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Notes

IN STATES WE "TRUST": SELF-SETTLED TRUSTS, PUBLIC POLICY, AND INTERSTATE FEDERALISM

Brendan Duffy

ABSTRACT—Over the last twenty years, domestic asset protection trusts have risen in popularity as a means of estate planning and asset protection. A domestic asset protection trust is an irrevocable trust formed under state law which enables an independent trustee to allocate money to a class of persons, which includes the settlor.

Since Alaska first enacted domestic asset protection legislation in 1997, fifteen states have followed its lead. The case law over the last twenty years addressing these trust mechanisms has, however, been surprisingly sparse. A Washington bankruptcy court decision, *In re Huber*, altered this drought, but caused more confusion by holding that a public policy exception trumped standard choice of law analysis. The end result: The court applied the law of the settlor's state, which prohibited these trusts, rather than the law of Alaska, where the trust actually originated.

This Note argues that the *Huber* decision was wrongly decided and provides a framework for future courts considering the choice of law issues related to domestic asset protection trusts. This Note also demonstrates that economic, public policy, and federalism considerations support the choice of law outcome.

AUTHOR—J.D., Northwestern University School of Law, 2017; B.A., The Catholic University of America, 2013. I am particularly grateful for the advice and guidance of Professor Max Schanzenbach, Professor Jim Lindgren, and Professor Erin Delaney. Also, a special thanks to the many editors of the *Northwestern University Law Review* who provided invaluable comments and edits over the past year. Finally, thank you to my parents for their unwavering love and support over the years and my siblings—Liam, Caitlin, Moira, Ciara, Aislinn, Mairin, and Declan—for always believing in their big brother.

INTRODUCTION

Imagine this: You recently started a new small business, you managed to acquire several million dollars, and you are now contemplating how to best protect your assets, not only for yourself, but also for your children and grandchildren. Or perhaps you are a doctor, a lawyer, or a businessman and are worried about shielding your money against potential future creditors because of the personal liability present in your profession or trade. Twenty years ago, you would have been allowed only one option—to place your money in an offshore self-settled trust[1] in a jurisdiction like the Cayman or Cook Islands.[2]

In 1997, however, the first American self-settled asset protection trust was born in Alaska, and since then, fifteen additional states have followed

[1] A self-settled asset protection trust is an irrevocable trust in which the person who creates the trust (the settlor) is also the beneficiary of the trust. *See* JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 704 (9th ed. 2013).

[2] *See id.* at 704–05 (discussing the recognition of asset protection trusts in several offshore jurisdictions); *see also* discussion *infra* Section I.C. While no empirical study exists, scholars have estimated that the value of offshore self-settled trusts currently exceeds one trillion dollars. Ritchie W. Taylor, *Domestic Asset Protection Trusts: "The Estate Planning Tool of the Decade" or a Charlatan?*, 13 BYU J. PUB. L. 163, 164 (1998) (stating that it was estimated more than one trillion dollars of trust funds were in asset protection trusts in foreign jurisdictions alone).

suit.[3] You may now choose between settling in one of sixteen domestic jurisdictions or elect to put your money in one of the many available offshore jurisdictions.[4] Intuitively, the choice appears an easy one: Why put your money in the Cayman Islands when you can put it in South Dakota or Alaska?[5] Not only will your trust business stay in the United States, but you can also avoid the obvious risks of transferring your money outside the country.[6] Unfortunately, what should be a simple decision has become anything but simple as a result of the risk that courts will refuse to enforce these new trust instruments.[7]

While self-settled asset protection trusts, known as domestic asset protection trusts in the United States, had their onshore genesis in 1997, it took over fifteen years for a domestic court to consider their enforceability.[8] The only case to speak to the enforceability of a domestic

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[3] DAVID G. SHAFTEL, ACTEC COMPARISON OF THE DOMESTIC ASSET PROTECTION TRUST STATUTES, at I (2015), http://www.actec.org/assets/1/6/Shaftel-Comparison-of-the-Domestic-Asset-Protection-Trust-Statutes.pdf [https://perma.cc/JV5U-9JJ9]. For a discussion on the current climate of self-settled asset protection states, see Adam J. Hirsch, *Fear Not the Asset Protection Trust*, 27 CARDOZO L. REV. 2685 (2006).

[4] *See* Matthew Russo, Comment, *Asset Protection: An Analysis of Domestic and Offshore Trust Accounts*, 23 MICH. ST. INT'L L. REV. 265, 279–91 (2014) (discussing the evolution of current law regarding both offshore and domestic trust instruments, presenting the advantages and disadvantages of each).

[5] *See* Henry J. Lischer, Jr., *Domestic Asset Protection Trusts: Pallbearers to Liability?*, 35 REAL PROP. PROB. & TR. J. 479, 515 (2000) (noting that choosing a domestic trust over an offshore one has the obvious benefits of avoiding the uncertainties that flow from transferring assets to a jurisdiction with different language, political and legal structure, and currency); Darsi Newman Sirknen, *Domestic Asset Protection Trusts: What's the Big Deal?*, 8 TRANSACTIONS TENN. J. BUS. L. 133, 136 (2006) (discussing the benefits that flow into the United States economy by choosing domestic trusts over offshore instruments and that "the United States is unquestionably more politically and economically stable than any of the offshore [domestic asset protection trust] host countries").

[6] *See* Ellen C. Auwarter, Note, *Compelled Waiver of Bank Secrecy in the Cayman Islands: Solution to International Tax Evasion or Threat to Sovereignty of Nations?*, 9 FORDHAM INT'L L.J. 680, 680–87 (1986) (analyzing the sovereignty and conflict of laws issues facing offshore jurisdictions); Paul M. Roder, Note, *American Asset Protection Trusts: Alaska and Delaware Move "Offshore" Trusts onto the Mainland*, 49 SYRACUSE L. REV. 1253, 1257 (1999) (discussing the risks of transferring money to foreign countries).

[7] Historically, offshore trusts have provided much better protection than domestic asset protection trusts. *See* Elena Marty-Nelson, *Offshore Asset Protection Trusts: Having Your Cake and Eating It Too*, 47 RUTGERS L. REV. 11, 56–66 (1994) (discussing the strengths of offshore trusts in places like the Bahamas and Cook Islands in comparison with the problems presented by domestic trusts); Robert T. Danforth, *Rethinking the Law of Creditors' Rights in Trusts*, 53 HASTINGS L.J. 287, 309–10 (2002) (highlighting common features of an offshore asset protection trust compared with the current evolution of domestic trust law, and concluding that myriad problems face domestic versus offshore settlors).

[8] Waldron v. Huber (*In re* Huber), 493 B.R. 798, 807–09 (Bankr. W.D. Wash. 2013). By this, I mean enforceability of a trust by a settlor from a jurisdiction which does not have domestic asset protection trust laws who places their money in trust in one of the states that does. However, it should be noted that several courts have considered the enforceability of offshore asset protection trusts. *See, e.g.*, Lawrence v. Goldberg (*In re* Lawrence), 279 F.3d 1294, 1298–301 (11th Cir. 2002); FTC v. Affordable Media, LLC, 179 F.3d 1228, 1239–44 (9th Cir. 1999). Moreover, courts have also considered choice of law principles in spendthrift trusts. *See, e.g.*, Sattin v. Brooks (*In re* Brooks),

asset protection trust is *In re Huber*, in which a Washington bankruptcy court first addressed the broader choice of law question in a decision involving a Washington settlor who created a self-settled trust under Alaska law.[9] The court determined that Washington law, not Alaska law, should apply to determine the validity of the Alaskan trust.[10] Applying Washington law, the court found that the trust violated Washington's public policy against self-settled trusts, rendering the trust unenforceable.[11] While no appellate court has yet considered this question, it is only a matter of time before one does.

Accordingly, this Note will address the choice of law[12] issues raised when dealing with domestic asset protection trusts, but will part company with the *Huber* court's application and analysis of these choice of law principles. More specifically, this Note will argue that *Huber* incorrectly applied choice of law principles as a matter of law, as well as through the normative law and economics perspective of jurisdictional competition.

First, this Note demonstrates that the choice of law analysis must not overlook one of the most important tenets of trust law: trustor intent.[13] In most cases, not only does the trustor intend for the trust to be governed under the law of the favorable jurisdiction, but the trustor also typically includes a provision in the contract which explicitly designates a particular jurisdiction.[14] Second, this Note establishes that both Restatement (Second) of Conflict of Laws §§ 270 and 273 weigh heavily in favor of enforcing domestic asset protection trusts.[15] Third, this Note demonstrates that not only was *Huber* incorrectly decided, but public policy actually favors the

217 B.R. 98, 101–03 (Bankr. D. Conn. 1998); Marine Midland Bank v. Portnoy (*In re* Portnoy), 201 B.R. 685, 701 (Bankr. S.D.N.Y. 1996).

9 *Huber*, 493 B.R. at 807–09.

10 *Id.* at 808–09.

11 *Id.* at 809.

12 Essentially, choice of law principles ask, "Which law should apply?" When there is a difference between multiple jurisdictions with some connection to a case, a court can either apply the law of the forum state or the law of the site of the transaction or happening which gave rise to the litigation. In this instance, we will consider the principles outlined in the Restatement (Second) of Conflict of Laws since it has consistently been the main consideration used in court decisions on the instant issue and related issues in the offshore context. *See, e.g.*, *id.* at 807; *Portnoy*, 201 B.R. at 697–98; Ferrari v. Barclays Bus. Credit, Inc. (*In re* Morse Tool, Inc.), 108 B.R. 384, 385–88 (Bankr. D. Mass. 1989).

13 *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS, ch. 10, topic 2 intro. note (AM. LAW. INST. 1971) (noting that the chief purpose of trust law is to carry out the intent of the trustor).

14 *See* Amy Lynn Wagenfeld, Note, *Law for Sale: Alaska and Delaware Compete for the Asset Protection Trust Market and the Wealth that Follows*, 32 VAND. J. TRANSNAT'L L. 831, 839 (1999) ("To create this ideal trust a settlor transfers his assets into trust, names himself as a beneficiary, includes a *provision* that the trust holdings may not be voluntarily or involuntarily alienated prior to distribution, and appoints as trustee either himself or a third party over whom he retains certain powers." (emphasis added)).

15 *See* discussion *infra* Part III.

legality of these trusts.[16] Amongst other reasons, there are already mechanisms in place by which individuals can *legally* protect assets that do *not* violate public policy. For example, tenancy by the entirety[17] and homestead exemptions[18] already allow individuals to legally shield their property from creditors.[19] Domestic asset protection laws merely tip the scales back towards the beneficiaries.

Moreover, the *Huber* court's misapplication of these principles within the broader context of domestic asset protection trusts will invite unforeseen and potentially devastating collateral damage, including a detrimental impact on current notions of interstate federalism. Specifically, this Note asserts that, by putting a chokehold on settlors who create domestic asset protection trusts through the mechanism of choice of law rules, courts ignore both the constitutional underpinnings and the economic benefits of interstate federalism—particularly the financial importance of interstate competition.

For all the aforementioned reasons, this Note will preemptively debunk any suggestion that *Huber* should become the standard-bearer for determining the enforceability of future domestic asset protection trusts.[20] Accordingly, Part I traces the evolution of trust law, from the advent of trusts to the development of domestic asset protection trust statutes. Part II outlines the facts, reasoning, and holding of the only case to directly address domestic asset protection trusts: *In re Huber*. Part III analyzes *Huber* within the broader framework of choice of law and domestic asset protection trusts, highlighting the logical and legal flaws in its reasoning. Part IV argues that, as more cases like *Huber* arise around the country, courts should recognize the benefits of enforcing these trusts—not look for reasons to minimize enforceability. A brief conclusion will follow.

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[16] While public policy is a somewhat amorphous concept, something typically runs in concert with public policy when it is in the interest of the state that it be performed. *See* discussion *infra* Section IV.A.

[17] This concerns only jurisdictions that allow shielding of property from the creditors of one spouse. *See* Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093, 1100–01 (2009).

[18] A homestead exemption protects a certain portion of a home's value from tax. *See id.*; Anup Malani, *Valuing Laws as Local Amenities*, 121 HARV. L. REV. 1273, 1294–97 (2008).

[19] *See* John K. Eason, *Policy, Logic, and Persuasion in the Evolving Realm of Trust Asset Protection*, 27 CARDOZO L. REV. 2621, 2668 (2006); Stern, *supra* note 17, at 1100–01.

[20] As Professors Max Schanzenbach and Robert Sitkoff observe, many scholars, from several vantage points, have argued that domestic asset protection trusts are unenforceable. Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 384 n.88 (2005); *see, e.g.*, Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035 (2000). This Note argues to the contrary.

I. BACKGROUND

A. Origins of Trust Law

The choice of law flaws in *Huber* can only be understood through the prism of both trust law generally and the progression of the trust landscape in the United States. Functionally, a trust is an arrangement by which assets, whether tangible or intangible,[21] are split and held by different persons—whereby a trustee manages the assets as a fiduciary for one or more beneficiaries.[22] The trustee holds legal title to the trust property, which in most cases means full autonomy to manage the property in trust.[23] The beneficiaries hold equitable title, meaning they are authorized to receive payments from the trust income or corpus.[24]

American trust law can be traced back to the thirteenth century, when the Franciscan friars first arrived in England.[25] Because the friars were not permitted to own property, land was conveyed to other individuals and held for the use of the friars.[26] While this system thrived for several years, laymen began taking advantage of the process in order to avoid certain compulsory legal obligations of a property's legal titleholder.[27] By transferring legal title to another person, but preserving the trust, persons who broke the law or made risky investments could prevent the forfeiture of their trust property.[28]

In 1535, Parliament enacted the Statute of Uses, recognizing the fact that trusts had predominantly become "instruments of fraud" and intending to thwart their further abuse.[29] While the Statute eliminated many trust uses,

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[21] For example, an intangible asset might be a patent, copyright, or other form of intellectual property. *See* George Mundstock, *Taxation of Business Intangible Capital*, 135 U. PA. L. REV. 1179, 1179 (1987).

[22] DUKEMINIER & SITKOFF, *supra* note 1, at 385.

[23] *Id.*

[24] *Id.* The corpus of a trust is the sum of money or property placed into the instrument and set aside for beneficiaries. *See* John Bourdeau et al., *Devise, Bequest, Inheritance, or Trust Income*, 85 C.J.S. TAXATION § 1866, Westlaw (database updated September 2016).

[25] DUKEMINIER & SITKOFF, *supra* note 1, at 386.

[26] M.D. LAMBERT, FRANCISCAN POVERTY 84 (1961); Avisheh Avini, Comment, *The Origins of the Modern English Trust Revisited*, 70 TUL. L. REV. 1139, 1144 (1996).

[27] Avini, *supra* note 26, at 1144. The English common law of property contained several limitations including general restrictions on holding legal title to land and *inter vivos* conveyances of property, and a complete prohibition on post mortem transfers. *Id.* at 1143.

[28] *Id.* at 1144–45.

[29] *Id.* at 1145–46. Many have argued that the object of the statute was to destroy the monasteries and confiscate their property, and the best way to accomplish this was to abolish trusts. *See* GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, HANDBOOK OF THE LAW OF TRUSTS § 4, at 11 (5th. ed. 1973). For the political history surrounding the Statute of Uses, see W.S. Holdsworth, *The Political Causes Which Shaped the Statute of Uses*, 26 HARV. L. REV. 108 (1912).

it spoke only to real property.[30] Therefore, utilizing trusts to protect personal property was regarded as a permissible trust use.[31] These trusts, which survived the Statute of Uses, then became the origin of modern trust law.[32]

B. Trust Law Moves to America

The thirteen original states, which generally adopted the English common law, also adopted the English structure and substance of equity jurisprudence, which incorporated the law of trusts.[33] Over time, however, American trust law began to separate from English trust law in several notable aspects.[34] One key distinction was the importance of "dead hand" control in American trust law.[35] American trust law sought to allow more control from the grave than did its English predecessor, where intent of the trustor ruled.[36] The spendthrift trust was one such example.[37]

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[30] *See* 27 Hen. VIII, c. 10 (1535) (Eng.), *in* 3 STATUTES OF THE REALM 539–42 (1817).

[31] *See* BOGERT & BOGERT, *supra* note 29, § 5, at 12. For example, a gift to A for five years, intended for the use of B, was not affected by the Statute. *Id.*

[32] *See* Avini, *supra* note 26, at 1143–47 (noting that the evolution of trusts converged with the passage of the Statute of Uses).

[33] *See* BOGERT & BOGERT, *supra* note 29, § 6, at 14. It should be noted, however, that the development of equity jurisprudence was initially "slow and difficult" in the United States. *Id.* Still, despite other legal deficiencies and a dearth of domestic precedent in early America, trust litigation was relatively prevalent. *Id.*; *see, e.g.*, Bacon v. Taylor, 1 Kirby 368 (Conn. Super. Ct. 1788); State *ex rel.* Hindman v. Reed, 4 H. & McH. 6 (Md. Ct. Ch. 1797).

[34] *See* Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189, 1193–1201 (1985) (describing the evolution of and ultimately separation of American and English trust law, with a specific description on spendthrift trusts).

[35] Dead hand control is the ability to use wealth to influence certain behavior after death. *See* LAWRENCE M. FRIEDMAN, DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW 4 (2009). American law, like other modern legal systems, recognizes the right of the dying to decide how their money will be allocated. *Id.* at 46. However, unlike other legal systems, American trust jurisprudence has placed a higher level of deference on the amount of testator freedom. *See* Susanna L. Blumenthal, *The Deviance of the Will: Policing the Bounds of Testamentary Freedom in Nineteenth-Century America*, 119 HARV. L. REV. 959, 963 (2006). To see arguments for and against limitations on dead hand control, compare Letter from Thomas Jefferson to James Madison (Sept. 6, 1789) *in* 6 THE WORKS OF THOMAS JEFFERSON 3–4 (Paul Leicester Ford ed., 1904) ("'[*T*]*hat the earth belongs in usufruct to the living;*' that the dead have neither powers nor rights over it."), and RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 18.3, at 554–56, § 18.7, at 548 (7th ed. 2007) (arguing, through an example, that fully embracing dead hand control would be "wholly devoid of an economic foundation" because there must be room for some flexibility), with RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 (AM. LAW INST. 2003) ("The controlling consideration in determining the meaning of a donative document is the donor's intention. The donor's intention is given effect to the maximum extent allowed by law.").

[36] According to Professors Dukeminier and Sitkoff, "in England and the Commonwealth . . . after a trust becomes irrevocable, the trust property is regarded as belonging to the beneficiaries, and the dead hand continues to rule only by sufferance of the beneficiaries." DUKEMINIER & SITKOFF, *supra* note 1, at 718. However, in America, it is the settlor who is seen as controlling—even from the grave. *See id.* at 719.

[37] *Id.* at 719.

A spendthrift trust is created for purposes of protecting the trust corpus while allowing the trust beneficiary to receive trust income.[38] As American trust law evolved and expanded, trusts played a prominent role in avoiding creditors.[39] The spendthrift trust became immensely popular because it was an instrument that served to do just that.[40]

The following hypothetical highlights the legal leap accomplished through the development of enforceable spendthrift trusts.[41] Assume a father wants to make a gift of money to his daughter. If the gift is made in a single payment, his daughter can go out immediately and spend that money. If the payment is made over time, his daughter can only spend the income as the stream of money comes in—though she could also sell her annuity for the present value and have access to a lump sum. In both cases, however, a creditor could easily gain access to the daughter's sum of money gifted by her father. By putting the money in a spendthrift trust, the father could make a gift to his daughter while assuring both that she could not alienate that trust interest and that no creditor could reach her interest. Simply put, it is one of the ultimate means of protecting wealth.

In essence, a spendthrift trust is a trust that includes specific provisions that prohibit the beneficiary from voluntarily alienating their interest, but which also bars attachment by creditors.[42] For example, a spendthrift provision prevents the beneficiary from using the trust instrument as collateral on a loan.[43] Additionally, a creditor can only reach the beneficiary's trust assets once a distribution has been made.[44] The

[38] *See id.* at 694–98.

[39] Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434, 438 (1998) (analyzing the functions of the law of trusts and asserting that protecting one's assets from creditors is one of the most significant contributions of trust law).

[40] *See* Alan Newman, *The Rights of Creditors of Beneficiaries Under the Uniform Trust Code: An Examination of the Compromise*, 69 TENN. L. REV. 771, 772 (2002) (stating that settlors started to place spendthrift provisions in their trusts to keep creditors of their beneficiaries from squandering their interests).

[41] This hypothetical is adopted from a similar hypothetical and explanation of spendthrift trusts. *See* Michael Sjuggerud, Comment, *Defeating the Self-Settled Spendthrift Trust in Bankruptcy*, 28 FLA. ST. U. L. REV. 977, 979 (2001).

[42] Erwin N. Griswold, *Spendthrift Trusts Created in Whole or in Part for the Benefit of the Settlor*, 44 HARV. L. REV. 203, 203 n.1 (1930). Some state courts, however have relaxed such restraints on voluntary alienation and have allowed attachment by creditors in some situations, such as fraudulent conveyances. *Id*. at 203 & n.1, 203–04.

[43] Kellsie J. Nienhuser, Comment, *Developing Trust in the Self-Settled Spendthrift Trust*, 15 WYO. L. REV. 551, 555 (2015).

[44] *Id.*

creditor cannot place a lien on the trust instrument or otherwise access the trust assets.[45]

Two late nineteenth-century cases contributed to the widespread acceptance of the spendthrift trust in the United States.[46] In the most important of these cases, *Nichols v. Eaton*, the Supreme Court laid the groundwork for the extensive recognition of spendthrift trusts as a legal mechanism for protecting beneficiaries from the legitimate entitlements of their creditors.[47] In *Nichols*, Justice Miller argued:

> Why a parent, or one who loves another, and wishes to use his own property in securing the object of his affection, as far as property can do it, from the ills of life, the vicissitudes of fortune, and even his own improvidence, or incapacity for self-protection, should not be permitted to do so, is not readily perceived.[48]

Justice Miller's assertion was the first instance in which a court specifically addressed the notion, and legality, of a spendthrift trust.[49] Although many supported Justice Miller's viewpoint,[50] the idea was not without its share of critics,[51] nor did it gain immediate traction.[52] Still, the *Nichols* decision proved to be the foundation of legitimacy for the concept.[53] Over the next

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45 *Id.*

46 *See* Nichols v. Eaton, 91 U.S. 716 (1875); Broadway Nat'l Bank v. Adams, 133 Mass. 170 (1882).

47 91 U.S. at 725–27. Interestingly, the case itself did not concern a spendthrift trust, yet Justice Miller saw an opportunity, in dicta, to discuss their validity. *See* John K. Eason, *Developing the Asset Protection Dynamic: A Legacy of Federal Concern,* 31 HOFSTRA L. REV. 23, 39 (2002).

48 *Nichols*, 91 U.S. at 727. Additionally, Justice Miller emphasized the power and ownership rights of the donor:

> [T]he doctrine, that the owner of property, in the free exercise of his will in disposing of it, cannot so dispose of it, but that the object of his bounty, who parts with nothing in return, must hold it subject to the debts due his creditors, though that may soon deprive him of all the benefits sought to be conferred by the testator's affection or generosity, is one which we are not prepared to announce as the doctrine of this court.

Id. at 725.

49 *See* Eason, *supra* note 47, at 41–42.

50 *See, e.g.*, Nathaniel S. Brown, *Spendthrift Trusts*, 54 CENT. L.J. 382, 393 (1902) (asserting that spendthrift trusts do not conflict with public policy); George P. Costigan, Jr., *Those Protective Trusts Which Are Miscalled "Spendthrift Trusts" Reexamined*, 22 CALIF. L. REV., 471, 480 (1934) (arguing in favor of a progressive attitude toward spendthrift trusts, in line with *Nichols*).

51 *See, e.g.*, John Chipman Gray, RESTRAINTS ON THE ALIENATION OF PROPERTY, at iii–iv (1883) (outlining objections to the adoption of spendthrift trust laws).

52 *See* Eason, *supra* note 47, at 41 n.73 (noting that while *Nichols* set the groundwork for the spendthrift trust doctrine, the subsequent state court decision *Broadway National Bank* and other dynamics ultimately were the driving force behind its acceptance).

53 *Nichols* continues to influence state court approaches to difficult spendthrift trust issues. *See* Scott v. Bank One Tr. Co., 577 N.E.2d 1077, 1082 (Ohio 1991) (relying on the reasoning in *Nichols*, specifically Justice Miller's freedom of disposition argument, as the rationale for why Ohio precedent disfavoring spendthrift trusts should be rejected); *see also* Sligh v. First Nat'l Bank of Holmes Cty.,

quarter of a century, an overwhelming majority of state legislatures and courts eventually acknowledged the enforceability of spendthrift provisions.[54] As it stands today, spendthrift provisions have found universal approval in all fifty states.[55] As spendthrift trusts began to garner widespread acceptance, the debate shifted to specific issues within the law of spendthrift trusts.[56] One of the most controversial of those issues became self-settled spendthrift trusts.

C. Self-Settled Spendthrift Trusts

Although the majority of jurisdictions in the United States now recognize some form of spendthrift trust, this recognition does not generally extend to spendthrift trusts created by and for the settlor.[57] That is, a trust is considered void if a portion of the beneficial interest is held for the creator of the trust.[58] This standard is based on the policy concern that property owners could mislead creditors by allocating money for their own needs before paying back creditors.[59] Historically, courts saw a philosophical divide between those property owners seeking to provide economically for their family and property owners looking to "protect themselves against their own profligacy, at the expense of their creditors."[60]

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704 So. 2d 1020, 1025–27 (Miss. 1997) (noting that *Nichols* laid the foundation for the strongest arguments in favor of enforcing spendthrift trusts before ultimately rejecting enforcement based on particular facts).

54 *See, e.g.*, ALASKA STAT. § 34.40.110 (2015); ME. REV. STAT. ANN. tit. 18-B, § 105(2)(E) (2016); NEV. REV. STAT. §§ 166.010–180 (2016); N.J. STAT. ANN. § 3B:9–11 (West 2016); OHIO REV. CODE ANN. § 5801.04(B) (West 2016).

55 *See* HELENE S. SHAPO, GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 222, at 421 (3d ed. 2007) (outlining the multitude of spendthrift trust provisions, along with their exceptions, in all fifty states). However, states have set a variety of limitations on the enforcement of spendthrift provisions. *See id.*; *see, e.g.*, LA. STAT. ANN. § 9:2005 (2016) (making an exception for "[a]limony or maintenance of a person whom the beneficiary is obligated to support" and necessary services); Shelley v. Shelley, 354 P.2d 282, 288 (Or. 1960) (holding that the application of a spendthrift clause to an ex-wife's alimony was against the state's public policy).

56 *See* DUKEMINIER & SITKOFF, *supra* note 1, at 697 ("The policy debate in contemporary times [about spendthrift trusts] has shifted to the question of whether to make exceptions for certain classes of creditors, such as spouses and children or tort victims.").

57 Griswold, *supra* note 42, at 203.

58 *See, e.g.*, Wenzel v. Powder, 59 A. 194, 195 (Md. 1904); State *ex rel.* v. Nashville Trust Co., 190 S.W.2d 785, 790 (Tenn. Ct. App. 1944). Not only did the case law prohibit self-settled trusts, but there was statutory agreement as well. *See, e.g.*, CAL. PROB. CODE § 15304 (West 2016); N.Y. EST. POWERS & TRUSTS LAW § 7-3.1 (McKinney 2016).

59 *See* Griswold, *supra* note 42, at 203–04.

60 Sterk, *supra* note 20, at 1044; *see* Pitrat v. Garlikov, 947 F.2d 419, 424 (9th Cir. 1991) ("The image of a wise and benevolent person seeking to provide for a foolish and impulsive loved one supersedes the values which generally require that creditors be able to have access to debtors' assets and allows for spendthrift trusts. However, this image of benevolent paternalism is absent when the settlor of the trust is also the beneficiary." (citations omitted)).

To hold otherwise, many courts reasoned, would give speculative business owners a vehicle to mislead creditors.[61] Stated another way, many creditors reasonably rely on the settlor's apparent income, and could be deceived into believing in the settlor's financial stability when, in fact, he has no assets outside of the protected trust.[62]

Under this logic, courts and jurisdictions for nearly a century concluded that the benefits of self-paternalism do not offset its costs.[63] Until the 1980s, settlors searching for maximum asset protection were thus forced to take their chances by creating a spendthrift trust in which the beneficiary was some person other than the settlor.[64]

Beginning in the mid- to late-1980s, however, several offshore jurisdictions began to recognize an innovative method[65] of attracting trust business: opening their doors to those individuals looking for asset protection against creditors through the use of self-settled asset protection trusts.[66] These offshore jurisdictions passed legislation which provided that judgments rendered by foreign courts were not enforceable against the self-settled trusts, or against the settlor, trust, or beneficiaries.[67] While no reliable empirical study exists, it is estimated that one trillion dollars of assets moved offshore after the implementation of these favorable self-settled trust laws.[68]

61 *See* GEORGE T. BOGERT, TRUSTS 155–56 (6th ed. 1987).

62 *Id.*

63 *See, e.g.*, *Pitrat*, 947 F.2d at 424 (stating that the benefits of spendthrift trusts created for persons other than the settlor must be differentiated from benefits afforded the settlor in a self-settled trust); Arizona Bank v. Morris, 435 P.2d 73, 76 (Ariz. Ct. App. 1967), *modified*, 436 P.2d 499 (Ariz. Ct. App. 1968) (asserting that inherent fairness concerns offset potential benefits accruing to the settlor).

64 Still, two problems arise with this strategy. First, the settlor risks running afoul of a fraudulent transfer law—which are in place in most jurisdictions—by attempting to disguise who truly receives the beneficial interest. *See, e.g.*, UNIF. FRAUDULENT VOIDABLE TRANSACTIONS ACT § 4 (UNIF. LAW COMM'N 2014). Thus, if a person engaged in business activities where claims are likely (for example, providing legal or medical services), future creditors may have a fraudulent transfer claim. Sterk, *supra* note 20, at 1047. Second, a settlor cannot circumvent the traditional self-settled spendthrift trust rule by selecting a beneficiary who is the settlor in fact, while not in name. RESTATEMENT (SECOND) OF TRUSTS § 156 cmt. f (AM. LAW. INST. 1957). "If a person furnishes the consideration for the creation of a trust, he is the settlor." *Id.* § 156 cmt. f, reporter's notes. In these situations, a creditor can still access the trust instrument.

65 At this point, offshore jurisdictions already provided trust outlets in the form of tax havens. *See* Sterk, *supra* note 20, at 1047–48; Douglas J. Workman, *The Use of Offshore Tax Havens for the Purpose of Criminally Evading Income Taxes*, 73 J. CRIM. L. & CRIMINOLOGY 675, 679 (1982).

66 DUKEMINIER & SITKOFF, *supra* note 1, at 704–05 (listing the Bahamas, Cayman Islands, Cook Islands, and many other offshore jurisdictions); *see, e.g.*, International Trusts Act 1984 § 13C (Cook Is.); Fraudulent Dispositions Law 1989 § 4 (Cayman Is.); Fraudulent Dispositions Act 1991 § 4 (Bah.).

67 *See* DUKEMINIER & SITKOFF, *supra* note 1, at 704–05.

68 Taylor, *supra* note 2, at 164.

Although these jurisdictions saw an influx of business following the new legislation, the lingering question of the trusts' enforceability remained. One of the first notable cases to consider their impact in the United States involved two media defendants that went bankrupt serving as owners and telemarketers of certain products and were not able to return the assured yields to their investors.[69] The Federal Trade Commission filed a lawsuit, alleging a Ponzi scheme in violation of the Federal Trade Commission Act.[70] The defendants, however, had placed their money in an offshore protection trust located in the Cook Islands, and the offshore trustee had strict orders not to repatriate the assets if the beneficiaries were under duress.[71] When the defendants would not repatriate the assets, they were held in contempt and taken into custody.[72] After serving six months in custody, the defendants were released and ultimately settled with the Commission.[73] While the court was not able to reach the offshore assets, the court's power to incarcerate did earn the plaintiffs some recompense.

Similarly, in *In re Portnoy*, a New York bankruptcy court faced the question of whether self-settled assets located in offshore trusts in the Jersey Channel Islands were property of the estate under the bankruptcy code or excluded from the estate entirely.[74] In that case, the debtor formed a self-settled trust in the Jersey Channel Islands, declaring in the trust instrument that Jersey law had jurisdiction over the trust.[75] Engaging in a choice of law analysis concerning the offshore and onshore jurisdictions—in this case the Jersey Channel Islands and New York—the court stated:

> Whereas under normal circumstances parties are free to designate what state's or nation's law will govern their rights and duties, where another state or nation has a dominant interest in the transaction at issue, and the designated law offends a fundamental policy of that dominant state, the court may refuse to apply the foreign law.[76]

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69 FTC v. Affordable Media, LLC, 179 F.3d 1228, 1231 (9th Cir. 1999).

70 *Id.* at 1231, 1232.

71 *Id.* at 1232.

72 *Id.* at 1233.

73 DUKEMINIER & SITKOFF, *supra* note 1, at 712.

74 201 B.R. 685, 689 (Bankr. S.D.N.Y. 1996).

75 *Id.*

76 *Id.* at 699. However, at least one scholar has argued that merging international and domestic choice of law analysis incorrectly conflates what should be a separate inquiry. *See* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 259 (1992) (arguing that "[i]t is a serious mistake to discuss domestic and international choice-of-law cases interchangeably" because international law is derived from different sources and international choice of law requires more flexibility).

The court determined it would not use the law of the offshore jurisdiction simply because the settlor "incorporat[ed] a favorable choice of law provision into a self-settled trust of which he is the primary beneficiary."[77] Applying § 270 of the Restatement (Second) of Conflict of Laws, the court went on to hold that self-settled trusts violated the public policy of New York law and were invalid because the domestic jurisdiction had a greater interest in the issue at hand than the foreign jurisdiction.[78] Consequently, the court ultimately refused to enforce the self-settled spendthrift provisions and allowed creditors to reach the assets.[79]

D. The Domestic Self-Settled Asset Protection Trust

In 1997, self-settled asset protection trusts finally made their onshore debut in the form of an innovative Alaska statute.[80] This statute allowed settlors to create an irrevocable trust that would make distributions to a class of beneficiaries which, unlike prior state laws, would allow allocations to the settlor.[81] Later that year, Delaware became the second state to enact legislation allowing self-settled asset protection trusts, affirming that it "intended to maintain [its] role as the most favored domestic jurisdiction for the establishment of trusts."[82] Following in Alaska and Delaware's footsteps, fourteen additional states have passed legislation allowing self-settled asset protection trusts.[83] While each state statute captures the essence of a self-settled trust, legislatures have taken different

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[77] *Portnoy*, 201 B.R. at 701.

[78] *Id.* at 698.

[79] *Id.* at 701. Two cases followed in the footsteps of *Portnoy*, using similar reasoning to arrive at the same outcome. *See* Sattin v. Brooks (*In re* Brooks), 217 B.R. 98, 101–02 (Bankr. D. Conn. 1998) (stating that, even though Bermuda choice of law was more advantageous to the debtor, Connecticut law must operate when there are overriding public policy implications); Goldberg v. Lawrence (*In re* Lawrence), 227 B.R. 907, 912, 912 n.10 (Bankr. S.D. Fla. 1998) (holding that though the debtor amended the trust document to incorporate a self-settled spendthrift provision for the Republic of Mauritius, he could not use the provision as a shield against creditors because of the public policy in the onshore jurisdiction).

[80] *See* ALASKA STAT. § 34.40.110 (1997). Trust attorneys in Alaska who noticed the flight of capital to offshore jurisdictions created the first domestic asset protection trust law, thinking that by enacting a domestic asset protection trust, they could capture at least a small slice of the self-settled trust market. *See* Douglas J. Blattmachr & Jonathan G. Blattmachr, *A New Direction in Estate Planning: North to Alaska*, TR. & ESTS., Sept. 1997, at 48.

[81] *See* ALASKA STAT. § 34.40.110 (1997).

[82] Synopsis of Qualified Dispositions in Trust Act, H.B. 356, 139th Gen. Assemb., 71 Del. Laws 452 (1997).

[83] Although different jurisdictions have adopted slightly distinct statutes, their purpose remains the same. For an overview of the state statutes which allowed domestic self-settled asset protection trusts as of September 2015, see SHAFTEL, *supra* note 3, at I. The current states that allow these self-settled trusts are Alaska, Colorado, Delaware, Hawaii, Mississippi, Missouri, Nevada, New Hampshire, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Virginia, and Wyoming. *Id.* at i–iv.

approaches regarding the protection, burden of proof, and statute of limitation exceptions for potentially fraudulent actions.[84]

Although the first domestic asset protection trust was enacted in 1997, there has been a dearth of litigation questioning the general enforceability of *any* of these statutes.[85] There are several possible explanations for this. First, it is possible, though unlikely, that there simply have not been any potential creditors or litigants that needed to challenge the enforceability of a self-settled asset protection trust. The second, more likely, possibility is that most settlors who—arguably—have *wrongly* avoided creditors typically either pay the money owed or settle the dispute without the cost of lengthy litigation. Finally, it is also possible that courts have made a concerted effort to avoid making any decisions on domestic asset protection trust enforceability, hoping that the debate, especially pertaining to public policy issues, would play out in state legislatures.[86] Nonetheless, regardless of the underlying reason for the lack of litigation on the issue, until 2013, no court had explicitly determined whether a settlor's self-settled trust in one state will be enforceable when the settlor's state of residence does not have a statute allowing self-settled trusts.

E. The Conflict of Laws Issue

In essence, courts are faced with a choice of law issue, namely, whether to enforce the law where the trust was formed or to enforce the law of the forum state where the suit is filed.[87] The body of law that

[84] *See id.* at I.

[85] *See* Howard B. Young, *Recent Court Decisions Impacting Enforceability of Domestic Asset Protection Trusts Suggest Using Hybrid Domestic Asset Protection Trust Structure*, MICH. ASSET PROTECTION LAW. BLOG (Mar. 3, 2015), http://www.michiganassetprotectionlawyerblog.com/2015/03/recent-court-decisions-impacti.html [https://perma.cc/M6NR-PNKU].

[86] For example, in *Dahl v. Dahl*, the court did not have to reach the question of whether the domestic asset protection trust was enforceable because it held that the trust was not a domestic asset protection trust, but actually a revocable trust, per the actual language found in the trust instrument. 345 P.3d 566, 579–81 (Utah 2015), *amended & superseded* Nos. 20100683, 20111077, 2015 WL 5098249 (Aug. 27, 2015), *cert. denied*, 136 S. Ct. 239 (2015).

[87] A federal bankruptcy court will typically apply the choice of law rules of the forum jurisdiction. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941). This Note will focus on the cornerstone of choice of law rules found in the Restatement (Second) of Conflict of Laws. Although there is not uniform acceptance of Second Restatement principles, outliers and nuanced state conflicts laws exceed the scope of this Note, and the First Restatement's principle of territorialism provides the obvious conclusion that a state's territory ends at its border. *Cf.* Symeon C. Symeonides, *Choice of Law in the American Courts in 2014: Twenty-Eighth Annual Survey*, 63 AM. J. COMP. L. 299 (2015) (providing an overview of recent cases and the choice of law rules those courts employed in a variety of states).

encompasses this choice of law question is known as conflict of laws.[88] While contracts typically provide choice of law provisions, competing state interests allow courts to select one state's law over another.[89] Simply put, conflict of laws typically dictates "when and why a law other than the forum court's laws should be applied."[90]

The cornerstone of conflict of laws is found in the Restatement (Second) of Conflict of Laws, which has shaped the conflict of laws model in America today.[91] The general policy regarding conflict of laws is outlined in § 6 of the Second Restatement, which outlines the aspects to be considered when making a choice of law decision:

> (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.[92]

These considerations have merged into what is commonly known as the "center of gravity test."[93] This test guides the court in selecting the state with the "most significant relationship" to the issue in question.[94] As we will see, and as many commentators have noted, the "virtue and . . . vice [of this test] lie[s] in its almost infinite flexibility."[95]

The Second Restatement elaborates further on the application of § 6 to trusts. Section 270(a) states that a trust is valid when:

> under the local law of the state designated by the settlor to govern the validity of the trust, provided that this state has a substantial relation to the trust and that the application of its law does not violate a strong public policy of the

[88] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS (AM. LAW. INST. 1971); *see also* NORMAN M. ABRAMSON, SUSAN GARY, GEORGE GLEASON BOGERT, & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 294, at 46 (3d ed. 2014).

[89] ABRAMSON ET AL., *supra* note 88, § 224, at 46.

[90] *Id.*

[91] *See* WILLIAM M. RICHMAN, WILLIAM L. REYNOLDS, & CHRISTOPHER A. WHYTOCK, UNDERSTANDING CONFLICT OF LAWS § 72, at 227 (4th ed. 2013). For various cases applying the Second Restatement, see, for example, Pounders v. Enserch E & C, Inc., 306 P.3d 9, 11–14 (Ariz. 2013); Shoen v. Shoen, 292 P.3d 1224, 1227 (Colo. App. 2012); W. Dermatology Consultants, P.C. v. VitalWorks, Inc., 78 A.3d 167, 192–93 (Conn. App. Ct. 2013), *aff'd in part, rev'd in part*, 322 Conn. 541 (2016).

[92] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (AM. LAW. INST. 1971).

[93] ABRAMSON ET AL., *supra* note 88, § 224, at 49.

[94] *Id.*

[95] *Id.* (citing Gregory E. Smith, *Choice of Law in the United States*, 38 HASTINGS L.J. 1041, 1047 (1987)).

> state with which, as to the matter at issue, the trust has its most significant relationship under the principles stated in § 6.[96]

There are two important points to parse out from § 270(a) that will determine the choice of law. First, this section notes that the domestic self-settled trust state must have a "substantial relation to the trust" in order to govern the validity of the provisions.[97] The comments to § 270 explain the definition of substantial relation as when a state:

> which the settlor designated as that in which the trust is to be administered, or that of the place of business or domicil of the trustee at the time of the creation of the trust, or that of the location of the trust assets at that time, or that of the domicil of the settlor, at that time, or that of the domicil of the beneficiaries.[98]

Essentially, there is not one outcome-determinative element, but several factors that courts consider.

The second consideration found in § 270 is that the domestic asset protection state's law will be honored unless the particular issue violates a "strong public policy" of the state with which, as to the issue at hand, the trust has its most significant relationship.[99] That is, the law of the pro-domestic asset protection state will apply even if the law would violate a strong public policy of the forum state, as long as the domestic asset protection state has the most significant relationship under the principles previously stated in § 6 of the Restatement (for example, needs of the interstate and international systems, relevant policies of the forum, etc.). Interestingly, as this Note will explore further in Part III, other than the trustor's domicile, the other factors in § 6 weigh in favor of honoring the choice of law provision selected by the settlor even if doing so offends the public policy of the non-domestic asset protection state.

In addition to the above considerations found in § 270, which the *Huber* court utilized, a court should also consider another Restatement provision: § 273. This provision addresses restraints on alienation of beneficiary interests and provides:

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[96] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 270(a) (AM. LAW. INST. 1971).

[97] *Id.*

[98] *Id.* § 270 cmt. b; *see also* 7 AUSTIN WAKEMAN SCOTT, WILLIAM FRANKLIN FRATCHER & MARK L. ASCHER, SCOTT AND ASCHER ON TRUSTS § 45.4.2.1, at 3234–42 (5th ed. 2010) [hereinafter SCOTT & ASCHER] (discussing the validity of trusts, including the substantial relation language, when the law is designated by settlor).

[99] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 270(a) (AM. LAW INST. 1971); *see* Monrad G. Paulsen & Michael I. Sovern, *"Public Policy" in the Conflict of Laws*, 56 COLUM. L. REV. 969, 1015 (1956) (noting that the rejection of foreign law on public policy grounds occurs when the law "violate[s] the strongest moral convictions or appears profoundly unjust at the forum").

> [w]hether the interest of a beneficiary of [an *inter vivos*] trust of movables is assignable by him and can be reached by his creditors is determined . . . by the local law of the state, if any, in which the settlor has manifested an intention that the trust is to be administered, and *otherwise* by the local law of the state to which the administration of the trust is most substantially related.[100]

While the *Huber* court did *not* consider this provision, this Note will later argue that it is potentially the most crucial provision for a correct choice of law analysis.

II. THE *IN RE HUBER* DECISION

Against the backdrop of the previous section, we now consider the only existing case to directly address the question of how a court in one state will handle a domestic asset protection trust created under the law of another state: *In re Huber*.[101] This case involved a Washington real estate developer who formed an Alaskan domestic asset protection trust in anticipation of potential personal liability on a business loan.[102] To protect several of the properties pledged against the loan from foreclosure, the developer placed the vast majority of his assets—including development projects, his home, real estate properties, and monetary assets—in the protected trust.[103]

Several years later, the real estate developer and settlor of the domestic asset protection trust declared bankruptcy.[104] However, given that he had placed many of his assets in the protected trust, his creditors filed suit to enforce the judgment against those assets in bankruptcy.[105] The primary question[106] for the Washington bankruptcy court was whether to apply the law of Alaska—a pro-domestic asset protection law—or the law

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100 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 273 (AM. LAW INST. 1971) (emphasis added).

101 493 B.R. 798 (Bankr. WD. Wash. 2013).

102 *Id.* at 802–03.

103 *Id.* at 805.

104 *Id.* at 806.

105 *Id.*

106 The court put forth three different rationales as to why the protections of the trust should not succeed. *Id.* at 807–16. The foremost question considered in this Note is whether the trust, which was governed by domestic asset protection law and administered there, should be void on the grounds that non-domestic asset protection trust law should apply. For a discussion on bankruptcy-related issues pertaining to domestic asset protection trusts, see Richard W. Nenno, *Planning and Defending Domestic Asset-Protection Trusts* (ALI-CLE Course Materials, Apr. 22–27, 2012), WL ST041 ALI-CLE 375, 501–19. Additionally, although the court could have held narrowly and focused solely on the fraudulent transfer issue or that much of the assets were real estate, the court instead broadly and incorrectly employed choice of law principles. *See infra* Part III.

of Washington, which did not have a statute allowing domestic asset protection trusts.[107]

In considering the choice of law question, the court looked to § 270 of the Restatement (Second) of Conflict of Laws, focusing specifically on the aforementioned comment b of § 270.[108] The court held that the debtor's choice of law, Alaska, did not have a substantial relation to the trust.[109] In coming to this conclusion, the court considered three factors: (1) whether the trustee or settlor was domiciled in the state, (2) whether the assets were located in the state, and (3) whether the beneficiaries were domiciled in the state.[110] Conversely, the court found that Washington had a substantial relationship to the trust because the debtor, creditors, and many of the assets were located there.[111]

Next, the court indicated that Washington also had a strong public policy against enforcing self-settled asset protection trusts.[112] The court pointed to similar decisions in the context of offshore asset protection trusts, such as *In re Portnoy*, in which the court relied on public policy in applying New York law instead of the law of the offshore jurisdiction.[113] Referencing *Portnoy*, the court stated, "[a]s with New York, Washington has a policy that a debtor should not be able to escape the claims of his creditors by utilizing a spendthrift trust."[114] In this light, the court ultimately found that Washington law applied, and therefore, the trust was not protected from the settlor's creditors.[115]

III. CHOICE OF LAW ANALYSIS FOR DOMESTIC ASSET PROTECTION TRUSTS

Choice of law issues have consistently presented difficult "choices," both for courts and for scholars. Unfortunately, the court in *Huber* applied the doctrine in a manner inconsistent with existing theory and practice. Although this Note offers a substantive critique of the *Huber* decision's choice of law analysis, the goal of this Note is not simply to assess *Huber*, but more broadly to articulate the correct choice of law analysis for the next court that faces a similar choice of law decision at the bankruptcy, district,

107 *Huber*, 493 B.R. at 807.
108 *Id.* at 807–09; *see supra* notes 91–100 and accompanying text.
109 *Huber*, 493 B.R. at 808.
110 *Id.*
111 *Id.* at 808–809.
112 *Id.* at 809.
113 *Id.* For a discussion of *In re Portnoy*, see *supra* notes 74–79 and accompanying text.
114 *Huber*, 493 B.R. at 809.
115 *Id.*

or—even more likely—appellate level. In light of this, the *Huber* decision is the best mechanism with which to illustrate the correct choice of law analysis.

A. Trustor Intent and "Substantial Relationship"

First, although the *Huber* court correctly considers § 270 of the Restatement, it incorrectly glosses over one of the most important tenets of trust law: the intent of the trustor. At least one federal court of appeals has specified that choice of law questions should begin with "the premise that the Restatement reflects a strong policy favoring enforcement of choice of law provisions."[116] In addition, historically, trustor intent was always given a high level of deference.[117] As long as the trustor provided a provision within the trust expressing the controlling choice of law, courts complied with the will of the trustor.[118] In addition, the Restatement presents a strong statement detailing the importance of trustor intent:

> The chief purpose in making decisions as to the applicable law is to carry out the intention of the creator of the trust in the disposal of the trust property. It is important that his intention, to the extent to which it can be ascertained, should not be defeated, unless this is required by the policy of a state which has such an interest in defeating his intention, as to the particular issue involved, that its local law should be applied.[119]

That is, the focus of the court should be the intent of the trustor. More specifically, courts should find ways of enforcing the intent of the trustor as opposed to looking for avenues to thwart specific provisions provided in the trust instrument. Furthermore, the two leading treatises on trusts similarly adopt this de facto rebuttable presumption that trustor intent should be granted some degree of deference, with one leading treatise calling the intent of the settlor, as expressed in the trust instrument, the "only important consideration."[120] Intent is not the only consideration in determining a contentious choice of law issue. However, as more and more

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[116] Green v. Zukerkorn (*In re* Zukerkorn), 484 B.R. 182, 192 (B.A.P. 9th Cir. 2012).

[117] *See* Spindle v. Shreve, 111 U.S. 542, 548 (1884); Liberty Nat'l Bank & Tr. Co. v. New England Inv's Shares, 25 F.2d 493, 495 (D. Mass 1928); Shannon v. Irving Tr. Co., 9 N.E.2d 792, 794 (N.Y. 1937).

[118] *See* WALTER W. LAND, TRUST IN THE CONFLICT OF LAWS 118–19 (1940).

[119] RESTATEMENT (SECOND) OF CONFLICT OF LAWS ch. 10, topic 2, intro. note (AM. LAW. INST. 1971).

[120] SCOTT & ASCHER, *supra* note 98, § 44.1, at 3053–54 ("In the making of a contract, the parties necessarily have conflicting interests, whereas, in the creation of a trust, the settlor's intention is the only important consideration, except to the extent that public policy is to the contrary."); *see also* ABRAMSON ET AL., *supra* note 88, § 301, at 108.

courts are faced with decisions similar to *Huber*, they must not overlook this basic tenet of trust law.

While the court in *Huber* ignores the underlying importance of trustor intent, the next choice of law consideration, per § 270, is whether the settlor's choice of law has a substantial relation to the trust.[121] The Restatement provides that a state has substantial relation to a trust if (1) it is the state designated by the testator, (2) it is the place of business or domicile of the trustee at the time the trust was created, (3) it is the location of the trust assets at the time the trust was created, (4) it is the domicile of the settlor, or (5) it is the domicile of the beneficiaries.[122] As mentioned above, as long as the trust instrument explicitly states the domestic asset protection-friendly state law shall apply, as it did in *Huber*, then the first factor establishes a substantial relationship, per the Restatement. Further, the fact that the Restatement places trustor intent first and foremost when listing considerations is no accident. It simply validates the importance of trustor intent historically, as mentioned earlier, which also aligns with its application in choice of law issues.[123] Giving even further credence to this argument is the approach of the Uniform Trust Code, which, although not as widely utilized, applies the law selected by the testator and states that "[t]he jurisdiction selected need not have any other connection to the trust"[124]—emphasizing the overlying importance of intent within choice of law decisions.[125]

Interestingly, the court in *Huber*—though purporting to apply the Restatement definition of substantial relationship mentioned above—completely disregards the actual Restatement and its comments.[126] Had the court considered, per the Restatement comments, that the trustor

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121 *See supra* note 96 and accompanying text.

122 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 270 cmt. b (AM. LAW INST. 1971). As the comment to the Restatement notes, this list is not exclusive; there may be other considerations that influence whether or not a state has a substantial relation. *Id.*

123 *See* First Nat'l Bank of Mount Dora v. Shawmut Bank of Boston, 389 N.E.2d 1002, 1008 (Mass. 1979); Rudow v. Fogel, 426 N.E.2d 155, 160 (Mass. App. Ct. 1981).

124 UNIF. TRUST CODE § 107 cmt. (UNIF. LAW COMM'N 2010).

125 For an overview of the Uniform Trust Code application and approach to this choice of law issue generally, see Eugene F. Scoles, *Choice of Law in Trusts: Uniform Trust Code, Sections 107 and 403*, 67 MO. L. REV. 213 (2002).

126 In *Huber*, the court cites three considerations mentioned in an earlier case: "(1) the trustee or settlor is domiciled in the state; (2) the assets are located in the state; and (3) the beneficiaries are domiciled in the state." 493 B.R. 798, 808 (Bankr. W.D. Wash. 2013) (quoting Green v. Zukerkorn (*In re* Zukerkorn), 484 B.R. 182, 192 (9th Cir. B.A.P 2012)). There are two inherent problems with this selective interpretation of the Restatement's definition of substantial relationship. First, the comments explicitly list four considerations and note that they are not exclusive. Second, the cited and paraphrased list does not mention that the case cited, *Zukerkorn*, actually states that the *intention* of the creator of the trust should be given great import. 484 B.R. at 192.

specifically named Alaska in the actual trust instrument in addition to the fact that the trustee and his business was located in Alaska, the court likely would have found a substantial relationship.[127] Still, the court in *Huber* correctly noted that neither the trust assets nor the trust beneficiaries were located in Alaska.[128] Yet, this fact is of little consequence given that case law consistently holds that one of, if not the most important factor when determining if a trust has a substantial relation to a state starts with the choice of law provision itself—not the location of the trust assets or the trust beneficiaries.[129] In this case, both the choice of law provision and the location of the trustee and his business favored finding that Alaska had a substantial relationship with the trust.

B. Strong Public Policy and Most Significant Relationship

Public policy, it would seem, is the default well from which all courts drink when strict legal analysis would otherwise call for the enforcement of a self-settled trust.[130] That is, beginning with the decisions in *Portnoy* and *Brooks*,[131] courts have consistently relied on the amorphous public policy exception found in § 270 of the Restatement to invalidate asset protection trusts. Section 270 states that "provided that this state has a substantial relation to the trust and that the application of its law does not violate a strong public policy of the state with which, as to the matter at issue, the trust has its most significant relationship."[132]

One interesting aspect of the Restatement § 270 public policy provision is that it sets up a precondition before courts even consider whether it is violative of public policy: the public policy exception is *only* considered as to the state where the trust has its *most significant relationship*—a separate consideration from the previous paragraph. While *Huber* completely glosses over this prerequisite,[133] scholars have noted that it is central to the choice of law decision and that the domestic asset

[127] Additionally, the trust met all of the prerequisites of Alaska law: (1) be irrevocable; (2) expressly state that Alaska law governs the validity, construction, and administration of the trust, and (3) include a spendthrift provision. *See* ALASKA STAT. § 34.40.110 (2015).

[128] 493 B.R. at 808–09.

[129] *See, e.g.*, *supra* notes 116–117 and accompanying text.

[130] *See* Gideon Rothschild et al., *Self-Settled Spendthrift Trusts: Should a Few Bad Apples Spoil the Bunch?*, 32 VAND. J. TRANSNAT'L L. 763, 767–77 (1999) (discussing the problems with *Portnoy* and others regarding their public policy analyses).

[131] For a discussion on these cases, see *supra* notes 74–79 and accompanying text.

[132] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 270(a) (AM. LAW INST. 1971).

[133] *Huber* cites to Restatement § 270, yet moves straight to the public policy analysis without any consideration of the actual principles or text of the Restatement—in this case the "significant relationship" test. *See* 493 B.R. at 807–09.

protection state (Alaska, in the case of *Huber*) has the most significant relationship.[134] The Restatement (in addition to the Uniform Trust Code) outlines several factors courts must consider in determining the state with the most significant relationship. A court is to consider:

> (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability, and uniformity of result, and (g) ease in the determination and application of the law to be applied.[135]

In considering the above-stated factors, one scholar noted that the "trustor's domicile is only one factor that warrants consideration and that most of the other factors weigh in favor of honoring the designation of domestic [asset protection trust] state law."[136] Thus, that scholar acknowledged that the other factors embrace the importance of testator intent.[137] As discussed in the previous section, testator intent should be the primary focus for any debate on determining a state's relationship to a trust.[138] Moreover, concerns within the factors of:

> certainty, predictability, and uniformity also point to finding the domestic [asset protection] state's relationship more significant than other states. Although courts elsewhere may only occasionally deal with domestic [asset protection states], and thus have limited need to address the laws governing trust funds held by such trusts, domestic [asset protection] state trustees and their many trustors and beneficiaries have a constant need to know which body of law governs their rights and duties.[139]

If courts continue to apply this endgame approach by not finding that the asset protection state has the most significant relationship, they blatantly disregard the spirit of the conflict of laws factors.[140] Thus, it is evident that—at the very least—courts must not ignore this "significant relationship" portion of Restatement § 270 because it is not as clear as the conclusory assumptions that the *Huber* court would have one believe.

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134 *See* Nenno, *supra* note 106, at 456–57.

135 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (AM. LAW INST. 1971).

136 Nenno, *supra* note 106, at 458.

137 *Id.*; *see id.* at 447 ("[T]he fundamental objective of the Second Restatement of Conflict of Laws is to carry out—rather than to defeat—the testator's or trustor's intent.").

138 *See* discussion *supra* Section III.A.

139 Nenno, *supra* note 106, at 478.

140 *Id.*

Although *Huber* failed to include any discussion addressing the necessary prerequisite to using public policy to determine the state with the most significant relationship to the trust, the court still relied heavily on the public policy portion of the Restatement, stating "Washington State has a strong public policy against self-settled asset protection trusts [and] [s]pecifically, . . . transfers made to self-settled trusts are void as against existing or future creditors."[141] The court also noted that statutory disapproval of self-settled trusts has been in place for over a century.[142] Additionally, the court cited *Portnoy* to convey that this holding is in solidarity with the various other states that have found that self-settled trusts violate public policy.[143]

There are several problems with the court's public policy analysis under Restatement § 270 that require correction. First, the court ignored the crucial detail that it was the *first* to consider *domestic* self-settled asset protection trusts. By contrast, *Portnoy* considered an *offshore* self-settled trust.[144] This point is made clearer, as noted by prominent Law Professor Douglas Laycock, given the original objective motivating the "strong public policy" language within the choice of law rules:

> Traditional approaches to choice of law contain an even more offensive variation on better-law approaches. This is the rule that the forum can reject sister-state law on the ground that it too deeply offends the public policy of the forum. This is the extreme case of better-law rules. Texas would reject California law not just because Texas law is better, but because California law is so offensive that it cannot be tolerated in a Texas court. Texas can reject the law of Libya in this high-handed way, or even the law of Alberta, and it may occasionally need to do so. But it cannot so treat a sister state admitted to the Union on an equal footing with itself. The public-policy exception is a relic carried over from international law without reflection on the changes in interstate relations wrought by the Constitution.[145]

Professor Laycock outlines the importance of recognizing that this particular exception came directly for the purpose served in decisions like *Portnoy*.[146] In these types of cases, when laws from foreign jurisdictions are

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[141] 493 B.R. 798, 809 (Bankr. W.D. Wash. 2013) (citing Carroll v. Carroll, 138 P.2d 653 (Wash. 1943)).

[142] *Id.*

[143] *Id.* (citing Marine Midland Bank v. Portnoy (*In re* Portnoy), 201 B.R. 685, 701 (Bankr. S.D.N.Y. 1996)).

[144] *See supra* notes 74–79 and accompanying text.

[145] Laycock, *supra* note 76, at 313 (footnotes omitted).

[146] *Id.* (recognizing that there is an inherent difference between selecting a foreign law over a domestic one versus simply choosing one state's law over the other).

so counter to American jurisprudence, an exception for strong public policy *should* be available. Yet, in *Huber*, the court relied heavily on *Portnoy* despite an important distinction between *Portnoy* and *Huber*: in *Portnoy* the choice was between foreign law and domestic law—not domestic law and domestic law.[147] The court erroneously concluded that applying Jersey Channels law should receive the same consideration as applying Alaska law.[148] As Professor Laycock suggests, the court is essentially trying to fit a square peg into a round hole when it applies *Portnoy* to a case of domestic law versus domestic law. Professor Laycock goes even further by outlining a specific example of courts making outcome-driven decisions:

> Unlike a federal trial judge sitting in California, Texas judges have no realistic experience of California law on which to base a judgment that a particular precedent is ripe for overruling. More important, Texas judges have a strong temptation to predict that California would now adopt the Texas rule that they consider more enlightened. This temptation may be especially strong if a Texas citizen would benefit. Even though the ideal is for a Texas court to decide the case as a California court would decide it, we may achieve that goal more often with a prophylactic rule that the courts of one state cannot predict change in the law of another state.[149]

Professor Laycock hits the nail on the head. This public policy exception was not created so that one state could superimpose its state's laws on another state. While one state may prefer self-settled trusts, another may not. Sixteen states currently allow self-settled trusts around the country.[150] Allowing these trusts is not a legal principle found in one outlier state.[151]

Yale conflict of laws scholar Professor Lea Brilmayer sheds light on states' rationale for applying their own law, identifying potential political considerations, rather than actual choice of law principles.[152] Professor Brilmayer notes that a common thread in modern conflict of laws is the "forum['s] preference for its own law because of the supposed duty of a forum court to further the interests of its elected superiors."[153] However, she continues by stating "[w]hat the state wants is irrelevant to whether it has a

147 *Compare Huber,* 493 B.R. at 809 (choosing between domestic and domestic law), *with Portnoy*, 201 B.R. at 699 (choosing between domestic and foreign law).

148 *Huber*, 493 B.R. at 809.

149 Laycock, *supra* note 76, at 314–15 (footnote omitted).

150 *See* SHAFTEL, *supra* note 3, at I.

151 If this were the case, perhaps the *strong* public policy exception could be utilized. However, it is not. *See id.*

152 *See* Lea Brilmayer, *Interstate Federalism*, 1987 BYU L. REV. 949, 971.

153 *Id.*

right to be interested."[154] In other words, according to Professor Brilmayer, state preferences should not guide courts, but rather, courts should heed applicable choice of law considerations.

In fact, the above argument carries even more weight in light of the literature regarding potential choice of law issues and gay marriage. Professor Andrew Koppelman argues, similarly to Professor Laycock, that applying the overreaching public policy of the forum jurisdiction violates principles of federalism by "deliberately subverting the legitimate operation of the laws of other states" in favor of the public policy of the forum state.[155] That is, the "strong public policy" bar is a high one which should not be used merely to apply the law that one court views as preferable.

In light of this literature, if we assume that gay marriage must be accepted by its sister states (i.e., it does not violate a strong public policy of the forum state), a domestic asset protection trust should then easily pass the public policy test.[156] Unlike gay marriage, a controversial moral and philosophical issue with extensive legal tentacles meandering into other areas of law, domestic asset protection trusts are simply a type of self-settled vehicle, which are already in place in most states. For example, many states, such as Washington, already have strong public policies *favoring* broad freedom in allowing people to pass their property to others.[157] Many states exempt individually funded retirement accounts and other tax-qualified retirement setups from creditors and bankruptcy estates.[158] Moreover, many states allow instruments like life insurance, homestead exceptions, and annuities to survive creditors' actions even

[154] *Id.*

[155] Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 943 (1998). Other scholars have gone so far as to argue that the public policy exception is entirely unconstitutional. *See, e.g.*, Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997).

[156] Additionally, similar to this Note's thesis regarding the economic benefits of self-settled trusts, many scholars have commented on the potential economic benefits of gay marriage. *See, e.g.*, Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 745, 831–33 (1995); Michael E. Solimine, *Competitive Federalism and Interstate Recognition of Marriage*, 32 CREIGHTON L. REV. 83, 90 (1998). However, this Note argues that the economic benefits of domestic asset protection trusts present an even stronger case. *See* discussion *infra* Section IV.B.

[157] *See, e.g.*, WASH. REV. CODE §§ 6.13 (2016) (homestead exemption); *id.* § 6.15.020(3) (retirement and annuity exemptions).

[158] *See, e.g.*, COLO. REV. STAT. § 13–54–102(s) (2016) (exemption for funds held in retirement plans, including accounts that qualify as employee pension benefit plans under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001–1461 (2012)); *cf.* Employee Retiree Income Security Act (ERISA), 29 U.S.C. § 1056(d)(1) (2012) ("Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.").

though they are self-settled.[159] Thus, not only does the forum state—in *Huber*, Washington—not have a *strong* public policy reason for disallowing asset protection trusts, but many of their laws actually favor more testator and trust settlor freedom. In contrast, in many states, the vast majority of citizens morally oppose gay marriage based on religious or philosophical beliefs.[160] In light of this, if we assume the literature arguing that gay marriage should pass the strong public policy test, domestic asset protection unequivocally should.

C. The Correct Choice of Law Analysis: § 273

While the above analysis considered § 270, the primary goal of this Note is to point out to future courts that § 270 is not even the correct provision courts should utilize. Interestingly, neither the court in *Huber* nor, surprisingly, the defendant,[161] discuss the correct Restatement provision. That is, both the court and the defendant incorrectly considered § 270 when the correct analysis should have been determined under § 273.

While § 270 outlines potential questions regarding the validity of a trust, it is § 273 which determines the efficacy of alleged restraints on alienation.[162] Both the courts and some scholars[163] have confused the issue of validity with the issue of whether or not a creditor can pierce the trust and reach the assets.[164] Section 273 states explicitly that:

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159 *See* BUIST M. ANDERSON, ANDERSON ON LIFE INSURANCE § 21.4, at 608 (1991); PETER SPERO, ASSET PROTECTION ¶ 10.09, at 10-100 n.611 (1994); Eason, *supra* note 47, at 64–70.

160 *See* David B. Oppenheimer, Alvaro Oliveira & Aaron Blumenthal, *Religiosity and Same-Sex Marriage in the United States and Europe*, 32 BERKELEY J. INT'L L. 195, 196–97 (2014).

161 Defendant Donald G. Huber's Response to the Plaintiff's Motion for Summary Judgment, Waldron v. Huber (*In re* Huber), 493 B.R. 798 (Bankr. W.D. Wash. 2013) (No. 12–04171). Although at least one author has noted that § 273 should apply to self-settled trusts in *offshore* jurisdictions, *see* Rothschild et al., *supra* note 130, at 768–69, it is important to differentiate the application of § 273 regarding *domestic* self-settled trusts versus those formed *offshore*. While both domestic and offshore trusts likely include a provision designating which law will govern, because offshore trusts do not have equivalent public policy benefits as those formed domestically, courts are more likely to ignore § 273 and apply § 270 and its public policy limitation. Thus, contrary to scholars who argue against domestic asset protection trusts, offshore trusts may carry more risk regarding this underlying public policy exception given the inherent differences between applying offshore versus domestic law. *See supra* notes 145–151 and accompanying text.

162 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 273 (AM. LAW INST. 1971).

163 Some scholars present the issue as simply a § 270 question, with no consideration to the important, if not exclusive, role § 273 plays. *See, e.g.*, Michael A. Passananti, *Domestic Asset Protection Trusts: The Risks and Roadblocks Which May Hinder Their Effectiveness*, 32 ACTEC J. 260, 267 (2006).

164 In trust law, the validity of the trust is a narrow concept, defined by the Restatement (Second) of Conflict of Laws § 269. That section states that the validity of a trust addresses questions such as whether the trust violates the rule against perpetuities. *See* RESTATEMENT (SECOND) CONFLICT OF LAWS § 269 cmt. d (AM. LAW INST. 1971).

> [w]hether the interest of a beneficiary of a[n] [*inter vivos*] trust of movables is assignable by him and can be reached by his creditors is determined . . . by the local law of the state, if any, in which the settlor has manifested an intention that the trust is to be administered, and *otherwise* by the local law of the state to which the administration of the trust is most substantially related.[165]

Unlike § 270, there is no caveat for a state's strong public policy found in the language of § 273 or in the Restatement comments. Indeed, there are no stipulations or additional requirements at all.[166] The only considerations are (1) the intent of the settlor, and if that is unclear, (2) which state has the most substantial relationship to the trust.[167]

In the case of *Huber*, as previously discussed, there *was* an express provision designating Alaska,[168] and even if that was not the case, Alaska still had the most substantial relationship.[169] Still, at least one trust treatise has considered whether § 273 still has an implicit public policy stipulation.[170] This raises the question of whether, even when considering § 273 rather than § 270, courts would simply claim that there is an embedded public policy exception in § 273 which is fundamental to all choice of law considerations. While this is a potential concern, given that § 270 *does* have an explicit public policy exception, it seems unlikely that § 273—which does not have one—was intended to have an implicit exception. More likely, there was a specific decision made *not* to include the public policy exception in § 273. Additionally, courts would still have to grapple with the express notion in § 273 that the applicable law should be determined by the intent of the settlor in the trust instrument, which seems a tough hill to climb.

IV. IMPLICATIONS

While the above choice of law discussion demonstrates that established conflict of laws principles should find domestic asset protection trusts enforceable, two broader arguments reveal the positive implications of allowing these trust instruments: (1) public policy and (2) the economic

165 *Id*. § 273 (emphasis added).

166 *Id.*

167 *Id.*

168 Waldron v. Huber (*In re* Huber), 493 B.R. 798, 807 (Bankr. W.D. Wash. 2013). Notably, most similar trusts will likely have an express provision designating the domestic asset protection state as the state whose laws will govern.

169 *See* discussion *supra* Section III.B.

170 *See* SCOTT & ASCHER, *supra* note 98, § 45.7.1.2, at 3350–51 (discussing the possibility of an implicit public policy provision with § 273).

and political theory of interstate federalism. Each will be discussed below in turn.

A. Public Policy

In 1995, not one state allowed domestic asset protection trusts.[171] Twenty years later, sixteen states—and counting—have passed legislation allowing these trusts.[172] This Note argues that, similar to the widespread adoption of spendthrift trusts,[173] more states will recognize the many public policy benefits of allowing these domestic asset protection trust instruments.

First, asset protection created to guard against potential future creditors is not a new invention. In fact, there are a host of asset protection vehicles which *already* provide nearly identical protection to domestic asset protection trusts. For example, employees can place assets into creditor-proof retirement accounts.[174] Similarly, while some scholars have argued that it is "disturbing . . . [to] allow debtors to leave their debts unpaid and still enjoy an extravagant lifestyle,"[175] other asset protection vehicles already provide the protection which so many scholars claim is disturbing. These vehicles include "tenancy-by-the-entirety property, family limited partnerships, limited liability companies, homesteads, life insurance policies, annuity contracts, and transfers to cooperative friends or family members."[176] Nevertheless, some business owners and individuals are not able to take advantage of these other vehicles; thus, domestic asset protection trusts simply even the playing field.

In the same light, as mentioned in the introductory hypothetical, domestic asset protection trusts would provide business owners with protection from potential tort liability. In 2008, the overall price tag for tort litigation for small business owners was $105.4 billion.[177] Small businesses were burdened, however, with 81% of the litigation costs and only 22% of

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171 *See* discussion *supra* Section I.C.

172 *See* SHAFTEL, *supra* note 3, at I. The most recent additions are Ohio in 2013 and Mississippi in 2014. *Id.*

173 Spendthrift trusts were once controversial, yet they have now achieved nearly widespread acceptance in the United States. Nienhuser, *supra* note 43, at 554.

174 *See* Tenneco Inc. v. First Va. Bank of Tidewater, 698 F.2d 688, 689–90 (4th Cir. 1983).

175 *See* Karen E. Boxx, *Gray's Ghost—A Conversation About the Onshore Trust*, 85 IOWA L. REV. 1195, 1259 (2000).

176 *See* Passananti, *supra* note 163, at 262.

177 U.S. CHAMBER INST. FOR LEGAL REFORM, TORT LIABILITY COSTS FOR SMALL BUSINESS 1 (2010), http://www.instituteforlegalreform.com/uploads/sites/1/ilr_small_business_2010_0.pdf [https://perma.cc/G2AB-7L9W].

the revenue.[178] Frivolous tort lawsuits are a continual drain on small business resources in the United States, and domestic asset protection trusts could help solve this problem, while also making sure, through fraudulent conveyance statutes and other means, that businesses are not cheating the system. Not only would domestic asset protection trusts allow small business owners to protect against these lawsuits, but presumably, these owners would shift those assets back into the economy—producing an additional economic benefit.[179]

The second public policy argument supporting domestic asset protection trusts is the economic benefit the United States would receive—a benefit currently enjoyed in offshore jurisdictions. In 2004, the Treasury Department estimated that "tens of billions" of dollars of assets were held in offshore asset protection trusts.[180] Additionally, according to one analysis, over 100,000 Americans created these offshore trusts between 1994 and 1999.[181] This information demonstrates that by not allowing domestic asset protection trusts, the United States has stimulated an exodus of wealth to offshore jurisdictions. Alternatively, if this capital remained in the United States via domestic asset protection trusts, the United States economy—through attorneys, financial advisors, potential tax revenue, and other means—would greatly benefit.[182] Moreover, allowing these offshore assets to move into similar vehicles in the United States will bring more economically productive uses, such as reducing the litigation battles currently fought to bring those offshore assets back to the United States.

[178] *Id.* at 9. Additionally, small businesses paid $35.6 billion of these tort costs out of their own pocket. *Id.*

[179] *See id.* at 6 (discussing research that demonstrates the economic benefit small businesses would otherwise provide to the economy without the fear of frivolous lawsuits); Lloyd Dixon et al., *The Impact of Regulation and Litigation on Small Businesses and Entrepreneurship: An Overview*, *in* IN THE NAME OF ENTREPRENEURSHIP? THE LOGIC AND EFFECTS OF SPECIAL REGULATORY TREATMENT FOR SMALL BUSINESS 17 (Susan M. Gates & Kristin J. Leuschner eds., 2007) (noting the uphill economic battle of small businesses who face prolonged litigation); *see also* discussion *infra* Section IV.B.

[180] Henry J. Lischer, Jr., *Professional Responsibility Issues Associated with Asset Protection Trusts*, 39 REAL PROP. PROB. & TR. J. 561, 569 n.31 (2004) (citation omitted); *see also* David Leigh, *Billions Hidden Offshore: Jersey Faces Tax Clampdown*, GUARDIAN, Sept. 26, 1998, at 1 (noting that billions of British pounds were hidden in offshore British tax havens in 1998).

[181] *See* William C. Symonds, *Offshore Trusts: Not So Watertight*, BLOOMBERG (July 25, 1999, 11:00 PM), http://www.bloomberg.com/news/articles/1999-07-25/offshore-trusts-not-so-watertight [https://perma.cc/E8HG-NWEX]. Additionally, it is estimated that tens of thousands of new offshore trusts are created every year. *See* Gary P. Kaplan, *Use of Offshore Trusts*, ARNOLD & PORTER (Apr. 28, 2008), http://www.arnoldporter.com/es/perspectives/publications/2008/04/use-of-offshore-trusts [https://perma.cc/26XU-WELW].

[182] Further, most domestic asset protection statutes mandate that one trustee be chosen from that particular state and that a certain percentage of the assets be managed from within the state—providing additional incentives for state legislatures to implement these statutes and boost their economy. *See* Passananti, *supra* note 163, at 261, 263.

Ultimately, allowing domestic asset protection trusts provides clarity within the legal process with regard to these instruments, where courts can limit abuse and potential fraudulent activity because the trusts will be created and administered within the jurisdiction of the United States.

B. Interstate Federalism

In addition to general public policy implications, courts that disregard choice of law principles in favor of their own states' public policy norms ignore (1) the constitutional underpinnings and (2) economic benefits of interstate federalism—specifically the financial importance of interstate competition. The Full Faith and Credit Clause of the Constitution sets the boundaries on a court's autonomy in applying the law of one state versus another.[183] The Clause reads: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[184] Essentially, the laws of one state must be given equal respect by the other forty-nine. States have different laws, but no state has inherently better laws than the others. With regard to interstate federalism, we must consider two related ideas: (1) whether interstate competition through domestic asset protection trusts is in agreement with or jeopardizes notions of interstate federalism found in the Constitution, and (2) whether interstate competition benefits the United States economically. That is, we have both a normative question—what *should* states be doing according to the constitution—and a descriptive one—is it *actually* benefiting the United States?

This analysis must begin with the Constitution itself and whether it envisions interstate competition rather than a protectionist environment between states. First, as mentioned above, the Full Faith and Credit Clause states that the laws of one state must be given equal respect by the other forty-nine—no state has fundamentally better laws than the others.[185] Second, the Privileges and Immunities Clause mandates that people from one state be treated equally to citizens from any other state,[186] thus promoting interstate movement and commerce. Third, the Commerce Clause precludes states from implementing trade barriers and also forbids

[183] *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 308, 312–13 (1981) (plurality opinion) (noting that full faith and credit requires "that for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair").

[184] U.S. CONST. art. IV, § 1.

[185] *Id.*

[186] *Id.* art. IV, § 2, cl. 1.

interstate agreements without congressional approval[187]—thwarting any interstate anticompetitive practices. Finally, the Contract Clause, which prohibits states from impairing contractual obligations,[188] further facilitates interstate competition by evening the playing field between states. The inherent competitiveness planted in the DNA of the Constitution is obvious: the Founders envisioned not only relations between states but competition.

Importantly, the competitive business environment envisioned by the Founders harmonizes with the economics of interstate competition, particularly in the choice of law field. Enforcing contractual choice of law provisions—like the one in *Huber*—fosters more efficient jurisdictional competition between and among states. Although the roots of interstate competition and its benefits can be traced to the economist Friedrich von Hayek in the 1940s,[189] Charles Tiebout provided the basis for modern research in the late 1950s.[190] Tiebout's model analogized political competition to competition in the private market by considering the benefits provided in the form of taxes and service by competing political jurisdictions.[191] He demonstrated two related benefits, which have been borne out in further research.[192] First, interstate competition between different jurisdictions forces elected officials to recognize the economic and political consequences of their choices.[193] Second, given that citizens' preferences differ, interstate competition leads to an ideal combination of goods, services, and laws across jurisdictions.[194] The host of literature expounding the benefits of interstate competition is vast.[195] For example,

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[187] *Id.* art. I, § 8, cl. 3.

[188] *Id.* art. I, § 10, cl. 1.

[189] *See* FRIEDRICH A. HAYEK, *The Economic Conditions of Interstate Federalism*, *in* INDIVIDUALISM AND ECONOMIC ORDER 255 (1948).

[190] *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (asserting that public expenditures would be allocated more efficiently through competition between localities).

[191] *Id.* at 419–20.

[192] *See, e.g.*, Daniel L. Rubinfeld, *The Economics of the Local Public Sector*, *in* 2 HANDBOOK OF PUBLIC ECONOMICS 571 (Alan J. Auerbach & Martin Feldstein, eds. 1987).

[193] *Id.*

[194] *Id.*

[195] *See, e.g.*, ALBERT BRETON, COMPETITIVE GOVERNMENTS (1996); ALBERT BRETON & ANTHONY SCOTT, THE DESIGN OF FEDERATIONS 13–19 (1980); THOMAS R. DYE, AMERICAN FEDERALISM: COMPETITION AMONG GOVERNMENTS (1990); Wallace E. Oates & Robert M. Schwab, *Economic Competition Among Jurisdictions: Efficiency Enhancing or Distortion Inducing?*, 35 J. PUB. ECON. 333 (1988); Barry R. Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 J. L. ECON. & ORG. 1 (1995); Judge Ralph Winter, *Private Goals and Competition Among State Legal Systems*, 6 HARV. J. L. & PUB. POL'Y 127 (1982). However, there are those that would debate the benefits of interstate competition. *See, e.g.*, Dennis Epple & Allan

literature noting the benefits of this "race to the top" of competitive federalism arose in regard to state legislatures recognizing gay marriage.[196] Scholars noted the economic advantages from recognizing same-sex marriages in light of jurisdictional competition.[197] This illustrates the long-term economic benefits—regardless of the issue—of promoting a climate of interstate competition between states.

Although interstate competition is rooted in our Constitution's DNA, and the normative literature establishes the economic benefits of interstate competition, it is harder to ascertain the actual monetary benefit flowing into the individual states and the United States generally by recognizing domestic asset protection trusts. Here, Professors Max Schanzenbach and Robert Sitkoff's empirical study on jurisdictional competition and trust assets is instructive.[198]

In their empirical analysis, Professors Schanzenbach and Sitkoff first and foremost considered the rule against perpetuities. Unlike the domestic asset protection trust—first enacted in 1997—several states abolished the rule against perpetuities before 1986, giving the authors a wide time frame to study the economic effects.[199] Based on the study, they found that a state's abolition of the rule against perpetuities increased trust assets by more than six billion dollars, as much as a twenty percent increase.[200] Moreover, the average trust account grew by at least $200,000.[201] Although the authors noted that the benefits accruing from jurisdictional competition were not felt in tax revenue, the findings fall in line with this Note's argument that jurisdictional competition positively affects states.[202] In particular, state interest groups, from lawyers to accountants to other

Zelenitz, *The Implications of Competition Among Jurisdictions: Does Tiebout Need Politics?*, 89 J. POL. ECON. 1197 (1981); Sterk, *supra* note 20, at 1055–74.

196 *See, e.g.*, Brown, *supra* note 156, at 831–33; Solimine, *supra* note 156, at 87–91. Although opponents may argue a "race to the bottom" will ensue, American legislatures, unlike many foreign jurisdictions, do not eliminate fraudulent conveyance statutes, thus still allowing liability for fraudulently enacted trusts. *See* Hans Christian Beyer, *When Worlds Collide: The Dubious Value of U.S. Judgments in Offshore Jurisdictions in* 2 ASSET PROTECTION STRATEGIES 433 (Alexander A. Bove, Jr. ed., 2005); *see also* UNIF. FRAUDULENT VOIDABLE TRANSACTIONS ACT § 4 (UNIF. LAW COMM'N 2014). This mitigates much of the worry that a race to the bottom could follow and only makes the economic arguments that much stronger.

197 *See supra* note 156.

198 *See* Sitkoff & Schanzenbach, *supra* note 20.

199 *Id.* at 373.

200 *Id.* at 410.

201 *Id.* at 409.

202 *Id.* at 362–63.

professionals, benefit from an increase in trust business.[203] Moreover, in trustee commission alone—assuming standard yearly costs—trust assets bring in more than a billion dollars a year to states.[204]

While Professors Schanzenbach and Sitkoff did not reach the same overall conclusions regarding the number of trust assets arising from states validating domestic asset protection trusts, they hypothesized that "jurisdictional competition in trust law appears ready to focus next on" domestic asset protection trusts.[205] At the time of their study, only a few states had enacted domestic asset protection trust statutes.[206] Today, that number is up to sixteen—and counting.[207] Moreover, synthesizing Professors Schanzenbach and Sitkoff's article with the Treasury statistics noting "tens of billions" of dollars currently in offshore trusts,[208] this Note hypothesizes that (1) those assets have begun to flow back into domestic asset protection states over the last eleven years since the publication of the Schanzenbach and Sitkoff article and (2) the benefits accruing to states since the abolition of the rule against perpetuities has begun to similarly accrue to domestic asset protection trust states.

The above discussion sets out the positive benefits from interstate competition of domestic asset protection trusts. Now, the question is whether courts will not only employ the correct choice of law analysis, but also recognize the federalism-related repercussions and possible economic benefits of domestic asset protection trusts. Only time will tell.

CONCLUSION

It is unfortunate that the first court to consider the application of choice of law principles to domestic asset protection trusts badly missed the mark. Accordingly, courts must not use *Huber* as a benchmark. Not only did it incorrectly consider the Restatement choice of law principles found in § 270 and completely ignore § 273, but if followed, its conclusory public policy analysis would wreak havoc on other areas of the law. Allowing forum jurisdictions to apply their own law because of political or economic partiality sets a dangerous precedent. Moreover, the Constitution demonstrates the Founders envisioned competition between the

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[203] *Id.* at 363*; see also* William J. Carney, *The Political Economy of Competition for Corporate Charters*, 26 J. LEGAL STUD. 303, 304–05 (1997); Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 522–23 (1987).

[204] *See* Sitkoff & Schanzenbach, *supra* note 20, at 417.

[205] *Id.* at 414.

[206] *Id.*

[207] SHAFTEL, *supra* note 3, at I.

[208] Lischer, *supra* note 180, at 569 n.31.

jurisdictions, not an environment which promotes protectionism. Similarly, economic and public policy considerations support the choice of law outcome. Domestic asset protection trusts already exist in alternative forms within nearly every state around the country. Furthermore, interstate competition is in line with the Constitution and promotes economic growth. Consequently, the decision for future courts is an easy one. The law is clear. The policy is clear. Domestic asset protection trusts, regardless in which state they are settled, should be enforced.