

2019

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Recommended Citation

Tait, Allison Anna, "Is My Family Constitution Unconstitutional?" (2019). *Journal of Inequality Inquiry*. 4.
<https://scholarship.law.umn.edu/jii/4>

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Is My Family Constitution Unconstitutional?

By Allison Anna Tait†

[Edward's] mother explained to him her liberal designs, in case of his marrying Miss Morton; told him that she would settle on him the Norfolk estate, which, clear of land-tax, brings in a good thousand a-year . . . and in opposition to this, if he still persisted in this low connection [to Lucy], represented to him the certain penalty that must attend the match.

- Jane Austen, *Sense and Sensibility*¹

Introduction

Every high-wealth family should write a constitution, at least that's what wealth managers say.² Because, "[w]ithout careful planning and stewardship, a hard earned fortune can easily be dissipated within a generation or two."³ The aphorism "shirtsleeves to shirtsleeves in three generations"⁴ vividly

† Associate Professor, University of Richmond School of Law. Thanks to Erez Aloni, Alex Boni-Saenz, Erin Collins, Meredith Harbach, Claudia Haupt, Corinna Lain, Luke Norris, Carol Sanger, Sarah Swan and participants in panels at both the 2018 International Society of Family Law North American Regional Conference: Inequality and the Future of Family Law at the University of Minnesota Law School and the 2018 Annual Meeting of the Law and Society Association.

1. JANE AUSTEN, *SENSE AND SENSIBILITY* 232 (Claire Lamont ed., Oxford Univ. Press 1970) (1811).

2. High-Net-Worth (HNW) families are worth at least \$5M, according to industry standards. Ultra-High-Net-Worth (UHNW) families are typically worth \$30M by the same standards. *High Net Worth Individual*, INVESTOPEdia, <https://www.investopedia.com/terms/h/hnwi.asp> (last visited Oct. 17, 2018). Constitutions are also recommended for other families, but for those without significant wealth transfer and preservation concerns, the needs are different. See Linda C. McClain, *Family Constitutions and the (New) Constitution of the Family*, 75 *FORDHAM L. REV.* 833, 846 (2006) (discussing the various contexts in which a family may choose to implement a constitution).

3. JAMES E. HUGHES JR., *FAMILY WEALTH: KEEPING IT IN THE FAMILY; HOW FAMILY MEMBERS AND THEIR ADVISERS PRESERVE HUMAN, INTELLECTUAL, AND FINANCIAL ASSETS FOR GENERATIONS* 3 (rev. & expanded ed. 2004); see also Brian Groom, *The Rise of the Family Business Constitution*, *FINANCIAL TIMES* (Dec. 13, 2017), <https://www.ft.com/content/5d06ec9e-c61b-11e7-b30e-a7c1c7c13aab> ("Where the goal of the family is to continue to manage . . . family wealth collectively across the generations, a constitution can be very helpful.")

4. HUGHES, *supra* note 3, at 3 ("[V]ariations of this proverb are found around the

captures this phenomenon and its universalism demonstrates how widespread and entrenched the problem is.

The family constitution, as the name implies, is a governance document that a high-wealth family creates (with the help of a wealth advisor or wealth consulting team). This document sets forth the rules that family members will adhere to in order to protect the family fortune from various kinds of creditor claims, family feuds, and reckless investments.⁵ The constitutional template provides “an overlying set of family principles and governance protocols that keep the different interests and parts of the family wealth structures working together efficiently and successfully.”⁶

Wealth advisors recommend basing family constitutional design on political constitutions, in particular the United States Constitution.⁷ To this end, wealth advisors suggesting that it contain a statement of values (similar to a preamble), and procedures for establishing executive, legislative, and judicial branches.⁸ The executive branch, about which there is little

world.”); see also *Shirtsleeves to Shirtsleeves in Three Generations*, THE MORGAN STANLEY PRIVATE WEALTH MANAGEMENT PODCAST (Dec. 13, 2017), <https://www.morganstanley.com/what-we-do/wealth-management/private-wealth-management/shirtsleeves-to-shirtsleeves> (“The proverb is certainly not unique to the western world. Clogs to clogs, stalls to stalls, rice paddy to rice paddy, shirtsleeves to shirtsleeves. It is a universal cultural proverb because it describes human nature.”).

5. Consultants recommend that a family constitution “include a minimum of 20 to 25 pages and a maximum of 70 pages (including appendices) when the content is more juridical and the family is more complex.” Rocio Arteaga & Susana Menéndez-Requejo, *Family Constitution and Business Performance: Moderating Factors*, 30(4) FAM. BUS. REV 320, 322 (2017); see also *Drawing Up a Family Constitution*, BAKER TILLY HUGHES BLAKE, <https://web.archive.org/web/20171117073820/https://www.bakertillyhb.ie/family-constitution/> (“[T]he Constitution can prove a difficult document to finalise, with many areas open to conflicting views.”) (last visited Mar. 30, 2019). These consultants also recommend allowing six to eight months to create a constitution because “it takes time for family members to agree and commit to the Family Constitution.” Arteaga & Menéndez-Requejo, *supra*, at 323.

6. TAYLOR WESSING LLP, THE FAMILY CONSTITUTION GUIDE 6 (2014), <https://united-kingdom.taylorwessing.com/documents/get/88/the-family-constitution-guide.pdf>.

7. One consultant clarifies that there is really only one choice in terms of political rule: “Every family I know . . . decides that a republic is the best system of family governance.” HUGHES, *supra* note 3, at 24.

8. Alexander Koerberle-Schmid, *The Benefits of a Family Constitution*, KPMG (July 10, 2017), <https://home.kpmg.com/xx/en/home/insights/2017/07/a-family-constitution-increases-family-cohesion-and-business-connectivity.html> (“[Creating a family constitution] can take between six to twelve months.”); Rupert Walker, *The Lasting Legacy*, THE PEAK 90, 92 (BNY Mellon), https://www.bnymellonwealth.com/assets/pdfs-strategy/the_peak_chuck_long.pdf (“Typically, this process lasts one or two years.”). But *c.f.* *Family Constitution*, ATENEO FAM. BUS. DEV. CTR., <http://ateneo>

discussion, may act as an administrative branch or may consist of a council that possesses the authority to make quick decisions on either routine matters or in emergency situations.⁹ The legislative branch is tasked with creating rules to govern the behavior of family members in a variety of domains, but especially on matters pertaining to marriage, divorce, and death – events that have the potential to be costly in a financial sense without the proper legal safeguards.¹⁰ Finally, the judicial branch, using family constitutions, mediate when family members encounter conflict or violate rules, to offer advisory opinions on matters of family business, or to adjudicate issues of concern.¹¹

But why, precisely, do wealth advisors suggest a constitution? Why not a mission statement or a strategic plan, building on the family-as-business analogy? Constitutions are critical, wealth advisors state, because they create a structure to govern all family members and their relationships to family wealth.¹² The constitution acts as a governance mechanism – a form of disciplinary technology – and enables a high-wealth family to control the behavior of its members in a way that other expressions of family purpose, like a mission statement, do not. The family constitution is more than a set of bylaws, a plan for inheritance, or the documentation of family aspirations.¹³ A family constitution is a scaffold that supports and regulates the family by imposing a governmental frame.¹⁴

Despite the fact that wealth managers use this analogy between family and political constitution unwaveringly, one

offamilybusiness.weebly.com/constitution-crafting.html (offering a two-day workshop to craft a family constitution).

9. Family Governance—The Why, What, and How for Affluent Families, LEBEL & HARRIMAN (Oct. 25, 2017), <http://lebelharriman.com/resources/news/article/2017/10/25/family-governance--why-what-affluent-families/> (last visited Mar. 30, 2019).

10. *Id.*

11. *Id.*

12. We the Family: The Benefits of Creating a Family Constitution, BROWN BROTHERS HARRIMAN (Nov. 27, 2017), <https://www.bbh.com/en-us/insights/we-the-family--the-benefits-of-creating-a-family-constitution-24624> (“Traditional governing documents such as shareholders’ agreements, company bylaws and even estate planning documents are characterized by technical language necessary to achieve desired legal, tax and administrative results. This language is not appropriate for a family constitution.”) (last visited Feb. 15, 2019).

13. *Id.*

14. *Id.*

question never addressed in the financial planning discourse is: “How perfect is the analogy between the [family constitution] and the U.S. Constitution?”¹⁵ No analogy is, of course, perfect. And no one expects a family constitution to replicate the U.S. constitution in exact detail. Nevertheless, by taking on the form of a political and democratic constitution, the family constitution raises the question of what constitutional principles inhere in and guide this specialized document.

This brief Article posits that the analogy between the two types of constitutions is imperfect in several significant ways and mainly because family constitutions largely ignore some of the core principles that animate a democratic constitution. Specifically, family constitutions fail to protect minority groups through a guarantee of equal protection. Likewise, family members embroiled in conflict lack due process rights, rights that would help ensure fair treatment and a more transparent exercise of governmental authority. Finally, the typical family constitution template fails to provide any mechanism for amending the constitution, enabling the document to remain responsive to changing circumstances and the needs of the family polity.

The family constitution may, in certain respects, mimic the United States Constitution by layering structure over family interactions. Whereas the United States Constitution sets forth the rights *and* responsibilities of citizens, the family constitution centers primarily on the responsibilities of family members. In order for the comparison between the constitutions to be a dynamic one, a family constitution should also protect the rights of family members, providing safeguards against embedded forms of discrimination as well as other instances of inappropriate dead-hand control. In other words, a family constitution need not and should not run the risk of its provisions contravening constitutional values.

I. Family Law Rules

The family constitution template is first and foremost “[a] tool intended to help the family to stay together and to stay wealthy for more than three generations.”¹⁶ Accordingly, family

15. McClain, *supra* note 2, at 840. McClain takes a different track in her article than the approach taken here. She uses family constitutions to explore the difference between a constructivist model of the family and the “natural” model. *Id.* at 836.

16. CHRISTIAN G. STEWART, FAMILY LEGACY ASIA (HK) LTD., HOW TO CRAFT YOUR OWN FAMILY CONSTITUTION: AN OVERVIEW 1 (2013), <http://www.familylegacy>

events and relationships that implicate wealth distribution and erosion are a special concern for the family government.¹⁷ One of the core areas of regulation, then, is what we would consider family wealth rules—rules concerning marriage, divorce, and the transfer of wealth on death. Wealth advisors recommend that families pay particular attention to these rules because “[u]nexpected death, or the divorce of a family member . . . can paralyse a structure and produce major problems and uncertainty for the family members who have a stake in the family wealth structures.”¹⁸

In this Section, I describe what typical family wealth rules look like in a family constitution and analyze the ways in which the typical rules may constrain the behavior of family members.

A. *Marriage Rules*

One of the most important tasks delegated to the family legislature is to craft the rules that govern family marital relationships.¹⁹ Advisors suggest that families pay particular attention to divorce because “[m]atrimonial breakdown is a major problem for family wealth structures.”²⁰ Divorce, advisors warn, has the potential to be “one of the world’s biggest destroyers of wealth. . . [because]. . . laws designed to protect a spouse can be abused to provide a spouse with rights to family businesses and wealth that by no stretch of the imagination should they have access to.”²¹

asia.com/whitepaper_pdf/Overview%20of%20how%20to%20craft%20a%20family%20constitution.pdf.

17. The other most important area of law for the family is corporate law. Family legislatures are encouraged to create a system of rules to facilitate the smooth running of the family business. *See, e.g.,* McClain, *supra* note 2, at 865–68.

18. TAYLOR WESSING LLP, *supra* note 6, at 9. A family constitution might also address “the risk that a family member becomes the ‘black sheep’ of the family in that they fail to properly engage with the family office/businesses or with the ethos of the family.” *Id.* at 7. Or, the constitution might govern the procedure for dealing with “a substantial claim brought by a creditor against the family.” *Id.* at 9. A card game makes this clear— Keeps Me Awake at Night—where “[e]ach card describes a particular issue related to wealth, like ‘Legacy’ or ‘Illness & Death.’” Robert Milburn, *SunTrust Uses Games to Help Clients Prioritize Finances*, BARRON’S (Oct. 2, 2015), <https://www.barrons.com/articles/suntrust-uses-games-to-help-clients-prioritize-finances-1443801518>.

19. McClain, *supra* note 2, at 865–68.

20. TAYLOR WESSING LLP, *supra* note 6, at 33.

21. PHILIP MARCOVICI, *THE DESTRUCTIVE POWER OF FAMILY WEALTH: A GUIDE TO SUCCESSION PLANNING, ASSET PROTECTION, TAXATION, AND WEALTH MANAGEMENT* 107, 112 (2016).

In a number of jurisdictions, wealth managers warn that it is easy to secure the court's jurisdiction to deal with matrimonial disputes and also to persuade the court "to take a robust approach to family wealth structures."²² Wealth managers routinely stress the significant discretion that family court judges have (the U.K. is often used as an example), such that even placing family assets in a discretionary asset-protection trust might not suffice to protect them at divorce. High-profile divorces such as the 2014 Poon case in which the wife of Otto Poon received a payout of over HK\$700 million after trust assets were determined to be marital property²³ have reinforced this message.²⁴

To address the problem of divorce, family constitutions routinely dictate certain protocols for family members who are planning marriage, most commonly requiring that they create prenuptial agreements. Prenuptial agreements allow the high-wealth family "to 'ring-fence' family wealth that a son or daughter may have inherited or will be inheriting during their lifetime."²⁵ This "ring-fencing" is accomplished mostly by specifying certain characterizations of marital and separate property, what assets will go to each spouse in the event of a divorce, and choice of law preferences.²⁶ Wealth managers claim that putting such protocols in the family constitution may be an advantage not just for the family balance sheet but also for the family member contemplating marriage: "What's great about this approach is it allows your daughter to tell her future husband, 'this prenuptial agreement isn't my idea, my family is making me do it,' which could smooth over what would otherwise be a difficult conversation."²⁷ To ensure the effectiveness of the

22. TAYLOR WESSING LLP, *supra* note 6, at 33.

23. Julie Chu, *HK\$766m Divorce Payout for Ex-Wife of Leading Engineer Otto Poon*, S. CHINA MORNING POST (July 17, 2014), <https://www.scmp.com/news/hong-kong/article/1555849/hk766-m-divorce-payout-ex-wife-leading-engineer-otto-poon>.

24. Jennifer Hughes, *Hong Kong Divorce Case Rattles Family Trust Industry*, FIN. TIMES (July 17, 2014), <https://www.ft.com/content/f953e8e4-0d92-11e4-815f-00144feabdc0>.

25. 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>.

26. See TAYLOR WESSING LLP, *supra* note 6, at 7 ("For example, [the constitution] can seek to anticipate and deal with difficult situations such as the marriage breakdown of certain members of the family.").

27. Schultz, *supra* note 25 ("It's a much better sales pitch . . . But writing a prenuptial agreement requirement into a family constitution, while practiced in Europe and the U.S., is not common among wealthy families in East Asia, at least not yet.") (internal citations omitted); see TAYLOR WESSING LLP, *supra* note 6, at 16 ("A structured dialogue . . . will de-sensitize these issues and foster an environment

prenuptial agreement, wealth advisors also recommend that the family constitution mandate the creation of small trusts for all individuals who marry into the family. These small trusts, advisors remark, “throw a bone to the divorcing sons- and daughters-in-law, heading off challenges to the *real* family wealth.”²⁸

Family constitutions may, in addition to requiring a prenuptial agreement, include provisions about who family members may marry. For example, in the well-known case of *Shapira v. Union National Bank*, a father conditioned a bequest to one of his sons such that the son “should receive his share of the bequest only if he is married at the time of my death to a Jewish girl whose both parents were Jewish.”²⁹ If the son did not marry a Jewish girl within seven years after the death of the father, then the money was to go to the State of Israel.³⁰ Family constitutions could, likewise, stipulate that family members were required to marry within a certain race or ethnicity—or alternately prohibit certain marital unions based on race, ethnicity, religion, or sexual orientation.³¹

Accordingly, marriage law rules in family constitutions may further the family’s wealth preservation goals but these rules may also abridge the marital choices and freedom of family members.

B. Wealth Transfer on Death

Death is another event in the family wealth timeline that can trouble wealth management if the proper planning is not put into place—and an event wealth managers recommend families address. Here again, family constitutions can be extremely useful in providing a reliable framework for wealth transfer upon the death of family members. Estate planning done through the family constitution not only helps families avoid probate proceedings and transfer tax on death, but also ensures that family assets are distributed according to a well-designed plan rather than through default rules. Advisors emphasize that the

of understanding and mutual respect.”).

28. BROOKE HARRINGTON, *CAPITAL WITHOUT BORDERS: WEALTH MANAGERS AND THE ONE PERCENT* 164 (2016) (emphasis in original).

29. *Shapira v. Union National Bank*, 315 N.E.2d 825, 826 (Ohio Ct. C.P. 1974).

30. *Id.*

31. Incentive trusts, which are popular mechanisms for extending control over family members, are used to the same effect and condition the receipt of trust distributions on a wide array of conditions, from school enrollment to sobriety to staying married. ROBERT H. SITKOFF & JESSE DUKEMINIER, *WILLS, TRUSTS, AND ESTATES* 9–10 (10th ed. 2017).

family constitution is not the place to detail the substance of an estate plan—that is most likely done in trust documents and perhaps an accompanying will. Nevertheless, the family constitution can add detail to the estate planning documents and put them in context with more personal detail than might go into the legal documents.³²

Some family constitution rules might be practical without being onerous, placing little burden on family members. Family constitutions might require, for example, that all family members engage in estate planning by creating a will or trust, make provisions for guardians as needed, and keep beneficiary designations up-to-date. Family constitution rules for wealth transfer might also, however, burden or constrain the rights of certain family members. Safeguarding family wealth as much as possible, the family constitution might outline general expectations of who a family member's beneficiaries will be at death and might circumscribe bequests or transfers outside the family. This is particularly true if the wealth transfer involves shares in the family business and an accompanying transfer of organizational leadership. The family constitution might, in these cases, contain directives about succession planning in the family business and might dictate the transfer of leadership (and ownership) to one particular person in the family. Ideally, the family would discuss and debate all of these provisions. Nevertheless, these kinds of provisions could be included by the family founder or other family leaders without discussion or even notice.

Ultimately, then, because family law directives can help manage how money flows in and out of the family at marriage, divorce, and death, family legislatures must provide rules and guidelines for dealing with these major family events in order to maximize wealth preservation.

II. Family Member Rights

While family constitutions set forth, sometimes in great detail, the responsibilities of family members in the great project of managing family money, these same documents are almost uniformly silent about some of the most basic rights of family members. In this Section, I discuss how this lack of certain family member rights creates a disjuncture with the constitutional

32. See Deborah S. Gordon, *Mortality, and Identity: Wills, Narratives, and Cherished Possessions*, 28(2) *YALE J.L. & HUMAN.* 265, 266–67 (2016).

framing and democratic aspirations of the high-wealth families writing family constitutions.

A. *The Absent Equal Protection Clause*

One ‘constitutional’ principle that is notably absent from the family constitution template is any mention—much less guarantee—of equality or non-discrimination. A hallmark of most democratic constitutions has typically been a statement of equality between citizens.³³ One example of this type of equality safeguard appears in the Equal Protection Clause of the U.S. Constitution’s Fourteenth Amendment.³⁴ This Clause protects citizens from rules that draw a distinction among people based on specific characteristics, such as race, gender, age, disability, or other traits, attempting to both recognize, secure, and preserve minority-group rights.³⁵

Citizenship built through the family constitution brings few, if any, assurances of equal treatment among family members or safeguards of the right to be safe from discrimination. Accordingly, as discussed in the previous section, family constitutions may include provisions with marital restrictions that evidence various kinds of bias or discriminatory intent. What are we to make, then, of the constitutionality of a family constitution with such provisions?

Courts have already taken up and answered some of these questions about the constitutionality in the context of restricted bequests. In *Shapira*, where the father required his son to marry a Jewish woman in order to inherit, the court ruled that the bequest did not infringe the son’s constitutional rights because he was indeed free to marry whomever he wished, even though his choice might entail a financial cost.³⁶ Because the conditional

33. See generally Freedom and Equality, AMERICAN BAR ASSOCIATION, https://www.americanbar.org/groups/civics/freedom_and_equality.html (offering a civics educational curriculum exploring freedom and equality in the United States).

34. U.S. CONST. amend. XIV. This constitutional amendment was ratified following the U.S. Civil War. “The Constitution as originally drafted and ratified had no provisions assuring equal protection of the laws. This, of course, is not surprising for a document written for a society where blacks were enslaved and where women were routinely discriminated against.” ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 711 (4th ed. 2013).

35. U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”); CHERMERINSKY, *supra* note 34, at 716.

36. *Id.* at 827–28. “In the case at bar, this court is not being asked to enforce any

bequest did not place a total ban on the son's marrying, the ban did not violate public policy.³⁷ Reinforcing this conclusion, was the fact that no child has any legal right or entitlement to an inheritance (unlike a surviving spouse).³⁸ Any bequest, gift, or trust distribution that a child receives is, legally speaking, an act of generosity rather than the fulfillment of an expectation.³⁹

Shapira, accordingly, demonstrates the limits of constitutional thinking regarding restrictions placed on marriage in the inheritance context. Nevertheless, the ruling in *Shapira* has its own limits and other, different restrictions might easily violate public policy in the constitutional calculus—especially restrictions aimed at limiting a family members marriage according to race or gender. Restrictions in a family constitution that place a total restraint on a family member's right to marry or, alternately, encourage divorce would clearly be against constitutional principle and public policy.⁴⁰ Consequently, if families want to take seriously the notion of a democratic family constitution and all the guarantees that come with it, then it is important the document provide certain protections against inequality and discrimination.

B. The Due Process Deficit

Another constitutional principle intimately connected to democratic governance is that of due process. Due process rights are meant to provide citizens with certain protections against arbitrary decision-making, unchecked judicial discretion, and undisclosed processes.⁴¹ The right of due process generally “refers to the procedures that the government must follow before

restriction upon Daniel Jacob Shapira's constitutional right to marry. Rather, this court is being asked to enforce the testator's restriction upon his son's inheritance.” *Id.* at 827.

37. *Id.* at 829. “It is the conclusion of this court that public policy should not, and does not preclude the fulfillment of Dr. Shapira's purpose, and that in accordance with the weight of authority in this country, the conditions contained in his will are reasonable restrictions upon marriage, and valid.” *Id.* at 832.

38. *Id.* at 828. A surviving spouse cannot be disinherited because of the elective share, etc. See SITKOFF & DUKEMINIER, *supra* note 31, at 521.

39. *Id.*

40. See SITKOFF & DUKEMINIER, *supra* note 31, at 12 (“The weight of authority holds that a *total or general restraint* on marriage or a provision encouraging divorce is void as contrary to public policy unless the donor's dominant purpose was to provide support until marriage or in the event of a divorce.”).

41. CHEMERINSKY, *supra* note 34, at 1143.

it deprives a person of life, liberty, or property.”⁴² This is another way in which the family constitution template falls short. The typical family constitution makes no mention of due process rights. On the contrary, some of the judicial provisions and procedures included in the family constitution may actually run the risk of unfairly abridging the due process rights of family members.

The judicial branch as established by a family constitution is, broadly construed, meant to help families navigate conflict by providing “protocols”⁴³ or a “road map”⁴⁴ to deal with problems. And, ideally, creating and maintaining a judicial branch allows family problems to be resolved with the least amount of emotional and psychological drama possible: “The desired outcome is rational economic and family welfare decisions that are not overwhelmed by traditional family dynamics.”⁴⁵ Nowhere in the family constitution literature, however, do the concepts of fair hearing and procedural rights factor into the design of the family judiciary.

In general, the dispute resolution process as managed by the judicial branch is envisioned as something more akin to mentoring or mediation. Wealth advisors suggest that this is a role particularly suited to “family elders”⁴⁶ who have the necessary experience and wisdom to confront and navigate conflicts when they arise.⁴⁷ One example epitomizes this emphasis on friendly intermediation: “The members of one business-owning family hold a family meeting every six months. . . In addition to a facilitator, the family meetings are always

42. *Id.* In the United States Constitution, due process rights are—like equal protection rights—enshrined in the Fourteenth Amendment. U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .”).

43. Arteaga & Menéndez-Requejo, *supra* note 8, at 322.

44. See *Four Keys to Writing Your Family Constitution for 2016*, STEWARDSHIP (Dec. 28, 2015), <https://www.stewardship.com/articles/4-keys-to-writing-your-family-constitution>.

45. ERNESTO J. POZA, FAMILY GOVERNANCE: HOW LEADING FAMILIES MANAGE THE CHALLENGES OF WEALTH 3 (Credit Suisse Group 2016), <https://www.credit-suisse.com/media/assets/apac/docs/cs-family-governance-white-paper.pdf>.

46. *Id.* If the family group is a small one, the judicial decision-makers may be the parents, which may already be problematic since parents are inherently vested with a positional authority that children may be unwilling to question. HUGHES, *supra* note 3, at 22 (“[T]hese matters naturally flow up for decision to my parents.”).

47. A family elder is, according to one advisor, not necessarily defined by age but rather by their ability “to bridge the communication gap between generations.” Stewart, *supra* note 16, at 48.

attended by a retired uncle-in-law, whose business sense and judgment is respected by the founder and the sons.”⁴⁸ This type of advisory role fits neatly with the “family elder” persona, and many examples given by wealth advisors focus on this type of family business mentoring.⁴⁹ In this way, the judicial branch can help family members navigate the wealth preservation rules by offering a form of advisory opinions.⁵⁰

Unsurprisingly, however, other situations can and do arise in which the family judiciary might be called upon to act in a more arbitral role: “Family elders can be given the authority in the family constitution to facilitate resolutions when there are disputes among family members, or otherwise have responsibility for ensuring compliance with the family’s conflict-resolution processes.”⁵¹ When these kinds of more persistent and acrimonious family conflicts arise, several due process problems with the family constitution become more evident.

First, the family constitution literature contains no language about judicial sanctions or sentencing—the consequences of violating family constitution rules are never mentioned. What penalties, then, would be at the disposal of the “Council of Family Elders” and how might the Council evaluate the situation? The most obvious penalties would be financial ones—family members who violate family constitution rules might be in danger of losing access to trust distributions, an allowance, family employment, or other types of financial subsidy from the family coffers. Losing a bequest or trust distribution might not be against constitutional principles, as *Shapira* teaches us. Nevertheless, the potentially arbitrary nature of these kinds of ad hoc penalties and sanctions, imposed without notice, present a troubling fit with democratic constitutional principles of due process.

A second problem with the judicial management of the family is that family members are often barred from taking their grievances outside of the family. One wealth management company presents an interesting example in which a son disagreed “with his father, and other senior executives of the

48. Stewart, *supra* note 16, at 47.

49. *Id.*

50. Hughes states that one of the roles of the judicial branch is to “[r]ender the advisory opinions to the family.” HUGHES, *supra* note 3, at 174.

51. The same advisor suggests that the family elder role might be performed by a trust protectors committee. *Id.*

family business”⁵² Their dispute resulted in an attempt on the son’s part to begin “legal proceedings in a jurisdiction that would have resulted in a public and damaging fight over his position.”⁵³ Fortunately for the family, the wealth manager remarks, “clearly stated family protocols” in the family constitution prevented the son from taking such action and safeguarded the family’s wealth, privacy, and reputation.⁵⁴ These kinds of restrictions on access to decision-making fora and public processes could be construed as a violation of the family member’s due process rights, especially if the family member has not consented to abide by such terms and conditions.

Providing a window into how these kinds of clauses in family constitutions may or may not inhibit due process rights, courts are currently addressing similar kinds of conditions in the context of mandatory arbitration clauses in both wills and trust documents. For example, in a 2004 case from Arizona, *Schoneberger v. Oelze*,⁵⁵ the court considered the validity of a trust created by parents for their two daughters that “set[] out in minute detail dispute resolution procedures.”⁵⁶ These procedures were ordered in “progressive stages of increasing complexity and involvement,” beginning with a “‘Stage One-Notice of Discomfort’ and ending with a ‘Stage Six-Arbitration.’”⁵⁷ When the daughters brought claims against the trustee to court ten years later,⁵⁸ the court held that the beneficiaries had not given their consent to arbitration and, consequently, mandatory arbitration was unacceptable.⁵⁹

Family constitution framers who want their constitutions to align not just in form but also in substance with democratic constitutions should demonstrate a concern for the due process rights of all family members. Family framers should task the judiciary branch with creating standardized responses to family

52. TAYLOR WESSING LLP, *supra* note 6, at 11.

53. *Id.*

54. *Id.* Again, the literature is largely silent on what penalties might have befallen the son if he had violated the family protocol.

55. 96 P.3d 1078, 1084 (Ariz. Ct. App. 2004), *superseded by statute*, Act of May 21, 2008, ch. 247, § 16, 2008 Ariz. Sess. Laws 1119 (codified at Ariz. Rev. Stat. § 14-10205 (2012)).

56. *Id.* at 1080.

57. *Id.* (internal quotation marks omitted).

58. Approximately ten years after the trusts were created, the daughters brought claims of breach of trust, conversion, and fraudulent concealment against the trustees, claiming in addition that the trustees had mismanaged and dissipated the trust funds. *Id.*

59. *Id.* at 1083–84.

constitution violations and seek ratification and approval of these terms and conditions from the larger family. Family constitutions will be constitutional in principle as well as configuration only when the guarantee of procedural safeguards and fair processes for family members is in place.

C. *The Overlooked Amendment Process*

Finally, family constitutions should address processes for modification in order to actualize the constitutional principles of their political counterparts. Ideally, any problems of discriminatory rules or unfair processes that arise with a family constitution should be able to be addressed, as needed, through constitutional amendment.⁶⁰ The ability to amend outdated provisions and the mechanism for doing so are essential if the constitution is to remain responsive to circumstances and vital within its time: “Changes in social organization, in technology, and in morality all require that the constitution evolve . . . Those drafting a constitution cannot possibly imagine the myriad of issues that will arise decades and centuries later.”⁶¹ In the language of family wealth, the ability to amend a governing document helps to mitigate the excesses and inefficiencies of dead-hand control.⁶²

Family constitutions generally do not contain a mechanism for amendment or even any language to address the problems of an unchanging document. One wealth consultant, going against the grain, has recognized this problem and states: “It is unrealistic to expect a single, unrevised family constitution to withstand the many changes that will occur in the future . . . [and] future family members may not feel an allegiance to a constitution that they did not have a hand in creating.”⁶³ The lack of an amendment mechanism can lead to a certain strain of family constitutions that

60. The United States Constitution provides a mechanism for amendment in Article 5: “The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes. . .” U.S. CONST. art. V.

61. Erwin Chemerinsky, *Amending the Constitution*, 96 MICH. L. REV. 1561, 1561 (1998).

62. See generally Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189 (1985).

63. Karin Prangle & Anne Warren, *We the Family: The Benefits of Creating a Family Constitution*, Brown Brothers Harriman (Nov. 27, 2017), <https://www.bbh.com/en-us/insights/we-the-family--the-benefits-of-creating-a-family-constitution-24624>.

another wealth manager calls “Monument to the Founder” constitutions, meant to “honor the extraordinary achievements of the heroic wealth creator.”⁶⁴

Many family constitutions represent this kind of “monument” to a founding family member or an original generational cohort of members. They are documents created to memorialize the legacy of the person or people who started the family dynasty or business—sometimes even written by that same person. One of the problems with this type of constitution is that, “the bigger the Monument to the Founder, the bigger the shadow it can cast.”⁶⁵ Consequently, this kind of constitution can be “restrictive,” typified by the lack of provision “for easy or fair exit mechanisms [and by an] unwillingness to have to deal with the ‘messiness’ of divergent voices and opinions.”⁶⁶ From this perspective, these kinds of family constitutions are more akin to a will or trust instrument that exists to express the will of the settlor than to a democratic constitution. The traditional rule, in fact, was that irrevocable trusts could be modified only in limited circumstances, based on respect for testator intent: “[A] testator has a right to dispose of his own property with such restrictions and limitations, not repugnant to law, as he sees fit, and . . . his intentions ought to be carried out, unless they contravene some positive rule of law, or are against public policy.”⁶⁷

The need for an amendment process becomes more obvious and pressing when one views the family constitution as a democratic constitution rather than an amplified trust document. As one scholar comments: “Formal provision for constitutional amendment is now a near universal feature of national

64. CHRISTIAN G. STEWART, FAMILY LEGACY ASIA (HK) LTD., THE THREE FAMILY CONSTITUTION ARCHETYPES 1 (2015), at 3. The same advisor writes that the “Monument to the Founder” family constitution is one of the “three basic family constitution archetypes.” *Id.* at 1. The others are “Family First Constitution” and “Expert Structure.” *Id.*

65. *Id.* at 3.

66. *Id.* “It might be created in a top down fashion without any real participation from the members of the rising generation of the family.” *Id.*

67. *Claffin v. Claffin*, 20 N.E. 454, 456 (Mass. 1889). Even long-standing, irrevocable trusts can be modified under the right circumstances. The *Claffin* doctrine states that a trust can be modified with the consent of all beneficiaries and if the modification is not contrary to a material purpose of the trust. *See id.* The Uniform Trust Code has softened the requirement somewhat, stating that the modification must not be “inconsistent with a material purpose of the trust.” *See* UNIF. TR. CODE § 411(a) (UNIF. LAW COMM’N 2010). The Uniform Trust Code also eliminates the requirement of consent from all beneficiaries as long as all interests are adequately protected. *See id.* § 411(e).

constitutions.”⁶⁸ Democratic constitutions, in the main, provide some mechanism for amendment. For example, Article V of the U.S. Constitution allows for constitutional amendment if the proposed change is properly ratified by the states.⁶⁹ Whatever shape they take, mechanisms are important because they “promote processes of democratic self-government” and help “facilitate certain valuable forms of constitutional pre-commitment, particularly those having to do with minority rights and inclusion.”⁷⁰ Family constitutions that are “monuments” to the legacy of the constitution founders risk impairing these democratic and inclusion values in ways we have already seen.

High-wealth families with constitutions should, therefore, consider ways to create amendment power within their governing documents. The legislative body, already constituted by the family constitution, could easily be tasked with crafting a procedure for constitutional amendment. Moreover, most family constitutions provide for family assemblies and meetings at which family members could vote on such proposals. Morgan Stanley, in the family constitution template that the company provides, does just this. Section seven of the template states “The Family Advisory Board may take any action it deems appropriate ... including amending the Constitution or its By-laws, with the written consent of a majority of its then acting voting members.”⁷¹

Creating an amendment power through family deliberation and ratification would help transform a family constitution from being a “monument” constitution to a “family first” constitution that places a “premium on the family values of togetherness,

68. Rosalind Dixon, *Constitutional Amendment Rules: A Comparative Perspective*, 1 (Univ. of Chicago Law Sch. Pub. Law & Legal Theory Working Paper No. 347, 2011), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1070&context=public_law_and_legal_theory. There is great variation of what the rules look like and in the level of difficulty.

69. “The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified” U.S. CONST. art. V.

70. Dixon, *supra* note 68, at 102.

71. *Family Constitutions and Family By-Laws*, MORGAN STANLEY https://advisors.morganstanley.com/michelle.ward/documents/field/w/wa/ward-sofia-michelle/Family_Constitution_and_Family_By_Laws.pdf.

equality and harmony”⁷² or a “wise” constitution that reflects an “aware[ness] of the culture and capacity and skills of the client family, as well as the transitions the family are facing.”⁷³ Furthermore, regardless of the label put on the family constitution, creating amendment power would help families realize the constitutional values they seek to capture when choosing to write a constitution.

Conclusion

No one expects a family constitution to replicate a democratic constitution in each and every way possible. Families are not vast political entities and they do not require the same sophisticated level of governance that states do. Nevertheless, family constitutions attempt to capture the form of a democratic constitution and import its foundational design. It is also therefore apt to measure the substance of the family constitution against that of the democratic constitution, seeking an integration of the democratic principles that enliven and illuminate political constitutions. What emerges from this mapping exercise is that family constitutions, in their current iterative state, focus on the regulation and responsibilities of the family citizenry, failing sometimes to secure and safeguard basic rights of equality and fairness. To be constitutional both in design and principle, these family governance documents must change. They must guarantee family member rights and remedies and ensure that the constitution, through amendment, remains sufficiently flexible and relevant to meet family needs through the generations.

72. STEWART, *supra* note 64, at 4.

73. *Id.*