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“That the Earth Belongs in Usufruct to the Living”: Intergenerational Philanthropy and the Problem of Dead-Hand Control

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Abstract: Intergenerational transfers are a core feature of the practice of private philanthropy. A substantial portion of the resources committed to charitable causes comes from transfers (either during life or at death) that continue to pay out after death. Indeed, much of the power of the charitable foundation lies in its ability to extend the life of an enterprise beyond the mortal existence of its initiating agents. Despite their prevalence, whether and in what way the instruments of intergenerational philanthropy can be justified is controversial. Many have argued that these instruments unfairly privilege the interests of the dead at the expense of the living and unborn. More recently, others have argued that intergenerational charitable transfers comport with the demands of distributive justice and are therefore legitimate. This paper contends that both of these perspectives fail to see the problem for what it is. Intergenerational charitable transfers may indeed promote justice in certain respects, but they do so at the cost of imposing the judgments of the dead onto the living. Respecting the wishes of the past conflicts with an interest in “generational sovereignty.” The paper concludes that properly accounting for this interest in generational sovereignty doesn’t require the abolition of intergenerational philanthropy. But it does tell in favor of a different regulatory orientation than most legal systems currently adopt.

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I. INTRODUCTION

A century has now passed since the death of Andrew Carnegie. The form of elite philanthropy that he helped pioneer, the private charitable foundation, has received no shortage of critical appraisal. Citizens and scholars of various stripes have questioned the compatibility of elite philanthropy with the principles that undergird a well-ordered liberal democracy. While some regard elite philanthropy as an unexceptional exercise of economic liberty,² others charge that it depends upon, and serves to reinforce, objectionable disparities in wealth.³ Some look to foundations to solve entrenched social problems;⁴ others challenge the asymmetries in power that come along with foundation-driven experiments in social policy.⁵ But whatever verdict awaits an overall assessment of philanthropy, one distinctive dimension of this practice hasn't generated significant scrutiny. This is the temporal dimension. A striking, albeit little noticed, fact is that although Carnegie and his peers are no longer living citizens, they are nonetheless still empowered to restrict the use of property and project influence over social conditions.⁶ Dead donors enjoy these powers because contemporary societies recognize "intergenerational charitable transfers" ("ICTs"), legal devices that allow members of one generation to mark off property for charitable purposes in future generations.⁷ The most prominent form of ICT is the *private charitable foundation*, typically designed as a perpetual endowment that makes grants for

² E.g., Joanne Florino, "The Case for Philanthropic Freedom," *Alliance* 21, no. 3 (2016).

³ E.g., Anand Giridharadas, *Winners Take All: The Elite Charade of Changing the World* (New York: Knopf, 2018).

⁴ E.g., Judith Sealander, "Curing Evils at Their Source: The Arrival of Scientific Giving," in *Charity, Philanthropy, and Civility in American History*, ed. Lawrence J. Friedman and Mark D. McGarvie (Cambridge: Cambridge University Press, 200), 217–39; Matthew Bishop and Michael Green, *Philanthrocapitalism: How Giving Can Save the World* (New York: Bloomsbury, 2010).

⁵ E.g., Emma Saunders-Hastings, "Plutocratic Philanthropy," *Journal of Politics* 80, no. 1 (2018): 149–61.

⁶ One exception is Ray D. Madoff, *Immortality and the Law: The Rising Power of the American Dead* (New Haven: Yale University Press, 2010).

⁷ In this terminological choice, I follow Chiara Cordelli and Rob Reich, "Philanthropy and Intergenerational Justice: How Philanthropic Institutions Can Serve Future Generations," in *Institutions for Future Generations*, ed. Axel Gosseries and Iñigo González (Oxford: Oxford University Press, 2016), 229–44.

enumerated charitable purposes—a form that Carnegie himself helped to put on the map. Other forms include the ordinary *charitable bequest*, which allows a person to dedicate his or her estate to a charitable cause upon her death, and the *restricted charitable gift*, a donation made to a charity for the sake of perpetually endowing a specific activity.

Other essays in this collection consider how a society should regulate intergenerational charitable transfers, or how individual philanthropists should make the best use of these tools. The present essay begins with a question that is in a sense more fundamental, even if its practical relevance may at first seem obscure. That is, do intergenerational charitable transfers have a legitimate place in a liberal democracy? Is there a convincing justification for permitting such transfers at all? If ICTs are ultimately impermissible, then questions about how to regulate them or how to make the best use of them take on a much different character. The essay reaches the conclusion that ICTs do indeed have a place in a well-ordered liberal democracy, but it's a role that comes with noteworthy limitations. In turn, I show how this exploration of the justification of ICTs helps us to answer pertinent questions of public policy.

The argument unfolds in six parts. To ground the philosophical discussion that follows, I proceed in the next section by describing the key features and prevalence of intergenerational charitable giving, particularly as it manifests in the contemporary United States. Drawing on the poignant remarks of Thomas Jefferson, Part III develops a skeptical challenge to the justification of intergenerational charitable transfers. Jefferson prompts us to see that ICTs are a form of “dead-hand control,” a way by which the past restricts the liberty of the living and unborn. But, in Jefferson’s view, the dead have no right to control the living. This casts the case for ICTs into doubt. Part IV examines recent attempts by political theorists to justify ICTs. Although these views contribute essential foundations to a response to the Jeffersonian challenge, I show that the arguments behind them fall short of justifying dead-hand control. Section V fills in the gap. It contends, *pace* Jefferson, that in the

case of philanthropy, dead-hand control isn't categorically objectionable. Rather, dead-hand control is objectionable to the extent that past persons lack the capacity to make sound judgments about temporally distant conditions. Part VI concludes that the resulting policy challenge becomes how to prevent the past from curtailing actions in the future on the basis of demonstrably false beliefs. Recent policy trends toward *cy-près* reform appear to be a step in the right direction, but they are not sufficient.

II. THE PRACTICAL CONTEXT

Instead of automatically relinquishing property to named heirs or remitting it to the state, testation empowers a decedent to decide what shall happen with her property after she is no longer around to manage it. Donating property to a charitable purpose is a popular use of this power. A substantial portion of the resources committed to charitable causes comes from gifts at death (bequests) and gifts that continue to pay out after death (trusts).

Bequests on their own provide only a small portion of the funding for organized charitable endeavors today. The proportion of charitable dollars from living individuals (71 percent) now dwarfs that of bequests (9 percent) by eightfold.⁸ But the declining status of bequests has been offset by the rising significance of perpetual charitable trusts. A charitable trust—whether established during one's life or through a bequest—allows a property owner to create a perpetual endowment by appointing agents (trustees) to invest and spend the entrusted property in a way that preserves its principal. Although the settlor of a charitable trust can opt to limit the trust's lifetime, perpetuity is the default. Barring gross mismanagement by trustees, national economic crisis, or changes in the law, a charitable trust can be expected to persist indefinitely.

Charitable trusts that are funded by a small number of people are called private foundations.

⁸ My calculations, based on data from *Giving USA 2016* (Indianapolis: IUPUI Lilly Family School of Philanthropy, 2016).

Private foundations typically make grants to other charitable organizations rather than engaging directly in charitable work.⁹ Despite some prominent exceptions, most private foundations are structured to exist in perpetuity.¹⁰ The number and size of these entities have grown astronomically over the past few decades. According to estimates of the Internal Revenue Service, between 1985 and 2011 the number of foundations tripled (from 31,171 to 92,990), and the value of assets held by foundations grew by six-fold (from \$95 billion to \$641 billion, in inflation-adjusted dollars).¹¹ In turn, the nonprofit sector has come to depend more heavily on foundations over time, with the proportion of funding that charitable endeavors draw from foundations rising from 5 percent in the 1980s to 15 percent in recent years.¹²

Restricted charitable gifts provide another possible example of perpetual philanthropy. Restricted charitable gifts are donations to charities for the purpose of supporting particular programs, typically on a perpetual basis. The receiving entity is bound to administer the gift according to the terms set out by the donor, which can be more or less specific. Restricted gifts, in other words, are charitable trusts under the trusteeship of individual charities. No statistical agency currently tracks the prevalence or extent of restricted gifts. However, some evidence suggests that the vast majority of “major gifts”—typically exceeding \$1 million—possesses this quality.¹³

To be sure, bequests, foundations, and restricted gifts raise many interesting issues apart from

⁹ Private foundations that engage directly in charitable work are called private operating foundations.

¹⁰ One notable exception is the Bill and Melinda Gates Foundation, which is set to terminate 50 years after the death of the last to die of Bill and Melinda Gates and Warren Buffet.

¹¹ Internal Revenue Service, Statistics of Income Division, “Historical Table 16: Nonprofit Charitable Organization and Domestic Private Foundation Information Returns, and Exempt Organization Business Income Tax Returns: Selected Financial Data, 1985–2011,” October 2014.

¹² My calculations, based on data from *Giving USA 1986* (Purdue: Indiana University Center on Philanthropy, 1986) and *Giving USA 2013* (Indianapolis: IUPUI Lilly School of Philanthropy, 2013).

¹³ Iris J. Goodwin, “Ask Not What Your Charity Can Do for You: *Robertson v. Princeton* Provides Liberal-Democratic Insights onto the Dilemma of *Cy Pres* Reform,” *Arizona Law Review* 51 (2009): 75–125, p. 97.

their relationship to time. However, as will become clear in what follows, philanthropy's temporal aspects are rarely examined, poorly understood, and tremendously important. Finding a legitimate place for intergenerational charitable transfers runs into a host of challenges.

III. THE JEFFERSONIAN CHALLENGE

Though it hasn't exercised many contemporary theorists, the power of dead persons to restrict how property can be used in the future was particularly disturbing to many commentators in the past.¹⁴ Thomas Jefferson was one of the most caustic critics. In his 1789 letter to James Madison, he considers it "self evident 'that the earth belongs in usufruct to the living;' that the dead have neither powers nor rights over it."¹⁵ (To own something "in usufruct" is to enjoy rights to its use and fruits without rights to diminish or destroy it.)¹⁶ Invoking the authority of nature, Jefferson points out that no "law of nature" entitles persons to control property after death. Although positive laws often recognize rights of bequest and inheritance, these legal rights shouldn't be conflated with moral rights. A legal right of testation is merely a social convention designed to solve the problem of property's succession: what should happen to property after its owner dies. Jefferson isn't entirely clear on what he wants his reader to draw from this observation. One strong possibility is that since dead persons have no natural right to control property beyond their lifetimes, succeeding generations shouldn't be in any way constrained by their wishes. In turn, a society ought to organize its laws of succession to prioritize the interests of the living and unborn.

¹⁴ E.g., Plato, *Laws*, XI, 923a *et seq.*; William Godwin, *Enquiry Concerning Political Justice, and Its Influence on Morals and Happiness*, vol. 2 (London: G. G. and J. Robinson, 1798), Bk. VIII, Ch. II, pp. 444–48.

¹⁵ Thomas Jefferson, "Letter to James Madison," September 6, 1789, in *The Works of Thomas Jefferson*, vol. 6., Federal Edition (New York and London: G.P. Putnam's Sons, 1904–1905).

¹⁶ In fact, Jefferson's famous sentence appears to contain a contradiction. If the rights of the living are only usufructory in nature, this doesn't prevent the dead from possessing certain property rights. However, the ordering of the words suggests that Jefferson is using "usufruct" in a more figurative sense to emphasize his view that the property claims of the living deserve more considerable weight.

Jefferson's remarks thus suggest one reason for preliminary discomfort with idea of intergenerational philanthropy: the fact that it restricts the way in which future persons may use property. A society has multiple alternatives at its disposal for organizing the succession of property and the finance of charitable enterprise. Some of these options would afford greater say to future generations. For instance, property could transfer to future generations without any restrictions on its use, leaving future generations entirely free to choose how much to devote to charitable purposes, as well as which purposes to pursue. Alternatively, a society could permit persons to dedicate property for future charitable purposes while leaving the choice of those purposes entirely up to future persons. Or, a society could license ICTs, but restrict their duration or subject them to the possibility of amendment. Given that the succession of charitable resources could be organized in different ways that afford greater control to future generations, we have reason to question whether the status quo is defensible.

Jefferson's remarks also furnish us with an additional source of skepticism about ICTs. He appears to believe that coexisting members of a political community stand in a much different relationship to each other than they do to past or future members of the same community. The letter continues, "We seem not to have perceived that, by the law of nature, one generation is to another as one independant nation to another [sic]." Jefferson appears to believe that coexisting in time and space is a necessary condition of membership in political community. Only through membership in such a community do we acquire claims against other members of that community, including a say in community affairs. Just as each nation is entitled to sovereignty, to exclude other nations from control over its own internal affairs, so too is a generation entitled to sovereignty, to exclude past generations from control over the affairs of living persons.¹⁷ If we follow this analogy to its end, we reach the

¹⁷ Jefferson was also aware of the challenge of defining the concept of a generation. If we believe that generations of persons are possible subjects of moral claims, we will need some way of distinguishing one generation from the next. But on what basis shall we make this distinction? One could say that "my generation" consists only of the persons born on the same day or within the same year as me. Or my generation might include persons born decades before or after me. Jefferson's letter

implication that instances of dead-hand control are tantamount to colonialism, an implication that should be even more unsettling to us today than it would have been to Jefferson's contemporaries.

Even if we could overcome the obstacle that dead persons have no natural right to testation, these remarks indicate that justifying intergenerational charitable transfers faces an additional challenge. The challenge emerges in light of a crucial difference between charitable and non-charitable gift-giving. The practice of interpersonal gift-giving is primarily a private affair. Its immediate effects are limited to the giver and the receiver. By contrast, charitable giving aims to affect wider civic conditions. Its point isn't to benefit a friend or family member, but to promote one's particular conception of the public good. In a liberal democracy, however, what constitutes the public good and how to promote it are inherently contested questions. Opinions differ considerably about the proper size of the charitable sector within a society's broader political economy, and about the relative merits of different potential charitable causes.

This distinction between interpersonal and charitable giving interacts with the passage of time in a normatively significant way. Arguably, part of the justification for respecting the charitable choices of our contemporaneous fellow citizens, even when we find them misguided, is the fact that our contemporaries are equally susceptible to our own such choices. We have reason to tolerate their philanthropic choices insofar as they respect ours. This isn't to say that the reciprocal liberty to make philanthropic gifts is all that matters in the justification of philanthropy within a single generation. For instance, vast inequalities in wealth that make philanthropy the province of a tiny elite might pose a serious challenge to this justification. Nonetheless, the very possibility of this kind of mutual toleration is absent in the case of intergenerational philanthropy. ICTs unilaterally impose past persons' conceptions of the public benefit upon future generations. Because time moves in one direction, future

suggests a complicated mathematical formula for sorting persons into separate generations, a formula that Michael Otsuka has attempted to clarify and operationalize in his *Libertarianism without Inequality* (Oxford: Oxford University Press, 2003), 132–50.

generations enjoy no reciprocal opportunity to influence civic conditions in the past.¹⁸ From the future's perspective, the expectation to honor the philanthropic directives of the past may seem like an unwarranted invasion. Why ought we allow former citizens a say in our common affairs?

Thus, Jefferson's letter gives rise to two related but distinct worries about intergenerational philanthropy. The first concern is that intergenerational philanthropy depends upon recognizing a right of testation as a solution to the succession of property. This solution appears to be prejudicial to future persons, who have an interest in receiving property unrestricted. The second concern is that intergenerational philanthropy allows past persons to influence civic conditions in future generations, encroaching on the sovereignty of future generations to determine social conditions for themselves.

IV. RECENT JUSTIFICATIONS OF INTERGENERATIONAL PHILANTHROPY

A. *A Right of Testation?*

As we saw above, part of the Jeffersonian challenge to intergenerational philanthropy is the absence of a natural right to testation. Jefferson makes plain that he regards this as a "self-evident" proposition needing no elaboration or defense. But we should try to flesh out this idea in some greater detail. Theories of natural rights typically hold that rights derive from a fundamental entitlement to individual self-ownership, an entitlement that preexists and constrains political institutions. According to Steiner and Vallentyne, such theories diverge on the question of which sorts of agents have these rights.¹⁹ On one view, agents are eligible for natural rights if they are capable of making *choices*. If some class of agents possesses the capacity for choosing between alternative options, that class of agents is a

¹⁸ A future generation may of course enjoy opportunities to influence social conditions in the generations that follow its own. But this isn't a reciprocal relationship. Nor are the opportunities necessarily equal: given the scarcity of resources, generations that come earlier in the historical sequence may enjoy significantly greater opportunities to shape social affairs in the future.

¹⁹ Hillel Steiner and Peter Vallentyne, "Libertarian Theories of Intergenerational Justice," in *Intergenerational Justice*, ed. Axel Gosseries and Lukas H. Meyer (Oxford: Oxford University Press, 2009), 50–75.

bearer of natural rights. On another view, agents are eligible for rights if they are the sorts of being that have *interests*—regardless of whether they are able to make choices of their own. Important for our purposes is that both views tend to converge on the conclusion that the dead have no rights. Clearly enough, dead persons are incapable of making *choices*, so they can't be rights-bearers on the choice-making conception of natural rights. To have an *interest* in something, meanwhile, is precisely to be in a position to derive benefits from its success and harm from its failure. A person is incapable of suffering setbacks or enjoying achievements once she has died.²⁰ Thus, the interest-holding conception of natural rights has little to offer to the dead either. If recognizing a right to testation depends upon ascribing rights to dead persons, the case for testation is in peril.

Testation would be ruled out from the start if government can't act legitimately except for the sake of protecting natural rights—as many libertarians believe. But Jefferson wasn't a thoroughgoing libertarian, and his letter leaves open the possibility that positive laws can derive legitimacy from sources other than natural law.²¹ Might testation be justified on alternative grounds? Indeed, numerous scholars have recently observed that, even if persons have no natural right to testation, testation can nonetheless be valuable as a social practice.²² A social practice of testation can be valuable, according to this view, not because it respects our posthumous rights as such, but because it increases the options available to us while alive and incentivizes greater social productivity.

One reason that testation is desirable is that it allows us to extend our plans and projects

²⁰ Although Joel Feinberg once famously tried to argue otherwise—that interests could persist posthumously—he later abandoned this position in his *Harm to Others* (Oxford: Oxford University Press, 1984). Thanks to Ray Madoff for this point.

²¹ Andrew Holowchak emphasizes the pluralistic origins of Jefferson's philosophical thought in his "Thomas Jefferson," *Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Winter 2016 Edition, <https://plato.stanford.edu/archives/win2016/entries/jefferson/>.

²² Those who defend views of this type include Janna Thompson, *Intergenerational Justice: Rights and Responsibilities in an Intergenerational Polity* (New York: Routledge, 2009), pp. 6off., and Rahul Kumar, "Wronging Future People: A Contractualist Proposal," in *Intergenerational Justice*, ed. Axel Gosseries and Lukas H. Meyer (Oxford: Oxford University Press, 2009), 252–71.

beyond our mortal existence, thereby affording us opportunities to pursue more or better options *during life*.²³ Suppose you are a person of advancing age with a deep commitment to your local community theater. However, you also face declining health, and a concern about having sufficient funds to cover your medical expenses prevents you from making more than token donations to the theater company during annual fundraising drives. Without the power of testation, each donation to the theater company would be money not saved for medical expenses, increasing your risk of facing greater suffering. Things look different with the power of testation, however. With that power, you can forego the annual contributions and instead arrange things so that whatever property remains in your possession at death goes to the theater group. This removes the trade-off between promoting your conception of the public good and protecting your own basic interests. By extending the range of available options in this way, testation facilitates the formulation and execution of a rational life plan.

A secondary benefit of a practice of testation is that it provides incentives for productivity and social savings that are generally advantageous to a society.²⁴ Lacking the option to pass on property after death might make it harder for us to undertake difficult or long-term projects.²⁵ If I'm not permitted to pass on my furniture store to my children, why should I put myself through the thankless travail of starting and running a business? But, clearly enough, the health of a market economy significantly depends on individuals' willingness to take such long-term risks. Part of what make such risks worthwhile lies in the ability to pass on the successes of our endeavors to successors.

Besides these potential effects on productivity, a right of testation might also induce greater

²³ Reeve holds that the role of bequest in helping to facilitate responsible planning explains the support it enjoys from J.S. Mill, T.H. Green, and John Rawls. See Andrew Reeve, *Property* (Houndsmills: Macmillan, 1986), p. 161.

²⁴ See, e.g., Edward J. McCaffery, "The Political Liberal Case Against the Estate Tax," *Philosophy & Public Affairs* 23, no. 4 (1994): 281–312, pp. 295–6.

²⁵ Samuel Scheffler, *Death and the Afterlife*, ed. Niko Kolodny (Oxford: Oxford University Press, 2013). Scheffler's argument is addressed to the broader importance of posterity to the motivations of present persons.

savings. If we couldn't pass on property beyond our lifetimes, we would face pressure to consume as much as possible before death. The opportunity to control property beyond our lifetimes thus provides an incentive to preserve resources for future persons, rather than consume it all ourselves.²⁶

These considerations indicate that attempts to justify intergenerational transfers need not ascribe natural rights to the dead. Rather, they indicate that recognizing a practice of testation can be a way of facilitating the interests of a society's members in living richer lives. Other things equal, a society that refused to honor wishes of the dead would be impoverished in many respects. But the fact that testation can be valuable as a social practice doesn't prove that it's justified in any and every possible form. For instance, an unlimited right of testation may very well lead to objectionable social conditions in the succeeding generation. It could also deprive members of a previous generation of their fair share of resources, if testators chose to save too much for the future. As the next subsection details, two notable strands of thought in contemporary political theory have explored in some detail what forms of testation are ultimately consistent with justice. They converge on the conclusion that while justifying interpersonal transfers faces certain challenges, the case for recognizing charitable transfers remains fairly strong.

B. ICTs and Equality of Opportunity

Several recent scholars have challenged the traditional practice of testation on grounds that it leads to objectionable inequalities in resources among members of the succeeding generations.²⁷ An unfettered right of individuals to make unilateral transfers can conflict with a society's attempts to

²⁶ Galle wonders how strong these incentives really are in Brian Galle, "Pay It Forward: Law and the Problem of Restricted-Spending Philanthropy," *Washington University Law Review* 93 (2015): 1143–1207, pp. 1168–71.

²⁷ See, e.g., D.W. Haslett, "Is Inheritance Justified?" *Philosophy & Public Affairs* 15, no. 2 (1986): 122–55; McCaffery, "The Political Liberal Case Against the Estate Tax"; Eric Rakowski, "Transferring Wealth Liberally," *Tax Law Review* 51 (1995–1996): 419–72; Liam Murphy and Thomas Nagel, *The Myth of Ownership* (New York: Oxford University Press, 2002), chap. 7.

secure or maintain conditions of background fairness, namely equality of opportunity. As it happens, those who make intergenerational transfers often tend to transfer their estates to kin. This promotes the accumulation of wealth within families and serves as a catalyst for socioeconomic stratification. Heirs of great fortunes receive opportunities unavailable to those who inherit less or nothing at all. Under regimes that recognize a right of testation, the success of one's life plans may depend more on the accident of being born into a particular family than on one's merit or one's status as an equal citizen. Furthermore, unless a society takes special measures to insulate public affairs from accumulations of wealth, inheritance also threatens the integrity of democratic processes. The beneficiaries of accumulated family wealth can come to serve as gatekeepers for political office, as recent empirical research on campaign finance suggests.²⁸ This undermines a sacred constituent of the ideal of democracy, that citizens are entitled to equal opportunities for political influence.

However, the same liberal-egalitarian theorists who rail against the effects of inheritance on equality of opportunity tend to acknowledge that intergenerational transfers of wealth aren't inherently unjust. In particular, these scholars typically treat charitable gifts as unmitigated exceptions to the problem of justice in property succession. Several explicitly encourage intergenerational charitable transfers and seek to protect them from the restrictions that they would impose on non-charitable transfers.²⁹ This is so for two main reasons. First, because ICTs are gifts for purposes, rather than gifts to persons, their benefits tend to be widely distributed and, in turn, less prejudicial to distributive fairness. A bequest to a nature preserve, for example, benefits all who choose to visit the preserve, rather than any one heir. Encouraging charitable bequests and trusts helps to divert wealth from inequality-generating ends to ends that are inequality-neutral. A second reason for the liberal-egalitarian support of ICTs is that ICTs can work to combat the same objectionable inequalities that

²⁸ Martin Gilens, *Affluence & Influence* (Princeton: Princeton University Press, 2012).

²⁹ This is true of Haslett, McCaffery, and Rakowski, *op. cit.*

inherited wealth helps to create. This position reflects the thought that many charitable causes have as their aim the mitigation of poverty and inequality. For this reason, a practice of testation focused on charitable transfers might ultimately serve to reduce conditions of background injustice among members of succeeding generations.

These claims deserve some critical qualification. While it's true that ICTs don't pass on wealth to family members, they may in fact work against equality of opportunity in other ways. For instance, a testator might erect a family foundation and install her children as its trustees, allowing them to inherit the associated power and social status. Or, an ICT might be used to provide collective goods that predominantly benefit wealthy persons, either by concentrating its work in a wealthy suburb, or by funding goods that predominantly appeal to richer people.³⁰ The liberal-egalitarian position can nonetheless respond that, odious as they are, the inequality-generating features of ICTs are only contingent possibilities, which we might manage through regulation or simply accept as lesser evils. This marks an important distinction between ICTs and intergenerational non-charitable transfers. For, whereas ICTs can contingently serve to perpetuate certain kinds of inequality, the transmission of dynastic privilege is an inherent and inexorable function of non-charitable transfers of wealth.

Another challenge for this position is that the extent to which ICTs serve as instruments of poverty or inequality reduction depends on which purposes a society designates as charitable and how it structures the choice among different purposes.³¹ In the contemporary U.S., according to one recent estimate, less than 31 percent of donated dollars end up benefitting the disadvantaged.³² Some believe

³⁰ On the first point, see Rob Reich, "A Failure of Philanthropy," *Stanford Social Innovation Review* (Winter 2005): 24–33.

³¹ This isn't to say that these are the only conditions that govern whether ICTs are effective instruments of redistribution.

³² "Patterns of Household Charitable Giving by Income Group, 2005," Indiana University Center on Philanthropy / Google, Inc. (Summer 2007), available at http://www.philanthropy.iupui.edu/files/research/giving_focused_on_meeting_needs_of_the_poor_july_2007.pdf.

that a society ought to provide greater incentives for charitable gifts aimed at reducing poverty and inequality.³³ Though I harbor some considerable doubts about the desirability of trying to combat poverty through charitable donation, for the sake of argument here I am willing to concede that the justification for ICTs would be strengthened if such transfers did indeed serve a genuinely redistributive function.

C. *ICTs and Justice in Savings*

Other scholars have made a more direct case for an affirmative policy toward ICTs, holding that ICTs are valuable not, or not only, because of their salutary effects on inequality *among* members of succeeding generations, but because of these salutary effects on inequality *between* generations. A significant aspect of the problem of justice between generations reflects the fact that each generation has a conflicting interest in consuming as much property as its members desire. Solving this problem requires determining what a present generation is obliged to save for the future, and what future persons can reasonably demand from their predecessors. John Rawls is often credited with helping to introduce this problem, as well as with offering a compelling general solution to it.³⁴ The “just savings principle,” in Rawls’s terms, directs generations to share the burden of developing and maintaining just institutions over time. Though rather vague in its particulars, the principle is distinct for holding that generations are neither to discount the interests of future persons (as economists often suggest), nor to engage in self-effacing sacrifice in the hope of delivering a future utopia. It’s also distinct in holding that the aim of saving isn’t to expand the economic pie continuously, but rather to establish stable just

³³ See, e.g., Liam Murphy and Thomas Nagel, *The Myth of Ownership*, p. 127; Robert D. Cooter, “The Donation Registry,” *Fordham Law Review* 72 (2004): 1981–89; Rob Reich, “A Failure of Philanthropy”; Rob Reich, “Philanthropy and Its Uneasy Relation to Equality,” in *Taking Philanthropy Seriously: Beyond Noble Intentions to Responsible Giving*, ed. William Damon and Susan Verducci (Bloomington: Indiana University Press, 2006), 27–49.

³⁴ John Rawls, *A Theory of Justice*, rev. edn. (Cambridge, Mass.: Harvard University Press, 1999), pp. 251–62.

institutions.

Cordelli and Reich argue that ICTs can serve as part of a strategy for satisfying Rawls's conception of justice in savings between generations.³⁵ In so doing, they draw attention to Rawls's overlooked remark that the savings required for this project may take various forms, including the conservation of natural resources, investment in buildings and technology, and the development of education and culture.³⁶ Building upon this idea, Cordelli and Reich posit three elements—social capital, disaster preparedness, and social innovation—that are at once critical for securing just institutions over time and unavailable through public administration alone. Maintaining just institutions over time requires continuous investment in social capital, which provides indispensable support for the virtues of democratic citizenship. The reproduction of social capital requires a diverse, vibrant, and independent civil society, supported by voluntary donation. The stability of just institutions also requires research into, and instruments to mitigate, low-probability, high-magnitude catastrophes. Though the state might take certain steps to address general disaster scenarios, Cordelli and Reich believe that private supplementation of state efforts is necessary to hedge against obscure cataclysmic events. Finally, Cordelli and Reich contend that ICTs serve as a corrective to democratic "short-termism," the tendency of democratic processes to disregard the interests of future generations. Because of their insulation from electoral pressure and their extended time horizons, ICTs are especially suited to financing long-term projects whose discoveries contribute to just conditions in the future.

For these authors, a society can't develop and maintain a just basic structure without ongoing, affirmative measures to finance social capital, disaster preparedness, and technological innovation. Though they acknowledge that there might be other ways of investing in such goods, Cordelli and Reich hold that charitable bequests and trusts have much to recommend themselves in this respect.

³⁵ Cordelli and Reich, "Philanthropy and Intergenerational Justice."

³⁶ Rawls, *A Theory of Justice*, p. 252.

V. REASSESSING THE JEFFERSONIAN CHALLENGE

The foregoing section concluded that testation needn't presuppose that the dead have natural rights and can instead be justified by reference to its benefits to living and future persons. Testation in all its forms may not necessarily conform to the demands of justice, but there are good reasons to believe that recognizing charitable acts of testation can in fact satisfy certain compelling principles. Intergenerational charitable transfers may help to promote (or at least not necessarily undermine) equality of opportunity, and ICTs may also help to satisfy a principle of justice in savings between generations. These considerations go some way toward showing that devices of intergenerational philanthropy aren't nearly as prejudicial to the living and unborn as some have thought. But it isn't obvious that these considerations are sufficient to extinguish concerns about dead-hand control.

Recall that a constitutive feature of charitable bequests and trusts is that they impose the judgments of past generations onto future generations. In this way, such devices restrict the liberty of future generations to make their own economic decisions. Resources that might otherwise be theirs entirely, to allocate as they choose, must instead serve the purposes declared and specified by their forebears. In turn, because ICTs are public investments, designed to alter the nature and extent of collective goods within a society, these transfers restrict the degree of control that future generations may exert over the qualitative features of the social world they inhabit. Why ought future generations not enjoy sovereignty over these decisions?

A fixed point of political morality is that moral equals are entitled to a presumption of liberty. By default, each agent is entitled to govern her own affairs by her own lights. Your attempt to exercise practical authority over me—to substitute your judgment for mine over how I am to act—must be justifiable to me. If a convincing justification isn't available, I am in turn justified in denying your authority and taking steps to resist it. One popular way to show how practical authority can be justified is to appeal to instrumental considerations.

Instrumental justifications of practical authority hold that an authority is legitimate if obeying its commands leaves subjects better off, in some relevant sense, than they would otherwise be.³⁷ To determine that future generations ought to abide by the directives of past generations, therefore, might involve showing that obeying the wills of the past makes future generations better off, in some relevant sense. In turn, a compelling reply to the Jeffersonian challenge could hold that obeying the wills of the past places future generations under conditions that are more beneficial and more just than they would be if future generations were to act independently. And it strikes me that each of the claims from the preceding section supplies an instrumental argument for the authority of the past over the future. That is, without intergenerational charitable transfers, future generations would be less able to advance their substantive aims, less able to maintain equality of opportunity, and less able to maintain various pillars of a just basic structure over time. To consider the foregoing justifications for ICTs as instrumentalist arguments for practical authority is also to open them up to pertinent objections, however.

A. *Generational Sovereignty: An Intrinsic View*

Obviously enough, some might reject instrumentalist justifications of authority out of hand. One might hold that, just as each nation is entitled to self-determination with respect to other nations, so each generation is entitled to self-determination with respect to other generations. It's generally wrong for one nation to colonize another on grounds that it has superior knowledge or capacity to promote justice, and it's equally wrong for past generations to "colonize" future generations in this way. If we reject colonial rule, must we also reject ICTs?

Answering this question requires that we consider positive arguments for collective self-determination, arguments that purport to show why it's distinctively valuable for a collectivity to

³⁷ Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), p. 53.

control its own affairs. Such arguments hold that even if it were true that a benevolent despot, or a supercomputer, or a sacred text could more reliably track justice's demands, our lacking collective control over our laws and policies would be objectionable.³⁸ According to Zuehl, it would be objectionable because in some sense it would make our world not fully our own. We wouldn't be able to identify with, or see ourselves in, the decisions that affect our lives. We would feel like guests in a hotel room rather than residents of a home. The social world would confront us as other and alien.

One might think that ICTs undermine collective self-determination precisely in this way. These devices impose the judgments of the past upon the future. They reflect the wills of past persons and not those of current co-citizens. I suspect, however, that ICTs can be made consistent with an appreciation of the value of collective self-determination.

For Zuehl, members of a collectivity can reasonably feel at home in their social world when their institutions are causally responsive to their will, as it's expressed through well-functioning representative democratic institutions. But members of a collectivity don't need to control each individual law and policy in order to be collectively self-determining in the relevant sense. Rather, Zuehl claims that a collectivity is self-determining when, by way of democratic decision-making, its "core institutions" intentionally reflect its "core values."³⁹ Thus, collective self-determination is undermined when the state isn't governed democratically, or when the state can't reliably regulate the society's core institutions in accordance with citizens' articulated values.⁴⁰ From this I believe we can also infer conditions for preserving collective self-determination in the face of external influences. Namely, a society suffers no objectionable setback to self-determination when such forces respect the collective's

³⁸ Anna Stilz, "The Value of Self-Determination," in *Oxford Studies in Political Philosophy*, vol. 2, ed. David Sobel, Peter Vallentyne, and Steven Wall (Oxford: Oxford University Press, 2016), 98–127; Jake Zuehl, "Collective Self-Determination," Ph.D. diss. (Princeton: Princeton University, 2016).

³⁹ Zuehl, "Collective Self-Determination," p. 1.

⁴⁰ Zuehl claims that collective self-determination also fails when citizens lack basic agreement on fundamental assumptions, such as the moral equality of persons (*ibid.*, pp. 68ff).

sovereignty over its core institutions or the conditions that core institutions are meant to regulate: fundamental rights, duties, and opportunities.⁴¹

Now we can begin to see how ICTs aren't morally equivalent to directives from a colonial administrator. A distinctive feature of colonial rule, and other forms of undemocratic authority, is that it involves domination of the society's core institutions and thereby deprives citizens of the opportunity to control their own affairs. But it's difficult to see ICTs as dominating in any meaningful sense. This is so for three reasons. First, even if ICTs require a future generation to pursue causes or implement strategies that it disapproves of, ICTs are expected to supply only a portion of the funding for charitable pursuits. Future generations can still make their own charitable investments to counteract or supplement the investments of the past.⁴² Second, given the wide range of charitable purposes, most ICTs bear only a tenuous relation to the distribution of fundamental rights, duties, and opportunities. It's difficult to see, for instance, how trusts for the preservation of historic landmarks or bequests for advancing excellence in the performing arts bear on matters of basic justice. The value of collective self-determination might tell against the privatization of basic education and welfare provision, insofar as such measures inhibit citizens from effectively regulating the content and distribution of fundamental rights, duties, and opportunities. But offhand it seems that at least some degree of private provision can be consistent with living citizens holding the reins that establish basic liberties and entitlements to essential resources. Third, even if these first two conditions somehow failed to hold, ICTs don't prevent

⁴¹ Though Zuehl provides no definition of "core institutions," the common illustrations that he offers (the civil and criminal justice systems, and systems for distributing employment, healthcare, and education) seem to possess a unifying quality (ibid., pp. 42–43). That is, a central unifying feature of such institutions is their role in assigning fundamental rights, duties, and opportunities—what we might otherwise call matters of basic distributive justice. I borrow this definition of "core institutions" from Rawls's comments about the "basic structure," to which Zuehl seems partially indebted. See Rawls, *Theory*, pp. 7, 96.

⁴² Historically this wasn't always the case. When the primary form of wealth was land, there was a real worry that a society's material basis would someday come to be controlled entirely by dead persons. See Lewis M. Simes, *Public Policy and the Dead Hand* (Ann Arbor: University of Michigan Law School, 1955).

a well-functioning democratic state from asserting legislative supremacy over questions of basic justice. Legislation to nationalize health care, for instance, would instantly supersede ICTs designed to finance the provision of medical services.

At the very least, then, ICTs don't categorically prevent a generation from exercising control over its common affairs in the way that colonialism does to a society. I take these observations to show that although ICTs subject a society to control by alien forces, this control is reconcilable with one central reason we have for wanting freedom from that kind of control.⁴³

B. Generational Sovereignty: An Epistemic View

As I have framed it, the challenge for the proponent of ICTs is to show that, although ICTs impose the judgments of the past onto the future, this imposition can be justified. It can be justified if it's true that obeying the wills of the past leaves future generations under conditions that are more beneficial and more just than they would be if future generations were to control property completely independently of the past. The immediately preceding subsection deflected a preliminary objection to this line of reasoning, that rule by the past would be impermissible even if it led to perfectly just outcomes. The present subsection considers a more direct challenge: that complying with the directives of past generations doesn't necessarily satisfy the instrumentalist justification at all. Complying with the directives of the past can often leave future generations in suboptimal conditions.

To see the force of this objection, consider some examples. When the Englishman Thomas Betton died in 1723, he ordered his estate placed into trust. His will declared that half of the trust's annual income be paid "forever to the redemption of British slaves in Turkey or Barbary."⁴⁴ Despite his

⁴³ An interesting consequence of this view is that it casts doubt on the legitimacy of perpetual constitutions, insofar as they presuppose substantive conceptions of justice. Perpetual constitutions enjoy monopoly or dominating influence over future generations in a way that I've claimed doesn't hold in the case of ICTs.

⁴⁴ Simes reports this case in *Public Policy and the Dead Hand*, p. 122.

good intentions, however, Betton failed to foresee that the white slave market would disappear in the 1830s, when France seized Ottoman territories and in short order rooted out the trafficking of human beings. Fidelity to Betton's stated wishes would require that the funds continue to accumulate unused should those markets somehow reappear. Also consider Bryan Mullanphy of St. Louis, Missouri. He died in 1851, but not before establishing a trust "to furnish relief to all poor immigrants and travelers coming to St. Louis on their way, bona fide, to settle the West."⁴⁵ Within a few decades, the West was mostly settled, and innovations in transportation made wagon stops in St. Louis obsolete. If Mullanphy had his way, his trust would still be idly accumulating funds, waiting perhaps for the Pacific Garbage Patch to become habitable.

The arguments in favor of ICTs that we considered above wouldn't necessarily rule out these kinds of troubling cases. Both cases appear consistent with the liberal-egalitarian perspective on inheritance, which approves of ICTs insofar as they are inequality-neutral or inequality-reducing. The succoring of weary immigrants and travelers, for instance, reduces a pertinent form of inequality. Each case also appears consistent with the justice-in-savings perspective on ICTs, which holds that ICTs are valuable as fonts of social capital, disaster preparedness, and technological innovation. Preserving Betton's slave-rescue fund would be a hedge against a kind of rare disaster. The slave rescue and repatriation organizations that it would fund could eventually contribute to the stock of social capital. The innovative methods that these organizations might develop could be adapted or scaled up by other organizations or by the state.

What we notice when we reflect on these cases is that although the donors in question appear to have been attempting to benefit future generations, the passage of time has called their judgment on this score into question. Clearly enough, Betton and Mullanphy respectively assumed that British slavery and waggoneer weariness would remain serious problems into the indefinite future. These

⁴⁵ Ibid., p. 127.

judgments turned out to be false. Armed with new information, future generations charged with preserving these trusts might well believe that the risks of British slavery and weariness among St. Louis waggoneers are now too remote to warrant saving so much resources for them. They might think other causes more urgent or more cost-effective investments.

The challenge for ICTs is that although their putative justification depends upon their resulting in significant benefits for future persons, past generations are entirely unreliable judges of what will be specifically useful to succeeding generations. Living persons are generally much better at gauging and satisfying the interests of their contemporaries. Partly this is because living donors have access to more intimate knowledge of the preferences of their potential beneficiaries. Being alive also enables them to update their judgments in response to new information. If I discover that no one is attending the museum that I have been supporting, I can change the direction of my donation (by funding some other cause) or change the strategy of my gift (say, by funding the museum's marketing efforts rather than its collection development). These features disappear with intergenerational philanthropy. For once I die, there is no guarantee that the judgments I formed while alive will satisfy the interests or preferences of any potential beneficiaries who survive me. The greater the separation of time, the worse the likely discrepancy between past judgments and future interests. Generally speaking, future generations may also be more reliable judges because of their privileged position in the historical sequence. Living later in time gives them access to improvements in technology and accumulations of historical data to draw more reliable causal inferences.

These initial considerations would appear to undercut the case for ICTs. If past generations are generally less wise about the interests of future persons and how to promote them, respecting directives from the past will not make future generations better off. In turn, future generations would then have no reason to regard these directives as binding. But this isn't the end of the story, as another example will help clarify.

Marie Robertson made a restricted gift to Princeton University in 1961.⁴⁶ The terms of the trust stated its purposes as “the education of men and women for government service.” Particularly in the years after Robertson’s death in 1981, Princeton started to interpret “government service” more loosely, using the gift to train students for careers in public service outside of formal government employment. The university believed a changing labor market for public service had rendered Robertson’s intentions obsolete. The size of the federal bureaucracy had been shrinking while opportunities for jobs with private contractors and nonprofit agencies had become more numerous. Princeton’s actions set off a rancorous dispute with Robertson’s surviving family members, who believed that her gift was meant explicitly to train officials for the federal government.

For the sake of illustration, let us suppose that Robertson did intend her gift to express a specific commitment to government work as such. She might have believed, for instance, that official state agencies are more democratically accountable than private firms and nonprofits and thus more legitimate ways of administering public policy. Had she lived to observe them, Robertson might well have opposed recent trends toward outsourcing state functions and Princeton’s willingness to follow suit. In this respect, the dispute didn’t arise because Robertson failed to predict future circumstances accurately, but because of a principled disagreement between Robertson and her trustees. It would certainly not be unreasonable for someone to hold that a liberal democracy ought to rely more heavily on a well-trained official bureaucracy than on outsourcing, and that training students for official roles is an essential mission of schools of public administration.

I take this case to indicate something distinctive about the epistemic virtues of ICTs. Namely, not all disputes with dead donors come about as a result of the donors’ lack of foresight. At least some disputes turn on matters of principle, where the past’s judgment may ultimately be as wise as, or wiser than, the future’s. Clearly, in cases where the judgments of the past are superior to the judgments of

⁴⁶ I take these facts from Goodwin, “Ask Not What Your Charity Can Do for You.”

the future, deferring to the judgments of the dead would help the future better advance its own interests. With this in mind, suppose that Robertson's view about public service ultimately is the most reasonable position. If we were to think about the matter carefully and abstract further from the status quo, we would come to accept this position as uniquely correct. The case would then show that prohibiting ICTs risks depriving future persons of the superior wisdom of the past.

One might also think that a certain amount of deference to past judgments can be valuable even when their apparent wisdom is more controversial. Suppose we find, after due reflection, that Robertson's position provides a reasonable alternative to the status quo, but not an obviously superior alternative. Even so, we might agree that ICTs that are merely controversial, as opposed to those that depend upon patently false beliefs, can still be useful to present and future persons, though in an indirect way. Obeying the reasonably controversial wills of the past can be useful because it forces the present and future to engage with conceptions of the public good that challenge the conventional wisdom of the moment. We don't need to endorse a thoroughgoing Burkean conservatism to appreciate that in some cases encountering judgments of the past exposes us to certain valuable advice that we wouldn't have otherwise considered.⁴⁷ At the very least, confronting the different practical judgments of past persons, as they manifest in the organizations of civil society, requires us to test the robustness of the propositions to which we are initially inclined. Thus, the fact that ICTs require a present generation to share the task of directing civil society with past persons can have certain educative effects on the present generation. Even when ICTs aren't altogether epistemically privileged, they can work in indirect ways to improve the present generation's ability to advance its aims consistent with the demands of justice.

Taken together, the observations of this section indicate that an instrumentalist justification for

⁴⁷ Edmund Burke, "Reflections on the Revolution in France," in *Select Works of Edmund Burke*, Vol. 2 (Indianapolis: Liberty Fund, 1999).

ICTs reaches mixed conclusions. Obeying the terms of ICTs that depend on patently false assessments would deeply undermine the ability of future generations to advance their interests. However, obeying the terms of ICTs that depend on assessments that are merely reasonably controversial might in fact leave future generations better off in relevantly valuable respects. Where does this leave us? If I am right, the resulting policy challenge that a society faces isn't the binary one of allowing ICTs or prohibiting them; it's one of fine-tuning the regulation of intergenerational transfers so as to screen out ICTs that become obsolete while protecting those that reflect merely controversial judgments. The final section offers some general thoughts on how different regulatory strategies might meet this challenge.

VI. POLICY IMPLICATIONS

One might think that a way of avoiding the possibility of obsolete ICTs is to restrict them to very general purposes. Restricting ICTs to general purposes would allow future trustees significant discretion over how to interpret and administer them. Future trustees would be able to make these decisions with reference to current understandings of empirical conditions. An immediate problem with this proposed solution, however, is that it squelches one of the main incentives for making ICTs in the first place. Arguably, a prime incentive for donors in making such transfers is the opportunity to give effect to their specific judgments about the public benefit. The pleasure in legacy giving is as much an expression of the donor's thoughtfulness and taste as it is an expression of her generosity. A scheme that significantly limits the degree of choice among potential objects of philanthropy would make ICTs much less attractive to most potential donors.⁴⁸ This would be an unfortunate implication in light of the

⁴⁸ One might object here that the prevalence of general-purpose foundations challenges the idea that the permission to craft narrow terms serves as an important incentive. However, I think it's more accurate to think of general-purpose foundations as exceptions to this rule. Those who possess vast sums of wealth may get as much, or more, satisfaction from endowing a general-purpose institution that bears their name. This alternative incentive isn't available to persons of more ordinary means.

hypothesis that ICTs are important instruments of justice.

Perhaps a more serious problem with confining ICTs to general purposes is that it would deprive ICTs of one of their chief virtues. As we have seen, one of the chief virtues of ICTs lies in their ability to preserve unique ideas from the past and counteract biases of the present. Confining trusts to general purposes would allow future generations to inherit the generosity of the past, but not its wisdom.⁴⁹ And as we saw above, the promise of epistemic benefits is an integral component of a successful defense against the Jeffersonian challenge. If the past has no knowledge to offer the future, the future has fewer reasons to respect the past's attempts to meddle in future social conditions.

A second policy option is to prevent donors from making perpetual trusts. A one-time bequest, or a trust that spends down its assets after a limited number of years, stands a good chance of avoiding the tendency toward obsolescence. I think this strategy would also prove over-inclusive, however. Certain types of initiatives take many years to get off the ground. Their benefits might not become apparent for many decades, if not centuries. Term limitations on ICTs would discourage the kinds of long-term thinking that some claim as one of their chief strengths.⁵⁰

A third and more promising possibility is to take a permissive attitude to the terms of the ICT, allowing donors to select the narrowness of their aims and the duration of their purposes. This permission would be qualified, however, by periodic review. A proposal along these lines has enjoyed the support of some prominent figures. One is John Stuart Mill.⁵¹ (See Rob Reich's contribution to this collection for a deeper investigation of Mill's views on this matter.) Mill argues that perpetual trusts pose a particular dilemma. On the one hand is the fact that even a "prudent man" lacks the foresight to predict what will be useful twenty or thirty years after his death. On the other hand is a danger in

⁴⁹ I'm grateful to Rob Reich for bringing this point to my attention.

⁵⁰ Cordelli and Reich, "Philanthropy and Intergenerational Justice."

⁵¹ J.S. Mill, "Corporation and Church Property (1833)," in *Collected Works of John Stuart Mill: Essays on Economics and Society Part I*, Vol. IV, ed. John M. Robson (Toronto: University of Toronto Press, 1967), pp. 193–222.

inviting the state to step in to revise the terms of a trust once that foresight proves faulty. Mill worries that public officials would be tempted to abuse this power, such as by reallocating trust funds to compensate for temporary budget shortfalls in other areas of public spending. He thus proposes to expose perpetual trusts to review after a fixed period of time (no longer than “the foresight of a prudent man may be presumed to reach”), but to limit the revisions that public officials may make. Public officials, he contends, may only resolve to amend a trust’s terms if they have in fact become obsolete. And in revising obsolete terms, officials must seek, first, to deploy them toward efficient uses and, second, to select uses that are as close as possible to the trust’s original purposes.⁵²

Vestiges of Mill’s proposal appear in ongoing efforts to reform the judicial doctrine of *cy-près*. In the U.S. and elsewhere, *cy-près* (from the archaic French *cy près comme possible*) permits public officials (typically judges) to revise a trust that has become obsolete. As it’s traditionally practiced, officials are only allowed to revise the terms of the trust when those terms have become illegal by current standards or literally impossible to carry out. By protecting the intentions of the donor to the extent possible, the doctrine preserves the incentives that encourage making ICTs and devoting them to unique purposes. However, the doctrine has also been the object of considerable criticism, particularly since terms can prove objectionably impractical or wasteful despite remaining possible to implement.⁵³ It’s *possible* to accumulate funds for the repatriation of British slaves or the relief of settlers passing through St. Louis. But is it worth saving millions or even billions of dollars for such rare causes?

In recent years, approximately half of American states have attempted to account for this kind

⁵² The precise details of Mill’s position are difficult to pin down. In revisiting the question in 1869, he restates a similar regulatory ideal but appears to suggest a different way of implementing it. Rather than revise the terms of obsolete trusts, he writes in passing that trusts should come under state control, where they can then be redeployed to more lasting public purposes. However, the context of this statement makes it ambiguous as to whether nationalizing trusts is truly what he intends to advocate, and whether this represents his considered position. See J.S. Mill, “Endowments (1869),” in *Collected Works of John Stuart Mill: Essays on Economics and Society Part II*, Vol. V, ed. John M. Robson (Toronto: University of Toronto Press, 1967), pp. 615–29.

⁵³ Simes, *Public Policy and the Dead Hand*, pp. 139–40.

of concern in their adoption of reformed guidelines for *cy-près*.⁵⁴ The Uniform Trust Code (UTC), a model law proposed by an independent commission of experts and adopted by numerous states, now contains a broadened understanding of *cy-près*.⁵⁵ The UTC allows a court to alter the terms of a trust when it judges that such terms have become impractical or wasteful, even if complying with the terms remains technically possible. From the perspective of the account I have offered in this essay, this is an encouraging development.

A noteworthy limitation of the UTC, however, is that it doesn't automatically subject perpetual trusts to periodic review. For a court to consider applying a *cy-près* remedy, an "interested person" must bring a challenge to the trust in question.⁵⁶ A predictable consequence of such a policy is that it exposes to scrutiny only a fraction of potentially obsolete trusts. But in view of Mill and Simes, *all* charitable trusts should come under review automatically after a fixed period of time. Only by subjecting all trusts to review can we be sure to address the problem thoroughly and fairly. (Lest this proposal appear to impose an unreasonably weighty administrative burden, imagine a process that reviews a pseudo-random sample of trusts—much like the Internal Revenue Service's current auditing procedures—with extra attention paid to trusts that control the largest endowments or operate within the most judgment-sensitive areas.)⁵⁷

Altogether, these observations point toward a particular regulative strategy. That is, a society ought to broadly recognize one-time bequests and limited-life trusts. Meanwhile, the price of adopting a longer time horizon is to expose one's endeavors to substantive audit and adjustment at successive intervals. Recent developments in American trust law go some way toward capturing the spirit of this

⁵⁴ Thanks to Paul Brest for bringing this to my attention.

⁵⁵ *Uniform Trust Code* (National Conference of Commissioners on Uniform State Laws, 2010), sec. 413, <http://www.uniformlaws.org/Act.aspx?title=Trust%20Code>.

⁵⁶ *Ibid.*, sec. 201.

⁵⁷ An audit system can also mitigate the potential for abuse of power by trustees, who can be tempted to spend trust funds for personal advantage (as discussed in Madoff, *Immortality and the Law*, pp. 102–4).

regulatory ideal, but they also leave one significant aspect of the problem—the need for periodic review—unaddressed.

Intergenerational philanthropy involves a conflict over the desire of the past to benefit the future, and the desire of future to govern itself by its own lights. This conflict is present in some form in any relationship of gift-giving and gift-receiving. But the public-facing nature of philanthropy and the passage of time conspire to make this conflict especially thorny. Attempts to find a place for intergenerational philanthropy in a liberal democracy have pointed to its potentially beneficial effects. I have argued that these attempts are incomplete.

To show that intergenerational charitable transfers are justifiable requires showing that such transfers are consistent with the value of generational sovereignty. Part of what makes generational sovereignty valuable, I contended, is the interest a generation has in control over matters of basic justice in its society. We have seen that ICTs don't ultimately pose a threat to the ability of living persons to exercise control over these fundamental questions. Another part of what makes generational sovereignty valuable is the superior knowledge that a generation is likely to have regarding its own interests. Living persons appear best positioned to understand their own interests and to take prudent steps to realize them. Dead-hand control appears to saddle a living generation with the well-meaning but obsolescent conjectures of the departed. I argued, however, that binding the living and unborn to obsolete notions is a dispensable feature of intergenerational philanthropy. Prudent regulation can cabin the tendency of ICTs to reflect obsolete ideas while also leveraging the unique wisdom of the past. The possibility of such regulation, and some encouraging steps currently being taken in its direction, supplies one strong response to the Jeffersonian challenge.

A striking upshot of the foregoing analysis is that it vindicates the enduring influence of persons like Carnegie, whose general-purpose foundation shows no obvious signs of becoming obsolete. Those

troubled by this implication may suspect that the analysis is mistaken. My own hunch, however, is that the sources of sound objections to Carnegie's enduring influence lie elsewhere: not in its perpetuity per se, but in its tainted origins and plutocratic proportions.

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