“That the Earth Belongs in Usufruct to the Living”:
Perpetual Philanthropy and the Problem of Perpetual Power

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Abstract: Intergenerational transfers are a core feature of the practice of philanthropy. A substantial portion of the resources committed to charitable causes comes from gifts at death and gifts that continue to pay out after death. Indeed, the power of the foundation, as we know it today, can be attributed in no small part to the instrument of the charitable trust, which splits ownership among multiple parties and extends the life of an enterprise beyond the mortal existence of its initiating agents. Yet whether and in what way the instruments of intergenerational philanthropy can be justified is philosophically controversial. Alternative ways of organizing the succession of property appear to be more advantageous to future generations. Recent accounts have argued that these appearances are misleading: intergenerational charitable transfers comport with the demands of distributive justice and are therefore legitimate. This paper contends that these accounts are incomplete. Although intergenerational charitable transfers may promote justice in certain respects, they do so at the cost of imposing the judgments of the dead onto the living. Respecting the intentions of the past conflicts with an interest in generational sovereignty. The paper concludes that properly accounting for this interest in generational sovereignty does not require the abolition of charitable bequests or trusts. But it does tell in favor of a different regulatory orientation than legal systems currently adopt.

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I. THE JEFFERSONIAN CHALLENGE

Intergenerational transfers are a core feature of the practice of philanthropy. A substantial portion of the resources committed to charitable causes comes from gifts at death and gifts that continue to pay out after death. In modern legal contexts, bequests and trusts are particularly common devices for distributing the benefits of a donation across generations. A practice of bequest allows property owners to dedicate their estates to charitable pursuits upon their death. Instead of automatically relinquishing property to named heirs or remitting it to the state, the bequest 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. The trust, whether established during one’s life or through a bequest, allows a property owner to create perpetual charitable endowments. Placing property into trust splits ownership among three parties: a settlor (or, “trustor”) transfers the management of the property to one party (a “trustee”), while designating a third party as the property’s beneficiaries. By designating others to manage the property on their behalf, settlors do not need to remain alive in order to give effect to their philanthropic intentions. In fact, by investing trust property in income-generating funds and assigning its management to a self-replacing board of professionals, a property owner can expect that her philanthropic projects will survive more or less indefinitely. Most grant-making foundations as we know them today are organized as trusts, and much of their power can be explained in relation to the perpetual existence that the trust instrument affords them.

Though such intergenerational charitable transfers (“ICT’s”) are a core feature of philanthropic practice, whether and in what way they can be morally justified is more
controversial than we typically realize. Whatever else they may do, charitable bequests and trusts allow the dead to exercise control over the living and unborn. Property that could otherwise transfer to the future unrestricted, to be invested or consumed as future persons deem appropriate, must instead serve purposes dictated by persons who are no longer present. Subjection to the “dead hand of the past” was especially concerning to historical commentators, of whom Thomas Jefferson was one of the most articulate. 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.” Each generation, he thought, is morally entitled to make its own laws and to use property as its members see fit. He 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].” If we object to exercises of authority of one nation over another, why should we not object to exercises of authority of one generation over another? Jefferson appears to have regarded these propositions as sufficiently dispositive to foreclose further elaboration and defense. Nonetheless, his suggestive remarks lay down a gauntlet for the justification of intergenerational control in all of its forms.

Jefferson’s comments help to remind us that ICTs are essentially non-democratic exercises of practical authority. And this observation should trouble us. We commonly think that

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1 For convenience I use “ICTs” to refer to all devices for investing private property in a charitable purpose beyond the donor’s mortal existence. This label therefore includes charitable gifts made at death as well as inter vivos charitable gifts placed in perpetual trust. 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, forthcoming).

2 Though not necessarily for the reasons I address below. Originally, the “dead hand” referred to the Church. Property bequeathed to the Church became effectively “dead” because it could no longer generate taxable income. Lewis M. Simes, Public Policy and the Dead Hand (Ann Arbor: University of Michigan Law School, 1955), pp. 2-3.


4 Ibid.
laws in a liberal democratic society owe their legitimacy, at least in part, to the fact that those subject to the laws are entitled to influence their legislation and contest their administration. We generally regard it as a grave transgression when some agent issues commands, backed by the threat of coercive force, without due recognition for the political liberties of the subjects of these commands. Thus, we tend to object to dictatorships, colonial occupations, and aristocracies. We object to these forms of exercising authority even when they rule benevolently. ICTs, in effect, are part of this same category of non-democratic exercises of authority. Although they may in fact be enforced by a state that is otherwise democratically authorized, they impose restrictions on future persons without affording future persons any opportunity to influence or contest them. In this way they encroach upon the self-determination or sovereignty of future generations, and they call out for special justification.

ICTs are not entirely unique in this respect. As instruments of testation, they share the stage with non-charitable bequests and trusts, which typically transfer property to specific individuals, such as surviving family members. Non-charitable bequests and trusts place restrictions on how future generations can use property in much the same way as their charitable variants. ICTs also have much in common with the perpetual constitution, which binds future persons to the governance conventions established by a founding generation. But ICTs are nonetheless special in several ways.

Historically, both legal theory and legal practice have tended to regard non-charitable bequests and trusts with suspicion, viewing them either as draconian attempts to control their recipients’ behavior or as catalysts of unjust social inequalities.\(^5\) At the same time, practitioners and theorists have tended to withhold scrutiny from charitable bequests and trusts, presuming

that their benevolent aims outweigh or undercut the problems that beset their non-charitable alternatives. Yet, from the perspective of democratic legitimacy, we may have no less reason to take concern with intergenerational charitable transfers than with intergenerational non-charitable transfers. Though ICTs seek to benefit the public in some sense, they do so according to their donors’ own preferences of what constitutes the public benefit. And in a liberal democracy, what constitutes the “public benefit” or “common good” is essentially contested. Opinions differ considerably about what is good for us all collectively. By financing particular kinds of cultural enrichment, education, service delivery, or social advocacy, ICTs work to shape a society’s public culture and institutions in ways that are necessarily controversial. Future generations would appear to have a particular interest in sovereignty over the collective features of the social world they inhabit.

ICTs are also unique in relation to their other cousin, the perpetual constitution. Perpetual constitutions typically provide future generations with opportunities to amend them in any way, provided that proponents can muster enough support among their contemporaries. By contrast, in common practice ICTs can only be amended in limited ways, and the process of amendment has little to do with the preferences of currently existing persons.6

In what follows below, I argue that recent attempts to justify ICTs have failed to give sufficient weight to the value of generational sovereignty. One reason why generational sovereignty is valuable is that a current generation is generally in a better position to judge the reasons that apply to it. Yoking itself to the wishes of the past can require a current generation to administer property in ways that are obsolete or impractical. Ultimately, this epistemic interpretation of generational sovereignty does not recommend prohibiting ICTs altogether. But

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6 I discuss the doctrine of cy près further below.
it does imply that certain limitations—particularly on their duration—may be necessary for rendering them legitimate.

II. THE PRACTICAL CONTEXT

Newcomers to the topic may be surprised to learn that until relatively recently debates about the ethics of philanthropy were entirely bound up in larger debates about intergenerational ethics. This was largely because most acts of donation took place post mortem, when an individual conveyed property to charity in his will. Prior to the income growth and innovations in social insurance that peaked in the twentieth century, few people felt secure enough in their possessions to consider parting with them during life. Only at death could they be certain that they would no longer need their savings to sustain themselves or their dependents. Thus, transfers for charitable purposes generally took place only after the would-be philanthropist had died. For this reason the history of ethical reflection on philanthropy has tended to arise within the general problem of succession: what ought to happen to property when its owner dies.\(^7\) More specifically, the question has been whether there is a right to testation, and how far such a right extends.

Changing economic circumstances have complicated this debate. Today, bequests compose only a small portion of the funding devoted to charitable endeavors. The dollar amount of charitable contributions from living individuals now dwarfs that of bequests by eightfold.\(^8\) The limited dollar value of bequests under contemporary conditions may help to explain why few

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\(^7\) This question carried particular significance when the main form of wealth was real estate, rather than corporate shares. Compared to stocks, bonds, and other financial assets, which can be created by law, land is a scarce natural commodity. This raised the stakes of conflict over succession. This observation is a recurring theme in Simes, *Public Policy and the Dead Hand*.

\(^8\) My calculations, based on data from *Giving USA 2016* (Indianapolis: IUPUI Lilly Family School of Philanthropy, 2016).
commentators spill much ink on philanthropy’s intergenerational dimension anymore. The waning significance of the traditional charitable bequest is misleading, however. For the declining value of bequests has been offset by the rising significance of perpetual charitable trusts.

To reiterate, a trust splits the incidents of property ownership across three parties. A (“settlor,” “trustor,” or “founder”) transfers to B (“trustee”) the right to manage the property for the benefit of C, a third party. A trust is charitable when instead of naming persons as its beneficiaries it names one or more charitable purpose. A trust is perpetual when the terms of the trust discourage (or forbid) the trustee from alienating the principal. A perpetual trust will persist as long as its assets do. In most cases, the trust’s assets are invested in financial markets, where they tend to accrue sizeable long-term gains, above and beyond the costs of administration. Barring gross mismanagement by trustees, national economic crisis, or changes in the law, a charitable trust can be expected to live indefinitely.

Private foundations are the most prominent example of charitable trusts. (Private universities provide an additional prominent example, though the issues they raise are somewhat different.) At bottom, what we call a “foundation” is nothing more than an endowed charitable trust that makes grants to other charitable agents. Though most foundations are now created within the lifetime of an individual donor, most are also designed to outlive the donor. The number and size of foundations has grown astronomically over the past few decades. According

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9 Unlike a foundation, a university’s main endowment fund is typically (i) not the gift of any one donor and (ii) governed by trustees often without significant direction from the donors themselves. However, universities do face the problem of restricted gifts, which I discuss below.

10 The Internal Revenue Service distinguishes between three types of foundation. “Non-operating” foundations are grant-making entities. “Operating” foundations, such as museums and zoos, engage in charitable enterprise directly. Though technically universities and hospitals are also operating foundations, the I.R.S. treats them separately. To make matters even more confusing, some organizations that contain the word “foundation” in their name are not in fact organized as endowed charitable trusts, but as ordinary charitable corporations.
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 relative terms, the proportion of finance that foundations provide to charitable endeavors has also tripled over this period.

Restricted charitable gifts provide another example of perpetual philanthropy. Restricted charitable gifts are donations to incorporated 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 others words, are charitable trusts under the trusteeship of particular 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.

To be sure, foundations and restricted gifts raise many interesting issues apart from their relationship to time. However, as will become clear in what follows, philanthropy’s temporal aspects are rarely examined, poorly understood, and tremendously important. Justifying the enforcement of charitable bequests and trusts is no easy task.

III. PRELIMINARY SKEPTICISM

Subjection to the “dead hand of the past” is not something most of us think much about,
and it can be hard at first to see why it raises any moral concerns at all. A general principle of normative theorizing is that conditions only require justification insofar as they are subject to human control. We cannot criticize gravity in a meaningful way because gravitational laws are not generally amenable to our control. One might say the same thing about time. It is simply a brute fact that because time marches forward, past generations will enjoy greater influence over future generations than vice versa. It is not physically possible to erase the influence of the past and start over from scratch. Or, even if erasing all of the influence from the past were physically possible, the astronomical costs of doing so rob it of any serious consideration.

These claims are hardly disputable. Despite time’s natural forward momentum, however, we must bear in mind that institutional choices can augment or limit the degree to which the past controls the future. When such choices appear to favor the interests of one generation over another, they call out for justification. ICTs are a prime example of this. There are a number of ways in which a society could organize the succession of charitable resources that would afford greater control to future generations. For instance, bequests and trusts could be reformed to secure property for charitable purposes while leaving the choice of those purposes entirely up to future persons. Alternatively, property could transfer to future generations without any restrictions on its use at all, leaving future generations entirely free to choose how much to devote to charitable purposes, as well as which purposes to pursue. Or, bequests and trusts could remain much as we know them, but subject to particular limitations. For instance, they could face restrictions on their duration, or they could be opened up to more liberal amendment possibilities. In light of the fact that the succession of charitable resources could be organized in different ways that afford greater control to future generations, we have reason to wonder whether the status quo is defensible.

Another form of thoroughgoing skepticism comes from the other direction. Many
commentators throughout recorded history have held that the wishes of past generations are not entitled to any respect whatsoever. A main argument for this conclusion is that because only living persons can have interests, only living persons can have rights. And we are not required to respect the stated wishes of entities that have no rights. To have an interest in something is precisely to be in a position to derive benefits from its success and harm from its failure. Most of us now accept that a person is incapable of suffering setbacks or enjoying achievements once she has died. Because nothing the future does affects the interests of the past, it might appear that the wills of the dead carry no moral weight.

This conclusion should give us pause, however. For its truth entails some disturbing consequences. Many societies recognize a wide range of obligations toward the dead, such as honoring their burial preferences and commemorating their achievements. At least some of these conventions probably strike us intuitively as unassailable. We would think it wrong, for instance, to deny a deceased relative a memorial service, knowing full well that this was something she had deeply desired. Were I to promise a dying friend to adopt his dog after he passes, I would take myself to be acting wrongly if I dropped the dog off at a shelter on my way home from the funeral. But how can we reconcile the conviction that the dead have no rights with the conviction that we nonetheless sometimes ought to respect their wishes?

I think it mistaken to infer from the mere fact that dead persons cannot experience harm that living persons have no duties whatsoever to respect their wishes. Indeed, it should be plain that fidelity to the wishes of the dead has its basis in another source. What might be called a “practice theory” of intergenerational obligation holds that respecting persons’ wishes

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posthumously can be valuable as a social practice. A social practice of testation can be valuable, according to this type of view, not because it respects our posthumous rights as such, but because it generates significant benefits for us while we are living.

One reason that testation is desirable is that it allows us to extend our plans and projects beyond our mortal existence, thereby affording us opportunities to pursue more or better options during life. Suppose you are a person of advanced age with an abiding passion for supporting community theater. However, you also face ill health, and a concern about having sufficient funds to cover your medical expenses prevents you from committing to making donations while you remain alive. Without the power of testation, supporting community theater would require you to put your health at greater risk, a decision that most would consider imprudent. With the power of testation, however, you can arrange things such that whatever property remains in your possession at death goes to your favored theater group. This removes the trade-off between promoting your conception of the public good and protecting yourself from physical distress. By extending the range of available options 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. If we could not pass on property after death, we might very well see no reason to undertake difficult or long-term projects that result in significant social benefits. If I am not permitted to pass on my furniture store to my

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16 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 Rawls. See Andrew Reeve, *Property* (Houndmills: Macmillan, 1986), p. 161.
children, why should I put myself through the hardship of starting and running a business? Similarly, not being able to enjoy control over property beyond our lifetimes might lead us to consume a higher proportion of our property while alive—leaving fewer resources available to our successors.

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 is a way of facilitating the interests of a society’s members in living richer lives. A society that refused to honor wishes of the dead would be impoverished in many respects. And, when a society does recognize conventions around honoring the wishes of the dead, it is ordinarily wrong to violate these conventions. It is wrong not because of the harm one causes (per impossibile) to the dead person herself, but because of the failure to do one’s part to uphold a practice from which one also benefits.17

I will assume in what follows that the practice theory of intergenerational obligation succeeds. Conceding that future generations can have duties to past generations allows us to consider what those duties might be. For surely, future generations cannot be expected to respect any and all wishes of past ones. Complying with certain wishes may contribute to objectionable social conditions or impose excessive sacrifices on generations to come. As the next section shows, two notable strands of thought in contemporary political theory have considered the status of bequests and trusts. They converge on the conclusion that while justifying interpersonal transfers faces particular challenges, the case for recognizing charitable transfers is fairly strong.

IV. OPTIMISTIC ACCOUNTS

A number of recent scholars have challenged the traditional practice of testation on grounds that it leads to objectionable inequalities in resources.18 An unfettered right of individuals to make unilateral transfers conflicts with a society’s attempts to secure or maintain a particular distribution of resources. Especially when they involve large amounts, gratuitous transfers to individuals can very easily undermine attempts to achieve or maintain just background conditions. As Rawls puts it, albeit with a different target in mind, “the overall result of separate and independent transactions is away from and not toward background justice.”19 Intergenerational transfers reshuffle the distribution of wealth in accordance with the whims of testators. The spontaneous and independent choices of testators cannot be expected to maintain or promote a desirable distributional pattern.

This occurs in two main ways. As it happens, those who make intergenerational transfers by and large tend to transfer their estates to kin. This promotes the accumulation of wealth within families and threatens the ideal of equality of opportunity. 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 potential contribution to society or one’s status as an equal citizen. Unless a society takes special measures to insulate public affairs from accumulations of wealth, the integrity of democratic processes can also suffer. Under conditions of radical economic inequality, private financing of political campaigns allows the wealthiest

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families to serve as gatekeepers for electoral candidacy.\textsuperscript{20}

However, these liberal-egalitarian theorists 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.\textsuperscript{21} 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 particular heir. To be sure, not all ICTs are entirely inequality-neutral. 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.\textsuperscript{22} But the major difference is that while ICTs can contingently serve to perpetuate certain kinds of inequality, the transmission of dynastic privilege is inherent to non-charitable transfers of wealth.

A second reason for the liberal-egalitarian favoring of ICTs is that ICTs can work to combat the same objectionable inequalities that inherited wealth helps to create. Of course, whether ICTs promote equality as a general rule depends on what purposes a society designates as charitable and how it structures the choice among different purposes. In the contemporary U.S., approximately 31 percent of donated dollars end up benefitting the disadvantaged.\textsuperscript{23} Many

\begin{footnotes}
\item[21] This is true of Haslett, McCaffery, and Rakowski, \textit{op. cit.}
\item[23] “Patterns of Household Charitable Giving by Income Group, 2005,” Indiana University Center on Philanthropy / Google, Inc. (Summer 2007), available at
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believe that a society ought to provide greater incentives for charitable gifts aimed at reducing poverty and inequality. Though they may raise other concerns, it is clear at least that gifts of this type can generally be seen as equality-enhancing. In sum, ICTs do not challenge equality as fundamentally as inherited wealth does, and they may even help to moderate other sources of inequality.

Other scholars have made a more direct case for an affirmative policy toward ICTs. Chiara Cordelli and Rob Reich argue that ICTs serve as an especially useful means for satisfying justice in savings between generations. The argument starts from the observation that, whatever their other functions, bequests also serve as a way of saving resources for future generations. Resources not consumed during one’s life remain available to others who are living or unborn. But saving for the benefit of future generations involves sacrificing the interests of members of the current generation. For the most part, each generation has an interest in consuming as much property as possible. A just savings principle specifies (abstractly) how much a present generation is obliged to save for the future, and how much future persons can reasonably demand from their predecessors. Cordelli and Reich adopt Rawls’s general solution to this problem. The “just savings principle,” in Rawls’s terms, directs generations to share the burden of developing and maintaining just institutions over time. They are to do this each by adopting a schedule of savings.

http://www.philanthropy.iupui.edu/files/research/giving_focused_on_meeting_needs_of_the_poor_july


25 Cordelli and Reich, “Philanthropy and Intergenerational Justice.”
rates that they wish their predecessors had also followed. Rawls notes that savings may take various forms, including the conservation of natural resources, investment in buildings and technology, and investment in education and culture. In addition, Rawls holds that once a society has stabilized just institutions, succeeding generations are no longer required to continue saving.

However, Cordelli and Reich note that certain types of goods are at once critical constituents of a just institutional environment, not well supplied by traditional policy instruments, and unable to sustain themselves without continuous reinvestment. One of these goods is 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. In turn, the health of such a society depends on financial support that is both ongoing and voluntary. Disaster preparedness is another component of intergenerational investment. Averting disasters requires research into, and instruments to mitigate, low-probability, high-magnitude catastrophes. Though the state might take certain steps to address these events directly, Cordelli and Reich believe that private supplementation of state efforts is necessary to hedge against cataclysmic events. Finally, Cordelli and Reich contend that democratic processes have inherently short time horizons, and they are thus unlikely to invest in mechanisms that sufficiently take the interests of future generations into account. Because of their insulation from democratic pressure and their longer time horizons, ICTs are especially suited for financing long-term and experimental research projects, which are primarily beneficial to future persons.

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For these authors, policies that encourage ICTs support the development and maintenance of just institutions in these particular ways. Even if a society seems to have otherwise achieved a just basic structure—what Rawls calls the “steady-state” stage of development—this structure will be unstable without ongoing, affirmative measures to finance social capital, disaster preparedness, and technological innovation. To Cordelli and Reich, even if not singularly necessary for financing these goods, charitable bequests and trusts are optimal sources for their support.

V. GENERATIONAL SOVEREIGNTY: AN EPISTEMIC INTERPRETATION

Suppose we agree with the conclusions of the foregoing section: that intergenerational transfers are consistent with particular demands of justice, and that under certain conditions ICTs can even be justice-promoting. If we accepted these conclusions, it might be tempting to conclude the story here. One might very well think that if a practice preserves or promotes justice, it should be freely permitted, if not actively encouraged. And yet, there is a sense in which these arguments fail to fully grapple with the Jeffersonian insight that ICTs are special exercises of practical authority.

To reiterate, 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 could 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?
The answer that the foregoing section’s arguments suggest is that obeying the wills of the past places future generations under conditions that are more just than they would otherwise be. Without intergenerational charitable transfers, future generations would inherit a smaller share of resources from the past, and the value of those resources would be qualitatively poorer. This is, in other words, an instrumental justification of practical authority. That authority can be justified on instrumental grounds is a position that has been elaborated and defended at length by Joseph Raz. According to Raz, “the normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly.” In other words, Raz’s “normal justification thesis” holds that the principal consideration in justifying practical authority is whether the alleged authority has superior to access to the relevant reasons.

If we accept that ICTs are exercises of practical authority, the liberal-egalitarian arguments from the previous section can be understood as instrumentalist justifications for their legitimacy. As such, they hold that among the reasons that apply to a generation are reasons to promote justice. In turn, respecting the charitable judgments of past generations helps a current generation to meet justice’s demands better than it could if it were to try to meet those demands independently. But to realize that the foregoing justifications for ICTs are effectively instrumentalist arguments for practical authority is also to open them up to pertinent objections. Obviously enough, plenty 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

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other nations, so each generation is entitled to self-determination with respect to other
generations. It is generally wrong for one nation to colonize another on grounds that it has
superior knowledge or capacity to promote justice, and it is equally wrong for past generations to
“colonize” future generations in this way. If we reject colonial rule, must we also reject ICTs?
Ultimately, I believe the self-determination argument does not carry as much force as this
charged analogy would suggest. Defending this point would take more space than I can claim in
this paper, however. 29 In place of a full explanation, I will note in passing that whereas colonial
rule involves a monopoly on coercion, ICTs generally do not rise to this level of control. Even if
ICTs require a future generation to pursue causes or implement strategies that it disapproves,
ICTs typically 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. 30 Consequently, ICTs do not inherently prevent a generation from exercising control
over its common affairs in the way that colonialism does to a society.

Another objection is more pressing, and it remains my focus in what follows. This second
objection contends that even if ICTs are consistent with justice in a general sense, presently
existing persons are equally or more competent judges of what it is that justice specifically
demands. ICTs do not therefore allow their subjects to better comply with reasons that apply to
them. If the decisions of past generations are ultimately no wiser than the judgments of the
future, why should they be constrained by the dictates of the past?

To see the force of this objection, consider some examples. When the Englishman

29 I attempt to develop this line of thought more thoroughly elsewhere. See Theodore M.
University, 2016), chap. 3.

30 Historically this was not 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 Simes, Public Policy and the Dead Hand.
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.”31 Despite his 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.”32 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 would not necessarily rule out these kinds of troubling cases. Each appears 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.

31 Simes reports this case in Public Policy and the Dead Hand, p. 122.
32 Ibid., p. 127.
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 white slavery and wagoner weariness would remain serious problems into the indefinite future. These judgments turned out to be false. Armed with new information, future generations charged with preserving these trusts might well believe that the risks of white slavery and weariness among St. Louis wagoners 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 exactly will be 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 preferences of any potential beneficiaries who survive me. The greater the separation of time, the worse the likely discrepancy between past judgments and future preferences. 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. The larger population size that future generations typically boast also means a
greater number of minds capable of aggregating knowledge.

These initial considerations would appear to undercut the case for ICTs. If past
generations are generally less wise about what future justice requires, respecting directives from
the past will not help future generations to comply better with the reasons that apply to them. In
turn, future generations would then have no reason to regard these directives as binding. But this
is not the end of the story, as another example will help clarify.

Marie Robertson made a restricted gift to Princeton University in 1961.33 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 this shift was warranted in
light of a changing labor market for public service. 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

33 I take these facts from Goodwin, “Ask Not What Your Charity Can Do for You.”
Princeton’s willingness to follow suit. In this respect, the dispute did not arise because Robertson failed to predict future circumstances accurately, but because of a principled disagreement between Robertson and her trustees.

I have little sense of whether Princeton’s position or the position that I have attributed to Robertson is ultimately the more reasonable of the two. 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. Offhand it is not obvious which if either of these two positions is the more sound.

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 no less wise or wiser than the future’s. Clearly, in cases where the judgments of the past are superior to the judgments of the future, deferring to the judgments of the dead would help the future better to comply with the reasons that apply to it. But one might also think that a certain amount of deference to past judgments can be valuable even when their apparent wisdom is more controversial. Being forced to confront the different judgments of past persons requires us to reevaluate the propositions to which we are initially inclined. In some of cases we may find that the judgments of the past expose us to certain valuable advice that we would not have otherwise considered. Thus, sharing the task of funding civil society with past persons can have certain educative effects on the present generation. In other words, they can also work in indirect ways to improve the present generation’s compliance with the reasons that apply to it.

Taken together, the observations of this section indicate that an instrumentalist justification for ICTs reaches mixed conclusions. Obeying the terms of ICTs that depend on false
assessments would deeply undermine the ability of future generations to comply with the reasons that apply to them. However, obeying the terms of ICTs that depend on reasonably controversial assessments might in fact leave future generations better off with respect to their reasons-compliance. If I am right, the policy challenge that a society faces is not the binary one of allowing ICTs or prohibiting them, but fine-tuning the regulation of intergenerational transfers so as to bolster their epistemic virtues.

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 persons significant discretion over how to interpret and administer them. One immediate problem with this proposed solution 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. I take much more pleasure in the thought of endowing a particular form of musical performance that I value than I do in the thought of making a contribution to “general artistic expression.” If I faced a choice between devoting my estate to “a form of art to be named later by anonymous future persons,” and devoting it to some private purpose, I am not sure what I would choose. A scheme that significantly limits the degree of choice among potential objects of philanthropy would make ICTs much less attractive to potential donors.

Another problem with confining ICTs to general purposes is that even seemingly general purposes can become obsolete once enough time has passed. A transfer designed simply to “combat child poverty” might seem broad enough to stand up to historical changes of any kind. (No doubt Betton and Mullanphy thought similarly of their own trusts.) But a transfer to combat
child poverty could become obsolete if child poverty ceased to remain a problem or if a future generation determined to address this problem exclusively through governmental efforts. And even a transfer that has not become entirely obsolete may prove to be objectionably wasteful or impractical, particularly when it controls a vast sum of wealth.

A second 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. Whether this is an attractive policy option seems to depend on the particular purposes to which the ICT is devoted. That is, 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.34

A third possibility is to apply greater oversight of ICTs by reforming the doctrine of cy-près. Cy-près (from the archaic French cy près comme possible) permits public officials (typically judges) to revise a trust that has become obsolete. However, as it is 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. An initial reaction is to regard this aspect of the doctrine as too conservative, precisely because it defers entirely to the potentially mistaken judgments of past persons. To some extent, however, this limited judicial power preserves the justification of ICTs. If judges could simply replace the terms of charitable trusts with their own preferences or the preferences of contemporary litigants, donors would have few incentives to make such transfers, and these transfers would no longer leverage particular epistemic benefits.

Lewis Simes suggests that, without supplanting the judgments of the donor, the

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34 Cordelli and Reich, “Philanthropy and Intergenerational Justice.”
“impossibility” standard should be broadened slightly to encompass trusts that are unreasonably wasteful or impractical. The Simes proposal aims to strike a balance between the interests of the past and the interests of the future. It protects donors’ judgments (and the incentives that come along with a promise to respect them) from falling victim to temporary budget crises or current funding fads. At the same time, it ensures that ICTs continue to serve ends that are not unreasonable and at a rate that is not too inefficient.

Along with John Stuart Mill, who made a similar proposal a century before him, Simes also offers a prudent way of administering the process of *cy-près* review. An enduring feature of *cy-près* is that officials may only consider revising a trust when some person with the legal standing to do so brings a challenge to the terms of the trust. Among other problems, this tends to expose to scrutiny only a fraction of potentially obsolete trusts. In view of Simes and Mill, all charitable trusts should come under review automatically after a fixed period of time. (Simes recommends thirty years.) If they are still effectively serving valid charitable purposes at this point, they may continue to do so unhindered for another interval of time. If they fail this test, officials may step in to revise their purposes.

Altogether, these observations point toward a particular regulative strategy. That is, a

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36 In truth, Mill offers at least two separate and partially incompatible proposals on this question. These occur in brief articles published in popular periodicals. In 1833, he makes the suggestion I report above, that the state step in to revise the terms of a trust after a fixed interval (no longer than “the foresight of a prudent man may be presumed to reach”). In 1869, he suggests instead that the state *nationalize* obsolete private trusts, so long as it devotes their funds to purposes “of a permanent character, to remove the temptation of laying hands on such funds for current expenses in times of financial difficulty.” What is puzzling is that though the 1869 proposal envisions a greater role for the state, Mill’s general position here is otherwise much more hostile to state control than his position in 1833. See J.S. Mill, “Corporation and Church Property (1833),” in *The Collected Works of John Stuart Mill: Essays on Economics and Society Part I*, ed. John M. Robson, Vol. IV (Toronto: University of Toronto Press, 1967), pp. 193–222, and his “Endowments (1869),” in *The Collected Works of John Stuart Mill: Essays on Economics and Society Part II*, ed. John M. Robson, Vol. V (Toronto: University of Toronto Press, 1967), pp. 615–29.
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.

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I have argued that the justification of intergenerational charitable transfers requires that we consider a dimension of political morality that receives infrequent attention. Intergenerational charitable transfers might serve egalitarian aims, and they might promote justice in intergenerational savings. But at least in their traditional operation, such mechanisms also subject future generations to the judgments of past persons. This conflicts with the interest that each generation has in sovereignty over its collective affairs.

In this paper I have suggested that one reason why generations have an interest in sovereignty is that presently living persons are often better judges of their own interests than past persons are. Recognizing ICTs carries a risk that future generations will be forced to devote resources to vain or wasteful pursuits. But I also suggested that the past contains certain epistemic virtues of its own, and that entertaining the judgments of the past for a certain amount of time is one way of making future generations better off with respect to the demands of justice than they would otherwise be. Insofar as ICTs help future generations to comply better with the reasons that apply to them, they muster one strong response to the Jeffersonian challenge.