THE TEXAS DEPORTATION TRUST: PROTECTING THE EQUITY OF IMMIGRANTS WORKING TOWARDS THE AMERICAN DREAM

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I. INTRODUCTION

The life of an immigrant is associated with a variety of risks stemming from the constant threat of deportation.[1] Immigrants who may have entered this country through means other than the typical admission process, or who have outlasted the conditions by which they were allowed to enter the United States, carry the burden of knowing their livelihood may be taken away at a

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1. *See* Sara Wise & Geoge Petras, *The process of deportation*, USA TODAY (June 25, 2018), https://www.usatoday.com/pages/interactives/graphics/deportation-explainer/ [perma.cc/6B49-YE6N].

moment's notice.[2] While the government cannot simply take an immigrant's property away in the case of deportation, removing an immigrant from the land where they have established their life bears the same result in many instances.[3]

When immigrants have been deported, it becomes extremely difficult—sometimes nearly impossible—for them to manage their assets left behind.[4] As creditor claims from debts and liens begin to pile up, their property that remains state-side may be seized while they watch helplessly from afar.[5] Immigrants who came to the United States to build a life for themselves and their future generations are suddenly back in the same place—literally and metaphorically—that they were before they entered this country.[6]

The field of immigration law has sought to remedy this issue by introducing the idea of the deportation trust.[7] Essentially, this is a type of self-settled spendthrift trust in which a person can transfer assets and name themself the beneficiary.[8] In states that allow for self-settled trusts to receive spendthrift protection, any assets that remain in the trust are well protected against creditor claims.[9] However, Texas's laws regarding self-settled trusts virtually prohibit these trusts from receiving spendthrift protection, rendering the deportation trust powerless in a state with a vast documented and undocumented immigrant population.[10]

This Comment will begin by discussing immigration in the United States.[11] This discussion will start by providing a brief history of American immigration and how the lives and perception of immigrants in this country have changed in the modern world.[12] The discussion will continue to the process of deportation and reentry, including an explanation of the differences between certain immigrant categories and how the rules apply to them respectively.[13] The discussion will finish by looking at how deportation affects the property interests of a person when they are removed from this country.[14]

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2. *See id.*
3. *See* U.S. CONST. amends. V, XIV.
4. Reema Khrais, *What happens to your house when you get deported?*, MARKETPLACE (Aug. 10, 2017), https://www.marketplace.org/2017/08/10/little-noticed-effect-deportations-foreclosures/ [perma.cc/4SQW-BHKD].
5. *See id.*
6. *See id.*
7. *See Deportation Trust: Protect Your Family With A Deportation Trust*, NOVO LEGAL, https://www.novo-legal.com/deportation-trusts/ (last visited Oct. 5, 2023) [perma.cc/AD9A-YXYK].
8. *Id.*
9. *Id.*
10. *See* TEX. PROP. CODE ANN. § 112.035(d).
11. *See* discussion *infra* Part II.
12. *See* discussion *infra* Sections II.A–B.
13. *See* discussion *infra* Sections II.B–C.
14. *See* discussion *infra* Section II.D.

Next, this Comment will address the self-settled spendthrift trust.[15] This section will discuss self-settled spendthrift trusts and why they are considered the best trust for asset protection beginning with a brief history of their inception and how they have developed in the modern world.[16] This discussion will then lead to an analysis of all the states that currently allow spendthrift provisions for self-settled trusts, comparing the language of some of these statutes and how they affect the creation and use of such trusts in their respective states.[17] This section will finish with an introduction to the deportation trust, how it works, and why it relies on spendthrift protection.[18]

Finally, this Comment will focus on why deportation trusts are needed and the possible solutions to facilitate their creation and use in Texas.[19] The first solution is to repeal the relevant statute in the Texas Property Code that prohibits the use of spendthrift provisions for self-settled trusts.[20] This solution will also involve the introduction of new self-settled spendthrift trust language in the Texas Property Code to mirror the statutory structure of other states.[21] The second solution is to amend the spendthrift trust statute in the Texas Property Code and modify the language to allow for deportation trusts to be used in a limited capacity.[22] This Comment will also analyze the negative and positive outcomes of both solutions with an emphasis on viability in terms of the likelihood of implementation.[23]

II. IMMIGRANTS AND DEPORTATION

A. A Brief History of American Immigration

The history of the United States could not be told without discussing immigration because this country was founded by immigrants from Europe, but primarily from Britain.[24] During the colonial days, people who came to the British colonies in America either came voluntarily or involuntarily.[25] Those who migrated to the colonies voluntarily were enticed by the availability of cheap land and high-paying work, while those who came involuntarily were forced to emigrate from Britain as an alternative

15. *See* discussion *infra* Part III.
16. *See* discussion *infra* Sections III.A–C.1.
17. *See* discussion *infra* Sections III.C.1–3.
18. *See* discussion *infra* Section III.E.
19. *See* discussion *infra* Part IV.
20. *See* discussion *infra* Section IV.A.
21. *See id.*
22. *See* discussion *infra* Section IV.B.
23. *See* discussion *infra* Sections IV.A–B.
24. *See* Andrew M. Baxter & Alex Nowrasteh, *A Brief History of U.S. Immigration Policy from the Colonial Period to the Present Day*, CATO INST. 1, 2–3 (Aug. 3, 2021), https://www.cato.org/sites/cato.org/files/2021-07/policy-analysis-919-revised.pdf [perma.cc/XKF6-R46S].
25. *Id.*

punishment to death by hanging for various crimes.[26] Much of this early immigration system was implemented by Britain to control the naturalization of British citizens and colonists—the crown's refusal to allow colonists to migrate and settle in newly-acquired French land in the Americas was a contributing factor for the creation of the Declaration of Independence.[27]

After the conclusion of the American Revolution, citizenship was primarily based on three different principals: *jus soli* (the right to citizenship by being born on American soil), *jus sanguinis* (the right to citizenship conferred to the children of citizens), and a pledged allegiance of foreigners to the United States.[28] Following its ratification, the United States Constitution enumerated a number of powers to the three branches of government, with Congress being given the power to set a uniform rule of naturalization.[29] Using this power, Congress passed legislation such as the Naturalization Acts of 1790 and 1795, which provided a path to citizenship for free white persons who could demonstrate good moral character and had resided in the United States for certain periods of time.[30] Congress also used other methods like the regulation and monitoring of ships as a way of tempering immigration traffic and tracking immigration flow.[31] However, nothing in the Constitution specifically conferred the power to control immigration to any government entity, so this power was left to the states to regulate during this time period.[32]

In the 1800s, events like the Irish Potato Famine and the changing political climates in Europe increased the flow of immigration to the United States.[33] With the demand for industrial workers spiking during the Industrial Revolution and Civil War, legislation such as the Homestead Act and the Contract Labor Act were passed to encourage citizens and immigrants alike to settle on open land and work for American companies.[34] The spiking demand for industrial workers was also a motivating factor in securing a trade treaty with China in 1868 that came with assurances from the United States that Chinese citizens would be allowed to immigrate there; although, many of these assurances were backtracked by legislation such as the Page Act and the Chinese Exclusion Act due to growing anti-Asian sentiments.[35] It was around this time when cases such as the *Head Money Cases* and *Ping v.*

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26. *Id.*
27. *Id.*
28. *Id.* at 3–4.
29. *See* U.S. CONST. art. I, § 8, cl. 4.
30. *See* Naturalization Act of 1790, Pub. L. No. 1-3, 1 Stat. 103 (repealed 1795); Naturalization Act of 1795, Pub. L. No. 2-20, 1 Stat. 414 (repealed 1802).
31. Baxter & Nowrasteh, *supra* note 24, at 5.
32. *Id.*
33. *Id.*
34. *See id.*; Homestead Act of 1862, Pub. L. No. 37-64, 12 Stat. 392 (repealed 1976); An Act to Encourage Immigration, Pub. L. No. 38-246, 13 Stat. 385 (repealed 1868).
35. Baxter & Nowrasteh, *supra* note 24, at 7–8; *see* Page Act of 1875, Pub. L. No. 43-141, 18 Stat. 477 (repealed 1974); Chinese Exclusion Act of 1882, Pub. L. No. 47-126, 22 Stat. 58 (repealed 1943).

United States began to determine how immigration should be regulated, with the Supreme Court in the latter case establishing that the Constitution gave Congress the implied plenary power to regulate immigration in order to preserve national sovereignty.[36] With this power, Congress passed the Immigration Act of 1891 and established the Office of the Superintendent of Immigration, which increased the scrutiny and enforcement of immigration policies and deprived many excludable immigrants from due process protections.[37] These actions disproportionality affected Jews, Asians, and Africans and even led to the introduction of mandatory literacy tests for incoming immigrants.[38]

Anti-immigration sentiments only grew in the 1900s.[39] The desire for more restrictive enforcement of immigration policies and an emphasis on assimilation of present immigrants into American society were bolstered by a combination of increased xenophobia, the racially-biased pseudoscience of eugenics, and other faulty methods of testing intelligence.[40] In 1921, Congress passed the Emergency Quota Act, which established the first national origins quota for the number of allowable admissions of immigrants, a precursor to how immigration regulation currently works in the United States.[41] Later legislation helped shape many key components of the current immigration system—such as visas, consulates, and border patrols—and established per country quotas for many European, African, and Asian countries; however, there were no quotas for countries such as Mexico and Canada, opening the door for an explosion of immigrant traffic in North America.[42] With an influx of Mexican immigrants, they became the prime candidates during the Great Depression for mass deportation by the newly established Immigration and Naturalization Services (INS) in the hopes of creating jobs for U.S. citizens; this was done despite many of the millions of deportees being citizens themselves.[43]

The years leading up to, during, and after World War II were some of the lowest points for American immigration, as the United States government turned down hundreds of thousands of refugees seeking asylum, many of whom were Jews being persecuted by Nazi Germany.[44] While a smaller amount of refugees were given asylum in the United States, there was also the forced detention of thousands of Asian immigrants in response to the attack on Pearl Harbor, with these detention camps leaving a black eye on the

36. *See* Edye v. Robertson, 112 U.S. 580, 580 (1884); Ping v. U.S., 130 U.S. 581, 606–07 (1889).
37. *See* Immigration Act of 1891, Pub. L. No. 51-551, 26 Stat. 1084 (repealed 1952).
38. Baxter & Nowrasteh, *supra* note 24, at 9.
39. *Id.* at 9–10.
40. *Id.*
41. *See* Emergency Quota Act of 1921, Pub. L. No. 67-5, 42 Stat. 5 (repealed 1965).
42. Baxter & Nowrasteh, *supra* note 24, at 11.
43. *Id.* at 12.
44. *Id.* at 12–13.

country following the war.[45] As a result, Congress passed post-war legislation such as the Displaced Persons Act and the Refugee Relief Act to facilitate the resettlement of refugees and to rehabilitate the country's image in the eyes of other established nations.[46] Congress also initiated the Bracero Program, which paved the way for the admission of tens of thousands of Mexican laborers to work for American farms that suffered labor shortages during the war.[47] However, the program was abused due to lack of enforcement by the Department of Labor, which led to many Mexican immigrants being given considerably low wages and dealing with poor working conditions.[48] When the program unceremoniously ended in 1964 after having seen various changes and attempted terminations for years, Congress reduced guest-worker visa quotas and illegal immigration traffic began to rise in response.[49]

B. Modern Developments in American Immigration

The foundation for the current system of immigration in the United States began when Congress passed the Immigration and Nationality Act (INA) of 1965.[50] The new system replaced national quotas and created preference categories for immigrants seeking employment visas or visas for family reunification—although the idea of preferences was not necessarily new.[51] Additional legislation increased the quotas for preference categories based on economic needs, but illegal immigration still continued to rise in the 1980s and 1990s.[52] Congress responded by passing legislation such as the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which increased deportation and barred present illegal immigrants from legally reentering the country.[53] Other legislation took away benefits such as welfare for illegal immigrants to disincentivize illegal entries.[54]

During President George W. Bush's administration, Congress passed the USA Patriot Act and the Homeland Security Act in response to the 9/11 attacks; the former expanded the deportation powers of the Attorney General (AG) by allowing the AG to detain immigrants—primarily those accused of

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45. *Id.*

46. *See* Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009 (codified as amended at 50 U.S.C. §§ 1951–65); Refugee Relief Act of 1953, Pub. L. No. 83-203, 67 Stat. 400 (codified as amended at 8 U.S.C. §§ 1101, 1104, 1153, 1182, 1252–53, 1351).

47. Baxter & Nowrasteh, *supra* note 24, at 13–14.

48. *Id.*

49. *Id.* at 14–15.

50. *See* Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended at 8 U.S.C. §§ 1101, 1151–57, 1181–82, 1201, 1254–55, 1259, 1322, 1351).

51. Baxter & Nowrasteh, *supra* note 24, at 15–16.

52. *Id.* at 16–17.

53. *See* Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009–546 (1996) (codified as amended at 8 U.S.C. §§ 1101, 1221, 1324, 1363a).

54. Baxter & Nowrasteh, *supra* note 24, at 18.

terrorism—without due process, and the latter allocated the enforcement of immigration policies to three new federal agencies: United States Customs and Border Protection (CBP), United States Immigration and Customs Enforcement (ICE), and United States Citizenship and Immigration Services (USCIS).[55] Other legislation during this period further increased the government's ability to detain and remove immigrants, but illegal entries continued to grow.[56] During President Barack Obama's administration, 1,242,486 illegal immigrants were deported, more than any other administration.[57] However, President Obama also introduced the Deferred Action for Childhood Arrivals program (DACA), which allowed those who illegally entered the country as children to work and have limited protection from deportation under certain conditions.[58] The Supreme Court later blocked similar executive actions and even restricted the reach of the DACA program.[59]

When President Donald Trump took office, he kept good on many campaign promises to crack down on immigration by issuing various executive orders and administrative directives, including the temporary cancellation of DACA.[60] Although such actions had little effect on immigration flow, President Trump drastically decreased the admission of immigrants on work visas, as the number of work visas issued in the latter half of 2020 decreased by over 90% compared to the same period in 2016 (although the COVID-19 pandemic undoubtedly played a role).[61] The issuance of nonimmigrant visas and the admission of refugees also drastically decreased during the Trump administration, demonstrating how much power the Executive Branch has in enforcing immigration policies.[62]

Today, the United States has the largest immigrant population in the world, with an estimated 50.6 million members of the population being foreign-born in 2023.[63] This equates to approximately 15.3% of the United States' population being foreign-born but less than half are naturalized citizens with the full protections and benefits of citizenship as of 2020.[64] Of those foreign-born noncitizens who are legally present in the United States,

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55. *See* USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended scattered sections of U.S.C. titles 8, 12, 15, 18, 20, 31, 42, 47, 49, 50); Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in 6 U.S.C. ch. 1).

56. Baxter & Nowrasteh, *supra* note 24, at 19.

57. *Id.* at 20.

58. *Id.*

59. *Id.* at 21.

60. *Id.* at 21–22.

61. *Id.*

62. *Id.* at 24.

63. *Immigration by Country 2023*, WORLD POPULATION REV., https://worldpopulationreview.com/country-rankings/immigration-by-country (last visited Sept. 10, 2023) [perma.cc/7TST-SWU3].

64. *Id.*; Abby Budiman, *Key findings about U.S. immigrants*, PEW RSCH. CTR. (Aug. 20, 2020), https://www.pewresearch.org/fact-tank/2020/08/20/key-findings-about-u-s-immigrants/ [perma.cc/82AU-CPCK].

the majority are either considered a lawful permanent resident (LPR), a conditional permanent resident, or a refugee/asylee.[65] Those with lawful or conditional permanent residency are allowed to work and are given the opportunity to apply for full citizenship after several years of residency and completing certain requirements, but they are subject to the possibility of deportation for engaging in certain criminal activity.[66] Refugees and asylees are foreign-born persons who have come to the United States due to fear of persecution in their home country, and after a year of being lawfully present, in addition to meeting certain requirements, they can apply for LPR status.[67] There are also foreign-born persons who are granted temporary admission and are issued non-immigrant visas, either as a student, vacationer, temporary worker, or another miscellaneous category, but these people have limited rights, are only allowed to remain in the country for a specified amount of time, and must follow certain conditions depending on the visa issued.[68]

Undocumented immigrants are those who are present in the United States but entered illegally or were never properly admitted.[69] The majority of this population—as well as the population of people who have overstayed or violated the conditions of their visas—are considered ineligible to adjust their status to that of an LPR if they have been unlawfully present in the United States for at least a year, meaning they are perpetually stuck in immigration limbo.[70] Considering that the term "immigrant" can encompass those persons who have obtained the rights and protections of a United States citizen—and that the term "undocumented immigrant" is too specific—this Comment will use the term "noncitizen" to identify all people who are foreign-born and are subject to the possibility of deportation.[71]

C. What Happens When a Noncitizen Gets Deported

The INA, as is currently amended, provides the criteria for what makes a noncitizen deportable while also giving considerable discretion to the AG.[72] It should come as no surprise that those noncitizens who are unlawfully present in the United States are automatically deportable.[73] Noncitizens granted lawful or conditional permanent residency are generally only

65. *Overview of Types of Immigration Status*, STATE JUST. INST. 1, 1 (Apr. 1, 2013), https://www.sji.gov/wp/wp-content/uploads/Immigration-Status-4-1-13.pdf [perma.cc/HJ4N-M9SK].

66. *Id.*

67. *Id.* at 2.

68. *Id.* at 3.

69. *See Defining Undocumented*, IMMIGRANTS RISING, https://immigrantsrising.org/wp-content/uploads/Immigrants-Rising_Defining-Undocumented.pdf (last visited Feb. 2, 2023) [perma.cc/SC2M-ADFL].

70. *See* Immigration and Nationality Act of 1952 §§ 212(a)(9)(B)(i), 245(a), 8 U.S.C. §§ 1182(a)(9)(B)(i), 1255(a).

71. Author's original thought.

72. Immigration and Nationality Act of 1952 § 212(a), 8 U.S.C. § 1227(a).

73. *Id.* §1227(a)(1)(B)

considered deportable if they are convicted for any of the listed criminal activities or if their status is terminated.[74] Those who are here on temporary nonimmigrant visas are deportable if they violate the terms of their visa.[75]

ICE is the federal agency that handles the deportation of foreign nationals, a process that begins with filing a Notice to Appear (NTA) alleging the basis for removal in an immigration court that will adjudicate the matter.[76] Given that there is a high amount of immigrant traffic between the United States and Mexico, the time between when a NTA is filed and when the removal actually takes place is usually about a week or two (in some cases a few months) for Mexican nationals, as well as for some nationals from other Latin and Central American countries.[77] However, noncitizens with a removal order could be held indefinitely by ICE depending on the country they are from and that country's willingness to accept them back.[78]

Once a noncitizen is removed, the process of readmission to the United States is handled by the USCIS.[79] There is usually an initial reentry ban that can last from five to twenty years, depending on the circumstances of the deportation itself.[80] For the purposes of this Comment, only two of the categories listed by the USCIS exist for noncitizens who have gained entry into the United States: persons being removed for the first time (ten-year reentry ban) and persons being removed after the first time (twenty-year reentry ban).[81] To gain reentry, a removed noncitizen must file an I-212 form, which is an application for permission to reenter.[82] The time it takes for these applications to process is usually about sixty to ninety days.[83] However, the USCIS requires that a noncitizen apply for a visa in conjunction with

74. *Id.* §1227(a)(1)(D).

75. *Id.* §1227(a)(1)(C).

76. *See Removal*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/remove/removal (Aug. 14, 2023) [perma.cc/R8GU-WTG7].

77. *How long will it take for a detained person to be deported?*, ILL. LEGAL AID ONLINE, https://www.illinoislegalaid.org/legal-information/how-long-will-it-take-detained-person-be-deported#:~:text=Immigrants%20from%20some%20countries%2C%20like,deport%20persons%20from%20some%20countries (May 15, 2023) [perma.cc/4GQH-NEBM].

78. *Id.*

79. *Application for Permission to Reapply for Admission Into the United States After Deportation or Removal*, U.S. CITIZENSHIP & IMMIGR. SERVS. 1, 1 (Mar. 21, 2022), https://www.uscis.gov/sites/default/files/document/forms/i-212.pdf [perma.cc/6H7C-DS5M].

80. Immigration and Nationality Act of 1952 § 212(a)(9)(A), 8 U.S.C. § 1227(a)(9)(A).

81. *See id.*

82. *Application for Permission to Reapply for Admission Into the United States After Deportation or Removal*, *supra* note 79, at 1.

83. *Form I-212: Application for Permission to Reapply for Admission Into the United States After Deportation or Removal,* U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.cbp.gov/travel/international-visitors/admission-forms/form-i-212-application-permission-reapply-admission-united-states-after#:~:text=Processing%20times%20will%20range%20from,day%20the%20biometrics%20are%20completed (Sept. 11, 2023) [perma.cc/R4H5-4XVL].

completing an I-212 form, with visa processing times varying from months to several years depending on the noncitizen's applicable category.[84]

D. What Happens to a Deported Noncitizen's Property

Even in the case of deportation, the United States government is prohibited from simply taking a removed noncitizen's state-side property.[85] However, this does not prevent creditors of a deported noncitizen from seizing certain assets.[86] Property, such as a home that is subject to a mortgage lien, may be foreclosed on for failure to make payments, and since many foreclosure assistance programs are only available to United States citizens, foreclosure is more likely for noncitizens.[87] This leaves removable noncitizens with a handful of undesirable options, such as attempting to sell their home quickly to fetch a higher bargain than that of a foreclosure auction to gain some benefit in the equity they have built.[88]

There is also the danger that a deported noncitizen may be subject to garnishment—a process in which creditors attach debts to other property a debtor owns, such as a bank account or wages.[89] In Texas, wage garnishment is prohibited except for the case of unpaid child support payments and spousal maintenance, but garnishment of bank accounts is fair game.[90] The practice of bank account garnishment is especially concerning in a state like Texas that is creditor friendly and lacks strong bank account protections seen in other states.[91] In examining the garnishment statute of the Texas Civil Practice and Remedies Code, Section 63.001 provides for the availability of a writ of garnishment in the case that:

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84. *Application for Permission to Reapply for Admission Into the United States After Deportation or Removal*, *supra* note 79, at 1; *see Visa Bulletin for October 2022*, U.S. DEP'T STATE BUREAU CONSULAR AFFS. (Oct. 2022), https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2023/visa-bulletin-for-october-2022.html [perma.cc/595P-YCHL].

85. *See* U.S. CONST. amends. V, XIV.

86. *See* Khrais, *supra* note 4.

87. *Protecting Assets & Child Custody in the Face of Deportation*, PROMISING FUTURES 1, 33–34, https://assets.aecf.org/m/resourcedoc/aecf-ProtectingAssetsAndChildCustodyInTheFaceOfDeportation-2009.pdf (last visited Nov. 7, 2022) [perma.cc/94PU-KUTX].

88. Khrais, *supra* note 4.

89. *Debt collection key terms*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/ask-cfpb/what-is-a-garnishment-en-1385/ (last visited Oct. 9, 2023) [perma.cc/JT97-ZL9D].

90. *See* TEX. CONST. art. XVI, § 28.

91. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 61.001; *see also* Kiah Collier & Ren Larson, *Coronavirus put her out of work, then debt collectors froze her savings account*, TEX. TRIB. (Apr. 22, 2020, 1:00 PM), https://www.texastribune.org/2020/04/22/texas-coronavirus-debt-collectors/ [perma.cc/URD6-GXAQ] ("Texans have the second-highest rate of debt in collections in the country and are uniquely vulnerable because the state's consumer protections for bank account garnishments are virtually nonexistent.").

> (1) the defendant is justly indebted to the plaintiff;
> (2) the attachment is not sought for the purpose of injuring or harassing the defendant;
> (3) the plaintiff will probably lose his debt unless the writ of attachment is issued; and
> (4) specific grounds for the writ exist under Section 61.002 [such as if the defendant is not a resident of this state].[92]

Essentially, if creditors seek to make good on any debts against a Texas resident—specifically former residents like in the case of a deported noncitizen—they will most certainly get what they want, either with a person's home, bank-account funds, or both.[93]

While there are ways to manage debts abroad, as well as protection methods to make assets harder to reach, these options are the equivalent of kicking the can down the road.[94] What is needed in these situations is a mechanism for a noncitizen, who the threat of deportation looms over, to take matters into their own hands; noncitizens should be able to take preventative measures to keep creditors from taking advantage of their separation from their property due to removal from the United States.[95]

III. SELF-SETTLED SPENDTHRIFT TRUSTS

In order to introduce the concept of the deportation trust, it is necessary to provide an illustration of its predecessor: the self-settled trust.[96] A self-settled trust can be defined as "a trust created by an individual for his or her own benefit."[97] It is also commonly referred to as a domestic asset protection trust (DAPT), but the extent of its protection is dependent on the rules regarding the spendthrift provisions of the state in which the trust is created.[98]

A. Self-Settled Trusts in General

Essentially, the settlor, or the person creating the trust, wants to protect certain assets from being seized by creditors who wish to attach debts to the settlor's property interests; to achieve this purpose, the settlor creates a trust

92. TEX. CIV. PRAC. & REM. CODE ANN. §§ 61.001–.002.
93. *See id.*
94. *See How Can I Protect My Assets And Finances If I Am Detained?*, LANDERHOLM IMMIGR. (Apr. 22, 2018), https://landerholmimmigration.com/how-can-i-protect-my-assets-and-finances-if-i-am-detained/ [perma.cc/22UJ-YG5S].
95. Author's original thought.
96. *Id.*
97. Kellsie J. Nienhuser, *Developing Trust in the Self-Settled Spendthrift Trust*, 15 WYO. L. REV. 551, 552–55 (2015).
98. *Id.*

with the specified assets in which the settlor makes themself a beneficiary.[99] This allows the settlor to use the trust assets while they remain in the trust, but the extent that the settlor may reap the benefits is dependent on the language of the trust instrument, which itself is subject to state-specific rules regarding the rights of a beneficiary.[100] In accordance with the general rules regarding the creation of trusts, the settlor may not name themself the sole trustee and sole beneficiary; therefore, the trust requires at least one independent trustee to be named in the case that the settlor intends to be the only beneficiary.[101] The alternative would be to name another person a beneficiary, but that may be a problem when the entire purpose of the trust is for the benefits of the assets to remain with the settlor.[102]

Adding other beneficiaries to the equation is also a difficult decision to make considering the alienability of the beneficiary's interest in the trust assets.[103] A self-settled trust alone does nothing to achieve the ultimate goal of providing additional protection to assets from creditor claims, as a provision must be included that prevents a beneficiary's interest in the trust from being tampered with.[104] This is where spendthrift protection comes into play.[105]

B. Spendthrift Protection in General

The key element of a DAPT is the spendthrift protection, which is created by a provision that "allow[s] debtors to insulate themselves from the claims of creditors" by establishing how interests may be transferred to and reached by third parties.[106] The scope of the protection is governed by the specific language of the spendthrift provision in a trust instrument with typical provisions "prevent[ing] a beneficiary from voluntarily assigning his interest in the trust to another" and providing that "[a] creditor generally cannot attach a lien or otherwise access the trust assets."[107]

Essentially, the spendthrift provision creates an irrevocable trust by establishing that once title of the assets has been transferred from the settlor to the trust, whatever interest the beneficiary or beneficiaries retain may not be subsequently transferred.[108] This is why, as mentioned before, it is not ideal to name a beneficiary other than the settlor in some cases because once the interest is created, it is virtually impossible to transfer or modify it without

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99. *See id.*
100. *See id.*
101. *See* UNIF. TR. CODE § 402(a)(5) (UNIF. L. COMM'N 2010).
102. *See id.*
103. Nienhuser, *supra* note 97, at 552–55.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *See id.*

terminating the trust altogether.[109] A virtual impossibility, however, is not an absolute impossibility as the Uniform Trust Code (UTC) and various state laws provide certain unenforceability exceptions.[110]

Section 503 of the UTC provides for a number of specific exceptions to whom a spendthrift provision is unenforceable against:

> (1) a beneficiary's child, spouse, or former spouse who has a judgment or court order against the beneficiary for support or maintenance;
> (2) a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust; and
> (3) a claim of this State or the United States to the extent a statute of this State or federal law so provides.[111]

The UTC also provides that "a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit."[112] While the language concerns spendthrift provisions in general, the listed exceptions are commonly seen in the various states that allow for the creation of self-settled spendthrift trusts: statutory avenues for courts to readily determine in what instances the spendthrift provision may be bypassed in the name of public policy.[113] More than half the states currently enforce the "maximum amount" exception, which means that spendthrift provisions are generally unenforceable for trusts where the settlor is also a beneficiary.[114]

But why is it that the majority of states prohibit the enforceability of spendthrift provisions of self-settled trusts?[115] While the reason may be obvious as to why a trust that prevents creditors from satisfying claims against their debtors poses public policy concerns, important considerations are the modern developments regarding DAPTs in conjunction with the controversies that surrounded them for much of their history—as well as some of the controversies that still exist.[116]

C. Modern Self-Settled Spendthrift Trust Legislation

The Romans—the civilization to first develop trusts—considered the policy concerns of self-settled trusts and subsequently prohibited them (although Roman trust law focused primarily around testamentary transfers).[117] The English, having implemented much Roman trust law into

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109. *See id.*
110. *See* UNIF. TR. CODE § 503 (UNIF. L. COMM'N 2010).
111. *Id.* § 503(b).
112. *Id.* § 505(a)(2).
113. *See id.* § 503(b).
114. *See id.* § 505(a)(2).
115. Author's original thought.
116. *See* discussion *infra* Section III.C.
117. Jay Adkisson, *A Short History of Asset Protection Trust Law*, FORBES (Jan. 26, 2015, 10:45 PM), https://www.forbes.com/sites/jayadkisson/2015/01/26/a-short-history-of-asset-protection-trust-law/?sh=

their own, extended these ideas to *inter vivos* transfers and were the first to be confronted with the misuse of the practice.[118] Additional laws addressed issues regarding transfers to friends, lords, and outright fraudulent transfers to protect assets from creditor claims.[119] Considering the early abuses of trusts while this area of law was relatively primitive, it was public policy concerns that dictated that self-settled trusts should not have protection from creditor claims as a general rule of thumb.[120]

The idea of spendthrift clauses in the United States first came to be in the 1800s despite much fear that allowing the practice "would be to form a privileged class, who could indulge in every speculation, could practice every fraud, and, provided they kept on the safe side of the criminal law, could yet roll in wealth."[121] However, applying these spendthrift provisions to self-settled trusts would still be prohibited until the 1990s when the Cook Islands amended its international trust laws to allow for valid spendthrift provisions in self-settled trusts, giving birth to the foreign asset protection trust.[122] As the business of trust creation and management was taken away from traditional tax and estate-planning attorneys and outsourced to other jurisdictions, the next logical step was for a state to break the mold and bring asset protection trusts to the mainland.[123]

1. The First DAPT State

In 1997, Alaska became the first state to establish a framework for the creation of self-settled spendthrift trusts with the Alaska Trust Act.[124] The main goal in passing the act was simple: to incentivize potential settlors to create Alaskan trusts and bring more business to the state.[125] The language of the statute that allows for self-settled spendthrift trusts reads as follows:

> (a) A person who in writing transfers property in trust may provide that the interest of a beneficiary of the trust, including a beneficiary who is the settlor of the trust, may not be either voluntarily or involuntarily transferred before payment or delivery of the interest to the beneficiary by the trustee. Payment or delivery of the interest to the beneficiary does not include a beneficiary's use or occupancy of real property or tangible personal property owned by the trust if the use or occupancy is in accordance with the trustee's discretionary authority under the trust instrument . . . .

680b882e3fb4 [perma.cc/3L8K-8YVP].

118. *Id.*

119. *Id.*

120. *Id.*

121. JOHN CHIPMAN GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY 174 (1883).

122. Adkisson, *supra* note 117.

123. *Id.*

124. *See* ALASKA STAT. § 34.40.110 (2013).

125. *See* Jeremy M. Veit, *Self-Settled Spendthrift Trusts and the Alaska Trust Act: Has Alaska Moved Offshore*, 16 ALASKA L. REV. 269, 281 (1999).

> (b) If a trust contains a transfer restriction allowed under (a) of this section, the transfer restriction prevents a creditor existing when the trust is created or a person who subsequently becomes a creditor from satisfying a claim out of the beneficiary's interest in the trust, unless the creditor is a creditor of the settlor and
>
> > (1) the creditor establishes by clear and convincing evidence that the settlor's transfer of property in trust was made with the intent to defraud that creditor, and a cause of action or claim for relief with respect to the fraudulent transfer complies with the requirements of (d) of this section; however, a settlor's expressed intention to protect trust assets from a beneficiary's potential future creditors is not evidence of an intent to defraud . . . .[126]

Subsection (a) contains the principal language that allows for the spendthrift provision, subject to the various restrictions that follow.[127] A settlor may transfer title to assets in the trust while holding a beneficiary interest that, when exercised, would then make the assets susceptible to creditor claims.[128] However, the statute does not include "a beneficiary's use or occupancy of real property or tangible personal property owned by the trust" allowed at the discretion of the trustee, meaning a person can transfer title of their home to the trust while still being able to use and live in the home.[129]

Reading the exceptions to enforceability in conjunction with subsection (d) of the statute shows that settlors who seek to hide assets from their current creditors may be liable for fraud, subject to a creditor's ability to establish with clear and convincing evidence that the settlor's intent was to defraud the creditor.[130] The provision specifically states that this cause of action is only available to those who became a creditor before the transfer of the assets to the trust.[131] Similar to Section 503 of the UTC, there also exists an exception in the case that "the settlor is in default [at the time of the transfer] by 30 or more days of making a payment due under a child support judgment or order."[132]

While Alaska provides certain exceptions to the enforceability of spendthrift provisions to prevent the kind of trust abuse that was encountered in the early days of English trust law, the language can be interpreted as fairly vague.[133] Many states that followed Alaska's lead in passing their own self-settled spendthrift legislation have used more precision in defining the rules

126. ALASKA STAT. § 34.40.110(a), (b)(1).
127. *See id.*
128. *See id.*
129. *Id.*
130. *See id.* § 34.40.110(b)(1), (d).
131. *Id.*
132. *Id.* § 34.40.110(b)(4).
133. *See id.* § 34.40.110(b)(1), (d).

regarding how these trusts may be established, managed, and enforced.[134] The precision of various state statutes has created very robust systems which govern DAPTs.[135]

2. The DAPT States and How They Stack Against Each Other

In 2021, Alabama passed the Alabama Qualified Dispositions in Trust Act to provide an avenue for the state to enforce spendthrift provisions in self-settled trusts, bringing the total number of DAPT states to eighteen.[136] The other seventeen DAPT states that have yet to be mentioned in this Comment are Connecticut, Delaware, Hawaii, Indiana, Michigan, Mississippi, Missouri, Nevada, New Hampshire, Ohio, Rhode Island, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wyoming.[137] While many states undoubtedly have borrowed some aspects of other statutes in drafting their own legislation, the differences in the language of each statute have produced varying degrees of protection, restrictions, and settlor rights.[138]

Given the desire of potential settlors to obtain as much protection for their assets as possible, the varying state laws have encouraged the practice of shopping for the best state in which to create a trust.[139] Nevada estate-planning attorney, Steve Oshins, has compiled annual lists ranking the states by their level of domestic asset protection since 2010.[140] The 2020 edition of the list has Nevada, South Dakota, and Ohio ranked as the states with the best domestic asset protection, respectively.[141] Considering that Alabama passed DAPT legislation after the list was compiled—and that a few other states' legislation was fairly new at the time—the rankings are not fully up to date; however, the list is still useful in determining the strongest asset-protection schemes in the states with more established laws.[142]

To assess why Nevada is considered the best state for protecting assets in trust, we must take a look at the language of Nevada Revised Statute Section 166.040(1)(b) and its accompanying provisions.[143] The language that establishes the validity of a spendthrift provision reads as follows:

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134. *See* discussion *supra* Section III.C.2.

135. *See id.*

136. *See* Alabama Qualified Dispositions in Trust Act, ALA. CODE §§ 19-3E-1–11 (2021).

137. David G. Shaftel et al., *Thirteenth ACTEC Comparison of the Domestic Asset Protection Trust Statutes*, AM. COLL. TR. & EST. COUNS. i, i/vi (Aug. 2022), https://www.actec.org/assets/1/6/Shaftel-Comparison-of-the-Domestic-Asset-Protection-Trust-Statutes.pdf?hssc=1 [perma.cc/D287-A5RY].

138. *See id.*

139. *See* Steve Oshins, *11th Annual Domestic Asset Protection Trust State Rankings Chart*, OSHINS (Apr. 2020), https://www.oshins.com/_files/ugd/b211fb_0e205011bc5f4e4cb9d6232ee68647ca.pdf [perma.cc/4TXZ-LFYZ].

140. *See id.*

141. *Id.*

142. *See id.*

143. NEV. REV. STAT. § 166.040(1)(b) (2011).

> Any person competent by law to execute a will or deed may, by writing only, duly executed, by will, conveyance or other writing, create a spendthrift trust in real, personal or mixed property for the benefit of . . . (b) [t]he settlor if the writing is irrevocable, does not require that any part of the income or principal of the trust be distributed to the settlor, and was not intended to hinder, delay or defraud known creditors . . . .[144]

The Nevada statute follows some of the general rules seen in other statutes regarding spendthrift provisions for self-settled trusts: the trust must be irrevocable and cannot have been made in an effort to defraud a known creditor.[145] The language of the statute differs, however, from the Alaska statute in that there is no exception to enforceability for child support, alimony, or divorce—something that is fairly unique to Nevada compared to the other DAPT states.[146] Also, the effect of the statute is that the settlor may not reserve discretion to distribute trust funds—either in the creation of the trust instrument or by discretionary payments made to oneself—and must instead give discretion to another trustee.[147] The payments may not exceed what would be considered income in accordance with subsection 643(b) of the Internal Revenue Code.[148]

Both statutes also hold that spendthrift provisions are valid even when the trust instrument allows the settlor to retain significant powers over the trust, which include the ability to serve as a trustee and the ability to add and remove trustees.[149] While Alaska does not specify who may serve as a trustee, the Nevada statute states that at least one trustee must either be a resident of Nevada, a trust company of Nevada, or a bank of Nevada.[150] The Nevada statute provides that the terms of the trust instrument may be amended by a reserved power in the trust instrument, so long as it is not the settlor invoking this power.[151] This means that a trustee who has been given the right to amend the trust may change the system of asset distribution, subject to standards of fiduciary duty, if the trust instrument sets up the system in the first place rather than giving the trustee discretionary power.[152]

3. Jurisdictional Limitations on Spendthrift Provisions

One issue to address is whether a person who owns property in State A can simply transfer title of that property to a trust created in State B, reaping

144. *Id.*
145. *See id.*
146. *See id.*; ALASKA STAT. § 34.40.110(b)(4) (2013).
147. NEV. REV. STAT. § 166.040(3).
148. *See* I.R.C. § 643(b).
149. *See* NEV. REV. STAT. §§ 166.045, 163.004(2); ALASKA STAT. § 34.40.110.
150. NEV. REV. STAT. § 166.015(2).
151. *Id.* § 163.004(2).
152. *See id.*

all the benefits and protections of the trust laws in State B.[153] While not illegal, this does not allow debtors to escape claims in most instances when creditors wish to attach unpaid debts to a debtor's property interest.[154] The concept of in rem jurisdiction grants jurisdiction to states over property located in that state.[155] While the scope of in rem jurisdiction has been scaled down considerably since the Supreme Court delivered their famous opinion, *Pennoyer v. Neff*, the existence of property in a state, when the subject of a creditor's cause of action is the property in question, would subject that property to the jurisdiction of that state.[156] This means that if a mortgage lender, for example, were to file for foreclosure on a piece of property in State A, a court in State A would have jurisdiction over any litigation regarding the property.[157]

But does this have any bearing on which states' trust laws would be applied when determining a creditor's ability to attach a debt to a settlor's interest in property held in trust?[158] Generally speaking, most creditor claims are filed in either bankruptcy or probate courts, and since most self-settled spendthrift trust litigation is concerned with *inter vivos* transfers, the focus of this subsection will be on bankruptcy courts.[159] As bankruptcy courts are federal courts, a creditor-claim case would, in most instances, be decided using the state law in which the court resides.[160] This means that if a creditor existed in State A and filed a claim in a court located in State A, the court will apply the laws of State A when addressing the claim.[161]

The Alaska Trust Act attempted to circumvent this principle when the state first passed its DAPT law.[162] Subsection (k) of Alaska Statute Section 43.40.110 contains a provision that states Alaska courts shall enjoy "exclusive jurisdiction over an action brought under a cause of action or claim for relief that is based on a transfer of property to a trust" created under its authority.[163] However, the Alaska Supreme Court's ruling in *Toni 1 Trust v. Wacker* invalidated this specific provision in the statute, holding it to be unconstitutional.[164] In this case, the main issue was a judgement rendered in a Montana court against a Montana resident who fraudulently transferred Montana property to an Alaska trust; the settlor of the trust argued that the

153. Author's original hypothetical.

154. *See id.*

155. *See* Pennoyer v. Neff, 95 U.S. 714, 733–34 (1877), *overruled by* Shaffer v. Heitner, 433 U.S. 186 (1977).

156. *See Heitner*, 433 U.S. at 207–12.

157. *See Pennoyer*, 95 U.S. at 733–34.

158. Author's original thought.

159. *Creditor's claim*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/creditor%27s_claim (Feb. 2022) [perma.cc/F3D2-GEYX].

160. *See In re* Chanel Fin., Inc., 102 B.R. 549, 550 (Bankr. N.D. Tex. 1988).

161. *See id.*

162. *See* ALASKA STAT. § 34.40.110(k) (2013).

163. *Id.*

164. Toni 1 Tr. v. Wacker, 413 P.3d 1199, 1203–07 (Alaska 2018).

Montana court should not have had jurisdiction over the judgment.[165] The court followed the United States Supreme Court's ruling in *Tennessee Coal, Iron, & Railroad Co. v. George* when coming to the determination that the Alaska statute claiming to have exclusive jurisdiction could not invalidate the Montana court's judgment for lack of subject-matter jurisdiction.[166] The same principle applies for federal courts in accordance with the ruling of *Marshall v. Marshall*, even if it is a state law that created the right to the cause of action.[167] Still, a state court could theoretically give deference to the trust law of the state in which the trust was created as an act of comity; but in most cases, the state in which the cause of action is born would have an interest in adjudicating the matter using its own laws.[168]

However, trust law is complicated in that a trust could be created in one state while a creditor, a debtor, and the assets could all be located in entirely different states.[169] To explain what choice of law to apply, here is a hypothetical scenario: a settlor residing in State A owns property in State A that he wishes to put in a self-settled spendthrift trust that was created in State B, a state with much stronger asset protection laws; a creditor who is located in State A files a claim in State A against the trust to satisfy the settlor's unpaid debts, and now the court must decide which state's trust laws to apply in determining whether the assets are protected from the creditor's claim.[170] In this scenario, the court will most likely decide that it must follow State A's trust laws because most jurisdictions conduct a modern choice of law analysis, similar to that of the Restatement (Second) of Conflict of Laws, in determining which state has the most substantial relationship to the matter at hand.[171] Section 270 comment b of the Restatement (Second) of Conflict of Laws lists factors to determine whether a state in which a creditor claim was filed is substantially related to the trust.[172] The court in *In re Zukerkorn* enumerated these factors, such as whether: "(1) the trustee or settlor is domiciled in the state; (2) the assets are located in the state; and (3) the beneficiaries are domiciled in the state."[173] In the hypothetical scenario, the State A court will likely conclude that because the settlor and the assets are located in State A, the laws of State A apply regardless of the existence of a choice of law provision in the trust instrument itself.[174] Even if the creditor

165. *Id.*

166. *See* Tenn. Coal, Iron, & R.R. Co. v. George, 233 U.S. 354, 359–61 (1914).

167. *See* Marshall v. Marshall, 547 U.S. 293, 312–14 (2006).

168. *See* Toni 1 Tr., 413 P.3d at 1205 ("[W]hile courts [of other states] may elect to follow a statute like AS 34.40.110 out of comity, they are not compelled to do so.").

169. *See* Tish McDonald et al., *The State of Domestic Self-Settled Asset Protection Trusts*, WILLAMETTE MGMT. ASSOCS. 13, 16, https://willamette.com/insights_journal/19/autumn_2019_2.pdf (last visited Oct. 9, 2023) [perma.cc/Q679-ZWY5].

170. Author's original hypothetical.

171. *See In re* Maue, 611 B.R. 367, 383 (Bankr. W.D. Wash. 2019).

172. RESTATEMENT (SECOND) OF CONFLICT OF LS. § 270 cmt. b (AM. L. INST. 1971).

173. *In re* Zukerkorn, 484 B.R. 182, 192 (B.A.P. 9th Cir. 2012).

174. Author's original hypothetical.

resided in State C, for example, the choice of law analysis would not change.[175] Thus, it is unlikely that a person who is domiciled and holds property in one state would receive spendthrift protection for their self-settled trust unless that state's trust laws permit the practice or the state decided to defer to another state's laws.[176]

D. Self-Settled Trust Legislation in Texas

As can be determined by Section III.C of this Comment, Texas is one of the majority of states that does not enforce the validity of spendthrift provisions when the settlor of a trust is also a beneficiary.[177] Specifically, subsection 112.035(d) of the Texas Property Code states that "[i]f the settlor is also a beneficiary of the trust, a provision restraining the voluntary or involuntary transfer of the settlor's beneficial interest does not prevent the settlor's creditors from satisfying claims from the settlor's interest in the trust estate."[178] Comparing this to the UTC's language, the Texas statute is a little more straightforward: a spendthrift provision will not work to prevent creditors from satisfying the settlor's debts, whereas the UTC provides that creditors can reach the maximum amount of the value of a trust that *may* be distributed to the settlor.[179]

While this would appear to be an open-and-shut case for whether DAPTs are permitted in Texas, this has not stopped a number of practitioners from suggesting a possible loophole to grant spendthrift protection for self-settled trusts.[180] According to subsection 112.035(d)(2) of the Texas Property Code, a settlor is not considered a beneficiary if "the settlor's interest in the trust was created by the exercise of a power of appointment by a third party."[181]

Practitioners note a particularly interesting backdoor method to create a functioning DAPT when the settlor assigns the power of appointment to another party, such as a spouse, parent, friend, or estate-planning attorney.[182] The person holding the power of appointment could then create a beneficiary interest in the trust for the settlor, which would mean that the settlor would not be considered a beneficiary of the trust within the meaning of the statute.[183]

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175. *Id.*
176. *Id.*
177. *See* TEX. PROP. CODE ANN. § 112.035(d).
178. *Id.*
179. *See id.*; UNIF. TR. CODE § 505(a)(2) (UNIF. L. COMM'N 2010).
180. Rania Combs, *Understanding Asset Protection Trusts in Texas*, RANIA COMBS L., https://raniacombslaw.com/resources/did-the-texas-legislature-create-a-backdoor-for-the-creation-of-a-self-settled-asset-protection-trust (May 2, 2023) [perma.cc/8P9Y-B34L].
181. TEX. PROP. CODE ANN. § 112.035(d)(2).
182. *See* Combs, *supra* note 180.
183. *See id.*

This method, however, comes with a few notable concerns.[184] First, it can be very risky for the settlor to grant a power of appointment considering that they would be relinquishing significant power to manage or transfer assets in the trust.[185] Juxtapose that with the Nevada statute that retains many of these powers for the settlor as a beneficiary so long as at least one trustee is a person, trust company, or bank that fits the statutory requirements.[186] Second, this would also require the settlor to name another person as a beneficiary to create a valid trust in the first place, and considering spendthrift trusts are irrevocable in nature, this method is effectively off the table for settlors who desire to keep the beneficial interests of trust assets to themselves[187] But this means that for a settlor who had already planned to name an additional person as a beneficiary, the only concern of this backdoor method would be the settlor's willingness to grant the same power that they possess to another party.[188]

E. Deportation Trusts

As self-settled spendthrift trusts are a device of general utility for protecting assets from potential creditors, the deportation trust is a type of DAPT created for a particular purpose.[189] Specifically, a deportation trust is a DAPT created for the purpose of protecting assets from garnishment, freezes, or foreclosure in the case that the settlor faces deportation.[190] Just like with other DAPTs, the noncitizen may still access and use trust assets while they remain in the United States; and if the noncitizen were to be placed in removal proceedings and subsequently deported from the United States, the spendthrift provision in the trust will make it extremely difficult for creditors to transfer the noncitizen's interest in the trust assets to the creditor to satisfy the debts in question.[191]

Given that the deportation process is rarely long enough for a removed noncitizen to make all adequate arrangements for the protection and distribution of their property, the deportation trust is a device that is imperative to create before the need arises.[192] In order to create a deportation trust, a noncitizen is only required to (1) have registered with the IRS for an Individual Taxpayer Identification Number (ITIN) and (2) be a taxpayer.[193]

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184. *See The Pros and Cons of Powers of Appointment*, SQUILLACE & ASSOCS., P.C. (Apr. 15, 2021), https://squillace-law.com/the-pros-and-cons-of-powers-of-appointments/ [perma.cc/32TK-CXGB].

185. *Id.*

186. *See* NEV. REV. STAT. § 166.040(3) (2011).

187. *See* UNIF. TR. CODE § 402(a)(5) (UNIF. L. COMM'N 2010).

188. Author's original thought.

189. *See Deportation Trust: Protect Your Family With A Deportation Trust*, *supra* note 7.

190. *Id.*

191. *Id.*

192. *See How long will it take for a detained person to be deported?*, *supra* note 77.

193. *See Deportation Trust: Protect Your Family With A Deportation Trust*, *supra* note 7.

Considering that having an identifier such as an ITIN is a general requirement for opening a bank account, and that many noncitizens pay their taxes as a demonstration of good will in case they apply for LPR or citizenship status in the future, these two requirements are not a problem for those noncitizens seeking long-term solutions for protecting their assets.[194]

IV. THE SOLUTION

Before discussing the possible solutions, we must first consider why Texas needs the deportation trust.[195] While California is first in terms of the state with the largest foreign-born population by a wide margin, Texas is ranked number two with a foreign-born population of about 4.7 million, with recent figures showing that this number accounts for about 17.2% of the total state population.[196] This population of foreign-born residents contributes substantial amounts of money to the economy with estimates showing that this population, in areas such as El Paso, "earned $4.8 billion in income, with $591.8 million going to federal taxes and $440.7 million going to state and local taxes" in 2019.[197] Considering that trust creation is more geared toward those who have established assets and income, the deportation trust can protect the assets of the noncitizen population who greatly contributes to these estimates in the name of equity and propriety.[198]

Now, the restriction on the ability of self-settled trusts to receive spendthrift protection (as mentioned before) is codified in the Texas Property Code; thus, the primary manner in which a solution could be addressed is through proposing changes to the current legislation.[199] The proposed changes may be introduced either through a repeal of the relevant subsection that contains the self-settled spendthrift trust ban or by an amendment that could have limited application but would be adequate in providing the avenue for the creation of deportation trusts in Texas.[200] This section will analyze the pros and cons of each proposed solution in order to determine the viability of each option.[201]

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194. *See id.*

195. Author's original thought.

196. *Immigrants by State*, WORLD POPULATION REV. (Oct. 2022), https://worldpopulationreview.comm/state-rankings/states-with-the-most-immigrants [perma.cc/G9KT-L28D].

197. *The Economic Contributions of New Americans in Texas Border Communities*, AM. IMMIGR. COUNCIL (Nov. 10, 2022), https://www.americanimmigrationcouncil.org/economic-contributions-new-americans-texas-border-communities#:~:text=In%202019%2C%20immigrants%20in%20the,be%20reinvested%20in%20the%20area [perma.cc/TJT7-VQUC].

198. Author's original thought.

199. *See* TEX. PROP. CODE ANN. § 112.035(d).

200. Author's original thought.

201. *See* discussion *infra* Section IV.A.

A. Repealing Subsection 112.035(d) of the Texas Property Code

First, this subsection will discuss what it would look like to repeal the language that contains the ban on self-settled spendthrift trusts.[202] As mentioned before, subsection 112.035(d) contains the language that bans self-settled spendthrift trusts and has two main exceptions that provide for scenarios where a settlor would not be a beneficiary—one is for certain tax reimbursements made by a non-settlor trustee, and the other is the backdoor method discussed in Section III.D of this Comment[203] As a practical matter, the entirety of subsection 112.035(d) could be repealed without further complications to the statutory schemes of this statute and other related statutes.[204] The viability of actually implementing such a change, however, is subject to the controversies around allowing self-settled spendthrift trusts in the first place, so the analysis for the repeal of subsection 112.035(d) needs to consider the general arguments and statutory restrictions that may be placed on self-settled spendthrift trusts as seen in other states.[205] This means that repealing subsection 112.035(d) will require introducing new statutory language that contains limits on the rights and powers of a settlor in the creation and use of DAPTs.[206] The main goal is to increase the viability of a potential Texas statute in terms of its chances for enactment, so long as it serves the purpose of facilitating the creation of deportation trusts.[207]

In weighing the pros and cons of removing the ban on self-settled spendthrift trusts and allowing their use in general, a Georgia Bar Journal article titled *Self-Settled Asset Protection Trusts in Georgia* provides some key points for and against allowing DAPTs.[208] The article encapsulates the debate regarding DAPTs in states that do not allow them (in this case, the state of Georgia).[209] The primary reason for opposition against the implementation of self-settled spendthrift trust legislation is, and has always been, that these trusts will merely become a mechanism for debtors to nefariously avoid their creditors by making attachment of debts to trust assets more difficult.[210]

As has been discussed in this Comment, a spendthrift provision in a trust is not an absolute protection against creditors as there are generally some exceptions found in DAPT statutes for certain creditors, such as those seeking child support and alimony payments, tort and criminal judgments, and

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202. *See id.*
203. TEX. PROP. CODE ANN. § 112.035(d)(1)–(2); *see* discussion *supra* Section III.D.
204. Author's original thought.
205. *See* TEX. PROP. CODE ANN. § 112.035(d).
206. *Id.*; author's original thought.
207. Author's original thought.
208. T. Kyle King & Blake N. Melton, *Self-Settled Asset Protection Trusts in Georgia*, 23 GA. BAR J. 17, 19 (2018).
209. *See id.*
210. *Id.* at 18.

instances where the creation of a trust was fraudulent.[211] But even in cases in which a creditor would theoretically fit the criteria for one of these exceptions, to actually make this determination and satisfy a claim would still require litigation.[212] Creditors will have to spend, in some cases, substantial amounts of money in litigation costs when attempting to satisfy a claim, and considering that fraud claims are very fact intensive to prove—a plaintiff would have to prove that the debtor had an intent to defraud the creditor—this can be a gamble.[213] Even for creditors who feel as if they have an open-and-shut case in satisfying a debt, litigation costs could offset the potential value of a winning judgment to the point that pursing such claims would not be feasible for smaller debts.[214] Those who oppose self-settled spendthrift trust legislation fear that any exceptions that could be attached to a statutory provision would still not be adequate to alleviate the effect of settlors who create DAPTs on the premise that even legitimate creditor claims may not be pursued as a result of cost-benefit analysis.[215]

However, proponents of self-settled spendthrift trusts believe that the threat of fraudulent transfer cases has been exaggerated, and that there likely are Texas settlors creating DAPTs in other states with their Texas property even if the spendthrift provision may be invalidated, so issues pertaining to out-of-state DAPTs should be addressed by legislation rather than by placing the burden on Texas courts to determine the efficacy of such spendthrift trusts.[216] Much like how other state trust companies and estate-planning law firms create out-of-state DAPTs for settlors willing to take on the calculated risk of an unfavorable judgment, lifting the ban on self-settled spendthrift trusts in Texas would bring the economic benefits that come with the business of creating these trusts.[217] This is especially pertinent to Texas considering that—much like the states that are number one and two on the Oshins DAPT state ranking chart: Nevada and South Dakota—there exists no state personal income tax, so state trust companies and estate-planning firms will attract more out-of-state business from those seeking the most advantageous tax schemes.[218] While these benefits are intriguing, the main opponents are most likely still more concerned with the potential for trust misuse weighed against the potential benefits.[219]

As seen in other DAPT states, the exceptions to the applicability of spendthrift provisions are meant to make weeding out fraudulent transfers of

211. *See* ALASKA STAT. § 34.40.110(b)(1), (d) (2013).
212. King & Melton, *supra* note 208, at 18.
213. *Id.*
214. *Id.*
215. *Id.*
216. *See id.* at 20.
217. *See id.*
218. *See* Oshins, *supra* note 139.
219. *See* King & Melton, *supra* note 208, at 18.

assets easier and more efficient for courts.[220] Public policy considerations would dictate that settlors should not be able to protect assets by transferring them to a trust for the purpose of avoiding a known creditor or escaping a known debt because debtors should not be able to escape their existing obligations to a creditor through nefarious means.[221] This is the most necessary exception to include considering it can apply to any transfer of property to a trust and that every state statute includes exceptions for fraud.[222] The standard for proving a fraudulent transfer for nearly all states is clear and convincing, thus, Texas should be no different.[223]

As seen with the Alaska statute, states tend to vary on the inclusion of a few family-based exceptions: child support, alimony, and divorce.[224] In terms of restricting as much bad conduct as possible, creditors seeking child support or alimony payments should be included as an exception to spendthrift provisions because the nature of such payments is generally for the support of persons who reasonably rely on such assets.[225] While the statutes that include such an exception differ on whether it should apply to only preexisting debts, to increase the viability of repealing subsection 112.035(d), an exception for all such debts is necessary.[226] Considering that Texas is a community property state, including an exception for divorce would also align with the state's desire to ensure equitable division and distribution of marital property.[227]

An exception found in some self-settled spendthrift statutes that is less general than the previously mentioned exceptions is for claims relating to a civil or criminal judgment.[228] Restitution for criminal convictions, while not a common remedy, is an exception that exists in a few self-settled spendthrift statutes, and considering that such a remedy is only available for unlawful conduct, it would make sense to include such an exception in potential legislation if it meant increasing its viability.[229] As for damages in civil cases, the statutes that include such an exception only do so for preexisting torts.[230] Subsection 18-9.2-5(2) of the Rhode Island General Laws, for example, includes an exception for "any person who suffers death, personal injury, or property damage on or before the date of a qualified disposition by a transferor"; this has the effect of bypassing the spendthrift provision of a trust if the transfer of assets came after the tortious act or omission occurred, rather

220. *See id.*
221. *See id.*
222. *See* ALASKA STAT. § 34.40.110(b)(1), (d) (2013).
223. *See id.*
224. *See id.*
225. *See id.*
226. *Id.*; *see* TEX. PROP. CODE ANN. § 112.035(d).
227. *See* TEX. FAM. CODE ANN. § 3.003(a).
228. *See* MISS. CODE ANN. § 91-9-707(i)(1)(B)–(C) (2014).
229. *See id.*
230. *See id.*

than after a judgment has been entered.[231] While not a universal exception in DAPT states, public policy considerations would likely lead to the evaluation of a similar exception necessary for increasing the viability of a potential Texas statute; otherwise, tortfeasors (after the tort has been committed) could hide all of their assets in a DAPT in anticipation of potential litigation, which could have the effect of depriving an injured party of a remedy.[232]

The next aspect that needs to be discussed is the rights and powers of a settlor to transfer trust assets to the trust, to add and remove trustees, and to control the distribution of trust assets.[233] In terms of the ability to transfer property to a trust, many states, such as Ohio, prescribe that any transfer of assets to a trust requires "a transferor [to] sign a qualified affidavit before or substantially contemporaneously with making a qualified disposition."[234] The information required to be included in such affidavits includes such assurances as seen in subsection 5816.06(B) of the Ohio Revised Code:

> (1) The property being transferred to the trust was not derived from unlawful activities.
> (2) The transferor has full right, title, and authority to transfer the property to the legacy trust.
> (3) The transferor will not be rendered insolvent immediately after the transfer of the property to the legacy trust.
> (4) The transferor does not intend to defraud any creditor by transferring the property to the legacy trust.
> (5) There are no pending or threatened court actions against the transferor, except for any court action identified by the affidavit or an attachment to the affidavit.
> (6) The transferor is not involved in any administrative proceeding, except for any proceeding identified by the affidavit or an attachment to the affidavit.
> (7) The transferor does not contemplate at the time of the transfer the filing for relief under the Bankruptcy Code.[235]

After Michigan passed the Michigan Qualified Disposition in Trust Act in 2016, the Michigan Bar Journal analyzed the rationale for placing such a requirement in creating a DAPT.[236] By having settlors sign these affidavits before making a transfer of property to a trust, settlors are required to attest that such a transfer will not result in litigation for fraud or for avoidance of a claim by an exception creditor.[237] If there are issues with the qualified

231. 18 R.I. GEN. LAWS § 18-9.2-5(2) (2013).
232. Author's original thought.
233. *Id.*
234. OHIO REV. CODE ANN. § 5816.06(A) (West 2021).
235. *Id.* § 5816.06(B)(1)–(7).
236. Daniel Burkhart, *Michigan Enacts New Qualified Disposition in Trust Act*, 97 MICH. BAR J. 22, 23 (2018).
237. *Id.*

affidavit—such as if it is not signed within a timely manner or if the affidavit itself is defective—courts become suspicious that the transfer was made in violation of the state statute or was done in bad faith, which "may be considered evidence in a creditor avoidance, attachment, or other action."[238] This requirement would give creditors a better foundation in potential litigation for satisfying debts against self-settled spendthrift trusts and would likely increase court efficiency, thus, a qualified affidavit requirement should be included in potential Texas legislation to increase its viability.[239]

The ability of a settlor to remove and add trustees, as well as the ability to control the distribution of trust assets to beneficiaries, needs to lean in favor of the debtor to ensure a reasonable amount of flexibility in the creation of deportation trusts.[240] Many DAPT statutes include provisions that uphold the irrevocability of a settlor's interest in trust assets, even if the settlor retains the general right to appoint and remove trustees.[241] The Utah Code puts a limit on this power by specifying that "the settlor [may have] the authority under the terms of the trust instrument to appoint a nonsubordinate advisor or trust protector who can remove and appoint trustees."[242] This language has the effect of preventing a settlor from being able to indirectly maintain total control of trust distribution, either by having the threat of removal hang over a trustee's head or using a trustee to distribute assets at the settlor's own discretion.[243] While this would seem a logical exception for checking the power of the settlor to manipulate trust distribution, it would be an unnecessary restraint on a noncitizen to have to form a trustee-appointment scheme that requires more people considering that many noncitizens operate in smaller social and professional circles compared to citizens due to possible cultural barriers or privacy concerns.[244] It would benefit noncitizens to be able to include as few people as possible in the creation of a trust to prevent scenarios in which they must appoint less than ideal trustees or trust advisors (or have to pay a firm or trust company additional expenses to appoint these people for the noncitizen).[245]

As for the distribution of trust assets, it is unwise to allow the settlor to have a substantial ability to take trust assets out of the trust at their own discretion.[246] Considering that the objective is to deter bad-faith creation of DAPTs and transfer of property to a trust, a self-settled spendthrift trust needs

238. *Id.*
239. Author's original thought.
240. *Id.*
241. *See* NEV. REV. STAT. § 166.040(1) (2011).
242. UTAH CODE ANN. § 25-6-502(7)(c) (West 2019).
243. *See id.*
244. *See* Jane Lee et al., *The Relationships between Loneliness, Social Support, and Resilience among Latinx Immigrants in the United States*, PUBMED CENT. (Oct. 16, 2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7880232/ [perma.cc/DXL6-CVFK].
245. Author's original thought.
246. *Id.*

to only be enforceable to the extent that the settlor cannot create the trust, avoid a debt, and then distribute the trust property back to themself.[247] This is the approach that even high-protection DAPT states like Nevada and Ohio have taken.[248] Nevada Revised Statute Section 166.040 states that a spendthrift provision is only valid if the trust instrument "does not *require* that any part of the income or principal of the trust be distributed to the settlor."[249] The statute further specifies that "[t]he settlor is authorized to receive income or principal from the trust, but only subject to the discretion of another person," meaning that even if the settlor was a trustee, the decision to make the distribution of trust assets to the settlor must come from someone else.[250]

Meanwhile, Ohio Revised Code Section 5816.05 specifically states in what instances a settlor may receive income and principal from a trust:

> (1) A qualified trustee's acting in the trustee's discretion. For purposes of division (G)(1) of this section, a qualified trustee shall have discretion with respect to the distribution or use of principal or income unless the discretion is expressly denied to the trustee by the terms of the trust instrument.
> (2) A qualified trustee's acting pursuant to a standard in the trust instrument that governs the distribution or use of principal or income;
> (3) A qualified trustee's acting at the direction of an advisor who is acting in the advisor's discretion or pursuant to a standard in the trust instrument that governs the distribution or use of principal or income. If an advisor is authorized to direct that distribution or use, the advisor's authority shall be discretionary unless otherwise expressly stated in the trust instrument.[251]

Ohio's statute, it would seem, is more preferable to the Nevada Statute—which takes more of a straightforward but vague approach—because it specifically states the scenarios in which a settlor may receive trust income or principal: (1) at the general discretion of a trustee if not specifically disavowed by the trust instrument, (2) at the discretion of a trustee in accordance with a set standard in the trust instrument, and (3) at the discretion of an advisor either by their own will or by a set standard.[252] Specifically stating the exceptions to a rule will prevent any issues that may arise from using vague language like "the discretion of any other person."[253] Also, the language of the Ohio statute explains how trust instruments should establish the way trust assets are distributed to the settlor, although in general terms.[254]

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247. *Id.*
248. *See* NEV. REV. STAT. § 166.040(1)(b) (2011); OHIO REV. CODE ANN. § 5816.05(G)(1)–(3) (West 2021).
249. NEV. REV. STAT. § 166.040(1)(b) (emphasis added).
250. *Id.* at § 166.040(2)(g).
251. OHIO REV. CODE ANN. § 5816.05(G)(1)–(3).
252. *See id.*
253. *See* NEV. REV. STAT. § 166.040(2)(g).
254. OHIO REV. CODE ANN. § 5816.05(G)(1)–(3).

While advisors may also make discretionary distributions so long as they are done in accordance with the powers established by the trust instrument, because the statute specifically refers to third-party advisors it is clear that one does not need to be a trustee in order to be granted this power.[255] Thus, the language of the Ohio statute is the ideal starting point for establishing the process of distributing trust income and principal to the settlor.[256]

There is one aspect of the Nevada statute that should also be addressed.[257] Under subsection 166.040(2)(b) of the Nevada Revised Statutes, a spendthrift provision is still valid even if "[t]he settlor holds a special lifetime or testamentary power of appointment that cannot be exercised in favor of the settlor, the settlor's estate, a creditor of the settlor[,] or a creditor of the settlor's estate."[258] This language means that Nevada settlors may retain the ability to appoint trust assets to another person as long as that other person is not a creditor.[259] This kind of power would be invaluable in the use of deportation trusts because it provides the noncitizen settlor with another option in how trust assets may be facilitated.[260] For example, if a noncitizen created a trust years ago in which he is the only trustee and the two beneficiaries are him and his now eighteen-year-old son, the noncitizen settlor would have two different options in the case that an immigration judge were to initiate removal proceedings.[261] The noncitizen can either appoint a new trustee who will have control over distributions of trust income and principal made to the son while the noncitizen is removed from the United States, or he can use his power of appointment to appoint all the trust assets to the son free of restrictions.[262] Having this kind of flexibility will increase the utility of deportation trusts by providing further options for how a noncitizen can ensure that their assets will be preserved for those who matter most.[263] Such a right is necessary to accommodate those noncitizen settlors whose situations may change following the creation of the trust.[264]

Now that all of the most important aspects of a self-settled spendthrift trust statute have been evaluated, the language of a potential Texas statute can be crafted.[265] As a recapitulation, the Texas Legislature should begin by repealing subsection 112.035(d) of the Texas Property Code entirely.[266] Then, the Texas Legislature should introduce the Texas Right to Self-Settled

255. *See id.*
256. *See id.*
257. *See* NEV. REV. STAT. § 166.040(2)(b).
258. *Id.*
259. *See id.*
260. *See id.*
261. Author's original hypothetical.
262. *Id.*
263. *Id.*
264. *Id.*
265. Author's original thought.
266. *See* discussion *supra* Section IV.A.

Spendthrift Trusts Act (TRSST Act)—a suitable working title of the bill—as its own, separate section of the Texas Property Code.[267] The TRSST Act should contain language that permits the enforceability of spendthrift provisions on self-settled trusts, but the Act should include exceptions for child support and divorce, restitution and civil damages, and fraudulent transfers.[268] There should also be a subsection that establishes the retainable rights of the settlor and permissible distributions.[269] Finally, a qualified affidavit must be attached to every transfer of property to the trust.[270] The language should look similar to this:

> SELF-SETTLED SPENDTHRIFT TRUSTS. A provision that restrains the voluntary and involuntary transfer of a beneficiary shall be enforced regardless of whether the beneficiary is the settlor in accordance with the rules of this title.
>
> (a) A spendthrift provision is not enforceable if:
>
> (1) the creation of the trust or the transfer of property was done with the intent to defraud a known creditor;
>
> (2) the creditor is a spouse, former spouse, or a child of the settlor seeking payment of child support, spousal support, or alimony pursuant to a court order;
>
> (3) the creditor is seeking payment relating to a criminal conviction against the settlor; or
>
> (4) the creditor is seeking payment of civil damages resulting from the settlor's conduct that occurred before the transfer of property to the trust.
>
> (b) A spendthrift provision is still enforceable regardless of whether the trust instrument retains the following rights to the settlor:
>
> (1) to add or remove trustees or advisors;
>
> (2) to act as a trustee;
>
> (3) to prevent a distribution from the trust; or
>
> (4) to hold a lifetime or testamentary power of appointment so long as it is not exercised in favor of the settlor, the settlor's estate, or a creditor of either two.
>
> (c) Distribution or use of principal or income to the settlor may not be made mandatory by the language of the trust instrument or be made at the discretion of the settlor. Any agreement between the settlor and the trustee or advisor responsible for the distribution of principal or income that is not established by the language of the

267. Author's original proposal.
268. *Id.*
269. *Id.*
270. *Id.*

trust instrument or is in violation of another rule of this section is void without disturbing the rest of the language of the trust instrument. The distribution and use of principal or income to the settlor made in accordance with the language of the trust instrument are permitted if they are the result of the following:

> (1) a trustee, other than the settlor, acting at the trustee's own discretion so long as the trust instrument does not expressly deny this authority to the trustee;
> (2) a trustee acting in accordance with a standard set by the trust instrument; or
> (3) a trustee acting at the direction of an advisor. The advisor may direct the trustee to distribute principal or income to the settlor to the extent that the advisor:
>
> > (A) is acting in accordance with a standard set by the trust instrument; or
> > (B) is acting on the advisor's own discretion so long as this authority is not expressly denied.

(d) The amount of principal or income that the settlor beneficiary is authorized to receive may not exceed:

> (1) what may be defined as income in accordance with 26 U.S.C. § 643(b); or
> (2) a percentage of the value of the trust based on a determinable standard set forth in the trust instrument. The standard may be adjusted on a yearly basis as decided by all trustees.

(e) A qualified affidavit is required for all transfers of property to a self-settled spendthrift trust. In the affidavit, the settlor who makes a transfer must attest to the following:

> (1) the settlor has full right, title, and authority to transfer the property to the trust;
> (2) the settlor does not intend to defraud a creditor by transferring the property to the trust;
> (3) the settlor is not involved in any current or threatened legal proceedings other than those disclosed in the affidavit;
> (4) the settlor is not involved in any administrative proceedings other than those disclosed in the affidavit;
> (5) the settlor does not intend to file for relief under the federal Bankruptcy Code; and
> (6) the property transferred to the legacy trust is not derived from unlawful activities.[271]

271. *Id.*

This language is obviously a miniscule version of what an act would look like compared to the Ohio or Alabama statutes, but the language of this proposed Texas statute covers the most significant aspects of governing self-settled spendthrift trusts.[272] The Ohio and Alabama acts contain multiple sections that flesh out the complex system that governs nearly every aspect of these trusts.[273] Additional language would have to address issues such as qualifications for trustees and advisors, fiduciary duties, and other miscellaneous rules, but this section lays the foundation for what potential Texas legislation may build upon.[274] However, the protections provided to creditors in cases involving self-settled spendthrift trusts by the language of the TRSST Act are adequate to give those creditors a fair and equitable opportunity to satisfy claims in specific circumstances, while also providing a level of freedom necessary for the creation and use of deportation trusts.[275]

B. Amending Subsection 112.035(d) of the Texas Property Code

Repealing subsection 112.035(d) of the Texas Property Code and passing legislation that would drastically alter the trust landscape in Texas—even though the state would simply be the next in line to hop on the DAPT bandwagon—would be a monumental proposition the state legislature would have to ponder and go through with.[276] Such a proposition could even be too drastic for state legislatures to consider, so a less far-reaching solution may be more viable in terms of facilitating the creation and use of deportation trusts.[277] What may be necessary is a change to the Texas Property Code that will have a limited effect on Texas's trust landscape as a whole, while also providing the protection that noncitizens will need if they are deported.[278]

Before addressing this possible solution, it is important to consider the mechanical reasons states prohibit self-settled spendthrift trusts by examining the Massachusetts bankruptcy court case *In re Cowles*.[279] In this case, the issue was whether the trust assets of a revocable trust—which included the family home—made by a settlor for the benefit of his wife and children should be reachable by the settlor's creditors in a bankruptcy proceeding.[280] Using Massachusetts case law and decisions from other bankruptcy courts, the court in *In re Cowles* ultimately determined that because the settlor retained the right to revoke the trust—even though he was

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272. *See* OHIO REV. CODE ANN. §§ 5816.01–.14 (West 2021); ALA. CODE §§ 19-3E-1–11 (2021).
273. *See* OHIO REV. CODE ANN. §§ 5816.01–.14; ALA. CODE §§ 19-3E-1–11.
274. Author's original thought.
275. *Id.*
276. *See* Morgan Smith, *How to kill a bill in 140 days (or less)*, TEX. TRIB. (May 3, 2017, 12:00 AM), https://www.texastribune.org/2017/05/03/how-kill-bill-140-days/ [perma.cc/3MR7-X7LB].
277. *See id.*
278. Author's original thought.
279. *See In re* Cowles, 143 B.R. 5, 7–11 (Bankr. D. Mass. 1992).
280. *Id.*

not a beneficiary—the trust property should be reachable because of "his ability to provide himself with such an interest, as well as the fact that the Debtor and his wife and child live in the family home."[281] Essentially, the idea is that the settlor gave himself the right to completely revoke the trust and still enjoy the use of the trust assets, like the home, so the settlor is barely surrendering any modicum of control.[282] It would be analogous to placing a lock on a safe but still keeping the key, because nothing is stopping you from using the key and taking everything inside.[283] Simply locking assets away should not prevent creditors from reaching those assets when one retains the right to access them.[284]

Similar principles are seen in Texas cases involving spendthrift trusts when the issue being addressed is to what degree of control over trust assets should render the trust self-settled.[285] In *Bank of Dallas v. Republic National Bank of Dallas*, the appellate court declared the spendthrift provision in a trust void as it pertained to trust income because the language of the trust instrument obligated the trustee to pay the settlor all of the net income of the trust over the course of the settlor's life.[286] The corpus of the trust, however, was more of a complex issue as there were other beneficiaries who also held an interest.[287] The court ultimately declared the spendthrift provision void as to the corpus as well because the trust instrument reserved a right to the settlor to invade the principal at the settlor's discretion for the settlor's benefit, which essentially amounts to a power of appointment.[288] The court relied on the language of subsection 156(c) of the Restatement (Second) of Trusts which states that "[i]f the settlor reserves for his own benefit not only a life interest but also a general power to appoint the remainder by deed or will or by deed alone or by will alone, his creditors can reach the principal of the trust as well as income."[289] To go back to the safe analogy, this situation would be akin to the settlor having a key to the safe but only being able to open the safe to take part of its contents when the need arises.[290]

The main takeaway from both cases is that courts enforcing self-settled spendthrift trust prohibitions are primarily concerned with two key aspects of the relationship between the settlor and the trust assets: benefit and

281. *Id.*; *see* State St. Bank & Tr. Co. v. Reiser, 389 N.E.2d 768, 770–71 (Mass. App. Ct. 1979); ITT Comm. Fin. Corp. v. Stockdale, 521 N.E.2d 417, 417–18 (Mass. App. Ct. 1988).

282. *In re Cowles*, 143 B.R. at 10.

283. Author's original thought.

284. *Id.*

285. *See* Bank of Dall. v. Republic Nat'l Bank of Dall., 540 S.W.2d 499, 501–02 (Tex. App.—Waco 1976, writ ref'd n.r.e.).

286. *Id.*

287. *Id.*

288. *Id.*

289. RESTATEMENT (SECOND) OF TRS. § 156(c) (AM. L. INST. 1959).

290. Author's original thought.

control.[291] When the settlor benefits from assets held in trust, or if the settlor has the power to terminate the trust or invade the interest of other beneficiaries, the settlor still retains such a degree of control over those assets that equitable title effectively remains with the settlor.[292] Thus, it would behoove public policy to not allow creditors to reach the assets that a settlor exercises that degree of control over in order to satisfy the debts of the settlor.[293]

Therefore, the amendment of subsection 112.035(d) of the Texas Property Code should revolve around the settlor's control of the trust assets and the benefits the settlor may receive to mirror the intentions of those courts and legislators who wish to prevent settlors from blurring the lines of where equitable title functionally lies.[294] So, a possible amendment to subsection 112.035(d) would read as so:

> (d) If the settlor is also a beneficiary of the trust, a provision restraining the voluntary or involuntary transfer of the settlor's beneficial interest does not prevent the settlor's creditors from satisfying claims from the settlor's interest in the trust estate to the extent that the settlor may reasonably enjoy the benefit and use of the trust assets.[295]

The effect of the amendment would be similar to, in most cases, the effect of the current provision because it is dependent on the settlor being able to benefit from trust assets, which is the primary concern for those who oppose DAPTs.[296] If a person puts assets into a DAPT and can reasonably use the assets (i.e., a person that remains in his home or has access to a trust bank account), then those assets may not receive spendthrift protection.[297] If the settlor has the key to the safe and can use it to access the contents at any time, creditors should be able to do the same.[298] However, the distinctive language may leave just enough wiggle room for deportation trusts to have enough effect to serve their purpose.[299] This effect is because of the primary purpose behind deportation trusts: to protect assets of a noncitizen when that person has been deported.[300]

When a noncitizen is deported and is no longer able to reside in a home held in trust, then that person cannot reasonably enjoy the benefit and use of

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291. *See* Bank of Dall. v. Republic Nat'l Bank of Dall., 540 S.W.2d at 501–02; *In re* Cowles, 143 B.R. 5, 7–11 (Bankr. D. Mass. 1992).
292. *See In re Cowles*, 143 B.R. at 7–11.
293. *See id.*
294. Author's original thought.
295. *Id.*
296. *Id.*
297. *Id.*
298. *Id.*
299. *Id.*
300. *See Deportation Trust: Protect Your Family With A Deportation Trust*, *supra* note 7.

the trust assets.[301] A spendthrift provision, by the language of the amendment, could still legally protect the trust assets from the claims of creditors.[302] The same principle, however, may be slightly more complicated when it comes to money left in trust because there are a multitude of ways to access such assets.[303] For example, if trust funds are held in a bank account with its own banking application on a computer or smartphone, one can simply use a virtual private network (VPN) to get around banks preventing transfers from abroad.[304] There is also an abundance of money transfer options that allow a person to send money to and from their bank account regardless of their location.[305] So, to ensure the enforceability of a spendthrift provision as it pertains to trust funds, the settlor needs to create a system for holding and distributing trust funds that will be as isolated as possible from the settlor's control.[306] As mentioned in Section IV.A, other DAPT states have specific distribution restrictions that must be followed for spendthrift provisions to be applicable.[307] Like with those state restrictions, settlors who want a spendthrift provision to be enforced on trust funds when they are deported would need to set up a distribution system in the trust instrument that provides an account separate from a personal account and is distributed by a set standard or at the discretion of another trustee.[308] This would keep access to trust funds far from the settlor, so it would not be considered reasonable that they enjoy the use and benefit of the assets, especially if the purpose is to keep those trust funds state-side for the benefit of the settlor's family or the settlor if they were to regain entry to the United States.[309]

There is a major drawback for creating deportation trusts by using this method.[310] If, or when, a noncitizen who has been deported regains entry to the United States, it is no longer unreasonable for them to enjoy the benefit and use of trust assets, meaning the noncitizen will immediately become susceptible to creditor claims.[311] However, the spendthrift provision will still protect the trust assets while a noncitizen is abroad, giving them more than enough time to prepare for that outcome as opposed to being put in removal proceedings and having little to no time to figure out what to do, especially

301. Author's original thought.
302. *Id.*
303. *Id.*
304. *See* Osman Husain, *How to safely access online banking with a VPN*, COMPARITECH, https://www.comparitech.com/blog/vpn-privacy/online-banking-vpn/ (Jan. 12, 2023) [perma.cc/7SLK-WH2W].
305. *See* Jenn Underwood, *International Money Transfer: Best Ways To Send Money Internationally*, FORBES, https://www.forbes.com/advisor/money-transfer/best-ways-to-send-money/ (Sept. 28, 2023, 3:16 PM) [perma.cc/2R9Q-EAUG].
306. Author's original thought.
307. *See* discussion *supra* Section IV.A.
308. *Id.*
309. Author's original thought.
310. *Id.*
311. *Id.*

considering that it may be at least ten years before a noncitizen who has been removed can apply for reentry.[312]

Opponents of this solution will also argue that using language such as "may reasonably enjoy the benefit of" will open the door to increased litigation, and creditor-claim cases will become more fact-intensive to determine whether the spendthrift provision should apply.[313] This is because courts will have to analyze on a case-by-case basis whether or not a settlor could reasonably access trust funds or use trust property.[314] That is why it may be necessary to add a subsection to the amended statute that provides guidance for courts to consider.[315] This subsection should have language similar to this:

> (a) If the trust asset is real property, the settlor may reasonably enjoy the benefit of the asset if the use or occupation of the asset is not prohibited by:
>
> (1) the terms of the trust instrument; and
>
> (2) operation of the law.
>
> (b) If the trust asset is money, the settlor may reasonably enjoy the benefit of the asset if the use of the asset is not prohibited by:
>
> (1) the terms of the trust instrument to the extent that the settlor is entitled to the possession and use of the funds for the settlor's benefit; and
>
> (2) operation of the law.[316]

The language of this explanatory subsection would have the effect of deeming noncitizens who have been deported as being prohibited from occupying any real property held in trust because they will be legally barred from reentering the country by the INA.[317] Also, the exception will not apply to any settlor who, as a beneficiary, may occupy real property held in trust and of whom is legally entitled to this occupancy, which should be broad enough to protect creditors from liberal applications of spendthrift provisions in most cases.[318]

As the exception pertains to trust funds, the explanatory subsection would essentially operate in the same way as how spendthrift provisions are treated in the UTC: a spendthrift provision will not protect trust funds the settlor is entitled to receive by the terms of the trust instrument.[319] In other words, a settlor, in creating a trust, can direct a certain percentage of trust funds to be distributed for future uses, such as their children's potential

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312. *See supra* text accompanying notes 77–83.
313. Author's original thought.
314. *Id.*
315. *Id.*
316. Author's original proposal.
317. *See* Immigration and Nationality Act § 212(a)(9)(A), 8 U.S.C. § 1182(a)(9)(A).
318. Author's original thought.
319. *See* UNIF. TR. CODE § 505(a)(2) (UNIF. L. COMM'N 2010).

medical or educational expenses, with the spendthrift provision applying to those funds and not to those that may be distributed to the settlor for other purposes.[320] While a settlor will not be able to protect trust funds that may be distributed to the settlor and used for their benefit, the settlor can ensure that at least those funds that are meant to support their family will be protected while also consolidating these assets in one trust.[321]

While repealing subsection 112.035(d) of the Texas Property Code is the more ideal method of facilitating the use of deportation trusts in Texas because its overall utility will be based on the degree to which self-settled spendthrift trusts are allowed, amending this statute with the suggested language can still facilitate a workable deportation trust.[322] Even though creating deportation trusts under this amended language would not allow for trust assets to get spendthrift protection while a settlor can reasonably use the assets, trust assets such as the settlor's real property while they are deported from the United States and trust funds that are meant for the benefit of other beneficiaries may still be protected from creditor claims.[323] By shifting the focus from the settlor being a beneficiary in name to being a beneficiary in practice, the amended language would also address the concerns of opponents to self-settled spendthrift trusts by making the new rule close to the old rule in its general application: preventing spendthrift provisions from protecting assets that the settlor is entitled to enjoy the benefit of by the trust instrument and by operation of law.[324]

V. CONCLUSION

As this Comment has shown, the lives of those who are foreign-born, but live in the United States, have been subject to drastic and harsh changes throughout the country's existence due to factors such as xenophobia, economic strife, politics, and indifference from the general public.[325] These factors have contributed to the current immigration policy, one that gives the federal government great power to deport noncitizens and uproot their lives despite how deeply they have ingratiated themselves into American society.[326] While speaking on immigration in general is outside the scope of this Comment, noncitizens who have entered this country with the best intentions and have built up equity—namely, earning and saving money, contributing tax dollars and overall income, and starting families—should be able to protect those accumulated assets during the pursuit of one day

320. *Id.*
321. *Id.*
322. Author's original thought.
323. *Id.*
324. *Id.*
325. *See* discussion *supra* Sections II.A–B.
326. *Id.*

becoming a naturalized citizen.[327] A deportation trust gives this ability to noncitizens who have the equity to invest in and ensure their own future and the futures of their families.[328]

For deportation trusts to be viable in Texas, changes to the Texas Property Code are necessary for noncitizens to be able to create trusts that will protect assets from the claims of creditors while also giving noncitizens the ability to still benefit from them.[329] The drastic change of repealing the ban on self-settled spendthrift trusts would be the most straightforward way of achieving this goal by joining Texas with the other states that have embraced the DAPT, and the concerns with opening the door to bad actors who wish to defraud creditors can be quelled by following the statutory schemes of states who have long established the practice.[330] A less-drastic approach would be to amend the current language of the ban on self-settled spendthrift trusts by shifting the focus from surface-level identifiers of parties involved in a trust to how the trust actually works by design; this would bring little change to how the ban on spendthrift trust applies generally but would allow spendthrift protections to be enforced when the need arises for deported noncitizens.[331]

Ultimately, the purpose of the deportation trust is to provide an insurance policy for noncitizens who have been and will continue to contribute to the economy and to American society overall.[332] In the words of President John F. Kennedy, "[w]e all know, of course, about the spectacular immigrant successes: the men who came from foreign lands, sought their fortunes in the United States and made striking contributions, industrial and scientific, not only to their chosen country but to the entire world."[333] Throughout the history of this great country following its inception, immigrants have had to walk on thin ice to achieve the same goals originally sought by those who founded the United States; like those founders, those resilient and hardworking immigrants should have the opportunity to protect what they have earned and to demonstrate the essence of the American Dream.[334]

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327. Author's original thought.
328. *See* discussion *supra* Section III.E.
329. *See* discussion *supra* Part IV.
330. *See* discussion *supra* Section IV.A.
331. *See* discussion *supra* Section IV.B.
332. Author's original thought.
333. JOHN F. KENNEDY, A NATION OF IMMIGRANTS 33 (First Harper Perennial ed. 60th ed. 1964).
334. *See* discussion *supra* Part II.