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THE LAW OF HIGH-WEALTH EXCEPTIONALISM

Allison Anna Tait

THE LAW OF HIGH-WEALTH EXCEPTIONALISM

*Allison Anna Tait**

No family is an island. But some families would like to be—at least when it comes to wealth preservation—and they depend on what this Article calls the law of high-wealth exceptionalism to facilitate their success. The law of high-wealth exceptionalism has been forged over the years from the twinned scripts of wealth management and family-wealth law, both of which constitute high-wealth families as sovereign entities capable of self-regulation and deserving of exemption from the rules that govern ordinary-wealth families. Consequently, high-wealth families take advantage of complicated estate planning techniques and highly favorable wealth rules in order to build walls around their family fortunes and construct bespoke governance systems. Hiding in plain sight, the law of high-wealth exceptionalism protects, privileges, and enables high-wealth families in their own particular form of organizational sovereignty.

The fact that high-wealth families operate according to their own rules might seem totally unconnected to the political lives and financial health of ordinary-wealth families. However, high-wealth exceptionalism intensifies old harms and creates new ones within the larger polity. To begin, the law of high-wealth exceptionalism increases systemic risk in financial markets, shifts tax burdens from high-wealth to lower wealth families, and widens the wealth gap. Compounding these problems, high-wealth-family exceptionalism facilitates the growth of a plutarchic and patrimonial system of government in which power is based on family wealth and privilege flows in a circuit between a small number of already exceptionally resourced families. Understanding how the law of high-wealth exceptionalism functions is, consequently, an important step in identifying hidden levers of wealth inequality and addressing the resulting democratic deficit.

* Professor of Law, University of Richmond School of Law. For comments and conversation, my thanks go to Erez Aloni, Susan Appleton, Alex Boni-Saenz, Naomi Cahn, Erin Collins, Bridget Crawford, Maxine Eichner, Andrew Gilden, Deborah Gordon, Meredith Harbach, Claudia Haupt, Corinna Lain, Luke Norris, Carol Sanger, Carla Spivack, Sarah Swan, and to participants at the Law and Society 2018 Annual Conference and the 2018 Richmond Junior Faculty Forum. Any errors are, of course, mine and mine alone. My thanks also to the editors at the *Alabama Law Review* for all their hard work and persistence in the fact of many changed circumstances.

"It is often said that successful families, especially those that jointly own a business or financial wealth together, are like 'small countries' and just like countries, they need to have their own 'constitution' and 'rule of law' if the family members are all to live in harmony together and if the family is to continue to be successful."

– *How to Craft Your Own Family Constitution*[1]

Why wish for a loaf of bread when you can wish for a grocery store?

– Eartha Kitt, *All I Want Is All There Is and Then Some*[2]

INTRODUCTION

No family is an island.[3] But some high-wealth families[4] would like to be. In certain cases, the attempt is quite literal: "seasteaders," for example, hope to build private islands that exist outside of traditional governance, floating legal entities designed to maximize personal and economic freedom.[5] More often, however, the private islands of high-wealth families are figurative spaces where these families escape from traditional regulation by taking advantage of a favorable tilt in the legal system that exempts them from the wealth rules constraining most families. Capitalizing on what this Article calls the law of high-wealth exceptionalism, certain families are therefore able to build walls around their fortunes and construct bespoke governance systems.

1. CHRISTIAN G. STEWART, FAM. LEGACY ASIA, HOW TO CRAFT YOUR OWN FAMILY CONSTITUTION: AN OVERVIEW 1 (2013), http://www.familylegacyasia.com/whitepaper_pdf/Overview%20of%20how%20to%20craft%20a%20family%20constitution.pdf.

2. EARTHA KITT, *All I Want Is All There Is and Then Some*, *on* BAD BUT BEAUTIFUL (MGM Records 1962).

3. Apologies to John Donne, whose 1624 poem said it better: "No man is an island, entire of itself; every man is a piece of the continent, a part of the main . . . therefore never send to know for whom the bell tolls; it tolls for thee." JOHN DONNE, *Meditation XVII*, *in* DEVOTIONS UPON EMERGENT OCCASIONS (1624).

4. In the wealth-management field, high-net-worth (HNW) families have a minimum of $5 million in investable assets and ultra-high-net-worth (UHNW) families are defined as those with at least $30 million in investable assets. Will Kenton, *Ultra-High Net-Worth Individual (UHNWI)*, INVESTOPEDIA (Sept. 11, 2019), https://www.investopedia.com/terms/u/ultra-high-net-worth-individuals-uhnwi.asp. As to numbers of families in these categories, "a 2015 study found that nearly 70,000 individuals living in North America have assets of $30 million or more—a huge jump from just a decade ago. It found that some 5,000 households had assets of over $100 million. These figures include just liquid, investable assets (not real estate)." DAVID CALLAHAN, THE GIVERS 18 (2017); *see also* BROOKE HARRINGTON, CAPITAL WITHOUT BORDERS 11 (2016).

5. *See* THE SEASTEADING INSTITUTE, https://www.seasteading.org/ (last visited Jan. 26, 2019); *see also* Leanna Garfield, *A Pilot Project for a New Libertarian Floating City Will Have 300 Homes, Its Own Government, and Its Own Cryptocurrency*, BUS. INSIDER (July 5, 2018), https://www.businessinsider.com/floating-city-plans-seasteading-institute-peter-thiel-blue-frontiers-2017-12.

That high-wealth families are encouraged to think of themselves as islands apart from the larger polity is not a secret phenomenon. In fact, hiding in plain sight, the wealth-management profession has been encouraging high-wealth families to imagine themselves as separate, exceptional entities for decades. One quintessential marker of this high-wealth-family exceptionalism—one particularly expressive vehicle through which wealth managers embolden high-wealth families in their quest for financial and regulatory self-determinism—is a widely marketed wealth-preservation tool: the family constitution.

A family constitution, unmistakably modeled on the national constitution, is a governance document that sets forth the rules that family members must adhere to in order to protect the family fortune from various kinds of creditor claims, family feuds, and reckless investments.[6] The family constitution creates political branches and "checks and balances" within the family power structure, all in service of staving off asset erosion. As one wealth consultant explains, "[f]amily wealth is not self-perpetuating. Without careful planning and stewardship, a hard-earned fortune can easily be dissipated within a generation or two."[7] Underlying this embrace of the gospel of wealth preservation is another unmistakable message—that every high-wealth family is distinctive, exceptional, and unique. In the world of family constitutions, every high-wealth family can and should create its own rules and regulations, its own value-system, and its own vision of rights and responsibilities. In this way, every high-wealth family constitutes its own site of law and order and its own sovereign state.[8]

While family constitutions allow high-wealth families to invent themselves notionally as sovereign entities, it is the constellation of laws governing wealth management and transfer that operationalizes this exceptionalism.[9] These wealth rules exempt high-wealth families from a number of financial regulations that limit other families and allow high-wealth families to craft their own rules, set their own rewards and penalties, and engage in self-government in certain areas of wealth management. For example, a high-wealth family can create an

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6. *See Note on Family Constitution*, LAWYERSCLUBINDIA (July 5, 2017), https://www.lawyersclubindia.com/articles/Note-on-Family-Constitution-8279.asp. Consultants recommend that a family constitution "include a minimum of 20 to 25 pages and a maximum of 70 pages (including appendices) when the content is more juridical and the family is more complex." Rocio Arteagal & Susana Menéndez-Requejo, *Family Constitution and Business Performance: Moderating Factors*, 30 FAM. BUS. REV. 320, 322 (2017). These consultants also recommend allowing six to eight months to create a constitution because "it takes time for family members to agree and commit to the Family Constitution." *Id.* at 323.

7. JAMES E. HUGHES JR., FAMILY WEALTH 3 (rev. & expanded ed. 2004); *see also* Brian Groom, *The Rise of the Family Business Constitution*, FIN. TIMES (Dec. 13, 2017), https://www.ft.com/content/5d06ec9e-c61b-11e7-b30e-a7c1c7c13aab ("Where the goal of the family is to continue to manage . . . family wealth collectively across the generations, a constitution can be very helpful.").

8. STEWART, *supra* note 1, at 1.

9. The focus of this Article is U.S. law; however, wealth planning for UHNW families is a global endeavor. One wealth manager remarks: "A typical client . . . has assets in a dozen different jurisdictions and family members in another half a dozen jurisdictions, and they need a bunch of wonks to make sure that they're holding their wealth in the most efficient way possible and don't lose their wealth to unnecessary taxes or get caught up in probate." HARRINGTON, *supra* note 4, at 124.

unregulated private trust company that not only protects assets but also operates outside of most state intervention. High-wealth families can invest their assets through a family office rather than an investment firm, thereby becoming exempt from a number of Securities and Exchange Commission (SEC) requirements. Similarly, through family foundations, high-wealth families can protect their assets while at the same time receiving exemptions from various forms of taxation. Often, these forms all work together, entwined in one financial fabric. For example, a family office may invest the foundation funds just as a private trust company can also operate under the umbrella of the family office.

Through these mechanisms, the twinned scripts of family constitutions and family-wealth rules cohere to form the law of high-wealth exceptionalism, which manifestly inspires high-wealth families to conceive of themselves as existing separate and apart from the larger polity. What is less manifest is how deeply and in what precise ways the law of high-wealth exceptionalism is problematic. The operation of high-wealth families within a separate financial stratosphere and their exemption from certain sets of rules might seem remote and even totally unconnected to the political lives and financial health of ordinary-wealth families. To think that, however, would be to miss the countless, translucent threads of connection between high-wealth families and their ordinary-wealth counterparts.

High-wealth exceptionalism not only intensifies old harms but also creates new ones within the larger polity. In a practical mode, high-wealth-family exceptionalism has the potential to inflict financial harms on ordinary-wealth and lower-wealth families by increasing systemic risk in financial markets, shifting tax burdens from high-wealth to lower-wealth families, and widening the wealth gap. In a political and theoretical mode, high-wealth-family exceptionalism facilitates the growth of a plutarchic and patrimonial system of government in which power is based on family wealth and privilege flows in a circuit between a small number of already exceptionally resourced families. In other words, privileged families—many with the wealth of small nations—use their fortunes not only to create and fortify rules that help them preserve wealth but also to shape law, policy, and social norms in a range of domains. That family constitutions reflect and family-wealth rules authorize this type of large-scale power for high-wealth families is, consequently, of the utmost importance to the larger economy and polity. Moreover, understanding how the law of high-wealth exceptionalism functions is an important first step to identifying hidden levers of wealth inequality and addressing the resulting democratic deficit.

Wealth-management tools like the family constitution—because they are marketing tools and expressive texts rather than legal documents—have been generally overlooked in the legal literature. Scholars have therefore failed to connect these personalized constitutions to either the workings of wealth-law rules or broader concerns about a legal system that privileges family wealth. This Article, aiming to excavate these connections, reveals how wealth management and wealth-law rules work in tandem to construct the law of high-wealth exceptionalism. The twofold goal is not only to connect the statist discourse of family constitutions to intricate legal frameworks for wealth regulation but also, subsequently, to connect these twin inscriptions of family power to a vast and varied landscape of economic and political inequality. In so doing, the Article builds on a new and developing literature about the legal creation and perpetuation of wealth inequality through devices such as tax and trust law.[10] And this line of scholarship feeds into a larger, lively discussion about wealth and income inequality—in the United States and globally—and how economic inequalities impact the democratic state.[11]

The Article proceeds in three Parts. The first Part is about the creation of the law of high-wealth exceptionalism. I read both the family-constitution literature and the family-wealth rules to see how they jointly inscribe the power and authority of high-wealth families in text. I detail the language of family constitutions and highlight the grammar of exceptionalism. I also discuss three sets of family-wealth rules that operationalize this exceptionalism: the rules for private trust companies, family investment offices, and charitable family foundations. In Part II, I explicate how the law of high-wealth exceptionalism is problematic, both in financial and political ways, for ordinary-wealth and lower-wealth families. In particular, I look at how the law of high-wealth exceptionalism contributes to both financial insecurity for ordinary-wealth families as well as the growth of a plutarchic state. Part III then turns to solutions. In the practical domain, I suggest tax-based solutions—and the estate tax in particular—for redistributing wealth and addressing the problems that come with wealth inequality. In the theoretical domain, I suggest mapping the family constitution onto the national constitution, in an expansive sense, to recover constitutional arguments against economic inequality and the consolidation of power through wealth.

10. *See* Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69, 90 (1990); Naomi Cahn, *Dismantling the Trusts and Estates Canon*, 2019 WIS. L. REV. 165, 175 (2019); Paul L. Caron & James R. Repetti, *Occupy the Tax Code: Using the Estate Tax to Reduce Inequality and Spur Economic Growth*, 40 PEPP. L. REV. 1255, 1256 (2013); Felix Chang, *Asymmetries in the Generation and Transmission of Wealth*, 79 OHIO ST. L.J. 73, 74–75 (2018); Iris J. Goodwin, *How the Rich Stay Rich: Using a Family Trust Company to Secure a Family Fortune*, 40 SETON HALL L. REV. 467, 467–78 (2010); Carla Spivack, *Beware the Asset Protection Trust*, 5 EUR. J. PROP. L. 1–26 (2016); Carla Spivack, *Democracy and Trusts*, 42 ACTEC L.J. 311, 339 (2017); *see also* HARRINGTON, *supra* note 4.

11. *See* David Singh Grewal, *The Laws of Capitalism*, 128 HARV. L. REV. 521, 652–53 (2014) (reviewing THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (2014)) ("[Piketty's] book should prompt further study of the actual laws of capitalism . . . that is, of the various legal and institutional arrangements governing capitalist economic systems. In this task, a range of insights from legal scholarship may be usefully deployed, particularly if oriented to the study of specifically capitalist economic and social relations."). A number of scholars have taken up this task, including Katharina Pistor in her book THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY (2019).

The law of high-wealth exceptionalism—dedicated to high-wealth family sovereignty and the preservation of family wealth—cannot and should not be the law that obliquely governs our larger state.

I. THE INSCRIPTION OF FAMILY GOVERNANCE

The message that high-wealth families are exceptional units of governance, separate and apart from the rules that govern ordinary families, is inscribed in both the wealth-advisory literature as well as the wealth-law rules. The family constitution, a wealth-preservation device aggressively marketed by wealth-management professionals, exemplifies this notion of exceptionalism and self-governance. Moreover, family-wealth rules also affirm and reflect this same view of high-wealth exceptionalism. This Part examines the discourse and perspective of both family constitutions and family-wealth rules to unearth and analyze both the strength of this message of exceptionalism as well as how it translates between the domains of law, financial industry, and cultural understanding.

A. Forming a Perfect Family Union

Every high-wealth family should write a constitution. That's what wealth managers say. And the recurring problem of wealth retention is the reason why.[12] A wealth consultant explains, "Family wealth is not self-perpetuating. Without careful planning and stewardship, a hard earned fortune can easily be dissipated within a generation or two."[13] Encapsulated in the universal aphorism "shirtsleeves to shirtsleeves in three generations,"[14] the knowledge that

12. A wealth advisor points out that the original problem of decay began with government. The cycle of decay, he remarks, transformed monarchies into oligarchies, oligarchies into republics, republics into democracies, and democracies into tyrannical states, which in turn finally self-destructed only to be replaced by more enlightened monarchies. HUGHES, *supra* note 7, at 25; *see also* Abby Schultz, *Why Asia's Rich Need a Family Constitution*, BARRON'S (Jan. 9, 2015), https://www.barrons.com/articles/why-asias-rich-need-a-family-constitution-1420777286?mod=_newsreel_2.

13. HUGHES, *supra* note 7, at 3; *see also* Groom, *supra* note 7.

14. HUGHES, *supra* note 7, at 3 ("[V]ariations of this proverb are found around the world."); *see also* Phoebe Venable, *How to Prevent the Proverb 'Shirtsleeves to Shirtsleeves in 3 Generations,'* TENNESSEAN (Sept. 8, 2017), https://www.tennessean.com/story/money/2017/09/08/how-prevent-proverb-shirtsleeves-shirtsleeves-3-generations/639116001/ ("The proverb is certainly not unique to the western world. Clogs to clogs, stalls to stalls, rice paddy to rice paddy, shirtsleeves to shirtsleeves. It is a universal cultural proverb because it describes human nature."). One commentator describes the global prevalence of the proverb as follows:

> In Spain and throughout Spanish-speaking Latin America, the challenge of preserving wealth and the spirit of enterprise across generations is captured in popular wisdom in the expression: 'Padre bodeguero, hijo caballero, nieto pordiosero' (or Father-merchant, son-gentleman, grandson-beggar). In Brazil, the three generation rule goes like this: 'Pai rico, filho nobre, neto pobre' (or Rich father, noble son, poor grandson). In North America the most common expression on the subject is: 'From shirtsleeves to shirtsleeves in three generations.' In China, the expression 'Fu bu guo san dai' states unequivocally that wealth is not supposed to survive three generations. And in

family wealth can be lost as quickly as it can be gained looms large, creating anxiety and prompting a search for solutions. And whether the family money comes from business revenue or investment income is immaterial because "[a]ll families are in business—the business of wealth preservation."[15] Enter the family constitution.

In this Subpart, I begin by exploring how the wealth-management literature describes and positions the act of drafting a family constitution as a safeguard against the seemingly inevitable erosion of family fortunes.[16] I provide an intricate reading of this literature with an eye toward mining the particular vocabularies and grammars that encourage families to think of themselves as self-contained statist entities—from creating governmental branches to expressing fundamental family values and family distinctiveness.

1. *Crafting Democratic Governance*

Starting, appropriately, with political origin stories, one wealth advisor states: "Family governance begins with the creation of the family by the joint decision of two individuals to subordinate their individual freedoms of choice to a system of representative governance in which each has a role."[17] Wealth advisors therefore recommend that families begin by gathering the group of family members that will agree and submit to representative family government: *the people*.[18] There is no right stage in wealth creation to write one, but wealth managers generally assume a need when high-wealth families are at a tipping point—one or two generations in—when wealth loss commonly begins. Families with old wealth are not, therefore, the natural targets for these products; rather, families with new money, looking for advice on how to manage and protect it, are the targets. Once identified, family members will meet at regular gatherings, or family assemblies. Wealth managers at Credit Suisse say: "Family assemblies are [a] vehicle for education, communication, and the renewal of

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> other countries around the world, similar folklore points to the significant challenge that family business and family wealth continuity represent.

ERNESTO J. POZA, CREDIT SUISSE, FAMILY GOVERNANCE: HOW LEADING FAMILIES MANAGE THE CHALLENGES OF WEALTH 7 (2010), https://www.credit-suisse.com/media/assets/apac/docs/cs-family-governance-white-paper.pdf. Or, as Jack Donaghy put it on *30 Rock*: "The first generation works their fingers to the bone making things; the next generation goes to college and innovates new ideas. The third generation snowboards and takes improv classes." *Jack Donaghy quotes, on business*, CHI. TRIB. (Oct. 11, 2012), https://www.chicagotribune.com/business/ct-xpm-2012-10-11-ct-biz-1011-bf-donaghy-quotes-20121011-story.html.

15. HUGHES, *supra* note 7, at 88. The breakup of the pool of family capital can also "negatively affect the family's access to new investments." *See also* POZA, *supra* note 14, at 6.

16. See HARRINGTON, *supra* note 4, at 36, for an examination of the wealth-management profession.

17. HUGHES, *supra* note 7, at 24.

18. *Note on Family Constitution*, *supra* note 6 ("Conceptually there is a step of forming the family task force and agreeing how the family task force is going to proceed and make decisions. This involves deciding and agreeing on the process for the family meetings that will follow.").

family bonds among a larger number of family members. Family assemblies create participation opportunities for all family members at least once a year."[19]

That the family state will be a democracy is generally taken for granted: "[e]very family I know . . . decides that a republic is the best system of family governance."[20] And that the republic will look much like the United States is also generally assumed. Making the constitutional analogy very explicit, one advisor remarks that convening these large decision-making groups "gives each member of the family an experience in making government and an understanding of what the members of the Constitutional Convention accomplished in writing the Constitution of the United States."[21] An explicit parallel is also apparent between this process and the U.S. constitutional process as "family members move from 'self-awareness' to 'family awareness,' . . . from an 'independent will' to an 'interdependent will or social will.'"[22]

One particularly important job tasked to the family assembly is to elect representatives from the family who will engage in the work of building a regulatory structure to govern the family and protect its wealth.[23] If it is a smaller family, the family assembly may act as the legislative body or, in a larger family, the assembly members may elect family members who act as legislators in a "representative democracy."[24] Luckily, according to one advisor, "American families are blessed with the knowledge of how to form a representative government."[25] In this way, the family constitution "sets out the way in which the family will make decisions."[26] For example, from the outset, a family constitution might establish rules for the frequency of family meetings, the funding of

19. POZA, *supra* note 14, at 21.

20. HUGHES, *supra* note 7, at 24. Whether these constitutions do, in fact, mirror democratic values is another question. For more, see Allison Tait, *Is My Family Constitution Constitutional?*, SUA SPONTE, May 2, 2019, at 1, 4, https://editions.lib.umn.edu/suasponte/wp-content/uploads/sites/10/2019/04/Tait_Final.pdf.

21. HUGHES, *supra* note 7, at 49.

22. Linda McClain, *Family Constitutions and the (New) Constitution of the Family*, 73 FORDHAM L. REV. 833, 845 (2006). McClain's article is one of the few readings on family constitutions, examining the constitutional ordering of families as well as family self-constitution. "This search for self-constitution by families is an apt point of departure for a consideration of the place of families and the rest of civil society in a new constitutional order." *Id.* at 835.

23. STEVEN KEMPSTER & MUSTAFA HUSSAIN, TAYLOR WESSING, THE FAMILY CONSTITUTION GUIDE 25 (2014), https://img.borsen.dk/img/cms/tuksi4/uploads/img_server_adm.files/4738_filename_4008.pdf.

24. POZA, *supra* note 14, at 10 ("While the strategy has to be tailored to each particular family, boards with independent advisors, family councils, family offices, family constitutions, estate and ownership control planning and committees of the family (e.g., investment, strategic planning, and philanthropy committees) are all part of the structure.").

25. HUGHES, *supra* note 7, at 21.

26. KPMG, CONSTRUCTING A FAMILY CONSTITUTION 1 (2010), https://www.fambiz.com.au/wp-content/uploads/Constructing-a-Family-Constitution-KPMG.pdf.

family meetings, and the selection of family-council members, as well as any outside professional advisors.[27]

Then, because the family constitution is meant to protect wealth through rule creation, "[t]he family members—or their appointed representatives—make 'laws' in the form of more detailed family policies and agreements, following the processes defined in their constitution."[28] In particular, family constitutions tend to create internal forms of both family and corporate law. In the "family law" vein, a family constitution might dictate certain protocols for family members who are planning marriage, such as the execution of prenuptial agreements.[29] Similarly, family constitutions might provide a reliable framework for wealth transfer upon the death of family members.

In the "corporate law" vein, the family constitution can also set forth the rules about the employment of family members and remuneration for family members.[30] Family legislators can decide upon salaries for those who work in the business and even set compensation for board members and those family members who provide other services to the family. The family legislators might, relatedly, address questions about allowances, distributions, and other forms of subsidy for family members: "[s]hould all family members be paid the same, or is a premium required for those engaged in senior roles within the family business or family office?[31]

Finally, to help resolve conflict when family rules are broken, advisors recommend establishing a judicial branch or "Council of Elders" in addition to the "legislative branch" (the assembly of all the family members).[32] The members of this judicial branch could be selected by the legislative committee or elected by the family at large. Wealth advisors make clear that the family constitution "won't circumvent or avoid conflict" ("If only it were so[!]").[33] However, adopting a judicial branch and setting into place mechanisms for dispute resolution sets in place "a set of checks and balances."[34] Creating and maintaining a judicial branch also hopefully allows family problems to be resolved with the least amount of family drama possible: "The desired outcome is rational

27. Karin Prangley & Anne Warren, Brown Brothers Harriman, *We the Family: The Benefits of Creating a Family Constitution*, OWNER TO OWNER, Quarter 4, 2017, at 1, 3–4, https://www.bbh.com/resource/blob/24622/0206d329812097ac1479bf1bdd0a9b4a/q4-2017-we-the-family—the-benefits-of-creating-a-family-constitution-pdf-data.pdf.

28. STEWART, *supra* note 1, at 1.

29. Brad Simmons, *The Six Most Contentious Parts of a Family Constitution*, MUTUAL TR., https://web.archive.org/web/20190310012214/https:/familyofficeinsiders.mutualtrust.com.au/article/governance/six-common-pressure-points-family-constitution/ (last visited Feb. 12, 2020).

30. *Id.*

31. *Id.*

32. HUGHES, *supra* note 7, at 175.

33. KPMG, *supra* note 26, at 1.

34. HUGHES, *supra* note 7, at 29.

economic and family welfare decisions that are not overwhelmed by traditional family dynamics."[35]

The family constitution, then, creates a universe of order and regulation for all family members. These idiosyncratic and custom-built rules are not necessarily tethered to the rules of the larger polity; instead, they center on and underscore the values of one particular family and its wealth-preservation needs. As one scholar remarks: "[F]amilies are advised to create institutions that mirror those provided by the state or the market, but with a crucial difference: the family institutions are designed with the sole purpose of making those particular families wealthier over time."[36]

2. *Identifying Fundamental Family Values*

Wealth advisors state: "Probably the most important feature of the Family Constitution is that it should be the embodiment of the personal ethos, and closely held principles, that the family all agree between themselves to abide by in protecting and enhancing the operation of the family wealth."[37] The expression of family values and commitments is, the literature suggests, not only what will give the rules meaning but also what will bind members to the document: "A critical part [of the family constitution] is that the individual family members enter into a social compact, asserting their shared values and goals and their willingness to govern themselves according to those values and goals."[38]

Part of the project of embedding family values in the document means including a literal statement of values that will organize and anchor the document—a constitutional preamble, so to speak. "Family values, family legacy and the renewed sense of purpose brought on by a multigenerational family vision are the anchors of an enterprising family's continuity plan."[39] Credit Suisse recommends a short section entitled "Values" at the beginning of the document that recounts "[t]he family values that have successfully guided the firm in its relations with customers, employees, suppliers, partners, competitors, and the community."[40] Other consultants confirm this advice: "A family constitution would typically articulate the mission[,] vision[,] and values of the family and

35. POZA, *supra* note 14, at 3.

36. HARRINGTON, *supra* note 4, at 251.

37. KEMPSTER & HUSSAIN, *supra* note 23, at 7.

38. HUGHES, *supra* note 7, at 20; *see also* Prangley & Warren, *supra* note 27, at 2 ("If the family constitution's theme is that consensus building and core values are paramount, the family will collectively support the success of the business.").

39. POZA, *supra* note 14, at 5; *see also* Prangley & Warren, *supra* note 27, at 2 ("[T]he family's philosophy and values should be the cornerstone of the document.").

40. POZA, *supra* note 14, at 22; *see also id.* at 19 ("Understanding the family values and traditions that underlie the business and the family's commitment to the business across generations of owners.").

important principles for working together or for governing and managing the family business."[41]

Families are encouraged to discuss what the core family commitments are at initial family assemblies. One family, for example, at its first family weekend retreat, "reflected on its legacy and recommitted to several core values that it wanted to pass on to the next generation."[42] The hope is that future generations reaffirm these values—or discuss how and why the original values have changed. The Rockefellers, we are told by wealth managers, bring all family members together annually "at the family seat" to discuss and reaffirm the "Rockefeller vision."[43] Similarly, a wealth advisor recounts this story: "There's a family in Europe, now in its tenth, eleventh, and twelfth generations, with many hundreds of members, that reaffirms and readopts its family constitution every year at a family meeting."[44]

What wealth advisors also recommend, to strengthen the sense of family values, is relating these fundamental values to family history. The reason? "Rooting the family values in history and personalities can produce a far more meaningful and enduring statement of those values than simply asking each family member what his or her values are and why."[45] History, like the statement of values, holds the family together, and the recitation of family history is therefore of paramount importance. A wealth advisor observes:

> In earlier times, particularly prehistoric ones, the recitation of the history of society through stories was the glue that held these societies together . . . . It was through these stories that individuals learned who they were, and it was through their retelling of the stories that they reaffirmed their place in that society.[46]

This historical work is something that the family assembly might discuss as a whole because "[r]ediscovering the values and the legacy takes time and conversation. It takes family history projects, and candid discussions regarding the strategies and growth opportunities sought by the different generations. It takes making history come alive again."[47] After a broad-based discussion, a smaller committee might write the actual history and incorporate it into the

41. STEWART, *supra* note 1, at 1. For example, the Bush family (of Bush's Beans) makes a short statement of this type at the beginning of their constitution: "Together, we will live by the values of integrity, responsibility, trust and caring as exemplified by our founder, A.J. Bush." Prangley & Warren, *supra* note 27, at 2.

42. JOSÉ ANTÓNIO PORFÍRIO, RICARDO RODRIGUES & TIAGO CARRILHO, UNIVERSIDADE ABERTA, FAMILY BUSINESS SUCCESSFUL SUCCESSION TRAINING MATERIAL MODULE 3: "GROWTH STRATEGIES FOR FAMILY BUSINESS" 35 (2018), https://www.fabuss-project.eu/wp-content/data/MDL/FABUSS_3_EN.pdf.

43. HUGHES, *supra* note 7, at 34.

44. *Id.* at 19.

45. Prangley & Warren, *supra* note 27, at 2.

46. HUGHES, *supra* note 7, at 20.

47. POZA, *supra* note 14, at 18.

constitution: "A small committee should write a brief family history. Place special emphasis on past family crises and opportunities, on the personalities of famous and infamous ancestors whose impact is still felt, and on past successes and failures in family decisions."[48]

One example is a family matriarch who "published a family history book which included a family tree, photos, memoirs, maps, and histories of family members in an era before there was much wealth in the family."[49] Every family member still receives a copy of this family history at Christmas, perpetuating a familiarity with and an understanding of the distinctive family character.[50] Alternately, the narratives that emerge from an inquiry into family history may be the result of more imaginative efforts. At one family-council meeting, a daughter of the family-business founder began the meeting by "reading a fictional letter from her deceased father."[51] She wrote the letter as if the father knew the family council was meeting and wanted to speak to the assembled members. In this way, "[i]ts purpose was to convey to all family members in attendance a sense of history, a sense of priorities, [and] the founder's commitment to a few essential principles."[52] The council meeting was, thanks to this letter, "launched with a tremendous sense of history and a personal challenge to the next generation to do the right thing as the family and the business moved forward."[53]

3. Exceptional Entities: Family as Nation-State

One of the broader aims of recovering family history and writing the family constitution is to help coalesce diverse family members. Another is to remind each family of how distinctive and unique it is. A wealth advisor comments: "Family stories give members a sense of the unique history and values they share, their 'differentness.'"[54] For this reason, the same advisor says, one family's annual meetings always includes a recitation of family stories and history: "Although the meeting has an extended agenda, its acknowledged main purpose is to remind family members who they are, where they come from, and in what way they are 'different.'"[55] These and other rituals that high-wealth families engage in will, according to the advice literature, provide a way not only of

48. HUGHES, *supra* note 7, at 49.

49. Barbara Hauser, *Family Governance: Who, What, and How*, J. WEALTH MGMT., Fall 2002, at 11.

50. *Id.*

51. POZA, *supra* note 14, at 18.

52. *Id.*

53. *Id.*

54. HUGHES, *supra* note 7, at 12. "It was through these stories that members of the society learned that they were different from other societies." *Id.* at 20.

55. *Id.* at 19. This is equally true, according to wealth professionals, as it relates to family businesses: "Just as each family business is unique, so each family constitution will need to reflect the unique characteristics of both the business and the family to which it relates." KPMG, *supra* note 26, at 2.

"linking" each current generation to its ancestors but also for family members to understand "the uniqueness of their tribe, and . . . their special place in it."[56]

Each family is a tribe; each family is a nation. Some wealth managers express this notion of family statehood explicitly. Several advisors note that high-wealth families are "like 'small countries' and just like countries, they need to have their own 'constitution' and 'rule of law' if the family members are all to live in harmony together and if the family is to continue to be successful."[57] Other advisors merely stress the analogy between family and state. Citing Aristotle, who posited the family as the template for government, one wealth manager remarks that "the family is the first and smallest unit of governance," adding that "[i]n our modern parlance, the system of governance practiced in a family is a microcosm of all other systems of governance."[58] In a more whimsical mode, another wealth manager muses: "Is a family easier to 'govern' than a country or a corporation? . . . Montaigne noted that governing a private family involves no less trouble that governing an entire kingdom."[59]

In various ways, the wealth-management discourse plays on this conception of the family as "an autonomous group . . . independently constituted and self-sustaining,"[60] referring back to the historical notion of the family as a separate and self-sustaining unit "whose ties are rooted in property."[61] What is more, this concept of the family as a small nation is fortified by the fact that many of the families who create family constitutions hold wealth that equals or surpasses that of small nations. In a wealth landscape in which hedge-fund managers earn amounts equal to the GDP of small countries on an annual basis, the boundaries between family and state quite literally begin to blur.[62]

High-wealth families are encouraged to think of themselves as "different" and "special"—which may also lead to these high-wealth clients considering

56. HUGHES, *supra* note 7, at 51.

57. STEWART, *supra* note 1, at 1.

58. HUGHES, *supra* note 7, at 23. "For as household management is the kingly rule of a house, so kingly rule is the household management of a city or of a nation, or of many nations." EVELYN ABBOT, A HISTORY OF GREECE, PART II: FROM THE IONIAN REVOLT TO THE THIRTY YEARS' PEACE, 500-445 B.C., at 10 (1892). *See generally* Allison Tait, *The Return of Coverture*, 114 MICH. L. REV. FIRST IMPRESSIONS 99 (2016).

59. Hauser, *supra* note 49, at 16. She adds, "One might think so, since family members are assumed to love each other and to reach agreement more easily. One would be wrong. Professional conflict resolution experts who dealt regularly with countries busy killing each other's citizens have commented that that work is far easier than negotiating a governance structure for a family." *Id.*

60. JULIA HIRSCH, FAMILY PHOTOGRAPHS: CONTENT, MEANING AND EFFECT 33–35 (1981).

61. *Id.*

62. "The world's top 25 hedge fund managers earned $13bn last year—more than the entire economies of Namibia, the Bahamas or Nicaragua. Kenneth Griffin, founder and chief executive of Citadel, and James Simons, founder and chairman of Renaissance Technologies, shared the top spot, taking home $1.7bn each—equivalent to the annual salaries of 112,000 people taking home the US federal minimum wage of $15,080." Rupert Neate, *Top 25 Hedge Fund Managers Earned $13bn in 2015 – More Than Some Nations*, GUARDIAN (May 10, 2016), https://www.theguardian.com/business/2016/may/10/hedge-fund-managers-salaries-billions-kenneth-griffin-james-simon; *see also* HARRINGTON, *supra* note 4, at 244.

themselves to be "above nationality and laws."[63] Furthermore, as the next Subpart details, family-wealth rules emphatically reinforce this notion of exceptionalism.

B. Securing the Wealth of Families

Like family constitutions, which inscribe the exceptionalism and sovereignty of high-wealth families into a governance document, legal rules governing family-wealth management etch high-wealth-family exceptionalism into law. In this Subpart, I analyze three legal frameworks—trust, investment, and charitable-giving law—that are of signal importance to high-wealth families, and I demonstrate how these frameworks privilege high-wealth families by exempting them from certain laws. Separately, each legal mechanism or entity works to ensure family-wealth preservation; used together, as interlocking pieces of a complicated financial strategy, these wealth-management vehicles form the overarching architecture of wealth preservation.

1. In Families We Trust

Playing directly into and reinforcing the wealth-management discourse of exceptionalism is the private trust company. Private trust companies—state-chartered entities designed to provide private financial services to members of a family and often run with the help of the family—are both a time-honored mechanism for facilitating family-wealth preservation as well as legally sanctioned entities exempt from most state regulation.[64] High-wealth families, like the Phipps and the Rockefellers, have used private trust companies since the 1800s to preserve wealth and keep their assets safe from family members and external creditors alike. What are today leading trust companies with significant holdings such as the Bessemer Trust and Northern Trust companies began as private trust companies.[65] Now, as in the past, the private trust company is indisputably a vehicle for wealth preservation: "[R]elying upon an architecture of complex planning techniques, the very wealthy utilize the family trust company as the keystone within these strategies to secure their fortunes for untold generations to come."[66] And now, as in the past, these trusts are geared toward serving the ultrarich. Wealth advisors all agree that a family should have at the

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63. HARRINGTON, *supra* note 4, at 245.

64. Christopher C. Weeg, *The Private Trust Company: A DIY for the Über Wealthy*, 52 REAL PROP., TR. & EST. L.J. 122, 124–26 (2016).

65. Bessemer Trust and Northern Trust—collectively with over $1.5 trillion in trust assets under management—similarly started as private trust companies founded by the Phipps and Smith families. *See* HUGHES, *supra* note 7, at 23; *see also* Weeg, *supra* note 64, at 124.

66. Goodwin, *supra* note 10, at 515.

very least $60 million in assets—but more likely $100 million—for a private trust to make financial sense.[67]

In every state a high-wealth family can create a "lightly regulated" private trust company, a company that is less regulated than any bank or trust company that serves the general public.[68] Light-regulation states often require organizational components, such as a minimum number of directors, annual board meetings, a physical office within the state in which it is organized, and a minimum number of employees.[69] The only consistent state requirement is that these companies have organizing documents limiting the entity's purpose to serving the family, broadly defined. In fact, the typical statute requires that the company make a statement under oath that it is not offering services to the general public.[70]

Alternately, some states permit the formation of unregulated private trust companies.[71] These states typically permit trust companies to organize as limited-purpose corporations with organizing documents that limit the purpose of the company to serving the private family.[72] Outside of that requirement—that

67. Weeg, *supra* note 64, at 125. Another source suggests that the costs of a private family-trust company "make it prohibitively expensive for families with less than $60 million." HUGHES, *supra* note 7, at 147. More routinely, estate-planning experts generally recommend assets of at least $100 million. *Private Trust Companies*, S.D. TR. CO., http://www.sdtrustco.com/pftc-regulated-and-unregulated/ (last visited Mar. 21, 2018). Despite the minimal start-up costs, there are other, significant expenditures, including "paying a skilled team of outside advisers," such as CPAs, professional trustees, attorneys, estate-planning professionals, and investment advisers. Weeg, *supra* note 64, at 130. There may also be compliance costs, if the private trust is a regulated one. Furthermore, there are "soft costs" as well, including time burdens on family members in managing those hired to assist the trust company, attending meetings, and conducting elections. *Id.* at 131.

68. Goodwin, *supra* note 10, at 474. States with this so-called "light regulation" include Alaska, Delaware, New Hampshire, and South Dakota. *Id.* at 473; *see* ALASKA STAT. § 06.26.200 (2019); DEL. CODE ANN. tit. 5, §§ 773, 774, 779 (2019); N.H. REV. STAT. ANN. § 383-D (2018); S.D. CODIFIED LAWS § 51A-6A-4 (2018).

69. Goodwin, *supra* note 10, at 474; *see, e.g.*, NEV. REV. STAT. § 661.135 (2019) (minimum number of directors); S.D. CODIFIED LAWS §§ 51A-6A-31, 51A-6A-32 (minimum number of employees). There are also capital requirements that vary by state, ranging from $250,000 to $2 million. Goodwin, *supra* note 10, at 475.

70. Weeg, *supra* note 64, at 136. Many of the statutes also explicitly require that the trust company designate ancestors of the company, limiting those persons by familial relationship, and require that the company be wholly owned by family members. *See, e.g.*, LA. REV. STAT. § 6:591 (2019) ("All individuals who control a private trust company . . . must be related within the second degree of affinity or consanguinity."); OKLA. STAT. tit. 6, § 1740 (2020) (same language as Louisiana); TENN. CODE ANN. § 45-2-2002 (2020) (requiring "[a] statement under oath of the name of the individual who will be the designated ancestor of the private trust company"); *id.* § 45-2-2001 (defining "designated ancestor" as "one (1) or more ancestors of the family designated as such in the application submitted . . . either living or deceased" and requiring that if two are named, those two are or were "spouses to each other"); *see also* Todd Ganos, *Putting "Family" In Private Trust Companies – A Follow-Up Discussion On Regulation*, FORBES (Nov. 10, 2015, 9:06 AM), https://www.forbes.com/sites/toddganos/2015/11/10/putting-family-in-private-family-trust-companies-a-follow-up-discussion-on-regulation/#10f69ac728cd (defining family).

71. States that permit private trust companies to operate without regulation include Virginia and Wyoming. Goodwin, *supra* note 10, at 473 n.22. In addition, states such as Massachusetts and Nevada make available either light regulation or no regulation. *Id.* at 473 n.23; *see Why Establish a Private Trust Company?*, FRONTIER ADMIN. SERVICES, LLC, http://wyoprivatetrust.com/about-us/why-establish-private-trust (last visited Feb. 5, 2019).

72. Goodwin, *supra* note 10, at 475.

the company be limited to serving the family—the trust company is generally exempt from trust rules and is not subject to regulatory oversight.[73]

One of the biggest draws of unregulated trusts is that they offer unparalleled financial privacy for families through exemptions from state reporting requirements about their holdings, transactions, or investments. With an unregulated private trust company, high-wealth families are not required to make available annual reports or meeting minutes, list directors and officers, or share financial reports that have gone out to shareholders.[74] Moreover, high-wealth families are able to make their own rules about voting rights, shareholder reporting, and the involvement of external members such as institutional advisors in the company.[75] In this way, exposure of sensitive financial information to outsiders is minimal, limited only to any expert advisors a family chooses to bring into the company. Taking these concerns for family privacy even further, South Dakota permanently seals all trust documents that a family files.[76] These benefits and the ethos of both family privacy and control are encapsulated in the Wyoming Private Trust Administration Company's advertising: "Keep it in the Family[.] Consider a Wyoming Private Family Trust Company."[77]

Escape from fiduciary and investment rules in trust law is another draw of the unregulated trust company. Families with private trust companies are free to invest in more idiosyncratic ways than they would otherwise be, no longer beholden to either state trust law regulation or the policies and procedures of any financial institution.[78] Accordingly, private trust companies are marketed as a good alternative for families with portfolios that contain "heavily concentrated or illiquid assets, such as real estate, stock in a particular company, or a family-owned business."[79] Unregulated private trust companies can hold these

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73. *Id.*; Weeg, *supra* note 64, at 137.

74. Weeg, *supra* note 64, at 137.

75. Goodwin, *supra* note 10, at 477; *see also* Weeg, *supra* note 64, at 128 ("[R]emoving a board member is far easier and cheaper than removing a trustee: simply do not re-elect the member."); Todd Ganos, *Wealthy Families Create Private Trust Companies for Privacy, Protection, Tax Savings, and Control*, FORBES (Oct. 28, 2015, 1:51 PM), https://www.forbes.com/sites/toddganos/2015/10/28/wealthy-families-create-private-trust-companies-for-privacy-protection-tax-savings-and-control/#1d8c437e3713. A private trust company would be helpful, for example, when "[t]he client also wanted to maintain a degree of control over the trust affairs and understood that a private trust company enabled them to be on the board of directors, and to appoint several other trusted family members and advisers." *Private Trust Companies*, HAWKSFORD, https://www.hawksford.com/selected-services/private-client-services/private-trust-companies (last visited Feb. 5, 2019).

76. Matt Tobin & Tom Cota, *Nine Reasons to Start a Private Family Trust Company*, FAM. OFF. EXCHANGE (Jan. 1, 2018), https://www.familyoffice.com/insights/nine-reasons-start-private-family-trust-company.

77. *Why Establish a Private Trust Company?*, *supra* note 71.

78. While fundamental standards of fiduciary duty apply to a private trust company when serving as trustee, the laxer "'business judgment rule' governs the investment decisions of its board of directors." Weeg, *supra* note 64, at 128 (footnote omitted); *see also* VA. CODE ANN. § 6.2-1080 (2019). With a conventional trust, the standard fiduciary duties apply across the board, and the "business judgment rule" is never an option. Weeg, *supra* note 64, at 128.

79. Weeg, *supra* note 64, at 129 (noting that a corporate trustee, though permitted to concentrate assets under the prudent-investor rule, would likely choose to diversify to avoid liability); *see also* Liz Moyer, *Private*

and other alternative assets such as hedge funds in concentrations not acceptable to a commercial fiduciary subject to state rules concerning fiduciary duty.[80] The regulatory exemption allows "board members to make bolder and more dynamic investment decisions when managing the assets of the family trusts."[81] Moreover, board members can also have their liability "limited to the company's capital, in the absence of criminal or reckless conduct."[82]

The legal rules governing (or not governing) private trust companies dovetail with the concept of high-wealth-family exceptionalism written, in a different register, in the family constitution. The high-wealth family, permitted to form a private financial institution and then left alone to manage and control the family wealth contained within, constitutes its own private dominion. An imagined sovereign territory of "family leadership succession, family cohesion, and intergenerational cultural succession,"[83] the private trust company is populated, animated, and superintended by the family. That this realm is self-contained is reinforced by the assumption that the private trust will serve as the "family seat,"[84] a training ground where each generation is able to "learn the ropes of asset management, while . . . still subject to the oversight of the other committee members,"[85] and a site of cultural inculcation.

Moreover, trust companies underscore this notion of high-wealth families being their own private islands—quite literally—in their marketing materials. Advertisements for commercial trust companies routinely suggest that all forms of asset-protection trusts, including private trust companies, create barriers between the family and the rest of the world. One Nevis trust company—aptly named the Fortress Trust Ltd.—encourages families to "Build Up That Wall" with the creation of a private trust company, declaring: "For wealthy individuals and families, properly-formed . . . trusts are like a wall between the world and

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Trusts for the Very Rich, WALL ST. J. (Dec. 14, 2014, 11:50 PM), https://www.wsj.com/articles/private-trusts-for-the-very-rich-have-advantages-1418619049; *Private Trust Companies*, *supra* note 75.

80. *See generally* WEALTHAVEN, PRIVATE TRUST COMPANIES A PRIMER (2013), http://www.wealthaven.com/wp-content/uploads/2015/12/Private-Trust-Company-Primer-October-2013.pdf ("A PTC can be structured to provide very tailored due diligence and oversight of unusual assets or concentrated positions . . . ."). Therefore, these companies may be less risk averse than a public trust company acting as trustee, and families can benefit from more aggressive investing strategies. Alan V. Ytterberg & James P. Weller, *Managing Family Wealth Through a Private Trust Company*, 36 ACTEC L.J. 623, 626 (2010).

81. Weeg, *supra* note 64, at 129.

82. *Id.*

83. *Id.* at 125.

84. HUGHES, *supra* note 7, at 150. "Even though we ultimately stayed with Wyoming, we made a few changes: we moved the annual family meetings to Jackson, and also decided to leverage more out of those trips, holding board meetings along with family meetings and staff meetings over the course of a few days." Ruth Easterling, *Evaluating Your PFTC State Situs: A Case Study*, FAM. OFF. EXCHANGE (Dec. 16, 2015), www.familyoffice.com/insights/evaluating-your-pftc-state-situs-case-study.

85. Weeg, *supra* note 64, at 126. This is what some call "financial parenting," and it is, essentially, the formation of financial citizenship within the family polity. *See* Goodwin, *supra* note 10, at 510–15 ("Most importantly for a family identified with its wealth, the family trust company provides a context in which successive generations can be tutored in long-term wealth preservation consistent with the family's particular ethos about money and investing.").

your assets. There's a gate in that wall, but only you have access."[86] Other trust companies, including private trust companies, use similar vocabularies to describe asset-protection trusts invoking walls, bridges,[87] and fortresses.[88] These images confirm the emphasis on isolation and wealth protection, as images of castles, fortresses, fences, and moats prevail. Moreover, in interviews with global wealth mangers, one sociologist recently found that many of these professionals "see their work as governed by an ethic reminiscent of medieval knighthood: an aristocratic code based on service, loyalty, and honor, dedicated to the cause of defending large concentrations of wealth from attack by outsiders."[89]

The trust literature states that having a private trust company is one of the best ways for high-wealth families "to protect and nurture their wealth"[90] while also enjoying the benefits of self-regulation and family control. Through the private trust company, the high-wealth family is able to remove itself from the nexus of service providers and legal regulations that are the lot of most financial consumers and operate as a self-sustaining entity.

2. *Investing in Family*

With roots in the Rockefeller tradition of family financial management,[91] the family office is a multipurpose and flexible vehicle. The family office can be located anywhere: "For some, the phrase conjures up a discreet presence located in Zurich or Boston for example; for others, a visit to the family office could easily mean a visit to a castle and estate in Scotland or a high-tech operation in Silicon Valley."[92] And, essentially, "family office[s] can be designed to

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86. *Nevis Trusts: State-of-the Art Protection and Estate Planning*, FORTRESS TR. LTD., http://www.fortress-trust.com/trusts/#private (last visited Feb. 5, 2019). This quote is about international trusts, but the same can be said about onshore ones. Wyoming, in fact, sells itself as the onshore offshore. Also said about asset protection trusts: "Properly-formed asset protection trusts (APTs) are like a wall between the world and your assets." ESQUIRE GRP., BUILD UP THAT WALL 1 (2015), http://www.esquiregroup.com/wp-content/uploads/2015/12/Esquire_Nevis.pdf.

87. *The Bridge Trust®: Offshore Protection with Domestic Simplicity*, LAW OFF. BRUCE C. JOHNSON, http://brucecjohnsonlaw.com/Page/the-bridge-trust (last visited Feb. 5, 2019) ("The Bridge Trust® combines the strength of an offshore asset protection trust, without the cost, complexity and compliance requirements . . . . If a legal crisis occurs, the Trust and accompanying assets 'cross the bridge' to the world's oldest and most tested offshore jurisdiction—The Cook Islands. Absent a threatening legal crisis, the client maintains direct control as trustee.").

88. Christian Reeves, *Maximum Security with a Cook Islands Asset Protection Trust*, PREMIER OFFSHORE (July 12, 2016, 12:30 PM), http://premieroffshore.com/maximum-security-with-a-cook-islands-asset-protection-trust/ ("If you want to build an impregnable fortress offshore, you want a Cook Island asset protection trust . . . . The Cook Islands asset protection trust is the Fort Knox of asset protection. An offshore trust from the Cook Islands is the ultimate in personal privacy and protection.").

89. HARRINGTON, *supra* note 4, at 38.

90. *Cf. Private Trust Companies*, *supra* note 75.

91. POZA, *supra* note 14, at 17.

92. Morven McMillan, *The Various Roles of the Successful Family Office*, CAYMAN FIN. REV. (July 18, 2017), http://www.caymanfinancialreview.com/2017/07/18/the-various-roles-of-the-successful-family-office/.

do anything [the family] want[s]."[93] Some "family office[s] . . . handle non-financial issues such as private schooling, travel arrangements, [event planning,] and . . . other household" organization.[94] The family office may also provide more comprehensive services, including tax and estate planning and coordination with trust companies and private bankers.[95]

For families with sufficient assets—generally assets over $100 million, according to wealth advisors[96]—the family office can also handle all family investment and financial management. As opposed to a family office focusing on social planning or more general administrative tasks, this kind of family office "focuse[s] primarily on the management and enjoyment of family wealth, ensuring that it is wisely invested for growth."[97] This form of the family office is widely used by high-wealth families because family offices for investment receives specialized legal treatment in the form of an exemption from the definition of "investment adviser" under the Dodd–Frank Act of 2010.[98]

This exclusion was the result, in part, of lobbying by a group called the Private Investor Coalition,[99] which argued that "family offices are aimed at preserving wealth and making conservative investments, not trying to beat markets

93. Michael Maslinski, *The Family Office: Adapting to Modern Needs in a Changing World*, 12 TR. & TRUSTEES 27, 27 (2006). "There are about as many variants of the family office as there are families." Alan Binnington, *Considering a Family Office? Here's What You Need to Know*, RBC WEALTH MGMT., https://www.rbcwealthmanagement.com/global/en/research-insights/considering-a-family-office-heres-what-you-need-to-know/detail/ (last visited Feb. 5, 2019). "As has often been said, 'once you have seen one family office, you have seen one family office.'" Maslinski, *supra*. "Family offices provide customized services and support for a single family, typically those with assets over $250 million." Philip Tedeschi & Joan Crain, *Key Considerations When Creating a Family Office*, BNY MELLON WEALTH MGMT., https://www.bnymellonwealth.com/articles/strategy/key-considerations-when-creating-a-family-office.jsp (last visited Feb. 11, 2020).

94. Adam Hayes, *Family Offices*, INVESTOPEDIA (June 25, 2019), http://www.investopedia.com/terms/f/family-offices.asp. This is the "service" model of a family office, in which the family office "employs staff to provide . . . bookkeeping, administrative services, personal property management . . . , project management, and concierge services." STEPHEN MARTIROS & TODD MILLAY, A FRAMEWORK FOR UNDERSTANDING FAMILY OFFICE TRENDS 2 (2006), http://cccalliance.com/FamilyOfficeTrends.pdf.

95. MARTIROS & MILLAY, *supra* note 94, at 2.

96. *See* Bernd Scherer, *Are You Rich Enough for a (Single) Family Office?*, J. WEALTH MGMT., Spring 2018, at 29, http://jwm.iijournals.com/content/20/4/29 (offering a test to determine whether someone is rich enough for a (single) family office). You may only be a "single-digit millionaire." Suzanne McGee, *Millionaires' New Challenge: They're Not Rich Enough for Private Banking*, GUARDIAN (Sept. 11, 2016, 8:00 AM), https://www.theguardian.com/money/us-money-blog/2016/sep/11/millionaires-private-banking-chase-wealth-management.

97. Maslinski, *supra* note 93.

98. Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 403(2), 124 Stat. 1376, 1571 (2010) (amending the Investment Advisers Act of 1940 and eliminating the private adviser exemption).

99. *Id.* The Private Investor Coalition "won an exemption in the 2010 Dodd-Frank financial reform bill, then spent much of the next year persuading the S.E.C. to largely adopt its preferred definition of 'family office.'" Noam Scheiber & Patricia Cohen, *For the Wealthiest, a Private Tax System That Saves Them Billions*, N.Y. TIMES (Dec. 29, 2015), https://www.nytimes.com/2015/12/30/business/economy/for-the-wealthiest-private-tax-system-saves-them-billions.html.

over time."[100] Similarly, advocates in favor of the exemption asserted that "[w]ealthy families . . . should be able to risk money as they please."[101] Bolstering the argument for exemption, a report from the Senate Committee on Banking, Housing, and Urban Affairs stated that SEC registration "[was] not designed to regulate the interactions of family members, and registration would unnecessarily intrude on the privacy of the family involved."[102] Accordingly, because of the presumed sophistication of these investment entities and because family offices were prohibited from soliciting or managing money from outside investors, Congress agreed that making family offices subject to regulations aimed at protecting investors was unnecessary.[103]

The most relevant part of this exemption—that is to say, the one most advertised by wealth managers and appreciated by high-wealth families—is the basic exemption from SEC registration. Registration would require public disclosure about family operations, office staffing, the amount of assets under management, and the office's trading history.[104] With the family office, this information is kept within the family and not shared with financial or governmental institutions or intermediaries. This exemption tracks with the wealth-management notion the "first and most important task for the family office is . . . 'information governance.'"[105] Deloitte notes in its marketing literature: For wealthy families and family offices, risk is not limited to investment

100. Robert Frank et al., *Soros Fund All in the Family*, WALL ST. J. (July 27, 2011), https://www.wsj.com/articles/SB10001424053111903999904576469761599552864.

101. *Id.*

102. S. REP. NO. 111-176, at 75 (2010).

103. Now, high-wealth families must worry only about meeting the definition of family office. To satisfy the SEC requirements and be classified as a family office, each family-office client must be a "family member," "former family member," "key employee," "former key employee," the estate of one of these persons, a company owned and controlled by one or more of these persons, or an affiliated trust or nonprofit organization meeting certain requirements. *See generally Family Office: A Small Entity Compliance Guide*, U.S. SEC. & EXCHANGE COMMISSION (Nov. 11, 2011), https://www.sec.gov/rules/final/2011/ia-3220-secg.htm. The family office must be "wholly owned by 'family clients' and . . . exclusively controlled [(directly or indirectly)] by [one or more] 'family members' and/or 'family entities.'" *Id.*

104. EY, EY FAMILY OFFICE GUIDE (2017), https://www.ey.com/Publication/vwLUAssets/ey-family-office-guide/$FILE/1006031-family-office-guide-hr.pdf. The Securities and Exchange Act requires that "brokers" and "dealers" register with the SEC. A family office will have to register if it meets one of these two definitions. 15 U.S.C. § 78c(a)(3)(A). A family office may also be subject to various forms of securities reporting such as beneficial-ownership reporting, 15 U.S.C. § 78m(d)(1) (2018), and large-trader reporting, Large Trader Reporting, Release No. 34-64976, 1–2 (2011), 17 CFR §§ 240, 249 (2011), https://www.sec.gov/rules/final/2011/34-64976.pdf. *See also* 15 U.S.C. § 78m(h). For example, in 2010, the SEC brought an action against two brothers, in part for utilizing an offshore family office "as a conduit and repository for communications and records they wished to conceal . . . . in an effort to avoid making required SEC filings." Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Corporate Insider Brothers with Fraud (July 29, 2010), https://www.sec.gov/news/press/2010/2010-137.htm (noting that the brothers were charged "with violating federal securities laws governing ownership and trading of securities by corporate insiders . . . [and] reaped more than $550 million in undisclosed gains").

105. Michelle St. Pierre, *Protecting a Family's Most Valuable Asset – Privacy*, WEALTH DIRECTOR (Jan. 6, 2015), https://www.wealthdirector.com/2015/01/protecting-a-familys-most-valuable-asset-privacy/.

strategy.[106] There are also issues of privacy, confidentiality, and the family's reputation to consider.[107]

Family offices can enhance their financial privacy even further through certain investment choices. If the family office invests primarily in private ventures—like private equity or hedge funds, which are also relatively unregulated by the SEC—there is even less likelihood of public disclosure concerning the family wealth and financial management. Another popular "trend"[108] is the creation of private-label funds that, "similar to a mutual fund,"[109] consist of the pooled assets of a family[110] and are usually managed by the family office. Private-label funds can be designed in any way to meet the specific investment and legal needs of the family, and "[t]hey are seen by many as ideal for private wealth structuring, not least because their existence may not be a matter of public record."[111]

Exempt from most SEC regulation and reporting, family offices are also exempt from the rules and limitations of commercial financial institutions. Families can assert a high degree of control over the types of investments that the office makes and can choose to invest in ways that traditional investment firms might not. For example, a family office might want to invest in the ventures of individual family members or friends, providing start-up loans or other funding. And, "[b]y creating a family office, the family . . . may give them far more favorable investment terms, tax advantages, and flexibility in deal structures."[112] Family offices can also take long-term approaches to investing, "[c]asting the lure of 'patient money'" and thereby "leveraging their bargaining position."[113] One wealth advisor remarks that, in this way, "single-family offices

106. DELOITTE, PRIVATE WEALTH & FAMILY OFFICES 1, 6 (2018), https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/corporate-finance/deloitte-uk-private-wealth-family-offices.pdf.

107. *Id.*

108. Ishika Mookerjee, *Private Label Funds Gaining Prominence: UBS Family Advisory Head*, CITYWIRE (Jan. 24, 2017), http://citywireasia.com/news/private-label-funds-gaining-prominence-ubs-family-advisory-head/a986466. "We have received a lot of demand for family office setups with a private label fund angle off-late. We have a specialized team working with families on such structures." *Amicorp Offers Private Label Fund Solutions for Families*, AMICORP (Mar. 16, 2017), https://www.amicorp.com/AmiNews/2017/march/amicorp-offers-private-label-fund-solutions-for-families.php.

109. Mookerjee, *supra* note 108.

110. "The fund can hold a family's assets including companies, real estate, as well as liquid financial assets." *Amicorp Offers Private Label Fund Solutions for Families*, *supra* note 108.

111. *Id.*

112. Moira Vetter, *Keeping It in the Family from the Family Office*, FORBES (Dec. 20, 2017, 1:51 AM), https://www.forbes.com/sites/moiravetter/2017/12/20/keeping-it-in-the-family-seed-funding-from-the-family-office/#5165af675cd1. "By going direct, rather than through a private-equity fund, a family can exert tighter control over the money, cherry pick investments, minimize fees and even give the kids a board seat to learn the trade." Simone Foxman & Peggy Collins, *How New Wealth, Few Rules Fuel Family-Office Boom*, BLOOMBERG BUSINESSWEEK (Oct. 20, 2017, 11:00 PM), https://www.bloomberg.com/news/articles/2017-10-20/how-new-wealth-few-rules-fuel-family-office-boom-quicktake-q-a.

113. Russ Alan Prince, *Consortiums Have Significant Advantages Investing In Privately Held Companies*, FORBES (Nov. 29, 2017), https://www.forbes.com/sites/russalanprince/2017/11/29/family-office-consortiums-have-significant-advantages-investing-in-privately-held-companies/#3c941d20469a.

are establishing highly preferential arrangements which will likely result in substantial profits."[114] Accordingly, family offices "offer a level of customization not possible through private banks"[115] and are designed to actualize the wants and will of a private family. In fact, as one advertisement promises, family offices allow families to create their own family values, as they relate to both money and morals.[116] In this way, "[f]amily [o]ffices play a crucial role in elite families['] reproduction, ensuring not only that capital is retained but also that the family line is maintained."[117]

Because of all these advantages, "[f]amily offices . . . are now a must-have accessory for the American super-rich"[118] and are "arguably the fastest-growing investment vehicle in the world."[119] After the exclusion of family offices in the Dodd–Frank Act, George Soros transitioned his $24.5 billion hedge fund into a family office to gain privacy and avoid compliance costs.[120] Steven Cohen started a family office, Point72 Asset Management (worth about $11 billion), after pleading guilty to securities fraud in 2013 and paying a $1.8 billion fine.[121] Numerous ultra-high-wealth individuals—from Bill Gates to Leslie Wexner, Sergey Brin, and the Koch brothers—all have family offices.[122] Oprah Winfrey has a family office, and she "made headlines last year when she hired a new family-office chief who had worked for billionaire Eli Broad."[123] As announced by *The Economist* on a December 2018 cover, family offices are now "how the super-rich invest."[124]

The family office, like the private trust company, allows the high-wealth family to exist in a separate sphere, apart from the larger population and the

114. EY, *supra* note 104 ("[F]amily offices may be more likely to achieve higher returns, or lower risk, from their investment decisions.").

115. Antoon Schneider et al., *Designing the Family Office in a New Era of Private Wealth* (July 6, 2017), https://www.bcg.com/en-gb/publications/2017/principal-investors-private-equity-designing-family-office-new-era-private-wealth.aspx.

116. MARCUARD FAM. OFF., https://www.marcuardfamilyoffice.com/ (last visited Feb. 6, 2019).

117. Luna Glucksberg & Roger Burrows, *Family Offices and the Contemporary Infrastructures of Dynastic Wealth*, 10 SOCIOLOGICA, May–Aug. 2016, at 1, 26 (2016), https://www.rivisteweb.it/doi/10.2383/85289.

118. Frank et al., *supra* note 100.

119. Gavin Ezekowitz, *Younger and Faster: Chinese Family Office Growth*, BELZ (Dec. 26, 2019), https://belzfamily.com.au/insights/faster-and-younger-chinese-family-office-growth/. There are more than 10,000 single-family offices globally. Foxman & Collins, *supra* note 112.

120. Frank et al., *supra* note 100; Madison Marriage, *Hedge Funds' Move to Become Family Offices Is Not Entirely Popular*, FIN. TIMES (Oct. 23, 2015), https://www.ft.com/content/5fb1a6c0-6d06-11e5-8171-ba1968cf791a.

121. Foxman & Collins, *supra* note 112. One of the sanctions was that he could not invest other people's money outside of the family. Hema Parmar, *The Hedge Fund Comeback That Wasn't: Steve Cohen's Mediocre 2018*, BLOOMBERG (Jan. 7, 2019, 7:44 PM), https://www.bloomberg.com/news/articles/2019-01-08/the-hedge-fund-comeback-that-wasn-t-steve-cohen-s-mediocre-2018. For the use of family-office investing as a sanction, see the Showtime television show *Billions*.

122. Frank et al., *supra* note 100.

123. *Id.*

124. *How the 0.001% Invest*, ECONOMIST (Dec. 15, 2018), https://www.economist.com/leaders/2018/12/15/how-the-0001-invest.

rules governing it. In this microcosm, the family crafts its own internal institutions, sets forth the rules of engagement, designs a strategy for maximal wealth accumulation and preservation, and manages the execution of that project.

3. Charity Begins at Home

The third critical building block for high-wealth families in the wealth-management project is the creation of a family foundation. Family foundations, although charitable in nature, have historically been created not just to enable philanthropy but also for the express purpose of protecting and increasing family wealth. In fact, when high-wealth families first attempted to create charitable foundations in the United States at the turn of the nineteenth century, legislators were extremely reluctant to endorse the form and viewed it with "deep suspicion."[125] John D. Rockefeller's proposed foundation was "denounced by the U.S. attorney general as 'an indefinite scheme for perpetuating vast wealth' that was 'entirely inconsistent with the public interest.'"[126]

Over time, family foundations have come to be accepted as a standard wealth-planning tool[127] and now are very common for high-wealth families, particularly because they further the twin goals of wealth preservation and philanthropic activity. These goals may seem inconsistent, but the family foundation weaves them seamlessly together by requiring only a minimal annual distribution, by allowing the foundation to fund administrative activities performed by family members, and—most importantly—by enabling high-wealth families to avoid wealth-transfer taxation.[128] One recent report summarizes the advantages of the family foundation: "Although [private foundations] fulfill the letter of the law when it comes to charitable donations, they can nevertheless serve as potential warehouses for revenue, proving advantageous to the financial advisers who manage the funds . . . but not necessarily moving money in a timely way to public charities."[129]

125. *See* CALLAHAN, *supra* note 4, at 5.

126. *Id.*

127. A family, or private, foundation is defined by § 501(c)(3) of the Internal Revenue Code, which provides for two types of charitable organizations: public charities and private foundations. All organizations are presumed to be private foundations unless they prove they are a public charity by satisfying the IRS "public support" test, requiring an organization to receive at least one-third of its annual support from the general public through ongoing fundraising efforts. *Starting a Private Foundation: 17 Frequently Asked Questions*, SUNTRUST, https://www.suntrust.com/resource-center/foundations-endowments/article/starting-a-private-foundation-17-frequently-asked-questions#.Xj3_bRNKjOR (last visited Feb. 7, 2020). A private foundation, on the other hand, is funded through gifts from a small number of individuals, usually one family. *Id.*

128. *Id.*

129. CHUCK COLLINS ET AL., INST. FOR POLICY STUDIES, GILDED GIVING 2018: TOP-HEAVY PHILANTHROPY AND ITS RISKS TO THE INDEPENDENT SECTOR 16–17 (2018), https://inequality.org/wp-content/uploads/2018/11/Gilded-Giving-2018-November-2018-FINAL.pdf.

A family will typically create a foundation with one large endowed gift (and then operate on income from that endowment).[130] Immediately upon making the gift, the donor receives tax benefits in the form of a charitable-gift deduction.[131] Moreover, any additional gifts that are made to the foundation by family members are likewise charitable gifts and may be taken as charitable deductions on income-tax reporting.[132] If family members donate certain types of assets, they can reap further benefits. Donors giving appreciated stock from a publicly traded company to the foundation, for instance, can claim the fair market value of the stock without paying any capital-gains tax.[133] Compounding the benefits, once the funds are in the family foundation, they are no longer part of an individual's taxable estate and no longer subject to estate tax.[134] Family wealth can, therefore, be sheltered from generations of transfer or estate tax as the wealth sits in the family foundation, where even the income that the endowment generates through investment is free from taxation.[135]

Because of these myriad tax exemptions, the family foundation has traditionally been a favored vehicle in high-wealth estate planning. For example, a *Business Week* article from 1960 observed: "If properly set up . . . [the family foundation] pays no Federal taxes at all; yet it can be kept entirely under the control of its founder and his family. The real motive behind most private foundations is keeping control of wealth."[136] Estate and wealth planners were, at that time, "counseled to bear the foundation firmly in mind particularly wherever a client had a substantial interest in a business."[137] The same 1960 *Business Week* article spelled out the benefits when working with a family business:

> You set [the family foundation] up, dedicated to charity. Year by year, you make gifts of company stock to it, until the value of your remaining holdings is down to the point where eventual estate taxes could be paid without undue

130. *See Starting a Private Foundation: 17 Frequently Asked Questions*, *supra* note 127. There is no minimum gift requirement to form a private foundation, but wealth advisors suggest "that a minimum investment of $1-2 million is prudent." *Id.* This is because, as with the private trust company and the family office, there are costs associated with the formation and operation of the foundation.

131. *Benefits of a Private Foundation*, FOUND. SOURCE, https://www.foundationsource.com/learn-about-foundations/benefits-of-a-private-foundation/ (last visited Feb. 7, 2020).

132. *See id.*

133. *Donating Stock to Charity*, FIDELITY CHARITABLE, https://www.fidelitycharitable.org/giving-account/what-you-can-donate/donating-stock-to-charity.html (last visited Feb. 7, 2020).

134. *Benefits of a Private Foundation*, *supra* note 131.

135. The only exception to this is the 1%–2% excise tax. *Starting a Private Foundation: Advantages and Disadvantages*, HURWIT & ASSOCIATES, https://www.hurwitassociates.com/starting-up-nonprofit-foundation-basics/starting-a-foundation-advantages-and-disadvantages (last visited Feb. 7, 2020).

136. Thomas A. Troyer, *The 1969 Private Foundation Law: Historical Perspective on Its Origins and Underpinnings*, 27 EXEMPT ORG. TAX REV. 52, 54 (2000) (emphasis omitted), http://www.capdale.com/files/Publication/E44A0B84-95C7-403F-B3A9-650681E25075/Presentation/PublicationAttacment/62C06DCF-DE96-4A23-BFFC-67A996F1C949/The%201969%20Private%20Foundation%20Law.pdf.

137. *Id.*

strain, or until the foundation's holdings constitute firm control of the company.[138]

Since 1960, the regulations for private foundations have changed to crack down on some of these perceived abuses. Despite the changes, however, wealth managers still recommend the family foundation for wealth-preservation purposes because the private foundation can still keep family assets safe from government reach and taxation. One New York practitioner sold the idea of a family foundation to a client this way: "So I say to him, 'How would you like to give your kids $50 million, and keep control of the $100 million you now have, and give zero to the IRS[?]' . . . So the next question is of course, 'How do you do that?' So I explain that he can set up a charitable foundation."[139] As one scholar states: "In terms of protecting private fortunes from the state's power to tax, trusts and foundations continue to fulfill their historical roles."[140]

Compounding the financial benefit of tax exemption, family foundations do not have to direct more than a minimal amount of the foundation corpus to charitable giving. Family foundations are only required to distribute 5% of their assets annually[141] (a requirement that did not even exist until 1969, when Congress implemented reforms).[142] This 5% distribution is not an onerous amount and it leaves most of the corpus to grow through investment. The rule is also easily managed to the benefit of the family. One strategy is for the foundation to make a payout in the form of a gift to a family-controlled, donor-advised fund. This qualifies as an acceptable distribution and yet the money still stays in the family's control, on reserve until the family chooses to make a distribution from the donor-advised fund.[143] Furthermore, annual distributions may fund

138. *Id.* (emphasis omitted).

139. HARRINGTON, *supra* note 4, at 151.

140. *Id.* at 150–51.

141. Section 4942 of the Internal Revenue Code requires private foundations to distribute 5% of the fair market value of their assets each year. I.R.C. § 4942 (2018). Specifically, § 4942 requires private foundations to distribute 5% of the fair market value of their non-charitable-use assets for the current year by the end of the following year. Thomas Schenkelberg & Virginia C. Gross, *Private Foundations – Distributions (Section 4942) (Portfolio 880)*, BLOOMBERG TAX & ACCT., https://pro.bloombergtax.com/portfolio/private-foundations-distributions-section-4942-portfolio-880/ (last visited Feb. 7, 2020). For example, a private foundation must distribute 5% of the 2014 average fair value of its assets by the end of 2015. *Focus on Not-For-Profits: Private Foundations Must Meet the 5% Annual Distribution Requirement While Ensuring the Long-Term Viability of Their Investment Portfolios*, RUBINBROWN (Feb. 5, 2015), https://www.rubinbrown.com/article/3338/Focus-on-Not-For-Profits-Private-Foundations-Must-Meet-the-5-Annual-Distribution-Requirement-While-Ensuring-the-Long-Term-Viability-of-Their-Investment-Portfolios.aspx?articlegroup=1117.

142. John R. Labovitz, *The Impact of the Private Foundation Provisions of the Tax Reform Act of 1969: Early Empirical Measurements*, 3 J. LEGAL STUD. 63, 65 (1974). In the 1960s, news outlets uncovered distributions from family foundations to U.S. Senate staffers and other private persons. *Id.* at 67. "A substantial portion of the Tax Reform Act of 1969 was directed at alleged abuses of the tax favoritism accorded private foundations and contributors to them." *Id.* at 63.

143. *See* COLLINS ET AL., *supra* note 129, at 14; *see also* CHUCK COLLINS ET AL., INST. FOR POLICY STUDIES, WAREHOUSING WEALTH: DONOR ADVISED FUNDS SEQUESTERING BILLIONS IN THE FACE OF GROWING INEQUALITY 6–7 (2018), https://ips-dc.org/wp-content/uploads/2018/07/Warehousing-Wealth-IPS-Report-1.pdf.

certain administrative costs, such as family members receiving reasonable compensation for any work they do on the foundation's behalf, including board service.[144] Family members may also be reimbursed for any reasonable expenses that they incur for foundation business, including travel to board meetings in distant and well-appointed locales.[145] The foundation can therefore serve not only as a source of tax benefit for family members but also as a source of employment, enrichment, and even income.

The foundation, like the private trust and family office, also offers the high-wealth family maximal control and privacy. Suntrust advertises this fact, declaring that "[a] private foundation provides a donor the greatest control of any charitable giving vehicle."[146] With a private foundation, donors do not have to engage with development or grant making staff, do not have to navigate the unknown in dealing with external board members, and do not have to fight over grant making priorities with board members who might not share the same family values. Moreover, donors do not have to give up control over investment strategy or financial management, which the family office may have to do.[147] Families create their own rules and systems for charitable giving, based on the family's priorities—even as the family benefits financially from the accumulation and safeguarding of their wealth within the foundation.

Finally, the family foundation is used as a training ground for family members and a site of inculcation for family values. Family foundations are portrayed as a good way to educate younger generations and get family members involved in the project of understanding and managing the family money. Suntrust states: "A private foundation . . . can also help establish a tradition of service and giving deeply meaningful to all family members, and it can create a vehicle to transmit family values from one generation to another."[148] Like the other family institutions, the family foundation is a site of employment and a place for elder members of the family to groom the younger members for eventual leadership

144. HARRINGTON, *supra* note 4, at 152 ("These salaries serve as a way to transfer wealth within families without the assets being subject to inheritance tax.").

145. JOHN A. EDIE, COUNCIL MICH. FOUNDS., SELF-DEALING: A CONCISE GUIDE FOR FOUNDATION BOARD AND STAFF 5–7 (2006), https://www.michiganfoundations.org/sites/default/files/resources/A-Concise-Guide-for-Foundation-Board-and-Staff.PDF.

146. *Starting a Private Foundation: 17 Frequently Asked Questions*, *supra* note 127. The American Bar Association states: "The private foundation is also a great method to involve family members who may or may not be involved in the family business, and it can be drafted to involve the younger generation at an early age as junior advisors." Michelle Coleman-Johnson, *Creating a Family Foundation*, AM. B. ASS'N, Sept./Oct. 2003, at 11. "Some wealthy families set up a foundation or trust in an attempt to engage the next generation, and some even put minors on the board to teach them how to manage money before they have to start looking after their personal wealth." Alice Ross, *In Name Only: The Ins and Outs of Starting a Charity*, FIN. TIMES (Dec. 2, 2010), https://www.ft.com/content/eece003e-fd70-11df-a049-00144feab49a.

147. This is of value to some donors, "particularly those who have made their money themselves and are skilled at managing it—[and] may feel they could run a charity more effectively themselves." Ross, *supra* note 146.

148. *Starting a Private Foundation: 17 Frequently Asked Questions*, *supra* note 127.

roles in the family. Foundations are sites of citizenship formation within the family.

The family foundation—with its winning combination of "deducibility and control"[149]—is a key component of any "family governance system."[150] And because of the many advantages it offers, including wealth preservation, "[t]he 'family foundation' has become the latest accessory for the philanthropic wealthy family."[151]

II. THE MEASUREMENT OF FAMILY POWER

Family constitutions and family-wealth rules inscribe and encode the law of high-wealth exceptionalism, revealing a conception of the family as a private and self-regulating unit of state based on a family's possession of significant wealth and the desire to preserve that wealth. It is implicit that other families—those without wealth-preservation needs—do not benefit from the rights accorded to high-wealth families by the law of exceptionalism. Instead, ordinary- and low-wealth families seem to operate on a completely different and separate legal plane from high-wealth families—their lives and fortunes never touching. This account is, however, misleading. The lives and fortunes of high-wealth families are deeply connected to those of other families in the larger state. In fact, the law of high-wealth exceptionalism "help[s] [high-wealth families] amass and maintain private fortunes that in some cases rival the GDP of whole nations . . . sometimes to the detriment of state power itself, as well as to the rights and well-being of the states' residents and citizens."[152]

This Part explores how the conceptualization of high-wealth families as separate and apart conceals the myriad ways in which the law of high-wealth exceptionalism has deep effects on the community, state, and democratic collective.

A. The Financial Harms of Exceptionalism

In a practical mode of economic consideration, the exemptions afforded to high-wealth families have the capacity to impact less-resourced families in direct ways. This Subpart describes the ways in which ordinary- and low-wealth families are put at risk and harmed financially by the preferential legal treatment of their high-wealth counterparts. Specifically, I discuss how financial

149. *What Is a Private Family Foundation?*, FIDELITY CHARITABLE, https://www.fidelitycharitable.org/philanthropy/private-family-foundation.shtml (last visited Feb. 3, 2019).

150. *Id.*

151. Coleman-Johnson, *supra* note 146. There are currently "an estimated 40,000 family foundations in the United States, with total assets estimated to be in the hundreds of billions of dollars." HARRINGTON, *supra* note 4, at 151.

152. HARRINGTON, *supra* note 4, at 246.

nonregulation has the potential to increase systemic risk and, therefore, financial harms for the greater population. I also explore how the financial privacy accorded to high-wealth families may tend to translate into lost tax revenue, thereby "shift[ing] the costs of business and government to the nonwealthy."[153] Finally, I analyze how the law of high-wealth exceptionalism widens the wealth gap. In all these ways, the exceptionalism of high-wealth families translates into unanticipated economic risk and burden for all other families.

1. *Shadow Banking and Systemic Risk*

Governmental or agency failure to monitor the activity, lending, and trading of certain financial entities poses a decided risk because the lack of systemic, coordinated oversight results in less opportunity to see emerging and possibly troubling patterns at work. One of the most currently discussed areas of unregulated activity is "shadow banking." Called the "weak underbelly of American finance,"[154] shadow banking is, broadly speaking, "credit intermediation involving entities and activities . . . outside the regular banking system."[155] A wide range of entities may be included in the shadow-banking system, from hedge funds to peer-to-peer lending to pawnshops, and "[e]ven art dealers like Sotheby's have become shadow banks, making millions of dollars of loans to clients buying masterpieces."[156] What links these entities is that they "flourish outside the regular banking system and often beyond the reach of regulators."[157]

High-wealth family assets—those governed by the family constitution and invested through family institutions—form an integral part of the shadow economy. Here's how: the family constitution establishes a family office as the investment arm of the family. The family office is then charged with investing the family's assets, including those parked in the family foundation (for tax avoidance) as well as those tucked away in the family's private trust company (for asset protection). Then, through the informal lending done by the family office, the family assets enter and circulate through the shadow economy. Family offices, as the investment unit of a high-wealth family's cosmos, are the money managers and moneylenders, and when these offices lend money, it flows

153. *Id.* at 217.

154. Robert Lenzer, *The $18 Trillion Threat of the Unregulated Shadow Banking System*, FORBES (Dec. 30, 2011, 6:19 PM), https://www.forbes.com/sites/robertlenzner/2011/12/30/the-18-trillion-threat-of-the-unregulated-shadow-banking-system/#458ae99c4da8. Saying the word *shadow banking* "conveys a sense of murkiness." Jun Luo, *Shadow Banking*, BLOOMBERG (Sept. 24, 2018, 12:10 AM), https://www.bloomberg.com/quicktake/shadow-banking. For this reason, it is sometimes also called "market-based" banking to eliminate the pejorative implications. Peter Andrews, *Shadow Banking – The Potential Risks and Rewards*, INSIGHT (Feb. 21, 2017), https://www.fca.org.uk/insight/shadow-banking-potential-risks-and-rewards.

155. FIN. STABILITY BD., ASSESSMENT OF SHADOW BANKING ACTIVITIES, RISKS AND THE ADEQUACY OF POST-CRISIS POLICY TOOLS TO ADDRESS FINANCIAL STABILITY CONCERNS 1 & n.1 (2017), http://www.fsb.org/wp-content/uploads/P300617-1.pdf.

156. Luo, *supra* note 154.

157. *Id.*

through informal channels not necessarily regulated by the conventional banking system.

Family-office lending, consequently, constitutes "shadow" banking. And this type of family-office lending is increasingly common. One driver of this trend, experts suggest, is that family offices are becoming increasingly sophisticated and consequently experiencing "a shift in appetite towards using a different range of instruments . . . to meet the family's specific investment objectives, as well as the growth and preservation mantra the family office stands for."[158] Part of this increasing sophistication stems from the fact that "[f]amily offices are becoming populated by investment managers from an investment banking or hedge fund background, and the sector is developing the confidence to trade markets it has not traditionally traded in the past."[159] The expertise of these new arrivals has helped some family offices step into lending, especially "to small and medium-sized businesses."[160] Additionally, many family offices, "especially first-generation wealth offices, are intimately familiar with the industry in which that wealth was created. As such, investment opportunities in the wealth creator's field of expertise can seem alluringly familiar, especially if banks are ignoring the needs of the industry in question."[161]

The extent of family office involvement in shadow banking remains, nevertheless, difficult to quantify because "[u]ncovering family-office fortunes is like putting together a puzzle: Most have purposely chosen obscure names to operate out of the public eye."[162] One wealth-consulting firm estimates that the overall amount of assets under management by family offices globally is $4 trillion.[163] This is "more than hedge funds and equivalent to 6% of the value of the world's stockmarkets."[164] Another consulting firm estimates that the approximately 3,000 single-family family offices in the United States hold about $1.2 trillion worth of assets under management.[165] It is estimated that the Koch brothers alone manage more than $2 billion in their family office, discreetly

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158. Carl Roberts et al., *How Are Family Offices Using Derivatives?*, RISK.NET (Jan. 30, 2015), https://www.risk.net/derivatives/2391837/how-are-family-offices-using-derivatives.

159. Peter Madigan, *Family Offices Find an Appetite for Credit Risk*, FAM. OFF.: NEWS (Mar. 20, 2013), https://familyofficenews.wordpress.com/2013/03/20/family-offices-find-an-appetite-for-credit-risk/; *see also Family Offices Bypassing Fund Managers*, Hedge Fund Alert (Apr. 17, 2019), https://www.hfalert.com/search.pl?ARTICLE=183266.

160. *Id.*

161. *Id.*

> Some of the families have a very good understanding of a specific sector or asset class and will allocate part of their wealth to funding corporates they know the conventional banks are not financing. If there is a scarcity of supply of funding, they are able to achieve a very high return for what they regard as low-risk financing because they will take collateral that a bank will not.

Id.

162. Foxman & Collins, *supra* note 112.

163. *Id.*; *see also How the 0.001% Invest*, *supra* note 124.

164. *How the 0.001% Invest*, *supra* note 124.

165. *Family Offices Find an Appetite for Credit Risk*, *supra* note 159 "[M]ulti-family funds reached $777 billion in managed assets in December 2012." *Id.*

named 1888.[166] These are significant numbers—especially when one estimate of the total assets circulating in the shadow-banking economy is $18 trillion.[167]

The gargantuan amount being lent through family offices, combined with the absence of regulatory oversight, is potentially disastrous. The very real fear, as a 2018 report from *The Economist* states, "is that family offices could endanger the stability of the financial system. Combining very rich people, opacity and markets can be explosive."[168] A recent International Monetary Fund report stated: "The global financial crisis revealed that, absent adequate regulation, shadow banking can put the stability of the financial system at risk . . . ."[169] One concern is that because there is little-to-no monitoring of shadow-banking transactions, "[i]t's much harder for regulators, investors and banks to keep track of where the risks lie in this so-called shadow-banking sector, potentially allowing big problems to bubble up undetected."[170] Another concern is that shadow banking may "become a catalyst of market turmoil" because shadow banking and most of its associated entities have "only limited capacity to withstand liquidity pressure."[171] Because of this limited liquidity, shadow institutions could suffer during moments of market illiquidity and possibly be forced into "rapid deleveraging, meaning that they would have to pay off their debts by selling their long-term assets."[172]

The United Kingdom's Financial Services Authority said family offices are "not a shadow banking concern" because "the repercussions go no further than

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166. Margaret Collins, *The Billionaire Koch Brothers Have a Hot New Number: 1888*, BLOOMBERG NEWS (Mar. 15, 2016), https://www.bloomberg.com/professional/blog/billionaire-koch-brothers-hot-new-number-1888/. "[R]egulatory filings show less than $100 million is in publicly traded stocks." *Id.* Families choose nondescript names to help mask the presence: "Google co-founder Sergey Brin's family office, Bayshore Global Management, gets its name from the location of the search engine's headquarters. Charles and David Koch named theirs after the year their grandfather emigrated to America: 1888." Foxman & Collins, *supra* note 112.

167. Lenzer, *supra* note 154 (noting that it is "down from $25 trillion before the 2008 meltdown").

168. *How the 0.001% Invest*, *supra* note 124.

169. INT'L MONETARY FUND, RISK TAKING, LIQUIDITY, AND SHADOW BANKING: CURBING EXCESS WHILE PROMOTING GROWTH 66 (2014), https://www.imf.org/en/Publications/GFSR/Issues/2016/12/31/Risk-Taking-Liquidity-and-Shadow-Banking-Curbing-Excess-While-Promoting-Growth; Angela Monaghan, *Shadow Banking System a Growing Risk to Financial Stability – IMF*, GUARDIAN (Oct. 1, 2014, 2:16 PM), https://www.theguardian.com/business/2014/oct/01/shadow-banking-system-risk-financial-stability-imf.

170. Matt Phillips & Karl Russell, *The Next Financial Calamity Is Coming. Here's What to Watch.*, N.Y. TIMES (Sept. 12, 2018), https://www.nytimes.com/interactive/2018/09/12/business/the-next-recession-financial-crisis.html.

> "Then, worry big-time about some $5.8 trillion of the 'shadow banking' system that are in some kind of crazy-quilt daisy chain where they are pledged by some huge unregulated hedge fund or sovereign wealth fund, and then end up as collateral being used by yet another financial dealer. There's no central collateral clearing desk or depositary—where all of these transactions can be observed."

Lenzer, *supra* note 154.

171. *The Shadow Banking System*, SYSTEMIC RISK AND SYSTEMIC VALUE, http://www.sr-sv.com/financial-system/shadow-banking-system/ (last visited Feb. 3, 2019).

172. RESERVE BANK OF INDIA, REPORT ON CURRENCY AND FINANCE 2008-09, at 23 (2010).

the wealth fund losing out."[173] Nevertheless, a large family office selling assets quickly could "cause further price declines of those assets and further losses and selloffs."[174] Confirming the presence of risk, a 2017 report from the Financial Stability Board—performed at the request of the G20[175]—found that, even though

> [a]spects of shadow banking considered to have contributed to the financial crisis . . . generally no longer pose financial stability risks . . . a rise in assets held in certain investment funds has increased the risks from liquidity transformation, underscoring the importance of effective operationalisation and implementation of policies agreed to address this.[176]

Exempt from a high degree of regulation, family-wealth management has the potential to produce negative results for the larger population by causing market instability and creating negative market events. Consequently, risks that high-wealth families take in their investments produce risks for the greater population, and financial steps they take hidden from view create ripple effects.

2. *Financial Secrecy and Tax Burdens*

Another problem stemming from the financial exceptionalism of high-wealth families is the resultant financial privacy and opacity. One of the key benefits of creating institutions like the private trust company, the family office, and the family foundation is the financial secrecy that these entities offer. These privacy-enhancing entities protect family information as well as assets by "provid[ing] a firewall between an asset and its owner,"[177] sometimes to the degree that "the very legal basis of ownership becomes muddied."[178] Keeping earnings, transactions, and even ownership out of sight from both the public

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173. Madigan*, supra* note 159. Statements about the minimal impact of family offices or even shadow banking may call to mind comments predating the 2008 recession about sub-prime mortgages.

> By 2004, a growing number of economists were warning that a speculative bubble in home prices and home construction was under way, which posed the risk of a housing bust. Mr. Greenspan brushed aside worries about a potential bubble, arguing that housing prices had never endured a nationwide decline and that a bust was highly unlikely. Mr. Greenspan, along with most other banking regulators in Washington, also resisted calls for tighter regulation of subprime mortgages and other high-risk exotic mortgages that allowed people to borrow far more than they could afford.

Edmund L. Andrews, *Greenspan Concedes Error on Regulation*, N.Y. TIMES (Oct. 23, 2008), https://www.nytimes.com/2008/10/24/business/economy/24panel.html.

174. INT'L MONETARY FUND, *supra* note 169; Monaghan, *supra* note 169.

175. *About G20*, G20, http://g20.org.tr/about-g20/ (last visited Feb. 3, 2019).

176. FIN. STABILITY BD., *supra* note 155, at 1.

177. *What Is Financial Secrecy?*, TAX JUST. NETWORK, https://www.financialsecrecyindex.com/faq/what-is-financial-secrecy (last visited Feb. 3, 2019).

178. *Id.*

and regulatory authorities creates optimal conditions for tax avoidance and evasion.[179]

Private trust companies effectuate ownership confusion by eliminating registration, but "[e]ven when trusts do have to register, their complex control structures often confuse authorities about who really controls or benefits from the assets."[180] Private trust companies also layer on both information- and asset- protection qualities by vesting legal ownership of family assets in the trustee. These trusts therefore "allow[] the true owners, beneficiaries or controllers of trust assets to keep hidden, especially from public scrutiny."[181] Foundations similarly confound ownership and allow families to shelter assets free from taxation. A global study found that "[r]oughly 13 percent of the grand corruption investigations studied involved . . . the misuse of . . . foundations."[182] Family offices, with their ability to shield trades and transactions from the SEC, lend cover to high-wealth families from the IRS, since "[s]ome of the I.R.S.'s cases against the wealthy originate with tips from the S.E.C., which is often better positioned to spot tax evasion."[183] Moreover, as family offices "becom[e] more complex"[184] and "[h]ungry brokers . . . are rolling out the red carpet and pitching deals with unlisted firms," tax avoidance or "tax wheezes [become] easier."[185] All of the entities that a family constitution might create and the values of privacy and self-determination that the family constitution might express lead to enhanced opportunities to escape from tax burdens.

Endowed with a sense of existing apart from the state, high-wealth families view these tax avoidance structures as a right and entitlement, often reframing taxation as governmental overreach rather than a responsibility of citizenship.[186] One advisor remarks that high-wealth families feel justified in seeking

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179. Wealth managers, for the most part, firmly state that their clients who use these entities for tax benefit remain on the tax-avoidance side. However, one advisor admits a more likely situation—"at least half of the world's wealthiest families are using structures that would struggle to stand up to a full and comprehensive audit." Helen Burggraf, *Panama Papers and the Average Investor: Family Offices Report from the Front Line*, INT'L INV. (Sept. 9, 2016), http://www.internationalinvestment.net/products/panama-papers-average-investor-family-offices-report-front-line/. "This secrecy enables all manner of financial crimes and abuses." ANDRES KNOBEL, TAX JUSTICE NETWORK, TRUSTS: WEAPONS OF INJUSTICE? 2 (2017), https://www.taxjustice.net/wp-content/uploads/2017/02/Trusts-Weapons-of-Mass-Injustice-Final-12-FEB-2017.pdf.

180. KNOBEL, *supra* note 179, at 2 (emphasis omitted).

181. *Id.* For these reasons, trusts, including private trust companies, are the most commonly used vehicle for providing tax advantage and avoidance. "Trusts, they said, prove such a hurdle to investigation, prosecution (or civil judgment), and asset recovery that they are seldom prioritized in corruption investigations." EMILE VAN DER DOES DE WILLEBOIS ET AL., THE PUPPET MASTERS 45 (2011) (ebook).

182. VAN DER DOES DE WILLEBOIS, *supra* note 181, at 48. In this particular study, the foundations were not U.S.-based. *Id.*

183. Scheiber & Cohen, *supra* note 99.

184. *How the 0.001% Invest*, *supra* note 124 ("[A] third have at least two branches.").

185. *Id.*

186. One wealth manager states that high-wealth families "think if they give their names [on financial documents], the IRS will come and seize all their assets, make them hand over gold to the Fed."

to avoid taxation because, "[o]n the one hand they feel under attack from governments in austerity mode that are focusing on getting more tax revenue from the wealthy, and on the other hand there is sense that their tax burden is always too high no matter what it is."[187] In more whimsical terms, another wealth manager explains:

> It's nature, people don't like the fruits of their labors taken away so arbitrarily. The squirrel says, "You know what, I did pretty well last year and stashed all my nuts in that tree, but the government knows where I live and took them all away. So I'm going to bury them in the woods where no one will find them and go occasionally when no one is looking to collect them."[188]

Giving these sentiments the imprimatur of professional approval, the Society of Trust and Estate Practitioners (STEP), the professional organization for wealth managers, "proudly positions wealth management as a defender of entrepreneurs against 'confiscatory' and misguided welfare state politics."[189] STEP literature, aligning itself with the values expressed by many of the wealth creators the industry serves, makes this deliberate statement about social and economic policy: "Onerously high, some may say unethical, tax demands to finance generous government spending clearly act as a chill upon the entrepreneur as a creator of wealth . . . the poor may then be caught in the poverty trap and rely on state welfare handouts rather than engage in productive work."[190]

Despite this positive framing of tax avoidance, however, financial-secrecy rules that enable tax avoidance for high-wealth families have negative impacts on lower wealth families. First and foremost, tax avoidance and evasion erode the tax base, depriving the federal government of tax revenue. Numbers are difficult to pinpoint because of the secretive nature of the wealth holding that makes the avoidance possible in the first place. One study estimates that "[t]he wealthiest taxpayers . . . pay on average 25 percent less [federal tax] than they owe—and, of course, many individuals pay even less."[191] This and other studies suggest that billions of dollars of federal tax revenue are lost through the facilitation of tax avoidance and evasion by family-wealth exceptionalism.

In the context of state taxes, the facilitation of tax avoidance through financial secrecy has also impacted tax rates. In what many have labeled a "race to the bottom," American states are competing—with other states as well as offshore jurisdictions—for trust business and advertising low or nonexistent state tax rates. The Jackson Hole Trust Company, for example, highlights that

HARRINGTON, *supra* note 4, at 136 (alteration in original). She adds: "I've had clients who are so paranoid that they said they've had teeth removed so that the feds couldn't monitor them." *Id.*

187. Burggraf, *supra* note 179.

188. HARRINGTON, *supra* note 4, at 228.

189. *Id.* at 225–26.

190. *Id.* at 225.

191. Paul Krugman, *Trump and the Aristocracy of Fraud*, N.Y. TIMES (Oct. 4, 2018), https://www.nytimes.com/2018/10/04/opinion/donald-trump-fred-taxes-fraud.html.

Wyoming has "[n]o state tax (income, estate, capital gains, corporate or gift)."[192] A Nevada trust company declares, "There is a lot to appreciate about Nevada's laws and regulations concerning wealth management and asset protection . . . Nevada protects your wealth more than any other state. . . . Nevada has no state or corporate income tax. Therefore, income generated from the trust is never taxed on a state level."[193] A South Dakota trust company claims the following: "South Dakota combines top rated trust, privacy, tax and asset protection laws with a cost-efficient and dedicated workforce, strong economy and supportive state government."[194] And, of course, there is no "state taxation on the assets within the trust (no state income, capital gains, dividend/interest or intangible tax)."[195] In this way, the competition for high-wealth family business, particularly in trust creation, "depriv[es] states of revenues . . . through the downward pressure this creates on statutory tax rates."[196] States fail to acquire tax revenue because of pressure from trust companies and their high-wealth clients to create conditions favorable to wealth preservation.

As a result, at both federal and state levels, revenue that should be available to be spent on the public good is not, and there is less money for public schools, transportation, parks and assistance programs.[197] One commentator has remarked that tax evasion on the part of America's wealthy is "probably costing the government around as much as the food stamp program does."[198] Public programs, spaces, and infrastructure lose funding and the greatest users of these resources—low- and ordinary-wealth families—are the ones who contend with cutbacks in public goods and services. Furthermore, the burden of paying for the public goods that continue to operate shifts to ordinary-wealth families. Consequently, when high-wealth families are able to avoid their tax obligations through the use of wealth-preservation vehicles, ordinary-wealth families assume a greater share of the tax burden, thereby creating a system in which not all citizens share in the responsibility of funding the state.[199]

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192. *Why a Wyoming Trust*, JACKSON HOLE TR. COMPANY, http://jacksonholetrust.com/wyoming-trust-company/ (last visited Feb. 3, 2019).

193. *Benefits of Nevada Trusts*, ALLIANCE TR. COMPANY NEV., https://alliancetrustcompany.com/who-we-are/nevada-advantage/ (last visited Feb. 3, 2019).

194. *Why South Dakota*, SDTC: S.D. TR. COMPANY LLC, http://www.sdtrustco.com/why-south-dakota/ (last visited Feb. 3, 2019).

195. *Id.*

196. HARRINGTON, *supra* note 4, at 219.

197. *Tax Justice*, PBS (Aug. 5, 2011), http://www.pbs.org/wnet/religionandethics/2011/08/05/January-28-2011-tax-justice/8012/.

> The main purpose of a tax system is to raise revenue for the common good, for the public good. That's its purpose. But it has to do so in a way that is fair, that involves shared sacrifice, because really it's a matter of sharing the burdens of a free society and of a good society.

Id.

198. Krugman, *supra* note 191.

199. *Id.* One journalist has called the ultrawealthy who evade tax bills "financial vampires." *Id.*

The business of wealth preservation, the lodestar for high-wealth families, requires entities that guard financial secrecy and enable tax minimization, avoidance, and even evasion. The result of this extreme financial secrecy includes more than private-wealth preservation. Financial secrecy shifts tax burdens from high-wealth families to ordinary- and low-wealth families, helping to fortify "rising inequality" and "creat[ing] a threat to democracy itself."[200]

3. The Creation of Wealth Inequality

Economic conditions in the United States have become increasingly characterized by economic inequality over the last several decades. The rising phenomenon of wealth inequality in the United States is such that, from 1983–2016, the top 1% "saw their average wealth . . . rise by . . . over 15 million dollars or by 150 percent . . . , while the middle quintile showed no change and the average wealth of the poorest 40 percent fell by $15,800."[201] One economist recently remarked: "U.S. wealth concentration seems to have returned to levels last seen during the Roaring Twenties."[202] Similarly, the UBS *Billionaires Insights* report for 2018 announced that, globally, billionaires increased their wealth by $1.4 trillion or 20% and that "the past 30 years have seen far greater wealth creation than the Gilded Age of the late 19th Century."[203] This growth of the "new gilded age" has spread across headlines[204] and has been debated by economists and other scholars,[205] policy makers, and politicians.[206] What has not

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200. HARRINGTON, *supra* note 4, at 219. This is a larger global problem as well—not knowing who owns companies. *See* Charmian Gooch, *Russian Dolls: Why Not Knowing Who Owns and Controls Companies Is a Huge Problem*, TED (June 4, 2014), https://ideas.ted.com/russian-dolls-why-not-knowing-who-owns-and-controls-companies-is-a-huge-problem/.

201. Edward N. Wolff, *Household Wealth Trends in the United States, 1962 to 2016: Has the Middle Class Recovered?* 13 (Nat'l Bureau of Econ. Research, Working Paper No. 24085, 2017), https://www.nber.org/papers/w24085.

202. Gabriel Zucman, *Global Wealth Inequality* 14 (Nat'l Bureau of Econ. Research, Working Paper No. 25462, 2019), http://www.nber.org/papers/w25462.

203. UBS, BILLIONAIRES REPORT 2018: NEW VISIONARIES AND THE CHINESE CENTURY 1, 24 (2018), https://www.ubs.com/global/en/wealth-management/uhnw/billionaires-report.html.

204. Josh Eidelson, *U.S. Income Inequality Hits a Disturbing New Threshold*, BLOOMBERG (Mar. 1, 2018, 5:00 AM), https://www.bloomberg.com/news/articles/2018-03-01/america-s-wage-growth-remains-slow-and-uneven; *see* Robert M. Solow, *The Rich-Get-Richer Dynamic*, NEW REPUBLIC, May 12, 2014, at 50; *see also* Paul Krugman, *Why We're in a New Gilded Age*, N.Y. REV. BOOKS, May 8, 2014, at 15.

205. *See, e.g.*, THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (Arthur Goldhammer trans., 2014); GANESH SITARAMAN, THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION (2017); Lawrence H. Summers, *The Inequality Puzzle*, DEMOCRACY (Summer 2014), https://democracyjournal.org/magazine/33/the-inequality-puzzle/; *see also* Shi-Ling Hsu, *The Rise and Rise of the One Percent: Considering Legal Causes of Wealth Inequality*, 64 EMORY L.J. ONLINE 2043 (2015); Eric Kades, *Of Picketty and Perpetuities: Dynastic Wealth in the Twenty-First Century (and Beyond)*, 60 B.C. L. REV. 145 (2019); sources cited *supra* note 10.

206. Erin Corbett, *Billionaires Hate Alexandria Ocasio-Cortez's 70% Tax. Could It Help the Economy?*, FORTUNE (Feb. 7, 2019 11:10 AM), https://fortune.com/2019/02/07/billionaires-hate-aoc-wealth-tax/; Erik Sherman, *Bernie Sanders and Tucker Carlson Agree on Income Inequality. Why Can't Democrats and Republicans?*, FORBES (Nov. 19, 2018), https://www.forbes.com/sites/eriksherman/2018/11/09/bernie-sanders-and-tucker-carlson-agree-on-income-inequality-why-cant-democrats-and-republicans/#68c602eb1de7; Jim

been discussed is the role that family constitutions and the coterie of family-wealth rules unquestionably play in entrenching this new state of economic affairs.

The law of high-wealth exceptionalism helps create an increase in the already troubling gap between the highest and lowest families on the wealth spectrum. Beginning with the private trust company, these entities—like most forms of asset-protection trusts—have long presented a cause for concern among those interested in equality. As early as 1883, when John Chipman Gray decried the spendthrift trust and the support it found in American courts, asset-protection trusts have been viewed as undemocratic. Gray declaimed:

> [I]t is hard to see the Americanism of spendthrift trusts . . . [T]hat men not paying their debts should live in luxury on inherited wealth, are doctrines as undemocratic as can well be conceived. They are suited to the times in which . . . the law was administered in the interest of rich and powerful families. The general introduction of spendthrift trusts would be to form a privileged class, who could indulge in every speculation, could practise every fraud, and yet, provided they kept on the safe side of the criminal law, could roll in wealth. They would be an aristocracy, though certainly the most contemptible aristocracy with which a country was ever cursed.[207]

Private trust companies, like other asset-protection trusts, enable high-wealth families to shield money from creditors, including the government, such that these families are able to pass wealth down through the generations without transfer taxation. Private trust companies compound the problem by providing not only extra-strength asset protection but also extreme financial secrecy and investment autonomy. These benefits are not available to families of low- or ordinary-wealth, who must operate transparently with their finances and pay both their creditors and their tax bills. These problems have led one current commentator to state: "Trusts are one of the primary vehicles used to create and perpetuate wealth concentration, enabling wealthy elites escape tax, regulation and creditors—and they must lie at the centre of debates about inequality."[208]

Family offices, investing the assets from the family's private trust company and private foundation, are also implicated in the problem of wealth inequality. As an article in a recent issue of *The Economist* stated: "[I]n an era of populism, family offices are destined to face uncomfortable questions about how they concentrate power and feed inequality."[209] Family offices are a cause for concern because they provide high-wealth families, those with large pools of

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Tankersley, *Warren's Plan Is Latest Push by Democrats to Raise Taxes on the Rich*, N.Y. TIMES (Jan. 24, 2019), https://www.nytimes.com/2019/01/24/us/politics/wealth-tax-democrats.html.

207. JOHN CHIPMAN GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY 246–47 (Boston, Boston Book Co. 1895).

208. KNOBEL, *supra* note 179, at 5.

209. *How the 0.001% Invest*, *supra* note 124.

capital, access to more investment opportunities than are available to ordinary-wealth families, many of these elite investment opportunities bringing higher-than-average returns. For example, as the UBS *2018 Global Family Office Report* relates, family offices are significantly increasing their investment in private equity—private equity now accounting for 22% of the average family-office portfolio—and the result of this overall increase has been a major increase in the average family-office performance.[210] In addition, because family offices take a long-term approach to investing, considering the fate of family wealth over generations, they can take a "patient capital" approach that allows for increased risk. As the head of UBS's global family office group states, with respect to the strong returns in 2018 for family offices: "This reflects the bull market, as well as family offices' ability to take a long-term approach and embrace illiquidity."[211] Family offices, accordingly, provide high-wealth families with investment opportunities and allow them to follow certain strategies that ordinary-wealth families cannot in order to reap high returns and long-term financial gain.

Finally, family foundations, despite money that they might direct toward charitable purposes—including the reduction of wealth and income inequality—are also vehicles for intensifying the wealth gap. Family foundations are, as one industry expert put it, in a "difficult dance with inequality."[212] This tension exists because "[f]oundations are the product of accumulated wealth . . . emanat[ing] from the top 1 percent of American households, a cohort whose share of household wealth rose from 7.1 percent in 1977 to 22.8 percent in 2012."[213] During that same time span, the collective assets of family foundations "mushroomed from $35.4 billion to $715.5 billion."[214]

Most troubling is the prospect that high-wealth families are parking their assets in these family foundations, taking charitable deductions and reducing their taxable estates, and all the while being required to make only minimal distributions. The *Gilded Giving* report cautions that "charitable revenue can be warehoused, sitting for years or decades after a charitable deduction has been taken, before any significant payout is made to public nonprofits."[215] Instead of serving as a vehicle for charity, "[f]oundations, charitable trusts, donor-advised

210. UBS & CAMPDEN RESEARCH, THE GLOBAL FAMILY OFFICE REPORT 8 (2018), https://www.ubs.com/global/en/wealth-management/uhnw/global-family-office-report/global-family-office-report-2018.html.

211. Susan Lingeswaran, *Higher Risk, More Illiquid Investments Boost Family Office Returns*, CAMPDEN FB (Oct. 17, 2018, 3:00 PM), http://www.campdenfb.com/article/higher-risk-more-illiquid-investments-boost-family-office-returns.

212. Bradford K. Smith, *Philanthropy's Difficult Dance with Inequality*, PHILANTHROPY NEWS DIG. (July 7, 2015), https://philanthropynewsdigest.org/commentary-and-opinion/philanthropy-s-difficult-dance-with-inequality.

213. *Id.*

214. *Id.*

215. COLLINS ET AL., *supra* note 129, at 22.

funds and supporting organizations are all financial instruments marketed to the affluent as tax-advantageous vehicles for surplus wealth."[216] Seen this way, a family foundation is no more than "a private investment company that uses some of its excess cash flow for charitable purposes."[217] And from this perspective, the relationship between family foundations and wealth inequality is quite clear. The privileges obtained through creating a family foundation accrue only to high-wealth families who have the resources to create a private foundation. It is not a stretch, then, to say that "[w]ealth and privilege are deeply encoded into the DNA of philanthropy."[218]

The law of high-wealth exceptionalism is, under another cover, the law of wealth inequality—a set of rules and norms that privilege high-wealth families by providing them with ways to obtain high investment returns, avoid creditors of any kind, and sidestep tax liability. At the same time, ordinary-wealth families worry about paying bills, sharp drops in their pension values brought on by market instability, and empty savings accounts. The law of high-wealth exceptionalism ensures that "[i]nequality's pervasive and pernicious effects are therefore a feedback loop reinforcing the concentration of economic and political power in the hands of the very few at the expense of the great many."[219]

B. The Return of Patrimonial Plutarchy

In addition to the material costs of exempting high-wealth families from the larger regulatory structure, such exemptions also present political costs to the democratic state. A regulatory framework that not only gives preferential treatment to high-wealth families but also completely exempts them from certain rules—to their financial benefit—is not a system rooted in or expressive of either democracy or equality of opportunity. Quite otherwise the ethos and ethics of high-wealth-family exceptionalism contribute to a particularly patrimonial brand of plutarchy centered on family advantage. Privilege flows to privilege in a family economy. The question addressed in this Subpart is what impact this system of family-based privilege has on the greater polity.

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216. Kevin Laskowski, *Philanthropy and Inequality: What's the Relationship?*, RESPONSIVE PHILANTHROPY, Winter 2011–2012, at 6, 8, https://www.ncrp.org/publication/philanthropy-inequality-whats-relationship#_edn1.

217. F. B. HERON FOUND., NEW FRONTIERS IN MISSION-RELATED INVESTING 1 (2004), https://community-wealth.org/sites/clone.community-wealth.org/files/downloads/report-heron.pdf.

218. Smith, *supra* note 212.

219. Felix Chang, *Asymmetries in the Generation and Transmission of Wealth*, 79 OHIO ST. L.J. 73, 90 (2018). *See generally* Paul L. Caron & James R. Repetti, *Occupy the Tax Code: Using the Estate Tax to Reduce Inequality and Spur Economic Growth*, 40 PEPP. L. REV. 1255 (2013) (detailing the harmful effects of wealth inequality on ordinary-wealth families).

1. *The Patrimonial Exercise of Political Power*

Political scientists have consistently defined plutocracy, with minor variations since Aristotle, as a system of governmental rule by the rich and oligarchy as rule by the few. Plutarchy, then, is rule by the rich few. One scholar has remarked that the "common thread for oligarchs across history is that wealth defines and empowers them, and inherently exposes them to threats. The existential motive of all oligarchs is the defense of wealth."[220] The power that plutarchs possess "always covers issues that affect the core material interests of the wealthy in safeguarding claims to what they have and permitting the acquisition of more."[221]

A more specific form of plutocracy is patrimonialism, which is also rule by the rich but organized around the family. Max Weber notably detailed a theory of patrimonialism,[222] which "began by delineating patrimonialism as the social logic of patriarchy when it is extended beyond the immediate household."[223] Patrimonialism, accordingly, has often denoted a structure of rule in which political power and material privilege passed through the family: "At the core of patrimonialism's legitimacy, both in early modern Europe and in the twenty-first century, is the idea that heirs to wealth or office deserve their inheritances."[224] Patrimonialism, more broadly, is the mapping of family and household ordering onto the larger state, combined with the legal privileging of prominent families in the quest to accumulate and maintain wealth and status.[225] Put even more simply, patrimonialism is a set of rules written by high-wealth families to favor high-wealth families and the preservation of their wealth.

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220. JEFFREY A. WINTERS, OLIGARCHY (2011) (appearing on the first page inside the front cover).

> [O]ligarchy can operate without explicit coordination or cohesion among oligarchs. School ties, clubs, social networks, interlocking directorates and the like among the wealthy can be interesting and important, but they are not necessary to enable oligarchs to act in unison. The common material interests of the wealthy can be sufficient for that. In key realms, common interests lead nearly all wealthy individuals to seek the same sorts of policies.

Jeffrey A. Winters & Benjamin I. Page, *Oligarchy in the United States?*, 7 PERSP. ON POL. 731, 733 (2009). They argue that oligarchy "limits democracy but does not render it a sham." *Id.* at 732.

221. Winters & Page, *supra* note 220, at 733.

222. *See generally* MAX WEBER, ECONOMY AND SOCIETY (1922). Weber contrasted patrimonialism with bureaucratic administration. "Patrimonialism's ultimate organizational base in families gives it a structural resilience that makes its beneficiaries' assertions of privilege more grounded and compelling than bureaucratic administrators' largely self-referential claims of legality and expertise." Richard Lachmann, *American Patrimonialism: The Return of the Repressed*, 636 ANNALS AM. ACAD. POL. & SOC. SCI. 204, 223 (2011).

223. John Hall, *Patrimonialism in America: The Public Domain in the Making of Modernity – From Colonial Times to the Late Nineteenth Century*, 28 POL. POWER & SOC. THEORY 7, 10 (2015) ("Weber's approach facilitates understanding relationships of power and reciprocity that obtain under a wide range of conditions that extend outward from direct kinship.").

224. Lachmann, *supra* note 222, at 217 ("[T]he revival of patrimonialism in the United States has, so far, been primarily ideological. This ideological patrimonialism is expressed most powerfully in the campaign to abolish the federal inheritance tax.").

225. *Id.* at 205–06.

If patrimonialism corresponds with the high-wealth families "safeguarding claims to what they have and permitting the acquisition of more,"[226] then the law of high-wealth exceptionalism, enabled by wealth rules and memorialized by family constitutions, is deeply and essentially patrimonialist. Family constitutions, encouraging families to think of themselves as primary units of governance in control of their own financial and legal destinies, demonstrate a decided affinity with plutarchic, patrimonialist thinking. Take, for example, this typical statement made by a wealth advisor: "Probably the most important feature of the Family Constitution is that it should be the embodiment of the personal ethos, and closely held principles, that the family all agree between themselves to abide by in protecting and enhancing the operation of the family wealth."[227] Patrimonial concepts inhere in family constitutions because, as this statement reflects, these documents organize all governance around the family, placing wealth preservation and transfer at the heart of this family governance.

The key notion in this framework, however, is not just that high-wealth families are able to consolidate their economic power but also that they are able to translate this economic power into political power, writing wealth laws to their liking. That is to say: "For the rich, wealth begets power."[228] This translation of power across domains is what intensifies the harms of high-wealth exceptionalism: "Oligarchs are actors who personally command or control massive concentrations of wealth—a material form of power that is distinct from all other power resources, and which can be readily deployed for political purposes."[229] It is this inappropriate deployment of economic power that most severely compromises the democratic state. Like true plutarchs, not only have high-wealth families benefitted from their exemption from financial regulation, these same families have also been actors in the creation of those very exemptions.

A direct and immediately relevant example of the political power of modern plutarchs is the story of how the lobbying efforts made by a group of high-wealth families, their lawyers, and hired lobbyists[230] resulted in the family-office exemption from the investment-adviser rules.[231] To obtain the desired legislative exemption, as previously mentioned, a number of high-wealth families formed the "Private Investor Coalition, which spent hundreds of thousands of dollars to lobby to keep family offices out of the legislation, according to their

226. Winters & Page, *supra* note 220, at 733.

227. KEMPSTER & HUSSAIN, *supra* note 23, at 7.

228. Zucman, *supra* note 202, at 4.

229. Winters & Page, *supra* note 220, at 732.

230. The coalition decided to hire two high-profile lobbyists from the law firm Venable LLP. Paul Golden, *Family Offices Must Learn the Dark Arts of Lobbying*, CAMPDEN FB (Mar. 8, 2010, 5:18 PM), http://www.campdenfb.com/article/paul-golden-family-offices-must-learn-dark-arts-lobbying.

231. Foxman & Collins, *supra* note 112.

lobbying disclosures."[232] Based, then, on their preexisting ability to hire lobbyists and access the halls of political power, high-wealth families obtained a regulatory exemption that facilitates further wealth accumulation and preservation.

Private trust companies—vehicles designed specifically for family-wealth preservation and the installation of family privilege—are also exceptional examples of patrimonialism at work. The patrimonialism of these trusts is evident in a very literal sense: trust creators are often termed "patriarchs"[233]—and the power of trust patriarchs does not stop at the title. Trust law, perhaps more than any set of wealth rules, has been radically refashioned in a number of states to benefit high-wealth clients as a result of lobbying done by trust companies. Lobbyists and trust companies, who "labor as salaried advocates and defenders of core oligarchic interests,"[234] push state legislatures for benefits on behalf of their high-wealth clients. These benefits have included the legislative enactment of private trust companies,[235] as well as the elimination of perpetuities restrictions and the introduction of self-settled asset-protection trusts, exempt from conventional asset-protection rules.[236] Recently, for example, Ohio enacted a Family Trust Company Act, authorizing both licensed and unlicensed trust companies for high-wealth families, and the legislation was coauthored by a member of BakerHostetler's private wealth team.[237]

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232. Frank et al., *supra* note 100; *see also* N.Y. CTY. LAWYERS' ASS'N, FAMILY OFFICES: A TO Z ABOUT ACTING AS LEGAL COUNSEL FOR A FAMILY OFFICE 1 (2015), http://www.nycla.org/PDF/Family%20Offices%20-%2004.21.15.pdf.

233. Martyn Crespel, *Structuring Trusts for Shari'a Compliant Clients*, PRAXIS IFM (May 5, 2018), https://www.praxisifm.com/news-and-views/structuring-trusts-for-sharia-compliant-clients/; Brian Luster, *Why Rich Kids Don't Pay Taxes*, FORBES (Feb. 26, 2014, 11:33 AM), https://www.forbes.com/sites/brianluster/2014/02/26/why-rich-kids-dont-pay-taxes/#6d4b541a6d09 ("Historically, the patriarch or matriarch of the family rules during their lifetime and has total control of the activities and investments."). The term *matriarch* is also used, mitigating the patriarchal orientation. However the use of *matriarch* still puts the family at the center of power and uses the family as a map for allocation of goods and resources. A number of offshore trust companies still employ the term *patriarch* and discuss how, in a private trust company, "the Patriarch, or Head of the Family, will own all the shares of the PTC." Martin Palmer, *Owning Private Trust Companies*, JORDANS, https://www.jordanstrustcompany.com/offshore-trusts-foundations/jersey-foundations/owning-private-trust-companies (last visited Feb. 3, 2019). Nevertheless, the term *patriarch* is apt, based on who the typical trust creator is. Discussing Qualified Terminable Interest Property (QTIP) trusts, Lily Kahng remarks: "A wealthy woman is less likely than her male counterpart to marry a series of younger spouses and therefore is less likely to use a QTIP trust—what one practitioner calls a 'Donald Trump arrangement.'" Lily Kahng, *The Not-So-Merry Wives of* Windsor*: The Taxation of Women in Same-Sex Marriages*, 101 CORNELL L. REV. 325, 353 (2016).

234. Winters & Page, *supra* note 220, at 732 ("The wealthy often control large organizations, such as business corporations, that can act for them.").

235. *Who We Are*, CLS CONSULTING, LLC, http://clsconsultingllc.com/who-we-are/ (last visited Feb. 3, 2019).

236. Lawrence W. Waggoner, *Congress Promotes Perpetual Trusts: Why?* 1 (Univ. of Mich. Law Sch. Law & Econ., Working Paper No. 80, 2014) ("As a direct result of Congress's action, and then of lobbying by financial institutions and other interest groups to convince state legislatures to remove the obstacle of perpetuity law, the very wealthy can now create tax-exempt private trusts for generations upon generations of their descendants. And they are massively taking advantage of the opportunity.").

237. *See Archives: Family Trust Company*, BAKERHOSTETLER, https://www.wealthdirector.com/category/family-trust-company/ (last visited Feb. 3, 2019).

High-wealth families have, in this way, navigated the political system at both state and federal levels with ease. Their existing wealth has helped to procure sophisticated strategists and amplified their political voice.[238] The process appears democratic as these families and their advisors "blend smoothly into the complex give and take of pluralist politics."[239] Nevertheless, "their character, focus, and effect is different: it is to advance the basic material interests of the wealthy."[240] In this respect, high-wealth families benefit not only from their material resources but also from the fact that most of the population is not familiar with the vast network of laws that govern family wealth and may even be disinterested in legislative events that are of core concern to the family oligarchs. Against this landscape, "a democratic 'politics of the ordinary' can proceed to govern many issues of little interest to oligarchs as a group," and plutarchs can take control of the financial regulations that matter most to them.[241]

The key regulatory issues that concern plutarchic families are clearly related to wealth preservation and therefore involve areas such as trade, monetary policy, and taxation.[242] These are not, however, the political issues that galvanize the majority of people even though ordinary-wealth and lower wealth families are "very much affected in the aggregate."[243] Mobilization by ordinary citizens is difficult, if not impossible, because they remain unaware of the many behind-the-scenes efforts to change family-wealth law, what effects those changes might have on their lives, and what the changes might mean on a larger scale, looking forward.[244]

Using their economic power to seek political power as well as legal exemptions, high-wealth families affirm patrimonial and plutarchic attitudes that contribute to "democracy-inhibiting" conditions.[245] These conditions are

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238. One scholar has found—by comparing the political preferences of a range of income groups to national political outcomes—that elected leaders tend to listen more and act upon the wishes of "the most affluent citizens." *See generally* MARTIN GILENS, AFFLUENCE AND INFLUENCE (2012).

239. Winters & Page, *supra* note 220, at 732.

240. *Id.*

241. *Id.* at 733.

242. *Id.*

> [T]he fault lines of future political contests will lie: in broad fights over debt, taxation, and public spending as the fiftieth through ninetieth percentiles in the income and wealth tables lose ground to the top 10%, and in more specific conflicts as professionals and small businesspeople in the top 10% lose ground to the 1% and yet smaller fractions.

Grewal, *supra* note 11, at 662. And on these issues, the perspective of high-wealth families is generally more conservative than that of the general public. CALLAHAN, *supra* note 4, at 32.

243. Winters & Page, *supra* note 220, at 732.

244. "[W]e suspect that the power share of the top tenth of 1 percent of US households may well be sufficient to dominate politics on key issues of most intense interest to that group, when we take into account the collective action problems of their potential opponents." Winters & Page, *supra* note 220, at 738.

245. Grewal, *supra* note 11, at 664. Some political scientists argue that oligarchy and democracy are not compatible; other political scientists argue that oligarchic conditions only limit democracy. *See* Winters & Page, *supra* note 220, at 733 (stating that "[a] thriving oligarchy in the richest and most politically developed nations implies a limited, rather than a sham, democracy").

characterized by their ability to support wealth preservation and further a vision of families at the center of both resource allocation and political governance. Moreover, these conditions compromise the health of the democratic state by allowing a miniscule fraction of the population to craft a wealth-law framework that exempts high-wealth families from oppressive regulations while placing the burden of compliance on ordinary-wealth families.

2. The Problem of "Gilded Giving"

Compounding the problems of plutarchic power that high-wealth families wield in the political arena, the family foundation reveals another facet of patrimony and plutarchy that further exemplifies why family-wealth institutions can be harmful to democratic principles. This is the problem of "gilded giving,"[246] or plutarchic philanthropy. Critics have called family foundations "the voice of plutocracy,"[247] and the claim of these critics is that high-wealth philanthropy not only allows certain families too much power in setting national agendas but also substitutes the wealth and power of these families for that of the state in inappropriate ways. According to critics, family foundations highlight the almost unlimited power of high-wealth families and this unlimited power, in turn, underscores how high-wealth families acting as sovereign entities undermine the larger democratic state.

A common initial criticism raised against family foundations is that the scope of major gifts from these foundations allows high-wealth families to exercise undue influence over important social institutions as well as governmental policy.[248] The charge, once again, concerns the translation of economic into political power—this time effectuated through charitable giving. And the charge has arisen because family foundations are increasingly directing their charitable dollars to public policy institutes, wielding their economic power to shape policy debates. That is to say, "today's billionaires may not be interested primarily in supporting traditional charitable endeavors (e.g., funding scholarships and hospital wings) but rather in tackling the systemic forces that produce and perpetuate public problems . . . ."[249] In fact, a study by one scholar found

246. COLLINS ET AL., *supra* note 129.

247. Rob Reich, *What Are Foundations For?*, BOS. REV. (Mar. 1, 2013), http://bostonreview.net/forum/foundations-philanthropy-democracy ("The assets of a modern philanthropic foundation are set aside in a permanent, donor-directed, tax-advantaged private endowment and distributed for a public purpose. These considerable private assets give it considerable public power. And with growing wealth and income inequality, their apparent tension with democratic principles only intensifies.").

248. Margaret H. Lemos & Guy-Uriel Charles, *Patriotic Philanthropy? Financing the State with Gifts to Government*, 106 CALIF. L. REV. 1129, 1170 (2018) ("Simply put, gifts to government may undermine norms of collective self-government by enabling certain individuals—wealthy ones—to exert outsized influence on public policy.").

249. Kristin A. Goss, *Policy Plutocrats: How America's Wealthy Seek to Influence Governance*, 49 PS: POL. SCI. & POL. 442, 443 (2016); *see also* Stanley N. Katz, *Beware Big Donors,* CHRONICLE (Mar. 25, 2012), https://www.chronicle.com/article/Big-Philanthropys-Role-in/131275/. Historically, the influence of

that more than half of America's most prominent philanthropists "have serious policy interests: they are seeking to inform, advocate for or against, or reform the implementation of public policy through charitable, advocacy, and/or issue-specific electoral donations."[250] This phenomenon, dubbed "philanthro-policy-making,"[251] signals that family foundations, because of the size of their gifts, are often able not only to set public agendas by shaping the funding landscape but also to "seek and obtain an outsize influence on public policy."[252]

If family members have strong ideological views favoring family-wealth preservation, for instance, the family foundation can fund policy research at institutions like the American Enterprise Institute, a conservative think tank that defends policies such as a lower tax on capital gains or the loophole on carried interest.[253] In this way, giving to policy institutes can complement the lobbying efforts of a high-wealth family in obtaining specific regulatory results. The Mercer Family Foundation, for example, has "given many millions to conservative policy groups,"[254] including the Federalist Society and the Media Research Center (founded on an "unwavering commitment to neutralizing left-wing bias in the news media and popular culture"[255]), to facilitate certain policy research and results. With sufficient resources, a family can even create a policy institute, like the Koch brothers did when they provided the seed funding for the Cato Institute ("dedicated to the principles of individual liberty, limited government, free markets, and peace"[256]) in the 1970s.[257] This type of major, strategic giving does not come solely from conservative family foundations. Family foundations with more liberal political leanings have provided significant

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charitable giving on local and national policy was not a great concern, even though donors were engaging in major giving and shaping institutions. This is because, traditionally, high-wealth families typically supported cultural organizations—such as art museums and opera—and educational institutions—mostly the private schools attended by family members. *See generally* FRANCINE OSTROWER, WHY THE WEALTHY GIVE (1997).

250. Goss, *supra* note 249, at 445.

251. *Id.* at 442.

252. Ryan Pevnick, *Philanthropy and Democratic Ideals*, *in* PHILANTHROPY IN DEMOCRATIC SOCIETIES: HISTORY, INSTITUTIONS, VALUES 226, 227 (Rob Reich, Chiara Cordelli & Lucy Bernholz eds., 2016). One report calls this "[m]ission distortion." The report continues:

> A small number of major donors gaining greater sway over an organization could create pressure to shift missions and programming towards the interests of those donors. It is easy to imagine nonprofits tweaking or adjusting the work they do, either consciously or unconsciously, to meet the wishes of a very large benefactor to secure essential funding.

COLLINS ET AL., *supra* note 129, at 19.

253. CALLAHAN, *supra* note 4, at 71.

254. *Id.* at 77.

255. Fredreka Schouten, *Who Are Mega-Donors Bob and Rebekah Mercer, Are They Influential?*, USA TODAY (Mar. 7, 2017), https://www.usatoday.com/story/news/politics/2017/03/07/who-are-trump-donors-bob-and-rebekah-mercer/98812284/. Gifts fund not only policy research but also impact litigation. *See* CALLAHAN, *supra* note 4.

256. *About Cato*, CATO INST., https://www.cato.org/about (last visited Feb. 9, 2020).

257. Laurie Bennett, *The Kochs Aren't the Only Funders of Cato*, FORBES (Mar. 13, 2012), https://www.forbes.com/sites/lauriebennett/2012/03/13/the-kochs-arent-the-only-funders-of-cato/.

funding for climate change, public-school reform, marriage equality, and reproductive rights. [258]

Whether the gifts go to politically liberal or conservative causes, however, is not the primary concern. The central issue, rather, is that "wealthy families—aided by wealth managers—have also created institutions that intentionally compete with the policies and programs of elected governments and other public governance structures."[259] Through their sizeable gifts and strategic-giving priorities, family foundations are exercising enormous influence. "[I]t's philanthropists who decide what scientific issues are researched, what types of schools exist in communities, and what initiatives get on ballots."[260] And through these gifts, high-wealth families are skewing power away from the state and toward themselves. "[M]odern-day plutocrats are disrupting stable governing arrangements and reconfiguring the delicate balance of power between the state and civil society."[261]

Many high-wealth family donors embrace this replacement of government and minimization of the role of the state through large-scale philanthropy. From their neoliberal and market-based perspectives, philanthropy facilitates "economic growth and creativity,"[262] "solv[es] collective-action problems,"[263] and presents more efficient solutions to social problems than governmental programs.[264] Some high-wealth family donors see themselves as partners with the government. Michael Bloomberg, for example, has remarked: "I see [philanthropy] as a way to embolden government . . . . By leveraging our resources, and forming partnerships with government, philanthropic organizations can help push . . . changes forward."[265]

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258. *See* JANE MAYER, DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT 376 (2016); *see also* COLLINS ET AL., *supra* note 129, at 20 ("Large foundations are more likely than small foundations to give to specific purposes than for general operating support. So as donations shift increasingly toward larger foundations, and as foundations themselves grow larger, donations are likely to shift more towards the support of specific restricted projects, as opposed to general operating support.").

259. HARRINGTON, *supra* note 4, at 252.

260. Alana Semuels, *The Problem with Modern Philanthropy*, ATLANTIC (Mar. 28, 2017), https://www.theatlantic.com/business/archive/2017/03/the-problem-with-philanthropy/520989/.

261. Goss, *supra* note 249, at 442. *See generally* THEDA SKOCPOL, DIMINISHED DEMOCRACY: FROM MEMBERSHIP TO MANAGEMENT IN AMERICAN CIVIC LIFE (2003).

262. Pevnick, *supra* note 252, at 228.

263. Goss, *supra* note 246, at 443.

264. Pevnick, *supra* note 252, at 228; *see* Aaron Horvath & Walter W. Powell, *Contributory or Disruptive: Do New Forms of Philanthropy Erode Democracy?*, *in* PHILANTHROPY IN DEMOCRATIC SOCIETIES: HISTORY, INSTITUTIONS, VALUES, *supra* note 252, at 87, 89 ("Disruptive philanthropy replaces the public sphere with all manner of private initiatives for special public purposes, dubbed by some enthusiasts as philanthro-capitalism. Such initiatives, we contend, crowd out the public sector, further reducing both its legitimacy and its efficacy, and replace civic goals with narrower concerns about efficiency and markets.") (citation omitted).

265. Mike Allen, *Michael Bloomberg: Philanthropy Should 'Embolden Government*,*'* POLITICO (Apr. 6, 2015, 8:12 AM), https://www.politico.com/story/2015/04/michael-bloomberg-philanthropy-government-116686.

Alternately, some high-wealth donors subscribe to the idea that "[w]hen the state fails to ensure that the demands of justice are met, proponents of democratic equality should see serving the poor and facilitating social justice as important and appropriate goals for philanthropists."[266] Taking this approach, some family foundations aim specifically to address social injustices by directing their giving to areas, conditions, and populations that they believe to be underserved by governmental programs. In this vein, George Kaiser of the George Kaiser Family Foundation wrote in his Giving Pledge letter: "America's 'social contract' is equal opportunity. . . . Yet, we have failed in achieving that seminal goal . . . . So, if the democratically-directed public sector is shirking, to some degree, its responsibility to level the playing field, more of that role must shift to the private sector."[267]

Family foundations, acting as patrons and filling in for the state when the state fails to provide basic needs and support social justice, are unquestionably admirable, humane, and moral actors. Their philanthropic perspective and the accompanying financial commitment, geared toward social justice and repairing the social fabric of American equality, are generous, socially compassionate, and exceedingly welcome in an era of great need for many. Nevertheless, whether the high-wealth donor rejoices in or regrets the replacement of the government by philanthropy, what stands out is the notion that high-wealth family donors have "come to be regarded as a legitimate provider of the public good[]."[268] And these megadonations directed at influencing public policy are reshaping the relationship between private actors and government, creating a democratic deficit in the process. As one political scientist observes: "[D]espite the tremendous good that these philanthropists have done for their fellow citizens, their contributions sometimes sit uneasily with a commitment to democratic government."[269]

Another reason that plutocratic philanthropy is often seen as incompatible with democracy is that foundations lack both transparency and accountability.[270] One scholar, for example, states: "The modern philanthropic foundation is perhaps the most unaccountable, nontransparent, peculiar institutional form we have in a democratic society."[271] Similarly, one commentator remarks that foundations are "pockets of great personal wealth" that are "gratuitously

266. Pevnick, *supra* note 252, at 240.

267. George B. Kaiser, *Giving Pledge*, THE GIVING PLEDGE, https://givingpledge.org/Pledger.aspx?id=220 (last visited Feb. 10, 2020).

268. Horvath & Powell, *supra* note 264, at 89. *See* Gara Lamarch, *Democracy and the Donor Class*, DEMOCRACY (Fall 2014), https://democracyjournal.org/magazine/34/democracy-and-the-donor-class.

269. Pevnick, *supra* note 252, at 226.

270. One risk is "an increasingly unaccountable and undemocratic philanthropic sector." COLLINS ET AL., *supra* note 129, at 5.

271. Horvath & Powell, *supra* note 264, at 144.

dispensed."[272] Richard Posner has written: "[A] perpetual charitable foundation . . . is a completely irresponsible institution, answerable to nobody. It competes neither in capital markets nor in product markets . . . and, unlike a hereditary monarch whom such a foundation otherwise resembles, it is subject to no political controls either."[273] Family foundations, typically governed by family members instead of paid professionals, are even more vulnerable to this charge since processes and priorities are formed to suit the family and the external perspective is often absent. With these foundations, "[w]e face a future in which private donors—who are accountable to no one—may often wield more influence than elected public officials, who (in theory, anyway) are accountable to all [citizens]."[274]

A final set of questions about the relationship between plutarchic philanthropy and democratic conditions stems from the problem of patronage. Plutarchic "philanthropy carries the aristocratic idea of noblesse oblige into a democratic society" and creates a system of patronage, in which well-resourced individuals and families assume responsibility because of their social position and financial ability to sponsor various causes.[275] Philanthropists themselves use this language of *noblesse oblige*: "The idea that 'with wealth comes responsibility' . . . is voiced often by top givers."[276] And the image of patron has been adopted by major donors, looking to style themselves in a certain manner. Science funding, for example, has attracted a new set of major donors who, "from Silicon Valley to Wall Street . . . seek to reinvent themselves as patrons of social progress through science research."[277]

Again, despite the significant good that philanthropic families enable, this system of philanthropic patronage may create a persistent sense of unease because "reliance on such donations renders some citizens deeply dependent on the contingent goodwill of others."[278] Practically speaking, this patronage is undesirable because allowing high-wealth families to act as financial providers for other citizens renders these citizens vulnerable "to the whims of individuals or private entities."[279] Citizens in a democratic state should not be subject to "the

272. John G. Simon, *The Regulation of American Foundations: Looking Backward at the Tax Reform Act of 1969*, 6 VOLUNTAS: INT'L J. VOLUNTARY & NONPROFIT ORGANIZATIONS 234, 245 (1995).

273. Yoni Appelbaum, *Is Big Philanthropy Compatible with Democracy?*, ATLANTIC (June 28, 2017), https://www.theatlantic.com/business/archive/2017/06/is-philanthrophy-compatible-democracy/531930/ (quoting *Charitable Foundations—Posner's Comment*, BECKER–POSNER BLOG (Dec. 31, 2006), https://www.becker-posner-blog.com/2006/12/charitable-foundations—posners-comment.html).

274. Semuels, *supra* note 260 (quoting CALLAHAN, *supra* note 4).

275. Pevnick, *supra* note 252, at 227.

276. CALLAHAN, *supra* note 4, at 38.

277. William J. Broad, *Billionaires with Big Ideas Are Privatizing American Science*, N.Y. TIMES, Mar. 16, 2014, at A1.

278. Pevnick, *supra* note 252, at 226.

279. Eric Beerbohm, *The Free-Provider Problem: Private Provision of Public Responsibility*, *in* PHILANTHROPY IN DEMOCRATIC SOCIETIES: HISTORY, INSTITUTIONS, VALUES, *supra* note 252, at 207, 212 ("Even if we found an agent who was as empirically reliable as the state—say, a private foundation or an individual like

idiosyncrasies of donors and what they deem to be worthy and fashionable."[280] Moreover, "what is given by donors is fragmented and typically short-term in nature,"[281] and it may not "be adequately distributed to those most in need."[282]

Even if citizens were not, however, subject to the whims of an individual or family patron, discomfort might emerge from the "concern that private philanthropy has the potential to undermine the public character of distributive justice."[283] No matter the generous and well-intentioned nature of some of these megagifts, private philanthropy in any realm does not and cannot change the structural defects that inhere in a system capable of producing major economic inequalities as well as social conditions of suffering and violence.[284] So, although some megagiving clearly provides important, sometimes life-sustaining benefits to those in need, "[w]hen a voluntary association auditions as an agent of distributive justice, it isn't capable of addressing the impaired relations [of inequality] among citizens."[285] Philanthropy is a second-best solution in the long-term project of "put[ting] citizens into egalitarian relationships with their fellow citizens in need."[286] As John Stuart Mill remarked in 1848, these gifts do not change the political and economic structures that created offending inequalities in society because "philanthropists . . . nibble at the consequences of unjust power, instead of redressing the injustice itself."[287]

Gilded giving presents the image of a world in which "philanthropists and philanthropic groups can become 'mini-governments.'"[288] This is the world of plutarchic philanthropy: when the role of high-wealth families, acting through their foundations, is transformed from a private role into a quasi-governmental one.

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the Benefactor—our worries would persist. Those in need of the most basic goods would have to rely on the good will of private actors.").

280. Angela M. Eikenberry, *Philanthropy and Governance*, 28 ADMIN. THEORY & PRAXIS, 586, 589 (2006).

281. *Id.* at 589.

282. *Id.* (stating "Stivers (2002) makes a similar case in arguing that one thing that the Progressive Era showed us was the inadequacies of voluntary effort and private charity for solving major social problems").

283. Beerbohm, *supra* note 279, at 212.

284. *See also* Pevnick, *supra* note 252, at 226 (stating that major gifts from a family foundation "depend on a background distribution of income and wealth that is arguably incompatible with the democratic ideal").

285. Beerbohm, *supra* note 279, at 212. Eikenberry also argues how "unreasonable it is to expect philanthropy to fill the space left open by government cutbacks and devolution." Eikenberry, *supra* note 280, at 589.

286. Beerbohm, *supra* note 279, at 209.

287. JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY 959 (William James Ashley ed., Longmans, Green, & Co. 1909) (1848).

288. Eikenberry, *supra* note 280 (observing that "[b]eing philanthropic may make us more fully human and enhance quality of life, but it may not be the way we want to set public policy").

III. THE AMENDMENT OF FAMILY PRIVILEGE

The inscription of family wealth and power into bespoke constitutions and statutory wealth-law language clearly contravenes values such as equality of opportunity and democratic governance that society collectively understands to organize the larger state. Identifying these modes of wealth management and power accumulation is a challenge because the law of high-wealth exceptionalism operates outside the plain view of everyday politics and debate. An even more difficult task is determining what paths are available in rethinking and restructuring the family-wealth framework and law of exceptionalism. In this third Part, I explore several solutions to address the problem of high-wealth-family exceptionalism and the plutarchic society it cultivates.

A. Inheriting the Family Fortune

One way to address the economic harms, including wealth inequality, produced by high-wealth-family power is through increased regulation. Responding to the problem of nonregulation or light regulation, one set of solutions would be designed to increase regulatory oversight and decrease financial secrecy.[289] This kind of solution would respond directly to the legal privileges that high-wealth families have created for themselves—by retracting them. That is to say, states' laws governing trust creation could be changed, the ability to form unregulated private trust companies could be withdrawn, and family-office exemptions could be retracted in new versions of legislation. Tax exemptions for family foundations could be restructured and the annual-distribution requirements could be increased. Targeting investment wealth more generally, solutions might include reform of capital gains or corporate taxation.[290] All these are possible and logical responses that could stem the worst effects of the law of high-wealth exceptionalism. Nevertheless, dismantling the complicated architecture of this law of high-wealth exceptionalism—an architecture that has been built piece-by-piece—would be difficult because of the vast network of trust, tax, and investment rules in play, coupled with the low likelihood of collective action.

A more overarching solution to address the profound problems associated with wealth inequality comes in the form of a reimagined and refortified estate tax. The estate tax—currently as well as historically—has often been singled out as the strongest tool available for enabling wealth redistribution and equalizing opportunity. Historically, in fact, politicians and philosophers have long

289. *Family Offices: Investments Under the Spotlight*, FIN. TIMES (Oct. 19, 2017), https://www.ft.com/content/4c6d79aa-a9cb-11e7-ab66-21cc87a2edde. For more on financial privacy and addressing its harms, see generally Allison Tait, *The Private Lives of High-Wealth Families*, *in* SHIFTING NORMATIVITIES (Erez Aloni & Regine Tremblay eds., forthcoming 2020).

290. *See generally* NAOMI CAHN, JUNE CARBONE & NANCY LEVIT, SHAFTED (forthcoming 2020).

debated the right to inherit in the context of social inequality, and the concepts of inheritance and wealth transfer have been the target of critique since at least the Enlightenment. Philosophers including Jean-Jacques Rousseau, Jeremy Bentham, and John Stuart Mill all "advocated eliminating or tightly limiting the right of inheritance so as to prevent the reestablishment of the concentrations of political and economic power that the revolutions of the eighteenth century sought to demolish."[291]

For these philosophers, the connection between inheritance law, wealth inequality, and social opportunity was obvious, and reforming inheritance law was key to progress: "For social reformers, the bequest of property was often deeply problematic. It was associated with a system of inherited privileges characteristic of aristocratic societies and stood in conflict with fundamental bourgeois values of equality and meritocracy."[292] Tocqueville, observing American practices and politics, stated:

> But it was estate law that made equality take its last step . . . . These laws belong, it is true, to the civil order; but they ought to be placed at the head of all political institutions, for they have an incredible influence on the social state of peoples . . . . They have, in addition, a sure and uniform manner of operating on society; in a way, they take hold of generations before their birth.[293]

The American taxation of inheritance began in 1916, along with the advent of the income tax.[294] At that time, and into the New Deal era, reformers and political leaders shared the concerns of Enlightenment philosophers. Franklin Delano Roosevelt, the beneficiary of significant inherited wealth himself, remarked that "inherited economic power is as inconsistent with the ideals of this generation as inherited political power was inconsistent with the ideals of the generation which established our government."[295] The apprehension then, as in earlier centuries, was that "wealth transfers 'allow for the intergenerational continuity of social positions, . . . stabiliz[ing] spheres of affiliation and thus the social structure of society, and . . . counteract[ing] the vagaries of success in the marketplace.'"[296]

Today, concerns about inheritance and inequality remain. As one tax scholar states: "[O]ur tax code often ignores barriers to equality of opportunity. Nowhere is this more apparent than the taxation of wealth transfers."[297] The

291. HARRINGTON, *supra* note 4, at 204.

292. Jens Beckert, *Are We Still Modern? Inheritance Law and the Broken Promise of the Enlightenment* 5 (Max-Planck-Institut für Gesellschaftsforschung, Working Paper No. 10/7, 2010).

293. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 47 (Harvey C. Mansfield & Delba Winthrop eds. & trans., The Univ. of Chi. Press 2000) (1835).

294. Richard J. Joseph, *Estate Taxation is Integral to Income Taxation*, TAX NOTES, Oct. 24, 2005, at 527, 527, https://taxprof.typepad.com/taxprof_blog/files/2005-21028-1.pdf.

295. Lily L. Batchelder, *Fixing the Estate Tax*, DEMOCRACY (Winter 2017), https://democracyjournal.org/magazine/43/fixing-the-estate-tax/ (quoting Franklin Delano Roosevelt).

296. HARRINGTON, *supra* note 4, at 202.

297. Batchelder, *supra* note 295.

uneven distribution of inheritances makes this point sharply: "More than 80 percent of individuals inherit less than $100,000. But the 1 percent who inherit more than $1 million account for about a quarter of the value of all bequests."[298] Moreover, because of the high exemption level, most high-wealth bequests go untaxed. To start, the estate-tax exemption—recently raised to $11 million per individual—gives high-wealth families great leeway, especially given that a married couple has a $22 million exemption as well as portability at its disposal.[299] Because of this exemption threshold, few estates are actually taxed. The Tax Policy Center estimates that for individuals who died in 2017 (with the then-applicable $5.49 million exemption) "an estate tax return will be filed for only about 0.15 percent of decedents, and only about 0.07 percent will pay any estate tax."[300]

Perhaps even more importantly, just because an individual possesses an estate significant enough to be taxed, this does not necessarily correlate with tax revenue because of the coterie of estate planning techniques available to avoid wealth-transfer taxation. Family constitutions, by enshrining the family aspiration to conserve wealth, express a simple and basic desire to avoid transfer taxes, and the institutions that grow up alongside the constitution—private trust companies, family offices, and family foundations—actualize this intention. Consequently, ultra-high-wealth families, who would be subject to the estate tax, exempt themselves through the strategic navigation of wealth-law rules. As one wealth manager explains: "As I always tell people, the estate tax in our country is a voluntary tax—you only pay if you don't plan."[301]

Aggravating this problem is that, until recently, there has been almost no topic with as little political traction as the estate tax. Lobbying and a sustained public-relations campaign against the estate tax by the wealthy—with the exception of the "billionaire backlash" group[302]—have succeeded in vilifying this

298. *Id.* (stating that inheritances represent roughly 40% of all wealth and about 4% of annual household income and that bequests alone total about $500 billion per year).

299. Some commentators point out that the estate tax in the United States is "the fourth highest estate or inheritance tax rate in the OECD at 40 percent." ALAN COLE, TAX FOUND., ESTATE AND INHERITANCE TAXES AROUND THE WORLD 1 (2015), https://files.taxfoundation.org/legacy/docs/TaxFoundation_FF458.pdf (stating that the world's highest rate, 55%, is in Japan, followed by South Korea (50%) and France (45%)).

300. TAX POLICY CTR., BRIEFING BOOK (2018), https://www.taxpolicycenter.org/sites/default/files/briefing-book/bb_full_2018_1.pdf. Consequently, because of the high and yet still rising exemption, "U.S. estate tax receipts have declined precipitously over the last fifteen years, from $38 billion (2015 dollars) in 2001 to an estimated $20 billion in 2015." COLE, supra note 299, at 1.

301. HARRINGTON, *supra* note 4, at 151; *see also* Beckert, *supra* note 292, at 5 ("Reform of the laws on inheritance became a pressing topic in the eighteenth and nineteenth centuries for thinkers and politicians such as Montesquieu, Rousseau, Mirabeau, Thomas Jefferson, Alexis de Tocqueville, Blackstone, Hegel, Fichte, and John Stuart Mill. All of these thinkers agreed on the importance of inheritance law for the transformation of the social and family order, based on principles of individuality, social justice, democracy, and equality before the law.").

302. Bill Gates Sr. has mobilized and led advocacy in favor of a high estate tax. *See generally* CHUCK COLLINS & WILLIAM H. GATES, WEALTH AND OUR COMMONWEALTH (2004).

transfer tax and rebranding it as the "death tax."[303] Focus by opponents on the dangers to family firms and farms presented by the estate tax—despite its general exemptions for these taxpayers—have made the estate tax wholly unpopular not only with high-wealth families but also with small-business owners and farmers.[304] Moreover, by emphasizing the idea of double taxation, opponents have considerably widened the scope of dissatisfaction and disagreement with the estate tax.[305] One commentator has suggested that "[t]he most remarkable example of how politics has shifted in favor of the wealthy—an example that helps us understand why economic policy has reinforced, not countered, the movement toward greater inequality—is the drive to repeal the estate tax."[306] Because of this concerted oppositional movement,

> [the estate tax] is a marginalized issue that pops up here and there without creating the social controversies it once did . . . . What we can observe over the last forty years is a backlash in crucial areas of inheritance law which breaks the Enlightenment's promise of moving from ascription to achievement.[307]

Nevertheless, despite this entrenched lack of enthusiasm for debating the estate tax, some progressive politicians have very recently pivoted to the idea of wealth taxation as a response to the current state of heightened wealth inequality. Elizabeth Warren, during her presidential campaign, announced an interest in instituting an annual wealth tax on those families with assets of $50 million or more, stating: "It's time to fundamentally transform our tax code so that we tax the wealth of the ultrarich, not just their income . . . . By asking our top 75,000 households to pay their fair share, my proposal will help address runaway wealth concentration . . . ."[308] Other politicians have suggested, in the same vein, increases in marginal tax rates, including a 70% top rate on income exceeding $10 million a year and an overhaul of the estate tax.[309]

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303. Batchelder, *supra* note 295; *see also* Stephen Martin, *America's Un-American Resistance to the Estate Tax*, ATLANTIC (Feb. 23, 2016), https://www.theatlantic.com/business/archive/2016/02/resistance-estate-tax/470403/ ("Today, estates represent an immense potential tax base, yet there is little political will to tap them."). For a recounting of the battle against the estate tax, see generally MICHAEL GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS (2005).

304. GRAETZ & SHAPIRO, *supra* note 303, at 50–74.

305. *Id.*

306. Paul Krugman, *For Richer*, N.Y. TIMES (Oct. 20, 2002), https://www.nytimes.com/2002/10/20/magazine/for-richer.html.

307. Beckert, *supra* note 292, at 5 (arguing "the topic of inheritance concerned social reformers from the Age of Enlightenment onwards, up until the mid-twentieth century, when it all but disappeared from public debate").

308. Tankersley, *supra* note 206 ("Ms. Warren's so-called ultramillionaire tax would levy a 2 percent annual tax on a household's assets—including stocks, real estate and retirement funds, held either in the United States or abroad—above $50 million. It would add an additional 1 percent 'billionaire surtax' on households with net worth exceeding $1 billion, a group that includes President Trump.").

309. *Id.* And some scholars have recently returned to the idea of estate tax to balance intergenerational equity. *See generally* Victoria J. Haneman, *Taxing Rich Dead People to Tackle Student Loan Debt*, 39 VA. TAX REV. 197 (2019).

Attempting, like progressive politicians, to revitalize conversation and action around the estate tax, one tax scholar has recently proposed several new reforms to the estate tax—including reinventing it as an inheritance tax. An inheritance tax would mean that the recipient rather than the donor paid the tax on the gift,[310] addressing the common critique of double taxation and reframing the question more broadly—not as one of freedom of disposition but rather as one of gifted assets and unearned windfalls. Accordingly, a fitting name for the tax would be the "silver spoon tax[]" rather than the "death tax[],” with its ominous and unpleasant ring.[311] This proposal also incorporates a change in tax rate as well, such that inheritors are taxed on the gift as income—the idea being that "[a] first step [to creating opportunity] is to start taxing extraordinarily large inheritances like we tax good old hard work."[312] Building on this idea of taxing wealth, some politicians are also turning toward annual wealth taxes—in addition to the estate tax—to help solve the problem.

These kinds of proposals, addressing the critical problem of wealth transfer and its role in perpetuating wealth inequality, would respond to the problem of growing plutarchic patrimonialism. And they would do so by going to the root of the issue: long-term family-wealth preservation. Because, "[f]or those concerned about economic inequality, taxing wealth transfers is a critical policy tool, mitigating inequality in ways that other taxes cannot.[313]

B. *Reframing Citizenship Rights*

Addressing the problem of high-wealth exceptionalism from a more theoretical angle, a productive approach to restoring a more democratic and less patrimonial vision of wealth and power is to revitalize the notion of economic citizenship, squarely grounded in constitutional values. The texts that inscribe high-wealth-family exceptionalism and the legal framework that supports this exceptionalism can be understood to inflate the economic rights of some citizens at the expense of others. In this way, the law of high-wealth exceptionalism represents a set of values that arguably contravenes and undermines what we collectively understand to be national citizenship and democratic values.

A democratic state is often defined by its extension of suffrage to citizens, and democratic citizenship has long been framed in terms of the right to engage in the political act of voting. Citizenship can, however, also be defined more broadly. T.H. Marshall, in his 1950 essay *Citizenship and Social Class*, famously expanded the concept of citizenship to include three elements: civil, political,

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310. Batchelder, *supra* note 295.

311. *Id.*

312. *Id.*

313. Lily Batchelder, *The "Silver Spoon" Tax: How to Strengthen Wealth Transfer Taxation*, WASH. CTR. FOR EQUITABLE GROWTH (Oct. 31, 2016), https://equitablegrowth.org/silver-spoon-tax.

and social.[314] Marshall considered the social element to encompass "the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in the society."[315] These rights were the right to economic opportunity, full participation not just in the workplace but also in the cultural realm, and access to all of the diverse institutions that comprise the social order.[316] Social citizenship, he believed, was "of a different order from the others, because it is the right to defend and assert all one's rights on terms of equality with others and by due process of law."[317]

Other scholars have amplified Marshall's idea of complex citizenship, supplementing it in particular with the notion of economic rights.[318] Pushing on the concept of economic rights, one scholar has stated that "[t]he achievement of economic citizenship can be measured by the possession and exercise of the privileges and opportunities necessary for men and women to achieve economic and social autonomy and independence."[319] The possession of these citizenship privileges is signified not only by access to gainful employment and paths to advancement but also by equal treatment in areas like access to financial planning opportunities, tax treatment, and modes of wealth transfer. Access to all of these privileges, and others like them, facilitates "[t]he fulfillment of economic citizenship [that] resides in the standing or status that enables women and men to participate fully in a democratic polity."[320]

The law of high-wealth exceptionalism undermines equality of economic citizenship by disproportionately supplying economic opportunity and legal privilege to high-wealth families. High-wealth exceptionalism also fosters unequal economic citizenship when the wealth inequality it intensifies keeps wages low, inhibits saving and wealth accumulation for those not in the top stratum of wealth, and reduces the access of ordinary-wealth families to home ownership, education, and stable employment. By creating these disparities in economic citizenship, the law of high-wealth exceptionalism undermines shared social values and cultural belonging.

High-wealth exceptionalism and its multiple effects violate the deeply ingrained American narrative of generalized prosperity, profit-as-reward for work, and plentiful opportunities for social and economic advancement. Culturally, "Americans remain profoundly attached to an idea of America as a middle-class nation, with very few of us on the economic margins, abundant

314. T.H. MARSHALL, *Citizenship and Social Class*, *in* CITIZENSHIP AND SOCIAL CLASS AND OTHER ESSAYS 1, 10 (1950).

315. *Id.* at 11.

316. *Id.*

317. *Id.* at 10–11.

318. *See generally* Alice Kessler-Harris, *In Pursuit of Economic Citizenship*, 10 SOC. POL.: INT'L STUD. GENDER, ST. & SOC'Y 157 (2003).

319. *Id.* at 159.

320. *Id.*

opportunities to raise oneself or one's offspring into the middle classes, and everyone enjoying a fair shot at wealth and success."[321] In making these conventional aspirations harder to reach for most other families, economic exceptionalism destabilizes the national notion of promise.

Accordingly, in order to recover some modicum of wealth equality, the law of high-wealth exceptionalism should be read and considered through the lens of economic inequality and the right to economic citizenship. Rules that nurture exceptionalism and financial privilege should also be read against the U.S. Constitution, which contains the political promise "to promote opportunity, avoid oligarchy, and build a robust middle class."[322] Reading an explicitly economic dimension into the Constitution, as a growing number of scholars encourage, the problematic nature of high-wealth exceptionalism becomes even more glaring.

These scholars reveal that a core of economic concerns were, in fact, present from an early historical point. In the early republic, "[t]he Constitution was understood to protect the rights of white men to a fair or equal chance to join the 'middling classes' that were the bulwark of republican government. . . . [T]he roads to a middle-class life had to be wide open and broad enough to accommodate everyone."[323] Subsequently, this concern for the middle classes and economic equality reappeared at other historical junctures, including during the Jacksonian period and under the political aegis of President Franklin Delano Roosevelt. FDR and New Deal politicians were acutely concerned with creating economic opportunity and curbing plutocratic conditions. FDR, for example, showed concern about the unchecked power of "economic royalists," who "carved new dynasties" and built "[n]ew kingdoms . . . upon concentration of control over material things."[324]

This recognition of the economic rights of ordinary-wealth families, scholars suggest, has lost its explanatory power and political purchase in recent decades. But what has been lost can also be found. Family constitutions and wealth rules break with the values underlying democratic citizenship and severely threaten "the promise of equal citizenship at the foundation of our democratic Constitution."[325] Nevertheless, the promise of equal citizenship can be renewed by reconstructing a robust understanding of economic citizenship and repositioning economic concerns within the constitutional ambit.

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321. Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669, 671 (2014).

322. *Id.* at 672.

323. *Id.* at 671.

324. Franklin Delano Roosevelt, U.S. President, Acceptance Speech for the Renomination for the Presidency (June 27, 1936), https://www.presidency.ucsb.edu/documents/acceptance-speech-for-the-renomination-for-the-presidency-philadelphia-pa.

325. Fishkin & Forbath, *supra* note 321, at 671.

CONCLUSION

The law of high-wealth exceptionalism has been painstakingly crafted, one intricate element at a time. Family constitutions authorize high-wealth families to imagine themselves as separate sovereignties. Family-wealth rules confirm this notion by exempting high-wealth families from the wealth rules that govern other families, affording them the benefits of financial privacy and family control. In this way, the law of high-wealth exceptionalism has enabled the construction of a "libertarian fantasy made real, in which . . . the world's wealthiest people [are] free not only of tax obligations but of any laws they [find] inconvenient."[326] The problem is that this libertarian fantasy of high-wealth exceptionalism has real results for ordinary- and low-wealth families. The laws that collectively constitute high-wealth exceptionalism have the potential to create instability in financial markets, shift tax burdens, and heighten wealth inequality. Moreover, these laws produce a democracy deficit by allowing high-wealth families to exert outsized influence in the political system through targeted lobbying and megaphilanthropy.

Solutions to counter this persistent national drift toward a plutarchic and patrimonialist system of governance include the reform of wealth-transfer taxation and the recovery of a robust notion of economic citizenship grounded within the field of constitutional values. The law of high-wealth exceptionalism currently serves a few select families—and serves them very well. Wealth law should not, however, exist to facilitate the creation of private islands of wealth for privileged families. Instead, family-wealth law should pave paths and build bridges to prosperity for all families.

326. Brooke Harrington, *Inside the Secretive World of Tax-Avoidance*, ATLANTIC (Oct. 26, 2015), https://www.theatlantic.com/business/archive/2015/10/elite-wealth-management/410842/.