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Essays

Justice Across the Generations

Richard A. Epstein*

The recent revival in ethical theory has led philosophers, political theorists, and even lawyers to think hard about justice across the generations.¹ The conceptual problems that lie in the path of this venture are difficult. As commonly phrased, the issue is often what duties do people alive today owe to unborn future persons? The normal modes of inquiry are effectively barred in dealing with this question. Democratic processes with universal suffrage cannot register the preferences of the unborn, and dialogue between generations is frustrated when future generations, or at least some future generations, are of necessity silent. The usual sources of information being closed, the analysis often proceeds by examining hypothetical situations, most of which ask a deceptively simple question: What would we want the present generation to do if we stood in the shoes of some future unborn generation?

For some, like John Rawls, the answer seems relatively straightforward: "Each generation must not only preserve the gains of culture and civilization, and maintain intact those just institutions that they have established, but it must also put aside in each period of time a suitable amount of real capital accumulation."² Rawls emphasizes collective determination, undertaken from behind a veil of ignorance, as to the optimal savings rate within each generation for the benefit of those that follow it. As stated, the principle anticipates a persistent increase of the savings rate with wealth until some kind of 'steady state' is achieved, for "when just institutions are firmly established, the net accumulation required falls to zero."³ The entire scheme essentially insists that the tem-

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1. See, e.g., B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 107-221 (1980) (chapter entitled "Justice Over Time"); J. RAWLS, A THEORY OF JUSTICE 284-93 (1971) (chapter entitled "The Problem of Justice Between Generations").

2. J. RAWLS, *supra* note 1, at 285.

3. *Id.* at 287. The "steady state" seems to be remarkably static in that increased levels of productivity might call for a positive savings and investment rate.

poral priority of people alive in the present yields them no moral priority. The same sentiments are expressed by Bruce Ackerman, who has argued that "all citizens are at least as good as one another regardless of their date of birth."⁴ Again, the clear implication is that some form of moral and, more importantly, legal constraint is necessary to protect the legitimate claims of future generations.

I confess that my moral intuitions on the grand scheme of things are not as well developed as either Rawls or Ackerman. Hard as I try, I cannot determine precisely what it was that my parents owed me, or what their generation owed my generation, or those yet to come. I am also somewhat overwhelmed by a similar inability to express what I owe my children, as opposed to what I hope to provide them with, or to determine, even globally, what my generation owes the next generation. I shall therefore attend to a more modest task. I propose to worry less about moral duties and more about real prospects. My thesis is that the debate on equity between the generations focuses too much on duty and too little on practice and incentive. Coercion and duty can do little specifically to insure that the next generation receives its "fair share" of human and natural resources. If we continue along in an unreflective state to create sound institutions for the present, the problem of future generations will pretty much take care of itself,⁵ even if we do not develop some overarching policies of taxation or investment that target future generations for special consideration.

This answer may be thought of as selfish and as incompatible with any disinterested inquiry from behind the veil of ignorance or in the full light of day. Nonetheless we ought to adopt this "leave bad enough alone" attitude because the alternatives are worse. The issue is not that of intentions, or of obligations, but of the connection between means and ends. A classical liberal regime of limited government, low taxation, personal liberty, and private property benefits future generations more than an alternative regime that consciously enlists large government to restrain liberty and to limit the present use of property for the benefit of future generations. The use of collective coercion must be carefully husbanded lest it does more harm than good.

To develop this thesis, I will approach the problem of intergenerational equity in stages. First, I ask how the problem of intertemporal allocation works in the absence of conflict between generations, so that the only problems are those of self-knowledge and coordinating present

4. B. ACKERMAN, *supra* note 1, at 203.

5. See Williams, *Running Out: The Problem of Exhaustible Resources*, 7 J. LEGAL STUD. 165, 182 (1978) ("Let future generations take their luck as past ones did.").

and future preferences. In this context, I conclude that although problems of foresight and planning exist, there is nothing that any system of public regulation can do to counteract them. Whatever the philosophical conundrums associated with self-knowledge and personal identity, the correct and workable assumptions must hold fast in the end to the naive view that preferences are generally continuous, stable, and well ordered.

Second, I shall examine the conflict between the generations within the context of the family, an institution in which the utility of the parents depends in part on the welfare of their children. Here I argue that the natural parental investment in their children creates a bias for the protection of their future that legal and social institutions should exploit, not undermine. Taxing and regulatory policies designed to secure equality of wealth in the next generation do so at the cost of reducing the levels of capital accumulation, thus putting the claims of *intragenerational* equity (if compelling at all) at odds with those of *intergenerational* equity.

Third, I shall then expand the inquiry to consider systems of public ownership that might be used to accumulate and invest present resources for future use. In this context, I believe that the efforts tend again to be self-defeating if only because it is harder to make public institutions responsive to the future than private ones given the short-term political pressures under which public institutions operate. What is true with respect to public assets is also true of public liabilities. The increase in public debt incurred to fuel public expenditures marks a covert transfer from future to present generations. A system of common-law property rights will tend to give greater protection to future generations than any regulatory or taxing substitute. Governmental regulation most properly concerns activities causing environmental spillovers and externalities—activities generating problems for which property rights solutions are weakest, both within and across generations.

I. The Self and the Future

The problem of equity between the generations presupposes that we can identify a conflict of interest between what people want today and what unborn people will want on some distant tomorrow. If one were to indulge for the moment in the assumption of a pie of constant size, then the argument is that each generation is entitled to only one slice of that pie, so that it is greed (or worse, theft)⁶ if members of the present genera-

6. See, e.g., B. ACKERMAN, *supra* note 1, at 203 (“So far as ideal theory is concerned, the bad trustee stands no better than any other kind of thief.”).

tion even nibble on a slice that in principle belongs to some future generation.⁷ To understand how serious a risk this overconsumption might prove to be in practice, imagine a different kind of universe where the question of temporal preferences remains but where any conflict of interest between generations disappears. That world exists when there is a single person who has all present and future claims on a limited set of resources. No group of individuals living in succession over the same period of time could hope to do a better job allocating those resources than this single person.

But how long does that person live? If that person were immortal, then the question of asset use and conservation quite literally blows up before our eyes. It is quite impossible to have equal endowments of a finite asset that will last an infinite period of time. If any minimum level of asset consumption is required for each period, it cannot be satisfied for all periods simultaneously. The only distributions of finite assets that can last an infinite time are those that follow some exponential decay function. This situation rules out equal consumption over all relevant periods.⁸

The assumption of immortality also makes it impossible to plan actions or evaluate behavior, because no one ever has to pay the full consequences of an error in judgment or conduct. Immortal people do not face the risks of starvation, death in combat, or even old age. By hypothesis, they have triumphed over scarcity, the basic fact on which all economic theories of allocation and all legal theories of entitlement⁹ depend. No one quite knows what he could or could not do if he were immortal. What is true of single individuals is true of societies at large; again, the assumption of immortality is necessarily incompatible with a universe of

7. Here I put aside the problem of an infinite number of future generations, so that no one generation could have a finite part of any pie, no matter how large. In the short run, this difficulty could be overcome by assuming an expanding output via improved production. But, in the long run, if resources are finite, then extinction is the necessary fate of all living species, including man, so that equality between the generations could never be maintained.

8. See Williams, *supra* note 5, at 169-73. Williams demonstrates that the resource owner will diminish the consumption in each period by the real interest rate, which in turn reflects the price of deferred gratifications. The formula he derives is $x = S(1-a)$ where S equals the amount of the original stock, a equals the fractional use that each period represents of the prior period, and x equals that portion of the stock consumed in the period. In order for the consumption to be equal in all periods, a has to be set equal to 1, which means that x , the amount consumed in the first period is zero. If x is a market basket of all goods and services, then there will be no second period. If there is some threshold x^* below which an individual or group cannot sustain itself, then human survival and equal consumption over all periods are not mutually compatible.

9. In legal theories of entitlement for each right there is a correlative duty. See, e.g., W. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* 38 (1919) (stating that "it is certain that even those who use the word and the conception 'right' in the broadest possible way are accustomed to thinking of 'duty' as the invariable correlative").

finite resources. We have to stick to people with finite lives to understand how choices are made over time.¹⁰

Once we assume the existence of some fixed life, even one with an uncertain duration, the problem of resource allocation over time becomes tractable. The ordinary individual will have to decide the allocation between present and future consumption, and present and future labor, given his preferences (which may change) for both labor and consumption, subject to a scarcity constraint. The resources used today will not be available in future periods: those who work hard today must recuperate tomorrow. By the same token, the consumption enjoyed today cannot be had tomorrow. An individual of this type would face the problem of discounting future costs and benefits to their present value.¹¹ This discounting tendency suggests that it is better to advance consumption and to defer labor, but there is a countervailing tendency. The person's probable belief that there are diminishing returns to consumption in any given period will lead to some desire to equalize net consumption over different periods of time. There is thus some pressure to defer net consumption. Exactly how these two pressures balance out is hard to predict in the abstract.

One implicit assumption in this model is that individuals retain constant preferences over time, or more generally, that they will be the "same people" tomorrow that they are today. This proposition is not necessarily accurate. People may have preferences that change all the time, and in principle the changes could be large enough to constitute a radical change in personal identity. But denying the continuity of preferences and of persons has certain dramatic consequences for the way in which people undertake the ordinary business of life, even within the same generation, or on the same day. Taken to its extreme, the position could be that persons are reconstituted on a continuous basis.¹² The person who orders the ham sandwich at lunch is not the same person to whom it is served ten minutes later, who in turn is not the same person who pays for it ten minutes after that. (This is a fast food restaurant.)¹³

10. See Williams, *supra* note 5, at 169-73. See generally M. FRIEDMAN, A THEORY OF THE CONSUMPTION FUNCTION *passim* (1957); Hall, *Stochastic Implications of the Life Cycle-Permanent Income Hypothesis: Theory and Evidence*, 86 J. POL. ECON. 971, 974-75 (1978) (analyzing theoretical formula used to represent a model of life cycle consumption).

11. See Williams, *supra* note 5, at 170 (noting that a human preference exists for discounting the future to present value).

12. See generally D. PARFIT, REASONS AND PERSONS 302-06 (1984) (discussing the concept of "successive selves").

13. John Donne, both lawyer and poet, made the same point far more elegantly in *Woman's Constancy*:

Now thou hast lov'd me one whole day,

People could be regarded as constant entities only over the smallest slivers of time, so that every case necessarily involves a temporal externality: the person who buys the sandwich at noon is allowed to bind the “different” person called upon to eat it at 12:10 p.m., and so on throughout the days, weeks, months, and years.

Thinking of this sort, however, is both ruinous and wrong. It is ruinous because it undermines the possibility of any social order. No set of long-term arrangements—no contracts, marriages, or friendships—could exist if individual personality was as plastic as this model of personal identity might suggest. Similarly, governmental regulation would be impossible, for no regulator could govern if his own preference structure and personal identity were as unstable as those of the public at large. No set of institutions can make sense if human preferences are radically discontinuous over time.¹⁴ For governmental regulation to be possible, the internal transformations within the person must be ignored, even if personal identity is as unstable as this extreme illustration suggests. The ordinary presumptions have to be established the other way, and some special proof of mental disorder (such as addiction to mind-bending drugs) must be necessary to overcome them.

Fortunately, however, we are not forced to choose between necessary social convention and philosophical truth. The entire system of biological inheritance depends on the ability of organisms to produce themselves over a life cycle. If organisms had preferences as transient and erratic as the above example suggests, they could never have raised their children to maturity; the entire cycle of evolution would have ground to a halt long before any persons could write about it. There are enormous selection pressures toward stability in human personality because of the survival advantages that it confers. Organisms that know their payoff schedules when they start to act get higher returns than those organisms that do not. Over time, the former will survive and the latter will perish. The total correspondence between physical organism and psychological continuity makes it far easier to organize any form of human personality.

Tomorrow when you leav'st, what wilt thou say?
Wilt thou then Antedate some new made vow?
Or say that now

We are not just those persons, which we were?
Or, that oathes made in reverentia fear
Of Love, and his wrath, any may foreswear?

J. DONNE, *THE POEMS OF JOHN DONNE* 9 (H. Grierson ed. 1912).

14. See North, *Institutions, Transaction Costs, and Economic Growth*, 25 *ECON. INQUIRY* 419, 421 (1987) (explaining that the complexity of stable institutions is limited by the stability of norms of behavior and common ideologies of the relevant population).

In this context, it is important to distinguish between two forms of adaptation. On the one hand, it is clear that a person, to survive and prosper, must be able to take into account changes in the external environment, and new information about the various courses of action that might be undertaken. The ability to respond reliably to what is good and bad in the external world is a key element of success for all individuals. That limited task of adaptation is quite formidable in its own right. New experiences constantly confront individuals with uncertain data that must be integrated into an already existing knowledge base. Just as individuals may not incorporate the new knowledge quickly enough, so to they may give it excessive weight.¹⁵ If the individual's set of basic preferences is constantly changing at the same time as he is responding to the new information then all these difficulties of responding are more complex. Adapting to the external world becomes quite impossible when there is constant alteration of the inner self. Personality must be highly stable over time. As a matter of rank empiricism, I have always been impressed by how people's changes in attitudes, behavior, and personality are both gradual and predictable even over long stretches of time. It is usually quite easy to pick up the threads of a conversation with someone whom I have not seen for a decade or more. We need not fear that any radical instability defeats the individual's ability to plan for his own future.

This observation notwithstanding, individual preferences for work and consumption do evolve over time. Any person who has seen other persons at different stages of their lives knows that some demands change as people age. Yet, as long as the ordinary person is aware of the problem, he will probably want to invest his assets in ways that permit some flexibility in future use—at least with respect to those matters for which preferences are expected to change. Most people keep their pension funds in liquid and tradeable assets for good reasons. Although we know today that consumption at certain levels may be required in the future, a person can defer some consumption decisions until after obtaining better information, as by consulting with people who have already reached retirement age. A person need not choose a retirement home at age 35, even if he sets aside retirement income at that time. There is certainly a mortality risk, but millions of people take advantage of simple lifetime annuities that allow them to keep a constant (or other desired) level of income over their lives. A great deal of difference exists between philo-

15. See generally Heiner, *The Origin of Predictable Behavior*, 73 AM. ECON. REV. 560 (1983), carried over to law in Heiner, *Imperfect Decisions and the Law: On the Evolution of Legal Precedent and Rules*, 15 J. LEGAL STUD. 227 (1986).

sophical doubt about personal identity and imperfect information about future demands. The former, like assumptions of immortality, makes it impossible to think about routine transactions in a sensible way. The latter is an argument for private ordering. People probably have *better* knowledge of their own future than do others, even if both are mistaken. Insurance companies always worry about selection against the firm precisely for this reason: their customers know more about the true status of risk than they will reveal to an insurance carrier. But individuals have less incentive to conceal the truth from themselves. Where knowledge is imperfect, the costs of external regulation quickly outstrip the costs of self-regulation.

II. The Family and the Future

Thus far, I have confined the discussion to cases of intertemporal decisions in the life of a single person. What happens when the future belongs to different people in a different generation? Here I begin with one assertion about human nature that I hope is not too controversial. Individuals do not seek to maximize individual utilities, but instead have utility functions that are heavily interdependent with their offspring.¹⁶ The most powerful source of this interdependence is not disinterested benevolence, although surely that is an important force. It is genetic connection, which induces parents to take into account the utility of their children (and the reverse as well) in making their decisions about present and future consumption.

The genetic code thus creates a bias that works against ignoring the future. The wise social system will exploit what nature has provided in an effort to span the generations. The trick is to make connections across the generations that exploit this bias toward the future. A simple example that can be constructed from the practice of making trusts illustrates how this can be done.

Assume that there are two sets of parents, each with two children. Each set of parents has accumulated a sufficient level of wealth to believe that the deferment of consumption from the present generation (in which there is plenty) to the future generation (in which there may not be) is desirable. The risk of a reversal of fortunes in the present generation also exists, so that the extra wealth must serve double duty: Both as insurance for the parents and as an inheritance for the children.

16. See generally Hamilton, *The Genetic Evolution of Social Behaviour: I*, 7 J. THEORETICAL BIOLOGY 1, 1 (1964) (explaining that under the natural selection theory, a species that demonstrates parental care may maximize the number of offspring that reach adulthood, thus preferentially propagating the "parental care" gene).

Standard legal practices can cope with the problem. One such practice is to place the property in trust, under terms that specify that the income is to go to the surviving parent, usually the mother, for life, with the remainder—the principal of the trust—to her children. Given the possible changes in the mother's position, she receives under the trust the right to invade the corpus to maintain her existing standard of living. She alone has complete discretion to decide whether a distribution from the corpus should be made and her decision is not reviewable (so the trust instrument states) by any court.

Arrangements of this sort tend to be perfectly stable in practice, so that the consumption patterns typically follow the lines stated in the trust instrument. Parents who invade the corpus think long and hard about their decision, and the common pattern is (if anything) to cut down consumption short of emergencies, such as major medical bills, to see that the inheritance passes to the next generation intact, especially if the children face financial burdens that the parents have been lucky enough to escape. The practice continues again over time, generally in regular form. Deviations occur, of course, but the infrequency of litigation, or indeed of disagreement, between different generations under a trust is powerful evidence of the power of interdependent utility functions to bind families together over time. The bequest motive thus tends to defer consumption and to promote investment.

This point becomes more vivid if we contrast the standard trust with an alternative arrangement having identical formal properties but very different economic ones. Switch the trusts around a bit: Take Mrs. *A* and make the remaindermen under her trust the children of Mr. *B*. Then do the same thing under the second trust. To see that there is no sleight of hand here, assume further that both trusts have identical assets, that both *A* and *B* have the same life expectancy, and that the position of both sets of children are identical in all respects. Under these two “cross” trusts, Mrs. *A* has the power to invade the corpus of a trust in which the remaindermen are the children of Mr. *B*, and vice versa.

There is no observational experience that tells us how a parent behaves when the remaindermen behind the trust are someone else's children. The reason is perfectly clear. No one in his right mind would create cross trusts in this fashion, because the business risks are too great.¹⁷ The obvious interdependence of utilities between the present and

17. Here the case law may prove helpful. There are a number of cases that address the estate taxation of cross trusts. In their simplest form, *A* creates a trust for *B* to life, remainder to *B*'s children, while *B* creates a trust of equal value to *A* with like remainder to *B*. The ostensible objective of the trust is to remove the remainder interest to *A* and *B*'s children for the taxable estate of *A*

the future generation disappears. Each set of parents has the same incentives: To strip his or her respective trust of all its assets, and to place those assets in a second conventional trust, in which *A* has her children as remaindermen, and so too with *B*. There is something akin to a prisoner's dilemma,¹⁸ given that *A* and *B* cannot bind themselves to each other by contract. Each will say: "If I am honest, I will surely lose out, because *A* (or *B*) will not be; or if *A* (or *B*) is honest, then I can do far better by cheating on the trust in which I am the tenant for life." Why play a game that you cannot win? The best scenario is that each parent will invade the corpus and set up a conventional family trust for the benefit of both generations. Incurring the transaction costs of this scenario makes no sense because they cannot generate any gains. Trusts, therefore, remain family institutions.

Suppose we change the rules of the game. One possibility is that the law prevent the parents from reinvesting the assets of this novel trust in a conventional trust, with remainders to his or her children. Now their choices would be somewhat different, but it still does not follow that the power to invade the corpus will be exercised in a disinterested fashion. Each parent would measure the gain from personal consumption against the satisfaction that they derive by seeing a stranger take what they have left over. Even if there is some altruism, it operates at far lower levels than does concern for one's own children. We should expect to see, therefore, the invasion of the corpus well nigh complete, with, at most, scraps left over. The moral should be clear: When the freedom of the present generation to make unfettered dispositions is cramped, we have to worry, at the very least, about the alterations in their consumption patterns in ways that reduce the total stock of wealth available in the future. The private law of inheritance and trust exhibits just this concern. When the law provides that certain monies must pass to particular persons, the recipients are the decedent's children, not strangers.¹⁹ In some cases,

and *B* respectively. The problem arises because if *A* created a trust for himself for life, remainder to his children, the full value of the corpus would be taxed under section 2036(a) of the Internal Revenue Code, because the grantor retained a life estate. The ruse has been repeatedly struck down as a carefully crafted evasion of a (dubious) estate tax provision. *See, e.g.,* United States v. Estate of Grace, 395 U.S. 316, 321 (1969); Estate of Moreno v. Commissioner, 260 F.2d 389, 392 (8th Cir. 1958); Lehman v. Commissioner, 109 F.2d 99, 100 (2d Cir. 1940). For our purposes, the relevant point is that at no time did any of the cross trusts take the form of a grantor, *A*, creating a life estate in *B* with remainder in his own children, even though that disposition would have been unassailable under section 2036(a). The personal risks are too great.

18. *See generally* R. HARDIN, COLLECTIVE ACTION 2-3 (1982) (explaining the concept of the prisoner's dilemma).

19. *See, e.g.,* W. MCGOVERN, S. KURTZ & J. REIN, WILLS, TRUSTS, AND ESTATES 7, 96-97 (1988) (explaining general rules of family members who inherit property of an intestate ancestor, and common-law limitations on a testator's right to disinherit members of his immediate family); UNIF.

there will be conflict between what parents want to do and what they have to do, but these cases will be relatively infrequent. A far greater conflict arises when dispositions must be made for the benefit of strangers. Such a disposition will predictably produce greater consumption in the first generation, with fewer assets to pass on to the next generation. The effort to create redistribution of wealth within the second generation reduces the amount of wealth passed on to that generation. We cannot have it both ways.

Bruce Ackerman has suggested one way around this problem: the creation of a tripartite bargain between the member of the present generation with the wealth (Manic Senior), his own offspring (Manic Junior), and some other offspring (Depressive Junior).²⁰ In his view, the baseline position allows Manic Senior to consume all of his excess wealth—that above and beyond his original allocation—but he can leave extra amounts to his own offspring only if he procures the “waiver” from other persons in that generation.²¹ He effectively sets up a bargaining game with an extensive range of outcomes that improves on the original position he postulates. Thus, if Manic Senior has four units of surplus, he can consume it all, and no one can object. But he cannot leave it to his son. Father and son, however, can buy off the outsider with any portion of the gain. It is hard to know what the exact bargaining range is. If Manic Senior knows about the problem in advance, he can arrange his affairs to increase the consumption value of his assets, and hence improve his own threat position. Assuming that he can raise his consumption up to two and that the payments to the outsider are between zero and two, bargaining pressures will dissipate part of that surplus, and less wealth will pass to the next generation than under a system that tolerates all forms of inequality across generations.

Thus far this simple model has contrasted two extreme cases: those in which the parents give all to their children and those in which they gave all to strangers. In practice the law may adopt a mixed strategy in which part goes to the children and part to strangers. An estate tax represents just such a practice. The higher the rate of tax, the greater the fraction of the wealth that goes, via the public treasury, for the benefit of (but not into the hands of) strangers. At this point, we should expect the parents to adopt a mixed strategy of their own in reply. They will compare the utilities of full consumption for themselves against the indirect

PROBATE CODE §§ 2-102, -103 (West 1982) (providing that under intestate succession rules, property passes to the spouse, issue, and other relatives of the decedent).

20. See B. ACKERMAN, *supra* note 1, at 204-06.

21. See *id.* at 204-07.

benefits they get from the fractional consumption of their children, taking into account any marginal benefits that those children receive from their negligible interest in the common fund. One expects that the transfers will still be relatively substantial in practice, if only because consumption patterns become less variable as people become older, when many people desire to hold on to wealth in the face of, for example, fears of major medical expenses. The estate tax has not destroyed all transfer of wealth to the next generation, but it has surely inhibited it.

The effects of the tax are more substantial in light of its effect on conduct before death. Transmission between the generations does not begin at death. It typically begins with prenatal care and continues with education and upbringing during youth and, most importantly, with educational expenditures long past the point at which children reach their majority. As people today routinely live into their seventies and eighties, transmission at death often takes place only when their children are well into middle age and their grandchildren are into their adult years. (One objectionable feature of the estate tax is that it ties taxation to mortality, so that its incidence and severity depends on the good or bad fortune that determines length of life.²²) Many important intergenerational transfers will therefore take place during life in forms that no system of transfer taxation can easily reach. Paying for education and the housing of minor children is only one obvious example. Others may assume great importance as well. Parents can take children in as business partners on favorable terms, with on-the-job instruction. They can provide their children with valuable advice or financial backing if the children wish to strike out on their own.²³ They can make valuable gifts of service, such as managing stock portfolios that they have given to their offspring.²⁴

It is of course possible to try to counteract the partiality that parents show toward their children during life, but now the steps are far more intrusive than any straightforward tax imposed on transfers at death. Inter vivos transfers are much harder to reach because consumption by parents is necessarily closely entwined with consumption by children. A

22. There is, for example, an enormous difference in the estate tax burden between the person who dies at 60 and the one who dies at 90. The latter person not only defers payment of the tax by 30 years, but also has the opportunity to make large annual inter vivos transfers in order to reduce the size of the estate still further. Without making any exact calculations, dying at age 90, apart from its other benefits, probably reduces the effective estate tax burden by well over 90 percent. An income tax is not subject to the same vagaries of fortune.

23. See, e.g., J. DUKEMINIER & S. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 7-22 (1984) (discussing the fine distinction between earned wealth and inheritor wealth particularly in the context of wealthy parents employing their children).

24. *Commissioner v. Hogle*, 165 F.2d 352, 354 (10th Cir. 1947) (holding that the grantor's management of a trust portfolio did not represent a taxable gift from the grantor to the trust).

simple gift tax on out and out transfers of money or property will not suffice; more radical intervention is needed in order to combat the disguised transfer of money, services, and support that routinely takes place within families. The law might force children out of the home or impose a special tax on families who educate their own children so as to provide scholarship funds in equal amounts for the needy. Because of the coercive nature of the egalitarian enterprise, we should expect powerful political resistance to this form of public intervention. Even as the ethic of redistribution continues to make major political inroads into the traditional institutions of private property, the tax reforms of the 1980s have virtually abolished the entire transfer tax system for all but the very rich, most of whom can evade huge portions of it by a combination of shrewd tax planning, which takes advantage of the ten-thousand-dollar annual exclusion per donor/donee, and solid longevity.²⁵

The effort to secure a patrimony for the next generation also has its powerful effects on production. The tax across generations works like any other redistributive tax. The tax reduces the private return on investment, which in turn leads to a reduction in investment level, an increase in present consumption, and an increase in disguised or tax-free transfers. Again the lesson seems clear. Transfer taxes may secure redistribution within the second generation, but they cannot secure transfers to the second generation.

III. Public Investment and the Future

Another strategy that might be adopted to cope with the conflicts between generations, given the limitations of an estate tax, is to impose a system of income taxation coupled with public investment in projects, that have expected lives running over to the next generation. But again, there is strong reason to doubt that such a system will work.

Let us start with the simplest model—one that ignores all political complications associated with running collective investments. The critical question is how private individuals will respond to the changes in the level of the state's collective investment. The best assumption is that private individuals will treat their own total wealth as the sum of their private wealth and the subjective valuation that they attach to the resources held in government hands. My personal wealth is not solely the sum of my land, cash, personal effects, and the like. To that figure one must add the subjective value that I attach to my interest in highway infrastruc-

25. The changes are reflected in legal education where the course on estate and gift transaction, once a staple of the upper years, is no longer taught at many law schools, and when the course is taught, it is taken by relatively few students.

ture, good (or bad) government, defense, and the like. The states as such does not own those assets. As is the case with the corporation, an aggregate theory of ownership reflects the underlying economic realities. Each person takes into account on a pass-through basis the "fractional" public burdens and liabilities as though they were his own. This point is especially important with such public benefits as social security, which is an elaborate network of rights and liabilities across citizens and across generations.

The difference between public and private wealth, however, indicates the obvious shortfall of this strategy. Levels of private savings can be reduced to offset the increase in public savings and investment. As a first approximation, therefore, the total level of future investment is not likely to increase by adopting this strategy, given the available private responses. Such is the result of the so-called Ricardo Equivalence Theorem, proved anew by Robert Barro²⁶ under the usual restrictive assumptions that all individuals have identical tastes and wealth, that all have equally strong bequest motives, that population will remain constant over time, and that technology will not change. Even if these assumptions are relaxed in some degree, Barro's basic point seems to be correct. Private investment decreases somewhat to offset the increased investment by the state.

What happens when these austere assumptions are relaxed? Suppose we assume that some individuals have bequest motives and that others do not, that population and technology can change, and, most importantly, that it becomes costly to monitor persons who have direct responsibility for the choice of investments made both on the public and private side of the line. Public and private investments are still substitutes for each other, and neither will be as efficient as each would be in a world in which it is possible to abstract from individual differences, political pressures, and institutional frameworks. When we take these complications into account, the question concerns the *relative rate* of decline in the efficiency of both public and private investment, from some ideal level obtainable only by an omniscient and benevolent being. Unfortunately, the differences suggest that public expenditures will be less favorable to the next generation than will private ones. The simplest illustration is the general disrepair in which we often find public bridges,

26. See Barro, *Are Government Bonds Net Wealth?*, 82 J. POL. ECON. 1095 (1974). The gist of Barro's argument is that where there is forced deferred consumption on the public side, self-interested individuals will increase their consumption of private assets to offset those losses. Under very restrictive assumptions, the offsets can be made well nigh precise. *Id.* at 1098.

highways, and buildings, especially in comparison with capital assets in private hands.

The differences are not random but systematic. The root of the problem has to do with the connection between ownership (and liability) structures and the ability to create and preserve value over the long run. The easiest way to illustrate the problem is by comparing the ordinary business corporation whose shares are publicly traded and governmental management of property, which ordinarily takes the form of a public trust in which the individual citizen's interests cannot be alienated in any organized market. (Even citizens who leave the country cannot sell their fractional interests of public assets to new immigrants but are forced to abandon them.)

The genius of the corporate form of business has often been elaborated²⁷ and need be discussed only briefly here. Complex business arrangements require large accumulations of capital, which will not be made when each individual is an ordinary partner of the everyday partnership. Partners normally have the power to bind each other for transactions in connection with the business,²⁸ and no one will place his entire wealth on the line if a total stranger with whom he is in partial association can make contracts or commit torts creating obligations far exceeding the possible return on the investment. Limited liability centralizes the management of the firm and creates shares that are both fungible and freely transferable, and hence marketable at a readily determined, uniform price.²⁹ Once the shares are sold, the seller retains no contingent liability for the conduct of the firm. Notice of the corporate status protects prospective trading partners, and tort creditors can be protected by minimum capitalization or insurance requirements. It is quite impossible to conceive how modern business could be conducted without use of the corporate form, which, when generally available and properly regulated, generates sufficient wealth to offset the occasional injustice that arises when corporate assets are insufficient to meet the claims of tort creditors—a risk that is, *caterus paribus*, far greater for small companies than for large ones.

For these purposes, however, it is important to note the impact of marketable shares on the incentives of firm managers. These shares ordinarily trade at a price estimated as the discounted present value of the

27. See generally H. HENN & J. ALEXANDER, *LAWS OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES* 128-32 (1983) (discussing advantages of availability of credit, limited liability of shareholders, and continuity of existence in the corporate form).

28. See *id.* at 70-71.

29. See Easterbrook & Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 94-98 (1985).

future income stream associated with the corporate assets. A short-term accounting profit, which is achieved only by invading the corpus, does not induce the market to capitalize that inflated figure to determine the value of the shares. Instead, the accounting entry is recognized for what it is—a return of capital—so that the full valuation takes into account both the lower level of real profit and the diminution in capital attributable to the invasion of the corpus. External monitoring of corporate assets is not perfect, but financial experts usually can work wonders in piercing through the fog of balance sheet notes. Firm managers, therefore, have an insistent incentive to maximize the full lifetime income stream of corporate assets, for a sharp reduction in price could expose them to derivative suits, displacement by shareholder vote or hostile takeover bid. The ability to buy and sell shares today in “the market for corporate control” disciplines the managers to preserve the corporate corpus for tomorrow.

Citizens *qua* citizens do not hold marketable shares in publicly owned assets. I cannot take my fractional interest in United States military preparedness or in national parks and sell it to an outsider, whether I wish to abjure the benefits of a particular project or to leave the country. The absence of a ready market in shares reduces first the ability, and hence the incentive, of citizens to value publicly held assets and to monitor the progress of government managers. When there is an invasion of the corpus—say the sale of timber, water or grazing rights at below market values—no private citizen can make a substantial gain by detecting the breach and calling present management to account. Publicly owned property has little in common with assets owned by publicly listed but privately owned corporations.

In some sense, the fitter comparison is with the private or closed corporation, in which shares are inalienable, either because of restrictions contained within the charter or because of the reluctance of outsiders to buy into family firms. Nonetheless, family corporations are characterized by a common interest—again, interdependent utilities—that helps to keep managers in line, and typically many shareholders also have management positions within the firm that help them to monitor its activities.³⁰ Even so, matters often get very sticky, and the changes between the generations are often best handled by some mandatory “buy-sell” arrangement funded by life insurance on key shareholders.

Ordinary citizens, however, possess none of the advantages that compensate shareholders of closed corporations for the inalienability of their interests. Ordinary citizens have tiny fractional interests in the

30. See H. HENN & J. ALEXANDER, *supra* note 27, at 693-783.

whole, and they find it difficult to coordinate their activities to monitor public officials. These officials, in turn, have powerful incentives to use or dispose of public assets for private gain, and they are subject to pressure by interest groups who wish to get more than their fair share of the public asset for less than their fair share of the price. Public highways, for example, must be maintained, yet taxes ordinarily do a poor job of matching the costs that different classes of users impose. General revenues may be used for projects that give disproportionate benefits to some concentrated group of individuals. Similarly, other fee structures are often ill-suited to induce the proper use of publicly held assets. If trucks weigh ten times as much as cars, their concentrated weight means that one truck-mile causes far more damage to the roads than ten car-miles. A formally neutral formula that makes user fees a linear function of car weight necessarily contains an implicit subsidy of trucks by cars, from which the usual economic distortions result.³¹ The result will be too great a use of trucks and not enough use of cars or other forms of transportation. A gasoline tax may well produce similar distortions if the car gets thirty miles per gallon and the heavy truck gets three. What is true of taxes is also true of regulation. The restriction of access to public roads through the creation of gratuitous monopolies in truck transportation is one of the sad tales of twentieth century regulatory policy.³²

These errors create more than distortions within a given generation; they also create distortions between generations. Public officials and private interest groups have a built-in preference for present over future gains. In particular, office holders run for reelection and have much to gain if their cash account appears to be high, even though their capital account is low. Their political incentives are to let deferred maintenance accumulate, for its costs come home to roost only after they leave office. Hence the problem with bridges and roads.³³

The protection of future generations is very hard even when the

31. Thus if a car causes \$1.00 of damage for 100 miles, then the truck should pay a tax 20 times as great as a car in order to avoid the implicit transfer from cars to trucks. A regime that taxes trucks only 10 times the rate of cars imposes an implicit tax on cars and provides an implicit subsidy for trucks. The consequences will be the usual: too many trucks and too few cars will ride the road. And general revenues may be needed to cover any shortfall when the vehicle taxes do not cover maintenance costs.

32. The development can be traced in some key cases. See, e.g., *Stephenson v. Binford*, 287 U.S. 251, 278 (1932) (upholding a Texas statute requiring contract carriers to obtain permits to operate on state highways); *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 599 (1926) (holding a California statute subjecting private carriers to the burdens of common carriers to be unconstitutional). See also Epstein, *The Supreme Court, 1987 Term—Forward: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 47-54 (1988) (discussing the implications of *Frost Trucking*).

33. See, e.g., N.Y. Times, Apr. 22, 1988, at B3, col. 1.

political system, say, through the pressure of environmental groups, works to preserve long-term assets in their original form. The difficulty here is that one cannot determine the wealth of the next generation simply by counting the number of acres of virgin timber that have been purchased for national parks. The cutting of timber does not necessarily amount to a transfer from the future generation to the present generation; the uses to which that timber is put must also be taken into account. If the timber in question is used to build long-term assets, such as housing, it may well be that long-term values are diminished by nationalization as inefficient public uses are substituted for more efficient, private ones. Again, standing timber is often a wasting asset, so that the failure to harvest in a proper mode results in older trees with rotten wood crowding out the newer growths that might replace them.³⁴ The ability to make sense of the individual worth of the collective account makes it hard to determine the soundness of strategies endorsed even by persons whose concern for the future generation is unquestionable. Matters do not improve when a laudable public motive is absent. The timber company with a license to cut timber from public lands will care less about the damage to the land and the environment than one that owns the land on which the timber stands. In the former case, the loss is externalized on the public at large; in the latter, it is not. Public officials are generally not as good businessmen as private entrepreneurs, if only because they do not face the right incentives for either loss or gain. The Forest Service's ability to monitor and control abuses of their lessees is likely to be less than their private counterparts. Their errors can have adverse effects on the maintenance of assets held in public trust. Once institutional imperfections are taken into account, therefore, the public ownership of assets poses great risk to the ability to preserve resources for the long haul.

IV. Deficits

The problem that exists on the asset side of the ledger can exist as well on the liability side. It is quite striking that the ever increasing size of the public deficit emerges in an age when the fraction of GNP devoted to governmental spending, or subject to governmental regulation, is at an all-time high. Deficits are charges that must be paid off in the future, often by the next generation. The analysis here, however, is again quite tricky, because it is impossible to determine the full social significance of the deficit by simply recording its amount. Other factors again have to

34. For a chronicle of difficulties with public management of forests, see *FORESTLANDS: PUBLIC & PRIVATE* (R. Deacon & M. Johnson eds. 1985).

be taken into account. Two bear special mention: the uses to which the borrowed capital are put and the soundness of the debt structure.³⁵

First, it is necessary to have some sense of the expected life of the assets that are purchased with the borrowed funds. If these assets had an expected life equal to the length of the debt, and if the debt itself were paid off by revenues generated solely from the asset, there would be no intergenerational transfer from the future to the present. Ideally, in each period the value of the public asset would exceed the amount of liabilities allocable to its depreciation and maintenance, so that people in each time period are net winners in the amount of period benefits over period costs. A system of revenue bonds, for example, in which the debts incurred to build a highway were funded only by the tolls the road generated would offer an example of a sound public project, even if the highway disappeared the moment the debt was discharged. Because the general credit of the State is not on the line, the individual creditors to the project now have an incentive to monitor both its revenue and costs: their own financial return is jeopardized by any shortfall. For the project to go forward, therefore, it must have a positive expected value.

This regime of asset-based financing, however, is not perfect because the highway system could well generate external benefits beyond those captured by highway users. The road may be critical for defense in times of national emergency. Yet even here the sound rule is to guess the size of that external benefit, and to fund it out of the defense appropriation and not from general highway funds. Now the defense establishment is forced to trade its use of the road system against other direct military purchases. The residue should be funded from revenues generated to minimize the political pressures that might point to excessive construction. Building the wrong long-term assets does not promote the welfare of the next generation.

Unfortunately, many public projects are not funded in this fashion. If there is a long-term debt for an asset with a short expected life, then some portion of the cost is externalized on the next generation in ways that cut against the goal of intergenerational justice. More to the point, public indebtedness today is not only incurred for long-term capital projects. Huge amounts of the deficit are incurred to generate short-term transfers to the present generation. It is no great news that the most powerful coalition in Washington today is the elderly and that social security benefits, including medical services, have increased far more rap-

35. See R. EISNER, *HOW REAL IS THE FEDERAL DEFICIT?* 3-8 (1986) (suggesting that there is an optimum level of deficit spending and that a deficit can be either too low or too high).

idly than has the cost of living (and more than any other component of the welfare budget). These transfers systematically thwart any claims of intergenerational justice. Barro's model of intergenerational transfers³⁶ suggests that these shortfalls will be offset by private transfers from parents to their children. But the frictional costs he excludes from his model are too great to ignore. Some elderly do not have children, and others will choose to consume some portion of their investment, given their own pressing needs. The parents of many working-age people have already died, cutting off the possibility of compensating private transfers. The level of future tax and benefit increases remains uncertain, and the political costs of deciding who gets how much further undermine the effectiveness of the private response to social security. People can mitigate the costs of regulation, but mitigation never brings us back to where we would have been had the first misstep not been taken. An alternative system that granted a tax deduction for money put into private retirement plans could (like any other consumption tax) remove the additional taxation burdens imposed upon private savings, without creating the uncertainty over both contribution and benefit levels. Even if participation in this program were made mandatory, the implicit backward redistribution of the present social security system would be reduced. But as matters stand, the political pressures favor those who vote, especially in a regime that offers but negligible protection to private property.

My second concern with public debt is directed to the form in which this obligation is held. Consider two debt structures. Case One is a debt structure in which each of ten people owe a single creditor ten dollars, for a total indebtedness of one hundred dollars. Case Two is a debt structure where ten people are jointly and severally liable for one hundred dollars to a stranger, without rights of contribution and indemnity among themselves. In a world in which all parties are perfectly solvent and thoroughly reputable, the two debt structures have the same economic effects: the austere assumptions of Barro's model are satisfied.³⁷ The creditor's asset is worth one hundred dollars and each debtor is liable for ten dollars. The moment, however, one recognizes the human tendency to avoid paying money, the two structures are no longer the same. When the debt is joint, each party has incentives to make the

36. See Barro, *supra* note 26, at 1105-07 (showing that public transfers in one direction are offset by private transfers in the opposite direction, regardless of the direction of the public transfer or the number of generations it spans); see also Becker, *A Theory of Social Interactions*, 82 J. POL. ECON. 1063, 1077 (1974) (positing that given present and future generations fully connected by intergenerational "bequests," public transfers of wealth from one generation to another will be offset by bequests in the opposite direction).

37. See Barro, *supra* note 26, at 1098-101.

others pay his share of the debt. In ordinary private markets, this problem is effectively (although not perfectly) counteracted by a general rule that allows any codebtor who pays more than his pro rata share to have indemnity and contribution against his fellow debtors. That debt structure gives the creditor the security of knowing that a single suit can satisfy the full claim, while leaving the hapless debtor who has paid more than his proportionate share full recourse against those who have not.

That system of contribution and indemnity is not, however, available in the public sphere. Now there is a built-in tendency to introduce methods for repayment that reduce the proponents' own fraction of the payment. One way to discharge the debt is through a progressive income tax. The shares of the indebtedness implicitly shift, as the poor pay less and the rich pay more. Alternatively, where the debt is refinanced by new borrowing the obligation remains constant across different classes of individuals. The total amount of indebtedness is not reduced by shifting between these payment methods, but the costs of trying to shift the incidence of debt, whether successful or not, result in some long-term social loss. An elimination of the progressive tax thus offers an important advantage: the choice between debt and tax financing will depend less on distributional consequences, thereby reducing the opportunities for strategic behavior and placing some gentle constraint against increasing the total amount of government expenditures. Indefinite property rights tend to reduce the value of the assets so owned. The analogue to this debt case is the proposition that ten owners with a one-tenth interest in ten houses behave differently from ten owners, each with his own house. In exactly the same fashion, indefinite obligations generally increase the total economic cost of the underlying debt. The problem of rent-seeking that takes place with the acquisition of assets can also arise with the avoidance of liabilities.³⁸

Inflation presents yet another risk to long-term contracting. Since the government (at least the federal government) controls the printing presses, the temptation to discharge the public debt by increasing the money supply and inflating the currency is great. This stratagem reduces the real amount of fixed debt and effects a short-term implicit transfer from creditors to debtors. Arguably the strategy is self-defeating, because the public debt is "internal" in that we owe the money to ourselves, so that what we gain in one capacity we lose in the other.

38. See generally TOWARD A THEORY OF THE RENT-SEEKING SOCIETY 184 (J. Buchanan, R. Tollison & G. Tullock eds. 1980). For an argument on the limitation of the anticipated level of rent-dissipation, see Flowers, *Rent Seeking and Rent Dissipation: A Critical View*, 7 CATO J. 431, 439 (1987).

Yet the fallacy of composition works in this area as well.³⁹ The argument about internal debt is correct only if every person has the identical interest as creditor (such as that of a lender of private money to the state) as he does as debtor (such as that of a citizen). But debt instruments are never held in precise proportion to wealth by all citizens. Some people are not creditors at all; some have extensive amounts of government paper. Much credit is held by foreign creditors, who are especially vulnerable to domestic manipulations of the money supply. Political coalitions do have incentives to change the value of money in order to alter the size of the debt. The creditor's gains are offset by the debtor's losses, but (as ever) the transaction is *not* an economic wash, because someone has to bear the costs of influencing the political process, while everyone has to bear the increased costs of uncertainty in the value of government bonds.⁴⁰

To complete the picture, inflation also imposes risks on any long-term private indebtedness, for if private debtors can increase the rate of inflation, they can secure an implicit wealth transfer from their creditors. (The converse is true of deflation.) Any reduction in the stability of long-term money markets necessarily increases the costs of borrowing in all markets and tends to invite huge amounts of regulation—such as mortgage moratoria statutes and anti-deficiency legislation—which further impede the operation of private credit markets.⁴¹ There will be less long-term investment. Yet variation in inflation rates can be reduced most

39. "We are committing the fallacy of composition when we argue from the premise that every man can decide how he will act to the conclusion that the human race can decide how it will act . . ." R. HARDIN, *supra* note 18, at 1 (quoting Mackie, *Fallacies*, 3 ENCYCLOPEDIA PHIL. 169, 173 (P. Edwards ed. 1967)). The fallacy applies to any movement from the single individual to any group, however small the group.

40. Uncertain levels of inflation convert any fixed income offering into a variable payment instrument whose maximum value (when inflation is always zero) is achieved when inflation remains at zero. The costs are that uncertainty simultaneously reduces the return to creditors and increases the costs to borrowers. The sum of those two costs acts as a wedge that prevents gainful transactions from taking place where the difference between what the debtor demands and what the creditor is willing to pay is smaller than the total level of uncertainty.

41. A mortgage moratoria statute defers the creditor's right to foreclose on the underlying security in exchange for giving the creditor some additional rights of interest. This prolonged extension of the debt usually leaves the creditor with a bundle of rights that are worth less than those enjoyed before regulation, but the courts have been reluctant to disprove of all such statutes categorically. See, e.g., *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 444-45 (1934) (sustaining a state mortgage moratoria statute and defining broadly the inherent government rights under police power); see also Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 735 (1984).

An antideficiency statute denies the creditor the right to sue the debtor for more than the amount of the property given to secure the loan. To the extent that the value of property has dipped below the face level of a loan, the statute denies the creditor his remedy for the difference via a "deficiency judgment." Substantial deflation in the economy, such as that experienced in the 1930s, transfers enormous sums of wealth to creditors. These two types of statutes are highly imperfect and are generally mischievous responses. A stable currency eliminates any case for either remedy.

effectively if the discretion of public officials in setting monetary policy is controlled.⁴² Limited government again offers certain long-term advantages. A fixed rule, for example, that tied the expansion of the money supply to the prior year's increase in the GNP would be a good thing. Whether we deal with public assets or public liabilities, a small state with limited discretion is the best way to promote the welfare of the next generation. The real risk in politics is that collective ownership will work redistribution back toward the present, toward those who have the votes.

V. Property Rights and the Future

I have said enough to show that there is no obvious reason to think that any policy of redistributive taxes or social investment will in fact aid the redistribution toward the next generation. The only remaining issue is whether any policy is needed. The ordinary rules of property, contract, and tort, enforced by a limited government subject to stringent eminent domain restrictions, are far more likely to achieve that end, if only because the protection of the future is the ordinary outgrowth of the consistent application of these rules.

Start with the ownership of labor. In the libertarian model, each person owns his own labor and need not perform any special act to acquire it. It follows, therefore, that all newborns have a substantial set of endowments that they do not take in any way from the generation that precedes them. Some members of that generation will have greater endowments than others, but if the concern is with intergenerational equities, then any inequalities within a given age cohort can be safely ignored. The problem of unsound endowments can be handled by ordinary charitable contributions or welfare programs, as these are administered at any given time, wholly without regard to the age of the payors or recipients.

Next there are physical assets. Land necessarily is permanent, and the improvements on it generally have an expected life beyond its present owner. These assets will be passed on, unless we think that persons in the present take great pleasure in the destruction of what they have created. This last risk seems quite small. Most people do make bequests to their children, and where wealth is sufficient, to permanent institutions such as universities, hospitals, and foundations. Regulatory intervention at common law has never been concerned with people who want to de-

42. See generally Kydland & Prescott, *Rules Rather than Discretion: The Inconsistency of Optimal Plans*, 85 J. POL. ECON. 473, 477-80 (1977) (explaining that real-time, discretionary control is not the best tool for economic decision making, because it reduces the opportunities for game playing by rational economic actors).

stroy what they own;⁴³ rather it has been directed at restricting the period of time during which assets could be tied up in trust.⁴⁴ Even if the present generation wants heavy consumption, it has to sell permanent assets to finance it. "You can't take it with you" is a very powerful message, which indicates that much wealth stays behind—for the next generation.

The situation is more striking when we move to intangible assets. Some, like patents and copyrights, have value beyond the current lifeholder and can be sold. It is difficult to know how these assets could be destroyed, except by refusing to use, license, or sell a patent. Even that strategy is self-defeating, because the government could then acquire the intangible property for public use through eminent domain, at close to zero cost—its value in the hands of its present owner.⁴⁵ In any event, the prospect is not worth considering seriously given the tiny fraction of assets for which destruction is plausible. The hard question with copyrights, trademarks, and patents concerns their ideal duration, which could vary from property form to property form. The tradeoff is that longer periods of protection induce greater invention, but only at the cost of more limited use over time. The trick is to minimize the sum of the two costs. If this is done in present value terms, future generations will be well served by the regime of property rights so created.

There is, moreover, a huge body of intangibles properly regarded as part of the public domain. Mathematicians who prove important theorems have their names immortalized. Pythagoras does not get exclusive rights to use his own theorem. The stock of human knowledge generally

43. Cf. Pound, *The Law of Property and Recent Juristic Thought*, 25 A.B.A. J. 993, 996 (1939) (discussing six rights of property, including *jus abutendi*, or the right of destroying or injuring one's own property). One exception has been the question of whether executors are under a duty to destroy the private papers of the testators according to instructions. Note that if the requests are routinely dishonored, then the papers can be destroyed prior to death. The eminent domain option in the text also remains, as does the possibility of preserving the papers while limiting access to them. For a discussion of Franz Kafka's order to his executor, Max Brod, see R. HAYMAN, *KAFKA: A BIOGRAPHY* 286 (1982).

44. The two major rules are the rule against perpetuities and the rule against unreasonable accumulations. The point of both rules is said to be the prevention of the "dead hand" from ruling the future. Stated otherwise, these rules aim to mitigate the risk that the present generation will attempt to protect grandchildren at the expense of children. There is no evidence that excessive short-term consumption is an important problem with private wealth, even if many of the philosophical examples treat death bed consumption binges as one of the realistic alternatives of the dying. See, e.g., B. ACKERMAN, *supra* note 1, at 205 (presenting a hypothetical deathbed dialogue between a dying devisor and a devisee who complains about unequal distribution of the devisor's wealth). My view is that these rules are generally unnecessary, although largely harmless. See Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U.L.Q. 667, 710 (1986).

45. See generally Kwall, *Governmental Use of Copyrighted Property: The Sovereign's Prerogative*, 67 TEXAS L. REV. 668, 726 (1989) (recognizing government's preeminent ability to exercise eminent domain power over copyrighted property).

increases, and the next generation always gets a free ride on the present, just as the nondiscoverers in the present generation get a free ride on the discoverers. It all works out pretty well. Academic positions, government honors, influence, and income may all be obtained by persons who have contributed to knowledge, even if they cannot copyright or patent their ideas as such.

The one major concern is the environment. But this is an area in which it is critical to define systems of private rights for the present. The common pool problem with fisheries is not solved by a rule allowing everyone the right to keep the fish that they catch. Some rule must be devised to preserve the long-term stock as well against, for example, oil pollution. The common pool problem is writ large when the issue is the preservation of diverse species, the prevention of the greenhouse effect, or the restoration of the ozone layer. Some form of collective intervention is appropriate here, just as it is appropriate to prevent nuisances and the premature exhaustion of common-pool assets. There are too many potential plaintiffs and defendants for ordinary litigation to work, particularly for future generations.⁴⁶ But the same systems of regulation that help in the present—damages, injunctions, tradeable permits—work to our long-term advantage as well.

VI. Conclusion

The proof in this case is generally in the pudding. To be born in the future is to be born in a world that typically holds out the promise of greater comfort and happiness. Historically, future generations have received benefits from past generations that exceed the level of transfers stipulated under any of the standard theories of justice between the generations. We can keep it that way by observing the same principles of private and public law that work to promote justice in the present generation. Indeed, we could probably do nothing today to neutralize the power of the next generation if that generation decided to act in selfish and short-sighted ways. If we govern ourselves well, we can and will leave the blessings of liberty for our posterity. At that point, someone else has to carry the ball.

46. A cogent recent example is the oil spill from the tanker *Exxon Valdez* in Prince William Sound, Alaska, that occurred on March 24, 1989. See *Largest U.S. Tanker Spews 270,000 Barrels of Oil off Alaska*, N.Y. Times, Mar. 25, 1989, at 1, col. 1; see also NATIONAL RESPONSE TEAM, THE EXXON VALDEZ OIL SPILL: A REPORT TO THE PRESIDENT 24-34 (1989) (discussing the environmental, energy, economic and health effects of the oil spill).

