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## **Why Did Trust Law Become Statute Law in the United States?**

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## WHY DID TRUST LAW BECOME STATUTE LAW IN THE UNITED STATES?

*John H. Langbein*\*

The Uniform Trust Code,<sup>1</sup> the first national-level codification of the American law of trusts,<sup>2</sup> was promulgated in 2000. The Code was the product of a five-year Uniform Law Commission drafting process that entailed extensive consultation with the trust and estates bar and the trust banking industry. The Code is being widely enacted. Eighteen states and the District of Columbia have thus far adopted it,<sup>3</sup> and many others are likely to follow. Alabama's enactment comes into effect in 2007.<sup>4</sup> For the future, trust law in Alabama and the other Code states will be prevailingly statute law, although the principles developed in prior case law will continue to inform the interpretation and application of the Code.<sup>5</sup>

In one sense, the Code marks a great departure by codifying a previously uncodified field. In another sense, however, the Code is simply the latest step in a trend toward statutory intervention in American trust law that has been underway for decades. If we focus on the Uniform Laws, and I shall have more to say about why uniform legislation has so characterized the trust field, we can identify a steady progression of enactments from the 1930s onward.

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\* Sterling Professor of Law and Legal History, Yale University. This Article originated as the Meador Lecture on Fiduciaries, presented at The University of Alabama School of Law on April 6, 2006. Regarding the Uniform Acts discussed in this Article, I should say that I serve as a Uniform Law Commissioner and was a member of the drafting committees for Uniform Trust Code (2000) and the Uniform Principal and Income Act (1997); I acted as the reporter for the Uniform Prudent Investor Act (1994). The views expressed in this Article do not represent the Uniform Law Commission.

1. UNIF. TRUST CODE (amended 2005), 7C U.L.A. 407 (2006) [hereinafter UTC], available at <http://www.law.upenn.edu/bll/ulc/uta/2005final.htm>.

2. Regarding the coverage of the Code and its main substantive reforms, see David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MO. L. REV. 143 (2002). See also John H. Langbein, *The Uniform Trust Code: Codification of the Law of Trusts in the United States*, 15 TR. L. INT'L 66 (2001).

3. National Conference of Commissioners on Uniform State Laws, Uniform Trust Code, [http://www.nccusl.org/Update/uniformact\\_factsheets/uniformacts-fs-utc2000.asp](http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-utc2000.asp) (last visited Mar. 19, 2007).

4. ALA. CODE § 19-3B-101 (West Supp. 2006).

5. See UTC § 106 ("The common law of trusts and principles of equity supplement this [Code], except to the extent modified by this [Code] or another statute of this State.").

## I. THE TWENTIETH-CENTURY UNIFORM ACTS

Five rounds of uniform legislation were centrally important in shaping modern trust law before the Uniform Trust Code. In order of promulgation, they are as follows:

- (1) The Uniform Principal and Income Act of 1931,<sup>6</sup> subsequently revised in 1962<sup>7</sup> and 1997,<sup>8</sup> which addressed the problems of allocating receipts, especially investment proceeds, and also expenses, between life and remainder interests in trusts;
- (2) The Uniform Trusts Act of 1937,<sup>9</sup> and the Uniform Act for Simplification of Fiduciary Security Transfers of 1958,<sup>10</sup> which smoothed the purchase and sale of securities for trust accounts by relieving a party transacting with a trustee from the former duty to investigate the trustee's authority to engage in the transaction.<sup>11</sup>
- (3) The Uniform Common Trust Fund Act of 1938,<sup>12</sup> which overcame the rule against commingling trust funds<sup>13</sup> in order to allow bank trust departments to pool small trust accounts for investment purposes.
- (4) The Uniform Trustees' Powers Act of 1964,<sup>14</sup> which bestowed upon trustees a full range of transactional and managerial powers respecting trust property, especially buying, selling, voting, and otherwise dealing with securities; and
- (5) The Uniform Prudent Investor Act of 1994,<sup>15</sup> now enacted in 45 states<sup>16</sup> and emulated in nonuniform legislation in virtually all the rest, which supplies the default standard of care for investing and managing trust assets, replacing an older and widely enacted

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6. 7A U.L.A. 593 (2006).

7. *Id.* at 547.

8. *Id.* at 363.

9. 7C U.L.A. 954 (2006).

10. *Id.* at 328.

11. The principle was continued in the Uniform Trustees' Powers Act § 7 (1964), 7C U.L.A. 685, 718-19, and is now codified as UTC § 1012 (amended 2005). The subject is discussed in Peter T. Wendel, *Examining the Mystery Behind the Unusually and Inexplicably Broad Provisions of Section Seven of the Uniform Trustees' Powers Act: A Call For Clarification*, 56 MO. L. REV. 25 (1991).

12. 7 U.L.A. 175 (2002).

13. *See infra* text accompanying note 56.

14. 7C U.L.A. 685.

15. 7B U.L.A. 1 (2006).

16. *See* National Conference of Commissioners on Uniform State Laws, Uniform Prudent Investor Act, [http://www.nccusl.org/Update/uniformact\\_factsheets/uniformacts-fs-upria.asp](http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-upria.asp) (last visited Mar. 19, 2007).

statute, the Model Prudent Man Act, drafted by the American Bankers Association in the 1940s.<sup>17</sup>

When codifying American trust law for the twenty-first century, the Uniform Trust Code perpetuated the substance of all five of these twentieth-century Uniform Law initiatives.<sup>18</sup>

What explains the trend across the twentieth century to recast the law of trusts from a field of case law into one of statute law? We are not surprised that relatively new fields such as pension law or condominium law should have a largely statutory basis. These fields developed too recently and too rapidly for the accretive processes of the common law to have been able to supply timely and adequate guidance. But trust law is an ancient field. The enforcement of trusts in the English court of Chancery can be traced back to the late fourteenth century,<sup>19</sup> and there is some indication that the courts of the English church may have been enforcing trusts even earlier.<sup>20</sup> Why, then, the movement to turn trust law into statute law in the twentieth century?

My answer is that the trust of today bears only a distant relationship to the trust of former centuries. The trust that we know is mainly a creature of the twentieth century; accordingly, common law processes of incrementalism were no more suitable for today's trust law than for the regulation of nuclear power plants.

Consider the five Uniform Acts to which I have pointed and ask what these statutes have in common. They share a dominant purpose, further discussed in Part III of this Article, which is to facilitate the use of financial assets as trust investments. That is not, however, what trusts were originally meant to do.

## II. THE MANAGEMENT TRUST<sup>21</sup>

The trust originated as a device for transferring real property, at a time when real property constituted the main form of wealth. Trust conveyancing allowed an owner to escape the medieval rule, which lasted into the seventeenth century, that freehold land was not devisable. Land that was transferred on death had to descend by intestacy rather than pass by will. The intestate regime of the time was, however, riddled with disadvantages. A widow was restricted to the one-third life estate called dower; primogeniture

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17. See Mayo Adams Shattuck, *The Development of the Prudent Man Rule for Fiduciary Investment in the United States in the Twentieth Century*, 12 OHIO ST. L.J. 491 (1951).

18. See *infra* text accompanying notes 37, 41, 51, 59, 73, and references therein.

19. A petition to enforce a trust dating from the 1390s is reproduced in 10 SELECT CASES IN CHANCERY: A.D. 1364 TO 1471, at 48 (William Paley Baildon ed., Selden Soc'y 1896).

20. See R.H. Helmholz, *The Early Enforcement of Uses*, 79 COLUM. L. REV. 1503, 1504 (1979).

21. I have discussed the emergence of the management trust in earlier works. See John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 632-43 (1995) [hereinafter Langbein, *Contractarian Basis*]; John H. Langbein, *Rise of the Management Trust*, TR. & EST., Oct. 2004, at 52 [hereinafter Langbein, *Management Trust*].

awarded the entire remaining estate to the eldest male heir if any; transfer taxes known as feudal incidents were exacted when an heir succeeded to an ancestor's estate; and minors and unmarried females suffered further disadvantages in heirship.<sup>22</sup>

Trust conveyancing deftly evaded this medieval law of succession. The owner of land, the person whom we now call the settlor, would transfer the land to a trustee or trustees, who were commonly relatives or gentlemen friends, subject to trust terms that functioned like a will. Thus, for example, a settlor might transfer land to trustees to hold it for himself and his spouse for their lives, and upon the death of the survivor, to transfer it in equal shares among his children. In that simple example, trust conveyancing allowed the settlor (1) to escape the feudal incidents, (2) to triple his widow's interest from the one-third life estate of dower, and (3) to defeat primogeniture by making equal provision for all his children.

There is nothing novel, therefore, about our modern understanding<sup>23</sup> that a trust can function as a will substitute. What is new is that the characteristic trust asset has ceased to be ancestral land and has become instead a portfolio of marketable securities. Long into the nineteenth century, the trust was still primarily a branch of the law of conveyancing, that is, the law of real property. The early treatises on trusts, Gilbert<sup>24</sup> (three editions from 1734 to 1811) and Sanders<sup>25</sup> (five editions from 1791 to 1844) are exclusively devoted to land transfer and landed estates. The modern trust, by contrast, is primarily a management device for assembling and administering a portfolio of financial assets.<sup>26</sup> The management trust has developed in response to the movement away from family real estate as the predominant form of personal wealth. Most modern wealth takes the form of financial assets—corporate shares, government and corporate bonds, insurance contracts, pension and annuity interests, bank accounts, interests in pooled investment vehicles such as mutual funds, and so forth. Indeed, even investments in real estate are increasingly held in financially intermediated forms, such as shares in real estate investment trusts (REITs), or pooled mortgage obligations, such as collateralized mortgage obligations (CMOs). Roscoe Pound captured the essence of this transformation in the nature of wealth in a wonderful epigram that I find myself quoting often: “Wealth, in a commercial age,” he said, “is made up largely of promises.”<sup>27</sup>

Modern trust property typically consists of a portfolio of these complex financial assets, which are contract rights against the issuers.<sup>28</sup> Such a port-

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22. See 4 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 442-48 (3d ed. 1924) (discussing these rules).

23. See RESTATEMENT (THIRD) OF TRUSTS § 25 cmt. a (2003).

24. SIR GEOFFREY GILBERT, THE LAW OF USES AND TRUSTS (London, 3d ed. 1811).

25. FRANCIS WILLIAMS SANDERS, AN ESSAY ON USES AND TRUSTS (London, A. Maxwell & Son, 5th ed. 1844).

26. See Langbein, *Contractarian Basis*, *supra* note 21, at 632-43; Langbein, *Management Trust*, *supra* note 21, at 52-53.

27. ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 236 (1922).

28. To be sure, a family farm or residence still sometimes passes in trust, but financial assets consti-

folio requires skilled and active management. Investment decisions must be made, monitored, and readjusted—work that is now called in the jargon of the trade asset allocation and portfolio rebalancing. Proxies must be voted, revenues collected and distributed, expenses paid, records and reports compiled, and tax returns prepared. Assets such as close corporation, partnership, or royalty interests can require especially active and skilled trust administration. By contrast, under the old conveyancing trust that held ancestral land, the beneficiaries commonly lived on the land and managed it. The trustees had few powers or duties beyond holding the property and then conveying it to the remainder beneficiaries when the life interests expired. Trustees of that sort resembled stakeholders or nominees much more than managers.

Because old-style trustees had so little to do, they needed little in the way of powers, which is exactly what the default law of trusts gave them.<sup>29</sup> Disempowering trustees served an important protective policy for trust beneficiaries. Restricting trustees' transactional powers limited the harm they could do to the trust beneficiaries. When, however, financial assets came to displace family land as the characteristic form of wealth held in trust, trustees had to be suitably empowered for the work of portfolio management. Because investing and managing financial assets requires extensive discretion to respond to changing market forces, trust law had to make a 180-degree turn to accommodate the management trust. Empowerment replaced disempowerment, and in consequence, trust fiduciary law underwent an immense expansion from quite modest roots for the purpose of safeguarding beneficiaries from abuse of trustees' new powers.<sup>30</sup>

This transformation in the character and function of trusteeship required legislation, either to clear away older inconsistent law or to facilitate the workings of the management trust. Look again at the functions served by the twentieth-century Uniform Acts that I emphasized above, with attention to their role in the rise of the management trust.

#### *A. Transactional Empowerment*

Traditional trust law hampered the transactional capacity of trustees not only by withholding transactional powers but also by deterring market actors from dealing with trustees. The law required a party who knew or had reason to know that he or she was transacting with a trustee to “make an inquiry as to the terms of the trust in order to ascertain whether and under what circumstances the trustee is empowered to make the transfer.”<sup>31</sup> The

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tute the vast majority of trust property.

29. See, e.g., 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA §§ 977-978, at 242 (1836) (stating that the trustee lacks powers of sale and purchase).

30. Regarding the origins of trust fiduciary law, see Langbein, *Management Trust*, *supra* note 21, at 54.

31. RESTATEMENT (SECOND) OF TRUSTS § 297 cmt. f (1959).

reach of this rule was magnified by the earmarking rule that trustees had to take title to trust assets “as trustees.”<sup>32</sup> Earmarking of title documents had the effect of placing a transacting party on notice to inquire into a trustee’s power of sale or purchase. Since trustees had no intrinsic powers, a prospective transactional party had to demand and study the trust instrument in order to determine whether the trust authorized the trustee to transact with the trust asset in the way that the pending deal envisaged. Thus, every transaction with a trustee became a research project. Not surprisingly, these notice and liability rules “effectively deter[red] third parties from dealing with trustees.”<sup>33</sup>

Legislation was needed to overcome these rules, and thus to open the securities and other markets to trustees. The Uniform Trusts Act of 1937,<sup>34</sup> the Uniform Act for Simplification of Fiduciary Security Transfers of 1958,<sup>35</sup> and comparable nonuniform legislation eliminated the duty to investigate the trustee’s authority to transact with securities. The Uniform Trustee Powers Act of 1964 carried forward this principle, authorizing a party dealing with a trustee to assume “the existence of trust powers and their proper exercise by the trustee.”<sup>36</sup> The Uniform Trust Code codifies the reform.<sup>37</sup>

The main mission of the Uniform Trustee Powers Act was to equip trustees as a matter of default law with essentially unlimited transactional authority.<sup>38</sup> The Act allowed trustees “to perform, without court authorization, every act which a prudent man would perform for the purposes of the trust.”<sup>39</sup> In support of that policy, the Act propounded a lengthy list of specific powers, most prominently those authorizing the purchase, management, and sale of securities, and the hiring of service providers such as accountants, brokers, and lawyers.<sup>40</sup> The Uniform Trust Code codifies this regime.<sup>41</sup>

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32. *Id.* § 179 cmt. d.

33. Wendel, *supra* note 11, at 31.

34. UNIF. TRUSTS ACT OF 1937 (withdrawn 1984), 7C U.L.A. 954 (2006).

35. UNIF. ACT FOR SIMPLIFICATION OF FIDUCIARY SEC. TRANSFERS OF 1958, 7C U.L.A. 328, *discussed in* Robert Braucher, *Security Transfers by Fiduciaries*, 43 MINN. L. REV. 193 (1958).

36. UNIF. TR. POWERS ACT § 7, 7C U.L.A. 718. The Act further provides that a transacting party “is not bound to inquire whether the trustee has power to act or is properly exercising the power.” *Id.* at 718-19. Moreover, a party acting “without actual knowledge that the trustee is exceeding his powers or improperly exercising them, is fully protected in dealing with the trustee as if the trustee possessed and properly exercised the powers he purports to exercise.” *Id.* at 719. Nominee legislation in every American state has overcome the main earmarking requirement, which made “it difficult to use corporate stock as a trust investment.” 6 WILLIAM F. FRATCHER, *INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW* § 79, at 62 (1973). Thus, trustees are now authorized to register trust holdings of corporate stock in a fashion that conceals the trust interest. *See id.* § 79, at 63-64.

37. UTC § 1012 (amended 2005).

38. *See* William F. Fratcher, *Trustees’ Powers Legislation*, 37 N.Y.U. L. REV. 627, 627-28 (1962).

39. UNIF. TR. POWERS ACT § 3(a), 7 U.L.A. 689 (2002).

40. *Id.* § 3(c), at 689-91.

41. UTC §§ 815-816.

*B. Allocating Expenses and Receipts*

Most family trusts make provision for multiple beneficiaries, often in succession, typically life and remainder interests.<sup>42</sup> In former times when ancestral land was the characteristic trust asset, distinguishing an income interest from the corpus of the trust was seldom problematic. The life beneficiaries commonly lived from the fruits and rental income of the land; the trustees then conveyed the land to the trust remainderpersons when the life interests terminated. By contrast, a trust containing financial assets requires the trustee to pay much more attention to apportioning the receipts and expenses of the trust between or among the different classes of beneficiaries. The trust settlor will often be unable to foresee and prescribe the treatment of portfolio events such as the partial liquidation of a corporation in which the trust owns shares. Accordingly, developing sound default rules for allocating trust receipts and expenses was a central precondition for the program of investing in financial assets that distinguishes the modern trust.

The core fiduciary principle governing these allocations is the duty of impartiality, which requires the trustee to act with “due regard”<sup>43</sup> to the life and remainder interests. That standard, although perfectly sound, did not supply suitably detailed guidance for trustees administering portfolios that were coming to hold ever more (and ever more complex) instruments of financial intermediation. The Uniform Principal and Income Act of 1931<sup>44</sup> addressed that need by prescribing default rules for the allocation of corporate distributions on trust-owned shares. The Act treats dividends on shares as reflecting earnings on trust assets, which belong to the income beneficiaries.<sup>45</sup> By contrast, the Act treats a distribution that functions as a change of form within the trust’s capital, such as a stock split or a merger or a liquidation, as belonging to the remainder interest.<sup>46</sup>

The 1931 Act effectively resolved a longstanding struggle in the case law between competing solutions, known as the Massachusetts and Pennsylvania rules, to the question of the trustee’s responsibility for characterizing receipts from trust-owned securities.<sup>47</sup> The Pennsylvania rule required the trust investor who received a distribution from a corporation (or other such payor) to probe the corporation’s characterization of the payment, and to make an independent determination of the true financial character of the distribution for trust purposes. The trustee receiving a dividend on trust-owned shares was obliged to investigate whether the corporation had in

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42. The Restatement says, “The typical private trust provides for successive enjoyment by different beneficiaries.” RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE § 227 cmt. i (1992).

43. “If a trust is created for beneficiaries in succession, the trustee is under a duty to the successive beneficiaries to act with due regard to their respective interests.” *Id.* § 232.

44. UNIF. PRINCIPAL AND INCOME ACT OF 1931, 7A U.L.A. 593 (2006).

45. *Id.* § 5(1), at 605-06.

46. *Id.* § 5(3)-(4), at 606.

47. 3A AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 236.3-5 (4th ed. 1988).

truth earned enough income to support the distribution, in order to decide whether the distribution constituted true earnings or was in function a return of capital that should be allocated to the trust's principal. Such investigations were costly and sometimes difficult or impossible to conduct effectively. The Massachusetts rule, by contrast, was form-preferring, that is, it allowed the trustee to rely upon the payor's characterization of the distribution. The 1931 Act followed the Massachusetts rule,<sup>48</sup> relieving trustees from the burden and expense of the investigations required under the Pennsylvania rule. By simplifying trust administration in this way, the Act materially facilitated trust investment in financial assets.

The 1931 Act was revised in 1962<sup>49</sup> and again in 1997<sup>50</sup> to take account of changes in investment practice, but the revisions did not alter the core policy decisions of the original Act. "Because [the 1997] Act addresses issues with respect both to decedent's estates and trusts," the drafters of the Uniform Trust Code endorsed the 1997 Act but left enacting states to decide whether "to include [the 1997 Act] as part of this Code or as part of its probate laws."<sup>51</sup>

### C. Facilitating Pooled Investments

Traditional trust law imposed a pair of rules (requiring earmarking and forbidding commingling of trust property) that required a trustee to keep personally owned property separate from property held in trust and to keep the property of different trusts separate from one another.<sup>52</sup> These rules prevented a trustee from favoring the trustee's own account or from playing favorites among trust accounts (for example, contending after the fact that a winning investment had been made for the trustee's account, whereas a loser had been bought for the trust, or for Trust A as opposed to Trust B).

These rules turned out to be overbroad as applied to the managerial trust, because they impeded trustees from pooling trust accounts for purposes of diversifying investments. As the immense advantages of diversifying investments<sup>53</sup> came to be better understood, trust law began to enforce a duty to diversify.<sup>54</sup> Because, however, most trusts are too small to construct a portfolio that is adequately diversified across available asset classes and issuers, effective diversification of smaller trust accounts required the abil-

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48. UNIF. PRINCIPAL & INCOME ACT OF 1931, ACT § 5, 7A U.L.A. 605-06, *refined by* UNIF. PRINCIPAL AND INCOME ACT, REVISED 1962 ACT § 6(b)-(e), 7A U.L.A. 572.

49. UNIF. PRINCIPAL & INCOME ACT, REVISED 1962 ACT, 7A U.L.A. 560.

50. UNIF. PRINCIPAL & INCOME ACT (1997 ACT), 7A U.L.A. 363.

51. UTC, prefatory note (amended 2005), 7C U.L.A. 364-65 (2006).

52. RESTATEMENT (SECOND) OF TRUSTS § 179 (1959).

53. I have discussed this point in detail in John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1111-15 (2004), and John H. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing*, 81 IOWA L. REV. 641, 646-49 (1996) [hereinafter Langbein, *Uniform Prudent Investor Act*].

54. The duty to diversify was recognized in the latter part of the nineteenth century. *See, e.g., In re Dickinson*, 25 N.E. 99 (1890).

ity to pool trust funds for investment. The main pooling device that emerged was the common trust fund, effectively an in-house mutual fund operated by a bank trust department.

Such funds required legislation to overcome the rule against commingling, which is what the Uniform Common Trust Fund Act of 1938<sup>55</sup> (and comparable nonuniform legislation) achieved.<sup>56</sup> In more recent times, as mutual funds have become the pooling vehicle of choice for investing trust funds,<sup>57</sup> the states have enacted legislation authorizing bank trust departments to invest in affiliated mutual funds.<sup>58</sup> The Uniform Trust Code codifies a version of this mutual fund enabling legislation.<sup>59</sup>

#### D. Fiduciary Investing

Although essential for the rise of the management trust, trustee empowerment came with an intrinsic downside. Disempowerment had been the primary safeguard for trust beneficiaries against misappropriation or maladministration of trust property by the trustee. Trustee empowerment exposed beneficiaries to the risk that powers meant to be used for their benefit could be used in ways that harmed their interests. Accordingly, trustee empowerment led to a vast expansion of trust fiduciary law, those rules of trust law that are meant to deter or—if necessary—to remedy misuse of trustee powers.

The two core fiduciary norms, the duties of loyalty and care (prudence), are longstanding,<sup>60</sup> but their field of application broadened materially as the management trust expanded the trustee's authority and activity respecting trust property. "Because asset management necessarily involves risk and uncertainty, the specific behavior of the fiduciary cannot be dictated in advance."<sup>61</sup> The duty of loyalty, which requires the trustee to administer the trust property "solely in the interest of the beneficiaries,"<sup>62</sup> responds "to the impossibility of writing contracts completely specifying the parties' obligations."<sup>63</sup> The other fundamental principle of trust fiduciary law, the duty of

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55. UNIF. COMMON TRUST FUND ACT OF 1938, 7 U.L.A. 175 (2002).

56. The official comment to the Act explains that "a common trust fund cannot legally be operated without statutory sanction, because its operation involves a mixture of trust funds." *Id.*, prefatory note, at 176. The Act authorizes a trust company to "establish common trust funds for the purpose of furnishing investments to itself as fiduciary." *Id.* § 1.

57. I have discussed the advantages of mutual funds over common trust funds in John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE L.J. 929, 973 & n.231 (2005).

58. UTC § 802(f) cmt. (amended 2005). The official comment explains: "Nearly all of the States have enacted statutes authorizing trustees to invest in funds from which the trustee might derive additional compensation. Portions of subsection [802](f) are based on these statutes." *Id.*

59. *Id.* § 802(f).

60. *E.g.*, *Keech v. Sandford*, [1726] 25 Eng. Rep. 223 (Ch.); see Walter G. Hart, *The Development of the Rule in Keech v. Sandford*, 21 L.Q.R. 258 (1905).

61. Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045, 1046-47 (1991).

62. RESTATEMENT OF TRUSTS (THIRD): PRUDENT INVESTOR RULE § 170(1) (1992).

63. Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425,

prudent administration,<sup>64</sup> which requires the trustee to exercise suitable care and skill, was extended to a variety of specific applications such as the duties to keep and render accounts<sup>65</sup> and to enforce and defend claims.<sup>66</sup>

Well before the development of the management trust, the law had been required to devise a standard of care for investing funds that came into the hands of trustees. The default standard that emerged in the English Court of Chancery in the eighteenth century was notably conservative, effectively restricting trustees to investments in government bonds and well-secured first mortgages.<sup>67</sup> Legislation in the nineteenth and twentieth centuries played a large role in expanding that standard to facilitate investment in the shares of private companies, both in England and in many American states. These so-called legal list statutes designated approved securities, for example, in England, shares in the East India Company.<sup>68</sup> The more important development in the United States, however, was the case law initiative in Massachusetts<sup>69</sup> that applied the prudence norm to trust investing without designating presumptively approved securities. The Model Prudent Man Rule, drafted by the American Bankers Association and widely enacted in the 1940s, supplied a standardized formulation of the rule.<sup>70</sup> The Uniform Prudent Investor Act of 1994, following the 1992 revisions to the Restatement of Trusts, updated the prudent investing norm to take account of the central findings of modern portfolio theory,<sup>71</sup> the body of empirical and theoretical knowledge about the behavior of investment markets that transformed the conduct of fiduciary investing in the second half of the twentieth century.<sup>72</sup> The Uniform Trust Code carries forward the 1994 Act.<sup>73</sup>

### III. INSTITUTIONAL INFLUENCES

Important institutional factors have been at work in the “statutorification” of trust law.

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426 (1993).

64. RESTATEMENT (SECOND) OF TRUSTS § 174 (1959).

65. *See id.* § 172.

66. *See id.* §§ 177-178.

67. Regarding the English history, see for example John H. Langbein & Richard A. Posner, *Market Funds and Trust-Investment Law*, 1976 AM. B. FOUND. RES. J. 1, 3-6, and A.H. OOSTERHOFF, TRUSTEES' POWERS OF INVESTMENT 6-50 (Ontario L. Reform Comm'n 1970).

68. *See* Langbein & Posner, *supra* note 67, at 3-6 (discussing legal list statutes, commencing with Lord St. Leonard's Act, 1859, 22 & 23 Vict., c. 35, § 32 (Eng.), authorizing East India stock).

69. *See* Harvard College v. Amory, 26 Mass. (9 Pick.) 446 (1830).

70. *See* Shattuck, *supra* note 17, at 508-09.

71. *See* JONATHAN R. MACEY, AN INTRODUCTION TO MODERN FINANCIAL THEORY 17-37 (2d ed. 1998) (discussing modern portfolio theory).

72. Langbein, *Uniform Prudent Investor Act*, *supra* note 53 (discussing the background and purposes of the Act).

73. *See* UTC art. 9 cmt. (amended 2005) (making provision for the Prudent Investor Act to be inserted as Article 9 of the Code).

### A. *The Trust Industry*

In the United States, the management trust has been closely associated with the rise of what we now commonly call the trust industry, that is, the organizations of fee-paid professionals who provide trusteeship services. In contrast to England, where lawyers (mostly solicitors) have tended to be the characteristic professional fiduciaries,<sup>74</sup> in the United States (for reasons that I have not seen explained), it was the banking industry that captured the field. The typical American professional fiduciary is a bank trust department. Until recent decades, American banking tended to be localized. Banks have been politically powerful, and they have been able to use their influence to get the state legislatures to enact measures that permitted the rise of the management trust. One senses the deference to the trust bankers in the official comment to the Uniform Common Trust Fund Act: "There is a strong sentiment among trust men that the great utility of these common trust funds justifies a statutory exception to the rule regarding [that is, forbidding] the mixture of two or more trust funds."<sup>75</sup>

In more recent times, as the barriers to multistate banking have fallen, large banks have found themselves doing trust business in many states. These firms have an interest in seeing trust law become as uniform as possible, both to simplify compliance with local law and to facilitate the movement of personnel across state lines as business needs dictate. The trust banking industry has in general welcomed legislatively driven consolidation of trust law. The several Uniform Acts in the trust field, now culminating in the Uniform Trust Code, reflect the increasing national consolidation of the trust banking industry.

### B. *The Role of the Uniform Law Commission*

An important dimension of the statutes that I have emphasized in this Article is that most have been Uniform Laws, that is, acts drafted by the Uniform Law Commission.<sup>76</sup> Not all the states enact all proposed Uniform Acts, but many states adopt most of them, and all states adopt some.<sup>77</sup>

The Commission, which was founded in 1892,<sup>78</sup> functions as a consortium of state governments that operate a pooled drafting service for the

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74. See CHANTAL STEBBINGS, *THE PRIVATE TRUSTEE IN VICTORIAN ENGLAND* 34-35 (2002). Another point of divergence between English and American patterns of trusteeship in the twentieth century is that the Americans experienced no serious counterpart to the troubled English experiment with governmental provision of trust services, on which see Patrick Polden, *The Public Trustee in England, 1906-1986: The Failure of an Experiment*, 10 J. LEGAL HIST. 228 (1989).

75. UNIF. COMMON TRUST FUND ACT OF 1938, prefatory note, 7 U.L.A. 176 (2002).

76. Shorthand for the National Conference of Commissioners on Uniform State Laws (NCCUSL).

77. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS: 2006-2007 REFERENCE BOOK 117-23 (2006) [hereinafter REFERENCE BOOK] (supplying an adoption table showing which states have enacted which acts).

78. See generally WALTER P. ARMSTRONG, JR., *A CENTURY OF SERVICE: A CENTENNIAL HISTORY OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS* (1991).

states. The Commission is composed of commissioners appointed by the governors of all the states (in a few states, the state legislature also chooses some commissioners).<sup>79</sup> The states pay the operating expenses of the Commission's small staff, but the commissioners serve without compensation.<sup>80</sup> The commissioners, who must be members of a state bar, are a mix of practicing lawyers, judges, state legislators, and academics.<sup>81</sup> Legislation promulgated by the Commission tends to be especially well drafted, on account of the Commission's resources and procedures. Drafting is normally done under the supervision of a committee of commissioners, which engages a reporter, typically an academic specialist, to prepare and revise drafts.<sup>82</sup> American Bar Association advisors sit with all committees, as do representatives of affected interest groups.<sup>83</sup> The Commission particularly emphasizes drafting projects in fields in which multistate transactions, interests, or contacts make uniformity of state law advantageous.

Uniform Law Commission drafting has played a major role in the transformation of American trust law into statute law. The Commission's reputation for good drafting tends to predispose state bar associations and state legislators toward acts that the Commission promulgates. Because so much of American trust legislation has been Commission-generated, state trust law has become ever more uniform. Comprehensive legislation such as the Uniform Trust Code or the Uniform Principal and Income Act also serves a gap-filling function. Even in a state with a well-developed common law of trusts, authority regarding many points is lacking, or unclear, or sometimes conflicting. A particular attraction of field-occupying legislation is that it resolves many such issues.

### *C. Fusion and the Decline of the Specialist Equity Bench*

Another development that may have contributed to the trend toward statute in trust law was the fusion of law and equity. In England and in many American jurisdictions, the law of trusts originated as the preserve of separate equity courts or equity divisions. The movement to merge law and equity got underway in the states with the Field Code in New York in the 1840s and culminated (in a sense) with the Federal Rules of Civil Procedure of 1938.<sup>84</sup> In the federal courts and in many states, fusion transformed every common law judge, however inexperienced with equity jurisdiction, into a Lord Chancellor. As the administration of trust law passed out of the hands of a specialist equity bench, the guidance of precise and authoritative statutory rules became more welcome.

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79. See REFERENCE BOOK, *supra* note 77, at 8.

80. *Id.* at 9.

81. *Id.* at 8.

82. *Id.* at 9.

83. *Id.*

84. See generally Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

*D. The Restatement of Trusts*

Yet another factor bearing upon the trend toward statute in twentieth-century American trust law was the Restatement of Trusts, published in 1935,<sup>85</sup> and its 1959 revision, the Restatement (Second).<sup>86</sup> Both versions were the work of Professor Austin W. Scott, whose influential treatise<sup>87</sup> cited the Restatement incessantly and was organized by Restatement section numbers. The Restatement supplied a comprehensive and authoritative formulation of trust law doctrine, expressing the main (“black letter”) provisions in statute-like voice.<sup>88</sup> Accordingly, the Restatement has served as a storehouse for legislative drafters. Sometimes we find a legislature absorbing isolated provisions, sometimes large swaths. Indiana, for example, has enacted with slight alterations a version of the Restatement’s rule limiting the enforcement of exculpation clauses in trust instruments.<sup>89</sup> California, by contrast, absorbed so much of the Restatement into its trust law that the drafters of the Uniform Trust Code took the California statute as their starting point.<sup>90</sup> The American Law Institute began work on a complete<sup>91</sup> Restatement (Third) of Trusts at about the time that the Uniform Law Commission was drafting the Trust Code, and there was “close coordination”<sup>92</sup> between the two projects.

## IV. CONCLUSION

The promulgation and widespread adoption of the Uniform Trust Code is a notable event in the history of American trust law. The Code recasts trust law on a comprehensive statutory base. However, this development should be seen less as a break with the past than as an intensification or culmination of a trend toward statute that has been underway in trust law for many decades. This Article has pointed to a series of Uniform Acts, including those governing trustee powers, principal and income, pooled invest-

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85. RESTATEMENT OF TRUSTS (1935).

86. RESTATEMENT (SECOND) OF TRUSTS (1959).

87. AUSTIN WAKEMAN SCOTT, THE LAW OF TRUSTS (1st ed. 1939). Scott published further editions in 1956 and 1967. After Scott’s death, other authors have revised the work. The fourth edition, by William F. Fratcher, is cited *supra* note 47. A new edition by Mark Ascher is in progress. See 1 & 2 AUSTIN WAKEMAN SCOTT, WILLIAM FRANKLIN FRATCHER & MARK L. ASCHER, SCOTT AND ASCHER ON TRUSTS (5th ed. 2006); see also Jeffrey N. Gordon, *The Puzzling Persistence of the Constrained Prudent Man Rule*, 62 N.Y.U. L. REV. 52, 57-59, 65-66 (1987) (discussing the influence of the treatise).

88. Parallels between the Restatements and European codes are developed in James Gordley, *European Codes and American Restatements: Some Difficulties*, 81 COLUM. L. REV. 140 (1981).

89. IND. CODE ANN. § 30-4-3-32 (West 2006) (lightly revising RESTATEMENT (SECOND) OF TRUSTS § 222(2) and (3) (1959)).

90. See UTC, prefatory note (amended 2005), 7C U.L.A. 364 (2006) (acknowledging the influence of the California legislation, CAL. PROB. CODE §§ 15000-19403 (West 1991), “which was used by the Drafting Committee as its initial model”).

91. See RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE (1992). A partial revision of provisions relating to fiduciary investing had been completed earlier. UTC, prefatory note, 7C U.L.A. 366.

92. UTC, prefatory note, 7C U.L.A. 366.

ments, and the prudent investor norm, as important precursors to the Code. What these acts have in common is their role in facilitating the rise of the management trust—the transformation in the character and purpose of trusteeship that resulted when marketable securities came to displace family real estate as the prototypical trust asset. Legislation was essential, both to overcome the older regime of trust law that hampered trustees' ability to transact with trust property, and to set default standards of prudence in administering the management trust. The emergence of the trust banking industry as an influential interest group helped promote the legislation. The American Law Institute and the Uniform Law Commission played major roles in working out the content of the legislative reforms and in legitimating them for enactment.