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## COMMERCIAL TRUSTS IN U.S. LEGAL THOUGHT: HISTORICAL PUZZLES AND FUTURE DIRECTIONS

*Thomas P. Gallanis\**

The law of commercial trusts has been taught in universities in London<sup>1</sup> and Cambridge,<sup>2</sup> Sydney<sup>3</sup> and Melbourne,<sup>4</sup> Hong Kong<sup>5</sup> and Singapore,<sup>6</sup> but it is absent from the law schools of the United States. This is a puzzle. Commercial trusts have been prominent in U.S. legal and economic history and today hold trillions of dollars in assets.<sup>7</sup> Indeed, the prominence and behavior of U.S. commercial trusts in the late nineteenth and early twentieth centuries led to our unusual name for what the rest of the world calls “competition law”: we call it “antitrust” law.

This Essay has two parts and two objectives. Part I of the Essay—subtitled “Historical Puzzles”—seeks to explain the absence of learning, teaching, or thinking about commercial trusts in U.S. law schools. Part II—subtitled “Future Directions”—offers reflections on the possible future inclusion of commercial trusts into U.S. legal education and legal

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1. See *Faculty of Laws: International and Commercial Trusts*, U. C. LONDON, <https://www.ucl.ac.uk/laws/study/llm-master-laws/modules-2018-19/international-and-commercial-trusts-law-laws0119> [<https://perma.cc/E7R7-95NN>].

2. See Interview by Lesley Dingle with Justice Paul Finn PhD, Arthur Goodhart Visiting Professor of Legal Science, Cambridge (November 23, 2010), [https://www.squire.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.squire.law.cam.ac.uk/legacy/Media/Eminent%20Scholars%20Archive%20Transcripts/paul\\_finn\\_first\\_interview\\_23\\_nov\\_2010.pdf](https://www.squire.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.squire.law.cam.ac.uk/legacy/Media/Eminent%20Scholars%20Archive%20Transcripts/paul_finn_first_interview_23_nov_2010.pdf) [<https://perma.cc/2EKH-NR2T>] (discussing his course in commercial equity at Cambridge).

3. See *Commercial Trusts*, U. OF SYDNEY L. SCH., <https://sydney.edu.au/courses/units-of-study/2018/laws/laws6333.html>.

4. See *Commercial Applications of Equity*, U. OF MELB. L. SCH., (Dec. 2, 2019) <https://handbook.unimelb.edu.au/2018/subjects/laws70011> [<https://perma.cc/KT7W-UMF5>].

5. See *Department of Law: Undergraduate Electives Offered by Eminent Visitors and Practitioners*, U. OF HONG KONG 1 (July 28, 2014), <https://www.law.hku.hk/lawdept/upload/notices/Eminent%20visitors%20and%20practitioners.pdf> [<https://perma.cc/4EJX-L7TD>].

6. See *Module Overview: Advanced Trusts Law*, NAT'L U. OF SINGAPORE [https://ivle.nus.edu.sg/V1/lms/public/view\\_moduleoutline.aspx?CourseID=f2b2b5ba-5884-4b03-9c24-80646dd7d410](https://ivle.nus.edu.sg/V1/lms/public/view_moduleoutline.aspx?CourseID=f2b2b5ba-5884-4b03-9c24-80646dd7d410) [<https://perma.cc/V5GP-E2CZ>].

7. For data on the value of assets in U.S. commercial trusts, see John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 Yale L.J. 165, 168, 170-72 (1997).

thought.

### I. HISTORICAL PUZZLES

Why have commercial trusts been absent from U.S. legal education and legal thought? Professor John Langbein, in his essay on *The Secret Life of the Trust*,<sup>8</sup> offered three answers to this question.

One answer emphasized the disciplinary fields within the legal profession. Professor Langbein noted that the commercial uses of the trust involve lawyers who are not within the field of trusts and estates. Therefore, he argued, it is not surprising that commercial trusts are excluded from our understanding and teaching of trusts. In Professor Langbein's words, "commercial trust practice has grown up in the hands of specialized bars, out of contact with the trusts and estates bar. Securities lawyers have nurtured mutual funds, the real estate bar has handled REITs [Real Estate Investment Trusts], pension law was a subspecialty of taxation in most law firms until well after the enactment of ERISA in 1974, and asset securitization has been centered in the hands of the banking and commercial transactions bar."<sup>9</sup>

This explanation has force but also raises questions. For example, does this explanation account for the teaching of commercial trusts in other common-law jurisdictions? The commercial uses of the trust in those jurisdictions similarly involve lawyers who are not practitioners in the field of trust law. For example, commercial uses of the trust in England do not typically involve lawyers who are members of the Society of Trust and Estate Practitioners.<sup>10</sup> What is different about the United States?

A second answer advanced by Professor Langbein focused on the timing of the emergence of commercial trusts. He observed that many commercial uses of the trust emerged in the twentieth century, whereas the traditional use of the trust as a device for the management of family wealth has a much older pedigree. In Professor Langbein's words, "The main forms of commercial trust that I have discussed in this Essay have been twentieth-century inventions. The mutual fund industry was effectively organized in the 1920s. Indenture trusts took their modern form with the 1939 legislation. The pension trust was a trickle until after World War II. REITs [Real Estate Investment Trusts] appeared in the 1960s, while asset securitization was unimportant into the 1970s."<sup>11</sup>

The timing of the commercial uses of the trust compared to the uses of the trust for family wealth management must be important, but here too

8. *Id.*

9. *Id.* at 189.

10. The URL of the organization's website is <https://www.step.org>.

11. Langbein, *supra* note 7, at 189.

there are questions. For example, what about the business trusts that were prominent in the U.S. in the nineteenth century, such as John D. Rockefeller's Standard Oil Trust? And how does the emergence of other commercial trusts in the 1920s through 1970s explain the absence of any commercial trusts from legal education and legal thought today?

A third answer explored by Professor Langbein focused on the Restatements and leading treatises on trust law. Here, he contrasted Professor Austin Scott of Harvard with Professor George Bogert of the University of Chicago. Scott was the reporter for the first and second *Restatements of Trusts* and the author of the multi-volume treatise *Scott on Trusts*. Bogert was the author of the multi-volume treatise *Bogert on Trusts and Trustees*. In Professor Langbein's words, "Scott ... excluded commercial trusts from the Restatement ... [and] carried his disdain for commercial trusts into his treatise, refusing to speak of them. ... [Bogert] was more tolerant; his book supplies introductory ... coverage of some types of commercial trust."<sup>12</sup> As Professor Langbein summarized, "If Bogert rather than Scott had been in charge of the Restatement, the Restatement would have noticed commercial trusts."<sup>13</sup>

Professor Langbein is right to observe that Bogert was more interested in commercial trusts than was Scott. However, the contrast between them is not quite so black-and-white. The Restatements and Scott's treatise did have a few things to say about commercial trusts—each has multiple index entries under the heading of "Business Trust."<sup>14</sup> Moreover, the 1931 edition of Scott's casebook on the law of trusts contained an appendix titled "Modern Uses of the Trust Device" in which Scott discussed commercial trusts.<sup>15</sup> Bogert was more open to the topic of commercial trusts, but here too the story is more nuanced. Bogert's treatise on *Trusts and Trustees* had two relevant chapters: Chapter 14 on "Various Trust Functions" and Chapter 16 on "Business Trusts."<sup>16</sup> The chapter on "Various Trust Functions" was authored by Bogert and discussed, among other topics, insurance trusts, trusts to secure creditors, investment trusts, and trusts in real estate financing.<sup>17</sup> The chapter on "Business Trusts" was written by Professor Wilber Katz, an expert on corporate law who was Bogert's colleague at the University of Chicago.<sup>18</sup> Starting with the revised second edition of the treatise, Katz's chapter on business trusts

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12. *Id.* at 166.

13. *Id.* at 188.

14. 4 SCOTT ON TRUSTS 2827 (1939) (Index s.v. "Business Trust").

15. AUSTIN W. SCOTT, SELECT CASES AND OTHER AUTHORITIES ON THE LAW OF TRUSTS 801-04 (2d ed. 1931).

16. 2 GEORGE G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES 755, 971 (1935).

17. *Id.*, at 755.

18. *Id.* at 971.

was dropped and was replaced by a chapter on trusts and the conflict of laws.<sup>19</sup>

Professor Langbein is surely right to look to the Restatements and treatises, but here too there are questions unanswered. For example, how influential were the organization and substantive boundaries of the Restatements and treatises in shaping the content of law school courses?

In this Essay, I explore a piece of the puzzle that has not been discussed before, and I believe it goes a significant distance in explaining why commercial trusts are absent from U.S. legal education and legal thought, in contrast to the legal education and legal thought in other common-law countries.

A crucial characteristic distinguishing the teaching of trusts in the U.S. from the teaching of trusts in other common-law jurisdictions is that the U.S. stands alone in combining the teaching of trusts with the teaching of succession. In other common-law countries, courses are offered on trusts or on equity or on equity and trusts;<sup>20</sup> in each case, the law of succession

19. 4 GEORGE G. BOGERT & GEORGE T. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* 222 (rev. 2d ed. 1977).

20. Cambridge University: Faculty of Law, Subject Papers (2018-2019), <https://www.law.cam.ac.uk/coursescurrent-studentsba-tripos/subject-papers> [<https://perma.cc/PZ24-7YRM>] (“Equity”); Oxford University: Faculty of Law, Options and Core Courses (2018-2019), <https://www.law.ox.ac.uk/admissions/options> [<https://perma.cc/FVU4-N3GJ>] (“Trusts”); University College London: Faculty of Laws, Property Law II, <https://www.ucl.ac.uk/laws/study/undergraduate/modules/property-law-ii-laws2002> [<https://perma.cc/3Z9P-TJ8V>] (“trusts law”); London School of Economics: Department of Law, List of Course Options, Property II (2018-2019), [http://www.lse.ac.uk/resources/calendar/courseGuides/LL/2018\\_LL275.htm](http://www.lse.ac.uk/resources/calendar/courseGuides/LL/2018_LL275.htm) [<https://perma.cc/5PV39Y5L>] (“Law of Trusts”); King’s College London: Law LLB Course Information Sheet (2018-2019), <https://www.kcl.ac.uk/study/assets/pdf/cma/undergraduate/law-llb.pdf> [<https://perma.cc/V27K-XRUG>] (“Law of Trusts”); University of Sydney: Juris Doctor, Units of study (2019), <https://sydney.edu.au/courses/uos-landing.page1.year0.html/content/courses/courses/pc/juris-doctor.html#0> [<https://perma.cc/L9XN-2WH4>] (“Equity” and “Death and Inheritance Law” taught separately); University of Melbourne: The Melbourne JD, Structure (2019), <https://law.unimelb.edu.au/study/jd#degree-structure> [<https://perma.cc/88JG-ERG5>] (“Equity and Trusts”); Australian National University (ANU): Programs and Courses, Juris Doctor, Study (2019), <https://programsandcourses.anu.edu.au/2019/program/MJD> [<https://perma.cc/LED6-9W6T>] (“Equity and Trusts”); University of Hong Kong: HKU Juris Doctor, Programme Structure, <http://www.law.hku.hk/postgrad/jurisdoctor/programme-structure/> [<https://perma.cc/Z4XD-U5HH>] (“Equity and Trusts I & II”); Chinese University of Hong Kong: Faculty of Law, JD Elective Courses (2019), [https://www.law.cuhk.edu.hk/en/study/download/jd\\_elective\\_list.pdf](https://www.law.cuhk.edu.hk/en/study/download/jd_elective_list.pdf) [<https://perma.cc/V7LS-V245>] (“Issues in Equity and Trusts”); City University of Hong Kong: School of Law, Programmes Juris Doctor (2019), <https://www6.cityu.edu.hk/slwa/academic/postgraduate.html> [<https://perma.cc/H6VG-MEMS>] (“Equity & Trusts”); National University of Singapore: Faculty of Law, Module Listing, Compulsory Subjects, Semester 2 (2018-2019), [https://law.nus.edu.sg/student\\_matters/course\\_listing/courses\\_disp.asp?MT=LL&Sem=2&MGC=1](https://law.nus.edu.sg/student_matters/course_listing/courses_disp.asp?MT=LL&Sem=2&MGC=1) (“Equity & Trusts”); Singapore Management University: J.D. Programme, Detailed Curriculum (2018), <https://law.smu.edu.sg/jd/detailed-curriculum> (“Law of Equity & Trusts”); University of Toronto, Course List (2019), <https://www.law.utoronto.ca/academic-programs/course-calendar> [<https://perma.cc/LU6A->

is taught separately, if at all. Uniquely in the United States, we combine the teaching of trusts and succession into the course known as “Decedents’ Estates and Trusts” or, more simply, “Trusts and Estates.” The combination of trusts and succession pushes us toward a focus on the use of the trust for family wealth management, and away from a discussion of the commercial uses of the trust.

It was not always so. In the late nineteenth and early twentieth centuries, U.S. law schools did not combine the teaching of trusts with the teaching of succession. Instead, they offered a course on trusts. This was reflected in the market for published teaching materials. Professor James Barr Ames of Harvard published his casebook on the law of trusts in 1881-1882,<sup>21</sup> with a second edition in 1893.<sup>22</sup> Austin Scott published his casebook on trusts in 1919,<sup>23</sup> with subsequent editions in 1931, 1940, 1951, and 1966.<sup>24</sup> George Bogert published his casebook on trusts in 1939,<sup>25</sup> with subsequent editions published during his lifetime in 1950, 1958, and 1967.<sup>26</sup> These casebooks were used in the classroom in courses on the law of trusts.

Within a course on trusts, an instructor could include material on commercial trusts. Here again, Bogert was more keen than Scott. Bogert integrated materials on commercial trusts throughout his casebook,<sup>27</sup> whereas Scott relegated commercial trusts to an appendix.<sup>28</sup> A discussion of commercial trusts was possible—for some instructors, natural—in a course on trusts.

Today there is no market among law students for books that cover only the law of trusts, nor for books solely on the law of succession. By way of example, the leading student hornbook on the law of wills—Thomas

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PH29] (“Trusts”). Osgoode Hall Law School, York University, Courses and Seminars (2019), <https://www.osgoode.yorku.ca/courses-and-seminars> [<https://perma.cc/B3HK-DL7R>] (“Trusts” separate from “Estates”). University of British Columbia, Course Schedule: Law (2019), <https://courses.students.ubc.ca> [<https://perma.cc/8BAF-CTW6>] (“Trusts”).

21. JAMES B. AMES, *A SELECTION OF CASES ON THE LAW OF TRUSTS* (1881-1882).

22. JAMES B. AMES, *A SELECTION OF CASES ON THE LAW OF TRUSTS* (2d ed. 1893).

23. AUSTIN W. SCOTT, *SELECT CASES AND OTHER AUTHORITIES ON THE LAW OF TRUSTS* (1919).

24. AUSTIN W. SCOTT, *SELECT CASES AND OTHER AUTHORITIES ON THE LAW OF TRUSTS* (2d ed. 1931); AUSTIN W. SCOTT, *SELECT CASES AND OTHER AUTHORITIES ON THE LAW OF TRUSTS* (3d ed. 1940); AUSTIN W. SCOTT, *SELECT CASES AND OTHER AUTHORITIES ON THE LAW OF TRUSTS* (4th ed. 1951); AUSTIN W. SCOTT & AUSTIN W. SCOTT JR., *SELECT CASES AND OTHER AUTHORITIES ON THE LAW OF TRUSTS* (5th ed 1966).

25. GEORGE G. BOGERT, *CASES ON THE LAW OF TRUSTS* (1939).

26. GEORGE G. BOGERT, *CASES ON THE LAW OF TRUSTS* (2d ed. 1950); GEORGE G. BOGERT, *CASES ON THE LAW OF TRUSTS* (3d ed. 1958); GEORGE G. BOGERT & DALLIN H. OAKS, *CASES ON THE LAW OF TRUSTS* (4th ed. 1967).

27. See the discussion in GEORGE G. BOGERT, *CASES ON THE LAW OF TRUSTS*, at v-vi (1939).

28. AUSTIN W. SCOTT, *SELECT CASES AND OTHER AUTHORITIES ON THE LAW OF TRUSTS* 801-04 (2d ed. 1931).

Atkinson's *Handbook of the Law of Wills*—was last updated in 1953,<sup>29</sup> and the leading hornbook on the law of trusts—Bogert's *Handbook of the Law of Trusts*—was last updated, by Bogert's son, in 1987.<sup>30</sup> Instead, casebooks and hornbooks offer a combined treatment of the law of succession and the law of trusts.<sup>31</sup> This correlates with law school courses, which combine trusts and succession.

When and why did U.S. law schools stop teaching separate courses on trusts and succession and start teaching only a combined course?

The story begins in the second half of the 1920s at the Columbia Law School. The law faculty had embarked on a large-scale project of reforming the curriculum in order to move away from Harvard's Langdellian model focusing on appellate case law and toward a program of legal education that "approach[ed] the study of law in terms of [its] underlying political, economic, and social factors."<sup>32</sup> In charge of reforming the part of the curriculum relating to the law of property was Professor Richard Powell. He was one of the reporters of the first *Restatement of Property* and would become the author of the multi-volume treatise *Powell on Real Property*.<sup>33</sup> Powell reorganized the separate courses in "Wills," "Trusts," and "Future Interests" into a single course called "Trusts and Estates." In 1932, Powell published his course materials in a two-volume casebook titled *Cases and Materials on Trusts and Estates*.<sup>34</sup> Here is what Powell wrote in the opening paragraph of the preface to his casebook:

The plan for a single law school course in replacement of the courses heretofore given under the titles of "Trusts," "Future Interests" and "Wills" was conceived some seven years ago [i.e. 1925]. It began in the embarrassments encountered by the editor in teaching Future Interests and, in the years 1926 and 1927, in the constructing of a Case Book for the subject of Future Interests. The boundary walls of Trusts and Wills repeatedly obtruded themselves as barriers to the completion, or to the comprehension, of topics partly studied in the areas of law traditionally known as Future Interests. The usefulness of these separations of subject-matter came to be questioned further because the editor could recollect no

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29. THOMAS E. ATKINSON, *HANDBOOK OF THE LAW OF WILLS* (2d ed. 1953).

30. GEORGE T. BOGERT, *TRUSTS* (6th ed. 1987). The prior version was GEORGE G. BOGERT & GEORGE T. BOGERT, *HANDBOOK OF THE LAW OF TRUSTS* (5th ed. 1973).

31. See, e.g., THOMAS P. GALLANIS, *FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS* (7th ed. 2019) (casebook); WILLIAM M. MCGOVERN JR., SHELDON F. KURTZ, DAVID M. ENGLISH & THOMAS P. GALLANIS, *WILLS, TRUSTS, AND ESTATES* (5th ed. 2017) (hornbook).

32. A HISTORY OF THE SCHOOL OF LAW [OF] COLUMBIA UNIVERSITY 312 (Julius Goebel Jr., ed. 1955).

33. RICHARD R. POWELL, *THE LAW OF REAL PROPERTY* (1949).

34. RICHARD R. POWELL, *CASES AND MATERIALS ON THE LAW OF TRUSTS AND ESTATES* (1932) (2 vols.).

such division in his practical experience at the bar. The idea was nourished by the research and self-examination induced by the curricular revision studies constantly present in the Law School of Columbia University since 1927.<sup>35</sup>

An official history of the Columbia Law School described Powell's achievement in the following words:

Perhaps the most radical change in the part of the old curriculum dealing with property was the tour de force executed by Professor Powell in his now famous course, Trusts and Estates, where he combined related parts of the subject matter previously given in separate courses, such as Future Interests, Trusts, and Wills. ... The combination of materials proved most effective from a teaching point of view, and the course was regarded by the students from the beginning as one of the best offered in the Law School.<sup>36</sup>

Powell's casebook on *Trusts and Estates* was the first published casebook for a combined course. Others followed. Professor Lewis Simes of the University of Michigan published *Cases and Materials on Trusts and Succession* in 1942.<sup>37</sup> John Ritchie, who spent much of his career at the University of Virginia but was then the dean of the law school at the University of Wisconsin, was the lead author of *Cases and Materials on Decedents' Estates and Trusts*, which appeared in 1955.<sup>38</sup> Professors George Palmer and Richard Wellman of the University of Michigan published *Cases and Materials on Trusts and Succession* in 1960.<sup>39</sup> Professors Eugene Scoles of the University of Illinois and Edward Halbach of the University of California at Berkeley published *Problems and Materials on Decedents' Estates and Trusts* in 1965.<sup>40</sup> Professor Ashbel Green Gulliver of Yale University was the lead author of *Cases and Materials on Gratuitous Transfers*, which appeared in 1967.<sup>41</sup> And

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35. 1 RICHARD R. POWELL, *CASES AND MATERIALS ON THE LAW OF TRUSTS AND ESTATES* v (1932).

36. A HISTORY OF THE SCHOOL OF LAW [OF] COLUMBIA UNIVERSITY 318-19 (Julius Goebel Jr. ed. 1955).

37. LEWIS M. SIMES, *CASES AND MATERIALS ON TRUSTS AND SUCCESSION* (1942). For earlier mimeographed versions published locally in Ann Arbor, see LEWIS M. SIMES, *TRUSTS AND ESTATES I: CASES AND MATERIALS* (1935), and LEWIS M. SIMES, *TRUSTS & ESTATES II: CASES AND MATERIALS* (1936).

38. JOHN RITCHIE, NEILL H. ALFORD, JR. & RICHARD W. EFFLAND, *CASES AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS* (1955).

39. GEORGE E. PALMER & RICHARD V. WELLMAN, *CASES AND MATERIALS ON TRUSTS AND SUCCESSION* (1960).

40. EUGENE F. SCOLES & EDWARD C. HALBACH JR., *PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS* (1965). A prior temporary edition appeared in 1963; see EUGENE F. SCOLES & EDWARD C. HALBACH JR., *PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS* (temp. ed. 1963).

41. ASHBEL G. GULLIVER, ELIAS CLARK, LOUIS LUSKY & ARTHUR W. MURPHY, *CASES AND MATERIALS ON GRATUITOUS TRANSFERS* (1967).



so on.

After the mid-1950s, it would be hard to find new casebooks only on trusts. Established casebooks on trusts—such as those of Scott and Bogert—continued to appear in updated editions. The final edition of Scott’s casebook appeared in 1966;<sup>42</sup> the final edition of what had been Bogert’s casebook<sup>43</sup> appeared in 2008,<sup>44</sup> and is now out of print.<sup>45</sup> These were the dinosaurs.

The separate course on “Trusts” disappeared, albeit much later at some law schools than at Columbia. At the University of Chicago and Harvard, Bogert and Scott cast long shadows. The separate treatment of trusts finally died at Chicago in 1976; it was in Winter Quarter of that year that John Langbein combined his prior courses on succession and trusts into a course in “Decedents’ Estates and Trusts.”<sup>46</sup> At Harvard, the separate

42. AUSTIN W. SCOTT & AUSTIN W. SCOTT JR., *SELECT CASES AND OTHER AUTHORITIES ON THE LAW OF TRUSTS* (5th ed. 1966).

43. Bogert died in 1977. *George G. Bogert, 92; Authority on Trusts*, N.Y. TIMES, Mar. 29, 1977, at 26, <https://www.nytimes.com/1977/03/29/archives/george-g-bogert-92-authority-on-trusts.html> [<https://perma.cc/2RGM-7TXB>].

44. GEORGE G. BOGERT, DALLIN H. OAKS, H. REESE HANSEN & STANLEY D. NEELEMAN, *CASES AND TEXT ON THE LAW OF TRUSTS* (8th ed. 2008).

45. The book is no longer available from its publisher, Foundation Press.

46. Before 1968, there were separate courses on “Trusts” and “Decedents’ Estates.” The “Trusts” course was taught by Bogert’s successor on the faculty and co-author, Professor Dallin Oaks; the course on “Decedents’ Estates” was taught by Professor Max Rheinstein. See, e.g., UNIV. OF CHI. LAW SCH., ANNOUNCEMENTS 16 (1965-1966); UNIV. OF CHI. LAW SCH., ANNOUNCEMENTS 15 (1966-1967); UNIV. OF CHI. LAW SCH., ANNOUNCEMENTS 19 (1967-1968). Rheinstein retired at the end of the 1967-68 academic year. In Autumn 1968, Oaks taught a combined course, called “Trusts, Wills, and Estates.” UNIV. OF CHI. LAW SCH., ANNOUNCEMENTS 17 (1968-1969). He repeated this course in Autumn 1969 and in Spring 1971. UNIV. OF CHI. LAW SCH., ANNOUNCEMENTS 18 (1969-1970); UNIV. OF CHI. LAW SCH., ANNOUNCEMENTS 17 (1970-1971). Then in Autumn 1971, John Langbein joined the faculty. For his first four years, Langbein taught separate courses: one called “The Law of Succession” which covered intestacy, wills, and will substitutes, and a second course called “Trusts and Estates” which (despite the name) focused on trusts and trust administration. UNIV. OF CHI. LAW SCH., ANNOUNCEMENTS 15-16 (1971-1972); UNIV. OF CHI. LAW SCH., ANNOUNCEMENTS 16-17 (1972-1973); UNIV. OF CHI. LAW SCH., ANNOUNCEMENTS 22-23 (1973-1974); UNIV. OF CHI. LAW SCH., ANNOUNCEMENTS 18 (1974-1975). Then in Langbein’s fifth year—in Winter 1976—he combined the courses into one course called “Decedents’ Estates and Trusts.” UNIV. OF CHI. LAW SCH., ANNOUNCEMENTS 18 (1975-1976). This combined course continued throughout the rest of his time on the University of Chicago faculty. See, e.g., UNIV. OF CHI. LAW SCH., ANNOUNCEMENTS 18 (1976-1977); UNIV. OF CHI. LAW SCH., ANNOUNCEMENTS (1978-79). The course title continued as “Decedents’ Estates and Trusts” until I was a student in Professor Langbein’s course in Spring 1989, when the course title was “Trusts and Estates: Family Wealth Transmission.” Compare UNIV. OF CHI. LAW SCH., ANNOUNCEMENTS 28 (1987-1989) (“Decedents’ Estates and Trusts”) with UNIV. OF CHI. LAW SCH., ANNOUNCEMENTS 30 (1988-1989). This was the last time he taught it at the University of Chicago. During the 1989-90 academic year, Langbein was a visiting professor at the Yale Law School; meanwhile, Professor Lawrence Waggoner of the University of Michigan was a visiting professor at the University of Chicago, offering “Trusts and Estates: Family Wealth Transmission” in Winter 1989 and “Advanced Trusts and Estates” and “Federal Estate and Gift Tax” in Spring 1990. UNIV. OF CHI. LAW SCH., ANNOUNCEMENTS 26, 33, 44 (1989-1990). Langbein received and accepted an offer to join the permanent Yale faculty in 1990. Since then, the University of Chicago has not had a permanent faculty member teaching trusts and estates. The course continues today under the name “Trusts and

course on trusts lasted until Spring Semester 1980, when it was taught by a visiting professor, Tamar Frankel from Boston University.<sup>47</sup>

Why did U.S. law schools stop offering separate courses on trusts and succession? There are likely many interconnected reasons. Here, I offer five.

1. *Alignment with the legal profession.* The combined course accurately reflects the disciplinary fields within the U.S. legal profession. The same lawyers who draft wills also draft trust instruments. These lawyers often describe their area of practice as “trust and estate law.”<sup>48</sup> This is not unique to the U.S., of course; other common-law countries have trust and estate practitioners.<sup>49</sup> However, it would not be surprising to find U.S. law schools more aligned with the legal profession, given that U.S. legal education is professional graduate legal education, with only a bar examination standing between the law school diploma and admission to practice. By way of example, recall that Professor Powell explained in the preface to his casebook that his experience as a practicing lawyer influenced his decision to combine separate courses on trusts and succession into a combined course in trusts and estates.

2. *Timing, and the flow and ebb of commercial trusts.* The use of the trust for business purposes has a long history in England and in the U.S.,<sup>50</sup> but in the U.S. its use was most noticeable in the late nineteenth and early twentieth centuries. The well-known Standard Oil Trust, for example, was formed in 1882.<sup>51</sup> Standard Oil soon attracted notoriety; the Sherman Anti-Trust Act was enacted in 1890.<sup>52</sup> This legislation targeted monopolistic activity, not business trusts per se, so the use of the trust for

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Estates: Wealth Management and Transmission.” UNIV. OF CHI. LAW SCH., ANNOUNCEMENTS 152 (2019-2020) (taught by visiting professor Thomas Gallanis).

47. HARVARD LAW SCHOOL, HARVARD LAW SCHOOL CATALOG 104 (1979-1980) (“Trust Law” offered by Visiting Professor [Tamar] Frankel). The following year, a combined course in “Wills and Trusts” was offered by Visiting Professor Mary Louise Fellows. HARVARD LAW SCHOOL, HARVARD LAW SCHOOL CATALOG 110 (1980-1981).

48. See, e.g., Vol. I, no. 1 (March 1961), of the American College of Probate Counsel Newsletter, describing the newsletter as a “vehicle for dissemination” of articles in “trust and estate law.” Quoted in THE ACTEC HISTORICAL COMMISSION, THE HISTORY OF THE AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL 6 (1999), <https://www.actec.org/assets/1/6/History-of-ACTEC.pdf> [<https://perma.cc/SZ44-BWEU>].

49. Note, however, that the field is not always defined in that way abroad. For example, Gerard Brennan Chambers in Australia distinguishes between the area of practice called “Equity” and the area of practice called “Wills, Probate & Family Provision.” See *Our Areas of Practice*, GERARD BRENNAN CHAMBERS, <http://www.gerardbrennanchambers.com.au/areas-of-practice> [<https://perma.cc/MF99-4WEC>].

50. John Morley, *The Common Law Corporation: The Power of the Trust in Anglo-American Business History*, 116 COLUM. L. REV. 2145, 2151-65 (2016).

51. Richard W. Hale, *The Standard Oil Anti-Trust Complaint*, 41 AM. L. REV. 51, 51 (1907).

52. Sherman Anti-Trust Act of 1890, ch. 647, 26 Stat. 209 (1890).

business purposes continued to thrive through the 1920s.<sup>53</sup> By the late 1930s, however, the advantages of the trust over the corporation as a vehicle for business enterprise had been noticeably diminished. In part, this was due to the modernization of state incorporation statutes, which made the corporate form increasingly attractive.<sup>54</sup> Also in part, this was due to the U.S. Supreme Court's 1935 decision in *Morrissey v. Commissioner of Internal Revenue*, holding that business trusts were sufficiently like corporations to be subject to corporate taxation.<sup>55</sup> The use of the trust for general business purposes was declining. As Professor Langbein observed, many of the specialized uses of commercial trusts that are prominent today—pension trusts, real estate investment trusts, asset securitization trusts—emerged only after World War II or later. Thus, when the first casebooks for a combined course on trusts and estates were being published—by Powell in 1932, by Simes in 1942—business trusts were ebbing, rather than flowing. There was not as much incentive to include material on commercial trusts as there might have been in earlier decades—or later decades.

3. *The revocable trust as a will substitute.* One point of significant overlap in the U.S. between a course on succession and a course on trusts is the use of the revocable trust as a substitute for a will. The growth of the revocable trust and other will substitutes—what Professor Langbein called the “nonprobate revolution”<sup>56</sup>—has been far more pronounced in the U.S. than in other common-law countries.<sup>57</sup> The reasons vary by the country, but let us take England as an example. In England, the use of a revocable trust as a will substitute would be a disaster from the perspective of inheritance taxation. The assets would be subject to U.K. inheritance tax multiple times: at the time of the transfer of the assets into the trust; again at periodic intervals during the rest of the settlor's lifetime and when distributions are made from the trust; and potentially again at the settlor's death.<sup>58</sup> In the U.S., by contrast, the assets in a revocable trust

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53. Morley, *Common Law Corporation*, *supra* note 50, at 2164-66.

54. For discussion, see Wiley B. Rutledge Jr., *Significant Trends in Modern Incorporation Statutes*, 22 WASH. U. L.Q. 305 (1937).

55. *Morrissey v. Commissioner of Internal Revenue*, 296 U.S. 344, 360 (1935) (stating that “we think that these attributes make the trust sufficiently analogous to corporate organization to justify the conclusion that Congress intended that the income of the enterprise should be taxed in the same manner as that of corporations”) (interpreting the Revenue Acts of 1924 and 1926). *Cf.* the earlier decision in *Crocker v. Malley*, 249 U.S. 223 (1919) (holding that a Massachusetts business trust was not subject to corporate taxation under the Revenue Act of 1913).

56. John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984).

57. See generally ALEXANDRA BRAUN & ANNE RÖTHEL EDS., *PASSING WEALTH ON DEATH: WILL-SUBSTITUTES IN COMPARATIVE PERSPECTIVE* (2016).

58. See Burges Salmon, *The Dangers of US Living Trusts* (August 2, 2016), <https://www.burges-salmon.com/news-and-insight/legal-updates/the-dangers-of-us-lifetime-trusts/>. See also Geoffrey Todd,

are subject to federal estate taxation only to the same extent—no more, no less—as if the assets were passing by the grantor’s will.<sup>59</sup> The advantage in the U.S. of a revocable trust is that it is a will substitute, hence avoiding both the formalities and the probate procedures for wills. The nonprobate revolution gained steam in the U.S. in the 1950s and 1960s and has continued to the present day. One of the leading cases was *Estate of Farkas*, decided in 1955 by the Illinois Supreme Court.<sup>60</sup> Albert Farkas purchased stock and instructed the company to issue the stock in his name as trustee for Richard Williams. By the terms of the trust, Farkas retained the right to revoke or amend the trust, the right to change the beneficiary, the right to deal with the stock as if he were an outright owner, and the right to all of the dividends during his lifetime. Williams would receive nothing until Farkas’s death, and then only if the trust had not been revoked or amended. The trust was essentially a will. However, the Illinois Supreme Court upheld the trust as a non-testamentary arrangement that did not need to comply with the formalities or procedures for wills. *Farkas* became an important case on revocable trusts. The consumer demand for revocable trusts increased even further after the publication in 1965 of a popular book by Norman Dacey, titled *How to Avoid Probate!*.<sup>61</sup> These developments do not have a real counterpart in other common-law countries. In England, a leading treatise on the law of succession does not mention the revocable trust,<sup>62</sup> and a leading treatise on the law of trusts devotes only a few pages to the subject, under the heading of “powers of revocation.”<sup>63</sup> The relative silence is unsurprising given that English lawyers do not commonly use revocable trusts. This difference in law and practice reinforces the difference in the classroom. In the U.S., revocable trusts are widely-used will substitutes. This fact helps to reinforce the U.S. approach of teaching wills, will substitutes, and trusts in a combined course in trusts and estates.

4. *Casebooks as both cause and effect.* Casebooks do more than respond to the existing curriculum. The right casebook at the right time can shape the curriculum by encouraging instructors to teach a new course

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*The Pitfalls of US/UK Tax Planning: The US Living Trust*, BOODLE HATFIELD, <https://www.boodlehatfield.com/the-firm/articles/the-pitfalls-of-usuk-tax-planning-the-us-living-trust> [<https://perma.cc/6LEY-49XP>] (originally published in November 2011 edition of PRIVATE CLIENT ADVISER).

59. Compare 26 U.S.C. § 2038(a)(1) (applying to transfers with a retained power of revocation) with 26 U.S.C. §2033 (applying to property in which the decedent had an interest at death).

60. *Estate of Farkas*, 125 N.E.2d 600 (Ill. 1955).

61. NORMAN DACEY, *HOW TO AVOID PROBATE!* (1965). A student at the law school of the University of California at Berkeley described the book as “potentially dangerous ... dangerous both to the public and to the legal profession.” Edmund R. Manwell, *Book Review*, 54 CALIF. L. REV. 2189, 2189 (1966).

62. ROGER KERRIDGE, PARRY AND KERRIDGE: *THE LAW OF SUCCESSION* (13th ed. 2016).

63. LYNTON TUCKER ET AL., *LEWIN ON TRUSTS* 1425-31 (19th ed. 2015).

or an existing course in a new way. Instructors are more willing to invest their time and human capital in new subject-areas if good teaching materials are available. The pioneering casebook on legislation and statutory interpretation authored by William Eskridge and Philip Frickey<sup>64</sup> helped to spur the teaching of that subject at U.S. law schools. The casebooks combining trusts and succession likely had a similar effect. Certainly they were authored by leading scholars in the field, especially Richard Powell, Lewis Simes, Richard Wellman, Eugene Scoles, and Edward Halbach.

5. *The growth of public law and its effect on the curriculum and on student demand.* The U.S. in the twentieth century saw dramatic growth in the federal government and in public law, especially constitutional, regulatory, and administrative law. This is reflected in law school curricula, which contain many more courses than a half-century ago.<sup>65</sup> Most of the new courses are in public law rather than private law. This is in sharp contrast to other parts of the common-law world, where private law still thrives in the law schools. But in the U.S., the real growth has been in public law. Professor Saul Levmore of the University of Chicago jokes that his school no longer offers simply Constitutional Law I and II but that it is now up to Constitutional Law XXIII. That is an exaggeration, but it is true that the school is up to Constitutional Law VII.<sup>66</sup> With a burgeoning array of constitutional, administrative, and regulatory courses on offer, how many students would be willing to enroll in separate courses on succession and trusts? Part of the appeal of a combined course is that it responds to student demand for a one-shot exposure to the law of trusts and estates.

## II. FUTURE DIRECTIONS

What are the prospects for the reintroduction of commercial trusts into our teaching, learning, and thinking about trusts?

The prospects for more scholarship on commercial trusts are reasonably good, as indicated by this symposium and others, but I am not optimistic about the inclusion of commercial trusts into the U.S. law school curriculum. The one-semester course on trusts and estates is well entrenched, and there is too much material to cover in that one course

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64. WILLIAM N. ESKRIDGE JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* (1988).

65. By way of illustration, the University of Chicago Law School offered more than 190 courses and seminars (not including clinics, journals, or moot court) in 2018-19, compared to 76 courses and seminars in 1968-69. UNIV. OF CHI. LAW SCH., ANNOUNCEMENTS 16-34 (1968-1969); UNIV. OF CHI. LAW SCH., ANNOUNCEMENTS 50-139 (2018-2019).

66. On "parent, child, and the state." UNIV. OF CHI. LAW SCH., ANNOUNCEMENTS 72 (2018-2019).

already, without additionally trying to squeeze in a treatment of commercial trusts. The *Restatement (Third) of Property: Wills and Other Donative Transfers* spans three volumes; the *Restatement (Third) of Trusts* spans four. That totals seven volumes of material. A one-semester trusts and estates course cannot do full justice even to the topics in the Restatements.

The best hope, I think, is that commercial trusts might be the subject of a seminar or intersession course. Seminars and intersession courses often are linked to the topics of faculty research. They offer an opportunity for instructors and students to explore a topic without committing to a semester-long course. To the extent that scholarship on the law of commercial trusts increases, so also might the willingness of instructors to teach it in a seminar or intersession format.

With trillions of dollars in assets held today in various forms of commercial trusts, the reintroduction of the subject into our teaching and thinking about trusts would be welcome. From a comparative perspective, it is long overdue. Perhaps someone at this symposium will be our generation's Richard Powell, preparing the teaching materials to inspire and facilitate a seminar or intersession course on commercial trusts at the author's own law school and beyond.