THE Philanthropic Prospect: A series of occasional monographs examining the role of philanthropy in a free society.

— SHOULD FOUNDATIONS EXIST IN PERPETUITY? —

"We can only hope that the broader foundation community reads these insightful analyses and benefits from their common respect for true philanthropy."

— Craig Kennedy

THE PHILANTHROPY ROUNDTABLE
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The Case for Limiting the Lives of Foundations
Heather R. Higgins

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The Case for Perpetuity
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Introduction by Craig Kennedy

THE PHILANTHROPY ROUNDTABLE

The Philanthropy Roundtable

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Should Foundations Exist in Perpetuity? is one of several volumes in ***The Philanthropic Prospect*** series. Monographs in this series examine the place of philanthropy in a free society, offering insightful perspectives on the tremendous potential of the voluntary sector to address society's most pressing needs. These works also address the conditions necessary for the sustenance of a thriving philanthropic community.

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INTRODUCTION

The enforcement of donor intent is one of the longest-standing issues concerning the operation of foundations. Most observers of philanthropy now agree that foundations should be expected to adhere to the wishes of their donors. While there may be differences regarding the specificity with which a foundation's current directors and staff must adhere to the original contributor's vision, hardly anyone will argue that the donors' stated purposes and interests should be ignored. There is pointed disagreement, however, over *how* to ensure that foundations actually follow the wishes of their creators.

This volume contains two very different perspectives on that question. Both writers believe strongly that the wishes of founders should be respected. Both also argue that many current foundations pay only lip service to donor intent and are instead driven by the personal and ideological interests of current staff and trustees. But, while the authors agree on the problem, they differ sharply over the solution.

Heather Higgins argues that most legal and other mechanisms for enforcing donor intent are ineffective. She suggests that the only effective means to ensure that foundations do not grossly deviate from their creators' intentions is to limit their existence to a set number of years. This approach is a popular one, especially in conservative quarters. One source of inspiration for it is Julius Rosenwald, who made his fortune building Sears, Roebuck and Company, and who very carefully designed his foundation to go out of business after his death.

Higgins adds important twists to the intellectual argument for foundation "term limits." In particular, she draws on an important stock of historical precedents, such as the seventeenth-century Rule against Perpetuities, in making her case. More importantly, she offers interesting and provocative ideas on how different types of foundations might be given different life spans depending on their purpose and function.

The idea of putting time limits on foundations is a simple, but also troubling, solution to the problem of donor intent. One concern is the arbitrariness of this approach. How should the limits be set? Is the right life span for a foundation 20 years? 30 years? 70 years? Furthermore, if the goal is to ensure the strictest possible adherence to the donor's interests and purposes, why not set the limit at zero and require wealthy individuals to give away their wealth in their own lifetimes? Under such a law, wealth could still be donated to the endowments of social service agencies, universities, museums, and other nonprofit organizations, but donors would be prevented from creating permanent or semi-permanent endowments devoted solely to giving away money.

Michael Joyce makes another argument against limits. In his view, legal, cultural, and political forces can all be used to prevent foundations from straying too far from their original missions. For Joyce, the control of foundations is one more field of battle in a larger cultural and ideological war. It is a fight that he is more than happy to wage, especially if the alternative is a set of rigid, governmentally imposed constraints on the operations of private institutions.

Higgins and Joyce do not exhaust the debate over donor intent or the appropriate means to protect the interests of contributors. But their essays do provide lively and provocative perspectives on this complicated issue. We can only hope that the broader foundation community reads these insightful analyses and benefits from their common respect for true philanthropy.

Craig Kennedy
German Marshall Fund of the United States

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THE CASE FOR LIMITING THE LIVES OF FOUNDATIONS

Heather R. Higgins

"For many years I have been convinced that it is wasteful to tie up money in perpetual trusts and that these trusts are often actually harmful in their influence."
—Julius Rosenwald
"The Trend Away from Perpetuities"
***The Atlantic Monthly**, December 1930*

"To me, it seems that in this matter of Charitable foundations we are reaping simply as we have sown. We have committed a vast power to fortuitous and irresponsible hands; and they have used it according to the measure of their goodness and wisdom. . . . If the plans of our noblest spirits . . . are found unsuitable as time runs on, what are we to expect from the easy and self-complacent spirit of the ordinary testator?"
— Sir Arthur Hobhouse
The Dead Hand: Addresses on the Subject of Endowments and Settlements of Property
(London: Chatto and Windus, 1880)

The fascination with perpetuity is very old, far older than the quotations above, as old as the desire for immortality itself. The temptation to try to build institutions that will last forever is abetted by our very human assumption that we know what is best for the ages. One of the earliest known endowments maintained the Oracle at Delphi; other perpetual trusts, all now defunct, were established in ancient Egypt, Greece, and Rome. In the Middle Ages, the negative consequences of perpetuities led to statutes that directly affected our common-law tradition.

The idea of perpetuity presents both temptations and perils: temptations in the form of a genuinely seductive idea proposed with high promise and noble intention; and perils

that are evidenced by a history of repeated disappointment and frustrating experience. The debate over the legitimacy and desirability of perpetual trusts is reviving, for we are now reliving the experiences with perpetuity of previous generations, experiences which had so dimmed in memory at the turn of the century as to be disregarded.

Though the debate about perpetuities has historically encompassed a wide range of institutions and perspectives, I shall confine my argument to the modern foundation, which is itself an artifact of tax law created at the turn of the century. Let me be quite explicit: This is not an issue pitting left versus right; in speaking on this matter I have discovered much mutual concern among people of opposing political viewpoints. The issues at stake are whether we have created a system that over time will likely diminish the vigor, creativity, relevance, and responsiveness of our charity; whether we will have abridged the opportunity for successive generations of citizens to fulfill their civic obligations; and whether such a system will eventually have adverse consequences for property rights as classically understood, the necessary underpinning of a free society.

There is an all-too-human tendency to assume, when we are presented with systems that are not working properly, that they could be fixed if only we had "the right people" dealing with the problem in "the right way."

There is an all-too-human tendency to assume, when we are presented with systems that are not working properly, that they could be fixed if only we had "the right people" dealing with the problem in "the right way." Many in the philanthropic community have observed with concern the significant number of foundations that actively pursue projects that would have been anathema to their founders. Yet they comfort themselves that this will not be their problem because they have the right people or have drafted the perfect governing document.

To the contrary. While they might have the right people and the best legal advice now, this is no insurance policy against the hazards of perpetuity. Rather, the problem

is the general *structure* of foundations as we know them today. Just as our Founding Fathers, with their realistic understanding of human nature, recognized that certain political arrangements tend to lead to predictable outcomes no matter how noble the intentions of those involved, so too with institutions. Foundations existing in perpetuity not only create counterproductive incentives for those who control them, they also give rise to or exacerbate a number of other problems.

In examining the problems posed by perpetuity, I shall give an overview of the legal history of perpetuities in general and foundations in particular; discuss the basic structural problems that tend to face foundations; examine why those structural problems are inherent to the system of perpetuity itself, and thus as a general rule will ultimately occur; analyze the broader implications of these structural flaws; and, finally, discuss the advantages of returning to a more traditional approach.

HISTORICAL ANTECEDENTS

From an historical point of view, modern foundations are a very recent experiment, the consequences of which we have only begun to discover. In contrast with present law, which permits the creation of perpetuities for broadly defined purposes, common-law tradition employed the Rule against Perpetuities. This rule was developed by the English courts in the seventeenth century to restrict the use of trusts as a means to pass wealth through a family. The rule was actually an extension of the Statute of Mortmain, enacted in 1279, which prevented anyone from purchasing or receiving property that could be controlled in perpetuity.[1] While part of the incentive for both of these statutes was surely the desire to increase tax collections, they were also concerned with the problems caused by the perpetual control of wealth, whether by an institution (the church) or particular families.

We see reflections of this dual concern — for contributions to the tax base and for limitations on control — in current trust law. While the relatively new generation-

skipping tax has eliminated much of the previous tax advantage enjoyed by trusts (long deferral or avoidance of estate tax obligations and the opportunity to transmit wealth without such taxes), the limits on the duration of trusts continue. This reflects the deep concern about the amount of time a dead person should control property used by the living, that is, about the proper "life" of property rights after death.

Thus common law with few exceptions required trusts to have limited lives, limiting the period for the suspension of the vesting of interests and property to, at most, the lifetimes of those alive at the time of the decedent's death plus 21 years. This resulted in a maximum total trust-life of roughly 80-100 years. No one objected to the transmission of wealth *per se*; what was feared was both the attempt to permanently remove assets from the taxable economy as well as the possibility that those assets, thus exempt, might be used for nefarious purposes.

Common law with few exceptions required trusts to have limited lives, limiting the period for the suspension of the vesting of interests and property.

The only exception to the limit of passing wealth through one generation was the charitable trust. Yet even before the codification of what constituted a "charitable use" in the Statute of Charitable Uses of 1601, those purposes needed to meet very rigorous and specific tests of what constituted genuine "charity." Hospitals, houses of correction, and educational institutions qualified, for example, but not much else did, as one requirement was having clear and specific beneficiaries. Much of what we find in the activities of modern "charities"— public policy, voter turnout efforts, and other qualifying 501(c)(3) programs — certainly would not have met the test.

Yet even such precautions did not always make for good charity. People in previous eras who reflected more deeply than we typically do on the nature and effectiveness of compassion realized that not all charity works to the good of its intended beneficiaries, and that in fact charity, poorly done, can be quite counterproductive. (This is not simply a

function of the contrasts between government efforts to provide charity and private efforts. While government efforts, for a host of reasons, tend to be significantly less effective and perhaps even counterproductive, well-intended but poorly conceived private efforts can also do more harm than good.)

The particular problem here, however, was that numerous projects outlived their usefulness, leading commentators to chafe at the waste of resources resulting from the problem of "the dead hand." In the Victorian era, trustees found themselves limited to giving out green clothes to the poor, thereby carrying out the orders of a long-deceased donor named Greene, and gray clothes from the bequest of Mr. Grey.[2] Benjamin Franklin, one of our wisest, most perspicacious minds, set up two loan funds, one for Boston, one for Philadelphia, to pay out a small stipend to married local apprentices; after 100 years, the accrued money was to be used for specific public improvements that Franklin felt would be needed in each city. But the number of qualifying apprentices gradually dwindled, and as a result the loan funds never approached the size Franklin had envisioned. Ironically, this was no pity, since the grand public projects he intended had already been completed by the time the funds became available.[3] Alexander Hamilton, another extraordinarily gifted man, composed a will that established a farm for retired sailors. One hundred years later the farm stipulated for such use, located on Fifth Avenue, was worth approximately $40 million[4] (giving new meaning, perhaps, to the term "land poor"). The Brian Mullanphy Trust, created in 1849 for the relief of those coming through St. Louis on their way to settle the West, had outlived its usefulness by 1900. It required seven court cases over more than 30 years to break the trust and modify its purposes.[5]

While the work of these trusts was not necessarily counterproductive, examples such as these and many others did lead to chafing at the idea that a "dead hand" was determining, long after death, how these assets were distributed. The concern about the dead hand was particularly great in the United States. Our Founding Fathers, surely

more serious and articulate proponents of property rights, properly defined, than we, would have been appalled at the idea that an individual could possess the "right" to control property indefinitely after his death, much as they would have been astounded to see how in this century we have redefined "rights" to mean exactly the opposite of their classic conception. Prior to the passage of the Tilden Act in 1893, even when the purpose of a bequest was clearly charitable, often "the only way a testator could ensure that a charitable gift would be upheld was to donate it to a charitable corporation of limited duration."[6]

There are three possible correctives to the problem of the "dead hand": the *cy pres* doctrine, eliminating the constraints of donor intent, or limiting the life of the organization. *Cy pres* is the legal doctrine that says that a court will only alter a will where the donor's wishes are basically illegal, impracticable, or impossible, and should substitute instead something that is as close as possible to the original intent. The doctrine has existed since the seventeenth century; it was originally construed so narrowly, however, that in the minds of reformers it did little to counteract the foolish whims of donors. As a result, efforts were made over time to require less specificity in donor intent, the most obvious such move being the attempt to establish the Rockefeller Foundation by special congressional charter. The idea was to free perpetual institutions from the constraints of any particular dead individual's beliefs. According to Starr Murphy, Rockefeller's lawyer,

> [I]t is eminently desirable . . . that the dead hand should be removed from charitable bequests and that the power to determine to what specific objects that should be applied should be left in the hands of living men who can judge of the necessities and the needs in the light of the knowledge which they have as contemporaries, and not that they shall find their hands tied by the will of the man who is long years dead. The wisdom of living men will always exceed the wisdom of any man, however wise, who has been long since dead.[7]

The concern over perpetual control — particularly where the purposes are amorphous — was neatly summarized as the Rockefeller family attempted from 1910 through 1913 to get the chartering legislation through Congress. Attorney General George Wickersham wrote:

> The medieval statutes against mortmain were enacted to prevent just such a perpetuation of wealth in a few hands under the cloak of such a charitable purpose as this. . . . It was not without much reason that the English common law and English statutes required bequests for charitable purposes to be definite and specific in their terms. Such legislation was the result of experience with the indefinite charities which the monastic and other medieval institutions erected, and which were the occasion of so much scandal and corruption.[8]

Congress never granted the request for a charitable charter, but the New York state legislature, more easily persuaded, quickly gave Mr. Rockefeller what he sought in 1913, thus setting a precedent that was widely followed.[9]

An additional spur to the growth of foundations in the 20th century was "the granting in 1917 of a deduction against individual income taxes for contributions to exempt organizations."[10] As Martin Morse Wooster details in his excellent book *The Great Philanthropists and the Problem of Donor Intent*, even people such as Henry Ford — who objected to the very concept of a foundation and strongly believed that such an institution would ultimately pervert good, effective charity — found that for purposes of estate planning and control of their companies, tax policy left them no choice. Sadly, the same has been true with many foundations: Too often the charitable impulse has been vague and secondary to the financial one.

STRUCTURAL PROBLEMS

What have been the results of these changes? Perpetual foundations tend to share two predictable characteristics that are functions of their structure and that intensify over time: a shift from donor intent, and an emphasis on asset growth over present charitable needs.

Many factors contribute to the departure from donor intent. Among the most important of these is that donors frequently neglect to clearly specify their purposes and expectations in establishing their foundations. This neglect is made worse by three other factors inherent in the current structure of foundations: the effects of time, the reliance on professional staff, and the absence of all but the most limited accountability.

It is much more common than one might expect for a founder[11] to be insufficiently specific about how his foundation's assets should be distributed. Even when those views have been set forth with great precision, however, they are commonly sidestepped, often with the best intentions, by those who think they know what the donor *really* would have wanted, if only he had known how different the world would be ten years after his death. Sometimes those wishes are thwarted outright, and programs that are at odds with the principles of the founder are pursued.[12] (These shifts sometimes occur quite quickly, but they are increasingly likely to occur with the passage of time.) Movement away from the beliefs of the donor to the presumptively greater wisdom of current trustees occurs even in cases where the founder wanted the foundation merely to serve as a vehicle for the transmission of certain values. What donors too often forget is that those same nominal "values" can be pursued in very different, even opposing, ways.

Movement away from donor intent is not simply a result of the "wrong" people running the foundation. Rather, the drift is largely due to a second factor: time itself.

A couple of examples should clarify this point. First, assume a donor wanted his foundation to care for the poor, with emphasis on inner-city school children. This sounds

simple enough. Assume further that the donor's values would have led him to endorse condom distribution and perhaps even abortion, following in the eugenics vein advocated by the Rockefeller Foundation and its ilk in the 1920s. In contrast, the present trustees, fully within the stated mission of caring for inner-city children, may be vehemently opposed to the donor's approach, feeling that it would only increase the likelihood of further illegitimacy, as well as the spread of AIDS and other sexually transmitted diseases. So the trustees choose instead to promote abstinence and adoption counseling. Or assume the donor was concerned about strengthening the nation. He might have argued passionately that integral to that objective were programs encouraging immigration, but his trustees could argue with equal vigor that the nation would be strengthened by curtailing immigration. In short, the interpretation of values and the implementation of program areas can both be highly subjective. As circumstances and received wisdom change, conflict with and violation of the donor's interpretation at some point in perpetuity is almost inevitable.

This move away from donor intent is not simply a result of the "wrong" people running the foundation, though certainly that contributes significantly to the problem in many instances. Rather, the drift is largely due to a second factor: time itself. Under conditions of perpetuity, the conflict described above will almost by definition occur at some point. The approaches to charity that dominate at any given time are determined by prevailing conditions and current ideas. If history has taught us anything, we know that one or both will eventually change. Unfortunately, human beings have a self-centered sense of time: They usually assume that the world changes and progresses — up to the present.

We should know better. Our time is but a dot at some point along a continuum. Some contemporary ideas will likely seem quaint or perhaps even barbaric 75 years hence, and then might enjoy a renewed vogue several centuries further on. Precisely because history is neither linear nor

inevitable nor scientific, the prevailing ideas and conditions that influence donors of perpetual foundations will inevitably fade until eventually they will no longer be compatible with current circumstances and ideas. These new circumstances and ideas will influence the thinking of the trustees of their time, people who never knew the long-dead donor any more than they know their own great, great, great, great, great granduncle. While such abuses of donor intent can happen regardless of whether a foundation continues in perpetuity, perpetuity dramatically increases the probability of such problems occurring.

Time is not the only source of pressure on donor intent. Professional management and staff can distort it as well. As perpetual foundations age, they almost certainly come to be managed by individuals who are increasingly distanced from knowledge of and concern for the intentions of the founder. As family involvement in the foundation decreases over the years, family members are often replaced by professional staff.[13] Certainly some foundations were designed to be run by professionals and are run very well. And, on the other hand, nothing guarantees adherence to the donor's vision by the grandson who wants to use the foundation's resources for his own social status or the daughter who never agreed with her parent's political views. But family-run foundations do seem somewhat more likely to adhere longer to a strict construction of the donor's vision. As time goes on, however, even those foundations that were meant to be controlled by family members tend to hire professionals to manage the operations. A similar problem can occur on the boards of these foundations when people outside the family, or family members who do not share the donor's vision but were chosen because of their relationship, eventually come to dominate.

This shift away from sympathetic family members and close personal friends to unsympathetic relatives or professional staff is a problem inherent in the system of perpetuity. Time puts pressures on a family that cause it to change. Its members become increasingly distant with the

fanning out of multiple generations. Simultaneously, what money was left to most of the descendants by the founder of the foundation tends to dwindle. Either their attention increasingly needs to be focused more on remunerative activities or the foundation takes on, effectively, an asset replacement role (e.g., by buying status through contributions that would otherwise be unaffordable) it was never intended to have. Some family members are simply uninterested in the process and want someone else to take care of it. Others, particularly with the growth of foundation assets, want professional expertise. We have witnessed all of these problems in only the first three or four generations of the existence of the modern foundation — imagine what will happen when we reach the tenth generation, or the 20th.

Even if the donor starts with an outlook that is in step with the current intellectual vogue, any student of ideas can guarantee that with time that vogue, and the conformist pressures that go with it, will shift.

The movement of staff members away from donor intent is predictable for other reasons as well. First, because grantmaking is their career, non-family employees want to be well regarded by their peers in the foundation community. Their current job, after all, will probably not be their last one. So there is pressure to conform to "industry standards," particularly in a field where practically the only way to get a job is to be known and approved of by someone who has a position in it already. Thus the pressures, mentioned above, to adapt to current circumstances and peer-group ideas will be felt to a greater extent by people for whom this is at least as much a profession as either a passion or an act of loyalty. Even if the donor starts with an outlook that is in step with the current intellectual vogue, any student of ideas can guarantee that with time this vogue, and the conformist pressures that go with it, will shift.

The second reason for the present disparity between the donor's mandate and the professional's execution of it is a cultural one. Many of those who made enough money to create a foundation were part of an entrepreneurial culture and subscribed to much, if not all, of what that implies. In

contrast, the foundation professional or trust-fund heir, much like the academic or cleric, inhabits a world with a very different economic and cultural model, one that is at its core redistributionist and reliant on a central bureaucracy. That such different worldviews manifest themselves in program preferences should surprise no one.

Finally, this inclination to shift away from donor intent is abetted by a third critical structural factor: As currently constituted, foundations, in effect, have no accountability mechanism, save in the case of egregious violations of the law that come to the attention of their state's attorney general. Companies face both the test of the market and the potential wrath of their shareholders. Politicians face the voters at regular intervals. Churches are accountable to the members who support them, and are further buttressed by claims to transcendent truth. But no one really referees the actions of foundation trustees, and no forces visit negative consequences upon them when they make poor decisions. Their latitude is extraordinary because the work they do is presumed to be for the public good and thus unlikely to be criticized. Potential grantees who would have an interest in criticizing are also those most reluctant to risk alienating a potential source of funding. Many trustees are themselves part-time and *pro bono* and thus have little interest in potential confrontation. Should the majority of trustees be amenable to paying out less than the donor intended, for example, or to shifting the focus of the grantmaking as described previously, they are unlikely to be prevented from doing so. This lack of general accountability can pose a problem at any time, but the likelihood of it having consequence and compounding itself increases substantially when attached to a perpetual institution.

The second pernicious characteristic of the modern foundation is the emphasis among trustees on the growth of assets. Julius Rosenwald, a leader in philanthropy and a critic of perpetual endowments, argued that "it is almost inevitable that as trustees and officers of perpetuities grow old they become more concerned to conserve the funds in their care

than to wring from those funds the greatest possible usefulness."[14]

Sadly, regardless of the age of the trustees, asset growth often seems to be a higher priority than the charitable activities of the foundation, with qualifying distribution minimums being treated as maximums and accounting games being played to further minimize the required payout.[15] (This tendency is only exacerbated in such instances as the Bishop Trust of Hawaii, where the stipend going to trustees is based on the wealth of the foundation, creating a strong incentive to minimize foundation payouts.)

Again, this should come as no surprise. First, by establishing perpetual entities, we have redefined the primary fiduciary obligation of the trustee from making grants that address today's charitable purposes to instead focusing on eternally growing the foundation's assets. How can a fiduciary not have such a focus when entrusted with the care and nurturance of these assets for all time? Tomorrow thus takes precedence over today, justifying the decision to give short shrift to today's needs in favor of the vague demands of tomorrow.

There are other all-too-human pressures that abet this proclivity. A foundation's importance is commonly measured by asset size, rather than by the caliber of its charitable gifts. Psychologically, it is also easier to measure success in terms of assets rather than charitable achievements; a foundation knows what the return on its investments is, but how does it measure the success of most grants?

Finally, there are the seductive temptations of substantial size: Large assets can bring considerable influence and even control over the entities in which the foundation's assets are invested (e.g., real estate, companies, partnerships),[16] and assets in turn can mean status and power, attention and flattery, blandishments that take more intestinal fortitude to resist than most of us can summon.

Unsurprisingly, perpetual organizations have produced a harvest of disappointment, frustration, scandal, and corruption. In the face of the historical record, only

hubris will dispose anyone to believe he can avoid these problems.

GOOD INTENTIONS VS. BAD SYSTEMS

Certainly some foundations have overcome the temptation to stray from their donors' intentions, and they are much to be commended. Some have done it by having limited lives and strict paydown provisions; in some cases trustees have even exceeded the speed with which the donor anticipated they would be able to pay down his bequest. Other foundations have wrestled long and hard internally and so far have managed to maintain a direction in keeping with the founder's wishes.

But here is the critical point: It is foolish to base public policy on exceptions. Inherent in the current design of foundations are several forces to which human nature easily succumbs. Historically, the staunchest advocates of property rights and keenest students of human nature understood the limitations and pitfalls of badly designed institutions. The structure of foundations and the incentives surrounding them are such that neither the best laid plans of donors nor of trustees are likely to prevail indefinitely.

The two predictable characteristics of perpetual foundations — the turning away from donor intent and the ever-increasing emphasis on asset growth as opposed to charitable spending — are unlikely to check themselves.

Nevertheless, perpetuity is tempting, especially in the face of death. For donors, there is the eternal lure of immortality, the ageless gratitude of those who will at least know their names and thus will assume their greatness and place in history. (Rosenwald exhorted those who seek lasting glory to remember Nesselrode, "who lived a diplomat, but is immortal as a pudding." [17] Today even the pudding has been forgotten.) Even the donor who recognizes the problems caused by perpetuity is likely to believe that he will be an exception, that somehow he will be able to draft a governing document that will, for once, sail cleanly between the twin dangers of a mandate that is too detailed (which invariably becomes

outmoded and leads to the problem of the dead hand) and one that is too vague (which quickly loses all control of direction). Such would-be exceptions should remember that even our own brilliantly authored Constitution needed amendment shortly after its ratification and has frequently been amended and reinterpreted in the 200 years since — and 200 years is but a fleeting moment from the perspective of perpetuity.

For the trustees, there is the headiness of doing good, which counts for a great deal in our Age of Good Intentions, where — irrespective of outcome — credit goes for showing that you care. Then there is the lure of being important. Not only is there a fiduciary obligation to preserve and increase the foundation's assets, but the bigger the foundation is, the more important its trustees are. The larger the foundation, the greater the kowtowing of assorted supplicants and would-be grantees. And while that may quickly grow transparent and tiresome for some, there always lurks the suspicion that perhaps the status and attention you and your spouse get at the local symphony might not be entirely personal, and the concomitant fear that in ending the foundation those perks would end as well. Under these conditions, it should be apparent that it would require tremendous strength of character to choose to spend down a foundation. Indeed, it is hardly likely that trustees will voluntarily decide to terminate a foundation. They, after all, are running it, and of course they are doing a good job (who isn't?). Why should they not continue to do so?

What about relying on the courts to enforce donor intent? The truth is that judges are no more eager to declare what is in keeping with a donor's intent — particularly where that turns on philosophical outlook — than to declare what is a religion. Past evidence indicates that aid from that corner is unlikely.

Thus the two predictable characteristics of perpetual foundations — the turning away from donor intent and the ever-increasing emphasis on asset growth as opposed to charitable spending — are unlikely to check themselves. We should be doubly concerned about this, for these characteristics

in turn present significant policy problems of their own and, in the absence of reform, threaten the future health of our nonprofit sector.

POLICY PROBLEMS

Donor Intent

The pressures generated by the realities of perpetuity to stray from donor intent are a source of much concern for three main reasons. First, one can hypothesize that with time, as people see the frequency with which deviations occur, they may question whether they should risk such an outcome themselves. This could lead to a diminution of charitable giving. Second, a benefit of adherence to donor intent is that, by allowing each trustor the ability to define the focus of his gift, we minimize the chance of homogenized charity and increase the likelihood that worthy causes that might otherwise be ignored will find succor. By contrast, if trustees and staff feel free to redirect all charity to the trend of the moment, we run the risk of a herd mentality, which minimizes the diversity of focus and approach.

The third cause for concern is the most serious: A system that ultimately creates pressure to circumvent or abandon donor intent potentially attacks "important philosophical precepts [that] dictate that an individual be allowed to dispose of his property as he wishes."[18] Clearly one of the linchpins of a free society is the right to own property and to dispose of one's property as one sees fit. It is important to understand, however, that sunsetting foundations subverts neither the principles of donor intent nor the capacity of the donor to dispose of property as he wishes, any more than limiting the lives of non-charitable trusts undermines donor intent.[19] There is a great difference between the capacity to determine where one's assets go after death and the ability to dictate the manner and duration of their use, particularly if that duration is indefinite. In fact, the misbegotten perpetuity of modern foundations exacerbates the temptation to alter donor intent, since time will create other attractive options for the use of assets. Thus the logic

of perpetuity ultimately is at odds with donor intent and undermines one of the cornerstones of a free society. Those who value donor intent, particularly as an extension of property rights, should appreciate that in the long run the perpetuity of foundations could well be its greatest enemy.

Foundation Size

As discussed above, the other result of perpetuity is the focus on asset size and the consequent conservation, rather than distribution, of wealth. This too leads to problems. First, consider that with a reasonable rate of compounded return, assets will double in ten to twelve years. This means that long-established foundations generally will have a geometric advantage over start-ups. Such a situation could lead to a phenomenon similar to what we witness happening to individual giving when there is large institutional support: The individual assumes that his small contribution will not have a material effect and so decides not to bother. (It is interesting to note that charitable giving has risen wherever cutbacks in government spending are threatened; people give where they think their money matters.) So too with foundations — some may be discouraged from establishing new foundations as they look at the behemoths already dominating the eleemosynary landscape.

A second, more consequential phenomenon springs from the inclination of oversized foundations to make large, cost-effective grants. Small organizations, which are often most in need of assistance and might well make the best use of funds, are often ignored. For example, the Damon Runyon-Walter Winchell Cancer Research Fund received total revenue in 1990 of $4.2 million, versus $332.6 million for the American Cancer Society (ACS). Yet despite a consistent differential of this magnitude, the Runyon-Winchell Fund has supported 36 Nobel laureates since 1946, 44 percent more than ACS during the same period — and the number of laureates supported is ACS's own criterion of quality.[20] The same is true of countless other small charities, as described by Marvin Olasky in his book *The Tragedy of*

American Compassion. Large foundations tend to overlook smaller organizations for two reasons: first, because it is simply too much work to give out a myriad of tiny grants instead of a smaller number of large ones; and second, because many large foundations have subscribed to the "social universalist" philosophy of making huge grants to solve great problems in great ways (not that it works, but there is such an irresistible frisson of virtue and importance in such grand intentions).

There is a third reason to be alert to the problem of oversized foundations: In political terms, they create a very small constituency hoarding great wealth that is exempt from taxes, money that is supposed to benefit the public good, yet is being indefinitely reserved for a vague tomorrow. This is wealth of increasingly vast proportions — foundation assets in the U.S. total around $200 billion.[21] Because of the economic boom of the last two decades, some observers predict that an amount even larger than that will soon be entering the tax-exempt pool. The coming era will see government searching for politically palatable sources of increased revenue, as well as calling for increased private funding for charitable purposes. In all likelihood this means that the tendency to treat qualifying-distribution minimums as maximums will be looked upon as an evasion of purpose, fueling the temptation to intervene. One may wish that history did not teach such a cynical lesson, but it has been ever thus.

"Charitable Efficiency"

Finally, and in the same vein, there is much to be concerned about in the call for "charitable efficiency," an idea that has not yet prevailed but that has gained intellectual currency. The premise is that the donor was not as wise as his present board or even the broader public (as defined by self-appointed advocacy groups), and that money held in a foundation, precisely because it "costs" the public forgone taxes, rightfully belongs to the public. Clearly this is a by-product of the two previous problems and shares some of

their ramifications, such as undermining the philosophical precept that an individual can direct the disposition of his property as he wishes.

What is even more disturbing about the notion of charitable efficiency is that it deliberately blurs the line between what is public and what is private. Its advocates essentially claim that you need to either tithe to the state or surrender control of your assets. This claim is based on the implicit assumption that all property belongs to the state, which allows individuals to keep some as it sees fit.

To whom is that control to be surrendered? The current trustees? Community activists? Judges? Who exactly is entitled to decide how these assets are to be spent? As tax-exempt wealth increases in perpetuity, as scandals involving foundations mount, and as instances of clearly inoperable cases of donor intent cause public comment, such questions will be raised with greater frequency and, one fears, to even greater effect.[22]

POLICY RECOMMENDATION

We should therefore follow the principle of management guru Peter Drucker and ask ourselves his key question: If you were not doing it this way already, would you start? In an ideal world, taxes would be so low that a tax exemption for charity would be unnecessary. Given current realities, however, we would be better off if we returned to a vision of foundations grounded in principles of common law. We need to revisit the concept of a limited life except for very specific types of charity with narrowly defined beneficiaries and purposes. Some have spoken in favor of making the law parallel to the balance of trust law (that is, lives-in-being plus 21 years, or roughly 90-100 years duration); others advocate an arbitrary term that is considerably shorter — for example, 20 years after the death of the donor. Even in the first instance, we may want to consider a mandated review every 25 years or so to minimize the dead-hand problem, which caused such concern over a century ago.

Whatever we do, we need to be much more hesitant about the concept of perpetuity. We already have distinctions between private foundations and public charities; it is easy to envision a system with further tiers defining different types of charities, with different rules and perhaps even different time horizons governing each. Payout rules for sunsetting foundations can also be devised (maximum payouts to organizations, rules regarding the types of organizations eligible to accept payouts, restrictions on overlapping board composition, and so on) to thwart the temptation to carry on the venture in a different form. The probability is, however, that most trustees, if faced with a limited life of their foundation and a clear mandate to spend its money to do good now, would hire an accountant and devise a fairly even method of paying down the assets over the life of the foundation.

We need to revisit the concept of a limited life except for very specific types of charity with narrowly defined beneficiaries and purposes.

Such a system would not be perfect — no system is — but on balance it should enjoy significant advantages over the present approach. More money would be spent doing good in the present and near future, rather than being warehoused for some indefinite faraway time. Funds would be better dispersed through society, preventing lopsided buildups of capital and precluding the likelihood of any public claim on those assets.

Instead of having a few large foundations dominate the charitable landscape, we would have an ever-rotating plethora of smaller foundations, which should increase the variety of giving. This should also increase gifts to small local organizations (which often do the best work) as they are more attractive as grantees to smaller foundations. Limiting the lives of foundations increases the likelihood that they will do work relevant to the donor's wishes regarding the problems of the day, while lessening the chance of funds being misused over time.

Finally, limiting the lives of foundations reminds us that institutions and programs only deserve to last when they

meet a human need, and when they do, they will continue to be supported. As Rosenwald put it:

> Real endowments are not money, but ideas. Desirable and feasible ideas are of much more value than money, and when their usefulness has once been established they may be expected to receive ready support as long as they justify themselves. We may be confident that if a public need is clearly demonstrated, and a practicable way of meeting that need is shown, society will take care of it in the future.[23]

It is an astonishing case of moral hubris — born, perhaps, of a generation of progressives — to think that future generations of citizens will be so slack that they will not rise to the challenges of their time. Rather, given the classical view of the fallibility of human nature and the limitations of our foresight, it is the character-enhancing obligation of each generation that it take care of the needs of its own time rather than presuming the prescience to attend to the needs of the infinite future.

In short, limiting the lives of foundations would remove the structural impediments to a healthy philanthropic community while improving the quality and variety of charity. For that, the ego gains of perpetuity are a small price to pay.

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Notes

1. Martin Morse Wooster, *The Great Philanthropists and the Problem of Donor Intent* (Washington, D.C.: Capital Research Center, 1994), pp. 101-104.

2. Ibid., p. 105.

3. Julius Rosenwald, "Principles of Public Giving," *The Atlantic Monthly*, May 1929, pp. 600-601.

4. Ibid., p. 601.

5. Wooster, op. cit., p. 111.

6. James Fishman, "The Development of Nonprofit Corporation Law and an Agenda for Reform," *Emory Law Journal*, 1985 (34 EMORY. L. J. 617, 628).

7. Wooster, op. cit., pp. 4-5.

8. Ibid., p. 5.

9. Ibid., p. 6.

10. Fishman, op. cit., p. 638.

11. By "founder" I refer either to a founder or to founders, as often the decision to create a foundation is made by a couple.

12. I commend Wooster's book for numerous examples of this phenomenon.

13. Having descendants run the foundation is itself no guarantee of adherence to donor intent. One of the characteristics of the first modern foundation, the Rockefeller Foundation, was the disparity between the views of Rockefeller Sr. and his son, who ran the foundation.

14. Rosenwald, op. cit., p. 604.

15. Tax law for foundations says that certain expenses count as part of the qualifying distribution. I recently asked several tax attorneys and accountants who specialize in nonprofit work whether the Internal Revenue Code says one *must* count expenses that way, or whether in fact one simply *may* choose to count them that way. (If it were not necessary to count such expenses, a foundation might spend more on charity than if it were.) I was told that no one, in all their years of practice, had ever asked the question, or sought to pay out more to charity than they had to.

16. It is true that there are restrictions on the holdings of foundations *per se*. The reality is that foundations are controlled by trustees, and by aggregating the assets held by the foundation with assets held by the individuals and the other entities they control, the influence they can enjoy is considerable.

17. Rosenwald, op. cit., p. 605.

18. Roger G. Sisson, "Relaxing the Dead Hand's Grip: Charitable Efficiency and the Doctrine of Cy Pres," *Virginia Law Review*, April 1988 (74 VA. L. REV. 635). This is an article that argues against donor intent and in favor of "charitable efficiency."

19. Some libertarians may object to such rules, but the question remains how completely we ought to free ourselves from laws and restrictions — a process that can become quite circular since certain simple rules are necessary to the concept and protection of property, as well as against force and fraud and the like. In a free and functioning society, at any given time the majority of property needs to be vested in someone for reasons of accountability and so that it may find its highest and best use.

20. James Bennett and Thomas DiLorenzo, *Unhealthy Charities* (New York: Basic Books, 1994), p. 147.

21. According to the 1995 edition of the Foundation Center's *Foundation Giving*, at the end of 1993 foundation assets in the U.S. totalled $189 billion and were growing by close to $8 billion each year. Readers should be aware, however, that these figures include corporate foundation assets of approximately $7 billion. The argument presented here is not meant to include corporate foundations in its scope.

22. See Wooster, op. cit., on the Buck Trust, pp. 51-60.

23. Rosenwald, "The Trend Away from Perpetuities," *The Atlantic Monthly*, December 1930, p. 749.

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THE CASE FOR PERPETUITY

Michael S. Joyce

One considers the brief histories of, say, the Ford Foundation and the Pew Charitable Trust, and asserts a universal principle: "All foundations over time evolve into monstrous enemies, generally, of all that is good and wise, and, specifically, of everything their founders believed." Thus, from the thinktankers who type a problem into their word processor in the morning and go to lunch confident it can be resolved that afternoon *by typing in a solution*, comes the proposal to establish sunset laws for private foundations so that they will dissolve in 90 years or so from their founding. They have since discovered ancient precedents for their argument (though precedents for reducing property rights are not all that hard to find), but it remains an essentially new approach, for today the voice we hear pleading for relief from the dead hand of the past comes from the right. That is a novelty.

In the course of disputing the remedy they propose, I am not required to deny the need for change nor to condone the behavior of most contemporary foundations. All I have to do is reject despair.

We speak of foundations today much as we spoke of another even more powerful American institution no more than two years ago, the U.S. House of Representatives. It was in the seemingly perpetual possession of the Dark Side. It had moved recklessly, perhaps irretrievably, from the intent of its founders, faithless to their purposes as stated in *The Federalist Papers* and elsewhere. It had become the captive of special interests that had undone geography as a basis of representation and dispersed communities into organized and aggrieved national constituencies of teachers, feminists, ethnic minorities, senior citizens, and so on. It had become the instrument of its professional staffs — manipulators *par excellence*, able to establish power and influence that bound even those whose authority they had usurped.

The deck was so stacked against the will of the people being justly served in this unhinged institution that systemic change seemed the only answer. Any other approach was benighted, Pollyanna-ish, irresponsible. And so few paid attention when Newt Gingrich came to Congress in 1978 and suggested renewing the original foundation of the institution. To the extent he was taken seriously, it was as a loose cannon. Wise men counseled him to abandon impossible aspirations lest he upset a delicate balance in which these simple, basic truths were weighed: *We are the losers, they are the winners; that's the way it is.*

But unlike most of his colleagues, Representative Gingrich had not come to Congress from a career that had disposed him to plea bargaining. Providentially, he was a professor of history, and, as such, one of the few people in politics who knew it could be made. Since November 1994, the new Republican Congress has time and again made history by doing that which only a few years earlier it was considered an intellectual embarrassment even to believe possible.

The same principle that undergirded the Republicans' we-lose-they-win *status quo* in Congress is at the heart of the proposal for sunset laws for foundations, the unfounded but powerful belief in the Marxist teleology — embraced, ironically, by many conservatives — that postulates, as a matter of "scientific" inevitability: History belongs to the left. After a century in which virtually all elite thought has been directed to the shaping and refinement of the state as the instrument of human salvation, it is understandably difficult to picture a future that does not bring more jobs and powers and social leadership to the left. Generations that have witnessed a lifelong progression of any change being defined as a new problem calling forth a new government program may be forgiven for finding it hard to believe that movement to the left is not a function of time.

But it is not. The 20th century will end. And the theme that ran through its institutions, the glorification of the state as the instrument of human advancement, is little heard today

outside the salons of *a priori* leftists. The dreams of American progressives were less disastrous than those of national socialists and communists, but they were of the same statist root and relied as much on a faith in science and management to improve the human condition. Science is a self-authorizing posture — hard to square with democratic discourse — for its upholders, experts all, *cannot* be wrong, whereas those who think otherwise *must* be wrong. As conduits for science and management, which do not come *up* from the people but *down* from above, high-minded organizations throughout this century have abandoned the role of the mediating structure. Civil institutions that knew and could speak for the citizens who participated in them were crowded out by modern structures that sought only to bring the great knowledge of the elites down to lower orders who, presumably, had little, if anything, to contribute to the exchange.

The American foundations from which sunset laws are intended to free us are creatures of an era so profoundly skewed by the massive structure of central government that other institutions, save the few so firmly anchored as to resist enormous forces of gravity, fell either into its orbit or its shadow.

Consider the behavior of the foundations. They have empaneled a mandarinate of highly credentialed experts whose claims to knowledge have emboldened them to build a comprehensive list of promises social science has shown itself manifestly incapable of delivering: racial harmony; rehabilitation of criminals; peacemaking; sex education; economic development; mental health; the elimination of violence, drugs, and disease. Possessing such "knowledge" and the administrative and financial resources to apply it, they can only resort to abstruse apologetics, constant redefinitions of The Problem, and ultimately deconstruction to account for their inability to restore Paradise.

They have eyed the public treasury as the long-term support for their programs, developing models for extraordinarily expensive and perversely counterproductive programs to transfer to the public sector, as if the public

sector could not devise its own failures. With pride, they have aggressively used their grants to leverage money from other sources, finally from government, teasing up the edges of the welfare state and seed-funding the great ground-losing debacle of the Great Society.

They have waded into waters far over their heads, meddling in areas of American culture where even their "sciences" make little pretense of predicting the real world outcomes of their dearest projects to promote oddball ideologies. Fortunes are devoted to the analysis and incantation of bizarre, oppression-mongering notions of culture and gender, relentlessly deconstructing good and evil, man and woman, family and community. Their inchoate, elite visions have become the standards of intellectual fashion and a wounding insult to the aspirations of real people whose real culture can only be expressed in real institutions.

In most circumstances, perpetuity is part of the donor's intent. Donors want their foundations to live on after them to provide long-term service to the ends for which they endowed them.

Capping it all off, most American foundations have ignored the purposes established by their donors. Some have behaved so shamefully as to become a permanent counter-memorial to their founders, acting in such consistent defiance of donor intent that they appear to be conversely guided by it.

Regarding such unbalanced institutional behavior as an historical necessity, sunset-law advocates foresee that huge, bad foundations will become bigger and worse, growing forever richer in resources that will be perpetually dedicated to more and more destructive meddling in support of policies further and further removed from human sensibilities. Their apocalyptic premonitions anticipate the accumulation over time of so much wealth and influence among these self-accountable institutions that they become a shadow government forever yoking the American people to the will of increasingly tyrannical, increasingly out-of-touch elites.

Indeed, if the future were, as they believe, merely an extrapolation of the present, I would agree with them. For in

the final analysis, the question of whether foundations should have long lives or shortened ones has to do with whether or not they are predictably going to be bad institutions. If so, let's do away with them entirely. But if not, there is no good reason to distinguish them from other long-lived institutions by arbitrarily setting a date for their dissolution. If they are not inevitably destined to become the sort of institutions whose termination would bring joy to the good, perhaps we should consider improving the purity of the bath water instead of discarding the infant.

I use the word "infant" advisedly. The modern foundation, as we know it, is a relatively recent invention. The behemoths to which the critics of perpetuity regularly point are less than a century old and in some cases much less. To apply the proposed rule that foundations exist only for the average duration of life at the time of the donor's death plus 21 years (the formula that gives us about 90 years), we would find that very few foundations have exceeded that limit. Behemoth Number One, for example, the Ford Foundation, would have another three decades left.

What this means, of course, is that even if foundations are somehow naturally inclined to go bad — which I do not agree is the case — the sunset law solution would at best reduce their capacity for evil to about the last and most powerful three-quarters of their existence, after which their great wealth would be passed on to other, fellow-traveling institutions.

Capitalism is dynamic. Moving fortunes from one place to another does not unmake them. This fact may prompt the problem-solvers back to their word processors to add "and its funds to be dispersed in allotments no larger than $100 each to unrelated institutions." Perhaps with enough such amendments to their sunset-law proposal it will become clearer to them what they are doing. Their project, begun with the historicist assumption that time is on the side of the left, proceeds, specifically, to propose new limits on property rights. ("New" in the sense that they are not now in place, though, as noted above, there are manifold precedents,

ancient and modern, for the dispersal or confiscation of personal fortunes.)

Instead of enacting further limitations, we could validate and revitalize property rights in a manner that would encourage donors to the continued support of good works. If this is to be realized, donors will need to have a reasonable expectation that their generosity will not be turned to the purpose of an eternal assault upon all they hold dear. There are lessons to be learned from the last century of experience, but it is possible to apply what we have learned to enhance the value of perpetual institutions.

The problems of the foundation world that give rise to the call for limited life can be grouped under three headings: a departure from donor intent; an over-emphasis on foundation size and asset growth; and a lack of accountability, which gives rise to calls for public intervention and control.

Of these issues, the first provides by far the most compelling argument in favor of sunset laws but also a strong one against them. Since donor intent is the cause of the existence of a foundation, there is no justification for the continued existence of an institution that cannot fulfill that purpose. But, in most circumstances, perpetuity is also the donor's intent. Donors want their foundations to live on after them to provide long-term service to the ends for which they endowed them.

Faithless professional staff members were the first culprits to be accused of leading the foundations astray, and there is abundant evidence that this has occurred. Thus it was thought that the sure solution to the problem of maintaining donor intent was to involve family members in the foundation, since they would surely understand the donor, honor his aspirations, and see to it that his intentions were carried out. Lamentably, experience provides only very limited support for this approach. Family members, assuming that they even maintain an interest in being involved in the foundation, have had their own agendas and may often think in terms of succession and owning rather than legacy and owing. And so

we find that one, two, or three generations down the line, a foundation can come to resemble nothing of what it was originally intended to be and that family members may as likely be the source of departure from the donor's intentions as professional staff.

However, it is important to recognize that disservice to donor intent is not a function of perpetuity. Donors (Harry John, for example) have been ousted from their own foundations while still alive; other foundations have, before the Brie from their opening ceremonies was gone, begun funding programs their founders would never have dreamt of supporting. The cure for this must be found somewhere other than limiting the life of the foundation.

It is important to recognize that disservice to donor intent is not a function of perpetuity. The cure for it must be found somewhere other than limiting the life of the foundation.

The central problem, of course, stems from a general lack of appreciation in contemporary culture for the authority of private property, which is the basis for the authority of donor intent. Even so, this problem is greatly exacerbated by the fact that donors themselves are not clear enough about their intentions, nor careful enough in structuring their institutions for adherence to them. If the last century has taught us anything, it is the need for greater attention on the part of the original donors to institutionalizing the legacy they wish to have carried on. I recommend to them that they leave behind comprehensive testimony to their views and intentions, analogous to *The Federalist Papers*. A few lines in the bylaws are not enough to inform trustees of the purposes with which they have been entrusted, nor to give the executive staff guidance as to what to execute.

It is through a well-established tradition and a body of affirmative authorizing documentation that so perpetual an institution as the Church has been able to survive major deviations from its Founder's intentions, yet find within itself the capacity for its own regeneration. Similarly, the U.S. Congress, as noted above, has recently renewed itself in keeping with its original purpose.

Any institution can fall prey to popular ideas, can be twisted by unfaithful trustees and staff, can find itself wondering what to do. While it is often thought that most donors adhere to a certain set of principles based on their entrepreneurial experience, this is by no means always the case. The foundation world is very diverse, which can also be a strength. Because there are always various sets of ideas, it may be possible, with careful planning, to see that the desired ones are adhered to when questions of electing trustees and staffing arise. In other words, whatever the popular ideas of the day, we can count on there being potential leaders who do share the donor's ideas — but the donor has to state his ideas in the first place.

These institutions are, indeed, private. They are not accountable to "the people", but to "some people," that is, to the trustees who exercise the authority of ownership.

Absent human honor, no code or constitution could hold off the corruption to which all institutions would be doomed. But trustees and administrators are not gratuitously disloyal, and many who would have been faithful to donor intent have had the weaker hand in decision-making for lack of a better and more complete representation of that intent. If structured properly, foundations can enjoy the same capacity for regeneration that I pointed to earlier in the examples of the Church and Congress. The lessons of foundations that have come before should provide excellent guidance for the task of shaping an institution so that donor intent stands the best chance of prevailing.

Another very real problem that gives rise to calls for sunsetting requirements is the over-emphasis found in many foundations on asset growth. Those who manage perpetual foundations have an obvious interest in seeing that the foundation brings in at least as much as it spends. But treating minimum qualifying distributions as maximums, as many foundations focused on asset growth tend to do, reduces and distorts the philanthropy that the foundation is supposed to be about, and may even further undermine donor intent. The problem is obviously exacerbated when trustee stipends and

administrative salaries are tied to the size of the foundation's assets.

Yet the size of a foundation is only a matter of concern if it is not distributing its money wisely and well. There are many examples of foundations that increase in size as time passes yet still manage to have a positive impact with their donations. Once again, it is up to the donor to be specific about how trustees should manage assets. Donors can place binding requirements on the percentage of assets that will be given out each year, and these requirements can easily exceed whatever the state decides is a qualifying minimum distribution. Enterprising donors might even wish to create a formula that takes into account average return on investments, inflation, and so forth. The point is that it is within a donor's power to limit the amount of temptation that can plague future trustees.

Still another stimulant to the call for limited foundation life is the fact that these institutions are, indeed, private. They are not accountable to "the people" (which the left understands to mean "the government"), but to "some people," that is, to the trustees who exercise the authority of ownership. Perhaps if American foundations *had* maintained donor intent, we would hear a lot more about the "accountability" issue from the left, but since they have instead become the funders of the left, we hear about it from conservatives who support property rights but have no faith that these rights can prevail against the will of the state. They tell us that the influence and wealth of long-lived foundations will bring about pressure for more government control.

This argument in favor of sunsetting is particularly troubling. It is certainly true that storehouses of wealth existing in perpetuity will be a great temptation for an omnivorous state. The state increases its power and influence through the waging of war, which serves as the justification for taking sons, seizing wealth, and bending the will of its subjects to that of the powerful class. This process diminishes kinship ties and destroys the natural state of communities. In other words, the possibility, even the probability, exists that

the state will at some point attempt to pilfer philanthropic capital. But must the state succeed in this attempt?

As a basis for policy, the expectation that foundations would be "nationalized" if they did not support the agenda of central government is a poignant display of the desperation visited upon conservatives by generations of liberal hegemony. So certain are they that institutions must inevitably be turned to the service of the state that they would destroy the institutions *during their watch* to prevent that outcome.

In 1986, as an expert witness in a court proceeding to rule whether trustees could amend some inconvenient aspects of a donor's will on the basis of some abstract standard of "effective philanthropy" (translation: "what we want to do"), I testified in favor of maintaining the integrity of will-making. The painfully ironic result was a decision to "uphold" the terms of the will but to do so by setting up a foundation designed by the state to take responsibility for its execution away from its unfaithful private sector administrators. Yes, the state will seize what it can, when it can.

Conceding this much of the argument, however, is not the same as agreeing that foundations should not exist in perpetuity. If one were to accept this "better dead than bled" principle, one would have to reconsider the free-market system itself. The perpetual institutions of the market system create wealth that is then devoured by the state, yet few would see this as an argument against wealth creation. Indeed, whether one yearns to pry wealth from "dead hands" or from live ones, the state is the beneficiary of any scheme to disperse capital.

I recommend the opposite view, that we should limit as much as possible the growth and interference of the state — even to the point of opposing sunset laws for foundations.

Because I do not believe that history is the unfolding of Marx's mind; because I do not believe there is anything in the nature of foundations that requires them to be malevolent institutions; because I believe that institutions can be so structured, staffed, and led as to maintain their integrity — or to regain it if it falters; and because I expect great and good

works from the foundations of the past, present, and future, I believe that sunset laws for foundations may be the worst of mistakes, both faithless and perpetual.

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— SHOULD FOUNDATIONS EXIST IN PERPETUITY? —

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THE Philanthropic Prospect

Should Foundations Exist in Perpetuity?

The Case for Limiting the Lives of Foundations
Heather R. Higgins

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The Case for Perpetuity
Michael S. Joyce

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Introduction by Craig Kennedy

THE PHILANTHROPY ROUNDTABLE