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Congress and Commercial Trusts: Dealing with Diversity Jurisdiction Post-Americold

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CONGRESS AND COMMERCIAL TRUSTS: DEALING WITH DIVERSITY JURISDICTION POST-*AMERICOLD*

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Abstract

Commercial trusts are one of the United States' most important types of business organizations, holding trillions of dollars of assets and operating nationally and internationally as a "mirror image" of the corporation. However, commercial trusts remain underappreciated and undertheorized in comparison to corporations, often as a result of the popular but mistaken belief that commercial trusts are analogous to traditional intergenerational trusts or that corporations reflect the primary or paradigmatic form of business association.

The treatment of commercial trusts reached its nadir in early 2016, when the U.S. Supreme Court held in *Americold Realty Trust v. ConAgra Foods, Inc.* that the citizenship of a commercial trust should be equated with that of its shareholder-beneficiaries for purposes of diversity jurisdiction. Unfortunately, the sheer number of shareholder-beneficiaries in most commercial trusts (often amounting to hundreds if not thousands of individuals) typically precludes the parties' ability to establish complete diversity and thus eliminates the possibility of federal jurisdiction over most commercial trust disputes. As a result, virtually all commercial trust disputes will now be heard in state court, despite their complexity, their impact on matters of national public policy, and their effect on the domestic and global economies.

Americold will also result in differential treatment of commercial trusts and corporations for purposes of federal jurisdiction, even though courts and commentators have long recognized the functional equivalence of the two types of business associations. Furthermore, as this research shows, there is no theoretical justification for this type of unequal treatment.

This Article therefore suggests, as a normative proposition, that Congress override *Americold* and provide commercial trusts with access to federal courts in a manner similar to that enjoyed by corporations. This recommendation is the result of a rigorous interdisciplinary analysis of both the jurisprudential and practical problems created by *Americold* as a matter of trust law, procedural law, and the law of incorporated and unincorporated business associations. This Article identifies two possible

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Congressional responses to *Americold*, one involving reliance on minimal diversity, as in cases falling under 28 U.S.C. §§ 1332(d) and 1369, and the other involving a statutory definition of the citizenship of commercial trusts similar to that used for corporations under 28 U.S.C. § 1332(c). In so doing, this Article hopes to place commercial trusts and corporations on an equal footing and avoid the numerous negative externalities generated by the Supreme Court's decision in *Americold*.

INTRODUCTION

Over the last few years, the U.S. Supreme Court has issued a number of decisions seeking to clarify diversity jurisdiction in the federal courts,

particularly with respect to commercial organizations.[1] While these cases have not achieved the level of notoriety associated with the Court's recent jurisprudence on personal jurisdiction,[2] rules on diversity jurisdiction have a significant and potentially outcome-determinative effect on commercial litigation in the United States.[3] When considered on a cumulative basis, the Court's decisions on diversity jurisdiction have a meaningful impact on the U.S. economy as a whole.[4]

Nowhere is this phenomenon more clearly illustrated than in the Supreme Court's recent opinion in *Americold Realty Trust v. ConAgra Foods, Inc.*,[5] which considered the citizenship of commercial trusts for the purpose of diversity jurisdiction.[6] Commercial trusts are an often-overlooked but extremely important type of business organization that

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1. *See, e.g.*, Americold Realty Tr. v. ConAgra Foods, Inc., 136 S. Ct. 1012, 1014 (2016) (considering citizenship of commercial trusts); Hertz Corp. v. Friend, 559 U.S. 77, 92–93 (2010) (describing a corporation's principle place of business pursuant to the "nerve center" test); Wachovia Bank v. Schmidt, 546 U.S. 303, 306 (2006) (determining the citizenship of a federally chartered national bank for diversity purposes); Grupo Dataflux v. Atlas Glob. Grp., 541 U.S. 567, 568 (2004) (considering whether a post-filing change in citizenship and status of both limited and general partners' citizenship should be considered in determining a partnership's citizenship in a diversity case); Carden v. Arkoma Assocs., 494 U.S. 185, 195 (1990) (reaffirming the rule that the citizenship of all members of a partnership must be considered in determining whether complete diversity exists).

2. *See* Walden v. Fiore, 134 S. Ct. 1115, 1121 (2014); Daimler AG v. Bauman, 134 S. Ct. 746, 751 (2014); Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 929 (2011); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 877 (2011); Judy M. Cornett & Michael H. Hoffheimer, *Good-Bye Significant Contacts: General Personal Jurisdiction After* Daimler AG v. Bauman, 76 OHIO ST. L.J. 101, 107 (2015); Roger M. Michalski, *Rights Come with Responsibilities: Personal Jurisdiction in the Age of Corporate Personhood*, 50 SAN DIEGO L. REV. 125, 188 (2013); Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1413 (2015); Zoe Niesel, Daimler *and the Jurisdictional Triskelion*, 82 TENN. L. REV. 833, 837 (2015); John T. Parry, *Rethinking Personal Jurisdiction After* Bauman *and* Walden, 19 LEWIS & CLARK L. REV. 607, 611 (2015); Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 NW. U. L. REV. 1301, 1304–05 (2014); Alan M. Trammell, *A Tale of Two Jurisdictions*, 68 VAND. L. REV. 501, 502 (2015).

3. *See* Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 607 (1998) (comparing outcomes in state and federal court). *But see* Debra Lyn Bassett, *The Hidden Bias in Diversity Jurisdiction*, 81 WASH. U. L.Q. 119, 140–41 (2003) (challenging empirical studies regarding the perceived superiority of federal court); Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1847–48 (2008) (discussing the role of diversity jurisdiction in case outcomes).

4. *See* Peter B. Oh, *A Jurisdictional Approach to Collapsing Corporate Distinctions*, 55 RUTGERS L. REV. 389, 451 (2003); William Howard Taft, *Possible and Needed Reforms in Administration of Justice in Federal Courts*, 8 A.B.A. J. 601, 604 (1922).

5. *Americold*, 136 S. Ct. at 1017.

6. *Id.* at 1014.

operate as a functional equivalent to corporations[7] and "dominate certain types of modern business and financial transactions."[8] These types of trusts bear little resemblance to traditional intergenerational trusts (i.e., those meant to pass on personal wealth after death) and play a central role in the U.S. economy, holding trillions of dollars' worth of assets and generating billions of dollars' worth of annual income, with administrators and trustees earning similarly massive amounts in fees each year.[9]

Americold held that, for purposes of diversity jurisdiction, commercial trusts are to be considered citizens of any state where their beneficiaries may be found.[10] The problem is that commercial trusts can have hundreds if not hundreds of thousands of beneficiaries spread throughout the fifty United States and indeed throughout the world.[11] In many cases, it is not possible for commercial trusts to determine the citizenship and domicile of their beneficiaries.[12] As a result, it will be difficult if not impossible for many commercial trusts to establish complete diversity as a matter of

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7. *See* Hemphill v. Orloff, 277 U.S. 537, 550 (1928) (stating that the classification of an entity is not essential to determine its powers); Paul B. Miller, *The Future for Business Trusts: A Comparative Analysis of Canadian and American Uniform Legislation*, 36 QUEEN'S L.J. 443, 451 (2011) (explaining that the trust was displaced by the corporation only when incorporation become more accessible); Steven L. Schwarcz, *Commercial Trusts as Business Organizations: Unraveling the Mystery*, 58 BUS. LAW. 559, 560 (2003); Robert H. Sitkoff, *Trusts as "Uncorporation": A Research Agenda*, 2005 U. ILL. L. REV. 31, 31 (2005).

8. Schwarcz, *supra* note 7, at 559; *see also* John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165, 172 (1997).

9. *See* David Horton, *The Federal Arbitration Act and Testamentary Instruments*, 90 N.C. L. REV. 1027, 1070 (2012); Langbein, *supra* note 8, at 178 (estimating in 1994 that commercial trusts held assets in the range of $11.6 trillion, with non-commercial trusts holding an additional $672 billion in assets, conservatively estimated). There does not appear to be any comprehensive data on the amount of money currently held by commercial trusts, although Professor Robert Sitkoff is in the process of compiling this information. *See* Robert H. Sitkoff, *The American Statutory Business Trust: A Research Agenda*, *in* THE REGULATION OF WEALTH MANAGEMENT 17, 29 (Hans Tjio ed., 2008). Some sector-specific information exists. *See infra* Subsection I.B.2.

10. *Americold*, 136 S. Ct. at 1016.

11. *See* Ryan A. Christy, *Redefining the Juridical Person: Examining the Business Trust and Other Unincorporated Associations for Citizenship Purposes*, 6 DUQ. BUS. L.J. 137, 151 (2004). For example, one publicly traded commercial trust that operates nationwide has over 96 million shares of common stock. *See CIM Commercial Trust Announces Preliminary Results of Tender Offer*, BUS. WIRE (June 14, 2016, 8:00 AM), http://www.businesswire.com/news/home/20160614005650/en/CIM-Commercial-Trust-Announces-Preliminary-Results-Tender; *see also infra* Subsection I.B.2.

12. *Americold*, 136 S. Ct. at 1016; *see also* Thomas E. Rutledge & Christopher E. Schaefer, *The Trust as an Entity and Diversity Jurisdiction: Is* Navarro *Applicable to the Modern Business Trust?*, 48 REAL PROP. TR. & EST. L.J. 83, 104 (2013) (explaining that trusts used in complex financial structures may lack information as to the citizenship of their beneficial owners).

law.[13] Indeed, this phenomenon has already occurred as part of the post-*Americold* reality.[14]

Because most trusts, including commercial trusts, are governed by state rather than federal law, these types of disputes will now be heard almost exclusively in state court.[15] This is an outcome that has been considered problematic not only in cases involving corporations[16] but also in other types of matters involving "national problems that happen to be governed by state law."[17] Indeed, numerous authorities—including the Supreme Court, the Judicial Conference, and Congress—have routinely recognized the significant benefits that are associated with federal jurisdiction.[18] A special Committee on Jurisdiction and Venue convened by the Judicial Conference in 1951 to consider corporate citizenship for purposes of diversity jurisdiction specifically noted that "to close the doors of the national tribunals to organized business seems to the Committee to be a bad policy that would create far more evil than it would cure."[19]

The situation is exacerbated by the international nature of many commercial trusts, since the rule on alienage jurisdiction[20] means that

13. *See* U.S. CONST. art. III, § 2, cl. 1; Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806); 4 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3605 (3d ed. 2015); Charles J. Cooper & Howard C. Nielson, Jr., *Complete Diversity and the Closing of the Federal Courts*, 37 HARV. J.L. & PUB. POL'Y 295, 300 (2014) (stating the requirement for complete diversity is that the citizenship of every plaintiff be different from every defendant).

14. *See* RTP LLC v. ORIX Real Estate Capital, Inc., 827 F.3d 689, 693 (7th Cir. 2016) (involving a pension trust); Wells Fargo Bank, N.A. v. Transcon. Realty Inv'rs, Inc., No. 3:14-cv-3565-BN, 2016 WL 3570648, at *4 (N.D. Tex. July 1, 2016) (involving a securitization trust).

15. *See* Thomas E. Rutledge & Ellisa O. Habbart, *The Uniform Statutory Trust Entity Act: A Review*, 65 BUS. LAW. 1055, 1055 (2010).

16. Concerns about state jurisdiction over corporate matters led to the creation of a special rule regarding diversity jurisdiction for corporations. *See* 28 U.S.C. § 1332(c) (2012); *see also infra* notes 385–402 and accompanying text (discussing the legislative history of 28 U.S.C. § 1332(c)).

17. Diane P. Wood, *The Changing Face of Diversity Jurisdiction*, 82 TEMP. L. REV. 593, 605 (2009).

18. *See, e.g.*, Hertz Corp. v. Friend, 559 U.S. 77, 85 (2010) (providing for a court free of local prejudice); S. REP. NO. 85-1830, at 4 (1958), *as reprinted in* 1958 U.S.C.C.A.N. 3099, 3102; *see also* 1958 U.S.C.C.A.N. at 3116–20 (reproducing the 1951 Report of the Committee on Jurisdiction and Venue to the Judicial Conference, which identified various problems with state courts).

19. 1958 U.S.C.C.A.N. at 3119.

20. Although most authorities consider alienage jurisdiction (which involves "citizens of a State and citizens or subjects of a foreign state") as identical to diversity jurisdiction (which involves "citizens of different States"), there are some significant differences. U.S. CONST. art. III, § 2, cl. 1; *see also* 28 U.S.C. § 1332(a) (2012); Walter C. Hutchens, *Alienage Jurisdiction and the Problem of Stateless Corporations: What Is a Foreign State for Purposes of 28 U.S.C. § 1332(a)(2)?*, 76 WASH. U. L.Q. 1067, 1072 (1998) (emphasizing that "[n]ot only do diversity and alienage jurisdiction apply to different types of parties, they are also founded on different

U.S. citizens domiciled abroad are considered "foreign aliens" who are "stateless" under 28 U.S.C. § 1332(a).[21] As a result, a commercial trust will be unable to establish diversity jurisdiction if even one of its beneficiaries is a U.S. citizen residing abroad,[22] something that is becoming increasingly likely in the modern world.[23] Indeed, as Professor Peter Oh has recognized, the rise of globalization and the concomitant increase in the use of commercial trusts has made "the problem of statelessness . . . not only real, but potentially ubiquitous."[24]

Similar problems occur in cases involving corporations that are incorporated outside the United States and have their primary place of business in the United States,[25] which suggests that commercial trusts formed in offshore jurisdictions (again, an increasingly likely possibility)[26] will experience problems with U.S. federal jurisdiction as

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rationales"); Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction Over Disputes Involving Noncitizens*, 21 YALE J. INT'L L. 1, 4 (1996) (noting the "academic preoccupation" with diversity jurisdiction and highlighting the dearth of attention given to alienage jurisdiction).

21. *See* Oh, *supra* note 4, at 466. Professor Peter Oh suggests circumventing this problem by "accord[ing] jurisdictional citizenship to foreign aliens based on their domicile." *Id.* at 461.

22. *See* Mossman v. Higginson, 4 U.S. (4 Dall.) 12, 14 (1800) (noting that one of the parties must be a U.S. citizen in order for federal courts to have diversity jurisdiction); Gall v. Topcall Int'l, No. Civ. A. 04-CV-432, 2005 WL 664502, at *4–5 (E.D. Pa. Mar. 21, 2005) (discussing the historical interpretation of alienage jurisdiction); 4 WRIGHT ET AL., *supra* note 13, § 3604 (discussing diversity jurisdiction in suits with citizens or subjects of foreign states as parties).

23. *See* Joe Costanzo & Amanda Klekowski von Koppenfels, *Counting the Uncountable: Overseas Americans*, MIGRATION POL'Y INST. (May 17, 2013), http://www.migrationpolicy.org/article/counting-uncountable-overseas-americans (noting the difficulty in estimating American expatriates and placing the number between 2.2 million and 6.8 million); Lyman Stone, *In an Age of Global Citizenship, American Expatriates Increase*, FEDERALIST (May 4, 2015), http://thefederalist.com/2015/05/04/in-an-age-of-global-citizenship-american-expatriates-increase/ (estimating approximately thirteen million Americans born abroad as of 2013, excluding military and diplomatic personnel, long-term tourists and temporary workers).

24. Oh, *supra* note 4, at 459; *see also id.* at 450–51 (discussing the interaction between alienage jurisdiction and international commercial interests).

25. *See* Hutchens, *supra* note 20, at 1073; David A. Greher, Note, *The Application of 28 U.S.C. § 1332(c)(1) to Alien Corporations: A Dual Citizenship Analysis*, 36 VA. J. INT'L L. 233, 233–34 (1995).

26. While this Article will not discuss commercial trusts outside the United States in detail, they are growing in importance. *See* Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434, 466–69 (1998); Norman P. Ho, *A Tale of Two Cities: Business Trust Listings and Capital Markets in Singapore and Hong Kong*, 11 J. INT'L BUS. & L. 311, 314 (2012) (noting rise of business trusts in Japan, Korea, Singapore, and Hong Kong as well as in continental Europe); Miller, *supra* note 7, at 444 (comparing commercial trusts in the U.S. and Canada); Steven L. Schwarcz, *Commercial Trusts as Business Organizations: An Invitation to Comparatists*, 13 DUKE J. COMP. & INT'L L. 321, 322 (2003); Sitkoff, *supra* note 7, at 47–48.

well. As a result, commercial trusts are caught between a rock (in some cases, the Rock of Gibraltar) and a hard place.

Matters relating to the citizenship of a commercial trust are not merely academic. Instead, the question of where a business entity can expect to sue or be sued is often critical to its operational decisions.[27] Indeed, in its "Doing Business" guides to international commerce, the World Bank always "measures the presence of rules that . . . minimize the cost of resolving disputes, increase the predictability of economic interactions and provide contractual partners with core protections against abuse," three criteria that are often associated with distinctions between U.S. state and federal courts.[28] Thus, the Supreme Court's decision in *Americold* is relevant not only to commercial actors in the United States but also to foreign parties considering whether to do business with and in the United States.[29]

Although *Americold* is consistent with the Court's recent efforts to limit federal subject matter jurisdiction,[30] the decision is at odds with Congress's longstanding desire to protect diversity jurisdiction in cases involving complex multijurisdictional disputes that are prone to error and bias if heard in state court.[31] This policy is particularly well-established in matters involving corporations.[32] Given the intricate, (inter)national nature of contemporary commercial trust disputes as well as the extensive similarities between commercial trusts and corporations, it appears appropriate if not necessary for Congress to override the Supreme Court's ruling in *Americold* so as to avoid injury to individual and institutional interests as well as to the U.S. economy as a whole.[33] This Article

27. *See* Oh, *supra* note 4, at 465.

28. WORLD BANK, ABOUT DOING BUSINESS 19 (2016), https://web.archive.org/web/20160430093742/http://www.doingbusiness.org/~/media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB16-Chapters/DB16-About-Doing-Business.pdf; *see also infra* Section III.A (regarding the theoretical justifications for diversity jurisdiction).

29. *See* Americold Realty Tr. v. ConAgra Foods, Inc., 136 S. Ct. 1012, 1016 (2016). Foreign entities or U.S. entities operating abroad are subject to relatively complex and often counterintuitive rules on citizenship. *See* Geraldine Soat Brown, *When Is a Foreigner Diverse? Diversity Jurisdiction in Cases Involving Foreign Citizens and Businesses*, 62 FED. LAW., Jan./Feb. 2015, at 66, 66–70.

30. *See* Cooper & Nielson, *supra* note 13, at 300–04 (discussing various ways that federal courts interpret and apply rules regarding complete diversity so as to restrict access to federal courts).

31. *See* 13E WRIGHT ET AL., *supra* note 13, § 3605; *see infra* notes 363–91 and accompanying text (discussing the Interpleader Act; the Multiparty, Multiforum Trial Jurisdiction Act (also known as the mass-disaster act); and the Class Action Fairness Act).

32. *See* 28 U.S.C. § 1332(c)(1) (2012).

33. *See Americold*, 136 S. Ct. at 1016.

therefore recommends legislative action, consistent with the Court's invitation to Congress in *Americold*.[34]

This Article proceeds as follows. Part I introduces the problem by outlining the Supreme Court's decision in *Americold* and providing a brief introduction to commercial trusts, including the differences between commercial and non-commercial trusts as well as the various types of commercial trusts. This discussion demonstrates the widespread negative effect that *Americold* will have on individuals and institutions as well as the U.S. economy as a whole.

Part II compares commercial trusts and corporations on both a practical and theoretical level and considers whether and to what extent the two types of business organizations can and should be considered analogous for purposes of federal jurisdiction. The procedural analysis becomes more targeted in Part III, which focuses specifically on diversity jurisdiction and commercial trusts. After describing why commercial trusts meet the theoretical rationales for diversity jurisdiction, the discussion identifies a number of practical concerns arising out of the rule in *Americold*, focusing in particular on commercial actors' anticipated efforts to exit the existing dispute resolution regime through arbitration, forum selection clauses, choice of law provisions, place of organization and choice of business form. Each of these alternatives carries a number of risks and negative externalities that Congress may wish to avoid.

Next, Part IV provides a detailed analysis of two possible Congressional responses to *Americold*. One option involves enacting legislation that would extend the rule on corporate citizenship to commercial trusts.[35] In many ways, this appears to be the preferred solution, since it respects the functional and theoretical similarities between corporations and commercial trusts and offers the lower courts a simple and thus predictable rule to follow.[36] Another option involves an exception to the rule requiring complete diversity, similar to that established by Congress in other contexts.[37] Although this approach might require more detailed legislative drafting, it might reflect the

34. *See id.* at 1017. Empirical studies suggest that Congress is highly likely to act if the Supreme Court makes such an invitation. *See* Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1332 fig.1 (2014).

35. *See* 28 U.S.C. § 1332(c)(1).

36. *See* Hertz Corp. v. Friend, 559 U.S. 77, 94 (2010) (noting that "[s]imple jurisdictional rules . . . promote greater predictability"); Hemphill v. Orloff, 277 U.S. 537, 550 (1928) (noting functional equivalence of two business forms); Schwarcz, *supra* note 7, at 560; Sitkoff, *supra* note 7, at 31.

37. *See* 28 U.S.C. § 1332(a); *see also infra* notes 363–91 (discussing complete diversity and the Interpleader Act; the Multiparty, Multiforum Jurisdiction Act; and the Class Action Fairness Act).

preferred policy objective (i.e., minimal diversity rather than complete diversity based on the statutory citizenship of a commercial trust).[38] After considering these proposals, the Conclusion ties together the various strands of argument to conclude the Article.

Before beginning, it is important to note that this Article focuses exclusively on commercial trusts, which were the type of entity at issue in *Americold*.[39] Although some or all of the arguments contained herein may be equally applicable to other types of business organizations (such as partnerships, limited liability companies, benefit corporations and the like), those entities are subject to their own unique jurisprudence and are therefore beyond the scope of the current discussion.[40] However, the widespread support for legislative reform regarding jurisdictional treatment of other types of unincorporated business organizations, including a recent resolution from the American Bar Association in that regard, suggests that the proposals contained herein are both timely and well within the mainstream of American jurisprudence.[41]

It should also be noted that some courts have criticized Congress's failure to address problems relating to the citizenship of unincorporated

38. *See infra* Part IV (discussing possible statutory approach).

39. *See Americold*, 136 S. Ct. at 1014.

40. *See, e.g.*, 28 U.S.C. § 1332; *Hertz Corp.*, 559 U.S. at 85; *see also* Michael E. Chaplin, *Resolving the Principal Place of Business Conundrum: Adopting a Single Test for Federal Diversity Jurisdiction*, 30 REV. LITIG. 75, 98–99 (2010) (discussing questions of corporate citizenship after *Hertz*); Debra R. Cohen, *Limited Liability Company Citizenship: Reconsidering an Illogical and Inconsistent Choice*, 90 MARQ. L. REV. 269, 272–73 (2006) (arguing that limited liability companies should follow the statutory rule of "entity citizenship" similar to corporations, which can be at most a citizen of two states (the state of creation and its principal place of business) rather than the common law rule of "aggregate citizenship," which looks through the organizational form to its individual owners, as in cases involving partnerships); Daniel S. Kleinberger, *The Closely Held Business Through the Entity-Aggregate Prism*, 40 WAKE FOREST L. REV. 827, 829–30 (2005); John H. Matheson & Brent A. Olson, *A Call for a Unified Business Organization Law*, 65 GEO. WASH. L. REV. 1, 2–3 (1996). "Benefit corporations" are a new type of business organization that may or may not fall within the statutory exception to complete diversity. *See* 28 U.S.C. § 1332(c)(1); Dana Brakman Reiser, *Benefit Corporations—A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 591, 592 (2011) (describing benefit corporations as a "hybrid organizational form"). *Compare* Hoagland v. Sandberg, Phoenix & von Gontard, P.C., 385 F.3d 737, 740–44 (7th Cir. 2004) (discussing diversity jurisdiction in cases involving non-business corporations and applying the statutory rule), *with* Nat'l Ass'n of Realtors v. Nat'l Real Estate Ass'n, Inc., 894 F.2d 937, 940 (7th Cir. 1990) (rejecting the statutory rule on diversity and looking to the shareholders as real parties in interest in a case involving a non-profit corporation). For example, some benefit corporations may be public in nature, thereby calling into question whether they can be considered a "citizen" of a state or a state entity. *See* Mich. Dep't of Transp. v. Allstate Painting & Contracting Co., No. 2:08-cv-286, 2009 WL 891702, at *2 (W.D. Mich. Mar. 31, 2009).

41. *See House of Delegates Resolutions: 103B*, A.B.A., http://www.americanbar.org/news/reporter_resources/annual-meeting-2015/house-of-delegates-resolutions/103b.html (last visited June 30, 2017) [hereinafter ABA Resolution 103B].

entities and have called for the Supreme Court to craft some sort of judicial response.[42] While such an effort might have been desirable, it does not appear to be forthcoming in light of the Court's decision in *Americold*.[43] As a result, this Article focuses exclusively on statutory solutions.

I. THE PROBLEM

If Congress is to appreciate the scope of the problem created by *Americold*, it must understand both the decision itself as well as the nature and economic importance of commercial trusts. Both of these issues are addressed in the following Subsections.

A. Americold Realty Trust v. ConAgra Foods, Inc.

The analysis begins with the Supreme Court's decision in *Americold*. The case involved a contract dispute between a number of corporations whose goods were destroyed in a warehouse fire.[44] The warehouse in question was owned by Americold Realty Trust, a real estate investment trust (REIT) formed under Maryland law, and the district court heard the dispute pursuant to its jurisdiction under the diversity statute.[45] However, when the matter came up for appeal, the U.S. Court of Appeals for the Tenth Circuit raised the question of federal subject matter jurisdiction *sua sponte* and held that jurisdiction did not exist under the diversity statute.[46] In so doing, the Tenth Circuit held that "the citizenship of any 'non-corporate artificial entity' is determined by considering all of the entity's 'members,' which include, at minimum, its shareholders."[47] The Supreme Court granted certiorari to resolve a circuit split regarding the citizenship of commercial trusts and affirmed the Tenth Circuit opinion.[48]

When considering this matter, the Supreme Court began by discussing the long and somewhat troubled history of citizenship for legal persons.[49]

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42. *See* Lincoln Benefit Life Co. v. AEI Life, LLC, 800 F.3d 99, 111 (3d Cir. 2015) (Ambro, C.J., concurring) ("As Congress has not accepted the invitation of the Court to craft a workable law of business citizenship, the latter should step into the breach.").

43. *See Americold*, 136 S. Ct. at 1016.

44. *Id.* at 1014.

45. *See id.* at 1014; 28 U.S.C. §§ 1332(a)(1), 1441(b).

46. *Americold*, 136 S. Ct. at 1014.

47. *Id.* at 1015 (quoting ConAgra Foods, Inc. v. Americold Logistics, LLC, 776 F.3d 1175, 1180–81 (10th Cir. 2015)).

48. *See id.*

49. *See id.* Commentators have argued that the lines between corporate and natural personhood are becoming inappropriately blurred. *See* Virginia Harper Ho, *Theories of Corporate Groups: Corporate Identity Reconceived*, 42 SETON HALL L. REV. 879, 891–97 (2012) (discussing theories of corporate personhood); Michalski, *supra* note 2, at 126–27 (discussing corporate personhood in the context of jurisdictional concerns); S.I. Strong, *Religious Rights in*

For example, the Court made an exception for corporations as early as 1844, deeming them to be citizens of the state in which they were incorporated.[50] That rule was subsequently codified by Congress in 1958.[51] However, other artificial entities have continued to be considered citizens of the state(s) of the entity's individual members, despite opposition from courts, commentators, and practitioners.[52]

The question to be resolved in *Americold* involved the definition of the term "members" in the context of a commercial trust.[53] To answer this question, the Supreme Court looked to the law of the state under which the trust was organized, a technique that has been criticized in other contexts on the grounds that "state law should not delineate the limits of federal jurisdictional reach."[54]

According to Maryland law, REITs such as the one at issue in *Americold* involve property that is held and managed "for the benefit and profit of any person who may become a shareholder."[55] As a result, the Supreme Court held that Americold's members were comprised of its various shareholders.[56]

Americold had argued a different proposition, claiming that its citizenship should have been determined pursuant to the Supreme Court's rule in *Navarro Savings Assn. v. Lee*,[57] which was said to suggest that "anything called a 'trust' possesses the citizenship of its trustees alone, not its shareholder beneficiaries as well."[58] However, the Court rejected

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Historical, Theoretical, and International Context: Hobby Lobby *as a Jurisprudential Anomaly?*, 48 VAND. J. TRANSNAT'L L. 813, 820 (2015) (discussing corporate personhood in the context of religious liberties); *see also* CAL. HEALTH & SAFETY CODE § 11022 (West 2016) (defining a "person" as including a business trust). The issue continues to vex the Court. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759 (2014) (providing corporations with religious rights); Mohamad v. Palestinian Auth., 132 S. Ct. 1702, 1705 (2012) (holding only natural persons can be liable under the Torture Victim Protection Act).

50. *See* Louisville, Cincinnati, & Charleston R.R. v. Letson, 43 U.S. (2 How.) 497, 558 (1844), *superseded by statute*, 28 U.S.C. § 1332(c)(1).

51. *See* 28 U.S.C. § 1332(c)(1).

52. *See Americold*, 136 S. Ct. at 1015; Lincoln Benefit Life Co. v. AEI Life, LLC, 800 F.3d 99, 111 (3d Cir. 2015) (Ambro, C.J., concurring); Chaplin, *supra* note 40, at 98–99; Cohen, *supra* note 40, at 272; Kleinberger, *supra* note 40, at 830; Matheson & Olson, *supra* note 40, at 1.

53. *See Americold*, 136 S. Ct. at 1015.

54. Recent Case, *Diversity Jurisdiction—Definition of a Corporation Under 28 U.S.C. § 1332(c)*, 118 HARV. L. REV. 1347, 1347 (2005) (discussing Hoagland v. Sandberg, Phoenix & von Gontard, P.C., 385 F.3d 737 (7th Cir. 2004)); *see also Americold*, 136 S. Ct. at 1015–16.

55. *Americold*, 136 S. Ct. at 1016 (quoting MD. CODE ANN., CORPS. & ASS'NS §§ 8-101(c), 8-102 (West 2016)).

56. *See id.* at 1016. *Americold* did not provide information on the citizenship of its members, so it was impossible for the Supreme Court or any of the lower courts to determine whether complete diversity existed. *Id.* at 1015–16.

57. 446 U.S. 458 (1980).

58. *Americold*, 136 S. Ct. at 1016.

Americold's argument on the grounds that *Navarro* involved situations where a trustee brought suit in his, her, or its individual capacity rather than matters where the trust itself was a party.[59]

The Court also discussed the correlation between "traditional" trusts (i.e., those designed primarily for the intergenerational transfer of personal wealth) and commercial trusts such as the REIT at issue in *Americold*.[60] Americold had argued that the longstanding jurisdictional rule applicable to trusts (i.e., that the citizenship of the trust can and should be equated with the citizenship of the trustee, not the beneficiaries) should apply even to commercial trusts.[61] However, the Court believed that, at their core, traditional trusts constituted little more than a fiduciary relationship that could not be made an independent party to a lawsuit, which justified a rule deeming the citizenship of the trust to be the same as the citizenship of the trustee.[62] However, the Court found that "[m]any States . . . have applied the 'trust' label to a variety of unincorporated entities that have little in common with this traditional template."[63] The various discrepancies between commercial and non-commercial trusts[64] led the Court to adopt a bright line rule holding that "[s]o long as such an entity is unincorporated, this Court will apply our 'oft-repeated rule' that it possesses the citizenship of all its members."[65]

Although the Court's decision in *Americold* was unanimous, there are signs that the Justices believed the holding was incorrect as a matter of policy, even if the outcome was appropriate as a matter of law, and that the Justices would therefore support a Congressional override.[66] For example, the Court specifically cited an earlier decision, *Carden v. Arkoma Associates*,[67] which recognized that a similar rule from 1990 involving the citizenship of partnerships could "validly be characterized as technical, precedent-bound, and unresponsive to policy considerations raised by the changing realities of business organization."[68] The Court in *Americold* then stated that "[t]hen as now we reaffirm that it is up to

59. *Id.* In traditional trusts, a trust cannot sue or be sued in its own name; instead, suit must be brought by or against the trustees. *See* Rutledge & Schaefer, *supra* note 12, at 90–91.

60. *Americold*, 136 S. Ct. at 1016.

61. *Id.*

62. *Id.*

63. *Id.*

64. The differences are indeed significant. *See infra* Subsection I.B.1.

65. *Americold*, 136 S. Ct. at 1016 (quoting Carden v. Arkoma Assoc., 494 U.S. 185, 195 (1990)).

66. *See id.* at 1017.

67. 494 U.S. 185 (1990).

68. *Id.* at 196; Cooper & Nielson, *supra* note 13, at 303 (discussing rules regarding limited partnerships and limited liability corporations).

Congress if it wishes to incorporate other entities into 28 U.S.C. § 1332(c)'s special jurisdictional rule."[69]

Congress is not insensitive to the need for statutory overrides of Supreme Court decisions and has enacted such legislation on a variety of occasions.[70] This Article therefore recommends that Congress adopt provisions to allow commercial trust disputes to be heard in federal court, either by treating commercial trusts the same as corporations when it comes to matters relating to citizenship or by eliminating the need for complete diversity.[71]

B. *Commercial Trusts*

If Congress is to appreciate the need for action, it must understand the nature and scope of commercial trusts. In some ways, this may be a difficult task, since commentators universally agree that commercial trusts "are a woefully under-analyzed and underappreciated form of business organization," even though these devices are "critically important" to the national and international corporate communities.[72]

To some extent, it is unclear why commercial trusts have been ignored in this manner. One reason may be that the complexity and diversity of contemporary commercial trusts makes any sort of generalized analysis difficult, if not impossible.[73] Some scholars may be put off by the challenges associated with researching commercial trusts[74] or by the fact that trusts are governed almost entirely by state rather than federal law.[75] However, the most logical explanation derives from commercial trusts' interstitial nature.[76] Although the vast majority of assets held in trust today are in commercial rather than traditional trusts, most specialists in trust law focus on trusts created for estate planning purposes.[77]

69. *Americold*, 136 S. Ct. at 1017.

70. *See* Christiansen & Eskridge, *supra* note 34, at 1409–13 (discussing various overrides). *But see* Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 NEV. L.J. 1559, 1594 (2015) (suggesting Congress is less likely to override the Supreme Court in certain types of cases).

71. *See infra* Part IV.

72. Miller, *supra* note 7, at 444.

73. *See infra* Subsection I.B.2 (discussing the types and nature of commercial trusts).

74. *See* Sitkoff, *supra* note 7, at 39 (remarking on the "puzzling experience" of finding only a single reported decision under the Delaware business trust statute, despite the fact that trillions of dollars are held in statutory commercial trusts).

75. *See* Rutledge & Habbart, *supra* note 15, at 1055.

76. *See* Sitkoff, *supra* note 7, at 34.

77. *See, e.g.*, Langbein, *supra* note 8, at 166. This phenomenon is true both in academia and in practice. *See* S.I. Strong, *Global Developments in Trust Arbitration*, *in* ARBITRATION OF TRUST DISPUTES: ISSUES IN NATIONAL AND INTERNATIONAL LAW 3, 4 n.4 (S.I. Strong ed., 2016) (noting large law firms house trust specialists in their estates practice, although commercial trusts generally fall within the domain of the corporate department).

Unfortunately, the lacuna is not filled by the commercial law community, since practitioners and scholars in that field concentrate largely on corporations and unincorporated business forms such as limited liability companies (LLCs) and partnerships.[78] As a result, it is necessary to provide a brief primer on commercial trusts to provide the foundation for the arguments made elsewhere in this Article.[79]

1. Commercial Versus Non-Commercial Trusts

Although the Supreme Court downplayed the similarities between commercial trusts and traditional trusts in *Americold*, the two mechanisms do resemble one another in some regards.[80] For example, commercial and non-commercial trusts both separate legal and beneficial ownership of a particular asset,[81] with the trustee holding legal title to the

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78. *See* Sitkoff, *supra* note 7, at 33 (noting "domestic business law scholars have a stunning lack of familiarity with the business trust"). Many practitioners are similarly uninformed. *See* Rutledge & Habbart, *supra* note 15, at 1059.

79. This summary is necessary because many lawyers' only reference for trusts is in law school classes on estate planning. *See* S.I. Strong, *Arbitration of Trust Disputes: Two Bodies of Law Collide*, 45 VAND. J. TRANSNAT'L L. 1157, 1168–69 (2012).

80. Americold Realty Tr. v. ConAgra Foods, Inc., 136 S. Ct. 1012, 1016 (2016).

81. *See* John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 632–43, 669–71 (1995); *see also* DAVID HAYTON ET AL., UNDERHILL AND HAYTON: LAW RELATING TO TRUSTS AND TRUSTEES ¶ 1.95 (David Hayton ed., 18th ed. 2010); WILLIAM M. MCGOVERN ET AL., WILLS, TRUSTS AND ESTATES: INCLUDING TAXATION AND FUTURE INTERESTS 369 (4th ed. 2010) ("The word 'trust' is used for many property arrangements that have little in common with each other apart from the fact that they were historically enforced . . . in the Court of Equity . . . ."). One internationally recognized set of criteria states that

> the term "trust" refers to the legal relationships created—*inter vivos* or on death—by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.
>
> A trust has the following characteristics—
>
> *a)* the assets constitute a separate fund and are not a part of the trustee's own estate;
>
> *b)* title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee;
>
> *c)* the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.
>
> The reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust.

property for the benefit of the beneficiary, who holds equitable title to the property.[82] The person who creates and funds the trust is known as the settlor.[83] Both commercial and non-commercial trusts contemplate the possibility that there may be more than one person in each role (for example, there may be multiple settlors, multiple trustees, or multiple beneficiaries).[84] Furthermore, the same person may act in multiple roles (for example, a settlor may also be a trustee, and a trustee may also be a beneficiary) so long as there is not an identity between a single trustee and a single beneficiary.[85]

Commercial and non-commercial trusts both give rise to two different types of disputes: (1) external (third-party) disputes that involve relationships with non-parties to the trust and (2) internal disputes that address matters relating to the inner workings of the trust and involving conflicts between some or all of the various parties to the trust.[86] Of the two types, internal disputes are by far the more common.[87] Unfortunately, these are precisely the types of disputes that are most at risk of falling under the rule in *Americold* and thus being barred from federal court.[88] Furthermore, reports suggest that hostile trust litigation is reaching "near epidemic" levels, meaning that the judiciary can expect to see more of these types of disputes in the coming years.[89]

Convention on the Law Applicable to Trusts and on Their Recognition art. 2, July 1, 1985, 23 I.L.M. 1389 (1984) [hereinafter Hague Convention on Trusts].

82. *See* MCGOVERN ET AL., *supra* note 81, at 370; Langbein, *supra* note 81, at 632. *But see* Rutledge & Schaefer, *supra* note 12, at 102 (noting some types of commercial trusts vest the title to trust property in the trust as a legal entity). The various roles may be altered somewhat in some statutory business trusts.

83. *See* Hague Convention on Trusts, *supra* note 81, art. 2; MCGOVERN ET AL., *supra* note 81, at 370.

84. *See* MCGOVERN ET AL., *supra* note 81, at 374–81.

85. *See* RESTATEMENT (THIRD) OF TRUSTS § 69 cmt. c (AM. LAW INST. 2001) (discussing merger).

86. *See* HAYTON ET AL., *supra* note 81, ¶¶ 8.157–.167; Langbein, *supra* note 81, at 664. Different commentators define internal and external trust disputes differently. *See* Paul Buckle & Carey Olsen, *Trust Disputes and ADR*, 14 TR. & TRUSTEES 649, 651 (2008); Tina Wüstemann, *Arbitration of Trust Disputes*, *in* NEW DEVELOPMENTS IN INTERNATIONAL COMMERCIAL ARBITRATION 2007, at 33, 38 (Christoph Müller ed., 2007).

87. *See* Michael Hwang, *Arbitration for Trust Disputes*, *in* GUIDE TO THE WORLD'S LEADING EXPERTS IN COMMERCIAL ARBITRATION 83, 83 (2009).

88. Internal disputes typically proceed *in rem* and therefore require participation of all beneficiaries, which can number in the hundreds of thousands. *See infra* Subsection I.B.2. External disputes would likely fall under the rule in *Navarro*, although the future applicability of that case to commercial trusts is somewhat in doubt. *See* Navarro Sav. Ass'n. v. Lee, 446 U.S. 458, 465–66 (1980); *see also supra* notes 58–59 and accompanying text.

89. Lawrence Cohen & Marcus Staff, *The Arbitration of Trust Disputes*, 7 J. INT'L TR. & CORP. PLAN. 203, 203 (1999).

Commentators sometimes seek to distinguish commercial and non-commercial trusts on the grounds that many commercial trusts are statutory in nature.[90] However, that issue is not as important as it may initially appear, since many commercial trusts, including the well-known Massachusetts business trust, are created by private agreements in the form of trust deeds or declarations of trust rather than by compliance with statutory or regulatory formalities.[91] As a result, many of the key legal principles relating to commercial trusts are found in the common law rather than in statutes.[92] This phenomenon has led Professor Robert Sitkoff to suggest that there are significant differences between so-called "common-law business trusts" and "statutory business trusts."[93]

Most issues involving the administration of commercial trusts are decided under the same principles that apply to non-commercial trusts.[94] Commercial and non-commercial trusts are also both governed primarily by state rather than federal law,[95] with relatively little harmonization

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90. Twenty-two states have enacted statutes dealing with business trusts. *See* ALA. CODE §§ 19-3-60 to -66 (2016); ARIZ. REV. STAT. ANN. §§ 10-1871 to -1879 (2016); DEL. CODE ANN. tit. 12, §§ 3801–3826 (2016); FLA. STAT. ANN. §§ 609.01–.08 (West 2016); IND. CODE ANN. §§ 23-5-1-1 to -11 (West 2016); KAN. STAT. ANN. §§ 17-2027 to -2038 (West 2016); KY. REV. STAT. ANN. §§ 386.370–.440 (West 2016); MASS. GEN. LAWS ANN. ch. 182, §§ 1–14 (West 2016); MINN. STAT. ANN. §§ 318.01–.06 (West 2016); MONT. CODE ANN. §§ 35-5-101 to -205 (West 2016); N.Y. GEN. ASS'NS LAW §§ 1–19-a (McKinney 2016); N.C. GEN. STAT. ANN. §§ 39-44 to -47 (West 2016); OHIO REV. CODE ANN. §§ 1746.01–.99 (West 2016); OKLA. STAT. ANN. tit. 60, §§ 171–174 (2016); OR. REV. STAT. ANN. §§ 128.560–.600 (West 2016); S.C. CODE ANN. §§ 33-53-10 to -50 (2016); S.D. CODIFIED LAWS §§ 47-14A-1 to -96 (2016); TENN. CODE ANN. §§ 48-101-201 to -207 (West 2016); TEX. REV. CIV. STAT. ANN. arts. 6133–6138 (West 2015); WASH. REV. CODE ANN. §§ 23.90.010–.060 (West 2016); W. VA. CODE ANN. §§ 47-9A-1 to -7 (West 2016); WIS. STAT. ANN. § 226.14 (West 2016); *see also* MYRON KOVE ET AL., BOGERT'S TRUSTS AND TRUSTEES § 247 (2016); Sitkoff, *supra* note 7, at 35–36 (noting some difficulties in estimating the proper number of statutes on business trusts and placing the number in 2005 between seventeen and thirty-four).

91. *See* 1 JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 1:15 (database updated Dec. 2016); Rutledge & Habbart, *supra* note 15, at 1055.

92. *See* Rutledge & Habbart, *supra* note 15, at 1059; Sitkoff, *supra* note 7, at 38.

93. Sitkoff, *supra* note 7, at 32–33.

94. *See* KOVE ET AL., *supra* note 90, § 247; Rutledge & Habbart, *supra* note 15, at 1066. Some states, such as Arizona, provide that business trusts are construed pursuant to principles of corporation law. *See* ARIZ. REV. STAT. ANN. § 10-1879 (2016).

95. *See* Sitkoff, *supra* note 7, at 42 (questioning whether state law is the dominant factor in commercial trust law). Federal law primarily comes into play in the area of tax laws, blue sky laws, and the Bankruptcy Code. *See* 11 U.S.C. § 101(9)(A)(v) (2012); Treas. Reg. § 301-7701-4(a) (2016); *see also* Treas. Reg. § 301.7701-2(a) (reflecting the "check-the-box regulation" that allows commercial trusts to choose whether to be taxed as a corporation or a partnership for purposes of the federal tax purposes); KOVE ET AL., *supra* note 90, §§ 247, 270.40. Federal law also requires employee pension funds to adopt the trust form. *See* Sitkoff, *supra* note 7, at 34. Constitutional issues occasionally come into play. *See* Hemphill v. Orloff, 277 U.S. 537, 550 (1928) (upholding the constitutionality of state legislation requiring foreign commercial trusts to

across state lines.[96]

As important as these similarities are, there are numerous ways that commercial trusts differ from traditional trusts. Perhaps the most important difference involves the purpose of the trust. Although commercial trusts operate under a variety of names (such as business trusts, Massachusetts trusts, or statutory trusts, depending on the context),[97] all typically "implement[] bargained-for exchange, in contrast to a donative transfer," which is the primary motivation for trusts created to pass on personal or family wealth.[98] Thus, "the settlor in a gratuitous [non-commercial] trust receives no compensation for the conveyance whereas the settlor in a commercial trust—typically a corporation or financial institution—always receives payment for the assets conveyed to the trust."[99] Furthermore, "[i]n ordinary trusts the settlor is seldom also the sole or principal beneficiary; in business trusts the trust res consists of property originally contributed by the beneficiaries themselves."[100]

Together, these factors demonstrate that commercial trusts are created for business rather than donative purposes.[101] However, the business activities associated with a commercial trust do not need to be either active or extensive in nature.[102] Furthermore, commercial trusts do not necessarily have to include the word "trust" in their name and may instead

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"qualify" before doing business in a particular state and distinguishing commercial trusts from traditional trusts to the extent that commercial trusts are "clothed with the ordinary functions and attributes of a corporation").

96. *See* KOVE ET AL., *supra* note 90, § 247 (referring to statutory investment trusts and subdivision and land trusts); Rutledge & Habbart, *supra* note 15, at 1055; *see also* Robert J. D'Agostino, *The Business Trust and Bankruptcy Remoteness*, 2011 NORTON ANN. SURV. BANKR. L. 4. The Uniform Law Commission has made some attempts to harmonize the law in this area. *See Acts: Statutory Trust Entity Act*, UNIFORM L. COMMISSION, http://www.uniformlaws.org/Act.aspx?title=Statutory%20Trust%20Entity%20Act (last visited Mar. 21, 2017) [hereinafter *USTEA*]. However, the USTEA has only been adopted in two jurisdictions (Kentucky and the District of Columbia). *See id.*

97. *See* 1 COX & HAZEN, *supra* note 91, § 1:15.

98. Langbein, *supra* note 8, at 166–67. For examples of how commercial trusts operate, see Mark Kantor, *The Use of Trusts in Financing Transactions: Special Issues Relating to Arbitration of Commercial Trusts*, *in* ARBITRATION OF TRUST DISPUTES: ISSUES IN NATIONAL AND INTERNATIONAL LAW, *supra* note 77, at 15, 16–25 (discussing trusts in the context of bond indentures, securitizations, lease financings and mutual funds); Schwarcz, *supra* note 26, at 326.

99. Schwarcz, *supra* note 7, at 562 (footnote omitted).

100. KOVE ET AL., *supra* note 90, § 247.

101. *See id.*; Sitkoff, *supra* note 7, at 38–39. For this reason, some authorities exclude commercial trusts from their analyses. For example, the *Restatement (Third) of Trusts* excludes business trusts from consideration and focuses solely on donative trusts. *See* RESTATEMENT (THIRD) OF TRUSTS § 1 cmt. b ("Although many rules of trust law also apply to business and investment trusts, many of these rules do not . . . . [T]he business trust is a business arrangement that can best be dealt with in connection with business associations . . . .").

102. KOVE ET AL., *supra* note 90, § 247.

use terms (such as "company," "association," or "limited") that could be used to describe other types of business organizations.[103]

This is not to say that non-commercial trusts cannot have certain business-oriented goals. For example, commercial and non-commercial trusts both provide protection from insolvency and some forms of taxation while also creating a fiduciary regime that requires the application of fiduciary duties such as loyalty and prudence.[104] Furthermore, a trust can operate a business without being considered a commercial trust.[105] This distinction has been recognized by the Internal Revenue Service, which differentiates between "ordinary trusts," which have as their purpose the protection and conservation of property for the benefit of the beneficiaries pursuant to the standard rules of probate or chancery, and trusts that are formed for the purpose of making a profit through the use of the combined capital of various investors.[106]

Although commercial trusts have a business purpose, parties frequently adopt the commercial trust form to take advantage of the structural flexibility inherent in trusts and create relationships or procedures that might be difficult or impossible to achieve if the venture were organized as a corporation, particularly with respect to "matters of internal governance and . . . the creation of beneficial interests."[107] "Transaction planners designing asset securitization trusts especially welcome the freedom to carve beneficial interests without regard to traditional classes of corporate shares," creating a wide range of "so-called tranches, each embodied in its own class of trust security."[108] Interest in commercial trusts has grown exponentially in recent years due to the increased liberalization of laws regarding the use and creation of such devices.[109]

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103. *See* DEL. CODE ANN. tit. 12, § 3814(c) (West 2016); KY. REV. STAT. ANN. § 14A.3-010(15) (West 2016); VA. CODE ANN. § 13.1-1214(A) (West 2016); Rutledge & Habbart, *supra* note 15, at 1065. *But see* CONN. GEN. STAT. ANN. § 34-506(c) (West 2016). This may be one of the reasons why researchers have so many difficulties identifying commercial trusts. *See supra* note 90 and accompanying text.

104. *See* Langbein, *supra* note 8, at 179–83, 189.

105. *See* COX & HAZEN, *supra* note 91, § 1:15; Rutledge & Habbart, *supra* note 15, at 1099. Some authorities suggest that "[w]here a part or all of the trust property consists of a business but no certificates of interest are issued the trust is not technically a business trust." *See* KOVE ET AL., *supra* note 90, § 247 n.25; *see also id.* §§ 571–79.

106. *See* Treas. Reg. § 301-7701-4(a) (2016).

107. Langbein, *supra* note 8, at 183.

108. *Id.* at 183 n.109 ("A tranche is simply a slice of a deal, a payment stream whose expected return increases with its riskiness.").

109. *See USTEA*, *supra* note 96; Gerardo J. Bosques-Hernández, *Arbitration Clauses in Trusts: The U.S. Developments and a Comparative Perspective*, 3 REVISTA PARA EL ANALISIS DEL DERECHO (INDRET) 1, 20 (2008); Dante Figueroa, *Civil Trusts in Latin America: Is the Lack of Trusts an Impediment for Expanding Business Opportunities in Latin America?*, 24 ARIZ. J. INT'L

Commercial and non-commercial trusts reflect other key differences.[110] For example, some types of commercial trusts vest the title to trust property in the trust as a legal entity, rather than in the trustees, as is the case with traditional trusts.[111] Furthermore, many commercial trusts are now able to sue and be sued in their own name.[112] However, this latter issue can become problematic, since Rule 17(b)(3) of the Federal Rules of Civil Procedure indicates that the ability of an unincorporated entity to sue in its own name is determined pursuant to the law of the state where the court is located.[113] Since commercial trusts often cannot know in advance where they will be sued, they cannot anticipate whether and to what extent they will be able to sue or be sued in their own name.[114] This approach differs from Rule 17(b)(2) relating to corporations, which indicates that the ability to sue or be sued is determined by the law of the state of incorporation.[115] Of course, if the rule in *Americold* is allowed to stand, many commercial trusts will not be able to sue or be sued in federal court, which eliminates concerns about Rule 17(b)(3).[116]

Other differences exist between commercial and non-commercial trusts. For example, commercial trusts typically refer to beneficiaries as "shareholders" or "members" and allow for the free transfer of beneficial interests in the trust, often through the issuance of certificates.[117] Commercial trusts also give beneficiaries the ability to elect, remove, or control the various trustees and amend the terms of the trust, something that is difficult or impossible with traditional trusts, at least without settlor consent.[118] Differences also exist with respect to the residual interest in

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& COMP. L. 701, 721–39 (2007); Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 359–64 (2005).

110. *See* Sitkoff, *supra* note 7, at 37–38 (noting the potential "mismatch between traditional trust law . . . and the exigencies of enterprise organization").

111. *See* Rutledge & Schaefer, *supra* note 12, at 103.

112. *See* FED. R. CIV. P. 17(b)(3).

113. *See* FED. R. CIV. P. 17(b)(3); *see also* Recent Case, *supra* note 54, at 1347 (discussing *Hoagland v. Sandberg, Phoenix & von Gotard, P.C.*, 385 F.3d 737 (7th Cir. 2004), and arguing that "state law should not delineate the limits of federal jurisdictional reach").

114. Commercial trusts could attempt to override this policy through a choice of law or choice of forum provision, but such clauses would likely be unable to cover all issues and all potential parties. *See infra* Subsection III.B.2 and accompanying text.

115. *See* FED. R. CIV. P. 17(b)(2).

116. *See* Americold Realty Tr. v. ConAgra Foods, Inc., 136 S. Ct. 1012, 1017 (2016); FED. R. CIV. P. 17(b)(3).

117. *See* Jonathan J. Ossip, Note, *Diversity Jurisdiction and Trusts*, 89 N.Y.U. L. REV. 2301, 2333–34 (2014).

118. *See* Thales Alenia Space France v. Thermo Funding Co., 989 F. Supp. 2d 287, 296 (S.D.N.Y. 2013); Ossip, *supra* note 117, at 2334.

the corpus of the trust.[119] For example, a settlor in a commercial trust "almost always retains a residual interest in trust assets that remain once the business transaction is concluded" while a settlor in a traditional trust may or may not do so.[120] Commercial trusts may also feature centralized management, perpetual existence, and state registration requirements that are not seen with traditional trusts.[121]

2. Types of Commercial Trusts

If Congress is to appreciate the scope of the problem created by *Americold*, then it must understand the role that commercial trusts play in the economic life of the nation.[122] Commercial trusts currently reflect a significant proportion of the trusts currently in operation in the United States. Indeed, "well over 90% of the money held in trust in the United States" in recent years has been held "in commercial trusts as opposed to personal trusts."[123] As a result, numerous commentators have concluded that "the role of trusts in intrafamily wealth transfers is today 'relatively trivial,'" particularly when compared to the "enormously important" role of trusts in the business context.[124]

While the following discussion does not attempt to provide a comprehensive list of all commercial trusts now in existence, it nevertheless illustrates how pervasive these instruments now are in the U.S. and global economies.[125] Furthermore, new forms of commercial

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119. *See infra* notes 166–67 and accompanying text (regarding differences between corporations and commercial trusts with respect to residual interests).

120. Schwarcz, *supra* note 7, at 562.

121. *See Thales*, 989 F. Supp. 2d at 296.

122. Some commentators distinguish between statutory trusts and commercial trusts, but that level of detail does not appear necessary here. *See* Rutledge & Schaefer, *supra* note 12, at 93–94 (discussing the USTEA); *see also* Schwarcz, *supra* note 7, at 564–72 (discussing and distinguishing various types of commercial trusts, including trusts used as special purpose vehicles (SPVs), trusts used for diversifying lending risk, master trusts, business trusts, trust indentures, deeds of trust, mutual funds, and REITs).

123. Langbein, *supra* note 8, at 166–67, 178 (citing figures from mid- to late-1990s). Commercial trusts have also become increasingly popular outside the United States. *See id.* at 166; *see also* HAYTON ET AL., *supra* note 81, ¶¶ 1.97–1.138; Figueroa, *supra* note 109, at 740–51; Hansmann & Mattei, *supra* note 26, at 434–35.

124. Henry Christensen III, *Foreign Trusts and Alternative Vehicles*, ALI CLE EST. PLAN. COURSE MATERIALS J., Dec. 2014, at 29, 30.

125. *See* KOVE ET AL., *supra* note 90, § 247 (describing some types and uses of commercial trusts). For a list of the various types of trusts recognized by the U.S. Internal Revenue Code, see Christensen, *supra* note 124, at 31 (listing nineteen separate categories of trusts). For a brief history of the development of the commercial trust from the nineteenth century to the present, see Peter B. Oh, *Business Trusts*, *in* RESEARCH HANDBOOK ON PARTNERSHIPS, LLCS AND ALTERNATIVE FORMS OF BUSINESS ORGANIZATIONS 268, 269–73 (Robert W. Hillman & Mark J. Lowenstein eds., 2015); Rutledge & Schaefer, *supra* note 12, at 86–92.

trusts are being developed all the time.[126]

Some commentators, most notably Professor Steven Schwarcz, have attempted to provide a taxonomy of commercial trusts that relies on two different attributes: "the 'type' of trust," which focuses on particular labels given to the trust in question, and "the business use to which the trust has been placed."[127] Both methods "are needed because there is sometimes an imprecise correlation between labels and functions: certain entities called trusts are not trusts, and other entities may be trusts even though they do not go by that name."[128]

The first and perhaps most important type of commercial trust is the pension trust, which arises out of contracts of employment and provides employees with the ability to defer some of their compensation until retirement.[129] Although pension trusts include a private contribution element, the trusts themselves are often statutory in nature pursuant to the Employee Retirement Income Security Act of 1974 (ERISA),[130] which indicates that "all assets of an employee benefit plan shall be held in trust."[131]

The amount of pension assets under management in the United States was over $24 trillion in 2014,[132] with similarly significant amounts held

126. For example, New Zealand has recently developed the "trading trust," which is distinguishable from unit or investment trusts. *See* L. COMMISSION (N.Z.), COURT JURISDICTION, TRADING TRUSTS AND OTHER ISSUES: REVIEW OF THE LAW OF TRUSTS: REVIEW OF THE LAW OF TRUSTS FIFTH ISSUES PAPER 66–67 (2011), http://www.lawcom.govt.nz/project/review-law-trusts?quicktabs_23=issues_paper.

127. Schwarcz, *supra* note 7, at 563–64.

128. *Id.* at 564.

129. *See* HAYTON ET AL., *supra* note 81, ¶ 1.127; Langbein, *supra* note 8, at 168–69.

130. Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 26 and 29 U.S.C.).

131. 29 U.S.C. § 1103(a) (2012). The United Kingdom recognizes a related type of statutory trust known as the employee trust, which is not tied to retirement but which instead provides certain tax-related and other benefits to current employees. *See* Pensions Act 1995, c. 26, § 124(1)–(2) (UK), http://www.legislation.gov.uk/ukpga/1995/26/contents/enacted. To the extent a pension trust dispute is governed by federal law, it would not have to rely on diversity jurisdiction to establish federal subject matter jurisdiction and would thus be exempt from concerns arising out of *Americold*. *See* Americold Realty Tr. v. ConAgra Foods, Inc., 136 S. Ct. 1012, 1014 (2016). *But see* RTP LLC v. ORIX Real Estate Capital, Inc., 827 F.3d 689, 691–92 (7th Cir. 2016) (applying *Americold* in a dispute involving a pension trust).

132. *See* ORGANISATION FOR ECON. CO-OPERATION & DEV., PENSION MARKETS IN FOCUS 7 (2015), http://www.oecd.org/finance/private-pensions/globalpensionstatistics.htm [hereinafter OECD, PENSION MARKETS]; *see also id.* at 7, 16 (noting diverse make-up of pension funds); Langbein, *supra* note 8, at 168–69 (noting in 1997 that private pension plans held assets in the realm of $3 trillion, with state and federal plans for governmental employees holding an additional $1.6 trillion in assets, primarily in trust form). While recent market vicissitudes have changed the amount held in private and public pension plans since the late 1990s, the amount in question is

in trust in other countries.[133] Although these numbers are impressive on their own, their importance becomes even clearer when one considers that in 2015 the market value of the publicly listed U.S. domestic stock market was approximately $25.067 trillion.[134] Pension trusts can have thousands of participants, as illustrated by the Steelworkers Pension Trust, which has over 500 participating employers and more than 112,000 participants, including active, retired, and terminated (vested) employees.[135]

Another kind of commercial trust is the investment or unit trust.[136] These types of devices are often international in nature and also control a staggering amount of money.[137] For example, in 2014, the largest British investment trust by assets (Alliance Trust) managed £3.2 billion in assets reflecting a global portfolio, with 46% of its holdings in North America.[138] American investment trusts operate on a similar scale, with

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nevertheless vast. *See* Younkyun Park, *Employee Benefit Research Institute*, NOTES, Apr. 2009, at 1, 2.

133. *See* OECD, PENSION MARKETS, *supra* note 132, at 7 (noting assets of private pension in OECD countries was in excess of $38 trillion in 2014). OPTrust, a Canadian pension plan, manages $19 billion in assets. *See About OPTrust*, OPTRUST, http://www.optrust.com/aboutoptrust/default.asp (last visited Mar. 22, 2017). The 1,000 largest U.S. retirement plans held assets of approximately $8.84 trillion in 2015. *See* James Comtois, *Assets of Largest Retirement Funds Tumble 2.3% For Year*, PENSIONS & INV. (Feb. 8, 2016), http://www.pionline.com/article/20160208/PRINT/302089971/assets-of-largest-retirement-funds-tumble-23-for-year. In early 2016, Japan's Government Pension Investment Fund, said to be the world's largest pension fund, reported a loss in excess of $50 billion, demonstrating the magnitude of these types of business entities as well as the public policy implications. *See* Robin Harding, *Japan Pension Fund Loses $50bn*, FIN. TIMES (July 29, 2016), https://www.ft.com/content/9138aba6-555b-11e6-befd-2fc0c26b3c60?mhq5j=e3 (noting the portfolio included domestic and international holdings).

134. *See Market Capitalization of Listed Domestic Companies (Current US$)*, WORLD BANK, http://data.worldbank.org/indicator/CM.MKT.LCAP.CD?end=2014&locations=US (last visited June 30, 2017).

135. *See* STEELWORKERS PENSION TR., http://www.steelworkerspension.com/. OPTrust, a Canadian pension plan, has approximately 90,000 members and retirees. *See About OPTrust*, *supra* note 133.

136. The term "investment trust" is more common in the United States, with the term "unit trust" being used in England. *See* HAYTON ET AL., *supra* note 81, ¶ 1.122; Langbein, *supra* note 8, at 170. For a brief description of the differences between unit and investment trusts, see Faith Glasgow, *10 Things You Need to Know About Investment Trusts*, MONEYWISE (May 19, 2011), http://www.moneywise.co.uk/investing/funds/10-things-you-need-to-know-about-investment-trusts.

137. *See* Bosques-Hernández, *supra* note 109, at 20.

138. *See* Marc Shoffman, *Top 20 Most Watched Investment Trusts: Investors Attracted to "Dividend Heroes"—and Size Isn't Everything*, THIS IS MONEY.CO.UK (Apr. 16, 2014), http://www.thisismoney.co.uk/money/investing/article-2604385/Most-viewed-investment-trusts-revealed-performed.html.

one industry member calculating the assets held by 181 providers of collective investment trusts to be approximately $2 trillion.[139]

Investment and unit trusts include a number of well-known types of commercial instruments, including mutual funds,[140] REITs, which were the type of instrument seen in *Americold*,[141] oil and gas royalty trusts,[142] and asset securitization trusts.[143] Some of these types of trusts (such as asset securitization trusts) may not involve a large number of shareholders and may not be unduly affected by the decision in *Americold*.[144] However, other types of investment or unit trusts feature

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139. *See* COALITION COLLECTIVE INV. TR., COLLECTIVE INVESTMENT TRUSTS 13 (2015), http://www.ctfcoalition.com/portalresource/CollectiveInvestmentTrustsWhitePaper.pdf (estimated as of the fourth quarter of 2013); *see also* Kevin Mahn, *Why Unit Investment Trusts Can Be a Good Investment Alternative*, FORBES (Apr. 22, 2013), http://www.forbes.com/sites/advisor/2013/04/22/why-unit-investment-trusts-can-be-a-good-investment-alternative/#3e950c8361ec ("According to the Investment Company Institute (ICI), data on the market value of unit investment trusts (UITs) issued and outstanding as of year-end 2012 indicates a total of 5,787 trusts with a value of $71.73 billion.").

140. Sitkoff, *supra* note 7, at 34 ("[M]ore than half of all mutual funds are organized as trusts.") These are known as collective investment schemes in England. *See* HAYTON ET AL., *supra* note 81, ¶ 1.122.

141. *See* Americold Realty Tr. v. ConAgra Foods, Inc., 136 S. Ct. 1012, 1014 (2016). REITs are mutual funds that invest in real property or in mortgages on real property. *See* Langbein, *supra* note 8, at 171 (noting that in 1997, U.S.-based REITs held over $98 billion in assets). Interestingly, calls have been made to reduce, rather than increase, the regulation of REITs in the wake of the recent financial crisis, thereby showing the level of legislative support for these types of investment vehicles. *See* Bruce Arthur, *Housing and Economic Recovery Act of 2008*, 46 HARV. J. LEGIS. 585, 589 (2009).

142. Langbein, *supra* note 8, at 171. These types of trusts are often created by oil corporations that want a vehicle to hold legal title to certain oil-producing properties while dispensing beneficial assets to corporate shareholders. *Id.* The trust interests can be sold, and several of the larger oil-royalty trusts are publicly traded. *See id.* at 171–72. Trusts relating to royalties from intellectual property are also possible. *See* HAYTON ET AL., *supra* note 81, ¶ 1.135.

143. *See* Kantor, *supra* note 98, at 20–22. In this form of trust, banks or other financial entities, often called originators or packagers, buy a type of debt (such as credit card receivables), "but then transfer[] [the debt] in trust to a separate trustee. Shares in that trust are sold to various participating investors, who, under the new scheme, are not lenders to the bank but share owners in the trust." Langbein, *supra* note 8, at 172. Changes have been made to the specific rules regarding these types of investment vehicles in the wake of the recent financial crisis, but the concept remains viable. *See* Giacomo Rojas Elgueta, *Divergences and Convergences of Common Law and Civil Law Traditions on Asset Partitioning: A Functional Analysis*, 12 U. PA. J. BUS. L. 517, 527–54 (2010); Peter A. Furci, *U.S. Trade or Business Implications of Distressed-Debt Investing*, 63 TAX LAW. 527, 537 (2010) (discussing U.S. regulations under the now-repealed Financial Asset Securitization Investment Trust (FASIT)); Grace Soyon Lee, *What's in a Name?: The Role of* Danielson *in the Taxation of Credit Card Securitizations*, 62 BAYLOR L. REV. 110, 126 n.82 (2010) (noting FASITs were repealed in 2004 but recognizing the continued use of similar devices).

144. *See Americold*, 136 S. Ct. at 1012 (holding that a trust's members included its shareholders for purposes of diversity jurisdiction). Indeed, many commercial trusts operate very

large numbers of geographically diverse shareholders. For example, the Internal Revenue Code requires any entity seeking to be classified as a REIT to have at least one hundred beneficial owners.[145] Some publicly traded REITs far exceed this minimum and offer millions of shares for individual or institutional purchase.[146] The amount of money involved in these instruments is impressive. For example, as of August 31, 2016, "there were 189 REITs listed on the New York Stock Exchange" with "a combined equity market capitalization of $986 billion."[147]

A third kind of commercial trust involves trusts relating to the issuance of bonds.[148] In the United States, such trusts arise under the Trust Indenture Act,[149] which requires "most debt securities issued in the United States . . . to provide for the services of a corporate fiduciary to act as trustee for the bondholders or other obligees."[150]

Trusts created under the Trust Indenture Act reflect certain unusual qualities.[151] For example, trustees under bond indentures have fewer responsibilities for the trust property and typically do not enjoy possession or the right to possession until a default occurs.[152] Instead:

> The trustee under a bond indenture acts primarily under the terms of the contract creating the relationship, and acquires actual possession of the particular assets only in the event that the issuer breaches the covenants of the loan agreement. The indenture regime imposes, therefore, a species of contingent or standby trusteeship.
>
> What commends the trust form for these corporate and municipal bond transactions is the ability to have a sophisticated financial intermediary—that is, a trust

much like secured loans or holding companies. *See* Kantor, *supra* note 98, at 16–22; Schwarcz, *supra* note 7, at 562–63 (describing structured finance deals).

145. *See* I.R.C. § 856(a)(5) (2012); Treas. Reg. 1.856-1(b)(6) (2016). Although many REITs are trusts, the Internal Revenue Code allows corporate entities to qualify as REITs. *See* I.R.C. § 856(a).

146. For example, one publicly traded REIT has over 96 million shares of common stock. *See CIM Commercial Trust Announced Preliminary Results of Tender Offer*, *supra* note 11. These numbers appear to contradict suggestions by some scholars that commercial trusts have smaller numbers of interested parties than do publicly traded corporations. *See* Sitkoff, *supra* note 7, at 43.

147. *Understanding the Basics of REITs*, REIT.COM, https://www.reit.com/investing/reit-basics/faqs/basics-reits (last visited Mar. 22, 2017).

148. *See* Kantor, *supra* note 98, at 16–20 (discussing bond indentures).

149. 15 U.S.C. § 77aaa (2012).

150. Langbein, *supra* note 8, at 173 (estimating that as of 1997, the amount held in these types of trusts exceeded $3 trillion).

151. *See* 15 U.S.C. § 77aaa.

152. *See* Langbein, *supra* note 8, at 173–74.

> company—act on behalf of numerous and dispersed bondholders in the event that a loan transaction does not work out routinely. The indenture trustee overcomes the coordination problem that inheres in widespread public ownership of debt securities.[153]

Other countries also recognize the concept of bond-related trusts, whereby a trust deed gives a trustee both the responsibility and the authority to enforce the terms of the bonds held in the trust.[154] Bond-related trusts arise frequently in international disputes involving U.S. parties and thus may generate disputes heard in U.S. courts, thereby falling under the *Americold* rule.[155] As with other types of commercial trusts, bond-related trusts account for billions of dollars' worth of assets.[156]

A fourth type of commercial trust involves "the 'regulatory compliance trust,' [which is] a trust created primarily for the purpose of discharging responsibilities imposed by law."[157] These trusts include nuclear decommissioning trusts, environmental remediation trusts, liquidating trusts, prepaid funeral trusts, foreign insurers trusts, and law office trust accounts, just to name a few.[158] Although a number of these types of trusts (for example, environmental remediation trusts and nuclear decommissioning trusts) are largely local in nature,[159] others (such as

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153. *Id.* at 174 (footnote omitted). A related type of device involves a trust created to establish a contingent value right (CVR) which requires an acquiring party "to pay additional consideration to a Target company's stockholders following the close of the acquisition contingent on the occurrence of specified payment triggers." Barbara L. Borden & Henry Gosebruch, *Contingent Value Rights Outline*, 1902 PLI/CORP. 323, 325 (Sept. 22–23, 2011); *see also id.* at 340 (noting CVRs can be "issued pursuant to a trust agreement").

154. *See, e.g.*, Law Debenture Tr. Corp. v. Elektrim S.A. [2009] EWHC 1801 ¶¶ 1, 11 (Ch) (Eng.).

155. *See* Americold Realty Tr. v. ConAgra Foods, Inc., 136 S. Ct. 1012 (2016); Kantor, *supra* note 98, at 19–20. The existence of the Trust Indenture Act does not guarantee the existence of a federal question allowing for federal jurisdiction in cases involving bonds. *See* 15 U.S.C. § 77aaa; Linda R. Hirshman, *Whose Law Is It, Anyway? A Reconsideration of Federal Question Jurisdiction over Cases of Mixed State and Federal Law*, 60 IND. L.J. 17, 46–47 (1984); Sarah L. Reid & Robert W. Schumacher, *Automatic Assignability of Claims: The Tension Between Federal and New York State Law*, 125 BANKING L.J. 725, 726 (2008); Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643, 697 (2005).

156. *See* Mahn, *supra* note 139 (noting reports that at the end of 2012 there were "2,808 tax-free bond trusts, with a market value of $15.76 billion" and "553 taxable bond trusts, with a market value of $4.06 billion").

157. *See* Langbein, *supra* note 8, at 174.

158. *See id.* at 175–76.

159. Examples of these types of trusts are publicly available. *See* SEC. & EXCHANGE COMM'N, DECOMMISSIONING TRUST AGREEMENT FOR PALO VERDE NUCLEAR GENERATING STATION 1 (2006), http://www.sec.gov/Archives/edgar/data/31978/000119312506107242/dex1003.htm (containing terms of a decommissioning trust agreement in El Paso); SEMPRA

foreign insurers trusts) are not and would therefore be affected by the rule in *Americold*.[160] International insurance and reinsurance play a significant role in the U.S. economy,[161] and requiring foreign insurers' trusts to appear in state court rather than federal court as per the rule in *Americold* would doubtless cause numerous problems as a matter of both commercial and foreign relations.[162]

While there are numerous other types of commercial trusts in existence, it is unnecessary to outline them all, since the question for this Article is whether and to what extent the rule enunciated in *Americold* will detrimentally affect commercial practices. As this Section has shown, the effect of *Americold* will be both broad and deep, and will resonate across both the U.S. and global economies. It is possible that Congress could intend such a result. However, a closer comparison of commercial trusts and corporations suggests that the better approach would be to treat the two business forms similarly and allow commercial trusts to have the same sort of access to federal courts that corporations do.[163]

II. COMMERCIAL TRUSTS VERSUS CORPORATIONS

If Congress is to justify differential treatment of commercial trusts and corporations, there must be a discernable difference between the two types of business organizations. The following Subsections therefore compare the two business forms as both a practical and theoretical matter.

ENERGY, NUCLEAR DECOMMISSIONING TRUST FUND (2014), https://www.sdge.com/sites/default/files/documents/2004502471/NDTF.pdf (containing notice of terms of a nuclear decommissioning trust in San Diego).

160. *See Americold*, 136 S. Ct. at 1015–16. A foreign insurer that wishes

> to accept surplus lines insurance typically starts the process with an application for inclusion on the Quarterly Listing of Alien Insurers published by the International Insurers Department of the National Association of Insurance Commissioners (NAIC). This includes the establishment of a trust fund of no less than $5.4 million for the benefit of its U.S. policyholders, which is revalued annually based on U.S. liabilities.

John P. Dearie & Michael Griffin, *Overseas Insurers*, RISK MGMT. (Feb./Jan. 2009), http://cf.rims.org/Magazine/PrintTemplate.cfm?AID=3835.

161. *See* S.I. Strong, *The Special Nature of International Insurance and Reinsurance Arbitration: A Response to Professor Jerry*, 2015 J. DISP. RESOL. 283, 314 n.229 (citing statistics indicating "that 62% of U.S. insurance premiums were ceded to offshore companies, although that number rises to 92% if the fact that many U.S. reinsurers are owned by foreign companies is taken into account"); *see also infra* notes 437–40 (regarding Lloyd's of London).

162. *See Americold*, 136 S. Ct. at 1015.

163. *See, e.g.*, 28 U.S.C. § 1332(c)(1) (2012).

A. *Practical Issues*

Professor Edward Purcell has claimed that "jurisdictional reform in the United States has been an intensely practical matter, a series of pragmatic responses to pressing real-world problems."[164] As a result, it is important to consider the practical differences between commercial trusts and corporations to see whether Congress should override the Supreme Court's distinction between the two entities in matters involving diversity jurisdiction.[165]

One of the country's leading experts on commercial trusts, Professor Schwarcz, has suggested that the key difference between corporations and commercial trusts is "the degree to which assets need to be placed at risk in order to satisfy the expectations of residual claimants."[166] Thus,

> [i]n a corporation, the residual claims are sold to third-party investors (shareholders) who expect management to use corporate assets to obtain a profitable return on their investments. . . .
>
> In contrast, a commercial trust's residual claimant is typically the settlor of the trust, who . . . does not expect a risk-weighted return. The expectations of the trust's senior and residual claimants are therefore the same: to preserve the value of the trust assets.[167]

As a result, commercial trusts and corporations are considered "mirror-image entities that respond to different investor needs."[168]

Although commercial trusts differ from corporations in this regard, there are a number of important practical similarities between the two types of organizations. For example, commercial trusts reflect at least four attributes that are normally associated with corporations: centralized

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164. Purcell, *supra* note 3, at 1825; *see also* Stephen N. Subrin, *Procedure, Politics, Prediction, and Professors: A Response to Professors Burbank and Purcell*, 156 U. PA. L. REV. 2151, 2153 (2008) (noting the role of politics).

165. *See* COX & HAZEN, *supra* note 91, § 1:15; KOVE ET AL., *supra* note 90, § 247. Some commentators have suggested that one of the key differences between commercial trusts and corporations is that the latter is created by statute and the former is created by agreement. *See* Sheldon A. Jones et al., *The Massachusetts Business Trust and Registered Investment Companies*, 13 DEL. J. CORP. L. 421, 423–24 (1988). While this may be true in some cases, many commercial trusts are statutory in nature. *See supra* notes 90–93 and accompanying text. As a result, this Article will not consider this particular issue.

166. Schwarcz, *supra* note 7, at 561.

167. *Id.* (footnote omitted); *see also supra* notes 119–20 and accompanying text (regarding residual interests in commercial and non-commercial trusts).

168. Schwarcz, *supra* note 7, at 561.

management, continuity of existence, limited liability for the shareholder beneficiaries, and transferability of ownership.[169]

Structurally, the commercial trust's foundational document (the declaration or deed of trust) works like a corporation's charter or articles of incorporation by establishing the business purpose(s) of the trust and setting forth the rights and responsibilities of both the trustees (who hold legal title to the trust) and the shareholder-beneficiaries (who hold certificates reflecting the nature and scope of their equitable title to the trust).[170] The trustees of a commercial trust carry out duties similar to those of the board of directors of a corporation, although business is typically conducted in the trustees' own names rather than that of the trust itself.[171] Trustees of commercial trusts owe a fiduciary duty to shareholders and represent shareholders in a manner similar to that of the directors of a corporation, although fiduciary duties in the corporate context are derivative in nature.[172]

In general, shareholder beneficiaries of a commercial trust have no duties of their own and are considered passive investors with the right to increase or relinquish ownership through the transfer of certificates as shares or units of interest.[173] However, there are some variations on this theme.[174] For example,

> [s]ome courts have held that to avoid individual shareholder liability the board of trustees must be a self-perpetuating body with the power to fill vacancies and that shareholders must be denied all rights except the right to receive dividends and their distributive shares of the assets on termination of the enterprise.[175]

Other jurisdictions indicate that shareholders are not personally liable unless they have the "ultimate power of control."[176] Commentators have suggested that various types of indirect control (such as the ability to elect trustees, fill vacancies on the board of trustees, amend the declaration of trust or dissolve the trust as a whole) should not provide sufficient grounds for shareholder liability.[177] Notably, these powers, which resemble the power of majority control seen in many corporations, far

169. *See* COX & HAZEN, *supra* note 91, § 1:15. Trustees retain personal liability unless the deed of trust or contract with the creditor indicates otherwise. *See id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. KOVE ET AL., *supra* note 90, § 247.

175. COX & HAZEN, *supra* note 91, § 1:15.

176. *Id.*

177. *Id.*

exceed those given to beneficiaries of non-commercial trusts absent settlor consent.[178] As a result of these and other corporate influences on commercial trusts, the overwhelming majority of authorities view commercial trusts as the functional equivalents of corporations.[179]

B. *Theoretical Issues*

Although most comparisons of corporations and commercial trusts have focused on practical concerns, Congress may find it useful to consider the theoretical nature of the two devices when determining its response to *Americold*.[180] If commercial trusts can be considered the theoretical equivalents of corporations as well as their functional equivalents, then there appears to be little if any reason to allow the rule in *Americold* to stand.[181] In fact, as the following discussion shows, there are significant similarities between the theoretical purposes of commercial trusts and corporations, which would suggest a similar need for access to federal courts.

1. Commercial Trusts

Although the legal community has long been aware of the many practical similarities involving commercial trusts and corporations, little if any attention has been devoted to theoretical comparisons between the two business forms.[182] Initially, it might appear as if commercial trusts had little theoretical overlap with corporations, given the predominance of the donative theory of trust law.[183] This theory states that trusts are not contracts but instead reflect "a unilateral transfer of assets to a person

178. *See id.* § 1:15 n.15 (citing Massachusetts Supreme Court); *see also* RESTATEMENT (THIRD) OF TRUSTS §§ 51, 57–59, 60, 64–65 (AM. LAW INST. 2001).

179. *See* Hemphill v. Orloff, 277 U.S. 537, 548 (1928); Miller, *supra* note 7, at 446 n.8; Schwarcz, *supra* note 7, at 560; Sitkoff, *supra* note 7, at 32.

180. Commentators have debated whether and to what extent theory describes or drives legal reform. *See* Morton J. Horwitz, Santa Clara *Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 176 (1985); David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 201, 241–43; Michael J. Phillips, *Reappraising the Real Entity Theory of the Corporation*, 21 FLA. ST. U. L. REV. 1061, 1063 (1994).

181. *See Hemphill*, 277 U.S. at 548 (noting functional equivalence of two business forms); Miller, *supra* note 7, at 444; Schwarcz, *supra* note 7, at 560; Sitkoff, *supra* note 7, at 31.

182. *See, e.g.*, Edward M. Iacobucci & George G. Triantis, *Economic and Legal Boundaries of Firms*, 93 VA. L. REV. 515, 570 (2007) (offering a single unsupported, conclusory statement); Larry E. Ribstein, *Limited Liability and Theories of the Corporation*, 50 MD. L. REV. 80, 126–27 (1991) (offering a limited analysis focusing on contract theory of the corporation); Sitkoff, *supra* note 7, at 45 (noting the need for this type of theoretical analysis). *But see* E. Merrick Dodd, Jr., *Dogma and Practice in the Law of Associations*, 42 HARV. L. REV. 977, 989–91 (1929) (discussing theoretical issues involving corporations and commercial trusts in the context of *Hemphill*, 277 U.S. 537).

183. *See* Strong, *supra* note 79, at 1174–75 (discussing U.S. and English law).

prepared to accept the office of trustee with the benefits and burdens attached to such office."[184]

The donative theory of trust law was initially promoted in the United States by Austin Scott, the Reporter of the first Restatement of Trusts, as a means of guaranteeing that trust law remained with the specialist equity bench rather than being subsumed into the common law.[185] "[F]or Scott, having the *Restatement* deny the contractarian character of the trust was a means of buttressing the jury-free preserve of equity judges . . . ."[186] As a result, the Restatement of Trusts considers only two types of trusts (the constructive trust and the resulting trust, which both arise as remedial measures as a matter of law) to be non-donative in nature.[187]

However, commercial trusts exist in something of a theoretical limbo. Both the second and third iterations of the Restatement of Trusts expressly exclude commercial trusts from their purview, which suggests that commercial trusts could be subject to a different theoretical paradigm.[188] The most logical candidate is the contractual theory of trusts, which had the support of numerous scholars (including Frederic Maitland) prior to the adoption of the first Restatement.[189] A number of contemporary commentators, most notably Professor John Langbein, also favor this characterization of trust law. As Professor Langbein has stated:

> [A]lthough the typical trust implements a donative transfer, it embodies a contract-like relationship in the underlying deal between the settlor and the trustee about how the trustee will manage the trust assets and distribute them to the trust beneficiaries. The difference between a trust and a third-party beneficiary contract is largely a lawyers' conceptualism.[190]

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184. HAYTON ET AL., *supra* note 81, ¶ 11.83; *see also* Strong, *supra* note 79, at 1174–81 (discussing the contractual theory, donative theory, and alternative theories of trust law).

185. *See* Langbein, *supra* note 81, at 627, 644–45, 648–50.

186. *Id.* at 649.

187. *See* RESTATEMENT (THIRD) OF TRUSTS § 7 & cmt. d (AM. LAW INST. 2001).

188. *See id.* § 1, cmt. b; RESTATEMENT (SECOND) OF TRUSTS § 1 cmt. b (AM. LAW INST. 1959). There has been some suggestion that an "agency cost theory" could apply to commercial trusts, but that work is still at a relatively early stage of development. *See* Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 623–24 (2004) (limiting the analysis to donative trusts but suggesting it may be applicable to commercial trusts in the future); Lee-ford Tritt, *The Limitations of an Economic Agency Cost Theory of Trust Law*, 32 CARDOZO L. REV. 2579, 2587 n.13 (2011) (referring to the importance and significance of commercial trusts yet still putting them outside the scope of the private trust analysis).

189. *See* Langbein, *supra* note 81, at 627, 644–45, 648–50.

190. Langbein, *supra* note 8, at 185 (citation omitted). Other commentators have noted that even if the contractarian approach is considered "unsuitable for the two-party declaration of trust . . . such an observation in no way invalidates the contract approach to the more traditional

Under this approach, the trust is viewed as "a deal, a bargain about how the trust assets are to be managed and distributed."[191]

Although Professor Langbein was focusing primarily on traditional intergenerational trusts, the persuasiveness of the contractarian theory of trust law is even more pronounced in the case of the commercial trust, since those devices are bereft of any type of donative element.[192] Indeed, even if traditional intergenerational trusts cannot be seen as having a contractual nature, commercial trusts, which reflect "an arm's-length, negotiated bargain in which all parties benefit," cannot realistically be viewed in any other light.[193]

While U.S.-trained lawyers view the contractual theory of trusts as conflicting with the donative theory of trusts, not every country experiences the same type of jurisprudential tension. Instead, a number of jurisdictions, particularly certain civil law nations that have adopted their own domestic version of the trust, view these instruments through an exclusively contractual lens.[194]

Trusts can also be conceptualized by reference to their intended purpose.[195] The primary purpose test is often used by bankruptcy courts to determine whether a particular entity is a commercial trust that is eligible for protection under the Bankruptcy Code or a family trust that is intended to preserve the res and thus is not eligible for protection under the Bankruptcy Code.[196] However, these principles can be used in other

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three-party trust where the grantor does not act as the trustee." Michael P. Bruyere & Meghan D. Marino, *Mandatory Arbitration Provisions: A Powerful Tool to Prevent Contentious and Costly Trust Litigation, but Are They Enforceable?*, 42 REAL PROP. PROB. & TR. J. 351, 362 (2007); *see* Langbein, *supra* note 81, at 627, 645. The two-party declaration trust, also known as a self-declarative trust, arises when a settlor declares him or herself to be the trustee of certain identified property for the benefit of another person rather than naming another person to act as trustee. *See* HAYTON ET AL., *supra* note 81, ¶¶ 12.7–12.8; MCGOVERN ET AL., *supra* note 81, at 374. Notably, self-declarative trusts are virtually never seen in the commercial context. *See id.* at 374–75; Langbein, *supra* note 81, at 672.

191. Langbein, *supra* note 81, at 627.

192. *See id.* at 631.

193. *See* Schwarcz, *supra* note 7, at 563. Some commentators, most notably Professor Larry Ribstein, have relied on the commercial trust as a means of suggesting that corporation law can and should be characterized pursuant to a type of contract theory. *See* Ribstein, *supra* note 182, at 126–27 (noting that the "Delaware business trust statute demonstrates that the states are approaching full-fledged recognition of the contract theory of the corporation").

194. Trusts developed as common law devices and thus were not traditionally seen in civil law countries. However, a growing number of civilian legal systems have adopted trust-like instruments. *See* COMMON CORE OF EUROPEAN PRIVATE LAW, COMMERCIAL TRUSTS IN EUROPEAN PRIVATE LAW 4 (Michele Graziadei et al. eds., 2009); Strong, *supra* note 79, at 1159 n.1.

195. *See* Ossip, *supra* note 117, at 2332.

196. *See In re* Kenneth Allen Knight Tr., 303 F.3d 671, 676 (6th Cir. 2002); *In re* Universal Clearing House Co., 60 B.R. 985, 991 (D. Utah 1986); *In re* Metro Palms I Tr., 153 B.R. 922, 923 (Bankr. M.D. Fla. 1993); *In re* Hemex Liquidation Tr., 129 B.R. 91, 97–98 (Bankr. W.D. La.

contexts as well.[197] Thus, it can be argued that if the primary purpose of the trust is to conduct a for-profit business, as is the case with commercial trusts,[198] then that entity should be treated as akin to a corporation, another for-profit entity, for the purpose of diversity jurisdiction.[199] While this approach could be criticized as inefficient and potentially unpredictable to the extent it would require courts to undertake a case-by-case analysis, the distinction between a trust created on a for-profit basis and a trust that is created to hold and maintain personal property appears relatively clear.[200]

Other analytical paradigms also exist. For example, it might be possible to construct a theory of trust law that focuses on an entity's governance structure and the way in which the entity interacts with its surroundings (i.e., its exogenous effect).[201] This type of functional approach suggests a strong correlation between commercial trusts and corporations, based on the way in which the two types of business organizations operate in the marketplace.[202]

2. Corporations

Like trusts, corporations are subject to a variety of theoretical constructs.[203] Theorization of corporation law is somewhat more mature than that of trust law and includes a number of sub-specialties focusing on different aspects of corporate practice.[204] The most relevant paradigm

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1991); *In re* Medallion Realty Tr., 103 B.R. 8, 11–12 (Bankr. D. Mass. 1989); *In re* Treasure Island Land Tr., 2 B.R. 332, 334 (Bankr. M.D. Fla. 1980); Treas. Reg. § 301.7701-4 (2016); David S. Jennis & Kathleen L. DiSanto, *Trust or Debtor: You Decide*, AM. BANKR. INST. J., Dec. 2013, at 34, 34. Other bankruptcy courts adopt a balancing test that considers whether the trust has a business purpose, title is held by a trustee, management is carried out in a centralized manner, the trust's continuity would be uninterrupted by the death of a beneficial owner, the trust's interests are transferable, and the trust allows for limited liability. *See* Morrissey v. Comm'r, 296 U.S. 344, 359–60 (1935); Jennis & DiSanto, *supra*, at 34; *see also* Swanson v. Comm'r, 296 U.S. 362, 365 (1935); Helvering v. Combs, 296 U.S. 365, 368–69 (1935); Helvering v. Coleman-Gilbert Assocs., 296 U.S. 369, 374 (1935).

197. *See* Schwarcz, *supra* note 26, at 327–28 (considering the purpose of commercial trusts).

198. *See* KOVE ET AL., *supra* note 90, § 247 ("[T]he business trust is organized not as a means of effecting a gift or transfer but as a device for profit making through the combination of capital contributed by a number of investors.").

199. *See* Ossip, *supra* note 117, at 2332–33.

200. *See id.*

201. *See* Schwarcz, *supra* note 26, at 327.

202. *See supra* Section II.A.

203. *See* Matheson & Olson, *supra* note 40, at 3–4; Millon, *supra* note 180, at 201 (discussing the historical evolution of theories of the corporation, including the artificial entity theory, the natural entity theory and the aggregate theory).

204. For example, some commentators speak of the "contractarian" theory of corporations, which refers to the corporation's freedom to enter into various contracts. *See* Matheson & Olson,

for the current analysis involves the various bases for corporate personhood, which include

> (i) the concession or "artificial entity" theory, which sees the corporation as a creation of the state or sovereign that grants its charter; (ii) the aggregate theory, which sees the corporation as a fictional construct representing the sum of its shareholders, managers, and other constituencies who contribute to the success of the corporate enterprise; and (iii) the real entity view, which sees the corporation, not as an extension of the state or of its many constituencies, but as having a separate identity independent of both.[205]

Although more research should, of course, be done, each of these theories appears easily applicable to commercial trusts. For example, the artificial entity theory, which is commonly associated with the jurist Friedrich Carl von Savigny despite earlier connections to Roman, English, and American law, holds that

> because legal persons could only have recognized rights and duties as a consequence of an act of the State, they were nothing but artificial beings or fictions. . . . [D]ue to its artificial personality, a firm could only have a very limited set of rights and duties, namely those pertaining to property.[206]

Although this theory has been called into question by contemporary corporate law scholars, it still carries some weight in the academic community.[207] Notably, the artificial entity theory can be used to describe commercial trusts, which are also subject to various legal restrictions and focus primarily on matters relating to the use and disposition of property.[208]

The second means of conceptualizing corporate personhood is the aggregate theory, which characterizes a legal entity's legal rights and duties as indirect or derivative in nature and holds that the rights and obligations of the shareholders or other individuals that make up the

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supra note 40, at 32; Ribstein, *supra* note 182, at 84. However, those inquiries are not directly relevant to the current discussion, since they focus on a single aspect of corporate practice.

205. Ho, *supra* note 49, at 891–92 (footnote omitted). These paradigms are most appropriate for this study because the current analysis focuses on questions of citizenship—an issue that is closely related to personhood—for purposes of diversity jurisdiction.

206. Martin Petrin, *Reconceptualizing the Theory of the Firm—From Nature to Function*, 118 PENN. ST. L. REV. 1, 5–6 (2013) (footnotes omitted).

207. *See id.* at 14.

208. *See id.*; *see also supra* Subsection I.B.2.

entity are coextensive with the legal entity itself.[209] Like the artificial entity theory, the aggregate theory has been criticized, although it retains a number of adherents.[210] Furthermore, this theory can be used to explain commercial trusts, particularly given the way in which trusts split ownership of the trust res into legal and equitable title.[211] Only by combining those two interests can a court truly appreciate the nature of the trust's rights and responsibilities.

The last of the traditional theories of the corporation, the real entity theory, has been credited with promoting the development of a number of different concepts in corporate law, including limited liability of corporations, tortious and limited criminal liability of corporations, and the corporate tax regime.[212] Commentators have also relied on the real entity theory to justify corporate claims to various constitutional rights, including "freedom of the press, commercial speech, and protections against unreasonable searches and seizures, among others."[213] While some of these issues have not yet been considered in the context of commercial trusts, courts have held that a number of these principles—most notably limited liability, tortious and criminal liability, and freedom of speech—apply to commercial trusts, thereby suggesting a theoretical coalescence between corporations and commercial trusts.[214]

As popular as these three paradigms have been, they have been largely replaced by the nexus of contracts theory, which is now the dominant theoretical construct in contemporary corporation law.[215] The nexus of contracts theory adopts a functional approach to the question of corporate identity and frames the corporation as the aggregate of "various explicit

209. *See* Petrin, *supra* note 206, at 10.

210. *See id.* at 14–15.

211. *See supra* notes 81–85 and accompanying text.

212. *See* Petrin, *supra* note 206, at 11–13.

213. *Id.* at 13.

214. *See* 29 OHIO REV. CODE ANN. § 2901.01(B)(1) (West 2016) (defining a person as including a business trust for purposes of the criminal code); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 364 (2010) (stating the First Amendment does not allow Congress to limit speech "based on the corporate identity of the speaker and the content of the political speech"); United States v. Hughes, 191 F.3d 1317, 1319 (10th Cir. 1999) (involving a criminal conviction of a commercial trust for conspiracy to defraud the government); DeRosier v. 5931 Bus. Tr., 870 F. Supp. 941, 944 (D. Minn. 1994) (featuring a commercial trust as a defendant in a trademark infringement action).

215. *See* Melvin A. Eisenberg, *The Conception That the Corporation Is a Nexus of Contracts, and the Dual Nature of the Firm*, 24 J. CORP. L. 819, 819 (1998); Petrin, *supra* note 206, at 33; *see also* Michael C. Jensen & William H. Meckling, *The Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305, 310–11 (1976) (first establishing the theory). This paradigm is slightly different than the "contractarian" theory of corporations, which refers to the corporation's freedom to enter into various contracts. *See* Matheson & Olson, *supra* note 40, at 32.

and implicit contracts between the firm's constituencies."[216] As such, the nexus of contracts theory bears certain similarities to earlier theories of the corporation.[217]

The nexus of contracts theory has been widely embraced by the corporate law community and particularly by adherents of the law and economics movement.[218] However, the theory has been challenged on various grounds.[219] For example, the nexus of contracts theory is said to be "unsatisfactory as a positive—that is, descriptive—matter, in part because the corporation has a dual nature: In one aspect, it consists of reciprocal arrangements; in another, it is a bureaucratic hierarchy. The nexus-of-contracts conception captures only one of these two aspects of the corporation."[220]

Although this criticism may be worrisome for corporate theorists, it need not affect the current analysis, since the focus of this Section is on whether and to what extent commercial trusts can be considered analogous to corporations as a matter of theory. Regardless of whether the nexus of contracts theory is characterized as unitary or binary in nature, the concept of a business entity that consists of "a nexus of reciprocal arrangements" can also be used to describe commercial trusts.[221] Furthermore, some of the other problems with the nexus of contracts theory cannot be said to apply to commercial trusts.

For example, the nexus of contract theory has experienced certain theoretical difficulties in the corporate context regarding the applicability of mandatory rules of law.[222] For example, some commentators seeking to justify the nexus of contracts theory have attempted to argue that corporations are not generally subject to certain mandatory rules of law.[223] Setting aside whether the inapplicability of mandatory rules of law can even be said to be central to the nexus of contract theory (something

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216. Petrin, *supra* note 206, at 34.

217. *See id.*

218. Eisenberg, *supra* note 215, at 819.

219. *See id.* at 820.

220. *Id.* at 819; *see also* Douglas Litowitz, *The Corporation as God*, 30 J. CORP. L. 501, 522 (2005) ("[C]orporate law never comes down one way or the other on whether the modern corporation is a public entity (hence a social actor) or a purely private entity (and hence an economic relationship).").

221. Eisenberg, *supra* note 215, at 822–24 (noting that this formulation may be somewhat inaccurate, despite its prevalence); *see also infra* note 351 and accompanying text (noting commercial trusts' responsiveness to market forces).

222. Eisenberg, *supra* note 215, at 823–24; *see also* Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 860 (1997) (reviewing PROGRESSIVE CORPORATE LAW (Lawrence E. Mitchell ed., 1995)).

223. Eisenberg, *supra* note 215, at 823.

that Professor Melvin Eisenberg doubts),[224] commercial trusts are commonly considered to be much more flexible than corporations, which suggests they suffer less than corporations with respect to this aspect of the nexus of contracts theory.[225]

Scholars have also struggled with the way in which the nexus of contracts theory conceives of shareholders as only holding a contractual claim against the corporation rather than as acting as owners of the corporation.[226] However, commercial trusts have far fewer difficulties in this regard, since legal title to the trust property is vested in the trustees rather than in the shareholder-beneficiaries, who simply hold a breach of trust (similar in this regard to a breach of contract) claim against the trustees.[227] Indeed, when discussing this issue in the corporate context, Professor Eisenberg specifically mentions Professor Tony Honoré's example of "split ownership" as exemplifying the nexus of contracts theory,[228] which of course accords nicely with standard principles of trust law.[229]

Another criticism of the nexus of contracts theory involves the notion that "a corporation . . . is not only a hierarchical organization; it is a *bureaucratic* hierarchical organization. That means, among other things, that much of the activity in a corporation is organized by established bureaucratic rules that are not open to continued reexamination, let alone negotiation."[230] While this issue may be problematic for corporations, commercial trusts experience few difficulties in this regard, since commercial trusts are much more flexible than corporations with respect to questions of corporate governance and can therefore be said to be more amenable to amendment of their internal rules.[231]

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224. *See id.*

225. *See supra* notes 107–09 and accompanying text.

226. *See* Eisenberg, *supra* note 215, at 825.

227. *See* RESTATEMENT (THIRD) TRUSTS §§ 93, 95, 100 (AM. LAW INST. 2001). In a corporation, the assets of the corporation are held by the corporation itself. *See* 3 TREATISE ON THE LAW OF CORPORATIONS § 19:4 (database updated Dec. 2016) (describing the classificaton of assets owned by a corporation).

228. Eisenberg, *supra* note 215, at 825–26 (citing A.M. Honoré, *Ownership*, *in* OXFORD ESSAYS IN JURISPRUDENCE 107 (A.G. Guest ed., 1961)); *see also supra* notes 81–85 and accompanying text (describing the standard principles of trust law).

229. *See supra* notes 81–85 and accompanying text (describing the standard principles of trust law).

230. Eisenberg, *supra* note 215, at 829; *see also* Edward B. Rock & Michael L. Wachter, *Islands of Conscious Power: Law, Norms, and the Self-Governing Corporation*, 149 U. PA. L. REV. 1619, 1641 (2001) (advancing a theory of the firm according to which the firm's boundary is determined pursuant to whether it is efficient to structure behavior according to non-legally enforceable rules and standards as opposed to contract and third party rules).

231. *See supra* notes 107–09 and accompanying text.

The nexus of contracts theory is often used to describe a single corporate unit.[232] However, corporations do not always operate as singular entities. Instead, several corporate entities may work together as part of a unified commercial endeavor,[233] a feature that they share with commercial trusts.[234] As a result, it is necessary to consider whether and to what extent commercial trusts fall within theoretical constructs describing corporate groups.

Corporate groups are often described pursuant to either the enterprise theory or the entity theory.[235] The enterprise theory "views all of the legal entities that comprise the corporate group as part of a single economic organization, while the entity view emphasize[s] the separate legal identity of the affiliates that together form the corporate group."[236] Notably, both paradigms can easily be used to describe groups of commercial trusts.

Professor Virginia Harper Ho has considered how the entity theory and enterprise theory correlate with the three traditional theories of corporate personhood discussed above (i.e., the concession theory, the aggregate theory, and the real entity theory)[237] and sought to correlate these individual theories with the two standard theories of corporate groups (i.e., the entity theory and the enterprise theory).[238] Not only was she successful in integrating these two different lines of thought regarding corporate personhood, but her approach—which she reflected visually in the form of a two-dimensional chart—can be adapted for use with commercial trusts as well.[239] Thus, a theoretical construct of the personhood of commercial trusts, based on standard corporate law theories, might be reflected as follows.

232. *E.g.*, Eisenberg, *supra* note 215, at 819.

233. This often happens in the capital market and asset securitization contexts. *See* Kantor, *supra* note 98, at 16–22.

234. *See id.* (noting how a single transaction can involve multiple related trust vehicles).

235. *See* Ho, *supra* note 49, at 897–98 (noting that these theories were initially developed in the context of tort and statutory liability).

236. *Id.* at 898. One commentator has claimed that commercial trusts should be considered singular entities, given that they can operate on a nationwide basis. *See* Christy, *supra* note 11, at 151.

237. *See supra* notes 204–14 and accompanying text.

238. *See* Ho, *supra* note 49, at 902 (creating a chart for analysis of corporate personhood).

239. *See id.*

Theories of Commercial Trusts in Two Dimensions[240]

	Entity approach	Enterprise approach
Concession Theory	Commercial trusts are created solely by operation of state law.	Commercial trusts are allowed to operate across state or national borders and thus are subject to multiple laws.
Aggregate Theory	Commercial trusts are fictional constructs representing the sum of the interests of the beneficiaries.	Commercial trusts are fictional constructs representing numerous individual interests of the beneficiaries.
Real Entity Theory	Commercial trusts have a separate identity greater than the sum of their individual beneficiaries.	Commercial trusts' identities reflect the disparate views of the individual beneficiaries.

As the above discussion shows, commercial trusts can easily fall within most if not all of the primary theoretical constructs relating to corporations. These theoretical similarities, combined with the many functional similarities between the two business forms,[241] strongly suggest that Congress should treat the two entities the same way in questions relating to diversity jurisdiction unless there is some procedural reason to distinguish between the two types of business associations. That issue is considered in the next Part.

III. DIVERSITY JURISDICTION AND COMMERCIAL TRUSTS

The Supreme Court's decision in *Americold* is consistent with conventional wisdom suggesting that the Court is seeking to reduce the federal judicial caseload by limiting the number of cases that qualify for diversity jurisdiction.[242] To some extent, the Court's efforts appear to have been successful, based on statistics indicating that the number of cases relying on diversity jurisdiction dropped by 17% between 2014 and

240. The following chart is an adaptation—focused on the personhood of commercial trusts rather than personhood of corporations—of Professor Ho's chart analyzing corporate personhood. *See id.*

241. *See* Hemphill v. Orloff, 277 U.S. 537, 550 (1928) (noting the functional equivalence of two business forms); Miller, *supra* note 7, at 448; Schwarcz, *supra* note 7, at 560; Sitkoff, *supra* note 7, at 31.

242. *See* Americold Realty Tr. v. ConAgra Foods, Inc., 136 S. Ct. 1012, 1015–17 (2016); Cooper & Nielson, *supra* note 13, at 300–04 (discussing various ways that federal courts interpret and apply rules regarding complete diversity so as to restrict access to federal courts).

2015.[243] Although this Article does not take a position on whether decreasing diversity jurisdiction is wise as a general proposition,[244] it does seem that commercial trusts should be exempt from those initiatives for a variety of practical and theoretical reasons.[245] This conclusion derives not only as a matter of trust and corporation law but also as a matter of procedural law.

In many ways, *Americold* appears to be a routine procedural decision that applies equally to all potential parties.[246] Under the Supreme Court's current ruling, no one—neither the trustees, the shareholder-beneficiaries nor anyone suing the trust—will likely be able to establish complete diversity and reap the benefits of federal court absent some sort of federal question.[247] This result will often arise by virtue of the sheer number of shareholder-beneficiaries found in many commercial trusts.[248] However, difficulties can also arise in cases involving smaller trusts, since "the trust may not have information as to its ultimate beneficial owners, much less information as to their citizenship."[249]

Although *Americold* can be said to reflect a type of formal neutrality among potential parties,[250] this quality does not necessarily save the decision when it is considered in light of the original purpose of diversity

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243. *See Federal Judicial Center Caseload Statistics 2015*, U.S. CTS., http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2015 (last visited June 30, 2017) (noting that, in 2015, 87,772 cases out of a total of 281,608 civil disputes relied on diversity jurisdiction). *But see* Purcell, *supra* note 3, at 1845 (suggesting that statistical data has actually "had relatively little impact on the rules of federal jurisdiction"). However, the number of cases involving diversity jurisdiction were still 41% greater in 2015 than in 2006. *See Federal Judicial Center Caseload Statistics 2015*, *supra*. These figures are particularly salient to the current discussion, given data suggesting that corporations constitute a significant proportion of the diversity cases heard in federal court. *See* Debra R. Cohen, *Citizenship of Limited Liability Companies for Diversity Jurisdiction*, 6 J. SMALL & EMERGING BUS. L. 435, 437 nn.6–7 (2002).

244. Other commentators have addressed this issue at length. *See* C. Douglas Floyd, *The Limits of Minimal Diversity*, 55 HASTINGS L.J. 613, 694 (2004); Rodney K. Miller, *Article III and Removal Jurisdiction: The Demise of the Complete Diversity Rule and a Proposed Return to Minimal Diversity*, 64 OKLA. L. REV. 269, 278 (2012) (suggesting return to a rule of minimal diversity for diversity jurisdiction).

245. *See supra* Part II.

246. *See Americold*, 136 S. Ct. at 1014.

247. *See id.* at 1016; Rutledge & Schaefer, *supra* note 12, at 104. While some types of suits might still be able to proceed under *Navarro*, that rule is somewhat in doubt given the discussion in *Americold*. *See Americold*, 136 S. Ct. at 1016; Navarro Sav. Ass'n v. Lee, 100 S. Ct. 1779, 1789–90 (1980). At the very least, significant litigation will arise to define the circumstances in which *Navarro* applies. *See Americold*, 136 S. Ct. at 1017.

248. *See supra* Subsection I.B.2.

249. Rutledge & Schaefer, *supra* note 12, at 104 (noting this issue may be particularly acute in certain types of disputes, such as those involving structured financing); *see also* Sitkoff, *supra* note 7, at 34 (noting that commercial trusts are "widely used in structured finance transactions").

250. *See Americold*, 136 S. Ct. at 1017.

jurisdiction.[251] As Justice Joseph Story explained in *Martin v. Hunter's Lessee*,[252] the Framers did not intend diversity jurisdiction "to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights, or assert their privileges, before the same forum."[253] The Supreme Court relied on this rationale in *Marshall v. Baltimore & Ohio Railroad*,[254] when it held that corporations could not deprive their opponents of the constitutional right to have their disputes heard in federal court simply by eliminating diversity through the election of corporate directors from every U.S. state.[255]

Although *Martin* and *Marshall* were decided in the mid-nineteenth century, concerns about rules that allow or require the virtual elimination of diversity jurisdiction are just as relevant today.[256] For example, the Supreme Court expressly acknowledged the problems associated with overly restrictive approaches to diversity jurisdiction in 2010 in *Hertz Corp. v. Friend*,[257] when it noted that the purpose of diversity jurisdiction was to increase access to the federal courts.[258] Although *Hertz* acknowledged the need to limit excessive federal litigation, the decision also recognized that, in 1951, a special committee of the Judicial Conference had cited "a general need 'to prevent fraud and abuses' with respect to federal jurisdiction" and had suggested corporations be considered citizens not only of the state in which they were incorporated but also citizens of the place where the corporation had its principal place

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251. *See id.* at 1014, 1015.

252. 14 U.S. (1 Wheat.) 304 (1816).

253. *Id.* at 348; *see also* Christy, *supra* note 11, at 151 (discussing this issue in the context of commercial trusts).

254. 57 U.S. (16 How.) 314 (1854), *superseded by statute*, 28 U.S.C. § 1332(c)(1) (2012).

255. *See id.* at 328. *Marshall* was the last in a trilogy of cases dealing with corporate citizenship prior to the enactment of 28 U.S.C. § 1332(c)(1). *See* 28 U.S.C. § 1332(c)(1); *Marshall*, 57 U.S. at 328; Louisville, Cincinnati & Charleston R.R. v. Letson, 43 U.S. (2 How.) 497, 558 (1844), *superseded by statute*, 28 U.S.C. § 1332(c)(1); Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 86 (1809), *overruled in part on other grounds by Louisville, Cincinnati & Charleston R.R.*, 43 U.S. at 497; Oh, *supra* note 4, at 421–22.

256. *See Marshall*, 57 U.S. at 328; *Martin*, 14 U.S. at 304. Some commentators have suggested that such a rule is necessary to preserve states' rights, *see* Ossip, *supra* note 117, at 2331, but that perspective appears to ignore the purpose and history of diversity jurisdiction. *See* Jesse M. Cross, *National "Harmony": An Inter-Branch Constitutional Principle and Its Application to Diversity Jurisdiction*, 93 NEB. L. REV. 139, 155–57 (2014).

257. 559 U.S. 77 (2010).

258. *See id.* at 86; *see also* Chaplin, *supra* note 40, at 98–99 (discussing questions of corporate citizenship after *Hertz*).

of business.[259] In 1958, this recommendation was adopted by Congress in slightly modified form and is now reflected in 28 U.S.C. § 1332(c)(1).[260]

While the Court, Congress, and the Judicial Conference have considered citizenship of corporations in various contexts, these bodies have not engaged in the same degree of debate about citizenship of commercial trusts. However, it may be time to do so, since, as the following Subsections show, the rule in *Americold* gives rise to a significant number of theoretical and practical problems as a matter of procedural law and practice.[261]

A. *Theoretical Issues*

Although diversity jurisdiction has been routinely criticized for several decades, the mechanism nevertheless continues to provide an important means of access to the federal courts.[262] Over the years, diversity jurisdiction has been rationalized on a variety of different grounds,[263] and Congress should keep these rationales in mind when considering the legislative proposals contained herein.[264]

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259. *Hertz Corp.*, 559 U.S. at 86 (citing REPORTS OF THE PROCEEDINGS OF THE REGULAR ANNUAL MEETING AND SPECIAL MEETING (Sept. 24–26 & Mar. 19–20, 1951), H.R. DOC. NO. 365, at 14 (2d Sess. 1952)); *see also* 28 U.S.C. § 1332(c)(1) (2012). For varying views on the history of diversity jurisdiction, see Bassett, *supra* note 3, at 122–31; Cooper & Nielson, *supra* note 13, at 295–98; Cross, *supra* note 256, at 155–57; Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 492 (1928); Deidre Mask & Paul MacMahon, *The Revolutionary War Prize Cases and the Origins of Diversity Jurisdiction*, 63 BUFF. L. REV. 477 (2015); Wood, *supra* note 17, at 593. For a history of alienage jurisdiction as distinguished from diversity jurisdiction, see Oh, *supra* note 4, at 440–41.

260. *See* 28 U.S.C. § 1332(c)(1); *Hertz Corp.*, 559 U.S. at 88.

261. Americold Realty Tr. v. ConAgra Foods, Inc., 136 S. Ct. 1012 (2016).

262. *See* Cross, *supra* note 256, at 152–54; Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395, 411 (1906), *reprinted in* 40 AM. L. REV. 729, 744–45 (1906); Purcell, *supra* note 3, at 1833–35 (noting some academics believe that diversity jurisdiction is indefensible as a matter of legal theory); Sharon E. Rush, *Federalism, Diversity, Equality, and Article III Judges: Geography, Identity, and Bias*, 79 MO. L. REV. 119, 136 (2014). In 1990, a Congressional report concluded that "[i]n most diversity cases . . . there is no substantial need for a federal forum." JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 40 (1990); *see also* Larry Kramer, *Diversity Jurisdiction*, 1990 B.Y.U. L. REV. 97, 98. However, the Committee "strongly recommend[ed]" the elimination of diversity jurisdiction, save for "complex multi-state litigation, interpleader, and suits involving aliens." JUDICIAL CONFERENCE OF THE U.S., *supra*, at 38–39. Notably, the debate about eliminating or curtailing diversity jurisdiction "has left alienage jurisdiction unscathed," which is an important feature, given the significant number of commercial trusts with actual or potential international contacts. Oh, *supra* note 4, at 439; *see also supra* notes 26, 72, 137, 155, 161 and accompanying text.

263. Cross, *supra* note 256, at 155–57.

264. *See id.* at 146 (noting the importance of theory to legislative practice).

Any analysis of diversity jurisdiction begins with the text contained in the Constitution[265] and the First Judiciary Act,[266] as interpreted by the Supreme Court in cases such as *Strawbridge v. Curtiss*[267] and *Bank of the United States v. Deveaux*.[268] In the latter decision, Chief Justice John Marshall recognized that diversity jurisdiction was not only meant to avoid actual bias by state court judges against parties from other jurisdictions but was also intended to eliminate potential and perceived biases.[269] This approach focuses on the facilitation of interstate and international commerce "by reassuring wary parties that interstate activities or transactions will not subject them to suits in state courts that might be infected with local bias."[270]

This theory is clearly relevant to cases involving commercial trusts, given the national and international nature of many commercial trusts and the role that commercial trusts play in the U.S. and global economies.[271] Given the competitive nature of interstate and international commerce, Congress should be cautious about any jurisdictional rule, including the one enunciated in *Americold*, that affects (or is believed to affect) the fair, efficient and neutral resolution of disputes involving a particular type of commercial organization, since that can diminish parties' willingness to do business in a particular location.[272]

Another theory involving diversity jurisdiction arose as a result of the United States' increasing participation in international affairs.[273] Under this view, diversity jurisdiction, broadly defined to include alienage jurisdiction, was justified as a means of ensuring foreign parties' access

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265. U.S. CONST. art. III, § 2, cl. 1.

266. Act of Sept. 24, 1789, ch. 20, §§ 11–12, 1 Stat. 73, 78–80 (codified as amended at 28 U.S.C. § 1332 (2012)); Purcell, *supra* note 3, at 1830.

267. 7 U.S. (3 Cranch) 267 (1806).

268. 9 U.S. (5 Cranch) 61 (1809), *overruled in part by* Louisville, Cincinnati & Charleston R.R. v. Letson, 43 U.S. (2 How.) 497 (1844), *superseded by statute*, 28 U.S.C. § 1332(c)(1).

269. *See Deveaux*, 9 U.S. at 67, 87; Cross, *supra* note 256, at 148–49; Friendly, *supra* note 259, at 492.

270. Cross, *supra* note 256, at 149; *see also* Rush, *supra* note 262, at 157 (noting concerns that a state court "judge 'will find a way,' perhaps unwittingly, to rule in favor of the resident"). Concerns about bias are particularly pressing given that so many state court judges are subject to election, either initially or through confirmation elections. *See id.* at 159; Wood, *supra* note 17, at 599; *see also infra* note 288 (regarding judicial elections).

271. *See supra* notes 26, 72, 137, 155, 161 and accompanying text.

272. *See* Americold Realty Tr. v. ConAgra Foods, Inc., 136 S. Ct. 1012 (2016); Donald Earl Childress III, *Escaping Federal Law in Transnational Cases: The Brave New World of Transnational Litigation*, 93 N.C. L. REV. 995, 1001 (2015) (noting "domestic and foreign courts compete through domestic and foreign law, both substantive and procedural, to regulate transnational activities as part of a transnational law market"); *see also supra* note 27 and accompanying text.

273. *See* Cross, *supra* note 256, at 149.

to federal courts and thereby facilitating foreign relations.[274] While this theory originally developed in the context of federal habeas corpus actions,[275] it remains relevant in a world that is increasingly focused on promoting and protecting international trade.[276]

Although this second theory appears somewhat similar to the first, the foreign relations rationale focuses on the difficulties that can and do arise when a foreign country believes its citizens and corporations are being mistreated in U.S. courts.[277] This theory is particularly relevant to cases involving commercial trusts, which can involve business that operate on a national and international basis.[278] Furthermore, many commercial trusts involve industries—such as capital markets, pensions and international insurance and reinsurance—that carry significant public policy implications, which may increase foreign states' concerns about fair and equitable treatment in U.S. courts.[279] If a foreign nation does not feel that it and its citizens are being respected in U.S. courts, that country may take action, diplomatically[280] or statutorily.[281]

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274. *See id.*; Michael G. Collins, Comment, *The Diversity Theory of the Alien Tort Statute*, 42 VA. J. INT'L L. 649, 681–85 (2002); Oh, *supra* note 4, at 437 (noting alienage jurisdiction focuses on "preserving foreign relations; the necessity of guarding against xenophobic sentiments, whether actual or perceived; and the values of facilitating trade" (footnotes omitted)).

275. *See* Collins, *supra* note 274, at 681–85.

276. The nature and limits of prescriptive and adjudicative jurisdiction have become increasingly problematic over the last few decades.

277. *See supra* notes 269–70.

278. *See* Cross, *supra* note 256, at 151; *see also supra* notes 26, 72, 137, 155, 159–64 and accompanying text.

279. *See supra* Subsection I.B.2.

280. For example, in the 1970s and 1980s, a number of U.S. courts sought to extend the extraterritorial reach of U.S. antitrust laws, leading to a variety of foreign relations concerns, as expressed in diplomatic notes from the United Kingdom and Germany. *See* GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS (5th ed. 2011) (discussing the *Laker Airways* cases); Stephen D. Piraino, Note, *A Prescription for Excess: Using Prescriptive Comity to Limit the Extraterritorial Reach of the Sherman Act*, 40 HOFSTRA L. REV. 1099, 1120–21 (2012). Indeed, Germany insisted on a special international accord to harmonize its efforts to address international trade violations and put the issue to rest. *See* Antitrust Accord, U.S-Germany, June 23, 1976, https://www.ftc.gov/sites/default/files/attachments/international-antitrust-and-consumer-protection-cooperation-agreements/agree_germany.pdf. These issues continue to be raised. *See* RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090 (2016) (discussing the extraterritorial reach of the Racketeer Influenced and Corrupt Organizations Act (RICO)); Hoffman-LaRoche Ltd. v. Empagran S.A., 542 U.S. 155, 167–68 (2004) (discussing *amicus* briefs from Canada, Germany and Japan regarding the extraterritorial reach of the Sherman Act).

281. *See* Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 YALE J. INT'L L. 113, 152 (2009) (discussing a variety of blocking statutes, including the Protection of Trading Interest Act 1980 (U.K.), which the United Kingdom adopted in response to the *Laker Airways* cases).

A third theory posits that diversity jurisdiction was founded on the need to alleviate concerns that foreign and out-of-state commercial actors, particularly creditors, will be disadvantaged in state court.[282] Some commentators distinguish this theory from the two preceding ones on the grounds that this proposition focuses on matters relating to the application of substantive state laws rather than concerns about emotion or prejudice on the part of the decision-maker.[283]

This third theory also augurs in favor of facilitating diversity jurisdiction in cases involving commercial trusts. Commercial trusts often include choice of law provisions[284] that could create problems for the parties if state court judges fail to respect those provisions or interpret them properly.[285] This concern may be particularly pronounced in cross-border cases governed by foreign law.[286]

A fourth rationale supporting diversity jurisdiction involves the real or perceived superiority of the federal bench.[287] While critics of diversity jurisdiction have claimed that few differences actually exist between state and federal courts, a number of empirical studies have suggested that the choice of forum can be outcome determinative.[288] Even if the empirical research on this issue is flawed, it is widely accepted that "many procedures, regardless of the motives behind their adoption, inevitably influence who brings suits, the value of settlement, and often the results at trial or by forced termination before trial."[289] Thus, the perception of the federal courts as being superior to state courts in terms of both

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282. *See* Bassett, *supra* note 3, at 133; Cross, *supra* note 256, at 151.

283. *See* Bassett, *supra* note 3, at 132–33; Rush, *supra* note 262, at 124 (defining bias as "a shared 'ideology' based on a shared geography between a litigant and his or her home state judge").

284. The flexibility of trust law generally supports the use of choice of law provisions, which could lead to a disconnect between the place where the dispute is heard and the law governing the dispute. *See also infra* Subsection III.B.3. Federal courts are more familiar with matters governed by foreign substantive law and thus may be more likely to respect choice of law provisions. *See* Matthew J. Wilson, *Demystifying the Determination of Foreign Law in U.S. Courts: Opening the Door to a Greater Global Understanding*, 46 WAKE FOREST L. REV. 887, 892–93, 97 (2011).

285. Commentators have noted that many judges ignore choice of law provisions so as to rely on local law. *See* Louise Ellen Teitz, *Determining and Applying Foreign Law: The Increasing Need for Cross-Border Cooperation*, 45 N.Y.U. J. INT'L L. & POL. 1081, 1091 (2013).

286. *See id.* at 1081. The internal affairs of trusts doing business in foreign jurisdictions are typically governed by the law of the jurisdiction where the trust was formed. *See* Rutledge & Habbart, *supra* note 15, at 1095.

287. *See* Cross, *supra* note 256, at 154; *see also* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1120–21 (1977) [hereinafter Neuborne, *Myth*]; Burt Neuborne, *Parity Revisited: The Uses of a Judicial Forum of Excellence*, 44 DEPAUL L. REV. 797, 799 (1995).

288. *See* Clermont & Eisenberg, *supra* note 3, at 607; Cross, *supra* note 256, at 154. *But see* Bassett, *supra* note 3, at 140–41 (challenging the legitimacy of empirical studies in this area).

289. *See* Subrin, *supra* note 164, at 2152.

procedure and judicial independence will influence party behavior regardless of whether there is any ascertainable difference in outcome.[290]

At this point, commercial actors organizing ventures as commercial trusts have few means of avoiding the rule in *Americold* other than to exit the U.S. judicial system entirely through arbitration, choice of law or choice of forum provisions, or decisions relating to the place and type of business organization.[291] While it is unclear whether the virtual elimination of diversity jurisdiction will drive parties to adopt one or more of these defensive mechanisms, it is a possibility that must be considered. Furthermore, the significance of commercial trusts to the U.S. economy suggests that this is not an issue that Congress should take lightly.[292]

The fifth and final justification for diversity jurisdiction involves the use of the federal judicial system to promote "harmony and proper intercourse among the States."[293] This principle can be explained in both

290. *See* Neuborne, *Myth*, *supra* note 287, at 1120–21; Rush, *supra* note 262, at 159–60. Judicial independence is often tied to the life tenure of the federal bench. The situation is quite different in state courts. At this point,

> twenty-two states use contested judicial elections to select their judges, with seven states holding partisan elections and fifteen using non-partisan elections, i.e., elections in which the party affiliation of the candidates is not shown on the ballot. Thirteen states use some form of the Missouri Plan, named for the state that first adopted this form of "merit" selection. The remaining fifteen states employ some variation of the federal model, mixing executive appointment with some form of legislative confirmation. And the experiment continues "in 2011, [with] 26 states consider[ing] legislation to change or replace their judicial merit selection systems."

Scott W. Gaylord, *Unconventional Wisdom: The Roberts' Court's Proper Support of Judicial Elections*, 2011 MICH. ST. L. REV. 1521, 1522 (citation omitted) (noting "[c]onventional wisdom" that "the experiment with judicial elections has failed"). The United States appears to be the only jurisdiction in the world to select its judges through popular election. The only other countries to include an electoral element to judicial selection are Switzerland, which appoints judges through election by the Federal Assembly, and Japan, which allows judges to be removed from the bench through a referendum. *See* JAPAN CONST., arts. 78–79, http://www.shugiin.go.jp/internet/itdb_english.nsf/html/statics/english/constitution_e.htm; Benjamin Suter, *Appointment, Discipline and Removal of Judges: A Comparison of the Swiss and New Zealand Judiciaries*, 46 VICTORIA U. WELLINGTON L. REV. 267, 280 (2015); Sher Watts Spooner, *Why Does America Elect Judges, Anyway?*, DAILY KOS (Mar. 6, 2016), http://www.dailykos.com/story/2016/3/6/1489191/-Why-does-America-elect-judges-anyway.

291. *See* Americold Realty Tr. v. ConAgra Foods, Inc., 136 S. Ct. 1012 (2016); *see also infra* notes 300–57 and accompanying text.

292. *See supra* notes 26, 72, 137, 155, 161 and accompanying text.

293. Cross, *supra* note 256 at 157 (quoting THE FEDERALIST NO. 42, at 235 (James Madison) (Clinton Rossiter ed., 1990)); *see also* THE FEDERALIST NO. 80, at 445–46 (Alexander Hamilton) (Clinton Rossiter ed., 1990). *But see* Bassett, *supra* note 3, at 119 (claiming that diversity jurisdiction actually hinders national harmony by promoting regional biases).

commercial terms (as illustrated by the work of Professor Akhil Amar) and social terms (as demonstrated by the writing of Professor Jack Balkin).[294] Judge Diane Wood has echoed these sentiments, noting that "diversity jurisdiction has existed as one tool for assuring a national approach to national problems that happen to be governed by state law."[295] Thus, diversity jurisdiction can be conceived of as an important means of "prevent[ing] state boundaries from impeding judicial efforts to dispose of controversies in the most fair and efficient manner possible."[296]

Although commercial trusts are largely governed by state law (a feature that is shared by corporations), they operate on a national basis and play a large and increasing role in both the national and international economies.[297] As such, there appears to be good reason for federal courts to have jurisdiction over disputes involving commercial trusts, as is the case with disputes involving corporations.[298]

As the preceding discussion shows, all of the theories used to justify diversity jurisdiction support extending the rule to include commercial trust disputes. While this analysis may be sufficient to convince some legislators to override *Americold*, Congress need not rely on theoretical concerns.[299] Instead, there are a number of highly persuasive practical arguments in favor of statutory reform, as discussed in the next Subsection.

B. *Practical Issues*

Traditionally, arguments against diversity jurisdiction have focused on the malleability of the device and its lack of jurisprudential cohesiveness, which is said to result in improper judicial and corporate strategizing.[300] These features have also made diversity jurisdiction appear "dubious to general theorists and those interested in systemic judicial efficiency."[301] However, trial lawyers and corporate counsel have consistently defended the mechanism as "an exceptionally useful tactical

294. *See* AKHIL AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 108 (2005); Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 15–16 (2010); Cross, *supra* note 256, at 170.

295. Wood, *supra* note 17, at 605.

296. Cross, *supra* note 256, at 186.

297. *See* Paul E. Lund, *Federally Chartered Corporations and Federal Jurisdiction*, 36 FLA. ST. U. L. REV. 317, 320 (2009) (noting "the majority of American corporations are chartered under state law"); Rutledge & Habbart, *supra* note 15, at 1055; *see also supra* notes 26, 72, 137, 155, 161 and accompanying text.

298. *See* 28 U.S.C. § 1332(c)(1) (2012).

299. *See* Americold Realty Tr. v. ConAgra Foods, Inc., 136 S. Ct. 1012 (2016).

300. *See* Purcell, *supra* note 3, at 1839.

301. *Id.*

tool" that provides them with a much-desired federal forum.[302] As a result, the contemporary debate about diversity jurisdiction often focuses more on pragmatic rather than theoretical concerns.[303] Indeed, Professor Purcell has noted that over the last few years, the discussion about jurisdiction has become

> more closely intertwined not just with issues of institutional structure and federal-state relations but also with issues of private economic conflict and public social policy. More particularly, reform efforts [have become] increasingly intertwined with what might be called "litigation-generated" issues, that is, issues that arose not from traditional structural or institutional conflicts but from pervasive and socially resonant patterns of litigation, especially the rapidly escalating number of cases that pitted national corporations against a wide variety of claimants—suppliers, customers, employees, and adversely affected third parties.[304]

The most recent example of this new approach to jurisdictional analysis can be seen in the debates involving the Class Action Fairness Act (CAFA), which addressed "practical problems that were both weighty and pressing."[305] Though CAFA resembled existing models of jurisdictional reform in some regards, the statute was unusual in the way it increased, rather than restricted, diversity jurisdiction and "opened new vistas for the expanded and highly flexible use of [diversity] jurisdiction by exploiting its two most potentially powerful instrumental characteristics: its nearly illimitable plasticity and its precise targeting capability."[306] Although CAFA is not the only federal statute to embrace the concept of minimum (rather than complete) diversity,[307] CAFA is said to have "strengthened the legitimacy of such a potentially vast and pliable protective jurisdiction with its original constitutional justification," thereby bringing practical considerations back into line with legal theory.[308]

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302. *Id.* at 1838.

303. *See id.* at 1825.

304. *Id.* at 1828.

305. *See id.* at 1851.

306. *Id.* at 1857.

307. The same technique was used in matters involving interpleader and multiparty, multiforum matters. *See* 28 U.S.C. §§ 1335(a)(1), 1369 (2012); Purcell, *supra* note 3, at 1856. Some commentators have called for the adoption of minimal diversity in all cases. *See* Miller, *supra* note 244, at 269.

308. Purcell, *supra* note 3, at 1859; *see also* Cross, *supra* note 256, at 146; Miller, *supra* note 244, at 279. *But see* Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1523–24 (2008) (noting constitutional arguments against CAFA); C. Douglas Floyd, *The Inadequacy of the Interstate Commerce*

The preceding suggests that Congress needs to evaluate the practical implications of *Americold* when considering whether and to what extent a legislative response is appropriate.[309] Among the prospects that Congress must consider are the likelihood that the rule from *Americold* will cause parties to exit the U.S. judicial system through arbitration agreements or through forum selection clauses, choice of law provisions or the place of organization.[310] Alternatively, parties could reject commercial trusts in favor of other types of business associations, most notably corporations. Each of these possibilities are analyzed in the following Subsections.

1. Exit Through Arbitration

One of the most popular and effective ways for parties to avoid an unwelcome judicial forum is through arbitration. This route may be particularly attractive to U.S. parties, given the strong pro-arbitration policy reflected in the Federal Arbitration Act (FAA) and most state arbitration statutes.[311]

Interestingly, there has never been a better time for parties to seek arbitration of commercial trust disputes.[312] Not only have five states (Arizona, Florida, Missouri, New Hampshire, and South Dakota) recently enacted statutes specifically providing for the enforcement of arbitration

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Justification for the Class Action Fairness Act of 2005, 55 EMORY L.J. 487 (2006); Floyd, *supra* note 244, at 613. Though the term is not well defined,

> [t]he concept of protective jurisdiction tends to arise in situations in which Congress has authorized a federal forum, the accepted minimum requirements for a case to arise under federal law are not met, and no other basis for federal jurisdiction can be found under article III of the Constitution. Since Congress has necessarily concluded in such instances that a federal forum is desired in order to promote some federal interest, the federal jurisdiction is characterized as "protective" of that interest.

Carole E. Goldberg-Ambrose, *The Protective Jurisdiction of the Federal Courts*, 30 UCLA L. REV. 542, 546–47 (1983).

309. *See* Americold Realty Tr. v. ConAgra Foods, Inc., 136 S. Ct. 1012 (2016).

310. *See id.* at 1016–17.

311. *See* 9 U.S.C. §§ 1–307 (2012); Nitro-Lift Tech., L.L.C. v. Howard, 133 S. Ct. 500, 501 (2012); CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 669 (2012); Southland Corp. v. Keating, 465 U.S. 1, 10 (1984). It is unclear whether and to what extent the FAA preempts state arbitration statutes in trust-related disputes. *See* David Horton, *Donative Trusts and the United States Federal Arbitration Act*, *in* ARBITRATION OF TRUST DISPUTES: ISSUES IN NATIONAL AND INTERNATIONAL LAW, *supra* note 77, at 203, 203–27 (focusing on non-commercial trusts but discussing factors that may be persuasive in the commercial context).

312. *See* S.I. Strong, *The Future of Trust Arbitration:* Quo Vadis? *in* ARBITRATION OF TRUST DISPUTES: ISSUES IN NATIONAL AND INTERNATIONAL LAW, *supra* note 77, at 531, 546.

provisions in trust instruments,[313] but some types of commercial trust disputes are statutorily required to be resolved through arbitration.[314] Support for trust arbitration has also been seen in judicial quarters, with a number of U.S. courts, most notably the Supreme Court of Texas, judicially recognizing the arbitrability of internal trust disputes even in cases without a specific statute on trust arbitration.[315]

Trust arbitration has spread to other countries as well. Not only have key offshore jurisdictions like Guernsey and the Bahamas explicitly adopted legislation allowing for the arbitration of trust disputes, but countries such as Switzerland have addressed the matter indirectly through their conflict of laws provisions.[316]

As these examples suggest, the field of trust arbitration is expanding rapidly.[317] However, these developments do not exist in a vacuum.

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313. *See* ARIZ. REV. STAT. ANN. § 14-10205 (2016), *applied in* Jones v. Fink, 2011 WL 601598 (Ariz. Ct. App. 2011); FLA. STAT. § 731.401 (2016); MO. REV. STAT. § 456.2-205 (2016); N.H. REV. STAT. § 564-B:1-111A (2016); S.D. CODIFIED LAWS § 55-1-54 (2016); Lee-ford Tritt, *Legislative Approaches to Trust Arbitration in the United States*, *in* ARBITRATION OF TRUST DISPUTES: ISSUES IN NATIONAL AND INTERNATIONAL LAW, *supra* note 77, at 150, 159–71. Other state statutes appear to permit the arbitration of trust disputes, although they have not yet been tested. *See* Strong, *supra* note 79, at 1188–92.

314. *See* 29 U.S.C. § 1401 (2012) (referring to certain types of multiemployer pension trusts); ILGWU Nat'l Ret. Fund v. Meredith Gray, Inc., 94 Fed. App'x 850, 852 (2d Cir. 2003); Teamsters-Emp'rs Local 945 Pension Fund v. Waste Mgmt. N.J., Inc., No. 11-902 (FSH), 2011 WL 2173854, at *2 (D.N.J. 2011); S.I. Strong, *Institutional Approaches to Trust Arbitration: Comparing the AAA, ACTEC, ICC, and DIS Trust Arbitration Regimes*, *in* ARBITRATION OF TRUST DISPUTES: ISSUES IN NATIONAL AND INTERNATIONAL LAW, *supra* note 77, at 99, 137; INT'L FOUND. OF EMP. BENEFIT PLANS, IMPARTIAL UMPIRE RULES FOR ARBITRATION OF IMPASSES BETWEEN TRUSTEES OF JOINT EMPLOYEE BENEFIT TRUST FUNDS (effective Jan. 1, 1988), https://www.adr.org/sites/default/files/Impartial%20Umpire%20Rules%20for%20Arbitration%20of%20Impasses%20Between%20Trustees%20of%20Joint%20Employee%20Benefit%20Trust%20Funds.pdf; INT'L FOUND. OF EMP. BENEFIT PLANS, MULTI-EMPLOYER PENSION PLAN ARBITRATION RULES FOR WITHDRAWAL LIABILITY DISPUTES (rev'd effective Sept. 1, 1986), http://www.lawmemo.com/arb/res/aaa-meppa.htm.

315. *See* Rachal v. Reitz, 403 S.W.3d 840, 842 (Tex. 2013); *see also* Mary F. Radford, *Trust Arbitration in the United States Courts*, *in* ARBITRATION OF TRUST DISPUTES: ISSUES IN NATIONAL AND INTERNATIONAL LAW, *supra* note 77, at 175, 176–96 (discussing numerous state and federal cases); Strong, *supra* note 79, at 1159–1248 (considering recent developments in the field of international commercial arbitration).

316. *See* Private International Law Statute, chs. 9a, 12 (Switz.); Trustee Act of 1925, ch. 19, pt. II, § 15(f) (Guernsey); Trustee (Amendment) Act 2011 § 18(2) (Bah.); Trusts (Guernsey) Law 2007 pt. II, § 63(1)(a) (Guernsey 2008); David Brownbill, *Arbitration of Trust Disputes Under the Bahamas Trustee Act 1998*, *in* ARBITRATION OF TRUST DISPUTES: ISSUES IN NATIONAL AND INTERNATIONAL LAW, *supra* note 77, at 313; Paul Buckle, *Trust Arbitration in Guernsey*, *in* ARBITRATION OF TRUST DISPUTES: ISSUES IN NATIONAL AND INTERNATIONAL LAW, *supra* note 77, at 289; Strong, *supra* note 77, at 383, 392; Strong, *supra* note 79, at 1193–95.

317. A full discussion of the various issues is beyond the scope of the current Article, although further reading is available. *See* ARBITRATION OF TRUST DISPUTES: ISSUES IN NATIONAL

Indeed, similar initiatives are currently being considered in the corporate context.[318] The most important development arose in 2009, when the German Federal Court of Justice declared shareholder disputes arbitrable,[319] but other countries have adopted analogous measures, leading a number of major multinational corporations, most notably Royal Dutch Shell, to adopt arbitration provisions in their corporate documents.[320] While the United States does not appear to be as far along as these jurisdictions, a number of U.S. scholars have considered the relationship between the FAA and arbitration provisions in corporate bylaws and charters.[321]

These developments suggest an increasingly positive global perspective on the arbitration of internal trust disputes, including those involving commercial trusts.[322] However, some problems do exist. Perhaps the most disquieting involves the Security and Exchange Commission's (SEC) unwritten but well-known policy of refusing to

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AND INTERNATIONAL LAW, *supra* note 77, *passim*; S.I. Strong, *Mandatory Arbitration of Internal Trust Disputes: Improving Arbitrability and Enforceability Through Proper Procedural Choices*, 28 ARB. INT'L 591, 593 (2012); Strong, *supra* note 79, at 1157.

318. *See* Olivier Caprasse, *Objective Arbitrability of Corporate Disputes—Belgium and France*, *in* ONDERNEMING EN ADR 79, 79–99 (C.J.M. Klaassen et al. eds., 2011); Gerard Meijer & Josefina Guzman, *The International Recognition of an Arbitration Clause in the Articles of Association of a Company*, *in* ONDERNEMING EN ADR, *supra*, at 117, 117–51; Strong, *supra* note 317, at 592.

319. *See* ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] [Federal Court of Justice] Apr. 6, 2009, II ZR 255/08 (Ger.), http://www.kluwerarbitration.com/CommonUI/document.aspx?id=kli-ka-0945006; Christian Borris, *Arbitrability of Corporate Law Disputes in Germany*, *in* ONDERNEMING EN ADR, *supra* note 318, at 55, 56. This decision led the German Arbitral Institution (DIS) to adopt a special set of arbitral rules dedicated to the resolution of internal shareholder disputes, including those relating to corporate governance. *See* DIS SUPPLEMENTARY RULES FOR CORPORATE LAW DISPUTES § 1.1 (2009), http://www.dis-arb.de/download/DIS_SRCoLD_%202009_Download.pdf. These rules could easily be adapted for use in internal trust disputes. *See* Strong, *supra* note 314, at 108–36; Strong, *supra* note 317, at 637–49.

320. Royal Dutch Shell is an Anglo-Dutch company incorporated in the United Kingdom and headquartered in the Netherlands. The company's articles of association include an arbitration agreement that constitutes "an express submission to arbitration by each shareholder, the company, its directors and professional service providers." ARTICLES OF ASSOCIATION OF ROYAL DUTCH SHELL PLC art. 138(A), (F) (adopted May, 18 2010), http://www.shell.com/media/news-and-media-releases/2012/cove-energy-02052012/_jcr_content/par/textimage.stream/1441180629555/ce14642c7238f77a5c65f42f40313ded1809ceed6a3b629b527465ad63a7d00d/articles-of-association-shell.pdf; *see also infra* note 339 (discussing other provisions).

321. *See* Claudia H. Allen, *Bylaws Mandating Arbitration of Stockholder Disputes?*, 39 DEL. J. CORP. L. 751, 773–75 (2015); Ann M. Lipton, *Manufactured Consent: The Problem of Arbitration Clauses in Corporate Charters and Bylaws*, 104 GEO L.J. 583, 600–03 (2016).

322. *See* Kantor, *supra* note 98, at 45 (noting desirability of arbitration of some types of commercial trust disputes); Strong, *supra* note 312, at 540; Strong, *supra* note 79, at 1177–79 (noting commercial trusts are not donative in nature).

provide accelerated registration for public offerings of equity securities in cases where shareholder disputes are subject to a pre-dispute arbitration agreement.[323] Although the scope of this rule is somewhat unclear (for example, it is not known whether bonds and other debt offerings are covered under the current policy),[324] the SEC's ban on arbitration would clearly affect commercial trusts that are or might be publicly traded at some point in the future.[325] While industry groups have occasionally sought to persuade the SEC to change its approach, those efforts have thus far been unsuccessful.[326]

Arbitration of commercial trust disputes could also experience difficulties as a matter of public policy. While U.S. courts have held that arbitration is appropriate in a number of areas of public concern,[327] opponents to arbitration of non-commercial trusts have asserted various types of policy arguments, including those claiming exclusive jurisdiction of probate or chancery courts over trust-related disputes and those involving the application of various mandatory rules of law, such as the law of succession.[328] Although more research needs to be conducted, it is possible that some of these objections could be applicable to disputes involving commercial trusts.[329] Furthermore, some types of commercial trusts might be subject to their own unique policy concerns. For example, the public nature of regulatory compliance trusts could require disputes to be resolved in an entirely transparent (i.e., public) manner.[330]

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323. *See* Kantor, *supra* note 98, at 36; Carl W. Schneider, *Arbitration Provisions in Corporate Governance Documents*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (2012), http://corpgov.law.harvard.edu/2012/04/27/arbitration-provisions-in-corporate-governance-documents/. Other difficulties exist, as in cases involving special purpose vehicles, which can give rise to issues of consent, and situations involving non-exclusive choice of forum. *See* Kantor, *supra* note 98, at 31–43.

324. *See* Kantor, *supra* note 98, at 37. Although the SEC policy does not apply to private bond placements, parties often contemplate the possible resale of private bonds on the public market, which often precludes the inclusion of an arbitration provision in the original documents. *See id.*

325. *See id.*; *see also supra* note 147 and accompanying text (noting the number of publicly traded REITs in August 2016).

326. *See* Kantor, *supra* note 98, at 37 (noting no judicial challenges have yet been brought to determine the propriety of the policy or its scope).

327. Arbitration has been considered appropriate in such policy-laden fields as antitrust and international insurance and reinsurance law. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 638 (1985); Strong, *supra* note 161, at 287–88, 301.

328. *See* Strong, *supra* note 79, at 1200 n.204, 1234–35.

329. For example, even a commercial trust could run into difficulties regarding the law of succession. *See* Regions Bank v. Britt, No. 4:09CV61TSL-LRA, 2009 WL 3766490, at *2 & n.2 (S.D. Miss. Nov. 10, 2009).

330. *See supra* notes 157–62 and accompanying text.

Arbitration therefore appears to provide parties with a possible means of relief from the rule in *Americold*, although this option is not without its difficulties.[331] However, there are other ways for a party to evade an undesirable judicial forum, as discussed in the following Subsection.

2. Exit Through Forum Selection Clauses, Choice of Law Provisions, and Place of Organization

Another way for parties to avoid a particular judicial forum is through a forum selection clause.[332] These types of provisions are widely recognized in U.S. courts, albeit with some limitations.[333] For example, parties cannot use a forum selection provision to create jurisdiction where none would otherwise exist.[334] As a result, parties cannot use a forum selection clause to choose a U.S. federal court if subject matter jurisdiction does not exist as a matter of federal or constitutional law.[335]

In the case of commercial trusts, parties might be inclined to use a forum selection provision to choose a U.S. state or foreign court with particular expertise in these types of disputes.[336] However, that technique

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331. *See* Americold Realty Tr. v. ConAgra Foods, Inc., 136 S. Ct. 1012, 1016–17 (2016).

332. Interestingly, forum selection provisions are routinely used in contracts between companies but are seldom found in the founding documents of publicly traded corporations. *See* Joseph A. Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses: An Empirical Analysis*, 37 DEL. J. CORP. L. 333, 336–37 (2012). The incidence of forum selection provisions in an entity's organic documents is higher for limited liability companies and limited liability partnerships than for corporations. *See id.* at 357. At this point, it is unclear which model is more applicable to commercial trusts because the issue may turn on whether and to what extent commercial trusts experience the same types of difficulties that corporations have with respect to the time and manner of adoption of the forum selection clause. *See id.* at 390. Delaware recently adopted a law allowing exclusive forum selection provisions for certain types of corporations, which should lead to an increase in the use of such provisions. *See* DEL. CODE ANN. tit. 8, § 115 (2016); Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934 (Del. Ch. 2013).

333. *See* Atl. Marine Constr. Co. v. U.S. Distr. Ct., 134 S. Ct. 568, 579, 581 (2013) (noting strong federal policy in favor of enforcing forum selection provisions in the interstate context); Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972) (holding forum selection provisions are enforceable unless unreasonable under the circumstances); Erin Ann O'Hara, *The Jurisprudence and Politics of Forum-Selection Clauses*, 3 CHI. J. INT'L L. 301, 301 (2002) (suggesting forum selection clauses are most robustly enforced in international commercial cases). The United States has signed the Convention on Choice of Court Agreements (COCA), although ratification has not yet occurred. *See* Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294, http://www.hcch.net/index_en.php?act=conventions.text&cid=98.

334. *See* Stephen E. Sachs, *The Forum Selection Defense*, 10 DUKE J. CONST. L. & PUB. POL'Y 1, 17–18 (2014).

335. *See id.*

336. For example, Delaware or Massachusetts might be a favored location, given those states' expertise in corporate law and statutory trusts. The English Commercial Court also has an excellent reputation in complex commercial matters. Other popular offshore jurisdictions include Switzerland, Guernsey, Singapore, and the Cayman Islands.

might require parties to make other procedural choices to allow the court in question to exercise jurisdiction over the dispute.[337] For example, some courts will hear any dispute governed by the law of that jurisdiction, regardless of whether any other connections exist between that jurisdiction and the parties or the dispute.[338] However, parties may have to choose to have the dispute governed by the law of the preferred forum if they have no other connections to that jurisdiction.[339]

Other courts may require a more substantive connection between the dispute and the jurisdiction. Thus, it may be necessary for a commercial trust to be registered or organized under a particular state law or have its primary place of business in a particular location if the parties want the courts in that jurisdiction to hear a dispute arising out of the trust.[340] This approach can be interpreted as an implicit requirement that the parties choose the law of the forum, since parties who choose to do business in or organize themselves under a particular jurisdiction's laws typically make themselves subject to that law.[341]

This is not to say that a choice of forum provision necessarily requires the parties to choose that jurisdiction's substantive law to apply to the merits of the dispute. The law of the forum and the law governing the dispute do not always have to be the same.[342] However, sophisticated commercial actors recognize that courts do not always apply foreign law correctly or readily, either in the interstate or the international context.[343]

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337. For example, some states require certain types of disputes to be heard in their courts or under their laws. *See, e.g.*, TEX. BUS. & COM. CODE ANN. § 272.001(b) (West 2016).

338. For example, English courts will typically exercise jurisdiction over any dispute governed by English law, even if the parties and the dispute have no other connection to England. *See* ADRIAN BRIGGS, PRIVATE INTERNATIONAL LAW IN ENGLISH COURTS 10 (2016). New York has adopted similar provisions in cases over a certain minimum amount. *See* N.Y. GEN. OBLIG. LAW §§ 5-1401 to 5-1402 (McKinney 2016); Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, 30 CARDOZO L. REV. 1475, 1484–85 (2009).

339. Royal Dutch Shell has adopted this type of choice of forum/choice of law provision to address situations where its arbitration provision does not apply. *See* ARTICLES OF ASSOCIATION OF ROYAL DUTCH SHELL PLC, *supra* note 320; *see also supra* note 320 and accompanying text (discussing the relevant arbitration agreement).

340. The place where a business entity is organized often acts as an implicit choice of forum provision. *See* Eisenberg & Miller, *supra* note 338, at 1476; Grundfest, *supra* note 332, at 350–51.

341. *See* Theodore Eisenberg & Geoffrey Miller, *Ex Ante Choices of Law and Forum: An Empirical Analysis of Corporate Merger Agreements*, 59 VAND. L. REV. 1975, 1978 (2006).

342. *See* Wilson, *supra* note 284, at 888, 890. For an interesting analysis of whether and to what extent substantive legal issues should be decided in the "home" forum of the relevant legal principle, see Verity Winship, *Aligning Law and Forum: The Home Court Advantage*, 81 TENN. L. REV. 1 (2013).

343. *See* Thomas O. Main, *The Word Commons and Foreign Laws*, 46 CORNELL INT'L L.J. 219, 220–21 (2013); Wilson, *supra* note 284, at 890–91.

Indeed, the desire to ensure proper application of choice of law provisions is one of the reasons why parties adopt arbitration rather than litigation in complex multijurisdictional actions.[344]

Although choice of forum and choice of law provisions may initially appear to be less problematic than arbitration,[345] these types of mechanisms experience a number of the same difficulties that are seen in arbitration. For example, choice of forum and choice of law provisions may trigger public policy concerns about having a nationally or regionally important dispute decided by someone other than a U.S. state or federal judge.[346] As the recent financial crisis shows, transparency and accountability are critical to the proper protection of individuals and institutions,[347] and policymakers may be loath to allow various types of public concerns to be heard outside the relevant jurisdiction. The international legal and business communities have also enunciated concerns about whether and to what extent offshore trusts are being used to conceal assets from judgment or award creditors.[348]

These concerns could lead judiciaries or legislatures to refuse to enforce certain types of forum selection provisions.[349] They also support the argument that these types of matters should be heard in federal rather than state court. Furthermore, some facially acceptable solutions—such

344. Arbitrators tend to comply with choice of law provisions more readily than judges and are often chosen for their expertise in that law. *Cf.* Stefan Michael Kröll, *The "Arbitrability" of Disputes Arising from Commercial Representation*, *in* ARBITRABILITY: INTERNATIONAL & COMPARATIVE PERSPECTIVES ¶ 16-57, at 339, ¶ 16-65, at 342 (Loukas A. Mistelis & Stavros L. Brekoulakis eds., 2009).

345. *See supra* notes 323–26 and accompanying text (discussing the SEC policy on arbitration).

346. *See* Verdier, *supra* note 281, at 119–20, 146 (noting problems associated with regulation of transnational disputes).

347. *See* FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES xix, xxii (2011), http://cybercemetery.unt.edu/archive/fcic/20110310173538/http://www.fcic.gov/report; Arthur, *supra* note 141, at 590.

348. Tim Penny QC has stated: "Offshore trusts are frequently used. . . . They will often engage bona fide trustees, a bona fide offshore structure with a bona fide trust and arrange matters so that they have the power to tell the trustees what to do." BURFORD BAROMETER, 2016 JUDGMENT ENFORCEMENT SURVEY 4 (2016), http://www.burfordcapital.com/wp-content/uploads/2016/06/Burford_WhitePaper_US_Final_Web.pdf (conducting an empirical study regarding the enforcement rates of court judgments and arbitral awards and noting that many judgments and awards are not complied with at their full value); *see also id.* ("Some of the most bedeviling enforcement challenges comes [sic] in cases in which a judgment debtor . . . has taken significant steps to conceal assets by moving them into offshore jurisdictions, where they are hard to identify, let alone recover.").

349. *See* O'Hara, *supra* note 333, at 309.

as the use of a foreign location as the trust's place of registration—may not resolve all of the problems created by *Americold*.[350]

The prospect of exit through organization in a foreign country may be particularly troubling to Congress, since the flight to offshore jurisdictions could have a significant financial effect on local and national economies. Trust law is a very lucrative and competitive field, and commentators have already noted "strong evidence of a national market for trust funds that is responsive to the interplay between state trust law and federal tax law."[351] Specialists have already voiced concerns about losing transactional and dispute-related business to other jurisdictions, leading state legislatures to become increasingly responsive to the concerns of the trust law industry.[352] International and interstate competition also gives rise to regulatory concerns, given the potential for a race to the bottom.[353]

3. Exit Through Choice of Business Form

Perhaps the most effective way for parties to avoid the effects of *Americold* is by choosing to operate as a corporation rather than a commercial trust. Numerous studies exist describing how various differences between trusts and corporations can affect the decision to use one business form over another,[354] and it appears likely that questions relating to diversity jurisdiction will soon be factored into these types of

350. For example, establishing a commercial trust in a foreign country does not ensure a federal forum if suit is brought in the United States. *See supra* notes 20–24 and accompanying text.

351. Sitkoff & Schanzenbach, *supra* note 109, at 362; *see also* Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035, 1037–38, 1055–56 (2000) (noting competition among the states for trust business); Eisenberg & Miller, *supra* note 338, at 1481 (noting competition for legal business outside the trust context).

352. Trust lawyers and commercial lawyers have both enunciated significant concerns about the prospects of losing business to jurisdictions with more welcoming laws, and anecdotal information suggests that practitioners are actively lobbying for legislation that facilitates commercial trusts in their jurisdictions so as to remain competitive. *See* Horton, *supra* note 9, at 1070; Sitkoff, *supra* note 7, at 40 (discussing regulatory competition in corporate, securities, bankruptcy, environmental, tax, secured transactions, welfare, and antitrust law); Sitkoff & Schanzenbach, *supra* note 109, at 359–64.

353. *See* Sterk, *supra* note 351, at 1037–38, 1055–57.

354. *See, e.g.*, Robert H. Sitkoff, *Trust Law, Corporate Law, and Capital Market Efficiency*, 28 J. CORP. L. 565, 570–81 (2003) (comparing trusts and publicly-traded corporations to determine the effect of capital market efficiency); A. Joseph Warburton, *Trusts Versus Corporations: An Empirical Analysis of Competing Organizational Forms*, 36 J. CORP. L. 183, 184–87, 219–20 (2010) (focusing on issues involving regulation of trusts and corporations, particularly with respect to agency conflict and decisional flexibility). Empirical studies also exist with respect to competition between different states for particular types of trust-related business. *See* Sitkoff & Schanzenbach, *supra* note 109, at 362.

strategic analyses. While some people may not believe that a Supreme Court decision about diversity jurisdiction will have a significant effect on commercial decision-making, recent research by Professors Richard Thaler and Cass Sunstein demonstrates how even small "nudges" can influence individual and institutional behavior.[355] The question therefore is whether Congress wishes to increase the incentives in favor of the corporate form by allowing *Americold* to stand.

IV. POSSIBLE CONGRESSIONAL RESPONSES TO *AMERICOLD*

As important as the Supreme Court is in deciding matters relating to diversity jurisdiction, the Court does not have the final word on this issue.[356] In fact, the Court itself suggested in *Americold* that Congress could and should intervene if it believes commercial trusts should be given increased access to federal courts.[357]

At this point, Congress appears to have two possible responses to *Americold.* First, Congress could create a statutory exception to the rule requiring complete diversity, something it has done on three previous occasions.[358] Second, Congress could create a statutory definition of the citizenship of a business trust, similar to that used for corporations in 28 U.S.C. § 1332(c)(1).[359] Both approaches seem viable, although they would lead to slightly different results.

A. *Creation of a Statutory Exception to the Rule Requiring Complete Diversity*

The first way that Congress could override *Americold* is through a statutory exception to the rule requiring complete diversity.[360] This approach would likely be relatively easy to implement, which is important given the wide range of commercial trusts in existence and the potential difficulty in providing a single definition for citizenship that encompasses all of the types of commercial trusts that are currently possible.[361] This type of response would also pass constitutional muster, since the Supreme Court has recognized that "[t]he complete diversity requirement is not mandated by the Constitution."[362]

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355. RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 252 (2008).

356. *See* Christiansen & Eskridge, *supra* note 34, at 1317, 1382.

357. *See* Americold Realty Trust v. ConAgra Foods, Inc., 136 S. Ct. 1012, 1017 (2016).

358. *See* 13E WRIGHT ET AL., *supra* note 13, § 3605, at 223.

359. *See* 28 U.S.C. § 1332(c)(1) (2012).

360. *See Americold*, 136 S. Ct. at 1017.

361. *See supra* Subsection I.B.2 (discussing types of commercial trusts).

362. Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 553 (2005) (citing State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530–31 (1967)).

Congress has adopted a rule of minimal diversity in three different statutes:[363] the Interpleader Act;[364] the Multiparty, Multiforum Trial Jurisdiction Act (known as the MMTJA or the mass-disaster act);[365] and CAFA.[366] Each of these enactments differs slightly in both form and intent. For example, the Interpleader Act was enacted in 1936 in response to the Supreme Court decision in *New York Life Insurance Co. v. Dunlevy*[367] and authorized national service of process in federal interpleader actions involving claimants who came from different states.[368]

The Interpleader Act stood as a jurisdictional anomaly until 2002, when the MMTJA was adopted to address injuries arising out of a single mass disaster.[369] The MMTJA acts by conferring original jurisdiction on

> the federal courts in any civil case involving minimal diversity between adverse parties and involving a single accident at a discrete location where at least seventy-five persons died and either (a) the accident occurred in a state or other location different from that of defendant's residence, (b) "any two defendants reside in different States," or (c) "substantial parts of the accident took place in different States."[370]

CAFA, the third and thus far final statute in this series, was enacted in 2005 to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction."[371] CAFA did so by giving federal courts jurisdiction over any class action with minimal diversity

363. Minimal diversity means that at least one plaintiff and one defendant are diverse, as opposed to complete diversity, which requires all plaintiffs and defendants to be diverse.

364. Act of June 25, 1948, ch. 646, 62 Stat. 931 (codified as amended at 28 U.S.C. § 1335 (2012)); *see also State Farm*, 386 U.S. at 531 (noting "in a variety of contexts this Court and the lower courts have concluded that Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens"); Goldberg-Ambrose, *supra* note 308, at 549 (noting the Interpleader Act is and was largely uncontroversial).

365. Pub. L. No. 107-273, § 11020, 116 Stat. 1826 (2002) (codified as amended at 28 U.S.C. § 1369 (2012)); *see also* Floyd, *supra* note 244, at 624–28.

366. 28 U.S.C. §§ 1332(d)(2), 1453 (2012); *see also* 13E WRIGHT ET AL., *supra* note 13, § 3605, at 229; Wood, *supra* note 17, at 602–03.

367. 241 U.S. 518 (1916).

368. *See* Goldberg-Ambrose, *supra* note 308, at 549 n.42.

369. *See* 28 U.S.C. § 1369(a), (c)(4).

370. Miller, *supra* note 244, at 296 (quoting 28 U.S.C. § 1369(a)(2), (3)). Congress also altered the removal statute to expand the jurisdiction of the courts in these types of matters. *See* 28 U.S.C. § 1441(e)(1) (2012); Miller, *supra* note 244, at 296.

371. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(b)(2), 119 Stat. 4, 5 (2005) (codified as amended in scattered sections of 28 U.S.C.).

among the adverse parties and an amount in controversy in excess of $5 million.[372]

Closer examination shows some key similarities between these various enactments, particularly the two most recent. For example, each of these statutes provides federal jurisdiction over matters primarily or exclusively governed by state law but addressing issues of national importance.[373] This rationale appears to apply equally to commercial trusts, since they are also largely governed by state law despite their national, if not international, significance.[374]

Another similarity involves the nature of the relevant disputes. All three statutes address questions of particular complexity that can and often do arise on a multijurisdictional basis.[375] Notably, commercial trusts also involve disputes involving complicated cross-border concerns.[376]

The final analogy to consider involves the number of parties and the types of claims asserted. Both the MMTJA and CAFA were designed to deal with large-scale disputes (i.e., class and mass actions) that cross jurisdictional lines.[377] Not only can the number of plaintiffs be relatively large, but the disputes involve claims that are identical or substantially similar in nature. Allowing access to federal courts encourages resolution of the matter at a single time, in a single forum, and avoids inequitable and inefficient fragmentation of the litigation process. Notably, these elements are also present in disputes involving commercial trusts. Not only can internal trust disputes involve hundreds if not hundreds of thousands of parties spread across the nation, but most of the parties are similarly if not identically situated.[378] Indeed, internal trust disputes often

372. *See* 28 U.S.C. § 1332(d)(2) (2012). CAFA also includes a provision allowing a "mass action" of over 100 plaintiffs to be removed to federal court if the $5 million minimum is also met. *Id.* § 1332(d)(11)(A)–(B)(i).

373. *See* Wood, *supra* note 17, at 604–05.

374. *See supra* note 297 and accompanying text. Notably, 28 U.S.C. § 1332(c)(1) seeks to achieve a similar goal, although it does so through different means (i.e., by deeming corporations to be citizens of the state in which they are incorporated and the state which constitutes their principal place of business).

375. *See* 13E WRIGHT ET AL., *supra* note 13, § 3605.

376. *See supra* notes 26, 72, 137, 155, 161 and accompanying text. It is also easy to see how disputes involving commercial trusts resemble those involving corporations, although 28 U.S.C. § 1332(c)(1) addresses federal jurisdiction in a different manner. *See supra* note 374.

377. *See* 28 U.S.C. §§ 1332(d)(2), 1369, 1453 (2012).

378. *See supra* Subsection I.B.2 (noting that trusts can have thousands of geographically diverse participants). Notably, the size and character of commercial trust disputes resemble that of corporate disputes, suggesting that commercial trusts should be considered akin to corporations for jurisdictional purposes. *See* Barak Orbach & Grace Campbell Rebling, *The Antitrust Curse of Bigness*, 85 S. CAL. L. REV. 605, 607 (2012) (discussing concept of "bigness in business").

demonstrate more consistency in terms of the parties' claims and defenses than actions under the MMTJA and CAFA.[379]

Together, these factors suggest that Congress should strongly consider adopting a statute that would allow commercial trust disputes to proceed in federal court if only minimal diversity exists. When drafting this statute, it may be necessary for Congress to include other requirements, similar to those used in the Interpleader Act, MMTJA, and CAFA, so as to make sure that the new regime is not overly inclusive. Thus, it might be reasonable to include a statutory minimum regarding either the number of parties or the amount in dispute, as is the case with both the MMTJA and CAFA.[380] If this approach is adopted, Congress should also consider amending the federal removal statute to reflect the rationales contained in the new statute.[381]

B. *Creation of a Statutory Definition of Citizenship Similar to That of Corporations*

The second option available to Congress involves a statute putting commercial trusts on equal footing with corporations by deeming commercial trusts to be citizens of one or perhaps two easily identified jurisdictions.[382] This proposal can be justified on the basis of the theoretical and functional similarity between commercial trusts and corporations,[383] although additional support can be found in the types of rationales used to justify a statute allowing for minimal diversity.[384]

This proposal can also be rationalized by reference to the reasons for adopting 28 U.S.C. § 1332(c).[385] To fully appreciate the nature of the statute, it is necessary to go back to the mid-nineteenth century,[386] when

379. Although parties to a dispute involving a commercial trust could be aligned on two separate sides (as would be the case in a dispute involving the propriety of a particular business decision), the litigation strategies would be essentially binary. *See* Strong, *supra* note 317, at 641. Indeed, internal trust disputes have often been described as proceeding in rem and thus would be more cohesive than some matters proceeding under the MMTJA or CAFA, which could require various subclasses to take into account different types of injuries or different applicable laws. *See* Strong, *supra* note 317, at 594, 637.

380. For example, the CAFA removal statute requires a minimum of 100 litigants, while the MMTJA requires seventy-five injured persons. *See* 28 U.S.C. §§ 1332(d)(11), 1369(a) (2012). CAFA also requires the amount in dispute to be in excess of $5 million. 28 U.S.C. § 1332(d)(2).

381. *See* 28 U.S.C. § 1441 (2012).

382. *See* 28 U.S.C. § 1332(c)(1).

383. *See supra* Part II.

384. Thus, the fact that commercial trusts give rise to what are often large-scale disputes of national significance and particular complexity even though they are governed by state law could be used to extend the rule in 28 U.S.C. § 1332(c)(1) to commercial trusts. *See supra* Part III.

385. 28 U.S.C. § 1332(c)(1).

386. An earlier decision held that corporations could be considered citizens, but looked through the corporate entity to individual shareholders to determine citizenship for purposes of

the Supreme Court first addressed the citizenship of corporations in *Louisville, Cincinnati, & Charleston Railroad v. Letson*[387] and *Marshall v. Baltimore & Ohio Railroad*.[388] These decisions sought to preserve the "valuable privilege" of federal jurisdiction for corporations by creating a conclusive presumption that corporations were citizens of their state of incorporation.[389] In both *Marshall* and *Letson*, the Court set aside the rule requiring courts to look through the corporation to the shareholders as the real parties in interest, thereby embracing the concept of "entity citizenship" as opposed to "aggregate citizenship."[390] This approach was justified because

> [t]he right of choosing an impartial tribunal is a privilege of no small practical importance, and more especially in cases where a distant plaintiff has to contend with the power and influence of great numbers and the combined wealth wielded by corporations in almost every State. It is of importance also to corporations themselves that they should enjoy the same privileges, in other States, where local prejudices or jealousy might injuriously affect them.[391]

One of the reasons why the Supreme Court adopted this rule was because "the members of a corporation are not individually liable for its obligations at all."[392] As a result, "there can be no judgment against them individually, nor against a part of them, the judgment must be against the body corporate, which includes all the members."[393]

The pre-existing case law on commercial citizenship was explicitly incorporated into 28 U.S.C. § 1332(c) when the statute was adopted in 1958.[394] Although some authorities have suggested the most important aspect of that process was the way in which it sought to limit federal jurisdiction through the insertion of language relating to a corporation's principal place of business, Congress nevertheless reiterated the

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diversity jurisdiction. *See* Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 83 (1809), *overruled in part on other grounds by* Louisville, Cincinnati, & Charleston R.R. v. Letson, 43 U.S. (2 How.) 497, 554–56 (1844), *superseded by statute*, 28 U.S.C. § 1332(c)(1).

387. 43 U.S. at 558.

388. 57 U.S. (16 How.) 314, 328 (1854), *superseded by statute*, 28 U.S.C. § 1332(c)(1).

389. *Id.* at 327–28.

390. Cohen, *supra* note 40, at 271–72.

391. *Marshall*, 57 U.S. at 329.

392. *Letson*, 43 U.S. at 503.

393. *Id.*

394. *See* 28 U.S.C. § 1332(c) (2012).

importance of diversity jurisdiction for commercial entities in its deliberations.[395]

Commercial trusts of course share numerous attributes with corporations, including the notion that "there can be no judgment against them individually, nor against a part of them."[396] As a result, it is logical for Congress to respond to *Americold* by adopting a definition for citizenship of commercial trusts similar to that used for corporations.[397]

Furthermore, there is nothing in either *Letson*[398] or *Marshall*,[399] or in the legislative history of 28 U.S.C. § 1332(c),[400] that suggests that either the Supreme Court or Congress believes that diversity jurisdiction was and is appropriate for incorporated entities but not for functionally identical entities such as commercial trusts. To the contrary, the Supreme Court has recognized that its current approach to unincorporated commercial entities, including commercial trusts, is entirely "unresponsive to policy considerations raised by the changing realities of business organization."[401]

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395. *See* Hertz Corp. v. Friend, 559 U.S. 77, 97 (2010) (noting that "a major reason for the insertion of the 'principal place of business' language in the diversity statute" was to impede "jurisdictional manipulation"); S. REP. NO. 1830, at 4 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3099, 3101–02; Jack H. Friedenthal, *New Limitations on Federal Jurisdiction*, 11 STAN. L. REV. 213, 218–19 (1959). For example, the Senate report on the bill stated:

> The underlying purpose of diversity of citizenship legislation (which incidentally goes back to the beginning of the federal judicial system, having been established by the Judiciary Act of 1789) is to provide a separate forum for out-of-state citizens against the prejudices of local courts and local juries by making available to them the benefits and safeguards of the federal courts. Whatever the effectiveness of this rule, it was never intended to extend to local corporations which, because of a legal fiction, are considered citizens of another state. It is a matter of common knowledge that such incorporations are primarily initiated to obtain some advantage taxwise in the state of incorporation or to obtain the benefits of the more liberal provisions of the foreign state's corporation laws. Such incorporations are not intended for the prime purpose of doing business in the foreign state. It appears neither fair nor proper for such a corporation to avoid trial in the state where it has its principal place of business by resorting to a legal device not available to the individual citizen.

S. REP. NO. 1830, at 4.

396. *Letson*, 43 U.S. at 503.

397. *See* 28 U.S.C. § 1332(c)(1); Americold Realty Trust v. ConAgra Foods, Inc., 136 S. Ct. 1012, 1017 (2016); 1 JAMES D. COX & THOMAS L. HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 1:15 (3d ed. 2015).

398. *See Letson*, 43 U.S. at 497.

399. *See* Marshall v. Balt. & Ohio R.R., 57 U.S. (16 How.) 314, 314 (1854), *superseded by statute*, 28 U.S.C. § 1332(c)(1).

400. *See* 28 U.S.C. § 1332(c); S. REP. NO. 1830, at 4.

401. Carden v. Arkoma Assocs., 494 U.S. 185, 196 (1990).

When considering the proposed change, it is also necessary to appreciate that the rule in 28 U.S.C. § 1332(c) cannot be justified on the grounds that the corporation is the standard form of business organization, since corporations do not in fact enjoy that status.[402] As a result, there is no policy-related reason why the rule in *Americold* should prevail and indeed numerous reasons why it should not.

Should Congress decide to override *Americold*, it has several options. One possibility would look for inspiration from the *Kintner* tax Regulations, which were originally generated to determine whether an unincorporated business association such as a commercial trust would be taxed as a corporation or what was known as a "pass-through" organization.[403] Commentators seeking to build off these rules have suggested that 28 U.S.C. § 1332 should be amended to state:

> (3) an entity other than a corporation that possesses at least four of the following characteristics: (i) limited liability for members; (ii) required filing of organizational documents by a state; (iii) lack of free transferability of interest; (iv) lack of centralized management; and (v) lack of continuity of life, shall be deemed to be a citizen of any State in which it has filed organizational documents and of the State where it has its principal place of business.[404]

This approach would create a workable rule for commercial trusts while also avoiding excessive litigation by allowing similar treatment of other sorts of unincorporated associations, including general partnerships, fraternal societies, or associations.[405] However, the *Kintner* Regulations were unable to address the diversity and creativity associated with commercial trusts, which ultimately led to the Regulations' demise.[406] As a result, this proposal must be considered with some caution.

The better approach might be for Congress to focus on the language of 28 U.S.C. § 1332(c)(1) itself, which states that:

> a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business, except that in any direct action against the insurer

402. *See* Thomas E. Rutledge, *Recent Developments in Diversity Jurisdiction for LLCs and Other Unincorporated Forms*, J. PASSTHROUGH ENTITIES, Nov.–Dec. 2015, at 57, 61.

403. *See* Christy, *supra* note 11, at 152; Oh, *supra* note 4, at 405–14.

404. Robert J. Tribeck, *Cracking the Doctrinal Wall of* Chapman v. Barney: *A New Diversity Test for Limited Partnerships and Limited Liability Companies*, 5 WIDENER J. PUB. L. 89, 121 (1995); *see also* Christy, *supra* note 11, at 152 (proposing this test in the context of commercial trusts).

405. *See* Tribeck, *supra* note 404, at 121–22.

406. *See* Oh, *supra* note 4, at 414.

> of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of—
>
> (A) every State and foreign state of which the insured is a citizen;
>
> (B) every State and foreign state by which the insurer has been incorporated; and
>
> (C) the State or foreign state where the insurer has its principal place of business.[407]

According to this model, Congress needs to consider three separate elements: the place where the commercial trust is formed, the trust's principal place of business, and any special rules on insurance.[408] Each element must of course be adapted to the needs of the commercial trust community.

The first item to consider is the place that is analogous to a corporation's place of incorporation. Here, Congress has several options. First, Congress could codify the rule in *Navarro* so as to equate the citizenship of a commercial trust with the place(s) where the trustees reside.[409] This approach has some merit, since trustees are an ineluctable part of every trust.[410] However, some commentators have opposed this option on the grounds that not all business trusts require legal title to be vested in the trustees.[411] Furthermore, commercial trusts can have an unlimited number of trustees, which could make this rule unwieldy and expand the number of jurisdictions in which a commercial trust is considered a citizen to more than two, which is the current limit under 28 U.S.C. § 1332(c)(1), at least in cases not involving insurance.[412]

A better alternative may be to indicate that commercial trusts are deemed to be citizens of the state in which they are formed. This approach

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407. 28 U.S.C. § 1332(c)(1) (2012).

408. *See id.* The ABA has suggested similar amendments. *See* ABA Resolution 103B, *supra* note 41, at 15.

409. *See* Navarro Savings Ass'n v. Lee, 446 U.S. 458, 465–66 (1980).

410. *See* Mecklenburg Cty. v. Time Warner Entm't—Advance/Newhouse P'ship, No. 3:05cv333, 2010 WL 391279, at *3 (W.D.N.C. Jan. 26, 2010). While this rule could lead to some forum shopping (for example, by having all corporate trustees reside in a jurisdiction that was friendly to commercial trusts), that outcome seems preferable to eliminating the possibility of federal jurisdiction altogether, as *Americold* requires. *See* Americold Realty Tr. v. ConAgra Foods, Inc., 136 S. Ct. 1012, 1016–17 (2016); *see also* Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 681–84 (2002) (discussing and criticizing conventional scholarship regarding forum shopping in the corporate context).

411. *See* Rutledge & Schaefer, *supra* note 12, at 107–09.

412. *See* 28 U.S.C. § 1332(c)(1).

would parallel the law of corporate citizenship and could easily be applied in cases such as *Americold*, which involved a REIT structured under a Maryland statute.[413] This rule would also reflect the common perception that "commercial trusts and corporations can be thought of as mirror-image entities that respond to different investor needs."[414]

This rule would be particularly easy to apply in cases where a commercial trust is created by statute. However, not all commercial trusts are statutory in nature.[415] Instead, some commercial trusts are created by agreement pursuant to the same longstanding rules that govern non-commercial trusts.[416] In these cases, it may be difficult to establish the same type of connection to a particular state that exists in cases involving statutory business trusts. Therefore, Congress may wish to consider adding a proviso indicating that non-statutory commercial trusts are deemed to be citizens of the state whose law governs that trust. In most cases, the trust instrument should explicitly identify the applicable law.[417] However, even if the settlor does not include a choice of law provision in the trust instrument, the relevant law can be determined through a standard conflict of laws analysis.[418]

The second element that Congress might include in a new statute on commercial trusts involves the trust's principal place of business. Congress, courts, and commentators have noted the importance of dual citizenship to avoid "jurisdictional manipulation" by corporations,[419] which suggests the need to establish a similar type of secondary citizenship for commercial trusts. There are several possible ways to deal with this element. First, Congress could duplicate the existing rule for corporations and indicate that a trust should be considered a citizen of the state where it maintains its principal place of business.[420] This approach has the benefit of simplicity, since it tracks the current approach to corporate citizenship.[421] Furthermore, most states require unincorporated

413. *See id.*; MD. CODE ANN., CORPS. & ASS'NS §§ 8-101(c), 8-102 (West 2016); *Americold*, 136 S. Ct. at 1015.

414. Schwarcz, *supra* note 7, at 561.

415. *See* Sitkoff, *supra* note 7, at 32–33.

416. *See* KOVE ET AL., *supra* note 90, § 247.

417. *See* Hague Convention on Trusts, *supra* note 81, art. 6; *In re* Peierls Family Inter Vivos Trs., 59 A.3d 471, 478–79 (Del. Ch. 2012).

418. *See* Hague Convention on Trusts, *supra* note 81, art. 7; Wilson, *supra* note 284, at 890.

419. Hertz Corp. v. Friend, 559 U.S. 77, 97 (2010) (noting that "a major reason for the insertion of the 'principal place of business' language in the diversity statute" was to impede "jurisdictional manipulation"); S. REP. NO. 1830, at 4 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3099, 3101–02; 13F WRIGHT ET AL., *supra* note 13, § 3624; Caitlin Sawyer, Note, *Don't Dissolve the "Nerve Center": A Status-Linked Citizenship Test for Principal Place of Business*, 55 B.C. L. REV. 641, 646–47 (2014).

420. *See* 28 U.S.C. § 1332(c)(1) (2012).

421. *See* Oh, *supra* note 4, at 461, 471–73.

business associations, including commercial trusts, to file some sort of statement regarding their business conduct within the state, which would assist with the task of identifying which state was the trust's primary place of business.[422] Thus, the transaction costs associated with this approach are relatively low.[423]

Adopting this approach would likely involve incorporation of the Supreme Court's "nerve center" test, as enunciated in *Hertz Corp. v. Friend*.[424] Although a number of commentators have praised the decision,[425] other observers have noted that the nerve center test experiences certain problems as a result of "[t]he variety of corporate structures and activities" that currently exist in U.S. law and practice.[426] Commercial trusts are equally or perhaps even more diverse in terms of their business structures and purposes, which may make it difficult to apply the nerve center test when seeking to determine these entities' primary places of business.[427] Additional problems may arise if a commercial trust operates primarily over the Internet rather than in a single physical location or if the trust has been dissolved.[428] While corporations also must struggle with these issues, Congress should be aware of these types of concerns when reforming the law relating to the citizenship of commercial trusts.[429]

Alternatively, Congress might wish to track recent developments regarding the "at home" standard enunciated by federal courts in the context of personal jurisdiction.[430] This possibility reflects certain

422. *See id.* at 469. Foreign trusts must file similar paperwork to obtain certain benefits. *See* UNIFORM STATUTORY TRUST ENTITY ACT §§ 102, 901–02, 905 (UNIF. LAW COMM'N 2009); *cf. id.* § 301 (noting parallels between domestic and qualified foreign trusts).

423. *See* Oh, *supra* note 4, at 471–73.

424. *See Hertz Corp.*, 559 U.S. at 89–91.

425. *See* Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1, 10–11 (2011) (expressing some skepticism); *The Supreme Court, 2009 Term—Leading Cases: Federal Jurisdiction and Procedure*, 124 HARV. L. REV. 309, 315 (2010) [hereinafter *Leading Cases*].

426. Sawyer, *supra* note 419, at 652; *see also Leading Cases*, *supra* note 425, at 319 (noting difficulties in judicial administration).

427. *See supra* Subsection I.B.2.

428. *See* Sawyer, *supra* note 419, at 652–53 (discussing problems of dissolved and inactive corporations). Although trust law disapproves of passive trusts, *see* RESTATEMENT (THIRD) OF TRUSTS § 6(3) cmt. b (AM. LAW INST. 2001), the definition of a commercial trust "does not require that the business be of an active or extensive nature." KOVE ET AL., *supra* note 90, § 247. Indeed, commercial trusts are often seen as "static entities with passive managers" as compared to the aggressive and opportunistic approach employed by corporate managers. Schwarcz, *supra* note 26, at 328.

429. *See* Chaplin, *supra* note 40, at 98–99; Sawyer, *supra* note 419, at 652–53.

430. *See* RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2115 (2016); Daimler AG v. Bauman, 134 S. Ct. 746, 751 (2014); Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919, 924 (2011); Niesel, *supra* note 2, at 837 (noting that recent case law from the Supreme Court requires courts to consider three separate factors in matters involving corporate

language in *Goodyear Dunlop Tires Operations, S.A. v. Brown*[431] that characterizes the place of incorporation and principal place of business of a corporation as "paradigm" forums where general personal jurisdiction exists.[432] Commentators discussing general jurisdiction have questioned whether this reference should be taken to reflect a link between the statutory requirements for diversity jurisdiction and the common law requirements for personal jurisdiction,[433] and it may be useful to consider whether the reverse is true (i.e., whether the law regarding personal jurisdiction should influence the law of diversity jurisdiction). In some ways, increasing the links between subject matter and personal jurisdiction could be seen as beneficial, since it might increase jurisdictional clarity.[434] However, commentators have identified several problems arising out of the nebulous nature of the "at home" requirement, which suggests that Congress might do well to avoid this standard when creating a new statute regarding the citizenship of commercial trusts.[435]

The third and final issue that Congress must consider is whether to incorporate a special rule regarding commercial trusts involved in the insurance business. Trusts are relatively common in the insurance industry, either as a means of complying with various U.S. regulations regarding foreign insurers[436] or as a means of spreading the risk of loss amongst various underwriters.[437] The situation regarding insurance-

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entities: the state of incorporation, the location of the principal place of business, and any unique factors that can be used to demonstrate where the corporation is essentially "at home"). The Supreme Court has also recently addressed specific jurisdiction, though to less criticism. *See* Walden v. Fiore, 134 S. Ct. 1115, 1121 (2014); Parry, *supra* note 2, at 619–23.

431. 564 U.S. 915 (2011).

432. *See id.* at 924 (describing general jurisdiction for a corporation as the place "in which the corporation is fairly regarded as at home" and citing Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 728 (1988), as describing domicile, place of incorporation, and principal place of business as "paradig[m]" bases for general jurisdiction); Niesel, *supra* note 2, at 859.

433. *See* Niesel, *supra* note 2, at 859–60 (citing authorities).

434. *See* Hertz Corp. v. Friend, 559 U.S. 77, 94 (2010) (noting that "[s]imple jurisdictional rules . . . promote greater predictability"); Dodson, *supra* note 425, at 4–5, 23–24 (identifying difficulties in achieving jurisdictional clarity).

435. *See* Cornett & Hoffheimer, *supra* note 2, at 105–07 (suggesting that although *Daimler* may result in "a level of certainty and predictability for which some commentators have longed," it has done so at a cost); Niesel, *supra* note 2, at 870–74. *But see id.* at 874 (discussing how to simplify the "at home" analysis).

436. *See* Langbein, *supra* note 8, at 176.

437. *See* Roby v. Corp. of Lloyd's, 796 F. Supp. 103, 106 (S.D.N.Y. 1992) ("Upon acceptance into the Society of Lloyd's, the individual executes a number of documents, among which are the premium trust deed, a member's agent agreement, and a managing agent agreement."); Ian Kelley, Note, *Regulatory Crisis at Lloyd's of London: Reform from Within*, 18 FORDHAM INT'L L.J. 1924, 1932 (1995).

related trusts is complicated by the fact that U.S. courts are split on the legal status of Lloyd's, the largest insurance market in the world,[438] including questions on how Lloyd's is to be treated for diversity purposes.[439] Although a full analysis of Lloyd's is beyond the scope of the current Article, a significant amount of the business conducted by Lloyd's involves trusts.[440]

As complicated as insurance-related disputes may be, many of the problems arise from the exclusion of commercial trusts and similarly unincorporated entities from 28 U.S.C. § 1332(c)(1). Creating a new statutory rule to address commercial trusts should eliminate a number of these concerns, particularly if the statute is drafted in such a manner as to deal with the Lloyd's problem.

In terms of language, the best solution would likely be to simply adopt the insurance-related terminology used in 28 U.S.C. § 1332(c)(1).[441] Not only is this solution simple as a matter of legislative drafting, it also does not jeopardize the possibility of diversity jurisdiction, since the addition of the citizenship of the insured party to the calculus means that there are only a limited number of states that need to be added to the jurisdictional calculus. This is a much better outcome than that which currently applies in most cases involving Lloyd's, where the citizenship of all of the underwriters (which can run in the tens of thousands) must be considered.[442]

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438. *What Is Lloyd's*, LLOYDS, https://www.lloyds.com/lloyds (last visited June 30, 2017) (describing the function of Lloyd's); *see* Terri K. Benton, *Where Do I Fit in? Citizenship Claims and the § 1332 Diversity Statute in* Underwriters at Lloyd's v. Osting-Schwinn, 79 DEF. COUNS. J. 67, 69 (2012); Strong, *supra* note 161, at 305.

439. Three circuits require complete diversity of all underwriters. *See* Underwriters at Lloyd's v. Osting-Schwinn, 613 F.3d 1079, 1084, 1088–89 (11th Cir. 2010) (requiring Lloyd's to plead the citizenship of all of its underwriters, which included over 400 syndicates and 30,000 members, when establishing diversity jurisdiction); E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins., 160 F.3d 925, 931 (2d Cir. 1998); Ind. Gas Co. v. Home Ins. Co., 141 F.3d 314, 317 (7th Cir. 1998). One circuit does not. *See* Certain Interested Underwriters at Lloyd's v. Layne, 26 F.3d 39, 42–44 (6th Cir. 1994) (applying the "real party to the controversy" test). Other courts have also weighed in on the subject. *See* Howard M. Tollin & Mark Deckman, *Lloyd's of London and the Problem with Federal Diversity Jurisdiction*, 9 J. TRANSNAT'L L. & POL'Y 289, 293–99 (2000).

440. *See Lloyd's Trust Deeds*, LLOYD'S, https://www.lloyds.com/the-market/operating-at-lloyds/regulation/lloyds-trust-deeds (last visited June 30, 2017) (including various Lloyd's trust deeds, including several U.S. trust deeds, such as the Lloyd's American Trust Fund (LATF), held in New York and involving premiums and other receipts relating to general business denominated in U.S. dollars, as well as various trust deeds involving business in Kentucky and Illinois and in other countries).

441. *See id.*

442. *See Osting-Schwinn*, 613 F.3d at 1084 (involving underwriters that included over 400 syndicates and 30,000 members).

CONCLUSION

Although the Supreme Court's recent ruling in *Americold Realty Trust v. ConAgra Foods, Inc.* is in many ways consistent with existing jurisprudence, the opinion will create significant problems if it is allowed to stand.[443] Not only will the decision severely restrict parties' ability to have commercial trust disputes heard in federal courts, it will also cause a potentially significant number of commercial actors to either exit the U.S. judicial system through the use of an arbitration agreement, choice of court clause, or choice of law provision, or through a decision to organize as a commercial trust in a foreign jurisdiction. *Americold* will also act as a "nudge" in favor of the corporate form, which could lead to significant but as of yet unknown ramifications.[444]

Over the years, the Supreme Court has had several opportunities to consider the citizenship of unincorporated business associations and has declined to treat those entities as analogous to corporations, claiming that such measures fall within the province of the legislature.[445] None of those previous cases inspired a congressional override, despite the near-universal support of both the academic and practitioner communities for reform in this field.[446] However, this Article has shown that legislative action is now necessary, given both the nature and the quantum of problems created by *Americold.*

Unlike some of the other types of unincorporated business associations that the Supreme Court has considered in the past, commercial trusts are a ubiquitous part of the American legal landscape, reaching across numerous industries that routinely operate on an interstate or international basis.[447] Commercial trusts are regularly used in fields laden with public policy concerns and control trillions of dollars' worth of assets, thereby affecting the economic and social interests of both individuals and institutions.[448] Requiring these types of disputes to

443. 136 S. Ct. 1012 (2016).

444. THALER & SUNSTEIN, *supra* note 355, at 8.

445. *See Americold*, 136 S. Ct. at 1017; Wachovia Bank, N.A. v. Schmidt, 546 U.S. 303, 306 (2006) (determining the citizenship of a federally chartered national bank for diversity purposes); Grupo Dataflux v. Atlas Glob. Grp., L.P., 541 U.S. 567, 568–69 (2004) (considering whether a post-filing change in citizenship and status of both limited and general partners' citizenship should be considered in determining a partnership's citizenship in a diversity case); Carden v. Arkoma Assocs., 494 U.S. 185, 195–96 (1990) (reaffirming the rule that the citizenship of all members of a partnership must be considered in determining whether complete diversity exists).

446. *See* ABA Resolution 103B, *supra* note 41, at 15 (suggesting all unincorporated entities be treated the same way as corporations for purposes of diversity jurisdiction); Chaplin, *supra* note 40, at 98–99; Cohen, *supra* note 40, at 275; Kleinberger, *supra* note 40, at 829; Matheson & Olson, *supra* note 40, at 3.

447. *See supra* Subsection I.B.2.

448. *See supra* Subsection I.B.2.

be heard in state rather than federal court would not only be ill-advised as a practical matter, it would make little sense in theoretical terms, given that commercial trusts have long been recognized as "mirror image" equivalents of corporations, a type of business association that has been given special jurisdictional status by both Congress and the Court for over 150 years.[449]

The effects of *Americold* have already been felt and will only increase in the coming months and years.[450] However, the Court does not have the final word on this issue. Instead, as the Justices themselves recognized, Congress is empowered to craft a statutory solution to cure the problems created by this decision.[451]

Two possibilities have been explored here. First, Congress could enact legislation allowing commercial trusts to be heard in federal court pursuant to minimal rather than complete diversity, as is the case under the Interpleader Act, the MMTJA, and CAFA.[452] Second, Congress could adopt a statute, similar to 28 U.S.C. § 1332(c)(1), identifying a discrete number of jurisdictions where a commercial trust can be considered a citizen.[453] Both of these alternatives are feasible. However, the latter option appears superior for several reasons.

Under the minimal diversity approach, plaintiffs will have more control in choosing the venue. This technique appears appropriate in cases involving mass disasters and class actions, because those situations involve large numbers of injured individuals, many of them blameless, unsophisticated, or both, who deserve some degree of autonomy in choosing the place of litigation, either for the sake of convenience or equity. It is therefore appropriate for the underlying legislation (i.e., the MMTJA and CAFA) to create a rule that provides for a federal forum but that does not mandate a particular place where the dispute should be heard.[454]

Although the types of disputes that arise in cases involving minimal diversity may be procedurally complex, many of them will be governed by tort or contract law. While judges are occasionally faced with difficult conflict of laws concerns, problems arise less often in practice than in

449. *See* Hemphill v. Orloff, 277 U.S. 537, 550 (1928) (noting functional equivalence of the two business forms); Marshall v. Balt. & Ohio R.R., 57 U.S. (16 How.) 314, 328 (1854), *superseded by statute*, 28 U.S.C. § 1332(c)(1) (2012); Louisville, Cincinnati & Charleston R.R. v. Letson, 43 U.S. (2 How.) 497 (1844), *superseded by statute*, 28 U.S.C. § 1332(c)(1).

450. *See* RTP LLC v. ORIX Real Estate Capital, Inc., 827 F.3d 689 (7th Cir. 2016) (involving a pension trust); Wells Fargo Bank, N.A. v. Transcont'l Realty Inv'rs, Inc., No. 3:14-cv-3565-BN, 2016 WL 3570648, at *4 (N.D. Tex. July 1, 2016) (involving a securitization trust).

451. *See* Americold Realty Trust v. ConAgra Foods, Inc., 136 S. Ct. 1012, 1017 (2016).

452. *See supra* notes 364–81 and accompanying text.

453. *See supra* Section IV.B.

454. *See* 28 U.S.C. §§ 1332(d)(2), 1369, 1453.

theory.[455] Furthermore, the basic principles of tort and contract law are relatively similar across the country, despite variation in certain details.[456] As a result, an incorrect determination of the conflict of laws analyses will likely not affect the outcome of the dispute and therefore will not offend the public policy of the state whose law ought to have been applied.

Litigation involving commercial trusts reflects a number of qualities that are in many ways analogous to litigation involving corporations. For example, corporations and commercial trusts both have a high need for predictability, and a statutory model that establishes the citizenship of a commercial trust will increase predictability in a number of ways. For instance, adopting a commercial trust statute that is modeled on 28 U.S.C. § 1332(c) would likely eliminate the distinction between Rules 17(b)(2) and 17(b)(3) of the Federal Rules of Civil Procedure regarding the law applicable to the question of whether a particular business organization has the ability to sue in its own name and therefore rationalize the venue selection analysis under 28 U.S.C. § 1391.[457] Increased predictability in terms of the location of suit will also help overcome concerns about the proper and consistent application of substantive law, both in terms of the anticipated outcome of the dispute as well as respect for the public policy of the state whose law governs the matter in question.

This issue is particularly important given that the vast majority of litigation involving commercial trusts involves internal disputes regarding the operation and governance of the trust.[458] Not only do these types of suits involve complex questions of law, they also involve matters that are intimately connected with public policy. As a result, it is in the interest of the trust, the parties (including the shareholder-beneficiaries), the state(s), and the nation to have these issues resolved in a consistent and predictable manner. All of these rationales are similar to those involving corporate litigation. As a result, it seems better to adopt a rule that puts commercial trust litigation on par with corporate litigation through the definition of citizenship rather than a rule that simply provides commercial trust disputes with increased access to federal courts

455. *See* Joseph William Singer, *Multistate Justice: Better Law, Comity, and Fairness in the Conflict of Laws*, 2015 U. ILL. L. REV. 1923, 1924–25.

456. *See, e.g.*, Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 VA. L. REV. 1, 36 (2015); Jane Stapleton, *Benefits of Comparative Tort Reasoning: Lost in Translation*, 1 J. TORT L. 6, 38–40 (2007).

457. *See* 28 U.S.C. § 1391(c)(2) (2012) (stating "an entity with the capacity to sue and be sued in its common name under applicable law, whether or not incorporated, shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question"); 28 U.S.C. § 1332(c); FED. R. CIV. P. 17(b); *supra* notes 113–16 and accompanying text (regarding Rule 17).

458. *See* Hwang, *supra* note 87, at 83.

by allowing such suits to rely on minimal rather than complete diversity. Indeed, in 2015, the American Bar Association adopted a resolution supporting just such an approach.[459]

As Judge Diane Wood has recognized, Congress has acted in the past to bring "the federal courts back into the business of adjudicating matters of national importance where no federal law prescribes the rule of decision."[460] While Congress must be cautious,[461] jurisdictional reform regarding commercial trusts can and should be completed without unnecessary delay so as to protect U.S. institutions and individuals, as well as the U.S. economy, from significant and potentially long-lasting harm. Indeed, as Chief Justice (formerly President) William Howard Taft once said:

> No single element—and I want to emphasize this . . . —no single element in our governmental system has done so much to secure capital for the legitimate development of enterprises . . . as the existence of federal courts . . . with a jurisdiction to hear diverse citizenship cases.[462]

As the preceding discussion has demonstrated, interstate and international disputes involving commercial trusts should be heard in federal district court as a matter of both policy and prudence. Congress should therefore take the appropriate steps to override the Supreme Court decision in *Americold Realty Trust v. ConAgra Foods, Ltd.* and allow parties to rely on diversity jurisdiction in cases involving commercial trusts.

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459. *See* ABA Resolution 103B, *supra* note 41, at 6, 15 (suggesting all unincorporated entities be treated the same way as corporations for purposes of diversity jurisdiction).

460. Wood, *supra* note 17, at 604; *see also* Miller, *supra* note 244, at 271; James M. Underwood, *The Late, Great Diversity Jurisdiction*, 57 CASE W. RES. L. REV. 179, 222 (2006) ("Congress has . . . embarked on a very different path, apparently intent upon pulling diversity out of the academic and judicial doghouse and more fully exercising its Article III power to open the doors to the federal courts. Such conduct is constitutional and likely to lead to dramatic changes in the way important interstate disputes are resolved. It is time for the legal community to wake up to these changes.").

461. Designing a clear jurisdictional approach is deceptively difficult. *See* Dodson, *supra* note 425, at 23–24.

462. Taft, *supra* note 4, at 604.