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Stewart E. Sterk*

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I. INTRODUCTION

Individuals living in organized society have limited freedom to choose the laws that apply to them. I cannot simply announce that I am subject to the New Hampshire resident income tax; if I want to enjoy the benefits of New Hampshire tax law, I have to move to New Hampshire. Similarly, if I want to take advantage of Florida's homestead exemption to protect myself from creditor claims, my only option is to move.[1] As long as I live in New York, I am stuck with New York income taxes and New York's homestead exemption. Those are some of the prices I pay for living in New York.

In some circumstances, I can take advantage of the laws of other states without changing my home. I can take advantage of Montana's eighty miles per hour interstate speed limit by taking a vacation in Montana.[2] If I want to buy a gun without a permit and carry it around, I can do so if I take a trip to Arizona[3] or a host of other states.[4] But I can't bring my driving practices, or my gun, back to my home state.

In none of these cases can I simply stay home and claim the benefits associated with the laws of another state or country. My home state

1. FLA. CONST. art. X, § 4.

2. MONT. CODE ANN. § 61-8-303 (2021).

3. Arizona has some of the most permissive gun laws in the United States. They allow any person who is at least eighteen years old to open carry, and at least twenty-one years old to conceal carry a firearm without a permit. ARIZ. CONST. art. II, § 26 (West, Westlaw through Nov. 2022 amendments); *see Arizona Weapons and Firearms Laws FAQs*, PHOENIX.GOV, https://www.phoenix.gov/policesite/Documents/088411.pdf [https://perma.cc/7K2X-N5ZN] (last visited Mar. 29, 2023).

4. As of June 2022, twenty-five states have enacted legislation allowing permitless carry: Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Mississippi, Missouri, Montana, New Hampshire, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, Vermont, West Virginia, and Wyoming. *See Permitless Carry States*, HANDGUNLAW.US, https://www.handgunlaw.us/documents/Permitless_Carry_States.pdf [https://perma.cc/WKM9-ZXV6] (last updated Jan. 1, 2023).

restricts my choices because those choices would have consequences for other members of the community, and local law reflects the community's choice about the balance between my preferences and the consequences of effectuating those preferences.

If I cannot ordinarily dictate the law that applies to my actions, why should I be able to—without leaving my home state—create a trust that avoids obligations imposed on me by my home state? That is, why should a court ever honor a choice-of-law clause in a trust instrument? Even if the trust instrument I execute is silent about choice of law, why should I be able to avoid my home state's law by locating the trust in another state?

The Restatement (Second) of Conflict of Laws (Second Conflicts Restatement) embraces a broad party autonomy rule with respect to trusts, subject to a vaguely defined "public policy" exception.[5] That is, the Second Conflicts Restatement gives trust settlors great latitude in choosing the law applicable to their trusts. But the American Law Institute drafted the Second Conflicts Restatement more than a half century ago, at a time of much greater uniformity in the law of trusts.[6] That uniformity has largely and paradoxically dissolved, despite the widespread adoption of the Uniform Trust Code (UTC).[7]

Many of the differences that led settlors to choose the law applicable to their trusts simply did not exist when the Second Trusts Restatement was drafted. Every jurisdiction had a rule against perpetuities.[8] Trust

5. Section 270 of the Restatement (Second) of Conflict of Laws provides: "An inter vivos trust of interests in movables is valid if valid (a) 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 state with which, as to the matter at issue, the trust has its most significant relationship under the principles stated in § 6 . . . ." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 270 (AM. L. INST. 1971).

6. As recently as 2002, Eugene Scoles concluded that "there are only minor differences in the law of trusts among the states of the United States." Eugene F. Scoles, *Choice of Law in Trusts: Uniform Trust Code, Sections 107 and 403*, 67 MO. L. REV. 213, 213 (2002). Scoles, in turn, cited Austin Scott's treatise for the prevalence of similarities among the trust laws of American states. *See* Austin Wakeman Scott, *Epilogue* to VA AUSTIN WAKEMAN SCOTT & WILLIAM F. FRATCHER, THE LAW OF TRUSTS 643-45 (4th ed. 1989).

7. The UTC has now been enacted, in some form, in thirty-six states. *See Trust Code Enactment Map*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=193ff839-7955-4846-8f3c-ce74ac23938d [https://perma.cc/5XZK-Q5LN] (last visited Mar. 29, 2023).

8. The Restatement (Second) of Property asserted that "the non-statutory rule against perpetuities is a part of the law of each jurisdiction in the United States." RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS div. I, pt. I, intro. note (AM. L. INST. 1983). The beginning of the movement away from the common law Rule began in 1979, when the Restatement recommended a wait-and-see approach. Howard Zaritsky, *The Rule Against Perpetuities: A Survey of State (and*

settlors could not insulate their own assets from creditor claims; spendthrift provisions in self-settled trusts were unenforceable everywhere.[9] Trustees had an undisputed duty to provide beneficiaries with information necessary to allow them to enforce fiduciary duties; a settlor could not create a trust but keep its terms secret from all trust beneficiaries.[10]

There were some areas of conflict among the states. Although the Restatement (Second) of Trusts and the law of most states had concluded that revocable trusts should be upheld even when the settlor reserves extensive power to control the trustee's behavior, a few states treated those

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D.C.) Law, ACTEC 1, 2 (2012), https://www.actec.org/assets/1/6/Zaritsky_RAP_Survey.pdf?hssc=1 [https://perma.cc/4WUV-BJ96]. That Restatement catalogued the various approaches to the Rule. 1983 brought the Uniform Statutory Rule Against Perpetuities (USRAP), which adopted the wait-and-see approach to the Rule, added an alternate ninety year period, and allowed the use of *cy pres* to fix RAP violations. *See* Lawrence W. Waggoner, *The Uniform Statutory Rule Against Perpetuities*, 21 REAL PROP., PROB. & TR. J. 569, 575 (1986). Although the USRAP was adopted in twenty-five states and the District of Columbia, mostly during the 1990s and early 2000s, many jurisdictions have since modified and extended the ninety year period to allow for true dynasty trusts. *See* Zaritsky, *supra* note 8, at 2. For example, Arizona adopted the USRAP in 1998 but substituted 500 years for ninety years. Zaritsky, *supra* note 8, at 7. Similarly, in 2006, Colorado adopted the USRAP and substituted 1,000 years for ninety years. Zaritsky, *supra* note 8, at 7. In 1983, South Dakota was the first to abolish the common law rule entirely and has remained a so-called "tax haven" for dynasty trusts. *See* Al W. King III & Pierce H. McDowell III, *A Bellwether of Modern Trust Concepts: A Historical Review of South Dakota's Powerful Trust Laws*, 62 S.D. L. REV. 266, 266-67 (2017). Eight other states have followed in South Dakota's footsteps and abolished or repealed the Rule Against Perpetuities: Delaware in 1986; Alaska in 1997; New Jersey, Rhode Island, and Wisconsin in 1999; Pennsylvania in 2006; Idaho in 2008; and most recently, Kentucky in 2010. *See* Zaritsky, *supra* note 8, at 7.

9. Alaska was the first state to create the domestic self-settled asset protection trust in 1997. *See* JOSHUA S. RUBENSTEIN & DIANE B. BURKS, SELF-SETTLED ASSET PROTECTION TRUSTS, Westlaw Practical Law (database updated 2023). This new statute allowed a grantor to utilize a spendthrift clause in a trust for herself. *Id.* Since 1997, eighteen more states have enacted similar statutes: Connecticut, Delaware, Hawaii, Indiana, Michigan, Mississippi, Missouri, Nevada, New Hampshire, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wyoming. *See* PRACTICAL L. TRS. & ESTS., STATE DOMESTIC ASSET PROTECTION TRUST CHART, Westlaw (database updated 2023).

10. David A. Diamond et al., *The Silent Trust: Using State Statutes to Delay Notification of a Trust*, AM. L. INST. (July 30, 2014), https://www.ali-cle.org/course/The-Silent-Trust-Using-State-Statutes-to-Delay-Notification-of-a-Trust-TSWB10R [https://perma.cc/8YJW-B7Y3]. "Quiet" or "silent" trusts are another modern development in trust law that direct the trustee not to inform the beneficiaries of the existence of the trust, its terms, or the details of the administration of the trust. *See id.* Many jurisdictions have enacted legislation to allow for the creation of silent trusts, including states that have adopted the UTC but have altered the default trustee disclosure requirements. William R. Burford, *What the Kids Don't Know—Deconstructing the "Silent" Trust*, 20 ALI-CLE EST. PLAN COURSE MATERIALS J. 3, 10 (2014).

trusts as invalid because they were testamentary.[11] But the primary issue on which state trust laws diverged was the extent to which trusts could be used to avoid the settlor's spousal obligations, and the Second Conflicts Restatement agreed that party autonomy should not prevail on that issue; instead, the law of the settlor's domicile would control.[12]

Perhaps because the issue seemed of little importance in light of the uniformity of basic trust law principles, the Second Conflicts Restatement provided little reasoning to support its party autonomy provisions. Instead, the provisions appeared derivative of the Second Conflicts Restatement's approach to party autonomy with respect to contracts, where the Restatement and its drafters did provide substantial justification for its departure from the Restatement (First) on Conflict of Laws (First Conflicts Restatement)'s blanket rejection of party autonomy.[13] Several of the reasons proffered for honoring choice-of-law clauses in contracts, which often involve parties from different jurisdictions, are inapplicable with respect to trusts created by a single settlor. Party autonomy in trust law, then, is ripe for rethinking, both because of the inadequacy of existing justifications and because of the increasing diversity of state law on important trust law issues.

Part II describes the Second Conflicts Restatement's approach to party autonomy—both in trust law and in contract law—and demonstrates why that approach is unsatisfactory with respect to the disputes that arise under contemporary trust law. Part III develops a framework for confining the ability of parties to choose the law applicable to their trusts. Part IV confronts what might ultimately be the primary stumbling block to implementing a rational framework: jurisdictional limits that tend to localize trust disputes in states particularly sympathetic to party autonomy. Part IV argues that these jurisdictional limits, primarily derived from the United States Supreme Court's 1958 decision in *Hanson v. Denckla*, are largely inconsistent with the Court's more recent efforts to rationalize the law of personal jurisdiction. In light of modern jurisdiction doctrine, the state of a settlor's domicile should have specific personal

11. *See* RESTATEMENT (SECOND) OF TRUSTS § 57 cmt. b–c (AM. L. INST. 1959).

12. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 270 cmt. b (AM. L. INST. 1971) ("[W]here the settlor creates a revocable trust in a state other than that of his domicil, in order to avoid the application of the local law of his domicil giving his surviving spouse a forced share of his estate, it may be held that the local law of his domicil is applicable, even though he has designated as controlling the local law of the state in which the trust is created and administered.").

13. *Id.* §§ 332 cmt. a, 355.

jurisdiction over the trustees of a trust, regardless of the supposed situs of the trust.

II. The Second Restatement's Party Autonomy Framework

Party autonomy plays a significant role in the Second Conflicts Restatement's treatment of trusts and contracts, a role largely absent from the First Conflicts Restatement. This Part summarizes the key provisions of the Second Conflicts Restatement and explores the rationales that underlie them. Because the discussion of party autonomy in the law of trusts is sparse and largely conclusory, the primary discussion of rationales will focus on the Second Conflicts Restatement's treatment of contracts.

A. Party Autonomy in Trust Law

The Second Conflicts Restatement includes three black letter provisions authorizing trust settlors to specify the law applicable to trusts they create. Section 269(b) provides that the validity of a trust of movables created by will is to be determined in accordance with the law chosen by the parties "[e]xcept when [the provision] would be contrary to the strong public policy of the state of the testator's domicil at death."[14] Section 270 applies a similar principle with respect to inter vivos trusts of movables: courts should honor the settlor's choice of law so long as the chosen state has a substantial relation to the trust and "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."[15] The comment makes it clear that the state in which the trust is to be administered or the place of business of the trustee has a substantial relation to the trust.[16] Finally, section 273, dealing with restraints on alienation of beneficial interests, provides that the validity of the restraint is to be determined in accordance with the local law of the state in which the settlor has "manifested an intention that the trust is to be administered."[17]

The comments to these sections provide little justification for the black letter. The focus is on effectuating the intent of the settlor, without indicating why settlor intent should be of paramount importance. For instance, comment (f) to section 269 emphasizes that even if a will

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14. *Id.* § 269 cmt. f (spelling in original).
15. *Id.* § 270(a).
16. *Id.* § 270 cmt. b.
17. *Id.* § 273.

included no express designation, "it may otherwise be apparent from the language of the trust provisions of the will . . . that the testator wished to have the local law of a particular state govern the validity of the trust."[18] Comment (b) to section 270 includes nearly identical language for trusts created inter vivos.[19] The comments also focus on settlor intent in suggesting a preference for applying the law of a state that would validate the trust because "[i]t is improbable that the settlor intended to execute an instrument wholly or partially invalid."[20]

Although the comments are largely devoid of rationale, they do provide some guidance about what constitutes a "strong public policy" that would override the settlor's express instructions.[21] In particular, when a settlor purports to create a revocable trust under the law of a jurisdiction that would insulate that trust from a spouse's elective share claim, the Second Conflicts Restatement provides that "it may be held that the local law of his domicil is applicable."[22] The comments to the party autonomy provisions do not go further, but more general comments supporting a rule of validation suggest a limited scope to the public policy exception. For instance, the comments indicate that when a trust violates the rule against perpetuities or a rule against accumulations applicable in the state of the settlor's domicile, the trust should nevertheless be upheld if valid in the law of the state in which the trust is to be administered.[23] If the settlor can avoid these rules by dictating that the trust be administered in another state, it seems clear that the settlor could accomplish the same result with a choice-of-law clause. The comments suggested a similar rule of validation when a settlor creates a revocable trust that might have been treated as testamentary under the now-outmoded law of another state.[24] The only exemption the comments discuss, other than the spousal share exception, is with respect to the now-obsolete mortmain statutes, which often limited the percentage of a decedent's estate that a decedent could give to charity.[25] The Second Conflicts Restatement indicated that these

18. *Id.* § 269 cmt. f.

19. *Id.* § 270 cmt. d.

20. *Id.* § 270 cmt. d.

21. *See, e.g.*, *id.* § 269 cmt. f.

22. *Id.* § 270 cmt. b (spelling in original).

23. *Id.* § 270 cmt. d.

24. *Id.*

25. *Id. See generally* GEORGE GLEASON BOGERT ET AL., BOGERT'S THE LAW OF TRUSTS AND TRUSTEES § 326, Westlaw (database updated June 2022) (noting that in 1971, ten states had mortmain statutes "intended to require gifts to charity to be made with proper deliberation and at

statutes, ostensibly enacted to protect family members against the entreaties of guilt-inducing religious practitioners, reflected a strong public policy.[26]

The Restatement did not, however, articulate any organizing principle for determining when a prohibition reflects strong public policy. Spousal share rules and mortmain statues are designed to protect readily identifiable third parties, while the protections afforded by the rule against perpetuities are more diffuse.[27] Whether the need to protect identifiable third parties is critical to the strength of the Second Conflicts Restatement's "public policy," however, is purely speculative.

Finally, the Second Conflicts Restatement's embrace of party autonomy with respect to trusts of movables did not extend to trusts of land. For those trusts, the black letter provides that the law applied by the courts of the situs of the land should apply.[28]

B. *Party Autonomy in Contract Law*

The paucity of justifications for party autonomy in the Second Conflicts Restatement's trust law provisions contrasts with its treatment of party autonomy in the contract law provisions. Drafted against the then-prevalent resistance to enforcement of choice-of-law clauses,[29] the Second Conflicts Restatement's black letter validates choice-of-law clauses, even on issues that the otherwise applicable law would not permit the parties to resolve by explicit language in their contract, subject to two exceptions.[30]

First, as with the trust provision, "the law of the state chosen by the parties" will not be applied if "the chosen state has no substantial relationship [with] the parties or the transaction and there is no other reasonable basis for the parties' choice."[31] Comment (d) to section 187 makes it clear that the party autonomy rule does not apply when all

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a time when the testator was in at least reasonably good physical and mental condition"). All of those statutes have since been repealed. *Id.*

26. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 270 cmt. e.

27. *See id.* § 270.

28. *Id.* § 278.

29. The Reporter of the First Conflicts Restatement, Joseph Beale, wrote that "[t]he fundamental objection [to party autonomy] is that it involves permission to the parties to do a legislative act. It practically makes a legislative body of any two persons who choose to get together and contract." 2 JOSEPH HENRY BEALE, A TREATISE ON THE CONFLICT OF LAWS 1079-80 (1935).

30. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2).

31. *Id.* § 187(2)(a).

contacts are located in a single state and, as a consequence, there is only one interest state.[32] Two Californians, for instance, cannot enter into an employment contract specifying application of Texas law in order to avoid California law restricting non-compete clauses. By contrast, a California family can avoid prohibitions of California trust law by the simple device of naming a South Dakota trustee.

The limitation of party autonomy to multistate transactions is consistent with the stated rationale for honoring the parties' choice of law: making it possible for parties "to foretell with accuracy what will be their rights and liabilities under the contract."[33] When contract parties are from the same state and contract for performance in that state, virtually any choice-of-law approach would lead to application of that state's law; enforcing a choice-of-law clause will almost never promote certainty and predictability.[34]

In multistate transactions, by contrast, enforcement of choice-of-law clauses facilitates planning and has the potential, at least, to reduce litigation costs and judicial burdens. When parties from different states contract, background choice-of-law principles create uncertainty about the law that would otherwise govern disputes that might arise. Even under the First Conflicts Restatement, a supposed bastion of certainty, issues of validity were to be determined in accordance with the law of the state in which the contract was made,[35] while issues of performance were relegated to the state of performance.[36] But the First Conflicts Restatement provided no formula for determining which issues fell into what category, or for determining where the contract was made.[37] More modern choice-of-law theories leave even more play in the joints. Interest analysis requires lawyers and courts to consider the policies behind the

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32. *Id.* § 187 cmt. d.

33. *Id.* § 187 cmt. e.

34. *Id.* § 187(2) cmt. d. The Restatement recognizes that in some circumstances, the parties may select a jurisdiction whose law is better developed than the law of their home state. For instance, it might be reasonable for parties to contract for the application of New York law or English law in various commercial contexts even though the contract itself has nothing to do with New York or England. *Id.* § 187 cmt. f.

35. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 332 (AM. L. INST. 1934).

36. *Id.* § 355.

37. A comment to the Restatement conceded that "[t]he point at which initiation ceases and performance begins is not a point which can be fixed by any rule of law of universal application to all cases. Like all questions of degree, the solution must depend upon the circumstances of each case." *Id.* § 332 cmt. c.

laws of various states.[38] The Second Conflicts Restatement creates presumptive rules, always subject to override upon consideration of the multi-factored principles of section 6.[39] Routine enforcement of choice-of-law clauses would enable lawyers and judges to avoid the messy choice-of-law analysis that multistate contract disputes would otherwise entail.

Enforcing choice-of-law clauses in contracts also reduces administrative costs for those whose business regularly crosses state lines.[40] Absent enforceable choice-of-law provisions, these parties would have two choices, both of which would involve increased legal costs (and ultimately higher prices for goods and services). As one alternative, the parties would incur the expense of drafting their contracts to conform to the requisites of many or all of the fifty states (and perhaps foreign countries). Alternatively, the parties could incur fewer investigative costs up front, but risk after-the-fact litigation costs whenever the contract did not comply with provisions of otherwise applicable law. Choice-of-law clauses, if enforceable, mitigate these costs.

Decades after the Second Conflicts Restatement was drafted, Larry Ribstein extolled enforcement of contractual choice-of-law clauses for another reason: competition among states would generate a race to the top, with each state seeking to develop a legal structure contracting parties would choose.[41] States with inefficient laws would find legal business migrating elsewhere.[42]

None of the justifications for party autonomy, however, were sufficient to prevent the Second Conflicts Restatement drafters from including a second limitation on enforcement of contractual choice-of-law clauses. Beyond the requirement that parties have some basis for their choice, the Second Conflicts Restatement precludes enforcement of a choice-of-law clause that would be contrary to a fundamental policy of

38. *See, e.g.*, BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 183-84 (Duke Univ. Press ed., 1963) (outlining the role of state policies in deciding choice of law cases).

39. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 191 (AM. L. INST. 1971) (dictating that the validity of a contract for sale of an interest in chattel is to be determined by the state where the chattel is to be delivered "unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6").

40. *Cf.* Willis L. M. Reese, *Contracts and the Restatement of Conflict of Laws, Second*, 9 INT'L & COMP. L.Q. 531, 534 (1960) (noting that party autonomy "has the supreme advantage of affording the parties to a multi-State contract a device whereby they can predict with fair certainty what their rights and liabilities will be").

41. *See* Larry E. Ribstein, *Choosing Law by Contract*, 18 J. CORP. L. 245, 249-50 (1993).

42. *Id.* at 250; *see* Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1186-87 (2000).

the state whose law would otherwise apply unless that state does not have a materially greater interest than the chosen state in determination of the particular issue.[43] As with trusts, the comments are vague about what policies are fundamental, but suggest that policies designed to protect parties against the oppressive use of superior bargaining power might be fundamental.[44]

C. *Problems with the Analogy Between Contracts and Trusts*

The rationales for embracing party autonomy in the law of contracts do not apply with equal force to trust law. First, consider the primary justification offered in the Second Conflicts Restatement: making it possible for parties to know what their rights and liabilities will be. With multistate contracts, the competing interests of different states might, in the absence of an effective choice-of-law clause, make it difficult for parties to predict and for courts to determine what law should apply. But no comparable clash of interests arises when a settlor creates the archetypal personal trust. There may be reasons to consider the interests of states other than the settlor's domicile, particularly if the trust includes interests in land. But in the vast bulk of cases, the state of a settlor's domicile has the paramount interest. As the next Part develops, a rule that focuses on the law of the settlor's domicile need not be absolute, but it furnishes a starting point not available when dealing with contracts between parties from different states. Such a rule would be consistent with the Second Conflicts Restatement's position that contractual choice-of-law clauses may be used to displace mandatory rules "only when two or more states have an interest in the determination of the particular issue."[45]

The administrative cost rationale for enforcing choice-of-law clauses in trusts is also weaker than it is with respect to contracts. Trust instruments are not assembly-line documents. If a potential settlor has an interest in creating a trust, she is most likely to consult a lawyer in the state of her domicile. Neither the settlor nor the lawyer will have the need to learn the trust law of other jurisdictions unless their objective is to evade the law of settlor's home jurisdiction.

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43. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b).

44. A comment to section 187 concedes that "[n]o detailed statement can be made of the situations where a 'fundamental' policy of the state of the otherwise applicable law will be found to exist," but goes on to say a "fundamental policy may be embodied in a statute . . . which is designed to protect a person against the oppressive use of superior bargaining power." *Id.* § 187 cmt. g.

45. *Id.* § 187 cmt. d.

Of course, the settlor might choose an out-of-state trust company as trustee. If the law of settlor's domicile were applicable to trust law issues, that trustee might have to investigate the content of that law. But there are precious few reasons for a settlor to choose an out-of-state trustee other than to evade the trust law of her domicile. Every state has its share of competent trustees. Moreover, many national trust companies operate in multiple states.[46] As a result, the quest for expertise does not furnish a reason for selecting an out-of-state trustee. Settlor convenience is an equally implausible reason for selecting an out-of-state trustee. Finally, even if a settlor did choose a large out-of-state trust company, trust companies of significant size (and their lawyers) routinely monitor the laws of multiple jurisdictions to take advantage of more favorable laws. As a result, administrative cost does not provide a persuasive basis for enforcing choice-of-law clauses.

Race to the top justifications for party autonomy are similarly unavailing with respect to most controversial trust law issues. A plausible case can be made that, if given the opportunity, the settlor and the trustee will opt for the most efficient set of rules governing their relationship, but many trust law rules are designed to protect non-parties to the trust agreement—creditors and taxpayers. There is no reason to believe that the settlor and the trustee will account for the interests of those third parties.

III. PARTY AUTONOMY AND CONTEMPORARY TRUSTS

The preceding Part established that the standard rationales for enforcing choice-of-law clauses in contracts do not translate seamlessly to the trust context. This Part considers the circumstances in which efforts to displace the law of settlor's domicile—either by including an express choice-of-law clause or by establishing the trust in another jurisdiction—should be enforced.

A. *Business Trusts*

Trusts play multiple roles in the American financial and legal systems. Much of trust law—including the Restatements of Trusts, the UTC, and many state trust statutes—focuses on the trust as a device for gratuitous wealth transfer. But the trust form is also used extensively in commercial transactions. Pension trusts, mutual fund trusts, asset

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46. *See generally* V. Gerard Comizio & Jeffrey L. Hare, *Regulatory Developments for Banks and Thrifts Conducting Trust and Fiduciary Activities*, 59 BUS. LAW. 1299, 1303 (2004) (noting that national banks may establish trust offices at locations in multiple states).

securitization trusts, real estate investment trusts, and trust-indentured bonds, taken in combination, dwarf the financial significance of the personal trust. Indeed, a quarter century ago, John Langbein estimated that personal trusts accounted for only about ten percent of assets held in trust form.[47]

When the trust is used as a form of business organization, the case for enforcing choice-of-law provisions is at its strongest. In many ways, the business trust is a substitute for the corporation as an organizational form and presents many of the same issues. With respect to corporations, the Second Conflicts Restatement largely endorses the doctrine that the corporation's internal affairs should be determined in accordance with the law of the state of incorporation.[48] As the comments note, "many matters involving a corporation cannot practicably be determined differently in different states" and "[u]niform treatment of directors, officers and shareholders is an important objective which can only be attained by having the rights and liabilities of those persons with respect to the corporation governed by a single law."[49] Although the Second Conflicts Restatement does not explicitly authorize the corporate charter to select the law that would apply to internal affairs, the incorporators have effectively made that choice by selecting the state of incorporation.

Investors and trustees in a business trust have the same need for uniform treatment as shareholders, directors, and officers in a corporation. Those investors and trustees, like their corporate counterparts, may hail from a variety of jurisdictions. Allowing the trust settlors to choose the law applicable to the trust may be the most effective way to generate certainty and uniformity. If courts chose instead to produce certainty and uniformity by applying the law of the trust's situs, that too would endorse party autonomy. Moreover, an increasing number of states have placed business trusts on a statutory foundation, requiring some form of registration.[50] For instance, when settlors choose to register as a Delaware

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47. John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165, 178 (1997).

48. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302(2).

49. *Id.* § 302 cmt. e.

50. Massachusetts was a pioneer in establishing a statutory framework for business trusts. *See* MASS. GEN. LAWS ch. 182, § 1 (West 2022) (applying the framework to a trust "the beneficial interest under which is divided into transferable certificates of participation or shares"); *id.* ch. 182, § 2 (requiring filing of trust instrument and other documents). For other examples of statutory business trusts, *see, e.g.*, CONN. GEN. STAT. § 34-502 (1997); DEL. CODE. ANN. tit. 12, §§ 3801-3829 (West 2022).

statutory trust, they have essentially elected to have Delaware law apply to many aspects of the trust relationship.[51]

Other states lose little by applying the law of the chosen state to most aspects of business trusts. A state seeking to impose stringent regulation on business trusts would find the effort fruitless so long as businesses were free to organize as corporations under the law of Delaware or another business-friendly state. Because business trusts and corporations are close substitutes, organizers would opt for corporate structure if trust law were less attractive. As a result, so long as party autonomy reigns in the domain of corporate law, a state would gain little by restricting party choice with respect to business trusts.

The argument for enforcing party choice with respect to business trusts rests on the function of those trusts, not on their status as independent entities. Unlike the corporation, whose origins can be traced to government charters, the trust developed through the actions of private individuals,[52] ultimately bolstered by the enforcement powers of courts of equity.[53] Settlors of a common law trust do not have to file articles of incorporation. As the United States Supreme Court has recognized, "[t]raditionally, a trust was not considered a distinct legal entity, but a 'fiduciary relationship' between multiple people."[54] Thus, the Court concluded that for purposes of diversity jurisdiction, a trust should not be treated like a corporation, which is considered only of a state of its establishment and principal place of business.[55] In determining when a state may constitutionally tax trust income or principal, the Court has focused on a variety of connections, rather than concluding that only a single trust "situs" has the power to tax.[56] Although it may be convenient

51. In Delaware, Delaware law applies to Delaware statutory trusts unless the language in the governing instrument provides otherwise. DEL. CODE ANN. tit. 12, § 3809. Other states also have statutes explicitly subjecting statutory trusts to the law of the state in which the trust is established. *See, e.g.*, CONN. GEN. STAT. § 34-502.

52. BOGERT ET AL., *supra* note 25, § 2 (noting that conveyances of land invented the use—the ancestor of the modern trust).

53. *See generally* BOGERT ET AL., *supra* note 25, § 3 (explaining that early English law often held uses, but the development of the Court of Chancery brought equitable remedies to use cases).

54. Americold Realty Tr. v. Conagra Foods, Inc., 577 U.S. 378, 383 (2016).

55. *Id.* at 383-84.

56. In *Curry v. McCanless*, the Court sustained the power of both the settlor's domicile and the home state of the trustee to impose a death tax on assets in the trust. 307 U.S. 357, 369, 373 (1939). In discussing the trustee's legal ownership of the intangibles in the trust and the settlor-decedent's power to dictate distribution of income and principal of the trust, Justice Stone wrote: "Even if we could rightly regard these various and distinct legal interests . . . as a composite unitary

for some purposes to ascribe a situs to a trust, the situs is at bottom a legal fiction, especially in an era where corporate trustees act in multiple states and where paper "books and records" of an earlier era have been replaced by electronic entries.[57]

B. *Personal and Family Trusts*

When settlors establish trusts for the benefit of themselves and other objects of their bounty—most often close family members—the justification for enforcing choice-of-law clauses are much weaker than with business trusts. First, because the trusts do not serve the same commercial functions as business trusts, there is less reason to worry that a particular state's restrictions on trusts will inhibit efficient organization of business enterprises. Second, because personal trusts are typically funded by a single individual with an established domicile, the need to provide certainty to investors from multiple jurisdictions is inapplicable.

Nevertheless, if state restrictions on trusts were designed only to regulate the relationship between settlor and trustee, there would be little reason to interfere with the parties' choice of law. Trust agreements between wealthy settlors and institutional trustees are not contracts of adhesion. There is little reason to fear that the settlor was unrepresented and the victim of superior bargaining power.

In fact, many state rules regulating trusts rest on policies other than protection of the settlor or the trustee. In these instances, there is less reason for the settlor's home state to permit that settlor to avoid local law provisions. This subpart explores the policies, examines how courts have dealt with party autonomy when state policy is at stake, and offers a framework for limiting party autonomy's free rein.

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interest and ascribe to it a single location in space, it is difficult to see how it could be said to be more in one state than in the other." *Id.* at 369; *see also* N.C. Dep't of Revenue v. The Kimberley Rice Kaestner 1992 Fam. Tr., 139 S. Ct. 2213, 2220 (2019) (noting that the Court had sustained tax on trust income distributed to a resident beneficiary and to a resident trustee and had suggested that a tax based on the site of trust administration would also be constitutional). The Court has also sustained a personal property tax on trust corpus levied by a city in the state in which one co-trustee was resident. Greenough v. Tax Assessors of Newport, 331 U.S. 486, 498 (1947).

57. *Cf.* David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MO. L. REV. 143, 155-56 (2002) (noting that the UTC did not attempt to define a trust's principal place of administration because of the difficulties in determining where a trust has been administered, given that a corporate trustee's trust officers may be located in one state, its investment division in another, and its operations facilities yet somewhere else).

1. State Doctrinal Limits and Their Rationales

a. Creditors' Rights

State law has historically restricted the right of a trust settlor to insulate assets from her own present and future creditors.[58] The traditional rule, embodied in the UTC, is that when a settlor creates a trust, "a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit."[59] The rule rests on the premise that a settlor should not place assets beyond the reach of her creditors while continuing to have access to those assets for her own use.[60]

By contrast, state law typically permits a settlor to create "spendthrift" trusts for other beneficiaries, thereby allowing the beneficiaries to enjoy the trust proceeds while avoiding creditor claims.[61] The doctrine rests on the principle that the trust assets belonged to the settlor who need not have provided for the spendthrift beneficiary at all—in which event the beneficiary's creditors would have been out of luck.[62] But states have imposed a variety of different restrictions on spendthrift trusts. Some states allow creditors to garnish a portion of spendthrift trust income;[63] most provide exceptions for alimony and child support claims.[64]

In some states, assets transferred into trusts count as part of the settlor's estate for elective share purposes.[65] Although the surviving spouse is not an ordinary creditor, these states have determined that a surviving spouse is entitled to a share of a decedent spouse's assets, and

58. *See* sources cited *supra* note 9.

59. UNIF. TR. CODE § 505(a)(2) (UNIF. L. COMM'N 2000); *see* RESTATEMENT (THIRD) OF TRUSTS § 58(2) cmt. e (AM. L. INST. 2003).

60. *See generally* BOGERT ET AL., *supra* note 25, § 223 (providing that a settlor may insulate assets in a spendthrift trust for other beneficiaries, but not themselves).

61. *See* RESTATEMENT (THIRD) OF TRUSTS, § 58(1).

62. *See* Broadway Nat'l Bank v. Adams, 133 Mass. 170, 173 (1882) (articulating its rationale for spendthrift trusts). The rationale has been subject to criticism for as long as it has been articulated. *See, e.g.*, JOHN CHIPMAN GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY 173-74 (Charles C. Soule pub., 1883); Paul G. Haskell, *Teaching Moral Analysis in Law School*, 66 NOTRE DAME L. REV. 1025, 1047 (1991).

63. *See, e.g.*, CAL. PROB. CODE § 15306.5 (1990) (authorizing court orders requiring a trustee to pay up to 25% of payment otherwise due a beneficiary).

64. *See, e.g.*, UNIF. TR. CODE § 503(b)(1) (UNIF. L. COMM'N 2000). *But see* Miller v. Miller, 643 N.E.2d 288, 294 (Ill. App. Ct. 1994) (construing an Illinois statute to permit garnishment for child support claims but not spousal support claims).

65. *See, e.g.*, N.Y. EST. POWERS & TRS. LAW § 5-1.1-A(b)(1)(F) (Consol. 2018) (treating trusts in which a decedent reserves a life interest as property of the decedent for elective share purposes).

that those assets the decedent spouse placed in trust should count in computing the share.[66]

Creditors and spouses who might seek to reach trust assets are never parties to the trust agreement between settlor and trustee. They did not consent to a choice-of-law clause that would limit the rights they might have under the law of the settlor's domicile. None of the justifications for party autonomy would allow a domiciliary of a state that protects creditors or spouses to avoid those claims by choosing the law of a state that affords the settlor greater protection from creditor or spousal claims.[67]

b. Tax Liability and the Public Fisc

Trust property is subject to various forms of taxation. First, trust property—like all property—is ultimately subject to estate and gift taxation. The estate tax is designed as a once-a-generation tax on wealth.[68] When a trust terminates and its proceeds are distributed to beneficiaries, the property becomes subject to estate tax in the estates of those beneficiaries. Historically, the rule against perpetuities ensured that the trust would terminate, setting the stage for a round of estate taxation.[69] When a state abolishes the rule—as a number of states have—the state effectively excuses one or more generations of the family from wealth transfer taxation.[70]

Trust property is also subject to income taxation at the federal level and, in some states, at the state level. If a trust is deemed a grantor trust, the Internal Revenue Code subjects the trust to pass-through taxation; the income is treated as income to the trust settlor and taxed accordingly.[71]

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66. *See, e.g.*, *id.*

67. *See* Lionel Smith, *Give the People What They Want? The Onshoring of the Offshore*, 103 IOWA L. REV. 2155, 2164 (2018) (noting that freedom of choice of law may make sense for contracts, but not for trusts "which always have significant effects on outside parties").

68. Curry v. McCanless, 307 U.S. 357, 360-61 (1939) (analyzing the application of a once-a-generation wealth tax in two states).

69. *See* Grayson M. P. McCouch, *Who Killed the Rule Against Perpetuities?*, 40 PEPP. L. REV. 1291, 1292 (2013).

70. Max Schanzenbach and Robert Sitkoff have established, empirically, that abolition of the Rule Against Perpetuities was largely driven to avoid the generation-skipping transfer tax. Max M. Schanzenbach & Robert H. Sitkoff, *Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust*, 27 CARDOZO L. REV. 2465, 2466-67 (2006); Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 359 (2005).

71. 26 U.S.C. § 671 provides that when the grantor of a trust is treated as the owner, the trust income is attributable to the grantor. 26 U.S.C. § 671 (2018). Sections 673 through 677 provide the instances in which the grantor would be treated as the owner. *Id.* §§ 673-677. For

State tax law generally follows federal law on this issue, so that grantor trust income is subject to state income taxation in accordance with the law of the settlor's domicile.[72] A settlor who creates a grantor trust, therefore, cannot escape from the tax regime adopted by the state of her domicile.

If, however, a settlor relinquishes enough control to establish what would qualify as a non-grantor trust, the Internal Revenue Code attributes the income to the trust as an entity.[73] Some states impose income taxes on trust income; others do not.[74] If a settlor of a non-grantor trust could choose to have the law of a no-tax jurisdiction apply to the trust, the settlor and her family could significantly reduce the trust's income tax bill.

Income and transfer taxation implicate state policies of horizontal and vertical equity.[75] A state that maintains the rule against perpetuities and taxes trust income may do so to ensure that the creation of a trust does not result in a lower tax burden for trust settlors as compared to similarly wealthy families that do not use the trust device.[76] The same legal regime may also ensure a level of progressivity by forcing those wealthy enough to consider the trust form to bear an appropriate share of the overall tax burden.[77] Allowing a settlor to opt out of the regimes of her home state by choosing the law applicable to a trust would frustrate these policies of the settlor's home state.

Of course, virtually no one believes that a trust settlor should be able to directly select the tax regime applicable to her trust, but allowing the settlor to choose the law of a state that has abolished the rule against perpetuities would essentially allow the settlor to elect a transfer tax regime. Moreover, a trust settlor might seek to influence the trust's tax

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instance, if the grantor has the power to revoke or the power to control beneficial enjoyment, the grantor is treated as the owner. *Id.* §§ 674, 676

72. *See, e.g.*, CAL. REV. & TAX. CODE § 17731(a) (2005) ("Subchapter J of Chapter 1 of Subtitle A of the Internal Revenue Code, relating to estates, trusts, beneficiaries, and decedents, shall apply, except as otherwise provided."). *See generally* Jeffrey Schoenblum, *Strange Bedfellows: The Federal Constitution, Out-of-State Nongrantor Accumulation Trusts, and the Complete Avoidance of State Income Taxation*, 67 VAND. L. REV. 1945, 1948 (2014) (explaining the interplay between the federal tax code and Nevada's pass-through tax provision).

73. As Professor Schoenblum has explained, by ceding control of the trust in part to younger family members or other technically "adverse parties," the settlor may retain practical control without having the trust qualify as a grantor trust. Schoenblum, *supra* note 72.

74. *See generally* Schoenblum, *supra* note 72, at 1957-60 (identifying states that impose no tax on trust income and other states that impose tax on trust income in a variety of circumstances).

75. *See* Mitchell M. Gans, Kaestner *Fails: The Way Forward*, 11 WM. & MARY BUS. L. REV. 651, 657-58 (2020).

76. *Id.* at 657.

77. *Id.* at 657-58.

status not merely by including a choice-of-law clause, but also by choosing the trust's situs, which is largely a legal fiction for a trust whose primary assets are intangibles. If courts concluded that settlor's choice of situs effectively dictated the trust's tax treatment, that too would allow settlors to frustrate their home state's tax policy.

c. Fiduciary Duties

Although all states give settlors and trustees considerable freedom to craft fiduciary duties to serve their individualized needs, most jurisdictions have some mandatory rules—an irreducible core[78]—that place some matters beyond the parties' control. Until recently, no state would enforce a trust provision purporting to absolve the trustee of all liability for any breach of fiduciary duty because such a provision would essentially give the trustee a license to steal.[79] States have differed, however, in the latitude they give parties to modify background fiduciary rules.[80]

Currently, one of the most controversial differences is the extent to which a settlor may require the trustee to keep the trust's terms secret from the trust beneficiaries.[81] The common law rule requiring trustees to inform beneficiaries is designed to ensure that those beneficiaries have the

78. *See* John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1124 (2004). David Hayton popularized the term "irreducible core." *See* David Hayton, *The Irreducible Core Content of Trusteeship*, *in* TRENDS IN CONTEMPORARY TRUST LAW 47, 47 (A.J. Oakley ed., 1996).

79. Langbein, *supra* note 78, at 1124 (noting that a term dispensing with good faith administration of the trust would effectively allow the trustee to loot the trust); Melanie B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 GEO. L.J. 67, 69 (2005) (noting that no court would uphold a provision eliminating the trustee's duty of loyalty in its entirety); *see also* McNeil v. McNeil, 798 A.2d 503, 509 (Del. 2002) (noting that a "trust in which there is no legally binding obligation on a trustee is a trust in name only and more in the nature of an absolute estate or fee simple grant of property" to the trustee).

80. *See* N.Y. EST. POWERS & TRUSTS LAW § 11-1.7(a)(1) (Consol. 2018) (explaining that in New York, a will may not exonerate a testamentary trustee from liability for failure to exercise reasonable care, diligence, and prudence). By contrast, the UTC would uphold an exculpatory clause (not inserted as a result of abuse by the trustee) unless it relieves the trustee of liability for breaches committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries. UNIF. TR. CODE § 1008 (UNIF. L. COMM'N 2000).

81. *See generally* Kent D. Schenkel, *Silent Trusts Are Trending: Will They Hold Trustees to Account?*, 47 ACTEC L.J. 107 (2021) (discussing the legal controversies around silent trusts); Frances H. Foster, *Trust Privacy*, 93 CORNELL L. REV. 555, 606-10 (2008) (discussing same); T.P. Gallanis, *The Trustee's Duty to Inform*, 85 N.C. L. REV. 1595 (2007) (discussing same).

information necessary to hold the trustee accountable.[82] Some states, however, have modified or dispensed with the requirement in order to accommodate settlors who fear that knowledge about their wealth might adversely affect the life decisions beneficiaries make.[83]

Delaware and Tennessee appear to have made it possible for a settlor to create a trust that dispenses with all traditional fiduciary duties.[84] In Delaware, a settlor who creates a directed trust can provide that the trust director shall act in a nonfiduciary capacity, while the directed trustee would not be liable for following the directions "except in cases of wilful misconduct."[85] Tennessee's statute goes even further, authorizing creation of an "investment services trust" that appears to preclude all actions against trustees of these supposed trusts.[86]

Some settlors might choose the law of a jurisdiction that reduces trustee accountability in order to reduce the cost of creating and maintaining the trust; trust services may be cheaper in states where the trustee bears no liability risk. Fiduciary rules, unlike rules designed to protect creditors or limit tax avoidance, are designed primarily to ensure that the trustee follows the settlor's instructions.[87] Other than the settlor herself, the trust's beneficiaries are the only parties at risk when the settlor chooses a law with somewhat watered-down fiduciary protections. The interest of those beneficiaries depends entirely on the settlor's largesse. In this situation, then, there is somewhat less reason for concern if a court enforces the parties' choice of law.

2. Case Law

Although the number of decided cases is relatively small, courts have shown less enthusiasm for party autonomy than the Second Conflicts Restatement would suggest. The cases that purport to enforce choice-of-law clauses often are cases where the court would have reached

82. *See* Schenkel, *supra* note 81, at 108; Foster, *supra* note 81, at 606-10; Gallanis, *supra* note 81, at 1616-17.

83. *See* Schenkel, *supra* note 81, at 117. This Appendix contains a list of states that have revised the UTC provisions to permit settlors to reduce the trustee's duty to inform beneficiaries.

84. Jeffrey Schoenblum, *The Nonfiduciary "Trust"*, 46 ACTEC L.J. 357, 368-70 (2021).

85. DEL. CODE ANN. tit. 12 § 3313(a)-(b).

86. *See* TENN. CODE ANN. § 35-16-104(d) (2007) (providing that "neither a creditor nor any other person shall have any claim or cause of action against the trustee, or an advisor of an investment services trust, or against any person involved in the counseling, drafting, preparation, execution or funding of an investment services trust").

87. *See* Leslie, *supra* note 79, at 78-79 (noting that fiduciary duties are best understood as the terms that the parties would have agreed to ex ante if they had anticipated future conflict).

the same result in the absence of the clause. In cases where enforcement would frustrate the policies of the settlor's domicile, courts have often held choice-of-law clauses unenforceable. This subpart examines these two patterns.

a. Cases Enforcing Choice-of-Law Clauses

First, many of the cases in which courts have enforced choice-of-law clauses are cases in which the clause selected the law of the parties' domicile.[88] In these cases, enforcing the parties' choice presented no threat to the policies of the settlor's home state.

Second, in other cases in which courts purported to enforce a choice-of-law provision, the result would have been the same if the court had applied the law of the settlor's domicile.[89] In a related set of cases, courts enforced the choice-of-law clause without indicating whether the law of the settlor's domicile would have been different—a sign that no party pressed the court on policies that would have been frustrated.[90]

Third, some cases have involved questions the settlor could have resolved, even under the law of her domicile, by closer attention to detail. For instance, a settlor might not have complied with the formalities her home state required for execution of trust instruments.[91] Alternatively, the issue might have revolved around construction of the trust instrument, an avoidable issue with more careful drafting.

Finally, in some cases, courts have applied the law of the chosen state to invalidate some aspect of the trust—certainly not a result advocates of party autonomy would support.[92]

Consider the six cases cited in the reporter's note to section 270 of the Second Conflicts Restatement as support for enforcing the law designated by the settlor.[93] One of those cases involved a business trust.[94] In two others, *Shannon v. Irving Trust Co.* and *In re Peterzell's Trust*, the courts enforced the settlor's choice to apply the law of the settlor's home

88. *See, e.g.*, Shannon v. Irving Tr. Co., 9 N.E.2d 792, 795 (N.Y. 1937).

89. *See, e.g.*, Russell v. Wachovia Bank, N.A., 578 S.E.2d 329, 336 (S.C. 2003).

90. *See, e.g.*, Matter of Pratt, 172 N.Y.S.2d 965, 969-70 (N.Y. App. Div. 1958).

91. *See, e.g.*, *In re* Ash's Tr., 111 N.Y.S.2d 115, 117-18 (N.Y. Sup. Ct. 1952).

92. *See* City Bank Farmers Tr. Co. v. Meyn, 34 N.Y.S.2d 373, 375-76 (N.Y. App. Div. 1942).

93. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 270, reporter's note (AM. L. INST. 1971).

94. *See* Liberty Nat'l Bank & Tr. Co. v. New Eng. Invs. Shares, 25 F.2d 493, 493 (D. Mass. 1928).

state.[95] In two other cases, *Matter of Pratt* and *In re Ash's Trust*, courts enforced a choice-of-law clause without indicating that the law would be different in the state in which settlor was domiciled at the time the trust was created.[96] In *Pratt*, a Nevada domiciliary transferred property to a New York trustee with instructions that, at his death, the property should be distributed as he directed by will.[97] After moving to Florida, the *Pratt* decedent executed a will three days before his death and left a portion of his estate to charities—in violation of a Florida mortmain statute invalidating such bequests unless made at least six months before death. In holding that the charities were entitled to a share of the trust assets, the *Pratt* court relied on the trust instrument's choice of New York law—but never indicated that the charities would have been treated any differently under the law of Nevada.[98] In *Ash*, a New Jersey domiciliary named a New York bank as trustee and directed that the trust's validity and effect be governed by New York law.[99] When a question arose about whether she effectively exercised a power of appointment she had reserved to herself, the *Ash* court concluded that New York law should apply, but never indicated that New Jersey law would generate a different result.[100] Moreover, the *Ash* settlor could have prevented the ambiguity that generated the litigation with more careful language in the will that exercised the power of appointment.[101] Finally, in *City Bank Farmers Trust Co. v. Meyn*, the court applied the New York law chosen by the District of Columbia settlor to invalidate the exercise of a power of appointment.[102]

These six cases provided slender support for routine enforcement of choice-of-law clauses in trust instruments. Cases decided since the Second Conflicts Restatement's promulgation follow a similar pattern. Three cases in bankruptcy court have purported to enforce choice-of-law clauses, but in each case, the settlor chose the law of settlor's own domicile. In *Matter of Hecht*, the court invoked the Maryland settlor's choice of Maryland law to hold that a New York beneficiary was not

95. 9 N.E.2d 792, 795 (N.Y. 1937); 7 Pa. D. & C.2d 400, 403 (Montgomery Cnty. Orphans' Ct. 1956).

96. 172 N.Y.S.2d 965, 970-71 (N.Y. App. Div. 1958); 111 N.Y.S.2d 115, 116-17 (N.Y. Sup. Ct. 1952).

97. 172 N.Y.S.2d at 968-69.

98. *Id.* at 971.

99. 111 N.Y.S.2d at 116-17.

100. *Id.*

101. *Id.*

102. 34 N.Y.S.2d 373, 375-76 (N.Y. App. Div. 1942).

subject to garnishment of his spendthrift trust interest.[103] On similar facts, the court in *In re Zukerkorn* upheld a choice of Hawai'i law by a settlor domiciled in Florida at the time the spendthrift trust was created, rejecting the bankruptcy trustee's contention that the interests of a California beneficiary should be subject to garnishment under California law.[104] In *In re Maue*, the court held that Florida law applied to breach of fiduciary claims against a Washington trustee, citing the Florida choice of law in the trust instrument.[105]

In two other cases, courts have honored choice-of-law clauses only after conceding that there was little evidence that the law of the chosen state was different from the law that would otherwise apply to the trust. In *Russell v. Wachovia Bank, N.A.*, the court agreed to apply North Carolina law to an undue influence challenge to the trust after noting that North Carolina law was similar to the law applicable in the settlor's South Carolina domicile.[106] Most recently, in *Jacobs v. Watson*, the court upheld the trust instrument's choice of Florida law while noting the absence of evidence that Florida law was different from Ohio law.[107]

b. Courts Holding Choice-of-Law Provisions Unenforceable

The most significant litigated challenges to trust choice-of-law clauses have involved efforts to establish foreign and domestic asset protection trusts. American courts have been unsympathetic to these efforts. The issue has generally arisen in the bankruptcy context, where a settlor seeks to insulate trust assets from the bankruptcy estate or seeks a discharge, despite law in the settlor's home state that would make trust assets available to creditors. In refusing to enforce choice-of-law clauses selecting the law of creditor-unfriendly states, courts have ordered settlors to transfer trust assets into the bankruptcy estate, have held settlors in contempt for failure to do so and have denied discharges to recalcitrant settlors.

Most of the cases have involved offshore trusts. In *In re Portnoy*, the court denied the settlor's summary judgment motion in an action to deny settlor a bankruptcy discharge, rejecting the New York settlor's argument that the trust's express choice of New Jersey law insulated the trust assets

103. 54 B.R. 379, 382-84 (Bankr. S.D.N.Y. 1985).
104. 484 B.R. 182, 192-93 (B.A.P. 9th Cir. 2012).
105. 611 B.R. 367, 383 (Bankr. W.D. Wash. 2019).
106. 578 S.E.2d 329, 388 (S.C. 2003).
107. No. 1:21-cv-306, 2021 WL 5299792, at *5-6 (S.D. Ohio Nov. 13, 2021).

from the bankruptcy estate.[108] In holding that New York law applied in determining whether the debtor had a property interest that should have been disclosed, the court wrote that a choice-of-law provision "will not be regarded where it would operate to the detriment of strangers to the agreement, such as creditors or lienholders."[109]

Subsequently, two courts of appeals upheld contempt sanctions against settlors who refused to repatriate assets held in offshore trusts purportedly governed by the law of jurisdictions that authorize asset protection trusts. In *FTC v. Affordable Media*, the United States Court of Appeals for the Ninth Circuit looked through the settlor's Cook Islands trust and held the settlor in contempt for failing to abide by a court's repatriation order.[110] Similarly, in *In re Lawrence*, the United States Court of Appeals for the Eleventh Circuit held that a Florida settlor's trust assets were part of the bankruptcy estate because Florida law applied despite express language selecting the law of Mauritius.[111] As in *Affordable Media*, the *Lawrence* court upheld a contempt sanction.[112]

In *In re Huber* , a bankruptcy court applied the same approach to a trust selecting the law of Alaska, a domestic haven for asset protection trusts.[113] The Washington settlor from *Huber* established the trust when his real estate development business was floundering, seeking to insulate trust assets from claims of his creditors.[114] In concluding that Washington law governed the trust, the bankruptcy court focused on the settlor's minimal relation to Alaska and on the strong Washington creditor-protection policy that would be frustrated if Alaska law were to apply.[115]

c. The Impact of Trust Location or "Situs"

Taken together, the cases in the preceding discussion reveal a united judicial front against the efforts of trust settlors to evade obligations to creditors by designating the law of a less creditor-friendly jurisdiction. In many cases, however, the settlor does more than include a choice-of-law clause to avoid the law of her home state; the settlor also attempts to locate the trust in that jurisdiction. In *Affordable Media*, for instance, settlors

108. 201 B.R. 685, 698 (Bankr. S.D.N.Y. 1996).

109. *Id.* at 701 (quoting H.K. and Shanghai Banking Corp., Ltd. v. HFH USA Corp., 805 F. Supp. 133, 140 (W.D.N.Y. 1992)).

110. 179 F.3d 1228, 1243 (9th Cir. 1999).

111. 279 F.3d 1294, 1297, 1301 (11th Cir. 2002).

112. *Id.* at 1300-01; *Affordable Media*, 179 F.3d at 1243-44.

113. 493 B.R. 798, 808-09 (Bankr. W.D. Wash. 2013).

114. *Id.* at 804-05.

115. *Id.* at 809.

sought to create a Cook Islands trust; in *Huber*, the settlor sought to locate his trust in Alaska.[116] But what does it mean to locate a trust in a particular jurisdiction? As the Supreme Court has noted, for most purposes a trust is not a distinct legal entity, but a fiduciary relationship among multiple people.[117] When the trust property consists of intangibles (as it usually does), locating the trust property requires the settlor (and courts) to resort to a legal fiction.[118] A similar fiction underlies the premise that the trust itself is located in a particular state. Nevertheless, legislatures and courts attach legal significance to the situs of the trust and sometimes conclude that the trust's situs is the state in which the trustee lives or operates, or where the trustee administers the trust.[119] Of course, multiple trustees might live or operate in different states, and individual trustees might move between states, illustrating the arbitrariness of the determination that the trust is located in a particular state.[120]

To the extent a trust is treated as if it were located in the trustee's principal place of business, a settlor can choose the trust's location almost as easily as the settlor can insert a choice-of-law clause in the trust instrument.[121] The settlors from *Affordable Media* did not have to travel to the Cook Islands to create a Cook Islands trust. The paperwork could all be done at home, with a transfer of title to the assets to the foreign or out-of-state trustee. There is, therefore, little reason to treat a settlor's choice of trust location to evade home state policy any differently from one's inclusion of an express choice-of-law clause. In fact, courts dealing with asset protection issues have typically not treated the choice of location differently.

Although courts have ignored the trust's location in assessing the validity of asset protection provisions, they have not explicitly challenged

116. *Id.* at 804-05; *Affordable Media*, 179 F.3d at 1232.

117. *See* Americold Realty Tr. v. Conagra Foods, Inc., 577 U.S. 378, 383 (2016).

118. *See* Greenough v. Tax Assessors of Newport, 331 U.S. 486, 493 (1947) (noting that intangibles themselves have no real situs).

119. *See, e.g.*, Cent. Standard Life Ins. Co. v. Gardner, 161 N.E.2d 278, 289 (Ill. 1959) (noting that the "situs of a trust is the place of performance of active duties of the trustee"). A New York statute provides that a trust's selection of New York law will be given effect whenever "the trustee of the trust is a person residing, incorporated or authorized to do business in this state." N.Y. EST. POWERS & TRUSTS LAW § 7-1.10 (Consol. 2018).

120. Moreover, the trustee may seek to change the trust's situs when doing so would be advantageous to the beneficiaries. The UTC, for instance, gives trustees broad power to change the trust's "principal place of administration" unless a qualified beneficiary objects. *See* UNIF. TR. CODE § 108(c)-(e) (UNIF. L. COMM'N 2000).

121. The UTC, for instance, validates terms of a trust designating the trust's principal place of business as the trustee's principal place of business. *See id.* § 108(a).

the premise that a settlor can choose the trust's location by choosing the trustee. State legislatures in a number of states have reinforced the notion by enacting statutes purporting to provide asset protection to trusts established within the state's borders—generally trusts with a local trustee.[122] While these statutes bind the state's own courts, they do not bind other courts, as the *Huber* decision illustrates.[123] Nor do they—or should they—bind the taxing authorities of other states, the subject of the next subpart.

d. Party Autonomy as a Tax Avoidance Device

The situs of the trust has assumed considerable significance in tax cases. No court or taxing authority would assume that a trust settlor could avoid state income tax by declaring that a trust should be governed by the law of another jurisdiction, but many settlors seek to avoid state income tax by locating the trust in a jurisdiction that does not tax trust income, a feat that involves little more than conveying the trust property to a trustee in that jurisdiction.

The Internal Revenue Code taxes income realized by grantor trusts not to the trust as an entity, but to the grantor or settlor of the trust.[124] Of the many states that tax trust income, most follow the federal pattern and treat grantor trust income as income of the grantor.[125] When a trust qualifies as a grantor trust, therefore, a grantor obtains little tax advantage by establishing the trust out of state.

When the trust does not qualify as a grantor trust, the Internal Revenue Code treats the trust as the taxpayer and taxes income to the trust, not the grantor or the trust beneficiaries.[126] The question then becomes whether a trust settlor can avoid her home state's income tax by locating the trust in a jurisdiction that does not tax trust income. That depends in part on state tax law. More fundamentally, however, whether a settlor can successfully avoid local income taxation by establishing a trust with an out-of-state trustee depends in considerable measure on the Supreme Court's construction of the commerce and due process clauses. Most

122. *See, e.g.*, DEL. CODE ANN. tit. 12, § 3570(8)(a) (2019).

123. *See e.g.*, *In re* Huber, 493 B.R. 798, 809 (Bankr. W.D. Wash. 2013).

124. *See* 26 U.S.C. § 671.

125. *See, e.g.*, CAL. REV. & TAX. CODE § 17731(a) (West 2005) (providing that Subchapter J of Chapter 1 of Subtitle A of the Internal Revenue Code—the grantor trust provisions—shall apply); Schoenblum, *supra* note 72, at 1948.

126. *See* 26 U.S.C. § 641. *See generally* Schoenblum, *supra* note 72, at 1947-48 (discussing how a Nevada Incomplete Gift Nongrantor Trust can provide the grantor with most of the advantages of a grantor trust without obtaining status as a grantor trust).

recently, in *North Carolina Department of Revenue v. Kimberley Rice Kaestner 1992 Family Trust*, the Court expressly reserved decision on whether and in what circumstances the settlor's domicile may impose and collect income tax on a trust whose trustee operates elsewhere.[127]

The perceived obstacle for a state seeking to tax income realized by a trust one of its domiciliaries established elsewhere arises from the Court's 1929 decision in *Safe Deposit & Trust Co. v. Virginia*.[128] In holding that the due process clause precluded a Virginia county from imposing a property tax on securities transferred by a Virginia settlor to a Maryland trustee, the Court emphasized that the trustee's possession of the securities in Maryland gave the securities "a permanent situs for lawful taxation there."[129] The Virginia county had, in the years after the settlor's death, taxed the property based on the equitable ownership of the trust beneficiaries, all of whom were Virginia domiciliaries.[130] The Supreme Court recognized the legal fiction of "*mobilia sequuntur personam*" for determining the tax situs of intangible property but held that it must yield to legal ownership elsewhere.[131] The Court's focus was on the unfairness of double taxation if both Virginia and Maryland could tax the trust property. In the Court's words:

> It would be unfortunate, perhaps amazing, if a legal fiction originally invented to prevent personalty from escaping just taxation, should compel us to accept the irrational view that the same securities were within two States at the same instant and because of this to uphold a double and oppressive assessment.[132]

In *Safe Deposit*, the issue involved Virginia's power to tax the trust property after a settlor's death; neither the settlor nor the trustee had challenged Virginia's power to tax the trust while the settlor was alive.[133] Further, the Court's central concern—avoiding double taxation—is not an issue when a settlor establishes a trust in a state that imposes no tax on trust income. In that situation, the settlor's objective is "escaping just taxation" imposed by his home state.[134]

127. 139 S. Ct. 2213, 2222 n.7 (2019).
128. 280 U.S. 83 (1929).
129. *Id.* at 92.
130. *Id.* at 91.
131. *Id.*
132. *Id.* at 94.
133. *Id.* at 90.
134. *See id.* at 94.

Two subsequent cases undermined *Safe Deposit*'s premise that the due process clause protects trusts against double taxation. In *Curry v. McCanless*, the Court held that the due process clause did not prevent Tennessee, the state of the trust settlor's domicile, from taxing property the settlor had transferred to an Alabama trustee, reserving a right to income and a testamentary power of appointment.[135] In concluding that the state of domicile was not deprived of constitutional jurisdiction to tax by a taxpayer's activities elsewhere, the Court made it clear that more than one state may have the power to tax property.[136] The *Curry* Court rejected the dissent's position that Tennessee could not tax the trust property because the property was in Alabama.[137] Eight years later, in *Greenough v. Tax Assessors of Newport*,[138] the Court reaffirmed the power of multiple states to tax the same property. A New York resident had established a testamentary trust, appointing a Rhode Island co-trustee.[139] When the trustee challenged Rhode Island's personal property tax on one-half of the trust corpus, the Court rejected the challenge, holding that the trustee's Rhode Island connection was sufficient to satisfy due process.[140] The *Greenough* Court's opinion emphasized the practical difficulties states would face in taxing intangible wealth if a taxpayer could avoid taxation by moving the intangibles out of state:

> So long as a state chooses to tax the value of intangibles as a part of a taxpayer's wealth, the location of the evidences of ownership is immaterial. If the location of the documents was controlling, their transfer to another jurisdiction would defeat the tax of the domiciliary state .... Since the intangibles themselves have no real situs, the domicile of the owner is the nearest approximation, although other taxing jurisdictions may also have power to tax the same intangibles.[141]

More recently, in *South Dakota v. Wayfair, Inc.*, the Court recognized the unfair competitive advantage out-of-state entities would enjoy if they could escape taxes imposed on transactions with in-state customers.[142] The *Wayfair* Court held that the commerce clause did not preclude South Dakota from requiring out-of-state sellers to collect and remit sales tax on

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135. 307 U.S. 357, 370 (1939).

136. *Id.* at 368 (noting that "there are many circumstances in which more than one state may have jurisdiction to impose a tax and measure it by some or all of the taxpayer's intangibles").

137. *See id.* at 369-70.

138. 331 U.S. 486, 497-98 (1947).

139. *Id.* at 488.

140. *Id.* at 491-98.

141. *Id.* at 492-93.

142. 138 S. Ct. 2080, 2095 (2018).

sales to South Dakota customers.[143] The Court overruled a past precedent because it had "come to serve as a judicially created tax shelter for businesses that decide to limit their physical presence and still sell their goods and services to a State's consumers"—the precise posture of trust companies who operate in no-tax states, but act as trustees for settlors in states that do impose state income taxes.[144] The Court emphasized that "[r]ejecting the physical presence rule is necessary to ensure that artificial competitive advantages are not created by this Court's precedents."[145] Moreover, although *Wayfair* involved a commerce clause challenge, the Court emphasized the significant parallels between the Commerce Clause's requirement of a nexus with the taxing state and the due process minimum contacts requirement.[146]

Against this background, the Court held in *Kaestner* that the due process clause precluded North Carolina from taxing accumulated trust income based solely on the North Carolina domicile of one of the trust's beneficiaries.[147] *Kaestner* did not involve a settlor seeking to evade taxes in his home state; Kaestner was a New York domiciliary who created a trust with a New York trustee.[148] The trust instrument conferred on the trustee discretion to pay income to a North Carolina domiciliary, but the trustee made no such payments.[149] In holding that the beneficiary's interest was insufficient to justify North Carolina's effort to tax trust income, the Court made it clear that its decision was narrow and did not address state tax laws that turn on a combination of factors, or "that turn on the residency of a settlor."[150] Indeed, the Court cited *Curry v. McCanless* for the principle that the state of a settlor's domicile can tax a trust when the settlor retains a power to dispose of the trust property,[151] and suggested, without deciding, that a lesser degree of control by a settlor might sustain a tax by the settlor's domicile.[152]

Left unresolved by the Court's decisions is the extent to which a settlor's domicile can tax a trust—during a settlor's lifetime or after their

143. *Id.* at 2098-2100.

144. *Id.* at 2094.

145. *Id.*

146. *Id.* at 2093.

147. N.C. Dep't of Revenue v. Kimberley Rice Kaestner 1992 Fam. Tr., 139 S. Ct. 2213, 2217 (2019).

148. *Id.* at 2218.

149. *Id.* at 2220.

150. *Id.* at 2225.

151. *Id.* at 2222 (discussing Curry v. McCanless, 307 U.S. 357 (1939)).

152. *Id.* at 2222 n.7.

death—when the settlor has retained no discretion over distribution of trust assets. But even when the settlor confers discretion on a trustee, it is the settlor's trust instrument that determines the scope and limits (if any) on the trustee's exercise of discretion. In a very real sense, all distributions are pursuant to the settlor's direction. When combined with the Court's concern about providing unfair competitive advantages to out-of-state entities, there is some reason to believe that the Court would sustain efforts by the state of a settlor's domicile to tax trust income, even if the settlor has selected an out-of-state trustee.[153]

Despite the uncertainty in Supreme Court doctrine, states have used several approaches to preclude parties from avoiding income tax by choosing a favorable tax state for a non-grantor trust. Some states tax income earned by non-grantor trusts whenever the settlor was domiciled within the state at the time the trust was created.[154] Others tax income whenever a trust beneficiary resides within the state—an approach invalidated in *Kaestner* unless the trust has some other connection to the state.[155] New York treats trusts as grantor trusts even if they are non-grantor trusts for federal income tax purposes, effectively taxing the settlor, rather than the trust, on income earned by the trust.[156] This device prevents the settlor from avoiding New York income tax, but only until the settlor's death.

As with asset protection, states have been unwilling to allow settlors to avoid home state tax law by choosing—indirectly—the tax law of another state. Due process doctrine may impose some constraints on the domiciliary state's efforts to collect income tax, but there is good reason to believe that the Court would provide states with considerable leeway to protect other taxpayers from the need to pick up the slack created if trusts escape income taxation, and to protect local trust companies from unfair advantages enjoyed by out-of-state trust companies.

153. State courts are divided on the issue. In *Chase Manhattan Bank v. Gavin*, the Connecticut Supreme Court upheld Connecticut's treatment of a trust as a resident trust if the grantor was a resident when the trust became irrevocable and if there is a current Connecticut beneficiary. 733 A.2d 782, 801-02 (Conn. 1999). By contrast, in *Fielding v. Commissioner*, the Minnesota Supreme Court concluded that the Minnesota statute violated due process. 916 N.W.2d 323, 334 (Minn. 2018). *See generally* Gans, *supra* note 75, at 666-72 (outlining states' options for favorable tax collection from its resident trust beneficiaries).

154. *See, e.g.*, VT. STAT. ANN. tit. 32, § 5811(11)(B) (2022).

155. Rhode Island, for instance, taxes a trust when the beneficiaries are Rhode Island residents, but only if the settlor was a resident individual at the time the trust was created. 44 R.I. GEN. LAWS § 44-30-5(c) (1971).

156. N.Y. TAX LAW § 612(b)(41) (Consol. 2006).

e. Perpetual Trusts

As Professors Sitkoff and Schanzenbach have demonstrated, the primary motivation for establishing perpetual trusts is tax avoidance.[157] By establishing a perpetual trust, a settlor can guard against future liability for estate and gift tax; if the settlor's home state retains a rule against perpetuities that precludes perpetual trusts, the settlor has an incentive to choose the law of another state or to establish the trust's situs in another state. From a policy perspective, there is no more reason to honor the settlor's choice in this instance than when the settlor chooses law that enables avoidance of creditor claims.

To date, there has been no litigation challenging a settlor's establishment of an out-of-state perpetual trust. Several reasons explain the absence of case law. First, the tax avoided is not a current tax, but a tax that will be due generations in the future, and only if current estate tax law remains in place. Budget-challenged taxing authorities have little incentive to expend current resources challenging transactions that might reduce revenue in the distant future. Moreover, tax authorities might not have standing to challenge the perpetual trust when the revenue loss is so speculative. Second, most of the tax avoided will be federal estate tax, not state tax, reducing the incentive for the taxing authorities of the settlor's home state to challenge the perpetual trust. The Internal Revenue Service (IRS), which stands to lose the most from establishment of perpetual trusts, is in an odd position so long as the Code, and the Service, tolerates the tax losses generated by perpetual trusts when the settlor is actually domiciled in a state that authorizes perpetual trusts. If those taxpayers can use the perpetual trust to avoid taxes, the IRS may be reticent to challenge other taxpayers seeking the same benefits.

3. An Analytic Framework

Although courts have generally reached sensible results in cases where settlors' choices would frustrate aspects of the trust law of their home states, neither the Second Conflicts Restatement nor the UTC provides much useful guidance about when party autonomy should prevail. Neither focuses on the party autonomy problem inextricably intertwined with choice-of-law clauses: settlor efforts to locate a trust outside the settlor's home state. This discussion starts by surveying two promising approaches and explains why neither fully resolves the

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157. *See* sources cited *supra* note 70.

problems posed by parties who attempt to choose the law applicable to their trusts. The discussion concludes by addressing a third alternative more consistent with protecting relevant state policies.

a. Invalidating "Substance-Targeted" Choice-of-Law Clauses

In a recent article focused on contracts, not trusts, Professor Katherine Florey argued that courts should decline to enforce what she calls "substance-targeted" choice-of-law provisions: "those that are adopted specifically in the hope of validating a separate contractual provision."[158] She argues that the reasons for honoring choice-of-law clauses are largely inapplicable to substance-targeted clauses.[159] She also argues that the clauses should be unenforceable if they would contravene the strong public policy of any interested state.[160]

The argument against enforcement of substance-targeted choice-of-law clauses may be even stronger with respect to trusts than with respect to contracts. Many of the policies protected by mandatory contract law provisions are designed to protect one of the parties to the contract—generally the party without resources to hire expensive lawyers to draft or review their contracts. But, at least those parties have the opportunity to object to provisions that would disadvantage them. By contrast, many trust and tax law policies are designed to protect third parties who would have no say in the drafting of the trust instrument.

Nevertheless, the substance-targeted approach is not without difficulties. The first is determining whether a choice-of-law clause is substance-targeted. Professor Florey recognizes the difficulty with a test that focuses on the intent of the parties especially because, in her words, "skillful lawyers are likely to be able to point to innocuous motives" for provisions that appear likely to have been targeted.[161] However, the objective test she proposes as a substitute would effectively capture all general choice-of-law clauses, including those inserted for non-nefarious purposes, so long as one application of the clause would violate the public policy of an interested state. Professor Florey responds to this over-inclusiveness problem by suggesting that a presumption of targeting could be rebutted by "pointing to other characteristics of the contract and/or the

158. Katherine Florey, *Substance-Targeted Choice-of-Law Clauses*, 106 VA. L. REV. 1107, 1119 (2020).

159. *Id.* at 1167-68.

160. *Id.* at 1160-61.

161. *Id.* at 1161.

chosen law."[162] A rebuttable presumption, however, would reintroduce the question of intent that the test was designed to avoid.

The second problem is more significant with respect to trusts than it might be in the contract law context: determining what law applies if the choice-of-law clause is not enforced. If we assume, as the Second Conflicts Restatement does, that the parties' choice of an out-of-state trustee, or out-of-state administration, should be relevant even in the absence of a choice-of-law clause,[163] the focus on substance-targeted choice-of-law clauses would not accomplish much.

b. Enforcing Mandatory Rules Without Regard to Choice-of-Law Clauses

Tom Gallanis has argued that courts and the Restatement should scrap the Second Conflicts Restatement's amorphous "public policy" formulation in favor of a simple rule: a choice-of-law clause should not be enforced if it contravenes a mandatory rule of the jurisdiction having the most appropriate relationship to the matter at issue.[164]

There is much to commend the Gallanis approach, but it, too, presents challenges. First, while reducing judicial burdens in assessing the strength of a state's public policy, the approach makes it necessary in a broader range of cases for courts to determine which state has the most appropriate relation to the matter at issue—a determination that, at least under the Second Conflicts Restatement's formulation, requires consideration of multiple factors. That is, in every case where a choice-of-law clause would conflict with a mandatory rule of a potentially interested state, the Gallanis approach would require the court to determine what state has the most appropriate relation to the issue. By contrast, the Second Conflicts Restatement attempted to minimize that burden in cases where a mandatory rule might reflect a less strong public policy. Indeed, a primary justification for party autonomy generally is a desire to minimize the judicial burden of conducting a choice-of-law analysis.

Second, at least under the Second Conflicts Restatement's formulation, the settlor's intent counts as a significant factor in

162. *Id.* at 1163.

163. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 270 cmt. c (AM. L. INST. 1971) (noting that the most important state insofar as validity is concerned, is the state "where the settlor manifested an intention that the trust should be administered").

164. Thomas P. Gallanis, *The Use and Abuse of Governing-Law Clauses in Trusts: What Should the New Restatement Say?*, 103 IOWA L. REV. 1711, 1719 (2018).

determining the state of most significant relationship to issues surrounding the trust, as does the location of the trustee.[165] If these factors continue to be significant in identifying the state of most appropriate relationship, the Gallanis approach might not significantly constrain the settlor's choice of law.

Third, for better or for worse, the Gallanis approach leaves no room for party autonomy even when autonomy would be harmless. To take a variation on one of Professor Gallanis's examples, suppose a former resident of New York who has moved to a USRAP state consults his New York lawyer to create a trust and the trust instrument designates New York law as applicable to the trust.[166] New York has statutorily adopted several rules of construction that would save a trust from invalidity under the rule, but has not adopted USRAP's ninety-year provision.[167] Suppose the trust would be perfectly valid under New York's savings provision, but not under the common law rule. Would the parties have to wait until the expiration of the USRAP ninety-year period to determine whether the trust is valid? Because USRAP is a mandatory rule, the Gallanis approach would presumably invalidate the choice-of-law provision and require the parties to endure up to ninety years of uncertainty about the trust's validity, even though the law selected is in most ways more protective of the same interests USRAP protects.

c. An Alternative Framework

Building on the instincts that underpin the work of Professors Florey and Gallanis, a few principles emerge. First, when a choice-of-law clause would interfere with enforcement of a mandatory rule, the clause should only be enforced if the settlor had a reasonable basis for the choice. Second, what constitutes a reasonable basis should differ depending on the issue involved. Third, unless the rule is one that relates to matters of administration that affect principally the settlor and the trustee, the location of the trustee and the location of trust administration do not provide a reasonable basis for a choice of law that would interfere with a mandatory rule of the state of the settlor's domicile. This third principle is the one that departs most significantly from the approach of the Second Conflicts Restatement and the statutes of a number of states, but the

165. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 270 cmt. c.

166. *See* Gallanis, *supra* note 164, at 1721-22.

167. N.Y. EST. POWERS & TRS. LAW § 9-1.3(c)-(e) (Consol. 2014) (drafted to eliminate unborn widow, slothful executor, precocious toddler, and fertile octogenarian problems).

principle reflects the sensible approach of courts that have dealt with the issue.

The requirement that a settlor have a reasonable basis for the choice-of-law clause is not at all novel. The Second Conflicts Restatement requires that the chosen state have "a substantial relation to the trust."[168] Its provisions on contracts include similar language.[169] The requirement addresses Professor Florey's concern with substance-targeted choice-of-law clauses; if the settlor must have a reasonable basis for choosing a state's law, it is less likely that the choice will be designed solely to take advantage of a particular provision in that law.

Mandatory rules are designed to protect different groups of people, and what counts as a reasonable basis depends substantially on what groups the rules are designed to protect. When the mandatory rule is designed to protect non-parties to the trust who are not objects of the settlor's bounty—creditors, elective share claimants, and taxing authorities—there is rarely a reasonable basis for a settlor to choose a state other than the state her domicile. Choice of another state would, with few exceptions, be intended to avoid claims the settlor's home state would recognize.[170] In that instance, courts should not enforce the choice-of-law clause. Professors Florey and Gallanis would reach the same result. The state of the settlor's domicile would, with respect to these issues, be the state with the most appropriate relation to the issue; if the choice-of-law clause were not enforced, that law would apply.

When the mandatory rule is designed to protect trust beneficiaries or creditors of those beneficiaries, more deference to settlor's wishes is appropriate. The interest of the trust beneficiaries and their creditors is dependent on the settlor's largesse. Because the settlor had freedom to make no provision for the beneficiaries, the settlor also ought to have more freedom to shape their rights to the trust proceeds. If a settlor, a domiciliary of State A, establishes a trust creating significant benefits for beneficiaries in States B and C, the settlor might reasonably include a choice-of-law clause selecting the law of any of those states, even if application of that law would conflict with a mandatory beneficiary-protecting rule of the other states.

168. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 270(a).

169. *Id.* § 187(2)(a).

170. *See* Gallanis, *supra* note 164, at 1721-22. The Rule Against Perpetuities hypothetical in the preceding discussion is one such example; a former resident's choice of New York law would in most circumstances be more constraining than if USRAP were applied, but not if one of the New York statute's savings provisions were applicable.

Consider two examples. First, suppose States A and C impose a mandatory obligation on trustees to inform all beneficiaries of their interest, while State B does not. If the trust instrument excuses the trustee from the obligation to inform and selects State B law, the settlor's choice should be honored. If it were not, a court would have to determine which state had the most appropriate relation to the issue, a decision that would not be without difficulty, especially with multiple beneficiaries who have different domiciles.

Similarly, suppose States A and B permit garnishment of a percentage of a spendthrift beneficiary's interest, but State C does not. In effect, States A and B have a mandatory rule protecting the creditors against trust beneficiaries, while State C has a mandatory rule protecting beneficiaries against their creditors. Which state's law should apply in the absence of a choice-of-law clause is not free from doubt. In this situation, it would seem reasonable for the settlor to choose the law of any of the states. The same approach should apply with other mandatory rules designed to protect trust beneficiaries, such as rules limiting the enforceability of exculpatory clauses or fiduciary duty waivers.

The location of the trustee, or the location of trust administration, should not alone constitute a reasonable basis for choosing the law of that location. Every state has its share of competent trustees, both individual and corporate. Perhaps more significant, the trust business has become a national business; major trust companies operate across the continent.[171] It would be difficult for a settlor to invoke convenience to defend the choice of an out-of-state trustee with no relation to the settlor or the trust beneficiaries. Once expertise and convenience are eliminated as reasons for choosing a trustee from out-of-state, it becomes apparent that the primary motive for choosing an out-of-state trustee, and for choosing the law of the trustee's state, is to evade the laws of states with a closer connection to the trust.

Although the approach I suggest diminishes the role of the settlor's choice of trust situs, the approach is by no means radical. The settlor would remain free to choose the law of another state that departs from

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171. For instance, J.P. Morgan's trust department advertises that it has "teams in more than two dozen locations" at the same time it extols the benefits of establishing a trust in Delaware. *See U.S. Trust Services*, J.P. MORGAN, https://privatebank.jpmorgan.com/gl/en/services/trusts-and-estates/us-trust-services [https://perma.cc/2JRS-KLNB] (last visited Mar. 29, 2023). Northern Trust advertises that it operates in twenty-two states, the District of Columbia, and twenty-two international locations. *See About Us*, NORTHERN TRUST, https://www.northerntrust.com/united-states/about-us [https://perma.cc/JWE8-HE5Y] (last visited Mar. 29, 2023).

default rules of the settlor's domicile. The settlor's choice would also be honored even when the chosen law would conflict with a mandatory rule of the settlor's domicile if that rule related principally to matters of trust administration. The settlor would remain free to choose law on issues that affect trust beneficiaries when the chosen state is home to some or all of the trust beneficiaries.

What explains the Second Conflicts Restatement's broader endorsement of party autonomy when the chosen state is one that the settlor has "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[?]"[172] First, as already noted, the differences among trust laws were less significant fifty years ago than they are today. Second, dicta in the few relevant cases extant at the time the Second Conflicts Restatement was drafted provided some support for its position.[173] Third, the trust business was substantially more local than it is today, and concepts like place of administration, domicile of the trustee, and location of trust assets had more meaning than they do today. Fourth, New York had enacted a statute directing its courts to enforce choice-of-law clauses selecting New York law whenever the trustee was a New York trustee.[174] Finally, and probably most important, jurisdiction over the trustee was easiest to obtain in the trustee's home state, meaning that most of the litigation surrounding the trust was most likely to occur in a court sympathetic to a clause directing it to apply its own law.

d. Choice-of-Law Clauses After the Settlor's Death

The argument so far has been that during a settlor's lifetime, the interest of the settlor's home state in protecting its creditors, spouses, and taxpayers should limit a settlor's power to choose the law of a state that would negate those protections. Trusts often endure long past the settlor's death, however, even in those states that retain some version of the rule against perpetuities. Concerns about elective share rights and self-settled asset protection trusts disappear after the settlor's death. As a result, there

172. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 270 cmt. b.

173. *See, e.g.*, Hutchison v. Ross, 187 N.E. 65, 70 (N.Y. 1933) ("Where a nonresident settlor establishes here a trust of personal property intending that the trust should be governed by the law of this jurisdiction, there is little reason why the courts should defeat his intention . . . .").

174. The current version of the statute is N.Y. EST. POWERS & TRUSTS LAW § 7-1.10 (Consol. 2014). The court quoted the previous version in *Hutchison*.

are fewer reasons to limit the power of the settlor (or a trustee exercising decanting power) to choose the applicable law.

Nevertheless, even after a settlor's death, enforcement of a choice-of-law clause may threaten significant interests of other states. In particular, the interests of states in which the trust beneficiaries reside may be significant. For instance, if a beneficiary lives in a state whose law permits a spouse and children to reach spendthrift trust interests for spousal or child support, that state has an interest in applying its law to ensure that the beneficiary's family receives adequate support.[175] A court frustrates that interest if it enforces a choice-of-law clause selecting the law of a state that provides no comparable protection for spouses and children.[176]

Unfortunately, there is no ideal solution to this problem. When a settlor creates a trust designed to endure beyond her death, a settlor cannot know for sure where her beneficiaries will live. In many cases, they may scatter across multiple states, replicating the choice-of-law problem that led the Second Conflicts Restatement to endorse party autonomy with respect to multi-state contracts. That is, in the absence of the choice-of-law clause, the applicable law might be unclear, especially when the beneficiaries are from different states. In addition, it would be administratively inconvenient for the trustee to have different rules apply with respect to beneficiaries in different states. In this circumstance, deference to the provisions of the trust instrument may be the least bad alternative.

e. Summing Up: Potential Rules

A tentative set of potential Third Conflicts Restatement rules embodying the analysis above might look something like this:

> A choice-of-law provision in a trust instrument that contravenes no mandatory rule of the settlor's domicile is enforceable.
>
> A choice-of-law provision in a trust instrument that does contravene a mandatory rule of settlor's domicile is enforceable only if there is a reasonable basis for the choice.

175. *See, e.g.*, FLA. STAT. ANN. § 736.0503 (2007) (providing that a spendthrift provision is unenforceable against a child or spouse who has a judgment for support or maintenance).

176. For instance, Nevada's statute protects spendthrift trust assets against claims for child and spousal support so long as those claims were not known at the time the trust was created. *See* NEV. REV. STAT. § 166.090(1) (2017); Klabacka v. Nelson, 394 P.3d 940, 950-51 (Nev. 2017) (construing the Nevada statute).

> During a settlor's lifetime, contacts with the trustee do not provide a reasonable basis for a choice-of-law clause except with respect to rules of trust administration affecting primarily the relationship between the settlor and the trustee.

The comments could provide further explanation and examples.

States seeking to attract trust business by giving settlors whatever they want will continue to enforce choice-of-law clauses without regard to their effect on the policies of other states, and without regard to any Conflicts Restatement rules.[177] But for states that have not succumbed to the pressure to eliminate all mandatory trust rules, jurisdiction remains an obstacle. If creditors, taxing authorities, and beneficiaries may only sue the trustee in the trustee's home state, clauses mandating application of the trustee state's law will routinely thwart the ability of states to regulate their own domiciliaries. The next subpart argues that the jurisdictional limitations may not be as robust as many have assumed.

f. Trusts of Land

The focus so far has been on trusts of "movables"—largely intangible assets like securities, which make up the bulk of most personal trusts. But many trusts also hold land as part of their portfolio. The Second Trusts Restatement treats trusts of land as a separate category and concludes that the law of the situs controlled the validity of trusts of land.[178] Although the Second Trusts Restatement explicitly authorized party autonomy with respect to trusts of movables, the sections on trusts of land included no parallel provisions.

The principal justification for party autonomy is absent with respect to trusts of land. Unlike securities and other intangibles, the location of land is fixed. A situs rule eliminates any uncertainty about what law would apply in the absence of party choice.

Nevertheless, if a settlor did decide to include a choice-of-law clause selecting the law of her domicile or the domicile of trust beneficiaries, there might be a reasonable basis for the choice, unless the issue on which the situs state has a mandatory rule is one designed to protect subsequent purchasers of the land who are not parties to the trust instrument. Conversely, a provision selecting the law of the trustee's location would not be a reasonable choice, absent some other connection to the trust. So

177. In some states, statutes expressly provide that a choice-of-law clause choosing forum law is conclusive on the state's courts. *See, e.g.*, ALASKA STAT. § 13.36.035(c) (1972).

178. RESTATEMENT (SECOND) OF TRUSTS § 278 cmt. a (AM. L. INST. 1959).

the basic party autonomy rules outlined above should also apply with respect to trusts of land. And, in the case of a trust of land, the situs of the land would not face the same jurisdictional hurdles that would arise when the trust includes movables.

IV. JURISDICTIONAL LIMITS

A party challenging the enforceability of a trust instrument's choice-of-law clauses faces a serious preliminary hurdle: establishing that the courts of the settlor's domicile have jurisdiction to adjudicate the underlying controversy. Jurisdiction would not be a problem if the settlor had chosen a trustee located in her home state, but a settlor seeking to avoid the law of her domicile is much more likely to choose an out-of-state trustee. This Part examines the jurisdictional hurdles a challenger faces.

A. Hanson v. Denckla

The primary due process limitation on a state's power to adjudicate a controversy involving an out-of-state trustee emerges from *Hanson v. Denckla*, a case in which the Supreme Court held that the Florida courts lacked jurisdiction over a Delaware trustee.[179] Donner, while domiciled in Pennsylvania, executed a trust instrument in Delaware.[180] In addition to reserving a right to revoke the trust at any time, she also reserved a general power of appointment.[181] She later moved to Florida, where she exercised the power by appointing $400,000 to be divided between trusts for the two children of her daughter Elizabeth, and the remainder (which amounted to about $1,000,000) to Elizabeth as executor of her estate.[182] At the same time, Donner executed her will, leaving the residue of her estate (which included the $1,000,000 from the trust) to her other two daughters.[183]

The two residuary legatees sought a declaratory judgment in Florida chancery court, seeking to invalidate the trust (and the exercise of the power created by the trust) on the ground that the trust was testamentary.[184] In effect, they sought to capture all of Donner's assets, to the exclusion of their sister's children. Elizabeth and her children moved

179. 357 U.S. 235, 254 (1958).
180. *Id.* at 238.
181. *Id.* at 238-39.
182. *Id.* at 239.
183. *Id.* at 240
184. *Id.* at 242.

to dismiss for lack of jurisdiction over an indispensable party: the Delaware trustee.[185] The Chancery Court held that it had no jurisdiction over the trustee, but nevertheless held that the power was testamentary and void under Florida law, so that the $400,000 passed to the residuary legatees by will.[186]

Before the Florida Chancery Court made its decision, Elizabeth and her children brought a declaratory judgment proceeding in Delaware to determine who was entitled to the trust assets.[187] When the Florida decree was entered, the residuary legatees argued that it was entitled to res judicata effect, but the Delaware court concluded that both the trust and the power were valid under Delaware law.[188]

Elizabeth then asked the Florida Supreme Court to remand with instructions to dismiss the Florida suit, which was then pending on appeal.[189] The Florida Supreme Court instead upheld the Chancery Court's decision that Florida law applied, but the court also held, unlike the Chancery Court, that the Florida courts had jurisdiction over the absent trustee.[190]

The pair of cases, one from Florida and the other from Delaware, presented two issues to the United States Supreme Court: first, did the Florida court err in holding that it had jurisdiction over the Delaware trustee, and second, did the Delaware court err in denying full faith and credit to the Florida judgment?[191] In a 5-4 decision, the Court held that the Florida courts lacked jurisdiction over the Delaware trustee, and that the Delaware courts therefore did not have to accord full faith and credit to the Florida judgment.[192]

Chief Justice Earl Warren, writing for the majority, first concluded that Florida had no in rem jurisdiction, noting that the parties "seem to assume that the trust assets . . . were located in Delaware and not in Florida" and that the owner's domicile within the forum was not a sufficient affiliation to establish in rem jurisdiction.[193] He then turned to what he labeled the "stronger argument" for in personam jurisdiction over

185. *Id.* at 241-42.
186. *Id.* at 242.
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.* at 243.
191. *Id.*
192. *Id.* at 254-56.
193. *Id.* at 247.

the Delaware trustee,[194] and concluded that the trustee had no minimum contacts with Florida to support jurisdiction.[195] The opinion emphasized the absence of an office or any transaction of business in Florida, and the absence of any solicitation of business in the state.[196] The Court considered whether the trust agreement itself might serve as a basis for jurisdiction, but noted that the agreement had no connection with Florida because "[t]he agreement was executed in Delaware by a trust company incorporated in that State and a settlor domiciled in Pennsylvania."[197]

Finally, the Court observed that "there is nothing in federal law to prevent Florida from adjudicating concerning the respective rights and liabilities" of the executor, legatees, and appointees—the beneficial owners of the trust interests—but Florida precluded itself from making that adjudication by treating the trustee as an indispensable party to any such litigation.[198]

B. Hanson*'s Limits*

A broad reading of *Hanson v. Denckla* would make it difficult for any court to obtain jurisdiction over a trust with an out-of-state trustee. But the Court's opinion leaves room for a narrower reading. First, the Court was almost certainly influenced by the perceived greed in the legatees' position: seeking all of decedent's assets to the exclusion of the children of their sister, contrary to the settlor's express wishes. Hard cases sometimes make bad law.

Second, in *Hanson*, the trust was created by a Pennsylvania domiciliary, not a Florida domiciliary—a fact the Court highlighted in its opinion.[199] By emphasizing that Florida's "first relationship . . . to the agreement was years later," the Court intimated that contracting to serve as the trustee for a Pennsylvania domiciliary might be sufficient to establish personal jurisdiction in Pennsylvania.[200]

Third, the Court relied heavily on Florida's rule making the trustee an indispensable party to controversies affecting the validity of the trust. As the Court pointed out, the due process clause did not prevent Florida from adjudicating the rights of the beneficial owners of the trust—and

194. *Id.* at 250.
195. *Id.* at 251.
196. *Id.*
197. *Id.* at 252.
198. *Id.* at 254.
199. *Id.* at 238.
200. *Id.* at 252.

presumably nothing would prevent the state of a settlors domicile from adjudicating the validity, with respect to creditors, of any transfer by the settlor to the trust.[201] The trustee might not be bound by that adjudication, but the settlor's leverage over the trustee will, in many cases, provide creditors and other third parties with the protection they need.

C. *Post-*Hanson *Developments*

In the sixty-five years since the Court decided *Hanson*, the Court's personal jurisdiction jurisprudence has evolved in ways that suggest that *Hanson*'s holding should be limited to the particular facts of the case. *Hanson* was decided less than a year after *McGee v. International Life Insurance Co.* sustained jurisdiction in California over a Texas insurance company that had neither offices nor agents in California.[202] In part, *Hanson* represented a response to the fear that *McGee* heralded the demise of all limits on personal jurisdiction. Without articulating a conceptual basis for jurisdictional limits, the *Hanson* Court took the opportunity to reaffirm that the limits "are a consequence of territorial limitations on the power of the respective States."[203] Since *Hanson*, however, a consensus has developed that limits on personal jurisdiction serve two related functions. "[A]cting as an instrument of interstate federalism," the due process clause protects other states against encroachment on its regulatory interests,[204] and protects defendants against arbitrary exercise of government authority.[205] In particular, the clause prevents states from applying their own law in ways that frustrate regulatory interests of other states or the reasonable expectation of parties who have relied on the laws of those states.[206] The result in *Hanson* was consistent with these objectives: the Court overturned an effort by the

201. *Id.* at 254.

202. 355 U.S. 220, 224 (1957).

203. *Hanson*, 357 U.S. at 251.

204. *See, e.g.*, Charles W. "Rocky" Rhodes et al., Ford*'s Jurisdictional Crossroads*, 109 GEO. L.J. ONLINE 102, 109 (2020) (quoting Bristol-Myers Squibb Co. v. Superior Ct. of Cal., 137 S. Ct. 1773, 1781 (2017)) (noting that a state's exercise of jurisdiction should not encroach on interests of other states); A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 645 (2006) (noting that minimum contacts with a non-resident defendant must be one where defendant's actions implicate the legitimate interests of the forum state); Stewart E. Sterk, *Personal Jurisdiction and Choice of Law*, 98 IOWA L. REV. 1163, 1164 (2013).

205. *See, e.g.*, Rhodes et al., *supra* note 204, at 108. Put slightly differently, the clause protects defendants against courts that "meddle in affairs in which they lack sufficient interest." Howard M. Erichson et al., *Case-Linked Jurisdiction and Busybody States*, 105 MINN. L. REV. HEADNOTES 54, 57 (2020).

206. *See* Sterk, *supra* note 204, at 1179.

Florida courts to invalidate a trust created before either the settlor or the trustee had any significant connection with Florida.

Since *Hanson*, the Court has developed doctrinal approaches that protect against abusive exercise of jurisdiction while leaving room for a court of settlor's domicile to assert jurisdiction over an out-of-state trustee. When *Hanson* was decided, Professors von Mehren and Trautman had not yet developed their influential distinction, since explicitly embraced by the Court, between general and specific jurisdiction.[207] By significantly constraining the exercise of general jurisdiction, the Court has limited the power of state courts to intervene—and apply their own law—when the forum state has no connection with or interest in the underlying dispute.[208] Similarly, *Shaffer v. Heitner*'s near-abolition of quasi in rem jurisdiction disables states from using the fictional presence of intangible property within a state as the basis for adjudicating claims unrelated to the property or the state.[209]

At the same time, the Court has sustained a state's exercise of specific jurisdiction over out-of-state defendants, like trustees in trust-friendly states, whose efforts to serve a state's market cause effects within the state. In *Calder v. Jones*, the Court held in a libel action brought by a California resident that the California courts had jurisdiction over a National Enquirer reporter and editor, both of whom were Florida residents.[210] Although little or no writing or editing was done in California, the Court held that jurisdiction in California was proper "based on the 'effects' of their Florida conduct in California" because California was the "focal point both of the story and of the harm suffered."[211] The Court went even further in *Keeton v. Hustler Magazine, Inc.*, decided the same day as *Calder*, holding that New Hampshire had jurisdiction over a libel action against *Hustler Magazine* brought by a non-resident of New Hampshire, based only on the harm caused by the sale of copies of the magazine in New Hampshire.[212]

207. *See generally* Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136-63 (1966) (distinguishing between general and specific jurisdiction). The Court, writing through Justice Ginsburg, explicitly relied on the distinction in *Daimler AG v. Bauman* and *Goodyear Dunlop Tires Operations, S.A. v. Brown*. *See* 571 U.S. 117, 127-28 (2014); 564 U.S. 915, 919 (2011).

208. *See* Sterk, *supra* note 204, at 1183-86.

209. Sterk, *supra* note 204, at 1182-84; 433 U.S. 186, 216-17 (1977).

210. 465 U.S. 783, 785 (1984).

211. *Id.* at 789.

212. 465 U.S. 770, 773-74 (1984).

Calder and *Keeton* were tort cases, but the following year, in *Burger King Corp. v. Rudzewicz*, the Court sustained Florida's exercise of jurisdiction over two Michigan franchisees based largely on the fact that the franchisees had contracted with a Florida franchisor.[213] Although the dispute was over a Michigan franchise, Justice Brennan emphasized that it would not be unfair to subject a defendant who "has created 'continuing obligations' between himself and residents of the forum" to the burden of litigation in that forum.[214] Citing *Calder*, *Keeton*, and *McGee*, he noted that the Court had "consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction" when a commercial actor has purposely directed his activities towards residents of the state.[215] That analysis applies directly to a trust company that had entered into a contract with a resident of the forum state. Indeed, the case for jurisdiction may be even stronger when the party to the dispute was not a party to the trust agreement, but rather a third party who never consented to the settlor's arrangement with an out-of-state trustee.

J. McIntyre Machinery, Ltd. v. Nicastro is not inconsistent with this analysis.[216] Although a splintered Court held that New Jersey did not have jurisdiction over a British manufacturer whose machine caused injury within the state, no opinion garnered the support of a majority of the Court; the concurring justices relied principally on the sparse record in the case, which established only that a single machine had reached a New Jersey customer.[217]

Most recently, in *Ford Motor Co. v. Montana Eighth Judicial District Court*, the Court reaffirmed the principle that specific jurisdiction over a defendant is not foreclosed merely because the defendant has had no physical presence in the state, as long as the suit at least related to the defendant's contacts with the state.[218] While making no mention of *Nicastro*, the Court cited with approval the conclusion reached in *World-Wide Volkswagen v. Woodson* that a car's manufacturer and importer would be subject to jurisdiction in Oklahoma if a car caught fire there—

213. *See* 471 U.S. 462, 487 (1985).

214. *Id.* at 476.

215. *Id.*

216. 564 U.S. 873 (2011).

217. *Id.* at 888-89 (Breyer, J., concurring). *See generally* Adam N. Steinman, *Access to Justice, Rationality, and Personal Jurisdiction*, 71 VAND. L. REV. 1401, 1438-41 (2018) (concluding that the concurrence is consistent with an understanding that would not allow manufacturers who profit from sales in the forum state to escape jurisdiction in those states when their sales have adverse effects in the forum).

218. 141 S. Ct. 1017, 1024-26 (2021).

even if the manufacturer and importer did no business in the state.[219] Because the manufacturer and importer had availed themselves of the Oklahoma automobile market, and could take steps to eliminate exposure to Oklahoma litigation by "severing its connection with the State," there would be no unfairness in subjecting those defendants to jurisdiction.[220] A trustee who voluntarily assumes a continuing fiduciary obligation to an out-of-state settlor is in a similar position.

The current doctrinal framework would not alter the result the Court reached in *Hanson*. Because neither the trustee nor the settlor had any connection with Florida at the time the trust was established, there would be no basis for specific jurisdiction in Florida. The settlor's unilateral action in moving to Florida served as an insufficient basis for subjecting the Delaware trustee to jurisdiction. But those facts are a far cry from the situation facing a trustee who has set up shop in a jurisdiction seeking to attract trust business from domiciliaries of other states. Under the framework the Court has developed, those trustees are directly serving the market in the domiciliary state and would be subject to personal jurisdiction in that state.

D. *Jurisdiction-Localizing Statutes*

Legislatures in trust haven states recognize that courts in other states might refuse to apply asset protection provisions to trusts created by their domiciliaries. To address the problem, a few trust havens have enacted statutes purporting to confer on local courts exclusive jurisdiction over transfers to trusts governed by local law. For instance, the Utah statute provides that "[a] court of this state has exclusive jurisdiction over an action or claim for relief that is based on a transfer of property to a trust that is the subject of this section."[221] These attempts to localize jurisdiction do not bind other states. More than a century ago in *Tennessee Coal, Iron & Railroad Co. v. George*, the United States Supreme Court held that the Georgia courts were not bound by an Alabama statute attempting to localize jurisdiction over suits for Alabama workplace injuries in the Alabama courts.[222] In upholding a Georgia judgment in favor of an injured

219. *Id.* at 1027.

220. *Id.*

221. UTAH CODE ANN. § 25-6-502(11)(b) (2019); *see* ALASKA STAT. § 13.36.035(f) (West 2022).

222. *See* 233 U.S. 354, 358-61 (1914). An Alabama statute made the employer liable for injuries caused by "defect[s] in the condition of the ways, works, machinery or plant connected with or used in the business of the master or employer." *Id.* at 358 (citing ALA. CODE § 3910(1)

employee, the Court wrote that "jurisdiction is to be determined by the law of the court's creation and cannot be defeated by the extraterritorial operation of a statute of another State."[223]

More recently, in *Toni 1 Trust v. Wacker*, the Alaska Supreme Court invoked *Tennessee Coal* to hold that Alaska's jurisdiction-localizing trust statute could not constitutionally divest other state and federal courts of jurisdiction to hear claims that a settlor fraudulently transferred assets to an Alaska trust.[224] *Toni 1* was a declaratory judgment action brought by the trustee of an Alaska trust seeking to establish that judgments against the trust—one from Montana state court and the other from federal bankruptcy court—were void because the Alaska trust statute conferred exclusive subject matter jurisdiction on the Alaska courts.[225] In affirming dismissal of the Alaska trustee's complaint, the court observed that the case for enforcing Alaska's localizing statute was even weaker than in *Tennessee Coal* because the Alaska statute would deprive the Montana courts of subject matter jurisdiction over claims derived from Montana law; by contrast, the Alabama statute in *Tennessee Coal* would only have precluded jurisdiction in Georgia over claims derived from Alabama law.[226] Taken together, the import of *Tennessee Coal* and *Toni 1* is clear: trust-friendly states may not deprive out-of-state courts of subject matter jurisdiction over claims related to trust property.

E. *Enforcement Issues*

The due process clause should not bar the courts of a settlor's domicile from adjudicating issues relating to the validity of provisions in settlor's trust, but the due process clause is not self-enforcing. If a trustee fails to honor a judgment of the domicile's courts, creditors will generally need to enforce the judgment against the trustee in the trustee's home state. The United States Constitution's Full Faith and Credit Clause generally requires the courts of each state to enforce the judgments of all

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(1907)). A second statute provided that all actions under the first statute "must be brought in a court of competent jurisdiction within the State of Alabama and not elsewhere." *Id.* (citing ALA. CODE § 6115 (1907)).

223. *Id.* at 360. The Court cited an earlier case, *Atchison, Topeka & Santa Fe Ry. Co. v. Sowers*, 213 U.S. 55, 70-71 (1909), which held that the then-territory of New Mexico could not localize jurisdiction of certain tort suits. *Id.*

224. 413 P.3d 1199, 1206-07 (Alaska 2018).

225. *Id.* at 1201-02.

226. *Id.* at 1204. For additional discussion of the *Toni 1* case, see Reid K. Weisbord, *Trust Law's Public Policy Doctrine: Major Policy Fault Lines, Aggressive Home Rule Legislation, and Implications for Conflicts Reform*, 97 TUL. L. REV. 1147, 1160 (2023).

other states, so long as those judgments are consistent with due process.[227] Short of a jurisdictional challenge to the initial judgment, the trustee would have only one remotely plausible defense to enforcement: whether trust assets are subject to execution is only a matter of remedy, and states are free to decide what mechanisms are available to enforce sister-state judgments.[228] Thus, courts have occasionally held that the forum's homestead or other property exemptions apply when a creditor seeks to enforce an out-of-state judgment.[229]

Allowing a trustee to avoid enforcement of a judgment by invoking its home state's rule insulating trust assets from creditor claims would be entirely inconsistent with the Supreme Court's full faith and credit jurisprudence. In 2021, South Dakota enacted a statute purporting to preclude enforcement of sister-state judgments "against any trust governed by the laws of this state" unless a South Dakota court "first determines that the time, manner, and mechanism for enforcing the judgment is consistent with the restrictions and limitations imposed under the terms of the trust and by the laws of this state."[230] As drafted, the statute appears to give South Dakota courts license to refuse enforcement of any judgment that is inconsistent with South Dakota law and policy. Read that way, the statute violates the full faith and credit clause. The United States Supreme Court has concluded, on multiple occasions, that

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227. Article IV, Section 1 of the U.S. Constitution dictates that, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. CONST. art. 4, § 1. As the Court has put it, "[a] final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land." Baker v. General Motors Corp., 522 U.S. 222, 233 (1998).

228. The Court has said that "[e]nforcement measures do not travel with the sister state judgment as preclusive effects do; such measures remain subject to the evenhanded control of forum law." *Baker*, 522 U.S. at 235.

229. *See, e.g.*, Nagel v. Westen, 865 N.W.2d 325, 341 (Minn. Ct. App. 2015) (applying Minnesota exemption law because Minnesota is the forum and rejecting the Texas judgment debtor's argument that Texas law, which exempted all annuities from garnishment, should apply); Bergman v. Bergman, 888 S.W.2d 580, 584 (Tex. App. 1994) (applying forum law to exempt retirement benefits from attachment to satisfy a Connecticut divorce judgment). In bankruptcy, federal law permits a debtor to use the exemptions afforded by the state of the debtor's domicile, but only if the debtor has lived in the state for at least 730 days immediately preceding the filing of the bankruptcy petition. 11 U.S.C. § 522(b)(3)(A). In that way, the bankruptcy code limits the ability of a debtor to manipulate exemptions. *See generally* Laura B. Bartell, *The Peripatetic Debtor: Choice of Law and Choice of Exemptions*, 22 EMORY BANKR. DEVS. J. 401 (2006) (outlining the developments of the exemption provision in federal bankruptcy law and their relative limitations).

230. S.D. CODIFIED LAWS § 55-3-49 (2021). For discussion of the statute, see Weisbord, *supra* note 226.

a forum cannot invoke its public policy as a basis for refusing to enforce a sister-state judgment.[231] Similarly, although a state generally controls the jurisdiction of its courts, a state may not evade its full faith and credit obligation by depriving its courts of jurisdiction to enforce sister-state judgments.[232] Although a state may control the means by which it enforces those judgments, it may not insulate judgment debtors from liability. If a state could declare trustees exempt from foreign judgments, little would stop the state from exempting its residents from enforcement of judgments more generally—the very evil that led to inclusion of the full faith and credit clause.[233]

The issue is more complicated when the settlor has selected an offshore or other foreign trustee not bound by the United States Constitution. If the trust holds real property within the United States, a judgment of a U.S. court would be enforceable in the state where the real property is located.[234] For that reason, settlors of offshore trusts are often advised not to fund the trusts with real property.[235] When the trust holds intangible assets, reaching them is more difficult if the trustee chooses to ignore an order by a court of the settlor's domicile. A creditor may have trouble identifying the assets held in the trust's portfolio, especially if the trust is structured with layers of obfuscation. Promoters of Cook Islands trusts frequently recommend that the trust settlor first transfer assets to an offshore LLC, and then transfer the LLC membership interests to the Cook Islands trustee.[236] Moreover, there would be no easy mechanism for compelling a recalcitrant trustee to reveal the contents of the trust portfolio.

As a result, when an offshore trustee refuses to abide by a judgment rendered in the state of the settlor's domicile, enforcement efforts

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231. *See Baker*, 522 U.S. at 233; Estin v. Estin, 334 U.S. 541, 546-48 (1948). *See generally* Fauntleroy v. Lum, 210 U.S. 230 (1908) (requiring Mississippi to enforce a Missouri judgment enforcing a futures contract, despite a Mississippi rule treating futures contracts as unlawful gambling).

232. *See, e.g., Fauntleroy*, 210 U.S. at 237-38.

233. *See generally* Charles M. Yablon, *Madison's Full Faith and Credit Clause: A Historical Analysis*, 33 CARDOZO L. REV. 125, 147-149 (2011) (noting that enforcement and collection of interstate debts was one of Madison's primary concerns).

234. *See* Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035, 1093-98 (2000).

235. *See, e.g.*, Jon Alper, *How an Offshore Trust Works*, ALPER L., https://www.alperlaw.com/florida-asset-protection/offshore-trust/ [https://perma.cc/LL88-EQY3] (last updated Jan. 25, 2023) (noting that offshore trusts are not as effective in protecting real estate located in the U.S.).

236. *Id.*

typically focus on imposing sanctions against the trust settlor. Bankruptcy courts may deny discharges to settlors who appear to have resources in offshore trusts.[237] Courts can hold settlors in contempt for failing to repatriate assets held in offshore trusts.[238] These mechanisms are imperfect, but even they would be unavailable if courts were willing to hold that settlors are free to choose the law applicable to their trusts, either directly or by choosing the situs of the trust.

V. CONCLUSION

The Second Conflicts Restatement was a product of its time. Its trust law provisions were drafted for a world in which states agreed on most aspects of doctrine; the primary differences reflected the varying pace at which states had abandoned rules that no longer served significant purposes, such as mortmain statutes and rules that invalidated revocable trusts as testamentary. In that environment, a broad party autonomy regime might have made sense—especially because most doctrinal differences were over rules designed to protect one of the parties to the trust agreement.

Over the last several decades, however, significant policy differences have emerged within trust law. These differences implicate not merely the parties to trust agreements, but also third parties with claims to trust assets. In this context, party autonomy is an inappropriate touchstone for choice-of-law doctrine. Settlors ought not to be able, with the stroke of a pen, to avoid obligations imposed on them by the law of their home state. Choice-of-law doctrine, together with judicial jurisdiction doctrine, needs reframing to emphasize the interests of the home state and the third parties its law endeavors to protect.

237. *See, e.g.*, In re Portnoy, 201 B.R. 685, 703 (Bankr. S.D.N.Y. 1996).
238. *See, e.g.*, F.T.C. v. Affordable Media, 179 F.3d 1228, 1243 (9th Cir. 1999).