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Trust Law and the Title-Split: A Beneficial Perspective

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TRUST LAW AND THE TITLE-SPLIT: A BENEFICIAL PERSPECTIVE

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I. Introduction

Though renewed effort has been made in recent years to categorize and explain the donative trust as a legal device, legal analysts cannot seem to agree on the foundations of its legal function.\(^1\) The pedagogical line is that the trust is a form of concurrent ownership,\(^2\) yet trusts are also explained as contractual arrangements.\(^3\) Trusts


\(^2\) This view, which dominates the treatises and law school casebooks, holds that a trust splits the title to property—the trustee receives legal title while the beneficiary receives beneficial (or equitable) title. See, e.g., ROGER W. ANDERSEN & IRA MARK BLOOM, FUNDAMENTALS OF TRUSTS AND ESTATES 327 (2d ed. 2005) (overriding feature is the relationship between the trustee and beneficiary that results from the “separation of legal and equitable title to property held in trust”); JOEL C. DOBRIS, ET AL., ESTATES AND TRUSTS: CASES AND MATERIALS 500 (3d ed. 2007) (trust property is divided so that trustee has legal title and beneficiary has equitable title); JESSE DUKEMINIER, ET AL., WILLS, TRUSTS, AND ESTATES 485-87 (7th ed. 2005) (trustee holds legal title and beneficiary holds equitable title); AMY MORRIS HESS ET AL., THE LAW OF TRUST AND TRUSTEES §1, at 1-2 (3d ed. 2000) (the trust is a fiduciary relationship in which one person, the trustee, “holds” a property interest, subject to an equitable obligation to keep or use that interest for the benefit of another, the beneficiary); 1 AUSTIN W. SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 1.1, at 5 (5th ed. 2006) (“[The trust is] . . . a form of double ownership. The trustee holds legal title, but the beneficiary has equitable ownership.”); PHILIP H. PETTIT, EQUITY AND THE LAW OF TRUSTS 22-23 (1984) (the trustee is the legal owner while the beneficiary is the equitable owner). Nowhere else in law is the divvying up of property rights described in this manner. Neat, clean, and concise, the title-split definition has superficial appeal. But the legal concept of ownership is already nebulous, and it certainly gains no clarity by being split in two. Commenting on the tendency in law to use such imprecise terminology, Karl Llewellyn (with a nod to Wesley Hohfeld) said it “invite[s] confusion, it makes bad logic almost inevitable, it makes clear statement of clear thought difficult, it makes clear thought itself improbable.” KARL N. LLEWELLYN, THE BRAMBLE BUSH 84 (3d ed. 1960). Nonetheless, this imprecise summary of the legal core of trusts does betray the device’s unique legal history. Both law and equity were indispensable to the trust’s gaining purchase as a tool for making donative transfers of beneficial property interests free of some of their burdens. See infra Part II. The Restatement’s perspective, while admitting of more complexity than the title-split, is decidedly property-based. See RESTATEMENT (SECOND) OF TRUSTS § 2 (1959) (“[The trust is] a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property, for the benefit of another person, which arises as result of a manifestation of an intention to create it.”).
are now yielding to the obligatory scrutiny of law and economics. These analyses tend to emphasize the device’s effect on the parties to the trust deal and give less attention to the nature of the beneficiary’s interest in the trust property, especially in relation to persons outside the trust transaction. For example, the trusts-as-contracts perspective focuses primarily on the obligations of the trustee. Likewise, law and economics approaches conclude either that the trust is internally efficient or find inefficiencies from the perspective of the trust settlor. Yet all consequences of the trust, including any benefits provided to the settlor and any obligations imposed upon the trustee, are incidental to and derivative of the purpose of benefiting the trust beneficiary. 

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3 Professor John Langbein goes so far as to assert that the contract between the settlor and trustee is the trust’s “distinguishing feature.” Langbein, supra note 1, at 627. Trusts, says Langbein, are “functionally indistinguishable from the modern third-party-beneficiary contract.” Id. Because of this, the transfer of property to the trustee, according to Langbein, is merely the “background event.” Id. The effort to reconstruct trusts as contracts has a parallel in other areas of law that followed a property paradigm. For example, leases were originally viewed purely as a means of conveying land, and thus property law dictated their treatment. See, e.g., Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074 (D.C. Cir. 1970); Hilder v. St. Peter, 478 A.2d 202, 206 (Vt. 1984). While this application of law made sense for a rural society, it has not translated well into the modern urban era. See Mary Ann Glendon, The Transformation of American Landlord-Tenant Law, 23 B.C. L. Rev. 503, 503-05 (1982). “The modern view favors a new approach which recognizes that a lease is essentially a contract between the landlord and the tenant wherein the landlord promises to deliver and maintain the demised premises in habitable condition and the tenant promises to pay rent for such habitable premises.” Hilder, 478 A.2d at 208 (citing Boston Hous. Auth. v. Hemingway, 293 N.E.2d 831, 842 (Mass. 1973)). On the surface, a trust undeniably resembles a third-party contract. In the classic third-party contract, A contracts with (and provides consideration to) B to provide value to 3P (to whom A may be indebted, for example). Likewise, the donative trust can be conceptualized as an arrangement whereby S (the settlor) contracts with T (the trustee) to provide valuable property interests to B (the beneficiary). But as this article demonstrates, and others have recognized, that model does not encompass all that is a trust. See supra note 1. It is particularly inapt when the trust is considered from the beneficial perspective.


5 See Langbein, supra note 1, at 627 (focusing on the “contract” between the settlor and the trustee); Hansmann & Mattei, The Functions of Trust Law, supra note 1, at 447-50 (focusing on the relationship between the transferor (settlor) and the manager (trustee)).

6 See, e.g., Sitkoff, supra note 1, at 621 (finding that “the law conforms to the suggested normative approach” which for Sitkoff is that agency costs should be minimized in the allocation of specific roles to the trustee (managerial authority), beneficiaries (residual claim) and settlor (dictator of terms)); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 477-79 (7th ed. 2007) (celebrating efficiency gains in the new prudent investor rule) and 549-50 (countering charges that the spendthrift trust increases transaction costs).

7 See generally Macey, supra note 4 (arguing that trusts cause certain inefficiencies in the common law).

8 These other consequences of the trust can also be created by other legal devices, such as contracts or one of the traditional property forms. See infra Part III. Even unique benefits gained by the settlor from the trust
they can do for the trust beneficiaries. They are employed because they provide beneficiaries with specific benefits to property as selected by the settlor and yet insulate those beneficiaries from potential costs of those benefits in ways that cannot be provided by any other legal device. And since property’s value resides primarily in the benefit it provides, the allure of the trust is that it enhances the value of property for the trust beneficiaries. Consequently, a critical approach to the trust from the primary perspective of the benefits it provides to beneficiaries offers essential insights into the nature of the device.

This article first finds that the trust, analyzed from the perspective of the beneficiary, is neither purely contractual nor solely a property form. Like a contract, the trust is flexible; its features can be customized to fit the very specific circumstances at hand. For a trust, this flexibility functions to allow the settlor to customize the legal interests of the beneficiary. The trust thus evades the rule that restricts property interests to a definite and limited number of clearly-defined forms. Yet, like a property form, the trust restricts legal interests of third parties who are strangers to the trust bargain; a feat that contracts are unable to accomplish. These consequences emerge because of the fiction of the trust form, which is that it splits title into “legal” and “equitable” parts. In this fiction lies the genius of the trust. And yet there are occasions when an overly-formalistic application of the title-split fiction also allows the trust to be used to skirt important obligations attached to property interests, causing negative ramifications to unrelated third parties. This occurs because no party to the trust agreement is required to

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are derivative of those provided to the beneficiary. For settlors, the management scheme of a trust satisfies the desire to retain a degree of control over property given away to the beneficiary.

9 See infra Part IV.
10 See infra Part III.
take on certain costs associated with benefits given to the trustee, which can leave others to absorb those costs. In some of these situations, courts have acknowledged that evasion of ownership burdens by trust beneficiaries should be trumped by policy arguments. Thus, a formal analysis of the title-split fiction is dropped in favor of a more pragmatic approach. But in other situations, policy arguments are inexplicably ignored, and the title-split prevails without meaningful inquiry.  

From a legal-economic perspective, this article maintains that the trust achieves its extraordinary results for beneficiaries in part because it externalizes certain costs of property ownership. Trust beneficiaries gain from these externalizations because the benefits of externalization currently exceed their costs. This creates an unacknowledged common-pool problem. Lack of universal access to trusts prevents a critical mass of persons from taking advantage of the benefits of externalization it provides, perpetuating the problem and raising egalitarian concerns.

The article concludes that, from a beneficial perspective, the magic of a trust lies in its proprietary characteristics. More specifically, the trust enhances the beneficial trust interest by curbing legal interests of third parties. It recommends that new approaches to beneficial interest analysis be pursued, with a view towards mitigating negative effects on parties not specifically included in the trust deal.

Structurally, the article proceeds as follows. Part II explains how trusts draw from contract and property law to create a device that offers beneficiaries the benefits of both. It begins by examining the historical origins of trusts to explain how the dual nature of the trust arose from the fortuitous exploitation of the intersection of common law limits

11 See infra Part IV.A.
12 See infra Part V.
and equitable principles. It points out that the title-split description of the trust is a convenient, but not altogether accurate, way of describing a more nuanced history of the device. Part III looks closer at the mechanics of trusts, comparing them to both contract and property forms. It demonstrates how trusts are employed as tools for creating property interests in the trust beneficiary that transcend the limits imposed on traditional property forms. It reveals how trusts maintain the flexibility of contracts while avoiding the categorical limitations imposed on property forms—forms that affect the legal interests of third parties. Part IV explores the way in which trusts reallocate property ownership costs. It demonstrates how trusts eliminate burdens normally associated with property benefits either by assigning those burdens to the trustee or by eliminating them from the bundle of property sticks altogether. To the extent that the burdens are assigned to the trustee, the trust functions as a kind of agency agreement. But to the extent that no one of the trio of parties to the trust takes on a burden, the trust functions as a device for achieving a kind of legal slight of hand. It concludes that although this feature can allow the trust to serve as an instrument of legal reform, it also permits the trust to skirt the law in more sinister ways. Part V undertakes a cursory legal-economic analysis of the trust, again from the standpoint of the trust beneficiary. It finds that the property ownership costs evaded by the beneficiary, and yet not taken up by the trustee, create externalities in that those costs are imposed on parties unrelated to the trust transaction. Because trusts are either not available to or not economically practical for all, externalizing these costs creates a common-pool problem. The article summarizes its conclusions in Part VI, which suggests that the interpretation of beneficial interests in trusts should diverge from a purely deductive analysis of the fiction of the title-split.
II. The Origins of Trusts and the Emergence of the Title-Split Fiction

The trust evolved from the English “use”—an imaginative device made possible by an accidental combination of common law limitations and emerging equitable principles.\(^\text{13}\) The primary impetus for its invention seems to be that, until the middle of the 16th century in England, land could not be devised by will.\(^\text{14}\) When a feudal tenant\(^\text{15}\) died, the tenant’s land was transferred according to English law.\(^\text{16}\) The use was a roundabout method of effecting a testamentary transfer of this land.\(^\text{17}\) As F.W. Maitland describes the device,\(^\text{18}\) a landowner would convey land to a friend (the “feoffee”) for the

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\(^{13}\) Oliver Wendell Holmes called the use “the greatest contribution to the substantive law which has ever been set down to the credit of the Chancery.” Oliver Wendell Holmes, *Early English Equity*, in COLLECTED LEGAL PAPERS 1, 2 (1920) [hereinafter Holmes, *Early English Equity*]. Other legal thinkers have offered similar paeans to the use, and its current iteration, the trust. See e.g., 3 F.W. Maitland, *The Unincorporated Body*, in COLLECTED PAPERS 271, 272 (H.A.L. Fisher ed., 1911) [hereinafter Maitland, *The Unincorporated Body*]. Maitland referred to the trust, as it developed from the use, as “the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence.” Id.

\(^{14}\) The first Statute of Wills was not promulgated until 1540. Statute of Wills, 32 Hen. VIII, c. 1 (1540) (Eng.). Allowing testamentary disposition of property in feudal times would have been anathema to the lord’s rights to reliefs, wardship, and marriage. See Kenelm Edward Digby, *An Introduction to the History of the Law of Real Property* 298 (Oxford, Clarendon Press 1875) [Hereinafter Digby, *Real Property*].

\(^{15}\) Though the use arose in a feudal system of land ownership, where the feudal tenant had a more complex yet less comprehensive legal relationship to the land than that encompassed by today’s conception of ownership, for convenience this article will generally refer to the feudal tenant, who usually stood in the relationship of a vassal to the lord, as the “owner” of the property.


\(^{17}\) That making testamentary transfers was the chief reason for uses is a conclusion reached by a number of students of the subject. See, e.g., F.W. Maitland, *Lectures on Equity* 26 (1929) [hereinafter Maitland, *Equity*]; W.S. Holdsworth, *Historical Introduction to the Land Law* 149 (1927); Francis Bacon, *Reading on the Statute of Uses*, in *The Works of Francis Bacon* 277, 303 (1900) (stating that uses arose primarily because “the lands by the common law of England were not testamentary or devisable”). Other advantages of the use were that it potentially avoided incidents of wardship, marriage, and relief. See, e.g., Cornelius J. Moynihan, *Introduction to the Law of Real Property* 173-76 (1962). Francis Bacon, among others, points out that uses were also sometimes used for fraudulent purposes. See Bacon, supra note 17, at 303.

\(^{18}\) See Maitland, *Equity*, supra note 17, at 25. Maitland lists five reasons such a scheme might be employed: evading feudal burdens of wardship and marriage, evading the law of forfeiture and for treason and escheat for felony, evading the Statutes of Mortmain, defeating creditors, and making a will of lands.
use of first the landowner and then certain of the landowner’s family (the “cestui que use”) in order to “in effect make a will.” The common law recognized the feoffee as succeeding to legal ownership of the land through the conveyance, and yet the original landowner retained the economic and personal benefits. After the death of the transferor, these benefits would shift to his family members. Uses arose as a kind of wink and nod deal struck between landowners and their confederates. Though the land was transferred to the feoffees so that English common law would recognize them as the owners, they were not intended to have any of the benefits of the property associated with ownership; they were simply supposed to follow the landowner’s instructions with respect to its use and disposition. Yet the ruse of ownership (as opposed to mere contractual obligation) in the feoffees was critical. As Maitland points out, had the use been perceived only as a contract between the landowner and the feoffee, its purpose would have failed:

[T]he success of this scheme would have been marred if the courts of law had compelled the feoffees to fulfil the honourable understanding by virtue of which they had acquired the land. If they had begin to say ‘After all this land is the feoffor’s land, the feoffees are a mere screen, or the feoffees are merely the feoffor’s agents,’ then the whole scheme would have broken down—wardships, marriages, forfeitures, escheats would have followed as a matter of course.

Id. at 27. Scott asserts that the use was employed to avoid feudal incidents such as escheat (where the tenant died without heirs) relief and heriot at the tenant’s death, aids in the case of the lord’s eldest son being knighted and his daughter being married. See Austin W. Scott, The Trust as an Instrument of Law Reform, 31 YALE L.J. 457, 460 (1922) [hereinafter Scott, Instrument of Law Reform]. Bacon also points out that the devices were sometimes used for fraudulent purposes. See BACON, supra note 17, at 303.

See MAITLAND, EQUITY, supra note 17, at 26. Uses were apparent “as early as the reign of Edward III.” DIGBY, REAL PROPERTY, supra note 14, at 242. However, testamentary transfers of property were not permitted under English law until the Statute of Wills was enacted in 1540. See DUKEMINIER & KRIER, PROPERTY 284 (5th ed. 2002).

See MAITLAND, EQUITY, supra note 17, at 27. See also 1 POLLOCK & MAITLAND, supra note 16, at 232 (pointing out how critical this common law shortcoming was to the development of enforceable rights in the cestui que use). See also Scott, Instrument of Law Reform, supra note 18, at 459 (pointing out that had the common law recognized the use for a covenant, it would probably have found that many of the purposes to which they were put were against public policy).
The common law’s recognition of ownership in the feoffee meant that when the landowner who had transferred his property to a use died, he owned nothing subject to the rules of succession.\(^{21}\) On the other hand, enforcement of the feoffee’s obligation to deal with property as directed by the transferring landowner was also critical, particularly from the standpoint of the cestui que use. Without legal enforcement of the obligation of the feoffee to grant the use of the land to the cestui que use, the devices would have been vulnerable to abuse by the feoffee. But because the common law of contract had not yet been developed,\(^{22}\) its courts could not enforce this obligation. This is where the equitable jurisdiction of the Chancellor came in.\(^{23}\) Digby writes that in “early times” when the various functions of government—legislative, judicial, and administrative—were not clearly defined, persons could petition the Council or the King for redress.\(^{24}\) This was particularly helpful in cases where the common law provided no remedy for the grievance at issue.\(^{25}\) The King began referring such cases to the Chancellor,\(^{26}\) who had historically only a type of ministerial authority. But because the King and Council were the “supreme depositaries of power,”\(^{27}\) and the Chancellor’s authority was granted by the King, he eventually began issuing decrees and doling out justice in ways not authorized

\(^{21}\) See supra notes 16-17.

\(^{22}\) Although this had apparently changed by the fifteenth century, by then the devices had already been recognized and established. MAITLAND, EQUITY, supra note 17, at 28. According to Holmes, a “covenant,” as an alternative to possession of the land, might have been a ground for recovery, but since the cestui que use was not privy to the covenant this offered no alternative ground for relief under the common law. See HOLMES, Early English Equity, supra note 13, at 13.

\(^{23}\) See, e.g., HOLDSWORTH, supra note 17, at 147 (noting that the “equitable jurisdiction of the Chancellor” was crucial to upholding the obligation of the feoffee to the cestui que use). Even where the cestui que use had possession, the common law was of no help. See HOLMES, Early English Equity, supra note 13, at 11-12.

\(^{24}\) DIGBY, REAL PROPERTY, supra note 14, at 245.

\(^{25}\) Id.

\(^{26}\) Digby contends that this began happening during the reign of Edward I (1272-1307). Id.; 4 ENCYCLOPEDIA BRITANNICA 374 (15th ed. 1994).

\(^{27}\) DIGBY, REAL PROPERTY, supra note 14, at 245.
by the common law.\textsuperscript{28} Increasingly, the Chancellor’s assistance was sought where the
commom law failed “to meet the wants of an advancing community.”\textsuperscript{29}

Practices had arisen giving rise to what were considered to be rights and
duties, upon the faith of which men acted, but which yet were wholly
unrecognized by the common law. . . . Conspicuous among the practices
which the common law refused to recognise, but which still were
commonly observed, was that of giving lands to be held to uses. . . . [U]ses
of land being wholly unrecognized by the common law, and yet the
practice having attained the force of a custom, . . . the Chancellor would
be resorted to as the depositary of the undefined prerogatives of the
Crown, in an age when the limits of the administrative, legislative, and
judicial functions were not clearly marked out.\textsuperscript{30}

As noted above, the common law did recognize the “feoffee to uses” (the trustee) as the
owner, although it did not recognize the “use” as such. It took the Chancellor,
derivatively armed by the power of the King and aimed at enforcing moral obligations
and good faith that arose in the context of custom, to enforce the part that now looks like
a simple third-party beneficiary contract.\textsuperscript{31} So separate systems of enforcement, one legal
and one equitable, unwittingly conspired to create the trust. Had either system not done
its part, the beneficiary of the use would not have been able to enforce his interest and the
use would not have worked. Langbein points out that the part enforced by the Chancellor
is, under current law, best described as contractual.\textsuperscript{32} He is right of course, but that is only
part of the story. Because at the same time that the Chancellor was filling in common law
gaps by enforcing the contract, the common law only had the “ownership,” and not the

\begin{footnotes}
\textsuperscript{28} According to Digby, the Chancellor began issuing decrees beginning at about the end of the reign of
Edward III (1327-1377) and first heard cases involving uses during the reign of Henry V (1413-1422). \textit{Id.}
at 246-48; 4 \textsc{Encyclopedia Britannica} 376 (15th ed. 1994); 5 \textsc{Encyclopedia Britannica} 838 (15th ed.
1994).
\textsuperscript{29} \textsc{Digby, Real Property}, supra note 14, at 247.
\textsuperscript{30} \textit{Id.} at 247-48.
\textsuperscript{31} \textsc{See Pollock & Maitland, supra} note 16, at 232 (“‘The use’ seems to be accomplishing its manifest
destiny when at length after many adventures [the interest of the cestui que use] appears as ‘equitable
ownership.’”).
\textsuperscript{32} \textsc{See supra} note 3.
\end{footnotes}
use, to enforce. It is the unwitting complicity of the common law with the Chancellor’s derivative equitable power to enforce obligations based on nothing but moral obligations and good faith which created the trust.

Despite Digby’s denials, surely the legislature and the courts of equity were aware of what the combination of their efforts had wrought. The use did, in fact, free property owners from certain burdens of ownership. In so doing it circumvented the efforts of the law. Why then was this anomaly tolerated? Perhaps because some of what these devices accomplished had what Maitland called “the spirit of their time” in their favor. The

33 As stated so aptly by Digby: “The law knows nothing of any third person who is free from the burdens while he reaps the profits of the tenancy.” DIGBY, REAL PROPERTY, supra note 14, at 249. See also HOLDSWORTH, supra note 17, at 146 (“It will give the beneficiary all the advantages of property, and yet leave him subject to none of the legal liabilities which property entails.”).

34 As stated by Holdsworth, “At law the feoffees to uses or trustees were the absolute owners. In equity they were compelled to use their power as legal owners for the benefit of the cestui-que use.” HOLDSWORTH, supra note 17, at 147-48. Langbein’s contractual perspective informs his rather bold assertion that Maitland “got the contractarian basis of the trust right” while Scott “got it wrong . . . .” Langbein, supra note 1, at 644. Compare Austin W. Scott, The Rights of the Cestui Que Trust, 17 COLUM. L. REV. 269, 270 (1917) [hereinafter Scott, Cestui Que Trust] (the creation of a trust involves the transfer of an interest rather than the mere creation of an obligation) with MAITLAND, EQUITY, supra note 17, at 29 (the trust originates in agreement). However, in this passage Maitland is referring only to the relationship between the settlor and the trustee. When the beneficial perspective is taken into account the trust’s proprietary characteristics are clearly essential. See infra Part III.A-B. Tellingly, Langbein admits that he cannot reconcile his view with the type of trust in which the settlor is the sole trustee, usually created under the so-called “declaration of trust.” For this reason, he simply dismisses these very common and popular types of trusts as transfers that are “not in function trusts,” but rather a “way station to the creation of a true third-party trust . . . .” Langbein, supra note 1, at 645. Langbein’s focus is on the internal workings of the trust arrangement; that is, on the relationship among the settlor, trustee, and the beneficiary. He thus asserts that what “most modern transferors want” from a trust is “the management services of a third-party trustee.” Id. at 672. Under a declaration of trust the settlor, not a third party, serves as trustee. See, e.g., DUKE MINER ET AL., supra note 2, at 489. Langbein relegates their treatment to the hinterland of his appendix, where he again dismisses them as “nontrusts” or again, “way stations” to “real” trusts. Langbein, supra note 1, at 672-75. While this mechanical technique affords him the advantage of foiling any criticism that he fails to address the devices, it also serves to keep the body of the article free of a prominent example of why his contract theory does not support reality across all types of trusts. In point of fact, the declaration of trust is a trust and has been consistent with trust law for some two hundred years. See Scott, Cestui Que Trust, supra note 34, at 270 (writing that “for the last hundred years [since 1917] it has been held that a trust may be created by gratuitous declaration of trust without transfer of the legal title”). Simply put, the declaration of trust creates a trust.

35 MAITLAND, EQUITY, supra note 17, at 29. See also WALTER ULLMANN, THE INDIVIDUAL AND SOCIETY IN THE MIDDLE AGES 84-86 (1966). Ullmann points out that after the Norman conquest in 1066 A.D., everyone was a vassal because even those who were lords held land from someone else, if none other than the King. Id. This condition had what Ullmann referred to as an “equalizing influence.” Id. at 84. Given the predicament of the vassals and the fact that the common law evolved largely on “common consent,” the
system of tenure was seen as incompatible with an increasingly agricultural and trade-based economy, coupled with the fact that more persons were unhappily becoming subject to tenurial obligations to the King.\textsuperscript{36} Property owners therefore sought to curb the crown’s ability to restrict their use of property.

In short, uses arose to limit legal rights or disable legal powers held by others over property. That landowners could not dispose of their property by will meant that successors to that property had a right to it, and that the law operated as a legally-imposed duty in the landowner to turn it over to the heir. The use took away this right, and converted the landowner’s duty into a privilege to make a testamentary conveyance of his property to anyone the landowner saw fit.\textsuperscript{37}

As uses allowed landowners to skirt the law and its purposes, including the purpose of raising revenue, Parliament eventually reacted.\textsuperscript{38} In 1535 under Henry VIII, the Statute of Uses was enacted, which operated to eliminate the use by converting the interest of the cestui que use into ownership.\textsuperscript{39} So, for example, where A transferred land

\textsuperscript{36} See 1 Richard R. Powell, Powell on Real Property §3.16 (Michael Allan Wolf, ed., Matthew Bender 2000).

\textsuperscript{37} See 1 Richard R. Powell, Powell on Real Property §3.16 (Michael Allan Wolf, ed., Matthew Bender 2000).

\textsuperscript{38} See, e.g., A.W.B. Simpson, An Introduction to the History of the Land Law 186 (1961) (describing the Statute of Uses as the means by which Parliament prevented conveyancers’ manipulation of legal estates to avoid feudal tenures).

\textsuperscript{39} As uses circumvented many of the processes by which the King had raised money, the crown was apparently desperate for revenue. Id. at 173. While Maitland takes the position that Henry VIII forced the statute on Parliament, Holdsworth offers a more nuanced explanation. Compare Maitland, Equity, supra note 17, at 35 (“The Statute of Uses was forced upon an extremely unwilling parliament by an extremely strong-willed king”), with Holdsworth, The Political Causes Which Shaped the Statute of Uses, 26 Harv. L. Rev. 108 (1912-13) (suggesting that the resultant Statute of Uses was the product of compromise with a strongly opposed Parliament).
to B for the use of C, the statute operated to vest legal title in C, removing title from A.\textsuperscript{40} But the statute could not affect the power of equity to enforce obligations absent a remedy at law. This left landowners with at least four ways to avoid the application of the statute. If A in the above example also implored C to hold the land for the use of, or in trust for, D, then this latter obligation of C to D could still be enforced by the Chancellor. This was allowed even though the common law held that this “use upon a use” was void.\textsuperscript{41} Another way to avoid the statute was where A transferred to B for a term of years for the use of C. Because the statute only applied to land of which a party was “seized” it did not reach terms of years.\textsuperscript{42} The statute also failed to apply to uses of personal property.\textsuperscript{43} Finally, the statute failed to apply if B in the above example had any “active duties” with respect to the property, such as the making of improvements or leasing the property and paying over the rents to C.\textsuperscript{44} Thus, while the statute presumably applied to many current uses, it had no significant effect on the future of the use, which eventually became known as the trust, and continued to be enforceable in equity.\textsuperscript{45}

A compact retrospective legal description of the use (and its successor, the trust) was eventually formulated. While this description is short on clarity and plausibility, it has the distinct advantage of brevity. In short, it tortures the concept of ownership by explaining that in the creation of the trust the bundle of property interests referred to as

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\textsuperscript{41} \textit{I d.} at § 6. Simpson points out that the language could be even simpler: “to A, unto and to the use of A, in trust for B.” \textit{See S I M P S O N, supra} note 38, at 188.
\textsuperscript{42} \textit{P E R R Y, supra} note 40, at § 6. According to Simpson, initially some Chancellors would not enforce these uses because they considered them to be fraudulent evasions of the Statute of Uses, depriving the Crown of revenue. \textit{S e e S I M P S O N, supra} note 38, at 188. But as the feudal system disappeared, these types of uses were enforceable, and became know as trusts. \textit{I d.}
\textsuperscript{43} \textit{P E R R Y, supra} note 40, at § 6.
\textsuperscript{44} \textit{I d.}
\textsuperscript{45} \textit{S I M P S O N, supra} note 38, at 188. According to Simpson, by the seventeenth century the term “use” was limited to those uses to which the Statute of Uses applied. \textit{I d.} Other “uses” were called trusts. “Thus it became property to speak of a conveyance of a term of years ‘to A in trust for B,’ and of a conveyance ‘to A to the use of B in trust for C.’” \textit{I d.} at 191-92.
ownership is split, giving ownership in name to the trustee, but the benefits of ownership to the beneficiaries. To phrase it another way, the trustee obtains legal title while beneficial title is transferred to the beneficiary. So the history of the trust is now encapsulated into the fiction of the title split and continues to stand on that fiction. However described for definitional purposes, without this historically fortuitous and unique coalescence of common law and equity there would be no trusts, regardless of whether a common law conception of contracts had been developed that would reach the trust arrangement.

III. HOW TRUSTS DIFFER FROM CONTRACTS AND PROPERTY FORMS

A. Trusts Maintain Advantages of Both Contracts and Property Forms

The unique legal genesis of trusts produced a device that resists a neat and clean categorization. Trusts have characteristics of both contracts and property interests. An important distinction between contracts and property interests is that, through contracts,
parties are free to customize their legal interests in any manner they choose. Real property interests, on the other hand, must fit within certain recognizable forms. A civil law term—numerus clausus—is sometimes employed to describe this numerical restriction on real property interests. Although common law jurisdictions observe the numeros clausus principle, they do not label it as such, and therefore it has not become the object of much study. Where numeros clausus is addressed by common law scholars, justifications for the rule are sparse, and often critical, but a common element concerns the fact that property forms affect the interests of outsiders unrelated to the bargain, which makes predictability more important. For example, Thomas W. Merrill and Henry E. Smith contend that the numeros clausus helps manage information costs incurred by these outsiders, while Henry Hansmann and Reinier Kraakman assert that

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50 Merrill & Smith, supra note 49, at 359.


53 Merrill & Smith note that many common law commentators have a negative view of the principle. It has been criticized for being anachronistic, preservative of undesirable social hierarchy, antagonistic to the legally unsophisticated, and an obstacle to reform. Merrill & Smith, supra note 49, at 6-7. Merrill & Smith conclude that, from a law and economics perspective, the value of the numeros clausus is that it limits information costs to third parties, and thus increases economic efficiency. Id. at 26-28. Cf. Hansmann & Kraakman, supra note 49, who argue that property rights, unlike contract rights, can be enforced against subsequent transferees, and that notice and verification are central to the numeros clausus.

54 If property is owned by X, and then is sold or given to Y, we still merely have an owner in fee simple, it is just a different person who can enforce the same property rights. But X and his transferees can create different types of property rights. For example, X might sell his property to H and W, who take title as tenants by the entirety, or to A and B, who take title as joint tenants. These different property forms will affect the rights of other persons. Were new and different property forms unlimited, the rights of outsiders could be manipulated by forms too numerous to track. But enter the numeros clausus.

the doctrine ensures that outsiders have adequate notice. Contracts, unlike property forms, affect only the interests of the parties to the contract. Since the parties to the contract must consent to that arrangement, it is perfectly acceptable, even desirable, to impose few or no restrictions on the parameters of contracts. Information costs of and notice to outsiders are presumably not a problem, at least where the bargain is concerned.

Whether trusts are functionally similar to contracts or property forms depends then, at least in part, on whether they affect the legal interests of outsiders. In determining how trusts affect the legal interests of the parties to the trust transaction and others, it is instructive to use the vocabulary developed by John Wesley Hohfeld in his article *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*. Hohfeld, who was concerned that the use of vague or ambiguous language in the law led to imprecise legal thinking, famously advocated the use of certain specific terms to describe legal relations. These terms were grouped into what he called “jural correlatives” and “jural opposites.”

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56 See generally Hansmann & Kraakman, supra note 49. See also Rudden, *Economic Theory v. Property Law*, supra note 51, at 246 (“One of the main reasons given in common and civil law for the *numerus clausus* of real rights is the problem a purchaser would face in finding out about fancies.”) Rudden also points out several other justifications that have been given, including various philosophical and economic reasons. Id. at 246-60. See Hanoch Dagan, *The Craft of Property*, 91 CAL. L. REV. 1517, 1562 (2003) (focusing on the expectations of the participants themselves, Dagan asserts that because the “institutions of property are unifying normative ideals for core categories of interpersonal relationships” they “must be limited in number and standardized” so that they can consolidate people’s expectations”).

57 Where contracts are concerned, the more customization the better. See e.g., Nicholas Mercuro & Steven G. Medina, *Economics and the Law: From Posner to Post-Modernism and Beyond* 138-39 (SECOND EDITION 2006) (Pointing out that if the contracting parties provided terms for every possible contingency, “there would be no occasion for the courts to prescribe remedies.”).

58 Hohfeld, supra note 37, at 16.

59 Hohfeld’s system groups legal interests as follows:

<table>
<thead>
<tr>
<th>Jural Correlatives</th>
<th>right</th>
<th>Privilege</th>
<th>Power</th>
<th>immunity</th>
</tr>
</thead>
<tbody>
<tr>
<td>duty no-right</td>
<td>Liability</td>
<td>disability</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Jural Opposites</th>
<th>right</th>
<th>privilege</th>
<th>power</th>
<th>immunity</th>
</tr>
</thead>
<tbody>
<tr>
<td>no-right</td>
<td>duty</td>
<td>disability</td>
<td>liability</td>
<td></td>
</tr>
</tbody>
</table>

Id. at 65.
Hohfeld’s system of correlatives recognizes that any time a person has a right, for example, there is a person with a duty with respect to that right. In other words, if person A has a right to a payment of X dollars from person B, B has a duty to pay those X dollars to A. Likewise, a privilege in one means that another has what Hohfeld referred to as no-right; power in one correlates with a liability in another, and so on. Each of these legal interests also has an opposite interest. That B in the above example has a duty to pay A means that B is not privileged (since privilege is duty’s jural opposite) to avoid that payment. To give another example, Y has a privilege to enter Y’s own land, and therefore D, for example, has no-right (privilege’s jural correlative) to prevent Y from doing so. That Y has a privilege means that Y could not have a duty (privilege’s jural opposite) to refrain from entering Y’s land.

Hohfeld’s system can be applied to the use to determine how the device affected legal interests. That a landowner could not dispose of his property by will meant that the landowner’s heir had a legally mandated right to that property, and likewise that the law imposed a duty in the landowner (or the landowner’s estate) to yield title to the heir at the landowner’s death. The use converted the landowner’s duty to its jural opposite, the privilege, while converting the heir’s right to no-right. The landowner was essentially now privileged (through the use) to make a testamentary conveyance of his property to anyone he saw fit. The heir, though a stranger to the bargain of the use, no longer had a right to the property. The use’s effect on wardship was similar. Wardship meant that when the landowner or tenant was underage, the lord had the power to take custody of the

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60 Id. at 32 (“[I]f X has right against Y that he shall stay off the former’s land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place.”).
61 For a summary of the use, which developed into the trust, see Part II of this article.
62 See, e.g., HOLDSWORTH, supra note 17, at 149.
property. The use converted the lord’s power of wardship into a disability, as it made
the landowner immune to wardship.

Importantly, the use was more powerful than a contract in that it affected the
rights of outsiders. Even if the common law of contract had been available, the contract
could not have accomplished the landowner’s goals because it could not affect the power
of the lord to take custody of the property. Suppose that landowner, L, could have, and
did, simply enter into a contract with the feoffee, F, to manage the property for the
benefit of L and, after L’s death, his son, S. This contract would be unable to divest L’s
heir of his right to the property at L’s death, unless the heir was somehow made a party to
the contract. This is because the heir’s right arose due to the landowner’s ownership
interest in, or property rights over, the property. Or to take the second example, if L died
when S was underage, the lord could take custody of the property because the contract
could not disable the lord’s wardship, the lord not being a party to the deal. Again, the
lord’s power to take control arose by reason of the landowner’s property rights in the
land.

Suppose, on the other hand, that L transfers ownership of the property during his
life to S. S takes title to the property in fee simple—a common property form. This
technique, unlike the contract, does affect the interests of parties not part of the
transaction. Because L no longer owns the property, L’s heir no longer has a right to the
property at L’s death. The property form can accomplish what the contract cannot—it can
modify the legal interests of parties outside the bargain. Importantly, however, it does not
have the flexibility that is afforded by the use. In our example, if L wished to continue to

63 See id. at 31 (The argument for wardship was that it gave the lord control over the underage tenant’s
education and perhaps even a say in the tenant’s marriage under the theory that the lord could thereby
ensure himself of a worthy tenant.).
benefit from the property during his lifetime, he could retain a life estate for himself and
transfer a remainder interest to S. If permitted under the law, this would accomplish some
of L’s purposes. But, even considering the various but limited purposes for which a use
was employed during feudal times, we soon run out of property forms to accomplish our
purposes. There is no employment of the life estate and remainder that would permit one
to evade the Statutes of Mortmain\textsuperscript{64} for example. When one begins to contemplate the
purposes to which modern trusts are put, the superiority of the trust becomes obvious
rather quickly.\textsuperscript{65} These examples illustrate that the trust, unlike a contract but like a
property form, quite clearly affects the interests of outsiders. And yet, as the next section
explains, it is apparent that the trust does not fit neatly into the category of property forms
either.

B. TRUSTS EVADE THE NUMERUS CLAUSUS PRINCIPLE

Merrill and Smith place the trust in the category of “concurrent interests” in
property.\textsuperscript{66} This characterization is based on the formal description of the trust as a title-
split—the trustee and beneficiary have concurrent interests in the title to the trust
property. But this categorization is too restrictive. For example, Merrill and Smith point
out that the present possessory interests in land consist of only five general types: the fee
simple absolute, the defeasible fee simple, the fee tail, the life estate, and the lease.\textsuperscript{67}
They then illustrate their point that courts will not permit interests that do not fit one of

\begin{footnotes}
\item[64] The Statutes of Mortmain were passed to prevent the church from permanently holding property. \textit{See}
generally, \textsc{Leonard ShefFord}, \textsc{Practical Treatise of the Law of Mortmain and Charitable Uses}
and Trusts (1842).
\item[65] \textit{See}, \textit{e.g.}, \textsc{Dukeminier, et al.}, \textit{supra} note 2, at 494-96 (comparing a trust to a legal life estate.
\item[66] Merrill & Smith, \textit{supra} note 49, at 15.
\item[67] \textit{Id.} at 13.
\end{footnotes}
the pre-defined property forms (courts will enforce the principle of the numerus clausus) by offering the case where a testator intends to leave “a life estate if the spouse dies intestate but a fee simple if the spouse decides to sell or make a gift of the property by will.” Merrill and Smith convincingly prove that this cannot be accomplished; courts will either construe it as a life estate or fee simple, fitting it into a “standardized box.” But one can easily fulfill the intention ascribed to the testator in Merrill and Smith’s example through the vehicle of a trust. The trust instrument would simply give to the surviving spouse an interest in the trust property for life, coupled with a general power of appointment. In default of exercise of the power of appointment the property would be distributed to whomever the settlor wished to succeed to the interest. This arrangement would take on a different title form than that described by Merrill and Smith but the benefits provided by the trust are the same as those provided by the attempted transfer. In other words, from the beneficial perspective, the prohibited interest can be created.

Though they fail to state so explicitly, Merrill and Smith further illustrate the way in which trusts skirt the numerus clausus when they discuss personal property interests. After explaining that the menu of options for types of personal property interests is even more limited than that for real property, they concede as follows:

The reality is that virtually anyone who wants to create complicated future interests in personal property… does so through a trust. The trustee holds title to the personal property in fee simple, and the beneficiaries hold life estates and remainders, or sometimes more unusual interests, described using the building blocks of the common-law estates in land.

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68 Id. at 13-14. The authors cite several cases in support of this proposition.
69 Id. at 14.
70 As discussed in Part IV infra, the position taken here is that all of property’s value generally stems from the benefits it provides.
71 Merrill & Smith, supra note 49, at 18 (emphasis added) (citations omitted).
Now recall that, in Merrill and Smith’s view, the trust form represents one, and only one, type of concurrent property interest. How is it then that trusts can “create” as they say, “more unusual interests”? The language they use is telling. Trusts create interests.

Like many courts, Merrill and Smith seem to be distracted by the formal description of the trust as a simple title-split. They maintain that the trust achieves a “highly simplified title” along with “a significant degree of flexibility in designating the beneficial uses of those assets.” But this tracing of title is a red herring born of the title-split fiction. The trust cannot be explained by simply observing that legal title resides with the trustee. Tracing title works outside the trust, because in all other property forms, benefit follows title. Benefit, because it is aligned with title, is restrained by the numerus clausus. But even in those other interests, title is only a proxy for benefit because property interests have value only to the extent they confer benefit on some person. The trust divorces the concept of title from the benefit. And so what does the trust reveal? The Achilles’ heel of the numerus clausus is that it is based solely on title and completely ignores benefit. As long as title and benefit are separated, then benefit need not follow any predefined form, despite the numerus clausus. And yet the value of property depends on the benefit it provides. Title, except to the extent it coincides with benefit, has no value. Taking the benefit is taking the property even though title remains. And in creating different or novel property interests our goal is to achieve a different kind of

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72 Id. To illustrate their point that the judiciary recognizes the numerus clausus, Merrill and Smith cite to the case of Johnson v. Whiton. 34 N.E. 542 (Mass. 1893). In that case the testator devised land to his granddaughter “and her heirs on her father’s side.” Id. The court held that because the will represented an attempt to create a new type of estate, the granddaughter instead took a fee simple absolute. Id. Again, this devise could be easily accomplished in substance through the use of a trust.

73 This is why any law that denies a person “all economically viable use” of the person’s property constitutes a taking for purposes of the Fifth Amendment of the United States Constitution. See generally, Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

74 Id.
benefit, not a different kind of title. This is why trusts can be used to achieve benefits not available under the common property forms. The trust thus evades the numerus clausus and accomplishes our goals.

IV. HOW TRUSTS REALLOCATE PROPERTY OWNERSHIP COSTS

A. THE TITLE-SPLIT AND FORMAL DEDUCTIVE REASONING.

The prior section shows how the title-split fiction allows the trust to evade the rule that limits property interests to certain clearly-defined forms. In this section I demonstrate how, by harnessing the power of that fiction, particularly where formalistic legal reasoning is employed, trusts dodge the intent of the law by shirking legal responsibilities corollary to ownership of property, all to the advantage of the trust beneficiary.

Courts are at least implicitly aware of the problems created by the fact of property forms based on title, on the one hand, and the fiction of the title split, on the other hand. Consequently, as trusts have gained in popularity, certain formal consequences of the title-split fiction have become increasingly difficult to justify, casting the nature of beneficial or equitable title into considerable confusion. A trio of Massachusetts cases illustrates this point, as it concerns statutory law that was enacted before the trust began to be widely used to avoid laws based on title to property. The first case, Kerwin v. Donaghy,\(^{75}\) is an example of a court dutifully following the form suggested by the title-split fiction in traditional conceptualist fashion. Kerwin involved a decedent, William J. Kerwin, who titled stock in the name of his daughter, Gladys, under trusts created by two

\(^{75}\) 59 N.E.2d 299 (Mass. 1945).
trust agreements. The agreements provided that during Mr. Kerwin’s lifetime he would receive the net income from the trusts created thereby and upon his death the trust property would be transferred to Gladys. Mr. Kerwin reserved the right, during his lifetime, to revoke the trusts and to amend the trust agreements by notice to Gladys, as trustee. After Mr. Kerwin’s death, his widow elected against the will, as she was entitled under Massachusetts law to take the portion of his estate she would have taken had he died intestate. She claimed the trust property as an asset of the estate within the meaning of the statute, while Gladys took the opposite position. After finding that the trust agreements were valid, the court held that legal title to the property was properly vested in Gladys, that Mr. Kerwin had an “equitable life estate” and that Gladys held an equitable remainder and that, therefore, the property was not part of the estate. In other words, the title-split mandated the result. The decedent’s estate could not have included the trust assets, reasoned the court, as the decedent did not die with legal title to those assets. Instead, title was vested in the trustee, while the decedent held only an equitable life estate which disappeared at his death.

*Kerwin v. Donaghy* thus validated the trust as a tool for eluding the elective share in Massachusetts. Remarkably, for the next forty years, anyone domiciled in Massachusetts with the wherewithal to take advantage of the trust form could simply

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76 Mr. Kerwin had originally titled the stock in Gladys’s name under an oral agreement that “it should remain his and should be turned back to him at his request.” Later, the trust agreements were established. *Id.* at 301-02.
77 *Id.* at 303.
78 *Id.* at 304.
80 Formally consistent with this reasoning, the court also pointed out that the trust arrangement was nontestamentary. *Kerwin*, 59 N.E.2d at 304. That the title-split allows the revocable trust to be employed as a will substitute that avoid probate is now accepted across jurisdictions. *See*, e.g., DUKE MINIER, ET AL., *supra* note 2, at 318 (probate is avoided because “legal title to the assets passes to the trustee, and there is no need to change the title to the trust assets by probate administration on the settlor’s death”).
elect out of exposure to the surviving spouse’s forced share. Such was the power of the formal description of the trust. Some forty years after Kerwin was decided, the Supreme Judicial Court of Massachusetts was once again faced with the same question. This time, the court relaxed its formalistic approach to the title-split, and recognized that public policy dictated against the result in Kerwin. In Sullivan v. Burkin, the facts were almost identical to those faced in Kerwin. Mr. Sullivan transferred property to himself as trustee. He retained the right to so much of the income and principal as he might request during his lifetime. At his death, the property was to be distributed to certain remainder beneficiaries. Mr. Sullivan made no provision in his estate plan for his estranged spouse, who, when Mr. Sullivan died, contended that the trust assets should be a part of the estate of the decedent for purposes of the forced share. Although the court concluded that Kerwin controlled the result in Sullivan, it was disturbed by the public policy implications of the rule. It therefore set forth a different rule to be followed in subsequent cases. It held that, in the future, the statutory forced share would apply to any assets in a revocable trust created by a deceased spouse who retained a power “to direct the disposition of those trust assets for his or her benefit.”

81 As Lawrence Waggoner has pointed out, where decisions are based on the form of a property interest (here, property legally owned by the decedent), rather than its substance (here, property fully or “equitably” enjoyed by the decedent), circumvention is often easy for the sophisticated lawyer. See Lawrence W. Waggoner, Reformulating the Structure of Estates: A Proposal for Legislative Action, 85 HARV. L. REV. 729, 732 (1972), where, discussing the complexity and artificiality of estates in land, he points out that “knowledgeable [lawyers] can use the artificiality of the system to the advantage of their clients.” Where the lawyer is armed with a tool as powerful as the trust, the task is made even easier.


83 Id. at 573.

84 Id.

85 Id. at 574. Mrs. Sullivan made the argument that the trust was an invalid testamentary disposition, which the court rejected. It then addressed the question whether the trust assets were described by the statute as a “portion of the estate of the deceased.” Id.

86 For example, the court pointed out that, under Massachusetts law, the right of a divorcing spouse to property of the other spouse had been substantially increased since the Kerwin case was decided. Id. at 572.

87 Id.
So *Sullivan* recognized that blind adherence to the title-split fiction at times yielded unjust results. But the opinion still demonstrated respect for the fiction of the form, tempered by a just a touch of realism. The problem with *Sullivan* from the perspective of the trust function, is that, while it revealed the inherent flaws in the title-split fiction, it offered no sensible guidelines for limiting its rejection of that fiction. For that reason, when the question came up several years later with slightly different facts, confusion reigned. In *Bongaards v. Millen*\(^88\) Josephine created a trust for her own benefit, and, upon her death, for that of her daughter, Jean. After Josephine’s death Jean also had a power of appointment over the trust assets, upon default of which the trust would terminate and the property be divided among Josephine’s grandchildren. In addition to the power of appointment, Jean had the power, during her lifetime, to amend or to terminate the trust and to distribute the property to herself, individually.\(^89\) Jean died married to George, for whom she made no provision in her will. George exercised his forced share rights under the same statute at issue in *Kerwin* and *Sullivan*, and argued, based on *Sullivan*, that the trust property was part of Jean’s estate.\(^90\) But the majority refused to extend *Sullivan* to the facts at issue in *Bongaards*, holding that *Sullivan* only included in a deceased spouse’s estate for purposes of the statute the assets of a trust created by the decedent, and not those of a trust created by a third party.\(^91\) This was a surprising conclusion, given that, since Jean could have withdrawn the assets from the trust at any time during her lifetime, she had virtual ownership of those assets. The court

\(^{88}\) 793 N.E.2d 335 (Mass. 2003).

\(^{89}\) During her lifetime, Jean appointed her sister, Nina, as remainder beneficiary of the trust, and amended the trust instrument to add a spendthrift clause. *See id.* at 338.

\(^{90}\) The court framed the Sullivan rule by firmly in the title-split mold by stating that the case modified the rule that gave spouses “an absolute right to dispose of any or all of their personal property in their lifetime . . . .” *See id.* at 340.

\(^{91}\) The court relied on the position of the American Law Institute as embodied in the *Restatement (Second) of Property: Donative Transfers* § 13.7 (1986).
justified its analysis by couching the *Sullivan* decision in terms of a prohibition against
the decedent spouse giving away assets during the decedent’s lifetime, and effectively
removing them from the reach of the elective share statute, yet continuing to benefit from
them. This is what happened under the *Sullivan* facts, said the court, and therefore,*Sullivan* “merely closed a loophole.”92 In *Bongaards*, on the other hand, because the trust
was created by a third party, the property was not ever removed from the estate.93 But the
opinion fails to square this reasoning in terms of the way in which it pokes holes in the
title-split fiction. If the *Sullivan* facts presented a loophole, that loophole arose solely
because the decedent’s beneficial trust interest amounted to ownership.

Contrasting the *Bongaards* facts with an example based on full ownership shows
the inconsistency in the court’s analysis. If H dies owning property outright, the forced
share statute applies to that property. No inquiry is made as to whether H’s interest in that
property was received as a gift from another. Why then should one make that inquiry in
the case of an interest that the court has already conceded is virtually identical to full
ownership? Some might argue that the difference is based on the intent of the donor.94 In
other words, if D gives property outright to H, then that is evidence that D intended H to
have all the consequences of full ownership. On the other hand, if D modified H’s
interest in the gifted property through the use of a trust, then D intended to relieve certain

92 *Bongaards*, 793 N.E.2d at 344.
93 *Id.*
94 Allusions to the intent of the donor as the highest normative ideal in trust law pervades the American law
of trusts. See, e.g., *RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1*
(2003) (“The controlling consideration in determining the meaning of a donative document is the donor’s
intention. The donor’s intention is given effect to the maximum extent allowed by law.”); Langbein, *supra*
note 1, at 663-64 (promoting a view of trusts that elevates respect for the settlor’s intention); Sitkoff, *supra*
note 1, at 644 (furthering the settlor’s intention is “normatively desirable”). It is my position here that
excessive focus on the settlor’s intent is misplaced as it necessarily minimizes or even ignores altogether
the implications to outsiders of the beneficial interest. Sitkoff, for example, admits that his “normative
claim” for minimizing agency costs of trusts “gives priority to the settlor over the beneficiaries as the
trustee’s primary principal.” *Id.* at 648.
burdens of ownership from the shoulders of H. D’s intent in this regard should control. This reasoning, however, invites a normative debate about whether allegiance to D’s intent should prevail over the policy of the elective share statute.\textsuperscript{95} It is not a justification for the position that the title-split fiction should control the result.

Nor is the \textit{Bongaards} court convincing when it maintains that it is just conceding a legislative question to the legislature. The opinion states that it is “not deciding a common-law issue of property rights,” but is instead “interpreting a statute.”\textsuperscript{96} The court then goes on to interpret that statute by offering that when the legislature referred to “estate of the deceased,” it meant “probate estate.”\textsuperscript{97} But the court does not reconcile this interpretation with the fact that the \textit{Sullivan} case, whose precedent the court is purporting to follow, concerned trust property that was decidedly not a part of the probate estate, and yet the court found that the statute somehow referred to that property.\textsuperscript{98} And in any event, the legislature had already acted, by enacting an elective share statute that reached the assets of the deceased spouse’s estate. In other words, it is the common law that gave the decedent the tools to keep virtually-owned property out of the decedent’s probate estate.

By any commonsensical (as opposed to hyper-legal) conception of a decedent’s estate, an asset that the decedent had the ability to dispose of or completely re-title in her own name

\textsuperscript{95} The policy behind the elective share is that since typically the surviving spouse has contributed to the deceased spouse’s wealth the survivor should be entitled to a portion of it (partnership theory of marriage) or alternatively that a surviving spouse has a right to a certain minimal level of support (support theory of marriage). See \textit{Dukeminier, et al., supra} note 2, at 425.

\textsuperscript{96} \textit{Bongaards}, 793 N.E.2d at 343.

\textsuperscript{97} Id.

\textsuperscript{98} A normative decision is being made here by treating the answer as logically compelled. For examples of realist critique of this type of legal reasoning see, \textit{e.g.}, \textit{Oliver Wendell Holmes, The Path of the Law}, in \textit{Collected Legal Papers} 180, 184 (1920) [hereinafter \textit{Holmes, The Path of the Law}] (decrying the “fallacy” of the “notion that the only force at work in the development of the law is logic,” and that pointing out that “social advantage” is often perpetuated by the “fallacy of logical form”); \textit{Jerome Frank, Law and the Modern Mind} 138 (A primary use of legal rules is “to enable the judges to give formal justifications—rationalizations—of the conclusions at which they otherwise arrive.”).
should be part of her estate when she died. It is only because of the judicially-created concept of the title-split, and the continued formal analysis of that concept, that the trust property would not be considered a part of the decedent’s estate. So it is not the statute that the court is being asked to modify; rather, it is being asked to interpret the concept of a trust in a way that makes sense in light of the legislature’s clearly-expressed rules regarding the property rights of surviving spouses. The net result is that Bongaards, which represents current law in Massachusetts, serves only to further muddy the legal effect of the title-split. It demonstrates that when a court begins to move away from the conceptualist approach to the title-split fiction, there is no elegant way to put on the brakes. So the Massachusetts Supreme Judicial Court, while it rejected the title-split fiction under the Kerwin facts, now suggests that the Kerwin decision was merely aberrational in that regard.

A recap of where we have been is helpful here. First, the main issue in the Bongaards trio of cases—whether or not a particular beneficial interest in a trust is included within a particular statutory use of the term “estate”—stands as an example of how trusts affect the legal interests of outsiders to the trust transaction. The outsider in these cases is the surviving spouse. The elective share statute created a Hohfeldian right in a portion of the deceased spouse’s estate on behalf of the surviving spouse. The trust converted that right into no-right, at least as respects property placed in the trust.99 Second, the cases show how a trust’s power to affect the legal interests of outsiders is used to skirt the intent of the law to benefit of the trust beneficiary. One could also argue that one of the most important outsiders to the bargain of a private lex (here, the trust) is the public lex of the legislature. The legislature passes laws applicable to large sets or

99 See supra text accompanying notes 58-65.
groups of persons. In determining how laws affecting property rights will in turn affect those persons, the legislature is mindful that property interests are limited to certain specifically identifiable forms. A decedent’s “estate” refers to property that was titled to the decedent during lifetime in certain of those forms, such as the fee simple. The trust, because it creates new forms not subject to the moderating influence of the numerus clausus, can be used to create the beneficial equivalent of fee simple ownership while avoiding the burdens of that form. Thus *Bongaards* also demonstrates how the trust evades the numeros clausus and, consequently, its purposes. Here, the trust accomplishes this by placing trust property outside the reach of laws designed to affect a person’s estate.

A study of the history of trusts teaches us that although the title-split fiction may be a convenient and compact way to conceptualize the trust, it is also an ambiguous and incomplete description of a vehicle with unique legal and sociological roots. Yet, a formal approach to legal interpretation of trusts informed by the title-split fiction has dominated judicial reasoning and led to statutory law based on this reasoning, which leads to the false comfort of logical coherence. For example, because of adherence to

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100 *See supra* note 56-57. The trust is also being used here to evade the government’s “off-the-rack” property entitlement—that of the decedent’s estate. *Cf.* Carol M. Rose, *What Government Can Do for Property (and Vice Versa)*, in *THE FUNDAMENTAL INTERRELATIONSHIPS BETWEEN GOVERNMENT AND PROPERTY* 213-14 (Nicholas Mercuro & Warren J. Samuels eds., 1999) (describing the government’s role in “defining off-the-rack versions of [property interests] that individuals (or at least their lawyers) can understand[,]”).

101 Of the burdens of property ownership triggered by death that trusts are commonly used to evade, probate is perhaps the best example. *See, e.g.,* GEORGE BOGERT ET AL., *THE LAW OF TRUSTS AND TRUSTEES* § 231 (pointing out that a decedent can avoid probate as to all assets transferred during lifetime to an inter vivos trust); *RESTATEMENT (THIRD) OF TRUSTS* § 25 (2003) (inter vivos trusts are “nontestamentary” despite the retention of considerable rights by the settlor, and thus are not subject to estate administration procedures). Trusts are also commonly used to aid in eliminating or mitigating exposure to federal transfer taxes. Recent repeal of the rule against perpetuities in some jurisdictions gives the inter vivos trust a new appeal in this regard. *See, e.g.,* Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 U.C.L.A. L. Rev. 1303 (2003).

102 *See supra*, note 101.
the title-split fiction, the question whether trust assets that produce benefits for a beneficiary should be subject to that beneficiary’s creditor’s claims is not recognized as a normative question.\textsuperscript{103} Since, under the title-split fiction, the beneficiary does not have legal title to the trust assets, a court applying formal judicial reasoning might conclude that the trust assets should not be available to the claims of the beneficiary’s creditors without ever confronting the policy implications of its decision.\textsuperscript{104} Instead, the court should be asking whether a transferor should be permitted to give a transferee all the benefit of property without exposing that transferee to any of the burdens of those benefits.\textsuperscript{105} The trust, with its property split, is therefore a perfect example of the “vivid fiction” of jurisprudence that should not stand as a reason for making a decision.\textsuperscript{106}

Potential exposure to the elective share is a burden borne by married property owners who live in Massachusetts, like those in other non-community property jurisdictions. Before \textit{Sullivan}, those persons could employ a simple trust as a tool to completely remove that burden from the property ownership bundle. And though the title-split fiction tells us that legal title to trust property is transferred to the trustee, the trustee did not take on the burden of the elective share, as property owned as trustee was not part of a decedent’s estate. The very particular burden of the elective share therefore seemed to disappear altogether.\textsuperscript{107} Post-\textit{Sullivan}, jettisoning the elective share burden is not so easy. Yet \textit{Bongaards} makes clear that \textit{Sullivan} applies only to property formerly owned in a traditional property form by the decedent, despite that this distinction cannot

\textsuperscript{103} See infra Part IV.B.1.
\textsuperscript{104} This type of formalist legal reasoning is widely criticized by legal realists. See supra note 101.
\textsuperscript{105} See generally Dagan, supra note 56 (comparing and contrasting two approaches to property: property as forms and property as bundles).
\textsuperscript{106} See Felix S. Cohen, supra note 47, at 811.
\textsuperscript{107} Cf. Macey, supra note 4 (stating that, in a trust, the beneficiary gets all the benefits and the trustee gets all the burdens).
be squared with the title-split fiction. This points up a problem with conceptual adherence to the title-split fiction—deviations from that fiction, if not guided by some alternative legal theory, stand out as puzzling aberrations.

B. THE FICTION REVEALED—CREDITORS’ RIGHTS AND DISCRETIONARY TRUSTS

1. THE GENERAL RULE

Under the law of many states, if not most, a beneficial interest in a what is known as a discretionary trust is exempt from the claims of the beneficiary’s creditors. Likewise, both the Restatement (Third) of Trusts and the Uniform Trust Code prevent a beneficiary’s creditors from reaching the beneficiary’s interest in a discretionary trust. Whether this is a good rule is, as a freestanding proposition, a question beyond the scope of this article. My purpose here is instead to point out that this result is reached, except in the case of “self-settled” discretionary trusts, without resort to a consideration of the relevant policy questions. A 1994 Minnesota case nicely illustrates the orthodox analysis. The question in *U.S. v. O’Shaughnessy* was framed as whether the beneficiary’s interest in a discretionary trust amounted to “property” or “rights to property” against which a federal lien for income taxes could attach. Predictably, the court purported to


109 *Restatement (Third) Trusts* § 60 (2003); *Unif. Trust Code* §504. A discretionary trust is distinguished by the nature of the beneficiary’s interest. In a pure discretionary trust, the trustee has uncontrolled discretion in making distributions to the beneficiary. *See 76 Am. Jur. 2d Trusts* §108 (2008). Some trusts grant the trustee discretion but subject that discretion to a standard such as education or support. *See Martin v. Martin*, 374 N.E.2d 1384 (1978).

110 517 N.W.2d 574 (Minn. 1994).

111 The court was interpreting a portion of the Internal Revenue Code, 26 U.S.C. § 6321, which imposes a lien for federal tax deficiencies on “all property and rights to property” held by a delinquent taxpayer. The question certified to the state court was whether the requisite property or rights to property existed “under Minnesota law.” *O’Shaughnessy*, 517 N.W.2d at 576. Though it is not important to our analysis, the question was improperly certified and improperly addressed. Prior and subsequent case law makes clear
base its analysis on the title-split fiction, explaining first that a trust creates two separate interests in property—one equitable, and one legal. The court concluded that the equitable interest of a beneficiary in a discretionary trust was a “mere expectancy” that did not rise to the level of a property interest.\textsuperscript{112} It chose to emphasize that the beneficiary could not compel distributions from the trust, rather than that the trust was created precisely so that this and other beneficiaries could enjoy the property’s benefits.\textsuperscript{113} 

\textit{O’Shaughnessy} typifies state law on the question of creditors’ rights to property held in a discretionary trust.\textsuperscript{114} Generally, a beneficiary’s interest in a trust does not expose trust property to the beneficiary’s creditors unless the beneficiary can compel distribution under the terms of the trust. Even a power in the beneficiary to compel distributions will not render the trust property vulnerable if the power is subject to any significant limitation.\textsuperscript{115} For example, a trust instrument could require that distribution be made as the trustee deems advisable for the health and support of the beneficiary. Under such a trust, although the trustee is given discretion, a beneficiary could compel distribution where that discretion has been abused. Because even “unlimited” discretion in a trustee is never completely beyond second-guessing by a court.\textsuperscript{116} Even where the circumstances under which a distribution is to be made to a beneficiary are governed by a so-called “ascertainable standard,” creditors’ rights are generally curtailed so long as discretion

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that, under §6321, the court is to look to state law only to determine what interests exist, and that federal law alone determines whether those state-created interests qualify as property or rights to property. \textit{See}, \textit{e.g.}, \textit{Drye v. United States}, 120 U.S. 424, 477 (1999).
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\textsuperscript{112} The court’s opinion was that “the beneficiary of a discretionary trust… does not have ‘property’ or any ‘right to property’ in nondistributed trust principal or income before the trustees have exercised their discretionary power of distribution under the trust agreement.” \textit{O’Shaughnessy}, 517 N.W.2d at 577.
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\textsuperscript{113} The court did not explain how a person could be entitled to a benefit from a trust and not have what could be described as a property interest in the trust property.
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\textsuperscript{114} \textit{See supra}, note 113.
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\textsuperscript{115} \textit{See, e.g.}, \textit{Smith v. Smith}, 517 N.W.2d 394 (Neb. 1994).
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\textsuperscript{116} \textit{See, e.g.}, \textit{Restatement (Third) of Trusts § 50 (2003).}
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under the standard resides in the trustee.\textsuperscript{117} The common explanation is that courts are loathe to substitute their judgment for that of the trustee, in whom rests legal title to the trust assets.\textsuperscript{118}

2. \textsc{The Anomaly: Self-Settled Discretionary Trusts}

But here, as in the elective share situations outlined above,\textsuperscript{119} courts, and the Restatement and Uniform Trust Code stop short of full obeisance to the title-split. Recall that under \textit{Sullivan},\textsuperscript{120} an exception to doctrinaire trust title-split analysis was carved out where the settlor and the beneficiary are the same person. Likewise, the discretionary trust that is “self-settled” (settlor and beneficiary are the same person) is not generally effective to keep a beneficiary’s creditors from access to the trust property.\textsuperscript{121}

\textsuperscript{117} The Restatement would allow a creditor to compel distribution in any instance in which the beneficiary could. \textit{See Restatement (Third) of Trusts} § 60 (2003). The Uniform Trust Code is more beneficiary-friendly. \textit{See Unif. Trust Code} § 504(1) (2004) (providing that a creditor of the beneficiary of a discretionary trust may not compel a distribution even where the discretion is expressed in the form of a standard).

\textsuperscript{118} Not included in this analysis is the spendthrift trust, which, almost incredibly, is protected from the claims of creditors merely by dint of settlor declaration. Most U.S. jurisdictions now permit the spendthrift trust. \textit{See 2A Austin W. Scott, The Law of Trusts} § 152.1, at 98-105 (1987) [hereinafter \textit{Scott, The Law of Trusts}]; \textit{Dukeminier et al., supra} note 2, at 549; \textit{Alan Newman, Spendthrift and Discretionary Trusts: Alive and Well Under the Uniform Trust Code}, 40 REAL. PROP. PROB. & TR. J. 567 (2007). In the late nineteenth century John Chipman Gray famously railed against the spendthrift trust but more recent attention by legal scholars has tended to be neutral or even favorable. \textit{Compare John Chipman Gray, Restraints on the Alienation of Property IV} (1895) (expressing shock and disapproval that “a man’s interest in trust property could be protected from his creditors by simply saying that it should be”), \textit{with} Adam J. Hirsch, \textit{Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectives}, 73 WASH. U. L.Q. 1 (1995) (analyzing the spendthrift trust from a law and economics and then a “cognitive” perspective, and concluding, if dispassionately, that the devices are largely salutary). \textit{But see R. Gingiss, Putting a Stop to Asset Protection Trusts}, 51 BAYLOR L. REV. 987 (1999). For an excellent summary of the history of the development of the spendthrift trust in the United States, see \textit{Restatement (Third) of Trusts} § 58 cmt a. (2003).

\textsuperscript{119} \textit{See supra} Part IV.A.

\textsuperscript{120} \textit{See supra}, Part IV.A.

\textsuperscript{121} \textit{See}, e.g., \textit{Unif. Trust Code} § 505 (2000) (providing that regardless of whether the trust instrument contains a spendthrift position a creditor of the settlor can reach “the maximum amount that can be distributed to or for the settlor’s benefit”); \textit{Restatement (Third) of Trusts} § 58(2) (2003) (providing that a spendthrift provision “retained by the settlor of a trust is invalid”). Some states are now legislating limited exceptions to this rule. \textit{See} Stewart E. Sterk, \textit{Asset Protection Trusts: Trust Law’s Race to the Bottom?}, 85 CORNELL L. REV. 1035, 1043-44 (2000).
Explanations for the self-settled exception are also based on policy considerations. But a review of the justifications given fails to reveal why a similar rule should not also apply to third-party trusts. For example, Bogert suggests indignantly that protecting the beneficiary’s interest in a self-settled trust from creditors claims would allow “unscrupulous persons” to protect their property while engaging in risky enterprises, and “mislead creditors into thinking that the settlor still owned the property since he appeared to be receiving its income, and thereby to work a gross fraud on creditors who might place reliance on the former prosperity and financial stability of the debtor.”

But if these policy considerations trump the title-split fiction in self-settled trusts, why are courts reluctant to entertain this very same policy in third-party trust situations, masking the normative implications of their decisions by references to the title-split? Are not donative trust beneficiaries also able to receive benefits from the trust property and therefore appear stable and prosperous? If, as Scott maintains, it chafes public policy to allow a trust settlor to benefit from property the settlor placed out of the reach of creditors (and it certainly is unseemly), then why is it acceptable so long as the transfer was made by another? The debtor benefits from the property in the exact same way in each situation and yet only the donee’s creditor comes up empty. And how does the self-settled exception square with the title-split fiction?

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122 See, e.g., I SCOTT, THE LAW OF TRUSTS, supra note 118, §156, at 782 (“It is against public policy to permit a man to tie up his own property in such a way that he can still enjoy it but can prevent his creditors from reaching it.”).

123 BOGERT ET AL., supra note 101, §40, at 155-56.
3. The Result: Donees Have Superior Property Interests

Though the self-settled exception to the discretionary trust rule has been extant for decades, it has attracted little academic scrutiny. One exception is a recent study that begins by assuming the integrity of the title-split, and concludes that the rule prohibiting creditor protection in self-settled trusts overreaches.\textsuperscript{124} In his article \textit{Rethinking the Law of Creditors’ Rights in Trusts},\textsuperscript{125} Robert T. Danforth criticizes the general rule, contained in the Restatement (Second) of Trusts, that a trust settlor’s creditors can reach the “maximum amount which the trustee under the terms of the trust could pay to him or apply for his benefit.”\textsuperscript{126} He uses the case of \textit{Greenwich Trust Co. v. Tyson}\textsuperscript{127} to make his point. This case involved a settlor who created a trust under which the trustee had complete discretion to pay all or any part of the net income to the settlor, to accumulate all or any part of the net income, or to pay net income to or for the settlor’s “support, or for the support and maintenance of [the settlor’s] wife, or for the support, education and maintenance” of the settlor’s children.\textsuperscript{128} The court held that the discretionary nature of the settlor’s interest in the trust was ineffective to prevent the settlor’s creditor from reaching the assets, even though there were other permissible discretionary trust beneficiaries. The court offered that a contrary decision would allow “evasion by the settlor of his just debts, although he may still have the full enjoyment of the income from his property.”\textsuperscript{129} Danforth sharply criticizes aspects of this opinion as evidencing “a

\textsuperscript{125} Id.
\textsuperscript{126} Id. at 293; see RESTATEMENT (SECOND) OF TRUSTS § 156(2) (1958).
\textsuperscript{127} 27 A.2d 166 (Conn. 1942).
\textsuperscript{128} Id. at 170.
\textsuperscript{129} Id. at 173.
misunderstanding of basic fiduciary principles.”

He first asserts that the court’s observation that the settlor may retain full enjoyment of his property implies “that the settlor gave up no rights to income when he included his wife and children as beneficiaries, i.e., that he might be entitled to receive all the income, notwithstanding that other beneficiaries were potential income recipients.”

Having thus expanded the court’s statement, Danforth attacks its more inclusive form by countering that fiduciary law would in fact require the trustee to consider the interests of the other beneficiaries in making distributions of income to the settlor. But Danforth’s technique here exposes the flaw in his analysis. The court, had it intended to say that the settlor gave up no rights to the income of the property, was presumably capable of doing so. But instead, the court said quite precisely and accurately that the settlor in this case “may still have the full enjoyment of the income from his property.”

The court’s opinion was that the mere possibility that the property would continue to be used for the settlor’s enjoyment, at least under the terms apparent here, was sufficient to invoke the policy considerations that motivated the prohibition against self-settled asset protection trusts. As the court stated earlier in its opinion, placing one’s own property in trust for one’s own benefit, were this effective to avoid creditors’ claims, violates the policy that “all the property of a debtor should be responsible for his debts.”

Danforth also takes exception to the court’s statement that permitting the settlor’s creditors to access the trust income “does not deprive others to whom the trustee might pay the income of anything to which they are

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130 Danforth, supra note 124, at 296.
131 Id. (first emphasis supplied, second emphasis in original).
132 Greenwich Trust Co., 27 A.2d at 173.
133 Id. at 171. The court specifically stated that this includes the retention of an equitable as well as legal estate. Id.
entitled of right; they could not compel the trustee to use any of the income for them.\textsuperscript{134} According to Danforth, this statement is at odds with the fiduciary principle that a trustee, even one operating with explicit discretion, may not unreasonably withhold distributions from a beneficiary.\textsuperscript{135} Danforth’s statement of fiduciary principle is correct, but he is wrong in his implication that its application here guarantees distributions to the other trust beneficiaries.\textsuperscript{136} On the contrary, the trustee here was given “absolute discretion,” unlimited by any standard, to pay all the income to the Settlor. Certainly the trust instrument contemplated a situation where the trustee might make a valid decision to do so.\textsuperscript{137} This is true even though such a decision would leave no income for the other beneficiaries.

And so the court is clearly correct in concluding that to prevent the settlor’s creditors access to this trust would permit one to avoid debts while still enjoying income from property. It is certainly not unreasonable to assert such a possibility as a reason to disallow the self-settled asset protection (or spendthrift) trust, even where, as here, other beneficiaries might also have discretionary interests in the trust property. Another reason is that if self-settled asset protection trusts were available to anyone with the wherewithal to assert a declaration of trust, the rights of unsecured creditors would virtually disappear.

Any estate planner could in the future make a client creditor-proof. The process would be

\textsuperscript{134} Id. at 173.
\textsuperscript{135} Danforth, supra note 124, at 296. Surprisingly, Danforth cites to no legal rule to support his position here.
\textsuperscript{136} Again, Danforth cites to no rule. For the rule see, e.g., 3 AUSTIN W. SCOTT, TRUSTS § 187, at 14. The trust in Greenwich Trust Co. purported to extend to the trustee “absolute discretion.” 27 A.2d at 170. But even where such language is used courts have refused to give completely free reign to trustees. See, e.g., Stix v. Comm’r, 152 F.2d 562, 563 (2d Cir. 1945) (where Judge Learned Hand offered that “no language, however strong, will entirely remove any power held in trust from the reach of a court of equity,” particularly where the trustee “has utterly disregarded the interests of the beneficiary.”).
\textsuperscript{137} See, e.g., RESTATEMENT (THIRD) TRUSTS § 87 (2003) (“When a trustee has discretion with respect to the exercise of a power, its exercise is subject to supervision by a court only to prevent abuse of discretion.”); BOGERT ET AL., supra note 101, at § 560 (absolute discretion is subject to “the qualification that the trustee shall act with some regard to the purposes of the trust”).
as simple as transferring one’s assets to a trust, giving oneself a discretionary interest in that trust, and giving one or more family members a discretionary interest as well, however minuscule. The availability of such a technique would clearly stand debtor-creditor law on its ear. And that, one cannot help but suspect, is the real reason for the exception. For a parallel in the law, consider the so-called revocable living trust. That device allows a settlor to avoid probate by transferring all of the settlor’s assets to the trust. Where the settlor also acts as trustee during lifetime, as in the usual case, the revocable living trust is necessarily self-settled. But because probate is largely seen as unnecessary, escaping this burden of owning property is universally sanctioned. Any conflicting policy arguments are ignored as we pretend that the question turns on the title-split.

So the policy behind prohibition of self-settled asset protection trusts has a legitimate basis. But are settlor/beneficiaries really less deserving of creditor protection than are donee/beneficiaries? Could not an argument be made that they are less deserving? After all, many settlor/beneficiaries earned their property, in contrast to donee/beneficiaries, who by definition did not. The number of people who stand to gain greatly as donees of third-party discretionary and spendthrift trusts is relatively small but very influential. Allowing them to create property rights superior to those that can be created by an individual on his or her own behalf is generally justified in other ways. One of the most sacrosanct concepts in the law of testamentary transfers is that of fidelity to the testator’s intent. 138 Whether or not the property is passed on by the settlor to the trust

at death or as a lifetime gift, if the intent of the donor is prioritized, a case can at least
conceivably be made justifying a superior property interest for the beneficiary. But when
focus moves from the settlor to the beneficiary that justification disappears. It seems
easier, from the perspective of the beneficiary, to make the argument that the
donee/beneficiary is less deserving of creditor protection than is the settlor/beneficiary.
The beneficiary of the self-settled trust may well have earned her wealth, while the
donee/beneficiary most certainly did not. From a beneficial perspective then, an
argument can be made that the self-settled exceptions do not go far enough. Again, the
point here is not to argue that we should or should not allow trusts to protect a
beneficiary’s assets, but rather to point out that we are not having any debate on that
issue.

PART V. OWNERSHIP COSTS REAPPEAR—HOW TRUSTS CREATE EXTERNALITIES

The previous section demonstrated how trusts are used to eliminate certain
burdens associated with outright ownership of property. For example, in certain cases a
married person can fully benefit from property and yet be relieved of the burden of
exposure to the elective share that would accompany outright ownership of that property.
Likewise, discretionary trust beneficiaries may enjoy property’s economic benefits yet
not suffer the property owner’s cost of creditors’ claims on that property. This section
explores what happens to those costs. Because although the title-split fiction is said to

Will of Crabtree, 865 N.E.2d 1119 (Mass. 2007) (“A trust instrument must be construed to give effect to
the intention of the donor as ascertained from the language of the whole instrument considered in the light
of circumstances known to the donor at the time of its execution.”); Mary Louise Fellows, In Search of
Donative Intent, 73 IOWA L. REV. 611 (1988) (asserting that our system of property law “reinforces the
classical liberal conception of rights as instruments for promoting individual autonomy,” and thus, where
donative instruments are concerned, strives to further the donor’s intent).
vest legal title to trust assets in the trustee, the above-described costs, reallocated by the trust, are not borne by the trustee. The trustee is not required to use the trust property to pay the elective share claims of the beneficiary’s surviving spouse. And neither is the trustee, as the legal owner of the trust property, required or even permitted to use it for the discretionary beneficiary’s creditors. In economic terms, these costs are externalized.  

That is, they are imposed on persons outside the trust transaction.

As alluded to above, Merril and Smith make the case that property forms are limited in number (the numerus clausus principle) because deviations (“fancies” is the term they use to describe such interests) would impose unacceptable information costs on persons “outside the zone of privity—the other market participants.” An example is used where A wishes to sell personal property (a watch in their example) to B but to restrict B’s use of the property to Mondays only; A would retain the use for all other days. Merrill and Smith divide persons who would be affected by this transaction into three classes. The “originating parties” (A and B), “potential successors in interest to the asset” (persons to whom either A’s or B’s rights are subsequently transferred) and what they call “other market participants” (those who will deal in or with personal property of the same type as but other than that which was transferred by A and B). The contention is that only this last class of persons, the other market participants, suffer information costs which cannot be internalized in the price of the transaction entered into by A and B. These costs include not only those to ensure that they get access to property they

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140 See, e.g., Posner, supra note 6, at 72; Steven Shavell, Foundations of Economic Analysis of Law 77 (2004).
141 See supra Part III.A.
142 See Merrill & Smith, supra note 49, at 1; Bernard Rudden points out that this term originated in the case of Keppel v. Bailey. See Rudden, supra note 51, Economic Theory v. Property Law, at 240.
143 See Merrill & Smith, supra note 49, at 31.
144 Id. at 26.
145 Id. at 27-28.
purchase during the desired days of the week, but include “dimensions of division and elaboration that perhaps no one has yet thought of, making the acquisition of any watch more uncertain was well as riskier.” Additionaly, they maintain that where the parameters of property rights are unknown, costs are raised to all others, who must investigate all rights to determine what rights they are to refrain from violating. They contend that this creates a classic “common-pool problem” because although the fancy causes measurement costs to all watch owners to increase, the owner bears only a fraction of those costs. So A in our example might enjoy a positive net benefit, but the costs to watch owners at large greatly exceeds the benefit to A.

Interestingly, Merrill and Smith state explicitly that trusts do not create measurement cost problems because outsiders to the trust transaction “deal only with the underlying trust assets, which are held by the trustee in fee simple.” This statement might be valid from the standpoint of the trustee’s dealings with the trust property. But the analysis of Merrill and Smith here seems to be skewed by their acceptance of the title-split fiction. The red herring of legal title in the trustee leads them to conclude that it is the trustee whose interest must be analyzed; after all, the trustee “owns” the property. But since the beneficiary of a trust gets all of what makes the property valuable (described by

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146 Id. at 32. (citation omitted).
147 Id.
148 A common-pool problem typically arises when a common-pool resource, such as a fishing ground, is excessively exploited, leading to overuse and even potential destruction in the absence of legal limits. In other words, costs of overfishing are externalized. See, e.g., Garrett Hardin, The Tragedy of the Commons, 162 SCIENCE 1243 (1968) available at http://www.jstor.org/stable/1724745; Steven N.S. Cheung, The Structure of a Contract and the Theory of a Non-Exclusive Resource, 13 J.L. & ECON. 49 (1970).
149 Assuming that Merrill and Smith’s outsiders will in fact suffer significant additional information costs, the economic basis for Merrill and Smith’s theory might be solid. But their example is weak in its demonstration of actual information cost problems encountered by the outsiders. These problems are described only in the vaguest of terms: That they will need to make sure “they are getting all the days of the week that they want,” and “will have to worry about dimensions of division and elaboration that perhaps on one has yet thought of” is short on specifics. Unfortunately, Merrill and Smith offer only this quaint hypothetical on the transfer of watches and leave the rest to our imagination.
150 See Merrill & Smith, supra note 49.
the title-split fiction as the beneficial interest), all costs of the trust can be assessed only when the beneficial perspective is considered. And trust beneficiaries also engage in market transactions. For example, suppose that rather than sell B a right to use the property on Mondays, A in Merrill and Smith’s watch example transferred the property to a trust that gave B the use of property on Mondays as a beneficiary of the trust. Do not outsiders face measurement costs in determining the scope of B’s interest in the trust? How do outsiders know that the property is in fact in trust? If property is often transferred to trusts, and there are no practical limitations on the range of beneficial interests in those trusts, how is that outsiders can differentiate between a beneficial interest and one in fee simple? We need not restrict our thinking here to Merrill and Smith’s example of novel interests in watches, because plenty of real-life examples exist in the trust arena. Suppose S wants to gift property to B but wants B’s benefits from the property to be protected from B’s general creditors. S places the property in trust for the benefit of B, making T the trustee, and giving T discretion to determine the frequency and scope of beneficial distributions to B for B’s happiness.151 Who is affected by this transfer of property? A and B are affected as the originating parties, as is T, the trustee, and any successor in interest. But this transaction also affects those who deal with B. Because this is a discretionary trust, B’s interest in the property is not subject to the claims of general

151 Note that since “happiness” is not generally considered to be an “ascertainable standard,” T’s discretion here is reviewable by a court only in cases of gross abuse of discretion. See e.g., BOGERT ET AL., supra note 101, at § 560 (absolute discretion is subject to “the qualification that the trustee shall act with some regard to the purposes of the trust” and “not recklessly or capriciously”); RESTATEMENT (THIRD) OF TRUSTS § 50 (2003) (“A discretionary power conferred upon the trustee to determine the benefits of a trust beneficiary is subject to judicial control only to prevent misinterpretation or abuse of the discretion by the trustee.”) The comment to the this provision includes the following: “The terms of a discretionary standard occasionally include . . . the word ‘happiness.’ [T]he primary effect of such a term is to immunize from challenge by remainder beneficiaries almost any reasonably affordable distributions. This, however, does not mean that the trustee cannot properly resist any reasonable request by the beneficiary, because the decision remains one within the fiduciary discretion of the trustee.”
creditors;\textsuperscript{152} thus, although B may well receiving all those economic benefits from the property that he would receive if he owned the property outright, B is a far greater credit risk than is an outright property owner. This is because the assets that serve as the foundation for B’s wealth are not available to B’s general creditors, in contrast to those situations where a debtor owns property outright. So those who participate in market transactions with B incur costs in determining whether B owns property from which he benefits outright. All other market participants also incur additional costs, because in order to properly assess the risks of certain transactions they all must determine whether assets are held in discretionary trusts. But perhaps most importantly, the fact that the assets of a discretionary trust are not available to satisfy creditors of the beneficiary of the trust raises the cost of credit to all other debtors. B, our beneficiary, bears only a fraction of that cost, but the cost to market participants at large greatly exceeds the benefit to B.

It makes sense to externalize costs when the gains of externalization exceed its cost.\textsuperscript{153} And from the economic perspective of the beneficiary, trusts are tools for externalizing costs of property ownership. To the extent that trusts are used in avoiding elective share claims of a surviving spouse, those burdens of property ownership are externalized. Likewise with using trusts to avoid probate, to avoid estate and gift taxes, and even to deprive addicted beneficiaries of funds with which to purchase drugs and alcohol. The externalities created by trusts are no less prominent than that which can

\textsuperscript{152} See supra Part IV.B.1.
\textsuperscript{153} See Harold Demsetz, Toward a Theory of Property Rights, 57 AM. ECON. REV. 347, 348 (1967) (“One condition is necessary to make costs and benefits externalities. The cost of a transaction in the rights between the parties (internalization) must exceed the gains from internalization.”).
occur in any common pool problem, though perhaps the scope has not yet reached those critical levels that serve as a call for reform.\textsuperscript{154}

An explanation as to the economic incentives created by trusts from the beneficial perspective can be gained from a rereading of Harold Demsetz’s seminal 1967 article regarding the evolution of property rights.\textsuperscript{155} Demsetz theorized that because property rights provide incentive for parties to internalize externalities those rights will develop when gains of internalization exceed its costs.\textsuperscript{156} Demsetz used the example of a study of the fur trade among the indigenous population of the Labrador Peninsula, where, as the value of furs rose sharply and hunting increased, overhunting resulted. The externality of a reduction in game, formerly of small significance, quickly became critical. Territorial hunting arrangements began to be made, and then seasonal allotments.\textsuperscript{157} The way in which trusts have been used as cost-externalizing tools seems to be evidence for the converse of Demsetz’s theory. If tools exist to externalize costs those tools will be employed where costs associated with the ownership of property can be allocated to others, so long as the gains of externalization exceed its costs. Probably because trusts have historically only been available to and utilized by a relatively small segment of the population, the costs offloaded to the community at large have been easy to ignore. But

\textsuperscript{154} Though the “classic” common pool problem arises in a situation like marine fisheries (See Jon G. Sutinen & Peder Andersen, \textit{The Economics of Fisheries Law Enforcement}, 61 Land Economics No. 4 (Nov. 1985)), the problem arises in many other contexts as well. Cf., e.g., Omer Kimhi, \textit{Reviving Cities: Legal Remedies to Municipal Financial Crises}, 88 B.U. L. REV. 633, 644 (2008) (pointing out that when various interest groups participate in the municipal budgeting process, “each fragment fully enjoys the benefits of its own (successful) budgetary demands, but shares the costs of those demands with all other residents”); Douglas G. Baird & Thomas H. Jackson, \textit{Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on the Adequate Protection of Secured Creditors in Bankruptcy}, 51 U. CHI. L. REV. 97, ___ (positing the so-called Creditors’ Bargain Theory of financially distressed firms: When a firm is on the verge of bankruptcy the unsecured creditors have incentive to overuse the pool of assets to everyone’s detriment.)

\textsuperscript{155} Demsetz, \textit{supra} note 157.

\textsuperscript{156} Demsetz at 350.

\textsuperscript{157} Demsetz at 352. Demsetz relies primarily on a study undertaken by Eleanor Leacock.
as trusts gain in popularity it seems reasonable to predict that those externalized costs will become an increasingly difficult burden for the community to bear.\textsuperscript{158}

To the extent that costs can be externalized through the use of a self-settled trust, the problem is likely to be larger in scope. This is because, in contrast to a third-party (non-self settled) trust, a self-settled trust can be arranged at will by virtually anyone who owns property. Were self-settled asset protection trusts universally available to externalize the burden of exposure of property to creditors the burden on the community would be increased substantially.\textsuperscript{159} This offers up an additional reason the creditor protection afforded by a discretionary trust might not be available to the settlor who is also a beneficiary. But when one considers that the externalization problem of shielding trust assets from creditors’ claims is virtually the same in both self-settled and third-party trusts, this difference in treatment does not seem warranted, at least not on this basis. That any type of discretionary trust provides creditor protection for the beneficiary means that certain burdens associated with property ownership are externalized.

\section*{VI. Conclusion}

Trusts are created solely for beneficiaries. It follows that the allure of the trust lies in the nature of the beneficial interest. All parts of and parties to the trust ultimately serve only to support that interest, which stands on the fiction of the title-split. Though

\textsuperscript{158} If the popularity of the so-called “revocable living trust” is any indication, the use of trusts seems to be on the increase. \textit{See}, \textit{e.g.}, \textit{Dukeminier}, \textit{supra} note 2, at 299 (pointing out that these trusts have come into widespread use); \textit{Dobris, et al.}, \textit{supra} note 2, at 548 (revocable living trust popularity has “exploded”). Several jurisdictions have now abolished or substantially diluted the application of the rule against perpetuities to trusts, which has apparently increased trust business. \textit{See} Robert H. Sitkoff \& Max M. Schanzenbach, \textit{Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes}, 115 \textit{Yale L.J.} 356 (2005).

\textsuperscript{159} At least arguably, the trend is in that direction. \textit{See} Sterk, \textit{supra} note 121, at 1043-44.
conceived by accident and not design\textsuperscript{160} the title-split fiction has proved useful when put to beneficial ends. But like other legal fictions that serve important functions, primarily as short-hand ways of perceiving more complex legal arrangements, the title-split fiction comes with utilitarian limits. Unconstrained, it leads to an analysis of trusts that ignores important consequences. These consequences, taken in total, warrant a call for a more measured approach to the analysis of a beneficiary’s interest in a trust.

The scope of the beneficial interest in trust has been chiefly informed by a formal deductive analysis of the title-split fiction. Because this type of analysis avoids drawing one’s attention to the normative consequences of judicial decisions, it is at best indifferent to the question whether and to what extent beneficial owners of property should be subject to the burdens of ownership. In some cases this phenomenon has had salutary effects in that it has allowed the trust to be employed as a tool for spurring needed legal reform. For example, the trust’s predecessor, the use, helped align the law with changing economic realities and hastened the end of the archaic and oppressive feudal system.\textsuperscript{161} Likewise, revocable living trusts are now being used to evade an anachronistic probate scheme that is at times needlessly expensive and ponderous; these trusts have thus helped highlight the need for reform in estate administration.\textsuperscript{162} But the formal title-split is generally applied indiscriminately, and we should therefore be asking whether it also allows trusts to be used to thwart important legal obligations.\textsuperscript{163}

\textsuperscript{160} See supra, Part II.
\textsuperscript{161} See supra Part II.
\textsuperscript{162} See, e.g., Kent D. Schenkel, Testamentary Fragmentation and the Diminishing Role of the Will: An Argument for Revival, 41 Creighton L. Rev. 155, 158 (2008) (discussing the use of the revocable living trust to avoid probate).
\textsuperscript{163} See Arthur Nussbaum, Sociological and Comparative Aspects of the Trust, 38 Colum. L. Rev. 408, 411 (1938) (arguing that, though the trust began as an “instrument of reform” it had evolved even by 1938 into an instrument used to evade “burdens imposed in the interest of the community rather than to avoid old and outmoded traditional rules which are generally felt to be ready for abolition.”).
example, trust beneficiaries, despite receiving generous benefits from trust property, can avoid exposing that property to creditors’ claims\textsuperscript{164} and statutory claims of surviving spouses.\textsuperscript{165} When used to these types of ends, it seems appropriate to consider whether trusts are in some cases simply a stratagem; whether they permit legal slights of hand, and whether, when put to some of their uses, they undermine confidence in the integrity of the legal process. And to the extent that beneficial trust interests reward donees with property interests that are in some ways superior to those available to others they raise egalitarian concerns.\textsuperscript{166} Finally, the current beneficial interest conception means that trusts externalize certain costs of property ownership, burdening the common pool. So long as trusts are used by relatively few, this burden is minimized. But as trusts become more widely-used this burden, and other distortions caused by the title-split, will necessarily increase. Because these issues affect the interests of third parties, they stem from the trust’s proprietary, as opposed to contractual characteristics. Insight into a solution would likely be gained by studying approaches to resolving conflicts between the owner of property and claims against that property by third parties. As the purpose of this article is largely to highlight and draw attention to the conceptual problem of beneficial interests in trusts; alternative proposals will be deferred to a later project.

\textsuperscript{164} See supra Part IV.B.1.
\textsuperscript{165} See supra Part IV.A.
\textsuperscript{166} See supra Part IV.B.3.