International Journal of Law in Context (2026), **22**, 433–449
doi:10.1017/S174455232610055X

SPECIAL ISSUE ARTICLE

The permissive invisibility of trust law

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(Received 27 April 2026; revised 27 April 2026; accepted 27 April 2026; first published online 15 July 2026)

Abstract

This article argues that modern trust law has undergone a radical global transformation while remaining largely absent from democratic debate, a condition the article terms trust law's 'permissive invisibility'. The article traces how trust law's origins in equity entrenched a judge-centric, normatively charged but socially insulated doctrinal culture, which proved increasingly permissive as trusts were repurposed for regulatory arbitrage in an era of transnational financial capitalism. The article then shows how legislative reform was critically enabled by trust law's particularly low public salience but inverted, high salience among the owners and operators of concentrated capital. The recursive force of this judicial and legislative permissiveness has now normalised antisocial innovations such as perpetual and massively discretionary trusts. The article concludes by calling for empirically grounded, critical socio-legal study in the tradition articulated by Roger Cotterrell as a necessary precondition for any democratically credible trust law reform agenda.

Keywords: trusts; democracy; asset protection; inequality; globalisation

1 Introduction

When Roger Cotterrell addressed trust law, he did so with an eye to how it presents a particular instance of how liberal law claims a foundational commitment to equality, yet in practice often facilitates the reproduction of inequality.[1] Cotterrell was far from the first who had questioned whether trust law's origins in equity had gifted it the same Janus-faced reputation that equity's nobler, once forthrightly clerical, aspirations had been subject to for centuries (Selden 1969). But the form and substance of Cotterrell's concern were distinct from earlier criticisms of equity's potentially capricious implementation. He was less preoccupied with equity's principled adjudicative coherence than with its function as a 'property-receptacle' which masked a role in reproducing economic inequality via intergenerational transfers of wealth (Caron and Repetti 2013; Cotterrell 1987). Cotterrell's intervention paralleled and inspired later attempts to develop what might be considered 'critical' studies of trust law, which sought to maintain his commitment to integrating internal and external knowledge of the law's operation while developing practical critiques (Crawford and Infanti 2014; Piška and Gibson 2024).

[1]'Outside the realm of law and legal ideology we experience the fact that individuals (and families, groups, organisations, social classes, etc.) are not equal, but grossly unequal in power and capacities. Yet the concept of property makes it possible for the law to accommodate and guarantee these inequalities while maintaining the ideology of equality' (Cotterrell 1987, p. 82).

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https://doi.org/10.1017/S174455232610055X Published online by Cambridge University Press

As long and storied as debates over trust law's character and social impact have been, Cotterrell's provocations would seem only ever more pressing today. Though the pace of trust law's global transformations in recent decades has accelerated, many of Cotterrell's core insights presaged current debates – often by those operating outside of the critical legal tradition. On the one hand, global dissatisfaction and disillusionment with the modern conditions of economic life have reached a fevered pitch in recent years and unsettled many of the powerful sociopolitical orthodoxies of the late twentieth century. On the other hand, trust law across almost every common law jurisdiction has undergone significant revision over the past fifty years. This reform process has routinely been driven by the forces of financial capitalism once legitimised by these same now unsettled orthodoxies. While still intimately tied up with processes of succession and inheritance, trust law has now become embedded in nearly every aspect of global finance.

While tax minimisation strategies for individuals and entities remain a primary driver of this proliferation, the alchemical split of legal and equitable title – long championed as trust law's particular genius – has become a focal point of attention for those seeking to avoid or arbitrage regulatory obligations. In tandem, the special privileges afforded assets held in trust have expanded while their public visibility is often fully cloaked by parallel changes in financial privacy reform. The sum force of these changes is that individuals can now settle assets in trust while avoiding the traditional requirement of legal alienation of control, while fully enjoying an ever-growing array of benefits unavailable to regular property holders.

However these newly broad debates resolve themselves in this time of unsettled orthodoxies and economic malaise, it is particularly striking that trust law's putatively radical and consequential transformation has occurred while nearly wholly absent from public discourse and open democratic deliberation, enabled by what this article will term trust law's 'permissive invisibility'. This is doubly striking given the fact that while trust law historically emerged as a product of judicial invention, trust law's modern transformation has been achieved largely through legislative action in liberal democratic jurisdictions.

Moreover, this invisibility has endured even though trusts have been repeatedly implicated in national and international scandals facially resonant with widespread concern with the fairness of modern economic life. The transformation of trust law now frequently draws the attention of scholars in and outside of the law concerned with deciphering the roots of wealth inequality (Beckert 2022; Galle *et al*. 2026; Pistor 2019). In practice, this transformation seals away assets from a wide range of creditors, frustrating commercial and private legal judgments alike. By obscuring the true ownership of property, this transformation undermines state capacity at its most basic level by delinking ownership from any enforceable means of social responsibility.

This article will provide a provisional inquiry into the sources of this 'permissive invisibility' of trust law. First, it will detail how trust law's historical genesis in equity lent it a decidedly judicial–centric quality inherently far removed from popular politics. As trust law, if not equity at large, came to confront the novelties of modern capitalism, it thus largely fell on judges to effectuate its adaptation. This adaptation became increasingly strained from the mid-twentieth century onward as judges found themselves facing the vast transnational resources of financial engineers and trust entrepreneurs. However, in response, judges have often not deferred to legislators to endorse foundational shifts in trust law, but instead have adopted highly permissive stances toward subsequent distortions of trust law's core commitments.

Second, the article will detail how the impact of this doctrinal permissiveness on trust law's transformation was soon rapidly outstripped by legislative permissiveness, as globalised lobbying campaigns to enact new trust statutes encountered only sporadic resistance. Here, what will be called trust law's decidedly low 'democratic salience' led these campaigns to generate little public engagement or political reaction, even in jurisdictions that have rapidly become leading global recipients of trust assets. With both experiential and technical drivers, this low democratic salience is matched by trust law's inverted, high salience for the owners and operators of concentrated

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capital. While notable exceptions exist, such as the development of revocable trusts in California, these are exceptions that prove the rule.

The article concludes by considering the implications of these arguments for Cotterrell's call for a more empirically grounded study of trust law. This permissive invisibility presents a challenge for those concerned with trust law's modern transformation, as well as for those concerned with its role in deepening the economic malaise which has inspired a resurgence in often less-than-productive forms of populist politics. Here, Cotterrell's original inspiration remains probative as understanding and addressing this permissive invisibility requires seeing trust law in not just its full social context within any particular jurisdiction, but a now fully global life.

2 Trust law as judicial darling

The pre-modern origins of equity in English legal history have been a perennial subject of scholarly debate. Beyond pure academic interest, this historical inquiry is driven by equity's claim to infuse the law with substantive norms, traditionally contrasted with the theoretical formalism of the common law. Claims to have discovered and rediscovered the genuine veins of equity's history are thus practical claims that can inform and impact contemporary doctrinal clashes. The trust and its defining split of legal and equitable title was a creation of equity during its thirteenth-century development. Thus, while trust law emerged alongside the first English statutory enactments, it was for centuries definable as 'judge–made law' (French 2015).

Equity's substantive underpinnings meant that trust law was infused with a set of normative tropes which justified its core innovation as facilitating other-regarding behaviour. Cotterrell highlighted this quality as giving trust law a particular status among legal doctrines by centring vulnerability and protection in the foundational aspirations:

> 'It enshrines an important notion of sacrificing one's own interests to those of others, or treating others' interests as one's own. It contains ideas otherwise rare in the doctrine of common law systems, such as that of general positive duties to act in the best interests of others even where no link of legal agreement, no consideration received by the trusted or detriment suffered by those who trust, binds the duty-holder with those for whom he acts' (Cotterrell 1993, p. 77).

Courts of equity were famously, or infamously, 'fused' with common law courts in the late nineteenth century; a procedural unification that has led to decades of debate about the substantive relationship between legal and equitable doctrines (Turner 2019). Though statutory interventions into trust law would largely emerge across the globe in the early twentieth century, the defining concepts and debates over the nature of trust remained largely driven by judicial refinement, even as industrial capitalism began the first of many re-shapings of modern asset holding (Hudson 2019).

Beyond its historical roots in a pre-democratic polity, equity's judicial character implicates the broad and ongoing debates over the democratic legitimacy of judicial 'law-making'. While a great deal of recent commentary has emphasised the tension between legality and politics in constitutional law, contests over the democratic legitimacy of judicial law-making are as long-standing as they are irascible (and well beyond the common law). While concepts such as certainty or predictability have always been foremost in theories of how judges should conceptualise their own practice, once the common law survived its feudal origins, these theories had to address how this power should be squared with democratic politics. Engagement, especially by non-legal scholars, has not always produced salutary evaluations of common law judicial law-making. Allen analogised Jeremy Bentham's damning eighteenth-century portrayal of William Blackstone's justificatory account of the common law to that of an anthropologist attempting to make sense of a

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seemingly irrational ritual obscuring the illegitimacy of judicial 'discovery' of the law (Allen 2018, pp. 5–6).

As society has become more complex, theorists of judicial decision-making have had to make some reference to the variability and contested interpretation of social developments, from Holmes's defence of 'experience' as the basis of the common law (Holmes 1881) to Pound's sociological jurisprudence which imagined an entire social scientific administrative infrastructure tasked with informing judicial decision-making (Gardner 1961). While some now claim that the complexity of modern life has rendered the traditional ambitions of common law judicial method empirically impossible (Entrikin 2019), new efforts have continued to defend judicial law-making as not just desirable but democratically legitimate independent of the processes and forms of judicial appointment.[2] Notably, these debates have necessarily transferred over to administrative decision-making, prompted by its similar remove from direct electoral decision-making (Jackson 2023).

Whatever one may take away from these debates, the tensions they revolve around are more acute in the context of equity. Equity's substantive orientations explicitly integrate essentially non-legal values such as 'unconscionability' into often expansive interventions in the law (Stevens 2023). In turn, background assumptions about any number of social facts regularly inform the material implementation of trust law, such as what social and family relationships are considered normative (Tritt 2020) or what type of commercial transactions cross the line from creative to socially deleterious (Samet 2024). Some scholars have even argued for removing classic equitable concepts from trust law as modern empirical complexity and social pluralism have rendered them difficult for judges to reconcile (Harding 2008). Still, while a particularly democratic theory of equity is still possible to construct, the fact remains that trust law's judicial genesis and predominant court-centred evolution have historically left it with the curious quality of being normatively charged while also less likely to be re-shaped by the direct outcome of democratic politics.

If trust law, like equity itself, remained for some time into the contemporary era more of a circumscribed and specialised judicial or academic concern, this remove did not mean that trust law's social impact remained minimal. As concentrations of new and old forms of wealth proliferated as the twentieth century progressed, the implications of trust law grew for debates over equality of opportunity, meritocracy or any other principle of the emergent ideologies seeking to explain and re-shape industrial life (Horowitz and Sitkoff 2014). Some of these were quite radical in orientation, most notably Georgist notions of land ownership (Kroncke 2018), but globally speaking, legislative reworkings of trust law remained rare as common law judges predominantly aimed to incrementally adjust its principles to new social conditions. At the same time, the articulated duties of the express trustee to the beneficiaries of the trust were more than adjusted; they were analogised to help govern a host of rapidly expanding social relationships derived from expanding financial intermediation and diversifying paternalistic or professional relationships (Worthington 2021, pp. 157–59).

Trust law's adaptation to twentieth-century social changes is central to one of Cotterrell's central analytic notions, that of 'moral distance' (Cotterrell 1993). Throughout his lifetime of work, Cotterrell was recurrently preoccupied with the law's relationship to notions of community (Cotterrell 1997; Cotterrell 2018). He saw the common law judge often acting as a 'trustee' for a community's values when adapting doctrines to social change (Cotterrell 2000, p. 18). This function was critical as what he called 'positive social relationships' were necessary for areas of law, just as trust law, which generated obligations and duties for citizens (Cotterrell 2018, p. 6).

[2]'The common law is democratically legitimate to the extent that it incorporates a deliberative procedure carried out under the conditions of freedom and equality that characterize the ideal deliberative procedure of deliberative democracy' (Steilen 2011, p. 484).

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The modern influence of trust law's grounding in extra-legal values on other forms of social intermediation derived from precisely the fact that in an era when industrial capitalism was transforming traditional community structures fiduciary law: 'constructs usually relatively precise, carefully measured entitlements and obligations to replace what are seen legally as the typically diffuse, fluid, implicit, inchoate and undefined, informal "feeling rules" and social expectations that previously governed these affective relations' (Cotterrell 2018, p. 15). Yet, the further society was transformed, the more it became the case that trustees and beneficiaries could be social strangers. This 'moral distance' both agitated many of the archetypal paternalistic presumptions of trust law and increasingly shifted the analytic focus of trust toward enabling trustees to manage financial complexity rather than an emphasis on circumscribing their actions based on beneficiary vulnerability, even for overtly protective arrangements such as charitable trusts or pension funds.[3]

Yet it was not until the mid-twentieth century that trust law underwent what can now be seen as its radical transformation. Most foundationally, the judicial endorsement of discretionary trusts – especially allowing trusts to be formed without fixed beneficiaries – laid the groundwork for the unsettling of trust law's conceptual foundations (Palmer and Rickett 2017). This shift was the most consequential of the litigation judges had long encountered which sought to stretch the truly other-regarding aspects of the trust via the ambitions of family patriarchs seeking to extend the reach of their dead hands further into the future.

While such litigation persists, its impact has been surpassed by the more diverse and intricate interests of the owners and operators of concentrated financial capital (Madoff 2010). These interests would increasingly see trust law as a productive site for strategic litigation in order to render trusts ever more desirable entities for the exercise of commerce – especially the implications of extending the availability of trust law's equitable remedies to their transactional interests (Yip and Lee 2017). The tensions these opportunistic but well-funded exercises would generate for trust law, especially for its demarcation from contract law, would render the role of equity in commerce a subject of growing judicial and academic interest up through the present day (Samet 2024). Cotterrell noted this development early on, pointing out that trusts were increasingly seen as simply 'property receptacles' rather than as constituted by moral notions of vulnerability and obligation.[4]

The expansiveness of this change has led to a contemporary academic debate over the general state of trust law. Judges and academics have now coined any number of terms to describe this unsettled state of affairs. Former Chief Justice of Australia Anthony Mason has noted with some nostalgia the lost days when 'trust law was settled and stable' (Mason 2014, p. 103), while Yip and Lee have dubbed it a 'dystopian revolution' (Yip and Lee 2017, p. 671). Smith's discussion of 'massively discretionary trusts' (Smith 2019) has demanded the attention and response of even those with strong positive sentiments about trust law's normative underpinnings (Dagan and Samet 2022). Some have even argued that these developments have now exposed, or at least centred, trust law's predominant function as a means to subvert other areas of legal regulation (Bennett and Hofri-Winogradow 2021; cf. Frydrych 2024).

Yet, for all of these changes, the intensity of these concerns has not dislodged trust law from its gravitational orientation around judicial dialogue. Many scholars remain committed to the ability of judges to recover trust law from these dilemmas (Brightwell and Richardson 2018; Yip and Wu 2024). Certainly, judges in many common law jurisdictions have pushed back (with the opportunistic help of wealthy litigants and interested public entities) against trust law's more

[3]The 'Relative remoteness of trustees from beneficiaries typically makes legal or social control of trusteeship harder … traditional controls seem counterproductive and even misguided; the pressure is for much more trustee freedom and flexibility to respond to complex contemporary conditions' (Cotterrell 1993, pp. 80, 81).

[4]Cotterrell distinguished an emergent 'dichotomy between a moralistic idea of the trust, in which interpersonal fiduciary relationships or legally-guaranteed moral ties appear paramount, and a more modern idea of the trust as essentially a property-receptacle, a device for specifying property entitlements in legally reliable, sophisticated and flexible ways' (Cotterrell 1993, p. 85).

https://doi.org/10.1017/S174455232610055X Published online by Cambridge University Press

aggressive modern novelties (Hofri-Winogradow and Bennett 2024). This judicial permissiveness is partially reflective of Cotterrell's claim that the detachment of trust relationships from actual personal relationships leads to deference to professional expertise as a substitute authority for clear social norms.[5]

However, consistent with dominant norms of judicial law-making as a necessarily restrained exercise, judges have been reluctant to wholly reject the conceptual foundations of new trust law practices and exhibit high levels of instinctive deference to the defensive representations of other financial and legal professionals (Clover-Alcolea 2022; Davenport and Thompson 2016; Hofri-Winogradow 2020). And claims that strategic litigation can re-shape areas of law, and is disproportionately carried out by the interests of the wealthy, are not novel (Galanter 1974). But few areas of law have had their historical development so fully absorbed by judicial process as in the case of trust law, and without any of the cautious deference to legislative prerogative for the radical reworkings.

3 Trust law's statutory revolution

It would be an overstatement to say that there were no meaningful statutory enactments during this era of transformation and iterative judicial reaction. There were debates that led to changes in charitable trusts, for instance, that could be described as significant (Morris 2018). However, in stark contrast, in the last fifty years, the most radical changes to trust law have been the product of legislative action. The repeal of the rule against perpetuities over the past half-century has been well recognised as a global trend effectuated by professional lobbying in nearly every common law jurisdiction (Kades 2019; Krier and Dukeminier 2003; McCouch 2013). While the initial elimination of Rule Against Perpetuity requirements was more an imitative pattern than a specifically coordinated campaign, the speed and rapidity of its statutory transformation became fully transnationalised, as is now the case with trust law writ large (Kuntz 2020).

As with the impact of earlier judicial relaxations such as endorsing discretionary beneficiaries, the super-majority of these statutory enactments have acted to render trust law more 'settlor–friendly' by allowing assets to enjoy the special treatment and remedies made available to equitable interests without requiring settlors to alienate any control over their assets (Garton 2024). For Cotterrell, the growing moral distance between trustee and beneficiary representatively reached its apex in large commercial trusts where settlor-friendly changes had led to a state of affairs where it was not just the relationship between trustee and beneficiary that had been transformed but also 'the distinction between settlors and beneficiaries becomes blurred in trusts' (Cotterrell 1993, p. 83).

Up through the present, these changes were often partially stigmatised as the product of 'offshore' jurisdictions either in post-colonial jurisdictions or small sub-jurisdictions of larger common law countries (Moon 2019). Such stigmatisation was often tied to racialised notions of post-colonial corruption and institutional underdevelopment (Sybblis 2024). However, statutory enactments in such jurisdictions quickly found their way into larger jurisdictions (Veit 1999) as part of a now globalised competition to attract capital assets and trust business (Sybblis 2021). Today, the total volume of assets held in settlor-dominated trusts is increasingly dominated by high-income nations (Dean and Waris 2021).

As a result, the global statutory transformation of trust law remains diverse and ongoing. Some have been reactive to judicial push-back. For example, the British Virgin Islands enacted a statute to directly pre-empt the elimination of expansive tax liability privileges for trust assets after an adverse ruling in the United Kingdom (McKenzie 2019). However, the BVI enactment was just

[5]'If people cannot know enough to contribute persuasively to debate, and if they cannot learn enough to be able to interpret other people's viewpoints and (assuming goodwill) to work towards consensus, the alternative is reliance on expertise (on the assumption that experts can close off debate by the superior authority of their knowledge)' (Cotterrell 2013, p. 16).

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one of a wave of similar enactments across the common law world, well beyond the post-colonial world (Morrison 2025). The now dominant role of US state-level trust law reforms in attracting global capital interested in evading regulatory oversight has been enabled by much more rapid, wholesale transformations, which often overlap with enabling adjacent reforms in corporate and financial privacy legislation (Weisbord 2023).

Both genres of transformation happened with little to no public debate or input. By contrast, the rapidity and commonalities of these changes reflect the fact that the most consistent and effective agent inspiring these changes are international trust service providers who have grown adept at marketing trust law reform around the world (Harrington 2016). While the impact of this transnationalisation has not been wholly uniform, it has led to a trend of global convergence around pro-settlor reforms to the extent that jurisdictional differences have significantly narrowed following this pattern of reform, notably the United States of America's historical beneficiary orientation (Gallanis 2026; Getzler 2009; Langbein 2007).

Notably, this transnationalisation of trust law reform was presaged by Cotterrell's writings when he explored the impact of late-twentieth-century globalisation through his aforementioned interest in the relationship between community and law (Cotterrell 2012). The relevant 'community' for trust law reform is not grounded in any particular local social group but the global array of concentrated owners and operators of capital, whose 'regulatory needs' are distinct from trust law's historical archetypes (Cotterrell 2009, p. 494). Perhaps the most ambitious manifestation of this push was the 1985 Hague Trust Convention, which sought to facilitate international recognition of trusts (Hayton 2018, pp. 1–2).

Facially, the shift from judicial to statutory drivers of trust law would seem to indicate that the concerns with democratic legitimacy inherent in trust law as a predominantly judicial subject would have been obviated. And in some formal sense, it is easy to point to the rise of legislative dominance as evidence that recent trust law reform, however imagined, should be subject to no greater democratic suspicion than any other arena of modern regulatory overhaul (French 1990).

However, legislative responsiveness in trust law reform faces the immediate challenge that the products of settlor-friendly trust enactments have been implicated in numerous international financial scandals. With increasing frequency in recent years, new exposés emerge on how trusts have been used to avoid domestic regulation and provide cover to some of the worst global human rights violators (Lederman 2024; Weisbord 2016). The public reaction to the effects of these reforms, if lacking more technical understanding, is always initially fiercely negative. Moreover, while these scandals do involve some smaller low-income jurisdictions, they now implicate some of the wealthiest jurisdictions on the planet – with the United States of America in an increasingly leading position (Bullough 2019). Still, these scandals have led to little enduring reform efforts, and the centrality of trust law to their operation has rarely been specifically raised in public discourse, even when reactive reforms are contemplated (Pinsker 2017). Even individual companies that are clearly identified as having structured their entire financial worlds around 'offshore' financial centres receive little long-term market rebuke (Yao 2018).

Thus, while the means of trust law's general transformation into an attractive arena for regulatory arbitrage have shifted from the inherently less-than-public arena of judicial law-making to statutory enactment, its dim resonance in public discourse in nearly every democratic country seems not to have disturbed the permissive invisibility under which its evolution continues to occur.

4 Trust law's persistently low democratic salience

Since the 1950s, political scientists have frequently used the term 'salience' as part of a repertoire of concepts aimed at dissecting the dynamics of electoral politics (Downs 1957). The intuitive idea that voters value some issues more than others, and with some form of prioritised weighting, has

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been progressively refined and expanded alongside debate over the empirical tools necessary to measure salience at the individual and group levels (Dennison 2019; Wlezien 2005).[6] Recent studies examine how issue salience naturally shifts across time and space and is shaped by structures and agencies, as well as by the dynamics of individual cognition and cultural traits.

The salience of financial regulation has been a topic of renewed interest following the 2008 Global Financial Crisis. It has been studied as a recent instance where exogenous shocks can potentially reorient salience in particular countries while stimulating coordinated efforts to shape public perception (Callaghan 2015; Kastner 2017). Yet, trust law is largely absent from this renewed interest and can only be inferentially related to concern with controversies over corporate taxation (Roland and Romgens 2022). In part, this absence might be the consequence that one element of trust law's general transformation is the limited effective liability of trustees, especially in commercial contexts, and thus has faded from public or practical concern as a target of either blame or reform. While experts involved with financial regulation may, if not consistently, understand the relevance of trust law (Knobel 2017, p. 10), the deconstructive trends in trust law reform have continued to be mostly insulated from these debates.[7]

The particularly low salience of trust law in electoral politics can be partially explained as driven by its traditional judicial character discussed earlier. Trust law's history as a judicial creature of equity does compound all the extant concerns with case law's public accessibility and intelligibility (Stevens 2023).[8] As trust law, if not again equity in general, remains a relatively specialised legal field beset by significant conceptual contest and controversy, it is understandable that public knowledge of trust law – or an ability to connect its reform to broader issues of financial regulation – remains decidedly low.[9] Moreover, direct empirical study of public knowledge of particular areas of law has a much shorter historical pedigree than some might assume. Historical debates over the democratic legitimacy of the common law, for example, often take this knowledge for granted. The emergence of more systematic studies of public legal knowledge has rarely included trust law, even when financial topics are addressed (Balmer *et al.* 2022).

While the comparatively arcane technical elements of trust law have clear force in explaining trust law's low democratic salience, such explanation is amplified when one considers the experiential dimensions of trust law. Attempts to qualitatively discern the drivers of issue salience, rather than infer patterns from quantitative data, remain an ongoing point of controversy in political science (Wiesner 2022). However, when it comes to legal systems, it is particularly relevant to consider which areas of law derive their salience from either direct individual contact or overlap with perceived confidence in relevant knowledge.

Consider the historically high salience of family law. While the rate at which any given demographic comes into direct contact with actual judicial adjudication varies, the regulation of the family concerns a persistent lived experience for most every individual. Moreover, the normative tropes of family law draw on this same comparatively broad corpus of individual

[6]'Issue salience is a pervasive concept in political science. Public–as opposed to elite–issue salience is a component of major theories of electoral behaviour, is regularly used as a mediating variable in studies of voting and is often measured in election surveys' (Dennison 2019, p. 436).

[7]Likely the sole exception would be some attempts to implement registries of beneficial interests. However, what success has been found in these arenas has had to draw on national security concerns and, as of yet, has had limited implementation while facing ongoing attempts to stymie implementation by trust service providers (Brown 2022, p. 664).

[8]'The common law is also inaccessible to non-lawyers. It is ridiculous that someone who wishes to know, say, what the rules on causation in the English law of torts are, or when a duty to take care not to inflict "pure" economic loss will be owed in Australia, is required to read dozens of decisions of enormous length by judges saying mutually inconsistent things that somehow must be reconciled. How can such "law" be used as a guiding rule for conduct? By contrast, Google gives me access to all of the legislation in Australia, the United Kingdom and elsewhere in an instant' (Stevens 2023, p. 541).

[9]'The legislation of trusts and estates … it isn't an area of law which garners much media attention and hardly ever makes headlines; most people are unaware of it and uninterested in it' (Spivack 2017, p. 333).

https://doi.org/10.1017/S174455232610055X Published online by Cambridge University Press

experience, which helps inspire the high salience of related issues even in times of economic turmoil. All citizens have experienced 'family' and believe in their intuitive expertise about its operation. It is thus not coincidental that family law plays such a strong role in the reification of the public/private split, which has otherwise been subject to ever-growing deconstruction in modern economic life (Kennedy 1982).

Consider now an area of recently emergent salience, corporate law. At the turn of the twentieth century, corporate law was a relative novelty in the public arena, but over time, especially in common law countries, corporations have come to be powerful intermediary institutions for large swaths of public and private life (Anderson 2017). While the finer points of corporate governance are likely beyond common individual knowledge, the basic parameters of corporate life are either a daily part of economic life for the vast majority of citizens or a consistent subject of public cultural production and scrutiny. Here again, even if its technical components are more exotic, corporate law's salience is driven by much the same experiential frequency and intuitive knowledge as family law. It is similarly not coincidental that the anthropomorphic character of corporations, both culturally and legally, has achieved a global prominence unthinkable a century ago (Jackson 2024).

By contrast, trust law lacks any of these direct or indirect experiential drivers of salience. Few citizens come into contact with trusts – or perceive that they do – and, to the extent they hold any coherent perception, most commonly see trusts as the exotic provenance of the wealthy.[10] As Sterk bluntly observes, it is a statistical truism that 'poor people do not create trusts' (Sterk 2017, p. 1994). Herein, the only potential experiential ties most citizens have to trusts are through processes of inheritance and, more frequently, through inheritance's public cultural representations rather than direct legal engagement. Here again, Cotterrell's notion of the increasing 'moral distance' between trustees and beneficiaries implicitly recognises that many individuals, such as the potentially large number of citizens in public and private pension schemes, may not even realise that a central aspect of their economic lives is structured or governed by trust law. Do they even know they are 'beneficiaries'? or what such status entails?

Even in what might be considered more traditional or mundane social settings, significant gaps exist between what legal professionals and academics presume about public understanding of relevant legal devices, such as wills (Hirsch 2026). As a result, when policy entrepreneurs attempt to legitimate modern trust reform, they do not attempt to discuss the actual motivations of interest groups they represent but rely on more resonant public notions of family values or abstracted notions of meritocracy, even if again largely concerned with commercial transactions or concentrated capital management (Tait 2019; Galle *et al.* 2026).

Thus, such generally low democratic salience is matched by an acutely inverted saliency of trust law for the owners and operators of concentrated capital. While advocacy for trust law reform is not wholly homogenous, especially among academics, the predominant, but-for drivers of trust law's modern transnational statutory transformation have been to further the objectives of these specific interest groups (Sitkoff 2004). Here, Cotterrell's work on transnationalisation and law is instructive as he notes that modern legal reform often requires less socially embedded lobbying but constellates around 'common and convergent economic projects' which transcend national boundaries (Cotterrell 2013, p. 11).

In this regard, the reform of trust law follows many of the now routinely discussed dynamics of modern regulatory capture, which test long-presumed notions of legal compliance and obligations. Rather than reconcilable through notions of reactive legal compliance, the content of many arenas of law can no longer be argued to be exogenous to those which such law is meant to regulate, today a mainstay of studies of tax reform (Ostas 2022). It is thus, not just for example, that financial regulation has gained some salience in recent decades, but also that the relatively inverted salience of issues of financialisation has spurred analogous transnational lobbying efforts

[10]It is a notable lament among many teachers of trust law that students view the subject as irrelevant to their lives on these grounds (Madden, this issue).

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even in what are considered to be comparatively responsive democratic contexts (Gava *et al.* 2022; Montalbano 2020). Furthermore, trust law reform campaigns have overlapped with other financial reform lobbying efforts through a concurrent interest in financial privacy and other reforms to delimit their implementation, monitoring and subsequent public evaluation (Hacker and Pierson 2010). As a result, it has been difficult to challenge many of the empirical claims advanced by trust law proponents which rarely are accompanied by systemic economic rationales (Lau 2011) and whose promise of local economic benefits has rarely been substantiated when closely examined (Sitkoff and Schanzenbach 2005, pp. 359–60; Simon 2023, p. 322). Characteristically, accompanying media coverage is meagre at best.

The powerful effect of this inverted salience is evident as most trust law reform does require going through processes of legislative enactment, which formally entails public disclosure requirements and notice-and-comment mechanisms. And while academic engagement can stimulate and impact legislative change (Hirsch 1999), specific inquiry into the substance of trust law reform materially demonstrates this inverted salience. If one investigates the submissions to most law commissions tasked with reviewing trust law, the asymmetry in submissions between the owners and operators of concentrated capital and all other social interests is yawning.[11] This gap replicates other aspects of democratic marginalisation in trust law reform, even in settings that have attempted to recognise more pluralistic interests in trust law reform (Cahn *et al.* 2023).

The sum consequence of these various factors generating and sustaining trust law's acutely low democratic salience challenges an easy reliance on related statutory enactments' democratic legitimacy. While perhaps only a focused instance of larger issues in democratic accountability in modern nations, it is hard to reconcile the resulting permissive invisibility with any substantive notion of participatory democracy (Spivack 2017). Several scholars have noted that the rapid 'onshoring' of once 'offshore' trust law should be the subject of open public debate (Lee 2018),[12] but, to date, it is nearly impossible to point to any actual broad public discourse which evidences informed approval of trust law's statutory transformation, or at least the minimum standard generally expected to accompany such expansive reforms (Knobel 2017; Smith 2018). Moreover, recent scholars have expanded Cotterrell's concerns into areas well beyond 'big trusts' regardless of size or complexity (Bryan 2024).

Moreover, this deficit is concerning as trust law reform is now increasingly packaged in larger financial reform agendas (Walker 2023), even when they have potentially deleterious implications for other areas of trust law with more traditionally protective functions, such as pension reform (Arvind and Stirton 2024). Even here, the fact that knowledge of trust law remains low among most financial experts means that changes can be enacted whose potential impact is only truly appreciated by trust entrepreneurs, let alone by judges and other lawyers.

As with any area of legal reform, establishing trust law's low salience does not necessarily mean that all trust law reform is or has been either antisocial or undesirable. Conversely, reform of law in high-salience areas – such as family law – is often complicated by the presence of strong experiential drivers that can crowd out relevant expertise. No argument is necessarily required about democratic salience and the quality of any related legislation.

One revealing counterexample in this vein that provides an exception to trust law's low salience is the proliferation of revocable trusts in the US state of California. During the 1970s, California witnessed the first systematic use and promotion of revocable *inter vivos* trusts to hold residential

[11]Even in what is considered a less deconstructed trust jurisdiction, New Zealand, the 2012 Law Commission noted that: 'We received submissions from law firms, accountancy firms, the judiciary, statutory trustee corporations, energy trusts, trustee and trust practitioner associations, law societies, trustee service providers, government departments, non-governmental organisations, private sector companies working in relevant fields, and a few individuals … We recognise that our submissions have predominantly come from those representing the perspective of trustees' (New Zealand Law Commission 2012, p. 6).

[12]'The question of whether onshore English and Hong Kong courts should follow the extremely settlor-friendly approach of the offshore tax havens indiscriminately should require a policy debate of its own' (Lee 2018, p. 2094).

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housing (Phillips 1976).[13] Some of this was stimulated by changes in community property laws (Vallerio 2017) and generally followed the US trend of will-substitutes to avoid probate (Langbein 1983; Fogel 2014; Newman 2008). However, specific conditions in California made this an issue of broader public concern, as in the 1970s the state began to experience one of the most rapid rises in property values in modern history. In Los Angeles, for example, houses in desirable neighbourhoods increased in value by a factor of seven; by the late 1980s, Los Angeles housing systematically increased eightfold (Furlong 1991). This spike in values led to a particular politics centred on property values that persists until today and is symbolised in ongoing debate over a public referendum that severely curtailed increases in property taxes (Danforth 2021). In the wake of this new social concern, the provision of revocable trusts – often called 'living wills' – to avoid the costs of probate and ensure the transfer of low bases for property taxation became a cottage industry in California. Moreover, these reforms have and continue to be active in California electoral politics, even when regarding their use by commercial entities. However, there has been concern that even the relatively minimal legal formalities required to create a revocable trust have made it difficult for many citizens to use. This is, again, another testament to the general public's perceived distance from the exoticism of trusts. As a result, the new frontier in this arena has been a trial period for pay-on-death deeds to achieve the same probate avoidance ends.

While this instance of high-salience trust reform is much easier to reconcile with substantive notions of democratic legitimacy, this does not mean that the trend has been pro-social in nature. Chang has recently argued that the expansive popularity of will-substitutes has created a crisis for the larger American probate system, and one with troubling democratic implications (Chang, forthcoming 2026). As such, the proliferation of revocable trusts raises the same issue that Schenkel noted about the self-settled asset protection trusts that are now commonly the product of low-salience statutory trust reform: if every citizen used them, nearly all creditor–debtor systems would collapse (Schenkel 2009, p. 212).

Still, highlighting this exception proves the rule. While democratic politics may be far from perfect and always subject to interest group capture or other social pathologies, in the context of trust law, the permissive invisibility under which its often radical transformation has occurred is perhaps one of the most extreme examples. Stretching back to the earliest centuries of equity up through the present, trust law's particular characteristics have created a now-perfect storm of the thinnest veil of procedural legitimacy to cloak furthering the interests of the already most powerful social classes in an increasingly unequal society.

4 Conclusion

The permissive invisibility of trust law promises to be of only growing significance in coming years. Trust law's imbrication into modern economic activity means that ignoring its reform will make already frustrated attempts to enact effective pro-social financial regulation even more unlikely (Awrey and Judge 2020). Given the dynamics of longitudinal transnational regulatory capture, it is also likely that subtle and nuanced approaches to trust reform may have to yield to more 'hard' and categorical reforms seen as needed in other areas of law (Armour *et al.* 2016). Indeed, some have already argued that only a highly restrictive paring down of trust law's scope can avoid the downsides of further opportunistic manipulation (Kades 2023), even while others continue to emphasise trust law's specific potential for social problem-solving (Ho and Lee 2017; Rosenberg 2000). What does seem inevitable is that the growing global malaise over modern economic life will only intensify as the world moves toward a more multi-polar geopolitical order where the free global flow of capital appears vulnerable to concerns with wealth inequality and democratic backsliding (Roberts *et al.* 2019).

[13]Comparatively, the proliferation of revocable trusts in US trust law remains notable as an outlier in common law jurisdictions in which *inter vivos* trusts have long been irrevocable (Newman 2008).

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Cotterrell's call for a holistic and integrative study of the full social life of trusts thus seems as, if not more, persuasive and necessary than when he first made it.[14] It is true that the rapid global transformation of trust law may require altering or reorienting some of Cotterrell's specific earlier claims (Piška 2024), but its general methodological demands remain essential to understanding the pattern of its reform and the varied impacts of its material implications. Throughout this article, Cotterrell's approach to law, community and trust law has presaged contemporary concerns by emphasising that trust law's traditional social archetypes, if not equity's larger imagination of communal norms, have been undermined by his notion of moral distance and the impact of concentrated capital's own collective interests and needs.

Calling for greater empirical scrutiny is difficult to dispute, though the functionally privatised baseline for trust formation presents special quandaries. Many have routinely noted the general challenges of measuring wealth inequality in the modern era (Pennell and Weisbord 2023), and others have outlined the specific difficulties of measuring the scope and content of trusts held across the world's many common law jurisdictions (Stowell *et al.* 2017). Many governments still rely largely on self-reporting mechanisms when it comes to trust assets – though assets held by trusts can be partially inferred by reporting requirements imposed on financial institutions when they act as trustees.

This lack of basic information can make more general arguments about trust law difficult to ground beyond intuition or the broad conceptual shifts emphasised in Cotterrell's writings on trusts. Characteristically, trust law figures only obliquely in 'numerus clausus' debates over the cost-benefit analysis that should inform the creation of new forms of property holding (Hansmann and Kraakman 2002). When trusts are mentioned, they tend to presume the operation of express trusts more akin to their historical use as succession devices and thus concurrently presume they impose limited informational costs on third parties (Merrill and Smith 2000).[15] By contrast, the permissive invisibility of trust law's transformation has given rise to what Chang and Smith would call 'numerus apertus', where new property forms freely propagate without legal discipline (Chang and Smith 2015, p. 2279).

Given the inherent normative trappings of equity, this reliance on untested or outdated intuitions only serves to pull academic discourse further from trust law's material reality. Bennett and Hofri-Winogradow have noted that dominant academic theorisations of trust law operate with little engagement with this material reality (Bennett and Hofri-Winogradow 2021).[16] Morley and Sitkoff also note that this absence applies even in the United States of America, where the rise of law and economics has inspired more systemic use of empirical methods – if largely econometric in nature (Morley and Sitkoff 2021). Others have noted this disjuncture as affecting judicial decision-making which still relies on reflexive understandings of social practices rather than being informed by forms of empirical investigation (Arvind and Stirton 2024).

Nonetheless, the particular historical development of trust law in equity still prompts many trust scholars confronted with this empirical mismatch to fall back on arguments grounded in proto-political hypotheticals regarding individual autonomy (Dagan and Samet 2023), which, from Cotterrell's critical socio-legal position, might be described as a form of equitable theology.[17]

[14]"As a social phenomenon itself, however, [the trust] is to be understood as obtaining all its specific characteristics from its place within a broader social environment' (Cotterrell 1987, p. 79).

[15]"The complexities of dividing the fruits of these efforts among different generations and classes need not trouble the third parties who deal with the trustee in the management of the trust corpus. Dividing the fruits is a concern only of the settlor, the trustee, and the beneficiaries. And to the extent that courts, creditors, and others must measure the different beneficial interests, the fact that they are described in the vocabulary of common-law estates in land reduces the information costs associated with this exercise' (Merrill and Smith 2000, p. 57).

[16]"Current trusts theory leaves much of the practical or empirical role of trusts in modern societies normatively unexplained and unsupported' (Bennett and Hofri-Winogradow 2021, p. 695).

[17]When confronting Smith's 'massively discretionary trusts', Dagan and Samet representatively argue for a move not towards empirical study but from the "doctrinal-analytical to the normative" (Dagan and Samet 2023, p. 702).

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Others simply cast empirical understanding as impossibly complex for legal scholars or judges to consider (Miller 2023) or argue for a baseline of permissiveness that places the burden on others to justify any restrictions on settlor-friendly reforms (Liew 2021). As such, Cotterrell's call for holistic and integrative critical trust scholarship seems all the more necessary unless debates about trust law stagnate as simply replicating broader political ontologies,[18] or remain orthogonal to the plural values and interests at conflict in trust law's modern transformation (Pennell and Weisbord 2023).

Still, even if academic studies of trust law become broadly armed with a more complete, Cotterrell-inspired empirical picture of trust law's full social life, no particular pathway for raising trust law's democratic saliency appears immediately evident. Cotterrell hinted at some of his own aspirational re-imaginations of modern trust law,[19] but it would seem, for all the reasons explored earlier, that legislative action would be the only realistic means to curtail the more antisocial elements of recent reforms (Weirer 2015), especially given judiciaries' inherently reactive stance toward social and statutory change (Spitko 2018). Yet, the current age of populist politics presents a double-edged prospect in this regard, as political polarisation has led to general ideological allegiance becoming more salient to many voters than any particular contested issue (Adams *et al.* 2024). At the same time, populist parties rarely match their aggressive critiques of the status quo with systematic reform (Böhmelt and Ezrow 2024). In this way, trust law may always have to be packaged into larger regulatory reforms sold as serving broader ideological agendas, and all the pitfalls this entails. Far from a halcyon imagination of recaptured democratic legitimacy.

For now, heeding Cotterrell's call may have to be satisfied in exploring and excavating dynamics such as trust law's permissive invisibility in order to more effectively clear the conceptual and empirical morass in which it has found itself - and which Cotterrell identified as one of the more acute sites where legal practice obscures the operation of social power and thus inhibits genuine democratic law-making.[20]

Acknowledgements. I would like to thank the participants in the 2025 workshop *The Law and Politics of Trusting* at Queen Mary University of London: Wayne Morrison, Angela Lindner, Cyprian Kambili and Michael Bryan. This paper was greatly improved due to the efforts of the workshop's organisers Raul Madden and Eric Loefflad, as well as the two anonymous peer reviewers.

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[18]In his classic comparative study of Italian and US ideas of numerus clausus, Merryman noted how in debates regarding autonomy: 'it seems unlikely that the assumptions of this line of argument will ever be susceptible of conclusive proof or disproof. They are part of a creed' (Merryman 1963, p. 227).

[19]'[A]ll property beyond certain (generous) limits of scale should, on the basis of the viewpoint developed in this paper, be held subject to a recognition that it is held on trust for the common good and that its use can be subject to control by law in the public interest' (Cotterrell 1988, p. 21).

[20]'[T]he very fluidity of beneficial entitlements which the trust makes possible hides from view even more effectively than the property concept in its simple form the actual structure of power which private law guarantees and perfects' (Cotterrell 1987, p. 86).

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Cite this article: Kroncke J (2026). The permissive invisibility of trust law. *International Journal of Law in Context* **22**, 433–449. https://doi.org/10.1017/S174455232610055X

https://doi.org/10.1017/S174455232610055X Published online by Cambridge University Press