“That the Earth Belongs in Usufruct to the Living” 

Perpetual Philanthropy and the Problem of Perpetual Power

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Intergenerational Charitable Transfers (ICTs): Three Kinds

1. **Charitable bequests**: gifts to an organized charity via will, completed upon death

2. **Charitable trusts**: transfer management of assets to professional trustees for the sake of some charitable purpose

3. **Restricted charitable gifts**: gifts to charities with use restrictions
The Practical Stakes

• **Bequests**: supply 9% of the funding for public charities in the U.S. (Giving USA 2016)

• **Trusts**: the organizational form of most private grant-making foundations, which have experienced explosive growth in recent decades

• **Restricted gifts**: the form of choice for many “major gifts” ($1 million+)
Are ICTs Justified?

- ICTs are a species of testation, traditionally a highly controversial practice

- Other ways of handling the succession of property once its owner dies:
  - return to the commons
  - redistribution by the state
  - inheritance

- For testation to be justified, the reasons in its favor must be weightier than the reasons in favor of its alternatives
Recent Arguments

- Two lines of thought argue for treating ICTs separately from intergenerational interpersonal transfers (inherited wealth)
- They conclude that inheritance should be restricted while ICTs should be encouraged
1. **Intragenerational Justice**

- Inheritance contributes to unjust inequalities within a single generation
  - Inequality of opportunity
  - Political inequality
- ICTs do not cause inequality; some even ameliorative inequality
  - Charities are gifts for purposes, rather than persons
  - Charities are often equality-enhancing
2. Intergenerational Justice

- ICTs necessary for assuring justice in savings between generations (Cordelli and Reich, forthcoming)

- Rawls’s just savings principle requires generations to share the burden of sustaining just institutions over time

- Sustaining just institutions requires long-term private investments in social capital, technological innovation, and disaster preparedness (i.e., a vibrant civil society)
The Jeffersonian Challenge

- “I set out on this ground which I suppose to be self-evident, ‘that the earth belongs in usufruct to the living;’ that the dead have neither powers nor rights over it.”

- “We seem not to have perceived that, by the law of nature, one generation is to another as one independant nation to another [sic].”

Letter to Madison, 1789
Jefferson’s Lesson

• If we object to colonial rule, we ought to be suspicious of rule by the past in all of its forms: the perpetual constitution, wills, bequests, trusts, etc.

• Does this mean that no form of “dead hand control” can ever be legitimate?

• My suggestion: take Jefferson as reminding us that each generation has an interest in sovereignty over its own affairs.

• Generational sovereignty is the default from which departures must be justified.
The Challenge for Philanthropy

- Charitable bequests, trusts, and restricted gifts allow past generations control over the rate and direction of charitable investment.

- In turn, this allows past generations to influence the relative size, composition, and character of civil society.

- Future generations have an interest in inheriting property unrestricted, so that they can determine how much to invest in civil society and what shape that society should take.
Example: Bryan Mullanphy

- Bryan Mullanphy of St. Louis (d. 1851) established a trust “to furnish relief to all poor immigrants and travelers coming to St. Louis on their way, bona fide, to settle the West.”

- This case is consistent with the justice-based defenses of ICTs.
  - Intragenerational justice: justice requires reducing unfair inequalities—poor immigrants are often victims of unfair inequality.
  - Intergenerational justice: the just savings principle requires saving for remote risks—such as the discovery/creation of unsettled territory in the West

- But something is missing. Succeeding generations clearly have an interest in deciding whether settling the West is to be encouraged, how much resources to devote to it, and in what way.
Why is Dead Hand Control Objectionable? (1)

An intrinsic conception of generational sovereignty

- Generational sovereignty is valuable because, by independently controlling the features of its social world, a generation enjoys the good of self-determination.

- Dead hand control is objectionable because it inhibits living persons from fashioning their society according to their own judgments; it makes living persons subjects rather than citizens.

- Objection: we can still enjoy self-determination even if we allow some degree of influence from the past.

- This argument explains why total enslavement by the past would be objectionable, but it seems forced to concede that most forms dead hand control are permissible.
Why is Dead Hand Control Objectionable? (2)

An instrumental conception of generational sovereignty: epistemic competence.

• Generational sovereignty is valuable because a living generation is often in a better position to judge its own interests and how to satisfy them.

• Dead hand control is objectionable when, and because, it imposes the less sound judgments of the past onto the future.
An Epistemic Diagnosis of Mullanphy’s Trust

• Mullanphy lacked the foresight to determine how long the West would remain unsettled, and how much resources are worth devoting to this cause.

• The principal objection to ICTs is that they can impose the obsolete judgments of the past onto the future.

• Why should a society enforce property rules that subject future generations to obsolete judgments?
A Counterexample: Marie Robertson

- Marie Robertson (d. 1981) made a restricted gift to Princeton University in 1961 for “the education of men and women for government service.”

- Princeton believed that Robertson failed to foresee changes in the market for government employment (decrease in size of federal agencies, increase in outsourcing). After her death, it began using the gift to train students for careers outside of formal government employment.

- Robertson’s surviving family members sued Princeton: they believed that her gift reflected a particular philosophy of government that was unaffected by changing historical conditions.
Robertson’s Lesson

• Not all ICTs reflect obsolete judgments; some reflect idiosyncratic principled convictions

• At some level, respecting the idiosyncratic judgments of past generations is beneficial to future generations

• A nonprofit sector partly directed by past judgments is richer and more diverse than a nonprofit sector directed entirely by the prejudices of the present generation

• The practical upshot: ICTs can be justified under a regulatory regime that protects future generations from obsolete empirical judgments.
Policy Options

- Prevent ICTs for narrow purposes?
- Prohibit perpetuities?
- Cy-près reform?
General Purposes and Time Limits

- Preventing ICTs for narrow purposes allows past generations to give some direction to a gift while allowing future generations to determine implementation

- Challenge: removes many of the incentives for making ICTs

- Time limits on trusts and restricted gifts would limit the duration that future generations must bear the burden of implementing obsolete past judgments

- Challenge: one of the main benefits of ICTs is their ability to support innovation and risk-mitigation through long-term investment
Cy-près Reform

- Currently, a charitable trust and restricted gift can face judicial scrutiny if a litigant charges that historical conditions have made it impossible to implement the terms of gift
- This standard is too restrictive
- An alternative policy (via J.S. Mill 1833, Simes 1955):
  - Permit one-time charitable bequests and time-limited charitable trusts / restricted gifts
  - Subject all perpetual trusts to periodic review (every ~30 years)
  - In addition to determining whether it is still possible to implement them, determine whether their accumulated endowment is a reasonable size for carrying out their purposes
In Summary

- Intergenerational charitable transfers are a controversial way of transmitting property.

- Recent arguments find them consistent with the demands of distributive justice.

- These arguments fail to appreciate that ICTs threaten an interest in generational sovereignty.

- Generational sovereignty is valuable because the living are often better judges of empirical facts than the dead are.

- ICTs should be regulated so as to inhibit their tendency toward obsolescence.
References


