# JUSTIFYING BUSINESS TRUSTS

ERIC C. CHAFFEE

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**Abstract:** Business trusts have been and will continue to be an integral part of the United States economy, especially because of the emerging dominance of index funds, which are often organized as business trusts. Remarkably, although corporations have been the subject of thousands of articles, articles on business trusts number in the dozens, which leaves gaping holes in the existing literature that need to be filled. This piece sets out to answer the question of whether business trusts should exist at all, or whether they are unnecessarily redundant of the corporate form. Based on various economic principles, this Article demonstrates the importance of preserving and nurturing business trusts and their common-law underpinnings because of the importance of diversification in investment and reducing systemic risk, the efficiency that regulatory competition and the common law produce, and the need to respect the knowledge that spontaneous order systems—such as the common law—impart. Because business trusts are common-law corporations, the question underlying this Article is whether the differences between corporations and business trusts matter. Based on the economic justifications contained in this article, the answer to that question is an unequivocal "yes."

## INTRODUCTION

Business trusts have been, are, and will continue to be a cornerstone of the American economy.[1] Historically, many of the most important businesses

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[1] *See* Peter B. Oh, *Business Trusts*, *in* RESEARCH HANDBOOK ON PARTNERSHIPS, LLCS AND ALTERNATIVE FORMS OF BUSINESS ORGANIZATIONS 268, 268 (Robert W. Hillman & Mark J. Loewenstein eds., 2015) ("Virtually ignored by academics, the business trust arguably is the most prominent organizational form used today."); Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 STAN. L. REV. 1599, 1635 n.118 (2000) ("[T]he trust has always provided an important form of business organization in American law as well, starting from the late nineteenth-century trusts synonymous with big business as well as smaller 'Massachusetts' business trusts, down to today's enormous pension trusts and investment trusts, such as mutual funds.").

in the United States were organized as business trusts.[2] For example, Standard Oil was organized as this type of entity and was the vehicle through which John D. Rockefeller controlled almost all oil production during the end of the 1800s and the beginning of the 1900s.[3] In fact, the reason why the United States has antitrust law, rather than competition law as it is referred in many other jurisdictions around the world, is because of the importance of these entities in American history.[4] The significance of this business form, however, did not end with the "trust busting" efforts of the early 1900s.[5] Currently, business trusts are commonly used for mutual funds,[6] pension funds,[7] real estate in-

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[2] *See* Norman P. Ho, *A Tale of Two Cities: Business Trust Listings and Capital Markets in Singapore and Hong Kong*, 11 J. INT'L BUS. & L. 311, 311 (2012) ("Business trusts have been utilized for over a hundred years in the Anglo-American legal world as an alternative business organizational form to the traditional corporation; for example, they were very strong competitors to the corporation as a way of business organization in early 20th century America . . . .").

[3] *See* Lynne L. Dallas, *Is There Hope for Change? The Evolution of Conceptions of "Good" Corporate Governance*, 54 SAN DIEGO L. REV. 491, 500 (2017) ("[A]t its peak the Standard Oil Trust, formed in 1882, controlled 90% of the oil industry."); Julian Ku & John Yoo, *Globalization and Structure*, 53 WM. & MARY L. REV. 431, 448 (2011) ("The first great trust, John D. Rockefeller's Standard Oil, was founded in 1870, and by the turn of the century it controlled about 90 percent of all oil in the nation."); Carla L. Reyes, *If Rockefeller Were a Coder*, 87 GEO. WASH. L. REV. 373, 376 (2019) ("Rockefeller organized the Standard Oil Trust as a business trust . . . . Doing so allowed the Standard Oil Trust to act as one large company, coordinating activity in the oil refining industry across a large geographic area, something the corporation laws of the time did not allow." (footnote omitted)).

[4] *See* Sean J. Griffith & Myron T. Steele, *On Corporate Law Federalism: Threatening the Thaumatrope*, 61 BUS. LAW. 1, 4 (2005) ("Congress passed the Sherman Antitrust Act in an effort to break up the business trusts and outlaw monopolization."); Tom C. Hodge, *Compatible or Conflicting: The Promotion of a High Level of Employment and the Consumer Welfare Standard Under Article 101*, 3 WM. & MARY BUS. L. REV. 59, 66 (2012) ("In the United States, competition law is known as 'antitrust,' the reason for this being that the Sherman Act had been passed specifically to combat business 'trusts' (or cartels)." (footnote omitted)); Eric A. Posner, Fiona M. Scott Morton & E. Glen Weyl, *A Proposal to Limit the Anticompetitive Power of Institutional Investors*, 81 ANTITRUST L.J. 669, 670 (2017) ("The impetus for U.S. antitrust law in 1890 was the creation of organizations—'trusts' . . . . The Justice Department used the law to attack collusion among firms and eventually garnered political support to 'bust' the trusts and restore some competition to the U.S. economy.").

[5] *See* Kimberly H. Anker, Note, *Best Frenemies: Evaluating the Dual Jurisdiction of Federal Antitrust Agencies*, 63 B.C. L. REV. 255, 261 & n.28 (2022) (discussing the "trust busting" efforts of the early 1900s).

[6] *See* Scott Hirst, *Social Responsibility Resolutions*, 43 J. CORP. L. 217, 222 (2018) ("[A] mutual fund is organized as a corporation (predominantly in Maryland), or a trust (predominantly Massachusetts business trusts or Delaware statutory trusts)."); Wulf A. Kaal & Bentley J. Anderson, *Unconstrained Mutual Funds and Retail Investor Protection*, 36 REV. BANKING & FIN. L. 817, 829 n.59 (2017) ("As a practical matter, however, most mutual funds are set up as Massachusetts business trusts, Delaware statutory trusts, or Maryland corporations."); Lee-ford Tritt & Ryan Scott Teschner, *Re-imagining the Business Trust as a Sustainable Business Form*, 97 WASH. U. L. REV. 1, 39 (2019) ("Today, business trusts remain in common usage for the structuring of mutual funds and in asset securitization.").

[7] *See* Harry J. Haynsworth, *The Unified Business Organizations Code: The Next Generation*, 29 DEL. J. CORP. L. 83, 96 (2004) ("Business trusts are contract-based organizations with flow-through

vestment trusts ("REITs"),[8] and asset securitization.[9] Regarding the capitalization of trusts, a vast amount of wealth—trillions of dollars—resides in the corpuses of business trusts.[10]

With the emerging dominance of index funds, a type of mutual fund, business trusts remain an integral part of the American economy because many of these entities are organized as business trusts.[11] BlackRock, Vanguard, and State Street have become dominant in the index fund industry.[12] They each

tax treatment that are widely used for mutual funds, pension funds and asset securitization financing . . . ."); S.I. Strong, *Arbitration of Trust Disputes: Two Bodies of Law Collide*, 45 VAND. J. TRANSNAT'L L. 1157, 1173 (2012) (describing the "more common types [of business trusts] including pension trusts, investment or unit trusts"); Valerie J. Vollmar, *The Oregon Uniform Trust Code and Comments*, 42 WILLAMETTE L. REV. 187, 204 (2006) ("Commercial trusts come in numerous forms, including trusts created pursuant to a state business trust act and trusts created to administer specified funds, such as to pay a pension or to manage pooled investments.").

[8] *See* Wendy S. Goffe, *Oddball Trusts and the Lawyers Who Love Them or Trusts for Politicians and Other Animals*, 46 REAL PROP. TR. & EST. L.J. 543, 561 (2012) ("[B]usiness trusts have become the preferred entity form for asset securitization and certain financial transactions related to mortgages, credit cards, and other debt, and many mutual funds, pension funds, real estate management investment companies, regulated investment companies, and real estate investment trusts, any of which could also be structured as a corporation, LLC, or partnership."); William L. Martin, II, *Federal Regulation of Real Estate Investment Trusts: A Legislative Proposal*, 127 U. PA. L. REV. 316, 316 (1978) ("The real estate investment trust ('REIT') is an unincorporated association or business trust managed by one or more trustees that invests funds of a number of investors in real estate, mortgages secured by real estate, or some combination thereof.").

[9] *See* Dale A. Oesterle, *Subcurrents in LLC Statutes: Limiting the Discretion of State Courts to Restructure the Internal Affairs of Small Business*, 66 U. COLO. L. REV. 881, 917 (1995) ("The Delaware business trust is now used routinely in asset securitization structures."); Thomas E. Rutledge & Ellisa O. Habbart, *The Uniform Statutory Trust Entity Act: A Review*, 65 BUS. LAW. 1055, 1057 (2010) ("[T]he business trust has come to be utilized for asset securitization and the organization of real estate investment trusts."); C. Porter Vaughan, III, David I. Meyers & W. Lake Taylor, Jr., *Corporate and Business Law*, 37 U. RICH. L. REV. 1, 3 (2002) ("Business trusts have often been the entity of choice for mutual funds (usually Massachusetts or Delaware business trusts), real estate investment trusts (often Maryland real estate investment trusts), and mortgage and other finance entities that securitize assets (often New York common law trusts).").

[10] *See* Asalya Akhmerova & William Price, *Should Illinois Have a Statutory Business Trust Act?*, 100 ILL. BAR J. 164, 164 (2012) ("The business trust is one of the predominant business entities in the U.S. economy, with activity measuring in the trillions of dollars."); David Horton, *Testation and Speech*, 101 GEO. L.J. 61, 75 (2012) ("[T]oday, trusts hold trillions of dollars in employee pensions, mutual funds, and securitized assets.").

[11] *See, e.g.*, Lucian Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 COLUM. L. REV. 2029, 2049 (2019) ("[I]ndex funds are generally structured as corporations or statutory trusts, with their own directors or trustees.").

[12] *See* Michael Cappucci, *The Proxy War Against Proxy Advisors*, 16 N.Y.U. J.L. & BUS. 579, 582–83 (2020) ("[S]tock ownership is concentrated among fewer large stockholders. Just three giant index fund managers, BlackRock, Vanguard, and State Street Global Advisors . . . together hold on average more than 20% of S&P 500 companies."); Brando Maria Cremona & Maria Lucia Passador, *Shareholder Activism Today: Did Barbarians Storm the Gate?*, 20 U.C. DAVIS BUS. L.J. 207, 233 (2020) ("Index funds currently play an increasingly important role in the asset management industry: indeed, index funds managed by the so-called 'Big Three' (Blackrock, Vanguard and State Street) have now become the largest investors within the modern capital markets."); Caleb N. Griffin, *Envi-*

currently control 5% to 7% of most public companies.[13] In 2015, when combined, these three entities amounted to the largest shareholder in 88% of S&P 500 companies.[14] This allows these entities to have a huge influence in proxy voting and the governance of many of the most important corporations in the United States.[15] As a consequence, having a thorough understanding of how and why business trusts exist as they do has never been more important.

Remarkably, however, despite the fact that corporations are the subject of hundreds of articles per year,[16] business trusts are rarely the subject of legal scholarship.[17] Throughout the existing legal literature, the articles on business trusts number in the dozens compared to the thousands on the corporate form, and, as a consequence, the holes in the existing literature on the business trust are plentiful and the opportunities for scholarship are numerous.[18]

This Article is designed to fill one of those existing holes. In a previous symposium essay, I developed the first essentialist theory of the business trust,

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*ronmental & Social Voting at Index Funds*, 44 DEL. J. CORP. L. 167, 172 (2020) (describing the dominance of BlackRock, Vanguard, and State Street, specifically how their "average combined stake in S&P 500 companies has nearly quadrupled in just two decades, going from 5.2% in 1998 to 20.5% as of 2017. Their voting control is even larger due to absenteeism amongst other shareholders").

[13] *See* Edward B. Rock & Daniel L. Rubinfeld, *Common Ownership and Coordinated Effects*, 83 ANTITRUST L.J. 201, 224–25 (2020) ("BlackRock, Vanguard, and State Street each currently own 5–7 percent of most public companies . . . .").

[14] *See* Brian R. Cheffins, *Corporate Governance and Countervailing Power*, 74 BUS. LAW. 1, 42–43 (2018) ("The proportion of S&P 500 companies where BlackRock, Vanguard, and State Street combined would constitute the largest shareholder increased from 25 percent in 2000 to 88 percent in 2015.").

[15] *See* Nathan Atkinson, *If Not the Index Funds, Then Who?*, 17 BERKELEY BUS. L.J. 44, 45 (2020) ("The largest three [asset managers], BlackRock, Vanguard, and State Street, taken together (the 'Big Three'), vote about 20% of shares in most large companies, with the majority of these shares held in passive index funds."); Caleb N. Griffin, *Margins: Estimating the Influence of the Big Three on Shareholder Proposals*, 73 SMU L. REV. 409, 410 (2020) ("Because of the legal structure of index funds, the Big Three have the right to vote the shares purchased with their investors' money, subject only to minimal constraints. Thus, the Big Three are not just managers of an enormous amount of capital but are stewards responsible for making pivotal decisions for the companies in which that capital is invested." (footnote omitted)); Alexander I. Platt, *Index Fund Enforcement*, 53 U.C. DAVIS L. REV. 1453, 1455 (2020) ("Three financial institutions now vote 25% of the stock in the largest U.S. public companies. The figure may soon be closer to 40%. Vanguard, BlackRock, and State Street Global Advisors . . . dominate the market for the low-cost, highly diversified investment vehicles known as 'index funds.' As more investors put their savings into these vehicles, these institutions have accumulated an unprecedented level of economic power." (footnotes omitted)).

[16] *See, e.g.*, ROBERT B. THOMPSON, VOTING LIST FOR CPC BEST ARTICLES 2022, PROFESSORTHOMPSON.COM (2022) http://www.professorthompson.com/uploads/2/1/4/7/21478240/cpc_best_articles_voting_list_2022.pdf [https://perma.cc/4975-ANJP] (containing a substantial list of corporate law articles and essays from 2022).

[17] *See generally* Robert H. Sitkoff, *Trust as "Uncorporation": A Research Agenda*, 2005 U. ILL. L. REV. 31 (discussing the numerous opportunities for scholarship regarding business trusts).

[18] *See generally id.*(explaining that, despite the importance of business trusts, there remains a relative dearth of scholarship on the subject).

which served as the lead article in a symposium on that business form.[19] In that work, I sought to answer the metaphysical question of what are the essential characteristics that define business trusts and to explore some of the normative implications of those characteristics.[20] This piece built upon previous work regarding the essential nature of the corporate form in which I developed a novel theory of the corporate form known as collaboration theory.[21] The essay applied collaboration theory to business trusts to gain an understanding of the similarities and differences between those two forms.[22] Because of space limitations, the following question lingered and remained unanswered: do those differences matter?

This Article seeks to explain why the preservation and nurturing of business trusts are important.[23] One leading commentator has referred to the business trust as the "common law corporation" because of the attributes it shares with the corporate form.[24] This Article will explain why the common law development of business trusts is significant because of the importance of diversification in investment and reducing systemic risk,[25] the efficiency that regulatory competition and the common law often produce,[26] and the need to respect the knowledge that spontaneous ordering—such as the common law—imparts.[27] As a consequence, even if jurisdictions choose to adopt business

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[19] *See generally* Eric C. Chaffee, *A Theory of the Business Trust*, 88 U. CIN. L. REV. 797 (2020) (discussing the theoretical foundations of business trusts).

[20] *Id.* at 801 ("[T]his Article embodies the first attempt to develop an essentialist theory of the business trust.").

[21] *See generally* Eric C. Chaffee, *Collaboration Theory and Corporate Tax Avoidance*, 76 WASH. & LEE L. REV. 93 (2019) [hereinafter Chaffee, *Collaboration Theory and Corporate Tax Avoidance*]; Eric C. Chaffee, *The Origins of Corporate Social Responsibility*, 85 U. CIN. L. REV. 353 (2017) [hereinafter Chaffee, *Origins of Corporate Social Responsibility*]; Eric C. Chaffee, *Collaboration Theory: A Theory of the Charitable Tax-Exempt Nonprofit Corporation*, 49 U.C. DAVIS L. REV. 1719 (2016) [hereinafter Chaffee, *A Theory of the Nonprofit Corporation*].

[22] *See generally* Chaffee, *supra* note 19 (comparing the theoretical groundings of the business trust to that of the corporation).

[23] *See infra* Part II (discussing various economic theories that justify the continued existence of common-law business trusts).

[24] *See* John Morley, *The Common Law Corporation: The Power of the Trust in Anglo-American Business History*, 116 COLUM. L. REV. 2145, 2146 (2016) ("This Essay challenges a central narrative in the history of Anglo-American business by questioning the importance of the corporate form. . . . I show that from the late Middle Ages to at least the middle of the twentieth century, the basic powers of the corporate form were also available through an underappreciated but enormously important legal device known as the common law trust.").

[25] *See infra* Section II.A (discussing why common-law business trusts allow for investment diversification and why they help to reduce systemic risk).

[26] *See infra* Section II.B (explaining why common-law business trusts ought to be nurtured and continue to exist because of the efficiency that regulatory competition and the common law help to facilitate).

[27] *See infra* Section II.C (explaining why common-law business trusts ought to be preserved because of the knowledge that spontaneous order systems impart).

trust statutes, they should maintain the existence of common-law business trusts and work not to eclipse them with statutorily created versions of the business form.

This Article contributes to the existing literature in three main ways. First, this Article deepens the relatively thin literature on business trusts. Although some well-written essays and articles do exist, they are not plentiful.[28] This Article adds to the existing scholarship. Second, it explains the general need for business trusts. Although corporations and business trusts share many similar features,[29] the common law underpinnings of business trusts should be preserved and nurtured. This Article offers a variety of economic justifications as to why this is the case.[30] Third, this Article suggests that statutory business trusts and common law business trusts ought to be allowed to co-exist and be nurtured.[31]

The remainder of this Article is structured as follows. Part I of this Article provides a comparison of the origins of the corporate form and the business trust, and discusses the shared characteristics and differences between the two entities.[32] Part II explains the justification for preserving business trusts because of the importance of diversification in investment and reducing systemic risk, the efficiency that regulatory competition and the common law often produce, and the need to respect the knowledge that spontaneous ordering—such as the common law—imparts.[33] Part III discusses and responds to various concerns about retaining common-law business trusts, including whether the form is necessary when such trusts have been aptly described as "common law corporations"; whether the form adds needless complexity to business law; and whether the form should be preserved when its essential nature requires unrepentant profit maximization.[34] This piece ends with brief concluding remarks.[35]

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[28] *See supra* notes 16–18 and accompanying text (explaining the limited amount of scholarly writing on business trusts).

[29] *See infra* Section I.C (discussing the similarities between common-law business trusts and corporations).

[30] *See infra* Part II (providing a variety of economic justifications for why business trusts ought to be preserved and nurtured).

[31] *See infra id.* (explaining the benefits of allowing common-law business trusts and statutory business trusts to co-exist).

[32] *See infra* notes 36–134 and accompanying text.

[33] *See infra* notes 135–209 and accompanying text.

[34] *See infra* notes 210–236 and accompanying text.

[35] *See infra* notes 237–245 and accompanying text.

## I. The Competing Histories of Corporations and Business Trusts

This Article adopts the description of business trusts as common-law corporations.[36] Although corporations and business trusts have come to share many attributes, the two entities have dramatically different histories,[37] and they differ from each other in substantial ways.[38] The remainder of this Part will explore the histories of corporations and business trusts and compare the two forms.

### *A. The History of the Corporation*

The history of the corporation is well documented.[39] Although the origins of the modern corporation can be traced to many roots, one place to begin is with Roman law.[40] The name "corporation" derives from the Latin word *corpus*, which translates to body.[41] In ancient Rome, the predecessors of the modern corporation were known by many different names, including *corpus*, *collegium*, and *universitas*.[42] Rather than being used for business purposes, these

[36] *See supra* note 24 and accompanying text (noting at least one leading commentator has referred to common-law business trusts as "common law corporations" because of the similarities between the two entities).

[37] *See infra* notes 39–109 and accompanying text (providing the varying histories of the corporation and the business trust).

[38] *See infra* notes 110–134 and accompanying text (comparing corporations and business trusts).

[39] For purposes of avoiding claims of self-plagiarism, I have written about the history of the corporate form in various other places. *See* Chaffee, *supra* note 19, at 802–06; Chaffee, *Collaboration Theory and Corporate Tax Avoidance*, *supra* note 21, at 131–35; Chaffee, *Origins of Corporate Social Responsibility*, *supra* note 21, at 357–60; Chaffee, *A Theory of the Nonprofit Corporation*, *supra* note 21, at 1729–32.

[40] *See* Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767, 772 (2005) ("The corporate form originated in Roman law in its classical period (the first two centuries AD), was further developed in the Middle Ages in both canon (Church) and civil law, and was adopted from civil law by the Anglo-American common law tradition."); Andrew I. Gavil, *Competition and Cooperation on Sherman Island: An Antitrust Ethnography*, 44 DEPAUL L. REV. 1225, 1241 (1995) ("The term 'corporation,' along with many of its essential legal characteristics, has been traced to Roman law."); Doron Narotzki, *Corporate Social Responsibility and Taxation: The Next Step of the Evolution*, 16 HOUS. BUS. & TAX L.J. 167, 178 (2016) ("[T]he corporation has evolved throughout two millennia since it was first introduced in Roman law, into what we know today . . . .").

[41] *See, e.g.*, Lyman Johnson, *Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood*, 35 SEATTLE U. L. REV. 1135, 1161 n.126 (2012) ("The etymology of the word 'corporation' comes from the Latin 'corpus,' which means 'body,' as in a 'corps' or group of people."); Michael J. Kelly, *"Never Again"? German Chemical Corporation Complicity in the Kurdish Genocide*, 31 BERKELEY J. INT'L L. 348, 350 (2013) ("From the Latin *corpus* for body, corporations have been around since Roman times."); Jonathan Macey & Leo E. Strine, Jr., Citizens United *as Bad Corporate Law*, 2019 WIS. L. REV. 451, 478 ("The very term 'corporation' derives from the Latin word *corpus* which translates into English as the word 'body' . . . .").

[42] *See* Brian M. McCall, *The Corporation as Imperfect Society*, 36 DEL. J. CORP. L. 509, 529 n.93 (2011) ("In addition to *universitas*, the corporation was also referred to by the words, *corpus* (body) and *collegium* (college)."); Ian D. McClure, *From a Patent Market for Lemons to a Marketplace for*

entities operated for public uses, similar to modern-day non-profit corporations.[43] Romans used these entities for various purposes such as religious societies, trade guilds, political clubs, burial societies, and educational institutions.[44] These entities were broadly construed and included municipalities and the Roman state itself.[45]

The attributes of the modern corporation developed slowly over time. During the Middle Ages, corporations began being chartered in Europe for municipal, charitable, and religious purposes.[46] In the thirteenth century, Sinibaldo Fieschi, who later became Pope Innocent IV, developed the concept of *persona ficta* that afforded corporations separate legal personhood.[47]

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*Patents: Benchmarking IP in Its Evolution to Asset Class Status*, 18 CHAP. L. REV. 759, 765–66 (2015) ("The significance of corporate entities began during the Roman Empire. In the early sixth century, Roman law recognized various types of municipal-led, political or religious-focused corporations under the names *universitas*, *corpus*, or *collegium*."); Sean M. O'Connor, *Hired to Invent vs. Work Made for Hire: Resolving the Inconsistency Among Rights of Corporate Personhood, Authorship, and Inventorship*, 35 SEATTLE U. L. REV. 1227, 1230 (2012) ("The term and concept 'corporation' derived from the *universitas*, *corpus*, and *collegium* of Roman law. At its core, the concept relied on the transformation of individuals into one new corporate body." (footnote omitted)).

[43] *See* Larry D. Thompson, *The Responsible Corporation: Its Historical Roots and Continuing Promise*, 29 NOTRE DAME J.L. ETHICS & PUB. POL'Y 199, 205–06 (2015) ("When first conceived in Roman law two millennia ago, the corporation was a legal entity licensed by the state to further *public* purposes.").

[44] *See* HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 216 (1983) (explaining that in ancient Rome, "many private associations, including organizations for maintaining a religious cult, burial clubs, political clubs, and guilds of craftsmen or traders, were considered to be corporations").

[45] Bruce P. Frohnen, *The One and the Many: Individual Rights, Corporate Rights and the Diversity of Groups*, 107 W. VA. L. REV. 789, 807 (2005) ("Corporate entities, including municipalities, trade guilds and burial societies, were known in Roman law from the earliest times."); Sergio Alberto Gramitto Ricci, *Artificial Agents in Corporate Boardrooms*, 105 CORNELL L. REV. 869, 878 (2020) ("[T]he Romans first invented the corporate form to grant autonomy to nonhuman entities, including municipalities . . . ."); Mary Szto, *Limited Liability Company Morality: Fiduciary Duties in Historical Context*, 23 QUINNIPIAC L. REV. 61, 108 (2004) ("The corporation has both Roman and ecclesiastical roots. Early commentators trace the history of the modern corporation to Roman municipal communities.").

[46] *See* Margaret M. Blair, *Corporate Personhood and the Corporate Persona*, 2013 U. ILL. L. REV. 785, 789 ("The earliest corporations were not organized for business purposes. Corporate law as we know it today evolved out of laws and practices governing municipalities, churches, and religious institutions in Europe during the Middle Ages."); James J. Fishman, *Charitable Accountability and Reform in Nineteenth-Century England: The Case of the Charity Commission*, 80 CHI.-KENT L. REV. 723, 730 n.35 (2005) ("Corporations in the Middle Ages were religious or municipal."); Leo E. Strine, Jr. & Nicholas Walter, *Originalist or Original: The Difficulties of Reconciling* Citizens United *with Corporate Law History*, 91 NOTRE DAME L. REV. 877, 891 (2016) ("The first corporations chartered in Europe in the Middle Ages were not business corporations. Rather, they were religious, municipal, and benevolent corporations.").

[47] *See* Nicholas P. Cafardi, *The Availability of Parish Assets for Diocesan Debts: A Canonical Analysis*, 29 SETON HALL LEGIS. J. 361, 362 (2005) ("The Canon law of the Roman Catholic Church was the first legal system in the world to develop the notion of a fictitious legal personality. . . . [T]he term *persona ficta*, meaning a fictitious or legal person, is actually used for the first time in legal his-

As corporations began to appear in England, they could only be created through a specific act of the Crown.[48] During the sixteenth, seventeenth, and eighteenth centuries, corporations were chartered to develop newly conquered lands and facilitate trade.[49] During this period, joint stock ownership companies were created to allow passive investment in corporations.[50] The role of the Crown in creating corporations through a specific act was later passed onto Parliament, which retained this power until 1844, when England enacted its first general incorporation statute.[51]

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tory by the canonist, Sinibaldo Fieschi in the mid-thirteenth century."); Szto, *supra* note 45, at 109 ("Sinibaldo Fieschi, also known as Sinibaldus Fliscus, is known as the father of modern corporations theory. In the thirteenth century he wrote about 'persona ficta,' which led to the notion of 'legal persons.'" (footnotes omitted)).

[48] *See* Margaret M. Blair, *A Contractarian Defense of Corporate Philanthropy*, 28 STETSON L. REV. 27, 42 (1998) ("[T]he earliest corporations were formed only upon the grant of a special charter by the crown . . . ."); Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 54 (2002) ("The first *business* corporations were chartered by the British Crown in the fifteenth century.").

[49] *See* William L. Baldwin, *The Corporation and Society: An Evolutionary/Institutional Approach*, 27 VT. L. REV. 841, 842 (2003) ("[T]he direct ancestor of the modern business corporation is without a doubt the joint stock company, or the great overseas trading companies of the 17th and 18th centuries, such as the British East India Company, Hudson's Bay Company, and the South Sea Company."); Janet McLean, *The Transnational Corporation in History: Lessons for Today?*, 79 IND. L.J. 363, 365 (2004) ("In the late sixteenth century, this began to change [in England]. For the first time, the corporate form was used in risky 'for profit' ventures . . . . The vast majority of these were incorporated for overseas trade."); Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1632 ("By the late sixteenth century, several European countries had begun chartering corporations to develop foreign trade and colonies. Some of these early corporations, such as the East India Company and the Hudson Bay Company, became well-known players in American colonial times." (footnote omitted)).

[50] *See* Franklin A. Gevurtz, *The Function of "Dysfunctional" Boards*, 77 U. CIN. L. REV. 391, 400 (2008) ("The development of the joint stock company, by setting the stage for transferable ownership interests in which voting power can depend upon the number of interests purchased and in which voting power might become widely dispersed among passive investors, obviously had tremendous implications for corporate governance; it laid the groundwork for the separation of ownership from control."); Kristin N. Johnson, *Macroprudential Regulation: A Sustainable Approach to Regulating Financial Markets*, 2013 U. ILL. L. REV. 881, 888 n.44 ("As early as the sixteenth and seventeenth centuries, the charters of English trading companies permitted passive investors to acquire transferable ownership stakes coupled with voting interests that enabled the investors to representatively govern the business.").

[51] *See* Ryan Bubb, *Choosing the Partnership: English Business Organization Law During the Industrial Revolution*, 38 SEATTLE U. L. REV. 337, 340 (2015) ("Until 1844, corporations [in the United Kingdom] could only be formed by an act of Parliament or a charter granted by the Crown."); Henry Hansmann, Reinier Kraakman & Richard Squire, *Law and the Rise of the Firm*, 119 HARV. L. REV. 1333, 1386 (2006) ("More than a century's worth of pressure [in the United Kingdom] for a company form featuring both free availability and unclouded legitimacy finally induced Parliament in 1844 to enact a statute permitting incorporation as a matter of right."); Jennifer G. Hill, *The Trajectory of American Corporate Governance: Shareholder Empowerment and Private Ordering Combat*, 2019 U. ILL. L. REV. 507, 541–42 ("Prior to 1844, when the first U.K. general incorporation statute was

The British government imported corporations to the American colonies.[52] Similar to what was occurring in England, corporations in the colonies could only be chartered through specific acts of the government.[53] This power passed from the British government to the early state legislatures.[54] Corporations were used relatively rarely.[55] When they were employed, these entities served charitable, educational, and religious purposes.[56] In addition, they also

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passed, the only legitimate methods of acquiring corporate personality were by special Act of Parliament or by royal charter." (footnote omitted)).

[52] *See* Cindy A. Schipani, *Taking It Personally: Shareholder Liability for Corporate Environmental Hazards*, 27 J. CORP. L. 29, 35 (2001) ("Entity law, since the time of the American Revolution, has been based on English corporation law, which in turn draws its origins from ecclesiastical and public corporations that reflect concepts derived from Roman law.").

[53] *See* Susan Pace Hamill, *The Origins Behind the Limited Liability Company*, 59 OHIO ST. L.J. 1459, 1485 (1998) ("The first colonial corporations obtained charters directly from the King of England. The colonial assemblies, once established, granted corporate charters under the implicit authority of the Crown, thus establishing precedent for the future individual states to retain the power over the corporate charter." (footnote omitted)); Julie R. O'Sullivan, *The Last Straw: The Department of Justice's Privilege Waiver Policy and the Death of Adversarial Justice in Criminal Investigations of Corporations*, 57 DEPAUL L. REV. 329, 349 (2008) ("During the colonial days, corporate charters came directly from the King of England or, later, through grants of colonial assemblies.").

[54] Colin P. Marks, *Jiminy Cricket for the Corporation: Understanding the Corporate "Conscience,"* 42 VAL. U. L. REV. 1129, 1131 (2008) ("The earliest forms of the corporation in America came by specific charters from the states in the late eighteenth century, which were carried-over from the colonial days when corporations obtained charters directly from the King of England."); David A. Skeel, Jr., *Rethinking the Line Between Corporate Law and Corporate Bankruptcy*, 72 TEX. L. REV. 471, 482–83 (1994) ("During the colonial era, the British crown controlled the granting of corporate charters in the colonies, just as it did in England . . . . Following the expulsion of England, and in the absence of an overarching national government, it was therefore a simple and natural step for each of the individual states to assume full authority in this area."); Christopher J. Wolfe, *"An Artificial Being": John Marshall and Corporate Personhood*, 40 HARV. J.L. & PUB. POL'Y 201, 204–05 (2017) ("The power to create corporate persons was considered a sovereign power. Initially, colonial governments were granted this power by the King's agents; after the colonies broke away and created new state governments, the power to create corporate persons was considered part of the sovereign power of the state governments.").

[55] *See, e.g.*, Eugene McCarthy, *The Pharma Barons: Corporate Law's Dangerous New Race to the Bottom in the Pharmaceutical Industry*, 8 MICH. BUS. & ENTREPRENEURIAL L. REV. 29, 32 (2018) ("In its earliest days, American corporate law looked like its conservative English ancestor: incorporation was a rare and special privilege that the legislature granted . . . ."); David Min, *Federalizing Bank Governance*, 51 LOY. U. CHI. L.J. 833, 843 (2020) ("During the colonial era and early years of the Republic, charters for banks and other business corporations were rare and typically given only to the privileged or politically well connected."); Malla Pollack, *The Romantic Corporation: Trademark, Trust, and Tyranny*, 42 U. BALT. L. REV. 81, 95 n.85 (2012) ("Corporations were relatively rare in the colonial and early post-revolution period.").

[56] *See* James J. Fishman, *The Development of Nonprofit Corporation Law and an Agenda for Reform*, 34 EMORY L.J. 617, 631 (1985) ("Almost all colonial corporations had charitable purposes. They were churches, charities, educational institutions, or municipal corporations."); Kevin M. Teeven, *Decline of Freedom of Contract Since the Emergence of the Modern Business Corporation*, 37 ST. LOUIS U. L.J. 117, 118 (1992) ("American corporation law is rooted in colonial use of the corporate device for religious congregations, charities, schools, local government units, and for large business enterprises providing public services . . . .").

served quasi-governmental functions, such as maintaining canals, bridges, and roads.[57]

As the American economy began to develop and individuals became more comfortable with private companies, legislatures began enacting general incorporation statutes during the nineteenth century.[58] With the passage of the statutes, legislatures drew the first distinction between non-profit and for-profit corporations, and as a result, the modern for-profit corporation was born.[59]

### *B. The History of the Business Trust*

The corporate form and the business trust share many common characteristics,[60] but the history of these entities is dramatically different.[61] Although the origins of the modern trust can be traced back to a number of different places,[62] the trust in Anglo-American law finds its ancestry in the medieval *use*.[63]

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[57] *See* Vincent S.J. Buccola, *Opportunism and Internal Affairs*, 93 TUL. L. REV. 339, 372 (2018) ("Most early, nonmunicipal corporations were chartered to build public infrastructure, especially canals and turnpikes."); Ronnie Cohen & Gabriele Lingenfelter, *Money Isn't Everything: Why Public Benefit Corporations Should Be Required to Disclose Non-financial Information*, 42 DEL. J. CORP. L. 115, 116–17 (2017) ("Early corporate charters in America were granted for specific activities that were seen as advantageous to the public good, such as building a railroad, a canal, a bridge, or even a university." (footnote omitted)); Chukwuemeka George Nnona, *Customary Corporate Law in Common Law Africa*, 66 AM. J. COMP. L. 639, 643 n.7 (2018) ("By the end of the eighteenth century, not less than 310 business corporations had been chartered by the states, with most of them engaged in banking, insurance, canal, toll bridge, turnpike, and water supply businesses.").

[58] *See* Stewart Jay, *The Curious Exclusion of Corporations from the Privileges and Immunities Clause of Article IV*, 44 HOFSTRA L. REV. 79, 98 (2015) ("In the eighteenth century, incorporation was far from the typical business model. Corporations were created by special legislative enactments. There were no general incorporation laws at the time—states adopted those mostly in the mid- to late-nineteenth century." (footnotes omitted)); Jonathan A. Marcantel, *A Unified Framework to Adjudicate Corporate Constitutional Rights*, 39 U. HAW. L. REV. 115, 162 (2016) ("[G]eneral incorporation statutes did not become prevalent until the late Nineteenth Century. Thus, for the roughly one hundred years that preceded the widespread use of general incorporation statutes, the existence of corporations was a relative rarity that required special action by a legislature." (footnote omitted)); David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 206 ("Increasingly during the latter half of the 19th century, states began to replace special chartering with general incorporation laws. These statutes . . . dispensed with the need for a special act of the legislature, instead making corporate charters available simply upon compliance with certain generally applicable filing requirements and submission to standardized substantive regulations.").

[59] *See* Elizabeth Pollman, *Line Drawing in Corporate Rights Determinations*, 65 DEPAUL L. REV. 597, 619 (2016) ("States . . . passed general incorporation statutes for business corporations and began to allow businesses to incorporate for purely commercial purposes, such as manufacturing. These different general incorporation statutes evidenced the for-profit–nonprofit dichotomy that began to take shape." (footnote omitted)).

[60] *See infra* notes 110–134 and accompanying texts. (comparing corporations and business trusts).

[61] For purposes of avoiding claims of self-plagiarism, I have written about the history of the business trust elsewhere. *See* Chaffee, *supra* note 19, at 806–13.

[62] *See* Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT'L L. 331, 379 (2009) ("[T]he modern Anglo-American law of trust owes a considerable debt to the *waqf*

During the thirteenth century, the English government placed substantial restrictions on property ownership by the Roman Catholic Church.[64] Religious orders often imposed restrictions on their members' abilities to own property as well.[65] When Franciscan friars arrived in England, they needed access to land on which to live and worship due to the these restrictions and to honor their vows of poverty.[66] As a consequence, wealthy benefactors employed *uses*

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from Islamic law—an endowment created by a donor for use by designated beneficiaries and under the administration of a trustee—which was introduced to England by Franciscan friars returning from the Crusades in the thirteenth century."); Ronald J. Scalise Jr., *Some Fundamentals of Trusts: Ownership or Equity in Louisiana?*, 92 TUL. L. REV. 53, 57–58 (2017) ("The exact origin of the modern-day trust is shrouded in history. Some have suggested that the English trust was borrowed from the Roman *fideicommissum*, the Frankish *Salaman*, or the Islamic *waqf*."); Andrew White, *Breathing New Life into the Contemporary Islamic* Waqf*: What Reforms Can* Figh *Regarding* Awqaf *Adopt from the Common Law of Trusts Without Violating* Sharī'ah?, 41 REAL PROP. PROB. & TR. J. 497, 511–12 (2006) ("The most intriguing theory, increasingly in vogue today, is that the modern trust actually is derived from the *waqf*. . . . This theory, put forth initially by Islamic scholars in the mid-1900s, proposes that the Franciscan Friars returning from the Crusades to England in the thirteenth century introduced the use as an adaptation of the *waqf* institutions to which they had been exposed in Islamic territories." (footnotes omitted)).

[63] *See* Melanie B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 GEO. L.J. 67, 73 (2005) ("Landowners arranged trust mechanisms (called 'uses') as early as the thirteenth century."); John H. Scheid, *Down Labyrinthine Ways: A Recording Acts Guide for First Year Law Students*, 80 U. DET. MERCY L. REV. 91, 94 (2002) ("The practice of causing legal title to be held by one party while another party retained the benefit of the use of the land, now known as a beneficial interest, began with the Franciscan Friars in the thirteenth century."); Robert Whitman, *Resolution Procedures to Resolve Trust Beneficiary Complaints*, 39 REAL PROP. PROB. & TR. J. 829, 845 (2005) ("The ancestor of the modern trust was the 'use.'").

[64] *See* Thomas E. Rutledge & Christopher E. Schaefer, *The Trust as an Entity and Diversity Jurisdiction: Is* Navarro *Applicable to the Modern Business Trust?*, 48 REAL PROP. TR. & EST. L.J. 83, 86 (2013) ("Various developments such as the Statute of Mortmain, which precluded or limited the ability of religious organizations to own real property, . . . encouraged the advancement of trusts." (footnotes omitted)).

[65] *See* Bridget J. Crawford, *Less Trust Means More Trusts*, 75 WASH. & LEE L. REV. ONLINE 74, 80 (2019), https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1114&context=wlulr-online [https://perma.cc/T8LN-YC6S] ("[I]n the thirteenth century in England, the Franciscan order prevented its mendicant friars from owning any property. But because the monks needed stable places to live and worship, the Franciscans occasionally identified a wealthy patron who would convey land to a third party to hold the property for the benefit of the friars, who could then use it for their own purposes." (footnote omitted)); Joseph A. Rosenberg, *Supplemental Needs Trusts for People with Disabilities: The Development of a Private Trust in the Public Interest*, 10 B.U. PUB. INT. L.J. 91, 100 (2000) ("The earliest instance of the use occurred in the first half of the thirteenth century when landowners employed the use for the benefit of the Franciscan friars. . . . Friars could not own any property, either individually or collectively.").

[66] *See* Dante Figueroa, *Civil Law Trusts in Latin America: Is the Lack of Trusts an Impediment for Expanding Business Opportunities in Latin America?*, 24 ARIZ. J. INT'L & COMP. L. 701, 710 (2007) ("As early as the thirteenth century, Catholic monks used trusts for the implementation of their vows of poverty."); Charles J. Reid, Jr., *The Seventeenth-Century Revolution in the English Land Law*, 43 CLEV. ST. L. REV. 221, 283 (1995) ("The doctrine of the use is traceable to . . . the late thirteenth-century Franciscans . . . . Since the Franciscans could not own property outright, but nevertheless had to eat and drink, wear clothing and reside in habitations, some third party had to hold proper-

to convey land to other individuals to hold for use by the friars.[67] In a *use*, a *feoffor*, the historical equivalent of a settlor, conveyed property to a *feoffee*, the historical equivalent of a trustee, for the benefit of the *cestui que use*, the historical equivalent of a beneficiary.[68]

In addition to avoiding land ownership restrictions, the *use* was eventually employed to circumvent other laws as well, including laws relating to inheritance,[69] taxes,[70] and creditors.[71] This led Parliament to attempt to abolish *uses*

ty for their benefit."); Carla Spivack, *Due Process, State Taxation of Trusts and the Myth of the Powerless Beneficiary: A Response to Bridget Crawford and Michelle Simon*, 67 UCLA L. REV. DISCOURSE 46, 55 (2019) ("One of the earliest trusts in English law were those benefitting the Franciscans, who were sworn to poverty. Their poverty oath made life difficult, even unpleasant. The solution appeared in the form of the use—a device which allowed a benefactor to vest legal title in a trustee 'ad opus franciscanorum' (for the use of the Franciscans)." (footnote omitted)).

[67] *See* Sande Buhai, *Lawyers as Fiduciaries*, 53 ST. LOUIS U. L.J. 553, 558 (2009) ("The Franciscans, founded in 1209, became the first to employ the use on a wide scale. Franciscans were prohibited by their vows from owning property. They solved this rather awkward problem by vesting title to their land in others; the order merely held the *ad opus* or use." (footnote omitted)); Myron T. Steele, *The Moral Underpinnings of Delaware's Modern Corporate Fiduciary Duties*, 26 NOTRE DAME J.L. ETHICS & PUB. POL'Y 3, 10 (2012) ("[R]eligious orders—most notably the Franciscan Friars—popularized the use significantly. The individual friars had taken vows of poverty and were therefore precluded from owning any worldly possessions, but they widely employed the use in order to take control of and manage land and other property donated for the benefit of their religious order." (footnote omitted)); Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035, 1041 n.38 (2000) ("Franciscan friars . . . employed uses to avoid the religious prohibition on property ownership.").

[68] *See* R.H. Helmholz, *The Early Enforcement of Uses*, 79 COLUM. L. REV. 1503, 1503 (1979) ("[In a use, the] holder of freehold land—the feoffor—would convey land during his lifetime to feoffees to uses. They in turn held it for the benefit of the feoffor, or sometimes of a third party—the cestui que use—under instructions to convey the land to persons to be named in the feoffor's will."); David J. Seipp, *Trust and Fiduciary Duty in the Early Common Law*, 91 B.U. L. REV. 1011, 1015 (2011) ("The standard terminology for this social practice was feoffment to uses. The landholder or feoffor granted or enfeoffed the land to feoffees to the use of the intended beneficiary, or *cestuy que use*." (footnote omitted)); Steele, *supra* note 67, at 10 ("English common law courts enforced 'uses,' which . . . were the forebear to trusts. . . . In the legal terminology of the era, a *feoffor* would transfer title—an act known as *enfeoffment*—to the *feoffee to uses* in order to benefit the *cestui que use*." (footnote omitted)).

[69] *See* Adam F. Streisand & Lena G. Streisand, *Conflicts of International Inheritance Laws in the Age of Multinational Lives*, 52 CORNELL INT'L L.J. 675, 690 (2020) ("Freeholders in medieval times found a means of circumventing the restriction against devising real property by will. They created 'uses' which have been called the precursor to the modern day trust." (footnote omitted)).

[70] *See* Carly Howard, *Trust Funds in Common Law and Civil Law Systems: A Comparative Analysis*, 13 U. MIA. INT'L & COMP. L. REV. 343, 349 (2006) ("The use was also a popular method of avoiding feudal taxes payable upon death, marriage, and coming of age . . . ."); Alex M. Johnson, Jr., *Is It Time for Irrevocable Wills?*, 53 U. LOUISVILLE L. REV. 393, 413 (2016) ("[W]hen a grantor executed a use, he was giving the property to another person to hold for the benefit of a third party (the intended donee). This was done to, among other reasons, evade taxes, avoid the prohibition on wills, evade feudal duties, and to avoid the rule of primogeniture."); Sterk, *supra* note 67, at 1041 ("As early as the fourteenth century, landowners employed the 'use'—the precursor to the modern trust—both as a tax avoidance device and as a way to escape English primogeniture rules . . . .").

with the Statute of Uses in 1535.[72] Legal loopholes, however, were found once again.[73] The *use* survived and was transformed into the trust.[74]

The date of the creation of the first business trust is hard to determine. The term "business" is notoriously difficult to define, and the corpuses of many trusts consist of property related to business activities. With that said, the popularization of business trusts corresponds with the popularization of passive investing during the 1600s.[75] As previously mentioned, during that period,

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[71] *See* Mark A. Hall & John D. Colombo, *The Charitable Status of Nonprofit Hospitals: Toward a Donative Theory of Tax Exemption*, 66 WASH. L. REV. 307, 335 n.93 (1991) ("Early English law developed a somewhat hostile attitude toward trusts (originally called 'uses' as a consequence of their conveyance of legal title to a nominal owner 'for the use of' another), because they originated in feudal times as devices for hiding land from creditors and the exactions of landlords."); Stewart E. Sterk, *Trust Decanting: A Critical Perspective*, 38 CARDOZO L. REV. 1993, 1997 (2017) ("The trust is a direct descendant of the 'use,' a popular tax-and-creditor-avoidance device in feudal England.").

[72] *See* Hall & Colombo, *supra* note 71, at 335 n.93 ("[T]he 1535 Statute of Uses . . . sought to abolish this device altogether by declaring that, for land transfers, the beneficiary holds legal title as well."); Kim Johnston, *Patient Advocates or Patient Adversaries? Using Fiduciary Law to Compel Disclosure of Managed Care Financial Incentives*, 35 SAN DIEGO L. REV. 951, 958 n.29 (1998) ("The use was abolished in 1535 by the Statute of Uses, but was quickly replaced by the trust."); C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism*, 43 FLA. L. REV. 167, 197 (1991) ("From the fifteenth to the early sixteenth century, the use was the most common form of ownership. The rise of the use, however, deprived the king of the incidents of tenure, a reliable source of revenue. In 1535 Parliament enacted the Statute of Uses, which abolished the use and declared that the person for whom the use was created had full legal title." (footnotes omitted)).

[73] *See* Jonathan R. Macey, *Private Trusts for the Provision of Private Goods*, 37 EMORY L.J. 295, 295 n.1 (1988) ("The [Statute of Uses] had many loopholes, which were exploited by the land holders and embraced by the courts . . . . Modern trusts sprang from these exceptions."); Scheid, *supra* note 63, at 96 ("Parliament's dream of the end of the use turned out to be just that: a dream. The Statute of Uses, which was intended by Parliament to terminate the use, ironically fortified the use because of the statute's judicial interpretation."); Whitman, *supra* note 63, at 849 ("Although the purpose of the Statute of Uses was to abolish uses by executing them, imaginative common-law lawyers and judges found holes in the Statute.").

[74] *See* Buhai, *supra* note 67, at 559 ("In 1535, the Statute of Uses converted equitable uses into legal estates . . . . Many uses, however, escaped conversion. . . . Uses that survived the Statute became 'trusts,' enforceable in the Court of Chancery."); Gerhard Dannemann, *Is Unjust Enrichment Law an Officious Intermeddler?*, 92 B.U. L. REV. 991, 1007 (2012) ("Trust law started its life as judicial intermeddling with the Statute of Uses 1535, which sought to exclude any separation of ownership and use by treating any transfer of use as a transfer of ownership" (footnote omitted)); Eduard A. Lopez, *Equitable Remedies for Breach of Fiduciary Duty Under ERISA After* Varity Corp. v. Howe, 18 BERKELEY J. EMP. & LAB. L. 323, 339 (1997) ("In 1535, the Statute of Uses was enacted. The statute abolished uses of land that involved no active duties on the part of the feofee, for such uses appeared to have the sole purpose of evading feudal levies on land. Uses that imposed duties upon the feofee were unaffected by the statute. In order to distinguish these uses from the passive ones barred by the statute, the active duty-imposing uses became known as trusts." (footnote omitted)).

[75] *See* Goffe, *supra* note 8, at 559 ("The common law commercial trust, also referred to as a business trust, emerged in the seventeenth century."); Hamill, *supra* note 53, at 1502 n.194 ("Business trusts date back to seventeenth century English trust law . . . .").

a corporation could only be created by a bespoke act of government.[76] Business trusts were used as a vehicle for facilitating passive investment while avoiding the complex task of petitioning the government for a corporate charter.[77] This sidestepping of authority concerned the British government because of its perceived threats to emerging capital markets, investors, and the government's authority to regulate business activity.[78] As a result, the government enacted the Bubble Act of 1720, which attempted to prohibit the use of unincorporated business forms with tradeable shares, such as business trusts.[79] Many have suggested that this Act was largely ignored, and business trusts continued to be regularly used.[80] Regardless, the Act was repealed in 1825, and business trusts flourished again in England.[81]

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[76] *See supra* note 51 and accompanying text (explaining that until 1844 and the advent of general incorporation in the United Kingdom, the British government chartered corporations through specific acts).

[77] *See supra* note 48 and accompanying text (explaining that originally corporations in England could only be chartered through a specific act of the government).

[78] *See* Tan Cheng-Han, Jiangyu Wang & Christian Hofmann, *Piercing the Corporate Veil: Historical, Theoretical and Comparative Perspectives*, 16 BERKELEY BUS. L.J. 140, 144 (2019) ("The British Parliament intervened to curb the gambling mania by enacting the 'Bubble Act' of 1720. The purpose of the Act was to prevent persons from acting as if they were corporate bodies, or to have transferable shares without any authority from the British Parliament." (footnote omitted)); Richard W. Painter, *Foreword: Evaluation and Response to Risk by Lawyers and Accountants in the U.S. and E.U.*, 29 J. CORP. L. 217, 217 (2004) ("The Bubble Act of 1720 . . . responded to financial frauds by requiring promoters to seek a specific charter from Parliament to establish a publicly traded limited liability company."); Larry E. Ribstein, Commentary, *Bubble Laws*, 40 HOUS. L. REV. 77, 95 (2003) ("Reacting to concerns about excessive speculation, on June 11, 1720, Parliament passed what is now known as the Bubble Act . . . .").

[79] Bubble Act of 1720, 6 Geo. I, c. 18 (1719), (repealed 1825); *see* Blair, *supra* note 46, at 792 ("[I]n 1720, Parliament passed the so-called 'Bubble Act,' which made it illegal to trade in the shares of unincorporated joint-stock companies."); Bubb, *supra* note 51, at 337 ("[T]he Bubble Act explicitly outlawed the formation of unincorporated joint stock companies with transferable shares."); Michael E. DeBow & Dwight R. Lee, *Shareholders, Nonshareholders and Corporate Law: Communitarianism and Resource Allocation*, 18 DEL. J. CORP. L. 393, 411 (1993) ("From the passage of the Bubble Act . . . the organization of a legally enforceable corporation required Parliamentary action to confer a corporate charter; a course of action that was complicated and costly. The Bubble Act prohibited the operation of unincorporated companies under the threat of severe penalties." (footnotes omitted)).

[80] *See* William J. Carney, *Limited Liability Companies: Origins and Antecedents*, 66 U. COLO. L. REV. 855, 870 (1995) ("Both in America and in England, the Bubble Act's ban on issuance of transferable shares without a charter was ignored, and interpreted as applying only in the special case of banks or other enterprises that threatened a governmental monopoly."); Paul G. Mahoney, *Contract or Concession? An Essay on the History of Corporate Law*, 34 GA. L. REV. 873, 888 (2000) ("Despite heavy penalties . . . the Bubble Act manifestly failed to eradicate unincorporated joint-stock companies. Joint-stock companies continued to be created and operate right up to the repeal of the Bubble Act in 1825."); Morley, *supra* note 24, at 2158 ("Modern historians have found that the Bubble Act was widely ignored and that it did not stop trusts from becoming widespread in the organization of English business in the eighteenth and early nineteenth centuries.").

[81] *See* Margaret M. Blair, *Reforming Corporate Governance: What History Can Teach Us*, 1 BERKELEY BUS. L.J. 1, 10 n.27 (2004) ("In England, the Bubble Act of 1720, passed in the wake of a

Similar to corporations, business trusts migrated to North America along with the English common law.[82] As previously discussed, colonial legislatures and later state legislatures continued to charter corporations through bespoke acts.[83] Consequently, the business trust remained an alternative to the complex process of obtaining a corporate charter.[84] Even as general incorporation statutes began to be enacted throughout the United States in the nineteenth century, business trusts retained their popularity because of legal restrictions placed upon the use of the corporate form.[85] For example, although Massachusetts enacted a general incorporation statute in 1809,[86] the state legislatures continued to place heavy restrictions on the use of the form, including prohibitions in dealing with real estate.[87] In Massachusetts, business trusts were used as a

financial collapse and associated market scandals, made it illegal to trade in shares of unchartered joint stock companies. This greatly slowed the development of [business trusts] in England for more than a century, until the Bubble Act was repealed in 1825.").

[82] *See* Hamill, *supra* note 53, at 1485 (discussing the introduction of corporations from England to the colonies).

[83] *See supra* notes 53–54 (explaining that originally, in colonial America and the early days of the United States, corporations could only be chartered through a specific act of the government).

[84] *See* Ryan A. Christy, *Redefining the Juridical Person: Examining the Business Trust and Other Unincorporated Associations for Citizenship Purposes*, 6 DUQ. BUS. L.J. 137, 148 (2004) ("Business trusts, which are essentially business organizations formed by declarations of trust, . . . originated in Massachusetts as a result of the inability to secure charters for acquiring and developing real estate without a special act of the legislature." (citing State St. Trust Co. v. Hall, 41 N.E.2d 30, 34 (Mass. 1942)); Tritt & Teschner, *supra* note 6, at 4 n.4 ("[T]he Massachusetts business trust originally emerged as an alternative to the corporation, specifically the restrictions on what was eligible for a corporate charter.").

[85] *See* Giacomo Rojas Elgueta, *Divergences and Convergences of Common Law and Civil Law Traditions on Asset Partitioning: A Functional Analysis*, 12 U. PA. J. BUS. L. 517, 531 (2010) ("In the first half of the nineteenth century in the U.S., incorporation was still restricted to a fixed range of business purposes. In order to achieve affirmative asset partitioning, business people used . . . trust law."); Jonathan J. Ossip, *Diversity Jurisdiction and Trusts*, 89 N.Y.U. L. REV. 2301, 2312 (2014) ("The business trust developed in response to the early limitations on the corporate form, serving as a substitute for purposes of business organization." (footnote omitted)).

[86] *See* Margaret M. Blair, *Locking In Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387, 425–26 (2003) ("In 1809, the Massachusetts legislature passed a general incorporation act for manufacturing companies."); David B. Guenther, *Of Bodies Politic and Pecuniary: A Brief History of Corporate Purpose*, 9 MICH. BUS. & ENTREPRENEURIAL L. REV. 1, 47 (2019) ("In 1809, Massachusetts adopted a general incorporation act for textile and certain other manufacturers."); Marks, *supra* note 54, at 1132 ("[S]tates began enacting general incorporation statutes. In 1809, Massachusetts passed a general incorporation act for manufacturing companies . . . .").

[87] *See* Alessandra Suuberg, *REIT Conversions in Context: A Case Study for the Tax Planning Initiate*, 44 REAL EST. L.J. 127, 137 (2015) ("The first recognized real estate trust ancestor to today's REITs, called the Boston Real Estate Trust, was formed in the 1880s in response to limitations under Massachusetts law on corporate ownership of real estate. At the time, state law prohibited corporations from owning real property unless it was incidental to their business, but allowed trusts to hold real estate for investment purposes." (footnote omitted)); Sitkoff, *supra* note 17, at 44–45 ("The standard account of the history of trust versus corporation is that trust was used in the late 1800s and

means of avoiding these restrictions.[88] These entities became so popular that "Massachusetts trust" became synonymous with business trusts nationally.[89]

Throughout the nineteenth century, business trusts continued to grow in popularity.[90] These entities also grew in prominence and dominance.[91] Business trusts, such as Standard Oil and United States Steel, developed monopolies over certain industries.[92] Public and government concerns grew over the success and power of certain business trusts.[93] As a result, Congress promul-

early 1900s primarily as a means to escape arbitrary regulatory limits in state corporate codes. This use of the trust was especially pronounced in Massachusetts, which forbade corporate ownership of real estate."); Louis J. Zivot, *The Evolution of a REIT Rule: Impermissible Tenant Service Income*, 33 REAL EST. L.J. 54, 56 (2004) ("[REITs] can be traced back to the 'Massachusetts Business Trusts' of the 19th century. Massachusetts law restricted corporations from owning real property, so investors used these aptly named trusts to own real estate." (footnote omitted)).

[88] *See* Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434, 474 (1998) ("The initial attraction of the business trust in Massachusetts was that it avoided arbitrary restrictions in that state's corporation laws."); Thomas A. Jesch, *The Taxation of "Opportunistic" Real Estate Private Equity Funds and U.S. Real Estate Investment Trusts (REITs)—An Investor's Comparative Analysis*, 34 REAL EST. L.J. 275, 281 (2005) ("[T]he Massachusetts business trust . . . was created to avoid state restrictions on land ownership by corporations."); Tritt & Teschner, *supra* note 6, at 48 ("In Massachusetts, the first state in which business trusts thrived, business trusts were used to avoid the state's strict incorporation statute and the prohibition on dealing in real estate that was placed on corporations.").

[89] *See* ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 409 (11th ed. 2022) ("In the late 1800s and early 1900s, entrepreneurs used the business trust to escape the heavy regulation of the corporate form. The business trust was so common in Massachusetts, where corporate ownership of real estate was prohibited, that the term *Massachusetts trust* became synonymous with business trust."); Hamill, *supra* note 53, at 1502 n.194 ("Massachusetts became the mainstay for business trusts in the nineteenth century, thus donning them with the name 'Massachusetts trusts.'"); Sitkoff, *supra* note 17, at 32 ("In the late 1800s and early 1900s, before the corporate form had matured, the common-law business trust (also known as the Massachusetts trust because of its prevalence there) was a strong competitor to corporation as a mode of business organization.").

[90] *See* Hamill, *supra* note 53, at 1502 ("Business trusts, which involve no formal state law filings providing statutory limited liability to the participants, first enjoyed widespread recognition by courts as a legitimate entity for doing business in the late nineteenth century."); Hansmann & Mattei, *supra* note 88, at 473 ("The business trust first came to prominence in Massachusetts in the nineteenth century as a common law variant on the private trust.").

[91] *See* Nolan Ezra Clark, *Antitrust Comes Full Circle: The Return to the Cartelization Standard*, 38 VAND. L. REV. 1125, 1140 (1985) ("[B]y the late 1880's, the term 'trust' almost replaced 'monopoly' as the popular designation for virtually every form of business combination deemed in restraint of trade."); Ronald E. Kennedy, *Political Boycotts, the Sherman Act, and the First Amendment: An Accommodation of Competing Interests*, 55 S. CAL. L. REV. 983, 987 (1982) ("In the late nineteenth century, the United States experienced explosive economic growth which was accompanied by the proliferation of large business trusts."); John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 631 (1995) ("In the nineteenth century, when the business corporation was in its infancy, great enterprises organized themselves as business trusts . . . .").

[92] *See* Morley, *supra* note 24, at 2164 ("The most prominent examples of the trust's enduring popularity, of course, were the huge monopoly trusts that inspired the 'anti-*trust*' movement of the 1880s, such as United States Steel and Standard Oil.").

[93] *See* Brian Kingsley Krumm, *Covenants Not to Compete: Time for Legislative and Judicial Reform in Tennessee*, 35 U. MEM. L. REV. 447, 453–54 (2005) ("Although the common law of re-

gated the Sherman Act of 1890,[94] and an age of "trust busting" began.[95] As previously mentioned, the reason that the United States has antitrust law, rather than competition law or monopoly law, is because of the historical success of the business trust as an organizational form in the United States.[96]

Even as governmental scrutiny regarding business trusts grew, the trust remained a strong competitor to the corporation at the beginning of twentieth century.[97] This continued until the 1920s as corporate law became better developed and matured.[98] For instance, in the 1910s, the Supreme Court relieved

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straints of trade was imported almost entirely from England to the United States, the industrial revolution and the growing public perception of a 'trust problem' led to dissatisfaction with common law remedies which, in turn, resulted in increasing pressure for congressional action."); Christopher R. Leslie, *Antitrust Law as Public Interest Law*, 2 U.C. IRVINE L. REV. 885, 888 (2012) ("As the American public cried out against the trusts, Congress had to take action and show that it, too, was alarmed by the growing power of the trusts. In response to public concerns about trusts, Congress enacted the Sherman Antitrust Act of 1890."); Kitsuron Sangsuvan, *Separation of Powers in Intellectual Property Rights: Balancing Global Intellectual Property Rights or Monopoly Power in the Twenty-First Century by Competition Law*, 26 N.Y. INT'L L. REV. 1, 47 (2013) ("[T]he government tried to deal with the growth of public concern over powerful business trusts by enacting the Sherman Act.").

[94] Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7); *see* Randy D. Gordon, *How Lawyers (Come to) See the World: A Narrative Theory of Legal Pedagogy*, 56 LOY. L. REV. 619, 634 n.65 (2010) ("[T]he Sherman Act sought to prohibit the economic bad acts (e.g., monopolization and price fixing) of large business trusts . . . ."); Nadia E. Nedzel & Walter Block, *Eminent Domain: A Legal and Economic Critique*, 7 U. MD. L.J. RACE RELIGION GENDER & CLASS 140, 165 n.108 (2007) ("Negative reaction to the business trusts led to the Sherman Antitrust Act in 1890."); Reyes, *supra* note 3, at 422 ("The unexpected economic prowess of the business trust and concerns regarding the effects on a market economy led to the enactment of the Sherman Antitrust Act.").

[95] *See* Charles W. Murdock, *The Big Banks: Background, Deregulation, Financial Innovation, and "Too Big to Fail,"* 90 DENV. U. L. REV. 505, 509–10 (2012) ("[T]he last couple of decades of the nineteenth century were the Gilded Age, or the age of trusts; this in turn led to the enactment of the Sherman Antitrust Act of 1890, and subsequent 'trust busting' by President Theodore Roosevelt." (footnotes omitted)); Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. 2583, 2671 (2008) ("In the late nineteenth century the growth of massive trust arrangements that exercised enormous market power with detrimental social effects resulted in governmental action trust-busting devices such as the Sherman Antitrust Act.").

[96] *See supra* note 4 and accompanying text (explaining that the purpose of antitrust in the United States was to break up powerful business trusts).

[97] *See* Elgueta, *supra* note 85, at 531 ("Despite the fact that many states passed general incorporation statutes during this time period, in the early twentieth century, the use of the trust—in particular, the business trust (also known as the Massachusetts trust)—was a strong competitor to the corporation . . . ."); Ho, *supra* note 2, at 311 ("Business trusts have been utilized for over a hundred years in the Anglo-American legal world as an alternative business organizational form to the traditional corporation; for example, they were very strong competitors to the corporation as a way of business organization in early 20th century America . . . .").

[98] *See* John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165, 188–89 (1997) ("To be sure, the business trust was already a prominent device for the conduct of enterprise in the nineteenth century, until the general corporation statutes made the company form easily available." (footnote omitted)); Morley, *supra* note 24, at 2164 ("The trust re-

or removed restrictions that states could place on out-of-state corporations through the use of foreign corporation statutes,[99] which allowed promoters to incorporate in states with favorable corporate law and to operate elsewhere.[100]

Despite the waning prominence of business trusts, these entities continue to be of tremendous importance to the American economy.[101] This form is regularly used for mutual funds, pension funds, REITs, and asset securitization.[102] In addition, trillions of dollars of wealth reside in the corpuses of business trusts.[103] Many state legislatures have enacted trust statutes,[104] including Delaware in 1988.[105] In 2009, the Uniform Law Commission promulgated the Uni-

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mained a popular vehicle for avoiding corporate regulations up through at least the 1920s—long after general incorporation statutes had made the corporate form widely available.").

[99] *See, e.g.*, W. Union Tel. Co. v. Kansas, 216 U.S. 1, 27 (1910) ("[A] corporation of one State, authorized by its charter to engage in lawful commerce among the states, may not be prevented by another State from coming into its limits for all the legitimate purposes of such commerce.").

[100] *See* Virginia Harper Ho, *Of Enterprise Principles and Corporate Groups: Does Corporate Law Reach Human Rights?*, 52 COLUM. J. TRANSNAT'L L. 113, 139 n.116 (2013) ("The incorporation doctrine provides that persons forming incorporations can choose to incorporate in any state, regardless of whether the company conducts its operations elsewhere."); Mohsen Manesh, *The Contested Edges of Internal Affairs*, 87 TENN. L. REV. 251, 265–66 (2020) ("Because a corporation can be incorporated in any state, regardless of whether the corporation has a physical presence in that state, the internal affairs doctrine means that business planners can effectively choose which state's corporate law will govern the relationship between the corporation, its shareholders, officers, and directors."); Erin Ann O'Hara, *Opting Out of Regulation: A Public Choice Analysis of Contractual Choice of Law*, 53 VAND. L. REV. 1551, 1571 n.98 (2000) ("A corporation can choose to incorporate in any state, regardless of whether it has any other connection to that state.").

[101] *See supra* notes 6–10 and accompanying text (discussing the current importance of business trusts to the United States economy).

[102] *See supra* notes 6–9 and accompanying text (explaining how business trusts are currently commonly used in the United States).

[103] *See supra* note 10 and accompanying text (discussing the capitalization of business trusts in the United States).

[104] *See* Goffe, *supra* note 8, at 560 ("At least thirty states have enacted business trust statutes because of the many limitations of the common law business trust and the common-law limitations on fiduciaries."); Haynsworth, *supra* note 7, at 96–97 ("Approximately thirty-four states have some form of business trust statute and most of these are very incomplete and inconsistent. . . . The most complete act is the Delaware Business Trust Act, enacted in 1988 and amended periodically."); Sitkoff, *supra* note 17, at 35 ("The existing literature, such as it is, puts the count of states with general business trust legislation anywhere from seventeen to thirty-four.").

[105] DEL. CODE ANN. tit. 12, §§ 3801–3863 (2023); *see* Langbein, *supra* note 98, at 187 ("In 1988, Delaware, long the home of permissive business corporation laws, enacted a liberal business trust act."); Rutledge & Habbart, *supra* note 9, at 1060–61 n.38 ("Delaware adopted a Business Trust Act in 1988, referring to an organization created thereunder as a 'business trust.' In 2001 the name of the act was changed to the Delaware Statutory Trust Act and the name of an organization created thereunder was changed to a 'statutory trust.'"); Amy Y. Yeung & Kristen J. Freeman, Gartenberg*, Jones, and the Meaning of Fiduciary: A Legislative Investigation of Section 36(B)*, 35 DEL. J. CORP. L. 483, 486 n.12 (2010) ("Delaware has been a popular jurisdiction to organize mutual funds since 1988, when the state enacted a liberal business trust act to match its permissive business corporation laws.").

form Statutory Trust Entity Act,[106] which has been enacted in the District of Columbia and Kentucky.[107] Although statutory business trusts are designed to provide greater clarity regarding the law,[108] common-law business trusts continue to exist and are well-entrenched in United States law.[109]

### *C. Comparing and Contrasting Corporations and Business Trusts*

This Article posits that common-law and statutory business trusts ought to be preserved and nurtured. A few words ought to be said about how these business entities compare to their main historical competitor, the corporation.[110] Importantly, comparing and contrasting corporations with business trusts is a difficult task because of the substantial variation among business trusts.[111]

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[106] UNIF. STATUTORY TR. ENTITY ACT (UNIF. L. COMM'N 2009); *see* Goffe, *supra* note 8, at 560 ("[O]n July 15, 2009, the National Uniform Conference of Commissioners of Uniform State Laws (NCCUSL) approved the Uniform Statutory Trust Entity Act . . . ."); Ho, *supra* note 2, at 313 ("As a further sign of the importance and growing proliferation of business trusts as a business organization form, the National Conference of Commissioners on Uniform State Laws approved in 2009 a uniform statute, the Uniform Statutory Trust Entity Act, in an effort to promote consistency among varying state statutory treatments of business trusts.").

[107] *See Statutory Trust Entity Act*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?communitykey=8277f058-520e-40f2-8413-bf1c7bc4836d&tab=groupdetails [https://perma.cc/MF3M-X5RQ] (providing a map of the jurisdictions adopting the Uniform Statutory Trust Entity Act).

[108] *See* Hansmann &Mattei, *supra* note 88, at 474 ("Delaware in 1988 adopted a new statute governing business trusts that seeks to remove the remaining uncertainties that have inhibited the use of the form for business organizations."); Ho, *supra* note 2, at 312 ("In order to resolve these uncertainties and remove the disadvantages associated with common law principles of trusts, many states in the US have now passed statutes regulating business trusts; therefore, these business trusts are more accurately referred to as statutory business trusts."); Tritt & Teschner, *supra* note 6, at 42 ("Because business trusts were associated with common law trust principles, business trusts posed a number of potential uncertainties. To avoid these uncertainties, many states in the United States passed statutes regulating business trusts." (footnote omitted)).

[109] *See* Joseph A. Franco, *Commoditized Governance: The Curious Case of Investment Company Shared Series Trusts*, 44 J. CORP. L. 233, 238 (2018) ("[M]utual funds frequently used common-law business trusts as a preferred entity for organization."); Strong, *supra* note 7, at 1173 ("[T]here are a wide variety of statutory and common law business trusts currently in use, with some of the more common types including pension trusts, investment or unit trusts (which include mutual funds, real estate investment trusts (REITs), oil and gas royalty trusts, and asset securitization trusts), and trusts relating to the issuance of bonds." (footnote omitted)).

[110] *See supra* Section I.B (discussing the history of the business trust, which is largely a tale of the business trust being used as an alternative to the corporate form).

[111] *See* Haynsworth, *supra* note 7, at 96–97 ("Approximately thirty-four states have some form of business trust statute and most of these are very incomplete and inconsistent. One example of the shortcomings of some business trust statutes is that they vary widely with respect to the provisions specifying the liability protection that exists. Some statutes state that both the holders of beneficial interests and the trustees have limited liability equivalent to a corporation. Others explicitly allow limited liability for holders of beneficial interests but are silent on the liability of trustees. Most, however, fail to cover the liability issue in any respect." (footnotes omitted)); Strong, *supra* note 7, at 1173 ("[T]here are a wide variety of statutory and common law business trusts currently in use . . . ."); Lee-

Even after the Uniform Law Commission promulgated the Uniform Statutory Trust Entity Act,[112] great variation still exists among statutory business trusts because only two jurisdictions, the District of Columbia and Kentucky, adopted the Act.[113] In addition, this Article advocates for the preservation and nurturing of common-law and statutory business trusts in large part because of the variation and diversity of the law governing them.[114] Still, enough commonality exists among business trusts that the business trust has been dubbed the "common law corporation."[115] This subpart provides an analysis of various ways in which business trusts are generally comparable to and different from the corporate form.

Business trusts possess many of the attributes of the corporate form.[116] First and foremost, similar to corporations, business trusts often afford limited liability to their trustees and beneficiaries, which shields individuals involved with these entities from personal liability.[117] Variations, however, do exist between states regarding the availability of limited liability and to whom it extends.[118] Second, business trusts provide capital lock-in,[119] which consists of

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ford Tritt & Ryan Scott Teschner, *The Rise of Business Trusts in Sustainable Neo-innovative Economies*, 88 U. CIN. L. REV. 735, 742 (2020) ("[B]usiness trusts are governed by the state laws of the trust's situs. These laws . . . [vary] significantly across states . . . .").

[112] *See supra* note 106 and accompanying text (discussing the Uniform Law Commission's promulgation of the Uniform Statutory Trust Entity Act).

[113] *See supra* note 107 and accompanying text (explaining that the Uniform Statutory Trust Entity Act has been adopted only in the District of Columbia and Kentucky).

[114] *See infra* Section II.A (providing a defense of the common-law underpinnings of business trusts, in part because of the variation and diversity of the law governing these entities).

[115] *See generally* Morley, *supra* note 24 (declaring business trusts to be the "common law corporation" and explaining the reasons for use of that title).

[116] *See* Christy, *supra* note 84, at 150 ("[A] business trust possesses many of the attributes that are fundamental to a corporation—namely, centralized control and management, free transferability of interests, limited liability, and continuity of life."); Morley, *supra* note 24, at 2166 ("Every aspect of the corporate form that legal theorists and historians have identified as key to the corporate form's success also existed in the [business] trust.").

[117] *See* Carliss N. Chatman, *The Corporate Personhood Two-Step*, 18 NEV. L.J. 811, 848 n.236 (2018) ("The business trust . . . does offer some characteristics of corporations, including limited liability . . . ."); Aleta G. Estreicher & Warren S. Green, *Heavy Duty II: Forming a Business Entity in the United States*, 17 N.Y. L. SCH. J. INT'L & COMP. L. 307, 309 n.13 (1997) ("The business trust, or Massachusetts trust, provides trust beneficiaries with limited liability . . . ."); Tritt & Teschner, *supra* note 6, at 39 ("[B]usiness trusts offer[] profit-seeking associations of individuals limited liability, entity shielding, capital lock-in, tradable shares, and legal personhood.").

[118] *See* Tamar Frankel, *The Delaware Business Trust Act Failure as the New Corporate Law*, 23 CARDOZO L. REV. 325, 344 (2001) ("Some states . . . do not recognize the limited liability status of beneficiaries of business trusts."); Goffe, *supra* note 8, at 560 ("The common-law business trust has a number of limitations, including a lack of clarity as to whether it consistently confers limited liability on its investors."); Rutledge & Schaefer, *supra* note 64, at 92 ("Continuing the departure from the common law under which the trustees bore personal liability as principals upon contracts and agreements entered into on behalf of the trust, the modern statutes afford the trustees limited liability from the debts and obligations of the business trust." (footnote omitted)).

giving individuals' and entities' assets irretrievably to the business entity when an equity investment occurs.[120] Third, business trusts offer passive investment, which means that holders of interests in business trusts do not engage actively in the management of those entities.[121] Fourth, business trusts afford centralized management.[122] Finally, the transferability of interests in a business trust is similar to that of a corporation.[123] Restrictions on transferability, however, can be placed within the documents governing the business trust.[124]

The attributes of business trusts also differ from the attributes of the corporate form in significant ways. First, the default fiduciary duties governing

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[119] *See* Morley, *supra* note 24, at 2167–72 (exploring capital lock-in as one of the legal features of business trusts).

[120] *See* Lynn A. Stout, *On the Nature of Corporations*, 2005 U. ILL. L. REV. 253, 255 ("In brief, an essential if often-overlooked difference between unincorporated and incorporated business forms lies in the latter's capacity to make it easier for equity investors to commit their financial contributions irretrievably to the firm. A corporation's assets belong to the corporation, and not to its equity investors. As a result, those assets cannot be unilaterally withdrawn from the firm by either its shareholders, or the creditors of its shareholders."); Larry E. Ribstein, *Should History Lock In Lock-In?*, 41 TULSA L. REV. 523, 523 (2006) ("The corporation does not allow owners, at least by default, to cash out their interests. This feature of 'capital lock-in' facilitates durable and centralized management of corporate assets. It has been argued that capital lock-in is what has made the corporation the dominant business form and has enabled the modern firm."); Blair, *supra* note 81, at 26–27 ("[E]quity investors in corporations generally have no power, on their own initiative, to insist that the corporation buy back their shares or distribute corporate assets to shareholders . . . . [T]he corporate form of organization, more than any other form, facilitates the locking-in of invested capital for an extended—even indefinite—period of time.").

[121] *See* Larry E. Ribstein, *The New Choice of Entity for Entrepreneurs*, 26 CAP. U. L. REV. 325, 330 (1997) ("[B]usiness trusts . . . permit passive investment, centralized management and default restrictions on dissociation." (footnote omitted)).

[122] *See* Christy, *supra* note 84, at 149 ("A cursory review of the fundamental characteristics of a business trust: centralized control; beneficial shares; profit motivation; and continued existence despite the death or disability of a member or shareholder or sale or transfer of interests, indicates a significant similarity to a corporation."); Norton L. Steuben, *Choice of Entity for Real Estate After Check-the-Box and the Entity Explosion*, 37 REAL PROP. PROB. & TR. J. 53, 76 (2002) ("The business trust . . . can provide forms of continuity, centralized management, and transferability without some of the detriments of a C corporation.").

[123] *See* Thomas E. Rutledge, *External Entities and Internal Aggregates: A Deconstructionist Conundrum*, 42 SUFFOLK U. L. REV. 655, 679 (2009) (describing how both business trusts and corporations allow for "freely transferable" rights); Natalya Shnitser, *Trusts No More: Rethinking the Regulation of Retirement Savings in the United States*, 2016 B.Y.U. L. REV. 629, 651 n.82 ("[B]eneficiary interests in statutory business trusts are generally freely transferable . . . ."); Charles A. Szypszak, *Jural Entities, Real Parties in Controversy, and Representative Litigants: A Unified Approach to the Diversity Jurisdiction Requirements for Business Organizations*, 44 ME. L. REV. 1, 27–28 (1992) ("[B]usiness trusts share many organizational features with the corporate form, including the transferability of interests without affecting continuity, and the limitation on the personal liability of the participants . . . .").

[124] *See* Tritt & Teschner, *supra* note 111, at 753 ("Transferability refers to the ability of unitholders to dispose of their interest, or units, in a business trust. Like U.S. corporations, . . . [American] business trusts—as a general rule—allow free transferability of ownership in the company. The primary restriction on that transferability is what the trust's governing instrument provides.").

business trusts are more robust than those governing corporations.[125] Trusts generally have a stricter and more exacting scheme of fiduciary duties than corporations because of the nature of the trust relationship.[126] Second, the majority of fiduciary duties governing business trusts can be modified and eliminated in ways that the fiduciary duties of corporations cannot.[127] The duty of good faith is the only fiduciary duty that cannot be eliminated in regard to business trusts.[128] The corporate form prevents most fiduciary duties from being removed,[129] with the exception that the duty of care can be eliminated under certain circumstances.[130] Third, business trusts, by their nature, are relent-

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[125] *See* Ann E. Conaway, *The Multi-facets of Good Faith in Delaware: A Mistake in the Duty of Good Faith and Fair Dealing; A Different Partnership Duty of Care; Agency Good Faith and Damages; Good Faith and Trust Law*, 10 DEL. L. REV. 89, 120 (2008) ("[U]nlike any other Delaware alternative entity statute, the *default standard* in the Statutory Trust Act is *the common law of trusts*. With the common law of trusts come strict fiduciary duties and a standard of accountability that is *higher* than that seen elsewhere in Delaware's business entity acts."); Susan N. Gary, *Regulating the Management of Charities: Trust Law, Corporate Law, and Tax Law*, 21 U. HAW. L. REV. 593, 634 (1999) ("While fiduciary duties exist under both trust and corporate law, corporate standards are less strict."); Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 680 (2004) ("[T]rust fiduciary law, especially the duty of loyalty, is stricter and more prophylactic than the fiduciary law of other organizational forms.").

[126] *See* Lee-ford Tritt, *Dispatches from the Trenches of America's Great Gun Trust Wars*, 108 NW. U. L. REV. 743, 753 (2014) ("In administering the trust, the trustee is held to a robust and rich concept of fiduciary duties. In fact, the concept of fiduciary duties may be one of the defining aspects of trusts. These duties function both as legal rules and moral norms."); A. Joseph Warburton, *Trusts Versus Corporations: An Empirical Analysis of Competing Organizational Forms*, 36 J. CORP. L. 183, 186 n.7 (2010) ("[W]hile U.S. business trust statutes could have invoked different fiduciary duties, most such statutes instead incorporate the strict fiduciary standards of the common law of trusts."); David H. Webber, *The Use and Abuse of Labor's Capital*, 89 N.Y.U. L. REV. 2106, 2162 (2014) ("[T]rust law has stricter fiduciary duties than, for example, corporate law . . . .").

[127] *See* Hansmann, Kraakman & Squire, *supra* note 51, at 1397 ("[T]he business trust leaves owners free to specify all other matters of organizational design, including control rights, allocation of earnings, and even fiduciary duties."); Ho, *supra* note 2, at 312 ("Delaware passed the Delaware Business Trust Act in 1988 . . . . The duties and liabilities of the trustee may . . . be modified by the trust's governing instrument. If one were to summarize the key advantage of the Act in one word, it would be flexibility." (footnote omitted)); Vaughan, Meyers & Taylor, *supra* note 9, at 5–6 ("Trustees are appointed in the manner provided by the business trust's governing instrument, which will prescribe the trustees' duties, rights, and powers . . . .").

[128] *See* Larry D. Barnett, *The Regulation of Mutual Fund Board Directors: Financial Protection or Social Productivity?*, 16 J.L. & POL'Y 489, 510 (2008) (reporting that, with the exception of the duty of good faith, "[t]he Delaware statute on business trusts . . . allows the document that governs a business trust to alter or remove fiduciary duties of a trustee").

[129] *See, e.g.*, Suren Gomtsian, *The Governance of Publicly Traded Limited Liability Companies*, 40 DEL. J. CORP. L. 207, 237 n.194 (2015) ("The fiduciary duties in Delaware corporations are mandatory and cannot be eliminated or restricted by contract."); Mohsen Manesh, *Equity in LLC Law?*, 44 FLA. ST. U. L. REV. 93, 103 (2016) ("[F]iduciary duties are generally mandatory under corporate law . . . ."); Mary Siegel, *Publicly-Traded LLCs: The New Kid on the Exchange*, 68 SMU L. REV. 885, 885–86 (2015) ("Delaware corporations lack the option to eliminate fiduciary duties.").

[130] *See* Geoffrey P. Miller, *Pleading After* Tellabs, 2009 WIS. L. REV. 507, 531 n.52 ("Section 102(b)(7) of the Delaware General Corporation Law, and its counterparts in other states, now allows

less wealth maximizing beasts, yet corporations do owe some restraint to the state for allowing for their existence and providing them with limited liability.[131] Although corporations should engage in wealth maximization, for them, it is wealth maximization within boundaries that do not apply to business trusts because of the fiduciary duties within the trust form, which require trustees to focus on undivided wealth maximization.[132]

In short, although corporations and business trusts share many commonalities that merit business trusts being termed "common law corporations," the two entities vary in significant ways as well.[133] This variation is accentuated

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companies to exempt directors from liability for money damages for breaches of the duty of care, even if the conduct involves gross negligence."); Lauren A. Newell, *High Crimes: Liability for Directors of Retail Marijuana Corporations*, 16 N.Y.U. J.L. & BUS. 419, 447–48 (2020) ("A . . . source of protection for corporate directors is a provision in the corporation's articles of incorporation that eliminates or limits directors' personal liability to the corporation for monetary damages arising from a breach of the duty of care. These exculpation provisions are authorized under many state corporation statutes."); Cindy A. Schipani, *Should Bank Directors Fear FIRREA: The FDIC's Enforcement of the Financial Institutions Reform Recovery and Enforcement Act*, 17 J. CORP. L. 739, 751 (1992) ("[A]lthough the directors' duty of care is codified in most states in terms of a simple negligence standard, most of these states provide the corporation with the means to limit or eliminate the directors' liability exposure to the corporation and its shareholders for acts of simple and gross negligence.").

[131] *See generally* Chaffee, *Origins of Corporate Social Responsibility*, *supra* note 21 (discussing reasons corporations should engage in corporate social responsibility because the state is a collaborator in the corporate form); *see also* Constance E. Bagley & Karen L. Page, *The Devil Made Me Do It: Replacing Corporate Directors' Veil of Secrecy with the Mantle of Stewardship*, 36 SAN DIEGO L. REV. 897, 899 (1999) ("The 'profit maximization' view of directors' duties ignores the historical reasons why corporations were given special privileges, such as limited liability, by the state. This narrow view should be replaced with a doctrine of stewardship that imposes a more comprehensive view of the corporation's and directors' responsibility to manage the vast resources held in corporate form." (footnote omitted)); Thomas J. Molony, *Charity, Truth, and Corporate Governance*, 56 LOY. L. REV. 825, 845 (2010) ("The benefits of limited liability and perpetual existence that corporations enjoy are coupled with an obligation to the public that is broader than shareholder wealth maximization."); Robert J. Rhee, *Bonding Limited Liability*, 51 WM. & MARY L. REV. 1417, 1435 (2010) ("[A]lthough social wealth and shareholder profit maximization are highly correlated, the purpose of limited liability must be based on societal wealth enhancement and not private gain of shareholders.").

[132] *Compare* Molony, *supra* note 131, at 845 (describing obligations corporations have beyond wealth maximization), *and* Rhee, *supra* note 131, at 1435 (arguing that the benefits of the corporate form are not solely for shareholders), *with* Alex M. Johnson Jr. & Ross D. Taylor, *Revolutionizing Judicial Interpretation of Charitable Trusts: Applying Relational Contracts and Dynamic Interpretation to Cy Pres and America's Cup Litigation*, 74 IOWA L. REV. 545, 575 (1989) ("The trustee is responsible for dealing with changed conditions and maximizing, in the safest and most conservative manner possible, the wealth generated by the trust to be enjoyed by the beneficiaries."), *and* Paul Rose, *Catalyzing Sustainable Investment*, 51 ENV'T L. 1221, 1224 (2021) ("Trust law . . . generally requires wealth maximization." (citing Paul Rose, *Public Wealth Maximization: A New Framework for Fiduciary Duties in Public Funds*, 2018 U. ILL. L. REV. 891, 894)).

[133] *See generally* Morley, *supra* note 24 (describing business trusts as the "common law corporation" and explaining the reasons for use of that term).

because although generalizations can be made, great variation exists among business trusts.[134]

## II. A DEFENSE OF THE COMMON-LAW UNDERPINNINGS OF BUSINESS TRUSTS

Although corporations and business trusts share many common features, they are different entities. The question that lingers is whether this variation is a good thing. Variation creates complexity that can often impede efficiency.[135] As a consequence, to justify the continued existence and use of business trusts, especially the common-law version, the variation that these entities afford from corporations and the variation that exists among business trusts themselves must serve some useful purpose.

This Article argues for the preservation and nurturing of business trusts for various reasons. Section A of this Part discusses the importance of diversification in investment and reducing systemic risk promoted through the use of business trusts. Section B explores the efficiency that regulatory competition and the common law often produce. Section C discusses why business trusts embody the knowledge and wisdom obtained through spontaneous ordering because of their common-law origins. Each of these justifications provides independent support for the existence of business trusts, even with the current highly developed state of corporate law.[136]

### *A. Business Trusts Permit Diversification and Reduce Systemic Risk*

Common-law and statutory business trusts are useful because they provide diversification that helps to protect investors' interests and reduce systemic risk. First, trusts are an excellent vehicle for investment diversification. In

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[134] *See supra* note 111 and accompanying text (discussing the great variation that exists among business trusts).

[135] *See* John R. Nolon, *Champions of Change: Reinventing Democracy Through Land Law Reform*, 30 HARV. ENV'T L. REV. 1, 4 (2006) ("Law is society's ordering mechanism and survival technique. The law, however, can be frustratingly complex, fragmented, and inefficient, given its multiple sources and constantly changing influences."); Limor Riza, *Two to Tango, One to Incentivize: Tax Incentives, Compliance and Symmetry*, 18 DEPAUL BUS. & COM. L.J. 1, 19 (2020) ("[C]omplexity has . . . deficiencies: it causes both individuals and governments to spend time and effort to comply with the law—a problem referred to as compliance complexity."); Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1, 18–19 (1992) ("[L]egal complexity magnifies transaction costs by generating uncertainty. . . . Complexity-induced costs can be both inefficient and unfair.").

[136] *See* Joan MacLeod Heminway, *Teaching Business Associations Law in the Evolving New Market Economy*, 8 J. BUS. & TECH. L. 175, 186 (2013) ("[C]orporate law [is] the most well-developed body of business entity law that we have in the United States."); Robert J. Rhee, *A Legal Theory of Shareholder Primacy*, 102 MINN. L. REV. 1951, 1953 (2018) ("[T]he field of corporate law has been well developed in law and scholarship.").

1952, Harry Markowitz introduced Modern Portfolio Theory in his article *Portfolio Selection* in *The Journal of Finance*.[137] In 1990, Markowitz received a Nobel Prize in Economic Sciences based upon his research on this topic.[138] A complete laying out of this theory is not possible within the limited number of pages of this Article. Modern Portfolio Theory suggests, however, that investors can minimize risk and create the greatest likelihood of consistent returns through diversification.[139]

Trusts are excellent vehicles for diversification.[140] As a default, trustees have a fiduciary duty to diversify the assets of the trusts.[141] Business trusts are currently commonly used for asset diversification because, as previously men-

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[137] *See generally* Harry Markowitz, *Portfolio Selection*, 7 J. FIN. 77 (1952) (introducing the concepts underlying Modern Portfolio Theory).

[138] *See* Kelli A. Alces, *Legal Diversification*, 113 COLUM. L. REV. 1977, 1985 n.15 (2013) ("In 1990, Markowitz won the Nobel Prize in Economic Sciences for his significant contributions to modern portfolio theory."); Peter H. Huang, *Trust, Guilt, and Securities Regulation*, 151 U. PA. L. REV. 1059, 1093 n.156 (2003) ("Markowitz shared the 1990 Nobel Prize in Economics in part for his pioneering insights about portfolio diversification."); Charles K. Whitehead, *The Evolution of Debt: Covenants, the Credit Market, and Corporate Governance*, 34 J. CORP. L. 641, 653 n.82 (2009) ("Markowitz first demonstrated the benefits of portfolio diversification in 1952, for which he won the Nobel Prize in Economics in 1990.").

[139] *See* Paul N. Cox, *Reflections on Ex Ante Compensation and Diversification of Risk as Fairness Justifications for Limiting Fiduciary Obligations of Corporate Officers, Directors, and Controlling Shareholders*, 60 TEMP. L.Q. 47, 53 (1987) ("Modern portfolio theory and capital asset pricing theory suggest that investment in an efficiently diversified portfolio, such as an index fund, will virtually eliminate unsystematic risk."); Susan N. Gary, *Best Interests in the Long Term: Fiduciary Duties and ESG Integration*, 90 U. COLO. L. REV. 731, 748–49 (2019) ("[Modern Portfolio Theory] builds on the theory of efficient markets and advocates spreading risk across a portfolio, rather than analyzing risk on an asset-by-asset basis. It emphasizes diversification as a key element in managing risk and improving returns on a risk-adjusted basis."); Charles Korsmo & Minor Myers, *The Flawed Corporate Finance of* Dell *and* DFC Global, 68 EMORY L.J. 221, 226 (2018) ("A basic tenet of modern portfolio theory is that, for diversified investors, only market or systematic risks affect asset values, while firm-specific risks are largely irrelevant to pricing. Undiversified investors, on the other hand, must discount for both types of risk.").

[140] *See* Steven L. Schwarcz, *Commercial Trusts as Business Organizations: Unraveling the Mystery*, 58 BUS. LAW. 559, 581 (2003) ("[T]rusts are efficient vehicles by which to diversify risk, thereby attracting funding from investors.").

[141] *See* Karen E. Boxx, *Too Many Tiaras: Conflicting Fiduciary Duties in the Family-Owned Business Context*, 49 HOUS. L. REV. 233, 243 (2012) ("The trustee has a general duty to diversify trust investments in order to minimize risks. The trust instrument can relieve the trustee of the duty to diversify, but the trustee is still required to exercise prudence and caution and may still be liable for failing to diversify if circumstances indicate that diversification is nevertheless necessary to protect trust assets." (footnotes omitted)); John H. Langbein, *Burn the Rembrandt? Trust Law's Limits on the Settlor's Power to Direct Trust Investments*, 90 B.U. L. REV. 375, 390 (2010) ("Like the rest of trust investment law, the duty to diversify is a default rule."); John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE L.J. 929, 970 (2005) ("As diversification came to be a central precept of modern investment practice, trust law absorbed it into fiduciary obligation. The duty to diversify trust investments appeared in the later nineteenth century and was recognized in the *Restatement (First)*." (footnotes omitted)).

tioned, business trusts are regularly used for mutual funds, pension funds, REITs, and asset securitization.[142] This is one of the main benefits and reasons for the popularity of index funds, which are a type of mutual fund that are often organized as business trusts, because they allow for investment diversification across a wide range of companies.[143] Investors in index funds reap the benefits of Modern Portfolio Theory through a single investment vehicle because the business entity involved holds a variety of assets, which provides a strong probability of profits while minimizing risk.[144]

Second, in addition to being an excellent vehicle for investment diversification, business trusts, along with other business forms that are governed by varying bodies of law, allow for legal diversification. Investment diversification is typically thought of as diversifying among different investment types, risk levels, industries, and domestic and foreign markets.[145] Diversification can also occur, however, by investing in various assets that are governed by different legal rules, which has been termed "legal diversification."[146] Based on Modern Portfolio Theory, legal diversification is another way to limit risk and

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[142] *See supra* notes 6–9 (discussing the current common uses of business trusts).

[143] *See* José Azar, *The Common Ownership Trilemma*, 87 U. CHI. L. REV. 263, 265 (2020) ("The enormous success of index funds and other instruments to achieve better and cheaper diversification is the practical counterpart to the triumph of the ideas of Modern Portfolio Theory, which showed that rational shareholders would want (under some assumptions, of course) to hold the market portfolio."); Anna Christie, *The Agency Costs of Sustainable Capitalism*, 55 U.C. DAVIS L. REV. 875, 903 (2021) ("A key principle of Modern Portfolio Theory is that investors can mitigate idiosyncratic (firm-specific) risk by diversifying their portfolios. This is one of the major benefits of passive index funds, as investors are diversified across a huge range of companies." (footnote omitted)).

[144] *See* Alyssa A. DiRusso & Kathleen M. Sablone, *Statutory Techniques for Balancing the Financial Interests of Trust Beneficiaries*, 39 U. S.F. L. REV. 261, 268 (2005) ("[M]odern portfolio theory not only permits passive investments (such as index funds), but it actually questions the use of more costly active management, which may be unable to achieve greater returns."); Mark R. Gillett, *Investing Trust Assets: Prudence Redefined*, 29 OKLA. CITY U. L. REV. 505, 512 (2004) ("It is consistent with modern portfolio theory to purchase index or market funds (such as a fund that mirrors the Standard and Poor's 500) to eliminate specific risk." (footnote omitted)); Charles R. Korsmo, *Delaware's Retreat from Judicial Scrutiny of Mergers*, 10 U.C. IRVINE L. REV. 55, 99 (2019) ("[I]ndex funds are certainly 'sophisticated' investors in the sense that they understand the central lesson of modern portfolio theory—that picking stocks is usually a fool's errand . . . .").

[145] *See* Jeffrey A. Cooper, *Speak Clearly and Listen Well: Negating the Duty to Diversify Trust Investments*, 33 OHIO N.U. L. REV. 903, 908 n.25 (2007) ("In the modern investment world, diversification extends not just to the selection of multiple common stocks in multiple industries, but also to investments in different asset classes and across geographic borders."); Russell Mangas, *Citizens United Against Dissenting Shareholders*, 46 TULSA L. REV. 409, 414 (2011) ("Modern portfolio theory teaches that to maximize their return on risk, investors should diversify their investment choices across a broad range of asset classes, industries, and companies."); Deborah M. Weiss & Marc A. Sgaraglino, *Prudent Risks for Anxious Workers*, 1996 WIS. L. REV. 1175, 1209 ("A properly diversified portfolio can be described in terms of the proportion it invests in various industries and sectors of the economy.").

[146] *See generally* Alces, *supra* note 138 (describing and providing a robust overview of legal diversification).

create a greater likelihood of consistent returns.[147] As previously discussed, business trusts in general share a lot of similar characteristics to corporations, to the point that business trusts have been referred to as "common law corporations."[148] Although significant similarities exist between the forms, they are still different from corporations in substantial ways, especially with regard to fiduciary duties and focus on wealth maximization.[149] In addition, business trusts have evolved from a much different history than corporations,[150] and they have often been used in circumstances in which corporations were unavailable or the government restricted certain kinds of activity.[151] Even focusing exclusively on business trusts, the law governing these entities varies significantly from state to state.[152] As a consequence, business trusts are important, not only because they provide a useful vehicle for portfolio diversification, but because they allow investors to engage in legal diversification as well.[153]

Third, the existence of common-law business trusts is useful because they provide diversification that reduces systemic risk. Although substantial debate exists over the definition,[154] "systemic risk" can generally be defined as the danger relating to the failure of an entire financial system or market, rather than failure of the individual parts.[155] Failure of individual parts is often referred to as

[147] *See id.* at 1981 ("In order to be fully protected from the risks of each business form's failure to prevent or redress . . . harms, but still take advantage of the benefits of each legal regime, investors should diversify among the various legal rules governing businesses."); *supra* notes 137–139 and accompanying text (providing an overview of Modern Portfolio Theory).

[148] *See generally* Morley, *supra* note 24 (arguing that a business trust is a "common law corporation" and explaining the reasons for the use of this term). *See also* Alces, *supra* note 138, at 2010 ("[A]n investor can diversify among different kinds of securities by considering the important legal protections each kind of security offers and showing how those legal features can be profitable in different circumstances.").

[149] *See supra* Section I.C (comparing and contrasting corporations and business trusts).

[150] *See supra* Sections I.A–B (providing the histories of corporations and business trusts).

[151] *See supra* Section I.B (discussing various circumstances in which business trusts have been used).

[152] *See supra* note 111 and accompanying text (explaining that significant variation exists from state to state regarding the law governing business trusts).

[153] *See supra* notes 140–144 and accompanying text (explaining that business trusts provide an excellent vehicle for investment diversification).

[154] *See* Adam J. Levitin, *In Defense of Bailouts*, 99 GEO. L.J. 435, 444 (2011) ("The term systemic risk is not a term of art with a precise, generally accepted definition. There have been numerous attempts to define the term 'systemic risk.' None has yielded a simple, precise, meaningful, and easy-to-use definition." (footnotes omitted)); Omari Scott Simmons, *The Federal Option: Delaware as a De Facto Agency*, 96 WASH. L. REV. 935, 982 (2021) ("[W]e have no consensus definition of what amounts to a systemic risk."); Christina Parajon Skinner, *Misconduct Risk*, 84 FORDHAM L. REV. 1559, 1565 (2016) ("[A]s the focus on systemic risk has grown, so too has the debate over the definition of that term.").

[155] *See* Barnali Choudhury, *Climate Change as Systemic Risk*, 18 BERKELEY BUS. L.J. 52, 57 (2021) ("Broadly speaking, [systemic risk] involves a shock that causes adverse economic effects that spread the consequences through a 'domino effect,' leading to the material impairment of the mar-

idiosyncratic risk or unsystematic risk.[156] Although corporations and business trusts share many common features, they are substantially different entities with their own unique benefits and risks.[157] Moreover, historically, business trusts have been used in instances in which corporations have been subject to cumbersome and inefficient regulation.[158] Regulatory diversity, which exists among corporations and business trusts, can help reduce systemic risk because of these entities' varying regulatory regimes.[159] Use of a single regulatory regime creates systemic risk because it inhibits legal rules from evolving and adapting, and it produces uniformity.[160] This makes a legal system more susceptible to failure

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ket."); Steven L. Schwarcz, *Systemic Risk*, 97 GEO. L.J. 193, 198 (2008) ("A common factor in the various definitions of systemic risk is that a trigger event, such as an economic shock or institutional failure, causes a chain of bad economic consequences—sometimes referred to as a domino effect. These consequences could include (a chain of) financial institution and/or market failures."); Jeffrey Manns, *Building Better Bailouts: The Case for a Long-Term Investment Approach*, 63 FLA. L. REV. 1349, 1395 (2011) ("Most definitions of systemic risk center on default risk that would adversely impact the broader economy . . . .").

[156] *See* Stephen M. Bainbridge, *Much Ado About Little? Directors' Fiduciary Duties in the Vicinity of Insolvency*, 1 J. BUS. & TECH. L. 335, 362 n.134 (2007) ("Unsystematic risk can be thought of as firm-specific risk. In contrast, systematic risk can be regarded as market risk, because systematic risks affect all firms to one degree or another." (citation omitted)); Giuliano G. Castellano & Marek Dubovec, *Global Regulatory Standards and Secured Transactions Law Reforms: At the Crossroad Between Access to Credit and Financial Stability*, 41 FORDHAM INT'L L.J. 531, 563 (2018) ("[I]diosyncratic risks are, by definition, uncorrelated with one another and show little correlation with market risk . . . ."); Cox, *supra* note 139, at 81 ("Unsystematic risk is defined as firm-specific risk, risk that affects a given firm rather than firms generally.").

[157] *See supra* Section I.C (comparing and contrasting corporations and business trusts).

[158] *See supra* Section I.B (discussing the history of business trusts, which is often a response to the lack of access to or the overregulation of the corporate form).

[159] *See* Sean J. Griffith, *Substituted Compliance and Systemic Risk: How to Make a Global Market in Derivatives Regulation*, 98 MINN. L. REV. 1291, 1372–73 (2014) ("The best approach to systemic risk, however, may be one that understands and anticipates that regulators and policymakers are not infallible and are likely to make mistakes in the future, as indeed they have done in the past. In this environment, a diversity of regulatory approaches to the same underlying problem may provide greater protection against contagion and an outbreak of systemic risk . . . ."); Hossein Nabilou, *Regulatory Arbitrage and Hedge Fund Regulation: The Need for a Transnational Response*, 22 FORDHAM J. CORP. & FIN. L. 557, 583–84 (2017) ("[R]egulatory consolidation and global harmonization may result in heightened systemic risk because in such a regime, regulators tend to adopt similar strategies and thereby push financial institutions to adopt similar business strategies. Deprived of the benefits of diversification, such regulatory systems, in which the risks of regulatory errors can easily be amplified, could be more prone to systemic risk than a decentralized regulatory regime.").

[160] *See* Alces, *supra* note 138, at 1983 ("[L]egal diversification is a complement to a relatively new trend in the literature that argues that the financial markets may be more vulnerable to systemic risk if all financial firms are forced to comply with identical regulations. Diversity that allows legal rules to evolve and adapt to changing circumstances is valuable and is an important mechanism for protecting investors from the consequences of flawed, or ineffective, legal rules." (footnote omitted)); Roberta Romano, *For Diversity in the International Regulation of Financial Institutions: Critiquing and Recalibrating the Basel Architecture*, 31 YALE J. ON REG. 1, 66 (2014) ("By incentivizing financial institutions worldwide to follow broadly similar business strategies, harmonized regulatory error contributed to the unleashing of a global financial crisis . . . . The fast-moving, dynamic nature of

because vulnerabilities exist uniformly throughout the system.[161] As a consequence, legal diversification can be useful not only with regard to investment diversification, but also as a means of reducing systemic risk.[162]

### *B. Business Trusts Promote Efficiency Through Regulatory Competition and as a Product of the Common Law*

The existence of business trusts is also useful because it promotes efficiency within the law of business organizations in at least two ways. First, the existence of common-law and statutory business trusts promotes efficiency because it produces regulatory competition with corporate law that encourages development, adaptation, and innovation in regard to the law. Second, the existence of common-law business trusts promotes efficiency because the common law is an efficiency-producing mechanism that gravitates toward efficiency-enhancing rules, meaning that the law governing common-law business trusts has likely produced more efficient rules than the law of corporations. Each of these points is examined in turn.

In regard to regulatory competition between corporations and business trusts promoting efficiency within the law of business organizations, regulatory competition generally improves the efficiency of the law because it forces legal systems to evolve and improve.[163] In regard to corporate law specifically, regulatory competition exists among the states because of the competition to

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financial markets renders it improbable that regulators can predict with confidence the regulatory policies optimal for reducing systemic risk, or what future categories of activities or institutions might generate systemic risk.").

[161] *See* Charles K. Whitehead, *Destructive Coordination*, 96 CORNELL L. REV. 323, 326–27 (2011) ("[R]egulations and standards that benefit financial firms and markets can also be destructive. By promoting coordination, regulations and standards can erode key presumptions underlying financial risk management, reducing its effectiveness and magnifying the systemic impact of a downturn in the financial markets. . . . In short, although regulation and market standards can help reduce systemic risk, they themselves can also *become* a systemic risk." (footnote omitted)).

[162] *See supra* notes 146–153 and accompanying text (discussing the usefulness of focusing on legal diversification for purposes of assembling a diversified investment portfolio based on the precepts of Modern Portfolio Theory).

[163] *See* Iris H-Y Chiu, *From Multilateral to Unilateral Lines of Attack: The Sustainability of Offshore Tax Havens and Financial Centres in the International Legal Order*, 31 CONN. J. INT'L L. 163, 167–68 (2016) ("[R]egulatory competition can be supported as it is key to fostering regulatory innovations, achieving optimal and efficient rules and preventing monopolistic domination over rule-making by inefficient constituents." (footnotes omitted)); Nabilou, *supra* note 159, at 584 ("[E]mpirical findings confirm the intuition that regulatory competition among legal systems can enhance the quality of corporate and securities laws by embracing bottom-up legal innovations and experimentation."); Tzung-bor Wei, *The Equivalence Approach to Securities Regulation*, 27 NW. J. INT'L L. & BUS. 255, 287 (2007) ("There is a well-developed line of literature advocating regulatory competition. Not only does regulatory competition accommodate real differences, but more importantly, regulatory competition fosters innovation. It allows regulators to experiment and to learn through trial and error. In this manner, regulators can develop more efficient regulatory regimes.").

attract corporate charters to their jurisdictions.[164] Robust debate continues to occur regarding whether competition among states to attract corporations yields a race-to-the-top in improving the quality of corporate law generally or a race-to-the-bottom in an attempt by states to pander to promoters and management of corporations.[165] Although the author of this piece believes that regulatory competition in corporate law generally results in a race-to-the-top, regardless, competition and the associated pressure to evolve yield useful legal innovations that improve the efficiency of the law that is appropriate for the business world.[166] For example, the transition that occurred in the eighteenth century from state-chartered corporations to general incorporation statutes removed barriers to conducting business and aided legal efficiency.[167]

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[164] *See* Jens Dammann, *State Competition for Corporate Headquarters and Corporate Law: An Empirical Analysis*, 80 MD. L. REV. 214, 230 (2020) ("Traditional charter competition is typically viewed as a market for corporate law in which corporations select a particular legal product, namely a state's corporate law and courts, and pay the corresponding price in the form of franchise taxes." (footnote omitted)); Carol R. Goforth, *The Rise of the Limited Liability Company: Evidence of a Race Between the States, but Heading Where?*, 45 SYRACUSE L. REV. 1193, 1193 (1995) ("It is widely acknowledged that states compete for corporate charters."); Varghese George Thekkel, *Cross-Border Mergers: Is India Ready? Lessons from the United States and European Union*, 28 IND. J. GLOB. LEGAL STUD. 231, 239 (2021) ("The fundamental premise of charter competition is that states compete with other states by enacting laws and formulating a judicial approach in such a way that attracts more and more incorporations/reincorporations.").

[165] *See* Robert Anderson IV, *The Delaware Trap: An Empirical Analysis of Incorporation Decisions*, 91 S. CAL. L. REV. 657, 660 (2018) ("The question of how businesses choose their states of incorporation is central to one of the most enduring and 'classic' debates in corporate law—whether allowing businesses a choice among state laws leads to a 'race for the top' or a 'race for the bottom.'"); Brett H. McDonnell, *Recent Skirmishes in the Battle Over Corporate Voting and Governance*, 2 J. BUS. & TECH. L. 349, 351 (2007) ("Corporations can choose which state's law they prefer to govern them by choosing where they incorporate. A favorite topic of debate among corporate law scholars has long been whether this system leads to a race to the bottom, to the top, or somewhere in between, if indeed there is a race at all."); Manesh, *supra* note 100, at 266–67 (discussing the debate regarding whether such competition produces "a race to the top, in which states compete to provide corporate laws that most efficiently and equitably balance shareholder rights with managerial prerogatives, or a race to the bottom, in which states compete to provide corporate laws that favor managers at the expense of shareholders and all other corporate constituencies" (footnote omitted)).

[166] *See* David C. Donald, *Approaching Comparative Company Law*, 14 FORDHAM J. CORP. & FIN. L. 83, 159 (2008) ("'[R]egulatory competition' for corporate charters has been a primary engine of development for corporate law . . . ."); Martin Gelter & Julia M. Puaschunder, *COVID-19 and Comparative Corporate Governance*, 46 J. CORP. L. 557, 623 (2021) ("The classic debate about regulatory competition in the United States could be described as an evolutionary account. Regardless of whether one believes that state corporate law is trending toward a 'race to the top' or 'race to the bottom,' the law evolves in a certain direction because laws that are selected more frequently survive in the market."); Harwell Wells, *The Modernization of Corporation Law, 1920–1940*, 11 U. PA. J. BUS. L. 573, 576 (2009) ("A bedrock assumption of corporate law scholarship is that states compete for charters, and that such competition propels the development of corporate law.").

[167] *See supra* notes 58–59 and accompanying text (discussing the advent of general incorporation statutes in the United States).

Regulatory competition within corporate law is somewhat constrained because of the dominance of Delaware.[168] Other states are highly deferential to Delaware in promulgating their own corporate law, which limits competition among state corporate law systems.[169] This dominance could eventually be eclipsed by the law of another jurisdiction. Notably, Delaware replaced New Jersey as the dominant source of corporate law in the early 1900s.[170] Because of Delaware's current dominance, however, regulatory competition in corporate law is not as robust as it could be.

Having another body of law to compete with corporate law, i.e., the law of business trusts, is important in promoting regulatory competition in business law, especially considering that regulatory competition in the corporate law realm is constrained by the dominance of Delaware. As discussed above, his-

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[168] *See* Robert Anderson IV & Jeffrey Manns, *The Delaware Delusion*, 93 N.C. L. REV. 1049, 1054–55 (2015) ("Delaware's dominance of corporate law is indisputable, although the reasons for its appeal are strongly contested. Delaware charters a clear majority of publicly traded companies in the United States, even though almost all publicly traded companies are headquartered in other states."); Summer Kim, *Corporate Long Arms*, 50 ARIZ. ST. L.J. 1067, 1076 (2018) ("Simply put, Delaware's dominance in the competition for corporate charters results in Delaware General Corporation Law (DGCL) being widely regarded as U.S. corporate law."); Peter Molk, *Delaware's Dominance and the Future of Organizational Law*, 55 GA. L. REV. 1111, 1113 (2021) ("Delaware dominates business law. It has attracted more business entities to the state than citizens. Over a quarter of the state's budget—$1.3 billion—comes from taxes and fees collected from the businesses organized within its borders. Two-thirds of *Fortune* 500 companies are formed under Delaware law, and 88% of recent IPOs are incorporated in Delaware . . . ." (footnotes omitted)); Frederick Tung, *Lost in Translation: From U.S. Corporate Charter Competition to Issuer Choice in International Securities Regulation*, 39 GA. L. REV. 525, 527 (2005) ("Corporate law is obsessed with Delaware. Delaware, Delaware, Delaware.").

[169] *See* Adam Chodorow & James Lawrence, *The Pull of Delaware: How Judges Have Undermined Nevada's Efforts to Develop Its Own Corporate Law*, 20 NEV. L.J. 401, 402 (2020) ("By virtue of this dominance, Delaware corporate law commands unrivaled respect, and many states routinely look to Delaware when crafting their own corporate laws."); Timothy P. Glynn, *Delaware's* Vantage-Point*: The Empire Strikes Back in the Post-post-Enron Era*, 102 NW. U. L. REV. 91, 137 (2008) ("[C]ourts in other states often reflexively defer to Delaware and its courts on corporate law matters . . . ."); Min, *supra* note 55, at 848–49 ("While Delaware law obviously does not bind the courts of other states, it is disproportionately influential given both the tremendous number (and aggregate asset size) of companies choosing to incorporate in Delaware and the high degree of deference given by other states to the expertise of Delaware courts in dealing with corporate law matters.").

[170] *See* Daniel J. Morrissey, *The Riddle of Shareholder Rights and Corporate Social Responsibility*, 80 BROOK. L. REV. 353, 394 n.260 (2015) ("In the first part of the 20th century, Delaware copied the corporate act of New Jersey, which was then the leading jurisdiction for incorporations. When a reforming Governor named Woodrow Wilson tightened New Jersey's law, many of the firms incorporated there migrated to Delaware and never left."); Omari Scott Simmons, *Delaware's Global Threat*, 41 J. CORP. L. 217, 246–47 (2015) ("Since the late-19th century, following New Jersey Governor Woodrow Wilson's sponsorship of the Seven Sisters legislation that led to the migration of corporations from New Jersey, Delaware has been the corporate capital of the United States."); Frederick Tung, *Before Competition: Origins of the Internal Affairs Doctrine*, 32 J. CORP. L. 33, 42 n.32 (2006) ("New Jersey lost its dominant position to Delaware when it voluntarily bowed out of the 'chartermongering' game in 1913.").

torically, the business trust has served as an important companion to the corporation.[171] The business trust provided an easily accessible vehicle for conducting business when the corporation could only be created by an act of the government.[172] When general incorporation statutes began to come into being, the business trust served as a means of avoiding overly onerous corporate law.[173] Even today, although the business trust can appropriately be considered a common-law corporation,[174] the rules governing business trusts vary in substantial and meaningful ways from the rules governing corporations, as in the default fiduciary duties and the focus on wealth maximization.[175] Both entities continue to be commonly used,[176] and the fact that Delaware and Massachusetts compete as dominant jurisdictions in regard to corporations and business trusts, respectively, produces useful competition that spurs development, adaptation, and innovation in regard to the bodies of law governing both types of entities.[177]

In addition, the existence of common-law business trusts also promotes efficiency because the common law is an efficiency-producing mechanism that gravitates toward efficiency-enhancing rules.[178] As a luminary of the law and economics movement, Judge Richard Posner championed this idea, and he summarized it as follows:

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[171] *See supra* Section I.B (providing the history of the business trust).

[172] *See supra* notes 75–84 and accompanying text (explaining that business trusts provided an alternative for conducting business when corporations could only be chartered by specific acts of the Crown, Parliament, colonial governments, or state governments).

[173] *See supra* notes 85–89 and accompanying text (explaining that, as general incorporation statutes began to be passed by state legislatures, business trusts remained a way of circumventing burdensome corporate law).

[174] *See generally* Morley, *supra* note 24 (referring to business trusts as a "common law corporation" and explaining the reasons for using that term).

[175] *See supra* notes 125–132 and accompanying text (explaining ways in which business trusts differ from corporations).

[176] *See supra* notes 1–15, 101–109 and accompanying text (discussing the current popularity of business trusts as a business form).

[177] *See supra* notes 168–170 and accompanying text (discussing Delaware's dominance as a state of incorporation); *supra* notes 86–89 and accompanying text (discussing Massachusetts's dominance as a state of organization for business trusts).

[178] *See* Sara Sun Beale & Adam G. Safwat, *What Developments in Western Europe Tell Us About American Critiques of Corporate Criminal Liability*, 8 BUFF. CRIM. L. REV. 89, 147 n.254 (2004) ("Law and economics scholars have traditionally argued that the common law evolves toward efficient rules."); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 69 (1991) ("[T]he field of law and economics has developed an evolutionary theory, which argues that rules formed through such a common law process will naturally tend to evolve toward efficiency."); Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551, 1551 (2003) ("From its inception, an animating insight of the economic analysis of law has been the observation that the common law process appears to have a strong tendency to produce efficiency-enhancing legal rules.").

> The law thus tries to guess where the parties would want (ex ante) to allocate some burden or benefit, such as responsibility if some happy, or harmful, contingency materializes. If it guesses right, this both minimizes the costs of transacting by making it unnecessary for the parties to transact around the law's allocation, and produces the efficient allocation of resources if transaction costs are prohibitive.[179]

According to Judge Posner, more than in cases involving statutes, common-law cases allow judges to take into account competing interests and allocate responsibilities in an efficient fashion.[180] Even in cases involving statutes, judges may still create efficiency-enhancing rules through interpretation, but the opportunity is less than in common-law cases.[181] With that said, significant debate has occurred regarding what actually is meant by efficiency in this context,[182] and scholars have argued about the reasons that the common law

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[179] RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 254 (4th ed. 1992).

[180] *See* Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 40 (1993) ("When a really new case arises, the rules of the judicial game require the judge to act the part of a legislator and therefore vote his values, although the rules do not require and may even forbid him to acknowledge that this is what he is doing. Efficiency—not necessarily by that name—is an important social value that judges, given their limited remedial powers and the value pluralism of our society, can promote in a reasonably effective, consistent, objective, and hassle-free fashion. One therefore expects it to be influential in judicial decisionmaking when judges are called upon to exercise a legislative function . . . . Since the judges have a larger legislative role in common law than statutory cases, we expect common law rules to be on average more efficient than statutory ones.").

[181] *See* Keith N. Hylton, *Efficiency and Labor Law*, 87 NW. U. L. REV. 471, 472 (1993) ("If statutes are generally the result of rent-seeking efforts, then the statutory initial conditions in any area are likely to be inefficient. The common law that develops in order to interpret and fill gaps between the statutory provisions pushes the body of doctrine in the direction of efficiency."); Nuno Garoupa & Andrew P. Morriss, *The Fable of the Codes: The Efficiency of the Common Law, Legal Origins, and Codification Movements*, 2012 U. ILL. L. REV. 1443, 1468 ("[J]udicial interpretation of statutes may fulfill a common-law-like function at times, creating innovations that would not have arisen absent the statute and that can be efficiency enhancing."); George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65, 65 (1977) ("[The] tendency toward efficiency is a characteristic of the common law process so that the content not only of the common law itself, but also of the legal interpretation of statutes or of the Constitution, is subject to forces pressing toward efficiency.").

[182] *See* Gregory Crespi, *Presenting a Critical Perspective on "Economic Efficiency" in Law and Economics Courses*, 71 SMU L. REV. 315, 317 (2018) ("Law and Economics courses are sometimes criticized for inadequately explaining and then summarily endorsing the use of the normative criterion of 'economic efficiency' to evaluate policies and then applying this criterion in a superficial and biased manner to pejoratively label most governmental market interventions and wealth redistribution measures as inefficient."); Derek Fincham, *Towards a Rigorous Standard for the Good Faith Acquisition of Antiquities*, 37 SYRACUSE J. INT'L L. & COM. 145, 174 (2010) ("The potential flaw in law and economics scholarship will always be the difficult question of defining efficiency. Efficiency is inherently subjective; it relies on intentions."); Alain Marciano & Elias L. Khalil, *Optimization, Path Dependence and the Law: Can Judges Promote Efficiency?*, 32 INT'L REV. L. & ECON. 72, 72 (2012)

moves toward greater efficiency-enhancing rules.[183] A complete literature review of this topic, however, is beyond the scope of this Article. In addition, although the common law generally produces greater efficiency, this mechanism is imperfect and has been criticized as being subject to distortive pressures from interest groups.[184] This Article, however, concedes that as an efficiency-producing mechanism, the common law is imperfect, but it concludes that the common law is an efficiency-producing mechanism that should be valued nonetheless.

As a consequence, common-law business trusts ought to be preserved and nurtured because they are a product of the common law. Because the common law is a mechanism for producing efficiency-enhancing rules, the body of law governing business trusts ought to be respected because of the nature of the rules that compose that body of law.[185] The fact that the common law gravitates toward efficiency-enhancing rules provides another reason why the regu-

("But what is efficiency? This is a very controversial subject on its own and it would be impossible to discuss all the definitions that are 'available.'").

[183] *See, e.g.*, Herbert Hovenkamp, *The First Great Law & Economics Movement*, 42 STAN. L. REV. 993, 1015 (1990) ("The common law, according to the arguments of 1970s law & economics, may be more efficient than legislation for two reasons: (1) the common law is designed to give effect to private bargains with minimum active interference from the state—i.e., the common law tracks the market and markets are more efficient than other forms of resource allocation; and (2) common law rules tend to become precedential only to the extent that they are efficient—i.e., through an evolutionary process, more efficient rules are upheld while less efficient ones are overruled."); Nim Razook, *Obeying Common Law*, 46 AM. BUS. L.J. 55, 87 (2009) ("Law-and-economics scholars . . . have labeled most common law rules efficient, despite the ebb and flow of rules-based common law jurisprudence. Theories abound about how common law pronouncements of duties and rules can meet contemporary tests of efficiency, when the judges formulating these rules rarely if ever considered principles of maximization in their musings." (footnote omitted)); D. Daniel Sokol, *Rethinking the Efficiency of the Common Law*, 95 NOTRE DAME L. REV. 795, 796–97 (2019) ("Since the time of the publication of Posner's work on the efficiency of common law, there have been numerous extensions of his idea. Some extensions suggest that the efficiency of common law is a function of litigants looking to reshape legal doctrine. In economic terms, this is a 'demand-side' response. Others argue that the efficiency is a function of 'supply-side' factors such as institutional factors." (footnotes omitted)).

[184] *See* David A. Skeel, Jr., *An Evolutionary Theory of Corporate Law and Corporate Bankruptcy*, 51 VAND. L. REV. 1325, 1350 n.84 (1998) ("Interest group distortions—especially the influence of lawyers—call into question any strong claims about the efficiency of the common law."); Adrian Vermeule, *The Invisible Hand in Legal and Political Theory*, 96 VA. L. REV. 1417, 1427 (2010) ("[T]he common law need not evolve to efficiency. Repeat players, such as organized interest groups, have superior access to courts or differential stakes in judicial precedent and will bias the selection of cases for litigation, thereby skewing the precedents that result."); Zywicki, *supra* note 178, at 1551 ("[M]any recent commentators have also concluded that recent decades have seen an evolution away from this traditional principle, as the common law appears to increasingly reflect interest-group pressures that have attenuated this traditional evolutionary tendency toward efficiency.").

[185] *See supra* notes 178–181 and accompanying text (explaining that the common law is a mechanism for generating efficiency-enhancing rules).

latory competition among business trusts and corporations is so important.[186] Corporate law, which is largely statutory, is forced to respond, evolve, and adapt to a system of common law, i.e., the law of business trusts, which forces the corporate law to behave in a more efficient manner. The best example of this is likely the adoption of general incorporation statutes as a response to the more efficient general availability of business trusts.[187]

In addition, although common-law business trusts should be preferred, even in regard to statutory business trusts, the role of the common law as a mechanism for producing efficiency-enhancing rules ought to be respected and supported. Statutory business trusts evolved from and are a codified form of common-law rules.[188] As a result, some efficiency-enhancing rules are found within the statutes governing statutory business trusts. Moreover, the common law has been and continues to be created in the interpretation of the statutes governing business trusts.[189] The rules created in the interpretation of these statutes are not as rich as common-law rules alone, but the rules can be efficiency-enhancing nonetheless.[190] This is especially important because the statutory law governing corporations is different than the statutory law governing statutory business trusts.[191] As a consequence, respecting the separate existence of the business trust and the corporate form is important because of what can be learned from the varying common law that is generated from the statutes surrounding both entities.

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[186] *See supra* notes 163–177 and accompanying text (describing the benefits of regulatory competition among corporations and business trusts).

[187] *See supra* notes 51, 58–59 and accompanying text (discussing the advent of general incorporation statutes).

[188] *See* Franco, *supra* note 109, at 239 ("[T]he perceived utility of common law business trusts led Delaware in recent times to adopt a statute authorizing formation of statutory trusts for business purposes which is essentially a statutory version of the common law Massachusetts business trust."); Sitkoff, *supra* note 17, at 48 ("The recent proliferation of new business entities, and the resurrection of older entities such as the business trust, is a fascinating development. Owing in large part to the Delaware Statutory Trust Act, the common-law business trust has been born again as the statutory business trust.").

[189] *See* Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control Over Corporate Legal Markets*, 60 STAN. L. REV. 1689, 1708 (2008) ("While much of substantive law is produced within legislatures and executive agencies, common law courts generate a great deal of law both in traditional common law areas such as tort, contract, and property and through statutory interpretation.").

[190] *See supra* note 181 and accompanying text (stating that efficiency-enhancing rules can be created through the common law, involving judicial interpretation of statutes).

[191] *See supra* notes 125–134 and accompanying text (discussing the ways in which business trusts vary from the corporate form).

### *C. Business Trusts Reveal Knowledge About How to Regulate Business Activity as a Spontaneous Order System*

The existence of common-law business trusts is also useful because it provides a spontaneous order system for discovering dispersed knowledge about how businesses ought to operate based on the development of these entities through the common law. This benefit of common-law business trusts is recognized because of the Austrian economic tradition, especially the work of F.A. Hayek.[192] Hayek recognized that when attempting to engage in economic planning, knowledge is widely dispersed,[193] and, as a result, the issue becomes how to distribute resources with limited knowledge.[194] He believed that markets and the competition within them create a spontaneous order system that communicates knowledge about proper economic ordering.[195] Specifically, he claims that prices in a competitive market coordinate the separate actions and values of people.[196] He acknowledged that markets, in regard to prices, for example, are likely never "perfect," but they move in the correct direction.[197] He used this as an explanation of why central planning regularly fails to function effectively, as it cannot account for the dispersed knowledge needed for economic planning.[198]

Hayek argued that the common law is also a spontaneous order system in which knowledge emerges from litigants and judges acting independently over time.[199] He viewed the common law and the knowledge that it imparts as a better mechanism for coordinating behavior, rather than the planning of a leg-

[192] *See generally* F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945) (discussing the foundations of Austrian economics).

[193] *Id.* at 519 ("The peculiar character of the problem of a rational economic order is determined precisely by the fact that the knowledge of the circumstances of which we must make use never exists in concentrated or integrated form, but solely as the dispersed bits of incomplete and frequently contradictory knowledge which all the separate individuals possess.").

[194] *See id.* at 520 ("It is rather a problem of how to secure the best use of resources known to any of the members of society, for ends whose relative importance only these individuals know. Or, to put it briefly, it is a problem of the utilization of knowledge which is not given to anyone in its totality.").

[195] *See id.* at 526 ("The whole acts as one market, not because any of its members survey the whole field, but because their limited individual fields of vision sufficiently overlap so that through many intermediaries the relevant information is communicated to all.").

[196] *See id.* ("Fundamentally, in a system in which the knowledge of the relevant facts is dispersed among many people, prices can act to coördinate the separate actions of different people in the same way as subjective values help the individual to coördinate the parts of his plan.").

[197] *Id.* at 527 ("Of course, these adjustments are probably never 'perfect' in the sense in which the economist conceives of them in his equilibrium analysis. . . . [But] they move in the right direction.").

[198] *See id.* at 524 ("[C]entral planning based on statistical information by its nature cannot take direct account of these circumstances of time and place and that the central planner will have to find some way or other in which the decisions depending on them can be left to the 'man on the spot.'").

[199] *See generally* 1 F.A. HAYEK, LAW, LEGISLATION AND LIBERTY: RULES AND ORDER (1973) (providing Hayek's theories on the common law).

islature.[200] Notably, Hayek's endorsement of the common law does share similarities with Judge Posner's support of the common law because of its gravitation toward efficiency-enhancing rules.[201] Although Judge Poser mainly appreciates the common law as an efficiency-enhancing mechanism,[202] however, Hayek appreciates the common law for the knowledge it reveals and the ordering that it permits.[203]

Common-law business trusts should be preserved and nurtured because they represent a spontaneous order system for coordinating dispersed knowledge about how business ought to be regulated. The common law provides a better mechanism for ordering behavior than the planning of a legislature.[204] Even if the common law might not be a perfect spontaneous order system, it gravitates toward efficiency-enhancing rules.[205] Common-law business trusts offer a mechanism for discovering efficiency-enhancing rules that can be

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[200] *See* Shyamkrishna Balganesh, *The Pragmatic Incrementalism of Common Law Intellectual Property*, 63 VAND. L. REV. 1543, 1581 n.172 (2010) ("Friedrich Hayek[] . . . preferr[ed] common law to statutory law, since to him the common law was made up *entirely* of rules that originate in customary practices, what he called the evolution of a 'spontaneous order.'" (citing HAYEK, *supra* note 199, at 124–25)); Alan Calnan, *Tamanaha's Jurisprudential Turn: From Social to Systems Theory*, 88 UMKC L. REV. 519, 529 (2020) ("Hayek argued that the common law is preferable to instrumental legislation because it arises spontaneously from bottom-up processes, promotes and reflects society's legitimate expectations, and is less susceptible to capture or hubris."); Douglas W. Kmiec, *Liberty Misconceived: Hayek's Incomplete Relationship Between Natural and Customary Law*, 40 AM. J. JURIS. 209, 209 (1995) ("Hayek favors, in most circumstances, customary or common law over positive enactment because the common law arises out of an evolution of discovery of the spontaneous order.").

[201] *See supra* notes 178–179 and accompanying text (discussing Judge Richard Posner's views on the common law as a mechanism for producing efficiency-enhancing rules).

[202] *See* Todd J. Zywicki & Anthony B. Sanders, *Posner, Hayek and the Economic Analysis of Law*, 93 IOWA L. REV. 559, 561–62 (2008) ("Posner and Hayek hold fundamentally different views about the nature of the common law, as encapsulated in Hayek's characterization of the common law as a 'spontaneous order,' in contrast to Posner's conceptualization of the common law as essentially a collection of disparate rules.").

[203] *See* Steven Gow Calabresi, *Friedrich A. Hayek, the U.S. Constitution, and Institutional Design*, 48 ARIZ. ST. L.J. 231, 232 (2016) ("Hayek argues that systems of spontaneous order like the common law, languages, and the free market are epistemically superior to systems of planned order because they draw on the crowd wisdom of countless numbers of people."); James L. Huffman, *People-Made Law: Spontaneous Order, Change, and the Common Law*, 11 J.L. ECON. & POL'Y 179, 186 (2015) ("The magic of both markets and the common law method, argued Hayek, is their merging of the hundreds and thousands and millions of these well informed individual actions into a spontaneous and constantly adapting order . . . ."); Henry E. Smith, *On the Economy of Concepts in Property*, 160 U. PA. L. REV. 2097, 2099 (2012) ("Hayek put great weight on abstractness as necessary for spontaneous order, including the one he saw arising in the common law. . . . Through the common law, dispersed knowledge could produce results that no single mind could achieve on its own.").

[204] *See supra* note 200 and accompanying text (explaining that the common law is superior to the central planning of a legislature because of the common law's superiority in discovering and coordinating dispersed information).

[205] *See supra* note 197 and accompanying text (acknowledging that the common law is not a "perfect" ordering system, but that it trends toward efficiency-enhancing rules).

used to govern business, and they provide a means of testing these rules as well. In some instances, the existence of these entities will be helpful in validating existing rules, but in others, they will be helpful in moving the law toward greater efficiency.

In regard to statutory business trusts, the existence of these entities remains helpful for the reasons discussed above.[206] Many states, including Delaware, have enacted business trust statutes.[207] With that said, the common law is a mechanism for producing efficiency-enhancing rules,[208] and it is a spontaneous order system for discovering dispersed knowledge about how businesses ought to operate.[209] As a consequence, states ought to retain common-law business trusts even if they decide to enact legislation to create statutory business trusts as well. Although the arguments for the existence of business trusts of all types are compelling, Part III addresses lingering counterarguments.

## III. Arguments Against the Continued Existence of Business Trusts

Strong economic reasons exist for the preservation and nurturing of common-law and statutory trusts, including the benefits of diversification that they provide,[210] the efficiency that their existence creates,[211] and the knowledge that the common-law version of these entities affords through the spontaneous order created by the governing common law.[212] With that said, reasons do exist to be skeptical about the worth of the continued existence of these entities. These include the necessity of the form when it has been described as a "common law corporation," the argument that the form adds needless complexity to business law, and the concern that the essential nature of the form is focused on unrepentant profit maximization. Although each of these arguments has

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[206] *See supra* Sections II.A–B (explaining that statutory business trusts are useful for the purposes of investment diversification, reduction of systemic risk, and creation of efficiency through regulatory competition).

[207] *See supra* notes 104–107 and accompanying text (discussing states that have enacted business trusts statutes).

[208] *See supra* notes 178–184 and accompanying text (explaining that the common law is a mechanism for generating efficiency-enhancing rules).

[209] *See supra* notes 193–203 and accompanying text (explaining that the common law is a spontaneous order system for discovering and coordinating dispersed knowledge).

[210] *See supra* Section II.A (explaining that the existence of business trusts is beneficial because they provide diversification that helps to protect investors' interests and to reduce systemic risk).

[211] *See supra* Section II.B (explaining that the existence of business trusts is beneficial because they promote efficiency through regulatory competition and because they are a product of the common law).

[212] *See supra* Section II.C (explaining that the existence of common-law business trusts is beneficial because they are the product of a spontaneous order system, i.e., the common law, for discovering dispersed knowledge about how businesses ought to be regulated).

some merit to it, as will be explained below, the benefits of the continued existence of business trusts outweigh the harms.

In regard to the necessity of the continued existence of the form when business trusts have been described as "common law corporations," one might argue that society has no need of business trusts because of the existence of actual corporations.[213] In general, both corporations and business trusts feature limited liability, capital lock-in, passive investment, centralized management, and transferability of interests.[214] Pretending that corporations and business trusts are the same entity, however, would be a mistake. Although business trusts may generally be common-law corporations, substantial variation exists regarding the law governing business trusts among jurisdictions.[215] In addition, business trusts do vary significantly from corporations in a number of different ways, including historical development,[216] fiduciary duties,[217] and emphasis on wealth maximization.[218] As a consequence, the existence of business trusts and corporations is important because the variation in the forms allows for legal diversification,[219] reduces systemic risk,[220] and produces beneficial regulatory competition.[221] Moreover, the common-law version of business trusts is especially important because of how it has evolved. The common law generally trends toward efficiency-enhancing rules,[222] and as a spontaneous order system, the common law reveals dispersed knowledge and allows for improved

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[213] *See generally* Morley, *supra* note 24 (referring to business trusts as "common law corporation" and explaining the reasons for that title).

[214] *See supra* notes 116–123 and accompanying text (discussing the shared attributes of business trusts and the corporate form).

[215] *See supra* notes 105–108 and accompanying text (discussing the variation in laws surrounding business trusts in different jurisdictions).

[216] *See supra* Sections I.A–B (recounting the very different histories of corporations and business trusts).

[217] *See supra* notes 125–130 and accompanying text (comparing and contrasting the fiduciary duties owed within corporations and business trusts).

[218] *See supra* notes 131–132 and accompanying text (explaining that corporations and business trusts ought to seek profits differently because of the distinct natures of these forms).

[219] *See supra* notes 145–153 and accompanying text (explaining the concept of legal diversification and why the existence of business trusts facilitates such diversification).

[220] *See supra* notes 154–162 and accompanying text (discussing how the existence of business trusts help to reduce systemic risk by introducing variation).

[221] *See supra* notes 163–177 and accompanying text (arguing that the existence of business trusts is important because it creates useful regulatory competition with the corporate form).

[222] *See supra* notes 178–191 and accompanying text (examining the common law in the context of business trusts as a mechanism for generating efficiency-enhancing rules).

ordering.[223] In short, business trusts can be described as "common law corporations," but they are not redundant of the corporate form.[224]

One might also try to argue that the continued existence of business trusts adds needless complexity to the law of business organization. As mentioned above, variation creates complexity that can often impede efficiency.[225] The virtue of simplicity is well-recognized. For example, during the fourteenth century, William of Ockham, a Franciscan monk and medieval philosopher, has been credited with developing a problem-solving approach that is currently known as "Ockham's razor."[226] Ockham's razor suggests that when faced with a problem, the simplest answer is the best answer until it can be refuted.[227] Many economists' obsession with efficiency is an endorsement of Ockham's razor because simplicity tends to yield efficiency, while complexity tends to yield the opposite.[228] Put differently, if one embraces complexity, there ought to be a good reason for doing it, or to borrow words commonly attributed to Albert Einstein, "[e]verything should be made as simple as possible, but not simpler."[229] In regard to business trusts, the form adds complexity to the law of business associations as an additional type business entity with a distinct body of law. That complexity, however, is worth the burden for all the benefits that come from the existence of business trusts.[230]

One also might be skeptical of the continued existence of business trusts because the essential nature of the form requires unrepentant profit maximization. As previously explained, although corporations, in seeking profits, owe some restraint to the state for allowing their existence and providing them with limited liability,[231] business trusts, by their nature, are relentless wealth-

[223] *See supra* notes 192–209 and accompanying text (examining the common law in the context of business trusts as a spontaneous order system).

[224] *See generally* Morley, *supra* note 24 (stating that a business trust is a "common law corporation" and explaining the reasons for why that is the case).

[225] *See supra* note 135 and accompanying text (noting that complexity can hinder efficiency).

[226] *See* JULIAN BAGGINI & PETER S. FOSL, THE PHILOSOPHER'S TOOLKIT § 5.7, at 209 (2d ed. 2010) (describing Ockham's razor).

[227] *Id.*

[228] *See, e.g.*, George M. Cohen, *The Negligence-Opportunism Tradeoff in Contract Law*, 20 HOFSTRA L. REV. 941, 946 (1992) ("In formulating efficient legal rules, economists usually start with the simplest model and then add complexities.").

[229] *See* THE ULTIMATE QUOTABLE EINSTEIN 475 (Alice Calaprice ed., 2011) (explaining that the origins of this quotation are uncertain, although it is regularly attributed to Einstein).

[230] *See supra* Part II (discussing the economic rationales for the preservation and nurturing of business trusts).

[231] *See supra* note 131 and accompanying text (explaining that corporations owe some restraint in their pursuit of profit because they are collaborations with the state, which brings them into existence and gives them limited liability).

maximizing vehicles.[232] This does create some societal risks dependent upon how aggressively business trusts ought to be operated. With that said, business trusts do provide a wide variety of economic benefits discussed in the previous Part.[233] If business trusts begin to create societal harm, positive law can be used to reign in their behavior. Arguably, this is what was done in the "trust busting" period of the early twentieth century[234] In addition, despite the fact that corporations ought to show restraint in seeking profit, many have still erroneously claimed that corporations should engage in unrepentant wealth maximization and have operated corporations in that manner.[235] Even though that flawed behavior has, in many instances, caused societal harm,[236] corporations are allowed to continue to exist because of the benefits that they provide society. Business trusts should be allowed to continue to exist because of the benefits that they provide to society as well.

## CONCLUSION

Business trusts have been, are, and will continue to be an integral part of the U.S. economy.[237] Their importance has even increased in recent years because of the emerging dominance of index funds that are often organized as business trusts.[238] With that said, business trusts have been referred to by one leading commentator as "common law corporations," which calls into question the necessity and usefulness of their existence.[239] Based on various economic principles, this Article demonstrates the importance of preserving and nurturing business trusts and their common-law underpinnings because of the importance of diversification in investment and reducing systemic risk,[240] the

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[232] *See supra* note 132 and accompanying text (stating that the fiduciary duties within the trust form require that trustees engage in relentless wealth maximization).

[233] *See supra* Part II (discussing the economic benefits of business trusts).

[234] *See supra* notes 90–96 and accompanying text (describing the popularity and prominence of business trusts during the years leading up to the passage of antitrust laws).

[235] *See also supra* note 131 and accompanying text (discussing why corporations ought to show restraint in their profit-seeking efforts).

[236] *See, e.g.*, George Shepherd, *Not Just Profits: The Duty of Corporate Leaders to the Public, Not Just Shareholders*, 23 U. PA. J. BUS. L. 823, 825 (2021) (discussing how profit maximization can negatively impact certain peoples and communities).

[237] *See supra* notes 6–10 and accompanying text (explaining that business trusts are currently commonly used for mutual funds, pension funds, REITs, and asset securitization, and that they hold trillions of dollars in their corpuses).

[238] *See supra* notes 11–15 and accompanying text (explaining the importance of index funds and noting that these funds are regularly organized as business trusts).

[239] *See generally* Morley, *supra* note 24 (describing business trusts as the "common law corporation" and explaining the reasons for use of that term).

[240] *See supra* Section II.A (exploring why common-law business trusts allow for investment diversification and why they help to reduce systemic risk).

efficiency that regulatory competition and the common law often produce,[241] and the need to respect the knowledge that spontaneous ordering—such as the common law—imparts.[242] In addressing concerns regarding the preservation and nurturing of these entities, this Article confronts whether the form adds needless complexity to business law[243] and whether the form should be preserved when its essential nature requires unyielding profit maximization.[244] Still, the benefits of these entities outweigh their burdens.[245] As common-law corporations, the question posed at the beginning of this piece was whether the differences between corporations and business trusts matter. The answer to that question is an unequivocal "yes."

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[241] *See supra* Section II.B (discussing why business trusts ought to be preserved and nurtured because of the efficiency that regulatory competition and the common law help generate).

[242] *See supra* Section II.C (examining why business trusts ought to be preserved and nurtured because their common-law origins provide a spontaneous ordering system that coordinates and conveys information).

[243] *See supra* notes 225–230 and accompanying text (addressing the claim that business trusts add needless complexity to the law of business associations).

[244] *See supra* notes 231–236 and accompanying text (addressing the claim that business trusts are problematic because their essential nature requires unrepentant profit maximization).

[245] *See supra* Part III (explaining that whatever concerns that exist about business trusts are far outweighed by the economic justifications provided for the preservation and nurturing of these entities).