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Inheriting Privilege

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Article

Inheriting Privilege

Allison Anna Tait[†]

The family is also an inheritance. To inherit the family can be to acquire an orientation toward some things and not others as the cause of happiness. In other words, it is not just that groups cohere around happy objects; we are asked to reproduce what we inherit by being affected in the right way by the right things.¹

Some spell [Undine] could not have named seemed to emanate from the old house which had so long been the custodian of an unbroken tradition: things had happened there in the same way for so many generations that to try to alter them seemed as vain as to contend with the elements.²

INTRODUCTION

All families may be created equal, to borrow a turn of phrase. But differences between families in terms of economic wealth, resource networks, and access to cultural capital are both severe and stark.³ Distinctly discernable across the highly textured landscape of opportunity and prosperity is the reality that there are families who

† Allison Tait, Professor of Law, University of Richmond School of Law. For comments and conversation, my thanks to Erez Aloni, Mary Bilder, Naomi Cahn, Erin Collins, Bridget Crawford, Marie-Amelie George, Andrew Gilden, Deborah Gordon, Tristin Green, Victoria Haneman, Claudia Haupt, Anita Krishnakumar, Ray Madoff, Doug Nejaime, Luke Norris, Shaun Ossei-Owusu, Karen Sneddon, Carla Spivack, Sarah Swan, and Karen Tani as well as participants in the SEALS 2019 Annual Conference, the 2022 AALS Trusts & Estates section panel, and faculty workshops at Boston College Law School, Northeastern Law School, and Wake Forest University School of Law. Also a big thanks to students in Karen Tani's and Shaun Ossei-Owusu's "Law and Inequality" seminar and Anita Krishnakumar's Trusts & Estates class. And finally thanks go to the editors of the *Minnesota Law Review* for their excellent editorial work. Any errors are, of course, mine. Copyright © 2022 by Allison Anna Tait.

1. SARA AHMED, *THE PROMISE OF HAPPINESS* 45 (2010).

2. EDITH WHARTON, *THE CUSTOM OF THE COUNTRY* 291 (1913).

3. See, e.g., Thomas Shapiro, Tatjana Meschede & Sam Osoro, *The Widening Wealth Gap: Why Wealth Is Not Color Blind*, in *THE ASSETS PERSPECTIVE* 99 (Reid Cramer & Trina Shanks eds., 2014) (discussing the startling rise in the racial wealth gap over the last twenty-five years).

“have” and families who “have not.”⁴ A large part of what shapes and cultivates this scenery of possibility is the legal framework of wealth transfer. Wealth travels through generations and sticks, crystallizing in predictable places and shapes, thereby embedding complex forms of inequality within and between families.

The family trust, in particular, is a mode of transfer that facilitates wealth preservation as well as wealth inequality.⁵ The family trust is a tool that high-wealth and ultrahigh-wealth families⁶ have used routinely for centuries to transfer their various forms of capital between generations. Elite families with exclusive access to sophisticated estate planning devices create family trusts to protect their wealth for two important reasons: one, because the family trust controls assets across space and time, opening up new avenues for the supervision of family members and the safeguarding of family fortunes; two, because the family trust is capable of transferring multi-

4. See, e.g., THOMAS SHAPIRO, TOXIC INEQUALITY: HOW AMERICA'S WEALTH GAP DESTROYS MOBILITY, DEEPENS THE RACIAL DIVIDE, AND THREATENS OUR FUTURE (2017) (containing a thorough discussion about the systemic inequalities that lead to the increasing wealth disparity between socioeconomic classes).

5. This Article concerns a particular form of private trust, the irrevocable and usually discretionary trust that provides stability, continuity, and asset protection. High-wealth families use these irrevocable family trusts because they protect principal, provide some tax benefits, bar certain creditors, and ensure control of the beneficiaries over time because of conditional and discretionary distributions. See Alan V. Ytterberg & James Weller, *Managing Family Wealth Through a Private Trust Company*, 36 AM. COLL. TR. & EST. COUNS. L.J. 623, 625–31 (2011) (outlining the numerous benefits motivating private family trusts). Revocable trusts, which serve as will substitutes and are one of the most commonly used tools in modern estate planning, are not implicated in the same way since the trust's asset management does not continue past the death of the trust settlor. See James V. Heffernan & Laurens Williams, *Revocable Trusts in Estate Planning*, 44 CORNELL L.Q. 524, 524–25 (1958) (discussing the nature of a revocable trust and its utilization in estate planning). Charitable trusts appear at various points in the Article as they intersect with high-wealth estate planning.

6. As to what families might qualify as elite currently: 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. See *Ultra Net Worth v. High Net Worth: What's the Difference?*, WEBER GLOB. MGMT. (Mar. 2021), <https://weberglobal.com/insights/ultra-high-net-worth-vs-high-net-worth-whats-the-difference> [<https://perma.cc/D6BN-ZD73>]. 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 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: WEALTH MANAGERS AND THE ONE PERCENT 11 (2016) (noting that there are 167,669 UHNW individuals worldwide).

ple forms of capital—entire family patrimonies, composed not just of business shares and land deeds but also aging furniture, architectural styles, club memberships, and the family holiday card list.⁷

In terms of protecting family wealth over time, a family trust is the ubiquitous planning tool for elite families because the trust settlor can protect financial capital by restricting principal, creating discretionary distributions, and shielding trust assets from creditors over a span of decades or longer.⁸ Equally important, however, is the fact that the family trust contains and conveys a family's cultural and social capital.⁹ By allowing a trust settlor to restrict sale of trust assets, the family trust transforms heirloom assets into inalienable cultural capital. In the same vein, the trust's facilitation of conditional distributions to beneficiaries helps transfer a family's values, narrative, and identity. Moreover, through trust administration and distribution conditions, the family trust also passes down an elite family's social capital from one generation to the next.

Trusts, in this way, are highly sophisticated conveyance mechanisms not just for wealth, but for expansive family patrimonies composed of the intricate layers of assets and resources that are unique to each family. The family trust is precisely tailored to convey and defend complex patrimonies in ways that no other form of wealth transfer can do. Wills, the other most common form of wealth transfer, do not have the same functionality and do little more than effect a one-time transfer, making it difficult to exert long-term control over beneficiaries.¹⁰ That is to say, wills can transfer wealth, but they cannot control either long-term asset management or beneficiary behavior in spending habits or lifestyle choices. The family trust can.

This Article's primary goal, then, is to excavate the myriad of ways in which the family trust is a driver of wealth inequality by explaining the family trust's plasticity and demonstrating how the family trust produces entwined forms of economic, social, and cul-

7. See, e.g., Christopher C. Weeg, *The Private Trust Company: A DIY for the Über Wealthy*, 52 REAL PROP., TR. & EST. L.J. 121, 124–30 (2017); Ytterberg & Weller, *supra* note 5, at 625–31.

8. See, e.g., Weeg, *supra* note 7, at 139–41 (outlining the structure of a family trust and how it impacts distributions and investment).

9. See Iris J. Goodwin, *How the Rich Stay Rich: Using a Family Trust Company to Secure a Family Fortune*, 40 SETON HALL L. REV. 467, 479 (2010) (describing how families can attain “financial reproduction” by instilling on younger generations the family's philosophy on spending and investing).

10. See, e.g., Joseph P. Morray, *The Rule Against Prolonged Indestructibility of Private Trusts*, 44 ILL. L. REV. 467, 480 (1950) (contrasting the multigenerational effect of certain trusts with traditional inheritance methods).

tural inequality. The Article accomplishes this goal by revivifying the concept of patrimony, meaning the extended set of inheritable family resources,¹¹ and explicating the relationship between the family trust and patrimony. This intertwined exploration into both patrimony and trust law helps us to better appreciate the significant role that family trusts play in the evolving story of class, gender, and race privilege in the United States. That is to say, studying the family trust as a mode of patrimonial succession reveals the full contours of wealth inequality with its concomitant racial and gender wealth gaps. Furthermore, pressing on the trust as a patrimonial mode of inheritance also allows us to see how the family trust serves to entrench biased cultural hierarchies, consolidate rarefied systems of social standing, and create elite forms of political power.¹²

Attending to the practices and possibilities of the family trust, this Article leads us to a better understanding of how trust reform might begin to dislocate the family trust from its central positioning within the legal architecture of inequality. By explicating the robust capacities of the family trust, this Article prompts a rethinking of the purposes that trusts serve and provokes a reconsideration of how trusts can and should be democratized. Ultimately, the family trust does not have to be coextensive with elite family advantage. The trust has, historically, been a vehicle used to protect vulnerable parties,¹³ and the trust can be reimagined to work on behalf of communities that are economically vulnerable and historically dispossessed.

In addressing these issues of trust, inequality, and privilege, this Article makes two particular contributions. The first is to bring trust and inheritance literature into deeper conversation with other literatures that discuss wealth inequality and related wealth gaps. There is currently a robust literature about wealth inequality in political sci-

11. *Patrimony*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("An estate inherited from one's father or other ancestor; legacy or heritage.").

12. See, e.g., JEFFREY A. WINTERS, OLIGARCHY 34 (2011) (containing a graphic depiction of various governments practices concerning wealth defense); HARRINGTON, *supra* note 6; Carla Spivack, *Democracy and Trusts*, 42 AM. COLL. TR. & EST. COUNS. L.J. 311, 315 (2017) (arguing that trust proliferation represents the failure of democratic decision making about property); Allison Tait, *The Law of High-Wealth Exceptionalism*, 71 ALA. L. REV. 981, 985 (2020) (describing how wealthy families can use trusts to protect their assets while still maintaining tax exemptions).

13. See, e.g., David B. Young, *The Pro-Tanto Invalidity of Protective Trusts: Partial Self-Settlement and Beneficiary Control*, MARQ. L. REV. 807, 808 (1995) (outlining the trajectory of protective trusts and their increasing popularity in the United States over the last century).

ence and economic literatures.¹⁴ There is also a growing legal literature that studies questions about income and wealth inequalities and the legal frameworks that support them.¹⁵ Scholars working in tax law have been attuned to these questions and have analyzed solutions from the tax perspective.¹⁶ The inheritance literature focuses primarily on patterns of transfer,¹⁷ empirical studies on transfers through wills,¹⁸ and how wills and trusts reveal social biases and preferences.¹⁹ Some trusts and estates scholars have made forays into the area of inequality,²⁰ but few scholars have focused exclusively on the role of the trust form.²¹ This Article adds to developing con-

14. See, e.g., THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (Arthur Goldhammer trans., 2014); Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data*, 131 Q.J. ECON. 519 (2016); CALLAHAN, *supra* note 6; HARRINGTON, *supra* note 6.

15. See, e.g., GANESH SITARAMAN, *THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION: WHY ECONOMIC INEQUALITY THREATENS OUR REPUBLIC* 223 (2017) (describing how wealth inequality threatens America's republic); ANAND GIRIDHARADAS, *WINNERS TAKE ALL: THE ELITE CHARADE OF CHANGING THE WORLD* 20 (2018) (noting how the recent recession was prohibitive of the American dream); KATHARINA PISTOR, *THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY* 4 (2019) (detailing how lawyers can manipulate the law to turn any asset into valuable capital).

16. See, e.g., Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69, 90 (1990) (arguing that a system exists allowing parents to use their material benefits to help their children while still prohibiting financial transfers); 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) (acknowledging the increasing wealth inequality and proposing an estate tax to remedy the situation); Felix Chang, *Asymmetries in the Generation and Transmission of Wealth*, 79 OHIO ST. L.J. 73, 117-18 (2018) (advancing the idea that a unifying policy regarding trusts must weaken fairness requirements to be compatible with efficiency requirements).

17. See, e.g., REMI CLIGNET, *DEATH, DEEDS, AND DESCENDANTS: INHERITANCE IN MODERN AMERICA* 41-45 (Michael Useem & James D. Wright eds., 1992) (describing how inheritance patterns in America have led to various categorical inequalities); *INHERITANCE AND WEALTH IN AMERICA* (Robert K. Miller, Jr. & Stephen J. McNamee eds., 1998).

18. See, e.g., Naomi Cahn & Amy Zietlow, *"Making Things Fair": An Empirical Study of How People Approach the Wealth Transmission System*, 22 ELDER L.J. 325 (2015).

19. See, e.g., Deborah S. Gordon, *Mor[t]ality and Identity: Wills, Narratives, and Cherished Possessions*, 28 YALE J.L. & HUMAN. 265, 271 (2016) (highlighting the "social regimes" that property law creates and perpetuates).

20. See, e.g., Naomi Cahn, *Dismantling the Trusts and Estates Canon*, 2019 WIS. L. REV. 165, 176 (stating that wealth transmission fuels economic and intergenerational wealth inequality).

21. Some scholars have addressed aspects of the trust and its relation to wealth inequality. See Iris J. Goodwin, *How the Rich Stay Rich: Using a Family Trust Company to Secure a Family Fortune*, 40 SETON HALL L. REV. 467, 471 (2010) (noting how trusts that accumulate vast wealth not subject to transfer tax become investment juggler-

versations about the legal construction of wealth inequality by focusing on trust law and elite family trusts in particular.

The second, related contribution is the way in which this Article deepens the inequality narrative by placing the concept of patrimony at the center of the analysis and defining patrimony through an historical and sociological inquiry. This Article draws on historical understandings of patrimony in Western European countries as well as the United States to underscore that inheritance has traditionally entailed a complete range of resources including cultural assets and social connections. This concept of patrimonial inheritance has been somewhat forgotten in modern inheritance discourse. However, introducing a sociological perspective on privilege that underscores the importance and transmissibility of social and cultural capital gives us a new way to appreciate how patrimonies work and how far-reaching the privileges they encompass are.²² This Article, in bringing the concept of patrimony to bear on the family trust, makes a first attempt at bridging the legal, historical, and sociological literatures on inheritance by folding the notions of cultural and social capital into trust law and legal analysis.

This Article proceeds in four parts. Part I explores the multiple meanings and definitions of patrimony and describes the three kinds of capital that comprise patrimony and are central to the Article's inquiry: economic, cultural, and social. This Part details the histories of these various forms of capital and what kinds of resources each form encompasses. The descriptive work in this Part grounds the following analysis and is significant because it broadens the notion of patrimony in legal analysis. Part II ties the law of trust to these three forms of capital, analyzing the ways in which family trusts contain,

nauts); Spivack, *supra* note 12, at 313 (explaining the unequitable implications of "dynasty trusts"); Carla Spivack, *Beware the Asset Protection Trust*, 5 EUR. J. PROP. L. 105, 106 (2016) (highlighting the damages asset protection in trusts has on socioeconomic inequality).

22. See Pierre Bourdieu, *The Forms of Capital*, in HANDBOOK OF THEORY AND RESEARCH FOR THE SOCIOLOGY OF EDUCATION 241, 245 (John G. Richardson ed., 1986) (detailing the impact inheritance patterns have on cultural and social capital); see also Gøsta Esping-Andersen, *Untying the Gordian Knot of Social Inheritance*, 21 RES. SOC. STRATIFICATION & MOBILITY 115, 128 (2004) (concluding that inherited inequalities are reproduced, rather than corrected by educational systems); Werner Georg, *Cultural Capital and Social Inequality in the Life Course*, 20 EUR. SOC. REV. 333, 339 (2004) (conducting an empirical analysis testing Bourdieu's theories on the impacts of inherited social capital); Tewodaj Mogues & Michael R. Carter, *Social Capital and the Reproduction of Economic Inequality in Polarized Societies*, 3 J. ECON. INEQ. 193, 194 (2005) (exploring how groups of socially proximate individuals make choices that sustain an inherited low level of economic success).

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transmit, and manage the tripartite characteristics of patrimony. This Part builds a new understanding of the trust as not only a particularly effective transfer mechanism for wealth but also as a secure container for heirloom assets, cultural orientations, and social networks. Part III analyzes the problematic outcomes that the family trust as a mode of patrimonial inheritance reveals, explaining the compound forms of inequality that result from the use of family trusts. The analysis explores how the use of family trusts intensifies privilege and wealth-based differences between families. Relatedly, the analysis focuses on the ways in which family trusts build a system of political patrimonialism that is defined by biased and unequal forms of participation in political governance. Part IV concludes the paper with a consideration of new ways that the trust form could be used, thereby destabilizing the deep and exclusive relationship between the trusts and wealth preservation for the ultrarich. This Part is, accordingly, an inquiry into the potential of the trust to become an instrument of wealth equalization and social equality.

This Article posits the family trust as a unique catalyst of inequality because of its robust capacity to contain and convey the full range of resources that elite families possess. This analysis unearths how trusts not only further family wealth preservation but also saturate beneficiaries in distinct cultural privilege, entrench certain modes of social knowledge and power, and sustain a family-based politics of wealth. Adopting this perspective toward the family trust enables us to see more clearly the patriarchal contours of the family trust, the biased outcomes that patrimonial inheritance enables, and a path to begin reimagining the trust as a tool for equality rather than privilege.

I. THE OVERLAPPING LAYERS OF PATRIMONY

All families, regardless of their wealth or status, have a unique range of resources at their disposal. This sum of resources is the family patrimony. Legal scholars tend to think of patrimonies as financial resources: a coterie of bank accounts, real estate holdings, and stock certificates to be inherited by children and other family members.²³ Historians and sociologists have taught us, however, that patrimonies are not limited to financial assets that can be valued and entered into probate records. Families also possess patrimonies in the form

23. See, e.g., Lionel Smith, *Trust and Patrimony*, 28 ESTS., TRS. & PENSIONS J. 332, 334-35 (2009); Remus Valsan, *The Trust as Patrimony: An Introduction*, in TRUSTS AND PATRIMONIES 3, 7 (Remus Valsan ed., 2015).

of cultural and social capital.²⁴ These patrimonial items might include a box at the opera, a job at the family foundation, or membership in a summer beach club. Patrimonies are therefore the true and comprehensive sum of what one generation can inherit from another and, in this sense, they are universal.²⁵

However, patrimonies, in practice, have never been neutral forms of inheritance. As historians have explicated, patrimonies have traditionally been intimately associated with elite families and the patriarchs who head them.²⁶ And these patrimonies—the ones that have been inscribed into global histories—have been constituted of high-value assets and objects. For elite families in Western European countries, the term patrimony has generally referred to a landed, inheritable estate and the privileges embedded therein.²⁷ From this perspective, the term patrimony indicates the gendered totality of not only assets but also family offices, titles, and privilege, which—at least in the English system—historically descended in full from father to the eldest son in every generation.²⁸ These high-wealth pat-

24. Nicholas Kasirer, *Translating Part of France's Legal Heritage: Aubry and Rau on the Patrimoine*, in TRUSTS AND PATRIMONIES, *supra* note 23, at 163, 169 (“[Patrimony] may allude to wealth generally, or successorial wealth in particular, to heritage in a generic or even genetic sense, and to a mass of property that falls short of the civilian notion of universality.”).

25. *Id.*; see also Steven J. Wolin & Linda A. Bennett, *Family Rituals*, 23 FAM. PROCESS 401, 402 (1984) (discussing the use of rituals to transmit a family’s enduring attitude, values, and goals); ELIZABETH HAFKIN PLECK, *CELEBRATING THE FAMILY: ETHNICITY, CONSUMER CULTURE, AND FAMILY RITUALS* 10–20 (2000) (articulating processes for the transfer of tradition and culture between generations); Jennifer Mason & Stewart Muir, *Conjuring Up Traditions: Atmospheres, Eras and Family Christmases*, 61 SOC. REV. 607, 608 (2013) (arguing traditions create moral currency of debatable value).

26. See, e.g., LLOYD BONFIELD, *MARRIAGE SETTLEMENTS, 1601–1740* (1983); Christopher Clay, *Marriage, Inheritance, and the Rise of Large Estates in England, 1660–1815*, 21 ECON. HIST. REV. 503, 508, 510 (1968) (describing how patrimonies served to widen the wealth gap between the gentry and lesser landowners); EILEEN SPRING, *LAW, LAND, AND FAMILY: ARISTOCRATIC INHERITANCE IN ENGLAND, 1300 TO 1800* (1993); LAWRENCE STONE & JEANNE C. FAWTIER STONE, *AN OPEN ELITE: ENGLAND 1540-1880* (1984).

27. See STONE & STONE, *supra* note 26, at 105 (describing how critical components of status, such as seat, estate, and titles, were transferred through inheritance).

28. See Stephanie Mooers Christelow, *The Division of Inheritance and the Provision of Non-Inheriting Offspring Among the Anglo-Norman Elite*, 17 MEDIEVAL PROSOPOGRAPHY 3, 11 (1996) (“The custom of primogeniture, and its gradual ‘crystalizing into law’ among the upper nobility in Northern Europe during the eleventh and twelfth centuries, suggests that parental obligations focused primarily on their oldest male child. This person, on his father’s death, received the patrimony; if there were no son, daughters would inherit, but the patrimony would be divided among them so that familial power was diffused and diverted to sons-in-law.”).

rimonies are recorded not just in bank ledgers but also in social registers, passed down through a variety of complex legal and institutional channels. As such, patrimonies have served historically to consolidate wealth in elite families and also maintain privilege in the male line of descendants.

These historical understandings that patrimony encompassed cultural and social assets as well as financial ones—and that patrimonies were elite and masculinist forms of wealth transmission—track with a sociological awareness that multiple forms of capital not only exist but also organize our hierarchies of privilege.²⁹ Sociologists have disentangled cultural and social capital from the financial and have explored how these forms of capital contribute to the creation, maintenance, and transmission of inequality.³⁰ This sociological work underscores the historical understandings of patrimony and helps to make legible both the categories within patrimony and how far the privilege of patrimony extends. Accordingly, using historical work on patrimony coupled with sociological work on cultural and social capital, we can understand the variegation in elite wealth, how amenable that wealth is to transmission, and how it relates to myriad and immense disparities.

This Part, drawing on both historical accounts and sociological theory, breaks patrimony into three component parts—economic, cultural, and social—and explores in detail what it means to reference patrimony in these specific contexts. This inquiry confirms that the array of assets inheritable as part of a patrimony is vast, just as it emphasizes that patrimonial inheritance is intricately connected to patriarchal legacy, white and male networks of privilege, and a static set of cultural values.

A. FAMILY ASSETS, PRIMOGENITURE, AND THE NET ESTATE

A primary way in which the term patrimony has commonly been used and understood is as the sum of a person's inheritable estate.³¹ In civil law countries, this understanding and use of the term has been explicitly integrated into inheritance law, while in common law jurisdictions like England, the term patrimony has had a similar meaning but no precise legal definition.³² The concept of patrimony

29. See STONE & STONE, *supra* note 26, at 105 (detailing the multiple inheritable components that create one's socioeconomic status).

30. See, e.g., Goodwin, *supra* note 9.

31. See *supra* note 11 and accompanying text.

32. See Christelow, *supra* note 28.

has a Roman derivation, and *patrimonium* is a term used by a number of Roman jurists, including Papinian, Pomponius, and Ulpian.³³ In the Roman context, *patrimonium* indicated the estate of an individual, usually the male head of household.³⁴ The estate contained family wealth, but there were also more idiosyncratic forms of property, like titles and memberships.³⁵

This understanding of patrimony as the whole of an estate—including a range of different assets and property interests—continued into medieval and early-modern Europe.³⁶ Natalie Zemon Davis has remarked that patrimonies were “a central concern of many families in the sixteenth and seventeenth centuries.”³⁷ She adds, “Some want merely to pass on the family’s patrimony as intact as possible to those of the next generation who will stand for the house or its name in the father’s line. Others want to enhance that patrimony”³⁸ In that historical space, some of the elements of a patrimony were “lands, cattle, houses, barns, pensions, rents, offices, workshops, looms, masterships, partnerships, and shares.”³⁹

Because of the importance of these transfers in representing and solidifying masculine lines of inheritance and authority, ceremonies grew around the “division of the patrimony.”⁴⁰ For example, in sixteenth-century Paris when a city councilor died, the heirs were

33. George L. Gretton, *Trust Without Equity*, in TRUSTS AND PATRIMONIES, *supra* note 23, at 87, 97–98. Despite this longstanding notion of what patrimony was and how to transfer it, it was not until the nineteenth century that French jurists Charles Aubry and Frédéric Charles Rau articulated one of the first full definitions of the legal notion of patrimony. Aubry and Rau suggested that patrimony was a “notional container” or “theoretical construct comprising all items of economic value, both positive and negative, both present and future, appertaining to a particular individual.” Paul Matthews, *Square Peg, Round Hole? Patrimony and the Common Law Trust*, in TRUSTS AND PATRIMONIES, *supra* note 23, at 62, 63–64; *see also* Kasirer, *supra* note 24, at 165–66 (“[Aubry and Rau] seem like two characters out of a Flaubert novel as much as pillars of the nineteenth-century legal establishment.”). In civil law jurisdictions, the code may specify exactly what assets compose an individual’s patrimony. *See, e.g.*, Civil Code of Québec, S.Q. 1991, c 64, art 415 (Can.).

34. *See* Gretton, *supra* note 33, at 97.

35. *Id.* at 97–100.

36. *See* J.C. Holt, *Presidential Address: Feudal Society and the Family in Early Medieval England: II. Notions of Patrimony*, 33 TRANSACTIONS ROYAL HIS. SOC’Y 193, 196 (1983) (discussing that both land and office were included within the patrimony).

37. Natalie Zemon Davis, *Ghosts, Kin, and Progeny: Some Features of Family Life in Early Modern France*, 106 DAEDALUS 87, 87 (1977).

38. *Id.*

39. *Id.*

40. BARBARA B. DIEFENDORF, *PARIS CITY COUNCILLORS IN THE SIXTEENTH-CENTURY: THE POLITICS OF PATRIMONY* 253 (2014).

gathered with the “family papers” and “[t]he process that began with the opening of the locked chest ended with the heirs assembled once again for the final signing of the papers that formalized the divisions of property.”⁴¹ In most cases, of course, the heirs were the sons, and the formalized division of assets was the ceremonial endowment of sons with their newly acquired patriarchal privilege.⁴²

In England, where there was no legal, term-of-art understanding of patrimony as the sum of all assets, the notion of patrimony still had a strong hold in the social imagination.⁴³ Patrimony, in England as elsewhere, was inexorably linked with male privilege, since married women were subject to the disability of coverture and could transfer wealth under very limited circumstances, leaving most inheritance planning to be done by either a husband or a father.⁴⁴ Patrimony generally referred to the inheritable estate owned by the male head of the family, especially in landed and noble families.⁴⁵ These patrimonies included the family land, the most important asset, as well as rents off the land, seignorial rights, offices, and titles.⁴⁶ This estate and the entitlements that went along with it were passed down to the eldest son through primogeniture, so as to not diminish the estate through partition.⁴⁷ For these families “[t]here was a strong sense of moral obligation felt by most greater landowners . . . that they were no more than trustees for the transmission intact of their patrimony according to the rule of primogeniture.”⁴⁸

In the United States, the concept of patrimony reflected the legal system of the relevant state. Civil law jurisdictions like Louisiana

41. *Id.*

42. *See* Christelow, *supra* note 28.

43. *See* Gretton, *supra* note 33, at 98 (discussing the concept of patrimony under English law).

44. *See* Allison Tait, *The Beginning of the End of Coverture: A Reappraisal of the Married Woman's Separate Estate*, 26 *YALE J.L. & FEMINISM* 165, 183–84 (2014) (noting the rare circumstances that would give rise to a married woman's separate estate).

45. *See* Lawrence Stone, *Inheritance Strategies Among the English Landed Elite, 1540–1880*, 90 *PUBLICATIONS DE L'ÉCOLE FRANÇAISE DE ROME* 267, 278 (1986) (describing the transmission of inheritable estates between various male family members).

46. *Id.* at 268.

47. *Id.* at 281.

48. *Id.* Families were, at the same time, concerned with provisioning daughters and younger sons: “The solution, which is technically known as ‘preferential partibility,’ was first to keep the seat and the bulk of the estates tied up more or less in perpetuity for transmission by male primogeniture, but second, to leave some small properties, or new properties recently acquired, at the free disposal of the current owner.” *Id.* at 277.

adopted a code-based concept of patrimony, and a court in Louisiana explained patrimony in this way: “Patrimony is the total mass of existing or potential rights and liabilities attached to a person for the satisfaction of his economic needs.”⁴⁹ In these jurisdictions, as in the European ones, the concept of patrimony was a legal term of art as well as a measure of the property transmitted by an owner to heirs at death. Even in common law jurisdictions in the United States, however, the concept of patrimony as inheritance was cognizable and common, building on the English understanding of patrimony as the male head of household’s estate, meant to be passed on to sons and other heirs.⁵⁰ Accordingly, in a common law grammar, patrimony was defined as “an inheritance coming by right of birth. It is a right or estate inherited from one’s father or from an ancestor on the father’s side . . . [a]n endowment or estate”⁵¹ That patrimonies were constituted of gendered rights descending primarily through the male line, from father to son, was relatively unquestioned (even though primogeniture was not uniformly embraced by colonies and states).⁵² Moreover, that patrimonies were associated with both race and inequality was made clear by the fact that black enslaved workers formed part of many inheritable estates in the Southern states.⁵³

A patrimony, then, has historically represented the full gathering of an individual’s economic properties and possessory rights, broadly defined through the inclusion of idiosyncratic property interests. This collection of property rights, however, has never been a neutral set of assets either in formation or succession. Patrimony has traditionally been coextensive with the rights and estates of high-wealth patriarchs and the intergenerational transfer of this family wealth between a father and his eldest son or other male heirs.

49. *Creech v. Capitol Mack, Inc.*, 287 So. 2d 497, 504 (La. 1973). Patrimony, coming from Roman Law’s *patrimonium*. See Gretton, *supra* note 33, at 97.

50. See Stone, *supra* note 45, at 278.

51. *Patrimony Law and Legal Definition*, USLEGAL, <https://definitions.uslegal.com/p/patrimony> [<https://perma.cc/5K4Y-DXRM>]. In an 1855 case from Connecticut, the state supreme court was called upon to decide upon the validity of a will in which “the deceased . . . would make the entire patrimony of each son (or, of the children of each son[]) much larger than the entire patrimony of each daughter.” *Taylor v. Taylor*, 23 Conn. 579, 583 (1855).

52. See Carole Shammass, *English Inheritance Law and Its Transfer to the Colonies*, 31 AM. J. LEGAL HIST. 145, 148 (1987) (noting that some colonial communities changed from primogeniture to ultimogeniture systems of succession).

53. See Stephen Duane Davis II & Alfred L. Brophy, *The Most Solemn Act of My Life: Family, Property, Will, and Trust in the Antebellum South*, 62 ALA. L. REV. 757, 780 (2011) (enumerating the specific bequeathing patterns of slave-owning testators).

B. HOMES, COLLECTIONS, AND FAMILY CULTURE

Part of a patrimony, alongside financial assets, is the cultural objects and products that belong to the family. Most often, cultural patrimonies are discussed and have been understood in the context of nations, to describe a cultural record of a people or a state.⁵⁴ National cultural patrimonies include a range of cultural recordings and products, from treasured art pieces to traditional music to public monuments.⁵⁵ Public, cultural patrimonies descend automatically and inviolately to each generation, preserving the public legacies of patriarchs, their gifts to the nation, and the outcomes of their industry.⁵⁶

But families, like nation-states, have cultural patrimonies, and they are similarly comprised of symbolically meaningful items, heirloom objects, shared rituals, and even particularized tastes. In civil law countries, these cultural properties are often folded into a legal description of the family patrimony.⁵⁷ The French Civil Code recognizes family cultural assets, such as “names, traditions, inventions, mottoes, brands, and creative works.”⁵⁸ More typically, however, a family’s cultural patrimony was formed from a loosely defined group of objects that coalesced over time to represent family history and prestige—family portraits, jewelry, tapestries, papers, letters, and

54. PATTY GERSTENBLITH, *ART, CULTURAL HERITAGE, AND THE LAW* 523 (2d ed. 2008) (describing cultural heritage in the context of war).

55. James A. R. Nafziger, *Cultural Heritage and Patrimony*, in *ENCYCLOPEDIA OF LAW & SOCIETY: AMERICAN AND GLOBAL PERSPECTIVES* 360, 361 (David S. Clark ed., 2007) (defining cultural patrimony). Cultural patrimonies may also include rituals, recipes, floral varieties, and even mortal remains (relics or even gravesites). France, for example, has a “Code du Patrimoine” for the protection of “the nation’s cultural, artistic, and architectural heritage.” ELIZABETH MACKNIGHT, *NOBILITY AND PATRIMONY IN MODERN FRANCE* 3 (2018). One important characteristic about these national cultural patrimonies, is that they are “so fundamental to the society’s identity and character that people deem [them] inalienable.” Nafziger, *supra*, at 360.

56. Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–3013 (2015). The Native American Graves Protection and Repatriation Act, for example, states that cultural patrimony “shall mean an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual.” *Id.* § 3001(3)(D). And while cultural patrimonies cannot be alienated, they can, however, be appropriated and stolen. The notion of cultural patrimony frequently appears in connection with stolen artifacts and the problems around ownership and repatriation. *See, e.g., id.*

57. *See* MACKNIGHT, *supra* note 55, at 3.

58. *Id.*

even recorded genealogies.⁵⁹ Historically, aristocratic families highly prized certain items—such as rare reliquaries, manuscripts, or medals from knightly orders—particularly if the items were connected in some way to longstanding family traditions or family mythologies.⁶⁰ Elite patrimonies were formed with longevity in mind, and the “collective family consciousness . . . served as a *topos* for aristocratic collecting.”⁶¹

These historical understandings of patrimony map on to sociological ones, and the cultural assets that have traditionally been included in patrimonies represent what sociologists describe as cultural capital. Much of a family’s cultural patrimony or cultural capital exists in an “objectified” form, to borrow Pierre Bourdieu’s formulation.⁶² That is to say, a family’s cultural capital often consists, in large part, of “material objects and media, such as writings, paintings, monuments, instruments, etc., [which are] transmissible in [their] materiality.”⁶³ An art collection gracing the walls of a family estate, a set of family papers, or the family silver—all of these objects are both part of a family patrimony and forms of cultural capital.⁶⁴

A family’s cultural capital—both historically and in the modern context—may have high value and may intersect with its economic patrimony. Meaningful family objects may come in the form of a valuable art collection, vacation homes, or high-worth jewelry. A family’s cultural patrimony or capital may also come in the form of difficult-to-value items that have great meaning for family members, such as books, decorative items, or artistic preferences.⁶⁵ What is significant about these objects is that they are treasured precisely because their value is beyond economic.⁶⁶ That is to say, “cherished or special possessions are treasured independent of their exchange

59. See, e.g., Juan Luis González García, *Charles V and the Habsburgs’ Inventories. Changing Patrimony as Dynastic Cult in Early Modern Europe*, RIHA J., Nov. 2010, at para. 3.

60. *Id.* at para. 22.

61. *Id.* at para. 24.

62. Bourdieu, *supra* note 22, at 243.

63. *Id.* at 246.

64. *Id.*

65. Gordon, *supra* note 19, at 276.

66. See *id.*; see also Cahn & Zietlow, *supra* note 18, at 341, 370 (describing the gifts survivors received from deceased loved ones). Survivors think of “inheritance as going beyond financial assets;” items like “a work shirt from Sears” and “a teddy bear made out of the shirts of a stepdad” help make a survivor feel valued. Cahn & Zietlow, *supra* note 18, at 341, 370.

value, and private or personal meanings are central to their worth.”⁶⁷

Family cultural property creates a highly curated backdrop for family life and is “invaluable” because it telegraphs identity within the family, creating a sense of “familiness.”⁶⁸ Families “surround [them]selves with material objects that communicate to others and to [them]selves who [they] are, what [they] have done, and who [they] would like to be.”⁶⁹ In this sense, items in the family cultural patrimony “serve as symbols of family identity enactment,”⁷⁰ and, over time, these “cherished possessions and keepsakes are transformed into ‘inalienable objects’ that the owner’s families believe to be ‘irreplaceable’ and ‘sacred’ through the power of memory.”⁷¹ In this way, cultural capital creates connections not just between members of a generational cohort but also across generations, as the objects take on the stories, lives, and aspirations of all family members who have interacted with them.

Through and in addition to this object-form capital, families also possess and transmit “embodied” cultural capital, a set of tastes, biases, and orientations or, as Bourdieu says, “culture [and] cultivation.”⁷² Embodied capital may be an affinity for American landscape art, knowing how to sail, or a familiarity with wine. Embodied capital is the absorption of certain family “orientations” and, as Pierre Bourdieu explained, we often act out and display embodied cultural capital as we move through the world, and we perform it as we interact with others.⁷³ Embodied cultural capital is “the sum total of invest-

67. Carolyn Folkman Curasi, Linda L. Price & Eric J. Arnould, *How Individuals’ Cherished Possessions Become Families’ Inalienable Wealth*, 31 J. CONSUMER RSCH. 609, 609 (2004).

68. Allison W. Pearson, Jon C. Carr & John C. Shaw, *Toward a Theory of Familiness: A Social Capital Perspective*, 32 ENTREPRENEURSHIP THEORY & PRAC. 949, 957 (2008) (“As a result of established patterns of interactions and involvement, families likely possess an abundance of internal network ties that are appropriable to the family firm. In contrast, individuals employed in nonfamily firms often bring few, if any, preexisting network ties to the workplace. Family firms, then, may have an advantage over nonfamily firms in the creation of structural social capital due to existing and familiar network ties.”).

69. Carolyn F. Curasi, *Intergenerational Possession Transfers and Identity Maintenance*, 10 J. CONSUMER BEHAV. 111, 111 (2011).

70. Linda L. Price & Amber M. Epp, *Finding Families: Family Identity in Consumption Venues*, 32 ADVANCES IN CONSUMER RSCH. 9, 10 (2005); see also Curasi, *supra* note 69, at 114 (“[S]pecial family possessions play a key role in the construction and definition of family identity.”).

71. Gordon, *supra* note 19, at 276.

72. Bourdieu, *supra* note 22, at 244.

73. Bourdieu, *supra* note 22; see also Nicki Lisa Cole, *What Is Cultural Capital? Do*

ments in aesthetic codes, practices and dispositions transmitted to children.”⁷⁴

Embodied and objectified cultural capital are intimately connected, and embodied cultural capital could easily be described as an orientation toward a family object-form capital:

Of course, when we inherit, we also inherit the proximity of certain objects, as that which is available to us, as given within the family home. These objects are not only material, they may be values, capital, aspirations, projects, and styles . . . [W]e also inherit orientations, that is, we inherit the nearness of certain objects more than others, which means we inherit ways of inhabiting and extending into space.⁷⁵

For example, if a family has a box at the opera, then family members, through its use, are exposed to “elite” forms of culture. Some family members may learn to affirmatively appreciate opera through attendance; some may associate certain operas with particular family memories, creating a fondness for the opera through association alone; some may never like it but still connect with others who were forced to go to the opera by parents or spouses. What matters is that family members acquire a minimal fluency in the art form and the experience such that they can discuss it—whether to praise or deride—with social peers at events or gatherings. What is important is that families pass on ways of seeing, biases in taste, and expectations about what the built and material landscape does and should accommodate.

Accordingly, cultural items in a family patrimony are either objects or orientations that a family understands to be noneconomic, identity-producing, and, ultimately, inalienable. These same characteristics also describe the social relationships that constitute another part of a family patrimony—a family’s social capital.

C. SOCIAL GROUPS AND FAMILY CIRCLES

In addition to the economic and cultural facets of patrimony, a family patrimony has historically also consisted of social networks,

I have It?: An Overview of the Concept, THOUGHTCO. (Sept. 23, 2019), <https://www.thoughtco.com/what-is-cultural-capital-do-i-have-it-3026374> [<https://perma.cc/5DD6-4YLB>] (“As for norms, mores, and skills such as table manners, language, and gendered behavior, people often act out and display embodied cultural capital as they move through the world and interact with others.”).

74. Michael Tzanakis, *Bourdieu’s Social Reproduction Thesis and the Role of Cultural Capital in Educational Attainment: A Critical Review of Key Empirical Studies*, 11 *EDUCATE* 76, 77 (2011).

75. SARA AHMED, *QUEER PHENOMENOLOGY: ORIENTATIONS, OBJECTS, OTHERS* 86 (2006).

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entry into which one generation hands down to another.⁷⁶ These group memberships and social networks are forms of social capital.⁷⁷ A classic definition of social capital is this: “Social capital is the aggregate of the actual or potential resources which are linked to possession of a durable network of more or less institutionalized relationships of mutual acquaintance and recognition.”⁷⁸ More precisely, social capital is “membership in a group—which provides each of its members with the backing of the collectivity-owned capital, a ‘credential’ which entitles them to credit, in the various senses of the word.”⁷⁹

Historically, one of the strongest and most distinguished forms of family social capital was the family title, which was a mark of membership in the aristocracy or nobility.⁸⁰ Titles created belonging, status, and identity in a rich and substantive way.⁸¹ Beyond titles, offices and patronages have also been strong inheritable connectors. Political offices traditionally went from father to eldest son in France, being difficult to divide otherwise, and patrimonies also included very idiosyncratic but cherished rights like the “right to nominate appointees to chaplaincies.”⁸² In early-modern Paris, city councilors passed lucrative social legacies to their children and heirs:

[T]he patrimony of the city councilors included more than money, lands, and other tangibles. The family name and reputation were a part of the patrimony, too. Ties of patronage and clientele, prestigious alliances, and social and political honors formed a heritage that could be drawn upon by all of the heirs alike, a heritage that could, despite division, become more fruitful with each new generation.⁸³

Even in the United States, without an explicit aristocracy, family names have served this function, providing access to patronage,

76. See Kasirer, *supra* note 24, at 169 (defining the scope of patrimony).

77. Bourdieu, *supra* note 22, at 252 (“[E]conomic capital is at the root of all the other types of capital and that these transformed, disguised forms of economic capital, never entirely reducible to that definition, produce their most specific effects only to the extent that they conceal (not least from their possessors) the fact that economic capital is at their root, in other words—but only in the last analysis—at the root of their effects.”).

78. *Id.*

79. *Id.*

80. *Id.* at 251 (describing the importance of family title).

81. *Id.* (“The title of nobility is the form *par excellence* of the institutionalized social capital which guarantees a particular form of social relationship in a lasting way.”).

82. JULIE HARDWICK, *THE PRACTICE OF PATRIARCHY: GENDER AND THE POLITICS OF HOUSEHOLD AUTHORITY IN EARLY MODERN FRANCE 148* (1998).

83. DIEFENDORF, *supra* note 40, at 277.

business and social connections, and marriage alliances.⁸⁴ Names of legendary families, like the Rockefellers or the Vanderbilts, did once and still do carry influence and sway in the board room and on the social circuit.⁸⁵

Social capital, unlike economic and cultural capital, is located not in objects or experiences but rather in relationships and the various forms of connective tissue that structure social interactions.⁸⁶ The social connections and relationships that define social capital may be thick or thin. Membership in a large group with little opportunity for exchange produces weak forms of social capital, whereas membership in more select groups with strong exchange norms produces powerful social capital. And the same factors that support the creation and circulation of social capital also enforce it: group norms, situational solidarity, reciprocity exchange, and enforceable trust.⁸⁷

The family itself is one of the strongest and thickest sources of social capital there is, representing a predetermined set of relationships that are “socially instituted and guaranteed by the application of a common name.”⁸⁸ Family belonging configures membership in an easily defined and well-bounded group that, in the case of high-wealth families, provides elite access to varied resources including forms of credit. Family social capital theorists detail how families are “motors of social capital” that allow their members to “cement their advantage . . . and transmit the benefits.”⁸⁹ Moreover, the social capital generated by families is “a power peculiar to family relations [and] their generative dimension of reliable and continuous social

84. Dylan Matthews, *How Your Last Name Will Doom Your Descendants Centuries from Now*, WASH. POST (Oct. 18, 2012), <https://www.washingtonpost.com/news/wonk/wp/2012/10/18/how-your-last-name-will-doom-your-ancestors-centuries-from-now> [https://perma.cc/RQR4-XL29] (“It’s well known that there’s a huge correlation between the earnings and social status of a person and the earnings and social status of that person’s parents.”).

85. *Id.*

86. Alejandro Portes, *Social Capital: Its Origins and Applications in Modern Sociology*, 24 ANN. REV. SOCIO. 1, 7 (1998) (“[S]ocial capital inheres in the structure of their relationships. To possess social capital, a person must be related to others, and it is those others, not himself, who are the actual source of his or her advantage.”).

87. *Id.* at 7–9 (describing the factors that support social capital); *see also* Bourdieu, *supra* note 22, at 249 (“[A] whole set of instituting acts designed simultaneously to form and inform those who undergo them; in this case, they are more or less really enacted and so maintained and reinforced, in exchanges.”).

88. Bourdieu, *supra* note 22, at 249.

89. Val Gillies & Rosalind Edwards, *A Qualitative Analysis of Parenting and Social Capital: Comparing the Work of Coleman and Bourdieu*, 2 QUALITATIVE SOCIO. REV. 42, 44 (2006).

bonds,”⁹⁰ bonds which are grounded in and cemented by acts of exchange, giving, and bequeathing.

Family membership might mean automatic affiliation with certain private clubs, or even leadership roles in these clubs. Very often, families have longstanding ties to particular colleges and universities—ties that are built and reinforced through both family member attendance and family philanthropy. Similarly, families come with networks connected to volunteer work, board service in cultural organizations, and participation in society events. As one scholar of elite philanthropy writes, “Through their philanthropy, wealthy donors come together with one another and sustain a series of organizations that contribute to the social and cultural coherence of upper-class life.”⁹¹

Family businesses are an additional source of family cohesion because “[t]he shared purpose of both the family and firm merge to create the collective understanding that is necessary for the family to maintain collaboration and achieve long-term family goals.”⁹² In fact, the term “familiness” is used by family business scholars to describe the “positive influence of family involvement in the firm” and the “competitive advantage” that families have “generating firm wealth and value creation.”⁹³

A family patrimony, therefore, may include relationships that are legally recognized (kinship relations) as well as ones that are institutionally recognized (business partners, alumni connections, or club memberships) or others that are just informally acknowledged and cemented through interaction and exchange (neighbors). These relationships—the work of time and exchange—are a constituent part of a family patrimony and many of them are sufficiently durable to be inherited through generations.

90. Riccardo Prandini, *Family Relations as Social Capital*, 45 J. COMP. FAM. STUD. 221, 224 (2014).

91. FRANCIE OSTROWER, *WHY THE WEALTHY GIVE: THE CULTURE OF ELITE PHILANTHROPY* 36 (1995).

92. Pearson et al., *supra* note 68, at 957 (“As a result of established patterns of interactions and involvement, families likely possess an abundance of internal network ties that are appropriable to the family firm. In contrast, individuals employed in nonfamily firms often bring few, if any, preexisting network ties to the workplace. Family firms, then, may have an advantage over nonfamily firms in the creation of structural social capital due to existing and familiar network ties.”).

93. *Id.* at 950.

II. THE ELASTICITY OF THE FAMILY TRUST

Defining patrimony through history and sociology reorients our understanding of inheritance as well as privilege by incorporating notions of cultural and social capital into the trust's ambit of inheritable assets. With this understanding in hand, we can move to the heart of the matter, explicating the relationship between the family trust and the preservation of patrimonies. This Part details the numerous features that enable the trust to excel—far more than any other wealth-transfer mechanism—at both preserving and perpetuating family patrimonies in all of their three facets (economic, cultural, and social). These features explain the popularity of the family trust in high-wealth estate planning and uncover the deep connections between the family trust and the perpetuation of family legacy.

A. FINANCIAL PROTECTION THE FAMILY FORTUNE

The first connection between the family trust and the family patrimony is that the trust is able not only to hold assets, providing management capacity, but also to protect them even through generational transfer. This level of protection is possible because, unlike other modes of wealth transfer, the family trust extends the transfer and management of assets over time: “[T]he normal private trust is essentially a gift, projected on the plane of time and so subjected to a management regime.”⁹⁴ This is quite different than a lifetime gift or a bequest made through a will—the most common alternatives to a trust for transmitting assets. Gifts and bequests simply transfer the assets in a one-time transaction, leaving the beneficiaries to do as they please, whether that means squandering the money on risky investments, spending the money on expensive purchases, or losing all the money in a costly divorce. Trusts, on the other hand, facilitate control over distributions for a term of decades, or even centuries with new forms of “dynasty” trusts that are not subject to the rule against perpetuities.⁹⁵ This Section discusses how the family trust is

94. *Id.*

95. See *Dynasty Trust*, BLACK'S LAW DICTIONARY (11th ed. 2019); see also Will Kenton, *Dynasty Trust*, INVESTOPEDIA, <https://www.investopedia.com/terms/d/dynasty-trust.asp> [<https://perma.cc/5X6Q-ZEZ7>] (Jan. 29, 2021). Traditionally, the settlor could control distributions for the length allowed by the rule against perpetuities, generally about one hundred years. *Id.* In the current trust landscape, in which over half of the states have repealed the rule against perpetuities, settlor wishes and conditions may last forever—or at least as long as there are institutions and fiduciaries to invest and manage the assets. *Id.* For an explanation and critique of perpetual trusts, see Lawrence Waggoner, *From Here to Eternity: The Folly*

not only a “container” for the family fortune but also a mechanism for keeping it both subject to settlor wishes and safe from creditors over a span of generations.

1. Discretion and Financial Paternalism

A primary concern for trust settlors, as they plan for the transfer of their wealth to new generations, is the preservation of family property, and there is no better vehicle than the family trust for effectuating this preservation. A defining characteristic of the trust, related to asset preservation and protection, is the high degree of financial paternalism—and therefore protectionism—that the trust enables. The trust, unlike any other form of wealth transfer, sustains the settlor’s financial preservation preferences because there is a trustee to provide continuing and extended asset management. With a will, there is no one who provides continuing financial intermediation between the assets and beneficiaries after death. With a trust, the trustee manages the assets for as long as perpetuities allow, on the beneficiary’s behalf and subject to the terms and conditions created by the trust settlor.⁹⁶

On a very basic level, then, the trust works to preserve family money by restricting a beneficiary’s access to the trust principal and limiting distributions of trust income—something that cannot be done through other forms of wealth transfer.⁹⁷ This financial protectionism goes even further. The trust settlor can eliminate mandatory distributions, even from income, and make all distributions to the beneficiary subject to trustee discretion.⁹⁸ Trustee discretion can be absolute, or subject to a standard that provides some guidelines. A typical distribution standard in a discretionary trust may require the

of Perpetual Trusts (Univ. of Mich. L. Sch. Scholarship Repository, Working Paper No. 76, 2014).

96. See generally ROBERT H. SITKOFF & JESSE DUKEMINIER, *WILLS, TRUSTS, & ESTATES* (10th ed. 2017).

97. See *id.* at 393–96 (discussing the bifurcation of trust asset ownership). One common trust form, a “simple” trust, provides for the mandatory distribution of all trust income and prohibits the distribution of any trust principal. Elise Lin, Ron Shoemaker & Debra Kaweck, *F. Trust Primer*, IRS (2001), <https://www.irs.gov/pub/irs-tege/eotopicf01.pdf> [<https://perma.cc/8Q5U-M9A9>] (“A simple trust must distribute all its income currently. Generally, it cannot accumulate income, distribute out of corpus, or pay money for charitable purposes. If a trust distributes corpus during a year, as in the year it terminates, the trust becomes a complex trust for that year. Whether a trust is simple or complex determines the amount of the personal exemption (\$300 for simple trusts and \$100 for complex trusts), that applies in calculating the tax owed.”).

98. SITKOFF & DUKEMINIER, *supra* note 96, at 696–99.

trustee to make distributions for the “health, education, support and maintenance” of the beneficiary.⁹⁹ The trustee must determine when to make distributions for these needs and in what amount.¹⁰⁰ This kind of determination is generally grounded in a particular family ethos and approach to money and spending, and in order to properly administer the trust according to both beneficiary needs and settlor conditions, trustees must put themselves in the place of the settlor and try to determine what that person would have wanted.¹⁰¹

Of course, trust settlors have a range of attitudes toward spending and saving. However, the choice to eliminate mandatory distributions is a protective one and creates extra layers of procedure and decision making that restrain a beneficiary from immediate access to trust assets. If trust settlors have specific desires as to how restrictive a trustee should be, wealth advisors suggest that the settlor specify these preferences. Practitioners suggest ideas such as this: “Have the client write a memo to his trustee telling the trustee what he wants for his children. Ask the client to share some of his hopes and dreams for his children. . . . Have the client request that the terms ‘health, education, support and maintenance’ be interpreted in light of the client’s overall intent in creating the trust.”¹⁰²

The trustee, in this way, becomes a kind of substitute parent in that the trustee is called upon to distribute money to the beneficiary for certain needs and potentially enforce a conservative approach to financial management. Sometimes the trustee is a relative, some-

99. Marjorie J. Stephens, *Incentive Trusts: Considerations, Uses and Alternatives*, 29 AM. COLL. TR. & EST. COUNS. J. 5, 7 (2003).

100. *Id.* “In a wealthy family with substantial funds held in the trust, the traditional distribution standard of ‘health, education, support and maintenance’ can result in distributions made to the beneficiaries to maintain the standard of living they had in their childhood.” *Id.* at 9.

101. See SITKOFF & DUKEMINIER, *supra* note 96, at 610–20. The trustee has duties to the beneficiary, including the duty to account such that the trustee must always keep the beneficiary informed about the financial health of the trust. *Id.* In addition, the trustee owes the beneficiary a duty of prudence, that is to say the trustee must always stay informed about the beneficiary’s circumstances and proactively inquire on a regular basis about beneficiary needs and expenses. *Id.* at 611–18.

102. Marjorie J. Stephens, *Incentive Trusts: Considerations, Uses and Alternatives*, 29 AM. COLL. TR. & EST. COUNS. 5, 20 (2003); *How Do You Choose a Trustee?*, J.P. MORGAN: PRIVATE BANK, <https://am.jpmorgan.com/blob-pbstudio/1383413703243/83456/Role-of-a-Trustee.pdf> [<https://web.archive.org/web/20170707151701/https://am.jpmorgan.com/blob-pbstudio/1383413703243/83456/Role-of-a-Trustee.pdf>] (“Provide your trustee with additional guidance with a ‘letter of wishes.’ Increasingly, grantors are writing these non-binding documents that convey more information to trustees about the grantor’s preferences, thinking and understanding of their heirs’ needs.”).

times a financial institution, but in either case the trustee represents—particularly in the exercise of discretion—the settlor’s embodied desire to shield trust assets from unfettered access and unwanted waste, thereby better enabling the preservation of wealth across generations.

2. Discretion and Escape from Creditors

Trustee intermediation and discretion preserve the economic patrimony by restricting a beneficiary’s access to the trust assets. Possibly even more useful, however, are the asset protection capabilities that trustee discretion facilitates by attenuating the rights of third-party creditors. This protection from creditors is possible, from the outset, because a trust is a partitioned asset that separates legal from beneficial ownership.¹⁰³ That is to say, because beneficiaries do not hold legal title to the assets in trust, they only “own” whatever the trustee is required to distribute by trust terms. Thus, when a trustee has discretionary control over all distributions and is not required to distribute any specific amount of money, the beneficiary has no present, possessory right in any of the trust assets. In this way “[t]he trust provides a way of freeing the property owner from constraints which the ideology of property otherwise imposes on her or him through its logic.”¹⁰⁴ The practical outcome is that trusts render assets unavailable to creditors.¹⁰⁵

The most common creditors that trust settlors seek to avoid are the tax authorities and because of its asset protection capability, the trust can help minimize transfer taxation, allowing generations to pass down wealth without any concern about the estate tax. A 2017 report from the United States Senate Committee on Finance stated that trusts, as a part of “basic gift and estate tax planning,” allowed high-wealth families to “avoid hundreds of millions of dollars in transfer taxes over a lifetime or generations, and . . . avoid tens of

103. Robert H. Sitkoff, *Trust Law as Fiduciary Governance Plus Asset Partitioning*, in *THE WORLDS OF THE TRUST* (L. Smith ed., 2013) (“The hallmark characteristic of the common law trust is bifurcation: the trustee holds legal title to the trust property and the beneficiaries have the equitable, or beneficial, interests.”).

104. Roger Cotterrell, *Power, Property and the Law of Trusts: A Partial Agenda for Critical Legal Scholarship*, 14 *J.L. & Soc’y* 77, 83 (1987).

105. Because trusts partition legal and equitable ownership of the trust assets, the real owner of the assets—the beneficiary—doesn’t have legal title to the assets and the legal owner—the trustee—doesn’t have any real rights to the property. In this way, trusts magically code their managed wealth as obscure and unavailable, without a true owner who can be held accountable for debts and obligations.

millions of dollars or more over just a few years.”¹⁰⁶

Another common creditor is an ex-spouse, and the family trust protects the beneficiary’s assets at divorce, placing them outside of divisible, marital assets.¹⁰⁷ The family trust can even protect a beneficiary from paying spousal or child support. Finally, in a properly drafted discretionary trust, the assets are safe from a range of ordinary creditors like credit card companies or banks and are not counted during bankruptcy proceedings. Wealth managers and estate planners, who heavily market this valuable feature of the discretionary trust, call these creditors “unintended beneficiaries.” A Wyoming trust company explains as follows:

Beyond tax benefits, the dynasty trust also protects assets from a future generation’s creditors. For example, teen age automobile accidents or divorces. These are called unintended beneficiaries. They are called unintended because when you set everything up your intent was not to pay for an automobile accident or for half the funds to go to your child’s ex-spouse. With proper planning you can ‘lock out’ unintended beneficiaries.¹⁰⁸

Another financial planner similarly observes, “Using trusts helps protect your heirs against future catastrophes—[such as] bankruptcies, money-hungry predators disguised as friends, family looking for loans or business bailouts and other financial challenges.”¹⁰⁹

Because of this ability to “lock out” creditors, trusts retain and preserve family assets in a way that no other form of wealth transfer can, staving off even creditors with legitimate claims on the family wealth. In this way, the family trust supports asset indivisibility, protection, and conservation.

B. CULTURAL CAPITAL AND FAMILY VALUES

The family trust, perhaps unsurprisingly, is a highly effective vehicle for the transfer of economic patrimonies. Less studied, but equally important, is how the family trust is exceptionally adept at transferring a family’s cultural capital. The family trust has the ability

106. S. COMM. ON FIN., 115TH CONG., ESTATE TAX SCHEMES: HOW AMERICA’S MOST FORTUNATE HIDE THEIR WEALTH, FLOUT TAX LAWS, AND GROW THE WEALTH GAP 2 (2017).

107. See Jeff Landers, *Can a Trust Protect My Assets in Divorce?*, FORBES (July 18, 2012), <https://www.forbes.com/sites/jefflanders/2012/07/18/can-a-trust-protect-my-assets-in-divorce> [<https://perma.cc/5C9G-SZV3>].

108. *Wyoming Asset Protection Trust*, WYO. TR. & LLC ATT’Y, <https://wyomingllcattorney.com/Wyoming-Asset-Protection-Trust> [<https://perma.cc/7L2N-DAN2>].

109. Jennifer Woods, *Heir Tight: The Dos and Don’ts of Creating Rock-Solid Trusts*, CNBC (Sept. 2, 2014), <https://www.cnbc.com/2014/05/27/heir-tight-the-dos-and-donts-of-creating-rock-solid-trusts.html> [<https://perma.cc/XWU4-EEA4>].

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to render family objects inalienable and create conditions around these family assets that promote certain family values, narratives, and aspirations. The family trust, accordingly, supports the unique and inalienable nature of cultural patrimonies through generational transfer in a way that wills and other transfer vehicles cannot. This Section explains how the family trust renders both objectified and embodied cultural capital transmissible through generations by creating “heirloom” assets and providing incentives for certain behaviors.

1. Inalienable Wealth and Heirloom Assets

A significant advantage that the family trust offers over other forms of wealth transfer is the ability to place restrictions on the assets held in trust. Through the strategic use of restrictions, trust settlors can not only preserve the family fortune but also crystallize their legacies in object form. Inheritance through any mode can transmit family objects as well as the narratives that ground them, asking heirs and beneficiaries to restrict sale and reaffirm the family values. Wills, however, have no mechanism for enforcing these kinds of conditions over time. The trust, with its continued control and financial intermediation, has a built-in mechanism for not only creating but also enforcing such conditions.

For example, family heirlooms and properties, the objects that create the material conditions for family flourishing and the construction of family identity, can be held in trust with restrictions on alteration or sale for as long as the trust is in existence.¹¹⁰ A settlor can write sale restrictions into the trust document, but even the default rules permit retention. The general investment rules—which normally require asset sale and diversification—state that a “trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.”¹¹¹ Special circumstances are generally understood to exist when the trust holds “a

110. Most commonly, trust settlors restrict the sale of a family business or family land (the “family firm” or the “family farm”). John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722, 723 (1988).

111. Va. Code Ann. § 64.2-783 (West 2012). Virginia has adopted the Uniform Prudent Investor Act, but all states have some version of the diversification rule. Forty-four states, Washington, D.C., and the U.S. Virgin Islands have adopted the UPIA as of February 2022. *Prudent Investor Act*, UNIF. L. COMM’N (Feb. 28, 2022), <https://www.uniformlaws.org/committees/community-home?communitykey=58f87d0a-3617-4635-a2af-9a4d02d119c9> [<http://perma.cc/6YAX-XHLG>].

family vacation home," "a surviving spouse's residence or a family farm," or "a family business . . . [p]articularly if the business is closely held and not readily marketable . . ."¹¹²

Trust rules are, consequently, key to the preservation of objectified cultural capital because they demand the "commitment of generations of a family to keep, rather than alienate, marketable objects."¹¹³ In so doing, trust rules and provisions that restrict sale recreate family belongings as inalienable wealth, the family's strongest form of cultural patrimony:

Inalienable possessions are imbued with affective qualities that are expressions of the value an object has when it is kept by its owners and inherited within the same family or descent group. Age adds value, as does the ability to keep the object against all the exigencies that might force a person or a group to release it to others. . . . The object acts as a vehicle for bringing past time into the present, so that the histories of ancestors, titles, or mythological events become an intimate part of a person's present identity. . . . In its inalienability, the object must be seen as more than an economic resource and more than an affirmation of social relations.¹¹⁴

This capacity of the trust to restrict sale of trust assets, within and across generations, means that each generation builds its own relationship with the assets, in conversation with the previous generations: "[T]he transfer of the one jewel, chair, clock, painting, or item of silverware . . . symbolizes above all the continuity of familial values and the underlying link between the objects and the individuals that are both located at the core of familial mythologies."¹¹⁵ This object continuity constructs and reinforces family identity around the assets, which come, over time, to narrate the family history and tradition.¹¹⁶ And, as the generations pass, the totemic power of the objects increases as does the distinctiveness and cohesion of the fami-

112. SITKOFF & DUKEMINIER, *supra* note 96, at 641–42. Even without special instructions, then, the trustee is exempt from the fiduciary duty to diversify trust assets in order to minimize risk.

113. Curasi et al., *supra* note 67, at 620.

114. Annette B. Weiner, *Inalienable Wealth*, 12 AM. ETHNOLOGIST 210, 210 (1985).

115. CLIGNET, *supra* note 17, at 192 (citation omitted). "[P]ossessions transferred intergenerationally are bundled with their stories of origin and are rich with life lessons and values that can be communicated to younger family members as these possessions are passed forward through the lineage." Curasi, *supra* note 69, at 114.

116. Moreover, given the change in trust law, trust settlors can now use perpetual trusts to guarantee that the trust will exist in perpetuity, thereby avoiding the threat of asset sale and dissipation at trust termination. "[T]he trajectories of specific objects such as jewelry, silverware, family Bibles, paintings, and clocks within as well as across generations reveal the need for successive individuals to assert the enduring quality of their feelings or of their commitments." CLIGNET, *supra* note 17, at 37.

ly.¹¹⁷

In this way, object permanence and household ubiquity effect socialization.¹¹⁸ Family members learn to value particular objects, but they also are given the opportunity by their inalienability to adopt certain postures toward the objects over time: “The values symbolized by these objects can become important frames of reference or mental models that later influence our behavior”¹¹⁹ Just as they learn to value the assets as possessing a high symbolic and noneconomic value, beneficiaries learn to place themselves in a certain position of entitlement toward the assets, knowing they are a core part of the family.¹²⁰ The value of these restrictions on alienation, then, is that trust beneficiaries can take the presence of heirloom assets for granted and, over time, learn how precisely to understand and narrate the family wealth without any fear of its loss, transformation, or absence.¹²¹

The family trust offers an exceptionally productive way of enabling and enforcing conditions attached to a family’s cultural objects through the generations. The family trust, in this way, creates and enforces inalienability, thereby enabling elite families to operate against a sustained backdrop of treasured objects and narrated be-

117. “[I]n the case of inalienable wealth the power accrues to a group. Caretakers fear loss of inalienable possessions, not for themselves alone but for their group. Loss, whether through forgetting, theft, or market alienation, entails a loss of identity, authority, and mythology.” Curasi et al., *supra* note 67, at 610.

118. Carolyn Folkman Curasi, *In Hope of an Enduring Gift: The Intergenerational Transfer of Cherished Possessions; a Special Case of Gift Giving*, 26 *ADVANCES CONSUMER RSCH.* 125, 131 (1999) (“[O]ften the older family members may hope and assume that the possession’s new owner will care for, maintain, and transfer it in the future along with the meanings, values and stories bundled with it.”).

119. Curasi, *supra* note 69, at 114 (“Thus, these object bundles serve as effective tools for educating and socializing younger family members. The values symbolized by these objects can become important frames of reference or mental models that later influence our behavior” (citation omitted)).

120. As Robert Crawley, Lord Grantham, states about *Downton Abbey*: “My fortune is the work of others, who labored to build a great dynasty. . . . I am a custodian, my dear, not an owner. I must strive to be worthy of the task I have been set.” *Downton Abbey: Episode 4* (ITV television broadcast Oct. 17, 2010).

121. These restrictions on the sale of family assets give particular meaning to the assets in times of financial trouble for the family. In Edith Wharton’s *The Buccaneers*, Seadown must marry Jinny in order to shore up the family fortune because no part of the estate can be sold. EDITH WHARTON, *THE BUCCANEERS* (1938). Similarly, in Wharton’s *The Custom of the Country*, Undine does not understand why her French aristocrat husband cannot or will not sell the tapestries given to the family by Louis XV. She says accusingly, “I understand that you care for all this old stuff more than you do for me, and that you’d rather see me unhappy and miserable than touch one of your great-grandfather’s arm-chairs.” WHARTON, *supra* note 2, at 297.

longings.

2. Incentives, Education, and Family Formation

In addition to transferring objectified cultural capital, the family trust can also, because of its plasticity, transmit a family's embodied cultural capital, such as educational ambitions, perspectives on family formation, and philanthropic involvement.¹²² This transference of embodied cultural capital is possible because of the ability that trust settlors have to place specific conditions on the receipt of trust distributions. Conditions can, of course, be used with bequests and there are well-known examples, like the *Shapira* case in which a father conditioned his son's inheritance on the son's marriage to a Jewish woman.¹²³ Using a trust, however, is an even more effective way to control beneficiary behavior because the conditions persist over time and the trust provides ongoing supervision and enforcement.

Traditionally, high-wealth families may have inserted a statement of values or a family "creed" into the preamble of their family trusts in order to reinforce a sense of family identity. In recent decades, however, the practice of placing actual conditions on distributions has become so common that there is even a name for these new trusts: incentive trusts.¹²⁴ Incentive trusts have been much-discussed in estate planning circles, so much so that one wealth planner has remarked, "Say hello to the latest fad in estate planning for the affluent—tying the transfer of wealth to descendants' acceptance of one's core values."¹²⁵ Another estate planner has linked the popularity of these trusts among newly rich families to an emerging awareness that one "goal of estate planning is to protect and preserve the fami-

122. E. Napolitano & John Schmidt, *Trust Funds: They're Not Just for The Wealthy*, FORBES (Apr. 25, 2021), <https://www.forbes.com/advisor/investing/trust-fund> [<https://perma.cc/4ENN-4CU8>] ("[A]n irrevocable trust could stipulate that beneficiaries must meet certain conditions . . . to receive benefits.").

123. *Shapira v. Union Nat'l Bank*, 315 N.E.2d 825 (1974).

124. Commentators generally note that these kinds of trusts are particularly popular with "new money" clients. "Clients with new wealth gained through the stock market, executive compensation packages and high tech start up companies are as concerned, if not more concerned, about the impact of that wealth upon their children than they are in saving taxes." Stephens, *supra* note 99; *see also* Shelly Steiner, *Incentive Conditions: The Validity of Innovative Financial Parenting By Passing Along Wealth and Values*, 40 VAL. UNIV. L. REV. 897, 905 n.51 (2006) ("Most of those interested in the incentive trusts have also made their fortunes in recent years and have a negative bias against inherited wealth.").

125. Monica Langley, *Trust Me, Baby: Heirs Meet 'Incentive' Arrangements*, WALL ST. J. (Nov. 17, 1999), <https://www.wsj.com/articles/SB942799766357531502> [<https://perma.cc/3S7S-26JX>].

ly's values, as opposed to the goal of protecting and preserving the family's assets."¹²⁶ Echoing these sentiments, one trust settlor has remarked, "I want [the trust] to be kind of like the Kennedys or Packards—a structure is in place with a certain set of expectations from the family."¹²⁷

In the name of preserving family values, trust settlors can place almost any kind of condition on trust distributions, limited only by the vague bounds of public policy.¹²⁸ Some of the most common controls that settlors write into trusts are meant to perpetuate values pertaining to education, marriage, work, and philanthropy. With respect to education, settlors may provide for special, one-time distributions if a child graduates from college, a professional school, or other graduate school.¹²⁹ If the settlor wants to be even more specific, the settlor can provide financial incentives for the children to attend certain schools or to pursue particular professional paths. Marriage is another lifetime event that trust settlors tend to encourage,

126. Shelly Steiner, *Incentive Conditions: The Validity of Innovative Financial Parenting by Passing Along Wealth and Values*, 40 VAL. UNIV. L. REV. 897, 906 (2006). Outside of conditions that relate to family values, the most common control that settlors write into their trusts is some form of staggered access to trust funds based on beneficiary age. Forty is a common age for trust distributions to become more generous: "Attaining age 40 does not mean that the beneficiary is magically mature. If that were the case, then we could simply have trusts continue until age 40 and then terminate. However, the literature suggests that at about age 40 the individual is either mature, or basically never will be." Stephens, *supra* note 99, at 18.

127. Langley, *supra* note 125. As many wealth managers have noted, this emphasis on work is more often associated with newly rich families. Old-wealth families often adhere to a different ethos. In *The Custom of the Country*, Ralph Marvell muses: "For four or five generations it had been the rule . . . that a young fellow should go to Columbia or Harvard, read law, and then lapse into more or less cultivated inaction. The only essential was that he should live 'like a gentleman'—that is, with a tranquil disdain for mere money-getting, a passive openness to the finer sensations, one or two fixed principles as to the quality of wine. . . ." WHARTON, *supra* note 2, at 45.

128. Specifically, the *Restatement of Trusts* specifies that a trust or provision is invalid if it requires the beneficiary to commit a criminal or tortious act, if it violates the applicable Rule Against Perpetuities, or if it is against public policy. RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. A (AM. L. INST. 2003).

129. A sample provision looks like this: "At any time after a beneficiary has received an advanced degree (such as a [master's] degree, a PhD, an MBA or a professional degree) from an accredited university, . . . the Trustees may make a single, lump-sum distribution to the beneficiary from his or her trust of an amount not to exceed THIRTY-FIVE THOUSAND DOLLARS (\$35,000.00)." R. James Young, *Incentive Trusts: An Idea Whose Time Has Come (And Gone?)* 8 (unpublished manuscript) (on file with the Minnesota Law Review). Young warns that the "client must be concerned to avoid creating a professional student" and suggests limiting the bonus distribution to one advanced degree. *Id.*

providing one-time distributions when a child marries and, potentially, at certain anniversaries to reward children who do not divorce.¹³⁰ Settlers have regularly tried to set restrictions on who beneficiaries can marry—especially with respect to religious preferences—often trying to provide incentives for their children to marry within a certain faith.¹³¹ Settlers also design their trusts terms to withhold distributions if a beneficiary marries without finalizing a prenuptial agreement or other form of marital financial protection.¹³²

Furthermore, trust settlers can create incentives for their children not just to marry but also to organize their household in certain ways. One example that has been widely referenced in popular and industry media is the trust that Tom Glavine, a player for the Atlanta Braves, created for his children.¹³³ The trust provides for additional monthly distributions to be made to his daughter if she chooses to be a stay-at-home mother and to his sons if they are married to women who choose to be stay-at-home mothers. Justifying this decision, Glavine has remarked, “My mom was there for me every day when I got off the bus There’s great value in a mom staying home.”¹³⁴ Another common feature is encouragement to engage in work, whether paid or volunteer. One estate planner has observed, “Each family has the unique set of values, purposes, goals and history. However, some common threads flow through almost all families, and one of these threads is the desire to have productive chil-

130. SITKOFF & DUKEMINIER, *supra* note 96, at 10–11.

131. RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. K (AM. L. INST. 2003) (noting that a trust condition offering a financial inducement to accept or reject a particular faith or set of beliefs about religion is usually invalid.)

132. Abby Schultz, *Prenuptial Agreements Gain Traction in Asia*, BARRON’S (Dec. 18, 2015), <https://www.barrons.com/articles/pre-nuptial-agreements-gain-traction-in-asia-1450409202> [<https://perma.cc/T3RH-FFZE>].

133. See Langley, *supra* note 125.

134. *Id.* As one commentator has remarked: “The point is not stay-at-home moms, but from-the-grave parents.” Mitch Albom, *Passing on Wealth a Matter of Sense*, DETROIT FREE PRESS (Nov. 21, 2008), <https://www.mitchalbom.com/passing-on-wealth-a-matter-of-sense> [<https://perma.cc/4TD3-NTFU>]. Another trust settlor “with a \$7-million estate, included a provision in his trust paying out \$30,000 a year for any descendant who opts to stay home and take care of their children, rather than work.” James T. Berger, *Trusts a Must to the Moneyed: Variety of Plans Offer Tax Breaks, Other Incentives*, CRAIN’S CHI. BUS. (Apr. 15, 2002), <http://www.jamesberger.net/wp-content/uploads/Trusts-a-must-to-the-moneyed.pdf> [<https://perma.cc/A2D8-U9ZQ>]. These terms, at the very least, appear to be gender neutral.

dren.”¹³⁵ Some trust settlors want to reward excellence and achievement. For example, one couple decided that their “descendants [would] have trusts with an on-off faucet for distributions based on their adherence to family philosophies,” which meant business achievement, academic excellence, or social contribution.¹³⁶ Parents may provide bonus distributions for employment milestones or may even choose to provide incentives for children to develop very specific career goals, like getting a promotion or entering the family business. After Glavine’s daughter told him that she wanted to be “an animal doctor,” he considered adding a \$200,000 bonus distribution for her if she chose to start a veterinary practice.¹³⁷ The Green family, founders of Hobby Lobby, created a “mission-oriented” trust that “ensures that the family can no longer touch the assets” unless they apply for a job and work at Hobby Lobby, the family company.¹³⁸

Finally, trust settlors frequently see philanthropy as valuable work and provide incentives for engagement in charitable giving or volunteer activity. As one wealth planner states, “Philanthropic giving . . . is about much more than tax savings . . . [H]ow can parents or grandparents ensure that the next generation inherits not just assets, but also the family’s values?”¹³⁹ Accordingly, trust terms might provide that distributions increase if beneficiaries engage in volunteer service or, alternatively, trust funds might be available to match donations made by trust beneficiaries.¹⁴⁰ Families might also require that children and heirs be involved in the family foundation, if there is one, as board or committee members.¹⁴¹ This kind of requirement not only connects the beneficiary to the family mission but makes the

135. Stephens, *supra* note 99, at 8.

136. Langley, *supra* note 125, at 5.

137. Albom, *supra* note 134 (“Gee. It’s a good thing little Amber didn’t want to be the queen of England. That’d be a hard check to collect.”).

138. Jerry Bowyer, *Restoring Trust Through Trusts: Hobby Lobby CEO Is a Steward, Not an Owner*, FORBES (May 1, 2017), <https://www.forbes.com/sites/jerrybowyer/2017/05/01/restoring-trust-through-trusts-hobby-lobby-ceo-is-a-steward-not-an-owner> [<https://perma.cc/9GVE-9WGX>].

139. Carol G. Kroch, *Putting the “Family” in Family Philanthropy*, WILMINGTON TR. 2, <https://www.wilmingtontrust.com/content/dam/wtb-web/wtb-migration/pdfs/Putting-the-family-in-family-philanthropy.pdf> [<https://perma.cc/2DEW-8ASZ>].

140. Families might even want to control the charities to which their beneficiaries give gifts because, as one trust settlor has said: “I definitely don’t want our money to go to militaristic, gun-toting extremists.” Langley, *supra* note 125, at 7.

141. See Ernesto J. Poza, *Family Governance: How Leading Families Manage the Challenges of Wealth*, CREDIT SUISSE 19 (2016), <https://www.credit-suisse.com/media/assets/private-banking/docs/mx/wp-05-family-governance-en.pdf> [<https://perma.cc/4TVF-GYPQ>].

beneficiary actively work to support it.

Using conditional distributions, trust settlors can shape expectations, drive family norms, and create attitudes to reflect a very particular set of values. Each family's distinctive set of values is an integral part of that family's embodied cultural capital—and the ability to express, promote, and enforce these values creates yet one more point of deep connection between the family trust and the transference of patrimony.

C. HOW FAMILY TRUSTS CONSTRUCT SOCIAL CAPITAL

A third component of family patrimonies that can be structured, contained, and transferred by the family trust is social capital, the intangible network of connections and relationships that facilitates opportunity and advantage. It may seem, at first glance, that this form of capital is difficult to turn into an inheritable asset. Nevertheless, the family trust—through its administration and the conditions that it imposes—has the ability to transfer these social capital connections from one generation to the next.

Through their administration alone, family trusts have the capability to establish and transfer connections through generations, building out a network of contacts, colleagues, and collaborators. Trust beneficiaries are automatically clients of the financial institutions that hold and manage the family wealth and part of a financial network; family trusts therefore create and expand networks just by virtue of their daily operation.¹⁴² Regular meetings with trustees—whether the trustee is a financial institutional or a trusted family member—may include conversations and meetings with investment advisors, estate planners, lawyers, and wealth experts.¹⁴³ Some trust terms even create a “trust committee” to help guide the beneficiary through the trust experience. This committee, “like a Board of Directors, . . . [may include] a financial planner, a psychologist, a business person, a career or college counselor, a certified mediator or any

142. See, e.g., *U.S. Trust Services*, J.P. MORGAN: PRIVATE BANK, <https://privatebank.jpmorgan.com/gl/en/services/trusts-and-estates/us-trust-services> [<https://perma.cc/73F4-9UKK>] (“Your trustee has a profound responsibility to you and to your trust’s beneficiaries. For years, decades or even generations to come. If you want the job done right, you need a trustee with the skills of an investor, accountant, administrator and a great communicator. Plus the integrity of a rock-solid fiduciary. Families have been naming J.P. Morgan as trustee for more than two centuries.”).

143. See Stephens, *supra* note 99, at 19 (discussing purposes of the annual beneficiary meetings).

other professional [the settlor] considers appropriate.”¹⁴⁴

Through the processes of trust administration, the family trust may also impose conditions that regularize and strengthen family bonds by mandating certain connections or interactions. At a very basic level, family members may all be bound together by their status as trust beneficiaries. When family members form part of a class like this, they build group solidarity because “[m]embership in the group is based on a clear demarcation (e.g., nobility, title, family) excluding outsiders.”¹⁴⁵ Moreover, as beneficiaries, family members likely attend regular meetings with the trustee, cotrustees, or a trust committee, ensuring that beneficiaries are consistently steeped in the family norms, notions, practices, and perspectives.

In the same vein, trust terms may require beneficiaries to attend larger, annual family meetings, where family members discuss finances and financial strategies with the advisors. Wealth advisors recommend this kind of “family assembly,” which provides the opportunity for “discussion over the operation of the family governance protocols and any control or distribution matters.”¹⁴⁶ Wealth managers at Credit Suisse say, “Family assemblies are [a] vehicle for education, communication, and the renewal of family bonds among a larger number of family members. Family assemblies create participation opportunities for all family members at least once a year.”¹⁴⁷

Trusts can also build and enforce family social capital by either providing incentives for or actually requiring participation in a family business or family foundation. Shared work in the family business gives family members, wherever they are located, a point of connection and shared concern.¹⁴⁸ Furthermore, if trust provisions require that beneficiaries maintain some kind of involvement in the family business, beneficiaries are consequently connected to a coterie of colleagues and business acquaintances. This constellation of acquaintances may include investors, partners, and purchasers, and this network of informal colleagues has the potential to give rise to opportunities. These contacts may provide introductions to other new people just as they might provide access to private membership

144. *Id.*

145. Nan Lin, *Building a Network Theory of Social Capital*, 22 *CONNECTIONS* 28, 34 (1999).

146. TAYLOR WESSIG, *THE FAMILY CONSTITUTION GUIDE* 25 (2014).

147. Poza, *supra* note 141, at 26.

148. *See supra* note 92 and accompanying text.

groups like associations or clubs.

Likewise, family foundations maintain connections within the family: “[T]he family foundation can be the glue that maintains connections as family members move to pursue college and start careers and families across the country or even the globe.”¹⁴⁹ And, if family members can agree on the mission and the giving goals, family foundations can “bring family members together under a mutual mission, purpose and a passion.”¹⁵⁰ Family members involved in family foundations will also be engaged in exchanges that solidify relationships with other donors and community leaders on a regular basis. Family members will be invited not only to benefit events but also to philanthropy gatherings, policy conferences, and community celebrations. Consequently, these family members will benefit from a vast network of connections that provides new and varied opportunities, including access to other nonprofit boards, investment opportunities, and social circles.

Moreover, if a family trust provides incentives for charitable giving, that giving will also establish strong and transferable social connections.¹⁵¹ Giving to a college or university is common among high-wealth families,¹⁵² as is giving to cultural organizations, including art organizations and museums. Through this kind of charitable giving,

149. *Benefits of a Private Foundation*, FOUND. SOURCE, <https://foundationsource.com/learn-about-foundations/benefits-of-a-private-foundation> [<https://perma.cc/6FGS-P964>].

150. Kerry Hannon, *Family Foundations Let Affluent Leave a Legacy*, N.Y. TIMES (Feb. 10, 2014), <https://www.nytimes.com/2014/02/11/your-money/family-foundations-let-affluent-leave-a-legacy.html> [<https://perma.cc/8QGW-RHC9>].

151. A trust could provide incentives or require that a beneficiary engage in charitable giving. For popular advice on this practice, see Christopher T. Lindsay, *The Pros and Cons of Using Incentive Trusts*, EST. PLAN. & ELDER L. SERVS. (Jan. 18, 2016), <https://www.formyplan.com/estate-planning/2016/01/18/pros-and-cons-of-incentive-trusts> [<https://perma.cc/UJV2-ASNB>]; John J. Scroggin, *Influencing Heirs and Family Incentive Trusts*, <https://www.scrogginlaw.com/articles-and-checklists/influencing> [<https://perma.cc/U2S6-8DFF>]; *Incentive Trusts: Ensuring That an Inheritance Will Be Well Spent*, ELDERLAWANSWERS (Dec. 22, 2021), <https://www.elderlawanswers.com/incentive-trusts-ensuring-that-an-inheritance-will-be-well-spent-15284> [<https://perma.cc/N96D-9F3E>].

152. “Among the wealthy, education is the number one giving priority . . . the wealthy do give more than twice as much to education, human services, arts and cultural organizations, as does the general population.” John J. Havens, Mary A. O’Herlihy & Paul G. Schervish, *Charitable Giving: How Much, by Whom, to What, and How?*, in NONPROFIT SECTOR: A RESEARCH HANDBOOK 33 (Walter W. Powell & Richard Steinberg eds., 2d ed. 2006) (suggesting that many university development offices have charitable remainder trust calculators and information available online because it is such a useful form of giving).

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beneficiaries are incorporated into an organization's internal network, with access to programming, events, and meetings with top artists, performers, or administrators. Donor families, for example, might be invited to annual luncheons to meet the faculty member funded by the family's endowed chair, family members might attend a private event with visiting lecturers funded by the family endowment, or family members might be invited to special performances in a concert hall that the family helped to fund.

Of equal importance, trust beneficiaries become a part of the donor network that is created and maintained through donor events, alumni gatherings, and service work on committees (particularly fundraising committees). Beneficiaries, because of their giving, might be asked to serve on an organization's board, thereby becoming embedded in a donor network of valuable social contacts. In a study of charitable practices among high-wealth families, one donor observed, "It's an opportunity to meet some people and do some things, which in my mind is more networking than anything else."¹⁵³ High-level charitable giving, therefore, offers "valuable social and business connections."¹⁵⁴

Social capital in the form of networks, associations, and connections is an integral part of a family patrimony. And trusts, unlike other forms of wealth transfer, have the capacity to create, maintain, and expand the network of people with whom the beneficiaries have a formalized and continuing relationship.

III. THE CRYSTALLIZATION OF INEQUALITY

Demonstrating how the trust's flexible features enable the transmission of the various kinds of capital that elite families possess help us, ultimately, perceive the myriad ways in which the family trust is congruent with historically entrenched inequalities. This Part returns to the problem of privilege within patrimony and explains how family trusts—by transmitting the triad of patrimony components—continue to promote complex forms of inequality. Family trusts correlate with high degrees of wealth inequality, based on the asset protection benefits they offer to high-wealth families. Moreover, family trusts vest authority in certain historically prized forms of cultural and social knowledge, cementing longstanding hierarchies and biases. Finally, family trusts lead to an entrenchment of political power in elite families.

153. OSTROWER, *supra* note 91, at 37.

154. *Id.* at 38.

A. PATRIMONIAL CAPITALISM AND FORMS OF PRIVILEGE

Family trusts correlate, in particular, with wealth inequality. The family trust also, however, plays a significant role in enabling cultural and social inequalities. This Section examines the diverse facets of inequality that the trust, as a vehicle for patrimony, amplifies.

1. Trust Funds and Wealth Gaps

A key characteristic of the family trust is its ability, as we have seen, to protect wealth, which is an important determinant of both opportunities and outcomes for families. Wealth, as opposed to income, “allows families to weather financial hardships, such as economic downturns and unexpected periods of unemployment. More profoundly, wealth creates opportunity and allows families to move from poverty to long-term prosperity.”¹⁵⁵ Otherwise stated, wealth is a set of “transformative assets . . . [that] has the capacity to lift a family beyond its own achievements.”¹⁵⁶

All forms of wealth transfer facilitate some level of both wealth accumulation as well as wealth inequality. Accordingly, the practice and rules of inheritance have long been implicated in debates about wealth inequality:

One of the primary mechanisms by which this sedimentation [of wealth] occurs is through inheritance. The historical wealth advantage . . . is transferred to the next generation as they inherit wealth of previous generations and use that wealth to provide themselves and their children with access to education, capital for entrepreneurship, and opportunities to build more wealth.¹⁵⁷

Elite families consolidate their wealth through inheritance while ordinary- and low-wealth families pass down meager amounts of wealth and sometimes just debt. Accordingly, inheritance is, and has always been, “an integral component of family, economic, and legal institutions, and a basic mechanism of class stratification.”¹⁵⁸

Trusts, however, are intimately related to inheritance inequality and class stratification because they preserve and protect a family’s economic capital in a way that no other wealth transfer mechanism

155. Karuna Jaggar, *The Race and Gender Wealth Gap*, 15 RACE, POVERTY & ENV’T 79 (2008).

156. Shapiro et al., *supra* note 3, at 101 (citation omitted).

157. Mariko Chang, *Lifting as We Climb*, INSIGHT CTR. CMTY. ECON. DEV. (2010), https://www.mariko-chang.com/s/Lifting_As_We_Climb_InsightCCED_2010.pdf [<https://perma.cc/JXS5-FDWF>].

158. CLIGNET, *supra* note 17, at 2.

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can. The family trust transfers patrimonial wealth through the generations, like all forms of inheritance do; the family trust, however, protects the wealth and keeps it safe from both spendthrift children and unpaid creditors, something only a trust can do. Consequently, family trusts preserve capital and minimize its erosion over generations, increasing the likelihood that the family will remain in an elite class of asset holders. The family trust is the record of a family's history of financial decision making and accrued privilege. That is to say, trusts are a "cumulative stock that reflects years of prior circumstances and decisions."¹⁵⁹

The family trust is a container for wealth, a protector of wealth, and even a generator of wealth since the assets in trust are invested and grow every day. Using a family trust to manage family wealth brings innumerable benefits, and these benefits are reaped almost exclusively by elite families who use family trusts more than any other group. Elite families, from the outset, have a great familiarity with the family trust because of its ubiquity in elite wealth planning. These families are familiar with the workings of the wealth management industry and—if they are not—they will be targeted and solicited by private banking representatives and boutique estate planners. In addition, while limited access to family trusts may be a result of a family's financial sophistication and familiarity with the financial products available, the use of family trusts is also generally limited to high-wealth families for other reasons.¹⁶⁰ Prohibitive costs in the creation and management of the trust as well as the fact that some trust companies require threshold amounts to create these kinds of family trusts render family trusts unavailable as a planning option for a broad swath of potential clients.¹⁶¹

A look at the wealthiest families in the United States and the ways in which they manage their fortunes tends to confirm this durable link between family trusts and inequality. The Forbes billionaires list and "Richest 400" lists provide a window into the wealth of

159. Alexandra Killewald, Fabian T. Pfeffer & Jared N. Schachner, *Wealth Inequality and Accumulation*, 43 ANN. REV. SOCIO. 379, 380 (2017).

160. Russ Alan Prince, *Russ Prince: How to Benefit from the Elite Wealth Planning Advantage*, PRIV. WEALTH (Feb. 22, 2019), <https://www.fa-mag.com/news/russ-prince-how-to-benefit-from-the-elite-wealth-planning-advantage-43448.html> [<https://perma.cc/AL8X-PB4Z>] ("Although elite wealth planning is being increasingly democratized, and some people can benefit from it in the same way as the super-rich, financial criteria and levels of complexity must be met to benefit from many of the solutions it provides.").

161. *See id.*

these ultrarich families and the origins of their wealth.¹⁶² Strikingly, “Seven of the 20 wealthiest members of the Forbes 400 inherited their wealth from previous generations,”¹⁶³ including Charles and David Koch, the Walmart heirs, and Jacqueline and John Mars of the Mars candy empire. In all of these cases, the families strategically transferred wealth from one generation to the next through a complicated system of trusts, charitable foundations, and corporate entities.¹⁶⁴

The Walton family—Walmart heirs—manage much of their money through the Walton Family Foundation, which funds other Walton charitable institutions, such as Alice Walton’s museum, Crystal Bridges.¹⁶⁵ The Family Foundation, in turn, is “funded mostly by a series of 21 [charitable lead] trusts. Sam Walton’s widow . . . set up four of the trusts in 2003. Her estate established 12 more after her death in 2007. Her son John . . . provided for five more in his estate.”¹⁶⁶ There is also a Walton Family Holdings Trust that owns approximately half of the shares in the family business, Walmart.¹⁶⁷ Similarly, the Koch brothers fund a dizzying array of family foundations and charitable organizations, while also holding personal wealth that is invested and managed through a network of innocuously named trusts.¹⁶⁸ All members of the fourth generation of the Mars Family, all of them part the Fortune 400 and billionaires club, benefit from family trust funds.¹⁶⁹

162. See Chuck Collins & Josh Hoxie, *Billionaire Bonanza 2018: Inherited Wealth Dynasties of the United States*, INST. POL’Y STUD. 10 (2018), <https://inequality.org/wp-content/uploads/2018/11/Billionaire-Bonanza-2018-Report-October-2018.pdf> [<https://perma.cc/6MBA-UG6F>].

163. *Id.* at 10.

164. *See id.*

165. Zachary R. Mider, *Trusts Allow Walton Family to Safeguard Wealth*, ST. LOUIS POST-DISPATCH (Sept. 15, 2013), https://www.stltoday.com/business/local/trusts-allow-walton-family-to-safeguard-wealth/article_147c1c1c-c38a-5e1a-b977-34cff3c2218f.html [<https://perma.cc/CWM4-PCMY>].

166. *Id.*

167. *Trillion Dollar Inheritance: The World’s Biggest Family Fortunes*, BLOOMBERG (June 27, 2018), <https://www.bloomberg.com/features/2018-richest-families> [<https://perma.cc/A7BN-EBPV>].

168. Kim Barker & Theodor Meyer, *How the Koch Brothers Hide Their Big Money Donations*, PHILA. INQUIRER (Mar. 17, 2014), https://www.inquirer.com/philly/news/politics/How_the_Koch_brothers_obscure_their_big_money_trail.html [<https://perma.cc/RUY2-EMRM>].

169. Jan Pottker, *Sweet Secrets: Opening Doors on the Very Private Lives of the Billionaire Mars Family*, WASHINGTONIAN (Apr. 29, 2008), <https://www.washingtonian.com/2008/04/29/from-the-archives-sweet-secrets-opening-doors-on-the-very-private-lives-of-the-billionaire-mars-fami> [<https://perma.cc/V4NR-PFQ5>].

Broadening the scope and looking at the fifteen wealthiest families with multiple members on the list, it is apparent that “these family’s wealth comes from companies started by an earlier generation, either a parent or more distant ancestor.”¹⁷⁰ These families and their individual members represent “wealth dynast[ies] passing generation to generation free from interruption,”¹⁷¹ always with the help of numerous trusts, both private and charitable. Even individuals who did not acquire their fortunes through inheritance quickly learn the value and benefit of family trusts as they accumulate wealth and seek to preserve it. Harold Hamm, an oil and gas billionaire who grew up in rural Oklahoma as the last of thirteen children born to a sharecropper, had his fifteen minutes of fame when he wrote a check to his ex-spouse, fulfilling the amount mandated by the divorce decree for \$974 million, on his trust fund account.¹⁷² Hamm was not a trust fund beneficiary growing up; as the check made clear, however, Hamm had quickly learned about and adopted wealth preservation mechanisms like the trust for financial management purposes and, undoubtedly, his children will all benefit from and inherit through trusts.¹⁷³

Trusts correlate with a concentration of wealth in elite sectors of society, as even a cursory look at the Forbes list indicates, and likely even aggravate this wealth inequality.¹⁷⁴ The link between family trusts, wealth preservation, and wealth inequality is so strong that one commentator has stated, “Trusts are one of the primary vehicles used to create and perpetuate wealth concentration . . . and they must lie at the centre of debates about inequality.”¹⁷⁵ The family trust plays, then, a central role in shaping the broader socioeconomic landscape, which—in the last three decades—has been defined by

170. Hillary Hoffower, *Income Inequality in the U.S. Has Hit a Record High. Meet the 15 Richest American Family ‘Dynasties,’ Who Have a Combined Net Worth of \$618 Billion*, INSIDER (Sept. 27, 2019), <https://www.businessinsider.com/richest-family-wealth-dynasties-ranked-generational-wealth-fortune-net-worth-2019-2> [<https://perma.cc/VJ79-RZQN>].

171. Collins & Hoxie, *supra* note 162.

172. Divorce proceedings revealed that Hamm held “about \$420 million in mostly liquid assets . . . , including \$224 million with Northern Trust.” *Harold Hamm*, BLOOMBERG: BILLIONAIRES INDEX, <https://www.bloomberg.com/billionaires/profiles/harold-g-hamm> [<https://perma.cc/ZK8P-W68E>].

173. *See id.*

174. *See* Andres Knobel, *Trusts: Weapons of Mass Injustice?*, TAX JUST. NETWORK 5 (Feb. 13, 2017), <https://www.taxjustice.net/wp-content/uploads/2017/02/Trusts-Weapons-of-Mass-Injustice-Final-12-FEB-2017.pdf> [<https://perma.cc/C46F-E686>].

175. *Id.*

historic levels of wealth inequality.¹⁷⁶ These decades in the United States have been defined by a rise in wealth inequality and almost all of this increase is due to the rise of the share of wealth owned by the 0.1% richest families, from 7% in 1978 to 22% in 2012.¹⁷⁷ The increase has been such that “in recent years, U.S. wealth concentration seems to have returned to levels last seen during the Roaring Twenties.”¹⁷⁸ This widening wealth inequality has been accompanied by the resurgence of what Thomas Piketty calls “patrimonial capitalism.”¹⁷⁹ This is a form of capitalism that is overwhelmingly grounded in ownership of capital through inherited wealth and an economic regime in which “unequal asset ownership proves hugely determinative (if not completely dispositive) of an individual’s life chances.”¹⁸⁰

Furthermore, wealth inequality, while it harms most parts of the population, harms certain groups and demographics more than others. In expanding wealth inequality, trusts also exacerbate related wealth gaps that highlight gender and racial inequality. A look at the “sedimentation” of wealth shows that the most likely sites of wealth accumulation are households headed by married, white men.¹⁸¹ Going back to the Forbes billionaire list, out of 2,755 billionaires, only 328 (11.9%) are women,¹⁸² and the large majority of those women inherited their wealth, usually from a father. The sedimentation of wealth through the use of trusts likewise compounds the racial

176. See generally Saez & Zucman, *supra* note 14.

177. See *id.* at 520–21.

178. Gabriel Zucman, *Global Wealth Inequality* 14 (Nat’l Bureau of Econ. Rsch., Working Paper No. 25462, 2019).

179. PIKETTY, *supra* note 14, at 215.

180. David Singh Grewal, *The Laws of Capitalism*, 128 HARV. L. REV. 626, 632 (2014).

181. To begin, “Married households are significantly wealthier than non-married households Never-married women’s median net worth is just \$2,500 compared to the \$148,700 median net worth of married individuals.” Jaggar, *supra* note 155, at 80. The fact that never-married women have the least wealth of all household types has particular implications for single black and Hispanic women. Chang, *supra* note 157, at 3. The median wealth for single white women is \$41,500; the median wealth for single black and Hispanic women is \$100 and \$120 respectively. Chang, *supra* note 157, at 3. “While white women in the prime working years of ages 36–49 have a median wealth of \$42,600, the media wealth for women of color is only \$5.” Chang, *supra* note 157, at 3.

182. Kerry A. Dolan, Jennifer Wang & Chase Peterson-Withorn, *World’s Billionaires List: The Richest in 2021*, FORBES, <https://www.forbes.com/billionaires> [<https://perma.cc/LZC6-RWTK>]; Deniz Çam, *World’s Billionaires List: The Top Richest Women in the World in 2021*, FORBES (Apr. 6, 2021), <https://www.forbes.com/sites/denizcam/2021/04/06/the-top-richest-women-in-the-world-in-2021> [<https://perma.cc/9F92-8LXQ>].

wealth gap by protecting and compounding the wealth of those with historical wealth advantages. From the outset, white families are more likely to inherit than their Black counterparts—five times more likely¹⁸³—and “28 % of whites received bequests, compared to just 7.7 % of black families.”¹⁸⁴ Even among those families receiving inheritances, black families receive less: “[B]lacks received 8 cents of inheritance for every dollar inherited by whites.”¹⁸⁵ Black families, as a result, hold less wealth than white families do even in the upper echelons of wealth: “The 99th percentile black family is worth a mere \$1,574,000 while the 99th percentile white family is worth over 12 million dollars.”¹⁸⁶ The trust-based inheritance practices of high-wealth families crystallize these wealth- and race-based differences and compound the inequalities.

Family trusts intensify inheritance inequalities and cement privilege more so than any other form of wealth transfer. And, like the patrimonies they have transferred across historical periods, family trusts still reflect the property power and financial privilege of certain groups within the broad, patriarchal system of wealth holding.

2. Inherited Furniture and Cultural Inequality

In addition to intensifying wealth inequality, patrimonial inheritance intensifies both social reproduction and the cultural inequality that accompanies it. That is to say, the “laws of succession allow social groups or societies to reproduce their economic and social insti-

183. Jaggar, *supra* note 155, at 80.

184. THOMAS M. SHAPIRO, THE HIDDEN COST OF BEING AFRICAN AMERICAN 69 (2004); see also Cedric Herring & Loren Henderson, *Wealth Inequality in Black and White: Cultural and Structural Sources of the Racial Wealth Gap*, 8 RACE & SOC. PROBS. 4 (2016) (“[T]hrough inheritance, the children of whites and blacks chart very different economic courses.”). Most private wealth in the United States is inherited, which perpetuates the racial wealth gap. Approximately 80% of assets come from transfers from prior generations. Jaggar, *supra* note 155, at 80.

185. SHAPIRO, *supra* note 184. One-quarter of white families received an inheritance, averaging almost \$145,000, but only one in twenty African American families inherited, with an average inheritance of approximately \$42,000. Jaggar, *supra* note 155.

186. William Darity Jr., Darrick Hamilton, Mark Paul, Alan Aja, Anne Price, Antonio Moore & Caterina Chiopris, *What We Get Wrong About Closing the Racial Wealth Gap*, INSIGHT CTR. CMTY. ECON. DEV. 2 (Apr. 2018), <https://socialequity.duke.edu/wp-content/uploads/2020/01/what-we-get-wrong.pdf> [<https://perma.cc/99ZD-5QTT>]. Looking at it from the perspective of educational attainment, “It takes a postgraduate education for a black family to have comparable levels of wealth to a white household with some college education or an associate degree.” *Id.* at 6.

tutions each new generation.”¹⁸⁷ Family trusts, in particular, allow high-wealth families to reproduce their cultural norms and understandings by protecting their cultural capital, preserving it for future use, and endowing it with the luster of history and value through its inalienability. The entrustment of cultural capital guarantees the continuity of and access to cultural capital through generations of elite families and, as a result, family trusts reinforce class distinctions based on conventional cultural hierarchies and classifications of high-value cultural capital.¹⁸⁸ This entrustment of cultural capital is problematic on two levels: it provides guaranteed access to prestige capital, and it solidifies cultural hierarchies that are grounded in white, masculine privilege.

On the most basic level, the transmission of inalienable cultural capital in the form of heirloom assets reinforces inequality by giving trust beneficiaries assets that other people and their families will have to purchase or may indeed never have.¹⁸⁹ A family home or estate that cannot be alienated provides a storied location for family living, retreats, meetings, or getaways. The sharing of family jewelry or art allows, even entitles, trust beneficiaries to access high-end objects without incurring any expense.¹⁹⁰ As the saying goes, only middle-class people buy furniture (because upper-class people inherit it).¹⁹¹ Moreover, the cultural capital that family members inherit through trust can also be pathways to experiences and opportunities: box seats at the opera, an art collection, libraries, or gardens. This automatic ownership of high-value objects is problematic because it creates very unequal opportunities for families depending

187. CLIGNET, *supra* note 17, at 32 (quoting Lawrence M. Friedman, *The Law of the Living, the Law of the Dead: Property, Succession, and Society*, 1966 WIS. L. REV. 340, 378).

188. Bourdieu, *supra* note 22, at 245–46.

189. *Id.* at 247.

190. In Edith Wharton’s *Custom of the Country*, the newly rich Undine Spragg and her mother are concerned when their manicurist tells them that Ralph Marvell did not buy the engagement ring for Undine: “Ain’t you ever heard of ancestral jewels, Mrs. Spragg? In the European aristocracy they never go out and *buy* engagement rings; and Undine’s marrying into our aristocracy.’ Mrs. Spragg looked relieved. ‘Oh, I thought maybe they were trying to scrimp on the ring.’” WHARTON, *supra* note 2, at 51.

191. *E.g.*, *But Did They Buy Their Own Furniture?*, ECONOMIST (Aug. 10, 2006), <https://www.economist.com/britain/2006/08/10/but-did-they-buy-their-own-furniture> [<https://perma.cc/HG9J-E3U8>] (“Being the sort of person who ‘buys his own furniture’, a remark that Alan Clark, a former minister and diarist once reported as directed at Michael Heseltine, a self-made Tory colleague, is still worthy of note in circles where most inherit it.”).

on their patrimonial history and the financial success of previous generations.¹⁹² In this way, the generational transfer of cultural patrimonies through family trusts underscores that elite cultural capital is “unequally distributed according to social class and education.”¹⁹³

Also problematic, as Pierre Bourdieu has argued, is that these elite forms of culture—the opera box, the art collection, or any other form of cultural capital that might be included in “the knowledges of the upper and middle classes”—are, because of their persistence and protectedness, prioritized forms of cultural capital that “are considered capital valuable to a hierarchical society.”¹⁹⁴ These elite forms of cultural capital are considered to be valuable not because of any innate worth or superiority. Rather, their value is constructed through intentional selection and the passing of time, which produces a canonization effect.¹⁹⁵

The endowment of value over time in a select group of cultural objects exhibits the core historical operation of patrimonial and patriarchal heritage. Elite cultural objects have historically been produced, owned, and exchanged through gendered modes and channels.¹⁹⁶ Men have produced, evaluated, and purchased high-value cultural commodities, displaying them in family homes and donating them to museums that have replicated and glorified the creative and purchasing power of these men. Likewise, cultural hierarchies have persistently entrenched elite white culture, in that the cultural objects of the white elites have consistently been valued and classified in ways that nonwhite cultural capital has not.¹⁹⁷ White cultural capi-

192. Bourdieu, *supra* note 22, at 247.

193. Tzanakis, *supra* note 74, at 77.

194. Tara J. Yosso, *Whose Culture Has Capital? A Critical Race Theory Discussion of Community Cultural Wealth*, 8 RACE, ETHNICITY, & EDUC. 69, 70 (2005); see also Tony Bennett & Elizabeth B. Silva, *Cultural Capital and Inequality: Policy Issues and Contexts*, 15 CULTURAL TRENDS 87, 91 (2006) (“[C]ultural capital is manifested less in terms of a familiarity with a restricted field of high culture than in the ability to ‘graze’ across a wide range of cultural activities, both high and low.”); cf. Yaojun Li, Mike Savage & Alan Warde, *Social Stratification, Social Capital and Cultural Practice in the UK*, in HANDBOOK OF RESEARCH METHODS AND APPLICATIONS IN SOCIAL CAPITAL 21, 24 (2015) (“The omnivore thesis says that people in higher social positions not only consume highbrow cultural items, they enjoy popular culture as well and to a similar extent.”).

195. Bourdieu, *supra* note 22, at 247.

196. See, e.g., Valentine Moghadam & Manilee Bagheritari, *Cultures, Conventions, and the Human Rights of Women: Examining the Convention for Safeguarding Intangible Cultural Heritage, and the Declaration on Cultural Diversity*, 59 MUSEUM INT’L 9, 13 (2007) (noting the historically gendered structures of economic and cultural capital).

197. E.g., Erik T. Withers, *Whiteness and Culture*, SOCIO. COMPASS, Apr. 3, 2017, at 1

tal has been categorized as “high” culture and consequently imbued with prestige and the patina of exclusivity. In all these ways “cultural capital actively reproduces social inequalities.”¹⁹⁸ Put differently, high-wealth cultural capital serves to “confer distinction and privilege to those who possess and deploy it,”¹⁹⁹ by drawing on a historical past of both exclusion and advantage.

At every turn, family trusts serve as a mechanism for further cementing the power of elite cultural patrimonies. That is to say, in passing down high-value objects, families pass on more than money.²⁰⁰ High-wealth families, through the use of family trusts, pass on access to and familiarity with privileged cultures, “transfer[ring] class and racial privileges, as well as disadvantages from one generation to another.”²⁰¹ High-wealth families regularly maximize the “socially distinctive function of possessing art works and antique interiors.”²⁰² These families are able to deftly manipulate and deploy “cultural codes and practices capable of securing a return to their holders.”²⁰³

Possession of “high” cultural capital permits elite families to telegraph social status and class belonging. The opera box and art collections, for example, allow beneficiaries to signal particular forms of cultural access and knowledge as they practice navigating elite social terrains.²⁰⁴ Possession of certain forms of cultural capital also allows elite families to communicate their privileged presence on a national stage. One historian writing about French noble families has remarked, “In making their residences and gardens into sites of commemoration . . . French nobles . . . put every effort into reinforcing associations with the past, using the home both for transmission of familial identity and as a symbol of their families’ importance on a

(describing how culture cements whiteness and “develops in ways that secure racial interests and maintain racial hierarchy”).

198. Tzanakis, *supra* note 74, at 77 (emphasis omitted).

199. *Id.* (emphasis omitted).

200. Bourdieu, *supra* note 22, at 242–43 (describing forms of capital beyond traditional economic capital that may be inherited, such as cultural capital and social capital).

201. Cedric Herring & Loren Henderson, *Wealth Inequality in Black and White: Cultural and Structural Sources of the Racial Wealth Gap*, 8 RACE & SOC. PROBS. 4, 8 (2016) (citing SHAPIRO, *supra* note 184, at 69).

202. Gerbert Kraaykamp & Koen van Eijck, *The Intergenerational Reproduction of Cultural Capital: A Threefold Perspective*, 89 SOC. FORCES 209, 209–10 (2010).

203. Tzanakis, *supra* note 74, at 77 (emphasis omitted).

204. Bourdieu, *supra* note 22, at 243–44.

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grand stage of nation.”²⁰⁵ Distinctive cultural capital helps families signal the kinds and amounts of cultural capital they possess and subsequently acquire more.²⁰⁶

By providing access to high-end objects and cultural experiences, the family trust as cultural patrimony allows high-wealth families to signal culture-based forms of prestige and privilege, within certain elite social groups and to other external social groups.²⁰⁷ Trusts, in this way, crystallize class and other forms of cultural privilege as mediated through and defined by objects, preferences, and aesthetic discrimination.

3. Privileged Networks and Unequal Social Capital

Similar to the possession of cultural capital, there is extreme variation in the kinds of social capital that families have as well as the prestige and returns associated with their social capital. Social capital, for some theorists, has decidedly positive characteristics, and scholars like Robert Putnam have extolled the virtues of social capital because “social networks have value.”²⁰⁸ Nevertheless, from the perspective of Bourdieu and like-minded theorists, social capital is an instrument of inequality—like economic and cultural capital²⁰⁹—because it best serves high-wealth families, who possess the greatest quantity as well as the most-prized forms of social capital. The quantity and the quality of a family’s social capital are the two most im-

205. MACKNIGHT, *supra* note 55, at 181.

206. Bourdieu, *supra* note 22, at 18 (“Furthermore, the specifically symbolic logic of distinction additionally secures material and symbolic profits for the possessors of a large cultural capital . . .”).

207. See, e.g., Michele Lamont & Annette Lareau, *Allusions, Gaps and Glissandos in Recent Theoretical Developments*, 6 SOCIO. THEORY 153, 154–56 (1988) (describing how, according to Bourdieu, high culture is associated with dominant class attributes and status).

208. ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 19 (2000); see also Marc Parry, *Can Robert Putnam Save the American Dream?*, CHRON. HIGHER EDUC. (Mar. 12, 2015), <https://www.chronicle.com/article/can-robert-putnam-save-the-american-dream> [<https://perma.cc/YPN7-SQ5E>]. Putnam and other like-minded scholars even envisioned social capital as a tool for building strong communities and equalizing opportunity. See Lin, *supra* note 145, at 34 (“Coleman . . . sees network closure as a distinctive advantage of social capital, because it is closure that maintains and enhances trust, norms, authority, sanctions, etc.”).

209. Like the cultural capital that high-wealth families possess, the social capital that these elite families possess is high-status, prestige-laden social capital and, in this respect, social and economic capital overlap or interact. That is to say, economic capital creates the conditions that consequently produce the social capital.

portant determinants in how productive that social capital will be and what kind of returns a family will see on its social capital.

In terms of quantity, the family trust very directly produces compound forms of social capital through trust administration, the objects inherited as part of the patrimony, and conditions that regulate beneficiary behavior and activity. Family trust beneficiaries, accordingly, have more automatic social capital than other individuals and one reason that advantage is troubling, from an inequality perspective, is that social capital acts as a multiplier: “Because the social capital accruing from a relationship is that much greater to the extent that the person who is the object of it is richly endowed with capital . . . the possessors of an inherited social capital . . . are able to transform all circumstantial relationships into lasting connections.”²¹⁰ That is to say, the more social capital a family has, the more the family can increase its social, cultural, and economic capital.²¹¹

Studies show, for example, that “[p]eople with rich social capital are paid better, promoted faster, and promoted at younger ages.”²¹² Similarly, a 2019 report from the congressional Joint Economic Committee stated, “Even from the narrowest of economic perspectives, who we know, the institutions to which we are connected, and what they can do for us are obviously related to economic outcomes.”²¹³ Studies have found that 75% of new business enterprises “find and secure financing through the ‘informal investing grapevine’—the social networks of capital seekers and investors.”²¹⁴ Individuals “find each other via friends, colleagues, acquaintances, and well-connected business associates such as attorneys, insurance agents, and accountants.”²¹⁵ And the amount of capital supplied

210. Bourdieu, *supra* note 22, at 250.

211. *Id.* at 249. (“The volume of the social capital possessed by a given agent thus depends on the size of the network of connections he can effectively mobilize and on the volume of the capital (economic, cultural or symbolic) possessed in his own right by each of those to whom he is connected.”).

212. WAYNE BAKER, ACHIEVING SUCCESS THROUGH SOCIAL CAPITAL: TAPPING THE HIDDEN RESOURCES IN YOUR PERSONAL AND BUSINESS NETWORKS 10 (2000).

213. *The Wealth of Relations: Expanding Opportunity by Strengthening Families, Communities, and Civil Society*, U.S. CONG. JOINT ECON. COMM. (Apr. 30, 2019), <https://www.jec.senate.gov/public/index.cfm/republicans/2019/4/the-wealth-of-relations> [<https://perma.cc/CFB8-RSUN>] (“We find jobs through our contacts. We develop skills (human capital) that pay off in the labor market through the mentorship of teachers, parents, and neighbors (reflecting the social capital inhering in those relationships).”).

214. BAKER, *supra* note 212, at 12.

215. *Id.*

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through this “informal capital market” is not to be underestimated—one study found “that the amount of capital it provides is much greater than the financing supplied via the professional venture capital market.”²¹⁶

Returning to the Forbes billionaire list, outside of those individuals who made the list based solely on inherited money, another 40.5% of the individuals on the list had some advantages that helped them in the acquisition of new wealth—advantages such as an inheritance, upper-class upbringing and connections, or start-up capital from a family member.²¹⁷ In this way, “Being assured and recognized of one’s worthiness as an individual and a member of a social group . . . not only provides emotional support but also public acknowledgment of one’s claim to certain resources.”²¹⁸ Families with robust social patrimonies have access to more and better opportunities in the form of investments, employment, volunteer service, and business partnerships, creating social capital gaps that mirror wealth gaps.²¹⁹

If quantity matters, so does the quality in the context of social capital. The quality of the capital not only has an effect on the kinds of opportunities it can create; the quality of the capital also positions the holder within social hierarchies and reifies the hierarchy through social reproduction. Family trusts further social reproduction by intentionally and strategically placing beneficiaries in groups that coalesce around wealth and privilege. Family trusts, through the social patrimonies that they pass down through generations, “bring together, in a seemingly fortuitous way, individuals as homogeneous as possible in all the pertinent respects in terms of the existence and

216. *Id.*

217. Of the 400 individuals and families on the 2011 Forbes 400 list, 22% had opportunities that gave them an advantage, such as being from an upper-class background, inheriting less than \$1 million, or receiving some start-up capital from a family member. Further, 11.5% inherited a medium-sized business or wealth of more than \$1 million or received substantial start-up capital for a business from a family member. Seven percent inherited wealth in excess of \$50 million or a large and prosperous company. Finally, 21.25% inherited sufficient wealth to make the Forbes 400 list compared to 35% who came from a lower- or middle-class background. *Born on Third Base: What the Forbes 400 Really Says About Economic Equality & Opportunity in America*, UNITED FOR A FAIR ECON. 9 (2012), https://www.faireconomy.org/born_on_third_base [<https://perma.cc/DT7Q-PB4M>].

218. Lin, *supra* note 145, at 31.

219. *E.g.*, BAKER, *supra* note 212, at 9–15 (explaining the significance and value of social capital and personal networks in obtaining opportunities, especially in one’s career).

persistence of the group.”²²⁰ And this positioning produces, through “an unceasing effort of sociability, a continuous series of exchanges in which recognition is endlessly affirmed and reaffirmed.”²²¹

This construction of homogeneity acts to exclude those individuals and families who do not have the material resources to enable entrance into these circles.²²² Moreover, the patrimonial privilege that is transferred through the family trust continues to bear traces of deeply entrenched patriarchal privilege that produces disadvantage along the axes of gender and race. Family trusts, for example, connect beneficiaries through the domestic landscapes they enable—the propertied spaces, furnishings, decorative embellishments, and heirloom objects that these trusts encase and protect—to other high-wealth families. The importance of who lives next door or down the street is a “neighborhood advantage,”²²³ and the realities of racial geography map onto these grids of privilege.

The educational affiliations that trust conditions can create also further elite advantage and social reproduction. In past decades, alumni connections memorialized through traditions like Harvard’s Red Book provided alumni information about and access to a roster of successful people based on school affiliation.²²⁴ A brief glance at the Harvard Club of Boston website tells the story of high-value social capital, shared experiences, and exclusive space:

At the Harvard Club, fellow members aren’t just faces you pass on the way to the squash court. They’re like-minded people who enjoy the Club’s camaraderie—through shared experiences at club events, over drinks in Veritas

220. Bourdieu, *supra* note 22, at 250.

221. *Id.*

222. Compounding the problem, those who have access to the privileges of the group benefit from group effects in that “economic success is influenced . . . by characteristics of the group of individuals with whom the person typically interacts.” Samuel Bowles & Herbert Gintis, *The Inheritance of Inequality*, 16 J. ECON. PERSPS. 3, 19 (2002).

223. See Jonathan T. Rothwell & Douglas S. Massey, *Geographic Effects on Intergenerational Income Mobility*, 91 ECON. GEOGRAPHY 83, 95 (2015) (“Neighborhood advantage, as well as regional economic integration and growing home wealth, appear to drive up future income.”). On the other hand, “[L]iving amid the wealthy even when you are upper-middle class is bad for your mental health.” Alissa Quart, *Out-classed: How Your Neighbor’s Income Might Affect Your Happiness*, GUARDIAN (May 11, 2017), <https://www.theguardian.com/global/2017/may/11/outclassed-neighbors-income-happiness> [<https://perma.cc/SBW4-84H2>].

224. *Class Reports*, HARV. ALUMNI, <https://alumni.harvard.edu/college/class-reports> [<https://perma.cc/9M3P-XYUZ>] (“Informally known as the ‘Red Books,’ Class Reports are a long-standing Harvard tradition, dating back at least to the mid-1800s. They serve as historical chronicles of classes and encourage alumni to maintain connections.”).

Lounge or after a tough workout in the fitness room. The Harvard Club's relaxed, comfortable atmosphere sparks conversations, uncovers common interests and allows friendships to flourish.²²⁵

Other clubs offer similar spaces and opportunities for privileged encounters and exclusive networking. Related conferences and gatherings also provide these same kinds of elite opportunities. Well-known invite-only gatherings like the Renaissance Weekend—attended by politicians, academics, artists, and entrepreneurs alike—advertise the benefits of being part of an “extended family reunion” and state that “enduring friendships, often the most unlikely, have continued to foster historic projects, ventures and public service—even several dozen marriages.”²²⁶ All of these elite institutions fortify social capital of those who are already privileged; furthermore, these institutions fortify social capital originally built on a base of gender- and color-coded privilege. In all these spaces where the presence of high-value social patrimony flourishes, the gender and race lines that have historically defined patrimony persist in dividing rather than connecting.

The family trust, therefore, not only builds but also amplifies a high-wealth family's social capital. This high-value social capital, consequently, allows “members in the dominant class . . . to engag[e] in mutual recognition and acknowledgment so as to maintain and reproduce group solidarity and preserve the group's dominant position.”²²⁷ The family trust is, in this way, a mode of conveying patrimonial privilege in the context of social resources.

B. PATRIMONIAL POLITICS AND THE ELITE CHORUS

Seeing the family trust as a mode of patrimonial inheritance reveals the deep roots of and problems with patrimonial capitalism. This mode of analysis also leads to a better and more nuanced understanding of patrimonial politics. Patrimonial politics is a politics based on family wealth and a system in which the agenda and rules are influenced by and biased toward ultrarich families.²²⁸ In a patri-

225. HARVARD CLUB OF BOS., <https://www.harvardclub.com> [<https://perma.cc/4MCG-RQZ5>].

226. *Generations of Shared Ideas*, RENAISSANCE WEEKEND, <https://www.renaissanceweekend.org/history> [perma.cc/HGM8-VMUK].

227. Lin, *supra* note 145, at 34.

228. Cf. ELMER ERIC SHATTSCHNEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA* 107 (1960) (“[T]he scope of the political community corresponds to the social facts of life The social system makes a substantial distinction between those who have relatively more and those who have relatively less. This is the bias of the system.”).

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monial system, political power maps on to household power, and benefits circulate within and among elite families, enabled and endorsed by state governmental policy.²²⁹

Patrimonial politics are intimately linked to the theory as well as the praxis of inheritance: “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.”²³⁰ Moreover, patrimonial inheritance—because it includes the transfer of not just economic but also cultural and social capital—passes down not only financial wealth but also political power that is grounded in a potent combination of purchasing power, social connections, and shared norms. In this way, “[I]nheritance not only affects ‘who gets what’ but also ‘who decides.’ . . . In the case of dynastic wealth, economic and political power converge.”²³¹ Patrimonial wealth, in all its forms, equates with political power, and “[f]or the rich, wealth begets power.”²³² Family trusts, because of their capacity for wealth concentration and preservation, are a critical component in creating the material conditions for wealth-based politics to flourish.

In an effort to measure the link between economic and political power, one political scientist created the Material Power Index (MPI) using household wealth data from 2004. The MPI shows that “each of the top 400 or so richest Americans had on average about 22,000 times the political power of the average member of the bottom 90 percent, and each of the top 100 or so had nearly 60,000 times as much.”²³³ Putting this wealth concentration in context, he states:

The MPI for the 400 highest American taxpayers is many magnitudes greater than the indices even for the top of the Athenian trierarchy, and is nearly identical to the concentrated wealth of Roman senators Based on income, the asymmetries in material power resources are enormous. Based

229. *Id.* at 107–08 (describing how the political system is exclusionary towards “the bottom of the social order”).

230. Richard Lachmann, *American Patrimonialism: The Return of the Repressed*, 636 ANNALS AM. ACAD. POL. SOC. SCI. 204, 217 (2011).

231. INHERITANCE AND WEALTH IN AMERICA, *supra* note 17, at 194.

232. Zucman, *supra* note 178, at 4; *see also* Jeffrey A. Winters, *Oligarchy and Democracy*, AM. INT. (Sept. 28, 2011), <https://www.the-american-interest.com/2011/09/28/oligarchy-and-democracy> [<https://perma.cc/9NX3-9RVR>] (“Concentrated wealth serves as both the source of oligarchic power and the motivation to exercise it.”).

233. Jeffrey A. Winters & Benjamin I. Page, *Oligarchy in the United States?*, 7 PER-SPS. ON POL. 731, 737 (2009) (emphasis omitted).

on wealth, they are simply too staggering to fathom.²³⁴

Wealth is the real driver of political power inequalities, and the family trust, as we have seen, is the most prevalent and successful wealth preservation mechanism available to elite families.

Based on the possession and deployment of wealth, political scientists have found that “economic elites stand out as quite influential—more so than any other set of actors . . .—in the making of U.S. public policy.”²³⁵ What also stands out is that this elite group of ultrarich families is using their political power in one particular way: to shape the legal system in such a way that it furthers wealth preservation. That is to say, “Unlike any other power resource, wealth unites oligarchs politically around a core set of shared interests,”²³⁶ and those interests include “sustain[ing] and expand[ing] existing bases of power and privilege, including mechanisms that permit transfer of privilege across generations.”²³⁷ Ultrarich families are, in other words, using their patrimonial power to obtain favorable legal reform and protect their family fortunes.

That trusts are a critical component of wealth preservation and of great service to elite families is clear from the fact that these same families who benefit from family trusts are also supporting the wave of massive trust law reform that is sweeping across the United States.²³⁸ From repealing the rule against perpetuities—in order to allow for dynasty trusts that never terminate—to increasing the levels and forms of available asset protection, ultrarich families are putting their influence and resources behind state-level legal reform to liberalize trust law.²³⁹ Elite families—in this vein of pursuing wealth accumulation and preservation—also take an interest in the benefits

234. WINTERS, *supra* note 12, at 216.

235. Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 *PERSPS. ON POL.* 564, 572 (2014). Similarly, Martin Gilens found that “when preferences across income groups diverged, only the most affluent appeared to influence policy outcomes” and that such “representational inequality was spread widely across policy domains, with a strong tilt toward high-income Americans on economic issues.” MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* 234 (2012); *see also* JACOB S. HACKER & PAUL PIERSON, *WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS* 70–72 (2010).

236. WINTERS, *supra* note 12.

237. CLIGNET, *supra* note 17, at 194.

238. *See, e.g.*, Adam S. Hofri-Winogradow, *The Stripping of the Trust: From Evolutionary Scripts to Distributive Results*, 75 *OHIO ST. L.J.* 529, 537–51 (2014) (describing eight recent reforms in trust law).

239. *See* Tait, *supra* note 12, at 1022 (describing the lobbying efforts undertaken by wealthy families in the U.S. at the state level).

obtainable through the corporate form.²⁴⁰ Most particularly, however, elite families are interested in taxation.²⁴¹ Taxation in its many forms has power to erode great fortunes. Consequently, tax policy and tax law are areas of particular political activity for high-wealth families. The inheritance tax, specifically, has historically been a target for elimination, and the ultrarich have fought long and hard against the tax and its redistributive effects.²⁴²

In terms of the mechanisms available to high-wealth families for exerting their power, they are multiple.²⁴³ Ultrarich families make political donations running into the hundreds of millions of dollars to candidates who hold sympathetic views and support appealing agendas.²⁴⁴ Ultra-rich families can also direct their funds to lobbying groups, thereby attempting to influence outcomes on target issues of importance.²⁴⁵ What is most effective for elite families, however, is not direct intervention in the political process; rather, the most effective tool has been the creation and maintenance of an entire industry dedicated to “wealth defense” and populated by lawyers, wealth managers, investment experts, accountants, and other financial pro-

240. 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> [<https://perma.cc/M82B-NZGW>].

241. WINTERS, *supra* note 12, at 212 (“At the center of civil oligarchy in the United States is the expression of material power by oligarchs to defend their incomes against taxation.”).

242. Partnering with family-business organizations and other special-interest groups like the American Farm Bureau Federation, high-wealth families have consistently lobbied against the tax, framing it as an overwhelming burden for family firms and farms. See MICHAEL GRAETZ & IAN SHAPIRO, *DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH* 21–22 (2005).

243. See Winters & Page, *supra* note 233, at 733 (“It is important to recognize that oligarchy 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.”).

244. GILENS, *supra* note 235, at 241 (“During the 2004 election cycle, for example, insurance magnate Peter Lewis and investor George Soros each gave over \$23 million dollars to Democratic candidates and organization. On the conservative side, . . . the Koch brothers have spent at least \$100 million supporting conservative causes over the years.”).

245. See Tait, *supra* note 12, at 1021 (describing how ultrarich families used lobbying efforts to get an exemption for family offices from the investment advisor rule). Katharina Pistor says this: “To attain legal certainty, asset holders and their lawyers have lobbied for legislative or regulatory change and have been remarkably successful” PISTOR, *supra* note 15, at 182.

professionals.²⁴⁶

This is an industry supported and patronized by high-wealth families seeking to “defend[] large concentrations of wealth from attack by outsiders.”²⁴⁷ The tools used by the professional foot soldiers in this undertaking are “legal modules that are . . . complex and hidden in arcane statut[es] or case law[,] and the plot frequently develops behind the closed doors of large law firms . . .”²⁴⁸ Wealth managers concoct complicated and opaque legal structures to manage the fortunes of the ultrarich, using trusts, corporations, and other entities to create financial privacy and asset protection.²⁴⁹ And lawyers at either large corporate firms or boutique trust companies not only invent but also defend legal strategies designed to take advantage of the ambiguity and intricacy of these legal rules, tax rules in particular.²⁵⁰ Accordingly, industry professionals not only manipulate the details of complex legal codes but also create new legal rights for their high-wealth clients, ensuring that the material power of these clients remains intact and resistant to confiscation.

In this way, elite families use their economic wealth—wealth that is formed and consolidated through the use of trusts—to exert political power. In a circular flow, the political power they exert is channeled into ensuring that the wealth they possess persists and proliferates. These patrimonial politics are grounded in entitlement, access, and private interest and depend on the political will of the few rather than the many. Opportunity and power are not allotted equally, nor are there even opportunities for ordinary-wealth families to counter the patrimonial moves being made by ultrarich families. Patrimonial politics, in this way, strip ordinary- and low-wealth families of the ability to participate meaningfully in the political process and therefore further a politics of inequality. A well-known political scientist once described American political pluralism as a “heavenly chorus [that] sings with a strong upper-class accent.”²⁵¹

246. WINTERS, *supra* note 12, at 218 (“At the heart of this industry are ‘professional organizations such as accounting firms, banks, investment advisors, and law firms.’”). Winters also notes that “[i]n a civil oligarchy, the burdens of political engagement for income defense are rarely borne by oligarchs themselves, but fall instead to others they set in motion.” *Id.*

247. HARRINGTON, *supra* note 6, at 38.

248. PISTOR, *supra* note 15, at 19.

249. See WINTERS, *supra* note 12, at 218 (describing the complicated structure used to manage and defend the wealth of the ultrarich).

250. PISTOR, *supra* note 15, at 19.

251. SHATTSCHNEIDER, *supra* note 228, at 35.

Patrimonial politics represents a chorus constituted almost uniquely by the voices of the ultrarich. It is a chorus that needs new voices and reimagined songs in order to accurately present as a democratic and pluralistic collective.

IV. THE CONSEQUENCE OF CITIZEN TRUSTS

The family trust, as this Article argues, is coextensive with patrimonial inheritance because of its characteristic protection of long-term, inalienable wealth in its various forms. As the previous Parts explicated, these family trusts are saturated in the historically formed wealth and privilege of patriarchs. And they continue, presently, to shape wealth holding and privilege along the axes of class, gender, and race. Family trusts reify conventional hierarchies of capital and enable elite families to crystallize their myriad advantages. The question that emerges, then, is how trusts can be either reformed or reimagined such that they are instruments of opportunity and equality rather than elite privilege.

Trust law is in fact undergoing a monumental wave of reform in the current historical moment.²⁵² This significant shift, however—spearheaded by the wealth defense industry—is moving trust law more toward high-wealth patrimonialism. Trust reform across the United States is trending toward the liberalization of trust rules in order to provide increasing amounts of asset protection, to repeal perpetuities periods, and to ease trust modification through decanting.²⁵³ Trust law reform in offshore jurisdictions, such as the Cayman Islands and the British Virgin Islands, initially sparked these and other reforms in the United States as jurisdictions competed for trust business.²⁵⁴ As the competition continues, trust companies, banks, and other interested institutions work to bring trust-friendly proposals to state legislatures with the ultimate goal of attracting trust business.²⁵⁵

252. See *e.g.*, Hofri-Winogradow, *supra* note 238, at 537–51 (describing eight recent reforms in trust law).

253. *Id.*

254. See Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035, 1037 (2000) (describing trust reform in offshore jurisdictions); Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 380–81 (2005) (describing trust reform in offshore jurisdictions and the resulting change).

255. See Oliver Bullough, *The Great American Tax Haven: Why the Super-Rich Love South Dakota*, GUARDIAN (Nov. 14, 2019), <https://www.theguardian.com/world/2019/nov/14/the-great-american-tax-haven-why-the-super-rich-love-south-dakota-trust-laws> [<https://perma.cc/JY3U-KBSL>] (explaining how South Dakota attracted

Numerous scholars have suggested that tax reform provides the means to redistribute wealth, equalize the fortunes of the few and the many, and close wealth gaps that family trusts exacerbate.²⁵⁶ The Institute on Taxation and Economic Policy's recent report stated that a "federal wealth tax on the richest 0.1 percent of Americans is a viable approach for Congress to raise revenue and is one of the few approaches that could truly address rising inequality."²⁵⁷ Revitalizing the estate tax or introducing a new wealth tax are therefore crucial topics in current political debates, and social movements have taken to heart the importance of how tax burdens are spread across the citizenry.

A different kind of response to the inequality engendered by family trusts is to reimagine the trust as a vehicle for the citizenry rather than elite families. This approach underscores a different set of qualities that has also been historically associated with the trust form. Although the trust has been intimately connected with family wealth preservation and has facilitated "dangerous—and undemocratic—possibilities," the trust has also been used over time to protect vulnerable parties and to provide a mechanism for the management and care of assets on behalf of individuals who might benefit from the financial intermediation because of age, disability, or other qualifying characteristic.²⁵⁸ Trusts have been used to protect married women from total financial dependence on their husbands under coverture's property reign.²⁵⁹ Likewise, trusts have been historically associated with guardianships and the protection and care of minors, the elderly, and those rendered incapacitated by mental or physical conditions. It is this facet of the trust that resists the family trust as

the ultra-wealthy with proposals at the state level).

256. See 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) (suggesting that estate tax could be an "apt reform vehicle"); Chang, *supra* note 16, at 77 (arguing that trusts and estates should be used to redistribute wealth).

257. Steve Wamhoff, *The U.S. Needs a Federal Wealth Tax*, INST. TAX'N & ECON. POL'Y (Jan. 23, 2019), <https://itep.org/the-u-s-needs-a-federal-wealth-tax> [<https://perma.cc/N8V3-7ZQD>] ("As this report explains, an annual federal tax of only 1 percent on the portion of any taxpayer's net worth exceeding the threshold for belonging to the wealthiest 0.1 percent (likely to be about \$32.2 million in 2020) could raise \$1.3 trillion over a decade.").

258. Carla Spivack, *Due Process, State Taxation of Trusts and the Myth of the Powerless Beneficiary: A Response to Bridget Crawford and Michelle Simon*, 67 UCLA L. REV. DISCOURSE 46, 70 (2019) ("The trust's unique device of separating legal from equitable title can serve many legitimate purposes. Trusts can protect minors and the vulnerable.").

259. See Tait, *supra* note 44.

high-wealth patrimony framing and provides an aperture for viewing trust's democratic possibilities.

One proposal, picking up on the threads of this alternate history of the trust, would be to create "citizen trusts" that address the needs of vulnerable individuals and communities, particularly economically vulnerable or historically disadvantaged ones. One model for these trusts exists already in Canada, where indigenous communities are placing settlement funds received from both local and federal governments "to compensate for losses in respect of indigenous lands and other damages suffered by indigenous peoples"²⁶⁰ in trust to benefit the whole community. The stated purpose of these First Nation Settlement Trusts "is to form a legacy to benefit those impacted aboriginals alive today as well as future generations of aboriginal peoples."²⁶¹

Because of the trust's robust capacity as a vehicle for managing and safeguarding assets, First Nation Settlement Trusts "have become the legal vehicle of choice to protect these types of legacy settlements."²⁶² Financial institutions like RBC Wealth Management have Indigenous Wealth offices to work with the First Nation Communities in structuring the trusts and, as the RBC Wealth Management office explains in their marketing materials, "Trusts [can be customized] to align with the unique values, needs and goals of each community, including how the money is invested, how it's spent, and over what timeframe."²⁶³ Furthermore, RBC mentions in its materials, "Though typically used in family estate planning, trusts can also be very effective for communities looking to set aside and invest assets that will benefit their citizens over the long term."²⁶⁴

260. William H. Cooper, *The Essentials of First Nation Settlement Trusts*, BOUGHTON L. (Apr. 28, 2014), <https://www.boughtonlaw.com/2014/04/essentials-first-nation-settlement-trusts> [<https://perma.cc/U5LL-KVK6>]; see also *Building Wealth for Indigenous Communities and the Next Generation*, RBC WEALTH MGMT., <https://www.rbcwealthmanagement.com/en-ca/insights/how-canadas-indigenous-communities-can-benefit-from-trust-structures> [<https://perma.cc/H8TU-VQ5G>] ("Many communities have received compensation from settlement agreements, and they have a responsibility to safeguard the assets for the good of their community. Some indigenous communities receive funds through impact benefit agreements with mining or oil and gas companies, which give them a negotiated share of revenue from resource projects on their territories.").

261. Cooper, *supra* note 260.

262. *Id.*

263. RBC WEALTH MGMT., *supra* note 260; see also *Indigenous Services*, T.E. WEALTH, <https://www.tewealth.com/invest/services/indigenous> [<https://perma.cc/JCR4-CMPT>].

264. RBC WEALTH MGMT., *supra* note 260; see also T.E. WEALTH, *supra* note 263.

A specific example of how these settlement trusts work is the Sayisi Dene First Nation Relocation Settlement Trust. In 2016 the Sayisi Dene First Nation received a relocation compensation settlement from the Canadian government in the amount of \$33.6 million as well as some land (and an official State apology).²⁶⁵ The funds were placed in the trust, and independent, as well as First Nation, trustees were selected to help manage the trust.²⁶⁶ Since the creation of the trust, income has been distributed to support various community projects, such as literacy camps, healthy eating initiatives, and the construction of a community facility.²⁶⁷ Generally, trust companies remark, indigenous communities may use the funds to “start planning and assist the youth and their children for healthy prosperous community for future generations.”²⁶⁸

A somewhat similar, stateside example—modeled on the sovereign wealth fund—is the Alaska Permanent Fund. When oil was discovered off the coast of Alaska in 1969, the sale of the lease by the state led to \$900 million in profit.²⁶⁹ Five years later, nearing the completion of the Trans Alaska Pipeline, more revenue was expected in the form of mineral royalties and, at that time, “[m]any of the state’s decision makers supported putting a portion of the expected revenues into a ‘permanent fund,’ where they would be out of reach of day-to-day government spending and generating income into perpetuity.”²⁷⁰ As a result of many public conversations and political debate, the Permanent Fund was formed in 1980 and “ultimately the proceeds were used to support infrastructure and social programs throughout the young state.”²⁷¹

265. *About Us*, SAYISI DENE FIRST NATION: RELOCATION SETTLEMENT TR., <https://www.sdfntrust.ca/about-us> [<https://perma.cc/K7GN-KBQU>].

266. *Id.*

267. *Sayisi Dene First Nation Ongoing Projects*, SAYISI DENE FIRST NATION: RELOCATION SETTLEMENT TR., <http://sdfntrust.ca/ongoing-projects> [<https://perma.cc/EXT8-S289>].

268. SAYISI DENE FIRST NATION: RELOCATION SETTLEMENT TR., *supra* note 265.

269. *History of the Alaska Permanent Fund*, ALASKA PERMANENT FUND CORP., <https://apfc.org/who-we-are/history-of-the-alaska-permanent-fund> [<https://perma.cc/4XY6-4YSG>].

270. *Id.*

271. *Id.* The trust was enshrined in the state constitution. See ALASKA CONST. art. IX, § 15 (“At least twenty-five percent of all mineral lease rentals, royalties, royalty sale proceeds, federal mineral revenue sharing payments and bonuses received by the State shall be placed in a permanent fund, the principal of which shall be used only for those income-producing investments specifically designated by law as eligible for permanent fund investments. All income from the permanent fund shall be deposited in the general fund unless otherwise provided by law.”).

The Fund has grown through successful investing,²⁷² from \$900 million at its inception in 1980 to a value of over \$60 billion in 2017, and all Alaskan citizens benefit from the income that is distributed from the Fund. State residents register every year to receive Fund dividends,²⁷³ which are currently worth between \$1,000 and \$2,000 annually for every individual.²⁷⁴ One Alaskan resident and his spouse have used their dividend payments for things like “heating oil, a new metal roof for their house, remodeling materials, a new septic system, winter clothing, and medical emergencies.”²⁷⁵ Another resident said that “[s]he builds the [Permanent Fund Dividend] into her annual finances, saving it entirely for assistance in paying bills.”²⁷⁶ While not sufficient for families to live on, the funds serve important and useful purposes by helping residents to manage unexpected expenses, pay for education, and ensure that the basics of food and heat are never missing.²⁷⁷ As one commentator has observed, “[I]t’s a truly universal cash transfer program, the only one of its kind to be implemented in the United States, and it almost always offers families enough to eliminate desperate \$2-a-day cash poverty.”²⁷⁸ This kind of financial safety net, which helps to equalize opportunity and eliminate the worst forms of poverty, exemplify the potential of a “citizen trust.”

These kinds of citizen trusts offer an elegant answer to the problem of high-wealth family trusts. To begin, the First Nation Trusts

272. *Our Performance*, ALASKA PERMANENT FUND CORP., <https://apfc.org/our-performance> [<https://perma.cc/Y94G-72TS>]. This is especially so since 2005, when the state legislature removed the allowed investment list from state law so that trustees make investment decisions solely under the guidelines of the prudent investor rule. *Historical Timeline of the Fund and APCF*, ALASKA PERMANENT FUND CORP., <https://apfc.org/who-we-are/history-of-the-alaska-permanent-fund/timeline> [<https://perma.cc/UD8S-4756>].

273. Eligibility requirement can be found here: *Eligibility Requirements*, ALASKA DEP’T REVENUE: PERMANENT FUND DIVIDEND DIV., <https://pfd.alaska.gov/Eligibility/Requirements> [<https://perma.cc/4X5A-46S7>].

274. Richard Feloni, *Nearly Everyone Living in Alaska Gets About \$2,000 a Year from the State’s \$65 Billion Fund. We Asked 9 Alaskans How They Spend It*, INSIDER (Feb. 17, 2019), <https://www.businessinsider.com/alaskans-spend-permanent-fund-dividend-2019-2> [<https://perma.cc/339H-QVV8>].

275. *Id.*

276. *Id.*

277. *Id.*

278. Dylan Matthews, *The Amazing True Socialist Miracle of the Alaska Permanent Fund*, VOX (Feb. 13, 2018), <https://www.vox.com/policy-and-politics/2018/2/13/16997188/alaska-basic-income-permanent-fund-oil-revenue-study> [<https://perma.cc/3ZYU-YL9H>].

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and the Permanent Fund take up the challenge of addressing wealth inequality and use the trust form to benefit not just high-wealth families.²⁷⁹ In the case of First Nation Trusts, the trusts benefit communities of citizens that have suffered mistreatment at the hands of the State and have been historically excluded from enjoying economic growth and prosperity. These trusts serve to facilitate a form of economic reparations, and one protects the assets for future generations, thereby bringing wealth preservation to the entire community.²⁸⁰ In the case of the Permanent Fund, the trust serves as a mechanism to protect and distribute wealth among members of the citizen community.²⁸¹ The trust safeguards the financial health of all citizens, and the dividends add to the wealth of the community, not just the wealth of select families.

These citizen trusts also address the question of cultural wealth and patrimony. In the case of First Nation Trusts, the trust form protects and renders inalienable not just the assets but also the cultural products of richly storied indigenous communities. The trusts consist of settlement funds, but they also include land as well as valuable pieces of each community's cultural heritage.²⁸² The trust form protects these assets and may even explicitly restrict their sale, ensuring that they remain a part of the community's available and visible legacy. Moreover, distributions from these trusts are being spent to build new cultural capital in the form of living history projects, new monuments, and art repatriation.²⁸³ In the case of the Alaska Permanent Fund, the dividends enable all citizens a small financial buffer that might go toward the purchase of family cultural wealth or toward participation in large community cultural events.²⁸⁴

279. One commentator suggests similar trusts as one solution to wealth inequality, stating this: "Promote public-private citizens trusts. These trusts, similar to the Alaska Permanent Fund that now pays annual dividends to every Alaska citizen, could be established in every state[,] . . . acquire income-producing assets[,] and use the income stream from these assets to pay a dividend to citizens of that state." Joseph Blasi & Maureen Conway, *A Better Way to Share the Wealth*, POLITICO (Nov. 20, 2018), <https://www.politico.com/agenda/story/2018/11/20/wealth-inequality-policy-solutions-000790> [<https://perma.cc/4XHV-HH68>].

280. Cooper, *supra* note 260.

281. Matthews, *supra* note 278.

282. SAYISI DENE FIRST NATION: RELOCATION SETTLEMENT TR., *supra* note 265 ("On August 14, 2016, we accepted the Relocation Compensation Settlement [including] the land at Little Duck Lake and an apology.").

283. See *e.g.*, SAYISI DENE FIRST NATION: RELOCATION SETTLEMENT TR., *supra* note 267 (ongoing Churchill experience memorialization project).

284. See, *e.g.*, Matthews, *supra* note 278 (describing the ways that Alaskan residents use their yearly dividend).

Finally, these citizen trusts also build and transfer new kinds of social patrimonies. Through the administration of the First Nations Trusts, community networks grow and expand in new directions. Each trust has both independent and First Nation trustees and, in and of itself, the act of selecting trustees from the First Nation community affirms the community's connection with a strong financial network and enlarges the community's number of contacts and collaborators. One of the First Nation trustees for the Sayisi Dene First Nation Relocation Settlement Trust, Sammi Thorassie, observed this:

Prior to me being a trustee, I didn't understand the whole process and to be honest I wasn't in agreement. I educated myself on the community comprehensive plan and trust documents and saw that we do have a chance for change. As the community trustee I play a big role in guiding with building capacity in our community for our future generations. Growing up we had very minimal resources, and now we have the chance to change that.²⁸⁵

In the case of the Alaska Permanent Fund, the Board of Trustees is composed of six governor-appointed trustees: "Two of the members must be heads of principal departments of state government, one of whom shall be the commissioner of revenue. Four public members fill the remaining seats, which have staggered, four-year terms."²⁸⁶ In this way, trusteeship and the opportunity to be a part of the trust administration is open to members of the public (although the trustees are usually chosen from the financial sector) and rotates, so that power is not perpetually embedded within one particular network or set of contacts. These trusts build resource capacity and—through the administration of the trust itself—form social capital.

The trust form need not, from this perspective, serve as a mode of high-wealth patrimonial inheritance, transferring capital from generation to generation within elite families and creating complex inequalities. Instead, building on the trust form's history as a mechanism for protecting vulnerable parties, trusts can help repair collective and historical injury. Trusts can work to the financial advantage of these collectives and communities by investing and protecting their assets. Trusts can also safeguard new and different types of cultural capital—with an eye to disrupting entrenched cultural hierarchies—and help community members build generative networks that expand their social capital. For this recentring of the trust to happen, resources and reparations need to be allocated to certain communities, particularly marginalized and minoritized ones; each

285. SAYISI DENE FIRST NATION: RELOCATION SETTLEMENT TR., *supra* note 265.

286. *The Board of Trustees*, ALASKA PERMANENT FUND CORP., <https://apfc.org/the-board-of-trustees> [<https://perma.cc/S7V8-LHVV>].

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community's cultural capital needs to be relocated and reproduced; and trust networks need to be reimagined in order to model new lines of power. Nevertheless, trusts bear the possibility of bringing long-term wealth accumulation and management to historically dispossessed and disadvantaged peoples. In this way, the trust form carries within it the seeds of change and the promise of equity.

CONCLUSION

The family trust is, at its core, a wealth preservation entity that transfers multiple forms of wealth, including economic, cultural, and social capital. The family trust has the capacity, based on its plasticity and the control it enables over time, to protect and pass down family patrimonies intact through generations with minimal loss or erosion. These same features allow the family trust to successfully render a family's cultural capital inalienable and to transmit social capital by embedding beneficiaries in preestablished networks.

Understanding the family trust in this way reorients our thinking. First, this framework makes legible all the kinds of capital that families transfer between generations. This patrimony frame also allows us to see better how family trusts facilitate complex forms of inequality by creating wealth gaps, reifying cultural hierarchies, and entrenching elite social networks. In all these ways, family trusts enable inequality along conventional axes of class, gender, and race. Finally, understanding the deep wealth accumulation that family trusts support allows us to realize the ways in which these trusts further a patrimonial politics of inequality.

What remains, then, is to consider whether or not trusts can be reimagined to equalize wealth and other resources across families and communities. Ultimately, drawing on some of the same qualities that make the trust a mode of patrimony, it is possible to redesign the trust such that it generates compound wealth for citizens and communities, particularly those who are economically vulnerable and those who have been historically disadvantaged.