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## Less Trust Means More Trusts

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# Less Trust Means More Trusts

Bridget J. Crawford\*

## *Abstract*

*The word “trust” has multiple meanings. In everyday speech, it refers to a feeling of confidence associated with integrity, such as trusting that a friend will keep a secret. In the financial context, some law students, lawyers and lucky individuals also understand that a trust is a near-magical device that splits legal and equitable title. A trustee holds formal legal title to property for the benefit of a beneficiary simply because the grantor declares it to be so. By turning the spotlight on “trust,” in both senses of the word, one can discern fault lines in contemporary U.S. political and legal structures. These are made even plainer when examined through the lens of ongoing litigation involving human embryos created by actress Sofia Vergara and her former fiancé.*

*Just as termites can enter homes through foundational cracks or wood brought from the outside, interpersonal, community or structural confidence may erode in the face of hostility, indifference or inequality. Similarly, as termites can slowly damage a home over a period of years before the harm becomes visible, the beneficial form of ownership known as a trust gradually—and then suddenly—has morphed almost beyond recognition over the last twenty-five years. Eaten away are the traditional limitations on trust duration, trust modification and the type of property that can be held in trust. In some states, irrevocable trusts can last forever, be decanted to another trust with entirely different terms, or even hold legal “title” to human embryos. These changes to centuries of trust law reveal changing attitudes about wealth, property ownership, and personal*

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*autonomy. If society truly values equal opportunity for all people, then trust—and trusts—need attention.*

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### *I. Introduction*

The word “trust” has multiple meanings. In everyday speech, it refers to a feeling of confidence associated with integrity, such as *trusting* that a friend will keep a secret.<sup>1</sup> When passengers board an airplane, they *trust* that the pilot is qualified and competent.<sup>2</sup> Trust also is the fragile and vulnerable precondition for democracy’s existence.<sup>3</sup> Just as wood girds a house, trust girds

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1. See, e.g., Steven Lubet, *Linda Tripp Deserves to Be Prosecuted*, *NEWSDAY*, Aug. 25, 1999, at A39 (detailing Monica Lewinsky’s misplaced trust in her “friend” Linda Tripp who, at the behest of law enforcement, recorded conversations about Lewinsky’s relationship with President Clinton).

2. Bill Murphy, Jr., *American Airlines Flight Was Canceled for a Truly Insane Reason (Hint: It’s the Last Thing Any Passenger Ever Wants to Hear About the Pilot)*, *INC.* (Feb. 9, 2019), <https://www.inc.com/bill-murphy-jr/an-american-airlines-flight-was-just-canceled-for-a-truly-insane-reason-hint-its-last-thing-any-passenger-ever-wants-to-hear-about-pilot.html> (last visited Mar. 30, 2019) (reporting on the removal of an American Airlines pilot in Manchester, England on the suspicion of being intoxicated) (on file with the Washington and Lee Law Review).

3. See, e.g., Mark Warren, *Trust and Democracy*, in *THE OXFORD HANDBOOK*

a society. Thomas Jefferson knew it.<sup>4</sup> Alexander Hamilton knew it.<sup>5</sup> Both men understood *trust* as foundational to government, although they had different views on who could be trusted to lead.<sup>6</sup> Both would have agreed that trust must flow at a minimal rate from the government to the people and from the people back to the government, as well as among the people. Otherwise, *We the People* lose confidence in the political and legal structures that are fundamental to society.<sup>7</sup>

Although the comparison may surprise at first, *trust*—in the plain-meaning sense and in a political sense—connects deeply to the legal device known as a *trust*. Law students, lawyers and lucky individuals understand that a *trust* is a near-magical device, splitting legal and equitable title between a trustee and a beneficiary.<sup>8</sup> A trustee holds formal legal title to property for the

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OF SOCIAL AND POLITICAL TRUST 75 (Eric M. Uslander ed., 2018) (“Democracy and trust have an essential but paradoxical relationship to one another. . . . Trust in governments enables citizens to provide collectively conditions for good lives. Yet the institutions of democracy were founded on distrust, especially of the powerful.”).

4. Thomas Jefferson identified two groups in the early nation: “[T]hose who fear and distrust the people . . . [and] those who identify themselves with the people, have confidence in them, cherish and consider them as the most honest and safe . . . .” Letter from Thomas Jefferson to Henry Lee, 10 August 1824, FOUNDERS EARLY ACCESS, <https://rotunda.upress.virginia.edu/founders/default.xqy?keys=FOEA-print-04-02-02-4451> (last visited Mar. 30, 2019) (on file with the Washington and Lee Law Review).

5. Alexander Hamilton imagined a sort of ruling class with greater authority and rights to participate in a democratic government. Hamilton said that communities naturally divided into “the few” and “the many.” 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 299 (Max Farrand ed., rev. ed. 1966) (statement of Alexander Hamilton at Constitutional Convention). Hamilton believed that the “few” (whom he called “rich and well-born”) would effectively check any improper impulses of the masses. *Id.*

6. See generally JOHN FERLING, JEFFERSON AND HAMILTON: THE RIVALRY THAT FORGED A NATION xv (2013) (“Politics in the broadest framework is likely to witness continuing divisions over the competing ideas that set Jefferson and Hamilton at odds.”).

7. See generally STEVEN LEVITSKY & DANEIL ZIBLATT, HOW DEMOCRACIES DIE 77 (2018) (“The erosion of democracy takes place piecemeal, often in baby steps. Each individual step seems minor—none appears to truly threaten democracy. Indeed, government moves to subvert democracy frequently enjoy a veneer of legality.”).

8. See, e.g., Scott Andrew Shepard, *A Uniform Perpetuities Reform Act*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 89, 116–17 (2013) (describing the trust’s split of

benefit of a beneficiary, simply because the grantor declares it to be so.<sup>9</sup> The extent to which a society does (or does not) tolerate trusts is a measure of the health of that society's political and legal structures, to a certain extent.

Part II of this Essay employs the metaphor of termites eating away at a building to explain how the erosion of trust can damage any relationship, community or society. Part III argues that a lack of trust in the legal system gave rise to the legal device for preserving or transferring assets known as the *trust*. Trust law has been relatively stable for centuries, but over the last twenty-five years, major changes to trust law have transformed these tradition-bound vehicles almost beyond recognition. Yet still *trusts* flourish because of a lack of *trust*. Part IV explores the function of trusts in contemporary U.S. society, given that certain types of trusts perpetuate wealth inequality. Although trusts that keep rich people rich are the subject of the greatest criticism, Part V of this Essay argues that Louisiana's unusual trust law—which permits human embryos to be held in trust and to have legal standing—presents a greater challenge to the legal system. The effect of the Louisiana law is to push good-faith debate out of venues in which ordinary citizens can participate into the esoteric world of “money law” specialists instead.<sup>10</sup>

## II. *The Nature of Termites and Trust(s)*

Termites can enter buildings from the outside.<sup>11</sup> They make tunnels through the ground, up the concrete foundation and into the wood of the structure.<sup>12</sup> Termites might also enter homes

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legal and equitable title between the trustee and the beneficiaries).

9. See generally RESTATEMENT (THIRD) OF TRUSTS § 27 (AM. LAW INST. 2003) (requiring trust to be administered for benefit of beneficiaries).

10. This is Alice Abreu's wonderful phrase. See Alice G. Abreu, *Tax Counts: Bringing Money-Law to LatCrit*, 78 DENV. U.L. REV. 575, 575 n.1 (2001) (“By ‘money-law,’ I mean the areas traditionally viewed as comprising the business curriculum: tax, corporations, securities, commercial law (UCC), securities, banking, antitrust and the like.”).

11. JOHN TYLER BONNER, CELLS AND SOCIETIES 76 (1955) (describing pathways by which termites may enter a structure from the outside).

12. Theodore A. Evans et al., *Termites Eavesdrop to Avoid Competitors*, PROCEEDINGS OF THE ROYAL SOCIETY B: BIOLOGICAL SCIENCES, Nov. 22 2009, at 4035, 4035–36 (describing difference between subterranean termites,

through wood brought from the outside.<sup>13</sup> Thus termites from the outside essentially can “attack” a property that previously was termite-free.<sup>14</sup> Alternately, a structure might be infested with termites from the day it is built, if the wood used in its construction already contains the insects.<sup>15</sup>

Termites can lurk in wood for many years and years before their damage becomes visible.<sup>16</sup> After making hundreds, thousands, and millions of little bites—bites imperceptible when made one by one—just a few of these tiny creatures can destroy an entire building.<sup>17</sup> As a thought experiment, consider the capabilities of one termite. A single insect would need over 3,000 years to eat all of the wood in a home of 1,000 square feet in size (the average termite’s lifespan is only two years).<sup>18</sup> But because termites live in colonies of millions, and multiple colonies may be found in the same structure, destruction can occur rapidly. By the time the property owner sees physical evidence of termite damage, the structure already may be beyond repair.<sup>19</sup>

Using termites as a metaphor, one can gauge the level of trust in any community. Trust within any group of any size—no less between and among the people and political and legal leaders—can erode bite by bite from termites on the inside. It happens in workplaces, where colleagues pass each other in the hallway and do not say hello or make eye contact because of some perceived wrongdoing, whether years in the past or yesterday. That type of behavior is uncivil and eats away at the workplace culture, just as termites eat away at wood. Similarly, trust can erode in families and in personal relationships by forgetting to thank someone for

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*Coptotermes*, and drywood termites, *Cryptotermes*).

13. *Id.* at 436 (explaining behavior of *Cyprtotermes*).

14. *Supra* notes 11–13 and accompanying text.

15. *See, e.g.*, C. A. Kofoid, *The Fight Against Termites*, 3 *SCI. MONTHLY* 275, 275 (1935) (noting that lumber in homes provides termites with even more desirable food than wood that has naturally died).

16. *See, e.g.*, *Comparing Methods for Termite Treatment*, *DAILY HERALD*, Nov. 23, 2018, at 2 (observing that termites “can go unnoticed for years”).

17. *See, e.g.*, *How Fast Do Termites Eat Wood?* *TERMINIX* (Mar. 5, 2015), <https://www.terminix.com/termite-control/termite-facts> (last visited Mar. 30, 2019) (on file with the Washington and Lee Law Review).

18. *Id.* (estimating time that one termite would need to eat small house).

19. *Id.*

doing an errand,<sup>20</sup> or failing to say, “I’m sorry,”<sup>21</sup> when an apology is appropriate.<sup>22</sup> Trust erodes in a social group, when one remains silent in the face of remarks that discriminate against some members.<sup>23</sup> Just as any one termite bite does not cause much damage to a building, any one incident of incivility, hostility, lack of gratitude, or dishonesty will not cause a community to become toxic or make political or legal systems unstable, to be sure. But through accumulated termite bites, the insects will destroy an entire structure, fracture a workplace, family, community, or political and legal systems.<sup>24</sup>

### III. Trust and Trusts

#### A. The Origins of Trusts

One need not be a legal historian to understand that trusts were invented to do an end-run around the law.<sup>25</sup> A quick glance at one popular law school Trusts & Estates casebook reveals that from inception, the *use*—the precursor to the trust—was established for the sole purpose of getting around certain rules.<sup>26</sup>

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20. See, e.g., Lisa A. Williams & Monica Y. Bartlett, *Warm Thanks: Gratitude Expression Facilitates Social Affiliation in New Relationships Via Perceived Warmth*, 15 EMOTION 1 (2015) (demonstrating empirical relationship between expressions of gratitude and positive perception by others).

21. See, e.g., Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1010 (1999) (“Parents, or at least good parents, teach children to take responsibility when they have wronged another: *Apologize and make amends*. In contrast, lawyers typically counsel the opposite.”).

22. See, e.g., Kenneth Cloke, *Designing Heart-Based Systems to Encourage Forgiveness and Reconciliation in Divorcing Families*, 53 FAM. CT. REV. 418, 424 (2015) (“Forgiveness is not something you do for someone else . . .”).

23. Beverly Tatum, *Breaking the Silence*, in WHITE PRIVILEGE: ESSENTIAL READINGS ON THE OTHER SIDE OF RACISM 147, 147 (Paula S. Rothenberg ed., 3d ed. 2008) (advocating for more explicit discussion about race in order to minimize racially-motivated violence).

24. See *supra* note 18 and accompanying text (describing structural damage effectuated by many termites over comparatively shorter period of time).

25. See GEORGE C. BOGERT & GEORGE T. BOGERT, HANDBOOK OF THE LAW OF TRUSTS 6, n.14 (5th ed. 1973) (attributing the origins of the trust to the *fideicommissum* of ancient Rome).

26. See, e.g., ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS & ESTATES 386 (10th ed. 2017) (“Because the friars were forbidden to own property, benefactors conveyed land to friends of the friars, to hold to the use of the friars.”).

Specifically, in the thirteenth century in England, the Franciscan order prevented its mendicant friars from owning any property.<sup>27</sup> But because the monks needed stable places to live and worship, the Franciscans occasionally identified a wealthy patron who would convey land to a third party to hold the property for the benefit of the friars, who could then use it for their own purposes.<sup>28</sup> Once the *use* became widely known, wealthy people began employing it to avoid feudal incidents, or a type of tax obligation.<sup>29</sup> Thus, it is fair to say that the history of trusts always—or for at least a very long time—has been intertwined with some type of avoidance.<sup>30</sup> Trusts are legal instruments that meet the needs of those who proclaim, “I don’t like or *trust* the system, so let’s figure a way around the rules.”

### B. Contemporary Trusts

Fast-forward about 900 years—with apologies to the actual legal historians—and trusts are alive and well in the twenty-first century. Trusts in this country hold trillions of dollars worth of assets.<sup>31</sup> At the most basic level, trusts allow rich people to stay rich, because if money is held in a perpetual trust, it need not ever vest in any beneficiary.<sup>32</sup> Absent vesting (and inclusion in someone’s taxable estate), there will never be an additional tax—

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27. See, e.g., F. W. Maitland, *The Origin of Uses*, 8 HARV. L. REV. 127, 130 (1894).

28. SITKOFF & DUKEMINIER, *supra* note 26, at 386 (explaining arrangement among *feoffor to uses* [analogous to the donor] for the benefit of the *cestui que use*, the friars [analogous to a beneficiary]).

29. *Id.* at 387.

30. But see Grayson M. P. McCouch, *Who Killed the Rule Against Perpetuities?*, 40 PEPP. L. REV. 1291 (2013) (tracing explosion in use of long-term trusts to the 1986 enactment of the generation-skipping transfer tax).

31. See, e.g., John J. Havens & Paul G. Schervish, *Why the \$41 Trillion Wealth Transfer Estimate Is Still Valid: A Review of Challenges and Questions*, 7 J. GIFT PLAN. 11 (Jan. 2003) (evaluating prediction that for years 1998 through 2052, wealthy individuals will transfer up to \$41 trillion by way of private express trusts).

32. See, e.g., Phyllis C. Smith, *The Estate and Gift Tax Implications of Self-Settled Domestic Asset Protection Trusts: Can You Really Have Your Cake and Eat It Too?* 44 NEW ENG. L. REV. 25, 50–57 (2009) (explaining role of estate tax inclusion of trust assets in wealth transfer tax system).



beyond the tax on the initial transfer in trust—imposed on the movement of wealth from one generation to or for the benefit of another.<sup>33</sup>

To be sure, there is a category of trusts that has nothing to do with tax avoidance or doing an “end-run” around that law.<sup>34</sup> Those are trusts for beneficiaries who do not have sufficient capacity to own or manage property themselves.<sup>35</sup> That may be by virtue of being too young—they simply are not old enough to own property<sup>36</sup>—or the beneficiary may be suffering from some sort of neurological difference that makes that person unable to manage assets.<sup>37</sup> These trusts are functional, desirable, efficient alternatives to expensive court-appointed guardianships or custodianships.<sup>38</sup> They allow families to ensure a minimal level of financial resources for loved ones.<sup>39</sup> This Essay brackets those trusts out of the discussion entirely.

In the case of trusts that are designed to keep rich people rich, three very curious things have happened in the United States in the last twenty-five years. These have revolutionized trust law more than anything else in the last 400 years: the rise of self-

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33. *Id.*

34. *See, e.g.*, Kristen M. Lewis, *Planning Challenges for Beneficiaries with Special Needs*, 46 EST. PLAN. 14 (2019) (detailing reasons for transfers of assets in trust for the benefit of a physically or mentally disabled individual).

35. *See, e.g.*, John M. Hemenway, *Effective Estate Planning for the Modern Family in Uncertain Times*, ASPATORE 2013 WL 9711 at \*6–7 (describing minors’ legal inability to own property outright and use of minority trusts in certain non-taxable estates).

36. These so-called “minority trusts” typically provide for property to be held in trust until the beneficiary attains the age of twenty-one (21) years. *See, e.g.*, James S. Sligar & Bridget J. Crawford, *Form 6*, in DAVID WESTPHALL & GEORGE MAIR, ESTATE PLANNING LAW AND TAXATION A-42 (4th ed. 2003) (providing for entrustment of any property passing to a beneficiary under the age of 21).

37. *See, e.g.*, Chadwick Allen Harp, *Estate Planning for the Disabled Beneficiary*, 11 APR. PROB. & PROP. 14, 14–15 (1997) (describing use of trusts for disabled beneficiaries and desirability of maintaining beneficiary’s eligibility for governmental benefits).

38. *See, e.g.*, Allen D. Webster & Douglas K. Riley, *Estate Planning for the Family with a Disabled Child*, 14 VT. L. REV. 529, 540 (1990) (describing time, cost and restrictions associated with a court-appointed guardian for a minor or disabled beneficiary).

39. *See, e.g.*, Stephanie R. Hoffer, *Making the Law More ABLE: Reforming Medicaid for Disability*, 76 OHIO ST. L.J. 1255 (2015) (describing obstacles faced by disabled individuals seeking to become eligible for certain federal benefits).

settled asset protection trusts,<sup>40</sup> the proliferation of trust decanting rules<sup>41</sup> and the repeal of the rule against perpetuities<sup>42</sup> in over half of the jurisdictions in the nation.<sup>43</sup> Each of these changes is, has been, and will continue to be the subject of study and scrutiny.<sup>44</sup>

In order to focus the discussion of *trust* and *trusts*, consider the rule against perpetuities. Law professors, law students, and lawyers learn to hate the rule because it is befuddling, confusing, and a minefield for professional errors.<sup>45</sup> Depending on the jurisdiction where they find themselves, some members of the same population then may herald the rule's repeal, rejoicing that they no longer have to teach it, learn it, or risk making a costly professional mistake.<sup>46</sup>

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40. See generally RICHARD W. NENNO & JOHN E. SULLIVAN III, 868 T.M. DOMESTIC ASSET PROTECTION TRUSTS at I.C. (defining an asset protection trust as one created by the settlor "in which the settlor may retain some potential benefits that cannot be reached by creditors" of the settlor). Prior to 1997, asset protection trusts were not able to be created in any U.S. jurisdiction, but now are permitted by Alaska, Delaware, Nevada, New Hampshire, Rhode Island, South Dakota, Tennessee, Utah, and Wyoming. *Id.*

41. See generally WILLIAM R. CULP, JR. & BRIANI BENNETT MELLEN, TRUST DECANTING, 871 T.M. TRUST DECANTING at I.A. (explaining decanting as "the distribution of trust property from one trust to another pursuant to a trustee's discretionary power to make distributions to or for the benefit of one or more beneficiaries").

42. The rule against perpetuities is the rule "prohibiting a grant of an estate unless the interest must vest, if at all, no later than 21 years . . . after the death of some person alive when the interest was created." *Rule Against Perpetuities*, BLACK'S LAW DICTIONARY (10th ed. 2014).

43. See, e.g., CHRISTOPHER P. CLINE, T.M. 838 DYNASTY TRUSTS 2d ed. at II.C. (classifying states into groups according to their rules against perpetuities).

44. See, e.g., Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035 (2000) (calling repeal of rule against perpetuities a "race to the bottom").

45. Professor Barton Leach famously commented that the rule against perpetuities was "so abstruse that it is misunderstood by a substantial percentage of those who advise the public . . . [and] so capricious that it strikes down in the name of public order gifts which offer no offense except that they are couched in the wrong words." W. Barton Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721, 722 (1952).

46. See, e.g., Joel C. Dobris, *The Death of the Rule Against Perpetuities, or The RAP Has No Friends—An Essay*, 35 REAL PROP. PROB. & TR. J. 601, 656 (2000) (asserting that the rule against perpetuities "is hard to learn, and students are customers now. Why risk bad evaluations when teaching sexy topics is so easy?"); Paul G. Haskell, *A Proposal for a Simple and Socially Effective Rule Against*

In 1997, the Alaska legislature passed a law that provided, in essence, that trusts could last forever.<sup>47</sup> Jonathan Blattmachr, then a partner at Milbank LLP,<sup>48</sup> was one of the principal drafters of the perpetuities repeal legislation in Alaska.<sup>49</sup> Blattmachr's motivation to work on repeal legislation stemmed from a growing awareness that his clients were establishing trusts in foreign jurisdictions to take advantage of laws that permitted self-settled asset protection trusts and perpetual trusts.<sup>50</sup> He thought that a domestic venue would be more reliable; he focused on Alaska because of the relatively small and cohesive bar in that state and because it was less tradition-bound than his home state of New York.<sup>51</sup> Alaska Governor Tony Knowles signed the bill into law on April 1, 1997.<sup>52</sup>

After the passage of the Alaska legislation, jurisdictions like Delaware, South Dakota and a variety of other states modernized or radically altered their trust laws.<sup>53</sup> Now, in over half of the jurisdictions in the U.S., an individual can create a trust that lasts forever (or at least for the lifetimes of many more successive generations than any common law perpetuities period would permit).<sup>54</sup>

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*Perpetuities*, 66 N.C. L. REV. 545, 545 (1988) (lamenting the rule against perpetuities as "one of the most difficult areas of our law").

47. See Alaska Trust Act, H.B. 101, 20th Leg. Sess. (1997); ALASKA STAT. § 34.27.050(a) (allowing abolition of the rule in trusts where the trustee had discretion to distribute some or all of the trust income and/or principal to a person alive at the time of the trust's creation). *But see* SLA 2000 ch. 17 § 9, eff. Apr. 22, 2000 (repealing Alaska Stat. § 34.27.050(a) and replacing it with Alaska Stat. § 34.27.051 that permits a 1,000 year period in gross for the exercise or non-exercise of a general power of appointment not presently exercisable because of a condition precedent) and Alaska Stat. § 34.27.100 (retaining limit on suspension of power of alienation to 30 years).

48. For a general history of the firm, see ELLEN JOAN POLLACK, *TURKS AND BRAHMINS: UPHEAVAL AT MILBANK, TWEED: WALL STREET'S GENTLEMEN TAKE OFF THEIR GLOVES* (1990).

49. Bridget J. Crawford, *On Perpetuities, Paradigms, and a Creative Life in the Law*, TAX NOTES 289, 289–90 (2016) (interview with Jonathan G. Blattmachr).

50. *Id.*

51. *Id.* at 290 (describing obstacles to enactment in New York State).

52. See, e.g., Jeremy M. Veit, Note, *Self-Settled Spendthrift Trusts and the Alaska Trust Act: Has Alaska Moved Offshore?* 16 ALASKA L. REV. 269 (1999) (providing overview of the Alaska Trust Act, including its legislative history).

53. See Sterk, *supra* note 44, at 1051–55.

54. See, e.g., NENNO & SULLIVAN, T.M. 867, *supra* note 40, Worksheet 4 State

*C. Twenty-First Century Trust Law Critiques*

Critics of perpetual trusts offer a variety of objections, including that the law encourages all trustees to invest conservatively.<sup>55</sup> Others claim that perpetual trusts create a monied aristocracy that is inconsistent with notions of equal opportunity.<sup>56</sup> Still others frame their opposition in terms of intergenerational equity, saying that each major age cohort should be able to decide for itself whether and how to dispose of trust property.<sup>57</sup> And others point to the lost tax revenue from perpetual trusts.<sup>58</sup> Simply stated, in the case of a trust that lasts forever, if the trust assets never vest in a beneficiary's estate, the assets will not be subject to wealth transfer taxation when they become available to the next generation.<sup>59</sup>

Focusing on the law's tolerance of perpetual trusts, it is reasonable to ask who "wins" and who "loses." At the most basic level, the government loses, in the sense that it is unable to collect wealth transfer tax revenue if a trust never terminates.<sup>60</sup> Wealthy people win because they can stay or get wealthier if they do not pay taxes.<sup>61</sup> Beyond the losses to the federal tax coffers and

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Perpetuities Statutes.

55. See Haskell, *supra* note 46, at 558–59 (arguing that trustees tend to invest conservatively). This argument has less purchase in light of the enactment of the Uniform Prudent Investor Act that allows the trustee to evaluate trust investments "in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust." Uniform Prudent Investor Act § 2(b) (Unif. Law Comm'n 1994).

56. Ray Madoff, *America Builds an Aristocracy*, N.Y. TIMES, July 11, 2010, at A19.

57. See, e.g., LEWIS M. SIMES, PUBLIC POLICY AND THE DEAD HAND 58–59 (1955). Yet anecdotal evidence suggests that many perpetual trusts grant each generation a limited power of appointment to dispose of trust property. See Bridget J. Crawford, *Who's Afraid of Perpetual Trusts*, 111 MICH. L. REV. FIRST IMPRESSIONS 79, 86–87 (2012).

58. See, e.g., Ira Mark Bloom, *The GST Tax Tail is Killing the Rule Against Perpetuities*, 87 TAX NOTES 569, 570 (2000) (describing long-term trusts as mechanisms for avoiding generation-skipping transfer tax).

59. See, e.g., Jay A. Soled & Mitchell M. Gans, *Asset Preservation and the Evolving Role of Trusts in the Twenty-First Century*, 72 WASH & LEE L. REV. 257, 280–85 (2015) (explaining estate tax savings of completed lifetime gifts to long-term or perpetual trusts).

60. See *supra* note 59 and accompanying text.

61. For the period 1964 to 1994, wealth transfer taxes never represented

wealthy people staying rich (or becoming richer), consider, however, whether there might be other “losers” in this so-called low point in American trust jurisprudence.<sup>62</sup> Or, to reframe the question: Why do the U.S. political and legal systems tolerate trusts? It seems clear that both *trust* and *trusts* are deeply implicated in the answer, but perhaps not in ways that traditional critics might think.

#### IV. Why Tolerate Trusts?

##### A. Trusts and Wealth Inequality

Just as termites can slowly and steadily damage a home over a period of years before the harm suddenly becomes visible,<sup>63</sup> the beneficial form of ownership known as a *trust* has gradually—and now suddenly—morphed nearly beyond recognition through the repeal of the rule against perpetuities, along with the other changes.<sup>64</sup> Traditional trust limitations have been eaten away. Trusts—except ones for minors or disabled beneficiaries<sup>65</sup>—are all based in some sort of desire to work around some law, most often the tax law.<sup>66</sup> Simply put, then, to the extent that trusts enable individuals to minimize or avoid taxation, then trusts certainly play *some* role in maintaining wealth inequality.<sup>67</sup>

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more than 2.33% of all federal tax revenue. See Christopher E. Erblich, *Recent Development: To Bury Federal Transfer Taxes Without Further Adieu*, 24 SETON HALL L. REV. 1931, 1933 (1994). In 2017, the estate tax generated 0.7% of all revenue. Scott Eastman, *New IRS Data Reiterates Shortcomings of the Estate Tax*, TAX FOUND. (Oct. 18, 2019), <https://tinyurl.com/y2qqho7r> (last visited Mar. 30, 2019) (showing sharp decline in estate tax revenue since 2000) (on file with the Washington and Lee Law Review); see also Howard Gleckman, *Only 1,700 Estates Would Owe Estate Tax in 2018 Under the TCJA*, TAX POL'Y CTR. (Dec. 6, 2017), <https://tinyurl.com/y3ozj94k> (last visited Mar. 30, 2019) (estimating further decline in number of returns and gross estate tax owed in wake of Tax Cut and Jobs Act of 2017) (on file with the Washington and Lee Law Review).

62. See Sterk, *supra* note 44 (calling the contemporary trust law a “race to the bottom”).

63. See *supra* Part II.

64. See *supra* notes 40–42 and accompanying text.

65. See *supra* notes 34–39 and accompanying text (excluding trusts for minors and disabled beneficiaries from discussion).

66. See *infra* Part III.A.

67. See generally Felix B. Chang, *Assymetries in the Generation and*

Wealth inequality in the U.S. is staggering.<sup>68</sup> The gap between the rich and the poor is only getting larger.<sup>69</sup> Trust lawyers should name and own their role in contributing to that inequality.<sup>70</sup> Consider, for example, data from the Congressional Budget Office for the period 1993 to 2013.<sup>71</sup> During that time period, the richest 10% of all families went from holding approximately 30% of all household wealth in this country to holding 76% of all family wealth.<sup>72</sup> The poorest 50% of families did not gain or lose much.<sup>73</sup> Families in between the top 10% to top 15% gained about 9 points.<sup>74</sup> But the big “winners” during this period were families in

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*Transmission of Wealth*, 79 OHIO ST. L.J. 73, 93–98 (2018) (considering perpetual trusts in context of wealth redistribution concerns). *But see* Jonathan G. Blattmachr & Martin M. Shenkman, *Trump Wins, A Brave New World for Estate Planners*, ULTIMATE ESTATE PLANNER (Dec. 1, 2016), <https://tinyurl.com/y22trqhq> (last updated Mar. 30, 2019) (“[S]tatistics as to the concentration of wealth in the U.S. suggest that the estate tax has not been particularly successful at dampening wealth concentration.”) (on file with the Washington and Lee Law Review).

68. *See, e.g.*, THOMAS PICKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 304–76 (2014) (documenting historic increase in wealth inequality, especially post-1980).

69. *See, e.g.*, Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data* 37–38 (Nat'l Bureau Econ. Research, Working Paper No. 20265, 2014), available at <http://www.nber.org/papers/w20625> (showing increase in wealth inequality over time).

70. *See generally* Thomas W. Mitchell, *Growing Inequality and Racial Economic Gaps*, 56 HOW. L.J. 849, 879–89 (2013) (discussing what the legal profession can do to promote economic inequality, including increasing minority homeownership and developing model laws that will promote equality). I include myself in this group, as I was a Trusts & Estates Associate at Milbank LLP from 1996 to 2003.

71. *Trends in Family Wealth, 1989 to 2013*, Congressional Budget Office, CBO (Aug. 18, 2016), <https://www.cbo.gov/publication/51846> (last visited Apr. 1, 2019) (segmenting aggregate national wealth of \$67 trillion by population, illustrating that the top 10 percent of all families held 76 percent of all wealth in 2013) (on file with the Washington and Lee Law Review).

72. Measuring wealth concentration is hardly a settled matter. *See, e.g.* Wojciech Kopczuk, *What Do We Know About the Evolution of Top Wealth Shares in the United States?*, J. ECON. PERSP., Winter 2015, at 47, 53–57 (describing and identifying limitations of three different measures of wealth inequality).

73. *Trends in Family Wealth*, *supra* note 71 (bottom 50% of households declined in wealth from 1989 to 2013).

74. *Id.* (“The share of wealth held by families in the top 10 percent of the wealth distribution increased from 67 percent to 76 percent, whereas the share of wealth held by families in the bottom half of the distribution declined from 3 percent to 1 percent.”).

the top 10%; they saw their share of wealth multiply two and one-half times.<sup>75</sup>

Wealth inequality must be understood not just in terms of individuals or families generically, but also with respect to race and other identifying characteristics.<sup>76</sup> According to the Institute for Policy Studies, the 400 individuals who comprise the Forbes list of the richest people in America hold as much wealth as all African American households combined with one-third of all Latinx households.<sup>77</sup> To better visualize this disparity, picture 400 people—a group that might fill a medium-sized high school auditorium.<sup>78</sup> It is possible to fill that auditorium with individuals in this country who have as much or more wealth than approximately 23 million people of color.<sup>79</sup>

Wealth statistics also break down along other identity lines.<sup>80</sup> There are countless ways to analyze the data.<sup>81</sup> The message is the same: Wealth in this country is concentrated in the hands of the few.<sup>82</sup>

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75. *Id.*

76. *See, e.g.,* Dedrick Asante-Muhammad et al., *The Ever-Growing Gap*, INSTITUTE FOR POLICY STUDIES (Aug. 2016), <https://tinyurl.com/y22tytff> (last visited Mar. 30, 2019) (comparing aggregate wealth of members of Forbes list with U.S. African-American and Latinx populations) (on file with the Washington and Lee Law Review).

77. Asante-Muhammad, *supra* note 76 at 6 (“America’s richest 400 individuals—with a collective net worth of \$2.34 trillion—now own more wealth than the entire Black population, plus one-third of the Latino population, combined.”).

78. *See, e.g.,* Auditorium, Colville (WA) High School and About Colville High School, <http://chs.colsd.org/auditorium> (last visited Apr. 5, 2019) (showing size and layout of 400-person auditorium for a high school with a student enrollment of approximately 535) (on file with the Washington and Lee Law Review).

79. Asante-Muhammad, *supra* note 76 at 6.

80. *See, e.g.,* Lucie Schmidt & Purvi Sevak, *Gender, Marriage, and Asset Accumulation in the United States*, 12 FEMINIST ECON. 139, 142–45 (2006) (showing single women are less wealthy than single men in United States).

81. *See, e.g.,* Wealth Inequality in the United States, INEQUALITY.ORG, <https://inequality.org/facts/wealth-inequality/#racial-wealth-divide> (last visited Apr. 1, 2019) (showing that combined wealth of Bill Gates, Jeff Bezos and Warren Buffet is greater than all wealth held by bottom half of all Americans) (on file with the Washington and Lee Law Review).

82. *See, e.g.,* Saez & Zucman, *supra* note 69 (showing historic trends in increasingly concentrated wealth in the U.S.).

*B. Trusts and the American Narrative*

Revenue may not be the most important “loss” from legal innovations that impede the taxation of transfers in trust.<sup>83</sup> Wealth transfer taxes represent a tiny percentage of all federal tax revenue.<sup>84</sup> The greater loss related to perpetual trusts, to give just one example, is the expressive value of taxing wealth as it passes from generation to generation or accumulates over time.<sup>85</sup> Because all of these referenced trust innovations are in their relative infancy, it is difficult to predict what the actual impact will be on wealthy individuals’ behavior.<sup>86</sup> So any concern is better framed less about what the trusts actually *do* and more about what they *symbolize*.

Trusts—and the seeming antidote to them, the estate tax—both have expressive value.<sup>87</sup> The estate tax has a transparent intent: redistribution of wealth.<sup>88</sup> Trusts, especially perpetual trusts, are an easy target.<sup>89</sup> Breaking up concentrations of wealth,

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83. See *supra* note 61 and accompanying text (explaining how wealth transfer taxes represent a declining portion of already small percentage of federal tax revenue).

84. *Id.*

85. See, e.g., Mary Louise Fellows et al., *Foreword: We Are What We Tax*, 84 *FORDHAM L. REV.* 2413, 2413–14 (2016) (discussing the expressive value of taxation).

86. But see Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 *YALE L.J.* 356, 410–11 (2005) (estimating that from 1997 through 2003, wealthy individuals transferred approximately \$1 billion of assets to trusts in jurisdictions that had abolished the rule against perpetuities).

87. Trusts might, in fact, signal a lack of trust (and with good reason), in the case of a spendthrift beneficiary or one with a drug habit. See, e.g., Christian Kelso, *But What’s an Ascertainable Standard? Clarifying HEMS Distribution Standards and Other Fiduciary Considerations for Trustees*, 10 *EST. PLAN. & COM. PROP. L. J.* 1, 58 (providing sample trust language prohibiting trustee from making distribution of any trust property if the beneficiary engages in illegal drug use).

88. Senator Elizabeth Warren, for example, has proposed an annual wealth tax of 2 to 3 percent. See Paul Krugman, *Elizabeth Warren Does Teddy Roosevelt*, *N.Y. TIMES*, <https://www.nytimes.com/2019/01/28/opinion/elizabeth-warren-tax-plan.html> (last updated Jan. 28, 2019) (last visited Apr. 1, 2019) (on file with the Washington and Lee Law Review).

89. See, e.g., Paul Sullivan, *The Ins and Outs of Trust That Last Forever*, *N.Y. TIMES*, Dec. 5, 2014, <https://www.nytimes.com/2014/12/06/your-money/estate-planning/the-ins-and-outs-of-perpetual-trusts.html> (last updated



the seeming goal of the estate tax,<sup>90</sup> is a natural extension of the notion, ideal, or even lesson communicated to children that the United States has or should have a democratic, egalitarian society in which there is one person, one vote, and equal opportunity for all.<sup>91</sup>

More likely, however, the political and legal systems tolerate trusts because of a lesser explored part of that same meritocracy story. If anyone can be anything in the United States<sup>92</sup>—a place lacking a formal nobility,<sup>93</sup> a country where an immigrant can go from rags to riches,<sup>94</sup> and a land that fosters the creative spirit of a college drop-out who builds a multi-million dollar company in his garage<sup>95</sup>—then maybe *anyone* might become rich through hard work and effort. Just as a significant percentage of the population thinks the estate tax applies to them or their families<sup>96</sup> (in fact, it

Dec. 5, 2014) (last visited Apr. 1, 2019) (“Critics of perpetual trusts have argued against them on moral grounds—saying tying up money for generations is bad public policy and could lead to a virtual aristocracy.”) (on file with the Washington and Lee Law Review).

90. See, e.g., Louis Eisenstein, *The Rise and Decline of the Estate Tax*, 11 TAX L. REV. 223, 235–36 (1956) (describing goal of wealth transfer tax as disrupting wealth concentration).

91. See, e.g., Barack Obama, *Inaugural Address*, THE WHITE HOUSE, <https://obamawhitehouse.archives.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama> (last updated Jan. 21, 2013) (last visited Apr. 1, 2019) (“We are true to our creed when a little girl born into the bleakest poverty knows that she has the same chance to succeed as anybody else, because she is an American; she is free, and she is equal, not just in the eyes of God but also in our own.”) (on file with the Washington and Lee Law Review).

92. See, e.g., CHARLES M. SCHULZ, *YOU CAN BE ANYTHING!* (2009) (collection of *Peanuts* cartoons showing Snoopy in a variety of professional and personal roles)

93. See, e.g., U.S. CONST. art. I, § 9, cl. 8 (“[n]o Title of Nobility shall be granted by the United States”).

94. See, e.g., Andrea Navarro, *Billionaire Immigrants Who Struck it Rich in the U.S.*, FORBES.COM, <https://www.forbes.com/sites/andreanavarro/2014/03/19/billionaire-immigrants-who-struck-it-rich-in-the-u-s/#2686f5b6764a> (last updated Mar. 19, 2014) (last visited Apr. 1, 2019) (profiling eight U.S. immigrants who are now billionaires) (on file with the Washington and Lee Law Review).

95. See, e.g., MICHAEL B. BECRAFT, *BILL GATES: A BIOGRAPHY* (2014) (describing the origins of Microsoft when Paul Allen and Bill Gates, who left Harvard College without graduating, began a company called “Micro-Soft” in an Albuquerque garage in 1975).

96. See, e.g., MICHAEL J. GRAETZ & IAN SHAPIRO, *DEATH BY A THOUSAND CUTS: FIGHTING OVER INHERITED WEALTH* 79–81 (2005) (describing how calling the estate tax a “death tax” causes non-wealthy Americans to become interested in—

applies only to those with estates of more than \$11.4 million, if single, or \$22.8 million if married),<sup>97</sup> a significant percentage of Americans likely think, “I might need a trust one day.” Thus, the legal (and practical) tolerance for trusts is entirely consistent with the American mythology that anyone can become anything, including rich and in need of a trust.

Imagine a legal regime in which all of the changes to substantive trust law of the last twenty-five years—perpetual trusts, self-settled asset protection trust and trust decanting—disappeared overnight. It is possible to conceive of a system that allows trusts only for those who are unable to manage money for themselves, because of age or disability.<sup>98</sup> Such changes unlikely would deter wealthy people from finding different ways to reduce their tax bills.<sup>99</sup> If the government closes off one avenue for minimizing taxes, then smart, well-paid lawyers will find other ways to accomplish the same results.<sup>100</sup> That cat-and-mouse game is built into the very structure of the U.S. tax system.<sup>101</sup>

Most of the well-known changes to the U.S. trust law in the last twenty-five years do not represent a great threat to democracy.<sup>102</sup> Citizens, lawyers and policy-makers who are committed to a fair and just society instead should turn their attention to a far lesser-known change to the law in the State of Louisiana. This change links more subtly and more profoundly to

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and object to—the tax).

97. See I.R.C. § 2010 (unified credit against estate tax that essentially “shelters” transfers of these amounts).

98. See *supra* notes 34–39 and accompanying text.

99. Popular self-help books employ this language unabashedly. See, e.g., MARK TABAK, ANYONE CAN BE RICH! A PSYCHIATRIST PROVIDES THE MENTAL TOOLS TO BUILD YOUR WEALTH (2017).

100. See, e.g., David Cay Johnston, *The Loophole Artist*, N.Y. TIMES, <https://www.nytimes.com/2003/12/21/magazine/the-way-we-live-now-12-21-03-encounter-the-loophole-artist.html?smid=pl-share> (last updated Dec. 21, 2003) (last visited Apr. 1, 2019) (noting that there are “thousands of lawyers and tax engineers who, with [any one particular] tax repealed, would put their minds to work helping the rich pay less”) (on file with the Washington and Lee Law Review).

101. See, e.g., *id.* (“[The tax planner's] cat-and-mouse game is to work the loopholes in the system until the government finds them and draws them closed.”).

102. See *infra* Part III.B.

problems with contemporary political and legal structures in the U.S.

*V. Human Embryos in Trust: The Case of Sofia Vergara*

Louisiana law treats as legal "persons" human embryos created through artificial reproductive technology.<sup>103</sup> The statute provides that an "in vitro fertilized human ovum exists as a juridical person until such time as the in vitro fertilized ovum is implanted in the womb; or at any other time when rights attach to an unborn child in accordance with law."<sup>104</sup> As a juridical person, the fertilized ovum has the capacity to become a legal party to a lawsuit, for example.<sup>105</sup> Louisiana law specifies that a fertilized human egg is not property, but rather "a biological human being," and if the "donors of the sperm and ovum" choose to "express their identity," then they have all of the rights that parents have under Louisiana law.<sup>106</sup> The standard for adjudicating any disputes over the genetic material is the "best interest of the in vitro fertilized ovum."<sup>107</sup>

Curiously, even though Louisiana law defines human eggs fertilized in vitro as "not property," Louisiana law appears to permit these embryos to be transferred to and held in a trust.<sup>108</sup> This treatment is not the result of an affirmative statement in the Louisiana trust law itself, but rather the statutory default rule that unless the governing instrument provides otherwise, a trustee may hold any type of property.<sup>109</sup> In Louisiana, human embryos

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103. Although several states have accorded "personhood" status to fetuses, Louisiana appears to be the only state that grants legal personhood to human eggs fertilized by means of assisted reproductive technology. *Cf.* KAN. STAT. ANN. § 65-6732 (2018) ("The life of each human being begins at fertilization . . . [and] unborn children have interests in life, health and well-being that should be protected . . .").

104. LA. STAT. ANN. § 9:123 (2019) (legal capacity of in vitro fertilized human ovum as juridical person).

105. *Id.* § 9:124 ("As a juridical person, the in vitro fertilized human ovum shall be given an identification by the medical facility for use within the medical facility which entitles such ovum to sue or be sued.")

106. *Id.* § 9:126 (ownership of in vitro fertilized ovum).

107. *Id.* § 9:132.

108. *Id.* § 9:1737.

109. Conflicting characterization of human bodily materials as "property" or

created by artificial reproductive technology are simultaneously “not property” for some purposes and “property” for other purposes.<sup>110</sup>

This changing nature of human bodily material as not-property to property (and vice versa) is not unknown in the law, but usually relates to when a patient has made a decision to part with certain bodily fluid or material for medical research purposes.<sup>111</sup> Whether embryos are “property” for purposes of inheritance and equitable distribution upon divorce are questions that different jurisdictions continue to answer inconsistently.<sup>112</sup> But Louisiana appears to be the only state that explicitly labels as juridical persons human eggs fertilized through artificial reproduction.<sup>113</sup> If those juridical persons can be held in trust, at first glance, the trust would seem to violate the Thirteenth Amendment’s prohibition against slavery.<sup>114</sup> Yet the entrustment of embryos has not been the subject of challenge under Louisiana (or any other) law.<sup>115</sup>

Granting legal personhood status to embryos created through artificial reproductive technology represents a creative legal victory by those who believe that life begins at the moment of conception.<sup>116</sup> These are people who believe that fertilized embryos

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“not property” is not unknown in the law. *See, e.g.*, Bridget J. Crawford, *Our Bodies, Our Tax Selves*, 31 VA. TAX REV. 695, 699–717 (2012).

110. *Supra* notes 108–109 and accompanying text.

111. *See, e.g.*, *Moore v. Regents of the University of California*, 793 P.2d 479 (Cal. 1990) (finding that patient had no property interest in his own bodily cells used for medical research, but that the scientists who developed products from the patient’s cells had a property interest in them).

112. *See, e.g.*, Mark P. Strasser, *You Take the Embryos But I Get the House (and the Business): Recent Trends in Awards Involving Embryos Upon Divorce*, 57 BUFF. L. REV. 1159, 1177 (2009).

113. *But see* GA. CODE ANN. § 19-8-40 (2019) (defining an “embryo” as “an individual fertilized ovum of the human species from the single-cell stage to eight-week development”).

114. *See, e.g.*, *Emma and Isabella Louisiana Trust No. 1, et al, v. Vergara*, No. 767-189, 2016 WL 7239128 (La. Dist. Ct. Jefferson Par., Dec. 7, 2016) (permitting trustee holding two embryos to bring legal action, with no apparent objection to legality of trust arrangement).

115. *Id.*

116. *See, e.g.*, Susan L. Crockin, *The “Embryo” Wars: At the Epicenter of Science, Law, Religion, and Politics*, 39 FAM. L. Q 599, 610 (explaining that some religious groups’ objections to destruction of fertilized eggs).

have the same rights as a child, and the rights of those embryos are superior to the couple's right to have the embryos destroyed, and, by extension, a pregnant woman's right to choose to have an abortion.<sup>117</sup> Many Americans sincerely and deeply hold these views; others do not.<sup>118</sup> All perspectives deserve fair evaluation, taking into account the balancing of rights—and of majoritarian and minority interests—that necessarily must occur in a democracy.<sup>119</sup>

But shifting from a macro-political analysis to a more ground-eye-view of trusts, consider the ongoing legal dispute between television star Sofia Vergara and her former romantic partner Nick Loeb.<sup>120</sup> When they were engaged to be married, the couple agreed to in vitro fertilization that led to the creation of two viable embryos in November, 2013.<sup>121</sup> The couple decided to freeze the embryos.<sup>122</sup> After the couple broke up in May, 2014, they could not agree about what to do with the embryos, which are stored in a medical facility in California.<sup>123</sup> The legal agreement they entered into prior to the creation of the embryos does not permit either party to use the embryos without the other's consent.<sup>124</sup> In fact, the agreement provides that if the parties cannot agree about the continued "storage, use or disposition" of the embryos, the genetic material is deemed to be "abandoned to the medical facility."<sup>125</sup>

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117. See, e.g., Robert P. George & Patrick Lee, *Embryonic Human Persons: Talking Point on Morality and Human Embryo Research*, 10 EMBO REP. 301, 303 (2009) ("embryological evidence shows that the human embryo is a whole, although obviously immature, human being; it is not a mere part")

118. See, e.g., Abortion, GALLUP, <https://news.gallup.com/poll/1576/abortion.aspx> (last visited Apr. 1, 2019) (showing percentage of Americans who believe abortions should be legal in some [50 percent], all [18 percent] or no circumstances [29%] has remained relatively constant for the period 1976 to 2018) (on file with the Washington and Lee Law Review).

119. See, e.g., JOHN ELY, DEMOCRACY AND DISTRUST 153 (1980) ("We are a nation of minorities and our system thus depends on the ability and willingness of various groups to apprehend those overlapping interests that can bind them into a majority on a given issue.").

120. See Petition of Plaintiff, Emma & Isabella Louisiana Trust No. 1 et al. v. Vergara, 2016 WL 7239128 (La. Dist. Ct., Dec. 7, 2016) at ¶¶19–55.

121. *Id.* at ¶ 51.

122. *Id.* at ¶ 54.

123. *Id.* at ¶¶ 60–62.

124. *Id.* at ¶ 48.

125. *Id.* at ¶ 49 (citing Form Directive signed by both parties, attached as

After the termination of the parties' romantic relationship, Loeb sought Vergara's permission to have the embryos implanted into a gestational surrogate, but Vergara did not consent.<sup>126</sup> Loeb then brought suit in Los Angeles, California against both Vergara and the medical facility, asserting his parental rights over the embryos.<sup>127</sup> He dropped that lawsuit on December 6, 2016, after Vergara's counsel sought in discovery the names of two former romantic partners of Loeb who had undergone abortions.<sup>128</sup>

On December 7, 2016—the day after the California case was dismissed—Loeb filed a petition in the District Court of Louisiana, 24<sup>th</sup> Judicial District, Jefferson Parish.<sup>129</sup> Some time during the California proceedings, Loeb had established sufficient contacts with the jurisdiction of Louisiana to be able to avail himself of the state law that grants legal personhood status to embryos created through artificial reproductive technology.<sup>130</sup> He created a trust under Louisiana law on November 30, 2016, and on December 5, 2016, he modified the trust to benefit the embryos, if one or both developed into a live baby, and gave the embryos the names “Emma” and “Isabella.”<sup>131</sup>

The plaintiffs in Loeb's Louisiana case are denominated as “Human Embryo # 4 HB-A (‘Emma’),” “Human Embryo #3 HB-A (‘Isabella’)” and the “Trustee of the Emma and Isabella Trust No. 1.”<sup>132</sup> According to its terms, the trust becomes irrevocable if and when either or both embryos develop into fetuses and are born

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Exhibit A to Petition).

126. *Id.* at ¶ 62.

127. *Id.* at ¶ 67. *See also* Complaint, Loeb v. Vergara and ART Reproductive Center, Inc. (Super. Ct. Cal. L.A. Co. 2014).

128. *See* Petition of Plaintiff, Emma & Isabella Louisiana Trust No. 1 et al. v. Vergara, No. 767-189, 2016 WL 7239128 (La. Dist. Ct., Dec. 7, 2016) at ¶ 68.

129. *See id.* at ¶¶ 19–55.

130. *See, e.g.*, Transcript, Emma & Isabella Louisiana Trust No. 1 et al. v. Vergara, No. 767-189, 2016 WL 7239128 (La. Dist. Ct., Dec. 7, 2016) at 17 (in response to question of whether Loeb created the trust immediately prior to filing suit in Louisiana, counsel responded that “Mr. Loeb himself has sufficient contacts and reason why he's bringing the—why he created the trust here in Louisiana. There's plenty of information that shows that.”). A federal District Court later found that Loeb is a citizen of Florida. Order and Reasons, Emma & Isabella Louisiana Trust No. 1 et al. v. Vergara, ECF 2:17-cv-01498 at 2.

131. *See* Order and Reasons, Emma & Isabella Louisiana Trust No. 1 et al. v. Vergara, No. 767-189, 2016 WL 7239128 (La. Dist. Ct., Dec. 7, 2016) at 5.

132. *Id.*

alive.<sup>133</sup> At that time, they will become the sole discretionary beneficiaries of the trust.<sup>134</sup> Loeb's petition states that the embryos have the expectation of an inheritance from Vergara, and Vergara's refusal to allow the embryos to develop into fetuses (and then be born) effectively denies them their inheritance.<sup>135</sup>

The case was removed from the 24<sup>th</sup> Judicial District, Jefferson Parish, upon petition by Vergara,<sup>136</sup> and the case was assigned to the federal District Court. There, Vergara successfully argued for dismissal of the case on the grounds that she is not subject to general or specific jurisdiction in Louisiana.<sup>137</sup>

In January 2018, Loeb brought another suit against Vergara in Louisiana.<sup>138</sup> The case was transferred to federal District Court where Loeb then sued for custody of the embryos under the Uniform Child Custody Jurisdiction and Enforcement Act and motioned for removal of the case back to state court.<sup>139</sup> Vergara motioned to dismiss the case, arguing that such law does not apply to the embryos and, even if it did, she is not subject to jurisdiction in Louisiana.<sup>140</sup>

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133. *Id.* at ¶¶ 75–76

134. *Id.* at ¶ 77. It is not clear whether there are other current beneficiaries of the trust, whether the trust is revocable or irrevocable, and how Loeb could transfer the embryos to the trust when the embryos remain in medical storage in California. Also, if neither Loeb nor Vergara is permitted by the terms of the agreement to use the embryos without the other's consent, *supra* note 124, then Loeb's transfer of the embryos to the trust would violate the agreement.

135. *Id.* at ¶¶ 163–177 (alleging that Vergara is “required to provide for [the embryos] care and administration, that the trust was created “for the express purpose of benefitting Emma and Isabella and providing for their health, education, maintenance and support” and that Vergara's refusal to allow the embryos to be implanted in a surrogate “caused and continues to cause [the embryos] financial harm”).

136. Notice of Removal, Emma & Isabella Louisiana Trust No. 1 et al. v. Vergara (La. Dist. Ct., Feb. 21, 2017).

137. Order and Reasons, Emma & Isabella Louisiana Trust No. 1 et al. v. Vergara, No. 767-189, 2016 WL 7239128 (La. Dist. Ct., Dec. 7, 2016) at 1, 10–12.

138. Loeb, Human Embryo #3 HB-A, and Human Embryo #4 HB-A v. Vergara, 25th Jud. Dist. Parish of Paquimines No. 64-217A.

139. First Amended Complaint for Sole Child Custody, Loeb et al. v. Vergara, Case 2:18CV03165 (D. La. Apr. 17, 2018) and Order and Reasons, 2:18CV03165 (D. La. May 18, 2018) (grant of motion to remand to 25th Judicial District Court, Parish of Plaquemines, State of Louisiana).

140. Loeb et al. v. Vergara, Defendant's Motion to Dismiss for Failure to State a Claim, 2:18CV03165 (D. La. May 1, 2018).

Loeb opposed Vergara’s motion to dismiss in a way that curiously—although obliquely—raises the issue this Essay identifies: There is a contradiction between treating the embryos both as “persons,” in the sense of allowing them to sue, and as “property,” by allowing them to be held in the very trust Loeb created.<sup>141</sup> Specifically, Loeb urges the court to recognize that Louisiana law accords to fertilized eggs the same status as human beings, even though other states do not, and that this split in state law harkens back to pre-Civil War treatment of African Americans as slaves by some states and not by others. He compares the case of the entrusted embryos to the case of Solomon Northup, the free man from New York sold into slavery in Louisiana in 1841 whose memoir was the basis for the film *12 Years a Slave*.<sup>142</sup>

There was a question at the time as to whether New York had the jurisdiction to reach into Louisiana and retrieve Northup but the New York governor discussed it with Louisiana officials and they were allowed to retrieve him . . . [L]egislation in most states on this issue [means] state courts are left to decide if embryos are human beings or property or something in between.

Loeb’s analogy of embryos to slaves is problematic, historically flawed, and entirely confusing.<sup>143</sup> His comparison of the embryos to Simon Northup is equally puzzling, given it is Loeb himself that created the trust for (or for the benefit of) the embryos.<sup>144</sup> The District Court has remanded the case to the state court.<sup>145</sup>

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141. See *supra* notes 103–115 and accompanying text.

142. 12 YEARS A SLAVE (Regency Enterprises et al. 2013). See also *The Kidnapping Case: Narrative of the Seizure and Recovery of Solomon Northup*, N.Y. TIMES (Jan. 20, 1853), <https://timesmachine.nytimes.com/timesmachine/1853/01/20/75123962.pdf>.

143. See, e.g., Orville Vernon Burton, *The Creation and Destruction of the Fourteenth Amendment During the Long Civil War*, 79 LA. L. REV. 189, 216–34 (2018) (describing significant judicial reluctance to recognizing and enforcing rights of former slaves during post-war era).

144. See *supra* note 131 and accompanying text.

145. Order and Reasons, Loeb et al. v. Vergara, Case 2:18CV03165 (D. La. May 18, 2018) (granting Loeb’s motion to remand to state court). In the meantime, Vergara sued Loeb in California for breach of contract and malicious prosecution related to his attempt to assert his rights over the embryos. Complaint, Vergara v. Loeb, Super. Ct. BC650580. On appeal of the lower court’s denial of Loeb’s motion to strike, Vergara’s malicious prosecution claim has been dismissed, but



Trusts for embryos are not unique to Louisiana. One Mississippi lawyer markets to clients a “Fertility Preservation Trust,” at a cost of \$850, to provide “a detailed plan for your embryos now and well into the future.”<sup>146</sup> If such a “fertility trust” and the trust created by Loeb in Louisiana are traditional private express trusts, then there persists the inherent contradiction between Louisiana’s view that embryos are legal “persons” and allowing persons to be held in trust.<sup>147</sup> It is possible that the word “trust” in the context of embryos is being used euphemistically, with the “trust” being a legal equivalent of a guardianship arrangement, and the trustee is performing the functions that a guardian ad litem would in other jurisdictions.<sup>148</sup> Even so, consider the significance of injecting a *trust* into legal disputes over genetic material created via assisted reproductive technology when Louisiana law buttresses those disputes by recognizing a fertilized egg as a legal person.<sup>149</sup>

Trusts for embryos obscure debates about the legal rights, if any, that should attach from the moment of conception, how those rights conflict with the decision to become a parent or not, and what limits there are to a woman’s right to decide what happens with her own body.<sup>150</sup> Trusts obscure and make inaccessible what should be serious discussions about reproductive rights. Trust talk pushes those legal, political, ethical, moral, and even religious conversations further away from venues and language that are accessible to most people.<sup>151</sup> Trusts for embryos are far more

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her breach of contract claim may go forward. *Vergara v. Loeb*, 2019 WL 337817 (Cal. Super. Ct. L.A. Co., Jan. 28, 2019) (unpublished/noncitabile opinion).

146. See Ashley W. Pittman, *Fertility Preservation Trust*, <https://trustfertility.com> (last visited Apr. 1, 2019) (on file with the Washington and Lee Law Review). The trust appears to be fully revocable during the lifetime of the creator or creators; see Ashley W. Pittman, *Benefits of a Trust*, <https://trustfertility.com/benefits> (last visited Apr. 1, 2019) (on file with the Washington and Lee Law Review).

147. See *supra* note 115 and accompanying text.

148. See, e.g., John Crouch, *The Child’s Attorney*, 26 FAM. ADVOC. 31 (2004) (describing the difference between guardians ad litem and attorneys for children).

149. See *supra* note 113 and accompanying text.

150. See, e.g., Jonathan F. Will, *Beyond Abortion: Why the Personhood Movement Implicates Reproductive Choice*, 39 AM. J.L. & MED. 573 (2013) (exploring multiple implications of embryo personhood language for pregnant women or users of reproductive technology).

151. Cf. Judith F. Daar, *Direct Democracy and Bioethical Choices: Voting Life*

insidious and harmful to the U.S. political and legal systems—far more termite-like—than any loss of revenue from perpetual trusts.<sup>152</sup>

### VI. Conclusion

Once one identifies the fault lines in a political system, the next question is what individuals and communities can do to repair them. To the extent that trusts of property have anti-democratic effects, there is an argument to minimize or discourage their use for wealth transfer purposes or to make them entirely unavailable except in cases of minor or disabled beneficiaries.<sup>153</sup> Certainly, the Louisiana law that permits trusts for embryos shows what lengths that opposing sides will go when they can no longer have civil conversations with each other to achieve legal compromises acceptable to most people. Trusts should not be deployed as weapons in the culture wars.

Lawyers need to be attuned to both *trust* and *trusts* in society. Measuring and monitoring both reveal what most needs repairing in the foundation of society. If a community, group or system has been damaged through multiple termite bites, the time is ripe to deploy multiple clusters of metaphorical spiders to restore it. Consider, for example, that approximately one-half of all spiders build webs for the purpose of catching prey.<sup>154</sup> But spider webs also play a role in maintaining social communities<sup>155</sup> and providing physical security to the aphids.<sup>156</sup> Through individual and

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*and Death at the Ballot Box*, 28 U. MICH. J.L. REFORM 799, 800 (1995) (discussing direct democracy on important questions linked to religion or ethics).

152. See *supra* Part IV.A.

153. See *supra* notes 65–83 and accompanying text.

154. See, e.g., Jonas O. Wolff et al., *The Great Silk Alternative: Multiple Co-evolution of Web Loss and Sticky Hairs in Spiders* n. 9, PLOS ONE (last updated May 1, 2013) (last visited Apr. 1, 2019), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0062682> (noting many spiders never developed web-making capabilities) (on file with the Washington and Lee Law Review).

155. See, e.g., Ingi Agnarsson, *Spider Webs as Habitat Patches: The Distribution of Keltoparasites (Argyrodes, Theridiidae) Among Host Webs (Nephilia, Tetragnathidae)*, 31 J. OF ARACHNOLOGY 344, 344 (describing spider webs as “habitat patches” for multiple spider communities).

156. See, e.g., Bengt Gunnarsson, *Bird Predation on Spiders: Ecological Mechanism and Evolutionary Consequences*, 25 J. OF ARACHNOLOGY 509

collective interactions, communications and efforts to build webs to connect to each other, it is possible to create presumptions of wisdom, goodwill and ethics. In terms of tensile strength, a spider's web is stronger than a steel cable.<sup>157</sup> Political and legal structures in the U.S., like a spider web, are both fragile but strong. Termites destroy structures.<sup>158</sup> Spiders create new and better places to dwell.<sup>159</sup> Democracy, trust and trusts need spiders, not termites.

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(describing how spider webs operate as defense mechanisms).

157. See, e.g., Courtney Miceli, *Spider Silk is Five Times Stronger Than Steel*, SCIENCEMAG.ORG, (last updated Nov. 20, 2018) (last visited Apr. 1, 2019) <https://www.sciencemag.org/news/2018/11/spider-silk-five-times-stronger-steel-now-scientists-know-why> (on file with the Washington and Lee Law Review).

158. *Supra* notes 11–19 and accompanying text.

159. *Supra* note 156.