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## A New View of Intergenerational Justice

H. Steven Green

*Abstract*

This essay proposes to view justice across generations as a trust instead of as a type of social contract. Despite popular notions of a “generational contract”, the concept, once examined, raises vexing questions about the meanings of terms we may have thought we could take for granted. The issue of intergenerational justice is a challenge even to frame, because it forces us to consider the utility of describing rights and duties across generations as a “contract.” Discussion here is confined primarily to the topics of state-mandated pensions for the aged and secondarily to what is owed to people not yet born. The essay argues that a trust fund is a better instrument for securing justice across generations than is social contract doctrine.

This paper will proceed as follows. First, it will draw on the work of Peter Laslett to examine whether and how we may conceive of justice across generations. As per Laslett’s argument, the essay will suggest that the notion of an intergenerational contract be replaced with that of a trust. Next, the paper will review the topic of justice across generations as discussed by John Rawls in *A Theory of Justice*. Finally, it will review arguments of Robert Nozick in *Anarchy, State and Utopia* as well as of Richard A. Epstein and demonstrate that, in James S. Fishkin’s words, “The limits of intergenerational justice” reveal that social contract doctrine “is a form of intuitionism.”<sup>(1)</sup>

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(1) James Fishkin, “The Limits of Intergenerational Justice,” in James Fishkin (ed.) and Peter Laslett (ed.), *Philosophy, Politics & Society: Volume 6, Justice Between Age Groups and Generations* (New Haven: Yale UP, 1992), pp. 62–63

### *A New View of Inter-Generational Justice*

The following short passage from Edmund Burke's *Reflections* raises important questions about democracy and the relation of duties and rights to time:

“You will observe that, from the *Magna Carta* to the Declaration of Right, it has been the uniform policy of our constitution to claim and assert our liberties, as an *entailed inheritance* delivered to us from our forefathers, and to be transmitted to our prosperity...”<sup>(2)</sup> (Emphasis in original.)

In this quote, Burke “place[s] liberty in a stable role.”<sup>(3)</sup> In fact, it resembles a tangible object. “By a constitutional policy working after the pattern of nature,” he continues, “we receive, we hold, we transmit our government and our privileges, in the same manner in which we enjoy and transmit our property and our lives.”<sup>(4)</sup> In this vision, liberty is implied to possess the same qualities of permanence and solidity as a family heirloom or an acre of land.

Burke, in particular, and conservative thinkers, in general, emphasize the preservation of particular institutions and traditions and reject “innovation” as “the result of a selfish temper.”<sup>(5)</sup> But, the act of transmission itself may be innovative in as much as it intends for the young and those not yet born to conform to their predecessors’ notion of justice. Just as the condition, nature and value of the land my son inherits from me in-

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(1) James Fishkin, “The Limits of Intergenerational Justice,” in James Fishkin (ed.) and Peter Laslett (ed.), *Philosophy, Politics & Society: Volume 6, Justice Between Age Groups and Generations* (New Haven: Yale UP, 1992), pp. 62–63

(2) Edmund Burke, *Reflections* (*Works*, Rivington Edition, Vol. V, pp.59–60, 77–81), cited in Russel Kirk, ed. *The Portable Conservative Reader* (New York, NY: Penquin Books, Ltd., 1982), p.11

(3) Fishkin, p.62

(4) *Ibid.*, p.12

(5) *Ibid.*, p.11

fluences what he can do with it, how society conceives of liberty now determines how future generations interpret and use their liberty.

In the welfare state we make allowances for age differences. We permit the state to determine the years in which adulthood and old age commence. Legislators use the latter to demarcate the specific moment when citizens become entitled to new rights, e.g. the right to a retirement pension. Furthermore, the fact that we expect our constitution to bind future citizens demonstrates we expect the rights and duties within it to be applicable to them, regardless of the fact that we cannot know what our descendants will want.

Today's wealthy welfare state democracies contain more senior citizens than workers. Those in the workforce right now face cuts in their expected retirement benefits and wonder if they may not outlive their country's pension system. Every citizen has a personal stake in the pension system, as contributions are mandatory and benefits universal. Declining fertility rates and rising aged-dependency rates – the ratio of retirees to workers – in the advanced democracies have created a demographic challenge that imperils the sustainability of national pension systems. Given the popularity of these programs, plus the fact that older people vote in high numbers, politicians may be reluctant to reduce benefits.

Government pension fund managers must figure out how to get more contributions out of a shrinking workforce, even as they may have to tax it at higher rates to pay for old-age pensions. This dismal calculation generates the potential for conflict across age groups: retirees who expect a return on their life-long payments versus contemporary workers who balk at paying more now for less later.

In the wealthy democracies pension benefits for senior citizens are designed with an understanding that the liberty of the elderly is for naught if they cannot maintain a certain level of well-being after leaving the workforce. Meeting these obligations now certainly affects the choices of the current working and of future generations. Are the rules for fulfilling these duties an abridgement or an enhancement of liberty? Among

the EU's ten principles for pension reform are these four: Ensure that all older people enjoy a decent living standard and are able to participate in public, social and cultural life; Provide access to all individuals to appropriate pension arrangements; Achieve a high level of employment so that the ratio between the active and the retired remains as favorable as possible; Ensure that public spending on pensions is maintained at a level in terms of per cent of GDP that is compatible with the Growth and Stability Pact.<sup>(6)</sup> As these provisions indicate, given the stated aims of a pension program, it is impossible to maintain pension systems without state intervention in other facets of the economy.

Are we right to assume that a contract exists across generations, as part of a social contract? Perhaps "intergenerational justice" is merely a convenient concept to justify politically popular income transfers to the elderly. David Hume insists that justice is a matter of convention, not of natural law, so the social contract has no authority transcendent of our senses and our traditions. An examination of the generational relationships assumed to form the foundation of the pension component of the welfare state's social contract reveals, in Peter Laslett's words, "the notorious unrealism of contractarian thinking."<sup>(7)</sup> I will review Laslett's critique below.

Framing the issue as one of a contract obscures the processional nature of the issue of rights and duties across generations. Politicians and policy analysts imagine a two-generational procreative contract (hereafter referred to as "the 2-gpc") when they refer to a generational contract. The 2-gpc is a useful heuristic to establish transfers between the working, those not yet working and the retired. The procreative nature of this contract follows from the fact that the "actual procreators (though not necessarily all of their lateral kin) are universally prior in time to those they procreate as well as being

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(6) John Myles, "A New Contract for the Elderly?" in Gösta Esping-Andersen, Duncan Gallie, Anton Hemerjick and John Myles, *Why We Need a New Welfare State* (Oxford: Oxford UP, 2002), p.135, box 5. 1

(7) Peter Laslett, "Is There a Generational Contract?" in James Fishkin (ed.) and Peter Laslett (ed.), *Philosophy, Politics & Society: Volume 6, Justice Between Age Groups and Generations* (New Haven: Yale UP, 1992), p.25

their generative originators.”<sup>(8)</sup> Laslett observes that the obvious metaphor to parental and filial relations is part of the 2-gpc’s intuitive appeal. In return for having been nurtured to adulthood by their parents, children provide for those parents when they can no longer provide for themselves.

I would argue further that the appeal to this metaphor lies in the fact it makes us feel we are recreating an idealized feature of the pre-modern extended family, in which people looked directly after their children and their parents under the same roof. Now, thanks to the wealth and freedom of movement generated by the economies of the wealthy democracies, we like to imagine we can do the same thing for our elders, and our children for us, but without having to share our homes or give up our freedom of movement.

Laslett posits two reasons why this 2-gpc is an unsatisfactory point of departure for conceiving of intergenerational justice and I present an additional reason. First, as Laslett notes, imagining the relationship between parents and children as contractual, “in the mode of if-you-do-something-for-me-now-I-will-in-due-course-do-the-equivalent-for-you” is “an absurdity.”<sup>(9)</sup> Not only is an unborn person incapable of making a contract with her parents-to-be but, all that parents give to their children is given in an act of love, which, by definition, is free of obligation. The parent cannot bind the child to a set of duties to be performed later in life because the “benefits” distributed to the children were unconditional acts of love. Nor are children bound to assist their parents later in life because of an implied contract.

I see a second problem with the 2-gpc. It seems unlikely that anyone, in the United States for example, considers her mandatory deductions for social security as the fulfillment of a filial duty. Rather, people understand the 2-gpc as an analogy to a pre-modern family structure in which families were responsible for their own. However, even as an analogy the 2-gpc fails to establish a principle for distributive justice across

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(8) Ibid., p27

(9) Ibid., p.29

generations. Births and deaths among the population, i.e. demographic trends, obscure the notion of a contract. The size of each group changes daily with noticeable fluctuations over time, such as the baby boom and the subsequent baby bust. These fluctuations impact the contribution and benefit levels of workers and retirees so that any “contract” is regularly “renegotiated” albeit by third parties- elected legislators and unelected policy experts.

The third problem, identified by Laslett, is that the 2-gpc applies only “between age-groups sharing the same time space”<sup>(10)</sup> but cannot cover removed generations, i.e. obligations between us and the unborn children of our children, or even between living grandparents and grandchildren. Of this latter relationship, Laslett notes, the best the 2-gpc can offer is a procreative claim by the grandparent on the grandchild. In fact, some environmentalists do try to make this claim based on appeals to consider our grandchildren’s children, and their children, etc. Yet, so long as appeals to contractual relations are made, there is no good answer to the question, “Why should I do anything for future generations? They have done nothing for me.”<sup>(11)</sup> In short, the notion of a contract across generations is actually a convention based on traditional notions of filial duty. However, the argument for a contract cannot apply to such a notion nor can it extend to cover removed generations.

In fact, the idea of a contract across generations is actually a modern convention based on traditional notions of filial duty, and a flawed sense of the direction in which obligations may flow. If a contract binds us to those who were born ahead of us, then it must also bind us to those who are born after us, but, as noted, this obligation cannot be justified under contractarian thinking.

On the other hand, if we emphasize both *trust-* as reliance on another’s word and character- and *trusts-* as a property managed by an agent for someone else- we may yet create a foundation for distributive justice across time. The welfare state bundles dif-

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(10) Ibid., p.28

(11) Ibid.

ferent age cohorts into three “distinct” generations and justice is assumed to flow “downward and upward from the parental generation, set in motion and regulated by the trust that subsists between the cohorts that constitute each of them.”<sup>(12)</sup> This trust is formed through communication by the entire population of the duties and rights inherent in the contract to each individual, regardless of his or her age. Although Laslett does not emphasize this next point, I do: This communication of the terms of the “social contract” creates part of the national identity and a shared purpose based on observing that one’s fellow citizens hold their end of the bargain. Thus, when demographics, among other factors, threaten the arrangements of the contract, worry about a “coming generational storm” commences. However, trust within and across age groups is not the problem with the contract.

At issue is that the so-called contract is actually a trust, managed by the state. As Laslett explains, contributors and beneficiaries of pension funds “have been allowed to suppose that their rights and duties were indeed of the kind that the untenable two-generational procreative contract implies.”<sup>(13)</sup> In fact, the arrangement of pensions for senior citizens should be understood not as a contract but as a trust, in which “the State [has] to be considered a further party.”<sup>(14)</sup> The state is not the intermediary who passes on our contributions to eligible retirees. Individuals of working age pay contributions to pension programs with the expectation that those who come next will do so also. The so-called generational contract, then, is not based upon the act “of one party repaying another for benefits received earlier, which is why the transfer arrangement is more trustlike than contractlike.”<sup>(15)</sup> Furthermore, trustees- i.e. workers- are obligated to meet future demands for increased payments due to changes in the size of particular age cohorts and fluctuations in the national economy. As manager of the trust, the state’s in-

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(12) Ibid., p.31

(13) Ibid., p.35

(14) Ibid., p.32

(15) Ibid., p.33

terest in it is to preserve it. Thus, the state's primary objective will always be to do what is best for the expansion of the trust fund.

How might a trust achieve justice for those not yet born? I offer an incomplete sketch: By expanding its domain to include welfare programs in general to provide assistance for those in need the trust could work much like the modern welfare state already does, but with a new understanding that it is a trust fund, not a social contract. The state's actual role would be that of executor of a trust with an interest in preserving and expanding the trust. It is only through expansion that the trust can exist in perpetuity.<sup>(16)</sup>

As noted above, contractarian thinking fails to provide the basis for justice across removed generations. On the other hand, the trust provides for future generations because of the processional nature of contributions to it. This same logic allows us to conceive of justice for removed generations. Duties in the pension trust fund do not flow upward in the generational order, from the young to the old. They flow along what Laslett identifies as an "Aristotelian nisis," in which, "Duties point always forward in time and downward in the procreative succession, backward in the generational procession and rights always point in the opposite direction."<sup>(17)</sup> By this same reasoning, I suggest we may posit both society and the territory of the state as trusts (or as a single trust, if so desired, as the former exists within the latter) for future generations. Although he anchors his claim in natural law, John Locke argues as much, namely "for he that leaves as much as another can make use of, does as good as take nothing at all."<sup>(18)</sup> We may

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(16) At this point, I concede that this proposal is vulnerable on at least two points. First, a critic might wonder how I imagine the state will raise the revenue for an expansion, considering that state's already face opposition to raising taxes just to pay for current obligations. So, a critic might suggest I have offered nothing more than to put a new label on an old product. At this point, my only answer is that I have shown the problems inherent in the contract doctrine, one of which is an unrealistic appeal to people to feel particular duties toward the not yet born. My argument only goes so far, at this point, to suggest that emphasizing the processional nature of the trust fund better frames the issue.

(17) *Ibid.*, p.37

ensure that we leave “as much as another can make use of” not only by monitoring our taking, but also by replacing what we took, for both of which we have incentives under the terms of the trust. The puzzle of achieving justice for removed generations resolves itself over time as each individual is inclined to maintain the preservation of enough in her society now so as to ensure enough will exist for her later in life as well. (This inclination may even be stronger among those with children and grandchildren, though I will not explore the matter here.)

How does Rawls imagine justice across generations? *A Theory of Justice* proceeds from belief in the utility of contract terminology. According to Rawls, “it conveys the idea that principles of justice may be conceived as principles that would be chosen by rational persons, and that in this way conceptions of justice may be explained and justified.”<sup>(19)</sup> Nothing in the previous section addresses the issue of equality across generations, yet equality is the central concern for Rawls. He argues that justice is inextricably linked to the basic structure of society, which includes constitutions, markets and property laws, and this structure “favor[s] certain starting places over others...It is these inequalities, presumably inevitable in the basic structure of any society, to which the principles of social justice must in the first instance apply.”<sup>(20)</sup> Social inequality may be inevitable, but it is also artificial and, therefore, can be regulated or controlled. Finding the best way to control inequality is the task Rawls assigns himself in *A Theory of Justice*. Rawls devotes 12 pages (Parts 44 and 45) to the topic of justice between generations. He addresses the issue of justice forward in time, for the inheritors of our political arrangements, but he does not address transfers from the working to the retired. I will review Rawls’s discussion of this topic and then consider how his claims might apply to the matter of pensions.

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(18) From John Locke, *Second Treatise of Government*, cited in Michael Cohen and Nicole Fermon, ed., *Princeton Readings in Political Thought* (Princeton, NJ: Princeton UP, 1996), p.252

(19) John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard UP, 1999), pp. 14–15

(20) *Ibid.*, p.7

For Rawls, the problem of justice across generations commences with determining how to maintain the “social minimum”.<sup>(21)</sup> The difference principle requires that inequalities of income and wealth may exist for so long as they assist the least well off in society, but, by itself, it does not suggest what minimal level of well being is tolerable. “Once the difference principle is accepted, however,” writes Rawls, “it follows that the social minimum is set at “that point which, taking wages into account maximizes the *expectations* of the least advantaged group” (emphasis mine).<sup>(22)</sup> Without the difference principle, the parties in the original position would be likely to choose an egalitarian distribution upon the lifting of the veil of ignorance. Without the social minimum, however, the least well off would be likely to reject the terms of the social contract as unbearable. The social minimum would provide a tolerable level of well being for the least advantaged and, therefore, provide some reasonable *expectation* of raising their well being over time.

However, Rawls emphasizes the “long-term prospects of the least favored extending over future generations.”<sup>(23)</sup> Preservation of the social minimum into the future is the duty of those living now and Rawls requires each generation to “put aside in each period of time a suitable amount of real capital accumulation”<sup>(24)</sup> to ensure it by establishing a just savings principle. The contract doctrine to which Rawls subscribes requires that the parties in the original position to adopt a just savings principle to ensure that savings will accumulate over generations. Each generation is required to make a contribution to “those coming later and receives from its predecessors.”<sup>(25)</sup>

Why would the parties in the original position choose to adopt the savings principle? After all, from behind the veil of ignorance they will have no way of knowing whether or not earlier generations will have saved. If not, then the savings principle would sure-

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(21) *Ibid.*, p.252

(22) *Ibid.*, p. 244, 252

(23) *Ibid.*, p.252

(24) *Ibid.*

(25) *Ibid.*

ly be a burden on economic growth. If so, then why would the parties want to negate the potential gains they receive from the savings of their predecessors? Rawls's theory bumps into the paradox of contractarian thinking discussed above. A contract requires the willingness of two parties to accept obligations toward one another. Yet, behind the veil of ignorance, the parties do not know to what obligations they may be beholden upon the lifting of the veil.

Rawls tries to work around this issue with an appeal to genetic-based affection. He claims that we "assume first, that the parties represent family lines, say, who care at least about their more immediate descendents; and second, that the principle adopted must be such that they wish all earlier generations to have followed it."<sup>(26)</sup> In order preserve the contract doctrine, Rawls actually removes some of the ignorance behind the veil by assigning to each party an identity as parents, or at least a will to procreate. "Thus imagining themselves to be fathers, say, they are to ascertain how much they should set aside for their sons and grandsons by noting what they would believe themselves entitled to claim of their fathers and grandfathers."<sup>(27)</sup> Surely, the assumption that one will be a parent upon lifting the veil affects the kind of distribution system that will follow, yet Rawls does not pursue this point in any detail.

Rawls stipulates that the parties in the original position must devise a savings rate that does not violate the difference principle, and will contain a mechanism for adjustments both within their lifetimes and beyond. The objectives of the accumulated savings are "a state of society with a material base sufficient to establish effective just institutions within which the basic liberties can all be realized" plus "the knowledge and culture, as well as the techniques and skills that make possible just institutions."<sup>(28)</sup>

Rawls considers justice only across removed generations but not across generations still living, i.e. across the young, the working and the retired. I propose to apply his

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(26) *Ibid.*, p.255

(27) *Ibid.*, p.256

(28) *Ibid.*, p.256

ideas to the matter of justice-as-income-transfers to the aged. Rawls assumes the parties in the original position will adopt the maximin rule- they will aim to obtain the best of all possible worst results, since they do not know what their position will be upon the lifting of the veil. The difference principle obliges them to accept only those inequalities that will improve the lot of the worst off.

Would the parties in the original position consider the elderly among the least advantaged whose well-being must improve with that of the most advantaged? Will the basic structure of the economy require the elderly to retire at a set age or will it allow people to work as long as they are willing and able? On the one hand, some people reach the age of 70 and higher with enough savings to guarantee a comfortable standard of living even if they live to be 100. Furthermore, many people who are a decade or more past the mandatory retirement age are capable of producing wealth. On the other hand, at some point around the age of 60 many people are not able, or not allowed, to remain in the workforce and, even if they have saved, they lack enough money to guarantee a comfortable standard of living for far into the future. How will these considerations affect the decision of the parties in the original position?

Becoming elderly is not a matter of birth, fate (acquiring cancer or another disease after birth) or accident. Most people expect to become elderly and intend to live as long as possible. Coming out of the original position some parties will find they are elderly but everyone will eventually become elderly. May we assume, then, that the parties in the original position would make some provision for the well being of the elderly? I believe they would, certainly if they follow the maximin rule. If the parties are the cautious risk takers Rawls claims, then they would want to provide for their own well being in the event of illness or poor health due to old age including a subsequent loss of income.

In fact, it is more likely that the parties would conceive of a safety net for the elderly before they would concern themselves with the just savings principle, because the former will affect their earnings and prospects more than the latter. It seems likely that the

parties in the original position would prioritize providing for the elderly over the savings principle so that this latter issue would have to be considered with the former. Finally, because the parties in the original position would have a stake in a pension system, they do not need to adopt contract doctrine to conceive of it, but can establish the system as a trust. Therefore, Rawls does not need to attach the parties to the strings of familial associations in order to establish a system to provide justice over time. (However, because he does assign to them the expectation of parenthood, it is fair to ask whether or not the parties would design a system that leaves childcare solely in the hands of families or one that includes generous provisions for child care. Either decision affects the basic structure greatly.)

Rawls conceives of justice across generations as a matter of ensuring that society preserve the means to make sure the difference principle is honored over time. To remain within the bounds of contract theory he stipulates that parties in the original position possess the will to procreate, but the savings principle sounds less convincing than the notion of the trust described by Laslett. Laslett's formulation does not require any procreational sentiments, though it certainly has room for them. Rather, its strength lies in the fact that individuals are expected to be motivated primarily by their own long-term interests, which, when realized through the contributions of their peers, and along the procession of age cohorts, will allow the future to take care of itself, as it were. Rawls concludes Part 44 of *A Theory of Justice* with only the assertion that "The derivation of these duties and obligations may seem at first a somewhat farfetched application of the contract doctrine. Nevertheless these requirements would be acknowledged in the original position" but does not say why.<sup>(29)</sup>

For classical liberals, the best means to achieve justice across generations rest in the hand of individuals and families, and not a public agency. If the state does not interfere with the individual's natural inclinations toward both self-preservation and providing

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(29) Ibid., p.258

for one's heirs, then, according to Richard A. Epstein, "the problem of future generations will pretty much take care of itself."<sup>(30)</sup> The libertarian argument begins with Robert Nozick's entitlement theory. Nozick argues that three rules "cover the subject of justice in holdings:

1. A person who acquires a holding in accordance with the principle of justice in acquisition is entitled to that holding.
2. A person who acquires a holding in accordance with the principle justice in transfer, from someone else entitled to the holding, is entitled to the holding.
3. No one is entitled to a holding except by (repeated) applications of 1 and 2."<sup>(31)</sup>

In sum, Nozick argues that we may keep what we have acquired in fair exchanges with another consenting adult; we may keep what someone gives, sells or trades to us as long as the object of the transaction was acquired justly; these two rules govern acquisition of all our holdings.

Nozick's concern is whether or not any distribution scheme is either end-result or historical and either patterned or unpatterned. The entitlement theory is historical and unpatterned; it requires no correlation of the distribution resulting from just acquisitions and transfers with anything else, such as need or, for the sake of this argument, age. As long as the history of a distribution records transfers in accordance with the three principles of the entitlement theory, it is just.

Nozick criticizes Rawls's theory as an end-result theory. Because the parties in the original position must design a distribution to fit the difference principle, the distribution system will necessarily interfere with the entitlement theory. Put another way, Rawls's theory tolerates forced takings of one person's property for the sake of another. End-result distributions threaten liberty because they prioritize the achievement of a

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(30) Richard A. Epstein, "Justice Across Generations," in Fishkin and Laslett, pp.84–85

(31) Robert Nozick, *Anarchy, State and Utopia* (Basic Books, 1974) p.151

particular outcome over fair processes of acquisition; what is mine under the entitlement theory, may be appropriated under an end-result distribution scheme. Ownership involves the liberty to give things to other people, but the pattern theories threaten the right of possession. “The view that holding must be patterned perhaps will seem less plausible when it is seen to have the consequence that people may not choose to do acts that upset the patterning, even with things they legitimately hold.”<sup>(32)</sup>

It follows from a rejection of patterned distributions that Nozick also rejects the idea of any central distributor, since “things come into existence already held (or with agreements already made about how they are to be held), there is no need to search for some pattern for unheld holdings to fit; and since the process whereby holdings actually come into being or are shaped, itself needn’t realize any particular pattern, there is no reason to expect any pattern to result…there is no separate process of distribution for a theory of distribution to be a theory.”<sup>(33)</sup> Attempts to reduce inequalities require forced transfers of wealth, which violate the entitlement theory. “Taxation of earnings from labor is on a par with forced labor,”<sup>(34)</sup> so redistributive policies by the state are unjust. The welfare state programs place an ownership right in others by allowing the poor to claim a portion of their earnings. This appropriation is called part of the “social contract” but Nozick sees nothing contractual in it: the parties have not entered freely into it, they do not know each other, and they may not opt out of it.

Nozick does not address the issue of intergenerational justice, except on the matter of rectification for past injustices, which would be any violations of the entitlement theory. In this instance, he allows that Rawls’s difference principle or even a welfare program may be the best means to rectify past injustices.<sup>(35)</sup> Nozick’s libertarianism dismisses any obligations to future generations beyond the duty of the living to honor the three principles in the entitlement theory.

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(32) Ibid., p.219

(33) Ibid

(34) Ibid., p.169

How might we apply Nozick's libertarianism to the issue of distributive justice and the elderly? Certainly it supports privately managed pension funds. The free, voluntary nature of the exchange between an investor and a fund manager is clear. So, mandatory participation in state pension programs must violate our liberty, as a specific example of the "forced labor" that taxation is. At first cut, the entitlement theory seems to rule out any tax-financed pension program for its own sake, that is merely to offer a guaranteed minimum income for those too old to work. The four EU guidelines for member nations' pension programs listed above demonstrate the complex relation between pension funding schemes and employment. From the forced removal of people from the workforce at a particular age, to the takings of a portion of earned incomes, and including the provision that the state cannot guarantee benefit levels without adjusting both the level of takings upward more earnings and the retirement age these programs seem to commit numerous violations of the entitlement principles.

Richard A. Epstein considers the matter of old-age pensions from the perspective of how an individual adjusts her actions now based on expectations and uncertainty for her own future. Individuals discount future costs and benefits based on present values, and the calculation hinges on how much labor and how much consumption to defer now for a future gain. "There are good reasons why most people keep their pension funds in liquid and tradeable assets."<sup>(36)</sup> Individuals want flexibility in the distribution of their assets over time. The libertarian assumes an individual can anticipate her future needs better than someone else, if for no other reason than the latter simply cannot have enough information to regulate others' choices. Obviously, libertarians like Epstein would support private funds for old age pensions, rather than state-mandated and managed. An individual can more directly influence his private fund manager (say, through discussions about potential changes in a portfolio) than he can a state bureaucrat who manages everyone's pension fund, and he can retain flexibility in expectations

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(35) *Ibid.*, pp.230-231

(36) *Ibid.*, p.89

over time. For the libertarian, the issue of justice upward in the generational order is moot: individuals are best left to invest for their own age.

But, asks Epstein, “What happens when the future belongs to different people in a different generation?”<sup>(37)</sup> He rejects the “collective determination” undertaken to find the just savings principle in Rawls’s original position because it “insists that the temporal priority of the present yields no moral priority for people alive in the present.”<sup>(38)</sup> Epstein challenges the notion of a duty toward future generations on the grounds that it constrains the rights of the living. The obligation of the living toward the not yet born will be based on moral claims, but also and “more important for these purposes, legal constraint.”<sup>(39)</sup> Epstein makes the same argument against regulations designed to distribute benefits into the future as libertarians do against the argument for a planned economy: “The use of collective coercion has to be carefully husbanded lest it do more harm than good.”<sup>(40)</sup> Finally, he makes the same claim as does Burke that if society preserves sound institutions of the present “then the problem of future generations will pretty much take care of itself.”<sup>(41)</sup>

Epstein argues that posing a conflict between present and future generations presupposes we know what both the living and the unborn want. Yet, even it were possible to understand what those alive right now desire, the further we try to look into the future of their lifetimes, the less reliable our predictions about their future desires become. Epstein proposes that individuals do not seek to maximize their individual utilities, “but instead have heavily interdependent utility functions with their offspring.”<sup>(42)</sup> Epstein argues that “genetic connection,” not disinterested benevolence, is the grease in the wheels of inter-generational justice. Parents’ desire to ensure the best future possible for their offspring provides an inherent bias for the future in any generation. “A wise

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(37) Ibid.

(38) Epstein, p. 84

(39) Ibid., p. 85

(40) Ibid.

(41) Ibid.

social system,” he suggests, “will exploit what nature has given us in an effort to span the generations.”<sup>(43)</sup>

If parents know the wealth they’ve accumulated over their lifetimes is going to their children when they die, then they will limit their consumption in old age. However, if they know it is going to strangers, they will consume more before they die. Inheritance taxes try to strike the balance between these two incentives. The effects of these possibilities on distributive justice across generations are clear: Family inheritances pass on wealth to the future and, as Epstein argues, “the problem takes care of itself” over time with each generation’s passing. If the state outlaws inheritance, then parents will spend more in their lifetimes and pass on less to the future generation. Epstein claims that modern estate taxes do not destroy the transfer of wealth but have inhibited it. He leaves the matter of direct transfers to future generations in the hands of families, in contrast to Rawls who, while assigning the status of parenthood to the parties in the original position, actually tries to build the “genetic connection” into social policy. After the “founders” of the society devised in the original position have passed away, successive states will transfer wealth across generations through a public agent.

Furthermore, argues Epstein, “the ordinary rules of property, contract and tort, enforced by a limited government subject to stringent eminent domain restrictions” are the best means to ensure the wealth of future generations.<sup>(44)</sup> Each newborn is endowed with particular abilities enabling her to perform labor, the fruits of which are hers, and the possession of which had not been taken away from a previous generation. Epstein assumes that any inequalities that arise will be tempered with charitable donations and welfare programs “without regard to the age of the payers and recipients.”<sup>(45)</sup> He describes his position on intergenerational justice as a “leave-bad-enough-alone” attitude that is better than the alternatives, nonetheless. This libertarian position assumes away

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(42) Ibid.

(43) Ibid., p.90

(44) Ibid., p.101

(437)

a role for the state in achieving justice across generations as less efficient than individuals.

To summarize the paper to this point: Following Peter Laslett's lead, I suggest that social contract doctrine cannot provide the strongest argument for justice across generations. Social contract theory imposes, but fails to inspire individuals to feel, an obligation to those not yet born, and demands an obligation to those ahead of us in the temporal procession, where there is none. Because Rawls relies on contract doctrine, he has to interfere with the level of ignorance of parties in the original position as well as assume they will accept a contractual obligation to those who precede them in time. This demand is based on an appeal to traditional family obligation and highlights the inappropriateness of contractarian thinking, which is now vulnerable to the libertarian argument from Epstein to remove the state and leave intergenerational justice in the hands of the family.

On the matter of distributive justice for the elderly, the instrument of a trust not only accurately describes the manner in which public pension program operate, but also better captures the relationship between the parties who participate in the trust. As an analogy to a "collective determination" to preserve our institutions and other social goods- such as the environment- for future generations, the trust is more effective than the contract as it releases individuals from the imposition of unrealistic duties. To achieve justice across generations, for the elderly and for the not yet born, the trust is a better instrument than the social contract.

The purpose of the trust is to ensure that we may reasonably expect the means to pursue our own projects after we are forced to leave the market, either due to age-related disability or forced retirement. After all, absent a retirement benefit of some type, the longer we live beyond the last paycheck we receive, the greater our likelihood of becoming poor. \*A libertarian might object that we could achieve the same goals by

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(45) Ibid., p.102

mandating that all individuals set aside some percentage of their salary for investment in a privately managed fund. The government of Chile, for example, privatized its pension system and requires workers to designate one fund, from a list of state-approved funds, into which a portion of their paychecks should be transferred.<sup>(46)</sup> This option requires coercion, though, and not just for political reasons, i.e. to overcome collective action problems, but for moral ones, as well, to ensure people have the means to pursue their own projects as self-owners.

An individual who chooses not to prepare for her retirement will violate her own moral capacity if she becomes destitute in her old age, and she will violate others' self-ownership rights if she receives a pension from them without ever having paid contributions into the fund. It is against this latter possibility that the libertarian has an incentive to make sure everyone contributes to the fund. Libertarians either advocate the provision of funding for the elderly or they are callous enough to tolerate those without a retirement income source or charity die homeless in their old age. (At which point the libertarian may have to make a cold calculation: Will the expense of disposing of the bodies of these tragic cases be less than the expense of preserving an expanding fund for retirement?) We must either tolerate the public spectacle of homeless elderly dying slow, painful deaths or concede some violation of the entitlement theory as insurance against such a scenario. The libertarian has to tolerate coerced participation in private funds or in a publicly managed fund. The case against any coercion on this matter

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\* I will not address the issue of *forced* retirement here but am ready to concede to the libertarian that the public agent should not necessarily require anyone to leave the workforce earlier than they wish. In fact, their presence arguably benefits the pension trust fund as the "working elderly" delay claims on it while continuing to work. The operative words for now are "not necessarily." High numbers of elderly people in the workforce will affect on the available number of jobs available for the young as well as their salaries, among other things, though the nature and degree of these affects depends partly on the demographic balance of the population.

(46) For a comprehensive, if not exhaustive, list of sources praising this system, consider typing the words "Chile's pension system" into the search engine of the Website for the libertarian Cato Institute, [www.cato.org](http://www.cato.org)

fails and the trust fund is the best means to provide a pension.

The trust fund, as noted above, replaces the artificial contract claim with an expectation of trust between citizens in similar age cohorts. This latter, for reasons celebrated by libertarians, is the more effective basis for appeal. People do relate more readily to people who share their status and age (say, being in one's thirties and working) than with those removed in time and place (from the perspective of a 35-year old a retiree is far away in both qualities) and the notion of a duty to not yet born strangers asks for our loyalty to an abstraction. The appeal of contributing to a fund that will return benefits to us- as a particular cohort- is more convincing than an appeal to a filial duty to millions of strangers. As Laslett demonstrates, we can posit no contract from familial relations. We cannot, therefore, posit a contract that makes an analogous appeal to familial relations, e.g. the claim that pension contributions are a collective duty to our parents' and grandparents' generations.

As for justice for those not yet born, my argument hinges more on perspective and scope than on substance at this point, but its implications are broad. I agree with Rawls and Burke that any democratic society should wish to transfer the fruits of its laws and culture to future generations in order to guarantee for the not-yet-born the means to realize their own projects as well as to innovate. The contract doctrine does not convince us to do so, however. If it is impossible on logical and psychological grounds to bind us to our immediate predecessors, then it is even more so for those further removed from us in the generational procession. It requires the absurdity of accepting that each of us owe something to those not yet born. Rawls wishes us to set aside a fund for the social minimum, in addition to preserve cultural artifacts. But, I propose the fund analogy is best, again. First, as the public agent is tasked with expanding the pension fund, that will persist into the future as a benefit for the not yet born. Second, laws, culture and even the environment, may be passed on through existing means such as the family, a constitution, universities, museums, a myriad of non-governmental organizations, etc. My position diverges from the libertarians on the matter of allowing the state to

play any distributive role. Thus far I have conceded a certain compatibility with my argument for the trust fund and a minimal state. This concession has been easy to make because once the door for some intervention is open, the matter of justice across generations is political- which is not to say the politics of it do not proceed from a carefully considered moral position. After the contract doctrine has been abandoned, and replaced with the trust fund doctrine, we may pick up an outdated notion as a project for political theory- the nurturing of the individual to be a citizen of a liberal, democratic state. As James S. Fishkin observes shortly after the collapse of the Soviet Union, "Liberal theory has seemed almost to assume that atomic individuals spring from nowhere into adulthood only to return, eventually to the void."<sup>(47)</sup> The future of a democratic society is not a void but the heir to the justice of the present. This project is one that should be embraced, and contested over, between progressives and conservatives, but it is one that democratic societies should facilitate.

—H. Steven Green· 法学部准教授—

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(47) James S. Fishkin, "The Limits of Intergenerational Justice," in Fishkin and Laslett, p. 62