L L. 54 (1969).

⁵⁵ NICOLAS MALUMIAN, TRUSTS IN LATIN AMERICA ch. 3 "Securitization" (Oxford Univ. Press 2009).

contrast to the corporation where the imprimatur of the state is a prerequisite to formation and many terms (such as certain shareholders' rights) can be required. And once a corporation is established, corporate boards can have a much freer hand in altering corporate purposes.

Of course, the challenge for these jurisdictions has been, without positing the concurrent jurisdictions of law and equity or otherwise relying on judicial nuance, to draw together into one legal rubric the nexus of very minimal but altogether essential interests and obligations with respect to property that together make the trust. The civil law has struggled, without violating its fundamental principle with respect to unity of title, to render a legal account of the authority of the trustee holding and disposing of property subject to terms stipulated by the transferor, terms that typically vest beneficiaries with rights with respect to trust property. (Indeed, in this vein beneficiaries must be able to hold trustees accountable for misapplied assets and in particular they must be legally empowered to pursue trust property which has been transferred in breach of trust.) Further, this empowerment of the trustee must be expressed in such a way as not to jeopardize the autonomy of the trust estate: the property conveyed to the trustee must somehow be rendered legally secure from both the creditors of the trustee (notwithstanding the status of the trustee as owner) and the creditors of the settlor (notwithstanding the settlor's stipulations in the foundational document).

The civil law has made numerous attempts to articulate these rudimentary requirements in a legal idiom consistent with its core values. First, in the early twentieth century, civil law jurists resorted to age-old civil law ideas and tried to cognize the trust as an agency relationship – a modern *fideicommissum*. Unfortunately, while this idea captured the obligation to manage the trust estate in accordance with the settlor's terms, it failed to clarify who actually owned the property. Also, if the trust was to be understood as a conventional agency relationship so that the trustee remained subject to the settlor after the conveyance, this formulation jeopardized the autonomy of the trust estate, especially with respect to the settlor's creditors.⁵⁶ Later civil law jurists characterized the trust as an entity in the law, like the corporation. Unfortunately, while this characterization secured the autonomy of the trust estate, it also rendered the trust a creature of the state, inviting regulation and even regimentation. Still others simply tried to bite the bullet and concede that the trust entailed a twofold ownership – “juridical ownership” in the trustee and “economic ownership” in the beneficiary. While this characterization empowered beneficiaries to secure and defend their interest in the trust estate, it flew in the face of the principle of unitary ownership. To date, perhaps the most successful attempt to characterize the trust consistent with fundamental precepts of the civil law has tempered technical legal terminology with metaphor, describing the trust as a “special-purpose patrimony.” The term captures the status of the trustee as owner of the trust property at the same time as, in the idea of an inherent “special purpose,” it tips its hat to the interests of beneficiaries created in the settlor's stipulations at conveyance. The idea of a special purpose also lays the groundwork for securing the trust estate vis-à-vis the trustee's creditors. If the devil is in the details, however, the idea of a special purpose patrimony provides only the broad outlines within which the real work must ensue.⁵⁷

⁵⁶ Also, as an agency relationship, the *fideicommissum* would not survive the settlor's death. See NICOLAS MALUMIAN, TRUSTS IN LATIN AMERICA 184 (Oxford University Press 2009).

⁵⁷ For a critique, see Paul Matthews, *The French Fiducie: And Now for Something Completely Different?*, 21 TR. L. INT'L, no. 1, 2007, at 17.

c. Who or What Can Serve.

In civil law jurisdictions adopting the trust, the trustee is no less an essential element of the institution than it has been under the common law.⁵⁸ If the trust is not to be deemed an entity in the law, then the institution has to be developed around the office of the fiduciary. And a significant cohort of these civil law jurisdictions has precluded the individual trustee from qualifying. These jurisdictions restrict the office of trustee to an entity regulated *ex ante*.

Of all the regions comprised of civil law countries, none has so embraced the common law trust as has Latin America. In 1932 Mexico became the first Latin American jurisdiction to adopt the common law trust, “*el fideicomiso*.”⁵⁹ After Mexico adopted the trust, the institution migrated south over subsequent decades to be adopted by other Latin American countries.

If Mexico adopted the common law trust, however, this country nevertheless repudiated the individual trustee. Indeed, in Mexico, the fiduciary must be an authorized *institucion fiduciaria*. Perhaps because, as in most Latin American jurisdictions, the trust is used primarily in financial operations and real estate matters, *instituciones fiduciarias* are limited to credit institutions, insurance companies and similar entities regulated *ex ante*. Of these, credit institutions have the broadest purchase, while insurance companies can qualify only with respect to trusts whose object is related to their corporate purposes. Where guarantee trusts are concerned, almost any of these fiduciary entities can serve, as can general depositaries and credit unions.⁶⁰

⁵⁸ Note that we are not concerned here with those civil law jurisdictions that have adopted the trust in order to develop an offshore trust business, to offer a tax haven and potentially asset protection for non-citizen non-residents. We are concerned instead with those civil law jurisdictions that have introduced the trust so that it can be used by their own citizens in ordering their affairs. We are also not concerned with countries (such as Italy) that have accepted the trust into the property regime not by introducing specific legislation but rather by ratifying the Hague Convention and recognizing the trust as a consequence, so that citizens who with Italian-situs property establish trusts pursuant to foreign law then benefit from the choice-of-law provisions under Article 11 of the Convention. For Italy, see MAURIZIO LUPOI, TRUSTS: A COMPARATIVE STUDY 368 (Cambridge Univ. Press 2000). For the Hague Convention, see Hague Convention on the Law Applicable to Trusts and on their Recognition, Hague Conference on Private International Law, July 1, 1985, 23 I.L.M. 1389 (with entry into force January 1, 1992), available at <http://www.hcch.net> (Full text of the convention, including a complete list of countries that ratified it of the members of the Hague Conference on Private International Law).

⁵⁹ The 1932 Securities and Credit Transactions General Act (*Ley General de Títulos y Operaciones de Crédito*) arts. 346-59 under the heading of *Del fideicomiso*, which was developed under the influence of the jurists Ricardo Alfaro and Pierre Lepaulle. See Roberto Molina Pasquel, *The Mexican Fideicomiso: The Reception, Evolution and Present Status of the Common Law Trust in a Civil Law Country*, 8 COLUM. J. TRANSNAT'L L. 54, 57-67 (1969).

⁶⁰ *Ley General de Títulos y Operaciones de Crédito* [LIC] [General Law for Securities and Credit Operations] c. V, art. 350, Diario Oficial de la Federación [DO], 1932 (Mex.).

After Mexico adopted the common law trust, the institution moved south in guises of various degrees of similarity.⁶¹ Colombia adopted the trust in 1941 and there only trust companies can be trustees. These trust companies be authorized by the superintendent of banking to undertake the role of fiduciary and must be engaged solely in the business of being trustee.⁶² In Honduras, where the trust was adopted in 1950, trustees also must be authorized banking institutions.⁶³ Venezuela adopted the trust in 1956 and allows only banking institutions and insurance companies to be trustees.⁶⁴ Guatemala put in place a statute permitting trust to be created in 1970 but permits to qualify as trustee only Guatemalan banks, credit institutions, and those private investment companies authorized by the Junta Monetaria.⁶⁵ In El Salvador, adopted the trust in the same year and requires that a trustee be either a bank or authorized credit institution.⁶⁶ Bolivia adopted the trust in 1977 and there only banks can be trustees.⁶⁷

Ecuador put in place legislation authorizing the trust in 1993, restricting the office of trustee to fund and trust management companies with the state bank and the National Finance Corporation also permitted to qualify.⁶⁸ Peru adopted the trust in 1996 and opened the office to a variety of banking institutions. A state-owned financial institution, the Corporacion Financiera de Desarrollo, can qualify, as can banking companies, financial companies, municipal savings and credit banks, municipal people's credit banks, entities for the development of small- and micro-sized companies and credit cooperatives authorized to raise resources from the public, rural savings and credit banks, exchange services companies and funds transfer companies, fiduciary services companies (corporations that have as sole object and activity to be trustees), and insurance companies.⁶⁹ Finally, Paraguay adopted the trust the same year as Peru and permits to qualify as trustee only banks and corporations organized for the exclusive purpose of being trustees and authorized by the Central Bank of Paraguay.⁷⁰

On the European Continent, Luxembourg introduced the *contrat fiduciare* into law in 1983.⁷¹ The office of trustee is limited to banks.⁷²

⁶¹ NICOLAS MALUMIAN, TRUSTS IN LATIN AMERICA 19 (Oxford Univ. Press 2009).

⁶² CODIGO DE COMERCIO [C. COM.] tit. IX, art. 1226 (Colum.).

⁶³ Ley de la Comision Nacional de Bancos y Seguros (Decree No. 155/95) (Hond.).

⁶⁴ Trust Law (1956) art. 12 (Venez.).

⁶⁵ CODIGA COMERCIA c. 5, §§ 766-793 (Guat.); Financial Supervision Decree No. 18-2002 (Guat.).

⁶⁶ CODIGA COMERCIA §§ 1233 *et seq.* (El Sal.); Ley de Bancos § 67 *et seq.* (El. Sal.).

⁶⁷ CODIGA COMERCIA tit. VII, c. IV, § 11, arts. 1409-1427 (Bol.); Ley de Bancos y Entidades Financieras arts. 3, 9 (Bol.); Circular SB/254/93 (Jul. 12, 1993) (Bol.).

⁶⁸ Securities Market Act (No. 367/1998) (Ecuador); Decree No. 390 (No. 87/1998) Law No. 107 (Ecuador).

⁶⁹ Ley General de Instituciones Bancarias, Financieras v. de Seguros (No. 770/1993), sub-ch. IX, art. 315 (Ecuador).

⁷⁰ Fiduciary Transactions Act (Law No. 921/1996) and Resolution No. 6 (Nov. 22, 2004) (Para.); (Law No. 861/96) §§ 40, 73 (Para.).

⁷¹ MAURIZIO LUPOI, TRUSTS: A COMPARATIVE STUDY 281 (Cambridge Univ. Press 2000).

⁷² Grand Ducal decree of 19 July 1983 art. 1 (Lux.).

Quite recently, in 2007, the wellspring of the code Napoleon, France, amended its civil code to introduce the *fiducie*. Significantly, the French *fiducie* is quite restricted in its application, both in the creation of a trust and in filling the office of trustee. Individuals and partnerships cannot settle a trust, but only corporations subject to the corporation tax can create a *fiducie*. Further, only banks and insurance companies can be trustees.⁷³ These restrictions would seemingly bespeak an enduring discomfort with substitutions – and the trust -- in France.⁷⁴

d. Exceptions.

There are exceptions, however. Not every civil law jurisdiction adopting the trust has rejected the individual trustee. In these cases, however, even if the legal regime is at base a civil law regime, each of these jurisdictions has in some way been subject to common law influence that has been especially resonant with respect to the trust. For example, some of these jurisdictions were once British or American colonies. Belize (known as British Honduras in the colonial era)⁷⁵ and Panama (where U.S. domination began in the early years of the twentieth century)⁷⁶ are civil law countries that allow the individual to qualify as trustee. Israel discovered the trust in 1924, during the British mandate, and permits an individual to can qualify as trustee.⁷⁷ South Africa can also be added to this list of former colonies that have adopted the trust and embrace the individual trustee.⁷⁸

Other civil law jurisdictions that allow the individual to qualify as trustee either are presently or have in the past been semi-autonomous regions within common law countries. Both Scotland (governed by Roman-Scots law, a regime with deep ties to the legal tradition of Continental Europe)⁷⁹ and Quebec⁸⁰ fit this description. Louisiana with a legal regime closely connected to

⁷³ Loi 2007-211 du 19 février 2007 instituant la fiducie [Law 2007-211 of February 19, 2007 establishing trust], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Feb. 19, 2007, art. 2051.

⁷⁴ See Paul Matthews, *The French Fiducie: And Now for Something Completely Different?*, 21 TR. L. INTERNAT'L, no. 1, 2007, at 17.

⁷⁵ Trusts Act, pt. 1, § 17 (1992) (Belize).

⁷⁶ Trust Law (No. 1/1984) (Pan.); Executive Decree (No. 16/1984) (Pan.); see also Ricardo J. Alfaro, *The Trust and the Civil Law with Special Reference to Panama*, 33 J. LEGIS. & INT'L L. 25 (3d Ser. No. 2, 1951); see also MAURIZIO LUPOI, TRUSTS: A COMPARATIVE STUDY 285 (Cambridge Univ. Press 2000).

⁷⁷ Trust Law, 5739-1979, ch. 2, § 21 (1979) (Isr.). For compensation, see Trust Law, 5739-1979, ch. 1, § 8(a) (Isr.); see also MAURIZIO LUPOI, TRUSTS: A COMPARATIVE STUDY 279-80 (Cambridge Univ. Press 2000).

⁷⁸ Trust Property Control Act 55 of 1988 § 1 (as amended) (S. Afr.).

⁷⁹ Trusts (Scotland) Act, 1961; Law Reform (Scotland) Act, 1968; see also R. Evans-Jones, *Civil Law in the Scottish Legal Tradition*, in CIVIL LAW TRADITION IN SCOTLAND *passim* (1995); D.M. WALTER, A LEGAL HISTORY OF SCOTLAND, EDINBURGH 1988-95 (1996); R. Burgess, *Thoughts on the Origins of the Trust in Scots Law*, JUR. REV. 196 (1974).

⁸⁰ The trust finally entered the Quebec civil code in 1994 on the heels of a great controversy as to whether the trust in its quintessential aspects could be assimilated consistent with civil law property principles (as per the Napoleonic Code). Civil Code of Québec, S.Q. 1994, art. 1274

the Napoleonic Code only adopted the trust in all its applications in 1964, but did so allowing the individual to qualify.⁸¹

Finally, other civil law jurisdictions adopting the trust and allowing the individual to qualify have developed their trust laws either by directly appropriating a statute from a common law jurisdiction or by relying on a common law advisor to draft their respective statute. Examples include the Russian Federation where English and American law firms have been responsible for drafting code provisions relating to the trust as part of an ongoing process of economic privatization.⁸² In Ethiopia, draftspersons relied heavily on the English Trustee Act of 1925 in creating the trust provisions of the Ethiopian civil code of 1960.⁸³ Liechtenstein relied on the English Trustee Act of 1925 to draft the *Personen- und Gesellschaftsrecht* which introduced the trust or *Treuhanderschaft*.^{84, 85}

(Can.); *see also* MAURIZIO LUPOI, *TRUSTS: A COMPARATIVE STUDY* 287 (Cambridge Univ. Press 2000).

⁸¹ LA. REV. STAT. ANN. § 9:1783 (2005); *see also* J.M. Wisdom, *A Trust Code for the Civil Law, Based on the Restatement and Uniform Acts*, 13 TUL. L. REV. 79 (1938). The trust was originally introduced in Louisiana in 1882 in the form of public interest (or charitable) trusts. The impetus to the introduction of this legislation was to permit Paul Tulane to create an endowment for Tulane University.

⁸² *Sobranie aktov Prezidenta i Pravitelstva* [Decree of President of Russian Federation], SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 1993, No. 2296, Item 1 § 6, para. 100 [hereinafter Decree No. 2296]. Note that trust beneficiaries cannot be trustees under Decree No. 2296, which was followed by regulations dated February 1st, 1994.

⁸³ ETHIOPIAN CIVIL CODE OF 1960 §§ 516-537; *see also* Le Trust dans le code civil ethiopien, Preface de Rene David (1975).

⁸⁴ Liechtenstein, *Personen- und Gesellschaftsrecht*, 1926 (amended 1980), art. 897 (Liech.). In 1928, section 932a on Treuunternehmen, consisting of 170 articles, was added. *See* MAURIZIO LUPOI, *TRUSTS: A COMPARATIVE STUDY* 280 (Cambridge Univ. Press 2000); *see also* GUIDO MEIER, *LIECHTENSTEIN IN TRUSTS IN PRIME JURISDICTIONS* 209 (2006) (“Treuhand (Trustee or Salmann) im Sinne dieses Gesetzes is diejenige Einzel-person, Firma oder Verbandsperson . . .”).

⁸⁵ Five civil law countries might be deemed outliers within the analysis promoted here. Four of these non-conforming jurisdictions—Costa Rica, Argentina, Uruguay, and, outside Latin America, China—permit the individual to qualify, even though none of these countries has been colonized by a common law country or has ever been a semi-autonomous jurisdiction within a common law country. Ley 24.441, art. 5, 9 Jan. 1995 (Arg.); *Zhonghua Renmin Gongheguo Xintuo Fa* [Trust Law of the People's Republic of China] (promulgated by President, Apr. 28, 2001, effective Oct. 1, 2001) 74 ST. COUNCIL GAZ. 16 § 2, art. 24 (China), *available at* http://www.gov.cn/english/laws/2005-09/12/content_31194.htm; CODIGA DE COMMERCIALES §§ 633-662 (Costa Rica); Ley Organica del Sistoma Bancario National, c. 10 (Costa Rica); Law No. 17703 (Nov. 26, 2003) (Uru.); *see also* MAURIZIO LUPOI, *TRUSTS: A COMPARATIVE STUDY* 273 (Cambridge Univ. Press 2000). Further, with respect to these jurisdictions, there is no evidence of a common law adviser nor is there evidence that any of these countries relied closely upon a common law statute as they themselves attempted to draft legislation authorizing the trust.

e. Appeal of the regulated trustee in civil law jurisdictions.

The frequent civil law requirement that the trustee be a regulated entity is noteworthy in light of the longstanding distaste that the civil law has shown the trust. Recall that the political values associated with the French Revolution and embedded in the Code Napoleon rendered the common law trust anathema, a threat to the bourgeois republic that potentially allowed wealthy landowners to circumvent aspects of the new property regime deemed integral to the new order.⁸⁶

If there are civil law jurisdictions that have now seen the utility of the trust, the requirement that the trustee be a regulated entity suggests that these jurisdictions remain unprepared to embrace the institution completely and that in fact they are prepared to forego some of the inherent flexibility of the trust in order to constrain the uses to which it can be put. If the trust is seen as potentially a way to avoid or indeed thwart essential elements of the civil law property regime, subjection of trustees to a regulatory apparatus vests those authorities with enormous power to constrain the settlor's discretion by denying him a counter-party where trust terms would otherwise circumvent fundamental norms.

Part III: Insights from the Common Law Reformation

While many civil law countries have been busy precluding the individual from qualifying as trustee, the American academic bar has undertaken to reform the core doctrines that inform the concept of the trust and govern fiduciary duty, but with seemingly scant attention to the perquisites of fiduciary office.⁸⁷ Although this literature has acknowledged the utility of the professional trustee on prudential grounds (especially in light of the change in the typical modern *res* from land to financial assets), this body of work contains no suggestion that the law should constrain the settlor's ultimate discretion in choosing an individual trustee, professional or

Finally, a fifth country, Japan, is non-conforming in ways that are the flip-side of the other four. Even though Japan (like Liechtenstein and Ethiopia) relied on a common law statute to amend its code to include the trust, Japan precludes the individual from qualifying and permits only banks (six banks in particular) to serve. Shintako Ho [Trust Law], Law No. 62 of 1922 (Japan); *see also Japan*, in INTERNATIONAL TRUST LAW, A219-A21.11.

⁸⁶ *See supra* Part II.a.

⁸⁷ The primary exponent of this movement has been Professor John Langbein, but others have participated as well. *See* John Langbein, *Reversing the Nondelegation Rule of Trust-Investment Law*, 59 MO. L. REV. 105 (1994); John Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625 (1995); John Langbein, *The Mandatory Rules in the Law of Trusts*, 98 NW. U.L. REV. 1105 (2004); John Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165 (1997); John Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing*, 81 IOWA L. REV. 641 (1996). Other scholars involved in this movement include Frank H. Easterbrook, Daniel R. Fischel, Robert H. Sitkoff, and Melanie B. Leslie. *See* Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425 (1993); Melanie B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 GEO. L.J. 67 (2005); Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621 (2004).

otherwise. The reason for this omission is clear upon consideration of the essential nature of the trust that this movement explicitly promotes. But beyond the concerns for the contemporary applications of the trust that are at the forefront of this movement, aspects of this literature indicate more fundamental reasons that the common law has always taken a permissive posture toward the individual trustee, reasons that go far beyond any contemporary requirements of the institution. Like many movements advocating change, this literature is as much about renewal as reform and what it advocates is at base the recovery and restoration of essential elements of the authentic common law trust. As this literature points to those age-old elements of the institution, it provides a window into deep normative biases in the common law understanding of property that underpin and indeed require the continuing vitality of the individual trustee. In short, in this literature the individual trustee remains an option – and an important one -- for reasons consistent with the doctrine advocated and indeed the one recovered.

a. Trust as contract.

This recent American literature of reform has promoted a cluster of ideas, the most important of which is that the trust is founded in contract. The trust is a “deal,” it is said, “a bargain about how the trust assets are to be managed and distributed.”⁸⁸ This claim is offered as the final sortie in a long-running battle concerning the fundamental nature of the trust – whether it is a creature of contract or of property. The modern chapter in the controversy dates at least from the era before the first Restatement of Trusts when the central figures were Frederic W. Maitland, the great scholar of the common law, and Austin W. Scott, the author of the Restatement. In his venerated lectures on Equity, Maitland allowed that the trust was in essence a contract. As early as the 14th century, observed Maitland, when the English Chancellor began to enforce the trust it was as “a contractual right, a right created by a promise.”⁸⁹ Be this as it may, however, several decades later, in 1917, Scott published an article in which, while recognizing “that in the creation of a ... trust there are often found all the elements ... of a contract,”⁹⁰ it is nevertheless the “undertaking” of fiduciary obligation and responsibility, Scott maintained, that is the basis of the trust. “A fiduciary is a person who undertakes to act in the interest of another person” and whether the role emerges from the quid-pro-quo of the contract or in a gratuitous act is immaterial. It is the presence of the role – with the set of attendant obligations -- that matters. A trust exists when a trustee is in place and acting in the role – that is, when the settlor has transferred to the trustee a *res* to manage subject to the requirements of fiduciary responsibility.⁹¹

As the author of the Restatement, Scott had the last word, at least until recent times. The language of the first Restatement (published in 1935) in the ordinary course found its way into the second Restatement (published in 1959) so that for many subsequent decades attorneys were

⁸⁸ John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 627 (1995). Equity interests would then arise as third-party beneficiaries of the contract.

⁸⁹ FREDERIC W. MAITLAND, *EQUITY: A COURSE OF LECTURES* 28-29, 110 (John Brunyate ed., rev. ed., 2d ed. 1936) (A.H. Chaylor & W.J. Whittaker eds., 1909). The beneficiary of the trust enters as beneficiary of third-party-beneficiary contract.

⁹⁰ Austin Wakefield Scott, *The Nature of the Rights of the Cestui Que Trust*, 17 COLUM. L. REV. 269, 270 (1917).

⁹¹ Austin Wakefield Scott, *The Fiduciary Principle*, 27 CALIF. L. REV. 539, 540-41 (1949).

encouraged to take Scott's view as authoritative. Throughout much of the twentieth century, in common law jurisdictions the trust was taken as a matter of law to be founded in a transfer of property subject to fiduciary duty.⁹²

In making the case that the trust is a bargain, the intent of this contemporary literature is to cut the ground from Scott's position and restore the advantage to Maitland once and for all. But this recent literature of doctrinal reformation does not resurrect the colloquy between Maitland and Scott and parse the elements of it in the mere pursuit of analytical integrity. At base, in the modern literature, the question of the nature of the trust – whether it is a creature of contract or of property – is important because it bears upon the requirement of particular terms – terms that in the ascendancy of Scott were taken as necessary to the creation of the fiduciary office and thus the trust itself.

An argument could be made that, in truth, the trust sits at the intersection between contract and property, incorporating elements of both. That is to say, any trust will include essentialist terms (a core list of fiduciary duties that are together constitutive of the office) as well as other terms that are included as a matter of agreement between the parties. But for purposes of this recent literature this solomonic view misses the point. With respect to any particular trust provision, whether the analytical vector toggles toward “contract term” or “property term” governs the amount of discretion the settlor has in including it in any given trust agreement. If terms are essentialist, they are required if what results is to be a trust. If they are not, then they are included at the discretion of the parties. By revisiting the disagreement between Maitland and Scott and taking Maitland's part, the modern literature lays the foundation to secure broad discretion in the settlor for purposes of crafting trust terms.

b. Default rules.

That the objective of the contemporary literature is to free the hand of the settlor becomes evident upon review of the second in the cluster of ideas promoted by the recent common law literature. Closely allied to the idea that the trust is a contract is a second claim -- that virtually all elements of fiduciary duty, components of the heretofore punctilio of honor, are simply default rules.⁹³ Most of those elements of fiduciary duty previously deemed essential are not required terms in any trust agreement. Rather, properly understood, these rules have the normative status of terms in a hypothetical bargain, the agreed-upon objectives of a hypothetical settlor and hypothetical trustee establishing a garden-variety trust.⁹⁴ Because these elements of

⁹² RESTATEMENT (FIRST) OF TRUSTS § 197 cmt. b (1935) states: “The creation of a trust is conceived of as a conveyance of the beneficial interest in the trust property rather than as a contract.” RESTATEMENT (SECOND) OF TRUSTS § 197 cmt. b (1959) adds: “Although the trustee by accepting the office of trustee subjects himself to the duties of administration, his duties are not contractual in nature.” Note also the requirement of a *res*: “A trust cannot be created unless there is trust property.” RESTATEMENT (SECOND) OF TRUSTS § 74 (1959).

⁹³ John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 628, 634 (1995).

⁹⁴ Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425 (1993).

fiduciary duty are only default rules, settlors can opt out with respect to all terms except the most minimal (for example, that the resultant agreement benefit the beneficiary). As a further implication of the position that the trust is essentially a contract, the claim that most of the historical components of fiduciary duty are default rules leaves enormous discretion in the hands of the settlor in determining which terms are included – and which are not.

c. Civil law alignment.

The claim in this recent literature that the trust is a creature of contract would seem to align the common law trust with the civil law model.⁹⁵ (We will return to the question of default rules momentarily.) In civil law jurisdictions, core principles of property embedded in the civil law courtesy of the French Revolution (such as unity of title) have meant that, if the trust was to be introduced, it could not be conceived as a property institution but could only be understood to arise by means of contract, one between the settlor and the trustee. Thus, in this common law literature the effort to reinvigorate Maitland's view of trust-as-contract would appear to draw the common law alongside the civil law with respect to the conceptual foundation of the trust.

And other ideas promoted in this recent American literature would also seem to make the common law trust of a piece with the new civil law version. For example, this literature seems to announce a certain similarity between the two trusts – at least in this era -- with the claim that, just as the civil law trust is in some jurisdictions used exclusively for commercial transactions, the present day common law trust is commonly an investment vehicle.⁹⁶ Indeed, this literature takes another step here and tries to raise the legal profile of what was previously only a bit-part player in the annals of the common law -- the commercial trust, the form of the common law trust that appears (as in civil law countries) in the quid-pro-quo of the marketplace.⁹⁷ But further, this literature continues, pressing yet another point -- that, of late, even the intra-familial donative trust, is, like the commercial trust, best understood as an entity operating in the stream of commerce. No longer is the intra-familial trust born of paternalism, erected to conserve assets and otherwise secure the fortunes of the vulnerable within the family, but this trust is now commonly established to implement sophisticated tax strategies and holds a portfolio of complex financial instruments.⁹⁸ Once only an asset-conservation vehicle,⁹⁹ the intra-familial trust is now

⁹⁵ John Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 629 (1995).

⁹⁶ John Langbein & Richard A. Posner, *Market Funds and Trust Investment Law*, AM. B. FOUND. RES. J. No. 1 (1976); see also John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165 (1997); John Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing*, 81 IOWA L. REV. 641 (1996).

⁹⁷ This is also part of the legacy of Scott. See John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165, 166 (1997).

⁹⁸ See Iris J. Goodwin, *How the Rich Stay Rich: Using a Family Trust Company to Secure a Family Fortune*, 40 SETON HALL L. REV. 457, 487-88 (2010).

⁹⁹ Until the late twentieth century, the trust and attendant fiduciary duties were formed on a medieval model where the trust facilitated the conveyance of land within the family and the fiduciary posture is one of risk-aversion. 2 FREDERICK POLLOCK & FREDERIC W. MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD 1*, 231, 237-38 (2d ed. 1898); see also John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 633 (1995);

best understood like the commercial trust, as operating in the stream of commerce and taking risks accordingly. Whether the common law trust is to be used for family financial purposes or as a trust established purely as a vehicle in the marketplace, today the common law trust is likely to be operating – like the civil law trust -- in the stream of commerce.

d. Settlors rule.

In claiming that the prototypical trust today is created to serve as an investment vehicle operating in the stream of commerce, the common law literature of reform seeks to register a paradigm shift. The law is no longer appropriately framed around the intra-familial donative trust, the trust where historically the lack of parity between beneficiary and trustee justified Scott's rigorous view of fiduciary duty as an antidote to exploitation. Rather, the paradigmatic common law trust is now an investment vehicle holding complex financial interests – perhaps established for family reasons, perhaps to function in the larger marketplace – but in all events operating in the stream of commerce.¹⁰⁰

This particular paradigm shift – registering a change both in the nature of the *res* and in what is to be done with it -- might seem to herald a commensurate sea-change in thinking about the fiduciary. A *res* of complex financial assets operating in the stream of commerce would seem to call for regulations *ex ante* applicable to trustees, requirements for the office that would potentially preclude the individual from qualifying. While this literature of reform recognizes that, given the modern *res*, a professional trustee is a prudent choice, there is no suggestion here that the law should stipulate criteria of fiduciary competence to govern the selection of trustees *ex ante* or that the office should be restricted (as in many civil law countries) to regulated entities.¹⁰¹ Indeed, rather than upping the ante for the would-be trustee, in this literature, the location of the trust in the stream of commerce serves instead as yet another reason to attenuate Scott's view of the fiduciary role as born of vulnerability and entailing an unyielding set of duties. So attenuated, the common law standards of fiduciary duty – and indeed the concept of fiduciary duty itself – stand ready to be framed in the expectation that market mechanisms will dissuade the fiduciary from most forms of opportunistic behavior.¹⁰²

The reason that this literature does not constrain the settlor's discretion regarding the individual trustee, paradigm shift notwithstanding, becomes evident upon placing this paradigm shift alongside those other ideas promoted by the reform movement – that the trust is a creature

Stewart Sterk, *Rethinking Trust Law Reform: How Prudent is Modern Prudent Investor Doctrine?*, 95 CORNELL L. REV. 851 (2010).

¹⁰⁰ See John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165, 166 (1997); see also Iris J. Goodwin, *How the Rich Stay Rich: Using a Family Trust Company to Secure a Family Fortune*, 40 SETON HALL L. REV. 457, 488 (2010).

¹⁰¹ John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 638-39 (1995).

¹⁰² This means that, for example, the long-embraced “no-further-inquiry rule,” the legal undergirding of the previously sacrosanct proscription against trustee self-dealing readily gives way to the standard for corporate directors and even this becomes a default rule. See Melanie B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 GEO. L.J. 67, 79 (2005).

of contract and that almost all rules of fiduciary duty are default rules. Taken alone with the view that the trust is a contract, the claim that in these times the typical trust is most likely an investment vehicle might appear to bring the common law trust alongside the civil law version. But when taken together with the view of the trust as contract and fiduciary duty as largely consisting of default rules, a profounder implication arises. It starts to appear that those ideas promoted in the movement of doctrinal reform are calculated to free the settlor's hand in shaping trust terms and indeed in devising fiduciary duties appropriate to the specified terms.

If the settlor's hand is to be free in any meaningful sense, however, he needs a willing counter-party. The individual trustee continues to appeal because he is more likely to agree to serve under a trust agreement incorporating innovative terms than is a corporate entity subject to governmental regulation. Regulations are put in place to minimize risk to particular institutions and to the entire financial services industry. Consequently, regulated trustees tend to be risk-averse and develop internal policies accordingly. Settlers can include cutting-edge terms, but in deciding whether to serve under such instruments, regulated trustees often construe existing laws against themselves, in the expectation that courts will continue to take the elements of fiduciary duty as mandatory and impose upon them the draconian remedies that have been part and parcel of the rigorous regime. And this reluctance often persists even where the trust agreement explicitly releases the fiduciary from duties previously thought absolute.¹⁰³

Ideas at the heart of this reformation suggest deep normative biases in the common law that underpin the continued vitality of the individual trustee. The most important of these biases is a willingness in the common law to tolerate – indeed to embrace -- the trust as a vehicle by which a settlor, adopting innovative trust terms, can manipulate aspects of the property regime and precipitate change. Indeed, during the period in which this literature of reformation has appeared, settlers in the U.S. using the trust have produced a reconsideration of assumptions underlying the recent movement to eliminate the rule against perpetuities. Until quite recently this rule limiting the time horizon of a trust was thought a needless vestige of the era when the typical trust asset was land and assets were rarely traded. Elimination of the rule was thought a mark of progress – that is, until states started repealing it. Immediately upon its repeal, wealthy settlers embraced the reform, establishing “Dynasty Trusts,” perpetual trusts that use the repeal of the rule to avoid the transfer tax regime, creating family endowments of a magnitude and permanence that they potentially jeopardize the rough equality that is a background condition to healthy democracy.¹⁰⁴ The advent of the Dynasty Trust has summoned the academic bar to reconsider the rule and, rather than advocate its repeal, recognize anew the reasons to limit the time horizon of trusts.¹⁰⁵

That the trust is a catalyst to legal change is not a new idea. In fact, the trust was born as a catalyst to change, a point not overlooked by Maitland:

¹⁰³ Iris J. Goodwin, *How the Rich Stay Rich: Using a Family Trust Company to Secure a Family Fortune*, 40 SETON HALL L. REV. 457, 479-81 (2010).

¹⁰⁴ Iris J. Goodwin, *How the Rich Stay Rich: Using a Family Trust Company to Secure a Family Fortune*, 40 SETON HALL L. REV. 457 *passim* (2010).

¹⁰⁵ RESTATEMENT (THIRD) OF TRUSTS ch. 27 (Tentative Draft No. 6, 2010).

Feudalism had ceased to be useful, it had become a system of capricious exactions – it was very natural and not dishonourable that men should attempt to free themselves from the burdens or reliefs and wardships and marriages, from the terribly severe law of forfeiture and escheat for crime, that they should wish to make wills of land or go very near to making them.¹⁰⁶

Maitland clearly views the trust here as a progressive instrument, a tool where outmoded elements of the legal regime could be circumvented. Of course, the impetus at work here – settlers seeking to avoid inconvenient or unprofitable aspects of the law – is the same agency that was in play in the *substitution fiduciaire*, a device the French viewed as thwarting fundamental principles of justice. The question is whether the trust – the instrumentality to which the common law has long given quarter -- is ultimately a progressive instrument or a reactionary one. As with most libertarian agencies, the exercise of individual discretion produces outcomes that are as difficult to predict as they are hard to control. Settlor's discretion is effectively a wild card and, whether in any given circumstance it serves progressive or reactionary purposes, turns on where this agency falls on the arc of history.

¹⁰⁶ F.W. MAITLAND, EQUITY—ALSO THE FORM OF ACTION AT COMMON LAW—TWO COURSES OF LECTURES 29 (A.H. Chaytor & W.J. Whitaker eds., 1929).